

VOLUME TWO OF THREE

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

R. Lawton McIntosh, Circuit Court Judge

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S.C. Supreme Court

DARRELL BURGESS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000779

APPENDIX

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VELLO PAAVEL -- DIRECT -- MR. HUBBARD

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1 sometimes not microscopic -- that are caused by the
2 bullet being driven through that barrel and being
3 marked by the rifling.

4 So in this case I have these bullets. I
5 weighed them, measured them. I looked at the
6 rifling impressions on here to see how many lands
7 and grooves are present, what direction of twist is
8 present.

9 Then I measured the dimensions of this
10 rifling, and I can produce a list of possible
11 firearms that could have fired these particular
12 bullets based on the rifling impressions.

13 Then I do a microscopic comparison of the
14 markings on the bullets to try to determine if they
15 were fired by one gun or more than one gun. In
16 this case I provided a list. I generate a report
17 indicating what caliber these bullets were and
18 determined that all seven of these bullets were
19 fired by one firearm.

20 Q What caliber did you determine the bullets to be?

21 A These bullets are the types and caliber of bullet
22 that I would expect to see in some .38 special
23 caliber cartridges. Thirty-eight special caliber
24 cartridges can be fired in .38 special caliber
25 firearms or they may be fired in .357 magnum

1 caliber firearms because a .357 is merely a
2 lengthened .38 special cartridge, and it has little
3 more gun powder in so it operates at a higher
4 pressure and the bullet generally travels faster.

5 I provided a list of possible firearms for the
6 investigators so they can try to look for the
7 proper type of firearm. I told them or indicated
8 in the report again that these particular bullets
9 were fired by the same firearm, and then these
10 bullets were suitable for identification, which
11 means that if they found the firearm, I may be able
12 to identify these bullets to a specific firearm.

13 Q Several days or even weeks after you examined those
14 seven projectiles that were fired from the same
15 weapon, were you given an opportunity to examine a
16 weapon as well?

17 A Yes, sir. A couple of weeks later a firearm was
18 submitted for comparison purposes, and I ultimately
19 received that firearm in my department. I examined
20 that firearm, documented its condition, test fired
21 the firearm to obtain test bullets.

22 The way I do that in our department is we have
23 a large vertical tank of water. If you can imagine
24 a tank that is about three feet in diameter made
25 out of stainless steel. It's about 14 feet long.

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1 Actually the opening is on the second floor of our
2 building in our department. The bottom of the tank
3 is on the first floor.

4 There is about 11 feet of water in that tank,
5 and literally I simply shoot the firearm into that
6 water. The water slows the bullet down. The
7 bullet falls to the bottom of the tank, and the
8 bottom of that tank is tapered, like a large ice
9 cream cone.

10 In the bottom of that cone, there is a metal
11 cup, and that cup is attached to a chain that goes
12 back up to the opening where I fired. So after I'm
13 through firing into that tank, those bullets have
14 literally rolled into that metal cup into the
15 bottom of the tank. I pull on the chain and then
16 the cup comes up, and I have got my fired bullets.

17 Once I obtained the fired bullets, I will mark
18 those, that they are test bullets. Then what I
19 have to do is microscopically compare the test
20 bullets to each other, and I also compare the test
21 bullets to the evidence bullets by using a
22 comparison microscope.

23 A comparison microscope is simply a microscope
24 that allows me to take one object, place it on one
25 stage, another object place it on the other stage,

1 and I can look through binocular eyepiece, and I
2 can see both of them at the same time. I can super
3 impose an image of one on top of to other, move it
4 side to side, rotate the bullets around.

5 What I'm looking for are these microscopic
6 markings that were placed on the bullets as a
7 result of them being fired through a gun barrel.
8 First, I make sure that I have a bullet that is the
9 same caliber. I need to be looking at a .38 or
10 .357.

11 I need to make sure it has the same rifling
12 characteristics, meaning it has the same number of
13 lands and grooves. The twists have to be correct.
14 The approximate dimensions of the rifling have to
15 be correct.

16 If all of that coincides, then I start looking
17 at microscopic markings that are called individual
18 markings that I can use to identify a particular
19 bullet to a gun.

20 I do that comparison, and if I find sufficient
21 agreement in those markings, then I can tell that
22 that particular bullet was fired by that particular
23 firearm.

24 Q Agent, at this time I want to show you what has
25 been marked as State's 74 and see if you can

1 identify this.

2 A Yes, sir. This is the revolver that was submitted
3 for comparison in this case. This is a Taurus .38
4 special caliber revolver.

5 Q Was Taurus one of the ones that you had told law
6 enforcement in Lexington County that could be a
7 possible match?

8 A Yes, sir. When I generated this list based on the
9 general rifling characteristics, Taurus is one of
10 the possibilities of the maker of firearms that
11 could have fired these bullets based on the general
12 rifling characteristics.

13 So in essence what I did when I had the
14 bullets, I provided a list for the investigators so
15 they can look for specific types of firearms, kind
16 of like to narrow their investigation or their
17 search.

18 Q And the caliber of the weapon you were asked to
19 examine?

20 A This is a .38 special caliber revolver, yes, sir.

21 Q What kind of working condition was it in when it
22 was provided to you?

23 A It was in proper working condition. It did work
24 properly. I test fired it six times into the water
25 tank and recovered those specimens.

1 Q And after you examined the specimens you fired from
2 that revolver to the items that you discussed
3 previously, the fired items that were submitted by
4 Lexington County, what, if anything, conclusions
5 did you reach?

6 A Yes, sir. Again, as I explained earlier, after I
7 looked at these under a comparison microscope and
8 did the comparisons, I found sufficient agreement
9 in the test bullets and the evidence bullets to
10 conclude that these seven fired bullets -- State's
11 41, 40, 39, 38, 37, 36, and 35 -- were fired by
12 this particular Taurus revolver which is in the box
13 marked State's Exhibit Number 74.

14 Q And looking at that revolver, Agent Paavel, how
15 many rounds does that revolver hold?

16 A This particular firearm holds five cartridges in
17 the cylinder. You can put up to five in here. You
18 can put any number up to five.

19 MR. BAKER: With the Court's permission, can I
20 have him step down in front of the jury.

21 THE COURT: Yes, sir.

22 (Witness leaves the witness stand).

23 BY MR. HUBBARD:

24 Q Agent Paavel, I will ask you to bring the firearm
25 with you.

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1 A Yes, sir.

2 Q Which still has the lock on it. If you can step
3 down in front of the jury and show this firearm.
4 To unload the firearm -- let's start with loading
5 the firearm. How would you load this firearm?

6 A First of all, let's assume this lock isn't here.
7 This lock is actually kind of in the way to show
8 it, but just imagine this lock isn't here. This
9 part of the firearm that I'm holding with my
10 fingers is the cylinder. As you can see, it's got
11 five holes in it. That cylinder has five holes or
12 chambers.

13 Obviously you can put a cartridge into each
14 one of these holes. This cylinder swings back and
15 forth. Normally if it's in a position to fire, the
16 cylinder will be all the way inside the frame.
17 Right now it can't go in there because the lock is
18 in the way.

19 So in order to load it, you have to open the
20 cylinder if the cylinder is not open. The way to
21 do that is to push on this latch. There is a thumb
22 latch over here.

23 So normally you would take it, push the latch
24 forward and then swing the cylinder out. Then you
25 can put a cartridge into each one of these

1 chambers. Then what you have to do is push the
2 cylinder all the way back into place so it locks
3 into place, and then the firearm is ready to fire.

4 Q Say you fire five wound rounds and you want to fire
5 additional rounds, what step do you take next?

6 A All right. If you had five rounds in it, you shoot
7 all five, and you want to reload the firearm, then
8 that is what you have to do if you are going to
9 shoot it again.

10 You have to press the thumb latch, swing the
11 cylinder out, get the cartridge cases out of the
12 cylinder itself. You can do that by either pushing
13 on the extractor rod. Depending on the firearm, it
14 may fall out.

15 But typically you have to push on the rod, and
16 then you have to insert new cartridges into it, up
17 to five. Then you close the cylinder, and it's
18 ready to fire again.

19 Q Again, the cartridge casing would be the brass part
20 that comes out?

21 A Yes, sir. It's brass. In this demo cartridge that
22 you have here, most of them are brass. Some of
23 them may be made out of aluminum, but typically
24 they are brass.

25 Q When you fire a weapon like this, a revolver, you

1 do not have cartridge casings flying like you would
2 in a semiautomatic weapon?

3 A No. The cartridge cases stay inside this cylinder
4 until you open the cylinder and remove them.

5 Q So if someone were to fire a weapon like that, they
6 could actually dump those cartridge casings in
7 their hand or put them in their pocket and take
8 them with them?

9 A Yes, sir, you could do that.

10 Q Thank you, Agent Paavel.

11 A (Witness resumes the witness stand).

12 Q Agent Paavel, I believe that's all the questions I
13 have for you at this time. Please answer any
14 questions that the defense might have.

15 THE COURT: Thank you, Solicitor. Mr. Baker.

16 MR. BAKER: Thank you, Your Honor.

17 CROSS EXAMINATION

18 BY MR. BAKER:

19 Q Agent Paavel, I think you testified -- and I think
20 it's State's 35 through 41 -- and your testimony is
21 those projectiles were fired from the gun that you
22 just were handed; is that correct?

23 A That's correct, yes, sir.

24 Q There is no examination or test that you can do to
25 actually indicate who was holding that gun when

1 those rounds were fired; is that correct?

2 A No, sir, I don't have any sort of examination that
3 I can conduct that tells who was holding a firearm
4 or who was firing the firearm.

5 Q All you can say is that those projectiles came from
6 that gun?

7 A That's correct, sir.

8 Q And in the demonstration you just did for the jury
9 when you were loading the gun, unloading the gun,
10 and then loading the gun again, you are having to
11 put both of your hands on that gun; is that
12 correct?

13 A Yes, sir, I have to, yes.

14 Q And your hands are all over that gun when you're
15 loading, unloading it, and then loading it again?

16 A Yes, sir, they were.

17 Q Then when you were provided or given this gun,
18 there were no rounds in it at that time; is that
19 correct?

20 A No, sir, there was no ammunition, no fired
21 cartridge cases. Let me review my notes just to be
22 sure.

23 Q And no shell casings?

24 A When I received it, I simply received the firearm.

25 Q And it wouldn't be your responsibility or your

TRAVIS BASS -- DIRECT -- MR. MADSEN

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1 department, I guess, to attempt to remove any
2 fingerprints from that weapon?

3 A No, sir, I would not do that in our department.

4 Q Thank you, Agent Paavel. I think that's all I
5 have.

6 THE COURT: Thank you, Mr. Baker. Anything in
7 redirect?

8 MR. HUBBARD: No further questions, Your
9 Honor, and I'd ask that he be excused.

10 THE COURT: Thank you, Agent Paavel. You may
11 be excused.

12 THE WITNESS: Thank you, sir.

13 THE COURT: Solicitor, you may call your next
14 witness.

15 MR. MADSEN: The State would call Detective
16 Travis Bass.

17 TRAVIS BASS, being
18 first duly sworn, testified as follows:

19 CLERK: Once you have a seat, I need you to
20 speak up loud and clear. State your full name, spelling
21 your last.

22 THE WITNESS: Travis Bass, B-A-S-S.

23 DIRECT EXAMINATION

24 BY MR. MADSEN:

25 Q Detective Bass, where are you employed?

- 1 A With the Lexington County Sheriff's Department with
2 the narcotics enforcement team.
- 3 Q And how long have you been -- when you say
4 narcotics enforcement team, the N.E.T. team?
- 5 A Yes, sir.
- 6 Q How long have you been employed in that capacity?
- 7 A Going on three years.
- 8 Q Before that were you with any other law enforcement
9 agency?
- 10 A Yes, sir.
- 11 Q Who was that?
- 12 A I've served with the Lexington County Sheriff's
13 Department prior and also with the Swansea Police
14 Department.
- 15 Q Does a part of being a member of the narcotics task
16 force include entry on search warrants?
- 17 A Yes, it does.
- 18 Q Did you have an occasion on 9/14 to be part of an
19 entry team at the request of the major crimes
20 division?
- 21 A Yes.
- 22 Q Was that at [REDACTED]?
- 23 A Yes, sir.
- 24 Q Look there back on State's Exhibit 88. Do you
25 recognize that diagram?

TRAVIS BASS -- DIRECT -- MR. MADSEN

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1 A Yes, I do.

2 Q And was that the home that you went into that
3 day?

4 A Yes, sir.

5 Q As far as -- when y'all enter the home, is that
6 kind of called a stack?

7 A As far as the way the members -- yes, sir, we call
8 it a stack.

9 Q And do you recall on that stack who was on the
10 shield?

11 A I believe John Moore.

12 Q Where would you have been in that stack?

13 A I think I was the third member in the stack that
14 day.

15 Q And generally when y'all go in a stack, the first
16 person goes one way. Where does the second person
17 go?

18 A He goes opposite of the first.

19 Q How about the third?

20 A He goes opposite of the second.

21 Q So he follows behind the person on the shield?

22 A Yes, sir. The first goes one way, the second guy
23 goes another, the third guy does the opposite of
24 the second, which would be the same way the first
25 guy went.

1 Q Can you tell me, when you enter that residence,
2 what do you do?

3 A Myself and John Moore entered first. We entered
4 through the front door, went into the living room,
5 went down towards where the hallway is. At that
6 time Detective Burke went to the living room, and I
7 think he made entry into the kitchen with someone
8 else, I don't know who, but I followed behind John
9 Moore. We went down the hallway and made entry
10 into bedroom number two.

11 Q Let me show you State's Exhibit Number 78. Do you
12 recognize that?

13 A Yes, sir, that's the front door and the living
14 room.

15 Q How about State's Exhibit Number 82?

16 A That's the hallway of the residence.

17 Q And when you go in, who do you end up following
18 right behind?

19 A John Moore on the shield.

20 Q Do y'all encounter anyone?

21 A In the hallway, in the living room, no, sir.

22 Q How about when you make your turn?

23 A When we entered into bedroom number two, yes, sir,
24 we made contact with Darrell Burgess.

25 Q What happened when you made contact with Darrell

TRAVIS BASS -- DIRECT -- MR. MADSEN

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1 Burgess?

2 A As we entered the residence, everyone was saying
3 "Police, search warrant," advising who we were.
4 When we made entry into the room, Darrell Burgess
5 was told to get on the ground. I believe he got on
6 the bed at that time. At that particular time, I
7 holstered my weapon and put him in handcuffs for
8 his safety and for ours.

9 Q Let me show what has been marked as State's Exhibit
10 Number State's Exhibit 83. Do you recognize that?

11 A Yes, sir, that's bedroom number two in the
12 residence.

13 Q On here where is it that you encountered the
14 Defendant?

15 A Where the door is. The door to the bedroom is here
16 (indicating). We entered in and he was, I believe,
17 getting off the bed. I know he was standing up
18 when we entered into the room.

19 Q When you ended up handcuffing him for your safety
20 and his, where do you end up handcuffing him at?

21 A He was laying on the bed.

22 Q On the bed in State's Exhibit Number 83?

23 A Yes, sir.

24 Q Now, let me ask you this. As far on that, are all
25 those items on the bed when you get there?

- 1 A No, sir, they were not.
- 2 Q Why are all those things on there then in this
- 3 photograph?
- 4 A During our search of the room, the items on the
- 5 search warrant we were looking for, instead of
- 6 just -- so that we can get everything out, we just
- 7 stuck it on the bed so we had everything out of our
- 8 way, and we knew what we had already searched and
- 9 what hadn't been.
- 10 Q After you get done and clear the residence, do you
- 11 then have some other responsibilities?
- 12 A Basically just if I'm finished searching that room
- 13 and somebody else needs help searching another
- 14 room, I do that.
- 15 Q That's what I'm talking about. Do you have a
- 16 search responsibility?
- 17 A Sometimes.
- 18 Q Did you in this case?
- 19 A Not really, no, sir. We searched the room. Like I
- 20 said, if somebody else needed help in another room,
- 21 we'd search the other room with them.
- 22 Q What rooms did you search?
- 23 A Two and three.
- 24 Q And when you say two, that's State's Exhibit
- 25 Number 83?

1 A Yes, sir.

2 Q How about State's Exhibit Number 85, do you
3 recognize that?

4 A Yes, sir, that's room three, the back bedroom on
5 the right.

6 Q Did you find some cell phones in bedroom number
7 two?

8 A Yes, sir.

9 MR. BAKER: Your Honor, I have an objection.

10 THE COURT: All right. It's the same as the
11 previous objection?

12 MR. BAKER: That is correct, Your Honor, per
13 17-13-150.

14 THE COURT: Based on the previous objection, I
15 would overrule your objection, but you are protected on
16 the record.

17 BY MR. MADSEN:

18 Q Let me show you State's Exhibit Number 84. Do you
19 recognize that photograph?

20 A Yes, sir.

21 Q What is that a photograph of?

22 A I'm sorry?

23 Q What is that a photograph of?

24 A Some cell phones that were on the headboard on the
25 bed in room two.

1 (State's Exhibit Number 89 is marked for
2 identification).

3 BY MR. MADSEN:

4 Q Let me show you what has been marked as State's
5 Number 89 for I.D. Is that one of the cell phones
6 that is pictured in State's Exhibit Number 84?

7 A Yes, sir, it's this phone here (indicating).

8 Q Did you end up collecting that phone?

9 A Yes, sir, I collected all the phones and turned
10 them over to Mike Burke.

11 Q What was Mike Burke's responsibility?

12 A He was actually doing the scribing, writing the
13 return of all the items found.

14 Q So this was ultimately turned over to him?

15 A Yes, sir.

16 MR. MADSEN: Your Honor, at this point in time
17 we would move State's Exhibit Number 89 for I.D.
18 purposes into evidence.

19 THE COURT: Subject to previous objection?

20 MR. BAKER: Thank you, yes, sir.

21 THE COURT: Any other objections?

22 MR. BAKER: No other objections than already
23 made, Your Honor.

24 THE COURT: Eighty-nine is in evidence subject
25 to previous objection.

MICHAEL PHIPPS -- DIRECT -- MR. MADSEN

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1 (State's Exhibit Number 89 is received into
2 evidence).

3 BY MR. MADSEN:

4 Q If you could answer any questions Mr. Baker has.

5 THE COURT: Mr. Baker.

6 MR. BAKER: Your Honor, I don't believe I have
7 any questions.

8 THE COURT: Thank you, Mr. Baker. Detective
9 Bass, you may step down.

10 THE WITNESS: Thank you.

11 THE COURT: Solicitor, you may call your next
12 witness.

13 MR. MADSEN: Your Honor, the State would call
14 Detective Mike Phipps.

15 MICHAEL PHIPPS, being
16 first duly sworn, testified as follows:

17 CLERK: Once you have a seat, speak up loud
18 and clear. State your full name, spelling your last,
19 please.

20 THE WITNESS: My name is Michael Phipps,
21 P-H-I-P-P-S.

22 DIRECT EXAMINATION

23 BY MR. MADSEN:

24 Q Detective Phipps, where are you employed?

25 A Lexington County Sheriff's Department.

1 Q And in what capacity are you employed?

2 A A crime scene investigator.

3 Q Let me show you what has been marked as State's
4 Exhibit Number 89. Do you recognize this?

5 A I do, sir.

6 Q And what is that?

7 A It's a cell phone that I signed out from our
8 evidence unit on the 24th of this month.

9 (State's Exhibits Number 90-91 are marked for
10 identification).

11 BY MR. MADSEN:

12 Q Where did you sign State's Exhibit Number 89 out
13 of?

14 A At the Sheriff's Department, there is an evidence
15 unit that is responsible for housing and
16 maintaining all items of evidence. I received a
17 lab request to sign this phone out in conjunction
18 with a search warrant that was issued to try to
19 obtain information off the phone.

20 Q Let me show you State's Exhibits Number 90 and 91,
21 I believe without objection. Do you recognize
22 those photographs?

23 A Yes, sir.

24 Q Who took those?

25 A I took these photographs.

MICHAEL PHIPPS -- DIRECT -- MR. MADSEN

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1 MR. BAKER: Your Honor?

2 THE COURT: Yes, sir.

3 MR. BAKER: It wouldn't be without objection,
4 it would be subject to my previous objection.

5 THE COURT: What are those? Let me see them.

6 MR. MADSEN: I'm sorry, Judge.

7 THE COURT: It's all right.

8 (Hands to Court).

9 THE COURT: If he lays the proper foundation,
10 I will allow them in subject to your previous objection,
11 Mr. Baker.

12 BY MR. MADSEN:

13 Q Can you tell me what the photographs in State's
14 Exhibit Number 90 and 91, what those are
15 photographs of?

16 A They are photographs of the inside of the battery
17 compartment. When you remove the back cover and
18 remove the battery from the phone, it's a label
19 that is adhered to the inside of that phone.

20 Q And did you take these photographs?

21 A I did.

22 Q And are these photographs of the back of State's
23 Exhibit Number 89 when you take the battery out of
24 the back?

25 A Yes, sir, they are.

1 MR. MADSEN: At this point in time, Your
2 Honor, we would move State's Exhibit 90 and 91 in
3 evidence.

4 THE COURT: Ninety and 91 is in evidence
5 subject to previous objections.

6 (State's Exhibits Number 90-91 are received
7 into evidence).

8 BY MR. MADSEN:

9 Q Can you show us with State's Exhibit Number 90 and
10 91 -- I guess one is just a close up?

11 A Yes, sir, one is just a closer view of the other.

12 Q Can you kind of show the jury on State's Exhibit 89
13 in front of you how you take this photograph?

14 A This (indicating) would be the phone. The battery
15 compartment is on the back. The cover is removed,
16 the battery is removed from the phone, and on the
17 inside of that compartment is the photograph that
18 you see there.

19 Q You can put it back together, please.

20 A (Witness complies).

21 Q Were you able to get that phone powered up?

22 A No, sir.

23 Q What problems did you encounter?

24 A There was an internal short in the battery itself.

25 So even with an A.C. charger attached to the phone,

1 because that current runs through the battery, the
2 phone would power up and then immediately shut down
3 and cycle back and forth.

4 Q What attempts did you make in reference to that
5 battery?

6 A We attempted to locate a like battery. We found
7 one similar to it. We installed that one. Again,
8 we tried powering it up. This time it would power
9 up and stay on, but it had a notation on the screen
10 that said, "Phone off," and we weren't able to
11 access anything further than that.

12 Q That's all the questions I have. If you could
13 answer any questions Mr. Baker has.

14 THE COURT: Thank you, Solicitor. Mr. Baker.

15 **CROSS EXAMINATION**

16 BY MR. BAKER:

17 Q So, Officer Phipps, you were not able to gather any
18 information from the phone as far as call history
19 or calls received or text messages or anything
20 along those lines?

21 A No, sir.

22 MR. BAKER: Thank you, Your Honor. I think
23 that's all I have.

24 THE COURT: Anything in redirect, Solicitor?

25 MR. MADSEN: No, Your Honor.

1 THE COURT: Thank you, Detective Phipps. You
2 may step down. Solicitor, you may call your next
3 witness.

4 MR. MADSEN: Your Honor, the State calls
5 Shelley Ulyak.

6 SHELLEY ULYAK, being
7 first duly sworn, testified as follows:

8 CLERK: If you will have a seat right up
9 there. Once you have a seat, I need you to speak up
10 loud and clear. State your full name on the record, and
11 if you would, please, ma'am, give the spelling of your
12 first and last name.

13 THE WITNESS: Good afternoon. My full name is
14 Shelley Ulyak, S-H-E-L-L-E-Y. The last name is
15 U-L-Y-A-K.

16 DIRECT EXAMINATION

17 BY MR. MADSEN:

18 Q Shelley, where do you reside?

19 A In South River, New Jersey.

20 Q And who are you employed with?

21 A I'm employed by Virgin Mobile U.S.A.

22 Q How long have you been with Virgin Mobile U.S.A.?

23 A Three years.

24 Q And could you tell me, what is Virgin Mobile
25 U.S.A.?

1 A Virgin Mobile U.S.A. is a prepaid cellular phone
2 company.

3 Q When you say prepaid, what does that mean?

4 A It's a non-contractual phone, so you can pay as you
5 go. You prepay your air time.

6 Q And what is your job with Virgin Mobile?

7 A I'm an operations manager.

8 Q And as part of being an operations manager, do you
9 have additional duties?

10 A I do also serve as custodian of records.

11 Q Does that require you sometimes to travel outside
12 of New Jersey?

13 A Yes, it does.

14 Q Have you done any traveling recently?

15 A I just got back from Seattle.

16 Q Now, besides being a prepaid cellular phone, what
17 type of network operator is Virgin Mobile?

18 A It's an M.V.N.O. is the proper terminology.

19 Q M.V.N.O., what does that stand for?

20 A That stands for Mobile Virtual Network Operator.

21 Q What does that mean?

22 A We operate off of a larger company's network. So
23 Virgin is a public company, our own company, but we
24 operate off of Sprint's network and towers.

25 Q Did you have an occasion to receive a subpoena on

- 1 September 22nd of 2005?
- 2 A Yes, we did.
- 3 Q And was it requesting information in relation to a
- 4 number or to an account or a phone number?
- 5 A Yes.
- 6 Q What was that phone number?
- 7 A The phone number was [REDACTED].
- 8 Q And was the subscriber name requested?
- 9 A Yes, it was.
- 10 Q What was the subscriber name associated with that
- 11 phone?
- 12 A According to the records, the subscriber name is
- 13 Darrell Burgess.
- 14 Q As far as with y'all being a prepaid, do you
- 15 require verification before someone goes in and
- 16 gets -- or gives a name on a phone?
- 17 A No, we don't. It's not contractual. There is no
- 18 Social Security or I.D. required.
- 19 Q So I could go in and request a phone and say I'm
- 20 Darrell Burgess?
- 21 A Absolutely.
- 22 Q Besides that was an E.S.N. number requested?
- 23 A Yes, it was.
- 24 Q Could you tell the jury, what is an E.S.N. number?
- 25 A An E.S.N. number is an electronic serial number

1 that is associated to the actual hand set.

2 Q Based on your records, how many E.S.N. numbers were
3 associated with this account?

4 A With this particular phone number, two E.S.N.
5 numbers.

6 Q Was there a time frame on those?

7 A Yes, there was.

8 Q What was the first time frame?

9 A From February 16, 2005, through March 11, 2005.
10 The E.S.N. Number, 05513489495.

11 Q And how about, was there a second one?

12 A Yes, there was a second one from March 11, 2005,
13 through present. That E.S.N. was 05510061251.

14 (State's Exhibit Number 92 is marked for
15 identification).

16 BY MR. MADSEN:

17 Q Let me show you what has been marked as State's
18 Exhibit Number 92 for I.D. purposes. Do you
19 recognize that?

20 A Yes, I do.

21 Q What is that?

22 A This is a response to the request that was sent in
23 2005 for the E.S.N. and subscriber information.

24 Q And was that provided to the Lexington Sheriff's
25 Department on 9/23/05?

1 A Yes, it was.

2 Q And is that a record that y'all keep in the regular
3 course of business?

4 A Yes, it is.

5 Q Are those made at or near the time or do y'all have
6 those records at or near the time that those come
7 about?

8 A Yes, they are.

9 Q And are you a certified records custodian for
10 Virgin?

11 A Yes, I am.

12 MR. MADSEN: Your Honor, at this point in
13 time, we would move State's Exhibit 92 for I.D. purposes
14 into evidence.

15 THE COURT: Mr. Baker?

16 MR. BAKER: Your Honor, I would have an
17 objection. I'm not sure that that communication --

18 THE COURT: Let me stop you there if you have
19 an on objection.

20 Mr. Foreman, and ladies and gentlemen of the
21 jury, if you would step momentarily to your jury room.
22 Do not discuss the case amongst yourselves during this
23 brief recess.

24 (The jury retires to the jury room).

25 THE COURT: I would be glad to hear from you,

1 Mr. Baker.

2 MR. BAKER: Your Honor, I would have an
3 objection to that document going into evidence. It
4 appears to be a document that was signed by some other
5 individual from Virgin Mobile and would not be
6 Ms. Shelley Ulyak.

7 I would like to know what information she has
8 about the -- I guess information that was gathered to
9 generate that document. I don't know that the
10 foundation has been laid for her to testify about that
11 document and the results of whatever subpoena was issued
12 to her.

13 THE COURT: Solicitor.

14 MR. MADSEN: Your Honor, I think under
15 Rule 803, I believe Subsection (6), that she has
16 testified and laid a foundation. That is a business
17 record and therefore would qualify under the business
18 records exception.

19 MR. BAKER: Your Honor, can I just respond to
20 that?

21 THE COURT: Yes, sir.

22 MR. BAKER: That document, as I understood it,
23 was a document generated in response to a subpoena,
24 which I wouldn't think it would qualify as a document
25 which is a -- would qualify under 803 (6), records kept

1 in the regular course of business. Their business would
2 not be responding to subpoenas.

3 THE COURT: Where is the underlying
4 information? This is a letter going to Detective Beaver
5 by Harmon Douglas. Where is the underlying record
6 showing the subscriber information on 546-1430 and the
7 E.I.N. numbers and dates she has testified to?

8 MR. MADSEN: I do not know, but I would point
9 out on (6) that they can -- the records of regular
10 conducted activity can be a memorandum, a report, a
11 record or a data compilation in any form of acts,
12 events, conditions or diagnoses made at or near the time
13 of information transmitted.

14 THE COURT: This wasn't made at or near the
15 time of the information transmitted except as it relates
16 to Mr. Beaver, Detective Beaver, not as it relates to
17 Mr. Burgess. That's why I asked, does she have the
18 underlying document for this information, the underlying
19 documentation?

20 MR. MADSEN: I do not believe so. I believe
21 that in the requests of the subpoena, as far as the
22 subscriber information, being that it's prepaid, they
23 don't have contracts or that, but she is certainly here
24 and we can ask her.

25 MR. BAKER: My concern would be, Your Honor,

1 how can she authenticate that that is accurate
2 information if she doesn't have the underlying
3 information if she didn't actually generate that
4 document?

5 THE COURT: Well, she has already testified to
6 just about everything here. She said she's the
7 operations manager, she has been there three years, she
8 has testified to the subscriber information, to two
9 E.S.N. numbers, to those numbers, to those dates. All
10 of that is actually contained here in this document.

11 So it's not so much a question of its
12 trustworthiness. That's the whole issue of an exception
13 to the hearsay rule. The reason it's an exception is
14 because it has the indicia, if you will, of
15 trustworthiness. I don't think she needs -- she says
16 she is the custodian of the records, not Harmon Douglas;
17 is that correct?

18 MR. MADSEN: Yes, sir, she is one of their
19 certified custodians.

20 THE COURT: Anything further, Mr. Baker?

21 MR. BAKER: Nothing other than what I noted on
22 the record, Your Honor.

23 THE COURT: It is Ms. Ulyak; is that correct?

24 THE WITNESS: Yes, Your Honor.

25 THE COURT: Ms. Ulyak, when you look at what

1 is marked State's Exhibit Number 92, is that all
2 information, information that is contained in the
3 official records of Virgin Mobile?

4 THE WITNESS: Yes, Your Honor.

5 THE COURT: Are there any subjective opinions
6 or judgments in there or is that just a compilation of
7 this information?

8 THE WITNESS: No, Your Honor. This letter is
9 generated by our backer systems in a user friendly
10 format.

11 THE COURT: And would you generate the same --
12 your company -- generate the same type of letter to
13 comply with any subpoena?

14 THE WITNESS: Yes, Your Honor.

15 THE COURT: Whether it was in South Carolina
16 or Seattle or wherever?

17 THE WITNESS: Yes, Your Honor.

18 THE COURT: All right. I'm going to allow it
19 under 803 (6). It appears, although it has Detective
20 Beaver's name on it, it appears that that would be how
21 they would generate compliance with a subpoena in each
22 and every case.

23 There's no subjective opinions or judgments in
24 there. I looked at the letter myself. It appears it's
25 just being presented in this memorandum type form from

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1 their records. So I would allow State's Exhibit 92 in
2 evidence subject to Mr. Baker's previous objection, both
3 under hearsay, and it goes back to the search warrant
4 also.

5 MR. BAKER: Thank you, sir.

6 (State's Exhibit Number 92 is received into
7 evidence).

8 THE COURT: Anything further, Mr. Baker?

9 MR. BAKER: Not on that issue, Your Honor.

10 THE COURT: If you would bring us our jury
11 please, Mr. Bailiff. Your witness has the document now,
12 Solicitor.

13 (The jury returns to the courtroom).

14 THE COURT: It appears our jury is back
15 present in the courtroom, as are all parties and their
16 attorneys. Solicitor, you may continue.

17 DIRECT EXAMINATION

18 BY MR. MADSEN:

19 Q Ms. Ulyak, what is an E.S.N. number again?

20 A It's an electronic serial number.

21 Q And can an E.S.N. number be matched up to a phone?

22 A Yes, it can.

23 Q Let me show you State's Exhibit Number 89 and ask
24 you, is that a Virgin Mobile phone?

25 A Yes, it is.

1 Q Where would you find an E.S.N. number on a phone
2 like that?

3 A You would open the battery cover up.

4 Q Does this phone have an E.S.N. number on it?

5 A Yes, it does.

6 Q Let me show you what has been marked as State's
7 Exhibit Number -- let's go with 91. Is that a
8 photograph of the back of that phone?

9 A Yes, it is.

10 Q Can you take a look at State's Exhibit Number 89
11 and tell me whether that E.S.N. number is the same
12 as on State's Exhibit Number 92, the report that
13 your company generated?

14 A Yes, it is.

15 Q Can you read that E.S.N. number on the back of
16 that? Can you read that E.S.N. number off?

17 A Sure, 05510061251.

18 Q So that phone that you have in your hand, was that
19 the last phone on that account?

20 A Yes, it was.

21 Q Based on your report, can you tell me the last time
22 that phone was replenished?

23 A The last date of replenishment was on September 14,
24 2005, at 1:24 a.m.

25 THE COURT: Would you say that again. What

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1 was that answer, the last time it was replenished?

2 THE WITNESS: It was September 14, 2005, at
3 1:24 a.m.

4 THE COURT: Thank you.

5 BY MR. MADSEN:

6 Q So this phone was seized, say, 11 or 12,
7 11:00 a.m., 12:00 p.m. of September 14th, how long
8 had it been since this phone had been replenished?

9 A I'm sorry, I didn't understand the question.

10 Q If this phone was actually seized on November 14th
11 at, say, 11 a.m. or 12:00 p.m.

12 A Okay.

13 Q How long had it been since it had been replenished?

14 A About a month. You said November?

15 Q September.

16 A September.

17 Q September 14 at 11:00 a.m.

18 A At 11:00 a.m., like 12 hours, 10 hours.

19 Q You said something with y'all being a virtual
20 provider, that y'all have a larger company that you
21 work with. What does that larger company provide
22 to y'all?

23 A Network service. We operate off of Sprint's
24 network.

25 Q So y'all operate off of Sprint's network?

1 A Yes.

2 Q You don't own physical towers?

3 A No, we don't.

4 Q As far as getting -- do you get call data in from
5 Sprint in regards to that phone?

6 A Yes, we could.

7 Q That's all the questions I have. Answer any
8 questions from Mr. Baker, please.

9 THE COURT: Thank you, Solicitor. Mr. Baker.

10 CROSS EXAMINATION

11 BY MR. BAKER:

12 Q Ms. Ulyak, you can't testify about any call data
13 regarding that phone; can you?

14 A I don't have that information with me, no.

15 Q You can't testify about the times the calls were
16 made, the times the calls were received?

17 A No.

18 Q Where the hand set was when such calls were made
19 and so forth, could you?

20 A No.

21 Q State's Exhibit Number 92, let me show you that,
22 Ms. Ulyak. Do you have or are you familiar with
23 the information that was used to generate that
24 document?

25 A Yes.

1 Q Did you have anything to do with generating that
2 document yourself?

3 A Physically?

4 Q Yes.

5 A No.

6 Q You were not personally involved in actually
7 generating that document?

8 A No, I have a team that generates these documents
9 for us.

10 Q So you would not actually have with you the
11 documentation or data that would actually be used
12 to then generate that document?

13 A I'm afraid I don't understand the question.

14 Q You have not reviewed the data that was used to
15 generate that document, have you?

16 A I do have the request for the data.

17 Q You have the request for the data?

18 A Right.

19 Q But you have not actually reviewed the data itself?

20 A This is actual data provided from our system. This
21 is a system generated letter.

22 Q But the data itself is on the system; is that
23 correct?

24 A It's stored in our systems, yes.

25 Q So there is no way of actually, I guess, printing

1 out or documenting the data that is used before you
2 generate that document?

3 A Depending on the way the subpoena is is what we
4 query in our system. So if a telephone is queried,
5 it will produce the E.S.N. and the subscriber
6 information associated with it.

7 Q So there are ways you can actually print out the
8 data, I guess?

9 A And this would be a result, yes.

10 Q Thank you.

11 MR. BAKER: I think that's all I have for
12 Ms. Ulyak.

13 THE COURT: Thank you, Mr. Baker. Anything in
14 redirect, Solicitor?

15 MR. MADSEN: No, Your Honor.

16 THE COURT: Thank you very much, Ms. Ulyak.

17 You may step down. May Ms. Ulyak be excused?

18 MR. MADSEN: Yes, Your Honor.

19 THE COURT: Any objection, Mr. Baker?

20 MR. BAKER: None, Your Honor.

21 THE COURT: Thank you. You may be excused.

22 Thank you very much.

23 MR. HUBBARD: Another scheduling matter?

24 THE COURT: All right. Yes, sir.

25 (Whereupon there was a bench conference off

1 the record in the presence of the jury but out of the
2 hearing of the jury).

3 THE COURT: Mr. Foreman, ladies and gentlemen
4 of the jury, we are going to take a brief recess. When
5 we took our early lunch today -- I thought about it over
6 lunch -- I didn't mean to imply that I think the parties
7 are dragging the case in any manner. They have now put
8 up 19 witnesses, the State has, and the defense, of
9 course, has moved along also.

10 As I told you in the beginning, it's not a
11 judicial marathon. So I don't want you to think that by
12 breaking early and by what I said, I was in any way
13 being critical of either the State nor the defense. I
14 allow the parties to try their cases. Sometimes
15 scheduling the next witness here can be very difficult.
16 I understand our next witness is also from out of state,
17 is that correct, as was Ms. Ulyak?

18 MR. MADSEN: Actually he is from somewhere
19 around here. He works the whole state though.

20 THE COURT: He should be present in the next
21 few minutes. Upon his arrival we will certainly start
22 back. Like I say I don't want you to take any
23 indication from me that I was being critical of either
24 side. I was not being critical of either side at all.

25 With that being said, if you would step to

1 your jury room for this afternoon recess. Do not
2 discuss the case amongst yourselves during the recess.
3 Thank you. Thank you very much.

4 (The jury retires to the jury room).

5 THE COURT: Let me get this straight in my
6 mind, Solicitor. You have a records -- a telephone
7 records custodian this afternoon?

8 MR. MADSEN: We have a telephone records
9 custodian for Cingular.

10 THE COURT: That's local?

11 MR. MADSEN: He is local.

12 THE COURT: Didn't we have some gentleman from
13 Kansas and Atlanta?

14 MR. MADSEN: Yes, sir, Kansas via Atlanta. I
15 got an e-mail from him at lunch saying that he was
16 traveling here, was going to grab lunch. He will be
17 here sometime tonight. We had planned on calling him
18 tomorrow morning.

19 THE COURT: Then you have the pathologist?

20 MR. MADSEN: We have the pathologist.

21 THE COURT: What about the Jackson versus
22 Denno witnesses?

23 MR. MADSEN: We have not made a decision on
24 him. We have one other witness from the Sheriff's
25 Department which will be tomorrow. He will need to

1 follow the phone records.

2 THE COURT: Are you going to decide on your
3 statement this afternoon?

4 MR. MADSEN: Yes, sir.

5 THE COURT: So that you would call also -- if
6 you decide to call your statement witness, you are going
7 to do that this afternoon?

8 MR. MADSEN: Yes, sir.

9 THE COURT: And then Mr. Baker needs an
10 opportunity to talk with your next witness; is that
11 correct?

12 MR. MADSEN: That is my understanding.

13 THE COURT: As soon as your witness is here
14 and that is accomplished, please let me know. I don't
15 want to leave the jury sitting back there.

16 MR. BAKER: Your Honor, I have the information
17 on Reggie Williams as well.

18 THE COURT: That's Reginald Larry Williams?

19 MR. BAKER: That's correct.

20 THE COURT: If you would provide that to
21 Mr. Hubbard, Solicitor Hubbard. Can you get the sheriff
22 or one of the deputies to take care of that for us?

23 MR. HUBBARD: Yes, sir, Your Honor.

24 THE COURT: Court will be in recess at least
25 15 minutes. Thank you.

1 (Whereupon there was a recess).

2 THE COURT: Are you ready, Solicitor?

3 MR. HUBBARD: The witness just stepped in the
4 rest room. They just finished talking, and he is on his
5 way.

6 THE COURT: All right. Are you ready,
7 Mr. Baker?

8 MR. BAKER: I think so, Your Honor.

9 THE COURT: All right.

10 (Pause).

11 THE COURT: It appears all the parties are
12 present. Mr. Baker, have you had an opportunity to talk
13 with the State's next witness?

14 MR. BAKER: I have, Your Honor.

15 THE COURT: What is his name?

16 MR. BAKER: Mr. Sam Alfakir.

17 THE COURT: Do you need anymore time to talk
18 with him?

19 MR. BAKER: I don't think so, Your Honor.

20 THE COURT: Are you ready, Solicitor?

21 MR. MADSEN: Yes, sir, I am having her premark
22 some things for I.D. purposes.

23 THE COURT: Are we ready for our jury?

24 MR. MADSEN: Yes, Your Honor.

25 THE COURT: Mr. Bailiff, if you would bring

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1 our jury, please.

2 (State's Exhibits Number 93-97 are marked for
3 identification).

4 (The jury returns to the courtroom).

5 THE COURT: It appear our jury is back present
6 in the courtroom. Solicitor, you may call your next
7 witness.

8 MR. MADSEN: Your Honor the State calls Sam
9 Alfakir.

10 SAMMY A. ALFAKIR, being
11 first duly sworn, testified as follows:

12 CLERK: Speak up loud and clear. State your
13 full name on the record and spell your last for us,
14 please.

15 THE WITNESS: Sammy A. Alfakir, A-L-F-A-K-I-R.

16 DIRECT EXAMINATION

17 BY MR. MADSEN:

18 Q Mr. Alfakir, can you give me your educational
19 background?

20 A I have an electrical engineering degree from George
21 Mason University, Fairfax, Virginia.

22 Q And where are you currently employed?

23 A A.T.& T. Mobility.

24 Q Is that also -- is Cingular a part of that company?

25 A Was Cingular, yes.

1 Q How long ago did they make the change from Cingular
2 to A.T.& T.?

3 A About six months ago.

4 Q And what are your job duties with A.T.& T.?

5 A I'm a radio frequency engineer, and my job is to
6 make sure the calls always go through, wireless
7 calls.

8 Q On top of that, are you an authorized custodian of
9 records?

10 A I am.

11 Q Did y'all receive a search warrant requesting items
12 from a particular phone number that was related to
13 Cingular?

14 A Yes, [REDACTED].

15 Q And did y'all produce those records?

16 A We did.

17 Q Were you requested to provide the subscriber
18 information?

19 A We were.

20 Q What type of account was that account?

21 A According to the record, it was a prepaid account.

22 Q Given that it was a prepaid account, was there any
23 subscriber information available?

24 A No information available, no identity information
25 available.

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1 Q Were you requested to provide call records?

2 A We were.

3 Q Were those dates between September 1st of 2005 and
4 September 12th of 2005?

5 A Yes.

6 Q Can you tell me, based on your records, when that
7 account was activated?

8 A Activated 8/16/2005.

9 Q Let me show you State's Exhibit Number -- well, let
10 me do this first. Let me show you what has been
11 marked as State's Exhibit Number 93 for I.D.
12 purposes and ask if you recognize that.

13 A That is the subscriber information for activation
14 for a prepaid account.

15 Q Is that what you provided the Sheriff's Office?

16 A We did.

17 Q Could you take a look at the pages behind it.

18 A That's got phone records of mobile [REDACTED].

19 Q Are those the phone records that you provided?

20 A Those are the same ones, yes.

21 Q Now, are those records and reports created by your
22 company?

23 A Yes, they are.

24 Q And are those records and reports recorded at or
25 near the time that those call records come out?

1 A Yes, every day they get recorded.

2 Q Are those kept in the course of your regularly
3 conducted business?

4 A Yes, absolutely.

5 Q Is that a regular practice of y'all?

6 A Yes, for billing.

7 Q Beside these records, did y'all provide some cell
8 tower information?

9 A We have.

10 Q That's not part of State's 93 for I.D.?

11 A No, I don't see them in there.

12 Q And are you a certified records custodian?

13 A Yes, I am.

14 MR. MADSEN: Your Honor, at this point in
15 time, we would offer State's Exhibit Number 93 in
16 evidence.

17 THE COURT: Mr. Baker?

18 MR. BAKER: I don't have any objection, Your
19 Honor.

20 THE COURT: State's 93 in evidence without
21 objection.

22 (State's Exhibit Number 93 is received into
23 evidence).

24 BY MR. MADSEN:

25 Q Let me show you what has been marked as 94 for I.D.

1 purposes. Do you recognize that?

2 A I do.

3 Q Is that a summary of some of these call records
4 that were created in State's Exhibit Number 93?

5 A Yes, it is.

6 Q Have you had a chance to review that?

7 A I have.

8 MR. MADSEN: Your Honor, at this point in time
9 we offer State's Exhibit Number 94 for I.D. purposes
10 into evidence.

11 THE COURT: Mr. Baker?

12 MR. BAKER: I don't have any objection, Your
13 Honor.

14 THE COURT: State's 94 in evidence without
15 objection.

16 (State's Exhibit Number 94 is received into
17 evidence).

18 BY MR. MADSEN:

19 Q Mr. Alfakir, can you explain, at least on that
20 summary, under the heading "from," what do that
21 indicate?

22 A That's the mobile I.D. number that originated the
23 calls. So the mobile number that made the calls.

24 Q So if we look under these "from," these are all the
25 same number. Those are all [REDACTED] making

- 1 calls?
- 2 A Yes, correct, making the calls.
- 3 Q What are the "to"s?
- 4 A The number they are calling.
- 5 Q And then we have got dates and times; is that
- 6 correct?
- 7 A Correct.
- 8 Q And then tower information. With does that
- 9 indicate?
- 10 A That indicates what tower they were closest to.
- 11 Q When you say you are a radio frequency engineer,
- 12 your day-to-day job is to work on those towers?
- 13 A Absolutely.
- 14 Q When we have got something like this that has a
- 15 tower number, at least on this, is this 2 somehow
- 16 significant?
- 17 A Yes, it indicates Columbia, the Columbia switch,
- 18 off the Columbia area.
- 19 Q So this 2 is a switch number for Columbia?
- 20 A It is.
- 21 Q What do the next three digits certify?
- 22 A Four-two-nine is the tower number.
- 23 Q So these next three digits on here are all tower
- 24 numbers?
- 25 A They are.

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1 Q What does that last digit certify?

2 A That indicates the phase or the direction of the
3 tower that was handling the call.

4 Q With Cingular how many sectors does a tower
5 generally have?

6 A Three sectors.

7 Q Is there a way that you call those three sectors --
8 do you have names for them?

9 A We call them one, two, three, alpha, beta, gamma,
10 A.B.C. interchangeably.

11 Q Which way do they go?

12 A Usually one or alpha goes to the north. Two or
13 beta goes to your 5:00 o'clock and gamma usually
14 goes to your 8:00 o'clock direction.

15 Q So if I'm looking up here and there are calls on
16 9/5 at 3:23:41 a.m. that is coming off tower 429?

17 A Yes.

18 Q And then what sector?

19 A Alpha sector.

20 Q That's going to be something to the north?

21 A Due north of that, yes.

22 Q Let me show you State's Exhibits 95 and 96 for I.D.
23 and ask you if you recognize those.

24 A Absolutely. I generated those. I made those plots
25 myself.

1 Q And what is State's Exhibit Number 95 and 96? What
2 does those depict?

3 A Those indicate the coverage area of each cell or
4 each phase of it, the alpha phase and beta phase
5 and gamma phase.

6 Q Do those actually show those towers on here?

7 A Yes, they do.

8 Q Is one just a little bit farther away than the
9 other one?

10 A One is a zoomed out copy of the other, yes.

11 MR. MADSEN: Your Honor, at this point in
12 time, we would offer State's Exhibit Number 95 and 96
13 into evidence.

14 THE COURT: Mr. Baker?

15 MR. BAKER: I don't have any objection.

16 THE COURT: Ninety-five and 96 in evidence
17 without objection.

18 (State's Exhibits Number 95-96 are received
19 into evidence).

20 BY MR. BAKER:

21 Q Mr. Alfakir, would you step down with me here.

22 A Sure. (Witness leaves the witness stand).

23 Q Come over here. Looking at State's Exhibit
24 Number 94 there, there is an indication that at
25 9505 at 3:23:41 a.m. that that call originated off

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1 of tower -- Columbia switch, which is the 2, tower
2 429, alpha sector. Can you show us on here where
3 that is.

4 A That would be in the mint green area right here
5 (indicating), wherever it says -- wherever you see
6 the mint green, the mobile was in this area for
7 sure.

8 Q Let's step down this way and show this side of the
9 jury. Show them again, where in there did that
10 call originate from?

11 A The mobile would be in the mint green area, where
12 you see mint green colors. That's the coverage
13 area of 429 tower.

14 Q As far as on this diagram here, where is [REDACTED]

15 [REDACTED]

16 A I located it to be right in this immediate vicinity
17 of 429.

18 Q It's that?

19 A Semicircle.

20 Q The semicircle right there (indicating)?

21 A Yes.

22 Q Can you show down here where [REDACTED] is
23 to this side of the jury.

24 A Yes, [REDACTED] is right there (indicating),
25 right dead smack in front of alpha sector of 429.

- 1 Q And, in fact, this top call originates there?
- 2 A Yes.
- 3 Q All of these originate off of that same one?
- 4 A All of them, yes.
- 5 Q Later at 5:11:20 there is a call that looks like it
6 originates off the Columbia switch, tower 201, in
7 gamma sector?
- 8 A It is.
- 9 Q Let's start down here. Can you show the jury where
10 that tower is.
- 11 A Number 201 is right there (indicating), so the
12 gamma sector would be all the area that is red. So
13 the mobile was anywhere along the red area, and he
14 was able to get picked up by 201 gamma.
- 15 Q Let's show down here. What area is the call made
16 out of?
- 17 A Right there (indicating), 201 gamma, which is
18 bright red, where it's red.
- 19 Q There appears to be another call at 5:13. Is that
20 hitting off the same tower there?
- 21 A Yes, again, the red area.
- 22 Q There is call a little bit later on 9/5/05 at
23 5:57:41 that looks like it's hitting off the
24 Columbia switch, tower 200, in the beta sector?
- 25 A It is.

1 Q Can you show us on here where that is?

2 A That would be the beta sector right there
3 (indicating), 200 beta along where it's blue, this
4 area (indicating).

5 Q Show down on this side of the jury, please.

6 A Two hundred beta is right there (indicating) where
7 it's blue.

8 Q Have a seat, please.

9 A (Witness resumes the witness stand).

10 Q Mr. Alfakir, let me show you what has been marked
11 as State's Exhibit 97 for I.D. purposes. Do you
12 recognize this?

13 A I do.

14 Q And does that show the Cingular or A.T. & T. towers
15 on there?

16 A It does.

17 Q Have you been able to confirm those latitudes and
18 longitudes?

19 A I did.

20 MR. MADSEN: At this point in time, Your
21 Honor, we would move State's Exhibit Number 97 for I.D.
22 purposes into evidence?

23 THE COURT: Mr. Baker?

24 MR. BAKER: Your Honor, I would have an issue
25 with that exhibit.

1 THE COURT: All right. Mr. Foreman, ladies
2 and gentlemen, step momentarily to your jury room. Do
3 not discuss this case amongst yourselves during this
4 brief recess.

5 (The jury retires to the jury room).

6 THE COURT: Mr. Baker.

7 MR. BAKER: Your Honor, my issue with this
8 diagram is that Mr. Alfakir has, in those last two
9 exhibits which were introduced, I guess through his
10 computer records has generated the actual coverage of
11 these towers.

12 There is on what has been marked for
13 identification State's Exhibit 97, there is a purple
14 radius or circle, for lack of a better word, listed on
15 this diagram, and I'm not sure that it accurately -- it
16 certainly doesn't exactly reflect the same radius that
17 Mr. Alfakir has on the last two exhibits.

18 That's a perfectly round circle. His is a
19 little bit broken up. I just don't think -- they have
20 already gotten the last two exhibits which show,
21 according to him -- which he represents the company --
22 what their coverage and the radius is. I just don't
23 think it's proper to allow this to go in, and this is
24 something that has been generated by the Solicitor's
25 Office.

1 THE COURT: May I see 97?

2 MR. MADSEN: Your Honor, I will have him
3 explain that that is not their coverage area.

4 THE COURT: What is it?

5 MR. MADSEN: It is basically a three-mile
6 radius around a tower just to show perspective.

7 THE COURT: How would he know that?

8 MR. MADSEN: Just through our reviewing of
9 that.

10 THE COURT: Who prepared it?

11 MR. MADSEN: It was prepared through the
12 Sheriff's Department.

13 THE COURT: Why is the three-mile radius
14 important?

15 MR. MADSEN: At that point just to give
16 perspective of the distance. We will certainly flesh
17 out with him that that is not coverage.

18 THE COURT: Anything else you want to say,
19 Solicitor?

20 MR. MADSEN: Your Honor, I think he has
21 testified as to the longitude and latitude of the towers
22 on there. We have attempted to blow-up the State's
23 Exhibits that he has tried -- we tried to blow them up
24 that way. Unfortunately it just bleeds.

25 MR. BAKER: Your Honor, I guess my question is

1 why is that circle on there? I wouldn't necessarily
2 have any problem with the exhibit if it didn't have that
3 circle on there.

4 It's got the towers on there. Mr. Alfakir can
5 testify about the towers, that's fine. But I just don't
6 think it's proper for it to be admitted as an exhibit
7 when it's got that three-mile radius on it that doesn't
8 really represent anything.

9 THE COURT: All right. I'm assuming you
10 wouldn't have any objections to them using it for
11 demonstrative purposes?

12 MR. BAKER: If they want to use it for
13 demonstrative purposes, that's fine, Your Honor. I just
14 don't think it ought to go into evidence.

15 THE COURT: It will be 97 for identification;
16 however, you may use it for demonstrative purposes with
17 Mr. Alfakir? Did I pronounce that correct, sir?

18 THE WITNESS: You did.

19 MR. BAKER: Can we just get a -- and I guess
20 Rob can handle this -- just make it clear that that is
21 not the coverage.

22 MR. MADSEN: I will flesh that out.

23 THE COURT: If the solicitor doesn't cover it,
24 you are going to cover it. Probably what is going to
25 happen is the solicitor is going to cover it, and you

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1 are going to cover it. I'm sure it would be well
2 covered. Anything further?

3 MR. MADSEN: No, sir.

4 MR. BAKER: No, Your Honor.

5 THE COURT: Mr. Derrick, if you would bring
6 our jury, please.

7 (The jury returns to the courtroom).

8 THE COURT: Our jury is back present in the
9 courtroom. Solicitor, you may proceed.

10 DIRECT EXAMINATION

11 BY MR. BAKER:

12 Q Mr. Alfakir, let me show you what has been marked
13 as State's Exhibit Number 97 for demonstrative
14 purposes. Have you had a chance to look at this?

15 A I have.

16 Q And on there have you had a chance to look at those
17 cell tower longitudes and latitudes?

18 A Yes, they are all correct.

19 Q As far as what is located on here, that first
20 number, the 2, what does that indicate again?

21 A That's the Columbia switch.

22 Q So that's that same number that is on State's
23 Exhibit Number 94?

24 A It is.

25 Q And how about those second three numbers?

1 A Those are the cell tower number.

2 Q On here each one of these has a 1. What does that
3 actually indicate?

4 A It would indicate sector 1, which points due north,
5 but here they are -- they really should not be
6 there. They are not showing anything.

7 Q And as far as the calls that are made right here
8 that is hitting off of 429, sector 1, where is that
9 on this on 97 for demonstrative purposes?

10 A It is right there (indicating).

11 Q This one right here (indicating)?

12 A That's the one right there.

13 Q As far as this three-mile circle around it, that is
14 not your coverage area; is it?

15 A That is not my coverage area.

16 Q Y'all are lot more specific than that?

17 A It's usually -- it's not uniform.

18 Q You don't have, any of the towers that you work on
19 throughout the State, I mean, you don't have a
20 circular area; do you?

21 A It's never that perfect.

22 Q If it was your job would probably be a lot easier,
23 wouldn't it?

24 A Anybody could do my job then.

25 Q That's all the questions I have. If you could

1 answer any questions Mr. Baker has.

2 THE COURT: Thank you, Solicitor. Mr. Baker.

3 CROSS EXAMINATION

4 BY MR. BAKER:

5 Q Mr. Alfakir, you were asked to, I guess, get some
6 records or you were sent a request regarding a
7 phone number [REDACTED]; is that correct?

8 A Correct.

9 Q And you have no idea who that phone belongs to?

10 A I do not.

11 Q And even on, I think, Exhibit Number 93, which was
12 introduced earlier, does it contain some subscriber
13 information? Exhibit 93, it doesn't have a name,
14 address or anything on it?

15 A No, it's a prepaid account with an address that is
16 provided. It does have an address.

17 Q The address is [REDACTED], Columbia?

18 A It appears on that thing, yes.

19 Q No name or anything associated with it?

20 A No name, yes.

21 Q And so the person who was using this phone, you
22 have no -- other than that -- you have no idea
23 where they would have resided?

24 A No idea who they are or where they resided, no.

25 Q And you are only testifying here today about phone

1 number [REDACTED], and you can only testify
2 about where those calls generated from; is that
3 correct?

4 A Correct.

5 Q You have no idea about the location of where the
6 call was going as far as --

7 A No.

8 Q -- the cell phone receiving the call?

9 A No idea.

10 Q And the technology regarding which tower a cell
11 phone hits off of, that's not always an exact
12 science; is it? It doesn't always hit off the
13 closest tower; isn't that correct?

14 A Not always.

15 Q There are factors, such as, I assume, landscape,
16 weather which might affect which tower a cell phone
17 might hit off of?

18 A Just landscape.

19 Q Just landscape?

20 A Terrain.

21 Q So this is not an exact science?

22 A No.

23 MR. BAKER: I think that's all the questions I
24 have of Mr. Alfakir.

25 THE COURT: Thank you, Mr. Baker. Anything in

1 redirect, Solicitor?

2 REDIRECT EXAMINATION

3 BY MR. MADSEN:

4 Q Mr. Alfakir, ultimately since it's not an exact
5 science, that's why you do these Picasso paintings
6 in State's Exhibit Number 95 and 96?

7 A Exactly why, yes.

8 MR. MADSEN: That's all the questions I have.

9 THE COURT: Recross?

10 MR. BAKER: Nothing else.

11 THE COURT: Thank you. Thank you very much,
12 Mr. Alfakir. You may step down. May he be excused?

13 MR. MADSEN: Yes, Your Honor.

14 MR. BAKER: Yes, Your Honor.

15 THE COURT: You may step down and you maybe be
16 excused. Solicitor, you may call your next witness.

17 MR. MADSEN: That's all we have for the day.

18 THE COURT: Mr. Foreman, ladies and gentlemen
19 of the jury, we are going to take our evening recess. I
20 would remind you during this recess, you are not to
21 discuss the case with anyone. That includes your fellow
22 jurors, your family, your friends, anyone involved in
23 the trial of this case.

24 If anyone should try to talk with you about
25 the case, please let me know immediately. Remember do

1 not read, watch, listen to any news reports, whether on
2 radio, television or in the newspapers about this case.
3 Do not do any independent investigation or any
4 investigation on the internet.

5 Remember to keep an open mind about the case
6 until I instruct you to begin your deliberations. With
7 that being said, you are now excused. I would ask you
8 to be please back in your jury room at 9:30 in the
9 morning, promptly at 9:30. I hope you all have a
10 pleasant, pleasant evening. Thank you very much.

11 (The jury is excused for the day at 4:00 p.m.)

12 THE COURT: Anything further, Solicitor?

13 MR. MADSEN: No, sir.

14 THE COURT: From the defense?

15 MR. BAKER: No, sir Your Honor.

16 THE COURT: Are you squared away on your three
17 witnesses: Mr. Williams, Mr. Summers, and Mr. McQuarley?

18 MR. BAKER: We got one straight, Your Honor.
19 I am supposed to get with Mr. Hubbard.

20 THE COURT: I will see y'all at 9:30 in the
21 morning. Thank you very much.

22 (Whereupon the proceedings were concluded for
23 January 30, 2008.

24 (The following proceedings were reported on
25 January 31, 2008).

1 THE COURT: Anything from the State before we
2 bring in our jury?

3 MR. HUBBARD: No, sir, other than I will let
4 Your Honor know we had a detective trying to find
5 Mr. Williams who apparently yesterday was good to go for
6 the defense.

7 We went down this morning, have not been able
8 to find him. He says the house he went to, he said it
9 looks like what he would call a crack house. Nobody is
10 coming to the door.

11 He has been riding around trying to find this
12 person and has not found him yet. I just wanted to let
13 the Court know he has been making effort, and he is
14 prepared to come here and let Your Honor know what he
15 has done on the defense's behalf.

16 THE COURT: He is under subpoena?

17 MR. BAKER: He is, Your Honor. He has been
18 served.

19 THE COURT: Do you have a motion?

20 MR. BAKER: Do I have a motion at this point
21 based on the lack of being able to get Mr. Williams
22 here? I guess, Your Honor, he is somebody we certainly
23 would like to be able to call.

24 We are considering calling him in our case,
25 and if he is unable to get here, if we are unable to get

1 him here, we would ask for a mistrial -- I know it's too
2 late to continue the case -- based on that fact. He is
3 under subpoena.

4 THE COURT: I was thinking more along the
5 lines of a bench warrant.

6 MR. BAKER: And a bench warrant as well.

7 THE COURT: I was thinking that initially.
8 Have one of the bailiffs call his name. Maybe he will
9 surprise us and show up on his own. Have one of the
10 bailiffs call his name three times. If he doesn't
11 respond, then I will issue a bench warrant. I don't
12 know if that will assist the officers. Does he have a
13 cell phone number?

14 MR. BAKER: We do have, I think, some numbers
15 for him.

16 THE COURT: If you have a cell phone number,
17 there are other orders that can be gotten also that may
18 assist in locating Mr. Williams.

19 MR. BAKER: I do have a number. I think I
20 gave it to law enforcement.

21 THE COURT: If you will provide that to the
22 Solicitor's Office. If I issue a bench warrant, perhaps
23 we can do another order to see if we could pin that
24 telephone down. I will deny your motion for a mistrial
25 at this point. Like I say, I had in my mind a motion

1 for a bench warrant, but have the bailiff call his name.

2 MR. HUBBARD: Yes, sir. Your Honor, I gave
3 that name back to Brad. It was passed on to law
4 enforcement.

5 Mr. Baker, if you don't mind, write that name
6 down so the bailiffs know exactly what name to call.
7 Beyond that, Your Honor, we will be happy to do whatever
8 we need to do.

9 THE COURT: Anything further before we bring
10 in our jury, Solicitor?

11 MR. MADSEN: Can we just premark a few things
12 for I.D.?

13 THE COURT: Sure.

14 (State's Exhibits Number 98-103 are marked for
15 identification).

16 THE COURT: Yes, sir, Mr. Baker.

17 MR. BAKER: Your Honor, I would have a few
18 matters. This morning I was given the opportunity to
19 speak to Eric Tyrell. He is from Sprint and Nextel.
20 Your Honor, I would object.

21 In talking to Mr. Tyrell, it's my
22 understanding that he is not an engineer. He is
23 basically just a records custodian. They have
24 subpoenaed from him some information about phone records
25 related to a few phone numbers.

1 If they want to put those records in based on
2 his response to that subpoena and if Your Honor
3 determines those are records kept in the ordinary course
4 of business, then that's fine.

5 But I don't think Mr. Tyrell is qualified to
6 testify about cell phone towers, location of calls, why
7 a phone might hit off of one tower versus another. He
8 is not an engineer. He has a Bachelor's Degree in
9 Business from Kansas State University.

10 From what he tells me, he essentially responds
11 to subpoenas. I don't think he is qualified to testify
12 about cell phone towers or why a phone might hit off one
13 tower versus another and would ask that he not be
14 allowed to testify as such.

15 THE COURT: Solicitor.

16 MR. MADSEN: Your Honor, he is a records
17 custodian through Sprint. He travels the country. It
18 is his job to be a certified records custodian. Part of
19 those records that were provided to law enforcement
20 includes tower information.

21 In other words, Your Honor, such as with these
22 diagrams they can tell that a call is made from a
23 particular number to a certain number. That information
24 also includes the date, the time that the call starts,
25 and some other information, but it also includes the

1 tower information.

2 We are not going to put him up here like an
3 R.F. engineer, but we are going to put him up and have
4 the records -- have him indicate what tower a certain
5 call hits off of.

6 He is also familiar through his work of the
7 sectors. They do the sectors for Sprint, Nextel slash
8 Virgin Mobile, who is actually a reseller of theirs.
9 It's a little bit different as far as the sectors. He
10 is aware of the sectors or the corresponding sectors
11 based on his experience.

12 He then, Your Honor, we had provided a map
13 that he has looked at. We have actually taken State's
14 Exhibit Number 32 for I.D. purposes that Mr. Baker
15 objected to, have had it redone, and had the buffer
16 zones taken out, and so we will end up utilizing -- he
17 has reviewed this.

18 He is familiar with the tower locations as far
19 as the latitude and longitude. He has checked that. He
20 will simply be saying that at such and such a time, a
21 call was made from this number to this number or
22 vice-versa, that it was at this time, and it did ping
23 off of this sector at this tower.

24 He is not like Sam Alfakir. He does not have
25 a Picasso-type coverage area, and we do not anticipate

1 getting that type of information out of him. But
2 certainly from the records, he can indicate what tower a
3 call hits off of since he has reviewed it and is
4 familiar with where those towers are.

5 THE COURT: Mr. Baker.

6 MR. BAKER: Your Honor, if he's going to
7 testify about, I guess based on the records, what tower
8 a phone call hits off of, he's just limited to that. I
9 think if he starts getting into why it hits off that
10 tower, what coverage or what radius is covered by that
11 tower, I think he gets outside of basically his
12 knowledge and experience.

13 He indicated to me that he could testify in
14 general terms about radius and so forth, but he is not
15 an engineer. He can't really get into or he can testify
16 in general terms, but not specifics as Mr. Alfakir had.
17 He had exact maps of radiuses of the particular cell
18 phone towers and so forth. This gentleman doesn't have
19 that.

20 MR. MADSEN: I can make it easy. We are not
21 going to have him talk about -- I would agree. We are
22 not going to have him talk about radiuses. Like I say,
23 he doesn't have that Picasso-type map of the coverage
24 areas. That is not what we are going to get out.

25 We will simply get out, based on the records,

1 the towers that they hit off, the sector of that tower,
2 and where the towers are located. He can say that
3 sector A. is the north base, sector 2 is the southeast,
4 but we are not going to get out of him --

5 THE COURT: How can he say that? How can he
6 say north, south, and east? Is that in his records?

7 MR. MADSEN: Yes, sir. The sector location is
8 located in there and all their 1 sectors face -- it's
9 kind of weird. Cingular does their towers, 1, 2, and 3.
10 For some reason Sprint does theirs, 2, 3 and 4. Their 2
11 is a north facing direction. I believe the 2 is the
12 Southeast, and the 3 is the other way.

