

**VOLUME TWO OF TWO**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Richland County

L. Casey Manning, Circuit Court Judge

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JAN - 8 2015

JOHN J. MOORE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000786

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APPENDIX

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1 Q And did you find that gun?

2 A We did not.

3 Q Did you have the opportunity to talk to Delia  
4 Nix, the owner -- or the resident at [REDACTED]  
5 [REDACTED]?

6 A I did at the time of the search warrant.

7 Q Yes.

8 A I talked with her, read her the search warrant.  
9 In fact, John Moore was there when we arrested him  
10 at her residence and was reading the search warrant  
11 to him and her and continued to read it to her and  
12 talk to her after John was taken back to  
13 headquarters.

14 Q So did you have -- how long would you say your  
15 conversation was with her?

16 A We talked on and off for the better part of 30  
17 minutes.

18 Q So you had a good opportunity to hear her  
19 voice?

20 A I did.

21 Q How about John Moore, did you have an  
22 opportunity to talk to him?

23 A I did. I spoke with him briefly out there at  
24 the scene at [REDACTED], again back at  
25 headquarters, we had some conversations. He mostly

1           talked to investigate --

2           **MR. COLLINS:** Objection, Your Honor.

3           **THE COURT:** Yes, sir.

4           **MR. COLLINGS:** We have an issue of law outside  
5 the presence of the jury.

6           **THE COURT:** All right. Ladies and gentlemen,  
7 please step in the jury room. Don't discuss the  
8 case.

9                     (The jury retires to the jury room.)

10          **THE COURT:** Yes, sir.

11          **MR. COLLINS:** Your Honor, the objection is  
12 based on his speaking of conversations that he had  
13 with the defendant, Mr. Moore. We had a pretrial  
14 motion where Your Honor ruled that Investigator  
15 Barnes did not establish the requirements to be able  
16 to talk about any of the contents of the  
17 conversations he had with Mr. Moore. It's our  
18 position that he should not then be allowed to talk  
19 about the conversations, period.

20          **THE COURT:** What are you intending to ask him?

21          **MS. WEISS:** Your Honor, that was the end of --  
22 we're not getting into any conversations that he  
23 had, just the fact that he had a chance to talk to  
24 Mr. Moore.

25          **MR. COLLINS:** Your Honor, I believe she's



1       trying to establish that he can recognize his voice.  
2       In pretrial, we established that he nodded his head  
3       in affirmation and possibly asked for chips and a  
4       drink. There was no other testimony regarding any  
5       other conversation, spoken conversation he had with  
6       Mr. Moore. And I object because I don't want the  
7       jury to get the impression that there was a  
8       conversation and they're missing out on the contents  
9       about it.

10           **THE COURT:** The issue before the Court in the  
11       pretrial motions was whether statements of the  
12       defendant would be admissible or not or whether  
13       nonverbal statements or acknowledgments or nodding  
14       of the head would be admissible. The ruling of the  
15       Court was at the preliminary stage, at the pretrial  
16       stage, that those things had not been established  
17       sufficiently under Denno to admit the statements.  
18       There was no ruling about this specific issue and he  
19       can be asked about whether he talked to the  
20       defendant. I note your objection.

21           **MR. COLLINS:** Your Honor, just for the record,  
22       my concern is that this conversation that we're  
23       speaking of did not come up in the Denno hearing and  
24       now they're seeking to introduce the existence of  
25       the conversation.

1           **THE COURT:** As long as they don't go into the  
2 content of the conversation, I don't think there's  
3 any way for me to exclude it. You'll have to  
4 cross-examine him about his ability to identify, if  
5 that's where they're going, his ability to identify  
6 the voice of the defendant on the recorder.

7           Anything else?

8           **MR. COLLINS:** Not at this time.

9           **THE COURT:** Thank you.

10          Are you ready for the jury to come back?

11          **MS. WEISS:** Yes, Your Honor.

12          **THE COURT:** Bring in the jury, please.

13          (The jury returns to the courtroom.)

14          **THE COURT:** All right. You may continue, Ms.  
15 Weiss.

16          **MS. WEISS:** Thank you, Your Honor.

17          BY MS. WEISS:

18          **Q**     Investigator Barnes, we were just talking about  
19 conversations that you had with John Moore the day  
20 of the search warrant, the day he was arrested. Did  
21 you have an opportunity to have a conversation with  
22 John Moore?

23          **A**     I did.

24          **Q**     And, approximately, how long did that  
25 conversation last?

1       **A**     We spoke a few moments, a few minutes, out at  
2       the house at [REDACTED] and then again  
3       we spoke several minutes at headquarters later on  
4       when I got back to headquarters.

5       **Q**     And did you have an opportunity -- I mean, you  
6       had a good enough opportunity that you would  
7       recognize his voice?

8       **A**     Yes.

9       **Q**     The next step that you took in the  
10      investigation after Mr. Moore was arrested, he was  
11      taken to Alvin S. Glenn, what was the next step in  
12      your investigation?

13      **A**     I had sent Sergeant Ewing over to recover the  
14      pick-up truck and he had gotten in touch with John  
15      Moore's father. Based on -- based on what I learned  
16      from there, we felt like we needed to get a hold of  
17      the phone records from the jail and we went about  
18      asking for those phone records.

19      **Q**     Is that something you normally do in  
20      investigations?

21      **A**     It's something actually that's really come  
22      around in the last few years, but this is something  
23      that had been a part of the jail and something that  
24      they had had in place with Pay-Tel and something we  
25      felt like we could access legally.

1           Q     And tell me how that works, how did you go  
2           about requesting phone records from the jail?

3           A     I called up Sergeant Shull and asked her for  
4           those particular phone calls out of numbers that we  
5           felt like might be called.

6           Q     And who did those numbers belong to?

7           A     Those were numbers that we knew were associated  
8           with John Moore.

9           Q     I'm going to show you what's been marked as  
10          State's Exhibit 129 for identification. Do you  
11          recognize this disk?

12          A     Yes, I do.

13          Q     And what is that disk?

14          A     This is a disk that I received from Sergeant  
15          Shull and I marked 11/10/05 at 1510 hours, which is  
16          3:10 hours in the afternoon.

17          Q     And how did you get this disk?

18          A     From Sergeant Shull.

19          Q     And did you actually record the information  
20          that was on this disk?

21          A     Sergeant Shull had and handed it to me.

22          Q     And you've been able to listen to the calls on  
23          this disk?

24          A     I have.

25          Q     Specifically as it references track three on

1           this call, you listened to that call recently?

2           **A**     I have.

3           **Q**     And did you recognize the voices on that call?

4           **A**     I did.

5           **Q**     And who were the voices on that call?

6           **A**     It would be Delia Nix, the girlfriend of John  
7           Joseph Moore, talking to John Joseph Moore, Junior.

8           **MS. WEISS:** Your Honor, at this time, I would  
9           like to introduce State's Exhibit 129 into evidence.

10          **MR. COLLINS:** Your Honor, we're probably going  
11          to have to take this up outside the presence of the  
12          jury.

13          **THE COURT:** Ladies and gentlemen, please step  
14          in the jury room. Don't discuss the case.

15          (The jury retires to the jury room.)

16          **THE COURT:** Yes, sir.

17          **MR. COLLINS:** Your Honor, first and foremost,  
18          this C.D. in question, only one track has been  
19          established for the method in which they're trying  
20          to introduce the C.D.

21                 But to back up a little bit, from what I  
22          gather, and I wanted to take care of this with the  
23          jury outside of our presence, but from what I  
24          gather, the State is seeking to introduce recorded  
25          phone calls from the jail. They've established that

1       the jail records it and that he's listened to it.  
2       However, there's no one that had any part of this  
3       conversation that can testify as to whether or not  
4       these recordings are a fair and accurate  
5       representation of the conversations that were had on  
6       the disk. I'd like to compare it to if you're  
7       trying to introduce a photograph. You can have  
8       somebody testify as to what it is, but it's not  
9       admissible until somebody can testify that it's a  
10      fair and accurate representation of what it purports  
11      to be.

12             I've researched numerous cases trying to find  
13      something directly on point in this situation, but  
14      the case law, there's always a participant of the  
15      conversation or somebody who listened to the  
16      conversation as it took place. We haven't heard any  
17      testimony as far as somebody that has personal  
18      knowledge of what this conversation was.

19             These are recordings. We don't know the  
20      authenticity of the recordings being a fair and  
21      accurate representation of that conversation. So we  
22      would object to the State introducing the  
23      conversations contained on these compact disks  
24      unless some sort of authentication of that nature  
25      can be provided.

1           **THE COURT:** Ms. Weiss.

2           **MS. WEISS:** Thank you, Your Honor. Your Honor,  
3 Ms. Shull testified prior to Eric Barnes and she's  
4 the one who keeps these records, she's the one that  
5 knows about these records, that the computer system  
6 only starts recording when somebody says hello and  
7 records entire conversations. She testified that  
8 she then records them to disk. I mean, that is the  
9 conversation itself, that's beginning to end.

10           And Eric Barnes has testified he recognizes the  
11 two voices on there as being Delia Nix and John  
12 Moore. The voices have been recognized, the phone  
13 call has been recorded in its entirety. I think, at  
14 that point, it becomes admissible. The defense can  
15 argue and introduce anything to rebut that, but --  
16 and I think that may go to the weight of the  
17 evidence, but the admissibility, the voices have  
18 been recognized and the conversations have been  
19 recorded in the ordinary course of business in their  
20 entirety by a computer.

21           **THE COURT:** Anything else?

22           **MR. COLLINS:** Your Honor, we've heard no  
23 supporting information about the computer system.  
24 We've only heard information about one of the tracks  
25 on the compact disk so far. And we would just stand

1       -- Rule 602, you have to be able to testify to  
2       personal knowledge about what you're testifying  
3       about. Mr. Barnes has no personal knowledge about  
4       what these original conversations were about. He  
5       only has personal knowledge about what's on the  
6       recording. And we would just stand by the original  
7       argument, Your Honor.

8               **THE COURT:** Bear with me a few minutes.

9               (Pause.)

10              **THE COURT:** What I've got so far is that  
11       Sergeant Shull testified that there is a software  
12       program affixed to the telephone, pay telephone at  
13       the jail, and that it will automatically record  
14       completed calls and that there is a system in place  
15       using that software whereby a telephone number that  
16       is dialed from the pay phone at the jail can be  
17       entered into a search mechanism and all the calls  
18       that went to that telephone number can be found on  
19       the hard drive and then downloaded onto a C.D. or  
20       something of that fashion. And she testified, the  
21       sergeant did, that she was asked by this  
22       investigator to download certain -- or check certain  
23       phone numbers, which she did, that she recorded them  
24       onto a C.D. and that she gave them to this  
25       investigator.



1           He has testified that he asked Sergeant Shull  
2       for the calls out to the particular numbers that he  
3       felt might be called. And the question, Who did  
4       those numbers belong to? And the answer was, Those  
5       were the numbers that we knew were associated with  
6       John Moore. And then you showed him the C.D. and  
7       asked him if he identified it and he said that that  
8       is the C.D. that he received from Sergeant Shull,  
9       which he marked on it November the 10th, 2005 at  
10      1510 hours, that he listened to the calls on the  
11      disk.

12           And then he was asked specifically as to track  
13      three of the call if he had listened to that  
14      recently. He said he had. He was asked does he  
15      recognize the voices on that call. He said he did.  
16      He was asked who the voices were. And he said Delia  
17      Nix, the girlfriend of John Joseph Moore, talking to  
18      John Joseph Moore, Junior. And that's when the  
19      State's Exhibit 129 was offered into evidence and  
20      the objection was raised.

21           Why did y'all ask him about one track?

22           **MS. WEISS:** Because, Your Honor, we planned to  
23      use that one track.

24           **THE COURT:** What's on the disk?

25           **MS. WEISS:** The disk has numerous phone calls.

1       There's an abundance of phone calls. But, Your  
2       Honor, for the purpose of this case, we plan on  
3       introducing track number three.

4               **THE COURT:** And what does the defense want to  
5       tell me?

6               **MR. COLLINS:** Your Honor, my reading of 901, it  
7       gives different illustrations of different ways in  
8       which a voice can be identified or different  
9       illustrations in which a call can be authenticated.  
10       One of the ways in which a voice can be identified  
11       is through any knowledge, I believe the case law  
12       states, as from a totality of the circumstances.

13               I would even argue that the evidence presented  
14       so far has not even provided enough information for  
15       a valid voice identification. The conversation that  
16       he referred to with Mr. Moore is extremely vague.  
17       We didn't hear anything about it in the pretrial  
18       hearing and it was only for a few minutes. And he  
19       never spoke with Mr. Moore on the phone before in  
20       his life. The same goes for Delia Nix, he never  
21       spoke to her over the phone. People's voices sound  
22       completely different over the phone.

23               In furtherance of that, there's also, I  
24       believe, the telephone conversation, Rule 901(b)(6),  
25       it talks about if you establish where numbers come

1 from and if a call's made to certain businesses, you  
2 can authenticate the parties to the call, but  
3 neither one of these authenticate the contents of  
4 the conversation. And what the State is trying to  
5 introduce is contents of a conversation between what  
6 they purport is Delia Nix and Mr. Moore without  
7 giving the defense a chance to cross-examine the  
8 contents of the conversation.

9 There's been no evidence or no testimony as far  
10 as authenticating the contents of the conversation  
11 and whether or not it fairly and accurately  
12 represents the original conversation, which is what  
13 the State is purporting this C.D. is a copy of.

14 **MS. WEISS:** Your Honor, if I may?

15 **THE COURT:** Sure.

16 **MS. WEISS:** Track number three contains  
17 numerous admissions made by the defendant in  
18 reference to this case. Those admissions are  
19 admissible by the State as well.

20 **THE COURT:** Well, I think his objection goes to  
21 the authentication of the exhibit.

22 **MS. WEISS:** Your Honor, we could go further as  
23 far as the voice identification. I know Rule  
24 901(b)(5) talks about hearing the voice at any time  
25 under circumstances connecting it with the alleged

1 speaker. Investigator Barnes, I can proffer some  
2 more testimony, could also tie in circumstances to  
3 the speakers as well. I think he has as far as John  
4 Moore being at Alvin S. Glenn, Delia Nix being his  
5 girlfriend, giving the number, tying it to Delia Nix  
6 and then recognizing the voices of Delia Nix and  
7 John Moore over the phone.

8 **THE COURT:** When did he ever say this was Delia  
9 Nix' phone number?

10 **MS. WEISS:** He did say Delia Nix, the  
11 girlfriend, was one of the phone numbers that he  
12 gave to Jeanie Shull to record.

13 (Pause.)

14 **THE COURT:** Was that since the jury came back  
15 in last time?

16 **MS. WEISS:** I believe so, Your Honor. Yes,  
17 sir, Your Honor.

18 **THE COURT:** When did he say that? I don't see  
19 it.

20 (Pause.)

21 **THE COURT:** All right. The ruling is that the  
22 exhibit has not been properly authenticated at this  
23 point. It may certainly be authenticated and have a  
24 different ruling at a later point. And you  
25 certainly may continue to ask him questions.

1           With regard to entering an entire disk with  
2           numerous conversations on it, I mean the only way I  
3           can do that is if I tell the jury that if they want  
4           to hear this exhibit, they have to hear it in the  
5           courtroom. Otherwise, I send the C.D. back with all  
6           kinds of conversations on it that aren't part of the  
7           record.

8           **MS. WEISS:** No, Your Honor. I've got -- that  
9           one, that's just the original C.D. and then I was  
10          going to enter in just the track as the piece of  
11          evidence to be played for the Court. I've got it  
12          recorded just that one track on a separate disk.

13          **THE COURT:** Okay. In evidence means in  
14          evidence. Exhibit means the same thing. I got lost  
15          in your lingo.

16          **MS. WEISS:** The original disk -- what we were  
17          going to play into evidence is the piece of  
18          evidence --

19          **THE COURT:** I understand now, but I didn't  
20          understand it 30 seconds ago. You were offering the  
21          whole thing in evidence. Offering it in means the  
22          same as offering it in evidence. An exhibit means  
23          the same thing as in evidence, the way I understand  
24          it. And I apologize to y'all if I misunderstand it.

25          **MS. WEISS:** Your Honor, I didn't know any other

1 way to do it without putting in the original.

2 **THE COURT:** Okay. It's no big deal.

3 **MS. WEISS:** I just want to make sure I'm clear  
4 with you. This is -- I'm entering it the way it is  
5 -- works.

6 **THE COURT:** I decided yesterday after I went  
7 home and said my prayers, I'm not going to try to do  
8 y'all's job.

9 **MR. COLLINS:** Your Honor, we would just ask  
10 that at any point in their continued questioning, if  
11 the Solicitor intends on playing the audio C.D. in  
12 front of the jury, we would like to at least proffer  
13 the conversation they intend on playing so that we  
14 can decide whether or not it is admissible before  
15 the jury gets a chance to hear it.

16 **MR. MEADORS:** Could we do that now?

17 **THE COURT:** We're going to have to do it now,  
18 but how long is the conversation?

19 **MS. WEISS:** Just a couple minutes, Your Honor.

20 **MS. MCDUFFIE:** It's six minutes, Your Honor.

21 **MR. MEADORS:** Your Honor, to defend us --

22 **THE COURT:** Y'all cue it up and I'll be back  
23 out in a second. We'll be at ease just a minute.

24 Mr. Barnes, you can't discuss your testimony  
25 with anybody, okay.

1           **THE WITNESS:** Yes, sir.

2           **THE COURT:** Thank you.

3                   (Brief Recess.)

4           **THE COURT:** Bring the jury in, please.

5                   (The jury returns to the courtroom.)

6           **THE COURT:** Ladies and gentlemen, after  
7           conferring with the attorneys about this legal issue  
8           that I have to deal with, they tell me it's going to  
9           be at least another half hour, 45 minutes. So I'm  
10          just going to let you folks go home so that I can  
11          continue to stay here and work on that and ask you  
12          to be here in the morning at 9:30.

13                 Now, as you know, I drew two alternates because  
14                 that's what the statute provides for me to draw up  
15                 two alternates and I've seated those two alternates.  
16                 So it's really, really important that you remember  
17                 those admonitions, don't let anybody discuss the  
18                 case with you, don't allow yourselves to be exposed  
19                 to any media coverage and report to me if anything  
20                 does happen.

21                 I hope you have a very pleasant evening.  
22                 Tomorrow I hope sometime by the midmorning break to  
23                 give you some idea of where I think we are with the  
24                 progress of the case, where we are in relation to  
25                 when we'll finish up or likely finish up. Okay. I

1           hope you have a pleasant evening. Thank you.

2                       (The jury was excused for the day.)

3           **THE COURT:** Just to make sure no one gets the  
4           impression I'm trying to be coy, I'm not. The  
5           customary way that I see things done with the  
6           situation we have here as far as preserving the  
7           record is that the C.D. in this instance with the  
8           greater material on it is marked either as a court's  
9           exhibit or as an identification exhibit and then the  
10          C.D. with the portion that relates to what is being  
11          tendered for the jury to take back with them is  
12          marked as an exhibit.

13                There is no magic to that. I've had numerous  
14          instances. It happens a lot with highway patrolman  
15          who come in and they have their recordings from  
16          their video cameras and they have all their stops  
17          for the last 20 or 30 days or whatever that thing  
18          will store on there and we have to deal with this  
19          kind of thing a good bit.

20                But right now I'll just have to deal with the  
21          issues before me. And it may be more than  
22          authenticity. I'm not saying that's the only issue.  
23          The defense is raising the objection that the  
24          witness is not qualified to testify that this is  
25          this particular person's voice.



1           Now, let me just tell you all to the extent  
2           that it helps you, and again I'm not trying to --  
3           I'm not trying to do anything except play this  
4           straight down the middle like I always do. I never  
5           heard the jailer -- the jail employee testify about  
6           Mr. Moore being an inmate. I know there may be  
7           reasons why nobody said that. I never heard any  
8           other witness say that and I never heard the phone  
9           number and I never heard who the phone number is  
10          listed as being the subscriber with the telephone  
11          company.

12          And I'm not trying to be hypertechnical, but I  
13          think the defense is right, in most of the cases  
14          that have had to deal with this, it's the situation  
15          where one of the participants to the conversation  
16          does testify. Now, I know there has to be cases  
17          where that doesn't happen. There also are 911 tapes  
18          that are admitted all the time. Of course, with 911  
19          systems, you generally have automatic tracking as to  
20          where the call's being placed from and usually there  
21          is some identification of the persons by their name  
22          at the outset of the call.

23          All right. Make your proffer as to what you  
24          need to do so I can make my rulings.

25          **MS. WEISS:** Thank you, Your Honor. Just for

1 clarification of what we're doing at this time, do  
2 you want me to go ahead and proffer all of his  
3 testimony or do you just want to proffer the C.D. at  
4 this time?

5 **THE COURT:** All I want to get into is the  
6 admissibility of the C.D.

7 DIRECT EXAMINATION

8 BY MS. WEISS:

9 Q Investigator Barnes, you arrested John Moore on  
10 November 3rd of 2005?

11 A I did.

12 Q And are you aware -- what day did you receive  
13 this C.D.?

14 A 11/10/05 in the afternoon, 11/10/05 at 1510  
15 hours.

16 Q And do you have personal knowledge whether or  
17 not John Moore was still incarcerated at the Alvin  
18 S. Glenn Detention Center?

19 A I do.

20 Q And was he?

21 A He was.

22 Q And had he been incarcerated continuously since  
23 November 3rd of 2005?

24 A He has been.

25 Q So when you received this, he had been at Alvin

1 S. Glenn?

2 A That is correct.

3 Q And the dates that this tape reflect occurred  
4 during those seven days?

5 A That is correct.

6 Q And how do you know that?

7 A Because that is the request that I had given to  
8 Ms. Shull.

9 Q And you listened to these C.D.'s as well?

10 A I did.

11 Q So information on these C.D.'s, that led you to  
12 know that they were recorded during that time  
13 period?

14 A That is correct.

15 Q And what is that information?

16 A Information regarding times and places, people  
17 associated with Mr. Moore, friends and associates,  
18 relatives all were a part of the conversations.  
19 This was -- the particular track you are referring  
20 to is one of several tracks that I heard. On those  
21 tracks I heard, it became apparent who was talking  
22 based on the descriptions, based on the reading of  
23 the search warrant from [REDACTED] by Delia  
24 to John Moore, I understood who that was, the whole  
25 volume of circumstances there, the totality of

1           circumstances.

2           **Q**     When you got that C.D. from Jeanie Shull, from  
3           Sergeant Shull, did you notate on that C.D. what  
4           phone number that C.D. pertained to?

5           **A**     I did not, that is not my handwriting. That is  
6           how I received it, though.

7           **Q**     Okay. And was that one of the phone numbers  
8           that you requested?

9           **A**     Honestly, I do not recall that. My assumption  
10          is that it is, that she would not have given it to  
11          me had I not notated it in my notes anywhere. I  
12          would have to refer back to my case files to find  
13          that particular number, so I don't honestly know  
14          where (sic) that number is associated with, but I do  
15          know that the people on that are associated with  
16          this particular case.

17          **Q**     And whose phone numbers did you give her,  
18          specifically? What people of phone numbers did you  
19          give?

20          **A**     They were John Moore's residence, his daddy's  
21          residence telephone number and Delia Nix's telephone  
22          number.

23          **Q**     So Delia Nix was one of the phone numbers that  
24          you gave her?

25          **A**     Yes.

1       Q     And this phone call when you listened to track  
2             three, who did you recognize as being the female on  
3             the phone?

4       A     Delia Nix, the girlfriend.

5       Q     I'm sorry?

6       A     Delia Nix, the girlfriend.

7       Q     And what was notated on the front of that C.D.?

8       A     G-friend.

9       Q     You take that --

10       THE COURT: I'm sorry, I didn't hear you.

11       THE WITNESS: G-friend.

12       BY MS. WEISS:

13       Q     Do you take that notation to mean --

14       A     Girlfriend.

15       Q     So that would be consistent with that being the  
16             girlfriend's phone number?

17       A     Yes, ma'am.

18       Q     That you provided to Sergeant Shull?

19       A     Yes, ma'am.

20       Q     And you recognized the male voice as being who?

21       A     John Moore.

22       Q     The inmate at Alvin S. Glenn?

23       A     That is correct.

24       Q     And at the beginning of that phone call, the  
25             Pay Telecommunications recording, are you aware of

1           what that says?

2           **A**     John.

3           **Q**     But the recording of the actual Pay  
4           Telecommunication recording says who is calling, and  
5           who does it identify?

6           **A**     An inmate at Alvin S. Glenn Detention Center.

7           **Q**     And that inmate identifies himself and  
8           identifies himself in this case as being?

9           **A**     John.

10          **Q**     Okay. And so you recognize the voice and he  
11          said that his name was John and he was an inmate at  
12          Alvin S. Glenn?

13          **A**     Correct.

14          **Q**     And all of those are consistent with John  
15          Moore, Junior, in this case?

16          **A**     That is correct.

17                 **THE COURT:** Before y'all go any further, where  
18          do y'all get junior from?

19                 **MS. WEISS:** That's just his name. He's a  
20          junior, Your Honor.

21                 **THE COURT:** Okay.

22                 **MS. WEISS:** It was in my head.

23                 **THE COURT:** Earlier he said John Joseph Moore  
24          and then he said John Joseph Moore, Junior.

25                 **MS. WEISS:** They're not different people, Your

1 Honor.

2 THE COURT: Y'all assume, like I told y'all,  
3 that I know this stuff. I don't know this stuff.  
4 Again, I'm not trying to be hypertechnical with you,  
5 but I don't know what his daddy's name is and y'all  
6 got to be careful. Go ahead.

7 MS. WEISS: Yes, sir, Your Honor.

8 BY MS. WEISS:

9 Q You recognize that voice as being John Joseph  
10 Moore, the defendant in this case?

11 A Yes, ma'am.

12 Q And in that tape, are there conversations that  
13 relate specifically to this case?

14 A Yes, ma'am.

15 Q There are conversations that relate  
16 specifically to John Moore, the defendant?

17 A Yes, ma'am.

18 Q In this tape, does -- are there  
19 conversations -- are there things that are being  
20 said by Delia, who is John Moore's girlfriend, that  
21 you recognize her voice, that are specific to this  
22 case?

23 A Yes, ma'am.

24 Q And are those conversations specific to the  
25 time period, these seven days, in which this tape --

1           this C.D. was recorded?

2           **A**     Yes, ma'am.

3           **Q**     And are those conversations that you would  
4           expect to come from John Moore and Delia Nix, his  
5           girlfriend?

6           **A**     Yes, ma'am.

7           **MS. WEISS:** Your Honor, at this time, I'd like  
8           to play the C.D.

9           **THE COURT:** You may play it.

10                   (Whereupon, State's Exhibit Number 124 was  
11           played for the Court.)

12           BY MS. WEISS:

13           **Q**     That would be track three that we're talking  
14           about?

15           **A**     Yes, ma'am.

16           **Q**     And hearing that voice again, do you recognize  
17           the male voice?

18           **A**     I do.

19           **Q**     That male voice belongs to?

20           **A**     John Joseph Moore, Junior, the defendant in  
21           this case.

22           **Q**     And the female voice?

23           **A**     Is Delia Nix, his girlfriend.

24           **Q**     And did you provide phone numbers for any other  
25           girlfriends that you knew about?



1       **A**     Not to my knowledge.

2       **Q**     This was the girlfriend. And the information  
3       they talked about, that specifically relates to this  
4       case?

5       **A**     Yes, ma'am.

6           **MS. WEISS:** Beg the Court's indulgence.

7           **THE COURT:** Yes, ma'am.

8                   (Pause.)

9       BY MS. WEISS:

10       **Q**     Investigator Barnes, specifically, comments  
11       that he made was specifically regarding this case,  
12       admissions in this case. And Delia Nix says, You  
13       did shoot -- she says, You did not pull that fatal  
14       shot. He says, Yeah?

15       **A**     Yes, ma'am.

16       **Q**     He admits to shooting?

17       **A**     Yes, ma'am.

18       **Q**     Says, What, you were shooting in front of  
19       Kerwyn? He responds, Yeah?

20       **A**     Yes, ma'am.

21       **Q**     Admits to shooting in front of Ker --

22           **MR. COLLINS:** Your Honor, I believe we heard  
23       the recording. I don't know if we need to go back  
24       through a transcript that the State's made up of  
25       their version of what they heard. I mean, the Court

1 heard the recording.

2 **THE COURT:** Overruled.

3 Go ahead.

4 **MS. WEISS:** Thank you, Your Honor.

5 BY MS. WEISS:

6 **Q** He says on the tape, I mean, we were shooting a  
7 gun right in front of his face?

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

9 **Q** He said that he saw the guy reach down in the  
10 car like he was about to pull a gun and that's when  
11 the shots started?

12 **A** That's what I remember, yes, ma'am.

13 **Q** He also admitted there was only one gun in the  
14 truck?

15 **A** Yes, ma'am.

16 **Q** He also admitted in this tape that the back  
17 window of the truck had opened up?

18 **A** Yes, ma'am.

19 **Q** Investigator Barnes, did law enforcement have  
20 anything to do with eliciting this conversation?

21 **A** No, ma'am.

22 **Q** Was John Moore being interrogated by anybody in  
23 this conversation involved with law enforcement?

24 **A** No, ma'am.

25 **Q** So these admissions were made freely and

1 voluntarily of his own free will?

2 A Yes, ma'am.

3 MS. WEISS: Your Honor, at this time, that's  
4 all we have.

5 THE COURT: All right. Cross?

6 MR. COLLINS: Thank you, Your Honor. Please  
7 the Court.

8 THE COURT: Yes, sir.

9 CROSS-EXAMINATION

10 BY MR. COLLINS:

11 Q You've testified at some point or another that  
12 you served a search warrant at a couple different  
13 places?

14 A Yes, sir.

15 Q And at the location of these search warrants,  
16 there was numerous people present, right?

17 A That is correct.

18 Q And on the search warrant, are many details  
19 involving the allegations of this crime, correct?

20 A That is correct.

21 Q And you left copies of the search warrants with  
22 the people at those residences?

23 A I did.

24 Q And this is probably a week after -- do you  
25 have any idea when this conversation took place?

1           A     I don't.

2           Q     You said --

3           A     I know that it happened some time after the  
4                 arrest and before I got the C.D.'s.

5           Q     You didn't actually ever see a video or witness  
6                 John Joseph Moore, Junior, pick up a phone and talk  
7                 on a phone at the jail, did you?

8           A     No, sir.

9           Q     You said you talked with Delia Nix for about 30  
10                minutes off and on?

11          A     Yes, sir.

12          Q     And this was at the residence where the search  
13                 warrant was served?

14          A     Yes, sir.

15          Q     With numerous other people around talking to  
16                 you?

17          A     No, sir, we pulled her out.

18          Q     You pulled her out. Did you talk to her over  
19                 the phone?

20          A     I don't recall that if I talked to her over the  
21                 phone prior to those or not, but I did talk to her  
22                 over the phone at some point after the arrest. I  
23                 don't recall whether I did that before these things  
24                 came in.

25          Q     Do you recall what type of conversation you had

1 with her over the phone?

2 A Yes, sir. I recall one of them.

3 Q And what type of conversation --

4 A It was in regards to there was a possibility  
5 that she was helping.

6 Q And how did you --

7 A Would you like me to go in further?

8 Q -- confirm that it was Delia Nix that you  
9 talked to on the phone on those occasions?

10 A Because I knew her voice and I had called her  
11 telephone number.

12 Q Is that before or after this conversation took  
13 place purportedly at the jail?

14 A Like I said, I don't recall -- if you'll let me  
15 refer to my notes. My notes are not clear on that  
16 except to say that I -- after the first set of phone  
17 calls that I received from Sergeant Shull out at  
18 AGDC, there were some questions that came up in  
19 regards to the search warrant and the evidence of  
20 that search warrant. I know that Tom Amaro was out  
21 at [REDACTED] with Delia Nix and I had  
22 given him a message to have Delia call me. And I do  
23 not recall whether or not I talked to her on the  
24 phone and there's no notations in my notes that I  
25 talked to her on the phone prior to me getting these

1 tapes, but it is fair to say that in the course of  
2 this, I did talk to her on the phone.

3 Q And you testified that you spoke to John Moore,  
4 Junior, for several -- a few minutes at the house  
5 when you served the search warrant?

6 A Yes, sir.

7 Q And then you said you spoke to him several  
8 minutes at headquarters?

9 A Yes, sir.

10 Q I believe you testified at pretrial hearing  
11 that you remember asking him if he wanted chips or a  
12 soda?

13 A Right. And we talked a little bit about  
14 bridges in the conversation that didn't have  
15 anything to do with this particular case in point,  
16 but we talked about other issues that, you know,  
17 that kind of opened up the conversation between he  
18 and I.

19 Q You didn't testify to that before trial?

20 A Yes, I did.

21 Q But you hadn't talked with John Moore  
22 personally on the phone, had you?

23 A No, sir.

24 Q You testified that the phone number belonged to  
25 Delia Nix?

1       **A**     Yes, sir.

2       **Q**     Are you positive on that?

3       **A**     After I had the -- testified here just a few  
4       minutes ago, I did have a chance to look at the  
5       arrest report and noticed on the arrest report at  
6       [REDACTED] for John Joseph Moore, I had  
7       listed at the time of his arrest that particular  
8       telephone number, which would be Delia Nix'  
9       telephone number.

10      **Q**     And how did you confirm that that telephone  
11      number is registered to Delia Nix?

12      **A**     Just from what John Joseph Moore, Junior, told  
13      me.

14      **Q**     He listed that as his number?

15      **A**     He listed that as his number.

16      **Q**     And how did you confirm that was Delia Nix'  
17      phone number?

18      **A**     Because that was the same address as Delia Nix.

19      **Q**     Do you know if it was a cell phone or a land  
20      phone?

21      **A**     Well, the jail, from what I understood, they  
22      cannot bill a cell phone. They have to bill a  
23      landline, so that was a landline number.

24      **Q**     From what you understand?

25      **A**     That's my understanding. [REDACTED]

1 Road and I know that as the prefix to be a landline  
2 number.

3 Q And you never checked to see if that number  
4 actually belonged to a person named Bridgett?

5 A Bridgett Cunningham also stays there at [REDACTED]  
6 [REDACTED]. And my belief is that's her in  
7 the background on some of those calls. I don't know  
8 that for a fact because I didn't talk to her, but  
9 that's my belief based on the totality of the  
10 circumstances.

11 Q So more than one person stays at this  
12 residence?

13 A Right.

14 Q You didn't listen to these conversations as  
15 they were taking place, did you?

16 A No, sir.

17 Q You didn't listen on the end of who you purport  
18 to be Delia Nix while this conversation took place,  
19 did you?

20 A No.

21 Q And you didn't listen on the end of who you  
22 purport to be John Moore while this conversation  
23 took place?

24 A No, sir.

25 Q So the only thing you have to go by is the



1 recording provided to you by the Alvin S. Glenn  
2 Detention Center?

3 A Yes, sir.

4 Q And you have to admit in listening to it there  
5 are inflections of voice indicating sarcasm in some  
6 of their statements, correct?

7 A There are tone and inflections in different  
8 things I understand. I mean, there was emotion tied  
9 up in those as well.

10 Q And it would be helpful to know what type of  
11 emotions are actually coming through on those  
12 voices, wouldn't it?

13 A Sure.

14 Q And it's also -- it would be fair to say that  
15 the person doing the majority of the talking on this  
16 track in particular is who you purport to be Delia  
17 Nix, correct?

18 A She does a lot of talking.

19 Q If you cut John Moore's statements out and took  
20 hers completely out, it would be extremely hard to  
21 follow what he was talking about, correct?

22 A I misunderstood that question because --

23 Q If you cut that voice, the female voice, out of  
24 this track and all you could hear was the voice of  
25 who you purport to be John Joseph Moore, Junior, it

1 would be extremely hard to follow what the subject  
2 of the conversation is?

3 **A** I don't know, but I would assume you could take  
4 that stance.

5 **MR. COLLINS:** Beg the Court's indulgence.

6 **THE COURT:** Yes, sir.

7 (Pause.)

8 BY MR. COLLINS:

9 **Q** Do you know where Delia Nix is right now?

10 **A** She was sitting outside earlier.

11 **MR. COLLINS:** Thank you. No further questions.

12 **THE COURT:** Redirect?

13 **MS. WEISS:** Yes, Your Honor, briefly.

14 REDIRECT EXAMINATION

15 BY MS. WEISS:

16 **Q** Referring to your notes page 29.

17 **A** Yes, ma'am.

18 **Q** I ask you to refresh on those notes for a  
19 minute.

20 **A** Yes, ma'am. Thank you for showing that. I did  
21 interview her outside and she listed that telephone  
22 number as her telephone number.

23 **Q** So you interviewed Delia Nix?

24 **A** Yes, ma'am.

25 **Q** And you actually asked her about the shooting?

1       **A**     Yes, ma'am.

2       **Q**     And so you actually had a conversation with her  
3       at that point?

4       **A**     Yes, ma'am.

5       **Q**     And she gave you some phone numbers at that  
6       point?

7       **A**     Yes, ma'am.

8       **Q**     And what phone numbers did Delia Nix give you?

9       **A**     She gave me a cell phone number of [REDACTED] and  
10      a home phone number of [REDACTED], which is the same  
11      telephone number as listed on the front of this C.D.  
12      that was given to me by Sergeant Shull on 11/10/05  
13      at 1510 hours.

14      **Q**     In listening to that tape, that C.D., John  
15      Moore did make a couple statements, admissions  
16      specifically, on there in his own words; do you  
17      remember that?

18      **A**     Yes.

19      **Q**     Specifically, did you hear him say, I said  
20      that's why I was just going to put it all on him  
21      because, I mean, I was shooting a gun right in front  
22      of his face?

23      **A**     Yes, ma'am.

24             **MS. WEISS:** Thank you.

25             No further questions, Your Honor.

1           **THE COURT:** Recross?

2           **MR. COLLINS:** Very briefly, Your Honor.

3                           RECROSS-EXAMINATION

4           **BY MR. COLLINS:**

5           **Q**     You understand that these phone calls from  
6           Alvin S. Glenn Detention Center are limited to a  
7           certain amount of time, correct?

8           **A**     Yes, sir.

9           **Q**     The phone cuts off after a certain amount of  
10          time?

11          **A**     Yes, and they give them a warning that it's  
12          getting ready to happen.

13          **Q**     I believe it's a one minute warning or  
14          something --

15          **A**     If I recall correctly, that's right.

16          **Q**     And this one track that we're speaking of and  
17          that the Solicitors have referenced the transcript  
18          to you on is one of many, many phone calls you  
19          listened to, correct?

20          **A**     That is correct.

21          **Q**     In some of the calls, it's even referenced that  
22          he would call her right back, correct?

23          **A**     That is correct.

24          **Q**     I believe we have copies of up to 20 phone  
25          calls, correct?

1       **A**     I have supplied you all the copies I have, yes,  
2       I believe that's --

3       **Q**     And that would be from one week's period?

4       **A**     -- that would be a fair assertion.

5       **Q**     And that would be from one week's period?

6       **A**     From the time that he got arrested to the time  
7       that I received them, I believe that's a week.

8               **MR. COLLINS:** No further questions, Your Honor.

9               **THE COURT:** Thank you, sir. I think you can  
10       step down, but you can't discuss your testimony with  
11       anybody.

12              **THE WITNESS:** Yes, sir.

13              **THE COURT:** All right.

14              **MR. MEADORS:** Can I say one brief thing and  
15       then I'll turn it...

16              **THE COURT:** Yes, sir.

17              **MR. MEADORS:** A lot of reference has been made  
18       to this wasn't brought up in the pretrial. I, and I  
19       think we specifically asked if there were any other  
20       objections to statements and they said, no. And Ms.  
21       Weiss, even in her opening, said there was a  
22       statement they were going to hear with the wire and  
23       then another statement from the Alvin S. Glenn  
24       Detention Center.

25              I say that because of some of the testimony

1       that he may or may not have testified as to all of  
2       these issues on Monday because we didn't think that  
3       was an issue. And we'd asked him if there was going  
4       to be an issue in the other two statements and we  
5       were told, no. I understand we still have to  
6       authenticate it, I'm not saying that, but by the  
7       same point, I don't want the fact he may not have  
8       gone into some of this Monday is because we did not  
9       think any of it was an issue. And I just wanted to  
10      put that on the record and turn it over to counsel.

11             And, Your Honor, we'd like to offer the entire  
12      statement on the tape. He's authenticated it. He  
13      said he had talked to both of them before,  
14      recognizes those voices. The facts in and of itself  
15      I think are -- to him have authenticated it because  
16      he's talking about the crime, using the names.

17             In addition to that, Your Honor, they are  
18      admissions. Law enforcement is not -- it's clearly  
19      an admission against interest. In response to Mr.  
20      Collins questions, he had no idea this conversation  
21      was going on. He's down there. After he's being  
22      warned your calls are being taped, it clearly says  
23      that, he makes these admissions, some of them  
24      straightforward, That's why I was going to put it  
25      all on him because, I mean, I was shooting a gun

1 right in front of his face. I think that's what  
2 happened. That's what the passenger said happened.  
3 That's clearly an admission there respectfully.

4 But, Judge, we'd ask Your Honor to consider  
5 that it's been authenticated that the only calls we  
6 can have and can be recorded are ones that are  
7 recorded front to end, that tape kind of speaks for  
8 itself on that. In a way, I don't know if I should  
9 say, but that's kind of self-authenticating, nothing  
10 else could be on there. They couldn't have recorded  
11 it and downloaded it unless they had the whole phone  
12 call. That's all. Thank you.

13 **THE COURT:** Anything else?

14 **MS. WEISS:** Speaking to some of the issues that  
15 you raised, Your Honor, he clearly indicates that  
16 the phone number -- the phone number of Delia Nix,  
17 the time period that he was an inmate that he was at  
18 the jail that it had to be within those seven days.  
19 He knew firsthand knowledge that he was still at the  
20 jail during that time. The tape says it's on an  
21 inmate at the Alvin S. Glenn Detention Center, that  
22 inmate's name is John, that's been further  
23 corroborated by the facts of what he's talking  
24 about.

25 I think the tape at this point has been

1        authenticated. I think the voices have been  
2        identified through the totality of the  
3        circumstances, the phone call, the number,  
4        everything, and the recognition of Eric Barnes of  
5        those voices. And I think, you know, once again,  
6        that they are admissions. I think that this tape  
7        has now been authenticated and should be presented  
8        to the jury.

9                **THE COURT:** Mr. Collins.

10              **MR. COLLINS:** Your Honor, first and foremost,  
11        if the Court rules that the identification of the  
12        voices on the telephone conversation are valid,  
13        that's still not enough to authenticate in  
14        introducing the entire contents of the conversation.  
15        We still don't have any witness that can testify as  
16        to the contents being what was actually said in the  
17        original conversation. We have a recording from a  
18        system we know nothing about and that witness has  
19        been released.

20              And it goes back to the comparison I made  
21        earlier as far as the photograph. You can identify  
22        it, but it then has to be what it purports to be.  
23        We don't have any testimony as far as that is  
24        concerned.

25              And after listening to the track that they're



1 seeking to introduce, you can clearly understand  
2 that Delia Nix is the one doing most of the talking,  
3 if you assume it's Delia Nix. She's the one doing  
4 the talking. She's testifying. She's on the  
5 witness list. She can easily come in here and  
6 explain what's on there.

7 As far as admissions, a lot of this has to do  
8 with inflection of voice. Sarcasm is easily to  
9 discern in a lot of those. The danger is taking  
10 statements out of context without having anybody  
11 from the defense to cross-examine as far as the  
12 situation and the contents of the conversation. I  
13 don't believe that they can authenticate the  
14 contents of this phone call without anyone who had  
15 any privy to the original conversation.

16 911 phone calls are allowed in as  
17 nontestimonial. I believe after hearing this, it's  
18 completely testimony on Delia Nix' part, the  
19 admissions from a party opponent being able -- the  
20 prejudicial effect of being taken out of context  
21 without anybody to cross-examine to explain the  
22 context of the conversation.

23 He testified that there were at least 20 phone  
24 calls in one week period that lasts a very short  
25 amount of time. We don't know if this was a phone

1 call directly after another phone call in the  
2 context of a bigger conversation. If we have a  
3 witness here to cross-examine and to testify, we can  
4 learn about that information, but without that, this  
5 is a single conversation that could easily be taken  
6 out of context and which is not authenticated this  
7 is even the contents of the original conversation.

8 **THE COURT:** All right. Thank you.

9 The ruling of the Court is that the track three  
10 recording is admissible. It has been authenticated  
11 sufficiently to satisfy the requirements of Rule  
12 901. Rule 901(a) deals with authentication or  
13 identification. Subsection (a) reads that the  
14 requirement of authentication or identification as a  
15 condition precedent to admissibility is satisfied by  
16 evidence sufficient to support a finding that the  
17 matter in question is what its proponents claims to  
18 be -- or what its proponents claims. And then it  
19 gives illustrations which are not to be -- deemed to  
20 be an exclusive list rather they are illustrations.

21 Subsection (5) deals with voice identification,  
22 subsection (6) deals with telephone conversations.  
23 With regard to subsection (6), I had raised some  
24 issues about concerns I had because the rule talks  
25 about evidence about a number assigned and tying

1       that number in some way to the particular person or  
2       business, and I think you have to read that to also  
3       deal with a location.

4               That now has been tied up sufficiently for the  
5       Court to allow it to go to the jury because there is  
6       evidence that this phone number is the home phone  
7       number of not only the location where the search  
8       warrant was executed and the defendant was arrested,  
9       it also is indicated to be the phone number given by  
10      Ms. Nix who's been identified as the defendant's  
11      girlfriend. The phone may be listed in someone  
12      else's name, but there's been evidence about who  
13      lived there and the connection that those people  
14      have to each other and to the case.

15             Moreover on subsection (5), a person can  
16      testify as to voice identification. I don't know  
17      that it would be absolutely necessary that both  
18      parties to the conversation be identified under  
19      subsection (5), but I think they have been in this  
20      instance sufficient to go to the jury.

21             Now, there are numerous jury issues. And there  
22      are numerous opportunities to cross-examine and  
23      point out weaknesses in what this conversation is  
24      and what it purports to be, but as far as it's  
25      admissibility, I'm satisfied that it is admissible

1           and it may be played to the jury.

2           Do we have anything else I can do tonight?

3           **MR. MEADORS:** If I could just get some  
4           guidance, Your Honor, as far as time tomorrow for  
5           planning purposes for us and the rest of the office.  
6           If we were to break around midday or rest, let's  
7           just say, hypothetically, I don't know whether or  
8           not they have anything, would Your Honor's  
9           inclination be to go on and go forward tomorrow  
10          afternoon and finishing the trial? And if you  
11          didn't want to comment now, I understand that. I'm  
12          just trying to think ahead --

13          **THE COURT:** No. I don't mind telling you at  
14          all what I'm thinking right now as long as you all  
15          understand this huge caveat, I don't know. I don't  
16          know what's going to happen with a juror. What  
17          happened this afternoon with that juror just was  
18          bizarre. And I should have learned a long time ago  
19          that I can't really plan a lot of these things too  
20          well. My wife doesn't seem to understand when I'm  
21          doing jury trials when I try to explain to her that  
22          I lose control over a lot of the time.

23          Now, to your question, I have drug court  
24          tomorrow night in Lexington, which is at 6:00. I  
25          cancelled it last week. I have no problem with

1       cancelling it this week if it looks as though that's  
2       something I need to do.

3               What I generally do with drug court is I try to  
4       find out how they're doing, the participants. And  
5       if the participants are doing well, we don't really  
6       need for me to go over there and pat them on the  
7       back too much. If there's some problem issues, then  
8       I don't like to string too many weeks in a row  
9       together that I don't have the ability to sanction.  
10      So I do have drug court, but I already told my law  
11      clerk that first thing in the morning, or either go  
12      ahead and send an e-mail today, notifying them that  
13      I might be tied up.

14             I've been looking at this law a good bit today.  
15      And I try to work on the computer and get a draft of  
16      the charge together as I go along in every case, of  
17      course I can't finalize it, but one of the issues  
18      that I've been looking at is something, quite  
19      frankly, I've never had to wrestle with. And so I  
20      can see us possibly getting bogged down on this to  
21      where we have to have a good bit of discussion. I  
22      plan to take the computer home with me tonight.

23             I think I've read every single case that I  
24      could find. The issue deals with whether the  
25      defendant is requesting a voluntary manslaughter

1 charge. And just to alert you all so maybe you can  
2 spend your night reading law, too, what I'm troubled  
3 by is that apparently South Carolina has case law  
4 which I read to be somewhat conflicting. And the  
5 case law states very specifically that if you're  
6 dealing with transferred intent, that murder doesn't  
7 get reduced to manslaughter. So if I am engaged in  
8 some provocation from one person and I kill another  
9 one in heat and passion following that provocation,  
10 that I don't get the benefit of having a reduced  
11 charge submitted to the jury on voluntary  
12 manslaughter.

13 And there was a recent case, it's a 2007 case,  
14 which, as you all know who read our cases in South  
15 Carolina, it's very unusual that we have a case that  
16 came down in this fashion. There were two justices  
17 who ruled that voluntary manslaughter should not be  
18 submitted to the jury. The Chief Justice concurred  
19 in result only and said that she felt as though that  
20 the majority was misconstruing the self-defense  
21 aspects and how that played into this division  
22 between murder and manslaughter.

23 Then two other justices dissented, Justice  
24 Pleicones and Justice Moore. And they stated that  
25 they felt as though voluntary manslaughter should

1 have been submitted to the jury in a situation where  
2 there was an altercation between one person and the  
3 defendant and another person wound up getting  
4 killed.

5 So I don't know what the defense intends to do.  
6 I don't know what their position is. I don't know  
7 if they're going to offer any evidence. I don't  
8 know any of that. Was it Childers?

9 **MR. MEADORS:** That's a Kershaw County case Your  
10 Honor's talking about and I tried that with now  
11 Judge McMahon. So I'm very familiar with it.

12 **THE COURT:** The Court of Appeals had said that  
13 the trial judge should have submitted voluntary  
14 manslaughter to the jury and that was a unanimous  
15 decision of that panel, which I remember Justice  
16 Anderson was on it and Chief Justice Hearn. I can't  
17 remember the third person, I think, wrote the  
18 opinion.

19 Anyway, that's something you all need to be  
20 prepared to address. And I don't know that there is  
21 an answer because you've got all this law that is  
22 much older, but also it's followed up through  
23 current law that says that transferred intent can  
24 make something -- some act be murder or  
25 manslaughter. So if you say it can be murder or

1       manslaughter...

2               **MR. MEADORS:** Judge, if I --

3               **THE COURT:** How do you have sudden heat and  
4       passion against -- I don't see how those things fit  
5       together. I mean, to me -- I guess what I'm  
6       struggling with is it seems that I understand  
7       Justice Pleicones and Justice Moore's logic and I  
8       think I follow the other ones. And I read very well  
9       the law that says that you don't have transferred  
10      intent that reduces murder to manslaughter.

11              Now, as far as I know, the defense may just  
12      want murder or nothing, but y'all need to give some  
13      thought to that and be prepared to talk about it.

14              **MR. MEADORS:** Judge, with that being said, if  
15      we broke midday, would Your Honor just assume that  
16      we might could have a charge conference so you can  
17      get to drug court and we argue Friday morning? I  
18      mean, is that a possibility?

19              **THE COURT:** Sure, that's a possibility. What I  
20      generally try to do is print out my charge for you  
21      in advance. Now, generally it's just printed out,  
22      you get a chance to read it before you argue to the  
23      jury and we talk about it and I try -- I've tried to  
24      do that for the last several years. I think there's  
25      only been one case, maybe two, where we were in such



1 a rush I couldn't get that done, but it helps me  
2 because it reduces the amount of argument I hear  
3 from the lawyers because once you see what I intend  
4 to charge, you might quibble over a few words here  
5 and there, but the concepts are basically the same.

6 So the answer to your question is, yes, that's  
7 a possibility. Regardless of the outcome, I'd be  
8 delighted to be over here on Friday. It doesn't  
9 matter to me.

10 **MR. MEADORS:** The State would -- and I briefly  
11 talked with them, we'd be happy to do this Friday if  
12 we finished midday and do the conference and  
13 obviously whatever Your Honor says --

14 **THE COURT:** If you're asking me realistically  
15 what I think is going to happen, I think it's  
16 probably going to be going to the jury on Friday.

17 **MR. COLLINS:** Just discussing with Mr.  
18 Strickler one brief thing going back to the  
19 recording, I believe that in the proffer one of the  
20 answers to one of the questions was Mr. Barnes'  
21 opinion as far as one of the responses of Mr. Moore.  
22 We would just ask there be some instruction that he  
23 not be allowed to register any opinions regarding  
24 the responses in front of the jury having no  
25 personal knowledge of that conversation.

1           **MR. STRICKLER:** And beyond that, Your Honor, if  
2           you will, I just submit that the recording speaks  
3           for itself. The jurors are possessive of all the  
4           senses that the investigator is possessed of. They  
5           can hear. It either says what he claims it says or  
6           it doesn't. And they're capable of making that  
7           decision. They don't need any help in that regard,  
8           that requires no special expertise.

9           **THE COURT:** I will say just without ruling, as  
10          far as, again, trying for one witness to say what  
11          another person thought or meant, that's going to be  
12          difficult to get in. Just like we did in the  
13          motions on Monday with the other recording, you had  
14          one participant in the conversation who was saying  
15          what was said, that's typical.

16          When you've got a third party who's not part of  
17          the conversation, it's going to be awfully hard for  
18          this officer or anybody else to sit on the stand and  
19          say that's what they said on that tape unless it's a  
20          translation issue or a slang issue that the jury  
21          might not be familiar with a term and the person has  
22          some expertise that can assist the jury in  
23          understanding.

24          So I will tell you as a general proposition, I  
25          agree with the defense 's assertion that the witness

1 is not going to be able to sit up there and the  
2 lawyer ask him what did they just say and he repeat  
3 it. Okay?

4 **MS. WEISS:** Yes, Your Honor.

5 **THE COURT:** But I'll take that as it comes.  
6 We're in recess until 9:30 in the morning.

7 (Whereupon, the proceedings were concluded  
8 for January 30th, 2008.)

9 (The following proceedings were held on  
10 January 31, 2008.)

11 **THE COURT:** Mr. Barnes, I think I need you back  
12 up here.

13 **THE WITNESS:** Yes, sir.

14 **THE COURT:** State ready?

15 **MS. WEISS:** State's ready, Your Honor.

16 **THE COURT:** Defense?

17 **MR. COLLINS:** Defense is ready, Your Honor.

18 **THE COURT:** All right. Bring the jury in,  
19 please.

20 (The jury enters the courtroom at 9:40 a.m.)

21 **THE COURT:** You may continue, Solicitor.

22 **MS. WEISS:** Thank you, Your Honor.

23 DIRECT EXAMINATION cont.

24 BY MS. WEISS:

25 **Q** Investigator Barnes, I'm going to start with

1 just a procedural issue. Do you recognize what's  
2 been marked as State's Exhibits 19, 20 and 34?

3 **A** Yes. Those are the pictures of the victim's  
4 vehicle when it was brought into the garage at the  
5 sheriff's office to be processed by the forensics.

6 **MS. WEISS:** Your Honor, at this time, the State  
7 would introduce Exhibits 19, 20 and 34 into  
8 evidence.

9 **MR. COLLINS:** No objection.

10 **THE COURT:** Thank you.

11 (State's Exhibit Numbers 19, 20 and 34,  
12 photographs, admitted into evidence.)

13 BY MS. WEISS:

14 **Q** Now, we're going to go back where we were  
15 yesterday when we broke and talk about your  
16 opportunity to talk to Delia Nix. Can you identify  
17 for the jury, refresh the jury's memories, who Delia  
18 Nix is?

19 **A** Delia Nix is the girlfriend of John Joseph  
20 Moore, Junior, the defendant in this case. She was  
21 staying at [REDACTED] and that's where  
22 Mr. Moore was staying as well.

23 **Q** And did you have the opportunity to talk to  
24 Delia Nix?

25 **A** I did.

1 Q And on what day were you able to talk to Ms.  
2 Nix?

3 A It was, I believe, the 3rd of November 2000 --  
4 bear with me just a moment -- it was the 3rd of  
5 November 2005.

6 Q And what were the circumstances under which you  
7 had the opportunity to talk to her?

8 A We had a search warrant for that house and an  
9 arrest warrant for Mr. Moore. We served the search  
10 warrant and arrest warrant that day. I pulled Ms.  
11 Nix and Mr. Moore out on to the front porch and read  
12 the search warrants to them. And I spoke with Ms.  
13 Nix about the search warrant and what we were doing  
14 for probably about 30 minutes. And we were there  
15 for a longer period of time.

16 Q When you were talking to her, did she give you  
17 any information, personal information, about  
18 herself?

19 A She did. She stated that -- she gave me her  
20 cell phone, her home phone and her date of birth and  
21 that sort of thing.

22 Q What was her home phone number?

23 A Her home phone number was [REDACTED].

24 Q And where did that number go to? Where did she  
25 tell you that number went to?

1       **A**     To that Hard Scrabble Road address where she  
2       lived.

3       **Q**     Are you aware if she lived there with anybody  
4       else?

5       **A**     She lived there with a young lady named  
6       Bridgett and I don't recall Bridgett's last name  
7       right off the bat, but she did live there with a  
8       young lady named Bridgett and also John Joseph  
9       Moore, Junior.

10      **Q**     And John Joseph Moore, Junior, is the  
11      defendant?

12      **A**     That is correct.

13      **Q**     Did you have ample time during that  
14      conversation to be able to recognize her voice at a  
15      later date?

16      **A**     Yes, I did.

17      **Q**     And did you talk with her on the phone at a  
18      later date?

19      **A**     I did.

20      **Q**     How did you know at that time that you were  
21      talking to Delia Nix on the phone?

22      **A**     Because I knew her voice and because I called  
23      her number and asked for her and she got on the  
24      phone and -- those identifiers.

25      **Q**     Did you have the opportunity that same day to

1 talk to John Joseph Moore, Junior, the defendant?

2 A I did.

3 Q And did that start at the same time?

4 A It started at the same time.

5 Q And did you have a conversation with him at

6 [REDACTED]?

7 A Right, that's where I first talked to him and

8 then later on I talked with him a little bit more.

9 Q Did you have sufficient time during those  
10 conversations that you would be able to recognize  
11 his voice?

12 A I did.

13 Q On that day, on November 3rd, 2005, was that  
14 the day that Mr. Moore was taken into custody?

15 A That is.

16 Q And where was he housed?

17 A At the Alvin S. Glenn Detention Center on Bluff  
18 Road.

19 Q Between November 3rd and November 10th, do you  
20 have firsthand knowledge as to whether or not he  
21 left the Alvin S. Glenn Detention Center?

22 A He resided there for the whole time.

23 Q I'm going to show you what's been marked as  
24 State's Exhibit 129 for identification only. Do you  
25 recognize this C.D.?

