

VOL I OF II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Berkeley County

Deadra L. Jefferson, Circuit Court Judge

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S.C. Supreme Court

JERMAINE T. MCKELVEY

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001743

A P P E N D I X

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STATE OF SOUTH CAROLINA	)	
	)	COURT OF GENERAL SESSIONS
COUNTY OF BERKELEY	)	
State of South Carolina,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 09-GS-08-0304 et al
	)	
Jermaine McKelvey,	)	
	)	
Defendant.	)	

TRANSCRIPT OF JURY TRIAL

The within Jury Trial was held in the above-captioned case on April 12-14, 2010, before The Honorable R. Markley Dennis, Jr. in Courtroom E of the Berkeley County Courthouse, 300 California Street, Moncks Corner, South Carolina; attended by Counsel, as follows:

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1 APRIL 12, 2010 1:00 P.M.

2

3 (DEFENDANT PRESENT)

4 THE COURT: You're Jermaine
5 McKelvey?

6 MR. McKELVEY: Yes, sir.

7 THE COURT: Good afternoon. Or good
8 morning, Mr. McKelvey. You can be seated.
9 Thank you, sir. I wanted to bring you in to
10 verify a couple of things. We've had some
11 status conferences concerning these charges
12 that are pending against you. The jury is
13 right now tied up with Judge Harrington in
14 civil, and then they're coming over and we'll
15 select our jury.

16 I was approached, and properly so, by
17 the security persons who have a duty to express
18 -- and I don't need to get into they whys or
19 wherefores. Apparently, they say they've had
20 some problems before, some disagreements and
21 misunderstandings about behavior. And they
22 wanted to have additional security in here,
23 since you were not -- I don't generally require
24 the witnesses to be shackled. In fact, I
25 choose not to.

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1 In 1996, I had the responsibility of
2 trying a prison -- basically riot, and the
3 three persons that were included. And my
4 suitemate was then a Circuit Court judge. He's
5 now on the Supreme Court. I went to him
6 because I hadn't been on the Bench very long
7 and said, "You know, security's here and they
8 want to make sure these people are in chains,
9 because they've had problems." They were
10 accused of taking a baseball bat and beating
11 guards and -- a pretty violent situation. And
12 I said, "What's your policy?" And he said,
13 "You know what? Over the years I've generally
14 just done what I'm doing with you." Because I
15 did the same thing in that case, after talking
16 with him. He said, "These are people that are
17 accused of committing crimes, and that's all
18 they are. They're accused of committing
19 crimes. They're citizens. They're people just
20 like you. And I just generally told them I'm
21 going to respect you if you respect this
22 process." And I shared that conversation with
23 the gentlemen. I said, "I'm not going to
24 require that you be in chains unless you give
25 me reason to require that. Otherwise, I'm

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1 going to treat you with respect and ask that
2 you do the same thing to this process. And I
3 say that to you, Mr. McKelvey.

4 I don't know anything more about you
5 than seeing you now, to my knowledge. And
6 they've handed me documents that accuse you of
7 committing some crimes. Whether or not you've
8 been good, bad or indifferent, that doesn't
9 matter to me. You're here in our courtroom
10 now, and I'm the trial judge, and I'm going to
11 respect you, sir. I am not going to require
12 you to be in chains.

13 They also wanted to have additional
14 law enforcement. I think that can be an
15 adverse influence. Typically, we have one.
16 And I said as long as we have -- as Mr.
17 McKelvey shows respect for this proceeding, one
18 is all that's necessary.
19 Of course, I will tell you that obviously --
20 and I unfortunately have had some that didn't -
21 - then we'll deal with it. And we'll make a
22 secure environment. But until you give me
23 reason to believe otherwise, I'm going to
24 assume that you're going to respect this
25 process, sir. And this is your day in court,

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1 okay?

2 MR. MCKELVEY: Yes, sir.

3 THE COURT: Thank you so much, Mr.
4 McKelvey. I appreciate it. I look forward to
5 trying the case.

6 Solicitor, anything from the State at
7 this point?

8 SOLICITOR BIAGANTE: No.

9 THE COURT: And there are no -- as I
10 understand, Mr. Shelton, you don't have any
11 preliminary matters that you need -- there's no
12 statement involved, *Jackson v. Denno* hearing?

13 MR. SHELTON: Actually, in
14 discussions with Ms. Biagante, I think we do
15 need to have a *Jackson v. Denno*. There is one
16 statement that was alluded to by one of the
17 officers in the report.

18 THE COURT: All right. What I will
19 do then is I will pick the jury and we'll take
20 care of that during the lunch break at some
21 point. I'll arrange for the jury to come back
22 -- I'll give them a little bit longer, so you
23 need to get your witnesses ready to do that, if
24 necessary. Okay? We'll take care of that.
25 But that won't stop us from going forward with

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1 the jury.

2 The other thing, Mr. McKelvey, before
3 -- and I just do this because I've had -- as
4 part of my job from time to time you may be
5 assigned to a post-conviction relief term. And
6 I remember -- I don't forget it. It's been
7 probably about eight years ago. But the
8 applicant testified that he was not aware of
9 the plea offer that was made to him. And it
10 was a pretty good deal. And, unfortunately,
11 that's not something -- at least I didn't find
12 and I don't think it's been reversed. He went
13 to trial and they convicted him, and the
14 sentence was unfortunately more than what was
15 offered to him. Plea offers happen all the
16 time, and people -- some accept, some reject.

17 But I said to myself, "I want to be
18 sure in cases -- in significant cases, and this
19 certainly is one, that the client was aware of
20 the plea offer." That client claimed he was
21 not, and had he been aware, he would have
22 accepted it.

23 As I understand, there was an offer
24 made of a cap or a range, basically, of not
25 less than twelve years nor more than eighteen,

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1 I think, for all charges. That was extended to
2 you, sir. Is that correct?

3 MR. MCKELVEY: Yes, sir.

4 THE COURT: And you advised your
5 lawyers that they should reject that offer?

6 MR. MCKELVEY: Yes, sir.

7 THE COURT: Thank you so much. And
8 I just want to be sure that was done with your
9 consent and at your direction.

10 DEFENDANT: Yes, sir.

11 THE COURT: Thank you very much.
12 Thank you. We will be at ease until the jury's
13 ready.

14 You can keep in holding, if you want to --
15 whatever. Or he can remain right here.

16 MR. SHELTON: Do you know how
17 long?

18 THE COURT: Don't know. It may be
19 just a few minutes.

20 MR. SHELTON: Or it could be
21 longer?

22 THE COURT: Or it could be longer.
23 Don't know. How many witnesses are you going
24 to need to call for that? Because what I may
25 do is once the jury's excused, let's go ahead

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1 and do that and then we'll take a lunch break.

2 SOLICITOR BIAGANTE: Just one, Your
3 Honor.

4 THE COURT: Okay.

5 (RECESS)

6 (DEFENDANT PRESENT)

7 THE COURT: Mr. McKelvey, thank you
8 very much. We've been waiting for the other
9 judge to finish with the jury panel. They're
10 still trying to get their jury, but we've
11 decided to go forward with the *Jackson v. Denno*
12 hearing which your lawyers have made a motion
13 concerning an alleged statement. So that's
14 what we're going to do.

15 But before you came in, I believe you
16 had a Motion, Mr. Shelton, that you wanted to
17 make?

18 MR. SHELTON: I ask the Court to
19 sequester the witnesses.

20 THE COURT: I'll allow the State to
21 identify any one witness, your chief
22 investigator, and that witness can remain in
23 the courtroom at all times. And the victim is
24 certainly entitled to remain in the courtroom.
25 But other than that, all other fact witnesses

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1 need to be excused.

2 SOLICITOR BIAGANTE: Officer Edwards
3 is our officer in the case.

4 THE COURT: No problem. He's
5 welcome to be here and we're delighted to see
6 him. Okay? You may proceed.

7 SOLICITOR BIAGANTE: Your Honor, the
8 State would call Corporal Tony Edwards.

9 (WITNESS TAKES STAND)

10 TONY M. EDWARDS, being duly sworn to
11 tell the truth, the whole truth and nothing but
12 the truth, testified, as follows:

13 DIRECT EXAMINATION

14 BY SOLICITOR BIAGANTE:

15 Q. Would you please tell us where you are
16 employed, in what capacity and for how long
17 you've been employed there?

18 A. I'm the senior shift supervisor with Moncks
19 Corner Police Department, and I've been with
20 the police department about twenty years.

21 Q. Do you have any prior law enforcement
22 experience?

23 A. Yes, ma'am. I worked in several
24 departments before I came to Moncks Corner.

25 Q. Tell us about your duties and

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1 responsibilities as a senior shift leader.

2 A. Well, it's my responsibility to oversee
3 cases when they happen, crime scenes and so on
4 and so forth, patrol procedures and supervise
5 two or either three employees under me.

6 Q. Sir, directing your attention to November
7 27, 2008, at approximately 12:56 a.m. did you
8 have an opportunity to respond to The Pleasure
9 Lounge?

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

11 Q. Why did you respond there?

12 A. One of the deputies had stopped a car near
13 McDonald's and Trident Hospital. I was going
14 to him, down 17A, and I had just crossed the
15 bridge. I heard him say that he had heard a
16 shot while he was out with the other car, from
17 behind the middle school area, which would have
18 been about a forty-five degree angle from where
19 he was.

20 I immediately turned down Cooper Street.
21 And the Pleasure Lounge was on the next corner,
22 on the corner of Gray Street. I seen two
23 people hurrying to get in a car, so I pulled up
24 behind them and sort of blocked that car in.

25 Q. Tell us a little bit about what happened

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1 when you got there.

2 A. Well, Mr. McKelvey was seated in the
3 passenger's seat. As I was pulling up there
4 was another gentleman at the side door to the
5 Pleasure Lounge. And I seen him -- when he
6 seen me coming, he stepped back into the door
7 and shut the door. And there was another
8 fellow laying on the concrete, right in front
9 of where he was. Mr. McKelvey and Mr. Dash,
10 who was the driver of the other car -- when I
11 pulled up, I got out. And I knowed there was a
12 gun somewhere present, so I had mine in my
13 hand. McKelvey was in the car. Askari Dash
14 was outside the car.

15 One of the other deputies came up Gray
16 Street and stopped right behind the car also.
17 And he proceeded to take Mr. Dash, and I got
18 Mr. McKelvey out of the car. As I told him to
19 get his hands up, when he raised his hands up I
20 could see blood and stuff on his right hand.

21 Q. Now, tell me about the -- first of all, do
22 you see the person who you identify as Mr.
23 McKelvey in the courtroom today?

24 A. Yes -- Jermaine, sitting right there with
25 the white shirt and tie on.

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1 SOLICITOR BIAGANTE: Your Honor, let
2 the record reflect he pointed to the defendant.

3 THE COURT: Okay.

4 DIRECT EXAMINATION CONTINUED

5 BY SOLICITOR BIAGANTE:

6 Q. And tell us about the gentlemen you saw on
7 the ground.

8 A. At that instant he was laying on the
9 ground, and his head was in a small pool of
10 blood. He was no farther than twenty-five feet
11 in front of the car.

12 Q. And at some point in time did some other
13 Moncks Corner police officers arrive on the
14 scene?

15 A. Yes.

16 Q. Was there a weapon found in the car that
17 evening?

18 A. Yes, there was.

19 Q. Now, because of that and because of the
20 type of call you responded to, at some point in
21 time did you perform a gunshot residue kit on
22 the defendant, Mr. McKelvey?

23 A. Yes, ma'am.

24 Q. Where was that done?

25 A. It was done at the Berkeley County

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1 Detention Center.

2 Q. And why was it done there as opposed to the
3 Pleasure Lounge?

4 A. Well, Mr. McKelvey, once he figured out he
5 was under arrest, started acting up, kicked the
6 back glass out of one of our patrol cars. And
7 one of the county officers, he put him in the
8 county officer's car, who had the side
9 protectors on the glass, on the inside, and he
10 transported him for us.

11 Q. And when you responded to the Detention
12 Center tell me about where Mr. McKelvey was and
13 what you did from there.

14 A. Mr. McKelvey, they had him in one of the
15 holding cells down the hall, like for the
16 attorneys and stuff to consult with them, in
17 there by hisself. And when I went in, they
18 unsecured the door. Myself and one of my
19 officers, Patrolman Winningham, went in. And I
20 told him what I needed to do. I told him, I
21 said, "I need you to hold your hands out, both
22 hands, and turn them over when I tell you." I
23 told him what I was going to do, how I was
24 going to do it, and told him it was a gunshot
25 residue kit.

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1 Q. Did he seem coherent when you told him what
2 you were going to do?

3 A. He was coherent.

4 Q. Did he seem to be under the influence of
5 drugs or alcohol that would impair his judgment
6 at that time?

7 A. Not to me.

8 Q. Did you ask Mr. McKelvey any questions?

9 A. No.

10 Q. Did you Mirandize Mr. McKelvey?

11 A. No, ma'am. I hadn't questioned him about
12 anything.

13 Q. At that point when you told him you were
14 going to do a gunshot residue test on his
15 hands, did he say anything?

16 A. Yes, he looked at me and said to the effect
17 of, "Well, y'all must think I shot somebody."
18 And he sort of turned his head away. And he
19 said, "Oh, I remember now." But he never said
20 anything else.

21 Q. Was that -- did he respond to any of your
22 questions about -- was that a response to
23 anything?

24 A. No.

25 Q. Did you promise him anything for making

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1 that statement?

2 A. No, ma'am.

3 Q. Did you coerce him to make that statement?

4 A. No, ma'am, none whatsoever.

5 Q. Did you know he was going to make that
6 statement when he made it?

7 A. No.

8 SOLICITOR BIAGANTE: Thank you.
9 Please answer any questions Mr. Shelton has.

10 THE COURT: Cross examine.

11 MR. SHELTON: Beg the Court's
12 indulgence.

13 THE COURT: Sure.

14 CROSS EXAMINATION

15 BY MR. SHELTON:

16 Q. Corporal Edwards, how are you doing?

17 A. Good.

18 Q. It's corporal, correct?

19 A. Yes, sir.

20 Q. You created your incident report. Isn't
21 that correct?

22 A. Yes, sir.

23 Q. And you would agree with me that an
24 incident report is to help you with your
25 memory. Isn't that correct?

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1 A. Yes.

2 Q. Because this incident occurred about
3 seventeen months ago.

4 A. Somewhere around there.

5 Q. Sixteen or seventeen months?

6 A. (Affirmative nod), November of 2008.

7 Q. And you did not put anywhere in your
8 statement, in your incident report Mr.
9 McKelvey's statement. Isn't that correct?

10 A. What statement are you talking about?

11 Q. Mr. McKelvey's statement at the detention
12 center?

13 A. Yes.

14 Q. You put that in your incident report?

15 A. Yes.

16 Q. You don't have a copy of your incident
17 report here with you today, do you?

18 A. It's on page three.

19 Q. Maybe I can direct you to page two of your
20 incident report. It starts with a supplement
21 number one by Officer Winningham.

22 A. At exactly what point?

23 Q. And then on the third page, going to page
24 two to page three, that would be Officer
25 Winningham's statement. Isn't that correct?

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1 A. No, evidently you don't have all the
2 supplement narrative.

3 Q. Well, in your incident report when you have
4 Mr. McKelvey as subject number one, did you
5 indicate that he was under the influence of any
6 alcohol or drugs?

7 A. No, sir, not that I remember.

8 Q. There was no -- in the subject line of your
9 incident report, subject number one of your
10 incident report.

11 A. Okay.

12 Q. And you see the question, subject number
13 one using alcohol, and you've got "yes" marked?

14 A. No, it's not marked. The "unknown" is
15 marked. See this right here? Unknown. Drugs,
16 yes, because we took drugs off of him.

17 Q. I think your testimony was that you never
18 Mirandized Mr. McKelvey. Is that correct?

19 A. Correct.

20 Q. Officer Taylor was the one that placed him
21 in handcuffs that night?

22 A. No, I believe it was Officer Winningham.

23 Q. Did at a point in time Officer Winningham
24 place him under arrest and give him his Miranda
25 warnings?

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1 A. You would have to ask him that. To my
2 knowledge, no. Once they found the drugs on
3 him during the search, he was placed under
4 arrest. He wasn't questioned about the drugs
5 or anything else.

6 Q. He was placed under arrest for drugs. Is
7 that what you're indicating?

8 A. I would imagine so.

9 Q. Did you ask for permission to do the
10 gunshot residue test on Mr. McKelvey?

11 A. No, sir, I didn't.

12 Q. Did you attempt to get a search warrant?

13 A. Did I attempt to get one?

14 Q. Yes.

15 A. No, sir.

16 SOLICITOR BIAGANTE: Nothing
17 further, Your Honor.

18 MR. SHELTON: Beg the Court's
19 indulgence.

20 THE COURT: Sure. Take your time.

21 CROSS EXAMINATION CONTINUED

22 BY MR. SHELTON:

23 Q. Could I look at your incident report as to
24 what you have?

25 A. (Tenders document)

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1 MR. SHELTON: Your Honor, I have no
2 further questions regarding the *Jackson v.*
3 *Denno* hearing.

4 THE COURT: Okay. Any redirect?

5 SOLICITOR BIAGANTE: Just one
6 question.

7 REDIRECT EXAMINATION

8 BY SOLICITOR BIAGANTE:

9 Q. Tell us, Officer, what happens to gunshot
10 residue on someone's hand after a period of
11 time?

12 A. It can either be wiped off in contact, or
13 he could have washed his hands, used hand
14 sanitizer or whatever to get rid of it.

15 THE COURT: Recross?

16 MR. SHELTON: None, Your Honor.

17 THE COURT: You can come down.

18 Thank you.

19 (WITNESS EXCUSED)

20 THE COURT: Any additional
21 witnesses?

22 SOLICITOR BIAGANTE: No, sir.

23 THE COURT: All right. Any
24 witnesses, Mr. Shelton?

25 MR. SHELTON: None..

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1 THE COURT: I'll be happy to hear
2 from you.

3 MR. SHELTON: Yes, Your Honor.
4 It's clear from Corporal Edwards' testimony
5 that Mr. McKelvey was under arrest and he was
6 aware of that. And at that point in time they
7 did not -- they did not Mirandize him. So that
8 means then that the statements after that are -
9 - should be excluded.

10 THE COURT: I'll be happy to hear
11 from you.

12 SOLICITOR BIAGANTE: Your Honor,
13 it's pretty clear that the officer knew he was
14 under arrest and Miranda does not apply when
15 there is any type of police questioning that is
16 involved. Corporal Edwards, Officer Edwards
17 and the other officer did not question him.
18 This was a spontaneous utterance made without
19 any question being tendered. There was no
20 comment or coercion.

21 THE COURT: Any further argument?

22 MR. SHELTON: No, sir.

23 THE COURT: I agree. It's a
24 spontaneous utterance. I don't find there was
25 any interrogation, therefore *Miranda* would not

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1 apply. Thank you.

2 All right. We have the jury ready.

3 Anything else before we bring in the jury?

4 MR. SHELTON: Your Honor, as part of
5 the discovery material, his incident report is
6 three page. I have a page and a half. I don't
7 know what is all there. I'm not sure if ---

8 THE COURT: During the break we want
9 to make a copy of that and make it a part of
10 the record. I'll be happy to hear from you
11 concerning any motions that you may have. If
12 you want a motion for continuance, or you want
13 a motion so you can talk to somebody or further
14 investigate it. At this point, I'm not going
15 to consider it prosecutorial misconduct, but I
16 use this opportunity, and, Solicitor, you'd
17 better not frown. Because the day is fast
18 coming with the case management order that when
19 you don't produce materials -- and this needs
20 to get back to law enforcement. It's going to
21 jeopardize cases. They're going to be kicked
22 out. You have an ongoing duty, just as you do
23 in a civil trial. It's considered the same as
24 being basically an interrogatory, where you
25 have an ongoing responsibility to produce

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1 those. I understand they may be supplemented.
2 We're talking about a time very shortly after
3 arrest that we started. I don't expect law
4 enforcement to stop investigating. In fact, I
5 assume it will continue.

6 But anything that changes, that has to
7 be submitted and has to -- I assume, Solicitor,
8 you don't have that.

9 SOLICITOR BIAGANTE: No, Your Honor

10 THE COURT: I made that assumption.

11 Otherwise, I'd be fussing at you all, and I
12 would consider it possibly prosecutorial
13 misconduct. But because the law enforcement is
14 merely an extension of your office, there's a
15 problem there. I will, however -- if you look
16 at it and you think it warrants continuing this
17 case, I'll be delighted to hear from you. I'll
18 also give you as much time as you need to talk
19 with Officer Edwards, if he will talk to you
20 about it, and answer any questions before you
21 actually cross examine him on that matter.

22 MR. SHELTON: Thank you, Your
23 Honor.

24 THE COURT: Good. So if we could
25 get a copy of it made during the break, then we

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1 could make that a Court's exhibit for purposes
2 of review, should that be necessary.

3 SOLICITOR WILLIAMS: Your Honor,
4 just for the record, is that new information?

5 THE COURT: It may not be. I don't
6 know anything. It doesn't surprise me. I
7 tried a case in Williamsburg, and I'll never
8 forget as long as I live, because Solicitor
9 Newman was the prosecutor. But Jerry Theos was
10 examining the officer and he said, 'Well,
11 that's not in my report.' And Clifton Newman -
12 - I said, 'Do you have the original?' And he
13 handed it to me from his file, and there were
14 three different reports. So it can happen. I
15 understand that.

16 But we'll just make a copy of what it
17 is. If you want to make a copy of what you
18 provided so that we have a comparison, that
19 would be helpful.

20 SOLICITOR BIAGANTE: Thank you, Your
21 Honor.

22 MR. SHELTON: Thank you, Your
23 Honor.

24 THE COURT: Thank you. We need to
25 bring in the jury panel now.

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1 (JURY PANEL IN @ 1:15 P.M.)

2 THE COURT: Do you have any voir
3 dire, Solicitor?

4 SOLICITOR BIAGANTI: Sir?

5 THE COURT: Do you have any voir
6 dire?

7 SOLICITOR BIAGANTE: No, Your Honor.

8 THE COURT: Thank you, Ladies and
9 Gentlemen. I'm sorry that things have taken as
10 long as they have. We now need your assistance
11 in helping me resolve this case.

12 The caption of this case, as you've
13 already experienced in the civil process, the
14 party who's make a claim here is the State of
15 South Carolina, this being a criminal dispute.
16 And the claim, State of South Carolina versus -
17 - is being made against Jermaine McKelvey. Mr.
18 McKelvey is seated at the table here to my
19 left.

20 Good afternoon, Mr. McKelvey. I would
21 ask, sir, if you would please stand and face
22 the jury panel.

23 DEFENDANT: (Complies)

24 THE COURT: The gentleman in the
25 middle is Mr. Jermaine McKelvey. Thank you,

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1 sir. You may take your seat.

2 Are there any members of the jury
3 panel related by blood or marriage, have any
4 business dealings with, socially or casually
5 acquainted with Mr. McKelvey? If so, please
6 stand. Yes, ma'am?

7 JUROR: Friend of the family.

8 THE COURT: Your number please?

9 JUROR: 138.

10 THE COURT: You know Mr. McKelvey?

11 JUROR: Friend of the family.

12 THE COURT: Would that affect or
13 influence you in this dispute, ma'am?

14 JUROR: Yes.

15 THE COURT: All right. And your
16 number again?

17 JUROR: 138.

18 THE COURT: 138 is excused. They're
19 not going to be needed back in civil today, are
20 they?

21 THE CLERK: No, sir.

22 THE COURT: If you will call the
23 number after 6:00 tonight, and just follow that
24 instruction. Have a great day.

25 (JUROR NUMBER 138 EXCUSED)

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1 THE COURT: Yes, ma'am.

2 JUROR: I'm 155, Eliza Singleton.

3 THE COURT: Yes, ma'am.

4 JUROR: And I know him.

5 THE COURT: Would that affect you in
6 this matter?

7 JUROR: No.

8 THE COURT: Would you be able to
9 consider the evidence fairly and impartially,
10 evaluate that evidence fairly and impartially,
11 make a decision based on the evidence and the
12 law that was fair to the State and fair to Mr.
13 McKelvey?

14 JUROR: Yes.

15 THE COURT: And what is the extent
16 of your knowledge? You're just friends?

17 JUROR: He is a friend of my
18 cousin's.

19 THE COURT: But no relation to
20 anyone?

21 JUROR: No.

22 THE COURT: Okay. Thank you, ma'am.
23 And your number again?

24 JUROR: 155.

25 THE COURT: Thank you, ma'am. Any

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1 others? (No response). Thank you. There
2 appear to be none.

3 Mr. McKelvey is represented by Mr.
4 Shelton. If you'll identify yourself and
5 anyone who will be assisting you.

6 MR. SHELTON: I'm Chad Shelton.
7 Sitting with me is Mr. David Schwacke.

8 THE COURT: Thank you. Are there
9 any members of the jury panel related by blood
10 or marriage, have any business dealings with,
11 socially or casually acquainted with Mr. Chad
12 Shelton, Mr. David Schwacke or ever been
13 represented by either or both of them? If so,
14 please stand. (No response). Thank you.
15 There are none.

16 Are there any members of the jury
17 panel related by blood or marriage, have any
18 business dealings with, socially or casually
19 acquainted with or ever been represented by the
20 Public Defender for the Ninth Judicial Circuit,
21 Mr. Ashley Pennington? If so, please stand.
22 (No response). There are none.

23 Mr. Pennington has offices -- the public
24 defender has offices in Charleston and in
25 Berkeley County. Are there any members of the

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1 jury panel related by blood or marriage, have
2 any business dealings with, socially or
3 casually acquainted with anyone employed with
4 the public defender for the ninth circuit? If
5 so, please stand. (No response). Thank you.
6 There are none.

7 The State of South Carolina is represented
8 in this matter by the Solicitor, Scarlett
9 Wilson. I would ask you first are there any
10 members of the jury panel related by blood or
11 marriage, have any business dealings with,
12 socially or casually acquainted with or ever
13 been represented by Solicitor Scarlett Wilson?
14 If so, please stand. (No response). Thank you.
15 There are none.

16 Ms. Wilson has offices and the Solicitor
17 has offices also in Berkeley and Charleston
18 County. Any member of the jury panel related
19 by blood or marriage, have any business
20 dealings with, socially or casually acquainted
21 with anyone employed with the Solicitor's
22 Office for the Ninth Circuit? If so, please
23 stand. (No response). There are none.

24 The Solicitor certainly has assistants that
25 assist her. And today the State is being

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1 represented by Ms. Biagante. If you would
2 identify yourself and anyone that will be
3 assisting you.

4 MS. BIAGANTE: Yes, Your Honor. My
5 name is Dorie Biagante. I'm an Assistant
6 Solicitor for the Ninth Circuit. Sitting with
7 me is Ann Williams who is also an Assistant
8 Solicitor.

9 THE COURT: Thank you. Are there any
10 members of the jury panel related by blood or
11 marriage, have any business dealings with,
12 socially or casually acquainted with, ever been
13 represented by Ms. Biagante or Ms. Williams?
14 If so, please stand. (No response). Thank
15 you. There appear to be none.

16 I'm going to identify a number of persons,
17 Ladies and Gentlemen. And if you are related
18 by blood or marriage, have any business
19 dealings with, socially or casually acquainted
20 with any of these persons, you need to stand
21 and share that information, please, with the
22 Court:

23 Bernard Phoenix

24 Askari Dash,

25 The following persons are employed

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1 with the Moncks Corner Police Department:

2 Corporal Tony Edwards,
3 Officer George Winningham,
4 Officer Jamie Taylor,
5 Sergeant Brad Norvell,
6 Lieutenant Michael Roach,
7 Captain Murray, and also
8 Sharon Vance,
9 Roshenda Baskins.

10 The following persons are employed with the
11 South Carolina Law Enforcement Division, also
12 known as SLED:

13 Selene Kinard,
14 Patricia Crooks,
15 Lisa McReynolds,
16 Dories Yarborough,
17 Ila Simmons,
18 Nathan McCoy,
19 David Black,
20 Suzanne Cromer.

21 Also Michelle Moritzkey with the Berkeley
22 County EMS, Cindy Fuda who is a nurse at MUSC
23 and Dr. Minshall also with MUSC.

24 Yes, ma'am?

25 JUROR: Juror 19, Stacie Brunsin. I know

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1 Tony Edwards and Michael Roach.

2 THE COURT: Would that affect or
3 influence in this dispute?

4 JUROR: No, sir.

5 THE COURT: If either or both of those
6 persons should testify, would you be able to
7 consider their testimony the same as any
8 witness that would testify?

9 JUROR: Yes, sir.

10 THE COURT: Would you base your decision
11 on the evidence and the law, and would that
12 decision be fair to both the State and to Mr.
13 McKelvey?

14 JUROR: Could you repeat that?

15 THE COURT: Would you base your decision
16 on the evidence and the law, and will that
17 decision be fair to the State and to Mr.
18 McKelvey?

19 JUROR: Yes, sir.

20 THE COURT: And your number again?

21 JUROR: 19.

22 THE COURT: Thank you. You may be
23 seated. Any others? Yes?

24 JUROR: 114. George Winningham, he's
25 married to my niece.

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1 THE COURT: Would that affect you in this
2 dispute? If Mr. Winningham testifies will you
3 be able to consider his testimony the same as
4 any witness?

5 JUROR: Yes.

6 THE COURT: Will you base your decision
7 on the evidence and the law, and with that
8 decision be fair to both sides?

9 JUROR: Yes.

10 THE COURT: Your number again?

11 JUROR: 114.

12 THE COURT: Thank you. Any others?
13 Thank you. There appear to be none.

14 The dispute, Ladies and Gentlemen, that
15 brings us here is basically framed by these
16 four documents that I'm showing you now. And
17 they are what they appear to be to you.
18 They're pieces of paper. They're not evidence.
19 They merely contain the allegations or
20 accusations against Mr. McKelvey. But I need
21 to share with you what's alleged so I can ask
22 you some questions about it. Please understand
23 that what I'm sharing with you is not to be
24 considered evidence.

25 One indictment accuses Mr. McKelvey of

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1 committing the offense of assault and battery
2 with intent to kill in that it accuses him of
3 on or about November 27, 2008, in Berkeley
4 County, he, with malice aforethought, did
5 commit an assault and battery upon one Bernard
6 Phoenix while armed with a deadly weapon with
7 the intent to kill or cause grievous bodily
8 injury to Mr. Phoenix in that he did shoot him
9 in the head with a handgun.

10 It's further alleged that at that time and
11 place, in Berkeley County on November 27, 2008,
12 while armed with a deadly weapon, to-wit: a
13 .380 Makarov handgun, did take and carry away
14 personal property of Bernard Phoenix with the
15 intent to deprive him of possession by use of
16 force, duress or intimidation, basically being
17 armed with a deadly weapon, in that he
18 allegedly committed the offense of armed
19 robbery.

20 In addition, he's accused of committing the
21 offense of being in possession of a firearm
22 during the commission of a violent offense, in
23 that he did allegedly at that time and place
24 willfully and unlawfully possess a firearm or
25 visibly display a firearm during the commission

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1 of a violent crime, that being assault and
2 battery with intent to kill.

3 Also, he's accused that at that time and place,
4 being in possession of crack cocaine, which was
5 allegedly in violation, again, of the laws
6 describing that conduct.

7 I share that with you to find out if any
8 member of the jury panel has read anything,
9 heard anything -- do you have any prior
10 knowledge of this dispute? If so, please
11 stand. (No response). Thank you. There are
12 none.

13 Is there anything about the nature of the
14 crimes charged, that is assault and battery
15 with intent to kill, armed robbery, possession
16 of a firearm during the commission of a violent
17 crime and possession of crack cocaine, that
18 you, because of some strong feelings you may
19 have, some philosophy you may have, something
20 that may have happened to you or a family
21 member or a close personal friend, that would
22 affect your ability to be fair and impartial in
23 analyzing the evidence? And that means
24 applying your common sense, your sense of logic
25 and reason, and deciding from the evidence what

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1 you believe to be the true facts, and then once
2 making that decision, taking the law as I give
3 it to you and applying that law fairly and
4 impartially to those facts so that your
5 decision would be fair to both sides? If you
6 feel that there is something in your background
7 that would affect your ability to perform that
8 task and accept that responsibility, please
9 stand. (No response). Thank you. There are
10 none.

11 Are there any members of the jury panel who
12 are presently members of or participate or
13 support any crime prevention organization, such
14 as People Against Rape, know as PAR; Citizens
15 Against Rape, known as CAR; Mothers Against
16 Drunk Driving, MADD; similar organizations? If
17 you are, please stand. Thank you.

18 JUROR NUMBER 41: Would national NRA
19 count?

20 THE COURT: If you are -- you support
21 that?

22 JUROR NUMBER 41: Yes.

23 THE COURT: Financially and are a member?

24 JUROR NUMBER 41: Yes.

25 THE COURT: Would that affect or

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1 influence you in any way, sir?

2 JUROR NUMBER 41: No, sir.

3 THE COURT: Would you, again, base your
4 decision on the evidence and the law, and would
5 that decision be fair to both sides?

6 JUROR NUMBER 41: Yes, sir.

7 THE COURT: Your number and name, please.

8 JUROR NUMBER 41: Forty-one (41), Mark
9 Danaher.

10 THE COURT: Thank you, sir. Are there
11 others? (No response). There appear to be
12 none.

13 Are there any members of the jury
14 panel or members of your immediate family or
15 close personal friends who are now or formally
16 connected with law enforcement in any capacity?
17 If so, please stand.

18 Yes, ma'am.

19 JUROR NUMBER 181: My son is a
20 police officer.

21 THE COURT: Your son's a police
22 officer where?

23 JUROR NUMBER 181: Summerville.

24 THE COURT: Would that affect or
25 influence you in this dispute?

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1 JUROR NUMBER 181: I think it
2 would.

3 THE COURT: Your number, please?

4 JUROR NUMBER 181: 181.

5 THE COURT: Number 181 will be
6 excused from participation in the dispute. If
7 you will call the number, please, after 6:00
8 and follow that instruction. You are free to
9 leave.

10 (JUROR NUMBER 181 EXCUSED)

11 THE COURT: Yes, ma'am?

12 JUROR NUMBER 13: I'm Juror 13. My
13 brother was in SLED for twenty years and my son
14 is with the military police.

15 THE COURT: Would that affect you in
16 this dispute?

17 JUROR NUMBER 13: No, sir.

18 THE COURT: Will you base your
19 decision on the evidence and the law and will
20 it be fair to both sides?

21 JUROR NUMBER 13: Yes, sir.

22 THE COURT: And your number again?

23 JUROR NUMBER 13: 13.

24 THE COURT: Yes, sir?

25 JUROR NUMBER 24: My brother-in-law,

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1 he works as a dispatcher for the police
2 department.

3 THE COURT: Okay. Would that affect
4 you in any way?

5 JUROR NUMBER 24: Yes, sir.

6 THE COURT: It would?

7 JUROR NUMBER 24: (Affirmative nod).

8 THE COURT: Your number?

9 JUROR: Twenty-four (24)

10 THE COURT: Juror 24 will be excused
11 from participation in this dispute. Thank you.

12 (JUROR NUMBER 24 EXCUSED)

13 THE COURT: Any others? Yes, ma'am.

14 JUROR NUMBER 60: My fiancée works for
15 North Charleston Police Department as a
16 dispatcher.

17 THE COURT: Would that affect you in
18 any way?

19 JUROR NUMBER 60: No, sir.

20 THE COURT: Will you base your
21 decision on the evidence and the law, and will
22 that decision be fair to both sides?

23 JUROR NUMBER 60: Yes, sir.

24 THE COURT: Thank you. You may be
25 seated. Your number, please? What was your

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1 number?

2 JUROR NUMBER 60: Sixty (60).

3 THE COURT: Thank you. Are there
4 others? (No response). Thank you. There
5 appear to be none.

6 One of the things that I mentioned to
7 you, Ladies and Gentlemen, when I qualified
8 you, it is a system that works exceedingly
9 well, as I've stated, and I believe in it
10 strongly. But one of the important parts of it
11 is that you and I have two different
12 responsibilities. And they really don't
13 overlap. We're judges together.

14 You, and you alone, will be the judge
15 of the facts. And you'll determine the facts
16 from the evidence, that's testimony of
17 witnesses and exhibits. But you don't have
18 anything to do with the law. And that means
19 that you have to accept the law as I give it to
20 you, notwithstanding your personal opinions and
21 philosophies.

22 And there are a lot -- many principles
23 of law that will apply in this case. One of
24 them that applies in this case and in every
25 single dispute of a criminal nature in this

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1 country, as far as I know, that persons accused
2 of committing criminal offenses are never
3 required to prove anything at all. They don't
4 have a responsibility to prove their innocence.
5 They don't have to disprove anything. They
6 don't have to explain anything. They don't
7 have to say anything. They don't have to
8 present any evidence. Because the law says
9 that the party that makes the accusation or
10 claims, the State of South Carolina in this
11 case, is the only party that has any burden of
12 proof. And they have to prove their case to a
13 standard known as beyond a reasonable doubt.
14 And that's a standard that -- I'll explain that
15 term to you.

16 That means that you will be analyzing
17 the evidence and decide, at the appropriate
18 time, whether you're convinced beyond a
19 reasonable doubt that the State has met its
20 burden of proof. And that's what the verdict
21 means.

22 Is there any person on the jury panel
23 that, because of your philosophy, your strong
24 feeling, something that may have happened to
25 you or a family member, that would give you any

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1 problem or concern about your ability to honor
2 the separation? And that is follow the law as
3 I give it to you and apply that law fairly and
4 impartially to those facts? If you feel that
5 there is, please stand.

6 Sir, I'll ask you to come forward, if
7 you would, please. The attorneys may approach
8 as well.

9 (OFF RECORD BENCH CONFERENCE)

10 THE COURT: Number 128 is excused
11 from participation in this dispute.

12 (JUROR NUMBER 128 EXCUSED)

13 THE COURT: Yes, sir. If you want
14 to come forward, please.

15 (OFF RECORD BENCH CONFERENCE)

16 THE COURT: Number 152 will be
17 excused from participation in the dispute.
18 Call the number after 6:00.

19 (JUROR NUMBER 152 EXCUSED)

20 THE COURT: Are there any others?
21 (No response). Thank you very much, Ladies and
22 Gentlemen.

23 The last question, Ladies and
24 Gentlemen, that I would have of you is this: Is
25 there anything that you've heard about this

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1 case that would give you any concern about your
2 ability to make a commitment to both to Mr.
3 McKelvey and to the State and to the Court that
4 you would, at the appropriate time, apply your
5 common sense, your sense of logic and reason,
6 fairly and impartially in analyzing the
7 evidence and decide what you believe to be the
8 true facts, then take the law as I give it to
9 you and apply that law fairly and impartially
10 to those facts so that your decision would be
11 fair? (No response). Thank you so much.

12 Unlike the previous process -- it's
13 very similar in that your names have been drawn
14 at random and place on a list. But while you
15 work with the list -- and eventually we're
16 going to get to that point where I'm going use
17 that -- I think if we use what I call the user
18 friendly criminal collection list, but I won't
19 do it today.

20 But when your name is called, you're
21 going to be asked to come forward. And if
22 you'll just come forward and take the stand
23 right here, just as I'm standing, facing both
24 sides. First, the State will have an
25 opportunity to say "excuse the juror, seat the

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1 juror, swear the juror" or something similar.
2 Then if they say "seat the juror," then Mr.
3 McKelvey will have an opportunity to say
4 "excuse the juror, seat the juror, swear the
5 juror" or something similar. And we'll go
6 through that process until we've selected our
7 twelve jurors and one alternate.

8 Now, please understand that each side
9 in this case -- the State can excuse five and
10 Mr. McKelvey has an opportunity to excuse ten
11 jurors. And we'll go through the process. And
12 if you're excused, it doesn't mean anything.
13 Don't take offense at that. That's just the
14 process. And we'll go through until we've
15 identified our twelve jurors and our one
16 alternate.

17 Thank you very much. I'll turn it
18 over to you now and we have our list. Just
19 give me the list. You might as well just put -
20 - well, we don't need but thirty-seven, I
21 think. I think with this new process we can go
22 back to the method that we employed before.
23 The only thing is they have to stand and give
24 their names so you have a chance to see them.
25 What we have is the computer is -- it used to

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1 be, when I first started -- in fact, I can
2 remember -- and then I remember a person that
3 had impaired vision coming when I worked in
4 Manning. They have a jury person that has some
5 problems or is challenged. And he comes in --
6 there's a statute that says you had to have a
7 small child or someone who was visually
8 impaired to pull the names out of the hopper.

9 Well, then we got sophisticated and we
10 went to putting your names on little slips of
11 paper, and they had to reshuffle. Then we got
12 really smart. We've got computer generated,
13 we've got a randomly-selected list. We've got
14 past that now. So it takes a few minutes to
15 generate the list. So you'all be patient.
16 We'll get you out of here before 2:00, I
17 promise and I hope.

18 (BRIEF RECESS)

19 (DEFENDANT PRESENT)

20 THE COURT: You'all ready? The
21 State's ready and Mr. McKelvey's ready?

22 SOLICITOR BIAGANTE: Yes, sir.

23 THE COURT: Madame Clerk, I turn it
24 over to you.

25 THE CLERK: When I call your name,

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1 please come forth and bring your personal
2 belongings with you. If I say "seat the
3 juror," please have a seat in the jury box. If
4 I say "excuse the juror," please return to your
5 original seating.

6 Juror 116, Leslie Mizell.

7 (JUROR BEFORE COUNSEL)

8 THE CLERK: What says the State?

9 SOLICITOR BIAGANTE: Please present
10 Ms. Mizell.

11 THE CLERK: What says the defense?

12 MR. SHELTON: Please seat the
13 juror.

14 THE CLERK: Seat the juror.

15 (JUROR NUMBER 116 SEATED)

16 THE CLERK: Juror 154, Matthew
17 Simmons, Jr.

18 (JUROR BEFORE COUNSEL)

19 THE CLERK: What says the State?

20 SOLICITOR BIAGANTE: Please excuse
21 Mr. Simmons.

22 THE CLERK: Excuse the juror.

23 (JUROR NUMBER 116 EXCUSED)

24 THE CLERK: Juror 111, Sally Gadson.
25

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1 (JUROR BEFORE COUNSEL)

2 THE CLERK: What says the state?

3 SOLICITOR BIAGANTE: Please present
4 Ms. Gadson.

5 THE CLERK: What says the defense?

6 MR. SHELTON: Please seat this
7 juror.

8 THE CLERK: Seat the juror.

9 (JUROR NUMBER 111 SEATED)

10 THE CLERK: Juror 18, William
11 Bremer.

12 (JUROR BEFORE COUNSEL)

13 THE CLERK: What says the State?

14 SOLICITOR BIAGANTE: Please excuse
15 Mr. Bremer.

16 THE CLERK: Excuse the juror.

17 (JUROR NUMBER 18 EXCUSED)

18 THE CLERK: Juror Number One,
19 Christine Adams.

20 (JUROR BEFORE COUNSEL)

21 THE CLERK: What says the State?

22 SOLICITOR BIAGANTE: Please present
23 Ms. Adams.

24 THE CLERK: What says the defense?

25 MR. SHELTON: Please present

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1 this juror.

2 THE CLERK: Seat the juror.

3 (JUROR NUMBER 1 SEATED)

4 THE CLERK: Juror 33, Joey Cantrell.

5 (JUROR BEFORE COUNSEL)

6 THE CLERK: What says the State?

7 SOLICITOR BIAGANTE: Please present

8 Ms. Cantrell.

9 THE CLERK: What says the defense?

10 MR. SHELTON: Please seat this

11 juror.

12 THE CLERK: Seat the juror.

13 (JUROR NUMBER 33 SEATED)

14 THE CLERK: Juror 51, Stephanie

15 Donaldson.

16 (JUROR BEFORE COUNSEL)

17 THE CLERK: What says the State?

18 SOLICITOR BIAGANTE: Please present

19 Ms. Donaldson.

20 THE CLERK: What says the defense?

21 MR. SHELTON: Please seat this

22 juror.

23 THE CLERK: Seat the juror.

24 (JUROR NUMBER 51 SEATED)

25 THE CLERK: Juror 26, Karen Burbage.

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1

2

(JUROR BEFORE COUNSEL)

3

THE CLERK: What says the State?

4

SOLICITOR BIAGANTE: Please present

5

Ms. Burbage.

6

THE CLERK: What says the defense?

7

MR. SHELTON: Please seat this

8

juror.

9

THE CLERK: Seat the juror.

10

(JUROR NUMBER 26 SEATED)

11

THE CLERK: Juror 124, Timothy

12

Oneil.

13

(JUROR BEFORE COUNSEL)

14

THE CLERK: What says the State?

15

SOLICITOR BIAGANTE: Please present

16

Mr. Oneil.

17

THE CLERK: What says the defense?

18

MR. SHELTON: Please excuse Mr.

19

Oneil.

20

THE CLERK: Excuse the juror.

21

(JUROR NUMBER 124 EXCUSED)

22

THE CLERK: Juror 72, Milton Grant.

23

(JUROR BEFORE COUNSEL)

24

THE CLERK: What says the State?

25

SOLICITOR BIAGANTE: Please present

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1 Mr. Grant.

2 THE CLERK: What says the defense?

3 MR. SHELTON: Please present
4 this juror.

5 THE CLERK: Seat the juror.

6 (JUROR NUMBER 72 SEATED)

7 THE CLERK: Juror 61, Christopher
8 Ellis.

9 (JUROR BEFORE COUNSEL)

10 THE CLERK: What says the State?

11 SOLICITOR BIAGANTE: Please present
12 Mr. Ellis.

13 THE CLERK: What says the defense?

14 MR. SHELTON: Please excuse this
15 juror.

16 THE CLERK: Excuse the juror.

17 (JUROR NUMBER 61 EXCUSED)

18 THE CLERK: Juror 190, Lori Wilhite.

19

20 (JUROR BEFORE COUNSEL)

21 THE CLERK: What says the State?

22 SOLICITOR BIAGANTE: Please present

23 Ms. Wilhite?

24 THE CLERK: What says the defense?

25 MR. SHELTON: Please excuse this

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1 juror.

2 THE CLERK: Excuse the juror.

3 (JUROR NUMBER 190 EXCUSED)

4 THE CLERK: Juror Number 5, Ray

5 Aldrow.

6 (JUROR BEFORE COUNSEL)

7 THE CLERK: What says the State?

8 SOLICITOR BIAGANTE: Please present

9 Mr. Aldrow.

10 THE CLERK: What says the defense?

11 MR. SHELTON: Please excuse this

12 juror.

13 THE CLERK: Excuse the juror.

14 (JUROR NUMBER 5 EXCUSED)

15 THE CLERK: Juror 14, Gary Benedict.

16

17 (JUROR BEFORE COUNSEL)

18 THE CLERK: What says the State?

19 SOLICITOR BIAGANTE: Please present

20 Mr. Benedict.

21 THE CLERK: What says the defense?

22 MR. SHELTON: Please seat this

23 juror.

24 THE CLERK: Seat the juror.

25 (JUROR NUMBER 14 SEATED)

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1 THE CLERK: Juror 16, William
2 Bradshaw, Jr.

3 (JUROR BEFORE COUNSEL)

4 THE CLERK: What says the State?

5 SOLICITOR BIAGANTE: Please present
6 Mr. Bradshaw.

7 THE CLERK: What says the defense?

8 MR. SHELTON: Please excuse this
9 juror.

10 THE CLERK: Excuse the juror.

11 (JUROR NUMBER 16 EXCUSED)

12 THE CLERK: Juror 40, Matthew
13 Curtis.

14 (JUROR BEFORE COUNSEL)

15 THE CLERK: What says the State?

16 SOLICITOR BIAGANTE: Please present
17 Mr. Curtis.

18 THE CLERK: What says the defense?

19 MR. SHELTON: Please seat this
20 juror.

21 THE CLERK: Seat the juror.

22 (JUROR NUMBER 40 SEATED)

23 THE CLERK: Juror 104, James Ludlam.

24

25 (JUROR BEFORE COUNSEL)

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1 THE CLERK: What says the State?

2 SOLICITOR BIAGANTE: Please present

3 Mr. Ludlam.

4 THE CLERK: What says the defense?

5 MR. SHELTON: Please seat this

6 juror.

7 THE CLERK: Seat the juror.

8 (JUROR NUMBER 104 SEATED)

9 THE CLERK: Juror 176, Todd Vinson.

10 (JUROR BEFORE COUNSEL)

11 THE CLERK: What says the State?

12 SOLICITOR BIAGANTE: Please present

13 Mr. Vinson.

14 THE CLERK: What says the defense?

15 MR. SHELTON: Please excuse this

16 juror.

17 THE CLERK: Excuse the juror.

18 (JUROR NUMBER 176 EXCUSED)

19 THE CLERK: Juror 136, Shameka

20 Pringle.

21 (JUROR BEFORE COUNSEL)

22 THE CLERK: What says the State?

23 SOLICITOR BIAGANTE: Please excuse

24 Ms. Pringle.

25 THE CLERK: Excuse the juror.

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1 (JUROR NUMBER 136 EXCUSED)

2 THE CLERK: Juror 13, Katherine

3 Bell.

4 (JUROR BEFORE COUNSEL)

5 THE CLERK: What says the State?

6 SOLICITOR BIAGANTE: Please present

7 Ms. Bell.

8 THE CLERK: What says the defense?

9 MR. SHELTON: Please excuse this

10 juror.

11 THE CLERK: Excuse the juror.

12 (JUROR NUMBER 13 EXCUSED)

13 THE CLERK: Juror 174, Henry Varner.

14

15 (JUROR BEFORE COUNSEL)

16 THE CLERK: What says the State?

17 SOLICITOR BIAGANTE: Please excuse

18 Mr. Varner.

19 THE CLERK: Excuse the juror.

20 (JUROR NUMBER 174 EXCUSED)

21 THE CLERK: Juror Number 4, Nelson

22 Albores.

23 (JUROR BEFORE COUNSEL)

24 THE CLERK: What says the State?

25 SOLICITOR BIAGANTE: Please present

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1 Mr. Albores.

2 THE CLERK: What says the defense?

3 MR. SHELTON: Please excuse this
4 juror.

5 THE CLERK: Excuse the juror.

6 (JUROR NUMBER 4 EXCUSED)

7 THE CLERK: Juror 25, Jane Bruno.

8 (JUROR BEFORE COUNSEL)

9 THE CLERK: What says the State?

10 SOLICITOR BIAGANTE: Please present

11 Ms. Bruno.

12 THE CLERK: What says the defense?

13 MR. SHELTON: Please excuse the
14 juror.

15 THE CLERK: Excuse the juror.

16 (JUROR NUMBER 25 EXCUSED)

17 THE CLERK: Juror 58, Clayton

18 Edmonds.

19 (JUROR BEFORE COUNSEL)

20 THE CLERK: What says the State?

21 SOLICITOR BIAGANTE: Please present

22 Mr. Edmonds.

23 THE CLERK: What says the defense?

24 MR. SHELTON: Please seat this
25 juror.

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1 THE CLERK: Seat the juror.

2 (JUROR NUMBER 58 SEATED)

3 THE CLERK: Juror 180, John Watkins.

4

5 (JUROR BEFORE COUNSEL)

6 THE CLERK: What says the State?

7 SOLICITOR BIAGANTE: Please excuse

8 Mr. Watkins.

9 THE CLERK: Excuse the juror.

10 (JUROR NUMBER 180 EXCUSED)

11 THE COURT: The State has exhausted
12 its strikes.

13 THE CLERK: Juror 95, Willie King.

14 (JUROR BEFORE COUNSEL)

15 THE CLERK: Any cause for challenge
16 from the State?

17 SOLICITOR BIAGANTE: No, please
18 present Mr. King.

19 THE CLERK: What says the defense?

20 MR. SHELTON: Please seat this
21 juror.

22 THE CLERK: Seat the juror.

23 (JUROR NUMBER 95 SEATED)

24 THE COURT: We'll select our
25 alternate. Strikes will be one and two.

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1 THE CLERK: Juror 60, Dawn Elia.

2 (JUROR BEFORE COUNSEL)

3 THE CLERK: What says the State?

4 SOLICITOR BIAGANTE: Please present

5 Ms. Elia.

6 THE CLERK: What says the defense?

7 MR. SHELTON: Please excuse the
8 juror.

9 THE CLERK: Excuse the juror.

10 (JUROR NUMBER 60 EXCUSED)

11 THE COURT: Juror 114, Carolyn
12 Mitchum.

13 (JUROR BEFORE COUNSEL)

14 THE CLERK: What says the State?

15 SOLICITOR BIAGANTE: Please present

16 Ms. Mitchum.

17 THE CLERK: What says the defense?

18 MR. SHELTON: Beg the Court's
19 indulgence.

20 THE COURT: Absolutely.

21 MR. SHELTON: Please excuse this
22 juror.

23 THE CLERK: Excuse the juror.

24 (JUROR NUMBER 114 EXCUSED)

25 THE COURT: Juror 188, Legina White.

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1 (JUROR BEFORE COUNSEL)

2 THE CLERK: What says the State?

3 SOLICITOR BIAGANTE: Please present
4 Ms. White.

5 THE CLERK: Any cause for challenge
6 from the defense?

7 MR. SHELTON: None.

8 THE CLERK: Seat the juror.

9 (JUROR NUMBER 188 SEATED)

10 THE CLERK: Your Honor, the jury is
11 seated.

12 (JURY SEATED @ 1:50 P.M.)

13 THE COURT: Any Motions from the
14 State regarding the selection?

15 SOLICITOR BIAGANTE: None, Your
16 Honor.

17 THE COURT: Any Motions from Mr.
18 McKelvey regarding the selection?

19 MR. SHELTON: None, Your Honor.

20 THE COURT: Thank you. Ladies and
21 Gentlemen, those of you that were not selected,
22 thank you so much for your patience and your
23 participation in the process. I'm pleased to
24 inform you that you are now free to leave for
25 the day. Call the number after 6:00 tonight

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1 and follow that instruction, as I'm sure maybe
2 Judge Harrington told you, we'll try to
3 minimize the amount of time when you have to
4 return. So the message will be one of three:
5 one, if you get the message tonight to call
6 back tomorrow after 6:00, then you know
7 tomorrow is your day you will not be coming to
8 see us. If it says to call between a certain
9 time, that means we may need you but we're not
10 sure when. And rather than have you come and
11 just sit around, we try to minimize that and
12 try to have -- be a little more definite about
13 that. And that would be the reason for that.
14 Typically, we'll give you about three hours
15 notice before you have to report, should you
16 have to come in.

17 Obviously, if it says report at a
18 certain time then you know we're going to need
19 a jury. But one thing is for sure -- when you
20 come after today, it won't be as long as you've
21 been here, because we don't have to qualify you
22 again and we'll be in a better position to move
23 forward. And generally it takes about thirty
24 minutes to an hour that you will be
25 inconvenienced.

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1 But thank you again for your
2 assistance, but you are free to leave now.
3 Have a good lunch. You don't have to wait in
4 line, I don't think.

5 (JURY PANEL EXCUSED)

6 THE COURT: Ladies and Gentlemen,
7 those of you that were selected, thank you for
8 your patience as well. I look forward to
9 working with you. We're going to take a break
10 now and have our lunch break. I'll ask you to
11 please return to your jury room by 3:15. It's
12 about five minutes to 2:00. We have something
13 else?

14 SOLICITOR BIAGANTE: Yes, sir.

15 THE COURT: You may get a little bit
16 longer. Thank you (Ms. Bigante) very much. I
17 appreciate it. I'd forgotten about that.

18 There are some matters that we have to
19 take up out of your presence. And rather than
20 have you come sit here -- I don't know how long
21 it's going to take. But rather than you
22 sitting around and waiting and maybe we take
23 about thirty minutes worth of time and
24 testimony, I think the better thing is to let
25 you be free for this afternoon, and for you to

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1 go ahead and go.

2 Please remember something. First of
3 all -- and you'll hear this throughout -- as
4 you've heard throughout the qualifications and
5 my questions, you're going to make a commitment
6 when you're sworn to be a judge with me that
7 you're going to decide this case based on the
8 evidence. And the evidence, of course, is what
9 you hear in this courtroom, testimony of
10 witnesses and exhibits that are introduced
11 through that testimony and nothing else.
12 Therefore, it would be very inappropriate for
13 somebody to talk with you outside of this
14 courtroom or talk about this case in your
15 presence. Please, if somebody should try to do
16 that, tell them to stop or walk away, and
17 report that upon your return. I doubt that's
18 going to happen. Sometimes when we're at lunch
19 people may not know you're on the jury, and
20 they may inadvertently start saying something.
21 If you'll just tell them to stop or walk away
22 from it, if you have to.

23 Secondly, it's very important -- and
24 maybe some of you or all of you have children.
25 I know with mine whenever I told my child or

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1 children not to do something, generally,
2 unfortunately, that was the very thing they
3 wanted to do. I'm thinking about me, not you.
4 But sometimes I look at myself and I don't act
5 very adultlike sometimes, I act like a
6 sophisticated child.

7 And I say that because we live in an
8 information society. I have right here
9 (indicating computer) my law, I have my
10 charges, I have access to research. Great.
11 It's a wonderful tool. You do, too, or may
12 have it. I don't know. But we've had
13 situations now where jurors conduct their own
14 independent research, both into the law and to
15 sometimes factual situations. Please know that
16 if you do that you jeopardize this case. You
17 can't do that. And it's obvious. Because
18 you're going to make the commitment to decide
19 it based on what you hear in this courtroom.
20 Not that there's anything that's really bad
21 that you can find out. It's just that it
22 violates that oath, and therefore violates the
23 process.

24 So, please don't conduct any
25 independent investigation. Don't do any

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1 independent research. And don't begin to
2 decide anything. You have an open mind, and
3 we'll talk about that more tomorrow. Have a
4 great day, and I'll see you tomorrow.
5 You'll need to report directly -- and when
6 you're excused I'm going to ask that you follow
7 Mr. Pontiff and Mrs. Wiggins. They'll take you
8 back to your jury room. They need to get
9 certain information from you. When you have
10 given them that information, then you are free
11 to leave. But when you report tomorrow, come
12 directly to the jury room, not to the
13 courtroom.

14 I'm going to ask that you return by
15 9:30 in the morning, and we'll bring you out
16 and start the trial at that time. Please do
17 not call that number tonight after 6:00,
18 because that message does not apply to you.
19 You just come directly here. Have a great
20 afternoon. Thank you again for your patience.
21 See you tomorrow. You're free to leave. And
22 please make sure you give them that
23 information.

24 Thank you, Ms. Biagante. I forgot about
25 that. I remember that was said.

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1 (JURY OUT @ 2:00 P.M.)

2 THE COURT: Any exceptions or
3 additions to the Court's remarks from the
4 State?

5 SOLICITOR BIAGANTE: No, Your Honor.

6 THE COURT: Any exceptions or
7 additions from Mr. McKelvey?

8 MR. SHELTON: No, Your Honor.

9 THE COURT: Anything further from
10 the State before we recess this case?

11 SOLICITOR BIAGANTE: Yes, Your
12 Honor. I was provided Corporal Edwards'
13 incident report.

14 THE COURT: Very well.

15 SOLICITOR BIAGANTE: It is about a
16 couple of paragraphs longer than what I had.
17 We've given it to Mr. Shelton. However,
18 everything in it is -- and I will make on a
19 Court's Exhibit, too, as well as the copy that
20 I've provided to Mr. Shelton.

21 THE COURT: All right. We'll make
22 -- Court's Exhibit 1 will be what you provided
23 to Mr. Shelton. Court's Exhibit 2 will be the
24 supplemental report.