13 So if it hits off that tower, it is coming
14 from one of those general directions. That's all he can
15 do. He can't do coverage as far as terrain and that,
16 but he can certainly testify, because it's part of the
17 records and part of what he knows, what tower is being
18 hit off of and what sector.

19 THE COURT: He knows what number 2 means as
20 far as Sprint and what number 3 means as far as Sprint
21 and what number 4 means as far as Sprint based on the
22 records?

23 MR. MADSEN: Correct.

24 THE COURT: He cannot testify though, I
25 think -- and I think you agree with Mr. Baker on this --

1 he can't testify as to why it hits off a particular
2 tower, nor can he testify as to the radius of a
3 particular tower.

4 MR. MADSEN: Correct.

5 MR. BAKER: I guess part of what I'm saying,
6 Your Honor, is I foresee a question of: This is
7 [REDACTED] This is the tower. I mean, I just
8 don't think he is qualified to testify about that. If
9 they want to point where -- I don't think he can get
10 into that.

11 THE COURT: I don't think that's based on the
12 records nor any type of expertise. Anyone can go out
13 and say: This is where [REDACTED] is at, whether
14 they are records custodian or not, and he can certainly
15 say where the towers are located for Sprint if he has
16 knowledge of that, independent knowledge of that. I
17 don't think it takes an expert to say where the Sprint
18 towers are.

19 MR. BAKER: Right.

20 THE COURT: He can't say where a particular
21 person was when a particular call was made but as I
22 understand it -- and we are all assuming he is going to
23 be qualified as an custodian. I don't know if that is
24 correct, qualified as a custodian -- but he can testify
25 to Sprint records, and he can testify to his personal

1 knowledge of locations, of addresses in the county and
2 locations of cell towers in the county or wherever if he
3 knows that, he has knowledge of it.

4 MR. BAKER: I guess I don't want him saying:
5 That location is in the radius of that cell phone tower.

6 THE COURT: As I understand it -- and I agree
7 that's what I said earlier -- part of the objection is
8 he has no knowledge of the radius. As I understood from
9 the solicitor, he is not offering Mr. Tyrell for that
10 purpose, and he is not going to ask him any questions
11 about the radius coverage of Sprint cell towers. Is
12 that correct, Solicitor?

13 MR. MADSEN: Yes, sir.

14 MR. BAKER: Thank you, Your Honor.

15 THE COURT: If you have any other objections
16 obviously during the course of his testimony -- and he
17 has not been qualified as a custodian yet either for
18 that matter.

19 MR. BAKER: Right.

20 THE COURT: Did you have anything further,
21 Mr. Baker?

22 MR. BAKER: No, Your Honor.

23 MR. HUBBARD: Your Honor, we had the name
24 Reggie Williams called out. Mr. Homer Corley called the
25 name out three times. Law enforcement is alerted. Your

1 Honor, I don't know if you wanted to actually have a
2 bench warrant in hand for them to carry because we are
3 set to put a task force on it and go find him if we have
4 to.

5 THE COURT: Do you make a motion for a bench
6 warrant?

7 MR. BAKER: Yes, Your Honor.

8 THE COURT: May I see the served subpoena?
9 May I see a copy of the subpoena, a copy of the cover
10 letter and the subpoena.

11 (Pause).

12 MR. BAKER: We may have to revisit this. My
13 office may have it.

14 THE COURT: If you would get the
15 documentation. I just want to make it clear for the
16 record before I issue a bench warrant.

17 MR. BAKER: I think my office has spoken to
18 him and told him that we needed him here at 11. What he
19 had told us was he needed transportation. That's why we
20 sent folks for him, unless maybe he shows up at 11. I
21 don't know.

22 THE COURT: We will hold off until then. Make
23 sure you give me that documentation. I don't want to
24 issue a bench warrant until I get that documentation
25 after service of the subpoena.

1 MR. HUBBARD: Your Honor, just for the record,
2 if we find him in the interim, we will go ahead and
3 bring him up here. If at 11 we have not found him,
4 we'll let Your Honor know we still have not made contact
5 with him.

6 THE COURT: I want to make sure it's clear for
7 the record he was properly served with a subpoena before
8 I issue a bench warrant. Thank you, Solicitor. Thank
9 you, Mr. Baker.

10 These items we had premarked, has Mr. Baker
11 had an opportunity to view these, Solicitor?

12 MR. MADSEN: He has. He has received the
13 physical records through discovery. I believe he took a
14 look this morning as the two diagrams that the buffer
15 zones were removed and also the summary charts which we
16 prepared.

17 THE COURT: Anything further before we bring
18 our jury in from the State?

19 MR. MADSEN: No, Your Honor.

20 THE COURT: From the defense?

21 MR. BAKER: None, Your Honor.

22 THE COURT: Mr. Derrick, if you would bring
23 our jury, please.

24 (The jury returns to the courtroom at
25 9:49 a.m.)

1 THE COURT: Good morning, ladies and gentlemen
2 of the jury. It appears that our jury is back present
3 in the courtroom. All parties are present, along with
4 their attorneys. We are continuing with the trial of
5 the case by the presentation of testimony by the State.

6 With that being said, Solicitor, you may call
7 your next witness.

8 MR. MADSEN: Your Honor the State would call
9 Eric Tyrell.

10 THE COURT: Mr. Tyrell, if would come around,
11 please, and be sworn.

12 ERIC TYRELL, being
13 first duly sworn, testified as follows:

14 CLERK: Have a seat up there, please. Once
15 you have a seat, speak up loud and clear. State your
16 full name, spelling your last, please.

17 THE WITNESS: Eric Tyrell, T-Y-R-E-L-L.

18 DIRECT EXAMINATION

19 BY MR. MADSEN:

20 Q Eric, let me ask you this. Where did you come to
21 South Carolina from?

22 A I'm based out of Kansas City.

23 Q Were you somewhere earlier this week?

24 A Yes.

25 Q Where was that?

1 A Lawrenceville, Georgia.

2 Q What were you doing there?

3 A Another trial.

4 Q Where are you employed at?

5 A Sprint Nextel telecommunications.

6 Q Where are they based out of?

7 A We have offices -- our operational headquarters is
8 in Kansas City and then our headquarters is in
9 Reston, Virginia.

10 Q And how long have you been employed with Sprint
11 Nextel?

12 A Seven and a half years.

13 Q Has it always been Sprint Nextel?

14 A No.

15 Q When was that Nextel added?

16 A About two years ago, we merged with Nextel.

17 Q Working with Sprint Nextel, what is your job?

18 A My particular job is I'm supervisor in our trial
19 group. We fall under our legal compliance
20 department, which responds to legal demands for
21 customer phone records and information.

22 Q And working in that department, what ultimately are
23 your job duties?

24 A My job duty, the main responsibility, is appearing
25 at court to authenticate our records and explain

1 those records and act as custodian of records for
2 the company.

3 Q So you are a certified custodian of the records for
4 Sprint Nextel?

5 A Yes.

6 Q Let me ask you, besides just Sprint Nextel records,
7 are y'all a reseller?

8 A We provide --

9 Q Do you sell things to resellers?

10 A Yes.

11 Q Can you tell the jury a little bit -- I guess I
12 kind of butchered that a little bit -- can you tell
13 them what that means when y'all sell tower space or
14 time.

15 A We provide -- we have a wireless network. We have
16 our own customers that utilize that network, Sprint
17 customers. We also then sell space on our network
18 to other companies in order for them to resell
19 our -- resell our services. So basically a
20 reseller would be someone that utilizes the same
21 network that we use, that Sprint Nextel uses. They
22 just brand their own service and sell that as their
23 own service.

24 Q So they utilize your network for their calls?

25 A Correct.

1 Q And they are called resellers?

2 A Yes.

3 Q Would they also be called the virtual operators?

4 A I have heard that as well.

5 Q Let me ask you, as far as some of the people that
6 y'all sell some of your minutes, I guess, or your
7 tower space, band with whatever to, is Virgin one
8 of those companies?

9 A Virgin Mobile is yes.

10 Q Did you receive a subpoena for Sprint records back
11 actually on 9/15/05?

12 A Yes.

13 Q Was that for [REDACTED]?

14 A Let me check. I have that here. Actually, yes,
15 [REDACTED].

16 Q And whose account was that? Was that a Sprint or
17 someone else's?

18 A That was a Sprint account.

19 Q Did they request the subscriber information?

20 A Yes.

21 Q Who was the subscriber on that number?

22 A That particular subscriber, that number comes back
23 to a Sharon Wise.

24 Q Can you spell that last name?

25 A W-I-S-E.

1 Q And as far as the type of account, what type of
2 accounts -- does sprint have like a prepaid type of
3 account?

4 A We actually have like a post paid account we bill
5 each month after a subscriber usage. So they would
6 use the service for a month, and then we bill them
7 for what they used.

8 Q So that information that Sharon Wise has that
9 number, is that somehow verified with y'all, being
10 that it's a post paid account?

11 A Yes.

12 Q Did they request call records?

13 A Yes.

14 Q And were the dates on that 9/1/05 to 9/15/05?

15 A Yes.

16 Q And did y'all provide those records?

17 A Yes.

18 Q Let me show you what has been marked as State's
19 Exhibit Number 102 for I.D. purpose and let you
20 take a look at that. Tell me if you recognize
21 that.

22 A I do, yes.

23 Q Are those the records that y'all provided to law
24 enforcement?

25 A Yes.

1 Q Do you keep those records, reports or data
2 compilations in your normal course of business?

3 A Yes.

4 Q Are those logged or kept by your network at or near
5 the time that they happen?

6 A Yes.

7 Q Is that just a regular practice of y'all?

8 A Yes.

9 Q And are you a certified records custodian to
10 testify as to those records?

11 A Yes.

12 Q Through Sprint Nextel?

13 A Yes.

14 MR. MADSEN: At this point in time, Your
15 Honor, we would offer State's Exhibit Number 102 for
16 I.D. purposes into evidence.

17 MR. BAKER: No objection.

18 THE COURT: State's 102 is in evidence without
19 objection.

20 (State's Exhibit Number 102 is received into
21 evidence).

22 BY MR. MADSEN:

23 Q Let me show you what has been marked as State's
24 Exhibit Number 98 for I.D. purposes. Do you
25 recognize that?

1 A Yes.

2 Q Is that a summary of some of the records that are
3 coming out of State's Exhibit Number 102?

4 A Yes, they are.

5 Q Did you have an occasion to review this summary?

6 A I did, yes.

7 Q Did you find some errors on it?

8 A I did, yes.

9 Q Were those errors corrected?

10 A Yes.

11 MR. MADSEN: At this point in time, Your
12 Honor, we would offer State's Exhibit Number 98 into
13 evidence.

14 THE COURT: Mr. Baker?

15 MR. BAKER: Your Honor, I don't have any
16 objection.

17 THE COURT: State's 98 is in evidence without
18 objection.

19 (State's Exhibit Number 98 is received into
20 evidence).

21 BY MR. MADSEN:

22 Q Mr. Tyrell, are you also familiar with tower
23 locations?

24 A Yes.

25 Q Now, would the Sprint Nextel calls, will they

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1 utilize the same towers as, say, someone who is a
2 reseller or a virtual operator like Virgin?

3 A Yes, they use our network and they utilize the same
4 towers.

5 Q Let me show you what has been marked for
6 identification as State's Exhibit Number 100. Have
7 you had a chance to review this?

8 A Yes.

9 Q Have you had a chance to review the tower locations
10 on there?

11 A I think we went over a few of them, yes.

12 MR. MADSEN: At this point in time we would
13 offer State's Exhibit Number 100 for I.D. purpose into
14 evidence.

15 THE COURT: Mr. Baker?

16 (Attorneys confer).

17 BY MR. MADSEN:

18 Q Let me ask you this. You had the latitudes and
19 longitudes of the towers; is that correct?

20 A Yes.

21 Q And in looking at this, you were able to confirm
22 that the latitudes and longitudes correspond with
23 the information that your company has?

24 A Yes.

25 MR. MADSEN: At this point we would offer it

1 into evidence.

2 MR. BAKER: Your Honor, I may have a concern.

3 THE COURT: Do you have a matter of law?

4 MR. BAKER: I may, Your Honor.

5 THE COURT: All right. Thank you, Mr. Baker,
6 Mr. Foreman, and ladies and gentlemen, please step very
7 briefly to your jury room. Do not discuss the case
8 amongst yourselves during this brief recess.

9 (The jury retires to the jury room).

10 THE COURT: Mr. Baker.

11 MR. BAKER: Your Honor, my concern was I don't
12 know the proper foundation has been laid for Mr. Tyrell
13 to say why he knows where these cell phone towers are.

14 THE COURT: Ask him that, Solicitor.

15 MR. MADSEN: I thought I asked him that.

16 IN CAMERA EXAMINATION

17 BY MR. MADSEN:

18 Q Through your work in your business, you are aware
19 of the longitudes and latitudes of the tower? That
20 is part of the records that y'all keep?

21 A Right. We keep lists of the tower locations.

22 Q And you've had an occasion to take a look at that
23 map and verify those longitudes and latitudes?

24 A Yes.

25 MR. BAKER: I guess this is the question.

IN CAMERA EXAMINATION

BY MR. BAKER:

Q You don't haven't that information in your head.

What you are saying is you have gone back and actually checked those towers against some documentation or records that are kept?

A Right. We provided a list of cell site locations, the addresses and the latitude and longitude. So I don't know in my head. I mean, we have tens of thousands of cell sites. I don't know each location, so they are all documented on what we call cell site lists.

Q Was there some documents generated that says where the cell phone towers are?

A The cell site would have the address.

Q You have those records and you have reviewed them?

A I have the records, yes, that we provided, that cell site list that we provided that is in these records.

Q And you've verified those cell site lists against that diagram?

A We went through some of the -- I don't know that I went through every one of those, but we went through some of the ones, I believe last night, when we were going over the records.

1 Q But you did go over all of them?

2 A I didn't go through every one of those sites and
3 match up their latitude and longitude on this
4 sheet. Some of the calls that we talked about, we
5 matched up with the latitude and longitude on that
6 chart.

7 Q So if you don't know where all of them are exactly
8 and you are not confirming the accuracy of all of
9 them, couldn't that affect what tower a call might
10 hit off of?

11 A Can you say that again? I'm lost.

12 Q If you don't know that all those towers on that map
13 are accurate, I guess how can you then say which
14 cell phone tower a call would be most likely to hit
15 off of?

16 A Well, I didn't generate the map. Our company
17 provided the list, which is in this exhibit 102
18 that has the latitude and longitude and the
19 addresses of those towers, which then can be
20 referenced on the actual call detail record.

21 Q And you haven't checked all those sites on that?

22 A Not on that map, no, but I have the list that we
23 provided in this to law enforcement that has all
24 those addresses and latitude and longitude. That
25 is our actual business record.

1 MR. BAKER: Your Honor, I would just object to
2 it on the basis he hasn't confirmed the accuracy of
3 those towers that are listed on that exhibit.

4 THE COURT: Solicitor.

5 MR. MADSEN: Your Honor, if I can, I will have
6 him lay the foundation for each one of those now.

7 THE COURT: Can I see 102 a minute,
8 Mr. Tyrell? Did I pronounce that correctly?

9 THE WITNESS: Yes.

10 THE COURT: Where is the cell tower list?

11 THE WITNESS: It starts here (indicating).

12 THE COURT: And it keeps going?

13 THE WITNESS: Yes.

14 THE COURT: Solicitor, why on -- is it 100
15 that we are referring to right now?

16 MR. MADSEN: I believe so, yes, sir.

17 THE COURT: Why on 100 are there cell tower
18 locations that he has not confirmed the latitude and
19 longitude on?

20 MR. MADSEN: I think there is just a
21 misunderstanding between he and I. These were placed on
22 there. We talked about specific ones that we are going
23 to draw out in testimony.

24 There were a couple up here that were included
25 in those records, but quite honestly they were not

1 something that we were going to ask him about, those
2 towers, and I think is why he has not reviewed those.
3 So they will not be questions from me.

4 THE COURT: So they are not relevant. There
5 are cell towers on 100 that are not relevant?

6 MR. MADSEN: Correct.

7 THE COURT: The ones that you say are relevant
8 that he is going to refer back to are the records he has
9 confirmed?

10 MR. MADSEN: Correct, the ones I am going to
11 ask him about.

12 THE COURT: What Mr. Baker is saying is that
13 he hasn't confirmed all the information on there, which
14 is correct?

15 MR. MADSEN: Yes, sir.

16 THE COURT: And you are saying but he hasn't
17 done that because it's not relevant?

18 MR. MADSEN: I do not anticipate drawing out
19 any testimony on those.

20 THE COURT: Therein is the rub so to speak.
21 If it's not relevant, those shouldn't go before the
22 jury. Those that aren't relevant should not go before
23 the jury.

24 MR. MADSEN: I will then have him confirm the
25 other towers on here also. I believe there's only two

1 or three that are even on here.

2 THE COURT: Well, do I become boxed in by then
3 letting irrelevant material go to the jury? I'm not
4 trying to be hard to deal with, with you or Mr. Baker,
5 but that's what I don't quite understand.

6 I realize he can do that or I assume he can do
7 that. He has testified he could confirm it. If you
8 look at that list, there's cell towers on the list that
9 include cell towers from Georgia -- Pooleer, Savannah --
10 Lexington, West Columbia. There is my rub right now.

11 MR. HUBBARD: I do have one suggestion, Your
12 Honor. Perhaps if he confirms them for this purpose, to
13 explain that those are their towers, but those towers
14 were not hit. We went ahead and put their towers on
15 because he is their person and to give them a full
16 picture.

17 THE COURT: I think he does need to confirm
18 that the locations are all accurate on there by
19 longitude and latitude. My understanding of his
20 testimony is he could do that.

21 MR. MADSEN: Yes, sir.

22 THE COURT: Mr. Baker.

23 MR. BAKER: I think Your Honor hit the nail on
24 the head. That was one of the points I was trying to
25 make about whether those other towers that are on that

1 map are relevant, and I think that's an issue.

2 THE COURT: I think the issue was whether or
3 not they were accurate actually. If he can authenticate
4 that, that the Sprint Nextel towers are at those
5 locations that were marked, if he can do that by records
6 that are already in the record by 102, I think it's
7 admissible.

8 MR. BAKER: I guess one other question I have,
9 does that diagram include all the cell phone towers --

10 THE COURT: I don't know the answer to that.

11 MR. BAKER: -- that would be in that diagram?

12 MR. MADSEN: Now, we are arguing both sides.
13 We are saying that because we have some on here that
14 aren't relevant, this ought to be excluded. Now it's
15 flipped over saying it should have all Sprint Nextel on
16 here, and since it doesn't have that, it's not relevant.
17 Then we jump from there to why don't we have a map of
18 the country that has --

19 MR. BAKER: I'm just asking the question, Your
20 Honor. It certainly could be -- if we're talking about
21 cell phone towers and if there is one excluded, it might
22 be relevant, but I wouldn't know because I don't know
23 where their cell phone towers are.

24 MR. MADSEN: And we have already agreed we are
25 not talking to him about radiuses or anything, only

1 simply the ones they are hitting off of.

2 THE COURT: Are there cell phone towers that
3 are Sprint Nextel cell phone towers are not on 100
4 within this area?

5 MR. MADSEN: Not ones that these records hit
6 off of within the time frame that we are looking at.

7 THE COURT: That wasn't my question. My
8 question was: Are there cell phone towers, Sprint
9 Nextel cell towers, that are not represented on State's
10 100 in that area?

11 MR. MADSEN: Certainly, Your Honor. If you
12 look at 100, I'm sure there are some up here
13 (indicating) near the lake that are not on here because
14 they are not within the time frames we are looking at or
15 some over here (indicating), say, in Richland County.

16 THE COURT: Isn't in a sense Mr. Baker
17 arguing -- he is arguing two things. I agree with that.
18 He is arguing at one level they are not relevant. I
19 agree or perhaps I argued that. He argued they were not
20 accurate and now he argues that.

21 Then at the next level he argues: Well, if
22 they are included on 100 and those that are not hit off
23 of are on 100, then all of them that are Sprint Nextel
24 cell towers should be included on 100 under Rule 104 and
25 under the rule of completeness.

1 He may say: There's other cell towers out
2 there, and they may not be relevant. If they are not
3 relevant, take them off. If there's some on there that
4 didn't hit off of that become relevant, then all of them
5 should be placed on there. I think that's what he's
6 saying or at least that's what I'm hearing.

7 MR. BAKER: It is, Your Honor. In a sense how
8 can I -- if it's excluded and is not on there -- I mean,
9 if it's on there, it might be relevant to me or might be
10 significant to me. But if it's not on there and I don't
11 know where it is, then I have no way of knowing that
12 it's the complete picture.

13 THE COURT: Solicitor, I'm not trying to say
14 that you cherry picked in any malicious manner. I don't
15 mean it like that whatsoever. I think it all ought to
16 be included on there if there's some on there -- it's
17 like equal protection cell towers.

18 If there's some on there that haven't been hit
19 on, then all of them on there that haven't been hit on
20 ought to be on there or none of them ought to be on
21 there. That's just my point.

22 MR. HUBBARD: Your Honor, I guess our question
23 as I'm seeing it is if we are talking about obviously
24 this case, and there is a certain area where this case
25 transpires, than what is relevant -- beginning with

1 relevance -- what towers are in that area, not anywhere
2 else. That's our first point to say relevance.

3 Of those in the area, list all of them. Don't
4 hide any of them. It then becomes the testimony of the
5 witness, the expert, to say: Of those towers you do
6 have in that area, which are hit? Because those are
7 relevant.

8 Then you are not hiding anything, but you are
9 not also putting towers way up here (indicating) or at
10 the lake or anywhere else, which becomes confusing, and
11 we are trying to have a witness use this to explain his
12 testimony.

13 So if we put the ones that are in this area
14 and then he shows the ones that are relevant, I think
15 that would be our position why we have done it this way.
16 I believe his testimony would corroborate the board for
17 that purpose.

18 MR. MADSEN: Ultimately we have put these
19 towers on here because they corroborate and will help to
20 explain his testimony to the jury as far as the tower
21 hits ultimately.

22 THE COURT: So say I accept that. Mr. Baker
23 gets up there and Mr. Baker says: Mr. Tyrell, are there
24 cell towers that are within State's Exhibit Number 100
25 that aren't marked? I take it the answer is yes.

1 MR. MADSEN: Yes, sir.

2 THE COURT: State's 100 is in evidence. All
3 of 100 is in evidence at that point, from left, right,
4 top, bottom is in evidence. Then you say, let's mark
5 those. You've got your records here under 102. Let's
6 mark all of those on 100 that are by latitude and
7 longitude on 100. He can do that. Is he prohibited
8 from doing that?

9 MR. MADSEN: I think that's a cross
10 examination question.

11 THE COURT: If he wants to do that and have it
12 marked up in front of the jury, we can do that.

13 MR. MADSEN: Yes, sir.

14 THE COURT: All right.

15 MR. BAKER: Your Honor, I would just note my
16 objection for the fact --

17 THE COURT: And specifically tell me your
18 objection again, Mr. Baker.

19 MR. BAKER: It's twofold, Your Honor. I think
20 Mr. Tyrell has testified that there are towers on this
21 exhibit that is marked State's Exhibit 100 that are
22 actually marked that he has not confirmed the latitude
23 and longitude of, if that is accurate.

24 As I understand, he also has indicated, and
25 the State agrees, that there are cell towers that would

1 be within State's Exhibit 100 which are not included.
2 It is not all inclusive.

3 It is an exhibit of a picture of a
4 geographical area and the cell phone towers that the
5 State thinks are relevant, the ones on there. They have
6 excluded all the others. I think it's incomplete and
7 would be improper to put that before the jury.

8 THE COURT: I'm going to allow it based on the
9 foundation that has been laid; however, you can ask him
10 about that. The term of art -- irrelevant, I think, is
11 a term of art. It's a legal term, the way we as
12 attorneys are using it.

13 He could testify, of course, that: Based on
14 my records, 102 -- which I need to hand him back if he
15 is going to refer to them -- phone calls, whatever date
16 and time, hit off of whatever tower number at whatever
17 location, he can testify to that. He can't testify that
18 it's relevant.

19 He doesn't know anything about the case
20 independent of the records. He can just testify to the
21 records itself. There's plenty of records there.
22 There's cell towers all over. Anything further before
23 we bring in our jury?

24 MR. MADSEN: Before we bring them in, can we
25 let him have a chance to take a look at the ones we have

1 on there instead of him having to spend two or three or
2 five minutes once the jury comes in to do that?

3 THE COURT: To confirm that those are correct?

4 MR. MADSEN: Yes, sir. We had talked about
5 laying that foundation just to let him have a chance.

6 THE COURT: Do you have any objection to that,
7 Mr. Baker?

8 MR. BAKER: No, Your Honor.

9 THE COURT: Yes, sir. You may step down and
10 do that. You may not discuss your testimony with
11 anyone, but you can look at the diagram and see if all
12 those that are indicated on 100 are correct and accurate
13 locations of Sprint Nextel cell towers.

14 (Pause).

15 THE COURT: Did you want to do anything in
16 camera, Solicitor, before we bring our jury back in?

17 **IN CAMERA EXAMINATION**

18 BY MR. MADSEN:

19 Q Mr. Tyrell, were you able to confirm those?

20 A Yes, sir.

21 Q Were they correct?

22 A The latitude and longitude matches up on this map
23 with our cell site records that we provided the
24 latitude and longitude for those cell sites.

25 THE COURT: Anything before we bring in our

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1 jury, additionally, Solicitor?

2 MR. MADSEN: No, sir.

3 THE COURT: Mr. Baker?

4 MR. BAKER: Nothing, Your Honor.

5 THE COURT: Mr. Derrick.

6 (The jury returns to the courtroom).

7 THE COURT: It appears our jury is back
8 present in the courtroom. Thank you very much, ladies
9 and gentlemen of the jury, for your continued patience
10 and your complete and undivided attention throughout the
11 trial of this case.

12 Solicitor, you may proceed.

13 MR. MADSEN: Thank you, Your Honor.

14 **DIRECT EXAMINATION**

15 BY MR. MADSEN:

16 Q Again, let me show you what has been marked as
17 State's Exhibit Number 100 for I.D. purposes. Have
18 you had a chance to take a look at those longitudes
19 and latitudes of those towers indicated on there?

20 A Yes.

21 Q Were you able to confirm those through your
22 records?

23 A Yes.

24 MR. MADSEN: At this point we move State's
25 Exhibit 100 into evidence.

1 THE COURT: Mr. Baker?

2 MR. BAKER: Subject to my previous objection.

3 THE COURT: State's 100 is in evidence subject
4 to previous objection.

5 (State's Exhibit Number 100 is received into
6 evidence).

7 BY MR. MADSEN:

8 Q Now, Mr. Tyrell, looking at your tower
9 information -- well, let's go through this summary
10 real quick. Underneath where it says, "from," what
11 is that number?

12 A This would be who initiated the call.

13 Q Under the "to," what is that number or what is
14 that?

15 A That would be who received the call.

16 Q And then the date?

17 A Date, this would be the date of the call.

18 Q And the time that is indicated on here?

19 A The time that the call started on the network.

20 Q And then listed under here, we have got, I guess,
21 four numbers on here. Is there a switch number on
22 here or anything?

23 A No.

24 Q And then, I believe, Cingular, do y'all have
25 sectors?

1 A Yes.

2 Q How are your sectors numbered?

3 A Our sectors for this particular market are labeled
4 2, 3, and 4, which is that first digit in that
5 numbers sequence.

6 Q So the first digit here (indicating) is your sector
7 number?

8 A Correct.

9 Q What then are these last three digits?

10 A The last three digits are the actual tower number.

11 Q So your sector and tower numbers 2, 3, 4, that's
12 different than, say, a Cingular that puts their's
13 at the end as 1, 2, 3; is that correct?

14 A Yes. I don't know how Cingular does it. Ours is
15 the first digit on that four digit string is the
16 sector or face of the tower.

17 Q And you don't have your switch number on here?

18 A It's not on this summary sheet. It is on the
19 actual call detail records. It gives a switch
20 number.

21 Q And what is the switch number on there?

22 A This switch is 631 is the switch number for this
23 particular market.

24 Q As far as your sectors, 2,3, and 4, do they
25 correspond with particular locations as far as

1 where the calls come as far as off of a tower?

2 A Yes, it gives us the direction of the tower that
3 was being utilized for that call.

4 Q Where would sector, say -- let's just start with
5 the one that is down there. It says sector. If
6 there is an indication of sector 2, where is that
7 direction?

8 A Two represents the north face of the tower.

9 Q What about 3 then?

10 A Three would be the southeast face.

11 Q And what would 4 be?

12 A Four would be southwest.

13 Q And, say, if we just pick one out at random where
14 it says 2126 here, what sector is that hitting off
15 of?

16 A That would be the north sector of that tower.

17 Q So that would be the north sector of, say, tower
18 126?

19 A Correct.

20 Q Now, with y'all providing, I guess, tower space --
21 am I correct in that? Is it tower space, band
22 width? How should I say that?

23 A For resellers?

24 Q Yes.

25 A Essentially they are buying space on our network.

1 Q I will call it tower space. Is that okay?

2 A Sure.

3 Q When they get tower space on someone such as
4 Virgin, do y'all keep their subscriber information?

5 A No.

6 Q Where would you get that?

7 A The reseller, like Virgin Mobile, they maintain
8 their own subscriber information.

9 Q Do you know who Shelley Ulyak is?

10 A I have heard her name, yes.

11 Q Who is she?

12 A She is the representative from Virgin Mobile.

13 Q As far as the call records, who has those on
14 someone, say, like Virgin, who is one of your
15 y'all's resellers?

16 A We provide, Sprint Nextel, provides the call
17 details records for their particular customers on
18 our network.

19 Q And did you receive a search warrant requesting
20 call records on a Virgin Mobile number on
21 September 14, 2005?

22 A Yes.

23 Q Can you tell me what that number was?

24 A That particular number is [REDACTED].

25 Q And y'all don't keep the subscriber information on

- 1 that, correct?
- 2 A Correct.
- 3 Q Just the call records?
- 4 A Yes.
- 5 Q And was the requested call data from July 30, '05
- 6 to September 14 of '05?
- 7 A Yes.
- 8 Q Let me show you what has been marked as State's
- 9 Exhibit Number 103 for I.D. purposes and ask if you
- 10 recognize that.
- 11 A I do, yes.
- 12 Q Are those the records y'all provided law
- 13 enforcement?
- 14 A Yes.
- 15 Q Do y'all keep those records, reports or data
- 16 compilations in your normal course of business?
- 17 A Yes.
- 18 Q Are those reported at or near the time that those
- 19 events happened?
- 20 A Yes.
- 21 Q Is that a regular practice?
- 22 A Yes.
- 23 Q Are you a certified custodian for those records?
- 24 A Yes.
- 25 MR. MADSEN: At this point in time, we offer

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1 State's Exhibit 103 for I.D. purposes into evidence.

2 MR. BAKER: No objection, Your Honor.

3 THE COURT: State's 103 is in evidence without
4 objection.

5 (State's Exhibit Number 103 is received into
6 evidence).

7 BY MR. MADSEN:

8 Q For those Virgin call records, is there going to be
9 any difference as far as your format as compared
10 to, say, Sprint as far as the sectors or the
11 towers?

12 A No, it's formatted the exact same way.

13 Q Do they, in fact, use the same equipment
14 ultimately?

15 A Yes.

16 Q Let me show you what has been marked as State's
17 Exhibit Number 99 for I.D. purposes. Have you had
18 a chance to take a look at this?

19 A Yes, I did yes.

20 Q Is this a summary of some of those records that are
21 included in State's Exhibit 103?

22 A Yes.

23 Q Does it fairly and accurately represent this
24 information off of there?

25 A Yes.

1 MR. MADSEN: At this point in time, we would
2 offer State's Exhibit Number 99 into evidence?

3 MR. BAKER: Without objection.

4 THE COURT: State's 99 in evidence without
5 objection.

6 (State's Exhibit Number 99 is received into
7 evidence).

8 BY MR. MADSEN:

9 Q Mr. Tyrell, remind me with those Sprint records, is
10 there a -- on the Sprint records, you have access
11 to the subscriber information?

12 A Correct.

13 Q In fact, you provided that?

14 A Yes.

15 Q And who is the subscriber?

16 A The subscriber to the Sprint account is a Sharon
17 Wise.

18 Q Place her name there on the corner. Then as far as
19 the Virgin records, you don't have access to that
20 information?

21 A To the subscriber information, no.

22 Q Who would I get that from?

23 A Virgin Mobile would provide subscriber information
24 for their subscribers.

25 Q And what was the number on the call record that you

1 provided on the Virgin number?

2 A That telephone number is [REDACTED].

3 Q Take a look at State's Exhibit Number 92 for me.

4 A Okay.

5 Q What is that?

6 A This looks like a response from Virgin Mobile about
7 their particular subscriber.

8 Q And is there a number associated with that?

9 A Yes.

10 Q What is that number?

11 A That [REDACTED].

12 Q And are those the same call records that are in
13 State's Exhibit Number 103?

14 A That's the same number that pertains to the call
15 records in 103, yes.

16 Q And who is the subscriber?

17 A This subscriber is a Darrell Burgess.

18 Q I will place this on here then. Taking a look at
19 these Sprint calls off of your network from, say,
20 9/5 at 11:00 a.m. all the way down through 9/6
21 through 9/7, 9/8, 9/9, 9/11, 9/12, there are other
22 calls not included in those records you have, on
23 the Sprint records, that are not contained on these
24 summaries; correct?

25 A Correct.

- 1 Q Are these calls between the same two numbers?
- 2 A Yes.
- 3 Q And who is the [REDACTED], who is that subscriber?
- 4 A That's Sharon Wise.
- 5 Q Then the one either calling to or calling from the
- 6 [REDACTED]?
- 7 A That would be the Virgin Mobile subscriber, Darrell
- 8 Burgess.
- 9 Q Can you go through -- I might need you to step down
- 10 for me. If you would step down for me.
- 11 A (Witness leaves the witness stand).
- 12 Q Can you show me on here, on the records that you
- 13 have here, if we go to Darrell Burgess, the phone
- 14 registered to Darrell Burgess, at 2:15:22, and I
- 15 guess are these times -- are these times a.m. and
- 16 p.m. or how are these times done?
- 17 A The times are all on a 24-hour clock with military
- 18 time. So it would be -- which call are you looking
- 19 at 9/5, that would be 2:15:22 a.m.
- 20 Q Y'all are from Kansas City. Is that central or
- 21 mountain time?
- 22 A Kansas City is in the central time zone.
- 23 Q Are these those times? Are these central or
- 24 mountain?
- 25 A No, these records reflect the time to the market

1 that the handset was in. So it would be based off
2 of where the cell site is, the cell tower.

3 Q So show me, if we look on here at 2:15:22, when
4 we've got two numbers on here, what is the first
5 number? I mean, the first group of numbers.

6 A The first group of numbers, of four digit numbers,
7 is the first cell site that was utilized. So when
8 they connected to the network, this would tell us
9 the cell site that they hit off when they
10 connected.

11 Q And on State's Exhibit 99, when we look at this
12 second column, what is that?

13 A The second column reflects the tower that was
14 utilized when it terminated from the network or
15 disconnected. So we show when they established on
16 the network what tower and then when they
17 terminated what tower.

18 Q So when we look at something like that, can you
19 start a call on, say, one tower and if you are
20 moving -- can you start a call on one tower and end
21 on another tower?

22 A Yes.

23 Q So when we look at 2:15:22 a.m., what tower do we
24 start on?

25 A The tower number is 123 and the face is the 4. So

- 1 that would be the southwest side of cell site 123.
- 2 Q Can you show me on State's Exhibit Number 100 where
- 3 123 is at 2:15?
- 4 A This right here (indicating) is cell site 123.
- 5 Q How about at 2:52:53? We start on 3123 and end on
- 6 what tower?
- 7 A That ended on tower 106, the Southeast face of that
- 8 tower.
- 9 Q So can you show me on here. It starts on 123.
- 10 Where is that again?
- 11 A One hundred twenty-three is here.
- 12 Q And where is 106?
- 13 A This tower here (indicating) is 106.
- 14 Q How about at 3:14:20 right here (indicating), what
- 15 tower do we start on?
- 16 A Again, tower 106, the Southeast face of tower 106.
- 17 Q And where do we end?
- 18 A The same sector, same face of the tower, tower 106.
- 19 So it started and ended at the same face, same
- 20 tower.
- 21 Q Next at 3:23:28, what tower do we start on?
- 22 A The tower is 221. That, again, is the southeast
- 23 face, the third face, southeast face of 221.
- 24 Q Can you show me on the map where that is.
- 25 A This (indicating) is cell site 221, cell tower 221.

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- 1 Q What sector is that hitting off of?
- 2 A The southeast face or sector of that tower.
- 3 Q There is another call in at 3:23:28. Where is that
- 4 hitting off of?
- 5 A That's tower 221, southeast face.
- 6 Q Same as the call before?
- 7 A At 3:23, the call before was cell site 106.
- 8 Q I am looking here (indicating), 3:23 starts where
- 9 and ends where?
- 10 A They start and end on the same face, same tower
- 11 221.
- 12 Q And how about this last one?
- 13 A At 3:38:14 it's the same tower, 221 face, southeast
- 14 face.
- 15 Q So each one of those calls initiate from the same
- 16 tower?
- 17 A Correct.
- 18 Q Which is what tower?
- 19 A Two-twenty-one is this tower here (indicating).
- 20 Q And what sector there?
- 21 A The southeast sector of that tower.
- 22 Q The next call is 3:44:26. What tower are we
- 23 hitting off of there? I just need the tower number
- 24 instead of sector.
- 25 A The tower is 106.

1 Q So we are hitting off of this tower (indicating)?
2 A Correct.
3 Q How about at 4:10:27?
4 A The tower is 124.
5 Q And where is that located?
6 A One-twenty-four is this tower up here (indicating).
7 Q At 4:19:21 what tower were we hitting off of?
8 A One-twenty-two.
9 Q Can you show me where 122 is on here?
10 A This is tower 122 (indicating).
11 Q How about at 4:23 in the morning?
12 A That would be tower 225.
13 Q Show me tower 225.
14 A This (indicating) is tower 225.
15 Q How about less than a minute later on 4:23:57?
16 A This would be tower 162 they started on.
17 Q Did they end on that same tower?
18 A No.
19 Q Where is 162 on here?
20 A One-sixty-two is this right here (indicating).
21 Q And what tower do they end on?
22 A They end on tower 161.
23 Q I guess we've got a gap in time from 4:23:57 to
24 5:48:14. At that time what tower are they hitting
25 off?

1 A One-sixty.

2 Q At 5:48:14?

3 A Tower 160 they start on.

4 Q Which one do they end on?

5 A One-twenty-three.

6 Q And then how about this last one down here,

7 5:49:37?

8 A They are hitting off of tower 123.

9 Q Show me where that is.

10 A One-twenty-three is located right here

11 (indicating).

12 Q Back down that way.

13 A Yes.

14 Q Go ahead and have a seat, please.

15 A (Witness resumes the witness stand).

16 Q If you could answer any questions Mr. Baker has
17 please.

18 THE COURT: Thank you, Solicitor. Mr. Baker.

19 CROSS EXAMINATION

20 BY MR. BAKER:

21 Q First of all, Mr. Tyrell, there are in State's
22 Exhibit 100, which is a map, there are actually
23 cell phone towers within that map that are not
24 noted and not included within this exhibit; is that
25 correct?

- 1 A Say that again.
- 2 Q On this map there are certain cell phone towers
3 noted and highlighted. Every cell phone tower on
4 that map is actually not noted and is not
5 recognized by that exhibit; is that correct?
- 6 A I guess I'm not understanding.
- 7 Q There are cell phones within this map that are not
8 represented on this map; is that correct?
- 9 A It's possible. I don't know what -- we provided
10 the list of cell towers for this market. So I
11 don't know if all the ones we provided are showing
12 up on that map.
- 13 Q So there may be cell towers that exist that are not
14 highlighted with this green --
- 15 A Correct.
- 16 Q -- and pictured on this map?
- 17 A That's a possibility.
- 18 Q And there are a number of factors which can
19 determine which cell phone tower a phone hits off
20 of; is that correct?
- 21 A Correct.
- 22 Q It can be terrain, weather; is that correct?
- 23 A Those are possibilities.
- 24 Q And traffic, if the tower is getting a lot of
25 traffic?

1 A Correct.

2 Q So a cell phone is not always going to hit off of
3 the closest tower; is that correct?

4 A Correct.

5 Q And there are times when cell phone towers actually
6 are turned off for maintenance; is that correct?

7 A Yes.

8 Q And that's normally between the hours of 2:00 a.m.
9 and 4:00 a.m.; is that correct?

10 A It's usually in the offpeak hours, so the early
11 morning, late night hours.

12 Q Somewhere between two and four. Obviously if cell
13 phone towers are off and not operating, that's
14 going to affect which cell phone a tower hits off
15 of; is that correct?

16 A Correct.

17 Q And these -- let me ask you to step down just one
18 second, Mr. Tyrell.

19 A (Witness leaves the witness stand).

20 Q The cell phone towers that are represented on
21 State's Exhibit 100, they are all on this exhibit
22 at least, put in a perfect, I guess, triangle where
23 the bottom of the tower or at least the bottom of
24 triangle is always pointing exactly south. In
25 putting up these towers, they are not always

1 perfectly centered; is that correct?

2 A When a tower is set up, it's not always true north.
3 Real estate issues and whatever, dictates where the
4 site is going to be. It might not be true north,
5 but the idea is that it's all going to face north.
6 It may just not be true north when it's actually
7 set up.

8 Q That would affect, I guess, some of the numbers you
9 get on these records that determine which side of
10 the tower a cell phone may be hitting off of?

11 A The records show we know that that particular face
12 of that tower was being utilized despite any other
13 conditions. That face of that tower, the call is
14 being routed through there.

15 Q The towers are not always perfectly centered like
16 they are on the map; is that correct?

17 A Correct. They might not be true north when they
18 are set up, which looks like most of these
19 triangles on the map are all, you know, due north.

20 Q The actual towers are not always perfectly centered
21 like they are on the map?

22 A Correct.

23 Q And that fact would have some effect or could have
24 some effect on the actual numbers that show-up on
25 these records; is that correct?

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1 A Well, that could -- like I said, the numbers on the
2 records are showing us the actual face of the tower
3 that is being hit. So it's that face of the tower,
4 whatever, however --

5 Q It could be turned?

6 A -- degree --

7 Q Some slight degree.

8 THE COURT: Let him finish, please. The court
9 reporter can't take down --

10 MR. BAKER: I'm sorry.

11 THE COURT: -- both folks at the same time.
12 You may finish, Mr. Tyrell.

13 A Whatever degree it might be off of true north, it's
14 still being routed through that north face of the
15 tower to whatever degree it's off of a true north.

16 Q Right. But it might be off? It might not be true
17 north?

18 A It's a possibility.

19 Q You certainly have no information, Mr. Tyrell,
20 about who is actually using the cell phone that's
21 reflected in these records?

22 A No, I don't know who was utilizing the phone.

23 Q You can have a seat.

24 A (Witness resumes the witness stand).

25 Q And you are not familiar and don't know anything

1 about quality control measures that are in place
2 which ensure the accuracy of those records, do you?

3 A No, other than our billing is based off of these
4 records. I don't know what those particular
5 groups --

6 Q You don't know what protocols are in place to
7 ensure those records are accurate; is that correct?

8 A I don't know of anything, other than it's based off
9 our billing. Our billing is based off all of
10 these.

11 MR. BAKER: That's all.

12 THE COURT: Thank you, Mr. Baker. Solicitor,
13 do you have anything in redirect?

14 MR. MADSEN: No, Your Honor.

15 THE COURT: Thank you. Thank you very much,
16 Mr. Tyrell. You may step down. May this witness be
17 excused, Solicitor?

18 MR. MADSEN: Yes, Your Honor.

19 THE COURT: Mr. Baker?

20 MR. BAKER: Yes, Your Honor.

21 THE COURT: Thank you, sir. You may step down
22 and you may be excused.

23 MR. MADSEN: The State calls Luke Fossum.

24 LUKE NATHANIEL FOSSUM, being
25 first duly sworn, testified as follows:

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1 CLERK: State your full name, spelling your
2 last.

3 THE WITNESS: Luke Nathaniel Fossum,
4 F-O-S-S-U-M.

5 DIRECT EXAMINATION

6 BY MR. MADSEN:

7 Q Detective Fossum, where are you employed?

8 A With the Lexington County Sheriff's Department.

9 Q And how long have you been employed there?

10 A Almost ten years now.

11 Q When you started, what was your job title and what
12 were your job duties?

13 A I started as a road deputy answering calls in the
14 yellow cars.

15 Q After that did you move to any other job duties?

16 A After about two, three years, I was promoted to
17 major crimes investigation where I worked as a
18 major crimes investigator for approximately three
19 years. From there I was promoted to supervisor of
20 the criminal intelligence unit, which is where I
21 have been for about the last three years.

22 Q What is your rank now?

23 A I'm a sergeant.

24 Q And could you tell us as far as -- you said you
25 work now in the intelligence division?

1 A That's correct.

2 Q What do y'all do in the intelligence division?

3 A The intelligence unit essentially analyzes
4 information provided from various sources to assist
5 investigations. Personally about 70 percent of
6 what I do involves the analysis of
7 telecommunication records.

8 Q So let me ask you, can you give me some examples
9 of, say, what the intel does at, say, the request
10 of some type of law enforcement agency?

11 A There may be some sort of crime that takes place
12 and they need to find a person, find out
13 information about a person, may need to essentially
14 locate a person. I assist with that with the
15 analysis of the telecommunication's records, as
16 well as some other ways, but primarily that.

17 I probably -- I have helped with over a
18 hundred different cases involving the analysis of
19 telecommunication's records, with our agencies,
20 other local, state, and federal agencies in the
21 last three years.

22 Q As part of your duties with the Sheriff's
23 Department, do you stay up with say cell tower
24 locations?

25 A Absolutely. It's essential. I am familiar with

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1 all the major carriers and routinely get cell tower
2 location information from them, along with records
3 to go along with those locations.

4 Q Are you able to do anything with that information
5 that you receive from those cell phone companies in
6 reference to tower information, along with mapping?

7 A Absolutely. One of the big things we do in intel
8 is mapping, mapping different locations. In taking
9 the cell tower provided by the cell phone companies
10 in the form of latitude and longitude, I am able to
11 import that into a high-patterns mapping software
12 that automatically plots those locations by
13 latitude and longitude. Of course, each cell tower
14 has a corresponding site I.D. that goes along with
15 that.

16 Q Do you recognize State's Exhibit Number 100?

17 A Yes, I do.

18 Q Who created that?

19 A I did.

20 Q The items on there, such as the towers and the
21 locations, who placed those on there?

22 A I did with the use of mapping software.

23 Q As far as your mapping software, what counties do
24 you have access to as far as putting maps together?

25 A This particular software I have road data from the

1 county, from Lexington County G.I.S. department, as
2 well as some road data from Columbia/Richland
3 County's G.S.I. department. So that's what you see
4 on that is essentially roads in Richland County up
5 here (indicating) and in Lexington County down in
6 kind of off-yellowish color area.

7 Q So that off-yellowish color is what county?

8 A That would be Lexington County.

9 Q And how about the white or grayish?

10 A Most of that is Richland County/Columbia area.

11 Q Let me show you what has been marked as State's
12 Exhibit Number 97 for I.D. purposes. Do you
13 recognize that?

14 A I do. That's a map that I created.

15 Q Let me show you what has been marked State's
16 Exhibit Number 101 for I.D. purposes. Do you
17 recognize that?

18 A I created that one as well.

19 Q Did you take the information off of State's Exhibit
20 Number 100 for I.D. purposes from any other maps?

21 A The information on this exhibit (indicating) came
22 from the information on that exhibit (indicating),
23 if that's what you are asking.

24 Q How about the cell tower locations or the addresses
25 on there?

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1 A That was provided by Cingular A.T.& T., just the
2 same as these were provided by Sprint.

3 Q And you stay up with those in the normal course of
4 your business?

5 A Yes.

6 Q Or at your job?

7 A Yes.

8 Q Why is that important to y'all?

9 A Well, we have successfully used it in many cases in
10 locating fugitives. We have used it to corroborate
11 statements in other investigations as to general
12 travel patterns that an individual using a phone
13 might be taking.

14 MR. MADSEN: At this point in time, Your
15 Honor, we would move State's 101 into evidence.

16 THE COURT: Mr. Baker?

17 MR. BAKER: Your Honor, I may have the same
18 issues with this as I did with the previous exhibit.

19 THE COURT: Would they be the same?

20 MR. BAKER: They would be, whether that is
21 sufficient.

22 THE COURT: Based on Rule 401 and 104 and the
23 rule of completeness?

24 MR. BAKER: Correct, Your Honor.

25 THE COURT: I will allow 101 into evidence

1 subject to Mr. Baker's objections.

2 (State's Exhibit Number 101 is received into
3 evidence).

4 BY MR. MADSEN:

5 Q Now, State's Exhibit 100 you have got cell phone
6 sites or cell phone towers on here?

7 A Correct.

8 Q And what company is that for?

9 A That would be Sprint's network and also a Virgin
10 phone which uses Sprint's network.

11 Q And on State's Exhibit Number 101, those cell phone
12 towers on here, whose towers are those?

13 A At the time I believe it was Cingular, who is now
14 A.T.& T. They just essentially absorbed those
15 location.

16 Q Are you familiar through your investigation and
17 have you had a chance to review cell phone records
18 in regards to this case?

19 A Yes.

20 Q Have you had a chance to look at State's Exhibits
21 Number 94, Number 98, and Number 99?

22 A Yes, sir.

23 Q Are you aware through State's Exhibit Number 98 who
24 that cell phone was registered to?

25 A It was registered to Sharon Wise, but from our

1 investigation and admissions, it was being used by
2 Michael Wise.

3 Q How about the Virgin Mobile phone, the [REDACTED]?

4 A Again, through our investigation and in that case
5 subscriber records, Darrell Burgess, the
6 Defendant's phone.

7 Q How about the Cingular phone, the [REDACTED]?

8 A That is a prepaid phone that was being used by
9 Michael Wise through his own admission in our
10 investigation.

11 Q Now, Virgin Mobile and, say, Cingular, they are not
12 utilizing the same towers?

13 A No, they actually use completely different
14 technology. So they are not using the same towers,
15 no.

16 Q What's the difference in their technology, Sprint
17 as compared to Cingular?

18 A Well Sprint uses C.D.M.A. technology, which stands
19 for Co-Division Multiple Access. Cingular uses
20 G.S.M., which is a global system for mobiling. I
21 guess an analogy might be the difference between a
22 Mack and a P.C., just slightly different ways of
23 doing the same thing.

24 Q Sergeant Fossum?

25 A Yes, sir.

1 Q Would you step down for me.

2 A (Witness leaves the witness stand).

3 Q Can you show me then -- I will put these summaries
4 underneath the jury --

5 THE COURT: We can't quite hear you,
6 Solicitor, if you will keep your voice.

7 MR. MADSEN: Yes, sir.

8 BY MR. MADSEN:

9 Q I will put these down here so you can refer to
10 these.

11 A Okay.

12 Q And you can utilize these maps. On the [REDACTED],
13 the Michael Wise phone?

14 A Right.

15 Q There is a call at 3:23:41 a.m.?

16 A Correct.

17 Q What tower is that hitting off of?

18 A That's utilizing Cingular tower 429, which is right
19 down here (indicating), and it's actually the north
20 facing tower.

21 Q Four-twenty-nine and the north facing tower,
22 correct?

23 A That's correct.

24 Q As far as Cingular goes, is that tower the closest
25 one to the murder location?

LUKE FOSSUM -- DIRECT -- MR. MADSEN

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- 1 A Yes, it is.
- 2 Q And that [REDACTED], what phone is that calling?
- 3 A That's Michael Wise calling Darrell Burgess.
- 4 Q And Michael Wise is calling and hitting off --
- 5 well, that phone is hitting off of this tower
- 6 (indicating)?
- 7 A Michael Wise is hitting off the north face of this
- 8 tower, that's correct.
- 9 Q Where is that call coming as far as the tower
- 10 location on here that Darrell Burgess' phone is
- 11 receiving that call?
- 12 A Darrell Burgess' phone is tower 221, which is right
- 13 down here (indicating), and in this case it's
- 14 actually the southeast facing sector, down this way
- 15 (indicating).
- 16 Q There is another call right after that, about 12
- 17 minutes later from the Michael Wise phone at
- 18 3:35:19 a.m., what tower is that hitting off of?
- 19 A Again, the same tower, the same north facing
- 20 sector.
- 21 Q That call is, again, I guess to the Darrell Burgess
- 22 phone?
- 23 A Correct.
- 24 Q What tower is that hitting off of?
- 25 A It would be the same Sprint tower, the southeast

1 sector.

2 Q And there is, I guess, a third call on here at
3 3:37:31 from the Michael Wise phone. What tower is
4 that hitting off of, the Michael Wise one?

5 A Michael Wise, again, this same tower 429, the north
6 facing tower.

7 Q Now, I notice on the records that there is no
8 corresponding record on there. Can you explain why
9 that would be?

10 A In my experience, and we have all had those
11 situations with our cell phone, where one minute
12 you've got a signal and the next minute you don't.
13 Michael Wise dials out, connects to his network
14 and, for whatever reason it does not complete
15 through the Sprint network. So it simply doesn't
16 register on Darrell Burgess.

17 Q So Michael Wise is connecting to his network --

18 A He is connecting to his network, but the network
19 for the Sprint phone at that precise moment for
20 whatever reason, it didn't go through.

21 Q And then at 3:38:25 a.m. there is again another
22 call from the Michael Wise phone. And who is that
23 call again to?

24 A Darrell Burgess.

25 Q And what cell phone tower is the Michael Wise phone

1 hitting off?

2 A The same tower, same north facing sector.

3 Q So all four of those calls between 3:23 a.m. and
4 3:38 are all hitting off the same tower, the same
5 sector?

6 A Correct.

7 Q That's what sector?

8 A The north facing sector, sector 1.

9 Q And then on that final call, what sector is the
10 Darrell Burgess phone or what tower and sector is
11 the Darrell Burgess phone?

12 A It's on site 221, the southeast facing sector,
13 which with Sprint phones it's labeled with a Lucent
14 technology it's 3.

15 Q How about then -- can you show me then next after
16 those calls, that last call from the Michael Wise
17 phone to the Darrell Burgess phone, there is a 344.
18 Can you kind of run me from -- utilizing State's
19 Exhibit Number 99 -- can you kind of run me through
20 the towers that the Darrell Burgess phone is then
21 hitting off of from the -- start with 3:38 and run
22 me through 5:49:37.

23 A Again, the 3:38 time, that call, that was the last
24 call from Michael Wise to Darrell. Again, that was
25 the southeast sector of this site right here

1 (indicating). The very next call is at 3:44:26,
2 and that is actually -- at this point it's not a
3 call between Michael Wise. It's somebody else
4 calling Darrell. But at 3:44:26, it's site 106,
5 which is actually up here (indicating), and it's
6 again the southeast sector.

7 Q What is the next call?

8 A The next call is at 4:10:27, and that utilizes
9 tower 124, which is up here (indicating), and this
10 is going to be the southwest facing sector.

11 Q How about the next call?

12 A The next call is 4:19:21 and that is tower 122, and
13 that is using the southwest sector.

14 Q And those two are actually now in Columbia?

15 A That's correct.

16 Q How about the next call?

17 A The next call is at 4:23 and that is tower 225, and
18 that will be the north facing sector of this tower.
19 The next call is about 57 seconds later, initiates
20 on tower 162, which is actually right underneath
21 label right here (indicating), and that's using the
22 southeast sector in this area.

23 Q Does it patterns on that same tower?

24 A In this particular case, no, it doesn't. It
25 actually ends on 161, which is this tower up here

1 (indicating), and that is the southeast sector.

2 Q How much of a gap in time is there between that
3 phone call there at 4:23:57 and the next phone
4 call?

5 A At 4:23:57 and the next call is over an hour,
6 almost an hour and 20 minutes.

7 Q That next one is 5:48:14?

8 A Correct.

9 Q Where is that phone? What tower does that phone
10 call start off of?

11 A That starts off of tower 160, which is right here
12 (indicating). That would be the southeast sector,
13 this way (indicating).

14 Q And where does that call patterns?

15 A That call ends on tower 123, which is this tower
16 (indicating) and it's sector 3, which is the
17 southeast facing sector, which is this way
18 (indicating).

19 Q And then how long is the next break between that
20 5:49 a.m.?

21 A Several hours. The next call isn't until 11:10:02,
22 so almost four hours.

23 Q You can have a seat, please.

24 A (Witness resumes the witness stand).

25 Q Answer any questions Mr. Baker might have, please.

1 THE COURT: Thank you, Solicitor. Mr. Baker.

2 CROSS EXAMINATION

3 BY MR. BAKER:

4 Q Detective Fossum, it's true that you don't know who
5 is in possession of these phones at the time of all
6 these calls; is that correct?

7 A Not as I was with them to say that, no, sir.

8 Q You have no personal knowledge of that?

9 A No, sir.

10 Q And there are factors outside of just location
11 which can determine which tower a cell phone may
12 hit off of; is that correct?

13 A That's correct.

14 Q Such as landscape?

15 A Sure.

16 Q Weather, call volume?

17 A (Witness nods). (Indicating affirmative response).

18 Q And, in fact, there are times when certain towers
19 are actually shut down for maintenance; is that
20 correct?

21 A I would imagine, yes, sir.

22 Q So when a cell phone call is made, it is not an
23 exact science to know that just because it hits off
24 of one tower, that's the tower necessarily closest
25 to the person making the phone call?

LUKE FOSSUM -- REDIRECT -- MR. MADSEN

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1 A As a general rule it may be, but as far as the
2 exact location using these types of historical
3 records, I can't pinpoint an exact location, no,
4 sir.

5 Q It's not an exact science that the cell phone call
6 always hits off of the closest tower; is that
7 correct?

8 A It's not always necessarily going to. There can be
9 some factors, correct.

10 MR. BAKER: I think that's all I have, Your
11 Honor.

12 THE COURT: Thank you, Mr. Baker. Solicitor.

13 **REDIRECT EXAMINATION**

14 BY MR. MADSEN:

15 Q One follow up. Are you familiar with what E.S.N.
16 numbers are?

17 A Yes, sir, that's the electronic serial number
18 assigned to phones.

19 Q Let me show you using State's Exhibit Number 89.
20 Where would the E.S.N. number be or the serial
21 number be on this?

22 A They are usually located underneath the battery on
23 the back plate of the phone.

24 Q Can you take a look and see if you can locate that?

25 A Sure.

1 Q Let me show you State's Exhibit Number 92, records
2 from Virgin Mobile. Does that indicate an E.S.N.
3 number on there?

4 A If I can get the battery off here.

5 Q Pull it from the bottom.

6 A Subscriber information, we typically ask for the
7 E.S.N. number because phone numbers can be
8 forwarded now to other carriers, other phones.
9 It's important to us to make sure that we have the
10 right phone number with the right phone. This is
11 the subscriber information from Virgin Mobile. The
12 series of numbers after the D. on this phone
13 represents the E.S.N. number for this phone. Do
14 you want me to read it?

15 Q Is that the same -- is that the phone that was
16 being utilized on this account at that time?

17 A Yes.

18 Q There is a second E.S.N. number on there. What
19 does that mean?

20 A That means that at one time another phone may have
21 been assigned to that phone number.

22 Q Is that other E.S.N. number in effect at the
23 patterns?

24 A No.

25 Q So for that Virgin Mobile account, is that the

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1 phone that is utilized in State's Exhibit Number 99
2 on these calls?

3 A Yes.

4 Q That you just went over?

5 A Yes.

6 Q That physical phone in your hand?

7 A This one right here.

8 Q Were those Virgin calls that we went over?

9 A Correct.

10 MR. MADSEN: That's all the questions I have,
11 Your Honor.

12 THE COURT: Thank you. Anything on recross,
13 Mr. Baker?

14 **RECROSS EXAMINATION**

15 BY MR. BAKER:

16 Q Detective Fossum, you have no idea who is in
17 possession of that phone when these calls were
18 made; is that correct?

19 A Just that this is Darrell Burgess' phone according
20 to his subscriber information.

21 Q But you have no idea who actually had possession of
22 that phone when those calls were made?

23 A No, no personal knowledge.

24 MR. BAKER: Thank you, Your Honor.

25 THE COURT: Thank you. Thank you, Sergeant

1 Fossum. You may step down. May this witness be
2 excused?

3 MR. MADSEN: Yes, Your Honor.

4 THE COURT: Any objection, Mr. Baker?

5 MR. BAKER: That's fine, Your Honor.

6 THE COURT: You may be excused.

7 THE WITNESS: Thank you.

8 THE COURT: Perhaps it would be a good time to
9 take our morning recess. Mr. Foreman, and ladies and
10 gentlemen of the jury, please remember during this
11 recess, do not discuss the case with anyone. That
12 includes your fellow jurors or anyone else.

13 If anyone tries to talk with you about the
14 case during this recess, please let me know immediately.
15 Remember, do not begin your deliberations until I direct
16 you to do so. With that being said, we are going to be
17 in recess about 15 minutes. If you would go with our
18 bailiff to your jury room. Thank you very much.

19 (The jury retires to the jury room).

20 THE COURT: Thank you very much. Court will
21 be in recess 15 minutes.

22 (Whereupon there was a recess).

23 THE COURT: Mr. Baker.

24 MR. BAKER: Your Honor, one matter that we
25 spoke of earlier, I have got here with me a copy of the

1 subpoena which was served on Reginald Williams. It was
2 served on him January 20th at 4:40 p.m. by a process
3 server, Mr. William Bennett.

4 I at this point would move for a bench
5 warrant. I requested that he be here this week at a
6 time to be determined. Our office had with this a cover
7 letter, which I think we actually gave to the Sheriff's
8 Office yesterday when we gave them the information about
9 Mr. Williams.

10 We communicated with him over the phone. He
11 was informed to be here at 11:00 a.m. this morning. He
12 then told us he did not have any transportation. We
13 arranged for the Sheriff's Office to pick him up.

14 I think it's my understanding -- maybe
15 Mr. Hubbard can verify that -- they actually spoke with
16 him yesterday. We may need to verify that, and then
17 went to pick him up this morning and they can't locate
18 him.

19 THE COURT: Could I see the subpoena,
20 Mr. Baker.

21 (Hands to Court).

22 THE COURT: I have a copy of the subpoena and
23 a copy of the affidavit of service by Mr. Bennett. I
24 will have them stapled together and marked as a Court's
25 exhibit and issue a bench warrant for the arrest of

1 Mr. Williams and have him brought to court.

2 (Court's Exhibit Number 14 is marked for
3 purposes of the record).

4 THE COURT: Are we ready for the jury?

5 MR. HUBBARD: Yes, sir, Your Honor.

6 THE COURT: Anything from the defense,
7 Mr. Baker?

8 MR. BAKER: None, Your Honor.

9 THE COURT: If you would bring our jury,
10 please.

11 (The jury returns to the courtroom).

12 THE COURT: Our jury is back present in the
13 courtroom. All parties and their attorneys are present.
14 Solicitor, you may call your next witness.

15 MR. HUBBARD: Yes, sir, Your Honor. The State
16 calls Dr. Joel Sexton.

17 THE COURT: Dr. Sexton, if you would come
18 around, please.

19 JOEL STEVEN SEXTON, being
20 first duly sworn, testified as follows:

21 CLERK: Doctor have a seat. Speak up loud and
22 clear. State your full name, spelling your last on the
23 record, please.

24 THE WITNESS: Dr. Joel Steven Sexton,
25 S-E-X-T-O-N.

1 DIRECT EXAMINATION

2 BY MR. HUBBARD:

3 Q Dr. Sexton, where do you work?

4 A In Newberry, South Carolina.

5 Q What type of work do you do?

6 A I'm in the field of medicine. I have a degree in
7 medicine and licensed in the State since 1968. I
8 also have a board certification in anatomical
9 pathology, clinical pathology, and forensic
10 pathology and serve as the Director of the
11 Pathology Department at Newberry County Memorial
12 Hospital and also a consultant forensic pathologist,
13 our group is. We are consulting forensic
14 pathologists for about 26 of the 46 county coroners
15 in the upper part of the state.

16 Q What is a forensic pathologist?

17 A First, a pathologist is a physician who, after
18 finishing medical school, trains in the field of
19 pathology, and pathology deals with the diagnoses
20 of disease and illness from looking at tissue.

21 So the pathologist examines tissue removed at
22 surgery to see if the patient has cancer or some
23 other condition and to what extent to help your
24 physician better treat you with that condition.

25 We also supervise the laboratory where blood

1 and urine and spinal fluids and other things are
2 examined to understand whether the constituents are
3 present in the right amount and whether they are
4 normal constituents.

5 This helps the physician that is treating you
6 understand more about your disease or illness. We
7 also advise that physician as to the significance
8 of the various tests that are run.

9 A hospital pathologist also does autopsies on
10 persons dying in the hospital to learn more about
11 that disease or illness, and that's with the
12 consent of the family and request of the physician.

13 Forensic pathologists have this knowledge that
14 I have just explained, but we have additional
15 training in how to recognize what causes various
16 injuries, so that by looking at the body externally
17 and internally at autopsy, we are able to determine
18 what might have caused the person's death, what
19 might have caused other injuries.

20 Oftentimes we are more concerned with not just
21 the cause of death, which may be very obvious, but
22 the circumstances under which those injuries were
23 inflicted.

24 Q How long have you been in the field of forensic
25 pathology?

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1 A Thirty-five years.

2 Q And you went through your education and training.
3 How many autopsies have you had an opportunity to
4 perform over those 35 years?

5 A Well over 8,000. As the head of the forensic
6 section at the Medical University for 12 years, I
7 was also in charge of supervising probably a like
8 number. In Newberry we do about 700 a year between
9 the two of us.

10 Q Have you ever had an opportunity to testify in a
11 court of law as an expert in forensic pathology?

12 A Over 700 times.

13 MR. BAKER: Your Honor, we would stipulate to
14 Dr. Sexton's qualification.

15 MR. HUBBARD: I certainly offer him.

16 THE COURT: Again, ladies and gentlemen,
17 normally a person cannot give opinion testimony.
18 Normally when a person testifies, that must testify as
19 to what they either saw, heard or sensed by smell or
20 something of that nature.

21 However there is an exception when someone is
22 qualified because of education, training, experience or
23 background. They are permitted to give their opinions
24 in certain areas if the Court qualifies them that way.

25 This witness, Dr. Joel Sexton, will be

1 qualified in the area of forensic pathology to give
2 opinion testimony in that area. That does not mean that
3 you must accept the opinion, but it is evidence for you
4 to use in any way you see fit.

5 Thank you. Solicitor, you may proceed.

6 MR. HUBBARD: Thank you, Your Honor.

7 BY MR. HUBBARD:

8 Q Doctor, did you perform an autopsy on David Slice
9 and Kim Fauscette?

10 A Yes, that was September 7th of 2005.

11 Q Let me ask you, when you are performing an autopsy
12 in situations such as this, what are you looking
13 for?

14 A We ask that the body be brought just as it is at
15 the time it's pronounced dead so that we can look
16 at the external surfaces of the body after
17 photographing the body after it arrives.

