

VOLUME TWO OF FOUR

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

Benjamin H. Culbertson, Circuit Court Judge

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S.C. Supreme Court

JOHN B. FRAZIER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002774

APPENDIX

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1 for change.

2 MR. HUMPHRIES: No problem with that.

3 MR. MARTIN: All right, and the basis for that is the
4 -- is to make them more reliable and that that is based on the
5 study of the North Carolina Actual Innocence Commission as
6 well as the United States Department of Justice.

7 THE COURT: If he knows this. I've heard him say that
8 he's familiar with the North Carolina study.

9 MR. MARTIN: Well, he might not be familiar with the
10 other, but at least the recommendations of the North Carolina
11 Actual Innocence Commission.

12 THE COURT: All right.

13 MR. MARTIN: I would think certainly all of that goes
14 to the issue of whether or not this particular photographic
15 lineup was suggestive at the end of the day or not and we'll
16 tie all that up, you know.

17 MR. HUMPHRIES: Well, now I can -- maybe I wasn't clear.
18 I'm not objecting to anything that he's already answered in
19 that regard.

20 THE COURT: The document.

21 MR. HUMPHRIES: I'm objecting to the use of that document
22 to cross examine and to publish to the jury, are you aware
23 that, da, da, da, da, da, which is basically publishing the
24 document to the jury when this witness says, "I'm not
25 familiar with this document." He's answered those other

1 questions.

2 MR. MARTIN: Well, I mean, I felt like Mr. Rowe
3 probably was familiar with the document and if he saw it that
4 he would be because this has been a, you know, a very
5 newsworthy item in the Winston-Salem area involving the
6 Winston-Salem Police Department, but he said, you know, I
7 won't cross examine him with the document per se if that's
8 what ---

9 THE COURT: All right.

10 MR. MARTIN: --- the Court says.

11 A: If I can interject a comment.

12 THE COURT: Is there any objection? There's not --
13 this is not in response to a question.

14 MR. MARTIN: No, I don't have any.

15 A: There is a study but I'm not involved in that study
16 ---

17 MR. MARTIN: I understand that.

18 A: --- involving many of our personnel. I'm involved in the
19 court process and spend a lot of time in court. I'm not
20 involved in the committee that's been formed to work with
21 that commission.

22 MR. MARTIN: I understand that.

23 A: I can't tell you the details about our department
24 involved with that study.

25 MR. MARTIN: All right, well, at this time if I think

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1 of more things I want to ask him I'll check with Fran
2 before I do and we'll see what the Court says about
3 it.

4 THE COURT: All right, very well, so long as you
5 don't use the document I think that there's no concerns.

6 MR. MARTIN: I won't use the document.

7 MR. HUMPHRIES: That's my only objection.

8 THE COURT: Very good, all right. Call your -- you
9 may step down, sir.

10 Call your next witness, please.

11 MR. HUMPHRIES: Kent Robey.

12 AT THIS TIME KENT ROBEY WAS CALLED TO THE STAND, DULY SWORN BY
13 THE CLERK AND TESTIFIED AS FOLLOWS:

14 THE CLERK: Thank you. Please be seated. Please
15 state your full name, spell your last name for the
16 Court.

17 MR. ROBEY: Special Agent Kent Robey, R-O-B-E-Y.

18 EXAMINATION

19 BY MR. HUMPHRIES:

20 Q: And Agent Robey, generally tell the Court how you are
21 employed at this time.

22 A: I was a lieutenant in the Bedford County Sheriff's
23 Office in Virginia.

24 Q: And at present, generally, federal law enforcement?

25 A: I'm a special agent with Homeland Security assigned to

1 the FBI.

2 Q: Thank you. Specifically going back to June of 1998
3 let's talk a bit about whether or not you assisted Myrtle
4 Beach in the presentation of a photo lineup or a photo array
5 to two people, Mark and Donna Hobbs.

6 A: That's correct.

7 Q: Tell the Court briefly the facts and circumstances
8 surrounding that request to you and what you did in response
9 to it.

10 A: I received a request from Lieutenant Frontz with the
11 Myrtle Beach Police Department through a professional
12 friend at another police department close to where I was
13 working.

14 Q: This is basically, just to be clear for the Court, this
15 is sort of a fraternity of FBI academy graduates.

16 A: Yes, sir; yes, sir.

17 Q: Okay, it's a networking.

18 A: Correct.

19 And received a call from Lieutenant Frontz and he
20 asked me if I was familiar how to do a lineup and I told
21 him yes and that he would be sending me a lineup for me to
22 show to the Hobbses in the Goodview area of our county.

23 Q: Which is in?

24 A: It's in Bedford County, Virginia.

25 Q: Okay, and let me ask you and let's be very specific,

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1 when -- did Lieutenant Frontz at that point or anytime before
2 your presenting the photo array to Mark and Donna Hobbs did he
3 indicate to you the person of interest or the suspect within
4 the photo lineup, that is what position he was or any other
5 information about the suspect?

6 A: No, sir, he didn't. He just said that they've got a
7 suspect in mind and that they would be sending a photo lineup.
8 I think we both agreed for him not to tell me and I didn't
9 want to know to preserve the integrity of the lineup,
10 receive it unknown, show it the proper way, separate with
11 neither one of them talking to each other, me witnessing all
12 this and me following up with a phone call afterwards and
13 advising him who they picked out.

14 Q: Okay, good enough. Let me show you some documents,
15 State's 20, 21, 22 and 23. Tell me if you can identify those
16 documents.

17 A: Okay, 20 is the colored lineup.

18 Q: Okay.

19 A: Okay, and 21 is Mark Hobbs's identification on June
20 28th, '98 at 8:10 p.m.

21 Q: Okay.

22 A: The Winston-Salem black and white lineup and 22 is Donna
23 Hobbs's at 8:17 June 28 '98 black and white where she
24 identified the suspect.

25 Q: Okay.

1 A: All right, and 23 is the Winston-Salem Police
2 Department admonition basically directions to them that I
3 read to them on June 28, '98 where they both signed it.

4 Q: Did you have all those documents -- well, first of all
5 did you make contact with the Hobbses?

6 A: Yes, I did.

7 Q: After receiving this packet from Myrtle Beach.

8 A: Correct.

9 Q: Okay, and ---

10 A: By Fed-Ex.

11 Q: By Fed-Ex?

12 A: Yes, sir.

13 Q: And when you made contact with Mark and Donna Hobbs
14 what specifically did you say to them?

15 A: At that time I called them to verify their address
16 and directions to it. I had been on that road but it was
17 during a tactical situation. So, I didn't -- really didn't
18 pay attention and it was dark, but I got directions up there
19 and asked them that I need to arrange a time to come up and
20 talk to them about what occurred down in Myrtle Beach and I
21 left it at that.

22 Q: Well, then, let's be specific. Did you ever indicate to
23 them prior to your arriving that you were coming to present
24 them with a photo lineup for the purposes of their identifying
25 a potential suspect?

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1 A: No, sir.

2 Q: Did acquiesce and did they say come on over?

3 A: Yes, we arranged the time between 7:30 and eight on
4 the 28th of June.

5 Q: And ultimately did you arrive at the home?

6 A: Yes, sir, I did.

7 Q: And when you arrived did you have those documents,
8 State's 20 through 23, with you?

9 A: Yes, they were in a Fed-Ex package.

10 Q: Now, as specifically as you can can you tell the Court
11 exactly what happened in terms of your contact with them and
12 the procedure you utilized in presenting them with the photo
13 identification packet or the photo lineup?

14 A: All right, I arrived there about 7:50 p.m. on the
15 28th, went up to the door, knocked on it, had some general
16 conversation just about, you know, who's here, did you have
17 any problem getting up there or anything like that, and I
18 advised them at that point that I'm here to show them a photo
19 lineup of someone that they might have seen at Myrtle Beach
20 while they were down there, and I asked them if they were
21 familiar with it and they said yes.

22 Q: And when you -- familiar with it, are you talking about
23 the ---

24 A: Familiar with not only the incident just in general
25 conversation but -- and also why a Bedford County deputy or

1 lieutenant of upper management was standing at their door
2 and I'm trying to put this in a way, apparently, that the
3 Myrtle Beach PD unbeknownst to me had contacted them other
4 than through a memo requesting myself to show the lineup to
5 them and that they were going to notify them of my contact if
6 that makes any sense.

7 Q: Uh-huh (affirmative response).

8 A: They basically agreed. I asked them is anybody in the
9 house. It's a split foyer home. So, you know, it's a pretty
10 good distance from one end of the house to the other, and
11 then we agreed that Mark Hobbs would look at the lineup
12 first.

13 Q: Okay, at this time were all the documents still in the
14 Fed-Ex packet?

15 A: Yes, sir, and you can't see through it. It's a solid
16 packet. I had a notebook with me, too, with just plain paper
17 in it.

18 Q: Okay, what next occurred?

19 A: I advised him that I have to separate them, and that if
20 we could do it in the dining room there at the table and they
21 agreed and I asked Donna Hobbs to go to the other end of the
22 house which there was a bedroom located, I believe, on the
23 left side of the hallway at the last door and we were kind
24 of standing there in the dining room, living room area.
25 It's kind of open there, and Donna agreed to go back to the

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1 back bedroom. I observed her walking down the hallway, turn
2 left in the last door and shutting it. Mark and I went --
3 Hobbs went over to the dining room table and at that point and
4 I had already opened the packet to make sure everything was
5 in there that I needed to do and I had it in an order so I
6 wouldn't have to pull everything out and just flash it and
7 look at it. So, I pulled the instruction form out from
8 the Winston-Salem Police Department.

9 Q: That's ---

10 A: Exhibit 23.

11 Q: Very good.

12 A: While the rest of the forms and the pictures were in the
13 Fed-Ex package and I began to explain to him the instructions.
14 I read through the instructions to him.

15 Q: And would you read this into the record at this time
16 exactly what you read to Mark Hobbs.

17 A: Okay, ``I'm going to show you a group of photographs.
18 These group of photographs may or may not contain the picture
19 of the person who committed a crime now being investigated.
20 Keep in mind hairstyles, beards, moustaches may be easily
21 changed. Also photographs may not always depict the true
22 complexion of a person. When you've looked at all the
23 photographs tell me if you recognize any individuals in
24 this lineup. Do not discuss this lineup with any other
25 witnesses,`` and I had one more request from Lieutenant Frontz

1 to ask after they signed that if they had seen any news
2 reports, any pictures of the suspect, anything that might
3 lead them to believe that they know through the press what
4 the suspect might look like.

5 Q: And what did Mark Hobbs reply?

6 A: He replied that he saw the initial report on TV and
7 he only caught some of it because I believe he was in the
8 next room when it came on and that he did not see any
9 photographs or pictures of the suspect during that
10 time.

11 Q: Did he indicate whether he had seen any pictures or
12 photographs up until the point you showed him the photo
13 lineup?

14 A: The same question. I mean, he told me he hadn't seen
15 any.

16 Q: He had not seen any photographs at the point.

17 A: Presented to him by law enforcement or the press. I was
18 the first to actually put the photographs of the suspect in
19 his -- that I'm aware of.

20 Q: Okay, and that's what he indicated to you?

21 A: Yes, sir.

22 Q: Okay.

23 A: I asked him to -- after I read this to him I asked him
24 to read it and make sure he understood it.

25 Q: On State's 23.

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1 A: Yes, sir, make sure he understood it and if he had any
2 questions to let me know.

3 Q: Okay, did he appear to read it before you?

4 A: Yes, sir, he did.

5 Q: And did he ask any further questions?

6 A: No, sir, he didn't.

7 Q: And ultimately did he sign the form indicating that he
8 understood the form?

9 A: Yes, sir, he did.

10 Q: What then did you do?

11 A: I put this off to the side, State's 23. At that time
12 pulled the State's 20, the colored photo lineup, out and slid
13 it over to him. We were kind of sitting -- he was sitting to
14 my right, and I pulled it out and slid it over to him and
15 basically shut up.

16 Q: Okay, let's talk -- well, we'll do that at the end. How
17 long did Mark Hobbs observe that photo lineup to the best
18 of your recollection?

19 A: I don't time these things. So, it's approximately
20 nine or ten minutes, somewhere around there, maybe, and that
21 was from the time we started. You know, I ---

22 Q: Including the admonition and everything else?

23 A: From the time, you know, I would say we, we sat down
24 and until I got through the State's 21 form, the black and
25 white.

1 Q: So, from the beginning to the end of the process?

2 A: Yeah.

3 Q: Okay, fair enough.

4 A: I'm not taught, you know, time these things.

5 Q: Very good, did you observe Mark Hobbs as he looked at
6 the photo lineup?

7 A: Yes, sir.

8 Q: And my question is this, did he appear to concentrate on
9 the photo lineup?

10 A: He did.

11 Q: Okay, and at some point in time did he indicate to you
12 whether he recognized a particular individual in that
13 lineup?

14 A: Yes, sir. What he did is he was trying to on --
15 position one and two of State's 20 he was trying to put his
16 hand below the nose and just above the forehead in that
17 manner and he was having a hard time, you know, finagling
18 his hands and looking at it. So, the only thing I did is I
19 went over to my notebook, pulled out a blank sheet of
20 paper, passed it over to him and said, "You know, maybe this
21 will help you in whatever you're trying to do there," because
22 it was obvious he was trying to move his and look and
23 distinguish between one and two.

24 Q: Okay, and after that was done did Mark Hobbs ultimately
25 identify the suspect in this case?

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1 A: Yes, sir, he picked number -- the person in State's 20,
2 the number one position and he stated that person most closely
3 resembles the one that he saw down at Myrtle Beach that
4 night of the June 9th.

5 Q: Okay, all right, and what did you do as a follow
6 up?

7 A: I took the colored photo, placed it back into the Fed-
8 Ex, pulled out, of course at the time they were just blank
9 copies, nothing was on them. There was no stray marks on the
10 colored one either and I didn't have him sign it. So, I just
11 grabbed the first black and white, State's 21, that I could
12 get to, pulled it out, placed that in front of him and asked
13 him to look at it again and put his initials, the time and the
14 date beside the one that he chose.

15 Q: Okay, and did he do that?

16 A: Yes, he asked -- I can remember him asking me the time.
17 I gave it to him and he did that on that form.

18 Q: Okay.

19 A: I took the form, immediately put it back into the Fed-Ex
20 package, the form that he signed, State's 21. I had shuffled,
21 shuffled them in the packet. So, when she came out, and I had
22 to pull the copy for her out, I wouldn't have to play with
23 that again. So, the blank copy was on top, set that off to
24 the side, color photo was still in the packet, set it up again
25 for the next, for Donna. We got up. We hollered Donna's name

1 and I don't think she heard us at first. So, we walked
2 towards, down the hallway a little bit and he hollered her
3 name again and then she -- it took a few seconds, then she
4 opened the door. When they passed in the hallway I was
5 standing right there within two or three feet of them.
6 Neither one of them said a word other than when she opened the
7 door I said, "We're ready for you." Mark Hobbs walked into
8 the room. There was no hand signals. There was no, you know,
9 no chatter whatsoever and Mark shut the door and then Donna
10 came out and at that point sat her down at the dining room
11 table, pulled out the Winston-Salem instructions again, read
12 through it, made sure she understood it, asked her to read it
13 to herself and if she had any questions to let me know.
14 Q: And did you ask her the same question in regard to
15 having previously seen a photograph of the suspect either
16 presented by the police or the media?
17 A: Yes, sir, I did.
18 Q: And her response was?
19 A: Her response was that she had seen the initial
20 reports on the TV. I don't know if it was that -- the next
21 day, that six o'clock news or whatever, but she had not -- and
22 I asked her had you, had the police or had she seen any, any
23 photos of the suspect prior to me being here, and she said no
24 she hadn't.
25 Q: Okay.

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1 A: At that point I had her sign what's now State's 23 and
2 date it. She did not have any questions. I put that back
3 in the Fed-Ex package, pulled the colored photo lineup out.
4 She was seated in the same seat Mark was when she came
5 Out, SLED, State's 20, color photo in front of her, and I
6 said, "Look at it. See if you recognize any of the
7 subjects in that lineup."

8 I noticed that she was -- where Mark didn't say anything,
9 she started, she appeared to start down at the bottom of
10 State's 20 and she just kind of tapped and said, you know,
11 "That's not him, that's not him, that's not him," and then
12 she immediately went up to the person in the one position
13 and said, "That's him. Those are the eyes," and I said, at
14 that point I said, "Make sure that you look at the whole
15 lineup. Make sure that you look at the rest of them to
16 make absolutely sure of your choice," and you know, she might
17 have took another ten seconds to glance back over it and she
18 went straight back to number one and said, "That's him,"
19 that person closely resembles the person they saw down at
20 Myrtle Beach or she saw down at Myrtle Beach.

21 Q: As a result of that selection what then did you
22 do?

23 A: I took the colored photo lineup, State's 20, stuck it
24 back in the Fed-Ex, pulled the black and white one back out.
25 It was blank, slid that in front of her, and I said, "I'm

1 going to need your initials and the time and the date of the
2 person in that photo that closely represents the one that
3 you picked out," and she immediately went to the number one
4 position, put her initials, time and date. At that point
5 after she finished that I stuck that back in the Fed-Ex and
6 we called Mark back out and she, you know, they -- to the best
7 of my recollection they said, "Do you think we're going to
8 have to testify," and I said, "I don't know at this point.
9 I'll have to call you later on." I was supposed to contact
10 Myrtle Beach or Lieutenant Frontz after I left the
11 residence, which I did. After I left the residence I
12 called Lieutenant Frontz via his cell phone. I believe he
13 was at his residence, his home at the time and advised him
14 that I was through and I said, "Bill, they picked the person
15 in number one position," and he said that that was good,
16 "That was the person that we had suspicion of." I said,
17 "Okay." I said, "Do you mind if I," because they -- they
18 were anxious to know if the person was in the photo or if they
19 picked the right one. I said, "Do you mind if I call them
20 back later on when I get to the office," and it's about a
21 30 minute drive from the lower end of the county, "Do you
22 mind if I call them back and just ease their mind and tell
23 them either they, you know, tell them what the Myrtle Beach
24 said." So he didn't mind. He said go ahead and call
25 them.

1 I got back to the office. I called. I believe Donna
2 answered the phone and I advised them that they had picked out
3 the suspect in the Myrtle Beach murder and she asked me again,
4 "Hey, do you think we're going to have to testify," and again
5 I said, "Look, Myrtle Beach will be in contact with you. I'm
6 not sure exactly what's going to happen from here. My job was
7 to show you the lineup and, you know, we'll take care of you
8 from there," and she indicated then, she said that they were
9 -- now that they knew what I told them they were rather
10 scared. They weren't -- I didn't hear any joy in their voice
11 when I told them the news that they had picked the person out.
12 They were very concerned.

13 Q: That's all I have of this witness at this time.

14 THE COURT: All right, cross.

15 EXAMINATION

16 BY MR. MARTIN:

17 Q: Mr. Robey.

18 A: Yes, sir.

19 Q: You say, I believe it is your testimony that you went in,
20 you talked with the Hobbses and you told them or the notes in
21 your report say that you arrived at approximately -- you've
22 got your report there?

23 A: Yes, sir, I do.

24 Q: "I arrived at approximately 7:50 on the 28th of June
25 '98."

1 A: Yes, sir.

2 Q: "And advised them that I was there to show them a photo
3 lineup of the person that they saw at Myrtle Beach prior to
4 the murder"; is that correct?

5 A: That's correct.

6 Q: All right, and you then proceeded to talk with them
7 about the logistics of showing the lineup; correct? I mean,
8 "I'm going to separate you."

9 A: Yes, sir.

10 Q: "And this is how we're going to do it."

11 A: Yes, sir.

12 Q: Then your reports says that Mark Hobbs was, he,
13 referring to Mark Hobbs, was shown the lineup at 8 p.m.;
14 correct?

15 A: Yes, sir.

16 Q: All right, and he looked at the lineup for ten minutes
17 during which time he covered the forehead and below the nose
18 area on the subjects one and two; correct?

19 A: That ten minutes was from the time we started and I
20 would guess I started two or three -- I'd say three minutes
21 after I walked in that door and introduced and split them up.
22 I wasn't there to socialize. I was there, I was there to get
23 it done and get out of there, had very little conversation
24 with them.

25 Q: I understand that.

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1 A: And, and that ten minutes, you know, I'm not -- I don't
2 time myself. That is, that is an approximate and I realize
3 it's in the report and that's the best that I can do on the
4 time for you.

5 Q: Okay, and I'm not arguing.

6 A: Okay.

7 Q: It's in your report.

8 A: Yes, sir, it is.

9 Q: You have given previous sworn statements on two or three
10 occasions.

11 A: Yes, sir.

12 Q: And on each of those statements in your report you
13 say that Mark Hobbs looked at the lineup for ten minutes;
14 is that correct?

15 A: Yes, sir.

16 Q: All right.

17 A: Mark took longer than Donna.

18 Q: I understand that.

19 A: Okay.

20 Q: Okay, but I'm going to ask you again, and I don't want
21 to belabor the fact but ---

22 A: Okay.

23 Q: --- your report says that you arrived at 7:50 and you
24 showed the lineup to Mark Hobbs at 8 p.m., right or
25 wrong?

1 A: Correct.

2 Q: All right, and the time that he made his initials on the
3 exhibits for identification was 8:10 p.m.; correct?

4 A: Yes, sir, it is.

5 Q: All right, and he told you -- and you say that he
6 was focusing on one and two when you handed him the white
7 piece of paper and those were the two individuals in the
8 lineup dressed in what color of clothing?

9 A: Blue or black. I mean, one looks a little lighter
10 than the other but they're dark clothing.

11 Q: Dark clothing.

12 A: Yes, sir.

13 Q: Be fair to say they appear to be black.

14 A: Yes, sir.

15 Q: Okay, all right, and then Mark Hobbs looked through them
16 and he told you that, "Number one most closely resembles the
17 individual that I saw on the beach that night."

18 A: Yes, sir.

19 Q: All right, sir, and then you exchanged positions and you
20 got Donna Hobbs in there?

21 A: Yes, sir.

22 Q: Correct?

23 A: Yes, sir.

24 Q: And in prior statements that you have made to the
25 courts, you testified that she looked at the lineup from

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1 two to three to four minutes; does that sound
2 correct?

3 A: Somewhere around in there.

4 Q: All right, and that she eliminated four, five and six
5 quickly, fairly quickly.

6 A: Yes, sir.

7 Q: And said number one is the person ---

8 A: Correct.

9 Q: --- that, well, and she went to number one.

10 A: That's right.

11 Q: And said, "Those are the eyes."

12 A: Yes, sir.

13 Q: And she said, "That person most closely resembles the
14 man I saw on the beach that night."

15 A: Yes, sir.

16 Q: And then you say they were anxious to know how well
17 they had done; right?

18 A: I wouldn't say as well as they done. I would say that
19 they were ---

20 Q: They were anxious to know what then?

21 A: Who the suspect was or what -- how their, you know
22 ---

23 Q: How they did on the lineup?

24 A: Did they pick it out or not. I mean, these are country
25 folk that live way out in the county and, you know, got kids.

1 I sensed more of a sacredness about them other than, "Yeah,
2 we picked them out. That's great. Oh, good, let's go to
3 court."

4 Q: Well, I understand. I understand that. All I said was
5 they said they were anxious to know the results of the lineup.

6 A: Correct.

7 Q: Or how they had done or how -- or if they had picked out
8 the suspect.

9 A: That's correct.

10 Q: All right, and both of them expressed that anxiousness
11 to you in the presence of each other I assume.

12 A: Donna more so than Mark.

13 Q: All right, did Mark and Donna Hobbs have any -- Donna
14 more so than Mark?

15 A: Just as, as ---

16 Q: I, I understand.

17 A: Okay.

18 Q: Both of them had some interest in it.

19 A: Yes, sir.

20 Q: Maybe Donna a little more than Mark.

21 A: Yes.

22 Q: All right, did the two of them and you, while you were
23 in their presence, discuss the fact that they had both
24 selected the same individual?

25 A: I don't, I don't remember that.

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1 Q: Don't remember for sure?

2 A: No, sir, because they all went back in the packet and I,
3 you know, I told them that I would be back in contact with the
4 results.

5 Q: And you didn't tell them they couldn't discuss ---

6 A No, sir.

7 Q: --- you know, who they picked out or ---

8 A: No, because it was, it was a done deal.

9 Q: --- what the lineup or anything like that. It was a
10 done deal then; right?

11 A: Yes, sir, it was done.

12 Q: Okay, and you then called Frontz and upon checking with
13 him he told you that that was good, that that was the suspect
14 they had; right?

15 A: Yes, sir.

16 Q: And that you then called Donna Hobbs back and told her?

17 A: 45, 30 to 45 minutes later, once I got back to the
18 office.

19 Q: And how did you tell her? What did you say to her?

20 A: The best I can remember, I just, "Donna, this is
21 Lieutenant Robey with the Bedford County Sheriff's Office. I
22 just want to let you know that Myrtle Beach has allowed me to
23 let you know that both you and Mark picked the person out that
24 they have as a suspect in the murder."

25 Q: Okay, did you have any further conversation with her?

1 A: That day or ---

2 Q: Yeah, during that phone call. I mean ---

3 A: No, other than her just, "You know, I'm, you know, I'm,
4 I'm scared of, you know, do you think we're going to have to
5 testify," they went into that and, "We just don't want that
6 guy coming after us if he finds out we picked him out," just
7 ---

8 Q: Did you tell them he was in jail?

9 A: No, because I didn't know.

10 Q: All right.

11 A: I didn't know -- want to know a lot about the case.

12 Q: I understand.

13 A: All I wanted was just give me the photo lineup and let
14 me do my duty and get it back and whatever, you know, I wasn't
15 sure if he was locked up, and I didn't lie to them and tell
16 them that he was.

17 Q: Okay, did you have any more conversation with them after
18 that?

19 A: The last conversation that I remember having with them
20 was when they had moved from Goodview to Goode, and I received
21 the summons for court and I went down there and served the
22 papers on them.

23 Q: Okay.

24 A: I never had any other conversation with them.

25 Q: Did you -- when you did that did you discuss the

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1 photographic lineup, identification testimony or anything of
2 that nature?

3 A: No, sir; no, sir.

4 Q: That's all the questions I have, Mr. Robey.

5 THE COURT: Anything further?

6 MR. HUMPHRIES: No.

7 THE COURT: You may step down, sir. Those are
8 exhibits. You can give those to the court reporter.

9 MR. HUMPHRIES: We do have the Hobbsses.

10 THE COURT: Okay, I know. They're coming. I just
11 wanted to make sure we kept those together.

12 MR. HUMPHRIES: And at the Defense request they were
13 sequestered.

14 Come around and be sworn, please, ma'am.

15 AT THIS TIME DONNA HOBBS WAS CALLED TO THE STAND, DULY
16 SWORN BY THE CLERK AND TESTIFIED AS FOLLOWS:

17 THE CLERK: Thank you. Please be seated. Please talk
18 right into the microphone.

19 MS. HOBBS: Okay.

20 THE CLERK: State your full name, spell your last
21 name for the Court.

22 MS. HOBBS: Donna Hobbs, H-O-B-B-S.

23 EXAMINATION

24 BY MR. HUMPHRIES:

25 Q: Mrs. Hobbs, you are the wife of Mark Hobbs.

1 A: Yes, sir.

2 Q: Which I'm not saying is your claim to fame but that is
3 the relationship. Let me ask you, did you have any occasion
4 to have a family vacation in Myrtle Beach during the week
5 which contained June 9th, 1998?

6 A: Yes, sir.

7 Q: And at what hotel were you staying at?

8 A: Carolina Winds.

9 Q: Let me ask you, was there any significant date during
10 that week as it relates to you and your husband?

11 A: Yes, sir, June 9th was our anniversary.

12 Q: And let's talk very briefly about what you might have
13 done earlier in the evening on June 9th, 1998. What did you
14 do?

15 A: I know we went out to dinner with my -- a lot of our
16 family, and after that we had come back to the motel late
17 and had put the kids down and went out for a walk or were
18 going out for a walk.

19 Q: Okay, and let me ask you this at dinner or at any time
20 during that day did you consume any alcoholic beverages?

21 A: No, sir.

22 Q: In fact do you drink alcohol at all?

23 A: No, sir.

24 Q: Okay, when we talk -- when you say you're going out for
25 a walk let's talk a little bit about the way the motel is

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1 configured. What door would you have exited to go on this
2 walk?

3 A: It's a back door. The -- their in-door pool's there and
4 out a back door where the pools are inside.

5 Q: Okay, and in whose company besides your husband were you
6 in at that time? Was it just you and your husband?

7 A: Just myself and my husband, uh-huh (affirmative
8 response).

9 Q: Now, when you came out of the door, what was your and
10 let's do this just for the Court's clarification at this
11 point. I'm going to show you State's 35 which is in
12 evidence, this being the Carolina Winds Hotel.

13 A: Right.

14 Q: Can you show the Court approximately where that door
15 would have been that you exited?

16 A: There, in there.

17 Q: Okay, and how would you have proceeded out that door
18 towards the area that you were going to walk?

19 A: Okay.

20 Q: I'm going to ask you to keep your voice up. Okay, let
21 me bring it up to you a little so you can stay close to the
22 microphone.

23 A: All right, okay, we would have come around this way
24 through this way and out.

25 Q: Okay.

1 A: Yeah.

2 Q: Let me ask you this, when you first exited Carolina
3 Winds Hotel did you notice anything unusual at that time?

4 A: Yeah, when we first come out I seen somebody just the
5 top of a head going really fast toward the beach, someone
6 that would have been running really fast.

7 Q: Okay, and coming from what direction to what direction?

8 A: When I was coming out here I would have seen somebody
9 coming this way.

10 Q: Headed towards the beach?

11 A: Yes, sir.

12 Q: Okay.

13 A: Uh-huh (affirmative response).

14 Q: And at that point all you saw was the top of the head?

15 A: Yes.

16 Q: And when you say the top of the head what do you mean
17 exactly?

18 A: Just, just a brief like a -- just the top of his head.
19 I just knew it was somebody running by.

20 Q: Okay, and did that cause you any concern?

21 A: Yes.

22 Q: Because where were you going?

23 A: I was going the same way.

24 Q: And did you make any remarks to your husband?

25 A: I did.

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1 Q: What did you say?

2 A: I did. I said, ``I wonder where he's going so fast
3 to.''

4 Q: Okay, where then did you proceed?

5 A: Then we headed out toward -- there was like a little
6 boardwalk that would go down to go down to the beach.

7 Q: And again, showing you State's 35 if you'd show the
8 Court the boardwalk that you're referring to.

9 A: Okay, here. You'd have to come across this way to go
10 down to the beach.

11 Q: And you're indicating this is the boardwalk.

12 A: Yes, sir, uh-huh (affirmative response).

13 Q: Now, and I'll keep this up for just a moment.

14 A: Uh-huh (affirmative response).

15 Q: Did you, in fact, go on to the boardwalk?

16 A: We did.

17 Q: And in approximately what position did you and your
18 husband go to the boardwalk?

19 A: Okay, like going toward the beach we come up on it.
20 When we come up on it the whole time I'm looking for the
21 individual I seen running.

22 Q: Okay.

23 A: Just trying to find them and I remember saying, you
24 know, ``Where'd he go,' ' and looking for him.

25 Q: Okay, so, you were -- your attention was ---

- 1 A: Was on him.
- 2 Q: Okay.
- 3 A: Uh-huh (affirmative response.)
- 4 Q: Let me ask you this, did, did you and your husband
- 5 ultimately go onto the beach at that time?
- 6 A: No.
- 7 Q: Did you stop on the boardwalk?
- 8 A: We stopped on the boardwalk.
- 9 Q: Okay, and tell the Court in what positions you and your
- 10 husband were there on the boardwalk.
- 11 A: Okay, when we were on the boardwalk he would have been
- 12 facing this way, his back toward the individual I'm looking
- 13 for and I'm standing here this way looking over his shoulder.
- 14 Q: And let's do this, if this is heading south and this is
- 15 heading north ---
- 16 A: Uh-huh (affirmative response).
- 17 Q: --- okay?
- 18 A: Uh-huh (affirmative response).
- 19 Q: Your back would have been to the ---
- 20 A: South.
- 21 Q: --- to the south.
- 22 A: Uh-huh (affirmative response).
- 23 Q: And your sight would be towards the north.
- 24 A: Facing north.
- 25 Q: And your husband would have been opposite at that time.