25 SOLICITOR BIAGANTE: Yes, sir.

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1 (SO ENTERED AS COURT'S EXHIBIT 1)

2 (SO ENTERED AS COURT'S EXHIBIT 2)

3 SOLICITOR BIAGANTE: And the only
4 additional thing is it talks about this other
5 person ---

6 MR. SHELTON: Your Honor, there's
7 two opposite factions in the courtroom, if
8 she's going to get into what ---

9 THE COURT: We don't need to go into
10 that. It speaks for itself. But you will have
11 the copy. Please let me know if tomorrow you
12 need any additional time before or any motions
13 we have about that. I'll allow you.

14 MR. SHELTON: One thing I would
15 ask is that maybe the State inquire into it.
16 It looks maybe what I got was a summary of
17 everything. And if that's true on the
18 supplemental, and that's true on the other
19 officers' too?

20 THE COURT: Well, we need to make
21 sure that they are. We'll do that while
22 they're here, and we'll get that supplemented.
23 If there are any additions we'll just add those
24 to the record as well.

25 MR. SHELTON: Thank you.

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1 THE COURT: Anything else,
2 Solicitor?

3 SOLICITOR BIAGANTE: No, sir.

4 THE COURT: Thank you very much.
5 We'll be at-ease and recess in this until 9:30
6 in the morning.

7 (DEFENDANT EXITS COURTROOM)

8 MR. SHELTON: Thank you, Your
9 Honor.

10 THE COURT: Wait just a minute, ask
11 Mr. McKelvey to step back in. Thank you.

12 (DEFENDANT ENTERS COURTROOM)

13 THE COURT: Thank you, Mr. McKelvey. We've
14 got a matter of law. We just need -- we can't
15 do anything without your presence, sir. Let
16 the record reflect Mr. McKelvey is present.

17 Mr. McKelvey, we've had a status conference
18 concerning this matter, and apparently there's
19 been some discussion between the State and your
20 lawyers about some witnesses and basically
21 chain of custody witnesses. I assume they've
22 talked with you about that. But we need to put
23 -- there's apparently an agreement that they've
24 reached, and I need to put it on the record.
25 And that's the reason for bringing you in.

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1 Okay.

2 Solicitor?

3 SOLICITOR BIAGANTE: Thank you, Your
4 Honor. I have discussed with Mr. Shelton
5 having the SLED chain witnesses, who are only
6 in the chain -- not the scientists -- Mr.
7 Shelton is going to stipulate to those people
8 in the chain. That is Selena Kinard who is
9 a log-in tech; Patrick Crooks, also a log-in;
10 Lisa McReynolds and Dories Yarborough. Those
11 are all witnesses in the chain of custody, Your
12 Honor.

13 THE COURT: Is that correct, Mr.
14 Shelton?

15 MR. SHELTON: Yes, it is.

16 THE COURT: But certainly that just
17 means they picked up something and took it to
18 somebody else. And basically the ultimate
19 person that received it is going to testify.

20 MR. SHELTON: Yes, Your Honor. And I
21 do believe there was an earlier stipulation as
22 to one of the SLED chain.

23 SOLICITOR BIAGANTE: That's correct.
24 Earlier, last week, Your Honor, Mr. Shelton and
25 I spoke to each other with regards to a fifth

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1 chain witness, Ergle. She had foot surgery and
2 is out on medical leave. And I spoke with Mr.
3 Shelton about that last week, and he agreed
4 last week to stipulate to her as well.

5 THE COURT: Is that correct?

6 MR. SHELTON: Yes, Your Honor.

7 THE COURT: Very well. Then those
8 stipulations will cover and continue throughout
9 the trial of this case.

10 Thank you. Do you have any questions about
11 that, Mr. McKelvey?

12 MR. MCKELVEY: No, sir.

13 THE COURT: Thank you so much.

14 We'll be at-ease, then, in this case until 9:30
15 in the morning.

16 (COURT IN RECESS)

17 (TRANSCRIPT CONTINUE NEXT PAGE)

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3 (DEFENDANT PRESENT)

4 THE COURT: Let the record reflect
5 that Mr. McKelvey is present. Is the defense
6 ready to proceed?

7 MR. SHELTON: Yes, Your Honor.

8 THE COURT: The State's ready to
9 proceed?

10 SOLICITOR BIAGANTE: Yes, Your
11 Honor.

12 THE COURT: Let's bring in our jury,
13 please.

14 (JURY IN @ 9:43 A.M.)

15 THE COURT: Good morning, Ladies and
16 Gentlemen. I hope you had a good evening.
17 We're ready now to continue the matter that we
18 started yesterday.

19 Before I ask Ms. Hill to administer your
20 oath, let me talk about the seating for just a
21 moment.

22 Ms. White, you've been selected as the
23 alternative juror. That term really doesn't
24 mean a whole lot right now. At the conclusion
25 of this case if the first twelve that were

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1 selected are able to continue, then you will
2 not participate in the final deliberations.
3 But neither you nor I know the status of those
4 persons. And so therefore you are very much a
5 part of the jury.

6 While you're the alternate you may occupy
7 either of those two chairs. They are for the
8 alternate jurors, and I would just ask the rest
9 of the jury not to sit in the two chairs at the
10 end. Sit in the remaining chairs as you come
11 in.

12 The only other assigned seat is this seat
13 on the end of the first row. Any of the first
14 twelve of you are eligible to serve -- I call
15 them presiding jurors, but they're also called
16 foreperson, foreman, forelady. Someone has to
17 be responsible for signing the verdict form on
18 behalf of the jury when you've completed your
19 deliberations.

20 There will be exhibits that will be
21 introduced during this trial and it will be the
22 responsibility of the presiding juror to
23 receive those from the Court and when the jury
24 has completed its deliberations, returning
25 those exhibits to the Court.

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1 Other than that -- that's really the
2 essence of the additional responsibilities. As
3 I mentioned, any of you of the first twelve are
4 eligible to serve. The statute permits me to
5 appoint the presiding juror or you to select
6 the presiding juror. I let the jury pick their
7 presiding juror. It doesn't have to be done
8 right away. But at some point I would ask that
9 you do that. And once you've selected that
10 individual, I would ask that that person simply
11 occupy that chair for the balance of the trial.
12 Until that person has been selected, you're
13 free to occupy any seats that are there, with
14 the exception of Ms. White's two seats at the
15 end.

16 Thank you for your attention. Please give
17 your attention now to Ms. Hill as she
18 administers your oath. Thank you, Ms. Hill.

19 THE CLERK: Thank you. Ladies and
20 Gentlemen of the jury, please stand and raise
21 your right hands to be sworn.

22 (WHEREUPON JURY SWORN)

23 THE CLERK: Please be seated.

24 THE COURT: Thank you, Ms. Hill. And
25 thank you, Ladies and Gentlemen. As I

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1 mentioned to you, this system of dispute or
2 this process of dispute resolution that we have
3 in this country contemplates two judges working
4 together. You now have become a judge with me
5 and now we will work together and resolve this
6 dispute.

7 Thank you for your commitment to this
8 process. Thank you for now becoming a judge.
9 And I will reiterate something that I mentioned
10 to you yesterday. Please know that you are
11 extremely qualified to perform the task that
12 you just accepted. Because all that you will
13 be asked to do is something that you've done
14 many times in your life, I would suggest
15 probably every day. We hear something or we
16 read something and we decide whether or not we
17 believe it. And that's precisely what you will
18 do.

19 What you promised is, at the appropriate
20 time, you will apply your common sense, your
21 sense of logic and reason -- that process that
22 you've used throughout your life to make
23 decisions. You'll use it fairly and
24 impartially, consider the evidence which
25 consists of the testimony of witnesses and the

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1 exhibits that are introduced through their
2 testimony, nothing else -- decide what you
3 believe to be the true facts, and then, once
4 you decide those facts, recognizing that
5 separation that exists between the two of us --
6 because, as I mentioned, two judges working
7 together. Our responsibilities do not overlap.
8 Then you will take the law as I give it to you
9 and apply that law fairly and impartially to
10 those facts and report your decision of how
11 this dispute is to be resolved.

12 I'm confident that each one of you will
13 honor that oath and will perform that task at
14 the appropriate time. You will use those tools
15 that you've used throughout your life to
16 evaluate the credibility and believability of
17 witnesses and matters that you consider.

18 You've also brought with you something else
19 I would suggest and submit that is equally
20 important to your common sense, your sense of
21 logic and reason. You remember when we were
22 qualifying you and some persons I excused
23 because they said they knew someone or they
24 knew a witness and it would influence them.
25 Each one of you, either by responding to the

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1 question or not responding indicated "it
2 wouldn't influence me, I can be fair and
3 impartial." Because you heard me ask over and
4 over "would your decision be based on the
5 evidence and the law" -- what we just talked
6 about -- "and would it be fair to both sides?"
7 And the persons that remained said that would
8 be possible. I would do that.

9 And each one of you, by not responding,
10 said "yes, I would do that." What else did you
11 say by doing that? You said you had an open
12 mind. You said you haven't pre-determined
13 anything. You haven't decided anything about
14 this case. That's important. That's important
15 to being a judge, I will suggest to you.

16 When you came in here you knew nothing
17 about the evidence. You have a completely open
18 mind. Please know that part of being a judge
19 of the facts requires you to maintain that open
20 mind throughout this entire process. And you
21 may not change that position until the Court
22 gives you an instruction on the law. You say
23 why? First of all, because that's part of the
24 process. You're going to take the law and
25 apply it fairly. Or the law that I give to you

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1 is when you may start your deliberations.

2 So until you're given that go-ahead to
3 decide the case you're required under that oath
4 to maintain that open mind. And I'm confident
5 that you will do that. And there are a number
6 of reasons why that's important.

7 First of all, as I've just mentioned, it's
8 part of the law. Secondly, this proceeding has
9 four distinct parts. Each part, I would
10 suggest, is very critical to the ultimate
11 determination of being a fair and just
12 resolution. In just a moment the attorneys
13 will talk to you in what we call opening
14 statements. They speak to you twice during
15 this process: once before you hear the
16 evidence, and then again after you've heard all
17 of the evidence. One we call opening
18 statements, the other, closing arguments.

19 As I mentioned to you yesterday, they
20 have a very important responsibility in this
21 process. They're officers of this Court, and
22 they have a duty and responsibility to present
23 the evidence and the law in a fashion that will
24 assist each of us in making the decisions that
25 we're called upon to make. You should, and I

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1 expect, will give them your undivided
2 attention.

3 But remember something -- while their
4 remarks are extremely important and they're
5 going to be extremely helpful to you, they
6 should never be considered evidence. Because
7 the evidence will come through the testimony of
8 the witnesses. And it is that testimony that
9 you will ultimately evaluate.

10 After you've heard the opening
11 statements, then you will start hearing the
12 evidence. And you will hear first from the
13 State. Why is that? Because as I mentioned to
14 you when I was qualifying you, in this country
15 and in this state, when a person is accusing of
16 committing a criminal offense, such as Mr.
17 McKelvey here today, that person is never
18 required to prove anything at all. The burden
19 of proof rests solely on the State. They make
20 the charge. They have to prove it.

21 How do they do that? They have to present
22 evidence that will persuade you to the
23 requisite standard that I mentioned to you and
24 we'll talk about again in just a moment. And
25 that means they have to prove each element of

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1 that offense to that standard. That's what a
2 jury's verdict means and says in a criminal
3 dispute.

4 A "Guilty" verdict means as to that offense
5 the jury considered the evidence and they were
6 convinced as to each of those elements and
7 therefore returned a verdict of guilty.

8 A "Not Guilty" verdict means that the jury
9 considered the evidence and they were not
10 convinced of one or more elements. Because if
11 you fail on one element, then you must return a
12 verdict of not guilty. The State has to prove
13 each element to that standard.

14 This process -- maybe some of you have
15 served on a jury in a civil proceeding or a
16 jury in another format. But the format is the
17 same. In fact, Judge Harrington is trying a
18 case this morning in a civil proceeding. And
19 she has four parts, just like this one, very
20 similar.

21 But there are two areas where there really
22 are major differences in a criminal dispute and
23 a civil dispute. One I just mentioned to you.
24 The only party in a criminal dispute that has
25 to prove anything is the State. In a civil

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1 proceeding generally the plaintiff who makes
2 the claim has to prove it. But there are
3 occasions when the defendant would have
4 something to prove. Not so in this case. Mr.
5 McKelvey has nothing to prove at all -- nothing
6 to disprove, nothing to explain.

7 The second area comes with the burden of
8 proof. As I mentioned to you the burden of
9 proof here in this proceeding is beyond a
10 reasonable doubt. I'll define that for you
11 when I give you the charge on the law which
12 will be the last stage of this process. I will
13 tell you now that a reasonable doubt is that
14 doubt that would make an honest, conscientious
15 juror, searching for the truth in a case to
16 hesitate to act or take some action. That's
17 the standard that you'll apply.

18 In civil proceedings the typical burden of
19 proof is called the preponderance or greater
20 weight of the evidence. Simply stated, that's
21 a probability standard -- more likely so than
22 not. The burden of proof here is beyond a
23 reasonable doubt. It's greater than a
24 probability. It's more than that. And as I
25 say, I will define it for you when the time

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1 comes, when I give you the charge.

2 In the charge, I'll discuss with you each
3 of the four offenses and define for you the
4 elements. Then you will go back and you will
5 ask yourself 'am I convinced of this element
6 beyond a reasonable doubt' as to each one?"
7 And if, at the end of the analysis, you have a
8 "yes" to each of those answers, then at that
9 time you must return a verdict of guilty.

10 If, at any point, your answer is 'no, I'm
11 not convinced of that beyond a reasonable
12 doubt,' then as to that crime the collective
13 decision, you must return a verdict of not
14 guilty.

15 So that's the way we proceed. The State
16 goes first. The State is the only party that
17 has anything to prove. And they have to prove
18 each of the four charges to that requisite
19 standard.

20 The defendant, as I mentioned, has nothing
21 to prove or disprove. He doesn't have a
22 responsibility to present any evidence. But at
23 the conclusion of the State's case if he
24 chooses to, he has the right to do it. But
25 again, he doesn't have to. He has no burden or

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1 responsibility to do that whatsoever.

2 Obviously, if he does present evidence, you
3 won't hear that until you've heard all the
4 State's case. That's another reason you want
5 to keep that open mind. You'll have to hear
6 all the evidence, obviously, before you make a
7 decision.

8 But then another equally important reason
9 why you have to keep that open mind is this.
10 After the evidentiary portion, the attorneys
11 have their second opportunity to address you.
12 Unlike the opening statement which they will
13 give you an overview of this dispute and
14 discuss with you some of the evidence that
15 expect you will hear and may discuss some of
16 the legal issues with you as well, now, in the
17 closing arguments, you've heard the evidence.
18 And it's proper for them to discuss that
19 evidence with you and suggest reasonable
20 inferences that you may draw from that
21 evidence.

22 I'm confident that when you begin your
23 deliberations you will find their remarks
24 extremely helpful, both in analyzing the
25 evidence and in applying the law. Please give

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1 them your attention in both states. Again,
2 it's very important to the process. But
3 remember, while extremely important, never
4 consider their remarks evidence.

5 The last stage of this process is when I
6 give you the law. Obviously, another good
7 reason why you shouldn't begin any decisions,
8 because you won't hear the law if you promised
9 to apply it fairly and impartially, until
10 you've heard all the evidence, until you've
11 heard the openings and closings of the
12 attorneys. But then you'll receive the law.
13 So, again, you can't decide something until you
14 know what the law is that says what you have to
15 apply.

16 So please remember that open mind is
17 important that you maintain. And at that time
18 I'll discuss with you various principles of law
19 that will apply. I'll define for you the
20 elements of each of these four charges. Then
21 after you've heard all the law you will begin
22 the process of deciding this case.

23 While you're not to decide any issue,
24 please do remember something else. We all
25 expect, and I'm confident that you will, that

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1 during this process those things that you may
2 hear that cause you -- you know and I know --
3 we hear -- somebody tells us something that
4 causes us to raise our eyebrows. If there's
5 something that strikes you as odd, something
6 that you find not consistent with logic,
7 certainly you're expected to make those notes,
8 those mental notes. But don't make any
9 decision or reach any decisions. Because some
10 of those things may be addressed and explained
11 by another witness. So you shouldn't decide
12 anything. But at the conclusion make the note
13 so that when you begin the process of
14 discussing this case you may say in the
15 deliberations "well, you know the person said
16 this or didn't say this -- I find that
17 unusual." Then there may be collectively an
18 answer or an explanation that resolves that
19 concern. But that's what you're expected to
20 certainly do as we go through the process. But
21 do not reach any final decisions.

22 I look forward to trying this case with
23 each one of you. It's an honor to serve as a
24 judge with you. I thank you for the commitment
25 that you made to this Court, to this State, to

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1 Mr. McKelvey. I ask you now to give them the
2 same attention that you've given me as each
3 attorney gives their opening statements on
4 behalf of their clients.

5 Thank you.

6 SOLICITOR BIAGANTE: May it please the
7 Court?

8 THE COURT: Yes, Ms. Biagante.

9 SOLICITOR BIAGANTE: Thanksgiving Day,
10 Thanksgiving morning of 2008, our victim,
11 Bernard Phoenix, who's sitting with our
12 victim's advocate -- Thanksgiving Day 2008 he
13 was robbed by the defendant. Thanksgiving Day,
14 2008, Mr. Phoenix was shot in the head and is
15 here to tell you about that. You're going to
16 hear in this case from the victim, Mr. Phoenix.
17 And he's going to tell you in the early morning
18 hours of Thanksgiving morning of 2008, he was
19 at a local establishment called the Pleasure
20 Lounge. That's right over by the Berkeley
21 County Administration Building.

22 He's going to tell you he knows this
23 defendant. He knows him because he knew his
24 family members. Mr. Phoenix is quite a bit
25 older than the defendant in this case. But

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1 he's going to tell you he knew him. He's going
2 to tell you on that fateful morning Mr.
3 McKelvey starts arguing with him, getting loud
4 with him and starts tapping him on he shoulder,
5 pushing him around inside the bar. Mr.
6 McKelvey's going to tell you at some point they
7 go outside and that the defendant says "give it
8 up." "Give up what?" "Give it up." The next
9 thing Mr. Phoenix is going to tell you, he's
10 shot. He's on the ground. He doesn't know
11 what happened.

12 Thankfully it's Thanksgiving morning and
13 there's some police officers that are just
14 patrolling the area and one of those police
15 officers happens to hear the gunshot. He's
16 that close. He gets on the radio. Officers
17 are there literally in minutes.

18 You're going to hear from Corporal Edwards,
19 who was the first officer on scene. He's going
20 to tell you he gets there so quickly he sees
21 this defendant trying to get in the car, trying
22 to get in the car to run.

23 The defendant is with another guy named
24 Askari Dash. You may or may not hear from
25 Askari Dash. Because you know why? He's

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1 friends with Mr. McKelvey.

2 But you're going to hear from evidence that
3 was taken from both Mr. Dash as well as Mr.
4 McKelvey. As the judge told you, you're going
5 to make your decision on the evidence. I'm
6 confident that when you hear not only the
7 testimony, but you have the evidence back in
8 the jury room with you, that you are going to
9 convinced because of the physical evidence as
10 well as the testimony. He was not only robbed
11 at the site, he was shot in the head. And he's
12 here to tell you that.

13 Mr. Phoenix -- there is no doubt, no doubt
14 who shot him. He's going to tell you who shot
15 him. Unlucky for Mr. McKelvey, he lived. He
16 left him there to die, and he lived.

17 And you're going to hear from some SLED
18 witnesses who tell you that there's some
19 gunshot residue performed on not only Mr.
20 McKelvey that night, but his friend, Mr. Dash.
21 The only one who had gunshot residue on his
22 hands was Mr. McKelvey. The officers
23 are also going to tell you when they respond
24 they find the gun that was used to shoot Mr.
25 Phoenix that night. Another officer is going

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1 to tell you which side was the gun on. The gun
2 was found in the passenger's seat, the
3 passenger's seat where the defendant was
4 getting into the car.

5 I'm asking you to keep your eye on the
6 ball. As the judge told you, the defendant
7 doesn't have to put up any evidence. But if he
8 does, it's up to you to judge and to ask
9 yourself does that make sense.

10 I'm assuming -- from preparing this case,
11 there's no doubt Mr. Phoenix was shot. The
12 question is who did it. So I don't know if
13 there's going to be a theory that someone else
14 did it -- Mr. Dash did it or someone else was a
15 part of it. There's no doubt, no doubt who
16 pulled the trigger.

17 Now, as the Judge told you, Mr. McKelvey is
18 charged with assault and battery with intent to
19 kill by shooting the victim in the face. And
20 for that charge you don't need in South
21 Carolina the specific intent to kill someone.
22 You don't need to go set out to kill this
23 person. All we need is the general intent to
24 do serious bodily harm, and the judge is going
25 to tell you about that. So I ask you to keep

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1 that in mind.

2 Obviously, he was shot in the head. Mr.
3 Phoenix had a skull fracture, had to flown in a
4 helicopter to MUSC for treatment, because he
5 was that bad off. It was assault and battery
6 with intent to kill.

7 Armed robbery, that just means that you
8 take something from someone -- it doesn't
9 matter what it is. It could be a pencil. It
10 could be a pen. It could be money. It could
11 be anything. In this case it was money. Mr.
12 Phoenix is going to tell you he takes a couple
13 of dollars.

14 He's also charged with possession of a
15 weapon during a violent a crime. All that
16 means is while he's committing this violent
17 crime of assault and battery with intent to
18 kill, a violent crime, he had a weapon on him,
19 the gun. But then when the police get there,
20 the policemen are going to tell you about the
21 interaction with Mr. McKelvey that night and
22 his attitude. When they arrest him for these
23 charges, lo and behold, in his front pants
24 pocket there's some crack on him.

25 Now, please don't mistake this has anything

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1 to do with drugs, because it doesn't. He was
2 just unlucky enough to have the drugs on him
3 when he got caught for shooting the guy.

4 And the judge also mentioned to you
5 that he will charge you on the law. What is
6 that? The judge is going to explain that to
7 you again and again. And if whatever I say is
8 different whatever he says, you must follow
9 what he tells you. But I tell you that if
10 you're firmly convinced that he did these
11 things then you must -- you have no choice but
12 you must find him guilty. I'm telling you that
13 this is a really simple case if you keep your
14 eye on the ball. Really simple.

15 Keep an open mind, but listen. I'm
16 convinced that you'll be convinced that when
17 you hear all the evidence that you will be
18 firmly convinced that he's guilty of assault
19 and battery with intent to kill, guilty of
20 armed robbery, guilty of possession of a weapon
21 during a violent crime and guilty of possession
22 of cocaine base, all of them. Thank you.

23 THE COURT: Thank you, Ms. Biagante. Mr.
24 Shelton.

25 MR. SHELTON: Your Honor, may it please

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1 the Court?

2 THE COURT: Yes, sir.

3 MR. SHELTON: Ladies and Gentlemen
4 of the jury, I'm going to repeat a little bit
5 of what the Judge said to you earlier. The
6 open mind -- Mr. McKelvey is presumed innocent.
7 At this point in time he's innocent. When you
8 hear the evidence, he's innocent. When you
9 hear closing arguments, he's innocent. That's
10 what keeping an open mind means. He's presumed
11 innocent.

12 I am confident that you will hear confusing
13 and conflicting testimony from that stand from
14 some of the people sitting there. And they're
15 going to have very confusing testimony. And
16 it's going to conflict.

17 That brings me to reasonable doubt. That's
18 a very high burden. It's not fifty-one
19 percent, 'maybe it happened this way, maybe it
20 happened that way.' It's a high, very high
21 standard. And what makes this system so great
22 is that they have to prove it. I ask you to
23 keep that open mind. Make them prove their
24 case to that high, high burden. I'm confident
25 when you do that, you will come back with a not

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1 guilty verdict. Thank you.

2 THE COURT: Thank you, Mr. Shelton. Call
3 your first witness, please, Ms. Biagante.

4 SOLICITOR BIAGANTE: The State calls
5 corporal Tony Edwards -- excuse me, Bernard
6 Phoenix to the stand.

7 (WITNESS TAKES STAND)

8 BERNARD PHOENIX, being duly sworn to
9 tell the truth, the whole truth and nothing but
10 the truth, testified, as follows:

11 DIRECT EXAMINATION

12 BY SOLICITOR BIAGANTE:

13 Q. State your name for the record, sir?

14 A. Bernard Phoenix. My street name be "Be
15 Nice."

16 Q. I'll address you as Mr. Phoenix, okay?
17 Good morning.

18 A. Good morning.

19 Q. Could you tell us how old you are, sir?

20 A. I'm 49 years old, thank God.

21 Q. And where do you live currently?

22 A. I live right here in Moncks Corner.

23 Q. Pull the microphone down maybe a little bit
24 and don't talk so close to it, okay?

25 A. Okay, I'll do that.

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1 Q. Just relax in your chair.

2 A. Okay, I do that.

3 Q. Are you currently employed right now?

4 A. No, because of my disability. I used to
5 drive a truck on the road. And I am hurt on
6 disability. I got hurt driving trucks on the
7 road. And I got disability.

8 Q. So you're currently receiving disability?

9 A. Yes, ma'am.

10 Q. Do you know the defendant in this case,
11 Jermaine McKelvey?

12 A. Yes, I know him.

13 Q. What do you -- does he have any other
14 nickname that he goes by?

15 A. Yes, he do. They call him "Droop".

16 Q. How long have you known Mr. McKelvey?

17 A. I moved here in '95, and I met his uncle
18 called George Davis. I don't socialize with
19 Droop but I knew his uncle, George Davis. He
20 does karate, and I do karate.

21 Q. So you're friends with his uncle?

22 A. Yes.

23 Q. Do you see Droop or Jermaine McKelvey in
24 the courtroom today?

25 A. Yes, I do.

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1 Q. Can you please point to him and tell us
2 what he's wearing?

3 A. Yes, he has on a white shirt and tie.

4 SOLICITOR BIAGANTE: Your Honor,
5 please let the record reflect he pointed to the
6 defendant in this case.

7 THE COURT: It so reflects.

8 DIRECT EXAMINATION CONTINUED

9 BY SOLICITOR BIAGANTE:

10 Q. Now, sir, because of this incident do you
11 have some memory problems?

12 A. Yes, I do.

13 Q. Just explain that a little.

14 A. Due to getting shot in my head, it's like
15 I'm seventy-five years old. The reason why is
16 -- if I leave the house and go to the grocery
17 store, I forget what I need at the store.

18 Q. Do you have some problems remembering all
19 the details of this incident?

20 A. Yes, I do.

21 Q. Now, sir, directing your attention to
22 November 26 and 27th -- the 27th being
23 Thanksgiving, tell us what you did that day
24 before you got to the Pleasure Lounge.

25 A. All right. Before, that day I was at the

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1 body shop. I paint cars also. That's why they
2 call me Be Nice, Be Nice Paint and Body Shop.

3 Q. So you own Be Nice Paint and Body Shop?

4 A. Well, I don't own it. I just do all the
5 work I can get. I like helping them. And
6 sometimes if he needs me, I help him. I am
7 good doing that. And that day I had a job.
8 And I finished that job that day. And I got
9 paid. And thank God I took some money home,
10 what I made.

11 Q. Okay.

12 A. And I had a ride back to Bonneau at my
13 mom's.

14 Q. Is that where the paint and body shop is,
15 in Bonneau?

16 A. Yes, ma'am. And from there I went home,
17 took the money home and I just took a little
18 bit to buy shrimp dinner with.

19 Q. And who were you living with at that time?

20 A. At that time I was staying with my mother,
21 because my mother was very ill. My mother
22 passed away September 18th. I thank God I
23 buried her before I got hurt. That's what
24 happened, I was taking care of my mother.

25 Q. So you were living with your mom when this

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1 incident occurred?

2 A. Yes.

3 Q. Now, after you left the house, where did
4 you go that day or that evening?

5 A. I stayed there until about 7:00 or 8:00
6 o'clock and then I walked over to Mo River's
7 club.

8 Q. Mo River's club?

9 A. Yes. It's right out there. Because he
10 asked me to look at his daughter's car.

11 Q. So Mr. Rivers asked you to look at his
12 daughter's car?

13 A. Right. Yes, ma'am.

14 Q. And then after being at Mo River's club --
15 where is that at? Is that near anything?

16 A. That's on 17A. It's across the street from
17 where I got shot at.

18 Q. Here in Moncks Corner?

19 A. Yes, ma'am.

20 Q. Is that here in Berkeley County?

21 A. Yes, ma'am.

22 Q. And then after you left Mo River's club
23 where did you go then?

24 A. I decided, I said, 'You know what? I like
25 the way they cook the shrimp over there', at

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1 the other club and I walked over there to get
2 some shrimp. That's all I was going to do. So
3 went to the other place to get some shrimp.

4 Q. And how far is the Pleasure Lounge from Mo
5 River's club?

6 A. On 17A, right across the street.

7 Q. And what kind of establishment is the
8 Pleasure Lounge?

9 A. The Pleasure Lounge was a nightclub. They
10 had just reopened it up from when it was
11 closed. It had new owners in it. The only
12 reason I went there is because they was cooking
13 food.

14 Q. So they had a kitchen there?

15 A. Right.

16 Q. What else do people do at the Pleasure
17 Lounge?

18 A. They had a TV in there.

19 Q. And it's also a bar?

20 A. Yes.

21 Q. So tell us about what happened when you got
22 to the Pleasure Lounge.

23 A. I got to the Pleasure Lounge and put my
24 order in for an order of shrimp. Everything
25 was all right. I saw Askari sitting at the

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1 table. And ---

2 Q. Did you know Askari's last name?

3 A. Yeah, he's related to my niece. Robinson.

4 Brother. Robinson. Me and him was talking

5 about painting his care. I saw Askari and I

6 was talking to him about painting his car, that

7 was it.

8 Q. What type of car did Askari have?

9 A. He had a blue car. It was a -- I think it

10 was -- oh, man.

11 Q. It's a big blue car?

12 A. Yeah. A Chevy or a -- and he wanted me to

13 paint his car for him.

14 Q. And was Mr. McKelvey there at the time?

15 A. He was there.

16 Q. Tell us about what happened next.

17 A. Okay. Me and Askari was talking. All of a

18 sudden Droop just got -- I mean McKelvey.

19 Q. You can call him Droop if you want to.

20 A. Okay, Droop. He came by and me and Askari

21 was talking.

22 Q. What did you think at first was happening?

23 A. I didn't know what was going on. I said,

24 'Hey Droop, how you doing?' That's it.

25 Q. Then what?

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1 A. He said "give me money".

2 Q. Did you think he was serious? Did you
3 think he was playing at that point?

4 A. At that time everybody was just playing
5 around.

6 Q. Okay.

7 A. I thought he was just playing around. I
8 didn't pay attention because I wasn't talking
9 to him to begin with anyway.

10 Q. Okay.

11 A. So me and Askari kept talking about
12 painting his car. And the guy who was running
13 the club at the time told Droop to stop. He
14 said, "Droop, stop hitting the man. What's
15 wrong with you?"

16 He kept hitting me. I don't know what was
17 wrong with Droop. So as I waited for my order
18 of shrimp I decided to play a game of pool.
19 Okay. My game was next, on playing a game of
20 pool. He started up again.

21 Q. At that point did you buy anything besides
22 your shrimp?

23 A. Before that. When we were over at the
24 counter, where they got a little counter,
25 Askari asked me to buy him a beer. Okay. I

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1 said, 'Okay, Askari, I will buy a beer. So I
2 bought him a beer. Then I went over to my game
3 to play pool. And then I started my game,
4 playing pool. And he came around the pool
5 table and he still kept hitting me. I said,
6 "Droop, what's your problem? What's wrong,
7 man? What's wrong, Droop?" He kept hitting
8 me.

9 Q. At that point did you realize that he was
10 playing still, or not?

11 A. Naw, it had already got to me.

12 Q. Was he saying anything to you?

13 A. He wasn't saying nothing. He just kept
14 hitting me and hitting me and that was it.

15 "What's your problem, Droop? What you hitting
16 me for, Droop?"

17 And then the guy that was running the bar
18 down there said, "Let the man shoot pool.

19 What's wrong, Droop, let the man shoot pool.

20 What's wrong, Droop?"

21 Q. So then what happened?

22 A. I played pool. And I played pool and -- I
23 don't know what happened. For some reason, I
24 don't know how we wound up outside after this.

25 Q. You don't remember that?

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1 A. No, I don't remember that.

2 Q. But what happened once you get outside?

3 A. I'd rather show you that.

4 Q. Do you want to stand up? Don't get out of
5 the box. You can stand up and show us.

6 A. Once we got outside -- I walked outside.

7 I walked outside and I didn't know what was
8 going on. I got hit on the head. I don't know
9 what I got hit with but I felt it. I got up.

10 I said, "Droop, Droop, what's the problem?"

11 What's the problem, Droop? What's your
12 problem? What's your problem, Droop?"

13 Q. What happened next?

14 A. After that I leaned on the car. There was
15 a truck out there. I leaned on the truck. I
16 was rubbing my head because my head was,
17 because he hit me. I said, "Droop, man, what's
18 your problem, Droop?"

19 He had a gun in his hand. He had a gun in
20 his hand. And he shot, boom!

21 Q. Did he ask you anything at that point?

22 A. No.

23 Q. Telling you anything?

24 A. I said, "Droop, what's your problem?"

25 He had his gun in his hand. He shot. He said,

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1 "The next one ain't gonna miss. Give it up,
2 Be. Give it up. Give it up, Be."

3 Q. What happened?

4 A. I said, "Give up what, Droop? Give up
5 what? (Displaying cash) -- this ain't no
6 money, Droop. This ain't no money. This ain't
7 no money, Droop."

8 Q. How much money did you have on you?

9 A. By the time I'd paid for my shrimps, maybe
10 seventeen or eighteen dollars. I said, "Droop,
11 this ain't no money, Droop. Put that gun down,
12 Droop. Put the gun down, Droop. I beg you for
13 your life. I beg for my life. Put the gun
14 down, Droop."

15 Q. What happened?

16 A. He snatched the money and shot me. Boom!
17 Shot me. I fell (demonstrating). The owner
18 same out to try to help me.

19 THE COURT: I want Mr. Phoenix to
20 sit down, please. That's enough of that.

21 DIRECT EXAMINATION CONTINUED

22 BY SOLICITOR BIAGANTE:

23 Q. What's the next thing you remember when the
24 owner came out?

25 A. He tried to help me. And we walked over by

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1 the front of the club. We went out by the
2 front of the club and that's about as far as I
3 could get.

4 And the next thing I remember is when the
5 police officer was coming to me. And the
6 police officer said, "What's your name? What's
7 your name?" I said, "Bernard." He said,
8 "What's your name?" I said, "Bernard Phoenix."
9 After that he said, "Where do you live at?
10 Where do you live at?" I couldn't answer him
11 no more.

12 Q. What's the next thing you remember after
13 that, Mr. Phoenix?

14 A. I didn't know anything until after the
15 helicopter came and took me to Roper Hospital,
16 they revived me. Another police officer asked
17 me who shot me and I told them Jermaine.

18 Q. What's the next thing you remember after
19 that?

20 A. After they revived me, I told the police
21 officer who shot me, Jermaine, and that was it.
22 The helicoptered me to MUSC, and that was it.

23 Q. Do you remember waking up at MUSC?

24 A. Not until they -- no, not until they did
25 the surgery and every-thing. I had a nurse to

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1 call my family members and tell them that I'd
2 got shot.

3 Q. Describe for us Mr. Dash's hairstyle that
4 night compared to Mr. McKelvey's hairstyle.

5 A. Mr. Dash, he's got a low cut. He keeps it
6 clean. He's got an arrow going on the back.

7 Q. He's got a low cut?

8 A. Yeah.

9 Q. And how did Mr. McKelvey have his hair that
10 night?

11 A. He had it in a dread style.

12 Q. Dread style. And did you end up also
13 giving a written statement to police a few days
14 after you got out of the hospital?

15 A. Yes, I did at that time.

16 Q. Did you tell them at that point who shot
17 you too?

18 A. Yes, I did.

19 Q. And who did you tell them shot you then?

20 A. I told them Jermaine McKelvey, street name
21 "Droop."

22 SOLICITOR BIAGANTE: One moment.

23 THE COURT: Certainly.

24 DIRECT EXAMINATION CONTINUED

25 BY SOLICITOR BIAGANTE:

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1 Q. Please answer any questions Mr. Shelton
2 might have for you.

3 THE COURT: You may cross examine,
4 Mr. Shelton.

5 MR. SHELTON: Thank you, Your Honor.

6 CROSS EXAMINATION

7 BY MR. SHELTON:

8 Q. Mr. Phoenix, let's go to before this
9 incident happened during that day. You said
10 you went to a place, Mr. Rivers' club?

11 A. No, I went home first. Okay, because I
12 went home. I ain't going to play no games with
13 nobody. I come here to tell the truth and I'll
14 tell the truth.

15 THE COURT: Hold on a second. Just
16 answer the questions. Wait on the question and
17 then answer the question, sir.

18 CROSS EXAMINATION CONTINUED

19 BY MR. SHELTON:

20 Q. You went to a Mr. Rivers' club?

21 A. I went home first.

22 Q. Then after you went home you went to ---

23 A. Yeah, I went there.

24 Q. At that point in time did you consume any
25 alcohol?

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1 A. I did that at home.

2 Q. Before you went to Mr. Rivers'?

3 A. Right.

4 Q. And then you went to the Pleasure Lounge?

5 A. Right.

6 Q. And you arrived near 10:30 or so?

7 A. My time -- at the, my timing of the
8 accident is off a little bit because I had just
9 got out of surgery. I only had been there for
10 not even an hour.

11 Q. So about what time did you arrive at the
12 Pleasure Club?

13 A. I had been there for about an hour. I went
14 there for an order of shrimp.

15 Q. In addition to the shrimp did you order an
16 alcoholic beverage for yourself?

17 A. (Affirmative nod), I ordered one beer for
18 Askari. He drank one beer and I drank one
19 beer, and that was it.

20 Q. Do you remember getting questioned at the
21 hospital according to your alcohol use?

22 A. Like I said, before I went to the club that
23 night, while I was at home -- that's when I did
24 it. I know I did it at home.

25 Q. Did you tell the nurses at the hospital --

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1 A. I couldn't tell them much of nothing
2 because I was shot in the head. I couldn't
3 tell them nothing.

4 Q. You had indicated that you were living in
5 Bonneau, taking care of your mother.

6 A. No, I don't live in Bonneau. I said I work
7 at the paint and body shop. I'm a professional
8 body and fender man known as Be Nice Paint &
9 Body Shop. And they recognize that paint and
10 body shop, and that's what I do.

11 Q. I apologize.

12 A. Okay.

13 Q. Where was your mother living when you were
14 taking care of her?

15 A. Old Highway 52, Plantation Apartments.

16 Q. In an apartment complex?

17 A. (Affirmative nod).

18 Q. Okay. And you were saying that you know
19 Askari personally?

20 A. Yes, his -- He is related to my niece.
21 My niece married his brother. Johnny and
22 Michael -- they're brothers. So Johnny is
23 Askari's son. Michael is Johnny's brother.
24 And Michael married my niece.

25 Q. Isn't it true you've seen Askari and Mr.

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1 McKelvey at this Pleasure Lounge on previous
2 occasions?

3 A. Wrong answer. Because, number one, I don't
4 socialize there. They had just reopened up.

5 Q. Prior to it being reopened, did you
6 frequent that place?

7 A. No. I don't do that. I go to work and I
8 don't socialize with none of them boys.

9 Q. Isn't it true that there were many people
10 at that bar that night?

11 A. When I got there I went there to get
12 shrimp. I don't know who was in there. And
13 there wasn't that many people in there that
14 night, because they had just reopened up.
15 That's all that I know about it.

16 Q. But you know that they have a good shrimp
17 dish?

18 A. Yes, sir. When they reopened up, I'd been
19 in there one other time and that was just my
20 second time going there.

21 Q. I believe the testimony is that you did not
22 know why you left the club that night -- why
23 you went outside?

24 A. No. I didn't say I didn't know why I went
25 outside. Droop was acting stupid that night,

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1 and I don't know how I went outside. I don't
2 want no dealings with Droop anyway. So I said
3 to myself that I don't know how I wound up
4 outside, because I went there for one thing --
5 to get the shrimp. Okay? I don't know Droop
6 very well and I don't know what happened that
7 night, why he -- I don't know why he was the
8 way that he was with me. I don't deal with
9 him.

10 Q. At one point in time at the hospital, at
11 Roper Hospital, you were intubated. Do you
12 know what that means?

13 A. (Negative gesture).

14 Q. You had a tube down your throat.

15 A. Right.

16 Q. Do you remember them putting the tube down
17 your throat?

18 A. Yes, sir.

19 Q. And you were released from MUSC the next
20 day.

21 A. Yes, sir. Thank God.

22 Q. And at that point two days later, three
23 days later, you went to the Moncks Corner
24 Police Department to write your statement.

25 A. Yes, sir.

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1 Q. And other than that statement that you
2 provided in writing and the statement that you
3 indicate you told to the police officer at
4 Roper, there's no other statement that you made
5 concerning this incident.

6 A. Say that again.

7 Q. You only made two statements concerning
8 this incident.

9 A. I told one officer and I made a statement
10 before then.

11 Q. And that was a written statement.

12 A. A written statement was made at the police
13 department. Yes, sir.

14 Q. The night of the incident you gave that one
15 statement to the police officer.

16 A. The night of the incident I didn't give a
17 statement the night of the incident. I didn't
18 give nothing the night of the incident. When I
19 got revived and they came and talked to me, I
20 didn't give no written statement.

21 Q. Not a written statement, but you provided
22 him a statement at that time.

23 A. I just told him who shot me.

24 Q. Okay. And you said that the owner of the
25 club came out to help you?

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1 A. I don't know if he was the owner but he is
2 the one that helped me, came outside to help
3 me. He's the one that told him to stop inside
4 the club, but he didn't want to stop.

5 Q. So do you know his name?

6 A. I -- (pause).

7 Q. Is it Adrian Gee?

8 A. Yes, sir.

9 Q. Adrian Gee wasn't out there, according to
10 your statement. He wasn't out there at the
11 time that the shooting took place.

12 A. He came out after I got shot.

13 Q. And you're saying there was two gunshots.
14 Isn't that correct?

15 A. Like he told me, he said, "Be Nice, the
16 next one ain't going to miss." So what do you
17 think?

18 Q. So there were two gunshots?

19 A. What do you think? "The next one ain't
20 going to miss."

21 Q. And there were two gunshots?

22 A. There had to be. He said, "The next one
23 ain't going to miss."

24 MR. SHELTON: Beg the Court's
25 indulgence.

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1 THE COURT: Certainly.

2 CROSS EXAMINATION CONTINUED

3 BY MR. SHELTON:

4 Q. Were you disabled before or after this
5 incident?

6 A. I was in transport, I was hurt in the
7 transport business.

8 Q. Thank you.

9 THE COURT: Redirect?

10 REDIRECT EXAMINATION

11 BY SOLICITOR BIAGANTE:

12 Q. Mr. Shelton asked you about your work. How
13 many years were you a truck driver, sir, before
14 you got hurt?

15 A. Okay. I came down there in '95 and I went
16 to school and got my CDL license. I went to
17 school and got my CDL license in 1996. I went
18 to truck driving school, because everything
19 down here was slow, and I got my CDL license.
20 I went on the road driving trucks.

21 Q. How long did you say you were married, sir?

22 A. Nineteen years, thank God.

23 Q. Are you still married, sir?

24 A. Right now we're separated but, you know,
25 we're going to get back together.

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1 THE COURT: Recross?

2 MR. SHELTON: No questions.

3 THE COURT: Thank you, Mr. Phoenix.

4 You may step down.

5 (WITNESS EXCUSED)

6 THE COURT: Call your next witness,
7 please.

8 SOLICITOR BIAGANTE: The State would
9 call Corporal Tony Edwards.

10 (WITNESS TAKES STAND)

11 TONY M. EDWARDS, being duly sworn to
12 tell the truth, the whole truth and nothing but
13 the truth, testified, as follows:

14 DIRECT EXAMINATION

15 BY SOLICITOR BIAGANTE:

16 Q. Can you please tell us where you are
17 employed and in what capacity and for how long
18 you've been employed there?

19 A. I'm the senior patrol supervisor with the
20 Moncks Corner Police Department. I've been
21 employed there for twenty years.

22 Q. Do you have any prior law enforcement
23 experience before coming to Moncks Corner
24 Police Department?

25 A. Yes, ma'am, about fifteen years.

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1 Q. And where was that at?

2 A. City of Gaffney Police Department and
3 another small department or two in the upstate
4 before I came down here.

5 Q. Now, tell our jury a little bit about some
6 of your duties and responsibilities as a
7 corporal and a shift supervisor.

8 A. It's my duty to supervise the people that
9 work under me and to oversee crime scenes and
10 witnesses and things of that nature, and to see
11 whatever they request of us to do is done. And
12 I have patrol duties just like the rest of the
13 police department and the rest of the
14 department.

15 Q. Sir, directing your attention the early
16 morning hours of November 27th, 2008, around
17 12:56 a.m., were you on duty that morning?

18 A. Yes, ma'am.

19 Q. Tell us what you were doing and how you
20 got involved in this case.

21 A. I was coming down 17A on normal patrol,
22 and ---

23 Q. Tell us the direction so we can kind of
24 feel ---

25 A. I was going north, toward the Berkeley

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1 Middle School and McDonald's and Trident
2 Hospital. And just as I topped the railroad
3 bridge there beside the old Gates Rubber
4 Company, one of the county deputies had stopped
5 a car right behind McDonald's. In fact, I
6 could see his blue lights from there.

7 In just a second he called back on the
8 radio and said that as he got out of the car he
9 heard a shot behind the Berkeley Middle School,
10 which would have been about a 45-degree angle
11 from where he was.

12 I immediately turned down Cooper Street,
13 which goes right around behind the middle
14 school. And as I approached the Pleasure
15 Lounge I seen two fellow making as to get to a
16 car. And as I got a little closer I could see
17 a gentleman laying on the side porch, on the
18 Gray Street side, laying on the porch. So I
19 pulled up and blocked their car. And it wasn't
20 but just a second or two before one of the
21 other county deputies came in behind them also.

22 As I got out of the car, Mr. McKelvey was
23 in the car and Askari Dash was on the other
24 side of the car. He was the driver.

25 Q. So Askari Dash was the driver, and where

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1 was Mr. McKelvey?

2 A. He was seated in the passenger's seat.

3 Q. So he was already sitting down?

4 A. Yes, ma'am. And I got him out of the car
5 at gunpoint. And as he held his hands up and
6 reached out -- I think I opened the door. But
7 I could see blood on his right hand, smeared on
8 his right hand. I got him out. The first
9 thing I done was patted him down for a weapon.

10 Q. And why is that?

11 A. For my safety and everybody else's. I
12 patted his waist and stuff down with one hand,
13 just to make sure he didn't have a handgun or
14 firearm on him.

15 Q. Did you know what was going on at that
16 point?

17 A. Not exactly. I knowed we had somebody
18 hurt and that there was a gun involved. At
19 that time I passed him to Deputy Robert
20 Thompson who had came up behind. And one of my
21 other officers, Officer Taylor, came up also
22 and he took care of Mr. Dash.

23 Q. Was Mr. Dash already seated in the
24 driver's seat, or was he still in the process
25 of getting in the car?

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1 A. No, he was in the process of getting in
2 when he seen me pull up. And then he got back
3 out of the car and had -- at the time I got
4 out, he had both his hands on top of the car,
5 looking at me on the other side. I could see
6 both of his hands.

7 I went to see about who I later learned
8 was Mr. Phoenix laying on the porch. I could
9 see him once I got out of the car and started
10 around to him. He was laying in a small puddle
11 of blood. As I walked up to him I wasn't sure
12 whether he was alive or not. I asked him what
13 his name was and I seen him blink his eyes one
14 time. He answered me. It was sort of in a
15 stumbled voice, but he answered me. And I
16 talked to him, asked him what happened. I
17 think the impact of the bullet sort of ---

18 MR. SHELTON: Objection, Your Honor.

19 THE COURT: Sustained.

20 DIRECT EXAMINATION CONTINUED

21 BY SOLICITOR BIAGANTE:

22 Q. Could he answer any more questions at that
23 point, beyond his name?

24 A. He told me his name, and that was just
25 about it.

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1 Q. So what did you do because of seeing Mr.
2 Phoenix laying in a pool of blood?

3 A. Well, the other officers, Officer Thomas
4 and Taylor -- Mr. McKelvey started showing out,
5 started cussing and rambling and carrying on.
6 And Officer Taylor placed him under arrest for
7 disorderly conduct and put him in the back of
8 the car.

9 Q. How was Mr. Dash acting at this point?

10 A. He was argumentative, but not near what
11 McKelvey was.

12 Q. Okay. Did somebody call EMS for Mr.
13 Phoenix?

14 A. Oh, yeah, we had them and the fire
15 department en route. They was on the way.
16 As I was standing looking at him something
17 caught my eye right in the doorway, about
18 roughly maybe this far from his head
19 (indicating). And it had a copper shine to
20 it. I looked at it and I picked it up and it
21 was the jacket of a bullet that evidently had
22 passed through Mr. Phoenix and wound up in the
23 wall.

24 SOLICITOR BIAGANTE: Your Honor,
25 can I approach the witness?

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1 THE COURT: You may.

2 DIRECT EXAMINATION CONTINUED

3 BY SOLICITOR BIAGANTE:

4 Q. Corporal Edwards, I'm showing you what's
5 been marked as State's Exhibit Number 21. Do
6 you recognize what that is?

7 A. (Upon review), Yes, ma'am.

8 Q. What is that?

9 A. That's a jacket of a bullet, copper
10 jacket.

11 Q. Did you do something when you saw that
12 copper jacket from the bullet?

13 A. Yes, ma'am, I actually picked it up and
14 put it in my shirt pocket.

15 Q. And at some point - what's the next thing
16 you did with it?

17 A. Well, we secured it as evidence. It was
18 in my custody until I put it in the bag, and I
19 sealed the bag.

20 Q. And is that your initials on that bag?

21 A. Yes, ma'am.

22 SOLICITOR BIAGANTE: Your Honor,
23 at this time I move State's Number 21 into
24 evidence.

25 THE COURT: Any objection?

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1 MR. SHELTON: No objection.

2 THE COURT: State's 21 is admitted,
3 a bag containing a bullet jacket.

4 (SO ENTERED AS STATE'S EXHIBIT 21)

5 SOLICITOR BIAGANTE: Your Honor,
6 may I publish it?

7 THE COURT: You may. Ladies and
8 Gentlemen, from time to time, as evidence is
9 admitted the attorneys may publish it or let
10 you see that. Please know that once it's
11 admitted it will accompany you to your jury
12 room, and you'll have an opportunity to study
13 it in greater depth and detail, if necessary,
14 at a later point.

15 DIRECT EXAMINATION CONTINUED

16 BY SOLICITOR BIAGANTE:

17 Q. So after picking up that bullet jacket,
18 Corporal, what's happening now? Tell us about
19 that.

20 A. Well, McKelvey and Mr. Dash had been
21 secured in the patrol car. Officer Winningham
22 came up. I asked him if he would search
23 McKelvey closer, do a thorough search of him.
24 He went to the car and done a thorough search.
25 Officer Taylor went to Askari's car, Mr.

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1 Dash's car. And in just a second he come
2 around and told me, he said, "I've got a gun
3 in the floorboard over here on the passenger's
4 side." I walked over there and looked at it,
5 and it was about halfway under the front seat.
6 I could see the butt of it and a little piece
7 of the trigger guard.

8 Q. And who was sitting on that seat?

9 A. McKelvey.

10 Q. When you saw the gun what did you do?

11 Tell us about the gun.

12 A. When I first seen the gun I left it right
13 where it was. I went and got the camera and
14 come back, took the gun out from under the
15 seat, noticed there was blood on the front
16 bottom of the slide and the trigger guard.
17 And I laid it in the seat of the car, took a
18 picture of it and then I unloaded it. It had
19 several cartridges in it, including one in the
20 barrel.

21 SOLICITOR BIAGANTE: Your Honor,
22 may I approach the witness?

23 THE COURT: You may.

24 COURT REPORTER: State's Exhibit 22
25 for identification.

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1 DIRECT EXAMINATION CONTINUED

2 BY SOLICITOR BIAGANTE:

3 Q. I'm showing you what's been marked as
4 State's Exhibit number 22 for I.D. Just for
5 everyone's edification, the clip has been
6 removed and there's no bullets in it.

7 THE COURT: Okay.

8 DIRECT EXAMINATION CONTINUED

9 BY SOLICITOR BIAGANTE:

10 Q. Do you recognize this?

11 A. Yes.

12 Q. And what is it?

13 A. It's a Russian-made Makarov or either a
14 copy of a Russian-made Makarov.

15 Q. Is this the gun you saw under Mr.
16 McKelvey's seat?

17 A. That's the gun that was under the seat,
18 yes.

19 Q. Describe for us where the blood was that
20 you saw.

21 A. It was around under the bottom and some
22 was on the trigger guard. It may have been
23 some on the side.

24 Q. This is the gun you photographed?

25 A. Yes.

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1 SOLICITOR BIAGANTE: Your Honor, at
2 this time I move State's Exhibit number 22
3 into evidence.

4 THE COURT: Any objection?

5 MR. SHELTON: No objection.

6 THE COURT: Without objection
7 State's 22, a firearm, is admitted.

8 (SO ENTERED AS STATE'S EXHIBIT 22)

9 COURT REPORTER: State's Exhibit 23
10 and 24 for identification.

11 DIRECT EXAMINATION CONTINUED

12 BY SOLICITOR BIAGANTE:

13 Q. Now, Officer, I'm showing you what's been
14 marked as State's Exhibit number 23 and
15 State's Exhibit number 24. Tell us what those
16 are and if you recognize it.

17 A. That's the ammunition and the ammunition
18 clip out of the gun.

19 Q. And when you found the gun ---

20 A. It was loaded and there was a shell in the
21 barrel.

22 Q. And who's the one that unloaded it and
23 made it safe?

24 A. I did.

25 Q. And when did you do that?

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1 A. Immediately after I took the picture of
2 it, laying in the seat of the car.

3 Q. When you processed it for evidence?

4 A. Yes, ma'am.

5 SOLICITOR BIAGANTE: Your Honor, at
6 this time I move State's Exhibits 23 and 24
7 into evidence.

8 THE COURT: 23 is which?

9 SOLICITOR BIAGANTE: The clip, Your
10 Honor.

11 THE COURT: From the firearm?

12 SOLICITOR BIAGANTE: Yes, from
13 Number 22, the firearm. And 24 are the
14 bullets which were in the firearm.

15 THE COURT: Any objection?

16 MR. SHELTON: No, sir.

17 THE COURT: Without objection,
18 State's 23, the clip is admitted. State's 24,
19 the cartridges, they are admitted.

20 (SO ENTERED AS STATE'S EXHIBIT 23)

21 (SO ENTERED AS STATE'S EXHIBIT 24)

22 SOLICITOR BIAGANTE: May I approach
23 the witness, Your Honor?

24 THE COURT: Certainly.

25 DIRECT EXAMINATION CONTINUED

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1 BY SOLICITOR BIAGANTE:

2 Q. Corporal Edwards, I'm going to show you a
3 stack of photos. If you could just review
4 them quickly and tell me if you recognize
5 them?

6 A. (Upon review), yes, ma'am.

7 Q. And did you and some other officers take
8 photos that night at the scene?

9 A. Yes, ma'am. I took some, and Detective
10 Novell took some.

11 Q. And are those photos a fair and accurate
12 representation of the way the scene was in the
13 early morning hours on November 27, 2008?

14 A. Yes, ma'am. A couple of them was actually
15 took even before EMS was there.

16 SOLICITOR BIAGANTE: Your Honor, at
17 this time I'd move State's Exhibits 1 through
18 17 into evidence.

19 THE COURT: Any objection?

20 MR. SHELTON: No objection.

21 THE COURT: Without objection

22 State's 1 through 17, each being a photograph,
23 is admitted.

24 (SO ENTERED AS STATE'S EXHIBITS 1-17)

25 DIRECT EXAMINATION CONTINUED

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1 BY SOLICITOR BIAGANTE:

2 Q. Corporal Edwards, I'm going to show you
3 what's been marked as State's Exhibit number
4 1. It's going to be shown up on the screen
5 right there. If you can look at it and tell
6 us what it is once it comes up.

7 A. That's Mr. Phoenix.

8 Q. Tell us what that is, State's Exhibit
9 number 1.

10 A. That's Mr. Phoenix laying on the cement
11 pad just outside the doorway to the Pleasure
12 Lounge.

13 Q. Did you take that photo of him?

14 A. Yes, ma'am.

15 Q. Now showing you State's Exhibit number 2.
16 Tell us what that is.

17 A. It's a blood spatter that was directed
18 back towards the door, the side door of the
19 Pleasure Lounge.

20 Q. Officer, I'm handing you a laser pointer.
21 If you could, point the blood spatter to the
22 jury and where the doorway of the Pleasure
23 Lounge is.

24 A. Okay. This piece of plywood right here is
25 the doorway going in. This is the stoop to

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1 the doorway. And this is part of the pool
2 right here where Mr. Phoenix's head was. And
3 you can see -- looks like a splatter trail
4 going in to here. And the jacket of the
5 bullet that I recovered was laying right about
6 right there (indicating), middleways of the
7 stoop.

8 Q. I'm showing you State's Exhibit number 3,
9 sir. Tell us what that is.

10 A. This is another picture from a little
11 farther off of Mr. Phoenix. You can see it
12 looks like he stumbled before he fell, or
13 either he fell and tried to get up. If you
14 look right here, there's a blood pool and then
15 a much larger blood pool where he's presently
16 laying. It looks like he may have hit the
17 ground one time ---

18 MR. SHELTON: Objection.

19 THE COURT: Sustained. That's
20 speculation under 602.

21 DIRECT EXAMINATION CONTINUED

22 BY SOLICITOR BIAGANTE:

23 Q. Tell us what you observed in that picture?
24 Where was the blood?

25 A. There's one pool right here (indicating),

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1 and then a larger pool here (indicating) and
2 the splatter of it was directed back toward
3 the door.

4 Q. Going back toward into the business?

5 A. Right.

6 Q. Now showing you State's Exhibit number 4.

7 A. This is a menu and price list that was
8 inside the restaurant. We had some other
9 problems with the restaurant itself.

10 Q. But it was a restaurant? But they also
11 served food?

12 A. Yes.

13 Q. I'm showing you State's Exhibit number 8.
14 Tell us what that is.

15 A. That is a Makarov firearm. If the picture
16 was a little clearer, in the actual photo
17 itself you can see the blood around the
18 trigger guard on the gun itself on the left
19 side.

20 Q. Point in that picture to what you just
21 described.

22 A. The blood is right around -- there's some
23 on the trigger, some on the trigger guard and
24 some on the bottom of the frame right here
25 (indicating).

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1 Q. Showing you State's Exhibit number 9.

2 A. This is the handgun when I slid it out
3 from under the seat. You can see the gun
4 right here -- of Mr. Dash's car, on the
5 passenger's side.

6 Q. And number 10?

7 A. This is just an overall view of the side
8 of Mr. Dash's car against the side of the
9 Pleasure Lounge.

10 Q. It's not really clear on the board -- it's
11 Mr. Dash's car?

12 A. Right.

13 Q. And number 11?

14 A. This is a far off view of all the pooled
15 blood.

16 Q. And if you can use the laser pointer and
17 show us on the screen.

18 A. This is one small pool right here, where I
19 believe he probably stumbled.

20 MR. SHELTON: Objection.

21 THE COURT: Sustained.

22 DIRECT EXAMINATION CONTINUED

23 BY SOLICITOR BIAGANTE:

24 Q. And number two?

25 A. Was right in here (indicating), and then

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1 the splatter toward the door.

