

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Appeal from York County
Edgar W. Dickson, Circuit Court Judge

RAYMOND BRADLEY MCCARTER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000647

APPENDIX

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2 COUNTY OF YORK) COURT OF GENERAL SESSIONS

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5 PLAINTIFF,) OF
6 VS.) RECORD
7 RAYMOND BRADLEY MCCARTER,) 2010-GS-46-01078
8 DEFENDANT.) 2010-GS-46-01079
9

10 August 23rd and 24th, 2011
11 Spartanburg, South Carolina
12

13 B E F O R E:

14 THE HONORABLE JOHN C. HAYES, Judge; and a jury.
15

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P R O C E E D I N G S

1
2
3 THE COURT: All right. Starting the trial of the case
4 of State versus Mr. McCarter, assault and battery with
5 intent to kill.

6 SOLICITOR LIPINSKI: Yes, Your Honor.

7 THE COURT: What's first?

8 SOLICITOR LIPINSKI: First, Your Honor, I think -- I
9 believe you have a witness list from the State. I did write
10 in pen one last writing. Just so you can read my
11 handwriting is Daniel Hamrick also with the York County
12 Sheriff's Office. I just left that off by omission. You
13 should also have a witness list of the defense.

14 Other than the defendant, and I believe his father,
15 Raymond McCarter, Senior, the defense three and four
16 actually are on our list as is defense six and seven.
17 Detective Wallace would be Alex Wallace on our list, and
18 Officer Riley would be Officer John Riley. The defense has
19 listed Officer Steele, York County Sheriff's Office. I
20 don't know if he has a first name for you or not. I don't
21 know of an Officer Steele. But that's not to say they
22 weren't employed back then, and I've just forgotten about
23 them.

24 THE COURT: All right.

25 MR. COOK: As to that, Your Honor, if it please the

9
1 Court, I don't know Officer Steele's first name. To be
2 entirely honest, I've changed my mind and I'm not planning
3 on calling Officer Steele. So, I should of, be striking
4 that off my list, Your Honor.

5 THE COURT: All right, sir. So, that just leaves your
6 client and Junior and Senior?

7 MR. COOK: Yes, sir.

8 THE COURT: Okay.

9 SOLICITOR LIPINSKI: So, in, in terms of that, I think
10 you are where you should be in terms of witness lists. You
11 also have two voir dire, one from the defense, and then one
12 from the State.

13 The State has two questions. The first one, you
14 normally, in your normal colloquy, do questions about has
15 anyone donated to the South Carolina Troopers Association
16 and those type of things trying to elicit a bias in favor of
17 law enforcement. The State is just -- and I don't remember
18 your exact wording. So, if you do go over this, there's,
19 there's no reason to, to carve outside, go outside the box
20 is, you know, also trying to elicit any prejudice against
21 law enforcement so, just so that question is even handed for
22 the State and the defense.

23 The second question, Mr. -- the, the two witnesses on
24 the defense list, Raymond McCarter, Junior, the defendant,
25 and Raymond McCarter, Senior, the defendant's father, I

1 believe Mr. McCarter runs a McCarter Painting out of Clover
2 based on the State's investigation. He also has another
3 family member named Andy McCarter who I've also seen up
4 here. There's also a McCarter's Barber Shop and an Eagle
5 Business Supply, all kind of family owned businesses, and
6 the State would just seek to draw that out because it may be
7 that ties to that family would produce jurors who can not be
8 fair and impartial.

9 So, just so you understand the basis of that State's
10 question, in one of the defendant's statements, which
11 obviously the defense may move to suppress, but he talks
12 about working for his father. He's driving around in what
13 could be described as a work truck, a painting or a framing
14 type truck, and the weapon involved is a framing hammer,
15 which also might be associated with his work. So, that's
16 why the State would seek to elicit that bias or prejudice,
17 and I just wanted to explain it because it is atypical in
18 terms of things that you see from the defense.

19 In terms of the defendant's voir dire questions, I
20 believe number one is something that you normally ask about.
21 Number two and three the State has no objection to them.

22 MR. COOK: Thank you, Your Honor.

23 I have no objection to any of the State's request for
24 voir dire as well.

25 THE COURT: All right. Are we ready to get the jury

1 panel up?

2 SOLICITOR LIPINSKI: The State's ready, Your Honor,
3 yes, sir.

4 THE COURT: All right. Let's get the jury up.

5 MR. COOK: Well, well, actually, Your Honor, if I may,
6 I'm hearing from my client that the barber shop is not part
7 of the McCarter clan. And, so, I wasn't -- I didn't want --
8 and I can imagine a lot of the jurors have heard of
9 McCarter's Barber Shop, and I wouldn't want them to excuse
10 themselves on, on those grounds. There might be one that I
11 would want on the panel.

12 THE COURT: All right.

13 SOLICITOR LIPINSKI: Well, I think you can follow-up,
14 and I, and I asked that solely because my officers told me
15 they actually go to that barber shop and that family members
16 of the defendant have tried to talk to them about the case.
17 So, I think there is, nonetheless, some connection. It may
18 be Raymond McCarter, Senior, but I think it may be his uncle
19 or some other family member, and, and I don't know that
20 necessarily excused them. It just elicits that they have a
21 close personal friendship or business relationship and that
22 I think the follow-up should be would that relationship
23 cause you, for any reason, not to be able to be a fair and
24 impartial member of the jury.

25 So, I don't think, just to answer -- the, the

1 affirmative answer to that response kicks you off. I think
2 it just goes to solicit that bias and prejudice and then be
3 the follow, the requisite follow-up for the Court.

4 MR. COOK: And I would just restate that we, we claim
5 we have no connections whatsoever to McCarter's Barber Shop.

6 THE COURT: Well, I'll ask about it just because
7 apparently it is a rather pervasive family situation.

8 MR. COOK: Yes, sir, Your Honor.

9 THE COURT: All right.

10 SOLICITOR LIPINSKI: Can we approach?

11 (WHEREUPON, a bench conference was held at this time.)

12 (WHEREUPON, the following takes place within the
13 presence of the jury.)

14 THE COURT: Members of the jury panel, I'm John Hayes.
15 I'm glad to see you here up today. I didn't get a chance to
16 meet with you yesterday.

17 This is the first trial -- this is the first trial
18 we're gonna try in this courtroom this week. Along with
19 Judge Alford, I am one of the resident judges, I'm from Rock
20 Hill, for our county and Union County, the Sixteenth
21 Circuit.

22 The State is calling for trial the case of the State
23 versus Raymond Bradley McCarter, and Mr. McCarter is charged
24 with assault and battery with intent to kill. It's alleged
25 that this occurred on February the 5th, 2010. The victim

1 is alleged to be one Dwayne Southard, S-O-U-T-H-A-R-D, and
2 it's alleged that the assault and battery was done with the
3 intent to kill Mr. Southard.

4 The State is represented by Mrs. Hervey. I'm gonna let
5 her introduce her co-counsel.

6 SOLICITOR LIPINSKI: My name is Mindy Hervey Lipinski.
7 I did recently get married. Judge Hayes is worked with me
8 long enough and knows me by my maiden name, Hervey. I'm
9 gonna be assisted by Assistant Solicitor Chris Epting in
10 this trial.

11 THE COURT: And Mr. McCarter is represented by
12 Mr. Cook. I'm gonna let him introduce himself and the
13 people at his table.

14 MR. COOK: Thank you, Your Honor.

15 My name is David Cook, and I have an associate,
16 Mrs. Rosalee Davis. Of course, my client's Brad McCarter.

17 THE COURT: All right. First, are any of you related
18 by blood or marriage or are you a close personal friend or
19 acquaintance of any of the individuals to whom you've just
20 been introduced, if so, please stand.

21 (No response.)

22 THE COURT: No one stands.

23 I -- this happened in the Clover area, is that right?

24 SOLICITOR LIPINSKI: The Sharon area.

25 THE COURT: The Sharon area.

1 This happened in the Sharon area in the western part of
2 our county. I tell you that cause the next question is do
3 any of you know anything about this case?

4 Have any of you heard about it from any source
5 whatsoever or have any of you formed or expressed any
6 opinion about any matter or issue which would be involved in
7 this case, if so, please stand.

8 (No response.)

9 THE COURT: No one stands.

10 Are any of you related by blood or marriage or are you
11 a close personal friend or acquaintance of Dwayne Southard,
12 Southard, S-O-U-T-H-A-R-D, the alleged victim in this case?

13 (No response.)

14 THE COURT: No one stands.

15 Are any of you members of the Grand Jury which passed
16 on this indictment at an earlier time, if so, please stand.

17 (No response.)

18 THE COURT: No one stands.

19 Do any of you have any moral, religious, or
20 philosophical reasons that you would be unable to be a fair
21 and impartial juror in the trial of this particular case, if
22 so, please stand.

23 (No response.)

24 THE COURT: No one stands.

25 Are any of you or a member of your family employed in

1 law enforcement or in the prosecution of criminal cases?

2 That is, are you or a member of your family anything
3 from a judge advocate general, an MP, to the Sheriff's
4 Association, sheriff's, sheriff's officer, policeman, U.S.
5 Marshal, anything like that, DA, if so, please stand.

6 (Jurors respond.)

7 THE COURT: All right. Yes, ma'am, your name and
8 number?

9 JUROR: Kelly Patson, 183.

10 THE COURT: All right. And who -- how are you related
11 to someone?

12 JUROR: My father-in-law was the chaplain with the
13 police department, and my cousin is a sheriff's deputy in
14 Columbia.

15 THE COURT: Okay. But you -- who -- the chaplain, is
16 that here in York County?

17 MR. COOK: Rock Hill Police Department.

18 THE COURT: Okay. Just remain standing. I'm gonna
19 come back over this way.

20 Yes, sir, your name and number?

21 JUROR: Mitch Fowler, Juror 75. My father is a retired
22 York County sheriff's deputy, and is now a constable here in
23 York County.

24 THE COURT: All right.

25 Yes, sir.

1 JUROR: Thomas Glenn, Juror Number 93. I'm a retired
2 police officer and homicide detective from Elena County
3 Pennsylvania area.

4 THE COURT: Yes, ma'am.

5 JUROR: Ellie Lucia, Juror Number 84. Both my father
6 and my cousin are, were Nazareth County New York police
7 officers.

8 THE COURT: All right. Yes, sir, in the back.

9 JUROR: J.B. Nix, Juror Number 176. My brother-in-law
10 is a retired York County sheriff's deputy.

11 THE COURT: All right. Your brother-in-law?

12 JUROR: (Nods affirmatively.)

13 THE COURT: And this is a sheriff's case?

14 SOLICITOR LIPINSKI: Yes, sir, it is.

15 THE COURT: All right. I'm gonna excuse you since, for
16 that close relationship. Just you can have a seat. Don't
17 leave. Just have a seat. We'll excuse you.

18 Two other people, three others who stood. I'm gonna
19 come back over here.

20 Yes, sir, your name?

21 JUROR: My father is retired from SLED in Columbia.

22 THE COURT: All right. Your name and number?

23 JUROR: Michael Kimbrell, 130.

24 THE COURT: All right. Thank you.

25 The lady in the jacket, sweater, red sweater.

1 JUROR: Cheryl Parris, Juror Number 182. My brother is
2 a police officer in Savannah.

3 THE COURT: In where?

4 JUROR: Savannah, Georgia.

5 THE COURT: Okay. Yes, sir.

6 JUROR: Juror Number 83. I was a former police officer
7 in the Mecklenburg County Police Department along with the
8 Mecklenburg County police officer.

9 THE COURT: All right. Your name and number?

10 JUROR: Juror Number 83, Marian Funderburk.

11 THE COURT: All right. Now, another lady standing --
12 all of y'all remain standing.

13 Your, your name and number?

14 JUROR: Lisa Orchard, Juror Number 178. My nephew is a
15 police officer in Spartanburg, South Carolina.

16 THE COURT: All right. The ones of you who are
17 standing, which should be everybody but the gentleman I told
18 to sit down, if this relationship with law enforcement would
19 prevent you from being fair and impartial, please raise your
20 right-hand.

21 (No response.)

22 THE COURT: No one -- okay. Yes, sir, your name and
23 number again?

24 JUROR: Thomas Glenn, Juror Number 93.

25 THE COURT: All right. You'll be excused also. You

1 can have a seat, and the rest of you can too. No one else
2 indicated that they would have a problem being fair and
3 impartial.

4 THE COURT: Now, are any of you are or a member of your
5 immediate family contributors to organizations as Mothers
6 Against Drunk Drivers, Student Against Drunk Drivers, CAVE,
7 that's Citizens Against Violence, Troopers Association,
8 Sheriff's Association, or Fraternal Order of Police, if so,
9 please stand.

10 (Jurors respond.)

11 THE COURT: All right. Yes, sir -- all right. We'll
12 do the same thing. If you'll just give your name and number
13 and which organization you have---

14 JUROR: I'm, I'm 193. My name is Arthur Ryder. I also
15 support the Endowment Police Office, FOP, and the Mothers
16 Against Drunk Drivers.

17 THE COURT: All right. Just remain standing if you
18 don't mind.

19 Yes, ma'am.

20 JUROR: Mary Shelly, 211. Mothers Against Drunk
21 Driving.

22 THE COURT: All right. And?

23 JUROR: Amy Mirad, 99. Fraternal Order of Police.

24 THE COURT: All right. Would -- if that relationship
25 would prevent you from being fair and impartial in this

1 trial, please raise your right-hand.

2 (Juror responds.)

3 THE COURT: All right. Your name again?

4 JUROR: Arthur Ryder, and, Your Honor, I, I
5 misunderstood. You know, my, my dad---

6 THE COURT: Well, I'll excuse you since you've raised
7 your right-hand. So, don't -- we don't really need to go
8 into anything else.

9 JUROR: All right.

10 THE COURT: That's all right. I'll talk to you later
11 if you want to.

12 MR. COOK: Your Honor, I didn't hear the number of the
13 lady with the brown sweater.

14 THE COURT: Yes, ma'am.

15 JUROR: 99.

16 THE COURT: I appreciate anything -- I know I think
17 where you're going with it, but you, you're fine. Just have
18 a seat. You're excused. The other two, two females are --
19 remain with us. Don't -- you can have a seat now.

20 Are any of you aware of any bias or prejudice that you
21 would have either in favor or against law enforcement that
22 would prevent you from being fair and impartial in this
23 particular trial, if so, please stand.

24 (No response.)

25 THE COURT: No one stands.

1 If any -- I'm not gonna ask you to be real personal
2 about this because it's somewhat a private matter. But I do
3 need to ask have any of you or a member of your immediate
4 family been the victim of what you consider to be a violent
5 crime such as an assault or assault of any fashion, if so,
6 please stand.

7 (Jurors stands.)

8 THE COURT: All right. We'll do the same thing, name,
9 number, and then I'll ask you that general question.

10 Yes, ma'am.

11 JUROR: Christine Goff, Juror 85. I have something
12 going on right now with one of my immediate family, one of
13 my aunts.

14 THE COURT: Okay. That -- you, you've told me enough.
15 Just stand again. I don't want -- I'm not gonna pry. I'm
16 just trying to find out---

17 JUROR: Okay.

18 THE COURT: ---the concept.

19 Yes, sir.

20 JUROR: My name is David Walker, Number 237. I had a
21 brother that was killed in a violent crime.

22 THE COURT: You remain standing.

23 Yes, ma'am.

24 JUROR: Rhonda McSwain, Juror 155. I had two cousins
25 that were the victims of crimes.

1 THE COURT: All right. Would the fact that this is
2 part of your life experience prevent you from being fair and
3 impartial, if it would, please raise your right-hand.

4 (Juror responds.)

5 THE COURT: All right. Yes, sir, your name and number
6 again?

7 JUROR: David Walker, 237.

8 THE COURT: All right. You'll be excused. The two
9 ladies did not raise their hands. So, they remain with us.
10 Thank you.

11 You've met the two solicitors, but we have quite a few.
12 I'm not gonna name them all, and I don't think I need to
13 because I don't think it would help you answer this
14 question.

15 Are any of you a close personal friend or acquaintance
16 or kin to anyone who works with Mr. Kevin Brackett, our
17 solicitor here in the Sixteenth Circuit, or have any of you
18 worked with or for Mr. Brackett or that office, if so,
19 please stand.

20 (Juror responds.)

21 THE COURT: All right. Yes, ma'am, your name and
22 number?

23 JUROR: Amy Pritcher, Juror Number 46. I worked for
24 the criminal defense attorney in Fort Mill where I worked
25 with the solicitors and Sheriff's Department.

1 THE COURT: All right. Would that affect your ability
2 to be fair and impartial in the trial of this case?

3 JUROR: No, Your Honor, it wouldn't.

4 THE COURT: Okay. Thank you. You may have a seat.

5 Do any of you have any personal, close personal ties or
6 business relationships with Raymond McCarter, McCarter
7 Painting, I understand that's a Clover area business, Andy
8 McCarter, McCarter's Barber Shop, or Eagle Business Supply,
9 if so, please stand.

10 (No response.)

11 THE COURT: No one stands.

12 The following are possible witnesses in this case. I
13 do not know that they will all testify. But they -- I have
14 to go over their names. Even if they don't testify their
15 names may come up. So, if any of you are related by blood
16 or marriage or a close personal friend or acquaintance with
17 any of these individuals, please stand.

18 (No response.)

19 THE COURT: You've met Raymond McCarter, Junior. He's
20 the defendant.

21 Possible witness is Raymond McCarter, Senior.

22 Also Brenda Gourley. That's G-O-U-R-L-E-Y.

23 The alleged victim, Dwayne Southard.

24 C.S.

25 Jamie Gilfillian.

1 William Harris.

2 Then the following are from York County Sheriff's
3 office:

4 Clair Painter.

5 Detective Alex Wallace.

6 Lieutenant Cheryl Guzman.

7 Sergeant Lanelle Day.

8 Deputy John Riley.

9 Deputy Thomas Kinnee, K-I-N-N-E-E.

10 Piedmont Medical Center, Doctor Tim Rumsey.

11 From the emergency medical technician people, Amanda
12 Rothbauer.

13 Also from the York County Sheriff's Office, Daniel
14 Hamrick.

15 Any of you related by blood or marriage or close
16 personal friends or acquaintances of those individuals, if
17 so, please stand.

18 (No response.)

19 THE COURT: No one stands.

20 Anything further from the State?

21 SOLICITOR LIPINSKI: Nothing from the State.

22 THE COURT: Anything from the defense?

23 MR. COOK: Nothing, Your Honor.

24 THE COURT: Finally, do any of you know of any reason
25 whatsoever why you could not or should not serve as a fair

1 and impartial juror in the trial of this particular case, if
2 so, please stand.

3 (No response.)

4 THE COURT: No one stands. Thank you.

5 Now, the way we draw juries in this type court is as
6 follows:

7 Names are drawn at random. If you hear your name
8 called, please come forward. And one of the bailiffs will
9 be standing here in the sort of middle of the floor. If you
10 hear your name called, please come up and stand beside him,
11 turnaround and face first the table where the solicitors are
12 seated. One of the solicitors will say either excuse the
13 juror or present the juror. If you hear the words present
14 the juror, you turn and face the table where Mr. McCarter
15 and his -- let me back up.

16 If you hear the word present the juror, turn to the
17 table where Mr. McCarter and his counsel are seated, and one
18 of his attorneys will say either excuse the juror or swear
19 the juror. If you hear the words excuse the juror from
20 either sets of attorneys, simply return to your seat. Don't
21 leave. Just return to your seat.

22 If you hear present the juror, turn to the table where
23 the defendant is seated. If you hear swear the juror,
24 you'll be shown where to sit in the jury box.

25 Please bring with you any personal belongings that you

1 have so you will not have to go back and get them when
2 you're seated.

3 Strikes are five and five.

4 All right. Madam Clerk.

5 (WHEREUPON, a panel of 12 jurors were selected at this
6 time.)

7 THE COURT: All right. We'll draw one alternate.
8 Strikes will be one and two.

9 (WHEREUPON, an alternate juror was selected at this
10 time.)

11 THE COURT: Anything from the State involving the
12 striking of the panel?

13 SOLICITOR LIPINSKI: Nothing from the State, Your
14 Honor.

15 THE COURT: Anything from the defense?

16 MR. COOK: Nothing, Your Honor.

17 THE COURT: All right.

18 (Pause.)

19 THE COURT: Members of the jury panel, I'm gonna chat
20 with you for just a minute. We're not gonna administer the
21 oath this afternoon because we're not gonna start into the,
22 what I would call the meat of the trial, the opening
23 statements of the attorneys and the presentation of
24 witnesses until in the morning.

25 We have some legal matters to take up that do not need

1 your presence and, in fact, can not do them in your
2 presence. We would have to excuse you and put you in a jury
3 room while we did them, and at this stage of the afternoon
4 we're not gonna do that. We're simply gonna wait and start
5 and we'll get into the trial tomorrow.

6 Now, even though you haven't been sworn in, you are all
7 on this panel. So, they're certain rules that you have to
8 follow as a juror.

9 Number one, you're not to try to make up your own mind
10 about what verdict you should render in this case until I
11 instruct you to jointly deliberate and return a unanimous
12 verdict. Prior to that time you're not equipped with all
13 the tools you need to make a fair and reasonable decision.
14 So, don't try to make up your mind until we reach that
15 point.

16 Do not discuss the case among yourselves until we reach
17 the point. Again, the same reason. You don't have all the
18 information, you hadn't heard the attorneys' closing
19 statements, and you hadn't heard my charge on the law. So,
20 to discuss this case would be a violation of the oath you
21 will take in the morning and it would not be fair.

22 You're not to let anyone discuss this case with you
23 outside the courtroom. If anyone tries to approach you and
24 discuss this case, tell them you can not do it as you are a
25 seated juror. Don't initiate a conversation with anyone

1 about this case and do not let anyone initiate a
2 conversation with you about this case.

3 Do not let yourself -- if anybody does try to talk to
4 you about this case, please try to get their identity and
5 report that back to me because I would have to take action
6 against anyone who tries to talk to a seated juror.

7 I do not know that this case will receive any news
8 coverage. If it does, do not let yourself be exposed to it.
9 Don't read about. Don't watch anything about it. Don't
10 let -- receive any information outside this courtroom about
11 this case. If anything catches your eye or your ear that
12 could remotely deal with this trial, do not, as I say, read,
13 watch, or listen to anything about this trial. You are
14 required to base your verdict solely on the law and the
15 evidence.

16 My last point along these lines is that now that we
17 have access to the world through Internet services, I have
18 to instruct you to not avail yourself of the use of any
19 electronic or any other means to obtain any information that
20 could remotely deal with this trial. Don't look up anything
21 about the charge. Don't look up anything about the lawyers.
22 Don't look up anything about Mr. McCarter. Don't look up
23 anything about the witnesses or me or Court procedure or
24 evidence. That will be improper.

25 we've had -- I just came from a conference last week

1 where it was emphasized that in some areas there have been
2 juries that have violated that, and, therefore, the cases
3 have been set aside and had to be retried. So, it would be
4 a violation of your oath to receive any information, smart
5 phone, text, anything that like. That would be improper.
6 So, do not do it.

7 when you come back in the morning I'll have some more
8 information to talk to you about before I turn it over to
9 the attorneys. When we get ready to leave, the bailiff will
10 show you how you are to ingress and egress the building,
11 building while you're serving on the panel. He will show
12 you the room which will be your sort of home. I think this
13 case will probably not take more than through tomorrow. It
14 make take over into Thursday. But while the trial is taking
15 place, you will be in a jury room and the bailiff will tell
16 you where that is.

17 Anything else before I dismiss the jury from anyone?

18 SOLICITOR LIPINSKI: Nothing from the State, Your
19 Honor.

20 MR. COOK: Nothing, Your Honor.

21 THE COURT: All right. Mrs. Bower, I'm gonna ask you
22 to be the forelady of this panel. When you come in, you'll
23 take this first seat. The alternate will take that seat
24 where he's seated now. There is no other assigned seating.
25 Just wherever you happen to come in have a seat. But I'll

1 tell you more about what the forelady will be doing tomorrow
2 and I'll give you some more instructions.

3 So, have a pleasant evening and we'll see you back at
4 10:00 in the morning.

5 (WHEREUPON, the following takes place outside the
6 presence of the jury.)

7 THE COURT: All right. The motions, the first one is
8 the discovery.

9 MR. COOK: Yes, sir, Your Honor, and I believe that the
10 State is complied fully with my first request regarding Rule
11 5, Your Honor.

12 THE COURT: All right. Jackson versus Denno, I
13 understand that we'll do that in the morning other than
14 maybe watching those DVDs or---

15 SOLICITOR LIPINSKI: Yes, Your Honor.

16 THE COURT: Okay. We'll do that. Let's skip over that
17 one then.

18 Any Lyle testimony?

19 SOLICITOR LIPINSKI: I informed Mr. Cook that the State
20 does not have any Lyle testimony that we intend to rely on
21 during our case in chief. However, the defendant does have
22 a prior record and I'll just kind of put this on the record.
23 We do have certified convictions of those, and I presented
24 most of them to defense counsel prior because I don't know
25 if they would even qualify if he took the stand. He does

1 have a possession of Scheduled I---

2 THE COURT: All right. Are we getting into
3 impeachment?

4 SOLICITOR LIPINSKI: Some of them are impeachment.
5 However -- and this -- let me explain where I'm going.

6 THE COURT: Okay. That's why I stopped you.
7 Go ahead.

8 SOLICITOR LIPINSKI: Some of them are for impeachment.
9 However, as you were made aware, in our, in our kind of
10 pretrial conference where we just kind of give you a
11 heads-up of what lies ahead, the defense indicated that
12 self-defense may become an issue in this trial. The
13 defendant does have a prior record for a Resisting Arrest B,
14 and he also has a prior record for a failure to stop for a
15 blue light, which is not necessarily a violent encounter.
16 But he has those two convictions.

17 I don't know that, at some point -- and, and he also
18 has a prior arrest for an assault and battery where the
19 allegations in 2004 where the person may or may not have
20 testified against him. He got upset about that, confronted
21 them out in public, and physically assaulted them, and I
22 provided a copy of that police report to Mr. Cook.

23 I don't know that, once he raises the issue of
24 self-defense, his propensity for violence or, or character
25 doesn't become a de facto issue where it might not otherwise

1 become an issue. So, I'm not going there now, and I -- but
2 I do want to raise that specter that that may become an
3 issue depending on where the, the State's case and the
4 defense progresses.

5 THE COURT: All right. You got that, Mr. Cook?

6 MR. COOK: Yes, sir, Your Honor. The only objection I
7 would have would be the failure to stop for a blue light
8 doesn't carry a potential sentence of over a year.

9 THE COURT: Well---

10 MR. COOK: I apologize, Your Honor. I meant to say
11 Resisting A---

12 THE COURT: Right.

13 MR. COOK: ---that he has.

14 THE COURT: Well, I hadn't got to impeachment. So, we
15 sort of balled them up together. But the Lyle matter we
16 would have to look at, if it arises, and probably have
17 something in camera---

18 SOLICITOR LIPINSKI: Right.

19 THE COURT: ---as far as impeachment. The failure to
20 stop within the last ten years, the Resisting B, if it's in
21 the last ten years, would constitute impeachable offenses.

22 All right. Let take -- sequester the witnesses.

23 SOLICITOR LIPINSKI: Your Honor, the State would just
24 extend that sequestration to the defense witnesses including
25 the defendant's father since he's on the witness list.

1 THE COURT: I always make it reciprocal. So, it will
2 be a reciprocal sequestration order, which is in effect at
3 this moment on.

4 MR. COOK: Your Honor, at that point then I would ask
5 Mr. Raymond McCarter, Senior to leave the courtroom.

6 THE COURT: Sure. That's fine.

7 (Pause.)

8 THE COURT: All right. Chain of custody issue, I think
9 y'all discussed that in chambers that that---

10 MR. COOK: Yes, sir, I don't believe there's any issues
11 as to chain of any custody, Your Honor.

12 SOLICITOR LIPINSKI: And, Your Honor, we do have
13 Officer Riley obviously in the chain and Officer Kinnee in
14 the chain and Officer Hamrick collected a hearing aid at the
15 scene, but that was subsequently returned to the defendant.
16 He was in jail and in need of it. Detective Wallace
17 actually went to sign it out of evidence and would of signed
18 it over to the defendant himself. So, we don't actually
19 have that physical piece of evidence because it was, in
20 essence, returned to the defendant, but you may hear some
21 testimony about that.

22 The only thing I would like to put on the record is
23 Clairra Painter, who I'm sure you've heard that name before,
24 worked at property and evidence, is having ongoing health
25 issues, and we'll just testify that I checked, checked the

1 evidence in, didn't do anything with it other than, than to
2 that extent, and Mr. Cook is indicated he would stipulate
3 that to her testimony in the chain, that, that she would of
4 collected it and allowed people, before and after, to just
5 log it into her.

6 MR. COOK: That's correct, Your Honor.

7 THE COURT: All right. Search and seizure, that's
8 number six. We'll have to have some testimony on that.

9 Number seven, motion to allow someone to interpret,
10 more or less. For the record, Mr. McCarter, Junior has a
11 hearing deficiency, and the -- his counsel has asked that
12 one of his staff, counsel's staff, be allowed to sit with
13 Mr. McCarter and state to him the questions and the answers
14 verbatim so that Mr. McCarter will know what's going on.

15 We discussed that in chambers and also I did not, I did
16 not anticipate that being done if Mr. McCarter himself
17 testifies. I think we'll have to cross that bridge when we
18 get to it. But I don't think the State has any objection.
19 I'll put on the record Mrs. Comar, I believe is her name, to
20 be sort of a translator or a mouth piece.

21 SOLICITOR LIPINSKI: I don't -- as the State indicated
22 in the pretrial conference, I don't have any objection to
23 whatever efforts we may take to facilitate him hearing
24 during the trial in question. I would, however, and then I
25 just state this because it is part of the defense motion in

1 limine, that she not be allowed to do that while he is on
2 the stand subject to cross-examination. I think it would
3 impair the State's ability to cross-examine him and, and
4 undermine our ability to, to solicit the truth and evidence
5 from him.

6 I would also indicate that I have available for me if,
7 after this pretrial hearing he's indicated he's having those
8 issues, a microphone which may help to amplify. I don't
9 know if Mr. Cook and I need a lot of amplification, but
10 amplify the testimony of witnesses to facilitate him hearing
11 if that so becomes an issue.

12 THE COURT: Okay.

13 MR. COOK: And that's all understood and agreed with,
14 by the defense, Your Honor.

15 THE COURT: That looks like it's it.

16 MR. COOK: Your Honor, if I may, there's one more
17 issue.

18 (Pause.)

19 MR. COOK: That's all for now, Your Honor.

20 SOLICITOR LIPINSKI: We have another stipulation we're
21 trying to work out, and that's what he was raising, but I
22 don't know that we necessarily are completely on the same
23 page, and we'll address that in the morning.

24 THE COURT: All right. Then you want to go forward
25 with the search issue or the---

1 SOLICITOR LIPINSKI: We do have Sergeant Day in the
2 hallway is my understanding, and we could go forward with
3 the search issue as to the search of the house.

4 THE COURT: Okay. Let's, let's do that then.

5 SOLICITOR LIPINSKI: And just to put on the record,
6 Your Honor, law enforcement has called the victim's
7 residence originally at Wycoff Road. He indicates to them
8 that a couple came to his house and physically assaulted
9 him, he had injuries indicative of that. However, the
10 description that he was able to give to law enforcement at
11 the time was a white van, a Chevy or a Ford van, and that it
12 was a white couple. Beyond that he wasn't able to provide a
13 name or anything of that nature.

14 At some point during that night law enforcement then
15 receives information from third parties that Misty
16 Montgomery and Brad McCarter are possibly that couple.

17 Sergeant Day, who you can go ahead and be sworn in and
18 take the stand if you want.

19 LANELLE DAY, having been first duly
20 sworn, testified as follows:

21 DIRECT EXAMINATION

22 BY SOLICITOR LIPINSKI:

23 Q Sergeant -- as I stated, Sergeant Day and officer Riley
24 and Kinnee received information that a Brad McCarter and
25 Misty Montgomery were possibly involved in this incident.

Lanelle Day - Direct examination
By Solicitor Lipinski

1 Sergeant Day then responded to what she knew to be Misty
2 Montgomery's house, and I'll let her testify. But the
3 State, as we go forward, submits the search was appropriate
4 based on the exigency of the circumstances, and also we
5 challenge the defendant, he was obviously sleeping there,
6 but would challenge that that was the address he gave when
7 he was arrested, and that he would have a diminished
8 expectation of privacy in that residence.

9 And, Sergeant Day, I know we called you, called you off
10 the road today. So---

11 A Yes, ma'am.

12 Q ---at anytime you need -- I don't think you did a
13 report yourself, but I understand that Officer Riley
14 summarized it for you, and, for any point, you need to
15 refer, you'd like to refresh your recollection, just ask me
16 and I'll provide a copy for you.

17 A That would be nice if I could see a copy please.

18 Q There you go.

19 And, Officer Day, with whom are you currently employed?

20 A Currently employed by the York County Sheriff's Office.

21 Q In what capacity?

22 A I'm a patrol sergeant assigned to District 1 in York
23 County.

24 Q And what does -- what is the area District 1
25 encompasses?

Lanelle Day - Direct examination
By Solicitor Lipinski

1 A The area that District 1 encompasses is basically
2 everything just south of the Clover city limits to the
3 Chester County line and from the Cherokee County line to
4 just west of Newport.

5 Q So, the western area of the county and the southern
6 area of the county?

7 A Yes, ma'am.

8 Q All right. And how long have you been so employed?

9 A I been employed by the Sheriff's Office since 2001 and
10 in capacity of a deputy since 2003.

11 Q All right. And as sergeant do you oversee a shift that
12 patrols that area?

13 A Yes, ma'am.

14 Q And is Officer Riley and Officer Kinnee, were they, at
15 that point in 2010, part of that shift that you more or less
16 supervised?

17 A Yes, ma'am.

18 Q And do you know the defendant, Brad McCarter, or prior
19 to this night, have you ever had an occasion to encounter or
20 deal with him?

21 A I had met him briefly on an occasion or two---

22 Q Just so---

23 A ---prior to that.

24 Q Just briefly?

25 A Yes, ma'am.

Lanelle Day - Direct examination
By Solicitor Lipinski

1 Q All right. And Misty Montgomery, the codefendant, do
2 you have any prior dealings with Ms. Montgomery?

3 A Yes, ma'am, I have met her briefly on an occasion or
4 two prior to that.

5 Q And were you the lead investigator, the one out there
6 working this case?

7 Were you part of the team?

8 Were you supervising so you're somewhat involved, but
9 not necessarily primarily involved?

10 How would you describe your involvement?

11 A As supervisor.

12 Q And at some point on the evening of February 5th
13 going into the morning of February 6th, do you have the
14 occasion to respond to [REDACTED]?

15 A It was on [REDACTED] and that -- I believe that's the
16 correct address.

17 Q Okay. At some point you go to the residence on [REDACTED]
18 [REDACTED]?

19 A Yes, ma'am.

20 Q And did you receive the information or were you told
21 from your other officers that possibly Misty Montgomery or
22 Brad McCarter where the suspects may be at a residence on
23 [REDACTED]?

24 A I did receive that from my other officers.

25 Q And when you get there, are you one of the first

Lanelle Day - Direct examination
By Solicitor Lipinski

1 officers on the scene?

2 A One of the first, yes, ma'am.

3 Q All right. And the other officers that may of been
4 there would of been Officer Kinnee?

5 A Officer Kinnee was on scene with me.

6 Q And Officer Riley either arrived at the same time or
7 shortly thereafter?

8 A To the best of my recollection, just shortly
9 thereafter.

10 Q And when you get there, is there a vehicle in the
11 driveway?

12 Do you recall?

13 A Yes, ma'am.

14 Q All right. Is it a white truck, if you recall?

15 A Yes, ma'am.

16 Q And was that vehicle description that you had been
17 given regarding the earlier incident?

18 A Yes, ma'am.

19 Q And do you go knock on the door?

20 A Yes, ma'am.

21 Q You or Officer Kinnee go knock on the door?

22 A Officer Kinnee and I both together approached the front
23 door and knocked.

24 Q And does anyone answer the door?

25 A The children.

Lanelle Day - Direct examination
By Solicitor Lipinski

1 Q And when you say the children, about, if you recall,
2 what time in the morning are you at this house?

3 A It was very early in the morning. I don't recall
4 specifically the time. Well, well after what I would
5 consider the children's bedtime.

6 Q After midnight or around?

7 A Yes, ma'am.

8 Q In the early morning hours?

9 A Yes, ma'am.

10 Q All right. And when we say children, approximately
11 what age are we talking about?

12 Grade school, middle school, high school?

13 A The children are small. They are kindergarten to grade
14 school.

15 Q Kindergarten to grade school age approximately?

16 A Yes, ma'am.

17 Q And have you ever been to this residence to deal with
18 these children in particular in the past?

19 A I have not per se dealt with the children. I've dealt
20 with household members.

21 Q Household members of that house?

22 A Yes, ma'am.

23 Q Were you ever involved in any type of EPC or other
24 action involving the children?

25 THE COURT: Tell her what EPC is.

Lanelle Day - Direct examination
By Solicitor Lipinski

1 SOLICITOR LIPINSKI: I'm sorry.

2 Emergency protective order---

3 A We --.

4 Q ---or emergency protective custody.

5 I apologize.

6 THE COURT: I was trying to figure out the order and
7 the C.

8 SOLICITOR LIPINSKI: Right. My acronyms are off, Your
9 Honor. I apologize.

10 MR. COOK: Your Honor, I'm gonna object on the grounds
11 of relevance to that question.

12 THE COURT: Well, I think I'm gonna overrule the
13 objection. I think we're talking about looking at
14 existences and seeing what was in the officer's mind at the
15 time.

16 SOLICITOR LIPINSKI: Yes, Your Honor.

17 Have had ever been involved with that type incident at
18 this residence?

19 A We have had occasions where that has been a
20 consideration of the officers on scene. Ms. Montgomery, I
21 believe it's her mother and father or step parents, live
22 almost directly behind this house. And so far, each time
23 we've dealt with this family with these children, they
24 volunteered to take them into their care so that D.S.S. was
25 not called.

Lanelle Day - Direct examination
By Solicitor Lipinski

1 Q So, on the night in question you arrived in the early
2 morning hours, you say the children, grade school or
3 younger, answered the door?

4 A Yes, ma'am.

5 Q Do they appear to be they got out of bed or, or can you
6 tell?

7 were they up at the time?

8 A They, they appeared to be up or napping in the living
9 room. When you approach the front porch of this house, you
10 can see into the living room area. The windows right there
11 on the front porch look directly into where the sofa and the
12 coffee table and the television set are at, and the children
13 were in the front room right with the door.

14 Q And what do you direct the children to do or what do
15 you---

16 A We ask them to, was Misty and Brad or are mom and Brad,
17 were, were they at home, and they said yes. We asked them
18 to wake them up or to go get them. We asked them where they
19 were, to go get them, get them to come to the door.

20 Q And were they able to do that?

21 A No, ma'am.

22 Q And when they came back, what did they tell you?

23 A They told us that they could not wake them up. They
24 were in bed but could not wake up.

25 Q And were they gone for a period of time or they -- do

Lanelle Day - Direct examination
By Solicitor Lipinski

1 they actually -- act like they were actually -- were they
2 gone long enough to go check on them and make that effort?
3 A Yes, ma'am, and actually made trips back and forth out
4 of the sight --

5 Q So, what were---

6 A -- going to do that multiple times.

7 Q ---their efforts to go wake them up or arouse them?

8 A Yes, ma'am. Yes, ma'am.

9 Q And at that point did you have any concern about the
10 children's well being?

11 A Yes, ma'am.

12 Q And based on that, what action, if any, did you take?

13 A We entered the residence and went directly from the
14 front door around the little hallway there, and, and into
15 the hallway where that bedroom is at, where the bedroom's
16 located that they were asleep in, observed them in bed and
17 tried to wake them up ourselves.

18 Q And were you able to do that?

19 A We were successful after some effort, yes, ma'am.

20 Q And by some effort, if you could just describe the
21 effort to the Court?

22 A We, we asked multiple times, you know, wake up, wake
23 up, we shook them. We -- there was, there was -- Kinnee and
24 myself -- we're talking about a small bedroom with them in
25 this bed, and we were both shaking them trying to get them

Lanelle Day - Direct examination
By Solicitor Lipinski

1 to wake up, trying to arouse them.

2 Q Okay. And while you were in that residence, did you
3 either observe any potential evidence in plain view?

4 A I did not initially, no, ma'am, because I stayed --
5 Misty was on the side of the bed closest to the doorway, and
6 I stayed closest to her.

7 Q And what did you and Misty then do?

8 A When, whenever I---

9 Q You eventually get her up?

10 A Yes, ma'am.

11 Q And what is her physical condition?

12 A Appeared to be intoxicated, groggy.

13 Q And was there anything about her clothing either that
14 she had on at the time or was near by---

15 A Yes, ma'am.

16 Q ---her that raised your suspicion?

17 A After, after I was able to get Misty roused up and get
18 her up, Misty and I -- I asked her, I said, okay, step with
19 me out of the room here, step with me to the hallway so we
20 could get kind of out of the way there. And when she raised
21 up, and I actually took a good look at her, she had a
22 t-shirt that appeared to have blood on the sleeve.

23 Q And did you -- what did you do in regards to that
24 t-shirt in terms of preserving it in anyway?

25 A Well, I, I asked Misty, I said, you know, what --

Lanelle Day - Direct examination
By Solicitor Lipinski

1 you're kind of dirty here. Do you want to go ahead and
2 change those shirts here, and her response was yes, and I
3 explained to her that we would be taking the shirt that she
4 had on into evidence and we did. We took that shirt into
5 evidence.

6 Q All right. And you -- did you locate the pants of the
7 defendant?

8 A No, ma'am, I did not.

9 Q Are you aware of whether Officer Riley did?

10 A Either Officer Riley or Officer Kinnee did, yes, ma'am.

11 Q In that bedroom?

12 A Yes, ma'am.

13 Q And they would of collected that evidence?

14 A Yes, ma'am.

15 Q All right. And what happened to the children that
16 night?

17 Did you leave them there or---

18 A Oh, no, ma'am. No, ma'am. That night we did request
19 that Misty's mother come over and get, and get the children
20 and reluctantly they did.

21 Q So, in fact, the children were not allowed to remain
22 there because obviously Misty and Brad were arrested that
23 night, but you were able to get a family member to come take
24 care of these children?

25 A Yes, ma'am.

Lanelle Day - Direct examination
By Solicitor Lipinski

1 Q All right. Let me show you a property and evidence
2 sheet --

3 A Okay.

4 Q -- and ask you if your signature's on that item.

5 A Yes, ma'am.

6 Q And there's a multitude of -- there's a few items
7 listed on it --

8 A Yes, ma'am.

9 Q -- including a pair of bloody pants, but there's also
10 a -- did you collect all the evidence on that evidence, on
11 this inventory sheet?

12 A No, ma'am, whenever you look at one of our inventory
13 sheets, the number's down the left-hand side near the
14 bottom, they correspond with numbers towards the center at
15 the top, and I have signed for Item Number 1. Item Number
16 1, Item Number 1 is the hammer. I believe---

17 Q There's actually---

18 A I believe the numbers have been transposed.

19 Q Okay. Did you collect the hammer?

20 A I was with them. We, we were both together when the
21 hammer was observed and when the hammer was collected.

22 Q But the hammer's not in the bedroom?

23 A Ma'am?

24 Q The hammer's not in the bedroom?

25 A No, ma'am, not -- no, ma'am.

Lanelle Day - Direct examination
By Solicitor Lipinski

1 Q The hammer's actually outside of the back of the pickup
2 truck?

3 A Yes, ma'am.

4 Q So, the actual search of the house reveals what items
5 on that property and evidence sheet?

6 A The one shirt that is Number 1 --

7 Q Okay.

8 A -- that Misty Montgomery was wearing.

9 Q And that's what you indicated you personally collected?

10 A Yes, ma'am. Yes, ma'am.

11 Q And then what other items?

12 A And the pair of pants which are Item Number 3 that John
13 Riley collected.

14 Q All right. And is there one more or is that all?

15 I just want to make sure we've covered it all so
16 that---

17 A Item Number 4 is a voluntarily statement collected by
18 John Riley.

19 Q All right. So, not necessarily a physical piece of
20 evidence, but he took a statement perhaps and would of also
21 entered that into evidence --

22 A Yes, ma'am.

23 Q -- in that grouping for that P&E sheet?

24 A Yes, ma'am.

25 Q All right. And did you have any conversation with Mr.

Lanelle Day - Direct examination
By Solicitor Lipinski

1 McCarter himself if you recall?

2 A Very minimal. If, if I had any with him, it was
3 nothing beyond, you know, stay here, have a seat here, you
4 know, be still. I mean it was nothing. It was very minimal
5 contact with---

6 Q Do you remember---

7 A ---with him.

8 Q ---anything about his physical condition or demeanor on
9 the night in question?

10 A He was intoxicated himself. He was having difficulty
11 hearing that night because he didn't have a hearing aid in,
12 and my understanding, kind of after the fact, was that Mr.
13 McCarter does wear hearing aids. He wears two hearing aids
14 I believe.

15 SOLICITOR LIPINSKI: Court's indulgence one moment.

16 (Pause.)?

17 SOLICITOR LIPINSKI: That's all we would have of
18 Sergeant Day, Your Honor.

19 THE COURT: All right. Mr. RosaLee.

20 MS. DAVIS: Your Honor, please the Court.

21 THE COURT: Yes, ma'am.

22 CROSS-EXAMINATION

23 BY MS. DAVIS:

24 Q Sergeant Day, was it your testimony that you were
25 familiar with Brad McCarter before this evening?

Lanella Day - Cross-examination
By Ms. Davis

- 1 A Yes, ma'am, somewhat.
- 2 Q Were you aware of the hearing loss then before this
- 3 evening?
- 4 A No, ma'am.
- 5 Q You hadn't -- you hadn't been that familiar with him?
- 6 A No. No.
- 7 Q Okay. And you -- was it your testimony that you
- 8 personally had never been involved in any removal action or
- 9 any voluntary removal action?
- 10 A Not so far as involving D.S.S. or the State, but so far
- 11 as, you know, having two grandparents care for the children.
- 12 Q You personally have been?
- 13 A Yes, ma'am.
- 14 Q Okay. So, on the night that you entered the trailer
- 15 or, or the residence, what immanent danger did you find that
- 16 the children were in?
- 17 A The night that we entered the residence?
- 18 Q Yes.
- 19 A What caused us to remove the children from the
- 20 household that night was that the danger that the children
- 21 were in that night was that there was not gonna be an adult
- 22 left in that house after we made an arrest of both---
- 23 Q Yes, ma'am.
- 24 A ---Mr. McCarter and Ms. Montgomery.
- 25 Q Yes, ma'am, I understand that.

Lanella Day - Cross-examination
By Ms. Davis

1 But prior to that arrest --

2 A Yes, ma'am.

3 Q -- what immanent danger were the children in when you
4 entered the residence?

5 A We feared for the safety of both Mr. McCarter and Ms.
6 Montgomery given the condition that our other party was in.
7 We had no idea what condition those two might of been in and
8 if they needed medical help.

9 Q Okay. But you entered without a search warrant, is
10 that correct?

11 A Yes, ma'am, absolutely.

12 Q And you say that you were in fear for the children?

13 A I was in fear for leaving the children alone later. I
14 was in fear for the safety of Brad McCarter and Misty
15 Montgomery at the time we entered as they could not be woke
16 up.

17 Q Okay. So, you were not in fear of the children when
18 you entered that residence because you saw that they were
19 okay, is that correct?

20 A They had no adult supervision --

21 Q All right.

22 A -- that was readily available.

23 Q But they had an older child with them, did they not?

24 A All of those children are young.

25 Q They had an eleven year old there, didn't they?

Lanella Day - Cross-examination
By Ms. Davis

1 A I don't know the ages of the children. They all
2 appeared to be very young.

3 Q Okay. Did they have a child old enough to baby-sit
4 there?

5 A In my opinion, no.

6 Q All right. But that's your personal opinion?

7 A Yes, ma'am.

8 Q All right. And are you aware of the D.S.S. guidelines
9 for how old a child has to be to baby-sit?

10 A I know what the recommendation is. However, I don't
11 think there's anything set in stone.

12 Q Do you know what their recommendation is?

13 A Thirteen.

14 Q Okay. And, so, at the time you entered you didn't have
15 a search warrant, is that correct?

16 A That's correct.

17 Q And did you have time to obtain one?

18 A Knowing that I might need to get another ambulance on
19 the way, no, ma'am.

20 Q How long, how long a time frame had elapsed from the
21 initial call that went into the Sheriff's Department and the
22 time you arrived at the residence?

23 A Ma'am, I don't know.

24 Q Do you know what time the initial call came in?

25 A According to the report, the call was dispatched at

Lanella Day - Cross-examination
By Ms. Davis

1 22:11.

2 Q I'm sorry, ma'am?

3 A According to the report, the call was dispatched at
4 22:11.

5 Q All right. So, in, in -- that's about ten o'clock, is
6 that correct?

7 A Shortly after.

8 Q And what time did you say you arrived at this home?

9 A Give me just one moment.

10 (Pause.)

11 A According to the report it says near 1:00AM.

12 Q Okay. And the children, when they reported back, just
13 told you that the parents were asleep, is that correct?

14 A They said they could not wake them up.

15 Q Okay. So, the converse of that would be that they were
16 asleep, one of the explanations for that?

17 A That is an explanation.

18 Q Okay. And, so, there was nothing, upon your reaching
19 that home, that would have caused you to remove the children
20 from the home under a D.S.S. case, is that correct?

21 A If we did not have very cooperative grandparents with
22 this family, yes, ma'am, those children may have to be EPC'd
23 independently --

24 Q Okay.

25 A -- considering the conditions of the household.

Lanella Day - Cross-examination
By Ms. Davis

1 Q Okay. All right. So -- but you didn't call D.S.S.
2 that night?

3 A No, ma'am.

4 Q All right. And tell me how close the grandparents
5 lived to that house.

6 A Oh, it's just a matter of, of yards. It is -- Old
7 Depot runs off at an angle that is almost parallel to
8 Woodlawn Street, and the homes almost back up to one
9 another. They're close.

10 Q And when you noticed that the children were there in
11 the front room, what was -- what activity were they doing?

12 Did you notice if they were doing anything?

13 A The television set was on.

14 Q Did you notice if they were playing any games or
15 anything?

16 A I did not observe any games.

17 Q Okay. And did you call the grandparents upon arriving
18 at the house?

19 A One of us actually went around and knocked on the door,
20 and I don't recall which one of us knocked on the door.

21 Q To the grandparent's house?

22 A Yes, ma'am.

23 Q Before you entered the residence?

24 A No, ma'am.

25 Q This was after you were already in the residence?

Lanella Day - Cross-examination
By Ms. Davis

1 A It was at the point in time we knew that we needed care
2 for the children.

3 Q Okay. Is there any reason that you couldn't have
4 called the grandparents to come around and tend to the
5 children if you were concerned about the care of the
6 children before you entered the residence while you waited
7 on a search warrant to arrive?

8 A Yes, ma'am, my, my thought process in that was that I
9 had a severely injured party who had been a member of or had
10 been part of whatever this confrontation was that we were
11 investigating, and that I might also have another or two
12 very severely injured people inside that residence.

13 Q Did you have an ambulance with you?

14 A Not at the time, no, ma'am. The ambulance is housed
15 literally inside of this residence. So, they would of been
16 there very quickly had I needed them.

17 Q So, your first explanation on why you entered this
18 house was for the safety of the children. Now your
19 explanation is for the safety of the parents.?

20 SOLICITOR LIPINSKI: Your Honor, I'm gonna object to
21 that. She testified previously---

22 THE COURT: Well, I think I can figure out what she
23 testified to. She's couching it as either or, and I'm not
24 sure it is. But she's entitled to ask that.

25 MS. DAVIS: All right. Thank you, Your Honor. I was

Lanella Day - Cross-examination
By Ms. Davis

1 just trying to get clarification for that.

2 THE COURT: All right.

3 MS. DAVIS: Court's indulgence one moment please, Your
4 Honor.

5 THE COURT: All right.

6 (Pause.)

7 THE COURT: Thank you, Your Honor. I have no further
8 questions for this witness.

9 THE COURT: Redirect.

10 SOLICITOR LIPINSKI: Just briefly.

11 REDIRECT EXAMINATION

12 BY SOLICITOR LIPINSKI:

13 Q Ms. Davis was asking you about your concerns with the
14 children. You also expressed an interest for the well being
15 of, of Mr. McCarter and Ms. Montgomery.

16 You stated that, in, in your opinion, you observed the
17 children make several efforts to try and wake up their
18 parents?

19 A I observed them disappear out of sight going towards in
20 the direction of the bedroom, yes, ma'am.

21 Q And come back?

22 A Yes, ma'am.

23 Q And then return and go back?

24 A Yes, ma'am.

25 Q And, so, if the explanation was that they were just

Lanella Day - Redirect examination
By Solicitor Lipinski

1 asleep, it would be reasonable to assume that the children
2 would of been able to wake them up and bring their parents
3 to the door?

4 A Yes, ma'am.

5 Q And have you, in your experience in law enforcement,
6 ever dealt with people who are the victim of some type of
7 head trauma?

8 A Yes, ma'am.

9 Q Who may perhaps become unresponsive?

10 A Yes, ma'am.

11 MR. COOK: Your Honor, we object on speculation.

12 SOLICITOR LIPINSKI: Speculating as to the parents
13 being asleep. It could also -- this goes to her---

14 THE COURT: Well, this is in camera. I'm gonna
15 overrule the objection. I'll allow the question.

16 Q So, also another possible explanation is that they
17 could of been the, the victims of some injury and be
18 completely nonresponsive?

19 A Yes, ma'am.

20 Q And had you waited to go get a search warrant and come
21 back, could that trauma have been exacerbated?

22 A Oh absolutely.

23 Q And you stated that the grandparents came reluctantly
24 to get the children.

25 Does that mean they quickly responded or that there was

Lanella Day - Redirect examination
By Solicitor Lipinski

1 some discussions or common effort to get them to take the
2 children?

3 A Well, there was some hesitation on their part because
4 this was not the first time we'd asked them to do that.

5 MR. COOK: May I re---

6 THE COURT: No, Ms. Davis can. She can.

7 RECROSS EXAMINATION

8 BY MS. DAVIS:

9 Q Sergeant Day, can I -- could you tell me how long it
10 usually takes to get a search warrant?

11 A My experience has been, especially that far out of
12 town, that it would be -- two hours would be a very
13 reasonable amount of time, two hours, three hours. By the
14 time we actually had an officer drive into town, type the
15 affidavit for the search warrant, go down to the judge's
16 office, have everything, the paperwork secured, and drive
17 all the way back out to Sharon, it could be a considerable
18 amount of time.

19 Q Have you ever gotten one quicker than two hours?

20 A No.

21 Q Okay.

22 A No, ma'am.

23 Q All right. All right. Thank you.

24 THE COURT: You can step down. You can -- can she be
25 excused today?

1 SOLICITOR LIPINSKI: Yes, Your Honor.

2 THE COURT: Thank you.

3 SOLICITOR LIPINSKI: I just wanted to make sure she
4 wasn't leaving with my papers and I didn't take hers. I
5 apologize, Your Honor.

6 THE COURT: That's happened before.

7 SOLICITOR LIPINSKI: And, Your Honor, that would be the
8 testimony that we would produce as to the exigent
9 circumstances of the house and the justification of the
10 officers in entering the house.

11 THE COURT: Defense have any witnesses to present?

12 MR. COOK: No, sir, Your Honor.

13 THE COURT: You want to make any argument?

14 MR. COOK: Yes, sir, Your Honor.

15 If I may?

16 THE COURT: Yeah.

17 MR. COOK: Basically, Your Honor, our position is that
18 we see no exigent circumstances in relation to the children
19 because the grandparents are yards away. The police could
20 of stayed there for two hours and watched the children while
21 they were getting a search warrant I think. So, that's,
22 that's our argument there. We think it's contrived.

23 THE COURT: And both of those you consider reasonable?

24 MR. COOK: Sir?

25 THE COURT: And those you are asserting, asserting to

1 the Court as reasonable alternatives?

2 MR. COOK: Yes, sir, Your Honor. The --

3 THE COURT: Leaving the children for two hours?

4 MR. COOK: No, I don't say they have to leave, but the
5 deputies can stay there in the yard, make sure nobody enters
6 the house.

7 THE COURT: How's that gonna help the children in the
8 house?

9 MR. COOK: I'm not sure that the children -- the
10 children were, were napping in the living room as the Court
11 heard testimony from the deputy. So, I'm not sure that they
12 "needed supervision."

13 THE COURT: I didn't hear her say napping.

14 MR. COOK: I apologize, Your Honor. But she, she
15 didn't, in our opinion obviously, state anything that was an
16 emergency relating, in relation to the children other than
17 it's late at night, and there was an adult in the room.