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1 A: That's right.

2 Q: Okay, which I guess puts you sort of in a hugging
3 position.

4 A: That's right.

5 Q: Okay, when in that position did you see anything that
6 caused you concern?

7 A: Okay, whenever I turned around and looking, I was
8 looking for him, and I seen somebody stoop down, and I said, I
9 probably said, "There he is," and he was stooped down and he
10 was looking at the back of the hotel. You know, I should
11 have said this though.

12 Q: Okay.

13 A: Before that, you know, right when I seen the
14 individual running ---

15 Q: Uh-huh (affirmative response.)

16 A: --- there was a pause because he looked at both of us
17 coming out of the Carolina Winds. He looked at both of us
18 then, and it was just like he was looking for somebody and
19 that's what I figured. He was looking for somebody.

20 Q: Okay.

21 A: He looked at both of us and paused a second and
22 then ran on.

23 Q: Okay.

24 A: And then that's when I couldn't find him. We
25 stopped and I did find him again stooped down looking at

1 the back of the motel.

2 Q: And let me show you State's 37 which is in evidence. Do
3 you recognize that photograph?

4 A: Yes.

5 Q: And who is that handsome young man in that photograph?

6 A: That's my husband.

7 Q: Okay, and in what position is he in relation to the
8 person that you saw that night?

9 A: That would have been the same position when he stood
10 back up.

11 Q: When he stood back up.

12 A: Uh-huh (affirmative response).

13 Q: That would have been the position that you seen him?

14 A: Yes.

15 Q: Okay, now, when, when you first saw him and he was
16 stooped down what, what view did you have of him?

17 A: When I first seen him and he was stooped down just a
18 side view then until he stood up and looked over to the
19 left.

20 Q: Okay, and let me ask you regarding your degree of
21 attention at that time, what was your degree of attention as
22 it relates to this person you saw stooped down?

23 A: My full attention was on him.

24 Q: And when he stood up you indicated that he looked over
25 at you.

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- 1 A: Yes.
- 2 Q: And at that time were you able to see him, that is his
3 face, clearly?
- 4 A: Yes.
- 5 Q: Okay, for what period of time do you believe?
- 6 A: Maybe just a couple of seconds, few seconds, not sure
7 exactly.
- 8 Q: Let's do this. Let's talk a little bit about your
9 ability to see him in terms of the lighting and the distance;
10 okay?
- 11 A: Uh-huh (affirmative response).
- 12 Q: And let's begin with your coming out of the pool side
13 doors.
- 14 A: Right.
- 15 Q: Okay, what were the lighting conditions as it relates to
16 your being able to see that night at that location?
- 17 A: Okay, I mean it was dark. It was nighttime, and I guess
18 there was lights off of the motel that I could see a face
19 fine.
- 20 Q: Are there exterior lights on that hotel?
- 21 A: I'm sure there are, yeah. It was lit up enough to see
22 fine.
- 23 Q: Okay, and once you got on the boardwalk what was your,
24 what was your ability to see facial features as it relates to
25 the lighting?

1 A: I could still see a face fine.

2 Q: No question about that.

3 A: No, no.

4 Q: Okay, when you saw this person stoop down and then
5 ultimately stand up and look at you what if anything did you
6 say to your husband?

7 A: I believe I said, "He's looking over at us now,"
8 and my husband even turned around at that time and
9 looked.

10 Q: Okay, and your husband then would have had the same
11 opportunity to view as you did at that time?

12 A: Yes, uh-huh (affirmative response).

13 Q: Okay, and ultimately after you had that opportunity to
14 view what then did that person do?

15 A: He took off pretty quick and went further north. He
16 didn't -- I guess that's one of the things that I noticed.
17 Nobody walks in that area. Usually when people take a walk
18 they walk on down to the beach and walk but he just headed
19 north in that same area up where nobody walks.

20 Q: You mean where the grass and all is?

21 A: Yes.

22 Q: Okay, tell the Court how that person was clothed.

23 A: He had dark clothing, long sleeves and pants, black
24 or dark and that's just, that's probably another, a big thing
25 why I was suspicious about him because it was pretty warm. We

1 had on shorts. It was really warm, and I don't know if I made
2 the comment to my husband. I know I thought to myself what in
3 the world is somebody doing out here in such hot clothes. So,
4 that was why he looked kind of odd to me, too.

5 Q: And let me ask you this, did you and your husband talk
6 about that person at that time?

7 A: Yes.

8 Q: And in what context -- did you go on that walk?

9 A: No, we didn't go on the walk.

10 Q: And why didn't you?

11 A: Because of him. My husband asked me, he said, "Do you
12 want to go ahead," and I'm like, "No. I don't." You know,
13 and I probably said, "I just didn't know where he went."

14 Q: Now, after, and I suppose you stayed out there for a
15 period of time; is that how it was?

16 A: Just, yeah, not, not really long once we decided not to
17 walk and he was out of sight. We just went back in.

18 Q: Did there come a time that you became aware that the
19 person you had seen might be of importance to law enforcement?

20 A: Yes.

21 Q: Tell the Court about that.

22 A: The next morning, I believe it was -- I'm not sure if
23 I was watching. Somebody had on the news. We have kids
24 and we weren't paying real close attention but somebody had
25 said some kind of announcement made, the police were asking if

1 anybody had seen anybody at this certain time in dark clothing
2 to please give them the information, and I don't know if it
3 was my husband or myself. I know I said one time, "That's
4 the man we seen," and it was around that time and he had on
5 dark clothes, and you know, Mark, when I said that to him, I
6 said, "That's him," and he said, "Yeah, I know. It's kind of
7 odd," or something, and I don't if it was him or myself that
8 said, "You know, we need to call," and then we hesitated,
9 said, "No, that's all right," but then I know I said, "Well,
10 I know we can at least just tell them that we seen a white
11 male in dark clothing," and like that's all we would know, you
12 know, that we could tell them at the time and that's what I
13 was hoping, that's all we could tell them at the time. So,
14 that's what we did. We made a call and told them that. Well,
15 then they started asking us more questions and that's pretty
16 much it. Then they would call and they come out there one
17 time to speak to us, and had asked us to if we could come out
18 and make a composite. Of course, you know, I didn't want to
19 get involved. That was the main thing. So, I thought,
20 "Well, I'll just tell them that and then they can go from
21 there with that information." That ended up being more.

22 Q: It did; didn't it?

23 A: Uh-huh (affirmative response).

24 Q: How did you describe this person to law enforcement?

25 A: I guess I would have told them that it was somebody in

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1 dark clothing. I know he was a white male. I probably said
2 dark features at that time, you know, I could tell dark hair,
3 dark eyes, and kind of a high forehead. I think probably at
4 that time, I'm not sure if I said anything else at that time
5 or not.

6 Q: You mentioned a request to do a composite.

7 A: Yes.

8 Q: Were you the first of you and your husband to go down
9 to Myrtle Beach Police Department to attempt to do that?

10 A: No, Mark did first my husband, yeah.

11 Q: And at -- but at some point in time were you called upon
12 to assist in trying to make a composite?

13 A: Yes, he tried and worked with it a little bit and
14 then they called and asked if I could try to come and see,
15 too, because Mark come back and he said he wasn't happy
16 with it. He didn't know, you know, how to do the composite
17 thing, and I was like, "Well, I'll just go look and see what
18 you did," and as soon as I looked at it I was like, "No,"
19 and then we tried to work together on the face, and of course,
20 I know it was like several eyebrows, several eyes, several
21 mouths, and that was really hard for us to do. So, we did the
22 best we could and I was kind of in a hurry, not taking a lot
23 of time.

24 Q: This was your vacation.

25 A: Yes.

1 Q: Okay, let me show you State's -- I'm sorry, Defense
2 Exhibit Two. Do you remember that?

3 A: Yes, sir.

4 Q: And is that the composite that you and your husband
5 attempted to do?

6 A: Yes, that is the composite.

7 Q: Okay, and after reaching this stage ---

8 A: Uh-huh (affirmative response).

9 Q: --- what did you express to law enforcement regarding
10 whether or not you felt like this was a good rendition of the
11 person you saw that night?

12 A: No, I said that's not it. His eyes didn't look like
13 his eyes.

14 Q: Okay, now, did you -- well, let me ask you this, did you
15 see any news accounts, were you presented any photographs or
16 did you ever see a photograph of the suspect while in Myrtle
17 Beach?

18 A: No.

19 Q: Okay, did you ultimately complete your vacation and
20 return home?

21 A: We did.

22 Q: And your home at that time was where?

23 A: Yes.

24 Q: Where was your home at?

25 A: Oh, in Goodview, I guess, at that time.

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1 Q: Now, did you have any contact with law enforcement
2 after that time?

3 A: No, I don't think after that time. I think they
4 called or something.

5 Q: They called you?

6 A: Yeah, they called one time.

7 Q: And do you recall what information they provided to you?

8 A: I know they were asking to come out to see us and I
9 think they said they had something we need to look at. I
10 can't remember exactly now.

11 Q: Ultimately did an individual at that time who was
12 Lieutenant Kent Robey come to your residence?

13 A: Yes, he did.

14 Q: And when he arrived at your residence did you know
15 precisely what purpose he was there for?

16 A: I think I may have known that. I think so.

17 Q: And when he got there tell the Court very briefly what
18 transpired.

19 A: Okay, when he come he said that he had a photograph of
20 some criminal suspects and that he would like us to point out.
21 He didn't show us anything at the time, but that he would like
22 us to point out a suspect if he was on the page. We didn't
23 know if he was or not, I don't think, but he would like to see
24 if we could identify anybody on that page that he had, and he
25 said that my husband and myself would have to be separate from

1 each other and he took my husband first. I went into a back
2 bedroom and closed the door. He and my husband went in the
3 dining room.

4 Q: Okay, now, let me ask you this, while he and your
5 husband were in the dining room were you able to hear anything
6 in connection with their conversation?

7 A: No, no, I couldn't hear them.

8 Q: Okay, and did there come a point in time when they came
9 to get you out of the back bedroom?

10 A: They did. They did. Mark come out or Lieutenant Robey
11 come out with them and I walked out. He walked in the
12 bedroom. We didn't exchange any words at all.

13 Q: Okay, now, let's talk a little bit about the procedure
14 that Lieutenant Robey used with you.

15 A: Okay.

16 Q: Okay? Let me show you first State's 23.

17 A: Okay.

18 Q: Tell me if you recognize that form.

19 A: Yes.

20 Q: And what is that form?

21 A: This is a ---

22 Q: Or how was it used on that evening?

23 A: Okay, Lieutenant Robey would have read this form to us
24 and then he asked or read it to me when I was in there and I
25 read it and then -- or he read it, and then he asked me to

1 read it myself. Yeah, I read it myself and signed it.

2 Q: Okay, and let me ask you this, when he had that form out
3 did he have any other forms out at that time?

4 A: No.

5 Q: Okay, or any other papers?

6 A: No.

7 Q: All right, and after you read and signed that form and
8 let's be specific in State's 23, one line in particular says
9 this group of photographs may or may not contain a picture of
10 the person who committed a crime now being investigated.

11 A: Right.

12 Q: You understood that?

13 A: Yes.

14 Q: Okay, after you had read that form and let me ask you did
15 you understand the form as you read it?

16 A: I did.

17 Q: Okay, what then did he present to you?

18 A: He then presented me with the photo lineup.

19 Q: I'm showing you State's 20. Tell me if you can identify
20 that photograph.

21 A: Yes.

22 Q: What is it?

23 A: It is the criminal suspects and it has the individual
24 that I seen on it that night.

25 Q: Okay, tell me how Lieutenant Robey presented it to you.

1 A: I just remember him laying it on the table and I don't
2 remember him saying anything at that time.

3 Q: Okay, after he laid it on the table what did you do?

4 A: I looked at it. I spotted him right off, but then I did
5 look at the other ones. Then I went right back to him.

6 Q: Let me ask you, about how long do you think you -- well,
7 you say that you spotted him right off?

8 A: Uh-huh (affirmative response), yeah.

9 Q: You did look at the other photographs?

10 A: I did.

11 Q: At what point in time approximately in terms of from
12 the time you started looking at it till the time you
13 indicated to Lieutenant Robey that you had selected the person
14 that you saw that evening ---

15 A: Uh-huh (affirmative response).

16 Q: --- how long was that?

17 A: I wouldn't even say a second or whatever. I'm not
18 really sure, but I knew right away.

19 Q: Right away, okay, and let me ask you this. In regard to
20 how certain you were at the point at which you saw him how
21 certain were you?

22 A: I was a hundred percent.

23 Q: Hundred percent sure, no question in your mind?

24 A: No question.

25 Q: Did he then present you with another form or another

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1 set of photographs? Let me show you State's 22.

2 A: Okay.

3 Q: Tell me if you can identify that.

4 A: Yes, I do.

5 Q: Okay, and in presenting that form to you what request
6 did he make of you?

7 A: Just to sign it and date it.

8 Q: Okay, and did you do that?

9 A: I did.

10 Q: Let me ask you this.

11 A: Uh-huh (affirmative response).

12 Q: Can you today based on your observations of that
13 individual on the night of June 9th, 1998, identify that
14 person for this Court, the person that you saw that evening if
15 he's in the courtroom?

16 A: Yes.

17 Q: And who is he? Where is he?

18 A: He's over there.

19 Q: Indicating the Defendant.

20 A: Uh-huh (affirmative response.) When I walked in here
21 yesterday and he looked around to his left at me I said to my
22 husband he shouldn't have done that. That's exactly how he
23 looked that night, the same look.

24 Q: Very good. I don't have any further questions of
25 this witness at this time.

1 THE COURT: All right, cross.

2 EXAMINATION

3 BY MR. MARTIN:

4 Q: Ms. Hobbs, the look that you got that person you saw on
5 the beach that night was a very quick look; wasn't it?

6 A: I wouldn't say real quick.

7 Q: Well, how else would you -- well, let me ask you this,
8 you have given statements, sworn statements earlier that it
9 was approximately two seconds. You wouldn't describe that as

10 ---

11 A: The one look was that.

12 Q: How many looks did you get?

13 A: You have to remember I'm watching him the whole time.

14 Q: Now, what do you mean by that?

15 A: I'm watching him the whole time. His face might have
16 been toward me a second or two, right exactly looking at me,
17 but you have to remember I'm looking at him the whole time.

18 Q: But his face would be a second or two.

19 A: Maybe, that's probably right.

20 Q: And it is your face -- his face you're identifying;
21 isn't it, Ms. Hobbs?

22 A: Yes, sir.

23 Q: Do you ever entertain the thought that you might be
24 wrong ---

25 A: No.

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- 1 Q: --- about this identification?
- 2 A: No.
- 3 Q: Never in your darkest quietest moments do you think,
4 "I could be wrong"?
- 5 A: No, no.
- 6 Q: Now, that night after you gave the identification and
7 you had picked number one out ---
- 8 A: Uh-huh (affirmative response).
- 9 Q: --- did anybody call you back that night to tell you
10 that you had picked out the suspect?
- 11 A: I don't believe it was that night. I want to think
12 it was the next day just because it seems like I remember
13 calling my husband at work and letting him know that we
14 picked out the same person.
- 15 Q: Well, let me ask you again and you tell me.
- 16 A: Okay.
- 17 Q: Do you know when it was that you were called?
- 18 A: Not exactly.
- 19 Q: Could have been called that night?
- 20 A: You know, it doesn't really seem like it because I'm
21 thinking my husband was working.
- 22 Q: All right, well, was it the next day?
- 23 A: Probably, I'm not definite, but ---
- 24 Q: Well, within a day or two ---
- 25 A: Uh-huh (affirmative response).

- 1 Q: --- they called you back and said what?
- 2 A: Goodness, he -- I think he had mentioned that that
- 3 suspect that we picked out was the same one that they had held
- 4 or something like that.
- 5 Q: The same one they had held?
- 6 A: I guess or that was convicted or whatever.
- 7 Q: Well, I'm asking you. I mean, you're pretty precise
- 8 about your identification that John Frazier is the man you
- 9 saw.
- 10 A: Right.
- 11 Q: So, I want you to try to be as precise with me ---
- 12 A: Sure.
- 13 Q: --- as the other answers you give; is that fair?
- 14 A: That's fair.
- 15 Q: All right, now, what did he tell you when he called? Who
- 16 called you back first of all?
- 17 A: I think it was Lieutenant Kent Robey.
- 18 Q: And what did he tell you?
- 19 A: Now, I can't say exactly what he told me.
- 20 Q: The gist of what he told you was that? Was that you had
- 21 picked out the suspect that they had in Myrtle Beach?
- 22 A: Yeah, pretty much.
- 23 Q: Let me ask you something, the composite you did
- 24 here ---
- 25 A: Uh-huh (affirmative response).

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1 Q: --- how would you describe those eyes for me?

2 A: They're more slanted, kind of wider.

3 Q: Okay, and you wouldn't describe those as big, round or
4 white eyes; would you?

5 A: No.

6 Q: And you wouldn't describe that as a high forehead; would
7 you?

8 A: I would.

9 Q: You would?

10 A: Uh-huh (affirmative response).

11 Q: That in your mind is a high forehead?

12 A: Uh-huh (affirmative response).

13 Q: Now, you have talked to a friend after you went back
14 to and in a prior statement that is my understanding, that
15 after you went back to Virginia you had talked to a friend
16 from Myrtle Beach or about what had happened in Myrtle Beach.
17 Who was that?

18 A: A friend from Myrtle Beach?

19 Q: I don't know where they were from, but in trying to
20 refresh your memory in a prior statement you said that you had
21 talked with a friend either from Myrtle Beach or about what
22 had happened in Myrtle Beach.

23 A: Okay, just remind me what I talked about because I can't
24 remember right now.

25 Q: You didn't, you didn't say what you talked about, but I

1 guess I'm trying to give you that to say you've said it
2 before. So, my question to you is who was it that you
3 talked to before they came to show you the lineup from or
4 about Myrtle Beach that might have been called a friend?

5 A: I don't know who you're referring to. I'm sorry.

6 Q: Did you talk with any members of the Myrtle Beach
7 Police Department before you were shown the lineup?

8 A: I don't remember it if we did.

9 Q: After you went back to Myrtle Beach ---

10 A: Uh-huh (affirmative response).

11 Q: --- and before Robey came to show you the lineup did you
12 talk with anybody from the Myrtle Beach Police Department?

13 A: I don't think so. I don't think so.

14 Q: Is that a no or ---

15 A: Well, I'm not really sure. I'm not really sure.

16 MR. HUMPHRIES: That's, that's her answer. Now, we've
17 done this over and over again.

18 THE COURT: She's indicated she's not sure.

19 Q: You're not sure, and you say that your
20 identification in court today is based solely on your
21 observation from the night of June the 9th?

22 A: Yes.

23 Q: You don't think that anything that has transpired
24 Between now and then has had the effect of contaminating your
25 memory to some degree so that it is difficult if not

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1 impossible to remember exactly what you observed on the night
2 of the 9th?

3 A: I'm sorry. Could you repeat that?

4 Q: The passage of time, the information, the fact that you
5 were told you picked out the right suspect, the
6 congratulations for the help you got, the reward money that
7 you got, all of that stuff, do you think that that could have
8 contaminated your independent memory from the 9th and have an
9 effect on it?

10 A: No.

11 Q: That's all I have at this time.

12 MR. HUMPHRIES: Nothing further of this witness.

13 THE COURT: All right, you may step down. Call your
14 next witness, please.

15 MR. HUMPHRIES: Mark Hobbs. Come around and be sworn,
16 please, sir.

17 AT THIS TIME MARK HOBBS WAS CALLED TO THE STAND, DULY SWORN
18 BY THE CLERK AND TESTIFIED AS FOLLOWS:

19 THE CLERK: Please be seated. Please state your full
20 name, spell your last name for the Court.

21 MR. HOBBS: Mark Hobbs, H-O-B-B-S.

22 EXAMINATION

23 BY MR. HUMPHRIES:

24 Q: And Mr. Hobbs, you are the husband of Donna Hobbs?

25 A: Yes, sir.

1 Q: Did you have an occasion to be on a family vacation in
2 Myrtle Beach, South Carolina, during the week which
3 contained June 9th, 1998?

4 A: Yes, sir.

5 Q: And June 9th -- well, June 9th why is that date
6 significant for you?

7 A: That's our anniversary.

8 Q: Let me ask you specifically about the early evening
9 of June 9th, 1998, what did you and your wife and others do
10 that early evening?

11 A: Well, we probably played ball, and then later on we --
12 me and my brother-in-law and his wife we all went out to
13 dinner.

14 Q: And at dinner or anytime that day did you consume any
15 alcoholic beverages?

16 A: No, sir.

17 Q: And do you drink at all?

18 A: No, sir.

19 Q: Okay, let me ask you, after you got the kids down did
20 you and your wife decide to go take a walk on the beach?

21 A: Yes, sir.

22 Q: And where were you staying?

23 A: Carolina Winds.

24 Q: Let me show you State's 35. Tell me if you can identify
25 it, this hotel.

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1 A: Yes, sir.

2 Q: Is that the Carolina Winds?

3 A: Yes, sir

4 Q: Okay, and in going along this walk or attempting to go
5 on this walk do you see the area that you would have exited
6 the hotel?

7 A: Yes, sir.

8 Q: If you'll point it out for the Court.

9 A: Right here.

10 Q: Okay.

11 A: Yes, sir.

12 Q: And in exiting those doors was there anything that
13 caught your attention?

14 A: Yes, sir.

15 Q: What was it?

16 A: As we walked out there was a man kind of just staring
17 at us and I kind of wondered about it. It just -- it was just
18 different, a different look. I mean, you don't mind somebody
19 just kind of looking, but it was a more a -- it was a
20 different stare.

21 Q: Okay, and caused you some concern?

22 A: A little bit, yes, sir, I just was -- looked right back,
23 you know, just looking back, yes, sir.

24 Q: Well, let me ask you this, you say you were looking
25 back. What was your degree of attention on the person that

1 was looking at you at that point?

2 A: Pretty good. I mean, I was just looking right back at
3 him. Just, I don't know why I just looking right back at him.

4 Q: Do you think he might be looking at your wife?

5 A: Could be, yes, sir, I didn't know that. He was looking
6 at us. It was just, yes, sir.

7 Q: Now, about how long an opportunity did you have to
8 look at his face at that point in time?

9 A: Two or three seconds, I guess, something like that.

10 Q: And let me show you State's 36 into evidence. Do you
11 recognize this photograph?

12 A: Yes, sir.

13 Q: Okay, and in this photograph there is pictured an
14 attractive young woman. Who is that?

15 A: That's my wife.

16 Q: Okay, and what is her position as it relates to the
17 individual you saw that night as you walked out the doors?

18 A: Pretty close.

19 Q: He was in that position?

20 A: Yes, yes, sir, yes, sir, looking in that position, yes,
21 sir.

22 Q: Okay, how tall is your wife?

23 A: Five-four.

24 Q: Well, let me ask you this, concerning the lighting
25 conditions and your ability to see the face of the individual

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1 you saw on that evening what was -- what were the lighting
2 conditions?

3 A: Pretty good, I mean, I could, you know, I could see
4 pretty good, yes, sir.

5 Q: Any difficulty in making out the features of that
6 face?

7 A: No, sir.

8 Q: None whatsoever?

9 A: No, sir.

10 Q: Okay, and as you exited the doors did you observe that
11 individual that you saw make any movements?

12 A: Yes, sir.

13 Q: And in what direction did that person move?

14 A: Going toward the beach.

15 Q: Toward the beach.

16 A: Yes, sir.

17 Q: Where were you headed?

18 A: Toward the beach.

19 Q: Okay, again, State's 35 if you'll show the Court the
20 route basically that you took.

21 A: We would have walked right around this way. I'm not
22 sure where the gates were, but I assume we would have probably
23 walked across here or either I'm not sure which way they come
24 out.

25 Q: Uh-huh (affirmative response), okay.

1 A: Yes, sir.

2 Q: And where did you head to?

3 A: We would have headed this way, come across the -- come
4 out the boardwalk onto the beach.

5 Q: Okay, now, did you get all the way to the beach?

6 A: No, sir.

7 Q: Okay, and did you have any conversation with your wife
8 about that person that you saw first of all looking at you and
9 then moving towards the beach?

10 A: Well, not at first, no, sir. I didn't, I didn't really
11 say anything, and then as we were walking, kind of walking
12 toward -- to the beach, she was kind of concerned, and she
13 said, "Wonder what he's doing," or something and then she --
14 as he -- because he kind of ran and beat us, like he was
15 trying to beat us to the beach, went ahead of us, and then she
16 kept saying, "Where'd he go? Where'd he go," and I said,
17 "Don't worry about it. Come on," you know it's ---

18 Q: You were ready to take that walk ---

19 A: Yes, sir.

20 Q: --- on the beach with your wife on your anniversary.

21 A: Yes, sir.

22 Q: Okay, did you then go on the boardwalk?

23 A: Yes, sir.

24 Q: Okay, and did you stop at some point on the boardwalk?

25 A: Yes, sir.

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1 Q: And tell the Court what your relative positions were,
2 where were you facing in terms of direction and where was
3 your wife facing?

4 A: We were -- we just stopped on the boardwalk and just
5 kind of -- I was trying to get her to keep going. She said,
6 "No, I don't want to go." So, we just kind of stood down
7 there and just started hugging and I would have been looking
8 south and she would have been looking north.

9 Q: Okay, and did there come a point in time when your wife
10 said something that made you direct your attention north?

11 A: Yes, sir.

12 Q: Okay, and what would that have been?

13 A: She kept saying, "Well, I wonder where he went, where
14 he went?" Then she said something about, "Well, I see him.
15 There he is again," and that's when I -- as I turned around I
16 saw this individual kind of coming up out of a crouch ---

17 Q: Okay.

18 A: --- and was looking at us, then turned and headed up the
19 beach.

20 Q: Okay, you say he came up out of a crouch and he turned
21 and looked at you?

22 A: Yes, sir.

23 Q: And did you have an opportunity to look at him?

24 A: Yes, sir.

25 Q: And what was your degree of attention at the point in

1 time he turned up and looked at you?

2 A: Pretty good. I was just kind of wondering why he was
3 still, still there.

4 Q: And for how long did you have an opportunity to observe
5 him at that point?

6 A: Just a couple of seconds.

7 Q: And is that a couple of seconds that you had to observe
8 his facial features?

9 A: Yes, sir.

10 Q: Okay, is that a full frontal?

11 A: Yes, because he kind of -- he turned and, just turned
12 his head kind of looked at us, yes, sir.

13 Q: And about the lighting conditions on the beach in that
14 area how were they?

15 A: Pretty good. I mean, you could make the face out. You
16 knew it was the -- definitely the same person, and you know it
17 was.

18 Q: Okay, now, did there come a point in time when that
19 person moved off from that position?

20 A: Yes, sir.

21 Q: Okay, and what direction did he go off?

22 A: North.

23 Q: And how was he clothed?

24 A: Dark clothes.

25 Q: Okay, long sleeves, short sleeves?

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- 1 A: Long sleeves.
- 2 Q: Long pants or short pants?
- 3 A: Long pants.
- 4 Q: And did you and your wife go on that walk?
- 5 A: No, sir.
- 6 Q: Why?
- 7 A: She didn't want to go.
- 8 Q: Didn't want to go.
- 9 A: No, sir.
- 10 Q: Okay, what then did you do?
- 11 A: We went back up to the hotel.
- 12 Q: And then -- let me ask you, did there come a time when
- 13 you became aware that what the person that you saw on that
- 14 evening may be of interest to the Myrtle Beach Police
- 15 Department?
- 16 A: Yes, sir.
- 17 Q: And how did that come about?
- 18 A: The next morning, I'm not sure exactly what I was doing,
- 19 but my wife and mother-in-law said, they just told me to
- 20 come in here and look at this and they -- there was something
- 21 on the news about, as I said they was wondering, said there
- 22 had been a murder on the beach and they said they wanted
- 23 anybody had any, saw anybody that might have been dressed in
- 24 dark clothes, and my wife said that might have been who we saw
- 25 last night, and I said, "Well, it could have been, you

1 know." I just -- I really didn't think a whole lot about it
2 being that, but.---

3 Q: And having that information then what did you do?

4 A: Well, we decided to call the police and tell them. We
5 could tell them it was a white male anyhow that we saw that
6 was dressed in dark clothes. I didn't know if it would help
7 them or not, but we said we could tell them that anyhow.

8 Q: And that's what you intended to tell them at that
9 point.

10 A: Yes, sir.

11 Q: And didn't intend to give them any further description
12 of the individual?

13 A: No, sir.

14 Q: Now, let me ask you this, your intention to tell them
15 just that it was a white male dressed in dark clothing --
16 well, let me move on. You called the police and they spoke
17 with you?

18 A: I'm not sure if I called them or who called them, but,
19 yes, sir, somebody did, yes, sir.

20 Q: And contact was made with the Myrtle Beach Police.

21 A: Yes, sir; yes, sir.

22 Q: Did there come a point in time when law enforcement
23 requested you come down and attempt to make a composite of the
24 individual you saw?

25 A: Yes, sir.

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- 1 Q: Okay, and who was the first to go down?
- 2 A: I was.
- 3 Q: Okay, let me show you Defendant's Two and tell me if you
- 4 recognize this.
- 5 A: Yes, sir.
- 6 Q: What is it?
- 7 A: My attempt at a composite.
- 8 Q: Okay, and let me ask you, upon getting to this point in
- 9 the project how did you feel in regard to your results, that
- 10 is your ability to recreate the face of the person that you
- 11 saw that night?
- 12 A: Not too good.
- 13 Q: And particularly was there anything that concerned you?
- 14 A: The eyes.
- 15 Q: The eyes.
- 16 A: Yes, sir.
- 17 Q: You didn't feel those were accurate.
- 18 A: Right, yes, sir.
- 19 Q: Okay, you finished your vacation.
- 20 A: Yes, sir.
- 21 Q: Went back to Goodview?
- 22 A: Yes, sir.
- 23 Q: Okay, and were you then contacted by law enforcement ---
- 24 A: Yes, sir.
- 25 Q: --- in connection with this case?

- 1 A: Yes, sir.
- 2 Q: Do you know how many times you were contacted by law
3 enforcement in connection with this case?
- 4 A: Not exactly sure, no, sir.
- 5 Q: Well, let me ask you this, do you know if you were
6 contacted by any law enforcement agency before Lieutenant
7 Kent Robey came to your house?
- 8 A: Yes, sir, I think so, yes, sir.
- 9 Q: Do you know who that might have been?
- 10 A: I think that was -- I'm not sure who called but the --
11 it, it may have been Dale Long. I'm not sure if it was -- who
12 it was. It was somebody from Myrtle Beach Police Department.
- 13 Q: Okay, and in contacting you what information -- what was
14 your conversation about?
- 15 A: What I saw, you know, just the ---
- 16 Q: Okay.
- 17 A: But they came up to see us, and I'm not sure what date
18 that was.
- 19 Q: And let me ask you this, do you recall the description
20 you would have provided to law enforcement regarding the
21 person you saw that night?
- 22 A: Yes, sir.
- 23 Q: And what was it?
- 24 A: Long sleeves, white male, probably high forehead,
25 round eyes.