2 Q. And number twelve?

3 A. More of a shot directly into the side
4 door.

5 Q. And what is that in front of the door, if
6 you can use the laser pointer?

7 A. It's a pool of blood. His head was right
8 here (indicating), and then this small
9 splatter back toward the door.

10 Q. And where was the bullet jacket found?

11 A. Right at the bottom corner of the stoop to
12 the door.

13 Q. I'm showing you State's Exhibit number 13.

14 A. This is the first pool, and the small
15 trail leading off.

16 Q. Is that the one closest to the door, or
17 farthest?

18 A. Farthest away from the door.

19 Q. I'm showing you State's Exhibit number 14,
20 when it comes up.

21 A. This is the one closest to the door,
22 exactly where he was laying, on our right.

23 Q. And is that the doorway leading --

24 A. Yes, ma'am. That's the doorway leading
25 into the Pleasure Lounge.

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1 Q. Let's just skip to sixteen.

2 A. This is just a picture of the doorway.

3 Q. What happened once Mr. McKelvey was
4 arrested for public disorderly conduct, as you
5 said, and he was further searched? Tell us
6 what happened after that.

7 A. Well, during the search that Officer
8 Winningham conducted, Winningham told me that
9 he found --

10 MR. SHELTON: Objection, Your Honor.

11 THE COURT: Sustained.

12 DIRECT EXAMINATION CONTINUED

13 BY SOLICITOR BIAGANTE:

14 Q. I'm getting to once he was being
15 transported to the Hill Finklea Detention
16 Center, who had to transport him and why?

17 A. One of the deputies, Deputy Thomas,
18 transported him to the Hill Finklea Detention
19 Center because he kicked the glass out of
20 Patrolman Taylor's car.

21 Q. At some point in time did you and another
22 officer go to the Hill Finklea Detention
23 Center to perform any type of test on Mr.
24 McKelvey?

25 A. Yes.

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1 Q. Tell us about that.

2 A. Once the detectives arrived I got a GSR
3 kit which is a gunshot residue kit.

4 Q. Do you have those readily available to
5 you?

6 A. No, ma'am. I had to get it from one of
7 the detectives.

8 Q. A gunshot residue kit -- just briefly tell
9 us what that is.

10 A. It's a kit with a small metal disc in it.
11 And you dab them on the suspected areas, and
12 then you can send them to SLED. SLED can read
13 the items and tell you whether there's gunshot
14 residue that it's picked up.

15 Q. And are these kits provided by SLED?

16 A. Yes, ma'am.

17 Q. Does SLED provide specific instructions
18 for these kits on how to administer the tests?

19 A. Yes, ma'am.

20 Q. So you were saying you went to the Hill
21 Finklea Detention Center to do this on Mr.
22 McKelvey. Tell us about that.

23 A. Officer Winningham and myself went to the
24 detention center. They had placed Mr.
25 McKelvey in one of the single holding cells

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1 down the hall from the booking desk. And I
2 went in, myself and Winningham, and I told
3 him, I said, "Droop, I've got a gunshot
4 residue test to do on you." He looked at me
5 and said, "You'all must think I shot
6 somebody." And then he sort of changed the
7 way he was looking and he said, "Oh, yeah, I
8 remember now." And I told him what I needed
9 to do, to hold his hands out straight, palms
10 up. And I dabbed each hand with the provided
11 collector for each part of his hands.

12 Q. So he said, "Oh, yeah, I remember now?"

13 A. Uh-huh.

14 THE COURT: Is that a "yes?"

15 THE WITNESS: Yes, sir.

16 DIRECT EXAMINATION CONTINUED

17 BY SOLICITOR BIAGANTE:

18 Q. You just referred to him as Droop. Are
19 you aware of whether Mr. Dash and Mr. McKelvey
20 are friends?

21 A. Yes, they are.

22 Q. You just know that from the community?

23 A. I know that from seeing them together
24 before on several occasions.

25 Q. And do you know -- you called him by his

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1 nickname. Is that the nickname that he goes
2 by?

3 A. Yes, ma'am.

4 Q. And what is that again?

5 A. Droop.

6 Q. Are you aware of whether Mr. Dash has a
7 nickname or not?

8 A. I can't think of it right off.

9 Q. Does Mr. McKelvey look the same as he did,
10 in terms of hairstyle, the night of the
11 incident?

12 A. Yes, ma'am.

13 Q. And how did Mr. Dash have his hair?

14 A. He had real short hair.

15 Q. At some point are you aware of whether
16 someone took a statement from Mr. Dash in
17 regards to this incident?

18 A. Yes, I believe Lieutenant Roach did.

19 Q. And was the decision made not to arrest
20 him at that point?

21 A. That was made by Roach also.

22 SOLICITOR BIAGANTE: One minute,
23 Your Honor.

24 THE COURT: Sure.

25 DIRECT EXAMINATION CONTINUED

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1 BY SOLICITOR BIAGANTE:

2 Q. When Mr. McKelvey -- when you told him you
3 were going to do the gunshot residue kit and
4 he made that statement to you, did you ask him
5 any questions before he made that statement?

6 A. No, ma'am.

7 Q. How would you characterize it?

8 A. I walked in and told him exactly what I
9 said. He was sitting there looking at me when
10 I walked in the door, myself and Winningham.
11 I told him, I said, "Droop, I've got to do a
12 gunshot residue test." I said, "You've got to
13 hold your hand out palms up and then palms
14 down." He said, "Oh, you'all must have
15 thought I shot somebody." Then he sort of
16 looked away like this (indicating), and said,
17 "Oh, I remember now."

18 Q. Thank you. Please answer any questions
19 the defense might have.

20 THE COURT: Cross examine.

21 CROSS EXAMINATION

22 BY MR. SHELTON:

23 Q. Corporal Edwards, this incident occurred
24 about sixteen or seventeen months ago. Is
25 that correct?

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1 A. It occurred on November 27, 2008.

2 Q. Okay. And it's to assume that you've done
3 thousands of cases -- you've handled thousands
4 of cases -- traffic stops and that sort of
5 thing since this incident.

6 A. Sure. I've handled a number of cases
7 since then.

8 Q. And one tool in order for us to help our
9 memory is that in this case you wrote an
10 incident report.

11 A. Yes.

12 Q. You never actually heard a gunshot.

13 A. No, sir, I didn't.

14 Q. You were headed down 17A. Is that
15 correct?

16 A. I was headed north on 17A, yes, sir.
17 North would be this way (indicating).

18 Q. You were heading down toward where the
19 incident occurred?

20 A. Almost directly.

21 Q. And the officer that had the person pulled
22 over was in front of you.

23 A. They were between McDonald's and Trident
24 Hospital.

25 Q. But your testimony was that you could see

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1 them.

2 A. From the top of the railroad bridge beside
3 Gates, yes, I could see the blue lights.

4 Q. And where that Berkeley County officer
5 heard the shot, that would have been in
6 between. Isn't that correct?

7 A. It would have been -- judging from where I
8 was to where he was, it would have been to my
9 right, about a 45-degree angle, to his left,
10 about a 45-degree angle.

11 Q. Behind him and in front of you. Isn't
12 that correct?

13 A. In front of me.

14 Q. And behind him.

15 A. I don't know which way he was facing. I
16 never got that close to his car.

17 Q. When you arrived on the scene you said you
18 observed the car where Mr. McKelvey and Mr.
19 Dash were. Isn't that correct?

20 A. Yes, sir

21 Q. And you observed the victim lying on the
22 ground.

23 A. Once I got out of the car I seen the
24 victim on the ground.

25 Q. Isn't it also correct you saw someone

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1 outside of the club?

2 A. Yes, sir.

3 Q. And that person, according to your
4 observations that night, he ran inside the
5 club.

6 A. All he had to go was make one step back
7 inside the door and then shut the door.

8 Q. He locked the door too, did he not?

9 A. Yes.

10 Q. Mr. McKelvey, he never ran, did he?

11 A. He never had a chance to.

12 Q. You weren't at this incident?

13 A. At the time of the occurrence? Obviously,
14 no.

15 Q. At the time of the gunshot. You don't
16 know where Mr. Dash was at the time of the
17 gunshot, do you?

18 A. No.

19 Q. You don't know where this other person
20 that was outside the club was at the time of
21 the gunshot, do you?

22 A. No, I don't.

23 Q. This blood that you said you saw on Mr.
24 McKelvey's right hand as he got out of the
25 car, you tested that, correct?

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- 1 A. Did we test it?
- 2 Q. Yes, sir, as if this was blood.
- 3 A. No, sir, not to my knowledge.
- 4 Q. You didn't take samples of this blood
- 5 that's on his right hand to send off to SLED?
- 6 A. No, sir.
- 7 Q. SLED can do a DNA test, correct?
- 8 A. Correct.
- 9 Q. At one point when Mr. Phoenix was laying
- 10 on the ground and you were talking to Mr.
- 11 Phoenix, there were other deputies on the
- 12 scene. Isn't that correct?
- 13 A. Yes, there were other deputies and
- 14 officers.
- 15 Q. And I think you said Thomas?
- 16 A. Rob Thomas, yes.
- 17 Q. He was talking with Mr. McKelvey?
- 18 A. He was holding at bay with Officer Taylor.
- 19 Q. And at that point he was not placed in
- 20 handcuffs.
- 21 A. At that instant, no. A minute or two
- 22 later, yes, he was.
- 23 Q. He was placed into handcuffs by Officer
- 24 Taylor?
- 25 A. He was arrested by Officer Taylor.

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1 Q. And once Officer Taylor arrested him,
2 that's when ---

3 A. He secured him in his car.

4 Q. And you did a pat-down of Mr. McKelvey.

5 A. A general pat-down, yes.

6 Q. And you didn't find anything illegal on
7 him at that time that you did the pat down,
8 did you?

9 A. What I was looking for was something the
10 size of that pistol, not something the size of
11 my finger, for my safety and the other people
12 that was on the scene. That's why I passed
13 him to the next officer.

14 Q. But you didn't find any illegal items on
15 Mr. McKelvey.

16 A. No.

17 Q. Mr. Phoenix was transported by EMS. Isn't
18 that correct?

19 A. Yes, sir.

20 Q. And at that point in time you were
21 involved with going through the Pleasure
22 Lounge to detain the other people in the
23 lounge. Isn't that cor?

24 A. Yes, sir.

25 Q. To secure the lounge?

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1 A. Roughly, yes.

2 Q. And at that point do you realize who the
3 person was that was outside the club?

4 A. Yes, I recognized the clothing he had on.
5 He was the only one in there that had on the
6 white shirt and jeans or white sweatshirt and
7 jeans.

8 Q. And there was something else about that
9 white shirt, was there not?

10 A. Yes, sir, there was what appeared to be
11 high velocity blood spatter on it.

12 Q. There was blood on his shirt.

13 A. A very small amount.

14 Q. And he lied to you at that point, did he
15 not?

16 SOLICITOR BIAGANTE: Your Honor,
17 objection.

18 THE COURT: What's the objection?

19 SOLICITOR BIAGANTE: I don't think

20 ---

21 THE COURT: What's the objection?
22 What's the basis of the objection?

23 SOLICITOR BIAGANTE: Wrong person
24 to ask.

25 THE COURT: Overruled.

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1 CROSS EXAMINATION CONTINUED

2 BY MR. SHELTON:

3 Q. He lied to you at that time, did he not?

4 A. By the time we got into the club and
5 secured these people, that's about the time
6 the detectives arrived on the scene. He
7 talked to them.

8 Q. This person was Mr. McGee, Avery McGee.

9 A. Yes.

10 Q. And you spoke with Mr. McGee.

11 A. Yes, I spoke with him.

12 Q. And at that point he gave something that
13 was inconsistent.

14 A. Yes.

15 Q. That was regarding the blood, was it not?

16 A. Yes.

17 Q. And in fact, when you secured evidence you
18 secured that shirt, did you not?

19 A. Yes, sir.

20 Q. Was that shirt ever presented to SLED?

21 A. I don't know. I'm not the one that
22 transported it back and forth.

23 Q. You also secured a white long-sleeved
24 shirt and a victim's hat and coat.

25 A. Yes.

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1 Q. You took some photos of the scene.

2 A. Yes.

3 Q. Which photos did you take, specifically?

4 A. (Upon review), Of the actual crime scene
5 photos, I'm assuming is what we're speaking?

6 Q. Any of the photos there. Which ones did
7 you take?

8 A. I took almost all of them except one or
9 two.

10 THE COURT: Why don't you identify
11 for the record, please, Mr. Edwards, by
12 exhibit number the ones you did not take.

13 THE WITNESS: I want to say Exhibit
14 11 and 12. If I took them, I don't remember
15 taking them.

16 CROSS EXAMINATION CONTINUED

17 BY MR. SHELTON:

18 Q. So you would have taken 1 through 10 and
19 13 through 17.

20 A. Probably.

21 Q. And your testimony was that you grabbed
22 the bullet jacket before you took the photos?

23 A. When I first walked up to Mr. Phoenix and
24 seen him laying on the ground I didn't have
25 the camera with me. I wanted to check on him.

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1 As he was trying to tell me his name is when I
2 seen the bullet jacket laying there. And
3 knowing that in a matter of a minute and a
4 half or two minutes there'd be a swarm of
5 EMT's and paramedics there, it could have got
6 lost. I picked it up and put it in my shirt
7 pocket.

8 Q. And you placed that into evidence?

9 A. Yes, sir, I did.

10 Q. Was that tested for blood?

11 A. I do not know.

12 Q. What about your shirt pocket that you put
13 the jacket in, was that tested for blood?

14 A. No.

15 Q. Did you pace off the scene?

16 A. The scene was in such chaos the first few
17 minutes we didn't have time to pace it off.

18 Q. But there was enough time for you to go
19 back to your car and take photos of Mr.
20 Phoenix before the EMS arrived. Isn't that
21 correct?

22 A. Yes, sir.

23 Q. I believe your testimony was that you saw
24 the gun underneath in the floorboard. Isn't
25 that correct?

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1 A. No, actually Officer Taylor seen the gun
2 on the floorboard, and he came and told me.

3 Q. And so you went and observed that and you
4 saw it on the floorboard.

5 A. Right.

6 Q. Do you have a copy of your incident
7 report?

8 A. No, sir.

9 Q. Do you remember what you put in your
10 incident report about where you found the gun?

11 A. Yes, sir.

12 Q. What did you put in the incident report?

13 A. I think it's in the incident report that
14 the gun was laying in the seat, which actually
15 I was trying to do some of it from memory.
16 But I found out a little later that Taylor
17 stated that he actually found it under the
18 seat, which is where I found it also and slid
19 it out. I had one picture of it, I think,
20 laying in the seat or laying in the
21 floorboard, one.

22 Q. Did you review your incident report before
23 you testified here today?

24 A. Yes.

25 MR. SHELTON: Let's mark this,

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1 please.

2 THE COURT: Very well. Defendant's
3 1, for I.D. only.

4 MR. SHELTON: Five pages.

5 THE COURT: Very well.

6 CROSS EXAMINATION CONTINUED

7 BY MR. SHELTON:

8 Q. I want to direct your attention to this.
9 If you don't mind reading that over and see if
10 that refreshes your memory.

11 A. (Upon review), yes, sir. I've got it in
12 the incident report that the gun was found in
13 the glove box. But obviously it wasn't.

14 Q. So you put in your report that it was
15 found in the glove box.

16 A. Yes..

17 Q. And when did you create your incident
18 report?

19 A. Way on later that night.

20 Q. That night?

21 A. 6:00 or 7:00 o'clock in the morning.

22 Q. Would that have been before you talked to
23 Officer Taylor?

24 A. Could have been.

25 Q. And you weren't involved in any taking of

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1 statements. Isn't that correct?

2 A. No.

3 Q. And you said when you found the gun the
4 clip and the ammunition was in there?

5 A. Yes, and there was one in the barrel.

6 Q. And so when you went to the detention
7 center to do the gunshot residue test, at that
8 point in time was Mr. McKelvey booked into the
9 detention center?

10 A. Shortly thereafter, yes.

11 Q. It was after you had talked to Mr.
12 McKelvey?

13 A. I don't know exactly when they done the
14 paperwork.

15 Q. Is the procedure not when you take someone
16 to the detention center to fill out the
17 paperwork?

18 A. If you take him, you fill it out. If I
19 take him, I fill it out. But he was not the
20 County's responsibility of arrest. We had him
21 arrested. They just transported him. They
22 put him in a holding area till we could get
23 there, which is not an uncommon thing.

24 Q. Right. But Officer Taylor was the one
25 that took him to the detention center?

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1 A. No, Robert Thomas took him to the
2 detention center, one of the Berkeley County
3 deputies, because he kicked the glass out of
4 Taylor's car there at the scene.

5 MR. SHELTON: Court's indulgence.

6 THE COURT: Certainly.

7 MR. SHELTON: No further questions.

8 THE COURT: Redirect.

9 REDIRECT EXAMINATION

10 BY SOLICITOR BIAGANTE:

11 Q. Was it a mistake that you had in your
12 incident report about where the gun was
13 located?

14 A. Yes.

15 Q. Did you take the photograph of the gun on
16 the floorboard at the scene?

17 A. Yes.

18 Q. Mr. Shelton asked you about Mr. McGee who
19 was the owner/operator of the business. Was
20 he very cooperative that night?

21 A. Not really.

22 Q. Tell us why he wasn't cooperative.

23 A. Well, because the club was being operated
24 illegally.

25 Q. And was he arrested that night for

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1 operating the club illegally?

2 A. Yes, ma'am, he was.

3 Q. Are you aware that he gave a written
4 statement to another officer afterwards?

5 A. I don't know whether he did or not.

6 Q. But you did speak with Mr. McGee?

7 A. I spoke with him there at the scene.

8 Q. And what did he tell you?

9 MR. SHELTON: Objection.

10 THE COURT: Sustained.

11 REDIRECT EXAMINATION CONTINUED

12 BY SOLICITOR BIAGANTE:

13 Q. As a result of what he told you did you
14 take pictures?

15 A. Yes, ma'am.

16 Q. While I'm doing this tell us when you got
17 to the scene did you order the patrons of the
18 club outside?

19 A. Well, when EMS got to Mr. Phoenix and got
20 him stabilized and moved him, the door was
21 still locked to the club. We could hear
22 several people in there and music going in the
23 background, but nobody would come to the door.
24 So once they got him out of the way we beat
25 and banged on the door enough to where we

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1 finally got somebody's attention. And at
2 first somebody refused to open the door and
3 was talking to us through the door.

4 (SO ENTERED AS STATE'S EXHIBIT 25)

5 REDIRECT EXAMINATION CONTINUED

6 BY SOLICITOR BIAGANTE:

7 Q. I'm showing you what's marked as State's
8 Exhibit number 25. And I'm showing you what's
9 been marked as -- I've taken number 25 out of
10 the bag. Do you recognize what this is?

11 A. Yes. It's the shirt Mr. McGee had on.

12 Q. Earlier you testified -- how many crime
13 scenes have you worked in your twenty or
14 thirty years of police work?

15 MR. SHELTON: Your Honor, beyond
16 cross.

17 THE COURT: I'll allow it. You
18 asked him if he'd had any other investiga-
19 tions.

20 THE WITNESS: I couldn't give you a
21 number.

22 RECROSS EXAMINATION CONTINUED

23 BY SOLICITOR BIAGANTE:

24 Q. Hundreds?

25 A. At least.

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1 Q. And you testified earlier that this was
2 high-velocity blood spatter.

3 A. Yes. You see some of the smaller droplets
4 here and a little bit on the center -- mostly
5 what's on the arm, right there (indicating).

6 Q. Based on your conversation with Mr. McGee,
7 where was he in relation to where the shooting
8 occurred? Was he in front of the shooting or
9 behind the shooting?

10 A. He would have been behind.

11 MR. SHELTON: Objection.

12 THE COURT: Sustained. It's
13 speculation on his part.

14 SOLICITOR BIAGANTE: Your Honor, at
15 this time I would move State's Exhibit 25 into
16 evidence.

17 THE COURT: Any objection?

18 MR. SHELTON: Objection to
19 completion, Your Honor.

20 THE COURT: I'll allow it, subject
21 to the objection.

22 (SO ENTERED AS STATE'S EXHIBIT 25)

23 RECROSS EXAMINATION CONTINUED

24 BY SOLICITOR BIAGANTE:

25 Q. At any time did Mr. Phoenix or anyone else

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1 tell you that Mr. McGee was the shooter?

2 MR. SHELTON: Objection, Your
3 Honor.

4 THE COURT: Sustained. Hearsay.

5 REDIRECT EXAMINATION CONTINUED

6 BY SOLICITOR BIAGANTE:

7 Q. Based on everyone's information at the
8 scene and all their statements who was
9 arrested for this crime?

10 A. Mr. McKelvey.

11 Q. Did you have any indication whatsoever
12 that Mr. Avery was involved?

13 A. Avery McGee? No.

14 Q. Tell us about Mr. Avery's hairstyle that
15 night, generally -- long, short, dreads, no
16 dreads.

17 A. He had what I basically describe, I
18 believe, as a short afro. It was skin tight.
19 It was maybe this long (indicating).

20 Q. You showed us on your finger.

21 A. Yes, maybe about an inch long.

22 Q. Mr. Shelton asked you about other clothes
23 that were taken.

24 SOLICITOR BIAGANTE: Mark this,
25 please.

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1 COURT REPORTER: State's Exhibits 26
2 and 27 for identification.

3 THE COURT: Okay.

4 REDIRECT EXAMINATION CONTINUED

5 BY SOLICITOR BIAGANTE:

6 Q. Officer, I'm showing you what's been
7 marked as State's number 26 and 27, taken out
8 of the bags. Do you recognize what these are?

9 A. Yes, that's Mr. Phoenix's hat and coat.

10 Q. This is the victim's clothes.

11 A. Right.

12 Q. If you could, tell us what Number 27 says.
13 What does that say?

14 A. Middleton Towing Service, Bonneau, South
15 Carolina.

16 Q. Did Mr. Phoenix have these on at the time
17 of the shooting or where were they?

18 A. They were laying in the -- he had the
19 jacket on. The hat was laying several feet
20 away.

21 SOLICITOR BIAGANTE: Your Honor, I
22 move State's 26 and 27 into evidence.

23 THE COURT: Any objection?

24 MR. SHELTON: No.

25 THE COURT: Without objection,

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1 State's 26 and 27 are admitted.

2 (SO ENTERED AS STATE'S EXHIBIT 26)

3 (SO ENTERED AS STATE'S EXHIBIT 27)

4 REDIRECT EXAMINATION CONTINUED

5 BY SOLICITOR BIAGANTE:

6 Q. Will it refresh your memory if I show you
7 State's Exhibit number 1 that's already in
8 evidence? What is he wearing in that picture?

9 A. He's wearing -- this is Mr. Phoenix?

10 Q. Right.

11 A. He's wearing like a short-sleeve
12 sweatshirt over top of that jacket, I believe.

13 Q. Well, is it that jacket, or is it
14 something else. If you want me to hold it up,
15 I will.

16 MR. SHELTON: Objection.

17 THE COURT: I sustain the
18 objection. He's answered. Thank you very
19 much.

20 THE WITNESS: That's not the
21 jacket. That could have been his outside
22 jacket. He's got a hoodie on and it looks
23 like a white sweatshirt.

24 REDIRECT EXAMINATION CONTINUED

25 BY SOLICITOR BIAGANTE:

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1 Q. Thank you. And at some point in time did
2 all the patrons from the club come out?

3 A. Yes.

4 Q. Were they laying down on the ground at
5 that time?

6 A. Yes, ma'am.

7 Q. So they were laying down near where the
8 blood was?

9 A. They were at the end -- the far end of the
10 cement pad, yes.

11 Q. And Mr. Shelton asked you about if you had
12 a chance to swab the blood on the defendant's
13 hands.

14 A. Yes.

15 Q. Was he being cooperative at that time?

16 A. No.

17 Q. And Mr. Shelton also asked you about you
18 not finding any contraband on Mr. McKelvey.
19 What were you looking for when you did a
20 general pat-down?

21 A. Well, I like I told Mr. Shelton, I was
22 looking for something the size of that pistol,
23 not something the size of my finger.

24 Q. Thank you.

25 THE COURT: Recross?

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1 MR. SHELTON: Very briefly.

2 RECROSS EXAMINATION

3 BY MR. SHELTON:

4 Q. Officer, the gun -- Officer Taylor told
5 you about where that gun was.

6 A. Yes, sir.

7 Q. I think your testimony was there was music
8 going on and you heard a bunch of people
9 inside the club. Isn't that correct?

10 A. Yes, inside the club.

11 Q. And you had problems swabbing Mr.
12 McKelvey's hands for gunshot residue. Isn't
13 that correct?

14 A. Not once he was at the detention center.

15 Q. You had no problems swabbing for that?

16 A. No.

17 Q. Mr. McKelvey was handcuffed on the scene,
18 was he not?

19 A. Yes.

20 Q. Was he handcuffed behind his back?

21 A. Yes.

22 MR. SHELTON: Nothing further.

23 THE COURT: Thank you. You may
24 come down.

25 (WITNESS EXCUSED)

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1 THE COURT: Ladies and Gentlemen,
2 at this point I'll let you go to your jury
3 room. Don't begin your deliberations. Don't
4 discuss the case. We'll be with you in about
5 ten minutes or so.

6 (JURY OUT @ 11:39 A.M.)

7 THE COURT: Anything from the State
8 before we recess?

9 SOLICITOR BIAGANTE: No, Your
10 Honor.

11 THE COURT: Anything from the
12 defendant?

13 MR. SHELTON: Nothing, Your
14 Honor.

15 THE COURT: We'll be at ease for
16 about ten minutes.

17 (RECESS)

18 (DEFENDANT PRESENT)

19 THE COURT: Is the State ready to
20 proceed?

21 SOLICITOR BIAGANTE: Yes, Your
22 Honor.

23 THE COURT: Defense ready?

24 MR. SHELTON: Yes, sir.

25 THE COURT: Let the record reflect

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1 Mr. McKelvey's present. Let's bring in our
2 jury, please.

3 (JURY IN @ 11:51 A.M.)

4 THE COURT: Thank you, Ladies and
5 Gentlemen. We're ready to continue.
6 Solicitor, you may call your next witness,
7 please.

8 SOLICITOR WILLIAMS: Thank you,
9 Your Honor. The State calls Officer Taylor.

10 (WITNESS TAKES STAND)

11 JAMES TAYLOR, being duly sworn to
12 tell the truth, the whole truth and nothing
13 but the truth, testified, as follows:

14 DIRECT EXAMINATION

15 BY SOLICITOR WILLIAMS:

16 Q. Officer Taylor, where do you work?

17 A. Moncks Corner Police Department.

18 Q. And how long have you worked there?

19 A. Two and a half years.

20 Q. Were you working there back in November of
21 2008?

22 A. I was.

23 Q. And did you respond on November 27, 2008
24 to a call at the corner of Cooper and Gray
25 Street in Moncks Corner?

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- 1 A. I did.
- 2 Q. What establishment is at that corner?
- 3 A. It's known to be the Pleasure Lounge.
- 4 Q. Are you familiar with that establishment?
- 5 A. I am.
- 6 Q. Have you been inside?
- 7 A. Not before that evening.
- 8 Q. That evening did you go inside?
- 9 A. I did.
- 10 Q. What kind of place is it?
- 11 A. Appeared to be a bar, pool tables.
- 12 Q. Is there a Wii in there?
- 13 A. Excuse me?
- 14 Q. A video game, like a Wii?
- 15 A. I didn't see one.
- 16 Q. Is it a stripper club?
- 17 A. No, it's not.
- 18 Q. So it's a bar?
- 19 A. Yes.
- 20 Q. And a restaurant?
- 21 A. I wouldn't call it a restaurant either.
- 22 Q. Did it have food?
- 23 A. Maybe. I don't know.
- 24 Q. You don't know.
- 25 A. I don't know.

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1 Q. Did you take any photographs that evening
2 when you responded to the scene?

3 A. No, I did not.

4 Q. The club, is it in Berkeley County?

5 A. It is.

6 Q. When you got the call what type of call
7 was it? Did you get it over the dispatch?

8 A. It was shots fired.

9 Q. And where were you when you were
10 dispatched to that location?

11 A. I was in the area of the post office.

12 Q. So how long about did it take you to get
13 there?

14 A. Maybe a minute or minute and a half.

15 Q. And when you arrived who else was at the
16 scene?

17 A. Corporal Edwards, Patrolman Winningham, a
18 couple of Sheriff's deputies.

19 Q. What did you observe when you arrived at
20 the scene?

21 A. When I exited my patrol car I observed a
22 black male laying on the front steps of the
23 bar. There was blood gathering around his
24 head. I also noticed two individuals standing
25 by a blue car.

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1 Q. Did you recognize those individuals?

2 A. I did.

3 Q. Who did you recognize them as?

4 A. I recognized the one standing by the
5 driver's side as Askari Dash and the one
6 standing by the passenger's side as Jermaine
7 McKelvey.

8 Q. Does Mr. McKelvey go by a nickname that
9 you're aware of?

10 A. He does.

11 Q. What is that?

12 A. Droop.

13 Q. What were they doing? Who was around
14 them?

15 A. Mr. Dash was standing by himself at that
16 time, and Mr. McKelvey was standing with
17 Corporal Thomas from the Berkeley County
18 Sheriff's Office.

19 Q. What did you do next when you arrived at
20 the scene?

21 A. I observed Mr. McKelvey becoming violent,
22 disorderly, boisterous. So I walked over to
23 Corporal Thomas to give him assistance.

24 Q. And then what did you do?

25 A. At that time Mr. McKelvey became extremely

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1 disorderly. I asked him to please turn around
2 and put his hands behind his back and placed
3 him in handcuffs for disorderly conduct.

4 Q. And did you have any contact with Mr. Dash
5 at this point?

6 A. No, I did not.

7 Q. At any point during the call did you have
8 any contact with Mr. Dash?

9 A. I did, briefly.

10 Q. Did you determine whose vehicle it was?

11 A. I did.

12 Q. And whose was it?

13 A. Mr. Askari Dash.

14 Q. Did you determine if there was any
15 evidence in the car?

16 A. Mr. Dash gave consent to search his
17 vehicle.

18 Q. Did he tell you of anything in the
19 vehicle.

20 MR. SHELTON: Objection.

21 THE COURT: Sustained.

22 SOLICITOR WILLIAMS: Your Honor, I
23 think it's a statement.

24 THE COURT: Thank you. I sustained
25 the objection.

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1 SOLICITOR WILLIAMS: Would the
2 Court allow me to lay a foundation?

3 THE COURT: No, ma'am. You can ask
4 any questions you want, Solicitor. I
5 sustained the objection.

6 DIRECT EXAMINATION CONTINUED

7 BY SOLICITOR WILLIAMS:

8 Q. Did you at some point collect some
9 evidence from that car?

10 A. I did.

11 Q. And was that evidence incriminating, just
12 in general?

13 MR. SHELTON: Objection.

14 THE COURT: Sustain the objection
15 as to leading. Just ask him what he was
16 doing.

17 DIRECT EXAMINATION CONTINUED

18 BY SOLICITOR WILLIAMS:

19 Q. Can you characterize that evidence?

20 A. A handgun.

21 Q. Who told you that the gun was in ---

22 MR. SHELTON: Objection.

23 THE COURT: I'll allow that
24 question.

25 THE WITNESS: Mr. Askari Dash.

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1 DIRECT EXAMINATION CONTINUED

2 BY SOLICITOR WILLIAMS:

3 Q. Did he tell you how he knew it was in the
4 car?

5 A. No, he did not.

6 Q. Did he tell you anything about Mr.
7 McKelvey?

8 MR. SHELTON: Objection.

9 THE COURT: Sustained.

10 DIRECT EXAMINATION CONTINUED

11 BY SOLICITOR WILLIAMS:

12 Q. Where did you find the gun?

13 A. I found the handgun underneath the
14 passenger's seat.

15 Q. And who was by the passenger's seat?

16 A. Mr. McKelvey.

17 Q. And where was Mr. Dash?

18 A. On the driver's side.

19 Q. Where, specifically, was the gun?

20 A. The gun was sitting with the barrel
21 pointed towards the back seat and a little bit
22 of the pistol grip showing from the front.

23 SOLICITOR WILLIAMS: Your Honor,
24 may I approach the witness?

25 THE COURT: You may.

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1 DIRECT EXAMINATION CONTINUED

2 BY SOLICITOR WILLIAMS:

3 Q. I'm showing you what's been previously
4 marked as State's Exhibit 22. Officer Taylor,
5 what is this?

6 A. It's a handgun.

7 Q. Is that the handgun that you found in the
8 car?

9 A. It is.

10 Q. What did you do with the handgun when you
11 found it, or what did you do after you found
12 the handgun?

13 A. I advised Corporal Edwards of my finding.

14 Q. And what, if anything, did he do?

15 A. Corporal Edwards then immediately came
16 over and cleared the gun.

17 Q. Was that then processed into evidence?

18 A. I believe so.

19 Q. Did you do anything else with the gun?

20 A. No, I did not.

21 SOLICITOR WILLIAMS: Your Honor,
22 may I approach?

23 THE COURT: Yes.

24 DIRECT EXAMINATION CONTINUED

25 BY SOLICITOR WILLIAMS:

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1 Q. Whose name is this on the packaging that
2 the gun was in?

3 A. Taylor.

4 Q. Is that you?

5 A. It is.

6 Q. What type of gun is this?

7 A. I believe it is a Markov .380.

8 Q. Is it a nine-millimeter gun?

9 A. No, it is not.

10 Q. I'm sorry. Go ahead. What did you say it
11 was? A .380?

12 A. .380.

13 Q. Are you aware of different things about
14 guns due to your job experience?

15 A. Yes.

16 Q. Do you have training with weapons?

17 A. Correct.

18 Q. If you know, can nine-millimeter bullets
19 be fired out of a .380? I'm sorry. I have it
20 backwards, because I, on the other hand, do
21 not know a lot about guns. Can a .380 be
22 fired out of a nine-millimeter gun?

23 A. I'm not sure.

24 Q. At some point in the evening did you come
25 into contact with the victim?

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1 A. I did.

2 Q. And what was his name, if you remember?

3 A. His name was Bernard Phoenix.

4 Q. And where did you come into contact with
5 him?

6 A. At the Roper Hospital.

7 Q. Tell me what his condition was at that
8 time?

9 A. He was conscious and alert, but a little
10 -- I don't know how you would actually
11 describe it.

12 Q. What was being done to the victim at that
13 time?

14 A. He was actually in the back of the
15 hospital awaiting medevac.

16 Q. When you say "medevac," what is that?

17 A. The helicopter.

18 Q. So he was waiting to be transported.

19 A. Correct.

20 Q. And did you have a conversation with him?

21 A. I spoke with Mr. Phoenix briefly.

22 Q. Don't tell us what he said, but did he
23 give you information about the crime?

24 A. He did.

25 Q. And without telling us what he said did he

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1 tell you who shot him?

2 A. He did.

3 Q. Did you communicate that information to
4 anybody?

5 A. When I left the hospital I then informed
6 Lieutenant Roach, Corporal Edwards and
7 Patrolman Wunningham what Mr. Phoenix told me.

8 SOLICITOR WILLIAMS: The Court's
9 indulgence for just a minute.

10 THE COURT: Certainly.

11 DIRECT EXAMINATION CONTINUED

12 BY SOLICITOR WILLIAMS:

13 Q. And at some point the defendant was
14 transported to Berkeley County?

15 A. Mr. McKelvey?

16 Q. Uh-huh, (affirmative nod).

17 A. Yes, he was.

18 Q. And how was he transported there, whose
19 vehicle?

20 A. He was taken out in one of the Berkeley
21 County Sheriff's deputy's vehicles.

22 Q. Was that the vehicle he was originally put
23 in?

24 A. No, it was not.

25 Q. And why was he put in a different vehicle?

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1 A. Sometime during -- while Mr. McKelvey was
2 in the rear of my patrol vehicle he kicked out
3 the driver's side rear window.

4 Q. During the period of time that he was
5 being placed in the vehicle did he tell you
6 anything about anything that he had on his
7 person?

8 A. He did. Mr. McKelvey stated that he had
9 some, quote, unquote, "dope" in his pocket. I
10 told Mr. McKelvey we weren't really interested
11 in that at that time, because we had more ---

12 Q. You were trying to secure the scene at
13 that time?

14 A. I was.

15 Q. He related to you that he had some dope in
16 his pocket. At some point, to your knowledge,
17 was that take into custody?

18 A. It was.

19 Q. And when he was placed in a different
20 vehicle what type of vehicle was that?

21 A. I believe it was a standard-issue Crown
22 Victoria.

23 Q. Was it a vehicle that was a little safer
24 so he couldn't kick the glass out?

25 A. It was. It had bars on the windows, on

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1 the side windows.

2 SOLICITOR WILLIAMS: Nothing
3 further.

4 THE COURT: Cross examine.

5 CROSS EXAMINATION

6 BY MR. SHELTON:

7 Q. This incident occurred sixteen or
8 seventeen months ago. Is that correct?

9 A. I believe so.

10 Q. Is it safe to say you've probably done a
11 thousand cases, road stops and that sort of
12 thing, in that amount of time?

13 A. Probably so.

14 Q. So in order to help you remember what
15 happened that night you created an incident
16 report. Isn't that correct?

17 A. Yes, sir.

18 Q. And do you have that incident report with
19 you here today?

20 A. I do.

21 Q. Do you mind if I see that?

22 A. Absolutely -- (tenders).

23 Q. You have a call number that dispatch gives
24 you. Isn't that correct, so that you have so
25 that dispatch can tell who you are?

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1 A. Yes.

2 Q. What is your call number?

3 A. QO-18.

4 Q. You said you noticed someone at the front
5 steps.

6 A. Where?

7 Q. When you arrived on the scene you saw
8 someone laying down on the front steps of the
9 club?

10 A. Correct.

11 Q. Do you know which way he was facing?

12 A. I believe he was facing out towards the
13 road with his back towards the door.

14 Q. And when you arrived on the scene Mr.
15 McKelvey was outside the car?

16 A. Yes.

17 Q. And he started getting loud and boisterous
18 when you came over to him.

19 A. He was getting that way as I was walking
20 that way.

21 Q. And you placed him in handcuffs.

22 A. Correct.

23 Q. At any point did you -- and when you
24 arrived Askari Dash was by himself?

25 A. He had some -- the way he was by himself,

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1 he was separated from Mr. McKelvey by the
2 vehicle.

3 Q. And you were the one that located the
4 firearm?

5 A. Correct.

6 Q. And then, what did you do after the
7 firearm was secured into evidence -- secured
8 by Officer Edwards?

9 A. What did I do after that?

10 Q. Yes.

11 A. I believe I responded to the hospital in
12 reference to a call from central dispatch.

13 Q. At any point in time did you notice that
14 Mr. Phoenix was intubated? Do you know what
15 that means?

16 A. No, I don't.

17 Q. Did you know if he had a tube in his
18 mouth?

19 A. No, I did not.

20 Q. At some point in time Mr. McKelvey said he
21 had dope in his pocket.

22 A. Correct.

23 Q. Was that after you got back from the
24 hospital?

25 A. No, that was before I went.

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1 Q. And you did not put that in your incident
2 report, did you?

3 A. What?

4 Q. About Mr. McKelvey having dope in his
5 pocket?

6 A. No, I did not.

7 Q. Did you find the dope on Mr. McKelvey?

8 A. No, I did not.

9 Q. At some point in time you booked Mr.
10 McKelvey into the detention center. Is that
11 correct?

12 A. No, I did not.

13 MR. SHELTON: Beg the Court's
14 indulgence.

15 THE COURT: Certainly.

16 MR. SHELTON: Please mark this as
17 Defendant's Exhibit 2 for I.D.

18 THE COURT: Okay.

19 COURT REPORTER: Defendant's Exhibit
20 2 for identification.

21 CROSS EXAMINATION CONTINUED

22 BY MR. SHELTON:

23 Q. Do you recognize that?

24 A. I recognize it as a booking sheet.

25 Q. Does it have your name next to "booking

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1 officer?"

2 A. Yes, it does.

3 Q. Do you remember booking him in?

4 A. Not right offhand. I can tell you I never
5 went to the jailhouse to book him in.

6 Q. And as to defendant's personal property,
7 what do you have there?

8 A. It says quantity of one bean (phonetic),
9 SCID (phonetic).

10 Q. So that's all you took off Mr. McKelvey?

11 A. That's all that's in this property
12 receipt.

13 Q. And the charges that you were charging him
14 with that night?

15 A. The charge is not on the property receipt.

16 Q. I'm sorry. On the booking report it has
17 the charges that he's being held for.

18 A. Can I look at it again?

19 Q. (Tendering).

20 A. The only charge that was written on here
21 by me is possession of crack cocaine.

22 Q. So at some point four other charges got
23 added. Because there are five charges on this
24 booking report, is there not?

25 A. I'd have to see it again so I can count

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1 them.

2 Q. (Tendering).

3 A. (Upon review), that would be correct.

4 There's five of them.

5 Q. Do you know about how long you were at the
6 scene before you went to the hospital?

7 A. No, I do not.

8 Q. Did you take any statements that night?

9 A. No, I did not.

10 Q. Could you refer back to your incident
11 report?

12 A. Sure.

13 Q. The very last part of it.

14 A. There are four paragraphs.

15 Q. Yes, sir. Did you assist with witness
16 statements?

17 A. I did assist, but I never took any.

18 Q. At one point in time you took Mr. Dash's
19 vehicle into evidence?

20 A. Lieutenant Rhodes asked me to drive Askari
21 Dash's vehicle to the Moncks Corner Police
22 Department.

23 Q. At any time did you try to obtain evidence
24 from that car?

25 A. No, I did not.

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1 Q. Your name's on the bag for the gun. Isn't
2 that correct?

3 A. Yes.

4 Q. So did you bag that gun up?

5 A. I believe I may have.

6 Q. And you didn't take any pictures?

7 A. No, I did not.

8 MR. SHELTON: I have nothing further,
9 Your Honor.

10 THE COURT: Redirect.

11 SOLICITOR WILLIAMS: Just briefly.

12 THE COURT: Sure.

13 SOLICITOR WILLIAMS: Your Honor,
14 may I approach?

15 THE COURT: You may.

16 REDIRECT EXAMINATION

17 BY SOLICITOR WILLIAMS:

18 Q. Mr. Shelton asked you about the booking
19 sheet and the fact that you are shown as the
20 booking officer.

21 A. Yes, ma'am.

22 Q. But you arrested Mr. McKelvey that night.
23 You're also shown as the arresting officer.

24 Is that true?

25 A. Correct.

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1 Q. And is it common for warrants to be done
2 after the initial arrest, additional warrants?

3 A. That is true.

4 Q. So the fact that not all of the charges
5 are put on the booking sheet immediately is
6 not uncommon?

7 A. Correct.

8 Q. Why is that, if you know?

9 A. It takes time and preparation to put these
10 things together. And we have to get a judge's
11 signature.

12 Q. So after additional evidence is collected,
13 sometimes more charges are brought up?

14 A. Yes, ma'am.

15 Q. Mr. Shelton asked you about your work at
16 the scene that night. Did you see the owner
17 of the club that evening?

18 A. I'm not familiar with who the owner is.

19 Q. Did you see anyone that you remember being
20 the manager?

21 A. Yes.

22 Q. Do you remember what that man's name was?

23 A. All I know is Avery McGee.

24 Q. And where did you see Mr. McGee?

25 A. I believe I seen him inside the Pleasure

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1 Lounge.

2 Q. Did you ever see him outside?

3 MR. SHELTON: Your Honor, I'm
4 going to object as being nonresponsive.

5 THE COURT: Sustained.

6 REDIRECT EXAMINATION CONTINUED

7 BY SOLICITOR WILLIAMS:

8 Q. And you arrested Mr. McKelvey for what?

9 A. Disorderly conduct.

10 Q. Also Mr. Shelton asked you if the two were
11 separated, Mr. McKelvey and Mr. Dash. And you
12 said by the car.

13 A. Yes, ma'am.

14 Q. So is it fair to say that Mr. Dash was on
15 one side of the car and Mr. McKelvey on the
16 other?

17 A. Yes, ma'am.

18 Q. And you testified that Mr. McKelvey told
19 you that he had drugs in his pocket.

20 A. Correct.

21 Q. Is that why you are not the person listed
22 as the one that arrested him for the crack
23 cocaine?

24 A. Correct.

25 Q. You didn't take him into custody?

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1 A. No, I did not.

2 SOLICITOR WILLIAMS: Nothing
3 further, Your Honor.

4 THE COURT: Recross?

5 RECROSS EXAMINATION

6 BY MR. SHELTON:

7 Q. You did arrest Mr. McKelvey because you're
8 listed as the arresting officer. Isn't that
9 correct?

10 A. I did arrest Mr. McKelvey, yes.

11 Q. And the one was possession of crack
12 cocaine. Isn't that correct?

13 A. It's on the booking sheet.

14 MR. SHELTON: Nothing further.

15 THE COURT: Thank you. You may
16 come down.

17 (WITNESS EXCUSED)

18 THE COURT: Ladies and Gentlemen,
19 at this point we'll take our recess for lunch.
20 Certainly, while you're out do not begin to
21 discuss this case among yourselves, or do not
22 permit anyone to talk to you or talk about
23 this case in your presence. Don't begin your
24 deliberations in any fashion. I'd ask you to
25 please return to your jury room by quarter to

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1 2:00, and at that time we'll resume the trial.

2 Thank you. You're free to leave. Everyone
3 else remain seated while the jury leaves.

4 (JURY OUT @ 12:20 P.M.)

5 THE COURT: Anything from the State
6 before we recess, Solicitor:

7 SOLICITOR BIAGANTE: No, Your Honor.

8 THE COURT: Anything from the
9 defendant?

10 MR. SHELTON: Nothing, Your
11 Honor.

12 THE COURT: Thank you. We'll be in
13 recess until 1:45, please. Thank you.

14 (LUNCH RECESS)

15 (DEFENDANT PRESENT)

16 (LUNCH RECESS)

17 THE COURT: Please let the record
18 reflect that Mr. McKelvey is present. Are you
19 ready, Mr. Shelton?

20 MR. SHELTON: Yes, sir.

21 THE COURT: State ready?

22 MS. BIAGANTE: Yes, Your Honor.

23 THE COURT: Bring in the jury.

24 (JURY IN @ 2:00 P.M.)

25 THE COURT: Thank you, Ladies and

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1 Gentlemen. Solicitor, you may call your next
2 witness.

3 MS. WILLIAMS: The State would
4 call Sharon Vance.

5 (WITNESS TAKES STAND)

6 SHARON VANCE, being duly sworn to
7 tell the truth, the whole truth and nothing
8 but the truth, testified, as follows:

9 DIRECT EXAMINATION

10 BY SOLICITOR WILLIAMS:

11 Q. Ms. Vance, you don't want to be here
12 today, do you?

13 A. Uh-uh.

14 Q. Are you scared?

15 A. More like nervous, a little of both.

16 Q. Were you thinking of not coming back after
17 the break?

18 A. Yes, ma'am, I was.

19 Q. Did you tell us you were scared?

20 A. Yes, ma'am.

21 Q. Were you at the Pleasure Lounge on
22 November 27, 2008?

23 A. Yes, ma'am, I was.

24 Q. And what time about were you there?

25 A. Maybe about 2:00, may have been sooner.

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1 Q. Was that a place you'd been to often?

2 A. Yes, ma'am.

3 THE COURT: Solicitor, Ms. Vance,
4 you are going to need to get closer to that
5 mic. Thank you. That'll be fine. Thank you.

6 DIRECT EXAMINATION CONTINUED

7 BY SOLICITOR WILLIAMS:

8 Q. Let me backtrack a minute. Where do you
9 work?

10 A. Wal-Mart, Moncks Corner.

11 Q. How long have you worked there?

12 A. It'll be three years in June.

13 Q. And you live in this area?

14 A. Yes, ma'am.

15 Q. Where do you live? What city?

16 A. Moncks Corner.

17 Q. So you'd been to the Pleasure Lounge on
18 other occasions?

19 A. Yes, ma'am.

20 Q. And when you went there who did you go
21 with?

22 A. I went alone, and I met a friend there.

23 SOLICITOR WILLIAMS: Your Honor,
24 may I approach?

25 THE COURT: You may.

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1 DIRECT EXAMINATION CONTINUED

2 BY SOLICITOR WILLIAMS:

3 Q. Ms. Vance, I'm going to show you a couple
4 of photographs of the inside of the lounge.
5 These have been previously marked and entered
6 as State's 16 and 17. What are those pictures
7 of (tendering)?

8 A. Inside of the lounge.

9 Q. This is State's 16 -- this is a little
10 clearer. If you could show us where you were
11 sitting that night. Is that a bar in front of
12 the TV?

13 A. Yes, ma'am.

14 Q. So about where were you?

15 A. I was on either side of it. I was closer
16 to the door.

17 Q. Push this little button and a red thing
18 will go up there (indicating). Push the
19 button right there. Take your time. Is it
20 working? So you were right there?

21 A. I was closer to the door. I was looking
22 at the television.

23 Q. And that evening did you see Jermaine
24 McKelvey there at the bar?

25 A. Yes.

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1 Q. What do you call him?

2 A. Droop.

3 Q. Droop?

4 A. (Affirmative nod).

5 Q. Who was he with?

6 A. I don't remember precisely, to be honest
7 with you.

8 Q. That's okay. In that picture you showed
9 us where you were. How far away was he from
10 you?

11 A. At the time?

12 Q. Uh-huh.

13 A. Maybe about from here to where the young
14 lady is sitting at.

15 Q. From here to here (indicating)?

16 A. Yes, about from here to there. Yes,
17 ma'am.

18 Q. And do you know who Bernard Phoenix is?

19 A. Yes, ma'am.

20 Q. What do you call him?

21 A. I call him "Be Nice".

22 Q. Did you see Mr. McKelvey and Mr. Phoenix
23 talking at all?

24 A. At the time?

25 Q. Uh-huh.

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1 A. When I came in I didn't see think much of
2 it. They were right there by the door.

3 Q. After you were in for awhile did you see
4 them talking with each other?

5 A. Yes, ma'am, in a way.

6 Q. Were they arguing?

7 A. Maybe a little.

8 Q. Are you sure it was Mr. McKelvey or Droop
9 that was arguing with Be Nice who is Mr.
10 Phoenix?

11 A. From standing there, like I was sitting
12 over here. Yes, ma'am.

13 Q. Would it refresh your memory to look at
14 your statement?

15 A. That'd be fine.

16 SOLICITOR WILLIAMS: May I
17 approach, Your Honor?

18 THE COURT: You may. Have it
19 marked, please, for identification, Solicitor.

20 COURT REPORTER: State's Exhibit 28
21 for identification.

22 DIRECT EXAMINATION CONTINUED

23 BY SOLICITOR WILLIAMS:

24 Q. Do you remember writing in your statement
25 that you saw them arguing?

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1 A. Yes, ma'am, I remember that.

2 Q. Did you see Mr. McKelvey do anything else
3 to Mr. Phoenix? Ms. Vance, you're under oath.

4 A. I don't know. (Emotional/crying) -- I
5 don't want to do this. I really don't.

6 Q. Are you frightened of the defendant's
7 family?

8 A. No, ma'am.

9 Q. Did something happen earlier that makes
10 you not want to testify here today?

11 MR. SHELTON: Your Honor, I object.

12 THE COURT: I'll allow this
13 question. Hold on a second.

14 (OFF RECORD SIDEBAR)

15 THE COURT: I'll allow that
16 question, and I understand the concern and
17 certainly be happy to entertain any future
18 further objections. Overruled at that point.

19 THE WITNESS: I remember my
20 statement. I did say they were arguing.

21 DIRECT EXAMINATION CONTINUED

22 BY SOLICITOR WILLIAMS:

23 Q. The question was did you see Mr. McKelvey
24 do anything else to Mr. Phoenix?

25 A. He hit him.

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1 Q. He hit him?

2 A. Yes. What it was was that it was like a
3 little dispute, okay?

4 Q. He hit him. That's your answer. Did you
5 see anything in Mr. McKelvey's hand?

6 A. I saw -- I kind of did -- I seen the gun
7 but I didn't know where it came from.

8 Q. Where did you see the gun?

9 A. In his hand, but I don't know ---

10 Q. Whose hand?

11 A. Mr. McKelvey's hand.

12 Q. Whose hand?

13 A. Droop's.

14 Q. Droop's hand?

15 A. (Affirmative nod)

16 Q. Do you remember what kind of gun it was?

17 A. I didn't pay any attention to it.

18 Q. At some point did you see those two
19 individuals, Mr. McKelvey and the victim, Mr.
20 Phoenix, leave the establishment?

21 A. The owner said that ---

22 THE COURT: No, ma'am. Listen to
23 the question. She asked you specifically did
24 you see them, not what the owner said.

25 DIRECT EXAMINATION CONTINUED

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1 BY SOLICITOR WILLIAMS:

2 Q. Did you see them leave the bar?

3 A. They was told to get out. Yes, ma'am, I
4 seen that.

5 Q. Did Mr. Phoenix look like he was leaving
6 willingly, or did Mr. McKelvey drag him out?

7 A. (No verbal response).

8 Q. You're under oath.

9 A. I know.

10 MR. SHELTON: Objection.

11 THE COURT: Solicitor, I sustain
12 the objection. Give her a chance to answer
13 the question.

14 THE WITNESS: He wasn't leaving
15 willingly.

16 DIRECT EXAMINATION CONTINUED

17 BY SOLICITOR WILLIAMS:

18 Q. He wasn't leaving -- can you please repeat
19 your answer?

20 A. He wasn't leaving willingly.

21 Q. Thank you. Did you hear anything that Mr.
22 McKelvey was saying to Mr. Phoenix?

23 A. I don't remember then, to be honest.

24 Q. Did you hear anything once they went
25 outside?

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1 A. I didn't hear anything once they went
2 outside.

3 Q. Did you ever tell anyone you heard a
4 gunshot?

5 A. No, ma'am. I didn't tell anyone that I
6 heard a gunshot, I don't recall saying that.

7 Q. Who is the person that runs that place?
8 What's his name?

9 A. Mr. Avery.

10 Q. Did you see Mr. Avery ever leave after
11 they went out?

12 A. Yes. Soon as they went out, Mr. Avery
13 went out behind them.

14 Q. And how long was he out there?

15 A. Not that long. Maybe just a few minutes.
16 Not that long.

17 Q. Then did he come back in?

18 A. He came back in.

19 Q. Did you see a gun in anyone else's hand
20 that night?

21 A. No, ma'am.

22 SOLICITOR WILLIAMS: The Court's
23 indulgence for just a minute.

24 THE COURT: Yes, ma'am. You need
25 to put that with the evidence, please,

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1 Solicitor. Thank you.

2 DIRECT EXAMINATION CONTINUED

3 BY SOLICITOR WILLIAMS:

4 Q. Did you tell the police why you didn't
5 hear the shot?

6 A. When I get nervous I cover my ears. When
7 I get scared, I do that.

8 Q. What did you tell the police about that,
9 with reference to this incident?

10 A. I just covered my ears. That's what I
11 said. It's in my statement.

12 Q. Did you say, "So if he did get shot I
13 wouldn't hear it. I covered my ears so that
14 if he did get shot that I wouldn't hear it."

15 MR. SHELTON: Objection.

16 THE COURT: Sustain the objection.
17 She answered your question, Solicitor. That's
18 as far as you can go with that.

19 SOLICITOR WILLIAMS: Nothing
20 further.

21 THE COURT: Cross examine.

22 CROSS EXAMINATION

23 BY MR. SHELTON:

24 Q. Ms. Vance, I'm sorry, I didn't hear. What
25 time did you arrive at the club?

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1 A. It was about 3:00, 2:00 or a little
2 before. Somewhere in that area, sir.

3 Q. Okay. That's about 2:00 in the afternoon?

4 A. Morning.

5 Q. On the 27th?

6 A. That was Thanksgiving Day.

7 Q. That was what time you arrived.

8 A. Maybe. I can't precisely say what time I
9 arrived. It might have been about 2:00. I
10 think it was. Maybe a little earlier. I'm
11 not sure, to be honest.

12 Q. And I'm really sorry, 2:00 a.m.?

13 A. A.M.

14 Q. You also say that you had been there
15 before?

16 A. Yes, I go there sometimes.

17 Q. Is Mr. Phoenix, Be Nice, is he a regular
18 customer at the bar?

19 A. I've seen him there a few times. I'm not
20 going to say he's a regular regular. You know
21 what I'm saying?

22 Q. Right. But you've seen him there before?

23 A. Yes, sir.

24 Q. I think you said in your statement that
25 you didn't hear a gunshot. But isn't it true

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1 that you saw a light coming from outside the
2 door?

3 A. Yes, that's when the officers came and
4 they were knocking on the door.

5 Q. And they placed everybody under arrest or
6 in handcuffs?

7 A. Yeah, they put all of us in handcuffs and
8 had us lay on the ground.

9 Q. Were there two officers that took your
10 statement?

11 A. I gave Detective Roach my statement. I
12 gave it to Detective Roach.

13 Q. Was there another officer there that was
14 witnessing that?

15 A. Yes, sir. I don't know who it was though.

16 Q. But there was another one there?

17 A. Yes, there were other officers at the
18 premises.

19 Q. At the time that you gave your statement
20 others were giving statements also.

21 A. Yes, sir.

22 Q. And, in fact, you were almost the last
23 person to give their statement.

24 A. This happened almost three years ago..
25 It's hard to say.

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1 Q. You weren't out there when ---

2 THE COURT: Rephrase your question.

3 THE WITNESS: No, sir.

4 CROSS EXAMINATION CONTINUED

5 BY MR. SHELTON:

6 Q. You weren't outside?

7 A. No, sir.

8 Q. You don't know what occurred outside.

9 A. No, I don't.

10 MR. SHELTON: Beg the Court's
11 indulgence.

12 THE COURT: Certainly.

13 MR. SHELTON: No further questions.

14 THE COURT: Solicitor?

15 REDIRECT EXAMINATION

16 BY SOLICITOR WILLIAMS:

17 Q. Very briefly, Ms. Vance. Mr. Shelton was
18 asking you about different times. You don't
19 really remember exactly when you got there.

20 A. No, ma'am, I don't.

21 Q. Do you remember what time you gave your
22 statement?

23 A. The best I can say is 2:00 a.m. in the
24 morning.

25 Q. Would it refresh your memory to look at

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1 the statement to see what time?

2 A. I don't know.

3 THE COURT: Just show her the
4 exhibit that you have.

5 REDIRECT EXAMINATION CONTINUED

6 BY SOLICITOR WILLIAMS:

7 Q. What time does it say you gave your
8 statement?

9 A. It doesn't have a time on here.

10 Q. See where it says "time?"

11 A. It says 2:20 a.m.

12 SOLICITOR WILLIAMS: Nothing
13 further, Your Honor.

14 THE COURT: Recross?

15 MR. SHELTON: Nothing.

16 THE COURT: Thank you. You may
17 come down.

18 (WITNESS EXCUSED)

19 THE COURT: Call your next witness,
20 Solicitor.

21 SOLICITOR BIAGANTE: Can she be
22 released from her subpoena?

23 THE COURT: Any objection?

24 MR. SHELTON: No objection.

25 THE COURT: You are also free to

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1 leave, Ms. Vance.

2 SOLICITOR BIAGANTE: The State calls
3 Officer George Winningham.

4 (WITNESS TAKES STAND)

5 GEORGE WINNINGHAM, being duly sworn
6 to tell the truth, the whole truth and nothing
7 but the truth, testified, as follows:

8 DIRECT EXAMINATION

9 BY SOLICITOR BIAGANTE:

10 Q. Can you tell us where you are employed,
11 in what capacity and for how long you've been
12 employed there?

13 A. At the time I was working for the City of
14 Moncks Corner Police Department, still am.
15 I've worked there for two and a half years,
16 and I'm a police officer.