1       **A**     Yes, ma'am. This is the C.D. that I received  
2       from Sergeant Shull at the Alvin S. Glenn Detention  
3       Center when I requested phone calls that might have  
4       come out of Alvin S. Glenn Detention Center on  
5       several numbers that I provided to Ms. Shull. She  
6       is -- she provided me with this C.D.

7       **Q**     And is that C.D. referencing one specific  
8       number?

9       **A**     Yes, ma'am. It's referencing [REDACTED], that  
10      would be Delia Nix' telephone number, John Joseph  
11      Moore, Junior's telephone number, the defendant, at  
12      [REDACTED].

13      **Q**     And is there another word on there that  
14      identifies whose number that is?

15      **A**     Right. It's G-friend, girlfriend, underneath  
16      the telephone number.

17      **Q**     And are you aware of whether or not the  
18      [REDACTED] is a cell phone or a landline?

19      **A**     That is a landline telephone number.

20      **Q**     Have you had the opportunity to listen to that  
21      C.D.?

22      **A**     I did.

23      **Q**     Specifically, did you have the opportunity to  
24      listen to track three of that C.D.?

25      **A**     I did.



1       **Q**     And I'm going to go back one second. On what  
2       date did you receive that C.D.?

3       **A**     I received this C.D. on 11/10/05 at 1510 hours,  
4       that's 3:10 hours in the afternoon.

5       **Q**     And at that time --

6       **A**     And I initialed it and timed and dated it when  
7       I received it.

8       **Q**     And at that time, you personally were aware  
9       that John Joseph Moore, Junior, was still  
10      incarcerated at the Alvin S. Glenn Detention Center?

11      **A**     That is correct.

12      **Q**     And you were able to listen to track number  
13      three of that C.D.?

14      **A**     That is correct.

15      **Q**     What voices, if any, were you able to recognize  
16      on track three?

17      **A**     I recognized the defendant's voice and Delia  
18      Nix' voice.

19      **Q**     And you recognized both of those voices from  
20      the conversations you had with them on November 3rd  
21      of 2005?

22      **A**     That is correct.

23      **Q**     When the recording begins, are you aware of  
24      what the very first thing says on that recording in  
25      general?

1       **A**     It says, This is a call from the Alvin S. Glenn  
2       Detention Center. You have a call from, and then  
3       whoever's --

4       **Q**     So it specifically says, you're having a call  
5       from an inmate at the Alvin S. Glenn Detention  
6       Center?

7       **A**     Right.

8       **Q**     And John Joseph Moore, Junior, was an inmate  
9       there?

10      **A**     That is correct.

11      **Q**     Then it says, This is a call from, and it gives  
12      a space. What name at that point is put in?

13      **A**     John is the name that came across.

14      **Q**     And that's consistent with the defendant?

15      **A**     The defendant.

16      **Q**     In listening to those conversations, to the  
17      conversation between Delia Nix and John Joseph  
18      Moore, Junior, are they discussing specific issues  
19      related to this case?

20      **A**     Yes, they are.

21      **Q**     Are they discussing issues specifically related  
22      to --

23              **MR. COLLINS:** Objection, Your Honor, leading.

24              **THE COURT:** Sustained.

25              **BY MS. WEISS:**

1       **Q**     Did those conversations relate to what was  
2       going on at the time in this case?

3       **A**     Yes.

4               **MS. WEISS:** Beg the Court's indulgence.

5               (Pause.)

6       **Q**     Show you -- I've got State's Exhibit 124, ,  
7       specifically track number three on this tape. Have  
8       you been able to listen to State's Exhibit 124?

9       **A**     I have.

10       **Q**     In its entirety?

11       **A**     I have.

12       **Q**     And is that the same exact recording as what  
13       was on State's Exhibit 129 for I.D.?

14       **A**     It is.

15               **MS. WEISS:** Your Honor, at this time, I'd like  
16       to introduce State's Exhibit 124 into evidence.

17               **THE COURT:** Subject to the previous objection?

18               **MR. COLLINS:** Yes, Your Honor.

19               **THE COURT:** All right. Mark it in evidence,  
20       please, ma'am.

21               (State's Exhibit Number 124, C.D., admitted  
22       into evidence.)

23               **MS. WEISS:** Your Honor, at this time, I'd like  
24       to play the recording.

25               **THE COURT:** Yes, ma'am.

1                   (Whereupon, State's Exhibit Number 124 was  
2           played for the jury.)

3           BY MS. WEISS:

4           Q       That's the same recording that you listened to  
5           from the Alvin S. Glenn Detention Center?

6           A       That is.

7           Q       And the male voice that you just heard on that  
8           tape was who?

9           A       The defendant.

10           MS. WEISS: Thank you. No further questions at  
11           this time. Please answer any questions the defense  
12           may have.

13           MR. COLLINS: Please the Court.

14           THE COURT: Yes, sir.

15                               CROSS-EXAMINATION

16           BY MR. COLLINS:

17           Q       Good morning, Investigator Barnes.

18           A       Good morning.

19           Q       Let's go ahead and start about the recording we  
20           just heard.

21           A       Sure.

22           Q       That's one of many phone calls made from the  
23           jail from the numbers that you asked for, correct?

24           A       That is correct.

25           Q       Roughly around at least 20 calls in a one week

1 period?

2 A That's correct.

3 Q You don't know what time that that call took  
4 place?

5 A No, I don't know what time that particular  
6 call --

7 Q Some time over a one week period?

8 A Some time over that one week period.

9 Q You don't know if conversations took place  
10 right before or right after that conversation?

11 A I believe there was conversations right before  
12 that from the standpoint of another phone call.

13 Q But you don't know the time of the phone calls?

14 A I don't know the time of the phone calls.

15 Q You didn't listen to this conversation as it  
16 took place either, did you?

17 A Real time? No. All I heard was the recording.

18 Q And you've been here all week throughout this  
19 trial, correct?

20 A That's correct.

21 Q Have you seen Delia Nix around?

22 A Yes, I have.

23 Q So she's been here?

24 A Yes, she has.

25 Q All right. I'm just going to kind of back up

1       and start back from the beginning from a lot of  
2       stuff we talked about yesterday. You've talked  
3       extensively with the Solicitors about this case in  
4       getting ready for this trial, correct?

5       **A**     Of course.

6       **Q**     You're the lead investigator on this case?

7       **A**     That's correct.

8       **Q**     And throughout all of the investigation and the  
9       long periods of time of investigating leading up to  
10      this trial, you took detailed notes of everything  
11      you did, correct?

12      **A**     I took some fairly detailed notes.

13      **Q**     You've done a lot of things and you put forth a  
14      lot of hard work to try to solve this case?

15      **A**     I have.

16      **Q**     You take pride in those notes you take because  
17      you want to make sure they're very accurate?

18      **A**     Well, I do my best. One can spend all their  
19      time writing and not doing and so you try to find a  
20      balance.

21      **Q**     And this was a long investigation?

22      **A**     Yes, it was.

23      **Q**     In fact, it turned into a cold case?

24      **A**     Well --

25      **Q**     Took over a year to solve it, correct?

1       **A**     It took over a year to solve. I guess, it's in  
2       your classification of what a cold case is, but,  
3       yes, it took over a year to solve.

4       **Q**     And there were many tips that came in, correct?

5       **A**     Yes.

6       **Q**     There were several leads to follow up on,  
7       correct?

8       **A**     We went down several roads, but none of them  
9       were -- we were able to corroborate back to the  
10      facts of the case.

11      **Q**     I believe your case file was almost 4,000 pages  
12      worth of information, correct?

13      **A**     It was a lot.

14      **Q**     You investigated many people that had ties with  
15      .45 caliber handguns, correct?

16      **A**     We investigated the -- yes, I would say so.

17      **Q**     Specifically black males?

18      **A**     Well, we investigated a lot of people and not  
19      all of them were black males and not all of them  
20      were white males. We -- it's a hodgepodge of the  
21      community. We investigated a lot, but --

22      **Q**     Predominantly what's in your case file, black  
23      males tied with handguns .45 caliber, correct?

24      **A**     Well, I would say so based on the makeup of our  
25      community.

1       Q     You also investigated Chevy pick-up trucks tied  
2       to black males, correct?

3       A     And white males.

4       Q     Predominantly in your case file, black males,  
5       correct?

6       A     Well, that was the description that we got --

7       Q     I understand.

8       A     -- from the first day, but --

9       Q     In fact, you --

10      A     -- to say that we, you know, every truck that  
11      came up if it didn't have a white male -- I mean, if  
12      it didn't have a black male tied to it then we just  
13      excluded it, would be wrong, but we checked a lot of  
14      people and investigated a lot of different leads  
15      that came up.

16      Q     You didn't preserve paperwork of a white male  
17      owning a Chevy pick-up truck in your case file, did  
18      you?

19      A     In my notes, I do not recall those in the 4,000  
20      pages of stuff that came up. I'm not going to sit  
21      here and say that I didn't preserve any of that  
22      because there's a lot of stuff that came up and the  
23      names would come up and you look at them and you  
24      follow up with initial stuff and you go, that's not  
25      tied to this at all. And some of them, you know, I



1        didn't even check to see if they were white males or  
2        black males, it was just these things that come up  
3        in any investigation. I'm not going to narrow it  
4        down in that way.

5        Q        And there was a lot of press about this  
6        incident when it first took place, correct?

7        A        There was.

8        Q        It was on the news a good bit?

9        A        The community was very interested in this case.

10       Q        And that puts a lot of pressure on the  
11       sheriff's department to solve this case, doesn't it?

12       A        Well, there was pressure from a lot of  
13       different areas.

14       Q        You want to find the people that did this,  
15       correct?

16       A        I would like to hold the right people  
17       accountable.

18       Q        You want to find the shooter?

19       A        I would like to.

20       Q        And you were using whatever means you had  
21       necessary, whatever means at your disposal, to try  
22       to find the shooter in this case, correct?

23       A        I tried to use whatever means that were  
24       available to me that were legal.

25       Q        Understandable. You also even went to a

1       certain point where you hypnotized the witness from  
2       the scene, Mr. Gene Derrick, correct?

3       **A**     We were trying to ascertain the tag of that  
4       truck after we had gotten a good description from  
5       him about the time and place and events and  
6       understood and felt pretty confident about what he  
7       was saying about that time line. And, yes, we did  
8       go back through hypnosis and tried to elicit when he  
9       was less stressed in that particular hypnotic state,  
10      that was the idea, to try to see if we could find a  
11      tag number that might come back to a truck that was  
12      involved in this.

13      **Q**     And where did you guys hypnotize him?

14      **A**     At the sheriff's office.

15      **Q**     Sheriff's department?

16      **A**     Uh-huh.

17      **Q**     It was video taped, wasn't it?

18      **A**     It was.

19      **Q**     So there is video tape equipment at the  
20      sheriff's department?

21      **A**     There is, yes.

22      **Q**     And in this hypnotism session, he stated he saw  
23      a left arm hanging out the window, didn't he?

24      **A**     If you'll stand by and let me go back to my  
25      notes here and just see. (Pause) I don't recall

1       that in my notes.

2       **Q**     You don't recall. When is the last time you  
3       watched the video?

4       **A**     I don't recall ever watching that video.

5       **Q**     Okay. Do you recall putting out a patrol  
6       directive on October 28th, 2004?

7       **A**     In regards to...

8       **Q**     In regards to sending it -- first of all,  
9       explain what a patrol directive is.

10      **A**     A patrol directive would be something that  
11      would come up in the case that we may be interested  
12      in finding. It's not necessarily -- it's not  
13      necessarily something that we are very sure of, but  
14      we're wanting to see if the patrol units find these  
15      particular things that are out there so that we can  
16      follow up with it. For instance, we may have a  
17      patrol directive saying that we have a series of  
18      house break-ins in a particular community, need you  
19      to get into the community and keep an eye out and  
20      see if anything comes up. And they will filter,  
21      hopefully, some information back to the  
22      investigators, much the same way -- I mean, if  
23      you're talking about a patrol directive, that is  
24      generally what a patrol directive would be.

25      **Q**     And October 28th, 2004 would be after you had

1 interviewed Mr. Derrick and after he had given a  
2 written statement, correct?

3 **A** Correct.

4 **Q** And after you had hypnotized Mr. Derrick?

5 **A** Correct.

6 **Q** If I showed you a copy of a patrol directive,  
7 would it refresh your memory?

8 **A** It probably would, yes.

9 (Pause.)

10 **MR. COLLINS:** We're not intending to offer this  
11 as evidence. I would like to have this marked as  
12 Defense Exhibit Number 1 for I.D. purposes only.

13 **MS. WEISS:** Your Honor, if the defense wants to  
14 enter it in evidence, the State has no objection.  
15 However, if they don't wish to, we'd ask that they  
16 not ask questions off of it if it's not in evidence.

17 **MR. COLLINS:** Your Honor, I'm trying to use  
18 this to refresh his memory about a patrol directive  
19 he sent out back in 2004.

20 **THE COURT:** The objection is overruled.

21 (Defendant's Exhibit Number 1, patrol  
22 directive, was marked for identification purposes  
23 only.)

24 **BY MR. COLLINS:**

25 **Q** Investigator Barnes, do you recognize what this

1 is?

2 A Yes. That was a patrol directive that we put  
3 out in regards to kind of what we were looking for  
4 as far as the pick-up truck to the best of our  
5 ability at the time and best of our investigative  
6 interviews at the time.

7 Q Does that refresh your memory about putting the  
8 passenger was the shooter in the patrol directive?

9 A Right. That's what we put into the patrol  
10 directive, that is correct.

11 Q That the passenger was the shooter?

12 A That's correct.

13 Q Thank you.

14 A As far as the patrol directive, that's correct.

15 Q So you're using all the resources to aid in  
16 this investigation, following up on any leads out  
17 there, correct?

18 A We're trying.

19 Q In fact, you focused on Mr. Gene Derrick for a  
20 while, too, didn't you?

21 A Well, that is what we call victimization. And  
22 I'll be happy to go into that if you like, but --

23 Q It was just a yes or no question.

24 A Yes.

25 Q I'm just going through all leads you followed

1 up on.

2 A Yes.

3 Q And moving on now to October 24th, 2005, do you  
4 remember that date?

5 A (Witness reviewing document.)

6 Q I believe it was the date you received the  
7 Crime Stopper tip report about Kerwyn Phillips and  
8 John Joseph Moore?

9 A I seem to have -- I am missing pages 26 through  
10 28 of my notes here.

11 Q I believe I have an extra copy.

12 A Thank you.

13 (Defendant's Exhibit Number 2, investigative  
14 report, was marked for identification purposes.)

15 Q Do you recognize this?

16 A October 24th?

17 Q Yes.

18 A Yes, that would be when I received the Crime  
19 Stoppers tip.

20 Q And as you stated before, you received a number  
21 of Crime Stopper tips, correct?

22 A In this testimony, I recall saying that there  
23 were a bunch of leads that we were following up. I  
24 don't know about a number of Crime Stoppers tips and  
25 I don't recall right now a number of Crime Stoppers

1 tips that would come in from that particular line,  
2 but we did have a number of leads that we followed  
3 up.

4 Q Your testimony is you don't remember a number  
5 of Crime Stopper tips reports coming in over a year  
6 on this case?

7 A You asked if I remembered -- had I followed up  
8 on a number of Crime Stoppers tips up until this  
9 point. And my answer is, I do not recall up until  
10 this point following up on a number of Crime  
11 Stoppers tips, I may have, but this particular Crime  
12 Stoppers tip was very important and showed some  
13 movement in this case.

14 Q Are you aware of other Crime Stopper tip  
15 reports that came in about this case from October  
16 2004 until October 2005?

17 A And it would help if you would show me those  
18 particular -- that piece of paperwork and it would  
19 refresh my memory.

20 Q If I showed you a stack of sample Crime Stopper  
21 reports, would that refresh your memory?

22 A If it's tied to this case, it probably would.

23 (Defendant's Exhibit Number 3, Crime Stopper  
24 reports, were marked for identification purposes.)

25 Q Do you recognize what these are?

1       **A**     Yes.

2       **Q**     And what are those?

3       **A**     These are Crime Stopper tips that were followed  
4       up during the course of this investigation.

5       **Q**     And what form are those reports in?

6       **A**     These are confidential Crime Stopper reports  
7       that come in. And it has, Confidential Crime  
8       Stopper report, 1-888-559-tips.

9       **Q**     And they're all in that same general format,  
10       correct?

11       **A**     Yes, sir.

12       **Q**     And that's a way to document how the tips come  
13       in and when they come in?

14       **A**     Uh-huh.

15       **Q**     To your knowledge, is there a Crime Stopper tip  
16       report for the Crime Stopper tip that came in  
17       October 24th, 2005 that you followed up on?

18       **A**     You're talking about a Crime Stopper tip report  
19       on this particular form?

20       **Q**     On the tip that came in that you testified led  
21       you to Kerwyn Phillips and John Moore, you said it  
22       came from Crime Stopper tips. Is there a formal  
23       report from that tip October 24th, 2005?

24       **A**     No.

25       **Q**     There's not?



1       **A**     No. And from time to time, that will happen.

2       **Q**     And you stated that that was an anonymous tip?

3       **A**     All Crime Stopper reports are anonymous.

4       **Q**     Do you remember talking to the confidential  
5 informant that gave this tip?

6       **A**     I do.

7       **Q**     So it wasn't so anonymous?

8       **A**     I didn't know who she was and still don't know  
9 who she is.

10      **Q**     But there was a phone number you had, correct?

11      **A**     I don't recall how -- between Chris Cowan  
12 handing me that Crime Stoppers tip information, how  
13 I ended up talking to her whether it was through a  
14 phone being transferred -- a phone call being  
15 transferred to me or a phone being transferred to  
16 some cell phone, I'm not sure how that came in, but  
17 I know I talked to the confidential informant over  
18 the phone.

19      **Q**     You got an e-mail first from Lieutenant Cowan,  
20 correct?

21      **A**     That is correct.

22      **Q**     So it wasn't as if the call came in and was  
23 transferred to you?

24      **A**     I got an e-mail from Chris Cowan, who is over  
25 our Crime Stoppers thing at the sheriff's office.

1 And in the e-mail, it detailed certain information.

2 And then I did ultimately talk to this woman who  
3 then provided a little bit more information and then  
4 we followed up on it from there.

5 Q And there was no report?

6 A Other than that e-mail that Chris Cowan sent to  
7 me, no report ended up in my hands.

8 Q So from this, you got Kerwyn Phillips and John  
9 Moore's name?

10 A That is correct.

11 Q And from that, you found out that Kerwyn  
12 Phillips was under a federal proffer at the time,  
13 correct?

14 A That is correct.

15 Q And he actually had a meeting set up already  
16 within the next two days, correct?

17 A That is correct.

18 Q In which he was cooperating with authorities,  
19 correct?

20 A That is correct.

21 Q And you understand what a federal proffer is,  
22 don't you?

23 A Yes, sir.

24 Q That means whatever statements he gives to you,  
25 you can't use against him to prosecute against him,

1 can you?

2 A Right. And I remember some discussion about  
3 that prior to us going and engaging with Mr.  
4 Phillips.

5 Q How to get a strategy before you went in there?

6 A You can call it strategy or you can call it do  
7 we really want to, you know, do we believe this  
8 information that's come in to the point where we  
9 believe that Kerwyn was not the shooter, is there --  
10 what's the possibility that Kerwyn is not the  
11 shooter and -- or is the shooter or not the shooter,  
12 those type of things came into play, same type of  
13 questions we were asking about the defendant, you  
14 know, is he the shooter or is he not the shooter.  
15 And ultimately, the decision was made that based on  
16 our conversations with the C.I. and the information  
17 that we knew about the case that we needed to talk  
18 to Kerwyn.

19 Q Because he was the passenger of the truck,  
20 correct, that was the information you got?

21 A Well, that's the information we got and the  
22 information we got was that he was the passenger in  
23 the truck and he was not culpable in the actual  
24 shooting.

25 Q From the anonymous tipster that there's no

1 report of a tip coming in, official report?

2 A You say official and my assumption is that this  
3 is what you're calling official (indicating). I got  
4 the Crime Stopper information from our official  
5 source at the sheriff's office, Chris Cowan, in the  
6 form of an e-mail.

7 Q Form of an e-mail.

8 A And it's documented.

9 Q Kerwyn Phillips, he was in trouble with the  
10 feds because he was trying to buy ammunition, right?

11 A That is my understanding.

12 Q And I believe we've been over this before, but  
13 he ran away when he was first confronted with this  
14 information, correct?

15 A Yes, he did and then he called back later.

16 Q He called back later and a couple days, he came  
17 back in, correct?

18 A He called back that night and apologized and  
19 set up an appointment to come back in, that's right.

20 Q That was very nice of him. Now, you took a  
21 statement from him, correct? You took a statement  
22 from him, correct?

23 A I did.

24 Q And that's in your handwriting?

25 A That is.

1       Q     Is that your normal practice to write other  
2       people's statements for him?

3       A     Well, my handwriting is not the best in the  
4       world and I like to type it now with a computer, but  
5       our procedures at the sheriff's office are that we  
6       write these statements out and then go over those  
7       statements with the defendant or the witness or  
8       whoever we're talking to, make sure that everybody  
9       agrees about the information and then the signatures  
10      come. That's our policy.

11     Q     And this wasn't videoed?

12     A     No.

13     Q     This wasn't recorded?

14     A     No.

15     Q     Kerwyn Phillips can read and write, can't he?

16     A     Yes.

17     Q     And in Kerwyn's statement, he states that he  
18     saw the passenger reach under the seat for  
19     something. If you can look at the statement, would  
20     it refresh your memory?

21     A     That would be great.

22     Q     For I.D. purposes only State's Exhibit 121, do  
23     you know what that is?

24     A     This is the statement that I took from Kerwyn  
25     Phillips.

1           **Q**     I'll reference you to page five --

2                   **MS. WEISS:** Your Honor, I object at this point.  
3           If he's going to have Investigator Barnes read from  
4           the statement or specifically quote from the  
5           statement, I think the defense needs to enter it  
6           into evidence. Otherwise, I object to him quoting  
7           directly from the statement.

8                   **MR. COLLINS:** Your Honor, I'm simply asking if  
9           this refreshes his memory from taking the statement.

10                  **THE COURT:** You're asking him if it refreshes  
11           his memory?

12                  **MR. COLLINS:** Yes, Your Honor.

13                  **THE COURT:** Objection is overruled.

14                  **MS. WEISS:** Thank you, Your Honor.

15           BY MR. COLLINS:

16           **Q**     Does this statement refresh your memory about  
17           Kerwyn's statement, statement that you wrote?

18           **A**     Yes.

19           **Q**     From after reading it, do you recall Kerwyn  
20           Phillips stating that he saw the passenger of the  
21           car reaching under the seat?

22           **A**     What struck me -- we're talking about the  
23           passenger of the victim's car or the passenger of  
24           the suspect's car?

25           **Q**     I'm asking if it refreshes your memory from

1 reading over the statement whether or not he said  
2 the passenger of the car was reaching under the  
3 seat?

4 A Right. Last page, yes, sir.

5 Q So it does -- that is in his statement?

6 A Yes, sir. That was passenger of the victim's  
7 vehicle.

8 Q And he also told you where the gun was supposed  
9 to be?

10 A Yes, sir.

11 Q And you guys searched for that not only once  
12 but twice?

13 A Yes, sir.

14 Q You got the help of an archeology professor  
15 from USC to help you out?

16 A Yes, sir, we did.

17 Q You didn't find any guns back there?

18 A We did not.

19 Q Now, after you took this statement, you wanted  
20 Kerwyn to do some work for you, correct?

21 A Yes, sir.

22 Q And you gave him audio recording equipment?

23 A I did.

24 Q Did that come from Richland County Sheriff's  
25 Department?

1       **A**     That did, yes.

2       **Q**     So there is audio recording equipment at the  
3       Richland County Sheriff's Department?

4       **A**     For that particular purpose, yes, sir.

5       **Q**     Just for that purpose, okay. And you actually  
6       had to give Kerwyn a working phone number for John,  
7       correct?

8       **A**     I recall that he had trouble getting a hold of  
9       John, had advised me of that. I told him I would  
10      call him back and give him some numbers that I had.  
11      And then before I was able to call him back, he was  
12      able to reach him on a number that he had found.

13      **Q**     Okay. I'm going to skip back now. We're going  
14      to go back to October of 2004 right after this  
15      incident.

16      **A**     Yes, sir.

17      **Q**     You arrived at the scene and you met with some  
18      other officers at the scene, correct?

19      **A**     Yes, sir.

20      **Q**     And in your -- you put some notes in your  
21      investigative report about arriving at the scene and  
22      about some information that you got when you got  
23      there?

24      **A**     Is this when I arrived at headquarters?

25      **Q**     Yes, when you arrived at headquarters.



1       **A**     Yes.

2       **Q**     Is there anything in those notes that said the  
3       driver was the shooter?

4       **A**     I don't recall anything at the beginning of  
5       this that would indicate that the shooting came from  
6       the driver's side of the vehicle. So our initial  
7       investigation led us to believe that it was coming  
8       from the passenger side of the vehicle.

9       **Q**     I believe you actually put in your notes, The  
10      passenger leaned out and shot back towards him  
11      again, page one; is that correct?

12      **A**     And this would be coming not from my interviews  
13      with --

14      **Q**     This is just from when you arrived at the  
15      scene. We're going to get to the interviews.

16      **A**     When I arrived at headquarters not at the  
17      scene.

18      **Q**     When you arrived at headquarters.

19      **A**     When I arrived at headquarters and was going  
20      through a debriefing with the investigators that had  
21      been on the scene.

22      **Q**     Okay. Now, we'll move on to when you and  
23      Investigator Faust were talking with Mr. Derrick, I  
24      believe it was the following day?

25      **A**     Yes.

1       Q     And you wanted to make sure that he had time to  
2       kind of collect his thoughts and rest because this  
3       was very traumatic for him, right?

4       A     Yeah.

5       Q     And you also wanted to make sure you got every  
6       detail he could give you because you wanted to find  
7       the shooter, correct?

8       A     That's right. We wanted to get as detailed a  
9       statement as we could get.

10      Q     So with this in mind, you had many conver -- at  
11      least a few conversations with him before you ever  
12      reduced the statement to writing?

13      A     We spent a great deal of time with him that  
14      day.

15      Q     You actually did a ride along?

16      A     We did.

17      Q     Going to the places trying to spark any  
18      memories that may come back to him?

19      A     That's important.

20      Q     And you took notes about what you guys talked  
21      about during this ride along?

22      A     I took notes and tried to make sure I covered  
23      the highlights, yes.

24      Q     And you put in your notes that there was no  
25      sliding glass back window to the truck, it was a

1 solid rear window?

2 A That's what he said at the time.

3 Q And you put in your notes that around  
4 Monticello Road, the passenger of the truck,  
5 parentheses, the one doing the shooting,  
6 parentheses, leaned out with his arm and fired back  
7 towards the vehicle?

8 A That's what I put in the notes.

9 Q And this will be information you gathered from  
10 Mr. Derrick?

11 A Yes.

12 Q Now, anywhere in these notes from October 18th  
13 from your conversations with Mr. Grover Derrick, is  
14 there anything in those notes talking about the  
15 driver doing the shooting?

16 A No.

17 Q Is there anything in your notes about a muzzle  
18 blast coming from the center of the truck?

19 A From my notes, no.

20 Q The only thing you have in your notes  
21 specifically distinguishing between the two  
22 passengers of the truck is that the passenger was  
23 the shooter?

24 A That would be fair to say at the beginning of  
25 the investigation.

1       **Q**     When the only information you had came from  
2       Mr. Derrick?

3       **A**     That's correct.

4       **MR. COLLINS:**   Thank you.

5       **THE COURT:**   Redirect?

6       **MS. WEISS:**   No further questions, Your Honor.

7       **THE COURT:**   Thank you, sir.   You may step down.  
8       Call your next witness.

9       **MR. MEADORS:**   Jennifer Stoner.

10                       JENNIFER M. STONER,

11       having been duly sworn, testified as follows:

12       **THE CLERK:**   Please have a seat there, ma'am.

13       State your full name for the record.

14       **THE WITNESS:**   Jennifer M. Stoner.

15                       DIRECT EXAMINATION

16       BY MR. MEADORS:

17       **Q**     Good morning.

18       **A**     Good morning.

19       **Q**     Please tell these ladies and gentlemen of this  
20       jury about yourself, specifically where you're from,  
21       your background, education, training and, in  
22       particular, training in the field of expertise I've  
23       asked you to testify about today.

24       **A**     My name is Jennifer Stoner and I'm employed by  
25       the South Carolina Law Enforcement Division in the

1 trace evidence section. I have a Bachelor of  
2 Science degree in chemistry from a small state  
3 school in Pennsylvania, it's California University  
4 of Pennsylvania. In 1997, I received my degree and  
5 I performed an internship at SLED in the trace  
6 evidence section.

7 After that internship, I was hired in the drug  
8 analysis department where I performed their training  
9 program and actively took drug cases. I then  
10 transferred into trace evidence after performing  
11 drug work for about a year and began a three year  
12 training program in trace evidence. This program  
13 started out, the first part of the training program  
14 was to process -- to learn how to process and how to  
15 analyze gunshot residue cases. This is the bulk of  
16 the evidence that we receive so all new chemists  
17 start in that area. I was in training under the  
18 supervisor of the department and other senior  
19 analysts in that department.

20 Upon completion of my gunshot residue training,  
21 I took a competency test and then I was able to  
22 actively take case work and I moved into other areas  
23 of training in that department.

24 Q What is gunshot residue?

25 A Gunshot residue is a term that's used to

1 describe a cloud that comes out of a weapon once  
2 it's fired. Gunshot residue is composed of three  
3 elements, barium, antimony and lead. These are  
4 elements that are present in the primer composition  
5 of bullets. It's in the base of a bullet. You have  
6 lead styphnate, antimony sulphate and barium  
7 nitrate.

8           What the purpose of this primer is is to form a  
9 spark to light your powder components in your bullet  
10 so that you can fire the gun. Whenever your firing  
11 pin hits this primer, it initiates an explosive  
12 reaction. It forms a lot of high heat and high  
13 pressure which vaporizes the inorganic components  
14 that I told you about that we look for, which is the  
15 barium, the antimony and the lead. Once they  
16 vaporize, it becomes so saturated with these  
17 components, they condense back out into droplets,  
18 your powder burns build in pressure and the bullet  
19 exits the gun. When this happens, this cloud exits  
20 the gun also through any opening in the gun and  
21 contains these particles which we call gunshot  
22 residue and they will deposit on anything in the  
23 vicinity of that weapon when it's fired.

24 Q     What percentage of your time now is done with  
25 gunshot residue?

1       **A**     When I first started training, I was in gunshot  
2       residue for approximately two years. We do  
3       rotations in it. Currently, I am training two  
4       chemists in arson and so I'm actively reviewing  
5       gunshot residue cases that the new trainee is  
6       working.

7       **Q**     Do you receive gunshot residue kits from local  
8       law enforcement agencies?

9       **A**     From most of the agencies in the state.

10      **Q**     And are you asked to look at those and make an  
11      analysis and come into court and give your expert  
12      opinion whether or not you think gunshot residue is  
13      present?

14      **A**     That's correct.

15      **Q**     And how many of those examinations have you  
16      done?

17      **A**     In training, I probably performed, gosh,  
18      hundreds, almost in the thousands of kits, of actual  
19      kits because a case will have one to however many  
20      kits they collect. Currently, we've had an increase  
21      in cases. I don't know what they're doing now, but  
22      I've performed in excess of a thousand.

23      **Q**     And have you been offered as experts in courts  
24      of record of this state in this field prior to this?

25      **A**     Yes.

1 Q Were you in a court case earlier this week?

2 A Yesterday.

3 Q In the low country?

4 A Yes.

5 MR. MEADORS: Your Honor, at this time, we  
6 would offer Agent Jennifer Stoner as an expert in  
7 the field of gunshot residue.

8 THE COURT: Any voir dire or any objection?

9 MR. COLLINS: No objection, Your Honor.

10 THE COURT: She is so recognized. You may  
11 continue.

12 BY MR. MEADORS:

13 Q If you fire a gun or handle a gun, are you  
14 likely to find -- is it potential you could find  
15 some gunshot residue on your hands?

16 A Yes, it is.

17 Q Getting right to this case -- is it all right  
18 if I call you agent, Senior Agent Stoner?

19 A That's fine.

20 Q Did you receive the SLED two kits, if you will?  
21 First, I want you to look at State's 96 and tell me  
22 if you recognize that and is that what you got and  
23 were asked to examine?

24 A Yeah, 96 was our item number five, which was  
25 the gunshot residue kit from Stephanie Dover.



1 Q And how do you know that's the one you did?

2 A When I receive these kits, I initial and date  
3 the kits and those are my initials.

4 Q J.M.S. What does the M stand for?

5 A May.

6 Q And please look at State's 65?

7 A State's 65 is our item number two and it also  
8 has my initials on the GSR kit.

9 Q And from who -- who was this kit from?

10 A This one was from Grover B. (sic) Derrick.

11 Q And who performed this kit? Does it say what  
12 officer?

13 A Can I check my other sheet that actually lists  
14 the -- for the kit, it was collected by an I.S.  
15 Richards of Richland County.

16 MR. MEADORS: Your Honor, at this time, we'd  
17 offer these.

18 MR. COLLINS: No objection, Your Honor.

19 MR. MEADORS: 96 and 65 without objection.

20 (State's Exhibit Numbers 65 and 96, GSR  
21 kits, admitted into evidence.)

22 BY MR. MEADORS:

23 Q Can we start with the gunshot residue kit from  
24 Grover Eugene Derrick?

25 A That's fine. Do you just want the results on

1           it?

2           **Q**     Tell these folks when you get this in from  
3           Grover Derrick, the gunshot residue kit, tell them  
4           what you do in the lab, take us there right now.  
5           Tell us what your examination consists of and how  
6           you did it and what your conclusions are, please.

7           **A**     When we receive a gunshot residue kit, it's  
8           logged into our log-in department. We pick it up  
9           and it's processed. A gunshot residue kit is a two  
10          part kit. We provide the kits to the agencies in  
11          South Carolina. The purpose of it is to collect any  
12          residue that's present on a person's hands whether  
13          it's a victim or a subject to see if there's any  
14          residue that is consistent with gunshot residue or  
15          if we can find gunshot residue.

16                 What they do is they take, it's about this big  
17          (indicating), and it's called a carbon planchet.  
18          It's in a -- it has a lid on it and it's just a  
19          round disk of carbon that has an adhesive it. It's  
20          somewhat like a Band-Aid adhesive, it's about that  
21          sticky. And they dab it over each area of the hand  
22          to pick up any particles that are present on the  
23          hands. They'll perform the exam on the right palm,  
24          the right back, the left palm and the left back and  
25          they just collect it till the sticky -- till it

1 doesn't pick anything else up.

2           Once they've completed that part of the kit,  
3 they take swabs and a mild solution of nitric acid,  
4 they wipe the swabs and they run the swabs over each  
5 area of the hand also. And this will pick up any  
6 remaining residue that is present so we can analyze  
7 that.

8           For the swabs, they'll also take a control.  
9 They'll take a swab off that person's body,  
10 somewhere that was under clothing, maybe if it's a  
11 long sleeve shirt, on their elbow or middle of their  
12 elbow, on their ankle, on their back, some area  
13 that's covered because we want to know what is  
14 present on that person's body to begin with because  
15 you can have these elements on you in low amounts.

16 **Q**     So a controlled swab from somewhere that's  
17 covered basically?

18 **A**     Correct.

19 **Q**     And swabs from both sides of the hands?

20 **A**     Both sides of the hands. When we receive the  
21 kit in, we prep the swabs with a solution of nitric  
22 acid. We add our internal standards and we filter  
23 them and we set them up on our instrument to run and  
24 it's called an inductively coupled plasma mass  
25 spectrometer. We call it an ICPMS. It's a lot

1 easier than saying that all the time.

2 And what this does is we prep the swabs, so we  
3 have a solution with whatever was on that swab. The  
4 instrument -- it's in a solution form. The  
5 instrument pulls it up and it analyzes it and tells  
6 us what's present. It will tell us how many counts  
7 of lead are there, how many counts of barium and how  
8 many counts of antimony. These are the elements  
9 that we look for to indicate the hands were in the  
10 vicinity of a weapon when it was fired.

11 The purpose of the control is we subtract what  
12 we find on the control from what we found on the  
13 hands so that we are subtracting what naturally  
14 occurs on that person's body so that we can have a  
15 true count of what is on their hands at that time.

16 Q You love your job, don't you?

17 A I do.

18 Q When you looked at the samples taken from  
19 Grover Eugene Derrick and after you conducted your  
20 examination, can you tell this jury if the sample  
21 submitted in that kit labeled Grover Eugene Derrick,  
22 were those metals -- did that indicate to you  
23 whether or not there was gunshot residue present on  
24 the hands of Mr. Grover Eugene Derrick?

25 A In the samples that were submitted from the kit

1 from Grover Derrick, the quantities of metals  
2 detected did not indicate the presence of gunshot  
3 residue. This means that the metals that we found  
4 were at such low levels, they didn't meet any  
5 threshold to show that it was probably around a  
6 weapon when it was fired.

7 Q So in your expert opinion in this field of  
8 gunshot residue, Agent, would that be -- those  
9 findings consistent with Grover Derrick not firing a  
10 gun?

11 A They are.

12 Q Would it be consistent with him not even  
13 handling a gun?

14 A They are.

15 Q Could we move on to the kit that you received  
16 from Ms. Stephanie Dover? And while we're going on  
17 this, too, just very briefly, is there a difference  
18 from how long this residue -- is there a difference,  
19 a time difference, how long a residue would stay on  
20 a living, breathing human being versus a deceased?

21 A There is a difference. When you fire a weapon,  
22 the residue is going to deposit on anything in that  
23 area. You can't see the gunshot residue because it  
24 is so small, but if you think of it, if you're  
25 baking and you get flour on your hands, you can see

1       that light dusting of flour, that's what it would be  
2       like, but if you brush that flour off, you're going  
3       to remove it. So once you fire a weapon, there's no  
4       reasonable expectation to find anything on your  
5       hands after six hours has passed.

6       **Q**     Six hours?

7       **A**     Six hours on a living, because you're going to  
8       sweat, you can absorb the residue, your hands are  
9       going to be in and out of your pockets, mostly what  
10      you do, you're going to do with your hands so you're  
11      going to remove that residue. So after six hours,  
12      we don't test the kits if they're collected because  
13      we don't expect to find anything. And if we did  
14      find something, we couldn't link it to that  
15      incident.

16            On a deceased individual, once you stop living  
17      and once you stop breathing, you stop moving. So if  
18      anything -- if something's deposited on your hands  
19      the moment you die, it will remain there until it's  
20      physically removed by an outside source. So if  
21      you're out in the rain and it washes it off or if  
22      you -- actually if the body starts to decompose,  
23      that can remove the residue. But once you stop  
24      moving, stop living, it's going to stay on your  
25      hands until something removes it and normally that

1 is the GSR kit that we take will remove that  
2 residue.

3 Q And a matter of fact is there a time limit from  
4 when you at SLED or your policy won't test a gunshot  
5 residue kit on a living human being?

6 A On a living human being, we won't test it after  
7 six hours. On a deceased individual, we will test  
8 it indefinitely until it's collected.

9 Q And is it fair to say on a human being or  
10 anything else, the environment and wind and  
11 environmental factors will affect gunshot residue,  
12 correct?

13 A It will. Wind can blow the gunshot residue.  
14 Small quarters can affect it. If you're in a  
15 bathroom or a small area, that cloud will be  
16 contained to that area and you're more likely to get  
17 it on your hands. If you're outside and the wind's  
18 blowing, there may be a chance it will blow it away  
19 from you and you won't receive as much residue. So  
20 all of the environmental factors do come into play.

21 Q Can you tell these ladies and gentlemen about  
22 your findings and your opinion as to Ms. Dover, the  
23 kit that you received from her?

24 A In the sample submitted in the kit labeled  
25 Dover, Stephanie Lynn, the quantities of metals

1 detected did not indicate the presence of gunshot  
2 residue, which also means when we tested it, the  
3 levels were so low that they did not meet our  
4 threshold to indicate anything was there.

5 **Q** And in your expert opinion, would that be  
6 consistent with her not having a gun and not firing  
7 a gun?

8 **A** It is.

9 **MR. MEADORS:** Thank you. That's all.

10 **THE COURT:** Cross?

11 **MR. COLLINS:** No questions, Your Honor.

12 **THE COURT:** Thank you, ma'am. You may step  
13 down.

14 Call your next witness.

15 **MR. MEADORS:** Clay Nichols, Doctor Clay  
16 Nichols.

17 CLAY ALLEN NICHOLS,  
18 having been duly sworn, testified as follows:

19 **THE CLERK:** Please have a seat there, sir.  
20 State your full name for the record.

21 **THE WITNESS:** Clay Allen Nichols,  
22 N-I-C-H-O-L-S.

23 DIRECT EXAMINATION

24 BY MR. MEADORS:

25 **Q** Good morning, Doctor.



1       **A**     Good morning.

2       **Q**     Please tell the jury about Doctor Clay Nichols,  
3           your background, your training and, in particular,  
4           your training in the field of expertise that I'm  
5           asking you to be qualified as an expert today,  
6           Doctor.

7       **A**     Okay. I received my Bachelor of Science degree  
8           from the University of Oklahoma in 1981. After  
9           that, I received my M.D. degree also from the  
10          University of Oklahoma in 1985. After that, I  
11          entered a residency program in both anatomic and  
12          forensic pathology at MUSC, completing that in 1990.  
13          I was on the faculty at MUSC for ten years teaching  
14          pathology and forensic pathology.

15               In 2000, I entered private practice here in  
16          Columbia where I'm the chief medical examiner of  
17          Richland County. And I also hold an unrestricted  
18          license to practice medicine and surgery in the  
19          State of South Carolina. I'm board certified by the  
20          American Board of Pathology in both anatomic and  
21          forensic pathology.

22               **MR. STRICKLER:** And I'll stipulate to his  
23          qualifications in both the areas that he stated,  
24          Your Honor.

25               **MR. MEADORS:** And we'd have him offered as an

1 expert in the field of forensic pathology. Thank  
2 you.

3 **THE COURT:** He's so recognized.

4 **BY MR. MEADORS:**

5 **Q** Just very briefly, what's the difference  
6 between pathology and forensic pathology?

7 **A** Essentially, pathology is a laboratory branch  
8 of medicine. We don't see patients as our normal  
9 part of practice. They also have training doing  
10 autopsies on people. A forensic pathologist has  
11 additional training in performing autopsies on  
12 people who die of suspicious or unnatural deaths.

13 **Q** How many have you done?

14 **A** Over 5,000.

15 **Q** And your office is where?

16 **A** Over at Richland Memorial.

17 **Q** In the morgue?

18 **A** Upstairs, yes.

19 **Q** You're one above the morgue?

20 **A** Right.

21 **Q** You do your work in the morgue?

22 **A** That's correct.

23 **Q** Now, did you have an occasion to perform an  
24 autopsy in this case on Stephanie Dover?

25 **A** Yes, I did.

1       Q     Can you please tell the ladies and gentlemen of  
2     the jury what date that was?

3       A     October 17th, 2004 at 9:00 a.m.

4       Q     Before we get to that, Doctor, tell these folks  
5     in what condition do you like to see -- generally  
6     and preferably, you know, in an ideal world, what  
7     condition do you like to see the body of a deceased?  
8     What's the potential crime involved when it gets to  
9     you, what condition?

10      A     We like to see it in the best condition  
11     possible, preferably clothed, if possible. But if  
12     the person's been through the emergency room or  
13     trauma center, the clothes are usually removed and  
14     there's some additional evidence of resuscitation,  
15     such as indotracheal tubes and I.V. lines.

16      Q     Can you take us to the morgue right now like  
17     where you're performing it and tell these jurors how  
18     you perform an autopsy, specifically what you did  
19     with Ms. Dover's body this time?

20      A     The autopsy begins with a phone call, which is  
21     a request for an autopsy. At that time, initial  
22     information is given. The body is in a refrigerated  
23     area and removed at that time. An external  
24     examination is performed looking at the general  
25     condition of the body, any sort of evidence of

1 medical intervention, once again, lines or tubes.  
2 The body is then examined unclothed if it was  
3 clothed to begin with, once again, looking for any  
4 evidence of significant injury or evidence of the  
5 cause of death.

6 After that, an internal dissection is performed  
7 where the organs are removed one by one, they're  
8 weighed, dissected down further, once again, looking  
9 for any significant finding. Small portions of each  
10 major organ system is submitted for a microscopic  
11 examination. And if necessary, toxicologic  
12 evaluation is initiated with the collection of blood  
13 and urine.

14 Q The external description?

15 A Yes, sir. This is a body of a well developed,  
16 well nourished white female appearing compatible  
17 with the stated age of 20 years. The height is 61  
18 inches, which is five foot one and the weight is  
19 estimated at 140 pounds.

20 Q What evidence of trauma did you find, Doctor?

21 A Specifically two gunshot wounds were identified  
22 to the body. They were arbitrarily labeled numbers  
23 one and two, that doesn't designate the firing  
24 sequence, it just designates how I found them and  
25 numbered them.

1           The first one is a close gunshot wound to the  
2           left forehead, two point five inches from the top of  
3           the head and two point five inches to the right of  
4           the midline, which is approximately in this area  
5           here (indicating). The area around the wound has  
6           been previously shaved and sutured. The suture is  
7           removed. The wound is circular measuring zero point  
8           four inch in diameter. There is a zero point one  
9           inch abrasion border from the 12 to five o'clock  
10          position. No soot or powder stippling is  
11          identified.

12          The bullet was found to enter the cranium or  
13          the head at this site with fracturing of the  
14          underlying cranial bones with appropriate inward  
15          beveling. The bullet travels through the  
16          deceased's brain causing a hemorrhagic laceration  
17          and exiting the right side of the head at a distance  
18          of three point five inches from top of the head and  
19          three inches to the right of midline, which is  
20          approximately here (indicating). The exit wound is  
21          lacerated with a maximum diameter of zero point  
22          three by zero point six inch. The approximate angle  
23          of trajectory is to the right 60 degrees, backwards  
24          30 degrees and downward ten degrees. The bullet  
25          exited and was not recovered.

1           The second gunshot wound I have a complicated  
2       description of it, but, essentially, the middle  
3       finger was bent down like that (indicating). The  
4       bullet goes in at the base of this knuckle, in, out  
5       here, in again and out here, so the perforation of  
6       the left middle finger with the finger bent over in  
7       this position (indicating).

8       **Q**     Doctor, with your position --

9           **MR. MEADORS:** Excuse me, Your Honor, with your  
10      permission, I apologize, would you allow the doctor  
11      to step down?

12      **THE COURT:** Yes, sir.

13           (Witness leaves the witness stand.)

14      **MR. STRICKLER:** And, Your Honor, of course, we  
15      will stipulate as to the doctor's finding as to  
16      cause of death. And I understand he's got  
17      photographs and while I submit they're completely  
18      unnecessary with our stipulation, I have no  
19      objection to them, sir.

20      **MR. MEADORS:** There's actually one picture that  
21      he did not want in and I took that out. And we're  
22      -- for the record, Your Honor, State's 131, 130,  
23      127, 128, 125 and 123, if Your Honor got all those,  
24      are without objection.

25      **THE COURT:** That lady over there is the one you

1       need to make sure got all of them. Give it to the  
2       court reporter, make sure everything is straight.

3               (State's Exhibit Numbers 123, 125, 127, 128,  
4       130 and 131, photographs, are admitted into  
5       evidence.)

6       BY MR. MEADORS:

7       Q     This is State's 123, Doctor?

8       A     Yes, sir.

9       Q     Can you tell the jury what that is?

10      A     This is an x-ray of the skull. This is not the  
11      bullet here. This is a reflection off of a flash.  
12      We have posts in each ear. These are earrings. You  
13      can see the fillings of the teeth. The eye sockets  
14      are here. And right here, this dark area, is the  
15      entrance wound to her skull.

16      Q     And, Doctor, you described the injury to the  
17      finger. State's 128 and 127, do they show an  
18      entrance and an exit?

19      A     This shows the entrance middle finger at the  
20      base by the hand. Then this shows the exit here and  
21      then the reentrance up here.

22      Q     And, again, put my -- what would it be  
23      consistent with the way...

24      A     Like that (indicating).

25      Q     Doctor, this is State's 131 and State's 125, I

1 believe, tell us what those are.

2 **A** This is the entrance wound to the left side of  
3 the forehead and right here at the hairline is the  
4 exit wound.

5 **Q** Are you able to determine where the hand may  
6 have been in relation to the head?

7 **A** No. The hand can be any place, up, down,  
8 around, that the hand just got in front of the  
9 bullet or the bullet went through the hand wherever  
10 the hand was.

11 **Q** Can you sit here and tell these folks right now  
12 where Ms. Dover's head would have been when she  
13 received that shot?

14 **A** No.

15 **Q** Specifically, in a specific position?

16 **A** No, I cannot.

17 **MR. MEADORS:** And, Your Honor, I'm going to  
18 withdraw 130. It's kind of duplicative. If that's  
19 -- I'll withdraw 130. I didn't realize 130 was kind  
20 of duplicative to one of the other ones.

21 **Q** Thank you, Doctor. You can have a seat back.

22 **A** (Witness resumes the witness stand.)

23 **Q** And, Doctor, those pictures, for the record,  
24 were of the body of Stephanie Dover, correct?

25 **A** Yes, sir.



1 Q And based on your examination -- and the other  
2 thing, were the hands bagged when they came in?

3 A I do not note that and I don't know if they  
4 were.

5 Q State's 133, do you recognize that?

6 A This shows a bag over, apparently, the forearm  
7 and hand of Ms. Dover.

8 Q And seeing that, would that -- her hands were  
9 bagged?

10 A Yes.

11 MR. MEADORS: Your Honor, I believe...

12 MR. STRICKLER: Without objection.

13 MR. MEADORS: 133.

14 (State's Exhibit Number 133, photograph,  
15 admitted into evidence.)

16 BY MR. MEADORS:

17 Q Why are hands bagged when they come in?

18 A The hands are bagged to preserve any sort of  
19 trace evidence that might be collected by law  
20 enforcement, specifically the sheriff's office in  
21 this case.

22 Q Do you know how long Ms. Dover might have lived  
23 after the shot?

24 A Matter of minutes afterwards from the time the  
25 bullet entered her head till she was technically

1 dead. No more than an hour.

2 Q And can you tell these jurors to a reasonable  
3 degree of medical certainty based on your expertise,  
4 the proximate cause of death for Stephanie Dover?

5 A Ms. Dover died as a result of cerebral  
6 laceration due to the gunshot wound to her head,  
7 which technically means the bullet lacerated a pore  
8 through her brain causing death.

9 MR. MEADORS: Thank you.

10 MR. STRICKLER: Please the Court, sir?

11 THE COURT: Cross-examination.

12 CROSS-EXAMINATION

13 BY MR. STRICKLER:

14 Q Good morning, Doctor.

15 A Mr. Strickler.

16 Q Just a couple things really, if you please.  
17 You testified that in reference to the hand wound  
18 when you were talking with Mr. Meadors, the bullet  
19 went through the hand leaving the implication that  
20 your findings are that the bullet that made the hand  
21 wound also made the head wound. Now, as a forensic  
22 pathologist, you were given information in addition  
23 to what you have on your examination of the body,  
24 correct?

25 A Yes. But, also, I did not want to give the

1 impression that the bullet that went through the  
2 hand caused the head injury and more than likely it  
3 did not.

4 Q Indeed in this case, it probably did. The only  
5 point I'm trying to make is that your field operates  
6 in conjunction with findings in -- from law  
7 enforcement, too, or they can be of assistance to  
8 you in rendering an opinion?

9 A That's correct.

10 Q But absent additional information from law  
11 enforcement, you couldn't say whether it was one  
12 shot or two, I would assume, at least in this  
13 particular situation?

14 A Once again, I favor two shots at least.

15 Q Okay. Just based purely on the information  
16 from your autopsy?

17 A That's correct.

18 Q Now, you described in your testimony on the  
19 stand, the location of the entrance wound and the  
20 exit wound in this case, correct?

21 A That's correct.

22 Q And the location and the somewhat convoluted  
23 description you had to go through for the injury to  
24 the finger, correct?

25 A That's correct.

1       **Q**     Okay. And nothing more than what you described  
2       on the stand is depicted -- or you described the  
3       posts located in the ears?

4       **A**     Right.

5       **Q**     Okay. And that's what's depicted in the  
6       photographs, correct?

7       **A**     Yes, sir.

8       **Q**     Okay. So the photographs merely depict what  
9       you have testified to while you're sitting on the  
10      stand, correct?

11      **A**     That's correct.

12      **Q**     Now, and lastly, you have no idea based on your  
13      autopsy who fired the shots that killed this young  
14      lady, correct?

15      **A**     That's correct. The autopsies seldom, but  
16      certainly can, but not in this case, would point to  
17      a particular shooter. It does not in this case.

18      **Q**     And you certainly couldn't say that if there's  
19      controversy regarding whether a passenger or a  
20      driver in another vehicle fired these shots whether  
21      it was the passenger or the driver, correct?

22      **A**     That's correct.

23              **MR. STRICKLER:** All right. Thank you very  
24      much, Doctor.

25              **THE COURT:** Redirect?

1           **MR. MEADORS:** Just very briefly.

2                               REDIRECT EXAMINATION

3           BY MR. MEADORS:

4           **Q**     One of these wounds was an entrance wound and  
5           one was an exit wound, correct?

6           **A**     Yes.

7           **Q**     On her face?

8           **A**     Yes, sir.

9           **Q**     And you said the injury to the hand --

10          **A**     Uh-huh.

11          **Q**     -- like this, correct (indicating)?

12          **A**     Yes.

13          **Q**     One bullet could have gone through the hand  
14          into the head, correct?

15          **A**     It could have, but from the forensic evidence,  
16          I think two bullets.

17          **Q**     On State's 132, can you show me where the  
18          entrance wound is, roughly?

19          **A**     Entrance wound, approximately there  
20          (indicating).

21          **Q**     So that's on the left side?

22          **A**     That's correct.

23          **Q**     And the exit wound?

24          **A**     Approximately here (indicating).

25          **Q**     And if Ms. Dover had had her hand up like this,

1       it could have gone through here and into the head,  
2       correct?

3       **A**     It could have.

4       **MR. MEADORS:** Your Honor, 132.

5       **MR. STRICKLER:** Without objection, Mr. Meadors.

6       **THE COURT:** Mark it in evidence.

7               (State's Exhibit Number 132, Styrofoam head,  
8       admitted into evidence.)

9       **MR. MEADORS:** That's all. We'd ask him to be  
10      excused.

11      **MR. STRICKLER:** Nothing further, sir, and  
12      without objection.

13      **THE COURT:** You're free to go. Thank you.

14              All right. Ladies and gentlemen, we'll be in  
15      recess for 15 minutes. Don't discuss the case.

16              (The jury retires to the jury room.)

17      **THE COURT:** Fifteen minutes.

18              (Brief recess.)

19      **THE COURT:** Does the State have any further  
20      witnesses?

21      **MS. WEISS:** No, sir, Your Honor. The State  
22      rests.

23      **THE COURT:** Are there any motions?

24      **MR. COLLINS:** Your Honor, at this time, the  
25      defense would renew all previous motions and

1 objections, specifically regarding the phone calls  
2 from the jail for the previously stated reasons. We  
3 would also move for a directed verdict on all counts  
4 based on, in the light most favorable to the State,  
5 no reasonable jury could come back with a guilty  
6 verdict.

7 Specifically, Your Honor, we'd also move for a  
8 directed verdict slash dismissal on possession of a  
9 gun of a person under 21 years old based on the  
10 statute being unconstitutional. South Carolina code  
11 16-23-30 subsection (b) creates it criminal for  
12 anyone under the age of 21 and over 18 to possess a  
13 handgun. I understand that the standard is that  
14 it's presumed constitutionally valid unless it's a  
15 clear showing to the contrary and that it's so  
16 clearly shown that there's no room for reasonable  
17 doubt that it violates some provision of the  
18 Constitution.

19 Article 1 Section 20 of the South Carolina --  
20 provides the right to bear arms. This right has  
21 recently been referenced as a basis for the  
22 protection of persons of property act, Section  
23 16-11-410, which specifically states that Article 1  
24 of the South Carolina Constitution guarantees the  
25 right of people to bear arms and the right shall not

1       be infringed.

2               Furthermore, Article 17 Section 14 of the South  
3       Carolina Constitution provides every citizen over  
4       the age of 18 years old with full legal rights  
5       provided that the general assembly may restrict the  
6       sell of alcohol. That's the last provision that has  
7       been added into Article 17 which allows for the  
8       restricted sell of alcohol to citizens under 21  
9       years old. The General Assembly specifically put  
10      that in there to infringe upon the rights of  
11      citizens over the age of 18. There's no provision  
12      in Article 17 referencing the right to bear arms,  
13      that is why -- and that's our position as to why  
14      this statute is unconstitutional. We would ask for  
15      a dismissal based on that.

16           **THE COURT:** Motions are respectfully denied.

17           Mr. Moore, I need to go over some things with  
18      you now and I need to have your responses under  
19      oath. Would you raise your right hand for me?

20                       JOHN JOSEPH MOORE, JR.,  
21      having been duly sworn, testified as follows:

22           **THE COURT:** You may have a seat.

23           Mr. Moore, we've reached the stage of the trial  
24      where the State has rested its case in chief. And  
25      the next thing that would happen is that I would



1 give your side the opportunity to present evidence  
2 for the jury to consider. Do you understand where  
3 we are in the trial?

4 **DEFENDANT MOORE:** Yes, sir.

5 **THE COURT:** Now, if you want to call witnesses,  
6 your attorneys may call witnesses. And if you want  
7 to testify, you may testify. Do you understand  
8 that?

9 **DEFENDANT MOORE:** Yes, sir.

10 **THE COURT:** Regardless of whether you testify  
11 or not, you could call witnesses if you wish to have  
12 witnesses called in your behalf; do you understand?

13 **DEFENDANT MOORE:** Yes, sir.

14 **THE COURT:** You have no obligation to put up  
15 any case. You are presumed to be innocent and I'm  
16 going to tell the jury that you're presumed to be  
17 innocent once again many times; do you understand?

18 **DEFENDANT MOORE:** Yes, sir.

19 **THE COURT:** You're in a criminal court setting  
20 and nobody can force you to testify; do you know  
21 that?

22 **DEFENDANT MOORE:** Yes, sir.

23 **THE COURT:** You have an absolute right to  
24 remain silent. If you choose not to testify, I'm  
25 going to tell that jury they cannot hold your

1       silence against you in any way. They're not to  
2       discuss it in the deliberations. It's not to enter  
3       their mind in making the decision of whether you're  
4       guilty or not guilty. Do you understand?

5               **DEFENDANT MOORE:** Yes, sir.

6               **THE COURT:** Do you understand that this  
7       decision about whether you testify or not is your  
8       own decision to make and your decision alone?

9               **DEFENDANT MOORE:** Yes, sir.

10              **THE COURT:** I expect that you would confer with  
11      your attorneys, with family members, with friends,  
12      anybody whose opinion you value on an important  
13      decision like this, but ultimately it is your call  
14      to make. You're the person on trial and you're the  
15      only one who gets to decide whether you testify or  
16      not. Do you understand?