18 So, we're -- we believe that those reasons are
19 contrived. We, we don't think that there was any exigent
20 circumstances in relation to the children, and that they
21 could of easily gotten a search warrant while they were
22 in -- if they, in fact, were concerned for the children,
23 they could of gotten the search warrant and stayed in the
24 yard till they had the search warrant available. So, that's
25 our argument there.

1 As to their concern about the defendant and the
2 codefendant, I didn't, I didn't hear any testimony that
3 would lead us to believe that they had any reasonable
4 concern as to his head trauma. We hadn't heard any
5 testimony that there was any head trauma at that point.

6 That -- that's just pure speculation. They're outside
7 the house, they don't have a search warrant. Instead of
8 waiting to get a search warrant, they're saying we were
9 worried about the children and we thought that, that they
10 might be knocked out in the house, and I'll leave it there,
11 Your Honor, but I don't think that they had any reason to
12 believe there was a head trauma. I just think these were
13 contrived reasons to effectuate some exigent circumstances.

14 Thank you, Your Honor.

15 THE COURT: Well, I find that these are the anthesis of
16 contrived. I find these are sincere very obvious proper
17 reactions to the situation as existed. I find that there
18 was compelling need for official action at the time, and
19 there was no time to obtain a warrant and assure the safety
20 of the children and/or the parents.

21 There's a twofold concern. It's not an either or.
22 There's a concern about the welfare of the children at the
23 time, the age. There was concern about the fact whether or
24 not it was by an injury, alcohol, or whatever, that the
25 parents were unresponsive and, therefore, medical

1 intervention was possibly needed for one or both of the
2 parents.

3 The law does not require clairvoyance. It only
4 requires a compelling need and exigent circumstances. The
5 age of the children, they were small, kindergarten to grade
6 school. I'm not sure why it makes any difference and
7 there's been no testimony there was a 13-year old in the
8 house as to what the guidelines for D.S.S. are because
9 there's no evidence to support there was a 13-year old in
10 the house. Past history of the child welfare issues, but
11 even without that, the circumstances were sufficient for
12 them to enter the home.

13 I find that the evidence -- and I hadn't heard anything
14 about the pants because I hadn't heard from Doctor, Officer
15 Riley. But they had a right to be in there. It's exigent
16 circumstances, and that -- at least as to the T-shirt, that
17 was in plain view, and the officer was right -- Officer Day
18 was rightly in point, in the situation she was in and in a
19 position to view. Obviously -- the obvious question of the
20 shirt.

21 So, therefore, I am not gonna suppress the, the shirt.
22 Again, I hadn't heard all the evidence on it, the pants.

23 So, I deny at least as to the shirt. I mean basically
24 compound finding. I find there was exigent circumstances,
25 and I find that the shirt, the shirt is admissible under the

1 Plain View Doctrine under the facts of this case.

2 What else is out there?

3 SOLICITOR LIPINSKI: Your Honor, the video in question
4 recording the defendant. I apologize. I was multitasking.
5 I shouldn't do that obviously.

6 The video which is the subject of part of the
7 defendant's Jackson v. Denno hearing, which we provided a
8 copy to the defense, it is approximately a half hour long as
9 relates to this defendant. I know it's ten after 5:00, but
10 I'm just offering to show it to you or if you would rather
11 start and watch it tomorrow.

12 THE COURT: All right. Well, let's go ahead and --
13 let's go ahead and look at it.

14 (WHEREUPON, the video was published to the Court at
15 this time.)

16 MR. COOK: Your Honor, if I may?

17 THE COURT: Yes.

18 MR. COOK: I know this seems a bit out of the ordinary,
19 but at this point I'm gonna redraw my motion to suppress
20 this video.

21 THE COURT: Okay.

22 MR. COOK: And I apologize for wasting the Court's
23 time, and if -- Your Honor, I've heard some things here that
24 I couldn't pick up with my home speaker.

25 THE COURT: All right.

1 SOLICITOR LIPINSKI: I -- Mr. Cook and I have, and I'll
2 tell you this, we've played with this video about 19
3 different ways, and I'm sitting here even now tweaking the
4 volume button and trying to get it so that you can -- it's
5 loud enough you can hear it and what have you. There is
6 also a written statement.

7 THE COURT: How about that?

8 MR. COOK: I do want to try to suppress that, but I
9 believe that will be tomorrow morning.

10 THE COURT: Okay.

11 SOLICITOR LIPINSKI: And that's, that's Officer Riley
12 would of taken that, Mirandized him, and there's a Miranda
13 form with it and it's in evidence.

14 THE COURT: Well, we'll, we'll deal with that in the
15 morning then, and we'll, we'll -- the motion to suppress the
16 video is withdrawn. So, it is -- the State has the right to
17 present it into evidence.

18 SOLICITOR LIPINSKI: Thank you, Your Honor. I just
19 wanted to let you know.

20 THE COURT: Okay.

21 MR. COOK: Thank you, Your Honor.

22 THE COURT: All right. That do it for today?

23 MR. COOK: Yes, sir.

24 THE COURT: All right. Ten o'clock in the morning.

25 MR. COOK: Ten o'clock?

1 THE COURT: Yeah, let's do 10:00 and I'll check with
2 the -- solicitor, check and see if they've got anything
3 before 10:00.

4 SOLICITOR LIPINSKI: I will, Your Honor.

5 THE COURT: Okay.

6

7 (WHEREUPON, Court was in recess for the evening.)

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1 Wednesday, August 24th, 2011

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3 THE COURT: Ms. Lipinski, are you ready to proceed?

4 SOLICITOR LIPINSKI: I am, Your Honor.

5 THE COURT: Mr. Cook.

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

7 THE COURT: All right. And you want to have Mrs. Coals
8 sworn in and have her, I notice she's here, and have her sit
9 next to Mr. McCarter. I don't know how y'all want to do
10 that logistically, but y'all can figure that out.

11 MR. COOK: Yes, sir, Your Honor. We'll do that now if
12 it please the Court.

13 THE COURT: Yeah.

14 Come up, Mrs. Coals, to be sworn to -- this isn't a
15 translation in the usual method. So, we'll have to fashion
16 a, a oath to you.

17 (WHEREUPON, Mrs. Coals was placed under oath at this
18 time.)

19 THE COURT: Okay. Thank you.

20 MR. COOK: May I, Your Honor, while we're on the
21 record?

22 I spoke with my client yesterday. He said he heard
23 everything that went on in those hearings. And, so, what I
24 would be suggesting is that she doesn't have to sit here the
25 whole time and talk with him. If he doesn't understand

1 something, he can turn to her --

2 THE COURT: That's fine. That's fine.

3 MR. COOK: -- and then she'll verbatim --.

4 THE COURT: That's fine. That will work.

5 NOW we do have to finish the motions.

6 SOLICITOR LIPINSKI: We do need to finish the motion
7 this morning. We have Officer Riley, who is returned to
8 town, here available to do that.

9 The Southards are present, Your Honor. The only two
10 people from his family that are on the witness list are both
11 he and his son obviously are victims to the, to the crime
12 itself. The State would submit that they should remain in
13 the courtroom and not be subject to sequestration.
14 Especially Dwayne himself.

15 THE COURT: Well, Dwayne himself definitely.

16 Do you have any objection to the son being in here?

17 MR. COOK: I do, Your Honor.

18 THE COURT: All right. Well, I'll -- well, the son's
19 not technically a victim.

20 SOLICITOR LIPINSKI: No, that's fine, Your Honor.

21 THE COURT: I'll allow---

22 SOLICITOR LIPINSKI: We can make him comfortable
23 outside. I just wanted to raise that issue.

24 THE COURT: Yeah, let's do that.

25 All right. Now, now the, the issue's still on the

1 table are the --?

2 SOLICITOR LIPINSKI: The pants and---

3 THE COURT: His pants, the search and seizure.

4 SOLICITOR LIPINSKI: ---and Denno.

5 THE COURT: And the Denno.

6 MR. COOK: The written statement, Your Honor.

7 THE COURT: Well, the written -- yeah, I got you.

8 okay.

9 SOLICITOR LIPINSKI: All right.

10 THE COURT: Call your first witness.

11 SOLICITOR LIPINSKI: Thank you, Your Honor.

12 We would call Deputy Riley to the stand.

13 If you could be sworn in and take the stand by the
14 court reporter.

15 JOHN RILEY, having been first duly
16 sworn, testified as follows:

17 DIRECT EXAMINATION

18 BY SOLICITOR LIPINSKI:

19 Q Deputy Riley, I'm gonna hand you copies of your report,
20 your narrative, and the property and evidence sheets. If
21 you need to refer to those to refresh your recollection
22 during this examination please do so.

23 A Thank you.

24 Q And I know you weren't here yesterday for the testimony
25 of Sergeant Day, but were you there initially when they

John Riley - Direct examination
By Solicitor Lipinski

1 start knocking on the door or do you come up during that
2 event?

3 A I come up during the event.

4 Q Are you there when they make entry into the home?

5 A I, I can't recall.

6 Q But at some point obviously, either at that time or
7 shortly thereafter or is a long time after, that you go into
8 the home with Deputy Kinnee or Day?

9 A That's correct.

10 Q Shortly thereafter?

11 A Yes.

12 Q All right. And when you go into the home, where do you
13 go initially?

14 Do you go specifically to one location or are you doing
15 a protective sweep of the home?

16 Do you recall?

17 A well; at the time period when we went into the home,
18 the kids said they were in the back bedroom. Okay. So,
19 went to the back bedroom, Deputy Kinnee and I, said they
20 couldn't get up. The kids had said the parents couldn't get
21 up. So, Misty ended up waking up, and then Sergeant Day
22 spoke to her outside the room, outside that room, and then
23 Deputy Kinnee and I were there, and then that's when we
24 attempted to get Brad up.

25 THE COURT: Apparently the individuals are well known

John Riley - Direct examination
By Solicitor Lipinski

1 among each other, but, for the record, we probably ought to
2 have Misty's name. I know we used her name, Misty,
3 yesterday. I'm not sure I know who Misty is. So --.

4 SOLICITOR LIPINSKI: I'm sorry. Her full name is Misty
5 Montgomery, the codefendant that was charged in the case.

6 THE COURT: Okay. But is that -- do you -- I mean this
7 witness is not Misty.

8 SOLICITOR LIPINSKI: I apologize. I apologize.

9 THE COURT: He referred to Misty there.

10 Q You actually arrested Misty, did you not?

11 A Yes.

12 Q And would that be Misty Montgomery?

13 A Yes.

14 THE COURT: That's good.

15 SOLICITOR LIPINSKI: And I apologize, Your Honor, for
16 that.

17 THE COURT: That's fine.

18 Q And when initially you speak with Mr. McCarter, you
19 stated that Misty woke up first?

20 A Yes.

21 Q And when she does, Lieutenant Day then removes her from
22 the bedroom, and then you-all then focus on Brad?

23 A Yes, cause Brad was still asleep or whatever at the
24 time.

25 THE COURT: And, for the record, Brad is --?

John Riley - Direct examination
By Solicitor Lipinski

- 1 Q And Brad would be --
- 2 A Yes, Brad McCarter.
- 3 Q The defendant or---
- 4 A Yes, the defendant.
- 5 Q Do you know his full name?
- 6 A Raymond Bradley McCarter.
- 7 Q Raymond Bradley McCarter?
- 8 A Yes.
- 9 Q And you referred to him as Brad.
- 10 Is that just how you would come to know him as you
- 11 dealt with him in the past?
- 12 A That's -- from talking to everybody, that seems to be
- 13 his name that everybody else is used was, was Brad. That's,
- 14 that's why I used it as Brad.
- 15 Q But when you would of arrested him, did you ask him his
- 16 full name?
- 17 A I can't recall.
- 18 Q Okay. But filling out that paperwork, those kind of
- 19 things at the jail, would you have gotten his full name and
- 20 his address and those types of details?
- 21 A Yes.
- 22 Q And do you recognize him here in the courtroom?
- 23 A Yes, I do.
- 24 Q And is he seated with defense counsel?
- 25 A Yes, he is.

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John Riley - Direct examination
By Solicitor Lipinski

1 Q And what is he wearing?

2 A He's wearing a blue shirt and a blue tie.

3 Q And are you able to arouse him at some point?

4 Are you able to get him awake?

5 A Yes.

6 Q And, just briefly, when you first encounter him, what
7 is his general physical demeanor and condition if you
8 recall?

9 A I recall him laying on the bed and not responding to us
10 trying to wake him up.

11 Q And are you touching him in any way or you just
12 verbally commanding him to wake him?

13 Do you recall?

14 A I do not recall.

15 Q And -- but you said, at some point, he does eventually
16 come to?

17 A Yes.

18 Q And does he speak to you?

19 A Yes.

20 Q Do -- does -- are you aware, at that time, that he has
21 any hearing deficiencies?

22 A No.

23 Q Does he, does he appear to understand you?

24 A Yeah.

25 Q Does he respond to you?

John Riley - Direct examination
By Solicitor Lipinski

1 A After -- at what point?

2 Q Okay. When you first wake him up and he, and he
3 initially comes to you and, and engages you, does he follow
4 your commands?

5 A Yes.

6 Q And do you talk to him at all about what, where is he
7 been that night, what's going on, those type things?

8 A I believe I read him Miranda first before going into
9 any of that. Due to training purposes, I didn't want
10 anything to be -- you know, I wanted to read Miranda first
11 before I talked to him.

12 Q Okay. Well, let's get to just does he appear to
13 understand you.

14 Despite -- you subsequently learned that he does have
15 some hearing deficiencies, correct?

16 A Yes.

17 Q But when you're initially in the bedroom is he, at
18 least, responsive to you?

19 A Yes.

20 Q All right. And while you're at the house talking to
21 him, do you have a video camera on your person?

22 A No.

23 Q Is there a video camera in your car?

24 A Yes.

25 Q And is it able to pick up what's, some of what's

John Riley - Direct examination
By Solicitor Lipinski

1 happening in the house via a body mic?

2 A Yes.

3 SOLICITOR LIPINSKI: All right. And, Your Honor, just
4 for the purpose of Jackson v. Denno, I'd like to just show
5 that initial part of the video where that Miranda is and ask
6 the officer a few questions about that. I know it isn't
7 related to the written statement, and Mr. Cook isn't
8 contesting, but I still think it's probative of the Court
9 analysis of the Jackson v. Denno issues.

10 Any objection to that?

11 MR. COOK: Without objection, Your Honor. The
12 projector's just -- there it is. It's taking a minute to
13 warm up. I didn't know how long it was gonna take.

14 (WHEREUPON, a portion of the video was published for
15 the Court at this time.)

16 Q And let me just stop you just to orient the, the judge
17 because we tried to play this for him yesterday in advance
18 of his testimony just to save some of the time today, but --
19 and you may need to step off the stand just to see the
20 smaller picture, but at the, at the top of this video, does
21 it say J.C. Riley?

22 A Yes.

23 Q And are you familiar with how your in-car video system
24 worked back in 2010?

25 A Yes.

John Riley - Direct examination
By Solicitor Lipinski

1 Q And in viewing this, is that the type of detailed
2 information that identifies him as the video from your
3 particular patrol car?

4 A Yes.

5 Q And does it identify the date of 2/6/2010?

6 A Yes, it does.

7 Q And the time, that 1:00:25, is that the time?

8 A Yes.

9 Q And is that one o'clock in the morning or shortly
10 thereafter?

11 A I believe so.

12 (WHEREUPON, another portion of the video was published
13 for the Court at this time.)

14 Q All right. Now, there's some radio traffic coming in
15 over your audio, correct?

16 A Yes.

17 Q You can turn the lights back up if you can.

18 When you, when -- on that video, to whom are you
19 speaking?

20 A Raymond Bradley McCarter.

21 Q To Raymond Bradley McCarter?

22 A Yes.

23 Q And were you in a bedroom or where are you in the---

24 A We're in---

25 Q Were you outside?

John Riley - Direct examination
By Solicitor Lipinski

1 Where are you?

2 A We are in the house in the bedroom, and he's sitting on
3 the bed.

4 Q And are you reading from a rights card?

5 Is that from memory and training?

6 A I do not recall since this time period.

7 Q All right. But the radio traffic kind of overruns what
8 you're saying?

9 You can kind of hear you start and end, but if it was
10 either from memory or training, do you recall the kind of
11 litany you would of went through at that time, what you
12 would of said to him?

13 A Yes.

14 Q And, just briefly, if you could relate to the Court,
15 because that radio traffic obviously interrupts some of what
16 you said, but what were the rights that you were using at
17 the time when you were questioning suspects?

18 A The Miranda warning.

19 Q Right.

20 But could you just actually say that?

21 A You have, you have the right to remain silent.

22 Anything you say can and will be used against you in a Court
23 of law. You have the right to an attorney. If you can not
24 find one, one will be appointed to you before any
25 questioning if you wished. You don't have to answer any

John Riley - Direct examination
By Solicitor Lipinski

1 questions or any statements at this time.

2 Q And, at that time, does Mr. McCarter indicate his
3 willingness to speak to you or does he object to speaking to
4 you in anyway?

5 A I, I can't recall.

6 Q All right. Had he, would you of continued questioning
7 him?

8 A If he agreed to speak?

9 Q Had he objected to it---

10 A No.

11 Q ---said I want a lawyer or anything of that, would you
12 have continued to question him?

13 A I wouldn't of, I wouldn't of spoke to him anymore about
14 the case.

15 Q When you go into the house, do you have guns drawn?

16 A No.

17 Q Is it that type of forced entry?

18 A No.

19 Q Is your gun in your holster?

20 A Yes.

21 Q And when you approach him, do you physically assault
22 him in anyway?

23 A No.

24 Q Did you threaten him in anyway?

25 A No.

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John Riley - Direct examination
By Solicitor Lipinski

1 Q Did you put your hands on him in any nature other than
2 to assist him out of the bed or secure him?

3 A I, I believe -- I'm pretty sure Deputy Kinnee and I
4 secured him at that point once we eventually got him up.

5 Q And secured him, placed him in handcuffs, or anything
6 like that, or just physically confined him in the bedroom?

7 A Due to the nature of the call, I'm more than certain we
8 put him in handcuffs.

9 Q Was he dressed in any fashion?

10 A He was in his underwear.

11 Q He was in his underwear?

12 A Yes.

13 Q Now, you go back and the defense is not objecting to
14 the video, but some of that was portrayed for the Court
15 yesterday. So, I just have a couple of questions.

16 You subsequently, at some point, walked him outside of
17 the patrol car, correct?

18 A Yes.

19 Q Put him in the back of the patrol car?

20 A Yes.

21 Q And at that point do you question him some more about
22 what's going on that night, and if you need to refer to your
23 notes you can?

24 A May I?

25 Q Uh-huh. (Affirmative).

John Riley - Direct examination
By Solicitor Lipinski

1 A Are you -- did you ask, after I set him in my patrol
2 car, if I asked him anymore questions?

3 Is that what the question was?

4 Q Right.

5 Do you remember at all having a conversation with him
6 at the back of your patrol car?

7 would viewing the video help refresh your recollection?

8 A Yes, please.

9 SOLICITOR LIPINSKI: Let me see if I can fast forward
10 just for that portion, Your Honor, just to initially get to
11 that point.

12 Can you dim the lights again?

13 (WHEREUPON, a portion of the video was published for
14 the Court at this time.)

15 Q Let me just pause the video.

16 As you're speaking to him, at this point you've gotten
17 into your patrol car, correct?

18 A Yes.

19 Q And are you seated in the back with him or are you in
20 the front talking to him or are you leaning in a window
21 speaking to him, if you recall?

22 A I can't recall. I know I wasn't sitting with him. I,
23 I probably opened the door and talked to him or rolled down
24 a window. It's one of the two things cause it was really
25 cold that night.

John Riley - Direct examination
By Solicitor Lipinski

1 Q It was really cold that night?

2 A Yes.

3 Q All right. And when he asked you to move to the other
4 side, is that you moving to the other side of the car?

5 A I can't recall.

6 Q You can't recall.

7 But if he had told you he could hear out of one -- if
8 you're talking to him through a window in a doorway, and he
9 would of indicated to you that he would of heard better from
10 another side, is that what you would of done?

11 A Yes.

12 Q All right.

13 (WHEREUPON, another portion of the video was published
14 for the Court at this time.)

15 Q All right. The video goes, goes on for sometime and
16 eventually you put Misty in the back of the patrol car with
17 him, Deputy Riley?

18 A Say again. I'm sorry.

19 Q Would you have eventually put Misty in the back of the
20 patrol car with him?

21 A Yes.

22 Q And did you also read Misty her Miranda rights?

23 A Yes, I believe so.

24 Q All right. And, so, at this point is there a reason
25 why you're not doing your written statement out there on the

John Riley - Direct examination
By Solicitor Lipinski

1 scene that night?

2 Was it too dark or were the conditions just not
3 conducive to it?

4 A The conditions were not conducive to the situation.

5 THE COURT: Keep your voice up.

6 WITNESS: Okay. Sorry.

7 Q You may need to speak up or lean perhaps in in the
8 direction of the microphone. They may help. You don't have
9 to lean over, but just---

10 A Okay. Well, due---

11 Q ---to be sure.

12 A Due to the conditions, no.

13 MR. COOK: Your Honor, I'm just, for the record, I want
14 to respectfully object to this kind of leading nature of the
15 questions.

16 THE COURT: There have been some leading questions.

17 SOLICITOR LIPINSKI: And I apologize, Your Honor. I
18 was trying to move it along and I hope you understand that.

19 THE COURT: I understand.

20 SOLICITOR LIPINSKI: But I'll try not to do that.

21 Q You eventually take -- you eventually take the
22 defendants back to the detention center?

23 A Yes.

24 Q And, at that point, do you conduct a second interview
25 of Mr. McCarter?

John Riley - Direct examination
By Solicitor Lipinski

1 A Yes.

2 Q And at that point do you take a written statement for
3 Mr. McCarter?

4 A Yes.

5 Q And prior to taking that statement, do you go over his
6 Miranda warnings again with him?

7 A Yes, I do.

8 Q And referring to Page 7 of your report, do you document
9 that in your report?

10 A Let me look further just to make sure. I got it
11 written down here.

12 Q Okay.

13 A Yeah, from my report that's, that's what I placed --
14 yes, I did read him Miranda and he did agree to write a
15 voluntary statement.

16 Q And let me go back to the pants because I apologize. I
17 kind of got focused on the statement as to what happened at
18 the house.

19 (WHEREUPON, seven photographs were marked as State's
20 Exhibit Nos. 1-A through 1-G for identification purposes
21 only at this time.)

22 Q But let me show you what's been marked for ID as
23 State's Exhibit A and B and ask you if you recognize those
24 photographs.

25 A Yes, I do recognize these photographs.

John Riley - Direct examination
By Solicitor Lipinski

1 Q And are you the one who actually took those
2 photographs?

3 A Yes, I am.

4 Q And do they document the -- and what is in the
5 photographs?

6 A These are photographs of bloody pants.

7 Q And where are -- are they where you found them?

8 A Yes, they're on the floor.

9 Q And do you pick them up off the floor and kind of lay
10 them on the bed?

11 A Yes.

12 Q And that's why there's the two photographs of the
13 pants?

14 A That is correct.

15 Q And do you collect those?

16 A Yeah, I believe so. I believe I put them in a brown
17 bag at this point, one of the bags, yes.

18 Q Did you have to look around the room and lift up stuff
19 to find them?

20 A No.

21 Q They were just on the floor there?

22 A They were on the floor near that drawer and then
23 there's a bed to the right. That's, that's exactly where
24 they were laying right there.

25 Q And does -- at any point, cause at this point they hear

John Riley - Direct examination
By Solicitor Lipinski

1 you in the house, does Mr. McCarter indicate that those are
2 his pants?

3 A I can't recall.

4 Q All right. But they were found -- are they found in
5 proximity to him or far away from him?

6 A They were found in proximity to him, yes.

7 SOLICITOR LIPINSKI: All right. Your Honor, at this
8 point that would be the State's evidence as to the pants
9 being found in plain view. If you've held in abeyance your
10 ruling as to the pants because Sergeant Day didn't find them
11 so that we could focus on this particular issue. The
12 State -- that would be the evidence the State would present
13 that your ruling yesterday and the exigent circumstances
14 existed to go into the house, and that the pants were found
15 in plain view subsequent to that exigent search, and I don't
16 know if Mr. Cook has any specific questions as to the pants,
17 but we can go ahead and do that now so we're not doing one
18 big convoluted---

19 THE COURT: Okay.

20 MR. COOK: Yeah, that's correct, Your Honor.

21 Please the Court, I, I prefer, if Your Honor would rule
22 on the pants, and then we could have a separate hearing
23 about the statement.

24 THE COURT: All right. That's fine. Yeah, let's go
25 ahead and do your cross.

John Riley - Cross-examination
By Mr. Cook

1 MR. COOK: Okay.

2 CROSS-EXAMINATION

3 BY MR. COOK:

4 Q Good morning, officer.

5 A How are you?

6 Q I'm doing well. Doing well.

7 Now, you said that you moved the pants while they were
8 in the scene, is that correct?

9 A That is correct, yes.

10 Q why?

11 A I wanted to get a more vivid picture.

12 Q Okay. Did you call any -- had you made an arrest at
13 this point?

14 A I believe there was a detainment made. I can't recall.
15 I don't remember. I'd have to, have to review the video if
16 I made an arrest at that point or not. I believe I didn't.

17 Q Did you call any detectives to the scene you knew --

18 A No.

19 Q -- for, for investigative purposes?

20 A No.

21 Q Was there any tape put up, crime scene tape?

22 A No, sir.

23 Q Fingerprints?

24 A No.

25 Q And you moved the pants and you put them on top of the

John Riley - Cross-examination
By Mr. Cook

1 bed?

2 A Yes.

3 Q Okay. But didn't you -- you gave some type of
4 testimony there, but that's where they were, that's right
5 there where they were.

6 what did you mean by that?

7 A The, the pants were in, laying in the floor as this
8 picture right here had not touched them. Exhibit A had not
9 touched the pants yet. They were laying in the floor.
10 That's -- I took the picture there.

11 Q Okay. Is this -- is this the picture you're referring
12 to?

13 If I may approach, Your Honor, the witness?

14 THE COURT: Sure.

15 A Yes. Yes, that is.

16 Q Okay.

17 A Yeah, Exhibit A.

18 Q Now, it looks like there's a white plastic bag there
19 that's been torn. It looks like the pants have been in. If
20 I may -- just so Your Honor can see the picture we're
21 referring to.

22 Did you take those pants out of that plastic bag?

23 A No.

24 Q Okay. And you stated that Mr. McCarter, at some point,
25 admitted that those were his pants, but I didn't hear that

John Riley - Cross-examination
By Mr. Cook

1 on the video.

2 Could you tell me at what point he admitted that those
3 were his pants?

4 A I can't recall.

5 THE COURT: You need to speak up.

6 A I can't, I can't recall. I'm sorry. I can't recall.

7 Q Let's go back to the litany of Miranda that the
8 solicitor was talking about.

9 Do you have a card that you pull out of your pocket?

10 SOLICITOR LIPINSKI: Your Honor, let's do the pants and
11 then we'll go back to the statement cause I've not---

12 MR. COOK: Well, this is towards the pants. I'm going
13 towards whether he was Mirandized properly before the pants
14 were discovered.

15 THE COURT: Well, we're getting in a little bit of a --
16 I'm not gonna call it moras. But I'm gonna let you
17 follow-up. But you're withdrawing your objection to the
18 tape. So, the tape's in. So, the tape speaks for itself.
19 whatever is on there is on there.

20 So, I -- I'll allow you to go forward and ask him
21 about -- you've already asked him whether he was detained or
22 arrested or not. He said he was at least detained. I'll
23 let you go forward.

24 MR. COOK: I'll be quick, Your Honor. Just two quick
25 questions.

John Riley - Cross-examination
By Mr. Cook

1 Q You asked him those Miranda questions. I noticed that
2 on the tape you didn't say do you understand these rights if
3 I've, as I have read them to you, which is a very common
4 question after Miranda.

5 why did you not say that?

6 A I can't recall.

7 Q Were you reading from a card?

8 A I'd have -- at that time I can't recall that either.

9 Q Okay. It's very important because you're aware now my
10 client's hearing impaired.

11 A I am, I am aware now, yes.

12 Q Were you aware at the time?

13 A No, I don't believe he said that until we were in the
14 back of, to the back of the patrol car.

15 Q I'm not certain that he heard you say the Miranda
16 rights.

17 SOLICITOR LIPINSKI: Your Honor, I object to
18 speculation.

19 THE COURT: I know.

20 SOLICITOR LIPINSKI: That's an opinion. That's not a
21 question for the officer.

22 MR. COOK: Okay. And---

23 THE COURT: That wasn't a question.

24 MR. COOK: And that's all the questions I have, Your
25 Honor. Thank you.

John Riley - Cross-examination
By Mr. Cook

1 SOLICITOR LIPINSKI: Your Honor, as to the pants, we
2 would indicate the search was proper due to the extent of
3 the circumstances testified to by Sergeant Day. The pants
4 were then found in plain view in the bedroom in close
5 proximity to the defendant. The State submits they were
6 properly seized by this officer, and, and there's no Fourth
7 Amendment violation in their, in their recovery.

8 THE COURT: Mr. Cook.

9 MR. COOK: I just make a generic motion to suppress the
10 pants, Your Honor.

11 THE COURT: All right. Well, I -- to follow-up on
12 yesterday where I found entry to the house and the bedroom
13 were appropriate under the exigent circumstances, I find
14 that the officers were properly in the, properly in the room
15 at the time, and that the pants were within the plain view
16 of the officer and the motion to suppress the pants is
17 denied. I find no violation of the Fourth Amendment rights.

18 DIRECT EXAMINATION

19 BY SOLICITOR LIPINSKI:

20 Q Going back to -- and I, and I apologize to jump all
21 over. We're kind of combining your testimony into two
22 separate issues.

23 But going back, you eventually take Mr. McCarter back
24 to the York County Detention Center, correct?

25 A Yes.

John Riley - Direct examination
By Solicitor Lipinski

1 Q And according to Page 7 of your report, you advise him
2 again of his Miranda rights?

3 A Yes.

4 Q At that point, once you're back at the York County
5 Detention Center, is that---

6 MR. COOK: Your Honor, I'm interrupting the solicitor,
7 and I apologize for my rudeness. I forgot to make one
8 motion while we're back on the video before we get to the
9 written statement, and I have, as Your Honor's correct, I, I
10 didn't object to it being entered into evidence, but I would
11 make a motion to redact.

12 The first two minutes the detective -- the videos goes
13 from 100 to 102, and those three or four sentences in there
14 when my client denies any involvement, and, quite frankly,
15 he's just being woken up, at 1:02 he's Mirandized and I
16 would move to redact the two minutes that are on the tape
17 before he was Mirandized for the -- because he hadn't been
18 read his Miranda rights at that point.

19 THE COURT: Well, he denied -- I mean I -- you want to,
20 you want to redact his denial?

21 MR. COOK: Yes, sir, just those two minutes before he's
22 Mirandized.

23 THE COURT: All right. What do you, what do you have
24 to say about that?

25 SOLICITOR LIPINSKI: Well, just briefly, Your Honor,

John Riley - Direct examination
By Solicitor Lipinski

1 I'm not sure what the basis of, of that motion for redaction
2 otherwise, other than it's evidence Mr. Cook particularly
3 doesn't like. The video is either a proper evidence and
4 that he was properly Mirandized.

5 At this point, they're waking him up. They're trying
6 to identify if he was the suspect. At that point they don't
7 even know if they have the right guy. And, so, they're
8 attempting to do that. Matter of fact, Mr. Bradley's heard
9 to say we're just trying to figure out if we got the right
10 guy, and, so, he, he says that.

11 I think it's -- the jury still, nonetheless, has to
12 make the determination that his statement is knowing and
13 voluntarily made. The fact that, at some point he's making
14 denials and then subsequently changing his story, is
15 probative evidence that he is forming that cognitive
16 decision about what to say and changing the story
17 accordingly.

18 So, the state feels that it is probative evidence is
19 that there no -- I'm not sure what the objection is based on
20 other than Mr. Cook doesn't like this evidence.

21 MR. COOK: Well---

22 SOLICITOR LIPINSKI: And he's not -- he's also not in
23 custody.

24 THE COURT: Yeah, he wasn't in custody.

25 SOLICITOR LIPINSKI: He's in the bedroom.

John Riley - Direct examination
By Solicitor Lipinski

1 THE COURT: That's, that's -- go ahead with that.

2 MR. COOK: well, I, I understand the points that were
3 made. I just renew my motion.

4 THE COURT: I deny it. I think he was not in custody
5 at the time, and I find that the questions were appropriate,
6 and not subject to redacting.

7 MR. COOK: Yes, sir, Your Honor. I apologize for
8 interrupting.

9 THE COURT: Very well.
10 where are we?
11 we're back in the detention center.

12 CONTINUED DIRECT EXAMINATION

13 BY SOLICITOR LIPINSKI:

14 Q You then get back to the York County Detention Center.

15 Do you recall where you speak with Mr. McCarter?

16 Are you in an interview room?

17 Are you in booking?

18 Are you at a desk somewhere?

19 A We were still in booking, but there's another --
20 there's an interview room that's, I believe, behind the DUI
21 room. But it's beside there, and I, I -- we went inside
22 that room and then we sat at a table, yes.

23 Q All right. And when you speak to Mr. McCarter in the
24 interview room, to the best of your recollection, does he
25 have any problem understanding you?

John Riley - Direct examination
By Solicitor Lipinski

1 A Not that I recall at that time, no.

2 Q Do you recall him asking you to repeat questions or
3 anything of that nature?

4 A I can't recall that, no.

5 Q Had he asked you to repeat a question cause you didn't
6 hear him, would you have done that?

7 A I would of repeated the question as many times as he
8 needed it.

9 Q And when you speak to him in this interview room, have
10 you, at anytime, leading up to that, back at the house, on
11 route to the detention center, at the detention center, do
12 you threaten him in anyway?

13 A No.

14 Q Do you physically assault him in anyway?

15 A No.

16 Q Do you display your weapon in any way other than for it
17 to be in your holster at your side?

18 A No.

19 Q When you asked him to give a written statement, is that
20 where you're asking him to do a written statement in
21 difference to what's on video?

22 A Yes, I, I wanted him to do a written statement. I --
23 that's why I Mirandized him, and he had a choice whether he
24 wanted to do one or not.

25 Q Do you promise him anything if he does give you a

John Riley - Direct examination
By Solicitor Lipinski

1 written statement?

2 A No, I believe I took his handcuffs, handcuffs off.

3 That's probably the only thing I did.

4 Q And you don't promise him anything in terms of
5 diminished charges---

6 A No.

7 Q ---bond, anything like that?

8 A No.

9 Q Does he ask you anything of those questions?

10 A I can't recall.

11 Q Do you recall him ever asking for an attorney or to
12 speak with anyone?

13 A No.

14 Q Had he done that, would you of allowed him to do so?

15 A If he asked to speak to an attorney and did not want to
16 answer my questions I would not have done anything of that
17 nature, no.

18 (Whereupon, the statement was marked as State's Exhibit
19 No. 6 for identification purposes only at this time.)

20 SOLICITOR LIPINSKI: Mr. Cook, do you have any
21 objection to me stapling these two pages together just so
22 they --?

23 MR. COOK: No objection, Your Honor.

24 Q Let me show you what's been marked for ID as State's
25 Exhibit No. 6, and ask you if that document bears your

John Riley - Direct examination
By Solicitor Lipinski

1 signature?

2 A Yes, it does.

3 Q And what is that document?

4 A This is a written statement made by Bradley McCarter.

5 Q And is it in his handwriting or yours?

6 A His handwriting.

7 Q And is this written statement taken before or after the
8 second Miranda warnings?

9 A It's taken after the second Miranda warnings.

10 Q And you just give him some paper and tell him -- how,
11 how did you go about getting him to write this statement if
12 you can relate that to Court?

13 A Well, with statements, I, I tell them to tell me how it
14 is. Here's, here's this. Tell me what happened tonight.
15 That's usually how I do it. After I read Miranda, here's
16 the paper. Tell me what, what happened tonight.

17 Q And did he -- you said that he wrote that in his own
18 handwriting?

19 A Yes.

20 Q Did he appear to have any difficulty writing?

21 A I, I'm not sure. I don't know how difficult it was for
22 him, but --.

23 Q Did it take him an inordinate amount of time?

24 A I don't recall the time. I gave as much time as he
25 needed.

John Riley - Direct examination
By Solicitor Lipinski

1 Q Do you sit there with him while he writes it?

2 A Yes, I do.

3 Q Do you give him the opportunity to speak with Ms.
4 Montgomery or anything of that nature?

5 A No.

6 Q And if you could, just if -- you can read it. I know
7 it's in his handwriting. If you could relate -- Your Honor,
8 do you want to read the statement or do you want me to have
9 the officer?

10 I don't know.

11 THE COURT: I don't -- it doesn't matter. Have him
12 read it.

13 Q If you could, just read -- to the best of your ability,
14 read that statement to the Court.

15 A The entire statement?

16 Q Yes.

17 A Okay. It says I, Brad McCarter, know and understand my
18 rights. Having decided to answer questions at this time, I
19 now make the following statement:

20 Jamie Gilfillian called my phone talking trash telling
21 me to meet him on the dirt road like the last time before.
22 So, I rode out there and went up to the house, which I
23 wasn't sure if it was his house or not. It was the wrong
24 house, and the dude, after I asked him did he know Jamie
25 Gilfillian, came sneaking close to me until he grabbed a big

John Riley - Direct examination
By Solicitor Lipinski

1 hammer and started chasing me with it.

2 I ran to the road and my girl drove off, left me
3 standing with the guy with the hammer in his hands. I kind
4 of asked him out -- I kind of psyched him out by flinching
5 at him and he fell in the ditch, and I had to defend myself
6 by slugging him with my fist until my girl came backing up,
7 and I left him there and get in the truck and left.

8 I'm on Page 2 of the voluntary statement.

9 It says I, again, Bradley McCarter, know and understand
10 my rights. Having decided to answer questions at this time,
11 I now make the following statement:

12 We came back about an hour later to try to find my
13 hearing aid, which I never found. Then we left and went
14 back home, and then I was apprehended for the charge, and
15 then it's signed Bradley or Raymond McCarter on the first
16 page, and then it's Brad McCarter on the second page, and my
17 signature is as a witness on both of those.

18 Q And at the top of both of those pages where it says I,
19 Brad McCarter, is that his handwriting or is that yours?

20 A That's his handwriting.

21 Q And then at the bottom where it says signed on the
22 first page, Raymond McCarter/Brad McCarter that you
23 indicated, is that your filling that in or is that him?

24 A No, that's his, his signature.

25 Q And, if you could, back to the first page, the first

John Riley - Direct examination
By Solicitor Lipinski

1 line it says Jamie, G-I-L-F-I, and you stated Jamie
2 Gilfillian.

3 That was a name you had developed as a witness earlier
4 in the evening?

5 A Yes.

6 Q All right. But he wasn't able to spell that?

7 You kind of filled that in as guessing that's what he
8 meant because there's some scribble after that?

9 A That's correct.

10 Q All right. And then just also -- if you could look at
11 Line 12. You started out I kind of asked, and then you said
12 side -- it actually says S-I-K-E-D, and that's, again, you
13 trying to figure out Mr. McCarter's handwriting?

14 A That's correct.

15 Q And if you could, look at Page 2. The statement
16 actually starts, stops on Line 5.

17 A Okay.

18 Q And actually then -- he then though has till Line 16 he
19 leaves blank?

20 A That's correct.

21 Q You didn't limit him in anyway in terms of how long the
22 statement he could of write, written?

23 A No.

24 Q You gave him as many pages or lines that he needed?

25 A As long as he needed, as much paper as he needed.

John Riley - Direct examination
By Solicitor Lipinski

1 Q And, if you would, look back to the first page of the
2 statement to the top. It has some identifying information
3 in terms of an address, a date of birth, and a phone number.

4 Is that in his handwriting or your handwriting?

5 A That's his handwriting.

6 Q And if you could look at the P&E sheet. I handed -- I
7 think it's the back of the report that I gave you.

8 Did you then take this statement and do anything with
9 it as it relates to the property and evidence?

10 A That's -- oh, sorry.

11 Q And I can draw your attention to---

12 A Yes, talking about off the evidence sheet?

13 Q Yes, looking at the evidence sheet. Specifically Line
14 Item 4.

15 A I said it appears that I placed it into evidence.

16 Q And looking at the bottom, does it indicate that Item 4
17 is then signed out to Detective Wallace?

18 A which line?

19 I'm sorry.

20 Q At the bottom of the last line on the P&E sheet that
21 you have, it says Item 4 indicated it's signed out to
22 anyone?

23 A Yes.

24 Q To Detective Wallace?

25 A Yes.

John Riley - Direct examination
By Solicitor Lipinski

1 SOLICITOR LIPINSKI: Court's indulgence one moment,
2 Your Honor.

3 (Pause.)

4 SOLICITOR LIPINSKI: We have nothing as to the Jackson
5 v. Denno.

6 MR. COOK: Please the Court.

7 CROSS-EXAMINATION

8 BY MR. COOK:

9 Q Deputy Riley, are you familiar with this sheet here
10 that I believe is the standard form. Before I ask you any
11 questions I want to advise you of your rights. Then it goes
12 through five rights there. Do you understand, check yes or
13 no, and a signature.

14 A Yes, I am familiar with that.

15 Q Okay. Are you familiar with the signature on that
16 form?

17 A Misty Montgomery?

18 Q That's correct.

19 A Yes.

20 Q Okay. In my discovery packet I noticed that she had
21 one of these forms, but interestingly didn't give a
22 statement, whereas Brad didn't have this form, my client,
23 the defendant, but he did give a statement, and I'm
24 wondering why didn't he sign one of these forms given the
25 fact that, at this point, you know he's hearing impaired,

John Riley - Cross-examination
By Mr. Cook

1 and you know he didn't have a hearing aid on him?

2 That's my question.

3 A Being a fairly new officer, I -- it's a lot of things
4 that, you know, I still work on. So --.

5 Q I understand.

6 Did you -- but it's your testimony today that you read
7 him Miranda---

8 A Yes.

9 Q ---at the station?

10 Now, I noticed at the house you didn't ask him the
11 question do you understand these rights.

12 What's your testimony as to the station?

13 Did you ask him that question?

14 Do you have a recollection?

15 Is it different?

16 A I can't, I can't recall.

17 MR. COOK: And I've got no further questions, Your
18 Honor.

19 SOLICITOR LIPINSKI: Just a few brief follow-up. I
20 apologize.

21 REDIRECT EXAMINATION

22 BY SOLICITOR LIPINSKI:

23 Q Did you---

24 THE COURT: Do you want to make the ID, the Court, the
25 Court's Exhibit for purposes of this hearing?

John Riley - Redirect examination
By Solicitor Lipinski

1 SOLICITOR LIPINSKI: Yes, Your Honor. We can.

2 THE COURT: Well, you don't have to. I'm just asking
3 you.

4 SOLICITOR LIPINSKI: Well, I understand. The State
5 would make it a Court's -- I didn't know if Mr. Cook had any
6 objection to it or questions about it.

7 MR. COOK: What are we talking about again?

8 SOLICITOR LIPINSKI: Just the statement.

9 THE COURT: The statement.

10 SOLICITOR LIPINSKI: Making it a Court's Exhibit---

11 MR. COOK: No objection, Your Honor.

12 SOLICITOR LIPINSKI: ---for the purposes of this
13 hearing.

14 Your Honor, we would enter it as State's Exhibit No. 6
15 or Court's Exhibit No. 1.

16 THE COURT: That's fine.

17 (WHEREUPON, the statement was now marked as Court's
18 Exhibit No. 1 and received into evidence for purposes of
19 this hearing only at this time.)

20 Q Did you take a written statement from Mr. McCarter,
21 Misty Montgomery?

22 A No.

23 Q This form that Mr. Cook showed you, does it actually
24 bear the name of Alex Wallace, the detective?

25 A Yes, it does.

John Riley - Redirect examination
By Solicitor Lipinski

1 Q And Mr. Cook asked you you didn't ask him the follow-up
2 question of do you understand these rights.

3 Did you perceive anything that gave you any inclination
4 that Mr. McCarter did not understand what you were saying to
5 him or your conversations with him that night?

6 A Will you repeat the question?

7 I'm sorry.

8 Q Did anything about Mr. McCarter's reactions to you in
9 any way indicate to you that he had any difficulty either
10 understanding his rights or any other part of your
11 conversation with him?

12 A No.

13 Q Did he respond appropriately to any commands you may
14 have given him in terms of sit here or let me get you out of
15 the car, those type things?

16 A Yes.

17 THE COURT: Could I see -- could I see the exhibit?

18 SOLICITOR LIPINSKI: Yes, Your Honor.

19 THE COURT: You --.

20 MR. COOK: Your Honor, if it please the Court, I'd like
21 to make this an exhibit.

22 THE COURT: You may.

23 (WHEREUPON, the waiver form was marked as Court's
24 Exhibit No. 2 and received into evidence for purposes of
25 this hearing only at this time.)

1 THE COURT: Ms. Lipinski, anything further from this
2 witness?

3 SOLICITOR LIPINSKI: Nothing further from this witness.

4 MR. COOK: Nothing further from me for this witness,
5 Your Honor.

6 THE COURT: Let me ask you then, Officer Riley, you
7 said at the station you read him his Miranda warnings, which
8 didn't elaborate on exactly what you warned him about with
9 specificity. We all have sort of a general concept of what
10 Miranda warnings mean, but I need to know exactly, before I
11 can rule, what you did advise him regarding his rights at
12 that time.

13 WITNESS: Yes, Your Honor. I either read it off the
14 card or I spoke it verbally off memory, which I don't
15 recall, but if I would have said it off memory, I would tell
16 him the same thing I told him on the scene would be, sir,
17 you have the right to remain silent. Anything you say can
18 and will be used against you in a Court of law. You have
19 the right to an attorney. If you can not afford one, one
20 will be, represent you before the Court of law. I'm
21 nervous.

22 THE COURT: Okay.

23 WITNESS: The same thing I said on the scene is the
24 same thing I said then. I -- everything that I would of
25 said, if it would of been it -- the last part -- may I pull

1 my card out right quick?

2 THE COURT: Yes, sir.

3 WITNESS: I would of read everything from Line 1 to 5,
4 but I wouldn't -- I didn't say the waiver if I would of said
5 it by memory---

6 THE COURT: All right. So, what one---

7 WITNESS: ---Your Honor.

8 THE COURT: I don't know what one through five is.

9 SOLICITOR LIPINSKI: I'm sorry. May I read this again?

10 THE COURT: Yes.

11 WITNESS: Okay. I would of said you have the right to
12 remain silent. Anything you say can and will be used
13 against you in a Court of law. You have the right to talk
14 to a lawyer and have him present with you while you are
15 being questioned. If you can not afford to hire a lawyer
16 one would be appointed to you to represent you before any
17 questioning if you wish. I said at anytime you can exercise
18 these rights to not answer any statement, not answer any
19 questions or make any statements.

20 That's what I would usually read off of memory. But
21 then there's a waiver at the bottom if you'd like to take a
22 look at that, which I, if I read it off memory, I would not
23 of asked that at that particular time.

24 THE COURT: But is it your testimony is you gave Mr.
25 McCarter those one through five rights prior to taking,

1 before taking this voluntary statement?

2 WITNESS: Yes. Yes, my testimony is I, I read that in
3 some way, shape, or form. But whether off memory or off the
4 card I can't recall.

5 THE COURT: Okay. Any follow-up questions?

6 SOLICITOR LIPINSKI: None from the State.

7 MR. COOK: None, Your Honor.

8 THE COURT: All right. You can step down.

9 WITNESS: Thank you.

10 THE COURT: Any further witnesses on this issue?

11 SOLICITOR LIPINSKI: Nothing from the State.

12 THE COURT: Anything from the defense?

13 MR. COOK: I'll call Mr. McCarter, Your Honor.

14 THE COURT: All right. Mr. McCarter, please come up
15 and be sworn.

16 RAYMOND MCCARTER, having been first
17 duly sworn, testified as follows:

18 SOLICITOR LIPINSKI: Your Honor, just to insure the
19 order of sequestration, I'm gonna ask Officer Riley to step
20 out of the courtroom during Mr. McCarter's testimony as to
21 Jackson v. Denno.

22 THE COURT: That's fine.

23 Mr. McCarter, you're on the stand now, and, of course,
24 you're the defendant in this lawsuit.

25 You understand you don't have to testify or make any

Raymond McCarter - Direct examination
By Mr. Cook

1 statements regarding these charges?

2 You understand that?

3 WITNESS: Yes, sir, I do.

4 THE COURT: Okay, sir.

5 DIRECT EXAMINATION

6 BY MR. COOK:

7 Q Can you hear me okay, Brad --

8 A Yes, sir.

9 Q -- at this level if I talk right here?

10 A That's fine.

11 Q That's real important to me that you understand. If
12 you ever can't hear, I want you to stop everything and let
13 me know.

14 A Okay.

15 Q This has nothing to do with this hearing, but I'm
16 curious, what is on your leg?

17 what was that buckle that I saw?

18 A That's the, the strap around my leg.

19 Q What's it for?

20 A I guess to keep me from running out of the courtroom I
21 guess.

22 Q Okay. So, that's something that's put on by the jail.

23 Okay. And I don't guess there's anything we can do
24 about that, Your Honor?

25 THE COURT: No.

Raymond McCarter - Direct examination
By Mr. Cook

1 MR. COOK: Okay. Just wanted to ask. Thank you, Your
2 Honor.

3 Q Okay. Back to this, do you remember the night when you
4 wrote this statement?

5 A Say that again.

6 Q Do you remember the night when you were in custody and,
7 and interrogated at Moss after---

8 A Uh-huh. (Affirmative).

9 Q -- on February 6th?

10 A Yes.

11 SOLICITOR LIPINSKI: Your Honor, I'm now gonna object
12 to, to leading. He's said you're in custody and being in,
13 interrogated, all conclusions on his part.

14 THE COURT: Yeah, let's just chop it up into simple
15 questions.

16 MR. COOK: Yes, sir, let me strike all of those
17 questions.

18 Q Let me start again over.

19 Do you remember being at Moss on February 6th?

20 A Yes, sir.

21 Q Do you remember writing this?

22 A Yes, sir.

23 Q Okay. Do you, do you remember the police officer
24 giving you Miranda warnings before this happened?

25 A No, sir.

Raymond McCarter - Direct examination
By Mr. Cook

1 Q Talk a little bit about that. He, he claims that he
2 read -- he can't remember if he read from a card or cited,
3 cited you Miranda.

4 A Yeah, I just got the paperwork. The paperwork asked me
5 did I want to fill it out and tell him what happened. He's
6 still back there beside me and I filled it out.

7 Q But he didn't read you any rights?

8 A Yeah, I don't remember nothing like that.

9 Q Do you remember him reading you the rights to you in
10 the patrol car?

11 A No, sir.

12 MR. COOK: No further questions, Your Honor.

13 THE COURT: All right.

14 CROSS-EXAMINATION

15 BY SOLICITOR LIPINSKI:

16 Q Do you recall the officer reading you Miranda warnings
17 or telling you your Miranda warnings in the bedroom?

18 A No, ma'am.

19 Q You have no recollection of that?

20 A No, ma'am.

21 Q Do you remember being in the back of the patrol car
22 sitting next to Misty Montgomery when they come and put her
23 in the patrol car next to you?

24 A Yes, ma'am.

25 Q Do you remember them advising her of Miranda warnings

Raymond McCarter - Cross-examination
By Solicitor Lipinski

1 at that time --

2 A No, ma'am.

3 Q -- seated next to you?

4 You don't recall that?

5 A Say that again.

6 Q Do you recall -- do you remember being in the back of
7 the patrol car with Misty, correct?

8 A Yes, ma'am.

9 Q And we didn't play that portion of the video, but you
10 two are in the back of the patrol car together for a while,
11 correct?

12 Do you remember being in the back of the patrol car
13 with her for a while?

14 A I'm not sure how long it was.

15 Q Not sure how long it was, but you do remember you're
16 back there together?

17 A Yes, ma'am.

18 Q All right. And a lot of -- while you're back there
19 they're waiting on her family to come get the kids, correct?

20 A No.

21 Q All right. Do you remember them getting her family to
22 come get the, take care of the kids?

23 A Yes, ma'am.

24 Q Cause you actually have a child in that house, correct?

25 A Yes, ma'am.

Raymond McCarter - Cross-examination
By Solicitor Lipinski

1 Q And she had children in the house, correct?

2 A Yes, ma'am.

3 Q Do you have any children in common?

4 MR. COOK: I'm gonna object on the grounds of
5 relevance, Your Honor.

6 SOLICITOR LIPINSKI: I'm just asking this question---

7 THE COURT: Well, it's in camera. I'll let her go
8 ahead.

9 SOLICITOR LIPINSKI: And I apologize, Your Honor. I
10 was just trying to go as to his recollection.

11 Q If you could -- do you still have the statement, Your
12 Honor?

13 Let me show you what's been marked as State's Exhibit
14 No., Court's Exhibit No. 1 and State's No. 6.

15 Do you recognize that document?

16 Oh, I'm sorry. I didn't mean to turn around on you.

17 Do you recognize that document?

18 A Yes, ma'am.

19 Q Is that your handwriting?

20 A Yes, ma'am.

21 Q And can you read your own handwriting?

22 A Yes, ma'am.

23 Q And at the top of the statement, is it -- is that --
24 did you fill in I, Brad McCarter?

25 A Yes, ma'am.

Raymond McCarter - Cross-examination
By Solicitor Lipinski

1 Q And the -- what is the rest of that line say right
2 underneath voluntarily statement, I, Brad McCarter, at the
3 top of the page?

4 A Which one?

5 SOLICITOR LIPINSKI: Can I approach, Your Honor, just
6 to point out where I'm---

7 THE COURT: Sure.

8 Q Referring to State's 6 and Court's 1 where it says
9 Brad -- there's some personal information up here, an
10 address, date of birth, and phone number, correct?

11 A Yes, ma'am.

12 Q Did you fill that out?

13 A Yes, ma'am.

14 Q And right here where it says Brad McCarter, did you
15 fill that out?

16 A Yes, ma'am.

17 Q And could you read that sentence that's printed on the
18 form?

19 A I, Brad McCarter, know and understand my rights.
20 Having decided to answer questions at this time, I now admit
21 the following statements.

22 Q Did you ever ask the officer any questions about what
23 does this sentence mean?

24 A No, ma'am.

25 Q So, you filled that in and you can read and write,

Raymond McCarter - Cross-examination
By Solicitor Lipinski

1 correct?

2 A Yes, ma'am.

3 Q And -- but you're now saying you didn't ever have your
4 rights read to you?

5 A No, ma'am.

6 Q well, why did you fill in that statement on the form if
7 you didn't understand your rights?

8 A I just thought I was doing the right thing.

9 Q And, if you could, turn to Page 2 of that same group of
10 documents.

11 Do you do the same thing at the top of Page 2?

12 A Yes, ma'am.

13 Q So, you fill your name in again?

14 A Yes, ma'am.

15 Q But you never asked the officer what that sentence
16 meant?

17 A No, ma'am.

18 SOLICITOR LIPINSKI: Court's indulgence one moment,
19 Your Honor.

20 (Pause.)

21 SOLICITOR LIPINSKI: That's all we have, Your Honor.

22 MR. COOK: Just a few brief follow-ups.

23 REDIRECT EXAMINATION

24 BY MR. COOK:

25 Q How far did you get in school, Brad?

Raymond McCarter - Redirect examination
By Mr. Cook

1 A Eleventh grade.

2 Q Didn't graduate?

3 A No, I got a GED.

4 Q Okay. Do you have to look at peoples lips to
5 understand what they're saying?

6 A Yes, sir.

7 Q I notice the solicitor was walking away from you and
8 talking and you didn't hear her, did you?

9 A No, I mean I can hear, but it's the -- vocal, the
10 words -- I mean it's -- really I'm 95 percent hearing loss
11 in both ears. Without the hearing aid I can't hear nothing.

12 Q Okay. And I just want you to be clear for the judge,
13 and I want you to be honest, do you remember that officer
14 reading you the Miranda rights before you wrote that
15 statement that night?

16 A No, sir.

17 Q Thank you. No further questions.

18 SOLICITOR LIPINSKI: Just one follow.

19 RECROSS EXAMINATION

20 BY SOLICITOR LIPINSKI:

21 Q How much had you had to drink that night?

22 A I had quite a few.

23 Q Is it fair to say that you were intoxicated?

24 A Intoxicated?

25 I say I was buzzing. I don't believe intoxicated,

Raymond McCarter - Recross examination
By Solicitor Lipinski

1 intoxicated.