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1 Q: Now, were you advised that an officer from the
2 Bedford County Sheriff's Department would also be coming to
3 your house to show you a photo lineup?

4 A: Yes, sir.

5 Q: Okay, and ultimately did an officer, particularly
6 Lieutenant at that time, Kent Robey?

7 A: Yes, sir.

8 Q: Show up?

9 A: Yes, sir.

10 Q: Okay, let's talk about that particular meeting; okay?

11 A: All right, sir.

12 Q: Now, when he arrived what was -- what if anything did
13 he discuss with you prior to getting into the procedure.

14 A: I don't remember that, just introduced ourselves. You
15 know, I really don't remember anything discussed as far as ---

16 Q: Okay, did there come a point in time ---

17 MR. MARTIN: Your Honor, I know -- I'm willing to
18 stipulate if it helps any that Mr. Robey told me Hobbs the
19 same thing he told Mrs. Hobbs, which is already in the record
20 if that'll help move the process along any.

21 MR. HUMPHRIES: It will help appreciably, yes.

22 MR. MARTIN: Yeah.

23 THE COURT: All right.

24 MR. HUMPHRIES: Thank you.

25 MR. MARTIN: Anything I can do.

1 MR. HUMPHRIES: I understand.

2 THE COURT: Very good.

3 BY MR. HUMPHRIES:

4 Q: Let me ask you this, in presenting and are you
5 stipulating to the procedure as well?

6 MR. MARTIN: Yeah, I mean, I'll stipulate ---

7 MR. HUMPHRIES: I'm trying to figure out where we ---

8 MR. MARTIN: --- to everything except what is specific
9 to him in terms of about, you know, what did -- who did you
10 pick out so to speak.

11 MR. HUMPHRIES: Good enough. Good enough.

12 BY MR. HUMPHRIES:

13 Q: All right, after advising you of your -- consistent
14 with State's 23 the admonition form, you recognize that?

15 A: Yes, sir.

16 Q: He read it to you. You read it yourself and signed it.

17 A: Yes, sir.

18 Q: Did you understand it?

19 A: Yes, sir.

20 Q: And particularly the part that says this group of
21 photographs may or may not contain a picture of the person
22 who committed a crime now being investigated.

23 A: Yes, sir.

24 Q: You understood that.

25 A: Yes, sir.

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1 Q: Okay, let me show you State's 20. Were you then
2 presented with this?

3 A: Yes, sir.

4 Q: And at the time his procedure began, prior to the
5 procedure beginning where was your wife?

6 A: In the back bedroom.

7 Q: Door closed or open?

8 A: Closed.

9 Q: Okay, and upon being presented that, you can keep it,
10 State's 20 did Lieutenant Robey give you any further
11 instructions or did he just place it in front of you?

12 A: Just put it in front of us.

13 Q: Okay.

14 A: Yes, sir.

15 Q: And what did you do? Tell the Court how you viewed
16 it, what your observations were and ultimately what you --
17 what decision you made if any.

18 A: Well, I looked at them, looked at them all and I kept,
19 just kept looking at them, but I recognized one of them, yes,
20 sir.

21 Q: And which was the one you recognized?

22 A: The number one position.

23 Q: Now, when you say you recognized one of them we're
24 going to need to be pretty specific about that. Did you
25 recognize that as the person you saw ---

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1 A: Yes, sir.

2 Q: --- in Myrtle Beach on June 9th, 1998?

3 A: Yes, sir.

4 Q: Or did it just look like the person you saw?

5 A: No, I really recognized it, yes, sir.

6 Q: Okay, and ultimately did you indicate that to Lieutenant
7 Robey?

8 A: Yes, sir.

9 Q: Okay, and do you know about how long that you viewed that
10 photo lineup?

11 A: No, sir, a few minutes. Yes, sir, I really don't -- I
12 couldn't tell you exact time, no, sir.

13 Q: Okay, and after having made that identification or
14 indication to Lieutenant Robey, let me show you State's 21.
15 Do you recognize this document?

16 A: Yes, sir.

17 Q: And what is that document?

18 A: That is where I signed the picture above the one I picked
19 out, yes.

20 Q: Okay.

21 A: Yes, sir.

22 Q: And those, those being your initials and the date and
23 time?

24 A: Yes, sir.

25 Q: Okay, now, after having done that what then did

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1 Lieutenant Robey do with you and ultimately with your wife?

2 A: He walked me back to the bedroom and she came out
3 and I went in and shut the door.

4 Q: Okay, and did you have any conversation whatsoever with
5 your wife?

6 A: No, sir.

7 Q: Did you indicate in any way by gesture or otherwise
8 that you had either picked out a person or the person that you
9 picked out?

10 A: No, sir.

11 Q: And after your wife had completed that process did they
12 come get you?

13 A: Yes, sir.

14 Q: Okay, and what conversation then was had between you,
15 your wife and Lieutenant Robey before he left?

16 A: He just said, that, you know, we -- he might let us know
17 something when he found out anything or -- and pretty much
18 said bye. That was pretty much it, yes, sir.

19 Q: Did he indicate at that time that you had selected
20 the suspect?

21 A: No, sir.

22 Q: Okay, did there come a point in time later where you
23 received a call from Lieutenant Robey indicating that you had
24 picked out a suspect, the suspect that the Myrtle Beach Police
25 Department was interested in?

- 1 A: I didn't receive the call. My wife called me, yes, sir.
2 I didn't.
- 3 Q: Where were you at the time?
- 4 A: I was at work.
- 5 Q: Okay, the next day perhaps?
- 6 A: I don't remember the day, no, sir.
- 7 Q: But you were at work?
- 8 A: Yes, sir.
- 9 Q: Well, let me ask you this, did you and your wife know on
10 that evening that you had selected the same person?
- 11 A: No, sir, I don't think so.
- 12 Q: Didn't even talk about that?
- 13 A: We may have talked about it but, you know, I really
14 don't -- I couldn't have told you what number position they
15 were in or anything like that because I just picked the person
16 out. I really didn't know they was even numbered really, but
17 ---
- 18 Q: I got you.
- 19 A: Yes, sir.
- 20 Q: So, at that point neither you or your wife knew that the
21 other had selected the same person.
- 22 A: No, sir.
- 23 Q: Okay, now, let me ask you this, in terms of the point in
24 time you identified John Boyd Frazier for the -- of course,
25 you didn't know his name at that point, but you identified the

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1 person in this position on State's 20.

2 A: Yes, sir.

3 Q: What we call position number one.

4 A: Yes, sir.

5 Q: What was your level of certainty at the point in which
6 you identified this person?

7 A: Real good.

8 Q: Real good.

9 A: Yes, sir.

10 Q: Any question in your mind that this was the guy that you
11 saw that night?

12 A: No, sir.

13 Q: None whatsoever?

14 A: No, sir.

15 Q: That's all I have of this witness at this time, Your
16 Honor.

17 THE COURT: Cross.

18 EXAMINATION

19 BY MR. MARTIN:

20 Q: Mr. Hobbs, what kind of work do you do?

21 A: Now I work for myself.

22 Q: Doing what?

23 A: Doing home improvements.

24 Q: Home improvements?

25 A: Yes, sir.

- 1 Q: How long you been doing that?
- 2 A: About three years.
- 3 Q: And what did you do back in '98?
- 4 A: A field service mechanic for Caterpillar.
- 5 Q: And your wife is doing what presently?
- 6 A: She just stays at home, home schooling.
- 7 Q: You got children?
- 8 A: Yes, sir.
- 9 Q: How old are your kids?
- 10 A: Seventeen today is one and the other one is 13 and 9.
- 11 Q: 17, 13 and 9. Okay, that night after Mr. Robey came to
- 12 your home and you had looked at the lineup and made your
- 13 selection, after -- when Mr. Robey was there did you and he
- 14 and your wife discuss the fact that you had picked out the one
- 15 in the number one position?
- 16 A: I don't think so, no, sir.
- 17 Q: And as best you can, you know, try to tell me yes or no
- 18 and if you don't know just say, "I don't know"; okay?
- 19 A: I don't think, no, sir, I don't, I don't remember that,
- 20 no, sir.
- 21 Q: All right, okay, now, after Robey left did you and your
- 22 wife discuss the lineup and what you had seen, which one you
- 23 had picked and what you thought and all that kind of stuff?
- 24 A: We may have, but it really doesn't stand out, no,
- 25 sir.

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- 1 Q: You would think you would; wouldn't you?
- 2 A: We probably talked about it, but you know, I mean, it's
- 3 ---
- 4 Q: I'm not saying there's anything wrong with it.
- 5 A: Yeah, I know it. Yeah, I just don't remember that, no,
- 6 sir.
- 7 Q: All right, when he -- and when he came up with the lineup
- 8 there with you and you looked at the lineup ---
- 9 A: Yes, sir.
- 10 Q: --- all right, you told him that number one most closely
- 11 resembled the man you saw on the beach that night.
- 12 A: Yes, sir, I don't know if I told him number one or
- 13 not, but I picked out the ---
- 14 Q: That picture ---
- 15 A: Yes, sir.
- 16 Q: --- most closely ---
- 17 A: Yes, sir.
- 18 Q: --- resembled the man you saw on the beach that night.
- 19 A: Yes, sir.
- 20 Q: All right, you -- who from the Myrtle Beach Police
- 21 Department contacted you prior to your being shown the
- 22 lineup?
- 23 A: I don't remember for sure.
- 24 Q: How did they contact you?
- 25 A: By phone.

1 Q: Where were you when you talked to them?

2 A: I don't think I talked to them. They contacted my
3 wife.

4 Q: Oh, okay.

5 A: As far as I remember.

6 Q: So, you didn't talk to them.

7 A: No, sir.

8 Q: You talked with her about the fact that she talked to
9 them?

10 A: Probably so, yes, sir. I mean, because I think they
11 -- what I remember is that they were setting up a time they
12 were going to come up and see us.

13 Q: Okay.

14 A: That's what the ---

15 Q: And later that night did you have -- after you had gone
16 through the lineup process did you talk with Robey anymore
17 that night?

18 A: No, sir.

19 Q: All right, and when was it that you found out that you
20 had picked out the suspect the police had?

21 A: I don't remember the day. You know, it was -- I know I
22 was at work. My wife called me and she said that they say
23 that the -- the one that we picked out is the same man.

24 Q: Let me ask you this, as I walk through the courtroom
25 tell me to stop when I have reached what you believe to be

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1 the distance that the man was from you when you were on the
2 beach that night.

3 A: On the beach that night?

4 Q: On the beach.

5 A: Somewhere right in there.

6 Q: Here?

7 A: Yes, sir.

8 Q: How about when you were at the pool.

9 A: At the pool, probably to the door, maybe a little
10 further.

11 Q: That's all the questions I have.

12 MR. HUMPHRIES: I've got one more and I just
13 neglected to do it.

14 REEXAMINATION

15 BY MR. HUMPHRIES:

16 Q: Let me ask you, Mr. Hobbs, based solely on your
17 observations of that individual that night, June 9th, 1998,
18 can you identify the person that you saw on the beach that
19 night in the courtroom today?

20 A: Yes, sir.

21 Q: And who is it?

22 A: Mr. Frazier.

23 Q: Indicating the Defendant. That's all. That's all we
24 have on this matter, Your Honor.

25 THE COURT: You may step down.

1 A: Thank you.

2 THE COURT: Is there anything from the Defense on this
3 matter?

4 MR. MARTIN: No, Your Honor.

5 THE COURT: All right, be glad to hear from you if
6 there's no further witnesses.

7 MR. MARTIN: Your Honor, we'd move -- we'd move to
8 suppress the introduction of evidence of the photographic
9 lineup and of the in-court identification of Mr. Frazier by
10 the Hobbs in that as required by South Carolina case law
11 not only was it suggestive but it was suggestive to the
12 extent that it is unreliable and unworthy of the
13 introduction of evidence in the case.

14 Primarily, of course, number one, we've got the witness
15 opportunity to view the suspect. This was in the nighttime
16 at a distance. They say they're -- these are the factors
17 should be looked at, the witness's degree of attention.
18 They say their attention was good. The witness accurate
19 prior description, there is no prior description, Judge.
20 That's one thing that will make itself evident in this
21 case. If there has it hasn't been produced to me. Their
22 level of certainty, I'd say they're pretty certain. They
23 probably win on that one. The time between the commission of
24 the crimes and the identification, well, that's 19 days,
25 approximately three weeks, but I think that the

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1 great problem with their lineup is under the cases is the
2 suggestiveness of this lineup, and that is that the fillers
3 in the lineup are, number one, don't have the same
4 distinctive features that apparently is the basis of this
5 identification.

6 There are a couple of federal court cases that have been
7 decided recently and I thought that I -- United States versus
8 Williams, I believe is one. Raheem versus Kelly, Second
9 Circuit case of 2001, and those are cases which say that that
10 is a linchpin of the reliability. You know, it's not enough
11 that you've got six white males all with short hair so to
12 speak, but if there are distinctive features and it's pretty
13 clear that the Hobbses at least have come to the conclusion
14 that the identifying features were high foreheads and
15 distinctive eyes and black clothing was the three things they
16 noticed. In this lineup you've got only two people with dark
17 clothing on and you've got only one person with those features
18 of -- I mean, you could argue about a high forehead on them,
19 but for all practical purposes there's only one with a high
20 forehead. There's only one with distinctive eyes and there
21 darn sure is only one with any combination of those features,
22 and that lack of adequate fillers makes this lineup not
23 only suggestive but unreliable and we would move that it be
24 suppressed.

25 THE COURT: All right, yes, sir.

1 MR. HUMPHRIES: In regard to the first prong, the
2 opportunity of the witness to see the accused during the
3 crime, they testified that the lighting was sufficient to
4 distinguish clearly the facial features. Mr. Hobbs had two
5 distinct opportunities where they both stared at each other,
6 albeit for seconds, but he did have that opportunity. We're
7 talking about distances, we're not talking about a hundred
8 yards away and we're not talking about 50 yards away. So,
9 their opportunity to view both for Mr. Hobbs at the pool
10 side and at the beach where the distance was much closer and
11 the Court saw when Mr. Martin stood 15 feet they both
12 testified that the lighting was sufficient to distinguish
13 the features of the face, that they had opportunities
14 to see that face because they stared at each
15 other.

16 The degree of attention is intense. If they are, they
17 are staring at each other. There's no question about
18 that.

19 The accuracy of the witness's prior description, well,
20 Mr. Martin may not know what it is but he's told the Court
21 what it is, the round eyes, the high forehead. Mrs. Hobbs
22 said they were dark features, dark hair. It was a white male,
23 heavy set, you know, that is a physical description and it is
24 accurate of the Defendant.

25 The fourth prong is the level of certainty demonstrated

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1 by the witness in the identification, there's no question
2 about that.

3 And the fifth prong is the length of time between the
4 crime and the identification. In the grand scheme of things
5 it is a very narrow period of time, 19 days. There have been
6 many more identifications well outside a period of 19 days
7 that the Court has found sufficient to allow the
8 introduction.

9 Your Honor, you have the photo lineup before you and
10 you've seen a lot of photo lineups. This one is not
11 suggestive. We can argue till the cows come home about what's
12 a high forehead and what's not, but the bottom line is it's a
13 good lineup and it certainly doesn't rise to the level of
14 suggestiveness or overly suggestiveness to the extent
15 that the Court should not allow it. Plenty of room for
16 cross examination, I'm sure that's going to happen, but in
17 terms of a threshold decision by this Court regarding
18 whether or not both the out-of-court and in-court
19 identification are admissible before this jury I submit that
20 they are.

21 THE COURT: All right, I don't find the photo lineup
22 to be unduly suggestive as to cause the Court concern about
23 misidentification. Nevertheless I'm going to go through these
24 Bigger factors and because they have been testified to and
25 I'll go through each one of them. The witness's opportunity

1 to view the subject at the time of the crime,
2 they indicated that the lighting was sufficient, that they
3 could see, that they could clearly see the face. Mr. Hobbs
4 had those two opportunities to see not only across the pool
5 where he said that there was -- they were staring at one
6 another, but also once again on the beach at a closer
7 distance more like the 15 feet, 15 foot distance right in
8 there.

9 Mrs. Hobbs was the one who seemed to be very
10 attentive, though, to, to the individual and was on the
11 lookout for him at all times and then saw him for a bit
12 longer period of time than Mr. Hobbs actually on the beach
13 and the closer, the closer distance.

14 As to the degree of attention, I do agree that they
15 were paying close attention. Mrs. Hobbs seemed somewhat
16 concerned about the situation and was paying very close
17 attention to him. Mr. Hobbs was less concerned, but he was
18 the one that indicated that he was very attentive because
19 they had initially had that almost staring match it
20 sounded like when he initially left the hotel room, I mean,
21 left the hotel.

22 The accuracy of the witness's prior description, it
23 was a -- it was not a very, very detailed description, but
24 what was given is accurate. It was the white male, more
25 heavy set, high forehead. One seemed to say something

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1 about the eyes, the round eyes. The other I'm not sure they
2 testified to that, but there was some indication of
3 testimony about the eyes.

4 Their level of certainty, both have testified and the
5 testimony is clear that they both were very certain. The
6 length of time is clear, it's 19 days. That's not a broad
7 period of time. It's nice when it's a smaller amount of
8 time but two weeks has been found and I think even longer
9 to be reliable even after, after the crime or the
10 sighting. Therefore, I respectfully deny the motion to
11 suppress.

12 Let me go on, too, I also find the in-court
13 identification is untainted by any prior pictures of the
14 suspect provided by the media or law enforcement
15 and/or this photo lineup because it was not unduly
16 suggestive.

17 MR. HUMPHRIES: Thank you, Your Honor.

18 THE COURT: All right.

19 MR. HUMPHRIES: We ready to do Mr. Diggs? We're ready to
20 take care of Mrs. Poole.

21 THE COURT: Let's go ahead and deal with that since
22 I've already -- and we also have a note from a juror to put
23 you on notice, and I'll go ahead and tell you which
24 juror.

25 It's Juror Number 207, Stephen Rainey.

1 AT THIS TIME KIMBERLY RENEE POOLE WAS CALLED TO
2 THE STAND, DULY SWORN BY THE CLERK AND TESTIFIED AS
3 FOLLOWS:

4 THE CLERK: Thank you. Please be seated. State your
5 full name, spell your last name for the Court.

6 MS. POOLE: Kimberly Renee Poole, P-O-O-L-E.

7 MR. HEMBREE: Your Honor, Mrs. Poole was -- is on the
8 State's witness list. We would call her as a witness;
9 however, we had consulted with her attorney and with Mrs.
10 Poole herself and she has indicated that she wishes to
11 assert her Fifth Amendment Privilege and refuse to testify,
12 thus making her unavailable. I would inquire as to Mrs.
13 Poole.

14 EXAMINATION

15 BY MR. HEMBREE:

16 Q: Mrs. Poole, are you willing to waive your Fifth
17 Amendment Rights and testify in the matter of State versus
18 John Boyd Frazier?

19 A: No, I'm not.

20 THE COURT: Is there anything from the
21 Defense?

22 MR. MARTIN: Nothing from the Defense.

23 MR. HEMBREE: I don't know if Mr. Diggs has anything
24 to add.

25 MR. DIGGS: I don't have anything to add, Your

1 Honor.

2 I think it's her decision and she has made that clear to
3 me and that's our position today.

4 THE COURT: All right, you refuse to answer any
5 questions; is that correct?

6 A: Yes, ma'am.

7 THE COURT: All right, all right, yes, ma'am, you may
8 step down. Thank you.

9 MR. HEMBREE: We'd ask that Ms. Poole be
10 excused.

11 THE COURT: Any objection?

12 MR. MARTIN: Without objection.

13 THE COURT: All right, she'll be taken at this
14 time.

15 Let me just note, too, under the Crawford case,
16 Crawford versus Washington and Ohio versus Roberts, under
17 that line of cases, that the Court does find that this
18 witness is unavailable and we've further gone through a
19 hearing and made a determination as to what was testimonial
20 and what was non-testimonial in nature.

21 The Court initially had indicated that all that had
22 occurred at the scene right after the incident that was within
23 five minutes, all that was said and every statement of Ms.
24 Poole would be allowed in as non-testimonial and as an
25 exception to hearsay.

1 The Court then upon its own reconsideration became
2 concerned and I'm going to go ahead and note on the record at
3 this time that I likened it to a 911 call or an investigatory
4 type of situation, and I should hope that -- we don't know
5 what the South Carolina Courts would do, but I should hope
6 that those would be non-testimonial in nature and that will be
7 the finding of the Court, but in light of the fact that
8 this is -- has not been determined in South Carolina and
9 it's not clear, the Court reconsidered its position and has
10 gone with the position of only allowing in the statement
11 that was the initial statement that, "My husband had been
12 shot by Ms. Poole," that I -- the Court has determined is
13 proper.

14 The Court gave a curative charge since the
15 testimony had already been given by the officer. The Court
16 gave a strict curative charge to the jury that it could not
17 consider any of the additional statements that had been
18 presented, that they were not in evidence for
19 consideration. That charge was accepted, it's the Court's
20 understanding, by both the State and the Defense; is that
21 correct?

22 MR. MARTIN: That is correct.

23 MR. HEMBREE: Correct, Your Honor.

24 THE COURT: All right, very well.

25 Let's take a break at this time. We'll take about a

1 10-minute break. Oh, we've got -- before we do that, my
2 apologies. Let's tend to this juror first. We have one more
3 issue and then we'll take a break. Juror Number 207, thank
4 you for bringing that to my attention, Mr. Stephen Rainey has
5 indicated he needs to speak to the Court. If you would
6 bring him out, please.

7 (Whereupon, Juror Number 207, Stephen Rainey enters
8 courtroom.)

9 THE COURT: Yes, Mr. Rainey, I have gotten a note that
10 you need to speak to the Court. I'll be glad to hear from
11 you.

12 MR. RAINEY: Well, I have quite a bit of stress. I've
13 considered very, very seriously when you offered us a chance
14 to be excused in the beginning when the case started. I
15 felt a great deal of civic responsibility to do something,
16 but I am self employed. I have my father who's working
17 with me. I figured if I went ahead and got it out of
18 the way that I wouldn't have to serve for a few
19 years.

20 THE COURT: And that's true, but what has brought you
21 to the point that you're willing to come before the
22 Court.

23 MR. RAINEY: Well ---

24 THE COURT: You've indicated that you had concerns,
25 there's this stress of business but you felt that civic

1 duty.

2 That's understandable.

3 MR. RAINEY: I have recently some personal issues
4 concerning a girlfriend who I've been with for a long
5 time, has been adding a lot of stress to me. I don't sleep
6 worth a crap, you know, to be completely honest with
7 you.

8 THE COURT: Is this something new, something that has
9 happened since the beginning of the trial?

10 MR. RAINEY: Yes, yes, absolutely. It basically
11 came about yesterday. I have a night job. I work
12 until about two o'clock in the morning. I would have been
13 fine with that except things just carried on from there and
14 there was no -- I personally -- if things in my social life or
15 my personal life continue to get any greater it very well
16 could effect how I make a decision in this case.

17 THE COURT: Okay, so, you, you -- correct, I'm not
18 trying to put words in your mouth.

19 MR. RAINEY: Okay.

20 THE COURT: --- correct me if I'm wrong, but you're
21 indicating that you're feeling additional stress, and I'm sure
22 the trial is not lessening up on you, but you're feeling
23 additional stress and you have concerns if it gets any worse
24 it could effect your ability.

25 MR. RAINEY: It's very possible.

1 THE COURT: All right, all right, are you aware that
2 this trial will probably be no longer than maybe tomorrow?

3 MR. RAINEY: No, actually I'm not.

4 THE COURT: It should be and don't hold me to that,
5 but that's the estimate that we believe it would probably
6 finish tomorrow, definitely this week.

7 MR. RAINEY: Been told that some things are moving kind
8 of quick, but I'm not sure. You know, I've never been in any
9 kind of situation like this before. I'll try to tough it out
10 if you'd rather me do that.

11 THE COURT: What -- well, I was about to ask you.
12 What do you want the Court to do? What is your request?

13 MR. RAINEY: Well, I don't know if, you know, if I
14 would rather, if I'm able to be excused at this point if
15 I'm already in too far.

16 THE COURT: Let me ask you this, do you have the
17 ability to be fair and impartial in this case?

18 MR. RAINEY: At this moment in time, yes.

19 THE COURT: Has that changed because you had indicated
20 that you could, and I'm sorry I interrupted you. What did you
21 say?

22 MR. RAINEY: At this moment in time, yes.

23 THE COURT: Okay.

24 MR. RAINEY: But if things continue I don't know how
25 it's going to effect me.

1 THE COURT: I understand. Okay, and let me ask you
2 something else, do you -- can you pay attention, listen to the
3 evidence and testimony, you as the judge of the facts of the
4 case? Can you do that at this time?

5 MR. RAINEY: I could certainly give it my best.

6 THE COURT: Okay, that's all we're asking of
7 everybody.

8 All right, all right, I'm going to have you step out for
9 just a moment, and I'm going to speak to the attorneys in the
10 case. We may bring you back in in just a second.

11 MR. RAINEY: Okay, thank you. No problem.

12 THE COURT: Thank you, sir.

13 (Juror Number 207, Stephen Rainey, exits courtroom.)

14 THE COURT: Anything from the State?

15 MR. HEMBREE: Well, Your Honor, I feel bad for him.

16 Obviously something has happened that is concerning him in
17 his personal life, but that being said, he answered the
18 questions the Court posed to him regarding his ability to
19 be fair and impartial. Could he continue to listen, could
20 he continue to serve, he'll do the best he can. I think that
21 I couldn't agree more. That's all we can ask any of these
22 jurors to do. I would, unless there's something more definite
23 or more concrete I can't see any reason that this juror should
24 be excused, would ask that he be retained.

25 MR. MARTIN: I would agree with the Solicitor.

1 THE COURT: What I'd propose to do is to bring him
2 back in and tell him that if he gets to the point that he
3 feels it has affected his ability to be fair and impartial or
4 to be attentive to us to bring that to the Court's attention.
5 Any objection to that so he knows that we at least acknowledge
6 his situation or would you rather just leave it alone?

7 MR. HEMBREE: Well, I mean, that's a, that's a --
8 certainly that's a fair statement of the law, Judge, and
9 that's a fair statement of, you know, if, if he can't be a
10 fair and impartial juror we need to know that, no question,
11 but I've got a, I've got a real ---

12 THE COURT: That you're giving him, that we're giving
13 him an out.

14 MR. HEMBREE: Well, I fear that, but I mean, if that --
15 if he truly can't, we have to take him at his word and if he
16 truly can't be fair and impartial he needs to tell us.

17 THE COURT: I think if he wanted an out he would have
18 taken it today. He knew where I was going when I asked that
19 question, but yes, sir.

20 MR. MARTIN: Well, I'm like the Solicitor if he just
21 couldn't but we've come a long way for somebody to decide
22 now they can't do it because there is some stress, and I
23 know that things are tough, but it -- but if he gets to
24 where he can't be fair that's one thing. I don't want us to
25 let him out otherwise.

1 THE COURT: Yeah, and I agree with that. My question
2 is this, should I even approach that with him? I want to
3 bring him back out and acknowledge what he said and tell
4 him that we appreciate that he'll continue to be fair and
5 impartial and pay attention. I will simply say if that
6 should change then inform the Court. How about that?

7 MR. HEMBREE: That sounds acceptable, Your Honor.

8 THE COURT: Satisfied with that, all right, very good.
9 Let's bring him out.

10 (Juror Number 207, Stephen Rainey, enters courtroom.)

11 THE COURT: Yes, sir. Thank you for bringing that to
12 the Court's attention and thank you also for your willingness
13 to continue in this capacity, fair and impartial and
14 attentive.

15 We -- while we understand the stress you're under we
16 want you to remain with us. If your situation should
17 change in any way you just inform the Court, all right.

18 MR. RAINEY: No problem. I apologize for the
19 inconvenience.

20 THE COURT: Thank you, that's quite all right. Thank
21 you, sir.

22 (Juror Number 207, Stephen Rainey, exits courtroom.)

23 THE COURT: And I don't know if he'd be consoled at
24 all by the fact that probably his fellow jurors are somewhat
25 stressed as well. I don't know if that would make him feel

1 any better.

2 Anything from the State at this time?

3 MR. HEMBREE: No, Your Honor.

4 THE COURT: Anything from the Defense?

5 MR. MARTIN: No, Your Honor.

6 THE COURT: All right, very well, we're going to take
7 a break at this time. We'll be back in here in about ten
8 minutes.

9 ***** OFF THE RECORD *****

10 (On the record.)

11 (Whereupon, the following takes place outside the
12 presence of the jury.)

13 THE COURT: Thank you, please be seated.

14 Let me let you know that the jury had given a note to
15 the bailiff saying that if it would help us out any they
16 would be willing to take a 30-minute lunch. I think that's
17 very sweet of them, but I know that they are probably tired of
18 sitting back there since I had them here at 10 and I have
19 really done a poor job of estimating the amount of time
20 some of this things, some of these things would take. I'll
21 take responsibility for that, but I'll also see to it that
22 they get taken to lunch today and that way they'll just
23 walk them straight down to maybe Wayne's or someplace and
24 then walk them straight back.

25 MR. HUMPHRIES: Judge, do you know about when we will

1 be taking the lunch break?

2 THE COURT: You know better than I.

3 MR. HUMPHRIES: Well, let me tell you ---

4 THE COURT: You're calling the witnesses.

5 MR. HUMPHRIES: I'm just -- I'm trying to determine for
6 the Hobbses. They will, they will be our fourth and fifth
7 witnesses. We have two before them relating to the ID,
8 Detective Rowe and Agent Robey who you've already heard from,
9 although I would think that their testimony would be in more
10 depth before the jury as opposed to in court and then we have
11 one citizen witness, Bruce Wolford, who will testify before
12 then and he'll probably be at least 30 minutes. I'm just
13 trying to determine whether or not I can send those poor
14 folks who have been sitting in there. The same way you're
15 concerned about the jury I'm concerned about the witnesses
16 just having them sitting in a room. I'd like to reach them
17 before but there's no way that we will finish, finish even
18 one of their testimonies before lunch based on ---

19 THE COURT: Well, then why don't you just plan on
20 calling them after lunch and let's call the other witnesses
21 prior to.

22 MR. HUMPHRIES: And then take a break.

23 MR. MARTIN: What time do you anticipate breaking for
24 lunch?

25 THE COURT: It depends on how long these witnesses

1 will take.

2 MR. HUMPHRIES: When we finish with Robey.

3 THE COURT: How long do you anticipate that?

4 MR. MARTIN: How many, I mean?

5 MR. HUMPHRIES: At least ---

6 MR. HEMBREE: Three.

7 THE COURT: And how long do you think that testimony
8 will take?

9 MR. MARTIN: Maybe five minutes.

10 MR. HUMPHRIES: The -- for those three?

11 MR. MARTIN: Fifteen minutes. I don't ---

12 MR. HUMPHRIES: I'm thinking an hour. Not trying to
13 belabor the point, but when you say that I know we're --
14 just settle down.

15 MR. MARTIN: Well, I can't, you know, it depends on
16 what -- I won't say that.

17 MR. HEMBREE: There's nothing you -- just don't say
18 anything.

19 THE COURT: Let me put it this way, I have
20 miscalculated every day when I've asked you all will that give
21 us enough time. So, I think that there's plenty of guilt to
22 go around all the way as far as who's talking long. All
23 right, did that resolve that?

24 MR. MARTIN: Yeah, we're not arguing about that. I was
25 just trying to -- I was just thinking certainly an hour.

1 Those three witnesses will probably be up and down, but I
2 might be wrong.

3 THE COURT: All right, let's say it's approximately an
4 hour and what we'll do then is we're going to walk the
5 jury to a location. I will let you know that location once
6 you all have chosen it, I really don't care what, Wayne's
7 so that everyone who's associated with this case do not go
8 there for lunch today. We will have the jury there at
9 lunch.