17              **DEFENDANT MOORE:** Yes, sir.

18              **THE COURT:** If your side offers no evidence,  
19      your attorneys get to make the last argument to the  
20      jury. Otherwise, the State makes the last argument.  
21      Do you understand that?

22              **DEFENDANT MOORE:** Yes, sir.

23              **THE COURT:** Does he have a prior criminal  
24      record that would subject him to impeachment?

25              **MS. MCDUFFIE:** Yes, sir, I believe he does.

1           **MR. MEADORS:** Your Honor, he does have. I  
2 don't know if you heard her.

3           **THE COURT:** I need to know what it is.

4           **MR. MEADORS:** Okay. Judge, he has a unlawful  
5 carrying of a weapon in April of 2004, possession of  
6 stolen vehicle greater than --

7           **THE COURT:** How is unlawful carrying of a  
8 weapon --

9           **MR. MEADORS:** I didn't say it would be. I'm  
10 just reading his record.

11           **THE COURT:** I want to know if he takes the  
12 stand, what you intend to ask him about as far as  
13 his prior criminal record.

14           **MR. MEADORS:** Okay. I didn't understand. I  
15 thought you wanted his record. Possession of a  
16 stolen vehicle greater than 5,000, which I think  
17 would be.

18           **THE COURT:** From when?

19           **MR. MEADORS:** April 2004. Also, April 2004,  
20 sell or possession of -- by a certain person of a  
21 stolen pistol, which I believe does carry over a  
22 year conviction, same date. I think that carries  
23 five. That's it.

24           **THE COURT:** Do you all want to be heard about  
25 his record?

1           **MR. COLLINS:** What he read is correct.

2           **THE COURT:** I mean, do you want to take a  
3 position as to whether he could be asked about those  
4 things if he testifies?

5                   (Pause.)

6           **MR. COLLINS:** At this time, he's not planning  
7 on testifying.

8           **THE COURT:** All right. Well, then I'll just  
9 make the call.

10           Mr. Moore, if you take the stand, and I'm not  
11 suggesting you should or you shouldn't, I have to go  
12 over this with everybody who's on trial whether  
13 they're on trial for a traffic offense or murder, if  
14 you take the stand, the State would be allowed to  
15 ask you if you were convicted in April of 2004 of  
16 possession of a stolen motor vehicle greater than  
17 \$5,000. Do you understand that?

18           **DEFENDANT MOORE:** Yes, sir.

19           **THE COURT:** I would not let them ask you about  
20 possession of or sell of a stolen pistol because I  
21 cannot make the finding required under the rule that  
22 the prejudicial value of that as balanced against  
23 the probative effect meets the standard of the rule.  
24 So I wouldn't let them ask you about that unless you  
25 in some way open the door to that. Do you

1 understand what I mean?

2 **DEFENDANT MOORE:** Yes, sir.

3 **THE COURT:** Opening the door would mean, for  
4 example, if you got on the stand and said, I never  
5 had a pistol in my life, well, then they'd be able  
6 to ask you about that conviction. All right?

7 **DEFENDANT MOORE:** Yes, sir.

8 **THE COURT:** Now, if you took the stand and if  
9 you were asked about that possession of a stolen  
10 vehicle charge, I would then tell the jury that they  
11 could only consider that on the issue of your  
12 credibility or your believability and no other  
13 purpose, you understand?

14 **DEFENDANT MOORE:** Yes, sir.

15 **THE COURT:** Now, today, I realize you're  
16 incarcerated, but today are you under the influence  
17 of any kind of medicine or any substance that  
18 adversely affects your thinking?

19 **DEFENDANT MOORE:** No, sir.

20 **THE COURT:** Do you suffer from any physical or  
21 mental problems that affect your thinking today?

22 **DEFENDANT MOORE:** No, sir.

23 **THE COURT:** You're clearheaded? You know what  
24 you're doing?

25 **DEFENDANT MOORE:** Pretty much, yes, sir.

1           **THE COURT:** Have you understood everything I've  
2           been over with you?

3           **DEFENDANT MOORE:** Yes, sir.

4           **THE COURT:** All right. Now, what I'm going to  
5           do at this point, Mr. Moore, is I'm going to make a  
6           finding that your decision as to whether you testify  
7           or not is your decision and yours alone; that you  
8           understand you have a right to testify or not to  
9           testify; you understand that nobody can make you  
10          testify; you understand that I would tell the jury  
11          they could not hold your silence against you if you  
12          chose not to testify; you understand what I would  
13          let the State ask you about as far as your prior  
14          criminal record if you testified and what I would  
15          tell the jury about that only being used for  
16          impeachment purposes and no other purpose; you  
17          understand that if you do not offer any evidence,  
18          that your lawyers get to make the last closing  
19          argument; and most importantly, you understand that  
20          this decision is yours to make and yours alone.

21          So if anybody attempts to unduly influence you  
22          in making your decision, you have to let me know  
23          that right away, all right?

24          **DEFENDANT MOORE:** Yes, sir.

25          **THE COURT:** Do y'all need a minute to talk?

1           **MR. COLLINS:** Just a brief moment.

2           **THE COURT:** All right.

3           (Pause.)

4           **MR. COLLINS:** Your Honor, I think he's made his  
5 decision.

6           **THE COURT:** Okay. Mr. Moore, do you want to  
7 testify or not testify?

8           **DEFENDANT MOORE:** Not testify.

9           **THE COURT:** Is that your own decision, made of  
10 your own free will?

11          **DEFENDANT MOORE:** Yes, sir.

12          **THE COURT:** All right. What I'm going to do is  
13 I'm going to bring the jury back in. I'm going to  
14 ask the State if the State has anything further to  
15 present. Then I'm going to tell the jury that  
16 that's all the evidence that they have to consider  
17 and I'm going to give the instruction about that the  
18 jury cannot hold the defendant's silence against  
19 him.

20               After that, I'm probably going to send them  
21 back in the jury room for just a few minutes and try  
22 to get my bearings as to how we're going to proceed  
23 this afternoon. My preference would be to continue  
24 moving the case and go forward this afternoon after  
25 an extended lunch break. However, as I told you

1       yesterday, there are some rather difficult issues of  
2       law.

3               Bring the jury in.

4               (The jury returns to the courtroom.)

5               **THE COURT:** Anything further from the State?

6               **MS. WEISS:** No, Your Honor. At this time, the  
7       State rests.

8               **THE COURT:** Ladies and gentlemen, you now have  
9       all of the evidence you're going to have to decide  
10      the case. And I need to give you an instruction at  
11      this point, please pay close attention.

12              I emphasize to you, ladies and gentlemen, that  
13      the fact that the defendant in this case elected not  
14      to testify is not a factor to be considered by you  
15      in any way in your deliberations and in your  
16      consideration on the question of whether he is  
17      guilty or not guilty. His decision not to testify  
18      must not be considered by you in any manner  
19      whatsoever against Mr. Moore. An accused has a  
20      constitutional right to remain silent and the  
21      assertion of that right cannot and must not be  
22      considered by you in your deliberations in any  
23      manner whatsoever against the defendant.

24              Under the oath you've taken, you are to reach  
25      no inference and you are to draw no conclusion



1       whatsoever from the fact that Mr. Moore elected not  
2       to testify. His decision not to testify should not  
3       be discussed by you in your deliberations in the  
4       jury room. It should not enter your mind in making  
5       your decision on the question of whether he is  
6       guilty or not guilty.

7               The burden of proof, as I've told you  
8       repeatedly, is entirely on the State to prove every  
9       essential element of an offense charged beyond a  
10      reasonable doubt and an accused has no burden to  
11      prove anything at all.

12             Now, I told you yesterday when we broke that  
13      after the morning break, I would probably be in a  
14      better position to tell you where I think we're  
15      going as far as how we're going to proceed with the  
16      trial. And as I just told you, you've got all the  
17      evidence now. There are two stages that remain in  
18      this trial, the closing arguments from the attorneys  
19      and the charge where I tell you the law.

20             I stayed here last night and talked to the  
21      attorneys some about the law. There are a couple of  
22      issues that I told them to think about and talk to  
23      me about today. And I don't know what they think  
24      about those issues and it's going to affect my  
25      decision as to whether I send you home for the rest

1 of the day because I think it's going to take us  
2 that long to work through those issues and then you  
3 come back tomorrow and hear the closing arguments  
4 and the charge or whether we continue on this  
5 afternoon after an extended lunch break for you.

6 Now, my preference, I don't mind telling you,  
7 is to keep going, but by the same token, I don't  
8 want to have you sitting in that room for an  
9 extended period of time unnecessarily. So I need to  
10 confer with them for a few minutes having just found  
11 out where we are with the evidence and then I'll get  
12 you in here within ten minutes and tell you whether  
13 you're free for the rest of the day or whether I  
14 need you back at a particular time this afternoon,  
15 okay. All right, don't discuss the case, follow the  
16 bailiff.

17 (The jury retires to the jury room.)

18 **THE COURT:** All right. In broad general terms,  
19 I need to know whether there is a position being  
20 taken on issues of lesser included offenses,  
21 specifically including manslaughter, whether there's  
22 an issue about transferred intent and whether there  
23 is an issue about self-defense and anything else, I  
24 guess, that you all want to talk to me about.

25 My law clerk said that the defense was asking

1       for a mere presence charge and I think that's  
2       probably appropriate. I don't have it in here yet,  
3       but I think that's probably appropriate. Is the  
4       defense requesting a charge of voluntary  
5       manslaughter?

6               **MR. STRICKLER:** Yes, we would request voluntary  
7       manslaughter. Yes, we would request self-defense.  
8       I've tried to figure a way to actually look at you  
9       and request involuntary manslaughter, but I haven't  
10      been able to work my way to that.

11             **THE COURT:** Well, just to ease anyone's  
12      concerns about that, you can ask for it all day  
13      long, I'm not charging it.

14             **MR. STRICKLER:** I spent enough time reviewing  
15      the law again this morning and realized that, so I  
16      won't press that issue. But, yes, as to voluntary,  
17      yes, as to self-defense.

18             **THE COURT:** All right. Now, I have to, at this  
19      stage, view all the evidence in the light most  
20      favorable to the defendant. And I need to recognize  
21      that my recollection apparently of -- my  
22      recollection of the testimony was that apparently  
23      there was an assertion that the driver of the car  
24      made some obscene gesture to the driver of the  
25      truck, or to the truck, the people in the truck, and

1       then later tried to run the truck off the road. I  
2       don't know that the obscene gesture would be enough,  
3       the running -- the evidence about trying to run the  
4       truck off the road would be what I would be dealing  
5       with as far as sudden heat of passion.

6               The self-defense, is that coming from these  
7       statements about running off the road, trying to run  
8       the vehicle off the road, or is that coming from  
9       somebody saying that the passenger or the driver of  
10      the car was making some movement underneath the  
11      seat?

12             **MR. STRICKLER:** Well, one augments another. I  
13      mean, certainly start from running off the road, but  
14      certainly this is supported by, and this is from the  
15      State's witness, these movements via by the  
16      passenger or the driver under the seat, that's --  
17      the inference being movements to get a weapon. In  
18      that regard, to the extent that you have to rely on  
19      that as opposed to trying to veer off the road as  
20      supporting self-defense, I mean the law in this  
21      state is that you don't have to let someone else  
22      have the opportunity to do damage to you or to get  
23      the drop on you as it were, classically in a  
24      situation involving a firearm, having a right to act  
25      in a somewhat preemptory fashion in that situation.

1           It's certainly -- perception is that the  
2 movement was to -- was interpreted as moving towards  
3 a weapon.

4           **THE COURT:** And, again, I don't want to get  
5 bogged down in this right now. I want to take as  
6 much time as is necessary.

7           Here's what I'm struggling with. These are two  
8 vehicles going down the interstate. There's a brake  
9 pedal, presumably, in that truck. How do you get to  
10 self-defense when another vehicle is beside you?

11           I'm assuming he could not see, whoever he was,  
12 could not -- in the truck, could not see somebody at  
13 some distance behind them after midnight at night  
14 reaching down underneath a seat, if it could be seen  
15 when they're side by side or close to being side by  
16 side. How is it that someone can act in  
17 self-defense when there are two vehicles going down  
18 the interstate? That's what I'm struggling with.

19           **MR. STRICKLER:** Yes, sir. Well, two vehicles  
20 going down the interstate under one version of the  
21 testimony, certainly --

22           **THE COURT:** That's what I'm looking for. And I  
23 realize there's times when they say the vehicles  
24 were behind -- one was behind the other and they  
25 were chasing each other. And there's testimony one

1 of them pulled off the side of the road. I don't  
2 know how a police interceptor would have caught back  
3 up with the truck in the distance, but that's really  
4 not for me to decide.

5 **MR. STRICKLER:** And that's testimony from the  
6 driver of that vehicle and it may be supported by  
7 the testimony from the passenger in Mr. Moore's  
8 vehicle, pulled off and evidently caught back up  
9 with them, and that indeed is a problem. I mean,  
10 you can slow down, speed up.

11 The testimony before this court is that the  
12 rate of speed had something to do certainly with not  
13 only the potential for the harm to the defendant's  
14 vehicle and the defendant, but the ability to avoid  
15 any problems and I would submit a heightened  
16 perception on the part of the defendant and the  
17 passenger, who's the one that testified about -- or  
18 gave a statement relating to the passenger in the  
19 victim's vehicle reaching down for something,  
20 heightens their perception as to what might be on  
21 the minds of people in that car.

22 And if you have a car slowing down, pulling off  
23 to the side, then flooring it and catching back up  
24 with them, I mean it's analogous to the situation  
25 that, you know, I don't have to put my back to the

1 wall if I can't get away from it. If it increases  
2 my danger to go ahead and try to remove myself from  
3 the situation, then that requirement's not present  
4 as far as self-defense goes. And so you have  
5 actions on the part of the operator of the victim's  
6 vehicle consistent with the mindset of both the  
7 driver and passenger of Mr. Moore's vehicle that his  
8 actions in operating the car, once again, in the  
9 light most favorable to the defendant at this point  
10 in time --

11 **THE COURT:** I understand. I've got to consider  
12 everything in the light most favorable to the  
13 defendant.

14 **MR. STRICKLER:** His actions in the operation of  
15 the motor vehicle would make useless any other  
16 action on their part other than acting in  
17 self-defense and that's certainly a view of the  
18 evidence -- a view of the facts as supported by the  
19 evidence -- view of the law as supported by the  
20 evidence, pardon me.

21 **MR. MEADORS:** Judge, Mr. Strickler a moment ago  
22 said that was testimony of the driver. My  
23 remembering, Mr. Derrick said he just kind of went  
24 off the side of the roadway. It was Mr. Kerwyn  
25 Phillips who said they may have gone off for an

1 extended period of time. Judge, I --

2 **THE COURT:** It was a statement, I remember -- I  
3 remember it being elicited, I think, through  
4 Mr. Barnes' testimony that the vehicle pulled off to  
5 the side of the road out there on the interstate and  
6 the truck continued going. And believe me, this is  
7 a very, very, very tragic situation no matter which  
8 side of the room you're on and nothing I'm saying is  
9 trying to be taken to make light of anything that  
10 happened that night.

11 **MR. MEADORS:** We all understand that, Your  
12 Honor.

13 **THE COURT:** What I'm saying that if you've got  
14 vehicles traveling at -- and I don't get to decide  
15 the evidence, I don't get to weigh the evidence, I  
16 don't get to decide what's believable or not, but  
17 I've been up and down that interstate a bunch in my  
18 lifetime and if one vehicle pulls off to the side of  
19 the road and the other one keeps going at interstate  
20 speeds between Broad River Road and -- giving every  
21 benefit of the doubt, I guess you're talking maybe  
22 four minutes to travel that distance. I thought he  
23 said he pulled over out there near where Blanchard  
24 Machinery is or wherever that space, that -- the  
25 landscaped area out there on the interstate,



1           whatever it is.

2           **MR. MEADORS:** Judge, my memory of Mr. Derrick's  
3 testimony was that the shots were fired around the  
4 golf course area of Broad River. It was after that,  
5 he pulled off to the right and kept going. His  
6 testimony was he didn't stop, that I remember.  
7 That's when he went over across the lanes to try to  
8 get the tag of the vehicle.

9           **THE COURT:** I know he said he didn't stop.

10          **MR. MEADORS:** And I understand the other  
11 evidence. And I was at the oral argument of  
12 Childers when there was a colloquy back between  
13 Justice Pleicones and Her Honor, Chief Justice,  
14 about something similar to this issue we're talking  
15 about right now quite frankly. And, I guess, the  
16 issue after that is after the swerve, is  
17 Mr. Derrick's testimony, a swerve back and I don't  
18 -- a swerve, anybody can swerve on the interstate on  
19 somebody inadvertently or whatever at that point. I  
20 don't know what swerve they're -- Mr. Derrick's  
21 testimony was he came back after the shots were  
22 fired.

23          Mr. Phillips' testimony, that I remember, that  
24 it was initiated by the defendant who was flicking  
25 their lights at him, came up beside them and that's

1       when they thought there was a gesture. Arguably, it  
2       could be the cigarette being flipped, I don't know.  
3       But it's at that point afterwards that the  
4       confrontation happened and he puts it in a little  
5       different place, I think Mr. Phillips does, but  
6       clearly puts it in that I-20 area, Judge.

7               I'm going to -- first, voluntary, whether  
8       there's a sufficient adequate legal provocation, I'd  
9       like to -- and the self-defense, I quite frankly  
10      didn't even know we'd be discussing that. I would  
11      like some time to do some research on that. And I'm  
12      going to ask Your Honor to consider hand of one,  
13      hand of all and State v. Mouzon. If they're going  
14      to argue it's the passenger, there are some other  
15      issues there. And shooting into a car recklessly  
16      going down the highway, I think Mouzon could apply,  
17      Judge, as another way to show malice.

18             **THE COURT:** Bring the jury back in, we're going  
19      to talk about law all afternoon. Bring the jury in.

20                     (The jury returns to the courtroom.)

21             **THE COURT:** Ladies and gentlemen, I told you  
22      before we took that little break there, that my  
23      preference was to continue going today and try to  
24      get the case to you this afternoon. That's  
25      unrealistic. So I don't get what I want a lot of

1 times and I don't know if what you want coincides  
2 with what I was trying to accomplish there, but I  
3 could leave you sitting back there in that room and  
4 maybe around four o'clock, we could start this. And  
5 the Chief Justice has given us instructions not to  
6 do that and I'm not -- I mean, she gave us some  
7 discretion, but there is no reason to tell you to be  
8 back here around four o'clock and then start  
9 arguments and charge then.

10 So we're going to stay here and we're going to  
11 work and I expect we're going to be here most of the  
12 afternoon. Then I'll put on paper what it is that I  
13 intend to tell you and I'll give that to the  
14 attorneys and we can talk about all those things  
15 that normally you would have to wait on us to do  
16 anyway in most trials. And, hopefully, we'll get  
17 all of that out of the way so that when you come  
18 back in the morning, you're going to hear the  
19 lawyers argue and then you're going to hear me tell  
20 you the law and you'll get the case some time late  
21 tomorrow morning.

22 So it's really important you not be exposed to  
23 any media coverage and you not let anybody talk to  
24 you in any way about this case. And remember all of  
25 those admonitions. I need you back here in the jury

1 room in the morning at 9:30. Thank you. Don't  
2 discuss the case.

3 (The jury was excused for the day.)

4 **THE COURT:** All right. I, for the first time,  
5 have had the benefit of having real time. And I  
6 will say that I've heard judges talk about it for a  
7 long while since it started coming into practice and  
8 I never really thought much of it, but it has been a  
9 real aid.

10 But since it's brand new to me and I didn't  
11 really know that I was going to have it set up, I  
12 haven't been able to go back and look at the  
13 previous days. I can look at part of them, but I'm  
14 apparently not saving the files right. So I may  
15 need to get the court reporter to help me with that  
16 or look at the law clerk's computer because the law  
17 clerk said she can go back and see previous days.

18 What I recall Mr. Kerwyn Phillips saying, and I  
19 did take old-fashioned notes, what I recall him  
20 saying was that the driver of the car swerved over  
21 and basically was forcing the truck off the road.  
22 Am I in error in that?

23 **MR. COLLINS:** Your Honor, I remember him  
24 testifying -- his testimony that, yes, the car  
25 swerved at them before any shots were fired and then

1       also the driver was reaching underneath the seat, or  
2       somebody inside the car was reaching underneath the  
3       seat for something. And, also, the truck had to  
4       swerve over to the left side near the concrete  
5       median.

6               **THE COURT:** You know, when I'm saying off the  
7       road, that's really not -- that's not really what  
8       I'm meaning. I'm meaning swerving to avoid a  
9       collision.

10              **MR. MEADORS:** Judge, that's what I need to go  
11       back in my mind, if I'm wrong, I'm not trying to be  
12       because it is what it is, you'll read it, I thought  
13       that there was testimony they went back and there  
14       was kind of like a back and forth like that before a  
15       swerve, that's what I can't remember in my mind.  
16       That there were lights flicked, came up beside them,  
17       they thought there might have been a gesture and  
18       then that's where they were, you know, kind of going  
19       back up in front. And I thought that was before the  
20       swerve, I may be wrong.

21                       (Pause.)

22              **MR. MEADORS:** Clearly, I remember Mr. Phillips  
23       said he thought the passenger went down and didn't  
24       say he saw -- specifically said he didn't see  
25       anything, see that person with anything. And if my

1       memory's correct, on the tape then, just thinking of  
2       all the evidence that's come in this morning, on the  
3       Alvin S. Glenn tape, that the defendant tells Ms.  
4       Nix, I believe, sees him reach under the seat at  
5       that point.

6               I'm just struggling with -- I've been on that  
7       road 46 years, you know, the issue is, I see people  
8       doing it all the time in different cars, just as to  
9       voluntary manslaughter, sufficient legal  
10       provocation, I just want to get to some case law  
11       that I have in my file in my office and maybe if  
12       we're going to break for lunch, I just want the  
13       opportunity to be heard on that on all of these  
14       issues and also self-defense.

15              And I apologize. I did not know that would be  
16       an issue today, I should have and I apologize, as  
17       far as self-defense.

18              **THE COURT:** Well, obviously, the reason I sent  
19       the jury home is so we can talk about all of this,  
20       so I'm certainly going to hear from you. But before  
21       I break for lunch and start thinking about these  
22       things, I want to make sure that I've got in my mind  
23       a version of the evidence in the light most  
24       favorable to the defendant, which is what I have to  
25       have.

1           And, you know, the mere fact that one witness  
2           said one thing and one said another, I don't get to  
3           pick and choose between that, that's a jury's job.  
4           I've got to take the parts from one witness that are  
5           the most beneficial to the defendant and put them  
6           together with the portions from the other witnesses  
7           that are most beneficial to the defendant.

8           I mean, because obviously you talked about the  
9           Childers case, Justice Toal started focusing in on  
10          self-defense and I guess that colloquy that you were  
11          talking about that occurred during the arguments of  
12          the Supreme Court was when -- was something that  
13          occurred when they were wrestling with the same  
14          sorts of concepts. You've got an assertion, I  
15          didn't do the shooting, the other guy did the  
16          shooting. You've got an assertion when they're  
17          asking for a self-defense charge, well if you  
18          believed I did the shooting or I'm somehow  
19          responsible for the shooting, then it's excused  
20          because it's self-defense which means it's not an  
21          unlawful act, which is what Justice Toal was  
22          focusing on.

23               **MR. MEADORS:** Exactly.

24               **THE COURT:** And then you've got this issue  
25          about transferred intent, which if you now have

1 evidence that the passenger was the one who was  
2 reaching under the seat and that that somehow gives  
3 rise to the creation of malice, well then that seems  
4 to take away the transferred intent issue because  
5 she's the one they say was reaching for something  
6 under the seat, which I didn't understand until  
7 today. I never thought there was any assertion that  
8 she was reaching under the seat. I guess I just  
9 missed that.

10 **MR. MEADORS:** I wouldn't say it's the seat from  
11 her. I thought the testimony just saw her reaching  
12 down. I think the seat came in today through this  
13 defendant.

14 **THE COURT:** And I agree with you. I guess I'm  
15 going to have to decide as some sort of blended  
16 issue of fact and law as to whether somebody  
17 reaching down in a car can possibly give rise to the  
18 things that they're asking me to give the jury the  
19 option to decide, which got to my point about if I'm  
20 riding down the road and some car is beside me, you  
21 know, some of my cars have judge's tags and when I  
22 see people pull up beside me, sometimes I kind of  
23 slow down and tap the brakes because if they just  
24 sit there, I don't know who those folks are and what  
25 they think of me and whether they're going to decide



1 to do something crazy.

2 So I can tell you from real experience that if  
3 a car comes up beside me and there's some sort of  
4 threatening gesture going on or something I  
5 interpret that way, there's a brake pedal in my cars  
6 that slows it down and there's an accelerator that  
7 speeds it up. And so Mr. Strickler's argument about  
8 the area of the law that you don't have to let  
9 somebody basically get the -- what's the term?

10 **MR. STRICKLER:** Get the drop on you.

11 **THE COURT:** Get the drop on you, I don't watch  
12 enough Westerns I don't guess, he's right, there's  
13 plenty of law on that. You don't have to stand  
14 there and wait for somebody to pull a gun out and  
15 point it at you, but making a leap that just because  
16 the passenger in the other side is reaching down and  
17 there's combined, in the light most favorable to the  
18 defendant, that there's obscene gestures going on  
19 that that somehow justifies a self-defense charge,  
20 I'm straining with that because there's -- the  
21 element of self-defense is that you have no other  
22 probable means to avoid the harm. And as I've said  
23 very verbosely, every truck I've ever been in has  
24 been equipped with an accelerator and a brake.

25 Now, as to whether it makes any sense at all

1       that instead of hitting the accelerator or the  
2       brake, and I know they said there was a chase that  
3       ensued, I'm not minimizing that, that somehow you  
4       can pull out a gun, aim it and fire it, that's a  
5       jury issue, that isn't really something I get to  
6       decide. Does it make any sense at all that instead  
7       of trying to do the other evasive things, you pull a  
8       gun out and you start shooting into another vehicle?  
9       Maybe the jury will wrestle with that. It matters  
10      not whether I would wrestle with it.

11             All right. Just before we break, because my  
12      head's starting to spin a little bit, the State was  
13      saying they wanted the hand of one is the hand of  
14      all.

15             **MR. MEADORS:** Last night, late, I started  
16      thinking about their arguments, my arguments, and  
17      that popped in my head, so, yes, sir, I'd like to  
18      think about that.

19             **THE COURT:** Was the defense asking for that,  
20      too? My law clerk came back and said something  
21      about they were asking for it and I didn't know who  
22      they was.

23             **MR. COLLINS:** I was just foreseeing the issue  
24      coming down, but we would not -- we would be opposed  
25      to a hand of one hand of all jury instruction in

1       this case.

2               **THE COURT:** Y'all be back here at 1:30.

3               **MR. STRICKLER:** Can I ask just one thing, Your  
4 Honor? I mean, I just ask that if the Court would  
5 inquire, I have written down hand of one hand of  
6 all, Mouzon. I mean, I've indicated to the Court  
7 the issues that I think from the defense side. I'd  
8 just ask if there are any other issues that the  
9 State thinks would be raised when we get back so  
10 that I have an opportunity to take a look at them  
11 also because I -- that's everything that I can think  
12 of, those two issues. And we may have to deal with  
13 transferred intent issues and I've been looking at  
14 that. You talked about that yesterday.

15              **MR. MEADORS:** I couldn't handle anymore.  
16 That's all.

17              **MR. STRICKLER:** I just want to make sure.

18              **THE COURT:** I can tell y'all what I've already  
19 got in this very, very, very rough draft. Other  
20 than the boiler plate, I've got an expert witness  
21 charge tells them they don't have to accept the  
22 opinions of an expert witness. I've got the charge  
23 about the failure of the defendant to testify which  
24 I've already given, but I'll repeat during the  
25 charge, the presumption of innocence and then I

1        don't use the language about reasonable person,  
2        hesitate to act. I don't stop the lawyers from  
3        arguing it. It's still the law. I don't understand  
4        it.

5                So what I use is the most recent thing which  
6        our Supreme Court adapted from the U.S. Supreme  
7        Court about being firmly convinced of the  
8        defendant's guilt. I do add some language which I  
9        did before that says that the defendant doesn't have  
10       to raise any doubt or any other possibility, it's  
11       the burden of the State to prove that he is guilty  
12       to the exclusion of any other reasonable hypothesis  
13       or any other reasonable -- any other possibility,  
14       not reasonable, any other possibility.

15               I've got a circumstantial evidence charge.  
16       I've got a charge about the statement and I've got  
17       some distinguishing language in there trying to make  
18       sure the jury knows that when I'm talking about all  
19       of these factors they have to consider aside from  
20       whether the defendant in fact made a statement,  
21       there's a different inquiry that goes on when you're  
22       talking about the statement made to the law  
23       enforcement officer versus statements made to other  
24       people not in response to police questions. But I  
25       go through all of the Miranda stuff and that it has

1 to be a knowing and intelligent waiver and can't be  
2 induced by promises and threats and whatnot.

3 Then I go through the indictments. I've got a  
4 murder charge and malice. And then the one thing  
5 that I expect that we may have some discussion  
6 about, and honestly I pulled this charge up from one  
7 I had given in another case and I haven't modified  
8 any of this at all so far about the inference of  
9 malice, but I've got some language in here from that  
10 other case that talks about if the conduct of the  
11 defendant results directly in the death of another  
12 and it was so culpable and inexcusable, so  
13 aggravated and grossly reckless as to show an  
14 active, intentional disregard of the consequences to  
15 human life thus devoting -- thus denoting a  
16 malignant spirit, a heart devoid of social duty and  
17 fatally bent on mischief, an inference of malice may  
18 arise.

19 But to infer malice requires more than  
20 carelessness, more than recklessness, more than a  
21 passive indifference to the safety of others, there  
22 has to be a deliberate and intentional design to use  
23 or employ or handle a deadly weapon so as to  
24 endanger the life of another without just cause or  
25 excuse. You may infer malice if you determine that

1 the alleged conduct on the part of the defendant in  
2 using a deadly weapon demonstrated such an  
3 intentional disregard for human life.

4 But I do explain to them about malice being an  
5 essential element of murder, it has to be proven  
6 beyond a reasonable doubt and that this is just an  
7 evidentiary inference.

8 I've got self-defense in this thing, but I  
9 don't know if I'm going to charge it. And I've got  
10 voluntary manslaughter in here just in case I charge  
11 it. Matter of fact, I've got two voluntary  
12 manslaughters.

13 **MR. STRICKLER:** Yes, sir.

14 **THE COURT:** I've got that the defendant may act  
15 on appearances if it's a self-defense situation so  
16 that he doesn't actually have to have been in  
17 danger. It's what a reasonable person would have  
18 believed under the circumstances.

19 The charge is 23 pages long. And I haven't  
20 added the part about possession of a firearm by  
21 someone under 21 -- possession of a pistol by a  
22 person under 21.

23 I don't think you're going to get hit with a  
24 bunch of surprises, Mr. Strickler, but if you do and  
25 you need some time, you tell me and I'll let you run

1 to your office.

2 **MR. STRICKLER:** I will, sir, that sounds all  
3 very much what I expected. I was mostly concerned  
4 that I be able to address whatever he brought up.  
5 The only other thing, Judge, is the getting the drop  
6 language, of course, that's from a South Carolina  
7 case from the 1880's, which was close to the Wild  
8 West, I'm sure, but it's not my idea of Wild West.

9 **THE COURT:** Well, there's bullet holes in the  
10 courthouse over in Edgefield, they can get the drop  
11 on some people over there.

12 **MR. STRICKLER:** Did you say 1:30, sir?

13 **THE COURT:** I said 1:30. We'll shoot for that,  
14 okay. Court's in recess till 1:30.

15 (Whereupon, there was a luncheon recess.)

16 **THE COURT:** I had an opportunity during the  
17 break to go back and look at the testimony. One of  
18 the critical factors in my mind was the relationship  
19 between this assertion that the car was giving chase  
20 to the truck, the relationship between when the  
21 chase is said to have begun and when the shots were  
22 first fired. And the testimony in the light most  
23 favorable to the defendant, I think, on that issue  
24 comes from Kerwyn Phillips.

25 And Mr. Phillips stated basically that there

1        was this exchange where the car was in front, the  
2        truck came up behind it, the defendant flashed his  
3        lights at the car. Mr. Phillips said that he  
4        believed that made the occupants of the car mad,  
5        that there was an obscene gesture made and that,  
6        again all of this is according to Mr. Phillips'  
7        version, that the defendant pulled up beside the  
8        car, made faces at them, made a responsive gesture  
9        apparently and drove off.

10        According to Mr. Phillips' version of the  
11        facts, after the truck got ahead of the car, the car  
12        pulled over to the side of the road and then came  
13        back after the truck in a fast manner. Mr. Phillips  
14        said that the car pulled over to the side of the  
15        road near the golf course and he said right after  
16        you pass Broad River Road a little bit. Mr.  
17        Phillips said that he thought it was the police  
18        coming after the truck, but it wasn't the police.  
19        Then he said that the car caught up to the truck,  
20        pulled up beside it and that's when Mr. Phillips  
21        claims that the car pulled over toward the truck,  
22        swerved towards the truck and the defendant swerved,  
23        almost hit the wall.

24        And then Mr. Phillips said he ducked. And I  
25        believe in that context, he's talking about the



1       defendant ducked down and then he said -- even  
2       though I didn't realize it when he was testifying, I  
3       thought he was talking about the driver of the car  
4       the whole time, he said that he saw the man put his  
5       hand under his seat like he was digging for  
6       something. He never saw anything, but then he said  
7       when John came back up, which is why I think he must  
8       have been referring to the defendant ducking down,  
9       he said that he dug from under the seat and told me  
10      to lean back and that John had rolled down the  
11      window by using the power windows for the driver's  
12      -- excuse me -- rolled down the passenger side  
13      window and shot into the car.

14             Then he said he set the gun down between the  
15      two of them and he tried to leave, but the car  
16      slowed a little bit and then picked back up running  
17      after the truck. He said the defendant was trying  
18      to outrun the car, the car was running pretty  
19      strong, too.

20             He said there was a sliding window in the back  
21      of the truck that was broken, all you have to do is  
22      pull it open and he said the defendant stuck the gun  
23      out the back window and shot at the car, it slowed  
24      down at the time. He believes the gun was empty.  
25      And then he tried to outrun the car and he took the

1       Fairfield Road exit almost lost control -- well, Mr.  
2       Phillips thought that he was going to lose control  
3       of the truck and the car was right behind them.  
4       They made a turn, ran through the light and the car  
5       also ran through the light and that's when they went  
6       down the dirt road shortly after that.

7               I also reviewed the cross-examination questions  
8       that were presented to Mr. Barnes about what Mr.  
9       Phillips told Mr. Barnes, but I don't think they're  
10      anymore favorable to the defendant than the  
11      testimony of Mr. Phillips.

12             So it appears in the light most favorable to  
13      the defendant, that the situation was one in which  
14      there was some dirty looks and gestures made, the  
15      truck went on ahead. The shots did not begin until  
16      the car had given chase, had pulled off to the side  
17      of the road and then came back after them and that  
18      the occupants of the truck believed, again in the  
19      light most favorable to the defendant, that someone  
20      had reached underneath the seat of the car or was  
21      reaching down in the car to get something which  
22      presumably could have been a weapon, though nobody  
23      ever saw a weapon.

24             All right. What do y'all need to talk to me  
25      about?

1           **MR. MEADORS:** I think I remember it as Your  
2 Honor did that thought he was referring to the  
3 defendant about going under the seat and all of  
4 those references, but just rereading what we think  
5 we wrote, obviously...

6           **THE COURT:** I mean, what I've got is not the  
7 transcript. I realize that. It's rough notes.

8           **MR. MEADORS:** No, I'm saying what you have is  
9 correct. No question about it. I wasn't  
10 questioning you.

11          **THE COURT:** When I heard it, I didn't take it  
12 that he was -- well, I don't know.

13          **MR. MEADORS:** Judge, I guess I start with this,  
14 then I would like to sit down and listen I guess,  
15 but I start with this premise that I don't know what  
16 Your Honor's still thinking about based on that, if  
17 their whole defense is that he's not the shooter,  
18 which has been the defense, and I start off with  
19 that simple statement, then under that, if that is  
20 their defense, I don't see how they're entitled to  
21 voluntary manslaughter, much less self-defense, if  
22 they're saying I'm not the shooter.

23          **THE COURT:** Well, that part I understand, but  
24 he didn't take the stand.

25               What else you got, Mr. Strickler?

1           **MR. STRICKLER:** I was just going to respond  
2           that we're not restricted. I mean, if we do that,  
3           we get accused of scattershooting things and the  
4           State can go ahead and do with that what they will,  
5           but we're certainly not restricted to one defense in  
6           the case.

7           **MR. MEADORS:** And I wasn't trying to -- but I'm  
8           -- questions and in opening statements, the  
9           statement was made the real shooter is coming in  
10          here, but that's all I'm saying, you can't have your  
11          cake and eat it, too. Although, I know he didn't  
12          take the stand.

13          I will still take the position that there was  
14          not sufficient -- our position, respectfully, for  
15          the record, is not sufficient legal provocation.  
16          Even under Mr. Kerwyn Phillips best -- most  
17          favorable to the defendant, coming down the road  
18          upon a vehicle, they swerve, is that sufficient  
19          legal provocation? And then the bending down, John  
20          ducked down and then saw the man dig under his seat  
21          and then John went under his seat. That would be  
22          our argument as far as there is not sufficient legal  
23          provocation.

24          I think you're riding down a highway and  
25          anybody can swerve, you can see somebody going down

1 the street, I just don't, you know, people come up  
2 firing guns on the highway, I just think that's a  
3 dangerous concept. So we'd object to voluntary  
4 manslaughter. And then as far as -- well, I'd like  
5 to take them one by one. That's all I would have as  
6 to that.

7 **THE COURT:** Why do -- does the defense think  
8 they're entitled to voluntary manslaughter?

9 **MR. STRICKLER:** Yes, sir. The issue becomes a  
10 question of fact for the jury. The facts before  
11 this court such as they are are capable of being  
12 construed in a number of ways, what does or does not  
13 constitute sufficient legal provocation. And what  
14 you have to have is, as far as voluntary goes, you  
15 know, sudden heat and passion, sufficient legal  
16 provocation.

17 Would someone swerving at you be an action  
18 such -- a swerving action so you swerve into, almost  
19 run into the center concrete wall be an action such  
20 as would inspire fear in you so that you'd act in  
21 self-defense? Well, that's certainly a construction  
22 that is reasonable in my mind. Would it also be  
23 possible that it's an action such that it would  
24 inspire anger in you, sudden heat and passion? That  
25 too is a reaction that is reasonable to draw from

1 the evidence in my mind.

2 I mean, were I to have to take a -- you'd have  
3 to be there I guess. I know my adrenaline would be  
4 up in that situation, whether I'd be reacting out of  
5 fear or anger is open, you know, I don't have a gun,  
6 but that would be open to question. But the  
7 question as to the mental state, and that's what  
8 you're getting to is the mental state of the person  
9 that does the shooting, that's a question for the 12  
10 people over there in that box to resolve. So I  
11 think we're definitely entitled to voluntary in that  
12 regard.

13 And just in response to Mr. Meadors, swerving  
14 towards you is not sufficient legal provocation.  
15 Swerving towards you to the point that you have to  
16 swerve away and almost make contact with the center  
17 concrete retaining wall could cause an accident  
18 resulting in your death I would say would be  
19 sufficient legal provocation that would, while not  
20 dethroning the reason entirely, cause a person of  
21 normal prudence and courage to react in a fashion  
22 such as this. And I think that's what the law  
23 requires as far as sufficient legal provocation.

24 **MR. MEADORS:** Just to briefly follow up to  
25 that, respectfully, I guess any -- if you swerve and

1       it was an accident and somebody got in a wreck, that  
2       doesn't give them sufficient legal provocation to  
3       pull out a gun and start shooting.

4               **MR. STRICKLER:** Then there would have been a  
5       cooling period. We'd probably have to talk about  
6       that, but that's not the issue here.

7               **THE COURT:** All right. Y'all bear with me and  
8       I'll give you an answer in a minute.

9               (Pause.)

10              **MR. MEADORS:** Judge, something that just popped  
11       in my mind, those statements that you read were from  
12       Kerwyn Phillips saying he saw the man, I believe,  
13       reach, which couldn't, I don't think, be imputed to  
14       the defendant. And the defendant's statements were,  
15       if I remember correctly, that they was pump faking  
16       on the tape to -- he was pump faking me. And in the  
17       tape to Delia was, I don't have those words right in  
18       front of me, to Ms. Nix that may be where he said he  
19       reached down.

20              But as far as Kerwyn's statements, I don't  
21       think those -- Kerwyn's observation that the man  
22       went down can necessarily be a reason for a  
23       sufficient legal provocation for the defendant's  
24       action, Kerwyn's words, I guess, Kerwyn's  
25       observations.

1           **THE COURT:** If the only evidence were -- first  
2 of all, I don't get to disregard the testimony of  
3 some witness that favors the defendant because some  
4 other witness said something that would refute that.

5           **MR. MEADORS:** I understand that, yes, sir.

6           **THE COURT:** Well, I don't understand the  
7 argument.

8           **MR. MEADORS:** I'm saying Kerwyn's observations  
9 wouldn't give the defendant sufficient legal  
10 provocation.

11           **THE COURT:** Kerwyn is describing what happened.

12           **MR. MEADORS:** Kerwyn is describing what he saw  
13 down there, but that doesn't mean the defendant saw  
14 that, the man reaching down there, Kerwyn's words,  
15 is all I'm trying to say.

16           **THE COURT:** You lost me.

17           **MR. MEADORS:** Okay. Kerwyn's saying he sees...

18                   (Pause.)

19           **THE COURT:** Y'all aren't going to win this  
20 argument. I'll be glad to let you put it on the  
21 record, but --

22           **MR. MEADORS:** I was arguing with co-counsel  
23 there, I'm sorry. But Kerwyn can't say what he sees  
24 the driver see. Kerwyn's saying what he saw was my  
25 point, I guess.



1 (Pause.)

2 **THE COURT:** The evidence in the light most  
3 favorable to the defendant is, as I recited earlier,  
4 that the defendant was being chased by a car, the  
5 driver of which had already attempted to cause  
6 contact at a relatively high rate of speed,  
7 interstate speeds were testified to in other  
8 testimony, that the car that was giving chase had  
9 pulled over to the side of the road and then the  
10 chase ensued. It was somewhere between midnight and  
11 3:00 a.m., I think the testimony went through that  
12 whole range of times. And that the car pulled up  
13 beside the truck, there was some motion made which  
14 was interpreted as being like going for a weapon, no  
15 weapon was ever seen. I concede that no weapon was  
16 ever seen in the car.

17 Though, I honestly didn't think when I was  
18 coming over here this morning, that voluntary  
19 manslaughter would be charged, I don't see where I  
20 have any option but to charge it.

21 Now, do y'all want to talk about self-defense?

22 **MR. MEADORS:** I request that it not be charged.

23 **MR. STRICKLER:** Your Honor, I think as to  
24 self-defense, I believe I expressed myself prior to  
25 the break we took regarding self-defense. I don't

1       really think I can add anything more to that as to  
2       whether or not the elements of it have been met.

3               And I guess the only thing I would add is just  
4       what I said in addressing the Court just a few  
5       minutes ago, and I almost have to think of it this  
6       way myself because the concepts of voluntary and  
7       self-defense are, to me, from a mental state,  
8       closely intertwined, and to me, it's a question of  
9       anger on one part and fear on the other part. I  
10      know that's a very simplistic way of viewing it, but  
11      that's just how I look at it for my sake.

12             And as I said earlier, I submit that issue is  
13      one the jury would have to resolve. I submit the  
14      other elements are met and that it's an appropriate  
15      charge under the law. There -- certainly, there's  
16      some cases that in my review of the cases early this  
17      morning, in which the court has found and has been  
18      upheld that know it's appropriate to charge  
19      voluntary but not self-defense. There are numbers  
20      of cases in which it's been found to be appropriate  
21      under the facts of that particular case to charge  
22      both and I think largely for just the reason that I  
23      mentioned to the Court. So I submit it should be  
24      charged.

25             **THE COURT:** The charge that I pulled up -- when

1 I prepare charges, usually I just go to one I've  
2 done before, I pull it up and then I cut and paste  
3 and delete. The one that I pulled up had murder,  
4 voluntary manslaughter and self-defense in it.

5 The difficult -- the problem that appears to  
6 the Court to be the major problem at this point is  
7 the issue about being without fault in bringing on  
8 the difficulty, even though I talked before lunch  
9 more about not having any other probable means of  
10 avoiding --

11 **MR. STRICKLER:** Yes, sir. As I listened to  
12 Your Honor review the testimony, come up behind the  
13 car, flick the lights at the car, which -- if I  
14 remembered what you read correctly, and at that  
15 point in time, I guess the responses that began,  
16 according to Mr. Phillips, the gesture or whatever.  
17 So as I look to the very beginning of the  
18 difficulty, it would be flashing your lights in the  
19 rearview mirror of the car ahead of you.

20 Now, I don't know whether that's -- I just  
21 submit that that's not actions sufficient to  
22 constitute bringing on any difficulties. Some  
23 people flash lights in the rearview mirror to  
24 indicate they want to pass someone.

25 **THE COURT:** The flashing the lights is not the

1       only determining factor. This whole evaluation is  
2       based on a combination of things on both sides when  
3       I'm looking at it from either side.

4               What I recall in the light most favorable to  
5       the defendant was the defendant flashed the lights  
6       which angered the people in the car, that some  
7       obscene gestures were made, that the defendant  
8       pulled up beside -- or the two vehicles were side by  
9       side, that Mr. Phillips testified that the defendant  
10      made faces at the people in the car and there were  
11      some obscene gestures made from the truck to the car  
12      and then the truck went on.

13             Now, a question whether that was a withdrawal  
14      of whatever confrontation there was at that point  
15      might be in play if that is considered to being at  
16      fault in bringing on the difficulties because if the  
17      truck then went on and didn't do anything else to  
18      perpetuate that difficulty, then one might determine  
19      that the defendant had withdrawn from the situation  
20      and that, not by words but by conduct, had clearly  
21      communicated to his adversary that that matter was  
22      over. He's gone on ahead.

23             **MR. STRICKLER:** The question is whether it's a  
24      series of events or one single stream of events, I  
25      guess, I mean, whether there's a break in the

1       conduct.

2               **THE COURT:** All right. What does the State  
3       want to say about self-defense?

4               **MR. MEADORS:** If Your Honor's already made his  
5       mind up, we're fine with --

6               **THE COURT:** No, I haven't. If I made my mind  
7       up, I would tell y'all what I was going to do and  
8       why I was doing it.

9               **MR. MEADORS:** I think without fault, I -- in  
10       the light most favorable to them, to the defense,  
11       the lights, they pulled up besides, I think there's  
12       testimony from Kerwyn Phillips there might have been  
13       a gesture coming back their way, but then the  
14       defendant makes another gesture, smiles at them,  
15       then he goes on. At that point, Mr. Phillips does  
16       say they go off to the side of the road, I don't  
17       know how long under his scenario they went off, I  
18       guess that can be argued any way, and then it comes  
19       back on.

20               I would say that there isn't a significant  
21       enough break for a withdrawal. I don't think they  
22       would get past the first step, come in with clean  
23       hands basically. And we'd ask first and foremost  
24       why that shouldn't -- that self-defense shouldn't be  
25       charged.

1           If we get past that, again it's like Mr.  
2       Strickler put it in kind of simplistic terms, to  
3       believe his life was in danger or was it actually in  
4       danger, I'd say no. Would a reasonable person  
5       believe that he was in danger of suffering serious  
6       bodily injury or death under the facts of this in  
7       the light most favorable to them, I don't think so.  
8       So if you got to the second or third prong, I don't  
9       think there's evidence in the record to justify the  
10      self-defense on those two, but I don't think we get  
11      past step one in my opinion.

12                   (Pause.)

13           **MR. MEADORS:** And I guess, and, Ms. Weiss, I  
14      want to thank you for that, that we are talking  
15      about just a few miles stretch, I mean, if you're  
16      practically looking into it. So, I mean, the time  
17      period with cars moving, the testimony of so many  
18      miles per hour, there's only so much time it would  
19      have taken to do that practically and factually, so  
20      that would, I think, hopefully strengthen our  
21      argument that there was not enough time to -- for a  
22      withdrawal.

23           **THE COURT:** I mean, again, if you believe the  
24      testimony of the victim...

25           **MR. MEADORS:** Shots had already been fired.

1           **THE COURT:** Sure.

2           **MR. MEADORS:** Yes, sir, I'm with you. I  
3 understand.

4           **THE COURT:** And if the shots were fired, that's  
5 why I said at the very beginning when I sat down,  
6 the critical issue is whether there's any evidence  
7 related to the sequence of shots being fired in  
8 relationship to the other things that were going on.  
9 And if shots were fired and then the chase ensued,  
10 there's no way you can claim that you were not at  
11 fault in bringing on the difficulty. But when I  
12 went back and read the real time notes, that's not  
13 what Phillips said happened. He said the shots  
14 didn't start until later.

15          **MR. MEADORS:** I agree.

16          **THE COURT:** And so that puts me in the  
17 situation -- again, I'm not -- I have no idea what  
18 the jury is going to decide the facts are, but it  
19 can certainly be said that the facts were  
20 substantially different in some ways than what Mr.  
21 Phillips said and that there can be reasonable  
22 explanations as to why he could be, and I'm not  
23 saying he is or he isn't, but he could be trying to  
24 tell the truth, but in all that that was going on at  
25 that particular time, it may be a little bit here, a

1        little bit there, that's all, but I've got to take  
2        everything in the light most favorable to the  
3        defendant. And I don't think I have to go out so  
4        far on the limb that I just am on the furthest  
5        branch and there's no basis whatsoever for a jury to  
6        make the determination that I'm allowing them to  
7        make.

8                And had the defendant taken the stand and  
9        testified, then I'd be in a situation sort of like  
10       Justice Toal was where I can say, well, he, himself,  
11       didn't say it happened this way. I would have  
12       narrowed those various options. But he didn't take  
13       the stand and that's fine. And I think Mr.  
14       Strickler is right, he's entitled then to any  
15       challenge that might refute the State's version of  
16       the facts.

17               I'm not ruling right now, but I can tell you  
18       that the scenario that someone is out on the  
19       interstate in the early morning hours and a car  
20       is -- there's been some little back and forth that  
21       probably everybody in this courtroom has been  
22       involved in to some degree or another, if there's  
23       anybody in here who drives who hadn't been flipped  
24       off, I'd like to know them, but something has  
25       happened, it escalates and then all of a sudden,



1       you're on a stretch of interstate late at night and  
2       a car is chasing after you and won't stop, if that's  
3       what happened, that is a very frightening scenario.

4               Now, just opposed against that if you believe  
5       that's not at all what had happened, the thought  
6       that somebody would ride down the interstate and  
7       fire a gun into another vehicle is just completely  
8       horrifying, which is why I think this thing has  
9       probably generated so much interest in the community  
10       is because if that's what happened, that could  
11       happen to anybody. The jury doesn't have to believe  
12       that that man was driving down the road talking to  
13       his fiancée about getting married and just out of  
14       the blue this truck pulls up beside him and starts  
15       shooting into the car.

16               All right. Y'all give me a few more minutes.  
17       I'm not going to make y'all stay here all afternoon.

18               **MR. MEADORS:** Your Honor, along with that, is  
19       Your Honor still going to let us know about hand of  
20       one, hand of all?

21               **THE COURT:** Yeah, we're going to go through  
22       every issue hopefully. We're at ease for a few  
23       minutes.

24               (Brief recess.)

25               **THE COURT:** We've been back there reading, and

1 I just have to tell you I've gone back and forth and  
2 back and forth. And so I've had somewhat of a  
3 change of game plan so that you all won't have to  
4 just sit here and wait on me. I know you've got  
5 other things to do.

6 I'm going to tell you what I'm inclined to do  
7 at this moment, and realize that I might talk myself  
8 out of it, but the plan is, as far as logistics,  
9 that I'm just going to leave here, I'm going to go  
10 to my office in Edgefield and I'm going to finish  
11 doing the charge and I'm going to e-mail it to you.  
12 So I need an e-mail address where you will get it  
13 and, hopefully, you'll check it tonight. If you're  
14 an early riser, that's a different thing. And then  
15 I'm going to ask you all to be back here in the  
16 morning at 8:45 so that you can put any objections  
17 on the record and talk about anything you want to.  
18 And realize that I might change my mind overnight  
19 and I might change my mind after you talk to me, so  
20 I'm going to probably err on the side of putting the  
21 stuff in there.

22 I've really been wrestling with this  
23 self-defense issue. Right now, what I think I have  
24 to do, based on my reading of the law, is that I  
25 have to charge self-defense and I have to charge

1       voluntary manslaughter. I'm not charging  
2       involuntary manslaughter.

3               I think I have to charge accomplice liability  
4       because there was a scenario, if you believe  
5       Mr. Derrick's version of the facts, whereby even if  
6       the jury believed that the passenger was the  
7       shooter, there had to be some -- or there could be a  
8       finding beyond a reasonable doubt there was some  
9       cooperation between the driver of the truck and the  
10      shooter to accomplish the killing. So I think that  
11      the State's going to be entitled to that charge.

12             I think if I do go forward with my present  
13      thinking of self-defense, it's really only based on  
14      the portion of the law that deals with withdrawal  
15      because I think that if you consider it as one  
16      continuing course of events, I'm hard pressed to  
17      charge self-defense. If you consider it as though  
18      there's a possibility for a jury to determine that  
19      there was a withdrawal, in other words, that there  
20      was this initial thing that went on between the two  
21      vehicles, the people in the two vehicles, and then  
22      the truck went on down the road on its merry way,  
23      the car pulled off to the side, knew the truck was  
24      continuing on away from them and then gave chase,  
25      then I think that you could have a withdrawal

1 situation that would break that link between  
2 bringing on the difficulty.

3 I've still got some problems with other  
4 elements of self-defense, too, but I think I've  
5 aired those, particularly the last one about there  
6 being no other probable means of avoiding the danger  
7 of serious bodily injury or death except to act as  
8 the defendant allegedly did. I really struggled  
9 with that one before lunch, but right before we  
10 broke this last time, I think I explained to you all  
11 that if you're on an interstate late at night and  
12 you take one version of these facts, that can be an  
13 extremely frightening and threatening course of  
14 events for someone if it is a self-defense  
15 situation.

16 Now, I still am really struggling to see why  
17 you can't just keep driving away until you know  
18 there's a gun or something like that. And, again,  
19 this gets into facts and I probably ought not even  
20 say it, the fact that the chase continued on so long  
21 is one of the real reasons I think I have to give  
22 the jury some ability to go down that road of  
23 exploring whether the defendants were -- the  
24 defendant was actually being chased for a different  
25 reason than what Mr. Derrick was asserting.

1 I'm sorry I can't just give y'all the charge  
2 this afternoon. I mean, I don't have to anytime,  
3 but if y'all can give me an e-mail address that I  
4 can get it to you and you can look over it and meet  
5 me at 8:45. And the security people assured me that  
6 the defendant will be here by eight o'clock so that  
7 shouldn't be a problem. Is that a problem with  
8 anybody, 8:45?

9 MS. WEISS: I'll do my very best. I just have  
10 to do childcare issues.

11 THE COURT: Well, if I've got two lawyers, I'll  
12 be okay for that part.

13 MR. MEADORS: Thank you, Judge.

14 THE COURT: All right. Thank you very much.  
15 Court's in recess until 8:45.

16 (Whereupon, the proceedings were concluded  
17 for January 31, 2008.)

18 (The following proceedings were held on  
19 February 1, 2008.)

20 THE COURT: All right. What comments do you  
21 have about the proposed charge?

22 MR. MEADORS: First and foremost, thank you for  
23 sending this to us. I got it late last night from  
24 Ms. Joanna McDuffie.

25 I guess one of the reasons we're meeting here,

1       and for the record, we would again ask Your Honor  
2       not, I think I'm allowed to do this here, just not  
3       to charge self-defense. And just thinking about it  
4       last night and thinking about the Childers case,  
5       when Mr. Childers testified, and he testified and I  
6       think that's one of the reasons he got that charge  
7       in that case, Your Honor, he actually said the words  
8       he was in imminent danger of suffering serious  
9       bodily injury or death, actually put that in the  
10      record.

11             It was ludicrous. It didn't make any sense.  
12      The jury didn't believe it. He came stalking his  
13      ex-girlfriend in a coat and had a gun there and said  
14      he was using the gun to shoot dogs in case he got  
15      hurt going to see her, it just made no sense, he'd  
16      been sitting out there, but the fact he said the  
17      words, he got it.

18             I don't think there's any evidence in this  
19      record that this defendant was in actual or had a  
20      reasonable belief that he was in danger of suffering  
21      serious bodily injury or death. I don't think  
22      there's any. And I'd -- respectfully, I don't think  
23      we're allowed to infer, like we are inference of  
24      malice, infer imminent danger. I think there's got  
25      to be some testimony of it. In this case, I think

1           there's actually just the opposite.

2           We could argue later on his comments, I didn't  
3           care. On the tape in the end he says, I shot nine  
4           times. And he should -- at the end of the tape, He  
5           should be gone, too. No evidence at all that he was  
6           in danger. And that's, again, we'd ask Your Honor  
7           in these next 35 minutes to reconsider self-defense.  
8           I'm certainly going to argue all that if Your Honor  
9           does charge it, but that's the only other thing I  
10          need to put on the record. Thank you.

11          **THE COURT:** Well, just so I respond to that  
12          while I'm thinking about it. This is the  
13          appropriate time for you to raise whatever  
14          objections you may have to the charge. Obviously,  
15          I'm going to give you another chance after I charge  
16          it because I never read the charge verbatim and so  
17          you need to listen carefully when I do talk to the  
18          jury because I may say something and not even  
19          realize I say it.

20          But as I said yesterday, I don't get to choose  
21          whether I think any of this stuff is believable or  
22          not. I have to go by the any evidence standard.  
23          And there's evidence in the record that I went into  
24          great detail yesterday on so I won't repeat it  
25          today, but about the chase, about the swerving, to

1        knock the car off the road, all that sort of thing,  
2        the circumstances which I think require me to give a  
3        self-defense charge. And, Solicitor, I will tell  
4        you that I have wrestled with this long and hard and  
5        had a lot of the same doubts, but I think I have to  
6        charge it.

7                **MR. MEADORS:** And I respect that and I know  
8        Your Honor has.

9                **THE COURT:** And you do your job. You tell me  
10       what you disagree with and I'll tell you if you  
11       change my mind.

12               **MR. MEADORS:** And I do respectfully disagree  
13       and I know you care and do what you think's right,  
14       Judge, and I really do respect that.

15               Judge, also, on the front page, You may  
16       consider the lack of evidence presented by the  
17       State, I've always heard that charge, I guess, in  
18       different places would be -- I don't have anything  
19       else, that's all.