17 Q. Tell us about the duties and responsi-
18 bilities that you have as a patrol officer.

19 A. Responding to calls, investigations,
20 report writing, just basically enforcing the
21 law.

22 Q. And do you have any other law enforcement
23 experience besides working at Moncks Corner?

24 A. Yes, ma'am. I worked for the City of
25 North Charleston for two and a half years as

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1 well.

2 Q. Now directing your attention to the early
3 morning hours of November 27, 2008, around
4 12:56 in the morning, were you on duty that
5 morning?

6 A. Yes, ma'am, I was.

7 Q. Tell us where you were and how you got
8 involved in this case.

9 A. I was in the parking lot across from
10 Crawford's Auto Sales. A call came out.

11 Q. Where is Crawford's Auto Sales?

12 A. It's on Highway 52, just before Main
13 Street. A call came out and said someone had
14 been shot in the head, and I responded that
15 way.

16 Q. Where did you respond to?

17 A. To the Pleasure Lounge which is right
18 behind the middle school.

19 Q. How long did it take you to get from
20 Crawford's to the Pleasure Lounge?

21 A. Not long at all, less than a minute.

22 Q. And the Pleasure Lounge is here in
23 Berkeley County?

24 A. Correct.

25 Q. Tell us what happened when you got on the

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1 scene. Were there other officers already
2 there?

3 A. Corporal Edwards was already on the scene.
4 Myself and Officer Taylor arrived on the scene
5 at the same time.

6 Q. Were you in separate cars?

7 A. Separate cars.

8 Q. Tell us what happened when you arrived.

9 A. When I arrived on the scene I noticed the
10 defendant, Jermaine McKelvey, on the
11 passenger's side of a vehicle. I saw Corporal
12 Edwards' car pulled in behind his vehicle, and
13 the subject that I know as Askari Dash was on
14 the driver's side of the vehicle.

15 Q. Prior to this night are you familiar with
16 both Mr. McKelvey --

17 A. Not Mr. McKelvey, but I am familiar with
18 Askari Dash.

19 Q. Tell us what happened next.

20 A. Basically, I walked up to the vehicle with
21 Officer Taylor. Mr. McKelvey was being loud
22 and boisterous and uncooperative. He was
23 using profanity. At that time Officer Taylor
24 detained him, placed him in handcuffs and
25 placed him in the rear of his patrol car.

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1 Q. What did you do?

2 A. Right after that, we didn't know who the
3 shooter was at the time or any information
4 about anything. It was a hectic scene.
5 Corporal Edwards was telling me that there was
6 more people inside the building. So at that
7 time I kind of went around the side of the
8 building and was just securing the scene.

9 Q. And why do you do that? Why do you try to
10 secure the scene in that way?

11 A. So we won't lose any witnesses, so nobody
12 will leave the scene.

13 Q. Is it also for your safety?

14 A. Correct. Also for my safety.

15 Q. So what happened next, after you secured
16 the scene?

17 A. Officer Taylor advised myself and Corporal
18 Edwards that he had found a gun in the
19 vehicle.

20 Q. What did you do then?

21 A. At that time, since the car belonged to
22 Askari Dash, I then detained Askari Dash for
23 questioning and placed him in the back on my
24 patrol vehicle.

25 Q. So he was in one vehicle and Mr. McKelvey

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1 was in a different one?

2 A. Right. Mr. McKelvey was placed in the
3 back of Officer Taylor's patrol vehicle. Mr.
4 Dash was put in the back of my vehicle.

5 Q. At this point what was -- was the
6 defendant saying anything, Mr. Dash saying
7 anything?

8 A. Not -- he was in the back of the vehicle
9 so I couldn't hear anything. But did know he
10 kicked the back window out of the vehicle.

11 Q. What did you do next at that point?

12 A. Once we knew that he was under arrest,
13 Officer Taylor was going to charge him with
14 disorderly conduct, Corporal Edwards advised
15 me to search him better. At that time I
16 searched Mr. McKelvey. As soon as I went in,
17 he was on the driver's side of the vehicle in
18 the rear. I stuck my hand in his left pocket
19 and pulled out a Chapstick container,
20 eventually opened it and had three rocks,
21 offwhite rocks that field tested positive for
22 being crack cocaine or cocaine base.

23 Q. You say cocaine base also known as crack.

24 A. Correct.

25 SOLICITOR BIAGANTE: May I approach

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1 the witness, Your Honor?

2 THE COURT: Yes.

3 DIRECT EXAMINATION CONTINUED

4 BY SOLICITOR BIAGANTE:

5 Q. Officer Winningham, I'm showing you what's
6 been marked as State's Exhibit number 18. Do
7 you recognize what that is?

8 A. Yes, ma'am. This is the crack that I
9 seized off of Mr. McKelvey. It's the
10 container with three rocks.

11 Q. How do you know that that's what you
12 seized off Mr. McKelvey?

13 A. This is the best kit that SLED provides.
14 And when the drugs are seized, I put them
15 inside of this kit and it's followed with a
16 chain of custody. I know it's mine because
17 that's my signature and my handwriting on the
18 bag.

19 Q. You talked a little bit about this Best
20 bag that SLED provides.

21 A. Yes, ma'am. SLED provides it and it's
22 given to officers. It's kept in the squad
23 room. We like to keep them in our patrol car.

24 Q. And when you put the drugs in the bag,
25 tell us what you do next to secure it and make

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1 sure it's tamperproof.

2 A. At the top here there's a seal. Once you
3 seal it, you can tell if it's been tampered
4 with. It's got a seal that you can obviously
5 know if it's been tampered with.

6 Q. And what did you do with the drugs at that
7 point?

8 A. The Best kit was completed and it was
9 placed into our evidence, which is a locker,
10 like you have in high school. Placed that in
11 the locker and it's locked from the outside.

12 SOLICITOR BIAGANTE: Your Honor, at
13 this time I'd move State's Exhibit Number 18
14 into evidence.

15 THE COURT: Any objection?

16 MR. SHELTON: No objection.

17 THE COURT: It's admitted without
18 objection.

19 (SO ENTERED AS STATE'S EXHIBIT 18)

20 DIRECT EXAMINATION CONTINUED

21 BY SOLICITOR BIAGANTE:

22 Q. Where, again, did you say you found the
23 drugs on Mr. McKelvey?

24 A. It was in his left front pants pocket. It
25 was in that container.

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1 Q. Once you found the drugs on him what did
2 you do next?

3 A. Normally, we keep evidence bags. They're
4 taken and they're put in my vehicle in the
5 trunk and locked.

6 Q. And in regards to the rest of the scene,
7 did you have any more interaction with Mr.
8 Dash that night?

9 A. Yes, ma'am, I did. Lieutenant Roach
10 arrived on the scene. He's our lead
11 detective. And he advised me to take Mr. Dash
12 to our headquarters for a witness statement.

13 Q. Did he go with you and provide a witness
14 statement?

15 A. Yes, ma'am, he did.

16 Q. After that was done did you at some point
17 go to the Hill Finklea Detention Center with
18 Corporal Edwards?

19 A. Yes, ma'am. During my course of being in
20 law enforcement I've never seen a gunshot
21 residue kit done. I went with Officer Edwards
22 at that time, and he showed me how to conduct
23 one on the defendant, Jermaine McKelvey.

24 Q. Who transported Mr. McKelvey to the
25 detention center?

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1 A. The Berkeley County Sheriff's Department.

2 Q. And why did the Berkeley County Sheriff's
3 Office do that as opposed to you guys?

4 A. At the time none of our patrol vehicles
5 had any bars on the back to protect our
6 windows. He was being out of control. He'd
7 kicked one of our glasses out already. We
8 weren't going to take the chance of putting
9 him in another patrol vehicle and costing us
10 more money. So he was transported by the
11 County.

12 Q. Tell us what you got to the jail where was
13 Mr. McKelvey, if you remember?

14 A. Mr. McKelvey was in one of the side
15 holding cells, which are inside.

16 Q. Tell us about what happened when you and
17 Corporal Edwards went in there to do the GSR
18 kit on him.

19 A. I wrote it word-for-word in my report.

20 Q. Before telling us about that, did Corporal
21 Edwards tell Mr. McKelvey why you guys were
22 there?

23 A. Right. He told him we're here because we
24 believe you shot somebody, and we were doing a
25 gun residue kit on him -- gunshot residue kit.

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1 Q. At that time did Corporal Edwards instruct
2 him on how to place his hands?

3 A. He told him to hold his hand straight out.

4 Q. And what, if anything, did Mr. McKelvey
5 say?

6 A. Mr. McKelvey made a remark -- I wrote it
7 here word-for-word. Mr. McKelvey asked,
8 "What are you'all doing to my hands?"
9 Edwards states, "A gunshot residue test."
10 Mr. McKelvey replied, "I shot somebody. Oh, I
11 remember."

12 Q. Did you ask him any questions before he
13 made that statement?

14 A. No, ma'am, I didn't.

15 Q. Did you coerce him to make that statement?

16 A. No, ma'am.

17 Q. Did you promise him anything to make that
18 statement?

19 A. No, ma'am. I didn't speak a word to him.

20 Q. Are you aware whether or not Askari Dash
21 also had a gunshot residue kit performed on
22 him?

23 A. Later I was told that, yes, ma'am. It all
24 happened prior to me going with Corporal
25 Edwards. Sgt. Norvell did conduct the gunshot

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1 residue kit in front of me, inside of our
2 station.

3 Q. And at some point in time did you later on
4 transport that evidence to SLED?

5 A. Yes, ma'am, I was asked to do so.

6 Q. I'm showing you State's Exhibit 20 that
7 came out of this envelope. Do you recognize
8 what that is?

9 A. Yes, ma'am, it's the gunshot resident kit
10 that I transported to SLED to be tested.

11 Q. And who was the gunshot residue kit
12 performed on?

13 A. It was performed on Askari Dash.

14 Q. And what date did you take that up to SLED
15 to be tested?

16 A. Here is the chain of custody. I took it
17 on March 4 of 2009.

18 Q. Are these sealed -- when you received
19 State's Exhibit number 20 was it sealed?

20 A. Yes, ma'am.

21 Q. Did you tamper with it in any way?

22 A. No, ma'am.

23 Q. Did you maintain the integrity of the
24 item?

25 A. Yes, ma'am. Straight to SLED, and it was

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1 turned over to them.

2 SOLICITOR BIAGANTE: Your Honor,
3 at this time I'd move State's Exhibit 20 into
4 evidence.

5 THE COURT: Any objection?

6 MR. SHELTON: We stipulated to the
7 chain.

8 THE COURT: Without objection,
9 assuming it's further qualified.

10 COURT REPORTER: State's Exhibit 20
11 for identification.

12 DIRECT EXAMINATION CONTINUED

13 BY SOLICITOR BIAGANTE:

14 Q. And showing you what's been marked as
15 State's Exhibit Number 19, do you recognize
16 what State's Exhibit Number 19 is?

17 A. Yes, ma'am, it's a gunshot residue kit.

18 Q. Performed on who?

19 A. The defendant, Jermaine McKelvey.

20 Q. Were you present when this kit was
21 performed on Mr. McKelvey?

22 A. Yes, ma'am, same one done at the jail by
23 Officer Edwards.

24 SOLICITOR BIAGANTE: Your Honor, at
25 this time I'd move State's Exhibit number 19

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1 into evidence as well.

2 MR. SHELTON: Subject to the
3 chain of custody.

4 THE COURT: It's admitted.

5 (SO ENTERED AS STATE'S EXHIBIT 19)

6 DIRECT EXAMINATION CONTINUED

7 BY SOLICITOR BIAGANTE:

8 Q. That night -- tell me about the
9 defendant's hairstyle compared to Mr. Dash's.

10 A. Mr. McKelvey has the same haircut he does
11 now. He had dreads. Mr. Dash had short
12 cropped hair, shorter than mine.

13 Q. Did you ever come into contact with the
14 owner or manager of the nightclub, Mr. McGee?

15 A. No. I was taking Mr. Dash to
16 headquarters.

17 Q. Where he gave a statement about the
18 incident?

19 A. Yes, ma'am.

20 Q. Are you aware of whether or not Mr. Dash
21 and Mr. McKelvey are friends?

22 A. No. I know of them together before.

23 Q. Please answer any questions the defense
24 may have.

25 THE COURT: Cross examine.

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1 CROSS EXAMINATION

2 BY MR. SHELTON:

3 Q. Officer Winningham, you've been with
4 Moncks Corner for two and a half years?

5 A. Yes, sir. I was with that department.

6 Q. So you had been there about a year when
7 this incident occurred?

8 A. Yes, sir.

9 Q. And you were at Crawford's Auto?

10 A. Yes, sir.

11 Q. You said you arrived around the same time
12 Officer Taylor did?

13 A. Yes, sir.

14 Q. You didn't observe any evidence or
15 anything that night?

16 A. No, sir, only the drugs.

17 Q. The drugs --

18 A. That I seized.

19 Q. Were you aware that Mr. McKelvey had been
20 searched prior to that?

21 A. I wasn't aware of that because I didn't
22 see it.

23 Q. At the time you weren't aware of it?

24 A. Correct.

25 Q. You had mentioned that you went to the

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- 1 detention center to see a GSR that Officer
2 Edwards was going to --
3 A. Correct. Right. I didn't take the --
4 I didn't use the kit. He showed me how.
5 Q. But you had a GSR that had already been
6 taken a couple of hours prior to that, on
7 Askari Dash?
8 A. I wasn't paying attention at the time,
9 sir. I didn't watch him do it.
10 Q. But you were at the Moncks Corner Police
11 Department?
12 A. Correct.
13 Q. When Mr. Dash gave his statement?
14 A. Correct. He gave his statement to me,
15 sir.
16 Q. He gave his statement to you?
17 A. Correct, a handwritten statement.
18 Q. Regarding his statement, there were
19 certain parts of the statement -- one is the
20 place that the statement's being taken. Isn't
21 that correct?
22 A. Repeat your question.
23 Q. There are certain sections to fill out in
24 the statement?
25 A. Correct.

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1 Q. And there's a place that the statement was
2 taken, that's a section to be filled out?

3 A. Correct.

4 Q. Do you recall what was placed in that?

5 A. I'd have to look at it. I don't know. I
6 don't have a copy.

7 Q. Did you fill out that first part?

8 A. I believe so. I can't answer. I don't
9 remember.

10 SOLICITOR BIAGANTE: Your Honor, I
11 would object to the hearsay.

12 THE COURT: Sustained. If you care
13 to admit it or try to, you may do so. But I
14 sustain the objection. No, sir, you can't
15 publish from the document. It's hearsay.

16 CROSS EXAMINATION CONTINUED

17 BY MR. SHELTON:

18 Q. And the call that came out was that
19 somebody was shot?

20 A. The call came out as shots fired and then
21 somebody came across and said the subject was
22 shot in the head. I believe the County was
23 first on the scene and then Officer Edwards.
24 And the information was relayed to me as I was
25 heading down that way.

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1 Q. And Berkeley County was on the scene --
2 the Sheriff's Department.

3 A. Yeah, they were on the scene. I don't
4 know who arrived first, Edwards or the County.
5 They were both there when I got there.

6 Q. At some point in time -- who was detained
7 first, Mr. McKelvey or Mr. Dash?

8 A. Mr. McKelvey was detained first by Officer
9 Taylor.

10 Q. Mr. Dash was detained?

11 A. By me because the weapon was found in Mr.
12 Dash's vehicle. So I detained Mr. Dash.

13 MR. SHELTON: Nothing further.

14 THE COURT: Redirect?

15 SOLICITOR BIAGANTE: I don't have
16 anything further.

17 THE COURT: Thank you. You may
18 come down, Mr. Winningham.

19 SOLICITOR BIAGANTE: May he be
20 released from the subpoena, Your Honor?

21 THE COURT: Any objection, Mr.
22 Shelton?

23 MR. SHELTON: No, objection.

24 THE COURT: You are also free to
25 leave.

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1 THE WITNESS: Thank you.

2 (WITNESS EXCUSED)

3 THE COURT: Call your next witness,
4 please.

5 SOLICITOR BIAGANTE: The State
6 calls Sergeant Brad Norvell.

7 (WITNESS TAKES STAND)

8 B. EDWARD NORVELL, being duly sworn
9 to tell the truth, the whole truth and nothing
10 but the truth, testified, as follows:

11 DIRECT EXAMINATION

12 BY SOLICITOR WILLIAMS:

13 Q. Where do you work, Mr. Novell?

14 A. I work for the Moncks Corner Police
15 Department.

16 Q. You're a sergeant?

17 A. Yes, ma'am.

18 Q. How long have you worked there?

19 A. Approximately five years.

20 Q. And have you been in law enforcement
21 longer than that?

22 A. Yes, ma'am, about ten.

23 Q. What are your present duties at the Moncks
24 Corner Police Department?

25 A. I'm the sergeant over investigations, and

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1 I'm responsible for providing the investiga-
2 tors and resource officers.

3 Q. Were you working in that capacity on
4 November 27 of 2008?

5 A. Yes, ma'am.

6 Q. Were you involved in the investigation
7 regarding the shooting at the Pleasure Lounge
8 on that date?

9 A. Yes, ma'am.

10 Q. Did you respond to the initial crime scene
11 at the Pleasure Lounge?

12 A. Yes, ma'am.

13 Q. Is that in Berkeley County?

14 A. Yes, ma'am.

15 Q. In Moncks Corner? What time did you
16 arrived on the scene?

17 A. I was contacted at home about 1:20. I
18 arrived I believe close to probably ten till
19 2:00.

20 Q. At the time you arrived was the victim
21 still at the scene?

22 A. No, ma'am.

23 Q. And at the time you arrived were there any
24 suspects at the scene at that time, anyone
25 that was identified as a suspect?

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1 A. No, ma'am, not at that point.

2 Q. What, if anything, did you do at the
3 scene?

4 A. I helped with processing the scene, as
5 they call it, basically collecting evidence.
6 What I did primarily was take photographs of
7 the incident location, and that's what I did
8 at the scene there.

9 Q. Was Mr. Jermaine McKelvey or Mr. Askari
10 Dash still at the scene at that time?

11 A. No, they were not at the scene.

12 Q. Did you see Mr. Dash later that morning?

13 A. Yes, ma'am.

14 Q. Tell us about that.

15 A. I was asked by Lieutenant Roach to go to
16 the Moncks Corner Police Department to meet
17 with Mr. Askari Dash and perform what they
18 call a gunshot residue kit on his hands.

19 Q. And did you do that?

20 A. Yes, ma'am.

21 Q. And where did that take place?

22 A. It took place in the squad room of the
23 police department.

24 Q. Is that a kit that you get from SLED?

25 A. Yes, ma'am.

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1 Q. Did you follow the directions that are in
2 the kit?

3 A. That's correct.

4 Q. And what did you do with that kit after
5 you finished with it?

6 A. Secured it in my desk in my office.

7 SOLICITOR WILLIAMS: Your Honor,
8 I'm going to show the witness what's
9 previously been marked as State's Exhibit 20.

10 THE COURT: Okay.

11 SOLICITOR WILLIAMS: May I approach
12 the witness?

13 THE COURT: Yes, you may.

14 DIRECT EXAMINATION CONTINUED

15 BY SOLICITOR WILLIAMS:

16 Q. What is this, Sergeant?

17 A. The gunshot residue kit that I collected
18 from Mr. Dash.

19 Q. And is that your name on it?

20 A. Yes, ma'am.

21 Q. And where did it go next?

22 A. Went to Officer Winningham. He took it to
23 SLED.

24 Q. And after you finished with the kit and
25 put it in this container, is it sealed?

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1 A. That's correct.

2 Q. Did you tamper with it in any way before
3 you put it into the bag?

4 A. No, ma'am.

5 Q. Did you do anything else regarding the
6 investigation of this case?

7 A. I also interviewed two witnesses that were
8 present at the bar when the shooting took
9 place.

10 Q. At the time that you were interviewing
11 those witnesses were other interviews going
12 on?

13 A. That's correct.

14 Q. With different detectives?

15 A. And officers. That's correct.

16 SOLICITOR WILLIAMS: The Court's
17 indulgence.

18 THE COURT: Certainly.

19 SOLICITOR WILLIAMS: Nothing
20 further, Your Honor.

21 THE COURT: Cross examine?

22 CROSS EXAMINATION

23 BY MR. SCHWACKE:

24 Q. Officer Norvell, are you the crime scene
25 guy for the Moncks Corner Police Department?

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1 A. No, sir. Our department is a small
2 department. We generally don't have a
3 specified crime scene or forensics persons
4 like you do on the CSI shows. Basically, we
5 do everything. We try to be a jack of all
6 trades.

7 Q. So does anyone in your department have any
8 crime scene training?

9 A. I'd say everybody in our department has
10 crime scene training.

11 Q. You indicated in your report that you had
12 actually been asked to take photographs at the
13 crime scene. Is that right?

14 A. That's correct.

15 MR. SCHWACKE: I'm sorry, Your Honor.

16 THE COURT: Take your time.

17 CROSS EXAMINATION CONTINUED

18 BY MR. SCHWACKE:

19 Q. Officer Norvell, I'm going to show you
20 what's already in evidence as photographs that
21 were taken at the scene. State's Exhibits
22 numbers 1 through 17, I believe.

23 A. Right.

24 Q. Could you go through those and pick out
25 the ones that you actually took the

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1 photographs?

2 A. Yes, sir. (Complies) Number 13, number
3 11, number 14, number 15, number 12, number 17
4 and 16.

5 Q. Do you know who took the other photographs
6 that you didn't take?

7 A. No, sir.

8 Q. Do you know which camera was used to take
9 these photographs? These are the ones that
10 you said you took?

11 A. No, sir, I didn't take these (indicating).

12 Q. These are the one you took (indicating),
13 and those are the ones you did not take
14 (indicating).

15 A. Right. The officers that arrived on the
16 scene took those pictures.

17 Q. Were these taken with the same camera or a
18 different camera?

19 A. Different camera.

20 Q. Different camera? Are officers at Moncks
21 Corner assigned a camera in a vehicle?

22 A. Every patrol officer is generally assigned
23 a camera. I can't say that everybody has a
24 camera assigned to them. Officers oftentimes
25 will have to share a camera.

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1 Q. So the shorthand way to tell which
2 photographs you took is the time stamp on it.
3 There's a time stamp and a date stamp on your
4 photographs.

5 A. Well, yes, sir, that's correct. But the
6 ones -- I'm just familiar with the ones I
7 took.

8 Q. What's the purpose of taking crime scene
9 photographs?

10 A. The purpose of taking crime scene
11 photographs is to document the incident
12 location, to show signs and indications that a
13 crime was committed at that location for the
14 investigation.

15 Q. So is that why in the photographs that you
16 took there is a little yellow mark?

17 A. That's correct.

18 Q. What would be the purpose of those yellow
19 markings?

20 A. The yellow markers help you identify items
21 in the picture that I'm attempting to focus
22 on.

23 Q. But when you come here today or whenever
24 the trial is, because these things don't
25 always come up fast, you have a better

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1 recollection and memory of what you took and
2 where things were. Is that right?

3 A. That's correct.

4 Q. In the crime scene training that you'd
5 received, had you ever been told to just pick
6 up a piece of evidence without documenting
7 exactly or photographing exactly where it was?

8 A. Yes.

9 Q. You have been told not to do that?

10 A. No, sir. Can you repeat the question?

11 Q. The question is if there is an important
12 item of evidence are you trained to document
13 where it is, or are you just told to pick it
14 up?

15 A. It depends on the situation. If it's a
16 situation where there's a lot of crowd around
17 and the evidence might be damaged, you don't
18 -- if you aren't able to secure that evidence,
19 then it's best to secure it at that time so it
20 doesn't get destroyed.

21 Q. So if the large crowd that's around had
22 barricaded itself inside the locked and closed
23 door, what's the direction?

24 A. I don't know. I would have to be in that
25 situation.

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1 Q. So the best practice is to document
2 exactly where the evidence is and pick it up
3 after you've done that?

4 A. If the evidence isn't going to be
5 destroyed.

6 Q. You participated in three statements,
7 correct?

8 A. I believe I participated in two and was a
9 witness for one.

10 Q. That's correct. You participated in it.

11 A. Right.

12 Q. So that night you interviewed an Alex
13 Gordon and also Mr. Avery McGee.

14 A. That's correct.

15 Q. And then on December the 1st you
16 participating by observing the statement that
17 was being taken from the victim in this case,
18 Bernard Phoenix.

19 A. That's correct.

20 Q. And that was at the Moncks Corner Police
21 Department.

22 A. Yes.

23 Q. He was not in the hospital. He was out of
24 the hospital.

25 A. Right.

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1 Q. You took some oral swabs from Mr. Phoenix?

2 A. Yes.

3 Q. What does that mean?

4 A. An oral swab is generally used to send to
5 SLED for DNA analysis.

6 Q. So comparison can be made from the victim
7 to blood by having those oral swabs taken?

8 A. I'm not a DNA expert.

9 Q. But that's what you're taught?

10 A. No, I haven't been taught anything
11 specifically with DNA, other than it can be a
12 tool used to connect persons to ---

13 Q. Then why did you do the oral swab?

14 A. I was instructed to do it.

15 Q. That was the first time you'd done it?

16 A. No, sir.

17 Q. And you know what it's for.

18 A. Sir?

19 Q. You know what it's for?

20 A. Yes, sir, DNA analysis.

21 Q. You know that?

22 A. Yes.

23 Q. That was my question. You know that's for
24 DNA analysis, to make a comparison.

25 A. Yes, sir.

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1 MR. SCHWACKE: I don't have any
2 further questions.

3 THE COURT: Redirect?

4 SOLICITOR WILLIAMS: Nothing
5 further, Your Honor.

6 THE COURT: Thank you. You may
7 come down, sir.

8 SOLICITOR BIAGANTE: Can he be
9 released from the subpoena, Your Honor?

10 THE COURT: Any objection, Mr.
11 Schwacke?

12 MR. SCHWACKE: No, sir.

13 THE COURT: You are also free to
14 leave.

15 THE WITNESS: Thank you.

16 (WITNESS EXCUSED)

17 THE COURT: Call your next witness,
18 please.

19 SOLICITOR BIAGANTE: Lieutenant
20 Michael Roach.

21 (WITNESS TAKES STAND)

22 MICHAEL ANTHONY ROACH, being duly
23 sworn to tell the truth, the whole truth and
24 nothing but the truth, testified, as follows:

25 DIRECT EXAMINATION

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1 BY SOLICITOR BIAGANTE:

2 Q. Good afternoon. Could you please tell us
3 where you are employed, in what capacity and
4 for how long you've been employed there?

5 A. I'm employed with the Moncks Corner Police
6 Department. I've been there twenty-one years.
7 My current position is as lieutenant over
8 investigations and school resource officers.

9 Q. Tell us some of your present duties and
10 responsibilities as lieutenant over
11 investigations.

12 A. I conduct follow-up investigations of
13 crime scene, interviewing, preparing case
14 files.

15 Q. A little of everything.

16 A. A little bit of everything.

17 Q. Directing your attention to November 27,
18 2008 in the early morning hours were you on
19 call?

20 A. I was on call.

21 Q. Tell us how you got involved in this case.

22 A. I received a call that there had been a
23 shooting at the Pleasure Lounge behind the
24 middle school, and that a victim had been shot
25 in the head and I responded to the scene.

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1 Q. What time did you respond to the scene

2 approximately?

3 A. It was late in the morning hours, or

4 should I say "early."

5 Q. You're refreshing your memory by looking

6 at your report?

7 A. Yes, ma'am. (Upon review), it would have

8 been 1:15 in the morning.

9 Q. And was the victim still on the scene when

10 you arrived?

11 A. No.

12 Q. Tell us what was going on when you arrived

13 on the scene and you began to do.

14 A. When I got there our vehicle was there.

15 Corporal Edwards was there. He had control of

16 the crime scene. There were several people in

17 the bar. I learned from Corporal Edwards that

18 the victim, Bernard Phoenix, had been shot in

19 the head and transported to the Medical

20 University. Certain evidence had already been

21 found, so we basically got into taking

22 statements from people that were inside the

23 bar when this happened.

24 Q. The next day did you have occasion to

25 travel to MUSC to speak with the victim,

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1 Bernard Phoenix?

2 A. I did. I actually called down there and
3 found out he was awake, and I went down and
4 interviewed him while he was in the hospital.

5 Q. And that was on the 28th?

6 A. That's correct.

7 Q. Did he give an oral statement that day or
8 a written statement?

9 A. It was an oral statement.

10 Q. Why was it oral as opposed to written?

11 A. Well, he was in the intensive care unit.
12 He had tubes and things coming out of him and
13 it just wasn't a conducive environment for
14 doing a written statement.

15 Q. Without telling me specific details did he
16 tell you what happened that night, the
17 previous night?

18 A. He told me that the person that he
19 identified as Jermaine McKelvey had shot him
20 in the head.

21 Q. Did he ever waiver as to who did that?

22 A. No, not one time.

23 Q. Did you also become aware from the victim
24 whether or not he had money taken from him?

25 A. Yes. He said he had some money taken. He

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1 couldn't give the exact figure, but he had
2 some money taken from him during the incident.

3 Q. At the time, the previous night, were
4 officers on scene aware of that?

5 A. No.

6 Q. Did you also transport some evidence to
7 SLED in regard to this case?

8 A. I did.

9 Q. Several pieces of evidence?

10 A. Several pieces of evidence.

11 Q. I'm showing you what is already in
12 evidence as State's Number 19. Do you know
13 what that is?

14 A. A gunshot residue kit from Jermaine
15 McKelvey.

16 Q. Were you involved of the transportation of
17 that to SLED?

18 A. I was.

19 Q. Do you know offhand what day you dropped
20 it off at SLED?

21 A. I don't have the exact date.

22 Q. Well, let me ask you this. When you had
23 the kit was it sealed?

24 A. It was sealed.

25 Q. Did you tamper with it in any way?

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1 A. No.

2 Q. Did you maintain the integrity of the
3 item?

4 A. That's correct. It was opened in front of
5 SLED and we signed it over to SLED.

6 Q. So you didn't mess with it in any way?

7 A. No.

8 Q. I'm also showing you State's Exhibit
9 number 18 that's already in evidence.

10 A. That's some crack cocaine that would have
11 been transported in a Best kit.

12 Q. And you made that journey as well?

13 A. That's correct.

14 Q. And this time was the Best kit sealed when
15 it came into your custody?

16 A. Yes, it was.

17 Q. Did you tamper with the item in any way?

18 A. No.

19 Q. Did you maintain the integrity of the
20 item?

21 A. I did.

22 Q. And it was signed over to SLED?

23 A. That's correct.

24 Q. I'm showing you what's been marked -- and
25 I'm going to put on gloves -- State's Exhibit

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1 number 22 which is already in evidence.

2 A. Uh-huh.

3 Q. Do you know what that is?

4 A. That's a weapon that I transported to
5 SLED.

6 Q. How was it packaged at that time?

7 A. It was in one of the plastic envelope
8 bags, and I believe it was sealed by Corporal
9 Edwards.

10 Q. And were all three, number 23, which is
11 the clip that's already in evidence, as well
12 as State's number 44, the bullets which are
13 already in evidence?

14 A. Right. They would have been placed in a
15 box, I believe.

16 Q. And were all those contained in a bag?

17 A. Yes.

18 Q. And you transported that to SLED as well?

19 A. I did.

20 Q. I'm showing you what's been marked as
21 State's Exhibit 21. Do you know what that is?

22 A. That's a bullet fragment from a spent
23 bullet.

24 Q. Were you also involved in the transporting
25 of that to SLED?

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1 A. That's correct, I was.

2 Q. And was it sealed as well?

3 A. It was sealed.

4 Q. Did you tamper with it in any way?

5 A. No, I did not.

6 Q. Did you maintain the integrity of the
7 item?

8 A. I did.

9 SOLICITOR BIAGANTE: Your Honor, could
10 I have one minute, please?

11 THE COURT: Sure, take your time.

12 DIRECT EXAMINATION CONTINUED

13 BY SOLICITOR BIAGANTE:

14 Q. Were you also involved in taking some
15 witness statements from some of the patrons in
16 the club that evening?

17 A. I was.

18 Q. Based on your investigation was there any
19 evidence that Mr. Avery was involved in this?

20 A. No.

21 Q. Was there any evidence that Askari Dash
22 was involved in this?

23 A. No.

24 Q. Thank you. Please answer any questions
25 the defense may have.

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1 THE COURT: Cross examine.

2 MR. SHELTON: Thank you, Your
3 Honor.

4 CROSS EXAMINATION

5 BY MR. SHELTON:

6 Q. Lieutenant Roach, you didn't arrive until
7 1:15 in the morning.

8 A. That's when I was called out. I don't
9 know the exact time I got there.

10 Q. You did direct some officers on the scene
11 to do certain things, correct?

12 A. That's correct.

13 Q. You directed a gunshot residue ---

14 A. That's correct.

15 Q. Some statements?

16 A. Yes, sir.

17 Q. At any point in time did you direct
18 somebody to swab Mr. McKelvey's hands for
19 blood?

20 A. Not for blood, no.

21 Q. Did at any point in time did you direct
22 somebody to test the blood that was on the
23 ground?

24 A. No.

25 Q. When you take items to SLED, you take out

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1 of evidence from Moncks Corner.

2 A. That's correct. They're signed over.

3 Q. They're signed over.

4 A. Uh-huh.

5 Q. There's a chain of custody.

6 A. That's correct.

7 Q. You've been doing this for a little while.

8 A. Yes, sir.

9 Q. And I understand that Moncks Corner is a
10 smaller department.

11 A. Yes.

12 Q. And so when there's things, Moncks Corner
13 would tend to wait till there's a significant
14 amount of stuff to take to SLED.

15 A. That's not an unfair characterization. It
16 doesn't always work that way. Time,
17 resources, it would depend on those things.

18 Q. And with this incident, there's some items
19 that were taken along with things from other
20 cases.

21 A. That's correct.

22 Q. And a chain of custody form is completed
23 for some of that?

24 A. Uh-huh.

25 THE COURT: Is that a "yes?"

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1 THE WITNESS: Yes.

2 CROSS EXAMINATION CONTINUED

3 BY MR. SHELTON:

4 Q. However, a chain of custody was not signed
5 off on the GSR.

6 SOLICITOR BIAGANTE: Your Honor, I
7 would object. He has to ask him.

8 THE COURT: Cross examination. I
9 overrule.

10 CROSS EXAMINATION CONTINUED

11 BY MR. SHELTON:

12 Q. A sheet of paper, chain of custody, was
13 not signed over on the GSR that was taken on
14 Mr. McKelvey, was it?

15 A. I'm not sure if there is one or not. I
16 know who took the -- I think Sergeant Norvell
17 took the actual GSR kit, and it was turned
18 over. Without seeing it, I'm not sure.

19 Q. Do you remember what you put down as the
20 description in the weapon?

21 A. I don't.

22 Q. Would it help to show you the chain of
23 custody?

24 A. Uh-huh.

25 COURT REPORTER: Defendant's Exhibit

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1 3 for identification.

2 SOLICITOR BIAGANTE: Your Honor, I
3 would object to this --

4 THE COURT: You object to his
5 looking at the document? Overruled. He's not
6 offering it at this point. He's just showing
7 it to him. I overrule the objection. I'll be
8 happy to entertain an objection once he asks
9 another question.

10 CROSS EXAMINATION CONTINUED

11 BY MR. SHELTON:

12 Q. Did that refresh your memory?

13 A. Uh-huh, there were several pieces of
14 evidence taken.

15 Q. Do you remember what you put down?

16 SOLICITOR BIAGANTE: I would object.
17 That's not his document, Your Honor.

18 THE COURT: Lay the foundation.
19 If he prepared the document, that's fine.

20 CROSS EXAMINATION CONTINUED

21 BY MR. SHELTON:

22 Q. Is your signature on the document?

23 A. My signature's there, but I did not
24 prepare this document. I signed for it and
25 transported it to SLED.

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1 Q. Before you sign for it do you make sure
2 that the description is correct?

3 A. I make sure that what is there is on here,
4 yes.

5 Q. So that the description matches what is
6 taken?

7 A. The evidence that is listed on here is
8 what I transported to SLED.

9 Q. So what does that sheet say you
10 transported to SLED regarding the bullets?

11 A. It says "one Markov, Serial Number 19745
12 with clip and three rounds, case number 08-
13 2296." There was also another weapon from
14 another case, a Best kit and a piece of blood.

15 Q. Isn't there an amount of bullets taken?

16 A. It says "with clip and three rounds."

17 Q. Three rounds. That's all I have on that.

18 Are you also aware that SLED produces a
19 document?

20 A. Yes.

21 Q. As to what they receive.

22 A. Correct.

23 Q. Let's go to November 28.

24 A. Okay.

25 Q. You went down to MUSC to talk to the

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1 victim.

2 A. I did.

3 Q. Do you have recording capabilities?

4 A. I do.

5 Q. Do you have tape recorders?

6 A. I do.

7 Q. You decided not to tape record that?

8 A. That's correct.

9 Q. Do you know about what time that was that
10 you took that statement?

11 A. I'm really not sure. It was the next day.

12 Q. Mr. Phoenix at that point was not
13 intubated at that point?

14 A. That's correct.

15 Q. And was he near release -- to be released?

16 A. My understanding is he was going to be
17 released. I was shocked to learn of his
18 condition, and he was alert and coherent.

19 Q. Did you find any money at the scene?

20 A. No.

21 MR. SHELTON: No further
22 questions.

23 THE COURT: Redirect.

24 REDIRECT EXAMINATION

25 BY SOLICITOR BIAGANTE:

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1 Q. Are you aware of whether or not the
2 defendant had money on him when he got to the
3 jail?

4 A. I'm aware, I believe it was \$162.10, but
5 I'm not sure if that figure is correct. I
6 believe that's the correct figure.

7 SOLICITOR BIAGANTE: Nothing further.

8 THE COURT: Recross.

9 RECROSS EXAMINATION

10 BY MR. SHELTON:

11 Q. Was that recorded any place?

12 A. It was recorded in the booking sheet that
13 he had that amount of money that was taken by
14 Moncks Corner Police Department, and it was
15 later returned, I believe, January the 8th.

16 Q. It was returned to Mr. McKelvey?

17 A. It was put in his funds over at the jail.

18 Q. Moncks Corner turned that over to Mr.
19 McKelvey.

20 A. That is my understanding. There is no
21 documentation of who the actual officer is who
22 took that money back over to the jail.

23 Q. Thank you.

24 THE COURT: You may come down

25 SOLICITOR BIAGANTE: Can he be

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1 released from his subpoena, Your Honor?

2 THE COURT: Any objection?

3 MR. SHELTON: No objection.

4 THE COURT: You are also free to
5 leave, sir.

6 THE WITNESS: Thank you.

7 (WITNESS EXCUSED)

8 THE COURT: Ladies and Gentlemen,
9 at this point we'll take a recess and let you
10 go to your jury room. Do not begin your
11 deliberations. Of course, do not discuss the
12 case among yourselves. We'll be with you in
13 about ten or 15 minutes. You may retire.

14 (JURY OUT @ 3:00 P.M.)

15 THE COURT: Anything from the State
16 before recessing?

17 SOLICITOR BIAGANTE: Nothing from
18 the State, Your Honor.

19 THE COURT: Anything from the
20 defendant?

21 MR. SHELTON: No.

22 THE COURT: Thank you. We'll be at
23 ease for about ten minutes.

24 (BRIEF RECESS)

25 THE COURT: Is the State ready to

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1 continue?

2 SOLICITOR BIAGANTE: Yes, Your
3 Honor.

4 THE COURT: Is the defense ready?

5 MR. SHELTON: Yes, sir.

6 THE COURT: Let's bring in our
7 jury, please.

8 (JURY IN @ 3:10 P.M.)

9 THE COURT: Thank you, Ladies and
10 Gentlemen. We're ready to continue.
11 Solicitor, you may call your next witness.

12 SOLICITOR WILLIAMS: The State calls
13 Korshenda Baskin.

14 (WITNESS TAKES STAND)

15 KORSHENDA BASKIN, being duly sworn to
16 tell the truth, the whole truth and nothing
17 but the truth, testified, as follows:

18 DIRECT EXAMINATION

19 BY SOLICITOR WILLIAMS:

20 Q. You're here because you were subpoenaed to
21 be here today. Is that correct?

22 A. Yes.

23 Q. Do you live here in Moncks Corner?

24 A. Yes, I do.

25 Q. Are you working right now?

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- 1 A. Planning to go to work.
- 2 Q. Are you planning to go to work somewhere?
- 3 A. Yes.
- 4 Q. Where is that?
- 5 A. At the Coin (phonetic).
- 6 Q. Are you familiar with a place called the
- 7 Pleasure Lounge?
- 8 A. Yes.
- 9 Q. Have you ever been there?
- 10 A. Yes, I have.
- 11 Q. Do you remember being there on November
- 12 27th of 2008?
- 13 A. Yes, ma'am.
- 14 Q. Why did you go there that night?
- 15 A. To enjoy myself and to kind of relax after
- 16 being at work all day.
- 17 Q. And who did you go with?
- 18 A. My fiancé.
- 19 Q. What is his name?
- 20 A. Allen Scranton.
- 21 Q. Do you remember what time you got there
- 22 about?
- 23 A. I know it was pretty late. I normally
- 24 close at the job that I was working at and
- 25 that's about all that was open at the time.

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1 Q. Do they serve food there?

2 A. Yes.

3 Q. Do they serve alcohol?

4 A. Not really serve, but they have it.

5 Q. Do you have to give money for the alcohol
6 and the food?

7 A. I never did.

8 Q. While you were there that evening did you
9 observe any kind of altercation between any of
10 the individuals in the bar?

11 A. Argument?

12 Q. Yes, argument or fight?

13 A. Yes.

14 Q. Do you remember who that was between?

15 A. I didn't know the gentlemen, either one of
16 them. I just knew them from being in the
17 club. One we called Dread and one we called
18 Be Nice. I really didn't know either one of
19 them.

20 Q. Why do you call the one "Dread?"

21 A. Because he had dreads.

22 Q. Do you see him in the courtroom today?

23 A. Right there, (indicating defense table).

24 SOLICITOR WILLIAMS: Your Honor,
25 please let the record reflect that the witness

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1 has identified the defendant, Jermaine
2 McKelvey.

3 DIRECT EXAMINATION CONTINUED

4 BY SOLICITOR WILLIAMS:

5 Q. Tell us a little bit about what you
6 observed between Mr. McKelvey, or the one you
7 know as Dread, and Bernard Phoenix, or the one
8 you know as Be Nice.

9 A. Well, they were there at the club that
10 night. And they were over at the right. It
11 wasn't that loud that you couldn't hear, but
12 it wasn't that crowded that you couldn't see
13 what was going on either. You know what I'm
14 saying? It was more like an altercation, like
15 an argument, you know, sort of like it could
16 have been a basketball game argument, you
17 know, that type thing. Then it escalated
18 because they came to the front of the bar
19 which is where I was sitting at the time.
20 There were three guys that were there that
21 were in the altercation together. And then as
22 they were coming towards the bar -- when you
23 come in, just like the bar's right here
24 (indicating). And then the pool room is on
25 the other side of the bar. And then the other

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1 side of the club is on this side. So we were
2 over here where the television was, and they
3 were on that side. And it just kind of
4 escalated and come over to this side. It was
5 told by the club owner ---

6 Q. Who is ---

7 A. Avery. I don't know his last name.

8 Q. Avery, did you say?

9 A. Avery. It was told by him to take it
10 outside. 'If you'all are going to be arguing
11 and stuff like that, just take that outside.'

12 Q. Would that be Avery McGee that owns it?

13 A. I don't know his name. I just know him by
14 Avery.

15 Q. So did they eventually go outside?

16 A. Yes, he wanted them to go outside. It was
17 actually about four or five men that went
18 outside besides the ones that were in the
19 altercation.

20 Q. Did you see Avery go outside at all?

21 A. Yes.

22 Q. Tell me about that.

23 A. After this was going on he told them to
24 take it outside and he kind of pushed and
25 said, "Y'all come on. Y'all go this way,"

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1 that type thing. So the bar -- I'm sitting
2 facing the bar. The door was back this way
3 (indicating). So he's kind of like ordering
4 them to go out. At this time I'm at this side
5 of the bar at the bottom of the floor because
6 the gun -- it was in the gentleman's hands.

7 Q. Whose hands?

8 A. In the one called Dreads.

9 Q. So you saw a gun in this man's hand?

10 A. Yeah, at the time that he told them to go
11 out.

12 Q. And then did you see Avery come back in?

13 A. Yes, he did.

14 Q. Tell me about that.

15 A. When he was coming back in, that's when
16 the gun went off. All I know is the gun went
17 off. You could see blood kind of splatter.

18 Q. So when you say you saw blood splatter,
19 was Avery coming back into the club?

20 A. (Affirmative nod), as it was splattering.

21 Q. And when you heard the shot was Avery
22 coming back into the club?

23 A. When he pushed the door open you could see
24 his full body, maybe except half of his shirt.

25 Q. Coming back in or going out?

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1 A. Coming back in.

2 Q. And that's when you heard the shot?

3 A. Yes.

4 Q. So he had his back to the outside when you
5 heard the shot?

6 A. Yes.

7 SOLICITOR WILLIAMS: The Court's
8 indulgence.

9 THE COURT: Certainly.

10 SOLICITOR WILLIAMS: Nothing
11 further, Your Honor.

12 THE COURT: Very well. Cross
13 examine.

14 CROSS EXAMINATION

15 BY MR. SHELTON:

16 Q. Ms. Baskin, you know Avery. Isn't that
17 correct?

18 A. Do I know him?

19 Q. Yes. You know him personally.

20 A. I know him by being at the club. I used
21 to go out there with my ex-fiancé.

22 Q. With your ex-fiancé.

23 Q. And he's related to Avery. Isn't that
24 correct?

25 A. I don't know.

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1 Q. How much did you have to drink that night?

2 A. Maybe one. I didn't get to finish.

3 Q. Liquor?

4 A. Beer. I don't drink liquor.

5 Q. You said that there were three people in
6 the altercation. Isn't that correct?

7 A. Yes, inside the club.

8 Q. But there were four or five other people
9 that went outside along with them.

10 A. Yeah, I guess they were -- I don't know,
11 they were trying to maneuver them outside.

12 Q. When the police arrived you all were
13 placed in handcuffs.

14 A. Yes.

15 Q. Y'all were told to write a statement?

16 A. Yes, we did.

17 Q. And you wrote a statement.

18 A. Uh-huh.

19 Q. Do you remember that statement?

20 A. Yes, I do.

21 Q. Do you remember ever mentioning you seeing
22 a gun?

23 A. Some of them asked -- they asked me what
24 was I doing.

25 Q. But you did mention that you heard one

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1 gunshot?

2 A. Yes.

3 Q. No more. You just heard one gunshot.

4 A. That's all.

5 MR. SHELTON: No further
6 questions.

7 THE COURT: Redirect.

8 REDIRECT EXAMINATION

9 BY SOLICITOR WILLIAMS:

10 Q. Koshenda, Mr. Shelton asked you when then
11 police came they put you in handcuffs.

12 A. Uh-huh, (affirmative nod).

13 THE COURT: Was that a "yes?" You
14 need to answer "yes."

15 THE WITNESS: "Yes."

16 THE COURT: Thank you.

17 REDIRECT EXAMINATION CONTINUED

18 BY SOLICITOR WILLIAMS:

19 Q. Did they bring you outside of the club?

20 A. Yes, they did.

21 Q. Tell me what they did when you came
22 outside.

23 A. Want me to show you?

24 Q. You can describe it.

25 A. After maybe not even -- I wouldn't even

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1 say it was ten minutes went by after we heard
2 the gunshot -- it wasn't even ten minutes that
3 we were ordered to come outside. And we came
4 outside. They told us to come outside with
5 our hands up. We came out with our hands up,
6 and we were put on the ground. And I was in
7 the blood. That's how I knew something
8 actually happened because of the blood.

9 Q. So you were laying in blood?

10 A. Yes.

11 Q. Did you get blood on your clothing?

12 A. Yes, I did.

13 Q. Was Avery and the rest of the people in
14 the club also ordered out?

15 A. Yes, they were.

16 Q. Were they also laid on the ground?

17 A. Yes, they were.

18 Q. Thank you.

19 THE COURT: Recross?

20 MR. SHELTON: Nothing.

21 THE COURT: Thank you. You may
22 come down.

23 SOLICITOR WILLIAMS: Sir, may she
24 be released from her subpoena?

25 THE COURT: Any objection?

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1 MR. SHELTON: No objection.

2 THE COURT: You are free to leave.

3 THE WITNESS: Thank you.

4 (WITNESS EXCUSED)

5 THE COURT: Next witness.

6 SOLICITOR WILLIAMS: The State
7 would call Michelle Moritzsky.

8 (WITNESS TAKES STAND)

9 MICHELLE MORITZKY, being duly sworn
10 to tell the truth, the whole truth and nothing
11 but the truth, testified, as follows:

12 DIRECT EXAMINATION

13 BY SOLICITOR WILLIAMS:

14 Q. Ms. Moritzky, where do you work?

15 A. I work for Berkeley County EMS.

16 Q. How long have you worked there?

17 A. I'm on my seventh year.

18 Q. And what are your duties in your job?

19 A. I'm a paramedic for Berkeley County, so
20 I'm in one of the ambulances. We get
21 dispatched to a call when somebody calls 9-1-1
22 and we diagnose them, treat them and transport
23 them if they need it.

24 Q. What type of background in terms of
25 education do you have to have to be a

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1 paramedic?

2 A. It takes about a year to become an EMT
3 basic. And then after that you can go on to
4 be a paramedic, and that takes about a year
5 and a half after that.

6 Q. Did you yourself go through that year and
7 a half of training?

8 A. Yes.

9 Q. And do you have to do any kind of on-the-
10 job training? Did you have to do any kind of
11 on-the-job training?

12 A. Yeah, you have to keep up your
13 certification. So you have to keep doing like
14 your advanced cardiac or your pediatric or
15 your CPR. There's a lot of credentials. And
16 then every month we have an in-service
17 training.

18 Q. How many medical emergency calls would you
19 say you've responded to during your career?

20 A. Let me think. We work twenty-four on and
21 forty-eight off, so we average about ten days
22 that we're on a month. And most of our trucks
23 -- we can run anywhere from five to twelve
24 calls a shift.

25 Q. So that would be in the hundreds?

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1 A. Hundreds, yes.

2 SOLICITOR WILLIAMS: Your Honor, at
3 this time we would ask that she be qualified
4 as an expert in emergency medical response.

5 THE COURT: Do you care to examine
6 her as to qualifications? I'll allow -- I
7 don't know to the extent you're going to ask
8 an opinion, Solicitor. I don't know that she
9 needs to be under 701. She certainly can give
10 opinions under certain things. You proceed
11 with your questions.

12 SOLICITOR WILLIAMS: Thank you,
13 Your Honor.

14 DIRECT EXAMINATION CONTINUED

15 BY SOLICITOR WILLIAMS:

16 Q. Were you on duty on November 27, 2008?

17 A. Yes.

18 Q. And did you come into contact with a
19 Bernard Phoenix?

20 A. Yes.

21 Q. In what capacity was he at that time? Was
22 he a victim that you were treating?

23 A. Yes, we were called to the scene of a
24 gunshot wound at the Pleasure Lounge. Me and
25 my partner responded to that.

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1 Q. When you got there can you just describe
2 the scene and what you did?

3 A. When we got there police were already on
4 the scene. They had already declared it to be
5 safe for us to enter. When we got there the
6 patient was laying on the ground, unconscious,
7 unresponsive with a pool of blood around his
8 head.

9 Q. And what type of medical treatment did you
10 administer initially?

11 A. Initially, we checked to make sure he was
12 breathing. We put a collar on him, put him on
13 the backboard, got him into the truck and
14 transported him to the landing zone. We were
15 going to fly him out. We started two IV's on
16 him, giving him normal saline fluid, did an
17 EKG, gave him oxygen, checked his vitals.

18 Q. And he was unconscious initially?

19 A. Yes.

20 Q. Do you do different kinds of monitoring
21 tests to determine if someone's in danger of
22 oxygen levels and things such as that?

23 A. Yes, that's part of the vitals that we
24 monitor. One of them is a pulse oximeter and
25 it measures the amount of oxygen that's

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1 actually in the blood.

2 Q. And at any point, in your opinion, based
3 on all the different calls you went to, was
4 there any kind of alarming condition in terms
5 of his condition, based on these monitors?

6 A. At one point his oxygen level did start to
7 drop. It got down to about 92 percent. We
8 felt like he needed us to assist him with his
9 ventilation which we did and got it back up to
10 99 percent. Most people run 99 to 100.

11 Q. Was he taken to a local hospital?

12 A. No, he was taken to -- well, he was taken
13 to a landing zone which is set up outside of
14 Roper Berkeley. He never actually went inside
15 Roper Berkeley. We just went there and the
16 helicopter landed and they took him to MUSC.

17 Q. Was that based on his condition?

18 A. Yes, ma'am. MUSC is the only Level One
19 trauma center in the area. So any penetrat-
20 ing, you know, gunshot wounds or bad traumas
21 go to MUSC.

22 Q. So based on your training and experience
23 and looking at his condition, you determined
24 that he should be flown to MUSC?

25 A. Yes.

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1 Q. At some point did you call the police
2 officers?

3 A. Well, the police officers were on the
4 scene initially. But once we got to the
5 landing zone when we were waiting on the
6 helicopter, we did call them back.

7 Q. Why was that?

8 A. The patient had regained consciousness,
9 and he seemed to recall a lot of the events
10 that had happened. And so we called the
11 officer to come and listen to him testify to
12 what had happened.

13 Q. Why were you so concerned about the
14 officers hearing it right then?

15 A. Over ninety percent of gunshot wounds to
16 the head are fatal. So, you know, we didn't
17 know what his outcome was going to be. So we
18 didn't know if that was going to be his only
19 chance to speak to the officers and give them
20 the story of what happened.

21 Q. When he told the officer who shot him,
22 that was just how long would you say from when
23 you had left the scene?

24 A. Well, from the time we were on the scene
25 until we got to the landing zone is ten

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1 minutes. And then we were at the landing zone
2 waiting on the helicopter for about five
3 minutes after that. So it had to have been
4 within fifteen minutes.

5 SOLICITOR WILLIAMS: The Court's
6 indulgence.

7 THE COURT: Certainly.

8 SOLICITOR WILLIAMS: Nothing
9 further, Your Honor.

10 THE COURT: Any questions.

11 CROSS EXAMINATION

12 BY MR. SHELTON:

13 Q. Ms. Moritzky?

14 A. Yes.

15 Q. At any point in time were there nurses
16 from Roper or did doctors from Roper do any
17 evaluation or anything like that?

18 A. No, sir.

19 Q. So Mr. Phoenix was taken directly from you
20 to a flight crew?

21 A. Yes.

22 Q. And the flight crew performed some tests.

23 A. Right. Before they put him on the
24 helicopter and then during the transport.

25 Q. Did at any point in time did you smell

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1 alcohol on him?

2 A. I didn't. Not that I can recall.

3 Q. At any point in time did he indicate to
4 you that he had been drinking?

5 A. I don't recall him ever saying he had
6 been.

7 Q. Did he deny drinking?

8 A. I don't know -- I don't remember that we
9 had asked him.

10 Q. You weren't at the incident when it
11 happened.

12 A. Right.

13 Q. So you don't know what happened.

14 A. No. I don't know. I just know once I got
15 there.

16 Q. And a call came out that he had suffered a
17 gunshot wound.

18 A. Right.

19 Q. And that was why you say it was a gunshot
20 wound.

21 A. Right, that's what we were dispatched to.
22 Then when we got there that's what the wound
23 seemed to indicate.

24 Q. Did you see any gun powder or anything on
25 the top of his head?

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1 A. No. We saw an entrance-type wound and an
2 exit-type wound. As far as -- that's kind of
3 what the police and officers do, the gunshot
4 residue and stuff.

5 Q. And you relied on the history that's given
6 to you.

7 A. History?

8 Q. As to what happened, what occurred?

9 A. And his injuries, you know, what we see
10 his injuries are and what the injuries
11 indicate happened.

12 MR. SHELTON: Nothing further.

13 THE COURT: Redirect.

14 SOLICITOR WILLIAMS: No, Your
15 Honor.

16 THE COURT: Thank you. You may
17 come down.

18 SOLICITOR BIAGANTE: May she be
19 released from her subpoena, Your Honor?

20 THE COURT: Any objection?

21 MR. SHELTON: No objection.

22 THE COURT: You are also free to
23 leave.

24 (WITNESS EXCUSED)

25 THE COURT: Call your next witness.

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1 SOLICITOR BIAGANTE: SLED Agent David
2 Black.

3 (WITNESS TAKES STAND)

4 DAVID WARREN BLACK, being duly sworn
5 to tell the truth, the whole truth and nothing
6 but the truth, testified, as follows:

7 DIRECT EXAMINATION

8 BY SOLICITOR BIAGANTE:

9 Q. Good afternoon, Agent Black.

10 A. Good afternoon, ma'am.

11 Q. Would you please tell us where you are
12 employed, in what capacity and for how long
13 you've been employed there?

14 A. Okay. I'm a senior agent with the South
15 Carolina State Law Enforcement Division,
16 better known as SLED. I'm a latent print
17 examiner assigned to the latent print and
18 crime scene department. I've been in the
19 latent print crime scene department for over
20 15 years. Prior to that I was employed with
21 the Richland County Sheriff's Office for
22 approximately seven years, and I have other
23 law enforcement experience with other
24 agencies. I have approximately thirty years
25 of law enforcement experience.

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1 Q. Prior to your coming or during your tenure
2 at SLED as a latent print examiner were you
3 also in another department?

4 A. Yes, ma'am. I was also in the firearms
5 department as a firearms and tool mark
6 examiner for over six years. Basically, what
7 happened is I did the crime scene latent print
8 work for fourteen years, had an opportunity to
9 become a firearms examiner, took that
10 opportunity, and with some reorganization that
11 they had done at SLED, they needed some more
12 court-qualified tenured latent print examiners
13 in the latent print crime scene department.
14 And I was asked to transfer back to the latent
15 department to help train some of the newer,
16 inexperienced examiners.

17 Q. Tell us about some of your duties and
18 responsibilities as a latent print examiner.

19 A. On a daily basis I evaluate, examine and
20 compare latent prints to known ink standards.
21 These latent prints may come in the form of a
22 latent lift backer. If you've ever watched a
23 program on TV where you see a crime scene
24 person that has a fiberglass fingerprint
25 brush, and they're using fingerprint powder to

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1 dust the scene, and they lift that print with
2 some tape and put it on a white card. That's
3 what I'm referring to as a latent lift backer.
4 Also it can come in the form of a hinge
5 lifter, a jolting lifter. It can be in a
6 photograph or a photographic negative. Also
7 now some of the new media that they have with
8 CDs and what-not, the prints can actually be
9 photographed on a CD. And as long as they're
10 to scale with the print where we can do an
11 enlargement, we can also use a CD to look at
12 the print. The prints are compared to known
13 ink standards. These are known ink prints
14 where someone -- fingerprint ink has been
15 placed on their fingers and rolled onto a
16 recipient surface, like a fingerprint card.
17 It has certain biographical information, like
18 their name and social security number, date of
19 birth. So we know it's their print.

20 Also as a latent print examiner I also
21 look at them to make identification of missing
22 persons and deceased persons. Also as a
23 latent print examiner I will process evidence
24 for latent impressions, whether it's a
25 fingerprint or a palm print, footwear or tire

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1 impression. Also as a latent print examiner I
2 also do footwear and tire wear examinations.
3 Q. And tell us about some of your training
4 and experience that got you where you are
5 today.