18 We are looking for any evidence that might be
19 there to turn over to law enforcement who generally
20 come with the body. We also unclothe the body,
21 still looking for any evidence and any trauma. We
22 correlate what is there on the clothing with what
23 is on the body as far as injuries.

24 Then we do a complete internal examination.

25 During that time we take photographs of what we see

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1 to document what we see both externally and
2 internally.

3 We collect samples they are used for
4 toxicology and for D.N.A. analysis, and we look for
5 the internal trauma and collect any foreign
6 material, such as bullets in a gunshot wound case.

7 Q Doctor, per the term cause of death, is there also
8 something called manner of death?

9 A Yes, there is.

10 Q Can you explain that?

11 A Cause of death has to do with the actual injury or
12 illness that causes a person to die, such as a
13 heart attack or a drowning or a gunshot wound.
14 Manner of death has to do with how it's inflicted,
15 whether the person shot themselves which we refer
16 to as suicide or whether the individual died of a
17 natural disease that we refer to as natural,
18 whether they drowned or were struck by lightning
19 that we refer to as accidental, whether the death
20 is at the hands of another person, meaning that
21 they could not have inflicted it upon themselves or
22 all the facts point toward another person
23 inflicting it.

24 It has nothing to do with the intent of the
25 other person, just that it was at the hands of

1 another person, which we refer to as homicide. If
2 we have no indication of how the death occurred,
3 maybe we don't have a cause because it's a skeleton
4 or maybe we have a cause but we don't know how it's
5 inflicted because of other reasons, we list it as
6 an undetermined manner of death.

7 Q Now I would like to ask you about David Slice.
8 Before performing his autopsy, did you see any
9 external injuries?

10 A We did.

11 Q And in conducting your autopsy, did you determine
12 what those injuries were?

13 A We did.

14 Q Can you please tell the jury what you found as far
15 as your findings of his injuries.

16 A Mr. Slice was dressed only in a T-shirt and
17 undershorts. He had blood on the T-shirt around
18 two wounds that went through the shirt. He also
19 had two wounds of his head. All of these were
20 gunshot wounds.

21 One of the gunshot wounds entered here
22 (indicating) at the right brow ridge right above
23 the eye, went across and came out the left side of
24 his neck. It only went through the front of the
25 face. It may have had some impact on the base of

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1 the skull by going across that area, and so it may
2 have rendered him unconscious, but I can't say that
3 for sure.

4 He also had one that entered the right side of
5 his shoulder from the rear but went across and was
6 found in the skin on the left side of the shoulder.
7 It went nearly straight across and slightly
8 downward. He had another that entered through the
9 clothing here (indicating) on the right side of his
10 chest, and it passed upward into the left shoulder.

11 He had a fourth one that entered right through
12 the middle of the forehead and ended up going out
13 the back of the head. That fourth one was
14 different from the others in that it had what we
15 refer to as powder tattooing and stippling around
16 it.

17 When a gun fires, if you have ever seen a gun
18 fired at night, there's flames that come out
19 because some of the powder is still burning. There
20 are powder particles that are burning that come out
21 when they hit the skin. If the muzzle of the gun
22 is close enough, they hit the skin and they tattoo
23 the skin. They produce a chemical reaction that
24 requires surgery to remove.

25 Some of the powder particles that are not

1 burning may hit the skin, causing a little crater
2 and fall out or still be present, and that is
3 referred to as stippling. It takes a period of
4 time for that to heal.

5 But the significant thing is that stippling
6 and tattooing cannot be washed away. Completely
7 burned powder particles produce a soot that only
8 travels for about eight inches generally with
9 pistols, and it can be found around the edge of
10 that wound.

11 All we found on this one was just about a two
12 inch spread of the powder tattooing, indicating the
13 gun for their gunshot wound was fairly close, less
14 than a foot between the muzzle and the head at the
15 time it was fired, where the one in the side of the
16 head here (indicating) near the eye had no
17 stippling or tattooing or soot, indicating it was
18 further away, greater than a foot and a half.

19 The one on the clothing we really couldn't
20 tell. Because there was so much blood there, we
21 could not tell whether there was any powder
22 particles on the clothing around the two that
23 entered the right chest and the back of the right
24 shoulder.

25 The one to the head would have been in my

1 opinion within reasonable medical certainty the
2 fatal wound. The one that went across the eye to
3 the back of the throat would have been potentially
4 fatal because it caused bleeding down into the
5 airway if he was unable to cough that up, and there
6 was some blood noted in the airway.

7 The one that went across the back was only a
8 superficial wound. The one that entered the right
9 side did go through the right lung, and with time
10 it could have bled enough to cause death.

11 There was only a cupful of blood in that right
12 chest, and it take three pints of blood in order to
13 bleed to death. So, therefore, the head shot or
14 shots in my opinion was the final or was the
15 immediate cause of death.

16 Q Doctor, that's the cause of death. The manner of
17 death, how did you rule that?

18 A In this case in my opinion he couldn't hold the gun
19 far enough away to shoot himself in these
20 locations. In our opinion it's a homicide, meaning
21 someone else inflicted those wounds.

22 Q And you mentioned four gunshot wounds to David
23 Slice. Did you recover any bullets or projectiles
24 from him during the autopsy?

25 A Yes, we did. The bullet that went through the head

1 went out the back. The one that went in here
2 (indicating) on the side of the head went out the
3 neck. We recovered the one that entered the right
4 shoulder, the superficial wound, and the one that
5 entered the right side of the chest. Both of those
6 were recovered.

7 Q Doctor, in performing your autopsy, do you often do
8 a chart or use a diagram to show where the wounds
9 are in the body in your report?

10 A Yes, I do.

11 Q Did you do that for both David Slice and Kim
12 Fauscette?

13 A Yes, we did.

14 Q I would like you to look at what has been marked as
15 State's I.D. 104 and 105 and see if these
16 correspond to the diagrams that you did. I would
17 also ask you, have you seen these charts before?

18 A Yes, I have.

19 Q And did you have them put on the positioning of the
20 wounds on these charts?

21 A I did. They show the same findings that my
22 diagrams do that I did at the time of the autopsy.

23 MR. HUBBARD: Your Honor, I will offer both of
24 these into evidence at this time, 104 and 105.

25 THE COURT: Mr. Baker?

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1 MR. BAKER: I don't have any objection.

2 THE COURT: State's 104 and 105 in evidence
3 without objection.

4 (State's Exhibits Number 104-105 are received
5 into evidence).

6 BY MR. HUBBARD:

7 Q Let's look at 104, which is the diagram that would
8 correspond to which victim, David Slice or Kim
9 Fauscette?

10 A That would be the diagram for David Slice.

11 Q Doctor, I don't know if you can see it from there,
12 but we will try. In your report you refer to them
13 as gunshot one, two, three, and four?

14 A That's correct.

15 Q Is that based on the order of the shots or is that
16 just an arbitrary system you use to just separate
17 the different gunshot wounds?

18 A It's an arbitrary system. When we are doing an
19 autopsy, since we have no idea what we are going to
20 find, we simply start numbering them, I do, on the
21 front of the body, starting at the top and working
22 down and if any on the back, I number those with
23 subsequent numbers. So these numbers are simply
24 the numbers that we did arbitrarily.

25 Q Doctor, the first shot you have listed, is that the

- 1 shot to the forehead?
- 2 A Yes, that's correct.
- 3 Q And you had described for the jury of the four
- 4 shots there was one that you said was a fatal
- 5 wound?
- 6 A Correct.
- 7 Q Is that the shot?
- 8 A Yes, it is.
- 9 Q And you also described something called stippling?
- 10 A Correct.
- 11 Q Is that seen on this chart as well?
- 12 A It is.
- 13 Q You mentioned another shot to the head or face. Is
- 14 that represented by the shot to the brow?
- 15 A Yes, the one that you have pointed to there on the
- 16 brow and exited on the left side of the neck.
- 17 Q So it was at a downward angle?
- 18 A Correct.
- 19 Q And then two shots to the body?
- 20 A Correct.
- 21 Q You mentioned a shot to the back coming down at a
- 22 downward angle from the neck?
- 23 A That is correct.
- 24 Q And then a shot from the side going up towards the
- 25 neck?

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1 A Correct.

2 Q Doctor, I would like you to look at State's
3 Exhibits 21, 23, and 19. Have you had an
4 opportunity to see those exhibits?

5 A Yes, I have.

6 Q If I could -- with the Court's permission -- have
7 you step down in front of the jury.

8 THE COURT: Yes, sir, that's fine. Just keep
9 your voice up, Doctor.

10 BY MR. HUBBARD:

11 Q Doctor, if you stand on this side and face the
12 court reporter, I think I talk loud enough. In
13 State's 19 you see a male figure. Does that
14 correspond to David Slice you performed an autopsy
15 on?

16 A Yes, it does. It matches the clothing and the
17 facial features, the same as the photographs I
18 took.

19 Q You see he is in lying towards which side, right or
20 left?

21 A He's lying toward his left. He is seated near the
22 middle of the couch but bent over against the left
23 arm of the couch.

24 Q Let's talk about the wounds to the neck and through
25 the side. Doctor, the neck wound, I want you to

1 look here. Obviously you can't see the neck wound
2 here. But the side shot, is that coming from the
3 right or the left?

4 A It's coming from the right and it's going upward.
5 As I'm demonstrating here with my arm across my
6 chest, my elbow is about here it enters, and the
7 tip of my fingers is about where it stops in the
8 body.

9 Q Would that be consistent with him being in a
10 reclining position to the left at that point for
11 that shot?

12 A It would. It would fit with the position he is in
13 at the time this photograph was taken if the person
14 doing the shooting was toward his feet and beyond
15 his feet.

16 Q And then this shot, State's 23, can you show the
17 jury. There's two wounds here, a wound to the brow
18 and the wound to the head. Let's start with the
19 wound to the head and describe the stippling if you
20 could. We will start down here.

21 A What you see is a round hole with sort of a brown
22 edge to it. When the bullet goes in, it generally
23 abrades the edge of the skin when it goes in, which
24 help us know it's an entrance as opposed to the
25 tearing we see in an exit with no scraping of the

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1 outside of the skin.

2 You see these little marks around the entrance
3 wound. We refer to these as tattooing, but some of
4 them did not actually tattoo. They simply hit and
5 fell out, which we call stippling. It's a
6 combination of tattooing and stippling. You can
7 see it's about a two-inch spread. The entrance
8 here on the brow is just at the edge of the ruler.
9 That was the one that goes into the brow and out
10 the left side of the neck.

11 Q Doctor, if we could step down here for this part of
12 the jury. Again, the tattooing?

13 A The tattooing and stippling is the pattern you see
14 around this round entrance wound in the forehead
15 and the wound in the eyebrow here at the edge of
16 the ruler. Like I say, that's the one that enters
17 the eyebrow and comes out the lower part of the
18 left side of the neck.

19 Q Thank you, Doctor.

20 A (Witness resumes the witness stand).

21 Q Doctor, as to tattooing, that would become a
22 permanent feature? If someone were to survive,
23 that tattooing would still be there; is that
24 correct?

25 A That's correct.

1 Q If I could I would like to talk to you about the
2 autopsy on Kim Fauscette. You said you did that
3 the same day?

4 A Yes, that's correct.

5 Q What wounds did you observe on her when you were
6 autopsying Ms. Fauscette?

7 A She had three wounds. These wounds consisted of
8 one that went into her left cheek and came out the
9 right jaw, one that went in the top of her head and
10 was found behind the right eye, and one that went
11 across her back that entered also from the left
12 side and was found on the right side of the back.

13 Q And did you recover any projectiles or bullets
14 during the autopsy of Ms. Fauscette?

15 A We did. We discovered two of the three. The one
16 that entered the top of the head was, as I
17 mentioned, found behind the right eye. The one
18 that entered the left back was found in the back of
19 the right shoulder. So we recovered those two
20 bullets.

21 Q What did you classify as the manner of death?

22 A Again, these three wounds were not the kind of
23 wounds that a person could inflict upon themselves
24 because we saw no stippling or tattooing. In fact,
25 when a person shoots themselves, they generally put

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1 the gun right against the skin, and we see tearing
2 of the skin and burning of the skin with some soot.
3 None of that was present. This is in our opinion
4 also a homicide.

5 Q And specifically the cause of death as to
6 Ms. Fauscette?

7 A The wound in the back was superficial. The one
8 that went in her cheekbone here on the left and
9 came out her right jaw bone, I'm sure would have
10 been painful, but would not have been fatal unless
11 she aspirated blood. The one on the top of the
12 head in my opinion was the fatal wound within
13 reasonable medical certainty.

14 Q I want to show you what has been put into evidence
15 and marked as Exhibit 105. If you would, Doctor,
16 let's begin with the head shot here (indicating) at
17 the top of the head. The direction of that bullet,
18 it went in where and came out and rested where?

19 A In the top of head and it came downward and
20 slightly to the right, coming to rest inside the
21 right eye near the nose.

22 Q And you described another shot to the face or head
23 area. Can you please point that out on here as
24 well?

25 A That's the one you see on the left cheek, and it

- 1 goes out the right side of the jaw.
- 2 Q That one actually exits?
- 3 A That's correct.
- 4 Q So you did not recover that bullet?
- 5 A That is correct.
- 6 Q But you did recover this one (indicating)?
- 7 A Yes.
- 8 Q Then you mentioned a superficial wound to the back.
- 9 We see a mark here with a white spot and then it's
- 10 dark with an arrow. Does that show the direction
- 11 of that wound?
- 12 A It does, entering the back of the left shoulder and
- 13 being found in the back of the right shoulder.
- 14 Q And that one was recovered as well.
- 15 A Yes, that's correct.
- 16 Q Did you observe another wound on Ms. Fauscette as
- 17 well that was not a gunshot wound?
- 18 A Yes. When a person is cut with a knife, we see
- 19 sharp edges with no injury to the edge of that
- 20 particular wound and no tissue bridging the wound.
- 21 When they strike a fairly sharp surface, then we
- 22 see sometimes a little bit of abrasion, but we
- 23 generally see tissue bridging across that wound.
- 24 It's not a knife cutting, it's a crushing.
- 25 In her case that type of injury is called a

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1 laceration. She had a cut on her forehead that was
2 linear and did have tissue bridging. It was in our
3 opinion a laceration from hitting an object that
4 was fairly sharp, maybe a right angle but not sharp
5 enough to be like a knife as far as cutting.

6 Q If I could you have you look at a photograph that's
7 been marked State's I.D. 27. Does that show the
8 wound on Ms. Fauscette's head?

9 A It does.

10 Q Was that taken at autopsy?

11 A It's not my photograph. I think it was probably
12 taken by one of the police officers at the autopsy.

13 Q Which is not unusual for them to take photos as
14 well?

15 A That is correct.

16 Q I would like you to look at another exhibit,
17 State's Exhibit 28 for I.D. purposes. Which wound
18 are we looking at there?

19 A First, 27 is the laceration on the forehead.
20 Twenty-eight is the entrance gunshot wound in the
21 top of the head.

22 MR. HUBBARD: Your Honor, I offer these into
23 evidence at this time.

24 THE COURT: Solicitor, tell me the purpose of
25 those photographs, 27 and 28.

1 MR. HUBBARD: I tell you what, Your Honor, if
2 I can ask the doctor.

3 THE COURT: Thank you.

4 BY MR. HUBBARD:

5 Q Doctor, will these photographs assist you in
6 describing the wounds to Ms. Fauscette to the jury
7 and also particularly as to I.D. 28, the cause of
8 death, the wound that caused her death?

9 A Yes, they would.

10 MR. HUBBARD: I offer them for that purpose,
11 Your Honor.

12 THE COURT: Mr. Baker?

13 MR. BAKER: Can I see the photographs.

14 (Pause).

15 THE COURT: Mr. Baker, any objections?

16 MR. BAKER: Your Honor, can I have just one
17 moment.

18 THE COURT: Yes, sir.

19 (Pause).

20 MR. BAKER: Your Honor, I would have an
21 objection pursuant to my previous motion. I just want
22 to be protected on the record.

23 THE COURT: All right. I will allow -- any
24 additional objections beside based on your previous
25 motion?

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1 MR. BAKER: None.

2 THE COURT: All right. I would allow State's
3 Exhibit 27 and 28 based on State versus Kelly, State
4 versus Fletcher, State versus Crossland, State versus
5 Mizzell. State's 27 and 28 are in evidence subject to
6 the defense objection.

7 (State's Exhibit Number 27-28 are received
8 into evidence).

9 BY MR. HUBBARD:

10 Q Doctor again if I can ask you to stand up and come
11 down here?

12 A (Witness leaves the witness stand).

13 Q Doctor, looking at State's Exhibit 27, I tell you
14 what, let's work both halves of the jury again.
15 State's Exhibit 27 depicts which wound?

16 A It's the laceration on the forehead. It's a little
17 difficult perhaps for those in the back row to see,
18 but you can see a little redness along the edge of
19 that laceration and some at the patterns,
20 indicating that it didn't get cut by a knife, which
21 would simply leave a clean cut and normal-looking
22 skin. It got squeezed by something that was fairly
23 sharp but not as sharp as a knife. That abrasion
24 is what tells us that. This is on her forehead
25 going across the forehead like so (indicating), a

1 littler higher on the left but up near the
2 hairline.

3 Q If we can walk down here and show this as well.
4 Let me ask you this question. Would that be
5 consistent with, say, a fall and landing on a sharp
6 object?

7 A It would, depending on what the object was. Here
8 again, you can see sort of a pinkish-redness here
9 (indicating) near the top of this particular
10 laceration, and you may even be able to see some
11 sort of purplish color at the bottom, other than
12 the blood at the bottom of the laceration.

13 Those are what indicate to us that it landed
14 on a sharp surface. That is not as sharp as a
15 knife and tends to crush but does so with very
16 little abrasion around the edge, compared to a tire
17 iron or a hammer or something that strikes someone.
18 Then you see a lot of abrasion around the edge,
19 anything that is on the rounded surface, but in
20 this case it's a fairly sharp edged surface.

21 Q Doctor, if I can have you look a State's 28. Is
22 this the photograph describing the wound to the top
23 of the head?

24 A Yes, it is. As you can see, the hair has been
25 shaved away around the wound to see if there is any

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1 tattooing and stippling and to see the
2 characteristics of the wound itself, and it's a
3 round hole with no tattooing or stippling. It's in
4 the top of the head, indicating that the gun was
5 probably some distance away at the time this shot
6 was fired.

7 Q Again, Doctor, does hair ever interfere with the
8 tattooing process as well?

9 A Depending on the type of powder, how heavy it is,
10 sometimes it can. So it may block the powder from
11 getting to the skin. In this case the round hole,
12 you see the edge is scraped or abraded, and there
13 is no tattooing or stippling around the hole where
14 we have shaved the hair in that location.

15 Q I would like you to look at State's Exhibit 25.
16 This photograph, does that show the wound from the
17 other shot to the head?

18 A Yes, it shows the wound that enters the left side,
19 left cheek, but actually what it shows is where it
20 exits here on the jaw. It looks like some of the
21 teeth might be there on the outside of the mouth,
22 but the wound came in from the left cheek and
23 exited the right jaw.

24 Q If we could go down here, Doctor. Again, which
25 side of the face did the gunshot wound take place

1 in?

2 A It entered the left side, the left cheekbone and
3 came out the right jaw, this area down near the
4 chin which you see in the photograph. It appears
5 to be some teeth there in that area. There were
6 teeth missing when we did the autopsy.

7 Q I believe you described this one as potentially
8 fatal. Certainly if she did not get help, she
9 could have died from blood internally?

10 A Blood going into the airway, that's correct.

11 Q And her jaw, was that also fractured during this
12 gunshot wound?

13 A It was. The right mandible or right jaw was
14 fractured.

15 Q Thank you.

16 A (Witness resumes the witness stand).

17 Q Doctor, with the Court's permission, I would like
18 to borrow a member of my staff and ask you to
19 assist the jury in showing them the angle of wounds
20 and how these wounds could be caused.

21 A (Witness leaves the witness stand).

22 MR. HUBBARD: Mike Ross. Your Honor, I am
23 going to ask him. He is an assistant solicitor in our
24 office.

25 THE COURT: All right.

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1 MR. HUBBARD: Mr. Ross, if you would pull up
2 that chair.

3 BY MR. HUBBARD:

4 Q Doctor, I will stand right here again. For that
5 first wound to Mr. Slice, let me say this -- not
6 first wound, but let's talk about the various
7 wounds. The shot to the brow, can you show the
8 jury, using Mr. Ross where that shot would have
9 entered and exited?

10 A It entered here (indicating) near the center of the
11 brow and came out the back of the head at about the
12 same location. As far as height, it went straight
13 through the head.

14 Q What about the one on the right brow, Doctor?

15 A The one on the right brow enters here (indicating)
16 near the edge of the brow and comes out on the neck
17 down in this location (indicating).

18 Q Doctor, let me ask you this. There's two other
19 shots that you described as being potentially
20 superficial, non-fatal?

21 A Correct.

22 Q If that first shot had been the shot to the brow
23 that you just described right around the temple and
24 came out down here (indicating), would that have
25 been a shot that could have been incapacitating to

1 the victim, David Slice?

2 A It could in that it came very close to the base of
3 the skull. If you look at the gentleman's head
4 here at this location (indicating), the brain comes
5 out to the front of the skull. It comes down
6 behind the ear. So that comes very close to the
7 base of skull, the bottom of the bone in your face
8 under the brain itself. So it could have damaged
9 that to the point where it would have knocked him
10 unconscious.

11 Q Could that account for what we see in State's
12 Exhibit 18 where the victim, David Slice, is
13 sitting on the sofa, not on the floor or having
14 fallen on the floor?

15 A Correct. It could have caused him to fall to the
16 his left and in the position he is seen in the
17 photographs.

18 Q This same wound, would it be consistent with an
19 upper angle coming down, the gunshot?

20 A Yes. It's definitely going down from the edge of
21 the eyebrow out the bottom of the neck on the other
22 side.

23 Q This is a steep angle here. Would it also be
24 consistent if the victim's head had been slightly
25 tilted?

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1 A If the victim had had his head slightly tilted to
2 the right, perhaps ducking or maybe sleeping and
3 his head tilted to the right, it would be easier
4 for someone to shoot that downward angle, it
5 patternsing up with where it comes out.

6 Q But it's consistent with somebody being above the
7 victim?

8 A Correct, someone standing as opposed to sitting at
9 the same level.

10 Q Let's talk about the wound to the neck. Can you
11 please tell the jury, using what you know and using
12 Mr. Ross in front of the jury.

13 A That wound ends up going in here (indicating), just
14 behind the shoulder, and it travels across and down
15 slightly and patternss up in the back in this
16 location (indicating). So it's going from here to
17 there. It's just in the soft tissue, superficial.
18 It may have been painful, may have bled some but
19 not a great deal, not enough to be life
20 threatening.

21 Q Again, Doctor, would that be consistent with a
22 downward angle shot from someone standing?

23 A Yes, it would. It's coming in from the same
24 direction, from the right and going to the left.
25 It's going down at about the same angle.

1 Q Now, this shot on the front side that goes up,
2 would that be consistent if Mr. Slice had slumped
3 over much further, as in the photograph we see in
4 State's 21?

5 A Yes. In other words in State's 21, Mr. Slice is
6 laying from the middle seat all the way over onto
7 the left arm of the couch. So if he is that far
8 over to his left, then somebody shooting about the
9 same direction could have the bullet go in here
10 (indicating) and come up slightly if he is far
11 enough over. I don't think it's far enough -- I
12 don't think he could get far enough in this chair
13 without falling out of it. On the couch as you can
14 you can see in the photographs, he is leaning far
15 enough over to have that happen.

16 Q Let's now focus on Ms. Fauscette. Doctor, if she
17 is sitting on the floor, heard gunshots, would
18 those be consistent with someone standing coming
19 down to the floor?

20 A Yes, they are going down. The one in the cheek
21 that comes out the right side of the jaw is going
22 downward. The one in her back is going downward.
23 So both are coming from her left. So from the time
24 the shots occurred if she is facing away from the
25 jury -- you might turn a little bit like that -- if

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1 she is facing away from the jury, then you'd expect
2 the shot to come in here (indicating) at the cheek
3 to come out low if she is down low at the time
4 compared to the person doing the shooting.

5 Q Then the wound to the back as well. Does it enter
6 on the left side going right?

7 A Left side going right. It's more horizontal than
8 the one in Mr. Slice, but still, depending on when
9 the shots occurred, I recognize this is one
10 scenario that would fit. Obviously there are other
11 scenarios that fit.

12 Q Doctor, we have got -- we have just discussed two
13 shots to Ms. Fauscette, and we were discussing
14 three shots to Mr. Slice, five shots?

15 A Correct.

16 Q Let me ask you about the final shot. Ms. Fauscette
17 is found face down. Which way was her face?

18 A In the photographs it looks like to the right.

19 Q Would her final wound be consistent with somebody
20 standing on her right, her left, behind her or
21 where would they be?

22 A They would be standing in the middle of this table.
23 So they could shoot downward toward her head and
24 have it go into her right eye. They would have to
25 be somewhere over in this vicinity (indicating),

1 about where this gentleman is seated.

2 Q If there is a step there, her head would be up a
3 little bit more?

4 A It may be, correct.

5 Q So it might not have to go as far forward, correct?

6 A Correct.

7 MR. HUBBARD: Thank you, Mr. Ross.

8 BY MR. HUBBARD:

9 Q The final shot for Mr. Slice, we have described
10 Mr. Slice sitting, Ms. Fauscette down, a final shot
11 next to her. That final shot to Mr. Slice, the one
12 that you described as the fatal wound, was that
13 from back here (indicating) as well?

14 A No, that's correct, and I cannot say it was the
15 final shot.

16 Q Okay.

17 A I can say that after that shot, he is not going to
18 move, and after the shot to Ms. Fauscette's head,
19 she is not going to move.

20 Q That's correct.

21 A It's certainly consistent with a final shot.

22 Q Let me clarify that. The other shots appear to be
23 consistent with a downward angle from someone
24 standing up?

25 A Correct.

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1 Q Some distance because there is no stippling?

2 A Correct.

3 Q The shot to the forehead is more consistent with
4 being an up-close shot?

5 A Yes, that's correct.

6 Q The shot to the top of the head in Ms. Fauscette is
7 more consistent with being a closer sort or a shot
8 over her as opposed to a distance shot?

9 A Can't say how far away it was, but it's the only
10 one that would probably have caused her to be
11 incapacitated, other than the laceration. If she
12 fell hard enough against something to lacerate her
13 forehead, that may have stunned her and knocked her
14 unconscious.

15 Q Fair enough. My question though is you had some
16 shots at an angle showing some distance by angle.
17 The shot to the top of the head is more coming
18 from -- it's coming from a different angle?

19 A Yes.

20 Q Thank you, Doctor.

21 A (Witness resumes the witness stand).

22 Q With both Kim Fauscette and David Slice, the wounds
23 that you described as fatal, the wound to
24 Mr. Slice's forehead and the wound to Ms. Fauscette
25 at the top of the head, to a reasonable degree of

1 medical certainty, can you tell us about how long
2 it would take to die? Would it be seconds,
3 minutes, hours, days?

4 A We generally refer to that as minutes, but
5 recognize there is an extreme variability in
6 gunshot wounds to the head. There are shots that
7 go to the front of the head from side to side that
8 sometimes leave the person incapacitated for years
9 without causing death, but generally speaking a
10 person who is shot in the head, on top of the head
11 or in the front of head, is going to be immediately
12 incapacitated. Usually with the type of shot that
13 we are talking about here will be dead in a matter
14 of minutes simply because the brain is very soft.

15 I don't know whether you have ever seen a
16 bullet pass through a gelatin block where the
17 little bullet goes in, you have a big cavity that
18 forms, and it collapses back. When that happens in
19 a brain, which is at the time we do the autopsy is
20 like cold tooth paste held together by membranes,
21 so it's very soft.

22 That type of injury in the vital areas -- and
23 Ms. Fauscette's went close to the vital area on the
24 right side of the head near the pods. The shot
25 that went straight to the rear went through the

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1 motor function area of Mr. Slice. So in my opinion
2 they would have been probably died within minutes,
3 but I can't say for sure. It could have been
4 longer.

5 Q But to a reasonable degree of medical certainty,
6 probably minutes?

7 A That's correct.

8 Q Based on those types of wounds?

9 A That's correct.

10 Q Thank you, Doctor. Please answer any questions
11 Mr. Baker has.

12 THE COURT: Thank you, Solicitor. Mr. Baker.

13 MR. BAKER: Thank you, Your Honor.

14 CROSS EXAMINATION

15 BY MR. BAKER:

16 Q Dr. Sexton, let me show you what has been marked as
17 State's Exhibit 104, and on this exhibit tell me
18 again what this depicts.

19 A You are referring to the wound here in the middle
20 of the forehead?

21 Q Is this Mr. Slice?

22 A That's Mr. Slice.

23 Q What is that?

24 A And what is depicted there is a circular hole with
25 the bullet behind -- or exiting in the back of the

1 head and the tattooing and stippling around it,
2 indicating the gun was fairly close to the skull at
3 the time the shot was fired.

4 Q And is it possible, Dr. Sexton, that when that shot
5 was fired that the person firing that shot would
6 potentially have the victim's blood on them?

7 A Rarely. What happens in gunshot wounds, you
8 sometimes get a fine mist of blood. There are very
9 tiny blood droplets that only travel a few feet.
10 It's possible.

11 Q Certainly possible?

12 A But the idea is you would have trouble seeing it on
13 the individual. It would easily be washed off, and
14 it is sometimes hard to see on clothing because
15 they are so small it can be rubbed off. So that
16 type of blood droplet is very tiny and only goes a
17 fairly short distance. Usually it goes that
18 distance if there is already blood on the surface
19 that the bullet goes through as opposed to the
20 initial injury.

21 Q But it is possible, Dr. Sexton, that blood could
22 get on someone's clothing?

23 A That's correct, particularly on the arm that would
24 be holding the pistol.

25 Q And there is testing that can be done that can

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1 verify that; is that correct?

2 A Yes, that's correct. Although like I say, it's
3 very difficult because of the tiny particles, but
4 they can do tests to see if blood is present on
5 clothing.

6 Q Dr. Sexton, when you do your autopsies, you don't
7 actually travel to the scene; is that correct?

8 A That is correct. I did that for years, about 17
9 years in Charleston all over the State. But
10 because we also have a private practice of hospital
11 pathology in order to be alert and awake, we do not
12 go to scenes anymore. We have the information
13 brought to us.

14 Q And based on the information that you are provided,
15 I guess by detectives and law enforcement that
16 actually go to the scene, you then give your
17 opinion based on that information about a time of
18 death; is that correct?

19 A Actually time of death is not what is shown on T.V.
20 If we go to a scene and we can evaluate the rigor
21 mortis, the lividity, the body temperature and
22 things of that sort, we might be able to estimate
23 the time of death. The estimate is greater the
24 longer the time between death and the time the body
25 is found. So if a body is found very quickly, you

1 can narrow down the time of death more easily and
2 to a shorter interval.

3 What we do, since the body has been put in a
4 cooler between the time it's found and brought to
5 us the next morning -- and this was two days later
6 that we saw this body, and the body had been moved
7 which sometimes requires moving the joints to tend
8 to break the rigor mortis, which is the coagulation
9 of the protein in the muscles that causes the
10 joints to stiffen that occurs after death.

11 That gives us some indication as to what
12 muscles are stiffened as to how long they have been
13 dead. But since this has been moved, the body has
14 been moved, the joints have been flexed, been put
15 in a refrigerator, we don't determine the time of
16 death. We simply examine what we see at the
17 autopsy, look at the time given to us by law
18 enforcement, the Coroner, and see if there is any
19 major discrepancy. If there is not, then we assume
20 that is accurate, as accurate as can be, time of
21 death.

22 Q And for whatever reason, Dr. Sexton, in this case
23 in the pathology reports you generated following
24 your autopsy of Mr. Slice and Ms. Fauscette, you
25 indicated the time of injury was around 12:00 a.m.;

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1 is that correct?

2 A Correct. That's really the time given to us by law
3 enforcement, and we chose to leave it the same.

4 Q And that's based on information provided to you by
5 law enforcement that actually travels to the
6 location; is that correct?

7 A Yes, that's correct, plus not seeing anything at
8 the time of autopsy that would contradict that.

9 Q And you, Dr. Sexton, don't have any information or
10 any knowledge about who inflicted these wounds on
11 Ms. Fauscette and Mr. Slice; is that correct?

12 A That's correct. I have no knowledge of who caused
13 these injuries.

14 Q Thank you, Dr. Sexton. I think that's all I have.

15 THE COURT: Thank you, Mr. Baker. Solicitor,
16 anything on redirect?

17 MR. HUBBARD: One quick follow up.

18 REDIRECT EXAMINATION

19 BY MR. BAKER:

20 Q On the time of death, you were told initially --
21 law enforcement indicated sometime after midnight,
22 but at that point that's the only information they
23 had to give you?

24 A Yes, that's correct.

25 Q Thank you.

1 MR. HUBBARD: No further questions, Your
2 Honor.

3 THE COURT: Anything in recross, Mr. Baker?

4 MR. BAKER: If I can have just one moment.

5 THE COURT: Yes, sir.

6 (Pause).

7 **RECROSS EXAMINATION**

8 BY MR. BAKER:

9 Q Let me show you a document, Dr. Sexton, and ask if
10 you can identify that document.

11 A Yes, this is a copy of the form we send to the
12 coroners to give them information they would need
13 to complete a death certificate.

14 Q And does that document actually contain your
15 signature?

16 A Yes, it does.

17 Q And does it indicate on that document the time of
18 injury as 12:00 a.m.?

19 A It does.

20 Q And is that document an accurate copy of the actual
21 document that you generated?

22 A Yes, it is.

23 MR. BAKER: Your Honor, I would ask that I get
24 that marked and entered into evidence.

25 THE COURT: That would be Defense 2. Any

1 objection?

2 MR. HUBBARD: No, sir.

3 (Defendant's Exhibit Number 2 is received into
4 evidence).

5 BY MR. BAKER:

6 Q Dr. Sexton, Defense Exhibit 2 indicates the time of
7 injury in this case as 12:00 a.m.; is that correct?

8 A The time we put on the certificate was 12:00 a.m.
9 based on the history we were given.

10 Q Thank you, Dr. Sexton. I think that's all I have.

11 THE COURT: Thank you, Dr. Sexton.

12 MR. HUBBARD: One follow up.

13 THE COURT: That's it. It's direct, cross,
14 redirect, and recross. Well, that is new matter.

15 MR. HUBBARD: He put an exhibit in.

16 THE COURT: All right.

17 REDIRECT EXAMINATION

18 BY MR. HUBBARD:

19 Q One real quick. But you don't know the actual time
20 of death?

21 A That is correct.

22 Q Thank you.

23 MR. HUBBARD: No further questions.

24 THE COURT: Thank you so much, Doctor. You
25 may step down and you may be excused.

1 THE WITNESS: Thank you, Your Honor.

2 THE COURT: Yes, sir. Solicitor, you may call
3 your next witness.

4 MR. HUBBARD: Your Honor, at this time the
5 State rests.

6 THE COURT: Mr. Foreman, and ladies and
7 gentlemen of the jury, perhaps this would be a good
8 point for us to take our luncheon recess. I would
9 remind you that during this recess you are not to
10 discuss this case with anyone. That includes your
11 fellow jurors, your lunch mates, your family, your
12 friend or anyone involved in the trial.

13 If anyone should try to talk with you about
14 this case, please let me know immediately. Remember, do
15 not read, listen, watch or review any news reports about
16 this trial. Remember to keep an open mind about the
17 case until I instruct you to begin your deliberations.
18 I would ask you to please be back at 2:00 p.m. You are
19 now free to go to your lunch. Please be back in your
20 jury room promptly at 2:00 p.m. Thank you very much.

21 (The jury is excused for lunch at 12:38 p.m.)

22 THE COURT: I would like to quickly put on the
23 record as far as State's Exhibits 27 and 28, the
24 photographs of the victim, I believe Ms. Fauscette at
25 the autopsy, that after the testimony or during the

1 testimony of Dr. Sexton that those photographs
2 demonstrate the trauma that occurred to the body of the
3 victim, Ms. Fauscette.

4 They tend both to corroborate the testimony of
5 the witness, James Anthony "Tony Red" Johnson that was
6 allegedly at the crime scene, and they also corroborate
7 the testimony of Dr. Sexton. They also corroborate the
8 State's theory of the position the victim,
9 Ms. Fauscette, was in at the time the rounds were fired
10 and where she was at in the crime scene.

11 I cited a number of cases, both in camera and
12 during my ruling, but specifically State versus
13 Fletcher, 609 S.E.2d 572, and State versus Crosby, 559
14 S.E.2d 352, a 2005 and 2001 case respectfully. With
15 that, Mr. Baker, do you have any motions?

16 MR. BAKER: Your Honor, at this time the
17 defense would move for a directed verdict in favor of
18 the defense on all indictments. This is based on
19 failure of competent evidence tending to prove the
20 charges in the indictments. The evidence, when viewed
21 in the light most favorable to the State, fails to
22 create an issue for the jury.

23 THE COURT: All right. Thank you, Mr. Baker.
24 Solicitor, do you care to respond?

25 MR. HUBBARD: Your Honor, only to say that we

1 believe we provided more than enough evidence to go to
2 the jury on this case: Eyewitness testimony, testimony
3 from someone who was both on the phone and met
4 Mr. Burgess immediately after the shootings, testimony
5 from officers who collected evidence from the scene that
6 was consistent with the eyewitnesses, and, of course,
7 testimony from the pathologist that is consistent with
8 the eyewitness.

9 Then, of course, we have the phone records
10 showing the Defendant's involvement in talking to the
11 parties involved in this case, to Michael Wise, and the
12 testimony that puts him in the area at the time and
13 going on the same route as was described by Michael Wise
14 immediately after this case.

15 THE COURT: Thank you, Solicitor. As I
16 understand the standard for directed verdict, the
17 Defendant would be entitled to a directed verdict when
18 the State fails to produce evidence of the offense as
19 charged, and the trial court is charged with the duty,
20 in viewing that motion for directed verdict, I am
21 concerned only with the existence of evidence and not
22 its weight.

23 In other words, if there is any direct
24 evidence or substantial circumstantial evidence
25 reasonably tending to prove the guilt of the accused,

1 the case should go forward. That is the standard I am
2 using. I want to make that clear because that's what I
3 understand the directed verdict standard to be.

4 When I look and review the testimony of the
5 witnesses, there is both direct and substantial
6 circumstantial evidence in this case. I won't laundry
7 list all the witnesses, but you actually have a witness
8 at the scene. James Johnson was at the scene.

9 You have Michael Wise who testifies as to
10 phone calls and contact between him and Mr. Burgess in
11 the early morning hours of the 5th, the conversations
12 and request for a weapon, the locations they went to,
13 either for Mr. Burgess to secure another vehicle and/or
14 a weapon, Mr. Wise testifying as to Mr. Burgess having a
15 silver revolver, I believe, in his possession and then
16 going to [REDACTED] where Mr. Wise parked the
17 vehicle and Mr. Burgess exited the vehicle.

18 He pointed that out on the map. He testified
19 to it. He testified he heard what he thought was
20 gunshots. He testified to calling Mr. Burgess. The
21 majority of that, if not all of that, is corroborated by
22 circumstantial evidence from both the custodians of the
23 records -- Ms. Ulyak, Mr. Alfakir, Mr. Tyrell -- and
24 additionally Detective Fossum as far as the
25 interpretation of all that data.

1 It's not my job to determine the believability
2 of those witnesses. It's only my job to see if there
3 is evidence sufficient for the case to go forward.
4 There clearly is. Therefore, I would respectfully deny
5 your motion for directed verdict as to all the
6 indictments in this case. Do you have any other
7 motions, Mr. Baker?

8 MR. BAKER: Not at this time, Your Honor,
9 unless Your Honor wants to take up the issue of my
10 client's rights, whether you want to do that now or
11 after lunch, and I guess any evidence that they may be
12 able to bring out in regard to my client's criminal
13 record.

14 THE COURT: Yes, let me do that. Madame
15 Clerk, if you would put Mr. Burgess under oath, number
16 one.

17 Mr. Burgess, would you please stand.

18 DARRELL BURGESS is first duly
19 sworn.

20 THE COURT: Mr. Burgess, I need to go over
21 some things with you. I have to do this with everyone
22 who is on trial. That's why I need your responses to be
23 under oath.

24 We have reached the stage in the trial where
25 the State has rested, and your side, the defense, now

1 has the opportunity to present additional evidence for
2 the jury to consider. Do you understand where we are at
3 in your trial?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: And in that regard you may call
6 witnesses to testify if you choose, and further if you
7 choose to testify yourself, you may do so. Do you
8 understand?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: No one can force you to testify.
11 You have an absolute right to remain silent, and if you
12 choose not to testify, I will tell this jury that they
13 cannot hold your silence against you in any way. I will
14 instruct them they are not to even discuss that in the
15 jury room. Do you understand?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Solicitor, does Mr. Burgess have
18 any prior record that would be subject to impeachment
19 under 609?

20 MR. MADSEN: Yes, Your Honor.

21 THE COURT: What would you indicate that to
22 be, Solicitor?

23 MR. MADSEN: Your Honor, he has records. He
24 pled guilty -- I will start and kind of work back -- he
25 pled guilty, I believe it was June of this year, to

1 trafficking in crack cocaine second offense. Mr. Baker
2 actually represented him on that.

3 THE COURT: June of '07?

4 MR. MADSEN: Yes, sir.

5 THE COURT: What was the charge?

6 MR. MADSEN: Trafficking in crack cocaine. I
7 believe that was a second offense. He received seven
8 years, which he is currently incarcerated in S.C.D.C.
9 for.

10 THE COURT: All right.

11 MR. MADSEN: Before that he pled guilty in
12 front of the Honorable Judge Manning on 10/31/05 to a
13 P.W.I.D. crack cocaine second offense, was sentenced to
14 18 months.

15 THE COURT: All right.

16 MR. MADSEN: At that same time, he also pled
17 guilty to distribution of crack cocaine second offense
18 and was sentenced to 18 months.

19 THE COURT: All right.

20 MR. MADSEN: On 3/30/2000 he pled guilty to
21 multiple indictments: An ill-treatment of animals, for
22 which he was sentenced to 60 days; assault and battery
23 of a high and aggravated nature, to which he was
24 sentenced to ten years incarceration; a grand larceny,
25 for which he was sentenced to five years; a burglary

1 second Subsection (a), for which he was sentenced to 15
2 years suspended on the service of ten years.

3 At the same time, he also pled guilty to a
4 possession of stolen vehicle and was again sentenced to
5 ten years. He has a variety of magistrate's court
6 offenses, Your Honor, but we do not -- if he does decide
7 to -- we do not intend to impeach him with any of those
8 convictions.

9 THE COURT: So you would intend to impeach him
10 with all of those that you have just stated for the
11 record?

12 MR. MADSEN: That is correct, Your Honor.

13 THE COURT: What about the ill-treatment of
14 animals? What is the maximum punishment on that?

15 MR. MADSEN: I don't recall off the top of my
16 head. I know there's a couple of statutes along that.
17 I tell you what, we would not impeach him with that one.
18 There is a one-year, a five-year, and a 90-day one.

19 THE COURT: I wasn't sure either. That's why
20 I asked that question, Solicitor, I wasn't sure.

21 MR. MADSEN: This is under 47-1-40, but we
22 will not even take that into account, Your Honor.

23 THE COURT: All right. So as I understand it
24 then, Mr. Burgess and Mr. Baker, the prior record, if
25 you take the stand, the solicitor would be able to

1 impeach you on your prior record.

2 In other words, he could ask you in front of
3 the jury if you have convictions for certain offenses if
4 they fall under Rule 609 of the South Carolina Rules of
5 Evidence. I do not think you could ask if it was second
6 offense and such.

7 However, he could ask if you were convicted of
8 trafficking in crack cocaine June of '07, if you were
9 convicted of possession with intent to distribute crack
10 cocaine in October of '05, distribution of crack cocaine
11 October of '05, and if you were convicted of assault and
12 battery of a high and aggravated nature, grand larceny,
13 burglary second (a) Section, possession of stolen
14 vehicle March 30th of 2000.

15 Do you question any of those convictions? In
16 other words, is that your prior accurate record as far
17 as those convictions are concerned, Mr. Burgess.

18 THE DEFENDANT: All except for the trafficking
19 in crack cocaine. It was trafficking in cocaine.

20 THE COURT: Let's check that indictment then.

21 MR. MADSEN: That is the only one that I do
22 not have a certified conviction of. He might be right
23 on that. We can pull that. That will be downstairs.

24 THE COURT: Let's pull that. The others I
25 listed, you do not question that is your accurate

1 record?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: The trafficking from June of '07,
4 your question or your statement to me is: I have a
5 conviction in June of '07 for trafficking in cocaine,
6 not trafficking in crack cocaine?

7 THE DEFENDANT: Right.

8 THE COURT: That's the sentence you are
9 serving now?

10 THE DEFENDANT: Right.

11 THE COURT: Do you have any question about
12 that prior record, Mr. Baker?

13 MR. BAKER: I don't have any question about
14 the prior record, Your Honor. I might have some matters
15 about whether the whole thing -- the argument about
16 where they all come in.

17 THE COURT: That's what I'm asking.

18 MR. BAKER: Your Honor, it would be our
19 position that under 609 and 403 that only the charges
20 involving -- I guess you could argue involving
21 dishonesty should come in -- the grand larceny, the
22 burglary second, maybe possession of stolen vehicle.

23 I think the other charges would be or should
24 be excluded per 403 in that their probative value is
25 substantially outweighed by any danger of unfair

1 prejudice, and I would just make that argument to the
2 Court.

3 THE COURT: Do you have any position on that,
4 Solicitor?

5 In other words, you are arguing that the drug
6 offenses basically are not admissible under a 403
7 analysis.

8 MR. BAKER: Rule 403, Your Honor, and 609 as I
9 read it.

10 THE COURT: All right.

11 MR. MADSEN: Judge, it's my understanding that
12 under 609 you have two subsections that Your Honor has
13 to take into account. Under 609, Subsection (2), crimes
14 than an individual has been convicted of involving
15 dishonesty come in regardless of punishment, and it is
16 not subject to a 403 balancing by the Court, which the
17 State would contend would be the possession of stolen
18 vehicle, the grand larceny, and the burglary second.

19 The drug convictions and the assault and
20 battery, Your Honor, would fall under 609, Subsection
21 (1), which I believe requires Your Honor to not only
22 look to make sure those convictions go over a year, but
23 additionally to conduct on the record 403 analysis as to
24 the probative versus prejudicial value, Your Honor.

25 We do believe that those convictions would be

1 more probative than prejudicial and do request that if
2 Mr. Burgess takes the stand, we are allowed to ask him
3 about that or those convictions.

4 THE COURT: I will look at that over the break
5 as far as the drug convictions and the assault and
6 battery of a high and aggravated nature. We will settle
7 your record based on my ruling prior to you taking the
8 stand if you choose to take the stand, Mr. Burgess.

9 If you were to take the stand and any of your
10 prior record came out during your testimony, I will tell
11 the jury that they could not consider that evidence
12 against you, and they can only consider it against you,
13 if at all, on the issue of whether your testimony is
14 believable or not and for no other purpose. Do you
15 understand?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: The decision about whether you
18 testify or not is your decision to make and yours alone.
19 I expect you may have conferred with your attorney and
20 with others whose opinions you value on important
21 decisions, but the decision about whether you testify or
22 not is your call to make, your decision. Do you
23 understand?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Has anyone exercised any undue

1 influence over you to get you to choose to testify or
2 not to testify?

3 THE DEFENDANT: No, sir.

4 THE COURT: Today are you under the influence
5 of any drug, alcohol medication or anything that
6 negatively affects your thinking ability?

7 THE DEFENDANT: No, sir.

8 THE COURT: Do you suffer from any physical or
9 mental problems that affect your thinking ability today?

10 THE DEFENDANT: No, sir.

11 THE COURT: All right. I am going to give you
12 an opportunity over the break to discuss that again with
13 your attorney about whether you wish to or not to
14 testify. You may be seated. Any other matters prior to
15 our break, Mr. Baker?

16 MR. BAKER: Maybe just one matter, Your Honor,
17 really for purposes of planning. As I indicated to Your
18 Honor earlier in the trial, we have potentially some
19 witnesses on the issue of third-party guilt, which I
20 understand we may have to proffer their testimony
21 assuming Your Honor would not allow or at least prior to
22 Your Honor determining whether it will be allowed before
23 the jury.

24 I'm assuming, and I attempted to find a case
25 on point on this, but should I proffer that evidence and

1 Your Honor determines it's not to go before the jury, I
2 would still be allowed to my right to close last?

3 THE COURT: No, sir. I don't think, now that
4 you have put in documents, you get the final clothing.

5 MR. BAKER: Because of the evidence?

6 THE COURT: Yes, sir, I think there is a
7 case -- I think it's State versus Battle, I believe.
8 But I think whether it's by way of witness testimony or
9 by way of any documents placed in evidence that the
10 closing arguments are already set. The solicitor would
11 be allowed to open, you would close, and then the
12 solicitor would have the final -- the solicitor could
13 open on the law, you would close, and the solicitor
14 would have the final closing.

15 MR. BAKER: Okay, Your Honor.

16 THE COURT: You can check that case. I assume
17 that's still the law. I don't know of a change in that
18 law.

19 MR. BAKER: Okay.

20 THE COURT: I will double-check.

21 MR. BAKER: Your Honor, what is that case?

22 THE COURT: I think it's State versus Battle.
23 Are you familiar with the case, Solicitor? Is there a
24 more recent case than State versus Battle?

25 MR. MADSEN: I don't know the name of it, but

1 I'm familiar with the case that says even if the defense
2 puts a piece of evidence in during the State's case,
3 they would lose the last closing.

4 THE COURT: There is another case even where
5 the defense put a piece of evidence in and tried to
6 withdraw it. I can't think of the name of that.
7 Ms. Whetstone would also be happy to check that during
8 the break. Anything further, Mr. Baker?

9 MR. BAKER: None, Your Honor.

10 THE COURT: Where are we at on Mr. Williams?

11 MR. HUBBARD: Your Honor, I have been notified
12 that we have units looking for him. He has not been
13 found yet.

14 THE COURT: I noted that he was served at a
15 B.P. station on the Charleston Highway. I noted that on
16 the affidavit of service. I was trying to think of
17 where the B.P. station is on Charleston Highway, if
18 that's the one way down 21 down towards Pine Plain or
19 the one further back up. I just couldn't place it in my
20 mind, but I did notice that on Mr. Bennett's affidavit
21 of service. Do you need him here?

22 MR. BAKER: At this point I do, Your Honor.

23 THE COURT: Let's keep working and see if we
24 can find him. Y'all keep working and see if you can
25 find Mr. Williams. What about Mr. Summers and --

1 MR. BAKER: They are here.

2 THE COURT: They are here? What about
3 Ms. Klein?

4 MR. BAKER: My understanding is she is here.

5 THE COURT: It's your understanding she is
6 here?

7 MR. BAKER: I haven't spoken with her, Your
8 Honor.

9 THE COURT: Do you have any other witness
10 problems?

11 MR. BAKER: No, Your Honor.

12 THE COURT: Court will be in recess until
13 2:00 p.m thank you very much.

14 (Whereupon there was a luncheon recess).

15 THE COURT: I would like to revisit the issue
16 of Mr. Burgess' prior record. Solicitor, if Mr. Burgess
17 takes the stand, I will allow you to cross examine him
18 or he can be examined on burglary second, grand larceny,
19 possession of motor vehicle from 2000 as to the
20 convictions only.

21 I'm not going to allow the trafficking in
22 cocaine or P.W.I.D. crack cocaine or distribution of
23 crack cocaine under 609 (1)(a) or (a)(1), and State
24 versus Colf. I think the probative value does not
25 outweigh the prejudicial effect in this particular

1 case.

2 So, Mr. Burgess, if you would please stand for
3 me. If you take the witness stand, the solicitor can
4 cross examine you as to a conviction for burglary in the
5 second degree under the (a) Section, grand larceny,
6 possession of a stolen motor vehicle in March of 2000.
7 Do you understand?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: He can ask you about that in front
10 of the jury about whether or not you have been convicted
11 of those offenses. Do you understand?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: He cannot -- the solicitor
14 cannot -- go into the details of the prior offenses, but
15 they can ask you if have you been convicted of those
16 offenses.

17 If that happens I would tell the jury they
18 could only consider that evidence against you, if they
19 consider it against you at all, on the issue of whether
20 your testimony is believable and for no other purpose.
21 Do you understand?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Have you had an opportunity to
24 think over the lunch break and discuss your decision
25 about whether or not you do or do not want to testify?

1 THE DEFENDANT: Somewhat, yes, sir.

2 THE COURT: Have you made your decision about
3 whether or not you do want to testify or do not want to
4 testify?

5 THE DEFENDANT: If I could, can I have another
6 minute or two to ask him?

7 THE COURT: All right. Certainly. Do you
8 want to step out? You may step out.

9 (Pause).

10 THE COURT: Mr. Burgess, have you had the
11 opportunity to confer with your attorney about your
12 decision of whether to testify or not to testify?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Have you made that decision?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: What is your decision?

17 THE DEFENDANT: I will not testify.

18 THE COURT: Let me ask you this. The decision
19 you have made to not testify, is that your decision?

20 THE DEFENDANT: Right, right.

21 THE COURT: Is that of your own free will and
22 accord?

23 THE DEFENDANT: Right.

24 THE COURT: Has anyone promised you anything
25 or held out any hope of reward to get you to make the

1 decision not to testify?

2 THE DEFENDANT: No, sir.

3 THE COURT: Do you have any questions you
4 would like to ask me about your decision not to testify?

5 THE DEFENDANT: No, sir.

6 THE COURT: All right. Thank you,
7 Mr. Burgess. You may be seated.

8 I find that Mr. Burgess is a very intelligent
9 young man. He freely, voluntarily, and knowingly
10 understands his right to testify and to not testify. He
11 has freely, voluntarily, knowingly, and intelligently
12 made the decision not to testify, after having the
13 opportunity to speak with his attorney and think about
14 it over the luncheon recess and then having another
15 opportunity given by the Court to discuss it further
16 with his attorney.

17 With that being said, I take it we are now at
18 the stage of going forward with the defense case. Are
19 you going to offer any evidence, Mr. Baker?

20 MR. BAKER: I think we are, Your Honor. I may
21 have at least two witnesses I don't think there will be
22 any issue with, and then there may be a number of
23 witnesses that we would proffer some testimony on.

24 THE COURT: Are you ready for the jury now?

25 MR. BAKER: Your Honor, I apologize. Can I

1 have about ten minutes? I had to run over to my office.
2 I did not have a chance to see or talk with one of the
3 witnesses that I intend to call right now.

4 THE COURT: Yes, sir, I will give you a couple
5 of minutes. Yes, sir, Solicitor.

6 MR. HUBBARD: Your Honor, one thing I would
7 request, just to save time, too. If he knows he is
8 going to be calling a witness, we would like their date
9 of birth and social to run a rap sheet. As far as
10 Mr. Williams, we probably need some clarification
11 because --

12 THE COURT: I think Mr. Williams is in the
13 courtroom; is that correct?

14 DEPUTY: Yes, sir.

15 MR. HUBBARD: We will get with him then.

16 THE COURT: Thank you. Is Ms. Klein a
17 potential witness?

18 MR. BAKER: She is Your Honor.

19 THE COURT: Is her date of birth on her
20 statement Solicitor?

21 MR. HUBBARD: I think we have a date of birth
22 on her, Your Honor.

23 MR. MADSEN: There's only two that I think
24 that we do not have a date of birth on, Frederick
25 Summers and Michael McQuarley, and I just handed my list

1 to go out to pull those.

2 THE COURT: Are they present?

3 MR. BAKER: Mr. McQuarley and Mr. Summers,
4 yes, sir, they are.

5 THE COURT: Are they present in the courtroom
6 now?

7 MR. BAKER: No, they are not.

8 THE COURT: Can you perhaps get their dates of
9 birth?

10 MR. MADSEN: If she can just point them out, I
11 will go get them.

12 THE COURT: And you need how much time,
13 Mr. Baker?

14 MR. BAKER: Just a few minutes, Your Honor, to
15 talk to Ms. Klein, ten minutes to talk to Ms. Klein and
16 Mr. Williams.

17 THE COURT: Court will be on standby for about
18 ten minutes. Thank you. Thank you very much.

19 (Whereupon there was a recess).

20 THE COURT: Mr. Baker?

21 MR. BAKER: Yes, sir.

22 THE COURT: Anything before we bring in our
23 jury?

24 MR. BAKER: I don't think so, Your Honor.

25 DEPUTY: I have a question, Your Honor.

1 THE COURT: Yes, sir.

2 DEPUTY: As to Mr. Williams, do you want us to
3 hold him in custody until they are ready for him?

4 THE COURT: Yes, sir, since he didn't appear
5 on time. When do you plan on calling him?

6 MR. BAKER: He is going to be right after the
7 first witness. I have spoken to Mr. Williams. He says
8 nobody ever called him. That's what he said. I think
9 we were under the impression that maybe law enforcement
10 had called him, but I don't know whether they called him
11 or not.

12 THE COURT: I mean, he is your witness.

13 MR. BAKER: Sure.

14 THE COURT: I had the bench warrant issued for
15 him, the Sheriff's Department has gone out and gotten
16 him here for you. If you tell me you are satisfied that
17 he is going to be here when you call him for trial, I
18 will release him from the bench warrant. But if he is
19 not here and I have released him from the bench warrant,
20 I'm not going to issue another one.

21 MR. BAKER: If we could hold him about 20 more
22 minutes, Your Honor.

23 THE COURT: Where is Mr. Williams?

24 DEPUTY: In the lobby of the courtroom, sir.
25 He is in custody of the deputy right outside the door.

1 THE COURT: Can he remain in custody with the
2 deputy, and you won't have to put him in the holding
3 cell?

4 DEPUTY: Yes, sir.

5 THE COURT: Yes, sir, let him remain in
6 custody with the deputy. Thank you very much, sheriff.
7 Are we ready for our jury?

8 MR. BAKER: Yes, sir.

9 THE COURT: Mr. Derrick.

10 (The jury returns to the courtroom at
11 2:27 p.m.)

12 THE COURT: It appears our jury is back
13 present in the courtroom. All parties are present,
14 along with their attorneys.

15 Mr. Foreman, and ladies and gentlemen of the
16 jury, the State has now rested. The State, of course,
17 has the burden of proving its case beyond a reasonable
18 doubt. The defense does not have to present any
19 evidence; however, they may do so if they choose to. So
20 now would be the defense's opportunity to present
21 evidence if they so choose.

22 With that being said, Mr. Baker, you may call
23 your first witness.

24 MR. BAKER: Your Honor, the defense would call
25 Tracy Klein.

TRACY KLEIN -- DIRECT -- MR. BAKER

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1 THE COURT: Ms. Klein, if you would come
2 around, please, ma'am, and be sworn in.

3 TRACY KLEIN, being
4 first duly sworn, testified as follows:

5 CLERK: Speak up loud and clear. State your
6 full name on the record, spelling your last.

7 THE WITNESS: My name is Tracy Klein,
8 K-L-E-I-N.

9 DIRECT EXAMINATION

10 BY MR. BAKER:

11 Q Good afternoon, Ms. Klein. Ms Klein, do you know
12 Mr. Michael Melton?

13 A Yes, sir.

14 Q And was he an acquaintance of yours in September of
15 2005?

16 A I knew him during that time period, yes.

17 Q Was he an acquaintance of you and your husband's?

18 A Yes.

19 Q And did you have the opportunity to travel to his
20 residence on September 5, 2005?

21 A Yes, sir.

22 Q And if you would, Ms. Klein, could you tell the
23 ladies and gentlemen of the jury about when you
24 traveled to his home on September 5, 2005.

25 A I remember it was later in the afternoon. I don't

1 recall if it was dark outside yet or not. I went
2 to the mobile home to the back door. Mike was at
3 the back door. He said to come on in. So I went
4 in through the back door.

5 I looked down the hall, saw David sitting on
6 the couch. I thought he was sleeping. The T.V.
7 was on but I don't recall, you know, what the
8 program was. I was there maybe five, ten minutes
9 at the most and left.

10 Q And in September of 2005 when you traveled to his
11 residence, who did Mr. Melton live with?

12 A I'm sorry?

13 Q Who did he live with, Mr. Melton?

14 A Kim and David.

15 Q Kim Fauscette and David Slice?

16 A I believe that's their last name, yes, sir.

17 Q And as you entered this residence where Mr. Melton
18 lived with Ms. Fauscette and Mr. Slice, did you see
19 anything that was unusual?

20 A No, sir.

21 Q Did you see anything that led you to believe that a
22 crime had been committed in that home?

23 A No, sir.

24 Q In fact, when you were leaving the home on the
25 September 5th, 2005, did you hear anything?

- 1 A Well, I thought I heard maybe David clear his
2 throat, but I'm not sure to be honest with you.
- 3 Q You thought that was what you heard?
- 4 A I thought so, yeah.
- 5 Q And you gave a statement to law enforcement to that
6 effect, did you not?
- 7 A Right, I did. I think I put that in parentheses
8 that I thought, I couldn't be 100 percent sure.
- 9 Q And this was late afternoon, I think you have
10 indicated, around 7, 7:00 p.m. on September 5,
11 2005?
- 12 A Yes, sir.
- 13 Q Thank you Ms. Klein. If you would answer any
14 questions the State may have.
- 15 THE COURT: Thank you, Mr. Baker. Solicitor.
- 16 CROSS EXAMINATION
- 17 BY MR. MADSEN:
- 18 Q How are you doing, Ms. Klein?
- 19 A Hi.
- 20 Q When you got to the house, you came in the back
21 door; isn't that true?
- 22 A Yes, sir.
- 23 Q And it's dark actually in the house? That's
24 correct, isn't it?
- 25 A The house was dark, yes, sir.

- 1 Q Kim and David kept some pretty thick curtains on
2 the windows in that house; isn't that right?
- 3 A They did.
- 4 Q And you had been over to that house before,
5 correct?
- 6 A Yes, sir.
- 7 Q And you didn't actually walk into that family room
8 area, did you?
- 9 A No, sir.
- 10 Q And you saw David what you thought was sleeping;
11 isn't that correct?
- 12 A Yes, sir.
- 13 Q And he was on the couch?
- 14 A Uh-huh. (Indicating affirmative response).
- 15 Q And he was not only on that couch but on the side
16 of the couch towards his bedroom; isn't that
17 correct?
- 18 A That's correct.
- 19 Q You never did see Kim, did you?
- 20 A Never saw Kim.
- 21 Q And when you went in there, were you making a bunch
22 of noise?
- 23 A No, sir.
- 24 Q Why was that?
- 25 A Because when I got there, Mike says, "I think

1 they're sleeping." I said, "Oh, okay, shh." I
2 didn't want to wake them up. I looked down the
3 hall, and I saw David on the couch. So I just
4 thought they were sleeping.

5 Q In fact, you remember that the air conditioning was
6 on there; don't you?

7 A Right, they did. They ran the air conditioner a
8 lot. They kept it really cold in there.

9 Q In fact, that air conditioner back then would
10 sometimes make some noises; wouldn't it?

11 A It would.

12 Q So you can't be 100 percent sure that that's not
13 the air conditioner you heard; can you?

14 A That's true. That's why in my statement I wrote,
15 "I thought," because I couldn't be sure, you know,
16 if it was David or the air conditioner.

17 MR. MADSEN: That's all the questions I have,
18 Your Honor.

19 THE COURT: Thank you, Solicitor. Anything in
20 redirect, Mr. Baker?

21 MR. BAKER: I don't think so, Your Honor.

22 THE COURT: Thank you very much, Ms. Klein.
23 You may step down. May Ms. Klein be excused?

24 MR. BAKER: Yes, Your Honor.

25 MR. MADSEN: No objection from the State.

1 THE COURT: You may step down and you may be
2 excused.

3 THE WITNESS: Thank you, sir.

4 THE COURT: Mr. Baker, you may call your next
5 witness.

6 MR. BAKER: Your Honor, the defense would call
7 Mr. Reginald Larry Williams.

8 THE COURT: Mr. Williams, if you would come
9 down and be sworn, please.

10 REGINALD WILLIAMS, being
11 first duly sworn, testified as follows:

12 CLERK: Have a seat up there please, sir. I
13 will need you to speak up loud and clear. State your
14 full name once you have a seat and spell your last.

15 THE WITNESS: Reginald Williams,
16 W-I-L-L-I-A-M-S.

17 DIRECT EXAMINATION

18 BY MR. BAKER:

19 Q Mr. Williams, is it true you have a criminal record
20 which includes distribution of crack cocaine?

21 A Yes.

22 Q And I think you were sentenced on that charge in
23 June 2002; is that correct?

24 A Yes.

25 Q And were you put on probation?

1 A Five years probation.

2 Q Was that ultimately revoked?

3 A Revoked.

4 Q And you spent some time in prison?

5 A I spend two years.

6 Q Mr. Williams, in September of 2005, did you have
7 occasion to give a statement to law enforcement --

8 A Yes, sir.

9 Q -- regarding your interaction with Mr. Tony Red?

10 A Yes, sir.

11 Q And do you recall what you said in that statement?

12 A Yes, sir.

13 Q What was it?

14 A He had over \$50. I told them that. He called me.

15 I seen him. He give me 50 --

16 COURT REPORTER: Judge, I didn't get that.

17 THE COURT: You might have to slow down for
18 our court reporter a little bit, Mr. Williams.

19 A He had owed me \$50, so he bring me my \$50 that
20 night.

21 Q And why did he owe you 50?

22 A Did some yard work.

23 Q So he owed you \$50. Was this on Sunday,
24 September 4, 2005?

25 A Yes, sir.

1 Q And you called him and told him to bring you your
2 money?

3 A My \$50.

4 Q And that was Mr. Tony Red?

5 A Tony Red.

6 Q And is his name James Johnson?

7 A James Johnson.

8 Q And tell me what happens after that?

9 A He give me my \$50. Me and him talk a little bit,
10 and he got in his car and left, and then that was
11 it.

12 Q What time did he bring you your \$50?

13 A About one in the morning.

14 Q About 1:00 a.m. in the morning?

15 A In the morning.

16 Q That would have been Sunday -- excuse me -- that
17 would have been Monday, early morning hours, of
18 September 5, 2005?

19 A Yeah.

20 Q He brought you your \$50?

21 A My \$50. I called him earlier. He took his time to
22 bring it.

23 Q He took his time?

24 A Yeah.

25 Q Thank you, Mr. Williams. If you would answer any

1 questions the State may have.

2 THE COURT: Thank you, Mr. Baker. Solicitor.

3 **CROSS EXAMINATION**

4 BY MR. HUBBARD:

5 Q Mr. Williams, how are you doing?

6 A I'm all right.

7 Q You say Tony Red owed you 50 bucks?

8 A Yes, sir.

9 Q And what was that for?

10 A Some yard work.

11 Q Yard work. Y'all were in the yard work business
12 together?

13 A Yeah, he was in the business. I was helping him.

14 Q Wait a minute. He was in business and you helped
15 him?

16 A I was helping him.

17 Q And he owed you money?

18 A He owed me some money.

19 Q And that's what y'all did for a living, yard work?

20 A No, I do mechanic work for a living. When he got
21 out of jail, he got in a little yard business, so I
22 was helping him out.