20               **THE COURT:** Well, the deputy solicitor in  
21       Lexington one time years ago, I've been giving that  
22       charge for years and years, and the deputy solicitor  
23       one time told me, Dayton Riddle said I had it in the  
24       wrong place. And he's probably right, but I can't  
25       remember where he said it ought to be.



1           **MR. MEADORS:** I guess that's what my -- I've  
2           seen it just in different places. I mean, you hit  
3           the nail on the head.

4           **THE COURT:** Well, Dayton hit the nail on the  
5           head.

6           **MR. MEADORS:** And that's unusual for Mr. Riddle  
7           if the record will reflect.

8           **THE COURT:** The thing is he didn't change what  
9           I was doing.

10          All right. From the defense?

11          **MR. STRICKLER:** Beg the Court's indulgence one  
12          moment.

13                       (Pause.)

14          **THE COURT:** Do y'all need a minute to confer or  
15          anything?

16          **MR. STRICKLER:** No, sir. Your Honor, I really  
17          don't have any changes but to ask you on pages three  
18          and six, you have headings for the charges that  
19          you're going to deliver, and my only concern was  
20          with the headings not the body of the failure of the  
21          defendant to testify.

22          **THE COURT:** I never read the headings.

23          **MR. STRICKLER:** And the sixth, the heading's  
24          confession.

25          **THE COURT:** I think that -- the heading I never

1 changed. It used to have failure in the body and I  
2 changed that to elected not to testify years ago.

3 **MR. STRICKLER:** With those issues, I don't have  
4 anything, Your Honor.

5 **THE COURT:** Okay. Well, we'll be at ease till  
6 the jury gets here. Now, you all be careful because  
7 these doors might be open and the jurors will be  
8 coming down this hallway, so y'all just be mindful  
9 of that. We're at ease till the jury's here.

10 (Brief Recess.)

11 **MR. MEADORS:** Judge, there's one word that I  
12 just missed, I don't know how else to say it, in  
13 accomplice liability.

14 **THE COURT:** Can you tell me a page number?

15 **MR. MEADORS:** Under line four.

16 **THE COURT:** I don't know what page yet.

17 **MR. MEADORS:** 15, I'm sorry, 15. I don't know  
18 if that's a mis -- but I think it needs to say the  
19 law is, because I don't -- the State asserts, I  
20 mean, that would be like saying the State asserts  
21 murder and voluntary. I think that's the law. And  
22 we just ask Your Honor take out the State asserts  
23 because I just think it's the law.

24 **THE COURT:** I'll just take the State asserts  
25 and say Mr. Moore may.

1           **MR. MEADORS:** Thank you.

2           **MR. STRICKLER:** It will then be up to the comma  
3 and then Mr. Moore may nonetheless be found guilty  
4 under the theory of -- that's fine, Judge. Thank  
5 you.

6           **THE COURT:** Is the State ready to argue?

7           **MR. MEADORS:** Yes, Your Honor.

8           **THE COURT:** Defense?

9           **MR. COLLINS:** Defense is ready.

10          **THE COURT:** Bring the jury in.

11                   (The jury enters the courtroom at 9:40 a.m.)

12          **THE COURT:** Ladies and gentlemen, thank you  
13 very much. We're going to now proceed into the  
14 closing arguments and following those, we'll have  
15 the charge on the law. As I told you yesterday,  
16 those are the only two stages of the trial that  
17 remain before you get the case.

18               Now, the way this will work is that the State  
19 will make the first closing argument and then the  
20 defense will make the defense's closing argument. I  
21 always take a break between the conclusion of both  
22 closing arguments and the part where I start telling  
23 you the law so I can get set up out here and usually  
24 it's a very short break. Sometimes I take breaks in  
25 between the two closing arguments, it just sort of

1 depends on how long the attorneys talk. So we'll  
2 play it by ear.

3 I can tell you that the charge in this case is  
4 going to be rather lengthy, so when I do talk to  
5 you, it's going to take me about 45, 46 minutes to  
6 tell you the law. So we'll again play that by ear.  
7 We'll see how that goes. I have, in a few cases,  
8 sort of broken up the charge and done it in two  
9 segments, so I'll let you know if I change my mind  
10 as to whether I'm going to go straight through or  
11 not, but we'll try to take periodic breaks.

12 And your lunch has been ordered and whenever we  
13 finish these steps and you start deliberating on the  
14 case, when your lunch gets here, it will be brought  
15 in to you. I invite your close attention.

16 Which of you is going to argue? Mr. Meadors,  
17 you're recognized for your closing argument.

18 **MR. MEADORS:** May it please Your Honor. Ms.  
19 McDuffie, Ms. Weiss, Mr. Collins, Mr. Strickler.

20 Mr. Foreman, ladies and gentlemen of the jury,  
21 good morning. My name is John Meadors. I was  
22 introduced by the Judge, but I want to formally  
23 introduce myself to you now. I'm the Deputy  
24 Solicitor for the Fifth Judicial Circuit.

25 Monday, I guess it was, we were in that

1        courtroom over there and the Solicitor, Barney  
2        Giese, was sitting up in this chair, which was over  
3        there, and y'all were back up in the audience, he's  
4        the elected Solicitor for the Fifth Judicial  
5        Circuit. I'm here on behalf of Barney Giese, the  
6        Solicitor's office, representing the people of the  
7        State of South Carolina, the people of Richland  
8        County, Stephanie Dover, Gene Derrick and their  
9        families against the defendant who's sitting there,  
10       Mr. John Moore, Junior, represented by Mr. Collins  
11       and Mr. Strickler.

12                I want to start off like my mama taught me like  
13       I always do and thanking y'all for being here. And  
14       I'm not just saying that, but thank you. Thank you  
15       for being here. Thank you for being a juror. You  
16       came in when you were summoned. Thank you for being  
17       here. Without y'all, this system wouldn't work.  
18       That's what makes our system great, this jury  
19       system, y'all.

20                And it was last year, I think, that I heard it  
21       phrased this way for the first time. We were in the  
22       same room where y'all were Monday, there was a  
23       judge, Carmen Mullen, from down in Beaufort, a new  
24       judge, female judge, nice lady. She was talking to  
25       the jury like y'all were being talked to by Judge

1       Manning Monday and she told them -- because, folks,  
2       we've all got our roles, His Honor said that to  
3       y'all, I guess, Monday or Tuesday, I can't remember,  
4       he's the judge of the facts. We've got our roles.  
5       Mr. Strickler and Mr. Collins has got their roles.  
6       By the way, we love our job. This is our office.  
7       This is where we work day-in and day-out. This is  
8       what we do.

9               But as Judge Mullen told the jurors that day,  
10       we're here week-in and week-out, but y'all come in,  
11       y'all being the jury, come in every week. And it's  
12       sort of like a basketball team, football team,  
13       whatever where the most valuable player comes in  
14       every week. And that's really true and I'm not just  
15       saying that, it's true. You are the franchise  
16       player of this team where everybody's trying to seek  
17       justice and determine what justice is in every case.

18              So every week the most valuable player comes  
19       in. We play our supporting roles in all respect to  
20       His Honor. Your role is most important. Because as  
21       His Honor told you, you are the judge of the facts,  
22       the finder of the facts and that's what it's all  
23       about in this courtroom, that courtroom, those  
24       courtrooms, every courtroom around the State, around  
25       the country.

1           Now, Ms. Scott is not in here right now, but  
2           y'all reported to her. She does an excellent job.  
3           Did she have a school for you to go to to learn how  
4           to be a juror? Did you go through a quick little  
5           course and take a test? No. But you've been in  
6           school your whole life to have the qualifications to  
7           be a juror and y'all know what it is, it's the  
8           school of common sense, watching people, listening  
9           to people, learning how to evaluate things, that's  
10          what serving on a jury is.

11          And Ms. Scott didn't have you check your common  
12          sense down there in the jury room. You brought it  
13          up here into this jury box and you've used it while  
14          you listened to the evidence and you're going to  
15          take it with you back to that jury room after you  
16          hear our arguments, after you hear the Judge's  
17          charge and you're going to use your common sense to  
18          decide what the truth is here.

19          What are we doing right now? This is called  
20          closing arguments. You say, well, no kidding.  
21          Well, I've always thought it was a crazy name for it  
22          because an argument assumes y'all can ask me  
23          something, you can ask Mr. Collins something back  
24          and forth, what do you think.

25          Well, you can't do that. But it's a chance for

1       us to give you our view or opinion on what the  
2       evidence is and the reasonable inferences from that  
3       evidence that came from this box and that's all  
4       we're allowed to do, here's what the evidence was,  
5       here's what we think the reasonable inferences are,  
6       here's what we think y'all ought to consider.

7               It's divided up into two parts really for me.  
8       I'm required actually to briefly go over the law as  
9       part of the closing argument to start with, give you  
10      briefly what the law is, what the State thinks the  
11      law is, and then His Honor will ultimately give you  
12      the law, and he is the judge of the law, and then  
13      I'll get into the facts.

14             Now, there are a couple of basic, basic  
15      premises which make this country great and I start  
16      off with it in every closing, two basic ones are the  
17      presumption of innocence. Mr. John Moore, Junior,  
18      sits over there at counsel table presumed innocent.  
19      He's presumed innocent unless and until the State  
20      proves him guilty. And how do we have to do that?  
21      What's our burden?

22             You can all -- you're thinking about it right  
23      now as I say it. Y'all know what it is. The burden  
24      on me, the burden on the State, the Solicitor's  
25      office here, it's the same burden that's being



1       talked about I bet this moment across the country,  
2       it's beyond a reasonable doubt. We've got to prove  
3       John Moore, Junior, guilty beyond a reasonable  
4       doubt, across the country the same verdict.

5             It's not beyond all doubt. You can doubt  
6       anything if you want to. It can't be a whimsical,  
7       fanciful, imaginary doubt, beyond a reasonable  
8       doubt.

9             Sometimes it's a hard concept. You know, I've  
10       been fighting over 20 years how to explain it, some  
11       folks say beyond a doubt that would make reasonable  
12       folks hesitate to act. I think Your Honor is going  
13       to charge you that you must be firmly convinced. If  
14       you're firmly convinced that the State has met its  
15       burden, you must find the defendant guilty. You  
16       must find him guilty if you take that oath, if  
17       you're firmly convinced. If, on the other hand, you  
18       think there's a real possibility he's not guilty,  
19       you should find him not guilty.

20            Not beyond all doubt, I could tell y'all the  
21       river's not going to run tomorrow, even though it's  
22       been dry, it hadn't been raining much, but that's  
23       not a reasonable doubt, that's a fanciful, imaginary  
24       doubt. But it comes back down to what I think  
25       you've been getting your whole life is common sense.

1 Reasonable doubt's like common sense, you kind of  
2 know it when you hear it. You know it, might be a  
3 better way to say it, I know it. You know he shot.

4 One thing a few years ago I was reading a  
5 transcript on a conflict case I was having for the  
6 next Solicitor down in Horry county, Solicitor  
7 Wilson. And Solicitor Wilson when he was in this  
8 same moment was explaining to a jury, and I thought  
9 about it ever since, you know, sometimes, folks, you  
10 might have questions, there might be a question  
11 here, a question there, that's not unusual in life,  
12 but just because you have a question, that's not  
13 reasonable doubt, there'll always be questions.  
14 Beyond a doubt to make reasonable folks hesitate to  
15 act. There's not a reasonable doubt here. I submit  
16 there's not a doubt here.

17 What's he charged with? He's charged with  
18 murder. All of you know what murder is. I'm going  
19 to briefly explain it. Murder is the unlawful  
20 killing of another living, breathing human being  
21 with malice aforethought.

22 Everybody knows what malice is, that's kind of  
23 one of those words when you hear it, you know what  
24 it is. You see it written, you see something that  
25 shows it, you know what malice is. Malice is a

1 wickedness, an evilness, a spitefulness one person  
2 shows to another. Y'all know what malice is.  
3 Malice, meanness, evilness, wickedness.

4 How can we show it? How can we show malice to  
5 y'all like we have to? Well, there are several  
6 ways, and the Judge will tell you all this, ladies  
7 and gentlemen, several ways the State can show  
8 malice to you.

9 Malice can be shown expressly. Well, that  
10 makes sense, doesn't it? I'm going to kill you. If  
11 somebody tells you, I'm going to kill you, that's  
12 expressed malice if they then kill them, expressed.

13 Malice can also be inferred, that's what the  
14 law says, and that makes sense, doesn't it? Because  
15 not everybody's going to come up and say I'm going  
16 to kill you right before they do it, so malice can  
17 be inferred.

18 There are several ways to infer it. Malice can  
19 be inferred by conduct of someone whose actions are  
20 totally devoid of any social concern, are so  
21 reckless, so wanton that it shows a malignant heart.  
22 Firing into a club where people might be behind it,  
23 you don't know who's behind there, firing into a  
24 church, don't know if anybody's behind there or not,  
25 probably should be because it's a business or a

1 church or some other establishment, but you don't  
2 care, you just fired, that's an example of malice,  
3 you don't care what's back there, you're just mean.

4 Firing into an occupied car, don't care if you  
5 hit anybody or not but just firing, that's allowed  
6 if you find that in an inference of malice, devoid  
7 of any social concern, malicious, that's another way  
8 to show malice.

9 What's the most common way if you don't have  
10 expressed malice? The most common, I say most  
11 common, the most common we see, you can infer malice  
12 from the use of a deadly weapon, a weapon, a .45,  
13 shooting into a car. Can you infer malice? Yes.  
14 Malicious, evil, I got a gun and I shoot. There are  
15 all kind of ways you can infer malice in this case.

16 Aforethought, it's a term of art. I'm not sure  
17 I understand it. I can explain it, doesn't mean I  
18 understand it. You don't have to have premeditation  
19 in this state. You don't have to plan to kill  
20 somebody. Malice, that meanness, that evilness,  
21 that wickedness just has to exist the instant you're  
22 pulling that trigger (indicating), aforethought,  
23 right then, it's a term of art, pulling the trigger,  
24 malice aforethought.

25 To kill a living, breathing human being, in

1       this case Stephanie Dover, with malice aforethought.  
2       And that we must prove that she died as a proximate  
3       result thereof, in this case by receiving a bullet  
4       from a firearm into her head. Doctor Nichols showed  
5       cause of death, possible cause of death yesterday is  
6       from the bullet in her head.

7               There are two other charges, possession of a  
8       firearm of someone less than 21 and possession of a  
9       firearm during the commission of a violent crime.  
10       Those kind of speak for themselves. I don't think I  
11       really need to go into those. The Judge will go  
12       over this. Established his date is less than 21,  
13       date of birth. He's in possession of a firearm,  
14       there's no dispute about that. Murder is a violent  
15       crime.

16              Now, the Judge is also going to tell you about  
17       some other offenses. Look at me, ladies and  
18       gentlemen, they don't apply in this case. Let me  
19       say that again, they don't apply in this case. But  
20       he's going to instruct you on an offense called  
21       voluntary manslaughter. It doesn't apply in this  
22       case. But he's going to instruct you, factually, we  
23       submit, it doesn't apply in this case. To prove  
24       voluntary manslaughter, the State must prove beyond  
25       a reasonable doubt that the defendant took the life

1 of another in the sudden heat of passion based upon  
2 sufficient legal provocation.

3 Now, Your Honor's doing the right thing  
4 charging this, no question about that. He knows the  
5 law better than anybody I know, but I'm telling you  
6 the facts of this case don't justify this is what  
7 I'm saying to you. That's why I'm saying it doesn't  
8 apply here.

9 Prove beyond a reasonable doubt that the  
10 defendant took the life of another in the sudden  
11 heat of passion based on a sufficient legal  
12 provocation. There are times that the law says in  
13 our lives where you get so angry, you get so upset  
14 and when you got so upset, if you have sufficient  
15 legal provocation, there's something legally,  
16 sufficient legal provocation, that doesn't justify  
17 what you do, you don't get away with it, but there  
18 are certain times in life, certain actions, certain  
19 events where they say, well it's not murder, but it  
20 might be manslaughter.

21 You're so angry, you get upset and sudden heat  
22 of passion that's based on the sufficient legal  
23 provocation, well in those circumstances, it don't  
24 mean you didn't do it, but it might mean you're  
25 entitled to a lesser offense of voluntary

1       manslaughter.

2               And if the heat of passion had cooled or if  
3       there was enough time between the provocation, if  
4       any, and the cooling for the passion of a reasonable  
5       person to cool, the killing would not be voluntary  
6       manslaughter. In deciding whether a reasonable  
7       person would have had time to cool off, you should  
8       consider all of the circumstances. The exercise of  
9       a legal right no matter how offensive to another is  
10      never sufficient legal provocation for voluntary  
11      manslaughter.

12             I do better without these boards, but let me  
13      give you an example, classic example, of voluntary  
14      manslaughter. You walk in a motel or wherever, you  
15      see your spouse with somebody else engaged in sexual  
16      relations, you get mad, you get angry, rightly so,  
17      and you strike a fatal blow, you're angry, you  
18      strike a fatal blow, do you get away with it? No,  
19      sir, no, ma'am. As the law says in certain  
20      circumstances like that, well you might have had a  
21      reason, not a legal reason, you still shouldn't kill  
22      somebody, but in that circumstance, then that might  
23      be a circumstance, sufficient heat of passion --  
24      it's got to be legal provocation.

25             Now, what's significant in this case, why this

1 does not apply, and that when Your Honor charges it  
2 to you, I submit you may talk about it a second, but  
3 it doesn't apply, words alone aren't enough, words  
4 alone aren't enough, that's not sufficient legal  
5 provocation. I don't care how nasty and mean they  
6 are, gestures alone aren't enough, making a gesture,  
7 pump faking at you, that's not enough to justify  
8 murder to a manslaughter. Overt words accompanied  
9 by acts could in certain circumstances.

10 Manslaughter doesn't apply here. I've talked about  
11 it longer than I meant to anyway, but the Judge is  
12 going to charge you that. It's not this case.

13 A couple of other things I think the Judge will  
14 charge you, which, respectfully, I don't think have  
15 anything to do with this case. Tuesday morning Mr.  
16 Collins precisely, straight to the point, said, My  
17 man's not the shooter, that's what he told you. The  
18 real shooter's going to come in this courtroom maybe  
19 today or Wednesday, is what he said. That's not an  
20 issue because we've shown through his own words who  
21 was the shooter, but their theory through the whole  
22 case, he's not the shooter, he's not the shooter,  
23 Kerwyn's the shooter. Based on what the -- Gene  
24 said that first day, Gene, and I'll explain to you  
25 later, was saying it was coming through the window.



1       So this doesn't apply under that theory, can't  
2       apply.

3               I'm assuming they won't even argue it. If they  
4       do, well if they do, then he is the shooter. The  
5       Judge is going to charge you on self-defense. If  
6       he's not the shooter, this doesn't apply. And  
7       Kerwyn sure didn't say he was in danger of anything,  
8       suffering serious bodily injury or death. He said  
9       he may have saw the fellow lean down, didn't see a  
10      gun. You heard those phone calls, never even  
11      expressed about, man, I was scared to death, none of  
12      it, but I got to go over this for you.

13             Self-defense, it's my understanding of the law  
14      for self-defense, and this is a complete defense, if  
15      you find self-defense in this case -- it's a  
16      complete defense. But for self-defense to be  
17      established, it's got to be four things, sort of  
18      like a chair, four things have got to be shown to  
19      y'all. The State's got the burden of proving beyond  
20      a reasonable doubt, but for self-defense to be  
21      proven, there's got to be four things, just like a  
22      chair, if you lose one of them, it's gone.

23             First is the defendant must be without fault in  
24      bringing on the difficulty. Well, the chair's on  
25      the floor right now, it's down. Well, number one,

1       he's not the shooter so this doesn't even matter,  
2       but if somehow they say, well he might be the  
3       shooter, well anyway. So I doubt you even get to  
4       this, I doubt they'll argue it, but in case they do,  
5       without fault in bringing on the difficulty, he  
6       brought on the difficulty. He started it. He  
7       brought it on. The chair's down, shouldn't even  
8       have to go further.

9               But if you want to go further just to talk  
10       about it, the defendant must be in actual, imminent  
11       danger. I can say it better without looking at it.  
12       The defendant must be in actual or imminent danger  
13       of suffering serious bodily injury or death, must  
14       actually be in imminent danger of suffering serious  
15       bodily injury or death. Well, we know that's not  
16       true.

17              Or, he must believe that he is in imminent  
18       danger of suffering serious bodily injury or death.  
19       And if it's believed -- if it's based on belief,  
20       then the reasonable, hypothetical reason an ordinary  
21       person in that position would believe they were in  
22       danger of suffering serious bodily injury or death.  
23       Well, the actual belief, reasonable belief, that's  
24       gone. There is no evidence in the record whatsoever  
25       that John Moore, Junior, thought he was in imminent

1 danger of suffering serious bodily injury, none. As  
2 I got to admit these phone calls, I don't care about  
3 it, uses the F word, I don't care about that shit.  
4 And I won't say that word again. He wasn't in  
5 danger, no evidence whatsoever. I hope you won't  
6 consider this line, just read through it. I doubt  
7 they'll argue it because he's not the shooter.  
8 Kerwyn Williams -- Kerwyn Phillips sure wasn't in  
9 danger. That's gone. Self-defense is out because  
10 that prong goes down, all four prongs have got to be  
11 met.

12 Finally, there must be no other way to avoid  
13 the danger than to strike the fatal blow as he did.  
14 You'll never get to that prong because he's not the  
15 shooter, because he was at fault in bringing on the  
16 difficulty. There's no evidence he was in imminent  
17 danger.

18 But if somehow you want to go through the  
19 fourth one, there was no other way to avoid the  
20 danger, duty to retreat, the law in October of 2004  
21 was you have to a duty to retreat in your car on the  
22 highway, that was the law then. He could have gone  
23 on. He could have stopped. There's no  
24 self-defense. It does not apply in this case,  
25 respectfully.

1           Very briefly, very briefly on the law, the  
2 other types of evidence you've heard is direct  
3 evidence. Y'all know what that is. It's evidence  
4 you get with one of your senses. I say you, I mean  
5 a witness gets, gathers with one of their senses,  
6 they see it, they smell it, they touch it and they  
7 come in here and tell you all about it.

8           There's also circumstantial evidence. The  
9 Judge is going to tell you about very briefly. It's  
10 just as strong as direct evidence. It's just as  
11 strong. If you -- circumstantial evidence is proof  
12 of a chain of facts and circumstances indicating the  
13 existence of a fact. Proof of a chain of facts and  
14 circumstances indicating the existence of a fact.  
15 The law makes absolutely no distinction of the  
16 weight to be given to them, one is just as strong as  
17 the other.

18           Y'all know what the classic example is. You go  
19 to bed, it's cold outside, nothing on the ground.  
20 You wake up, there's snow there. You didn't see it  
21 snow, but it snowed.

22           That's circumstantial evidence right there.  
23 There's a bullet hole in that tailgate, Kerwyn told  
24 them about that. Kerwyn told them about that. It  
25 wasn't covered then. He doesn't remember that liner

1       being in there. Wonder why Mr. John Moore, Junior,  
2       covered that liner up to hide that? That's  
3       circumstantial evidence.

4               What other type of evidence? Documentary  
5       evidence, you've heard the tapes, phone calls, all  
6       kind of evidence.

7               And, finally, credibility, believability, which  
8       in most every case comes down to, every case comes  
9       down to credibility, believability of the witnesses.  
10       I think the Judge will instruct you that you can  
11       believe all of what a witness says, part of what a  
12       witness says, none of what a witness says. That's  
13       up to you. And what do you decide that with? Your  
14       common sense, watching them, seeing their reactions.  
15       You determine the credibility and believability of  
16       witnesses. Y'all do, the most valuable player does.

17               Let's go back as the evidence took us -- and,  
18       y'all, this is not complicated case, it's important.  
19       It is an important, one of the most important cases  
20       that's ever been tried in this courtroom. It's  
21       important for John Moore, Junior. It's important  
22       for Stephanie Dover, Eugene and his family. It's  
23       important for this community. This is an important  
24       case.

25               **THE COURT:** Mr. Meadors, since there's that

1 noise going on, let me take this opportunity, folks,  
2 if y'all don't keep your eyes open, I've got to  
3 stop, okay. I know some folks think with their eyes  
4 closed, you have to keep your eyes open. If not,  
5 I'll have to send you in the jury room, let you get  
6 a little caffeine, a little break, whatever you need  
7 and then we'll start back, okay? Thank you.

8 **MR. MEADORS:** I think this is the most -- as  
9 important a case to be tried. I want to thank y'all  
10 for listening and thank you for your attention.  
11 Let's go back to October of 2004, October 17 of  
12 2004, right now like the evidence took us there.

13 **THE COURT:** All right. We've got to stop.  
14 Ladies and gentlemen, step in the jury room. Don't  
15 discuss the case. If you need a drink of a  
16 Coca-Cola or Pepsi or something, get it.

17 (The jury retires to the jury room.)

18 **THE COURT:** All right. I've got one juror  
19 fighting sleep. He hasn't gone to sleep, but he's  
20 fighting it pretty bad. So let's give them a break.  
21 We're at ease.

22 (Brief Recess.)

23 (Court's Exhibit Number 5, jury note, was  
24 marked for identification purposes.)

25 **THE COURT:** All right. Bring the jury in,

1       please.

2               While we're waiting, one of the jurors sent out  
3       a note, I assume it was the same young man. He was  
4       just explaining he has a sinus infection and his  
5       face is swollen and it may cause his eyes to appear  
6       to be closed at times. He said he's fine to serve.  
7       And I've had that shown to the attorneys. I don't  
8       think that's an issue. We'll mark it as a Court's  
9       Exhibit.

10              **MR. MEADORS:** It certainly makes me feel  
11       better, too.

12              (Pause.)

13              **MR. STRICKLER:** My apologies, Your Honor. I do  
14       have something nagging at me relating to the charge.  
15       It may be in there, I've read it three times. It's  
16       what I call the Elmore language regarding  
17       inferences. And it's -- I don't want -- my  
18       negligence in bringing it to the Court's attention,  
19       I don't want it to be a problem in this case. I  
20       think the language is and -- to the inferences in  
21       regard to deadly weapon, it's permissible inference  
22       only. You're free to accept or reject this  
23       permissible inference depending on your view of the  
24       evidence.

25              **THE COURT:** If you'll hand up the language. I

1       was intending to put that in there. If I didn't  
2       state it well, then I'll be happy to consider  
3       anything you would have.

4               **MR. STRICKLER:** I'm reading over it again as  
5       the arguments are being done, but it's right in that  
6       section.

7               **THE COURT:** Bring in the jury.

8               (The jury returns to the courtroom.)

9               **THE COURT:** Okay. You may continue, Mr.  
10       Meadors.

11              **MR. MEADORS:** May it please the Court.

12              **THE COURT:** Yes, sir.

13              **MR. MEADORS:** Mr. Foreman, ladies and  
14       gentlemen, October 17, 2004, we're going to go back  
15       there right now and we're going back initially  
16       through Gene's testimony. I think they'd been at  
17       the flea market, one of those things, that morning  
18       over in Lexington, I'm not sure. He'd been out with  
19       his girlfriend/fiancée, the victim in this case,  
20       Stephanie Dover, their two children. Gene had been  
21       working as a lineman going around putting up the  
22       line poles. He, I think, his testimony was he'd  
23       been in Florida shortly before this, down there,  
24       working a hurricane down there, had been down there  
25       working for a period of time, came back shortly



1       before this incident, I don't know how many days,  
2       but shortly before this incident, made some money  
3       down there, worked, bought this new car.

4               They were going out, went to the flea market,  
5       if you will, then went to see their friend in  
6       Pelion. Coming back from Pelion, take Highway 6, I  
7       believe they said, stopped at the peanut store that  
8       had the peanut sign out front, go in and get some  
9       cigarettes. They then go to I-20, start heading on  
10      I-20 back to the house. They start going down,  
11      heading down right now, heading down I-20 under  
12      Broad River into Richland County, that's what  
13      evidence we've got to prove a lot of those questions  
14      right there, this happened between Broad River and  
15      down there at Fairfield Road that's where this  
16      incident happened in between there. That's in  
17      Richland County, it's not in dispute, another  
18      element, though, we must prove to y'all.

19             Gene's driving, Stephanie's in the passenger  
20      side, the two kids are in the back. After they go  
21      over Broad River Road, Gene testifies her window  
22      won't roll down. He says throw these cigarettes, he  
23      said he throwed some cigarettes out, the window's  
24      halfway down. He rolls the other window down.  
25      You've got his statement back here, too, that you're

1       going to have, it's been admitted into evidence, go  
2       read it, see if that's in there the statement he  
3       gave the day after this happened, fresh in his mind,  
4       says he flicks her cigarette out, then he flicks  
5       another cigarette out.

6               Now, I don't know, this may be one of those  
7       questions I talked to you about. It's not a  
8       reasonable doubt, but what he did, you know, people  
9       have habits, you know, he shouldn't have been  
10      littering, he shouldn't have been littering, maybe  
11      get a fine for that or something, but Stephanie  
12      doesn't need to go to the grave for eternity for it  
13      that's for sure. But he flicks that cigarette out,  
14      and I don't know if that's what John Moore saw or  
15      not, I don't know if that's what they saw, they come  
16      up and thought somebody was shooting them the bird,  
17      I don't know, but he testified he did that. Could  
18      that be considered a gesture? Could be a reasonable  
19      inference from that.

20             Be that as it may, right after that, shortly  
21      after that, he hears shots fired, several shots  
22      fired. Stephanie, isn't this consistent, in the  
23      passenger side, does like this maybe when she hears  
24      the first shot, goes down, there's a shot that goes  
25      through her finger and her head. I think Mr.

1 Strickler and I both talked to Doctor Nichols,  
2 probably one shot, could it have been two, sure.  
3 Probably one.

4 But as she hears those shots, she goes --  
5 that's when the kill shot was. The first shot is to  
6 the side. There's no other explanation. I don't  
7 think there will be any dispute about that, or from  
8 the side. The second shots come from the front,  
9 there's no damage to the front. There's four shots.  
10 And I'm not going to bang or do that. He says we  
11 tried to do that to get y'all -- appeal to y'all's  
12 emotions. We don't. I tell you one thing,  
13 Stephanie heard them, first heard a shot and went to  
14 there, then she gets killed. That's real.

15 And what does Gene do? Emotions pumping, shots  
16 fired, he goes after them, said he goes after them  
17 to try to get their tag. State's 16, just a few  
18 miles from this courthouse, on public roads or  
19 highways of this state, I-20. As he's heading down,  
20 he says he remembers the first shots around this  
21 area (indicating), around the river, around the golf  
22 course.

23 Now, when shots are being fired, have y'all  
24 ever been on the highway, you tried somebody on the  
25 cell phone, what mile marker are you at? Well, you

1        don't know, it takes a little while to find it.  
2        Well, shots are being fired, you're not going to  
3        really know exactly where you are. Is it going to  
4        be a little difference between witnesses' testimony  
5        and where they were? Sure. If it was the exact  
6        same place, that's when -- but he kind of remembers  
7        it was around that golf course, around that river.  
8        It doesn't matter exactly where it is in there, but  
9        he says it was right there the best of his memory.  
10       He hears those shots and then he starts to follow  
11       them.

12                And then he goes down, then he says he gets  
13       behind them and then they get in front of him,  
14       describes a black truck, get in front of him and  
15       then he says he hears some more or sees some more  
16       shots coming back toward him. Did they hit him?  
17       No. Is there any evidence they hit him? No.

18                And at that point, he says the first time, and  
19       I'm going to get to this, he says when the first  
20       shots come, it looks like, I think I did it during  
21       the trial, it looks like there's an elbow up here  
22       and then an arm. Y'all remember that testimony?  
23       That's what Kerwyn said up here -- excuse me --  
24       that's what Gene said up here. Go look in his  
25       statement and see if that's in his statement. Right

1       here like this.

2               And the only issue, who's the shooter, he said  
3       that in his -- that's the only issue and it's not an  
4       issue. I see an arm right here. Bullets are coming  
5       from the passenger side. That's no question about  
6       it, that's where -- that's not in dispute, they're  
7       coming from the passenger side, I see it. Does he  
8       think they're coming from there? Yes. Does he  
9       think the passenger did it? Probably so right then.  
10      They're coming from there.

11             Keep following down and then he says he sees  
12      some shots come out in the back. He testified to  
13      that. He said it looked like a left arm to him,  
14      that's here, but he says it comes out in the back of  
15      the window, that's significant. We learn how  
16      significant that is later on through the testimony.  
17      But none of those shots hit him. None of those  
18      shots hit the car. The kill shots were from the  
19      side, no dispute about it.

20             And where do they go? One, two, three, one of  
21      them goes in, thank God, hits little Zachary. I'm  
22      allowed to show you this. There's nothing wrong,  
23      I'm not trying to appeal to anything. This goes to  
24      malice. This goes to that conduct so devoid of  
25      social duty, you don't care who's in the car, you

1        don't care. Is it likely that kids are going to be  
2        in the back of a car? Yes. Families in a car, a  
3        four-door car? Yes.

4                I don't care, I'm going to shoot anyway. I  
5        don't care what's in there. And it does get hit.  
6        This flies off and hits Zachary. He's got his  
7        injuries back here. Malice, malicious. I'm  
8        entitled to show you that. I'd be fired if I didn't  
9        show you that, a shot in the car and it hits and  
10       hurts a little child.

11               I don't care, he says that later. He says that  
12       later, I don't care, I don't think about this  
13       anymore, I don't care. He didn't care that night.

14               He keeps going down. Now, Gene follows him.  
15       He follows him trying to get a tag. He goes on down  
16       to Fairfield Road, goes around. He says the second  
17       shots happened around Monticello Road. He follows  
18       them to Fairfield Road, cut up, they're heading back  
19       to Hollywood Hills, you heard Kerwyn, that's where  
20       they're from. Gene follows them up there some ways  
21       and decides to stop and turn around.

22               He then says, Stephanie, Stephanie, call 911,  
23       give me the phone, call 911. What does Stephanie  
24       say? Nothing. He testified she's there, she's shot  
25       in the head. Is he excited? Is adrenaline running?

1 Is he going after the folks that shot in his car?  
2 Yes. Did he know she was dead? No. She doesn't  
3 answer. He turns around and flies back to the  
4 Flying J, talks to law enforcement, tells them what  
5 happened, gives a written statement.

6 Stephanie's dead. Stephanie is dead. She's  
7 dead. That's what this case is about. She is  
8 riding down I-20 on a public road and gets shots in  
9 her car and she's dead. This is road -- this is  
10 inexcusable conduct. It's got to stop. It's got to  
11 stop today.

12 Who did it? Who did it? Who did it? It's a  
13 road. It's a car. Who did it? There are no  
14 suspects. So what happens to it? It sits there.  
15 He tries to describe the truck, describes the  
16 individuals what they looked like. Do you know who  
17 did it? I don't know who did it.

18 The law enforcement, Barnes, all of them, they  
19 go up, they go search, they walked out there, looked  
20 for shell casings, do the whole stretch, can't find  
21 anything. And it sits there. They look at  
22 everybody. They looked at Gene. They looked at  
23 everybody. You heard some of the questions that Mr.  
24 Collins asked. That's just what they do, they look  
25 at everybody. And it sits.

1           November, December, January, no arrests for the  
2 murder of Stephanie Dover. It sits and it sits  
3 until the media runs an anniversary special looking  
4 for suspects again.

5           And thank goodness there's a Crime Stopper tip.  
6 Chris Cowan who works at the sheriff's department  
7 gives an e-mail to this man and says, here's a tip.  
8 Does he know what it is? No. He says it's a  
9 female. Is he supposed to know who it is? No.  
10 That's why they have Crime Stoppers tip, anonymous.  
11 People are not going to call if their name is going  
12 to be given out. If we're going to sit here and  
13 tell who it is, they're not going to call. We're  
14 not going to get the cases solved, that's why it's  
15 anonymous.

16           Now, what does the information say? Well, you  
17 might want to look at Kerwyn Phillips and John  
18 Moore, Junior, and John Moore, Junior's daddy's  
19 truck, the black Chevrolet. Well, that's  
20 significant because that's what Gene said, that's  
21 what Gene said back a year earlier, kind of fits the  
22 description Gene gave. So they start looking into  
23 John Moore, Junior's family. They discover the  
24 black truck. They discover they live in Hollywood  
25 Hills, that's significant, that's where the car was



1 heading.

2 So what do they do then? They locate Kerwyn  
3 Phillips. Previously, he already had an appointment  
4 with the feds. He didn't know about the appointment  
5 with the feds. Kerwyn got up here and told you,  
6 Yeah, I was a little trouble when I was younger,  
7 pled to strong arm robbery, did a 90 day shock  
8 incarceration. Then I was at a pawnshop, went to  
9 buy some ammo for a .38, I think, \$39 worth in a  
10 pawnshop. And for that, I got 30 something months.

11 By the way, he got four months for doing this,  
12 four months. You didn't hear much cross about that.  
13 He didn't get much of a deal. He came in and told  
14 it because it was the right thing to do. Under his  
15 proffer with the feds, he agreed to cooperate and  
16 tell the truth. He got up here and did that. Four  
17 months is all he got. And he's going to have to  
18 live in his world as a snitch where he is, but he  
19 did it and you saw him, you saw his demeanor. Who's  
20 the shooter? There's no issue about the shooter and  
21 that is the only issue.

22 They go up to talk at the Strom Thurmond  
23 building just a block or two from where we are right  
24 now. They go in there. Do you know anything about  
25 this? I need to talk to my attorney.

1           Anything wrong with that? Talks to his  
2           attorney. You remember I asked him, I said, Tell it  
3           all, Kerwyn, tell it all.

4           I left. He went to see people, I understand,  
5           who I'd go to see. He went to see his child's  
6           mother, then he went to see his mama. And then he  
7           called back the next day and he said, y'all, I'm  
8           sorry I left. You saw his mannerism. You know  
9           habits, you can't make up habits. You can tell how  
10          somebody's raised and they're reactions and how they  
11          say yes or no, ma'am. He called back and said, I'm  
12          sorry. I talked to them. Yeah, I know about it.  
13          Let me tell you what I know about it. Not only do I  
14          know about the truck, but a couple days after that,  
15          he called me, said look at the shot in the tailgate.  
16          And that's significant.

17          This piece of evidence right here is about --  
18          we can't bring it all in. I would have driven the  
19          car here if I could, that's not realistic. But this  
20          tailgate comes off and this tailgate is significant  
21          because he said a couple of days later, he came  
22          over, he told me, he said, you know what, shooting  
23          out of the back, there's a shot back here in the  
24          back, come look at it. Did you go look at it?  
25          Yeah. Did you touch it? Yeah. Did you put your

1 hands on it? Yeah.

2 And, ladies and gentlemen, I'm going to ask  
3 y'all, I don't know if -- I'm going to ask you to  
4 take this back there, somebody will take it back  
5 there in the jury room with you, take it back there  
6 and touch it, look at it, lift up that tailgate.  
7 And you touch this right there, you're touching  
8 malice. It's one of the few times you get to touch  
9 malice.

10 Yeah, he doesn't know they're already killed  
11 back there, but he's shooting back in the back  
12 randomly again, he doesn't care what he's shooting  
13 at, doesn't care who's in that car. And here's  
14 circumstantial evidence of the shot and then he  
15 tells Kerwyn it's the shot.

16 And you remember what David Collins said up  
17 here -- I think it was Mr. Strickler said, couldn't  
18 that come from the passenger side? Well,  
19 gymnastically, it might be tough, but it's  
20 consistent with coming from the back window,  
21 shooting back right here. And I think Mr. Strickler  
22 even said something about which way the angle went  
23 and Mr. Collins said that could have ricocheted, I  
24 don't -- that could have happened anywhere. That's  
25 consistent with coming in that back window, like

1       Gene Derrick said, from the back window it came. He  
2       thought it was a left arm.

3               And what does Kerwyn say? He said they were  
4       coming back and they were flashing lights on them.  
5       Y'all remember that. He said they were flashing  
6       lights. Kerwyn puts the shooting down a little bit  
7       more. Says after they were flashing lights and did  
8       the gestures back and forth, he said he saw them  
9       pull off the road a little bit and then come back.  
10      Kerwyn's got the shooting down here a little bit,  
11      just a little bit farther. It doesn't matter, no  
12      withdrawal.

13             Back down here, what did Kerwyn say -- this is  
14      the case, what did Kerwyn say that John Moore told  
15      him when the car was there beside him? Lean back,  
16      lean back. And then Kerwyn said he put the gun in  
17      front of him and shot. That's that shoulder Gene  
18      Derrick said he saw over there. That's the arm  
19      coming in front of him. That's pure.

20             Kerwyn doesn't know Gene Derrick. Told me to  
21      lean back. Y'all saw Kerwyn. Is Kerwyn telling the  
22      truth? Is there any doubt about it? And he shot.  
23      What did you see? Well, I saw the guy in the front  
24      reaching down, but I didn't see a gun. No testimony  
25      he was afraid or anything. He said when they came

1 back, they swerved towards them. No evidence they  
2 were in danger of suffering serious bodily injury or  
3 death. It's road rage. It's anger on I-20 right  
4 near from here.

5 The second shots Kerwyn has a little bit closer  
6 to Fairfield Road, still two sets of shots, still  
7 him shooting, still him shooting out the back. I'm  
8 glad it's not exactly right, then y'all may say well  
9 that's too perfect, nothing's perfect in life.  
10 There are two sets of shots. He did the shooting,  
11 two sets of shots.

12 Then he says they go on off Fairfield Road. I  
13 think Kerwyn said they almost lost control when they  
14 went around there. He says this vehicle behind them  
15 comes and eventually they go down a road that's got  
16 rocks. They go somewhere, I think he goes to his  
17 grandmama and granddaddy's and they hide about 30,  
18 35 minutes. Credible. Believable. Who's the  
19 shooter?

20 Well, I submit to you that's good evidence.  
21 But what did the police say? Well, you're bringing  
22 this to a jury, the jury might want more. I submit  
23 to you that's enough. The jury might want more so  
24 what do you do? Do you think you can get a  
25 statement from him? I think I can get a statement

1 from him. Mr. Strickler made a big deal, you wanted  
2 to go talk to him in private. Doesn't that make  
3 sense? Is he going to talk about shooting out the  
4 back of a truck after they know it's on the news now  
5 that somebody's killed them in front of a bunch of  
6 people? So he calls him.

7 You got the tape. I was going to play it, but  
8 I'm not going to play it. Y'all can go back and  
9 play it. He calls him on the phone and he said, you  
10 remember that stuff? He said you know it's about a  
11 year anniversary, it was on the news the other day.  
12 What did it say? Well, it kind of -- so, you know,  
13 when that thing first started, why did you shoot?  
14 Not because I was scared, man, I was in danger of  
15 losing my life. Pump faking. What's pump faking?  
16 Doing like that (indicating). You ever reach for  
17 your rearview mirror, reach for something in the  
18 middle of your car, reach up to do your hair or your  
19 cell phone?

20 Who's the shooter? He just told you in his own  
21 words there, I'm the shooter. Is there any issue  
22 now? He told you that. They was pump faking, so I  
23 shot them.

24 And he also said on there, and I told y'all I  
25 wasn't going to say this word again and I won't, he

1       said, Well, you ever think about it? What did he  
2       say? S happens. S happens. A lady's dead,  
3       Stephanie Dover's dead and he says shit happens.  
4       That's the real John Moore, Junior.

5               well, one other thing -- two other things he  
6       says -- three other things he says, please go back  
7       and listen, play it, play it. I was going to play  
8       it in here over and over. Play it, you'll have it  
9       back there.

10              Malicious, malice, criminal intent. It's over  
11       and done with. I don't think about that S no more.  
12       I don't care about it. It ain't nothing. It's just  
13       like shooting in that car, I don't care who's in  
14       there. Is that malice? Is that malicious? Go  
15       listen to that tape. I don't give a damn. And  
16       listen to the very end, go listen to the very end.  
17       Malice, malicious, don't care who's in that car, go  
18       listen to it.

19              At the very end of the tape, John Moore to  
20       Kerwyn Phillips, I shot nine times. Go listen to  
21       the end. Be real quiet in that jury room, get this  
22       thing and listen. He should have been, too. That's  
23       what you can make out. I shot nine times, he should  
24       have been, too. Gene Derrick should have been dead,  
25       too. That's malice. That's not caring. That's not

1 self-defense. That's not voluntary manslaughter.

2 Based on that information, the truck, the  
3 tailgate, the tape, they do a search warrant. They  
4 go and they talk and they go to where he resides,  
5 search warrant's read. He's read his advice of  
6 rights by Investigator Faust. Investigator Faust  
7 testified, Did he understood (sic) he rights? Yes,  
8 he seemed to. Did you threaten or coerce him? No.  
9 Was his statement freely and voluntary? And he  
10 tells Investigator Faust when he goes to talk to  
11 him, he knows the date of that incident, what did  
12 John Moore, Junior say? I was in bed that night.  
13 That's not the truth. That's evidence of guilt,  
14 denial, doesn't know what they have on him at this  
15 point.

16 Then he's locked up at the Alvin S. Glenn  
17 Detention Center, no dispute about that. And I tell  
18 y'all, that's why I asked -- I think it was Ms.  
19 Weiss that asked Investigator Barnes one more time,  
20 does it say up there that your calls are recording?  
21 Does it say it? Yes, it does. Is there a sign?  
22 Yes. Does it say it on the phone? And y'all heard  
23 it, These calls will be recorded. You're warned,  
24 don't say anything on there, they're being recorded.

25 What does that mean? If it comes into our



1       possession, if they implicate themself in a crime,  
2       are we going to use it? Of course, we are. Warned  
3       them not to say anything. Don't, you know, it's on  
4       the tape, I can't -- don't blame me because he  
5       admits the stuff and the calls are recorded at the  
6       jail. They warn folks down there no matter who they  
7       are, no matter who's using the phone these calls are  
8       being recorded. And that's all that's required and  
9       I'm glad they are in this case.

10               And you'll listen to what's been identified as  
11       his girlfriend as they try to figure out what to do,  
12       what to say the night he's in danger. Go listen to  
13       that tape as they try to figure out and get the gun  
14       in Kerwyn's hands, say Kerwyn was shooting as they  
15       try to start to develop a plan or a story. And  
16       she'll say at first, Y'all were at the crime, you're  
17       at the crime. They got you at the crime. They got  
18       your daddy's truck. You can't get around that. So  
19       you and Kerwyn both had a gun, right? And listen to  
20       John Moore. No, no, it's just one gun. It's just  
21       one gun.

22               This is the case, this board is the case.  
23       What, were you shooting in front of Kerwyn? What,  
24       were you shooting in front of Kerwyn? Yeah.

25               And if you need more, That's why I figured S,

1 I'd put it all on him. Those are his words, not my  
2 words, not his words, not his words, his words. I  
3 said that's why I was just going to put it all on  
4 him, listen, ladies and gentlemen, Because I mean I  
5 was shooting the gun right in front of his face.

6 He's the shooter. The Judge is going to charge  
7 you if somebody back there thinks that -- if  
8 somebody back there thinks that Kerwyn's the  
9 shooter, which there's no evidence of that, no  
10 credible evidence of that, but he's going to charge  
11 you the law says under the hand of one, hand of all,  
12 he'd still be guilty because he's the driver of the  
13 truck. He decided when it went up, when it went  
14 back. But he's the shooter, there's no question  
15 about that.

16 He's going to charge you about mere presence,  
17 see that's what fits Kerwyn. Kerwyn's in the  
18 passenger seat. He didn't have the gun. He didn't  
19 shoot. He couldn't be -- Mr. Strickler said, You  
20 weren't worried about being charged with murder?  
21 No, you see his expression, no, I didn't do it. I  
22 wasn't there. He wasn't driving the car. He didn't  
23 control with his foot and his mind where and back it  
24 went, that's why he couldn't be under the hand of  
25 one, hand of all.

1           But there's no issue who the shooter is.  
2       Because, I mean, I was shooting a gun right in front  
3       of his face. I shot nine times. He should have  
4       been dead, too.

5           I'm through. I want to thank y'all for your  
6       patience. When you walked up here everyday these  
7       past few days, I bet some of you noticed it, as you  
8       come up to the courthouse, you look to the left, you  
9       see these two scales of justice on the iron gates, I  
10      think they are there. And when you come up to the  
11      elevator on floor one outside of Ms. Scott's office  
12      and the public defenders office, you look on the  
13      elevator it says, Justice will direct our course.  
14      And it's directed at all of you. It's going to  
15      direct you back in that jury room.

16           Besides being the MVP, you're what's called  
17      Lady Justice. You've got a blindfold on. You take  
18      the blindfold down to look at the witnesses and  
19      evaluate their demeanor and testimony, but you're  
20      Lady Justice. You decide what's right. You decide  
21      what's just based on this evidence and the law the  
22      Judge gives you.

23           The final thing I'll say is the greatest power  
24      we have, greatest power we have, and my mother  
25      taught me this, is the power to choose, the power to

1 choose what we do to ourselves, what we do to  
2 others, how we treat others. It's our choice.

3 John Moore, Junior, chose on October 17th,  
4 2004, to shoot into that vehicle no matter who was  
5 there, no matter what with no evidence he was in  
6 danger of suffering serious bodily injury, no  
7 evidence he was in imminent danger, he just shot  
8 because he was mad at a gesture. And he shot again.  
9 He chose to do that. He chose not to tell about it  
10 until he was -- all this evidence when he was  
11 arrested was found. He didn't tell anybody. He  
12 didn't care. He didn't care.

13 Now, it's time for you to choose. When you go  
14 back to your room to make your choice, to exercise  
15 your greatest power, all I can ask you to do is use  
16 your common sense, follow the law that the Judge  
17 gives you and come back with a verdict.

18 And verdict simply, simply, means to speak the  
19 truth. And the truth in this case, respectfully,  
20 ladies and gentlemen of the jury, is that on October  
21 17th, 2004, John Moore, Junior, fired into a vehicle  
22 with Gene Derrick, Stephanie Dover and their kids,  
23 struck Stephanie in the head for no reason, no good  
24 reason and she's dead and we're going to find him  
25 guilty of that. Thank you.

1           **THE COURT:** Thank you, Mr. Meadors.

2           All right. Ladies and gentlemen we'll take a  
3 very brief break, five minutes, then I'll get you  
4 back out here to hear the defense's closing  
5 argument. Don't discuss the case.

6           (The jury retires to the jury room.)

7           **THE COURT:** We're at ease for five minutes.  
8 Thank you.

9           (Brief Recess.)

10          **THE COURT:** Defense ready for the jury?

11          **MR. COLLINS:** Defense is ready.

12          **THE COURT:** State?

13          **MR. MEADORS:** Yes, sir.

14          **THE COURT:** Mr. Collins, are you going to  
15 argue?

16          **MR. COLLINS:** Yes, Your Honor.

17          **THE COURT:** Okay. Bring in the jury.

18          (The jury returns to the courtroom.)

19          **THE COURT:** Mr. Collins, you're recognized for  
20 your closing arguments.

21          **MR. COLLINS:** Thank you, Your Honor.

22          Good morning. This case hasn't been nearly as  
23 clearcut and clear as we thought it was going to be.  
24 At times, it's been downright confusing. We've got  
25 a whole pile of mess over here, most of it's not

1           even relevant to this case.

2           Mr. Meadors held this up, said he has to  
3           present that. What's this doing here? We still  
4           don't know. It's just been here the whole time.

5           There's been a lot of misstatements. There's  
6           been misquotes. He took all those boards out of  
7           here, I'm glad he took them out of here because they  
8           don't belong in here. Those recordings are what  
9           they are.

10          I don't usually bring my notes up here in the  
11          closing argument, but I feel like I need to because  
12          I don't want to miss anything. I don't want you  
13          guys misled, because basically when it comes down to  
14          it, most of this stuff over here, most of these  
15          pictures, the bullet fragments, everything that's  
16          over here, most of it's not relevant, it's not their  
17          case. The case boils down to two things, Kerwyn  
18          Phillips and his audio recording and then one call  
19          made from the jail from John Moore to his  
20          girlfriend. We want to know who the shooter is.  
21          Those are the only two things that they have  
22          presented that helps us with that, that helps their  
23          case. There's other things that are relevant, but  
24          that's the only two things that help their case.

25          Number one, Kerwyn Phillips, it's the recorded

1       phone call. You heard the recording. It's not that  
2       great a quality. I was surprised to hear Richland  
3       County Sheriff's Department had audio recording  
4       equipment. Investigator Faust said that they didn't  
5       have it. But, regardless, he had it and recorded  
6       the conversation, we don't know the exact context.

7               We heard Kerwyn Phillips' version of what pump  
8       faking means, possibly means when one person tries  
9       to say somebody else did what they did. We don't  
10      know, we heard his version that suits him best. You  
11      never heard John Moore say, I shot in the car; not  
12      in that recording. Listen to it.

13             Then we have Kerwyn Phillips' testimony.  
14      Surprising enough, the first part of his testimony  
15      kind of makes sense. We were all wondering how did  
16      this random shooting happen. He talked about the  
17      car pulling over because of an altercation, the car  
18      chasing after the truck, swerving at the truck and  
19      then reaching under the seat, that kind of made  
20      sense.

21             But when it stopped making sense is when Kerwyn  
22      Phillips said John Moore pulled out the gun. Let's  
23      think about this. His testimony is they're both in  
24      the truck, John's driving, a car comes up from  
25      behind, pulls beside them, swerves at the truck

1       probably going 70, 80 miles per hour. And Kerwyn's  
2       testimony is that in one fell swoop, John Moore,  
3       who's driving going 80 miles per hour trying to  
4       avoid a car swerving at him, reaches down, grabs a  
5       gun, somehow rolls the passenger window down with a  
6       third arm I don't know that he has, reaches across  
7       Kerwyn's face with a .45 caliber hand cannon, fires  
8       it off four times while the shell casings are  
9       shooting off to the right.

10               We heard David Collins testify, the ballistics  
11       expert, that the gun in this crime, the shell  
12       casings shot out to the right, which would be  
13       shooting right into Kerwyn's face four times. And,  
14       yet, Kerwyn's here today with no burns on his face.  
15       Miraculously, he still has his hearing. Does that  
16       make any sense?

17               He talks about the shot to the tailgate, Mr.  
18       Meadors, I'm glad he pointed it out, I'm going to  
19       get to that a little bit later, it's important.  
20       Then Kerwyn goes on in his testimony talks about he  
21       told John, Take this exit. He told John, Turn right  
22       here, turn left here, spin the gravel up, John.  
23       Who's in control of this situation? Probably the  
24       guy with the gun.

25               Now, I'm going to move on to the phone



1 conversation from the jail. You saw some poster  
2 boards of what they say is said on the tape. What  
3 the poster boards leave out are inflection in the  
4 voice, sarcasm. And people that can tell you about  
5 the context of the conversation are the people that  
6 were in the conversation, Delia Nix.

7           You heard Investigator Barnes testify she's  
8 been here the whole time. This is the State of  
9 South Carolina, this isn't just these Solicitors,  
10 it's the whole state. All the resources that law  
11 enforcement, the entire state, right at their  
12 disposal and they don't even call a witness who's  
13 sitting right outside the whole week and put her on  
14 the stand, what are they trying to hide? They want  
15 to pick and choose and pick quotations out of  
16 context to try to use it against him, try to make  
17 their case.

18           And a classic example is in opening, Ms. Weiss  
19 stated, You're going to hear a recording in which  
20 John Moore said I shot in front of Kerwyn's face.  
21 Yeah, he said it, but please go back and listen to  
22 that recording, he's being sarcastic. They're  
23 talking about how ridiculous of an accusation that  
24 is, a .45 caliber hand cannon going off right in  
25 front of your face and the shells shooting and

1 hitting you in the face, that doesn't make sense.

2 In the end when you look back at what the State  
3 is saying is their key pieces of evidence, you have  
4 bad quality recordings, doesn't clearly say exactly  
5 what's going on. Does that leave you firmly  
6 convinced beyond a reasonable doubt, just these  
7 recordings nothing else? You have the testimony of  
8 a witness, Kerwyn Phillips. He's going to say  
9 whatever they want him to say. He doesn't want to  
10 get charged with murder. Talking about the only  
11 deal he got was four months knocked off his federal  
12 sentence, he got the deal of a lifetime, he didn't  
13 get charged with murder, that's the deal Kerwyn  
14 Phillips got and that's an incentive to say whatever  
15 they want you to say.

16 Now, I want to back up a little bit. I want to  
17 talk about the facts that everybody agreed were the  
18 facts back in 2004 when this originally happened.  
19 Gene Derrick came in here and testified, back in  
20 2004, he spoke with Investigator Faust, Investigator  
21 Barnes and whoever else would listen, the passenger  
22 was the shooter. No doubt about it, the passenger  
23 was the shooter. He told everybody he could tell,  
24 verbally. He even put it in a written statement.  
25 It's right here. This is the testimony we need to

1       be concerned about. Please read through this  
2       statement. Many things in here, the passenger hung  
3       his arm out, passenger was the shooter. It's clear.

4               There's also a point in this statement talks  
5       about the back window of the truck was solid glass.  
6       The one thing missing from this is any muzzle flash  
7       from the middle of the back window of the truck.  
8       That's nowhere in that statement. It wouldn't make  
9       sense to go along with that statement because he  
10      says the back window was solid glass. He said the  
11      shots came from the passenger side, the second shots  
12      from the passenger hanging out and shooting back at  
13      them. And that was the day after it happened, after  
14      he met with the investigators, after he rode the  
15      same route in trying to trigger any memories, that's  
16      when it was fresh.

17             The police in 2004, every investigator that got  
18      on the stand had in their notes the passenger was  
19      the shooter. Not one of them had in their notes the  
20      driver could have been the shooter. The inner  
21      office memos they sent out, the passenger shooter.  
22      Never saw a driver shooter, passenger.

23             Now, on October 24th, 2005, that's an important  
24      date, too, that's when everything with this case  
25      changed. Crime Stopper tip came in about John Moore

1       and Kerwyn Phillips.  Mysteriously, we don't have an  
2       official report of this tip.  We have the reports  
3       from all the other reports that came through, but we  
4       don't have a report for the most important tip in  
5       the case.  I find that a little bit suspicious.  
6       Maybe the original tip said that Kerwyn was the  
7       shooter.

8               But you know what, they did a little bit of  
9       investigating and they found out Kerwyn Phillips has  
10      a federal proffer meeting scheduled, conveniently,  
11      where he's cooperating with the feds.  This is when  
12      Investigator Barnes realizes Kerwyn Phillips, at  
13      this point, is kind of untouchable.  Anything he  
14      says in a federal proffer they can't use against  
15      him.  We've got to change something.  We've got to  
16      convict somebody.  All this pressure, the press is  
17      all over this, we've got to convict somebody.

18             And this is when the case turns towards the  
19      driver, John Moore.  Not when they thought, oh, well  
20      the driver is the shooter, but it's when they  
21      realized they couldn't prosecute the right person,  
22      got to get somebody.

23             So what happens?  Investigator Barnes  
24      testifies, goes and meets with the solicitors, the  
25      federal prosecutors, they get a strategy together.