10 MR. HUMPHRIES: And we'll plan to do that at 12:30?

11 THE COURT: That'll be -- that'll happen. We'll walk
12 them down about 12:30 and we'll all break as well.

13 MR. HUMPHRIES: And we would come back at 1:30 or ---

14 THE COURT: I'm hoping since we're walking them down
15 there if we call ahead it won't take as long. Maybe we can
16 knock it down to about a 45 minute lunch.

17 MR. HUMPHRIES: Good enough.

18 OFFICER: Need at least an hour, Judge, probably at
19 least to walk over there for them to eat and come back.

20 THE COURT: All right, do you need an hour? Okay,
21 we're staying with an hour lunch. It won't save us any
22 time. We'll bring it in next time.

23 OFFICER: As quick as we get everybody back I'll let
24 you know if we get back quicker.

25 THE COURT: That's fine. They may feel better about

1 it anyway.

2 All right, anything from the State prior to bringing
3 the jury out?

4 MR. HUMPHRIES: No, Your Honor.

5 THE COURT: All right, anything from the Defense?

6 MR. BRITTAIN: No, ma'am.

7 THE COURT: All right, we'll bring them out.

8 While we're waiting on the jury, does it look as if
9 this case will be complete tomorrow or are we going a
10 little slower than ---

11 MR. HEMBREE: I don't believe it will, Judge.

12 THE COURT: You don't, okay?

13 MR. HEMBREE: I'm just trying to be fair. I'd like it
14 to be, but it's just going a little longer than we expected.
15 It'll probably going to move to Friday morning.

16 THE COURT: All right, what we will plan on doing then
17 tomorrow is calling in for lunch. We'll just make sure lunch
18 comes to us and it will cut down on the time, see if we can
19 move things along.

20 All right.

21 (Whereupon, the following takes place in the presence
22 of the jury.)

23 THE COURT: Mr. Foreman and ladies and gentlemen of
24 the jury, please know that I am mindful of your being back
25 there since 10 o'clock, which is when I told you to be

1 there. We have been here since nine. I thought I had
2 given us ample opportunity in time. I misjudged and I told
3 you I would do better and I intend to. So, future planning
4 I'll make sure that I give plenty of time for anything that
5 we need to do. I hate that you'd had to sit back there that
6 length of time, but thank you for being here promptly and
7 thank you very much for your patience. You know what I'm
8 going to ask you next, and that is about whether or not you
9 have read or heard or seen anything regarding this case.
10 Have you seen anything in the media or read, heard or
11 discussed this case with anybody? If so, please raise your
12 hand.

13 (No response.)

14 THE COURT: All right, thank you very much for
15 following those instructions. I know that you are being
16 very diligent about that. It takes some effort to be able
17 to follow those instructions so carefully, and I thank you
18 for that. We continue in the phase of the case where the
19 State is presenting evidence and testimony. Call your next
20 witness, please.

21 MR. HUMPHRIES: The State calls Bruce Wolford to the
22 stand.

23 AT THIS TIME RAYMOND BRUCE WOLFORD, JR., WAS CALLED TO THE
24 STAND, DULY SWORN BY THE CLERK AND TESTIFIED AS FOLLOWS:

25 THE CLERK: Thank you. Please be seated. Talk right

Bruce Wolford - Direct by Mr. Humphries

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1 into that microphone and state your full name, spell your last
2 name for the Court.

3 MR. WOLFORD: Raymond Bruce Wolford, Jr., W-O-L-F-O-R-
4 D.

5 DIRECT EXAMINATION

6 BY MR. HUMPHRIES:

7 Q: Mr. Wolford, in what community do you reside?

8 A: Greensboro, North Carolina.

9 Q: Let me ask you in June -- well, March, April, May, June
10 how were you employed?

11 A: I was a bartender at Silver Fox.

12 Q: How are you employed now?

13 A: Self employed network consultant.

14 Q: Do you know the Defendant, John Boyd Frazier?

15 A: I do.

16 Q: Tell the Court how you came to meet him.

17 A: He was actually a customer in the club I worked at.

18 He'd come in the bar quite regularly and we actually had a
19 mutual interest of computers. I'd work on his computers
20 from time to time. He'd come over to the house. I'd go to
21 his house. We'd hang out together.

22 Q: And in relation to ---

23 THE COURT: We need for you to speak up. I've gotten
24 an indication from the jury they're having difficulty hearing
25 you. You're going to have to speak up, sir.

1 A: Sorry.

2 THE COURT: Thank you.

3 Q: In relation to the date of June 9th, 1998, about how
4 long before that did you meet John Boyd Frazier?

5 A: About a year.

6 Q: Now, did you also know an individual named Kimberly
7 Renee Poole?

8 A: I do.

9 Q: And how did you come to know Ms. Poole?

10 A: She was a dancer at the club.

11 Q: Let's talk just a little bit about your relationship
12 with Kimberly Renee Poole. Initially what type of
13 relationship did you have with Ms. Poole?

14 A: She worked in the club for a while. I met her. We
15 took off to a hotel one night and that was about it and she
16 started hanging out with my wife at the time.

17 Q: And your wife's name was?

18 A: Courtney.

19 Q: And what was Courtney's employment?

20 A: She was a dancer there in the club, also.

21 Q: You talked about this liaison, if you will, this one
22 night liaison.

23 A: Yes.

24 Q: Was there anything more than that at least in terms of

25 ---

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1 A: Between me and her no.

2 Q: Okay, and what was the reason for not continuing that
3 kind of relationship?

4 A: I met Renee's husband, Brent, and I liked him, and I
5 just couldn't do it.

6 Q: Okay, did you still consider Renee a friend?

7 A: I did.

8 Q: Was there a point in time when John Boyd Frazier
9 became romantically involved with Kimberly Renee Poole?

10 A: There was.

11 Q: And about how long before June 9th?

12 A: I'd say maybe a couple of months maybe.

13 Q: Okay, did Defendant Frazier talk to you about his
14 relationship with Renee and her relationship with her
15 husband, Brent?

16 A: Yeah, quite often. He would come in and hang out at the
17 bar, and you know, we'd talk about everything, Renee,
18 computers, different things, we'd talk about cars.

19 Q: Let me ask you, did John Frazier and Renee Poole come
20 to your residence on more than one occasion together?

21 A: Yes, they did.

22 Q: Now, what was the -- again, do you know about
23 when the relationship between John Frazier and Kimberly Renee
24 Poole became romantic in nature?

25 A: I'd say maybe a couple of months and, yeah, the details

1 of what they did, you know, I didn't get into a lot of the
2 details but they, they were seeing each other. They'd come
3 over to my house a few times together. We'd went to the mall
4 together.

5 Q: Did John Boyd Frazier talk to you about his relationship
6 with Kimberly Renee Poole?

7 A: He did.

8 Q: How did he say he felt about Kimberly Renee Poole?

9 A: He liked her a lot.

10 Q: Did there come a point in time to your knowledge that
11 Kimberly Renee Poole moved in with John Boyd Frazier?

12 A: Yes.

13 Q: And let me ask you, is it consistent with your
14 recollection that she moved in with John May 1st of 1998?

15 A: Sounds about right.

16 Q: Okay, now, do you know how long she stayed with the
17 Defendant?

18 A: It wasn't very long, maybe, you know, a couple, two or
19 three weeks.

20 Q: Were you aware of the time, that is are you aware
21 that she did move out?

22 A: Yeah, I was aware.

23 Q: And is it consistent with your recollection that she
24 would have moved out approximately May 12th?

25 MR. MARTIN: I object to his leading the witness.

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1 THE COURT: All right, sustained.

2 MR. HUMPHRIES: It's facts that have been established
3 but I understand.

4 BY MR. HUMPHRIES:

5 Q: In any event a couple of weeks.

6 A: Yeah.

7 Q: Okay, now, after Kimberly Renee Poole moved out of John
8 Boyd Frazier's home were you aware of their continuing to see
9 each other?

10 A: Yes.

11 Q: And in fact did John Frazier tell you that he continued
12 to see her?

13 A: They would see each other in the club for sure I know
14 of and they would talk inside the club.

15 Q: Well, let me ask you this, particularly on June 2nd
16 did Kimberly Renee Poole and John Boyd Frazier have the
17 occasion to be at your home together?

18 A: Yes, they did.

19 Q: Tell the jury if you will a little bit about that day
20 and what transpired.

21 A: Well, if I'm not mistaken that's the day we, we had met
22 at the mall.

23 Q: Tell the jury about that.

24 A: I got up with John and me and John went to High Point
25 to go to a computer shop, and my wife and Renee had got

1 together and done something, and we all met up at the mall
2 and I think my wife had her ears pierced and I had my ear
3 pierced or something at that time, and we split up, and
4 Renee and my wife decided to go pick up K.P. .

5 Q: Who's K.P. ??

6 A: It's Renee's daughter, and me and John took off and went
7 back towards the house and we all eventually ended up back at
8 the house together.

9 Q: Okay, whose house?

10 A: At my house.

11 Q: All right, now, when at the house what, what occurred
12 then?

13 A: Well, they -- I had a bad migraine headache that day and
14 I decided to lay down a little bit and Renee and John and my
15 wife were in the living room talking, which is right next to
16 the bedroom.

17 Q: And who was your wife at that time?

18 A: Courtney.

19 Q: And you said you went to lay down.

20 A: Right.

21 Q: What I'd like you to do is tell the jury where the room
22 you were was in relation to the room they were.

23 A: The bedroom I was in was right next to the living room
24 and the foot of the bed is right next to the door where the --
25 goes -- that goes into the living room, and so, when you go

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1 out the door you're right at the sofa, and the love seat sits
2 right there. It's like almost on the back side of the door.

3 Q: All right, so, it's on the adjacent wall?

4 A: Right.

5 Q: Okay, and where did you lay in your bed that day?

6 A: I laid at the foot of the bed, had a water bed and the
7 foot of the bed usually was always cooler than the head of the
8 bed and I just -- I laid across the foot of the bed.

9 Q: And in what position was your head in relation to say
10 the door?

11 A: It was right at the door.

12 Q: And tell me, were you able to hear the conversation that
13 was occurring in the living room while laying there?

14 A: It was -- it was actually I was -- it was unavoidable.
15 I was trying to block out the conversation because of my
16 headache but I was able to hear some of the conversation.

17 Q: And can you tell us what the conversation was?

18 A: Talking about going -- that Renee ---

19 MR. MARTIN: Wait a minute now.

20 Q: No, let me lay the foundation. I want the conversation
21 as it relates to what John Boyd Frazier said and what Kimberly
22 Renee Poole said and let's not talk about what Courtney said.

23 A: Right, as far as they were just discussing going
24 down, going down to the beach.

25 Q: Who was going down to the beach?

1 A: Renee was going down to the beach.

2 Q: With whom?

3 A: With Brent. As far as any details I really didn't
4 get into the details. It was more of just I know they were
5 discussing a beach trip going down. You know, I didn't really
6 get all the details to it.

7 Q: I understand that you didn't get the details, but is
8 your recollection that details regarding ---

9 MR. MARTIN: Objection. He's leading the witness.

10 MR. HUMPHRIES: I'll ask it another way.

11 THE COURT: All right.

12 BY MR. HUMPHRIES:

13 Q: The conversation that was had between John Frazier and
14 Kimberly Renee Poole, can you characterize that conversation?

15 MR. MARTIN: Objection, he -- my objection just to make
16 it clear is he can say what either one of them said. He said
17 he didn't get any details. They were discussing a trip to the
18 beach. Now, in terms of how can he characterize that or all
19 that I think he's already answered those questions.

20 MR. HUMPHRIES: Your Honor, I disagree. A
21 characterization of that conversation is not even hearsay.

22 MR. MARTIN: It's not admissible either.

23 MR. HUMPHRIES: Certainly it's admissible.

24 THE COURT: Let me have you, let me have you come
25 forward for just a moment. Let me see where you're going.

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1 (Whereupon, a Bench conference was held in the
2 presence, but out of the hearing, of the jury.)

3 BY MR. HUMPHRIES:

4 Q: Mr. Wolford, talking again about this conversation
5 between John Frazier, the Defendant, and Kimberly Renee Poole,
6 and you previously testified that they were talking about the
7 beach trip, Renee and Brent's beach trip.

8 A: Right.

9 Q: Do you specifically recall the details of that
10 conversation?

11 A: Not the details, no.

12 Q: Okay, do you recall that there were details but you
13 don't know -- can't recall them at this point?

14 A: They were, there were details. They were, they were
15 just planning a trip is all I know and I don't know exact the
16 date or whatever they were doing. It was just they were
17 talking about going down to the beach.

18 Q: Well, now, let me ask you this, having responded in that
19 fashion, do you recall that a date was mentioned but do not
20 recall what the date is?

21 A: I couldn't recall whether a date was mentioned or not.
22 It was just something that it was a definite plan. It's -- I
23 don't -- I wasn't paying attention to a date or anything.

24 Q: Now, let me ask you regarding the conversations that you
25 had with John Boyd Frazier and Kimberly Renee Poole did either

1 of them speak with you concerning Renee Poole's relationship
2 with Brent, particularly in regard to they're staying together
3 or their child?

4 A: Yeah.

5 MR. MARTIN: Now, I have an objection as it relates to
6 -- he said that either of them, and those statements -- well,
7 we need to approach the bench.

8 THE COURT: Well, all right.

9 (Whereupon, a Bench conference was held in the
10 presence, but out of the hearing, of the jury.)

11 BY MR. HUMPHRIES:

12 Q: What did John Frazier tell you if anything about
13 Brent and Renee's relationship and particularly their child?

14 A: John hated Brent for Brent's control over Renee with
15 the child. Brent could.

16 Q: I need -- you're going to have to speak up. If you will
17 repeat that answer.

18 A: I said John hated Brent because Brent had control over
19 Renee with their child and that was sort of the reason that
20 Renee went back to Brent was because of K.P.

21 Q: Because of K.P.'s.

22 A: Right.

23 Q: Now, let me ask you this, in regard to John Frazier
24 expressing his feelings about Brent to you, that is that he
25 hated him, on how many occasions did he make such a statement?

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1 A: More than once. It wasn't uncommon. It was more of
2 a just a, you know, be hanging out at the bar, and you know,
3 it just come up sometimes, you know, he'd talk about how he
4 hated the guy or he disliked him or something.

5 Q: Now, did John say anything to you, John Boyd Frazier,
6 about plans that he and Renee had for Renee to get out of
7 the marriage?

8 A: Well, they had talked about it before and I actually had
9 told them they needed to go talk to a lawyer about, you
10 know, K.P., you know, and the custody of K.P.

11 Q: Let's talk about May 30th, which is a Saturday.

12 A: Okay.

13 Q: Do you recall an occasion when John Boyd Frazier had a
14 confrontation with Brent Poole?

15 A: I do when I was working.

16 Q: Tell the jury about that if you will, where it took
17 place and the circumstances under which it took place.

18 A: I was working at the Silver Fox. It's a two-story
19 club. There's a bar downstairs and there's a bar upstairs
20 and I was working at the upstairs bar which is sort of an
21 L-shaped section back in the corner right next to the stage
22 and John was at the front to my left right next to where
23 the waitress station was, where the waitress could come in
24 behind the bar, and Renee and Brent had came in and was
25 sitting on the right hand side over more of the L-shaped.

1 John came in and he had handed me a videotape and asked me to
2 keep it behind the bar for him.

3 Q: Now, let me ask you, in regard to this videotape you
4 were able to see Brent and Renee?

5 A: Right.

6 Q: Based on your observations, did Brent and Renee see
7 John Frazier with the videotape at that time?

8 A: Yeah, I'm sure of it. I mean, the bar was maybe 12 feet
9 long total, including the bend, and it was a very small bar.
10 I mean, you might seat six people at the bar at one time.

11 Q: All right, please continue.

12 A: And I put -- had the videotape behind the bar and Brent
13 had asked something about ---

14 MR. MARTIN: Objection.

15 Q: Without saying what Brent said please continue.

16 A: Well, the tape was sort of waved out, you know, when I
17 was ---

18 Q: By whom?

19 A: By John when he had me put it behind the bar, and it
20 was obvious he was trying to draw attention to it, you know,
21 and I sort of felt a little uncomfortable, you know, sitting
22 up in the middle of that situation being I was sort of in that
23 situation a little bit.

24 Q: Well, and that's what I want to talk about. Let's leave
25 there just for the moment.

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1 A: Right.

2 Q: Let's go back to the liaison, for lack of a better term,
3 that you had with Kimberly Renee Poole in the motel room.

4 A: Right.

5 Q: Was anything done to memorialize?

6 A: We had recorded it on video.

7 Q: Your sex acts.

8 A: Yes.

9 Q: All right, please continue, back, back to the Silver Fox.

10 A: Well, I sort of felt a little uncomfortable, you know,
11 being in the middle of that situation between the three of
12 them there and I was -- I had stepped around the corner to the
13 side where the waitress station was. So, I was looking down
14 the bar but I was looking over. I could see over where Renee
15 and Brent were sitting and John had a pair of lady's underwear
16 that he was wiping the sweat off his face with.

17 Q: Did he ever tell you whose underwear those were?

18 A: He told me they were Renee's underwear.

19 Q: Okay.

20 A: And it was one of those things where he wasn't just --
21 they weren't just balled up. They were sort of hanging down
22 so you could see what they were and he stuck them in the back
23 of his pocket so they were hanging out, you know, and you
24 could tell Renee was very uncomfortable with it. She could
25 see them, you know, and I think Brent just wasn't paying

1 attention to it. You know, he was looking. He could see it,
2 but I think he was trying to ignore the situation. Obviously,
3 he -- Brent was under some type of tension, but when John had
4 turned around to go and tip one of the girls on the stage, it
5 was hanging out of the back of his pocket to where it was, you
6 know, not just balled up, they were draped out. So, he was
7 tipping one of the girls on stage and he come back around and
8 stand there. You know, he was like he was almost taunting
9 Brent a little bit.

10 Q: Okay, what happened next?

11 A: Renee and Brent got up and left and went outside and
12 John sort of followed him behind. They was outside for a
13 few minutes and then John came back inside.

14 Q: What did he tell you when he came back inside?

15 A: That he tried to call Brent out of the truck, that Brent
16 was just sitting in the truck staring straight ahead and
17 wouldn't come out of the truck, that he had, you know, he had
18 called Brent a pussy and was trying to get him to get out of
19 the truck and Brent wouldn't respond.

20 Q: Did he tell you the purpose -- his purpose or intention
21 in getting Brent out of the truck?

22 A: It was to start a fight with him.

23 Q: And that was on May 30th?

24 A: Yes.

25 Q: Let me ask you if this is a fair characterization of

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1 your testimony before this jury today. June 2nd Renee Poole
2 meets with the Defendant at Wolford home.

3 A: Yes.

4 Q: Let me ask you one other thing, after the Defendant
5 was arrested ---

6 A: Yes.

7 Q: --- did you receive any attempts to communicate with you
8 from John Boyd Frazier?

9 A: It was the day after the murder. There was a phone
10 call to my house. I wasn't home. It was John on the
11 answering machine trying to get in touch with me. He was a
12 little shaken, nervous sounding, not -- wasn't his normal loud
13 voice. It was just, you know, it was, it wasn't a normal
14 aggressive voice that John had. It was more of a, "Hey, man,
15 I need to talk to you," you know, that type of thing but, you
16 know, I really wasn't interested in talking to him.

17 Q: Not at that point?

18 A: No. And then there was -- he had called and left, you
19 know, a few days later he had called and left a message wanted
20 me to get in touch with some person, one of his investigators
21 or something and, you know, I wasn't really responsive to that
22 Either, but eventually I did talk to the gentleman. He had
23 paged me quite a few times, and I met him in -- on my way to
24 work one day and talked to him in the car for a few minutes.
25 He was asking about some e-mails and some stuff that I had.

1 MR. MARTIN: Objection.

2 Q: Without saying what he said.

3 THE COURT: Yeah, disregard anything that he may have
4 said, he said, that is not evidence for your consideration.
5 You continue.

6 Q: And was this investigator for ---

7 A: For John.

8 Q: --- for the Police Department or for the Defendant.

9 A: For John.

10 Q: Thank you. Answer any questions the Defense has of you.

11 CROSS EXAMINATION

12 BY MR. MARTIN:

13 Q: Mr. Wolford, now, let me ask you first of all about your
14 relationship with Renee, and let me be sure I understand
15 this, you had a sexual relationship with Renee Poole;
16 right?

17 A: Yes.

18 Q: And you say it occurred on one occasion?

19 A: Yes.

20 Q: You and she slipped off to a motel ---

21 A: Yes.

22 Q: --- from work, I guess.

23 A: It was actually, I believe it was before work or maybe
24 after work.

25 Q: Spur of the moment thing that never happened again.

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1 A: It was actually preplanned like the day in advance.

2 Q: A day in advance?

3 A: Yes.

4 Q: And you're telling me now that on your first encounter
5 with this young lady you videotaped it?

6 A: Yes.

7 Q: You took the video camera to the motel room?

8 A: That was preplanned.

9 Q: Preplanned.

10 A: Yes, because I was married and my wife wanted to
11 watch and she didn't want to be there and I was -- that's
12 the only way it could have happened if I'd take the video
13 camera with me.

14 Q: All right, wait a minute. I want to be sure I
15 understand you. You videotaped this first encounter ---

16 A: Uh-huh (affirmative response).

17 Q: --- with Ms. Poole because your wife wanted to watch.

18 A: Uh-huh (affirmative response).

19 Q: And she couldn't be there.

20 A: She didn't want to be there during it. She just
21 wanted to be able to see what happened.

22 Q: All right, so, you videotaped this so you could go
23 back and show it to your wife.

24 A: Yes.

25 Q: All right, and it'd be fair to say, Mr. Wolford, with

1 that that you and your wife were, I don't know, for lack of a
2 better term swingers or ---

3 A: Maybe a little open.

4 Q: Open with yourselves?

5 A: Yes.

6 Q: And that you would have sexual relations with other
7 couples from time to time?

8 A: No.

9 Q: You didn't do that?

10 A: No.

11 Q: Well, you'd bring -- would you bring another girl into
12 the house with you and she?

13 A: Yes.

14 Q: All right, and you would videotape these things?

15 A: Not normally, no.

16 Q: All right, sometimes?

17 A: Possibly.

18 Q: Well, would you videotape your relationship with
19 other girls and bring them home like you did this one with
20 Renee?

21 A: One other.

22 Q: One other?

23 A: One other.

24 Q: Did you ever have any conversation with Brent Poole
25 about this videotape or the kind of lifestyle that you and

1 your wife lived?

2 A: Not about the videotape, no. Later on ---

3 Q: Well, let me ask you this, how long did you know Renee
4 Poole?

5 A: Maybe months, a little longer.

6 Q: Well, wait a minute, you knew her longer than that.

7 You don't understand my question I don't think. You had known
8 her about a month when you had this sexual relationship with
9 her; is that what you're saying?

10 A: Yes.

11 Q: But how long did you know her altogether, how long had
12 you know her say on June of '98, from June of '98?

13 A: Six, eight months, I guess, something like that.

14 Q: Six or eight months.

15 A: Yeah.

16 Q: Now, you're sure about that, Mr. Welford?

17 A: I really can't remember how long I knew her.

18 Q: Well, and you're telling this jury that the extent of
19 your relationship with that young lady sexually was one time.

20 A: That's correct.

21 Q: And you videotaped it?

22 A: Yeah.

23 Q: And you had a conscience attack and decided not to
24 see her anymore; is that right?

25 A: No, not necessarily that. It was more of along the line

1 of I like Brent and just didn't think it was right. It wasn't
2 so much as I felt guilty. It was just more I liked the guy.

3 Q: Well, I'm assuming you destroyed that videotape when you
4 ended that relationship with Renee Poole.

5 A: Part of it got destroyed, yes. It was recorded -- part
6 of it was recorded over.

7 Q: Did you, did you -- they can't hear you. You're going
8 to have to -- if you can speak into the microphone there. Did
9 you, did you destroy the videotape that you made of you and
10 Renee Poole after you decided it wasn't a good thing to be
11 doing?

12 A: No.

13 Q: You kept it; didn't you?

14 A: It was to be recorded over. It was actually on a
15 small tape and I started, had recorded over it once.

16 Q: Well, for whatever reason it wasn't recorded over; was
17 it?

18 A: Part of it wasn't, no.

19 Q: And that was just part of the lifestyle that you and
20 Renee and Brent and John and I guess all of you lived to some
21 degree?

22 A: I don't know about everybody else.

23 Q: Just about yourself.

24 A: Just about myself.

25 Q: And your wife.

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1 A: Right.

2 Q: Now, you asked Detective Bill Frontz back here during
3 one of your many interviews if you were eligible for reward
4 money; didn't you?

5 A: Yeah, I did.

6 Q: And he told you at that time that you would be eligible
7 but it would depend on your testimony at trial; didn't he?

8 A: No, not like that.

9 Q: That's not the way he said it?

10 A: No.

11 Q: What did he say?

12 A: I think it was more based upon what the -- it was, it
13 was based on where the biggest help was as far as the
14 investigation goes.

15 Q: All right, again, I know that it's hard -- they can't
16 hear you.

17 A: Okay.

18 Q: If you could speak up a little bit. All right, I'm
19 going to try to do this. Let me just ask you again. You
20 gave several statements to the police about what you knew
21 about this case after June the 9th; did you not?

22 A: Yes.

23 Q: Most of them pretty quick after June the 9th; right?

24 A: Yeah, it was quite a few after June 9th.

25 Q: And in one of those conversations with Lieutenant

1 Bill Frontz, the Myrtle Beach Police Department, and you
2 asked him if you were eligible for reward money; didn't
3 you?

4 A: It was something I saw on TV. It was just -- it was a
5 curiosity.

6 Q: That's right. You were interested in getting some
7 reward money if you could.

8 A: Well, it's possibility.

9 Q: Right, and he told you then that yes there was
10 reward money. Right, he confirmed that to you; didn't he?

11 A: He said he wasn't sure about it, but he said
12 something about it.

13 Q: All right, and that they were going to hold that reward
14 money until the trial to see how things went at the trial;
15 didn't he?

16 A: No, it was the reward money was to be after a
17 conviction, and I think that's what the paper or the -- what
18 the newspaper said or something.

19 Q: And I know it's a long time to remember. So, let me
20 mark this for identification and let you ---

21 (Whereupon, Defense Exhibit Number 27 [Statement of Bruce
22 Wolford] marked for identification.)

23 Q: Let me hand you, Mr. Wolford, this document which is
24 marked as Defense Exhibit 27 for identification and so you can
25 us it to refresh your memory and the star here is, I believe,

1 the relevant part and let you look at that and let me just ask
2 you a couple of questions in connection with it. Do you see
3 where we are there?

4 A: Right.

5 Q: All right, and you say that, "I wanted to, I wanted to
6 ask you if I was eligible for any part of that reward at all.
7 I know they offered it up at one time and I just wanted to
8 know if they were keeping it for the little girl or
9 anything"; is that right?

10 A: Right.

11 Q: And do you see where Frontz responded, said, "Yeah, and
12 they still are, Bruce, and kind of what, because they're the
13 ones, it's the family discretion on what or how much they're
14 going to pay, but they have assured us they still have,
15 reward money is still there"; is that what he said?

16 A: Yes.

17 Q: All right, and you said, "I don't know if I was
18 eligible for anything like that or not because right now
19 really it would help in my hospital bills. I don't know. I'm
20 really messed up, I mean," and Frontz says, "Well, I mean, I
21 don't think," well, first of all, is that what you said?

22 A: Yeah, that's what I said.

23 Q: Okay, and Lieutenant Frontz said, "I don't think -- I
24 think they are kind of holding it now because arrests were
25 made, I mean, we've got enough lawful to do arrest but we're

1 holding the money for what is going to be helpful in the
2 courtroom proceeding and in the trial and that kind of
3 thing." Is that not what he said?

4 A: That's what it says here.

5 Q: Well, and you said, "Well, I was just curious."

6 A: Right.

7 Q: And then he says, "I just wanted to tell you they
8 are, you know, somebody else and they might ask our input
9 on who's helped and I think that is all going to be saved
10 for the trial to see how much actually, you know, what's
11 actually going to be useful. A lot of times we aren't
12 going to be able to tell until we get to the trial"; right?

13 A: Right.

14 Q: Okay.

15 MR. HUMPHRIES: Your Honor, at this time I'd move
16 under the remainder of writings to include the other
17 relevant portions of that statement.

18 THE COURT: And ---

19 MR. MARTIN: Your Honor, I would object to that.

20 MR. HUMPHRIES: I understand.

21 THE COURT: And I'm going to allow it on your
22 redirect if there is -- if it puts it in context. Let me see.

23 (Whereupon, a Bench conference was held in the
24 presence, but out of the hearing, of the jury.)

25 BY MR. MARTIN:

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF HORRY) 99-GS-26-2249

State of South Carolina,)
Plaintiff,) Transcript of Record
versus)
John Boyd Frazier,) May 16-20, 2005
Defendant.) VOLUME III

B E F O R E :

Honorable Paula H. Thomas
Horry County Courthouse
Conway, South Carolina

A P P E A R A N C E S:

Gregory Hembree, Esquire
Fran Humphries, Esquire
Attorneys for Plaintiff

Morgan Martin, Esquire
Thomas Brittain, Esquire
Natasha Hanna, Esquire
Attorneys for Defendant

Grace L. Hurley, CVR-CM
Circuit Court Reporter

1 Q: All right, let me hand this back to you. Did I leave it
2 up here?

3 MR. HUMPHRIES: Actually I think I gave you ---

4 THE COURT: That's just a copy.

5 Q: Okay, let me go back. You're right. Let's start where I
6 was just curious; okay?

7 A: Okay.

8 Q: Well, I don't want to read that again. Let's go past
9 to where it says Wolford here again. You said, "Oh,
10 understandable. I was just curious if I was eligible in
11 any way. Right now I'm looking for any help I can get
12 since this just happened"; is that right?

13 A: Yes.

14 Q: All right, Frontz says, "Well, I would be -- I would say
15 you definitely and disclaimer. I don't know. It's going to
16 be up to them and how much they pay and when but our
17 understanding is there is money not going to be disbursed
18 until the trial"; is that right?

19 A: Yes.

20 Q: And then you say, "Well, I understand that
21 completely. I'm just asking you questions, you know, that
22 that even -- you know that was not even a priority for the
23 reason I was helping you."

24 A: Yes.

25 Q: Is that right? Okay.

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1 MR. HUMPHRIES: That's fine. Thank you.

2 Q: All right, now, let me talk to you about June the 2nd.

3 Now, again, Mr. Wolford, you have given several statements in
4 this case and did you ever tell any of the policemen at any
5 time that it was June the 2nd when John and Renee were at your
6 house at the same time?

7 A: Did I ever tell them it was June 2nd?

8 Q: Yeah, that's right. You got specific today and said
9 June 2nd. I'm asking you if you had ever told anybody
10 before today.

11 A: It's very possible, yes.

12 Q: Well, and you got several statements. Here's one
13 of them I'm going to let you be looking at. All right, and
14 here's my question to you, do you -- did you ever tell a
15 specific date when John and Renee were at your house before
16 you came into this courtroom today? Let's do it this way, Mr.
17 Wolford. We're taking a lot of time here but this is
18 important. Here's what I'm going to do. I've asked you
19 you don't recall the time that you would have told the
20 police that day specifically right now; do you?

21 A: No, I don't.

22 Q: All right, now, would it be fair to say then that you
23 gave them a statement here with Lieutenant Frontz, the one
24 we've been talking about, within a week or two after the death
25 of Brent Poole?