6 A. Again, I had, as a latent print examiner,
7 I've had over fifteen years experience as a
8 latent print examiner between SLED and the
9 Richland County Sheriff's Office. I've
10 attending the basic fingerprint examiner's
11 school at the South Carolina Criminal Justice
12 Academy. I also attended the advanced latent
13 fingerprint taught by the FBI at the South
14 Carolina Criminal Justice Academy. By
15 appointment only, I attended Quantico,
16 Virginia at the FBI Academy for three weeks
17 administrative advanced fingerprint course,
18 and that's by appointment only. I
19 successfully completed those courses.

20 I've also attended other seminars and
21 courses through the International Association
22 of Identification known as the IAI, and the
23 South Carolina division of the International
24 Association of Identification known as the
25 SCIAI, and various courses and seminars that

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1 dealt with processing items of evidence for
2 latent prints and also examining those latent
3 prints.

4 I've also attended up in North Carolina at
5 their Criminal Justice Academy advanced palm
6 print identification course taught by Mr. Lon
7 Smith.

8 Q. Have you testified as an expert in latent
9 prints before?

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

11 Q. How many times?

12 A. In the over fifteen years in the state
13 courts of South Carolina, federal court and in
14 military court, over 100 times.

15 SOLICITOR BIAGANTE: Your Honor, at
16 this time I'd like to offer Agent Black as an
17 expert in latent fingerprint examination.

18 MR. SCHWACKE: No objection.

19 THE COURT: Very well. He will be
20 permitted to render opinions in that area.

21 DIRECT EXAMINATION CONTINUED

22 BY SOLICITOR BIAGANTE:

23 Q. You talked about earlier, basically about
24 prints and you're trying to make comparisons.

25 Tell us about how comparisons are made and how

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1 identifications are effected.

2 A. Yes, ma'am. If you have an identifiable
3 print, you are looking at the ridge
4 characteristics and the ridge structure and
5 the ridge formation in that print. And you
6 try to determine if those ridge characteris-
7 tics and formations are in the same similar
8 position and area. That's how a comparison is
9 done between the latent, which is the unknown,
10 and the known print.

11 Identification is effected when those
12 similar ridge characteristics are similar,
13 they do have the same unit relationship to
14 each other. And you're also taking into
15 consideration the number of characteristics
16 that line up with one another.

17 Q. And tell us a little bit about what are
18 the basic factors in the existing print as
19 compared to the unidentified print.

20 A. Yes, ma'am. There are two basic factors.
21 You have uniqueness and permanence. Your
22 fingerprints are unique to you, the
23 individual. You have eight fingers and two
24 thumbs. You also have finger joints, palms
25 and also on the soles of your feet you have

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1 unique skin. And this skin is called friction
2 ridge skin.

3 If you take a moment and look at your
4 fingers and palms you'll notice that these
5 ridges or the lines that you're looking at
6 form different patterns and shapes. What
7 we're doing is looking at those different
8 patterns and shapes. And when, from the
9 twelfth week of gestation, the third month of
10 a pregnancy, those ridges and patterns have
11 been formed during that time. And they're
12 individually unique to that person. And they
13 remain permanent until after decomposition
14 occurs after death or, in some cases you have
15 people who've had their prints surgically
16 removed or have had some type of accident
17 where it may have had acid or something like
18 that spilled on them. That will alter and
19 change them. But, actually, it's likely to
20 make them more unique when that does occur.

21 Q. In regards to this case were you -- did
22 you have given to you some evidence to
23 analyze?

24 A. Yes, ma'am, I did.

25 Q. And what were those pieces of evidence?

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1 A. I received one item which was a Bulgarian
2 model Markov semi-automatic pistol, serial
3 number AB19745. And I also received five
4 unfired .380 automatic caliber cartridges, and
5 they were head stamped "RP380 auto."

6 Q. Did you also receive the unloaded magazine
7 that was in the gun?

8 A. Yes, ma'am, the unloaded magazine was with
9 the pistol.

10 Q. I'm showing you what's been marked and
11 already in evidence State's Exhibit number 22
12 which is the weapon, 23 which is the magazine
13 and 24 which are the bullets. Are those the
14 items you just referred to? And here is the
15 box they came out of, if that'll help you.

16 A. (Upon review), Yes, ma'am. State's
17 Exhibit 22 and 23 -- State's Exhibit 22 being
18 the pistol and State's Exhibit 23 being the
19 magazine -- I actually scribed on those items
20 of evidence the SLED laboratory number, item
21 number, my initials, DWB. You're also going
22 to see an L with a circle around it. That
23 stands for "latent" from the latent print
24 department.

25 State's Exhibit 24 which is the five

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1 unfired cartridges, I did not mark the
2 cartridges because I didn't know if the
3 firearms examiner may have to do some type of
4 test, and I just didn't know. But I did mark,
5 and this is the heat-sealed pouch that I put
6 them in when I was done. Again, it has the
7 SLED lab number, the item number, my initial
8 and circle L. And also on the heat seal it
9 bears my initials, DWB, and the circle L, also
10 in the heat sealed back.

11 Q. They were in a previous bag, but we took
12 them out to individually mark them. I believe
13 they were all in this sack. Does that look
14 familiar to you?

15 A. Yes, ma'am, it does. Because, again, what
16 I've done is -- this is the box that I
17 received this evidence in. It has my
18 initials, the DWB with the circle L. And also
19 on the evidence tape bears the date that I
20 sealed and the date that I sent it to Ms. Sue
21 Ann Palmer in the firearms department.

22 Q. Tell us a little bit about when an officer
23 drops off evidence to SLED, if it's in one of
24 their bags -- in this case a gun, the bullets
25 and the magazine, what happens when the

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1 evidence is dropped off and logged in?

2 A. In general, when the evidence comes in at
3 SLED, it make come in whatever container that
4 the local agency has it in, whether it's a
5 heat-sealed pouch or a box. When I
6 particularly received it, some of the evidence
7 was actually in an adhesive-type pouch.

8 Q. I don't mean to interrupt you, but we
9 opened this earlier.

10 A. Yes, ma'am.

11 Q. Is that what it came in?

12 A. This is the pouch that it was in, because
13 it has the SLED lab number, the item number,
14 again my initials and what-not on the actual
15 pouch. The evidence was in this bag, sealed
16 inside of this box. So when I actually opened
17 this box, the evidence that you see here,
18 State's Exhibits 22, 23 and 24, were in this
19 pouch. I removed them from this pouch so I
20 could do whatever processing that I needed to
21 do. And from there, when I was done, I put
22 the evidence back in and sealed the box. In
23 this case, I took it to Agent Palmer in
24 firearms when I was done.

25 Q. When you received State's Exhibits 22, 23

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1 and 24 in this evidence bag, was it still
2 sealed?

3 A. Yes, ma'am, it was sealed.

4 Q. Had it been tampered with in any way?

5 A. No, ma'am.

6 Q. And what would you have done if you knew
7 it had been tampered with?

8 A. If it had been tampered with I would have
9 made notes in my worksheet. I would also have
10 let my supervisor know, and I would have
11 contacted the local agency to inquire, you
12 know, why had this been tampered with, just to
13 see what I could find out about it.

14 Q. And that was not the case here.

15 A. That is correct. That was not the case.

16 Q. If you could, Agent Black, tell us what
17 you did when you received the items 22, 23 and
18 24.

19 A. Yes, ma'am. The first thing I do is I
20 conduct a digital examination. I use what's
21 known as oblique lights. When people hear
22 "oblique light" they say, 'Oh, that's a great
23 thing.' The only thing you're doing is you're
24 just taking light, it could be a light in a
25 room or it could be a flashlight, or in this

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1 case I used an alternate light source, like a
2 laser. And you're shining the light at
3 various angles and various degrees to the
4 surface of the evidence. Because what can
5 happen, you might actually be able to see the
6 fingerprints or the ridge detail on the item
7 by just shining light on it.

8 In this particular case, on the pistol
9 near the serial number, which is on the left
10 side of the slide, there was some partial
11 fragmented ridge detail. However, that ridge
12 detail was not identifiable. It was
13 insufficient. But from there I also noticed
14 that there was some blood, what appeared to be
15 blood, on the muzzle and trigger and trigger
16 guard of the pistol. When I saw this, I
17 immediately swabbed and collected the blood
18 from the muzzle, from the trigger and trigger
19 guard, and I submitted that to the SLED DNA
20 department for their examination.

21 Once those areas had dried, because I'm
22 using distilled water, I then fumed the
23 pistol, the magazine and the cartridges in a
24 fish tank, something called cyanolacrilate
25 fumes, SuperGlue fumes. There was a movie

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1 Eddie Murphy was in called Beverly Hills Cops.
2 He did, he literally took an item of evidence
3 -- I can't remember if it was a bottle or a
4 can. He placed it in a fish tank with a
5 coffee cup warmer with some super glue on it
6 and a cup of warm water and filled the tank.
7 We're simply doing the exact same thing.

8 What happens, when the SuperGlue is
9 heated, it creates -- and with the warm water,
10 it creates a vapor -- that super glue, it
11 becomes a vapor. And it will adhere to
12 whatever contaminants may be on the surface of
13 these items. I SuperGlued the pistol, the
14 magazine and the cartridges. After I finished
15 with the super glue process, again I looked at
16 them under light. There was no additional
17 ridge detail developed on any of the items. I
18 then placed -- using a fiberglass brush and
19 some fingerprint powder, I then processed
20 these items with black fingerprint powder. No
21 additional prints were developed. And on the
22 magazine and on the cartridges no ridge detail
23 was developed. However, on the pistol in the
24 one area, there were some fragmented partial
25 ridge detail. But, again, it was insufficient

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1 for identification.

2 Q. Is that unusual or is that common?

3 A. That's common. On firearms, there were
4 two studies done through the International
5 Association for Identification. And what they
6 found in those two studies, over a year-long
7 process, any firearms evidence that came in,
8 they were documenting what the results were.
9 In the case of firearms, they found roughly
10 somewhere between ten and twelve percent that
11 they developed any identifiable prints. But
12 on cartridges there were no prints developed.
13 A lot of that just has to do with the surfaces
14 that we're dealing with, how they're being
15 touched and handled. And those factors come
16 into play also.

17 Q. What other factors come into play? When
18 someone touches something do they automatical-
19 ly leave their fingerprint, or does it depend
20 on the type of surface, if they're perspiring?
21 Talk to us about that.

22 A. With a latent, "latent" in Latin means
23 invisible. And with a latent, what you have
24 to remember it's a random touching. It is a
25 subconscious action when you touch something.

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1 You're not really thinking, 'okay, I'm going
2 to touch, pick this up and move this.' It
3 happens automatically. You're thinking about
4 it so fast. But you also have to remember
5 when you're touching something, there is
6 movement involved and you may be going real
7 fast and not slow. Also, the surface that
8 you're touching comes into play. If you have
9 something like polished, shiny metal or a
10 clean glass surface, those are better
11 receptors for prints versus maybe a piece of
12 wood or in some cases metal.

13 In this particular case, on the pistol,
14 for example, there is rough presence on the
15 surface of the pistol. Also the finish is
16 worn on it. So these things can limit the
17 fact of just what kind of prints you may be
18 able to develop on the item.

19 SOLICITOR BIAGANTE: May I approach
20 the witness, Your Honor?

21 THE COURT: Yes.

22 DIRECT EXAMINATION CONTINUED

23 BY SOLICITOR BIAGANTE:

24 Q. As you're describing State's Exhibit 22,
25 describe for us just what I would call the

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1 grip. I don't know if I'm using the correct
2 term.

3 A. Yes, ma'am.

4 Q. But does that affect whether a print can
5 be had off that or not?

6 A. It could. It's a plastic surface. Some
7 of the plastics is a smooth plastic. But then
8 parts of the plastic with the actual grip area
9 has a texture to it. It's rough. And that's
10 made on purpose by the manufacturer. Like you
11 say, it's called a grip. The grip panel
12 assists when you hold the firearm to give you
13 a better grip so it doesn't slip and it
14 doesn't move around on you. But also, if you
15 look at it, it's almost like a little diamond
16 shape. It's a very small area. So not much
17 of a print is going to be left on there. But
18 it's also, like I said, it's plastic -- some
19 plastics do better than others.

20 Q. So long story short, you couldn't find any
21 fingerprints that you were able to identify on
22 the gun or the bullets?

23 A. There was no identifiable prints developed
24 on the cartridges. What you're calling
25 bullets I refer to as cartridges, unfired

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1 ammunition, and on the magazine. But on the
2 pistol itself, there was one area where there
3 was some partial fragmented ridge detail. But
4 it's insufficient. It can't be identified to
5 anyone, only that it was touched by someone
6 sometime.

7 Q. And you alluded to it earlier -- you said
8 you saw what appeared to be blood and you took
9 some swabs.

10 A. Yes, ma'am.

11 Q. Did you perform any kind of presumptive
12 test for blood?

13 A. Yes, ma'am, I did.

14 Q. Tell us about that.

15 A. There is a chemical which is known as
16 phenolphthalein I can't spell it for you. We
17 call it "phenol" for short. That I can spell
18 for you -- P-H-E-N-O-L. The rest of it I
19 can't help you on. But it's a test that is
20 used as a presumptive test for blood. In this
21 particular case I swabbed the area first for
22 the blood, then sealed those swabs into a box
23 that had holes in it to allow it to breathe
24 still where it won't get contaminated. I then
25 took another swab and went back over those

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1 areas. I put the phenolphthalein first, two
2 drops, on that swab. Then you follow with
3 two drops of hydrogen peroxide. If it
4 immediately, within a second or two, turns a
5 pinkish color, it is a presumptive positive
6 for being blood. If it does not change into
7 that pink color, then it's definitely not
8 blood. And it did, within a matter -- it was
9 not even a second. It immediately changed to
10 that pinkish-purplish color which is a
11 presumptive positive for blood.

12 Q. So you can't tell at that point whose
13 blood or even if it's human blood or peanut
14 butter.

15 A. That is correct. The swabs that I
16 collected I sent to the SLED DNA department
17 so they could do further analysis on it.

18 Q. Please answer any questions Mr. Shelton
19 may have. You might want to leave the gloves
20 on. I'm not sure.

21 THE COURT: Cross examine.

22 MR. SHELTON: I'll be brief, Your
23 Honor.

24 THE COURT: Very well.

25 CROSS EXAMINATION

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1 BY MR. SCHWACKE:

2 Q. Agent Black, it's been a long day for you,
3 right?

4 A. Part of the job. Part of the job.

5 Q. You had to drive here?

6 A. Yes.

7 Q. Have to drive back?

8 A. Yes, sir. It's a beautiful day.

9 Q. And what your last twenty-five minutes of
10 testimony boils down to is you really don't
11 have anything for this jury to help them sort
12 out who is a suspect and who isn't a suspect.

13 A. That's absolutely correct.

14 Q. And the one thing that might have been
15 able to be done on this is DNA. Is that
16 right?

17 A. Again, I collect that blood. The DNA
18 department had an opportunity to do an exam on
19 it. They may be able to tell you whose blood
20 it is or not. But I don't know. I just sent
21 it to them for exam. After I send it off I
22 don't know what happens with that evidence.

23 Q. And there's nobody sitting out there from
24 DNA from SLED to --

25 SOLICITOR BIAGANTE: Your Honor, I

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1 would object.

2 THE COURT: I don't think it's
3 relevant. Thank you.

4 MR. SCHWACKE: That's all I have.

5 THE COURT: Redirect?

6 SOLICITOR BIAGANTE: No, sir. May
7 he be released from his subpoena, Your Honor?

8 THE COURT: Any objection, Mr.
9 Shelton?

10 MR. SCHWACKE: No, sir.

11 THE COURT: You may come down and
12 you're free to leave.

13 THE WITNESS: Thank you, Judge.

14 (WITNESS EXCUSED)

15 THE COURT: Call your next witness.

16 SOLICITOR BIAGANTE: The State
17 would call Agent Suzanne Cromer.

18 (WITNESS TAKES STAND)

19 SUZANNE CROMER, being duly sworn to
20 tell the truth, the whole truth and nothing
21 but the truth, testified, as follows:

22 DIRECT EXAMINATION

23 BY SOLICITOR BIAGANTE:

24 Q. Can you please tell us where you are
25 employed, in what capacity and for how long

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1 you've been employed there.

2 A. I'm employed by the South Carolina Law
3 Enforcement Division, commonly referred to as
4 SLED. I've been there eleven-and-a-half years
5 as a firearms examiner.

6 Q. And tell us about some of your duties and
7 responsibilities as a firearms examiner.

8 A. What we do in the firearms department is
9 we look at ammunition components, bullets,
10 cartridge cases, shotgun shells, wadding, to
11 determine what it was fired by, loaded into
12 and extracted out of a specific weapon.

13 Q. And tell us about your education, back-
14 ground and experience that brought you where
15 you are today.

16 A. I have a Bachelor's degree from Clemson
17 University. I've done some graduate work at
18 the University of South Carolina. I've
19 completed in-house training programs. It's a
20 three to five-year program where I studied
21 under five court-qualified firearms examiners.
22 It's more than an apprenticeship, if you will.
23 We take series of tests, written tests, oral
24 tests, practical exercises. As I said, it
25 takes three to five years. Then we start

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1 working cases on our own.

2 I've also become a member of the
3 Association of Firearms Examiners which is an
4 international professional organization. I've
5 attended several conferences through them.
6 Some of the most relevant, ethics, barrel
7 making.

8 I'm also a member of the South Carolina
9 Chapter of the International Association of
10 Identification. I've attended numerous
11 seminars with them, pathology of gunshot
12 wounds, forensic pathology, anthropology,
13 those type of things.

14 Q. And have you testified as an expert
15 before, as an expert in the field of firearms
16 identification and testing?

17 A. Yes, ma'am, thirty-two times.

18 SOLICITOR BIAGANTE: Your Honor, at
19 this time I'd like to have her qualified as an
20 expert in the field of firearms identification
21 and testing.

22 THE COURT: Do you care ---

23 MR. SCHWACKE: No objection.

24 THE COURT: Very well. She will be
25 permitted to render opinions in that area.

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1 SOLICITOR BIAGANTE: Thank you,
2 Your Honor.

3 DIRECT EXAMINATION CONTINUED

4 BY SOLICITOR BIAGANTE:

5 Q. Ms. Cromer, were you given some items to
6 test in this case?

7 A. Yes, I was.

8 Q. I'm not going to pick these up. I'm just
9 going to hand it up to you. I'm showing you
10 what's been marked as State's Exhibit number
11 22, which is a pistol, State's Exhibit number
12 23, which is a magazine, and State's Exhibit
13 number 24. Were those the items that you were
14 given to test in this case?

15 A. Yes, ma'am. What I'm looking for is I
16 scribed my lab number, my item number and my
17 initials, and I'm looking for that.

18 Q. And you see your initials and lab number
19 on those items. Just for the record, tell us
20 what the lab number is in this case.

21 A. The lab number is L0818357.

22 Q. Tell us who you got the items from?

23 A. I received them from the latent examiner,
24 David Black.

25 Q. The gentleman who just testified.

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1 A. Yes, ma'am.

2 Q. Tell us what you did and what you normally
3 do when you receive items such as these.

4 A. When I receive a gun and some evidence,
5 ammunition, what I do when I first get the
6 gun, I look at it. I take notes from it. I
7 measure it. I test it basically -- I
8 determine whether it's safe to fire. And I
9 did so in this case.

10 Q. Was it safe to fire?

11 A. Yes, ma'am.

12 Q. You make sure it's in working order before
13 anything else happens.

14 A. That's correct.

15 Q. Then what?

16 A. Then I look at what's brought in with it.
17 I look at the ammunition that I receive and
18 determine what I need to test fire in that
19 firearm.

20 Q. And what did you do in this case?

21 A. I looked at it. I noticed that it was
22 received with .380 auto ammunition. This
23 firearm is a nine-millimeter Makarov.

24 Q. Tell us a little bit about that and the
25 difference, how this is possible.

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1 A. When you're talking about nine-millimeter
2 most people think -- when they hear nine
3 millimeter or they hear nine, they are
4 thinking about a nine-millimeter luger which
5 is the common American caliber, which is 9-by-
6 19 millimeter. Nine millimeter Makarov is
7 actually 9-by-18 millimeter. And .380 auto is
8 9-by-17 millimeter. So they're very close in
9 size. But, actually, a nine-millimeter
10 Makarov bullet is about .364 of an inch where
11 your nine-millimeter luger or the .380 auto is
12 .355 of an inch. So I looked at it. I
13 determined that I could fire 380 auto in this
14 gun. And I test fired it using nine-
15 millimeter Makarov and 380 auto bullets.

16 Q. So, in essence, in English, in laymen's
17 terms, you just said that a nine-millimeter
18 luger has a larger bullet than a nine-
19 millimeter Makarov.

20 A. Actually, it's the other way around. The
21 nine-millimeter Makarov is larger in diameter
22 than the nine-millimeter luger or the 380
23 auto.

24 Q. But you said that you can fire 380 rounds
25 in a nine-millimeter Makarov.

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1 A. That is correct. That is correct. The
2 actual 380 is smaller in length, so it fits
3 and it'll go down the barrel.

4 Q. And tell us what you do when you do a test
5 fire. How does that happen?

6 A. Our department is on the second floor of
7 our laboratory building. We have a sealed
8 tank that goes all the way down to the first
9 floor. So we shoot into this tank of water,
10 because the water will slow down the bullet
11 without adding to or taking from the markings
12 that are placed there by the gun. So what I
13 do is I load up my magazine. I go to my
14 bullet recovery room. I shoot down into that
15 water, and I pull up my test-fired bullets
16 that I know were fired from this gun.

17 Q. And tell us about the results of that
18 test.

19 A. What I did is I determined that it was in
20 working order. I also looked at another piece
21 of evidence.

22 Q. Okay. I'm showing you what's been marked
23 as State's Exhibit number 21 that's already in
24 evidence. Do you recognize what that it?

25 A. First, it's in a sealed bag with my

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1 initials and seal date. But, yes, ma'am, this
2 is the fired bullet jacket fragment that I
3 received and examined and compared to the test
4 fires that I fired from this gun.

5 Q. When you received State's Exhibit number
6 21 was it still sealed in that bag that you
7 have in your hand?

8 A. I believe so, but let me look.

9 Q. Please refresh your memory.

10 A. (Upon review), yes, I received it in the
11 heat-sealed pouch.

12 Q. Tell us if you tried to make a comparison
13 with that versus the other material, and tell
14 us what that is, more specifically.

15 A. It is a fired bullet jacket fragment. On
16 some ammunition you can have a jacket. Some
17 ammunition is just straight lead. This is a
18 jacket which would have a lead core.

19 Q. The jacket is what goes around the bullet?

20 A. Yes. And it's also the part of the bullet
21 that comes into contact with the barrel of the
22 gun.

23 Q. So what did you do when you received that
24 with the other things?

25 A. I looked at it. I visually inspected it.

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1 I weighed it, and I determined that it was too
2 damaged to determine what caliber it was, and
3 that also it didn't really have any of the
4 markings that I need for identification
5 purposes.

6 Q. So were you able to tell whether item
7 number 21 was fired from item number 22?

8 A. No, I was not.

9 Q. Just because it was too damaged.

10 A. That's correct.

11 Q. What about the other bullets that you had?
12 Was there anything that you did with the other
13 bullets, or did you just determine if they
14 were also in working order?

15 A. Well, I just looked at them. Usually,
16 when we receive extra ammunition with a gun,
17 we don't do much to it. So I did really no
18 physical exam other than noting what caliber
19 and what it looked like.

20 Q. I'm sorry. You've probably already said
21 this. But was the gun that you received,
22 State's Exhibit number 22, in working order?

23 A. Yes, ma'am, it was.

24 Q. So you were able to fire it?

25 A. Yes, I was.

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1 Q. And that's the gun that you used for your
2 test firing?

3 A. Yes, ma'am.

4 Q. Thank you. Nothing further. Please
5 answer any questions Mr. Schwacke may have.

6 THE COURT: Cross examine.

7 CROSS EXAMINATION

8 BY MR. SCHWACKE:

9 Q. Let's start with the gun. Could you
10 explain to the jury the mechanics of the
11 firing of that gun? For instance, you've got
12 a clip. You have shells that you'd load into
13 the clip. You then pull the trigger and what
14 happens?

15 A. Okay. This is actually called a magazine.
16 One way to fire it is you can put unfired
17 cartridges into the magazine. Then you load
18 the magazine into the magazine well. This is
19 actually what we call a double-action firearm,
20 meaning it can be fired single action or
21 double action. Single action means you have
22 to cock the hammer then pull the trigger.
23 Double action means you pull the trigger and
24 that cocks the hammer and fires the gun. So
25 you load it, pull the slide back to chamber a

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1 round. Then whether you're going to shoot
2 single action or double action, you either
3 cock the hammer or pull the trigger.

4 Q. The actual ammunition has various
5 components too. You talked about the jacket.
6 You would normally have the projectile, but
7 the jacket is the covering to the lead core of
8 the projectile. Is that right?

9 A. Yes, sir.

10 Q. And then you have a casing that holds that
11 together with the gunpowder inside and any
12 other items inside of the casing. Is that
13 correct?

14 A. Yes, sir. Like this is an unfired piece
15 of ammunition. We call it a cartridge. You
16 have your bullet. You have your cartridge
17 case. You have the primer at the back which
18 is struck by the firing pin of the gun. It
19 starts the initial spark. The spark goes
20 through the flash hole in the cartridge case,
21 ignites the gunpowder which starts the burning
22 gases which then pushes your bullet down the
23 barrel and the cartridge case back into the
24 gun.

25 Q. And so the cartridge case goes back into

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1 the gun?

2 A. Well, it's pushed back into the breach
3 space. You have this extractor here, kind of
4 like a little claw, that hooks onto this
5 little rim here. So it's a claw and because
6 it's blowing backwards, it's going to come --
7 that extractor's holding it in place, so it
8 hits an ejector and it's going to turn and
9 flip out the ejection port.

10 Q. So if a gun like that were fired, you'd
11 not only expect -- I should say "expect to
12 find," because you may never find the
13 projectile. But if you find one, you could
14 expect to find cases.

15 A. Usually.

16 Q. You weren't submitted any cases.

17 A. No, sir, I was not.

18 Q. If you had a casing you would be able to
19 check the scratch marks on the casing to
20 perhaps match it to the weapon accordingly.

21 A. There are several different areas that we
22 can look at on the casing. But if I had one,
23 I could have tried to compare that, yes, sir.

24 Q. So the only items that you were given from
25 the scene is a part of a jacket that is too

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1 deformed to let you know and let the jury know
2 that it came from that weapon.

3 A. That's correct.

4 Q. Let me ask you some other questions
5 because you said you'd been certified
6 previously or the pathology of gunshot wounds,
7 you had studied in that area as well.

8 A. I took a seminar, but I am not an expert
9 in that.

10 Q. You also mentioned some forensic courses
11 that you had taken?

12 A. Most of them are pertaining to my field of
13 expertise of firearms identification.

14 Q. Well, in your field of fireworks
15 identification, do you make observations
16 perhaps of entry points of the actual
17 projectile into various types of things, any
18 type of object?

19 A. We don't go out to the scene. Most of it
20 is evidence that is picked up from a field
21 agent or local agencies and brought to us. So
22 we don't go out to collect any of that.

23 Q. Correct. But if you're handed an item
24 such as clothing that a person might have had
25 on when they were shot, that could be an item

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1 in your area that you could be doing an
2 examination on?

3 A. Usually, when you're talking about bullet
4 holes in clothing, you're looking for gunshot
5 residue, which is done by a different
6 department than ours.

7 Q. You don't do that?

8 A. No, sir.

9 Q. But you're aware that entrance areas of a
10 gunshot might leave residue and those
11 substances?

12 A. They might. But, like I said, that's not
13 my area of expertise.

14 MR. SCHWACKE: That's all my
15 questions.

16 THE COURT: Redirect?

17 SOLICITOR BIAGANTE: Nothing, Your
18 Honor. May she be excused from her subpoena?

19 THE COURT: Any objection?

20 MR. SCHWACKE: No, Your Honor.

21 THE COURT: Thank you. You may
22 come down and you're free to leave.

23 (WITNESS EXCUSED)

24 THE COURT: Call your next witness.

25 SOLICITOR WILLIAMS: Nathan McCoy.

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1 (WITNESS TAKES STAND)

2 NATHAN McCOY, being duly sworn to
3 tell the truth, the whole truth and nothing
4 but the truth, testified, as follows:

5 DIRECT EXAMINATION

6 BY SOLICITOR WILLIAMS:

7 Q. Where do you work, Mr. McCoy?

8 A. I work for the South Carolina Law
9 Enforcement Division, otherwise known as SLED.

10 Q. And what do you do at SLED?

11 A. I'm a forensic chemist in the drug
12 analysis department.

13 Q. How long have you worked in that division?

14 A. I've worked there in that division since
15 January of 2003.

16 Q. And in that position what do you do?

17 A. What do is basically get in evidence, an
18 unknown substance and analyze it for the
19 presence of controlled substances.

20 Q. When you say controlled substances, you
21 mean drugs?

22 A. That's correct.

23 Q. How long have you been there?

24 A. I've been there, at SLED, since January of
25 2003.

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1 Q. So about seven years.

2 A. Correct.

3 Q. Tell us briefly a little bit about your
4 background and some of your education and
5 training in that field.

6 A. I have a Bachelor of Science degree in
7 chemistry, a Bachelor of Arts degree in
8 biochemistry from the College of Charleston,
9 and also graduated College of Charleston in
10 2002, hired on with SLED in 2003. And I
11 received training at SLED.

12 Q. And have you had to chemically analyze
13 substances to determine whether those
14 substances contained narcotics in the past?

15 A. Yes, I have.

16 Q. About how many times have you done that?

17 A. At least twenty-five hundred times.

18 Q. And have you been qualified as an expert
19 in the area of chemical and drug analysis?

20 A. Yes, I have.

21 Q. And about how many times have you been
22 qualified as an expert in a General Sessions
23 courtroom?

24 A. Twenty-one times.

25 SOLICITOR WILLIAMS: Your Honor, at

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1 this time we would offer Mr. McCoy as an
2 expert in the field of chemistry and drug
3 analysis.

4 MR. SHELTON: No objection.

5 THE COURT: Very well. Without
6 objection, he will be permitted to render
7 opinions in those areas.

8 DIRECT EXAMINATION CONTINUED

9 BY SOLICITOR WILLIAMS:

10 Q. Mr. McCoy, did you analyze some evidence
11 in this case?

12 A. Yes, I have.

13 Q. I want to show you what's been previously
14 marked as State's Exhibit 18.

15 SOLICITOR WILLIAMS: Your Honor,
16 I'm showing defense counsel what has been
17 marked as State's 18.

18 THE COURT: Okay.

19 SOLICITOR WILLIAMS: May I approach
20 the witness?

21 THE COURT: You may.

22 DIRECT EXAMINATION CONTINUED

23 BY SOLICITOR WILLIAMS:

24 Q. Do you recognize this?

25 A. Yes, I do.

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1 Q. What do you recognize it as?

2 A. It recognize it as being a Best bag, in
3 what we call a pouch. I'm looking for my
4 initials.

5 Q. And when you say a Best bag, for those
6 people who are not in law enforcement what is
7 a Best bag?

8 A. A Best bag is basically a bag that we
9 provide to law enforcement agencies to collect
10 evidence, drug-type evidence. It's a tamper
11 proof evidence bag. If someone tried to get
12 into the bag, we would know that it had been
13 tampered with.

14 Q. So the purpose of it is to protect the
15 integrity of the evidence and make sure nobody
16 contaminates it or tampers with it.

17 A. Yes. It's not tamper proof, but it's
18 tamper evident. So you would know if someone
19 tampered with it.

20 Q. And when something comes up to SLED from
21 an agency, a police agency, it gets logged
22 into evidence by some kind of SLED technician.
23 Is that correct?

24 A. That is correct.

25 Q. And each person that handles it signs off

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1 on it?

2 A. Each person who handles it it's in our
3 computer system. Basically, it'd be under
4 their name and their name comes up as being
5 the person who touched it last.

6 Q. What is in this package? What did you
7 analyze?

8 A. I analyzed -- let me look at my notes real
9 quick. It began with a plastic tube with back
10 tape and it contained a rock substance inside
11 the tube.

12 Q. And did you analyze those rock substances?

13 A. Yes, I did.

14 Q. What kind of test did you perform on them?

15 A. Actually, I do two different types of
16 tests. The first test is what we call a
17 presumptive test or a color test, a chemical
18 test. Basically, we take two different types
19 of chemicals. We add the substance to the
20 chemicals and see if we get some sort of color
21 reaction. Based on the reaction of the color
22 given off, we'd be able to tell presumptively
23 what it might be. And the second test I
24 performed is what's called a confirmatory
25 test. In this particular case I used an

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1 instrument called a mass spectrometer, mass
2 spectrometer or GP mass for short to determine
3 what the substance is.

4 Q. And from these tests were you able to form
5 an expert opinion as to what that substance
6 was?

7 A. Yes.

8 Q. And in your opinion, what is it?

9 A. This substance is cocaine base, crack.

10 Q. What was the weight of the cocaine base,
11 the crack?

12 A. The weight of this substance is 0.26
13 grams.

14 Q. And after you were finished testing it and
15 had formed your opinion, could you describe
16 for the jury how you repackaged it once you
17 tested it?

18 A. Basically, all the evidence I get, I
19 usually repack the substance itself into a
20 ZipLoc bag. It's identified here with the red
21 markings on top of it. I take the Best bag,
22 any packaging it came in and the evidence
23 itself and put it inside a pouch which is heat
24 sealed. It's sealed, and I put my initials
25 and date that I sealed the bag.

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1 Q. And then what did you do with it?

2 A. Until I get ready to dispose of it or send
3 it back to the agency, we have a locked vault
4 inside our drug lab. And then at a later date
5 I'll take it out and it'll be returned back to
6 the agency, take it down to log-in and they'll
7 store it down there until it's picked up.

8 SOLICITOR WILLIAMS: Your Honor, I
9 think item eighteen was entered into evidence
10 subject to the chain. At this time we would
11 offer 18 into evidence.

12 THE COURT: It's been admitted.

13 MR. SHELTON: I have no questions.

14 THE COURT: You may come down. Do
15 you wish the witness to be excused, Ms.
16 Williams?

17 SOLICITOR WILLIAMS: Yes, Your
18 Honor.

19 THE COURT: You are also free to
20 leave sir. Thank you.

21 (WITNESS EXCUSED)

22 THE COURT: Call your next witness.

23 SOLICITOR BIAGANTE: Thank you.

24 The State would call Agent Ila Simmons.

25 (WITNESS TAKES STAND)

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1 ILA SIMMONS, being duly sworn to tell
2 the truth, the whole truth and nothing but the
3 truth, testified, as follows:

4 DIRECT EXAMINATION

5 BY SOLICITOR BIAGANTE:

6 Q. Good afternoon, Agent Simmons. Will you
7 please tell us where you are employed, in what
8 capacity and for how long you've been employed
9 there?

10 A. I work at the South Carolina Law
11 Enforcement Division, also known as SLED,
12 in the forensics laboratory trace evidence
13 department, and I've been there for ten years.

14 Q. And tell us about some of your duties and
15 responsibilities in the trace evidence
16 department.

17 A. In the trace evidence department we
18 analyze gunshot residue, gunpowder residue.
19 We perform paint, glass, fiber comparisons as
20 well as analyzing evidence.

21 Q. Tell us a little bit about your back-
22 ground, education and experience that brought
23 you to SLED and here today.

24 A. I have a Bachelor of Science degree in
25 chemistry. Once I completed my degree in

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1 chemistry I went to work at SLED. For the
2 first three years that I was employed there I
3 worked with a trace evidence examiner who
4 taught me how to collect and analyze trace
5 evidence. During that time I had to take
6 written, practical and oral examinations and
7 pass them all with 100 percent efficiency.

8 Q. Educate our jury about what exactly is
9 trace evidence.

10 A. Trace evidence comes from several areas.
11 It is basically anything at an incident scene
12 that is very small, often so small that the
13 eye can't see it, like in the instance of
14 gunshot residue. We also analyze paint
15 samples where two vehicles might strike each
16 other or a vehicle strikes a pedestrian. We
17 do glass comparisons, fiber comparisons. If
18 two people come in contact and fibers
19 transfer, we do that.

20 Q. And approximately how many gunshot residue
21 kits have you tested before in your career?

22 A. I believe I've analyzed probably over
23 twenty-five thousand gunshot residue samples.

24 Q. And have you been qualified as an expert
25 in the area of trace examination and gunshot

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1 residue testing?

2 A. Yes, I have.

3 Q. Approximately how many times?

4 A. Over a hundred and fifty times.

5 SOLICITOR BIAGANTE: Your Honor,
6 at this time I would offer Agent Simmons as an
7 expert in the area of trace evidence analysis
8 and gunshot residue testing.

9 MR. SHELTON: No objection.

10 THE COURT: Very well. She will be
11 permitted to render opinions in those areas.

12 SOLICITOR BIAGANTE: Thank you,
13 Judge.

14 DIRECT EXAMINATION CONTINUED

15 BY SOLICITOR BIAGANTE:

16 Q. Please tell us what gunshot residue or
17 GSR.

18 A. Gunshot residue is a mixture of
19 microscopic chemicals that come out of a gun
20 when it's fired. It can get on anything in
21 close proximity to the gun, including the hand
22 of the person shooting the gun or any object
23 that may be within the vicinity as it goes
24 off.

25 Q. And how long does GSR remain on a living

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1 person?

2 A. On a living person gunshot residue will
3 not remain longer than six hours. If someone
4 were to shoot a gun at me, by 6:00 o'clock
5 that afternoon they would have no gunshot
6 residue left on them.

7 Q. And why is that?

8 A. Because the skin absorbs gunshot residue.
9 If you sweat it'll wash it away. If you wash
10 your hands it will be completely gone. If you
11 wipe your hand on a towel or put something in
12 and out of your pocket, it can all remove the
13 gunshot residue.

14 Q. Is it fair to say that you would have the
15 highest of the three elements or whatever you
16 characterize them as right after you shot a
17 gun as opposed to four or five or six hours
18 later?

19 A. Yes. The gunshot residue begins to come
20 off immediately. So it is optimum to collect
21 the GSR kit as soon after the shooting as
22 possible.

23 Q. And did you receive some items in this
24 case to test?

25 A. Yes, I did.

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1 SOLICITOR BIAGANTE: I'm showing
2 counsel what's been introduced into evidence
3 as State's numbers 19 and 20.

4 DIRECT EXAMINATION CONTINUED

5 BY SOLICITOR BIAGANTE:

6 Q. I'm showing you 19 and 20. Let's start
7 with number 20, and take it out of the
8 package. Can you tell me what that is?

9 A. Yes, ma'am. This is a gunshot residue
10 collection kit. It is marked with our
11 laboratory identification number. Everything
12 you take that comes into the lab is assigned
13 its own identification number as well as each
14 piece of evidence has an item number. It's
15 also marked with that item number. It's
16 marked with my initials, and the date that the
17 kit was opened for analysis.

18 Q. For the record, what is that SLED
19 identification number?

20 A. In this case it is L0818357.

21 Q. And what item did SLED give this
22 particular gunshot residue test?

23 A. This was item three.

24 Q. Tell us about how it comes into your
25 custody. What typically happens when a law

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1 enforcement agency drops it off at SLED until
2 the point where it gets to you.

3 A. We have a central login area where, when
4 the agencies bring in the evidence, they go to
5 out login technician who assigns the item
6 number and the lab numbers to the evidence.
7 The evidence technician would take it into
8 their custody. It will already be sealed
9 here. The investigator or whomever bring it
10 in will put it in another envelope and seal it
11 and initial it again with evidence tape. The
12 evidence tape has a very tight seal. So it's
13 very hard to tamper with it in any way without
14 somebody being able to see it. Once that's
15 been sealed, the evidence technicians take it,
16 put it in a secured, locked room. And until
17 our evidence technician from our own
18 department goes down and picks it up and
19 brings it up into our custody.

20 Q. And were you able to tell whether or not
21 that item ---

22 A. It's State's Exhibit 20.

23 Q. Had that been tampered with before it got
24 into your custody?

25 A. No, ma'am, because once the GSR kit is

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1 collected, right after it's collected the
2 person collecting the kit will put this piece
3 of evidence tape on the back and initial it.
4 And it was still intact when it came into our
5 custody.

6 Q. And if it had been tampered with, what
7 would you have done at that point?

8 A. It would depend upon the degree of damage
9 to the kit. We would have either noted it and
10 then continued on with the analysis. Or if
11 something was damaged inside, we would not
12 have analyzed the kit at all.

13 Q. And that was not true in this case?

14 A. No, it was not.

15 Q. And did you also receive State's Exhibit
16 number 19?

17 A. Yes, ma'am. It is also marked with the
18 laboratory evidence case number. The item
19 number on this particular piece of evidence is
20 item number one. It's marked with my initials
21 and the date in which it was opened for
22 analysis.

23 Q. And, again, when that item came into your
24 custody had it been tampered with in any way?

25 A. No, ma'am. It was sealed with the same

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1 type of evidence tape and initialed by the
2 person who collected the kid.

3 Q. And if you could, please tell us who the
4 evidence in number 20, who did that test be
5 performed on? Whose test is that?

6 A. It came from Askari Dash.

7 Q. And the other kit was --

8 A. Jermaine McKelvey.

9 Q. McKelvey?

10 A. McKelvey.

11 Q. Tell us what happens when you get a GSR
12 kit. What type of testing do you do to find
13 out whether there are present elements on it.

14 A. In this particular kit, the samples were
15 collected on purple lift which is basically a
16 piece of double-sided sticky tape with a
17 handle. So the person taking the sample never
18 touches the sticky tape. The sticky tape only
19 touches the hand of the person that's being
20 sampled, the person they believe may have had
21 gunshot residue on them. In this case they
22 brought in the purple lift. They'd taken the
23 purple lift and dabbed it over the hands of
24 both Mr. Dash and Mr. McKelvey.

25 Q. Who provides these kits to the law

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1 enforcement agency?

2 A. SLED will provide these kits free of
3 charge to most agencies.

4 Q. And in those kits are there specific
5 instructions so an officer doesn't have to
6 guess about what to do?

7 A. Yes. In every kit that SLED gives to the
8 different agencies, it has a full list of
9 instructions and exactly step-by-step how to
10 take the gunshot residue kit.

11 Q. And how many samples and where are the
12 samples taken from in each GSR kit?

13 A. In each kit a sample is collected from the
14 palm of the right hand. Then another sample
15 is collected from the back of the right hand,
16 another sample from the palm of the left hand,
17 and then a final sample from the back of the
18 left hand.

19 Q. So four total samples per individual?

20 A. Yes.

21 Q. Tell us about what you did next.

22 A. When I receive these I check to make sure
23 they were not tampered with. They were not.
24 I began analysis on them. On the stickie
25 tabs, we place them on a very powerful

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1 microscope. It sees hundreds of thousands of
2 times smaller than a human eye can see. And
3 what we're looking for is three elements:
4 lead, barium and antimony, all in the same
5 particle. This is what comes out of a gun
6 when it fires. And in this case that's what
7 we were looking for.

8 Q. Did you do that on those two?

9 A. Yes, ma'am, I did.

10 Q. Tell me about the results on Mr. Askari
11 Dash's kit, State's number 20.

12 A. On each of the samples no gunshot residue
13 was found.

14 Q. So none on his right palm.

15 A. No, ma'am.

16 Q. None on his left palm.

17 A. No, ma'am.

18 Q. None on his right palm or left palm.

19 A. No, ma'am.

20 Q. Excuse me. Front and back.

21 A. Right, none was found on either palm or on
22 the backs of either hand.

23 Q. And what about Mr. McKelvey's which, I
24 believe, is State's number 19? Tell us about
25 those results.

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1 A. On the right palm I found one particle
2 containing lead, barium and antimony.
3 However, that is not enough for us to say that
4 is a probable. You have to have two or more
5 particles. So that result was inconclusive.

6 Q. And that's on the right palm.

7 A. Yes, ma'am.

8 Q. What about the right back?

9 A. On the back of the right hand I found a
10 non-round particle containing the lead, barium
11 and antimony which may be associated with
12 gunshot residue.

13 Q. So that one was positive?

14 A. Yes.

15 Q. What about the left palm?

16 A. On the left palm we found a round lead
17 particle which is also a component of gunshot
18 residue, and one non-round particle containing
19 the lead, barium and antimony.

20 Q. Also consistent with gunshot residue?

21 A. Yes.

22 Q. And what about the left back?

23 A. On the back of the left hand no gunshot
24 residue was found.

25 Q. And tell us what that indicates to you.

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1 What are those results consistent with?

2 A. It's consistent with someone that's either
3 fired a weapon or been in close proximity to a
4 gun when it was discharged. That is what is
5 most significant.

6 Q. What about someone who just happens to
7 pick up a gun when it was been fired? So, for
8 example, I shoot a gun and I put it down and
9 someone else picks it up. What type of
10 results do you expect from that?

11 A. In a situation like that I would expect to
12 find the gunshot residue just on the palms of
13 the hand, unless someone picks it up. And
14 then they would have to rub their hands like
15 this (indicating) to transfer the gunshot
16 residue from the palm of the hand onto the
17 back of the hand.

18 Q. So in this case Mr. McKelvey is most
19 consistent with firing a weapon or what else
20 did you say?

21 A. Being in close proximity to a gun when it
22 went off.

23 Q. And Mr. Dash had absolutely no gunshot
24 residue on his hands at all.

25 A. Yes, that's correct.

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1 Q. Please answer any questions the defense
2 might have.

3 THE COURT: Cross examine.

4 CROSS EXAMINATION

5 BY MR. SHELTON:

6 Q. Ms. Simmons, you rely on the agency that's
7 doing the gun residue test to do it correctly.
8 Isn't that correct?

9 A. Yes, sir, because I don't collect the
10 kits. I analyze them once they're collected
11 by the agency.

12 Q. And you rely on them to transport them in
13 a timely manner?

14 A. Yes, sir.

15 Q. Does that matter, time?

16 A. Generally, gunshot residue is not affected
17 by time. Once it is on the particle list,
18 because it's sticky tape and it doesn't
19 interact with the gunshot residue particles,
20 the only thing that could damage that is if
21 they were opened and disturbed in some way,
22 the actual tape.

23 Q. Does it matter where it's held?

24 A. Where it's stored?

25 Q. Yes.

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1 A. No, sir, it should not.

2 Q. Some of the items that were found, the
3 lead, the antimony and barium, that could be
4 found in other materials. Isn't that correct?

5 A. When they're found separately, yes, sir.
6 They can be found in other materials.

7 However, these were one particle containing
8 all three elements. And that is consistent
9 with being found from a discharge of a
10 firearm.

11 Q. And I think your opinion is that it may
12 be associated with a gunshot?

13 A. Yes, that's right.

14 Q. You can't state that it was gunshot
15 residue.

16 A. No. It's most consistent with gunshot
17 residue.

18 MR. SHELTON: No further
19 questions.

20 THE COURT: Redirect.

21 SOLICITOR BIAGANTE: Nothing, Your
22 Honor. Can Ms. Simmons be released from her
23 subpoena?

24 THE COURT: Any objection?

25 MR. SHELTON: No, sir.

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1 THE COURT: You may step down and
2 you're free to leave.

3 (WITNESS EXCUSED)

4 SOLICITOR BIAGANTE: Your Honor, can
5 we approach?

6 THE COURT: Sure.

7 (OFF RECORD SIDEBAR)

8 THE COURT: Ladies and Gentlemen,
9 at this point, we'll recess for the evening.
10 Please do not begin your deliberations. Of
11 course, do not discuss this case among
12 yourselves. Do not permit anyone to talk with
13 you about the case outside the courtroom or
14 talk about it in your presence.

15 Also tonight when you go home if
16 there's someone there, I would imagine what
17 the typical questions would be are "What are
18 you doing?" "What's the case about?" It would
19 be a normal question. If you responded to
20 that question you will have violated the oath
21 that you took this morning because you will
22 have started your deliberations by discussing
23 this case. So, please, we'll finish this case
24 most probably tomorrow. And then, if you want
25 to talk about it, you may do so. But as for

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1 now, talk about something else, but do not
2 talk about this case.

3 I don't anticipate there'll be any
4 news coverage. But if you should be watching
5 the news or reading the newspaper and you saw
6 headlines about this case, please change the
7 channel and remove yourself. Do not watch
8 anything or read anything.

9 Have a good evening. Don't call the
10 number tonight. The message will not apply to
11 you. I look forward to seeing you tomorrow.

12 We have some matters not related to
13 this that I'm going to start about 9:00
14 o'clock. I should be finished at 9:30, so I'm
15 going to ask that you be here at 9:30. But if
16 we're not finished, it won't be too long
17 thereafter.

18 So have a good evening and we'll see
19 you tomorrow at 9:30.

20 (JURY OUT @ 4:35 P.M.)

21 THE COURT: Anything from the State
22 at this point?

23 SOLICITOR BIAGANTE: Not from the
24 State, Your Honor.

25 THE COURT: Anything from the

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1 defendant?

2 MR. SHELTON: Nothing.

3 THE COURT: Thank you. We'll be at
4 ease until 9:30.

5 (COURT IN RECESS)

6 (TRANSCRIPT CONTINUED NEXT PAGE)

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4 THE COURT: Is the State ready to
5 proceed?

6 SOLICITOR BIAGANTE: Yes, Your
7 Honor.

9 MR. SHELTON: Yes, sir.

10 THE COURT: Very well, let's bring
11 in our jury, please.

12 (JURY IN @ 9:43 A.M.)

13 THE COURT: Thank you, Ladies and
14 Gentlemen. Good morning to you. We're ready
15 to continue. I hope you had a good evening.
16 Please give your attention to the next
17 witness. Solicitor, you may call your next
18 witness.

19 SOLICITOR BIAGANTE: Thank you.
20 The State would call Cynthia Fuda to the
21 stand.

22 (WITNESS TAKES STAND)

23 CYNTHIA FUDA, being duly sworn to
24 tell the truth, the whole truth and nothing
25 but the truth, testified, as follows:

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1 DIRECT EXAMINATION

2 BY SOLICITOR BIAGANTE:

3 Q. Please tell us where you are employed, in
4 what capacity and for how long you've been
5 employed there.

6 A. I'm a registered nurse at the Medical
7 University of South Carolina in the surgical
8 trauma ICU. I have been at MUSC since 1993
9 and in the critical trauma ICU for the last
10 two years.

11 Q. Tell us a little bit about your education,
12 background and experience that brought you
13 here today.

14 A. I went to college in Missouri and then I
15 moved out here after I graduated. I have a
16 Bachelor of Science in nursing. Came to the
17 Medical University. Worked for a year in the
18 burn ICU and then transferred into the
19 surgical trauma ICU.

20 Q. Are you a member of any professional
21 societies or organizations?

22 A. Yes, ma'am. I'm a member of the AACN
23 which is the American Association of Critical
24 Care Nurses.

25 Q. To be a nurse in South Carolina do you

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1 have to hold any type of license?

2 A. Yes, ma'am. We have a license that is
3 renewed every two years. We must do
4 continuing education. We have to do yearly
5 competency to prove that we're still competent
6 to take care of things and to be up-to-date on
7 the newest things that relate to our field.

8 Q. Have you held that license since you came
9 to South Carolina in '93?

10 A. Yes, ma'am.

11 SOLICITOR BIAGANTE: Your Honor, at
12 this time I'd like to qualify Ms. Fuda as an
13 expert in the area of intensive care nursing.

14 THE COURT: Do you care to examine
15 her?

16 MR. SHELTON: No, sir.

17 THE COURT: She will be permitted
18 to render opinions in that area.

19 SOLICITOR BIAGANTE: Thank you,
20 Your Honor.

21 DIRECT EXAMINATION CONTINUED

22 BY SOLICITOR BIAGANTE:

23 Q. Nurse Fuda, directing your attention to
24 November 27, 2008 were you working at MUSC
25 that day?

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1 A. Yes, ma'am, I came on at 7:00 a.m.

2 Q. What hours are your shifts?

3 A. We work from 7:00 a.m. to 7:00 p.m.

4 Q. Was that day a holiday?

5 A. Yes, that was Thanksgiving.

6 Q. Did you come into contact with a patient
7 by the name of Bernard Phoenix?

8 A. Yes.

9 Q. Tell us who the doctor was who primarily
10 treated Mr. Phoenix that day.

11 A. Dr. Minshall was our attending that day.
12 He's a trauma surgeon at the Medical
13 University.

14 Q. Where is he presently today?

15 A. He is out of the country on a mission
16 trip.

17 Q. Do you know where he is?

18 A. Tanzania, I believe.

19 Q. Tell us how you came in contact with Mr.
20 Phoenix.

21 A. When we come in in the morning, at 7:00
22 a.m., they go over a list of our patients, and
23 we choose our assignments for the day. And I
24 chose to take care of Mr. Phoenix that day. I
25 came to the bedside and got a report from the

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1 offgoing nurse and assumed care of Mr.

2 Phoenix.

3 Q. Tell us how he came to MUSC that morning.

4 A. He was flown in by helicopter from -- I
5 believe it was Roper Berkeley, but I'm not
6 positive -- to our emergency room. He was
7 seen in our emergency room and stabilized and
8 transferred to our unit, the surgical trauma
9 ICU.

10 Q. Tell us a little bit about how emergent or
11 non-emergent was he when he was flown into
12 MUSC.

13 A. When he was flown in he was very critical,
14 for the record. And also when we saw him he
15 was in what we considered critical condition.
16 His blood pressure was very low. His
17 temperature was very low. We were trying to
18 warm him up. We were having to give him lots
19 of IV fluids to keep his blood pressure up.
20 He was going in and out of consciousness
21 initially when he got there. And he had to
22 have a breathing tube in.

23 Q. What is that commonly referred to as?

24 A. Well, it's called intubation. But we had
25 to put a breathing tube in to help him

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1 breathe, because he was in and out of
2 consciousness.

3 Q. When he got to the emergency room tell us
4 about the injuries that he had on him that
5 morning.

6 A. He had a gunshot wound to the left side of
7 his head which caused a skull fracture.

8 Q. I'm sorry.

9 A. Which caused a skull fracture.

10 Q. Tell us approximately where the entrance
11 wound was and whether or not there was an exit
12 wound.

13 A. It went in in the front forehead right
14 here (indicating) and it came out back here
15 (indicating) on the left.

16 Q. Tell us about that and how serious that
17 injury is.

18 A. An injury to the head -- I mean, he was
19 lucky it didn't pierce his brain. It could
20 have pierced his brain. It didn't. But it
21 did give him a depressed skull fracture which
22 caused him to go into shock. His blood
23 pressure was very low. We had to maintain
24 that. We were trying to warm him up and just
25 get him stabilized.

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1 Q. Was he also diagnosed -- I can't pronounce
2 it.

3 A. It is air in the head which was from the
4 skull fracture. When there's a break in the
5 skull air can get into your brain and cause
6 damage. Depending on how much air can get in,
7 it can take up too much -- it can cause brain
8 damage, essentially.

9 Q. Can it be fatal?

10 A. It could be.

11 Q. When he was moved up to where you were,
12 what unit is that called?

13 A. The surgical trauma ICU.

14 Q. And why was he put there?

15 A. We specialize in trauma patients, gunshot
16 wounds, stab wounds, car accidents, and all
17 cases surgical.

18 Q. Do you remember based on the medical
19 records whether he had any money on him that
20 day?

21 A. The inventory just showed that he had a
22 wallet but there was no money. And the ER
23 inventories would have indicated that, and
24 there was no indication in the record that
25 he had any money on him.

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1 Q. Nurse Fuda, if Mr. Phoenix had not
2 received treatment what could be the potential
3 outcome?

4 MR. SHELTON: Objection, Your Honor.

5 THE COURT: I sustain the
6 objection. It's not necessary. Common sense,
7 logic, but I'm not going to allow her to
8 testify about that. That's speculation.

9 DIRECT EXAMINATION CONTINUED

10 SOLICITOR BIAGANTE:

11 Q. Based on your expertise as a nurse and
12 other patients that you've seen with gunshot
13 wounds to the head, how likely would it be ---

14 MR. SHELTON: Objection.

15 THE COURT: Sustained. It's
16 speculation. She's already testified to the
17 essential parts. That's just speculative,
18 Solicitor. Move on to something else.

19 DIRECT EXAMINATION CONTINUED

20 BY SOLICITOR BIAGANTE:

21 Q. Did you have any conversation with Mr.
22 Phoenix about his injury?

23 A. Yes, I told him he was very lucky.

24 Q. Did you have to call anyone in his family?

25 A. Yes, when he woke up and we were able to

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1 take the breathing tube out, he asked if I'd
2 call his mother and let her know what was
3 going on.

4 Q. And are you aware of whether or not he had
5 any type of surgery afterward or any follow up
6 treatment after he left MUSC?

7 A. According to the records, it appears that
8 he had a follow up with the clinic. But I
9 don't know any of the details of that.

10 Q. Tell us ---

11 SOLICITOR BIAGANTE: Briefly, Your
12 Honor.

13 THE COURT: Sure.

14 SOLICITOR BIAGANTE: Please answer
15 any questions the defense may have for you.

16 THE COURT: Cross.

17 CROSS EXAMINATION

18 BY MR. SHELTON:

19 Q. To be fair, when a patient comes into the
20 emergency room, their first thing is to save
21 that patient. Isn't that correct?

22 A. Yes, sir.

23 Q. It's not to collect evidence.

24 A. Correct.

25 Q. So there are observations that are made.

1 A. Yes.

2 Q. And when those observations are made
3 they're placed in writing and reports are
4 generated.

5 A. Yes.

6 Q. And you arrived at 7:00 a.m., so you
7 weren't there when Mr. Phoenix was brought in?

8 A. Correct.

9 Q. So some of what you testified earlier is
10 based on records that you would have.

11 A. Correct.

12 Q. You've reviewed all the records?

13 A. Yes.

14 Q. Concerning MUSC and concerning follow up
15 treatment?

16 A. No, I did not see the follow up part. I
17 just saw his patient records.

18 Q. But you knew that he had gone to see --
19 gone for follow up treatment?

20 A. I'm not sure if he followed through with
21 it or not. I saw on his discharge orders that
22 he was supposed to follow up with the
23 neurosurgery clinic. I do not know if that
24 was done or not.

25 Q. Are you familiar with the flight crew

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1 report?

2 A. Yes.

3 Q. Are they based off MUSC's reports? Are
4 they based out of MUSC?

5 A. I am not exactly sure.

6 SOLICITOR BIAGANTE: Objection.

7 She would have no knowledge of that.

8 THE COURT: Overruled. She just
9 answered she's not sure.

10 THE WITNESS: I'm not sure. I know
11 we have a helicopter, but I'm not sure if they
12 were paid by MUSC or if they're a private
13 company. It's called Omniflight.

14 CROSS EXAMINATION CONTINUED

15 BY MR. SHELTON:

16 Q. Do you know about what time that Mr.
17 Phoenix was seen by the flight crew?

18 A. I believe his record was around 2:00 or
19 3:00 in the morning.

20 Q. Was that about the time he arrived at
21 MUSC?

22 A. I'm not sure. According to MUSC, he
23 arrived at 2:09 to the emergency room.

24 Q. Prior to arriving at the emergency room
25 he was intubated?

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1 A. Yes, sir. It appears, according to the
2 records, that he was intubated in transit to
3 MUSC due to vomiting. And they were worried
4 about him protecting his airway. And it also
5 says he's in and out of consciousness. So it
6 was for airway protection.

7 Q. And specifically regarding the vomiting --

8 SOLICITOR BIAGANTE: Your Honor, I
9 would object before he asks his next question.
10 I know where he's going.

11 THE COURT: Well, I don't. Thank
12 you. I appreciate it, Solicitor. He has to
13 ask the question and then I'll have to
14 entertain the objection.