2 Q Had you done any pills or any Clonopin or anything like
3 that?

4 A I don't remember.

5 Q Does alcohol tend to affect your recollection of
6 events?

7 A No, ma'am.

8 SOLICITOR LIPINSKI: Okay. That's all I have, Your
9 Honor.

10 THE COURT: Now, quite a few means quite a few what?

11 WITNESS: Quite a few. I'd say about three cups of
12 White Russian.

13 THE COURT: Three cups of white Russian?

14 WITNESS: Yeah, I know---

15 THE COURT: I just wanted to know what. Thank you.
16 You can step down.

17 MR. COOK: Well, Your Honor, my question if I may?

18 THE COURT: Well, we got to have an end to this, but go
19 ahead. I'll let you ask one more, but then---

20 REDIRECT EXAMINATION

21 BY MR. COOK:

22 Q How much time had passed since your last drink before
23 you, you were in Moss?

24 A The last drink I had was, was at like about 11:15.

25 THE COURT: He said 11:15.

Raymond McCarter - Redirect examination
By Mr. Cook

1 MR. COOK: Thank you. No further questions.

2 THE COURT: Please have a seat back there.

3 Anything else, Mr. Cook?

4 MR. COOK: Nothing, Your Honor.

5 THE COURT: Anything from the State?

6 SOLICITOR LIPINSKI: Nothing from the State, Your
7 Honor.

8 THE COURT: All right. Your motion's to suppress?

9 MR. COOK: Yes, sir, Your Honor.

10 THE COURT: All right. well, I deny the motion. I
11 find that Mr. -- focusing on the interrogation or the
12 statement given at the detention center because there's no
13 objection to the, except for the two minutes that were asked
14 to be redacted, there's no objection to the video. But I
15 find that prior to being, prior to giving the statement,
16 that Mr. McCarter was advised of his Constitutional rights
17 to remain silent and his right to counsel. He was advised
18 that he had the right to remain silent, and that if he did
19 make any statements the statement could be used against him
20 in a Court of law. He has a right to have an attorney
21 present and that if he could not afford one, one would be
22 appointed for him. That he had a right to ask questions,
23 that he had a right to stop answering questions at anytime.
24 I find this by a preponderance, all these findings by a
25 preponderance of the evidence. Of course, this issue will

1 be submitted to the jury. Their finding would have to be
2 beyond a reasonable doubt.

3 I find that he voluntarily, knowingly, and freely
4 waived the, his right, his Constitutional rights as, and was
5 advised of, after being properly advised as required by
6 Miranda, of his Constitutional rights, he freely,
7 voluntarily, knowingly, and intelligently waived them. He
8 did not do it orally. But he did sign on the top of both
9 pages of the statement that he had been advised and it just
10 says rights, that he had been advised of his rights, and is
11 waiving them.

12 I find that he understood what he was doing and that
13 there was no promise, no threats, that he did not request an
14 attorney, and that there was no drawing of any weapon, and
15 that the statement was, in fact, freely, voluntarily,
16 knowingly, and intelligently made, and we submitted to the
17 jury for its consideration, and used to the extent it
18 determines whether the State has proven, to its
19 satisfaction, beyond a reasonable doubt, that he was advised
20 of his rights and he freely and voluntarily waived those.

21 All right. We're gonna take a break, and then we'll be
22 ready for the jury when we get back?

23 SOLICITOR LIPINSKI: Thank you, Your Honor.

24 THE COURT: We'll take about a ten minute break.

25 (WHEREUPON, a short recess was taken at this time.)

1 SOLICITOR LIPINSKI: Your Honor, we have one issue
2 before the jury.

3 THE COURT: Yes, ma'am.

4 SOLICITOR LIPINSKI: Obviously we have a sequestration
5 order in place, and the State asked that that be applied to
6 the defense witnesses, and for that purpose we ask Mr. Ray
7 McCarter, Senior to step outside and not be present during
8 any pretrial hearing. I don't know what Mr. McCarter,
9 Senior is -- I apologize. I'll start over. I didn't
10 realize he wasn't in here.

11 THE COURT: All right.

12 SOLICITOR LIPINSKI: In terms of the order of
13 sequestration, the State asked that apply to the defense
14 witnesses.

15 THE COURT: Well, I thought I did say that yesterday.

16 SOLICITOR LIPINSKI: Yes, sir, Your Honor. For that
17 reason we ask Mr. McCarter, Senior to step outside, and I
18 don't know what the purpose of calling him as a witness is.
19 Mr. Cook did show me some photographs where he went back out
20 to the scene subsequent to this event and perhaps took some
21 photographs, but beyond that, I don't know.

22 THE COURT: Well, it doesn't matter. He's suppose to
23 be sequestered.

24 SOLICITOR LIPINSKI: Nonetheless, as Mr. Epting was
25 coming back into the courtroom today, Mr. McCarter, Senior

1 had some friends in the courtroom who he was outside telling
2 him what transpired this morning, which violates the
3 sequestration. I also put Mr. Cook on notice when he told
4 me he was gonna call Mr. McCarter, Senior. At some point in
5 my pretrial conference conversations with the victim, he
6 indicated, either in person or over the telephone, someone
7 from the McCarter family approached him about getting him to
8 drop the charges.

9 Now, I have no intention of going there, but I felt
10 that I should give Mr. Cook a fair heads-up that that
11 occurred. Mr. Cook also related to me that he told Mr.
12 McCarter that that possibly was going to now become an issue
13 if he testified. So, the State is concerned that Mr.
14 McCarter, Senior has de facto destroyed the sequestration
15 order at this point.

16 THE COURT: well, what relief are you seeking?

17 SOLICITOR LIPINSKI: I would seek to exclude Mr.
18 McCarter, Senior as a witness. If it's just to get the
19 photographs admitted, I think that's of Mr. Southard's home.
20 He can authenticate them. I don't know what else the
21 relevance is of the father. He was not present during any
22 of this and I don't know what he has to do with this case.

23 THE COURT: All right. well, I'm not gonna prohibit
24 him from testifying if he's called. I will require that the
25 sequestration order be in place, and that if anyone is

1 caught conveying to any witness information that transpired
2 in the courtroom, they will be in contempt of Court and be
3 jailed for a minimum of thirty days.

4 So, if these people sitting in here and slipping out
5 and doing an end run, trying to do an end run around my
6 sequestration order, they'll do that at their own peril.

7 All right. Can you -- I believe you need to advise
8 anybody that you have any control over, Mr. Cook, of that,
9 what that means if they don't understand it.

10 MR. COOK: Yes, sir, Your Honor. Yes, sir, Your Honor.
11 I admonished them all in front of the solicitor very
12 strenuously.

13 THE COURT: Okay.

14 SOLICITOR LIPINSKI: And he did, Your Honor. I
15 acknowledge that.

16 THE COURT: All right. Bring in the jury.

17 (WHEREUPON, the following takes place within the
18 presence of the jury.)

19 THE COURT: All right. Now, now that you-all are
20 comfortably seated, I'm gonna ask you to stand and the clerk
21 will administer the oath.

22 (WHEREUPON, the jury was placed under oath at this
23 time.)

24 THE COURT: Be seated. Thank you.

25 Looking at your watches, I know you think I missed that

1 class in kindergarten when they taught you how to tell time,
2 but I really didn't. I believe I told you yesterday that we
3 had a witness that was unavailable. The witness was here
4 this morning, and we had some legal matters to take care of
5 and some things I had to do before we could present the case
6 to you, and it took a little longer than I had anticipated.
7 So, we have been working since ten o'clock, but I apologize
8 for keeping you waiting.

9 I'm not gonna repeat what I said yesterday, but I do
10 have a few more things I need to tell you.

11 First, Madam Forelady, you will be the liaison between
12 the jury and myself, preside over the jury's deliberation,
13 and ultimately sign on behalf of the jury as to its
14 unanimous decision.

15 Mr. McCarter has been charged with this offense,
16 assault and battery with intent to kill, and he is entered a
17 plea of not guilty to this charge. He is presumed innocent
18 of this charge. He need not prove his innocence. The State
19 must prove his guilt beyond a reasonable doubt before you
20 can convict him of this charge. So, he does not have to
21 prove his innocence. He is presumed innocent.

22 I have three primary jobs. One is I'm the logistics
23 person. I try to make sure that you can see, that you can
24 hear, that we take breaks, the mechanical part of the trial.

25 I also have to rule on questions of admissibility of

1 evidence, and I've been doing that, to some degree, this
2 morning. During the trial, if anyone believes that evidence
3 is being presented, if one side believes evidence is about
4 to be presented that should be excluded, I have to make a
5 ruling on that, and it may be that I'll have to excuse you
6 from the courtroom while I do that because sometimes we have
7 to take these matters up outside of your presence, and if an
8 attorney does object to testimony, don't hold that against
9 the attorney. They're simply doing that job. That is what
10 they're suppose to do.

11 My third job is that I'm the sole judge of the law in
12 this case. You must take, accept, and apply the law as I
13 charge it even if you think I charge the law in error or
14 even if you think the law should be different.

15 I am giving you some legal principles now. I may,
16 during the trial, give you some legal principals, and, at
17 the end of the trial, I'll give you a concise and
18 comprehensive charge on the law which you are to apply to
19 the facts as you determine them to be.

20 You're not to infer, from anything I say or do at
21 anytime, as being an indication of an opinion of mine on the
22 facts. Our law does not allow a trial, a trial judge to
23 formulate or express to a jury any opinion on the facts.
24 It's solely up to you, as the trial jury in this case, to
25 examine the evidence and to give to the evidence the effect,

1 the value, the weight, and the truth you believe it should
2 have.

3 In doing this, you may believe one witness as opposed
4 to several, several witnesses as to, opposed to one. You
5 may believe all, part, or none of a witness' testimony. In
6 analyzing the evidence, use your common sense, your sense of
7 logic, your sense of reason, and use your experiences in
8 life.

9 As judges of the facts, you must judge the credibility,
10 that is the believability, of the witnesses who will
11 testify, who testify. In doing this, use the things that
12 I've just talked about, and you can use certain, I call
13 them, evaluators, a witness' demeanor, how they act on the
14 stand, are they hesitant or straightforward. Look at
15 consistencies and inconsistencies in a witness' testimony.
16 Considering any bias or prejudice. That is, whether a
17 witness would wish to help or hurt one side or the other,
18 and you can consider the opportunity a witness had to
19 actually know those things about which they testify. All
20 these things you consider, determine the true facts, apply
21 the law, and you'll be able to return a verdict that speaks
22 the truth.

23 I'm not going to go over, but I'm gonna remind you
24 about what I can, my admonitions that I gave you yesterday
25 about not discussing the case, talking to, trying to make up

1 your own mind about a case or receiving any information from
2 any source whatsoever outside of the courtroom. I'm not
3 gonna repeat that, but I emphasize again that is a very
4 important part of your oath.

5 If you can't see or you can't hear, cup your ear or
6 give me a voice raising gesture, a nudging gesture, and I'll
7 try to correct it. It's not fair to charge you with
8 disposing of this case and not let you see and hear the
9 things that are important for you to see and hear.

10 we take breaks about every hour and a half. If you
11 need a break though, let me know. Everybody's comfort level
12 is different, and we -- I have found that an hour and a
13 half, generally in that area of time, is a pretty good time
14 to break. But if anybody needs a break, at any time, simply
15 raise your right hand, and no questions asked, we'll take a
16 break.

17 I extend that to counsel and Mr. McCarter also.

18 we want to move the case along, but we're not in such a
19 hurry that we won't take a break if it's needed.

20 Now, the attorneys have the right, but no obligation,
21 to come before you and make what are called opening
22 statements. They're not witnesses. So, they're not
23 testifying and they're not giving you any arguments. That
24 is, they're not trying to convince you of anything at this
25 time.

1 They're simply giving you a blueprint or an outline of
2 the trial. At a later point in the trial they will have the
3 opportunity to sum up and present an argument, and at that
4 time they will be trying to convince you that your verdict
5 should be a certain verdict based on the evidence and the
6 law that you will thereafter hear. At this time they're
7 simply giving you a roadmap or an outline or a preview of
8 what to expect through the presentation of their cases.

9 Madam Solicitor.

10 SOLICITOR LIPINSKI: May it please the Court, Your
11 Honor?

12 Do you have the indictment in front of you?

13 Thank you.

14 Good morning, ladies and gentlemen of the jury. My
15 names is Mindy Hervey Lipinski, and I'm an assistant
16 solicitor here in York, South Carolina.

17 My father spent a great deal of time and effort making
18 sure I stayed in school, and even went to law school, and
19 when I told him I was going to be an assistant door-to-door
20 salesman, he got a little upset with me. Not that that's
21 not an honorable profession, but he didn't quite understand.

22 So, I explained to him that a solicitor, in the State
23 of South Carolina, is a prosecutor, a district attorney, a
24 State's attorney, and those kind of different terms are used
25 throughout the United States. But, in essence, my role is

1 to work for Solicitor Kevin Brackett, who's the elected
2 official, and bring criminal cases before you that we are
3 not able to otherwise resolve. We then bring these cases
4 before you, and ask you, the jury, to render a verdict of
5 guilty or not guilty.

6 So, that is my role in the courtroom and, and what I
7 do. I will be assisted, in the next couple of days, by
8 Mr. Epting, who's also an assistant solicitor. You may
9 additionally see the lady in the purple shirt. She is my
10 paralegal, Lynn. She likes to come in and hand me papers,
11 remind me to do things, and make sure generally I stay on
12 track. But it will be my role to basically call the
13 witnesses before you in an orderly fashion, and present the
14 evidence that the State has as to whether or not the
15 defendant is indeed guilty of the offense of assault and
16 battery in the first degree.

17 I will tell you now that there's nothing like CSI, Law
18 & Order, or any of these other fascinating shows that I may
19 or may not also guiltily indulge on occasion. I have no
20 dramatic reenactments. There will be no videos or, of, of
21 animation type things. It is a much more common sense type
22 presentation here in York County.

23 So, I ask your indulgence because we may, in fact, take
24 a couple of witnesses out of order to accommodate
25 everybody's schedule. Sometimes my job is a lot like

1 herding cows. He can be here at 2:00, and he's got to be
2 out of here by 4:00, and those type of things. So, I do beg
3 your indulgence in terms of doing that, but I assure you
4 that we will try and keep it moving along as orderly as
5 possible in a cohesive understandable fashion so that you do
6 understand what evidence the State does have against the
7 defendant.

8 The defendant is accused of assault and battery with
9 the intent to kill, which is a mouthful, but I know you know
10 lawyers. We get paid by the words. So, we try and come up
11 with as many as we can.

12 But assault and battery with intent to kill is, in
13 layman's terms, an attempted murder.

14 Had the victim died as a result of his injuries, would
15 it have been murder?

16 And murder is defined as the intentional killing of
17 another with malice aforethought, an intentional act, it
18 wasn't an accident, with malice. Not premeditation, not
19 lying in wait, not all of those kind of things. But when
20 they intended the fatal blow or the deadly blow or the
21 possibly deadly blow was inflicted that the defendant have
22 malice, meanness, evilness in his heart. So, that is a
23 crime that you-all are going to focus in on on the next two
24 days.

25 what you will hear and what the defendant is accused of

1 doing in this indictment, and this is just a charging paper
2 that puts the defendant on notice, it's not evidence, but
3 that on February 5th of 2010, with malice in his heart, he
4 attacked Dwayne Southard. He's the gentleman in the orange
5 shirt seated here on the front row.

6 Mr. Southard will testify that he lived in the Sharon
7 community in kind of the southwestern corner of York, South
8 Carolina, that he was home on February 5th there with his
9 two children, ^{C.S.} and his daughter, that it was the end
10 of the day, his wife was working that night, and that his
11 son came to him and said daddy, there's some dude outside,
12 and he's screaming and, and I don't know what's going on,
13 and I say these things although I'm not ^{C.S.} and I -- he
14 will testify before you today, and if those aren't his exact
15 words, it's not impeachment on him. I'm just giving you
16 kind of a Readers Digest version of events. But he alerts
17 his father that there is this man outside.

18 Mr. Southard, concerned for his safety of his children,
19 concerned for his home, looks outside and indeed Brad
20 McCarter is standing in the yard wielding a hammer,
21 demanding Jamie Gilfillian, where's Jamie Gilfillian. I
22 want Jamie Gilfillian, wanting to fight Jamie Gilfillian.

23 Mr. Southard is not Jamie Gilfillian. Jamie Gilfillian
24 had never lived in Mr. Southard's house. Sharon's not a
25 large community. They do know who one another are, but

1 there's no connection to them. Mr. Southard goes out. You
2 got the wrong house. You got the wrong man. I don't know
3 what you're doing here, but get off my property, you need to
4 leave, and the man's got a hammer. He's wanting to fight
5 him. He's telling him about the fight he's been in the past
6 with Jamie Gilfillian. He's there to settle this score.

7 Mr. Southard said he's trying to calm him down. He's
8 trying to walk him away from the house to get him away from
9 his children, and that they go outside in the yard, and that
10 Mr. McCarter's truck is parked in the yard, and also in the
11 truck we'll later learn was Misty Montgomery, and it's also
12 a name you're gonna hear, the defendant's girlfriend, that
13 she was in the truck waiting on him. And that he's trying
14 to get him to walk back to the truck. And he's talking
15 about this hammer and how he's been cut, and how he's here
16 to fight him, you need to get him out, you need to bring him
17 out.

18 At some point, somehow, Mr. Southard does temporarily
19 disarm Mr. McCarter and gets the hammer away from him.
20 Leaves, take your hammer, go, you got the wrong house, that
21 Mr. McCarter walks back in the direction of his truck,
22 picking up various other items, and throwing them into, in
23 the direction of the victim. That he's still just get away,
24 get away.

25 So, they get back to the truck, that more things come

1 flying at him, and that instead of getting in the truck and
2 leaving, for whatever reason, Misty Montgomery drives off
3 and leaves this madman in his yard, in the road, in his
4 driveway. The struggle continues, that, as the struggle
5 continues and they're wrestling, Misty Montgomery comes back
6 and tries to run them over, that they end up in the ditch
7 trying to get away from the truck, that the struggle over
8 the hammer resumes, but they're now fighting over it, and
9 that while they're fighting over it, Misty Montgomery gets
10 out of the truck and joins in the attack on Mr. Southard,
11 kicking him, and striking him, that in defense of her, he
12 let's go of the hammer, and that Mr. McCarter takes that
13 opportunity and hits him in the head with the hammer causing
14 injuries to his head, back, and arms, that his son comes
15 outside.

16 I've called 9-1-1, daddy, hang on, the police are on
17 their way, that, at that point, Mr. McCarter and Montgomery
18 leave the scene, drive off, and that EMS responds. They
19 have to transport Mr. Southard, that he has injuries to his
20 skull, staples to his head.

21 No dog in this fight. Not the -- tells the police I
22 don't know who they are. They were driving a red truck.
23 Some couple showed up and attacked me. The police then
24 go -- they know Jamie Gilfillian. They go to Jamie
25 Gilfillian and said who's out to hurt you tonight. He says

1 I don't know, gives them a couple of names. Later on that
2 night he calls the police back and says I think the people
3 you're looking for may be Brad McCarter and Misty
4 Montgomery.

5 So, they know that Misty Montgomery lives there in
6 Sharon. They look her up in the system that they have, the
7 9-1-1 system. They go to her residence. They knock on the
8 door. They go inside. They find Brad and Misty there.
9 They find a hammer in the back of Mr. McCarter's truck, and
10 that is the evidence that you will hear and that the State
11 will present to you.

12 You'll hear that this wasn't even the first house he
13 stopped at that night looking for a fight. You'll hear that
14 he went to Brenda Gourley's house, and she was able to
15 direct him away.

16 You may hear completely different versions of events
17 from the defendant. He has no obligation to testify, to
18 take the stand, present evidence of any kind. He has a
19 right to remain silent. You can not use that against him.
20 But the defense will likely attempt to portray some
21 alternative version of events, and that is what you, the
22 jury, are here to resolve.

23 It's easy, in civil cases, in car wreck cases, two cars
24 go through an intersection and collide. They both say they
25 have the green light. The Department of Transportation

1 shows up and says we don't let two green lights go at the
2 same time. Somebody had to be red, somebody had to be
3 green, and the civil attorneys call witnesses to say we all
4 say that the truck has a red light or the green light.

5 Criminal cases, the truth is in details. It's
6 sometimes more hidden. It's sometimes harder to discover.
7 You will listen to the witnesses that the State calls, and I
8 ask, as the judge instructed you, to evaluate their
9 credibility.

10 Do they have any bias?

11 Do they have any prejudice?

12 Look at their consistencies and sometimes their
13 inconsistencies cause they, in themselves, can be telling.
14 Look at who has any friends to reward or enemies to punish.

15 Who acted with blood or guilt on their hands?

16 Who was an innocent man attacked in his own home
17 without provocation?

18 These are the type of tools that you use on a daily
19 basis to evaluate whether or not certain salespeople are
20 telling you the truth when they're trying to sell you a car
21 or perhaps you talk to people at work and they're trying to
22 get you to do different things or friends or neighbors. You
23 use these kind of hidden nonverbal clues. You look at them
24 and say, you know, with that guy at work, he's always trying
25 to get people in trouble. I might need to stay away from

1 him or the only reason the Toyota dealer is telling me they
2 don't have brake problems anymore is he wants me to buy this
3 car. Sometimes you go, you know what, I looked at Consumer
4 Reports, they don't have anything. I can trust them.

5 These type of tools that we use to evaluate the
6 evidence that we get on our daily lives are the same things
7 that you will use in this trial in order to evaluate the
8 credibility of the State's evidence or the State's
9 witnesses. I must prove to you the defendant's guilt beyond
10 a reasonable doubt and I embrace that.

11 As you now know, this is a very serious case. It's a
12 very serious case for Mr. Southard and the defendant is
13 accused of a very serious crime. So, I embrace that I must
14 prove to you his guilt beyond a reasonable doubt. But I
15 will tell you that that does not mean beyond all doubt,
16 beyond any shadow of a doubt, beyond every doubt.

17 The key word in that phrase is reasonable.

18 what is reasonable?

19 Is there a reason to doubt the defendant's guilt?

20 So, as you evaluate evidence, you need to look at
21 things like consistency and uniformity and bias and
22 prejudice as you evaluate not only the evidence, but the
23 doubt.

24 And, so, I ask you to bear -- that those tools employ
25 both ways, but I will, at the end of the trial, once we have

1 presented the testimony of the officers involved, the
2 detective, the EMT that transported Mr. Southard to the
3 hospital, the medical personnel who treated him there, the
4 testimony of his son who witnessed the event, the woman at
5 the house he came to first, even Jamie Gilfillian himself,
6 when I -- the State gets done, we will return to you and ask
7 you that you return a verdict of guilty of assault and
8 battery with intent to kill.

9 But it's very important that you not make up your mind
10 at anytime prior to you going back to the jury room at the
11 end of the trial because, as you'll see, if I don't get to
12 necessarily dictate some of the order of things. And, so,
13 you may hear from one witness, not believe that person, it's
14 important you not make up your mind then because it may be
15 that when you hear another witness or another piece of
16 evidence that gives credence to what you heard initially,
17 and it's only when you have all of the pieces of the puzzle
18 at the end that it's appropriate for you to evaluate his
19 guilt and render that verdict, and that's why I started off
20 asking for your indulgence and your patience because it may
21 take you getting all these pieces of the puzzle in order for
22 you to feel comfortable rendering that opinion.

23 I appreciate your time and your sacrifice. We know we
24 have taken you away from your day-to-day lives, from your
25 work, and your family. But perhaps now that you have this

1 put before you you understand the significance of jury
2 service, and how these issues can not be resolved any other
3 way but with your valuable service. And, so, we appreciate
4 that as we go forward over the next couple of days.

5 Thank you.

6 THE COURT: Mr. Cook.

7 MR. COOK: May it please the Court, Your Honor?

8 THE COURT: Yes, sir.

9 MR. COOK: Madam Solicitor, Mr. Solicitor.

10 Madam Foreperson, and ladies and gentlemen of the jury,
11 he set the hammer down. I almost feel like sitting down
12 right now. That's the main thing I have to say to you.

13 You're about to enter a world wind. At some point all
14 of you are gonna be back in that jury room deliberating
15 after you've heard all the evidence. Maybe some of you can
16 keep calm enough of a mind to remember that first sentence
17 that I said during this trial.

18 My name is David Cook. It's a pleasure to be here in
19 front of all of you. This is my associate, RosaLee Davis.
20 That's Mr. Brad McCarter, and that's my paralegal,
21 Mrs. Sheila Coles.

22 Now, paralegals don't normally sit behind defendants
23 during trials. But Brad has a hearing impediment, and we've
24 made motions before the trial, and the judge has agreed to
25 allow Sheila to stand back there. He can hear. He has two

1 hearing aids. He can hear just fine especially if I speak
2 up and especially if he can see my lips.

3 So, a lot of times, when I'm talking, I'm gonna look
4 over here instead of at you, but I apologize. I'd rather
5 you, but it's more important for me if my client hears what
6 I say, and that's what she's doing. She has the Judge's
7 permission. If he doesn't understand anything during the
8 trial, he can stop and say what did they say. She will tell
9 him -- she'll have to tell him verbatim. She can't add any
10 of her own spin or anything. She has to just simply say
11 what the words were that he didn't hear so he can hear her
12 voice move. And, so, if you see them talking, that's what's
13 going on over there.

14 I want to begin by sincerely thanking every one of you
15 for not trying to come up with an excuse during jury
16 selection, and actually serving a duty that Winston
17 Churchill said, other than active, in active service during
18 a war, is the most important duty that a citizen can serve
19 for their country, and that's jury service.

20 It's what makes America great. It's constitutional.
21 You are here -- I know that each one of you has somewhere
22 more important to be. I know that you've got jobs. I know
23 you've got lives. I know you have families and children and
24 problems that are bearing down on you right now just like
25 everybody else in this courtroom, and you're here, and I

1 really appreciate it. My client really appreciates it.

2 You are his peers, ladies and gentlemen, Brad McCarter.
3 You're his peers. You're a jury of his peers. He is asking
4 you to perform, perform this duty. He's thanking you for
5 your service.

6 Okay. If everything -- again, this is an opening
7 argument. This is no testimony here. If everything happens
8 the way that Madam Solicitor says it did, my client would be
9 guilty.

10 But guess what?

11 It didn't.

12 You're gonna hear a lot of different stories today and
13 I'll leave it to you. Most of you have children. You know
14 when a kid's lying to you and one's telling you the truth.
15 You read cues. Please read those cues in every witness
16 that's before you. See if they look at the ground when
17 they're talking. See if, if they stutter, if they hesitate.
18 You know when somebody's lying to you. You figure it out.

19 Okay. But I want to get back to thanking you for your
20 service. It's, it's the most important thing, in my
21 opinion, in the American constitutional fabric. It's what
22 separates us from communists, Stalinist, Russia, or the
23 Third Reich. You, you don't have to go to jail just because
24 you're arrested in the United States. That doesn't mean
25 you're guilty. That means the State thinks you're guilty.

1 But luckily we have a jury system. And, so, you're all
2 here, and you are the only people in this room to determine
3 whether my client is guilty or not.

4 Okay. So, I sincerely thank you for your service and
5 I'll move on there, and whereas I'm thanking you for your
6 service, I have to tell you that it comes with a duty.
7 There is, as most defense attorneys in America know, an
8 emphasis, for some reason, to convict. For you to think
9 that just cause somebody's accused of something they're
10 guilty of it.

11 I'm asking you to approach that very very cautiously.
12 I'm not asking you to render a verdict, which is Latin for
13 speak the truth, I'm not asking you to render a verdict
14 based on your impulses, based on how you were raised.

15 My daughter's constantly, at the dinner table, how can
16 you represent criminals?

17 I just don't understand that, and I go through an
18 explanation well, they're not criminals until the jury says
19 that they are, and all across America attorneys win trials
20 all the time.

21 What, what happens, I say to them, if an innocent
22 person is accused of a crime?

23 Are they a criminal?

24 So, I'm doing my constitutional duty to give this man
25 due process, a fair trial. That's all he's asking for.

1 He's coming to you today, he's telling you, just by the fact
2 alone that he's in this courtroom, and that you're here,
3 he's saying, it's a very strong statement he's saying to
4 you, I am innocent. I'm not guilty.

5 This is a very serious allegation against my client.
6 This trial will probably take two days, maybe three. When
7 it's done, you're gonna feel a big sense of relief just that
8 it's done regardless of what the verdict is. You're going
9 to drive home. You're gonna resume your normal schedule
10 immediately. You're gonna make a cell phone call in the
11 car, here's how it went, what's for supper, I'm on my way,
12 and you won't think much more about this for the rest of
13 your life. It will be an occasional fleeting thought.

14 To my client, this is the most important decision that
15 you will ever make in your entire life. So, I can tell that
16 you're approaching it with solemnity and I appreciate that
17 very much.

18 So, you have a duty to do your job as, as a juror, and
19 I'm gonna close here with just a few concepts that, as a
20 defense attorney, I want to address. They are the
21 foundation of our State's Supreme Court juris prudence
22 regarding the criminal burden of proof, which is beyond a
23 reasonable doubt. I want to explain it just a little bit
24 more than the solicitor did.

25 This is not a civil case. This is a criminal case.

1 There's three basic concepts I want to pass on to you. The
2 first two are pretty easy and the second one is beyond a
3 reasonable doubt.

4 The first one is, is that my client is innocent until
5 he's proven guilty. He has a robe of innocence on him right
6 now. Until you hear the last bit of information, and the
7 judge releases you to go deliberate, he is innocent. You
8 have to look at him like that. Please. There's the first
9 concept.

10 The next one is it's not his burden to prove his
11 innocence to you. These, these are concepts you hear all
12 growing up, and now they're very real to you. He is
13 innocent until he's proven guilty. This is America.

14 This is not Judge Judy's Court. This is not some
15 frivolous thing that you see on TV that we all laugh at.
16 This is very serious. He is not guilty until he proves
17 himself innocent, which is the playground justice of America
18 in the schools. Somebody makes an accusation, you're guilty
19 and you got to go a long way out of your way to prove your
20 innocence at that point.

21 This is a court of law. It's entirely different.
22 There's a lot at stake.

23 Next it's the State's burden. They have the burden of
24 proof to prove that my client's guilty. I just want to
25 address those concepts. So, don't be looking at us to prove

1 our innocence today. Look at them to prove our guilt if
2 they can.

3 How would they go about doing that?

4 They would have to meet their burden of proof, which,
5 in a criminal case, is beyond a reasonable doubt. Madam
6 Solicitor talked about a traffic wreck case. Those are
7 civil cases. You know, somebody breaches a contract, that's
8 a civil case. Somebody owes you money, signs a promissory
9 note, doesn't pay you, that's a civil case. Real estate
10 closings, civil case. The civil world, if somebody loses,
11 you cut a check.

12 The difference, in those two trials, between a civil
13 and a criminal, is this, in the civil trial the burden of
14 proof is called a preponderance of the evidence. It's in a
15 civil trial. It's 51 percent. If one side can convince you
16 51 percent and the other side 49 percent, then they win, and
17 you're suppose to give them the verdict, and then somebody
18 cuts a check.

19 In the criminal world, my client's liberties at stake.
20 The stakes are much higher. The framers of the Constitution
21 realize that and they say because these stakes are so high
22 the burden of proof is much higher. It's not 51 percent.
23 You know, you say in a civil trial, you see the scales of
24 justice, and if they lean a little bit to one side, that's
25 the side that you vote for. No, hu huh. (Negative).

1 what does beyond a reasonable doubt mean?

2 You have to be convinced, at the end of the
3 deliberation, beyond a reasonable doubt that my client is
4 guilty of every element, every, every definition of the
5 crime charged. Not definition. Every -- what it takes to
6 meet this, this crime. Every element of the crime charged.

7 Okay. I said -- I mentioned our State's Supreme Court
8 jurisprudence. Our State's -- this is obviously a very
9 controversial topic. So, our State Supreme Court has ruled
10 on it, and they've defined what beyond a reasonable doubt is
11 to help jurors understand just how important this concept
12 is, and the case law says, after hearing all of the
13 evidence, when you're deliberating, a reasonable person, and
14 we all assume that you are reasonable, the State and myself,
15 that's why we, we could of struck you if we wanted to, you
16 know that, a reasonable juror, after hearing all of the
17 evidence, if they hesitate to act, then the State has not
18 met their burden of beyond a reasonable doubt.

19 I don't want to come up with some rhyme like Johnny
20 Cochran if the glove don't fit you must acquit. But
21 there's -- if you hesitate, if you were to lay down at night
22 and think about this case, and you have to come in the next
23 morning to, to finish your deliberations, and you lay down
24 on, your head on that pillow, and at any point you hesitate,
25 you think to yourself---

1 SOLICITOR LIPINSKI: Your Honor, I'm gonna object at
2 this point as beyond the scope of opening argument.

3 THE COURT: Yeah, just, just -- that -- you're getting
4 to be argumentative at this point.

5 MR. COOK: All right. I apologize, Your Honor.

6 I'll just resume with a concluding sentence. If you
7 hesitate during your deliberation, you have to acquit my
8 client. If you're firmly convinced, that's what the United
9 States Supreme Court says, if you're firmly convinced, after
10 you heard, heard, hear all the evidence, and you don't
11 hesitate, you absolutely know, then by all means convict
12 him.

13 Now, I have to kind of recover here. I got objected to
14 during my opening argument, and the judge said that it was
15 proper. But I don't want to dwell on it forever. But, at
16 the same time, I don't want to just walk away from that.
17 It's, it's all I got. So, I think you can understand.

18 I'll conclude with malice aforethought. In order to be
19 guilty of assault and battery with intent to kill, the case
20 law says that it has to be the situation where if you would
21 of actually killed him it would be murder. I'm gonna leave
22 a lot of that for my closing argument, and I'll talk a good
23 deal about it then. I don't want to be cryptic or mystical,
24 but I also don't want to tip my hand.

25 So thank you.

Brenda Gourley - Direct examination
By Solicitor Lipinski

1 THE COURT: Call your first witness.

2 SOLICITOR LIPINSKI: State calls Brenda Gourley to the
3 stand.

4 Mrs. Gourley, if you could approach the lady in black
5 and be sworn in. There's a Bible right there in front of
6 her computer station, and then take the black chair at the
7 back of the courtroom.

8 BREND A GOURLEY, having been first
9 duly sworn, testified as follows:

10 SOLICITOR LIPINSKI: Your Honor, can I approach the
11 court reporter before I begin?

12 THE COURT: Yes.

13 SOLICITOR LIPINSKI: State's 2.

14 (WHEREUPON, a photograph was marked as State's Exhibit
15 No. 2 for identification purposes only at this time.)

16 DIRECT EXAMINATION

17 BY SOLICITOR LIPINSKI:

18 Q Mrs. Gourley, I'm gonna stand back here, and ask that
19 you just speak in the direction of those microphones beside
20 you.

21 A Okay.

22 Q You don't have to lean, but obviously that will aid you
23 in projecting your voice so that everyone in the courtroom
24 can hear you here today.

25 If you could begin with stating your full name and

Brenda Gourley - Direct examination
By Solicitor Lipinski

1 spell your last name for the record.

2 A Brendalyn Marie Gourley. G-O-U-R-L-E-Y.

3 Q And, Mrs. Gourley, in what area of York do you reside
4 here in York County?

5 A Sharon, South Carolina.

6 Q In Sharon.

7 And how long have you lived in Sharon?

8 A Eighteen years.

9 Q And what do you do as an occupation for a living?

10 A We own the Sharon Grill and three convenience stores.

11 Q And for those fine members of the jury who may not have
12 ever been to Sharon, what is the Sharon Grill?

13 Is it a restaurant or---

14 A Yes, ma'am, it's a restaurant. It's a greasy diner,
15 spoon.

16 Q And does Sharon have a lot of restaurants?

17 A No, ma'am, we're the only one. Well, I take that back.
18 There is one more that just opened.

19 Q But is it a small community?

20 A Yes, ma'am.

21 Q And you stated you've lived there approximately 18
22 years?

23 A Yes, ma'am.

24 Q And do you live on [REDACTED]?

25 A Yes, ma'am.

Brenda Gourley - Direct examination
By Solicitor Lipinski

1 Q And, if you could, just describe to the jury just
2 briefly your residence.

3 Is it an apartment, a house, two story, one story?

4 A No, ma'am, it's a two story house, and a little
5 history, it was built in 1864.

6 Q So, is it like an old farm house?

7 A Yes, ma'am.

8 Q All right. And how long have you lived at that
9 residence?

10 A Eighteen years.

11 Q It is a family home or just something you would of
12 purchased a while back?

13 A No, ma'am, my husband inherited. It's a family home on
14 his side of the family.

15 Q All right. And do you actually know the victim, Dwayne
16 Southard?

17 A I've met Dwayne. His son use to work for me. But this
18 happened before his son worked for me.

19 Q So, back in February of 2010 did you know Mr. Southard
20 then?

21 A No, I don't think I did, no.

22 Q Is it possible that he may of come into the Sharon
23 Grill as a customer?

24 A Yes, and -- yeah.

25 Q But have you ever socialized with him---

Brenda Gourley - Direct examination
By Solicitor Lipinski

- 1 A No, ma'am.
- 2 Q ---like on side work?
- 3 A No, ma'am.
- 4 Q Do you attend church with him?
- 5 A No, ma'am.
- 6 Q All right. And do you recall the evening of
- 7 February 5th into the early morning hours of February
- 8 6th of 2010?
- 9 A Yes, ma'am.
- 10 Q And do you recall -- were you at home that night?
- 11 A Yes, ma'am.
- 12 Q And you stated that you lived on [REDACTED].
- 13 What is the nearest, if there is a major intersection
- 14 in Sharon, what's the nearest major intersection from where
- 15 you reside?
- 16 A Major intersection or --?
- 17 Q Crossroad.
- 18 A Wycoff.
- 19 Q If you were giving directions to your house telling
- 20 somebody to come to Sharon, just what's the major road that
- 21 it would take to get to your house?
- 22 A 49, turn right on [REDACTED].
- 23 Q All right. And if I showed you an aerial photograph
- 24 with some of the roads in Sharon, would you be able to
- 25 identify that area?

Brenda Gourley - Direct examination
By Solicitor Lipinski

1 Have you lived there long enough to be familiar with
2 it?

3 A Yes, ma'am.

4 (WHEREUPON, a photograph was marked as State's Exhibit
5 No. 2 for identification purposes only at this time.)

6 SOLICITOR LIPINSKI: And, Your Honor, if I could
7 approach the witness with State's Exhibit No. 2?

8 THE COURT: Yes, ma'am.

9 Q And this is a smaller photograph, but let me show you
10 State's Exhibit No. 2, and some of the roads are indicated
11 in red, and give you a moment to just look at that and ask
12 you if that depicts some of the area of Sharon, South
13 Carolina.

14 Does that depict, from an aerial depiction, the
15 general, at least some portion of the Sharon community?

16 A Yes, ma'am.

17 Q And are you familiar enough with those roads to say it
18 accurately depicts that area?

19 A Yes, ma'am.

20 SOLICITOR LIPINSKI: Your Honor, at this time we would
21 move State's Exhibit No. 2 into evidence.

22 MR. COOK: without objection.

23 THE COURT: In without objection.

24 (WHEREUPON, State's Exhibit No. 2 was received into
25 evidence at this time.)

Brenda Gourley - Direct examination
By Solicitor Lipinski

1 SOLICITOR LIPINSKI: And, Your Honor, we would also
2 move to publish it on the projector so the jury may see it
3 as Mrs. Gourley testifies.

4 MR. COOK: Without objection.

5 THE COURT: Okay.

6 Q Mrs. Gourley, if you'll put that down. The projector
7 will take a little while to come up.

8 A Okay.

9 Q So let's back up just in general.

10 A Okay.

11 Q Now, being from Sharon, you say that you live on [REDACTED]
12 [REDACTED]?

13 A Yes, ma'am.

14 Q Do you live in a subdivision or do you just live as if
15 your driveway comes off of [REDACTED]?

16 A Our driveway comes off [REDACTED].

17 Q And I want to draw -- I was -- before I got sidetracked
18 and I apologize for that, I want to draw your attention back
19 to the evening of February 5th into the morning of
20 February 6th.

21 Do you remember anything unusual happening that night?

22 A Yes, ma'am.

23 Q And do you recall if at all -- did you work that day?

24 A Yes, ma'am.

25 Q And what time does the Sharon Grill close?

Brenda Gourley - Direct examination
By Solicitor Lipinski

1 Do you-all serve dinner?

2 A Yes, ma'am.

3 Q And had you worked till close that evening?

4 A Yes, ma'am.

5 Q And when you went home, were you the only one home?

6 was there any other family members there?

7 A No, there was no other family members there, but there
8 was a young gentleman that came to my house. He normally
9 came to the house on Friday and Saturday nights because he
10 picks up his uncle at the Industrial Park, and I guess
11 because his uncle maybe was on parole or probation or
12 something, he had to pick him up from work because he wasn't
13 allowed to loiter, but he lives in Smyrna, which is a ways
14 from the Sharon Grill. So, he would come to my house, wait,
15 then leave, and then go pick his uncle up.

16 Q And was he an employee of the Sharon Grill?

17 A Yes, ma'am.

18 Q All right. So, your employee would often follow you
19 home and then wait at your house until he could go pick up
20 his uncle from work?

21 A Yes, ma'am.

22 Q All right. And on the night in question that gentleman
23 was there as well?

24 A Yes, ma'am.

25 Q And were you-all just watching television or, or

Brenda Gourley - Direct examination
By Solicitor Lipinski

1 hanging out that evening?

2 A Hanging out in the kitchen.

3 Q All right. And what, if anything, unusual happened?

4 was it in the house or outside of the house or, or what
5 happened?

6 A There was a, a knock on the door, and by the -- and I
7 kept hearing it, but in -- from my kitchen it's hard to hear
8 cause that house is so big. But I kept hearing something.
9 So, I thought well, let me go check. So --.

10 Q Were you -- well, let me stop you.

11 were you expecting anyone that night?

12 A No, ma'am.

13 Q Was it---

14 A well, my husband hadn't gotten home yet. So --.

15 Q But did he come to the door and knock?

16 A No.

17 Q Okay. So, was it that unusual to hear a knock at the
18 front door?

19 A Yes, ma'am.

20 Q All right. And, so, you said you went to investigate
21 and then what happened?

22 A well, that -- my door nob started -- they tried to open
23 the door. So -- but I opened the door and I said who is it.

24 Q And did you see anyone there?

25 A Yes, ma'am.

Brenda Gourley - Direct examination
By Solicitor Lipinski

1 Q And do you remember that individual?

2 A Yes, ma'am.

3 Q And did you know that individual?

4 A No, ma'am.

5 Q And was it a man or a woman?

6 A Man.

7 Q And just briefly what do you remember about his
8 physical appearance or demeanor?

9 A He was quite out of it. He had a blue shirt on, a
10 baseball cap. I remember seeing a hearing aid, and when he
11 was talking to me, through the door, he was demanding that I
12 bring a Jamie Gilfillian to the door, and wanted to know if
13 Jamie lived there, and I said no, he doesn't, and then he
14 proceeds to argue yes, he does. You know, get him for me,
15 and I said no, he doesn't, and the whole time he was talking
16 to me he had his hand behind his back talking to me, and I
17 just proceeded to tell him that no, Jamie Gilfillian does
18 not live here.

19 Q And you said at one point, and I just want to clarify,
20 I think you said you opened the door, but then you were
21 talking to him through the door.

22 Do you have a storm door or anything?

23 A Yes, ma'am, it's a glass storm door.

24 Q Okay. So, when say you opened the door, did you open
25 the main door?

Brenda Gourley - Direct examination
By Solicitor Lipinski

- 1 A Yes, ma'am.
- 2 Q And then you would of talked to him through the storm
3 door?
- 4 A Yes, ma'am.
- 5 Q Did you have any problem hearing him?
- 6 A No, ma'am.
- 7 Q And you stated that he was arguing with you about a
8 Jamie Gilfillian?
- 9 A Yes, ma'am.
- 10 Q And he had his hand behind his back?
- 11 A Yes, ma'am.
- 12 Q Did -- and how did that conversation progress?
13 what ultimately happened?
- 14 Did he eventually -- did he stay there or did---
- 15 A No, no, once I convinced him that Jamie didn't live
16 there he asked me where did Jamie live, and I proceeded to
17 tell him, try to tell him how to get to Jamie's house.
- 18 Q Do you know Jamie Gilfillian?
- 19 A No. I mean yes, I know him, but I mean I don't hang
20 out with him. I don't -- but everybody knows Jamie.
- 21 Q Okay.
- 22 A He lives in Sharon.
- 23 Q All right. So, you knew of him?
- 24 A Yes, ma'am.
- 25 Q And his family?

Brenda Gourley - Direct examination
By Solicitor Lipinski

1 A Yes.

2 Q All right. And you -- did you know exactly like they
3 live at 123 Smith Street or did you know he lived on such
4 and such road?

5 A He lives, lived one road over from me as far as I knew.

6 Q All right.

7 A I didn't know his exact address.

8 Q All right. So when you give him directions, do you
9 tell him, you know, this is what you plug into the GPS or
10 what kind of directions do you give him?

11 A No, ma'am. No, I told him to go down my driveway, go
12 back up like the way he came, the first road on your right,
13 turn right.

14 Q So, go back up [REDACTED] --

15 A Yes, ma'am.

16 Q ---and take the first road on his right?

17 A Right.

18 Q And do you know what road that is?

19 A It's some crossroad that leads over to [REDACTED].

20 Q All right.

21 A I don't---

22 Q Did you know or believe that Jamie Gilfillian lived on
23 [REDACTED]?

24 A I think he does.

25 Q All right.

Brenda Gourley - Direct examination
By Solicitor Lipinski

1 A Somewhere over there.

2 Q And that crossroad, is that a paved road or a dirt
3 road?

4 A Dirt road.

5 Q So, you were telling him to take that first dirt road
6 to the right?

7 A Yes, ma'am.

8 Q And when he leaves or at any point during your
9 encounter with him do you ever determine what he has in his
10 hand behind his back, if anything?

11 A Yes, ma'am, when he turned around to leave, and I was
12 worried about my two dogs, I seen a hammer in his hand. So,
13 I'm trying to call my two dogs because I didn't know what he
14 was gonna do.

15 Q And are your dogs out in the yard?

16 A Yes, ma'am.

17 Q And do you ever observe any other occupants or people
18 in your yard that night?

19 A No, ma'am.

20 Q Do you get any indication of whether or not Mr.
21 McCarter is alone or anyone is with him?

22 A Yes, ma'am, he was not alone.

23 Q Okay.

24 A There was a female. I heard her.

25 Q You heard a female?

Brenda Gourley - Direct examination
By Solicitor Lipinski

1 A Yes, ma'am.

2 Q And do you remember, if anything, what you heard the
3 female say?

4 A He asked her what she was doing, and I really don't
5 want to say this, but I'll keep it clean, and she said I'm
6 going to the bathroom, but that's not exactly how she said
7 it.

8 Q All right. And at that point do both or either of
9 them -- do you remember what kind of vehicle they were
10 driving?

11 A No, I did not see the vehicle. I just heard the
12 vehicle.

13 Q And why -- is there anything about the orientation of
14 your house or the road or where their truck was parked or
15 where their vehicle was parked, I apologize, that would give
16 you an indication of why you couldn't see their vehicle?

17 A Right, they didn't pull all the way up in the driveway,
18 and Clint's vehicle was blocking the view.

19 SOLICITOR LIPINSKI: Court's indulgence one moment,
20 Your Honor.

21 (Pause.)

22 SOLICITOR LIPINSKI: Now I apologize, Your Honor.
23 Evidently the laser pointer for the solicitor's office is
24 gone missing in action, but if the Court has no objection,
25 can Mrs. Gourley step off just so we can ask her a few

Brenda Gourley - Direct examination
By Solicitor Lipinski

1 follow-up questions about this aerial photograph?

2 THE COURT: Yes, as long as whatever she does doesn't
3 block what the jury needs to see.

4 SOLICITOR LIPINSKI: Right.

5 THE COURT: You can step down.

6 Q All right. Mrs. Gourley, if you can, you can leave
7 your things right there, and I'm gonna -- if you come stand
8 right in front of this where the, you were sworn in here,
9 and look in the direction of this aerial photograph.

10 (Witness complies.)

11 SOLICITOR LIPINSKI: Can we turn down the lights to
12 make this a little bit easier to look at?

13 (Bailiff complies.)

14 Q Might not be able to do this with my mouse. I
15 appreciate the Court's indulgence.

16 But this main road that's kind of parallel to the
17 right-hand corner is listed as Lockhart Road.

18 Are you familiar with that road?

19 A Yes, ma'am, that's 49.

20 Q All right. And I'm gonna ask you to kind of turn just
21 a little to make sure they can see. You might need to step
22 back a little. We may of brought you up too far.

23 But you stated that's Lockhart Road.

24 Is that a main road in Sharon?

25 A Yes, ma'am.

Brenda Gourley - Direct examination
By Solicitor Lipinski

1 Q And you're also -- is that also 49?

2 A Yes, ma'am.

3 Q And this address here that's listed on Sharon Road,
4 you're not necessarily familiar with that address, but you
5 stated that you knew Jamie Gilfillian to live on [REDACTED]

6 [REDACTED]?

7 A Yes, ma'am.

8 Q And, so, that would be this little road here right
9 beneath the yellow house?

10 A Yes, ma'am.

11 Q And you stated that you lived off [REDACTED]?

12 A Yes, ma'am.

13 Q And is that this road at the top of the picture that
14 takes a big dip?

15 A Yes, ma'am.

16 Q And to the left, the far left, there's another little
17 yellow house that has an address of [REDACTED].

18 Is that where you lived?

19 A That's my house.

20 Q All right. And is that where the events that you
21 described took place?

22 A Yes, ma'am.

23 Q And you stated that you asked or you instructed the man
24 who came to your house to go up [REDACTED], turn down a cut
25 through, and get to this [REDACTED] area?

Brenda Gourley - Direct examination
By Solicitor Lipinski

- 1 A Yes, ma'am.
- 2 Q Are you also familiar with Wycoff Road?
- 3 A Yes, ma'am.
- 4 Q Okay. Does Wycoff cut off or veer off of [REDACTED]?
- 5 A Yes, ma'am.
- 6 Q And I want to draw your attention to this fork in the
7 road just past where this label is, and is that, that goes
8 to the north, Wycoff Road?
- 9 A Yes, ma'am.
- 10 Q And once the gentleman leaves your house, do you stay
11 out on the porch or at the door to watch in what direction
12 he leaves?
- 13 A Yes, ma'am.
- 14 Q And through the miracle of all the people in our office
15 we have a laser pointer, but I'm gonna ask that you take and
16 just press the big red button, and, if you could, show what
17 path, if you recall, that the gentleman who came to your
18 house where he went that night.
- 19 A I've never done this.
- 20 Okay. Right here. Straight back.
- 21 Q All right.
- 22 A And I'm on my front porch there.
- 23 Q All right. And there's kind of -- obviously there's --
24 that's some dark green areas on this map, but there's also
25 some light green, and a particularly large light green area

Brenda Gourley - Direct examination
By Solicitor Lipinski

1 towards the front of your house.

2 Is that a, that light green area, is that a field or a
3 wooded area?

4 A It's a field.

5 Q And are you able to see across that field?

6 A Yes, ma'am.

7 Q And I know it was late at night.

8 what made you believe that the gentleman who came to
9 your house turned down Wycoff Road?

10 A I saw the headlights.

11 Q So, you saw the truck leave in that direction, and then
12 you saw those headlights come back down Wycoff Road?

13 A Right, and by now Clint's at the front door and I said
14 look, he's turning there. He didn't turn where I told him
15 to.

16 Q So, he didn't follow the directions you gave him?

17 A No, ma'am.

18 Q All right. And you can put that laser pointer down and
19 retake the seat and you can bring the lights back up.

20 Thank you, Mrs. Gourley.

21 (Witness returns to the stand.)

22 SOLICITOR LIPINSKI: Court's indulgence one moment.

23 (Pause.)

24 SOLICITOR LIPINSKI: That's all we have of Mrs. Gourley
25 at this time, Your Honor.

Brenda Gourley - Cross-examination
By Ms. Davis

1 THE COURT: Ms. Davis.

2 MS. DAVIS: Thank you, Your Honor.

3 If it please the Court?

4 THE COURT: Yes, ma'am.

5 CROSS-EXAMINATION

6 BY MS. DAVIS:

7 Q Mrs. Gourley, is it your testimony that when you gave
8 the defendant, the gentleman that was at your house the
9 directions that he left?

10 A Yes, ma'am.

11 Q Pretty much immediately?

12 A Yes, ma'am.

13 Q All right. And did you call 9-1-1 at that point?

14 A No, ma'am.

15 Q All right. Did you call 9-1-1 at any point?

16 A No, ma'am.

17 Q All right. And, and without getting too personal here,
18 can you tell me how tall you are?

19 A 5'2".

20 Q Thank you.

21 No further questions, Your Honor.

22 THE COURT: Any redirect?

23 SOLICITOR LIPINSKI: Just briefly, Your Honor.

24 REDIRECT EXAMINATION

25 BY SOLICITOR LIPINSKI:

Brenda Gourley - Redirect examination
By Solicitor Lipinski

1 Q Ms. Davis asked you about him leaving immediately after
2 you gave him those directions, but when he first comes up to
3 your door and begins asking for Jamie Gilfillian, do you
4 tell him whether or not Mr. Gilfillian resides there?

5 A I did and I did told him he did not live there.

6 Q And did he just accept that answer and then go?

7 A No. No.

8 Q What---

9 A No, kept arguing with me and he said get me Jamie,
10 bring Jamie, give me Jamie, and I told him Jamie doesn't
11 live here.

12 Q So, while he left after the directions, initially upon
13 learning that Mr. Gilfillian was not there he did not
14 immediately leave at that point?

15 A I think he had to wait for that woman to get done doing
16 her business.

17 Q All right. Thank you.

18 We have nothing further, Your Honor.

19 THE COURT: Ms. Davis.

20 MS. DAVIS: Nothing further, Your Honor.

21 THE COURT: You may step down. All right. You may be
22 excused. We appreciate your time.

23 WITNESS: Thank you.

24 THE COURT: And I would -- I would describe it as a
25 meat and three. Not a greasy spoon. I eat there myself.

C.S. - Direct examination
By Solicitor Epting

1 All right.

2 SOLICITOR LIPINSKI: State would call -- and I
3 apologize for Mr. Epting cause I did stand up, but the State
4 would call C.S. to the stand.

5 THE COURT: Who?

6 SOLICITOR LIPINSKI: C.S.

7 THE COURT: Okay.

8 SOLICITOR LIPINSKI: And I apologize, Your Honor. It
9 is Mr. Epting's witness. I just stood up out of habit.
10 C.S. , having been first

11 duly sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY SOLICITOR EPTING:

14 Q All right. would you please state your name for the
15 record?

16 A Sir?

17 Q would you please state your name for the record?

18 A C.S.

19 Q All right. Make sure that when you speak, speak loud
20 enough so the jury can hear you.

21 A Yes, sir.

22 Q I know you're a little bit nervous today, but we'll get
23 this together, and I'm a little bit nervous too.

24 where do you live at present?

25 A [REDACTED]

C.S. - Direct examination
By Solicitor Epting

- 1 Q And who lives with you at that address?
- 2 A My mom, Cindy, my dad, Dwayne, and my sister, Minor .
- 3 Q Okay. How old is Minor ?
- 4 A Thirteen.
- 5 Q Okay. And do you go to school?
- 6 Do you work?
- 7 A Yes, sir, I go to school at York.
- 8 Q Okay. At York Comprehensive?
- 9 A Yes, sir.
- 10 Q what grade are you in?
- 11 A Eleventh.
- 12 Q Okay. Eleventh.
- 13 So, so, about to graduate?
- 14 A Yes, sir.
- 15 Q what plans do you have for next year?
- 16 A Gonna go to Clemson after I graduate.
- 17 Q Okay. Have any plans for what you're gonna study
- 18 there?
- 19 A I don't know what I'm gonna major in, but I'm gonna be
- 20 an orthodontist.
- 21 Q Okay. Now, you haven't always lived at the address
- 22 you're at now, correct?
- 23 A No, sir.
- 24 Q where did you live back in February of 2010?
- 25 A [REDACTED].

C.S. - Direct examination
By Solicitor Epting

1 Q Okay. And who lived there with you?

2 A Mama, daddy, and ^{Minor} .

3 Q Okay. And were you at home on the night of
4 February 5th---

5 A Yes, sir.

6 Q ---or 6th of 2010?

7 A Yes, sir.

8 Q Okay. And they were with you that night?

9 A well, mama was at, was at work.

10 Q Okay. But who else was with you?

11 A Daddy and ^{Minor} .

12 Q Okay. And at some point during that night did you hear
13 somebody come to your residence?

14 A Yes, sir, I seen a truck at the end of the driveway.

15 So, I went and told daddy and I seen someone walking up the
16 driveway.

17 Q Okay. Now, now, is this driveway close to your house
18 or far away?

19 A About forty yards to the end of it from the house.

20 Q If you had to estimate on using the distances in the
21 courtroom --?

22 A From my house to the end of the driveway?

23 Q (Nods affirmatively.)

24 A Past those doors.

25 Q Past those doors?

C.S. - Direct examination
By Solicitor Epting

- 1 A (Witness nods affirmatively.)
- 2 Q So, some distance?
- 3 A Yes, sir.
- 4 Q Okay. Could you see any details of the truck?
- 5 A It was a white pickup truck.
- 6 Q Okay. So, the car drove up.
- 7 Did anything happen after that?
- 8 A I went and told daddy and we seen someone walking up
- 9 the driveway.
- 10 Q Tell the jury what you, what specifically you saw.
- 11 A A man walking up the driveway holding a hammer.
- 12 Q Okay. You could see the hammer?
- 13 A Yes, sir.
- 14 Q Okay. This was at night?
- 15 A Yes, sir.
- 16 Q What, if anything, did the man say or do as he walking
- 17 to your house?
- 18 A He was saying something about he had got cut by a
- 19 sword. He was hollering about that---
- 20 Q Was he saying---
- 21 A ---as he was walking up.
- 22 Q Was he saying anybody's names or anything like that?
- 23 A I can not -- I don't remember that.
- 24 Q Okay. So, would it -- what did you and your daddy do
- 25 once you heard him hollering about that?