1 A: Yes.

2 Q: All right, and then on February the 8th of '99 you gave
3 a statement?

4 A: Right.

5 Q: And on June the 13th of '98 you gave a statement;
6 right?

7 A: Right.

8 Q: All right, now, what I'm going to ask you to do ---

9 A: Uh-huh (affirmative response).

10 Q: --- is you can do it off this -- when you get down from
11 the witness stand if you can't think of anything, you look
12 through those three statements and if you find where you told
13 the police that the date that John and Renee came to your
14 house was June the 2nd of 1998 you bring it to the Solicitor
15 over here and let them put you back on the witness stand to
16 tell about it. Is that fair enough?

17 A: I think it was deduced from a check or something that
18 was written.

19 Q: Good. Let me talk to you about that check. Is that
20 fair enough?

21 A: Yes.

22 Q: The check you're talking about was a check made to L
23 and M Electronic Shop; wasn't it?

24 A: Uh-huh (affirmative response).

25 Q: Let me hand you what's marked for identification as

Bruce Wolford - Cross By Mr. Martin

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1 State's Exhibit Number 30 and ask you if you can identify
2 that.

3 A: Yeah.

4 Q: What is it?

5 A: It's a check.

6 Q: Well, wait a minute. What is it, Mr. Wilford?

7 A: It's a check.

8 Q: And it's a check made out to who?

9 A: Looks like L and M something.

10 Q: Computers.

11 A: Right.

12 Q: Right?

13 A: Well it may say that. I can't read it.

14 Q: Well, you told about the trip on June 2nd you and
15 John made. You said, you testified that was to L and M
16 Computers; didn't you?

17 A: Uh-huh (affirmative response), I did.

18 Q: And wouldn't you agree with me that that check is made
19 to L and M what could be computers there?

20 A: Right.

21 Q: And the date on the check is what?

22 A: It says May 27th.

23 Q: It don't say June 2nd; does it?

24 A: Well, we've made more than one trip there. I don't know
25 if this is the same check.

1 Q: How far, how far is it from where you live, you and John
2 live to the L and M Computer shop?

3 A: How far from my house or from John's house?

4 Q: Yeah, how long does it take you to drive there?

5 A: From my house or from John's house.

6 Q: Well, from your house.

7 A: From my house it would be about say little over an hour.

8 Q: All right.

9 A: From John's house.

10 Q: From the mall, from the mall where you guys were there
11 -- well from John's house how far?

12 A: That's maybe 30, 45 minutes, maybe.

13 Q: Actually you said that in a statement that you gave
14 prior to the police that it was an hour and a half trip
15 to L and M Computers. You don't deny that; do you?

16 A: I can't say one way or another right now.

17 Q: My point is the check that you say that you base your
18 testimony of June 2nd on actually says May 27th; does it
19 not?

20 A: I don't know if that's the check that we were talking
21 about.

22 Q: You've seen another check in this matter?

23 A: No, not here.

24 Q: All right, and then more specifically on that let me
25 show you -- let you refresh your memory with another statement

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1 that you made in connection in this case, the highlighted
2 lines beginning at 19 through 25. Let me ask you to review
3 that before I ask you a question about it.

4 A: Okay.

5 Q: All right, now, did you not tell in that statement that
6 you do not know the specific date that you all went to the
7 mall and that John and Renee were together at your house?

8 A: Yeah, that's what I said there.

9 Q: That was what you said; isn't it?

10 A: Right.

11 Q: So, does your memory get better with time?

12 MR. HUMPHRIES: Can I see that statement, please?

13 A: It says within a few days.

14 MR. HUMPHRIES: I'd move again to have the ---

15 MR. MARTIN: I'll read the whole thing. I don't have
16 a problem ---

17 MR. HUMPHRIES: Thank you.

18 MR. MARTIN: --- have a problem with that. I wasn't
19 through questioning.

20 BY MR. MARTIN:

21 Q: But I'm asking you now does your memory get better with
22 time?

23 A: No.

24 Q: But what you told at that time was that the last time
25 you saw John and Renee together was what?

1 A: It was a few days before Brent died.

2 Q: Do you know the specific day that it occurred? Do you
3 have a recollection of that and what was your answer?

4 A: I don't have a specific date, no.

5 Q: Do you recall it was within a few days?

6 A: Yes.

7 Q: But at that time you didn't know June 2nd; did you?

8 And I'm asking you again how does your memory get better,
9 specific dates as time goes on. Did somebody suggest to
10 you that was the time to say or how does your memory get
11 better?

12 A: Well, I think what happened was I deduced it from the
13 days of which I was working, which days I were off and sitting
14 down thinking about which days were which.

15 Q: And when did you make this deduction?

16 A: Probably back then in '98.

17 Q: Well, you didn't tell anybody that in '98; did you?

18 A: I don't think anybody really asked how I come up with a
19 date exactly. It was one of those things where you'd sit
20 down. I figured what days I worked, what days I were off.

21 Q: There's those three statements. When you get time you
22 look at them and see if you can find where you told them June
23 2nd. On that trip, the fact of the matter is, Mr. Wilford,
24 that John and Renee did not come to your house together; did
25 they?

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- 1 A: They come to my house together?
- 2 Q: They didn't; didn't they?
- 3 A: No, they didn't.
- 4 Q: All right, as a matter of a fact what actually happened
- 5 that one day, that day that you and John got together, went to
- 6 the mall and then decided to go down to the L and M Computer
- 7 Shop; is that not right?
- 8 A: Yes.
- 9 Q: Renee wasn't with John; was she?
- 10 A: Renee and John had shown up at the mall together and
- 11 met us there and then me and my ---
- 12 Q: Now, you sure about that?
- 13 A: I'm pretty sure.
- 14 Q: Pretty sure or sure?
- 15 A: I'm pretty sure.
- 16 Q: While they're looking for it for me, at any rate, you
- 17 and John go down to ---
- 18 A: Uh-huh (affirmative response).
- 19 Q: --- the L and M Computer Store; right?
- 20 A: Right.
- 21 Q: And your wife and John has gone and your wife and Renee
- 22 are where?
- 23 A: They went to go get K.P.
- 24 Q: All right, from where?
- 25 A: I'm not sure where they went. I wasn't ---

1 Q: And then later on you and John went back to your house.

2 A: And that was the plan for me and John to go back to
3 my house and my wife and Renee to go back to my house and
4 meet up.

5 Q: And Renee and Courtney came back to the house with
6 the child; right?

7 A: That's correct.

8 Q: But they didn't come to your house together; did they?
9 They arrived at my house in different cars, but they left in
10 the same car.

11 MR. HUMPHRIES: I'm sorry. I didn't hear the last
12 answer.

13 MR. MARTIN: What was your last answer?

14 A: I said they may have arrived in different cars, but
15 they left in the same car.

16 Q: All right, we'll talk about that in just a minute.
17 Let me go back and let you refresh your memory again now.
18 Again, this is a prior statement that you had made. Let me
19 let you read this paragraph. Okay, now, let me ask you
20 again, having refreshed your memory did you not make the
21 statement that, "It started out that John had come over to
22 the house wanting me to go with him to take one of his
23 computers to a shop. A buddy of mine owned that shop and
24 we were swapping out parts taking used parts trading them
25 for others and we rode out, which was about an hour and a

1 half away''; is that not what you said?

2 A: Yep.

3 Q: Yeah, ``We drove out to the computer shop and then we
4 met my wife and Renee back in the mall in Winston after we had
5 left the computer shop''; is that not what you said?

6 A: Yeah, that's what I said.

7 Q: All right, and so, from that point on, later on in the
8 day you and John go back to your place, and then later on
9 after that, according to your statement, Renee and her child
10 and your wife come back to the place; right?

11 A: I believe so, yes.

12 Q: And I believe you go on further you're feeling sick
13 again that day; aren't you?

14 A: Uh-huh (affirmative response).

15 Q: Got another migraine headache and you're laying down.

16 A: Right.

17 MR. HUMPHRIES: That's a bit unfair because that's the
18 same day.

19 Q: Well, that's -- the same day, I'm sorry, that is the
20 same day, and you take some medication and go to sleep.

21 A: No.

22 Q: Well, you laid down.

23 A: Right.

24 Q: Now ---

25 MR. MARTIN: Give me just a minute, Judge.

1 THE COURT: Yes.

2 BY MR. MARTIN:

3 Q: The conversation that you say you heard between Renee
4 and John where there was some discussion about the trip to
5 Myrtle Beach at your house on that date, whatever it was, in
6 these three statements that you gave to the police you
7 never told about that conversation; did you?

8 A: About what conversation?

9 Q: The conversation that you overheard that John and
10 Renee having some conversation though you couldn't get any
11 details about the fact that Renee was going to the beach
12 the next week. You never told that to the police in any of
13 these three statements; did you?

14 A: That I overheard part of a conversation.

15 Q: That they were talking about going -- Renee's going to
16 the beach.

17 A: I don't remember if I've said that or not in any of
18 that.

19 Q: I'm going to ask you again so you won't have to take an
20 hour to read them, but there they are and I'm going to leave
21 them right here and when you get down, you pick them up and
22 you go back and read them and if you see where in any of those
23 three statements you told the police that you heard John and
24 Renee talking about the trip Renee was taking to the beach
25 bring it to the Solicitor and show it to him; okay? Is that

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1 fair enough?

2 A: Sure.

3 Q: And one other -- well, actually two other things, Mr.
4 Wolford. The -- you testified that there was an incident
5 concerning the panties there at the Silver Fox on the 30th;
6 right?

7 A: Yes.

8 Q: And then it's your -- and then again June the 2nd comes
9 after May 30th; don't it?

10 A: Yes.

11 Q: Okay, and one other question, you also testified
12 that this videotape, and I hate to disturb you all but I'm
13 going to need one of those statements I've handed over to you
14 quickly. Let me see. You made the statement that when
15 John came in on that night of the 30th, you made the
16 statement that when John came in that night he had the
17 videotape with him; is that right?

18 A: I believe he had it with him, but ---

19 Q: As a matter of a fact that's not true; is it, Bruce? He
20 didn't come in there with the videotape as you told this
21 jury; did he?

22 A: I don't recall where the videotape came from. I know
23 ---

24 Q: Well, then why did you tell this jury John came in
25 there with it if you don't recall? You want to refresh

1 your memory or you want to tell them where the videotape
2 was?

3 A: The videotape was behind the bar. I don't know if
4 John give it to me earlier or if he came in with it. What
5 did I say?

6 Q: Okay, the fact of the matter is that you said that John
7 came in, "I had a wrestling tape or something behind the
8 bar."

9 A: Right.

10 Q: "And it was just laying there and John said something
11 and you want to see the tape which wasn't even the tape."
12 Isn't that right?

13 A: Okay.

14 Q: Well, my point is John didn't bring the tape in
15 there. You had a tape in there; didn't you?

16 A: Well.

17 Q: And you told -- and at that time you told the police it
18 was just a wrestling tape that was laying back there; isn't
19 that right?

20 A: If that's what I said. It's been a, it's been a few
21 years.

22 Q: Well, which is right, what you told today and to this
23 jury or what you told to the police then. Which one is the
24 truth?

25 A: That's what I told to the police then, I

1 guess.

2 Q: So, you didn't tell this jury the truth today; did
3 you?

4 A: I didn't remember that part of it.

5 Q: That's all I have.

6 MR. HUMPHRIES: Just briefly.

7 THE COURT: Redirect.

8 REDIRECT EXAMINATION

9 BY MR. HUMPHRIES:

10 Q: Mr. Wolford, did you have an occasion to give prior
11 sworn testimony in connection with this case?

12 A: Yes.

13 Q: And did you at that time ---

14 MR. MARTIN: What page are you referring to, please,
15 Mr. Humphries?

16 MR. HUMPHRIES: I'm referring to page 886 through
17 888.

18 MR. MARTIN: Okay.

19 BY MR. HUMPHRIES:

20 Q: Did you at that time have an occasion in prior sworn
21 testimony to relate the story regarding the Myrtle Beach
22 trip and that discussion between John Frazier and Kimberly
23 Renee Poole?

24 A: I believe so.

25 Q: Let's do this. Hang on just a second. The question

1 to you was, "Did you hear John Frazier in particular discuss
2 the beach trip scheduled by Kimberly Renee Poole and her
3 husband Brent," and your answer.

4 A: "Yes".

5 Q: "At some point in that time -- in time that evening did
6 Kimberly Renee Poole and John Boyd Frazier leave"?

7 A: "Some time, yes."

8 Q: "Do you recall when"?

9 A: "I don't know exactly what time I woke up and sort of
10 drifted through the house and knew that they were gone."

11 Q: And the question was, "And noted that they were not
12 there?"

13 A: "And they were not there."

14 Q: And your answer was?

15 A: "Well, then actually they were just leaving but I was
16 half asleep."

17 MR. HUMPHRIES: That's all I have of this witness at
18 this time, subject to recall.

19 THE COURT: All right, yes, sir.

20 RECROSS EXAMINATION

21 BY MR. MARTIN:

22 Q: You did say at that time you were half asleep;
23 right?

24 A: Yes.

25 Q: Again, the three statements, look at them and see if

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1 you ever told this before. That's all I have.

2 THE COURT: All right, thank you. You may step down,
3 sir.

4 For scheduling could I have you approach just very
5 briefly.

6 (Whereupon, a Bench conference was held in the
7 presence, but out of the hearing, of the jury.)

8 THE COURT: All right, Mr. Foreman and ladies and
9 gentlemen of the jury, we have arranged and let me tell you
10 I do appreciate the note. I did receive the note about
11 your willingness to shorten lunch and we're going to try to
12 do that today and what we will do is probably take you up on
13 this tomorrow. We're just going to order you lunch here.
14 We will not even leave, but what we're doing working
15 towards that direction is we're walking you down to Wayne's
16 Restaurant where you will have lunch together as a group
17 today and we will be taking care of that for you today and
18 then bringing you back promptly at which time we intend
19 that we will continue in the trial of this case. So, you
20 will not scatter. You will remain together, but even so I
21 need for you to understand that you can't discuss the case,
22 you need to stay away from any media and we'll have
23 some bailiffs with you. So, they'll know if the TVs are
24 on, those kinds of things. They'll ask those to be cut off
25 and they'll watch that and assist you in it, but still it's

1 going to be your responsibility and your obligation to stay
2 from anything that even remotely resembles this case and to
3 not discuss the case with anyone I'll ask you to continue
4 to wear your juror buttons when you are -- walk down there
5 and during your lunch and then I'll question you more when
6 you return. Have a good lunch and we will see you after
7 lunch.

8 (Whereupon, the following takes place outside the
9 presence of the jury.)

10 THE COURT: All right, is there anything from the
11 State at this time?

12 MR. HEMBREE: No, Your Honor.

13 THE COURT: Anything from the Defense?

14 MR. MARTIN: No.

15 THE COURT: All right, very good. We'll see you --
16 try to be here in about -- well, let's try to be here at
17 1:30. I would think based on what I've been told it will
18 take them about an hour. See you then.

19 MR. HEMBREE: Thank you, Your Honor.

20 ***** OFF THE RECORD *****

21 (On the record.)

22 (Whereupon, the following takes place outside the
23 presence of the jury.)

24 THE COURT: The State's ready?

25 MR. HUMPHRIES: Yes, ma'am.

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1 THE COURT: The Defense ready? Are you ready to go
2 forward?

3 MR. MARTIN: Ready, I'm sorry, Judge.

4 THE COURT: All right, we're ready for them.

5 I'm going to ask them once again if they read or heard or
6 saw anything about the case. If there are any -- at any time
7 any additional inquiry that you request, whether I ask you of
8 it or not, just ask to approach and I would inquire further if
9 that's your desire. I wanted to make sure both the State and
10 the Defense know that.

11 MR. HUMPHRIES: And as to State's Exhibits 20
12 through 23 they have been introduced into
13 evidence.

14 MR. MARTIN: That's the lineup stuff we're talking
15 about? Yes.

16 THE COURT: All right, very good. I think we're just
17 waiting on one juror. Here they are.

18 (Whereupon, the following takes place in the presence
19 of the jury.)

20 THE COURT: Once again, welcome back. Come in and
21 have a seat.

22 Mr. Foreman, ladies and gentlemen of the jury, welcome
23 back. I hope that you had a good lunch. I want to ask you,
24 and of course, you know what I'm about to ask, have you
25 heard, seen, read anything regarding this case. If you

1 have please raise your hand.

2 (No response.)

3 THE COURT: Were you able to refrain from discussing
4 this case with anyone? If you were unable to please raise
5 your hand.

6 (No response.)

7 THE COURT: All right, thank you very much for
8 following those instructions and I'll remind you we remain in
9 the case of the State presenting evidence and testimony. Call
10 your next witness.

11 MR. HUMPHRIES: Thank you, Your Honor.

12 The State calls Detective Mike Rowe.

13 AT THIS TIME MIKE ROWE WAS CALLED TO THE STAND, DULY
14 SWORN BY THE CLERK AND TESTIFIED AS FOLLOWS:

15 THE CLERK: Please be seated. Please state your full
16 name, spell your last name for the Court.

17 MR. ROWE: Detective Mike Rowe, R-O-W-E.

18 DIRECT EXAMINATION

19 BY MR. HUMPHRIES:

20 Q: With whom are you employed?

21 A: I'm employed by the City of Winston-Salem Police
22 Department.

23 Q: And how long have you been so employed?

24 A: Twenty-four years.

25 Q: In what capacity do you now serve on the Winston-

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1 Salem Police Department?

2 A: I currently am assigned to the homicide section where
3 I've been so assigned for the last 14 years.

4 Q: That would then answer my next question. How you
5 were employed in June of 1998.

6 A: As a homicide detective.

7 Q: Let me ask you, Detective Rowe, do you have an
8 occasion consistent with your duties to assist other
9 agencies in investigations?

10 A: Yes, sir.

11 Q: And did you receive such a request in connection with
12 this case?

13 A: Yes, sir.

14 Q: Tell the jury about it just a bit.

15 A: I received a phone call on June the 14th, 1998,
16 to assist the Myrtle Beach Police Department with a
17 homicide investigation which occurred here on June the 9th,
18 1998. I was given some background information and was
19 requested to complete come court documents. A few days
20 later I was requested to construct a photographic
21 lineup.

22 Q: And in fact did you do so?

23 A: I did.

24 Q: I'm going to show you a series of documents, State's 20,
25 21, 22 and 23, which are in evidence.

1 Ask you if you can identify those documents.

2 A: Yes, sir, I can.

3 Q: And let's go one by one.

4 A: Yes, sir.

5 Q: State's 20.

6 A: State's 20 is an original color photographic lineup.

7 This was constructed at my request to our identification

8 technicians.

9 Q: And how does -- and tell us a little bit about the

10 request process.

11 A: Yes, sir, I was requested to construct a photographic

12 lineup of John Boyd Frazier. I completed a form called a

13 photographic lineup request form. His photograph is one of

14 the photographs in our system as of that time. The

15 photographic lineup is constructed of his photograph and five

16 other photographs of people that have similar characteristics

17 and physical appearances as he does. That request was made.

18 That photographic lineup was given to me for acceptance,

19 which and appropriateness which is -- which I did. I'm

20 then given a packet of information which includes the

21 identity of the six people that are in this photographic

22 lineup, the original photographic lineup, copies of the

23 photographic lineup and an admonition form, which is a form

24 or a paragraph read to each person that's going to view the

25 photographic lineup at a later time. That gives them

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1 specific directions.

2 Q: Let me ask you specifically in regard to State's 20,
3 obviously these photographs have to appear in some order.

4 A: They do.

5 Q: Can you tell the jury how the position of each of
6 these subjects is determined for the purposes of this photo
7 lineup?

8 A: Yes, sir. The way that our system works this is all
9 done by computers. They're computer-generated. When folks
10 have photographs taken and then are in our system their
11 photographs are categorized by race, sex, age and so forth.
12 This particular photographic lineup was constructed
13 starting with the photograph of John Boyd Frazier, being
14 that the other five are subjects that are the similar height,
15 weight, hair color, eye color, physical description. So
16 his photograph is into the computer system. The computer
17 randomly selects what position that his photograph goes in.
18 The computer also starts generating a selection of five
19 fillers from the pool of photographs that match those basic
20 parameters that are used to make the entire six
21 photographs, six photographs of the photo lineup.

22 Q: Now, you have several other documents.

23 A: Yes, sir.

24 Q: State's 21 which is into evidence and State's

25 22.

1 A: Yes, sir.

2 Q: These are?

3 A: Those are photocopies of the same photographic
4 lineup. As you can see the photographs are turned
5 sideways. There's a number on the top of each one of those
6 photographs. That number gives us the information as to
7 what their name is and what their birth date is. So, copies
8 of those are given to me as well as the original photographic
9 lineup.

10 Q: Then finally State's 23.

11 A: Yes, sir.

12 Q: What is that?

13 A: This is an admonition form or a set of directions.
14 In other words if I was going to show this photographic
15 lineup to a witness the first thing that I would do is read
16 them this form, have them sign this form and then allow
17 them to view the photographic lineup. So, this is
18 basically instructions on how to view the photo lineup.

19 Q: So, after having had this set of documents compiled
20 what then did you do?

21 A: I was requested to turn those over to the Myrtle
22 Beach Police Department which I did.

23 Q: You did that?

24 A: Yes, sir.

25 Q: Thank you. That's all I have of you at this time.

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1 THE COURT: Cross.

2 CROSS EXAMINATION

3 BY MR. MARTIN:

4 Q: Let me ask you, Mr. Rowe, the lineup was prepared on
5 what date?

6 A: On June the 16th, 1998.

7 Q: And the description that you had at that time was
8 that the -- that had been provided to you on what these
9 witnesses had saw was a white male approximately six foot,
10 180 pounds in black or dark clothing?

11 A: I did not have that much information.

12 Q: You didn't have. What information did you have?

13 A: White male, dark clothes.

14 Q: White male, dark clothes.

15 A: Yes, sir.

16 Q: All right, now, in fact, the suspect was in custody
17 there at the Winston-Salem Police Department at that time;
18 wasn't he?

19 A: Somewhere in Winston-Salem. I don't believe at the
20 Police Department but somewhere in Winston-Salem.

21 Q: Well, you had his photograph.

22 A: Yes, sir.

23 Q: All right, so, you knew who he was in this lineup;
24 right?

25 A: Yes, sir.

1 Q: Did you consider the fact that in the lineup that you
2 approved that there's only two individuals with black
3 clothing?

4 A: No, sir, the purpose of the photographic lineup is to
5 look at the facial features. The clothing that they're
6 wearing at the time of the arrest is the clothes that they
7 have on. Photograph number two has a dark colored or black
8 colored shirt. Photograph number four also has a dark
9 colored shirt; however, it has stripes in it. So, the
10 clothing is not a purpose or a parameter to have the
11 photographic lineup made.

12 Q: Well, but the problem is now you know, you are trained
13 to some extent in the preparation of photo lineups; aren't
14 you?

15 A: Somewhat.

16 Q: All right, and you know in that training that one of the
17 factors that you consider is the clothing and whether or not
18 it matches that the one -- that he's got on anything to do
19 with the description that is given.

20 A: No, sir, that's not accurate.

21 Q: You don't know that.

22 A: No. You're not asking the same question.

23 Q: Okay.

24 A: A photographic lineup is constructed for the purposes of
25 identifying or having someone look at facial features.

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1 When you start talking about clothing and physical
2 descriptors other than what's going to be in a photographic
3 lineup that's not a photographic lineup or any purposes for
4 that.

5 Q: All right, well, let me ask you this, the reality, the
6 purpose of a photographic lineup is to test the memory of
7 the witness in an accurate and reliable manner; isn't it?

8 A: Yes, sir.

9 Q: All right, now, anything that would be suggestive in
10 nature would be a negative as opposed to a positive in
11 terms of a reliable identification; would it not?

12 A: Can you rephrase that question?

13 Q: Well, if you're looking for a reliable identification
14 anything that plays into the identification is relevant; is
15 it not?

16 A: Yes, sir.

17 Q: All right, and if you say that a person was wearing
18 black or dark clothing and for example you fix a lineup and
19 you've just got one person in black clothing or two people in
20 black clothing and the rest not, doesn't it worry you that
21 that might be a little suggestive to say the white man in
22 black clothes and then you put him in the number one position
23 and of all things a black shirt and then only one other person
24 has a dark shirt on, don't you think that that is relevant in
25 terms of the suggestiveness, therefore, the reliability of the

1 ultimate choice of the witnesses?

2 A: We have several choices. One photograph we could use
3 would be a mug shot when he's in a jumpsuit. Those are
4 orange in color. He chose the clothes that he was wearing on
5 June 13th, which is when his photograph was taken.

6 Q: Wait a minute. Whose chose what now?

7 A: He, he was, he was arrested in the clothes that he was
8 wearing. Nobody asked him to put on a black shirt. So, the
9 clothes that he's wearing at the time of his arrest is the
10 photograph we have to choose from. So, he picked the clothing
11 that he was wearing on June the 13th.

12 Q: Well, he probably didn't know he was going to be in a
13 lineup in that shirt. Just to go on down ---

14 A: I can't answer that question.

15 Q: --- the line let me ask you this, you were in -- you
16 were the quality control manager of a product that left there
17 at the Winston-Salem Police Department; weren't you?

18 A: Yes, sir, and I'm satisfied with this photographic
19 lineup.

20 Q: All right, and you approved this photographic lineup.

21 A: I did.

22 Q: All right, and so, you're telling us it didn't bother
23 you that he had on black and the description was a man in
24 black clothes.

25 A: Correct. Particularly since photograph number two also

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1 is a subject wearing a dark colored shirt.

2 Q: So, we have two as opposed to one.

3 A: Two out of six, yes, sir.

4 Q: All right, if you would tell the jury what fillers
5 are.

6 A: When John Boyd Frazier's photograph is put into the
7 computer system with his physical characteristics five
8 other photographs were also put in there of folks that have
9 similar characteristics as him. So, all the subjects in the
10 photographic lineup are similar in appearance to the person
11 that you're having the photographic lineup constructed
12 about.

13 Q: And wouldn't you agree that the distinguishing
14 physical characteristics that eyewitnesses have given are
15 relevant factors in determining which fillers should be
16 used?

17 A: That is an accurate statement. However, that was not
18 any parameters used for this photographic lineup.

19 Q: Well, why wasn't it?

20 A: I did not, I did not have any access to any witness
21 descriptions other than white male with dark clothing.

22 Q: Well, did you call Myrtle Beach and ask them for a
23 description so you could make a reliable, un-suggestive lineup
24 before you did it?

25 A: No, sir, this photographic lineup was constructed

1 based on starting point being a photograph of John Boyd
2 Frazier.

3 Q: That's right. That's right, but again as I understand
4 it, so, you didn't have in mind when you prepared this
5 lineup high foreheads and big distinctive eyes; did you?

6 A: Correct.

7 Q: That wasn't part of your equation; was it?

8 A: Correct.

9 Q: Now, you're familiar with the North Carolina Actual
10 Innocence Commission; aren't you?

11 A: I'm familiar with that organization. I am, yes, sir.

12 Q: Are you familiar with their recommendations?

13 A: I know that that commission has generated several
14 recommendations for changes in the construction of
15 photographic lineups.

16 Q: What is the North Carolina Actual Innocence
17 Commission?

18 A: It is a group of attorneys and judges and law
19 enforcement personnel that are currently studying
20 investigations in relation to this case, photographic
21 lineups, the way they're constructed, the way they're
22 presented. They're also exploring many other aspects of
23 investigations.

24 Q: Do you know why it was formulated, created?

25 A: Not specifically.

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1 Q: Well, isn't it a fact that you had a problem with two
2 well-known cases in North Carolina ---

3 MR. HUMPHRIES: No, no, no, no, no, objection.

4 THE COURT: Sustained.

5 MR. HUMPHRIES: Thank you.

6 THE COURT: Let me have you come forward. Let me ---

7 MR. HUMPHRIES: Thought we'd already covered that.

8 MR. MARTIN: Well ---

9 THE COURT: I'm going to ask you to disregard that
10 last statement that was made by the attorney. That's not
11 in evidence for your consideration. Do you need to
12 approach?

13 MR. MARTIN: Yes.

14 MR. HUMPHRIES: Yes, we do.

15 (Whereupon, a Bench conference was held in the
16 presence, but out of the hearing, of the jury.)

17 BY MR. MARTIN:

18 Q: This North Carolina Actual Innocence Commission, Mr.
19 Rowe, has made a recommendation of lineup procedures that
20 should be used; have they not?

21 A: They are -- have made recommendations that are under
22 review and under study. None of those have been approved
23 or accepted by any law enforcement agency that I'm aware of
24 at this point.

25 Q: Okay, but now, let me go back and be sure. They've made

1 recommendations about what procedures should be used in
2 eyewitness identification cases; have they not?

3 A: They have made recommendations, yes, sir.

4 Q: All right, and the whole purpose of the study or of this
5 commission was to improve the reliability of eyewitness
6 identifications to be used in court; were they not?

7 A: I don't have enough information to answer that
8 question.

9 Q: Well, you don't deny that statement; do you?

10 A: Well, that would be one of the reasons why, but if
11 that's the primary reason why ---

12 Q: All right, well, let me put it this way, one of --
13 let me say this ---

14 A: If that's a primary reason why ---

15 THE COURT: Wait, wait, one at a time.

16 MR. HUMPHRIES: Let him answer his question.

17 THE COURT: One at a time, please.

18 A: If that's the primary reason why, which is your
19 question, I can't answer that.

20 Q: All right, that was one of the reasons of the North
21 Carolina Actual Innocence Commission.

22 A: Likely.

23 Q: And as a matter of a fact when they came out with their
24 recommendations all of those recommendations related to
25 eyewitness identification lineups; did it not?

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1 A: I don't understand your question.

2 Q: Well, the recommendations that the Actual Innocence
3 Commission came out with would you agree with me they came out
4 with some recommendations?

5 A: They did.

6 Q: All right, and they all had to do with the lineup
7 procedure recommendations; did they not?

8 A: You said the word all, sir. I don't know what all
9 that commission is exploring. I know that they are
10 exploring photographic lineups. I believe they're exploring
11 other avenues or other aspects of investigations, but I
12 don't know what they area.

13 Q: All right, well, well, then would you agree that
14 recommendations were made relating to lineup eyewitness
15 identification procedures?

16 A: Yes, sir, said that.

17 Q: And in those recommendations they recommended that
18 simultaneous lineups not be used or that -- well, let me
19 ask you this way, that sequential lineups are preferable
20 over simultaneous lineups.

21 A: That is their recommendation, yes, sir.

22 Q: All right, explain to the jury what the difference
23 between sequential and simultaneous is.

24 A: Simultaneous lineups is when we -- you have a
25 photographic lineup constructed and it has the same

1 photographs, the same subjects on the same form. So, you
2 hand that lineup to a witness. They look at all the same
3 photographs at the same time.

4 Sequential is when you hand them one photograph at a
5 time, when I lay one photograph out and give you an
6 opportunity to look at that photograph. After you've --
7 satisfied of looking at that photograph then you take a
8 moment, look at the next photograph and then you look at the
9 next photograph.

10 Q: And the lineup used in this case was what?

11 A: This one, which is the one that ---

12 Q: And that was simultaneous ---

13 A: Yes, sir.

14 Q: --- or sequential again?

15 A: Simultaneous, which is what our policy at our
16 department is and still is.

17 Q: And still is.

18 A: Yes, sir.

19 Q: But the present -- the Innocence Commission decided that
20 the present recommended as it were ---

21 A: Right.

22 Q: --- recommended that the presentation in this manner,
23 that is sequential as opposed to simultaneous, produces
24 misidentification resulting in witnesses making identification
25 ---

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1 MR. HUMPHRIES: I object. I object. Now, we've been
2 through this.

3 THE COURT: Do you need to approach?

4 (Whereupon, a Bench conference was held in the
5 presence, but out of the hearing, of the jury.)

6 THE COURT: All right, ladies and gentlemen of the jury,
7 please disregard that question. It's not in evidence and
8 we'll continue.