23 Q So his business was yard business?

24 A His business was yard business. I was helping him
25 out.

- 1 Q That \$50, it didn't have anything to do with drugs?
- 2 A No.
- 3 Q It didn't have anything to do with crack?
- 4 A No.
- 5 Q We are sure about that?
- 6 A Positive.
- 7 Q Positive. I just want to be positive about
- 8 something else. That conviction, that was 2002 for
- 9 distribution of crack cocaine; right?
- 10 A Yeah.
- 11 Q You said you caught some probation?
- 12 A I caught probation.
- 13 Q You got five years probation?
- 14 A Five years.
- 15 Q You had some time over your head while you are on
- 16 probation for five years?
- 17 A Yes, sir.
- 18 Q And then 2003, August of 2003, that probation was
- 19 revoked?
- 20 A Revoked.
- 21 Q You had four years revoked off of that time?
- 22 A Four years, yes, sir.
- 23 Q And you did how much of that time?
- 24 A Two years.
- 25 Q Two years. But now even though you've got that

REGINALD WILLIAMS -- CROSS -- MR. HUBBARD

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1 drug conviction for selling crack, this didn't have
2 anything to do with crack?

3 A No, sir.

4 Q It was all yard work.

5 A All yard work, positive.

6 Q Positive. Thank you, Mr. Williams.

7 THE COURT: Redirect, Mr. Baker?

8 MR. BAKER: No, Your Honor.

9 THE COURT: Mr. Williams, you may step down.

10 If you would remain in the custody of the sheriff for
11 me, please. You may step down. Thank you very much,
12 Mr. Williams. I will talk to you when we get a break,
13 all right?

14 Mr. Baker, you may call your next witness.

15 MR. BAKER: At this time, Your Honor, we may
16 need to address a matter outside the presence of the
17 jury.

18 THE COURT: Thank you. Mr. Foreman, and
19 ladies and gentlemen of the jury, if you would step
20 momentarily to your jury room. Do not discuss the case
21 amongst yourselves during this brief recess.

22 (The jury retires to the jury room).

23 THE COURT: Mr. Baker.

24 MR. BAKER: Your Honor, first with the Court's
25 permission, I would ask that at this point we release

1 Mr. Williams from the bench warrant if Your Honor sees
2 fit.

3 THE COURT: I would ask the sheriff to get
4 Mr. Williams right now. I will interview him and decide
5 what I'm going to do with him. Yes, sir.

6 MR. MADSEN: Judge, while we are waiting, I
7 think one of his potential witnesses during this time or
8 potentially for Your Honor to make a decision who to
9 proffer is James Thomas.

10 MR. BAKER: Mr. Thomas? I won't call him.

11 MR. MADSEN: His rap sheet shows he is wanted.
12 Quite honestly I didn't know how to handle it. If he is
13 not here, that is not a concern of mine.

14 (Pause).

15 THE COURT: Did Mr. Williams go do some
16 landscaping?

17 DEPUTY: We took him down to the third floor
18 to hold him until you were ready to deal with him.

19 THE COURT: Thank you. You are still under
20 oath. You had wanted to ask me a question. What did
21 you want to ask me?

22 THE WITNESS: Your Honor, I called the
23 lawyer's secretary Tuesday. She supposed to let me
24 know. I told her I didn't have no ride. She was
25 supposed to call me back and let me know what time the

1 police was to pick me up to bring me up here, but she
2 didn't. I'm sorry about that, sir.

3 THE COURT: Where do you live?

4 THE DEFENDANT: [REDACTED] in Gaston.

5 THE COURT: [REDACTED]?

6 THE WITNESS: Yes, sir.

7 THE COURT: Down behind the pond?

8 THE WITNESS: Yes, sir.

9 THE COURT: Is that all dirt road still?

10 THE WITNESS: They get ready to pave it now.

11 THE COURT: I haven't been down there in
12 awhile. What kind of work do you do?

13 THE WITNESS: I do a little bit of carpentry
14 work and mechanic.

15 THE COURT: A little bit of carpentry and
16 mechanic?

17 THE WITNESS: Yes, sir.

18 THE COURT: And some yard work?

19 THE WITNESS: Not no more.

20 THE COURT: Not no more. How old are you?

21 THE WITNESS: Fifty.

22 THE COURT: How much education do you have?

23 THE WITNESS: Eleventh grade.

24 THE COURT: Who do you live with?

25 THE WITNESS: I live by myself.

1 THE COURT: Are you still on probation?

2 THE WITNESS: I don't owe nothing.

3 THE COURT: You don't know?

4 THE WITNESS: I'm through with that.

5 THE COURT: Oh, you are through with it. All
6 right.

7 Mr. Baker, you told me earlier or you
8 indicated you thought for some reason, maybe
9 incorrectly, you thought the State was going to call
10 Mr. Williams?

11 MR. BAKER: I did, Your Honor.

12 THE COURT: Call him to come up here?

13 MR. BAKER: Correct. I thought they were
14 going to call him and coordinate picking him up.

15 THE COURT: When is the most recent time you
16 have been in jail Mr. Williams?

17 THE WITNESS: I hadn't been in jail in the
18 last four years.

19 THE COURT: In the last four years?

20 THE WITNESS: I ain't been in jail.

21 THE COURT: So since you got out the last time
22 in 2004?

23 THE WITNESS: I haven't been back since.

24 THE COURT: Is that correct, Solicitor? Do
25 y'all have his rap sheet?

1 MR. HUBBARD: I believe that's correct, Your
2 Honor. It says four years was revoked in 2003. So if
3 he did a couple of years, it was probably in 2004 when
4 he got out, 2005 at the latest, and I don't see anything
5 else.

6 THE COURT: All right. I am going to release
7 him from the bench warrant. Do I need to do any
8 paperwork on that sheriff?

9 DEPUTY: The original warrant is probably
10 right there.

11 THE COURT: I guess that's a long walk back to
12 Pine Plain, ain't it? That wasn't a joke.

13 THE WITNESS: Huh?

14 THE COURT: That wasn't a joke.

15 THE WITNESS: I know you want me to walk back
16 home?

17 THE COURT: You will have to talk to the
18 sheriff about that. Do you have any objection,
19 Solicitor, if I release him from the bench warrant?

20 MR. HUBBARD: No, sir, Your Honor.

21 THE COURT: Mr. Baker?

22 MR. BAKER: No, sir.

23 THE COURT: I will release him from the bench
24 warrant, sheriff.

25 THE WITNESS: Thank you, sir.

1 THE COURT: Thank you y'all very much. I
2 would like to thank the Sheriff's Office for assisting
3 the defense in getting Mr. Williams here. Good luck to
4 you, Mr. Williams.

5 THE WITNESS: Thank you, sir.

6 THE COURT: Mr. Baker.

7 MR. BAKER: Your Honor, at this point we have
8 several witnesses we would like to proffer some
9 testimony on third-party guilt.

10 THE COURT: You may call them.

11 MR. BAKER: The defense would call Michael
12 McQuarley.

13 THE COURT: Come around, please, sir.

14 MICHAEL MCQUARLEY, being
15 first duly sworn, testified as follows:

16 CLERK: Have a seat right up there. Speak up
17 loud and clear. State your full name and spell your
18 last for us.

19 THE WITNESS: My name is Michael McQuarley,
20 M-C-Q-U-A-R-L-E-Y.

21 IN CAMERA EXAMINATION

22 BY MR. BAKER:

23 Q Mr. McQuarley, did you live on [REDACTED] at
24 one time?

25 A Yes, sir.

MICHAEL MCQUARLEY -- IN CAMERA -- MR. BAKER

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1 Q And was Kim Fauscette your landlord?

2 A Yes, she was.

3 Q And you actually lived next door to Kim Fauscette
4 and David Slice?

5 A The trailer in front of theirs.

6 Q How long did you live there?

7 A Maybe a month.

8 Q And while you lived there, did you ever see any
9 suspicious activities that you were concerned
10 about?

11 A Just traffic more or less going in and out from
12 their house.

13 Q And did you ever see any altercations between or
14 interaction between Ms. Fauscette and Mr. Slice
15 with other individuals?

16 A I never seen him, but she was in an argument with
17 someone one day when I just happened -- I had dogs
18 and they would bark. I would look out. It was a
19 guy arguing with her.

20 Q When did you live there?

21 A That was back in -- I think I moved there in
22 September about two years ago and I left in
23 October. Because as a matter of fact, I was in the
24 hospital during the time this incident happened. I
25 was at Lexington Medical Center. I was in there

1 for eight days. And when I actually got out the
2 hospital, I went home to my mother's house, which
3 is in Williston, South Carolina.

4 Q Were you questioned by law enforcement in this
5 case?

6 A Yes, I was.

7 Q And did you give them a statement?

8 A When they came to my mother's house, whatever they
9 asked me, they wrote it on the paper.

10 (Defendant's Exhibit Number 3 is marked for
11 identification).

12 BY MR. BAKER:

13 Q Let me show you what is marked as Defendant's
14 Exhibit 3, Mr. McQuarley. Do you recognize that
15 document?

16 A Yes, sir.

17 Q And is your signature on that document?

18 A Yes, it is.

19 Q And is that, in fact, your statement?

20 A (Pause). Yes, sir, pretty much, yeah.

21 Q If you need a moment you can read through the
22 entire statement.

23 A Read it out loud or to myself?

24 Q Read it to yourself first if you would.

25 A (Pause). Yes, sir.

MICHAEL MCQUARLEY -- IN CAMERA -- MR. BAKER

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1 Q That's your statement?

2 A Yes, it is.

3 Q And I ask you again, Mr. McQuarley, and if you need
4 to refer to that statement, did you see any threats
5 made toward Kim Fauscette or David Slice while you
6 lived next door to them?

7 A Never towards David. I saw that time that's on the
8 statement, that guy that was in a Neon that came.
9 I looked out and he grabbed her by her shirt, but
10 they walked to the back of the house. So after
11 that I don't know.

12 Q Was there any arguing between them?

13 A Pretty much him being kind of rude to her, calling
14 her names and stuff. She really wasn't saying
15 anything back. I mean, he was kind of
16 disrespectful in the statement.

17 Q What did he say to her?

18 A I remember him calling her a bitch and stuff like
19 that. Then I think she walked towards him and
20 turned to walk away, and he grabbed her shirt.
21 Bout then they walked behind the trailer after
22 that. I couldn't see once they walked behind the
23 trailer. The front of her trailer faces my back
24 door.

25 Q And he actually physically grabbed her?

1 A Grabbed onto her arm or somewhere in that area.

2 Q And according to your statement, they were arguing
3 about money?

4 A I think so, yeah, yeah.

5 Q And what gave you that impression?

6 A I think I heard him mention something about money,
7 "You owe me, do you have my money," some kind of
8 statement like that.

9 Q Do you know based on your statement about when that
10 happened?

11 A Around August 23rd.

12 THE COURT: August when?

13 THE WITNESS: Twenty-third.

14 BY MR. BAKER:

15 Q And the individual that was in the Neon, was that
16 Mr. Darrell Burgess?

17 A No, I never seen him before.

18 Q Thank you, Mr. McQuarley. I think that's all the
19 questions I have.

20 THE COURT: Thank you, Mr. Baker. Solicitor,
21 do you have any questions?

22 IN CAMERA EXAMINATION

23 BY MR. MADSEN:

24 Q So you are staying in Williston now?

25 A Yes, sir.

MICHAEL MCQUARLEY -- IN CAMERA -- MR. MADSEN

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1 Q During the time that Kim and David were murdered,
2 you were actually in the hospital; correct?

3 A Correct.

4 Q And then this altercation that you saw was the 23rd
5 of August?

6 A Right, I'm assuming it was around that time.

7 Q Just based on your statement? You don't remember
8 that yourself?

9 A Not really. As far as the date wise, no. I did
10 witness it, but as far as what the date actually
11 was, I'm just going by the statement.

12 Q And you don't know what happened behind the
13 trailer?

14 A No, sir.

15 Q And that's it?

16 A That's it.

17 Q You didn't have to call the law or anything?

18 A No, no.

19 Q And is Chief Kaney still the Chief down in
20 Williston?

21 A Yes.

22 Q How about Mr. Rivers, is he still there?

23 A Yeah, he's the mayor.

24 Q Still the mayor?

25 A Yeah.

1 MR. MADSEN: That's all the questions I have
2 got.

3 THE COURT: Redirect?

4 MR. BAKER: None, Your Honor.

5 THE COURT: Thank you, Mr. McQuarley. You may
6 step down, and you may remain outside of the courtroom.
7 You are not released from your subpoena yet.

8 THE WITNESS: Okay.

9 THE COURT: Mr. Baker.

10 MR. BAKER: The defense would call Mr. Fred
11 Summers.

12 FREDERICK LOUIS SUMMERS,
13 being first duly sworn, testified as follows:

14 CLERK: Have a seat right up there please,
15 sir. Once you have a seat, speak up loud and clear.
16 State your full name and spell your last.

17 THE WITNESS: Frederick Louis Summers.

18 IN CAMERA EXAMINATION

19 BY MR. BAKER:

20 Q Mr. Summers, are you a former neighbor of Kim
21 Fauscette and David Slice?

22 A That's correct.

23 Q And when did you live next door to them?

24 A It was two years ago? About two years ago. It
25 wasn't long at all though. I want to say about two

FREDERICK SUMMERS -- IN CAMERA -- MR. BAKER

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1 months. The accident happened that shook us and we
2 disappeared.

3 Q Did you get questioned by law enforcement in this
4 matter, do you recall?

5 A Uh-huh. (Indicating affirmative response).

6 Q And is that a statement that you gave and you
7 signed?

8 A Yeah.

9 (Defendant's Exhibit Number 4 is marked for
10 identification).

11 BY MR. BAKER:

12 Q Is that your signature at the bottom of what has
13 been marked Defendant's Exhibit 4 for I.D.?

14 A Uh-huh. (Indicating affirmative response).

15 Q If you would, Mr. Summers, if you would read that
16 statement into the record.

17 A Which one?

18 Q The statement, where it starts right there
19 (indicating).

20 A The whole thing?

21 Q Yes.

22 A On Friday, the 26th, and Saturday, the 27th, around
23 noon, me and Lezzie Rose appeared -- or seen a
24 black male standing at the front door of Kim's
25 trailer. That was in 2005 at 10:30. Michael

1 McQuarley and Kim returned to the trailer. As we
2 were driving, I looked back and seen a red Neon
3 standing or sitting in the driveway with a white
4 male as a passenger. Let's see. When the Neon was
5 there, I seen a Neon. The fellow that was out,
6 that was on the front, that was to the front door,
7 that was arguing, he was arguing at her.

8 Q So there was a guy on the front door --

9 A Arguing.

10 Q -- of Ms. Fauscette's house arguing with her?

11 A I didn't see her through the door. He was arguing
12 through the door, "Give me my money," this and
13 that.

14 Q He said what?

15 A "I want my money," and all this, you know, like
16 that, "I want my money." I can't remember it was
17 like two years ago, you know. Then the Neon came
18 every now and then, you know, I'd say about every
19 20 minutes basically. I seen that. Then we pulled
20 off and went back to Lexington Hospital. That
21 Saturday we come back to get some more clothes, and
22 it was surrounded with cops and stuff, and that's
23 when they told us what happened basically, you
24 know.

25 Q Does your statement say: On Friday, the 26th, or

FREDERICK SUMMERS -- IN CAMERA -- MR. MADSEN

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1 Saturday, the 27th, at around noon, me and Lezzie
2 Rose observed a black male standing at the front
3 door of Kim's trailer yelling and screaming, "Give
4 me my money," while holding a stick?

5 A Yep, yep, uh-huh. That's correct.

6 Q And that would be the 26th or 27th of August?

7 A Uh-huh. (Indicating affirmative response).

8 Q 2005?

9 A Yeah.

10 Q And the individual you witnessed saying, "Give me
11 my money," was that Mr. Darrell Burgess?

12 A No. That ain't nowhere near it. That man, I ain't
13 never seen that man before. No, that's a little
14 dude. He is little. We was looking at...

15 Q A big guy?

16 A Yeah, a big guy.

17 Q Thank you, Mr. Summers. If you would answer any
18 questions the State may have.

19 THE COURT: May I see 4, Defendant's
20 Exhibit 4. Solicitor, do you have any questions?

21 IN CAMERA EXAMINATION

22 BY MR. MADSEN:

23 Q Given your statement here, it says the guy was at
24 the front door of Kim's trailer yelling. You don't
25 see who he is yelling at, do you?

1 A No, no, because the door was closed. It was like
2 he probably know that Kim was on the other side of
3 the door or Kim or the other guy. I mean, I don't
4 know.

5 Q But you can't tell us whether it was them, and they
6 had someone else actually living with them for a
7 little bit?

8 A Right, right.

9 Q You don't know if it was him, do you?

10 A Right, it was either of those three.

11 MR. MADSEN: That's all the questions I have.

12 THE COURT: Anything on redirect?

13 MR. BAKER: None, Your Honor. I don't have
14 any questions, Your Honor.

15 THE COURT: All right. Thank you,
16 Mr. Summers. You may step down and you may remain
17 outside the courtroom. Thank you very much.

18 Mr. Baker, you may call your next witness.

19 MR. BAKER: Tonya Aycock.

20 TONYA AYCOCK, being
21 first duly sworn, testified as follows:

22 CLERK: Have a seat right up there. Once you
23 have a seat, I need you to speak up loud and clear.
24 State your full name, spelling your last.

25 THE WITNESS: My name is Tonya Aycock,

TONYA AYCOCK -- IN CAMERA -- MR. BAKER

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1 A-Y-C-O-C-K.

2 IN CAMERA EXAMINATION

3 BY MR. BAKER:

4 Q Ms. Aycock, good afternoon. In 2005 were you
5 questioned by law enforcement following the death
6 of Kim Fauscette and David Slice?

7 A Yes, sir.

8 Q Did you gave a handwritten statement --

9 A Yes, sir.

10 Q -- to law enforcement. Do you have a copy of your
11 statement?

12 A Yes, sir.

13 Q I will show you a copy, and I will get it marked.
14 Is this a copy that accurately reflects the
15 statement you gave to law enforcement?

16 A Yes, sir. This one here is basically hearsay, and
17 the only thing I know that is not hearsay --

18 Q Hold on just one second. Let me ask you -- well,
19 let me get this marked first.

20 (Defendant's Exhibit Number 5 is marked for
21 identification).

22 BY MR. BAKER:

23 Q Defendant's Exhibit 5 that has been marked, is that
24 a statement that you gave and is that your
25 signature at the bottom of that page?

1 A Yes, sir.

2 Q Is that your signature at the bottom of the second
3 page?

4 A Yes.

5 Q If you could, Ms. Aycock, would you read that
6 statement to us.

7 A I knew Kim for 20-plus years. Kim moved back from
8 Georgia two years ago, and she was on ice in
9 Georgia. When she moved back to South Carolina,
10 she started on crack from that point and never
11 started (sic) smoking crack. David got in on it
12 just as bad but -- wait a minute -- but worse.
13 Every time they got paid, it went on crack. They
14 got in debt with Steve Riley. He made it sound
15 like if they didn't pay him, he would take care of
16 them. The other guy, I don't know his name, but he
17 made the same comment. Do you want me to read it
18 all?

19 Q Yes, ma'am.

20 A Where did the other guy live?

21 Across from Sharpe's, not the first trailer
22 but second, and he made threats toward them.

23 It says: Who is Sarge?

24 Kim's running buddy. He had a limp, and he
25 would know where she got her stuff. I don't think

TONYA AYCOCK -- IN CAMERA -- MR. BAKER

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1 Sarge -- wait a minute -- I didn't think Sarge
2 would harm Kim.

3 What did you think Steve Riley meant when he
4 said he would take care of them?

5 I think he would have killed them, and he made
6 comments that if he didn't get paid, he would take
7 care of them.

8 Q Does it say: If he didn't get paid, he would kill
9 them?

10 A Wait a minute. He made a comment that if he didn't
11 get paid, he would kill them.

12 When was the last time you saw Kim or David?

13 About two weeks ago, wanted me to buy a mirror
14 she had.

15 When was the last time you talked to either
16 Kim or David?

17 I talked to Kim Saturday, and she was going to
18 come by but never did. She was wanting to pawn
19 some kind of mirror table.

20 Q Is that the statement you give to law enforcement
21 on September 6, 2005?

22 A Yes, sir.

23 Q Thank you, Ms. Aycock. If you would answer any
24 questions the State may have for you.

25 THE COURT: Solicitor.

1 IN CAMERA EXAMINATION

2 BY MR. HUBBARD:

3 Q Ms. Aycock, I notice in your statement you don't
4 say when this happened. Do you remember all of
5 this?6 A I don't remember the dates. But when I moved away
7 from my trailer, it was like two years that I
8 didn't go around Kim. She would call me on the
9 phone and say: Well, I have got this to pawn or
10 whatever. She would come to my house. If I wanted
11 it, I would buy it. If not, I didn't. But as far
12 as me going there, no, I didn't got to her house.

13 Q When you talk about Steve Riley --

14 A Steve Riley, I had seen him at Sharpe's store, and
15 he made that comment there. When I was going in to
16 pay for some gas, he made that comment to me.

17 Q Do you remember that date?

18 A No, sir.

19 Q Was it the same day they were murdered?

20 A Oh, no this was way before.

21 Q Way before?

22 A Yeah.

23 Q You had mentioned a lot of this was hearsay, too?

24 A Yeah, a lot of it. Kim would tell me things and
25 all. The only thing that I know, which I didn't

TONYA AYCOCK -- IN CAMERA -- MR. HUBBARD

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1 give in this statement, was the only thing I know
2 that was a fact, I was giving her a ride home from
3 Seawell's. There was this guy. He was a big,
4 stocky guy. We had just got off work. I just got
5 her to her house. He come in, didn't knock or
6 nothing. He come in and made the comment that if
7 David didn't have his \$250, then he would come
8 shoot up the place.

9 Q Is that a long time ago, too?

10 A Yeah, yeah.

11 Q Long before they were killed?

12 A That was probably a year before they were killed.

13 Q So all that happened a long time ago?

14 A Yes, sir.

15 MR. HUBBARD: No more questions.

16 THE COURT: Redirect?

17 MR. BAKER: None, Your Honor.

18 THE COURT: Thank you, Ms. Aycock. You may
19 step down. If you would remain outside the courtroom.
20 Thank you.

21 Mr. Baker.

22 MR. BAKER: Your Honor, I have got one more
23 witness.

24 THE COURT: All right.

25 ALICE BALLARD, being

1 first duly sworn, testified as follows:

2 CLERK: Once you have a seat, please speak up
3 loud and clear. State your full name and spell your
4 last.

5 THE WITNESS: Alice Ballard, B-A-L-L-A-R-D.

6 THE COURT: Mr. Baker.

7 IN CAMERA EXAMINATION

8 BY MR. BAKER:

9 Q Ms. Ballard?

10 A Yes.

11 Q Were you questioned by law enforcement following
12 the death of Kim Fauscette and David Slice?

13 A Yes, I was.

14 Q And how did you know them?

15 A Kim was my landlord and David was her live-in
16 boyfriend.

17 Q And I want to show you a document and ask you if
18 you can recognize it or if you do recognize it.

19 A Yes, I do.

20 (Defendant's Exhibit Number 6 is marked for
21 identification).

22 BY MR. BAKER:

23 Q What has been marked as Defendant's Exhibit 6 for
24 identification purposes, is this a statement you
25 gave on September 7, 2005, Ms. Ballard?

1 A Yes, it is.

2 Q It consists of three pages?

3 A Yes, sir.

4 Q If you would can you read that into the record,
5 please.

6 A I certainly will. I met Kim Fauscette on July 7,
7 2004, in her home on [REDACTED] Gaston. I
8 rented a mobile home from her. About one month
9 after I moved in, Kim met David Slice through their
10 mutual friend -- through a mutual friend of theirs,
11 Tonya. Kim, over a period of time, began to ask me
12 to take her places. At first I was unaware of what
13 she was doing.

14 Later I found out she was buying crack.
15 Several times she would have me take her to a man
16 named Twelve's house. Sometimes she would ask me
17 to take her to a mobile home directly across the
18 street from Sharpe's on Fish Hatchery Road. She
19 really started using more heavily around
20 November of 2004.

21 In November she allowed a known drug dealer
22 Eldog (phonetic) to move in and sell drugs from her
23 home. Instead of rent money, she would accept
24 crack for payment. She also in October let another
25 known drug dealer move in temporarily to sell drugs

1 in lieu of rent.

2 Traffic at her home rapidly increased.
3 Sometimes I would be at home, and there would be
4 six or seven cars in her yard. The next day she
5 would tell me she had stayed up all night with
6 crack..

7 She and David made the decision that since the
8 cars was possibly drawing attention from the
9 neighbors, they would make a deal with dealers to
10 bring crack to them. I would be in my home and
11 see a car drive up. Kim or David would come out,
12 and it appeared to me there would be an exchange
13 between the two. They would maybe have these
14 individuals over four or five times a night.

15 Kim liked being on the road because she knew
16 just about everybody on that road. I stayed
17 concerned for myself... I stayed concerned for
18 myself and my children because she, Kim, would
19 argue with the dealers. She told me of her past
20 and quite frankly I was scared of her. I felt if I
21 did not do what she asked me, my children and I
22 would be evicted.

23 I witnessed three confrontations between Kim
24 and Twelve. One confrontation was on the phone.
25 The other two were in her yard. All three were

ALICE BALLARD -- IN CAMERA -- MR. HUBBARD

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1 over money and drugs. I witnessed confrontations
2 between Kim and a dealer who lives across the
3 street from Sharpe's store. The confrontation was
4 over drugs and money.

5 David traded a white Park Avenue for crack
6 from the same individual. A confrontation happened
7 in the front yard of the individual's house at the
8 end of October of 2004. I witnessed a
9 confrontation between Mack, Kim, and David on [REDACTED]
10 [REDACTED] over crack, over a rock off of the ground that
11 Mack tried to pass as crack. This occurred
12 November 2004. I witnessed a confrontation between
13 Kim and Tim on [REDACTED] that Tim supposedly owed
14 her. This occurred approximately November 2004.

15 Q That's the statement, Ms. Ballard, you gave to law
16 enforcement September 7, 2005?

17 A Yes, it is.

18 Q Thank you, Ms. Ballard. If you would answer any
19 questions the State would have for you.

20 THE COURT: Thank you, Mr. Baker. Solicitor.

21 IN CAMERA EXAMINATION

22 BY MR. HUBBARD:

23 Q Ms. Ballard, by your statement all these incidents
24 happened in 2004?

25 A Yes, I only stayed there six months. I got out of

1 there as fast I could.

2 Q Thank you, ma'am?

3 THE COURT: Anything in redirect?

4 MR. BAKER: Nothing, Your Honor.

5 THE COURT: Thank you, Ms. Ballard. You may
6 step down, and you may remain outside of the courtroom.
7 Thank you so much.

8 MR. BAKER: Your Honor, I think that's all we
9 have.

10 THE COURT: All right. I would be glad to
11 hear from you, Mr. Baker.

12 MR. BAKER: Your Honor, I would make an
13 argument that based on the numerous threats that these
14 individuals have testified to regarding what seems to be
15 a name that comes up kind of over and over is a
16 gentleman named Twelve, some gentleman that lives across
17 the street from Sharpe's Septic Tank and some folks that
18 drive a red Neon.

19 There are a number of individuals who have
20 seen threats toward the victims and some of them were in
21 close proximity to the time of these murders.

22 Mr. Melton testified earlier about the same individual
23 by the nickname Twelve who threatened these individuals
24 as well.

25 He said he had seen a confrontation between

1 Twelve and David Slice, and I would argue in order to
2 put up a complete defense that the jury ought to have
3 the opportunity to hear this evidence.

4 THE COURT: Thank you. Solicitor.

5 MR. HUBBARD: Your Honor, we believe these do
6 not come within the purview of Holmes versus South
7 Carolina, State versus Gregory, along that line of
8 cases. This is third-party guilt that is the type of
9 evidence that should be excluded.

10 THE COURT: Thank you, Solicitor. As I
11 understood the testimony of Mr. Michael McQuarley, Fred
12 Summers, Tonya Aycock, and Alice Ballard, none of that
13 testimony can be received unless there is such proof of
14 a connection with that testimony in such a train of
15 facts or circumstances as tends clearly to point out
16 such other persons as the guilty party.

17 Remote acts disconnected outside the crime
18 itself cannot be separately proved for such a purpose.
19 An orderly and unbiased judicial inquiry as to the
20 guilt or innocence of the Defendant on trial will not
21 contemplate that such defendant be permitted by way of
22 defense to indulge in conjectural inferences that some
23 other person might have committed the offense for which
24 he is on trial or by the fanciful analogy to say to the
25 jury that someone other than he is more probably

1 guilty.

2 It's clear that the evidence offered through
3 these witnesses to the commission of a crime or the
4 crimes by another person must be limited to such facts
5 that are inconsistent with his own guilt, and none of
6 this rises to that level. Such facts must raise a
7 reasonable inference or presumption as to his own
8 innocence.

9 Evidence which can have no other effect than
10 to cast a bare suspicion upon another or to raise a
11 conjectural inference as to the commission of the crime
12 by another is not admissible. It's clear some of these
13 acts are in 2004 and before.

14 Even the act testified to by Mr. McQuarley and
15 Mr. Summers on August 23rd, some two weeks or better
16 prior thereto is not inconsistent with the Defendant's
17 guilt. It's mere conjecture or surmise.

18 I think there is a long line of cases in South
19 Carolina, a prodigy of the Gregory standard, and that's
20 what I apply. I would not allow the testimony of
21 Mr. McQuarley, Summers, Aycock or Ballard. Do you have
22 other witnesses you intend to present, Mr. Baker?

23 MR. BAKER: No, Your Honor.

24 THE COURT: In other words, is the defense
25 going to rest when I bring the jury back out?

1 MR. BAKER: We would, Your Honor.

2 THE COURT: Will there be any testimony in
3 reply?

4 MR. MADSEN: There will not, Your Honor.

5 THE COURT: It's 3:30. How long are your
6 closings going to be?

7 MR. MADSEN: Fifteen, 20 minutes.

8 MR. BAKER: I would need 15 to 20 minutes as
9 well. Once I close I may have a few matters to take up
10 with the Court, just as a matter of time.

11 THE COURT: That was kind of where I was
12 headed. Do y'all want to close today?

13 MR. BAKER: It would be my preference to close
14 in the morning, Your Honor.

15 THE COURT: Solicitor?

16 MR. MADSEN: I would defer to Mr. Baker. If
17 that's his preference, I am happy to go along with that
18 also if that's okay with the Court.

19 THE COURT: All right. I will bring the jury
20 back out and ask you to call your next witness. You can
21 rest. I will ask them if they have any evidence in
22 reply. They can rest. Then I will release the jury,
23 and I would be glad to hear your motions, Mr. Baker. I
24 will have the jury come back at 9:00 hours in the
25 morning. If you would bring our jury, please,

1 Mr. Derrick.

2 (The jury returns to the courtroom).

3 THE COURT: It appears our jury is back
4 present in the courtroom. Mr. Baker, you may call your
5 next witness.

6 MR. BAKER: Your Honor, at this time the
7 defense would rest.

8 THE COURT: Thank you, Solicitor. Do you have
9 any witnesses in reply?

10 MR. MADSEN: We do not, Your Honor.

11 THE COURT: Mr. Foreman, and ladies and
12 gentlemen of the jury, I had some motions to take up in
13 your absence, and I have taken those up. At this phase
14 of the proceedings, I have other motions that I must
15 take up at the close of all the evidence, which may take
16 some period of time.

17 I know you feel like you have been held
18 captive back there all afternoon. So I will not
19 continue to have you feel like that for the remainder of
20 the afternoon since I have these legal matters I must
21 take up at this juncture.

22 Momentarily I will release you from your jury
23 service for the remainder of the day. You have now
24 heard all the evidence and testimony. All the exhibits
25 that are going to be presented have been presented by

1 both of the parties in this case.

2 The procedure we will follow after I hear
3 these motions is the solicitor, the State, has the right
4 to open on the law. Then Mr. Baker would be able to
5 present his closing argument on behalf of his client.
6 Thereafter the solicitor, being the party that has the
7 burden of proof beyond a reasonable doubt, would close
8 in full.

9 That procedure takes a certain amount of time
10 for each of the parties. Many times it could take 20,
11 30 minutes. Sometimes it can take much longer per
12 party. So at the very least after I heard the motions,
13 you would be looking at, say, 40 minutes to an hour's
14 worth of argument. Then I have to charge you the law,
15 which is pretty well scripted. That takes 30 to 40
16 minutes generally.

17 Our Supreme Court frowns on submitting a case
18 to the jury after 4:00 p.m. in the afternoon. I see I
19 will not reach that time frame at this time. So I am
20 going to ask you, does anyone have a problem with being
21 here at 9:00 in the morning, about 9:00 o'clock?

22 I will ask you then to please be back in your
23 jury room at nine, promptly at nine in the morning.
24 Remember, do not discuss the case with anyone during
25 this recess. That includes your family, friends, anyone

1 involved in the trial.

2 If anyone tries to talk with you about the
3 case, please let me know. Remember to keep an open mind
4 and do not begin your deliberations until you are
5 instructed to do so by the Court. With that you are now
6 excused for the remainder of the day.

7 Please be back promptly at 9:00 o'clock in the
8 morning. Everyone please remain seated in the courtroom
9 while the jury is excused. Thank you very much. I hope
10 you have a pleasant evening.

11 (The jury is excused for the day at 3:33).

12 THE COURT: Mr. Baker, you have motions?

13 MR. BAKER: Yes, Your Honor. At this time I
14 would renew my motion for directed verdict in favor of
15 the defense on all charges, Your Honor, due to the
16 failure of competent evidence tending to prove the
17 charges in the indictments. The evidence, when viewed
18 in the light most favorable to the State, fails to
19 create an issue for the jury.

20 There are just a couple of other motions I
21 would renew at this point, Your Honor, a motion to
22 strike for cause or leave for cause, juror Mr. Emanuel
23 who indicated he was a supervisor of one of the family
24 members of Mr. Slice.

25 I would just renew my motion to quash the

1 murder indictments per 17-19-30 based on the inadequacy
2 of the time and place in those indictments.

3 THE COURT: Thank you, Mr. Baker. I would not
4 recite all I did concerning the directed verdict at the
5 close of the State's case. I reiterate the standard
6 that I am applying is the standard that is well founded
7 in our law and a very recent case within the last week,
8 State versus Dantonio, I think written by the Honorable
9 Ralph King Anderson, that reconfirms all that law.

10 I will not revisit the facts of the case. I
11 think there is sufficient direct and substantial
12 circumstantial evidence that would make this a jury
13 issue, and I would deny your motion for directed
14 verdict.

15 As to juror Emanuel, I would reaffirm my
16 decision concerning juror Emanuel and further his
17 statements that he could be fair and impartial. He was
18 questioned independently in the courtroom. Also I would
19 renew my rulings concerning quashing the indictment.
20 Anything further, Mr. Baker?

21 MR. BAKER: Nothing, Your Honor, not at this
22 time.

23 THE COURT: Solicitor?

24 MR. MADSEN: No Your Honor.

25 THE COURT: Any specific requests to charge

1 from the State?

2 MR. MADSEN: No, sir, Your Honor.

3 THE COURT: From the defense?

4 MR. BAKER: I don't have anything right now,
5 Your Honor. I may have something for you.

6 THE COURT: We start at nine. If you or if
7 you could have your paralegal get it to my office at
8 8:30 so I could look at it so y'all can know before
9 y'all argue, if there is a specific request that is not
10 in my standard charge.

11 MR. BAKER: I don't anticipate having anything
12 that I think would not be in your standard charge, Your
13 Honor.

14 MR. MADSEN: Can I be provided a copy of that
15 if he does come up with something?

16 MR. BAKER: Certainly.

17 MR. MADSEN: That way I can look at it.

18 THE COURT: With that be said, court will be
19 in recess until 9:00 o'clock in the morning. Thank you
20 very much.

21 (Whereupon the proceedings were concluded for
22 January 31, 2008).

23 (The following proceedings were reported on
24 February 1, 2008).

25 THE COURT: I did check State versus Battle

1 last night, 403 S.E.2d 331, I did not shepherdize it. I
2 know there is a more recent case consistent with it.
3 When there is evidence introduced by the defense,
4 documentary, it would give the State the right to the
5 final closing. In addition to that in this case, of
6 course, the defense has offered witnesses in front of
7 the jury also. Any requests to charge specifically,
8 Solicitor?

9 MR. HUBBARD: None from the State, Your Honor.
10 We believe your standard charge would cover everything.

11 THE COURT: Mr. Baker?

12 MR. BAKER: Yes, Your Honor, I don't have
13 anything specifically.

14 THE COURT: For those of you that are
15 observing today, I do not allow any movement in or out
16 of the courtroom during the course of time when the
17 attorneys are addressing the jury. You can certainly
18 leave between the closing arguments.

19 Are y'all going to open on the law, Solicitor?

20 MR. HUBBARD: Your Honor, I will waive that,
21 and I will just close on the facts altogether.

22 THE COURT: After Mr. Baker's closing, if
23 anyone wants to leave, you may do so at that time prior
24 to the solicitor beginning. Once the solicitor begins
25 his closing, you must remain in the courtroom until

1 after the solicitor has closed.

2 You may then leave prior to my charge to the
3 jury, although I can't imagine why anyone would want to
4 leave during the course of my instructions to the jury.
5 Beyond that, Mr. Bailiff, I don't want anyone coming in
6 and out during the course of the arguments to the jury.

7 So if the parties or the victims or
8 Mr. Burgess' family are not present now, they need to be
9 in the courtroom because I'm not going to allow anyone
10 to come in once we start this process.

11 BAILIFF: I will lock the door.

12 THE COURT: That will be fine. Thank you.

13 MR. HUBBARD: Your Honor, I do have one
14 request, and I would ask defense counsel as well if we
15 could take a quick break just to move some stuff around.
16 As you know, there is over a hundred pieces of evidence.
17 I know he wants to pull out what he wants to use. I
18 thought that might in the long run look a little bit
19 better.

20 THE COURT: Have you got your exhibits in
21 order?

22 MR. BAKER: Yes, sir Your Honor, I think I
23 have got what I need.

24 MR. HUBBARD: I won't need much time, Your
25 Honor, just set up time.

1 THE COURT: Anything further before we bring
2 our jury?

3 MR. HUBBARD: Nothing from the State, Your
4 Honor.

5 THE COURT: From the defense?

6 MR. BAKER: Nothing, Your Honor.

7 THE COURT: If you would bring our jury.

8 (The jury returns to the courtroom at
9 9:03 a.m).

10 THE COURT: It appears our jury is present in
11 the courtroom.

12 Mr. Foreman, ladies and gentlemen of the jury
13 good morning. Again, the procedures we are going to
14 follow, the State has the right to open on the law.
15 They are waiving that right.

16 So what will happen first this morning is
17 Mr. Baker will present the closing argument on behalf of
18 the Defendant. Thereafter we will take a very quick
19 recess, only because there are 103 exhibits between the
20 parties, I believe.

21 The solicitor had requested to have the
22 opportunity to get them back in order he wanted to use
23 them. Rather than have us all sit out in the courtroom
24 while he does that, we will take a quick break. We will
25 then come back for the solicitor's closing argument.

1 Thereafter, after both closing arguments, I
2 will charge you or tell you what the law is that you are
3 to apply to the facts of this case as you and only you
4 can find what the facts are.

5 I have advised everyone in the courtroom that
6 no one is to go in and out during the course of the
7 attorneys addressing you in their closing arguments.
8 These are different from opening statements. These are
9 true arguments. They can comment on the facts, the law,
10 and the inferences to be drawn from the facts. So these
11 are the true arguments.

12 Individuals may be able to leave after
13 Mr. Baker's closing and prior to the solicitor's, after
14 the solicitor's closing and prior to my charge to you,
15 but there is not to be any movement about the courtroom
16 during these closing arguments.

17 This is a very important phase of the trial,
18 as all phases of the trial are, because it's only the
19 second time the attorneys are allowed to address the
20 jury on behalf of their respective sides.

21 With that being said, I would ask you to
22 please give the attorneys your complete and undivided
23 attention during the course of their closing argument,
24 as you have to all the parties during the trial of this
25 case.

1 With that being said, Mr. Baker, you may
2 address the jury.

3 MR. BAKER: May it please the Court, Your
4 Honor.

5 THE COURT: Yes, sir.

6 **CLOSING ARGUMENT**

7 MR. BAKER: Members of the jury, this is the
8 last opportunity I will have to speak with you regarding
9 this case. First of all, on behalf of myself and my
10 client, I would like to thank you for your service and
11 your attentiveness this week.

12 I would like to say that what happened to Kim
13 Fauscette and David Slice was a horrible thing. It's
14 certainly a tragic matter, and certainly my thoughts and
15 prayers are with the families of these victims.

16 But the State has accused Mr. Burgess of
17 committing these crimes, and there are some things I
18 would like for you to think about while you are
19 deliberating in this case.

20 I think if you take a look at this evidence
21 there are, as Your Honor mentioned, over a hundred
22 exhibits that have been introduced during this trial. I
23 think you will see that there are some missing pieces.

24 The first thing I want to talk with you about
25 this morning is the testimony of the first witness that

1 you heard from in this case, that being Mr. Michael
2 Melton. He was the roommate of these victims. His
3 testimony is that he comes home at 5:00 p.m. on Monday,
4 September 5th, and that is some 12 hours after the State
5 alleges that my client killed these victims.

6 You heard the testimony of Mr. Melton. His
7 testimony is that he came in to this house through the
8 front door and sat down on this love seat (indicating).
9 He comes in through the front door, goes into the
10 kitchen, fixes his self a glass of tea and goes and sits
11 on the love seat.

12 I think he said he was going -- he sat there
13 and drank his tea. The State would have you believe
14 that the victims, Ms. Kim Fauscette and Mr. David Slice
15 were already dead at those two locations.

16 I want to show you what has been put into
17 evidence, some pictures that have been introduced in
18 this case. I think you heard C.S.I. Detective Gould say
19 she took this picture from the front door. This would
20 have been what Mr. Melton would have seen when he would
21 have come in at 5:00 p.m. on September 5th.

22 This is a picture of the victims from the love
23 seats where Mr. Melton said he was sitting, and this is
24 a close-up picture of the victims as they were found.
25 Mr. Melton said he spent, by his own testimony, some 18

1 hours in that house, didn't see anything unusual, had no
2 reason to believe that there had been a crime committed,
3 never called law enforcement.

4 I would argue to you, ladies and gentlemen,
5 that if you were in this home for 18 hours, you would
6 have known that these victims had been killed. If the
7 victims were alive at 5:00 p.m. when Mr. Melton comes
8 home, the State's case falls apart.

9 Their timeline doesn't make sense. Their
10 witnesses aren't credible. You would have to find my
11 client not guilty based on the position of the State and
12 their theory about how this happened.

13 Also I want to talk you about the testimony
14 you heard of Tracy Klein. She was one of the last
15 witnesses you heard from. She came over to this
16 residence at 7:00 p.m. on the night of September 5,
17 2005.

18 This is some 14 or 15 hours after the State
19 claims that my client killed Kim Fauscette and David
20 Slice. She testified she heard nothing or she saw
21 nothing unusual, nothing that led her to believe that a
22 crime had been committed. She looked down the hallway,
23 thought she said David Slice watching T.V. And as she
24 was leaving, she thought she heard him clear his throat.

25 Again, if David Slice and Kim Fauscette are

1 alive at 7:00 p.m. on September 5, 2005, the State's
2 case again falls apart, and you have got to find my
3 client not guilty.

4 I want to talk to you about another missing
5 piece in this case, and that's the physical evidence
6 that links my client to this crime scene. There's no
7 fingerprints of my client found at this residence.
8 There's no D.N.A. of my client found at this residence.
9 There's no hair fibers, no physical evidence linking my
10 client to this murder scene.

11 You heard nothing from the State about any
12 clothing of my client that was recovered that had any of
13 the blood of the victims on it. I think you heard from
14 Dr. Sexton who testified in this case who performed the
15 autopsy that one of the shots to Mr. Slice was in close
16 range. It's certainly possible an individual who fired
17 that gun would have blood on them, and there are tests
18 that can be run to determine that.

19 You didn't hear anything about that. You
20 didn't hear anything about any of my client's clothing
21 having any residue which would prove that he had fired a
22 weapon. Whoever killed Kim Fauscette and David Slice
23 fired a weapon seven times. I would argue to you there
24 would be a lot of residue in that situation.

25 You saw the -- you heard the agent from

1 S.L.E.D. testify. I think his name is Mr. Valejo
2 (phonetic), and he got up here and he demonstrated in
3 front of you how you would load this gun, how you would
4 unload it and how you would load it back.

5 You would have your hands all over this
6 weapon, which brings me to another point. There were no
7 fingerprints of my client on this weapon. The gun
8 doesn't trace back to him. There is a lack of physical
9 evidence linking my client to this crime.

10 Based on the testimony of Mr. Wise, and you
11 saw again the demonstration, my client's hands would
12 have been all over this gun if someone fired this weapon
13 seven times.

14 Where is the physical evidence from Mr. Wise's
15 car? Where is the blood evidence from Mr. Wise's car?
16 Mr. Wise says my client had this gun in his car and got
17 in the car supposedly, according to Mr. Wise, after he
18 had fired this weapon seven times. We didn't hear
19 anything about any physical evidence which was gathered
20 from Mr. Wise's car.

21 Why is that? The State has the burden of
22 proof in this case, and that is evidence that you didn't
23 hear about. You heard from C.S.I. Detective Hickman who
24 testified about fingerprints, and I asked him: Is it
25 more likely that you are going to find fingerprints

1 inside rather than outside? And he agreed that it is.
2 He also said that it's a good place to find fingerprints
3 on door handles and doors, yet there is no fingerprints
4 of my client in the victims' residence.

5 Let me talk to you about Mr. Johnson and
6 Mr. Wise's testimony. Mr. Johnson and Mr. Wise both
7 admitted that they have been in Lexington County
8 Detention Center for over two years and that they have
9 been talking about this case. They have had plenty of
10 time to get their stories straight. They have obviously
11 conversed about the case.

12 Mr. Johnson, by his own admission, is a crack
13 addict, crack dealer and he regularly supplied the
14 victims with crack cocaine. There's multiple phone
15 records linking Mr. Johnson to the victims.

16 You heard testimony from Mr. Larry Williams
17 yesterday and from Mr. Johnson himself about 1:00 a.m.
18 on September 5th after Mr. Johnson leaves the residence
19 of the victims, he goes and pays off Mr. Williams, pays
20 him his \$50 that he owes him.

21 Well, I don't know why Mr. Johnson owed
22 Mr. Williams \$50. Mr. Williams says it was about yard
23 work, but Mr. Williams has a history of selling crack
24 cocaine, and Mr. Johnson has got a history of smoking
25 crack cocaine. So you, the members of the jury, are who

1 determine what the facts are. Was that a drug debt? I
2 don't know. That's for y'all to determine.

3 Mr. Johnson admitted in his testimony that
4 crack addicts -- and he has been one for a long time --
5 do violent things to get money so they can buy more
6 crack.

7 When law enforcement originally questioned
8 Mr. Johnson, he said he didn't know anything about this
9 case. He then spends four days in the Lexington County
10 Detention Center, and he changes his story. He then
11 implicates my client.

12 He has told more than one story in this case,
13 ladies and gentlemen, and that's for y'all to consider
14 and consider whether he is credible. What incentive
15 does he have to testify in this case?

16 He is facing some serious charges. He is
17 facing accessory after the fact of murder, misprision of
18 a felony, and I think he is also facing some drug
19 charges. He is hoping for a deal, and he admitted that
20 on the stand.

21 Mr. Johnson wants y'all to believe that he is
22 so feared of my client that after he witnesses these two
23 victims get murdered, the only thing he can think about
24 is to go out, smoke more crack, go home, get more money
25 from his wife and to go out and ride around some more

1 and leaves his wife home alone.

2 Now, are those actions of a man who is in fear
3 of his neighbor who lives across the street? Or is
4 Mr. Johnson running from something? That's a decision
5 for y'all to decide.

6 I want to talk to you about the testimony of
7 Mr. Wise. Mr. Wise admitted on the stand that he had
8 embellished his statement to law enforcement at their
9 direction.

10 He admitted that he tried to make himself
11 looked good and tried to make my client not look so
12 good. He also, as I just indicated, said that was at
13 the direction of law enforcement.

14 He also admitted that he talked to Mr. Johnson
15 about this case while he was at the Lexington County
16 Detention Center. And I would argue to you, ladies and
17 gentlemen, there's a few things about Mr. Wise's
18 statement that maybe just don't add up.

19 I think his testimony was that he had parked
20 at this residence, [REDACTED]. The
21 victim's home is over here (indicating). I would argue,
22 ladies and gentlemen, that's a long ways from the
23 victim's home. Why he says that, I don't know. That's
24 a decision for y'all to make.

25 The burning of the clothes, the burn pile. I

1 think Mr. Wise's testimony was that my client didn't get
2 out of the car with any clothes in his hands, but yet he
3 goes and he burns some clothes, and then he gets back in
4 the car, and he's still got clothes on. So I don't know
5 whether Mr. Wise's statement really adds up.

6 We know from Mr. Wise himself, because he
7 admitted it, that Mr. Wise goes to the Hess Station.
8 Now, you also heard the testimony of Sandra Scott who
9 was the clerk at the Hess Station.

10 Now, her testimony was a little bit
11 inconsistent with her statement that she originally
12 gave. We know Mr. Wise went to the Hess Station because
13 he admitted that he did. This is Ms. Scott's statement.
14 It's in evidence. I will read it to you.

15 It says: Investigator Baumgardner will write
16 this statement for me. I am employed with the Hess
17 Station on Elmwood Avenue, Columbia, South Carolina. On
18 September 5th, I started my work shift at 9:45 p.m.
19 September 4th, 2005.

20 We had been busy most of the early part of my
21 shift, but things had started to slow down. At about
22 4:15 a.m. or somewhere close to that time, a black male
23 in his late 20s came into the Hess Station. This man
24 asked for a gas can. Monique Frazier asked me where the
25 gas cans were.

1 Monique Frazier is a new employee. I told her
2 the man -- I told the man to look where the oil is. The
3 man grabbed a can and took it to the register. I said,
4 "That ain't going to get you far." The man said, "I ran
5 out of gas and I need some gas to get back here." He
6 paid for two dollars worth of gas, he left with the gas
7 can, and I did not see him again.

8 Detective Baumgardner showed me a photo
9 lineup, but I did not -- but because of the time, I
10 cannot remember what the man looked like. Nothing else
11 happened. When she wrote that statement, she said
12 nothing about seeing two black males at the Hess Station
13 at 4:15 on September 5th.

14 Now, back to Mr. Wise. Mr. Wise knows where
15 the gun is in this case. Mr. Wise knows where the
16 burned pile was. Mr. Wise knows everything about these
17 murders. We know that he goes to the Hess Station.

18 Mr. Wise is a convicted armed robber. He has
19 a violent history. He has been caught with a gun since
20 he got convicted of armed robbery. Mr. Wise knows about
21 guns. Mr. Wise has told more than one story in this
22 case, and Mr. Wise, by his own admission, has
23 embellished his statement at the direction of law
24 enforcement.

25 He originally told them he picked up my

1 client, who had wrecked his car, took him home, and that
2 was the patterns of the story. He knew nothing about
3 these crimes.

4 . After being questioned by law enforcement, he
5 then, after spending some time in jail, he then
6 implicates my client. Again, he admits that he and
7 Mr. Johnson have spoken about this case since they have
8 been in the Lexington County Detention Center.

9 Mr. Wise is facing two counts of murder, two
10 counts of accessory before the fact to murder, and two
11 counts to accessory after the fact to murder. He is
12 facing multiple life sentences, and yet he has been
13 offered the opportunity to plead guilty to accessory
14 after the fact which carries a maximum sentence of 15
15 years. Mr. Wise has a lot to gain by testifying against
16 my client. He has been given a sweetheart deal.

17 We know from law enforcement that they
18 searched the home of Mr. Burgess. They had a bull's eye
19 on Mr. Burgess. Did we hear anything about law
20 enforcement testing the stories of Mr. Johnson and
21 Mr. Wise?

22 Did we hear any evidence that was gathered at
23 their homes, any evidence gathered from Mr. Wise's
24 vehicle. We didn't hear about that. Again, ladies and
25 gentlemen, the State has the burden of proof in this

1 case.

2 I want to talk to you about the phone
3 situation. First of all, we know that a phone was
4 gathered or retrieved at the home of Mr. Burgess. The
5 State would have you believe that during the commission
6 of this crime, my client is on and off the phone on
7 multiple occasions.

8 Again, you saw Agent Valejo handling that gun,
9 loading it, unloading it. Where is the physical
10 evidence on the phone? Where is the blood evidence on
11 the phone? Where is the residue from the gun on the
12 phone?

13 About these phone -- cell phone towers.
14 Everybody involved in this case lives in Gaston, ladies
15 and gentlemen. The victims live in Gaston. Mr. Burgess
16 lives in Gaston. Mr. Wise lives in Gaston. Mr. Johnson
17 lives in Gaston.

18 Cell phone calls are hitting off cell phone
19 towers in Gaston. It would only make sense. You heard
20 from the individuals from the phone company. It's not
21 an exact science. It depends on the weather, landscape,
22 traffic on the tower itself.

23 They testified that oftentimes these towers
24 can be shut down. That's going to affect which cell
25 phone tower a call hits off of. Some towers are shut

1 down.

2 Mr. Tyrell said they shut them down often when
3 they do maintenance from 2 to 4:00 a.m. If towers are
4 shut down, ladies and gentlemen, cell phone calls are
5 going to hit off of different towers.

6 One other big missing piece is motive. You
7 have heard nothing about why my client would have
8 committed these crimes. You haven't even heard any
9 evidence linking my client to these victims.

10 We know Mr. Johnson had a bunch of phone calls
11 of these victims. There is no phone calls linking my
12 client to these victims. There is no evidence of any
13 kind linking my clients to these victims. Why would he
14 have wanted to kill them?

15 One final thought, ladies and gentlemen. If
16 you believe the State's case, Mr. Burgess, after having
17 committed these heinous crimes, had money, a rental car,
18 and he had some time. He didn't get locked up until
19 September, I think, 14th when they searched his home.

20 Why didn't he flee? He didn't give them --
21 you heard the officers that searched his home. He did
22 not give them any trouble when they come busting in his
23 house and searched his home. I just ask that you think
24 about that when you are deliberating. The testimony, I
25 think, was that Mr. Burgess followed the commands of

1 these officers.

2 Just briefly, ladies and gentlemen, I spoke to
3 you a little bit about this in my opening about the
4 burden of proof. My client does not have to prove
5 anything. The State has the sole burden of proof in
6 this case, and they have got to prove to you that my
7 client committed these crimes beyond a reasonable doubt.

8 Reasonable doubt is a doubt that would cause a
9 reasonable person to hesitate to act. Reasonable doubt
10 is more than mere probability. They have got to prove
11 more than my client probably committed these murders.
12 It's a higher standard than mere probability.

13 I would ask that during your deliberations --
14 there's over a hundred exhibits -- that you hold the
15 State to their burden. I think once you have considered
16 the evidence in this case, you will find that my client
17 is not guilty, and the State has not met their burden of
18 proof in this case. Thank you very much for your
19 attention.

20 THE COURT: Thank you. Thank you, Mr. Baker.

21 Mr. Foreman, and ladies and gentlemen of the
22 jury, if you would step momentary to your jury room. Do
23 not discuss the case. Remember to keep an open mind
24 until I instruct you to begin your deliberations. You
25 may go with our bailiff.

1 (The jury retires to the jury room).

2 MR. HUBBARD: Thank you, Your Honor.

3 THE COURT: Court will be in recess about ten
4 minutes.

5 (Whereupon there was a recess).

6 THE COURT: Solicitor, are you ready?

7 MR. HUBBARD: Yes, sir, Your Honor.

8 THE COURT: Please remember all the
9 spectators, no moving about during the closing argument.
10 Mr. Bailiff, if you would bring our jury
11 please.

12 (The jury returns to the courtroom).

13 THE COURT: It appears our jury is back
14 present in the courtroom. Again, ladies and gentlemen,
15 if you would please give the attorney for the State, the
16 solicitor, your complete and undivided attention during
17 the course of his closing argument.

18 Solicitor, you may address the jury.

19 **CLOSING ARGUMENT**

20 MR. HUBBARD: Thank you, Your Honor. Why
21 should you care? Why should you care what happened in
22 that home September 5th, 2005? Why should you care?
23 Why should you care that two crack addicts were murdered
24 in their own home on a night they were smoking dope?
25 Why does it matter?

1 I think each one of you knows the answer to
2 that. You wouldn't be here. You wouldn't be here. You
3 would not have listened if you didn't care, if life
4 didn't mean something to you.

5 Each one of you knows this case isn't about
6 whether David Slice or Kim Fauscette was a good person
7 and whether they were the type of people we want
8 everyone to be.

9 That's not what this case is about. This case
10 isn't about them, but it's going to say an awful lot
11 about us. What we do with this case will say a lot
12 about us.

13 You are here because two people in your county
14 were brutally, senselessly murdered in their own homes
15 without any, any justification, without any reason, and
16 it doesn't matter who they were. They were one of us.
17 They were human. And no one -- no one -- had the right
18 to do what happened in that room, certainly not that
19 man.

20 And then to be left there like trash in that
21 dark room, ladies and gentlemen. You know in that world
22 of darkness when you dig through it all, they are two
23 human beings.

24 You heard a lot of evidence. Ladies and
25 gentlemen, there is a lot, an awful lot. You have had

1 the unique opportunity of hearing from an eyewitness who
2 saw the murders, James Johnson, Tony Red.

3 And, yeah he is a crack user and a crack
4 dealer. He was there. He described what he saw in
5 detail. He described the face at that door, who walked
6 in that door, who sat down in that room.

7 He took the stand and told you where everybody
8 was seated. He sat on the sofa and right here
9 (indicating) sat David Slice, down on the floor, Kim
10 Fauscette, and over in the love seat, that man, Darrell
11 Burgess.

12 Darrell Burgess wasn't a stranger to him. He
13 knew him. Darrell Burgess came in, sat down, little
14 chitchat, wasn't drinking anything, brought his own
15 cigarettes.

16 Ten, 15 minutes, small chitchat, this man
17 stands up and starts shooting. One, two, three shots in
18 David Slice. He moves towards Kim Fauscette, one, two
19 shots, goes back to David Slice, click, click, and he
20 runs.

21 Ladies and gentlemen, you might think:
22 Mr. Solicitor, he is a crack addict. How in the world
23 can we believe him? Well, let me ask you several
24 things.

25 One, you heard a pathologist, been doing this

1 30 years, 8,000-plus autopsies, does this type of work
2 every day, testified 7, 800 times. Did you see him walk
3 through it?

4 What he said was consistent with what happened
5 that night. I will be dog-gone. A crack addict can't
6 fool a man who has been in this business for longer than
7 some of us may have been alive. How about that?
8 Because its true.

9 You say: All right, Solicitor. James Johnson
10 saw a murder. How do you know it's that man? Let me
11 ask you this. Why of all the people in the world would
12 James Johnson want to finger that man, Darrell Burgess?

13 Because every morning when James Johnson opens
14 that front door, guess who he has got to see? That man
15 and that man's family. Why not just say it was T. or
16 somebody that doesn't exist? Why say anything at all?

17 Because it's true. Why put himself at risk by
18 saying anything at all? And getting the stories
19 together? Please. Who was arrested first in this case?
20 James Johnson. Who gave a written statement before he
21 had a chance to talk to anybody? James Johnson.

22 Getting their stories together, huh? You have
23 got the written story that he gave before he said a word
24 to anybody, before he had a chance to talk to Michael
25 Wise, who was still free. Remember, this man was still

1 free, too.

2 You heard them testify on the stand. You can
3 compare the two. Ladies and gentlemen, it's the same
4 story. You saw fear in that man. Sure, he is scared
5 about himself, but he made it clear to you, and you can
6 understand.

7 If you see somebody brutally murdered, two
8 people in front of you right there. You are going to be
9 afraid of him. Cops will put cuffs on you. He'll put
10 lead in you. Who else did you hear? Michael Wise,
11 Michael Wise.

12 Michael Wise of all people in the world says
13 that's his best friend. They are like brothers. They
14 grew up together. When Michael Wise turned to somebody
15 when he was going to take his own life, who did he turn
16 to? That man right there.

17 And yet you are not supposed to believe him?
18 Why would he lie about Darrell Burgess? Why? If he's
19 going to lie, why doesn't he pick another name out? Why
20 not pick somebody he hates?

21 Because the game is over and he has got to
22 step up to the plate, and he knows what the truth is,
23 that it's Darrell Burgess. You might be asking
24 yourselves: Michael Wise, we think he is more involved
25 than he really admitted to. You know what? He might

1 be. He might be.

2 That doesn't help that man. That doesn't help
3 that man at all, but there is no proof of that, folks.
4 We use proof in this courtroom, and the man on trial
5 right now is Darrell Burgess.

6 Michael Wise says he got the call from a
7 fellow that he couldn't ignore that call. He had to get
8 up and go get him. He had to help him. It pulled him
9 out of bed. He goes and picks up Darrell Burgess. And
10 what does Darrell Burgess ask for? "Got a gun?
11 Pistol?"

12 "No, I don't have one." Where do they go?
13 Michael Wise takes him to Darrell Burgess' house. They
14 both live in [REDACTED], takes him to his house,
15 thinks he is going to be dropping him off.

16 "No, you wait right here. I will be right
17 back." Getting in the car, what does he see? Of all
18 the things he could see, he sees a shiny revolver in the
19 hands of that man, Darrell Burgess.

20 Where do they go next? To a place Michael
21 Wise has never been, had to have direction, to meet
22 people he had never met, Kim Fauscette and David Slice.
23 Who knew him? That man. "Drop me off. Wait here.
24 I've got some business to take care of," business.

25 It's a lot of business, folks. He hears

1 gunshots and who comes jumping back in that car? That
2 man and they go for a ride. He sees something shiny
3 going out the car window around I-77. They go to the
4 Hess Station in Columbia, and he sees his brother
5 burning what appears to be clothes near the Elmwood
6 cemetery.

7 Folks, that's not all you have. You not only
8 have an eyewitness. You not only have the Defendant's
9 best friend and codefendant. You've got something else.
10 You got the Defendant's phone.

11 This phone will tell you stories, folks. This
12 phone went for a little ride in the early morning hours
13 of September 5, 2005. This phone went all over town.
14 And where did it go?

15 It went to [REDACTED] Calls were
16 made. No one can dispute it. Calls were made to this
17 phone owned by Darrell Burgess. No one can dispute
18 that, a lot of calls in fact.

19 If you really look, this is Darrell Burgess'
20 chart here. You will see his phone number up here. You
21 have got two other charts with Michael Wise's name. See
22 his phone number at the top and just start going through
23 these. These fellows talked a lot.

24 When Michael Wise said they are brothers, let
25 me tell you, ask yourself: Do you have any friends you

1 talk to that much? But there is one part I want you to
2 really focus in on, folks. Right here (indicating)
3 looking at Darrell Burgess' phone records, his phone
4 records.

5 See these 210 numbers the time of the murder.
6 Guess who 210 is? It's Michael Wise. Guess who says,
7 "I was calling Darrell Burgess when I heard gunshots."
8 Michael Wise. And guess what tower they hit on? Folks,
9 not up here (indicating) at the tower near [REDACTED]
10 [REDACTED], huh-uh. It's all the way down here
11 (indicating) near [REDACTED] the closest tower.

12 That phone went for a ride, folks. What
13 happened next? That phone ends up hitting down later
14 going towards 77. Folks, it doesn't stop there, nope.
15 You go on down 77, it hits on a cell tower way out
16 there.

17 It's right on the path to guess what? Where
18 that gun was tossed out. We know -- we know -- that
19 phone went in that car and went down that road, folks.
20 You know that. You know that.

21 And you say: Solicitor, phones are always
22 dropping calls. There's towers. Look how many calls we
23 are talking about. I want you to look at something
24 else. When you look at Darrell Burgess' phone records,
25 when he is running, you know who he is not talking to on

1 the phone anymore?

2 Michael Wise. You don't need to call anybody
3 if they are sitting right next to you. He's making
4 calls and receiving calls. And, folks, he can't lie
5 about phone records.

6 You heard Luke Fossum, the sergeant at the
7 Sheriff's department come in. Right on the trail the
8 phone is tossed out, hitting on the towers. Where does
9 that phone go next? Well, that phone takes a trip to
10 Columbia.

11 I will be dog-gone if it's not right up here
12 at the Hess station. See that tower right there
13 (indicating), folks? Who said something about the Hess
14 Station? Michael Wise. Why would Michael Wise need
15 Darrell Burgess' phone, folks? He has his own. He's
16 got two.

17 Darrell Burgess' phone, it's hitting all the
18 way around. And guess what? It winds back around. And
19 you know what happens to that phone later in the
20 evening, folks, early in the morning, later in the
21 morning? That phone goes home.

22 This phone is to [REDACTED] It goes
23 down I-77 on the same route that that pistol right here,
24 this very pistol, was tossed out. This phone takes a
25 little detour through Columbia right near a Hess

1 Station.

2 And I'll I be dog-gone if it doesn't find
3 itself back at home in Gaston in the Burgess home. And
4 in of all the rooms, what room? Darrell Burgess' room
5 just in time for the search warrant.

6 Now, folks, you might be asking yourselves:
7 Well, Solicitor, how do you know Darrell Burgess had
8 that phone? Was it James Johnson? Was he the killer?
9 Well, we've got a lot of problems if it is because
10 Michael Wise is calling somebody with Darrell Burgess'
11 phone in the [REDACTED] area.

12 Does James Johnson have that phone? Is this a
13 grand conspiracy? The only problem with that is James
14 Johnson, after the murder, would have to take that phone
15 back to [REDACTED], get in the Burgess home and put
16 it right back in its owner's bedroom, Darrell Burgess.

17 James Johnson, ladies and gentlemen, would
18 have to be Houdini and he ain't. Look at this
19 photograph and see if you notice anything else when you
20 think about James Johnson's testimony. Right here
21 (indicating), right here.

22 Do you remember what James Johnson said that
23 man was smoking in the home of David Slice and Kim
24 Fauscette? Newport cigarettes, brought his own, asked
25 him for a short, the last half, which ran out with James

1 Johnson.

2 But you might say: All right, look, what if
3 it's Michael Wise? Michael Wise, he is a bright guy.
4 Maybe he's setting up Darrell Burgess. Don't know why
5 but maybe he is.

6 But then you have a problem. He is a bright
7 guy and if he's setting Darrell Burgess up by using that
8 phone to commit a murder and making calls to it, Michael
9 Wise is an idiot because he used his own phone. If he's
10 I.D.ing Darrell Burgess with this phone, he's I.D.ing
11 himself at the same time.

12 This phone, ladies and gentlemen, and the
13 records behind it don't lie. They don't lie. There is
14 just way too many calls to say: All right, look, maybe
15 it bounced off one tower or whatever. There's too many
16 calls. Follow the calls, folks. They keep going. Is
17 Darrell Burgess just the most unlucky man in the world?
18 Or is he in the car with Michael Wise?

19 Ladies and gentlemen, you heard defense
20 counsel get up here and say: There's a lot of evidence
21 that we don't have, forensics, forensics. We don't have
22 D.N.A. Well, correct me if I'm wrong, but the only
23 blood spilled in that home the early morning hours was
24 that of Kim Fauscette and David Slice. Folks, we know
25 who they are.

1 There was no struggle because that man didn't
2 give them a chance. If he had left his blood, we might
3 have some D.N.A. for you. He had left his hair, well do
4 you see any hair on the man's head? And fingerprints?
5 Oh, fingerprints.