C.S. - Direct examination
By Solicitor Epting

1 A well, we -- I was at the screen door, and I think daddy
2 was either right on the porch or at the screen door, and he
3 stopped at the very end of the porch.

4 Q Okay. How close did this man get to your house?

5 A Oh, I was probably like five, ten yards from him.

6 Q Okay. You said he walked up to the end of the porch?

7 A Yes, sir.

8 Q And your daddy walked out to meet him?

9 A Yes, sir.

10 Q Could you hear anything that was said between them?

11 A No, sir.

12 Q Okay. what happened next?

13 Your daddy goes out to meet him. The man walks up to
14 the porch, your daddy goes out, what happens next?

15 A The dude either set the hammer on the porch or he
16 rested his arm with the hammer on the porch. So, daddy
17 tried to get the hammer from him to get him away from the
18 house.

19 Q Okay. when you say he tried to get the hammer from
20 him, can you be more specific?

21 A He pulled it from him.

22 Q He pulled it from him?

23 A Yes, sir.

24 Q Did he get it right away?

25 A I'm thinking maybe. I can't really remember that part.

C.S. - Direct examination
By Solicitor Epting

1 I know once he did get it the guy turned around and picked
2 up a stepping stone and threw it at the house.

3 Q Okay. And where was your sister while this occurred?

4 A She was in the house. I can't -- I don't really know
5 exactly where she was in the house though.

6 Q What, if anything, did you tell her?

7 A I don't remember telling her nothing. Maybe call
8 9-1-1. I think she is who called them, but I'm not sure.

9 Q All right. And it's been some time since this
10 occurred, correct?

11 A Yes, sir.

12 Q Okay. So, your daddy gets the hammer away after a
13 struggle?

14 A Yes, sir.

15 Q What happens then?

16 A He was kind of walking him down the driveway like away
17 from the house like down into the road. By this time the
18 truck had like left. The truck wasn't even there.

19 Q Uh-huh. (Affirmative).

20 Did they walk all the way down the driveway?

21 A They were in the road.

22 Q In the road?

23 A Yes, sir, they're at the very end of the driveway.

24 Q Could you hear anything said or done at that point?

25 A I heard talking, but I'm not sure what they were

C.S. - Direct examination
By Solicitor Epting

1 saying.

2 Q Okay. What happened after that?

3 A I was on the phone with the police woman, and I seen
4 the truck coming back down the road pretty fast, and I seen
5 them jump out of the way. But I couldn't see much from
6 there cause I was all the way up at the porch.

7 Q Did you see -- did you see if they fell down, they fell
8 forward, fall backwards?

9 A They fell across the road. So, they were in our land
10 on, like across the road.

11 Q Okay. And what happened then?

12 A I was just talking to the police woman, and then I seen
13 daddy coming up out of the woods. So, I ran down there.

14 Q Okay. What was the state of your dad at that point?

15 A He had blood running down his head.

16 Q Okay. Did you see the other man doing anything?

17 A He was coming up out of the woods holding the hammer.

18 Q He had the hammer in his hand?

19 A Yes, sir.

20 Q Okay. What did he do?

21 A He didn't really do nothing and cause the woman had
22 pulled the truck around in the yard. So, I'm guessing he
23 got in the truck.

24 Q Did you hear -- did you say anything to your dad?

25 A No, I just tried to help him get back up to the house.

C.S. - Direct examination
By Solicitor Epting

1 Q Okay. Were y'all armed?

2 A Were I -- was I armed?

3 Q (Nods affirmatively.)

4 A I, I picked up a cow whip on the way down there, but it
5 didn't do no good.

6 Q Okay. When you say it didn't do any good, what does
7 that mean?

8 A I didn't use it.

9 Q Okay. At some point did the people leave?

10 A Yeah, they both hopped in the truck and left.

11 Q And drove off slowly, drove off quickly?

12 A Well, that went through the ditch. So, it wasn't super
13 quick, but I'm guessing they sped off after they got out of
14 that.

15 SOLICITOR EPTING: Beg the Court's indulgence.

16 (Pause.)

17 Q All right. At this time I have no further questions.
18 Please answer any questions defense counsel may have for
19 you.

20 MR. COOK: I beg the Court's brief indulgence, Your
21 Honor.

22 (Pause.)

23 SOLICITOR LIPINSKI: Your Honor, can we approach?

24 THE COURT: Sure.

25 (WHEREUPON, a bench conference was held out of the

C.S.

- Cross-examination

By Mr. Cook

1 hearing of the jury at this time.)

2 CROSS-EXAMINATION

3 BY MR. COOK:

4 Q Good morning, Mr. C.S. .

5 How are you, sir?

6 A I'm good.

7 How about you?

8 Q I'm doing fine. Thank you. I just have a couple
9 questions.

10 You understand that I'm the attorney for Mr. McCarter,
11 right?

12 A Yes, sir.

13 Q Okay. I want to take you through all that again.

14 You said that you saw a truck pulling up the road, is
15 that correct?

16 A Yes, it was at the end of the driveway.

17 Q Okay. Where were you in the, in the -- what, what type
18 of building were you living at that time?

19 A As in --?

20 Q Was it a house or a trailer?

21 A A trailer.

22 Q All right. And the reason, the reason I'm asking that
23 is just simply where were you in the trailer at that point?

24 A I was in my room.

25 Q Okay. And where is your room in the trailer?

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- Cross-examination

By Mr. Cook

1 A At the very end. So, if I look out my window I can see
2 our whole driveway and the dirt road.

3 Q Okay. You saw them walking up the, the -- him being --
4 I guess you said some man pulled up?

5 A Yeah.

6 Q Okay. And you saw him walking up the driveway.
7 Were you still in your room?

8 A I seen the truck whenever I was in my room, but I don't
9 think I seen him until I was looking out the front door.

10 Q Okay. So, you moved from your room to the front door
11 at this point?

12 A Cause I went and told daddy that there's a truck parked
13 at the end of my driveway.

14 Q Right.

15 And what was your dad doing at this time?

16 A Probably watching TV or eating. He's just in the
17 living room.

18 Q Okay. And what time of night was it?

19 A Maybe around 10:30, 10:45.

20 Q Do you remember what day of the week it was by any
21 chance?

22 A Maybe a Friday.

23 Q Okay. So, it's toward the weekend.

24 A (Witness nods affirmatively.)

25 Q All right. And did you tell your dad that you see a

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- Cross-examination

By Mr. Cook

1 guy walking up the driveway, and you said that you saw a
2 hammer in his hand?

3 A Yes, sir.

4 Q Did you tell your dad that you saw a hammer in his
5 hand?

6 A I didn't say that to him.

7 Q Okay.

8 A I don't think -- I don't recall.

9 Q All right. Now, I'm never trying to stump you. I'm
10 just trying to get an idea of---

11 A Yeah.

12 Q ---what happened. This is real important to me. You
13 said that you're uncertain did he lay the hammer down or you
14 said that he sit there and keep the hammer in his hand.

15 You, you intimated that you don't know the answer
16 there, is that right?

17 A Yeah, I don't know if he sat the hammer on the porch or
18 if he just propped his arm up on the porch with the hammer.

19 Q Okay. Where were you standing at that point?

20 A Right at the front door.

21 Q And, and I take it the porch that you're talking about
22 is the porch that's at the door you're talking about?

23 A Yeah, front porch.

24 Q How big was the porch?

25 A Maybe a ten by eight, 10-foot by 10-foot porch,

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- Cross-examination

By Mr. Cook

1 something like that.

2 Q Did you---

3 A Not, not very big.

4 Q Okay. Did you have a porch light on, an outside light
5 there?

6 A Yes, sir. I'm thinking. I don't, I don't remember
7 that part.

8 Q Could you remember if you had a second?

9 I mean let me get -- let me say this.

10 what's the lighting arrangement that you had at your
11 house that night for your yard and outside?

12 A There's a street light---

13 Q Okay.

14 A ---coming up from the driveway about right in the
15 middle of the driveway.

16 Q All right. And you don't know whether you had your
17 porch, porch light on or not?

18 A I don't, I don't know if we had the porch light on or
19 not.

20 Q Was it light enough from the street light you're
21 talking about to see the man?

22 A Yeah, I could see him walking up from the street light
23 cause he was right up under it pretty much.

24 Q Okay. And what I'm trying to get at is if the porch is
25 ten by eight, and you got a light there, you just can't

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- Cross-examination

By Mr. Cook

1 remember whether you sat the hammer down or not?

2 That's your testimony?

3 A I don't know if he sat the hammer down or not, but I
4 mean I seen him walking up the driveway with it.

5 Q All right. And, and you said you couldn't hear
6 anything though?

7 A As in --?

8 Q well, I don't know. I mean you, you said I couldn't
9 hear. I think the solicitor was asking you what all was
10 said.

11 A Yeah, I don't know his conversation with daddy. I
12 don't know what they were talking about or nothing.

13 Q So, was it -- it seemed to me ten feet there you could
14 probably hear that.

15 Does that mean the door was closed?

16 A The door was closed, yeah.

17 Q Okay. Does the door -- what's the door have?

18 Is it a screen door---

19 A Screen door.

20 Q ---with glass?

21 I'm not trying to lead you. I'm just --.

22 A Yeah, it's a screen door.

23 Q Is there glass?

24 A Yeah, like I'm, I'm not -- I don't know if it was glass
25 or plastic. It's just a screen door. I can, I can see out

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- Cross-examination

By Mr. Cook

1 of it.

2 Q That's what kept you from hearing the outside then?

3 A Well, maybe not necessarily I couldn't hear them. I
4 don't know what they were saying to each other.

5 Q Right.

6 A Yeah.

7 Q Okay. Now, about how long did they stay on the porch
8 there talking?

9 A I couldn't tell you. Maybe a couple minutes.

10 Q And then your dad got the hammer?

11 A Took the hammer from him, yeah.

12 Q Okay. Well, he took the hammer from him?

13 A Or where -- yeah, I mean -- yeah.

14 Q Okay. Well, that would, that would indicate that the
15 man didn't set the hammer down, and your dad got the hammer
16 off the porch, but that he kept this hammer and your dad had
17 to see---

18 SOLICITOR EPTING: Your Honor, I'll object. That's not
19 a question.

20 THE COURT: Yeah, just, just don't speculate. Just ask
21 him a question.

22 A The man's arm---

23 THE COURT: Don't, don't interrupt his answer. Just
24 ask him a question.

25 MR. COOK: Yes, sir.

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- Cross-examination

By Mr. Cook

1 THE COURT: Go ahead. He's gonna ask you another
2 question.

3 Q When your dad took the hammer from him, from the
4 person, did the person have the hammer in his hand at that
5 point?

6 A I don't know if he had the hammer in his hand or if he
7 sat it down.

8 Q Okay. Did you see them struggling over the hammer on
9 the porch?

10 A Not -- I don't know if it was a struggle or not. I
11 know daddy ended up with the hammer.

12 Q Did you see a struggle on that porch?

13 A I seen daddy get the hammer.

14 Q That's not what I asked you.

15 A No, then it wasn't a struggle.

16 Q Do you remember making a voluntary statement to the
17 police?

18 A Like talking to them?

19 Q Yeah.

20 A Yes, sir.

21 Q Well, do you remember writing it down?

22 A I don't know if I wrote -- do I remember what I wrote
23 down?

24 Q I'm asking you do you remember writing anything down?

25 A To the police that night?

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- Cross-examination

By Mr. Cook

1 Q Uh-huh. (Affirmative).

2 A I don't remember writing nothing down that night.

3 Q Do you remember writing something down on another
4 night?

5 A I remember coming to the Solicitor's Office and writing
6 like something down. I don't -- but I don't remember when
7 that could of been.

8 Q All right. Well, there's a date on here that says
9 16th of February. I think that is the 16th.

10 SOLICITOR EPTING: Your Honor, I'm gonna object. If
11 he, if he wants him to remember the statement I think he
12 needs to show it to him.

13 MR. COOK: I'm, I'm trying to lay the foundation to get
14 it to him, Your Honor, but---

15 THE COURT: Go ahead. Just---

16 MR. COOK: Can I -- Your Honor, may I approach?

17 THE COURT: Yes, sir.

18 Q This, this is the statement I'm talking about. I'm not
19 trying to confuse you. I promise. That's the statement I'm
20 talking about.

21 Do you remember writing that at any point in your life?
22 Is that your handwriting?

23 A Yeah, that's my handwriting.

24 Q Okay. Do you remember writing that?

25 A Yeah.

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- Cross-examination

By Mr. Cook

1 Q All right. May I hold it?

2 A (Witness nods affirmatively.)

3 Q Do you see this sentence here, daddy tried to get the
4 hammer from the man, the guy lost the hammer to daddy. So,
5 he picked up a stepping stone and threw it at daddy and
6 missed?

7 A Yeah.

8 Q Okay. You remember writing that?

9 A Yeah.

10 Q And, so, you do remember talking to the police that
11 night, don't you?

12 A Yes, sir.

13 Q Officer Riley I believe was one of the officers---

14 A Yes, sir.

15 Q ---you spoke with, and you may not remember his name,
16 but you remember talking to a deputy, is that correct?

17 A Yes, sir.

18 Q Do you remember meeting Officer Riley?

19 A I don't remember who it was.

20 Q Okay. Now, you're talking about throwing a stone.
21 This man threw a stone at your dad.

22 Could, could you elaborate on that?

23 Was your dad chasing the man?

24 A No, as soon as daddy got the hammer from him, like we
25 had stepping stones leading up to the porch.

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- Cross-examination

By Mr. Cook

1 Q Uh-huh. (Affirmative).

2 A As soon as the guy didn't have the hammer no more, he
3 just picked up that stone and threw it.

4 Q And your dad wasn't chasing him to the road?

5 A Not, not whenever he threw it. Daddy was still on the
6 porch.

7 Q And then you said that you stepped away to go get a
8 shotgun?

9 A Yeah, daddy did yell go get the gun.

10 Q Okay. And when you came back from getting the gun,
11 what did you do with the gun?

12 A Laid it right beside the couch.

13 Q How long did it take you to get the gun?

14 A Twenty-five, thirty seconds. I don't know.

15 Q Where was your sister during all this?

16 A I'm thinking -- I think -- I can't really remember, but
17 I think she was in the living room with me like right by the
18 door.

19 Q Okay. What color shirt did the guy have on?

20 A I'm not sure.

21 Q Did you say it was a dark shirt that night?

22 A Yeah, it's dark.

23 Q No, I'm not asking if the night was dark, but are you
24 saying his shirt was dark?

25 A I'm thinking -- I think -- I can't remember.

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- Cross-examination

By Mr. Cook

1 Q Okay. How big was the stone that he threw?

2 A Maybe a foot long. It's rounded.

3 Q Did he throw it with both hands?

4 A I don't remember.

5 Q Now you said it was past those doors from the distance
6 from your porch to the road. There's a lot of---

7 A Yeah, past those doors.

8 Q Sorry?

9 A Sir?

10 Q There's a lot of space past that door. China is past
11 that door.

12 SOLICITOR EPTING: Your Honor, I'm gonna object.

13 That's a statement.

14 Q And my question is how far would it be past that door?

15 A From my porch to the end of the driveway?

16 Q (Nods affirmatively.)

17 A Maybe twenty yards past those doors.

18 Q Okay. Thank you.

19 It's dark that night, is that correct?

20 A Yes, sir.

21 Q Farther than this?

22 A To the end of my driveway, yes, sir.

23 Q You didn't see anything that happened down on that
24 road, did you?

25 A Like, like before -- like him actually hitting daddy or

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- Cross-examination

By Mr. Cook

1 like whenever they're down there like before he walked up
2 the driveway?

3 Q Anything.

4 A I seen the truck.

5 Q Okay. You, you just said you saw him actually hitting
6 daddy.

7 Did you see him actually hit daddy?

8 A No, but I'm, I'm guessing he did. He walked up right
9 out behind him with the hammer and daddy had blood coming
10 down his head.

11 Q You don't know what happened down on that road, do you,
12 between them---

13 A It's just my best guess.

14 Q ---at all? Thank you.

15 Now, you saw the truck pull off?

16 I'm asking you.

17 A Like whenever I helped daddy back up to the porch?

18 Q Well, I -- you can't, you can't ask me questions, and
19 I'm not trying to be rude. I'm trying to clarify something
20 if you don't understand it.

21 But my question to you is did you ever see the truck
22 ever pull off?

23 A Yes, whenever I helped daddy back up to the porch
24 because it pulled through the yard and then it left.

25 Q Did you see it pull off and go down the road while the

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- Cross-examination

By Mr. Cook

1 man was still in your yard without the man in the truck?

2 A No, but whenever they had went down the truck wasn't
3 there. So, I'm guessing it had to.

4 Q Uh-huh. (Affirmative).

5 And then you saw it come back?

6 A Yeah, I did see it come back.

7 Q And did it come back before or after the incident down
8 the road?

9 A Before cause that's what made them leave to get into
10 the woods cause I seen them jump out of the way.

11 Q Now, the, the voluntary statement that you gave that
12 I'm -- I'll show it to you again. It reads---

13 SOLICITOR EPTING: Your Honor?

14 THE COURT: Just---

15 SOLICITOR EPTING: He's going to read from the
16 voluntary statement.

17 THE COURT: Yeah, let him, let him see the statement.

18 Q Could you start reading right there where it says I
19 went back outside?

20 A I went back outside, the truck was gone, and the man
21 and daddy were in the dirt road. Then all of a sudden the
22 truck comes back about sixty miles per hour and almost hits
23 both the people. I was still on the porch watching because
24 I couldn't see what was happening, and then I saw daddy
25 crossing the dirt road. I ran to him. That's when the

C.S.

- Cross-examination

By Mr. Cook

1 truck came plowing through the yard. I helped daddy up
2 because he fell in the ditch. The man was holding the
3 hammer at that point. Me and daddy then ran up to the porch
4 as the man got in the truck and drove off.

5 Q Okay. So, what I'm confused about is where is this
6 ditch you were helping your dad up at.

7 was it in the road or in your driveway?

8 A It's between my yard and the road.

9 Q So, did you run down to the road?

10 A To help daddy whenever I seen him crossing it.

11 Q Did he fall down in the ditch after you ran down?

12 A He, he tripped into the ditch cause I seen him crossing
13 the road. So, I ran down to him and he tripped into the
14 ditch and I helped him up.

15 Q Okay. And how much time passed between the time the
16 truck drove off and the time that the police showed?

17 A Maybe five minutes.

18 Q Who showed first, the police or the ambulance?

19 A I don't remember that part. I think the police.

20 Q The police -- you remember that night -- the night---

21 SOLICITOR LIPINSKI: Hold on.

22 (Pause.)

23 SOLICITOR LIPINSKI: Your Honor, if we can approach?

24 (WHEREUPON, a bench conference was held out of the
25 hearing of the jury at this time.)

C.S.

- Cross-examination

By Mr. Cook

1 Q The night that the police officer came to you, like
2 five minutes afterwards the police showed up, you remember
3 talking with that officer?

4 A Yes, sir.

5 Q Okay. And you're, you're, may not be aware that he had
6 this patch on his shoulder that was recording the
7 conversation.

8 Okay. You remember saying to the officer dad tried to
9 get the hammer, but the defendant, that the guy threw a
10 stone at him?

11 A Yes, sir. well, I don't necessarily remember saying
12 that to him, but if it was recorded I guess I said that.

13 Q Yeah.

14 Dad tried to get the hammer, but the man threw the
15 stone at him.

16 THE COURT: You got to ask a question.

17 MR. COOK: I'm just -- I'm sorry, Your Honor.

18 Is that what you remember?

19 If I said that you said that that night, would you
20 agree with me?

21 A Yes, sir.

22 Q Okay. The officer -- if I said to you that the officer
23 said did the man hit your dad with the hammer and you
24 replied I didn't see that, would you agree with that?

25 A Yes, sir.

C.S.

- Cross-examination

By Mr. Cook

1 Q It's pretty consistent with what you said in the
2 courtroom here today?

3 A Yes, sir.

4 Q Okay. What's a cat whip?

5 A Cow whip?

6 Q A cow whip. Okay.

7 A It's just a long stick.

8 Q Does it---

9 A No, it's not even a whip at all. It's just a wooden
10 thing, and it was in our yard, but we used that cause
11 whenever we fished, you'd beat the bottom of the boat and it
12 attracts fish. So, it's in the yard.

13 Q It's a wooden stick?

14 A Wooden stick.

15 MR. COOK: Okay. No further questions, Your Honor.

16 SOLICITOR LIPINSKI: Court's indulgence one moment.

17 THE COURT: Okay.

18 (Pause.)

19 SOLICITOR EPTING: No further questions from the State.

20 THE COURT: All right. You may step down and be
21 excused. We appreciate your time. Thank you.

22 SOLICITOR LIPINSKI: Your Honor, if we could approach
23 as to scheduling?

24 That's all.

25 THE COURT: Yeah, I'm going to take---

1 SOLICITOR LIPINSKI: Oh, okay.

2 THE COURT: I think this is a good time to break for
3 lunch. It's a quarter to 1:00. We'll break till two
4 o'clock. Have a pleasant lunch and we'll see you back at
5 two o'clock.

6 (WHEREUPON, the following takes place outside the
7 presence of the jury.)

8 THE COURT: Anything before we break for lunch?

9 SOLICITOR LIPINSKI: Nothing from the State, Your
10 Honor.

11 MR. COOK: Nothing, Your Honor.

12 THE COURT: Be back at two o'clock.

13 (WHEREUPON, Court was in recess for the lunch hour.)

14 THE COURT: State ready?

15 SOLICITOR LIPINSKI: Yes, sir.

16 THE COURT: Defense ready?

17 MR. COOK: Yes, sir.

18 THE COURT: Mr. McCarter is present.

19 Bring in the jury.

20 (WHEREUPON, the following takes place within the
21 presence of the jury.)

22 THE COURT: All right. Call your next witness.

23 SOLICITOR LIPINSKI: State calls Amanda Rothbauer to
24 the stand, Your Honor.

25 You can come forward, approach the lady in front of the

Amanda Rothbauer - Direct examination
By Solicitor Lipinski

1 computer monitor and be sworn in, and then take the witness
2 stand at the back of the courtroom.

3 AMANDA ROTHBAUER, having been first
4 duly sworn, testified as follows:

5 DIRECT EXAMINATION

6 BY SOLICITOR LIPINSKI:

7 Q Mrs. Rothbauer, if you could, I'm just gonna ask you to
8 speak in the direction of those microphones. You don't have
9 to lean towards them, but they will pick up your voice and
10 amplify it so these last jurors can hear you.

11 If you can begin by stating your name and spelling your
12 last name for the record.

13 A My name's Amanda Rothbauer. It's R-O-T-H-B, as in boy,
14 A-U-E-R.

15 Q And, Mrs. Rothbauer, I see that you're wearing a
16 uniform today.

17 With whom are you currently employed?

18 A Currently a paramedic with Mecklenburg EMS agency out
19 of Charlotte.

20 Q And how long have you been a paramedic?

21 A Three years.

22 Q And what type of training and education did you receive
23 in order to become a paramedic?

24 A Two years paramedic associate degree.

25 Q And you been working as a paramedic for three years.

Amanda Rothbauer - Direct examination
By Solicitor Lipinski

1 Do you have any other training in any type way in the
2 medical field?

3 A Currently in nursing school.

4 Q You're currently in nursing school?

5 A Uh-huh. (Affirmative).

6 Q And back in February of 2010 with whom were you
7 employed at that time?

8 A Piedmont Medical Center.

9 Q And you stated -- are you a certified EMT?
10 Are you licensed?

11 what type of sanctioning do you have by either the
12 State of South Carolina or North Carolina?

13 A I am a nationally registered EMT paramedic.

14 Q And do you have to take a test or something of that
15 nature?

16 A The national, the national EMT test, yeah. It's good
17 in all states primarily.

18 Q So, there's an exam that you-all have to take in order
19 to work---

20 A Oh, yeah.

21 Q ---as a licensed paramedic?

22 A Yes, ma'am.

23 Q And just if you could relate to the Court what type of
24 training and education does a paramedic go through?

25 what do they teach you how to do?

Amanda Rothbauer - Direct examination
By Solicitor Lipinski

1 A A full range. We have to, we have to be able to
2 independently work in the field as an extension of the
3 medical doctor's license. We are trained to all
4 pharmacology. Mostly we're able to have heart attack
5 victims where we can defibrillate, shock, bring them back to
6 life. We can intubate, a full, full range of, of medical,
7 all narcotics that we can give. Everything from asthma
8 attacks to, to car wrecks, death, everything. We're able to
9 function through the protocols of the medical doctor in the
10 ER.

11 Q And approximately when, when we say you work as a
12 paramedic, do you work in an emergency room or do you work
13 on an actual ambulance?

14 A Work on the ambulance in the field.

15 Q And you stated you worked in that field for three years
16 approximately?

17 A Yes, ma'am.

18 Q And, if you could, do you have any estimation as to the
19 number of calls that you responded to?

20 Is it in the hundreds, the thousands, if you can say?

21 A Easily the thousands.

22 SOLICITOR LIPINSKI: Your Honor, at this time we would
23 tender Mrs. Rothbauer as an expert EMT in the field of
24 emergency medical service provision.

25 MR. COOK: Without objection.

Amanda Rothbauer - Direct examination
By Solicitor Lipinski

1 THE COURT: Entered. I find she is qualified. Thank
2 you.

3 SOLICITOR LIPINSKI: Thank you, Your Honor.

4 On the evening of February 6th, 2010, going into the
5 morning or the evening of February 5th, 2010, going into
6 the morning of February 6th, 2010, did you have the
7 occasion to respond to Wycoff Road here in York County?

8 A Yes, ma'am.

9 Q And do you, at that time -- where do currently work as
10 an EMT?

11 A Currently I'm in Mecklenburg County in Charlotte.

12 Q Okay. Back in February of 2010, where were you working
13 at that time?

14 A I was stationed at one of our outlining posts in York.

15 Q And, so, you would of responded to calls, for the most
16 part, within the York vicinity?

17 A York, Sharon, all those areas.

18 Q And you responded to [REDACTED]?

19 A Yes, ma'am.

20 Q Had you ever been to that residence before if you
21 recall?

22 A No, ma'am.

23 Q And it is an actual residence of a home?

24 A Yes.

25 Q And what did you find when you got there?

Amanda Rothbauer - Direct examination
By Solicitor Lipinski

1 A Me and my paramedic arrived on scene. I do remember
2 the call, and as we approached, the scene was safe. Police
3 was on the scene, and my patient was sitting on the porch
4 with family and police, and I approached him, and I, I -- my
5 first observance was that I could see that he had been
6 assaulted. I was concerned at first because he had blood
7 all over and down his shirt. So, I couldn't see how severe
8 the injuries were at the moment, and I began my primary
9 assessment where I listened to his lung sounds, make sure
10 that it was clear, equal and bilateral, and I checked his
11 pulse, make sure he wasn't too tachycardic.

12 I'm, at this point, assessing for normal hemodynamics.
13 The patient was extremely tachycardic, which is any heart
14 rate---

15 Q You're using a lot of big terms. Let me slow you down
16 about that.

17 A Any heart rate above 100 is considered hypotensive,
18 hypo -- above normal limits. It's called tachycardic when
19 your heart rate is above 100. He was about 130.

20 Q And what does that tell you about his physical
21 condition?

22 when you say tachycardic, in layman's terms, what does
23 that mean to the jury?

24 Heart beating really fast?

25 A Heart beating faster than within normal limits.

Amanda Rothbauer - Direct examination
By Solicitor Lipinski

1 Q And what are the dangers of that?

2 why is that important to you as a paramedic?

3 A Anything above 150 is considered SVT or so high that it
4 could cause the heart not to fill with blood. Cause he's
5 going so fast, it doesn't have time to bring profusion
6 and/or enough blood to the body.

7 So, if he gets too high, I'm, I'm concerned about
8 anything that's outside the normal limits. It tells me a
9 lot about his body. Concerned that in the assault, whether
10 he possibly had bleeding internally. I monitor all those
11 vital signs to make sure that my patient doesn't become
12 unstable.

13 Q And before we get to a little bit more of the EMT part
14 of it, how was he dressed?

15 Do you recall?

16 A I believe he had on shorts and a white t-shirt cause I
17 was attracted to being able to see all the blood all over
18 his shirt.

19 Q And as to -- how was his physical demeanor?

20 was he able to communicate with you?

21 was he able to talk to you?

22 Is he agitated?

23 How would you describe it?

24 A He was, he was calmly sitting on the, on the porch. I
25 think he was in a state, from my observations, in a state of

Amanda Rothbauer - Direct examination
By Solicitor Lipinski

1 shock that someone had actually come up into his private
2 residence and assaulted him. I don't think he felt like he
3 had any enemies. He doesn't understand. He was in a state
4 of shock. He was very calm.

5 MR. COOK: Your Honor, I'm gonna object from a
6 speculation part as to what the witness is saying here.
7 She, she's---

8 THE COURT: Well, I think she's quoting what the victim
9 said.

10 SOLICITOR LIPINSKI: Yes, Your Honor.

11 THE COURT: I'll allow that. I find that it's outside
12 the exception to the hearsay.

13 Q When you go up, do you start talking to him?

14 A Yeah.

15 Q And is part of your ability to treat him dependent on
16 any questioning of him of how he came to be in the state
17 that he's in or why you've been summoned there?

18 A I, I just began asking him what happened, and he was
19 able to let me know someone came up, knocked on my door,
20 started yelling for me to come out, and I -- he stated to me
21 that I don't know what you're talking about, you have the
22 wrong house, and it just kind of went from there.

23 Q All right. And you stated that he appeared to be in
24 shock to you?

25 A He was just altered in his mental status, the, the way

Amanda Rothbauer - Direct examination
By Solicitor Lipinski

1 that he was sitting there so calm. I think he wasn't
2 thinking so much about his injuries as he was in shock that
3 this had happened to him. I was concerned about other
4 hemodynamics because he wasn't acting right. So, I was---

5 Q when you say hemodynamics, that's a big word, what do
6 you mean by hemodynamics?

7 A I'm sorry. Hemodynamics is just your basic body's
8 response to shock. If you are -- if your body is stable,
9 then you're gonna have, within normal limits, pulses, blood
10 pressures, heart rate, respirations, breathing. We have
11 normal limits from a normal human being, and I was checking
12 to make sure all of those were within normal ranges.

13 Q You stated you observed some blood on him.

14 where was that coming from or where was it present at
15 the time?

16 A Yes, ma'am, the left side of his face was very bruised,
17 and there wasn't any active bleeding. By the time EMS
18 arrived on scene, it had been controlled. It wasn't
19 dribbling, but I noticed that it had -- it was coming -- it
20 had come off his face and head and was all over his
21 clothing.

22 Q All right. Do you notice any lacerations and what do
23 you mean by lacerations?

24 A Basically the definition of, of a laceration is a cut
25 whereas a contusion would just be a bruise. The skin was

Amanda Rothbauer - Direct examination
By Solicitor Lipinski

1 actually cut. The specifics that he had multiple
2 lacerations on his left arm and forearm, two large lacs we
3 call them, lacerations to the back of both side, left side
4 and right side of his head, and he had multiple lacerations
5 to the right side back lack area, and the left side of his
6 face was really swollen and bruised from what I could see.

7 Q All right. And you said back lack area---

8 A Lack.

9 Q ---and I saw you take your hand and move down the lower
10 part of your back.

11 A Uh-huh, lack.

12 Q All right. And what do you do in terms of treating and
13 who did you treat out there?

14 Do your records indicate a name?

15 A What's that?

16 Q Do you records indicate the name of the person you
17 treated?

18 A Dwayne.

19 Q Southard?

20 A Uh-huh. (Affirmative).

21 Q All right. And what do you do in terms of what type of
22 care do you render to him?

23 Do you give him oxygen?

24 Do you stitch him up?

25 Is that your role as a paramedic or what do you do for

Amanda Rothbauer - Direct examination
By Solicitor Lipinski

1 him out there that day?

2 A In the pre-hospital setting, the goal is to stabilize
3 him and get him to the ER for definitive care from a
4 physician, and what we're able to do, when I'm monitored,
5 that's put him on the monitor, and is, evaluated his oxygen
6 saturation of his body, and it was like only at 93. We have
7 protocol that suggests that anything under 96 I need to
8 treat with oxygen.

9 So, I gave him like three of four liters of oxygen.
10 Oxygen is just -- it helps a lot of the different body
11 processes. I was able to monitor his blood pressure, and
12 his mental status, and his respirations, and then bandage
13 his head, and then we went to the hospital.

14 Q Okay. And, so, you, in fact, did you transport him via
15 ambulance or do you let a family member take him to the
16 hospital?

17 A No, not with a head injury. We, we transported him.
18 It's about a 30-minute transport time into Rock Hill at
19 Piedmont Medical Center.

20 Q And when you get to the hospital, do you then turn him
21 over to the doctors at the emergency room?

22 A Yes, it's protocol that we need to give a full report
23 of everything that we saw and the treatment we rendered to
24 the RN or the M.D. that was accepting report from him,
25 transferred patient care.

Amanda Rothbauer - Cross-examination
By Mr. Cook

1 SOLICITOR LIPINSKI: Court's indulgence.

2 (Pause.)

3 Q Thank you. Please answer any questions Mr. Cook or Ms.
4 Davis might have.

5 CROSS-EXAMINATION

6 BY MR. COOK:

7 Q How are you?

8 A Good.

9 Q You have no idea who started this fight, do you?

10 A I don't.

11 Q Thank you.

12 No further questions, Your Honor.

13 A Sure.

14 THE COURT: You can step down and be excused. We
15 appreciate your time. Thank you.

16 WITNESS: Thank you.

17 SOLICITOR LIPINSKI: Thank you, Your Honor.

18 The State would now call Doctor Rumsey to the stand.

19 Doctor Rumsey, if you could approach the lady in black
20 and be sworn, and then take a seat in the black chair at the
21 back of the courtroom.

22 TIM RUMSEY, having been first duly
23 sworn, testified as follows:

24 DIRECT EXAMINATION

25 BY SOLICITOR LIPINSKI:

Tim Rumsey - Direct examination
By Solicitor Lipinski

1 Q Mr. Rumsey, if you could, I'm gonna request that you
2 speak directly into the microphones and keep your voice up
3 so everyone in the courtroom can hear you. You don't need
4 to lean in. Just talk in the direction of the microphones.

5 If you could begin by just stating your name and
6 spelling your last name for the record.

7 A Tim Rumsey. R-U-M-S-E-Y.

8 Q And with whom are you currently employed?

9 A Piedmont Medical Center.

10 Q And do you need some water?

11 A No, I'm good.

12 Q Okay.

13 A Thank you.

14 Q And in what capacity are you employed with Piedmont
15 Medical Center?

16 A I'm a physician assistant in the emergency room.

17 Q And just briefly what are some of your duties and
18 responsibilities there in the emergency room?

19 A I see a full spectrum of patients from minor care,
20 strep throat, all the way up to traumatic injuries, strokes,
21 and heart attacks.

22 Q And you say you're a physician assistant.

23 What does that mean exactly?

24 A We practice medicine under a license licensed by the
25 State of South Carolina, and by the national licensing

Tim Rumsey - Direct examination
By Solicitor Lipinski

1 association. We practice autonomously under the supervision
2 of a physician.

3 Q And what type of training and education have you
4 received that's enabled you to work in this capacity?

5 A I received a Bachelor of Health Science from Campbell
6 University and a Master of Health Science from Duke
7 University.

8 Q And subsequent to your education at Duke, have you had
9 to take any boards or test or other certification measures
10 that allow you to work as a physician assistant?

11 A Prior to the certification from Duke?

12 Q Or, or -- no, after -- subsequent to your education at
13 Duke---

14 A Yes.

15 Q ---but prior to your employment, are you ongoing, do
16 you have any license or certification requirements that you
17 met?

18 A Yeah, we have to take a national board every six years
19 and be licensed by the State of South Carolina every two
20 years.

21 Q And how long have you been employed with Piedmont
22 Medical Center?

23 A Five years.

24 Q And where -- did you work, ever work as a physician
25 assistant anywhere else?

Tim Rumsey - Direct examination
By Solicitor Lipinski

1 A No.

2 Q And have you always worked in an emergency room
3 setting?

4 A Yes.

5 Q Do you have any special training that goes further than
6 a normal physician assistant that focuses on emergency room
7 care?

8 A I was a medic with the US Army Green Berets for twenty
9 years.

10 Q And subsequent to that you became a physician or
11 during---

12 A After that.

13 Q After that.

14 Your Honor, at this time we would ask to qualify -- are
15 you considered a doctor or are you---

16 A No, a physician assistant.

17 Q Physician assistant.

18 At this time we would submit Mr. Rumsey, Physician
19 Assistant Rumsey as an expert in providing that emergency
20 room care.

21 MR. COOK: Without objection, Your Honor.

22 THE COURT: I find he's qualified.

23 Q Did you have the occasion to treat a Dwayne Southard on
24 February 5th of 2010?

25 A Yes.

Tim Rumsey - Direct examination
By Solicitor Lipinski

1 Q Do you remember Mr. Southard?

2 A Yes.

3 Q And just briefly, when anyone comes into the emergency
4 room and you encounter them as a patient, what's your normal
5 protocol in terms of assessing them or rendering care?

6 A We see the patient to begin with and obtain a history
7 from the patient on exactly why they're there, what
8 happened, any mechanism of injury or time of onset of their,
9 their symptoms, then examine them relative to their, their
10 chief complaint.

11 Q And what -- and how many patients do you normally see
12 on any given night?

13 Is there a range?

14 A Between 30 and 35 during a ten to twelve hour period.

15 Q And is there any reason that Mr. Southard sticks out in
16 your mind in any particular fashion?

17 A Mainly the extent of his injuries. He did have a
18 pretty significant open skull fracture I remember with a, a
19 piece of bone that was depressed into his brain.

20 Q Okay. And, Mr. Cook, do you mind if I -- let me just
21 show you what's been struck, marked as State's Exhibit 1-A
22 through 1-G and ask you if you recognize what is depicted in
23 these photographs.

24 A The first photograph shows what I considered to be
25 superficial lacerations to the left arm.

Tim Rumsey - Direct examination
By Solicitor Lipinski

1 Q Before, before we go through them, let's start with do
2 you recognize what's in them?

3 A Yes.

4 Q All right. And is -- are -- do those photographs
5 depict a person?

6 A Yes, they do.

7 Q And do they depict, to the best of your knowledge,
8 Dwayne Southard?

9 A Yes, ma'am.

10 Q And do they consistently document his, his injuries as
11 you recalled them being on the night in question?

12 A Yes.

13 Q And are there any bandages or anything else in those
14 pictures that you have any personal knowledge about?

15 A I have personal knowledge about all the bandages. I
16 also have personal knowledge about the staples in his scalp
17 that I placed. Mainly that's it, yes.

18 Q So, those accurately depict his condition after you
19 rendered that care?

20 A Yes.

21 SOLICITOR LIPINSKI: Your Honor, at this time we would
22 move states 1-A through G into evidence.

23 MS. DAVIS: No objection, Your Honor.

24 THE COURT: In without objection.

25 (WHEREUPON, State's Exhibit Nos. 1-A through 1-G were

Tim Rumsey - Direct examination
By Solicitor Lipinski

1 received into evidence at this time.)

2 SOLICITOR LIPINSKI: And, Your Honor, may I publish
3 them to the jury via the overhead projector?

4 THE COURT: Yes, you may.

5 SOLICITOR LIPINSKI: And I'm gonna show them up there
6 so the jury understands what you're doing. Thank you very
7 much. I'm gonna have to put a GPS on the laser pointer,
8 Your Honor.

9 Is it warming up?

10 I'm gonna hand you this. It's a laser pointer. Point
11 the red. It will appear and, if necessary, we may need to
12 come off the stand if it would help you in seeing those
13 photographs better.

14 A Okay.

15 Q While that's warming up, if you could, just briefly
16 describe to the jury what his general physical condition and
17 demeanor is when you first encountered him in the emergency
18 room?

19 A He was a bit agitated obviously after the injuries that
20 he sustained. He was coherent, alert, and oriented, but,
21 like I said, somewhat agitated. His heart rate was
22 elevated, as I remember, looking at the chart there. When
23 he first came in his heart rate was 131. So, that's, that's
24 pretty tachycardiac whereas 100 would be high range of
25 normal.

Tim Rumsey - Direct examination
By Solicitor Lipinski

1 Q And when you say agitated, just to clarify, do you mean
2 a, agitated in an aggressive manner, agitated in terms of
3 excited?

4 what do you mean exactly when you use that term?

5 A More of a distress rather than excited or angry.

6 Q And what obvious physical injuries does he have to his
7 head?

8 A He's got two I think significant lacerations. The
9 biggest one was to the right parietal scalp, which I
10 examined and did find bony involvement in that.

11 Q All right. Let me show you -- how about we go through
12 these pictures at -- let me show you what's been marked as
13 State's Exhibit No. 1-A, and if you could turn those down
14 for the jury?

15 You stated in 1-A that is the victim as you recall him
16 being that night?

17 A Yes.

18 Q And, if you could, just detail to the jury what
19 injuries we see on his face, and we'll kind of walk through
20 the pictures and that way make a better road map.

21 A So we see the obvious abrasions here on the right
22 forehead, abrasions and contusions around the left zygomatic
23 area, some soft tissue swelling around the lower lip, and
24 then he has a laceration here on the left cheek that was
25 repaired with steri strips.

Tim Rumsey - Direct examination
By Solicitor Lipinski

1 Q Let me show you what's been marked as State's Exhibit
2 No. 1-B, and ask you what injury -- there's a couple
3 bandages in this particular picture to his shoulder and
4 back, and ask you to start with what injuries he had that
5 lies beneath those bandages, if any.

6 A So underneath the bandages here were some deep puncture
7 type lacerations that were sutured here at the right
8 scapular area and over the right trapezius.

9 Q And---

10 A An obvious contusion here on the left scapula.

11 Q And you said the trapezius and, and all, lots of other
12 big words, but the top of his shoulder here --

13 A Correct.

14 Q -- he has a laceration?

15 A A puncture type laceration.

16 Q And when you say puncture, what do you mean by that?
17 Would it require stitches?

18 A Yes.

19 Q All right. And then you would of covered that, do you
20 recall, with how many stitches?

21 And I believe the laceration repairs are on Page 7 of
22 your report if that's helpful.

23 A So the right trapezius area there, the upper shoulder,
24 required four sutures and then the right scapula area
25 required two, two sutures.

Tim Rumsey - Direct examination
By Solicitor Lipinski

1 Q And other than these being puncture wounds requiring
2 sutures, did either of these two injuries require any
3 further medical aid or inquiry on your part?

4 A Yes, ma'am, the nature of these wounds, with
5 penetrating injury to the torso, could obviously effect the
6 lungs. So, we did do a, a posterior to anterior and lateral
7 chest x-ray to rule out any lung injury.

8 Q So, they were deep enough that you were concerned that
9 these lacerations had punctured his lung?

10 A Correct.

11 Q All right. You stated he also has a bruise to his
12 other shoulder, which would of been his left shoulder?

13 A Right.

14 Q And do you see any other injuries as to the back of his
15 upper arm?

16 A I do see an injury here. I think we had some what I
17 consider superficial lacerations to the left arm that just
18 required bandaging.

19 Q Let me show you what's been marked as State's Exhibit
20 No. 1-C, and there's some glare on this photo from this
21 overhead, but is there any injury in this photograph that
22 you rendered care on?

23 A Yes, ma'am, the right parietal scalp laceration here
24 was repaired with staples.

25 Q And these kind of gray linear marks, are those the

Tim Rumsey - Direct examination
By Solicitor Lipinski

1 staples?

2 A Yes, ma'am.

3 Q And is that something that you administered in terms of
4 care?

5 A Yes, ma'am.

6 Q And other than this laceration, is there any injury
7 beneath the surface in this immediate area?

8 A This is the laceration that had bony involvement of the
9 skull. I did see bone fragments beneath the laceration.

10 Q And when you say bony lacerations and skull, what
11 happened to the skull beneath these, this stapled wound
12 here?

13 A It was fractured. What we call comminuted. That means
14 in many pieces, and according to the CAT Scan, he did have a
15 piece of bone that was depressed into the brain.

16 Q And, and in terms of rendering medical care, what is
17 the significance of that injury had that wound or injury
18 gone untreated?

19 A There are actually four things that could of occurred
20 with this. The first two that are most major would be a
21 subdural or epidural hematoma and that is bleeding between
22 the skull and the brain that causes pressure. The other
23 wound would be a subarachnoid hemorrhage, which is also
24 bleeding beneath the, what we call the arachnoid mater of
25 the meninges, and because it's an open fracture with brain

Tim Rumsey - Direct examination
By Solicitor Lipinski

1 injury, we did have to administer IV antibiotics and
2 hopefully the patient would continue with oral antibiotics
3 at home to prevent infection of the brain.

4 Q And when you used the term open fracture, and what do
5 you mean by that in terms of an open, open fracture?

6 A We consider it -- another term would be a compound
7 fracture where there's actually bone erupting through the
8 skin. If it were to happen on the leg or an arm, it would
9 be considered a compound fracture. We don't really call it
10 a compound fracture. We call it an open fracture.

11 Q And these staples that created this, and correct me if
12 I'm wrong cause I don't want to use this -- but this
13 circular type laceration to the skull, was that open?

14 were you able to peel that back and then staple that
15 shut or was it irregular in any particular fashion?

16 Do you understand my question?

17 A I don't really understand.

18 Q Okay.

19 A So, it was a flap of tissue that was---

20 Q Right.

21 A ---evolved off the scalp.

22 Q When treating individuals in the emergency room who
23 have been involved in altercations that occurred outside, is
24 it ever necessary to debride an injury if there's anything,
25 any debris from the ground or elsewhere that may of become

Tim Rumsey - Direct examination
By Solicitor Lipinski

1 impacted near or around the wound?

2 A Yes, there is. However, I don't believe we had any
3 debridement on this particular wound.

4 Q Let me show you State's 1-D and draw your attention to
5 the back of his head as depicted in this kind of profile
6 line, and ask you if these three lines, are those different
7 staples than what we saw in the last photograph or is that
8 the same as you move around the head?

9 And you may need to step off, and if you do, then
10 please do so.

11 A I think -- well, the other -- that may be the same one
12 or is this a -- it's hard to tell. I know he had two -- can
13 you go out a little bit further?

14 Q Sure.

15 A I thought the other one was a little bit more superior
16 or higher up than this one.

17 Q All right.

18 A This may be a different one.

19 Q Are there any other injuries in this picture other than
20 that sutured wound in the back of his head?

21 A Some soft tissue swelling and bruising over the right
22 ear.

23 Q Let me show you what's been marked as State's Exhibit
24 No. 1-E.

25 I believe this is a bruise or abrasion to the left

Tim Rumsey - Direct examination
By Solicitor Lipinski

1 shoulder blade that we saw in that previous picture?

2 A Yes, ma'am.

3 Q Let me show you State's Exhibit No. 1-F, left side of
4 his head.

5 Is that the left side of his head?

6 Can you tell?

7 A Correct.

8 Q I know you're picking up a lot of glare from this.

9 A That is the left side, yes.

10 Q I think -- I'm actual -- did he have a wound to this
11 area that also required either staples or sutures of some
12 --?

13 A Yes, this, this wound did require three staples.

14 Q Was there, there any skull injury or bone injury to
15 this wound?

16 A No, ma'am.

17 Q And similarly to the other wound to the back of the
18 head, do you, you put these staples in?

19 A I did, yes.

20 Q And was there any need to debride this wound of any
21 type of, of foreign objects?

22 A No.

23 Q And, finally, what's been shown on State's Exhibit 1-G,
24 there are some -- is this a -- what part of the body is
25 this?

Tim Rumsey - Direct examination
By Solicitor Lipinski

1 A This looks like the upper arm.

2 Q And---

3 A Left upper arm.

4 Q Left upper arm.

5 And are the, these wounds, do you remember seeing those
6 on the night in question?

7 A I do.

8 Q And is there -- you stated that the ones to the
9 trapezoid in the back you actually stitched up or sutured.

10 Did you do that with these?

11 A I did not.

12 Q Is there a reason that these didn't require sutures
13 versus the other ones that did?

14 A Based on the, the size and the depth of these wounds.
15 These were a little bit more superficial than the other
16 ones.

17 Q So, the ones that are underneath the bandage to his
18 shoulder and his back would of been deeper?

19 A Deeper.

20 Q And he also has a bandage here to his arm.

21 Did you administer that bandage?

22 A I believe the nurse administered that bandage, and I
23 believe there was an abrasion beneath that bandage.

24 Q You stated that you did a chest x-ray to check his
25 lungs, and you talked about the injury to his scalp.

Tim Rumsey - Direct examination
By Solicitor Lipinski

1 Was any type of head x-ray, CT, or any of that nature
2 to diagnose or document that, that injury to the skull
3 itself?

4 A Yes, ma'am, CT Scan.

5 SOLICITOR LIPINSKI: Court's indulgence please one
6 moment, Your Honor.

7 (Pause.)

8 Q And after you completed the staples, suturing, and
9 bandaging of his wounds, was he kept in the emergency room
10 overnight?

11 A No, ma'am, he was discharged approximately five hours
12 after he arrived.

13 Q And was there any follow-up care or any other signs
14 that you put either he or his family on as it related to the
15 need for any follow-up care to any of these injuries
16 including those to his skull?

17 A Yes, ma'am, I did consult with the neurosurgery service
18 because of the open skull fracture that he did have, and, to
19 my knowledge, he did follow-up with the neurosurgery
20 service.

21 Q Let me take you back to State's Exhibit No. 1-C to this
22 area where there's a skull fracture associated with the
23 laceration.

24 Is there anything in this particular area in particular
25 about the head or brain that makes this injury in anyway

Tim Rumsey - Direct examination
By Solicitor Lipinski

1 more dangerous or more threatening to the victim versus if
2 he had received it in other areas of the head?

3 MS. DAVIS: Your Honor, we'd object to leading on that
4 question.

5 SOLICITOR LIPINSKI: I asked him---

6 THE COURT: Rephrase the question.

7 Q Is there anything about this particular area that is
8 anyway significant that would make it more significant if he
9 received a blow to the head in any other area?

10 Is there anything about this area in terms of the
11 relationship to the brain or arteries or blood vessels in
12 the brain?

13 MS. DAVIS: Renew the objection, Your Honor.

14 THE COURT: I overrule it.

15 Q You can answer the question.

16 A I don't, I don't feel there's any significance to the
17 anatomical location of this injury that would make it worse
18 than if it were in the frontal region or the, anywhere else
19 on the skull.

20 SOLICITOR LIPINSKI: That's all we have from this
21 witness, Your Honor. We tender him to the defense.

22 THE COURT: You want that to stay up?

23 MS. DAVIS: We can leave it -- we can take it off, Your
24 Honor.

25 THE COURT: All right.

Tim Rumsey - Cross-examination
By MS. Davis

1 MS. DAVIS: Probably easier to see. Thank you.

2 THE COURT: Yes, ma'am. Proceed.

3 CROSS-EXAMINATION

4 BY MS. DAVIS:

5 Q Mr. Rumsey, you indicated that the patient came in at
6 approximately 11:30, is that correct?

7 A Yes, ma'am.

8 Q And he was coherent?

9 A Yes.

10 Q And at anytime was he unconscious?

11 A No.

12 Q Was he confused?

13 A No.

14 Q All right. So, he was alert, coherent, and he was
15 discharged at approximately four o'clock in the morning, is
16 that correct?

17 A Yes, ma'am.

18 Q All right. So, when he was discharged, are you
19 familiar with what medications he was discharged with?

20 A Yes, ma'am.

21 Q And what were those?

22 A I believe it was Keflex, which is an antibiotic, and I
23 believe Lortab, which is given for pain.

24 Q Okay. And was he given any follow-up instructions?

25 A Yes, ma'am.

Tim Rumsey - Cross-examination
By Ms. Davis

1 Q And what were his follow-up instructions?

2 A Specifically?

3 Q As far as his care.

4 A That he was to follow up with the neurosurgery service
5 in two days, and he was given closed or head injury
6 precautions so that if he were to experience any of those
7 symptoms, decreasing mentation, decreasing level of
8 consciousness, or vomiting, that he should return to the
9 emergency department.

10 Q And did you work in the emergency department for the
11 rest of the weekend?

12 A I don't recall that.

13 Q Do you recall seeing him return at anytime?

14 A No, ma'am, he didn't. I, I didn't see him return.

15 Q Okay. So, as far as, as far as you know, he did not
16 have any recurring symptoms that require emergent care?

17 A Correct.

18 Q Okay. And as far as the abrasions that he had or the
19 wounds that he had, when he came to the emergency room, were
20 they already bandaged?

21 A I believe he did have bandages on his head. Mainly on
22 the head, yes.

23 Q Okay. So, would the EMS personnel have debrided those
24 or cleaned those a little bit before they had bandaged them?

25 Is it typical that EMS personnel, they take care of the

Tim Rumsey - Cross-examination
By MS. Davis

1 wounds a little bit before they bandaged them?

2 A Not usually. Usually they're just bandaged.

3 Q Did nurses or anyone else attend to the patient before
4 you saw the patient?

5 A No, as I recall, the -- I was there -- as soon as the
6 patient rolled through the door I was there with the patient
7 and actually saw the patient prior to the triage process by
8 the nurse or in conjunction with that.

9 Q Okay. And some nurses did assist with some of the
10 wound care?

11 A Yes.

12 Q In addition to yourself?

13 A Yes.

14 Q All right. And when were the photos taken that we saw?
15 Are you aware?

16 A I do not know.

17 Q You didn't take these photographs?

18 A I did not.

19 Q All right. And as far as you know, on the CT Scan that
20 the patient had, was there a report from that?

21 A Yes, ma'am.

22 Q And did that report indicate that there was any acute
23 hemorrhage or any brain, any significant acute intracranial
24 hemorrhaging or anything like to be concerned with?

25 A The only thing that was of concern was that there was a

Tim Rumsey - Cross-examination
By Ms. Davis

1 piece of bone depressed into the brain.

2 Q Okay.

3 A He didn't have any kind of, as I mentioned earlier sub,
4 subdural hematoma or epidural hematoma.

5 Q Okay. And I believe that's described as a small or
6 mildly depressed fracture in the CT Scan report?

7 A Small or a small -- depressed approximately
8 3-millimeters.

9 Q Okay. And on that impression -- do you have that CT
10 Scan report in front of you?

11 A I do.

12 Q And on that, could you, could you read for it where it
13 says impression?

14 What does, what does that state there?

15 A Impression, number one, there's a comminuted depressed
16 skull fracture involving posterior superior parietal bone on
17 the right. No significant -- it says here note significant
18 injury or hemorrhage. I believe that's suppose to say no
19 significant injury or hemorrhage in the underlying brain.

20 Then, number two, sub-galeal hematoma involving the
21 fracture site on the right and also posterior scalp on the
22 left, but no underlying fracture on the left.

23 Q Thank you.

24 Court's indulgence please, Your Honor.

25 (Pause.)

Tim Rumsey - Redirect examination
By Solicitor Lipinski

1 MS. DAVIS: Your Honor, I have no further questions for
2 this witness.

3 SOLICITOR LIPINSKI: Very briefly.

4 REDIRECT EXAMINATION

5 BY SOLICITOR LIPINSKI:

6 Q Ms. Davis asked you some questions about the nurses
7 assisting you.

8 You stated that the stapling to the two head wounds was
9 care you actually personally rendered to the patient?

10 A Yes, ma'am.

11 Q And also the lacerations to the shoulder and the lower
12 back?

13 A Yes, ma'am.

14 Q But she would of only taken care of the laceration to
15 the forearm?

16 A Correct.

17 Q And was the victim able to describe to you how he came
18 to have these injuries or what he had been hit with?

19 A Yes. Yes, ma'am.

20 Q And what did he describe to you?

21 A He stated he was in a, some type of an argument or
22 altercation with another male and was hit several times with
23 a hammer.

24 Q And in any part, while rendering care to him, did you
25 receive anything that was inconsistent with his version of

Tim Rumsey - Redirect examination
By Solicitor Lipinski

1 events?

2 A No.

3 SOLICITOR LIPINSKI: That's all we have, Your Honor.

4 MS. DAVIS: Nothing.

5 THE COURT: You may step down and be excused. we
6 appreciate your time.

7 WITNESS: Thank you, sir.

8 THE COURT: Thank you.

9 Call your next witness.

10 SOLICITOR LIPINSKI: Your Honor, can we approach just
11 briefly?

12 THE COURT: Sure.

13 (WHEREUPON, a bench conference was held out of the
14 hearing of the jury at this time.)