1 I submit they did get a strategy together on how to  
2 fabricate a case. What they did is they scared  
3 Kerwyn Phillips. They scared him good. He ran  
4 right out the back door of that federal courthouse,  
5 down in the basement, he was doing anything to get  
6 the heck out of there, went home, talked to his  
7 mama, baby mama. I submit he probably talked with  
8 his attorney, comes back in and meets with them.

9 And Investigator Barnes testified they met with  
10 him, he gave all the details very forthright, they  
11 didn't give him any kind of information. But who  
12 wrote the statement? Investigator Barnes. Kerwyn  
13 Phillips got on the stand says, I can barely even  
14 read that. But he signed it because it's sign it or  
15 else. He's got a murder charge hanging over his  
16 head. He knows he shot somebody.

17 Now, they've got the script. This is what  
18 Investigator Barnes wrote. Now, they've got the  
19 script and Kerwyn's got to follow this because  
20 they've got a big murder charge hanging over his  
21 head.

22 And then we come to the trial. Mr. Derrick  
23 gets on the stand. He met with Investigator Barnes  
24 a few times. He met with the solicitors preparing  
25 for trial. Everything he testifies to it's almost

1 exactly the same down to the number of packs of  
2 cigarettes he buys on the night as his written  
3 statement.

4 The only things that changed is any reference  
5 to the passenger being the shooter and then he adds  
6 in one more thing saying he saw a muzzle blast in  
7 the center of the back window, that wasn't in this  
8 statement.

9 Now, I think that's the best representative  
10 piece of evidence in this case to show that they are  
11 fabricating a case to convict somebody. Why else  
12 would those be the only two pieces of his testimony  
13 that changed? Is he sticking with the program  
14 maybe? He wants somebody to be punished. He now  
15 knows they can't get the right guy.

16 Luckily, and again thank God we have it, this  
17 is what he signed the day after it happened. This  
18 is Gene Derrick's testimony, not what he came and  
19 said after talking with the solicitors and  
20 investigators. This is what he says happened. And  
21 you know he was trying to be accurate the day after.  
22 He wants to find that -- he wants to find that  
23 person that shot his wife. He wants to find that  
24 shooter, the passenger.

25 Now, while we're talking about Mr. Derrick, I

1       just want to sidetrack for just a little bit.  
2       Regardless of who you find the shooter to be, the  
3       Judge is going to instruct you on voluntary  
4       manslaughter and self-defense. And Mr. Meadors said  
5       that doesn't apply in this case. I submit it does  
6       apply because the Judge has instructed you, so it  
7       obviously does apply in this case.

8               And when you think about the series of events  
9       that led up to this altercation in listening to  
10      Mr. Derrick's version, driving on the interstate at  
11      2:30 in the morning with his family in the car  
12      talking about marriage and suddenly four shots rip  
13      into the side of his car, then he decides to chase  
14      the truck down the interstate, shot at again and  
15      continues to chase the truck, that really doesn't  
16      make too much sense.

17             Kerwyn's version, that argument going back and  
18      forth, the flashing of lights, cars swerving at the  
19      truck, that makes a little bit more sense. And if  
20      you're talking about an interstate 2:30 in the  
21      morning, two o'clock in the morning, there's  
22      probably only two cars on the road and you've got a  
23      Buick coming up from behind you going 70, 80 miles  
24      per hour and swerves at you, that could be a scary  
25      situation.

1           I don't know if you'll even get to talking  
2           about these issues, voluntary manslaughter and  
3           self-defense, but if you do, I would ask you to  
4           think about the situation.

5           Now, lastly, I want to end with two points and  
6           I think they're important because they're the two  
7           pieces of evidence that don't depend on the  
8           credibility of witnesses. And right here they're  
9           tangible and you're going to get to look at them  
10          when you're back in the jury room.

11          One is this tailgate right here. I said I was  
12          going to get to it and I'm getting to it. We'll  
13          make sure somebody carries it back there for you  
14          because I want you to get down and really look at  
15          it, look at the hole that's made. You can see it.  
16          It doesn't take an expert to tell us which way a  
17          bullet came from that hit that spot when you look at  
18          it closely.

19          They were talk -- Mr. David Collins was up here  
20          talking about, well it could have been a ricochet or  
21          something of that nature. If it had been a  
22          ricochet, don't you think they would have brought  
23          something in here from where it ricocheted off of?  
24          They didn't see that.

25          When you look at it, you can see it's coming



1 down at an angle like this (indicating) which would  
2 draw a line right out to the passenger leaning out  
3 shooting back at a car behind him exactly how  
4 Mr. Derrick said in his original statement. So I do  
5 like that. We want you to look at that.

6 Secondly, is bullet hole number three. You  
7 heard Mr. Strickler, David Collins talk about it at  
8 great length. This is the one bullet hole in the  
9 side of the car where it had two points of  
10 reference, through the outside and through the  
11 inside part of the door. That gives you two points  
12 you can get where the bullet came from, pretty good  
13 representation of the angle of the shot.

14 Here's the picture, the bottom one. I want you  
15 to look at this picture when you get back there.  
16 Think about it, it's a pretty low trajectory. Is  
17 that more consistent with the passenger leaning out  
18 and shooting at a car?

19 Or, if you don't want to say it's the right arm  
20 with his shoulder up against the window and the  
21 door, because they're saying that he put his  
22 shoulder up against the window, ladies and  
23 gentlemen, the window has to be down, but if the  
24 shoulder's up against the door pointing at a car, is  
25 it more consistent with that or is it more

1 consistent with a driver driving 80 miles per hour  
2 with a .45 caliber hand cannon right in front of the  
3 passenger shooting out with the shell casings  
4 shooting in the face of the passenger from a high  
5 range? Which one's more consistent? It's common  
6 sense. And this is the best representation you  
7 have.

8 When you get in this case, they said they want  
9 to hold somebody responsible. They didn't say  
10 responsible for what or for who. But throughout  
11 this case, they've been picking bits and pieces of  
12 what they want to pick out of it and put their own  
13 spin on it, just like the phone call from the jail,  
14 his girlfriend. They introduced this C.D. track  
15 three, didn't introduce this C.D. Investigator  
16 Barnes testified there were over 20 phone calls.  
17 They don't want you to know the context of the  
18 conversation. They want to pick their own bits and  
19 pieces and give their own meaning to it and say  
20 they're doing their job.

21 Ladies and gentlemen, is that justice  
22 prosecuting one person because you can't prosecute  
23 the right person? We ask you to deliberate, come  
24 back with a just verdict. A just verdict is not  
25 guilty.

1           **THE COURT:** Thank you, Mr. Collins.

2           All right. Ladies and gentlemen, I'm going to  
3 send you into the jury room for a short break once  
4 again, then I'll bring you out and tell you the law  
5 that applies to the case. Don't discuss the case.

6           (The jury retires to the jury room.)

7           **THE COURT:** All right. Ladies and gentlemen,  
8 this is going to be a short break. And I want you  
9 all to understand something, when I start charging  
10 the jury, those doors back there are going to be  
11 locked. All this going in and coming out is not  
12 going to take place.

13          Now, if you get sick or there's some emergency  
14 and you've got to go, go, but absent an emergency,  
15 you better stay still, you better stay quiet and you  
16 better not be distracting this jury. It's going to  
17 be hard enough for them to concentrate on me talking  
18 for 45 minutes without having to worry about what  
19 somebody else is doing moving about in the  
20 courtroom, that includes taking coats off and  
21 putting coats on and all that, so decide before I  
22 start whether you're hot or cold. We're at ease.

23          **MR. MEADORS:** Judge, can I -- very briefly.

24          **THE COURT:** Yes.

25          **MR. MEADORS:** Mr. Collins referred to that tape

1       which wasn't in evidence, I didn't want to object,  
2       he didn't object to me, but I think that was  
3       improper. But, Your Honor, is in this charge that  
4       they can only consider evidence that was presented?

5               **THE COURT:** I tell them in my standard charge  
6       that they are to consider the competent evidence  
7       before them, the testimony of the witnesses and any  
8       exhibits admitted in the trial.

9               **MR. MEADORS:** Okay. Thank you.

10              **THE COURT:** All right. We're at ease.

11                   (Brief recess.)

12              **THE COURT:** Bring the jury in.

13                   (The jury returns to the courtroom.)

14              **THE COURT:** Members of the jury, all of the  
15       evidence has been presented, you've heard the  
16       arguments of counsel and now it's time for me to  
17       instruct you on the law. Please continue to pay  
18       close attention during this next stage of the trial.

19              Now, first, you need to understand some basic  
20       ground rules. You, the jury members, are the sole  
21       judges of the facts. You decide all of the issues  
22       of fact. You alone determine the truth of the  
23       evidence, its effect, its value and its weight. You  
24       alone judge the credibility of the witnesses, in  
25       other words, whether or not a witness' testimony is

1       believable.

2               In evaluating the testimony of the witnesses  
3       including any expert witnesses, you may believe all  
4       that a witness said or none of it. You may believe  
5       part of what a witness said and not believe the  
6       balance. You may believe one witness against many  
7       or many against one. You may consider any interest,  
8       bias or prejudice that you feel that a witness has  
9       in the case. You may consider the demeanor and the  
10      appearance of the witness and the opportunity for  
11      knowledge that the witness had. You may consider  
12      the lack of evidence presented by the State. You  
13      may consider whether a witness has been consistent  
14      or inconsistent.

15             But you're not to exercise these considerations  
16      arbitrarily. What I want you to do is use your  
17      common sense, use your sense of logic and reason and  
18      your good judgment.

19             It's not proper for me to give you a charge on  
20      the facts of the case. I can't discuss the facts  
21      with you. I'm not permitted to convey to you an  
22      impression as to what, if any, personal opinions I  
23      may develop about the facts of a case as it goes  
24      along. So if, during any stage of this trial, you  
25      have developed an impression that I've got a

1       personal opinion about the facts, you must remove  
2       that totally from your mind. You're the sole judges  
3       of the facts.

4               Now, I am the judge of the law that applies to  
5       the case and under your oath, you must accept and  
6       apply the law as I give it to you. That means if  
7       you've got conflicting ideas about what the law is  
8       or what it should be, you have to abandon those  
9       things. I give you the law, you apply it to the  
10      facts as you determine them to be and in that way,  
11      you reach your verdicts.

12             It's also my job to decide what evidence is  
13      admissible. If I've ruled something inadmissible or  
14      told you to disregard something, you're not to  
15      consider those things in arriving at your verdicts.  
16      Base your verdicts on the competent evidence before  
17      you, consider the testimony of the witnesses and the  
18      exhibits that have been admitted in the trial.

19             Now, the rules of evidence allow for opinion  
20      testimony to be given under certain circumstances.  
21      And one area where that's allowed is where someone  
22      by virtue of education, training and experience is  
23      permitted to testify as an expert witness. Now, the  
24      mere fact that someone is allowed to render opinions  
25      under our rules as an expert witness does not mean

1       that you have to accept the opinions given if you  
2       choose not to do so. You may accept or reject the  
3       opinions of an expert witness just as you may any  
4       other witness in whole or in part.

5               I remind you, ladies and gentlemen, of an  
6       instruction I gave you during the trial and that is  
7       that the fact that the defendant in this case  
8       elected not to testify is not a factor to be  
9       considered by you in any way in your deliberations  
10      and in your consideration on the question of whether  
11      he is guilty or not guilty. His decision not to  
12      testify must not be considered in any manner  
13      whatsoever against Mr. Moore. An accused has a  
14      constitutional right to remain silent and the  
15      assertion of that right cannot and must not be  
16      considered by you in any manner whatsoever against  
17      him.

18             So in your deliberations and under the oath  
19      you've taken, you are to reach no inference and you  
20      are to draw no conclusion whatsoever from the fact  
21      that the defendant in this case elected not to  
22      testify. His decision not to testify should not be  
23      discussed among you in the jury room. It should not  
24      enter your mind in making your decision on whether  
25      he is guilty or not guilty.

1           The State has the entire burden of proof and  
2           the State has to prove the defendant guilty beyond a  
3           reasonable doubt. An accused has no obligation to  
4           prove anything at all.

5           The defendant in this case is presumed to be  
6           innocent. Now, this is no mere legal theory. It is  
7           a fundamental and substantial right to which  
8           everyone is entitled. It's been described as being  
9           like a robe of righteousness placed around an  
10          accused and it remains with him through every stage  
11          of the trial. It continues to exist after you go  
12          back to your jury room to deliberate so that he is  
13          presumed to be innocent unless and until you, the  
14          jury, determine that the State has proven him guilty  
15          beyond a reasonable doubt.

16          A defendant is not required to prove his  
17          innocence. He's not required to prove anything at  
18          all. The burden is on the State to prove the guilt  
19          of the defendant beyond a reasonable doubt and they  
20          have to prove that as to every essential element of  
21          an offense charged.

22          The State is not required to prove the guilt of  
23          the defendant beyond all doubt or beyond every  
24          doubt. The appropriate standard is proof beyond a  
25          reasonable doubt.



1           So I'm going to explain that concept to you.  
2       Some of you might have served as jurors in civil  
3       court and if you have, you know that the burden of  
4       proof in civil court requires establishing that  
5       something is probable, that it's more likely than  
6       not, and that's called the greater weight or  
7       preponderance of the evidence. But in criminal  
8       court such as we're in now, the standard is much  
9       higher and the proof must be much stronger than is  
10      required in civil court. The burden of proof in a  
11      criminal case such as this case is proof beyond a  
12      reasonable doubt.

13           So what do I mean by that? Proof beyond a  
14      reasonable doubt is proof that leaves you firmly  
15      convinced of the defendant's guilt. There are few  
16      things in the world that we know with absolute  
17      certainty and in criminal cases the law does not  
18      require proof that overcomes every possible doubt.  
19      If, based on your consideration of the evidence, you  
20      are firmly convinced that the defendant is guilty of  
21      a crime charged, then you must find him guilty of  
22      that crime. If, on the other hand, you think there  
23      is a real possibility that he is not guilty, you  
24      have to give him the benefit of the doubt and find  
25      him not guilty on that charge.

1           Now, there's no obligation on the part of the  
2       defendant to raise any other doubt or any other  
3       possibility or raise any doubt at all. He's  
4       presumed to be innocent and the State has the entire  
5       burden of proof and has to prove to you that the  
6       defendant is guilty to the exclusion of any other  
7       real possibility.

8           I need to explain to you that there are two  
9       types of evidence that are generally presented  
10      during a trial. There's direct evidence and there's  
11      circumstantial evidence. Direct evidence is  
12      evidence of direct perception, including the  
13      testimony of a person who asserts or claims to have  
14      actual knowledge of a fact such as an eyewitness.

15           Now, circumstantial evidence is proof of a  
16      chain. It's proof of a chain of facts and  
17      circumstances indicating the existence of a fact.

18           The law makes absolutely no distinction between  
19      the weight or value to be given to either direct or  
20      circumstantial evidence, nor is a greater degree of  
21      certainty required of circumstantial evidence than  
22      of direct evidence. What you need to do is to weigh  
23      all of the evidence in the case. And after weighing  
24      all of the evidence, if you're not convinced of the  
25      guilt of the defendant beyond a reasonable doubt,

1           then you must find him not guilty.

2                   Now, folks, I have to explain to you some  
3           things about statements allegedly made by this  
4           defendant. There's been some testimony in evidence  
5           about statements allegedly made by this defendant  
6           and in evaluating such statements, you need to look  
7           at whether the statement was made during police  
8           interrogation or not, okay. So in evaluating  
9           statements, you have to first look to see was this  
10          statement the product of police interrogation or was  
11          it not during police interrogation.

12                   With either type of statement, you first have  
13          to determine whether the State has proven that the  
14          defendant made the statement. If not, then you  
15          disregard it.

16                   But you need to understand that there are  
17          additional evaluations that you have to make if the  
18          statement was made in response to police  
19          interrogation. When police or law enforcement  
20          officials are questioning a defendant, the law has  
21          certain protections that are afforded and are put in  
22          place. So before the police can question a  
23          defendant who is under arrest for a crime, the State  
24          has to prove to you that the defendant was first  
25          warned properly of his constitutional rights prior

1 to the questioning and giving of the statement.

2 When an individual is taken into custody or had  
3 his freedom of movement deprived by a law  
4 enforcement officer in any significant way, he has  
5 to first be warned of his constitutional rights  
6 before there can be custodial interrogation or  
7 custodial questioning and these rights are commonly  
8 called the Miranda warnings. And they are that he  
9 has the right to remain silent, that any statement  
10 he makes can and will be used against him in court,  
11 that he has the right to an attorney and if he  
12 doesn't have the resources to hire a lawyer, the  
13 Court will appoint one for him at no expense, that  
14 he has the right to consult with an attorney before  
15 answering any questions or making any statement,  
16 that he has a right to have the attorney present  
17 with him at all times during all interviews and  
18 interrogations and that he may stop answering the  
19 questions at any time.

20 Now, these Miranda warnings, it's not required  
21 that those exact words be used, but the substantial  
22 equivalent of those warnings has to be given. If  
23 the State proves to you that it gave Miranda  
24 warnings prior to interrogating the defendant, the  
25 State then has to prove that the defendant knowingly

1       and intelligently waived his constitutional rights  
2       and answered police questions and made a statement  
3       to the police.

4               The final requirement is that the statement in  
5       question has to have been given voluntarily. The  
6       State has to prove to you beyond a reasonable doubt  
7       that the statement was the expression of the  
8       defendant's own free will and it was not improperly  
9       induced by compulsion, duress, force, fear or by the  
10      promise of some reward or hope of reward. Unless a  
11      statement given in response to police questioning is  
12      given freely and voluntarily, then you are not to  
13      consider it.

14             Now, with regard to the alleged statement of  
15      the defendant, Mr. Moore, that was allegedly given  
16      to a law enforcement officer in response to that  
17      officer's questions, I instruct you that the State  
18      has to prove every requirement about which I've just  
19      instructed you and that proof must be beyond a  
20      reasonable doubt before you may consider the alleged  
21      statement against the defendant.

22             All right, folks, I've decided what I'm going  
23      to do now is I'm going to go through the section of  
24      the charge where I recap the indictments, which I  
25      read to you in full at the beginning of the trial,

1 and then I'm going to take that short break because  
2 we're about halfway through the charge, okay, and  
3 just let you step out, stretch your legs. It will  
4 be a very short break and I'll bring you back in.  
5 But before you go, I'm going to recap the  
6 indictments. We're going to turn to the specific  
7 charges in this case.

8 In separate indictments, John Moore is charged  
9 with crimes of murder, unlawful possession of a  
10 pistol by a person under the age of 21 years and use  
11 of a firearm during the commission of a violent  
12 crime. Each indictment is separate and distinct and  
13 has to be evaluated on its own merit or lack of  
14 merit. All the indictments allege that the offenses  
15 occurred in Richland County on or about October the  
16 17th, 2004.

17 The murder indictment alleges that John Moore  
18 did with malice aforethought, kill Stephanie Dover  
19 by shooting her and that she died as a proximate  
20 result, a direct result thereof on the same date.

21 The indictment for possession of a firearm  
22 during the commission of a violent crime alleges  
23 that Mr. Moore possessed or visibly displayed what  
24 appeared to be a firearm during -- I should restate  
25 that. It alleges that Mr. Moore possessed or

1 visibly displayed a firearm during the commission or  
2 attempted commission of a violent crime, which is  
3 specifically alleged to be murder.

4 And the final indictment charges Mr. Moore with  
5 unlawful possession of a pistol by a person under  
6 the age of 21. And that law is pretty simple. It  
7 alleges that he knowingly possessed a pistol while  
8 under the age of 21 years.

9 I read those indictments to you in full at the  
10 beginning of the trial. I caution you once again  
11 that an indictment is not evidence. It is merely  
12 the formal means by which someone is charged and  
13 brought to trial.

14 Folks, we'll take a very brief recess now,  
15 three to five minutes. You cannot discuss the case.  
16 Just stretch your legs and I'll get you back in.  
17 Thank you.

18 (The jury retires to the jury room.)

19 **THE COURT:** We'll be at ease just a couple of  
20 minutes. If you leave, I suggest you don't go far.

21 (Brief Recess.)

22 **THE COURT:** You can bring the jury in.

23 (The jury returns to the courtroom.)

24 **THE COURT:** All right. At this point, I'm  
25 going to explain to you the offense of murder.

1 Murder is the unlawful killing of another person  
2 with malice aforethought either expressed or  
3 inferred. So to convict Mr. Moore of murder, the  
4 State has to prove beyond a reasonable doubt that at  
5 the date, time and place alleged in the indictment,  
6 the defendant unlawfully killed Stephanie Dover and  
7 that the killing was done with malice aforethought.

8 Now, what do we mean by the term malice?  
9 Malice imports wickedness. It excludes any just  
10 cause or legal excuse. It's something that springs  
11 from depravity, from a depraved spirit, from a heart  
12 devoid of social duty and fatally bent on mischief.  
13 Malice may be expressed or inferred. It is  
14 something that springs from wickedness. The element  
15 of malice may be shown by direct evidence or by  
16 inference.

17 Now, examples of direct evidence of malice  
18 would be where there was a threat of vengeance made  
19 or where ill will was directly expressed or where  
20 the killing was planned. And, obviously, there are  
21 other ways that expressed malice could be shown.

22 Malice may also be inferred from facts and  
23 circumstances that are proven by the State. Malice  
24 may be inferred from the use of a deadly weapon.  
25 These inferences are evidentiary only and may be



1       considered by you alone with all of the other  
2       evidence in the case and given such weight, if any,  
3       that you decide the inference should receive. You  
4       are free to accept or reject permissive inferences  
5       depending upon your view of the evidence.

6               Now, if facts are proven by the State beyond a  
7       reasonable doubt to be sufficient to raise an  
8       inference of malice, you may accept or reject that  
9       permissive inference of malice as I've just told  
10      you. If the conduct of the defendant directly  
11      results in the death of another and was so culpable  
12      and inexcusable, so aggravated and so grossly  
13      reckless as to show an active, intentional disregard  
14      of the consequences to human life thus denoting a  
15      malignant spirit, a heart devoid of social duty and  
16      fatally bent on mischief, an inference of malice may  
17      arise.

18             To infer malice, however, requires more than  
19      carelessness, more than recklessness, it's more than  
20      a passive indifference for the safety of others.  
21      There has to be a deliberate and intentional design  
22      to use or employ or handle a deadly weapon so as to  
23      endanger the life of another without just cause or  
24      legal excuse.

25             Now, you may infer malice if you determine that

1 the alleged conduct on the part of the defendant in  
2 using a deadly weapon demonstrated such an  
3 intentional disregard for human life, but malice is  
4 an essential element of the crime of murder and has  
5 to be proven by the State beyond a reasonable doubt.

6 So I've given you some explanations about  
7 malice and I need to explain to you now the word  
8 aforethought. Whether the malice is expressed or  
9 inferred, the malice has to be aforethought. And I  
10 spell that usually for juries, it's  
11 A-F-O-R-E-T-H-O-U-G-H-T. It's not required that the  
12 malice exists for any particular amount of time, but  
13 it has to exist in the mind of the accused just  
14 before and at the time of the commission of the act.  
15 There has to be a combination of this previous evil  
16 intent and the act producing the fatal result.

17 I told you that murder involves an unlawful  
18 killing. So to constitute murder, the killing must  
19 be unlawful, meaning that the killing was not  
20 justified under the law.

21 I'm going to explain to you further in the  
22 charge that you may evaluate whether the act was in  
23 self-defense, if the defendant acted in  
24 self-defense. Acts done in self-defense are  
25 justified under the law; therefore, a killing that's

1       done in self-defense is not murder, it's not  
2       unlawful.

3               So let me go back through and recap for you  
4       about murder. Murder is the unlawful killing of  
5       another person with malice aforethought expressed or  
6       inferred. The law recognizes that certain crimes  
7       include within them lesser crimes and these things  
8       are called lesser included offenses. Murder  
9       contains a lesser included offense of voluntary  
10      manslaughter. Murder requires malice. Malice is  
11      not an essential element of the crime of  
12      manslaughter. It may be present in voluntary  
13      manslaughter, but it's not required to be proven by  
14      the State, that is, malice is not required to be  
15      proven by the State to prove voluntary manslaughter.

16              Voluntary manslaughter is the unlawful killing  
17      of another person in sudden heat of passion upon a  
18      sufficient legal provocation. The law recognizes  
19      that a person who is sufficiently provoked by  
20      someone and acts in sudden heat of passion to kill  
21      the person is not guilty of murder but of a lesser  
22      offense of voluntary manslaughter. So if you have a  
23      reasonable doubt as to whether the State has proven  
24      that the defendant committed murder, you may  
25      consider the offense of voluntary manslaughter.

1           To prove voluntary manslaughter, the State has  
2           to prove beyond a reasonable doubt that the  
3           defendant took the life of Stephanie Dover in sudden  
4           heat of passion based on sufficient legal  
5           provocation. Both the sudden heat of passion and  
6           the sufficient legal provocation have to be present  
7           at the time of the killing to constitute voluntary  
8           manslaughter. Sudden heat of passion may for a time  
9           affect a person's self control and temporarily  
10          disturb a person's reason. The sudden heat of  
11          passion must be the type that would make an ordinary  
12          person unable to coolly reflect on his actions and  
13          produce an uncontrollable impulse to do violence.

14          To constitute sudden heat of passion, it is not  
15          necessary that reason be entirely dethroned, but it  
16          has to be such as to disturb and sway the reason of  
17          an ordinary prudent person and to shut out the power  
18          of cool reflection and create in the mind an  
19          uncontrolled impulse to do injury to another. Now,  
20          that's sudden heat of passion.

21          Sufficient legal provocation must be the type  
22          that would make a person of ordinary reason and  
23          caution become enraged and lose control temporarily.  
24          The provocation needed for a voluntary manslaughter  
25          has to come from some act of or some act related to

1 the purported victim.

2 Words or insulting communications no matter how  
3 insulting the words or the communications are, those  
4 things are not sufficient to constitute sufficient  
5 legal provocation. Where death is caused by the use  
6 of a deadly weapon, the words or insulting  
7 communications have to be accompanied by some overt,  
8 threatening act that could have produced the heat of  
9 passion.

10 If the heat of passion had cooled or if there  
11 was enough time between the provocation and the  
12 killing for the passion of a reasonable person to  
13 cool, the killing would not be voluntary  
14 manslaughter. In deciding whether a reasonable  
15 person would have had enough time to cool off, you  
16 consider all the circumstances surrounding the  
17 killing, you may consider the nature of the  
18 provocation, if any, the defendant's mental state  
19 and physical state and the circumstances and  
20 relationships between the parties.

21 If the State has proven beyond a reasonable  
22 doubt that the defendant killed the decedent in  
23 sudden heat of passion upon a sufficient legal  
24 provocation, you may convict the defendant of  
25 voluntary manslaughter even though that charge is

1 not specifically written on the face of the  
2 indictment because murder includes within it  
3 voluntary manslaughter.

4 Now, if after reviewing the facts of the case,  
5 you have a reasonable doubt as to whether the State  
6 has proven that the defendant was the person who  
7 actually fired the weapon and killed Ms. Dover,  
8 Mr. Moore may nonetheless be found guilty under the  
9 theory of accomplice liability, which is sometimes  
10 called the hand of one is the hand of all if  
11 accomplice liability has been proven by the State,  
12 all right.

13 Now, accomplice liability or the hand of one is  
14 the hand of all is a recognition that if two or more  
15 people acting in concert are present and they're  
16 aiding, abetting and assisting each other in the  
17 commission of a crime, it doesn't matter who  
18 actually did a particular act within the commission  
19 of the crime, all of the accomplices are guilty.

20 An accomplice is a person who was present at  
21 the scene of the crime and intentionally or through  
22 some common plan aided, abetted and assisted in the  
23 commission of that crime through some overt act with  
24 the other person.

25 To be held guilty as an accomplice, the

1       defendant must have knowledge of the principal's  
2       criminal conduct because merely being present at the  
3       scene of the crime is not sufficient to establish  
4       guilt as an accomplice. Mere presence at the scene  
5       of the crime is not a crime.

6               Now, intentionally means willfully intending  
7       the result that actually occurs, not something done  
8       by accident or involuntarily. If the State proves  
9       to you that the defendant was present and  
10       intentionally through some overt act on his part  
11       aided, abetted and assisted another person in the  
12       commission of a homicide against Ms. Dover as  
13       alleged in the indictment and if you find that the  
14       State has proven that Mr. Moore knew that the person  
15       was engaged in that criminal conduct when he  
16       provided the assistance in that criminal act, then  
17       the defendant may be found guilty of that crime even  
18       if the defendant did not pull the trigger.

19              Now, I need to go over with you self-defense.  
20       In reviewing this case, you may consider  
21       self-defense. Self-defense is a complete defense  
22       which means that if a defendant acted in  
23       self-defense, he is not guilty of murder or  
24       manslaughter. The law recognizes the right of every  
25       person to defend himself from death or serious

1       bodily injury. To do so, a defendant may use such  
2       force as is reasonably necessary or apparently so  
3       even to the extent of taking the life of an  
4       assailant.

5               Now, generally the elements of self-defense  
6       include the following things: First, the defendant  
7       had to have been without fault in bringing on the  
8       difficulty. If Mr. Moore was at fault or jointly at  
9       fault in bringing on the difficulty, he is not  
10      protected by self-defense even though the initial  
11      disagreement escalated beyond what may have been  
12      originally envisioned.

13             The only way that someone who is at fault in  
14      bringing on the difficulty can be restored to the  
15      protections of self-defense is where before the  
16      shooting occurred, he had withdrawn from the  
17      conflict and tried in good faith to avoid further  
18      conflict and by his actions had made known to the  
19      other party that he was discontinuing and  
20      withdrawing from the dispute, okay.

21             So the first thing on self-defense that you  
22      have to evaluate is whether the defendant was  
23      without fault in bringing on the difficulty. And,  
24      again, the only -- if he was, the only way he can be  
25      restored to a claim of self-defense, if at all, is



1       if he had withdrawn as I explained to you.

2               Now, the second thing is if the defendant was  
3       without fault in bringing on the difficulty or had  
4       withdrawn from the conflict and communicated that to  
5       the other parties, the next requirement for  
6       self-defense is that the defendant must have  
7       actually believed that he was in imminent danger of  
8       losing his life or sustaining serious bodily injury,  
9       or the defendant must have actually been in such  
10      imminent danger of death or serious bodily harm.

11             The third thing relates to the situation of  
12      where a person is in imminent danger. If a person  
13      is in such imminent danger, the circumstances facing  
14      the defendant must have been such that would warrant  
15      a person of ordinary prudence and firmness and  
16      courage to strike back in the manner that the  
17      defendant did. So if there was an actual imminent  
18      danger of death or serious bodily harm to the  
19      defendant, the circumstances facing the defendant  
20      must have been such to warrant him -- I'm sorry --  
21      to warrant a person of ordinary prudence, firmness  
22      and courage to strike back in the manner that the  
23      defendant allegedly did.

24             If the claim of self-defense is based on a  
25      belief that a person is in imminent danger of death

1 or serious bodily harm, then the circumstances must  
2 have been such that a reasonably prudent person of  
3 ordinary firmness and courage would have entertained  
4 the belief that he was actually in imminent danger  
5 or the circumstances were such that would warrant a  
6 person of ordinary firmness, courage and prudence to  
7 use deadly force in order to save himself from  
8 serious bodily harm or loss of life.

9 And the fourth element in self-defense is that  
10 the defendant must have had no other probable means  
11 of avoiding the danger of death or serious bodily  
12 harm except to act as he did.

13 If the defendant acted in self-defense, you  
14 must find him not guilty on the charge of murder and  
15 you cannot find him guilty on the charge of  
16 manslaughter.

17 The State has the burden of disproving  
18 self-defense, which means the State has to disprove  
19 self-defense beyond a reasonable doubt. If you have  
20 a reasonable doubt of the defendant's guilt after  
21 considering all of the evidence including the  
22 evidence of self-defense, then you are to find the  
23 defendant not guilty on the charge of murder. And,  
24 again, you can't find him guilty of murder or  
25 manslaughter if the act was in self-defense because

1       it's a lawful act.

2               On the other hand, if you have no reasonable  
3       doubt of the defendant's guilt after considering all  
4       of the evidence including evidence of self-defense,  
5       then you are to find the defendant guilty.

6               In assessing the issue of self-defense, you  
7       look at all of the facts and circumstances. In  
8       evaluating the defendant's perception of danger, a  
9       defendant may act on appearances and it is not  
10      required that a defendant actually have been in  
11      danger. It is enough if the defendant believed he  
12      was in imminent danger and a reasonably prudent  
13      person of ordinary firmness and courage would have  
14      had the same belief. The defendant has the right to  
15      act on appearances even though the defendant's  
16      beliefs may have been mistaken.

17              Now, generally a person acting in self-defense  
18      has a duty to retreat to avoid the danger. If the  
19      defendant has a means of escape, he is generally  
20      required to use it. He must leave if he has a means  
21      of escaping the danger unless by doing so the danger  
22      of being killed or suffering serious bodily injury  
23      would increase. Also, one who is attacked by the  
24      use of a deadly weapon has no obligation to retreat.

25              A defendant acting in self-defense has the

1 right to use the amount of force apparently  
2 necessary to avoid death or serious bodily harm.  
3 The force does not have to be limited to the degree  
4 or amount of force used by the assailant. The  
5 defendant has a right to use so much force as  
6 appeared to be necessary for complete protection and  
7 for which a person of ordinary reason and firmness  
8 would have believed to be needed to prevent death or  
9 serious bodily harm. Once a defendant is justified  
10 in acting in self-defense to defend himself, he is  
11 justified in continuing using force until it is  
12 apparent that the danger of death or serious bodily  
13 injury has completely ended.

14 Where a defendant is operating under a  
15 reasonable belief of his impending death or serious  
16 bodily injury, he is not required to wait until the  
17 perceived assailant gets the drop on him before  
18 acting in self-defense.

19 So to wrap this up about self-defense, if a  
20 defendant acts in self-defense, as I've explained  
21 all of those concepts to you, he is not guilty of  
22 murder or manslaughter. In very broad terms,  
23 self-defense involves lack of fault in bringing on  
24 the difficulty, being in imminent danger of losing  
25 life or sustaining serious bodily injury or having

1 an actual belief of being in such imminent danger;  
2 if the imminent danger in fact existed, the  
3 circumstances would warrant a person of ordinary  
4 prudence, firmness and courage to strike back in the  
5 manner the defendant did; if the defense relates to  
6 a belief of imminent danger, the circumstances must  
7 have been such that a reasonably prudent person of  
8 ordinary firmness and courage would have entertained  
9 the same belief; and the fourth necessary thing on  
10 self-defense is there was no other probable means of  
11 avoiding the danger of serious bodily injury or  
12 death except to act as the defendant did.

13 Another charge made against Mr. Moore is for  
14 possessing a firearm during the commission of a  
15 violent crime. It is a separate criminal offense to  
16 have in one's possession a firearm during the  
17 commission of a violent crime. I charge you that a  
18 pistol is a firearm under the law and that the  
19 offenses of murder and voluntary manslaughter are  
20 defined as violent crimes in South Carolina.

21 To convict Mr. Moore of this offense, you have  
22 to determine that the State has proven him guilty of  
23 either murder or the lesser included offense of  
24 voluntary manslaughter because the possession of the  
25 firearm during the commission of the violent crime

1 requires that there be a violent crime. You must  
2 then determine that the State has proven beyond a  
3 reasonable doubt that Mr. Moore possessed a firearm  
4 during the commission of that violent crime as  
5 alleged in the indictment.

6 The last charge against Mr. Moore is for  
7 possession of a pistol by a person under 21. It's  
8 unlawful in this state for a person under the age of  
9 21 years to possess a handgun except in limited  
10 circumstances such as weapons issued as part of  
11 military service or while temporarily using a  
12 handgun for training while under the immediate  
13 supervision of a parent or an adult instructor.

14 To prove the defendant guilty of this charge,  
15 the State has to prove that on the date and at the  
16 time and place alleged in the indictment, John Moore  
17 knowingly possessed a handgun in violation of the  
18 law, in other words, that he knowingly possessed a  
19 handgun and that he was under the age of 21 and he  
20 didn't fall under any of those exceptions.

21 The final thing I have to tell you on the law,  
22 ladies and gentlemen, is that the defendant is  
23 entitled to every reasonable doubt arising in the  
24 whole case or in any defenses. If, upon any issue  
25 of fact essential to a conviction, you have a

1 reasonable doubt as to how that issue should be  
2 resolved, you have to resolve that doubt in favor of  
3 the defendant. If, upon reviewing the entire case,  
4 you have a reasonable doubt of the guilt of the  
5 defendant on a particular charge, he is entitled to  
6 that doubt and a verdict of not guilty on that  
7 charge.

8 On the other hand, if upon reviewing an entire  
9 case, you find that the State has proven every  
10 essential element of that charge against the  
11 defendant beyond a reasonable doubt, it's equally  
12 your duty to find the defendant guilty of that  
13 charge.

14 If you find the defendant guilty but you have a  
15 reasonable doubt as to whether he is guilty of a  
16 greater crime charged or a lesser included offense,  
17 you have to resolve that doubt in favor of the  
18 defendant and write a verdict of guilty only as to  
19 the lesser charge, but you cannot find the defendant  
20 guilty of any crime greater or lesser until you're  
21 satisfied that the State has proven all of the  
22 essential elements of that offense beyond a  
23 reasonable doubt. That's the law.

24 When you go back to the jury room to decide the  
25 case -- cases, you're going to have with you all of

1 the exhibits that have been admitted in the trial  
2 and you're going to have these verdict forms. You  
3 see that there are three verdict forms. There's one  
4 for each charge, one for murder, one for possession  
5 of a firearm during commission of a violent crime  
6 and one for unlawful possession of a pistol by a  
7 person under the age of 21. There's a little  
8 heading under each caption to tell you which charge  
9 the form goes with.

10 Now, ladies and gentlemen, I now have to tell  
11 you the possible forms of verdict. And I'm supposed  
12 to tell you at this point that you're not to infer  
13 from the order in which I say these things that I'm  
14 trying to suggest one over the other. I've got to  
15 say one first, one second and so on.

16 The truth is that I did these forms at a  
17 computer school at the National Judicial College a  
18 bunch of years ago and all I do now is change names  
19 and case numbers. So long before I ever saw any of  
20 these folks, these forms were done except for the  
21 names and the case number.

22 This one on top reads, As to the charge of  
23 murder. And it reads, We, the jury, unanimously  
24 find the defendant, and you have three options. You  
25 may find him not guilty, you may find him guilty of



1 the lesser included offense of voluntary  
2 manslaughter or you may find him guilty of murder.

3 On the other two, you'll see that the charge is  
4 at the top. This one reads, As to the charge of use  
5 of a firearm during the commission of a violent  
6 crime, we, the jury, unanimously find the defendant,  
7 you have two options. You may find him not guilty  
8 or you may find him guilty of use of a firearm  
9 during the commission of a violent crime.

10 And the next one is to the charge of possession  
11 of a firearm by a person under the age of 21. I  
12 said firearm, I should have said pistol. Possession  
13 of a pistol by a person under the age of 21, we, the  
14 jury, unanimously find the defendant, you have two  
15 options. You may find him not guilty or you may  
16 find him guilty of possessing a firearm by a person  
17 under the age of 21.

18 Folks, how you go about your deliberations and  
19 how you go about taking your votes, all of that is  
20 entirely in your discretion except is subject to  
21 this requirement, the verdicts have to be unanimous,  
22 all 12 of you have to agree. When you come back out  
23 and your verdicts are read, you can be asked  
24 individually if that was your verdict and if it's  
25 still your verdict. So please understand that you

1 cannot do anything to change the requirement of a  
2 unanimous verdict, all 12 must agree in order for  
3 your foreman to record the verdict, which gets me to  
4 that.

5 Mr. Foreman, part of your job is fill out these  
6 forms for me. I think you'll find them  
7 self-explanatory. Just check the responses chosen  
8 by the jury on each charge and then there's a  
9 signature line on each page, you need to sign your  
10 name on that signature line.

11 One last thing before I get into my truly final  
12 comments and that is I gave you an instruction about  
13 notes at the beginning of the trial if you wanted to  
14 take notes. When you leave the courtroom this time,  
15 you can take your notes with you, but remember you  
16 cannot physically show them to another juror. And  
17 at the end of the trial, you have to give them to  
18 the bailiff so that they're destroyed. We don't  
19 read your notes.

20 All right. The final thing, I've told you  
21 dozens of times now not to discuss the case until I  
22 tell you to. Well, it's not time yet. The law says  
23 that I have to go over with the attorneys what I  
24 just told you before you start deciding the case and  
25 that's just common sense. We don't want you back

1       there deciding these cases using the wrong law. So  
2       if I said something wrong, they have to be given a  
3       chance to point it out to me before you start.

4               Now, we stayed here yesterday until about four  
5       o'clock. I went home, e-mailed this stuff to them  
6       last night about nine o'clock. We met this morning  
7       at 8:45 and we went over all of this. It shouldn't  
8       take us long to do this next part, okay, because  
9       we've already done it. That's why I told you you'd  
10      either be waiting on us back there or you'd be on  
11      your own.

12             If I need to bring you back out here and  
13      clarify something, I will, but if I'm satisfied with  
14      what I told you, this is the signal you need to look  
15      for. When the bailiff brings the exhibits in the  
16      courtroom and leaves and you've got the exhibits and  
17      the verdict form in the courtroom and it's just the  
18      12 of you, you start talking about the case, you  
19      don't have to wait another second, but don't talk  
20      about it until then.

21             They should send in there to you something to  
22      play these C.D.'s with. If, for some reason, you  
23      get in there and you don't have something that you  
24      need to display, that's fine.

25             And, folks, I don't know if this is going to

1       come up or not, I just thought about it and it might  
2       save some question once you get back there. There  
3       were a whole bunch of things marked in the course of  
4       the trial, what the lawyers do to speed things up is  
5       they will mark a whole bunch of things some of which  
6       are not going to ever come into the trial, all  
7       right. They mark them for identification purposes,  
8       you heard them use that term. If it's an exhibit,  
9       it goes back there with you in the jury room. So if  
10      there's a gap between the numbers, don't worry about  
11      that, all right.

12               When you've reached your verdicts, knock on the  
13      door, the bailiff will respond to your knock.

14               Thank you very much for your attention. You  
15      paid very close attention to me and I really  
16      appreciate it. And you paid very close attention  
17      during the trial. If you'll retire to your jury  
18      room. I'll have them bring back the verdict form  
19      and the exhibits. Thank you.

20               (The jury retires to the jury room.)

21               **THE COURT:** State, for the record, any  
22      exceptions, additions, objections to the  
23      instructions?

24               **MR. MEADORS:** Just very briefly. I heard Your  
25      Honor say as to the first element, you must be

1 without fault, if you don't find that, you can't go  
2 forward. I didn't hear Your Honor say, maybe you  
3 don't have to, so if I'm wrong, I'm wrong, that if  
4 you didn't get the other second or fourth element or  
5 however you say it, second, third or fourth, that  
6 all four would have to be shown for self-defense to  
7 be considered. I don't know if you said that. If  
8 not, I'd ask you to do it. If not, I'll say no  
9 more.

10 **THE COURT:** I didn't say precisely that, but I  
11 hope I said the substantial equivalent of it. You  
12 want to preserve the objections you raised during  
13 the charge conference, right?

14 **MR. MEADORS:** Yes, Your Honor.

15 **THE COURT:** All right. The objections that  
16 were raised this morning during the charge  
17 conference, those are preserved.

18 Anything else from the defense, exceptions,  
19 additions, objections?

20 **MR. STRICKLER:** No, sir, nothing additional.  
21 Just to make sure the record's clear, I approached  
22 right before the -- or in the middle of the closing  
23 and raised the concern regarding inference of malice  
24 and I actually found the references to it that Your  
25 Honor already had present, so I withdraw any request

1 on my part in that regards.

2 **THE COURT:** Well, I did add a sentence to the  
3 charge, but I had it in there twice, you're right.

4 **MR. STRICKLER:** Yes, sir.

5 **THE COURT:** Okay. Well, folks, you obviously  
6 worked very, very hard on the case as attorneys and  
7 investigators or paralegals or whatever role you  
8 played. I want to commend you for that. I want to  
9 thank everybody for the respect they've shown the  
10 Court. I appreciate that very much. You've done  
11 your jobs, we'll put it in the jury's hands. Check  
12 the verdict forms and the exhibits.

13 And while -- the verdict form, I generally  
14 don't break out and give two separate ones where  
15 there's a lesser included offense, I just list them  
16 like that. Is there any objection to the way I did  
17 that?

18 **MR. STRICKLER:** No. I've reviewed the verdict  
19 forms. I have no objection to the forms of verdict.

20 **MR. MEADORS:** Nothing from the State.

21 **THE COURT:** Okay. Well, check the exhibits and  
22 the verdict forms, give those to the bailiff. Do  
23 y'all have something they can play those C.D.'s on?

24 **MS. MCDUFFIE:** Yes, Your Honor.

25 **THE COURT:** We have no alternates, so we'll be

1 at ease pending a verdict.

2 For the audience, what I usually do is wait to  
3 see if there's some sort of quick question or  
4 something and then the food's supposed to be here  
5 around 12:30 for the jury. At some point, if you  
6 need to go to lunch, I'll let you go to lunch. If  
7 you want to be advised if we're going to be  
8 reconvening, you need to leave a cell phone number  
9 with somebody who's going to be here, but don't  
10 leave right now, give it a few minutes to be sure  
11 there's no quick questions.

12 (The jury commences its deliberations at  
13 12:25 p.m.)

14 (A recess transpired.)

15 (Court's Exhibit Number 6, jury note, was  
16 marked for identification purposes.)

17 (The following occurred during jury  
18 deliberations.)

19 **MR. MEADORS:** Your Honor, for the record, I'm  
20 okay if you just want to say there are no  
21 transcripts and not go into other -- I'm okay either  
22 way. Just for the record as far as the State,  
23 whatever -- if Your Honor goes beyond that, we'd  
24 just ask that you'd say, you know, it's here if you  
25 want something.

1           **MR. COLLINS:** The defense would agree with  
2           that.

3           **THE COURT:** I'll try to do what I think you're  
4           saying.

5           Bring the jury in.

6           (The jury returns to the courtroom at 1:07  
7           p.m.)

8           **THE COURT:** Mr. Foreman, I got a note from the  
9           jury that reads, We don't see a written statement of  
10          Mr. Phillips or Mr. Derrick. Clarification, were  
11          these entered into evidence?

12          My understanding is that one of those was  
13          entered into evidence, the other was not and that  
14          you have -- after checking, you have found the one  
15          that was entered into evidence.

16          The second request is for transcripts of the  
17          sworn testimony of Mr. Phillips and Mr. Derrick.  
18          There is no transcript of the trial yet. Without  
19          going into great detail, the only thing that I can  
20          tell you is that if you have some request to hear  
21          testimony again, we can play the backup tapes. The  
22          backup tapes are just like cassette tapes that run  
23          all the time. There are some issues with that that  
24          if you ask, I'll explain to you maybe so you will  
25          know. And I'm not trying to encourage you or



1       discourage you. I'm just trying to answer your  
2       question.

3               There is no transcript. It has not been  
4       prepared yet. It takes hours to prepare transcripts  
5       and the only thing that we can do is play the backup  
6       tapes, which we'd be happy to do if y'all want to  
7       hear some testimony. If you do, you have to send me  
8       a note and depending upon the note, I'll tell you  
9       what, if any, problems there may be with that  
10      process, but I encourage you to do it if you need to  
11      do it, okay. Thank you.

12              (The jury retires to the jury room to  
13      continue its deliberations at 1:10 p.m.)

14              **THE COURT:** Please state for the record  
15      exceptions, additions or objections regarding these  
16      instructions?

17              **MR. MEADORS:** None whatsoever.

18              **THE COURT:** Defense?

19              **MR. COLLINS:** None from the defense.

20              **THE COURT:** We're at ease pending a verdict.  
21      Thank you.

22              (A recess transpired.)

23              (The following occurred during jury  
24      deliberations.)

25              **THE COURT:** All right. I received a note from

1 the jury indicating that they wanted to hear the  
2 testimony of Investigator Collins replayed and we're  
3 set up to do that. While we were in the midst of  
4 trying to make the transition, and I've got my court  
5 reporter doing triple duty today, one of the jurors  
6 had indicated that they needed a smoke break. I  
7 told them just to hold off on that. Then we got  
8 word that, apparently, there's a gentleman here who  
9 has some papers that one of the jurors needs to sign  
10 on a closing of some type and I certainly don't want  
11 to stand in the way of that.

12 So here's what I'm going to do. I'm going to  
13 bring the jury out. I'm going to tell them that  
14 those of them that want to smoke, can go smoke. I'm  
15 going to tell the lady, I think it's a lady who  
16 needs to sign the papers, that she can go with a  
17 bailiff into the other jury room back here, there  
18 will be a bailiff with them all the time, and sign  
19 whatever papers need to be signed. And then I'm  
20 going to tell all of them that they can't talk about  
21 the case until all 12 of them are back in that room  
22 together. And whenever we get finished with those  
23 things, we'll bring them out and replay Collins'  
24 testimony. If anybody objects to that, speak.

25 **MR. MEADORS:** No, sir.

1           **THE COURT:** Bring them in.

2           (The jury returns to the courtroom at 3:53  
3 p.m.)

4           **THE COURT:** Mr. Foreman, I understand the jury  
5 wants to hear the testimony of Investigator Collins  
6 replayed; is that right?

7           **FOREMAN:** Yes, sir, that's correct.

8           **THE COURT:** We're set up to do that, but I've  
9 got a couple of matters that have been brought to my  
10 attention. One is apparently some of y'all  
11 indicated you wanted a smoke break. And, secondly,  
12 I understand that one of you were scheduled to have  
13 a closing today and your husband is here to get the  
14 papers signed.

15           Stand up, sir.

16           One of y'all claim this gentleman?

17           **JUROR:** I claim him, but I gave him power of  
18 attorney.

19           **THE COURT:** Well, it's no problem whatsoever  
20 because what we're going to do is this. We're going  
21 to take a recess, not long because we're set up  
22 ready to go, and I'm going to have a bailiff go with  
23 the juror who needs to sign the papers and go into  
24 the other office and do whatever you need to do.  
25 And I'll have a bailiff escort anybody that wants to

1 smoke down to the area where they smoke.

2 But here's the reason I had to bring you in  
3 here. You can't talk about this case until all 12  
4 of you are together in that room. So those of you  
5 who will be separated, those of you who will still  
6 be staying together, you can't talk about the case  
7 until all 12 of you are reconvened in that room.

8 Now, as soon as all 12 of you get reconvened in  
9 that room, unless you tell me differently, I'm going  
10 to bring you out and play that tape. So that's what  
11 we're going to do, all right. If you'll step in the  
12 jury room, the bailiffs will take care of you.

13 (The jury retires to the jury room at 3:56  
14 p.m.)

15 **THE COURT:** All right. We're at ease.

16 (Brief Recess.)

17 (Court's Exhibit Number 7, jury note, was  
18 marked for identification purposes.)

19 **THE COURT:** Bring the jury in, please.

20 (The jury returns to the courtroom at 4:13  
21 p.m.)

22 (Whereupon, portions of the testimony of  
23 David Collins was played for the jury.)

24 **FOREMAN:** I believe we've heard enough.

25 **THE COURT:** Okay. Mr. Foreman, are you sure?

1           **FOREMAN:** Yes.

2           **THE COURT:** Anybody else over there want to  
3 hear anymore? Raise your hand if you do.

4           No hands are raised. Thank you very much.

5           (The jury retires to the jury room to  
6 continue its deliberations at 5:01 p.m.)

7           **THE COURT:** We're at ease pending a verdict.

8           (A recess transpired.)

9           **THE COURT:** All right. Ladies and gentlemen,  
10 I've been informed the jury has reached a verdict in  
11 the cases. I have no way of knowing what the jury  
12 has decided. I say this in every single case so  
13 please don't think I'm singling anyone out. The  
14 jury has the most difficult job in the courthouse.  
15 When this verdict is displayed or presented, I do  
16 not want any display of emotion. I expect you to  
17 stay still and stay quiet, don't show any sign of  
18 approval or disapproval with the verdict, don't  
19 shake your head in agreement or disagreement, don't  
20 make any sounds, just stay still and stay quiet and  
21 we'll get through this just fine.

22           Now, I really appreciate the way everybody's  
23 conducted themselves so far and I expect you will do  
24 exactly as you have been doing which has been  
25 exemplary. I appreciate it. But please don't put

1 me in a situation of having to decide whether to put  
2 you in prison for up to six months for contempt of  
3 court. I don't want to have to deal with that nor  
4 do you.

5 Bring the jury in.

6 (The jury returns to open court to report  
7 its verdict at 5:50 p.m.)

8 **THE COURT:** Mr. Clerk.

9 **THE CLERK:** Yes, Your Honor.

10 Mr. Foreman, if you have reached a verdict,  
11 would you hand them to me, please. Thank you.

12 (The clerk hands the verdicts to the Judge.)

13 **THE COURT:** All right. Mr. Clerk, would you  
14 please publish these verdicts?

15 **THE CLERK:** Yes, Your Honor.

16 In the State of South Carolina in the County of  
17 Richland in the Court of General Sessions, the State  
18 of South Carolina versus John Moore, defendant, on  
19 indictment number 2006-GS-40-2203 as to the charge  
20 of murder, the verdict is guilty of the lesser  
21 included offense of voluntary manslaughter, signed  
22 by the foreperson Steven Carter on this 1st day of  
23 February 2008.

24 Indictment number 2006-GS-40-11739, State of  
25 South Carolina versus John Moore, defendant, as to

1 the charge of use of firearm during the commission  
2 of a violent crime, the verdict is guilty of the use  
3 of a firearm during the commission of a violent  
4 crime, signed Steven Carter on this 1st day of  
5 February 2008.

6 Indictment number 2006-GS-40-11738, the State  
7 of South Carolina versus John Moore, defendant, as  
8 to the charge of possession of a firearm by a person  
9 under the age of 21, the verdict is guilty of  
10 possession of a firearm by a person under the age of  
11 21, signed Steven Carter on this 1st day of February  
12 2008.

13 Mr. Foreman, are these your verdicts and the  
14 verdicts of the entire jury?

15 **FOREMAN:** Yes, sir.

16 **THE CLERK:** Thank you, sir.

17 **THE COURT:** Ladies and gentlemen, if the clerk  
18 accurately stated your verdicts, those being guilty  
19 of voluntary manslaughter and guilty of possession  
20 of a firearm during commission of a violent crime  
21 and guilty of possession of a pistol by a person  
22 under the age of 21 years, please signify by raising  
23 your right hands.

24 All hands are raised.

25 Are there any matters to take up prior to the

1 jury being discharged from the State?

2 MR. MEADORS: Nothing from the State, Your  
3 Honor.

4 THE COURT: From the defense?

5 MR. COLLINS: We can poll the jury, Your Honor.

6 THE COURT: As to each verdict? Just  
7 collectively?

8 MR. COLLINS: Just collectively.

9 THE COURT: Ladies and gentlemen, the clerk is  
10 going to call the roll. And as the clerk calls your  
11 name, I need you to raise your hand so he knows  
12 where to look, okay. And he is going to ask you  
13 basically these two questions, were these your  
14 verdicts and are they still your verdicts. Just  
15 answer them truthfully please.

16 All right. Mr. Clerk.

17 THE CLERK: Yes, Your Honor.

18 Steven Carter, were these your verdicts?

19 FOREMAN: Yes, sir.

20 THE CLERK: Are they still your verdicts?

21 FOREMAN: Yes, sir.

22 THE CLERK: Michael Weeks, sir, were these your  
23 verdicts?

24 JUROR: Yes, sir.

25 THE CLERK: Are they still your verdicts?



1           **JUROR:** Yes, sir.

2           **THE CLERK:** Norma Overstreet, madame, were  
3 these your verdicts?

4           **JUROR:** Yes.

5           **THE CLERK:** Are they still your verdicts?

6           **JUROR:** Yes.

7           **THE CLERK:** Missy Kelly, madame, were these  
8 your verdicts?

9           **JUROR:** Yes.

10          **THE CLERK:** Are they still your verdicts?

11          **JUROR:** Yes.

12          **THE CLERK:** Faye Gordon, madame, were these  
13 your verdicts?

14          **JUROR:** Yes.

15          **THE CLERK:** Are they still your verdicts?

16          **JUROR:** Yes.

17          **THE CLERK:** Lavern Evans, madame, were these  
18 your verdicts?

19          **JUROR:** Yes.

20          **THE CLERK:** Are they still your verdicts?

21          **JUROR:** Yes.

22          **THE CLERK:** James Hamner, sir, were these your  
23 verdicts?

24          **JUROR:** Yes, sir.

25          **THE CLERK:** Are they still your verdicts?

1 JUROR: Yes, sir.

2 THE CLERK: James Harrington, sir, were these  
3 your verdicts?

4 JUROR: Yes.

5 THE CLERK: Are they still your verdicts?

6 JUROR: They are.

7 THE CLERK: Rashaad Egister, sir, were these  
8 your verdicts?

9 JUROR: Yes.

10 THE CLERK: Are they still your verdicts?

11 JUROR: Yes.

12 THE CLERK: Sandra Smith, madame, were these  
13 your verdicts?

14 JUROR: Yes.

15 THE CLERK: Are they still your verdicts?

16 JUROR: Yes.

17 THE CLERK: Cheryl Worrell, were these your  
18 verdicts?

19 JUROR: Yes.

20 THE CLERK: Are they still your verdicts?

21 JUROR: Yes.

22 THE CLERK: Suzanne Turner, madame, were these  
23 your verdicts?

24 JUROR: Yes.

25 THE CLERK: Are they still your verdicts?

1           **JUROR:** Yes.

2           **THE CLERK:** Thank you.

3           The jury has been polled, Your Honor.

4           **THE COURT:** Anything further prior to the jury  
5 being discharged from the defense?

6           **MR. COLLINS:** Nothing further, Your Honor.

7           **THE COURT:** Thank you very much.

8           All right. Ladies and gentlemen, that's going  
9 to conclude your jury service. I truly want to  
10 express to you my thanks. I'm as sincere as I can  
11 possibly be. You have been an exemplary jury.  
12 You've paid attention throughout. It's been a  
13 pleasure having you folks in court this week. I  
14 hope that you feel like it's been educational if  
15 nothing else. And I am extremely grateful for the  
16 way you've conducted yourselves. I don't remember a  
17 case this long where everybody was always on time  
18 and I just appreciate that.

19           So if you want to talk to me about anything,  
20 you can wait back in the jury room and I'll take off  
21 the robe and you can have at me with any questions  
22 or comments or criticisms or complaints.

23           You have an exemption from jury service through  
24 2008, 2009 and 2010. You do not have to serve on a  
25 state court jury through 2010. That won't help you

1 in federal court. It won't help you in magistrates  
2 court or city court, but you don't have to serve  
3 through 2010. Since you actually sat on a trial  
4 jury, you're disqualified for one year, so just try  
5 to remember when you served.

6 They will mail you a little check. It won't be  
7 much. I call it Happy Meal money and that's about  
8 all you're going to get out of it.

9 If you need a slip for work -- what do y'all  
10 do, Jim, about that?

11 **THE CLERK:** I have one prepared, Your Honor.