9 BY MR. MARTIN:

10 Q: Recommendations -- recommended sequential as opposed to
11 simultaneous because sequential reduced the likelihood of
12 misidentifications caused by people comparing one
13 photograph to another instead of actually picking out who
14 they saw; is that not correct?

15 A: I'm not in a position to answer that question.
16 That commission has ongoing meetings and recommendations.
17 Our department has a committee that is working with the
18 Innocence Protection Commission that I am not a part of. I
19 can't answer questions as to what the current recommendations
20 are or the plan for the future.

21 Q: Well, and I don't ---

22 A: I know that, I know that there is a lot of discussion
23 about it. However, I've not been privy to those discussions.

24 Q: Well, I don't want you to answer anything you don't
25 know, but do you deny that sequential is preferred to

1 simultaneous because it reduces the likelihood of
2 misidentifications resulting from relative judgments?

3 A: State that question again.

4 Q: Do you deny that sequential is preferred over
5 simultaneous because it reduces the likelihood of
6 misidentifications based on relative judgments of the array
7 of photos shown?

8 A: In my opinion it makes no differences.

9 Q: I didn't ask you what your opinion was. I asked you ---

10 MR. HUMPHRIES: Well, then we need to determine who
11 prefers it because he asked -- he's asking this witness.

12 THE COURT: All right, maybe clarify the question.

13 MR. MARTIN: I don't think it's that hard.

14 THE COURT: Go ahead and clarify the question.

15 MR. MARTIN: I don't think it's that hard.

16 BY MR. MARTIN:

17 Q: I'm asking about the North Carolina Actual Innocence
18 Commission recommendations, and I'm asking you if -- do you
19 deny that one of their recommendations is that sequential is
20 preferred to simultaneous because it reduces the likelihood of
21 misidentifications caused for relative judgments made by
22 people looking at a simultaneous lineup?

23 A: And I've answered you I'm not familiar with that
24 document. I am not a part of that committee. I'm not a
25 part of that commission. Those are recommendations that

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1 are all under study.

2 Q: And would you deny that the recommendations made by that
3 same commission was in order to enhance the reliability of
4 identifications made by use of photographic lineups is that
5 you use eight as opposed to six photographs?

6 A: That is their recommendation, yes, sir.

7 Q: And would you deny that the North Carolina Actual
8 Innocence Commission recommended that eyewitnesses not be
9 given feedback after they view the lineup as to whether
10 or not they had picked the suspect that the police had
11 because it would cause false confidence in the selection
12 that they had made?

13 A: I'm not familiar with that summation.

14 Q: If -- where is the item of evidence that you used to
15 -- that was the instructions given? Did you send this out
16 along with the lineups?

17 A: Yes, sir.

18 Q: And you approved it?

19 A: I did.

20 Q: All right, would you have approved a statement before
21 that that read, "I am going to show you a lineup of the
22 person you saw on the beach at Myrtle Beach on that night"?

23 A: No, sir, and that's not what that says.

24 Q: All right, but you wouldn't have approved that
25 statement; would you?

1 A: I would not have.

2 Q: Why?

3 A: It's not appropriate.

4 Q: Why is it not appropriate?

5 A: You're telling the person that you're showing the

6 photographic lineup to that the suspect is one of those six

7 people, and in fact, that may not be the case.

8 Q: And that's a mistake; isn't it?

9 A: It would be improper.

10 Q: It can lead to misidentifications, can it not?

11 A: You're asking for me to predict the future.

12 Q: No, I'm just asking you what you know. It can lead

13 to misidentifications, can it not?

14 A: You're asking me to predict the future about a

15 witness that may or may not be able to identify somebody.

16 Q: Well, you planning on going home tomorrow?

17 A: When I'm finished here.

18 Q: Well, I'm asking you to predict the future there.

19 So, I'm going to ask you to predict it again. That type of

20 statement could have the effect of leading to a

21 misidentification; could it not?

22 A: It could, it could not.

23 Q: That's all I have. Wait a minute, wait just a

24 minute. Isn't it your department, the Winston-Salem, North

25 Carolina, Police Department is reviewing its protocol and

1 studying its protocol in relationship to eyewitness
2 identification; is it not?

3 A: Yes, sir.

4 Q: And if they're doing that they would be doing it in
5 order to improve and make more reliable the identifications
6 produced from their lineup procedure; would they not?

7 A: They're doing it as a result of the commission that's
8 reviewing all departments' procedures in North Carolina.

9 Q: That's all I have.

10 THE COURT: Redirect.

11 REDIRECT EXAMINATION

12 BY MR. HUMPHRIES:

13 Q: Just so I'm clear, when you received the photograph,
14 John Boyd Frazier, how do you use that in order to determine
15 the other five?

16 A: The other five photographs are selected from a group
17 of photographs of white males, approximately the same age,
18 approximately the same weight, approximately the same hair
19 color, eye color. Those characteristics of other subjects
20 that are in our computer system are then matched to that
21 photograph.

22 Q: And the object of or the goal, if you will, of the
23 other five in relation to the subject or the suspect
24 photograph is what?

25 A: Is to find five other photographs that are similar in

1 height, weight, race, hair color, eye color, complexion and,
2 as you'll see from the six that are there out of the numerous
3 photographs in our system they are similar.

4 Q: And your responsibility after that lineup was
5 compiled was what?

6 A: To deliver that photographic lineup to the Myrtle
7 Beach Police Department for their investigative purposes.

8 Q: Let me ask you this, how many photographs did you go
9 through or were potentials in order to choose those five out
10 of your system at that time?

11 A: 4,563.

12 Q: Thank you.

13 RECROSS EXAMINATION

14 BY MR. MARTIN:

15 Q: Now, you didn't look at those photographs. You just
16 let the computer pick them out; right?

17 A: As I said earlier I fill out the form. The
18 identification technician completes the photographic
19 lineup. So, no, I didn't view any of these photographs
20 until this was presented to me.

21 Q: Okay, and if you had looked at that and decided
22 that you didn't want to approve it, you could have sent it
23 back and they could have put more photographs in there;
24 right?

25 A: Yes, sir, could have had.

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1 Q: The computer doesn't run the Winston-Salem Police
2 Department; does it?

3 A: No, sir. No one said it did.

4 Q: Okay, that's all I have.

5 REDIRECT EXAMINATION

6 BY MR. HUMPHRIES:

7 Q: And you had that option and you didn't take it because
8 you approved that photo lineup.

9 A: Yes, sir, in other words when the technician finished
10 with the lineup they called the officer that's asked
11 for the lineup to be made. She's going to allow me to look
12 at it and see if I approve it. If there's a photograph
13 that looks out of skew, height, weight is wrong, the hair
14 color is wrong or what not then I could easily say,
15 "Photograph number six doesn't meet the parameters or doesn't
16 look right, let's, let's change that photograph out."

17 Q: And did you have any such opinion when you received that
18 photo lineup?

19 A: I did.

20 Q: And what was your opinion?

21 A: This photographic lineup is appropriate.

22 Q: Thank you.

23 THE COURT: All right, you may step down, sir.

24 A: Thank you.

25 THE COURT: Let me make sure we've got all of the

1 exhibits. I just want to make sure one wasn't inadvertently
2 taken.

3 MR. HUMPHRIES: Yes, ma'am, we have them all.

4 THE COURT: Very good.

5 Call your next witness, please.

6 MR. HUMPHRIES: Kent Robey.

7 AT THIS TIME KENT ROBEY WAS CALLED TO THE STAND, DULY SWORN
8 BY THE CLERK AND TESTIFIED AS FOLLOWS:

9 THE CLERK: Please be seated. Please state your full
10 name, spell your last name for the Court.

11 MR. ROBEY: Special Agent Kent Robey, R-O-B-E-Y.

12 DIRECT EXAMINATION

13 BY MR. HUMPHRIES:

14 Q: Agent Robey, at this time can you tell the jury how
15 you're employed?

16 A: I'm a special agent with Homeland Security assigned
17 to the FBI's counter-terrorism division.

18 Q: And in June of 1998 with whom were you employed?

19 A: Bedford County Sheriff's Office.

20 Q: And in what capacity at that time?

21 A: The lieutenant in charge of the field, field
22 operations.

23 Q: Now, consistent with your responsibilities as a
24 lieutenant with the Bedford County Sheriff's Department,
25 do you have an occasion to assist other agencies in

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1 investigations?

2 A: Yes, sir, I do.

3 Q: And did you have such a request from the Myrtle Beach
4 Police Department in connection with this case?

5 A: Through an adjacent jurisdiction of another
6 lieutenant that I knew, yes, sir.

7 Q: And your -- the relationship you had with the other
8 lieutenant was?

9 A: Professional. We trained together, our SWAT teams
10 trained together.

11 Q: Okay, what was the task requested of you?

12 A: Was to contact a couple that lived on the south side of
13 the county and show them a photo lineup from Myrtle
14 Beach PD in reference to a murder that they had had back in
15 the early part of June.

16 Q: Now, and let's be clear, this is Bedford County,
17 Virginia?

18 A: Yes, sir.

19 Q: And what community did this couple live in?

20 A: It's ---

21 Q: Do you recall?

22 A: Yes, sir, it's Goodview, Virginia, which is, I'm
23 guessing, you know, 15 minutes from Roanoke, be east of
24 Roanoke.

25 Q: Okay, now, how was the -- well, what documents were

1 provided you in order for you to accomplish this task, that is
2 the presentation of a photo lineup to these two witnesses?

3 A: You're talking about the memo that -- I'm sorry.

4 Q: That's all right.

5 A: Okay.

6 Q: Could I be any grayer? Let's see, State's 20 through
7 23, and ask if you recognize those documents?

8 A: Yes, sir, I received -- yes, sir.

9 Q: Tell me what those documents are.

10 A: State's 20, color photo lineup, State's 21 black
11 and white photo lineup, State's 22 black and white
12 photo lineup and a Winston-Salem Police Department
13 admoneration [sic] form, which was blank at the time.

14 Q: Now, did you have any communication with
15 the Myrtle Beach Police Department prior to receiving
16 those documents in connection with this case and that -- the
17 task that you were asked to perform?

18 A: After the lieutenant from the other jurisdiction
19 contacted me, apparently he called Bill Frontz back, the
20 lieutenant from Myrtle Beach. Lieutenant Frontz called me.
21 This happened within a two-day period, explained to me
22 what was going on, you know, at which time I advised him that
23 I would need a memo of some kind requesting our assistance,
24 just standard protocol for our sheriff. He agreed to do that,
25 and in the memo he, he stated that they would be making

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1 contact with Mark and Donna Hobbs about my -- about me
2 contacting them in reference to coming up and showing them a
3 photo lineup.

4 Q: Now, in that memo that you received and did ultimately
5 you receive it or did it go to someone else?

6 A: I got it and then passed a copy of it to the sheriff and
7 I haven't seen it in a while, so.

8 Q: I'm going to show it to you. This is Defense Exhibit 26
9 for identification purposes. Do you recognize that document?

10 A: Yes, sir, I do.

11 Q: And is that the document you received from Lieutenant
12 Frontz in connection with this referral?

13 A: Yes, sir, it is.

14 Q: Now, I want to be very specific. Contained in that memo
15 is there any reference to a physical description or a facial
16 description of the suspect in question?

17 A: No, sir, it's not.

18 Q Okay, and were you -- was it ever communicated to you,
19 either a facial description of this suspect or were you ever
20 advised what position the Defendant in this case, John Boyd
21 Frazier, was in in this photo lineup?

22 A: No, sir, I was not, never asked.

23 Q: Never asked, never told.

24 A: No, sir.

25 Q: So, when you received the photo lineup ---

- 1 A: Didn't want to know.
- 2 Q: Didn't want to know.
- 3 A: Didn't want to know.
- 4 Q: And tell the jury why.
- 5 A: I wanted to preserve the integrity of the lineup. So,
- 6 it'd be no question of, I mean, it would be obvious that a
- 7 police officer received it, sat down with the witnesses,
- 8 showed it to them, they either picked them out or didn't, pick
- 9 it back up, make notification back to the other jurisdiction
- 10 or whoever I'm doing it for, and that's, that's the end of it
- 11 as far as cut and dry.
- 12 Q: All right, sir, now, having received that packet, that is
- 13 State's 20 through 23, then -- did you then make contact with
- 14 Mark and Donna Hobbs?
- 15 A: Yes, I did.
- 16 Q: Okay, and tell the jury how you did that.
- 17 A: I did it by phone and we had set up a time for June 28th,
- 18 somewhere between 7:30 and 8, the best that I can remember.
- 19 Q: Okay.
- 20 A: P.M.
- 21 Q: And then did you have an occasion to go to their
- 22 residence on that date at approximately that time?
- 23 A: Approximately 7:50, ten minutes to eight, p.m. on that
- 24 date.
- 25 Q: Okay, now, were these documents, State's 20 through 23,

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1 were you carrying them loosely like this?

2 A: No, sir.

3 Q: Tell the jury how they were contained.

4 A: They were Fed-Ex'd to me in a Fed-Ex package that you
5 could not see the contents. When I, when I received them I
6 arranged them in such a way as to how I would pull them out,
7 such as 23.

8 Q: And 23, again, let's talk about 23 right now.

9 A: Okay.

10 Q: What is 23?

11 A: It's instructions basically that the Winston-Salem Police
12 Department sent along with the, with the packet on how should
13 I explain to them, what questions they might have and there
14 was an additional question that Lieutenant Frontz asked me to
15 ---

16 Q: Okay, and we'll get into that specifically in just a
17 moment. Now, when you arrived at the residence of the Hobbses
18 what was the first thing you did?

19 A: Let me back up to the phone call. When I, when I had
20 arranged the time I did not go into why I was coming up there.
21 I assumed that they knew. The only thing I said is, "I need
22 to meet with you in reference to talk about what happened down
23 at Myrtle Beach."

24 Q: Okay.

25 A: I arrived at the residence and there was some small talk

1 about the area or, you know, how many times I'd been up there,
2 and then I asked them, I told them that I had a photo lineup
3 that I needed to show them about someone that they might have
4 seen or saw down at Myrtle Beach during the murder.

5 Q: Let me ask you this, that statement you just made to the
6 jury, do you recall specifically -- well, first of all let me
7 ask you this, did you read this admonition form prior to
8 taking it to the Hobbsses? Did you review the admonition form?

9 A: Yes, sir, I looked at all the contents to make sure that
10 Lieutenant Frontz had sent what was needed to get it done.

11 Q: Okay, and did you read specifically the admonition form?

12 A: Yes, sir.

13 Q: Okay, and specifically did you read contained in this
14 admonition that this group of photographs may or may not
15 contain a picture of the person who committed a crime now
16 being investigated?

17 A: That's correct, sir.

18 Q: Okay, now, when you spoke with the Hobbsses, again, tell
19 the jury if you recall specifically, and if you don't recall
20 that's fine, too, but do you recall specifically what you said
21 your purpose for meeting with them?

22 A: To show them a photo lineup of someone that they might
23 have seen down in Myrtle Beach.

24 Q: Okay and that would be consistent with the admonition
25 form; would it not?

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1 A: Yes, sir.

2 Q: That language.

3 A: Yes, sir.

4 Q: What, what occurred next? What -- how did you initiate
5 this procedure?

6 A: I advised them that they needed to be separated and that
7 they need to go far enough away where -- we weren't talking
8 loud at all and it's a, it's a split foyer home. So, it's a
9 pretty good distance between the dining room table and the
10 back bedroom. So, Mark agreed, Mark Hobbs agreed to look at
11 the photo lineup first.

12 Q: Okay.

13 A: All this, State's 21 through 23, were all still in a Fed-
14 Ex package.

15 Q: Right.

16 A: Donna agreed, Donna Hobbs agreed to go to the back
17 bedroom and shut the door.

18 Q: Now, did you have a visual of that from where you were
19 positioned?

20 A: Yes, sir, we were kind of standing five or six feet from
21 the front door and the hallway, the best I remember, is off to
22 the right. The dining room is off to my left, and I was
23 standing right there kind of in the middle, watched her. She
24 agreed to do it and watched her walk down the hallway. Prior
25 to that, before we split up, let me back up, I advised them

1 that they -- after this point on they could not have any
2 conversation.

3 Q: Okay.

4 A: Between each other, and that she was to go back and shut
5 the door, which she did, watched the door shut. Mark Hobbs
6 and I went over to the dining room table. I sat down and I
7 had a notebook with just plain paper in it. I pulled out the
8 Winston-Salem State's 23 first.

9 Q: Right.

10 A: That's to read him the instructions of the photo lineup.
11 I was -- it looked -- appeared that he's never done a photo
12 lineup because he was like, you know, "What is this all
13 about?" So ---

14 Q: Okay, when you pulled out that form you say you read it
15 to him?

16 A: Yes, sir, I did.

17 Q: Okay, read to this jury exactly what you read to Mark
18 Hobbs on that evening.

19 A: Okay, "I'm going to show you a group of photographs.
20 These, these group of photographs may or may not contain the
21 picture of the person who committed a crime now being
22 investigated. Keep in mind that hairstyles, beards,
23 moustaches might be easily changed. Also, photographs may not
24 always depict the true complexion of a person. When you've
25 looked at all the photographs, photos tell me if you recognize

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1 any individual in the lineup. Do not discuss this lineup with
2 the other witness." At that point I asked him if he had seen
3 -- per Lieutenant Frontz if he had seen any news reports, any
4 police officers had showed him other photos, any way, shape or
5 form of any suspect down at Myrtle Beach.

6 Q: Any photograph of any suspect.

7 A: Correct.

8 Q: And what was his response to you?

9 A: He said he had not seen a picture of a suspect but he did
10 see the news clipping on that day on the TV of the day of the
11 murder or the next morning.

12 Q: The next morning.

13 A: Right.

14 Q: Now, let me ask you this, do you know what day John Boyd
15 Frazier was arrested?

16 A: No, sir, I do not.

17 Q: And I believe it's in the record. It was June 13th, the
18 date of the incident is June 9th.

19 A: Okay.

20 Q: Okay, and, all right, and he responded what in regard to
21 your question about having seen a photograph of the suspect?

22 A: No on the photograph but he saw the initial report of
23 the incident.

24 Q: Okay.

25 A: That's, that's what he told me and I then slid State's 23

1 over to him and advised him to read it, make sure he
2 understood it and if he had any questions to ask me.

3 Q: After reading it did he ask any questions?

4 A: No, sir.

5 Q: And what did you ask him to do as a result of his -- your
6 having explained it to him and then his reading it?

7 A: I asked him to date it and sign it and then I signed it.

8 Q: And in fact, did he do that?

9 A: Yes, sir.

10 Q: Okay, after that procedure was completed what then did
11 you do?

12 A: I put this form back in the Fed-Ex container, pulled out
13 State's 20, the colored photograph that had no markings on it.
14 I know it does now, but I don't -- that wasn't on there.
15 There was no markings on this.

16 Q: Okay.

17 A: Okay, placed the instructions back into the Fed-Ex, slid
18 it over to mark and asked him to take a look at it and see if
19 he recognizes any of these people.

20 Q: Okay, and was it apparent to you that he did begin that
21 process?

22 A: Yes, sir.

23 Q: What did you observe of Mark Hobbs while he was reviewing
24 the photo lineup?

25 A: I'm not going to sit here and guess the time he spent on

1 it. I mean, he spent a little bit of time looking at it, and
2 he eventually narrowed it down to one and two on State's 20,
3 one and two, and I observed him taking his hands as if he was
4 trying to cover up below the nose on both at the same time and
5 above, just above the eyes, and he looked like he was having
6 trouble kind of getting it right where he could look at it.
7 So, I reached over and I grabbed my book and gave him a --
8 just a blank sheet of paper, something that was making it a
9 little bit easier to slide and move it up and down and look
10 and then that was it as far as, you know, he made a statement
11 as, "That looks like the eyes," and I just, I just sat there
12 and kind of looked at him and ---

13 Q: Did you offer him any encouragement at that point?

14 A: No, sir, I didn't say anything. I was waiting for him to
15 -- it was obvious that he was still -- I didn't know which one
16 he was talking about and I didn't ask. He was trying to
17 figure out which one, you know, closely represents the person.
18 So, at some point in time there just after that he said number
19 one looks like the one that closely resembles the person they
20 saw at Myrtle Beach.

21 Q: And as a result of that identification what then did you
22 do?

23 A: I took the colored photo, placed it back in the Fed-Ex
24 container, pulled out the first, State's Exhibit 21, which was
25 blank at the time, and I -- then I asked him, I said, "What I

1 need you to do is look at this one and place your initials,
2 the time and the date at the one that you think you saw in
3 Myrtle Beach. He looked at it again and I believe I gave him
4 my pen and he put his initials at it. He asked me what time
5 it was. I told him it was 8:10, thereabout, and of course, he
6 put the date there.

7 At that point I took the form that he initialed, placed
8 it while he was sitting there, because Donna was not in the
9 room, fixed my packet again where I would first pull out the
10 instructions of State's 23. The next one would be State's 20
11 and behind that and then another blank black and white one
12 without any initials on it, that was placed in there third.

13 Q: Let me ask you this before we go to Mrs. Hobbs and hold
14 State's 20.

15 A: Okay.

16 Q: I'm sorry. Yeah, State's 20. State's 21, you've since
17 had an opportunity to learn the identity of the person who is
18 indicated in this position, position one on State's 21; have
19 you not?

20 A: Yes, sir.

21 Q: Who is that person?

22 A: John Boyd Frazier.

23 Q: The Defendant?

24 A: Correct.

25 Q: And again correspondingly John Boyd Frazier?

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1 A: Yes, sir.

2 Q: Position one; correct?

3 A: Yes, sir.

4 Q: I'm going to let you get these organized again. Tell me
5 what you did next.

6 A: Okay, at that point I told him he was through, that we
7 needed to get Donna Hobbs back into the -- and switch places.
8 So, he got up first and was just a little bit of -- a few
9 steps ahead of me. I was walking behind him and he hollered
10 her name. She didn't respond. Then we both kind of
11 simultaneously hollered her name and then she eventually, she
12 opened the door. I observed her come out of the bedroom, walk
13 past Mark, didn't say anything, didn't give any signals or
14 anything, walked into the room and I asked Mark to, "Please
15 shut the door and stay in there until I come get you."

16 Q: Did he do that?

17 A: Ye, sir.

18 Q: What procedure then did you utilize with Donna Hobbs?

19 A: The same one. We went to -- back to the dining room
20 table, had the Fed-Ex package sitting there and the first form
21 I reached over and pulled out was the instruction form from
22 Winston-Salem. I read it to her. I asked her the same
23 question, had she seen any news reports, pictures, police
24 show, had they showed her pictures of the suspect since the
25 murder and she also stated that she saw the news reports on

1 the TV, I believe it was the next morning after the murder,
2 but she hadn't seen any pictures of any suspects.

3 Slid it over to her, after I read it to her, asked her if
4 she understood. She said, yes, and asked her to read it, and
5 ask me any questions that she might have.

6 Q: And again let's be specific, regarding State's 23, did
7 you include this admonition, "This group of photographs may
8 or may not contain a picture of the person who committed a
9 crime now being investigated?"

10 A: Correct. After she appeared to read it, I asked her
11 that I needed her to sign and date it and hand it back to me,
12 which she did. At that time I placed that back into the Fed-
13 Ex container, pulled the colored State's 20, laid it down on
14 the table, slid it over to her, and said, "See if there's
15 anybody you recognize from Myrtle Beach."

16 Q: And what did you observe of Mrs. Hobbs at that time?

17 A: I'll set it up here so you can kind of, she was sitting
18 beside me and she said, "That's not him, that's not him,
19 that's not him, " and then she went straight up to the number
20 one slot and said, "That's him, that's the eyes," and
21 because she did it so quick, I reiterated to her, "Look, make
22 sure you look at this and look at all of them, just don't jump
23 and go to it. You know, make sure you're correct on this."

24 She went back through, I mean, it appeared that she
25 looked, went back through to the, through the others and she

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1 went straight back to number one. She said, "That's, that's
2 him, that's the eyes." I said, "Okay, are you sure?" She
3 said, "That's him, that's the eyes."

4 I took this, the State's 20, placed it back in the Fed-
5 Ex, and the Fed-Ex package, if you know them, you can kind of
6 just slide it up and so you can flip through it to make sure
7 you've got the right one, which I had it lined up, the black
8 and white blank photo lineup without the initials. I said,
9 "Okay, Donna, this is what I'm going to need you to do,"
10 slid that back over, "Let's verify what you picked out on the
11 color one, look through this and then I need you to
12 put your initials by the one that you chose." I believe I
13 gave her my pen. She went up there and put her initials in
14 position one. She asked me the time, also. I gave her 8:17
15 on June 28th, '98.

16 Q: And again, in position one, that is the Defendant, John
17 Boyd Frazier; is it not?

18 A: Yes, sir, it is.

19 Q: And this is a photocopy of or an exact photocopy of
20 the one that was presented to Mark Hobbs; is that correct?

21 A: Yes, sir. I need to back up. When I showed her the
22 black and white photo ---

23 Q: Uh-huh (affirmative response).

24 A: --- she made a quote to me. When she saw that she
25 said, "That picture is better. That picture is better. That's

1 him," was what I had her quoted saying when I placed ---

2 Q: When you showed her that one.

3 A: When I showed her the black and white one, and I said,
4 "Okay, I need you to initial it."

5 Q: And at this point in time is it your testimony before
6 this jury that you still did not know the person of interest
7 or the suspect in Myrtle Beach had -- his relative position in
8 that lineup?

9 A: No, sir, I did not. Lieutenant Frontz had asked me
10 to call him after I had left the residence, and that when I
11 was alone, which I did after I left the residence.

12 Q: Okay, well, let's do this. After Donna Hobbs made those
13 notations on State's 22 what then did you do?

14 A: After she initialed it, placed the black and white,
15 State's 22, back into the Fed-Ex, gathered up my notebook and
16 I said, "You can have Mark come out now." So, I kind of -- I
17 stood up and was started towards the front door right there in
18 the living room area. Mark came out and I had -- you know,
19 "Thanks for your help. Thanks for giving me time this
20 evening to take care of this," and that we would -- that
21 somebody would be in contact with you, and I believe
22 Donna asked me something along the lines of, "Are we going
23 to have to testify?"

24 Q: And did -- based on your observations of Mrs. Hobbs did
25 she appear to be excited at the prospect of testifying or

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1 concerned about the prospect of testifying, if you can say?

2 A: She appeared to be concerned.

3 Q: Now, did there come a time when you called Lieutenant
4 Frontz regarding the execution of this photo lineup?

5 A: Yes, sir. Soon as I left the driveway, due to the
6 terrain there, I had to drive about another ten miles on the
7 way back to the office to get cell phone service at which
8 time I called Lieutenant Frontz. I believe it was at his
9 home at the time because it was late in the evening and
10 advised him that the Hobbses had picked out the person in the
11 first slot, top left corner.

12 Q: And let me ask you this, did you ever indicate from
13 Mark and Donna Hobbs at the point in time that you were at
14 their house that they had picked out the same person, that
15 is the person who is in the same position, John Boyd Frazier?

16 A: No, and I believe they asked me because I did not
17 make a statement right up front. "I don't know who this is,
18 and I don't know what the correct answer is," I mean, what I
19 believe she asked me, "Did we pick out the right one," and I
20 said, "I don't know. We're going to have to call you
21 back."

22 Q: Okay, you called Lieutenant Frontz.

23 A: Yes, sir.

24 Q: You advised him of the identifications.

25 A: Yes, sir.

1 Q: What did Lieutenant Frontz advise you in regard to
2 their identification as to whether or not it was the
3 suspect, John Boyd Frazier?

4 A: After I told him that -- what Mark and Donna Hobbs
5 had chosen he said, "Well, that's the suspect we have," and
6 that's the only thing he said at that point. I didn't know
7 if he was in custody or they were still, I mean, it wasn't
8 like we were talking daily or weekly on a progression of
9 the investigation. He just said, "That's the suspect that we
10 have. I'll call you back and let you make arrangements," on
11 getting the material back to him or something, and that was
12 about it, and I asked him at that point, I said, "Can I
13 contact the Hobbsses and let them know if it was right or
14 wrong?" And he said, "Well, I don't see any problem with
15 that." I said, "Well, they're really concerned about
16 testifying." I said, "I don't know, you know, what's going
17 on there. I guess I'll find out," but I said, "I'll call
18 them back."

19 Q: And did you?

20 A: After I got back to the office, which is another
21 probably 20, 25 minutes, 30 minute drive, I called them back
22 and I believe Donna answered the phone, and I told her who I
23 was and she said, "Well, where are we with this," or
24 something along that lines, and I said, "Well, you guys
25 chose, both of you chose the one that Myrtle Beach has as

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1 a suspect," and it was quiet there for a minute, and she
2 said, "Are we going to have to testify," and I said, "You
3 know, I don't, I don't know what Myrtle Beach has plans
4 for you," and she said, "Well, this is, you know, this is
5 kind of scary," and I said, "Well, I understand that," and
6 I believe she did ask me if the ---

7 MR. MARTIN: Well, Your Honor, I know I've let it go
8 on, but there's a lot of hearsay being told here ---

9 THE COURT: And ---

10 MR. MARTIN: --- Probably ought not to be.

11 THE COURT: --- sustained, if you'd caution, direct
12 him, please.

13 MR. HUMPHRIES: Thank you.

14 THE COURT: Thank you.

15 BY MR. HUMPHRIES:

16 Q: Let's not say what Mark and Donna Hobbs said, but you
17 can say what you said or what you did as a result of what he
18 said.

19 A: Okay.

20 Q: That might have brought you to the end of your ---

21 A: Yeah, I think it did. I was concerned of their
22 safety and I told them if they needed anything to let us
23 know and if I heard anything that for some reason we
24 found out relatives or something were living up in their
25 area or something like that that I would make sure patrols

1 would go by their residence and check.

2 Q: And do you recall ever having had any other direct
3 contact with the Hobbs after that evening, after that phone
4 call?

5 A: The last contact I had was just prior to trial.

6 Q: Okay.

7 A: Served a paper on them.

8 Q: Okay.

9 MR. HUMPHIRES: That's all we have of this witness at
10 this time, Your Honor.

11 THE COURT: Cross.

12 CROSS EXAMINATION

13 BY MR. MARTIN:

14 Q: Mr. Robey.

15 A: Yes, sir.

16 Q: First, you testified that the first thing that you
17 told the Hobbses when you got there was that you were there
18 to show them a photo lineup of the person they saw at
19 Myrtle Beach prior to the murder; is that not right?

20 A: That's what I have in my report.

21 Q: If you would read to the jury what you have in your
22 report there as it relates to that.

23 A: I was there to show them a photo lineup of a person that
24 they saw in Myrtle Beach prior to the murder.

25 Q: All right, there's no question about that. Then you

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1 got this form out and read it to them that was provided by
2 the Winston-Salem Police Department; right?

3 A: State's 23, yes, sir.

4 Q: All right, and then you told them that you were going to
5 separate them so they could look at the lineup individually;
6 right?

7 A: Okay, I read them the instructions first.

8 Q: Jointly?

9 A: No.

10 Q: Okay.

11 A: No, separately.

12 Q: Separately.

13 A: Yes, sir.

14 Q: That's what I'm saying, you told them you were going
15 to -- you had to separate them.

16 A: Yes, sir.

17 Q: All right, and then at eight o'clock according to your
18 report you showed this lineup to Mark Hobbs; right?

19 A: Yes, sir.

20 Q: All right, and he looks at it and at 8:10 he selects in
21 some manner the person in the number one position; right?

22 A: That is approximate time, but yes, I put in my
23 report that I showed it, he looked at it for 10 minutes.

24 Q: Well, what do you have -- all right, so, and I believe
25 that 8:10 is what is on one of those items of evidence which

1 you've been testifying about; isn't it?