15 THE COURT: I've being informed that this is a good
16 time to take a short break before we get into the next
17 witness. It may be a little lengthy. So, we'll take a
18 break at this time.

19 Everyone else remain seated.

20 (WHEREUPON, the following takes place outside the
21 presence of the jury.)

22 THE COURT: All right. Before we take our break, I do
23 want to put on the record, to make sure that the record is
24 protected for any later observation by anybody, as to
25 Mrs. Rothbauer's testimony about the state of the victim, I

1 ruled it was an exception to the hearsay rule and that
2 particular rule would be Rule 803(3), South Carolina Rules
3 of Evidence dealing with existing mental, emotional, or
4 physical conditions.

5 Thank you.

6 We'll take about a ten minute break.

7 SOLICITOR LIPINSKI: Thank you.

8 (WHEREUPON, a short recess was taken at this time.)

9 THE COURT: All right. Bring in the jury.

10 (WHEREUPON, the following takes place within the
11 presence of the jury.)

12 THE COURT: You may call your next witness.

13 SOLICITOR LIPINSKI: State calls Dwayne Southard to the
14 stand.

15 Approach the lady in the black to the right and be
16 sworn and take the witness stand.

17 DWAYNE SOUTHARD, having been first
18 duly sworn, testified as follows:

19 DIRECT EXAMINATION

20 BY SOLICITOR LIPINSKI:

21 Q Mr. Southard, am I pronouncing that correctly?

22 A Yes, ma'am.

23 Q And, if you could, state your name spelling your last
24 name for the record.

25 A Dwayne Southard. S-O-U-T-H-A-R-D.

Dwayne Southard - Direct examination
By Solicitor Lipinski

- 1 Q And, Mr. Southard, like the other witnesses, I'm gonna
2 ask that you speak in the direction of that microphone and
3 that you speak up---
- 4 A Okay.
- 5 Q ---so that these last jurors can hear you.
- 6 A (Witness nods affirmatively.)
- 7 Q Mr. Southard, with whom are you currently employed?
- 8 A I'm with Lowe's in Gaffney. I'm a delivery driver.
- 9 Q And in February of 2010, were you similarly employed?
- 10 A I was, had just been kind of laid off from Falkner Pump
11 Service.
- 12 Q And how long had, have you lived in the York area?
- 13 A Oh, I lived in Sharon probably -- well, I been
14 married -- it's gonna be twenty years this year. Just about
15 all my life. You know, since about ten.
- 16 Q So, more or less grew up in that general community?
- 17 A Yes, ma'am.
- 18 Q All right. And you stated you worked for a pump
19 company and now you currently work with Lowe's as a truck
20 driver?
- 21 A Yes, ma'am.
- 22 Q All right. And back in February of 2010 where were you
23 living at the time?
- 24 A On [REDACTED] in Sharon.
- 25 Q And what type of residence did you have there?

Dwayne Southard - Direct examination
By Solicitor Lipinski

1 Was it an apartment, a two story house, single story
2 house?

3 A It was a 16 by 80 single wide trailer.

4 Q And how long had you lived there?

5 A We purchased that land in about '90, since '99 to 2010.

6 Q And have you since moved from that location?

7 A Yes, ma'am.

8 Q Do you still own the land?

9 A Yes, ma'am.

10 Q Do you still own the trailer?

11 A No, I sold the trailer.

12 Q And did you move somewhere else?

13 A Yes, ma'am.

14 Q Are you still living here in York County?

15 A Yes, ma'am.

16 Q All right. And do you remember the evening of
17 February 5th of 2010?

18 A Yes, ma'am.

19 Q Did you work or go anywhere that day that you recall?

20 A No, I didn't really work that day at all.

21 Q And do you have any children?

22 A Yes, ma'am.

23 Q And ^{C.S.} who previously testified, is that your
24 son?

25 A Yes, ma'am.

Dwayne Southard - Direct examination
By Solicitor Lipinski

- 1 Q And do you have any other children?
- 2 A Yeah, I got a little girl, ^{Minor}
- 3 Q And how old is ^{Minor}
- 4 A Thirteen.
- 5 Q And, so, in 2010, would she have been 12?
- 6 A Yes, ma'am.
- 7 Q And---
- 8 A No, actually 11.
- 9 Q Eleven?
- 10 A She just turned -- she was 11 when this incident
- 11 happened. She turned 12 on, in April. So, basically --
- 12 yeah, 12, but 11.
- 13 Q And, so, there's a couple of years time between her and
- 14 C.S.
- 15 A Yes, ma'am.
- 16 Q Is -- who wins that fight?
- 17 Is he bigger than his sister?
- 18 A Well, luckily they don't fight all that much, but they
- 19 do fuss a lot. But, yeah, they -- I think she probably wins
- 20 most of them.
- 21 Q Is she taller than him, smaller than him?
- 22 How would you describe her physical stature?
- 23 A No, he's -- she's shorter than he is, and she's pretty
- 24 stocky for her size though.
- 25 Q On February 5th of 2010, were both of your children

Dwayne Southard - Direct examination
By Solicitor Lipinski

1 home with you that night?

2 A Yes, ma'am.

3 Q And were you-all up?

4 Had anyone gone to bed?

5 Were they in their bedroom?

6 Do you remember where your children were?

7 A Yeah, ^{Minor} was actually in her room and ^{C.S.} was in
8 his bedroom. His bedroom is at the end of the trailer, and
9 as he stated -- I mean he's got a window. He's the one that
10 told me about the truck.

11 Q All right. And was your wife home?

12 A No, she was working.

13 Q Was there anybody else at the home other than you and
14 your two children that night?

15 A No, ma'am.

16 Q And you stated that it's a trailer.

17 Are there any other residences right there on your
18 immediate property?

19 A Yes, ma'am, my sister-in-law and my brother-in-law live
20 right beside us.

21 Q Are they on this same lot?

22 A No, they're not -- well, we actually purchased 28 acres
23 and we split 14 a piece. So, that's -- they -- you couldn't
24 see their house from my house, but you -- they wasn't but a
25 few hundred yards away.

Dwayne Southard - Direct examination
By Solicitor Lipinski

1 Q And is there a tree line or anything like that between
2 your house and theirs that prevents you from seeing it from
3 your residence---

4 A Yes, ma'am.

5 Q ---back then?

6 And what do you remember out of the ordinary happening
7 on Friday, February 5th of 2010?

8 A Well, I -- out of the ordinary, I was, like any man, I
9 was laying around watching TV in my underwear, and around
10 about 10:00, a little after 10:00 or something, I don't
11 really know exactly what time it was, C.S. come in there
12 and said daddy, there's somebody parked down at the end of
13 the road and somebody's walking up the driveway. So, I, out
14 of, just not thinking, I walked straight outside and he was
15 standing -- he never come up on the porch. He was just
16 standing down on the ground right there at the porch. The
17 porch is about two and a half foot higher than the ground.

18 (WHEREUPON, a photographs was marked as State's Exhibit
19 No. 3 for identification purposes only at this time.)

20 Q All right. Let me show you what's been marked as
21 State's Exhibit No. 1, I'm sorry, State's Exhibit No. 3, and
22 ask you if you recognize what is depicted in this photograph
23 as it relates to your residence on Wycoff in 2010?

24 A Yeah, that's the -- that's my trailer and where
25 everything happened.

Dwayne Southard - Direct examination
By Solicitor Lipinski

1 Q Now, is that how your house looked back then?

2 Some of these aerial photographs are actually taken and
3 some of these things may or may not---

4 A Yeah, the only difference is the white car wasn't there
5 right in that spot.

6 Q Right in that spot that wasn't where the white car was
7 parked that night, but in terms of the relationship of the
8 trailer to the road and other, the---

9 A Yes, ma'am.

10 Q ---any other outbuildings on the property, does that
11 accurately depict how it looks that night?

12 A Yes, ma'am.

13 SOLICITOR LIPINSKI: Your Honor, at this time we would
14 move State's Exhibit No. 3 into evidence.

15 MR. COOK: Without objection, Your Honor.

16 THE COURT: In without objection.

17 SOLICITOR LIPINSKI: Thank you.

18 (WHEREUPON, State's Exhibit No. 3 was received into
19 evidence at this time.)

20 (WHEREUPON, seven photographs were marked as State's
21 Exhibit Nos. 4-A through 4-G for identification purposes
22 only at this time.)

23 Q Let me also show you what's been marked as 4-A through
24 4-G, and ask you if these are a street level view of your
25 yard and the surrounding area.

Dwayne Southard - Direct examination
By Solicitor Lipinski

1 A Yes, ma'am.

2 Q And these pictures, is there anything that is changed
3 about your yard in terms of it being for sale or any items
4 being removed from your yard that was different than from
5 the night in question?

6 A Yes, ma'am, the underpinning is taken out from under
7 the trailer because the people had just, you know, had
8 purchased it and they was fixing to get ready to move it,
9 and the deck is gone, the front deck.

10 Q But otherwise, do they accurately depict where the
11 trailer was situated on the property in relation to the road
12 and your driveway?

13 A Yes, ma'am, because -- yeah, it's exactly right because
14 the tongue ain't even on the trailer yet to be moved.

15 SOLICITOR LIPINSKI: Your Honor, at this time the State
16 would offer 4-A through G into evidence.

17 MR. COOK: Without objection, Your Honor.

18 THE COURT: In.

19 (WHEREUPON, State's Exhibit Nos. 4-A through 4-G were
20 received into evidence at this time.)

21 Q Mr. Epting, if you could bring up State's Exhibit No.
22 3.

23 Here's a glass of water, Mr. Southard.

24 A Thank you.

25 Q And this is a laser pointer. If you press the red

Dwayne Southard - Direct examination
By Solicitor Lipinski

1 button, it creates a red dot on the screen. Just gonna,
2 before we go through your testimony, try and give the jury a
3 general idea of the area out there.

4 when ^{C.S.} comes and, and tells you, stated you were
5 watching TV, were you in your bedroom or living room?

6 A I was in the living room laying on the, covered up on
7 the chair. Just --

8 Q And was your daughter, ^{Minor} in the living room with
9 you or in her bedroom?

10 A She's in her bedroom.

11 Q If you could turn the lights down.

12 State's Exhibit No. 3 is on the overhead projector, and
13 if you pick up a little glare, that type thing, you can step
14 off the stand to see it, but briefly, if you could, using
15 that laser pointer, what is actually Wycoff Road versus your
16 driveway?

17 A That is Wycoff Road right through there, and that's my
18 driveway. I'm shaking. I'm nervous. So --.

19 Q I understand.

20 A -- with that.

21 Q Okay. Well, we'll try not to use the laser pointer
22 unless we have to.

23 So, the gray line going across the top of the picture
24 would be Wycoff Road?

25 A Yeah, and actually says Wycoff Road. That's the gray

Dwayne Southard - Direct examination
By Solicitor Lipinski

1 line, and that horseshoe is like my driveway right through
2 there.

3 Q So, your driveway actually comes up you said in a
4 horseshoe, makes a turn around, and then goes back out?

5 So, it's not a one, one lane driveway?

6 It's actually a, a U-shaped or sort of U so to speak?

7 A Right.

8 Q All right. And which end of your residence was
9 C.S. bedroom?

10 A Right there where the white car is right there.

11 Q All right. You stated that white car wasn't in that
12 exact location that night, but that's the edge where his
13 bedroom would of been situated?

14 A Yes, ma'am.

15 Q And the area that is, that is kind of encircled by your
16 driveway and Wycoff Road, are there any street lights or
17 yard lights in that vicinity or---

18 A Yeah, right in front of that building right there.

19 Q So, the small gray pole, kind of at that corner, is a
20 yard light or a street light?

21 A Yes, ma'am.

22 Q Do you remember if it was illuminated that night?

23 A Yes, ma'am.

24 Q And as a result of that, is it possible to see the end
25 of your driveway?

Dwayne Southard - Direct examination
By Solicitor Lipinski

1 A Yeah, you can see just about the whole, inside that
2 whole circle there.

3 Q And you stated -- we're looking in the back of your
4 residence?

5 A Uh-huh. (Affirmative).

6 SOLICITOR LIPINSKI: Court's indulgence one moment,
7 Your Honor.

8 (Pause.)

9 Q Showing you State's Exhibit 4-G for the record, is this
10 now standing more or less from Wycoff Road?

11 A Yes, ma'am, that's exactly -- whoever took that picture
12 is probably standing in the road.

13 Q All right. And looking back up at -- when we looked at
14 the aerial photograph, is that more or less the back of the
15 residence?

16 A No, this is the front.

17 Q Right.

18 In this photograph we see the front.

19 The photograph we just saw would of been more or less
20 the back?

21 A Yes, ma'am, it was the back.

22 Q All right. Thank you for correcting me, and please do
23 that cause obviously you know your residence a lot more than
24 I do.

25 You referred to a front porch.

Dwayne Southard - Direct examination
By Solicitor Lipinski

1 was that -- that's not depicted in this photograph?

2 A Hu huh. (Negative).

3 It's not.

4 Q Where would that have been on the night in question?

5 A Right there where the white door there is.

6 Q All right. So, there's a white door approximately half
7 way down the trailer.

8 That would of been more or less your front door?

9 A Yes, ma'am.

10 Q And there would of been a porch right there so that you
11 could get up to that, to that level of the residence?

12 A Yes, ma'am.

13 Q And when we talk about the porch, was it ten by ten,
14 four by four?

15 Do you remember approximately?

16 A If I'm correctly, I think it was 12 by 16.

17 Q So, a fairly large porch?

18 A It's a fairly good size porch.

19 Q And you stated when you walked out the door at that
20 time, where did you see the gentleman that your son warned
21 you about?

22 A Standing right in there. He was right there -- I mean
23 like the steps come down, and it wasn't but like three or
24 four steps on the porch, and the railings come here. He was
25 standing on this side, on the right-hand side of the steps

Dwayne Southard - Direct examination
By Solicitor Lipinski

1 as you're looking down.

2 Q And if you could -- could you bring the lights back up?

3 (Bailiff complies.)

4 Q Thank you.

5 And was he saying anything to you?

6 A Yes, he was, he was hollering about Jamie Gilfillian,
7 bring Jamie Gilfillian out, you're Jamie Gilfillian. I said
8 I don't -- I ain't Jamie Gilfillian. I don't know who you
9 are. You know, he just kept on about Jamie Gilfillian.

10 Q Do you know Jamie Gilfillian?

11 A Yes, I do know him.

12 Q Does he -- has he ever lived with you?

13 A No, ma'am.

14 Q Has he ever lived beside you?

15 A No, ma'am.

16 Q Do you know where he lives in Sharon?

17 A Yes, I do.

18 Q Approximately how far from your house to, to his house
19 is it?

20 A couple of miles, a couple of blocks?

21 A Oh, yeah, it's a good two, two and a half, maybe even
22 three miles. I mean --.

23 Q Have you been on, out on your property at anytime in
24 the past six months?

25 A Jamie Gilfillian has never been on my property that I

Dwayne Southard - Direct examination
By Solicitor Lipinski

1 know of, you know.

2 Q And when he asked you and was yelling about Jamie
3 Gilfillian, how did you respond to that?

4 A I was just telling him I ain't Jamie Gilfillian, that
5 he needs to get off my property, and I asked him what were
6 you doing with a hammer. I kept asking him what are you
7 doing with that hammer.

8 Q And, so, you saw the hammer?

9 A Yeah, I seen he was holding a hammer.

10 Q And could you describe -- was that -- was it a normal
11 hammer?

12 was there anything unusual about it if you recall?

13 A I didn't pay that much attention about the hammer at
14 all.

15 Q All right. It's just a hammer?

16 A All I -- I just noticed he had a hammer.

17 Q All right. Is he holding it to his side?

18 Is it in a belt loop of some type?

19 A No, he's got it in his right-hand standing there with
20 the hammer.

21 Q Is he moving it around in any fashion?

22 A He's just holding it. You can tell he's holding it
23 with a -- he had the hammer for a reason and it wasn't to
24 carry it around cause he's fixing to do carpentry work.

25 Q How would you describe his demeanor and appearance to

Dwayne Southard - Direct examination
By Solicitor Lipinski

1 the jury?

2 How did he appear to you?

3 A He, he was definitely messed up on something. I mean I
4 can't tell you exactly what he was messed up on. I don't
5 know if he was just that belligerently drunk or on cocaine
6 or on some kind of pills or what. But he was definitely on
7 something.

8 Q Could you understand what he was saying?

9 A He -- I could make out the words Jamie Gilfillian, you
10 cut me with a sword, and la la la. I mean he kept on.

11 Q And when he said you cut me with a sword, had you ever
12 cut him with a sword?

13 A No. At that point I think he thinks I'm Jamie
14 Gilfillian. I mean I don't know what he's thinking.

15 Q And when he talked about the sword and he said you cut
16 me with a sword, did he indicate where he had been cut
17 allegedly with this sword?

18 A Well, that's what he did. He actually -- when he was
19 standing at the bottom of the porch like that, he actually
20 laid that hammer down and pointed at his arm. You cut me
21 with a sword, you cut me with a sword.

22 Q And how did you respond to that?

23 A As he done that I eased down there because he, like I
24 said, he, he ain't -- he's out of it, and I eased down there
25 and I grabbed the hammer from him. Well, from -- not from

Dwayne Southard - Direct examination
By Solicitor Lipinski

1 him, but he laid it right there at the edge of the porch,
2 and started hollering you cut me with a sword.

3 Q And when you take the hammer, how did he react to that?

4 A He grabbed my stepping stone.

5 Q And what did he do with the stepping stone?

6 A He threwed it at me and knocked one of grills off the
7 porch and my kids was at the door, and I was -- I'm not
8 looking back at them, but I'm thinking they're right there
9 at the door, and it's a glass door.

10 As ^{C.S.} said, it's like a screen door, but it's,
11 it's glass. And when he done that, I come off the porch and
12 I told him you need to get off my property right now, and I
13 might of been cursing and whatever, you know. I can't tell
14 you exactly what words, but at this point he needs to get
15 away from my front door because if he's gonna start throwing
16 stuff, he can throw it through my front door and hurt my
17 kids.

18 Q And does he, after he throws the stepping stone, does
19 he stay in the immediate vicinity of the porch or does he go
20 anywhere else?

21 A He's walking towards the truck, and that's, like I'm
22 saying, just get you off my property, get in the truck, and
23 leave.

24 Q And where, looking back at State's Exhibit 4-G, if it's
25 in this picture, and if I need to go bring up another

Dwayne Southard - Direct examination
By Solicitor Lipinski

1 picture I will, where approximately was his truck that
2 night?

3 A It wasn't even in that picture right there.

4 Q Okay. Where -- would it have been farther back towards
5 Wycoff Road or towards your end of the driveway?

6 A It would be -- it was almost parked in the center. It
7 was toward the other end of the driveway.

8 Q Okay. Let me go back---

9 A Not quite center. But, you know, three-quarters of the
10 way or so.

11 Q Let's go back to State's Exhibit 3, the aerial
12 photograph.

13 A C.S. -- I'm sorry.

14 Q Okay. Let me show you -- okay. That's fine. But
15 understand the jury wasn't out there that evening. It's
16 important that they understand.

17 A Right.

18 Q And, so, I may back you up and I apologize for
19 interrupting you if I did.

20 A That's no problem.

21 Q Showing you State's Exhibit No. 3, which is the aerial
22 photograph of your property, approximately where was his
23 truck parked when you initially walked him back away from
24 your porch?

25 A Right about there. About the top of that pine tree.

Dwayne Southard - Direct examination
By Solicitor Lipinski

- 1 Q All right. You---
- 2 A In the road.
- 3 Q You got about 20 pine trees on your property.
- 4 A I'm sorry. I'm trying to get this where it's at.
- 5 Q I understand.
- 6 A Right in there.
- 7 Q Is he on [REDACTED] or is he in your driveway?
- 8 A He's in my driveway at this point.
- 9 Q All right. And that first main leg or that leg that
- 10 stretches further out?
- 11 A We come right here and walked across -- where's it at?
- 12 Across the yard like that to his truck.
- 13 Q All right. So, in that interior grassy area site---
- 14 A Yes.
- 15 Q ---close to that?
- 16 A Yeah. Yes, ma'am.
- 17 Q And are you aware, at that time, whether or not there's
- 18 anyone with this gentleman?
- 19 A Yeah, because I could hear her hollering get in the
- 20 truck, get in the truck. I'm -- I ain't gonna sit there and
- 21 say she said his name, but she said a name, and I
- 22 couldn't -- I wasn't paying that no attention, and I'm
- 23 thinking just get in this truck because when I walked off
- 24 the porch, I told my boy call 9-1-1 and grab the shotgun
- 25 because I knew this wasn't good.

Dwayne Southard - Direct examination
By Solicitor Lipinski

1 Q And does he get in the truck?

2 A No, he opens his tool box up -- well, he opened the
3 door and then he opened his tool box up and grabbed a tube
4 of chalking and chunked that tube of chalking at me.

5 Q And at that -- does it hit you in any way?

6 A No, he didn't hit me.

7 Q And do you know that it's a tube of chalking?

8 A Yes, I do.

9 Q You can see---

10 A No, I could see the sharp point. I could tell -- cause
11 I'm thinking, at this time, I'm thinking I done walked out
12 here, and if he pulls a gun out I'm a, I'm a goner. I says
13 I done done something really stupid. I thought I'm just --
14 he's gonna pull a gun out and shoot me and it was -- if he
15 done that.

16 Q And, so, when he chunks that chalk gun at you, at that
17 point are you able to identify that it's a chalk gun or do
18 you know it's some---

19 A It was not a chalk gun. It was a tube of chalking.

20 Q Oh, it was a tube of chalking?

21 A Yes, ma'am.

22 Q All right. And does he get in the truck?

23 A No, she was hollering get in the truck, get in the
24 truck. She just stormed off and left us and I'm thinking
25 what am I doing now, and I'm thinking the whole time, I said

Dwayne Southard - Direct examination
By Solicitor Lipinski

1 if we just stay calm, everything like that, my boy -- if I
2 told him to call 9-1-1 I felt certain that they done called
3 9-1-1, and I'm thinking myself just stay calm, maybe this,
4 maybe the cops can get here before, you know, anything bad
5 could happen.

6 Q And you said she stormed off.

7 Did she storm off on foot?

8 A No, she took off in the truck.

9 Q All right. And leaves?

10 A She's gone.

11 Q You can't see the truck anymore?

12 A Can't see the truck.

13 Q And [REDACTED], is, is it -- does it, does it connect
14 to the roads?

15 Is it a dead-end cul-de-sac?

16 What would you consider it?

17 A Well, if you're coming off [REDACTED], it's a dead-end
18 cul-de-sac, and what they did, they went to the dead-end
19 cul-de-sac and turned around and they was, they was -- she
20 was aiming going back out to [REDACTED] when she stormed
21 off. So, she would be heading back towards Sharon.

22 Q All right. And how did he react to her departure?

23 A I, I'm pretty sure he was kind of shocked that she left
24 him too, you know. I mean he's just -- we was just standing
25 there looking at each other, you know, and, and we was doing

Dwayne Southard - Direct examination
By Solicitor Lipinski

1 that. He kind of walked around and we was just kind of
2 walking down the middle of the road, you know, and he was
3 acting like he was calming down, you know, and I'm thinking
4 just let the cops go ahead and get here, you know.

5 And about that time she come back and then I don't how
6 fast she was running. It was all I could do to get out of
7 the way, and when I, when I got -- when I jumped to get out
8 of the way he lunged at me.

9 Q And where do you two land?

10 A We land in the ditch.

11 Q And do you land on the ditch between [REDACTED] and
12 your residence or on the other side of [REDACTED]?

13 A On the other side of Wycoff.

14 Q And, again, in this picture, are you closer to the
15 left-hand side where there---

16 A By then we walked down and we would be walking down the
17 middle of that road, and about where the W is on Wycoff,
18 that's where the other side of the road we went to, hit the
19 ditch, and we would of been about -- let me see where it's
20 at.

21 Q And it may be hard to point that out, but you said
22 there's a Wycoff Road written in the right at the end of
23 your driveway?

24 A Yes, ma'am.

25 Q And you're basically in the ditch right before that W?

Dwayne Southard - Direct examination
By Solicitor Lipinski

- 1 A Before the w. Right before the w.
2 Q And you said that you're on the far side of the road---
3 A Yeah, the opposite side of the road where the, the
4 driveway is.
5 Q All right. And you stated he lunged at you?
6 A Ma'am?
7 Q You stated he lunged at you?
8 A Yeah, he did lunge at me.
9 Q And what happened after that?
10 A When he lunged at me he grabbed the hammer -- we went
11 down on the ground and I'm actually on top of him. We just,
12 just down like this right here, I'm kind of straddling him,
13 and then that's when every -- she must of got out of the
14 truck. She started kicking me. I started being kicked in
15 the side of the head holding him like that, about six or
16 seven different times. Once she got -- I reached for her.
17 When I reached for her, he come up, and when he did that I
18 remember being hit and, and everything.
19 Q Was he hitting you with his fist?
20 A He's hitting me with his hammer, with the hammer.
21 Q And do you remember where you were hit with the hammer?
22 A I was being -- I know I got hit two or three times in
23 the head. He took, stuck the claw in me there, right here.
24 It's claw marks, and had a cut here. I had -- in the back.
25 I mean he -- I got hit anywhere from eight to thirteen

Dwayne Southard - Direct examination
By Solicitor Lipinski

1 times.

2 Q Does Misty ever hit you with the hammer to the best of
3 your recollection?

4 A No, she -- not that I know of cause she kicked me and I
5 don't believe she hit me with no hammer because I do recall
6 him having the hammer after I run back with ^{C.S.}

7 Q And how does it -- after he starts hitting you with the
8 hammer, what happens after that?

9 A When Brad started -- I can remember being on my knees
10 and I don't know, God willing or what happened, I managed to
11 get up and I run across the road and it was funny cause I
12 toad ^{C.S.} I said, you know, the next day I was like, you
13 know, it's funny I didn't fall going across that big ditch
14 right there. He said daddy, you did. I was like well, I
15 didn't realize I had fell.

16 But we got up to the road, and he had that cow stick,
17 you know. It's not really a whip. What it is is a
18 fiberglass rod. It's got a leather handle on it and it's
19 probably about 4-foot long and cattlemen uses it to pop the
20 cows going into the, the, to make them go up through the
21 bays and stables and stuff like that to keep them herded up,
22 to keep them moving, and it's just a fiberglass rod, and I
23 did have it for the fishing technique. That's funny, but it
24 does work.

25 Q And where is ^{C.S.} as you come across [REDACTED]?

Dwayne Southard - Direct examination
By Solicitor Lipinski

1 Is he up back at the house or is he at the road,
2 between the house and the road?

3 A Yeah, he's -- he's -- I can't get this thing to work.

4 Q That's fine.

5 A He's actually in front of the blue building to the left
6 of it. He would be -- where the pine tree is beside the
7 blue building, he would be right about middle of that at the
8 edge of -- right there in the driveway.

9 Q So, you kind of had a storage shed or a blue building
10 right there on your property that we can see the back of?

11 A Yes, ma'am.

12 Q And he's in that vicinity?

13 A Yes, ma'am, he's actually standing in the middle of the
14 driveway in that vicinity.

15 Q And as you come across---

16 A As -- yes, ma'am, as I come across.

17 Q ---the driveway and the---

18 A He never did run down there to us and thank God he
19 didn't.

20 Q And once you get back up to him, does Brad or, or do
21 the -- does the man and the woman stay in your property?

22 A By then they done -- I guess when she turned -- she
23 come back down. She spun in our driveway, driveway and was
24 parked in our yard right about in front of the -- there it
25 is. Right about, right in that area and---

Q So, just below [REDACTED] is written?

A It's in my yard, yes, ma'am. Below where [REDACTED]

3 that she parked -- she was parked in the yard and I come
4 running back across the yard right there, and he come and he
5 was standing in -- I mean it looked like a horror scene

6 cause he was standing in front of the truck with the lights
7 on holding the hammer like that, and I don't know if he seen
8 C.S. with that and it must of been enough to make him

9 stop or, or if he just got wore out from -- I don't know.

10 But he did get in the truck then, and they, they

11 crossed the ditch right there at about the pine tree because
12 it -- I mean it -- they liable -- they like to got stuck

13 cause I'm thinking myself they gonna get this truck stuck

14 right there, and then they gonna be stuck. You know, what

15 if they get back, come back -- but I did, I did know the law

16 should be coming. But, you know, you don't never know how

17 long that's gonna take, and at this time I mean -- I mean I

18 know what's going on, but I couldn't -- I can't put time

19 frames on it. You know, I don't know how long it took for

20 all this to happen.

21 Q And once you get back to C.S. do you stay out in

22 your yard or do you go into your house?

23 Do you recall?

24 A Once they got out of sight we walked to the front porch

25 and I told him to go get me some shorts or something because

Dwayne Southard - Direct examination
By Solicitor Lipinski

1 I was, like I said, I was in my underwear barefooted.

2 Q And do you remember going to the hospital --?

3 A Yeah, I do.

4 Q -- and being treated by the physician assistant, Mr.
5 Rumsey?

6 A Yes, I do.

7 Q And he described some staples to your head.

8 A Oh, yeah.

9 Q And do you still have scars or anything of that as
10 they---

11 A Yeah, I've got scars.

12 Q And, if you could, just show the jury where, on your
13 head, you have these scars or where these injuries were now
14 that you're here in front of us?

15 A I got -- I don't know if you can see them, but if I had
16 a haircut you would. They're right in there, up here, and
17 there's little ones over here.

18 Q And---

19 A I've got claw markings in my arm. There's -- these,
20 these here you might not be able to see. I mean that's
21 basically defending myself. There's another one on my back,
22 a little -- this one healed pretty good. A little scratch
23 there.

24 Q And you stated you still -- do you still have scars to
25 your upper arms?

Dwayne Southard - Direct examination
By Solicitor Lipinski

1 A Yes, ma'am.

2 Q And to your lower forearm?

3 A Yes, ma'am.

4 SOLICITOR LIPINSKI: And, Your Honor, at this time we
5 would just ask him to step down and just show those to the
6 jury.

7 Do you have any objection to that?

8 MR. COOK: No objection.

9 THE COURT: All right. You may step down.

10 (Witness comes down from the stand.)

11 A These here are not quite as I guess -- but you can tell
12 what they're, exactly what they are.

13 Q All right. And if you could retake the stand, Mr.
14 Southard.

15 A (Witness returns to the stand.)

16 Q Let me take you back to State's Exhibit No. 1-A.

17 Do you remember when this photograph was taken?

18 A Yes, I do.

19 Q And could you dim the lights one more time, and let me
20 show him these pictures.

21 Did you have any of these injuries prior to the night
22 in question?

23 A None.

24 Q None of them are work related or from working out in
25 the yard or anything of that nature?

Dwayne Southard - Direct examination
By Solicitor Lipinski

1 A No, ma'am.

2 Q And do you recall when these photographs were taken,
3 approximately how long after the incident?

4 A It was the next morning whenever the officer come and
5 got his hearing aid.

6 Q This is States 1-A. I want to show you 1-B, this
7 bruise.

8 Did you have this prior to the night in question?

9 A No, ma'am.

10 Q I'm gonna draw your attention to the side, this bruise
11 or laceration here.

12 Did you have that prior to the night in question?

13 A No, ma'am.

14 Q These bandages here, did you have any stitches or
15 sutures beneath them?

16 A Yes, ma'am.

17 Q Did you ever have to go back for follow-up care and
18 have those removed?

19 A Yes, ma'am.

20 Q These staples to the back of your head, did you go have
21 to follow-up with a neurosurgeon or other medical care for
22 that?

23 A My wife took them out. She's a nurse at Piedmont.

24 Q Your wife's actually a nurse at Piedmont?

25 A Well, she was a nurse, nurse then at Piedmont. She's

Dwayne Southard - Direct examination
By Solicitor Lipinski

1 at Chester right now.

2 Q All right.

3 A Trying to save myself some money.

4 Q This injury at 1-D, these, these are injuries to your
5 ear and that -- did that happen on the night in question or
6 before?

7 A Right. Yes, ma'am.

8 Q It happened before the night in question, those
9 injuries?

10 Did you have them before this all happened or as a
11 result of this happening?

12 A Oh, this was a result of this happening.

13 Q And 1-E, this bruise to your back left shoulder, was
14 that as a result of this altercation?

15 A Yes, ma'am.

16 Q And, so, you stated you had staples to the back right
17 side of your head and also to the back left of your head?

18 A Yes, ma'am.

19 Q And that injury that's in 1-G, that's the residual scar
20 that you just showed the jury?

21 A Yes, ma'am.

22 Q And also the injury to your forearm, that scar?

23 A Yeah, they had that bandage up pretty good because
24 where it actually, actually went they was afraid it might of
25 broke the bone, but it didn't. They done the x-rays and the

Dwayne Southard - Direct examination
By Solicitor Lipinski

1 bone wasn't broke, but it was, you know, bruised up real
2 bad.

3 SOLICITOR LIPINSKI: Court's indulgence one moment.
4 (Pause.)

5 SOLICITOR LIPINSKI: That's all we have of this
6 witness.

7 THE COURT: Cross.

8 CROSS-EXAMINATION

9 BY MR. COOK:

10 Q Mr. Southard?

11 A Southard.

12 Q You stated -- Southard. I'm sorry.

13 A Okay.

14 Q You stated that, that my client threatened you.

15 How so?

16 A When you're standing there with a hammer, and you throw
17 a stone at me or stepping stone, that's a pretty big threat
18 at ten o'clock at night.

19 Q Now, when he threw the stepping stone, you'd already
20 taken the hammer at that point, right?

21 A I had. He laid the hammer down, yes.

22 Q Okay. All right. I mean -- so, you're admitting that
23 he laid the hammer down?

24 A I'm here to tell the truth about it.

25 Q Okay. Did you feel threatened when he laid the hammer

Dwayne Southard - Cross-examination
By Mr. Cook

1 down?

2 A Yes, cause he picked the stepping stone up and throwed
3 it at me.

4 Q Okay.

5 A And that was a threat for my kids too because that's
6 when I told him he needed to leave.

7 Q Right.

8 You said he kept saying that you stabbed him?

9 A He said Jamie -- he kept hollering for Jamie
10 Gilfillian, and then like you stabbed, you stabbed me, yes,
11 sir.

12 Q You sure he wasn't saying he stabbed me?

13 A No, he said you, he said he. He, he don't even know
14 what he said because he won't --.

15 Q How do you know what my client knows?

16 A I don't know. I was just---

17 SOLICITOR LIPINSKI: Your Honor, object as to his
18 arguing. He's asked the witness whether or not he---

19 THE COURT: well, he -- well, he -- let's move on. Ask
20 and answered the question.

21 Q What I'm getting at is this, sir, you're trying to --
22 and this is a question. You're trying to portray to the
23 jury---

24 SOLICITOR LIPINSKI: Your Honor, object.

25 THE COURT: That's not, that's not, that's not a

Dwayne Southard - Cross-examination
By Mr. Cook

1 question. Ask him a question.

2 Q Are you trying to portray to the jury that my client
3 thought you were Jamie Gilfillian?

4 A I really believe he might of thought I was, yes, I do.

5 Q You really believe he might of thought or he did think
6 that?

7 A I mean I can't tell you what he's thinking right then.

8 Q When you're addressing somebody---

9 A Uh-huh. (Affirmative).

10 Q Let me clear all this up.

11 Didn't he ask you where Jamie Gilfillian is?

12 A Yeah, he did at first.

13 Q Well, what did---

14 A He said bring Jamie Gilfillian out.

15 Q Okay.

16 A And he was hollering then you're Jamie Gilfillian, and
17 he was hollering -- I mean you had to be there.

18 Q If, if he asked you where Jamie Gilfillian is, why do
19 you think he thought you were Jamie Gilfillian?

20 A Cause he started hollering you cut me with a sword.

21 Q And then he wanted to show you where you cut him with a
22 sword?

23 A Yes, sir, he was --.

24 Q You just wanted him to leave, is that correct?

25 A Oh, yes.

Dwayne Southard - Cross-examination
By Mr. Cook

1 Q Okay. Then why did you follow him to the road?

2 A Cause he threwed a stepping stone at me and he wasn't
3 trying to leave on his own. When I walked him to the road
4 he left because I did have a hammer in my hand.

5 Q Now, I thought your testimony was that he left on his
6 own, isn't that correct?

7 A No.

8 Q You said he started leaving?

9 A When we were walking out, he would -- I, I take that as
10 he's gonna get in the truck and leave, yeah.

11 Q Okay. My question to you is why did you follow him
12 then if you were just waiting for the police to get there,
13 and all you wanted was for him to go---

14 A Cause he never offered to go until I walked him, come
15 off the porch and walked with him.

16 Q Okay. That light in your driveway, which way is it
17 facing, towards your house or towards the road?

18 A It's just one of them green night lights that -- let's
19 see. The bulb was -- it just shines -- it's a big light
20 that shines straight down.

21 Q Now, at some point you saw that he was gonna go get in
22 the truck---

23 A We were standing at the---

24 Q ---is that correct?

25 A ---back of the truck when he, I had opened the door.

Dwayne Southard - Cross-examination
By Mr. Cook

1 Q How close were you to, to him at that point?

2 A Probably about from me to you.

3 Q Okay. And at that point you hadn't turned around to go
4 back to your house?

5 A I was hoping he got in the truck and leave.

6 Q Right.

7 I mean I'm asking you did you turn around to go back to
8 your house when you saw that he was going on to the truck
9 with your assistance, your calm assistance?

10 A (Witness nods negatively.)

11 No.

12 Q Well, why did you still stay there next to him then?

13 A Cause she pulled off and I didn't have no choice, and I
14 didn't want him to come back up there and threaten me and
15 the kids at my house.

16 Q When she pulled off, couldn't you have said we're going
17 back to the house, you stay here, you're in the road now,
18 you're not on property?

19 A It wasn't -- it wasn't as simple as that.

20 Q Was it not?

21 A No, sir.

22 Q Well, why wasn't it?

23 A Mr. McCarter didn't make it simple.

24 Q I'm not asking you about what he did.

25 I'm saying why didn't you make it simple?

Dwayne Southard - Cross-examination
By Mr. Cook

1 A Because I couldn't leave and leave him out there by
2 himself until the police got there because I knew the police
3 would be coming.

4 Q Didn't you---

5 A I did not want him being out there by hisself and he
6 could come back and do something.

7 Q You're saying to me that you couldn't have left?

8 SOLICITOR LIPINSKI: I object.

9 A I wasn't gonna turn my back on him.

10 SOLICITOR LIPINSKI: This question has been asked and
11 answered at this point about---

12 THE COURT: Well, it's cross-examination.

13 Go ahead.

14 A I wasn't -- I didn't trust him enough to turn my back
15 on him, no, sir.

16 Q Then why did you walk to the house like this?

17 (WHEREUPON, Mr. Cook trips over a chair at this time.)

18 A Then I fell like that.

19 Q Probably so.

20 It was through the chair in your yard?

21 A I think it's ditches.

22 Q Okay. You couldn't, at anytime, just leave him alone
23 with his truck?

24 A No, she left.

25 Q You couldn't leave him alone in your yard -- in the

Dwayne Southard - Cross-examination
By Mr. Cook

1 road?

2 A Nope.

3 Q Okay. How do you know where Jamie Gilfillian lives?

4 A well, I've lived in Sharon just about all my life, and
5 everybody around Sharon knows Jamie Gilfillian.

6 Q Now, when you were talking to Officer Riley, you never
7 mentioned to him once that my client was saying that he was
8 gonna cut you, did you?

9 A I never said he was gonna cut me.

10 Q Okay. Isn't today the first time you're saying that
11 then?

12 A I didn't say he said he was gonna cut me then. I said
13 he said you cut me with a sword.

14 Q Okay. You never mentioned that to the police officer?
15 Throughout the whole investigation you told the police
16 officer that he said that, that Jamie cut him with a sword,
17 is that correct?

18 A I don't really recall hardly what I said to the police
19 officer that night.

20 Q So when did the fight actually happen then?

21 A It really never was a fight. It was just when he
22 lunged at me we went down, and then I started being kicked.
23 I mean as far as fight, fist throwing fight, no. It was a,
24 being kicked and then he grabbed the hammer and he started
25 hitting me with it.

Dwayne Southard - Cross-examination
By Mr. Cook

1 Q All right. So, you're saying he lunged at you, grabbed
2 you with that lunge, and took you to the ditch?

3 A Yeah, we come around like that.

4 Q Okay. Just a minute ago you said that you guys went to
5 the ditch when the truck came back and you had to dodge---

6 A We did.

7 Q ---and that's what got you in the ditch?

8 A And I said -- and I also said when I dodged he lunged
9 for me.

10 Q Okay. When you dodged, he lunged at you?

11 A Yes, sir.

12 Q That's simultaneous.

13 And then you ended up on top of him in the ditch?

14 A Yeah, it -- we come over just like that, yes, sir.

15 Q Okay. And what did you do when you were on top of him
16 in the ditch?

17 A Just basically having him pinned down, but holding a
18 hammer, we both had our hand on the hammer at that time, and
19 I didn't want to let go of the hammer then.

20 MR. COOK: I beg the Court's indulgence.

21 (Pause.)

22 Q Earlier you said that my client never came on your
23 porch, is that correct?

24 A No, he never did come on the porch.

25 Q All right. And how did the fight break up?

Dwayne Southard - Cross-examination
By Mr. Cook

1 A What do you mean?

2 Q How did the fight break up?

3 A As I spoke before, somehow or another I was on my knees
4 when, after I been hit and I got up and run back across the
5 road.

6 Q Okay. And he -- you said he had the opportunity to
7 pursue you, but you don't know why he didn't?

8 A Sir?

9 Q You said earlier, and I'm just clarifying---

10 A Okay.

11 Q ---that he had the opportunity to pursue you, but you
12 don't know why he didn't?

13 A Well, yeah. Well, when I went up there I had ^{C.S.}
14 and that's when he had that stick, and I don't know if
15 that's the reason he stopped because he seen somebody else
16 with a stick or, or if he just was tired. That's---

17 Q When you say stopped though, did you mean he started to
18 chase back after you at the house and then didn't stop or
19 did he ever chase you back towards the house?

20 A He chased me back across the road and he was standing
21 in the -- he stopped in front of the truck in the, in my
22 yard holding the hammer, and that's when she was hollering
23 back at him to get in the truck, and they left and went
24 across the ditch.

25 MR. COOK: Thank you, Your Honor. No further

Dwayne Southard - Redirect examination
By Solicitor Lipinski

1 questions.

2 THE COURT: Redirect.

3 SOLICITOR LIPINSKI: Just briefly, Your Honor.

4 REDIRECT EXAMINATION

5 BY SOLICITOR LIPINSKI:

6 Q Other than the hammer, you stated that the, that Mr.
7 McCarter had when you stepped out on the porch, did you walk
8 outside with a hammer of your own of any kind?

9 A No, ma'am.

10 Q Did you walk outside with a weapon of any kind?

11 A No, ma'am.

12 Q And you stated when you were initially able to get this
13 hammer away from him when he sets it down on the porch, is
14 he on the porch when he sets it down?

15 A No, ma'am, he's standing there. I mean I don't know
16 why he done it, but I mean he, he was just -- I'm telling
17 you, the man was out of it. He was, he was, he was messed
18 up on something really bad, and -- but he laid it down, and
19 then he started hollering you or he, I can't exactly say
20 exactly -- I mean I think he was hollering you cut me. I
21 mean that's the reason I said I thought maybe he was Jamie
22 Gilfillian, I mean that I was Jamie Gilfillian, and
23 sometimes I still think he thought I was to this day. But
24 at the time that he thinks he might of got him, but I mean,
25 I can't speculate on what, you know, he thinks.

Dwayne Southard - Redirect examination
By Solicitor Lipinski

1 Q I understand.

2 When he set it down on the porch, cause you said he set.
3 it down on the porch, he's not on the porch --

4 A Right.

5 Q -- did he set it on the steps, the decking, or railing?

6 A He set it right there on the decking because, like I
7 said, the decking is about two and a half foot to three foot
8 high, and he just laid it down. And I mean I seen an
9 opportunity to, you know, get the hammer away from him. At
10 least I ain't no threat with that, and -- but it didn't work
11 out too good.

12 Q And initially at that point, and once you took the
13 hammer away from him, did he leave on his own volition then?

14 A No.

15 Q And is that what happened with the stepping stone?

16 A When he picked the stepping stone up and he throwed it
17 at me, and I thought he was gonna get another one because I
18 mean he didn't just turn around and walk away when I told
19 him to. It took me walking him off holding that hammer
20 cause he was probably scared I was gonna hit him with it,
21 and all I wanted him to do was leave my property and get in
22 that truck and leave.

23 Q And Mr. Cook asked you some questions about once he's,
24 you two are out in the roadway and the truck is driven off,
25 why didn't you just leave him in the roadway.

Dwayne Southard - Redirect examination
By Solicitor Lipinski

1 Did you ever feel whether it was safe to turn your back
2 on him?

3 A I -- that's what I said. I didn't feel like it would
4 be safe to turn my back on him or get him out of my, keep
5 him out of sight because he might of returned, and I got two
6 kids in there, and I mean that's what it was all about, kids
7 safety.

8 Q And in terms of if you had returned to your residence
9 after the truck drove off the first time, when we were
10 looking at those aerial photos, are there woods surrounding
11 your house?

12 A Yes, ma'am, they woods surrounding my house.

13 Q Is it possible to approach your house from an angle
14 other than the driveway where you, where you wouldn't have
15 been seen?

16 A Yes, ma'am.

17 Q And you stated that when the photographs were taken
18 that was the day that you turned the hearing aid over to law
19 enforcement?

20 A Yes, ma'am, I was out looking -- well, I had ^{C.S.}
21 out looking for my glasses cause I couldn't find my glasses,
22 and he come back in there and he kept saying dad, I hear
23 some kind of squeaking noise, a squeaking noise. So, I
24 actually put my clothes on and walked out there and I found
25 his hat and his, and his hearing aid, and I called the law

Dwayne Southard - Redirect examination
By Solicitor Lipinski

1 and told them, you know, he might want that.

2 Q And when the officers came to take those, those
3 photographs, you gave them those two items?

4 A Yes, sir, it's Officer Hamrick to be exact who come out
5 there.

6 SOLICITOR LIPINSKI: That's all we have. Thank you,
7 Your Honor.

8 THE COURT: Recross?

9 MR. COOK: Nothing, Your Honor.

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

11 WITNESS: All right. Thank you.

12 THE COURT: You can go back out.

13 Call your next witness.

14 SOLICITOR LIPINSKI: Court's indulgence one moment,
15 Your Honor.

16 (Pause.)

17 SOLICITOR LIPINSKI: Your Honor, we might have a -- we
18 might need to take up a quick moment outside the presence of
19 the jury before the next matter.

20 THE COURT: All right. Let the jury go to the jury
21 room just for a few minutes while I take up a matter of law.

22 (WHEREUPON, the following takes place outside the
23 presence of the jury.)

24 THE COURT: All right.

25 SOLICITOR LIPINSKI: May it please the Court, Your

1 Honor.

2 The next witness the State does intend to call is Jamie
3 Gilfillian. Pursuit to pretrial motions filed by the
4 defense, there's a rap sheet on Mr. Gilfillian, and I just
5 wanted to make sure -- there may be -- he does have some
6 impeachable offenses.

7 Specifically a malicious injury to personal property,
8 2010, for which he got three years. So that would carry
9 more than the one year offense.

10 In 2002 he has a grand larceny for which he got a
11 Y.O.A. sentence.

12 In 2003 he has a burglary and a grand larceny for which
13 he got a Y.O.A. sentence.

14 In 2006 he has assault and battery of a high and
15 aggravated nature, which he only got ten months on, but I
16 think that would be a ten year, within the ten year purview.

17 He also has a pending DUI that I'm not involved in.
18 It's a city charge. However, I will put on the record that
19 he did call me about it and one of the previous dates that
20 we had in terms of a subpoena cause we've added this trial
21 on between Mr. Cook and I, he indicated that the Court date
22 for that DUI was during the term that he was under subpoena,
23 and I did call York Police Department and ask them to
24 continue the case solely so he would be available to
25 testify. I've not engaged in anything in terms of a deal

1 regarding the charges or that particular nature, but I did
2 get that court date moved so he would be available had we
3 been able to call the case earlier.

4 I just wanted to put those issues on the record, and if
5 Mr. Cook had any issues before we call him outside the
6 presence of the jury.

7 THE COURT: Any comments, Mr. Cook, if any?

8 MR. COOK: Sir?

9 THE COURT: Any comments on any of that?

10 MR. COOK: Nothing, Your Honor. Just to be clear, when
11 I impeach him on these offenses, I'm just gonna state that
12 you have a felony in 2010, correct, and then if the door
13 opens we'll go into that?

14 THE COURT: Just keep it clean.

15 SOLICITOR LIPINSKI: And, Your Honor, I intend to go
16 through that with him on direct.

17 MR. COOK: Thank you, Your Honor. Nothing else.

18 THE COURT: All right. Let's take a real quick break
19 cause you know, when the jury goes back, they all need to
20 have a little short break. So, we'll take one too. Not,
21 not long.

22 (WHEREUPON, a short recess was taken at this time.)

23 THE COURT: Bring in the jury.

24 (WHEREUPON, the following takes place within the
25 presence of the jury.)

Jamie Gilfillian - Direct examination
By Solicitor Lipinski

1 THE COURT: All right. Call your next witness.

2 SOLICITOR LIPINSKI: State calls Jamie Gilfillian, Your
3 Honor.

4 Mr. Gilfillian, if you could approach the lady in black
5 and be sworn in, and take the witness stand at the back of
6 the room please.

7 JAMIE GILFILLIAN, having been first
8 duly sworn, testified as follows:

9 DIRECT EXAMINATION

10 BY SOLICITOR LIPINSKI:

11 Q Mr. Gilfillian, I'm gonna ask if you speak into the
12 direction of those microphones so that these last jurors can
13 hear you. You don't need to lean over to them, but if you
14 just make sure your head is generally in terms of that
15 direction when you answer my questions.

16 All right?

17 A Yes, ma'am.

18 Q And if you could, please state your name and spell your
19 last name for the record.

20 A My name is Jamie Lee Gilfillian. G-I-L-F-I-L-L-A-N.

21 Q And, Mr. Gilfillian, where do you currently reside?

22 A At [REDACTED], South Carolina, [REDACTED].

23 Q And is that -- that's in the Sharon community?

24 A Yes, ma'am.

25 Q And [REDACTED], what road does it come off of or turn

Jamie Gilfillian - Direct examination
By Solicitor Lipinski

1 off of in Sharon?

2 Is there a major road that intersects with it anywhere?

3 A South Carolina 49, ma'am.

4 Q Is that also referred to as Lockhart Road?

5 A Yes, ma'am.

6 Q And with whom do you reside there in [REDACTED]?

7 A My mother and father.

8 Q And approximately how long have you live there?

9 A Twenty-six years.

10 Q And, so, you grew up in Sharon?

11 A Yes, ma'am.

12 Q All right. And do you know Brad McCarter?

13 A I know of him, yes, ma'am.

14 Q Have you ever encountered him before?

15 You say you know of him.

16 Does that mean you know who he is or you never spoke to
17 him?

18 What does that mean?

19 A Well, I spoke to him here and there, seen him out in
20 places.

21 Q Have you ever, what we say, socialized with him, been
22 out with him or other people, with friends---

23 A Yes.

24 Q ---doing things in the community?

25 A Yes, ma'am.

Jamie Gilfillian - Direct examination
By Solicitor Lipinski

1 Q Would you consider yourself and him to be a good friend
2 or a close friend?

3 A No, ma'am.

4 Q Are you more close to being an acquaintance or a friend
5 of a friend?

6 A Maybe like a friend of a friend, yes, ma'am.

7 Q And do you know Misty Montgomery?

8 A Yes, ma'am.

9 Q And how well do you know Misty Montgomery?
10 Do you know her more than you know Brad or better than
11 you know Brad?

12 A I know her more.

13 Q And how long have you known Misty?

14 A All my life. I grew up with her. I went to school
15 with her.

16 Q And has Misty ever been to your house at [REDACTED]?

17 A Yes, ma'am.

18 Q And approximately how many times would you say?
19 More than ten, more than fifty, more than a hundred?

20 A More than ten.

21 Q And is she friends with anyone in your family or you in
22 particular?

23 A Just me.

24 Q And you stated you-all grew up together.
25 Did you go to school together?

Jamie Gilfillian - Direct examination
By Solicitor Lipinski

- 1 A Yes, ma'am.
- 2 Q Did you ever ride the same bus together or anything?
- 3 A Yes, ma'am.
- 4 Q And how long have you known Mr. McCarter?
- 5 A Probably about five, six years.
- 6 Q So, you didn't grow up with him or go to school with
- 7 him?
- 8 A No, ma'am.
- 9 Q You just started knowing him socially?
- 10 A Yes, ma'am.
- 11 Q Some time in the last five years?
- 12 A Yes, ma'am.
- 13 Q And, if you could, point out Brad McCarter?
- 14 Is he in the courtroom here today?
- 15 A Yes, ma'am.
- 16 Q And what is he wearing?
- 17 A Blue stripped shirt and a blue and dark blue tie.
- 18 Q And I want to draw your attention to February 5th of
- 19 2010.
- 20 Do you recall law enforcement coming to your house late
- 21 that night?
- 22 A Yes, ma'am.
- 23 Q All right. And you didn't call them there?
- 24 You didn't call 9-1-1 or ask them to come there, did
- 25 you?

Jamie Gilfillian - Direct examination
By Solicitor Lipinski

1 A No, ma'am.

2 Q They just showed up unannounced?

3 A Yes, ma'am.

4 Q Is it fair to say, Mr. Gilfillian, and I'm not gonna go
5 into the details of it, but you have somewhat of a criminal
6 record?

7 A Yes, ma'am.

8 Q And the police have been to your house before?

9 A Yes, ma'am.

10 Q And correct me if I'm wrong, but you've been convicted
11 of a felony in 2010?

12 A Yes, ma'am.

13 Q And, and as far back as 2003?

14 A Yes, ma'am.

15 Q And, so, when they come to your house that night, do
16 they explain to you why they're there?

17 A Yes, ma'am.

18 Q And what do they tell you?

19 A They told me that a guy was looking for me to kill me.

20 Q And what do they ask you about -- why, why do they come
21 to warn you about that or do they ask you anything about
22 that?

23 A They asked me if I would, had any problems with anybody
24 in the past recent month or two and I couldn't recall.

25 Q And at that point when they first come out to your

Jamie Gilfillian - Direct examination
By Solicitor Lipinski

1 house that night, were you able to give them any names?

2 A Yes, ma'am, I got a phone call when the police officers
3 was standing there -- there was three police officers
4 standing there and I got a phone call from a friend of mine.

5 Q And would that be Will Harris?

6 A Yes, ma'am.

7 Q And what did Mr. -- what -- did you have a conversation
8 with Mr. Harris?

9 A Yes, ma'am, I had it on speaker phone. That way the
10 police could hear it.

11 Q And was Mr. Harris able, able to give you any
12 information about who may be out looking for you that night?

13 A Yes, ma'am.

14 Q And did he give you any names?

15 A Brad McCarter.

16 Q And did you -- you say you had it on the speaker phone.
17 So, were the officers standing close enough to hear you
18 that they were able to hear that information?

19 A Yes, ma'am.

20 Q And did you know where Brad McCarter was staying that
21 night?

22 A Not right off hand. Will Harris had asked me -- he was
23 asking me if I was all right because he saw Brad at the
24 store---

25 MS. DAVIS: Your Honor?

Jamie Gilfillian - Direct examination
By Solicitor Lipinski

1 A ---in Sharon.

2 MS. DAVIS: Your Honor, we would object to hearsay
3 testimony.

4 THE COURT: All right. I sustain objection.

5 SOLICITOR LIPINSKI: And, Your Honor, the only reason
6 the State is offering it is to explain why the law
7 enforcement took the next course of conduct. Not for the
8 truth of the matter asserted obviously.

9 THE COURT: Well, I sustain the objection.

10 SOLICITOR LIPINSKI: Thank you, Your Honor.

11 Q And you stated that Will told you that Brad McCarter
12 may be out looking for you?

13 A Yes, ma'am.

14 Q And the officers -- did he ever mention Misty
15 Montgomery's name?

16 A Yes, ma'am.

17 Q And did he say it was Brad or Misty or possibly both of
18 them?

19 A He just stated that both of them was at the store.

20 Q All right. And without going into what he said, but he
21 gave you both of those names?

22 A Yes, ma'am.

23 Q And did you, at that time, did you know where Brad
24 McCarter was staying?

25 A I'd asked Will -- I asked Will, I said Will, I said

Jamie Gilfillian - Direct examination
By Solicitor Lipinski

1 what's he looking for me for, and he says I don't know. All
2 I know is that he's planning on hurting you real bad. I was
3 like well, where's he at and that stated that they -- he---

4 MS. DAVIS: Your Honor, we have an objection.

5 THE COURT: Let's don't go into what somebody else
6 said.

7 Q Are you able to provide them as a possible address to
8 Mr. McCarter or Mr. Montgomery?

9 Did you know where Misty or Brad was staying that
10 night?

11 A At Misty's house.

12 Q All right. And did you know where Misty was living at
13 that time?

14 A Yes, ma'am.

15 Q And did you provide that information to law
16 enforcement?

17 A Yes, ma'am.

18 Q And as a result of that they left you?

19 A Yes, ma'am.

20 Q Had you had any -- when was the last time you saw Brad
21 McCarter prior to this night?

22 A Him and two other guys had come to my house and was
23 threatening to jump on me because I was talking to Misty
24 over the phone.