12 **THE COURT:** If you'll just wait back there, the  
13 clerk will bring you your slip for work if you need  
14 that, okay. Again, if you want to wait on me to  
15 talk to me, that's fine, but I have to deal with the  
16 lawyers about some things outside your presence.

17 I need you to step back in the jury room. If  
18 you want to leave, you can go, just turn in your  
19 badges or whatever the bailiffs require you to do.  
20 Thank you.

21 (The jury was excused.)

22 **THE COURT:** Motions?

23 **MR. COLLINS:** Your Honor, at this time, we'd  
24 renew all previous motions and objections  
25 specifically relating to the introduction of the

1       phone call from jail between John Moore and Delia  
2       Nix. It's still our contention that the phone call  
3       was not properly authenticated, especially when it  
4       was referenced in closing arguments by the  
5       Solicitors as far as the content of the  
6       conversation. With regard to that, we would move  
7       for a new trial on those grounds. And that'd be  
8       all, Your Honor.

9               **THE COURT:** All right. Motions for a new trial  
10       are respectfully denied.

11              Does the State have anything related to  
12       sentencing?

13              **MR. MEADORS:** Yes, sir, if you'll just give us  
14       a few moments.

15              **THE COURT:** Sure.

16              (Pause.)

17              **MR. MEADORS:** Your Honor, I think for time  
18       purposes, if you allow me, I think there's only  
19       going to be one person that would like to speak, if  
20       I could just read out some names briefly, I think  
21       that'll -- if that's okay with the Court.

22              **THE COURT:** Sure.

23              **MR. MEADORS:** Betty Derrick and Grover Derrick,  
24       Senior, Gene's mom and dad, are here, Grover  
25       Derrick, Junior, Kimberly Brewer, Joel Brewer,

1 Melissa Mitchel, Heather Dover, Michelle Simpson,  
2 Andy Simpson, Christy Dover, David Ferguson, Scott  
3 Baker, Kerri Baker and Denis Gundersun, all friends  
4 and family that are sitting up here, have been  
5 through this whole trial. I want to thank them for  
6 being here and they're support.

7 After that, Judge, I want to thank the  
8 Sheriff's Department, Investigator Barnes,  
9 Investigator Faust and the rest of them for the job  
10 they did, of course the office here and our support  
11 stuff, and Natoki, Ace and everybody else.

12 And, finally, Judge, I think Gene's here, Jacky  
13 Lee Dover and mom is here. And, Your Honor, she  
14 would like to just briefly address the Court.

15 **THE COURT:** What's your name, ma'am?

16 **MR. MEADORS:** Marilyn Dover. I apologize.

17 **THE COURT:** Yes, ma'am.

18 **MS. DOVER:** Your Honor, first of all, I just  
19 want to say thank you to the State of South Carolina  
20 for all the help, the investigation, support of  
21 finding this man who murdered my daughter. This has  
22 been a great, great, great tragedy in our life. I  
23 never in a million years thought that we would ever  
24 go through anything like this in our lives. It's a  
25 nightmare to wake up in the middle of the night and

1        get a phone call to say that your child has been  
2        murdered and your grandson has been hurt.

3            Stephanie was such a sweet girl. She never,  
4        ever deserved any of this. But I have laid in my  
5        bed many a nights and asked God to help me find  
6        forgiveness in my heart for the man that done this  
7        to Stephanie and that's a hard thing to do.

8            But I know you're in this life, you know, we  
9        have to be punished for things that we do in this  
10      life, you know, but the great God in Heaven is the  
11      one that's really our judge.

12           Stephanie, we miss her all so much and we love  
13      her so much. And her babies, they have to go  
14      through this life without their mommy. And I know  
15      every time they see a picture of their mommy, they  
16      talk about her. They seen her on the news and they  
17      said -- I went to see them last night and they said,  
18      Maw-maw, you been watching the news? I say, Yeah,  
19      baby. They said, Did you see our mommy on T.V.? I  
20      said, Yeah, baby.

21           You know, we just try to comfort them and let  
22      them know, you know, that Stephanie is in a better  
23      place. That's all.

24           **MR. MEADORS:** Judge, obviously the family  
25      misses her, loves her and wishes she was still here.

1           I also want to thank Ms. Weiss and Ms.  
2 McDuffie. And I think I have a few final comments  
3 after that, but I think one of them has the prior  
4 record.

5           **THE COURT:** Thank you very much, ma'am.

6           **MS. MCDUFFIE:** Your Honor, as we discussed  
7 prior, his prior record was a possession of a stolen  
8 motor vehicle over \$5,000, possession of a pistol  
9 under 21 and an unlawful carrying charge.

10          **MR. MEADORS:** Your Honor's heard the facts,  
11 this was a cold case that was solved thanks to the  
12 sheriff's department. And we just want to thank the  
13 jury for their verdict.

14          **THE COURT:** Does the defense -- you can stay  
15 there, that's fine with me. Does the defense have  
16 anything related to sentencing?

17          **MR. COLLINS:** Your Honor, just to -- briefly,  
18 this is obviously a very unfortunate -- for everyone  
19 involved in this case, it's a tragedy.

20                I would like to tell you a little bit more  
21 about Mr. Moore. He's 22 years old. He's got a  
22 really good head on his shoulders. He's a smart  
23 guy. Obviously some of his actions have led to  
24 where he is here today are not the best decisions.

25                I've gotten to know him for over a year now.



1       He has grown up a lot. He has the ability to be a  
2       very productive member of society in the future. We  
3       realize he's going to get some time here today. He  
4       does have the love and support of his family and  
5       friends who have been here throughout the trial.  
6       His father, John Moore, Senior, has been very  
7       involved and influential. I believe that his father  
8       is extremely influential and is a prominent member  
9       of the community.

10       Again, this is very unfortunate. However, we  
11       do have a young man who I feel can be rehabilitated  
12       and can become a productive member of society. With  
13       that in mind, Your Honor, we would just ask for the  
14       Court's mercy in something under the maximum penalty  
15       of voluntary manslaughter.

16       **THE COURT:** Thank you, sir.

17       Mr. Moore, if you wish to say anything, I'd be  
18       happy to hear you. If -- you may want to confer  
19       with your attorneys.

20       (Pause.)

21       **DEFENDANT MOORE:** I'd like to just apologize  
22       for the whole incident that happened. I mean, like  
23       Mr. Collins said, it's a tragedy on both ends  
24       because my family is losing a loved one, their  
25       family lost one that can't come back. And I just

1 ask for the Court's mercy, but -- I mean, I just  
2 apologize for the whole situation.

3 **THE COURT:** All right. Mr. Moore, you  
4 understand that if you wish to file any appeal from  
5 this proceeding, you have to do so in writing. It  
6 has to be done promptly because there's a narrow  
7 time limit. So you need to instruct your attorneys  
8 to file an appeal on your behalf. Do you understand  
9 that?

10 **DEFENDANT MOORE:** Yes, sir.

11 **THE COURT:** Thank you.

12 If there's nothing further, the sentence of the  
13 Court on voluntary manslaughter is that you be  
14 committed to the South Carolina Department of  
15 Corrections for 30 years plus costs and assessments.  
16 You're given credit for jail time under section  
17 24-13-40, that's to be calculated and applied by the  
18 department of corrections. Pay your court costs at  
19 a rate set by probation, parole and pardon services  
20 while on community supervision.

21 On possession of a firearm by a person under  
22 21, the sentence is that you be committed to the  
23 South Carolina Department of Corrections for a  
24 period of five years plus costs and assessments  
25 consecutive to indictment 2203. Conditions are the

1 same as on 2203.

2 And on possession of a firearm during the  
3 commission of a violent crime, the sentence is five  
4 years plus costs and assessments concurrent, credit  
5 jail time under 24-13-40 to be calculated and  
6 applied by the department of corrections. The  
7 conditions are the same as on 2203. Thank you.

8

9

END OF PROCEEDINGS

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C E R T I F I C A T E

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

I, the undersigned, Stacy L. Sheppard, Circuit Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the trial of the captioned cause, relative to appeal in the Criminal Court for Richland County, South Carolina, on the 28th of January, 2008.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

August 2, 2008

A handwritten signature in black ink, appearing to read 'Stacy L. Sheppard', with a large, stylized loop at the end.

Stacy L. Sheppard  
Circuit Court Reporter

STATE OF SOUTH CAROLINA )

In the Court of Common Pleas

County of Richland

2011C P4000190

John J Moore Jr #326455

Full name and prison number, if any, of applicant.

# APPLICATION FOR

## POST-CONVICTION RELIEF

v.

## State of South

Name of Respondent

Carolina

JEANETTE W. MOBRIDE  
C.C.P. & C.S. 1

2011 JUN 13 AM 10:28

RICHLAND COUNTY  
FILED

**INSTRUCTIONS - READ CAREFULLY**

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

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

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

1. Place of detention Brandriver Correctional Institution
2. Name and location of Court which imposed sentence Richland County Judicial Center; 1701 Main Street; Columbia, S.C. 29201
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
- (a) 2006-GS-40-02203
- (b) 2006-GS-40-11739
- (c) \_\_\_\_\_
4. The date upon which sentence was imposed and the terms of the sentence:
- (a) February 1<sup>st</sup>, 2008, 35 years, County Jail Credit
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_

5. Check whether a finding of guilty was made

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

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

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

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

- i. S.C. Court of Appeals  
 ii. \_\_\_\_\_  
 iii. \_\_\_\_\_

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

- i. Reversed  
 ii. \_\_\_\_\_  
 iii. \_\_\_\_\_

(c) the date of each such result:

- i. September 11<sup>th</sup> 2010  
 ii. \_\_\_\_\_  
 iii. \_\_\_\_\_

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

- i. Rule 215, SCACB  
 ii. \_\_\_\_\_  
 iii. \_\_\_\_\_

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

- (a) N/A  
 (b) \_\_\_\_\_  
 (c) \_\_\_\_\_

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

- (a) Ineffective Assistance of Trial Counsel  
 (b) Prosecutorial Misconduct  
 (c) Ineffective Assistance of Appellate Counsel

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

(a) See attachment

(b) \_\_\_\_\_

(c) \_\_\_\_\_

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

(a) any petition in a State Court under South Carolina Law ?

S.C. Court of Appeal

(b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief?

no

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7) no

(d) any other petitions, motions or applications in this or any other Court?

no

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

(a) the specific nature thereof:

i. Direct Appeal on gun charge. 116-

ii. \_\_\_\_\_

iii. \_\_\_\_\_

iv. \_\_\_\_\_

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

i. S.C. Court of Appeal, 1015 Sumter St; P.O. Box 11629; Columbia, SC 29211

ii. \_\_\_\_\_

iii. \_\_\_\_\_

iv. \_\_\_\_\_

(c) the disposition thereof:

i. Reversed

ii. \_\_\_\_\_

iii. \_\_\_\_\_

iv. \_\_\_\_\_

(d) the date of each such disposition:

- i. September 16<sup>th</sup>, 2010
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_

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

- i. Rule 215, SCACB
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? no

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

(a) which grounds have been presented:

- i. N/A
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_

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

- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_

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

- (a) N/A
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_

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

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



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

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

- i. Greg Collins, Richland County Public Defenders Office, P.O. Box 192, Columbia, SC 29202
- ii. Joseph L. Savitz, III; Division of Appellate Defense; P.O. Box 11589, Columbia, SC 29211-1589
- iii. \_\_\_\_\_

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

- i. Trial and Sentencing
- ii. Direct Appeal
- iii. \_\_\_\_\_

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

Reverse and remand, new trial

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

No

STATE OF SOUTH CAROLINA )  
COUNTY OF Richland )

## VERIFICATION

I, John J. Moore Jr., 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.

John J. Moore Jr.

Sworn to and subscribed before me

This 6<sup>TH</sup> day of December, 2010

[Signature]

L.S.

Notary Public for South Carolina

My Commission Expires \_\_\_\_\_ My Commission Expires  
August 25, 2015

JEANNETTE W. MORRIS  
C.C.P. & C.S.

2011 JAN 13 AM 10:38

FILED  
RICHLAND COUNTY

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

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

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

John J. Moore Jr.  
Applicant

Sworn to and subscribed before me

This 6<sup>TH</sup> day of December, 2010

[Signature]

Notary Public for South Carolina

My Commission Expires: \_\_\_\_\_ My Commission Expires  
August 25, 2015

Continuation of question 10.

pg. 1

a) Ineffective Assistance of Trial Counsel

Trial counsel provided ineffective assistance by unreasonably:

- 1) Failing to object and properly preserve trial courts egregious Accomplice Liability Charge for direct review
- 2) Failing to object and properly preserve improper malice charge for direct review.
- 3) Failing to object and properly preserve prosecutor's improper instructions to the jury during the closing arguments, misstating the law of Self-Defense, for direct review.
- 4) Failing to object and properly preserve trial courts confusing and burden shifting self-Defense charge for direct review.
- 5) Failing to investigate, develop and present all available, relevant and admissible mitigating evidence, which could have affected juror's evaluation of truthfulness of Grover Eugene Derrick.  
See Statements

pg. 2

- 6) Failing to object and properly preserve prosecutor misstating the facts and evidence, which are not supported by the record, during the closing arguments concerning the recording between Applicant and Kerwyn Phillips, for direct review.
- 7) Failing to hire audio expert and have taped conversation between Applicant and Kerwyn Phillips transcribed and presented to the jury.
- 8) Failing to raise the motion to suppress the recording between Applicant and Kerwyn Phillips due to the bad quality of the recording.
- 9) Failing to request that trial judge include in jury instructions, that a vehicle can be considered and used as a deadly weapon.
- 10) Failing to effectively cross-examine State's witness, Kerwyn Phillips.
- 11) Failing to object and properly preserve prosecutor's improper instructions to the jury during the closing arguments, on the charge of malice, for direct review.

pg. 3

- 12). Failing to object and properly preserve trial court's Voluntary manslaughter charge.
- 13). Failing to make any closing argument concerning evidence of self-defense and the hostile acts of the alleged victim's boyfriend, Eugene Derrick Grover.
- 14). Failing to object and properly preserve the Solicitor commenting on the lack of remorse of Applicant, during the closing arguments, for direct review.
- 15). Failing to object and properly preserve the Solicitor's bolstering the State's witness, Herwyn Phillips, for direct review.

## b) Prosecutorial misconduct

- 1) Prosecutor provided misconduct by failing to turn over exculpatory evidence under Rule 5 and Brady. Generally, see statements of Brett Alger, Mike Lankford and Beth Lankford, also Crime Stoppers tip, and the States internet article.

### c) Ineffective Assistance of Appellate Counsel

pg. 5

- i) Appellate Counsel provided ineffective assistance by failing to appeal the principle conviction, voluntary manslaughter, where mistrial issue was preserved and Applicant's indictment was constructively amended.

STATE OF SOUTH CAROLINA )

COUNTY OF RICHLAND )

MOORE John J -  
# 00326455,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

2011CP4000190

RETURN

The Respondent, making its Return to the application for post conviction relief (PCR) filed January 13, 2011, would respectfully show this Court:<sup>1</sup>

## I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. The Applicant was represented by Greg Collins, Esquire. On February 1, 2008, the Applicant pled guilty and was sentenced by The Honorable William P. Keesley. Following a jury trial, the Applicant had been indicted and/or convicted of the following: Murder, Use of Firearm During Commission of a Violent Crime - (06-GS-40-2203;11739).

1

<http://www4.rcgov.us/publicindex/PICaseDetails.aspx?County=40+&Casenum=2011CP4000190&CourtType=G&CaseType=Civil&CourtAgency=40002>

State's Return - (2011CP4000190) – Applicant: MOORE John J

Page 1 of 13



|                                        |                         |
|----------------------------------------|-------------------------|
| <u>Offender Type</u>                   | Adult-straight Sentence |
| <u>Offense</u>                         | Voluntary Manslaughter  |
| <u>Sentence Start Date</u>             | 11/03/2005              |
| <u>Sentence Length</u>                 | 30 YRS, 0 MOS, 0 DYS    |
| <u>Admission Date</u>                  | 02/04/2008              |
| <u>Committing County</u>               | Richland                |
| <u>Location</u>                        | Broad River             |
| <u>Projected Release Date</u>          | 04/28/2031              |
| <u>Projected Parole Date</u>           | Not Eligible            |
| <u>Supervised Furlough Eligibility</u> | Not Eligible            |
| <u>Sex Offender Registry</u>           | No                      |

2

## II.

Attached herewith and incorporated herein are the records of the Richland County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, and the trial transcript, and the Applicant's applicable direct appeal files.<sup>3</sup> The Respondent reserves the right to amend this Return upon receipt of any relevant materials or submit an amended Return to reflect any amended allegations and/or to provide a more detailed procedural history.

### Direct Appeal

The Applicant appealed his conviction and/or sentence. The appeal was unsuccessful and the Remittitur was dated October 5, 2010.

<sup>2</sup> <https://sword.doc.state.sc.us/incarceratedInmateSearch/incarceratedInmateFaceSheet.do?id=00326455&youth=N&type=F>

<sup>3</sup> The Respondent will utilize the Record on Appeal if the direct appeal was an Anders appeal.

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

The State,

Respondent,

v.

John Joseph Moore,

Appellant.

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Appeal From Richland County  
William P. Keesley, Circuit Court Judge

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Unpublished Opinion No. 2010-UP-409  
Submitted September 1, 2010 – Filed September 16, 2010

---

**REVERSED**

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Senior Appellate Defender Joseph L. Savitz, III, of  
Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief  
Deputy Attorney General John W. McIntosh,  
Assistant Deputy Attorney General Salley W. Elliott,

Senior Assistant Attorney General Norman Mark Rapoport, and Solicitor Warren B. Giese, all of Columbia, for Respondent.

**PER CURIAM:** John Joseph Moore was convicted of voluntary manslaughter, possession of a pistol by a person under the age of twenty-one, and use of a firearm during commission of a violent crime. On appeal, Moore argues the trial court erred in declining to dismiss the charge of possession of a pistol by a person under the age of twenty-one because section 16-23-30(A)(3) of the South Carolina Code (2007) was found unconstitutional. We reverse<sup>1</sup> Moore's possession of a pistol conviction pursuant to Rule 220(b)(1), SCACR, and the following authority: State v. Bolin, 378 S.C. 96, 100, 662 S.E.2d 38, 40 (2008) (finding section 16-23-30(A)(3) unconstitutional because it violates the plain language of article XVII, section 14, of the South Carolina Constitution).

**REVERSED.**

**SHORT, THOMAS, and LOCKEMY, JJ., concur.**

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<sup>1</sup> We decide this case without oral argument pursuant to Rule 215, SCACR.

The application for post conviction relief (PCR) was filed January 13, 2011"

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

- (a) Ineffective Assistance of Trial Counsel
- (b) Prosecutorial Misconduct
- (c) Ineffective Assistance of Appellate Counsel

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

- (a) See attachment

Continuation of Question 10:

pg. 1

a) Ineffective Assistance of Trial Counsel

Trial counsel provided ineffective assistance by unreasonably:

- 1) Failing to object and properly preserve trial courts egregious Accomplice Liability Charge for direct review
- 2) Failing to object and properly preserve improper malice charge for direct review.
- 3) Failing to object and properly preserve prosecutor's improper instructions to the jury during the closing arguments, misstating the law of Self-Defense, for direct review.
- 4) Failing to object and properly preserve trial courts confusing and burden shifting Self-Defense Charge for direct review.
- 5) Failing to investigate, develop and present all available, relevant and admissible mitigating evidence, which could have affected jurors evaluation of truthfulness of Grover Eugene Derrick.  
See Statements

pg. 2

- 6) Failing to object and properly preserve prosecutor misstating the facts and evidence, which are not supported by the record, during the closing arguments concerning the recording between Applicant and Herwyn Phillips, for direct review.
- 7) Failing to hire audio expert and have taped conversation between Applicant and Herwyn Phillips transcribed and presented to the jury.
- 8) Failing to raise the motion to suppress the recording between Applicant and Herwyn Phillips due to the bad quality of the recording.
- 9) Failing to request that trial judge include in jury instructions, that a vehicle can be considered and used as a deadly weapon.
- 10) Failing to effectively cross-examine state's witness Herwyn Phillips.
- 11) Failing to object and properly preserve prosecutor's improper instructions to the jury during the closing arguments on the charge of malice, for direct review.

pg. 3

- 12). Failing to object and properly preserve trial court's Voluntary manslaughter charge.
- 13). Failing to make any closing argument concerning evidence of self defense and the hostile acts of the alleged victim's boyfriend, Eugene Derrick Grover.
- 14). Failing to object and properly preserve the Solicitor commenting on the lack of remorse of Applicant during the closing arguments, for direct review.
- 15). Failing to object and properly preserve the Solicitor's bolstering the state's witness, Kerwyn Phillips, for direct review.

b) Prosecutorial Misconduct

pg 4

- i) Prosecutor provided misconduct by failing to turn over exculpatory evidence under Rule 5 and Brady. Generally, see statements of Rhettt Alger, Mike Lankford and Beth Lankford, also Crime Stoppers tip, and the states internet article.

c) Ineffective Assistance of Appellate Counsel

pg 5

- i) Appellate Counsel provided ineffective assistance by failing to appeal the principle conviction, voluntary manslaughter, where mistrial issue was preserved and Applicant's indictment was constructively amended.

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

- Reverse and remand, new trial



## III.

While there are some issues other than ineffective assistance of counsel, there is nothing specific, therefore, for the purposes of this Return, the Respondent interprets each of the Applicant's allegations to be claims that he received ineffective assistance of counsel. The Respondent contends that the Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Id. Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 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, 80 L.Ed.2d 674. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

#### IV.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied. The Respondent therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis

that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held. The Respondent will coordinate with the Applicant's attorney who is, according to the Respondent's file, Kevin K. Bell, Esquire regarding when the hearing should be set.<sup>4</sup>

Respectfully submitted,

ALAN WILSON  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

SALLEY W. ELLIOTT  
Assistant Deputy Attorney General

BRIAN T. PETRANO  
Assistant Attorney General

By:   
ATTORNEYS FOR RESPONDENT

Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211  
Telephone: (803) 734-3737  
[bpetrano@scag.gov](mailto:bpetrano@scag.gov)

February 15, 2011

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<sup>4</sup> The current PCR Roster for the 5<sup>th</sup> Circuit is available at <http://www.scattorneygeneral.com/inside/pdf/5th.pdf>

STATE OF SOUTH CAROLINA )

COUNTY OF RICHLAND )

MOORE John J -  
# 00326455,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

2011CP4000190

## CERTIFICATE OF SERVICE

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 a letter in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

**Kevin K. Bell**  
**Post Office Box 944**  
**Columbia, SC 29202**

DATED February 15, 2011.

  
 Jean R. Indriago  
 Legal Assistant

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )  
John J. Moore, Jr., # 326455, )  
Applicant, )  
vs. )  
The State of South Carolina, )  
Respondent. )

---

IN THE COURT OF COMMON PLEAS

C/A No.: 2011-CP-40-0190

**SUPPLEMENTAL APPLICATION  
FOR POST-CONVICTION RELIEF**

2012-07-06 PM 1:57  
J. H. & G. S.

Applicant, pursuant to S.C. Code §17-27-10 *et seq.*, would respectfully show:

STATEMENT OF FACTS

1. That Applicant is currently incarcerated at the Broad River Correctional Institution in the County of Richland, State of South Carolina, and is an indigent applicant.
2. That Applicant was indicted for the following offenses:
  - a. Indictment # 2006-GS-40-2203 for murder;
  - b. Indictment # 2006-GS-40-11738 for unlawful possession of a pistol by person under 21 years of age; and
  - c. Indictment # 2006-GS-40-11739 for use of a firearm during commission of violent crime.
3. That Applicant was appointed a public defender for Applicant's defense, and an appellate defender for Applicant's appeal.
4. That Applicant was represented by Greg Collins, Esq., with the Richland County Public Defender's Office, and Joseph L. Savitz, III, with the Division of Appellate Defense.
5. That Applicant was convicted after a plea of not guilty and a criminal trial, and a judgment was entered against Applicant of thirty years for the offense of voluntary manslaughter, five years consecutive for the offense of possession of a firearm during the

commission of a violent crime, and five years for possession of a firearm by a person under the age of 21, on or about February 1, 2008, in the Court of General Sessions, Fifth Judicial Circuit.

6. That Court of Appeals reversed Applicant's conviction as to possession of a firearm by a person under the age of 21 on or about September 16, 2010, and remitted to the lower court on October 5, 2010.

7. That Applicant timely filed a first application for post-conviction relief on January 13, 2011.

8. That Applicant has not filed any prior petition with any Court, State or Federal, under South Carolina law, for habeas corpus or conviction relief, for writ of certiorari, or any other petitions.

9. That Applicant has not set forth any ground for relief to this or any other Court, State or Federal, in any motion, petition, or application, other than the initial application for post conviction relief for this action pending in the Court of Common Pleas.

10. That Applicant incorporates by reference his first application, files this first supplemental application, and seeks post-conviction relief for the reasons set forth herein.

#### GROUND FOR RELIEF

11. Paragraphs 1 through 10 of this Application are incorporated herein by reference.

12. That public defender's performance as counsel for Applicant was deficient under the United States Constitution and the South Carolina Constitution in the following particulars:

a. That public defender failed to convey to Applicant one or more plea offers prior to the verdict.

b. That public defender failed to adequately investigate the case before trial, and, as a consequence, failed to develop and present all available, relevant,

impeachable, and mitigating evidence that would have challenged the credibility and veracity of witnesses for the prosecution.

- c. That public defender did not properly object or renew the motion for a mistrial given the exposure of four jurors to a mug-shot photograph of the Applicant.
- d. That public defender never objected or moved for a mistrial given the prosecution's failure to provide exculpatory evidence under Rule 5, especially including, but not limited to, statements of witnesses Rhett Alger, Mike Lankford, Beth Lankford, Crime Stoppers, and an article from "The State" newspaper.
- e. That public defender failed to properly object to and/or move for a mistrial regarding juror(s) who were sleeping during trial.
- f. That public defender did not ensure Applicant's right under the Constitution to confront the witnesses against Applicant.
- g. That public defender failed to object to and properly preserve for appeal the prosecution's bolstering the witness Kerwyn Phillips.
- h. That public defender failed to effectively cross-examine the witness Kerwyn Phillips.
- i. That public defender never objected to or moved to exclude the evidence of the recording between the Applicant and witness Delia Nix, who was the common law spouse of Applicant and thus entitled to common law spousal immunity.
- j. That public defender failed to properly object to thereby preserve for appeal the prosecution's misrepresentation of the facts and evidence, unsupported by



the record, during closing arguments, especially regarding, but not limited to, the recording between Applicant and witness Kerwyn Phillips.

- k. That public defender failed to object and properly preserve for appeal the prosecution's improper closing argument regarding malice.
- l. That public defender failed to object to and properly preserve for appeal the prosecution's improper comment on the Applicant's lack of remorse during closing argument.
- m. That public defender failed to request that the Court include in the jury charge that a vehicle can be considered a deadly weapon.
- n. That public defender failed to request a jury charge regarding the intoxication of Eugene Derrick, in which the condition was relevant to the nature of the threat and the need of force.
- o. That public defender for Applicant failed to object to and properly preserve for appeal the closing argument and jury charge regarding accomplice liability.
- p. That public defender for Applicant failed to properly object to and properly preserve for appeal the jury charge regarding malice.
- q. That public defender for Applicant failed to properly object to and properly preserve for appeal the burden-shifting jury charge regarding self-defense.
- r. That public defender failed to object to and properly preserve for appeal the Court's voluntary manslaughter jury charge.
- s. That public defender failed to properly take exception to the Court's comments on the facts of the case.

t. Any other particulars that may be demonstrated at trial.

13. That appellate defender's performance as counsel for Applicant was deficient under the United States Constitution and the South Carolina Constitution in the following particulars:

- a. That appellate defender failed to appeal the principal conviction of voluntary manslaughter, where mistrial issue was preserved and Applicant's indictment was constructively amended.
- b. That appellate defender did not properly review the record to determine all issues meriting appeal.
- c. Any other particulars that may be demonstrated at trial.

14. That public and appellate defender's performance as counsel for the Applicant, as stated herein, was so deficient that the Applicant was prejudiced such that there is a reasonable probability that, but for public and appellate defender's professional errors, the result of the criminal trial and/or conviction and/or appeal would have been different.

15. That public and appellate defender's conduct so undermined the proper functioning of the adversarial process that the criminal trial cannot be relied upon as having produced a just result.

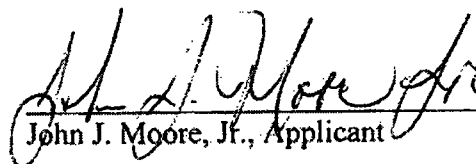
RELIEF DESIRED

16. That the Court enter judgment granting Applicant's application for post-conviction relief, and remanding the criminal case for a new trial.

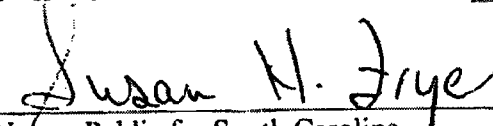
(VERIFICATION AND SIGNATURE OF COUNSEL PAGE TO FOLLOW.)

STATE OF SOUTH CAROLINA    )  
                                           ) VERIFICATION  
 COUNTY OF RICHLAND         )

I, John J. Moore, Jr., 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.

  
 John J. Moore, Jr., Applicant  
January 3, 2011

Sworn to and subscribed before me on January 3, 2011.

  
 Notary Public for South Carolina

My commission expires \_\_\_\_/\_\_\_\_/\_\_\_\_.

Respectfully submitted,



Rowland P. Alston III  
 The Law Office of Rowland P. Alston III, LLC  
 1314 Lincoln Street  
 Suite 214  
 Columbia, South Carolina 29201  
 (803) 708-0460  
 Attorney for the Indigent Applicant

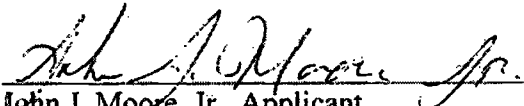
January 6, 2011

(APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS PAGE TO FOLLOW.)

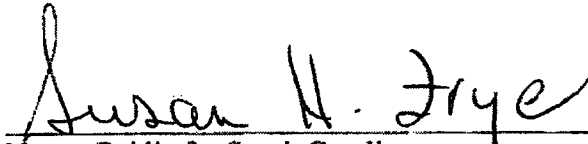
APPLICATION TO PROCEED WITHOUT PAYMENT  
OF COSTS AND AFFIDAVIT  
IN SUPPORT THEREOF

I, John J. Moore, Jr., hereby continue to apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my supplemental 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.

  
John J. Moore, Jr., Applicant  
January 3, 2011

Sworn to and subscribed before me on January 3, 2011.

  
Notary Public for South Carolina

My commission expires        /        /       .

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

C/A No.: 2011-CP-40-0190

John J. Moore, Jr., # 326455,

Applicant,

vs.

The State of South Carolina,

Respondent

CERTIFICATE OF SERVICE

2012 JAN -6 PM 1:5  
C.C.P. & A.S.

I, the undersigned, do hereby certify that I have served the SUPPLEMENTAL APPLICATION FOR POST CONVICTION RELIEF in the above-captioned case, by causing a copy of the same to be hand delivered or personally deposited in a United States Postal Service mail box, with the return address clearly visible, postage prepaid, addressed to attorney(s) of record as indicated below:

Brian T. Petrano, Esq.  
Office Of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211-1549



Rowland P. Alston III

January 6, 2012

|                              |   |                                 |
|------------------------------|---|---------------------------------|
| STATE OF SOUTH CAROLINA      | ) | IN THE COURT OF COMMON PLEAS    |
|                              | ) |                                 |
| COUNTY OF RICHLAND           | ) | C/A No.: 2011-CP-40-0190        |
|                              | ) |                                 |
| John J. Moore, Jr., # 326455 | ) |                                 |
|                              | ) |                                 |
| Applicant,                   | ) | <b>MEMORANDUM IN SUPPORT OF</b> |
|                              | ) | <b>APPLICATION FOR</b>          |
| vs.                          | ) | <b>POST-CONVICTION RELIEF</b>   |
|                              | ) |                                 |
| The State of South Carolina, | ) |                                 |
|                              | ) |                                 |
| Respondent.                  | ) |                                 |
| _____                        | ) |                                 |

### STATEMENT OF FACTS

The Applicant, John J. Moore, Jr. ("Applicant"), an indigent criminal defendant, was indicted and tried for murder, possession of a firearm by a person under the age of 21, and possession of a firearm during the commission of a violent crime in the Richland County Court of General Sessions. On or about February 1, 2008, Applicant was convicted and sentenced to thirty years for voluntary manslaughter, five years consecutive for possession of a firearm during the commission of a violent crime, and five years concurrent for possession of a firearm by a person under the age of 21 by the Hon. William P. Keesley (the "Court"). The State was represented by John P. Meadors ("Meadors"). The Applicant was represented by Richland County public defenders Douglas Strickler and Gregory Collins (collectively "Counsel").

The Applicant appealed his conviction. Applicant's counsel for the appeal was Joseph Savitz ("Appellate Counsel"). Appellate Counsel only appealed the conviction as to possession of a firearm by a person under the age of 21. *See 07/27/09 Final Brief of Appellant.* This conviction was reversed on or about September 16, 2010, and was remitted to the lower court on October 5, 2010.

On January 13, 2011, the Applicant timely filed an Application for Post-Conviction Relief.

On January 6, 2012, the Applicant filed a First Supplemental Application for Post-Conviction Relief.

In his applications, the Applicant states as grounds for relief, *inter alia*, that Counsel did not properly object to and/or move for a mistrial regarding jurors who were sleeping during trial, that Counsel did not properly prepare for trial, that Counsel did not properly investigate the case, that Counsel did not ensure a ruling on a mistrial motion, that Counsel did not assert the right of the Applicant to confront witnesses against him, that Counsel did not object to improper jury charges, and that appellate counsel did not properly appeal the convictions. *See 01/06/12 Supplemental Application, pp. 3, 4, 5.*

The Applicant argues that Counsel and Appellate Counsel's performance was so deficient that it constitutionally deprived him of effective assistance of counsel for the reasons set forth herein, and asks for a new trial.

#### DISCUSSION/ARGUMENT

- I. Counsel's failure to object, demand an inquiry, and/or move for a mistrial in regards to jurors who may have been sleeping or somnolent during trial was deficient performance and prejudicial.

Upon review of the Transcript of Record for the trial ("Record"), there were at least three incidents where a juror may have been sleeping or somnolent during the trial of the case.

In the first incident, a juror's apparent inattention in turn commanded the attention of the Court to the extent the Court was monitoring the juror's behavior rather than the testimony.

THE COURT: ...I had one juror over there who kept shutting her eyes and I kept watching rather intently because I had to stop if she was going asleep. She never did. She eventually opened

her eyes up completely and that's why I'm afraid I might have missed something. I'm looking back through here.

MR. MEADORS: I noticed that juror on the second row far left and it seemed like some of the jurors were noticing her, too. And I was trying to watch to see if she was sleeping, but I did not see her doze off.

*See Record, pp. 325-26, lines 20-25, 1-6.*

Second, the Court determined that a juror was apparently in such a condition that a glass of water was necessary for her to properly pay attention to the testimony.

THE COURT: Mr. Bailiff, get that juror some water for me please. Do you need a break, ma'am?

JUROR: No.

THE COURT: Just let me know if you need to stop, okay?

JUROR: Okay.

THE COURT: I'm sorry, Mr. Meadors. Go ahead.

MR. MEADORS: Thank you.

*See Record, p. 374; lines 8-16.*

Third, the Court noted that, during closing arguments, another juror was fighting sleep.

THE COURT: All right. We've got to stop. Ladies and gentlemen, step in the jury room. Don't discuss the case. If you need a drink of a Coca-Cola or Pepsi or something, get it.

(The jury retires to the jury room.)

THE COURT: All right. I've got one juror fighting sleep. He hasn't gone to sleep, but he's fighting it pretty bad. So let's give them a break. We're at ease.

\*\*\*

THE COURT: All right. Bring the jury in, please. And while we're waiting, one of the jurors sent out a note, I assume it was the same young man. He was just explaining he has a sinus infection and his face is swollen and it may cause his eyes to appear to be closed at times. He said he's fine to serve. And I've had that shown to the



attorneys. I don't think that's an issue. We'll mark it as a Court's Exhibit. [Emphasis added.]

MR. MEADORS: It certainly makes me feel better, too.

MR. STRICKLER: My apologies, Your Honor. I do have something nagging at me relating to the charge...

*See Record, pp. 692-93; lines 13-25, 1-14.*

In *State v. Hurd*, 325 S.C. 384, 480 S.E.2d 94 (Ct. App. 1996), Hurd was convicted of criminal conspiracy to commit burglary. During the trial, Hurd's counsel brought to the Court's attention that one of the jurors appeared to be sleeping during most of the Court's charge, and asked that the Court remove and replace the juror, or, in the alternative, question the juror. The Court refused the request. *Id.*, at 97.

On appeal, the Court of Appeals held that:

'it is incumbent upon the trial court to conduct a probing and tactful inquiry to determine whether a sworn juror is unqualified,' and 'the court must not speculate...but must ascertain the juror's state of mind and must place its reasons for excusing or retaining the juror on the record.'

*Id.*, quoting *People v. Valerio*, 141 A.D.2d 585, 529 N.Y.S.2d 350, 351 (1988).

The Court of Appeals then expounded on the present facts before them.

Just because a juror closed his eyes does not necessarily mean that he was asleep, but a trial judge should at least attempt to make this determination wherever a juror appears to be asleep. The trial judge committed reversible error by refusing defense counsel's request to question the juror as to whether he heard all of the charge.

*Id.*

Because the trial court in *Hurd* did not question the juror, the Court of Appeals reversed the conviction, and ordered a new trial.

Here, there were three instances where a juror may have sleeping or somnolent during the trial. In none of the instances did the Court conduct any inquiry as to whether or not the juror

was listening. In one instance the Court assumed that a note given explained the appearance of a sleeping juror, but nothing was done to confirm the assumption.

Of supreme importance to this action, at no time did Counsel request that the Court conduct any inquiry in any of these instances.

In criminal cases, the right of trial by jury is preserved inviolate. *See S.C. Const. Art. I, § 14.* Regardless of whether the Applicant's constitutional right to a twelve-member jury was violated, the record is replete with potential juror misconduct. Counsel, as a protector of the Applicant's constitutional rights and a right to a trial by all twelve jurors, had the paramount obligation to ensure that the jurors were fair to Applicant, and thus attentive during trial, and request an inquiry or move for a mistrial if he thought they were not. Counsel also had the obligation to demonstrate prejudice by a "sleeping" juror. *See State v. Smith*, 338 S.C. 66, 73, 525 S.E.2d 263, 267 (Ct. App. 1999). In accepting any finding of the Court and in failing to ask the Court conduct a *voir dire* of the jurors or further inquiry, Counsel also waived the issue on appeal. *Id.*, at 75, 268.

Both prongs of the ineffective assistance of counsel inquiry, deficient performance and prejudice, are manifest. Counsel's failure to request an inquiry of jurors who may have been sleeping or somnolent during trial was deficient performance and prejudicial.

II. Counsel's preparation for the trial of the case was inadequate, and was deficient performance and prejudicial.

The Applicant was tried for voluntary manslaughter. The Applicant asserts that Counsel met with the Applicant only two or three times prior to the trial of the case. That is an entirely inadequate amount of time to prepare for this felony criminal trial. This lack of preparation was deficient performance and was prejudicial to the Applicant. There is a reasonable probability that, but for this error of Counsel, the result would have been different.

III. Counsel's investigation of the case was inadequate, and was deficient performance and prejudicial.

Counsel had a duty to perform a reasonable investigation, which included interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case. *See Lounds v. State*, 380 S.C. 454, 460, 670 S.E.2d 646, 649 (2008). A "reasonable investigation" also includes discovery of "all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." *See McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008).

The Applicant asserts that Counsel did not try to obtain any data as to the state of intoxication of the driver of the other car involved in the incident, or seek the opinion of a forensic toxicologist one that data had been obtained. This evidence would have been most relevant to the self-defense defense of the Applicant. The Applicant also asserts that Counsel did not make a reasonable investigation of potential witnesses, of the facts and circumstances of the case, of mitigating evidence, and evidence rebutting aggravating evidence of the State. The failure to perform a reasonable investigation was deficient performance and was prejudicial to the Applicant. There is a reasonable probability that, but for this error of Counsel, the result would have been different.

IV. Counsel failed to ensure a ruling on a mistrial motion regarding jurors who were exposed to a mug-shot of the Applicant, which was deficient performance and prejudicial.

At least three jurors came forward prior to opening statements regarding seeing a mug-shot photo of Applicant in the media. *See Record*, pp. 109-117. Counsel moved for a mistrial. *Id.*, p. 121, lines 17-19. However, the Court only excused one juror on a different basis and did not address the mistrial motion. *Id.*, pp. 123-124. Meadors himself was going to move for a mistrial, but declined because of double jeopardy issues. *Id.*, p. 128, lines 3-5. Counsel never

followed up to ensure a ruling on the motion ignored by the Court. The failure to ensure a ruling by the Court on such an important issue was deficient performance, and was prejudicial to the Applicant.

- V. Counsel failed to ensure that Applicant had the right to confront a witness against him at trial, which was deficient performance and prejudicial.

The prosecution offered into evidence a recorded conversation between Delia Nix, the Applicant's former girlfriend, and the Applicant. During an *in camera* hearing, the Court ruled that the conversation was admissible under *S.C.R.E. 901*. *See Record, p. 544*. Applicant contends that the conversation was testimonial in nature, as it was recorded by a government entity and the recording's purpose was for use at a future trial. Applicant did not have the opportunity to cross-examine Nix on the meaning and context of her statements.

In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004), the United States Supreme Court held that, under the 6<sup>th</sup> Amendment confrontation clause, admission of out-of-court testimonial evidence requires the unavailability of the witness and a prior opportunity for cross-examination. *Id.*, at 68, 1374. Further, the Supreme Court noted that "[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability'." *Id.*, at 61, 1370.

Here, the Court admitted the recording on the basis of reliability under the authentication provisions of *S.C.R.E. Rule 901*. *Crawford* had been the law of the land for almost four years at the time of trial, and Counsel made no objection under the 6<sup>th</sup> Amendment. The failure to object by Counsel on this fundamental basis was deficient performance, and was prejudicial to the Applicant.

- VI. Counsel failed to take exception to the propriety of the jury charges made by the Court, which was deficient performance and prejudicial.

The Court charged the jury on implied malice (See Record, pp. 742-44) and accomplice liability (See Record, pp. 748-49). Both were arguably improper, but Counsel made no exception to them for the record.

First, the Court charged that malice may be inferred from a deadly weapon. However, in State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009)<sup>1</sup>, the Supreme Court held that where evidence is presented that would justify a homicide, juries will not be charged on malice inferred from the use of a deadly weapon. Since a self-defense claim/charge was made (See Record, pp. 749-55), the charge was improper.

Second, accomplice liability is premised upon "one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." See Barber v. State, 393 S.C. 232, 236-37, 712 S.E.2d 436, 439 (2011). Applicant asserts that there was no evidence of conspiracy or common design/purpose, that the charge was thus not warranted, and that the charge only served to offer another theory of guilt for the Applicant, and was thus prejudicial.

The failure to object by Counsel to the jury charges made by the Court was deficient performance, and was prejudicial to the Applicant.

- VII. Appellate Counsel's appeal of the case was inadequate, and was deficient performance and prejudicial.

A criminal defendant is entitled to effective assistance of appellate counsel just as trial counsel, and a court analyzes a claim of ineffective assistance of appellate counsel in the same manner. See Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009).

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<sup>1</sup> The Supreme Court stated that the ruling "will not apply to convictions challenged on post-conviction relief." Id., 613, 810. However, the Applicant contends that the Supreme Court intended that the ruling would only not apply to applications pending at the time the decision was rendered, rather than any applications.

Appellate counsel only appealed the conviction for possession of a firearm by a person under the age of 21. *See 07/27/09 Final Brief of Appellant.* There were numerous issues that could have been appealed, given the Applicant's conviction for voluntary manslaughter. One such issue was the admissibility under authentication of the recording of witness Delia Nix. Counsel did renew the exceptions made to the Court's rulings at the conclusion of the trial, and specifically as to the aforementioned recording. *See Record, pp. 778, lines 23-25, 779, lines 1-8.* Because these issues were not appealed, they were waived, and prevented any chance of Applicant from having his conviction for voluntary manslaughter reversed.

The failure to appeal the other convictions was deficient performance and was prejudicial to the Applicant. There is a reasonable probability that, but for this error of appellate counsel, the result would have been different.

#### CONCLUSION

Counsel committed a multitude of grievous errors before and during the criminal trial. These errors constituted deficient performance that was prejudicial to the Applicant. There is a reasonable probability that, but for these errors of Counsel, the result would have been different.

Appellate Counsel committed a multitude of grievous errors in handling the appeal. These errors constituted deficient performance that was prejudicial to the Applicant. There is a reasonable probability that, but for these errors of Appellate Counsel, the result would have been different.

For the foregoing reasons, the Applicant has established ineffective assistance of counsel. The Applicant's request for post conviction relief should be granted, and the matter should be remanded to the Court of General Sessions for a negotiation of a plea bargain, or, a new trial.

(SIGNATURE OF COUNSEL PAGE TO FOLLOW.)

Respectfully submitted,

*s/Rowland P. Alston III*  
Rowland P. Alston III  
The Law Office of Rowland P. Alston III, LLC  
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Columbia, South Carolina 29201  
(803) 708-0460  
Attorney for the Applicant

May 23, 2012

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )

IN THE COURT OF COMMON PLEAS  
C/A No.: 2011-CP-40-0190

John J. Moore, Jr., #326455  
Applicant,  
vs.

**AFFIDAVIT OF DR. ROBERT BENNETT**

The State of South Carolina

Respondent

THE AFFIANT, AFTER BEING DULY SWORN, DEPOSES AND SAYS AS FOLLOWS:

1.) Affiant: I, Dr. Robert Bennett, am a Forensic Toxicologist providing forensic laboratory testing service and toxicology consultation in South Carolina as a full time profession. I possess a Ph.D. degree in drug science and also a Pharmacy degree, both from the Medical University of South Carolina. I provide DNA testing and testing for substances of abuse (illegal drugs and prescription drugs) and alcohol for Courts in South Carolina and have been qualified as an Expert Witness in drug and alcohol testing and Forensic Toxicology in South Carolina courts.

2.) Purpose: The purpose of this Affidavit is documentation of the known adverse behavior and cognitive reactions of alcohol, cocaine, and methamphetamine, alone and in combination.

3.) Establishment of Drug/Alcohol use by Grover Derrick: According to the sworn statement of Mike Lankford, on March 16, 2005, to a Richland County Sherriff's Officer, Grover Derrick and he left a cookout (sponsored by Mr. Lankford) and reports that on the way to the store, that "Grover and I smoked a small, sociable amount [of



methamphetamine]. "We pulled off of a side road and finished it off." In his sworn statement, Mr. Lankford was also questioned as to any other drugs that Grover has been using. Mr. Langford reported that, he "had a small amount of cocaine that Grover and Stephanie (victim) used with [him]; and that Grover was always involved in cocaine, even after Stephanie passed." When Mike was asked if Grover got the meth from him, he reported that "he got it from Kimberly (Mike's girlfriend). In the investigation, Beth Lankford, the wife of Mike Lankford, reported that the night of the incident (cookout) that "Grover was so drunk that he fell on Ian (her 12 year-old son), as he was trying to walk out of the door (to leave)." According to Ian, Grover could not have driven, he was too drunk, he could hardly walk." In his sworn statement, Mike said that Grover drove anyway because Stephanie had a headache. This testimony establishes that Grover Derrick was under the influence of methamphetamine, cocaine, and alcohol at the time of the incident.

4.) Effects of Cocaine: Cocaine is a powerfully addictive drug, with a high relapse rate. Cocaine causes intense changes in brain chemistry. Cocaine can cause bizarre and violent behavior such as anger, aggressiveness, delusions, and paranoia. (Prim Care Companion J Clin Psychiatry. 1999 Aug;1(4):109-113). Cocaine use produces a state of hyper alertness in which users are more likely to perceive the actions of other as hostile which can evoke a violent response. In rare cases, sudden death can occur on the first use of cocaine or unexpectedly thereafter. Cocaine effects can vary between individuals and can even vary within the same person at various times. (Source: National Institute on Drug Abuse). Research has shown even modest cocaine use may cause brain changes, that could contribute to or lead to addiction. (Journal of Neuroscience 20(18):7109-7115, 2000). There is no safe level of cocaine use.

5.) Effects of Methamphetamine: Methamphetamine is a powerfully addictive drug, with a high relapse rate. Methamphetamine causes intense changes in brain chemistry. (J Neurophysiol. 2012 May 16). Even in small amounts, psychological effects include aggressiveness, irritability, confusion, and anxiety. (Arch Gen Psychiatry. 2006 Jan;63(1):90-100). Substances with psychotomimetic properties such as cocaine and amphetamines [e.g. methamphetamine], are widespread, and their use or abuse can provoke psychotic reactions resembling a primary psychotic disease. (Curr Drug Abuse Rev 2011 Dec;4(4):228-40). Habitual use of methamphetamine may result in a toxic psychosis characterized by paranoia, delusions, hallucinations and bizarre violent behavior. (Am J Psychiatry, 158(3): 377-382, 2001). Commonly, the methamphetamine user feels invincible and indestructible, and thus engages in risky, potentially deadly, behavior and activities that normally would be avoided. (Drug Alcohol Rev. 2008 May;27(3):253-62). In rare cases, sudden death can occur on the first use of methamphetamine or unexpectedly thereafter. Methamphetamine effects can vary between individuals and can even vary within the same person at various times. Behavior is unpredictable. Methamphetamine can cause damage to the brain similar to that caused by Alzheimer's disease, stroke and epilepsy. (Eur J Pharmacol. 2004 Jun 28;494(2-5):183-9). Research has shown even modest methamphetamine use may cause brain changes that could contribute to or lead to a seemingly uncontrollable addiction. (Subst. Abus. 2008;29(3):31-49). There is no safe level of methamphetamine use.

6.) Effects of Alcohol: Alcohol is a depressant that is widely used and abused, often leading to alcohol dependence. The consumption of alcohol leads to a state of intoxication impairing brain function and motor skills. It causes clumsiness, delayed

reflexes, irritability, and impaired judgment. It affects the part of the brain responsible for controlling inhibition, which often leads to extreme behaviors such as violence and aggression. A study was conducted on the relationship between alcohol consumption and road rage. It provided evidence that the odds of a road-rage incident occurring are greatly increased when the perpetrator or victim had recently consumed alcohol. (J Stud Alcohol. 2004 Mar;65(2):161-8).

7.) Use in combination: The abuse of cocaine, alcohol, and methamphetamine have been shown to cause cognitive difficulties that impair judgment and decision making and each has been associated with the inability to inhibit hostile or dangerous impulses. Cocaine, alcohol, and methamphetamine each have their own mind-altering side effects; the combining of any of these drugs increases the likelihood of users engaging in risky or violent activities. One study (Biology Psychiatry. 1998 Aug 15;44(4):250-9) showed that cocaine concentrations were greater in persons following cocaine-alcohol administration. Alcohol actually increased the levels of cocaine in the body. Also, when taken together, cocaine and alcohol interact to produce a third drug called Cocaethylene, an active metabolite with a half-life three times that of cocaine. The combined use of the two substances results in a more intense effect on the brain. This interaction prolongs the effects of both cocaine and alcohol. Cocaine offsets the sedating effects of alcohol and the alcohol enhances the euphoric effects of cocaine. Cocaethylene itself has a profound effect on brain function. (Biology Psychiatry. 1998 Aug 15;44(4):250-9). The use of alcohol, drugs, and illicit substances causes suppression of psychomotor inhibition, which leads to major behavioral disorders. The behavioral disinhibition induced by either use or misuse can cause humans to behave inappropriately according to a given environmental situation. Affected persons tend to lose restraint over their social

behavior and exhibit increased aggression and violent behavior. People that have problems with substance misuse have an established role as a risk factor for violence and have been related to aggressive driving and violence on the road. (Butters, J. E., Smart, R. G., Mann, R. E. and Asbridge, M. 2005. Drug and Alcohol Dependence , 80: 169-175).

8.) Opinion: It is my opinion, to a reasonable degree of scientific and toxicological certainty, that each of these substances can cause profound mind-altering effects. These effects may not be dose-dependent or consistent, even within the same individual, especially with methamphetamine. Therefore, even a small dose of methamphetamine, in the right circumstances, can result in an unpredictable occurrence of violent behavior or aggression. It was noted in the Court transcripts that Mr. Derrick admitted to chasing after the pick-up truck after shots were fired at him. Mr. Derrick also admitted to not having access to any gun. So essentially, this creates a scenario where an unarmed man is chasing after a man with a gun, who is shooting at him. This is a classic example of behavior of a person under the effect of methamphetamine, exhibiting the well-known reaction of feeling invincible. It is my opinion that a typically, an unarmed person not under the influence of methamphetamine, would not chase after a person shooting at them, as this would most likely create a confrontation resulting in escalated violence, possibly requiring the original shooter to be forced to take a self-defensive action.

9.) Certification: I certify that the foregoing is true and accurate to the best of my knowledge and recollection and my opinions are to a reasonable degree of scientific and toxicological certainty.

FURTHER THE AFFIANT SAYETH NOT.



Robert Bennett, R.Ph., Ph.D.

Subscribed and sworn before me on this 21<sup>st</sup> day of May, 2012.



Eleanor G. Bennett, Notary Public, State of South Carolina

My Commission expires: October 31, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

---

Appeal from Richland County

William P. Keesley, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

JOHN JOSEPH MOORE,

APPELLANT

---

FINAL BRIEF OF APPELLANT

---

JOSEPH L. SAVITZ, III  
Chief Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, S. C. 29211-1589  
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The trial judge erred by refusing to dismiss the charge of possession of a firearm by a person under the age of twenty-one, as *S.C. Code Section 16-23-30* (which has since been amended) was found to violate *Article 17, Section 14* of the *South Carolina Constitution* in *State v. Bolin*, 378 S.C. 96, 662 S.E.2d 38 (2008).

STATEMENT OF FACTS

On January 28 through February 1, 2008, John Joseph Moore stood trial in Richland County, before Judge William P. Keesley and a jury, on indictments charging him with murder, possession of a firearm during the commission of a violent crime, and possession of a firearm by a person under the age of twenty-one. The State alleged that Moore had shot Stephanie Dover once in the head during an episode of road-rage between her fiancé, Gene Derrick, and Moore. Based on the testimony of Moore's passenger, Kerwyn Phillips, that Derrick had been the aggressor, the judge instructed the jury on voluntary manslaughter and self-defense, in addition to murder and the firearm charges. The jury found Moore guilty of voluntary manslaughter and the two firearm charges, and the judge sentenced him to thirty years for manslaughter, five years concurrent for possession of a firearm during the commission of a violent crime, and five years consecutive for possession of a firearm by a person under the age of twenty-one.

ARGUMENT

The trial judge erred by refusing to dismiss the charge of possession of a firearm by a person under the age of twenty-one, as S.C. Code Section 16-23-30 (which has since been amended) was found to violate Article 17, Section 14 of the South Carolina Constitution in State v. Bolin, 378 S.C. 96, 662 S.E.2d 38 (2008).

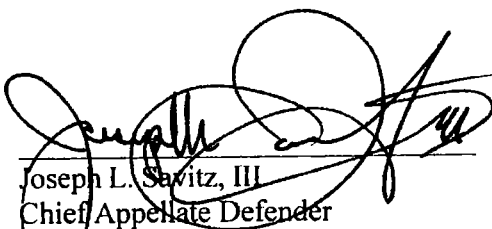
John Joseph Moore was born October 2, 1985. On the date of the incident, October 17, 2004, he was nineteen. ROA p. 1, line 16 – p. 2, line 20.

Moore was charged with having violated S.C. Code Section 16-23-30, which, prior to its amendment in 2004, prohibited persons under the age of twenty-one from possessing handguns. In *State v. Bolin*, 378 S.C. 96, 662 S.E.2d 38 (2008), the Supreme Court found that this statute violated Article 17, Section 14, of the South Carolina Constitution.

Defense counsel moved to dismiss the charge for precisely that reason. ROA p. 3, line 21 – p. 5, line 15. The judge denied the motion. ROA p. 5, line 16.

Since Moore's conviction for violating Section 16-23-30 is unconstitutional under *State v. Bolin*, the Court should vacate that conviction.

Respectfully submitted,

  
Joseph L. Savitz, III  
Chief Appellate Defender

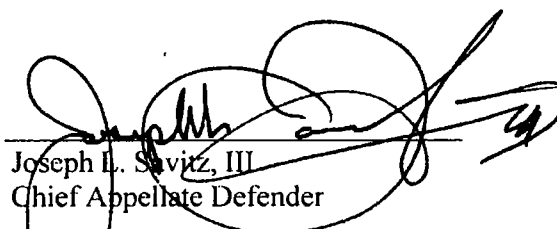
ATTORNEY FOR APPELLANT

This 27th day of July, 2009.

## CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

July 27, 2009



Joseph L. Savitz, III  
Chief Appellate Defender

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Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

William P. Keesley, Circuit Court Judge

THE STATE,

RESPONDENT,

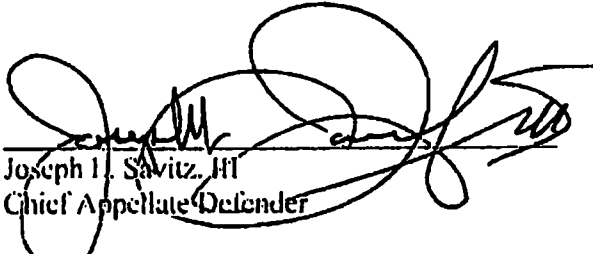
V.

JOHN JOSEPH MOORE,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Norman Mark Rapoport, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 27th day of July, 2009.

  
Joseph I. Savitz, III  
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 27th day of July, 2009.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: July 1, 2019.

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF RICHLAND ) 2011-CP-40-190

John J. Moore, Jr., )  
Plaintiff/Applicant, )  
vs. ) TRANSCRIPT OF RECORD  
The State of South Carolina, )  
Defendant )

May 23, 2012  
Columbia, South Carolina

B E F O R E:

HONORABLE L. CASEY MANNING, JUDGE.

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

ROLAND P. ALSTON, III, ESQUIRE  
Attorney for Plaintiff

ROBERT D. CORNEY, ESQUIRE  
Attorney for the State

Crystal Holmes  
Official Court Reporter

E X H I B I T S

| <u>NO.</u> | <u>DESCRIPTION</u>              | <u>I.D.</u> | <u>EVD.</u> |
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1 Wednesday, May 23, 2012:

2 MR. CORNEY: Please the Court.

3 THE COURT: Yes, sir.

4 MR. CORNEY: Your Honor, the State would next  
5 call the PCR of John J. Moore, Jr. That's docket number  
6 2011-CP-40-0190. Mr. Moore was true bill indicted at the  
7 April 2006 term of the Richland County Grand Jury for  
8 murder, use of a firearm during the commission of a  
9 violent crime and unlawful possession of a pistol by a  
10 person under the age of 21.