15 SOLICITOR BIAGANTE: May we
16 approach the Bench?

17 THE COURT: Sure.

18 (OFF RECORD SIDEBAR)

19 THE COURT: Overruled.

20 CROSS EXAMINATION CONTINUED

21 BY MR. SHELTON:

22 Q. You indicated that you reviewed the
23 records..

24 A. Yes, sir.

25 Q. \ And what did Mr. Phoenix vomit?

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1 A. According to the EMS record it says
2 "ETOH", which is an acronym for alcohol.

3 Q. That was prior to him being intubated?

4 A. Yes, sir

5 Q. There's also notes that were taken
6 concerning history. And at some point in time
7 you get some history from EMS. Isn't that
8 correct?

9 A. The emergency room nurses would have got
10 reports from EMS. In the ICU we didn't deal
11 with them on that basis.

12 Q. What was another reasons for him to be
13 intubated, according to the notes?

14 A. I saw where he was unresponsive at times.
15 He was unconscious and then he was awake, and
16 then he was unconscious again. So they would
17 intubate him to protect his breathing.

18 Q. Are you familiar with combative behavior?

19 A. Yes, sir. I did see that as well.

20 Q. That would be different than going in and
21 out of consciousness.

22 A. Yes.

23 Q. And the injury to Mr. Phoenix, it never
24 penetrated the skull. Isn't that correct?

25 A. According to the records, it did not

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1 penetrate the skull.

2 Q. It was a puncture wound, I think, is the
3 term that they used.

4 A. Yes, I saw that.

5 Q. It was a puncture wound and a puncture.

6 A. Yes.

7 Q. If you go to his history, you get history
8 from all kinds of different sources. Isn't
9 that correct?

10 A. Yes, sir.

11 Q. And that's to find out what happened to
12 the victim, his condition, and that goes to
13 make a diagnosis. Isn't that correct?

14 A. Yes.

15 Q. And there were no doctors on scene. Isn't
16 that correct?

17 A. At the initial scene?

18 Q. Let me rephrase that. You don't know what
19 happened.

20 A. Right.

21 Q. And none of his doctors know what happened
22 that night.

23 A. I would assume ---

24 THE COURT: You don't have to
25 answer. Of course, they don't. Thank you.

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1 CROSS EXAMINATION CONTINUED

2 BY MR. SHELTON:

3 Q. So in creating your history you rely on
4 what other people say.

5 A. Yes.

6 Q. And you don't know if Mr. Phoenix went
7 through any follow up treatment. You
8 mentioned that earlier.

9 A. I don't know off the top of my head. I
10 don't recall if I saw anything in this record.
11 This is his inpatient record. I don't know.

12 Q. You don't have any records and you didn't
13 look at any records concerning visits later on
14 to Roper Berkeley?

15 A. No.

16 MR. SHELTON: I have no further
17 questions.

18 THE COURT: Very well. Redirect,
19 Solicitor.

20 SOLICITOR BIAGANTE: Briefly, Your
21 Honor.

22 THE COURT: Sure.

23 REDIRECT EXAMINATION

24 BY SOLICITOR BIAGANTE:

25 Q. Is there anything in the MUSC records that

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1 indicates anything about alcohol being present
2 or Mr. Phoenix vomiting alcohol?

3 A. Not that I recall seeing anywhere.

4 Q. And the records from the ambulance, does
5 that indicate how much alcohol, a little bit,
6 a lot?

7 A. No, it just says "alcohol."

8 Q. So you have no idea how much?

9 A. No idea.

10 Q. Mr. Shelton asked you about a reason to
11 intubate somebody, one of them being combative
12 behavior. Is that unusual with a gunshot
13 victim in shock?

14 A. No, that's very common.

15 Q. Thank you.

16 THE COURT: Recross.

17 RECROSS EXAMINATION

18 BY MR. SHELTON:

19 Q. Is there any evidence of shock?

20 A. His blood pressure was very low. That
21 could have been indicative of shock.

22 Q. In one of the reports, as far as there
23 being no other evidence -- as the Solicitor
24 indicate, no other evidence of alcohol, do you
25 have ---

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1 THE COURT: Hold on. Approach, Mr.
2 Shelton.

3 (OFF RECORD SIDEBAR)

4 MR. SHELTON: I have no further
5 questions.

6 THE COURT: Thank you.

7 SOLICITOR BIAGANTE: Your Honor,
8 can she be released from her subpoena?

9 THE COURT: Any objection?

10 MR. SHELTON: No, sir.

11 THE COURT: Thank you. You are
12 free to leave.

13 THE WITNESS: Thank you.

14 (WITNESS EXCUSED)

15 THE COURT: Any additional
16 witnesses?

17 SOLICITOR BIAGANTE: Your Honor,
18 could I just check with Ms. Williams?

19 THE COURT: Sure. Absolutely.
20 Take your time, Solicitor. Take your time.

21 SOLICITOR BIAGANTE: Your Honor, at
22 this time the State would rest.

23 THE COURT: Very well. Ladies and
24 Gentlemen, there are some matters of law that
25 I must now take up out of your presence. I'm

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1 going to ask that you go to your jury room,
2 but do not begin your deliberations, and
3 certainly do not discuss this case among
4 yourselves. We'll be with you as quickly as
5 we can. Thank you.

6 (JURY OUT @ 10:04 A.M.)

7 THE COURT: Any motions from the
8 State, Ms. Biagante.

9 SOLICITOR BIAGANTE: No motions
10 from the State.

11 THE COURT: I'll be happy to hear
12 from you, Mr. Shelton.

13 MR. SHELTON: Thank you, Your Honor.

14 At this time I move for a motion for a
15 directed verdict. I don't believe the
16 elements of every charge have been met.

17 THE COURT: I thought and have been
18 thinking about this. But as I recall the
19 testimony of the victim was he said he had
20 money. "This is all I've got." There is
21 testimony that he didn't have any money when
22 they found him. He clearly said, "I have
23 money." I think the reasonable inference to
24 be drawn from that it was taken, because he
25 further said, "Give it up. Give me that."

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1 There's testimony of that. Of course, if the
2 jury believes that -- so I think all of the
3 elements of the armed robbery have been met.

4 Clearly, the firearm is -- there's
5 several witnesses who testified about the
6 presence of the firearm. So that element is
7 established. The only concern I had was of
8 taking his money. There wasn't any money
9 found at the scene, and I understand that.
10 And the money that was found in his possession
11 was returned to him, which certainly the
12 inference to be drawn is that it was his
13 money. I guess a cleaner thing would have
14 been to hold that until this matter has been
15 resolved, but that wasn't done.

16 But given that, because of the fact
17 that the victim didn't have any, then I think
18 it's been met.

19 Obviously, the possession of crack
20 cocaine, the jury believed that, that's been
21 met clearly.

22 Assault and battery with intent to
23 kill, you know, I hope maybe somebody someday
24 will -- and I think both sides ought to do it.
25 I think we need to do away with it and have it

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1 -- make it first and second degree. Because
2 this business of assault and battery with
3 intent to kill, and the element is you don't
4 have to prove intent to kill, it just doesn't
5 make any sense. You have to prove malice, and
6 that's all that's necessary. The degree of
7 injury is really nothing more than indicia of
8 -- goes to the gravity of it. But it really
9 is not -- doesn't have to be life-threatening.
10 As I read the law, it doesn't say that. It
11 just says it has to be serious bodily harm.

12 I stopped you, Ms. Biagante -- I
13 didn't mean to interrupt you, but I heard
14 something years ago and I thought that's good.
15 The person asked a question, and the person
16 that was being interviewed said, "I'm sorry, I
17 think you'd have to have a Ph.D. in the
18 obvious to answer that question." And I
19 thought, you know, there's so many things that
20 we ask -- and I did it too -- such as you
21 weren't there, you don't know what happened.
22 Of course, if you weren't there, the follow up
23 question is kind of obvious. No, you don't
24 know what happened.

25 But be that as it may, clearly, I

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1 think the assault and battery with intent to
2 kill is there. Obviously, because of the
3 altercation, the testimony of that, I don't
4 know what you'all are going to ask. I put it
5 in as a lesser-included offense. Because of
6 that, I think it's there. Based on the
7 evidence it could be just a fight between two
8 people. And the use of a weapon could be an
9 aggravating circumstance and there not be any
10 malice involved.

11 Given that, I think the elements are
12 certainly present for all of the crimes. So,
13 thank you.

14 When we've talked you've indicate
15 throughout that you did not anticipate calling
16 witnesses. Have you talked with your client
17 about his right to testify or not to testify?

18 MR. SHELTON: I have.

19 THE COURT: Has he made a decision?

20 MR. SHELTON: He has.

21 THE COURT: And his decision is --

22 MR. SHELTON: Not to testify.

23 THE COURT: Mr. McKelvey -- and you
24 may remain seated, sir. That'll be fine.
25 You've had a chance to discuss with your

1 lawyers your right to testify or not to
2 testify. Is that true, sir?

3 DEFENDANT: Yes, sir.

4 THE COURT: And today are you under
5 the influence of any alcohol or any type of
6 medication?

7 DEFENDANT: No, sir.

8 THE COURT: Have you had sufficient
9 time to think about what you talked with your
10 lawyers about?

11 DEFENDANT: Yes, sir.

12 THE COURT: And you've made a
13 decision for yourself. If that correct?

14 MR. MCKELVEY: Yes, sir.

15 THE COURT: And that decision is
16 not to testify?

17 MR. MCKELVEY: Yes, sir.

18 THE COURT: Are you comfortable
19 with that decision, sir?

20 MR. MCKELVEY: Yes, sir.

21 THE COURT: And you've certainly
22 heard me tell the jury when we started this
23 case, in fact, when we qualified them, that
24 persons accused of criminal offenses, as you
25 are today, don't have to prove or disprove a

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1 thing. And you don't have to present any
2 evidence. And that would be your right to do
3 that, if you chose to do that, and they can't
4 consider that in any fashion. I'll certainly
5 instruct the jury again that they cannot draw
6 any inference from your failure to testify at
7 all. But it is your right to testify, if you
8 wanted to. You understand that.

9 DEFENDANT: Yes, sir.

10 THE COURT: But you, after con-
11 sidering everything, have made that decision
12 for yourself?

13 DEFENDANT: Yes, sir.

14 THE COURT: Anybody threatened you
15 in any way or promised you anything to make
16 you come to this conclusion?

17 DEFENDANT: No, sir.

18 THE COURT: And you made this
19 decision on your own?

20 DEFENDANT: Yes, sir.

21 THE COURT: Are you comfortable and
22 satisfied with the manner in which your
23 attorneys have advised you concerning this
24 matter?

25 DEFENDANT: Yes, sir.

1 THE COURT: And the strategies
2 employed during the trial of this case?

3 DEFENDANT: Yes, sir.

4 THE COURT: You realize, sir, I
5 will be relying on your responses here this
6 morning.

7 DEFENDANT: Yes, sir.

8 THE COURT: And you want me to do
9 that, I assume?

10 DEFENDANT: Yes, sir.

11 THE COURT: If at any point between
12 now and the time when your lawyer, Mr.
13 Shelton, says the defense rests or does not
14 wish to present any testimony, you change your
15 mind, if you will let him know or let your
16 lawyers know, I'll excuse the jury and we'll
17 have further discussions.

18 But if I don't hear from you, I'm
19 going to assume that you're still comfortable
20 with your decision that it is your desire not
21 to testify in this matter. Is that fair?

22 DEFENDANT: Yes, sir.

23 THE COURT: Thank you. At this
24 point, Mr. Shelton, you do not intend to call
25 any additional witnesses. You've had a chance

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1 to cross examine just everybody that was
2 there.

3 MR. SHELTON: Yes, Your Honor. At
4 this point the defense would rest.

5 THE COURT: Okay. Your lawyer has
6 explained that as well, because that gives you
7 the right to have the closing argument. You
8 understand that, and your lawyers have talked
9 with you about that as well.

10 DEFENDANT: Yes, sir.

11 THE COURT: So when we bring the
12 jury back, I'll probably bring them back -- do
13 you'all want to take a moment now and we can
14 put on the record -- I assume you're going to
15 rest. We can hear your motions, or would
16 you'all prefer to bring them back and then
17 send them back? I would rather just go ahead
18 with arguments. Is that agreeable with
19 everyone?

20 SOLICITOR BIAGANTE: Yes, sir.

21 THE COURT: So if you do rest, you
22 now would renew your motion that you'd
23 previously made at the close of the State's
24 case.

25 MR. SHELTON: Yes, Your Honor. I

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1 would.

2 THE COURT: Very well. I think
3 I've stated fully my position on that, and I
4 would reiterate that position. I think the
5 evidence clearly would support a verdict on
6 all of the indicted offenses, and therefore I
7 would respectfully deny your Motion.

8 Do y'all need a few moments to collect your
9 thoughts?

10 SOLICITOR BIAGANTE: Just briefly.

11 MR. SHELTON: Your Honor, we need one
12 minute to discuss another possible request for
13 a jury instruction.

14 THE COURT: All right. That'd be
15 fine. Yes, sir.

16 MR. SHELTON: We were going to ask
17 for a charge or attempted armed robbery also,
18 so the jury could consider that.

19 THE COURT: I thought about that.
20 But I wonder is that a lesser-included
21 offense?

22 MR. SHELTON: I think they thought
23 that testimony that was given and the evidence
24 that's there, that the possibility that no
25 money was taken, but he threatened the victim,

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1 I think those elements could be met.

2 THE COURT: What's your position,
3 Solicitor?

4 SOLICITOR BIAGANTE: Your Honor, we
5 would disagree with that charge being given.
6 I don't think there's any evidence that
7 suggests it was an attempt. All the evidence
8 that's presented is that he said, "Give it up.
9 Give it up. Give it up." The victim took the
10 money out of the hand and snatched it away
11 from him. When he gets to the hospital he has
12 no money in his possession. And Lieutenant
13 Roach testified that even though there's no
14 documentation that the money was in the
15 defendant's hands. So there's no testimony to
16 say that he didn't successfully complete that
17 armed robbery.

18 THE COURT: The only thing that's
19 there is that there was no money recovered
20 from the scene per se, which obviously -- the
21 problem I have with all of these is there
22 would always be -- in theory, I guess, there
23 would always be an attempt for committing a
24 crime if the witness -- they believe that all
25 the elements weren't met.

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1 But in this case, they have to
2 disbelieve -- and they certainly have the
3 right to disbelieve the witness in the
4 entirety. But without the money being taken,
5 there really isn't -- I don't know how you'd
6 prove that that's what he wanted to do in the
7 first place. Because either he took the money
8 or he just hit him, which would be the offense
9 of assault and battery with intent to kill. I
10 mean, clearly striking him -- we've got two
11 situations here. We've got the shooting.
12 We've got the firing. But we've got also the
13 person saying I was hit in the head with a
14 gun. I mean, that could be considered assault
15 and battery with intent to kill in itself.

16 So I hear you. Probably out of an
17 abundance of caution from an appeal
18 standpoint, it'd be probably a great idea and
19 a safe idea to include it. But I just don't
20 think it's there.

21 There's no question -- at least the
22 evidence right now -- no question the victim
23 testified that he had money. There's no
24 question at least that he didn't have --
25 there's question did he take the money from

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1 him, and there's testimony that the defendant
2 had money. Obviously, it could have been his.
3 There's no question about that. But if that's
4 the case, then there was not an armed robbery.
5 There may have been -- if I didn't have the
6 assault and battery with intent to kill crime,
7 I think it would be clearer. But because
8 there's an overlap there, I just don't have
9 enough to separate it.

10 But, listen, when I was making the
11 coffee this morning, that was the thought that
12 I was saying, "Well, suppose they don't
13 believe the money was gone." But that really
14 -- truly this witness, the last witness helped
15 that one, as far as I'm concerned. Because
16 there's no logical explanation other than --
17 the only reasonable inference, I think, shows
18 that the crime was consummated. So he either
19 did it or he didn't do it. So that's my
20 rationale. Thank you.

21 MR. SHELTON: I did have one
22 clarification as far as the possession of a
23 firearm during the commission of a violent
24 crime.

25 THE COURT: Yes.

1 MR. SHELTON: He was only indicted
2 based on the assault and battery with intent
3 to kill.

4 THE COURT: Well, what's your
5 position on that, Solicitor?

6 SOLICITOR BIAGANTE: I mean, he's
7 correct that he was only indicted for assault
8 and battery with intent to kill. But the
9 indictment -- he's obviously charged with
10 armed robbery. To be frank, I wasn't even
11 going to argue the armed robbery. I mean, I'm
12 arguing the armed robbery, but I'm not arguing
13 as an element of the possession --

14 THE COURT: I was going to tell the
15 jury if they don't return a verdict of assault
16 and battery with intent to kill or armed
17 robbery, they can't return a verdict on the
18 crime of possession based on your position.
19 And I agree with you. You could have just
20 said "committed a violent crime," and that
21 would have been all that was necessary to put
22 him on notice. But because you said
23 committing assault and battery, because the
24 indictment was specific, I would agree that's
25 what they are accused of. So I'm going to

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1 tell them if you don't return a verdict of
2 guilty on assault and battery with intent to
3 kill, then you can't return a verdict of
4 guilty on the possession of a gun.

5 SOLICITOR BIAGANTE: Your Honor,
6 before you bring the jury in can you just --
7 I'm concerned about the ABHAN as a lesser-
8 included offense.

9 THE COURT: I appreciate that. I'd
10 be happy to hear from you. I'm not concerned.
11 If I were in your boat I'd be concerned if a
12 judge didn't charge it. You know why?
13 Because under the old law -- and I know we've
14 departed from it. I think it was *Pilgrim*.
15 But after that case, under the old law, what
16 you charged was -- assault and battery with
17 intent to kill, the only element is it would
18 be murder if he died. And we'd say basically
19 the same logic that it would be basically
20 manslaughter if he died. And it really is,
21 from understand it, it truly does explain.
22 It's a crime that doesn't involve malice.
23 And if somebody gets involved in a fight
24 there's not malice. We say that. I under-
25 stand there's sufficient provocation and

1 reasonableness and all that. But that's what
2 a jury has to determine.

3 I appreciate it. In this case, if we
4 had this set of facts, that he walked out,
5 there was no altercation, anything other than
6 he shot him, I'd agree with you. It's the
7 altercation. It's the -- and there's
8 testimony that this was -- this had been
9 brewing all evening, really.

10 So I appreciate your position. I'm
11 not uncomfortable with it, and I've refused to
12 charge it a lot of times, probably wrongly so.
13 But this is one. I think it's there. No
14 question about that. So thank you.

15 SOLICITOR BIAGANTE: But I can
16 still, Your Honor, argue the malice and the
17 deadly weapon.

18 THE COURT: No, you can't do that.
19 I'm not going to let you argue that. Because
20 that would be just unfair. Of course, you
21 can.

22 SOLICITOR BIAGANTE: Thank you,
23 Your Honor.

24 THE COURT: You can argue anything
25 that you want to argue that's consistent with

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1 the evidence and the law. And there's no
2 question about it.

3 You shoot somebody in the head, you
4 know, they can talk about lucky all they want.
5 But if you shoot somebody in the head, that's
6 a pretty good indication you wanted to kill
7 somebody, to me. That's like you asking her
8 well, yeah, you think. You get a skull
9 fracture getting shot with a .380? That man
10 -- he commented about it, and I hope he is a
11 religious person. Because if he's not, he
12 ought to be. Because this is one that he can
13 say, "Thank you, Lord. I'm here." And that's
14 really what was involved here.

15 I don't need to be pontificating that
16 from the State's position. I'm not imposing
17 that, but I believe that strongly. And I
18 think you do too.

19 Okay, are we ready to go?

20 SOLICITOR BIAGANTE: Yes, sir.

21 MR. SHELTON: I was discussing
22 the charge with him. Can I have a couple of
23 minutes?

24 THE COURT: Certainly.

25 (RECESS)

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1 (DEFENDANT PRESENT)

2 THE COURT: Defense ready?

3 MR. SHELTON: Yes, sir.

4 THE COURT: Ms. Biagante, is the
5 State ready?

6 SOLICITOR BIAGANTE: Yes, sir.

7 THE COURT: Bring in the jury.

8 (JURY IN)

9 THE COURT: Thank you, Ladies and
10 Gentlemen. Mr. Shelton, does the witness wish
11 to present any evidence?

12 MR. SHELTON: No, Your Honor.

13 THE COURT: Very well, thank you.

14 And thank you, Ladies and Gentlemen. We --
15 the parties and I have had a discussion and
16 preserved certain Motions for the record while
17 you were out, to facilitate you not having to
18 go out and back in at this time. So we are
19 now ready to move into the next phase of the
20 trial, which is when the attorneys will be
21 able to make their closing arguments to you.
22 Please keep in mind that while the closing
23 arguments are not evidence that they will be
24 extremely helpful to them and you should give
25 them your full attention. Thank you.

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1 Solicitor?

2 SOLICITOR BIAGANTE: May it please the
3 court?

4 THE COURT: Yes, ma'am.

5 SOLICITOR BIAGANTE: From the
6 evidence that you're going to have with you
7 back in the jury room and from the testimony
8 presented from everyone, lay witnesses,
9 officers, agents from SLED, medical personnel
10 you've heard from, they are all common
11 threads. And that's what I'm asking you to
12 do, is use your common sense and look for the
13 common thread throughout this morning's
14 testimony.

15 What better evidence is there than
16 listening to the victim himself saying, "He's
17 the one who shot me and took my money." What
18 better evidence than that? And you've got to
19 think what motivation does Mr. Phoenix have to
20 lie? You heard from officers -- and I'll go
21 through it again in a little bit. I'll go
22 through everyone's testimony and hit the high
23 notes. But you heard from the EMS driver that
24 when he was taken to the landing zone it
25 wasn't but less than fifteen minutes. And

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1 he's calling his name as the person who shot
2 him. So what motivation does he have to lie
3 about that? And for you believe that he did
4 not shoot him, there has to be some
5 conspiracy. So in 15 minutes, you know, the
6 victim's calling the defendant's name.

7 The police are somehow claiming
8 gunshot residue on the defendant's hands and
9 finding crack on him. It's just ridiculous.
10 The gunshot residue kit -- you don't believe
11 the victim? How powerful is that? And you're
12 going to have the kits back there with you.
13 And you're going to see on the kit the time it
14 was taken. And I think Mr. Dash's kit was
15 taken about 3:00 a.m., and this happened, if
16 you remember, about 12:56. So a couple of
17 hours later his kit's taken. He has no GSR,
18 none on the back of his hands or front of his
19 hands. None.

20 And then the defendant's kit is taken
21 at 3:51, so roughly three hours. So it had an
22 even longer amount of time to dissipate from
23 his hands. What did it say? He had it on the
24 back of his hand, all three elements of
25 gunshot residue, lead, antimony and there's

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1 one other one I can't remember. All three of
2 those elements on the back of his hand. And
3 she said it was also on the front of his right
4 palm, but she had to testify that it was
5 inconclusive. She said she only found one
6 particle, as opposed to the two she needed.
7 He's rubbing his hands. He's wiping his
8 hands. He's already at the jail. It is very
9 easy for GSR to come off. It doesn't make any
10 sense. Use your common sense.

11 How did that GSR get there? He shot
12 the victim. That's how he gets GSR on his
13 hands. You know, the statement at the jail
14 when they go to do the gunshot residue test.
15 Two officers tell you something to the effect
16 of, "Oh, I shot somebody. I remember."

17 I don't know if Mr. Shelton -- I'm
18 not going to have another chance to get up
19 here and address you. He's going to have the
20 last closing argument, which is the law here
21 in South Carolina. But, you know, I don't
22 know if Mr. Shelton's going to say either the
23 police are lying about that -- some on.
24 They're going to put their careers on the line
25 for Mr. McKelvey? Or he's going to say, I

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1 guess, he was joking about it. Is that a time
2 and place to joke? No. I hope not.

3 And even if you didn't believe any of
4 that stuff, the victim, the gunshot residue
5 kit, you know, you heard from two witnesses in
6 that bar that night who were so powerful. Ms.
7 Vance was the first lady you saw up here. And
8 I don't know if you saw her, but she clearly
9 did not want to be here. Clearly. And she's
10 stuck between a rock and a hard place because
11 the State subpoenaed her to testify. She puts
12 her hand on the Bible and she swears to tell
13 the truth. It was obvious she didn't want to
14 be here. She said, "I don't want to be here.
15 I don't want to do this." She said, "I didn't
16 want to come back after lunch."

17 You know, this is a really simple
18 case before you so I'm not going to go over
19 every single detail. But use your common
20 sense. Who has the greatest motivation to
21 lie?

22 You know, Mr. Shelton, in his opening
23 said inconsistencies are what you should focus
24 on. There is nothing that is inconsistent
25 except a few minor details. For example, the

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1 number of bullets that was in the gun. One
2 report said it had three bullets instead of
3 five. That's a scrivener's error. The man --
4 the captain who wrote that down didn't collect
5 the evidence. SLED got the evidence. No big
6 deal. So what? Are you going to write him
7 off because there were five bullets in the gun
8 instead of three?

9 Corporal Edwards, in his report, he
10 had glovebox as opposed to that the gun was
11 found under the seat. All three officers
12 testified it was found under the seat. That's
13 where we took the picture of it. Even if it
14 was found in the glovebox it was on the
15 passenger's side, nowhere near Mr. Dash.

16 Mr. Shelton might also tell you that
17 some people heard one gunshot. The victim
18 tells you two. People hear and remember
19 things differently, and that's just human
20 nature. That's just the way it is. Ms.
21 Vance, who is our most telling witness of all,
22 the one who didn't want to be here. And what
23 does she testify? "I didn't hear any
24 gunshots." You know, they're in a club. It's
25 loud. People don't want to hear. They don't

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1 want to know what's about to happen outside,
2 because they know something's about to happen.
3 Dread or Droop has the gun. You know, Ms.
4 Baskin says she heard one shot. So what?
5 People hear things and remember things
6 differently.

7 You know, those things are not
8 perfect. If they were perfect, that would
9 make me a little more suspicious. But it's
10 not. People remember things differently.
11 Everything you heard was corroborated by
12 independent testimony and independent
13 evidence. The GSR kit, the medical testimony,
14 the lay witnesses who have nothing -- 'no dog
15 in this fight'. Those two ladies you heard,
16 Ms. Baskins and the second lady who testified,
17 she's going to Kuwait. What does she care
18 about this? Who does she have to reward or to
19 hurt? She doesn't have any motivation to lie.
20 She came in here and told the truth about what
21 happened, who had the gun that night.

22 You know, the victim, let's start
23 with him, the first person who testified. You
24 know, what he showed you was just raw emotion.
25 You know, yes, he was animated. He was

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1 animated because he got shot by that defendant
2 right there. Angry, mad, yes. Because that's
3 what happened to him that night. You know,
4 don't fault him for that. He tells you in the
5 beginning part of his testimony, he's friends
6 with the defendant. So why would he call his
7 name, but for the fact that it weren't true?
8 He never said he was an enemy. I always had a
9 problem with him. He never said anything like
10 that.

11 Mr. Shelton asked about the relation-
12 ship that Mr. Phoenix had with Askari Dash.
13 His niece is married to Askari's brother. So
14 what? So the inference is, I guess from Mr.
15 Shelton, that Mr. Dash is the one who shot Mr.
16 Phoenix. And because they're related, he's
17 just not going -- he's just going to pin it on
18 him. Come on.

19 You know, he tells you he bought beer
20 for Askari and Jermaine that night. If he had
21 such a problem with the defendant why would he
22 do that? It's kind of funny because it's a
23 nice thought, buying a beer for two guys. Why
24 shouldn't he buy him a beer?

25 You know, he told you he has some

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1 memory problems. He can't remember how he got
2 outside. Yeah, he's shot in the head. You
3 know, but most importantly and the most
4 telling evidence was when Ms. Williams asked
5 Ms. Vance did he go out willingly. She did
6 not want to answer that. I think she even
7 said -- she did not want to say that he was
8 going outside.

9 Mr. Phoenix tells you how he gets
10 outside. He taps him on the shoulder and he's
11 pushing, pushing him around. He's forty-nine
12 years old, obviously a lot older than the
13 defendant. He said, "Droop, man, what's your
14 problem? What's your problem?" And what does
15 he do? He gets hit in the back of the head,
16 whether it was with the defendant's fist,
17 possibly the pistol -- maybe it's a pistol
18 whipping. "Droop, man, what's your problem?"
19 And what does he say? "Give it up. Give it
20 up." He knew he had money on him because he
21 bought him a beer. "Give it up." And what
22 does Mr. Phoenix say? He pulls his money out
23 and said, "Man, this ain't nothing but a
24 couple of dollars." The defendant still says,
25 "Give it up. The next time I'm not going to

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1 miss." Next scene you know, he's shot in the
2 head. He's laying there bleeding to death
3 while he's running around to the car trying to
4 run.

5 How lucky is he? Truly. And he said
6 it on the stand, but for the grace of God,
7 he's here. And that is the absolute truth.
8 You heard the EMS lady testimony that over 90
9 percent of gunshot wounds to the head are
10 fatal. And that's why she thought it was so
11 important to call the police, because this
12 might be the only opportunity he had to say
13 who killed him. What motivation does she have
14 to lie about that?

15 Being shot in the head -- it's a
16 pretty good indication that he wanted to kill
17 somebody that night. He didn't shoot him in
18 the kneecap. He didn't shoot him in the
19 pelvis. He shot him in his head to kill him.

20 He doesn't ever waiver. Never once
21 does he waiver. You know, the police are
22 asking him his name. He gets out his name,
23 and then he goes out. In and out of
24 consciousness. As soon as he wakes up he
25 calls the defendant's name. Lieutenant Roach

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1 goes to see him the next day in ICU. Calls
2 the name again. There's a written statement a
3 few days later. Calls his name again. You
4 hear from him yesterday. He calls his name
5 again.

6 Corporal Edwards, who's sitting here
7 in the courtroom, literally, thank God, is
8 seconds away from the scene. He's just at the
9 right place at the right time. He sees the
10 defendant and actually getting in the car. He
11 sees him sitting in the car getting ready to
12 leave. You know, the gun's found in the
13 passenger's seat. You've heard no testimony
14 that said Mr. Dash was anywhere near that gun.
15 None. It was under his seat.

16 He told you he sees blood on the
17 defendant's hand. That makes sense. Because
18 what does SLED tell you? There's blood on the
19 gun. Agent Black tells you that -- the latent
20 print examiner, he swabbed the gun and does a
21 presumptive test for blood on the gun. That
22 makes sense, because he's holding the gun,
23 shooting it. And he's getting it on his hands
24 and on the trigger guard.

25 Why would Corporal Edwards say that?

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1 If he were going to lie and this were going to
2 be a big police conspiracy, he could have said
3 I saw him shoot Mr. Phoenix. And, guess what
4 -- none of us would be the wiser. None of us
5 would know. But he didn't. A thirty-year law
6 enforcement veteran came in here and told the
7 truth.

8 Mr. Shelton tired to harp on -- he asked
9 some of the officers so they swab and do some
10 DNA testing on the blood. Now, don't fault
11 the victim for that. That's the State's
12 decision. We didn't have it tested. You know
13 why? Who's the only one bleeding that night?
14 The victim. You're going to find the victim's
15 blood on that gun. That's why it was never
16 compared to the victim's. No testimony it was
17 Mr. Dash's. No testimony Mr. Avery McGee was
18 bleeding. No testimony the defendant was
19 bleeding. We're going to find his blood on
20 the gun. That's why it wasn't tested. What
21 is that going to prove?

22 You know, Mr. Shelton -- getting to
23 the latent prints -- remember when Mr. Black
24 got up and said basically, the latent print
25 examiner, you've had a long day and you came

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1 all this way to tell us basically nothing.
2 Yes. Sometimes, the State, we have to do
3 that. Because you know why? If we didn't do
4 it, he's going to get up here and say, "Why
5 didn't you print the gun? Were there any
6 fingerprints on the gun?" That's why we had
7 to put him up here. So they tried to get
8 prints off the gun, but there wasn't enough
9 printable ridge material there. The same goes
10 for the swab.

11 There's been inferences again from
12 the defense that it obviously wasn't Mr.
13 McKelvey who shot him. I don't think there's
14 any question that Mr. Phoenix got shot. But
15 his inference from his questions are that it
16 was Mr. McGee, the club owner, or maybe Mr.
17 Dash. And Mr. Shelton brought out that Mr.
18 McGee had some blood splatter on his shirt and
19 wasn't being very cooperative. Well, Corporal
20 Edwards told you why. He was cited and
21 arrested that night for operating a business
22 without a license. He's running an illegal
23 bar.

24 Now, what sense does it make for Mr.
25 McGee, who's running this illegal bar, to

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1 shoot the victim and bring attention to
2 himself while he's running an illegal bar?
3 That makes no sense.

4 Everyone talks about -- most of the
5 officers and lay witnesses I asked about
6 people's hair and how were their hairstyles.
7 The reason why I did that is Ms. Baskins said
8 it was dreads. She called them dreads, dread-
9 locks. He's the only one with that hairstyle.
10 Mr. Dash had a low-cut hair. Mr. McGee had
11 low-cut hair. It's Dread with the gun.

12 Officer Taylor, he's the officer who
13 found the gun under the seat. You know, when
14 he pulls up the first thing he tells you is
15 that the defendant is boisterous. He's acting
16 out. We even hear he kicked out the window of
17 a police car being transported to jail. So
18 Berkeley County has to transport him, the
19 Sheriff's Department, because they have bars
20 on their cars. They're not doing anything
21 wrong. If you haven't just shot somebody in
22 the head, why are you acting like that? What
23 do you have to hide? And the funny thing is
24 he tells -- Mr. McKelvey tells Officer Taylor,
25 yeah, I have some dope in my pocket. Okay.

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1 Mr. Shelton's asking Corporal Edwards
2 and Officer Winningham, the other officer who
3 testified, why they didn't find the dope, why
4 there wasn't a good enough search. Heck, his
5 own client even said that he had the dope in
6 his pocket, and they were just searching him
7 for weapons initially. They go to a call.
8 Shots are fired. They don't know who has the
9 gun. They don't know if multiple people have
10 guns. They don't know anything like that.
11 They're just trying to secure the scene, put
12 people in patrol cars for everyone's safety.
13 And then, lo, and behold, when they do a
14 search on him before they take him to jail,
15 there's dope in his pocket. That's a no
16 brainer. I'm not going to argue to you about
17 the dope part.

18 Again, Ms. Vance, she was the third
19 or fourth witness you heard from -- again,
20 just how real was that? How real was her
21 testimony that she obviously did not want to
22 be here? She told you she knows both Droop
23 and Be Nice. She knows them both. Didn't
24 have a problem with either one of them. So
25 why lie? Why lie? And it was like pulling

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1 teeth to get her to tell the truth, because
2 she didn't want to say it. It's a hard thing
3 to say.

4 Officer Winningham, again says the
5 defendant's loud and boisterous, and finds the
6 crack in his pocket. He goes to the jail with
7 Corporal Edwards. Again, he heard him make
8 the statement that "I shot somebody. Oh, I
9 remember." Why would he lie about that?

10 Sergeant Brad Norvell, he took some
11 photographs. Mr. Shelton might say, well, he
12 admitted taking more photographs -- Corporal
13 Edwards thought he took all of them but two.
14 So what? So what? They don't remember
15 whether they took three photographs or four
16 photographs. So what? We're going to let him
17 off because he took two more photographs than
18 he testified to?

19 The GSR kit, they're sealed. You
20 can't tamper with them. So for you to believe
21 that he is not guilty, you would have to
22 believe somehow that the police planted this
23 evidence on his hands. And remember what the
24 SLED agent testified, Ms. Simmons, who said
25 when an officer does the GSR kit, they can't

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1 -- it's tamper-proof. The officer -- there's
2 no way for the officer, if he had any GSR on
3 his hands, for it to get on the tape, because
4 it's double-sided tape, or however she
5 explained it. There's no way that it can be
6 tampered with.

7 Lieutenant Roach testified about the
8 money. We put him up. He transported a lot
9 of items to SLED. But we also put him up to
10 testify about the money in the armed robbery.
11 You have to keep in mind that the night that
12 this happened, when the victim's in and out of
13 consciousness, all the police know is he's
14 shot. They have no idea that he was robbed at
15 the time. So it's not until the next day when
16 Lieutenant Roach sees him in ICU that he tells
17 him, "He took money from me." He said, "Give
18 it up, and he snatched the money out of my
19 hand."

20 You know, and the lady who just
21 testified this morning, the nurse from ICU,
22 no money on him. No money whatsoever when he
23 came into the hospital. But when the
24 defendant's booked into jail, he has money.
25 And I'm sure Mr. Shelton's going to get up and

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1 argue and say, "Well, that's just his money he
2 had." Granted, he did have some money of his
3 own, because I think his testimony was it was
4 \$152.00. And the victim said it was only a
5 few. Now, if the victim's going to lie, why
6 wouldn't he say he took a couple of hundred
7 dollars from him? The fact is, he had no
8 money when he gets to the hospital. The
9 defendant has money when he's booked in jail.
10 And he's telling you he took money from him.

11 Korshenda Baskins, she's the young
12 lady who's going to Kuwait. She's telling you
13 that there's this altercation or argument.
14 It's not an altercation or argument. She
15 hears them getting louder and what does she
16 tell you? "The next thing I know, he takes
17 out a gun." Who takes out the gun? Dread.
18 She calls him Dread. Other people call him
19 Droop. Dread takes out the gun. And the
20 funny thing she talks about is when Mr. McGee
21 goes out there, the club owner -- because
22 everyone, both Ms. Baskins and Mr. Vance say
23 Avery, the club owner, is saying, "Get out.
24 I don't want this in my establishment. Take
25 it outside." Right? That's common sense.

1 So Avery tells them to go outside,
2 apparently goes out there to make sure they're
3 out. And what does Ms. Baskins tell you.
4 When Avery's coming back in the door,
5 literally walking through the door, that's
6 when she hears the shot, and that's when the
7 blood spatter happens. Which makes sense
8 because if he is in between the club and the
9 victim, he's in between them, and the victim's
10 getting shot by the defendant, the bullet hole
11 pierces his forehead and goes out the back,
12 blood spatters are going backwards. The blood
13 spatters are not going forward.

14 The Judge is going to tell you the
15 law in this case, and he's going to instruct
16 you about reasonable doubt. Reasonable doubt
17 is a standard. It does not mean that I have
18 to prove it beyond all doubt. That's
19 impossible. No prosecutor in the country has
20 to prove a case beyond all doubt. That's not
21 going to happen. If you are firmly convinced
22 -- firmly convinced -- then you must find him
23 guilty.

24 You know, the judge is going to
25 charge you assault and battery with intent to

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1 kill. What is assault and battery with intent
2 to kill? And as I told you earlier, you don't
3 need a specific intent to kill somebody. You
4 don't need to go out and say, "I'm going to
5 kill so-and-so." And the judge is going to
6 tell you about that. All we need is a general
7 intent to do great bodily injury with malice
8 aforethought.

9 What is malice? Malice is an ill
10 will, hatred, extreme indifference for human
11 life. Well, how do you know if someone's
12 acting maliciously? We tell that from the
13 circumstances and the surroundings that are
14 happening. Having a deadly weapon, having a
15 gun is an inference of malice. Shooting
16 someone in the head is an inference of malice.

17 You know, it's a hostility toward a
18 person without any justification to do so.
19 And the judge is going to tell you about how
20 malice can be inferred. Again, use your
21 common sense.

22 I leave you with this. If you truly
23 believe that he didn't do -- he didn't shoot
24 the victim in the head, he didn't rob the
25 victim, he didn't have crack, he didn't have

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1 the gun, then he doesn't need you to
2 compromise on his part.' Because you can find
3 him not guilty. But if you truly believe that
4 he did do these things, then he doesn't
5 deserve the fact that you compromise your
6 verdict.

7 So I'm asking you to find a guilty
8 verdict on all counts -- guilty of assault and
9 battery with intent to kill, guilty of
10 possession of a weapon during a violent crime,
11 guilty of armed robbery and guilty of
12 possessing cocaine base, also known as crack.
13 Thank you.

14 THE COURT: Thank you, Solicitor.
15 Mr. Shelton.

16 MR. SHELTON: May it please the
17 Court?

18 THE COURT: Yes, sir.

19 MR. SHELTON: Ladies and
20 Gentlemen of the jury, I told you at the
21 beginning that there were going to be a lot of
22 inferences and there was going to be a lot of
23 conflicting testimony. You heard the
24 testimony and you can go off your memory of
25 what you heard.

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1 But how did it start? Corporal
2 Edwards said he gets a call that they heard a
3 shot. One shot. He's near the scene. He
4 goes. He comes across not Mr. McKelvey
5 running away, but another person in a white
6 shirt running into the club and locking the
7 door. That person ran away from the scene
8 when he saw the police, not Mr. McKelvey. He
9 sat there in the car. Mr. Dash was going
10 toward the driver's side, and he was stopped.

11 You have Officer Taylor that came on
12 the scene. And shortly thereafter he arrived
13 with Winningham. What did he say concerning
14 Mr. McKelvey. He was started to be
15 disorderly. When he gets more extremely
16 disorderly is when Taylor came and started
17 placing him under arrest. Being arrested for
18 something he didn't do.

19 Edwards said he found blood on his
20 hands and saw blood on his hands. They took
21 swabs of Mr. Phoenix. Compare that. Where is
22 it? He was placed under arrest and had his
23 hands behind his back. Take the swab. Take
24 that DNA.

25 Corporal Edwards, he didn't know how

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1 many pictures he took. He didn't remember.
2 But he remembered finding the lead -- the
3 piece that allegedly came out of the victim's
4 head. Blood? Where's the blood on that?
5 It's going through someone's head, according
6 to them. Where's the blood? He put it in his
7 pocket. Where's the blood? Where's the
8 evidence? There's no evidence.

9 Blood on the ground -- two pools of
10 blood. You'll get the pictures. You'll see
11 there's two pools of blood. Mr. Phoenix is
12 bleeding. That's going to be some of his
13 blood. But who else's blood is there? Ms.
14 Baskins said four or five people left the
15 club. Where are those people? Ms. Baskins
16 also Mr. McGee was coming into the club at the
17 time that the shots were fired. But Edwards
18 did not get to the club until after the shots
19 were fired, and he saw Mr. McGee going into
20 the club and locking the door.

21 What was going on when they were
22 locking the door? They heard music. They
23 heard people talking. Where's Avery McGee?
24 As some of the witnesses testified, they were
25 under subpoena. They didn't want to be here.

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1 Where's Avery McGee? Where's Askari Dash?
2 Not here. Could they tell us what happened
3 out there? They're scared. Scared of what's
4 going to be said.

5 Blood found on the gun. SLED agent
6 testified he doesn't know what it is. It
7 could be animal blood. It could be any type
8 of blood. It tested positive for blood. When
9 did it get there? How long had it been there?
10 Where's the evidence? Where's the evidence
11 that that blood was Mr. Phoenix's? That would
12 help tie some of this together. Where's the
13 evidence on his right palm that that is Mr.
14 Phoenix's? That would help tie this somewhat
15 together. They have the burden. The State
16 told you they chose not to do that. They have
17 the burden to prove this.

18 Corporal Edwards, he testified that
19 he wrote his report before he talked to Mr.
20 Phoenix. He put in his report the gun was
21 found in the glovebox. Now it's found under
22 the passenger's seat of the car and pulled out
23 before pictures are taken. No pictures taken
24 of that bullet found on the ground either.
25 But they had enough time to take pictures of

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1 the victim before EMS comes up, of Mr. Phoenix
2 before EMS comes up.

3 Taylor gets there. He's able to
4 detain Mr. McKelvey who's, according to him,
5 being disorderly. He's then able to find the
6 gun. And you'll get some of this evidence
7 property -- recovery by Edwards with chain of
8 custody from Taylor -- of the gun. He's able
9 to place that into the chain of custody and
10 take possession of the gun. Finds the gun.
11 Gives it to Edwards. Talks to Askari Dash
12 before that. Fifteen minutes -- fifteen
13 minutes -- he goes later to the hospital. EMS
14 driver decided not to say that he had alcohol,
15 that he consumed alcohol. But what does the
16 report say? He vomited alcohol.

17 Mr. Phoenix said he drank some beers
18 before he came. He drank some beer at the
19 club. But he doesn't really go to that club.
20 You're going to get pictures of the club.
21 There's some pictures of where the alcohol's
22 stored, where the food is. He ordered a
23 shrimp dish because he likes it. Didn't go
24 to that club before, but he likes the shrimp
25 there. Didn't have any interaction with these

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1 But I asked him if he remembered giving
2 statements. He didn't remember the day after
3 giving a statement to Lieutenant Roach. I
4 asked Lieutenant Roach did you record that
5 statement? He had recording capabilities.
6 He didn't.

7 The Judge is going to give you the
8 law. He's going to be a lot more articulate
9 than I am. Malice aforethought. This was an
10 altercation. This was a fight.

11 Armed robbery. There's the element
12 that he has to take the goods from that person
13 in their presence. You have to take the goods
14 from the person. There's no evidence. No
15 evidence.

16 The possession of crack cocaine --
17 Edwards patted him down. Didn't find any
18 weapons on him. Taylor, who in the 15
19 minutes, was able to do all that stuff and
20 then go to the hospital, he still didn't put
21 it in his report, said Mr. McKelvey said he
22 had dope on him. He's the person that said
23 he's very -- extremely disorderly. And he
24 stops and says, "I have dope in my pocket."

25 Think about what's not there. Two

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1 young guys. Didn't have any interaction with
2 these young guys, but he buys them a beer. He
3 knows their family. No interaction?

4 The argument escalates. It gets
5 loud. Mr. McGee throws everyone out that's
6 arguing, not just according to what the
7 inference is that it was just Mr. McKelvey
8 that was doing this arguing. It was just a
9 one-sided argument. Why did they throw
10 everybody out?

11 And you'll get pictures. It's a
12 little hard to tell by how dark it is in
13 there. And you can make a decision based on
14 what witnesses heard, saw. One gunshot. Mr.
15 Phoenix said there's two. Gunshots are
16 distinct. The police officer heard it from a
17 45-degree angle, from back behind him. He
18 knew it was over here. It's distinct. They
19 didn't hear two. They heard one.

20 Mr. Phoenix says that he was standing
21 up and why -- it's nothing. It's nothing.
22 Only a couple of dollars. Only a couple of
23 dollars. What did Roach testify to? A
24 hundred and sixty-two dollars on a person.
25 Why would he want to take seventeen dollars?

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1 Why would he want to take seventeen dollars if
2 he had a hundred and sixty-two? And Moncks
3 Corner made the decision -- Moncks Corner
4 Police Department made the decision to give
5 that back to him. It would be great if we had
6 some evidence right here to show seventeen,
7 eighteen one-dollar bills. That's distinct.
8 We don't have it. No evidence. No evidence.

9 No DNA. They had the ability to do
10 it. The decided not to. Bullets parts --
11 picked up the lead piece. No evidence. They
12 had a bunch of Berkeley County Sheriff's
13 Department out there. They had a bunch of
14 Moncks Corner Police Department out there.
15 They had Norville that came in, and he
16 testified about everybody training. We have
17 Lieutenant Roach out there. Where's the
18 cartridge that came out of the gun? The SLED
19 expert came up here and testified that this
20 particular gun shoots out a cartridge, shoots
21 out the fired one. Where is that? Where is
22 that? It's not here.

23 They talked about GSR. They got this
24 GSR from Askari Dash. Why was GSR taken from
25 Askari Dash? GSR was taken from Mr. McKelvey,

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1 taken at the detention center. How easy is it
2 from GSR to get taken off. The expert talked
3 about that. After six hours it comes off.
4 It's easy to take it off your hands. They
5 found some. They found some on his hand. But
6 they didn't find blood. They didn't swab that
7 for blood. You didn't hear him testify about
8 taking blood when he was over here at the
9 detention center. But GSR is easy to come off
10 the hands, and they found that. So what was
11 the explanation? Well, there's a gunshot.
12 The SLED expert could not testify that he shot
13 the gun. Could be in close proximity to a
14 gunshot going off. Mr. McKelvey was there.
15 Everybody testified he was there. Mr. Phoenix
16 -- there was a gunshot, a puncture wound. A
17 puncture wound from the front and the back.
18 No penetration of the skull. No blood on the
19 lead that was found, was there? Gunshot
20 wound? Hospital reports rely on what people
21 tell them. They hear a gunshot. They see
22 somebody laying on the ground. No evidence of
23 GSR on the head. No evidence. No evidence.
24 Mr. Phoenix, he has memory problems.
25 He was pretty exact right there on the stand.

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1 things I want to ask you to do. One thing is
2 if you have any question, any question, then
3 it must be resolved in favor of the defendant.
4 Any questions must be resolved in favor of the
5 defendant. That's because this process is
6 great. It's tremendous. The State has the
7 burden. He's been accused of a crime. The
8 State has to prove each and every single
9 element beyond a reasonable doubt. Every
10 element has to be proven beyond a reasonable
11 doubt.

12 This process of twelve individuals -
13 beyond a reasonable doubt. The second thing
14 I'm going to ask is to hold the State to that
15 burden. They have to prove it. They have to
16 prove every element beyond a reasonable doubt.
17 That's what makes this system so great.
18 That's what makes this work. That's why
19 everybody wants to come and observe this
20 system, because it's so great because of that.
21 Mr. McKelvey does not have to prove anything.
22 They have to prove everything beyond a
23 reasonable doubt.

24 I'm confident that when you look at
25 everything and hold the State to that burden,

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1 you will find him not guilty on every single
2 charge, and I ask that you do.

3 THE COURT: Thank you, Mr. Shelton.
4 Ladies and Gentlemen, thank you very much. If
5 I could have your attention it now becomes my
6 responsibility as the trial judge, as I
7 mentioned when we started, my role has been to
8 preside over the trial and, of course, now to
9 give you the law which you have promised to
10 accept and apply fairly and impartially to the
11 facts that you will determine very shortly
12 when you begin your deliberations in this
13 case.

14 It is your exclusive duty to assess
15 and evaluate the evidence and determine the
16 effect, the value and the weight and the truth
17 of the evidence. Both the State and Mr.
18 McKelvey have a right to believe and expect
19 that you will do that when you do consider and
20 decide this case.

21 Please remember that this entire
22 process truly, from your perspective, is a
23 common sense exercise. You are expected to
24 apply your common sense, your sense of logic
25 and reason and your life's experiences fairly

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1 and impartially. And that also deals with the
2 law that I give to you. Please accept this
3 and understand this and apply your ordinary
4 understanding to terms, unless they're
5 specifically defined for you during my charge.

6 During this charge you may hear me
7 from time to time refer to Mr. McKelvey as the
8 defendant. That's really a term that we use
9 to designate the party against whom a claim is
10 made. That's the significance of that, and
11 it's just a way of identifying him. It means
12 nothing more than that. And you're not to
13 infer anything from that. But just understand
14 that if I use that term, I'm referring to Mr.
15 McKelvey.

16 As I told you when we started, Mr.
17 McKelvey has been accused by these four
18 documents that I hold in my hand. They're
19 called indictments, a legal term, that
20 basically says this brings the charges, this
21 brings the dispute, puts the parameters on the
22 dispute. He's accused of committing the
23 offense of armed robbery, possession of a
24 firearm during the commission of a violent
25 crime, possession of cocaine base or crack

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1 cocaine and assault and battery with intent to
2 kill. I'll define those charges, each of
3 them, for you very shortly, but will tell you
4 these indictments are not evidence. They will
5 not accompany you to your jury room. They're
6 not to be considered evidence in any fashion.

7 To these indictments Mr. McKelvey has
8 rendered a plea of not guilty to each of them.
9 And that, then, places the burden upon the
10 State to prove his guilt beyond a reasonable
11 doubt. As I stated to you when we started
12 this process, it is the law in this state and
13 as far as I know every state in the United
14 States that when persons are accused of
15 committing criminal offenses, they're never
16 required to come in and prove anything at all.
17 And they certainly do not have to prove their
18 innocence.

19 No, the law says that -- there's a
20 principle of law known as the presumption of
21 innocence. And it's an active presumption.
22 And by that I mean that each of you, under
23 your oath, has to actively presume that Mr.
24 McKelvey is innocent of each of these charges.
25 And that is maintained throughout the entire

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1 trial and at all times until and unless you,
2 in considering the evidence, decide otherwise.
3 And that means that you evaluate the evidence
4 and decide that the State has met its burden
5 of proof as to one or more of these offenses.
6 If they establish each element to the standard
7 beyond a reasonable doubt, which I will
8 explain to you in just a moment. Then you
9 have a duty to return a verdict of guilty as
10 to that particular charge.

11 If, on the other hand, after
12 considering all the evidence, you have a
13 reasonable doubt as to the guilt of this
14 defendant, then you must resolve that in his
15 favor and must return a verdict of not guilty.
16 That means the State has not met its burden of
17 proof in establishing each of those elements
18 beyond a reasonable doubt. Because, as I
19 stated, the presumption of innocence will
20 carry the day, insofar as that charge is
21 concerned.

22 Obviously, Ladies and Gentlemen,
23 then, the fact that persons who are accused of
24 committing criminal offenses do not present
25 evidence or do not testify in his or her own

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1 behalf, that can never be considered in
2 determining and resolving a particular case.
3 Because persons who are accused of committing
4 criminal offenses have the absolute right to
5 remain silent. And the assertion of that
6 right cannot be used against them in any
7 fashion by a jury considering that case.

8 Therefore, under your oath and
9 consistent with that law, you are to reach no
10 inference and to draw no conclusion whatsoever
11 from the fact that Mr. McKelvey did not
12 testify in this matter. His failure to
13 testify should not even be discussed by you in
14 the jury room. If it is and you do, then you
15 will have violated your oath. Because, as I
16 stated throughout, the burden rests upon the
17 State to prove his guilt beyond a reasonable
18 doubt.

19 What is a reasonable doubt? A
20 reasonable doubt is a doubt which would make
21 an honest, sincere, conscientious juror who's
22 searching for the truth in a case to hesitate
23 to act or take some action. Proof beyond a
24 reasonable doubt is proof that leaves you
25 firmly convinced of the defendant's guilt.

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1 Now, Ladies and Gentlemen, there are
2 very few things in this world that we know
3 with absolute certainty. And this law beyond
4 a reasonable doubt does not require the State
5 to prove the case to an absolute certainly.
6 It's not possible. They're not required to
7 submit proof that overcomes every possible
8 doubt. If, based on your consideration of the
9 evidence, you are firmly convinced of the
10 defendant's guilt as to one or more of these
11 crimes, they you must return a verdict of
12 guilty.

13 If, on the other hand, you think
14 there's a real possibility that he's not
15 guilty, then you must give him the benefit of
16 that doubt and resolve that doubt in his favor
17 and return a verdict of not guilty as to that
18 particular crime.

19 A reasonable doubt, Ladies and
20 Gentlemen, may arise from the evidence which
21 is in a case or from the lack or absence of
22 evidence in a case. And it's up to you to
23 decide whether or not a reasonable doubt
24 exists as to the guilt of Mr. McKelvey. I
25 charge you that he's entitled to every

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1 reasonable doubt arising in the whole case.
2 By that I mean simply this. If, upon any
3 issue of fact which would be essential to your
4 returning a verdict of guilty, that is a
5 conviction, you should have a reasonable doubt
6 as to how that issue should be resolved, it
7 would be your duty to resolve that in his
8 favor.

9 Now, the evidence which you are to
10 consider and to evaluate consists of the
11 testimony of the witnesses and the exhibits
12 that were introduced through their testimony.
13 Now, when we say evidence that was introduced
14 during their testimony, there are many times,
15 and I understand that, that a witness may be,
16 as there was in this proceeding -- they may be
17 asked to look at a document, to review a
18 document, but the document was marked for
19 identification only and was never introduced.
20 If you have a discussion in your jury room
21 about that document, you're entitled to and
22 should consider the testimony that was
23 rendered about the document. But the document
24 itself will not be submitted. Why? Because
25 it was not introduced into evidence.

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1 Anything that was introduced into
2 evidence, any documentation, will be submitted
3 to you and you may consider that document, of
4 course, and the testimony concerning that
5 document. But please understand that's what I
6 mean when we talk about being introduced into
7 evidence.

8 Now, of course, remember that my
9 remarks during this instruction, my remarks
10 during the trial of this case, any rulings
11 that I have made should never be considered
12 by you in any fashion as to how you are to
13 resolve a factual issue in this case. That's
14 your responsibility and yours alone. I have
15 nothing to do with that. So please remember
16 that.

17 Also, I would remind you that the
18 remarks of the attorneys, while extremely
19 important and very, very beneficial, they
20 should never be considered evidence either.
21 In fact, I would instruct you that if, during
22 this instruction, I give you a principle of
23 law which differs from what the attorneys may
24 have stated during either opening statements
25 or closing arguments, you're to disregard

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1 their remarks and take the instruction as I
2 give it to you. Because for purposes of this
3 proceeding, I'm the sole judge of the law as
4 it pertains to this proceeding today.

5 Likewise, if, in your discussion and
6 your collective recollection on what a witness
7 said or didn't say it differs from what the
8 attorneys suggests in their opening statements
9 or closing arguments, you're to disregard
10 their remarks again. Why? Because you're the
11 sole judges of the facts, and it's your
12 responsibility to decide those facts.

13 In that regard, however, I would
14 remind you that Ms. Garrison who is my court
15 reporter and the court reporter for purposes
16 of this proceeding has the responsibility of
17 keeping the verbatim record. And if, in your
18 deliberations, you have a difference of
19 opinion about what a witness said or didn't
20 say, we can replay that testimony for you and
21 resolve that. So please understand you have
22 that available to you, should that become
23 necessary.

24 But it is your ultimate decision
25 about the witnesses' testimony that is to

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1 control in this case, because you are the sole
2 judges of the facts.

3 Ladies and Gentlemen, there is
4 generally two types of evidence used in
5 presenting cases such as this. One we call
6 direct evidence and the other indirect or the
7 more popular name is called circumstantial
8 evidence.

9 Direct evidence is the testimony of a
10 person who claims to have actual knowledge of
11 a fact or a circumstance. It is evidence that
12 immediately establishes the main fact to be
13 proved, if you believe beyond a reasonable
14 doubt or are firmly convinced as to the
15 truthfulness or credibility of that testimony.
16 Basically, we're talking about generally
17 sensory perceptions -- I saw something. I
18 heard something. I felt something, or the
19 like.

20 Circumstantial evidence, on the other
21 hand, is proof of a chain of facts and
22 circumstances indicating the existence of a
23 fact. It is evidence which immediately
24 established collateral facts from which the
25 main fact may be inferred. Circumstantial

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1 evidence is based on inference and not
2 necessarily on personal knowledge or
3 observation.

4 Now, our law makes absolutely no
5 distinction between the weight or the value to
6 be given to either direct or circumstantial
7 evidence. Nor is a greater degree of certain
8 required of circumstantial evidence than it is
9 direct evidence. You should weigh all of the
10 evidence in the case and decide what you find
11 to be credible and believable.

12 I would instruct you, however, that
13 the mere fact that the circumstances brought
14 out in a case are strongly suspicious of guilt
15 or that the circumstances are such that the
16 defendant's guilt is probable, remember that's
17 not enough. Because in order to sustain a
18 conviction, it has to be more than proof that
19 would raise suspicion or proof of the
20 probability of one's guilt. It has to be
21 proof that rises to that standard, beyond a
22 reasonable doubt, that is that you are firmly
23 convinced of his guilt of one or more crimes.

24 How do you decide the case? You
25 decide it by doing what you've done throughout

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1 your life. You apply your common sense, your
2 sense of logic and reason. And you find and
3 you make a determine of what you find to be
4 credible and believable. For you see, Ladies
5 and Gentlemen, you have to evaluate all the
6 evidence because the fact that testimony in a
7 case is not necessarily contradicted doesn't
8 render it undisputed. And I say that for this
9 reason that there always remains the inherent
10 credibility and probability of what one is
11 testifying to. And you have to make that
12 assessment. And you have to make that
13 determination.