25 Q And when was that in relationship to the night the

Jamie Gilfillian - Direct examination
By Solicitor Lipinski

1 police come to your house?

2 A New Years.

3 Q Around New Years Eve?

4 A It was exactly New Years Day.

5 Q It was New Years Day?

6 A Yes, ma'am.

7 Q And did you ever cut him with any type of implement?

8 A No, ma'am, we got into a scuffle in the yard and my mom
9 ran out with a broom and they took off running and the car
10 pulled off.

11 SOLICITOR LIPINSKI: Court's indulgence one moment,
12 Your Honor.

13 (Pause.)

14 SOLICITOR LIPINSKI: That's all we have of Mr.
15 Gilfillian.

16 MR. COOK: No questions, Your Honor.

17 THE COURT: All right. You can step down. Be excused.

18 WITNESS: Thank you.

19 THE COURT: Appreciate your time.

20 WITNESS: Thank you, sir.

21 THE COURT: Thank you.

22 SOLICITOR LIPINSKI: If I could step in the hallway and
23 see if my next witness is, is here, and, if not, I'll move
24 on to another one, Your Honor. But I'd just like to do
25 that.

Daniel Hamrick - Direct examination
By Solicitor Lipinski

1 (Pause.)

2 SOLICITOR LIPINSKI: Can he be excused, Mr. Cook?

3 MR. COOK: Yes, no objection.

4 (Pause.)

5 SOLICITOR LIPINSKI: Deputy Hamrick is here. So, we
6 would call him at this time, Your Honor.

7 If you could approach the lady in black and be sworn,
8 and then take the witness stand at the back of the room.

9 DANIEL HAMRICK, having been first
10 duly sworn, testified as follows:

11 DIRECT EXAMINATION

12 BY SOLICITOR LIPINSKI:

13 Q If you could, state your name, spelling your last name
14 for the record.

15 A Daniel Hamrick. H-A-M-R-I-C-K.

16 Q And, Mr. Hamrick, with whom are you currently employed?

17 A York County Sheriff's Office.

18 Q And in what capacity?

19 A Deputy.

20 Q And, so, if somebody calls 9-1-1, you go out to their
21 house or wherever they happen to be at?

22 A Yes, ma'am.

23 Q And do you work the Sharon area?

24 A Yes, ma'am.

25 Q All right. And is part of your duties and

Daniel Hamrick - Direct examination
By Solicitor Lipinski

1 responsibilities, have you ever had the occasion to collect
2 evidence?

3 A Yes, ma'am.

4 Q And when York County does that, do you fill out a form?

5 A Yes, ma'am.

6 SOLICITOR LIPINSKI: All right. Court's indulgence one
7 moment, Your Honor.

8 (Pause.)

9 SOLICITOR LIPINSKI: May I approach the witness, Your
10 Honor?

11 THE COURT: Yes, ma'am.

12 Q Let me show you this evidence inventory sheet and are
13 you familiar with that document?

14 A Yes, ma'am.

15 Q And, if you could, looking at the bottom of the
16 evidence inventory sheet, does it bear your signature?

17 A It does.

18 Q And do you respond to a number of calls?

19 A Yes, ma'am.

20 Q And, so, you fill out these forms, is it fair to say,
21 to help document or refresh your recollection in the event
22 that you're called here to testify?

23 A Yes, ma'am.

24 Q And are you working tonight?

25 A No, ma'am.

Daniel Hamrick - Direct examination
By Solicitor Lipinski

- 1 Q All right. Had you -- have you worked today?
- 2 A I worked last night. I got off this morning at 6:00AM.
- 3 Q And did I wake you up to come testify here today?
- 4 A No, I woke up early.
- 5 Q All right. And does this form indicate that on
- 6 February 6th of 2010 you collected any evidence?
- 7 A Yes, ma'am.
- 8 Q And did you fill out the top of this form?
- 9 A I did.
- 10 Q And where did you collect evidence at?
- 11 A At [REDACTED] --
- 12 Q In---
- 13 A ---in Sharon.
- 14 THE COURT: You need to speak up just a little. You've
- 15 got a soft voice.
- 16 WITNESS: I'm, I'm sorry, sir.
- 17 THE COURT: Thank you.
- 18 Q And I apologize. I know we woke you up, but I'm gonna
- 19 ask you to speak up so these last jurors can hear you.
- 20 It says that you collected evidence at [REDACTED]
- 21 in Sharon?
- 22 A Yes, ma'am.
- 23 Q And did you do that as a response to being sent out
- 24 there on a call or were you sent there for the specific
- 25 purpose of collecting some evidence?

Daniel Hamrick - Direct examination
By Solicitor Lipinski

1 A If memory serves me correctly, the day I got the call
2 to go out there it was just to collect this evidence.

3 Q And what does it indicate that you collected?
4 what two items?

5 A A brown hearing aid and a camouflaged hat.

6 Q And where were they recovered from?
7 Did the victim hand them to you?
8 Did you actually collect them?
9 Do you recall?

10 A I don't recall.

11 Q And what did you do with those items?

12 A I -- once I got them in my possession I took them from
13 there, brought them to the Sheriff's Office, and placed them
14 into evidence.

15 SOLICITOR LIPINSKI: That is all we have of Deputy
16 Hamrick.

17 MR. COOK: Nothing, Your Honor, and he may be excused.

18 THE COURT: You may step down and be excused. Thank
19 you.

20 SOLICITOR EPTING: The State calls Alex wallace to the
21 stand.

22 ALEX WALLACE, having been first duly
23 sworn, testified as follows:

24 DIRECT EXAMINATION

25 BY SOLICITOR EPTING:

Alex wallace - Direct examination
By Solicitor Epting

1 Q Please state your name for the record.

2 A It's Alex wallace.

3 Q And what do you do for a living?

4 A I'm a detective at the York County Sheriff's Office.

5 Q And as a part, part of your duties as a detective, is
6 that to be assigned to certain cases for follow-up
7 investigation?

8 A Yes, sir.

9 Q Were you assigned -- were you assigned this case
10 against Brad McCarter that we're trying here today?

11 A Yes, sir.

12 Q Please tell the jury your duties as case agent?

13 A As case agent, we're assigned -- of course, the patrol
14 officers take the initial report, and we follow-up doing any
15 investigative leads or collecting any further evidence that
16 may be required.

17 Q Is part of your duties, as case agent, to speak to
18 certain witnesses and perhaps take written statements?

19 A Yeah, talk to victims, witnesses, yes, sir.

20 Q Did you do that in this case?

21 A Yes, sir.

22 Q Okay. Which witnesses did you talk to?

23 A Spoke to Brenda Gourley. Also spoke with the victim,
24 Dwayne Southard, and his son, C.S.

25 Q Okay. And anyone who doesn't have a witness statement

Alex Wallace - Direct examination
By Solicitor Epting

1 taken, do you then take a witness statement, a written
2 witness statement from them?

3 A Also -- I'm sorry. Also spoke to Misty Montgomery
4 also.

5 Q Okay. Now, Deputy Hamrick testified a little bit about
6 a hearing aid.

7 Are you familiar with which hearing aid they're
8 discussing?

9 A Yes, sir.

10 Q Would you tell the jury how you became familiar with
11 it?

12 A After he collected it over the weekend I came back to
13 work that---

14 Q When you say he --?

15 A Deputy Hamrick.

16 Q Okay.

17 A Collected the evidence, the hearing aid, and put it
18 into evidence. I do remember I was off. I had training or
19 something else on that Monday, and that Tuesday is when I
20 realized, was noted I was assigned the case, and I collected
21 evidence, the hearing aid, and returned it to Mr. McCarter
22 at the detention center.

23 Q Did he sign for it?

24 A Yes, sir.

25 Q Did he accept it?

Alex Wallace - Direct examination
By Solicitor Epting

1 A Yes, sir.

2 Q Did he say that it wasn't his hearing aid?

3 A No, sir.

4 Q Okay. The hearing aid that was found at the scene, he
5 accepted it in his own person and signed for it, took it in
6 his possession?

7 A Yes, sir.

8 SOLICITOR EPTING: Beg the Court's indulgence.

9 (Pause.)

10 Q That's all the questions I have for you at this time.
11 Please answer any questions defense may have.

12 MR. COOK: No questions, Your Honor.

13 THE COURT: You may step down and be excused. Well,
14 you're actually here. You can step down.

15 SOLICITOR LIPINSKI: Your Honor?

16 THE COURT: Call your next witness.

17 SOLICITOR LIPINSKI: If we can approach on a scheduling
18 matter?

19 (WHEREUPON, a bench conference was held out of the
20 hearing of the jury at this time.)

21 THE COURT: And I'm told, for scheduling purposes, it's
22 best that -- the case is going into tomorrow anyway. So,
23 we'll stop for the day and start back at 10:00 in the
24 morning. We have some work to do. We'll do it this
25 afternoon so we won't hold you up in the morning like we did

1 this morning.

2 But please be back at 10:00 ready to go and report just
3 like you did today. Keep in mind my admonition about not
4 having any, trying to make up your mind or discussing the
5 case or getting any information about anything dealing with
6 this case outside the courtroom.

7 Have a pleasant evening.

8 Thank you.

9 (WHEREUPON, the following takes place outside the
10 presence of the jury.)

11 THE COURT: All right. So the State has how many more
12 witnesses?

13 SOLICITOR LIPINSKI: We would call Mr. Harris just to
14 confirm that he relayed that information to Mr. Gilfillian,
15 and we would call obviously Deputy Riley who testified
16 during the Jackson v. Denno hearing. He'll be responsible
17 for the admission of the evidence that he collected for
18 showing the video back of the patrol car. So, we anticipate
19 he will be a little lengthy in terms of our own witnesses.
20 But after that, unless some complications with Mr. Epting
21 over the evening, I do anticipate resting tomorrow morning.

22 THE COURT: All right. Well, why don't we stop for the
23 day and we'll start back at 10:00 in the morning, and I'll
24 meet with the lawyers and we'll start talking about our
25 charge.

1 SOLICITOR LIPINSKI: Thank you, Your Honor.

2 MR. COOK: Yes, sir, Your Honor, in the morning.

3 THE COURT: 10:00 in the morning.

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

5 THE COURT: All right. If y'all take just a few
6 minutes, then come on back.

7 MR. COOK: Oh, okay.

8 THE COURT: Yeah, we'll do a -- we'll do a charge now.

9 MR. COOK: Yes, sir, I got you. I understand.

10

11 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for York County, South Carolina, on the 23rd and 24th day of August, 2011.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

January 16th, 2013



PAMELA E. GREEN, Court Reporter

1 STATE OF SOUTH CAROLINA
2 COUNTY OF YORK

) COURT OF GENERAL SESSIONS

3
4 STATE OF SOUTH CAROLINA,
5 PLAINTIFF,
6 vs.
7 RAYMOND BRADLEY McCARTER,
8 DEFENDANT.

) TRANSCRIPT

) OF

) RECORD

) 2010-GS-46-01078
) 2010-GS-46-01079

9
10 August 25th, 2011
11 Spartanburg, South Carolina

12
13 B E F O R E:

14 THE HONORABLE JOHN C. HAYES, Judge.

15
16 A P P E A R A N C E S:

17 MINDY LIPINSKI and CHRIS EPTING
18 ASSISTANT SOLICITORS
Attorneys for the State

19 DAVE COOK and ROSALEE DAVIS
20 ESQ.
21 Attorneys for the Defendant

22
23
24 PAMELA E. GREEN
Circuit Court Reporter
25 Seventh Judicial Circuit

I N D E X

WITNESSESPAGE

(There were no exhibits marked or testimony taken during this hearing.)

P R O C E E D I N G S

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SOLICITOR LIPINSKI: May it please the Court, Your Honor?

THE COURT: Yes, ma'am.

SOLICITOR LIPINSKI: This is Raymond Bradley McCarter. He's obviously been on trial in front of you the past two days. He was indicated, as you're well aware, on assault and battery with intent to kill. He's indicated that he is willing to plead guilty to that charge, and the State's gonna recommend a cap of ten with the understanding between the State and the defense, and the State will be arguing for that ten years, but the defense would have the opportunity to try to convince you to give him less.

He does also, at the time and resulting from the same incident, have a charge of lynching in the second degree, which was really based on the facts and whether there's any premeditation between he and his codefendant, Missy, whose charges are still outstanding. The State will dismiss the lynching charge as a result of his plea today and I did want to go ahead and put that on the record.

The State has a few other facts we'd like to bring to your attention. I know you're well, you're well aware of 95 percent of them, and the victim would like to speak at the appropriate time.

1 THE COURT: All right. Mr. McCarter, how old are you?
2 How old are you?

3 DEFENDANT: How old?

4 (The Court nods affirmatively.)

5 DEFENDANT: Thirty-four.

6 THE COURT: You're represented by Mr. Cook?

7 DEFENDANT: Yes, sir.

8 THE COURT: You satisfied with his services?

9 DEFENDANT: Yes, sir.

10 THE COURT: I have in front of me an indictment.
11 You've been indicted for assault and battery with intent to
12 kill. It's alleged this occurred here in York County on
13 February 5th, 2010. It's alleged, at that time, with
14 malice aforethought, you did commit an assault and battery
15 on Mr. Dwayne Southard.

16 Do you understood that?

17 DEFENDANT: Yes, sir.

18 THE COURT: It carries up to 20 years in jail, and it
19 is a most serious offense, and a most serious offense is the
20 type of an offense which if, in your lifetime, you receive
21 two most serious or a combination of three serious and most
22 serious offenses you'd be subject to being incarcerated for
23 life without parole.

24 Do you understand that?

25 DEFENDANT: Yes, sir.

1 THE COURT: This is a no parole offense, which means
2 you would have to serve at least 85 percent of whatever
3 sentence you receive before you would be eligible for any
4 early work release. I mean not work release. I take it
5 back. Any early release.

6 If you were released early, after serving 85 percent of
7 your sentence, you would be released in a community
8 supervision program for up to two years. If you violated
9 the condition of that community supervision program you
10 could be reincarcerated for up to a year and that pattern
11 could continue, that is being incarcerated and released,
12 until such time as you have served the full ten years if you
13 are granted an early release after 85 percent of your
14 sentence.

15 Do you understand that?

16 DEFENDANT: Yes, sir.

17 THE COURT: How do you plead to this charge?

18 How do you plead to this charge?

19 DEFENDANT: Guilty.

20 THE COURT: And other than the recommendation of a cap
21 of ten years, has anyone made any other promise or threats
22 to cause you today to enter your plea of guilt to this
23 charge?

24 DEFENDANT: No, sir.

25 THE COURT: Are you today under the influence of

1 anything that would cause you to be intoxicated?

2 DEFENDANT: No, sir.

3 THE COURT: Are you entering a plea today to this
4 charge, Mr. McCarter, freely and voluntarily?

5 DEFENDANT: Yes, sir.

6 THE COURT: You have a right to a trial by jury. In
7 fact, we have the jury in the jury room at this time, and
8 are partly, part of the way through the trial. You are
9 presumed innocent of this charge as you possibly heard me
10 tell the jury on the, when it was impaneled, and you're so
11 presumed until such time as the State is able to prove to
12 the jury your guilt, if it can, beyond a reasonable doubt.

13 As to the charge, you have the right to remain silent,
14 the right to confront the witnesses against you, and the
15 right to have your witnesses made to come to court to
16 testify for you.

17 You understand you have these rights?

18 DEFENDANT: Yes, sir.

19 THE COURT: You have any questions about them?

20 DEFENDANT: No, sir.

21 THE COURT: I advise you that by entering a plea of
22 guilty you're giving up these rights. You're also giving up
23 any defense. I understand, through discussions with your
24 attorney, that you possibly would of taken the position that
25 you have a defense of self-defense, and you're giving that

1 up by entering a plea of guilty. You're also giving up any
2 issues involving the search and your confession by entering
3 a plea of guilty.

4 Do you understand that?

5 DEFENDANT: Yes, sir.

6 THE COURT: Knowing all those things, I ask again how
7 do you plead to assault and battery with intent to kill?

8 DEFENDANT: Guilty.

9 THE COURT: All right. Madam Solicitor.

10 SOLICITOR LIPINSKI: May it please the Court, Your
11 Honor.

12 You're obviously well aware of the overwhelming facts
13 in this case, and the only thing I did want to bring to the
14 Court's attention, because this piece of evidence has not
15 been shown to you either pretrial or during trial, but this
16 is the actual hammer that was recovered from the back of the
17 defendant's truck, and the only thing that I would like to
18 point out is it's not a typical hammer. It's actually a
19 framing hammer, longer, and somewhat more substantial in
20 weight, and I just wanted to make the Court aware that that
21 was the weapon involved in order to substantiate the State's
22 position that he does, in fact, deserve the full ten years.

23 I'd also like to go ahead and put on the record the
24 defendant's criminal record, which dates, dates back to 1994
25 when he was convicted of criminal domestic violence and

1 tampering with a vehicle.

2 1998, simple assault and battery.

3 2005, hit and run with property damage. In 2005 he was
4 convicted of possession of a controlled substance, Schedule
5 1 to 5, and also distribution of prescription drugs. In
6 2005 he was also convicted of malicious injury to personal
7 property, and resisting arrest under the A offense for which
8 he got one year.

9 In 2006 he was convicted of resisting arrest on an
10 officer and was sentenced to ten years suspended on 30
11 months with three years probation. The facts of that
12 resisting arrest were so bad that the officer actually had
13 to have surgery as a result of that resisting arrest, and I
14 pointed that out so you're aware of this propensity for
15 violence in the past.

16 In 2006 he was convicted of possession of a controlled
17 substance, another resisting arrest, and failure to -- I
18 apologize. Those were duplicative. He has two prior
19 resisting arrests.

20 In 2008 he was convicted of failure to stop for a blue
21 light, and then he does have these charges, Your Honor.
22 Again, the -- would you like to hear from the victim now?

23 THE COURT: First, the, the facts have been presented
24 yesterday through the witnesses. Particularly Mr. Southard.

25 Do you agree that you struck Mr. Southard with this

1 hammer?

2 DEFENDANT: I don't know what you mean.

3 THE COURT: well, you agree -- he testified that you
4 came to his house, that you had a tussle, that at some point
5 the two of you were in a ditch, he was on top of you because
6 of being kicked by this woman whose name I think is Missy.

7 DEFENDANT: Okay.

8 THE COURT: He raised up to defend himself and at that
9 time you raised up and struck him.

10 Do you agree with that?

11 well, if you don't, we got the jury.

12 (No response.)

13 THE COURT: Let's go through with the trial. It
14 doesn't look like he wants to plead guilty. I don't think
15 he's sincere.

16 MR. COOK: Your Honor, may I, Your Honor?

17 THE COURT: well, no, he's got to, he's got to fess up.
18 If he wants to plead guilty, then he's got to plead guilty
19 or else we can go on with the trial. we got the jury back
20 there.

21 DEFENDANT: Are you saying I got to claim where he says
22 it's true?

23 THE COURT: No, you got to claim you hit him with a
24 hammer.

25 MR. COOK: Your Honor, may I?

1 THE COURT: No.

2 All right. Let's just -- we're back, back down. Let's
3 get the jury back in.

4 All right. You can go back and have a seat.

5 MR. COOK: Do you understand what's going on?

6 DEFENDANT: Yes, sir.

7 All right. Yeah, I hit him.

8 THE COURT: You, you hit him with a hammer?

9 DEFENDANT: Yes, sir.

10 THE COURT: All right. Well, I accept your plea. I
11 find the plea is freely, voluntarily, and knowingly, and
12 intelligently entered, and entered with the advice of
13 competent counsel with whom you're satisfied. I find the
14 facts support your plea at this time.

15 Now, I'll be glad to hear from the victim. I've
16 already heard his testimony, but also I'll be glad to hear
17 from the defense attorney before I---

18 SOLICITOR LIPINSKI: Your Honor, obviously I've
19 cautioned him to focus his remarks on sentencing and how he
20 feels about that, how it's impacted his life since then.

21 THE COURT: Mr. Southard.

22 MR. SOUTHARD: How you doing?

23 THE COURT: Okay.

24 MR. SOUTHARD: I'm gonna make this kind of short.
25 where I got a lot of scars, my kids is scarred inside, and

1 they got to watch their daddy go away in an ambulance,
2 bloody from head to toe. But that's better than watching
3 their daddy die in a ditch. So, I don't feel like ten years
4 is enough because that's life, but it's whatever the Court
5 decides.

6 THE COURT: well, I understand that and this is an
7 arrangement worked out that the Court is considering, of
8 course. He will have to serve eight and a half years
9 regardless---

10 MR. SOUTHARD: Yes, sir.

11 THE COURT: ---if he gets the ten. If he gets less
12 than that, he would have to serve 85 percent of that. I
13 know that's no atonement for the injuries that you and your
14 family have suffered.

15 MR. SOUTHARD: Yes, sir.

16 THE COURT: But I certainly understand and I appreciate
17 your, your testimony yesterday.

18 MR. SOUTHARD: Thank you.

19 THE COURT: All right. Thank you.

20 Anything else, Ms. Lipinski?

21 SOLICITOR LIPINSKI: Nothing else from the State.

22 THE COURT: Mr. Cook.

23 MR. COOK: May it please the Court, Your Honor.

24 Mr. McCarter's 34. Your Honor heard that he didn't
25 graduate high school, but he has a GED and he's got one

1 child.

2 Your Honor, I'd, I -- my client's throwing himself on
3 the mercy of the Court, and he's begging Your Honor to
4 consider a downward departure. He, he accepted
5 responsibility before Your Honor, and he may of been just --
6 and I realize that alcohol is no justification. He may or
7 may not remember. He admits to striking.

8 The distinction I was gonna try to make is he admits to
9 striking the victim, and I believe that the injuries are
10 such that it could be construed as assault and battery with
11 intent to kill regardless of whether he remembers the hammer
12 or not, and I'm just, with all of the persuasion that I can
13 muster, trying to convince Your Honor to perhaps consider a
14 downward departure to eight years. He would still do 85
15 percent of that, and I'll digress from there, Your Honor.

16 THE COURT: All right. Mr. McCarter, anything you want
17 to say?

18 DEFENDANT: Yes, Your Honor.

19 I take full responsibility of my actions, Your Honor.
20 Everybody has decisions to make, and I felt like I wasn't
21 guilty of assault and battery with intent to kill. I felt
22 like I was guilty of assault and battery, and that
23 decision's got to be made in life and take responsibility,
24 you know. So, I take responsibility and I'm pleading guilty
25 to assault and battery with intent to kill, and I apologize

1 to the Court.

2 THE COURT: All right. How long has he been in jail?

3 MR. COOK: Seventeen months, Your Honor. I apologize.

4 I don't have the days.

5 SOLICITOR LIPINSKI: He was out on bond for a good
6 while.

7 MR. COOK: With that -- obviously reducing that. He
8 was in for three months before he got out. I'm saying 17
9 months.

10 THE COURT: Well---

11 MR. COOK: I apologize. I don't have that, Your Honor.

12 THE COURT: Well---

13 DEFENDANT: September, September the 15th will be 17
14 months.

15 MR. COOK: Including the time that you were out?

16 THE COURT: All right. Well, just a minute. I'll do
17 it.

18 All right. Mr. McCarter, Sentence of the Court is ten
19 years. I will give you credit for whatever time the
20 Department of Corrections determines you've already served.
21 I'll give you credit for that.

22 Thank you.

23 SOLICITOR LIPINSKI: Thank you, Your Honor.

24

25 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for York County, South Carolina, on the 25th day of August, 2011.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

July 8th, 2012

A handwritten signature in cursive script, reading "Pamela E. Green", is written over a horizontal line.

PAMELA E. GREEN, Court Reporter

STATE OF SOUTH CAROLINA)

) IN THE COURT OF COMMON PLEAS

County of York

CERTIFIED TRUE COPY

Raymond Bradley McCarter #3188127 APR 11 AM 10:37

Full name and prison number (if any) of Applicant

DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

v.

APPLICATION FOR

State of South Carolina)

) POST-CONVICTION RELIEF
)
)
)
)**INSTRUCTIONS - READ CAREFULLY**

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

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

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

1. Place of detention Wateree Correctional Institution, Statefarm Rd.
P.O. 189 Rembert, S.C. 29123
2. Name and location of Court which imposed sentence Moss Justice Center,
1675-2A York Hwy York, S.C. 29745
3. Name(s) of co-defendant(s) (if any) Misty Terldine Montgomery,
6639 Old Depot Rd. Sharon, S.C. 29742
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 10-GS-4601073
(b) _____

FILED-RECEIVED
2012 APR - 9 AM 11:30
DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) August 25, 2011 (10 years without parole) most serious.
- (b) _____
- (c) _____
6. 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 _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
NO
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) Attorney, David Cook, advised that he did not do appeals.
- (b) Counsel did not present or argue an appeal.

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective Counsel

(b) Sentence was unduly harsh

(c) _____

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

(a) ^① Counsel failed to use important evidence in trial. ^② Conflict of Interest.

(b) Medical records states mild injuries (Not Life threatening injuries) (Judge was biased.)

(c) _____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? No

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions or applications in this or any other Court? No

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

(a) the specific nature thereof:

i. _____

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

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

(d) the date of each such disposition:

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

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

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

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

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

(a) which grounds have been presented:

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

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

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

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) This is the first opportunity to present grounds "PCR"
 (b) _____
 (c) _____

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

(a) your arraignment and plea? Yes
 (b) your trial, if any? Yes
 (c) your sentencing? Yes
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? No
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
No

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

(a) the name and address of each attorney who represented you:
 i. David Cook, 301 N. White St. Lancaster, S.C. 29720
 ii. Melissa Inzirello, Public Defender's Office at 1675-2A York Hwy. York, S.C. 29745.
 iii. _____
 (b) the proceedings at which each such attorney represented you:
 i. arraignment, plea, trial, sentencing, and hearings
 ii. bond hearing
 iii. _____

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Raymond Bradley McCarter #314487, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

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

Raymond Bradley McCarter #314487
Applicant

SWORN or affirmed to and subscribed before me this

5th day of April, 2012.

[Signature]
Notary Public

My Commission Expires: 02/15/17

19. State clearly the relief you seek in filing this application:

case reversed, plea to a lesser included offense, or
vacated.

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

No.

STATE OF SOUTH CAROLINA)

VERIFICATION

County of York)

I, Raymond Bradley McCarter #314487, 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.

Raymond Bradley McCarter #314487

SWORN to and subscribed before me this 5th
 day of April 2012

[Signature] (L.S.)
 Notary Public

My Commission Expires: 02/15/17

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK	)	SIXTEENTH JUDICIAL CIRCUIT
	)	
	)	
Raymond Bradley McCarter, # 314487,	)	2012-CP-46-1312
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

Respondent, making its Return to the application for post conviction relief (PCR) filed April 9, 2012, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. Applicant was indicted at the March 2010 term of the York County Grand Jury for Assault and Battery with Intent to Kill (2010-GS-46-1078). He was represented by David Cook, Esquire. On August 25, 2011, Applicant pled guilty as indicted. The Honorable John C. Hayes, III sentenced Applicant to confinement for a period of ten (10) years. Applicant did not appeal his conviction and sentence.

Attached herewith and incorporated herein are the records of the York County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his current Application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Counsel"
 - a. "Counsel failed to use important evidence in trial"
 - b. "Conflict of Interest"
 - c. "Medical records states mild injuries (not life threatening(sic) injuries)"
2. "Sentence was unduly harsh"
 - a. "(Judge was biased)"

Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at evidentiary hearing. All amendments should be made well in advance of hearing and should be filed as required by Rule 11, SCRCP(a).

III.

Respondent interprets Applicant's claims as being claims of ineffective assistance of counsel. In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

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, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea 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 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. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

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 the record does not conclusively refute. Accordingly, 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).

V.

Applicant alleges that his sentence is too harsh. The court has broad discretion in imposing criminal sentences. State v. Franklin, 267 S.C. 240, 226 S.E.2d 896 (1976). Absent a showing of partiality, prejudice, oppression or corrupt motive by the sentencing court, or absent a showing that the statutory punishment in and of itself constitutes cruel and unusual punishment, the post-conviction relief court has no authority or jurisdiction to review or change a sentence falling within statutory limits. State v. Cogdell, 273 S.C. 563, 257 S.E.2d 748 (1979).

Furthermore, Applicant did not object to the sentence handed down by the trial court. Applicant's failure to object has waived any allegation that his sentence was excessive or otherwise improper. Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979); Peeler v. State, 277 S.C. 70, 283 S.E.2d 826 (1981). Respondent submits the Court should summarily dismiss this ground for relief.

VI.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

VII.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY ELLIOTT
Senior Assistant Deputy Attorney General

J. RUTLEDGE JOHNSON
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for the Respondents

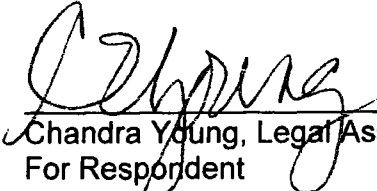
, 2012

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK	)	
	)	
	)	2012-CP-46-1312
	)	
RAYMOND B. MCCARTER,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Sarah DiFranco, Esquire
 301 South Colledge St., Ste 2300
 Charlotte, North Carolina 28202

DATED this 26th day of July, 2012.


 Chandra Young, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

Raymond McCarter #314487)

☐ Plaintiff)

v.)

State Of South Carolina)

☒ Defendant.)

IN THE COURT OF COMMON PLEAS

CASE NO.
2012-CP-46-1312MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:

Sarah Difranco, Bar No.

Address:

301 S. Colledge St., Ste 2300 Charlotte, NC 28202

phone: fax:

e-mail: other:

Defendant's Attorney:

J. Rutledge Johnson, Bar No. 78871

Address:

PO Box 11549 Columbia, SC 29211-1549

phone: 803-734-3737 fax: 803-734-4113

e-mail: other:

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion:

Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

July 26, 2012

Date submitted

SECTION III: Motion Fee

☐ PAID - AMOUNT:☒ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support(check reason) ☐ Domestic Abuse or Abuse and Neglect☐ Indigent Status ☐ State Agency v. Indigent Party☐ Sexually Violent Predator Act ☒ Post-Conviction Relief☐ Motion for Stay in Bankruptcy☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the
attached order.☐ Other:

JUDGE

CODE: _____ Date:

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____☐ CONTESTED - AMOUNT DUE: _____

1 STATE OF SOUTH CAROLINA

2 -----x

3 RAYMOND BRADLEY MCCARTER,

4 Applicant,

5 Case No.

6 -against-

2012-CP-46-1312

7 STATE,

8 Respondent.

9 -----x

10 York, S.C.

11 October 9, 2012

12 B E F O R E:

13 HONORABLE EDGAR W. DICKSON

14

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

16 SARAH DIFRANCO, Esquire

17 Attorney for the Applicant

18

19 RUTLEDGE JOHNSON

20 Attorney for the State

21

22 Aileen Butler

23 Official Court Reporter

24

25

1		<u>I N D E X</u>			
2	<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
3	RAYMOND BRADLEY MCCARTER				
4	Ms. DiFranco	9		44	
5	Mr. Johnson		44		
6	RAYMOND MCCARTER, SR				
7	Ms. DiFranco	45			
8	Mr. Johnson		58		
9	DAVID COOK				
10	Mr. Johnson	64		97	
11	Ms. DiFranco		77		97
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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EVD.</u>
State's 1	Affidavit		73
State's 2	Retainer agreement		76

1 MR. JOHNSON: May it please the Court.

2 THE COURT: Yes, sir.

3 MR. JOHNSON: This is case of Raymond McCarter
4 versus State of South Carolina, case number 2012-CP-46-
5 1312.

6 Mr. McCarter was indicted the March 2010 term of
7 the York County Grand Jury with assault and battery
8 with intent to kill. I believe after two days of trial
9 testimony Mr. McCarter decided to plead guilty on
10 August 25, 2011. He plead guilty as indicted before
11 the Honorable John C. Hayes III. There was a
12 recommended cap of ten years. He was sentenced to ten
13 years. There was no appeal.

14 In addition to that guilty plea the State dismissed
15 a lynching charge. There was a timely PCR application
16 filed April 9, 2012. The State filed its return on
17 July 26, 2012 and he is represented here by Miss Sara
18 DiFranco.

19 THE COURT: All right. And Miss DiFranco, are you
20 all ready to proceed?

21 MS. DIFRANCO: Yes, Your Honor. Just as a
22 preliminary matter I think I brought this to the
23 Court's attention, but my client is very hard of
24 hearing.

25 THE COURT: Okay.

1 MS. DIFRANCO: He does wear two hearings aids, but
2 it is still very difficult for him to hear. If we can
3 all try to project and he may need to let me know he
4 can't hear something and I may need an opportunity to
5 repeat it to him. That kind of think.

6 THE COURT: Mr. McCarter, if you can't hear what I
7 say or what Mr. Johnson says if you just let us know
8 I'm sure we can all talk louder.

9 MR. MCCARTER: All right.

10 MS. DIFRANCO: And Your Honor, if I may perhaps
11 when I am questioning him get a little bit closer he
12 does better with reading lips.

13 THE COURT: Okay. Miss DiFranco, that is fine.
14 You can get as close as you want to.

15 MS. DIFRANCO: Thank you.

16 Mr. Johnson is correct, on August 25, 2011 Mr.
17 McCarter plead guilty to assault and battery with
18 intent to kill after two days of a trial. He was
19 sentenced to ten years without parole and we are here
20 today on his application for post conviction relief.
21 From August 2010 until Mr. McCarter plead guilty in
22 August of 2011 he was represented by Mr. David cook.

23 Brad's father, also named Raymond McCarter, so I
24 will call my client Brad and his father Raymond.
25 Raymond McCarter hired --

1 THE COURT: I am sorry, you are going to call your
2 client --

3 MS. DIFRANCO: Brad.

4 THE COURT: Brad?

5 MS. DIFRANCO: Yes, and his father Raymond.

6 THE COURT: Okay.

7 MS. DIFRANCO: Raymond hired Mr. Cook to represent
8 his son and Brad and his father believed the entire
9 time leading up to trial that the State's evidence was
10 not strong enough to convict him of assault and
11 battery with intent to kill and wanted Mr. Cook to
12 investigate the evidence, question the State witnesses
13 and put up their defenses.

14 I think the evidence today will show that time and
15 time again they asked Mr. Cook for a jury trial and
16 that is what they wanted. Mr. Cook in our opinion
17 failed Mr. McCarter in a number of ways. When it came
18 down to the third day of trial the day that Brad was
19 suppose to testify in his own behalf, David cook told
20 Mr. McCarter that if he didn't plead guilty he would
21 get 20 years. So you better go ahead and plead guilty
22 and get the ten.

23 MR. JOHNSON: I don't mean to be rude, Miss
24 DiFranco, this seems to be argument and we haven't
25 heard testimony yet, Your Honor.

1 MS. DIFRANCO: Sure. I think we all read the plea
2 transcript and know what it says, but I ask the Court
3 to hear the evidence here today with an open mind
4 about what happened in August of 2011.

5 THE COURT: All right, and you said you had two
6 days worth of trial and then he plead?

7 MR. JOHNSON: Yes, Your Honor.

8 THE COURT: I just have the plea transcript.

9 MR. JOHNSON: That is all I have as well.

10 THE COURT: All right.

11 MR. JOHNSON: And if the Your Honor wishes us to
12 order the transcript.

13 THE COURT: We will see how this goes.

14 MR. JOHNSON: All right.

15 MS. DIFRANCO: So it's our contention that Mr.
16 Cook's representation of Raymond McCarter effectively
17 rendered his guilty plea involuntary despite what he
18 said at the plea and that is Mr. McCarter was
19 prejudiced by that representation, and it is
20 reasonable to believe -- I think it will be once you
21 hear this evidence today that he would not have plead
22 guilty but for the things that happened leading up to
23 that third day of trial. So, I would like to call my
24 client to the stand.

25 THE COURT: Okay.

1 MR. JOHNSON: And Your Honor, just for the record
2 involuntary guilty plea is not grounds for PCR that I
3 am aware of and we would ask that testimony be limited
4 to what was in his application, and that ineffective
5 assistance of counsel and then the sentence was unduly
6 harsh which is a direct appeal issue and should be
7 dismissed, but just only on ineffective assistance of
8 counsel. Counsel failed to use important evidence.
9 You have it in.

10 THE COURT: I got it, and Mr. Johnson, I don't
11 want to put words in Miss DiFranco's mouth, but it's
12 my understanding what she is saying is because of the
13 ineffective assistance of counsel -- but for the
14 ineffective assistance of counsel he would not have
15 plead.

16 MR. JOHNSON: Yes, sir, I understand.

17 THE COURT: Just so we are clear on the record
18 what you are trying to prove.

19 MS. DIFRANCO: And it is my understanding that
20 when you have someone who plead guilty, an ineffective
21 assistance of counsel, in order to prove that you have
22 to prove both that they erred in their representation
23 and that it prejudiced him.

24 THE COURT: Right.

25 MS. DIFRANCO: So that's how we arrived at the

1 ineffective assistance of counsel.

2 THE COURT: You are doing fine. Thank you, ma'am.

3 MS. DIFRANCO: Thank you.

4 RAYMOND BRADLEY MCCARTER, called as a witness,
5 having been duly sworn by The Clerk, was examined and
6 testified as follows:

7 DIRECT EXAMINATION

8 BY MS DIFRANCO:

9 Q Mr. McCarter, can you give the Court your full name?

10 A Raymond Brad McCarter.

11 Q And your age and date of birth?

12 A Thirty-five, [REDACTED].

13 Q And what is the highest level of schooling that you
14 completed?

15 A Eleventh.

16 Q Do you have a GED?

17 A Yeah, I got a GED.

18 Q When did you complete that?

19 A 2004.

20 Q I want to ask you a little bit about your hearing
21 problem. How long have you been hard of hearing?

22 A I got hearing aids since I was in 5th grade.

23 Q And do you have -- do you know of an actual diagnosis
24 from a doctor?

25 A No, I don't.

1 Q Did you have a doctor prior to being incarcerated?

2 A No, ma'am. No, ma'am.

3 Q And your currently incarcerated?

4 A Ma'am?

5 Q You are currently incarcerated?

6 A Yes.

7 Q Where are you incarcerated?

8 A Wateree.

9 Q Do you understand why we are here today?

10 A Yes, ma'am.

11 Q Who was your attorney on August 25, 2011?

12 A David Cook.

13 Q And how long had he been your attorney?

14 A I would say close to a year.

15 Q When did you first met him?

16 A I met him four days, I believe four days after my dad
17 said he hired him.

18 Q Where did that meeting take place?

19 A At the visitation in York County back here in the back.

20 Q Okay. And what did you and Mr. Cook discuss that first
21 day that you met him?

22 A He had said my dad had hired him and that he was going
23 to represent me. That he had, my dad had told him about some of
24 the stuff that had happened at the incident and from there he
25 said he would try and get me five years probation and it dropped

1 down to assault and battery of high and aggravated nature but he
2 would say he could do. Everything in that area right there.

3 Q So during that first meeting you discussed with Mr.
4 Cook attempting to negotiate a reduced charge?

5 A Yes, ma'am.

6 Q And that charge was assault and battery?

7 A Intent to kill.

8 Q Those were the charges that you hoped he would get
9 reduced to or those were at the charges at the time?

10 A Those were my charges at the time and he wanted to
11 reduce it down to assault and battery of high and aggravated
12 nature.

13 Q Okay. And what did he say that he would do to make
14 that happen?

15 A He said -- I can't remember everything. He said
16 particularly at that time -- I do remember he said it had to be
17 a solicitor that he went to school with, that I could get the
18 deal, but if not then he wouldn't be able to get it.

19 Q And did he say the name of the solicitor that he had
20 hopped he could discuss this with?

21 A He said it was a solicitor. It wasn't a name. It was
22 someone he went to school with, Clemson. Somebody that went to
23 Clemson school.

24 Q And after that first meeting did Mr. Cook -- or did you
25 ever follow up with Mr. Cook about the outcome of those

1 potential negotiations to reduce the charge?

2 A Yeah, he came back and he told me he didn't know if he
3 could do it and he started back peddling. Starting saying your
4 probably going to do some time. Maybe three years. I didn't
5 get the solicitor I was hoping for. I got Mindy Lipinski and
6 then it went from there.

7 Q Okay. Did you and Mr. Cook meet prior -- between
8 August 2010 when you met him and your trial, did you meet to
9 discuss the State's evidence against you?

10 A States evidence, bits and pieces, yes, ma'am.

11 Q And do you know specifically what things? Did he tell
12 you what the State had against you?

13 A No, ma'am.

14 Q Did you ask for anything specific from Mr. Cook?

15 A Yes, ma'am.

16 Q What did you ask for?

17 A I asked for the whole motion for discovery.

18 Q And in your mind what did that mean?

19 A Everything; statements, written statements, physical
20 evidence, DNA, pictures, photographs, everything.

21 Q Okay. And what -- let's take those things sort of one
22 at a time. Statements, what did Mr. Cook tell you about what
23 statements were out there?

24 A He didn't mention no statements. He said there were no
25 statements.

1 Q Pictures, what did he say in response to the pictures?

2 A He told me he would get those pictures to me later on
3 on. He said I will get them to you whenever I can get them to
4 you.

5 Q You mention DNA. What was his response to that?

6 A I never heard nothing about the DNA, nothing about the
7 rest of it. Medical reports, I asked him about the medical
8 report. I got the medical report through the mail when I was
9 locked up in York County. Waiting for trial I got the medical
10 report by itself and then I got bits and pieces of the emergency
11 room. It was like one day, he came to me and delivered the
12 pictures direct. I had a visit and they let up meet and he
13 delivered the pictures directly. That was within a month before
14 the trial, but and then he gave me NCIC record sheet and then he
15 gave me some other papers that didn't have nothing to do with
16 the case period. And I wrote him a letter two or three times
17 asking him for the, you know, for everything pertaining to my
18 case.

19 Q When you say medical report, what medical report are
20 you referring to?

21 A Well, it is a medical report that the State and the
22 victim went to receive medical treatment, and that I wanted the
23 medical reports.

24 Q Did you and Mr. Cook discuss a potential self-defense,
25 defense?

1 A Yes, ma'am.

2 Q Did you and Mr. Cook talk about self -defense?

3 A Yes.

4 Q Did you talk about this during your first meeting?

5 A No, ma'am.

6 Q Do you remember or do you recall what conversations you
7 had with Mr. Cook before the trial about self-defense?

8 A Before trial, nope, only up to the about the second day
9 of trial.

10 Q Okay. So is it your understanding that you were going
11 to use a self-defense defense?

12 A I didn't really know what was going on. I didn't know
13 really what was going on. I mean as far as I know he said he
14 would try to get it dismissed with suppression and my knowledge
15 I didn't have no idea what was going on with him.

16 Q Okay. Did you later find out that there were
17 statements from --

18 A Yes, ma'am.

19 Q -- witnesses that testified at trial?

20 A Yes, ma'am.

21 Q What statements did you later find out about that you
22 had asked about earlier?

23 A The victim's statement and the son's statement.

24 Q The victim's statement is that a written statement?

25 A Yes, ma'am.

1 Q When did you find out about that?

2 A Second day of trial.

3 Q Okay, and how did that come about?

4 A At the end of that trial -- I mean at the end of that
5 day, he came when I was back in the holding cell and he came in
6 there and he told me, he said that-- he said look, it's not the
7 State's fault. He said it's my fault, he said, but here I know
8 you wanted these and I got them, but I just wanted to let you
9 know it's not the State's fault and I looked at him and I was
10 like you had that the whole time.

11 Q Did he say when he had received them?

12 A No, ma'am.

13 Q Had -- I am jumping ahead a little bit. Had the victim
14 already testified when you received the statement?

15 A Yes, ma'am.

16 Q Okay. When you went back and read the statement --

17 A Yes, ma'am.

18 Q -- did you see inconsistencies between what he had
19 testified too and what he had written in the statement?

20 A Yes, ma'am.

21 Q Did you point those out to Mr. Cook?

22 A I didn't have a chance.

23 Q Okay. Were there things when the victim testified at
24 trial, were there things that you thought were inconsistent or
25 that Mr. Cook should have asked him about?

1 A The consistency was he kept saying that I was the one
2 that assaulted him and beat him up with a hammer and then later
3 on in there he tried to say that he didn't know who hit him, he
4 said, but it was pretty sure it was me. That I was the last one
5 standing there with the hammer and then he said he didn't know
6 if Misty, which is my co-defendant, Montgomery, and it was some
7 other things that he said he didn't know what kind of vehicle
8 that drove off and then in the hearing -- in Court during the
9 trial he said that I went to my tool box grabbed a -- I mean the
10 white truck and opened the toolbox and grabbed a tube of calking
11 out and thru it at him and he didn't know what kind of truck I
12 drove off in and now he knows what kind of truck I had.

13 There was a lot of things that were inconsistent.

14 Q Besides the written statement that you contend Mr. Cook
15 gave you on the second day of trial were there any other
16 statements that you received?

17 A From the son, the victim's son.

18 Q And was that a written statement?

19 A Yes, ma'am.

20 Q Were there any audio statements?

21 A Audio statements - - there was some audio statement in
22 the evidence, yes, ma'am.

23 Q Did you have an opportunity to hear those prior to
24 trial?

25 A The audio, yes, ma'am. Well, bits and pieces now.

1 They couldn't really get the CD working on it. They just let me
2 hear bits and pieces. They kept rewinding it and trying to get
3 it to play and it would stop. I never really got to hear the
4 whole thing. Probably maybe five, ten seconds of it. Said you
5 would be able to hear it at trial you will be able to hear it at
6 trial.

7 Q How long before the trial did you hear the bits and
8 pieces of the audio statement?

9 A That was on Friday, say about three days, three or four
10 days on a Friday, about four days before trial.

11 Q Did Mr. Cook tell you how long he had had that
12 statement?

13 A No, ma'am.

14 Q Was there any other evidence specifically that you
15 asked about and if so what was Mr. Cook's response?

16 A I asked him about having Misty testify on my behalf and
17 he said he didn't think it was best for her to be here. I told
18 him that I wanted her to be here and he wouldn't do it.

19 Q Okay. Did you and Mr. Cook discuss you testifying at
20 trial?

21 A Yes, ma'am.

22 Q And what was your desire about that?

23 A I wanted to testify.

24 Q And what did he say?

25 A He said that I could testify, but he said that he would

1 let me know my record might have a bad influence on my
2 testimony.

3 Q Did he ever tell you that he wasn't going to allow you
4 to testify?

5 A Right at the beginning, the third day of trial that's
6 when he told me he told me that statement right there. He said
7 he didn't want to let me testify, not unless I testified my "ass
8 off".

9 Q Mr. Cook said that you needed to testify your "ass
10 off"?

11 A Yes.

12 Q Did you understand the elements of the charges that you
13 were charged with, assault and battery with intent to kill?

14 A Yes, ma'am.

15 Q Did you understand the elements of that and what the
16 State needed to prove?

17 A As far as from what he told me. I mean I am going by
18 what he tells me.

19 Q So you and Mr. Cook did discuss that?

20 A Yeah, we discussed that on the second day, the end of
21 the second day of trial.

22 Q So you are saying that before the second day of trial
23 you had not discussed the elements of the charges?

24 A As a matter of fact he gave me a paper saying -- I
25 mean, there was a paper that said you got to say these things

1 and that's when I had said those are the elements of
2 self-defense, that is the only time I was ever mentioned about
3 the elements.

4 Q Those were the elements of self-defense, but what about
5 the elements of things that you were charged with, assault and
6 battery with intent to kill?

7 A No, ma'am.

8 Q Did you guys talk about malice aforethought and what
9 that is?

10 A No, ma'am.

11 Q And what the State needed to prove?

12 A No, ma'am.

13 Q Besides Mr. Cook did you have any other attorneys
14 representing you at trial?

15 A Yes, ma'am.

16 Q Who were they?

17 A I am not even sure of the name. I can't remember off
18 the top of my head. He had a paralegal and he had another
19 attorney that was sitting on the left side. I can't remember
20 the name.

21 Q So these were people that worked with Mr. Cook?

22 A I guess so.

23 Q Okay. And when did you first -- the other attorney who
24 was there at your trial when did you first met her?

25 A I met her four days before trial when his paralegal,

1 Sheila had brought her down there and had like a visit, like a
2 lawyer/client visit and they were trying to show me the video
3 and that's when I met her and she told me she was going to be
4 helping David. That's when I met her like four days before
5 trial.

6 Q Prior to trial were there any hearings before the court
7 about evidence? Any evidentiary hearings prior to trial?

8 A Yes, ma'am.

9 Q And what was the nature of the hearing as you
10 understand it?

11 A Suppression hearing. He said something about he didn't
12 have enough - - they didn't have a warrant. The police did not
13 have a search warrant, an arrest warrant and search warrant and
14 he was trying to have it dismissed.

15 Q Okay, and was Mr. Cook successful in having those
16 suppressed?

17 A No, ma'am.

18 Q And what were your feelings about how Mr. Cook did for
19 you during that hearing?

20 A I really don't think he gave it his best shot. There
21 was a couple of things as far as like photos. There were some
22 photos in there that I was trying to ask him about. He said
23 that there was nothing he could do unless it got in like photos
24 of having injuries. You couldn't see the injuries. All you can
25 see is the like a patch on the his top and on his side and I was

1 asking about stuff like the actual police photos and the hammer.
2 There was no hammer in the evidence and I was wanting to know
3 why could they not bring it out to show the jury, you know, and
4 let them know that there was a hammer involved that they said it
5 had DNA on it.

6 Q Okay. So, at the suppression hearing was there
7 discussion about this hammer?

8 A No, ma'am.

9 Q Had you reviewed a list of the State's evidence? I
10 mean, did you know what they were planning to bring or not bring
11 to trial at that point?

12 A No, ma'am.

13 Q And the pictures, those pictures you wanted to be
14 brought into trial or did not want it brought to trial?

15 A I just think how it could be admissible. How could you
16 turn in photos that you don't know if the police took or they
17 didn't take. You can't see actual injuries. I mean you see
18 head injuries and I little scratch on the arm, but you got
19 actual supposedly they said severe injuries and you can't see
20 them.

21 MR. JOHNSON: Your Honor, at this point that's
22 going to a direct appeal issue, interest of photos,
23 suppression hearing that's a direct appeal issue
24 that's not proper for PCR.

25 THE COURT: All right.

1 MS. DIFRANCO: Okay.

2 THE COURT: Just stick to ineffective assistance.

3 MS. DIFRANCO: Sure.

4 Q Moving forward to the actual day of trial, can you tell
5 me which witnesses had given testimony?

6 A Which witnesses had given testimony?

7 Q Yes.

8 A There was a lady that I didn't even know that came and
9 testified and she lied through the whole thing saying that she
10 saw me and all this, but anyway, I don't know her name. Never
11 seen her before in my life and then you have the victim. Then
12 you have his son and then you had Jamie Gilfillan which he never
13 he never questioned period, and then -- I can't remember and
14 then you had paramedic.

15 Q Was there any testimony from any doctors?

16 A Yeah, there was a doctor.

17 Q And did a police or law enforcement testify?

18 A Yeah, it was like two at the beginning. One at the
19 beginning, I think, I am not mistaken during the suppression
20 hearing but the one that arrested me he was getting ready to
21 testify on the third day.

22 Q So the police officer had not yet testified?

23 A He didn't get to testify yet.

24 Q Who is Jamie Gilfillan?

25 A He's the guy that really instigated it, this whole

1 situation and he was the one that called me on the phone and
2 instigated this situation.

3 Q So, he's the person that you were looking for?

4 A Yes, ma'am.

5 Q When the incident happened?

6 A He's the person that called me to come see him, yes,
7 ma'am.

8 MR. JOHNSON: Your Honor, at this point this is
9 starting to retry the case. This is a guilty plea.
10 Can we please direct counsel to ask questions about
11 the guilty plea.

12 MS. DIFRANCO: Well, I mean, as I tried to say a
13 little bit in the opening, it is the pattern leading
14 up to what happened. It is everything that
15 effectively rendered the guilty plea involuntarily
16 because of the way the case was handled.

17 THE COURT: I will give you a little more leeway
18 Miss DiFranco, but move it along.

19 MS. DIFRANCO: Okay.

20 THE COURT: I'D appreciate it. Thank you ma'am.

21 MS. DIFRANCO: Okay.

22 Q Did Mr. Cook cross examine Jamie Gilfillan?

23 A Ma'am?

24 Q Did Mr. Cook cross examine --

25 A No, ma'am.

1 Q Did he ask him any questions?

2 A No, ma'am.

3 Q Did his associate ask him any questions?

4 A No, ma'am.

5 Q Do you think he should have asked questions?

6 A Yes, ma'am.

7 Q The woman who you don't know her name, did Mr. Cook
8 cross examine her?

9 A Yeah, I am not sure what all he asked, but yes, ma'am.

10 Q Are you not sure because you don't remember or because
11 you couldn't hear?

12 A I couldn't hear everything that was said. I mean, I
13 will go ahead and put on the record I only heard for every ten
14 words somebody would say I hear three, unless you are standing
15 right there directly in front of me.

16 Q Were there any accommodations made at the trial to help
17 you hear better?

18 A He tried to have a paralegal whisper in my ear. That
19 was only going to make it worse. I couldn't hearing the
20 whispering either. I would have to watch her, read her lips
21 while they were talking. See I am not good at that. I have to
22 read lips.

23 Q Okay.

24 A So I choose just to read as many lips as I could and
25 get it from there.

1 Q The victim, Mr. Southard. I don't know how you
2 pronounce his name. Did he testify?

3 A Yes, ma'am.

4 Q And did Mr. Cook cross examine the victim?

5 A Yes, ma'am.

6 Q Did he ask him about any inconsistencies with any of
7 his prior statements?

8 A Not really, no, ma'am.

9 Q Is it not really you don't remember or no, ma'am?

10 A It was a 15 minute question.

11 Q He question him for 15 minutes. Did he question him
12 about the nature of his injuries?

13 A I am not sure.

14 Q Okay. And are you not sure because you couldn't hear
15 or because you do not remember?

16 A Because I didn't hear.

17 Q Were you present when the victim's son testified?

18 A Yes, ma'am.

19 Q And did Mr. Cook cross examine him?

20 A Yes, ma'am.

21 Q And do you feel like he asked him all the questions
22 that should have been asked of him?

23 A Yes, ma'am.

24 Q Okay. At the end of the second day of trial did you
25 and Mr. Cook have any discussions about you pleading guilty?

1 A No, ma'am.

2 Q Okay. What did you discuss at the end of the second
3 day?

4 A He said he was going to put my on the stand, if I
5 wanted to get on the stand, and then he said that I think we can
6 win it and he said I will see you tomorrow.

7 Q Okay. Do you recognize that piece of paper?

8 A Ma'am?

9 Q Do you recognize that piece of paper?

10 A Yes, ma'am.

11 Q Can you tell me what it is?

12 A This is a paper that Dave gave me on that second day of
13 trial. At the end of the second day of trial.

14 Q Okay. The paper saying these are the things I have to
15 say in order to win. I have to say these things on the stand to
16 win.

17 Q Does this look like from the best that you can remember
18 does this look like a copy of the piece of paper that Mr. Cook
19 gave you on the second day of trial?

20 A Yes, ma'am.

21 Q Is there anything different about it?

22 A It's the same.

23 Q Okay.

24 MS. DIFRANCO: Your Honor, can I provide you with
25 a copy of this?

1 THE COURT: Sure.

2 (Whereupon, document was handed to the Court.)

3 Q When, Mr. Cook gave you this piece of paper, what did
4 you say?

5 A I didn't say nothing right then. He told me if you go
6 on back you read this, look over it. He said we will win this
7 thing tomorrow. I will see you tomorrow.

8 Q Did you have any trouble with any of the things that he
9 had written down?

10 A Yes, ma'am.

11 Q Which one?

12 A Lets see. Okay number two, "We have to feel like we
13 were in imminent danger of losing life or sustaining serious
14 bodily injury. Okay. And then got quote, "He picked up the
15 hammer and ran at me screaming 'What are you going to do now big
16 boy.' I tried to slow him down by throwing a stepping stone at
17 him, I believed I was in danger of getting hurt badly or
18 killed."

19 Q If Mr. Cook put these on the piece of paper you must
20 have said that before?

21 A No, ma'am.

22 Q You never said you through a stepping stone and ran
23 screaming at the guy?

24 A No, ma'am.

25 Q So, when he gave you the piece of paper and you read it

1 did you have tell him you had trouble with that statement?

2 A Yes, ma'am. Yes, ma'am, I told him, I asked him why
3 did he want me to say I tried to slow him down by throwing a
4 stepping stone or something that wasn't true because I felt like
5 if I said something that it was agreeing to what the victim said
6 then he would believe everything else that the victim said and I
7 asked him why did he want me to say something like that, and
8 then that's when he pointed out, well, you got to say these
9 things in order to win. If you can't testify your ass off and
10 say these things I'm not going to put you on then.