11 He proceeded to a jury trial January 28th, 2008  
12 before Judge Keesley. After a five day trial, Mr. Moore  
13 was convicted of a lesser included voluntary manslaughter  
14 ---

15 THE COURT: Hold on a minute. Ma'am, I assume  
16 you're related to the victim or somebody?

17 LADY: Am I? Yes, sir ---

18 THE COURT: You're his daughter.

19 LADY: --- sister-in-law.

20 THE COURT: Are you okay?

21 LADY: Yes, sir.

22 THE COURT: All right. I'm sorry, when someone  
23 is crying ---

24 LADY: I'm sorry.

25 THE COURT: --- you make an inquiry. It's

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1 understandable. Go ahead, Mr. Corney.

2 MR. CORNEY: Yes, sir, Your Honor. He was  
3 convicted by the jury of a lesser included voluntary  
4 manslaughter and of the two weapons charges as indicted.  
5 He was sentenced to 30 years on the voluntary  
6 manslaughter charge, five years concurrent for the  
7 possession of a weapon during the commission of a violent  
8 crime and five years consecutive for the possession of a  
9 weapon by a person under the age of 21 ---

10 THE COURT: And that was reversed by the Court  
11 of Appeals?

12 MR. CORNEY: It was, Your Honor.

13 THE COURT: All right.

14 MR. CORNEY: That's right where I was going with  
15 it, a Notice of Appeal was filed. Joey Savitz  
16 represented him on the appeal. Mr. Savitz obviously  
17 formerly of the South Carolina Office of Appellate  
18 Defense. They challenged only the possession of a weapon  
19 by a person under the age of 21 conviction. That was  
20 reversed by the Court of Appeals. The remittitur was  
21 issued on October 5th, 2010 and a timely PCR application  
22 was filed January 13th, 2011.

23 Present in the courtroom today prepared to  
24 testify are Applicant's former trial counsel Greg  
25 Collins. He was represented also by Doug Strickler. We

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1 don't have Mr. Strickler in the courtroom today. I think  
2 we're prepared to go forward with Mr. Collins ---

3 THE COURT: All right.

4 MR. CORNEY: --- who should be able to provide  
5 testimony on his PCR application. Also present -- and I  
6 don't know that I've seen him in the courtroom but we  
7 talked to him this morning and he is ready to testify, is  
8 his appellate counsel Joey Savitz.

9 THE COURT: All right, sir.

10 MR. CORNEY: Mr. Moore is represented by Roland  
11 Alston today on the application, Your Honor.

12 THE COURT: All right, Mr. Alston.

13 MR. ALSTON: Your Honor, may it please the  
14 Court. I have prepared a Memorandum ---

15 THE COURT: All right.

16 MR. ALSTON: --- for the application that  
17 outlines a lot of the issues that I think are important  
18 and will make sure that I give you the original.

19 THE COURT: Has this been filed?

20 MR. ALSTON: It has not been filed but marked as  
21 an exhibit, Your Honor.

22 THE COURT: Go ahead and have Crystal mark it.

23 (Whereupon, Plaintiff's Exhibit Number 1,  
24 Memorandum in Support of PCR, was admitted into  
25 evidence.)

1 MR. CORNEY: And, Your Honor, I'm assuming that  
2 this is all just setting forth the allegations in the  
3 application.

4 THE COURT: I don't see anything objectionable.  
5 All right, Mr. Alston.

6 MR. ALSTON: Your Honor, my client in his  
7 application -- I filed a supplemental application on his  
8 behalf and he raised a host of issues that he wanted to  
9 at least be on the record. I have as my obligation as  
10 counsel told him that, you know, there are certain issues  
11 that I think are important from my -- in my evaluation.  
12 That's what I want to go forward to today. And if I may  
13 have one moment to confer with my client?

14 THE COURT: Yes, sir, go ahead.  
15 (Pause.)

16 MR. ALSTON: Your Honor, at this time I would  
17 like to call Mr. Collins to the stand.

18 THE COURT: All right. Come around, Mr.  
19 Collins. You've got to help me out a little bit. Just  
20 place your left hand on the Bible, Mr. Collins, and raise  
21 your right hand.

22 (GREG COLLINS, having first been duly sworn,  
23 testified as follows:)

24 THE COURT: All right. Please take a seat, tell  
25 us your full name and spell your last name for the

GREG COLLINS -- DIRECT BY MR. ALSTON:

1 record.

2 THE WITNESS: My name is Greg Collins, C-o-l-l-  
3 i-n-s.

4 DIRECT EXAMINATION

5 BY MR. ALSTON:

6 Q Good morning, Mr. Collins?

7 A Good morning.

8 Q Mr. Collins, where are you employed?

9 A With the Richland County Public Defender's Office.

10 Q And were you employed there when my client was being  
11 tried for murder?

12 A Yes, I was.

13 Q Okay. And were you his trial counsel at that time?

14 A Yes.

15 Q Okay. And what was the verdict rendered in that  
16 case?

17 A Guilty of voluntary manslaughter and then the two  
18 gun charges.

19 Q During the course of the trial, was there a  
20 recording played between my client and his common-  
21 law spouse?

22 MR. CORNEY: Your Honor, I'm going to object to  
23 that. I think that he's leading as to the common-law  
24 spouse, that's the issue at hand, is whether she was the  
25 common-law spouse. I'm going to object to leading on

JAMES J. MOORE, JR. V. THE STATE

GREG COLLINS -- DIRECT BY MR. ALSTON:

9

1 that.

2 THE COURT: Hold on. The question was -- say  
3 the question again?

4 MR. ALSTON: Was there a tape recording or a  
5 recording of a conversation played between my client and  
6 his common-law ---

7 THE COURT: And what's your objection?

8 MR. CORNEY: My objection is that that's a very  
9 -- the question at hand is whether she was his common-law  
10 spouse or not. I think that he's inferring facts in the  
11 record that aren't ---

12 THE COURT: You'll get a chance to cross-  
13 examine. He's just -- it's just a characterization. I  
14 don't know whether it is or not.

15 MR. CORNEY: Thank you, Judge.

16 THE COURT: Go ahead.

17 A There was a phone conversation recorded that was  
18 played between Mr. Moore and whom I thought at the  
19 time was his girlfriend and mother of his child.

20 Q Okay. At any point in time, did you inquire whether  
21 or not it was his spouse or common-law spouse?

22 A I did not ask him that, no.

23 Q Okay. Are you aware of the law of spousal privilege  
24 in South Carolina?

25 A Yes.

GREG COLLINS -- DIRECT BY MR. ALSTON:

1 Q And what is that, spousal privilege immunity?

2 What's your understanding of that?

3 A My understanding of that is that it's inadmissible  
4 if it's between two spouses.

5 Q Okay. Was that ever raised at the criminal trial  
6 of my client?

7 A No, it was not.

8 Q Was the tape recording, pardon the phrase, damning  
9 as to my client?

10 A It didn't help, that's for sure.

11 Q Would it be your obligation as his counsel to  
12 inquire as to whether or not any privilege would  
13 apply in those circumstances?

14 A I would have thought that maybe he would have told  
15 me that.

16 Q During the trial, did you -- was there ever any  
17 discussion about jurors who were sleeping or drowsy  
18 or otherwise inattentive during the course of the  
19 case?

20 A Yeah, there was one juror in particular that said he  
21 had a cold and was kind of in and out of it  
22 throughout and actually completely fell asleep  
23 during the Solicitor's closing argument.

24 Q Did you ever ask the Court to conduct any voir dire,  
25 any inquiry or any examination of a juror who

GREG COLLINS -- DIRECT BY MR. ALSTON:

11

1 appeared to be sleeping or drowsy during the trial?

2 A I didn't because he was awake when we were going  
3 forward and was dozing during the prosecution.

4 Q You did?

5 A We didn't because he was not sleeping when we were  
6 putting up -- when we were up. He was sleeping when  
7 the prosecution was going.

8 Q Okay. So I just want to make sure that the record  
9 is clear that's being transcribed. At no time  
10 during this trial did you ever request Judge  
11 Keesley, who was the Trial Judge as I understand it,  
12 to conduct any sort of voir dire or any sort of  
13 inquiry of a juror who appeared to be sleeping or  
14 drowsy during the trial?

15 Q We didn't request it. I do -- I do believe the  
16 Judge did address it and ask if he needed any  
17 caffeine or things like that. But we didn't request  
18 any voir dire.

19 MR. ALSTON: Your Honor, at this time I would  
20 like to mark ---

21 THE COURT: Go ahead. I think Judge Keesley  
22 inquired, gave him some water. There was another one  
23 almost about to fall asleep and they gave them a break.  
24 You can make that part of the record. I think it's a part  
25 of the record but you can mark it.

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GREG COLLINS -- DIRECT BY MR. ALSTON:

12

1 (Whereupon, Plaintiff's Exhibit Number 2,  
2 Trial Transcript, was admitted into evidence.)

3 THE COURT: Was my characterization correct so  
4 far, from what I read?

5 THE WITNESS: (Affirmative response.)

6 THE COURT: All right.

7 Q Do you recall an incident where jurors came forward  
8 at the beginning of the trial and informed Judge  
9 Keesley that they were exposed to mugshot  
10 photographs of the Defendant before the case in  
11 chief was presented?

12 A Yes.

13 Q Okay. And did you move for a mistrial on the basis?

14 A I don't believe so. I know we moved to have some  
15 jurors removed because of it.

16 Q Okay. Why didn't you move for a mistrial?

17 A Honestly, I can't tell you that. I don't remember  
18 exactly what was going through my head at that time.

19 THE COURT: You need to speak up, Mr. Collins?

20 A I don't remember exactly what was going through my  
21 head at that time. I guess we didn't feel it was  
22 appropriate to move for a mistrial at that time.

23 Q Was a self-defense claim ever made or charged?

24 A I believe we asked for it to be charged but it  
25 wasn't charged.

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1 Q Do you know why self-defense was asked for?

2 A Do I know why it was asked for?

3 Q Yes.

4 A Because that was one of the defenses we were going  
5 to try to go forward with.

6 Q Okay. And why is that?

7 A Due to the fact that the other car on the interstate  
8 was driving towards the truck swerving at the truck  
9 Mr. Moore was allegedly in. And the fact that there  
10 was testimony that the passenger of the car reached  
11 under the seat, supposedly possibly for a gun.

12 Q Okay. Were you -- did you have any indication as to  
13 whether or not the driver of the other car was under  
14 the influence of drugs or intoxicating liquor?

15 A We had information that he was potentially a  
16 methamphetamine user. The information came from  
17 interviews with his family members and the victim's  
18 family members. Those were the only people that we  
19 got the information through.

20 Q Okay. Did you ever consult any forensic  
21 toxicologist to examine this issue and to perhaps  
22 testify at trial as to the state of the driver of  
23 the car to substantiate and bolster your self-  
24 defense argument?

25 A No, we didn't retain any experts for that.

GREG COLLINS -- DIRECT BY MR. ALSTON:

14

1 MR. ALSTON: Your Honor, I'm marking as Exhibit  
2 3 an Affidavit that was submitted for the Court's  
3 consideration by a forensic toxicologist that I think is  
4 probative of this issue.

5 THE COURT: Well, that may be fine but where is  
6 -- the State has a right to cross-examine this gentleman.

7 MR. CORNEY: Judge, that would be our objection  
8 is that he's not here. I don't have an opportunity to  
9 cross-examine him on this Affidavit or where this  
10 information came from, what investigation he did, how he  
11 even came up with these findings.

12 THE COURT: Your objection is noted. You may  
13 proffer what you want to -- you can proffer this but  
14 there's a valid objection. I sustain it but I'm going to  
15 let you proceed. Go ahead, as a proffer.

16 MR. ALSTON: Yes, sir.

17 (Whereupon, Plaintiff's Exhibit Number 3,  
18 Affidavit of Dr. Robert Bennett, was admitted  
19 into evidence.)

20 Q Do you recall a charge being made on implied malice  
21 by Judge Keesley?

22 A Yes.

23 THE COURT: I'm still a little bit confused. I  
24 think you stated earlier, you asked Mr. Collins whether  
25 or not Judge Keesley had charged self-defense but he

GREG COLLINS -- DIRECT BY MR. ALSTON:

15

1 couldn't recall. I think he did in fact charge self-  
2 defense, if I read the record correctly?

3 MR. CORNEY: Yes, Judge, the record ---

4 THE COURT: So let's clear that up right now.  
5 Self-defense was charged in this case.

6 Q Was self-defense charged in this case, your  
7 understanding?

8 A I guess it was.

9 MR. ALSTON: My understanding it was, Your  
10 Honor.

11 THE COURT: Okay. Okay, go ahead, go ahead. It  
12 was somewhat confusing for me.

13 MR. ALSTON: All right.

14 THE COURT: But it was in fact charged.

15 MR. ALSTON: Yes, sir.

16 THE COURT: All right.

17 Q Did you do any research to determine whether or not  
18 an implied malice charge was warranted under the  
19 circumstances?

20 A We researched jury charges. I believe this was  
21 before that case came out saying that the presence  
22 of a weapon, that the charge with the presence of a  
23 weapon can be implied malice. That came out I  
24 believe after this case. Looking back, yeah, we  
25 should have objected to that charge.

GREG COLLINS -- DIRECT BY MR. ALSTON:

1 MR. ALSTON: The Court's indulgence, Your Honor.

2 THE COURT: Yes, sir.

3 (Pause.)

4 MR. ALSTON: Your Honor, I've marked as Exhibits  
5 4 and 5 a statement from a Mike Langford (phonetic) taken  
6 by, it appears to be, law enforcement. And also an  
7 investigator report from Info, Inc. Investigations.

8 THE COURT: Any objection?

9 MR. ALSTON: Your Honor, if I could have just  
10 one second to ---

11 THE COURT: All right. Take your time and look  
12 at them.

13 (Pause.)

14 MR. ALSTON: Judge, just based on these two  
15 documents, I first would object to them unless Mr.  
16 Collins can identify these as part of this trial notebook  
17 or something that came from his file.

18 Also, I don't think they can be brought to the  
19 truth of the matter asserted if we don't have anyone to  
20 testify that created these reports. I think to go to his  
21 reasonableness on how he conducted his investigation  
22 based on these things perhaps but not for the truth of  
23 the matter asserted, they are hearsay.

24 THE COURT: Okay, all right. Objection is  
25 noted, go ahead.

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GREG COLLINS -- DIRECT BY MR. ALSTON:

17

1 (Whereupon, Plaintiff's Exhibit Number 4,  
2 Statement, was admitted into evidence.)

3 (Whereupon, Plaintiff's Exhibit Number 5, Info,  
4 Inc. Report, was admitted into evidence.)

5 Q Mr. Collins, do you ever recall seeing those two  
6 documents?

7 A Yes.

8 Q Okay. And would these documents, at least one of  
9 them, be probative of the ---

10 THE COURT: What are the documents, identify  
11 them for me.

12 MR. ALSTON: Okay, these -- Your Honor, this is  
13 a document by Mike Langford.

14 THE COURT: Uh-huh.

15 MR. ALSTON: Which attest to ---

16 THE COURT: Is it a statement?

17 MR. ALSTON: It is a statement, it is not --  
18 it's signed, does not appear to be notarized.

19 THE COURT: All right.

20 MR. ALSTON: And it appears ---

21 THE COURT: Okay. Let Mr. Collins -- do you  
22 recognize it, Mr. Collins?

23 THE WITNESS: Yes.

24 THE COURT: And what is it, sir?

25 THE WITNESS: One statement, as he said, is a

GREG COLLINS -- DIRECT BY MR. ALSTON:

1 signed statement from Mike Langford and another is the  
2 report from the investigator that we used on this case.  
3 It's Info Investigations ---

4 THE COURT: And these are documents from your  
5 file?

6 THE WITNESS: I believe, yes, Your Honor.

7 THE COURT: All right. Go ahead.

8 MR. ALSTON: And, Your Honor, my position is ---

9 THE COURT: I said, go ahead.

10 MR. ALSTON: Okay.

11 THE COURT: All right.

12 Q Would these support your -- any argument for self-  
13 defense given the condition of the driver of the  
14 other vehicle?

15 A It's relevant, yes.

16 Q Okay. Were they ever called to testify, the person  
17 who signed this document?

18 A Mike Langford?

19 Q Yes.

20 A I don't believe so.

21 (Pause.)

22 Q Mr. Collins, do you feel that you met the  
23 requirement of effective counsel during this trial?

24 A I believe so, yes.

25 Q Did you ever ensure what was appealed at the

1 conclusion of the trial?

2 A I filed a Notice of Appeal but I didn't have any  
3 other control after filing the Notice of Appeal  
4 because ---

5 Q Did the Notice of Appeal encompass all convictions?

6 A We filed -- the standard after a trial, we file the  
7 Notice of Appeal within the 10 day requirement and  
8 then it goes to the Office of Appellate Defense.

9 Q Going back to the statement that the -- or the  
10 recording of Ms. Nix (phonetic). Okay, did you ever  
11 do any research about whether or not my client's  
12 right to confront a witness against him at trial was  
13 being violated?

14 A Yes, that's what we objected to at trial. We -- the  
15 Judge still allowed it in but that was the basis for  
16 our objection to that recording coming in.

17 Q I recall an objection based on authentication. Are  
18 you sure you made an objection on the record as to  
19 his constitutional right to confront a witness?

20 A If it's not in the record, I guess I didn't. But  
21 that's definitely what was considered.

22 MR. CORNEY: And, Your Honor, I think the record  
23 would speak for itself in that regard.

24 THE COURT: All right.

25 MR. ALSTON: The Court's indulgence.



GREG COLLINS -- DIRECT BY MR. ALSTON:

1 THE COURT: Yes, sir.

2 (Pause.)

3 Q Do you recall the prosecutor ever taking -- during  
4 his closing argument, misrepresenting the testimony  
5 or taking the -- anything out of context, especially  
6 the recording of Ms. Nix that we just discussed?

7 A Mr. Meadors takes a lot of things out of context,  
8 yes.

9 Q Okay. And why did you -- did you object to that?

10 A We did not object.

11 Q Why not?

12 A Didn't feel that it was that far out of context. In  
13 fact, he used -- I used that in my closing. We  
14 spoke about it in the opening as far as that they  
15 will play on the emotions of the jury which is  
16 exactly what he was trying to do by misrepresenting  
17 the recording.

18 (Pause.)

19 Q What sort of investigation did you do before the  
20 trial?

21 A We retained Lee Connelly with Info Investigations  
22 and she produced numerous reports and interviewed  
23 numerous people. I don't recall exactly how many.

24 Q Is that Info, Inc., is that the report that's been  
25 marked as an exhibit, I believe it's Exhibit 3?

GREG COLLINS -- DIRECT BY MR. ALSTON:

21

1 A Yes.

2 Q Or 5 rather?

3 A That's Lee Connelly's company, yes.

4 Q And how many times did you meet with Mr. Moore  
5 before the trial began?

6 A Numerous times, I don't -- I can't give you the  
7 exact number without looking it up. I can look it  
8 up on our computer data base but numerous, numerous  
9 times.

10 Q Okay, you can give me a range of what that would be?

11 A I'd say at least 10 times.

12 (Pause.)

13 MR. ALSTON: Your Honor, that's all the  
14 questions I have at this time.

15 THE COURT: All right, Mr. Corney?

16 MR. ALSTON: Oh, I'm sorry, Your Honor. I'm  
17 sorry.

18 THE COURT: All right.

19 Q One more follow up, Mr. Collins. If these documents  
20 were relevant to you, why were they not presented?

21 A At the time of the trial, we decided not to put  
22 forth a case, we didn't feel like we had strong  
23 enough witnesses to risk losing the last closing  
24 argument. Looking back that very well could have  
25 been a mistake but that was our decision at the time

GREG COLLINS -- DIRECT BY MR. ALSTON:

1 was to not put forth the case so that we could keep  
2 the last closing argument.

3 Q What was the last closing argument for the record?

4 A So that we could have the last closing after the  
5 Solicitor gets his closing argument, we have an  
6 opportunity to have the last word with the jury.  
7 Unfortunately in South Carolina, that's the law  
8 here.

9 MR. ALSTON: Okay. No further questions, Your  
10 Honor.

11 THE COURT: All right, Mr. Corney.

12 MR. CORNEY: May it please the Court, Your  
13 Honor.

14 THE COURT: Yes, sir.

15 CROSS-EXAMINATION

16 BY MR. CORNEY:

17 Q Mr. Collins, thank you for being here with us today.  
18 I just want to start, Doug Strickler was involved in  
19 this case with you. Was he co-counsel, second  
20 chair, how did that work?

21 A He was second chair. He kind of started on the case  
22 the week before and basically he was just there to  
23 kind of just aid me throughout the trial.

24 Q Okay.

25 A Due to the size of the case and the complexity of

1 the case and I think it was thousands of pages in  
2 the discovery.

3 Q So any meetings with Mr. Moore, conversations with  
4 him, discovery, you were privy to all that, you were  
5 the lead counsel in this matter, correct?

6 A Yes. I got the case from somebody else in the  
7 office but I represented him for a fair amount of  
8 time before trial.

9 Q Okay. Do remember making your discovery motion in  
10 this matter?

11 A I don't remember specifically. It could have been  
12 somebody else in the office but we had numerous  
13 motions, I believe, after the original Rule 5 was  
14 filed.

15 Q Okay. But you recall that you did receive discovery  
16 in this case?

17 A Oh, yes, I recall that.

18 Q And do you remember any noteworthy items that were  
19 included in that discovery that might have stuck out  
20 to you, something you wanted to look into and  
21 investigate or speak with Mr. Moore about?

22 A There were a lot of things in there that were  
23 noteworthy.

24 Q Okay. There were some witness statements as part of  
25 that discovery file?

GREG COLLINS -- CROSS BY MR. CORNEY:

1 A Witness statements, yes.

2 Q A co-defendant's statement?

3 A Yes.

4 Q Mr. Moore himself gave a statement?

5 A Yes.

6 Q Based on your review of the discovery and your  
7 discussions with Mr. Moore, were you able to start  
8 formulating an opinion about the State's ability to  
9 prove his guilt beyond a reasonable doubt at trial?

10 A I had my opinion on it, yes.

11 Q Okay and what was that opinion, just based on your  
12 preliminary investigation of the case?

13 A We were always concerned with the theory of the hand  
14 of one, hand of all. We were from the beginning  
15 firmly convinced that Kerwyn Phillips is the one who  
16 actually shot the victim. But we were concerned  
17 with the hand of one, hand of all theory, if they  
18 could place John with Kerwyn.

19 Q Okay. And you said you hired Lee Connelly as the  
20 private investigator in the matter?

21 A Yes.

22 Q Okay. And was she able to look into some of the  
23 potential witnesses that might be testifying at  
24 trial and interview and investigate them?

25 A She interviewed numerous people, yes.

JAMES J. MOORE, JR. V. THE STATE

1 Q Did she have the opportunity to interview Mr.  
2 Phillips, Kerwyn Phillips?

3 A I don't recall if -- if -- I don't believe Mr.  
4 Phillips agreed to meet with her.

5 Q Based on your discovery, your review of the  
6 discovery and the independent investigation done,  
7 were you able to start developing some defenses to  
8 be used at trial?

9 A Yes.

10 Q Okay. And just as a preliminary matter, what  
11 defenses were you initially looking at? What did  
12 you investigate and start to prepare for trial?

13 A I mean, the theory, the theme that we had for the  
14 trial was to have the jury, convince the jury, that  
15 Kerwyn Phillips is the -- is the killer. And we  
16 were hoping that they -- the jury would be convinced  
17 of that and not convict Mr. Moore for what Mr.  
18 Phillips did.

19 Q And so kind of, you've got the wrong guy defense, if  
20 you will?

21 A And that defense and basically placing Mr. Moore in  
22 the situation where Mr. Phillips has a gun and just  
23 shoots and kills somebody doesn't really put Mr.  
24 Moore in a position to then call the cops or try to  
25 stop him or else he would get shot too.

GREG COLLINS -- CROSS BY MR. CORNEY:

26

1 Q Okay, I want to start talking about the actual  
2 trial. At the beginning of the trial, there was an  
3 issue that came out about pictures shown of Mr.  
4 Moore on the news after the jury was sworn, is that  
5 correct?

6 A I believe so.

7 Q And I believe Mr. Alston had questioned you about  
8 that and he characterized that as a mugshot of Mr.  
9 Moore that was on the news. Do you recall during  
10 the voir dire of those jurors whether any of them  
11 ever mentioned it being a mugshot or ever mentioned  
12 the word mugshot?

13 A It was a mugshot. I don't know if the juror  
14 recognized it as a mugshot but it wasn't a glamour  
15 photo or anything like that. It was definitely a  
16 mugshot.

17 Q But you agree that the record would speak for itself  
18 on whether a juror ever said he saw a mugshot of Mr.  
19 Moore, right?

20 A I don't know if it was ever specifically asked of a  
21 juror if it was a mugshot.

22 Q And there was an in-camera hearing held on that  
23 particular issue where the jurors were brought out  
24 one by one and questioned by the Judge about what  
25 they had seen, right?

1 A I believe so, yes.

2 MR. CORNEY: I just direct the Court's attention  
3 to page 109 of the trial transcript where that's held.

4 Q And Mr. Strickler actually made a motion to set  
5 aside some of those trials -- some of those jurors  
6 and actually did ask for a mistrial based on that,  
7 didn't he?

8 A That was in the record, yes.

9 MR. CORNEY: And I direct the Court's attention  
10 to page 121, lines 17 through 19 where that motion was  
11 made.

12 Q Assuming -- I mean, the case did go forward and the  
13 motion was denied for the mistrial?

14 A Yes.

15 Q Do you recall if any jurors were actually set aside?

16 A One was set aside. I believe the person said he had  
17 a conversation with a friend of his at Columbia  
18 Athletic Club about some news story or something of  
19 that nature. He was set aside.

20 Q Okay.

21 A The Solicitor asked for a mistrial but quickly  
22 withdrew that motion.

23 Q And that is all reflected in the record.

24 A Yes.

25 Q The jurors that saw this picture, none of them were



GREG COLLINS -- CROSS BY MR. CORNEY:

1 set aside, the ones that actually just saw the  
2 picture, just based on that point?

3 A I believe it was just that one juror that was set  
4 aside.

5 Q Now, as far as Mr. Gene Derrick's testimony at  
6 trial, he was the husband and the driver of the car  
7 in this incident. Would it be fair to say that part  
8 of your strategy was to bring his credibility into  
9 issue on cross-examination?

10 A It was a little complicated because certain parts of  
11 his testimony, depending on when you talked to him,  
12 we wanted the jury to believe other parts. His  
13 testimony at trial obviously was completely  
14 different than his early statements. So it was a  
15 bit complicated. As I was looking back through the  
16 transcript, I definitely should have played up the  
17 drug use more than we did.

18 Q Okay. But there was plenty of testimony about the  
19 fact he had been drinking that night?

20 A I believe the only testimony he admitted to was  
21 three or four beers and smoked an entire pack of  
22 cigarettes.

23 Q Okay. During his testimony you were also able to  
24 get Mr. Derrick to even testify that he believed  
25 that the passenger and not Mr. Moore was the shooter

1 in this case, right?

2 A That's what was in his original sworn statement. He  
3 just changed his testimony at trial.

4 Q And you brought that out on cross-examination, you  
5 had him admit that that's what he said originally?

6 A Yes.

7 Q About these jurors sleeping, I think you said that  
8 you -- during the closing you didn't make a motion  
9 for mistrial or any objections to that because it  
10 was during the Solicitor's closing argument and not  
11 yours?

12 A As far as the juror actually falling asleep, yes, it  
13 was during the Solicitor's closing argument.

14 Q And that would have been your strategy not to object  
15 to that, based on the fact that he wasn't missing  
16 anything you were presenting, he was missing  
17 something that was by admission of the State, their  
18 arguments?

19 A We felt good about that juror, yes.

20 Q Throughout the rest of the trial with these jurors  
21 falling asleep, I think that they're noted by the  
22 Judge each time it happens on the record and they're  
23 addressed on the record, is that your recollection?

24 A As far as I recall, yes.

25 Q Okay. And regarding the phone call tape between Mr.

GREG COLLINS -- CROSS BY MR. CORNEY:

1 Moore and his girlfriend, Delia (phonetic) Nix, he  
2 said he never asked him whether it was his common-  
3 law spouse or if it was girlfriend, you never asked  
4 him about that specifically?

5 A I didn't think of it, I probably should have.

6 Q Okay. And during the course of your representation,  
7 did you have a chance to speak to Ms. Nix?

8 A Yes.

9 Q Okay. And how did she characterize their  
10 relationship to you when you met with her?

11 A I didn't go down that line, all I knew was she was  
12 the mother of his child and they were close and had  
13 a relationship.

14 Q Okay. Kerwyn Phillips did, the co-defendant, did  
15 testify at trial, right?

16 A Yes.

17 Q And he was a long time friend of Mr. Moore's?

18 A That was the State's theory, yes.

19 Q Okay. Do you recall at any point in time when Mr.  
20 Phillips referred to Ms. Nix as his spouse or wife  
21 or anything along those lines?

22 A I don't recall, no.

23 Q Okay. And if -- you would agree that if the record  
24 reflected such, that he only referred to her as his  
25 girlfriend the entire time during his testimony?

1 A Yes.

2 Q That's what the record reflects?

3 A (Affirmative response.)

4 Q Spousal immunity, would it be fair to characterize  
5 spousal immunity as having to be a confidential  
6 conversation between spouses that is not subject to  
7 brought in at trial?

8 A I would argue that any conversation would be  
9 confidential. I don't know which way the Judge  
10 would rule but ---

11 Q Okay.

12 A --- I would argue that anyway.

13 Q A statement or a conversation taped on a jailhouse  
14 phone that they know they're being recorded, you  
15 would characterize that as a spousal communication  
16 that could be held out at trial?

17 MR. ALSTON: Objection, Your Honor, I don't know  
18 if it's been established that it was the source of the  
19 recording.

20 MR. ALSTON: Judge, it's all in the record that  
21 it's a jailhouse phone call.

22 THE COURT: You're objecting because you're not  
23 sure?

24 MR. ALSTON: I objected because I don't think  
25 he's laid a proper foundation.

GREG COLLINS -- CROSS BY MR. CORNEY:

1 THE COURT: Overruled, go ahead.

2 Q If it was a jailhouse phone call that they knew --  
3 that was alleged that they knew they were being  
4 recorded, would you characterize that as a  
5 confidential conversation between spouses?

6 A I mean, I don't believe confidential is the correct  
7 term. My answer would be we would try to keep it  
8 out, I just don't know what the success rate we  
9 would have with that.

10 Q Okay. That would have been -- that would have been  
11 something you brought up at trial, okay. But you  
12 did make an objection to the tape based on those  
13 grounds?

14 A Yes.

15 Q Okay. The tape was ultimately admitted by the  
16 Court?

17 A Yes.

18 Q Okay. You preserved those objections for appeal  
19 after it was admitted?

20 A The best way I could, yes.

21 Q Okay.

22 MR. CORNEY: Beg the Court's indulgence for just  
23 one minute, Your Honor.

24 THE COURT: Yes, sir.

25 (Pause.)

1 Q I believe you testified a minute ago that getting  
2 closing argument was a pretty important strategy of  
3 yours on whether you want to present a defense for  
4 Mr. Moore?

5 A I thought so at the time. I think differently now,  
6 this was awhile back.

7 Q In hindsight maybe differently, but at that time you  
8 thought you were doing the right thing?

9 A At the time, yes.

10 MR. CORNEY: Beg the Court's indulgence  
11 just one moment, Your Honor, I'm sorry.

12 THE COURT: Yes, sir.

13 (Pause.)

14 MR. CORNEY: I believe that's all the questions  
15 I have, Your Honor.

16 THE COURT: Anything on technically redirect, I  
17 guess?

18 MR. ALSTON: Yes, sir, the Court's indulgence.

19 (Pause.)

20 MR. ALSTON: Nothing further, Your Honor.

21 THE COURT: All right, you may step down, Mr.  
22 Collins.

23 (The witness leaves the witness stand.)

24 THE COURT: Call your next witness.

25 MR. ALSTON: Your Honor, we call attorney Joey

JOSEPH L. SAVITZ, III -- DIRECT BY MR. ALSTON:

1 Savitz to the stand.

2 THE COURT: All right.

3 (JOSEPH L. SAVITZ, III, having first been duly  
4 sworn, testified as follows:)

5 THE COURT: All right, please take a seat. Tell  
6 us your full name and spell your last name for the  
7 record.

8 THE WITNESS: Okay. My name is Joseph L.  
9 Savitz, S-a-v-i-t-z, the third.

10 DIRECT EXAMINATION

11 BY MR. ALSTON:

12 Q Good morning, Mr. Savitz.

13 A Good morning, how are you?

14 A Good. Were you ever the attorney for my client, Mr.  
15 John Moore?

16 A Yes, I was.

17 Q In what capacity?

18 A I was his appellate attorney.

19 Q Okay. For what convictions?

20 A I guess it was a manslaughter and a weapon's charge  
21 on top of that.

22 MR. ALSTON: Your Honor, I have marked as the  
23 next exhibit a final brief of Appellant.

24 THE COURT: All right, sir.

25 (Whereupon, Plaintiff's Exhibit Number 6, Court

JAMES J. MOORE, JR. V. THE STATE

1 of Appeals Brief, was admitted into evidence.)

2 Q Does this appear to be a copy of the final brief you  
3 submitted for my client?

4 A Yes, it is.

5 Q And what issues were raised on appeal?

6 A Okay. The -- the issue that I raised on appeal  
7 basic -- this case was, I believe, like a road rage  
8 shooting. There were like fact bound -- I mean, a  
9 lot depended on the facts. When I read it, the only  
10 issue that I could see at the time dealt with the  
11 gun charge, the weapon's offense. I raised that  
12 issue and got that charge dropped which was kind of  
13 a period of victory because it was five years  
14 concurrent with the 30 he was doing for the  
15 manslaughter, so in turn was a win but in terms of  
16 its importance to him it wasn't that big a deal.

17 Q Did you ever review the record of the trial?

18 A Yes.

19 Q Okay. Did ever review this trial transcript?

20 A Yes. I have not reviewed it for today though. I  
21 reviewed at the time I did the appeal but I have not  
22 reviewed it for today.

23 A Okay. And after review of that trial transcript,  
24 you saw no issues that you could raise in regards to  
25 the voluntary manslaughter conviction?



JOSEPH L. SAVITZ, III -- DIRECT BY MR. ALSTON:

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1 A I didn't see -- I didn't see any issues at the time,  
2 no.

3 Q Okay.

4 A I mean, it was like I say, it was fairly fact bound  
5 and not a lot of legal issues were raised during the  
6 trial. There just wasn't anything I could raise.

7 Q Okay.

8 A Which is not saying I'm perfect, okay, I could have  
9 missed something, I might have. You might have  
10 found something.

11 Q Okay. Well, in that regard, I -- my client argues  
12 that there were arguable three instances where a  
13 juror was not paying attention to the testimony from  
14 being drowsy or asleep or whatever condition the  
15 juror was in. Do you recall reading that in the  
16 transcript?

17 A I don't remember reading that at the time. I don't  
18 remember that being an issue at the time I read the  
19 transcript. I've heard people talk about it here  
20 today and I understand that it is, so.

21 Q A sleeping juror, would that be a good issue to  
22 raise on appeal?

23 A You know, it depends on the context in which it  
24 occurred. If jurors were sleeping during the trial,  
25 generally yes, that's a real good issue to raise on

1 appeal.

2 MR. ALSTON: Your Honor, I'm having marked as  
3 the next two exhibits, a letter of April 8, 2009 ---

4 THE COURT: Ask the witness if he can identify  
5 it. Do you intend to get it in through Mr. Savitz?

6 MR. ALSTON: Yes, I do.

7 THE COURT: All right, go ahead.

8 Q I'm going to hand you a document dated April 8th,  
9 2009, could you please identify that.

10 A Yes, this is -- it looks like a like a letter that I  
11 sent him after the -- either I filed the brief or  
12 the opinion came out, I'm not sure.

13 Q Okay. And does this letter represent you were not  
14 able to find any issues to attack the voluntary  
15 manslaughter conviction?

16 A No ---

17 Q Does this letter reflect that you were not able to  
18 find any issues to attack the voluntary manslaughter  
19 conviction?

20 A Yes.

21 MR. ALSTON: Your Honor, it's been marked as  
22 Exhibit 7.

23 THE COURT: All right, any objection?

24 MR. CORNEY: Your Honor, I don't know which one  
25 he's referring to, the one signed by Mr. Savitz ---

JOSEPH L. SAVITZ, III -- DIRECT BY MR. ALSTON:

1 MR. ALSTON: The one that's dated April 8th,  
2 2009.

3 MR. CORNEY: No objection, Your Honor.  
4 (Whereupon, Plaintiff's Exhibit Number 7,  
5 Letter Dated April 8, 2009, was admitted into  
6 evidence.)

7 Q I have also a document unsigned. Would you please  
8 identify that for the record, it's dated June 25th,  
9 2009?

10 A Okay. This -- yeah this looks like the letter that  
11 one of the law clerks there at Appellate Defense or  
12 Indigent Defense sent to Mr. Moore.

13 Q Okay. And who was your law clerk?

14 A I didn't have one. This -- this guy was not my law  
15 clerk but he did work there.

16 Q Okay.

17 A I mean ---

18 Q He worked with ---

19 A It's legitimate, it's not a forgery or anything.

20 Q Okay. And this was dated June 25th after you sent  
21 April the 8th?

22 A Yes.

23 Q Okay. But yet this record, this letter, reflects  
24 that you had not yet reviewed the record. Do you  
25 understand why that is the case?

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1 A I mean, I can see that he has written a letter  
2 saying I had not reviewed the record. I'm saying  
3 that if the letter I wrote before that is dated  
4 earlier, I had obviously reviewed the record. He  
5 was mistaken when he wrote that.

6 MR. CORNEY: Your Honor, is he planning to  
7 introduce that as part of the record?

8 MR. ALSTON: Yes, I ---

9 THE COURT: I don't know what he plans to do.

10 MR. CORNEY: Of course it's testified to and  
11 put in the record. But I'd like to make an objection to  
12 it.

13 THE COURT: Go ahead, object.

14 MR. CORNEY: I object to it on the grounds of  
15 hearsay. Rusty Neely (phonetic) is not here. He's going  
16 based on the truth of the matter asserted in that letter  
17 that Mr. Savitz hasn't read in the record and it's all  
18 hearsay so it can't be admitted as to the truth of the  
19 matter asserted.

20 THE COURT: Thank you, sir. Mark it, proffer  
21 it, go ahead. The problem is you don't have the law  
22 clerk here. But go ahead anyway. And Mr. Savitz  
23 testified, if he wrote the letter saying he reviewed it,  
24 that's what happened ---

25 THE WITNESS: I'm sure -- that was a guy that

JOSEPH L. SAVITZ, III -- DIRECT BY MR. ALSTON:

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1 worked at Appellate Defense. I am sure he wrote that  
2 letter about this case. I am not disputing that at all.  
3 I am saying the letter is incorrect.

4 THE COURT: All right.

5 Q Do you recall, in your review of the transcript when  
6 you were preparing for the appeal, any issues, any  
7 evidentiary issues regarding whether or not the  
8 recording should be introduced against my client?

9 A I don't remember but I haven't read the transcript  
10 recently so.

11 (Pause.)

12 MR. ALSTON: Your Honor, that's all I have at  
13 this time, thank you.

14 THE COURT: Mr. Alston, you need to have that  
15 marked for the record, the second letter, I assume from  
16 the law clerk.

17 MR. ALSTON: I believe it ---

18 COURT REPORTER: I haven't marked it yet, I just  
19 need the letter.

20 (Whereupon, Plaintiff's Exhibit Number 8, Letter  
21 Dated June 25, 2009, was admitted into  
22 evidence.)

23 MR. ALSTON: Nothing further, Your Honor.

24 THE COURT: Thank you, sir. Mr. Corney.

25 MR. CORNEY: Your Honor, I'll be very brief.

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CROSS-EXAMINATION

BY MR. CORNEY:

Q Mr. Savitz, how long did you serve in your capacity as an attorney for the South Carolina Office of Appellate Defense?

A I was there from January 5, 1985 to January 5, 2011.

THE COURT: Was it 15 years, how long were you there?

THE WITNESS: 26.

THE COURT: 26 years?

THE WITNESS: Yeah.

THE COURT: Okay.

Q And ---

A Yes, sir.

Q Sorry, anyway for you to throw a just rough, you know, estimate on how many appeals you might have handled in your time there?

A I mean it was hundreds of them, thousands.

Q Okay. Now, when you received an appeal or a Notice of Appeal was brought to your office, what was your procedure for determining what the issues ---

A Well, this one was kind of different. I talked to Mr. Moore's father first and the case was already in the office. I specialized in murder cases. This was voluntary manslaughter. And I talked to his

JOSEPH L. SAVITZ, III -- CROSS BY MR. CORNEY:

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1 daddy first and he asked me if I would take the case  
2 and I said, yes, I would. And I handle them all the  
3 same.

4 I read through the transcript and, you know,  
5 tried to find something that would win. The only  
6 thing I could find unfortunately was the weapon's  
7 offense.

8 Q Okay. And based on your experience as an appellate  
9 -- as an appellate defender, would it be uncommon  
10 not to raise every preserved issue on appeal?

11 A Yeah, I mean, we just try to raise the ones that  
12 stand a chance of winning. I wish I had had  
13 something I could have raised that would have went  
14 for the voluntary manslaughter. I just didn't see  
15 anything, which is not to say that, you know, I mean  
16 I could have missed something. If I missed  
17 something we would have won, then I was ineffective.

18 Q Okay. So it's fair to characterize that testimony  
19 is you pick the strongest issues and that's what you  
20 raise?

21 A I picked the one that I thought would win and it did  
22 win but unfortunately it's not that great an issue  
23 in the overall scheme of his trial.

24 Q And I believe you said before the weapon's charge  
25 was concurrent. Did you mean that it was

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1 consecutive or was it ---

2 A I thought it was concurrent.

3 THE COURT: It was consecutive.

4 THE WITNESS: It was?

5 MR. CORNEY: I just wanted the Court to take  
6 notice of that.

7 THE COURT: That's all right, it's a matter of  
8 record, it was consecutive.

9 MR. CORNEY: And that's all the questions I  
10 have.

11 THE COURT: All right. Anything further of this  
12 witness?

13 MR. ALSTON: Nothing further, Your Honor.

14 THE COURT: One question, didn't you use to work  
15 with a Tara Dawn Shurling?

16 THE WITNESS: Yes, I did.

17 THE COURT: Years ago?

18 THE WITNESS: For quite some time

19 THE COURT: Okay. Thank you, sir.

20 THE WITNESS: Thank you.

21 THE COURT: You may step down.

22 (The witness leaves the witness stand.)

23 THE COURT: Anything further of this witness?

24 MR. CORNEY: Nothing from the State, Your Honor.

25 THE COURT: Anybody want to keep him here?



JOHN J. MOORE, JR. -- DIRECT BY MR. ALSTON:

1 MR. ALSTON: No, sir.

2 THE COURT: He's now retired.

3 MR. CORNEY: I think he's a busy man, I don't  
4 think we'll be able to keep him here, Your Honor.

5 THE COURT: All right. Anything further?

6 MR. ALSTON: Yes, sir, Your Honor. I would like  
7 the call my client John Moore to the stand.

8 THE COURT: Come around, Mr. Moore.

9 (JOHN J. MOORE, JR., having first been duly  
10 sworn, testified as follows:)

11 THE COURT: All right, please take a seat, sir.  
12 Tell us your full name and spell your last name for the  
13 record.

14 THE WITNESS: John Joseph Moore, Jr., last name  
15 M-o-o-r-e.

16 DIRECT EXAMINATION

17 BY MR. ALSTON:

18 Q Mr. Moore, did you file this post conviction relief  
19 application?

20 A Yes, sir.

21 Q Okay. And did we meet on several occasions to  
22 discuss your application?

23 A Yes, sir.

24 Q Okay. And were almost all, if not all, of the  
25 issues you wanted raised in your application covered

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1 in the supplemental application for post conviction  
2 relief filed on January the 6th of this year?

3 A Basically, yes, sir.

4 Q Okay. Have you been listening to the testimony that  
5 has been offered here today by the various  
6 witnesses?

7 A Yes, sir.

8 Q Okay. This is your time, Mr. Moore, and you have  
9 expressed to me you want the Court to hear your  
10 complaints and your grounds for relief.

11 So to the extent there was anything you want the  
12 Court to consider, you understand this is your time  
13 to do it?

14 A Yes, sir.

15 Q Okay. What is the first issue you want to address  
16 to the Court?

17 A The first issue I would like to address is the  
18 issue, again, about the sleeping jurors. Y'all  
19 excuse me for a minute, I'm kind of nervous, first  
20 time.

21 THE COURT: Go ahead.

22 A Another factor that I want the Court to also  
23 consider is that the failure for the jurors to be  
24 able to follow instructions due to sleeping --  
25 sleeping in the course of the trial. They failed to

JOHN J. MOORE, JR. -- DIRECT BY MR. ALSTON:

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1 be able to hear all of the presented evidence and  
2 that showed their inability, whether intentional or  
3 inadvertent, to follow the law, that requires a  
4 reversal.

5 And the fact is, the fact that is a question,  
6 that the jurors were able -- were not able to be  
7 attentive or they missed certain evidence or not,  
8 that is a question that they did, that establish  
9 prejudice as well.

10 I -- as far as that issue, far as the issue of  
11 sleeping jurors, that kind of concludes that.  
12 That's something else I wanted the Court to consider  
13 as well.

14 When it came to the second issue I need to be  
15 addressed as far as the ---

16 THE COURT: Stop, stop. Who is this gentleman?

17 GENTLEMAN: I'm sorry, I was bringing the law  
18 clerk with me.

19 THE COURT: Let her know what's going on. Just  
20 don't walk -- come on around and sit down. We're in the  
21 middle of a proceeding, sir. Just have a seat.

22 Go ahead.

23 A As far my counsel's preparation for trial being  
24 inadequate, 10 times, trial counsel Collins said we  
25 met at least 10 times. I wouldn't quite call it 10

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1 times. I remember seeing him often but that was  
2 more to say, okay, I was in the room in lockdown  
3 trying to get out to speak with him. And most of  
4 the time he would let me know he wasn't there to  
5 speak to me, but I say more two or three times that  
6 me and him actually sat down and what his visit was  
7 based on coming to see me.

8 Q Let me just make sure that I understand what you're  
9 saying. You're saying that you only visited with  
10 him two or three times to prepare for trial?

11 A Yes.

12 Q Okay, go ahead, please.

13 A And most basically every time he came down it was  
14 with a legal pad. He was never -- from my  
15 recollection, he never came with any documents that  
16 would help further our preparation for the trial.  
17 It was basically a legal pad, the same thing I was  
18 able to purchase off the canteen. And I believe  
19 that this lack of preparation, you know, was  
20 deficient performance and, you know, if we had a  
21 better chance to prepare (phonetic), there's  
22 reasonable probability that, you know, the outcome  
23 of the trial would have been different.

24 Q Okay.

25 A As far as with the investigation, the inadequate

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1 investigation, as far as the statements concerned,  
2 initially I thought that maybe he didn't have the  
3 informa -- the statement of Mike Langford. But as  
4 we see now, he did have the information. So it goes  
5 towards Mike Langford and Beth (phonetic) Langford's  
6 statement. I believe it prejudiced me because both  
7 of them could have testified to the mind state of  
8 Mr. Derrick upon leaving the Langford's residence.  
9 As far as -- I mean, I don't know if it's  
10 appropriate to speak on the crystal meth because --  
11 I mean, effects of it due to not having the counsel  
12 -- the doctor here to testify to the affidavit.

13 But, I mean, is it okay for me to testify to  
14 some of the effects?

15 Q If you want to offer something to substantiate your  
16 position, now's the time to do it.

17 A Well, some of the effects of crystal meth ---

18 MR. CORNEY: Your Honor, I would object to this  
19 testimony right here. I don't think ---

20 THE COURT: Slow down a little lit.

21 MR. CORNEY: I'm sorry. I'm going to object. I  
22 don't -- I don't think it's proper for him to offer his  
23 opinion on crystal meth and how it might affect -- what  
24 effects it might have on an individual. I don't think  
25 he's qualified in any way or any -- we know that he can

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1 offer his opinion based on that.

2 THE COURT: All right. Go ahead, the objection  
3 is noted.

4 Q Proceed, continue.

5 A I mean, can I still ---

6 THE COURT: Answer the question.

7 Q Go ahead.

8 A Okay. Crystal meth, I mean, some of the effects are  
9 delusions, hallucinations, aggression and psychosis.  
10 And I believe that had the jury been able to  
11 consider these facts, there was a probability the  
12 outcome would have been different versus the State's  
13 theory. Because this would drastically change the  
14 whole State's theory from a couple coming from a  
15 party, just joyfully riding down the road, talking  
16 about getting engaged, versus a guy that's out of  
17 his mind on -- under the influence of alcohol,  
18 cocaine or meth, being the aggressor which was never  
19 brought out at trial.

20 And to Beth Langford's statement, she -- her and  
21 I could have been brought forth to testify, you  
22 know, due to mind state as well of Mr. Derrick and  
23 it also would have showed who was the initial  
24 driver. Now this never came out at trial that Ms.  
25 Dover (phonetic) was the initial driver and it

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1       wasn't until they pulled off near the golf course  
2       that they swapped seats. This also would have  
3       showed intent and that aggression -- that bring that  
4       difficulty to their family, that unreasonableness.  
5       And again, as I say, had that been brought forth,  
6       this would have gave reasonable probability for the  
7       outcome of my trial to be different.

8               And that would conclude that issue.

9               Just to address the issue about the right to  
10       confront my witness about the conversation with Ms.  
11       Delia Nix. Ms. Nix was present right outside the  
12       courtroom and was never brought to testify to the  
13       Court and this failure -- this failure to ensure my  
14       Sixth Amendment right violating to be able to  
15       confront -- to confront a witness and denied me a  
16       fair trial.

17   Q       And, Mr. Moore, you're aware that one of the claims  
18       in this case is spousal privilege?

19   A       Uh-huh.

20   Q       Okay. Was she your common-law wife?

21   A       Yes, sir. We had present agreement of marriage, we  
22       lived together, cohabit together, and we had a  
23       holding out to others as married. And, I mean, my  
24       dad can confirm that.

25   Q       Okay.

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1 A So that -- that was ---

2 THE COURT: This is the subject of the  
3 conversation that he was in jail, she was outside, it was  
4 recorded at the jail, is that right? This is what you're  
5 talking ---

6 MR. ALSTON: Yes, sir yes.

7 THE COURT: Okay, go ahead.

8 A Okay. And that -- that being that I could not --  
9 that I could not have that right protected is what  
10 prejudiced me in the outcome of my trial because  
11 again, as Mr. Collins said, this recording was not  
12 in my favor. So had this been protected, the outcome  
13 of the course of my trial and the outcome of my  
14 trial is a reasonable probability that it would have  
15 been different.

16 Joseph -- Mr. Joseph Savitz' failing to appeal  
17 the conviction as he stated, there may have been  
18 things that he missed or didn't see but there was  
19 numerous issues for him to appeal that had merit.  
20 And by him failing to -- to address these issues, he  
21 waived my -- my ability to have any chance to have  
22 my -- my voluntary manslaughter conviction reversed  
23 on appeal.

24 I see that we couldn't -- since we didn't have  
25 Rusty, the guy who typed up the paperwork to go into



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1 detail with, I'm more than sure that he had the guy  
2 to write the statement saying he didn't go over my  
3 case but, however, he didn't properly research my  
4 case in order for him to bring about more meritis  
5 claims and this denied me a right to have a  
6 effective direct appeal. And I believe if he would  
7 have actually went over the case in its entirety,  
8 then the outcome on direct appeal would have been  
9 different.

10 THE WITNESS: All right. I would like to address  
11 -- may I ask--- may I speak to my lawyer -- my attorney  
12 for a second. I want to know about ---

13 THE COURT: Beg your pardon?

14 THE WITNESS: I wanted to speak to my attorney  
15 for a second about the due process claim. I don't ---

16 THE COURT: Stop. Any objection?

17 MR. CORNEY: I don't have and objection to him

18 ---

19 THE COURT: All right. Let's take a short  
20 break. Talk to your lawyer.

21 MR. CORNEY: Thank you.

22 (Whereupon, the Court was in recess.)

23 THE COURT: Are we all ready?

24 MR. ALSTON: Yes, Your Honor.

25 DIRECT EXAMINATION CONTINUES

1 BY MR. ALSTON:

2 Q All right, Mr. Moore. What other grounds do you

3 want to address to the Court for the record?

4 A I would like to briefly discuss the issue about the  
5 juror -- the four jurors being exposed to the  
6 mugshot of me. Actually, it was a mugshot of me  
7 being incarcerated. We -- we referred to the trial  
8 transcript page 114 -- 114, line 25 and 115, lines 1  
9 through 4. Judge Keesly, you know, puts on the  
10 record that it was a mugshot because he seen it  
11 himself. This should've been objected to or asked  
12 for a ruling so it could have been preserved for my  
13 direct review which would have gave my attorney,  
14 Joseph Savitz, more meritis issues to, you know,  
15 brief. And especially because the jurors' exposure  
16 to the improper identification and information  
17 prejudiced me. I mean, that's -- that's basically  
18 what the prejudice prong came in on that. I was not  
19 able to have it briefed on direct review.

20 Okay, on -- on the issue with the self-defense  
21 charge. In the trial, Judge Keesley instructed the  
22 jury that the first prong of self-defense was you  
23 have to be at fault or jointly at fault in bringing  
24 on the difficulty and in no other self-defense  
25 charge the base charge where the word jointly used.

JOHN J. MOORE, JR. -- DIRECT BY MR. ALSTON:

1 And I looked at this as being kind of like confusing  
2 to the jury because the word jointly is kind of  
3 going towards, okay, if -- if they feel like I  
4 jointly acted with the guy who was in the vehicle  
5 with me, that's kind of giving a definition of  
6 accomplice liability, you know, when two or more act  
7 together.

8 So in addition I did have accomplice liability  
9 jury instruction. So it's kind of giving the jury  
10 another opportunity to look at me as acting in  
11 concert with another, aiding, abetting or assisting  
12 another and there's no evidence that -- there was no  
13 evidence during the course of the trial that stated  
14 that I -- that I acted together with anyone else,  
15 throughout the course of the trial.

16 Q And your position is that your counsel should have  
17 objected to that?

18 A Yes, sir, my counsel should have objected to the  
19 self-defense issue, at least -- at least ask that it  
20 be, you know, reinstructed, that instruction be, you  
21 know, redone.

22 This misstatement of law, it amounted to an  
23 error of constitutional matter too as presumed  
24 prejudicial. It denied me a fair trial and  
25 prejudiced me also by transferring the State's

1       burden of proof to -- from the State to the defense  
2       to have to prove self-defense. I mean, I don't  
3       think that he told when he gave the charge due to  
4       the fact that there was evidence presented by the  
5       State's key witness, Kerwyn Phillips, that there was  
6       a withdrawal period but still yet it shifted the  
7       burden when the burden is not, it's on the State,  
8       remains on the State to disprove self-defense.

9               Again, I say my lawyer was ineffective for  
10       failing to object to it and requesting a more proper  
11       charge for that. And I'd like to address that as  
12       well, my attorney failed to object and request --  
13       failed to request the Trial Judge that a vehicle can  
14       be used and consider it as a deadly weapon.

15   Q       That a what?

16   A       That a vehicle ---

17   Q       Okay.

18   A       --- may be used and considered as a deadly weapon  
19       because that's testimony that was presented through  
20       the course of the trial by again, a key witness,  
21       Kerwyn Phillips, that Mr. Derrick used his car to  
22       try to run us into the concrete barrier of the  
23       interstate doing about 70, 80 miles an hour. And  
24       this would have caused serious bodily harm or death.

25   Q       And your position is that your attorney should have

JOHN J. MOORE, JR. -- DIRECT BY MR. ALSTON:

1       insisted that that charge be made?

2   A    Yes.

3   Q    This prejudiced me because this may have kept the  
4       jury from considering the self-defense charge and  
5       the fact that an automobile is indeed a deadly  
6       weapon, as well as Mr. Derrick's attempt. And had  
7       this charge been given, the jury would have been  
8       able to consider this in the outcome of my trial and  
9       there's a probability that the case, the trial could  
10      have been different with them considering that fact.

11           One more issue I would like to address and this  
12      is about the trial counsel should have objected to  
13      the -- the improper malice charge. The inference of  
14      malice by use of a deadly weapon was instructed by  
15      the jury (sic) and if now, at least Mr. Collins said  
16      he didn't know that, you know, that the case -- I  
17      guess the case was pending or however, but now he  
18      knew that if in a murder situation, in a murder  
19      conviction, if there's evidence to reduce, excuse,  
20      justify or mitigate a homicide, that the inference  
21      of malice should not be instructed to the jury,  
22      which it was in my case. This at least, this  
23      failure to object caused the issue not to be  
24      preserved. This would have put me at least in the  
25      pipeline due to the issue, do to the fact that

JAMES J. MOORE, JR. V. THE STATE

1 during one of the cases I was following, my case, my  
2 own direct appeal, was not yet final. So this  
3 charge violated my common-law and constitutional  
4 prohibitions against charging jurors a fact. And  
5 again I say that had the charge been instructed or  
6 objected to -- the charge that was instructed had  
7 been objected to, there's reasonable probability  
8 that the outcome of my appeal would have been  
9 different.

10 I believe that's it. I'm going to rest on that  
11 right there.

12 Q Okay. And you stand by all the grounds you've  
13 raised in your applications for post conviction  
14 relief?

15 A Yes, sir.

16 Q Okay.

17 MR. ALSTON: Thank you, I have no further  
18 questions.

19 THE COURT: All right, Mr. Corney.

20 MR. CORNEY: Very briefly, Your Honor.

21 CROSS-EXAMINATION

22 BY MR. CORNEY:

23 Q Mr. Moore, Kerwyn Phillips was the passenger in the  
24 car with you on the night of the shooting, is that  
25 right?

JOHN J. MOORE, JR. -- CROSS BY MR. CORNEY:

1 A Correct.

2 Q And he testified at trial, right?

3 A Correct.

4 Q On the State's behalf?

5 A Yes.

6 Q Okay. I think in his testimony he testified that he  
7 had known you pretty much his whole life and y'all  
8 were pretty good friends?

9 A Yes.

10 Q And you would say that's a pretty fair  
11 characterization?

12 A Yes.

13 Q Okay. So he must have known Delia Nix also as your

14 ---

15 A Yes.

16 Q --- significant other?

17 A Yes.

18 Q And he was aware of your relationship with her?

19 A Yes.

20 Q Okay. Never once in his testimony, the entire time  
21 he's testifying, does he refer to her as your spouse  
22 or wife, does he?