6 You know you heard Jim Hickman who has been
7 doing this 25 years. He just tried to be matter of fact
8 about it. He said: Look, we look, but it's not
9 uncommon to not find fingerprints. What did they focus
10 on? The front door, the point of entry. The back door
11 is locked. Remember that front door is open. Everybody
12 had to go in and out that front door, and they powdered
13 it.

14 We know they didn't find Darrell Burgess'
15 fingerprints, and they didn't find Kim Fauscette's or
16 David Slice's or anyone else's that we know were there.
17 Maybe -- maybe -- a wild thought, maybe those T.V. shows
18 like C.S.I. and all aren't always right.

19 Maybe Jim Hickman is and maybe when he talks
20 about fingerprints on a pistol, when it's left out in
21 the weather and he's not surprised if you don't find
22 them but checked and didn't. Maybe he is right. Maybe
23 T.V. is wrong.

24 Maybe all those shows C.S.I. and Law and
25 Order -- you've got to love Law and Order, Jack McCoy,

1 maybe those aren't real. Goodness knows, Jack McCoy has
2 got a beautiful assistant, and I got a bald-headed guy.
3 Maybe -- maybe -- we need to just sit down and do like
4 we tell our kids: Focus. Turn those T.V.s off. It's
5 time for reality.

6 Folks, y'all have been listening. Y'all have
7 been listening. Y'all haven't varied one bit. Nobody
8 has fallen asleep. Y'all have been listening. You have
9 an abundance of evidence, an abundance: An eyewitness,
10 this man's partner, this man's phone, an abundance of
11 evidence.

12 When Kim Fauscette heard that noise the early
13 morning hours of September 5, 2005, and got up and went
14 to the door, she didn't just let in a familiar face, she
15 let in you.

16 You have come into that home, into that dark,
17 dark home and those lights on. Just like law
18 enforcement turned those lights on at the scene, those
19 lights are on now. Evidence turns the lights on.

20 And just like I asked you at the beginning of
21 this trial and told you at the beginning of this trial
22 that at the patterns of this trial, you would know that
23 face. Folks, you do. You do. That's the face that
24 came in that door.

25 That's the face that picked up this pistol

1 folks, stood up off of that chair, and shot three rounds
2 into David Slice, one wound right here in the temple,
3 leaving him no chance of getting away and then stepped
4 forward and shot two more rounds into Kim Fauscette.

5 Then he walked right up to David Slice and put
6 one in his temple, his forehead, right there
7 (indicating). He dropped that arm down and put the last
8 round in Kim Fauscette's head. It was this pistol,
9 folks. You will actually get to touch a murder weapon.

10 When you go back in that jury room, you go
11 back as 12 people. When you come out, you will come out
12 as one. We ask for one thing, that when you come out,
13 you speak with one voice. And with your voice you let
14 everyone know, particularly that man, that you know who
15 he is and what he is, a ruthless, cold-hearted murderer.
16 That folks is the voice of justice.

17 THE COURT: Thank you thank you, Solicitor.

18 (Whereupon the Court charged the jury as
19 follows).

20 THE COURT: Mr. Foreman, ladies and gentlemen
21 of the jury, I would ask you to please give me your
22 complete and undivided attention during the course of my
23 charge to you, as you have to all the parties during the
24 trial of this case.

25 The indictments in this case allege several

1 different offenses against the Defendant, Darrell
2 Burgess. The charges are: Indictment one, murder;
3 indictment two, murder; and indictment three, possession
4 of a firearm during the commission of a violent crime.

5 Each indictment charges a separate and
6 distinct offense. You must decide each indictment
7 separately on the evidence and the law applicable to it,
8 uninfluenced by your decision as to any other
9 indictment.

10 The Defendant may be convicted or acquitted on
11 any or all of the offenses charged. You will be asked
12 to write a separate verdict of guilty or not guilty for
13 each indictment.

14 I remind you that the fact the Defendant was
15 arrested, charged, and indicted in this case is not
16 evidence in this case and cannot be considered by you as
17 evidence of guilt in this case, nor does it create any
18 presumption or inference of guilt.

19 These documents, these indictments, are simply
20 the formal written instruments which contain the charges
21 made against the Defendant. These are the formal
22 documents by which the case is brought into court.

23 The Defendant has pled not guilty to these
24 indictments, and that plea puts the burden on the State
25 to prove the Defendant guilty. A person charged with

1 committing a criminal offense in South Carolina is never
2 required to prove himself innocent.

3 I charge you that it is an important rule of
4 the law that a defendant in a criminal trial, no matter
5 what the seriousness of the charges may be, will always
6 be presumed to be innocent of the crime for which the
7 indictments were issued unless guilt has been proven by
8 evidence satisfying you of that guilt beyond a
9 reasonable doubt.

10 This presumption of innocence does not
11 patterns when you begin your deliberations, but it
12 accompanies the Defendant throughout the trial until
13 you reach a verdict of guilt based on evidence
14 satisfying you of that guilt beyond a reasonable
15 doubt.

16 The presumption of innocence is like a robe
17 of righteousness placed about the shoulders of the
18 Defendant which remains with the Defendant until it
19 has been stripped from the Defendant by evidence
20 satisfying you of the Defendant's guilt beyond a
21 reasonable doubt.

22 The presumption of innocence is not a mere
23 legal theory. It is not just a legal phrase. It is a
24 substantial right to which every defendant is entitled
25 unless you the jury are satisfied from the evidence of

1 the Defendant's guilt beyond a reasonable doubt.

2 The State has the burden of proving the
3 Defendant guilty beyond a reasonable doubt. Some of you
4 may have served as jurors in civil cases where you were
5 told that it is only necessary to prove that a fact is
6 more likely true than not true, such as by the greater
7 weight or preponderance of the evidence.

8 In criminal cases the State's proof must be
9 more powerful than that. It must be beyond a
10 reasonable doubt. Proof beyond a reasonable doubt is
11 proof that leaves you firmly convinced of the
12 Defendant's guilt.

13 There are very few things in the world that we
14 know with absolute certainty, and in criminal cases the
15 law does not require proof that overcomes every possible
16 doubt.

17 If based on your consideration of the
18 evidence, you are firmly convinced that the Defendant is
19 guilty of the crimes charged, you must find the
20 Defendant guilty.

21 If, on the other hand, you think there is a
22 real possibility that the Defendant is not guilty, you
23 must give the Defendant the benefit of the doubt and
24 find him not guilty. A reasonable doubt is the kind of
25 doubt that would cause a reasonable person to hesitate

1 to act.

2 I remind you that during this trial, you and I
3 have certain duties to perform. As the trial judge, it
4 is my responsibility to preside over the trial of this
5 case, and I also have the duty to rule on the
6 admissibility of the evidence during this trial.

7 You are to consider only the competent
8 evidence before you. If there was any testimony ordered
9 stricken from the record in this case during this trial,
10 you must disregard that testimony.

11 You are to consider only the testimony which
12 has been presented from this witness stand and any
13 exhibits which may have been made a part of the record
14 in this case.

15 I have the additional duty to charge you the
16 law you must apply to this case. As the presiding
17 judge, I am the sole judge of the law of this case, and
18 it is your duty as jurors to accept and apply the law as
19 I now state it to you.

20 If you already have any idea as to what the
21 law is or what the law ought to be, and it does not
22 agree with what I now tell you the law is, you must
23 abandon this idea because you are sworn to accept the
24 law and apply the law exactly as I state it to you.

25 In every case tried in this court before a

1 jury, the jury becomes the sole and exclusive judge of
2 the facts in a case. A trial judge cannot intimate,
3 state, comment on or make any statement to a trial jury
4 about the facts in a case.

5 Since you the jury are the sole judge of the
6 facts in this case, you are not to infer from what I
7 have said during the progress of this trial, in ruling
8 upon the admissibility of evidence or otherwise or
9 anything that I now say to you during the course of this
10 instruction, that I have any opinion about the facts in
11 this case. The law does not allow me to have an opinion
12 about the facts in this case. This is a matter solely
13 for you the jury to determine.

14 As jurors it is your duty to determine the
15 effect, the value, the weight, and the truth of the
16 evidence presented during this trial. There are two
17 types of evidence which are generally presented during a
18 trial, direct evidence and circumstantial evidence.

19 Direct evidence is the testimony of a person
20 who claims to have actual knowledge of a fact, such as
21 an eyewitness. It is evidence which immediately
22 establishes the main fact to be proved.

23 Circumstantial evidence is proof of a chain
24 of facts and circumstances indicating the existence of
25 a fact. It is evidence which immediately establishes

1 collateral facts from which the main fact may be
2 inferred. Circumstantial evidence is based on
3 inference, not on personal knowledge or observation.

4 The law makes absolutely no distinction
5 between the weight or the value to be given to either
6 direct or circumstantial evidence, nor is there a
7 greater degree of proof required of circumstantial
8 evidence than of direct evidence.

9 You should weigh all of the evidence in this
10 case. After weighing all of the evidence if you are not
11 convinced of the guilt of the Defendant beyond a
12 reasonable doubt, you must find the Defendant not
13 guilty.

14 Necessarily then you must determine the
15 credibility of the witnesses who have testified in this
16 case. Credibility simply means believability. It
17 becomes your duty as jurors to analyze and to evaluate
18 the evidence and determine which evidence convinces you
19 of its truth.

20 In determining the believability of witnesses
21 who have testified in this case, you may believe one
22 witness over several witnesses or several witnesses over
23 one. You may believe a part of the testimony of a
24 witness and reject the remaining part of the testimony
25 of that same witness.

1 You may believe the testimony of a witness in
2 its entirety or reject the testimony of a witness in its
3 entirety. You may consider whether any witness has
4 exhibited to you any interest, bias, prejudice or other
5 motive in this case. You may also consider the
6 appearance and manner of a witness while on the witness
7 stand.

8 A person who has a past criminal record is
9 competent to testify during a trial. A past record
10 does not affect the ability of a witness to testify.
11 The past record may only be considered by you, if at
12 all, in determining the witness' believability.
13 Remember, you the jury are the sole judges of the facts
14 in the case and the believability of any and all of the
15 witnesses.

16 The rules of evidence ordinarily do not permit
17 witnesses to testify to opinions or conclusions. An
18 exception to this rule exists for a witness which we
19 call expert witnesses.

20 A witness, who by education and experience,
21 has become expert in some art, science, profession or
22 calling may state an opinion as to relevant and material
23 matter in which the witness claims to be an expert and
24 may also state the reasons for that opinion.

25 You should consider any expert opinion

1 received in evidence in this case, and like any other
2 evidence give it the weight you think it deserves. If
3 you decide that the opinion of an expert is not based on
4 sufficient education and experience or if you conclude
5 that the reasons given in support of the opinion are not
6 sound or that the opinion is outweighed by other
7 evidence, you may disregard the opinion entirely.

8 An expert witness' testimony is to be given no
9 greater weight than that of other witnesses simply
10 because the witness is an expert. Further, you are not
11 required to accept an expert's opinion, even though it
12 is not contradicted.

13 I instruct you and emphasize that the fact
14 that the Defendant, Mr. Burgess, did not testify is not
15 a factor to be considered by you in any way in your
16 deliberations and in your consideration of the question
17 of the guilt or innocence of the Defendant. It must not
18 considered by you in any manner whatsoever.

19 A defendant has the constitutional right to
20 remain silent, and the assertion of this right must not
21 be considered by you in your deliberations. I repeat,
22 under your oath you are to draw no conclusions
23 whatsoever from the fact that the Defendant in this case
24 did not testify.

25 The fact that this Defendant did not testify

1 should not even be discussed in the jury room. The
2 burden of proof, as I have stated to you, is on the
3 State. The Defendant is not required to prove his
4 innocence. The burden of proof remains on the State to
5 prove guilt beyond a reasonable doubt.

6 In order to establish criminal liability,
7 criminal intent is required. For example, the mental
8 state required to be proven by the State for a
9 particular crime might be purpose, intent, knowledge,
10 recklessness or criminal negligence.

11 Criminal intent must be proven by the State
12 beyond a reasonable doubt. Criminal intent is always a
13 matter that must be determined by the jury from the
14 circumstances surrounding the situation.

15 There is no way to prove intent to a
16 mathematical certainty. There is no way medical science
17 can dissect a person's brain and determine what the
18 person had in mind.

19 So the law says that criminal intent may be
20 inferred from the circumstances shown to have existed.
21 This is how you make the determination of whether or not
22 the element requiring intent was present.

23 It is not necessary to establish intent by
24 direct and positive evidence, but intent may be
25 established by inference in the same way as any other

1 fact, by taking into consideration the acts of the
2 parties and all the facts and circumstances of the
3 case.

4 Criminal intent is a mental state, a
5 conscious wrongdoing. It is up to you to determine
6 what the Defendant intended to do based on the
7 circumstances shown to have existed.

8 Now, the Defendant is charged with two counts
9 of murder and one count of possession of a firearm
10 during the commission of a violent crime. As to the
11 charge of murder, the State must prove beyond a
12 reasonable doubt that the Defendant killed another
13 person with malice aforethought.

14 Malice is hatred, ill will or hostility
15 towards another person. It is the intentional doing of
16 a wrongful act without just cause or excuse and with an
17 intent to inflict an injury or under circumstances that
18 the law will infer an evil intent.

19 Malice aforethought does not require that
20 malice existed for any particular time before the act is
21 committed, but malice must exist in the mind of the
22 Defendant just before and at the time the act was
23 committed. Therefore, there must be a combination of
24 the previous evil intent and the act.

25 Malice aforethought may be express or

1 inferred. These terms, express and inferred, do not
2 mean different kinds of malice but merely the manner in
3 which malice may be shown to exist, that is, either by
4 direct evidence or by inference from the facts and
5 circumstances which are proved.

6 Express malice is shown when a person speaks
7 words which express hatred or ill will for another or
8 when the person prepared beforehand to do the act which
9 was later accomplished. For example, lying in wait for
10 a person or any other act of preparation going to show
11 that the deed was within the Defendant's mind would be
12 express malice.

13 Malice may be inferred from conduct showing a
14 total disregard for human life. Inferred malice may
15 also arise when the deed is done with a deadly weapon.
16 A deadly weapon is any article, instrument or
17 substance which is likely to cause death or great
18 bodily harm. Whether an instrument has been used as a
19 deadly weapon depends on the facts and circumstances of
20 each case.

21 The following are examples of instruments
22 which may be deadly weapons: A pistol, a shotgun, a
23 rifle, a dirk, a dagger, knife, slingshot, metal
24 knuckles. A gun may be a deadly weapon even if it is
25 not operating.

1 That is the charge as to the indictment for
2 the murder as to David Slice, and that is the charge on
3 the indictment for murder as to Kim Fauscette. The
4 third indictment is possession of a weapon during the
5 commission of a violent crime which is a statute in
6 South Carolina, Section 16-23-490.

7 The Defendant is charged with possession of a
8 weapon during the commission of a violent crime. The
9 State must prove beyond a reasonable doubt that the
10 Defendant was in possession of a firearm or visibly
11 displayed what appeared to be a firearm during the
12 commission of a violent crime.

13 For purposes of this section, a firearm means
14 any machine gun, automatic rifle, revolver, pistol or
15 any other weapon which is designed to or may be readily
16 converted to expel a projectile.

17 In order to find the Defendant guilty of
18 possession of a firearm or weapon during the commission
19 of a violent crime, you must first find the Defendant
20 guilty of committing a violent crime. Murder is a
21 violent crime.

22 Mr. Bailiff, would you please hand this
23 verdict form to our foreperson, and he can follow along
24 as I explain this document to him.

25 BAILIFF: Yes, sir.

1 THE COURT: Mr. Foreman, there are two
2 possible verdicts which you may find in this case as to
3 each indictment. As I stated at the beginning of my
4 charge, you are to consider these indictments separately
5 and distinctly.

6 There is absolutely no significance whatsoever
7 in the order in which I have placed these possible
8 verdicts on the verdict form, nor in the order in which
9 I state them to you now.

10 As you will see this document, Mr. Foreman,
11 has the number of the case, the caption number, and the
12 verdict form. I note on here it has the State of South
13 Carolina versus Darrell Burgess and then has A/K/A
14 Darryl Burgess. That is just a different spelling.

15 Do not take that into consideration in any
16 manner. The name was spelled differently at different
17 points in time. So don't be concerned about that. I
18 put it on there because that is the manner in which it
19 is listed on the indictments.

20 This form says: Please check and circle the
21 appropriate verdict below and following the accompanying
22 instructions carefully. You will see on the first page
23 it's one, two, and three.

24 As to murder, the first one, if after y'all's
25 consideration of the evidence as to the indictment --

1 and you can do the two murder indictments in whatever
2 order you so choose. Remember, you cannot find the
3 Defendant guilty -- if you were to find the Defendant
4 guilty of the murder, you could then and only then
5 consider the possession of a weapon during the
6 commission of a violent crime.

7 So you would consider the murder indictments
8 first, whether it's Mr. Slice or Ms. Fauscette's first.
9 Based on your consideration of the evidence, your
10 determination of the fact, applying the facts to the
11 charge as I told you the law is, if you find by
12 unanimous consent that the Defendant is guilty of the
13 murder of Mr. Slice, I would ask you to check guilty of
14 murder, Mr. Foreman, and then circle that.

15 If after your consideration of the evidence as
16 to the indictment as to the homicide of Mr. Slice, you
17 find the Defendant not guilty, again, I would ask you to
18 check not guilty and circle that.

19 The same is as to Ms. Fauscette. Based on
20 your determination of the facts, applying the facts to
21 the law as I have told you the law is in this case, if
22 by unanimous consent you find the Defendant guilty of
23 murder, I ask you to check to the left and circle that,
24 Mr. Foreman.

25 If you find by unanimous consent the State has

1 failed to meet its burden of proof beyond a reasonable
2 doubt, I would ask you to check not guilty and circle
3 that.

4 On page 2 is the third indictment, possession
5 of a firearm or knife during the commission of a violent
6 crime. Again, based on your review of the evidence if
7 the State has proved its case beyond a reasonable doubt,
8 I would ask you to check guilty of possession of a
9 firearm during the commission of a violent crime. If
10 the State has failed to meet its burden of proof, I'd
11 ask you to check not guilty and circle that.

12 Remember, ladies and gentlemen, your verdict
13 must be unanimous. All 12 of you must agree on the
14 verdict. Your verdicts cannot be based on sympathy,
15 passion, prejudice, emotion or any other consideration
16 not in any evidence in this case.

17 Mr. Foreman, when the jury has agreed on its
18 verdict unanimously and you have followed my
19 instructions, I would ask you to please then sign and
20 date the form. If you would then knock on the jury room
21 door and inform the bailiff that you have reached a
22 verdict, at that time we would receive you back into the
23 courtroom for your verdict.

24 If you would now leave that form on the rail,
25 I have to meet with the attorneys one final time outside

1 of your presence. Do not begin your deliberations until
2 you receive the verdict form, you receive all the items
3 of evidence that have been presented. It will be
4 delivered to you by the bailiff, and then you will be
5 instructed and only then to begin your deliberations.

6 Once you begin your deliberations,
7 Mr. Foreman, if you have any questions that you need to
8 ask the Court, if you would please just write those out,
9 knock on the jury room door. The bailiffs will be
10 stationed outside. They will get them to me.

11 If you have any questions, concerns, any needs
12 that I can respond to, please do not hesitate. Again,
13 do not begin your deliberations until you are informed
14 to do so by the bailiff or the clerk. With that being
15 said, if you will now go with our bailiff to your jury
16 room.

17 (The jury retires to the jury room).

18 THE COURT: Any exceptions from the State?

19 MR. MADSEN: No, Your Honor.

20 THE COURT: From the defense?

21 MR. BAKER: None, Your Honor.

22 THE COURT: If y'all would please get the
23 exhibits straight so I can get that on the record.

24 (Pause).

25 THE COURT: All right. Have y'all checked the

1 exhibits, Solicitor?

2 MR. MADSEN: Yes, Your Honor.

3 THE COURT: Mr. Baker?

4 MR. BAKER: We have, Your Honor.

5 THE COURT: Are y'all satisfied?

6 MR. BAKER: Yes, sir.

7 MR. MADSEN: Yes, sir.

8 THE COURT: If y'all would come look at the
9 form of verdict.

10 (Pause).

11 THE COURT: As far as the form of verdict, the
12 solicitor and defense lawyer have reviewed it and have
13 no objection. Is that correct, Solicitor?

14 MR. MADSEN: Yes, Your Honor.

15 THE COURT: Is that correct, Mr. Baker?

16 MR. BAKER: That's correct, Your Honor.

17 THE COURT: Mr. Bailiff, if you would please
18 take the exhibits and the form of the verdict to the
19 jury and bring the alternate out to the hallway. Thank
20 you very much. We will be standing by awaiting our
21 verdict.

22 (The jury commences its verdict at 10:45 a.m.)

23 (The following occurred at 12:30 p.m.)

24 THE COURT: If you would mark this note,
25 please.

1 (Court's Exhibit Number 15 is marked for
2 purposes of the record).

3 THE COURT: All parties and attorneys are
4 present. It appears we have received a note from the
5 jury. The jury would request James Johnson's testimony
6 from the Court and Michael Wise's testimony, in
7 parentheses, statement or recording. This is Court's
8 15. Do you have it keyed up, Madame Court Reporter?

9 COURT REPORTER: Yes, sir.

10 THE COURT: Anything from the State?

11 MR. HUBBARD: No, sir.

12 THE COURT: From the defense?

13 MR. BAKER: No, Your Honor.

14 (The jury returns to the courtroom).

15 THE COURT: It appears our jury is back
16 present in the courtroom.

17 Mr. Foreman, I have received your note where
18 the jury requested hearing Mr. Johnson's testimony and
19 Mr. Wise's testimony. Our court reporter has it keyed
20 up. Both testimonies are about 45 minutes. I believe
21 she indicated to me Mr. Wise's may be a little bit
22 longer than that.

23 If at any time during the testimony, one of
24 you wants to take a break, please raise your hand and we
25 can take a break. If you get to a point you have heard

1 all you want to hear, raise your hand also, if there is
2 a particular part. Otherwise, we will go all the way
3 straight through it, okay? All right, Madame Court
4 Reporter.

5 COURT REPORTER: Yes, sir.

6 (The testimony of James Johnson is played for
7 the jury).

8 FOREMAN: Judge, we have heard enough.

9 THE COURT: Do you need to hear the testimony
10 of Mr. Wise?

11 FOREMAN: We will take a break if that's okay.

12 THE COURT: Yes, sir. Thank you very much.

13 (The jury retires to continue its deliberation
14 at 1:18 p.m.)

15 THE COURT: We will be on standby awaiting the
16 jury's verdict. Thank you.

17 (Whereupon there was a recess).

18 (The following occurred at 2:17 p.m.)

19 THE COURT: I understand we have a verdict.
20 Mr. Bailiff, if you would bring our jury, please.

21 To all the spectators, there will be no show
22 of emotion in the courtroom at the taking of the
23 verdict. If you feel like you cannot contain your
24 emotions, I would ask you to please leave the courtroom
25 now.

1 Sheriff, if y'all would note that for me.

2 (The jury returns to open court to report its
3 verdict).

4 THE COURT: It appears our jury is back
5 present in the courtroom. Madame Clerk.

6 CLERK: Mr. Foreman, have y'all reached a
7 verdict?

8 FOREMAN: Yes, we have.

9 THE COURT: Would you pass it to the bailiff,
10 please.

11 (Hands to Court).

12 THE COURT: Madame Clerk, our verdict appears
13 to be in proper order. If you would publish the
14 verdict, please.

15 (Whereupon the verdicts of the jury are
16 published as follows).

17 CLERK: Indictment 2005-GS-32-4561, 4563, and
18 4564, the State versus Darrell Burgess. As to David
19 Slice, we the jury by unanimous consent find the
20 Defendant guilty of murder.

21 As to Kim Fauscette, we the jury by unanimous
22 consent find the Defendant guilty of murder. As to
23 possession of a firearm during the commission of a
24 violent crime, we the jury by unanimous consent find the
25 Defendant guilty of possession of a firearm during the

1 commission of a violent crime. And it is so signed.

2 THE COURT: Mr. Foreman, was this the
3 unanimous verdict of the jury?

4 FOREMAN: Yes, sir.

5 THE COURT: Anything further for the jury from
6 the State?

7 MR. MADSEN: Nothing from the State, Your
8 Honor.

9 THE COURT: From the defense?

10 MR. BAKER: Your Honor, we just request the
11 jury be polled.

12 THE COURT: Madame Clerk.

13 CLERK: As I call your name, if you will raise
14 your right hand. As to the verdict, is this your
15 verdict and is it still your verdict, Janet Bratcher?

16 JUROR: Yes.

17 CLERK: Johnny Hakim, was this your verdict
18 and is this still your verdict?

19 JUROR: Yes.

20 CLERK: Christina Heustess, was this your
21 verdict and is it still your verdict?

22 JUROR: Yes.

23 CLERK: Julie McCaaskill, was this your
24 verdict and is it still your verdict?

25 JUROR: Yes.

1 CLERK: Ellen Sides, was this your verdict and
2 is it still your verdict?

3 JUROR: Yes.

4 CLERK: Joseph Emanuel, was this your verdict
5 and is it still your verdict?

6 JUROR: Yes.

7 CLERK: Patricia Weiss, was this your verdict
8 and is it still your verdict?

9 JUROR: Yes.

10 CLERK: Valerie Rhodes, was this your verdict
11 and is it still your verdict?

12 JUROR: Yes.

13 CLERK: William McCarter, was this your
14 verdict and is it still your verdict?

15 JUROR: Yes.

16 CLERK: Toni Smith, was this your verdict and
17 is it still your verdict?

18 JUROR: Yes.

19 CLERK: Rebecca Hilton, was this your verdict
20 and is it still your verdict?

21 JUROR: Yes.

22 CLERK: Rhonda Babb, was this your verdict and
23 is it still your verdict?

24 JUROR: Yes.

25 CLERK: All jurors are polled, Your Honor.

1 THE COURT: Thank you, Madame Clerk. Anything
2 further from the jury, Mr. Baker?

3 MR. BAKER: Nothing, Your Honor.

4 THE COURT: Mr. Foreman, and ladies and
5 gentlemen of the jury, I would like to thank you very
6 much for your service on this jury this week. I realize
7 it has been a long week. I appreciate your presence,
8 your focus, your attention, your participation.

9 As I told you earlier in the week, we could
10 not be about the very important business of
11 administering your civil and criminal justice system
12 without citizens such as yourselves, realizing you are
13 not volunteers but at the same time being willing to
14 participate in the system.

15 You now will not be required to serve on a
16 jury as far as a State circuit court of record in South
17 Carolina for the remainder of this calendar year. That
18 does not protect you from magistrate's court or city
19 court or federal court, but you would have that
20 protection for the remainder of this calendar year.

21 Again, with that being said, I thank you for
22 your service. It has been my privilege and my honor to
23 serve with y'all this week. Shortly I will conduct the
24 sentencing proceeding as far as the Defendant is
25 concerned, but you are now excused. If you would leave

1 your pins with the bailiff as you exit the courtroom.

2 Thank you very much.

3 (The jury is excused).

4 THE COURT: Mr. Baker, do you have any
5 motions?

6 MR. BAKER: Yes, Your Honor.

7 THE COURT: All right, sir.

8 MR. BAKER: A number of motions. Your Honor,
9 first of all, I would make a motion for a new trial
10 based on the fact that the evidence is illegally
11 insufficient to support this verdict. That's my first
12 motion, Your Honor.

13 THE COURT: All right. Is there a particular
14 standard or do you think that is the same standard as a
15 directed verdict?

16 MR. BAKER: Yes, sir, Your Honor.

17 THE COURT: I would respectfully deny your
18 motion. I think there is clearly sufficient direct and
19 substantial circumstantial evidence for the jury to have
20 reached the verdicts that the jury did reach in this
21 matter.

22 MR. BAKER: The next motion, Your Honor, is a
23 motion for a new trial for failure to strike for cause
24 juror Emanuel, number 72, based on the fact that he
25 indicated after we had picked the jury that he had a

1 family member -- or actually he was a supervisor, I
2 think, of a family member of one of the victims.

3 Again, as I stated this was after the jury had
4 been selected. We were at that point denied the right
5 to strike him, to use one of our peremptory strikes
6 during the jury picking process.

7 I respectfully argue that my client, based on
8 that, was denied due process and a fair and impartial
9 jury based on the fact that juror Emanuel, number 72,
10 works with one of the family members of one of the
11 victims, that being Mr. David Slice.

12 THE COURT: Again, I would deny your motion in
13 that regard. I would further point out that during the
14 voir dire, I asked individuals if they knew the victim,
15 if they were related by blood or marriage or close
16 personal friends of either of the victims.

17 After selection Mr. Emanuel stated he
18 recognized a lady that was sitting out in the courtroom
19 behind the State that I believe was the estranged
20 spouse. Is that a correct characterization, Solicitor?

21 MR. MADSEN: That is my understanding.

22 THE COURT: Of David Slice. She was not
23 called as a witness. As I understand it, he,
24 Mr. Emanuel, worked with her brother, which was actually
25 the relationship.

1 Additionally I interviewed Mr. Emanuel. He
2 said, given that fact, he could still be a fair and
3 impartial juror. I believe I gave the opportunity for
4 both the State and the defense to ask me or submit any
5 additional voir dire in that regard. I would
6 respectfully deny your motion as to juror Emanuel.

7 MR. BAKER: The next motion, Your Honor, is a
8 motion for a new trial based on the admission of the --
9 I think it's photographs, Exhibits 21 through 28, over
10 the objection of defense.

11 It would be the argument of the defense or we
12 would respectfully argue that it was material error to
13 admit those photographs, and the admission of those
14 photographs constituted an abuse of discretion.

15 Specifically, I think it was photos 21 through
16 28. Your Honor excluded 22, 24, and 26 and admitted 21,
17 23, 27, and 28, which I think 27 and 28 being autopsy
18 photos. This motion is based on, Your Honor, rules of
19 evidence 401, 402, and 403.

20 The photos were immaterial and irrelevant,
21 only served to arouse the sympathy and prejudice of the
22 jury, also pursuant to the Eighth Amendment, Fourteenth
23 Amendment, Eighth Amendment being cruel and unusual
24 punishment, the Fourteenth Amendment due process and the
25 right to confront the witnesses against you.

1 THE COURT: Again, I would reconfirm my trial
2 rulings in regards to those specific photographs. I do
3 not think those photographs are calculated to arouse the
4 sympathy or the prejudice of the jury.

5 I think they did not have a tendency to
6 suggest a decision on an improper basis. They
7 corroborated the State's theory of the case,
8 particularly in corroborating the testimony of the
9 eyewitness, James Johnson, and corroborating the
10 testimony of Dr. Sexton. So I would reconfirm my trial
11 rulings in that regard and deny your motion.

12 MR. BAKER: Your Honor, the next motion is a
13 motion for a new trial based on the denial of the motion
14 to quash the indictments. I would respectfully argue
15 that ruling was erroneous and materially prejudiced the
16 Defendant.

17 That motion, Your Honor, was originally based
18 on South Carolina Code Section 17-19-30, which is the
19 time and place requirement of the two -- this motion,
20 Your Honor, goes to the two murder indictments.

21 Again it's 17-19-30 in that the indictments
22 themselves only state that on or about September 5,
23 2005, in Lexington County and give no more specifics
24 about time and place.

25 I just would further argue, Your Honor, in

1 this case because of some of the testimony of witnesses,
2 some of the evidence presented, certainly the time of
3 death was certainly an issue. There was some testimony
4 from Dr. Sexton, I think, regarding the time of death or
5 time of injury being around 12:00 o'clock.

6 There was the testimony of Michael Melton who
7 indicated that he got home at 5:00 o'clock
8 September 5th, 2005. He did not notice the victims had
9 been injured at that point and would argue that based on
10 that, there is no subject matter jurisdiction to go
11 forward on these cases and would ask that those
12 indictments be quashed and a new trial granted.

13 THE COURT: I would respectfully deny your
14 motion and reconfirm my pretrial rulings in regard to
15 your motion to quash the indictment.

16 MR. BAKER: Your Honor, the next motion is a
17 motion for a new trial based on the denial of my
18 original motion to suppress all the evidence which was
19 gathered at the home of my client.

20 That was based on a violation of South
21 Carolina Code 17-13-150, which we actually put up some
22 testimony regarding the fact this warrant was not served
23 on Mr. Burgess. A copy of the warrant was not left at
24 the residence. She testified that she got a copy of the
25 warrants some two years later.

1 Even, I think Detective Palkowski, could not
2 confirm, just basically didn't remember whether he had
3 left a copy of the warrant at the house. I would argue
4 that specifically to the evidence gathered there, which
5 would be the photos that were taken from inside the
6 house, as well as the cell phone, that evidence should
7 have been excluded respectfully. Based on that my
8 client was prejudiced by the admission of that evidence,
9 and we would ask for a new trial based on that.

10 THE COURT: I would respectfully deny your
11 motion and reaffirm my pretrial rulings in that regard.

12 MR. BAKER: The next motion, Your Honor, is a
13 motion for a new trial based on the fact of the
14 statement of Mr. Wise that Mr. Burgess had requested a
15 gun at the motel, which was allowed to go before the
16 jury.

17 We would just make an argument pursuant to
18 404 (b) and 403. The probative value of that was
19 outweighed by the prejudice, and the fact that that
20 evidence did not go to prove motive, identity or the
21 existence of a common scheme or plan or the absence of
22 mistake or accident or intent.

23 There was not clear and convincing evidence of
24 that, and evidence of another crime or bad act must have
25 a direct bearing or be related to the commission of a

1 later crime. We just ask for a new trial, Your Honor,
2 based on Your Honor's previous denial of the motion to
3 allow that evidence before the jury.

4 THE COURT: All right. I'm not even sure that
5 is 404 (b) testimony. I think that's clearly just
6 circumstantial evidence, the fact that the Defendant,
7 according to the testimony of Mr. Wise, asked for a gun
8 in the late night hours of the 4th and early morning
9 hours of the 5th of September of '05, then within hours
10 thereafter committed a homicide with a gun.

11 I just think that's circumstantial evidence.
12 I think in balancing under 403, its probative value is
13 very high and not outweighed by its prejudicial effect.
14 So I would respectfully deny your motion in that regard.

15 MR. BAKER: Your Honor, the next motion is a
16 motion for a new trial based on the admission of
17 Exhibit 92, which was an exhibit I objected to. That
18 was basically testimony of Shelley Ulyak.

19 I would argue that that document was hearsay.
20 I think it was let in under the 803 (6) exception to the
21 hearsay rule. My argument, I think at the time, was
22 that did not fit into that exception as a business
23 record and that it was a response to a subpoena.

24 I would respectfully argue that a response to
25 a subpoena does not qualify as a regular course of

1 business and would respectfully request a new trial
2 based on the fact that that evidence was allowed to go
3 before the jury.

4 THE COURT: I would deny your motion based on
5 Ms. Ulyak's testimony as a certified records custodian
6 of Virgin Mobile and the foundation laid during the
7 trial and find it was admissible under 803 (6), business
8 record exception.

9 MR. BAKER: Next is a motion, Your Honor, for
10 a new trial based on the fact that exhibits 100 and 101
11 were allowed into evidence over my objections. Those
12 exhibits were let in, I think through the witness
13 Tyrell.

14 My motion is based on a violation of Rule 401,
15 402 of evidence and that there was portions of those
16 exhibits that were not relevant. Also, Your Honor, I
17 would argue that -- which I think I did at the time --
18 that it was a violation of Rule 106, which I think
19 commonly is know as the completeness rule.

20 The testimony was there were potentially cell
21 towers or there were cell towers which weren't actually
22 included on Exhibit 100 and 101, that being a violation
23 of Rule 106. Based on that and based on the fact that
24 that evidence was admitted before the jury, I would ask
25 for a new trial.

1 THE COURT: I would deny your motion. As I
2 said during the trial, you could have brought out all of
3 those other cell towers. Those records were already
4 included with the other records, which were State's
5 Exhibit Number 102.

6 It listed all those other cell towers by
7 latitude and longitude. It just happened not to be
8 marked on State's 100 and 101. I would deny your motion
9 in that regard.

10 MR. BAKER: Your Honor, our next motion is a
11 motion for a new trial based on the exclusion of the
12 testimony of several witnesses that had seen other
13 individuals, other than Mr. Burgess, threaten the
14 victims, that being the testimony of Mr. Michael Melton,
15 which was proffered for Your Honor, as well as the
16 testimony of Michael McQuarley, Frederick Summers, the
17 testimony of Tonya Aiken, and the testimony of Alice
18 Ballard.

19 I would respectfully argue, Your Honor, that
20 my client was denied the right to put up a complete
21 defense based on the fact that he was not allowed to --
22 or the jury was not allowed to hear that testimony. On
23 that basis I would ask for a new trial.

24 THE COURT: I would reconfirm my rulings based
25 on State versus Gregory. I applied the Gregory rule to

1 that testimony, which was elucidated by Holmes versus
2 United States. I don't have the cites in front of me
3 right at the moment.

4 I know Gregory was a 1941 case, I believe. I
5 don't have the cites in front of me. That was based on
6 primarily those two cases and from the progeny from
7 Gregory.

8 MR. BAKER: Your Honor, that would conclude
9 the post-trial motions. I make those for the record,
10 some nine motions.

11 THE COURT: All right. Solicitor, anything
12 further prior to sentencing?

13 MR. MADSEN: Nothing prior to sentencing, Your
14 Honor.

15 THE COURT: There is no victim impact?

16 MR. MADSEN: I believe we have two family
17 members that would like to speak, Your Honor.

18 THE COURT: All right. If you would give your
19 name for the record, please, ma'am.

20 MS. SLICE: Anna Slice, A-N-N-A, S-L-I-C-E.

21 THE COURT: Yes, ma'am, I would be glad to
22 hear from you, Ms. Slice.

23 MS. SLICE: I just want to commend these
24 gentlemen on the great job that they did in this trial.
25 And when you are sentencing Mr. Burgess, please don't

1 give him a second chance, not to walk on the streets,
2 not to have a happy life because he took that.

3 He took that right from David and Kim to ever
4 have a chance to straighten up and be decent people and
5 have a choice to breathe and be people. He took that
6 choice. So he don't deserve a second chance.

7 David's two children are going to be affected
8 by this for the rest of their life. They have a lot of
9 anger and they have a lot of issues due to this. And if
10 they could speak, they would beg you, don't let him out,
11 not so he could do this to somebody else.

12 THE COURT: Thank you, Ms. Slice. Anybody
13 else, Solicitor?

14 MR. MADSEN: Yes, Your Honor.

15 THE COURT: Yes, sir, your name?

16 MR. REYNOLDS: I'm Colie Reynolds. I was
17 Kim's daddy. I would like to thank all of y'all for
18 what you have done, but that would not replace my
19 daughter, but it would probably save somebody else's
20 life.

21 THE COURT: Thank you, Mr. Reynolds. Anyone
22 else, Solicitor?

23 MR. MADSEN: No more family members, Your
24 Honor.

25 THE COURT: What is Mr. Burgess' prior record?

1 MR. MADSEN: Your Honor, he has, working back,
2 the trafficking in cocaine second offense, to which he
3 is currently serving seven years in S.C.D.C. Prior to
4 that he had pled at the same time and received 18-month
5 sentences on P.W.I.D. crack cocaine and distribution of
6 crack cocaine, if I remember correctly, only a few days
7 after these murders.

8 It might have been in October of '05 or late
9 September that he had pled guilty on those. Prior to
10 that he had convictions for assault and battery of a
11 high and aggravated nature, possession of stolen goods,
12 grand larceny, and burglary second, and then a variety
13 of magistrate court offenses.

14 THE COURT: As I recall, the burglary and
15 grand larceny and assault and battery was back in 2000?

16 MR. MADSEN: Correct. They were at various
17 times. He patterned up, I believe, pleading guilty to
18 those all at the same time.

19 THE COURT: Thank you. Anything further?

20 MR. MADSEN: Judge, I mean obviously you have
21 heard the testimony. You heard about the victims. You
22 know they had their problems, I think like everyone
23 does. We met with the family members. That doesn't
24 mean these weren't people who loved or were quite loved
25 themselves by a variety of people.

1 They have had a lot of friends and family
2 members who have met with our office and been up here
3 the entire time because they were concerned and
4 obviously upset by what has happened, and they still
5 feel that even over two years later.

6 I would respectfully request, Your Honor, that
7 based on the nature of these crimes and the Defendant's
8 prior record that Your Honor sentence him to life
9 without parole on the two murder charges.

10 THE COURT: Thank you, Solicitor. Mr. Baker,
11 I would be glad to hear from you.

12 MR. BAKER: Your Honor, Mr. Burgess is 29
13 years old. As you have probably noticed, Your Honor, he
14 has his family here. That have been here throughout
15 this process, very supportive of Mr. Burgess. He is a
16 young man and he has, as I understand it, four children.
17 We would ask Your Honor to give him the opportunity to
18 get out of jail one day.

19 THE COURT: Thank you. I assume Mr. Burgess
20 would not want to address the Court?

21 THE DEFENDANT: No, sir.

22 (Pause).

23 THE COURT: It is very clear to me that there
24 was more than sufficient evidence for the return of the
25 verdicts in this case. Really what gets me about the

1 case is you have Mr. Slice and Ms. Fauscette in the
2 sanctity of their own home. They were not out on the
3 street.

4 I realize there was testimony concerning their
5 addiction to drugs. There was testimony from at least
6 one witness concerning his addiction to drugs for a long
7 time, years, decades. People should be able to be safe
8 in their own homes.

9 Given the brutality of the crimes, the
10 maliciousness, the cold-bloodedness, it wasn't one but
11 two lives that were taken and many, many other lives
12 affected, both on this side of the courtroom and on this
13 side.

14 I have noticed Mr. Burgess' family being here
15 with him. The Slice and Fauscette family can't be with
16 their loved ones. I commend Mr. Burgess' family for
17 being here. So many times people on that side of the
18 courtroom have no one here on their behalf. I know you
19 love your son and your -- whether he is your brother or
20 husband or what have you, friend. I'm sure you do.

21 But given two lives and given four shots --
22 given four shots to Mr. Slice and three shots to
23 Ms. Fauscette, a total of seven shots -- which means on
24 a six-shot revolver, he would have had to have reloaded,
25 had to get closer to the victim, Mr. Slice, for the

1 fatal injury and had to come around and get lined up
2 with the top of the head of Ms. Fauscette for that
3 injury, which I think is corroborated both from
4 Mr. Johnson's testimony and Dr. Sexton.

5 They had absolutely no opportunity to defend
6 themselves. Mr. Slice was sitting there in his
7 undershirt and underdrawers watching T.V. It looked to
8 me like in the pictures, the T.V. had been on since
9 September the 4th. The police were processing the scene
10 on the 6th.

11 There wasn't one eyewitness, there actually
12 ending up being at least -- well, an eyewitness, an ear
13 witness, Mr. Wise, and then two other witnesses. That's
14 the gun and the phone. They don't have any records.
15 They don't have any crack addictions.

16 Based on his prior record, based on all the
17 facts and circumstances of the crime and the
18 characteristics of the Defendant, his prior record, on
19 Indictment 2005-GS-32-4561, 4563, 4564, murder, murder,
20 and possession of a firearm, on the murder indictment,
21 the Defendant is committed to the South Carolina
22 Department of Corrections for a determinate term of life
23 without parole.

24 On 4563 the Defendant is committed to the
25 State Department of Corrections for a determinate term

1 of life without parole. On 4564 the Defendant is
2 committed to the State Department of Corrections for a
3 determinate term of five years. Good luck to you,
4 Mr. Burgess.

5 Thank you, Solicitor and Mr. Baker. Y'all
6 represented your clients very well. Good luck to the
7 Slice and Fauscette families. Court will be in
8 recess.

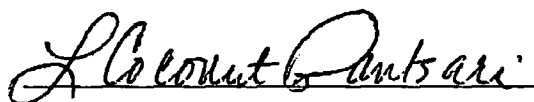
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C E R T I F I C A T E

I, the undersigned L. Coconut Pantsari, Official Reporter for the Eleventh 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 Lexington County, South Carolina on the 28th through the 31st days of January and the 1st day of February, 2008

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

April 24, 2008



Court Reporter

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DARRELL BURGESS,

APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the trial court abused its discretion by refusing to excuse juror #72, Juror Emanuel, where the juror revealed to the court that he was the supervisor of murder victim David Slice's brother-in-law since defense counsel told the judge he would have removed the juror with a preemptory challenge had he known he was a relative of the murder victim?

2.

Whether the trial court erred by refusing to admit the testimony of witnesses Melton, McQuarley, Summers, Aycock, and Ballard about the victims being threatened over drug debts by another man within weeks of the murder, and also before that, since this evidence of third-party guilt was relevant, and appellant had the right to present a complete defense under Holmes v. South Carolina?

STATEMENT OF THE CASE

Appellant was indicted by the Lexington County grand jury for two counts of murder and possession of a firearm during a violent crime. R. 615 - 620. His case was called to trial on January 28, 2008 before the Honorable R. Knox McMahon and a jury. J. Bradley Baker represented appellant. Samuel R. Hubbard, III and Robert M. Madsen were the solicitors. R. 1.

At the conclusion of the trial on March 1, 2008 the jury found appellant guilty on all three counts. R. 603, l. 17 - 604, l. 1. Judge McMahon sentenced appellant to life imprisonment on each of the murder counts, and he imposed a five year sentence on the possession of a firearm during a violent crime conviction. R. 613, l. 16 - 614, l. 4.

This appeal follows.

ARGUMENT

1.

The trial court abused its discretion by refusing to excuse juror #72, Juror Emanuel, where the juror revealed to the court that he was the supervisor of murder victim David Slice's brother-in-law since defense counsel told the judge he would have removed the juror with a preemptory challenge had he known he was a relative of the murder victim.

Relevant Facts

The trial court read the indictments to the venire prior to jury selection. The jury was told that appellant, along with Michael T. Wise, was charged with unlawfully killing David Slice and Kim Fauscette with malice aforethought. R. 5, ll. 2 – 17. The following occurred with the trial court and the venire:

The Court: Is any member of the jury panel or a member of your immediate family [that] were the close personal friends of the victims named in the indictment, either David Slice or Kim Fauscette? If so, please stand.

(There is no response).

The Court: These indictments allege an incident that occurred in Lexington County, on or about September 5, 2005, allegedly involved a handgun. Does any member of the jury panel have any knowledge about the case? If so, please stand.

(Juror stands).

The Court: Ms. Sawyer, I have set you aside. Thank you so much. Any others?

(There is no response).

The Court: Does any member of the jury panel have any bias or prejudice towards the parties, that being either the

state or the defendant, or the subject matter involved in this case? If so, please stand.

(There is no response).

The Court: Has any member of the jury panel heard or know anything about the case from any source whatsoever? If so, please stand.

(There is no response).

R. 8, l. 20 – 9, l. 20.

As seen above, venireman Joseph E. Emanuel, juror number seventy-two, did not respond to any of these questions, including whether he knew or had heard anything about the case “from any source whatsoever.” At the time juror number seventy-two was accepted as a juror defense counsel had only used five of his ten peremptory challenges. R. 29, l. 21 – 30, l. 1.

Prior to any testimony before the jury the clerk informed the court that juror number seventy-two approached her and said he recognized “a lady in the audience.” The clerk said “he didn’t recognize the name, but he did recognize her face, that it’s either her son or her husband, [that was victim] but some kind of kin of hers works with him, and he wanted to speak with the judge about it.” R. 36, l. 19 – 37, l. 2. The solicitor said they were having the victim’s family come back into the courtroom in case the relationship happened to be with “one of the victims.” R. 37, ll. 3 – 9.

Juror number seventy-two then stated “yesterday morning I realized that I knew somebody that worked with me that was a family member here . . . her brother actually works with me.” R. 37, ll. 16 – 23. The juror said the person he recognized was Georgette Slice, and that he was the supervisor of her brother. The juror confirmed to the judge that “a

member of the victim's family, brother works for you . . . and you are his supervisor. The juror then answered, "yes," when asked if he "could still be a fair and impartial juror to both the State and the defense in this case." The judge then asked to jury to "step back to your jury room," and instructed him not to talk to the other jurors about what was transpiring. R. 38, l. 3 – 39, l. 21.

Defense counsel then asked that the juror be excused. The judge inquired of the solicitor "what relationship is Georgette Slice to the victim David Slice. The solicitor then said Georgette Slice was actually victim David Slice's "estranged wife." The solicitor added that he thought Georgette Slice was still married to David Slice, even though they were not living together at the time of the murder. R. 38, l. 3 – 39, l. 21. Defense counsel Baker would continue to request that the juror be removed for cause under these circumstances. The solicitor and defense counsel both stated that they understood the juror actually supervised David Slice's brother-in-law rather than his brother. R. 39, l. 9 – 40, l. 19.

The juror was then brought back into the courtroom. The juror stated that Eugene Ford was the brother-in-law's name, and the person he supervised. R. 40, ll. 14 – 19. The judge then asked the juror "the fact that you work with one of the victim's brothers-in-law, could you still be fair and impartial. The juror stated that he could. R. 40, ll. 14 – 24.

The juror responded to the judge's questions by asserting that he had "heard anything about the case . . . prior to being selected for jury service." The juror stated he did not know "that it had happened," and that he "put names and faces together, Slice. I just recognized a face." R. 40, l. 25 – 41, l. 18.

Defense counsel Baker then renewed his motion that the juror be removed for cause. "He has indicated that he is a supervisor for one of the victim's family members." R.

41, ll. 19 – 25:

I think it's human nature that he could not be impartial in this matter and [I] would ask that he be removed for cause from the jury. I think it would be proper for that to happen at this point.

The Court: Yes, sir.

Mr. Madsen: I just think he gave appropriate answers that he could be fair and impartial. This is obviously a murder case, and he hasn't even heard from this fellow that works for him that there is an estranged brother-in-law who has been murdered.

I think that is telling, and he has answered the court, was solid in his answers, that he would be fair and impartial and had not heard anything or discussed anything about the case.

The Court: Yes, sir. *I would have to deny your motion based on State v. Elmore*¹. In that case actually a relative of one of the prosecutors was selected for [the] jury and was authorized to be a member of that jury.

I think I have to take jurors at their word. I can't second-guess that. That's why I even went and asked him once he put the face and name together if he recollected anything about the facts of the case, and he says he knows nothing. I can't sit up here and decide that jurors won't follow the law.

Mr. Baker: Just to put a couple of things on the record, Your Honor.

The Court: Certainly.

Mr. Baker: Obviously, *had I known this prior to selection of the jury. I would have struck Mr. Emanuel from the jury. I have been denied that right at this point.*

¹ 279 S.C. 417, 308 S.E.2d 781 (1983).

He has indicated he works with a family member of the victim. I think he would be - - it's just prejudice to my client for us to go forward with him on the jury.

The Court: All right. Thank you. Thank you, Mr. Baker.

R. 42, l. 1 – 43, l. 13. (emphasis added).

Later during the trial the court disclosed that it had received a note that "I, Allen Pinner, juror number one eighty-four were friends with the family of David Slice." The juror stated in the note "I do not think I am able to make a fair decision." R. 118, l. 12 – 119, l. 25. After the attorneys said they did not have any questions for the juror the judge excused him. R. 119, ll. 3 – 25.

Defense counsel Baker then moved for a mistrial stating that juror number seventy-two earlier informed the court that he worked with a member of victim's family. Counsel argued the Court now had a second revelation from juror one eighty-four of direct ties to the family of victim David Slice. R. 121, l. 10 – 122, l. 10. Defense counsel asked the judge to declare a mistrial or at least poll the jurors to find out "if there was anybody else on the panel who may know of something else about the case." R. 121, l. 15 – 122, l. 10. The judge denied the motion for a mistrial. R. 122, l. 11 – 123, l. 13.

At the conclusion of the trial defense counsel would move for a new trial based on the failure of the trial court to excuse juror seventy-two based on the fact that he was a supervisor of a family member of the victim. Counsel argued this was a denial of due process and appellant's right to a fair and impartial jury. R. 606, l. 22 – 607, l. 11. The judge denied the motion for a new trial. R. 607, l. 12 – 608, l. 6.

Discussion

The present case is distinguishable from State v. Stone, 350 S.C. 442, 467 S.E.2d 244 (2002). State v. Stone was a death penalty case.

During the penalty phase of the trial Stone's aunt, Bernice Perry, was called as a witness. When Perry was placed on the witness stand juror Thompson indicated to the court that she knew Ms. Perry. Although Perry had been announced as a witness at the start of *voir dire*, Thompson did not recognize her by name. Thompson had lived down the street from Perry *five or six years earlier*, and they were casual acquaintances only. Thompson indicted her past acquaintance with Perry would not affect her ability to be fair and impartial.

The solicitor asked that Thompson be removed for cause arguing it would be difficult to impose a death sentence "on a *former* acquaintance's nephew." (emphasis added). The court removed juror Thompson and replaced her with an alternative. State v. Stone, 350 S.C. 448, 567 S.E.2d 247.

The Supreme Court found this was error. The court noted that the first line of analysis under State v. Woods, 345 S.C. 583, 587–588, 550 S.E.2d 282, 284 (2001), dealt with whether the juror concealed information inquired into during *voir dire*. The Court held that a new trial was required only when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been material factor in the use of the party's preemptory challenges. Thompson v. O'Rourke, 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986).

The Court then noted that where a juror, without justification, fails to disclose a relationship, it may be inferred, nothing to the contrary appearing, that the juror is not impartial. State v. Savage, 306 S.C. 5, 409 S.E.2d 809 (Ct. App. 1991).

The Court noted that juror Thompson's failure to disclose her acquaintance with Perry was innocent in State v. Stone. Importantly, the court found "her *scant acquaintance* would neither have supported a challenge for cause *nor would it have been a material factor in the state's exercise of its preemptory challenges.*" State v. Stone, 350 S.C. 448, 567 S.E.2d 247 – 248. (emphasis added).

The same is simply not true here. Juror number seventy-two was the *present* supervisor of the decedent's brother-in-law. That was an ongoing relationship and not a "scant acquaintance" as in State v. Stone where the juror there had only "lived down the street from Perry five or six years earlier" and they were only casual acquaintances then. State v. Stone, 350 S.C. 448, 567 S.E.2d 247. Here, the juror was going to have to go back to work and supervise the dead victim's brother-in-law on a continuing basis. The brother-in-law knew that victim's Slice's wife, Georgette, his sister-in-law, still cared for the victim since she was watching the trial.

Defense counsel Baker correctly argued it was only human nature under these circumstances for brother-in-law juror to be affected. Since this was an ongoing supervisor-employee relationship, the juror was going to have to face the murder victim's brother-in-law at work, and human nature does dictate that fact was going to be on the juror's mind.

Moreover, the judge's ruling that he had "to deny your motion based on State v. Elmore," and that he was bound by the juror's answers was an error of law. The judge had the discretion, upon a motion, to remove the juror if he thought the juror might be being

affected or influenced despite the juror's hopeful view that he would remain fair. Judges commonly excuse jurors where it appears by family or friendship that they may be too close to the situation despite their assertions that they would still be fair. The failure to recognize discretionary authority where it in fact exists is reversible error. State v. Alexander, 309 S.C. 495, 424 S.E.2d 526 (1992).

The murder in this case was a brutal one. The state contended, through witness James Johnson, also known as "Tony Red," who admitted he was a "prime suspect" in the murder that he witnessed appellant shoot David Slice and Pam Fauscette in the mobile home they shared at the time. Johnson also admitted he sold the victims drugs. R.222, l. 1 – 224, l. 25.

Johnson claimed appellant shot both victims as they lay on the floor wounded. Johnson was allowed to plead to being an accessory after the fact of murder in return for his testimony. Johnson claimed appellant told him he shot the victim because "Slice can't be trusted." R. 184, l. 1 – 213, l. 25; R. 222, l. 1 – 224, l. 25.

The judge abused his discretion by refusing to remove Slice's brother-in-law from the jury upon defense counsel's motion, and his assertion, as an officer of the court, that he would have struck the brother-in-law had he known of the relationship. Defense counsel would have been ineffective to not have struck the brother-in-law had he know he was a relative of the victim. The judge had to discretion to do so, and he erred by ruling he was bound by a single prior case -- State v. Elmore -- to deny the motion. The court, in each case, considers the *voir dire* answers of a juror in their totality, and not in isolation. State v. Elmore, 286 S.C. 70, 332 S.E.2d 762 (1985). Appellant should be granted a new trial since

defense counsel correctly told the judge he would have struck the victim's brother-in-law if he had known of that relationship because appellant was entitled to a fair and impartial jury.

2.

The court erred by refusing to admit the testimony of witnesses Melton, McQuarley, Summers, Aycock, and Ballard about the victims being threatened over their drug debts by another man within weeks of the murder, and even before, since this evidence of third-party guilt was relevant, and appellant had the right to present a complete defense under *Holmes v. South Carolina*, 547 U.S. 319 (2006).

Relevant Facts

Michael Melton rented a room from the victims, and he lived in the back bedroom of their mobile home. Melton admitted that crack use was rampant in the mobile home they shared. R. 44, l. 24 – 58, l. 14.

Melton traveled to Fayetteville, North Carolina on a bus to visit his daughter in early September, 2005. He returned on Monday, September 5, 2005, “which was Labor Day.” R. 58, l. 10 – 59, l. 18. David Slice or Kim were supposed to pick him up at the bus station. Melton telephoned them but he received no answer. R. 59, l. 16 – 60, l. 18.

Melton finally “caught a cab ride from the bus station.” When he got home the back door to the mobile home was locked, which was very unusual. R. 60, l. 15 – 61, l. 16.

Melton therefore entered through the front door and he saw “Kim and David” inside. “David was sitting on couch and Kim was laying on the floor.” Melton said he thought they were sleeping so he did not attempt to wake them. Melton also noted it was always quite dark inside of the mobile home because of the heavy curtains. Melton also testified he wanted to smoke his crack cocaine alone, and that David and Kim would be “begging and begging and begging” him to share it if he woke them. R. 61, l. 14- 63, l. 16.

The next morning Melton went to the store to get a cigarette lighter at about 6:30 a.m. R. 65, l. 7 – 68, l. 11. Melton returned to the mobile and went back to sleep. A little later, at about 11:00 a.m., he went into the kitchen. He became suspicious for the first time because Kim and David had not “moved an inch” from the prior night. Melton looked more closely at Slice and Kim, and he realized “that they had been killed, been murdered.” R. 68, l. 21 – 69, l. 20. Melton ran out of the mobile home, and he had a friend of his call 911. R. 80, ll. 18 – 20.

In the presence of the jury Melton acknowledged that James Johnson, the eyewitness who claimed he saw appellant murder the victims, was known as “Tony Red.” Melton acknowledged Tony Red was over at the mobile home frequently. R. 81, ll. 10 – 23.

The beginning of the proffer

Out of the presence of the jury appellant proffered Melton’s testimony that he had lived with Kim Fauscette and David Slice for about two and a half months. Melton said that they were heavy drug users, and they regularly had drugs delivered to the mobile home. R. 84, l. 14 – 85, l. 2.

Melton acknowledged that in the statement he gave to the police that he told them he thought the murders were drug related. Melton also told the police he had been concerned that the victims were not going to be able to pay back these drug dealers. Melton had witnessed “first hand” threats that were made against the victims because of their drug debts. R. 85, ll. 3 – 20.

Melton remembered that one drug dealer, “Twelve, had come to the house” and “jacked up David and demanded that he get his money.” R. 85, l. 21 – 86, l. 15. Melton

said Twelve was **not** appellant. Twelve told David Slice, "He was going to get paid one way or the other." R. 86, ll. 2 – 15.

Still outside the presence of the jury, Melton acknowledged to the solicitor that he told the police the day after the murder that Twelve had been threatening David Slice a few weeks before the murders actually occurred. The circumstantial evidence showed the murders occurred before or just after Melton returned from North Carolina on September 5, 2005. R. 88, l. 15 – 89, l. 5.

After the proffer of Melton on third party guilt the judge stated he had considered the precedents of Holmes v. South Carolina, 547 U.S. 319 (2006) and State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941). R. 90, ll. 2 -6. The solicitor argued Melton's testimony should be excluded because the threat he testified about was "a couple of weeks before," and the solicitor maintained it was too remote and that it was "conjecture." R. 90, l. 8 – 91, l. 22.

Defense counsel argued that there was no forensic evidence in this case to link appellant to the crime, and that is what distinguished prior South Carolina cases on third party guilt where there "was overwhelming scientific evidence or forensic evidence to link an individual to the crime." R. 91, l. 25 – 92, l. 8. Defense counsel also told the judge that there would be several other witnesses who would testify that Twelve threatened the victims. Counsel argued that appellant had the constitutional right to present a complete defense to these murder charges. R. 92, ll. 13 – 25.

The judge ruled he would not allow the evidence "at this time." "That is not to indicate that I am going to allow it at a later time." R. 93, l. 1 – 17.

Four other proffered witnesses

Appellant later proffered the testimony of four other witnesses on death threats involving drug debts that were not in any way related to appellant. These witnesses were Michael McQuarley, Frederick Summers, Tonya Aycock, and Alice Ballard.

McQuarley testified that he was a neighbor of the victims, and that he lived in the mobile home in front of the victim's mobile home. Kim Fauscette was his landlord. McQuarley became suspicious because there was constant "traffic more or less going in and out of their house." R. 531, ll. 3 – 20.

McQuarley testified that around August 23, 2005, which also would have been about two weeks before the murders, he witnessed a man "that was in a Neon" grab Fauscette "by her shirt." McQuarley said this man was talking to the victim in a very "disrespectful manner." R. 533, ll. 3 – 24. McQuarley remembered the man demanding, "you owe me, do you have my money." This threatening man was not appellant. R. 534, ll. 5–17.

Frederick Summers also testified that on Friday, August 26, 2005 or August 27, 2005 he witnessed someone in "a red Neon" arguing with Fauscette. "He was arguing through the door. 'Give me my money.' This and that . . . 'I want my money,' and all this this . . . Then the Neon came very now and then, you know, I'd say every 20 minutes basically. I seen that. Then we pulled off and went back to Lexington Hospital. That Saturday we come back to get some more clothes, and it was surrounded with cops and stuff, and that's when they told us what happened basically, you know." R. 538, ll. 2 – 539, l. 5.

Summers also testified the threatening man was big, and he was wielding a stick at the time he made his demands. Summers confirmed the man was not appellant whom he characterized as "a little dude." R. 537, l. 12 – 539, l. 16.

Tonya Aycock testified she was also questioned about the victims deaths, and she gave a statement to the police on September 6, 2005. Aycock told the police she had known Kim Fauscette for twenty years and that Fauscette was constantly smoking crack cocaine. Aycock testified:

Every time they got paid, it went on crack. They got in debt with Steve Riley. He made it sound like if they didn't pay him, he would take care of them. The other guy, I don't know his name, but made the same comment.

R. 542, ll. 13 – 17.

Aycock said she understood that Steve Riley "would have killed them" if they did not pay him for the drugs he supplied. R. 542, l. 20 – 543, l. 22. As to when this actually happened, Aycock could only say it happened "way before" the murders occurred. R. 544, ll. 19 -22.

Alice Ballard then testified that she rented a mobile home from Kim Fauscette, and she often gave the victim rides to Twelve's house where the victim purchased her crack cocaine. R. 546, l. 9 – 547, l. 20. Ballard also said as a landlord that the victim took crack cocaine "for rent money." R. 547, l. 21 – 548, l. 6.

Ballard recalled that Fauscette was constantly arguing "with the dealers," and Ballard said she witnessed confrontations between the victim and Twelve over drug money she owed him. R. 548, l. 23 – 549, l. 4. Ballard said on cross-examination all of these

incidents with Twelve occurred in 2004. The murders occurred around September 5, 2005. R. 549, ll. 23 – 25.

Defense counsel Baker argued the proffered testimony showed numerous threats over drug money were made, and Twelve's name was raised by the varying witnesses "over and over." Counsel noted that Melton was the first witness to testify he had witnessed Twelve threatening the victim. R. 550, l. 12 – 551, l. 3.

The judge ruled that he was not going to allow the testimony of these five witnesses to be heard by the jury. He stated the evidence was "mere conjecture or surmise." The judge also said the acts testified to "some two weeks or better" before the murders were not "inconsistent with the defendant's guilt." R. 551, l. 10 – 552, l. 17.

After appellant was convicted defense counsel moved for a new trial on the basis of the exclusion of the testimony of these five witnesses who had seen the drug dealer threatening the victims. R. 609, ll. 10 – 23.

Discussion

In Holmes v. South Carolina, 547 U.S. 319 (2006) the Court held that the exclusion of defense evidence of third-party guilt denied Holmes his constitutional right to present a complete defense. The Court in Holmes abrogated State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001).

The Holmes Court noted that the trial court excluded the third-party guilt evidence under State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941) which held that such evidence is admissible if it raises a reasonable inference or presumption as to the defendant's own innocence. However, the Court noted under Gregory that the evidence was not admissible if

it only cast a bare suspicion upon another or simply raised a conjectural inference as to commission of the crime by another person.

The court in Holmes wrote that while the state and federal rule makers have broad latitude under which to establish rules of evidence that the Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant be given a meaning opportunity to present a complete defense. See Crane v. Kentucky, 476 U.S. 663, 689 – 690 (1986); Chambers v. Mississippi, 410 U.S. 284 (1973). Consequently, evidentiary rules cannot be arbitrary or disproportionate to the purposes they serve. See Rock v. Arkansas, 483 U.S. 44 (1987).

The Court in Holmes held that the state court in State v. Gay and Holmes had sporadically extended the rule of State v. Gregory beyond its meaning. The Gregory rule was that evidence which only cast a bare suspicion upon another was not admissible. State v. Gregory, 198 S.C. 104 – 105, 16 S.E.2d 534 – 535.

The court in Holmes also reasoned that the state court erred by concentrating on the strength of the state's evidence, and its forensic evidence. The United States Supreme Court wrote: "The point is that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." The court therefore found that the rule excluding the third-party guilt evidence "was arbitrary," and it did not rationally serve the end that the Gregory rule and other similar third-party guilt rules were designed to further.

Here, five unrelated defense witnesses testified in camera to similar threats being made by a drug dealer against the victim. These were all within two weeks of the murder, with the exception of Tonya Aycock who said Steve Riley's death threats were made

sometime “way before” the murders, and Ballard’s testimony that Twelve’s threats were made sometime in 2004.

The *blanket* exclusion of all of this evidence was an abuse of discretion, and as argued infra, it was made on erroneous ground. It was apparent these witnesses took these threats from the drug dealer against the victims very seriously, and they gave the information to the police in their statements.

This evidence was undoubtedly relevant under Rule 401, SCRE, which states that “evidence is relevant if it has a direct bearing upon or tends to establish or make more or less probable the matter in controversy.” Here, the testimony tended to show it was probable that the victims were killed because of their crack cocaine debts over which they were receiving death threats. Appellant was not the person threatening them -- he was not Twelve.

There was absolutely no evidence in this case that appellant was acting in concert with Twelve, or his associates, since none of the five proffered witnesses -- or any of the state’s witnesses for that matter -- testified to any connection between appellant and another person in committing the murders. An accessory after the fact to murder is not a participant in the murder, but one who can be present at the time of the murder and one who subsequently assists the felon with the intent to hinder the felon’s detection. See State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998).

Consequently, the proffered evidence was relevant since it tended to make more or less probable some matter at issue upon which it directly or indirectly bears. See State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986).