11 Q And how -- did he say that in a calm and collective
12 voice? Tell me what the interaction was like?

13 A He was pretty hot.

14 Q And what were you?

15 A I was kind of scared. I mean, I felt like I didn't
16 know who he was working for. I understand the four elements,
17 but why can't I just go in there and be myself and explain
18 exactly what happened on my part.

19 Q Okay. So after that conversation you went back to
20 jail?

21 A Yes, ma'am.

22 Q And you took the piece of paper with you?

23 A Yes, ma'am.

24 Q Okay. And you came back the next morning for the third
25 day of trial?

1 A Yes, ma'am.

2 Q And at what point did pleading guilty come up?

3 A Very first thing. First thing I seen he had a shirt
4 that he got from my father because I asked for a shirt and he
5 came in and he said you need to plead guilty. He said if you
6 don't you'll get 20 years, but I think I can get you a deal. I
7 tried to tell him I didn't want to plead guilty. How come you
8 do think we're going to win it. Because you got to get on the
9 stand and you can't get on the stand. I said well, I'll get on
10 the stand and then he tried to back down, said well, your
11 record. He tried to say my record and I am not going to put you
12 on stand because of your record. You need to plead. If you
13 don't plead you're going to get 20.

14 Q If you don't plead you are going to get 20, but if you
15 do plead was there any discussion?

16 A He said I'll see what kind of deal I can get you and he
17 shot out and left me in there by myself. I was shook up because
18 I mean, my life is on the line. I wanted somebody to fight for
19 me and do what's right. I want to do what's right.

20 Q Prior to trial had there been any discussion about
21 pleading guilt?

22 A Yes, ma'am.

23 Q And when was that?

24 A He came to see me. He came to see me within probably
25 about three or four months before the actual trial date and

1 explained to me, said 20 years is a long time. You know that
2 don't you. Yeah. He said well, started talking about if you
3 get convicted you get 20 years and when you go do the 20 years
4 and you get out you won't remember the date you got locked up
5 what do u want to do? I want to go to trial.

6 So, then, then that's pretty much it right there. And then I
7 turned down an eight year over.

8 Q Okay. So, at some point the State made an offer to
9 allow you to plead guilty to eight years?

10 A Yes, ma'am.

11 A And when was that?

12 A Four days before trial.

13 Q Okay. Was that on the same day that you heard the
14 audio statement?

15 A Yes, ma'am.

16 Q And who -- did Mr. Cook talk to you about that?

17 A No, ma'am, it was his paralegal.

18 Q His paralegal, and do you know what her name was?

19 A Sheila Cove.

20 Q And what did she say?

21 A She had a piece of paper saying for me to sign. Do you
22 want the eight years, and I told her no. Well, here sign saying
23 that you turned down the eight year offer and I was kind of
24 curious about signing because I didn't know what I was signing
25 and I read it and it said you turned downed the eight year offer

1 and I signed the paper.

2 Q Between the four months when you and Mr. Cook talked
3 about, you know, you pleading guilty or getting potentially 20
4 years, and this day when you met with his paralegal four days
5 before trial, had you talked to Mr. Cook about a guilty plea?
6 Had he recommended a guilty plea?

7 A No, it was only really twice that a guilty plea was
8 brought up. The first time was ten and the second time was
9 eight. And then that's when she came with the eight years on
10 the paper. That's the only time.

11 Q So you turned down the eight years. You recall signing
12 a piece of paper turning down eight years?

13 A Yes, ma'am.

14 Q And then you went to trial?

15 A Yes, ma'am.

16 Q Okay. On the third day of trial when Mr. Cook told you
17 that you should plead guilty or you were going to get 20 years
18 did he talk specifically about any evidence that the State had
19 that he thought was particularly bad for you?

20 A No, ma'am.

21 Q Did he say why he thought you should plead guilty?

22 A No, ma'am. He just said that you can't make the jury
23 believe nothing. He said all the witnesses are against me. He
24 said he'd be doing this for 25 years. He said he felt that I
25 would get 20 if I didn't go in there and plead. That's the

1 bottom line, you need to plead.

2 Q At that point did you bring up any of the things that
3 you thought would have been would have helped you evidence wise?
4 Did you talk to him about that?

5 A I was -- I was kind of dazed to tell you the truth. I
6 didn't know what to do. I couldn't think of nothing to do.

7 Q Did you speak to anyone else between when he left and
8 you came into the courtroom?

9 A No, ma'am.

10 Q Do you feel like you had enough time to think about
11 your options?

12 A None whatsoever.

13 Q Did Mr. Cook give you any advice, instructions about
14 what to do when you came in and made the guilty plea?

15 A Yeah, he told me he said, just go in there, agree to
16 everything and I will do my part to try and get you anywhere
17 from zero to five, to zero to eight. He said, I can't promise
18 you anything. He said you won't get no more than ten. There's
19 a cap on it. Your charge carries 20. He said, but you ain't
20 going to get no more than ten he said, but I'll try my best to
21 go there and talk for you.

22 Q And did you feel pressured into pleading guilty?

23 A Yes, ma'am.

24 Q Did you feel like you had an alternative? Did you have
25 a choice?

1 A No, ma'am, really I didn't. At the moment he made me
2 feel that was the best thing to do for the moment.

3 Q You reviewed the transcript of your guilty plea?

4 A Yes, ma'am.

5 Q And you recall that as part of that the solicitor went
6 through your prior convictions?

7 A Yes, ma'am.

8 Q And had you actually been convicted of all the things
9 that were listed out?

10 A On the guilty plea?

11 Q Do you recall reviewing the transcript from the guilty
12 plea?

13 A Yes, ma'am.

14 Q And in that transcript the solicitor goes through your
15 prior convictions. Were you actually convicted of all of those
16 things?

17 A I am not sure. I am not sure.

18 Q Would looking at the transcript help you to remember
19 that?

20 A Yes, ma'am.

21 (Document handed to the witness.)

22 Q You don't have to read it out loud. On the bottom of
23 page seven, top of page eight.

24 A On page seven?

25 Q The bottom of page seven over to page eight.

1 A Okay. Yes, ma'am.

2 Q So you were convicted of all those things?

3 A Yes, ma'am.

4 Q Understand that Judge Hayes asked you a number of
5 times, or at least twice whether you were entering this plea
6 voluntarily?

7 A Yes, ma'am.

8 Q And you responded that you were?

9 A Yes, ma'am.

10 Q So, you are now telling the Court that on August 25th,
11 2011 you were not being honest with the Court?

12 A Yes, ma'am.

13 Q But you are being honest with the Court now?

14 A Yes, ma'am.

15 Q And understand that Judge Hayes asked you if you were
16 happy with Mr. Cook's representation?

17 A Yes, ma'am.

18 Q And you answered that you were?

19 A Yes.

20 Q Why did you answer that?

21 A I went along with it because I felt like if I didn't
22 they were going to bring the 12 out and give me a conviction and
23 get the 20 years like he said.

24 Q And do you recall that you said that you would take
25 full responsibility for ---

1 A For my ass. I'm not going to take responsibility for
2 everybody else. I told him that I thought I was guilty of
3 assault and battery, not assault and battery with intent to
4 kill. I mean that is a whole different ball game now.

5 Q Do you recall whether during the plea hearing you were
6 having trouble hearing what Judge Hayes was saying?

7 A No, ma'am.

8 Q You could hear him fine?

9 A Yeah. Yes, ma'am.

10 Q Was there anything else about Mr. Cook's representation
11 that you think that the Court really needs to know?

12 A Honestly, this man right here it was so back and forth,
13 whisy-washy. I didn't know what to count for him. I mean, he'd
14 tell me we are going to win one minute. He'd tell me he will
15 fight for me one minute. Then I'm worried about this. It was
16 back and forth. And then it was one time, that really sparked
17 is there was and inmate locked up at the same time I was and he
18 was represented by Dave Cook and I was talking to him about
19 David Cook about the motion for discovery. I said -- I asked
20 him how do you get the motion for discovery from David Cook and
21 he was telling me about it and all this and then -- well day
22 inmate and I got into a little physical altercation when I was
23 locked up. We ended up going to lockup for ten days. Well, it
24 wasn't two days later Mr. Cook comes and sees me and like a
25 video visitation. He said look, I am going to make this quick.

1 I could tell he was pissed. He said if you are going to, quote,
2 keep talking shit about me. He said I will just give your daddy
3 half his money back and I will keep the other half for making a
4 negotiation with the solicitor. I said whoa, whoa, whoa, I
5 said, what are you talking about I'm talking shit about you?
6 Well, you're talking shit about me. I'm not going to hold your
7 hand. He said, I'm not going to hold your hand down there. I
8 said ain't nobody talking shit about you David, and then he
9 calmed back down. He said okay, okay, okay. He calmed down,
10 okay, okay. I couldn't -- that right there I asked my daddy
11 later on I think I need another lawyer. But at the same time he
12 was playing my daddy. He was telling my daddy everything is
13 okay, okay. It was back and forth. I keep telling my daddy I
14 think I need another lawyer, but he was playing my daddy.
15 Telling my daddy everything else is all right.

16 Q We are going to hear from your dad. So, after you
17 entered the guilty plea and were sentenced, did you talk to
18 David --

19 A Yes, ma'am.

20 Q -- about whether you had any options at that point?

21 A I asked him for an appeal. He said he didn't do no
22 appeals.

23 Q What was his response?

24 A He said he didn't do no appeals. He flat out told me
25 no.

1 MS. DIFRANCO; I think that is all the questions
2 I have Your Honor.

3 THE COURT: Mr. Johnson, your witness.

4 MR. JOHNSON: Yes, sir, Your Honor, one second.

5 CROSS EXAMINATION

6 BY MR. JOHNSON:

7 Q Mr. McCarter, let me know if you can't hear me at any
8 point, okay.

9 A Okay.

10 A Can you read my lips?

11 Q Yeah, you could come a little closer?

12 Q Is that better?

13 Q Let me start off, apparently you like to get in
14 physical altercations, correct? You like to fight with other
15 inmates?

16 A No, I don't like to fight with inmates.

17 Q You have conviction for criminal domestic violation and
18 you also have another conviction for simple and assault and
19 battery, is that correct?

20 A Yes, sir.

21 THE WITNESS: Excuse me, Your Honor. Excuse me.
22 Can I have a drink of water?

23 THE COURT: Sure.

24 MR. JOHNSON: There you go. (Handing a glass of
25 water to the witness.)

1 THE WITNESS: Thank you.

2 Q Now, Mr. McCarter, this is not the first time you have
3 been in the criminal system is it?

4 A No, sir.

5 Q Okay. And at the guilty plea the first thing the judge
6 asked you is if you are satisfied with your attorney and you
7 said yeah?

8 A Yes, sir.

9 Q And he went over the elements of assault and battery
10 with intent to kill and they carry 20 years and you said you
11 understood that, didn't you?

12 A Yes, sir.

13 Q And you wanted to plead guilty?

14 A Not 20 years.

15 Q But you wanted to plead guilty to the assault and
16 battery with intent to kill?

17 A I didn't wants to, no.

18 Q But it was your decision to plead guilty, wasn't it?

19 A It wasn't my decision, no.

20 Q You never told the judge it wasn't your decision, did
21 you?

22 A No.

23 Q And he asked you if there were any threats or promises
24 and you said no; isn't that correct?

25 A Yes.

1 Q And he asked you if you were doing it freely and
2 voluntarily, and you told the judge yes; isn't that right?

3 A Yes, sir.

4 Q He also went over all your constitutional rights
5 including the right to present a defense and you waived all
6 those rights, didn't you?

7 A Yes, sir.

8 Q That you wanted to waive a right to trial. You wanted
9 to take a guilty plea, isn't that right?

10 A Really I didn't want to take the guilty plea at all.
11 You keep saying I wanted to. No, I didn't want to take the
12 guilty plea.

13 Q Did you ever tell the judge that?

14 A I wanted to. I wanted to tell him I didn't want to
15 take the guilty plea. I told -- I told at one point that I
16 wasn't guilty of intent to kill, just assault and battery.

17 Q But then he stopped and said we are going to go to
18 trial, didn't he, and then you came back on record and you said,
19 yeah, I agree. I hit him with the hammer, ain't that right?

20 A Know what, I felt threatened.

21 Q But you didn't tell the judge that, did you?

22 A No, sir.

23 Q Okay. And you actually said, yeah, all right, I hit
24 him. And he said you hit him with the hammer and you said, yes,
25 sir. And later on you took full responsibility for your

1 actions; isn't that right?

2 A Let me see.

3 Q Page 12, line 19. And on line 24, so, I take full
4 responsibility and I am pleading guilty to assault and battery
5 with intent to kill and I apologize to the Court. Isn't that
6 right?

7 A Yes, sir.

8 Q I got a few questions about your testimony today.
9 First of all you admitted to lying at the guilty plea?

10 A Yes, sir.

11 Q But you want us to believe that you telling the truth
12 today?

13 A Yes, sir.

14 Q Okay. And isn't it true there was a suppression
15 hearing to try and get the video suppressed, but the judge
16 overruled that and allowed it to come into evidence, isn't that
17 right?

18 A I believe so.

19 Q But your attorney made that motion?

20 A I believe so.

21 Q You also say that you wanted your attorney, Mr. Cook,
22 to call the co-defendants to come testify, isn't that right?

23 A No, sir.

24 Q That was your testimony earlier that you told him that
25 you wanted the co-defendant to come testify at your trial?

1 Maybe I misunderstood you, but I thought that is what you said
2 earlier.

3 A Did I wanted them to come testify.

4 Q Your co-defendant, your girlfriend?

5 A Yeah, yeah, yeah, my bad.

6 Q That is fine. But is she here today to testify on your
7 behalf?

8 A No, sir.

9 Q And getting to this sheet that he said that he made you
10 talk about your testimony of self-defense. I think you have a
11 copy up there.

12 This is based on the things that you told Mr. Cook, isn't
13 it?

14 A No, sir.

15 Q So he just made up a story?

16 A Yes, sir.

17 Q Just out of the blue?

18 A Yes, sir.

19 Q Because he's the one going to prison?

20 A You know what, why would a man have to lie. I mean, he
21 wanted me to lie just to get out of this here. I don't want to
22 lie to get out of it., I don't want to lie to beat the trial. I
23 know he wants four elements of self-defense in order for these
24 four elements you got to say these things. That's not -- that's
25 not coming out of my mouth.

1 Q So he just made up this details, that's your testimony?

2 A Yes, sir.

3 Q That's your testimony, is that he made up this these
4 details?

5 A Yes, sir. Yes, sir. And on top that --

6 Q With the exact details of your case?

7 A Yes, sir, and you know what and on top of that he spoke
8 confidentially and told around and lie and told my father that I
9 had told him that I hit him with the hammer. That was a lie
10 too.

11 Q But you admitted you hit the fella with the hammer?

12 A But I had to say that, I had to say that to get the
13 plea.

14 Q That's what he told you?

15 A Yeah, he said you know what you are doing? You got to
16 admit it. You have to admit it. You can read it. He told me I
17 had to fess up. He told me they would bring the jury back out,
18 I mean I felt like I was in a lynching mob. You know, everybody
19 was stacked up against me.

20 Q But yet you told the judge that there were no threats,
21 no promisees and that you agreed?

22 A I didn't have to tell him that. He was sitting telling
23 me I had to fess up out of his own mouth too. I mean, he's
24 telling me. That's on the paper.

25 Q Did I tell the judge that?

1 A Did I tell the judge that, no, I didn't tell him that.
2 I went ahead and gave them what they wanted.

3 Q And the judge says anything you want to say and you
4 never said anything about that, did you?

5 A No, sir.

6 Q But you lied under oath?

7 A Yes, sir.

8 Q You lied under oath. The other thing you said on your
9 direct testimony is that you wanted to do the right thing. You
10 told the attorney you wanted to do the right thing and that you
11 didn't have enough time to think about your decision whether or
12 not to plead guilty?

13 A Yes, sir.

14 Q But you never told the judge that, did you?

15 A No, sir.

16 Q You also never told the judge about wanting a new
17 attorney. As a matter of fact you said to the judge under oath
18 that you were satisfied with his services?

19 A Yes, sir. I didn't know what to do. I didn't know
20 what to say. What to do.

21 Q But under oath you said you were satisfied, right?

22 A Yes, sir.

23 MR. JOHNSON: No further questions at this time
24 for this witness Your Honor.

25 THE COURT: Anything on redirect.

1 MS. DIFRANCO: I do have one.

2 REDIRECT EXAMINATION

3 BY MS. DIFRANCO:

4 Q Had you appeared before Judge Hayes before?

5 A Yes, ma'am. Twice.

6 Q And what were your feelings about how he felt about
7 you?

8 A I knew right then he didn't like me. I mean from the
9 first time --

10 MR. JOHNSON: Objection, Your Honor. That's
11 speculation whether or not about counsel liked him or
12 not.

13 MS. DIFRANCO: Not about counsel the judge.

14 MR. JOHNSON: That is also irrelevant.

15 MS. DIFRANCO: Well, I am asking what his feelings
16 are.

17 A Yeah, I knew right then he had it against me if I came
18 in front of me again and he had a chance to sentence me because
19 the first time I met him he told me if I ever came back in front
20 of him again my people can stay at home. That's he's will send
21 me down the road. I didn't go to prison that day but ---

22 Q Did that play into your feelings about why you felt you
23 had to plead guilty?

24 A Yes, ma'am.

25 MS. DIFRANCO: No further questions, Your Honor.

1 THE COURT: Anything on recross?

2 MR. JOHNSON: No, Your Honor.

3 THE COURT: You may step down.

4 Miss DiFranco, you call your next witness.

5 MS. DIFRANCO: Call Raymond McCarter.

6 RAYMOND EUGENE MCCARTER, called as a witness, having
7 been duly sworn by The Clerk, was examined and
8 testified as follows:

9 DIRECT EXAMINATION

10 BY MS. DIFRANCO:

11 Q Mr. McCarter, can you introduce yourself to the Court.

12 A My name is Raymond Eugene McCarter.

13 Q And where do you currently live?

14 A I live at [REDACTED], York, South Carolina.

15 Q And what is your relationship to Brad McCarter?

16 A Brad is my son by my first marriage.

17 Q Are you currently employed?

18 A I am paint contractor.

19 Q And how long have you been a paint contractor?

20 A Twenty-nine years.

21 Q Are you -- you said that Brad was your son by your
22 first marriage so you are not currently marriage to his mother?

23 A That's right.

24 Q And when were you all divorced?

25 A After about six years of marriage I won custody of Brad

1 and one of the girls in the divorce hearing.

2 Q So did you -- were you primarily responsible for
3 raising Brad?

4 A Yes, ma'am I was.

5 Q Did you hire Mr. Cook to represent your son?

6 A Yes, ma'am, I did.

7 Q And how did you meet Mr. Cook?

8 A I came here to visit Brad one day and I seen a girl
9 that I had went to school with and she was walking across the
10 parking lot and I asked her about her son that he was in trouble
11 and she started telling me and she started pointing back up to
12 the front of the sheriff's department there and she said that
13 was her attorney and she mentioned Dave Cook. And I said, well,
14 is he a good attorney? She said, "Well, I don't really know
15 right now. We use hired him to represent my son." So I got out
16 and I went up there and I asked him did he have a minute. He
17 said sure. He was smoking a cigarette. He said, "sure, I have
18 a minute", and I told him about my son and told him the
19 situation. Told him the charges he had been under. We sat and
20 talked a little bit. And I said, "I'm not interfering with you
21 doing your job or anything like that. Oh, no". And he had his
22 paralegal, I guess Sheila Cole, with him, and I told him the
23 charge against Brad, the lynching charge that they had filed
24 against him and I told him about the assault and battery with
25 intent to kill and told him that I knew there was a lot of

1 evidence that didn't add up to that and what would he charge to
2 represent him and after I got through telling him the situation
3 there and he said, "Well, most attorneys get \$5,000, but I can
4 get him off self-defense." He said, "I tell you what I'll do".
5 He said, "I will do it for three thousand dollars". And so I
6 didn't pay him at that time. I took -- must have been about
7 three or four days and went and spoke with another attorney.

8 Q So he told you he could get him off on self-defense?

9 A Yes, ma'am.

10 Q Was there I maybe able to, it could happen, or was it a
11 definitive I could do that?

12 A That's what he told me. I could get him off on
13 self-defense.

14 Q And he told you that would be three thousand dollars?

15 A He told me that would be three thousand dollars.

16 Q Okay. Did you after that meeting, did you go and meet
17 with Mr. Cook again at his office?

18 A No, I didn't meet with him in his office. He told his
19 paralegal to give me an a card with his name on it. He told me
20 he comes from three generations of lawyers out of Lancaster,
21 South Carolina and he told me just to contact her. So I did
22 contact her and I met with her right across the street and gave
23 her three thousand dollars in cash money.

24 Q Was there any written engagement? Was there any letter
25 from Mr. Cook saying what his role would be or what he would do

1 or wouldn't do?

2 A He turned around and Sheila Cole told me she would get
3 me a letter to me saying he would represent him in a jury trial
4 for lynching and assault and battery with intent to kill.

5 Q Did you ever get that letter?

6 A Not as I know of.

7 Q Were you in contact with Mr. Cook from the time that
8 you hired him until the time of Brad's trial?

9 A I was in contact with him whenever I could get in touch
10 with him. Most of time I talked to a lady name Gretchen at his
11 office.

12 Q Did you ever tell you that he wasn't able to talk to
13 you because you weren't his client?

14 A No, never told me that.

15 Q Did you ever talk to him about potential strategy for
16 the trial?

17 A No, there was just certain things that he would bring
18 up that we needed and stuff like that, and of course I had
19 police reports of things that had happened and just like the
20 blood all over the hammer and the blood in the back of the truck
21 I went to the sheriff's department and I told him, I have been
22 to the sheriff's department and told them to examine the hammer
23 and the blood in the back of truck because I knew it came from a
24 deer.

25 Brad had ran over a deer and he was going to give it to the

1 black lady over up at Clover at Hardies, and they tried to say
2 in their police report that it was blood off the victim and
3 blood all over the hammer. So, I started telling Dave that I
4 wanted to make sure the hammer was examined.

5 Q And how did he respond to that?

6 A He just told me he would try and get that done. But
7 over a period of time I asked him two or three different times
8 and he would said, "No, we haven't got that yet. That ain't in
9 evidence. They will not bring that in evidence", so ---

10 Q Did Mr. Cook ever ask you for more money?

11 A He did. One time he told me that there was going to be
12 a doctor brought in and which, you know, I was glad it was a
13 doctor brought in because I done seen the paperwork from the
14 hospital. It all said simple injuries, simple lacertations
15 {sic}. All of the medical records said simple lacertations. He
16 try to get me to give him 2000 more dollars to bring a lawyer in
17 and I talked with Tom McKinney out or York -- out of Rock Hill,
18 excuse me, and he told me not to give him no more money.

19 Q He wanted you to give him 2000 more dollars for what?

20 A To bring a doctor in.

21 Q Okay, you said lawyer, so I wasn't sure. And the
22 doctor would be someone who would be able to refute the State's
23 testimony about the injuries, is that your understanding?

24 A Well, he never did explain it to me. He just told me
25 that's what he wanted and then when Tom McKinney told me that he

1 could question the doctor that they brought and not to give him
2 no more money.

3 Q So you never gave him any more additional money?

4 A No, I didn't.

5 Q Did he ever talk to you about that again?

6 A No, he never did ask me for no more money.

7 Q Did you and Mr. Cook ever have any discussions about --
8 prior to trial, about Brad needing to plead guilty?

9 A Well, he kept on telling me that he wanted him he was
10 going to get him off on self-defense and then one day I met him
11 at the parking lot. I came to see Brad. I didn't have an
12 appointment with him. He was coming out of the courtroom and he
13 had Sheila with him and he come to me and he stuck out his hand.
14 I shook his hand. He told me was in Court. Didn't have but
15 about two or three minutes. I said, that is fine, and he said I
16 want your son to plead guilty. He said eight years. He hit the
17 man in the head with a hammer. Said, "Didn't he Sheila? Didn't
18 he Sheila?" She would never say it. She never did say yes.
19 She just had a funny look come over her face. And I look at him
20 and said, "I don't believe that." He went on. So I went down
21 and visit Brad and I asked Brad and he said, "I didn't tell him
22 that daddy." He said, "I didn't hit no man in no head with no
23 hammer. I said, "well, that's what he told me." So ---

24 Q Okay. After the first meeting with Mr. Cook when he
25 told you that he could get him off on self-defense were there

1 any other conversations that you had with him about his promised
2 outcome from these charges or the trial?

3 A Yes, he told me he could get him out on self-defense.
4 He said, a charge like this, he said if it's not somebody put
5 like in a coma, or something like that, a serious injury, I can
6 get him out on self-defense.

7 Q I am trying to understand the timeline though. You
8 testified that that happened the first time you met him. Were
9 there any subsequent conversations after that about --

10 A Yes.

11 Q -- self-defense or promised outcome from trial?

12 A Well, he came out of the courtroom -- once we started
13 getting into what I thought was going to be the trial time, I
14 came down here like from May, I found out he was on the docket
15 with Judge Hayes, and I tried to talk to him and all. He came
16 out from the solicitor's office and told me that he better take
17 a plea, plea of eight years. I said, "Dave, who are you working
18 for? Are you working for the prosecution or are you working for
19 defense?" And he flew off the handle at me. Got real angry at
20 me. I had a friend with me and he said, "I'm going to give you
21 your money back. That's what I was going to do." There was
22 people all in the hallway because this were other courts going
23 on. And I said, "That's thing for you to do." I said, "You
24 give me my money back. I said, "I'll go hire me a lawyer
25 instead of somebody flim-flamming around." So he turned around

1 and took me and one ever my friends and Sheila and put us in a
2 room right outside this courtroom here in a little holding room.
3 We sat there an hour and a half waiting for him to come back and
4 then when he come back in the room, he took me, he said let's go
5 downstairs. So he took me back down in front of the sheriff's
6 department where the little benches are at and he just changed
7 his hold attitude. Starting smiling. Said, "Look, I'm going to
8 win this case. I know I can win this case. I am going to win.
9 And I said, "Dave, that's all I am asking you to do. Just
10 present the truth. We ain't asking you to tell no lies. Just
11 present the truth of what happened. There's enough evidence
12 there to show what happened. Just do that."

13 So he said, "Well, I will tell you something." He said, "The
14 solicitor, Mindy Hervey, and the judge hate you and your son
15 both." And I thought to myself, well, why would he say that
16 because that solicitor don't know me. She might know Brad, but
17 she didn't know me and Judge Hayes didn't know me neither. It
18 just kind of blew my mind that he said that. What kind of
19 strategy is he trying to pull. So I asked my buddy when we left
20 so do you think I ought to get me another lawyer and drop him.
21 He said, I don't know what is going on with him because he come
22 a couple of times just for meetings. Anyway, he was just
23 backwards and forwards.

24 Q This incident that you just described here in the
25 courthouse where he said he would give you your money back and

1 you said that was the thing to do, how long before trial did
2 that happen?

3 A This happened -- let's see. This happened probably
4 about two months before the trial started.

5 Q And help me understand why you didn't insist on getting
6 your money back if you felt like he wasn't doing a good job?

7 A Well, because the way, you know, the way he operated.
8 He was one minute he was just like I can win this thing. I am
9 telling you I can win it. And the next thing, your son is going
10 to catch thirty years and stuff. I just told my friend I don't
11 know what to do. What should I do. Should I get my money back
12 and go talk to another attorney or should I trust him. And I
13 mean he was just different night and day. One minute he was
14 fine, the next minute he was just like, no, you are going to
15 lose. No, your going to win.

16 Q At the end of that day, outside as you are describing
17 it, you felt better? You felt reassured he was going to do his
18 job?

19 MR. JOHNSON: Your Honor, can we direct this
20 towards ineffective assistance of counsel

21 THE COURT: Yes, Miss DiFranco, if you could just
22 get quickly to the ineffective assistance the Court
23 would appreciate it.

24 MS. DIFRANCO: Sure.

25 Q Where were you during Brad's trial?

1 A They held me outside the courtroom. They wouldn't let
2 me come in.

3 Q And what was the reason for that?

4 A Dave Cook told me that I couldn't come inside. Well,
5 he kind of like to start with I was getting ready to come in and
6 he was over there talking to me and then the solicitor, Mindy,
7 and that other solicitor back there, they run out there like
8 they caught us doing something wrong and started saying if he
9 come out and told me what was going on in that courtroom it was
10 going to be a mistrial. And I was told, but not by family they
11 did go in there and try to get a mistrial, but anyway so, they
12 wouldn't let me come in the courtroom. I had to sit outside the
13 courtroom.

14 Q And do you know -- do you have understanding of why?
15 Were you planning to testify at trial?

16 A Well, they had said that because this boy had chased me
17 up the road and ran me off the road, but he never did tell me,
18 yes, your going to a witness or whatever. I mean I never did
19 talk to me about what was going to go on.

20 Q Take me to the morning of the third day of trial. Did
21 you have any conversations with Mr. Cook that day?

22 A I did. I was always here a little bit early. I don't
23 like to be late for anything. So I was sitting out in the
24 parking lot and he pulled up in a black Ford truck and he got
25 out and he had a smile on his face. I said, well what do you

1 think. We are going to win this trial, that's what I think. We
2 got this trial won. I said okay, so I gave him Brad's clothes
3 and he went to the courthouse and I sit and waited a little bit
4 for my brother and friend of mine.

5 Q Do you have an idea what time? Is that first thing in
6 the morning?

7 A Yeah, that was -- must have been around 9:10, 9:15.
8 Somewhere around there.

9 Q And then what was next thing that you heard?

10 A Well, I went up there and sat down and all of them went
11 in the courtroom and the next thing I know Dave and this
12 attorney come out, Rosalee, I think was her first name. I never
13 met her. I didn't hire that lady. I never met her or anything.
14 I didn't know what she was even really doing there or if she
15 works for him or whatever.

16 They took me in a room and it was another conference room
17 back off the other courtroom down there and he come in there and
18 he laid down his books he said, "You're going to hate me for
19 this." I said, "What are you talking about?" He said, "Well,
20 you are going to hate me for this one." I said, "What are you
21 talking about?" He said, "We got a deal going on and Brad is
22 going to plead. He is going to plead." I said, "Wait a minute
23 now. You been telling me we're going to win self-defense trial
24 and there is a plea going on. He said, "Yeah, he's going to
25 plead." He said, "Your going to hate me for this. What you

1 think? I said, "Well, Brad is a grown man. I can't tell him
2 what to do." I said, "But I will tell you something." I said,
3 "All this that has been going on, this ruckus about you going to
4 win and you're not going to win. Me and Brad got a little thing
5 we go by and I said it is a little code that we go by and I said
6 I run my dogs in Aiken, South Carolina. I'm a bid dear hunter.
7 I said, I have to put my three digit numbers on those dog's ears
8 and dog's side. We bleach it into the hair. I said me and Brad
9 has got a deal before he does anything I got to write him a
10 letter and put a code on there, which I didn't tell Dave what
11 the code was. I said or he has got to write me and tell me and
12 he looked at me like I was real crazy or something. I said, I'm
13 serious. He said, you sit down right there. I sat down with
14 the lady, Rosalee. So she started talking to me about this guy
15 that was out there, the victim, that was out there had alcohol
16 in his system and come out naked out of the house.

17 MR. JOHNSON: Your Honor, the witness is being
18 non-responsive and it's not going to ineffective
19 assistance of counsel.

20 THE COURT: Miss DiFranco, I have given you a lot
21 of leeway. Try to get to the point of what is the
22 ineffective assistance of counsel. I let you get a
23 lot of background, but I would appreciate it if you
24 could get to I'm assuming -- I don't need to assume.
25 If you can tell me where we're going I would

1 appreciate it.

2 MS. DIFRANCO: Well, I was asking him where he was
3 when his son plead guilty because he didn't know it
4 was coming. So we are trying to get some context.

5 THE COURT: Okay.

6 MS. DIFRANCO: And next step --

7 THE COURT: I think I got the context.

8 MS. DIFRANCO: Well, I don't know that there is
9 anything -- I mean, I would like for him to tell the
10 Court what happened after the guilty plea, but you
11 probably don't want to hear that.

12 THE COURT: If you he want to. Mr. McCarter, if
13 you want to tell me briefly what happened after I'd
14 appreciate that.

15 THE WITNESS: Yes, sir. Yes, sir, I will, Your
16 Honor.

17 THE COURT: Okay.

18 A Anyway I was sitting in the room and of course he had
19 him up there and got him to plead guilty. I went down in the
20 front. Didn't know I wasn't suppose to walk down there because
21 I'd never been in the courtroom like that with criminal charges.
22 But anyway, when I went back out I was standing there crying in
23 the hallway because I was broken when I found that it happened
24 because I knew something wasn't right and he come up to me and
25 he said you made my cry too your S.O.B, but he didn't abbreviate

1 it. And I was so broken, and I sat there and I thought why
2 would he say that to me.

3 After about a day or so, I went home, I talked with my pastor
4 and I told him. He didn't understand neither, but that's what
5 was said to me.

6 MS. DIFRANCO: No further questions.

7 THE COURT: Thank you ma'am.

8 THE COURT: All right, Mr. Johnson.

9 CROSS EXAMINATION

10 BY MR. JOHNSON:

11 Q Mr. McCarter I just have a few questions for you.

12 A Yes, sir.

13 Q I know you hired Mr. Cook to represent your son, but it
14 was your son's case, right?

15 A Yes, sir, it was.

16 Q So you are aware he doesn't have to discuss any trial
17 strategy, any negotiations that he makes with you because you
18 are not his client?

19 A I understood that, but he asked me to help him with a
20 lot of things. Yes, I understand

21 Q And you also realize that the reason you were outside
22 of the courtroom is because the solicitor made a motion to
23 sequester. That way witnesses can't talk to each other about
24 their story. Were you aware of that? That's the reason why you
25 outside not anything he did?

1 A No, I wasn't aware of that.

2 Q Okay.

3 A Not the way it was done.

4 Q Okay. And you also say Mr. Cook went in there and just
5 told you that Brad -- as you call him, was going to plead
6 guilty; isn't that right? Isn't that what you just testified
7 to?

8 A That's what he said.

9 Q Are you aware of that attorneys makes negotiations all
10 the time?

11 A Well --

12 Q To try to get the best deal possible for their client?

13 A Yes, sir, I do.

14 MR. JOHNSON: No further questions, Your Honor.

15 THE COURT: Anything on redirect?

16 MS. DIFRANCO: No, Your Honor.

17 THE COURT: Thank you, sir. You may step down. I
18 appreciate it.

19 THE WITNESS: Yes, sir.

20 THE COURT: All right, Miss DiFranco, whose your
21 next witness?

22 MS. DIFRANCO: Well, Your Honor, I do have two
23 other people who are here during the trial.

24 THE COURT: Is there testimony going to be couple

25 THE COURT: Is there testimony going to be

1 cumulative or do they have something new to add and
2 how does it relate to ineffective assistance of
3 counsel?

4 MS. DIFRANCO: Well, it relates to what Mr. Cook
5 did not do during the trial.

6 THE COURT: Okay. I have heard from Mr. McCarter
7 different things before in his representing, but I
8 hadn't heard anything about the trial except from your
9 client. Okay. These witnesses were in trial?

10 MS. DIFRANCO: They were observing trial, yes.

11 THE COURT: Okay. And what did they -- they were
12 there for two days observing trial?

13 MS. DIFRANCO: Yes.

14 THE COURT: If you want to tell me, if you want to
15 proffer what they were going to say.

16 MS. DIFRANCO: Sure. Essentially they were there
17 in support of the family and they had never met Mr.
18 Cook and didn't know him, but they understood him to
19 be Brad's attorney. They can, you know, tell the
20 Court that there was no detailed cross examination of
21 the victim. There was no cross examination of Mr.
22 Gilfillan. That Mr. Cook did not do the things that
23 you would expect a defense attorney.

24 THE COURT: Any specifics other than not a
25 detailed cross examination, what else?

1 MS. DIFRANCO: They can talk to you about what the
2 witnesses -- what he talked to the witnesses about.
3 It was my understanding he only cross examined the one
4 witness.

5 THE COURT: So Miss DiFranco, you would like for
6 me to review the two-day transcript, is that correct?

7 MS. DIFRANCO: I think it would be helpful.

8 THE COURT: I will be happy to ask Mr. Johnson to
9 get me that two days of testimony and then, other than
10 not a detailed cross examination I believe you said
11 and he only cross examined one witness that's what
12 they were going to proffer and tell me.

13 MS. DIFRANCO: I believe so Your Honor.

14 THE COURT: And what was the witness that he cross
15 examined?

16 MS. DIFRANCO: I believe he cross examined the
17 victim.

18 THE COURT: Okay. Okay, and that was only one?

19 MS. DIFRANCO: That is my understanding.

20 THE COURT: Okay. Is there anything else that
21 these witnesses would tell me?

22 MS. DIFRANCO: Other than what their feelings were
23 about the voluntariness of Mr. McCarter's plea, I
24 don't think so Your Honor.

25 THE COURT: And what would they say, that they did

1 not believe it was voluntarily?

2 MS. DIFRANCO: I don't know that they would go
3 that far, but that they felt he was being pressured I
4 think would be the words, but I mean I don't want to
5 put words in potential witnesses's mouths.

6 THE COURT: Okay. Do you know if they talked to
7 the defendant about whether or not he felt pressured?

8 MS. DIFRANCO: I do not believe that they have.

9 THE COURT: They did not talk to him. So they
10 wouldn't be able to tell me whether they felt like he
11 pressured or not other than just their opinion from
12 watching.

13 MS. DIFRANCO: From observing him prior to trial
14 and then at trial.

15 THE COURT: Okay. All right. Anything else that
16 they would testify about?

17 MS. DIFRANCO: Not that I am aware of Your Honor.

18 THE COURT: Okay. What I will do I will note the
19 the proffered testimony of these witnesses and Mr.
20 Johnson when you get the testimony when I review the
21 testimony I will look it over that way and
22 additionally Miss DiFranco if you, once we get the
23 testimony, if there are any specific pages or lines
24 that you want me to pay attention to you may send me
25 that so I will make sure I pay attention to those

1 specific points in the transcript.

2 MS. DIFRANCO: Thank you, Your Honor. I
3 appreciate that.

4 THE COURT: Anything else Miss DiFranco?

5 MS. DIFRANCO: No, Your Honor.

6 THE COURT: Thank you ma'am.

7 Mr. Johnson, you understand I am going to require
8 you to send -- to get the testimony for the two days
9 of trial?

10 MR. JOHNSON: Yes, sir I will send Miss DiFranco a
11 copy and I will send Your Honor a copy.

12 THE COURT: Absolutely. And Mr. Johnson after she
13 makes any comments about pages and lines you will be
14 free to do the same.

15 MR. JOHNSON: Certainly.

16 Do you want to hold this hearing in abeyance until
17 we get that?

18 THE COURT: We are all here. I think everybody is
19 here and if after that either one of you feel I need
20 to hear anything else we can reconvene to take up
21 anything else.

22 So Mr. Johnson, the ball is now in your Court.

23 MR. JOHNSON: I call Mr. Cook to the stand.

24 THE COURT: Mr. Cook.
25

1 DAVID C. COOK, called as a witness, having been
2 duly sworn by The Clerk, was examined and testified as
3 follows:

4 DIRECT EXAMINATION

5 BY MR. JOHNSON:

6 Q Good afternoon Mr. Cook, would you please state your
7 name for the record?

8 A David C. Cook.

9 Q And how long have you been practicing law?

10 A Going on seven years now.

11 Q And how much of your practice is dedicated to criminal
12 law?

13 A I would say about eighty percent of it.

14 Q And have you had prior experience with criminal lay
15 besides your current position?

16 A I was employed as a public defender with Harry Dest
17 here in York County and I clerked with Doug Strickler, Richland
18 County while I was in law school at that public defender's
19 office.

20 Q In your seven years have you handled criminal matters
21 and tried criminal cases?

22 A I have.

23 Q About how many cases have you tried?

24 A I tried -- I would say a lot. At the general sessions
25 level with trials I had probably three or four trials that dealt

1 with thirty years. Won some lost some. Had numerous trials
2 that DEF level Magistrate's Court. I was a CDV attorney for
3 public defender's office. Over one hundred CDV trials.

4 Q And you were retained in this case by Mr. McCarter?

5 A Yes, sir.

6 Q That being Raymond McCarter, not Brad?

7 A That's right. I was approached by his father and then
8 I went down to get Brad's permission in the cell.

9 Q So you represented Brad was your client?

10 A That's correct.

11 Q And did you ever met with Brad --

12 MR. JOHNSON is that okay that I refer to you as
13 Brad?

14 MS. DIFRANCO: Yeah, I think it's easier.

15 MR. JOHNSON: Okay.

16 Q Did you ever met with Brad to discuss the case, the
17 charges in discovery?

18 A On numerous occasions over the course of a year.
19 Probably had to be specific at least I would say ten jail visits
20 with him. I met with his father on numerous occasions in the
21 parking lot as he mentioned. I went over extensively with him
22 what the discovery. I left copies with him of everything that
23 he asked. Was I watched videos. There was a video,
24 particularly there was a police car, in-car video, that was very
25 troubling for his case because it was essentially a confession

1 where he and the co-defendant were in back seat talking and I
2 tried to get that video -- again there was a suppression hearing
3 and I am fairly certain it was about the video and the hammer,
4 but I tried to get the video suppressed. It had to do with
5 whether he was in custody at the time or not. I was
6 unsuccessful in getting it suppressed.

7 I had transcribed the video -- and again I want to be clear
8 since I am on the record, to be entirely honest, I can't
9 remember what that suppression hearing was about, but I'm pretty
10 sure it was about the video that we watched, this in-car video
11 that I was mentioning. I transcribed the video for Brad,
12 because I knew he was hard of hearing and he couldn't read the
13 lips and I told him that in my opinion that video was very bad
14 for his chances at the trial because at first his assertion was
15 that he never hit the victim with a hammer. Later on after I
16 showed him some of the pictures of the victim from the hospital
17 it was obvious that the victim had been hit by something that
18 looked like a hammer to me. There were claw marks, there were
19 round impressions in his head and I think Brad changed his
20 memory and said, yes, I hit him but it was self-defense.

21 His dad was talking about apparently that hammer had blood on
22 it from a deer. I'm not certain. I was trying to explain to
23 him I can't make the solicitors do DNA testing on the hammer,
24 but I could ask them to and I could bring out in the trial that
25 it hadn't been. But to be entirely honest didn't want to know

1 whose blood was on that hammer as his defense attorney.

2 Q That can confirm whether or not --

3 A Yeah, if it came back the victim's blood then we then
4 we definitely had a self-defense case. So to answer your
5 question I consulted -- I maintain that I consulted with him
6 often in regards to this. It's a trial where he was going to
7 look at at least if it ran concurrent it was a thirty year
8 trial, the ABWIK and the lynching. I just wanted it to be known
9 I take those trials very seriously. I was very worried about
10 his predicament and explained to him often that I can't tell him
11 what to do. The decision is his, but my advice is to take the
12 plea offer that is on the table of eight years at the time.

13 The solicitor at the time was Mindy Harvey Lipinski and to be
14 frankly honest she was showing no signs of ever coming down off
15 that eight years. I tried on numerous occasions to talk her
16 down to five.

17 I would like to say I guess at this point at no time ever
18 did I promise Mr. McCarter, the father or the son, any results
19 in the trial that you are definitely going to win, or I
20 definitely can get you this plea agreement. It's just common
21 practice among attorneys not to do that because you can't
22 guarantee any results. Secondly, obviously I didn't try to get
23 him to take the plea by coercion. My advice was that he should
24 take the plea the entire time. For the entire year that I
25 represented him I was begging him to take take plea because I

1 just frankly didn't think that he could convince a jury of
2 several defense. I also would like to state for the record that
3 I never contrived any evidence that would support a self-defense
4 claim. And the handout that was presented as evidence has the
5 quote in it about the defendant throwing a stepping stone toward
6 the victim, that was the defendant's story the entire time. I
7 never would put words in one of my client's mouth. That is
8 eliciting perjury and would cause me to loose my license to
9 practice law.

10 Q Those are pretty detailed statements?

11 A Well, I agree. It is not something that I could come
12 up with on my own. Regardless, I been through a few PCR
13 hearings and so I think I need to just make the record clear. I
14 would never in my entire life suborn perjury for any of my
15 clients and do anything to place my license in jeopardy not only
16 because it's an issue of licensure, but it's just a moral issue.

17 Q As a matter of fact let's go through all of his
18 allegations, step-by-step if you don't mind.

19 A Please.

20 Q Brad said that you promised you could get five years
21 probation for him?

22 A Never in my life have I ever promised any client that I
23 have in any court any result. Let me be clear, I told him there
24 is no way he is getting probation on this case. Looking at his
25 rap sheet and after talking with the solicitor who is very able

1 body solicitor. She was obviously aware of his rap sheet and
2 just the severity of the alleged injuries, this wouldn't have
3 been a probationary case if it was at first offense, and I never
4 told him that. I said the very best I may be could do if I'm
5 lucky is talk the solicitor down to five years instead of eight,
6 and I made his dad crystal clear of that the first day we met.
7 His dad said he went back and talked to a lawyer. His dad told
8 me that lawyer was John Ray and John Ray gave me high
9 recommendations and that's why his dad came back to hire me for
10 my trial work.

11 Q At any point did you tell Brad that if you got the
12 right solicitor you could work out a deal for him?

13 A Never. I don't know what he's talking about as far as
14 Clemson. I'm not aware of any solicitors that go to Clemson,
15 that went to Clemson with me in this department. There are a
16 few I went to law school with but they were not trying these
17 levels of felonies at that chance by any stretch of the
18 imagination and I never went to school with Mindy Hervey
19 Lipinski who was the solicitor on the case in law school or
20 undergrad, and quite frankly that is just absurd. I never said
21 that. I don't know how to address it. That is just not way it
22 works.

23 Q Brad also said that there was some statements from -- I
24 guess the witness being the victim's son and the victim that he
25 never received. Did you turn over -- did you receive any

1 statement, number 1, and number two, did you turn any statement?

2 A I maintain I turned over all of the statements and it
3 is just standard operating procedure for me to send discovery to
4 all of my clients and that not only did I give Brad the
5 discovery on this case, I gave him discovery on a lot of
6 unrelated cases that he asked about because there was bond
7 revocation issue that did implicate some past cases that were
8 really not what I was hired for. I was hired to do this jury
9 trial.

10 I went over and above the call of duty in making all of the
11 discovery material available to him and transcribing what he
12 couldn't hear from the video recording to cater to his special
13 needs with regard to hearing.

14 Q Just kind of switch gears, Brad also says he wanted to
15 testify at trial. Had the trial gone on would you have called
16 him as a witness?

17 A He would have had to testify at trial. I explained to
18 him that self-defense is an affirmative defense. You have to
19 present it. That was biggest fear, is that his whole innocence
20 hinged on self-defense in my assessment.

21 There were plenty of witnesses to put him there at the
22 scene. Plenty of witnesses to put him there with a hammer at
23 the scene. So self-defense was his only hope and I explained to
24 him he had to testify and that's why I didn't think he was going
25 to win because his record is very impeachable and in talking

1 with me his story changed often and so I was very worried that
2 his story was going to change on the stand. But I explained to
3 him that, what I just explained, if you want to present
4 self-defense you have to testify. I never told him -- let me
5 rephrase it. I never told him you have to testify. I said that
6 if you want to put forward self-defense you will need to take
7 the stand to put forward self-defense, but the decision is
8 entirely yours.

9 Q He also claims in the second day there was no
10 discussion about pleading guilty. Was there any discussion in
11 the second day or did that happen the third day?

12 A There was discussion about pleading guilty from the day
13 I was hired. I was begging him to plead guilty, but I never --
14 to be clear, I always told him that this was his decision and
15 that my advice is to plead guilty because I've lost some thirty
16 year trials and that's hard. And when you lose one you make
17 sure that you never encourage anybody to put themselves in that
18 situation and I honestly thought he was going to lose this trial
19 and I was reading the jury during the trial. All through the
20 year I asked him to plead guilty, but especially at the trial
21 just the demeanor of the jury. They would physically shake
22 their heads, you know, and agree with the victim and I could
23 just read them and I told him I didn't think they were going to
24 come back with a not guilty. And I explained to him the
25 difference between -- and initially the the solicitor took the

1 offer off the table, and it took for me a lot of doing to get
2 her to put the offer back on the table and of course she didn't
3 put the eight years back on the table she put the ten years
4 because it's a policy you can't -- you lost that offer when went
5 to trial.

6 Q But you did put the eight-year offer into writing?

7 A I did. I had Brad sign an affidavit because I thought
8 he was going to lose this trial and then PCR me saying that I
9 forced him into going into a trial. So I got that affidavit to
10 say that I have been trying to get you to take the eight years.
11 When the day that his plea happened I didn't have the time to
12 write an affidavit saying that now you are advising me to take
13 the plea offer because it happened last minute. So I don't have
14 that affidavit.

15 MR. JOHNSON: Your Honor, may I approach the
16 witness.

17 THE COURT: You may.

18 Q This is State's number 1 marked for identification
19 purposes.

20 A That's the affidavit I was referring to.

21 Q So you recognize that and is that an accurate copy of
22 that agreement?

23 A Yes, sir.

24 MR. JOHNSON: Your Honor at this time --

25 A I think that is the original actually.

1 MR. JOHNSON: If I could get a copy of that, but
2 I would like to move that into evidence as State's
3 one.

4 THE COURT: Has Miss DiFranco seen it?

5 MR. JOHNSON: Yes, Your Honor.

6 MS. DIFRANCO: I have Your Honor.

7 THE COURT: Any objection?

8 MS. DIFRANCO: No objection.

9 THE COURT: State's number one, or a copy of
10 State's number one is placed in evidence.

11 MR. JOHNSON: Thank you Your Honor.

12 (State's Exhibit One, affidavit, received in
13 evidence as of this date.)

14 Q So you did in fact put that in writing that he had an
15 offer of eight years on the table. Whose decision was it to
16 reject that offer?

17 A Oh, it was Brad's entirely.

18 Q Is it always your client's decision whether to plead
19 guilty or go to trial?

20 A Always. I mean, I just want to be crystal clear, I
21 make it very clear to my clients that that's their decision and
22 I tell them that I will offer them any advice that they would
23 like and tell them my opinion, but that's ultimately their
24 decision because they are the ones that are going to go serve
25 the time if they were wrong, and so that's that.

1 Q All right, moving right along here.

2 A I would like to comment parenthetically if I might in
3 regards to this "dog code" I think that is very telling, if I
4 may.

5 Q Go ahead. I was just going to ask you about that.

6 A Sure. We were in the jail cell and Brad's dad was
7 convinced that I was coercing Brad and not letting him make any
8 decisions and so I said, that is just not the case. This is
9 Brad's decision to plead guilty. I think it finally hit him
10 that he is going to lose this trial and he was to take the eight
11 years instead. It has been my experience if you lose a trial
12 you get a lot closer to the maximum then you do if you take a
13 plea. So I explained that to Brad, and quite frankly in this
14 county it is a lot closer to the maximum, from my experience.
15 And so, he said I want you to tell my dad I want to plead guilty
16 so I won't have to tell him. He said you tell him to tell me
17 the numbers -- or he said tell him to tell me the "dog code". I
18 didn't know what it was. I went back to Brad's cell and said
19 your dad wants some assurance that this is your decision. He
20 wrote some numbers on the sheet of paper. I walked out and
21 handed to his dad and his dad broke down crying and hugged
22 Rosalee, my associate at the time, and said let him plead guilty
23 then. That's the end of it.

24 MR. JOHNSON: Court's indulgence, Your Honor.

25 THE COURT: Take your time.

1 Q Just to cover my bases, did Brad ever ask you to file
2 an appeal?

3 A No, he did not.

4 Q Had he done so would you?

5 A I would have. I would have filed a notice to appeal,
6 but I mean, I wouldn't -- I advise my clients when they sign my
7 contract that I am trial attorney. I do not do appellant work
8 and I have on numerous occasions filed a notice to appeal, but
9 that you would have hire an appellant attorney to do that.

10 MR. JOHNSON: May I approach, Your Honor?

11 THE COURT: You may.

12 Q I am showing the witness retainer agreement. Do you
13 recognize that?

14 A I do and I want to be clear, I believe that his father
15 signed this instead of him. I don't know if that has any -- but
16 I went down and talked with Brad in the jail cell and advised
17 him of my representation. Asked him on numerous occasions, they
18 were constantly complaining that I was scared because I was
19 trying to talk them into taking this plea. And they would call
20 often to the extent at one point, I did say, if you would like
21 your money back, I will give you your money back. They never
22 demanded their money back. They told me they wanted me to stay
23 on the case and so I did.

24 Q So is that a true accurate copy of the retainer?

25 A Yes.

1 Q Is this the original?

2 A No, I think that is the copy because I always sign in
3 blue.

4 MR. JOHNSON: Okay. Your Honor, at this time I
5 move this as State's two.

6 THE COURT: Any objection, the retainer
7 agreement?

8 MS. DIFRANCO: Only that it was signed by -- it
9 wasn't signed by his client.

10 THE COURT: Okay.

11 Q Did at any point Brad ever object to your
12 representation of him?

13 A No.

14 Q So whether or not dad signed that or he signed it, he
15 consented by his acts that you were his attorney?

16 A Yes, that's is true and I -- I may have had some - I
17 will digress. I was hoping to find some document that he
18 ratified that agreement in the file that is written, but I
19 haven't as of now.

20 Q I think that is all the questions I have at this time?

21 THE COURT: And the State's two is in evidence.

22 (State's Exhibit two, retainer agreement, received
23 in evidence as of this date.)

24 THE COURT: Your witness.

25 MS. DIFRANCO: Yes, Your Honor.

1 CROSS EXAMINATION

2 BY MS. DIFRANCO:

3 Q You and I have never spoken before today is that
4 correct?

5 A Correct.

6 Q But you received a letter from me asking that you give
7 me a call?

8 A You know I think that I received some back up, follow
9 up correspondence regarding that and I don't remember seeing a
10 letter from you asking you to give you a call, but if I did and
11 I been unresponsive I want to apologize. It wasn't intentional.

12 Q When you got my letter did you send me an e-mail saying
13 I got your letter?

14 A Did I? I don't know.

15 Q I am asking you the question.

16 A I don't know the answer.

17 Q Okay. But you I have never spoken before today?

18 A That's correct.

19 Q Okay. You testified that you have done three or four
20 felony trials dealing with thirty years?

21 A Yes.

22 Q And how many of those were prior to Mr. McCarter?

23 A All ever them.

24 Q Any since then?

25 A No.

1 Q You said that you visited him at least ten times in
2 jail. Do you have documentation that would verify that?

3 A No, there are records that we sign in at the jail, but
4 I haven't gone back to look over the past year, but I maintain
5 those records are kept with the jail.

6 I can tell you on three different occasions we met in the
7 B.A.C. room because that where the video equipment is and
8 watched this video and talked about other aspects of this trial
9 then and I definitely have a recollection of maybe five times
10 meeting him through the glass for at least thirty minutes,
11 sometimes to an hour.

12 Q How long prior to trial did you discuss this video that
13 you are talking about with Brad?

14 A Probably about three hours with him. II had to
15 transcribe --

16 Q No, how much prior to trial was that conversation?

17 A I am not exactly certain. The moment that it came into
18 my custody I am sure that week I played it for him. I spent
19 more time in preparation for this trial than I have for any
20 trial.

21 Q Did he see the entire video?

22 A Yes.

23 Q The audio of the victims audio statements do you recall
24 when that was given to Brad?

25 A I don't have a date certain, but as soon as it came

1 into my possession I am sure I transcribed it. I have a copy of
2 it here where I transcribed it with the notes that I made on it
3 and the notes that Brad made in response that we could use in
4 preparation of what I considered a very detailed cross
5 examination of every State's witness.

6 Q Is it possible that audio was played for him on the
7 Friday before trial?

8 A No. I would say it was played for him probably --
9 again, I am not certain. So I want to be clear for the Court,
10 but I would say I would guess may be a few months before the
11 trial.

12 Q Did you hand deliver that over to the jail? How did it
13 come to Brad's possession?

14 A I think this is when I sat down with him and we talked
15 about it in the B.A.C. room. One of those times.

16 Q So there wouldn't be any enclosure letter or any
17 document when it was provided

18 A No, there wouldn't.

19 Q You testified that you felt it would be very bad for
20 him to go to trial and that it would have been good for him to
21 take eight years?

22 A Yes.

23 Q Could you tell us in more detail about that
24 conversation that you had in which you told him it would be very
25 good for him to take the eight years?

1 A Oh, that wasn't one conversation. That was a series of
2 conversations over the year before this trial came about,
3 starting from the first day after I received discovery.

4 Q So eight years had been the on table since August of
5 2010?

6 A I'm fairly certain it has. I mean, again, this has
7 been a while since this case has come down the pike, but I am
8 fairly certain. Melissa Inzerillo, the public defender had that
9 offer. That's the whole reason I was hired is because the
10 family thought that offer was unacceptable and they were trying
11 to see if I could talk the solicitor down to five.