2 A: It's the black and white, State's 21, sir.

3 Q: All right, so, he looked at that lineup for 10 minutes;
4 right?

5 A: The -- what the ten minutes is referring to was the
6 total time I was -- I had -- was seated and we started working
7 on this as far as the instructions, showed him the colored
8 State's 20, put that back up, showed him the black and
9 white, State's 21. That's what that's referred to.

10 Q: Well, your report, look at your report. Your report
11 says that you read him the form. You had separated them,
12 got it out, read him the form and showed him the lineup at
13 eight o'clock; right?

14 A: Showed him the lineup at eight o'clock, yes, sir.

15 Q: Had already read ----

16 A: Started it.

17 Q: --- the form now when the clock starts running; right,
18 right?

19 A: We started at eight o'clock.

20 Q: Well, I'm asking you, I'm asking you to look at your
21 report.

22 A: I understand that.

23 Q: Does your report not say that, "I read him the form and
24 then I showed him the lineup at eight o'clock"?

25 A: That's correct.

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- 1 Q: All right, and then he got to looking at two pictures,
2 right?
- 3 A: Yes, sir, off of the colored State's 20.
- 4 Q: All right, he got to looking at two pictures.
- 5 A: Yes, sir.
- 6 Q: And as fate would have it it happened to be the two
7 dressed in black; right?
- 8 A: Position one and position two with dark or black
9 colored shirt; yes, sir.
- 10 Q: All right, and when you get it down to -- well, I'll
11 save that, but those are the two that he got narrowed down
12 and got to looking; right?
- 13 A: Yes, sir.
- 14 Q: All right, and then he told you that number one most
15 closely resembled the man he saw on the beach that night;
16 right?
- 17 A: Yes, sir, he did.
- 18 Q: Now, do you know the difference between a sequential
19 and a simultaneous lineup? I know you're not doing lineups
20 much anymore, so.
- 21 A: I do a few.
- 22 Q: All right.
- 23 A: Yeah.
- 24 Q: What's the difference in them?
- 25 A: I've used both in the last 23 years.

1 Q: All right, and one of them is, again, where you show
2 them all at the same time, that's a simultaneous lineup.

3 A: Simultaneous, yes, sir.

4 Q: And a sequential is where you lay them out one at the
5 time.

6 A: Yes, sir, it is.

7 Q: All right, and would you agree with me that the reason
8 that some people prefer sequential as opposed to simultaneous
9 is that research has shown that relative judgments are made in
10 the simultaneous lineups such as instead of saying, "That's
11 the person I saw," "That one most closely resembles the
12 person I saw"? Isn't that right?

13 A: No disrespect, but I have not read research on
14 photo lineups and I've used both. I mean, when I first became
15 a law enforcement officer that's how we did it. There was no
16 computers picking out other pictures. We had to pick it out.

17 Q: Right. Well, let me take the research part out of
18 the question.

19 A: Okay.

20 Q: You would agree with my statement that that's the
21 reason some people prefer sequential as opposed to
22 simultaneous?

23 A: I don't have that answer. I've seen them both work.

24 Q: Okay, you don't have the information about that.

25 A: No, sir, I've seen them both work.

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- 1 Q: Okay, all right, that's good. Now, also, they've got
2 their suspect here in the number one position; right?
- 3 A: Yes, sir.
- 4 Q: That's not a good thing under your training; is it?
- 5 A: I've used it some and some I haven't, but yes, sir ---
- 6 Q: Well ---
- 7 A: --- I've -- it's been taught in some classes and some
8 classes it hasn't.
- 9 Q: Well --
- 10 A: But you're right.
- 11 Q: I'm right what?
- 12 A: You're right. It is normally suggested not to put
13 It there, but I've seen it put there ---
- 14 Q: Okay, oh, I understand. We see it put there right here.
- 15 A: --- to also throw the -- also -- well, also to throw the
16 witness off, too.
- 17 Q: Okay, all right, could throw them off, could not --
- 18 A: Yes, sir.
- 19 Q: --- but my point to you is that you have been taught
20 in some of your class that you don't put the suspect in
21 the number one position; right or wrong?
- 22 A: It's been suggested that it might not be a good idea.
23 The same goes for the last one.
- 24 Q: For the last one as well.
- 25 A: Yes, sir.

- 1 Q: And of course, you didn't know that the suspect was
2 in the number one position; you've told us that.
- 3 A: That's correct, sir.
- 4 Q: All right, and then you had Donna Hobbs come in,
5 having changed positions ---
- 6 A: Yes, sir.
- 7 Q: --- had Donna Hobbs come in ---
- 8 A: Yes, sir.
- 9 Q: --- and I believe that your report and your statements
10 indicate Donna Hobbs viewed the photographs anywhere from two
11 to four minutes.
- 12 A: That's correct, sir.
- 13 Q: All right, how about look at this clock for me, this
14 second hand and tell us when we get to two minutes.
- 15 A: Okay, sir.
- 16 Q: Mr. Hembree said that's the quietest I've been the
17 whole trial, and then she affixed her signature to the
18 bottom of that page, which is one exhibit you've got there
19 in your hand; right?
- 20 A: Yes, sir; yes, sir.
- 21 Q: And the manner in which she made her identification
22 was she eliminated four, five, six, goes to one and says,
23 that's the what? What's the word that was common between Mark
24 and Donna Hobbs, those are the ---
- 25 A: That's him. I asked her to look at it again, make

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1 sure of her choice.

2 Q: Uh-huh (affirmative response).

3 A: She stated, "That's him, those are the eyes."

4 Q: Did she elaborate to you then what about the eyes or
5 just that those are the eyes?

6 A: Those are the eyes.

7 Q: Would you agree with me that number one is the only
8 photograph on there with any eyes that are distinctive in
9 any way?

10 A: Number Three's close.

11 Q: Okay, Number Three is close.

12 A: They kind of squint.

13 Q: Well, there's no question -- if you're looking at
14 eyes you're immediately drawn to number one; aren't you? I
15 mean, that's a fair statement; isn't it, Mr. Robey?

16 A: I can't say that because if you ask me who ran over a
17 little kid in a car there I'd just go, "That one." I mean
18 ---

19 Q: But I'm not asking you, I'm not asking you that.

20 A: --- I don't know; I don't know.

21 Q: But I'm just -- and I'm just going to ask you one
22 more time. I don't want to belabor it, but isn't it pretty
23 clear that the only one that's got a distinctive set of
24 eyes as opposed to the other is number one?

25 A: And number three. I mean, ---

1 Q: Okay.

2 A: --- yes, sir, I'd pick both of them out.

3 Q: That doesn't strike you as a little suggestive in
4 nature that eyes is what we're looking at, the only one
5 that's got eyes, and you say three, but those eyes are the
6 most important identifying physical characteristic from what
7 you learned; right?

8 A: Well, Donna was talking about the eyes.

9 Q: Uh-huh (affirmative response).

10 A: Mark was placing the paper to look just below the nose.
11 So, he could have been looking at the nose and the eyes and
12 the forehead. I don't, I don't know.

13 Q: Well, let me make sure I understand now.

14 A: Now, Donna was looking -- she stated about the eyes,
15 yes, sir.

16 Q: Okay, and as my understanding was you also, you also
17 said Mark Hobbs came back with the same thing, "Those are
18 the eyes."

19 A: Yes, sir, but ---

20 Q: All right, and it's my understanding that Hobbs had a
21 piece of paper, and maybe I'm wrong, you correct me if I'm
22 wrong, but that he had the piece of paper so that he was
23 showing that the only -- was above, was the eyes covering
24 below and above ---

25 A: Below the nose.

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1 Q: --- below the nose.

2 A: Below the nose.

3 Q: Covering the forehead.

4 A: Right, right like that.

5 Q: All right, okay, I got you.

6 A: Okay?

7 Q: All right, so, it could have been the nose or the
8 eyes is what you're saying; right?

9 A: Could have been sir, yes, sir.

10 Q: I got you, but at least what his comment to you was
11 it's the eyes; right?

12 A: Yes, sir.

13 Q: Okay, and Mrs. Hobbs in doing that then told you that
14 number one most closely resembled the man she saw on
15 the beach that night.

16 A: When I got the black and white one out, State's 22,
17 her quote was, "That picture is better. That's number one.
18 That's him."

19 Q: All right, you had testified earlier that she had
20 said that number one that he most closely resembled the man
21 she saw on the beach that night; is that right or wrong?

22 A: Yes, sir.

23 Q: All right, sir, okay, all right, now, did you ever
24 instruct Mr. and Mrs. Hobbs that it was just as important to
25 clear an innocent person as it was to convict a guilty one?

1 A: In the Winston-Salem instructions.

2 Q: Is that in there?

3 A: Well, it -- not those words but it says it may or may not
4 contain a picture and I read it that slow, it may or may not
5 contain a picture of the person who committed a crime now
6 being investigated.

7 Q: But that's a different statement than what I just
8 asked you.

9 A: That's an opinion.

10 Q: Okay, and Mr. and Mrs. Hobbs were interested or eager
11 to find out how that -- how they had done on the pictures.

12 A: They wanted to know if they had chosen a suspect,
13 yes, sir.

14 Q: And you didn't know what to tell them.

15 A: No, sir, I told them ---

16 Q: You called them back later that night and told them.

17 A: Yes, sir, I did.

18 Q: Let me see those items of evidence just a second, and
19 I believe you testified that when Mrs. Hobbs looked at the
20 black and white one here and signed her name on this ---

21 A: This is hers.

22 Q: Oh, I'm sorry.

23 A: That's all right.

24 Q: It is, that it was the eyes, "That's them, those are
25 the eyes."

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1 A: Yes, sir.

2 Q: Right?

3 A: Yes, sir.

4 Q: That's all the questions I have, Mr. Robey.

5 THE COURT: Thank you.

6 MR. HUMPHRIES: Very briefly, Judge.

7 THE COURT: Yes, sir.

8 REDIRECT EXAMINATION

9 BY MR. HUMPHRIES:

10 Q: That, that two minutes, that seemed like a long time;
11 didn't it?

12 A: Yes, sir, it does.

13 Q: And on the evening when you showed it to Mrs. Hobbs,
14 did it seem all that long?

15 A: No, it didn't.

16 Q: And when you were going through this procedure with
17 Mrs. Hobbs were you staring at a clock as you were in this
18 courtroom today?

19 A: Sir, I was more focused on doing it right.

20 Q: And the two to four minutes that you indicated in your
21 report was that an exact time or was it an approximation?

22 A: Those were approximate times, sir.

23 Q: Thank you.

24 MR. MARTIN: Nothing further.

25 THE COURT: You may step down, sir.

1 Just leave all of those exhibits right up on that.

2 Very good, thank you.

3 MR. HUMPHRIES: May we approach briefly, Judge?

4 THE COURT: Yes, you may.

5 (Whereupon, a Bench conference was held in the
6 presence, but out of the hearing, of the jury.)

7 THE COURT: All right, we're going to take a quick
8 break at this time. We've just come to a good breaking
9 point. I see you're in agreement with that. We must send
10 you back. It'll be only about a ten-minute break. We'll
11 have you back in the near future. Do not discuss the case.
12 Everybody remain seated, please. I just happened to get
13 you this time. It's usually someone else.

14 (The following takes place outside the presence of the jury.)

15 THE COURT: All right, anything from the State at
16 this time?

17 MR. HUMPHRIES: Not at this time.

18 THE COURT: Anything from the Defense?

19 MR. MARTIN: No, Your Honor.

20 THE COURT: All right, we'll take a ten-minute break.
21 See you back in here in ten minutes.

22 ***** OFF THE RECORD *****

23 (On the record.)

24 (Whereupon, the following takes place outside the
25 presence of the jury.)

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1 THE COURT: Thank you, please be seated. I just
2 received word all my smokers are back in. So, let's see if
3 we can get everybody in place.

4 Anything from the State prior to bringing the jurors
5 out?

6 MR. HEMBREE: No, Your Honor.

7 THE COURT: Anything from the Defense?

8 MR. MARTIN: No, Your Honor.

9 THE COURT: We're ready for them.

10 (Whereupon, the following takes place in the presence
11 of the jury.)

12 THE COURT: Welcome back. I see you are creatures of
13 habit. You can move around a little other than Mr. Foreman
14 and Madam Alternate. The remainder of you can move around
15 a little bit if that's your desire just to let you know,
16 but we do sometimes choose a seat and stay with it.
17 That's, that's your choice.

18 We continue with the State's case. Call your next
19 witness, please.

20 MR. HUMPHRIES: Thank you, Your Honor.

21 The State calls Mark Hobbs.

22 AT THIS TIME MARK HOBBS WAS CALLED TO THE STAND, DULY SWORN
23 BY THE CLERK AND TESTIFIED AS FOLLOWS:

24 THE CLERK: Thank you. Please be seated. Please
25 talk right into that microphone.

1 MR. HOBBS: Yes, ma'am, all right.

2 THE CLERK: Please state your full name and spell your
3 last name, please.

4 MR. HOBBS: Mark Hobbs, H-O-B-B-S.

5 THE COURT: Very good, that's fine. Yes, sir.

6 DIRECT EXAMINATION

7 BY MR. HUMPHRIES:

8 Q: Good afternoon, Mr. Hobbs.

9 A: Yes, sir.

10 Q: Mr. Hobbs, where do you presently reside, what
11 community?

12 A: Goode, Virginia.

13 Q: Goode?

14 A: Yes, sir.

15 Q: G-O-U-D-E?

16 A: G-O-O-D-D -- D-E.

17 Q: G-O-O.

18 A: Double E, yes, sir.

19 Q: I got you, and in June of 1998 in what community did
20 you reside?

21 A: Goodview.

22 Q: Goodview.

23 A: Virginia.

24 Q: Virginia.

25 A: Yes, sir.

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1 Q: Okay, now, in the early part of June 1998 did you
2 have an occasion to come to Myrtle Beach on a family
3 vacation?

4 A: Yes, sir.

5 Q: Well, let me ask you this just by way of background,
6 in, in June of 1998 how were you employed?

7 A: I was a mechanic, field service mechanic for
8 Caterpillar.

9 Q: Caterpillar?

10 A: Yes, sir.

11 Q: Diesel engines?

12 A: Yes, sir.

13 Q: And presently how are you employed?

14 A: I work for myself.

15 Q: And in what line of work?

16 A: Home improvements.

17 Q: Okay, are you married?

18 A: Yes, sir.

19 Q: Children?

20 A: Yes, sir.

21 Q: How many?

22 A: Three boys.

23 Q: And their ages now?

24 A: Nine, 13 and 17 today.

25 Q: Seventeen today?

- 1 A: Yes, sir.
- 2 Q: Happy birthday to him.
- 3 A: Yes, sir.
- 4 Q: On June 9th -- well, let me ask you this, was your
5 family vacation in Myrtle Beach on the week which included
6 June 9th, 1998?
- 7 A: Yes, sir.
- 8 Q: And tell the jury, if you will, what significance is
9 the date June 9th to you and your wife?
- 10 A: That's our anniversary.
- 11 Q: Okay, when you came down to the beach do you remember
12 where you stayed?
- 13 A: Yes, sir, the Carolina Winds.
- 14 Q: Let me show you State's 35 into evidence and
15 tell me if you can identify the hotel in which you
16 stayed.
- 17 A: Yes, sir. This, this is the hotel right here.
- 18 Q: Okay, were you there with other family besides you
19 and your family?
- 20 A: Yes, sir, a whole lot of us.
- 21 Q: Okay, and is that an annual thing for you?
- 22 A: Yes, sir.
- 23 Q: Okay, and have you since come back to Myrtle
24 Beach?
- 25 A: Yes, sir.

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1 Q: Ever stay at the Carolina Winds again?

2 A: No, sir.

3 Q: Okay, now, what I'd like to do is talk a little bit
4 about the evening of June 9th, 1998, the early evening.

5 Well, tell us a little bit about your day that day, what
6 you did and what you did in the early evening.

7 A: We just played on the beach, swam in the pool, played
8 volleyball and then that evening we decided to go out and
9 eat for our anniversary, my wife and my wife's sister and
10 her husband.

11 Q: Okay, have any idea where you went?

12 A: It was up at Barefoot Landing.

13 Q: Barefoot Landing.

14 A: Yes, sir.

15 Q: Okay, and tell the jury any time that day or at
16 dinner did you consume any alcoholic beverages?

17 A: No, sir.

18 Q: And in fact do you drink alcohol at all?

19 A: No, sir.

20 Q: How about your wife?

21 A: No, sir.

22 Q: Okay, when you got back from dinner what did you
23 do?

24 A: Went, went back up -- we probably went and swam more
25 than likely and then put the kids back up in the -- to

1 bed.

2 Q: Okay.

3 A: And then after they were in bed my -- we was in a
4 suite and my in-laws were staying with us in the same room.
5 So, we asked them if they would mind watching the kids
6 while we went for a walk.

7 Q: A walk where?

8 A: Out on the beach.

9 Q: Okay, and this is your anniversary.

10 A: Yes, sir.

11 Q: All right, do you know approximately what time that
12 might have been?

13 A: Somewhere around midnight. It was after, you know,
14 after 11 for sure, yes, sir.

15 Q: Okay, and do you recall how you made your way out of the
16 hotel towards the beach?

17 A: Yes, sir. We come out the elevator doors right
18 beside the pool.

19 Q: And if you will point on State's 35 where those doors --
20 in the area in which those doors are located.

21 A: Right in here.

22 Q: And let me ask you there is an MH which has been
23 previously marked. Is that basically the position at which
24 the doors are?

25 A: Yes, sir, I think so.

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1 Q: Let's tell the jury a little bit about the lighting
2 conditions as you exit that door and go onto the pool
3 deck.

4 A: I mean, it's -- there's a little light there. You can
5 see pretty good, yes, sir.

6 Q: And when you first came out the door was there anything
7 that caught your attention?

8 A: Yes, sir.

9 Q: Tell the jury what it was.

10 A: There was a man kind of looking at us kind of, just kind
11 of staring at us almost. It was a different, it was a
12 different look. That's what caught my attention, just a
13 really staring hard at us; and so, I just kind of looked right
14 back at him.

15 Q: Sort of stared right back him?

16 A: Yes, sir.

17 Q: And do you recall where that individual was when you
18 first saw him?

19 A: Yes, sir.

20 Q: Showing you again State's 35.

21 A: Yes, sir, somewhere in this area right here.

22 Q: Okay, and I believe you previously marked a triangle to
23 represent that position; is that right?

24 A: Yes, sir.

25 Q: Okay, now, when you saw him in that position about how

- 1 long did you have an opportunity to view him?
- 2 A: A few seconds.
- 3 Q: And in the lighting that was available were you able
- 4 to clearly observe the features of his face?
- 5 A: Yes, sir.
- 6 Q: And again, what was your degree of attention to him at
- 7 that point?
- 8 A: Pretty good because I just was wondering why he was
- 9 staring, yes, sir.
- 10 Q: Now, did, that individual that you saw did he remain
- 11 in that position?
- 12 A: No, sir.
- 13 Q: In what direction did he go?
- 14 A: Toward the beach.
- 15 Q: Toward the beach, and I don't want to be suggestive but
- 16 just for ease of demonstration you've got him in relatively in
- 17 this position.
- 18 A: Yes, sir.
- 19 Q: The beach is down here. You're saying that he moved in
- 20 this direction?
- 21 A: Yes, sir.
- 22 Q: Okay, and tell me how did he move in that
- 23 direction?
- 24 A: Pretty fast.
- 25 Q: Okay.

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- 1 A: It was almost like he was trying to beat us to the beach
2 ---
3 Q: All right.
4 A: --- when we were coming around the pool, yes, sir.
5 Q: And do you recall at that point how he was
6 dressed?
7 A: Yes, sir, dark clothes.
8 Q: Okay, and let's see if we can be more specific regarding
9 his dark clothes.
10 A: They were ---
11 Q: Can you talk about ---
12 A: They were -- it was long sleeves and long pants.
13 Q: Okay, now, again, this is June 9th?
14 A: Yes, sir.
15 Q: And tell the jury what kind of temperature.
16 A: It was warm, yes, sir, it was real warm.
17 Q: June 9th in Myrtle Beach?
18 A: Yes, sir.
19 Q: Okay, did you say anything and let me ask you this where
20 was your wife?
21 A: She was right beside me.
22 Q: Okay, did you say anything to your wife at that time?
23 A: I don't think so, no, sir.
24 Q: Okay, and do you recall her having said anything to you
25 at that time?

1 A: Not right at that time, no, sir.

2 Q: Okay, after making this observation what then did you do
3 with your wife?

4 A: We were heading toward the beach to, to take a walk
5 and after he had ran by she, she was scared. She didn't want
6 to walk.

7 Q: How did that make you feel?

8 A: Kind of aggravated at her a little bit. I mean, just I,
9 just because I thought it was silly.

10 Q: Okay, if you will, and I know it's going to be difficult
11 for the jury to see this, but if you will show the path that
12 you would have taken towards the beach with your finger and
13 describe it as you go.

14 A: We come out the pool doors right here, then walked
15 around the pool and come out across here. Then you walk
16 over there and hit the boardwalk and come across.

17 Q: And this is the boardwalk you're talking about?

18 A: Yes, sir; yes, sir,

19 Q: And do you recall in what position you were at the
20 boardwalk? Did you come to a stop at the boardwalk?

21 A: Yes, sir.

22 Q: And in what position did you stop basically?

23 A: Somewhere, well, it was kind of stop and go because I
24 was trying to get her to -- she was scared to walk and I
25 wanted to go. So, we just kind of -- well, we ended up

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1 somewhere right in here, yes, sir.

2 Q: And there is an MH there.

3 A: Yes, sir.

4 Q: Those are your initials.

5 A: Yes, sir.

6 Q: And of course, these exhibits will be available to the
7 jury for closer inspection. Now, when you -- when you got
8 in that position on the boardwalk what then did you and
9 your wife do? How were you positioned?

10 A: We were, we were walking across there and she was just
11 -- because I was -- said, "Come on, let's go," and she just
12 said, "Where'd he go? Where'd he go?" She just kept, kept
13 saying that over and I said, "Just come on. Let's go for a
14 walk," and then we didn't. So, we stopped and then we just
15 started hugging, and she was -- she would have been facing
16 north and I was facing south.

17 Q: She's facing north?

18 A: Yes, sir.

19 Q: You're facing south?

20 A: Yes, sir.

21 Q: Okay, now, did anything occur when you were in that
22 approximate position that called your attention north?

23 A: Yes, sir.

24 Q: Okay, and what was it?

25 A: You know, when we were hugging and she just kept saying,

1 you know, "Where'd he go?" And then she said, "Well, there
2 he is," and I was just kind of, "Just leave him alone,
3 honey. It's all right," and then she said, "Well, he's kind
4 of -- he's kind of crouched down over there." So, then I
5 turned around, and as I turned around he was -- he was coming
6 out of a stoop so to speak and turned and looked at us.

7 Q: Now, let's talk about the lighting conditions down
8 here. The lighting conditions in this area were you able
9 to clearly observe his face?

10 A: Yes, sir.

11 Q: And what -- how long did you have an opportunity to
12 look at him?

13 A: Just a couple of seconds.

14 Q: Okay, but in -- within those couple of seconds what view
15 of his face did you have?

16 A: Full face, I mean, he just turned and looked up at
17 us.

18 Q: And were you then looking at him?

19 A: Yes, sir.

20 Q: Frontal face to frontal face?

21 A: Yes, sir.

22 Q: Okay, and at this point what was your degree of
23 attention?

24 A: Pretty good because I -- I mean, I was just, I was
25 wondering why he was still, still right there, you know, and

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1 looking at us. That was -- kind of bothered me a little bit.

2 Q: Bothered you a little bit?

3 A: Yes, sir.

4 Q: Now, at some point in time did he leave that
5 position?

6 A: Yes, sir.

7 Q: Okay, and in what direction did he head?

8 A: North.

9 Q: Did he head north down on the beach?

10 A: No, sir.

11 Q: In what way did he travel?

12 A: Right up through the -- there's some of this kind of
13 seaweed and stuff there or something.

14 Q: Through this grass?

15 A: Yes, sir.

16 Q: Okay, now, let's go to a couple of other exhibits if you
17 will. Let me show you State's 34 which was involved in
18 another -- when you had another opportunity to provide a sworn
19 statement; okay?

20 A: Yes, sir.

21 Q: State's 34, can you identify that photograph?

22 A: Yes, sir.

23 Q: Okay, and is that the Carolina Winds Motel?

24 A: Yes, sir; yes, sir.

25 Q: And there are some marks on this photograph as well.

1 Let me let you take a look at it.

2 A: Yes, sir.

3 Q: Okay, now, specifically let's talk about this mark up
4 here.

5 A: All right, sir.

6 Q: Okay, who made that mark?

7 A: I did.

8 Q: And what was that mark to signify?

9 A: Where the man was standing.

10 Q: Okay, showing you State's 35. In relation to State's
11 34, what is the relationship between this mark, this X in
12 State's 34 and this triangle on State's 35? Are they in the
13 exact same position?

14 A: They don't appear to be, no, sir, but I mean, it's
15 pretty close, but I mean, it's from the different angles.
16 It's ---

17 Q: And let's talk about that.

18 A: All right, sir.

19 Q: Is State's 34 a different angle than State's 35 ---

20 A: Yes, sir.

21 Q: In terms of the side of the motel?

22 A: Yes, sir.

23 Q: Okay, and which of these photographs was it easier for
24 you to more closely approximate the position of the person you
25 saw there by the pool side?

- 1 A: This one, the bigger picture, yes, sir.
- 2 Q: State's 35?
- 3 A: Yes, sir.
- 4 Q: Well, let's stay on State's 34 just another minute
- 5 because there are other markings on State's 34. Down here in
- 6 the sea oats ---
- 7 A: Yes, sir.
- 8 Q: --- okay, there is a -- there's a mark here which is
- 9 relatively close to the boardwalk.
- 10 A: Yes, sir.
- 11 Q: And then there's a mark further along the way in the sea
- 12 oats.
- 13 A: Yes, sir.
- 14 Q: Okay, who made those marks?
- 15 A: I did.
- 16 Q: And do you recall what those marks were made to signify?
- 17 A: I think so, yes, sir.
- 18 Q: And what were they?
- 19 A: This is where I first -- when I was standing, when we
- 20 were hugging, this is where I saw him when I turned around.
- 21 Q: Okay.
- 22 A: And this was, this was when he was walking away and
- 23 about where I last seen him. He was kind of looking up at the
- 24 motel and stuff walking that way.
- 25 Q: So, the X closest to the boardwalk is where you first

1 saw him?

2 A: Yes, sir.

3 Q: And the X walking away is where you last saw him.

4 A: Yes, sir.

5 Q: Okay, let me ask you this, put them down. There we are.
6 Based on those two exhibits, State's 34 and 35, and you'd have
7 to concede there's some difference in the positions in which
8 you placed the individual by the poolside; is that
9 correct?

10 A: Yes, sir.

11 Q: Okay, what did you do in connection with that certain
12 aspect of this observation you had to try and clarify in
13 your mind regarding the position in which you saw this
14 individual?

15 A: We went up to the hotel and tried to figure out
16 exactly where I saw him at.

17 Q: And let me ask you this, was that exercise helpful to
18 you ---

19 A: Yes, sir.

20 Q: --- in determining exactly or more closely approximately
21 where you saw the individual?

22 A: Yes, sir.

23 Q: Let me show you State's 36 into evidence. Can you
24 identify that photograph?

25 A: Yes, sir.

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1 Q: Okay, and what is that a view of?

2 A: That's, that's the pool across from the -- coming off
3 the doors we came out of. This is the pool here and that's
4 my wife on the other side.

5 Q: And this photograph, was it taken at the vantage point,
6 at the place where you first saw the individual by the
7 poolside?

8 A: Yes, sir.

9 Q: And there is an attractive young lady on the other
10 side of that fence. Who is that?

11 A: That's my wife.

12 Q: Okay, and in what position is she right now relating
13 to the position that you saw that individual that night?

14 A: Pretty close, real close, yes, sir.

15 Q: How tall is your wife?

16 A: Five-four.

17 Q: Five-four, and what of your wife are you able to
18 observe in this position from your vantage point at the
19 doors of the pool?

20 A: You can see her head.

21 Q: Her full head?

22 A: Yes, sir.

23 Q: Let me show you State's 37 which is in evidence. Can
24 you identify that photograph?

25 A: Yes, sir.

1 Q: There's a handsome fellow in that one, too; isn't
2 there?

3 A: Not too handsome, no, sir.

4 Q: Who is that?

5 A: That's me.

6 Q: Okay, and the position that you placed yourself in
7 here, well, first of all, from what vantage point is this
8 picture taken?

9 A: That's, that's where I saw looking down off the
10 boardwalk.

11 Q: The picture is taken from the boardwalk where you
12 were positioned.

13 A: Yes, sir.

14 Q: And you're standing where?

15 A: Approximately where I saw him at.

16 Q: Okay, and again, in this position did you have any
17 trouble in distinguishing the face of the individual that was
18 looking at you and you were looking at?

19 A: No, sir.

20 Q: No difficulty with the lighting?

21 A: No, sir.

22 Q: Let's talk about some distances and everybody's got
23 their own internal ruler I know. What I'd like you to do
24 is as I back away let's try and estimate for this jury how
25 far away this individual was from you when you were on the

- 1 boardwalk; okay?
- 2 A: All right, sir.
- 3 Q: I'm backing up. Don't let me hit anything.
- 4 A: All right, sir. Somewhere right in there.
- 5 Q: Right in here.
- 6 A: Yes, sir.
- 7 Q: Estimate about 12, 15 feet?
- 8 A: Sounds good to me, yes, sir.
- 9 Q: Okay, that's just my internal ruler.
- 10 A: Yes, sir.
- 11 Q: All right, now, when you came out of the doors of the
- 12 pool I'm going to back up and you try and stop me. If I get
- 13 too far out of the courtroom, just holler for me, okay?
- 14 A: All right, sir.
- 15 Q: All right.
- 16 A: Somewhere around there.
- 17 Q: Right about here?
- 18 A: Yes, sir.
- 19 Q: Okay, I'm not going to try and use my internal ruler on
- 20 that one. Suffice it to say it's the back of this courtroom.
- 21 A: Yes, sir.
- 22 Q: Okay, now, maybe the more important question is after
- 23 your wife having observed this what decision did you jointly
- 24 make about whether or not you were going to take that walk
- 25 on the beach?

1 A: We didn't go.

2 Q: Didn't go?

3 A: No, sir.

4 Q: What did you do?

5 A: We went back up to the hotel.

6 Q: Okay, that was the end of that.

7 A: That was the end, yes, sir.

8 Q: Okay, happy anniversary.

9 A: Thank you.

10 Q: Now, did there come a point in time, Mr. Hobbs, when
11 you learned or believed what you and your wife or the
12 person that you and your wife had observed on the evening of
13 June 9th after 11 o'clock would be of interest to the
14 Myrtle Beach Police Department?

15 A: Yes, sir.

16 Q: Tell me how that occurred.

17 A: The next morning, I don't remember exactly what time
18 it was or not, but I -- we -- I was in the other room and we
19 had, you know, like a lot of family was here. So, everybody
20 was running around, but then they, they hollered at me and
21 said, "Come in here and look at this."

22 MR. MARTIN: Your Honor, we need to approach the bench
23 just a second.

24 THE COURT: All right.

25 (Whereupon, a bench conference was held in the presence

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1 but out of the hearing of the jury.)

2 BY MR. HUMHPRIES:

3 Q: Mr. Hobbs, as a result of what you either saw or heard
4 on the news report, and let me ask you this because we do
5 need to clear this up, on what you saw on the news report
6 was there ever displayed a picture of a suspect?

7 A: No, sir.

8 Q: Okay, no, based on what you saw and/or heard from that
9 news report what then did you do or what then did you or wife
10 do?