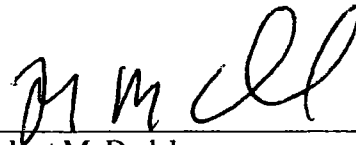
Therefore, for this relevant evidence to have been excluded there must have been a legitimate basis for its exclusion that did not deny appellant his constitutional right to present a complete defense. The trial judge reasoned that the proffered evidence was not inconsistent with appellant's guilt. That was erroneous since there was *no evidence of any connection* between Twelve and appellant, or evidence of appellant threatening the victims over drug debts. The proffered evidence involving Twelve's threats was clearly inconsistent with appellant's guilt.

The trial judge found the evidence inadmissible under the standard of Holmes v. South Carolina and State v. Gregory. That respectfully was error, and it denied appellant his constitutional right to present a complete defense. Appellant should be granted a new trial.

CONCLUSION

Based on the foregoing arguments, appellant's convictions should be reversed and this case remanded to the Lexington County Court of General Sessions for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

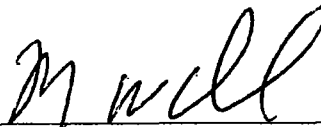
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June 23, 2009

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief 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."

June 23, 2009



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

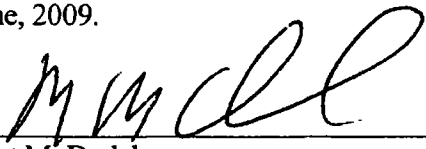
V.

DARRELL BURGESS,

APPELLANT

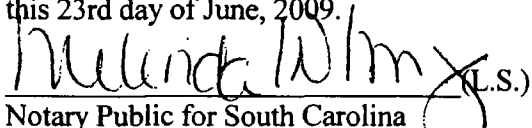
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William Edgar Salter, III, Esquire, Senior Assistant Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 23rd day of June, 2009.


Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 23rd day of June, 2009.


(L.S.)
Notary Public for South CarolinaMy Commission Expires: October 30, 2018.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DARRELL BURGESS,

APPELLANT

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

- I. Whether the trial court abused its discretion by refusing to recuse juror # 72, Juror Emanuel, where the juror revealed to the court that he was the supervisor of murder victim David Slice's brother-in-law since defense counsel told the judge he would have removed the juror with a peremptory challenge had he known he was a relative of the murder victim?

- II. Whether the trial court erred by refusing to admit the testimony of witnesses Melton, McQuarley, Summers, Aycock, and Ballard about the victims being threatened over drug debts by another man within weeks of the murder, and also before that, since this evidence of third-party guilty was relevant, and appellant had the right to present a complete defense under Holmes v. South Carolina?

COUNTERSTATEMENT OF ISSUES PRESENTED

- I. Is Burgess's first argument preserved for appellate review where the issue, as stated in the STATEMENT OF ISSUES ON APPEAL, was not presented in the trial court?

- II. Whether the trial judge abused his discretion by denying Burgess's motion to disqualify juror # 72, Joseph Emanuel, where the juror revealed to the court after jury selection that he was the supervisor of victim David Slice's former brother-in-law because the record supports his findings that the juror did not intentionally conceal this information on *voir dire*, and that the juror could be fair and impartial to both Burgess and the State despite the working relationship with the former brother-in-law?

STATEMENT OF THE CASE

Appellant, Darrell Burgess, (Burgess) is incarcerated in Lee Correctional Institution, of the South Carolina Department of Corrections. The Lexington County Grand Jury indicted him at the December 2005 term for two counts of murder (05-GS-32-4561 & -4563) and possession of a firearm or knife during the commission of a violent crime (05-GS-32-4564). These charges stemmed from the September 2005 deaths of David Slice and Kim Fauscette, the victims.

On January 28-February 1, 2008,¹ Burgess received a jury trial on these charges before the Honorable R. Knox McMahon. Jack Bradley Baker, Esquire, represented him on these charges, Deputy Eleventh Circuit Solicitor Samuel R. Hubbard and Assistant Solicitor Robert M. Madsen represented the State. The jury convicted Burgess of each of the charged offenses. Judge McMahon sentenced him to life imprisonment without parole for each of the murder convictions and a five year sentence on the weapons charge.

Burgess timely served and filed a notice of appeal.

¹ The trial transcript and Appellant's Statement of the Case state the trial ended on March 1, 2008. However, the Certificate of the Court Reporter reflects that the trial was actually held on "the 28th through the 31st days of January and the 1st day of February, 2008."

ARGUMENTS

- I. Assuming that the Court finds Burgess' argument is preserved for appellate review, the trial judge did not abuse his discretion by denying Burgess's motion to disqualify juror # 72, where the juror revealed to the court after jury selection that he was the supervisor of victim David Slice's estranged brother-in-law because the record supports the trial judge's findings that the juror did not intentionally conceal this information on *voir dire*, and that the juror could be fair and impartial to both Burgess and the State despite the working relationship with the brother-in-law.**

Burgess's first argument is that the trial judge erroneously denied his motion to disqualify juror # 72, Juror Emanuel, where the juror revealed to the court after voir dire that he was the supervisor of victim David Slice's estranged brother-in-law. Assuming that the Court finds Burgess' argument is preserved for appellate review, Respondent submits that the trial judge did not abuse his discretion by denying the motion because the record supports his findings that the juror did not intentionally conceal this information, and that the juror could be fair and impartial to both Burgess and the State despite this relationship with the brother-in-law.

A. How issue was raised in trial court

After the case was called for trial, the trial judge read each of the indictments (05-GS-32-4561, -4563 & -4564) to the venire and explained that Burgess was charged with killing David Slice and Kim Fauscette on September 5, 2005, with malice aforethought. **R. pp. 4-5.** He then asked the following questions, to which juror #72, Mr. Joseph Emanuel, did not respond:

- "Is any member of the jury panel related by blood or marriage or close personal friends of the Defendant in this case?
- Is any member of the jury panel or a member of your immediate family were they close personal friends of the victims named in the indictment, either David Slice or Kim Fauscette?
- Does any member of the jury panel have any knowledge about the case?

- Does any member of the jury panel have any bias or prejudice towards the parties, that being either the State or the Defendant or the subject matter involved in this case?
- Has any member of the jury panel heard or know anything about the case from any source whatsoever?

R. p. 8, l. 17-p. 9, l. 20.² Juror Emanuel was the sixth juror selected. R. p. 2.

Thereafter, juror # 244, Ms. Weiss came forward and informed the trial judge that she had not recognized Burgess' name. However, "the more I look at him, I believe he has been in my home, but I don't know for sure." She explained that there was a pond in her back yard that people used frequently. She further stated that she could be fair and impartial. Neither party made a motion to disqualify, and defense counsel stated that Burgess had denied going to her home. The trial judge therefore left her on the jury. **R. p. 31, l. 2-p. 33, l. 8.**

Before any testimony was presented to the jury, the Clerk informed the trial judge that juror Emanuel had approached her in the hallway and told her that he needed to let the rial judge know that he had recognized the face of a woman in the gallery. He did not know the woman's name, but he worked with someone related to the woman and he wanted to speak to the trial judge about it. **R. p. 36, l. 13-p. 37, l. 2.** The Deputy Solicitor agreed with the trial judge that it would be prudent to speak with the juror and he stated that the victims' family were being brought into Court to see whether it was a family member whom the juror had recognized. **R. p. 37, ll. 3-9.**

Juror Emanuel then entered the courtroom, and the trial judge asked him to repeat what he had told the Clerk. Juror Emanuel stated that he had realized that someone with whom he worked was a victim's "family member here." He explained that he had recognized Georgette Splice when

² The only question to which any juror responded was the inquiry as whether any venireman had any knowledge about the case.

the jury was released the previous evening, that her brother worked for him, and that he was her brother's supervisor. However, he stated that he could still be a fair and impartial juror to both the State and to Burgess. **R. p. 37, l. 16-p. 38, l. 24.**

After juror Emanuel had left the courtroom, the trial judge asked if either party requested further *voir dire*. Burgess' counsel asked the trial judge to inquire about whether juror Emanuel had discussed this with any other jurors, and he moved to have juror Emanuel removed for cause. In response to the trial judge's inquiry about the relationship between David and Georgette Slice, the State explained that she was his "estranged wife" but that they were still married. **R. p. 39, l. 3-p. 143, l. 1.**

The trial judge had juror Emanuel brought back into the courtroom and questioned him further. Juror Emanuel stated that he had not discussed this matter with "anyone in the jury room" either before or after discussing it with the judge. He also explained that the co-worker's name was Eugene Ford; that he had not heard anything about the case; that he did not even know that the murders had occurred; and that he had simply "put names and faces together, Slice. I just recognized the face." However, he stated that still did not have "any recollection of any knowledge about the case;" and he indicated that he could still be "a fair and impartial juror to both the State and the defense." **R. p. 40, l. 2-p. 41, l. 15.**

Once juror Emanuel left the courtroom, Burgess' counsel renewed his request for the trial judge to remove juror Emanuel for cause. Burgess argued that since juror Emanuel supervised a victim's family member, "it's human nature that he could not be fair and impartial. The State maintained that juror Emanuel had properly responded that he could still be fair and impartial, and that he had stated that he heard anything about the case. The State urged that it was "telling" that his

co-worker had not told him about the murder of an estranged brother-in-law. **R. p. 41, l. 22-p. 42, l. 15.**

The trial judge denied Burgess' motion based upon *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983). He stated that:

I think I have to take jurors at their word. I can't second-guess that. That's why I even went and asked him once he put the face and name together if he recollected anything about the facts of the case, and he says he knows nothing. I can't sit up here and decide that jurors want follow the law.

R. p. 42, ll. 20-25.

Burgess' counsel was then allowed to place on the record that he would have used a peremptory challenge to strike juror Emanuel if he had known about the disclosed information. He further argued that juror Emanuel's presence on the jury prejudiced Burgess. **R. 43, ll. 1-11.**

The trial judge later questioned juror # 184, Alan Pinner. Juror Pinner had written a note stating that he had been friends with another sister of David Slice "for about six years;" that he was just now realizing how much" that he already knew about the case; and that he did not think that he could be fair and impartial. In response to the trial judge's questioning, juror Pinner stated that the note was correct, and that he had not said anything about this to any other jurors. After the rial judge excused juror Pinner, juror Pinner explained that "[i]t was the last names. I wasn't sure. Then I started putting two and two together." **R. p. 118, l. 9-p. 119, l. 22.**

Burgess moved for a mistrial because this juror was the foreman of the jury and he was the second juror who may know the victim's family or something about the case that was not revealed on *voir dire*. Alternatively, he asked the trial judge to poll remaining petit jurors to determine whether any other jurors may no something about the case. **R. p. 121, l. 15-p. 122, l. 10.**

The trial judge denied the mistrial motion. He found that this juror's situation differed from that of juror Emanuel because juror Emanuel stated that he realized that he supervised David Slice's brother-in-law when he saw a woman in the audience, but he stated that he could still be fair and impartial. Juror Pinner realized that he knew David Slice "once the evidence unfolded," and stated that he could not be fair. The trial judge also noted that "David Slice" may not be an uncommon name in Lexington County in general and in specific parts of Lexington County also." He further found that neither juror had discussed the issue with other jurors. Therefore, he denied Burgess' motion. **R. p. 122, l. 11-p. 123, l. 13.**

When the petit jury returned to the courtroom, however, he asked jurors the following question: "I ask each of you, has any member of the jury panel heard anything about this case from any source whatsoever, besides what you have heard in the courtroom this week. No jurors responded to his query. **R. p. 124, ll. 20-25.**

After the verdict and the polling of the jury, Burgess made a new trial motion based upon the trial judge's failure to remove juror Emanuel for cause. He asserted that he was denied due process because the failure of the juror to timely disclose this relationship deprived him of an opportunity to strike the juror and denied him the right to a fair trial. **R. p. 606, l. 22-p. 607, l. 11.**

The trial judge denied the motion. He observed that he had inquired on voir dire whether any member of the panel knew the victims or if they were related by blood or marriage or if they were close friends with the victims. Juror Emanuel stated that he recognized the estranged spouse sitting in the courtroom after jury selection, and that he worked with David Slice's brother-in-law. He further found that the wife was not called as a witness. Further, the trial judge had questioned juror Emanuel; and juror Emanuel stated that he could be fair and impartial. Also, Burgess did no request additional voir dire when given an opportunity to do so. **R. p.607, l. 12-p. 163, l. 6.**

B. Burgess' argument is procedurally barred because the issue, as stated in the STATEMENT OF ISSUES ON APPEAL was not presented in the trial court.

Initially, Respondent submits that Burgess' argument is procedurally barred because the issue, as stated in the STATEMENT OF ISSUES ON APPEAL, was not presented in the trial court.

Burgess set forth his first issue as follows:

- I. Whether the trial court abused its discretion by refusing to recuse juror # 72, Juror Emanuel, where the juror revealed to the court that he was the supervisor of murder victim David Slice's brother-in-law since defense counsel told the judge he would have removed the juror with a peremptory challenge had he known he was a relative of the murder victim?

IBOA, p. 3.

As the preceding section makes clear, however, he never raised any contention in the trial court that Juror Emanuel had been related to David Slice, and he did not present any evidence to support this contention. Also, there was absolutely no evidence that David Slice's estranged brother-in-law, Mr. Ford, served as a petit juror.

At, first blush it might be tempting to dismiss this as a typographical error. However, he premises part of his argument on whether trial counsel would have been ineffective if he had knowingly failed to strike the victim's brother-in-law. *See IBOA, p. 12.* ("Defense counsel would have been ineffective to not have struck the brother-in-law had he know[n] he was a relative of the victim"). Therefore, he is raising an argument that was not raised below and his argument is not preserved for appellate review. *See State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (stating a party cannot argue one theory at trial and a different theory on appeal); *State v. Byram*, 326 S.C. 107, 113, 485 S.E.2d 360, 363 (1997) (same). *See also State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (an objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error).

C. There was no abuse of discretion.

Alternatively, his assertion must be rejected because the trial judge did not abuse his discretion. The applicable law was set forth in *Smith v. State*, 375 S.C. 507, 518-20, 654 S.E.2d 523, 529-30 (2007):

“[A] criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury.” *Palacio v. State*, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999). “ ‘[I]n order to fully safeguard this protection, it is required that the jury render its verdict free from outside influences of whatever kind and nature.’ ” *State v. Bryant*, 354 S.C. 390, 395, 581 S.E.2d 157, 160 (2003) (quoting *State v. Cameron*, 311 S.C. 204, 207, 428 S.E.2d 10, 12 (Ct.App.1993)).

“To protect both parties' right to an impartial jury, the trial judge must ask potential jurors whether they are aware of any bias or prejudice against a party.” *State v. Woods*, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001). “When a juror conceals information inquired into during *voir dire*, a new trial is required only when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges.” *Id.* “Where a juror, without justification, fails to disclose a relationship, it may be inferred, nothing to the contrary appearing, that the juror is not impartial. On the other hand, where the failure to disclose is innocent, no such inference may be drawn.” *Id.* at 586-87, 550 S.E.2d at 284.

“Determining whether a juror's failure to respond to a *voir dire* question amounts to intentional concealment is a ‘fact intensive determination that must be made on a case-by-case basis.’ ” *State v. Guillebeaux*, 362 S.C. 270, 274, 607 S.E.2d 99, 101-02 (Ct.App.2004)(quoting *State v. Sparkman*, 358 S.C. 491, 496, 596 S.E.2d 375, 377 (2004)). “Intentional concealment occurs ‘when the question presented to the jury on *voir dire* is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable.’ ” *Id.* “Concealment is considered unintentional where the *voir dire* question posed is ambiguous or incomprehensible to the average juror or where ‘the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances.’ ” *Id.*

Here, the trial judge did not abuse his discretion by denying Burgess' motion to disqualify juror Emanuel for cause because the record supports his findings that the juror did not intentionally conceal this information, and that the juror could be fair and impartial to both Burgess and the State despite this relationship with the former brother-in-law. *Smith*, 375 S.C. at 518-20, 654 S.E.2d at 529-30. *See also State v. Elmore*, 279 S.C. 417, 420, 308 S.E.2d 781, 784 (1983); *State v. Gulledege*, 277 S.C. 368, 287 S.E.2d 488 (1982). With respect to whether or not juror Emanuel's failure to disclose the fact he was the supervisor of David Slice's brother-in-law, the trial judge's voir dire consisted of four relevant questions, which are set forth above. While he did ask whether any venireman or a member of the venireman's "immediate family were ... close personal friends of the victims," neither this question nor the trial judge's other inquiries asked whether any venireman had a business or working relationship with either victim's family members. *See R. p. 8, l. 17-p. 9, l. 20.*

Further, the brother-in-law's name is Eugene Ford; and there is nothing in the record to refute juror Emanuel's representations that he did not know anything about the case and that he did not even know that the murders had occurred. Rather, he had simply "put names and faces together." Thus, it cannot reasonably be said that "the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable." *See Smith*, 375 S.C. at 518-19, 654 S.E.2d at 529; *see also State v. Stone*, 350 S.C. 442, 448-49, 567 S.E.2d 244, 247- 48 (2002); *State v. Galbreath*, 359 S.C. 398, 403-04, 597 S.E.2d 845, 847- 848 (Ct.App. 2004). This is particularly true where nothing in the record supports the conclusion that juror Emanuel had a close personal relationship with Mr. Ford or his sister (Mr. Slice's **estranged** wife); Mr. Ford apparently never mentioned the murder of his estranged brother-in-law; and juror Emanuel had not heard anything about the case.

Thus, the present case is readily distinguishable from *State v. Woods*, 345 S.C. 583, 587-90, 550 S.E.2d 282, 284-86 (2001), where the Court concluded that Juror B intentionally failed to

disclose on voir dire that she had “worked as a volunteer victims' advocate for a period of three years in the solicitor's office which prosecuted the case” where one question “unambiguously sought a response from any juror having a business association with any of the attorneys trying the case” and an honest answer to a second question should have revealed that “Juror B had for three years performed volunteer work for an organization whose primary function was the protection of victims' rights.” Also, Juror B. “offered inconsistent explanations for her failure to respond” to the second question;” and “she responded affirmatively to a similar question on voir dire at a later trial during the same term of court.” *Id.* The present case is more like *Smith* and *Galbreath* because the trial judge's voir dire did not specifically inquire about any potential juror's relationship with the victims' family members; juror Emanuel did not have “any recollection of any knowledge about the case;” and he indicated that he could still be “a fair and impartial juror to both the State and the defense,” in spite of the working relationship with Mr. Ford.

Burgess's argument that the trial judge erred as a matter of law by finding that he had to deny the motion based on *Elmore*, and that he was bound by the juror's answers is procedurally barred because these same grounds were not raised in connection with his motion at trial. *See Bailey*, 298 S.C. at 5-6, 377 S.E.2d at 584 (a party cannot argue one theory at trial and a different theory on appeal); *Byram*, 326 S.C. at 113, 485 S.E.2d at 363 (same). *See also Prioleau*, 345 S.C. at 411, 548 S.E.2d at 216 (an objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error).

Alternatively, his argument lacks merit. The Court's decision in *Elmore* unequivocally states that “[t]he qualification of a prospective juror is addressed to the sound discretion of the trial judge, whose decision will not be disturbed unless wholly unsupported by the evidence.” 279 S.C. at 420, 308 S.E.2d at 784. “Trial judges are presumed to know the law and to apply it in making their

decisions.” See *Walton v. Arizona*, 497 U.S. 639, 653 (1990); see also *State v. Ray* 310 S.C. 431, 437, 427 S.E.2d 171, 174-75 (1993). Despite Burgess’ contrary argument, nothing in the present record demonstrates that the trial judge failed to exercise his discretion. Further, because Burgess’ motion required a “‘fact intensive determination that must be made on a case-by-case basis.’ ” *Guillebeaux*, 362 S.C. at 274, 607 S.E.2d at 101-02 (citation omitted), this Court should defer to his credibility determination. See *State v. Woods*, 382 S.C. 153, 159, 676 S.E.2d 128, 132 (2009) (in reviewing juror qualification issues on direct appeal, “[d]eference must be paid to the trial court who saw and heard the juror”); *Smith*, 375 S.C. at 519-20, 654 S.E.2d at 530.

Further, juror Emanuel’s representations to the trial judge are un-refuted by the current record. Also, the trial judge’s finding that “I can’t sit up here and decide that jurors won’t follow the law,” see **R. p. 42, ll. 20-25**, is a correct understanding of the law. “The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court’s instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them.” *Francis v. Franklin*, 471 U.S. 307, 324 n. 9 (1985).³ See also *United States v. Olano*, 507 U.S. 725, 740 (1993) (“[It is] the almost invariable assumption of the law that jurors follow their instructions”) (citing *Richardson*, 481 U.S. at 206); *Gray v. Maryland*, 523 U.S. 185, 200 (1998) (Scalia, J., dissenting) (“The almost invariable assumption of the law is that jurors follow their instructions”) (citing *Francis*, *supra*).

Burgess’ contention that “[d]efense counsel would have been ineffective to not have struck the brother-in-law had he know[n] he as a relative of the victim” is also procedurally barred under

³ This rule “is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process.” *Richardson v. Marsh*, 481 U.S. 200, 211 (1987)

Bailey and *Byram* because he did not raise it in the trial court. Further, it lacks merit because the brother-in-law was never a juror. Also, the argument has no place on direct appeal, even assuming Burgess' argument relates to striking the brother-in-law's employer, Mr. Emanuel, because ineffective assistance of counsel claim should not be addressed on direct appeal. Rather, the proper forum for resolution of such a claim is under the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §§ 17-27-10, *et seq.* 120 (1985). *See State v. Kornahens*, 290 S.C. 281, 287, 350 S.E.2d 180, 184 (1986); *State v. Carpenter*, 277 S.C. 309, 286 S.E.2d 384 (1982).⁴

Finally, Appellant's claim that the trial judge's ruling violated his right to due process is not properly before this Court because it was not raised by a contemporaneous objection or motion, and it was first raised in his new trial motion. *See State v. Robinson*, 238 S.C. 140, ___, 119 S.E.2d 671, 676 (1961) ("a defendant may not reserve vices in his trial, of which he has notice as here, taking his chances of a favorable verdict, and in case of disappointment, use the error to obtain another trial"); *State v. Lynn*, 277 S.C. 222, 226, 284 S.E.2d 786, 789 (1981) ("Failure to contemporaneously object to the question [subsequently] advanced as prejudicial cannot be later bootstrapped by a motion for a mistrial"); *State v. Heavener*, 146 S.C. 138, 143 S.E. 674 (1928) (argument that trial court, without objection, permitted solicitor to exhibit prosecutrix's baby to jury and refer to resemblance to defendant, cannot be considered as ground for new trial of seduction case); *Dial v.*

⁴ Further, Burgess' argument is a red herring, since counsel would not necessarily be ineffective for not striking the juror under *Strickland v. Washington*, 466 U.S. 668 (1984), if he had a reasonable strategy for not striking the juror even if counsel had knowledge that Mr. Emanuel was the brother-in-law's supervisor. For instance, Burgess' argument assumes that the two men had a good *personal* relationship, as opposed to simply a working relationship. His argument further assumes that Mr. Emanuel, as a supervisor, would worry about the personal feelings of his subordinate employee, Mr. Ford; that Mr. Ford had a good relationship with his sister; and that Mr. Ford cared about whether the perpetrator was prosecuted for killing Slice, whose crack use had apparently caused the dissolution of the marriage of Ford's sister. None of assumptions are necessarily and inevitably true.

Niggel Associates, Inc., 333 S.C. 253, 257, 509 S.E.2d 269, 271 (1998) (holding that *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 442 S.E.2d 611 (1994) sets forth a narrow exception to the general rule that a party must make a contemporaneous objection to improper argument or the objection is waived if first raised in a new trial motion); *Cooper v. Armour & Co.*, 178 S.C. 117, 182 S.E. 298 (1935) (appeal by defendant, on basis that there was no evidence in support of allegation that defendant's agent with whose truck plaintiff's automobile collided did not give required signal before suddenly stopping truck, dismissed where defendant raised objection for first time on motion for new trial).⁵ Therefore, the trial judge's ruling must be affirmed.

II. The trial judge did not abuse his discretion by refusing to allow Burgess to present evidence of third-party guilt because the proffered evidence was not inconsistent with Burgess' guilt and merely cast a bare suspicion and raised a conjectural inference as to the commission of the crime by another person.

Burgess's remaining allegation is that the trial judge erred by refusing to allow Burgess to present evidence of third-party guilt. However, the trial judge did not abuse his discretion because the proffered evidence was not inconsistent with Burgess' guilt and merely cast a bare suspicion and raised a conjectural inference as to the commission of the crime by another person.

A. Events at trial.

In a pretrial hearing, the State brought to the trial judge's attention that it had filed a motion regarding Burgess' presentation of evidence of third-party guilt, but the State did not think that it was necessary for the trial judge to address the motion at that time. **R. p. 34, ll. 3-6.** Burgess' counsel agreed that it was unnecessary to address the matter at that time because most of this evidence would

⁵ It is clear that it was unnecessary for Burgees to make a new trial motion to preserve his earlier objection. *See State v. Blyther*, 287 S.C. 31, 336 S.E.2d 151 (Ct.App.1985) (A motion for a new trial is not needed for a defendant to preserve an error where the objection that prompted the error was ruled on by the trial court).

be presented by defense witnesses. However, he alerted the trial judge that the issue would be raised on his cross-examination of one of the State's first witnesses, Michael Melton, because Mr. Melton had given a statement indicating that he had seen the victims threatened on several occasions, by someone other than Burgess. **R. p. 34, ll. 12-25.**

The State explained that Melton was the victims' roommate, and that he had indicated that the victims had "a dispute with an individual they knew as Twelve at various times." The State added that Melton was going to be the first witness, and it maintained that Burgess' proposed cross-examination of Melton involved inadmissible evidence of third-party guilt because "it just casts some bare speculation that since they've had disputes in the past with Twelve, . . . over drug debts, that [this] means that Twelve is the person [who committed the murders]." **R. p. 35, ll. 3-13; p. 35, l. 21.** The trial judge suggested receiving the disputed portion of Melton's testimony *in camera*. **R. p. 35, ll. 14-20.** Burgess indicated that, depending upon the trial judge's ruling, he might need to proffer other witnesses *in camera*. **R. p. 35, l. 23-p. 36, l. 1.**

After the prosecution had completed its direct examination of Michael Melton, the trial judge entertained Burgess' *in camera* proffer of the third-party guilt evidence that he planned to elicit on cross-examination. Mr. Melton testified that he only lived with David Slice and Kim Fauscette for roughly "two and a half months." He knew that they were "heavy drug users," who "regularly [had] drugs delivered to their house." Immediately after the murder, he thought that the killings were drug related. **R. pp. 84-85.**

In his statement to law enforcement after the murder, he indicated that the victims "would go deep in debt with certain drug dealers, and [he] often [was] concerned about how" the victims would be able to repay this debt. While they did not "go extremely in debt, . . . they would go from

person to person.” Mr. Melton even witnessed some threats and altercations between the victims and drug dealers. **R. p. 85.**

In one instance, he saw a drug dealer whom he knew as “Twelve” demand money. Twelve came in and told Mr. Slice that “he was going to get paid one way or the other.” Then, he “jacked up David [Slice] and demanded that he get his money.” Twelve was “pretty upset” on this occasion. Also, “Twelve” was not Burgess. **R. pp. 85-86.**

Mr. Melton also testified that Kim told him that Twelve had threatened her, and that he had forced her to give him some money. However, he denied that he had ever told Burgess that he knew who had killed the victims. He also denied touching the victims or handling a weapon in the eighteen hours after he returned from North Carolina until he realized that the victims were dead. He did know that Mr. Slice had once sold his car to buy drugs. Also, Mr. Slice once told him that Slice did not owe any money to Burgess, but that Burgess owed money to Mr. Slice. **R. pp. 86-88.**

On cross-examination, Mr. Melton testified that the incident with “Twelve” and David Slice was “a few weeks” before he left town.⁶ Also, his only knowledge about any confrontation between Kim and “Twelve” was entirely based on what she had told him. Mr. Melton’s knowledge of why David Slice sold the car was also based on something that was told to him. **R. pp. 88-89.**

Burgess asked the trial judge to allow him to present the jury with the proffered evidence. He argued that “multiple witnesses” in the case had told law enforcement that the victims were “deeply in debt . . . to certain drug dealers,” and that “[t]he name of Twelve has come up on multiple occasions.” Therefore, the evidence was admissible. **R. p. 89, ll. 9-20.**

⁶ He testified before the jury that he had gone to North Carolina to visit his daughter on the “Wednesday prior” to Labor Day 2005, and that he had returned on Monday. **R. pp. 58-59.** A review of calendar for 2005 reflects that the Wednesday before Labor Day was August 31, 2005. Thus, the incident he witnessed occurred almost three weeks before the murders.

The State, however, quoted extensively from the South Carolina Supreme Court's decision in *State v. Gregory*, 198 S.C. 98, 16 S.E.2d. 532 (1941), and the United States Supreme Court's decision in *Holmes v. South Carolina*, 547 U.S. 319 (2006). It argued that Burgess' proffer did not meet the standard for admissibility set forth in those cases for the admission of third-party guilt evidence. **R. p. 90, l. 8 - p. 91, l. 11.**

In response, Burgess noted that there was "no forensic evidence linking him to this crime." Also, a number of witnesses had indicated that Twelve had threatened the victims on several occasions, and he maintained that *Holmes* had held that a defendant has a constitutional right to present a complete defense. Therefore, the evidence should be admitted. **R. p. 91, l. 25 - p. 92, l. 25.**

However, the trial judge ruled that "I am not going to allow it at this time. This is not to indicate that I am going to allow it at a later time." He found that the proffered evidence was conjectural at that point. He found that it did not reach the standard of *Gregory* or *Holmes*. Despite this ruling, the trial judge held that Burgess could cross-examine Mr. Melton about matters that did not directly involve third-party guilt, including whether Melton had told Burgess that Melton knew who had committed the offense.⁷ Also, the trial judge ordered that Mr. Melton remain under subpoena, so that he would be available if Burgess presented third-party guilt evidence that was not conjectural. **R. pp. 93-95.**

As part of his case-in-chief, Burgess later proffered evidence of third-party guilt from Michael McQuarley, Frederick Summers, Tonya Aycock, and Alice Ballard. McQuarley testified that he had previously lived in the trailer in front of the victims for roughly a month; but he was in

⁷ Melton denied having said this when asked before the jury. **R. p. 104, ll. 10-13.**

the hospital when the murders occurred. While living there, he had seen "traffic more or less going in and out from the house". One day, he saw an individual arguing with Kim Fauscette. **R. p. 530, l. 17 - p. 274, l. 3.**

Mr. McQuarley had given a statement to law enforcement shortly after the murders, in which he described seeing a man confront Kim and the man arrived in a Neon car on April 23, 2005. He and Kim argued over money. He called her a "bitch" and was rude to her. Kim did not say much in reply. When she turned to walk away from him, the man grabbed her by the shirt. However, Mr. McQuarley lost sight of them when they walked behind the trailer. The man involved in the August 23rd incident was not Burgess, and Mr. Quarley had never seen him before. On cross-examination, he admitted that he did not know what happened after "Kim and the man walked behind the trailer, and that he had not called law enforcement based on what he had seen". **R. p. 532, l. 4 - p. 535, l. 18.**

Frederick Summers testified that he had been the victims' neighbor for about two months in 2005. On Friday, August 26, 2005, and again around 10:30 a.m. on Saturday, August 27, 2005, he saw a black man standing in the doorway of Kim's trailer. On Saturday, Kim and McQuarley had just returned. As Summers was leaving to go to the hospital, he saw a red Neon parked in the driveway of Kim's residence, with a white male in it.⁸ The black male was arguing through the door of Kim's trailer and saying he wanted his money. In his statement, Summers had described the black male as "yelling and screaming" for his money, and the man was holding a stick. This man was not Burgess and was bigger than Burgess. Then, Mr. Summers left to go to the hospital. **R. p. 536, l. 12 - p. 539, l. 16.**

⁸ The Neon had come by at twenty minute intervals on several occasions that day.

On cross-examination, Mr. Summers admitted that he did not know at whom the black man had been yelling because the trailer door was closed. He did not know if the man was yelling at Kim, David or the person who was living with them at the time (Melton). **R. p. 539, l. 23 - p. 540, l. 10.**

Tonya Aycock testified about incidents that occurred roughly one year before the victims were murdered. She had also been questioned by law enforcement after the murders. She told law enforcement that she had known Kim for over twenty years. When Kim returned to South Carolina from Georgia, she started using crack. When she became involved with David Slice, her addiction became worse; and they would spend whatever money they had on crack. **R. p. 540, l. 20 - p. 542, l. 13; p. 547, ll. 9-14.**

The victims "got in debt with Steve Riley. He made it sound like if they didn't pay him, he would take care of them." She thought that Riley had meant that he would kill the victims if they did not pay him. Riley made this comment to Ms. Aycock at Sharpe's store "way before the murders." **R. p. 542, l. 13 - p. 543, l. 11; p. 544, ll. 3-22.**

One day, "probably a year before" the victims were murdered, Ms. Aycock gave Kim a ride home. A "big, stocky guy" entered Kim's trailer without knocking and said "that if David didn't have his \$250.00, then he would come blast the place up." Ms. Aycock last spoke to Kim on the Saturday before the murders, when Kim called about pawning a mirror. **R. p. 543, ll. 12-22; p. 544, l. 24 - p. 545, l. 14.**

Alice Ballard testified that she also was questioned by law enforcement after the murders and that she had given a statement. Kim Fauscette was her landlord and David Slice was Kim's "live-in boyfriend." In Ms. Ballard's statement, she indicated that Kim had met David about a month after Ms. Ballard began renting from Kim. Over a period of time, Kim began asking Ms. Ballard to take her places. Although Ms. Ballard was unaware of this at first, she later discovered that Kim was

getting crack at these places. "Several times she would have me take her to a man named Twelve's house. Sometimes she would ask me to take her a mobile home directly across the street from Sharpe's store." Kim began using crack more heavily in November, 2004. **R. p. 546, l. 9 - p. 547, l. 20.**

Kim eventually allowed crack dealers to move into her trailer and sell drugs. She would accept crack in lieu of rent payment. Because traffic had rapidly increased at the residence, Kim and David decided to have the crack dealers deliver the crack to their trailer. Ms. Ballard was concerned for her safety and that of her children because Kim "would argue with the dealers." Kim told Ms. Ballard "of her past," and Ms. Ballard "was scared" that Kim would evict her if she did not do what Kim asked. Ms. Ballard witnessed three confrontations over money and drugs. One confrontation was over the telephone, and the other two were in the front yard. **R. p. 547, l. 21 - p. 549, l. 1.**

Ms. Ballard witnessed a confrontation between Kim and a dealer who lives across the street from Sharpe's store. She testified that another confrontation happened in the front yard of this person's house in October 2004. In November 2004, she witnessed two confrontations. The first occurred when someone named "Mack" tried to sell Kim and David a rock that he had picked up off of the ground as crack cocaine. The other occurred when Kim confronted a "Tim" over money that *he owed* Kim. On cross-examination, Ms. Ballard testified that all of the events that she had related occurred in 2004 because she had moved out after six months. **R. p. 549, l. 2 - p. 550, l. 1.**

Burgess argued that the witnesses had testified to repeated threats by "Twelve," a man who lived across from Sharpe's store and "some folks that drive a red Neon." He argued that a number of witnesses had seen the victims threatened and that some of the threats occurred "in close proximity to the time of these murders. Mr. Melton had testified that Twelve had a confrontation

with David, and "I would argue in order to put up a complete defense that the jury ought to have the opportunity to hear this evidence." R. p. 550, l. 12 - p. 564, l. 3.

After listening to the State's argument opposing introduction of this evidence (R. p. 551, ll. 5-9), the trial judge ruled that it was inadmissible. He found that:

THE COURT: Thank you, Solicitor. As I understood the testimony of Mr. Michael McQuarley, Fred Summers, Tonya Aycock, and Alice Ballard, none of that testimony can be received unless there is such proof of a connection with that testimony in such a train of facts or circumstances as tends clearly to point out such other persons as the guilty part.

Remote acts disconnected outside the crime itself cannot be separately provided for such a purpose. An orderly and unbiased judicial inquiry as to the guilt or innocence of the Defendant on trial will not contemplate that such defendant be permitted by way of defense to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial or by the fanciful analogy to say to the jury that someone other than he is more probably guilty.

It's clear that the evidence offered through these witnesses to the commission of a crime or the crimes by another person must be limited to such facts that are inconsistent with this own guilt, and none of these rise to that level. Such facts must raise a reasonable inference or presumption as to his own innocence.

Evidence which can have no other effect than to cast a bare suspicion upon another or to raise a conjectural inference as to the commission of the crime by another is not admissible. It's clear some of these acts are in 2004 and before.

Even the act testified to by Mr. McQuarley and Mr. Summers on August 23rd, some two weeks or better prior thereto is not inconsistent with the Defendant's guilt. It's more conjecture or surmise.

I think there is a long line of cases in South Carolina, a prodigy of the *Gregory* standard, and that's what I apply. I would not allow the testimony of Mr. McQuarley, Summers, Aycock or Ballard.

R. p. 551, l. 16 - p. 552, l. 21.

Burgess subsequently raised the trial judge's failure to permit introduction of his proffered evidence as part of his motion for a new trial. The trial judge denied his motion. Again, the trial

judge stated that he had applied the *Gregory* rule that "was elucidated by *Holmes versus [South Carolina]*," and the *Gregory* prodigy. R. p. 609, l. 10 - p. 610, l. 7.

B. The trial judge did not abuse his discretion.

In *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941), the South Carolina Supreme Court set forth the rule governing the admissibility of evidence offered by the defendant to establish that someone else committed the offense with which he was charged. This rule for the admission of "third-party guilt" was stated as follows:

"[E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible..... [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party.' "

Gregory, 198 S.C. at 104-05, 16 S.E.2d, at 534-35 (quoting 16 C.J., *Criminal Law* § 1085, p. 560 (1918) and 20 Am.Jur. *Evidence* § 265, p. 254 (1939) (footnotes omitted).

In *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 1733 (2006), the United States Supreme Court held that the South Carolina Supreme Court in *State v. Gay*, 343 S.C. 543, 541 S.E.2d 541 (2001) and *State v. Holmes*, 361 S.C. 333, 605 S.E.2d 19 (2005), vacated and remanded, 547 U.S. 319 (2006) "had radically changed and extended the rule." *Holmes*, 547 U.S. at 328. The Court explained that;

In *Gay*, after recognizing the standard applied in *Gregory*, the court stated that "[i]n view of the strong evidence of appellant's guilt--especially the forensic evidence--... the proffered evidence ... did not raise 'a reasonable inference' as to appellant's own innocence." *Gay*, 343 S.C., at 550, 541 S.E.2d, at 545 (quoting *Gregory, supra*, at 104, 16 S.E.2d, at 534, in turn quoting 16 C.J., § 1085, at 560).

Similarly, in the present case, as noted, the State Supreme Court applied the rule that "where there is strong evidence of [a defendant's] guilt, the proffered evidence about a third party's alleged guilt" may (or perhaps must) be excluded. 361 S.C., at 342, 605 S.E.2d, at 24.

Holmes, 547 U.S. at 328-29.

The Supreme Court found that the modification of the *Gregory* rule enunciated in *Gay* and *Holmes* was "no more logical than its converse would be, *i.e.*, a rule barring the prosecution from introducing evidence of a defendant's guilt if the defendant is able to proffer, at a pretrial hearing, evidence that, if believed, strongly supports a verdict of not guilty." *Id.* at 330. The Court also found that this modification of the *Gregory* rule was:

"arbitrary" in the sense that it does not rationally serve the end that the *Gregory* rule and other similar third-party guilt rules were designed to further. Nor has the State identified any other legitimate end that the rule serves. It follows that the rule applied in this case by the State Supreme Court violates a criminal defendant's right to have "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)] (quoting [*California v. Trombetta*, 467 U.S. 479, 485 (1984)].

Id. at 331 (citations omitted).

Applying the *Gregory* rule, as explained in *Holmes*, Respondent submits that the trial judge did not abuse his discretion by finding that the proffered evidence was inadmissible. "Our state supreme court has imposed strict limitations on the admissibility of testimony indicating third-party guilt." *State v. Rice*, 375 S.C. 302, 317, 652 S.E.2d 409, 416 (Ct.App.2007). The Court's holding in *Holmes* permits a defendant to introduce evidence of third-party guilt regardless of the strength of the State's case, but *only* if the evidence meets the standard for admissibility stated in *Gregory*. See *Holmes*, 547 U.S. at 328 (quoting *Gregory*, 198 S.C. at 104-05, 16 S.E.2d, at 534-35 (quoting 16 C.J., *Criminal Law* § 1085, p. 560 (1918) and 20 Am.Jur. *Evidence* § 20 265, p. 254 (1939))). See also *Lorenzen v. State*, 376 S.C. 521, 532-33, 657 S.E.2d 771, 777-78 (2008).

Nothing in the record suggests that the trial judge considered the strength of the State's evidence against Burgess in refusing to admit the proffered evidence. To the contrary, he expressly relied upon the *Gregory* standard "as elucidated in *Holmes*." **R. p. 609, l. 25-p. 610, l. 1.** More importantly, the proffer did not involve "'a train of facts or circumstances, as tends clearly to point out such other person as the guilty party,' " as required for its admission under *Gregory*. See *Gregory*, 198 S.C. at 104-05, 16 S.E.2d, at 534-35.

First, both Ms. Aycock and Ms. Ballard testified to threats that were in no ways temporally connected to the murders: the events described by Ms. Aycock occurred almost one year before the murder, and the events to which Ms. Ballard testified occurred by November 2004. *E.g.*, **R. pp. 544-45; 547-550.** Second, the proffered evidence demonstrated that three individuals had made threats to the victims because of the victims' failure to pay the money they owed each individual for crack cocaine: "a gentleman named Twelve, some gentleman that lives across the street from Sharpe's Septic Tank and some folks that drive a red neon." **R. p. 550, ll. 12-18** (argument of defense counsel).

Even with respect to the threats made more closely in time to the murders, these threats occurred one or more weeks before the murders. Also, Mr. McQuarley testified that he did not see the conclusion of the argument between Kim and the man who had demanded his money from Kim and grabbed her by the shirt when she tried to walk away. He lost sight of them when they walked behind the trailer. Also, he did not have to call law enforcement. **R. pp. 533-35.** Further, McQuarley did not identify the person whom he saw involved in the confrontation. Mr. Summers unequivocally testified that he did not see the person with whom the man with the Neon argued because the trailer door was closed. **R. pp. 539-40.** Further, the argument of defense counsel makes clear that this individual was not Twelve.

With respect to the threat witnessed by Mr. Melton, he clearly testified that the incident with “Twelve” and David Slice was “a few weeks” before he left town. Also, his only knowledge about any confrontation between Kim and “Twelve” was entirely based on what she had told him. Mr. Melton’s knowledge of why David Slice sold the car was also based on something that was told to him. **R. pp. 88-89.**

More importantly, Burgess failed to present any testimony that placed either “Twelve,” or either of the other drug dealers with whom the victims had prior difficulties, either in or near the victims’ trailer at the approximate time of the murders. He also did not proffer any reliable admission by Twelve or anyone else admitting to the crimes. Thus, the proffered evidence was not inconsistent with Burgess’ guilt. Instead, it merely raised a bare suspicion that someone other than Burgess may have committed the murder. *See State v. Swafford*, 375 S.C. 637, 642, 654 S.E.2d 297, 300 (Ct.App. 2007) (“Johnson’s testimony that she witnessed Swafford in the truck as a passenger several hours prior to the accident neither offers proof that he was a passenger at the time of the accident nor that Gillespie was the driver at either point in time. At best, Johnson’s testimony raises the mere suspicion that Gillespie may have been driving an hour prior to the accident, but offers no reliable proof that he was driving at the time of the accident”); *State v. Rice*, 375 S.C. 302, 652 S.E.2d 409 (Ct.App. 2007). *Contra Holmes*, 547 U.S. at 323 (“Petitioner ... sought to introduce proof that another man, Jimmy McCaw White, had attacked Stewart.... At a pretrial hearing, petitioner proffered several witnesses who placed White in the victim’s neighborhood on the morning of the assault, as well as four other witnesses who testified that White had either acknowledged that petitioner was “‘innocent’ ” or had actually admitted to committing the crimes”) (case citation omitted); *Miller v. State*, 379 S.C. 108, 665 S.E.2d 596 (2008) (trial counsel should be ineffective for failing to present evidence that applicant’s nephew had similar physical features, had been charged with three armed

robberies in Greenville that occurred around the time victim was robbed, that nephew used co-defendant's vehicle and that nephew owned a handgun similar to the one that victim claimed to have seen during the robbery).

Nor can Burgess show any prejudice from the trial judge's ruling since the trial judge's ruling did not prevent him from presenting evidence tending to suggest that someone else may have committed the murders. On cross-examination of James "Tony Red Johnson, the State's eyewitness to the murders, Burgess established that Johnson regularly supplied crack to the victims and smoked crack with them. Also, Johnson had gone to the victims' trailer on the morning that they were killed in order to collect money that they owed him for drugs. Although he collected the money that they owed him (**R. pp. 224-25**), he did not call police after seeing the victims shot and leaving their residence. Rather, he went and found crack cocaine, which he smoked. **R. pp. 224-26**. Later the same morning, he also left his wife at home, alone, despite his professed fear of Burgess. **R. pp. 226-27**.

Johnson likewise admitted on cross-examination that he had seen people "do violent things to collect" money owed for crack. Further, Johnson admitted that he said that he did not know anything about the crimes when law enforcement first questioned him. He only implicated Burgess after he was charged with accessory after the fact to murder and misprision of a felony. Also, he had been in the Lexington County Detention Center since his arrest and he had spoken to Burgess' co-defendant, Michael Wise, about this case. **R. pp. 221-22; 228-32**.

On cross-examination of Michael Wise, who admitted driving Burgess both to the victims' trailer and elsewhere after the shootings, Burgess established that Wise had been in the Lexington County Detention Center ever since his September 16, 2005 arrest; that he and Johnson had discussed this case; and that Johnson told Wise the contents of his (Johnson's) statement. Also, Wise did not originally implicate Burgess or say that he had been frightened by Burgess' behavior. Rather,

he only did so after he had been in jail for a day. Further, he admittedly “embellished” parts of his statement to make himself look good. He likewise testified that he wrote down what the police told him to say, “[n]ot as far as the facts but as far as my impressions” to make himself look good and implicate Burgess. **R. pp. 279-85.**

Burgess’ subsequent closing argument first pointed out evidence that he urged was inconsistent with the victims’ murders occurring on the morning of September 5, 2005, the unreliability of the State’s time-line for the crimes and the absence of physical evidence connecting him to the crimes. **R. pp. 556-61.** Thereafter, Burgess extensively focused upon the unreliability of Johnson’s testimony and the extent of Wise’s involvement in the murders, his knowledge of the offenses and the deal that he received. **R. pp. 561-69.** Thus, there was no prejudice resulting from the trial judge’s ruling.

Likewise, Burgess’ assertion that the evidence was admissible under his right to present a complete defense lacks any plausible merit. As this Court explained in *State v. Lyles*, 379 S.C. 328, 342-43, 665 S.E.2d 201, 209 (Ct.App. 2008):

[i]n the exercise of this right [to present a defense], the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.” [*Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)]. “The right to present a defense is not unlimited, but must ‘bow to accommodate other legitimate interests in the criminal trial process.’ ” [*State v. Hamilton*, 344 S.C. 344, 359, 543 S.E.2d 586, 594 (Ct.App.2001), overruled on other grounds by *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005)] (quoting *Rock v. Arkansas*, 483 U.S. 44, 55, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) (quoting *Chambers*, 410 U.S. at 295 ...)). “ ‘The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.’ ” *Montana v. Egelhoff*, 518 U.S. 37, 42, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996) (quoting *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988)) (brackets in original). Defendants are entitled to a fair opportunity to present a full

and complete defense, but this right does not supplant the rules of evidence and all proffered evidence or testimony must comply with any applicable evidentiary rules prior to admission. *Hamilton*, 344 S.C. at 359, 543 S.E.2d at 594.

Here, the trial judge did not abuse his discretion by excluding the proffered testimony. Although Burgess had a fundamental right to present a complete defense, this right does not supersede any pertinent evidentiary rules. The testimony was inadmissible under the rule set forth in *Gregory*. The *Gregory* standard is consistent with the Constitution and cannot be considered arbitrary or disproportionate to the ends it serves. *Holmes*, 547 U.S. at 324-25, 327-28. Burgess had no right to present evidence that was inadmissible under *Gregory* and *Holmes*. Therefore, his due process rights were not violated. *Id.* See also *Lyles*, 379 S.C. at 344, 665 S.E.2d at 209-10. Therefore, Burgess' argument lacks merit.

CONCLUSION

For the foregoing reasons Respondent respectfully submits this Court should affirm Appellant's convictions and sentence.

Respectfully submitted,

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July 13, 2009.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Lexington County
The Honorable R. Knox McMahon, Circuit Court Judge

THE STATE,

Respondent,

-VS-

DARRELL BURGESS,

Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 13th day of July, 2009.



WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Lexington County
The Honorable R. Knox McMahon, Circuit Court Judge

THE STATE,

Respondent,

-vs-

DARRELL BURGESS,

Appellant.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing three (3) copies of the same via inter-office mail to his attorney of record, Robert Dudek, Esq., South Carolina Commission on Indigent Defense, Division of Appellate Defense, 1330 Lady Street, Ste. 401, Columbia, SC 29201.

I further certify that all parties required by Rule to be served have been served.

This 13th day of July, 2009.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Darrell Burgess,

Appellant.

Appeal From Lexington County
Knox McMahon, Circuit Court Judge

Opinion No. 4765
Heard May 19, 2010 – Filed December 15, 2010

AFFIRMED

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FEW, C.J.: Darrell Burgess was convicted of the drug-related murders of David Slice and Kim Fauscette. The trial judge sentenced Burgess to two life sentences for the murders, and five years for possession of a firearm during the commission of a violent crime. Burgess has raised two issues on appeal. First, he challenges the trial judge's decision not to remove a juror who realized after jury selection that the brother of Slice's estranged wife worked for him. Second, he argues the judge violated his constitutional right to present a complete defense by excluding evidence of third party guilt. We affirm.

I. Facts

Slice and Fauscette lived together in a "crack house" in Gaston with at least one other person. During the evening of September 5, 2005, and continuing into the following morning, Slice, Fauscette and a crack dealer named James Johnson had been talking, watching television, drinking alcohol and smoking crack in the mobile home. Before dawn on September 5, Burgess arrived unexpectedly and Fauscette allowed him inside. Burgess explained that he wrecked his car and was running from the police. Burgess did not mention that Michael Wise drove him to his house after the wreck so Burgess could get his gun and Wise was waiting outside. Burgess, Slice, Fauscette and Johnson sat around for ten or fifteen minutes while Burgess waited for Johnson to leave. Eventually, Burgess stood up and shot Slice three times and Fauscette twice, killing them both. Johnson ran away when Burgess's gun emptied. Burgess fled the scene with Wise.

II. The Decision not to Remove the Juror

After the jury was selected but before opening statements, a member of the jury notified the deputy clerk of court that "he recognized a lady in the audience."¹ The judge brought the juror into the courtroom to question him. The juror explained that after jury selection he recognized a woman in the courtroom whom he believed to be Georgette Slice. Georgette, who had not been introduced to the jury panel during voir dire, was the estranged wife of

¹ The record does not indicate whether the jury had been sworn.

David Slice, and the sister of a man the juror supervised at work. The judge asked the juror if he could still be a fair and impartial juror to both the State and the defense, to which the juror responded "yes, sir." Outside of the juror's presence, the judge asked if either side wanted additional voir dire. Burgess requested that the juror be asked whether he discussed the situation with any other members of the jury, and that the juror be removed for cause. After returning to the courtroom, the juror testified he had not discussed it with anyone in the jury room. He again testified he could be fair and impartial to both sides. The juror also testified he had not heard anything about the case and did not even know the murders occurred. Neither side requested further voir dire.

We find no error in the judge's decision not to remove the juror. First, the fact that a juror has some relationship with the victim does not automatically require the trial judge to remove the juror. See State v. Jones, 298 S.C. 118, 121, 378 S.E.2d 594, 596 (1989) ("The mere fact that a person is a friend or acquaintance of the deceased does not render him incompetent as a juror."); State v. Wells, 249 S.C. 249, 259-60, 153 S.E.2d 904, 909-10 (1967) (affirming qualification of a juror who directly employed victim a year or more prior to trial); State v. Hilton, 87 S.C. 434, 439, 69 S.E. 1077, 1078 (1910) ("There is no rule of the common law, nor is there a statute disqualifying a juror on account of his relationship to a witness, either by affinity or consanguinity, within any degree."). Second, the juror did not conceal any information requested during voir dire.² Finally, the judge acted within his discretion in finding the juror could be fair and impartial. See State v. Mercer, 381 S.C. 149, 158, 672 S.E.2d 556, 560-61 (2009) (describing the trial judge's broad discretion to determine whether a juror is qualified); State v. Bell, 374 S.C. 136, 147, 646 S.E.2d 888, 894 (Ct. App. 2007) ("A decision on whether to dismiss a juror and replace her with an alternate is within the sound discretion of the trial court . . .").

² The trial judge asked whether "any member of the jury panel or a member of your immediate family[,] were they close personal friends of the victims . . . ?" The record does not indicate whether the juror even knew David Slice. They were not "close personal friends." The only other relevant questions were whether the jurors "had any knowledge about the case" or had ever "heard or known anything about the case from any source whatsoever[.]"

Burgess argues, however, that the juror should have been excused based on the supreme court's reasoning in State v. Stone, 350 S.C. 442, 567 S.E.2d 244 (2002). We believe Burgess misinterprets the opinion. In Stone, the State called the defendant's aunt to testify during the penalty phase of a capital trial. 350 S.C. at 448, 567 S.E.2d at 247. One of the jurors realized she knew the aunt, and the trial judge granted the State's request to remove the juror. Id. On appeal, the supreme court quoted its decision in State v. Woods:

When a juror conceals information inquired into during voir dire, a new trial is required only when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges.

350 S.C. at 448, 567 S.E.2d at 247 (emphasis added) (quoting State v. Woods, 345 S.C. 583, 587-88, 550 S.E.2d 282, 284 (2001)). Calling Woods "instructive," the Stone court held the removal of the juror was error because neither of the criteria listed in Woods existed. 350 S.C. at 448-49, 567 S.E.2d at 247-48. First, the court stated "[i]t is patent here that [the juror's] failure to disclose her acquaintance with [the witness] was innocent." 350 S.C. at 448, 567 S.E.2d at 247. Second, the court stated "we find her scant acquaintance would neither have supported a challenge for cause nor would it have been a material factor in the state's exercise of its peremptory challenges." 350 S.C. at 448, 567 S.E.2d at 247-48. However, either of those findings would have independently rendered the trial judge's removal of the Stone juror erroneous.

When a party contends a juror should be removed for failure to disclose information during voir dire, Stone requires the trial judge to consider the two criteria from Woods. If the judge finds both of the Woods criteria exist, the judge must remove the juror. However, if either of the criteria is absent, the judge may not remove the juror on that basis. Here, we need only look to the absence of the first criterion to affirm. As in Stone, this juror's failure to

disclose the information was innocent. Thus the removal of the juror would have been error. See Smith v. State, 375 S.C. 507, 518, 654 S.E.2d 523, 529 (2007) ("Where a juror, without justification, fails to disclose a relationship, it may be inferred . . . that the juror is not impartial. On the other hand, where the failure to disclose is innocent, no such inference may be drawn." (quoting Woods, 345 S.C. at 587-88, 550 S.E.2d at 284)).

Finally, Burgess argues the trial judge applied the wrong legal standard in deciding not to remove the juror. In making this argument, Burgess focuses on one comment made by the judge immediately after he denied the motion to remove the juror: "I think I have to take jurors at their word. I can't second guess that. . . . I can't sit up here and decide that jurors won't follow the law." The State contends the argument is not preserved for appellate review. We agree.

The rules of issue preservation impose on counsel a duty to challenge a statement of law made by the trial judge which counsel believes to be erroneous.

A litigant must object to inadequate . . . conclusions of law in order to give the trial court an opportunity to correct them. . . . While a party has the right to assume that the trial court knows and will properly apply the law, this does not excuse the failure to seek correction of an error once the complaining party becomes aware of it.

89 C.J.S. Trial § 1134 (2001). See also I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("The losing party must first try to convince the lower court it has ruled wrongly . . ."). Burgess's failure to challenge the judge's comment and seek clarification of the basis of his ruling leaves the issue unpreserved for two reasons.

First, we cannot determine the correct context in which to interpret the comment. Burgess argues the judge was stating the legal standard he had used in deciding not to remove the juror. The State argues, however, the comment simply indicates the judge expected the jurors to follow his

instructions on the law. See U.S. v. Olano, 507 U.S. 725, 740 (1993) (noting "the almost invariable assumption of the law that jurors follow their instructions") (quoting Richardson v. Marsh, 481 U.S. 200, 206 (1987)). Second, even if he was addressing the standard for removing the juror, we cannot determine that he applied the wrong standard. The judge made the comment immediately after he ruled. In the ruling itself, however, he stated: "I would have to deny your motion based on State v. Elmore." While the comment cited by Burgess would indicate the judge used an incorrect standard, the reference to Elmore indicates he used the correct standard.³

If Burgess had sought correction of the alleged error at trial, we would be able to determine which issue the trial judge was addressing, and whether he was correct. Because we cannot determine either, the issue is not preserved.

III. Third Party Guilt and the Right to Present a Complete Defense

Burgess offered the testimony of five witnesses who would have testified that the victims had been threatened over their drug debts in the months leading up to the murders. On appeal he contends the trial judge's

³ In State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983) overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), the defendant asked the trial court to disqualify a juror for cause because one of the assistant solicitors was the juror's daughter's closest friend. 279 S.C. at 420, 308 S.E.2d at 784. The supreme court characterized the trial judge's ruling as follows: "The trial judge re-examined [the juror] and assured himself that the juror was impartial." Id. (emphasis added). The Elmore court then cited State v. Gullledge, in which the supreme court stated: "The trial judge has the duty to assure himself that every juror is unbiased, fair and impartial." 277 S.C. 368, 370, 287 S.E.2d 488, 489 (1982) (emphasis added). Moreover, after the juror in the case before us initially testified he could be fair and impartial, the judge asked both sides if they requested any additional voir dire. If the judge felt he was bound by the juror's answer, he would have had no reason to offer further questioning.

decision not to allow their testimony before the jury violated his constitutional right to present a complete defense. We conclude the judge ruled correctly.

The United States Constitution guarantees a criminal defendant the right "to present a complete defense." Crane v. Kentucky, 476 U.S. 683, 690 (1986). This right is also guaranteed by our State constitution: "Any person charged with an offense shall enjoy the right . . . to be fully heard in his defense" S.C. Const. art. I, § 14 (2009). See S.C. Code Ann. § 17-23-60 (2003) ("Every person accused shall, at his trial, be allowed . . . to produce witnesses and proofs in his favor"); State v. Lyles, 379 S.C. 328, 341, 665 S.E.2d 201, 208 (Ct. App. 2008). In Chambers v. Mississippi, 410 U.S. 284 (1973), the United States Supreme Court stated: "Few rights are more fundamental than that of an accused to present witnesses in his own defense." 410 U.S. at 302. However, the right to introduce even relevant evidence "is not unlimited, but rather is subject to reasonable restrictions." U.S. v. Scheffer, 523 U.S. 303, 308 (1998). The exclusion of witness testimony does not violate a defendant's constitutional right to present evidence so long as the evidence rules are "not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" Id. (quoting Rock v. Arkansas, 483 U.S. 44, 56 (1987)). In this case, Burgess's argument that his right to present a defense was violated is refuted by the trial judge's correct application of the law of third party guilt to the facts of the case.

As the trial judge correctly stated, the admissibility of evidence of third party guilt is governed by the rule set forth in State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941). See State v. Cope, 385 S.C. 274, 292-93, 684 S.E.2d 177, 186-87 (Ct. App. 2009) (quoting State v. Gregory as the rule governing admissibility of evidence of third party guilt); State v. Swafford, 375 S.C. 637, 641-43, 654 S.E.2d 297, 299-300 (Ct. App. 2007) (affirming application of State v. Gregory). In Gregory, our supreme court stated:

[T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence

which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. . . . But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose.

198 S.C. at 104-05, 16 S.E.2d at 534-35 (internal citations omitted).

The trial judge applied the Gregory standard correctly. The judge listened to each witness's testimony outside the presence of the jury and provided Burgess the opportunity to argue its admissibility. After quoting Gregory, the judge noted that some of the evidence related to events occurring more than eight months before the murders, and that even the most recent events occurred more than two weeks before. He found that none of the evidence was inconsistent with Burgess's guilt and concluded "it's mere conjecture or surmise." The exclusion of the testimony was consistent with Gregory, and within the trial judge's discretion.

Burgess argues, however, that this case is controlled by the decision of the United States Supreme Court in Holmes v. South Carolina, 547 U.S. 319 (2006). Burgess is correct that the Supreme Court concluded "the rule applied in [State v. Holmes]⁴ by the State Supreme Court violates a criminal defendant's right to have 'a meaningful opportunity to present a complete defense.'" 547 U.S. at 331 (quoting Crane, 476 U.S. at 690). However, Burgess fails to understand that it was not the rule of Gregory which offended the defendant's rights. Rather, it was the "radically changed and extended" rule of State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001), and State v. Holmes. 547 U.S. at 328-31. In fact, the Supreme Court specifically stated that the rule of State v. Gregory is the type of rule that does not deny a defendant his right to present evidence. 547 U.S. at 328. Holmes v. South

⁴ 361 S.C. 333, 605 S.E.2d 19 (2004).

Carolina preserves Gregory as the appropriate standard for evaluating the admissibility of evidence of third party guilt. The trial judge in this case applied Gregory correctly, and there was no error.

AFFIRMED.

THOMAS and PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA
 IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

DARRELL BURGESS,

PETITIONER

Appeal from Lexington County

R. Knox McMahon, Circuit Court Judge

Opinion No. 4765

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Darrell Burgess petitions this Court to rehear this case because this Court may have overlooked the fact that its holding that criminal defense counsel has a duty “to seek correction of [what defense counsel believes to be] an error” directly conflicts with defense counsel’s duty under Rule 18(a), SCRCrimP to “not attempt to further argue any matter after he has been heard and the ruling of the court has been pronounced.”

Here, petitioner argued that the trial court abused its discretion by refusing to excuse juror #72, Juror Emanuel, where the juror revealed to the court that he was the supervisor of murder victim David Slice’s brother-in-law since defense counsel told the judge he would have removed the juror with a preemptory challenge had he known he was a relative of the murder victim. Counsel

also told the judge as an officer of the court that he would have used a peremptory challenge to remove juror #72 has he known of the supervisor of the brother-in-law of the victim relationship since it was only human nature that the juror was being placed in an untenable situation.

As this Court will recall, the trial court read the indictments to the venire prior to jury selection. The jury was told that petitioner, along with Michael T. Wise, was charged with unlawfully killing David Slice and Kim Fauscette with malice aforethought. R. 5, ll. 2 – 17. The following occurred with the trial court and the venire:

The Court: Is any member of the jury panel or a member of your immediate family [that] were the close personal friends of the victims named in the indictment, either David Slice or Kim Fauscette? If so, please stand.

(There is no response).

The Court: These indictments allege an incident that occurred in Lexington County, on or about September 5, 2005, allegedly involved a handgun. Does any member of the jury panel have any knowledge about the case? If so, please stand.

(Juror stands).

The Court: Ms. Sawyer, I have set you aside. Thank you so much. Any others?

(There is no response).

The Court: Does any member of the jury panel have any bias or prejudice towards the parties, that being either the state or the defendant, or the subject matter involved in this case? If so, please stand.

(There is no response).

The Court: Has any member of the jury panel *heard or know anything about the case from any source whatsoever*? If so, please stand.

(There is no response).

R. 8, l. 20 – 9, l. 20. (emphasis added).

Venireman Joseph E. Emanuel, juror number seventy-two, did not respond to any of these questions, including whether he knew or had heard anything about the case “from any source whatsoever.” At the time juror number seventy-two was accepted as a juror defense counsel had only used *five* of his ten peremptory challenges. R. 29, l. 21 – 30, l. 1.

Prior to any testimony before the jury the clerk informed the court that juror number seventy-two approached her and said he recognized “a lady in the audience.” The clerk said “He [the juror] didn’t recognize the name, but he did recognize her face, that it’s either her son or her husband, [that was victim] *but some kind of kin of hers works with him*, and he wanted to speak with the judge about it.” R. 36, l. 19 – 37, l. 2. (emphasis added). The solicitor said they were having the victim’s family come back into the courtroom in case the relationship happened to be with “one of the victims.” R. 37, ll. 3 – 9.

Juror number seventy-two then stated “yesterday morning I realized *that I knew somebody* that worked with me that was a family member here . . . *her brother actually works with me.*” R. 37, ll. 16 – 23. (emphasis added). The juror said the person he recognized was Georgette Slice, and that he was the supervisor of her brother. The juror confirmed to the judge that “a member of the victim’s family, brother works for you . . . and you are his supervisor. The juror then answered, “yes,” when asked if he “could still be a fair and impartial juror to both the State and the defense in this case.” The judge then asked to jury to “step back to your jury room,” and instructed him not to talk to the other jurors about what was transpiring. R. 38, l. 3 – 39, l. 21.

Defense counsel then asked that the juror be excused. The judge inquired of the solicitor “what relationship is Georgette Slice to the victim David Slice. The solicitor then said Georgette Slice was actually victim David Slice’s “estranged wife.” The solicitor added that he thought

Georgette Slice *was still married to David Slice*, even though they were not living together at the time of the murder. R. 38, l. 3 – 39, l. 21. Defense counsel Baker would continue to request that the juror be removed for cause under these circumstances. The solicitor and defense counsel both stated that they understood the juror actually supervised David Slice's brother-in-law rather than his brother. R. 39, l. 9 – 40, l. 19.

The juror was then brought back into the courtroom. The juror stated that Eugene Ford was the brother-in-law's name, and the person he supervised. R. 40, ll. 14 – 19. The judge then asked the juror "the fact that you work with one of the *victim's brothers-in-law*, could you still be fair and impartial." The juror stated that he could. R. 40, ll. 14 – 24. (emphasis added).

The juror responded to the judge's questions by asserting that he had "heard anything about the case . . . prior to being selected for jury service." The juror stated he did not know "that it had happened," and that he "put names and faces together, Slice. I just recognized a face." R. 40, l. 25 – 41, l. 18.

Defense counsel Baker then renewed his motion that the juror be removed for cause. "He has indicated that he is a supervisor for one of the victim's family members." R. 41, ll. 19 – 25:

I think it's human nature that he could not be impartial in this matter and [I] would ask that he be removed for cause from the jury. I think it would be proper for that to happen at this point.

The Court: Yes, sir.

Mr. Madsen: I just think he gave appropriate answers that he could be fair and impartial. This is obviously a murder case, and he hasn't even heard from this fellow that works for him that there is an estranged brother-in-law who has been murdered.

I think that is telling, and he has answered the court, was solid in his answers, that he would be fair and impartial and had not heard anything or discussed anything about the case.

The Court: Yes, sir. *I would have to deny your motion based on State v. Elmore*¹. In that case actually a relative of one of the prosecutors was selected for [the] jury and was authorized to be a member of that jury.

I think I have to take jurors at their word. I can't second-guess that. That's why I even went and asked him once he put the face and name together if he recollected anything about the facts of the case, and he says he knows nothing. I can't sit up here and decide that jurors won't follow the law.

Mr. Baker: Just to put a couple of things on the record, Your Honor.

The Court: Certainly.