12 Q Okay. Can I see the affidavit again. This affidavit,
13 I think it State's exhibit one, was signed on the 19th of August
14 2011. So he didn't -- you didn't get him to sign the affidavit
15 even though he had been telling you for a year that he wasn't
16 going to take the eight years you got him to sign the affidavit
17 on the 19th?

18 A Yes.

19 Q And that was the CYA?

20 A I's sorry.

21 Q That was just because you were worried that he was
22 going to file an application for post conviction relief?

23 A Right, that is when we were heading to the trial and I
24 start getting in trial mode. So, for the longest I tried to
25 keep that trial from even happening and when we start going to

1 trial and there were some risks with his dad about how I am
2 scared to go to a trial and so I could see the writing on the
3 wall in the sense that -- and, you know, Brad had expressed to
4 me he wasn't happen with my representation at the time for
5 whatever reason. They think I was -- the maintain I was
6 wishy-washy. I was never wishy-washy. I told them from the
7 onset you need to need to take this offer. When I started
8 saying things like you know, first of all I never said -- looked
9 at him and said you are going to win this trial. When I started
10 saying language to that effect is when they had forced me into
11 the trial. The offer was off the table and then I got into a
12 trial mode and got in my mind that I am going to go win this
13 trial as best I can.

14 Q They forced you into the trial?

15 A Well, what I mean by that is they -- yeah, essentially
16 they wouldn't take the offer that I suggested. Perhaps that is
17 not the best verbiage. But what I mean to say is when I
18 realized that he was going to take this offer and I was going
19 into a trial with him.

20 Q That's when you got into I'm going to win this mode and
21 perhaps you said I am going to win this?

22 A Perhaps is incorrect. I never told him that I am
23 definitely going to win this trial. Let me be clear.

24 Q Did you ever say I think I can win this trial?

25 A Ma'am, from day one with all of my clients I never,

1 ever, tell them any result is going to happen.

2 Q Do you recall having a discussion with Brad early on
3 about potentially getting the charges reduced?

4 A No. I told him that I would try to talk the solicitor
5 down and that perhaps if she had to go down below what the
6 mandatory minimum was that she would have to change the name.
7 That is typically conversation. I never said it was going to
8 happen.

9 Q You testified here today that you were very worried
10 about going to trial that you begged him to take the plea the
11 entire time. What document do you have that would show that you
12 advised Mr. McCarter that he needed to take this eight year plea
13 deal besides this affidavit?

14 A I don't know that I produced any.

15 Q Do you ever put your legal recommendation in writing to
16 your clients?

17 A To be entirely honest with you, very rarely.

18 Q And why is that?

19 A This is just common practice. We have a lot of
20 clients. I don't have the time or the resources to include
21 every offer down on paper.

22 Q But your testimony there was only one offer. It was
23 eight year offer and it was on the table for a year?

24 A Well, I guess what I meant to say, every conversation
25 that I have with my client I don't memorialize with an

1 affidavit.

2 It would be great for PCR purposes, but it is not something
3 that is standard practice for most. Well, I will just testify
4 for me, and if I am heading to trial I do get that affidavit
5 signed that I got him to sign.

6 MS. DIFRANCO: May I approach?

7 THE COURT: You may.

8 (Document handed to the witness).

9 A Yes.

10 Q Is that the sheet that we were discussing with Brad.
11 You agree that you prepared that, correct?

12 A I did.

13 Q And is it possible that the things that were put in
14 there were actually from the victim's statement or the
15 co-defendant's statement?

16 A No. In no way, shape, or form did I ever coach him to
17 perjure himself on the stand. The entire time he told me that
18 the guy picked up hammer and started screaming, what are you
19 going to do now big boy and started chasing after him. That is
20 where his self-defense lay, and he said I picked up a stepping
21 stone and through it at the guy to try and slow him down. That
22 is self-defense.

23 Those words were generated by Brad from day one. I never
24 contrived that statement. They were entirely his. He was
25 acting confused about self-defense. I thought his entire trial

1 hinged on it and so I made this prep sheet and I gave it to him
2 a couple of weeks before the trial so he could sit there and
3 review it and look over it and realize what he suppose to say
4 for the trial to put it in a piece meal fashion. But all of
5 these statements that are on here are statements that Brad made
6 and stated that, you know, were true.

7 Q So you prepared that before he had formerly rejected
8 the eight year?

9 A He -- well, I don't know what you mean formerly. He
10 never accepted the eight year.

11 Q Signed the affidavit.

12 A Yeah. I can imagine so. Again, this doesn't have a
13 date on it. I can't testify exactly as to what date I handed
14 this to Brad, but it wasn't on the day before the trial. He
15 wouldn't have had time to absorb it by then.

16 Q And you said from day one he said that he threw the
17 stepping stone?

18 A Yes.

19 Q That is your understanding. Are you familiar with his
20 statement that he gave to police?

21 A Yes.

22 Q Does he mention stepping stone in there?

23 A I am not familiar with it enough to comment on it now.
24 It has been about a year.

25 Q Okay.

1 A If he didn't that would have been one of the reasons I
2 was worried about his self-defense.

3 Q Do you have any correspondence in your file that would
4 evidence when you provided Brad McCarter with any of the
5 statement in this case or any of the other discovery?

6 A No, I'm sorry. I mean, once again I will just state
7 it's standard operating procedure to give your client a copy of
8 the discovery as soon as you get it. I represented him for a
9 year. I can only imagine that he got that a long time ago.

10 Q And what would you consider -- I know what I say is
11 discovery is not probably what you consider discovery. So what
12 is the discovery in this context?

13 A Anything I get from the solicitor's office that they
14 are going to use in the trial against him; statements, incident
15 reports, videos, pictures, medical reports. I gave him all
16 that.

17 Q But that doesn't come in all at once. It is over time?

18 A We get all the paper emailed to us in a package as soon
19 and they get our letter of representation. The pictures I can
20 imagine that probably came in a big CD is usually what happens.

21 Q Do you have a copy of CD?

22 A As a matter of fact I think I do.

23 A Here's pictures, here's the video and here is the
24 audio.

25 Q Are they dated?

1 A No. I mean they rarely are from the solicitor's
2 office. It's one of those you can stop by and bring us a blank
3 and pick up your copy today. I guess, if I had known this was
4 the crux I maybe would have better prepared for this hearing and
5 went back and got some emails as to when they sent this to my
6 office and if we have a second hearing in the future I can
7 archive all ever my emails. Be glad to.

8 Q When did you find out about this hearing?

9 A I am sorry.

10 Q When did you become aware that you were going to be
11 needed at this hearing?

12 A A long time ago.

13 Q So you had time to prepare?

14 A Right, but what I am saying is if I had known you were
15 going to ask me about -- I didn't know a long time ago that you
16 were going to ask me today when did I receive this discovery.

17 Q In fact you might have known what I was going to ask
18 you if you had called me?

19 A Did I give you my cell phone on my reply email.

20 Q No.

21 A I'm sorry.

22 MR. JOHNSON: Your Honor, at this point it is not
23 our burden to prove this case. She should have filed
24 discovery. She is attacking him for not bringing
25 emails. It's her burden of proof in this case.

1 THE COURT: I understand. Thank you, Mr. Johnson.

2 Q You testified that you had a lot of doing to get the
3 offer back on the table. Can you explain what that means?

4 A I had to -- yeah, the solicitor withdraw the offer when
5 you start a trial. It's their policy in this county to never
6 give you an offer mid trial, and I basically had to convince
7 Mindy Harvey Lipinski to go against her department policy and
8 put an offer on the table halfway through the trial.

9 Q When you convinced her to do that had you already
10 talked to Brad again about pleading guilty?

11 A Yeah. When I convinced her to do that -- under my
12 analysis as his defense attorney I thought he was losing that
13 trial and about to go to jail for 18 years. When I got that
14 offer back on the table I looked at it as saving him 18 years in
15 prison. Still do.

16 Q And when did the solicitor agree to the ten years?

17 A The morning of the day that we plead guilty.

18 Q And what had you -- how many conversations had you had
19 with her about it prior to that during the trial?

20 A Of what is "it"?

21 Q A plea of a ten year cap?

22 A I started asking her that after the conclusion of the
23 first day of trial when I saw how badly the testimony went
24 against my client.

25 Q Okay. And so a lot of doing is --

1 A We texted all night long and emailed and called and
2 talked to each other over the phone often.

3 Q During the trial?

4 A During the night, yeah, all through that, which is
5 typical.

6 Q And did they start somewhere above a ten year cap? I
7 mean, what were all the texts and emails and phone calls about?

8 A Will you give him an offer. No. Pretty please. I
9 will think about it. Okay ten years. Can I get it back to the
10 eight. You've got to be crazy. That's what I offered the first
11 time. Just to give you -- you are asking me the overall
12 contour.

13 Q I wanted to know the flavor of --

14 A Yeah, that's the flavor. These were texts.

15 Q And you said that the plea on the third day happened
16 you testified last minute, and that's why you couldn't get
17 affidavit from your client?

18 A Yeah, when I went in there that morning I didn't know
19 he was going to take that ten year offer. He was telling me
20 that we were going all the way to a trial. I saw him in holding
21 cell and he said what do you think? What do I mean what do I
22 think? I have been telling you what I think for a year and he
23 said I think I am going to plead and I said I think that is a
24 good idea.

25 Q It's your testimony here today that his father signed

1 the retainer agreement, the one that advising that you do not do
2 appeals?

3 A Yeah, I put that in there because his dad said he had
4 no idea what the terms of our relationship were.

5 Q I am just -- it was his father who signed it and not
6 Brad?

7 A Yes, ma'am. When that happened he brought the three
8 thousand dollars to me on a date out here in front of the jail
9 cell and when he gave me that money I got him to sign the
10 retainer. I should have went in and gotten Brad to sign a
11 separate agreemnt also. I apologize for not doing that.

12 Q But it was -- but there was never any question in your
13 mind that Brad was running the show not his father?

14 A Never any question. Brad was always pleased with my
15 representation. It was his dad that wasn't and Brad reassured
16 me on numerous occasions you're my attorney. We are going to
17 trial on this. I don't want my money back. I want you on my
18 case.

19 Q Is your testimony that Mr. -- that Raymond McCarter
20 came and gave you the money here?

21 A Yes, outside there.

22 Q And he did not take it to your office and give it to
23 your paralegal?

24 A You know -- you know what, to be entirely honest I
25 thought that I was present during the exchange of the money, but

1 I'm not -- I am pretty picture sure he did right out here in
2 front of the jail cell. I can't remember to be entirely honest.
3 When he says across the street I have an office across the
4 street.

5 Q I understand.

6 A So he might have met me at my office. My paralegal is
7 named Sheila Cole. I am pretty certain I was present, but I may
8 not have been.

9 Q Who were -- what witnesses were you prepared to call at
10 trial?

11 A I was going to have to call Brad. I tried to talk him
12 into hiring an expert to counter the State's medical testimony
13 like they mentioned. My witness list -- I tried to contact the
14 co-defendant and spoke briefly with her attorney, Elliot Fields
15 and got from them that they were not going to corroborate our
16 testimony during the trial, so I wasn't going to call her. And
17 I think that's about it. I'm not sure there was anybody else I
18 have called.

19 Q Was the State going to call Raymond McCarter?

20 A Oh, yeah, I was going to call his dad as well, okay,
21 because his dad had an anecdote about the victim chased him down
22 in the car and there was an exchange of words and the victim
23 admitted that the victim was the aggressor and so that's why I
24 was going to call Raymond Sr. and I made a motion to sequester
25 the State's witness and the State made a reciprocal motion so he

1 had to go out in the hallway.

2 Q And had you met with him, Raymond that is, prior to
3 trial to tell him here is what a trial is like. Here is what is
4 going to happen?

5 A Like I said, I prepared for this trial more than any.
6 I met with him on numerous occasions. I had numerous hour long
7 phone calls on Sunday nights with him and I told him every step
8 of the trial what was going to happen, what I thought might
9 happen, what to anticipate the State's questions to be on cross.

10 Q Did you cross examination this Jamie Gilfillan fellow?

11 A I can't remember. Let me put it this way, did he
12 testify during the trial, I am fairly certain that I cross
13 examined everybody.

14 Q So it's your testimony - -

15 A I think, my memory which is obviously not the freshest
16 which is that Gilfillan didn't even show up for the trial. I
17 think the trial transcript will show that. Maybe he did. I
18 can't remember.

19 Q You can't remember if he was here, but you think if he
20 was here you did cross examine him?

21 A It's my standard operating procedure to cross witnesses
22 against my client. If I didn't it would have been tactical
23 because I didn't know the answer to my question.

24 Q Had you and Brad discussed what Mr. Gilfillan might
25 specifically know about the night of February 5th that no other

1 witnesses could have known?

2 A Yeah, the police went out to his house because they --
3 I can't -- they said we -- do you know where Brad McCarter is
4 tonight. To be honest with you it shows that I can't remember
5 the specifics, but I remember that night the police questioned
6 Jamie Gilfillan because Jamie had been in an altercation in the
7 past. There was a sword involved and Brad was -- the police
8 went to Gilfillan to ask if he knew where Brad whereabouts were.

9 Q Do you recall ever having any conversation with Brad
10 about what he perceived to be inconsistencies in the victim's
11 three statements?

12 A I had numerous conversations with Brad about the
13 inconsistencies. I have my notes here about all of the
14 inconsistencies. I have the notes that I used to cross examine
15 the witnesses that you are referring to. Brad went over these
16 and pointed out the other inconsistencies that he thought I
17 missed and I should have them. So yes, I had numerous occasions
18 to discuss the inconsistencies with Brad.

19 Q And you cross examined the victim about this?

20 A I am quite confident that the trial record will bring
21 that out.

22 Q So, it was your hope all along that Brad would plead
23 guilty, correct?

24 A Yes. I mean -- let me explain it. When you lose a
25 thirty year trial and see somebody go down the road for that

1 long time it changes you as an attorney and so it was my hope to
2 represent him as zealously as I could, to the best of my
3 ability, despite any perceived riffs with the family today or
4 then, it still remains. In every case that I ever have to
5 represent my client because I do come from three generations of
6 attorneys. There is ten in my family and they teach you are the
7 most important person in this guy's life. The entire time all I
8 was ever trying to do was save him from spending eight extra
9 years in jail because that is the different between his plea and
10 what he would have gotten if he lost this trial.

11 I can also say this, there is often when there is times that
12 I do consult with my client and tell them I think you have a
13 chance of winning this trial. I think that I probably, here is
14 how the trial will play out. I never say you are going to win
15 the trial and I tell them why I think they have a chance. This
16 was not one of those cases. The photo evidence was telling.

17 Q It's your testimony that you spoke to Raymond McCarter
18 -- you spoke to Brad and he agreed to plead guilty. You spoke
19 to Raymond and he asked for dog code and you went back, somebody
20 did you brought that out and that all happened before he
21 appeared before Judge Hayes?

22 A Did you say docket?

23 Q Dog -- the dog code that you talked about?

24 A I am sorry.

25 Q What was your question again?

1 Q My question is -- I am trying to ge the timeline. You
2 met with Brad and he agreed to plead guilty?

3 A Yes.

4 Q You went out and spoke with his father?

5 A Yes.

6 Q He said get me this dog code.

7 A Right. I thought that was strange.

8 Q You or somebody else went back?

9 A I did.

10 Q And got that from Brad.

11 A Uh-huh.

12 Q You came back out and gave it to his father and that
13 all happened before he appeared before Judge Hayes on the guilty
14 plea?

15 A I think that his dad actually got the dog code in his
16 hands right after the plea.

17 Q And what -- how did you advise Brad about what to do
18 when he appeared before Judge Hayes?

19 A I mean, I want to be clear with you, my decision on
20 whether I plead Brad in front of that judge had nothing to do
21 with his father or his dog code. The dog code was just a
22 extension of courtesy by me to try and convince his dad that
23 this was Brad's decision to plead, not mine after the fact.

24 Q And how did you advise Brad about how to act when he
25 appeared before Judge Hayes pleading guilty?

1 A I mean I generally tell them to comport themselves with
2 respect and say yes, sir; no, sir, Your Honor and don't put your
3 hands in your pockets. Things like that.

4 Q Do you recall that during the guilty plea there was at
5 least two occasions when Judge Hayes said well, we are going to
6 bring the jury back in?

7 A Oh, yes, I do.

8 Q And I you said let me talk to my client and he said no?

9 A No, the judge always lets me to talk to my client on a
10 little side note.

11 What I am getting at is the judge said I think it was along
12 the lines the Judge wanted him to accept responsibility and he
13 wasn't going to. So I pulled Brad aside and I said if you don't
14 accept responsibility then the judge is going to send you to a
15 trial.

16 Q Do you have a copy of the transcript?

17 A It's on the table over there.

18 Q All right.

19 A I haven't reviewed it before you I handed it to me.

20 Q Okay. Well, the bottom of page nine, top of page ten,
21 or as much as you need to read.

22 Q Okay, what do you want me to read?

23 Q Start on line 13. I am just seeing if this refreshes
24 your recollection about whether you were able to ---

25 A Confer with my client during the plea?

1 Q Yes.

2 A Okay. Okay. I am with you. I see the page on the
3 transcript you refer to. Is there question?

4 Q My question is, do you recall at least two occasions
5 during the guilty plea hearing where, you know, Judge Hayes to
6 say or does say, that he is going to bring the jury back in.
7 Then you respond by saying, may I talk to my client, or Your
8 Honor, may I and he says no.

9 A Yes, I agree with you now. I stand corrected.
10 Apparently at this point Judge Hayes did not let me confer with
11 my client during the plea.

12 Q After the guilty plea was entered and Brad was
13 sentenced what conversation did you have with him about
14 appealing?

15 A I advised him if he wanted to appeal he had to, you
16 know, within ten days of the plea just like the judge did during
17 the colloquy. He made no indication to me at that time he
18 wanted to appeal the plea.

19 Q Is there any documentation that would verify that?

20 A No.

21 MS. DIFRANCO: No further questions, Your Honor.

22 THE COURT: Anything on redirect?

23 MR. JOHNSON: Just briefly.

24 REDIRECT EXAMINATION

25 BY MR. JOHNSON:

1 Q This retainer agreement doesn't it say that you don't,
2 you know, represent him on appeal until he retains you?

3 A That's correct.

4 Q And you didn't threaten him in any way to get him to
5 plead guilty?

6 A Absolutely not.

7 Q And it's his decision?

8 A Entirely.

9 MR. JOHNSON: No further questions.

10 THE COURT: Anything on recross?

11 RECROSS EXAMINATION

12 BY MS. DIFRANCO:

13 Q Do you know that Brad ever saw the retainer agreement
14 that his father signed?

15 A No. Yeah, I would have to answer no. I don't know. I
16 suspect he did.

17 MS. DIFRANCO: Thank you, Your Honor.

18 THE COURT: You may step down.

19 MR. JOHNSON: The State has no further witnesses,
20 Your Honor, but we would like to make a quick argument
21 if you don't mind. The.

22 The only argument is --

23 THE COURT: Okay, go ahead and make a quick
24 argument.

25 MR. JOHNSON: This appellant has admitted to lying

1 under oath. Therefore we think he has absolutely no
2 -- or should have no credibility with this Court.
3 Also, any alleged errors of counsel were cured by the
4 plea colloquy, so Your Honor, we ask that you dismiss
5 this case as he has not proven either of the prongs of
6 the Stricklin test.

7 THE COURT: I understand Mr. Johnson, and as you
8 recall I am waiting for to review of the two days of
9 testimony.

10 MR. JOHNSON: Yes, sir.

11 THE COURT: I'm also going to allow Miss DiFranco
12 to comment on any particular pages or lines that she
13 wants me to review, even though I will read the
14 transcript. You will also be allowed to do the same
15 thing at that time. And then once I've done that I
16 will make my decision.

17 Miss DiFranco, if you want to make a quick, brief,
18 two-sentence argument.

19 MS. DIFRANCO: No argument, Your Honor. I don't
20 think I ever moved the statement.

21 THE COURT: This thing?

22 MS. DIFRANCO: Yes, and I just wanted to do that.

23 THE COURT: Any objection?

24 MR. JOHNSON: No, sir.

25 THE COURT: All right, that will be Applicants's

1 one.

2 (Applicants Exhibit one, statement, received in
3 evidence as of this date.)

4 THE CORUT: Anything tells we needs to clear up.

5 MS. DIFRANCO: I don't think so.

6 THE COURT: Thank you.

7 MR. JOHNSON: Thank you, Your Honor.

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C E R T I F I C A T E

I, the undersigned Aileen Butler, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings in the captioned case, in the Circuit Court for York County, South Carolina, on the 9th day of October, 2012.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

June 9, 2014

Aileen Butler

BRAD MCCARTER

- what happened (gilfilin cut me w sword, that is why I had a hammer)
- present self D
- go thru events if he freezes- set hammer down on porch, vic picked it up and chased after him saying what are you gonna do now big boy, threw stone, got to road, misty sped off, vic attacks, self D grabs hammer, *DOESN'T USE IT*, Misty comes back and vic is on top, she gets him off and you leave
- injuries you sustained
- cop came to see you re hammer two days later
- deer blood in car, clothes moved.

PRESENTING SELF DEFENSE (BRAD, READ THIS, YOU HAVE TO SAY THESE THINGS ON THE STAND TO WIN:

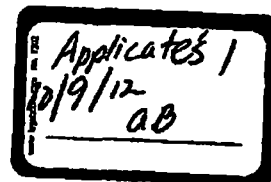
WE HAVE TO PRESENT IT BY PUTTING BRAD ON STAND. WE ALSO HAVE TO REQUEST JURY CHARGE

1) WE HAVE TO SHOW WE WERE NOT AT FAULT IN BRINGING ON THE FIGHT. "I PUT THE HAMMER DOWN, I RAN FROM HIS PROPERTY."

2) WE HAVE TO FEEL LIKE WE WERE IN ACTUAL IMMINENT DANGER OF LOSING LIFE OR SUSTAINING SERIOUS BODILY INJURY. "HE PICKED UP THE HAMMER AND RAN AT ME SCREAMING 'WHAT ARE YOU GOING TO DO NOW BIG BOY.' I TRIED TO SLOW HIM DOWN BY THROWING A STEPPING STONE AT HIM, I BELIEVED I WAS IN DANGER OF GETTING HURT BADLY OR KILLED."

3) A REASONABLY PRUDENT MAN OF ORDINARY FIRMNESS AND COURAGE WOULD FEAR FOR HIS LIFE OR SUSTAINING SERIOUS BODILY INJURY IF SOMEONE WAS COMING AFTER HIM WITH A HAMMER.

4) DEFENDANT HAD NO OTHER PROBABLE MEANS OF AVOIDING THE DANGER. "MISTY DROVE OFF WHILE I WAS RUNNING TO GET IN THE TRUCK, SHE HAD TO GET HIM OFF OF ME WHEN SHE CAME BACK."



STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK) AFFIDAVIT

Personally appeared before me Brad McCarter, after being duly sworn and deposed, and states:

I am Brad McCarter. I realize that my attorney David Cook has an offer from the state for 8 years in regards to my charges of ABWIK and Lynching. I am directing Mr. Cook to represent me at trial despite the fact that he has advised me that I probably will not win.

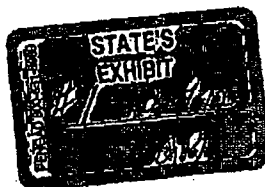
FURTHER AFFIANT SAYETH NAUGHT.

Brad McCarter
Brad McCarter

Sworn to and subscribed before me
This 19th day of August, 2011.

Ronald A. Sari
Notary Public for South Carolina

My commission expires: 6/23/21



**Cook Law Firm, L.L.C.
Retainer and Fee Agreement
300 N. White St.
P.O. Box 1449
Lancaster, South Carolina 29721
Ph. 803-285-4848
Fax 803-283-3680**

I, **Raymond Bradley McCarter** (hereinafter referred to as "Client") do hereby retain the law firm of Cook Law Firm, L.L.C. (hereinafter referred to as "Attorneys") as my attorneys to represent me in the following criminal action(s):

Assault With Intent to Kill, and Lynching

The attorney's fee for this charge is: **\$ 3000.00**

I realize that representation by Attorneys for the above referenced charge(s) will not begin until Attorneys have received the full amount for representation listed above. I also realize that at no time will any money be returned to me for any reason, including termination of Attorneys for convenience. By signing this contract, I am entering into an attorney-client relationship with Attorneys, and all conversations and correspondences will be protected completely from disclosure.

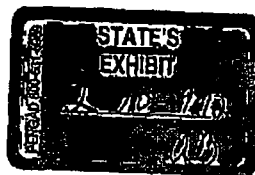
I further realize that Attorneys represent me only for the charges listed above and do not represent me for any other legal actions. Moreover, the representation for the above-referenced charges will end upon disposition of this case at the trial level. In no way will Attorneys represent me for any appeal related to the charges listed above, unless I enter a new fee agreement with Attorneys for such appeal.

I acknowledge, by execution hereof, that the foregoing contractual agreement has been fully explained to me, that I acknowledge receipt of a copy of this Agreement; and that I acknowledge and understand that this is a binding contract between myself and Attorneys and/or the law firm of Cook Law Firm, L.L.C.

**Senor Cook ha explicado este contrato en Espanol
(Mr. Cook has explained this contract in Spanish)**

Dated at York, South Carolina, this 4 day of August, 2010.

Raymond M. McCarter David C. Cook
(CLIENT SIGNATURE) ESQ.



Poyner Spruill^{LLP}

Sarah L. DiFranco
 Attorney-at-Law
 Direct Dial: 704.342.5330
 Facsimile: 704.342-5264
 sdifranco@poynerspruill.com

February 11, 2013

VIA EMAIL & U.S. MAIL

The Honorable Edgar W. Dickson
 First Judicial Circuit
 P.O. Box 1949
 Orangeburg, SC 29116

Re: ***Raymond Bradley McCarter v. State of South Carolina***
Case No.: 12-CP-46-1312

Dear Judge Dickson:

I represent Raymond Bradley McCarter in the above-referenced PCR action which you presided over on October 9, 2012 in York. I received the transcript by email on January 24, 2013. Since receiving the transcript I have corresponded with Mr. McCarter by mail.

As you instructed, I am writing to provide you with a list of portions of the transcript that we would specifically like to draw your attention to as you review it. In addition to that list I provide limited commentary to give you some context and explain why we believe these portions of the transcript are relevant to Mr. McCarter's claim of ineffective assistance of counsel.

- **Page 33, lines 10-14; Page 65, line 20 through Page 66, line 4; Page 113, lines 10-11-** As Mr. McCarter testified at the PCR hearing he suffers from significant hearing loss, wears two hearing aids and must rely on reading lips to understand what is being said. Mr. McCarter was not able to hear much of what was being said during the trial, yet defense counsel said that he could.

- **Page 62, lines 18-24; Page 88, lines 12-19; Page 89, lines 6-22-** Defense counsel's withdrawal of the motion to suppress the police car video was highly prejudicial to Mr. McCarter's defense and we contend one of the main reasons Mr. McCarter ultimately felt he had no choice but to plead guilty. Mr. Cook testified at the PCR hearing that it was because of what was said on the video that he believed it was in Mr. McCarter's best interest to plead guilty. However, Mr. McCarter testified that he had only seen portions of the video prior to trial.

- **Page 86, lines 12-19; Page 115, lines 10-14-** Withdrawal of the motion to suppress the video prejudiced Mr. McCarter and the video was referred to by the trial judge when he denied the defense's motions to suppress Mr. McCarter's pants and written statement.

February 11, 2013

Page 2

Poyner Spruill ^{LLP}

- **Page 89, lines 6-22-** The morning after defense counsel withdrew its motion to suppress the video defense counsel moves to have a portion of the video redacted, which the court denies.

- **Page 99, line 9 through Page 100, line 17-** The defense asked Officer Riley a total of six questions on cross examination during the motion to suppress Mr. McCarter's written statement.

- With regard to the motions to suppress, defense counsel did not call any witnesses to corroborate Mr. McCarter's testimony or rebut the testimony of the State's witnesses, namely Misty Montgomery or Mr. McCarter's son.

- **Page 134, line 9 through Page 142, line 25-** Defense counsel does not mention self defense in his opening statement.

- **Page 263, lines 10 through 13; Page 272, line 16-** The defense did not cross examine witness Jamie Gilfillan. Jamie Gilfillan was an important fact witness who should have been cross examined and potentially impeached by defense counsel. Despite saying he was going to impeach Jaime Gilfillan, defense counsel did not ask him one question on cross examination.

- **Page 276, line 17-** The defense did not cross examine witness Deputy Hamrick.

- **Page 279, line 12-** The defense did not cross examine witness Alex Wallace.

- **Page 202, line 23-** The defense did not object to the foundation for the photographs of the victim's injuries before they are admitted into evidence.

- **Page 214, line 5 through Page 218 line 2; Page 247, line 24 through Page 248, line 1-** The defense did not cross examine witness Tim Rumsey, the attending emergency room physician's assistant, regarding the characterization of the severity of injuries in the medical records versus how he described them in his testimony at trial. The defense also did not cross examine Mr. Rumsey regarding whether he knew the victim prior to the night he treated him in the emergency room or whether he worked with the victim's wife.

- **Page 160, lines 7-21-** The defense did not cross examine witness Brenda Gourley regarding how she came to be known to police or how long she had known the victim's son. Mr. McCarter maintains he never went to Ms. Gourley's home had had never seen Ms. Gourley prior to trial.

- **Page 249, line 10 through Page 258, line 1-** The defense did not cross examine the victim, Mr. Southard, regarding his prior statement to police or about the nature or extent of his injuries.

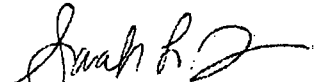
Thank you for your consideration of the trial transcript in conjunction with the other evidence presented in this matter. Please let me know if I can answer any questions.

February 11, 2013
Page 3

Poyner Spruill^{LLP}

Sincerely,

POYNER SPRUILL LLP


Sarah L. DiFranco

/SLD

cc: J. Rutledge Johnson (via email and U.S. Mail)
Raymond Bradley McCarter

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Raymond Bradley McCarter, # 314487,

2012-CP-46-1312

Applicant,

ORDER OF DISMISSAL

v.

State of South Carolina,

Respondent.

FILED-RECEIVED
2013 JUN 28 AM 10:04
DAVID L. HARTMAN
C.C.P. & C.S.
YORK COUNTY, SC

This matter comes before the Court by way of an Application for Post-Conviction Relief filed April 9, 2012. The Respondent made its Return on July 26, 2012. An evidentiary hearing into the matter was convened on October 9, 2012, at the Moss Justice Center in York, SC. Sarah L. DiFranco, Esquire represented the Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf, as well as his father Raymond McCarter. David Cook, Esquire also testified. This Court had before it a copy of the records of the York County Clerk of Court, records from the South Carolina Department of Corrections, and the guilty plea transcript. The trial transcript, which preceded the guilty plea, was subsequently provided to the Court after the evidentiary hearing. PCR counsel also provided the Court with a letter which specifically referenced passages in the transcript for the Court's consideration.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. Applicant was indicted at the



March 2010 term of the York County Grand Jury for Assault and Battery with Intent to Kill (ABWIK) (2010-GS-46-1078). He was represented by David Cook, Esquire. On August 25, 2011, Applicant pled guilty as indicted. The Honorable John C. Hayes, III sentenced Applicant to confinement for a period of ten (10) years. Applicant did not appeal his conviction and sentence.

In his Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Counsel"
 - a. "Counsel failed to use important evidence in trial"
 - b. "Conflict of Interest"
 - c. "Medical records states mild injuries (not life threatening(sic) injuries)"
2. "Sentence was unduly harsh"
 - a. "(Judge was biased)"

At the hearing, the Applicant proceeded on his claim of ineffective assistance of plea counsel.

SUMMARY OF TESTIMONY

The Applicant testified he when he met with Counsel, the two did not discuss the discovery on the charges, that Counsel did not mention any statements the victim gave, and did not discuss DNA as it relates to the crime scene. The Applicant stated Counsel did not discuss self-defense as a defense until the second day of trial and was not informed of the victim's or other witnesses' statements until the second day of trial. He asserted he found inconsistencies with the statements as opposed to the victim's in-court testimony. The Applicant testified he heard the audio statement before trial, but does not think he heard the entire statement. The Applicant also stated he wanted his co-defendant to testify at the trial. He further testified he wanted to testify at the trial, which he would have had to do to establish a self-defense claim.

Additionally, the Applicant testified Counsel did not discuss the elements of ABWIK with him. He also stated, although Counsel asked for and received a suppression hearing, he did not think Counsel 'gave it his best shot' as it was unsuccessful. The Applicant also asserted Counsel did not cross-examine Jamie Gilfillan, but did cross-examine the victim, although not about a prior inconsistent statement.

The Applicant's further testified at the end of the second day of trial, there was no discussion about pleading guilty because Counsel supposedly told the Applicant there was a good chance of acquittal. Upon entering the third day of trial, the Applicant stated he thought he needed to plead guilty because he wanted to do the right thing. He testified that before trial the plea offer from the State was for eight years, but he did not have enough time to think about his options. The Applicant also testified he felt pressured into pleading guilty because he did not feel like he had another choice.

Concerning the guilty plea, the Applicant stated the solicitor explained all of his prior convictions and that he was convicted of all previous charges through guilty pleas. He admitted he lied during his guilty plea because while he took responsibility for Assault and Battery, he did not take responsibility for ABWIK. He also admitted he could hear the plea judge clearly. He lastly testified he had gotten into a fight with another inmate while in the county detention center awaiting trial in this case.

On cross-examination, the Applicant admitted the plea court explained the crime for which he was charged and the penalty it carried. He also agreed that he understood ABWIK and wanted to plead guilty. The Applicant acknowledged he gave up his Constitutional rights associated with a trial at the guilty plea. He admitted he pled freely and voluntarily. The Applicant also testified he

was satisfied with his Counsel. He lastly admitted he hit the victim with a hammer and accepted responsibility for his actions.

The Applicant's father (Raymond McCarter) testified he hired Counsel to represent his son and talked to Counsel about this case. During the trial, Mr. McCarter testified he was held outside of the courtroom pursuant to a motion for sequestration. He also stated he was informed that his son was going to plead guilty, and Counsel mentioned a 'dog code' which meant it was his son's decision to plead guilty. This 'dog code' was a secret code between the Applicant and his father which was used to show the Applicant was not coerced into pleading guilty.

Counsel testified he has been practicing law for seven years and eighty percent of his practice is criminal defense. He stated he was formally an assistant public defender and tried many cases. Counsel testified he was retained and visited the Applicant numerous times to discuss this case. He stated he watched the in-car video where the Applicant gave a confession which was troubling to his defense. Counsel said he had the video transcribed for the Applicant due to the Applicant's hearing impairment.

Upon meeting with the Applicant, Counsel testified the Applicant first claimed he never hit the victim with a hammer. Then, after seeing the pictures of the victim, the Applicant claimed he hit the victim in self-defense. Counsel testified he consulted with the Applicant and recommended that he plead guilty. However, Counsel stated he did not promise any results at trial and did not force the Applicant to plead guilty. Counsel also testified he did not tell the Applicant he would only receive probation in this case but did try to convince the solicitor to offer five years instead of eight years. Counsel stated he turned over all of the victim's and witnesses' statements to the Applicant.

Concerning the trial and plea, Counsel testified had the trial continued, the Applicant would have had to testify to establish self-defense, especially because there were multiple witnesses that testified he was at the scene with a hammer in his hand. Counsel also stated guilty plea discussions were part of the equation from the onset, but it was the Applicant's decision to reject the State's eight-year offer and pursue a trial. Counsel testified the Applicant's father thought Counsel coerced the Applicant into pleading guilty, but the Applicant wrote down the 'dog code' to prove to his father that it was the Applicant's decision to plead guilty.

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 facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). 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 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within

the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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, 385 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. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

This Court finds Counsel was competent and diligent in his representation of the Applicant in this case. Counsel sufficiently advised the Applicant of the charges against him, the potential penalties if convicted at trial, and the evidence the State would produce at trial. Counsel satisfactorily investigated this case based on the information supplied by the Applicant and the evidence available. Counsel also engaged in plea negotiations which were beneficial to the Applicant. This Court also finds the Applicant was well informed by Counsel in this case. This Court is convinced that all of Counsel's strategies at trial and his advice that the Applicant eventually accept a plea offer from the State were reasonable professional decisions based upon Counsel's experience and the facts of the case. As such, the Applicant cannot show any resulting prejudice.

This Court further finds the Applicant's testimony concerning Counsel's ineffective

assistance not credible while finding Counsel's testimony credible. The Applicant admitted a few times that he lied at the guilty plea. As such, the Applicant has ^{little} ~~no~~ credibility with this Court. This Court finds the Applicant has failed to meet his burden of proving counsel's performance was deficient or that he was prejudiced thereby. Accordingly, this allegation is denied.

Involuntary Guilty Plea

To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621 (1977). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. U.S., 519 F.2d 317 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993).

The Applicant alleged his guilty plea was not voluntarily entered because Counsel coerced

him to plead guilty. At the PCR hearing, the Applicant testified he felt he had no other option but to plead guilty. However, the guilty plea transcript and the Applicant's answers during cross-examination at the PCR hearing directly refute his claims.

At the guilty plea, the Applicant stated he understood the charge against him and the penalty the charge carried. (Plea Tr. p. 4 lines 10-15). He then stated he wanted to plead guilty to the charge. (Plea Tr. p. 5 line 19). The Applicant testified he was not promised anything or threatened in any way to influence him to enter a guilty plea. (Plea Tr. p. 5 line 24). He also stated he was satisfied with Counsel. (Plea Tr. p. 4 line 9). The Applicant testified he was not under the influence of drugs or alcohol and that he had no mental or emotional condition that would interfere with his judgment. (Plea Tr. p. 6 ln 2). He stated he was pleading freely and voluntarily. (Plea Tr. p. 6 line 5). The Applicant testified he understood his Constitutional rights, had no questions about them, and wanted to plead guilty understanding these rights. (Plea Tr. p. 6 line 6-p. 7 line 8). After a brief discussion with the plea court, the Applicant agreed with the facts as presented during the trial phase of the case. (Plea Tr. p. 10 lines 6-9). Lastly, the Applicant stated, "I take full responsibility for my actions, You Honor... I'm pleading guilty to assault and battery with intent to kill, and I apologize to the Court." (Plea Tr. p. 12 line 19-p. 13 line 1).

On cross-examination at the PCR hearing, the Applicant freely admitted he testified to all of the above at his guilty plea.

This Court further finds the Applicant's testimony regarding the pressure Counsel alleged placed upon him to plead guilty is not credible while also finding Counsel's testimony is credible Counsel testified he never promised the Applicant he would receive probation or anything less than what the State offered. Counsel also testified it was the Applicant's decision to plead guilty.

Additionally, the Applicant admitted he lied during the guilty plea under oath. As such, this Court finds him not credible. Further, Counsel and the Applicant's father both testified that the 'dog code' confirmed that it was the Applicant's decision to plead guilty in this case.

Therefore, this Court finds the Applicant pled guilty freely, voluntarily and without any coercion, threats or promises. Therefore, this allegation is denied.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. Therefore, these allegations are denied.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR.

Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED!



Edgar W. Dickson
Presiding Circuit Court Judge
Sixteenth Judicial Circuit

June 17, 2013
Orangeburg, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
12-CP-46-1312

Raymond Bradley McCarter #314487,
Applicant,

vs.

State of South Carolina,
Respondent.

APPLICANT'S MOTION TO ~~ALTER~~
OR AMEND JUDGMENT
RULE 59(e)

FILED - RECEIVED
2013 JUL 16 AM 11:46
DAVID HAMILTON
CLERK
S.C.P. & GS
YORK COUNTY, SC

NOW COMES Applicant Raymond Bradley McCarter ("McCarter"), by and through undersigned counsel, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure and moves this Court to alter or amend the Order of Dismissal entered on June 28, 2013, and received by undersigned counsel on July 12, 2013¹. In support of this motion, McCarter shows the Court as follows:

PROCEDURAL BACKGROUND

On August 25, 2011, following two days of a jury trial, McCarter pled guilty to Assault and Battery with Intent to Kill. (2010-GS-46-1078). The Honorable John C. Hayes, III sentenced McCarter to ten years without parole. McCarter filed an Application for Post Conviction Relief on April 9, 2012 on the basis of ineffective assistance of counsel. The State filed its Return on July 26, 2012. A hearing on McCarter's Application for Post Conviction Relief was held in York, South Carolina on October 9, 2012. At the hearing, McCarter testified

¹ On July 5, 2013, undersigned counsel received a copy of a letter dated June 24, 2013 from assistant Attorney General J. Rutledge Johnson to the York County Clerk of Court requesting that the Order of Dismissal be filed. When on July 12, 2013 undersigned counsel still had not received a file-stamped copy of the Order of Dismissal, she had her assistant follow up with the York County Clerk's office. Donna Yarbrough in the York County Clerk's office advised that undersigned counsel had been served with a copy of the Order on June 28, 2013, but since it had not been received, Ms. Yarbrough sent it to counsel's assistant via email. Attached hereto as Exhibits A and B are copies of the envelope enclosing Mr. Johnson's letter dated June 24, 2013 and the July 12, 2013 email from Ms. Yarbrough attaching the file stamped Order of Dismissal.

on his behalf. McCarter's father, Raymond McCarter, Senior and trial counsel, David Cook, also testified. The Court was provided a copy of McCarter's guilty plea transcript. Following the hearing, the Court was provided a copy of the trial transcript. At the Court's request, counsel for McCarter submitted a letter highlighting specific portions of the trial transcript. On June 17, 2013, The Honorable Edgar W. Dickson signed an Order of Dismissal, dismissing McCarter's Application For Post Conviction Relief with prejudice.

DISCUSSION

"[W]here an issue has not been ruled on by the trial judge nor raised in a post-trial motion, such issue may not be considered on appeal." Pelican Bldg. Ctrs. v. Dutton, 311 S.C. 56, 60, 427 S.E.2d 673, 675 (1993).

Counsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to issuance of the order, and the PCR judge should carefully review the order prior to signing it. Even after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRCP, motion to alter or amend if the order fails to set forth the findings and the reasons for those findings...

Pruitt v. State of South Carolina, 310, SC 254, 256, 423 S.E.2d 127 (1992). Although the Court's Order of Dismissal includes a nearly three page "Summary of Testimony" along with detailed findings of fact and conclusions of law, it does not include any reference to certain salient issues about which evidence was offered. The Court's Order of Dismissal should be amended to include findings on the following issues.

First, at the hearing on McCarter's Application for Post Conviction Relief ("PCR hearing") both McCarter and his father testified that McCarter suffers from significant hearing loss. McCarter wears two hearing aids and must read lips to understand most of what people say. McCarter also testified he had trouble hearing much of what was said at his trial.

Second, McCarter offered evidence that trial counsel, David Cook, gave him a one-page computer generated sheet that detailed exactly how McCarter should testify at trial. The sheet was offered into evidence at the PCR hearing and McCarter testified about it. The sheet says **"YOU HAVE TO SAY THESE THINGS ON THE STAND TO WIN:"** (emphasis in original) McCarter testified at the PCR hearing that he wanted to testify at trial. However, McCarter never testified because he pled guilty. McCarter contends he could not agree to testify to certain things included in the sheet provided by trial counsel, including that he threw a stepping stone at the victim. McCarter offered evidence that because he refused to testify exactly as written on the sheet from trial counsel, trial counsel was not willing to put him on the stand and advised McCarter to plead guilty.

Finally, McCarter testified at the PCR hearing that trial counsel failed to look at all potentially exculpatory evidence including having the blood on the hammer tested or subpoenaing McCarter's phone records.

For the reasons set forth above, McCarter respectfully requests that the Court to amend its Order of Dismissal to include findings of fact regarding the above issues.

This the 15th day of July, 2013.

POYNER SPRUILL LLP



Sarah L. DiFranco

S.C. State Bar No. 79830

301 South College Street, Suite 2300

Charlotte, NC 28202

Telephone: 704.342.5250

Facsimile: 704.342.5264

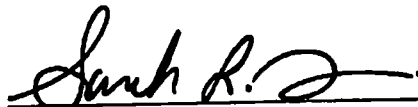
sdifranco@poynerspruill.com

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies the foregoing *Applicant's Motion to Alter or Amend Judgment* was served by mailing a copy thereof, first class mail, postage prepaid, to the following:

J. Rutledge Johnson
Assistant Attorney General
Office of the Attorney General, State of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211-1549

This the 15th day of July, 2013.



Sarah L. DiFranco

Poyner Spruill LLP
301 S. College Street, Suite 2300
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STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Raymond Bradley McCarter, # 314487,

2012-CP-46-1312

Applicant,

AMENDED ORDER OF DISMISSAL

v.

State of South Carolina,

Respondent.

This matter comes before the Court by way of an Application for Post-Conviction Relief filed April 9, 2012. The Respondent made its Return on July 26, 2012. An evidentiary hearing into the matter was convened on October 9, 2012, at the Moss Justice Center in York, SC. Sarah L. DiFranco, Esquire represented the Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. The undersigned signed an Order of Dismissal on June 17, 2013 which was then filed by the Clerk on June 28, 2013. Thereafter, on July 16, 2013, Applicant, by and through undersigned counsel, timely filed Applicant's Motion To Alter or Amend Judgment pursuant to Rule 59(e).

At the hearing, the Applicant testified on his own behalf, as well as his father Raymond McCarter, Senior. David Cook, Esquire, Applicant's trial counsel, ("Counsel") also testified. This Court had before it a copy of the records of the York County Clerk of Court, records from the South Carolina Department of Corrections, and the guilty plea transcript. The trial transcript, which preceded the guilty plea, was subsequently provided to the Court after the evidentiary hearing. PCR

counsel also provided the Court with a letter which specifically referenced passages in the transcript for the Court's consideration.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. Applicant was indicted at the March 2010 term of the York County Grand Jury for Assault and Battery with Intent to Kill (AB.WIK) (2010-GS-46-1078). He was represented by David Cook, Esquire. On August 25, 2011, Applicant pled guilty as indicted. The Honorable John C. Hayes, III sentenced Applicant to confinement for a period of ten (10) years. Applicant did not appeal his conviction and sentence.

In his Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Counsel"
 - a. "Counsel failed to use important evidence in trial"
 - b. "Conflict of Interest"
 - c. "Medical records states mild injuries (not life threatening(sic) injuries)"
2. "Sentence was unduly harsh"
 - a. "(Judge was biased)"

At the hearing, the Applicant proceeded on his claim of ineffective assistance of plea counsel.

SUMMARY OF TESTIMONY

The Applicant testified he when he met with Counsel, the two did not discuss the discovery on the charges, that Counsel did not mention any statements the victim gave, and did not discuss DNA as it relates to the crime scene. The Applicant stated Counsel did not discuss self-defense as a defense until the second day of trial and was not informed of the victim's or other witnesses'

statements until the second day of trial. He asserted he found inconsistencies with the statements as opposed to the victim's in-court testimony. The Applicant testified he heard the audio statement before trial, but does not think he heard the entire statement. The Applicant also stated he wanted his co-defendant to testify at the trial. He further testified he wanted to testify at the trial, which he would have had to do to establish a self-defense claim.

Additionally, the Applicant testified Counsel did not discuss the elements of ABWIK with him. He also stated, although Counsel asked for and received a suppression hearing, he did not think Counsel 'gave it his best shot' as it was unsuccessful. The Applicant also asserted Counsel did not cross-examine Jamie Gilfillan, but did cross-examine the victim, although not about a prior inconsistent statement.

The Applicant further testified at the end of the second day of trial, there was no discussion about pleading guilty because Counsel told the Applicant there was a good chance of acquittal. Upon entering the third day of trial, the Applicant stated he thought he needed to plead guilty because he wanted to do the right thing. He testified that before trial the plea offer from the State was for eight years, but he did not have enough time to think about his options. The Applicant also testified he felt pressured into pleading guilty on the third day of trial because he did not feel like he had another choice.

The Applicant further testified that on the morning of the third day of trial Counsel presented him with a computer generated document which detailed what Counsel wanted him to say on the stand. The document states "YOU HAVE TO SAY THESE THINGS ON THE STAND TO WIN[.]" (emphasis in original). The Applicant testified that he wanted to testify at his trial.

However, he could not agree to testify to certain items included in the document presented by Counsel, including that he threw a stepping stone at the victim. The Applicant claimed because he was not willing to testify exactly as Counsel instructed him to, Counsel would not put the Applicant on the stand and advised the Applicant to plead guilty.

The Applicant and his father both testified that the Applicant suffers from significant hearing loss and must wear hearing aids in both ears. The Applicant stated he must read lips in order to understand most of what people say and he further testified that he had trouble hearing much of what was said during his trial.

Moreover, the Applicant testified Counsel was ineffective because he failed to review all of the potentially exculpatory evidence, including having blood on the weapon (a hammer) tested or subpoenaing the Applicant's phone records.

Concerning the guilty plea, the Applicant stated the solicitor explained all of his prior convictions and that he was convicted of all previous charges through guilty pleas. He admitted he lied during his guilty plea because while he took responsibility for Assault and Battery, he did not take responsibility for ABWIK. He also admitted he could hear the plea judge clearly. He lastly testified he had gotten into a fight with another inmate while in the county detention center awaiting trial in this case.

On cross-examination, the Applicant admitted the plea court explained the crime for which he was charged and the penalty it carried. He also agreed that he understood ABWIK and wanted to plead guilty. The Applicant acknowledged he gave up his Constitutional rights associated with a trial at the guilty plea. He admitted he pled freely and voluntarily. The Applicant also testified he

was satisfied with his Counsel. He lastly admitted he hit the victim with a hammer and accepted responsibility for his actions.

The Applicant's father (Raymond McCarter) testified he hired Counsel to represent his son and talked to Counsel about this case. During the trial, Mr. McCarter testified he was held outside of the courtroom pursuant to a motion for sequestration. He also stated he was informed that his son was going to plead guilty, and Counsel mentioned a 'dog code' which meant it was his son's decision to plead guilty. This 'dog code' was a secret code between the Applicant and his father which was used to show the Applicant was not coerced into pleading guilty.

Counsel testified he has been practicing law for seven years and eighty percent of his practice is criminal defense. He stated he was formally an assistant public defender and tried many cases. Counsel testified he was retained and visited the Applicant numerous times to discuss this case. He stated he watched the in-car video where the Applicant gave a confession which was troubling to his defense. Counsel said he had the video transcribed for the Applicant due to the Applicant's hearing impairment.

Upon meeting with the Applicant, Counsel testified the Applicant first claimed he never hit the victim with a hammer. Then, after seeing the pictures of the victim, the Applicant claimed he hit the victim in self-defense. Counsel testified he consulted with the Applicant and recommended that he plead guilty. However, Counsel stated he did not promise any results at trial and did not force the Applicant to plead guilty. Counsel also testified he did not tell the Applicant he would only receive probation in this case but did try to convince the solicitor to offer five years instead of eight years. Counsel stated he turned over all of the victim's and witnesses' statements to the Applicant.

Concerning the trial and plea, Counsel testified had the trial continued, the Applicant would have had to testify to establish self-defense, especially because there were multiple witnesses that testified he was at the scene with a hammer in his hand. Counsel also stated guilty plea discussions were part of the equation from the onset, but it was the Applicant's decision to reject the State's eight-year offer and pursue a trial. Counsel testified the Applicant's father thought Counsel coerced the Applicant into pleading guilty, but the Applicant wrote down the 'dog code' to prove to his father that it was the Applicant's decision to plead guilty.

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 facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). 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 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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, 385 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. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

This Court finds Counsel was competent and diligent in his representation of the Applicant in this case. Counsel sufficiently advised the Applicant of the charges against him, the potential penalties if convicted at trial, and the evidence the State would produce at trial. Counsel satisfactorily investigated this case based on the information supplied by the Applicant and the evidence available. Counsel also engaged in plea negotiations which were beneficial to the Applicant. This Court also finds the Applicant was well informed by Counsel in this case. This Court is convinced that all of Counsel's strategies at trial and his advice that the Applicant eventually accept a plea offer from the State were reasonable professional decisions based upon Counsel's

experience and the facts of the case. As such, the Applicant cannot show any resulting prejudice.

While the Applicant testified Counsel failed to review potentially exculpatory evidence including the having the blood on the hammer tested or subpoenaing the Applicant's phone records, the Applicant failed to produce any evidence sufficient to show that the Applicant would have continued with his trial and not plead guilty had Counsel researched these issues. Specifically, the Applicant produced no phone records or blood tests at the PCR hearing and thus, failed to carry his burden of proof.

This Court further finds the Applicant's testimony concerning Counsel's ineffective assistance not credible while finding Counsel's testimony credible. The Applicant admitted a few times that he lied at the guilty plea. As such, the Applicant has no credibility with this Court. This Court finds the Applicant has failed to meet his burden of proving counsel's performance was deficient or that he was prejudiced thereby. Accordingly, this allegation is denied.

Involuntary Guilty Plea

To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621 (1977). Therefore,

statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. U.S., 519 F.2d 317 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993).

The Applicant alleged his guilty plea was not voluntarily entered because Counsel coerced him to plead guilty. At the PCR hearing, the Applicant testified he felt he had no other option but to plead guilty. He also testified that Counsel gave him a document detailing the things he must testify to if he took the stand at trial. The Applicant claimed because he would not agree to testify exactly as Counsel instructed, including that he threw a stepping stone at the victim, Counsel refused to put Applicant on the stand and advised him to plead guilty. However, the guilty plea transcript and the Applicant's answers during cross-examination at the PCR hearing directly refute his claims.

At the guilty plea, the Applicant stated he understood the charge against him and the penalty the charge carried. (Plea Tr. p. 4 lines 10-15). He then stated he wanted to plead guilty to the charge. (Plea Tr. p. 5 line 19). The Applicant testified he was not promised anything or threatened in any way to influence him to enter a guilty plea. (Plea Tr. p. 5 line 24). He also stated he was satisfied with Counsel. (Plea Tr. p. 4 line 9). The Applicant testified he was not under the influence of drugs or alcohol and that he had no mental or emotional condition that would interfere with his judgment.

(Plea Tr. p. 6 ln 2). He stated he was pleading freely and voluntarily. (Plea Tr. p. 6 line 5). The Applicant testified he understood his Constitutional rights, had no questions about them, and wanted to plead guilty understanding these rights. (Plea Tr. p. 6 line 6-p. 7 line 8). After a brief discussion with the plea court, the Applicant agreed with the facts as presented during the trial phase of the case. (Plea Tr. p. 10 lines 6-9). Lastly, the Applicant stated, "I take full responsibility for my actions, You Honor... I'm pleading guilty to assault and battery with intent to kill, and I apologize to the Court." (Plea Tr. p. 12 line 19-p. 13 line 1).

On cross-examination at the PCR hearing, the Applicant freely admitted he testified to all of the above at his guilty plea.

This Court further finds the Applicant's testimony regarding the pressure Counsel alleged placed upon him to plead guilty is not credible while also finding Counsel's testimony is credible. Counsel testified he never promised the Applicant he would receive probation or anything less than what the State offered. Counsel also testified it was the Applicant's decision to plead guilty. Additionally, the Applicant admitted he lied during the guilty plea under oath. As such, this Court finds him not credible. Further, Counsel and the Applicant's father both testified that the 'dog code' confirmed that it was the Applicant's decision to plead guilty in this case.

Therefore, this Court finds the Applicant pled guilty freely, voluntarily and without any coercion, threats or promises. Therefore, this allegation is denied.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that Counsel

committed either errors or omissions in his representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. Therefore, these allegations are denied.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED!



Edgar W. Dickson
Presiding Circuit Court Judge
Sixteenth Judicial Circuit

March 4, 2014

Orangeburg, South Carolina

DOCKET NO. 2010-GS-46-01078

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

WITNESSES

YCSD\Riley

The State of South Carolina
County of York

Defendant

COURT OF GENERAL SESSIONS

I hereby appear in my own proper person and plead guilty to the within indictment or to

March 25, Term 2010

In

ARREST WARRANT NUMBER

J-169529

THE STATE

Raymond B. McCarter
Defendant

vs.

Witness:
Regina Rutledge - Ct. Spec.
C.C.C. PLS. AND G.S.

ACTION OF GRAND JURY

RAYMOND BRADLEY MCCARTER

TRUE BILL

J.B. Van
Foreperson of Grand Jury 3.25.10
Date:

VERDICT

Indictment for

**ASSAULT AND BATTERY WITH
INTENT TO KILL**

Foreperson of Petit Jury

SC Code: 16-3-620
CDR Code: 014

CERTIFIED TRUE COPY
2012 APR 11 PM 2:38
DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

STATE OF SOUTH CAROLINA)

INDICTMENT

COUNTY OF YORK

At a Court of General Sessions, convened on March 25, 2010, the Grand Jurors of York County present upon their oath:

ASSAULT AND BATTERY WITH INTENT TO KILL

The Defendant, Raymond Bradley McCarter, did in York County, South Carolina on or about February 5, 2010, with malice aforethought commit an assault and battery upon one Dwayne Southard, with intent to kill the said victim. All in violation of Section 16-03-620 of the Code of Laws of South Carolina, (1976, as amended).

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


ASSISTANT SOLICITOR