14 Now, there are many, many factors
15 that we consider to assist us in making a
16 determination of credibility and believ-
17 ability. I'm going to discuss some of them
18 with you now. But if I don't mention a factor
19 or a method that you've used in your life and
20 you've found it reliable, please employ it
21 when you begin your deliberations in this case
22 or evaluating the evidence.

23 Some of the factors that you may want
24 to consider would be the appearance of the
25 witness. How did they appear to you,

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1 straightforward or hesitant in answering
2 questions?

3 Was the testimony of the witness
4 consistent or was it inconsistent?

5 Was it strengthened or weakened by
6 other evidence in the case?

7 How did the witness come to know the
8 facts that he or she testified to?

9 What was the ability of that witness
10 to know those particular facts or circum-
11 stances?

12 Was there a reason for a witness to
13 give testimony which may be helpful or
14 beneficial to one side or which may be harmful
15 or detrimental for one side?

16 In other words, did the witness have
17 any bias or prejudice?

18 Now, in making the determinations of
19 credibility and believability, our law gives
20 you very broad discretion. For, you see, you
21 have the right to believe one witness against
22 many, many witnesses against one. You have
23 the right to believe all of a witness's
24 testimony, parts of a witness's testimony or
25 none of a witness's testimony. Now, of

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1 course, you don't make these decisions
2 arbitrarily. But if there's a reason in the
3 evidence of this case for taking that
4 position, you have that prerogative. Because
5 your objections has been, from the state and
6 will be when you decide it, to determine the
7 truth, regardless of the source of the
8 evidence.

9 Please remember while you have very
10 broad discretions, wide latitude in determin-
11 ing the facts -- that is, what you believe and
12 what you find to be credible -- you don't
13 enjoy the same with the law. You've promised
14 that you'll accept the law as I give it to you
15 and apply it fairly and impartially.

16 You may say 'of course I will do
17 that.' Well, it's not uncommon sometimes for
18 persons to hear a law that they thought was
19 really not that way, or think it should be
20 changed. I respect your right to feel that
21 way. In fact, one of the principles of law I
22 always mention, because as you recall when I
23 was qualifying you, I asked you whether you
24 had a driver's license or voter's registration
25 certificate or an ID card. I knew the answer.

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1 The reason I knew the answer is you were
2 present. You had to have one or we wouldn't
3 have been able to get your name. I think
4 that's unusual. We have to ask that question
5 because you're present. But it's the law.

6 So notwithstanding my personal
7 opinion about it, I've done it for sixteen
8 years, and as long as it's the law I'll
9 continue to do that. And you have to do the
10 same thing. You may hear a principle of law
11 and it may cause you to scratch your head.
12 You can scratch your head, but you have to
13 apply it. That's what you promised to do.

14 Now, please remember that you're not
15 to focus on any one aspect of my charge. You
16 consider the charge as a whole. And, again, I
17 would remind you that nothing in this charge
18 is to be taken as to how you are to resolve
19 the factual issue, because that's your job and
20 yours alone.

21 Let's look at the various charges
22 now. First, I would like to discuss with you
23 the charge of assault and battery with intent
24 to kill. That's an interesting name. It says
25 "assault and battery," and we'll define those

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1 for you, "with intent to kill." Intent to
2 kill is not a required element of that charge
3 notwithstanding its name. The State doesn't
4 have to prove a specific intent to kill. So
5 please remember that as you consider that
6 charge.

7 But the State has to prove beyond a
8 reasonable doubt that the defendant committed
9 an unlawful act of a violent nature to the
10 person of another with malice aforethought.
11 An assault, Ladies and Gentlemen,, occurs when
12 a person unlawfully attempts or offers to
13 commit a violent injury upon another person
14 and had the present ability to complete the
15 attempted injury.

16 An assault is the intentional
17 creation of a reasonable fear of immediate
18 bodily harm. It's not necessary that the
19 attempted injury or harm actually take place
20 for an assault to occur. For instance,
21 walking out I was angry and upset and I walked
22 up to you and drew back my hand and I balled
23 up my fist. That could be and most probably
24 would be an assault. The fact that I didn't
25 hit you would not negate the assault.

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1 A battery is the unlawful touching of
2 another person by a person who has committed
3 the assault. An unlawful touching could be
4 caused by a part of the body or by any object
5 that the accused puts in motion. A battery is
6 the completion of the assault by using or
7 applying force to another person however
8 slight in a rude, angry or resentful manner
9 without legal justification for doing so.

10 Using my earlier example, if I drew
11 back and then I struck you, then the battery
12 would have been committed.

13 There also has to be the element of
14 malice aforethought. Malice is hatred, ill
15 will or hostility towards another person. It
16 is the intentional doing of a wrongful act
17 without any just cause or excuse and with the
18 intent to inflict an injury or under circum-
19 stances that the law would infer an evil
20 intent. Malice aforethought does not require
21 that the malice exist for any particular
22 period of time before the act is committed.
23 But malice must exist in the mind of the
24 accused just before and at the time the act is
25 committed. Therefore, there must be a

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1 combination of the previous evil intent and
2 the act.

3 Malice aforethought may be expressed
4 or inferred. Now, the terms expressed and
5 inferred do not mean different types of
6 malice, but merely the manner in which malice
7 may be shown to have existed. That is, either
8 by direct evidence or inference from facts and
9 circumstances which are proved. Express
10 malice, as the name would imply, is shown when
11 a person speaks words which express hatred or
12 ill will towards another person, when the
13 person prepares beforehand to do the act which
14 was later accomplished.

15 Malice may be inferred, as I told
16 you. Inferred malice may be shown from
17 conduct showing a total disregard for human
18 life. Inferred malice may also arise when the
19 deed is done with a deadly weapon.

20 Now, a deadly weapon is an article,
21 instrument or substance which is likely to
22 cause death or great bodily harm. Whether an
23 instrument has been used as a deadly weapon,
24 of course, depends on the facts and circum-
25 stances of each case. A pistol, Ladies and

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1 Gentlemen, I would instruct you, is a deadly
2 weapon.

3 If the facts proved beyond a
4 reasonable doubt are sufficient to raise an
5 inference of malice to your satisfaction, this
6 inference, Ladies and Gentlemen, would simply
7 be an evidentiary fact to be considered by you
8 along with all other evidence in this case.
9 And you may give it the weight that you
10 determine it's entitled to receive.

11 Again, I would remind you a specific
12 intent to kill is not an element of assault
13 and battery with intent to kill. But there
14 must be a general intent to commit serious
15 bodily injury.

16 "Intent" means intending the result
17 which actually occurs, not accidentally or
18 involuntarily. Intent may be shown by action,
19 conduct of a defendant and other circumstances
20 from which you may naturally and reasonably
21 infer intent. Evidence of the character of
22 the assault, the character of the instrument
23 used, the manner in which it was used, the
24 purpose to be accomplished and the resulting
25 wounds or injuries may be considered in

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1 determining the intent with which the assault
2 was committed. Intent may be inferred when it
3 is demonstrated that the defendant willfully
4 and voluntarily commits an act the natural
5 tendency of which is to destroy life of
6 another or inflict serious bodily injury.

7 Now, if you find, Ladies and
8 Gentlemen, that the State has not proven that
9 the defendant committed an assault and battery
10 with intent to kill, then you must determine
11 whether or not you may consider as a lesser-
12 included offense -- that means within the
13 offense of assault and battery with intent to
14 kill, there's also a lesser-included offense
15 known as assault and battery of a high and
16 aggravated nature. The difference between the
17 two is simply this. If the State fails to
18 convince you that the defendant acted with
19 malice aforethought, but the defendant
20 committed an assault and battery, then you
21 must determine whether or not the defendant
22 committed an unlawful act of a violent nature
23 on another and that there were aggravating
24 circumstances proven and established.

25 Circumstances of aggravation, Ladies

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1 and Gentlemen, would include the use of a
2 deadly weapon, the intent to commit a felony,
3 the infliction of a serious bodily injury, a
4 disparity between the ages or physical
5 conditions of the parties. And these are some
6 of the circumstances of aggravation. But you
7 must, in evaluating to return a verdict of
8 guilty on that charge, you would have
9 concluded the State failed to prove beyond a
10 reasonable doubt malice aforethought, but
11 concluded that the State did prove assault and
12 battery of a high and aggravated nature and at
13 least one element or one aggravating
14 circumstance. You don't have to prove all of
15 them, but they must prove at least one.

16 If, on the other hand, you find that
17 they failed on that, then the verdict would
18 have to be not guilty.

19 Let's look at the crime of armed
20 robbery. The defendant is charged with armed
21 robbery, and in order to prove this offense
22 the State must prove beyond a reasonable doubt
23 that the defendant took personal property from
24 the person or presence of another. Property
25 is in the presence of a person if it's within

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1 that person's reach, inspection, observation
2 or control so that the person could, if not
3 overcome with violence or prevented by fear,
4 keep possession of the property.

5 The State must also prove beyond a
6 reasonable doubt that the defendant carried
7 the property away intending to permanently
8 deprive the owner of the property and to keep
9 the property for the defendant's own use.
10 The slightest removal of the property or the
11 complete possession of the property, even for
12 an instant by the defendant, is sufficient to
13 show a taking and carrying away of the
14 property.

15 The taking and carrying away of the
16 property must have been done with violence or
17 by putting the owner of the property in fear
18 of violence. Finally, the State must prove
19 beyond a reasonable doubt that the defendant
20 was armed with a deadly weapon during the
21 robbery.

22 A deadly weapon, as I previously
23 instructed, is any article, instrument or
24 substance which is likely to cause death or
25 great bodily harm. And in that respect again

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1 I would instruct you that a pistol is
2 considered a deadly weapon.

3 Now, let's look at the offense that
4 he's accused of commission of possession of a
5 weapon during a violent crime. If a person --
6 that's the statute 16-23-90 provides in part
7 that if a person is in possession of a firearm
8 or visibly displays what appears to be a
9 firearm during the commission of a violent
10 crime and is convicted of committing or
11 attempting to commit a violent crime, as
12 defined by Section 16-160, which, Ladies and
13 Gentlemen, would define, for your purposes
14 here today, assault and battery with intent to
15 kill as a violent crime. If you find, then,
16 the defendant is guilty of that offense and
17 find also that the State has proven the
18 possession or visibly displaying a firearm
19 during the commission of that offense, then
20 the State would be entitled to a verdict of
21 guilty on that offense.

22 If, on the other hand, you find that
23 the State has failed to establish beyond a
24 reasonable doubt the offense of assault and
25 battery with intent to kill or failed to

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1 establish that this defendant committed any
2 act or that the defendant did not have a
3 firearm, then, of course, you must return a
4 verdict of not guilty on that.

5 "Intentionally" means willfully
6 intending the result which actually occurs,
7 not accidentally. Again, those parts of what
8 I've just discussed with you of intent is a
9 part of the general intent which we will talk
10 about also in just a moment.

11 Ladies and Gentlemen, the defendant
12 also is charged with the offense of possession
13 of cocaine base, which is called crack
14 cocaine. In order to obtain a conviction
15 beyond a reasonable doubt, the State must
16 prove beyond a reasonable doubt that this
17 defendant knowingly or intentionally possessed
18 the drug of crack cocaine.

19 "Knowingly" means with knowledge,
20 consciously, not accidentally.

21 "Intentionally" means willfully intending the
22 result which actually occurs, not accidentally
23 or involuntarily. "Possession" is
24 just as the name implies, that it was in his
25 presence and control.

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1 If the State has failed to prove
2 beyond a reasonable doubt either element, that
3 is proved the drug or proved that he had it in
4 his possession, then you must return a verdict
5 of guilty. If, on the other hand, you find
6 the State proves that he was in actual
7 possession of the drug and the drug has been
8 established as crack cocaine, then you must
9 return a verdict of guilty as to that offense.

10 As you've heard me state throughout,
11 criminal intent is an element in each of the
12 crimes. Criminal intent is always a matter
13 that must be determined by you from the
14 circumstances surrounding the situation.
15 The law states that criminal intent may be
16 inferred from circumstances which have been
17 shown to have existed.

18 Criminal intent is a state of mind
19 that operates jointly with an act in the
20 commission of a crime. Intent would include
21 those consequences which represent the very
22 purpose for which an act is done or known to
23 be substantially certain to result, regardless
24 of what one specific desire intends.

25 Criminal intent is a mental state of

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1 a conscious wrongdoing. So it's up to you to
2 determine whether or not, Ladies and Gentle-
3 men, the State has established beyond a
4 reasonable doubt this aspect or this element
5 of the crimes charged.

6 Throughout this matter, Ladies and
7 Gentlemen, you have been selected to be a
8 judge. And that means that you aren't
9 advocates for either side. You don't have any
10 friends or enemies in this process. You're
11 here, really, to do something that's very
12 important to being a judge. I would submit to
13 you that you and I are required to set aside
14 something that's not always easy to do. We're
15 human. But we have to consciously do it, I
16 suggest and submit, in performing the task of
17 being a judge. And that is we have to set
18 aside human emotions. It had no place in that
19 function.

20 And you've promised to do the same
21 thing. You've promised that in just a few
22 moments when I excuse you and give you the
23 instruction to begin your deliberations,
24 you're going to go back and you're going to
25 apply your common sense, your sense of logic

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1 and reason, analyze the evidence and decide
2 what you believe to be the truth. And then
3 once you make that decision, you take the law
4 and apply it fairly and impartially and report
5 your decision.

6 When you've done that, you will have
7 honored the commitment that you made when we
8 started this case, and you will have fulfilled
9 in every respect your obligations as a just of
10 the facts in this case.

11 To assist you, Mr. Presiding Juror,
12 in reporting your verdict, I will be sending
13 back four verdict forms. And there's one for
14 each crime charged. They are basically the
15 same, with the exception of the charge of
16 assault and battery with intent to kill. That
17 one, there are three choice which we'll talk
18 about in just a moment. But for the other
19 three, there are two choices.

20 Now, the order in which they appear
21 means nothing. I had to put them in some
22 order. Do not infer anything from that.
23 You'll note that the caption and you'll see
24 that there's one for armed robbery, one for
25 possession of a firearm during the commission

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1 of a violent crime and one for possession of
2 crack cocaine or cocaine base. That's the way
3 it's referred, but that means crack cocaine.

4 Let's look at the one for armed
5 robbery. What will you be saying by your
6 choice indicated? Well, if your choice is
7 guilty, you'll be saying that you analyzed the
8 evidence and you're satisfied and firmly
9 convinced that the State has met its burden of
10 proof as to each of those elements, and you
11 return a verdict of guilty. If it's not
12 guilty, you'll be saying that in analyzing the
13 evidence you're not firmly convinced. The
14 State has failed on one or more elements, and
15 therefore collectively you've determined that
16 he's not guilty.

17 Whichever your choice, I would simply
18 ask -- you'll note there's a line that
19 precedes it -- that you place a check on that
20 line and circle it and then sign it where it
21 says "presiding juror." Once you've done that
22 you set that one aside and go on to the next
23 one.

24 And you'll find the same for the
25 possession of a firearm during a violent a

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1 crime. What will you be saying? If it's
2 guilty, you will be saying that the State --
3 this is one that's kind of tied to this one,
4 assault and battery with intent to kill. In
5 order for you to return a verdict of guilty,
6 you will also have had to return a verdict of
7 guilty on assault and battery with intent to
8 kill. Because if you return any other verdict
9 on that, then you must return a verdict of not
10 guilty on this particular charge, that is
11 possession of a firearm during the commission
12 of a violent crime.

13 Assault and battery with intent to
14 kill is the one we talked about -- remember I
15 said it had lesser-included offense of assault
16 and battery of a high and aggravated nature.
17 And the difference between the two is
18 basically there's no malice and the State has
19 failed on malice and establishing the malice
20 aforethought.

21 If in your consideration of the
22 evidence you're firmly convinced as to each
23 element of assault and battery with intent to
24 kill, then guilty would be your choice. If,
25 on the other hand, you think the State has

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1 failed to convince you beyond a reasonable
2 doubt of malice, but convinced that he
3 committed assault and battery, then you
4 consider whether or not there were aggravating
5 circumstances. If you conclude that there
6 were aggravating circumstances beyond a
7 reasonable doubt, then your verdict must be
8 assault and battery of a high and aggravated
9 nature. If, on the other hand, you're not
10 convinced as to that, then you must return a
11 verdict of not guilty.

12 Whichever your verdict, again, it's
13 got to be the collective decision of everyone.
14 What do I mean by "collective decision?" It
15 means twelve to zero. Eleven to one won't
16 work. All of you have to agree to the
17 verdict, whichever it is. And whatever it is,
18 I'd ask you simply to place a check mark in
19 the blank that precedes it, circle it and sign
20 it.

21 Once you have evaluated all the
22 crimes and reached a decision on each of the
23 verdict forms, you may knock on the door and
24 we will be happy to return you to the
25 courtroom to receive your verdict.

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1 Now, I need to ask a question. Of
2 the first twelve jurors that were selected,
3 any of you feel that you will not be able to
4 continue? If so, raise your hand. Thank you.
5 (No response). Thank you. It appears that
6 the first twelve will be able to continue. So
7 when the jury retires in just a moment, I'm
8 going to ask that you not rejoin them in the
9 jury room. They'll take you to another room
10 and I'll be in shortly to discuss how much
11 longer you need to remain with us. But you
12 may not go back to the jury room.

13 In just a moment, Ladies and
14 Gentlemen, I'm going to excuse you. And I
15 know you're anxious to get start with your
16 deliberations, and you're almost there. You
17 remember I said to you the last thing I would
18 tell you is when you can start. I have to
19 discuss the charge with the attorneys. I have
20 to discuss that, as we've done already.
21 That's what we call "matters of law." And I
22 have to excuse you to do that. If there are
23 any additions or corrections that have to be
24 given, then I'll return you to the courtroom
25 and we'll give you those, and we'll bring the

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1 alternate back as well.

2 If there aren't any additions, then
3 we will gather the exhibits and deliver them
4 to you. When you receive the exhibits, then
5 you may begin your deliberations, but not
6 before.

7 Once the deliberations start, Mr.
8 Presiding Juror and Ladies and Gentlemen, the
9 only restriction I place is that if at any
10 point a juror has to leave the table for any
11 reason, you must stop deliberating until all
12 12 of you are together. Other than that,
13 Ladies and Gentlemen, you proceed as you deem
14 fit and proper.

15 Thank you very much for your
16 attention. Please retire to your jury room
17 but do not begin your deliberations until you
18 have received the exhibits.

19 (JURY OUT @ 12:04 P.M.)

20 THE COURT: Exceptions or additions
21 from the State?

22 SOLICITOR BIAGANTE: Nothing from
23 the State.

24 THE COURT: Exceptions or additions
25 from defendant, other than your request for me.

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1 to charge attempted armed robbery?

2 MR. SHELTON: Other than that, no,
3 Your Honor.

4 THE COURT: Very well. That is
5 preserved. I would decline to do that, but
6 the record is now complete with that. And
7 it's noted and I deny it again.

8 Thank you very much. We'll be at
9 ease. If you leave, let me know how to get in
10 touch with you in case we need you. Thank
11 you.

12 (NOTIFIED OF JURY QUESTION @ 12:20 P.M.)

13 (DEFENDANT PRESENT)

14 THE COURT: We have a question from
15 the jurors. Please let the record reflect
16 that Mr. McKelvey is present. Bring in the
17 jury.

18 (SO ENTERED AS COURT'S EXHIBIT 3)

19 (JURY IN @ 12:24 P.M.)

20 THE COURT: Thank you, Ladies and
21 Gentlemen. I have what has now been marked as
22 Court's Exhibit 3, an inquiry from the jury
23 containing two questions:

24 "We would like to see the bullets and
25 a transcript of Mr. Phoenix's testimony."

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1 The day may come and it might be
2 sooner than later where we will be able to do
3 that but at this moment, we can't, don't. We
4 can replay that testimony but we can't send it
5 back.

6 PRESIDING JUROR: Okay, I understand.

7 THE COURT: If the jury needs to
8 rehear it, that's fine, we will be happy to
9 play that. I will let you go discuss that
10 some more in just a moment. If necessary,
11 just let us know that you do want to rehear
12 the testimony. We're prepared to do that.

13 The second question -- the first
14 question, 'we'd like to see the bullets.'
15 It's just a practice when you have firearms
16 and you have live cartridges that we don't
17 send both back. We will be happy to pass the
18 bag with the cartridges in it, the jury can
19 inspect it here. Or if you want to send out
20 the firearm, we'd be happy to send back the
21 cartridges. If you want to view it now, we
22 can certainly pass it around. That'd be fine.

23 PRESIDING JUROR: Yes, Your Honor.
24 We just want to see them.

25 THE COURT: No problem. You're

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1 entitled to. That's not a problem.

2 Absolutely a legitimate question.

3 PRESIDING JUROR: I understand.

4 COURT REPORTER: That's Court's
5 Exhibit 24, (tenders to bailiff).

6 THE COURT: Court's or State's?

7 COURT REPORTER: You are correct,
8 it's a State's exhibit. State's Exhibit 24.

9 BAILIFF: (Tenders to jury)

10 PRESIDING JUROR: (After Exhibit 24
11 is circulated among all jurors, tenders to
12 bailiff.)

13 BAILIFF: (Returns exhibit to
14 exhibit table).

15 THE COURT: Thank you. You may
16 retire and continue your deliberations. If
17 you do need to hear Mr. Phoenix's testimony
18 replayed, just write me a note and indicate
19 that. I appreciate it.

20 PRESIDING JUROR: Okay. We just have
21 one small section that we just need.

22 THE COURT: What I typically do is
23 I will be -- we will replay it from the start
24 and play it as long as you want it played. At
25 such time as that portion has been heard, I

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1 would ask that juror notify you that they
2 don't need to hear any additional. You raise
3 your hand and we will stop. Until I see your
4 hand go up we'll play the -- we will continue
5 to play the testimony. Do you want us to play
6 that now? Is that the jury's desire.

7 PRESIDING JUROR: Yes, sir.

8 THE COURT: Okay. Ms. Garrison, do
9 you have that?

10 COURT REPORTER: Yes, sir, I do.

11 THE COURT: Please remember also,
12 Ladies and Gentlemen, and I know that you know
13 this but I would remind you that testimony of
14 a witness consists, as you heard, -- it's
15 really four times: one is direct, the other is
16 cross examination, redirect and recross
17 examination. It is not always that you have
18 all four but sometimes a witness may have four
19 distinct parts. Generally redirect addresses
20 matters that were covered in cross-
21 examination. Sometimes also covered in
22 direct. Recross is limited to what was asked
23 on redirect by our Rules. I share that with
24 you so that when you listen to testimony --
25 and I am not asking you to tell me, I don't

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1 want you to tell me, but just remember that
2 some of those areas may be covered in cross or
3 redirect or recross. Ms. Garrison.

4 COURT REPORTER: Testimony of Mr.
5 Bernard Phoenix, direct examination by
6 Solicitor Biagante:

7 Q. State your name for the record, sir?

8 A. Bernard Phoenix. My street name be
9 "Be Nice."

10 Q. I'll address you as Mr. Phoenix,
11 okay? Good morning.

12 A. Good morning.

13 Q. Could you tell us how old you are,
14 sir?

15 A. I'm 49 years old, thank God.

16 Q. And where do you live currently?

17 A. I live right here in Moncks Corner.

18 Q. Pull the microphone down maybe a
19 little bit and don't talk so close to it,
20 okay?

21 A. Okay, I'll do that.

22 Q. Just relax in your chair.

23 A. Okay, I do that.

24 Q. Are you currently employed right now?

25 A. No, because of my disability. I used

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1 to drive a truck on the road. And I am hurt
2 on disability. I got hurt driving trucks on
3 the road. And I got disability.

4 Q. So you're currently receiving
5 disability?

6 A. Yes, ma'am.

7 Q. Do you know the defendant in this
8 case, Jermaine McKelvey?

9 A. Yes, I know him.

10 Q. What do you -- does he have any other
11 nickname that he goes by?

12 A. Yes, he do. They call him "Droop".

13 Q. How long have you known Mr. McKelvey?

14 A. I moved here in '95, and I met his
15 uncle called George Davis. I don't socialize
16 with Droop but I knew his uncle, George Davis.
17 He does karate, and I do karate.

18 Q. So you're friends with his uncle?

19 A. Yes.

20 Q. Do you see Droop or Jermaine McKelvey
21 in the courtroom today?

22 A. Yes, I do.

23 Q. Can you please point to him and tell
24 us what he's wearing?

25 A. Yes, he has on a white shirt and tie.

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1 SOLICITOR BIAGANTE: Your Honor,
2 please let the record reflect he pointed to
3 the defendant in this case.

4 THE COURT: It so reflects.

5 DIRECT EXAMINATION CONTINUED

6 BY SOLICITOR BIAGANTE:

7 Q. Now, sir, because of this incident do
8 you have some memory problems?

9 A. Yes, I do.

10 Q. Just explain that a little.

11 A. Due to getting shot in my head, it's
12 like I'm seventy-five years old. The reason
13 why is -- if I leave the house and go to the
14 grocery store, I forget what I need at the
15 store.

16 Q. Do you have some problems remembering
17 all the details of this incident?

18 A. Yes, I do.

19 Q. Now, sir, directing your attention to
20 November 26 and 27th -- the 27th being Thanks-
21 giving, tell us what you did that day before
22 you got to the Pleasure Lounge.

23 A. All right. Before, that day I was at
24 the body shop. I paint cars also. That's why
25 they call me Be Nice, Be Nice Paint and Body

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1 Shop.

2 Q. So you own Be Nice Paint and Body
3 Shop?

4 A. Well, I don't own it. I just do all
5 the work I can get. I like helping them. And
6 sometimes if he needs me, I help him. I am
7 good doing that. And that day I had a job.
8 And I finished that job that day. And I got
9 paid. And thank God I took some money home,
10 what I made.

11 Q. Okay.

12 A. And I had a ride back from Bonneau at
13 my mom's.

14 Q. Is that where the paint and body shop
15 is, in Bonneau?

16 A. Yes, ma'am. And from there I went
17 home, took the money home and I just took a
18 little bit to buy shrimp dinner with.

19 Q. And who were you living with at that
20 time?

21 A. At that time I was staying with my
22 mother, because my mother was very ill. My
23 mother passed away September 18th. I thank God
24 I buried her before I got hurt. That's what
25 happened, I was taking care of my mother.

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1 Q. So you were living with your mom when
2 this incident occurred?

3 A. Yes.

4 Q. Now, after you left the house, where
5 did you go that day or that evening?

6 A. I stayed there until about 7:00 or
7 8:00 o'clock and then I walked over to Mo
8 River's club.

9 Q. Mo River's club?

10 A. Yes. It's right out there. Because
11 he asked me to look at his daughter's car.

12 Q. So Mr. Rivers asked you to look at
13 his daughter's car?

14 A. Right. Yes, ma'am.

15 Q. And then after being at Mo River's
16 club -- where is that at? Is that near any-
17 thing?

18 A. That's on 17A. It's across the
19 street from where I got shot at.

20 Q. Here in Moncks Corner?

21 A. Yes, ma'am.

22 Q. Is that here in Berkeley County?

23 A. Yes, ma'am.

24 Q. And then after you left Mo River's
25 club where did you go then?

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1 A. I decided, I said, 'You know what? I
2 like the way they cook the shrimp over there',
3 at the other club and I walked over there to
4 get some shrimp. That's all I was going to
5 do. So went to the other place to get some
6 shrimp.

7 Q. And how far is the Pleasure Lounge
8 from Mo River's club?

9 A. On 17A, right across the street.

10 Q. And what kind of establishment is the
11 Pleasure Lounge?

12 A. The Pleasure Lounge was a nightclub.
13 They had just reopened it up from when it was
14 closed. It had new owners in it. The only
15 reason I went there is because they was
16 cooking food.

17 Q. So they had a kitchen there?

18 A. Right.

19 Q. What else do people do at the
20 Pleasure Lounge?

21 A. They had a TV in there.

22 Q. And it's also a bar?

23 A. Yes.

24 Q. So tell us about what happened when
25 you got to the Pleasure Lounge.

1 A. I got to the Pleasure Lounge and put
2 my order in for an order of shrimp. Every-
3 thing was all right. I saw Askari sitting at
4 the table. And ---

5 Q. Did you know Askari's last name?

6 A. Yeah, he's related to my niece.
7 Robinson. Brother. Robinson. Me and him was
8 talking about painting his care. I saw Askari
9 and I was talking to him about painting his
10 car, that was it.

11 Q. What type of car did Askari have?

12 A. He had a blue car. It was a -- I
13 think it was -- oh, man.

14 Q. It's a big blue car?

15 A. Yeah. A Chevy or a -- and he wanted
16 me to paint his car for him.

17 Q. And was Mr. McKelvey there at the
18 time?

19 A. He was there.

20 Q. Tell us about what happened next.

21 A. Okay. Me and Askari was talking.
22 All of a sudden Droop just got -- I mean
23 McKelvey.

24 Q. You can call him Droop if you want
25 to.

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1 A. Okay, Droop. He came by and me and
2 Askari was talking.

3 Q. What did you think at first was
4 happening?

5 A. I didn't know what was going on. I
6 said, 'Hey Droop, how you doing?' That's it.

7 Q. Then what?

8 A. He said "give me money".

9 Q. Did you think he was serious? Did
10 you think he was playing at that point?

11 A. At that time everybody was just
12 playing around.

13 Q. Okay.

14 A. I thought he was just playing around.
15 I didn't pay attention because I wasn't
16 talking to him to begin with anyway.

17 Q. Okay.

18 A. So me and Askari kept talking about
19 painting his car. And the guy who was running
20 the club at the time told Droop to stop. He
21 said, "Droop, stop hitting the man. What's
22 wrong with you?"

23 He kept hitting me. I don't know what was
24 wrong with Droop. So as I waited for my order
25 of shrimp I decided to play a game of pool.

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1 Okay. My game was next, on playing a game of
2 pool. He started up again.

3 Q. At that point did you buy anything
4 besides your shrimp?

5 A. Before that. When we were over at
6 the counter, where they got a little counter,
7 Askari asked me to buy him a beer. Okay. I
8 said, 'Okay, Askari, I will buy a beer. So I
9 bought him a beer. Then I went over to my
10 game to play pool. And then I started my
11 game, playing pool. And he came around the
12 pool table and he still kept hitting me. I
13 said, "Droop, what's your problem? What's
14 wrong, man? What's wrong, Droop?" He kept
15 hitting me.

16 Q. At that point did you realize that he
17 was playing still, or not?

18 A. Naw, it had already got to me.

19 Q. Was he saying anything to you?

20 A. He wasn't saying nothing. He just
21 kept hitting me and hitting me and that was
22 it. "What's your problem, Droop? What you
23 hitting me for, Droop?"

24 And then the guy that was running the bar
25 down there said, "Let the man shoot pool."

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1 What's wrong, Droop, let the man shoot pool.

2 What's wrong, Droop?"

3 Q. So then what happened?

4 A. I played pool. And I played pool and

5 -- I don't know what happened. For some

6 reason, I don't know how we wound up outside

7 after this.

8 Q. You don't remember that?

9 A. No, I don't remember that.

10 Q. But what happened once you get out-

11 side?

12 A. I'd rather show you that.

13 Q. Do you want to stand up? Don't get
14 out of the box. You can stand up and show us.

15 A. Once we got outside -- I walked outside.

16 I walked outside and I didn't know what was

17 going on. I got hit on the head. I don't

18 know what I got hit with but I felt it. I got

19 up. I said, "Droop, Droop, what's the

20 problem? What's the problem, Droop? What's

21 your problem? What's your problem, Droop?"

22 Q. What happened next?

23 A. After that I leaned on the car.

24 There was a truck out there. I leaned on the

25 truck. I was rubbing my head because my head

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1 was, because he hit me. I said, "Droop, man,
2 what's your problem, Droop?"

3 He had a gun in his hand. He had a gun in
4 his hand. And he shot, boom!

5 Q. Did he ask you anything at that
6 point?

7 A. No.

8 Q. Tell you anything?

9 A. I said, "Droop, what's your problem?"
10 He had his gun in his hand. He shot. He
11 said, "The next one ain't gonna miss. Give it
12 up, Be. Give it up. Give it up, Be."

13 Q. What happened?

14 A. I said, "Give up what, Droop? Give
15 up what? (Displaying cash) -- this ain't no
16 money, Droop. This ain't no money. This
17 ain't no money, Droop."

18 Q. How much money did you have on you?

19 A. By the time I'd paid for my shrimps,
20 maybe seventeen or eighteen dollars. I said,
21 "Droop, this ain't no money, Droop. Put that
22 gun down, Droop. Put the gun down, Droop. I
23 beg you for your life. I beg for my life.
24 Put the gun down, Droop."

25 Q. What happened?

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1 A. He snatched the money and shot me.

2 Boom! Shot me.

3 (PRESIDING JUROR RAISES HAND)

4 (PLAY BACK COMPLETED)

5 THE COURT: All right. You have
6 raised your hand, indicating that the jury has
7 heard all the testimony that they want to
8 hear. Is that correct?

9 PRESIDING JUROR: Yes, Your Honor.

10 THE COURT: You may retire and
11 resume your deliberations.

12 (JURY OUT @ 12:50 P.M.)

13 THE COURT: Any exceptions or
14 additions from the State?

15 SOLICITOR BIAGANTE: No, Your
16 Honor.

17 THE COURT: Any exceptions or
18 additions from Mr. McKelvey?

19 MR. SHELTON: No, sir.

20 THE COURT: Very well, we will be
21 at-ease.

22 (JURY IN DELIBERATION)

23 (RECESS PENDING VERDICT)

24 (NOTIFIED OF VERDICT @ 2:10 P.M.)

25 (DEFENDANT PRESENT)

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1 THE COURT: I understand that
2 the jury has reached a verdict. Is the State
3 ready to receive the verdict?

4 SOLICITOR BIAGANTE: Yes, Your
5 Honor.

6 THE COURT: Is Mr. McKelvey ready
7 to receive the verdict?

8 MR. SHELTON: Yes, sir.

9 THE COURT: Thank you. Thank you,
10 Ladies and Gentlemen, as well. Those in the
11 audience, I appreciate the courtesy shown to
12 this proceeding and your decorum throughout.
13 It's a process that I think warrants that.
14 It's a dignified process. It's a process
15 that's served this country extremely well.
16 And it's one certainly that I'm proud to be a
17 part of and proud to be involved as a judge
18 for sixteen years.

19 I believe the jury has honored the
20 oath and they're about to render their
21 decision. And we're going to continue to have
22 the dignity in this courtroom that we've had
23 when we receive that verdict. And by that I
24 mean I will not tolerate any outbursts at all.
25 And I understand we're all human, and if you

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1 feel that you think you would have trouble
2 controlling yourself, I would ask that you
3 leave now. Because if you remain we're going
4 to expect that you will honor that in every
5 respect.

6 If there are any outbursts or any
7 remarks, that will be contempt of court, and I
8 will tell you that you will be subject -- I
9 could sentence you to more than this but you
10 will be subject to a sentence up to ninety
11 days in jail. That's what I would consider.
12 So if you think you're not going to be able to
13 control yourself, you'd better leave now.

14 Let's bring in our jury.

15 (JURY IN @ 2:14 P.M.)

16 THE COURT: Thank you very much,
17 Ladies and Gentlemen. Mr. Edmunds, as I
18 understand the jury has reached a verdict.
19 Is that correct, sir?

20 PRESIDING JUROR: Yes, Your Honor.

21 THE COURT: If you would pass the
22 verdict forms, please, to Ms. Wiggins.

23 PRESIDING JUROR: (Complies)

24 THE COURT: Thank you, sir. The
25 verdict forms have been properly completed.

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1 If you would publish the verdict. I'd ask
2 that the defendant please rise.

3 THE CLERK: State of South Carolina
4 versus Jermaine McKelvey, Indictment number
5 2009-GS-08-0504, "We, the jury, find the
6 defendant guilty of armed robbery."

7 In Indictment 2009-GS-08-2447, "We,
8 the jury, find the defendant, Jermaine
9 McKelvey, guilty of possession of cocaine
10 base."

11 In Indictment 2009-GS-08-0304, "We,
12 the jury, find the defendant, Jermaine
13 McKelvey, guilty of assault and battery with
14 intent to kill."

15 In Indictment 2009-GS-08-0305, "We
16 find the defendant, Jermaine McKelvey, guilty
17 of possession of a firearm during the
18 commission of a crime."

19 Ladies and Gentlemen of the jury, if
20 this is your verdict, please signify by
21 raising your right hands.

22 (UNANIMOUS RESPONSE BY JURORS)

23 THE COURT: Thank you. Let the
24 record reflect that each juror, in response to
25 the Clerk's inquiry, has raised their right

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1 hand. Anything further from the State for the
2 jury?

3 SOLICITOR BIAGANTE: Nothing from
4 the State.

5 THE COURT: Anything further from
6 the jury from Mr. McKelvey, Mr. Shelton?

7 MR. SHELTON: Regarding the jury,
8 no, Your Honor.

9 THE COURT: Very well. Thank you
10 very much. Ladies and Gentlemen, thank you
11 very much for your assistance in resolving
12 this dispute. As I mentioned to you when we
13 started it's an honor to serve with you as a
14 judge, and it has been my honor to serve with
15 each one of you. I commend you.

16 And please understand, I'm not
17 talking about your decision. That doesn't
18 have to be addressed. You took an oath, just
19 as I did. And you performed your task. I'm
20 talking about the manner in which you
21 approached it. You were punctual. You've
22 been attentive. And I appreciate that. And I
23 appreciate the service that you've rendered to
24 your county.

25 You are now free to talk about this

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1 case, if you want to. And if you don't want
2 to, that's your right, too. And if somebody
3 should ask you a question and persist in
4 asking you questions and you don't want to
5 talk about it, you make that known to Ms.
6 Brown and she can make me aware of that and
7 we'll take care of it for you.

8 Have a great day. I will ask you now
9 -- you may retire. You're free to leave. Has
10 the jury been excused for the week?

11 THE CLERK: Not yet.

12 THE COURT: I'll tell you what
13 we're going to do. This is your option. And
14 sometimes people choose to still be eligible,
15 and that's fine. But if you want to have this
16 be your service for this week, you're free to
17 claim it. And that means you can be excused
18 from any further service. I would just simply
19 ask that when you retire you go back to your
20 jury room and make that known to one of the
21 bailiffs as to whether you want to be
22 eligible. And we can certainly pass that on
23 to the clerk. But if I don't see you any
24 more, thanks again for serving. I appreciate
25 the service that you've rendered to the

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1 county.

2 You're free to leave now. Thank you.
3 You may want to talk with them also about some
4 other matters before you leave. It'll be your
5 choice.

6 (JURY DISMISSED)

7 THE COURT: Thank you, Ladies and
8 Gentlemen, for honoring the Court's request
9 concerning the conduct. And I appreciate that
10 very much. I know it's a difficult time for
11 you, but I thank you for honoring that and for
12 again dignifying the process.

13 Solicitor, anything from the State at
14 this point?

15 SOLICITOR BIAGANTE: Your Honor,
16 we're awaiting the sentencing sheet.

17 THE COURT: That's fine. No
18 Motions or anything. Mr. Shelton?

19 MR. SHELTON: Yes, Your Honor.
20 At this point I'd like to renew all motions,
21 all objections which includes the directed
22 verdict and the armed robbery regarding the
23 ABHAN element and the ABWIK claim regarding
24 the Motions.

25 THE COURT: Thank you so much. And

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1 I appreciate that position, and I certainly --
2 if the jury had returned a verdict of not
3 guilty, would have been able to say I
4 understand how they came up with that. But
5 they have returned a verdict of guilty, and
6 I think the evidence overwhelmingly supports
7 their decision, both direct and circumstantial
8 evidence as to all charges. And for that
9 reason, I must respectfully deny your motions.

10 You're awaiting the sentencing
11 sheets. How long do you think it'll take? I
12 don't need the sentencing sheets to really
13 start the process, so I'll be happy to hear
14 from you now.

15 Anything from the State?

16 SOLICITOR BIAGANTE: Yes, Your
17 Honor. For Mr. McKelvey's prior criminal
18 history, he has a:

19 1999 conviction for criminal domestic
20 violence.

21 2001 he has a malicious injury to
22 property. In 2001 he has a pointing and
23 presenting a firearm at a person. In 2001 a
24 separate incident, he was originally charged
25 with two counts of assault and battery with

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1 intent to kill, and he plead guilty to two
2 counts of assault and battery of a high and
3 aggravated nature where it looks like he
4 received a YOA not to exceed six years.

5 THE COURT: That was 2001?

6 SOLICITOR BIAGANTE: Yes, Your
7 Honor. In 2001 he also has a failure to stop
8 for a blue light.

9 In 2003 he has a couple of disorderly
10 conducts.

11 In 2006 he has an open container of
12 beer or wine.

13 In 2007 he has an interfering or
14 hindering an officer. In 2007 he has a
15 resisting arrest charge.

16 In 2008 with this incident he was
17 convicted of a malicious injury to property
18 for kicking out the police window as well as
19 a public disorderly conduct.

20 Your Honor, the State's position is
21 by no means do you freeze a person's rights by
22 a jury trial. You obviously hear a lot more
23 testimony in the last few days than you will
24 ever hear in a guilty plea.

25 The State's position in working with

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1 Mr. Phoenix as well as talking with the police
2 officers involved that we are going to ask for
3 the maximum 30-year sentence on the armed
4 robbery and the 20 years on the ABWIK charge
5 because of his violent nature and because he
6 is a threat to society.

7 Mr. Phoenix would like to address
8 you, if you'd like to hear him.

9 THE COURT: Certainly. I'd be
10 delighted to hear from him.

11 MR. PHOENIX: Thank you for being
12 here today. Your Honor, I want to address the
13 Court. Your Honor, this has affected my life,
14 after I got shot I'm not the same person I
15 used to be. I've changed wholly -- my whole
16 life, I've changed. I have problems sleeping.
17 I have to sleep a special way at night. I'm
18 asking for the max to sentence him. For the
19 rest of my life I've got to take medication
20 and I don't know for how long but I know I'm
21 on medication for the rest of my life. I'm
22 asking for the max.

23 THE COURT: Okay. Thank you, sir.
24 Anything else from the State?

25 SOLICITOR BIAGANTE: Nothing from

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1 the State.

2 THE COURT: Mr. Shelton, I'll be
3 delighted to hear from you and anyone you want
4 to present.

5 MR. SHELTON: Your Honor, could I
6 have one ---

7 THE COURT: Oh, absolutely. Take
8 your time, sir. No rush.

9 MR. SHELTON: Your Honor, while
10 we respect the jury's decision, for fifteen
11 months I've been representing Jermaine. We've
12 had our ups and downs. From the beginning
13 he's been very passionate towards this case
14 and towards his innocence in the case.

15 Also during his time of incarceration
16 he's lost his father. He's lost an uncle. A
17 lot of things have happened to him since he's
18 been incarcerated. And this is the longest
19 time he's ever been incarcerated.

20 He fully understood and understands
21 the punishment that could be handed out, and
22 he understood that and the risk he was taking
23 in going to trial. We would ask Your Honor to
24 have mercy on Mr. McKelvey and to fashion an
25 appropriate sentence and take into considera-

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1 tion that he is young and that he could at
2 some time become a productive citizen.

3 THE COURT: Thank you, sir. Mr.
4 McKelvey is 29. Is that correct?

5 MR. SHELTON: Yes, Your Honor.

6 THE COURT: Does Mr. McKelvey wish
7 to speak at all?

8 MR. SHELTON: No, he doesn't.

9 THE COURT: Very well. Thank you.
10 How long has he been in jail?

11 MR. SHELTON: Since this incident
12 on November 27, 2008, Your Honor.

13 THE COURT: Mr. McKelvey, thank
14 you, sir. One of the things that you
15 consider, of course, and I have my entire
16 career as a judge -- it is significant,
17 sometimes more than not -- sometimes it's
18 really more significant than some other cases.
19 This is one that your prior record is really
20 compelling to me in that -- in two ways.

21 The CDV is basically the same type of
22 conduct of 'I'm controlling and you're going
23 to do what I say do. And if you don't do,
24 then there are going to be consequences.'
25 Your record demonstrates that this has been a

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1 way of life for you for awhile. I don't know
2 why, but it clearly has been escalating, and
3 now it's to the point that it is.

4 That's one significant part. The
5 other is the involvement of firearms, and that
6 continues and that's been the downfall, I
7 think, of our society is how readily it's
8 used, how much -- how prevalent they are.

9 So in fashioning a sentence I have to
10 fashion a sentence that is a punishment. But
11 it also should serve as a deterrent. There
12 have been a lot of people here observing this,
13 a lot of young people. And I hope they hear
14 this sentence. Because it needs to stop.
15 There are too many people that are in jail as
16 you're going to be, people that are suffering,
17 as Mr. Phoenix is suffering, and frankly
18 people that aren't here any more all because
19 of just an attitude of, 'I'll do what I want
20 to do.' And it's very prevalent. And it's
21 come across in this case that that's what it
22 was on that night.

23 I understand and appreciate the
24 innocence that you have maintained. As I
25 instructed the jury, you're presumed innocent

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1 and I honored that presumption in every
2 respect the entire time. But now the jury has
3 spoken. So I will now govern my actions
4 accordingly. The sentence of the Court,
5 therefore, is as follows:

6 On Indictment 2009-2447, that's the
7 possession of crack cocaine, the sentence is
8 one year. You're given credit for one year of
9 jail time, so that sentence has been
10 satisfied.

11 The sentence of the Court on 2009-
12 305, which is the first sentence that I impose
13 and will be the controlling sentence insofar
14 as when certain eligibility is to accrue
15 because I understand and do believe and am
16 sentencing you in this fashion for this
17 reason. 209 (sic) is a day-for-day sentence,
18 as your lawyers have explained to you. It's
19 five years and it's five years. It's not one
20 day shorter than five years. So the sentence
21 is five years, and you're given credit for
22 time served since November 27, 2008.

23 The sentence of the Court on 2009-
24 504, which is the sentence for armed robbery,
25 and that sentence is that you be committed to

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1 the Department of Corrections for a term of
2 twenty-seven years. I give you credit for
3 time that you've served since November 27,
4 2008. But that sentence is consecutive to
5 2009-GS-08-305. Since that is a violent crime
6 it's also a nonparolable crime. It is my
7 understanding that you will not earn any
8 credit for that sentence until you have
9 satisfied 2009-305. I want the record to be
10 clear that is the intent of the Court in
11 fashioning the sentence.

12 The sentence of the Court in 2009-304
13 is that you be committed to the Department of
14 Corrections for a term of twenty years. That
15 sentence, however, is concurrent.

16 Good luck to you, sir. And you're
17 given credit for time served since November
18 27, 2008.

19 (END OF PROCEEDINGS)

20

21

22

23

24

25

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CERTIFICATE OF REPORTER

I, the undersigned, Deborah Garrison,
official court reporter for the 9th Judicial
Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true,
accurate and complete transcript of the jury
trial held before The Honorable R. Markley
Dennis, Jr., on April 12-14, 2010;

I further certify that I am neither
kin nor counsel to any of the parties and have
no interest in the outcome of this action.

Deborah Garrison

Deborah Garrison

Circuit Court Reporter

9th Judicial Circuit

FORM 5

STATE OF SOUTH CAROLINA)

County of BERKELEY)Jermaine T. McKelvey, 280590)

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

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

20 12 - CP - 08 - 1235APPLICATION FOR
POST-CONVICTION RELIEF

2012 APR 23 PM 4:41

FILED

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Lee Correctional Institution, Dar 1224,
990 Wisacky Hwy, Bishopville, SC 29010
2. Name and location of Court which imposed sentence Berkely County Court
of General Sessions; Moncks Corner, South Carolina
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2009-GS-08-0304; Assault & Battery / WIK
 - (b) 2009-GS-08-0504; Armed Robbery

JTM

(c) 2009-GS-G-0305; Poss. Firearm During Commission of Violent Crime

5. The date upon which sentence was imposed and the terms of the sentence:

(a) April 14, 2010; 27 years consecutive for all convictions;
committed to 22 years concurrent for all convictions.

6. Check whether a finding of guilty was made:

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

7. Did you appeal the judgement of conviction or imposition of sentence?

Yes

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

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

i. The South Carolina Court of Appeals
ii. _____
iii. _____

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

i. Appeal Dismissed
ii. _____
iii. _____

(c) the date of each such result:

i. Filed March 7, 2012
ii. _____
iii. _____

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

i. not known
ii. _____
iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) _____
(b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Violation of 6th Amend. right to effective assistance of counsel
- (b) Violation of 5th Amend. right to a fair trial
- (c) Violation of 14th Amend. right to due process & equal protection
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See attached page 3(a)
- (b) See attached page 3(a), 3(b)
- (c) See attached page 3(b)
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. _____
- iii. _____
- iv. _____

APPLICATION FOR POST-CONVICTION RELIEF

Attachment: page 3(a)

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

(a) Applicant states the constitutional claim that trial counsel violated Applicants' Sixth Amendment right to the effective assistance of counsel by and through counsels' failure to timely and properly object to the trial judges' improper jury instruction that malice could be implied from the use of a deadly weapon. At the time of Applicants' trial State v. Belcher, 385 S.C. 597, 610, 685 S.E.2d 802, 809 (2009) was established law in South Carolina, effectively ruling that the violative jury charge given by the trial judge in Applicants' trial was no longer good in South Carolina. Applicant states the clear and convincing claim that, in accord with Belcher, the trial judges' jury charge constitutes reversible error, and trial counsels' failure to timely and properly object to same establishes ineffective assistance of trial counsel, showing to the Court substantive evidence that Applicants' U.S.C.A. Sixth Amendment right to the effective assistance of trial counsel was violated.

(b) Applicant states the constitutional claim that his U.S.C.A. Fifth Amendment right to a fair and impartial trial was violated, offering the record of the proceeding to fully support this allegation. The record shows the trial judge issuing an improper jury instruction in Applicants' trial proceeding. Pursuant to State v. Belcher, supra, the jury charge given by the trial judge was, at the time of Applicants' trial, unlawful in the State of South Carolina, having been decided as such in the Courts' Opinion in Belcher. The basic and simple precept now advanced by Applicant is his position that the inferior court of General Sessions may not repeal, nor overrule, the precedent rule of law handed down by the South Carolina Supreme Court. Applicant believes in good faith that further discussion and/or argument is not necessary in light of the definitive ruling and affirmative findings published in Belcher.

APPLICATION FOR POST-CONVICTION RELIEF

Attachment: page 3(b)

Applicant states in confidence that his U.S.C.A. Fifth Amendment right to a fair trial was violated by the unwarranted prejudice inflicted by the violative jury charge in Applicants' trial, and seeks this Court make that finding of fact and conclusion of law.

- (c) Applicant states the claim that his rights to due process and equal protection of law were unjustly violated by the actions of the prosecution and trial judge. The record clearly shows that the prosecution preempted the jury panel with the prejudicial announcement that the judge would soon charge them that malice could be inferred from the use of a deadly weapon. Subsequently, the judge did, in fact, charge the jury that malice could be inferred from the use of a deadly weapon. Applicant states that the prosecution and the judge were well aware of the controlling rule of law made precedent by the opinion handed down by the S.C. Supreme Court in Belcher, yet the prosecution and the judge made the decision to act in a manner contrary to state law, thereby violating Applicants' rights to due process and equal protection of law in the process of these violative acts. These violations literally stripped Applicant of his constitutional rights, guarantees, and protections of established law. Applicant states the allegation that the rule of law, as strictly defined in Belcher, regarding jury charges, conferred upon Applicant the equal protection from the very violation which was erroneously enforced upon Applicant at his trial. Therefore, Application states the meritorious claim that his rights of due process and equal protection were wrongfully violated in his trial proceeding, and seeks this Court make findings and conclusions of law in agreement with these claims.

(c) the disposition thereof:

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

(d) the date of each such disposition:

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

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

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

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

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

(a) which grounds have been presented:

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

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

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

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) This is the first PCR filing
 (b) _____
 (c) _____

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

(a) your arraignment and plea? _____
 (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. Chad D. Shelton, Esq., Berkely County Public Defenders Office,
P.O. Box 1687, Moncks Corner, SC 29461
 ii. Katherine H. Hudgins, Esq., Office of Appellate Defense, P.O.
Box 11589, Columbia, SC 29211
 iii. _____
 (b) the proceedings at which each such attorney represented you:
 i. trial and sentencing
appeal
 ii. _____
 iii. _____

19. State clearly the relief you seek in filing this application:

For the conviction and sentence to be vacated and set aside, or in the
alternative, for the conviction to be reversed and a new trial be
granted.

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

No

20 12-CP-08

2011 APR 23 PM 4:41

FILED

STATE OF SOUTH CAROLINA)

County of Berkeley)

VERIFICATION

I, Jermaine M. Kelvey, 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.

SWORN to and subscribed before me this 19
 day of April, 2012.

[Signature] (L.S.)
 Notary Public

My Commission Expires: 11-4-2015

2012 CP 08 - 1235

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Termaine M. Key, 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.

Termaine M. Key
Applicant

SWORN or affirmed to and subscribed before me this

19 day of April, 2012.

D. J. S. S. S.
Notary Public

My Commission Expires: 11-4-2015

FILED
2012 APR 23 PM 4:41
CLERK OF COURT
J. SC.

GROUND FOR RELIEF WITH SUPPORTING FACTS

Applicants' right to effective assistance of trial counsel, as guaranteed by the U.S.C.A. Sixth Amendment, and South Carolina Law, was violated as a result of counsels' "BAD REPRESENTATION" and failure to competently represent Applicant.

Ineffective Assistance of trial counsel:

(1) Counsel was ineffective for failing to call Expert Witnesses to testify on Applicants' behalf, especially Experts in the field of Medicine, such as:

- A) A Licensed Physician;
- B) A Pathologist;
- C) A Toxicologist;
- D) A Forensic Expert in the field of Ballistics;
- E) A Registered Nurse experienced in Triage.

Counsel failed to object to the witnesses acts of committing perjury when testifying under oath.

Counsel failed to object to the trial courts' error regarding the jury instruction on malice.

Counsel failed to fully investigate Applicants' case and all witnesses involved in Applicants' case to the extent required under the standard of effective representation; Strickland v. Washington, 466 U.S. 658, 104 S.Ct. 2052, 80 L.Ed.2d 674; Pauling v. State, 503 S.E.2d ____ (S.C. 1998).

Counsel was ineffective for failing to subpoena the Doctor from MUSC Hospital who attended the victim in Applicants' case, Bernard Phoenix, on the morning of the accident.

Doctor Todd Mishall could have established exculpatory evidence in Applicants' case, which now gives standing to the claim that the results of Applicants' trial would have been different but for the the ineffective assistance of Applicants' trial counsel; Strickland v. Washington, supra, Pauling v. State.

The testimony of an Expert Witness would have offered the opportunity of the difference between acquittal and conviction in Applicants' case, yet Applicant was unconstitutionally denied and deprived of that opportunity and constitutional right because of

trial counsels' inadequate representation.

Trial counsel was ineffective for failing to subpoena Dr. Todd Mishall to testify in Applicants' defense, and for failing to introduce the Doctors' notes, failing to interview the Doctor, and failing to use the available exonerating evidence which was available by and through the Doctors' personal testimony and case notes regarding the incident that Applicant was unjustly convicted for. NOTE: In the "Hospital Report from MUSC Dr. Todd Mishall shows NO MEDICAL NOTATION that the victim, Bernard Phoenix, underwent any surgery required by any trauma. As Applicant was convicted for actually shooting the victim, Bernard Phoenix, in the head, the Hospital Report of Dr. Todd Mishall would have, with certainly, documented the extensive medical attention demanded immediately for a gunshot wound to the head! In the NOTES of the Interdisciplinary Progress, from MUSC, it is indicated that [the bullet] did not penetrate the skull, but that the patient did have partial skull fracture. Trial counsel was vastly ineffective for failing to call Dr. Todd Mishall to testify to the fact that the victim was NOT shot in the head with a gun, but only sustained an abrasion in the forehead area of his body. A laceration/abrasion does not qualify as a gunshot wound to the victims' head. Further, the legal consequences between inflicting a laceration to the victims' head and inflicting a gunshot wound to the victims' head is measured in large numbers of years spent in prison.

Counsel was ineffective for failing to subpoena an Expert Pathologist in Applicants' trial. Applicant states the claim that an Expert Pathologist would have provided strong and important testimony supporting Applicants' defense that he did not, in fact, shoot the victim, Bernard Phoenix, in the head. The prejudice resulting from this failure is evident by the fact of Applicants' imprisonment for an offense he never committed; See Strickland v. Washington, Dove v. State, 523 S.E.2d 454 (S.C. 1990).

Applicant claims that the testimony of an Expert Pathologist would have made such a difference in his case to the degree that such testimony would have proven beyond any doubt that the victim Bernard Phoenix did not suffer a gunshot wound to the head, yet, as unbelievable as it appears, APPLICANT WAS CONVICTED FOR

SHOOTING THE VICTIM IN THE HEAD 'AT CLOSE RANGE'. A Pathologist could have testified to the fact that the victim, Bernard Phoenix, did not receive an "entrance wound" from a bullet to the left side of his head, that there was not an exit wound from a bullet in the rear of the victims' head, and therefore, an Expert Pathologist could have testified that the victim did not sustain a gunshot wound to his head, OR, to any other part of his body, as a matter of documented fact. To the contrary, the Law Enforcement Investigators did not find any gunpowder residue on the hands, head, or clothing of the victim, nor did they find any blood splatters on the victim or on Applicant. The failure of trial counsel to fully investigate these issues unfairly placed Applicant in the position of not challenging the States' accusations that Applicant shot the victim in the head. Should counsel have performed effectively they could have proven to the court, through medical history and Expert Testimony, that Applicant did not shoot the victim in the head. Because the jury was deprived from hearing and seeing the material evidence which establishes that the victim, Bernard Phoenix was not shot, it can be stated as a genuine issue of material fact that Applicant was prejudiced by counsels' ineffective and incompetent representation of Applicant. It is both absurd and illogical to realize that Applicant is suffering the unconstitutional onus of a conviction which medical records prove NEVER HAPPENED. Applicant states the claim of ineffective assistance of counsel in that Applicant was unconstitutionally denied the opportunity to present relevant and material evidence, to include Expert Witness Testimony, pursuant to Stakes v. State, 308 S.C. 546, 419 S.E.2d 778, wherein the Applicant in that case was denied supporting testimony in defense and perjury was incidental to the case. In the present case, Applicants' trial counsel failed to present Expert Witness Testimony in Applicants' defense, and stood by silently when perjury was presented by the State. Applicant states the claim that this is equal to fraud upon the court. The record is convincing that trial counsel failed to use available medical documentation and Expert Medical Witnesses to prove before the court that Applicant IS NOT GUILTY OF SHOOTING ANYONE IN THE HEAD WITH A GUN.

Counsel was ineffective for failing to subpoena an Expert Toxicology Witness for the purpose of testifying to the blood level of alcohol in the victims' blood on the night of the incident. An Expert Toxicology Witness could have testified to the showing that the victim relieved himself of ETOH, which is some type/form of alcohol. The Expert Toxicologist could have testified to the victims' blood level of alcohol which reached levels so dramatic that incoherence, imagination, and even hallucination could have motivated the victim to believe he was actually shot in the head. The Toxicology Expert could have testified to the fact that drugs were documented to be in the blood of the victim of such strength that the effects could have moved the victim to imagination or the elusiveness of being shot. An Expert Witness could have given the determination that this was the cause of the victim having the listed "combative behavior" on the night of the incident, which is different from going in and out of consciousness: this is stated in the Trial Transcript, p. 329, l. 18-29, and resulted in the victim being "intubated". Counsel was clearly ineffective for failing to subpoena an Expert Witness to testify concerning this matter: a different outcome would have resulted in Applicants' trial but for counsels' errors. ETOH is an acronym for alcohol, and counsel was ineffective for failing to subpoena and call Expert Witnesses who would have exposed these material facts to the jury.