Mr. Baker: Obviously, *had I known this prior to selection of the jury. I would have struck Mr. Emanuel from the jury. I have been denied that right at this point.*

He has indicated he works with a family member of the victim. I think he would be - - it's just prejudice to my client for us to go forward with him on the jury.

The Court: All right. Thank you. Thank you, Mr. Baker.

R. 42, l. 1 – 43, l. 13. (emphasis added).

This Court held defense counsel waived the issue because he did not seek further clarification of the trial judge's ruling. Respectfully, it was apparent that the trial judge ruled he had to take the jurors at their word and that he did not have the discretion to remove them if they said they could fair. Further, present undersigned appellate counsel respectfully submits that vague cites such as the one here to the holding of State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983) by trial counsel or the judge are disfavored when a coherent argument or ruling on the law can be had in its place.

¹ 279 S.C. 417, 308 S.E.2d 781 (1983).

This case illustrates a good example of why that is true. This Court noted that in Elmore “the defendant asked the trial court to disqualify a juror for cause because one of the assistant solicitor’s was the juror’s daughter’s closest friend . . . The supreme court characterized the trial judge’s ruling as follows: ‘The trial judge reexamined [the juror] and assured himself that the juror was impartial.’” (This Court’s emphasis). State v. Darrell Burgess, Op. No. 4765, Shearouse’s Adv. Sh. 50 at p. 55, n. 3.

Here the trial judge cited Elmore because “a relative of one of the prosecutors was selected for [the] jury and was authorized to be a member of that jury.” Petitioner does not respectfully considering it quibbling to note that here the situation indeed involved a relative of the victim that the juror supervised. Elmore did not involve a relative as the trial judge stated. It involved Juror Chalmers who returned to court to state that assistant solicitor Selma Jones was his daughter’s closet friend. After the judge assured himself that Chalmers could be impartial, he gave both sides a chance to strike Chalmers which both sides declined to do. That most respectfully was not the situation here.

Petitioner respectfully submits the trial judge’s ruling here that he had to take the juror at his word was in response to trial counsel’s statement that it was “human nature that he could not be impartial.” The bottom line contention, in the final analysis here, was that defense counsel said human nature dictated that you could not expect the supervisor of a victim’s relative in a murder case to be impartial. He also stated the common sense point that he would have struck this juror had he been aware of the relationship. The trial judge incorrectly cited Elmore as one point in this case, and by stating he had to take the juror in this case at his word. With all due respect this Court expects too much of trial counsel to “nail down” the trial judge’s ruling any further to preserve it here.

As this Court will recall, later during the trial the court disclosed that it had received a note that "I, Allen Pinner, juror number one eighty-four were friends with the family of David Slice." The juror stated in the note "I do not think I am able to make a fair decision." R. 118, l. 12 – 119, l. 25. After the attorneys said they did not have any questions for the juror the judge excused him. R. 119, ll. 3 – 25.

Defense counsel Baker then moved for a mistrial stating that juror number seventy-two earlier informed the court that he worked with a member of victim's family. Counsel argued the Court now had a second revelation from juror one eighty-four of direct ties to the family of victim David Slice. R. 121, l. 10 – 122, l. 10. Defense counsel asked the judge to declare a mistrial or at least poll the jurors to find out "if there was anybody else on the panel who may know of something else about the case." R. 121, l. 15 – 122, l. 10. The judge denied the motion for a mistrial. R. 122, l. 11 – 123, l. 13.

At the conclusion of the trial defense counsel would move for a new trial based on the failure of the trial court to excuse juror seventy-two based on the fact that he was a supervisor of a family member of the victim. Counsel argued this was a denial of due process and petitioner's right to a fair and impartial jury. R. 606, l. 22 – 607, l. 11. The judge denied the motion for a new trial. R. 607, l. 12 – 608, l. 6.

Petitioner stands by his position that the judge had the discretion to remove Juror number seventy-two -- the *present* supervisor of the decedent's brother-in-law -- and his failure to recognize discretionary authority -- "he had to take the juror at his word" -- where it in fact exists was reversible error. See State v. Alexander, 309 S.C. 495, 424 S.E.2d 526 (1992) The ongoing relationship here between the juror and victim's brother in law was not a "scant acquaintance" as in State v. Stone where the juror there had only "lived down the street from Perry five or six years

earlier” and they were only casual acquaintances then. State v. Stone, 350 S.C. 448, 567 S.E.2d 247.

Here, the juror was going to have to go back to work and supervise the dead victim’s brother-in-law on a continuing basis. The brother-in-law knew that victim’s Slice’s wife, Georgette, his sister-in-law, still cared for the victim since she was watching the trial. The solicitor even offered that he thought Georgette and the decedent David Slice were still married.

Petitioner respectfully requests that this Court reconsider its holding that this issue is procedurally barred for the reasons above, and reverse. As the Chief Justice of the Supreme Court has observed defense counsel has the duty to make a coherent argument in favor of his legal position, in fairness to the trial judge, but he is not expected to cite case law. Undersigned counsel would also add that trial counsel should not, and previously was not, expected to argue with the trial judge’s ruling once he ruled.

Counsel here argued to be heard a respectful final time after the trial judge ruled and he should not been penalized for his failure to continue to argue given Rule 18(a), SCRCrimP that counsel “not attempt to further argue any matter after he has been heard and the ruling of the court has been pronounced.” Counsel had a duty to obtain a ruling from the trial judge and he had a duty not to continue to argue with the judge. He did that here, and petitioner respectfully requests rehearing for these reasons, and because the judge committed a reversible error of law.

II. Holmes v. United States, State v. Gay, and State v. Gregory.

Present appellate counsel was also appellate counsel in State v. Gay, which was abrogated by the United States Supreme Court in Holmes. Perhaps this is why it is difficult for petitioner to understand the Court’s writing that “Burgess fails to understand that it was not the rule of Gregory which offended the defendant’s rights . . . but it was the radically changed and extended rule of

State v. Gay.” State v. Darrell Burgess, Op. No. 4765, Shearouse’s Adv. Sh. # 50 at p. 57. That is all the more true give petitioner’s memory of the discussion at oral argument in this case about State v. Gregory. This is what petitioner argued in his brief:

In Holmes v. South Carolina, 547 U.S. 319 (2006) the Court held that the exclusion of defense evidence of third-party guilt denied Holmes his constitutional right to present a complete defense. The Court in Holmes abrogated State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001).

The Holmes Court noted that the trial court excluded the third-party guilt evidence under State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941) which held that such evidence is admissible if it raises a reasonable inference or presumption as to the defendant’s own innocence. However, the Court noted under Gregory that the evidence was not admissible if it only cast a bare suspicion upon another or simply raised a conjectural inference as to commission of the crime by another person.

The court in Holmes wrote that while the state and federal rule makers have broad latitude under which to establish rules of evidence that the Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant be given a meaning opportunity to present a complete defense. See Crane v. Kentucky, 476 U.S. 663, 689 – 690 (1986); Chambers v. Mississippi, 410 U.S. 284 (1973). Consequently, evidentiary rules cannot be arbitrary or disproportionate to the purposes they serve. See Rock v. Arkansas, 483 U.S. 44 (1987).

The Court in Holmes held that the state court in State v. Gay and Holmes *had sporadically extended the rule of State v. Gregory beyond its meaning*. The Gregory rule was that evidence which only cast a bare suspicion upon another was not admissible. State v. Gregory, 198 S.C. 104 – 105, 16 S.E.2d 534 – 535.

The court in Holmes also reasoned that the state court erred by concentrating on the strength of the state’s evidence, and its forensic evidence. The United States Supreme Court wrote: “The point is that, by evaluating the strength of only one party’s evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt.” The court therefore found that the rule excluding the third-party guilt evidence “was arbitrary,” *and it did not rationally serve the end that*

the Gregory rule and other similar third-party guilt rules were designed to further.

Here, five unrelated defense witnesses testified in camera to similar threats being made by a drug dealer against the victim. These were all within two weeks of the murder, with the exception of Tonya Aycock who said Steve Riley's death threats were made sometime "way before" the murders, and Ballard's testimony that Twelve's threats were made sometime in 2004.

The *blanket* exclusion of all of this evidence was an abuse of discretion, and as argued infra, it was made on erroneous ground. It was apparent these witnesses took these threats from the drug dealer against the victims very seriously, and they gave the information to the police in their statements.

This evidence was undoubtedly relevant under Rule 401, SCRE, which states that "evidence is relevant if it has a direct bearing upon or tends to establish or make more or less probable the matter in controversy." Here, the testimony tended to show it was probable that the victims were killed because of their crack cocaine debts over which they were receiving death threats. Petitioner was not the person threatening them -- he was not Twelve.

There was absolutely no evidence in this case that petitioner was acting in concert with Twelve, or his associates, since none of the five proffered witnesses -- or any of the state's witnesses for that matter -- testified to any connection between petitioner and another person in committing the murders. An accessory after the fact to murder is not a participant in the murder, but one who can be present at the time of the murder and one who subsequently assists the felon with the intent to hinder the felon's detection. See State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998).

Consequently, the proffered evidence was relevant since it tended to make more or less probable some matter at issue upon which it directly or indirectly bears. See State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986).

Therefore, for this relevant evidence to have been excluded there must have been a legitimate basis for its exclusion that did not deny petitioner his constitutional right to present a complete defense. The trial judge reasoned that the proffered evidence was not inconsistent with petitioner's guilt. That was erroneous since there was *no evidence of any connection* between Twelve and petitioner, or evidence of petitioner threatening the victims over drug debts.

The proffered evidence involving Twelve's threats was clearly inconsistent with petitioner's guilt.

The trial judge found *the evidence inadmissible under the standard of Holmes v. South Carolina and State v. Gregory. That respectfully was error*, and it denied petitioner his constitutional right to present a complete defense. Petitioner should be granted a new trial.

(emphasis added). Brief of Appellant at 19-22.

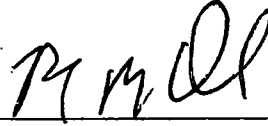
Petitioner realizes that solicitors continue to beat the drum with their contention of how little the 9-0 decision in Holmes v. United States has allegedly changed the law on third-party guilt in South Carolina. However, here petitioner's argument was straightforward. He noted that Defense counsel Baker argued the proffered testimony showed *numerous threats over drug money* were made, and Twelve's name was raised by the varying witnesses "*over and over*." Counsel noted that Melton was the first witness to testify he had witnessed Twelve threatening the victim. R. 550, l. 12 – 551, l. 3.

The judge ruled that he was not going to allow the testimony of these five witnesses to be heard by the jury. He stated the evidence was "mere conjecture or surmise." The judge also said the acts testified to "some two weeks or better" before the murders were not "inconsistent with the defendant's guilt." R. 551, l. 10 – 552, l. 17.

After petitioner was convicted defense counsel moved for a new trial on the basis of the exclusion of the testimony of these five witnesses who had seen the drug dealer threatening the victims. R. 609, ll. 10 – 23. Petitioner continues to maintain the exclusion of the evidence of these witnesses about drug dealer threats denied him his right to offer a complete defense to the murder charges in this case. See Rock v. Arkansas, 483 U.S. 44 (1987); Crane v. Kentucky, 476 U.S. 663,

689–690 (1986); Chambers v. Mississippi, 410 U.S. 284 (1973). Petitioner respectfully requests rehearing.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

This 30th day of December, 2010.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington CountyR. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

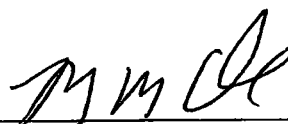
V.

DARRELL BURGESS,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William Edgar Salter, III, Esquire, this 30th day of December, 2010.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 30th day
of December, 2010.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: August 23, 2014.

The South Carolina Court of Appeals

The State,

Respondent,

v.

Darrell Burgess,

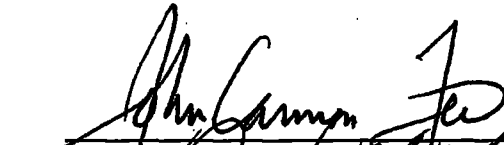
Appellant.

The Honorable Knox McMahon
Lexington County
Trial Court Case No. 2005-GS-32-04561
2005-GS-32-04563
2005-GS-32-04564

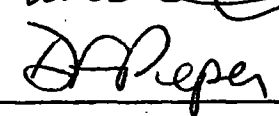
ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing.

It is, therefore, ordered that the Petition for Rehearing be denied.



C.J.

J.

cc: Chief Appellate Defender Robert M. Dudek
Attorney General Alan Wilson
Chief Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Donald J. Zelenka
Senior Assistant Attorney General William Edgar Salter, III
Donald V. Myers, Esquire

FILED

JAN 28 2011

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

R. Knox McMahon, Circuit Court Judge

Opinion No. 4765 (S.C. Ct. App. filed 12/15/2010)

05-GS-32-4561, 4563, 4564.

THE STATE,

RESPONDENT,

V.

DARRELL BURGESS,

PETITIONER

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

ROBERT M. DUDEK
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 PETITIONER.

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1.

The Court of Appeals erred by holding the failure of defense counsel to argue he believed the trial judge was mistaken in his belief that he had to take the jurors at their word when they claimed that they could be impartial was procedurally barred on appeal because counsel did not have a duty to argue with the trial court's ruling and the opinion of the Court will invite disrespect for the trial court and the mandate of Rule 18(a), SCRCrimP

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2.

The Court of Appeals erred by not finding an abuse of discretion where the trial court refused to excuse juror #72, Juror Emanuel, where the juror revealed to the court that he was the supervisor of murder victim David Slice's brother-in-law since defense counsel told the judge he would have removed the juror with a preemptory challenge had he known he was a relative of the murder victimi

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3.

The Court of Appeals erred by not finding an abuse of discretion where the trial court refused to admit the testimony of witnesses Melton, McQuarley, Summers, Aycok, and Ballard about the victims being threatened over drug debts by another man within weeks of the murder, and also before that, since this evidence of third-party guilt was relevant, and petitioner had the right to present a complete defense under Holmes v. South Carolina

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on January 28, 2011.

QUESTIONS PRESENTED

1.

Whether the Court of Appeals erred by holding the failure of defense counsel to argue he believed the trial judge was mistaken in his belief that he had to take the jurors at their word when they claimed that they could be impartial was procedurally barred on appeal because counsel did not have a duty to argue with the trial court's ruling and the opinion of the Court of Appeals will invite disrespect for the mandate Rule 18(a), SCRCrimP?

2.

Whether the Court of Appeals erred by not finding an abuse of discretion where the trial court refused to excuse juror #72, Juror Emanuel, where the juror revealed to the court that he was the supervisor of murder victim David Slice's brother-in-law since defense counsel told the judge he would have removed the juror with a preemptory challenge had he known he was a relative of the murder victim?

2.

Whether the Court of Appeals erred by not finding an abuse of discretion where the trial court refused to admit the testimony of witnesses Melton, McQuarley, Summers, Aycock, and Ballard about the victims being threatened over drug debts by another man within weeks of the murder, and also before that, since this evidence of third-party guilt was relevant, and petitioner had the right to present a complete defense under Holmes v. South Carolina?

STATEMENT OF THE CASE

Procedural history

Petitioner was indicted by the Lexington County grand jury for two counts of murder and possession of a firearm during a violent crime. R. 615 - 620. His case was called to trial on January 28, 2008 before the Honorable R. Knox McMahon and a jury. J. Bradley Baker represented petitioner. Samuel R. Hubbard, III and Robert M. Madsen were the solicitors. R. 1.

At the conclusion of the trial on March 1, 2008 the jury found petitioner guilty on all three counts. R. 603, l. 17 – 604, l. 1. Judge McMahon sentenced petitioner to life imprisonment on each of the murder counts, and he imposed a five year sentence on the possession of a firearm during a violent crime conviction. R. 613, l. 16 – 614, l. 4.

Petitioner's convictions were affirmed in State v. Darrell Burgess, 391 S.C. 15, 703 S.E.2d 512 (2010). App. 1-9. Petitioner sought rehearing. App. 10-22. Rehearing was denied. App. 23. This petition for a writ of certiorari to the Court of Appeals follows.

ARGUMENT

1.

The Court of Appeals erred by holding the failure of defense counsel to argue he believed the trial judge was mistaken in his belief that he had to take the jurors at their word when they claimed that they could be impartial was procedurally barred on appeal because counsel did not have a duty to argue with the trial court's ruling and the opinion of the Court will invite disrespect for the trial court and the mandate of Rule 18(a), SCRCrimP.

Relevant Facts

The trial judge read the indictments to the venire prior to jury selection. The jury was told that petitioner, along with Michael T. Wise, was charged with unlawfully killing David Slice and Kim Fauscette with malice aforethought. R. 5, ll. 2 – 17. The following occurred with the trial court and the venire:

The Court: Is any member of the jury panel or a member of your immediate family [that] were the close personal friends of the victims named in the indictment, either David Slice or Kim Fauscette? If so, please stand.

(There is no response).

The Court: These indictments allege an incident that occurred in Lexington County, on or about September 5, 2005, allegedly involved a handgun. Does any member of the jury panel have any knowledge about the case? If so, please stand.

(Juror stands).

The Court: Ms. Sawyer, I have set you aside. Thank you so much. Any others?

(There is no response).

The Court: Does any member of the jury panel have any bias or prejudice towards the parties, that being either the state or the defendant, or the subject matter involved in this case? If so, please stand.

(There is no response).

The Court: Has any member of the jury panel heard or know anything about the case from any source whatsoever? If so, please stand.

(There is no response).

R. 8, l. 20 – 9, l. 20.

As seen above, venireman Joseph E. Emanuel, juror number seventy-two, did not respond to any of these questions, including whether he knew or had heard anything about the case “from any source whatsoever.” At the time juror number seventy-two was accepted as a juror defense counsel had only used five of his ten peremptory challenges. R. 29, l. 21 – 30, l. 1.

Prior to any testimony before the jury the clerk informed the court that juror number seventy-two approached her and said he recognized “a lady in the audience.” The clerk said “he didn’t recognize the name, but he did recognize her face, that it’s either her son or her husband, [that was victim] but some kind of kin of hers works with him, and he wanted to speak with the judge about it.” R. 36, l. 19 – 37, l. 2. The solicitor said they were having the victim’s family come back into the courtroom in case the relationship happened to be with “one of the victims.” R. 37, ll. 3 – 9.

Juror number seventy-two then stated: “Yesterday morning I realized that I knew somebody that worked with me that was a family member here . . . her brother actually works with me.” R. 37, ll. 16 – 23. The juror said the person he recognized in the courtroom was Georgette Slice, and that he was *the supervisor* of her brother. The juror confirmed to the judge that “a member of the victim’s family, brother works for you . . . and you are his supervisor. The juror then answered, “yes,” when asked if he “could still be a fair and impartial juror to both the State and the defense in this case.” The judge then asked him to “step back to your jury room,” and instructed him not to talk to the other jurors about what was transpiring. R. 38, l. 3 – 39, l. 21.

Defense counsel Baker then requested that the juror be excused under these circumstances. The judge inquired of the solicitor "what relationship is Georgette Slice to the victim David Slice. The solicitor then said Georgette Slice was actually victim David Slice's "estranged wife." The solicitor added that he thought Georgette Slice *was still married* to the victim David Slice, even though they were not living together at the time he was killed. R. 38, l. 3 – 39, l. 21. Defense counsel would continue to request that the juror be removed for cause under these circumstances. The solicitor and defense counsel both stated that they understood the juror actually supervised David Slice's *brother-in-law rather than his brother*. R. 39, l. 9 – 40, l. 19.

The juror was then brought back into the courtroom. The juror stated that Eugene Ford was the brother-in-law's name, and the person he supervised. R. 40, ll. 14 – 19. The judge then asked the juror "the fact that you work with one of the victim's brothers-in-law, could you still be fair and impartial. The juror stated that he could. R. 40, ll. 14 – 24.

The juror responded to the judge's questions by asserting that he had "heard anything about the case . . . prior to being selected for jury service." The juror stated he did not know "that it had happened," and that he "put names and faces together, Slice. I just recognized a face." R. 40, l. 25 – 41, l. 18.

Defense counsel then renewed his motion that the juror be removed for cause. "He has indicated that he is a supervisor for one of the victim's family members." R. 41, ll. 19 – 25:

I think it's human nature that he could not be impartial in this matter and [I] would ask that he be removed for cause from the jury. I think it would be proper for that to happen at this point.

The Court: Yes, sir.

Mr. Madsen: I just think he gave appropriate answers that he could be fair and impartial. This is obviously a murder case, and he hasn't

even heard from this fellow that works for him that there is an estranged brother-in-law who has been murdered.

I think that is telling, and he has answered the court, was solid in his answers, that he would be fair and impartial and had not heard anything or discussed anything about the case.

The Court: Yes, sir. *I would have to deny your motion based on State v. Elmore*¹. In that case actually a relative of one of the prosecutors was selected for [the] jury and was authorized to be a member of that jury.

I think I have to take jurors at their word. I can't second-guess that. That's why I even went and asked him once he put the face and name together if he recollected anything about the facts of the case, and he says he knows nothing. I can't sit up here and decide that jurors won't follow the law.

Mr. Baker: Just to put a couple of things on the record, Your Honor.

The Court: Certainly.

Mr. Baker: Obviously, *had I known this prior to selection of the jury. I would have struck Mr. Emanuel from the jury. I have been denied that right at this point.*

He has indicated he works with a family member of the victim. I think he would be - - it's just prejudice to my client for us to go forward with him on the jury.

The Court: All right. Thank you. Thank you, Mr. Baker.

R. 42, l. 1 - 43, l. 13. (emphasis added).

Later during the trial the court disclosed that it had received a note that "I, Allen Pinner, juror number one eighty-four were friends with the family of David Slice." The juror stated in the note "I do not think I am able to make a fair decision." R. 118, l. 12 - 119, l. 25. After the attorneys said they did not have any questions for the juror the judge excused him. R. 119, ll. 3 - 25.

¹ 279 S.C. 417, 308 S.E.2d 781 (1983).

Defense counsel then moved for a mistrial stating that juror number seventy-two earlier informed the court that he worked with a member of victim's family. Counsel argued the Court now had a second revelation from juror one eighty-four of direct ties to the family of victim David Slice. R. 121, l. 10 – 122, l. 10. Defense counsel asked the judge to declare a mistrial or at least poll the jurors to find out “if there was anybody else on the panel who may know of something else about the case.” R. 121, l. 15 – 122, l. 10. The judge denied the motion for a mistrial. R. 122, l. 11 – 123, l. 13.

At the conclusion of the trial defense counsel would move for a new trial based on the failure of the trial court to excuse juror seventy-two based on the fact that he was a supervisor of a family member of the victim. Counsel argued this was a denial of due process and petitioner's right to a fair and impartial jury. R. 606, l. 22 – 607, l. 11. The judge denied the motion for a new trial. R. 607, l. 12 – 608, l. 6.

Court of Appeals

On appeal petitioner distinguished this case from State v. Stone, 350 S.C. 442, 467 S.E.2d 244 (2002) where this Court held a juror was wrongfully excused because she knew Stone's aunt, who became a witness during the trial. This Court noted that the failure of the juror to disclose that he knew Stone's aunt was innocent, and further that “her *scant acquaintance* would neither have supported a challenge for cause *nor would it have been a material factor in the state's exercise of its preemptory challenges*.” State v. Stone, 350 S.C. 448, 567 S.E.2d 247 – 248. (emphasis added). Petitioner argued: “The same is simply not true here.” Brief of appellant at 10-11.

Petitioner also argued that the judge applied the wrong legal standard – that he had to take the Juror at his word and he did not think he had the discretion to remove Juror #72 – because he in fact had such discretion where defense counsel credibly told the judge he would have struck Juror

#72 if he had known he was the supervisor of the victim's brother-in-law. Petitioner also focused on this Court's opinion in State v. Woods, 345 S.C. 583, 587-588, 550 S.E.2d 282, 284 (2001). Brief of appellant at 10-13.

In affirming petitioner's murder convictions the Court of Appeals found that the failure of defense counsel to inform the judge defense counsel *thought* the judge was applying the wrong legal standard procedurally barred the issue on appeal. The Court of Appeals reasoned defense counsel had a duty to *correct* the judge's mistaken belief. App. 5-6. The Court also found since it believed, or the trial judge believed, the failure to disclose the relationship with the victim's relative was innocent that the inquiry ended there, and the juror properly was not excused. App. 4-5.

The procedural bar discussion

As to the procedural bar petitioner will begin as he argued on rehearing:

This Court held defense counsel waived the issue because he did not seek further clarification of the trial judge's ruling. Respectfully, it was apparent that the trial judge ruled he had to take the jurors at their word and that he did not have the discretion to remove them if they said they could fair. Further, present undersigned appellate counsel respectfully submits that vague cites such as the one here to the holding of State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983) by trial counsel or the judge are disfavored when a coherent argument or ruling on the law can be had in its place.

This case illustrates a good example of why that is true. This Court noted that in Elmore "the defendant asked the trial court to disqualify a juror for cause because one of the assistant solicitor's was the juror's daughter's closest friend . . . The supreme court characterized the trial judge's ruling as follows: 'The trial judge reexamined [the juror] and assured himself that the juror was impartial.'" (This Court's emphasis). State v. Darrell Burgess, Op. No. 4765, Shearouse's Adv. Sh. 50 at p. 55, n. 3.

Here the trial judge cited Elmore because "a relative of one of the prosecutors was selected for [the] jury and was authorized to be a member of that jury." Petitioner does not respectfully

considering it quibbling to note that here the situation indeed involved a relative of the victim that the juror supervised. Elmore did not involve a relative as the trial judge stated. It involved Juror Chalmers who returned to court to state that assistant solicitor Selma Jones was his daughter's closet friend. After the judge assured himself that Chalmers could be impartial, he gave both sides a chance to strike Chalmers which both sides declined to do. That most respectfully was not the situation here.

Petitioner respectfully submits the trial judge's ruling here that he had to take the juror at his word was in response to trial counsel's statement that it was "human nature that he could not be impartial." The bottom line contention, in the final analysis here, was that defense counsel said human nature dictated that you could not expect the supervisor of a victim's relative in a murder case to be impartial. He also stated the common sense point that he would have struck this juror had he been aware of the relationship. The trial judge incorrectly cited Elmore [at] one point in this case, and by stating he had to take the juror in this case at his word. With all due respect this Court expects too much of trial counsel to "nail down" the trial judge's ruling any further to preserve it here.

Petition for rehearing at 5-6. App. 14-15. The Court of Appeals rejected this challenge to its procedural bar analysis by denying rehearing. The Court of Appeals respectfully is inviting disrespect for Rule 18(a), SCRCrimP by ruling that defense counsel has a duty *to argue with or correct* the trial judge where counsel *thinks he is right about the law and the judge is wrong*. Rule 18(a), SCRCrimP, prohibits counsel from arguing with the trial court once it has ruled. See, also, State v. Ross, 272 S.C. 56, 249 S.E.2d 159 (1978). At oral argument before this Court for more than twenty years undersigned counsel has always understood that what is expected of trial counsel is make a coherent argument on his position, and to respect the ruling of the trial court if it is counter to that legal *position*. Defense counsel's *belief* as to what is the applicable law in a certain situation is often just that: His belief. He should not be expected to argue with the trial judge once he or she has ruled, he is not obligated to pursuant to State v. Ross, 272 S.C. 56, 249 S.E.2d 159

(1978), and he is prohibited from doing so by Rule 18(a), SCRCrimP. While self-confidence may be appealing to some the time for it ends in the courtroom when the judge has ruled. This disturbing procedural bar analysis by the Court of Appeals most respectfully should be reviewed by this Court on certiorari. See, also, State v. Bixby, Op. No. 4768 (filed June 16, 2010, *rehearing granted*), 2010 WL 5155430 (S.C.App).

2.

The Court of Appeals erred by not finding an abuse of discretion where the trial court refused to excuse juror #72, Juror Emanuel, where the juror revealed to the court that he was the supervisor of murder victim David Slice's brother-in-law since defense counsel told the judge he would have removed the juror with a preemptory challenge had he known he was a relative of the murder victim.

As seen above, defense counsel told the judge he would have struck the juror if he had known he worked with the victim's brother-in-law.

[M]r. Baker: Just to put a couple of things on the record, Your Honor.

The Court: Certainly.

Mr. Baker: Obviously, *had I known this prior to selection of the jury. I would have struck Mr. Emanuel from the jury. I have been denied that right at this point.*

He has indicated he works with a family member of the victim. I think he would be - - it's just prejudice to my client for us to go forward with him on the jury.

R. 42, l. 1 - 43, l. 13. (emphasis added).

Respectfully, to turn this situation around, the solicitor likely would have made the same motion -- justifiably so -- if the defendant's brother-in-law's supervisor was on the jury at the defendant's trial. Again, as petitioner argued to the Court of Appeals this case is distinguishable

from State v. Stone, 350 S.C. 442, 467 S.E.2d 244 (2002), where during the penalty phase of the trial Stone's aunt, Bernice Perry, was called as a witness. When Perry was placed on the witness stand juror Thompson indicated to the court that she knew Ms. Perry. Although Perry had been announced as a witness at the start of *voir dire*, Thompson did not recognize her by name. Thompson had lived down the street from Perry *five or six years earlier*, and they were casual acquaintances only. Thompson indicted her past acquaintance with Perry would not affect her ability to be fair and impartial.

The solicitor asked that Thompson be removed for cause arguing it would be difficult to impose a death sentence "on a *former* acquaintance's nephew." (emphasis added). The court removed juror Thompson and replaced her with an alternative. State v. Stone, 350 S.C. 448, 567 S.E.2d 247.

This Court found this was error. The court noted that the first line of analysis under State v. Woods, 345 S.C. 583, 587–588, 550 S.E.2d 282, 284 (2001), dealt with whether the juror concealed information inquired into during *voir dire*. The Court held that a new trial was required only when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been material factor in the use of the party's preemptory challenges. Thompson v. O'Rourke, 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986). This Court then noted that where a juror, without justification, fails to disclose a relationship, it may be inferred, nothing to the contrary appearing, that the juror is not impartial. State v. Savage, 306 S.C. 5, 409 S.E.2d 809 (Ct. App. 1991).

The Court wrote that juror Thompson's failure to disclose her acquaintance with Perry was innocent in State v. Stone. Importantly, the court found "her *scant acquaintance* would neither have

supported a challenge for cause *nor would it have been a material factor in the state's exercise of its preemptory challenges.*" State v. Stone, 350 S.C. 448, 567 S.E.2d 247 – 248. (emphasis added).

The same is simply *not true* here. Juror number seventy-two was the *present* supervisor of the decedent's brother-in-law. That was an ongoing relationship and not a "scant acquaintance" as in State v. Stone where the juror there had only "lived down the street from Perry five or six years earlier" and they were only casual acquaintances then. State v. Stone, 350 S.C. 448, 567 S.E.2d 247. Here, the juror was going to have to go back to work and supervise the dead victim's brother-in-law on a continuing basis. The brother-in-law knew that victim's Slice's wife, Georgette, his sister-in-law, still cared for the victim since she was *present and watching the trial*.

Defense counsel Baker argued it was only human nature under these circumstances for brother-in-law juror to be affected. Since this was an ongoing supervisor-employee relationship, the juror was going to have to face the murder victim's brother-in-law at work in the future, and human nature does dictate that fact was going to be on the juror's mind.

Moreover, as argued to the Court of Appeals, the judge's ruling that he had "to deny your motion based on State v. Elmore," and that he was bound by the juror's answers was an error of law. The judge had the discretion, upon a motion, to remove the juror if he thought the juror might be being affected or influenced despite the juror's hopeful view that he would remain fair. Judges commonly excuse jurors where it appears by family or friendship that they may be too close to the situation despite their assertions that they would still be fair. The failure to recognize discretionary authority where it in fact exists is reversible error. State v. Alexander, 309 S.C. 495, 424 S.E.2d 526 (1992).

The Court of Appeals erred by ruling the judge did not abuse his discretion by refusing to remove Slice's brother-in-law from the jury upon defense counsel's motion, and his assertion, as an

officer of the court, that he would have struck the brother-in-law had he known of the relationship. Defense counsel would have been ineffective to not have struck the brother-in-law had he know he was a relative of the victim. The judge had to discretion to do so, and he erred by ruling he was bound by a single prior case -- State v. Elmore -- to deny the motion. The court, in each case, considers the *voir dire* answers of a juror in their totality, and not in isolation. State v. Elmore, 286 S.C. 70, 332 S.E.2d 762 (1985). In sum, the issue was preserved and the published opinion of the Court of Appeals incorrectly instructs the bench and bar that it is necessary to argue with the trial judge when counsel *believes he is right* about the law and the judge is wrong. Further, the judge here made an error of law by ruling he did not have discretionary authority he had, and he also abused his discretion by refusing to remove Juror #72, the supervisor of the victim's brother-in-law.

3.

The Court of Appeals erred by not finding an abuse of discretion where the trial court refused to admit the testimony of witnesses Melton, McQuarley, Summers, Aycok, and Ballard about the victims being threatened over drug debts by another man within weeks of the murder, and also before that, since this evidence of third-party guilt was relevant, and petitioner had the right to present a complete defense under Holmes v. South Carolina

Relevant Facts

Michael Melton rented a room from the victims, and he lived in the back bedroom of their mobile home. Melton admitted that crack use was rampant in the mobile home they shared. R. 44, l. 24 – 58, l. 14. Melton traveled to Fayetteville, North Carolina on a bus to visit his daughter in early September, 2005. He returned on Monday, September 5, 2005, “which was Labor Day.” R. 58, l. 10 – 59, l. 18. David Slice or Kim were supposed to pick him up at the bus station. Melton telephoned them but he received no answer. R. 59, l. 16 – 60, l. 18. Melton finally “caught a cab

ride from the bus station.” When he got home the back door to the mobile home was locked, which was very unusual. R. 60, l. 15 – 61, l. 16.

Melton therefore entered through the front door and he saw “Kim and David” inside. “David was sitting on couch and Kim was laying on the floor.” Melton said he thought they were sleeping so he did not attempt to wake them. It was also quite dark inside of the mobile home because of the heavy curtains. Melton also testified he wanted to smoke his crack cocaine alone, and that David and Kim would be “begging and begging and begging” him to share it if he woke them. R. 61, l. 14- 63, l. 16.

The next morning Melton went to the store to get a cigarette lighter at about 6:30 a.m. R. 65, l. 7 – 68, l. 11. Melton returned to the mobile and went back to sleep. A little later, at about 11:00 a.m., he went into the kitchen. He became suspicious for the first time because Kim and David had not “moved an inch” from the prior night. Melton looked more closely at Slice and Kim, and he realized “that they had been killed, been murdered.” R. 68, l. 21 – 69, l. 20. Melton ran out of the mobile home, and he had a friend of his call 911. R. 80, ll. 18 – 20. In the presence of the jury Melton acknowledged that James Johnson, the eyewitness who claimed he saw petitioner murder the victims, was known as “Tony Red.” Melton acknowledged Tony Red was over at the mobile home frequently. R. 81, ll. 10 – 23.

The beginning of the proffer

Out of the presence of the jury petitioner proffered Melton’s testimony that he had lived with Kim Fauscette and David Slice for about two and a half months. Melton said that they were heavy drug users, and they regularly had drugs delivered to the mobile home. R. 84, l. 14 – 85, l. 2.

Melton acknowledged that in the statement he gave to the police that he told them he thought the murders were drug related. Melton also told the police he had been concerned that the

victims were not going to be able to pay back these drug dealers. Melton had witnessed “first hand” threats that were made against the victims because of their drug debts. R. 85, ll. 3 – 20.

Melton remembered that one drug dealer, “Twelve, had come to the house” and “jacked up David and demanded that he get his money.” R. 85, l. 21 – 86, l. 15. Melton said Twelve was **not** petitioner. Twelve told David Slice, “He was going to get paid one way or the other.” R. 86, ll. 2 – 15. Still outside the presence of the jury, Melton acknowledged to the solicitor that he told the police the day after the murder that Twelve had been threatening David Slice a few weeks before the murders actually occurred. The circumstantial evidence showed the murders occurred before or just after Melton returned from North Carolina on September 5, 2005. R. 88, l. 15 – 89, l. 5.

After the proffer of Melton on third party guilt the judge stated he had considered the precedents of Holmes v. South Carolina, 547 U.S. 319 (2006) and State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941). R. 90, ll. 2 -6. The solicitor argued Melton’s testimony should be excluded because the threat he testified about was “a couple of weeks before,” and the solicitor maintained it was too remote and that it was “conjecture.” R. 90, l. 8 – 91, l. 22.

Defense counsel argued that there was no forensic evidence in this case to link petitioner to the crime, and that is what distinguished prior South Carolina cases on third party guilt where there “was overwhelming scientific evidence or forensic evidence to link an individual to the crime.” R. 91, l. 25 – 92, l. 8. Defense counsel also told the judge that there would be several other witnesses who would testify that Twelve threatened the victims. Counsel argued that petitioner had the constitutional right to present a complete defense to these murder charges. R. 92, ll. 13 – 25.

The judge ruled he would not allow the evidence “at this time.” “That is not to indicate that I am going to allow it at a later time.” R. 93, l. 1 – 17.

Four other proffered witnesses

Petitioner later proffered the testimony of four other witnesses on death threats involving drug debts that were not in any way related to petitioner. These witnesses were Michael McQuarley, Frederick Summers, Tonya Aycock, and Alice Ballard.

McQuarley testified that he was a neighbor of the victims, and that he lived in the mobile home in front of the victim's mobile home. Kim Fauscette was his landlord. McQuarley became suspicious because there was constant "traffic more or less going in and out of their house." R. 531, ll. 3 – 20. Quarley recalled that around August 23, 2005, which also would have been about two weeks before the murders, he witnessed a man "that was in a Neon" grab Fauscette "by her shirt." McQuarley said this man was talking to the victim in a very "disrespectful manner." R. 533, ll. 3 – 24. McQuarley remembered the man demanding, "you owe me, do you have my money." This threatening man was not petitioner. R. 534, ll. 5–17.

Frederick Summers also testified that on Friday, August 26, 2005 or August 27, 2005 he witnessed someone in "a red Neon" arguing with Fauscette. "He was arguing through the door. 'Give me my money.' This and that . . . 'I want my money,' and all this this . . . Then the Neon came very now and then, you know, I'd say every 20 minutes basically. I seen that. Then we pulled off and went back to Lexington Hospital. That Saturday we come back to get some more clothes, and it was surrounded with cops and stuff, and that's when they told us what happened basically, you know." R. 538, ll. 2 – 539, l. 5. Summers also testified the threatening man was big, and he was wielding a stick at the time he made his demands. Summers confirmed the man was not petitioner whom he characterized as "a little dude." R. 537, l. 12 – 539, l. 16.

Tonya Aycock testified she was also questioned about the victim death of the victims, and she gave a statement to the police on September 6, 2005. Aycock told the police she had known

Kim Fauscette for twenty years and that Fauscette was constantly smoking crack cocaine. Aycock testified:

Every time they got paid, it went on crack. They got in debt with Steve Riley. He made it sound like if they didn't pay him, he would take care of them. The other guy, I don't know his name, but [he] made the same comment.

R. 542, ll. 13 – 17.

Aycock said she understood that Steve Riley “would have killed them” if they did not pay him for the drugs he supplied. R. 542, l. 20 – 543, l. 22. As to when this actually happened, Aycock could only say it happened “way before” the murders occurred. R. 544, ll. 19 -22.

Alice Ballard then testified that she rented a mobile home from Kim Fauscette, and she often gave the victim rides to Twelve's house where the victim purchased her crack cocaine. R. 546, l. 9 – 547, l. 20. Ballard also said as a landlord that the victim took crack cocaine “for rent money.” R. 547, l. 21 – 548, l. 6. Ballard recalled that Fauscette was constantly arguing “with the dealers,” and Ballard said she witnessed confrontations between the victim and Twelve over drug money she owed him. R. 548, l. 23 – 549, l. 4. Ballard said on cross-examination all of these incidents with Twelve occurred in 2004. The murders occurred around September 5, 2005. R. 549, ll. 23 – 25.

Defense counsel Baker the proffered testimony showed numerous threats over drug money were made, and Twelve's name was raised by the varying witnesses “over and over.” Counsel noted that Melton was the first witness to testify he had witnessed Twelve threatening the victim. R. 550, l. 12 – 551, l. 3.

The judge ruled that he was not going to allow the testimony of these five witnesses to be heard by the jury. He stated the evidence was “mere conjecture or surmise.” The judge also said the

acts testified to “some two weeks or better” before the murders were not “inconsistent with the defendant’s guilt.” R. 551, l. 10 – 552, l. 17.

After petitioner was convicted defense counsel moved for a new trial on the basis of the exclusion of the testimony of these five witnesses who had seen the drug dealer threatening the victims. R. 609, ll. 10 – 23.

The Court of Appeals ruled that the trial judge listened to the proffered five witnesses and properly concluded the properly ruled the evidence was not admissible under State v. Gregory, 198 S.C. 16 S.E.2d 532 (1941), and that petitioner was not denied his right to offer a complete defense under Holmes v. South Carolina, 547 U.S. 319 (2006) by the exclusion of this evidence of third party guilt. Despite the fact that undersigned counsel was the appellate attorney in State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001) who did not seek certiorari from the United States Supreme Court where Gay was abrogated five years later in Holmes v. South Carolina the panel of the Court of Appeals found petitioner’s reliance on Holmes v. South Carolina for the admission of this misplaced. App. 8-9. Petitioner took strong exception to that holding on rehearing. App. 17-21.

Discussion

In Holmes v. South Carolina, 547 U.S. 319 (2006) the Court held that the exclusion of defense evidence of third-party guilt denied Holmes his constitutional right to present a complete defense. The Court in Court in Holmes abrogated State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001).

The Court in Holmes wrote that while the state and federal rule makers have broad latitude under which to establish rules of evidence that the Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant be given a meaning opportunity to present a complete defense. See Crane v. Kentucky, 476 U.S. 663, 689 – 690 (1986); Chambers v.

Mississippi, 410 U.S. 284 (1973). Consequently, evidentiary rules cannot be arbitrary or disproportionate to the purposes they serve. See Rock v. Arkansas, 483 U.S. 44 (1987).

As petitioner argued in the Court of Appeals, the Court in Holmes held that the state court in State v. Gay and Holmes had sporadically extended the rule of State v. Gregory beyond its meaning. The Gregory rule was that evidence which only cast a bare suspicion upon another was not admissible. State v. Gregory, 198 S.C. 104 – 105, 16 S.E.2d 534 – 535.

The court in Holmes also reasoned that the state court erred by concentrating on the strength of the state's evidence, and its forensic evidence. The United States Supreme Court wrote: "The point is that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." The Court therefore found that the rule excluding the third-party guilt evidence "was arbitrary," and it did not rationally serve the end that the Gregory rule and other similar third-party guilt rules were designed to further.

Here, five unrelated defense witnesses testified in camera to similar threats being made by a drug dealer against the victim. These were all within two weeks of the murder, with the exception of Tonya Aycock who said Steve Riley's death threats were made sometime "way before" the murders, and Ballard's testimony that Twelve's threats were made sometime in 2004.

The *blanket* exclusion of all of this evidence was an abuse of discretion, and as argued infra, it was made on erroneous ground. It was apparent these witnesses took these threats from the drug dealer against the victims very seriously, and they gave the information to the police in their statements. Here, the testimony tended to show it was probable that the victims were killed because of their crack cocaine debts over which they were receiving death threats. Petitioner was

not the person threatening them -- he was not Twelve. This evidence was relevant under Rule 401, SCRE.

There was absolutely no evidence in this case that petitioner was acting in concert with Twelve, or his associates, since none of the five proffered witnesses -- or any of the state's witnesses for that matter -- testified to any connection between petitioner and another person in committing the murders. Counsel also noted there was no forensic evidence linking petitioner to the killings. An accessory after the fact to murder is not a participant in the murder, but one who can be present at the time of the murder and one who subsequently assists the felon with the intent to hinder the felon's detection. See State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998).

Consequently, the proffered evidence was relevant since it tended to make more or less probable some matter at issue upon which it directly or indirectly bears. See State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986). Therefore, for this relevant evidence to have been excluded there must have been a legitimate basis for its exclusion that did not deny petitioner his constitutional right to present a complete defense. The trial judge reasoned that the proffered evidence was not inconsistent with petitioner's guilt. Again, that was erroneous since there was *no evidence of any connection* between Twelve and petitioner, or evidence of petitioner threatening the victims over drug debts. The proffered evidence involving Twelve's threats was clearly inconsistent with petitioner's guilt.

The trial judge found the evidence inadmissible under the standard of Holmes v. South Carolina and State v. Gregory. The Court of Appeals agreed, and petitioner respectfully that was error given the highly unusual facts of this case.

CONCLUSION

Based on the foregoing arguments, a writ of certiorari should be issued as to Questions 1, 2, and 3.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 29th day of April, 2011

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
R. Knox McMahon, Circuit Court Judge

Opinion No. 4765 (S.C. Ct. App. filed 12/15/2010)
05-GS-32-4561, 4563, 4564.

THE STATE,

RESPONDENT,

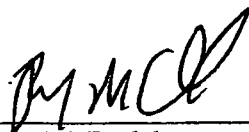
V.

DARRELL BURGESS,

PETITIONER

CERTIFICATE OF SERVICE

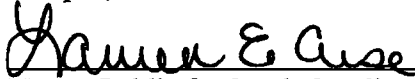
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on William Edgar Salter, III, Esquire, and the S.C. Court of Appeals this 29th day of April, 2011.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 29th day
of April, 2011.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**Appeal From Lexington County
The Honorable R. Knox McMahon, Circuit Court Judge**

THE STATE,

Respondent,

-VS-

DARRELL BURGESS,

Petitioner.

**RETURN TO PETITION FOR WRIT OF CERTIORARI
TO THE SOUTH CAROLINA COURT OF APPEALS**

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PETITIONER'S STATEMENT OF ISSUES ON APPEAL

1. Whether the Court of Appeals erred by holding that the failure of defense counsel to argue he believed the trial judge was mistaken in his belief that he had to take the jurors at their word when they claimed that they could be impartial was procedurally barred on appeal because counsel did not have a duty to argue with the trial court's ruling and the opinion of the Court of Appeals will invite disrespect for the mandate [of] Rule 18(a), SCRCrimP?
2. Whether the Court of Appeals erred by not finding an abuse of discretion where the trial court refused to excuse juror #72, Juror Emanuel, where the juror revealed to the court that he was the supervisor of murder victim David Slice's brother-in-law since defense counsel told the judge he would have removed the juror with a preemptory challenge had he known he was a relative of the murder victim?
3. Whether the Court of Appeals erred by not finding an abuse of discretion where the trial court refused to admit the testimony of witnesses Melton, McQuarley, Summers, Aycock, and Ballard about the victims being threatened over drug debts by another man within weeks of the murder, and also before that, since this evidence of third-party guilty was relevant, and petitioner had the right to present a complete defense under Holmes v. South Carolina?

COUNTERSTATEMENT OF ISSUES PRESENTED

- I. Whether the Court of Appeals properly found that Burgess' argument the trial judge relied on an error of law in denying his motion to disqualify juror # 72 was procedurally barred on appeal because he did not make the same argument in the trial court?
- II. Whether the Court of Appeals properly held that the trial judge did not abuse his discretion by denying Burgess's motion to disqualify juror # 72, Joseph Emanuel, where the juror revealed to the court after jury selection that he was the supervisor of victim David Slice's former brother-in-law because the record supports his findings that the juror did not intentionally conceal this information on *voir dire*, and that the juror could be fair and impartial to both Burgess and the State despite the working relationship with the former brother-in-law?
- III. Whether the Court of Appeals properly held that the trial judge did not abuse his discretion by refusing to allow Burgess to present evidence of third-party guilt because the proffered evidence was not inconsistent with Burgess' guilt and merely cast a bare suspicion and raised a conjectural inference as to the commission of the crime by another person?

RESPONDENT'S ADDITIONAL SUSTAINING GROUND

- I. Is Burgess's first argument preserved for appellate review where the issue, as stated in the Statement Of Issues On Appeal, was not presented in the trial court? (*See* Argument I).

STATEMENT OF THE CASE

Petitioner, Darrell Burgess, (Burgess) is incarcerated in Lee Correctional Institution, of the South Carolina Department of Corrections. The Lexington County Grand Jury indicted Burgess at the December 2005 term for two counts of murder (05-GS-32-4561 & -4563) and possession of a firearm or knife during the commission of a violent crime (05-GS-32-4564). These charges stemmed from the September 2005 deaths of David Slice and Kim Fauscette, the victims.

On January 28-February 1, 2008,¹ Burgess received a jury trial on these charges before the Honorable R. Knox McMahon. Jack Bradley Baker, Esquire, represented him on these charges, Deputy Eleventh Circuit Solicitor Samuel R. Hubbard and Assistant Solicitor Robert M. Madsen represented the State. The jury convicted Burgess of each of the charged offenses. Judge McMahon sentenced him to life imprisonment without parole for each of the murder convictions and a five year sentence on the weapons charge.

Burgess timely served and filed a notice of appeal. Chief Appellate Defender Robert M. Dudek represents Burgess on appeal. Burgess filed his Final Brief of Appellant on June 23, 2009. Respondent, represented by the undersigned, submitted the Final Brief of Respondent on July 13, 2009. Following oral argument, the Court of Appeals filed an Opinion affirming Burgess' convictions and sentence on December 15, 2010. *State v. Darrell Burgess*, Op. No. 4765 (S.C. Ct.App., Dec. 15, 2010). App. pp. 1-9. This decision is published as *State v. Burgess*, 391 S.C. 15,703 S.E.2d 512 (2010). Burgess filed a Petition for Rehearing on December 30, 2010 (App. pp.

¹ The trial transcript and Burgess' Statement of the Case mistakenly represent that the trial ended on March 1, 2008. However, the Certificate of the Court Reporter reflects that the trial was actually held on "the 28th through the 31st days of January and the 1st day of February, 2008."

10-22), which the Court of Appeals denied in a January 28, 2011 Order Denying Petition for Rehearing. App. p. 23.

ARGUMENTS

I. The Court of Appeals properly found that Burgess' argument the trial judge relied on an error of law in denying his motion to disqualify juror # 72 was procedurally barred on appeal because he did not make the same argument in the trial court. Also, his entire argument is procedurally barred because the issue as stated in his "Statement Of Issues On Appeal" was not presented in the trial court. (Petitioner's Issue 1; Respondent's Additional Sustaining Ground).

Burgess first argues that the Court of Appeals erroneously held that his argument the trial judge relied on an error of law in denying his motion to disqualify juror # 72 was procedurally barred on appeal because he did not make the same argument in the trial court. Characterizing this bar as the failure of his attorney "argue he believed the trial judge was mistaken in his belief that he had to take the jurors at their word when they claimed that they could be impartial," he asserts error "because counsel did not have a duty to argue with the trial court's ruling and the opinion of the Court of Appeals will invite disrespect for the mandate [of] Rule 18(a), SCRCrimP." Respondent submits that his claim lacks merit and that the Court of Appeals properly determined that this portion of his argument was procedurally barred.

Alternatively, Respondent submits that his challenge to the rial judge's ruling on the motion to disqualify juror # 72, Juror Emanuel - where the juror revealed to the court after voir dire that he was the supervisor of victim David Slice's estranged brother-in-law - is not preserved for appellate review because the issue, as stated in Burgess' "Statement Of Issues On Appeal," was not presented in the trial court.

A. How issue was raised in the trial court.

After the case was called for trial, the trial judge read each of the indictments (05-GS-32-

4561, -4563 & -4564) to the venire and explained that Burgess was charged with killing David Slice and Kim Fauscette on September 5, 2005, with malice aforethought. **R. pp. 4-5.**

He then asked the following questions, to which juror #72, Mr. Joseph Emanuel, did not respond:

- Is any member of the jury panel related by blood or marriage or close personal friends of the Defendant in this case?
- Is any member of the jury panel or a member of your immediate family were they *close personal friends of the victims* named in the indictment, either David Slice or Kim Fauscette?
- Does any member of the jury panel *have any knowledge about the case*?
- Does any member of the jury panel *have any bias or prejudice towards the parties*, that being *either the State or the Defendant or the subject matter involved* in this case?
- Has any member of the jury panel *heard or know anything about the case from any source whatsoever*?

R. p. 8, l. 17-p. 9, l. 20. (Emphasis added).² Juror Emanuel was the sixth juror selected. **R. p. 2.**³

Before any testimony was presented to the jury, the Clerk informed the trial judge that juror Emanuel had approached her in the hallway and said that he needed to let the trial judge know he had recognized the face of a woman in the gallery. He did not know the woman's name, but he worked with someone related to the woman and he wanted to speak to the trial judge about it. **R. p. 36, l. 13-p. 37, l. 2.** The Deputy Solicitor agreed with the trial judge that it would be prudent to

² The only question to which any juror responded was the inquiry as whether any venireman had any knowledge about the case.

³ Thereafter, juror # 244, Ms. Weiss came forward and informed the trial judge that she had not recognized Burgess' name. However, "the more I look at him, I believe he has been in my home, but I don't know for sure." She explained that there was a pond in her back yard that people used frequently. She further stated that she could be fair and impartial. Neither party made a motion to disqualify, and defense counsel stated that Burgess had denied going to her home. Therefore, the trial judge left her on the jury. **R. p. 31, l. 2-p. 33, l. 8.**

speaking with the juror, and he assured the court and opposing counsel that the victims' family were being brought into Court to see whether it was a family member whom the juror had recognized.

R. p. 37, ll. 3-9.

Juror Emanuel then entered the courtroom, and the trial judge asked him to repeat what he had told the Clerk. Juror Emanuel stated that he had realized that someone with whom he worked was a victim's "family member here." He explained that he had recognized Georgette Splice when the jury was released the previous evening, that her brother worked for him, and that he was her brother's supervisor. However, he stated that he could still be a fair and impartial juror to both the State and to Burgess. R. p. 37, l. 16-p. 38, l. 24. After juror Emanuel had left the courtroom, the trial judge asked if either party requested further *voir dire*. Burgess' counsel asked the trial judge to inquire about whether juror Emanuel had discussed this with any other jurors, and he moved to have juror Emanuel removed for cause. In response to the trial judge's inquiry about the relationship between David and Georgette Slice, the State explained that she was his "estranged wife" but they were still married. R. p. 39, l. 3-p. 40, l. 1.

The trial judge brought juror Emanuel back into the courtroom and questioned him further. Juror Emanuel stated that he had not discussed this matter with "anyone in the jury room" either before or after discussing it with the judge. He also explained that the co-worker's name was Eugene Ford; that he had not heard anything about the case; that he did not even know that the murders had occurred; and that he had simply "put names and faces together, Slice. I just recognized the face." However, he still did not have "any recollection of any knowledge about the case;" and he could still be "a fair and impartial juror to both the State and the defense." R. p. 40, l. 2-p. 41, l. 15.

Once juror Emanuel left the courtroom, Burgess' counsel renewed his request for the trial judge to remove juror Emanuel for cause. Burgess argued that since juror Emanuel supervised a

victim's family member, "it's human nature that he could not be fair and impartial. The State maintained that juror Emanuel had properly responded that he could still be fair and impartial, and that he had stated that he heard anything about the case. The State urged that it was "telling" that his co-worker had not told him about the murder of an estranged brother-in-law. **R. p. 41, l. 22-p. 42, l. 15.** The trial judge denied Burgess' motion based upon *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983). He stated that:

I think I have to take jurors at their word. I can't second-guess that. That's why I even went and asked him once he put the face and name together if he recollected anything about the facts of the case, and he says he knows nothing. I can't sit up here and decide that jurors want follow the law.

R. p. 42, ll. 20-25. Burgess' counsel was then allowed to place on the record that he would have used a peremptory challenge to strike juror Emanuel if he had known about the disclosed information. He further argued that juror Emanuel's presence on the jury prejudiced Burgess. However, he did not suggest, much less argue, that the trial judge's statement that "I think I have to take jurors at their word. I can't second-guess that" was erroneous as a matter of law. **R. 43, ll. 1-11.**

The trial judge later questioned juror # 184, Alan Pinner. Juror Pinner had written a note stating that he had been friends with another sister of David Slice "for about six years;" that he was just now realizing how much he already knew about the case; and that he did not think that he could be fair and impartial. In response to the trial judge's questioning, juror Pinner stated that the note was correct, and that he had not said anything about this to any other jurors. After the trial judge excused juror Pinner, juror Pinner explained that "[i]t was the last names. I wasn't sure. Then I started putting two and two together." **R. p. 118, l. 9-p. 119, l. 22.** Burgess moved for a mistrial because this juror was the foreman of the jury and he was the second juror who may know the victim's family or something about the case that was not revealed on *voir dire*. Alternatively, he asked the trial judge

to poll remaining petit jurors to determine whether any other jurors may know something about the case.

R. p. 121, l. 15-p. 122, l. 10.

The trial judge found that (1) this juror's situation differed from that of juror Emanuel because juror Emanuel stated that he realized that he supervised David Slice's brother-in-law when he saw a woman in the audience, but he stated that he could still be fair and impartial; (2) Juror Pinner realized that he knew David Slice "once the evidence unfolded," and stated that he could not be fair; (3) "David Slice" may not be an uncommon name in Lexington County in general and in specific parts of Lexington County also;" and (4) neither juror had discussed the issue with other jurors. Therefore, he denied Burgess' motion. **R. p. 122, l. 11-p. 123, l. 13.** When the petit jury returned to the courtroom, however, he asked jurors the following question: "I ask each of you, has any member of the jury panel heard anything about this case from any source whatsoever, besides what you have heard in the courtroom this week. No jurors responded to his query. **R. p. 124, ll. 20-25.**

After the verdict and the polling of the jury, Burgess made a new trial motion based upon the trial judge's failure to remove juror Emanuel for cause. He asserted that he was denied due process because the failure of the juror to timely disclose this relationship deprived him of an opportunity to strike the juror and denied him the right to a fair trial. Again, however, he failed to argue that the trial judge's denial of the motion to remove juror Emanuel was controlled by an error of law. **R. p. 606, l. 22-p. 607, l. 11.** The trial judge denied the motion. He observed that he had inquired on voir dire whether any member of the panel knew the victims or if they were related by blood or marriage or if they were close friends with the victims. Juror Emanuel stated that he recognized the estranged spouse sitting in the courtroom after jury selection, and that he worked with David Slice's brother-in-law. He further found that the wife was not called as a witness. Further, the trial judge had

questioned juror Emanuel; juror Emanuel stated that he could be fair and impartial; and Burgess did no request additional voir dire when given an opportunity to do so. R. p.607, l. 12-p. 163, l. 6.

B. The Court of Appeals' ruling.

On appeal, the Court of Appeals held that the trial judge did not abuse his discretion in not removing juror Emanuel because the trial judge does not automatically require to remove a juror who has some relationship with the victim the juror; juror Emanuel "did not conceal any information requested during voir dire; . . . [and], the judge acted within his discretion in finding the juror could be fair and impartial." *Burgess*, 391 S.C. at 18-19, 703 S.E.2d at 514. The Court also found that Burgess' reliance upon this Court's decision in *State v. Stone*, 350 S.C. 442, 567 S.E.2d 244 (2002), was misplaced and that the "juror's failure to disclose the information was innocent." *Burgess*, 391 S.C. at 19-20, 703 S.E.2d at 514-15. The Court further found that Burgess' argument the trial judge relied on an error of law in denying his motion to disqualify was procedurally barred because he did not make the same argument in the trial court. *Id* at 20-21, 703 S.E.2d at 515.

C. The Court of Appeals properly found that Burgess' argument was procedurally barred because not raised in the trial court. Alternatively, his Argument II is procedurally barred in its entirety because the issue, as stated in the Statement Of Issues On Appeal was not presented in the trial court.

Notwithstanding Burgess' contrary argument, Respondent submits that Court of Appeals properly found that Burgess' argument the trial judge applied the wrong legal standard in deciding not to remove the juror was procedurally barred because not raised in the trial court. Without the objection being raised, "we cannot determine the correct context in which to interpret the comment[,] . . . [and] even if he was addressing the standard for removing the juror, we cannot determine that he applied the wrong standard." *Id* at 20-21, 703 S.E.2d at 515. Rather than inviting disrespect for Rule 18(a), SCRCrimP., as Burgess claims, the Court of Appeals made a straightforward application

of a basic rule of appellate procedure that is necessary to an orderly administration of the judicial system. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments"). In addition to the citations and analysis set forth by the Court of Appeals, Respondent would cite *State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) and *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001).

Alternatively, Respondent submits that Burgess' **Argument II** is procedurally barred in its entirety because the issue, as stated in the Statement Of Issues On Appeal, was not presented in the trial court. Burgess set forth his first issue as follows:

- I. Whether the trial court abused its discretion by refusing to recuse juror # 72, Juror Emanuel, where the juror revealed to the court that he was the supervisor of murder victim David Slice's brother-in-law since defense counsel told the judge he would have removed the juror with a peremptory challenge had he known he was a relative of the murder victim?

IBOA, p. 3. However, he never raised any contention in the trial court that Juror Emanuel had been related to David Slice, and he did not present any evidence to support this contention. Also, there was absolutely no evidence that David Slice's estranged brother-in-law, Mr. Ford, served as a petit juror.⁴ Therefore, he is raising an argument that was not raised below and his argument is not preserved for appellate review. *Id. See also State v. Torrence*, 305 S.C. 45, 60-71, 406 S.E.2d 315, 324-29 (1991) (Toal, J., concurring in result and joining Justice Chandler's concurrence in result).

⁴ While it might be tempting to dismiss this as a typographical error, he has premised part of his argument on whether trial counsel would have been ineffective if he had knowingly failed to strike the victim's brother-in-law. *See Petition*, p. 16; *IBOA*, p. 12. ("Defense counsel would have been ineffective to not have struck the brother-in-law had he know[n] he was a relative of the victim").

- II. The trial judge did not abuse his discretion by denying Burgess's motion to disqualify juror # 72, where the juror revealed to the court after jury selection that he was the supervisor of victim David Slice's estranged brother-in-law because the record supports the trial judge's findings that the juror did not intentionally conceal this information on *voir dire*, and that the juror could be fair and impartial to both Burgess and the State despite the working relationship with the brother-in-law.

Alternatively, his argument must be rejected because the trial judge did not abuse his discretion in denying Burgess' motion. The applicable law was set forth in *Smith v. State*, 375 S.C. 507, 518-20, 654 S.E.2d 523, 529-30 (2007):

"[A] criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury." *Palacio v. State*, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999). "[I]n order to fully safeguard this protection, it is required that the jury render its verdict free from outside influences of whatever kind and nature." *State v. Bryant*, 354 S.C. 390, 395, 581 S.E.2d 157, 160 (2003) (quoting *State v. Cameron*, 311 S.C. 204, 207, 428 S.E.2d 10, 12 (Ct.App.1993)).

"To protect both parties' right to an impartial jury, the trial judge must ask potential jurors whether they are aware of any bias or prejudice against a party." *State v. Woods*, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001). "When a juror conceals information inquired into during *voir dire*, a new trial is required only when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges." *Id.* "Where a juror, without justification, fails to disclose a relationship, it may be inferred, nothing to the contrary appearing, that the juror is not impartial. On the other hand, where the failure to disclose is innocent, no such inference may be drawn." *Id.* at 586-87, 550 S.E.2d at 284.

"Determining whether a juror's failure to respond to a *voir dire* question amounts to intentional concealment is a 'fact intensive determination that must be made on a case-by-case basis.'" *State v. Guillebeaux*, 362 S.C. 270, 274, 607 S.E.2d 99, 101-02 (Ct.App.2004)(quoting *State v. Sparkman*, 358 S.C. 491, 496, 596 S.E.2d 375, 377 (2004)). "Intentional concealment occurs 'when the question presented to the jury on *voir dire* is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable.'" *Id.* "Concealment is considered unintentional where the *voir dire* question posed is ambiguous or incomprehensible to the average juror or where 'the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances.'" *Id.*

Here, the Court of Appeals properly found, *Burgess*, 391 S.C. at 17-20, 703 S.E.2d at 513-15, that the trial judge did not abuse his discretion by denying Burgess' motion to disqualify juror Emanuel for cause because the record supports his findings that the juror did not intentionally conceal this information and that the juror could be fair and impartial to both Burgess and the State despite this relationship with the former brother-in-law. *Smith*, 375 S.C. at 518-20, 654 S.E.2d at 529-30. See also *Elmore*, 279 S.C. at 420, 308 S.E.2d at 784. While the trial judge did ask on voir dire whether any venireman or a member of the venireman's "immediate family were ... close personal friends of the victims," neither this question nor the other inquiries asked whether any venireman had a business or working relationship with either victim's family members. See R. p. 8, l. 17-p. 9, l. 20. *Burgess*, 391 S.C. at 18-19 & n. 2, 703 S.E.2d at 514 & n. 2.⁵

Thus, the present case is readily distinguishable from *State v. Woods*, 345 S.C. 583, 587-90, 550 S.E.2d 282, 284-86 (2001), where the Court concluded that Juror B intentionally failed to disclose on voir dire that she had "worked as a volunteer victims' advocate for a period of three years in the solicitor's office which prosecuted the case" where one question "unambiguously sought a response from any juror having a business association with any of the attorneys trying the case" and an honest answer to a second question should have revealed that "Juror B had for three years performed volunteer work for an organization whose primary function was the protection of victims'

⁵ Further, the brother-in-law's name is Eugene Ford; and there is nothing in the record to refute juror Emanuel's representations that he did not know anything about the case and that he did not even know that the murders had occurred. Rather, he had simply "put names and faces together." Thus, it cannot reasonably be said that "the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable." See *Smith*, 375 S.C. at 518-19, 654 S.E.2d at 529; see also *Stone*, 350 S.C. at 448-49, 567 S.E.2d at 247-48; *State v. Galbreath*, 359 S.C. 398, 403-04, 597 S.E.2d 845, 847-848 (Ct.App. 2004). This is particularly true where nothing in the record supports the conclusion that juror Emanuel had a close personal relationship with Mr. Ford or his sister (Mr. Slice's estranged wife); Mr. Ford apparently never mentioned the murder of his estranged brother-in-law; and juror Emanuel had not heard anything about the case.

rights.”⁶ Instead this case is like *Smith* and *Galbreath* because the trial judge’s *voir dire* did not specifically inquire about any potential juror’s relationship with the victims’ family members; juror Emanuel did not have “any recollection of any knowledge about the case;” and he indicated that he could still be “a fair and impartial juror to both the State and the defense,” in spite of his working relationship with Mr. Ford.

Burgess’s argument that the trial judge erred as a matter of law by finding that he had to deny the motion based on *Elmore* lacks merit because the Court of Appeal correctly found that *Elmore* states that “[t]he qualification of a prospective juror is addressed to the sound discretion of the trial judge, whose decision will not be disturbed unless wholly unsupported by the evidence.” 279 S.C. at 420, 308 S.E.2d at 784. “Trial judges are presumed to know the law and to apply it in making their decisions.” See *Walton v. Arizona*, 497 U.S. 639, 653 (1990); *State v. Ray* 310 S.C. 431, 437, 427 S.E.2d 171, 174-75 (1993). Despite Burgess’ contrary argument, the record does not demonstrate that the trial judge failed to exercise his discretion. Further, because Burgess’ motion required a “fact intensive determination that must be made on a case-by-case basis.” *Guillebeaux*, 362 S.C. at 274, 607 S.E.2d at 101-02, this Court should defer to his credibility determination. See *State v. Woods*, 382 S.C. 153, 159, 676 S.E.2d 128, 132 (2009) (in reviewing juror qualification issues on direct appeal, “[d]eference must be paid to the trial court who saw and heard the juror”); *Smith*, 375 S.C. at 519-20, 654 S.E.2d at 530.