23 A No, not to my knowledge.

24 Q He says she's your girlfriend every time he refers  
25 to her during his testimony, doesn't he?

1 A I believe so. If it's on the record, yes, that's  
2 what he testified to.

3 Q Okay. So clearly you weren't telling people that, I  
4 mean, you weren't holding yourself out as your  
5 spouse? I mean, he's -- he's someone you've known  
6 your whole life, you're good friends with and he  
7 didn't even know you were married to this girl?

8 A But if you reflect back the record, when asked by my  
9 attorney, Greg Collins, he stated that it had been  
10 awhile that me and him contacted because he had no  
11 -- no phone number to reach me at when he was trying  
12 to set me up as far as the recording, get me  
13 recorded on the conversation, he had -- me and him  
14 had kind of fell out, stopped dealing, we didn't  
15 have dealings around that time.

16 Q Okay. Investigator Barnes (phonetic) was the lead  
17 investigator on the case and I think he spoke to Ms.  
18 Nix in the course of his investigation as well?

19 A Yes.

20 Q Okay. And so he had an opportunity to speak with  
21 her and in his testimony he never refers to her as  
22 your -- anything but your girlfriend as well, right?

23 A To my knowledge, I suppose.

24 Q So she probably didn't tell him that she was married  
25 to you and y'all were spouses?



JOHN J. MOORE, JR. -- CROSS BY MR. CORNEY:

1 A I guess not.

2 Q Okay. I think you pointed the Court's attention to  
3 page 114 about the Judge, Judge Keesley, mentioning  
4 a mugshot and he used the word mugshot. I don't  
5 know if you've got a copy of the transcript there in  
6 front of you, do you know whether that was done on  
7 or off the record, in front of the jury?

8 A I believe it was done in front of the jury.

9 Q Okay.

10 MR. CORNEY: And I just point the Court's  
11 attention to page 114, line 2, it says, the jury leaves  
12 the courtroom, and all that takes -- on page 114 and 115,  
13 takes place with the jury out of the courtroom.

14 Q So that mugshot comment was not made in front of the  
15 judge (sic) at that point in time if that's what the  
16 record reflects?

17 A I mean, the record may reflect that but that still  
18 doesn't change the fact that that is what the Court  
19 -- the jury seen. He's just confirming that, okay,  
20 I seen exactly what they saw, it's a mugshot of me  
21 being previously incarcerated.

22 Q Okay.

23 MR. CORNEY: I believe that's all I have, Your  
24 Honor. I would just point the Court's direction to page  
25 752 at the self-defense charge that's given and the

JOHN J. MOORE, JR. -- REDIRECT BY MR. ALSTON:

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1 burden being on the State. That's all I have.

2 THE COURT: All right, Mr. Alston.

3 REDIRECT EXAMINATION

4 BY MR. ALSTON:

5 Q Mr. Moore, do you have anything else you'd like to  
6 address the Court at this time?

7 A No, sir.

8 Q Okay.

9 MR. ALSTON: That's all I have, Your Honor.

10 THE COURT: All right. Anything further from  
11 anyone on this case?

12 MR. CORNEY: Nothing from the State and no  
13 witnesses for the State.

14 MR. ALSTON: No, sir, Your Honor.

15 THE COURT: All right, you may step down, sir.

16 (The witness leaves the witness stand.)

17 THE COURT: Now, I assume that we have family of  
18 Mr. Brown up here? Are y'all Mr. Brown -- y'all with Mr.  
19 Brown? Anybody? I'm sorry, Mr. Moore? Are y'all Mr.  
20 Moore's family?

21 (Affirmative response.)

22 THE COURT: And these are the victim's family  
23 there?

24 (Affirmative response.)

25 THE COURT: Y'all don't need to leave at the

JAMES J. MOORE, JR. V. THE STATE

1 same time, make sure they leave separately. Where's my --  
2 where's my deputy?

3 This matter is concluded. One of y'all -- I don't  
4 want y'all leaving the courthouse at the same time so  
5 something else would happen. I don't care who leaves  
6 first. Let me invite the victim's family to leave first,  
7 y'all leave now. Let me give y'all a chance to get out.  
8 Don't want any more trouble, that's all. These people --  
9 feelings are high and this is what I'm doing, so.

10 ----- END OF TRANSCRIPT OF RECORD -----

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## 1 CERTIFICATE OF REPORTER

2

3 STATE OF SOUTH CAROLINA )

4 COUNTY OF RICHLAND )

5

6 I, Crystal Holmes, Official Court Reporter for  
7 the Fifth Judicial Circuit of the State of South  
8 Carolina, do hereby certify that the foregoing is a  
9 true, accurate and Complete Transcript of Record of  
10 the proceedings had and evidence introduced in the  
11 hearing of the captioned case, relative to appeal, in  
12 the Court of Common Pleas for Richland County, South  
13 Carolina, on the 23rd day of May, 2012.

14 I do further certify that I am neither of kin,  
15 counsel nor interest to any party hereto.

16

17

July 18, 2014

18

19

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Crystal Holmes, Court Reporter

21

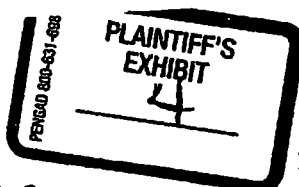
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JAMES J. MOORE, JR. V. THE STATE



STATE OF SOUTH CAROLINA)  
COUNTY OF RICHLAND ) S.S.

DATE: 3-16-05  
TIME: 1216

Personally appeared before me, this date, an officer duly and legally authorized to administer oaths in the above-named county and state aforesaid, comes one MIKE LANKFORD W/M 4-19-57

(Phone Day) (Phone Night)

Who makes the following statement under oath to wit:

Q Was Barry and Stephanie at your house by your request on Oct 18, 2004?

A Yes. I asked them over for a cook out. My son was there. Kimberly wouldn't come over unless I had friends over. Most of the time it was Barry or Stephanie. They arrived shortly before dark. Barry and I went down to the store and got some charcoal. That's where I did the last of the meth I had with him.

Q Both of you smoked some?

A We smoked (Both Barry and I) a small, socially amount. We pulled off at a side road and finished it off.

This statement was made in the presence of E.K. Barnes of the Richland County Sheriff's Department.

I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth, and nothing but the truth, so help me God.

SWORN TO AND SUBSCRIBED BEFORE ME  
THIS \_\_\_\_ DAY OF \_\_\_\_ 19\_\_.

SIGNED: Mike Lankford

WITNESS: [Signature]

WITNESS: \_\_\_\_\_

NOTARY PUBLIC FOR SOUTH CAROLINA  
MY COMMISSION EXPIRES \_\_\_\_\_.

## WITNESS STATEMENT

Mike Lusk  
(CONTINUED)

DATE: 3-16-05TIME: 1216

Q Did Stephanie do any work?

A. I didn't see her do any. I wouldn't be surprised if she had. I've seen her do it before.

Q How late did the party go?

A. That's the question. Kimberly and her children left about 30 minutes prior to Garvin and Stephanie. ~~the~~ I thought it had been around 12:30 - 1 am, but after talking with my son it could very well have been closer to 11:30pm. It may have been earlier - I was drunk. I also cleaned up afterward and I could be recalling the time after I finished cleaning.

Q Do you know of any other drugs that Garvin has been using?

A. I had a small amount of cocaine that Garvin and Stephanie used with me. Garvin was always involved in cocaine. He had a line on some cocaine just about all

This statement was made in the presence of E.K. Barnes  
of the Richland County Sheriff's Department.

I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth, and nothing but the truth, so help me God.

SWORN TO AND SUBSCRIBED BEFORE ME  
THIS \_\_\_\_\_ DAY OF \_\_\_\_\_ 19\_\_.

SIGNED: Mike Lusk

WITNESS: \_\_\_\_\_

WITNESS: \_\_\_\_\_

NOTARY PUBLIC FOR SOUTH CAROLINA  
MY COMMISSION EXPIRES \_\_\_\_\_.

## WITNESS STATEMENT

Mike Lockard  
(CONTINUED)

DATE: 3.16.85 TIME: 1216

the time. Garver still had cocaine connections after  
Stephanie passed.

Q Who were they?

A I don't know

Q Do you recall anyone ever ripping Garver off on  
drugs or visa versa.

A Not as I recall.

Q Did Kimberly have meth that night?

A yes

Q Did Garver get the meth from you?

A No I think he got it from Kimberly. It was in  
a plastic bag - maybe a gram. Not a large quantity.  
A personal use size sack.

Q Did you have any involvement in the murder of Stephanie  
Dover?

A No I did not

This statement was made in the presence of G.K. Barnes  
of the Richland County Sheriff's Department.

I make this statement of my own free will and accord, without  
reward or intimidation. All of the above is the truth, the whole truth, and  
nothing but the truth, so help me God.

SWORN TO AND SUBSCRIBED BEFORE ME  
THIS      DAY OF      19    .

SIGNED

WITNESS:

WITNESS:

NOTARY PUBLIC FOR SOUTH CAROLINA  
MY COMMISSION EXPIRES     .

## WITNESS STATEMENT

M. L. Lankford  
(CONTINUED)

DATE: 3-16-05TIME: 1216

Q Do you know who killed St. John?

A. No I do not.

Q Do you know anyone who has a .45 handgun?

A. Kim's friend Doug had a .45 Colt (off brand)

He was going to sell it right before this incident and move to Alaska. I don't know if he sold it. It was a semi auto .45 handgun. I never saw the gun. I think it was a Llama. It has an ejection pin on the side of the barrel.

Q Do you know if Gene ever made any drug deals off of I-20?

A. Not that I know of.

Q Did Gene ever buy any pistols that you know of?

A. I don't know if he did. I know Doug tried to sell it to him just like he's tried to sell it to a lot of people.

This statement was made in the presence of G. K. Barnes  
of the Richland County Sheriff's Department.

I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth, and nothing but the truth, so help me God.

SWORN TO AND SUBSCRIBED BEFORE ME  
THIS \_\_\_\_\_ DAY OF \_\_\_\_\_ 19\_\_\_\_.

SIGNED: M. L. LankfordWITNESS: [Signature]

WITNESS: \_\_\_\_\_

NOTARY PUBLIC FOR SOUTH CAROLINA  
MY COMMISSION EXPIRES \_\_\_\_\_.



## WITNESS STATEMENT

Mike Conkling  
(CONTINUED)

DATE: 3-16-05 TIME: 1216

Q Anything else?

A They chased the Tom cat out of their car, picked up the kids and left.

Q When was the first time you heard something was wrong?

A It was maybe 5:30 am. The Richland County Sheriff's Dept as Columbia police called and said someone had shot Stephanie. They called me at my house and woke me up.

Q Who was driving when they left your house?

A Grover. Stephanie had a head ache and Grover decided he would drive. Then the Tom cat jumped out of the driver's seat and scared Grover.

Q What strip clubs would Grover hang out at?

A Platinum Plus is the only Columbia club that I remember. What struck me odd was his friends from where he grew up (maybe his brother) took him to the titty bar right after this happened. Grover used to say that he and Stephanie would go to bars together and pick up strippers.

This statement was made in the presence of E.K. Barnes  
of the Richland County Sheriff's Department.

I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth, and nothing but the truth, so help me God.

SWORN TO AND SUBSCRIBED BEFORE ME  
THIS \_\_\_\_\_ DAY OF \_\_\_\_\_ 19\_\_\_\_.

SIGNED: Mike Conkling

WITNESS: [Signature]

WITNESS: \_\_\_\_\_

NOTARY PUBLIC FOR SOUTH CAROLINA  
MY COMMISSION EXPIRES \_\_\_\_\_.

## WITNESS STATEMENT

Mike Conkard  
(CONTINUED)

DATE: 3.16.05 TIME: 1210

Q Anything else?

A No sir not as I can think of.

Q Has Kimberly mentioned anything like a possible drug deal involving Graver in which Graver might be selling a package for her on Eric Conner that night?

A No she is a very secretive person.

Q Anything else?

A I never sold large amounts of meth to anyone. It was just to casual friends *Mike*

This statement was made in the presence of E.K. Brown  
of the Richland County Sheriff's Department.

I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth, and nothing but the truth, so help me God.

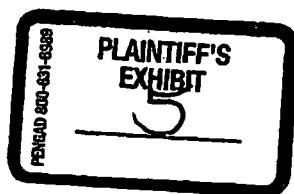
SWORN TO AND SUBSCRIBED BEFORE ME  
THIS \_\_\_\_ DAY OF \_\_\_\_\_ 19\_\_.

SIGNED: *Mike Conkard*

WITNESS: *[Signature]*

WITNESS: \_\_\_\_\_

NOTARY PUBLIC FOR SOUTH CAROLINA  
MY COMMISSION EXPIRES \_\_\_\_\_.



## **INFO, INC. Investigations**

**Post Office Box 5415  
Columbia, SC 29250  
phone (803) 331-1968  
fax (803) 781-8597**

**John Joseph Moore Report**

January 24, 2008

Beth Lankford

This morning, I conducted a telephone interview with Beth Lankford, wife of Mike Lankford who is currently serving time in North Carolina. Beth informed me that she had never met Stephanie Dover, but did know Grover Derrick as he worked with Mike at Gregory Electric. When asked how Grover felt about Stephanie, Beth indicated that he would sometimes call her (Stephanie) his wife and other times his girlfriend. He mentioned that they had 2 boys. It was Beth's impression from the way Grover talked that Stephanie was much younger and that Grover was pretty much the boss of what went on in their lives and that Stephanie was more interested in getting married than Grover was. But, Beth had only known Grover for a few months before she discovered that Mike was heavily involved in the drugs business—found a bag of cocaine on the night stand and left him around April 14, 2004.

After Mike and Beth split up, Beth tried to see Mike as little as possible, but because they have a 12 year old son, Ian, (he has special needs) they did see each other. On the Sunday morning of the incident, it was about 6:30 A.M., and Mike began banging on Beth's door. Mike had brought Ian home from his visitation (Ian had been at Mike's house for the weekend) and was extremely upset. Mike asked Beth if she had heard the news and when she asked what, Mike said "Someone at my house last night got killed." Mike went on to say that the victim had been Grover's girlfriend, Stephanie. According to Mike, Grover called him (Mike) and said, "Stephanie is dead."

Later on that day, Beth spoke with Ian about the weekend and asked what had happened. Ian said that Mike had gotten a phone call early, early that morning and that he (Mike) had been upset ever since.

Still later that day, Beth was watching the news and Ian turned to her saying that the news reports were not true. When Beth asked what was not true, Ian said a "bunch" of it. Ian told Beth that Grover, Stephanie and the kids had left Mike's house at 11:00 P.M., not the time the news was saying. Ian indicated that he knew the time because he was watching Futurama (Beth won't let him watch that at her house) on Mike's 1 tv on the couch. The program had just come on when Grover, Stephanie and the 2 kids were leaving. Grover was so drunk that he fell on Ian as he was trying to go out the door. According to Ian, Grover could not have driven, he was too drunk, he could hardly walk.

The more Beth thought about the situation and heard the conflicting stories that Grover was giving—about when he had first said that the shooter was in a dark colored car and that they had been shot at and he had followed the car off of the road, then that the shooter had been in a big dark pick-up truck (Mike owned a similar truck)—the more concerned she got.

Beth knew that Mike kept in touch with Grover because of comments that Mike would say. It seemed that Grover had recovered really well, even getting a new girlfriend about 2 months after the incident. According to Beth, Grover went right on living the way he had been.

Eventually, Beth contacted the authorities and told them about the inconsistencies in what Ian was saying and what Grover was saying. The police actually called her in and showed Beth a cd of the parking lot where Grover pulled in. It showed him running inside, yelling that "she's been shot." At the beginning of the tape, though, a dark colored truck was shown following a car similar to Grover's past the gas station going down a frontage road. About 8 minutes later, the same car came back to the gas station from the opposite direction and that was when Grover got out to tell of the shooting. Beth informed me that basically the police were saying that there was more to the story than Grover was telling. All Beth could say about the truck was "it's not Mike's." Mike drove a Chevy and the one on tape was like a big Dodge ram—it had a rounded front.

Because of the inconsistent times that Grover told the police, Beth suspects that perhaps he, Stephanie and the children made a drug stop after leaving Mike's and something went wrong causing the shooting.

Beth believes that whoever did kill Stephanie deserves the death penalty, but "it is extremely unlikely that they have the right person."

**\*\*Special Notes\*\***

- ✓ 1. Mike was muling drugs for someone in North Carolina.
- ✓ 2. Mike's house was about 20 minutes from where the shooting occurred.
3. Neighbors of Mike's would call Beth asking if she could do something about the parties Mike was having.
- ✓ 4. At the time of the shooting, Mike dated a girl named Kim (does not know her last name). She was married to a guy who was doing time for drugs and her father was in jail for drugs, too. She also had a record. Kim and her kids (2 or 3) moved in with Mike after her house blew up in a fire (drugs).
- ✓ 5. The party at Mike's was an "adult party."
- ✓ 6. Everyone that Mike hung around with at the time was involved in drugs.
- ✓ 7. Of the party, Ian has said that everyone was drunk and that Mike let him taste a margarita. Ian was impressed with the margarita glasses that Mike had bought.
- ✓ 8. One of Mike's cats was also shot at the same party and then thrown into the swimming pool to drown. Mike said it was an accident.

9. After Mike was arrested, Beth went to the house. She found a microwave glass dish underneath the bed with cocaine already lined out. She found video tapes whose insides had been hollowed out to put inserts with needles. She found brown boxes in the closet full of vials. There were used syringes in the bathroom. There was not a single t-spoon in the whole house.
10. Mike warned Beth not to speak to the police about Grover.
11. Beth thinks she remembers RCSD telling her that Grover had called Mike's cell phone around the same time that Stephanie had been shot. Beth thinks that perhaps Grover was warning Mike that something might be going down.
12. Beth saw the news story of the 2<sup>nd</sup> anniversary of Stephanie's death and thinks that the news paper overstated Grover's involvement in his children's lives.

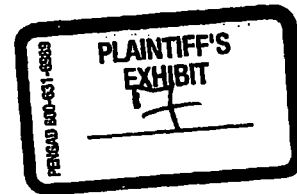


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Joseph L. Savitz, III, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

April 8, 2009



Mr. John Joseph Moore, #326455  
Lee Correctional Institution  
990 Wisacky Hwy.  
Bishopville, SC 29010

Re: Your appeal

Dear John:

The most that we will be able to accomplish in this direct appeal is to have your conviction for unlawful possession of a firearm – and consecutive sentence of five years – vacated. As to the manslaughter conviction, you will need to file an application for post-conviction relief once the Court vacates this conviction. I regret that I was unable to find any issues upon which to attack the manslaughter conviction in this proceeding, but getting the consecutive sentence vacated is at least a start.

Sincerely,

Joseph L. Savitz, III  
Chief Appellate Defender

JLS,III/kde

Enclosure



SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332

Post Office Box 11589  
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Joseph L. Savitz, III, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

June 25, 2009

Mr. John Joseph Moore  
#326455  
Broad River Correctional Institution  
4460 Broad River Rd.  
Columbia, SC 29210



Dear Mr. Moore,

I am a law clerk with the Division of Appellate Defense. Mr. Savitz asked me to respond to your letter.

Mr. Savitz has not yet reviewed your record. When Mr. Savitz reviews your record he will do so with all potential issues in mind and will craft his final brief to include the issues which he believes to be the most meritorious and persuasive. Thank you for the time and effort spent on your suggestions as to what the issues should be.

Sincerely,

Ruston Neely

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT

John J. Moore, Jr., #326455,

2011-CP-40-00190

Applicant,

v.

ORDER OF DISMISSAL

State of South Carolina,

Respondent.

RICHLAND COUNTY  
FILED  
2014 JAN -8 PM 2:58  
JEANETTE W. MCBRIDE  
C.C.P. & G.S.

### PROCEDURAL HISTORY

This matter comes before the Court by way of an application for Post-Conviction Relief filed January 13, 2011. The Respondent made its Return on February 15, 2011. An evidentiary hearing into the matter was convened on Wednesday, May 23, 2012, at the Richland County Courthouse. The Applicant was present at the hearing with counsel, Rowland P. Alston, III, Esquire. The Respondent was represented by Robert D. Corney of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Also testifying were Applicant's former trial counsel, Greg Collins, Esquire ("counsel"), and Applicant's former appellate counsel, Joseph Savitz, III, Esquire. This Court also had before it a copy of the transcript of the proceedings against the Applicant, the records of the Richland County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections and the relevant documents from Applicant's direct appeal.

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland

MOORE John J. #326455 – Order of Dismissal (2011-CP-40-00190)

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SCANNED



County Clerk of Court. The Applicant was true bill indicted at the April 2006 term of the Richland County Grand Jury for Murder, Use of a Firearm During the Commission of a Violent Crime and Unlawful Possession of a Pistol by a Person Under 21 Years of Age (2006-GS-40-02203, -11738, -11739). Doug Strickler, Esquire, and Greg Collins, Esquire, represented him on the charges. On January 28, 2008, Applicant proceeded to a jury trial before the Honorable William P. Keesley. After a five day trial, Applicant was found guilty of the two weapon charges as indicted, as well as the lesser included Voluntary Manslaughter. Judge Keesely sentenced Applicant to thirty (30) years imprisonment for Voluntary Manslaughter, five (5) years imprisonment to run concurrently for Possession of a Weapon During the Commission of a Violent Crime, and five (5) years imprisonment to run consecutively for Possession of a Pistol by a Person under 21.

A notice of appeal was filed and an appeal was perfected. Applicant was represented by Joseph Savitz, III, Esquire, of the South Carolina Office of Appellate Defense. After briefing, the South Carolina Court of Appeals reversed Applicant's conviction for Possession of a Pistol by a Person under 21. State v. Moore, Op. No. 2010-UP-409 (S.C. Ct. App. filed September 16, 2010). The Remittitur was issued October 5, 2010.

In his current Application, the Applicant alleged that he is being held in custody unlawfully for the following reasons:

- a. That public defender failed to convey to Applicant one or more plea offers prior to the verdict.
- b. That public defender failed to adequately investigate the case before trial, and, as a consequence, failed to develop and present all available, relevant,

impeachable, and mitigating evidence that would have challenged the credibility and veracity of witnesses for the prosecution.

- c. That public defender did not properly object or renew the motion for a mistrial given the exposure of four jurors to a mug-shot photograph of the Applicant.
- d. That public defender never objected or moved for a mistrial given the prosecution's failure to provide exculpatory evidence under Rule 5, especially including, but not limited to, statements of witnesses Rhett Alger, Mike Lankford, Beth Lankford, Crime Stoppers, and an article from "The State" newspaper.
- e. That public defender failed to properly object to and/or move for a mistrial regarding juror(s) who were sleeping during trial.
- f. That public defender did not ensure Applicant's right under the Constitution to confront the witnesses against Applicant.
- g. That public defender failed to object to and properly preserve for appeal the prosecution's bolstering the witness Kerwyn Phillips.
- h. That public defender failed to effectively cross-examine the witness Kerwyn Phillips.
- i. That public defender never objected to or moved to exclude the evidence of the recording between the Applicant and witness Delia Nix, who was the common law spouse of Applicant and thus entitled to common law spousal immunity.
- j. That public defender failed to properly object to thereby preserve for appeal the prosecution's misrepresentation of the facts and evidence, unsupported by

the record, during closing arguments, especially regarding, but not limited to, the recording between Applicant and witness Kerwyn Phillips.

- k. That public defender failed to object and properly preserve for appeal the prosecution's improper closing argument regarding malice.
- l. That public defender failed to object to and properly preserve for appeal the prosecution's improper comment on the Applicant's lack of remorse during closing argument.
- m. That public defender failed to request that the Court include in the jury charge that a vehicle can be considered a deadly weapon.
- n. That public defender failed to request a jury charge regarding the intoxication of Eugene Derrick, in which the condition was relevant to the nature of the threat and the need of force.
- o. That public defender for Applicant failed to object to and properly preserve for appeal the closing argument and jury charge regarding accomplice liability.
- p. That public defender for Applicant failed to properly object to and properly preserve for appeal the jury charge regarding malice.
- q. That public defender for Applicant failed to properly object to and properly preserve for appeal the burden-shifting jury charge regarding self-defense.
- r. That public defender failed to object to and properly preserve for appeal the Court's voluntary manslaughter jury charge.
- s. That public defender failed to properly take exception to the Court's comments on the facts of the case.

- a. That appellate defender failed to appeal the principal conviction of voluntary manslaughter, where mistrial issue was preserved and Applicant's indictment was constructively amended.
- b. That appellate defender did not properly review the record to determine all issues meriting appeal.
- c. Any other particulars that may be demonstrated at trial.

14. That public and appellate defender's performance as counsel for the Applicant, as stated herein, was so deficient that the Applicant was prejudiced such that there is a reasonable probability that, but for public and appellate defender's professional errors, the result of the criminal trial and/or conviction and/or appeal would have been different.

15. That public and appellate defender's conduct so undermined the proper functioning of the adversarial process that the criminal trial cannot be relied upon as having produced a just result.

#### 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 (1985).

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must

prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 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, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, 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.

#### *Spousal Immunity*

Applicant first alleges counsel was ineffective for failing to properly investigate Applicant's relationship with Delia Nix (hereafter "Nix"). Applicant contends he and Nix are common law married and, had counsel sufficiently investigated this relationship, he could have used a "spousal privilege" argument at trial to suppress the state's introduction of a taped

conversation between he and Nix recorded by the jail. Applicant noted Nix was directly outside of the courtroom the entire trial, but was never called as a witness.

Counsel testified he never asked Applicant whether he and Nix were married, as he believed Applicant would have disclosed that information during one of their many meetings if such were the case. For that reason, counsel said, he did not raise a challenge to the introduction of the audio tape on spousal privilege grounds at trial. Rather, counsel objected to its introduction on several other grounds including a violation of the Confrontation Clause as it presented impermissible testimony of an unavailable witness whom Applicant would not have the opportunity to confront and cross-examine at trial. Counsel readily admitted the audio tape was "damning" evidence, as Applicant essentially admitted to firing the fatal shots during the call, but said he was able to argue in closing that the state was entirely misrepresenting and misinterpreting Applicant's comments heard on the tape. Counsel also said in his conversations with Nix, she only categorized herself as the mother of Applicant's child and never made any reference to being Applicant's "wife". Further, counsel said, Applicant's codefendant (Kerwyn Phillips) referred to Nix repeatedly during his testimony as Applicant's "girlfriend" despite Phillips having been close friends with Applicant and known Applicant his entire life. Counsel also noted the conversation occurred from a jailhouse phone which clearly informs both parties involved the conversation is being monitored and recorded, so as to make any conversations between the two far from "confidential" in nature.

After reviewing the testimony presented and entirety of the record, this Court finds Applicant has failed to satisfy his burden in proving counsel was ineffective in this regard. As a preliminary note, this Court finds Applicant's testimony in this regard to be wholly not credible, while conversely finding counsel's testimony to be credible and persuasive. Counsel's failure to

investigate spousal privilege against forced testimony as a basis for challenging the jailhouse phone call was not objectively unreasonable based on his pretrial conversations with Applicant. See Strickland v. Washington, 466 U.S. at 691, 104 S.Ct. at 2066 (1984) ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements...[as] [c]ounsel's actions are usually based, quite properly, on...information supplied by the defendant. In particular what investigation decisions are reasonable depends critically on such information."). At no point during counsel's representation did Applicant ever indicate he and Nix were common law married. In fact, the trial record is replete with testimonial references to Nix as Applicant's "girlfriend", but at no point did Applicant ever bring this alleged mischaracterization to counsel's attention. In sum, this Court finds counsel's performance was not deficient in failing to conduct some further investigation into the alleged common law marital status of Applicant and Nix, as he had no reason to believe such was the case.

Further, this Court finds Applicant has failed to carry his burden in proving resulting prejudice, as Applicant has failed to produce any credible evidence supporting the allegation he and Nix were in fact common law married. "A common-law marriage is formed when two parties contract to be married." Callen v. Callen, 365 S.C. 618, 624, 620 S.E.2d 59, 62 (2005). "No express contract is necessary; the agreement may be inferred from the circumstances." Id. "The fact finder is to look for mutual assent: the intent of each party to be married to the other and a mutual understanding of each party's intent." Id. Further, the "circumstantial evidence typically relied upon to establish a common-law marriage includes evidence establishing that the parties have lived together for an extended period of time and have publicly held themselves out as husband and wife." Barker v. Barker, 330 S.C. 361, 367, 499 S.E.2d 503, 507 (Ct. App. 1998). Applicant's self-serving and unsupported testimony in this regard is wholly **not** credible. Further,

Applicant did not produce any evidence or testimony to support the allegation that he and Nix lived as husband and wife, or otherwise publicly held themselves out to the community as husband and wife. Rather, the record before this Court conclusively refutes Applicant and Nix were common law spouses. Therefore, this Court finds no resulting prejudice.

Finally, this Court finds no reasonable probability that had a motion to suppress been presented on grounds of spousal privilege *and* been successful in suppressing the recorded phone call, the outcome at trial would have been any different. The record reflects substantial evidence presented by the state at trial to firmly convince the jury of Applicant's guilt beyond a reasonable doubt regardless of the introduction of the tape recorded phone call. Therefore, Applicant cannot satisfy the second prong of Strickland v. Washington.

*Failure to Prepare/Investigate*

Applicant also alleges counsel was ineffective for failing to properly investigate and prepare Applicant's case. Specifically, Applicant contends counsel should have more thoroughly investigated the victim's husband, Gene Derrick's ("Derrick"), alleged methamphetamine ("crystal meth") use and retained a private toxicology expert to help bolster the self-defense theory.

First, counsel was not ineffective for failing to properly investigate Derrick's methamphetamine use, nor in failing to retain an expert toxicologist to assist in the defense. Applicant alleges a toxicologist could have helped develop a background on the effects of crystal meth use for the jury, including potential side effects such as aggressiveness. Applicant alleges such testimony would have helped bolster the theory that his exercise of deadly force was reasonable based on Derrick's erratic and aggressive driving. Applicant testified counsel also



should have sought to introduce the statements of Mike and Beth Langford at trial to support the contention that Derrick was a known drug user.

Counsel testified he and Applicant were aware of Derrick's alleged history of methamphetamine use prior to trial because their private investigator was able to obtain statements from Mike and Beth Langford referencing such. Counsel said although he never retained an expert to help prepare for trial or to testify at trial as to methamphetamine use, he was able to elicit testimony throughout trial as to alcohol consumption just prior to the incident, including Derrick's own testimony admitting to having consumed several beers and a margarita prior to the shooting. Counsel went on to say with the benefit of hindsight, perhaps he should have "played up" Derrick's alleged drug use at trial, but thought he did an effective job of highlighting Derrick's potential intoxication throughout the course of the trial. He also noted he did not attempt to introduce the Langfords' statements or any other documents obtained by his private investigator at trial as he wanted to retain the right to last closing argument before the jury and did not believe the introduction of the statements would be more beneficial than having last closing argument.

This court finds counsel was not ineffective in this regard. Counsel had his private investigator conduct a reasonable and diligent investigation into Derrick's alleged drug use, from which he was able to obtain the statements of Mike and Beth Langford. Counsel was fully aware of those statements at the time of trial, but made the reasonable strategic choice to focus his cross-examination on Derrick's self-admitted alcohol consumption on the night in question, and the theory that Applicant was not the shooter. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) ("Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed

ineffective assistance of counsel.”). Counsel was able to elicit testimony during trial from Officer Scott Faust that “there was some information brought up” in his investigation about Derrick’s “dealings with crystal meth”. Counsel sought to elicit testimony from Faust about Mike Langford’s reputation as a “meth dealer” as well, but was prohibited from doing so by the trial judge upon objection by the state. With the main theory of defense in mind (Applicant not being the shooter), it is clear counsel made a reasonable decision not to present the statements of the Langfords as doing so would have created inconsistencies in Applicant’s theory of defense and involvement in the case.

Further, this Court finds Applicant has failed to meet his burden in proving resulting prejudice. First, Applicant failed to produce a toxicology expert at the PCR hearing to present the alleged beneficial testimony he believes would have been given at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998) (PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness’ failure to testify at trial). Additionally, he failed to produce any admissible evidence as to what benefit hiring such an expert to assist in pretrial preparations would have produced.<sup>1</sup> See Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) (Failure to conduct independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result).

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<sup>1</sup> Applicant attempted to introduce an affidavit of Dr. Robert Bennett into the PCR record regarding the potential effects of Methamphetamine and Cocaine, and Dr. Bennett’s opinion in correlating those side effects to this case. Respondent posed a contemporaneous objection to the introduction of the affidavit, which this Court sustained finding the affidavit not admissible on grounds of hearsay, a violation of Respondent’s right to cross-examine the witness, and as impermissible opinion testimony by a witness neither presented, nor qualified, as an expert by this Court. Accordingly, the affidavit was proffered into the record, but not considered by this Court in its determination of the current allegation.

*Sleeping Jurors*

Applicant alleges counsel was ineffective for failing to object or otherwise move for a mistrial based on several jurors allegedly falling asleep during the course of the trial.

Counsel testified he did recall discussions on the record about jurors potentially having fallen asleep during some points of the trial, but noted one of the jurors never actually fell asleep and the issue was ultimately addressed by the trial judge. Specifically, after the testimony of Investigator Stanley Richards, Judge Keesley noted outside of the presence of the jury he had seen one juror "shutting her eyes" during Richards' testimony. Judge Keesley went on to say he "kept watching her rather intently" because he would have had to stop the trial if she was going to sleep, but explicitly noted the juror never actually fell asleep. The solicitor said he also saw the juror close her eyes, but agreed she never fell asleep.

At the end of the trial, upon completion of the state's closing argument, Judge Keesley took the opportunity to caution the jury about keeping their eyes open before sending them to the jury room for a short break. After the jury retired, Judge Keesley said he had "one juror fighting sleep" during the state's closing argument, but again noted "he [hadn't] gone to sleep". Prior to the jury reentering the court, the judge stated he had received a note from "the same young man" he had been referring to, in which the juror explained he was suffering from a sinus infection which caused his face to swell and eyes to appear closed, but that he was able to continue to serve as a juror. At the PCR hearing, counsel testified he did not see the juror ever actually fall asleep and believed the trial court effectively admonished the jury to cure the issue, but noted the alleged incident occurred during the state's closing argument which would not have been harmful to Applicant's case.

The record is clear in showing counsel was not ineffective in this record. The record of the trial is clear in showing no juror actually fell asleep during the course of the trial, and the trial judge effectively admonished the jury to ensure they were giving the trial their full attention. With this in mind, this Court finds counsel's failure to object or otherwise move for a mistrial to have been objectively reasonable. Further, Applicant has failed to prove resulting prejudice as he failed to establish that any juror actually ever fell asleep or missed any portion of the trial. Finally, as set forth by counsel, the juror alleged to have been sleeping was doing so during the *state's* closing argument in which the solicitor reviewed the entirety of the damaging evidence against Applicant and implored the jury to find Applicant guilty. The juror's alleged "absence" from that portion of the trial would have been beneficial, *not* damaging, to Applicant's case. Therefore, any alleged sleeping did not prejudice Applicant's case. Accordingly, this allegation is denied.

*Failure to Object/Renew Motion for Mistrial Based on Exposure to Mugshot*

Applicant alleges counsel was ineffective for failing to properly object to and renew his mistrial motion based on three jurors' exposure to an alleged "mugshot" picture of Applicant displayed on the local news after the first day of trial, and therefore the issue was not preserved for appeal.

The record before this Court and testimony presented at trial reflect counsel was not ineffective in this regard. At the start of the second day of trial, counsel brought to the trial court's attention the issue of potential juror exposure to media reports about the case. Upon inquiry of the jury, three jurors stated they had seen a photograph of Applicant on the news, but each noted they had turned their television off upon seeing the picture alone without any exposure to the associated commentary. Additionally, each stated seeing the picture would not

affect their ability to be a fair and impartial juror in the case. The court declined to question the jurors as to the nature of the picture they saw as requested by counsel. After having the opportunity to independently question each juror, counsel requested the trial judge exclude the jurors from participating in the trial, and additionally motioned the court for a mistrial. The court, finding "beyond a reasonable doubt that there [was] absolutely nothing about [the jurors'] exposure to that media coverage that would in any way affect their ability to be a fair and impartial juror", denied counsel's motions.<sup>2</sup>

At the PCR hearing, counsel credibly testified he did recall several jurors advising the court they had seen a picture of Applicant on the news, but stated the motions to exclude the three jurors and for mistrial were denied by the trial judge after each juror was independently questioned in-camera on the issue. At the close of the state's case, counsel renewed all previous motions and objections made throughout the course of the trial, which was promptly denied.

This Court would first note counsel *did* in fact pose a motion for mistrial based on a lack of qualified jurors due to pollution of the jury pool by exposure to pretrial publicity, i.e. Applicant's picture on the news. Therefore, his actions were not deficient in failing to present such a motion. Further, counsel timely posed the motion for mistrial and set forth the grounds for the motion specifically, after which the trial judge specifically referenced the mistrial motion after denying counsel's request to excuse the jurors on the same grounds. Accordingly, the motion was preserved for appeal. See State v. Sweet, 342 S.C. 342, 536 S.E.2d 91 (2000) (issue preserved for appeal where counsel makes timely objection, despite trial judge not ruling upon that motion immediately thereafter, where trial judge made clear on the record he understood the motion).

<sup>2</sup> There was, however, a fourth juror who had briefly discussed the case with friends at the gym who was excluded by the court. His exclusion was not based on the media outlet's display of Applicant's picture and, therefore, not relevant to this analysis.

Further, Applicant has failed to prove resulting prejudice from counsel's alleged failure to preserve the mistrial motion for direct appeal. Applicant has failed to prove he would have been successful in having the convictions overturned on appeal based on the court's denial of the mistrial motion. Mere exposure to pretrial publicity does not automatically disqualify a prospective juror. State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990). "When the trial judge bases his ruling upon an adequate voir dire examination of the jurors, his conclusion that the objectivity of the jury panel has not been polluted by outside influence will not be disturbed absent extraordinary circumstances." State v. Kelsey, 331 S.C. 50, 68, 502 S.E.2d 63, 71 - 72 (1998); see also State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997). Further, "whether or not a mistrial should be granted is a matter resting within the trial court's sound discretion." State v. McDaniel, 275 S.C. 222, 224, 268 S.E.2d 585, 586 (1980). This court finds no reasonable probability the issue would have been successful if raised on direct appeal and, therefore, Applicant cannot prove resulting prejudice.

*Failure to Properly Request/Object to Jury Instructions*

Applicant next alleges counsel was ineffective for failing to request the jury be charged with "use of a vehicle as a deadly weapon" in support of his self-defense theory, as well as in failing to object to the use of the words "at fault or jointly at fault in bringing on the difficulty" in the actual self-defense charge given.

This Court finds counsel was not ineffective in either instance. Counsel testified he requested the self-defense instruction on the basis that the victims' car was swerving at Applicant's truck, as well as on the basis that Applicant believed the driver of the car was pulling a gun out from under his seat at the time. No instruction on the use of a car as a deadly weapon was requested or given at trial, but counsel was able to present Applicant's position in closing

argument that any shots fired from his truck were in self-defense as a result of Victim's erratic and dangerous driving.

First, Applicant has failed to prove counsel was deficient in failing to request a jury charge on the "use of a vehicle" constituting a "deadly weapon" as he has failed to establish that any sanctioned jury charge exists for counsel to have requested. Further, Applicant has failed to establish the relevant case law upon which such a jury charge could be founded, or to support the legality of such a charge. Applicant produced no example of a hypothetical charge counsel could have drafted and submitted to the court in support of the request either. Therefore, he has failed to prove counsel how counsel was deficient in failing to pose such a request to the trial judge, or that such a charge would have in fact been given had it been requested. Additionally, this Court finds no reasonable probability the outcome at trial would have been different had such a charge been given as the jury was provided with a self-defense instruction, as well as the testimony and arguments about victim's alleged menacing driving, but opted not to find Applicant acted in self-defense.

Turning to the second portion of the charge complained of, this Court finds, when taken as a whole, the charge is a correct statement on the law of self-defense as it stood at the time of Applicant's trial. "The trial court is required to charge only the current and correct law of South Carolina." Barber v. State, 393 S.C. 232, 712 S.E.2d 436 (2011). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." State v. Mattison, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010). Accordingly, this Court finds counsel was not objectively unreasonable in failing to pose an objection to the charge, nor was Applicant prejudiced by the alleged deficiency as the charge was proper.

*Failure to Object to Improper Closing Argument and Jury Charge on Inferred Malice*

Applicant alleges counsel was ineffective in failing to pose objections to the solicitor's improper commentary and the Court's erroneous charge on the permissible inference of malice from the use of a deadly weapon.

This Court finds counsel was not ineffective for failing to pose an objection to either reference as, at the time of Applicant's trial, such a permissible inference was proper. In 1981, the South Carolina Supreme Court in State v. Mattison, 276 S.C. 235, 277 S.E.2d 598 (1981), found "an appropriate instruction on implied malice would not deal with the evidentiary nature of the presumption and that the implication does not *require* the jury to infer malice but only *permits* it", in accordance with the United States Supreme Court's ruling in Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979). Id. at 238, 277 S.E.2d at 600 (emphasis added). Two years later, in State v. Elmore, the South Carolina Supreme Court set forth the appropriate jury charge to be given on the inference of malice from the use of a deadly weapon, which the Court felt complied with the Due Process requirements that Sandstrom was concerned with. State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983). The Elmore Court noted that "only slight deviations from [the] charge [set forth therein] [would] be tolerated." Id. at 421, 308 S.E.2d at 784. Such was the legal standard for the permissible inference of malice from the use of a deadly weapon in South Carolina until the October 12, 2009, decision of State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

In Belcher, the Court held, "where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon." Id. at 612, 685 S.E.2d at 810. The Belcher Court held the new precedent would not apply retroactively, nor would it "apply to convictions challenged on post-conviction relief." Id.



The charge given at the time of Applicant's trial was the sanctioned charge on the law as it stood in South Carolina under State v. Elmore. Therefore, it was not objectionable and counsel was not ineffective for failing to object. Further, attorneys are not required "to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial." Thornes v. State, 310 S.C. 306, 310, 426 S.E.2d 764, 765 (1993); see also Robinson v. State, 308 S.C. 74, 78, 417 S.E.2d 88, 91 (1992) (finding counsel not ineffective for failing to assert defense not yet recognized by the Court). Therefore, counsel's failure to object was not unreasonable, and there is no reasonable probability that such an objection would have been successful if made.

Additionally, the solicitor's comments in closing argument as to the permissible inference of malice were not objectionable as they, too, were appropriate statements on the law as it stood at the time. Further, a successful objection to the solicitor's comments would not have reasonably affected the outcome of the trial. For those reasons, this Court finds the allegation as to plea counsel to be without merit.

Regarding appellate counsel's failure to raise the decision in Belcher on direct appeal, this Court finds the allegation to be equally without merit and improperly raised herein. In Belcher, the Court set forth because their "decision represents a clear break from modern precedent, [the] ruling is effective in this case and for all cases which are pending on direct review or not yet final *where the issue is preserved*." Id. at 612, 685 S.E.2d at 810. The legality of the charge given was not preserved for appeal at trial; further, Belcher expressly prohibits challenges based on its ruling through post-conviction relief, according to the Court's opinion. Therefore, these claims are hereby denied and dismissed.

*Ineffective Assistance of Appellate Counsel*

Applicant finally alleges appellate counsel was ineffective in his representation for failing to challenge the voluntary manslaughter conviction on direct appeal based on a constructively amended indictment and the trial court's denial of counsel's motion for mistrial.<sup>3</sup>

Appellate counsel testified he worked as an appellate defender for the South Carolina Commission on Indigent Defense, Office of Appellate Defense, for twenty-six (26) years, during which he served as appellate counsel on "thousands" of criminal appeals. He noted his work focused a great deal on murder appeals. Appellate counsel stated he spoke with Applicant's father during the course of the appeal. He said the case was "very fact intensive" and that there were not many legal issues to be raised on direct appeal because many of them were "fact bound". Appellate counsel testified he read through the entire record in deciding which issues to raise, and picked what he thought was the strongest issue for appeal. In doing so, he said, he decided to raise a challenge to only the "Possession of a Weapon By a Person Under the Age of 21" conviction as he believed that was the strongest and most meritorious issue he saw. Appellate counsel noted he did not see any specific, strong issues to be raised challenging the Voluntary Manslaughter conviction and, therefore, opted to focus on challenging the weapon charge. He stated he believed the appeal was a success in that Applicant's weapon charge, the sentence for which was set to run consecutively, was reversed by the Court of Appeals.

Based on the record and testimony, this Court finds appellate counsel was not ineffective in his representation of Applicant. Appellate counsel must be allowed to exercise reasonable professional judgment in determining which non-frivolous issues to raise on direct appeal and there is no constitutional duty imposed on appellate counsel that every non-frivolous issue requested by a defendant be raised. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983). Where

<sup>3</sup> Of interesting note is Applicant's contention in the application that counsel's mistrial motion was properly preserved for direct appeal, where he previously alleged counsel was ineffective for failing to properly preserve the mistrial motion.

the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4<sup>th</sup> Cir. 1985). Appellate counsel, as a very experienced and skilled appellate attorney, conducted a thorough review of the record and ultimately made the reasonable strategic decision to raise the issue he did on appeal. Clearly the issue raised on direct appeal was a very strong issue, as the conviction was reversed, thereby eliminating a five year consecutive jail term from Applicant's sentence. Further, Applicant has failed to convince this Court appellate counsel overlooked any meritorious issue that would have been successful on appeal, thereby failing to meet the prejudice requirement. Accordingly, this Court finds appellate counsel was not ineffective.

### 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.

Except as discussed above, this Court finds that the Applicant failed to raise all additional allegations raised in his application at the hearing and has, thereby, waived them. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BML, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address any other issues at the hearing indicates a voluntary and intentional

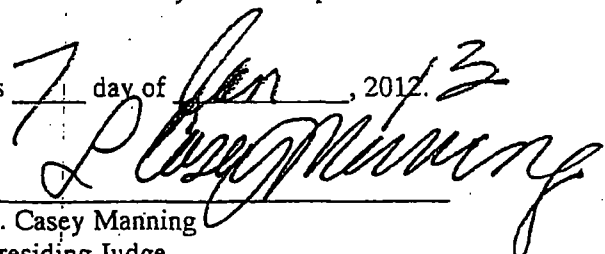
relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

This Court notes Applicant 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 this 7 day of Jan, 2012.

  
L. Casey Manning  
Presiding Judge  
Fifth Judicial Circuit

Columbia, South Carolina.

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

John J. Moore, Jr., #326455,

Applicant,

vs.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

C/A No.: 2011-CP-40-0190

**NOTICE OF MOTION  
AND MOTION TO ALTER  
OR AMEND A JUDGMENT**

FILED  
2013 JAN 15  
JEANETTE W. HARRIS  
C.C.P. & J.S.

PLEASE TAKE NOTICE that the Applicant, by and through his undersigned attorney, will move before the Presiding Judge of the Court of Common Pleas, Fifth Judicial Circuit, on the tenth (10<sup>th</sup>) day after service hereof or at such time and place as is convenient to the Court and counsel for an Order granting the Applicant's Motion to Alter or Amend a Judgment of the Order of Dismissal, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, as to the within action. The Court entered an Order of Dismissal, filed on January 8, 2013, denying and dismissing with prejudice the Applicant's application for post-conviction relief. This Order was received by the undersigned on January 11, 2013 (less than ten (10) days from the filing of this motion).

The undersigned asks this Court to rule upon/reconsider the argument made at the hearing, and in supporting memorandum, that the applicant's public defender failed to request a specific inquiry by the Court of jurors who appeared to be sleeping or somnolent, pursuant to *State v. Hurd*, 325 S.C. 384, 480 S.E.2d 94 (Cl. App. 1996).

The undersigned asks this Court to rule upon/reconsider the following grounds, which were pled and not waived and, upon information and belief, not addressed in the order:

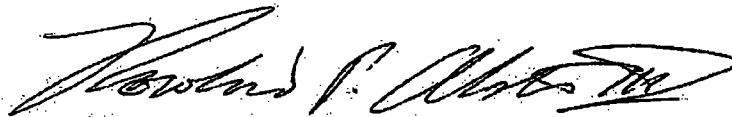
- a. That public defender never objected to or moved for a mistrial given the prosecution's failure to provide exculpatory evidence under Rule 5, especially including, but not limited to, statements of witnesses Rhett Alger, Mike Lankford, Beth Lankford, Crime Stoppers, and an article from "The State" newspaper;
- b. That public defender did not ensure Applicant's right under the Constitution to confront the witnesses against the Applicant;
- c. That public defender failed to object to and properly preserve for appeal the prosecution's bolstering the witness Kerwyn Phillips;
- d. That public defender failed to effectively cross-examine the witness Kerwyn Phillips;
- e. That public defender failed to request a jury charge regarding the intoxication of Eugene Derrick, the driver of the other vehicle, in which condition was relevant to the nature of the threat and the need of force;
- f. That public defender failed to object to and properly preserve for appeal the Court's voluntary manslaughter charge;

- g. That public defender failed to properly take exception to the Court's comments on the facts of the case; and
- h. Any other particulars demonstrated at the hearing.

The undersigned also asks this court to reconsider all rulings contained in the Order.

This motion is based upon the pleadings, any memorandum previously or subsequently submitted, the common and statutory laws of the State of South Carolina, and any other matter considered by the Court.

Respectfully submitted,



Rowland P. Alston III  
The Law Office of Rowland P. Alston III, LLC  
1314 Lincoln Street, Suite 214  
Columbia, SC 29201  
(803) 708-0460

January 15, 2013

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

John J. Moore, Jr., #326455,

Applicant,

vs.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

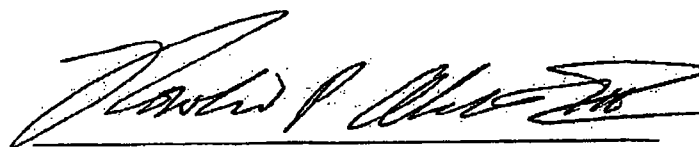
C/A No.: 2011-CP-40-0190

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have served the **NOTICE OF MOTION AND MOTION TO ALTER OR AMEND A JUDGMENT** in the above-captioned case, by causing a copy of the same to be personally deposited in a United States Postal Service mail box, with the return address clearly visible, postage prepaid, addressed to the Court and attorney(s) of record as indicated below:

The Hon. L. Casey Manning  
P.O. Box 192  
Columbia, SC 29202

Robert Corney, Esq.  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211-1549



Rowland P. Alston III  
Attorney for the Applicant

January 15, 2013

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

John J. Moore, #326455,

Applicant,

vs.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT

**2011-CP-40-00190**

**RETURN TO RULE 59(e), SCRCP,  
MOTION TO ALTER OR AMEND**

This matter comes before the Court by way of Applicant's Rule 59(e), SCRCP, Motion to Alter or Amend Judgment filed January 15, 2013. An evidentiary hearing was convened before this Court on May 23, 2012, at the Richland County Courthouse, at which Applicant was present with counsel, Rowland P. Alston, III. The state was represented by Robert D. Corney of the South Carolina Attorney General's Office. By order filed January 8, 2013, this Court denied Applicant's request for relief with prejudice. The current post-hearing motion followed.

Respondent respectfully requests this Court deny the current motion to alter or amend as the twenty-one (21) page order of dismissal entered by this Court on January 8, 2013, contains all of the relevant findings of facts and conclusions of law required by S.C. Code § 17-27-80 and Rule 52(a), SCRCP. See also Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007). Respondent submits the current order of dismissal makes accurate, complete and appropriate findings based upon the testimony and arguments presented at the PCR hearing. Therefore, Applicant's Rule 59(e), SCRCP, motion to alter or amend should be denied, and the filed order should remain undisturbed.



WHEREFORE, having made its Return to the motion, the State requests the current motion be denied and said motion be dismissed.

Respectfully submitted,

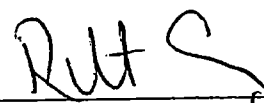
ALAN WILSON  
Attorney General

JOHN W. MCINTOSH  
Chief Deputy Attorney General

SALLEY W. ELLIOTT  
Senior Assistant Deputy Attorney General

ROBERT D. CORNEY  
Assistant Attorney General

BY:

  
ATTORNEYS FOR RESPONDENT

Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211  
(803) 734-3737

Columbia, South Carolina  
January 17, 2013

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

)  
) IN THE COURT OF COMMON PLEAS

2011-CP-400-0190

John J. Moore, 326455

Applicant,

vs

State of South Carolina,

Respondent.

)  
)  
)  
) AFFIDAVIT OF SERVICE BY MAIL  
)  
)  
)  
)

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Rowland P. Alston, III, LLC  
1314 Lincoln Street  
Columbia, South Carolina 29211

DATED this 22<sup>nd</sup> day of January, 2013.

  
\_\_\_\_\_  
Jean R. Indriago, Legal Assistant  
For Respondent

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

John J. Moore, #326455,  
Applicant,

v.

State of South Carolina,  
Respondent.

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT

Case No. 2011-CP-40-0190

**ORDER DENYING APPLICANT'S  
MOTION TO ALTER OR AMEND  
JUDGMENT**

2011 APR -7 AM 10:56  
RICHLAND COUNTY  
FILED  
JEANETTE W. MCGRIDE  
C.C.P. & G.S.

This matter comes before this Court by way of Applicant's "Motion to Alter or Amend Judgment", asking this Court to alter or amend its Order of Dismissal denying Applicant post-conviction relief.

I.

An evidentiary hearing was convened before this Court on May 23, 2012, at the Richland County Courthouse, at which Applicant was present with counsel, Rowland P. Alston, III. The state was represented by Robert D. Corney of the South Carolina Attorney General's Office. By order filed January 8, 2013, this Court denied Applicant's request for relief with prejudice. On January 15, 2013, Applicant filed a motion to alter or amend, asking this Court to alter or amend, and reconsider its ruling. Respondent made a Return to this motion, asking that said motion be denied and dismissed.

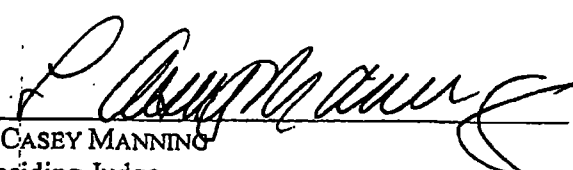
III.

This Court's Order of Dismissal contains the required findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (1976) and Rule 52(a) SCRCP. See also McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991). Having carefully reviewed the entire record in this matter, this Court finds that there is no basis for altering or amending its prior ruling.<sup>1</sup> Therefore, this Court hereby denies the Applicant's Motion in its entirety, and affirms the previous Order of Dismissal.

<sup>1</sup> The Court, in its discretion, has considered this matter based upon the motions submitted by the parties and the post-conviction

This Court notes that if the Petitioner desires to secure appellate review of this Order and the Order of Dismissal, a notice of appeal must be filed and served within thirty days of the service of this Order. Petitioner is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of appeal has been timely filed.

AND, IT IS SO ORDERED this 1 day of April, 2014

  
L. CASEY MANNING  
Presiding Judge  
Fifth Judicial Circuit

Columbia South Carolina

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relief file, since oral argument will not aid the Court in reaching its decision. See Rule 59(f), SCRCP.

## WITNESSES

(S) *Eric Barnes*  
ERIC BARNES - RCSD

ARREST WARRANT NUMBER

1915652

ACTION OF GRAND JURY

TRUE BILL

*for K. R. G.*  
Foreperson of Grand Jury APR 20 2006  
Date:

VERDICT

Foreperson of Petit Jury  
Date:

DOCKET NO. 2006-GS-40-02203

## The State of South Carolina

County of Richland

COURT OF GENERAL SESSIONS

APRIL TERM 2006

102

THE STATE  
vs.

JOHN MOORE

Indictment for

MURDER

SC Code: 16-3-10  
CDR Code: 0116  
Class FEL/EXM(V)

After being fully advised as to my legal rights, I hereby waive my right to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

CERTIFIED TRUE COPY  
 OF ORIGINAL FILED  
 CLERK H. A. W. M. G. S.  
 C.C.C. P. & G.S.  
 RICHLAND COUNTY  
 SOUTH CAROLINA

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )

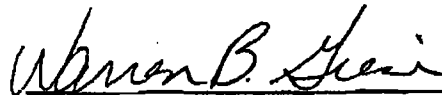
INDICTMENT

At a Court of General Sessions, convened on April 19, 2006, the Grand Jurors of Richland County present upon their oath:

**MURDER**

That John Moore did in Richland County on or about October 17, 2004, feloniously, willfully and with malice aforethought, kill one Stephanie Dover by means of shooting the victim with a firearm and that the said victim died as a proximate result thereof. All in violation of SC Code of Laws § 16-3-10

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

  
Warren B. Glese, SOLICITOR

949

WITNESSES

(S) INV. ERIC BARNES - RCSD

ARREST WARRANT NUMBER

1974768

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date

APR 20 2006

VERDICT

Foreperson of Petit Jury

Date:

16

DOCKET NO. 2006-GS-40-11738

The State of South Carolina

County of Richland

COURT OF GENERAL SESSIONS

APRIL TERM 2006

102

THE STATE

vs.

JOHN MOORE

Indictment for

UNLAWFUL POSSESSION OF A  
PISTOL BY PERSON UNDER 21 YEARS  
OF AGE

SC Code: 16-23-30(A)(1)

CDR Code: 2364

Class FEL-F

After being fully advised as to my  
legal rights, I hereby waive presentment  
to the Grand Jury.

Defendant

I  
hereby appear in my own proper person and plead  
guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )

## INDICTMENT

At a Court of General Sessions, convened on April 19, 2006, the Grand Jurors of Richland County present upon their oath:

**UNLAWFUL POSSESSION OF A PISTOL BY PERSON UNDER 21 YEARS  
OF AGE**

The John Moore did in Richland County, on or about October 17, 2004 unlawfully possess a pistol, in that the defendant was under the age of twenty-one (21), all in violation of Section 16-23-30, 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.

  
WARREN B. GIESE, SOLICITOR



951

WITNESSES

INV ERIC BARNES - RCSD

ARREST WARRANT NUMBER

1974767

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date:

APR 20 2006

VERDICT

Foreperson of Petit Jury

Date:

14

DOCKET NO. 2006-GS-40-11739

The State of South Carolina  
County of Richland

COURT OF GENERAL SESSIONS

APRIL TERM 2006

102

THE STATE  
vs.

JOHN MOORE

Indictment for

USE OF A FIREARM DURING  
COMMISSION OF A VIOLENT CRIME

SC Code: 16-23-0490

CDR Code: 0549

Class FELF

After being fully advised as to my  
legal rights, I hereby waive presentment  
to the Grand Jury.

Defendant

I  
hereby appear in my own proper person and plead  
guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )

INDICTMENT

At a Court of General Sessions, convened on April 19, 2006, the Grand Jurors of Richland County present upon their oath:

**USE OF A FIREARM DURING COMMISSION OF A VIOLENT CRIME**

That John Moore did in Richland County on or about October 17, 2004, possess or visibly display a firearm or visibly display a firearm during the commission or attempted commission of a violent crime, to wit: Murder, in violation of Code Section 16-23-490, *Code of Laws of South Carolina*, (1976), as amended.

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

  
WARREN B. GIESE, SOLICITOR