Counsel was ineffective for failing to subpoena an Expert Witness in BALLISTICS, who could have been an important witness in Applicants' defense to show, conclusively, that the victim never sustained a gunshot wound to the head; Strickland v. Washington. Counsel was highly ineffective for failing to subpoena a Forensic Expert who could have explained to the jury: 1. the dynamics of projectiles (bullets), and, 2. The study of firearms and bullets. Counsels' failure to subpoena a Forensic Expert prejudiced Applicant by reason that testimony from a Forensic Expert would have produced a different result at Applicants' trial. Applicant states that a Forensic Expert would have been able to testify to the fact that there was never any type of blood splatter on Applicant OR on the victim, who was

alleged to have been shot 'at close range': Pauling v. State, and the Expert could also have testified to the absence of any gun powder burns and/or residue on the head, hands, or any part of his clothing. Expert testimony would have shown the inconsistency of being shot 'at close range' with no material evidence of a gunshot found. An Expert would have testified that there was no lead elements found on the victim, which again is inconsistent with being "shot at close range". An Expert could have testified that there was not found on the victim any metal fragments, on any part of the victims' body or clothing, which would have established the fact that the victim had not been in the presence of a discharged firearm or handgun. Counsel was ineffective for failing to show these material facts establishing inconsistencies to the States' criminal allegation that the victim was shot in the head by Applicant. The physical evidence in this case proves this did not happen, and counsel was ineffective for failing to present all this evidence to the court by and through Expert witnesses. Counsel was ineffective for failing to subpoena a Ballistics Expert to present testimony which would have produced a different outcome at Applicants' trial. A Ballistics Expert in firearms and bullets could have presented testimony regarding the kinetic energy, destructive force, and fatal injury a 9mm bullet would have caused to the victim IF the victim had DEARLY been shot in the head 'at close range', as the State alleges to have occurred. In the absence of Divine Intervention, the victim, alleged to have been shot in the head 'at close range' with a 9mm pistol, would not have been released from the hospital within 4-6 hours after having been admitted for a gunshot wound to the head, AT CLOSE RANGE, with a 9mm pistol !!! Counsel was ineffective for failing to show these documented facts to the jury during the course of Applicants' trial. Expert Forensic testimony could also have provided evidence that just because gun powder residue was found on Applicants' hands does not establish positive evidence as to Applicant actually discharging a firearm. Expert testimony could have established that applicant could have been in close proximity to a discharged firearm: State v. Ard, 232 S.C. 370, 505 S.E.2d 228 (1998); Dove v. State, 522 S.E.2d 454.

Counsel was clearly ineffective for failing to subpoena

Forensic and Ballistic Experts who could have presented testimony supporting Applicants' defense, which certainly would have produced a different result at Applicants' trial. Counsel was ineffective for failing to subpoena Expert testimony for the purpose of presenting evidence to the jury that there was no blood or fingerprints from Applicant or the victim found on the gun alleged to have been used on the victim, and that the samples taken came back inconclusive. Counsel was ineffective for failing to subpoena the Triage Nurse from MUSC Hospital, and Roper Berkely Hospital in Moncks Corner. The Triage Nurses could have served as strong and important defense witnesses in Applicants' case, causing a different result in Applicants' trial: Strickland v. Washington; Pauling v. State; Dove v. State. Counsel was ineffective for failing to subpoena the attending Nurse from MUSC Hospital to testify that the victim was treated for an abrasion to the forehead, and a bloody laceration, and/or such injuries. Counsel was ineffective for failing to introduce the notes of the attending Triage Nurses from MUSC Hospital and from ROPER BERKELY Hospital, and for failing to interview the Triage Nurses and prepare them as defense witnesses at Applicants' trial. Counsel was ineffective for failing to subpoena the Nurse from ROPER BERKELY Hospital for testimony regarding the victims' checkup 30 days after the victim was alleged to have been shot in the head 'at close range' with a 9mm pistol. The Nurse could have testified that the abrasion and laceration on the forehead of the victim was healing "significantly". This report would have shown that the victim reported for a checkup on a head injury, BUT WAS TREATED FOR A SHOULDER INJURY. The Nurse could also have testified that the alleged victim HAD NO HISTORY TO SUGGEST ANY HEAD INJURY, and this documentation is taken from the CLINICIAN HISTORY OF PRESENT ILLNESS: Pauling v. State. The Nurse could have testified that the alleged victim denied anything that consisted of his being shot in the head, such as, denial of headaches or blackouts. The record does not indicate or show that there was confusion in locating the Triage Nurse, or even the attending Doctor, for that matter. There was no corroborating physical evidence of penetration or any forensic evidence to show a gun shot wound. Testimony by either or both of the attending

Triage Nurses would have been crucial to the showing that a shooting did not occur (and therefore there was no CSC), establishing evidence to impeach the victims' testimony. Counsel was ineffective for failing to subpoena and use at Applicants' trial Medical Records relevant to the victims' V-PAY PICTURES, which could have shown there was not any break in the victims' skull that would have established a gunshot wound or evidence of surgery required by a gunshot wound; Johnson v. State, 325 S.C. 182, 186, 190 S.P.2d 733, 735. Counsel was ineffective for failing to subpoena the attending Triage Nurses for testimony which would have made a determining difference in Applicants' hearing. Counsel was ineffective for failing to object to the witness committing perjury under oath; this failure to object and call the courts' attention to the perjury prejudiced Applicant. If counsel would have properly and timely objected to the perjury the outcome of Applicants' trial would have been different. Bernard Phoenix, the victim, "did willfully, unlawfully, and feloniously" commit perjury under oath. The victim told 3 different stories: one in a verbal statement, which counsel failed to present to the jury; a second statement which was handwritten; and a third statement of testimony at trial, to which the victim testified under oath, committing perjury, in the presence of trial counsel. Each of these statements included differing accounts of what happened, and counsel allowed the differing accounts to go unchallenged, failing to object to the contradictions offered by the victim. The record of the proceeding will show clearly that the victim gave testimony constituting perjury. Medical records will establish as fact that the victim was not shot in the head, and that the victim never underwent surgery for a gunshot wound to his head. In another instance of perjury, the victim stated that Applicant took money from him, however, the records show plainly that Applicant was booked with NO MONEY in his personal possession. The victim stated that there were two shots fired when he was shot in the head, but the police officers and one witness stated there was only one loud "bang" of a noise. The victim stated that he doesn't drink, and that he doesn't know Applicant. The medical records show the victim on the night of the incident to be

extremely intoxicated, and the victim and Applicant had talked on the street and came in contact with each other when the victim was arrested and detained for breach of trust. Counsel was ineffective for failing to present all this evidence and information to the jury. The victim also committed perjury by his statement that the last thing he remembers before being shot is the owner of the club asking him (the victim) why the Applicant did that, when clearly in the witnesses statement he states he opened the door to a fight and went back inside, and that is what happened. The victim stated he does not deal with people at the club, but witness Miss Vance said the victim does visit the club and "deals with the people there".

The victim has charges of breach of trust, with fraud, and also habitual traffic offender, and DUI. Because of these outstanding charges against the victim, counsel should have initiated impeachment proceedings against the victim for a showing of discrediting the victims' testimony before the jury. The victim committed further perjury by stating that he did not give a verbal statement at the Hospital. This statement is contradicted by Police Officer Michael Roach, who stated that when he went to the Hospital to check on the victim, the victim told Officer Roach that Applicant asked him (victim) for money, and that he (victim) laid it on the top of a car hood, and that's when the Applicant shot him. This is only one of the three conflicting statements the victim gave, which Applicants' trial counsel failed to challenge or move to impeach. All these failures severely prejudiced Applicant, and firmly establish a violation of Applicants' U.S.C.A. Sixth Amendment right to the effective assistance of trial counsel.

Counsel was ineffective for allowing Korshenda Raskin to commit perjury under oath, and with that being said, if counsel did not let witness commit perjury it could have been a different outcome in Applicants' case at trial. Witness did willfully, unlawfully, and feloniously commit perjury under oath. First, the witness said that she saw blood splatter everywhere, when there was not any picture showing such things. Secondly, she said the owner of the club said to take it outside, which is in the Trial Transcript, p.245, l. 9-13, but the owner never did say that in

statements. And the victim also said that Applicant asked him to go outside, and that victim and Applicant went [outside] together. The witness said she saw a gun in Applicants' hand, Trial Transcript, p. 246, l. 3-6, but in her written statement she does not say anything about seeing a gun in Applicants' hand. p. 248, l. 14-25., the witness can't remember if she saw a gun or not. She also heard "one loud bang" of a noise. The witness states on p. 250, l. 1-18 that she was laid in blood; if that's a truthful statement, then WHY wasn't her clothing taken for evidence? With this being said trial counsel was ineffective for allowing Korshenda Baskin to commit perjury under oath.

Counsel was ineffective for allowing Sharon Vance to commit perjury under oath, and with that being said, if counsel would not have let the witness commit perjury it would have been a different outcome in Applicants' case at trial. The witness did willfully, unlawfully, and feloniously commit perjury under oath. Witness Sharon Vance, in statements, said she saw Applicant pull out a gun and go outside with another guy, but the victim stated that Applicant asked him to go outside, and never did say anything about a gun being pulled out. And also, Korshenda Baskin said the owner of the club kicked us out, but at Applicants' trial the witnesses story changed, and she was allowed to "refresh" her memory by looking at a written statement, Trial Transcript, p. 187, l. 13-14. The witness said Applicant and victim was joking and arguing, but at trial she said Applicant and victim were just arguing. Even Mrs. Baskin said Applicant and victim were joking. The witness said she saw Applicant hit the victim, Trial Transcript, p. 188, l. 25 thru p. 189, l. 1-4. But in a statement she did not say that. The witness stated, p. 190, l. 3, that they [victim and Applicant] was told to get out, but in statements she said Applicant followed the victim outside. On p. 190, l. 6-20, she said the victim was not leaving willingly, which shows she committed perjury. She stated that Applicant took a gun out and followed the victim outside; the other witness stated that the owner told Applicant and victim to go outside, and the victim said Applicant asked him to go outside. The witness also did not hear a gun shot or a loud noise or bang of

such sort. NOTE: The witness does not know what time she was there. She said 3:00, 2:00, and 2:20. So, that being said, counsel was ineffective for allowing Mrs. Vance to testify. Also, the witness has a rap sheet of previous felony convictions which was in possession of counsel at Applicants' trial, but counsel did not present those facts or move to impeach the witnesses testimony. The witnesses prior convictions consist of false social security numbers, false names, fraudulent checks, damage/concealment/removal of property, and failure to appear. At the time of Applicants' trial the witness was wanted by North Charleston law enforcement, and Applicant has in his possession proof to establish that fact. Counsel was ineffective for permitting the witness to testify unchallenged when counsel had knowledge that the witness was wanted by the North Charleston Police. At that time it was stated as Caution Information - WANTED - Confirm Want is still outstanding. Agency: Police Department North Charleston (SC 0100800) WANTED - NCIC #W107826530; Vance, Sharon, Forgery (Free Text), Case # 20090287907; Date Of Warrant: 12/23/2009; Notify SC 0100800; Police Department North Charleston, S.C. With this being said, Applicants' case at trial could have been different if the witnesses testimony would have been challenged by counsel as having committed perjury. Counsel failed to move to impeach the testimony of this witness.

Nurse Euda Cynthia committed perjury under oath, stating in Trial Transcript, p. 317-332 that she was there when the victim came to the Hospital. She testified that she was there, which was 2:00 a.m., but she stated to Applicants' counsel that she arrived at work at 7:00 a.m. She also stated that the victim was lucky that the bullet went through his head, but did not penetrate his brain!!! She stated further that there was no penetration of a bullet, that it was only a skull fracture. But she did state the truth in saying the victim was not shot. Applicants' trial would have been different if she had not committed perjury and told the truth from the beginning.

Police James Taylor committed perjury under oath in the Trial Transcript when he stated he found a gun under a seat, when

another Officer stated he found a gun in the glove box. The witness also stated he did not perform the booking, then later he stated he did book; his name is on the Booking Sheet. He also stated he got a call at the Hospital for the family acting out of some sort, but the EMS worker says he was there for the victim to say who shot him. With this being said, the witness committed perjury under oath.

Police Tony Edwards committed perjury by stating that he found a gun in the glove box, and also by saying the victim was shot in the head, when the witness is not an expert in that field. Officer Edwards said he saw blood on the right hand, but never tested it for blood, but did perform a GSR Kit on Applicant. The Officer stated he picked up a bullet jacket that had evidently passed through the victim, but it was only a casing, and not the bullet. Officer Edwards was derelict in his duties by picking up the bullet case with his bare hands, this constitutes tampering with evidence. Officer Edwards said that he found a gun in the glove box, under the seat, and on the seat; all three of these accounts establish the ground of perjury. Officer Edwards committed perjury by stating he knew where the owner of the club was standing when the shot was fired. This being said, Officer Edwards should never have been allowed to testify under oath without being challenged for perjury.

Counsel was ineffective for allowing Detective Michael Roach to commit perjury under oath. That being said, if counsel would have challenged the testimony as perjury Applicants' trial would have had a different result. The witness did willfully, unlawfully, and feloniously commit perjury under oath. "Michael Roach" did commit perjury as an "Officer of the Law", as one who holds an Office of authority, or "TRUST". The witness charged Applicant with Assault and Battery W/Intent To Kill and Armed Robbery, which is not true because no one was shot or robbed. This witness even stated at Applicants' Preliminary Hearing that he did not have a thing which said that Applicant shot the victim, but at Applicants' trial the witness committed perjury by stating that Applicant shot the victim. The witness stated that when the Hospital Reports come back it will show that Applicant

shot the victim. To this day there is not one document to show that Applicant shot the victim in the head. Also, at Applicants' Preliminary Hearing, this witness stated that the bullet went in the left side of the victims' head, and went around the side, and then came out the right rear of the victims' head. But at Applicants' trial this witness stated the bullet went through. Counsel failed to object to the witnesses perjury. Also, the witness committed perjury by saying that the victim did not give a verbal statement at the Hospital, but in the witnesses Report he stated the victim told him he laid money on the car and then Applicant shot him. The witness committed perjury by telling the Solicitor the reason he did not take a written statement from the victim at the Hospital is because the victim had tubes and things, I.V., hooked up to him, but told counsel he was about to be released, and was "shocked" to learn of his condition; he was alert and coherent. So he could have written a statement. The witness committed perjury by saying it was recorded that Applicant had money on the Booking Sheet, which Booking Sheet states only I.D. With this being said, the witnesses testimony of perjury should have been challenged by Applicants' trial counsel.

FORMERLY 92K 257 / Constitutional Law Key 257.5

(2) Conviction obtained through use of false testimony, known to be such by representatives of the State, is a denial of due process, and there is also a denial of due process when the State, though not soliciting false evidence, allows it to go uncorrected when it appears; U.S.C.A. Const. Amend. 14.

92K 257.5 Formerly

(3) Constitutional Law Key 257.5 Principle that a State may not knowingly use false evidence including false testimony to obtain a tainted conviction implicit in any concept of ordered liberty, does cease to apply merely because the false testimony goes only to the "credibility of the witness"; U.S.C.A. Const. Amend. 14

(2) First, it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under Fourteenth Amendment; Mooney v. Holohan,

294 U.S. 103, 55 S.Ct. 240, 79 L.Ed. 791: Pyle v. State of Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214; Curran v. State of Delaware, 3 Cir. 259 F.2d 707; see State of New York ex rel.; Whitman v. Wilson, 318 U.S. 688, 63 S.Ct. 840, 87 L.Ed. 1083; White v. Ragen, 324 U.S. 760, 65 S.Ct. 878, 89 L.Ed. 1348. Compare: Jones v. Commonwealth of Kentucky, 1 Cir. 97 F.2d 335, 338, with re 79 S.Ct. 1173 (cite as: 360 U.S. 264*, 269, 79 S.Ct. 1173**).

People v. Savvidis, N.Y.2d 554, 857, 154 N.Y.S.2d 885, 887, 136 N.E.2d 853, 854, 855, it is of no consequence that falsehood bore upon Defendants guilt (A LIE IS A LIE) no matter *270 what it's subject, and is in any way relevant to the case the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. **** That the district attorneys silence, for its' impact, was the same preventing as it did, at trial that could in real sense be termed fair. With this being said by law for itself facts or corrections upon which federal constitutional issues rest (FN 4). As previously **1179 indicated our own evaluation of the record here compels us to hold that the false testimony used by the State in securing the conviction of Petitioner may have had an effect on the outcome of the trial. Accordingly, the judgement "ABOVE MUST BE REVERSED"!

Trial counsel was ineffective for failing to object to the trial courts' error on the jury instruction of malice. Due to the lack of adequate, competent performance by counsel, in the State of S.C., the outcome of Applicants' trial would have been different. If counsel would have properly and timely objected to the judges' error in jury instruction Applicants' trial would have had a different result.

The trial judge committed error when instructing the jury on malice. That being said, the outcome of Applicants' trial would have been different; State v. Belcher. It has long been the practice for trial courts in South Carolina, as sanctioned by this court, to charge juries in any murder/abwikt prosecution that the jury may infer malice from the use of a deadly weapon. We granted Belcher's Petition to argue against this precedent, having carefully scrutinized that historical antecedents to this

permissive inference. "We hold today that a jury charge, INSTRUCTION, that MALICE may be inferred from the use of a deadly weapon IS NO LONGER GOOD in South Carolina". Where evidence is presented that would reduce, mitigate, excuse, or justify the homicide, we therefore reverse Belcher's convictions and remand for a new trial.

Did the trial judge commit reversible error, based on State v. Belcher, when, in charging the jury on the law of assault and battery with intent to kill (ARWIK), he instructed the jury that "inferred malice may also arise when the deed is done with a deadly weapon", when evidence was presented that would reduce the ARWIK to assault and battery of a high and aggravated nature (ARHAM) and the judge instructed the jury on the law of the lesser included offense of ARHAM?

The trial court charged the jury, in part, as follows:

Trial Transcript: p. 396, l. 13-14: "There also has to be the element of malice aforethought. Malice is hatred."

p. 397, l. 3-4: "Malice aforethought may be expressed or inferred."

p. 397, l. 15-19: "Malice may be inferred, as I told you. Inferred malice may be shown from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon."

p. 397, l. 20 thru p. 398, l. 2: "A deadly weapon is an article. . . I would instruct you, is a deadly weapon."

State v. Belcher, 385 S.C. 597, 610, 685 S.E.2d 802, 809 (2009) (Decided in October)

The charge given by the trial court has heretofore been considered the textbook, yet when confronted with Belcher's challenge the learned and experienced trial court judge expressed "concern about [the charge] rising to a charge on the facts".

Where a jury is asked to consider a lesser included offense of murder or a defense, Belcher asserts the permissive inference charge violates our common law and our "Constitutions".

prohibition against charging juries on the facts". (1) We elect to decide this appeal solely under the common law challenge. We conclude that our modern day usage of this jury charge has strayed from this courts' "ORIGINAL JURISPRUDENCE".

With this being said Applicants' case should be reversed, dismissed, thrown out, terminated, vacated and set aside at once. Accepting the fact that the trial judge did willfully, unlawfully, and feloniously commit error in instructing the jury on malice, this is proven by the prevailing case law handed down in Belcher, and this occurring because of trial counsels' U.S.C.A. 6th Amendment violation of ineffective assistance of trial counsel.

Also, the judge committed perjury by stating that the victim was shot in the head when clearly the victim was not shot in the head. Applicants' right to the effective assistance of trial counsel, as guaranteed by the U.S.C.A. Sixth Amendment, and the South Carolina Constitution, was violated as a result of counsels' failure to thoroughly and properly examine crucial prosecution witnesses.

The Solicitor called to testify, for the State, a witness named Laurie Villalobos. Ms. Villalobos was the only eyewitness who claims to have seen the Applicant at the murder scene near the time of the murder. However, she did not report what she saw until four years after the murder. Ms. Villaloboses testimony was extremely damaging to the Applicant, but at the same time was highly suspect. Although it is not entirely clear from the record it is likely that trial counsel was taken by surprise by this witness; if that is so, he should have requested that the judge grant continuance in order to investigate Ms. Villalobos and her testimony. He did not make such a request. Furthermore, Ms. Villalobos had an extensive criminal record, including crimes involving an inherently dishonest nature, which are admissible for impeachment of witnesses under the South Carolina Rules of Evidence. Defendants have an absolute right under the U.S.C.A. Sixth Amendment to confront witnesses against them. One of the rules of trial counsel is to confront the witnesses against

defendants on their behalf. Part of this right of confrontation is impeachment of unreliable witnesses. Trial counsels' files indicate that "he was in possession of a rap sheet" revealing Ms. Villalobos testimony to be subject to impeachment. Trial counsel did not make any attempt to introduce Ms. Villalobos prior convictions to impeach her testimony. Because Ms. Villalobos testimony was so damaging, failure of trial counsel to adequately impeach her significantly prejudiced Applicant by allowing the jury to hear the damaging testimony unchallenged.

This being said, counsel was very highly ineffective by this unreasonable representation. Counsel had knowledge of the victims' rap sheet, which consisted of Breach Of Trust, key word trust, and a Habitual Traffic Offender. With that being said the victims' credibility to testify should have been challenged. Counsels' failure to introduce the victims' criminal history for impeachment purposes establishes ineffective assistance of trial counsel.

Counsel was very highly ineffective for permitting witness Sharon Vance to testify at Applicants' trial unchallenged for the fact that she also had a rap sheet of prior felony convictions. Counsel was aware of this, yet took no action to discredit her testimony or move for impeachment. This witnesses prior convictions consisted of False Social Security Numbers, False Names, Fraudulent Checks, Damage/Concealment/Removal of Property, and Failure To Appear. This witness was also wanted by the North Charleston Police Dept. while testifying under oath at Applicants' trial! Therefore, her testimony should not have been allowed; Ms. Vance has an extensive criminal record, including FRAUD crimes of a dishonest nature, which was available for impeachment of her testimony under the South Carolina Rules of Evidence. That being said, counsel was highly ineffective for failing to challenge the testimony offered by this witness for impeachment purposes. Applicants' case should be reversed, dismissed, thrown out, vacated, and/or terminated. With this being said, counsel was ineffective for failing to investigate this witness. Applicant should have had a more fair, impartial, and unbiased trial proceeding, but was violated of this right

because of trial counsels' inadequate, unprofessional representation. Applicant was unconstitutionally denied the right to a fair trial because of counsels' numerous failures at the proper times during Applicants' hearing. The result of Applicants' hearing would have been different if counsel would have provided effective representation.

MAGISTRATE COURT RULES: Rule 13: Conduct of Trial Jury: Trials: Witnesses: Subpoenas

A trial should be conducted in an informal manner and the S.C. Rules of Evidence shall apply but shall be relaxed in the interest of both parties who are unrepresented by legal counsel. The court shall question the parties and witnesses in order to assure that all claims and defenses are fully presented: Jury Key 25 (7), 25 (8). Justices of the Peace Key 104, 105, 109. West Law Topic Nos. 230, 231. CJS. Juries §§ 156 to 160. CJS. Justices of the Peace §§ 01, 183 to 188; 196 to 198.

Victims Character: State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (S.C. 1999).

Rule 608. Evidence of character conduct and bias of witnesses / opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and, (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Counsel was ineffective for not attacking victim and witness character: Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (S.C. 2002). Counsel was ineffective as to Rule 613: Statements of witnesses for failure to investigate the credibility of the witnesses testimony.

Applicants right to the effective assistance of trial counsel, as guaranteed by the U.S.C.A. Sixth Amendment, and S.C. law, was violated as a result of counsels' failure to perform his duty to Applicant as a competent attorney of the law in the State of S.C.

Co

Counsel was ineffective for failing to properly prepare for trial.

Counsel was ineffective for failing to secure and present at Applicants' trial X-Rays, CAT Scans, and MRI Pictures of the victim for a showing that the victim never suffered a gunshot wound to any part of his body, AND CERTAINLY NOT TO HIS HEAD.

Counsel was ineffective for failing to move the court for the trial judge to recuse himself from the case. The judge knew Applicant, and had openly displayed resentment over a dispute, which became an argument with a disagreement between Applicant and judge when Applicant made an effort to have his counsel removed from the case. The judge showed hostility toward Applicant, telling Applicants' counsel that he (the judge) didn't care if Applicant received different counsel or not, the judge wanted to give Applicant prison time.

Counsel was ineffective for failing to subpoena witnesses on Applicants' behalf when counsel was aware that the State would be calling 15 witnesses to testify against Applicant. 7 of those witnesses did not show at Applicants' trial.

Counsel was ineffective for misleading Applicant with the promise that he, counsel, was "ready" to represent Applicant at trial, when in reality counsel was vastly unprepared.

Counsel was ineffective for failing to subpoena Expert Witnesses to testify at Applicants' trial during critical stages, which would have exonerated Applicant from the charge of shooting the victim in the head with a gun.

Counsel was ineffective for failing to subpoena the Investigator on Applicants' case, as she had evidence that the crime did not occur.

Counsel was ineffective for failing to conduct any investigation into Applicants' case as an effective attorney at law.

Counsel was ineffective for failing to challenge the court on the finding of guilty of having a deadly weapon when the victims' Expert Witness testified that the gun given to them had no fingerprints, blood, or anything to link Applicant to the gun, or his having possession of it; Trial Transcript: p. 272, l. 16 thru

n. 272, l. 1. Expert David Black, for the State, stated the same thing at n. 275, l. 20-25; n. 276, l. 1-6; n. 277, l. 12-15; and n. 278, l. 2-13, where David Black testified: "And what your last twenty five minutes of testimony boils down to is you really don't have anything for this jury to help them sort out who is a suspect and who isn't a suspect". David Black stated "THAT'S ABSOLUTELY CORRECT". Counsel was ineffective for failing to pursue this material fact given in testimony.

Counsel was ineffective for failing to subpoena the Triage Nurses, Doctors, and any other witnesses who could have provided Applicants' defense. Counsel was ineffective for failing to provide Applicant with reasonable, effective representation, which can be stated to be incompetent in the State of S.C. With that being said, Applicants' case should be reversed, dismissed, and terminated because of the unreasonable attorney performance given by trial lawyer, counsel, Public Defender. If counsel would have performed his duty to Applicant to the best of his ability, the result of Applicants' trial would have been different.

GROUND FOR RELIEF WITH SUPPORTING FACTS

Applicants' right to the effective assistance of trial counsel, as guaranteed by the U.S.C.A. Sixth Amendment, and under the South Carolina Constitution was violated.

Counsel was ineffective under Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052. Counsel was ineffective at trial for failing to subpoena a NEUROSURGEON, pursuant to Pauling v. State, 503 S.E.2d (S.C. 1998). A NEUROSURGEON, under oath, would have been a key witness for providing an Expert Opinion to the jury that the victim, Bernard Phoenix WAS NEVER SHOT IN THE HEAD. The NEUROSURGEON, as an Expert Witness, could also have testified before the jury that the victim, Bernard Phoenix, had NOT, at that time, been shot in ANY part of his body!!! For the logical reasoning that a NEUROSURGEON is the medical professional who performs surgery on persons involved in injuries affecting a persons' nerve functioning, a NEUROSURGEON would have certainly

provided the valuable factual information that the victim HAD NOT SUSTAINED ANY GUNSHOT WOUND.

The victim committed perjury at trial by stating under oath that he was in surgery, Trial Transcript, p. 105, lines 24-25. The victim stated " . . . not until they did the surgery and everything". The Hospital Reports from MUSC and ROYAL BROOKLYN HOSPITAL are clear and unambiguous that the victim, Bernard Phoenix, did not receive any manner or form of surgery. NO SURGEON WAS CONTACTED FOR TREATMENT OF THE VICTIM; the on-call attending Physician was the only Doctor to see and treat the victim on the date in question. Therefore, trial counsel was ineffective for failing to subpoena the on-call attending Physician and a NEUROSURGEON to testify to the extent of the injuries, AND TREATMENT, provided to the victim, Bernard Phoenix, on the night the State alleges the victim was shot in the head by Appellant. The testimony of these two medical professionals could have introduced evidence that would have literally exonerated Appellant of the charge for which the jury ultimately convicted. With absolute certainty the testimony of these two medical professionals testifying in regard to the charge of a gunshot wound to the head of the victim, Bernard Phoenix, would have produced a different result at Applicants' trial.

NOTE

The testimony of a Neurosurgeon could have explained to the jury that his primary specialty is surgery involving the brain, spinal cord, or nerves in particular, and that brain surgery is performed for treating a wound, removing growths or foreign substances, for relieving pressure on the brain caused by injury, bleeding, or obstructions. Brain surgery is also performed for infection, Parkinsons disease, and for relieving pain. Types of brain surgery include: CRANIOTOMY, LOBOTOMY, and HYPOPHYSECTOMY. Surgery of the spine is performed for correction of a defect, to remove growths, for repairing ruptured discs, for pain relief, including spinal fusion and laminectomy. Surgery performed on

nerve injuries or disorders are performed for removing growths, relieving pain, or repairing severed nerves. One type of nerve surgery is SYMPATHECTOMY. With this being said, a Neurosurgeon could have explained that Mr. Bernard Phoenix was never shot in the head, and also that none of the above-listed surgeries were shown - by the Hospital Reports - to have been performed.

PARKINSONISM

A NEUROSURGEON could also have explained that if Mr. Bernard Phoenix would have been shot in the head, at close range, as the State alleged and the jury convicted, and IF a bullet would have entered Mr. Phoenix's frontal lobe and exited the back of his skull, the victim would have, without any shadow of doubt, suffered from a disorder of the brain, and subsequently, body functions. The least of dysfunctions Mr. Phoenix would have suffered would have been tremors, rigid muscles, mild paralysis, and a slow, shuffling gait, with lesser complications of difficulty in chewing, swallowing, and/or speaking, for the medical fact that a gunshot wound to the head encompassing the frontal and rear lobes of the skull would have effected the MOTOR SYSTEM of the brain, which controls all voluntary and involuntary body functions. Signs of Parkinsonism appear as those of Parkinson's Disease, and may be caused by "brain swelling", syphilis, malaria, polio, or carbon monoxide poisoning. Parkinsonism often occurs in patients given tranquilizers. With this being said, a Neurosurgeon could have given testimony at trial that Mr. Bernard Phoenix did NOT suffer from ANY of the above-listed injuries, and that Mr. Phoenix was NEVER shot in the head with a firearm at close range. The supporting facts of these statements are displayed fully in the documented HOSPITAL REPORTS.

A NEUROSURGEON could have testified at trial to the fact that LOBOTOMY is a brain surgery performed on nerve fibers in the frontal lobe of the brain, which would have been necessary on Mr. Phoenix IF Mr. Phoenix would have had a bullet enter the frontal

lobe of his skull, AS THE STATE ALLEGED, AND THE JURY CONVICTED!! A NEUROSURGEON could have explained the resulting symptoms and complications for any person suffering a bullet wound to the frontal lobe of the brain. A physical inspection by a NEUROSURGEON would have exposed that Mr. Phoenix did not undergo any operation to his skull, and therefore could not have suffered any symptoms or complications from brain surgery. Lobotomy, brain surgery, in which nerve fibers in the frontal lobe of the brain are severed, are usually done so for difficult-to-treat depression and/or untreatable pain in patients requiring such surgery. This procedure was overused in the treatment of mental patients in the past. It is rarely performed now because it had many unpredictable and undesirable side effects, including loss of bladder & bowel control, personality change, aggressiveness or apathy, and socially unacceptable behavior. This being said, a NEUROSURGEON could have testified that Mr. Phoenix did not suffer or exhibit any of the above-listed symptoms or medical conditions, AND, that Mr. Phoenix DID NOT sustain a bullet wound to the frontal lobe of his brain, or in any other part of his brain - OR BODY - for that matter. Testimony by a NEUROSURGEON would have proven beyond doubt that Mr. Phoenix did not tell the truth about being shot in the head.

Counsel was ineffective for not subpoenaing a NEUROSURGEON. A NEUROSURGEON could have explained at trial that IF Mr. Phoenix was shot in the head at close range, AS THE STATE ALLEGED, with the bullet entering the frontal lobe of his brain and exiting the back of Mr. Phoenix's head, that the alleged gunshot would have required CRANIOTOMY SURGERY. CRANIOTOMY is: "Any surgical opening into the skull. It may be done to relieve pressure in the brain, to control bleeding, or to remove a tumor." A curved cut is made in the skin, "holes" are "drilled" in a circle, and the flap of bone is removed. A NEUROSURGEON could have explained to the jury that IF Mr. Phoenix would have been shot, AS ALLEGED BY THE STATE, he would have required this type of surgery to relieve pressure on the brain, and, to control bleeding, etc. A NEUROSURGEON could have testified that the available CAT Scans

and X-Rays taken of Mr. Phoenix's skull would have shown, WITH ABSOLUTE MEDICAL CERTAINTY, that Mr. Phoenix had not undergone any type of head surgery, that there was no evidence of any surgical procedures ANYWHERE on Mr. Phoenix's cranial area, and all this material issue of fact is in direct contradiction with the States allegation. A NEUROSURGEON could have explained to the jury that ANYONE sustaining this type of injury and surgical procedure would be in immediate need of intense Hospital recovery treatment and observation, and could have not possibly, in any circumstance imagined, be released from a Hospital and close medical observation in 4 to 6 hours, as Mr. Phoenix was! This is merely another instance which displays the truth of this case in exposing that Mr. Phoenix was never shot, and Mr. Phoenix committed perjury by stating under oath that he was shot.

A NEUROSURGEON could also have explained at Applicants' trial that IF Mr. Bernard Phoenix had been shot he could have had a SYMPATHECTOMY operation if this was indeed the problem of the matter. SYMPATHECTOMY is: an operation done using local anesthetic, to ease long-term pain in certain vessel diseases, as arteriosclerosis, claudication Buerger's Disease, and Raynaud's Phenomenon. The sheath around an artery carries the sympathetic nerve fibers that control tightening of the vessel. Removing part of the sheath causes the vessel to relax and expand and allows more blood to pass through it. The operation may also be done with a graft, to increase the blood flow through the graft area. With this being said, counsel was highly ineffective for failing to subpoena the NEUROSURGEON, attending Doctors, Nurses, and any other witnesses who could have provided Applicants' defense. Counsel was ineffective for failing to provide Applicant with reasonable, effective representation, which can be stated to be incompetent in the State of South Carolina. With that being said, Applicants' case should be reversed, dismissed, and terminated because of the unreasonable attorney performance given by trial lawyer, counsel, public defender. If counsel would have performed his duty to Applicant to the best of his ability, the result of Applicants' trial would have been different.



MARY P. BROWN
CLERK OF COURT
Post Office Box 219
MONCKS CORNER, SOUTH CAROLINA 29461-0219
(843) 719-4400 (843) 567-3311 (843) 723-3800

June 6, 2013

Office of the Attorney General
Post Conviction Relief Section
PO Box 11549
Columbia, SC 29211-1549

Re: Jermaine T. McKelvey #280590 vs. State of South Carolina
2012-CP-08-1235

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

FILED
2013 JUN -6 PM 4:42

Dear Sir/Madame:

Please find enclosed an Amended Post-Conviction Relief application for applicant Jermaine T. McKelvey #280590. Please contact our office if you need any further assistance.

Sincerely yours,

Mary P. Brown
Mary P. Brown
Clerk of Court

cc: Dennis J. Rhoad

/jw

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	CASE NO.: 2012-CP-08-1235
COUNTY OF BERKELEY	)	
	)	
JERMAINE T. MCKELVEY, 280590	)	AMENDED APPLICATION FOR POST
	)	CONVICTION RELIEF
V.	)	
	)	
STATE OF SOUTH CAROLINA	)	

FILED
MAY 28 PM 4:17
CLERK OF COURT
BERKELEY COUNTY

Applicant hereby amends the grounds for his application for post conviction relief. In addition to the grounds previously stated in said application (attached as Exhibit 1), Applicant hereby amends his application to assert the following additional arguments:

(1) Applicant was denied the right to effective assistance of counsel-guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article 1, § 3 and 14 of the South Carolina Constitution-during the guilt-or-innocence phase of his trial. The supporting facts are as follows:

Trial counsel's performance during the guilt or innocence phase was both unreasonable and prejudicial. Counsel's acts or omissions included, but are not limited to the following:

- (a) Counsel failed to object to the inference of malice charge given by the trial judge;
- (b) Counsel failed to object to the testimony of the MUSC nurse (Cindy Fuda) that the alleged victim Mr. Phoenix sustained a gun shot wound. There was no evidence in the record to establish that she was properly qualified to make this conclusion.
- (c) Counsel failed to object to the introduction of the bullet jacket found at the scene as evidence. There was nothing in the record to establish that the police officer had the expertise to conclude that the jacket found was actually from the bullet fired. He also was allowed to testify to his conclusion as to the bullet's trajectory without a showing that he had any expertise in this area. Trial counsel should have objected when officer testified he picked up jacket of a bullet that he said passed through victim and landed in wall. Also, SLED report stated bullet jacket fragment could have been fired by gun in evidence or by another firearm.
- (d) Counsel failed to impeach witnesses based on their prior convictions;
- (e) Counsel failed to inform Applicant that he was not calling any witnesses on his behalf.

(2) Counsel failed to adequately investigate the facts and circumstances surrounding the injury to the victim. Counsel's failure to conduct such an investigation deprived the jury of critical information relevant to the accurate assessment of Applicant's guilt or innocence.

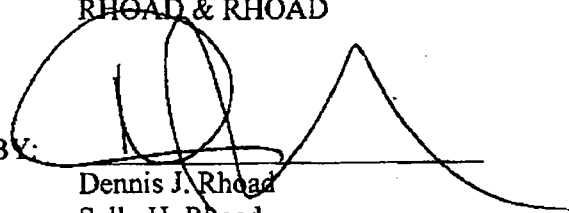
(3) Applicant was denied the right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution-during the sentencing phase of his trial. The supporting facts are as follows:

Trial counsel's performance during the sentencing phase was both unreasonable and prejudicial. Counsel's acts or omissions included, but are not limited to, the following:

- (a) Counsel failed to investigate, develop, and present all available, relevant, and admissible mitigating evidence. As a result of counsel's failure to uncover and present this evidence, applicant's sentence is unreliable.

RHOAD & RHOAD

BY:


Dennis J. Rhoad
Sally H. Rhoad
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Moncks Corner, SC 29461
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(843) 482-8877 PH
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478
STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

JERMAINE T. MCKELVEY

☒ Plaintiff

v.

State Of South Carolina

☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.
2012-CP-08-1235

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:
Dennis J. Rhoad, Bar No. 11864
Sally H. Rhoad 11865
Address:
123 West Main Street
Moncks Corner, SC 29461
phone: 843-482-8877 fax: 843-482-2852
e-mail: dennis@rhoadlawoffice.com
sally@rhoadlawoffice.com other:

Defendant's Attorney:
Ashleigh R. Wilson, Bar No.
Address:
P.O. Box 11549
Columbia, SC 29211-1549
phone: (803) 734-3970 fax: (803) 253-6283
e-mail: other:

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

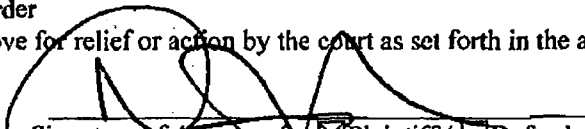
Nature of Motion: Amended Application for Post-Conviction Relief

Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☒ Plaintiff / ☐ Defendant

May 28, 2013

Date submitted

SECTION III: Motion Fee

☐ PAID - AMOUNT:

- ☒ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Collected by: _____

Date Filed:

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
CASE NO.: 2012-CP-08-1235

COUNTY OF BERKELEY)

JERMAINE T. MCKELVEY, 280590)
POST)**AMENDED APPLICATION
FOR POST CONVICTION RELIEF**

V.)

STATE OF SOUTH CAROLINA)
_____)

Without waiving any of the prior grounds stated in his Application for Post Conviction Relief, Jermaine T. McKelvey, by and through his attorney Dennis J. Rhoad, hereby states the following grounds for post conviction relief:

1. Trial counsel violated Applicant's right to the effective assistance of counsel by failing to timely and properly object to the trial judge's improper jury instruction that malice could be implied from the use of a deadly weapon. See, State v. Belcher, 385 S.C. 597, 685 S.E. 2d 802 (2009).
2. The trial judge's use of an improper jury instruction in Applicant's trial violated Applicant's Fifth Amendment right to a fair and impartial trial.
3. The trial judge's use of an improper jury instruction and the prosecution's announcement that the judge would charge the jury panel that malice could be inferred from the use of a deadly weapon violated Applicant's right to due process and equal protection in his trial proceedings.
4. Applicant's right to effective assistance of counsel was violated by his trial counsel's failure to properly investigate the facts surrounding Applicant's case including but not limited to, the following:

A. prior records of testifying witnesses;

2014 MAY -9 AM 10:33
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

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DW

DR

- B. medical experts who treated and made diagnosis concerning victim Bernard Phoenix;
5. Applicant's right to effective assistance of counsel was violated by trial counsel's failure to call expert witnesses on Applicant's behalf including but not limited to treating and or non-treating physicians and nurses, emergency personnel, forensic experts and police personnel.
 6. Applicant's right to effective assistance of counsel was violated by trial counsel's failure to object or move to impeach testimony of testifying witnesses;
 7. Applicant's right to effective assistance of counsel was violated by trial counsel's failure to move for or accept the court's offer of a continuance based on the failure of Dr. Todd Mishall to attend the trial;
 8. Applicant's right to effective assistance of counsel was violated by trial counsel's failure to investigate or subpoena any medical expert who could testify on the issue of whether the alleged victim Bernard Phoenix did in fact sustain a gunshot wound to the head;
 9. Applicant's right to effective assistance of counsel was violated by trial counsel's failure to question witnesses and or subpoena medical records showing facts in conflict with the allegation that Bernard Phoenix in fact sustained a gunshot wound to the head;
 10. Applicant's right to effective assistance of counsel was violated by trial counsel's failure to investigate and or subpoena an expert witness who could testify as to the level of alcohol in alleged victim Bernard Phoenix's blood and its impact on his ability to perceive and observe his surroundings.
 11. Applicant's right to effective assistance of counsel was violated by trial counsel's failure to investigate and or subpoena and or question an expert on the issue of the significance of the presence and or lack of presence of gun powder burns and or residue;

12. Applicant's right to effective assistance of counsel was violated by trial counsel's failure to object to emergency personnel and treating nurses testimony that the alleged victim Bernard Phoenix in fact sustained a gunshot wound when such witnesses lack the expertise to classify a wound as coming from a gunshot;
13. Applicant's right to effective assistance of counsel was violated by trial counsel's failure to investigate and or subpoena an expert witness to testify as to whether the CT scan and or other medical records indicate the alleged victim Bernard Phoenix sustained a gunshot wound;
14. Applicant's right to effective assistance of counsel was violated by trial counsel's failure to object and or question the alleged victim Bernard Phoenix as to possible perjury in his testimony and failure to impeach his testimony based on prior arrest records of Mr. Phoenix;
15. Applicant's right to effective assistance of counsel was violated by trial counsel's failure to object and or question witness Korshanda Baskin as to blood spatter, statements made by bar owner and inconsistencies in her testimony and statement;
16. Applicant's right to effective assistance of counsel was violated by trial counsel's failure to object to and question witness Sharon Vance as to inconsistencies in her testimony and statement. Also, trial counsel failed to impeach witness Vance with the use of her prior convictions;
17. Applicant's right to effective assistance of counsel was violated by trial counsel's failure to further question and or investigate Officer James Taylor regarding his testimony as to where the gun was found and as to who performed the booking of Mr. McKelvey;
18. Applicant's right to effective assistance of counsel and other Constitutional rights were violated by trial counsel's failure to object to testimony concerning gunshot residue as said

evidence was improperly collected and collected without giving Mr. McKelvey his Miranda rights as required by the State and Federal Constitutions;

19. Applicant's right to effective assistance of counsel was violated by counsel's failure to object to the testimony of officer Tony Edwards concerning a bullet jacket and or fragment found at the scene as there was no testimony properly linking the said bullet and or fragment to the gun. Further, Officer Edwards was allowed to testify concerning the location of a gun found at the scene without proper questioning as to the location of said gun. Further, trial counsel failed to object to the introduction of said bullet jacket and or fragment into evidence.
20. Applicant's right to effective assistance of counsel was violated by counsel's failure to properly investigate and or object to Officer Michael Roach's testimony concerning whether Mr. Phoenix was in fact shot and the location of alleged wounds as Officer Roach is not qualified to make such conclusions;
21. Applicant's right to effective assistance of counsel was violated by counsel's failure to object to the trial court's jury instruction of malice. The trial judge instructed the jury that "inferred malice may also arise when the deed is done with a deadly weapon" when evidence was presented that would reduce the armed robbery with intent to kill to assault and battery of a high and aggravated nature and the judge instructed the jury on the law of the lesser included offense of assault and battery of a high and aggravated nature;
22. Applicant's right to effective assistance of counsel was violated by trial counsel's failure to present any evidence and or argue to the jury that there was in fact evidence that malice should not be inferred and there was evidence that the "deed" was not done with a deadly weapon;

23. Applicant's right to effective assistance of counsel was violated by trial counsel's failure to investigate and or question witness Laurie Villalobos as to her criminal record. Further, counsel failed to attempt to impeach Ms. Villalobos concerning her criminal record;
24. Applicant's right to effective assistance of counsel was violated by trial counsel's failure to investigate and or attack the victim and witnesses' character;
25. Applicant's right to effective assistance of counsel was violated by trial counsel's failure to have properly qualified medical experts present testimony concerning Mr. Phoenix' x-rays, CT scans and or other medical records. Further, trial counsel failed to obtain such pictures so that the jury could view the alleged gunshot wound with the assistance of trained medical personnel;
26. Applicant's right to effective assistance of counsel was violated by trial counsel's failure to move the court for the trial judge to recuse himself from the case when the trial judge showed resentment and hostility toward Applicant.
27. Applicant's right to effective assistance of counsel was violated by trial counsel's failure to subpoena witnesses on Applicant's behalf and or to be properly prepared to go forward with Applicant's trial, although trial counsel assured Applicant he was prepared prior to trial;
28. Applicant's right to effective assistance of counsel was violated by trial counsel's failure to further investigate and or question witness David Black concerning his testimony that the gun he examined did not have any fingerprints, blood or anything to link Applicant to the gun;
29. Applicant's right to effective assistance of counsel was denied because trial counsel failed to inform Applicant as to the possible length of sentence he could be given based on the charges Applicant faced in his trial;

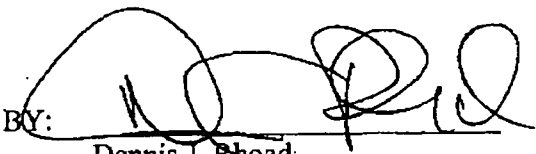
30. Applicant was denied effective assistance of counsel, because trial counsel failed to ask for a continuance when he discovered he had not been provided the most recent police report concerning Applicant's incident. The supplemental report contained additional information that would have been important to discuss with Applicant and to investigate prior to the trial of the case;
31. Applicant was denied his right to effective assistance of counsel, because trial counsel failed to properly object to alleged statement of Applicant. In addition to the grounds stated, trial counsel should have objected to the statement on the grounds it was not voluntarily given since Applicant was not mentally and physically capable of knowingly making a statement at the time. Further, trial counsel should have objected to the statement on the ground he was not provided a complete copy of the police investigation report prior to trial such that trial counsel could have properly investigated the statement and its circumstances and could have informed his client of the consequence of the introduction of the statement.
32. Counsel failed to object to the testimony of the MUSC nurse (Cindy Fuda) that the alleged victim Mr. Phoenix sustained a gun shot wound. There was no evidence in the record to establish that she was properly qualified to make this conclusion.
33. Counsel failed to object to the introduction of the bullet jacket found at the scene as evidence. There was nothing in the record to establish that the police officer had the expertise to conclude that the jacket found was actually from the bullet fired. He also was allowed to testify to his conclusion as to the bullet's trajectory without a showing that he had any expertise in this area. Trial counsel should have objected when officer testified he picked up jacket of a bullet that he said passed through victim and landed in wall. Also, SLED report stated bullet jacket fragment could have been fired by gun in evidence or by another firearm.

34. Applicant was denied the right to effective assistance of counsel because trial counsel failed to inform Applicant that he was not calling any witnesses on Applicant's behalf.
34. Applicant was denied the right to effective assistance of counsel because trial counsel failed to adequately investigate the facts and circumstances surrounding the injury to the victim. Counsel's failure to conduct such an investigation deprived the jury of critical information relevant to the accurate assessment of Applicant's guilt or innocence.
35. Applicant was denied the right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution-during the sentencing phase of his trial. The supporting facts are as follows:

Trial counsel's performance during the sentencing phase was both unreasonable and prejudicial. Counsel's acts or omissions included, but are not limited to, the following:

- (a) Counsel failed to investigate, develop, and present all available, relevant, and admissible mitigating evidence. As a result of counsel's failure to uncover and present this evidence, applicant's sentence is unreliable.

RHOAD & RHOAD

BY:  5/9/14

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY	)	
	)	
	)	2012-CP-08-1235
	)	
Jermaine T. McKelvey, # 280590,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

The Respondent, making its Return to the application for post-conviction relief (PCR) filed April 23, 2012, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. The Applicant was indicted at the February 2009 term of the Berkeley County Grand Jury for assault and battery with intent to kill (ABWIK) (2009-GS-08-0304) and possession of a firearm during the commission of a violent crime (2009-GS-08-0305). The Applicant was subsequently indicted at the April 2009 term of the Berkeley County Grand Jury for armed robbery (2009-GS-08-0504).¹ The Applicant was represented by Chad D. Shelton, Esquire and David Schwacke, Esquire.

On April 14, 2010, the Applicant proceeded to trial and was found guilty on all charges. The Applicant was sentenced by Judge Dennis to confinement for a period of twenty-seven (27) years for armed robbery, five (5) years for possession of a firearm during the commission of a

¹ The Applicant was also indicted and convicted of possession of cocaine base/meth (2009-GS-08-2447) for which he was sentenced to one year. However, the Applicant does not challenge this allegation in his Application for post-conviction relief.

violent crime, and twenty (20) years for ABWIK. The sentences for armed robbery and possession of a firearm during the commission of a violent crime are to be served consecutively with the remainder of the convictions to be served concurrently.

A timely Notice of Appeal was filed on behalf of the Applicant. Katherine H. Hudgins, Esquire of the South Carolina Office of Appellate Defense perfected the appeal in the form of an Anders² brief. The South Carolina Court of Appeals affirmed the Applicant's convictions and sentences and the Remittitur was issued on February 27, 2013.

Attached herewith and incorporated herein are the records of the Berkeley County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, and appellate records. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his original application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel

- a. Failure to timely and properly object to jury instruction on malice
- b. Failure to call expert witness to testify on the Applicant's behalf
- c. Failure to object to perjured testimony
- d. Failure to fully investigate the case
- e. Failure to impeach witnesses with prior convictions
- f. Failure to attack the character of the victim and the witnesses
- g. Failure to prepare for trial
- h. Failure to secure the victim's medical records
- i. Failure to move for the recusal of the judge
- j. Failure to subpoena witnesses
- k. Failure to subpoena the Applicant's investigator
- l. Failure to challenge the court's guilty verdict

² Anders v. California, 386 U.S. 738 (1967).

On May 28, 2013, the Applicant amended his application to allege the following:

1. Ineffective Assistance of Counsel

- a. Counsel failed to object to the inference of malice charge given to the trial judge.
- b. Counsel failed to object to the testimony of the MUSC nurse (Cindy Fuda) that the alleged victim Mr. Phoenix sustained a gunshot wound.
- c. Counsel failed to object to the introduction of the bullet jacket found at the scene as evidence.
- d. Counsel failed to impeach witnesses based on their prior convictions.
- e. Counsel failed to inform Applicant that he was not calling any witnesses on his behalf.
- f. Counsel failed to adequately investigate the facts and circumstances surrounding the injury to the victim.
- g. Counsel failed to investigate, develop, and present all available, relevant, and admissible mitigating evidence for sentencing.

III.

The Applicant alleges he received ineffective assistance of counsel. The Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a criminal defense attorney. 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 on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel.

First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Id. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington 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, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

[Signature on the following page.]

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General

By: AA R W S
ATTORNEYS FOR RESPONDENT

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June 28, 2013.

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS

2012-CP-08-1235

JERMAINE T. McKELVEY, #280590

Applicant,

vs

AFFIDAVIT OF SERVICE BY MAIL

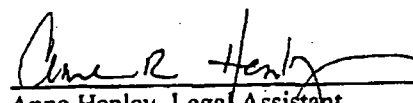
STATE OF SOUTH CAROLINA,

Respondent.

1. I am an employee of the Respondent in the abovecaptioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Dennis J. Rhoad, Esquire
123 West Main Street
Moncks Corner, SC 29461

DATED this 28th day of June, 2013


 Anne Henley, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA)

THE COURT OF COMMON PLEAS)

COUNTY OF CHARLESTON)

DOCKET NO. 2012-CP-08-1235)

JERMAINE T. MCKELVEY)

Plaintiff)

vs.)

STATE OF SOUTH CAROLINA)

Defendant)

TRANSCRIPT OF RECORD)

May 19, 2014

Charleston, South Carolina

B E F O R E:

THE HONORABLE DEADRA L. JEFFERSON, JUDGE

A P P E A R A N C E S:

DENNIS J. RHOAD, ESQ.

SALLY H. RHOAD, ESQ.

Attorneys for the Plaintiff

ASHLEY R. WILSON, ESQ.

Attorney for the State

JOYCE C. RUEGER, CVR-M
Circuit Court Reporter

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PROCEEDINGS

THE COURT: All right. Is the state ready to proceed?

MS. WILSON: Yes, Your Honor, the State is ready.

THE COURT: Is the applicant ready to proceed?

MR. RHOAD: Yes, Your Honor.

THE COURT: Okay. You may call your first witness.

MR. RHOAD: Your Honor, may we make a little brief summary?

THE COURT: I've already read the file ---

MR. RHOAD: --- you already have ---

THE COURT: --- the application and the record ---

MR. RHOAD: then we'll call Chad Shelton, Your Honor.

[Whereupon, Mr. Shelton comes forward]

THE COURT: I'm going to go ahead and get you to raise your right hand for me.

[Whereupon, the witness is duly sworn by the Clerk of Court]

THE COURT: Mr. Shelton, if you would be seated and state your full name for the record, spelling your last name for the court reporter.

WITNESS: Chad Daniel Shelton, S-H-E-L-T-O-N.

THE COURT: And before you proceed, Mr. Rhoad, bear

1 with me one moment, I apologize I did not do this. This
2 is Jermaine T. McKelvey versus the State of South
3 Carolina 2012-CP-08-1235. It's before the court on his
4 amended application for post conviction relief filed May
5 28th of 2013.

6 THE COURT: I do not believe State filed an amended
7 answer or amended reply, correct?

8 MS. WILSON: That's correct, Your Honor.

9 THE COURT: The original application was filed on
10 April 23rd of 2012.

11 [Whereupon, the court reviews documents]

12 THE COURT: And the State's -- and an unfiled copy
13 of the State's return ---

14 MS. WILSON: --- that's correct, Your Honor ---

15 THE COURT: --- what was the file date of your
16 application?

17 MS. WILSON: Your Honor, I don't know because the
18 Clerk's office doesn't send us filed copies back.

19 THE COURT: Yeah, it seems like they -- I may have
20 just missed it though in all the paperwork, but it was
21 dated June 28th of 2013. Mr. McKelvey was convicted by
22 -- after a trial on all of his charges on April 14th of
23 2010. He was sentenced by Judge Dennis to 27 years for
24 Armed Robbery, 5 years for Possession of a Firearm during
25 the Commission of a Violent Crime and 20 years for

1 Assault and Battery with Intent to Kill. The sentence
2 for Armed Robbery and Possession of a Firearm during the
3 Commission of a Violent Crime were served -- were to be
4 served consecutively, but the remainder of his conviction
5 is to be filed -- be served concurrently and he raised
6 several grounds for ineffective assistance. Okay, you
7 may proceed with questioning the witness.

8 MR. RHOAD: Thank you, Your Honor. Is it proper
9 with the court for me to move a little closer to Mr.
10 Shelton?

11 THE COURT: It's up to you, whatever you're
12 comfortable with.

13 MR. RHOAD: Thank you, Your Honor.

14 THE COURT: You can move that -- that podium moves.

15 MR. RHOAD: That's fine.
16
17
18
19
20
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25

Jermaine McKelvey v State of S.C.
Chad Shelton-Direct Examination by Mr. Rhoad
May 19, 2014

1 CHAD SHELTON,
2 Having been first duly sworn,
3 Was examined and testified as follows:

4 DIRECT EXAMINATION

5 BY MR. RHOAD:

6 Q. Good morning -- or good afternoon, Mr. Shelton how
7 are you?

8 A. Good.

9 Q. Now, you were the appointed public defender in Mr.
10 McKelvey's case?

11 A. Yes, sir.

12 Q. And as the Judge says he was found guilty of Assault
13 and Battery with Intent to Kill, Possession of a Firearm
14 during the Commission of a Violent Crime and Armed
15 Robbery and Possession of Cocaine is that correct?

16 A. Yes, sir.

17 Q. Did you discuss with Mr. McKelvey prior to the trial
18 his theory or his strategy of the case with regard to
19 whether he actually shot the victim in this case?

20 A. Yes, sir.

21 Q. And what did he always maintain to you?

22 A. That he never shot Mr. Phoenix.

23 Q. Okay, so would you agree with me that at this man's
24 trial at least if not the most important factor, or one
25 of the most important factors was whether he shot Mr.

1 Phoenix?

2 A. As to the ABWIK yes. Yes.

3 Q. As to the what?

4 A. To the Assault and Battery with Intent to Kill,
5 absolutely yes.

6 Q. Okay. Well we will focus on the Assault and
7 Battery with Intent to Kill; he got 20 years for that,
8 right?

9 A. Absolutely, yes.

10 Q. Okay. So that's a pretty big one. All right. So
11 do you agree with me that you presented no evidence that
12 he didn't shoot Mr. Phoenix in the head during this
13 incident? Did you call any witnesses?

14 A. I did not call any witnesses.

15 Q. Okay. Did you talk to the radiologist who read the
16 CT scans and whose testimony is in the affidavit here
17 today?

18 A. I did not.

19 Q. Okay. Did you attempt to call him?

20 A. No.

21 Q. Okay. Would it surprise you if in her affidavit
22 she said the opinion that at least from one of the CT
23 scans, her opinion is there's no evidence of a gunshot
24 wound?

25 MS. WILSON: Objection, Your Honor.

1 THE COURT: Basis?

2 MS. WILSON: Your Honor, I think that we should
3 maybe try to offer his affidavit into evidence before he
4 has Mr. Shelton speculate as to his context ---

5 MR. RHOAD: --- I will withdraw that ---

6 MS. WILSON: --- from my understanding that wasn't
7 the context.

8 MR. RHOAD: I will withdraw it.

9 Q. [Mr. Rhoad] Would you agree with me that the
10 radiologist who examined the victim in this case --
11 radiologists who examined the victim in this case read
12 the CT scans and read the x-rays would be in the best
13 position to testify as an expert as to whether the victim
14 was actually shot? And if you don't agree with that, who
15 would be the best person to testify to that?

16 A. I don't know.

17 Q. You would agree with me that that's a medical
18 function?

19 A. Yes, absolutely.

20 Q. Okay. So you would agree with me that the medical
21 people that reviewed the medical records would be in the
22 best position to testify as to whether this man shot the
23 victim?

24 A. Yes.

25 Q. Okay. But yet you didn't talk to those people?