Further, juror Emanuel’s representations to the trial judge are un-refuted by the current record. Also, the trial judge’s finding that “I can’t sit up here and decide that jurors won’t follow the

⁶Also, Juror B. “offered inconsistent explanations for her failure to respond” to the second question;” and “she responded affirmatively to a similar question on *voir dire* at a later trial during the same term of court.” *Id.*

law," see R. p. 42, ll. 20-25, is a correct understanding of the law. "The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." *Francis v. Franklin*, 471 U.S. 307, 324 n. 9 (1985).⁷

Finally, Burgess's claim that the trial judge's ruling violated his right to due process is not properly before this Court because it was not raised by a contemporaneous objection or motion, and it was first raised in his new trial motion. See *State v. Robinson*, 238 S.C. 140, ___, 119 S.E.2d 671, 676 (1961) ("a defendant may not reserve vices in his trial, of which he has notice as here, taking his chances of a favorable verdict, and in case of disappointment, use the error to obtain another trial"); *State v. Lynn*, 277 S.C. 222, 226, 284 S.E.2d 786, 789 (1981); *State v. Heavener*, 146 S.C.

⁷ See also *United States v. Olano*, 507 U.S. 725, 740 (1993) ("[It is] the almost invariable assumption of the law that jurors follow their instructions") (citing *Richardson v. Marsh*, 481 U.S. 200, 206 (1987)). This rule "is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process." *Richardson*, 481 U.S. at 211.

Burgess' contention that "[d]efense counsel would have been ineffective to not have struck the brother-in-law had he know[n] he as a relative of the victim" is also procedurally barred under *Bailey* because he did not raise it in the trial court. Further, it lacks merit because the brother-in-law was never a juror. Also, the argument has no place on direct appeal, even assuming Burgess' argument relates to striking the brother-in-law's employer, Mr. Emanuel, because ineffective assistance of counsel claim should not be addressed on direct appeal. Rather, the proper forum for resolution of such a claim is in Post-Conviction Relief. See S.C. Code Ann. §§ 17-27-10, *et seq.* - 120 (1985). See *State v. Kornahens*, 290 S.C. 281, 287, 350 S.E.2d 180, 184 (1986).

Moreover, his argument is a red herring, since counsel would not necessarily be ineffective for not striking the juror under *Strickland v. Washington*, 466 U.S. 668 (1984), if he had a reasonable strategy for not striking the juror even if counsel had knowledge that Mr. Emanuel was the brother-in-law's supervisor. His argument in this regard is predicated upon a number of assumptions. He assumes that: (1) the two men had a good *personal* relationship, as opposed to simply a *working* relationship; (2) Mr. Emanuel, as a supervisor, would worry - or even learn - about the personal feelings of his subordinate employee, Mr. Ford; (3) Mr. Ford had a good personal relationship with his sister; and (4) Mr. Ford cared about whether the perpetrator was prosecuted for killing Slice. All of these assumptions are dubious, *at best*, particularly the last one. It was Slice's crack use that had apparently caused dissolution of his marriage to Ford's sister and led him to be living with another woman at the time he was murdered.

138,143 S.E. 674 (1928); *Cooper v. Armour & Co.*, 178 S.C. 117, 182 S.E. 298 (1935). Therefore, the trial judge's ruling must be affirmed.

III. The Court of Appeals properly held that the trial judge did not abuse his discretion by refusing to allow Burgess to present evidence of third-party guilt.

Burgess's remaining allegation is that the trial judge erred by refusing to allow Burgess to present evidence of third-party guilt. However, there was no abuse of discretion because the proffered evidence was not inconsistent with Burgess' guilt and merely cast a bare suspicion and raised a conjectural inference as to the commission of the crime by another person.

A. Events at trial.

In a pretrial hearing, the State notified the trial judge that it had filed a motion as to Burgess' presentation of evidence of third-party guilt, but the State did not think that it was necessary for the trial judge to address the motion at that time. R. p. 34, ll. 3-6. Although Burgess agreed that it was unnecessary to address the matter at that time because most of this evidence would be presented by defense witnesses, he informed the trial judge that the issue would be raised on his cross-examination of one of the State's first witnesses, Michael Melton, because Melton had given a statement indicating that he had seen the victims threatened on several occasions, by someone other than Burgess. R. p. 34, ll. 12-25.

The State explained that Melton was the victims' roommate, and that he had indicated that the victims had "a dispute with an individual they knew as Twelve at various times." The State added that Melton was going to be the first witness, and it maintained that Burgess' proposed cross-examination of Melton involved inadmissible evidence of third-party guilt because "it just casts some bare speculation that since they've had disputes in the past with Twelve, . . . over drug debts, that [this] means that Twelve is the person [who committed the murders]." R. p. 35, ll. 3-13; p. 35,

l. 21. The trial judge suggested receiving the disputed portion of Melton's testimony *in camera*. **R. p. 35, ll. 14-20.** Burgess indicated that, depending upon the trial judge's ruling, he might need to proffer other witnesses *in camera*. **R. p. 35, l. 23-p. 36, l. 1.**

After the prosecution had completed its direct examination of Michael Melton, the trial judge entertained Burgess' *in camera* proffer of the third-party guilt evidence that he planned to elicit on cross-examination. Mr. Melton testified that he only lived with David Slice and Kim Fauscette for roughly "two and a half months." He knew that they were "heavy drug users," who "regularly [had] drugs delivered to their house." Immediately after the murder, he thought that the killings were drug related. **R. pp. 84-85.**

In his statement to law enforcement after the murder, he indicated that the victims "would go deep in debt with certain drug dealers, and [he] often [was] concerned about how" the victims would be able to repay this debt. While they did not "go extremely in debt, . . . they would go from person to person." Mr. Melton even witnessed some threats and altercations between the victims and drug dealers. **R. p. 85.** In one instance, he saw a drug dealer whom he knew as "Twelve" demand money. Twelve came in and told Mr. Slice that "he was going to get paid one way or the other." Then, he "jacked up David [Slice] and demanded that he get his money." Twelve was "pretty upset" on this occasion. Also, "Twelve" was not Burgess. **R. pp. 85-86.⁸** Melton testified on cross-examination that the incident with "Twelve" and David Slice was "a few weeks" before he left

⁸ Melton also testified that Kim told him that Twelve had threatened her, and that he had forced her to give him some money. However, he denied that he had ever told Burgess that he knew who had killed the victims. He also denied touching the victims or handling a weapon in the eighteen hours after he returned from North Carolina and before he realized that the victims were dead. He did know that Mr. Slice had once sold his car to buy drugs. Also, Mr. Slice once told him that Slice did not owe any money to Burgess. However, Burgess owed money to Mr. Slice. **R. pp. 86-88.**

town.⁹ Also, his *only* knowledge about any confrontation between Kim and "Twelve" was entirely based on what she had told him. Mr. Melton's knowledge of why David Slice sold the car was also based on something that was told to him. R. pp. 88-89.

Burgess asked the trial judge to allow him to present the jury with the proffered evidence. He argued that "multiple witnesses" in the case had told law enforcement that the victims were "deeply in debt . . . to certain drug dealers," and that "[t]he name of Twelve has come up on multiple occasions." Therefore, the evidence was admissible. R. p. 89, ll. 9-20. The State, however, quoted extensively from the South Carolina Supreme Court's decision in *State v. Gregory*, 198 S.C. 98, 16 S.E.2d. 532 (1941), and the United States Supreme Court's decision in *Holmes v. South Carolina*, 547 U.S. 319 (2006). It argued that Burgess' proffer did not meet the standard for admissibility set forth in those cases for the admission of third-party guilt evidence. R. p. 90, l. 8 - p. 91, l. 11.

In response, Burgess noted that there was "no forensic evidence linking him to this crime." Also, a number of witnesses had indicated that Twelve had threatened the victims on several occasions, and he maintained that *Holmes* had held that a defendant has a constitutional right to present a complete defense. Therefore, the evidence should be admitted. R. p. 91, l. 25 - p. 92, l. 25.

However, the trial judge ruled that "I am not going to allow it at this time. This is not to indicate that I am going to allow it at a later time." He found that the proffered evidence was conjectural at that point and that it did not reach the standard of *Gregory* or *Holmes*. Despite this ruling, the trial judge held that Burgess could cross-examine Melton about matters that did not

⁹ He testified before the jury that he had gone to North Carolina to visit his daughter on the "Wednesday prior" to Labor Day 2005, and that he had returned on Monday. R. pp. 58-59. A review of calendar for 2005 reflects that the Wednesday before Labor Day was August 31, 2005. Thus, the incident he witnessed occurred almost three weeks before the murders.

directly involve third-party guilt, including whether Melton had told Burgess that Melton knew who had committed the offense.¹⁰ Also, the trial judge ordered that Melton remain under subpoena, so that he would be available if Burgess presented third-party guilt evidence that was not conjectural.

R. pp. 93-95.

As part of his case-in-chief, Burgess later proffered evidence of third-party guilt from Michael McQuarley, Frederick Summers, Tonya Aycok, and Alice Ballard. McQuarley testified that he had previously lived in the trailer in front of the victims for roughly a month; but he was in the hospital when the murders occurred. While living there, he had seen "traffic more or less going in and out from the house." One day, he saw an individual arguing with Kim Fauscette. R. p. 530, l. 17 - p. 274, l. 3.

Mr. McQuarley had given a statement to law enforcement shortly after the murders, in which he described seeing a man confront Kim and the man arrived in a Neon car on April 23, 2005. This man and Kim argued over money. He called her a "bitch" and was rude to her. Kim did not say much in reply. When she turned to walk away from him, the man grabbed her by the shirt. However, McQuarley lost sight of them when they walked behind the trailer. The man involved in the August 23rd incident was not Burgess, and Quarley had never seen him before. On cross-examination, he admitted that he did not know what happened after "Kim and the man walked behind the trailer, and that he had not called law enforcement based on what he had seen". R. p. 532, l. 4 - p. 535, l. 18.

Frederick Summers testified that he had been the victims' neighbor for about two months in 2005. On Friday, August 26, 2005, and again around 10:30 a.m. on Saturday, August 27, 2005, he

¹⁰ Melton denied having said this when asked before the jury. R. p. 104, ll. 10-13.

saw a black man standing in the doorway of Kim's trailer. On Saturday, Kim and McQuarley had just returned. As Summers was leaving to go to the hospital, he saw a red Neon parked in the driveway of Kim's residence, with a white male in it.¹¹ The black male was arguing through the door of Kim's trailer and saying he wanted his money.¹² This man was not Burgess and was bigger than Burgess. Then, Mr. Summers left to go to the hospital. R. p. 536, l. 12 - p. 539, l. 16. On cross-examination, Mr. Summers admitted that he did not know at whom the black man had been yelling because the trailer door was closed. He did not know if the man was yelling at Kim, David or the person who was living with them at the time (Melton). R. p. 539, l. 23 - p. 540, l. 10.

Tonya Aycock testified about incidents that occurred roughly one year before the victims were murdered. She had also been questioned by law enforcement after the murders. She told law enforcement that she had known Kim for over twenty years. When Kim returned to South Carolina from Georgia, she started using crack. When she became involved with David Slice, her addiction became worse; and they would spend whatever money they had on crack. R. p. 540, l. 20 - p. 542, l. 13; p. 547, ll. 9-14.

The victims "got in debt with Steve Riley. He made it sound like if they didn't pay him, he would take care of them." She thought that Riley had meant that he would kill the victims if they did not pay him. Riley made this comment to Ms. Aycock at Sharpe's store "way before the murders." R. p. 542, l. 13 - p. 543, l. 11; p. 544, ll. 3-22. One day, "probably a year before" the victims were murdered, Ms. Aycock gave Kim a ride home. A "big, stocky guy" entered Kim's trailer without knocking and said "if David didn't have his \$250.00, then he would come blast the

¹¹ The Neon had come by at twenty minute intervals on several occasions that day.

¹² In his statement, Summers had described the black male as "yelling and screaming" for his money, and the man was holding a stick.

place up." Ms. Aycock last spoke to Kim on the Saturday before the murders, when Kim called her about pawning a mirror. R. p. 543, ll. 12-22; p. 544, l. 24 - p. 545, l. 14.

Alice Ballard testified that she also was questioned by law enforcement after the murders and that she had given a statement. Kim Fauscette was her landlord and David Slice was Kim's "live-in boyfriend." Ms. Ballard indicated in her statement that Kim had met David about a month after Ms. Ballard began renting from Kim. Over a period of time, Kim began asking Ms. Ballard to take her places. Although Ms. Ballard was unaware of this at first, she later discovered that Kim was getting crack at these places. "Several times she would have me take her to a man named Twelve's house. Sometimes she would ask me to take her a mobile home directly across the street from Sharpe's store." Kim began using crack more heavily in November, 2004. R. p. 546, l. 9 - p. 547, l. 20.

Kim eventually allowed crack dealers to move into her trailer and sell drugs. She would accept crack in lieu of rent payment. Because traffic had rapidly increased at the residence, Kim and David decided to have the crack dealers deliver the crack to their trailer. Ms. Ballard was concerned for her safety and that of her children because Kim "would argue with the dealers." Kim told Ms. Ballard "of her past," and Ms. Ballard "was scared" that Kim would evict her if she did not do what Kim asked. Ms. Ballard witnessed three confrontations over money and drugs. One confrontation was over the telephone, and the other two were in the front yard. R. p. 547, l. 21 - p. 549, l. 1.

Ms. Ballard witnessed a confrontation between Kim and a dealer who lives across the street from Sharpe's store. Also, another confrontation happened in the front yard of this person's house in October 2004. In November 2004, she witnessed two confrontations. The first occurred when someone named "Mack" tried to sell Kim and David a rock that he had picked up off of the ground as crack cocaine. The other occurred when Kim confronted a "Tim" over money that *he owed* Kim.

On cross-examination, Ms. Ballard testified that all of the events that she had related occurred in 2004 because she had moved out after six months. R. p. 549, l. 2 - p. 550, l. 1.

Burgess argued that the witnesses had testified to repeated threats by "Twelve," a man who lived across from Sharpe's store and "some folks that drive a red Neon." He argued that a number of witnesses had seen the victims threatened and that some of the threats occurred "in close proximity to the time of these murders. Mr. Melton had testified that Twelve had a confrontation with David, and "I would argue in order to put up a complete defense that the jury ought to have the opportunity to hear this evidence." R. p. 550, l. 12 - p. 564, l. 3.

After listening to the State's argument opposing introduction of this evidence (R. p. 551, ll. 5-9), the trial judge ruled that it was inadmissible. He found that:

THE COURT: As I understood the testimony of Mr. Michael McQuarley, Fred Summers, Tonya Aycock, and Alice Ballard, none of that testimony can be received unless there is such proof of a connection with that testimony in such a train of facts or circumstances as tends clearly to point out such other persons as the guilty part.

Remote acts disconnected outside the crime itself cannot be separately provided for such a purpose. An orderly and unbiased judicial inquiry as to the guilt or innocence of the Defendant on trial will not contemplate that such defendant be permitted by way of defense to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial or by the fanciful analogy to say to the jury that someone other than he is more probably guilty.

It's clear that the evidence offered through these witnesses to the commission of a crime or the crimes by another person must be limited to such facts that are inconsistent with this own guilt, and none of these rise to that level. Such facts must raise a reasonable inference or presumption as to his own innocence.

Evidence which can have no other effect than to cast a bare suspicion upon another or to raise a conjectural inference as to the commission of the crime by another is not admissible. It's clear some of these acts are in 2004 and before.

Even the act testified to by Mr. McQuarley and Mr. Summers on August 23rd, some two weeks or better prior thereto is not inconsistent with the Defendant's guilt. It's more conjecture or surmise.

I think there is a long line of cases in South Carolina, a prodigy of the *Gregory* standard, and that's what I apply. I would not allow the testimony of Mr. McQuarley, Summers, Aycock or Ballard.

R. p. 551, l. 16 - p. 552, l. 21.

Burgess subsequently raised the trial judge's ruling on the proffered evidence as part of his motion for a new trial. The trial judge denied his motion. Again, the trial judge stated that he had applied the *Gregory* rule that "was elucidated by *Holmes*" and the *Gregory* prodigy. R. p. 609, l. 10 - p. 610, l. 7.

B. The trial judge did not abuse his discretion.

The Court of Appeals correctly analyzed this issue, rejecting it as follows: "

The United States Constitution guarantees a criminal defendant the right "to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). This right is also guaranteed by our State constitution: "Any person charged with an offense shall enjoy the right ... to be fully heard in his defense...." S.C. Const. art. I, § 14 (2009). See S.C.Code Ann. § 17-23-60 (2003) ("Every person accused shall, at his trial, be allowed ... to produce witnesses and proofs in his favor...."); *State v. Lyles*, 379 S.C. 328, 341, 665 S.E.2d 201, 208 (Ct.App.2008). In *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), the United States Supreme Court stated: "Few rights are more fundamental than that of an accused to present witnesses in his own defense." 410 U.S. at 302, 93 S.Ct. 1038. However, the right to introduce even relevant evidence "is not unlimited, but rather is subject to reasonable restrictions." *U.S. v. Scheffer*, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998). The exclusion of witness testimony does not violate a defendant's constitutional right to present evidence so long as the evidence rules are "not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Id.* (quoting *Rock v. Arkansas*, 483 U.S. 44, 56, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)). In this case, Burgess's argument that his right to present a defense was violated is refuted by the trial judge's correct application of the law of third party guilt to the facts of the case."

As the trial judge correctly stated, the admissibility of evidence of third party guilt is governed by the rule set forth in *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941). See *State v. Cope*, 385 S.C. 274, 292-93, 684 S.E.2d 177, 186-87 (Ct.App.2009) (quoting *State v. Gregory* as the rule governing admissibility of evidence of third party guilt); *State v. Swafford*, 375 S.C. 637, 641-43, 654 S.E.2d 297, 299-300 (Ct.App.2007) (affirming application of *State v. Gregory*). In *Gregory*, our supreme court stated:

[T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a

reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.... But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose.

198 S.C. at 104–05, 16 S.E.2d at 534–35 (internal citations omitted).

The trial judge applied the *Gregory* standard correctly. The judge listened to each witness's testimony outside the presence of the jury and provided Burgess the opportunity to argue its admissibility. After quoting *Gregory*, the judge noted that some of the evidence related to events occurring more than eight months before the murders, and that even the most recent events occurred more than two weeks before. He found that none of the evidence was inconsistent with Burgess's guilt and concluded "it's mere conjecture or surmise." The exclusion of the testimony was consistent with *Gregory*, and within the trial judge's discretion.

Burgess argues, however, that this case is controlled by the decision of the United States Supreme Court in *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). Burgess is correct that the Supreme Court concluded "the rule applied in [*State v. Holmes*] FN4 by the State Supreme Court violates a criminal defendant's right to have 'a meaningful opportunity to present a complete defense.'" 547 U.S. at 331, 126 S.Ct. 1727 (quoting *Crane*, 476 U.S. at 690, 106 S.Ct. 2142). However, Burgess fails to understand that it was not the rule of *Gregory* which offended the defendant's rights. Rather, it was the "radically changed and extended" rule of *State v. Gay*, 343 S.C. 543, 541 S.E.2d 541 (2001), and *State v. Holmes*. 547 U.S. at 328–31, 126 S.Ct. 1727. In fact, the Supreme Court specifically stated that the rule of *State v. Gregory* is the type of rule that does not deny a defendant his right to present evidence. 547 U.S. at 328, 126 S.Ct. 1727. *Holmes v. South Carolina* preserves *Gregory* as the appropriate standard for evaluating the admissibility of evidence of third party guilt. The trial judge in this case applied *Gregory* correctly, and there was no error.

FN4. 361 S.C. 333, 605 S.E.2d 19 (2004).

Burgess, 391 S.C. at 21–23, 703 S.E.2d at 515–17.

Additionally, Respondent would submit that the Supreme Court's rejection of the *Gay* standard in *Holmes* is found at 547 U.S. at 328–31. Also, this Court "has imposed strict limitations on the admissibility of testimony indicating third-party guilt." *State v. Rice*, 375 S.C. 302, 317, 652 S.E.2d 409, 416 (Ct.App.2007). Moreover, the Supreme Court's holding in *Holmes* permits a

defendant to introduce evidence of third-party guilt regardless of the strength of the State's case, but only if the evidence meets the standard for admissibility stated in *Gregory*. See *Holmes*, 547 U.S. at 328 (quoting *Gregory*, 198 S.C. at 104-05, 16 S.E.2d, at 534-35 (quoting 16 C.J., *Criminal Law* § 1085, p. 560 (1918) and 20 Am.Jur. *Evidence* § 20 265, p. 254 (1939)). See also *Lorenzen v. State*, 376 S.C. 521, 532-33, 657 S.E.2d 771, 777-78 (2008). Nothing in the record suggests that the trial judge considered the strength of the State's evidence against Burgess in refusing to admit the proffered evidence. To the contrary, he expressly relied upon the *Gregory* standard "as elucidated in *Holmes*." R. p. 609, l. 25-p. 610, l. 1.

Also, the proffer did not involve "a train of facts or circumstances, as tends clearly to point out such other person as the guilty party," as required for its admission under *Gregory*. See *Gregory*, 198 S.C. at 104-05, 16 S.E.2d, at 534-35. First, both Ms. Aycock and Ms. Ballard testified to threats that were in no ways temporally connected to the murders: the events described by Ms. Aycock occurred almost one year before the murder, and the events to which Ms. Ballard testified occurred by November 2004. E.g., R. pp. 544-45; 547-550. Second, the proffered evidence demonstrated that three individuals had made threats to the victims because of the victims' failure to pay the money they owed each individual for crack cocaine: "a gentleman named Twelve, some gentleman that lives across the street from Sharpe's Septic Tank and some folks that drive a red neon." R. p. 550, ll. 12-18 (argument of defense counsel).

Even the threats made more closely in time to the murders occurred one or more weeks before the murders. Also, McQuarley testified that he did not see the conclusion of the argument between Kim and the man who had demanded his money from Kim and grabbed her by the shirt when she tried to walk away. He lost sight of them when they walked behind the trailer. Also, he did not have to call law enforcement. R. pp. 533-35. Further, McQuarley did not identify the person

whom he saw involved in the confrontation. Mr. Summers unequivocally testified that he did not see the person with whom the man with the Neon argued because the trailer door was closed. *R.* pp. 539-40. Moreover, the argument of defense counsel makes clear that this individual was not Twelve. Melton clearly testified that the threat of David Slice by "Twelve" that he witnessed was "a few weeks" before he left town.¹³ *R.* pp. 88-89.

More importantly, Burgess failed to present any testimony that placed either "Twelve," or either of the other drug dealers with whom the victims had prior difficulties, either in or near the victims' trailer at the approximate time of the murders. He also did not proffer any reliable admission by Twelve or anyone else admitting to the crimes. Thus, the proffered evidence was not inconsistent with Burgess' guilt. Instead, it merely raised a bare suspicion that someone other than Burgess may have committed the murder. *See Swafford*, 375 S.C. at 642, 654 S.E.2d at 300; *Rice, supra*. *Contra Holmes*, 547 U.S. at 323 ("Petitioner ... sought to introduce proof that another man, Jimmy McCaw White, had attacked Stewart.... At a pretrial hearing, petitioner proffered several witnesses who placed White in the victim's neighborhood on the morning of the assault, as well as four other witnesses who testified that White had either acknowledged that petitioner was " 'innocent' " or had actually admitted to committing the crimes") (case citation omitted); *Miller v. State*, 379 S.C. 108, 665 S.E.2d 596 (2008).

Nor can Burgess show any prejudice from the trial judge's ruling since the trial judge's ruling did not prevent him from presenting evidence tending to suggest that someone else may have committed the murders. On cross-examination of James "Tony Red Johnson, the State's eyewitness

¹³ Also, his only knowledge about any confrontation between Kim and "Twelve" was entirely based on what she had told him. Mr. Melton's knowledge of why David Slice sold the car was also based on something that was told to him.

to the murders, Burgess established that Johnson regularly supplied crack to the victims and smoked crack with them. Also, Johnson had gone to the victims' trailer on the morning that they were killed in order to collect money that they owed him for drugs. Although he collected the money that they owed him (**R. pp. 224-25**), he did not call police after seeing the victims shot and leaving their residence. Rather, he went and found crack cocaine, which he smoked. **R. pp. 224-26**. Later the same morning, he also left his wife at home, alone, despite his professed fear of Burgess. **R. pp. 226-27**.

Johnson likewise admitted on cross-examination that he had seen people "do violent things to collect" money owed for crack. Further, Johnson admitted that he said that he did not know anything about the crimes when law enforcement first questioned him. He only implicated Burgess after he was charged with accessory after the fact to murder and misprision of a felony. Also, he had been in the Lexington County Detention Center since his arrest and he had spoken to Burgess' co-defendant, Michael Wise, about this case. **R. pp. 221-22; 228-32**.

On cross-examination of Michael Wise, who admitted driving Burgess both to the victims' trailer and elsewhere after the shootings, Burgess established that Wise had been in the Lexington County Detention Center ever since his September 16, 2005 arrest; that he and Johnson had discussed this case; and that Johnson told Wise the contents of his (Johnson's) statement. Also, Wise did not originally implicate Burgess or say that he had been frightened by Burgess' behavior. Rather, he only did so after he had been in jail for a day. Further, he admittedly "embellished" parts of his statement to make himself look good. He likewise testified that he wrote down what the police told him to say, "[n]ot as far as the facts but as far as my impressions" to make himself look good and

implicate Burgess. **R. pp. 279-85.** Thus, there was no prejudice resulting from the trial judge's ruling.¹⁴

CONCLUSION

Wherefore, Respondent respectfully submits that this Court should deny certiorari.

Respectfully submitted,

ALAN WILSON
Attorney General

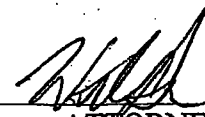
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By: 
ATTORNEYS FOR RESPONDENT

June 24, 2011.

¹⁴ Burgess' subsequent closing argument first pointed out evidence that he urged was inconsistent with the victims' murders occurring on the morning of September 5, 2005, the unreliability of the State's time-line for the crimes and the absence of physical evidence connecting him to the crimes. **R. pp. 556-61.** Thereafter, Burgess extensively focused upon the unreliability of Johnson's testimony and the extent of Wise's involvement in the murders, his knowledge of the offenses and the deal that he received. **R. pp. 561-69.**

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Lexington County
The Honorable R. Knox McMahon, Circuit Court Judge

THE STATE,

Respondent,

-VS-

DARRELL BURGESS,

Appellant.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Return to Petition for Writ of Certiorari by depositing two (2) copies of the same in the United States mail, first class postage prepaid, to his attorney of record, Robert Dudek, Esq., South Carolina Commission on Indigent Defense, Division of Appellate Defense, 1330 Lady Street, Ste. 401, Columbia, SC 29201.

I further certify that all parties required by Rule to be served have been served.

This 24th day of June, 2011.



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ATTORNEY FOR RESPONDENT

The Supreme Court of South Carolina

The State, Respondent,

v.

Darrell Burgess, Petitioner.

Appellate Case No. 2011-186306

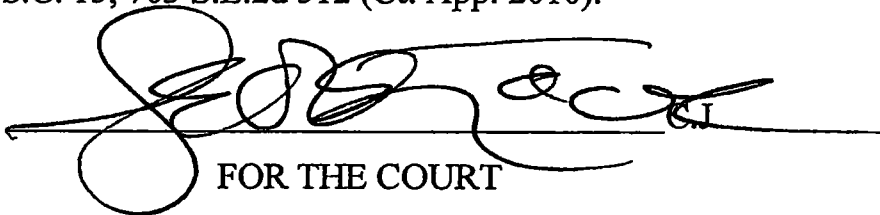
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SC OFFICE OF
APPELLATE DEFENSE

ORDER

We deny the petition for a writ of certiorari to review the Court of Appeals' decision in *State v. Burgess*, 391 S.C. 15, 703 S.E.2d 512 (Ct. App. 2010).


FOR THE COURT

Columbia, South Carolina

May 25, 2012

cc:

Donald V. Myers

W. Edgar Salter, III

John W. McIntosh

Donald J. Zelenka

Robert Michael Dudek

Alan McCrory Wilson

The Honorable Jenny Kitchings

ORIGINAL

FORM 5

STATE OF SOUTH CAROLINA

FILED

IN THE COURT OF COMMON PLEAS

COUNTY OF Lexington

2012 JUL -9 A 8 41

DARRELL BURGESS 265544

Full name and prison number (if any) of Applicant

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

v.

APPLICATION FOR

State of South Carolina

VW

POST-CONVICTION RELIEF

2012CP3202813

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Lee Correctional Inst. 990 WISACKY HWY. Bishopville, S.C. 29010
2. Name and location of Court which imposed sentence Lexington County Court of General Sessions
3. Name(s) of co-defendant(s) (if any) Michael T. White, James A. Johnson
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 05-GS-4563 / MURDER
 - (b) 05-GS-4561 / MURDER
 - (c) 05-GS-4564 / possession of firearm or knife during Commission of Violent Crime
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) March 1, 2008 / Life
 - (b) March 1, 2008 / Life

A TRUE COPY

Revised 3/2003

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

- (c) March 1, 2008 / 5415.
6. Check whether a finding of guilty was made: **FILED**
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ☒ **2012 JUL -9 A 8:41**
- (c) after a plea of nolo contendere _____ **BETH A. CARRIGG**
CLERK OF COURT
LEXINGTON SC
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list: **2012CP3202813**
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Conviction Affirmed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. May 25, 2012
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. STATE V. BURGESS, 391 S.C. 15, 703 S.E.2d 512
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) N/A
- (c) N/A
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(u) INEFFECTIVE ASSISTANCE of trial COUNSEL(b) SEE PAGE 2(a)**FILED**

(c) _____

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

(a) Trial Counsel was deficient failing to(b) SEE PAGE 2(a)(c) SEE PAGE 2(a)

BETH A. CARRIGG

PROPERLY PREPARED FOR APPELLATE REVIEW

2012CP3202813

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? No
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? No

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

(a) the specific nature thereof:

i. N/Aii. N/Aiii. N/Aiv. N/A

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

i. N/Aii. N/Aiii. N/Aiv. N/A

(c) the disposition thereof:

i. N/Aii. N/Aiii. N/A

ORIGINAL

State of South Carolina
County of Lexington
Darrell Burgess #265544
Applicant

) In the Court of Common Pleas

FILED

) Case No.: 05-GS-32-4563, 4561, 4564

2012 JUL -9 A 8:41

vs.

) Motion for Appointment of

State of South Carolina
Respondent

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON

Counsel

2012CP3202813

Applicant set forth this cause of action pursuant to the jurisdiction set forth in South Carolina Code Ann. Chapter 17, §17-27-20(1), (6) "Collateral Attack upon any ground of alleged error heretofore available under this uniform that are being submitted or amended."

Applicant asserts that there are no grounds that can be raised due to his lack of understanding of the law. South Carolina Rules of Civil Procedure, Rule 71.1(c), (d) states the burden of proof is on the Applicant to show his entitlement for relief by a preponderance of the evidence, and also appointment of counsel for the hearing to insure all available grounds for relief are included in application and shall be amended if necessary. It would be impossible for Applicant to carry such a burden without the aide of Counsel to help establish his constitutional claims. Thus, Applicant request that this Court will appoint counsel in his application, and afford him adequate time to consult with counsel before he state the claims he is requesting relief for. Applicant further request that counsel be allowed to amend this application at a later date so all his constitutional claims can be properly raised. If Applicant is forced to state his constitutional claims, he is certain to jeopardize his chance of having a successful appeal because he is a lay person at law.

Applicant seeks the Court approval of this application so that his right to Post Conviction Relief won't be deemed abandoned, due to the fact he has only one year from the dismissal of his Direct Appeal to file this application; and a year is not enough time for him to adequately learn his constitutional claims and properly raise them before this Court.

[Signature]
Darrell Burgess #

- iv. N/A
- (d) the date of each such disposition: **FILED**
- i. N/A
- ii. N/A **2012 JUL -9 A 8:41**
- iii. N/A **SETH A. CARRIGG**
- iv. N/A **CLERK OF COURT**
LEXINGTON SC
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. N/A **2012CP3202813**
- ii. N/A
- iii. N/A
- iv. N/A
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
No
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. N/A
- ii. N/A
- iii. N/A
- (b) the proceedings in which each ground was raised:
- i. N/A
- ii. N/A
- iii. N/A
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) See page 2(a)
- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? N/A
- (b) your trial, if any? Yes
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? No

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

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

i. Jack Bradley Baker - P.O. Box 925 - 0925 Lexington, S.C. 29071-0925

ii. Robert M. Dudek - P.O. Box 11589 Columbia, S.C. 29211-1589

iii. _____

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

i. Jack Bradley Baker / Trial and Sentencing

ii. Robert M. Dudek / Direct Appeal

iii. _____

19. State clearly the relief you seek in filing this application:

Vacate Conviction

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

No

2012CP3202813

BETH A. CARRIG
CLERK OF COURT
LEXINGTON ST.

2012 JUL -9 A 8:41

FILED

Revised 3/2003

ORIGINAL

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

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

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


Applicant

SWORN or affirmed to and subscribed before me this

29 day of June, 2012


Notary Public

My Commission Expires: 11-4-2015

2012CP 3202813

FILED
2012 JUL -9 A 8:41
BETH A. CARRIG
CLERK OF COURT
LEXINGTON SC

ORIGINAL

STATE OF SOUTH CAROLINA)

VERIFICATION

County of)

I, _____, 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.

D. B. [Signature]

SWORN to and subscribed before me this 29
day of June, 2012.

[Signature] (L.S.)
Notary Public

My Commission Expires: 11-1-2015

2012CP3202813

FILED

2012 JUL -9 A 8:41

BETH A. CARRIG
CLERK OF COURT
LEXINGTON SC

Revised 3/2003

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	
	)	Case No. 2012-CP-32-2813
Darrell Burgess,	)	
S.C.D.C. No. 265544,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed July 9, 2012, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Lexington County. The Applicant was indicted at the December 2005 term of the Court of General Sessions for Lexington County for two counts of murder (2005-GS-32-4561, -4563) and possession of a knife during the commission of violent crime (2005-GS-04-4564). Applicant was represented by Jack Bradley Baker, Esquire. On February 1, 2008, the Applicant proceeded to trial after which he was found guilty as charged. He was sentenced by the Honorable R. Knox McMahon, to confinement for life for both murder convictions and five years for possession of a knife during the commission of violent crime conviction. The sentences were to be served concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The Applicant was represented by Robert M. Dudek, Esquire on direct appeal.

The South Carolina Court of Appeals on December 15, 2010 affirmed Applicant's conviction in State v. Burgess, 391 S.C. 15, 703 S.E.2d. 512. The South Carolina Supreme Court denied Applicant's Petition for Writ of Certiorari on May 25, 2012. The Remittitur soon followed.

Attached herewith and incorporated herein by reference are the records of the Lexington County Clerk of Court regarding the subject conviction(s), the Applicant's records from the Department of Corrections, the transcript of the proceeding against Applicant, and Applicant's appellate records. Respondent reserves the right to amend its return upon the receipt of other relevant records.

II.

In his Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel;
 - a. Failure to preserve issue for appeal

III.

Applicant's claim is an allegation of ineffective assistance of trial 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.

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.

Applicant must specify any claims he intends to raise at the PCR trial. Any claims not *specifically* laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing. S.C. Code '17-27-10 et seq; SCRCP 71.1. All claims should be made well in advance of the PCR hearing. If Applicant has an attorney appointed, the attorney, and not the inmate, is the only one authorized to file amendments. SCRCP Rule 11. Filings by inmates will not be considered at the PCR hearing.

VI.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

VII.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held.

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

WALT WHITMIRE
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

June 12, 2013

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS
COUNTY OF LEXINGTON ___) 2012-CP-32-02813

DARRELL BURGESS)
) APPLICANT
) vs.
) TRANSCRIPT OF RECORD
STATE OF SOUTH CAROLINA)
) RESPONDENT

November 12, 2013
Lexington, South Carolina

B E F O R E:

THE HONORABLE R. LAWTON MCINTOSH, JUDGE.

A P P E A R A N C E S:

CHARLES BROOKS, ESQ.
Attorney for the Applicant

WALTER WHITMIRE, ASSISTANT ATTORNEY GENERAL
Attorney for the Respondent

CAROL M. THUEME, RPR
Official Court Reporter

I N D E X

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EXHIBITS

(There were no exhibits offered.)

1 MR. WHITMIRE: May it please the Court.

2 THE COURT: Yes, sir.

3 MR. WHITMIRE: The last matter before this court
4 today is Darrell Burgess V State of South Carolina,
5 2012-CP-32-2813. Mr. Burgess filed his application for
6 post-conviction relief July 9th, 2012. Mr. Burgess was
7 indicted for two counts of murder, one count of possession
8 of a weapon during the commission of a violent offense.
9 State called the case to trial February 1, 2008.
10 Mr. Burgess was represented by J. Bradley Baker.

11 Mr. Burgess filed notice of appeal. That notice
12 of appeal was perfected by Bob Dudek at the Office of
13 Appellate Defense. The Court of Appeals affirmed
14 Mr. Burgess's conviction in a published opinion.
15 Mr. Dudek did petition the Supreme Court for certiorari.
16 The Supreme Court denied that petition.

17 He has filed a timely application for
18 post-conviction relief, is present, and is represented by
19 Mr. Charles Brooks.

20 At this time, Your Honor, I would like to let
21 the Court know that I have a copy of the full transcript.
22 The record on appeal was missing about 150 pages that
23 Mr. Dudek did not include. The reason I mention this is
24 that Judge Few noted in a footnote that the jury had never
25 been sworn; in fact, they were sworn on page 150.

1 Additionally, I think you have all the appellate
2 records before you also.

3 THE COURT: Do you agree with that, Mr. Brooks?

4 MR. BROOKS: That's my understanding.

5 THE COURT: Mr. Brooks, will you tell me the
6 petitioner's grounds, please.

7 MR. BROOKS: Judge, basically we talked about
8 there's a juror issue. Trial counsel -- there was a -- I
9 guess a better way to word it, there was an issue about a
10 juror's -- some connection to family members of the
11 deceased and my client said that his trial lawyer did not
12 talk about -- did not do a good job of trying to have that
13 juror removed for cause. That's one issue.

14 Judge, in addition to that, there is a
15 suppression issue when my client was arrested in regards
16 to some evidence that was taken from that. He was
17 initially arrested at his home for some drugs, but the
18 police took like some cell phones and things of that
19 nature, and then according to my client, those things
20 ended up being utilized against him in his murder case.
21 There was a question about whether or not these things
22 should have been suppressed.

23 THE COURT: And cell phones and what else should
24 have been suppressed?

25 MR. BROOKS: Cell phones, photographs, they were

1 all taken as a part of the drug arrest. And then those
2 things ended up being utilized in the murder trial.

3 THE COURT: Okay. And what is your -- any other
4 grounds?

5 MR. BROOKS: In addition to that, my client had
6 written up an amended application and he handed it to me.
7 I've shown it to the Attorney General. I do have it here.

8 THE COURT: Do you adopt it as yours?

9 MR. BROOKS: We would adopt it as ours.

10 THE COURT: Any objection to that?

11 MR. WHITMIRE: Your Honor, just the amended
12 pleadings, also it's hybrid representation as Mr. Brooks
13 has adopted them. Just the amended pleadings refer to any
14 allegation he has relating to ineffective assistance of
15 counsel pertaining to failure to preserve the record for
16 appeal just on the record, that's all that's before this
17 court today.

18 THE COURT: Say that again, please.

19 MR. WHITMIRE: The only allegation before this
20 court today is ineffective assistance of counsel for
21 failure to preserve the record for appeal. Anything
22 outside of that respondent objects to.

23 THE COURT: I got you.

24 Since Mr. Brooks has adopted that as his
25 pleading, then I'm going to accept it.

1 Yes, sir.

2 MR. BROOKS: I would like to hand this to the
3 Court.

4 MR. WHITMIRE: And, Your Honor, I forgot to
5 announce there are victims present, Mr. Reynolds who was
6 one of the victim's father who was slain, he is present at
7 the hearing.

8 And also State moves for summary judgment on the
9 second allegation regarding failure to make a suppression
10 motion. Counsel did make that suppression motion on page
11 71, and it was renewed.

12 MR. BROOKS: We think it's premature for that,
13 Judge. Obviously my client needs to testify in regards to
14 whether or not it's ineffective assistance of counsel.

15 THE COURT: Let me just listen to the evidence.

16 So right now, Mr. Brooks, the issue before the
17 Court, number one, that a juror should have been stricken
18 or that Counsel was ineffective for failing to take
19 further efforts to have him stricken for cause.

20 MR. BROOKS: That's correct.

21 THE COURT: That there was ineffective
22 assistance of counsel for failing to have certain cell
23 phones and photographs suppressed.

24 MR. BROOKS: That's correct.

25 THE COURT: What else? What other grounds?

1 MR. BROOKS: Beg the Court's indulgence. I want
2 to make sure we get it all out.

3 THE COURT: Yes, sir.

4 (Pause.)

5 MR. BROOKS: Your Honor, the other issue that my
6 client intends to raise is -- one is that his trial
7 counsel should have dealt with a Batson motion. I don't
8 know if I would call it a Batson motion but would have
9 done a motion to perhaps either change the venue or have
10 an entire different with jury pool. His position is that
11 his pool had 39 white people versus one black.

12 THE COURT: Is he going to present any evidence
13 concerning the jury make-up in this case? That's a very
14 high standard as you know.

15 MR. BROOKS: My client plans to rely on the
16 transcript, Judge.

17 THE COURT: I'm going to deny your motion on
18 that.

19 MR. BROOKS: I understand, Judge.

20 In addition to that, he indicates that the
21 Solicitor withheld some information about some phone
22 company witnesses. His trial counsel made some motions
23 during the trial, but that his trial counsel should have
24 asked for a continuance at the outset of the trial.

25 THE COURT: Are these set forth in the motion

1 you adopted as your own today? If they're raised in
2 writing including the one you filed I'll hear them today.
3 If they're not, I'm going to deny the motion.

4 MR. BROOKS: I understand, Judge. In all
5 honesty I would -- I'm not quite sure if they're in that
6 bunch that I handed you.

7 THE COURT: I haven't seen them, that's why I'm
8 asking you.

9 MR. BROOKS: My review of that, I would tend to
10 take a cautious approach and say I don't think they may be
11 in there.

12 THE COURT: All right. Just so the record is
13 clear, I did accept a filing today, belated filing today
14 over the State's objection. However, if there is any
15 grounds not alleged in any pleadings filed or accepted by
16 the Court to this date they're not to be heard in this
17 hearing. Fair enough?

18 MR. BROOKS: Fair enough, Judge.

19 THE COURT: All right. Are you ready to
20 proceed?

21 MR. BROOKS: Ready to proceed, Judge. We'd call
22 Mr. Burgess to the stand.

23 THE COURT: Come around, please, sir.

24 THE APPLICANT: Your Honor, could you explain to
25 me what you just said just now?

1 THE COURT: I'm sorry.

2 THE APPLICANT: Could you explain to me what you
3 just told him just now about --

4 THE COURT: I still couldn't hear him.

5 MR. BROOKS: He couldn't hear you.

6 What basically he asked, could you explain again
7 what Your Honor just ruled upon.

8 THE COURT: Come around, Mr. Burgess.

9 Mr. Brooks, am I clear with you on the ruling?

10 MR. BROOKS: Yes, sir, I understand your ruling.
11 I understand.

12 THE CLERK: Raise your right hand, please.

13 DARRELL BURGESS, after being duly sworn,
14 testified as follows:

15 THE CLERK: Have a seat, please.

16 THE COURT: Mr. Brooks.

17 MR. BROOKS: Yes, sir.

18 DIRECT EXAMINATION

19 BY MR. BROOKS:

20 Q Mr. Burgess, before we begin and get into the
21 substance of the case I want to ask you a couple of
22 background questions.

23 You had Mr. Baker representing you; is that
24 correct?

25 A Correct.

1 Q And he was court appointed; is that correct?

2 A Correct.

3 Q Now you went to trial, Judge McMahon was the judge,
4 and you were found guilty of two murders; is that correct?

5 A Correct.

6 Q And you were sentenced to life?

7 A Yeah, two life.

8 Q Two life sentences?

9 A Yes.

10 Q Okay. Now make sure you speak up because this lady
11 seated right here is the court reporter and it's important
12 that she has to take down everything in order to have a
13 complete record. And when you give answers to my
14 questions, you're going to have to give a verbal response
15 as opposed to saying uh-huh, unh-unh, that kind of thing
16 because she can't record that. Do you understand that?

17 A Yes, sir.

18 Q Okay. Now, you do understand -- I'm not telling you
19 this to scare you but I want to make sure you're fully
20 informed, that if you do get your PCR granted and you
21 start over and get a new trial, that you could potentially
22 face a death penalty. I don't know if that ever happens
23 or whatever, but basically what you were charged with
24 could potentially be a death penalty case. You understand
25 that?

1 A Yes.

2 Q I'm not saying that to scare one way or the other, I
3 just want to make sure you're fully informed in knowing
4 what you're doing and understanding that there are risks
5 even for the situation you've got. Do you understand
6 that?

7 A Yes, sir.

8 Q Okay. And you told me you understood that and you
9 still want to go forward and get a new trial in this case;
10 isn't that correct?

11 A Correct.

12 Q Now, you raised certain issues in regards to the
13 representation of Mr. Baker; is that correct?

14 A Yes.

15 Q And one of those things that you were talking about
16 was a juror that was selected or called during jury
17 qualification or jury selection. Can you tell the judge
18 about that?

19 A All right. Basically during the voir dire, evidently
20 the jury didn't hear or didn't notice that he knew -- must
21 have been the victim's wife -- she was sitting in the
22 gallery -- and the information wasn't disclosed until he
23 had already been selected for the jury. And so Counsel
24 made the motion to the Court for the juror to be removed
25 for cause. And the judge basically ruled that he had to

1 deny the motion based on State versus Elmore and that he
2 didn't -- he couldn't -- he said that he couldn't sit up
3 there and decide that jurors won't follow the law.

4 THE COURT: Where is this in the transcript?

5 THE APPLICANT: Yes, sir. I have the pages
6 right here. The ruling is on page 145?

7 THE COURT: 145?

8 THE APPLICANT: Yes, sir.

9 THE COURT: All right. Go ahead.

10 THE APPLICANT: Basically he said he couldn't --
11 he had to deny the motion based on State versus Elmore,
12 and in that case actually a relative of one of the jurors
13 or one of the prosecutors was selected for the jury and
14 was authorized to be a member of the jury. And he further
15 ruled that "I think I have to take jurors at their word, I
16 can't second-guess that. I can't sit up here and decide
17 that jurors won't follow the law." And so Counsel
18 continued to try to persuade the judge to remove the
19 juror, but he -- he denied the motion.

20 And when the issue got to the appellate court,
21 Counsel raised the issue that the trial judge had abused
22 the discretion based on the fact that we still had
23 preemptory strikes left and Counsel had told the judge
24 that, you know, had he known the information prior to
25 selecting the juror that he would have removed him, but

1 the appellate court denied the argument and went over to
2 the Court of -- to the writ of certiorari and they shot it
3 down and they said that Counsel failed to challenge the
4 judge's ruling and seek clarification of the basis of the
5 ruling because he -- the appellate counsel used State
6 versus Elmore, a 1985 case, to refute the prior State
7 versus Elmore which is the one that the judge was
8 referring to. But even I didn't understand that because
9 in the first State versus Elmore, the judge in that case
10 gave the defendant and the State a chance to strike the
11 juror. But in my case the judge didn't offer the State or
12 me a chance to strike the juror, so I didn't --

13 THE COURT: Let me make sure I understand
14 something. I understand the argument that you're saying
15 the judge should have stricken for cause and the attorney
16 didn't preserve that issue for the record. But at the
17 time did your attorney have any strikes left?

18 THE APPLICANT: Oh, yeah, we had maybe four or
19 five strikes left.

20 THE COURT: Okay.

21 THE APPLICANT: That's why I didn't really
22 understand why they shot down the argument on direct
23 appeal. But, nevertheless, they blamed Counsel, which I
24 really didn't think he did anything wrong with that, but
25 evidently they did, so we're here with that issue right

1 now.

2 THE COURT: Thank you, sir.

3 BY MR. BROOKS:

4 Q Now, that covers that issue in regards to the juror
5 issue?

6 A Well, I mean, yeah, it pretty much covers it, but I
7 mean the prejudice -- I mean I had a constitutional right
8 to a fair jury, to a fair trial, and I feel that, you
9 know, basically with him being on the jury he was -- he
10 continued to have a job with the victim's brother-in-law.
11 So, I mean, I don't know how he felt about going back to
12 work --

13 MR. WHITMIRE: Objection, hearsay.

14 THE COURT: Overruled.

15 THE APPLICANT: I don't know how he felt about
16 going back to work looking at this guy or whatever and
17 finding me not guilty versus finding me guilty and, you
18 know, moving on with his life or whatever, but, I mean, I
19 found it --

20 MR. WHITMIRE: Objection, speculation.

21 THE COURT: Overruled.

22 THE APPLICANT: I found that it was highly
23 prejudicial, you know. I mean, if I had someone in my
24 family who was -- you know, had been in a situation like
25 that, I probably would have found the person guilty, too,

1 but, you know, oftentimes people do things that -- but I
2 felt it was prejudicial. I don't know why the Court
3 didn't overturn the case on direct appeal, that they
4 wanted to blame Counsel, so...

5 BY MR. BROOKS:

6 Q Let me ask you this: We put that issue out there for
7 this Court to consider.

8 A Right.

9 Q One of the issues you raised was a suppression issue
10 about the cell phones and them being used in the trial,
11 you being arrested for one of those things and something
12 about trial counsel's failure to adequately raise these
13 issues. Can you go ahead and explain to the Court what
14 you mean in regards to that?

15 A Well, what had happened was I was at my house and the
16 police basically came in with a battering ram knocking the
17 door off the hinges and basically got me out of my bed and
18 arrested me, put me in handcuffs, taking me outside and
19 placing me in the police car, in the back of the police
20 car. At the same time you got other officers in the
21 house, they're searching the house and they find drugs
22 evidently because the call came over the radio that -- for
23 them to take me to jail because they had done found drugs
24 in the house. And when I got down to the police
25 department, I found out they had charged me with

1 trafficking cocaine. And so my mother, she had -- I went
2 to bond court like a day or two later, something like
3 that, and I told my mother to go ahead and pay the bond.
4 So I was getting ready to get out and they continued to
5 hold me. Must have been one of the officers that was at
6 my house during the search, he saw the lady in booking and
7 told the lady not to let me go anywhere, so they didn't
8 let me out.

9 Probably about maybe four days later, five days
10 later, I think it was Steve Baumgardner, Officer Steve
11 Baumgardner, he brought me arrest warrants for murder. He
12 signed the arrest warrant in my face. I don't know
13 whether that was legal or not, but he signed it himself in
14 my face.

15 When we got to trial -- well, Counsel was
16 appointed to represent me and I told him everything that
17 happened. So at trial Counsel argued that -- Counsel
18 argued the warrant was not executed properly.

19 They never had a search warrant. The only thing
20 they had at my house was a return, a return to search. My
21 mother testified at the trial that she had came home
22 during the search, she requested to see a search warrant
23 from one of the officers, Officer Palkowski, and when she
24 requested to see the search warrant he showed her a
25 statement and he -- you know, advised her that "we'll show

1 you a search warrant before we leave." And she continued
2 to stand there and talk with the guy and asked again for a
3 search warrant. Never gave her a search warrant.

4 They left. And when they were getting ready to
5 leave she told them to -- she asked them again for a
6 search warrant and they told her that it was inside the
7 house. So she went inside the house, she found a return.
8 So she called the officer, Officer Palkowski, and asked
9 him, you know, where did you leave the search warrant,
10 where is the search warrant. So he again told her, you
11 know, "I left it in the house," or whatever. And so she
12 told him that, you know, what was left was not a search
13 warrant, this is only the return. And so things went on
14 from there.

15 And so at the trial, the investigator testified
16 that my mother indeed had arrived during the search,
17 requested to see the search warrant, that he didn't give
18 her one, that he didn't give me one, and that he didn't
19 give my brother one who was also at the search and they
20 arrested him for the drugs, too. They found the drugs in
21 his car and they found maybe a little drugs in the house.

22 During the suppression hearing --

23 Q Let me interrupt you, Darrell.

24 What did they take on this drug arrest? What
25 did they take on the drug arrest that ended up being used

1 against you in this murder case?

2 A Well, they took -- they took some cell phones out the
3 house and they took pictures of my personal effects like
4 cigarettes -- I smoke cigarettes, I used to -- and they
5 took pictures of cell phones and some money I had on the
6 headboard in my house. And basically they -- they used my
7 life-style to paint a picture that I had, you know, maybe
8 committed these crimes and to go along with the story that
9 was being told at trial and things like that, things of
10 that nature. But, yeah, basically they just took cell
11 phones, some pictures and things like that.

12 They never had a search warrant to search my
13 house. The Solicitor on the case, he sent a search
14 warrant to the house, two years after the search was
15 conducted he sent the search warrant to my mom. He
16 alleged that he had did this as a courtesy.

17 MR. WHITMIRE: Objection, hearsay.

18 THE COURT: Overruled.

19 THE APPLICANT: He alleged he had done this as a
20 courtesy.

21 BY MR. BROOKS:

22 Q Darrell, Darrell -- go ahead, please.

23 A I'm just basically trying to lay everything out so
24 then the Judge will understand where I'm coming from.

25 At the trial Counsel objected to everything up

1 under South Carolina Rule 17-13-150. So the Judge when he
2 ruled, he based his ruling on Court's Exhibit 8 and 9
3 which was a picture that the officers at my house had
4 taken of my mother holding a piece of paper or something,
5 I guess, and they tried to say that that was a search
6 warrant.

7 Looking at the picture, you can't tell whether
8 the picture's a search warrant or a statement or whatever.
9 You can't tell what it is. But the Judge, he denied the
10 motion.

11 Q Darrell, let me ask you this: They took the cell
12 phones from that search?

13 A Yes, they took the cell phone.

14 Q Now how did they use the cell phone to implicate you
15 in the murder case?

16 A Well, one of the guys involved in the case, he
17 basically said that --

18 Q One of the prosecuting witnesses?

19 A Yeah, yeah, prosecuting witness.

20 He said that he had taken me to the area near
21 the crime scene, okay, and he said that he had called my
22 phone after making a phone call to me and he had heard
23 gunshots, he had heard a gunshot or something like that,
24 and he made a call to my phone. And so at the trial the
25 State presented a couple of phone company witnesses who

1 testified that his cell phone pinged off of a certain cell
2 tower in the area and that made it look like I was in the
3 area and so on and so forth, and that's the picture that
4 they painted with the cell phone, that I was in the area
5 of the crime scene. And the -- that corroborated the eye
6 witness testimony so to speak, but --

7 Q Now, Darrell, does that also go to the additional
8 thing that we told the Judge about phone company
9 witnesses, your trial lawyer didn't necessarily ask for a
10 continuance at the time, didn't know what these people --
11 that whole issue, that last issue we put forth to the
12 Court, does that kind of roll into that?

13 A Well, that -- that -- the phone witnesses, they're
14 the ones who were testifying about the calls hitting off
15 certain cell towers in the area. Yeah, these witnesses
16 was presented to testify to cell towers and things like
17 that, cell tower locations and signals hitting off of cell
18 towers and things like that, so yeah.

19 Q Now, how did the police know that certain a ping was
20 attributed to your number? How did they know it was your
21 number?

22 A Oh, well, the phone was in my name.

23 Q Okay.

24 A Yeah, the phone was in my name, so -- it was a
25 prepaid phone and it was in my name.

1 Q And this was the phone they had found --

2 A In my house.

3 Q -- incident to the search warrant arrest --

4 A Right.

5 Q -- or alleged search warrant arrest for the drugs?

6 A Well --

7 Q For the drug case that -- I mean, obviously that
8 was --

9 A The drugs was just a probable cause for the search.
10 They didn't have a search warrant in the first place, so
11 everything that happened after that is just, you know.

12 Q So what you're saying is if the cell phones had been
13 suppressed they never would have gotten to the issue about
14 the phone company coming in and talking about signals
15 bouncing from tower to tower?

16 A Right, right.

17 Q Okay. All right. Now, what are you telling the
18 Court that Mr. Baker should have done in that situation?

19 A In which situation, the suppression situation or --

20 Q Both. Because they're all intertwined, the
21 suppression of the cell phone and the pinging of the
22 towers that was testified to about the phones. What are
23 you saying Mr. Baker should have done?

24 A Well, he had probably maybe several things he could
25 have done. One thing he could have did -- well, let me

1 back up for a second.

2 The search warrant that the State later
3 produced, the affidavit is dated September 13th. The
4 search took place September 14th.

5 THE COURT: What's the date on the affidavit?

6 THE APPLICANT: The affidavit is September 13th.
7 The search warrant is September 14th. The return is
8 September 15th.

9 The affiant of the affidavit, he testified that
10 he went to the magistrate on September 13th -- no, pardon
11 me -- he interviewed the witness on September 13th and
12 went to the magistrate with the information on
13 September 14. Instead of Counsel challenging the
14 affidavit or whatever, challenging the affiant as far as
15 the information he gave over, he chose to tell the Judge
16 that he had no questions of the affiant and that he wanted
17 to move on to his objection, 17-13-150, and so that's when
18 the next part of the suppression hearing was conducted and
19 my mother testified and Investigator Palkowski testified
20 and the Solicitor, he basically told the Judge that he
21 sent the search warrant as a courtesy. And so the Judge,
22 he denied the motion, basing his ruling in part on
23 photographs 8 and 9, Court's exhibits, and he based his
24 ruling on State versus Mullison after Counsel could not
25 tell him how the error prejudiced me, the error that he

1 argued based on 17-13-150, which was the warrant was not
2 executed properly.

3 So he could have attacked the affidavit and he
4 could have argued my arrest because I was under arrest
5 when they came and seized me out of my house. That's when
6 I was under arrest. The drugs were just a probable cause,
7 man. I mean, it didn't have nothing to do with the case,
8 but that's what happened. They violated my rights, had me
9 locked up, and here I sit with two life sentences.

10 MR. WHITMIRE: Objection, speculation.

11 THE COURT: Overruled. Go ahead.

12 THE APPLICANT: So, I mean, that's basically
13 what happened on that issue.

14 I think the Judge knew exactly what was going
15 on, he knew what happened, but, I mean, for some reason
16 they -- I don't know. I'm here.

17 I don't really know much about the law, but I
18 know what happened to me and I know what happened in my
19 case and I can tell you the best of my ability, but I
20 leave the law to -- I know he should have objected to the
21 search up under 17-13-140, and the arrest and all of that.
22 So that's all I can --

23 BY MR. BROOKS:

24 Q All right, Mr. Burgess.

25 A Do I need to go into the prejudice on that? I mean,

1 I allege a due process violation, too, on that, on this
2 issue about my arrest and the search and things like that.

3 Q Isn't that part of the stuff we just filed with the
4 Court?

5 A Yes. I just wanted to put it on the record.

6 Q It's already in the record.

7 Mr. Burgess, I think that's it. I'm going to go
8 ahead and sit down and Mr. Whitmire's going to ask you
9 some questions.

10 A Well, could I -- how many issues did we cover?

11 THE COURT: What I have --

12 THE APPLICANT: I know you only get one chance
13 to do this, so...

14 THE COURT: I understand. What I down as issues
15 is that the Judge (sic) should have asked the Court to do
16 more to remove for cause a juror who's identified as an
17 employer for the estranged wife of Mr. Slice.

18 THE APPLICANT: Right.

19 THE COURT: Also, the failure to have cell
20 phones and certain photographs suppressed.

21 I ruled earlier that if it was not in any prior
22 pleading, including the ones I accepted today, that I
23 would not hear it today. So to the extent that you
24 have -- was it venue, Mr. Brooks?

25 MR. BROOKS: We were talking about racial

1 composition, that's correct, Judge.

2 THE COURT: That's right. And the composition
3 of the jury, that's not before me because I have not found
4 it in writing so far. If I find it in writing I'm going
5 to read this and I will consider it and make notes on it.

6 THE APPLICANT: Well, Your Honor, Counsel only
7 been appointed to me maybe two weeks. I had another
8 lawyer for like a year, year and a half or something like
9 that, and then all of a sudden they decided to take him
10 off the case and put him on there, maybe two or three
11 weeks.

12 THE COURT: That's what I'm going to do. If I'm
13 incorrect there will be an appellate court to correct me.

14 THE APPLICANT: So are you giving me leave to
15 file it?

16 THE COURT: No, sir, I'm not. I'm saying, in
17 fact, I'm not giving any more leave to file other than
18 what was filed today by Mr. Brooks who adopted your
19 pleadings. If it's not in writing in this pleading or any
20 prior pleading, I'm not considering it. Okay, sir?

21 THE APPLICANT: Okay.

22 THE COURT: Go ahead, please, sir.

23 MR. BROOKS: Your Honor, I think that's it. I'm
24 going to sit down and Mr. Whitmire is going to ask you
25 some questions.

1 THE APPLICANT: Oh, excuse me, Your Honor.

2 Did you say anything about the failing to move
3 for a mistrial when the Solicitor throwed those
4 photographs on the table, the inadmissible evidence?

5 MR. BROOKS: Those are the photographs taken
6 from the search?

7 THE APPLICANT: No, no, no. These are autopsy
8 photographs, inadmissible basically inadmissible evidence.
9 The Solicitor basically -- can I --

10 THE COURT: Go ahead.

11 THE APPLICANT: There was some photographs,
12 autopsy photographs of the victims that the Solicitor was
13 trying to introduce. Counsel objected to it. The Judge,
14 instead of him ruling on the admittance of the evidence
15 all at once, he, you know, wanted to base his ruling on
16 testimony of the witnesses in camera. So to make a long
17 story short, during the testimony of Laura Gould, she was
18 a witness for the State, the Solicitor sought to introduce
19 some autopsy photographs of the victims. So basically
20 when the Solicitor elicited the testimony, the Judge said
21 that, "No, I'm not going to allow the photographs to come
22 in on this witness." So I guess the Solicitor in his
23 anger, he threw the photographs on the table right in
24 front of the jury.

25 MR. WHITMIRE: Objection, speculation.

1 THE COURT: Overruled. Go ahead.

2 THE APPLICANT: He threw the photographs on the
3 table right in front of the jury.

4 Counsel alerted the Court to the situation. He
5 excused the jury and so Counsel told the Judge what was
6 going on and the Judge asked Counsel, okay, what you want
7 me to do? What you asking me to do about the situation?
8 Counsel said that "Basically, Your Honor, it just looked
9 like a situation that the jury could have seen the
10 photographs. You know, you hadn't admitted the
11 photographs yet," so, you know, it just seemed like an
12 issue for the Court. So the Judge said, "Well, I'm going
13 to recircle my wagon and I'm going to ask you again, what
14 you want me to do, what you telling me to do? So Counsel
15 was just like, "Well, Your Honor, I just ask that you see
16 to it that photographs or any other evidence are not
17 presented before the jury until such time as they have
18 been admitted." So the Judge did exactly what he said.

19 The trial went on. The judge later admitted the
20 photographs anyway on the medical examiner, which he
21 didn't really have a reason to admit the photographs other
22 than trying to cover his own behind, I guess, because now
23 he's forced to admit these photographs --

24 MR. WHITMIRE: Objection, speculation.

25 THE COURT: Overruled. Go ahead.

1 THE APPLICANT: -- he forced to admit these
2 photographs now because if he don't, then there's an error
3 on appellate court. So the photographs got admitted.

4 But up under State versus Jackson, a similar
5 situation like that happened when the guy was on trial and
6 a rap sheet was the issue and the counsel objected and
7 moved for a mistrial when he thought the jury had saw the
8 rap sheet and he moved for a mistrial. But the Judge
9 denied the mistrial and things like that. And when it got
10 to the appellate court, the Court said, you know, that the
11 guy wasn't prejudiced or whatever because he had already
12 made testimony anyway regarding his rap sheet. But in my
13 case I didn't make any testimony, I didn't take the stand
14 or anything like that, and I just felt it was prejudicial
15 of me for him not to ask for a mistrial when the jury has
16 saw evidence that -- that sways on the heart really. I
17 mean, you see things like that and that kind of like plays
18 on your heart and your mind --

19 MR. WHITMIRE: Objection, improper testimony.

20 THE COURT: Overruled.

21 THE APPLICANT: -- and leaves the jury to not be
22 impartial. So I felt like he violated when he didn't move
23 for a mistrial in that situation.

24 MR. BROOKS: All right. I think that wraps it
25 up for us.

1 THE APPLICANT: Well --

2 MR. BROOKS: I'm going to go ahead and let
3 Mr. Attorney General ask you any questions. Okay?

4 THE APPLICANT: Oh, I had one other thing, Your
5 Honor.

6 There were fingerprints at the crime scene that
7 was not disclosed at trial because Counsel didn't
8 introduce it. But I have documentation that -- well, let
9 me back up.

10 There was testimony given that there were no
11 fingerprints at all left at the crime scene. Basically
12 they tried to paint the picture that the crime scene was
13 spotless. Even if I was there, I left no evidence that I
14 was there or whatever, so have you, then that's what it
15 is. Nobody had any evidence there, not even the victims,
16 and it was their home. But there was fingerprints lifted
17 at the crime scene that was from people not involved in
18 the case. There's no names on the documents as far as
19 whose fingerprints it was, but it said there was
20 fingerprints lifted. And I think if Counsel would have
21 introduced these records into evidence at trial, that it
22 may have created a reasonable probability of a different
23 verdict.

24 MR. BROOKS: Is that it, Mr. Burgess?

25 THE APPLICANT: Yeah, I think that's about it.

1 MR. BROOKS: All right. Answer any questions
2 Mr. Whitmire has.

3 MR. WHITMIRE: Brief indulgence, Your Honor.
4 (Pause.)

5 MR. WHITMIRE: May it please the Court.

6 THE COURT: Yes, sir.

7 CROSS-EXAMINATION

8 BY MR. WHITMIRE:

9 Q Mr. Burgess, regarding your suppression issue, do you
10 recall your attorney making a motion to suppress the
11 fruits of that search on page 71?

12 A Do I recall him making this?

13 Q During trial.

14 A Yes, of course he made a motion to suppress the
15 evidence.

16 Q Didn't he also make a motion to suppress mention of
17 those drugs that were found and the drug charges?

18 A No.

19 Q Page 132.

20 THE COURT: 132?

21 MR. WHITMIRE: Yes, Your Honor.

22 THE WITNESS: Hold on. Say that one more time.

23 BY MR. WHITMIRE:

24 Q He made a motion to suppress the State mentioning
25 that they had found narcotics in your home on the

1 search --

2 A Yeah.

3 Q -- to use against you at trial, bad character.

4 Didn't he do that?

5 A I don't understand. The drugs had nothing to do with
6 the murder case.

7 Q And that's why he kept -- that's why he made a motion
8 to keep the State from mentioning it.

9 A Yeah. They had no business mentioning it. Why would
10 they mention that in a murder case?

11 Q And during that motion hearing, do you recall the
12 detective testifying?

13 A Which detective?

14 Q One moment. I believe Detective Palaski, page 97?

15 A Palkowski, yes.

16 Q Didn't he testify he served a warrant on your mother?

17 A No, he didn't. He said that he didn't give her a
18 warrant. He said that he let her read one. He showed her
19 one. He said that he showed her one.

20 Q And didn't your attorney present these facts as you
21 allege to the Court?

22 A Could you go into depth?

23 Q Didn't your attorney present your mother during that
24 motion hearing --

25 A Of course.