11 A: Well, they said something on there.

12 Q: Well, what ---

13 A: Yes, sir.

14 Q: --- and that's sort of what we need to be careful
15 without saying what they said.

16 A: Yes, sir.

17 Q: Well, let me ask you this, is what the news said did
18 that -- was that consistent with your observations?

19 A: Yes, sir.

20 Q: Okay, and did that then cause you or bring you to the
21 decision to do something?

22 A: Yes, sir.

23 Q: Okay, and what was that?

24 A: We called the police department.

25 Q: Okay, Myrtle Beach Police Department.

1 A: Yes, sir.

2 Q: And you all are on vacation.

3 A: Yes, sir.

4 Q: Did you and your wife have a discussion about whether
5 a call should be made?

6 A: Yes, sir.

7 Q: Both of you immediately in favor of calling the
8 police?

9 A: No, sir.

10 Q: Okay, who was for it and who was against it?

11 A: Well, neither one of us was really for it at first. I
12 think I was more for it, but neither one of us really wanted
13 to take the time to get involved with that, and I, I said,
14 "Well, we ought to tell them at least that. We could tell
15 them it was a white man, you know, at least."

16 MR. MARTIN: Your Honor, I'm sorry, excuse me.

17 Q: Okay, go ahead.

18 A: That it was a white man that we saw, and I said, "Well,
19 maybe that could be of some help." So, we decided to call,
20 and I don't remember who made the call but ended up talking to
21 them and we told them that. That was pretty much it.

22 Q: Okay, and did you think you had completed your civic
23 service at that point?

24 A: Yes, sir.

25 Q: Okay, had you?

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1 A: No, sir.

2 Q: Okay, after advising the Myrtle Beach Police Department
3 of what you had seen or at least to the extent that you saw a
4 white man in dark clothing ---

5 A: Yes, sir.

6 Q: --- as you testified, what, what then happened next?

7 A: They asked me to come down and if I could do a
8 composite.

9 Q: A composite?

10 A: Yes, sir.

11 Q: And you've got a lot of experience in doing composites.

12 A: No, sir.

13 Q: Ever done one before?

14 A: No, sir.

15 Q: How did you find the process?

16 A: Very difficult.

17 Q: Tell the Court -- I'm sorry. Tell the jury where you
18 had to go to do this.

19 A: Down at the police station.

20 Q: This is still during your vacation?

21 A: Yes, sir.

22 Q: Okay, and tell the jury a little bit about the process
23 that you had to go through.

24 A: Went down there, and he just asked if I could, you know,
25 just -- he had a -- you had to pick from a whole bunch of

1 faces and the shape of faces, the foreheads, eyes, noses,
2 ears.

3 Q: Now, was this on a computer?

4 A: Yes, sir.

5 Q: Computer program?

6 A: Yes, sir.

7 Q: Just flash up certain features by themselves and you
8 had to look at them?

9 A: I think so. I'm trying to remember -- I don't remember
10 exactly. I just remember trying to look at all these
11 different eyes and trying to bring them over to the, to the
12 picture, yes, sir.

13 Q: Okay.

14 MR. HUMPHRIES: Your Honor, at this time the State and
15 the Defense have a stipulation of fact regarding that
16 computer program and the potential options.

17 THE COURT: All right.

18 MR. MARTIN: Yes, we do.

19 THE COURT: Okay. If you'd read it into the record,
20 please, or state it.

21 MR. HUMPHRIES: And that stipulation is that the computer
22 program utilized by the Hobbses had the option of
23 approximately 250 sets of eyes and had approximately 100
24 sets of foreheads from which to chose. Fair enough?

25 MR. MARTIN: Fair enough.

1 THE COURT: Is that it?

2 MR. MARTIN: Fair enough.

3 THE COURT: All right, that is now in evidence for
4 your consideration.

5 MR. HUMPHRIES: And we may reduce that to writing for
6 the purpose of the jury.

7 THE COURT: Very good.

8 BY MR. HUMPHRIES:

9 Q: So, did you attempt to do this?

10 A: Yes, sir.

11 Q: Okay, and about how long did you work at it?

12 A: I really don't know. I couldn't tell you the time,
13 no, sir.

14 Q: Okay, did you come -- did there come a point in time when
15 you said, "I've had enough"?

16 A: Yes, sir.

17 Q: Okay, and after you had had enough did you have a face
18 of some sort constructed?

19 A: Yes, sir.

20 Q: And tell the jury what your feelings were regarding
21 your handiwork. How close was it?

22 A: I didn't like it at all.

23 Q: And tell the jury specifically what you didn't like.

24 A: The eyes.

25 Q: The eyes.

1 A: Yes, sir.

2 Q: And this is in evidence, Defense Exhibit Two. Showing
3 you Defense Exhibit Two. Do you recognize this as the
4 composite that you worked on?

5 A: Yes, sir.

6 Q: And in fact did you and your wife later work on
7 it together?

8 A: Yes, sir.

9 Q: Okay, and again, tell the jury what you were not
10 satisfied with particularly with this.

11 A: The eyes.

12 Q: So, then your wife comes.

13 A: Yes, sir.

14 Q: She happy about that?

15 A: No, sir.

16 Q: Okay, and when she gets down there does she attempt to
17 improve what you've done.

18 A: Yes, sir.

19 Q: Does she make some changes?

20 A: I think so, yes, sir.

21 Q: Okay, and we'll talk with her about how she felt about
22 her handiwork. Did you have any other contact with the Myrtle
23 Beach Police Department while you were there on vacation after
24 this if you recall?

25 A: I don't recall, no, sir.

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- 1 Q: Okay, now, did you ultimately come to the end of your
2 vacation ---
- 3 A: Yes, sir.
- 4 Q: --- and return home?
- 5 A: Yes, sir.
- 6 Q: And then returning home what was your hopes in regard
7 to your involvement in this case?
- 8 A: I figured it was over with.
- 9 Q: Did there come a time that you were contacted by a
10 law enforcement agency in connection with this case?
- 11 A: Yes, sir.
- 12 Q: Okay, and do you recall whether it was you or your wife
13 that was first contacted?
- 14 A: I don't remember, no, sir.
- 15 Q: But in any event, you as a couple were contacted.
- 16 A: Yes, sir.
- 17 Q: Somebody at Myrtle Beach?
- 18 A: Yes, sir.
- 19 Q: Okay, and did they tell you the purpose of their
20 contact, why they called you?
- 21 A: I think so, yes, sir.
- 22 Q: And what is your recollection?
- 23 A: It seem like they wanted to get back with us later and
24 they were going to, you know, and maybe come talk to us.
- 25 Q: Okay, ultimately did you receive a telephone call from

1 Kent Robey, who was then a lieutenant with the Bedford County
2 Sheriff's Department?

3 A: Yes, sir.

4 Q: Okay, and as a result of that phone call was an
5 appointment made for him to come visit you at your home?

6 A: Yes, sir.

7 Q: And does the date June the 28th, 1998, sound like the
8 date?

9 A: Yes, sir; yes, sir.

10 Q: Okay, now, now, when Lieutenant Robey arrived did he
11 tell you the purpose for which he was there?

12 A: Yes, sir.

13 Q: And what did he say?

14 A: He told us that he had a lineup that we'd have to -- he
15 was going to show us and he was going to have to separate us.

16 Q: Okay, and at that point did he have any of the documents
17 he brought with him out?

18 A: No, sir.

19 Q: Okay, and who went first?

20 A: I did.

21 Q: Okay, and how were you all separated, you and your wife?

22 A: My wife was -- we were in the dining room and my wife
23 was in the back bedroom.

24 Q: Okay, and did you see her go to the back bedroom or do
25 you know that she went to the back bedroom?

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- 1 A: Yes, sir, know she went back, yes, sir.
- 2 Q: Close the door?
- 3 A: Yes, sir.
- 4 Q: All right, now, where were you all situated in your
- 5 house, you and Lieutenant Robey?
- 6 A: We were in the dining room.
- 7 Q: All right.
- 8 A: On the opposite end of the house.
- 9 Q: Say again.
- 10 A: On the opposite end of the house.
- 11 Q: Okay, how do you recall Lieutenant Robey beginning the
- 12 process?
- 13 A: He read us, he read this paper, and ---
- 14 Q: Let me show you State's 23 which is in evidence.
- 15 A: Yes, sir.
- 16 Q: Do you recognize that document?
- 17 A: Yes, sir.
- 18 Q: Did he read this in full?
- 19 A: He did, yes, sir.
- 20 Q: Did he give you an opportunity and ask you to read
- 21 it?
- 22 A: Yes, sir
- 23 Q: Did you read it?
- 24 A: Yes, sir.
- 25 Q: Did you understand it?

1 A: Yes, sir.

2 Q: Let me ask you specifically, did you understand that
3 this group of photographs may or may not contain a picture of
4 the person who committed a crime now being investigated?

5 A: Yes, sir.

6 Q: What did that mean to you?

7 A: It meant that it -- he may be there, may not be there.

8 Q: Okay, let me ask you this, how would you have felt if
9 you had not seen the person that you saw in Myrtle Beach in
10 that lineup?

11 A: Probably relieved.

12 Q: Read the admonition form to you, had you read it; is
13 that right?

14 A: Yes, sir.

15 Q: What did he then ask you to do in connection with the
16 admonition form, State's 23?

17 A: Had to sign it.

18 Q: Did you do so?

19 A: Yes, sir.

20 Q: After that was done what next?

21 A: He got out the, a photo lineup.

22 Q: Showing you State's 20.

23 A: Yes, sir.

24 Q: Is that a photo lineup?

25 A: Yes, sir.

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1 Q: Now, when he presented it to you what if any
2 instructions did he give you? Well, let me go back just a
3 second. In addition to this admonition form did Lieutenant
4 Robey ask you if you had seen any photographs of the suspect?

5 A: I think he did, yes, sir.

6 Q: And what was your response if any?

7 A: No.

8 Q: In any event, had you seen a picture of the suspect
9 before you saw State's 20, the photographic lineup?

10 A: No, sir.

11 Q: All right, he presents you with the photo lineup, the
12 color photo lineup, which is State's 20, does he give you
13 any instructions at that time?

14 A: Just, he said look at it and see if I recognize anyone
15 there.

16 Q: Okay, and then did you begin that process?

17 A: Yes, sir.

18 Q: Okay, and tell the jury a little bit about how you went
19 about doing that.

20 A: I just kind of looked at each one, studied them and just
21 tried to study them, you know, you want to make positive if
22 there's somebody you recognize there and there was one there
23 that I recognized, yes, sir.

24 Q: Well, let me ask you this, how early on in the process
25 did you see someone that you recognized?

1 A: Pretty quick.

2 Q: Pretty quick?

3 A: Yes, sir.

4 Q: But separate and apart from that you looked at the

5 rest of the photographs.

6 A: Yes, sir.

7 Q: Okay, and in your words you studied them.

8 A: Yes, sir.

9 Q: Do you have any estimation for this jury approximately

10 how long that took?

11 A: A few minutes. I really don't know, no, sir.

12 Q: Okay, and did you do anything in connection with

13 State's 20 to get a better look at anyone or more of the

14 features if you recall?

15 A: I don't recall. I mean, I may have like covered

16 eyes or something. So, I don't really know if I, you know,

17 I don't, I don't recall.

18 Q: Okay, in any event at some point in time in this

19 process, this few minutes, did you indicate to Lieutenant

20 Robey that there was something that you did recognize?

21 A: Yes, sir.

22 Q: Okay, and do you recall what you said to Lieutenant

23 Robey regarding your selection, that is how did you indicate

24 to him your selection?

25 A: I really don't know what I said, no, sir, but I kind

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1 of pointed out. I said, "Well, this, it's that one right
2 there."

3 Q: It's that one right there?

4 A: Yes, sir.

5 Q: And I understand that the words may not come to you
6 at this point but let me ask you this, in regard to your
7 selection in State's 20 were you certain that the person
8 that you had identified was the person you saw on June
9 9th, 1998, at the poolside and in the sea oats there at the
10 Carolina Winds?

11 A: Yes, sir.

12 Q: Any question in your mind?

13 A: No, sir.

14 Q: Now, having done that did he have another request of
15 you regarding State's 21?

16 A: Yes, sir.

17 Q: And what was that request?

18 A: To initial and date and time the other picture that I
19 had picked out.

20 Q: All right, and did you do that?

21 A: Yes, sir.

22 Q: These are your initials here at the top?

23 A: Yes, sir.

24 Q: Now, in going through this entire process when you're
25 looking at State's 20 did Lieutenant Robey ever suggest to

1 you that the person that you saw in Myrtle Beach was
2 contained in that photograph?

3 A: No, sir.

4 Q: Never?

5 A: No, sir.

6 Q: Did he ever suggest to you which person you should
7 select if anyone at all?

8 A: No, sir.

9 Q: Did he ever give you any encouragement regarding any
10 particular subject contained in that photograph?

11 A: No, sir.

12 Q: And, in fact, after you selected the one in position
13 one did he give you any encouragement at that time?

14 A: No, sir.

15 Q: Didn't say good job?

16 A: No, sir.

17 Q: What did he do then?

18 A: He said, "Well, we'll get your wife to do this now,"
19 and so, we -- he walked me down the hallway and we got my wife
20 out the bedroom and I went in and shut the door and then
21 they, then they went on to -- for her turn to do this.

22 Q: Okay, now, did you go back in that room and shut the
23 door?

24 A: Yes, sir.

25 Q: And passing by your wife did you say anything, make any

1 hand gesture, make any signal to indicate either that you had
2 picked out somebody or who you had picked out?

3 A: No, sir.

4 Q: Okay, and at that point did you know that the person
5 that you had picked out was actually the suspect that Myrtle
6 Beach was questioning?

7 A: No, sir.

8 Q: Now, after your wife finished this procedure were you
9 then called out of the room?

10 A: Yes, sir.

11 Q: Okay, and did Lieutenant Robey at that time tell you
12 both of you picked out the same one?

13 A: No, sir.

14 Q: Okay, did he tell you, "Well, you picked out the
15 right one?"

16 A: No, sir.

17 Q: Okay, did you have any questions of Lieutenant Robey
18 at that time?

19 A: I don't think so, no, sir.

20 Q: Are you aware if your wife had any questions of
21 Lieutenant Robey?

22 A: No, sir.

23 Q: Okay, he left.

24 A: Yes, sir.

25 Q: Okay, and after he left did you have an occasion then

1 to either hear from him or talk to him again in connection
2 with this photo lineup?

3 A: No, sir, I didn't talk to him.

4 Q: Do you know if your wife did?

5 A: I think she did, yes, sir

6 Q: Okay, and based on Lieutenant Robey's conversation
7 with your wife what did you learn?

8 A: She called me. I was at work and she called me and
9 told me that the, the man that we had picked out happened
10 to be the suspect.

11 Q: Okay, and was it at that time that you learned that
12 both of you had picked out the same person?

13 A: Yes, sir.

14 Q: Were you aware before that time, if you recall, whether
15 or not you knew that both of you had picked out the same
16 person?

17 A: I don't remember that, no, sir.

18 Q: Okay, and did you have any questions or concerns at that
19 point after having picked out the suspect and been advised
20 by law enforcement that that was the suspect that they were
21 interested in?

22 A: Not really. I mean, I didn't really have any
23 questions, no, sir.

24 Q: Now, let's do this, have you had the opportunity in
25 addition to June 28th, 1998, to give sworn statements, that

1 is statements under oath regarding your identification of
2 the suspect in this case?

3 A: Yes, sir.

4 Q: Three times.

5 A: Yes, sir.

6 Q: And in all of those three times has your identification
7 of the suspect been consistent?

8 A: Yes, sir.

9 Q: Answer has always been the same.

10 A: Yes, sir.

11 Q: Let me ask you this, are you any more sure or less
12 sure of your identification today than you were on June
13 28th, 1998?

14 A: No, sir.

15 Q: Now, was there a point in time when you were
16 approached by the parents and brother and sister of the
17 victim in this case, Brent Poole?

18 A: Yes, sir.

19 Q: In terms of timing was it before or after these
20 three previous occasions when you provided sworn under oath
21 statements regarding the identification of John Boyd
22 Frazier?

23 A: It was after.

24 Q: After? Do you recall how long after?

25 A: I don't recall exactly. I would -- I'd guess close

1 to a year or so.

2 Q: Now, tell the jury just a bit about how this contact
3 and this meeting took place.

4 A: Well, we were -- I was contacted and we were asked if
5 we would like to go out and have dinner.

6 Q: Okay, and let me ask you this -- well, I'll save that.
7 Did you say yes?

8 A: Yes, sir.

9 Q: And did they get in the car and come on down to your
10 place?

11 A: Yes, sir.

12 Q: All right, did you go and have dinner?

13 A: Yes, sir.

14 Q: And was there something that was remarkable that
15 occurred at dinner?

16 A: Yes, sir.

17 Q: Tell the jury about that.

18 A: Well, we had dinner and we just were just kind of
19 talking having conversation talking about family and
20 different things, but -- and at the end of the dinner they
21 presented us with a card and we opened the card up. It was
22 just a, you know, thanks and then when I opened the card up
23 there was two checks in it.

24 Q: Two checks?

25 A: Yes, sir.

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1 Q: Tell the jury what the checks were for.

2 A: They were for \$10,000 each, one for me and one for
3 my wife.

4 Q: And what did you learn from the Pooles regarding the
5 reason for the checks?

6 MR. MARTIN: Objection.

7 MR. HUMPHRIES: Well, now, we're going to need some
8 leeway here, Judge.

9 THE COURT: Let me have you come forward.

10 MR. MARTIN: Well ---

11 MR. HUMPHRIES: We need some leeway.

12 (Whereupon, a Bench conference was held in the
13 presence, but out of the hearing, of the jury.)

14 THE COURT: All right, give him just a minute.

15 Bear with us just a minute, ladies and gentlemen of
16 the jury.

17 MR. MARTIN: I will withdraw my objection to that
18 question and see as we go along.

19 THE COURT: All right, go right ahead, sir.

20 MR. HUMPHRIES: Thank you.

21 BY MR. HUMPHRIES:

22 Q: Mr. Hobbs, what did you understand the money was for?

23 A: It was for, "I appreciate, thank you for stepping
24 forward."

25 Q: Okay, and were you made aware that it was a reward

1 which had been previously issued at large to anyone in
2 assistance in this case by the Poole family?

3 A: What, was I made aware of it? Yes, sir, at
4 dinnertime, yes, sir.

5 Q: At dinnertime.

6 A: Yes, sir.

7 Q: That's my question, prior to that dinner, as much as a
8 year after the last time you provided sworn under oath
9 statement regarding the identification of John Boyd Frazier
10 had you ever known of any offering of any reward in
11 connection with this case?

12 A: No, sir.

13 Q: And what was your reaction when the Pooles, Brent's
14 parents and his brother and sister extended this reward to
15 you and your wife?

16 A: I was very surprised and I didn't really want to take
17 it.

18 Q: And tell them what you said.

19 A: I told them, "No, I don't want to take this," and they
20 insisted.

21 Q: Now, here's my question, having testified under oath
22 -- sorry, having provided sworn statements under oath three
23 previous times in regard to the identification of John Boyd
24 Frazier and on all three occasions identifying John Boyd
25 Frazier consistently, does the fact that the Poole family

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1 extended this reward in connection with the murder of their
2 son, does it impact your testimony before this jury in any way
3 whatsoever?

4 A: No, sir.

5 Q: Does it make you more certain regarding your
6 identification today as you sit there?

7 A: No, sir.

8 Q: Has the certainty of your identification changed from
9 June 9th, 1998, June 28th, 1998, till the present day, has
10 it changed whatsoever?

11 A: No, sir.

12 Q: Let me ask you, based on your observations on June
13 9th, 1998, at the Carolina Winds Hotel in Myrtle Beach,
14 South Carolina, of the individual that you saw that day or
15 that evening can you tell this jury is that person in the
16 courtroom today, Mr. Hobbs?

17 A: Yes, sir.

18 Q: Point him out.

19 A: Mr. Frazier.

20 MR. HUMPHRIES: Let the record reflect he's indicated the
21 Defendant.

22 THE COURT: The record will so reflect.

23 BY MR. HUMPHRIES:

24 Q: Let me ask you this, State's 20, that's the fellow you
25 saw that night?

1 A: Yes, sir.

2 Q: No question?

3 A: No, sir.

4 Q: Tell the jury a little bit, if you've observed it, about
5 the change in appearance of the Defendant since June 9th,
6 1998, or in this case June 13th, 1998, till present day.

7 A: I didn't understand the question. I'm sorry.

8 Q: How has he changed in appearance from then ---

9 A: Until.

10 Q: --- until now.

11 A: Until now? Not a whole lot, not to me really, but ---

12 Q: How about his hair?

13 A: It's thinned, yes, sir.

14 Q: How about his weight?

15 A: Gained a little bit, maybe.

16 Q: Any question in your mind the same person?

17 A: No, sir.

18 Q: And the record will reflect the person in position
19 number one on State's 20 is the Defendant, John Boyd
20 Frazier. That's all we have at this time.

21 THE COURT: Cross.

22 MR. MARTIN: May it please the Court.

23 THE COURT: Yes, sir.

24 CROSS EXAMINATION

25 BY MR. MARTIN:

Mark Hobbs - Cross by Mr. Martin

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1 Q: Flip, flip up the picture, the State's Exhibit Number
2 One.

3 (Mr. Martin and staff confer.)

4 That's the -- that's this picture of the hotel that Mr.
5 Hobbs has been testifying about, this big overall picture if I
6 can find it, this one, this one.

7 Mr. Hobbs, you and I are going to get to practice with
8 this computer. Do you know a lot about computers?

9 A: No, sir.

10 Q: I don't either. Is this thing ready to work here?
11 Mr. Hobbs, let me ask you, can you turn around here so you
12 can see this thing?

13 THE COURT: Now, he's, he's without the benefit of a
14 ---

15 MR. MARTIN: His microphone.

16 THE COURT: --- microphone. Let's see if we can move
17 it.

18 MR. MARTIN: Well, do what?

19 THE COURT: We'll move that one over, okay. Just watch
20 out for that wire behind you. Okay.

21 BY MR. MARTIN:

22 Q: Now, Mr. Hobbs, let me ask you first of all, whoever
23 you saw at this -- at the beach that night you didn't see
24 them with a gun; did you?

25 A: No, sir.

1 Q: You didn't see them with any weapon of any kind; did
2 you?

3 A: No, sir.

4 Q: And the only place you saw them was behind the Carolina
5 Winds Motel at 76th Avenue; right or wrong?

6 A: The only place I saw him?

7 Q: Yeah, was behind there at this motel.

8 A: Yes, sir.

9 Q: All right, you didn't see him anywhere else in Myrtle
10 Beach that night.

11 A: No, sir.

12 Q: Okay, now, in these prior statements that you have given
13 is it fair to say that you have placed yourself and the person
14 that you saw around the motel that night in different
15 positions in different statements made at different times?

16 A: Yes, sir, I think they're all pretty close, but yes,
17 sir, it's fair to say that.

18 Q: Is it fair to say that?

19 A: Yes, sir, but it's pretty close.

20 Q: All right, and let's see how this works, Mr. Hobbs. If
21 you could take this little pen and show the jury where you
22 came out of the -- you got to press a color or something?

23 MS. ROBERTS: Press like the red or the blue.

24 MS. HANNA: The red.

25 Q: You like red, Mr. Hobbs?

Mark Hobbs - Cross by Mr. Martin

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1 MS. ROBERTS: Whatever you want.

2 A: This right up here?

3 Q: Let's try that. Yeah, let's try that.

4 A: All right, sir.

5 Q: All right, put an X there where you came out of the
6 motel.

7 A: All right, somewhere right in here.

8 Q: All right, and then, and then put an X where you first
9 say in your first statement, and we've got the pictures here,
10 Mr. Humphries went through them with you, where it was that
11 you saw the man as he stood out in the street across the pool.

12 A: Somewhere right in here. It's hard to ---

13 Q: All right, right in there?

14 A: Yes, sir.

15 Q: All right, and then is it fair to say that that person
16 in the next statement went further up the street away from the
17 ocean? In other words put another X where you, where he had
18 been moved to in your later statements.

19 A: Well, I don't know.

20 MR. HUMPHRIES: Your Honor, let me just suggest, we've
21 got pictures, which have been marked by this witness
22 in prior sworn statements and they speak for themselves.
23 To try and duplicate it now with no reference to them is
24 almost impossible.

25 MR. MARTIN: They don't have -- they don't have them

1 all on there, Mr. Humphries.

2 MR. HUMPHRIES: Well, they do. You've got 35 up there.

3 THE COURT: Let him refer then, too, if he's unsure.

4 MR. HUMPHRIES: That's all I'm asking. Just let him
5 see the pictures.

6 MR. MARTIN: Where is 35?

7 MR. BRITTAIN: Right here, I believe. That's 34.

8 MR. HUMPHRIES: I'm sorry.

9 Q: All right, let me ---

10 MR. HUMPHRIES: 34 and 35 is the big one.

11 MR. BRITTAIN: 34, here's 34.

12 THE COURT: All right.

13 BY MR. MARTIN:

14 Q: All right, let me show you State's Exhibit Number 34,
15 Mr. Hobbs.

16 A: Yes, sir.

17 Q: All right, if you put a -- you had put an X there and
18 said in one of your statements that the man you saw was
19 standing in that location; right?

20 A: Close to that vicinity, yes, sir.

21 Q: All right, now, is that close to where you have this
22 mark on the board?

23 A: From this angle you can't tell.

24 Q: All right, now, but there's no question that you
25 decided -- you went back down there to the motel.

Mark Hobbs - Cross by Mr. Martin

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- 1 A: Yes, sir; yes, sir.
- 2 Q: After you've given a statement and took another look;
3 didn't you?
- 4 A: Yes, sir.
- 5 Q: All right, and you decided once you had done that the
6 man was actually standing, so you can see this ---
- 7 A: Yes, sir.
- 8 Q: --- that the man was actually standing further up ---
- 9 A: Yes, sir.
- 10 Q: --- towards the street up here?
- 11 A: Yes, sir.
- 12 Q: Right?
- 13 A: Yes, sir.
- 14 Q: Okay, and then that is the time that you put the X that
15 is on State's Exhibit 35; is that right?
- 16 A: Yes, sir, probably so, yes, sir.
- 17 Q: And then they actually took a picture while you were
18 there.
- 19 A: Yes, sir.
- 20 Q: In which you placed your wife where you say the man
21 was standing.
- 22 A: Yes, sir.
- 23 Q: Right?
- 24 A: Yes, sir.
- 25 Q: And that is State's Exhibit Number 36.

- 1 A: Yes, sir.
- 2 Q: Is that right?
- 3 A: Yes, sir.
- 4 Q: All right, and in that picture your wife is standing
- 5 even further back up towards the street than what you had
- 6 marked on either of the other pictures, State's Exhibit One
- 7 or 35; wasn't she?
- 8 A: Yes, sir.
- 9 Q: All right.
- 10 A: But when you're looking at it from, from an airplane
- 11 picture versus when you're standing exactly where you were
- 12 it's totally different.
- 13 Q: All right, I understand. I understand.
- 14 A: Yes, sir.
- 15 Q: But there's no question now that you have progressively
- 16 moved this person -- that you had progressively moved this
- 17 person from here back this way; had you not?
- 18 A: Well, it appears so, yes, sir.
- 19 Q: All right, now, that's important to us because why,
- 20 Mr. Hobbs?
- 21 A: Well, I don't know if it's real important or not
- 22 because this is not where I was standing. I was standing
- 23 here.
- 24 Q: Well, you were standing ---
- 25 A: I mean, when I was standing here looking right, I can

1 see exactly the way everything was. From this angle I have no
2 idea.

3 Q: Well, no, maybe you're missing my point. The street
4 and the fence that run there by the motel are on an incline;
5 are they not?

6 A: I think so, yes, sir.

7 Q: All right, now, if your wife had been standing back up
8 here where you initially placed them you could not have
9 seen her at all; could you?

10 A: I don't know.

11 Q: You don't know?

12 A: No, sir.

13 Q: Okay, all right, do you know then why you decided that
14 she had changed in position -- the person had changed in
15 position from here to here?

16 A: Do I know what ---

17 Q: What difference does that make? What difference does
18 that make? Do you know?

19 A: Well, I just -- they just asked me to point out where I
20 could see him at. I know where I saw him at and that's when
21 you come out the door you can see plainly where you saw him
22 at.

23 Q: All right, but you know the area. You've been down
24 there and that street is on an incline; is it not?

25 A: I think so.

1 Q: All right, and if a person is standing at one end of
2 the pool behind this fence, you may be able to see them.
3 Whereas if you move down this way to the other end of the
4 pool because of the street declining you couldn't see that
5 same person over the fence which remained level; could you?

6 A: Probably not.

7 Q: Okay, so, whether or not you could see a six foot
8 person would depend on where they were standing along this
9 pool area; right?

10 A: That's correct.

11 Q: All right, now, another statement that you had made,
12 let me ask you this, you testified -- sit back there.
13 Just put that thing down. I don't know about this.

14 A: Me neither.

15 Q: You testified on State's Exhibit Number 35, now look
16 at that thing. Now, your wife is standing there; right?

17 A: Yes, sir.

18 Q: That picture taken in the daytime; right?

19 A: Yes, sir.

20 Q: Can you tell whether she's got on short or long
21 pants?

22 A: No, sir, not right there.

23 Q: All right, well, then how did you know that this
24 person that you saw that night had on long pants as you
25 testified on direct examination?

Mark Hobbs - Cross by Mr. Martin

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- 1 A: When they were running across there, going across the
2 -- toward the boardwalk.
- 3 Q: Well, but now, Mr. Hobbs, the further they run the
4 less you see; right?
- 5 A: Not when they get out there, no, sir.
- 6 Q: Well, where is that you ---
- 7 A: At the, at the boardwalk.
- 8 Q: --- can before they get to the boardwalk?
- 9 A: At the boardwalk there you can see it.
- 10 Q: Oh, it was after he got all the way down to the
11 boardwalk. You can see from there? Show -- well -- where,
12 where were you? Where can you see this individual between
13 where they're standing and the boardwalk?
- 14 A: Well, you can, you can see, you can see his upper
15 body all the way down through here.
- 16 Q: I agree with that.
- 17 A: Yes, sir.
- 18 Q: All right, well, I don't know about short pants. I'm
19 going to ask you again now. If you want to you can step down
20 there and look at that or you can do it on this or wherever
21 you can do it but show me at what point through there you
22 can tell that he would have had on short pants, I mean,
23 long pants, long pants.
- 24 A: When he went by the gate that we were walking out of
25 you could see it plainly.

1 Q: You could see it plainly.

2 A: Yes, sir.

3 Q: All right, well, I'm going to come back to you on
4 that.

5 A: All right, sir.

6 Q: Now, you would agree with me on this the person that
7 you saw there across the pool you saw for a couple of
8 seconds at most.

9 A: Probably somewhere around there. We were staring --
10 he was staring at us. So, we stared right back and it
11 was, I mean, I'm just kind of guessing there, but ---

12 Q: Now, your wife didn't stare right back, only you stared
13 right back; am I right?

14 A: I don't know about her.

15 Q: All right, you've discussed this with her some;
16 haven't you?

17 A: Probably so.

18 Q: And so, you stared right back, okay.

19 A: Yes, sir.

20 Q: Is that true?

21 A: Yes, sir.

22 Q: All right, and you got a two second look.

23 A: All right, sir.

24 Q: Is that right?

25 A: Yes, sir, close to that.

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1 Q: All right, and at that distance and in this picture
2 which is ---

3 MR. BRITTAIN: Right there on that table.

4 Q: --- State's Exhibit 35; is that right?

5 A: Yes, sir.

6 Q: All right, and that picture was taken in the daytime;
7 wasn't it?

8 A: I think so, yes, sir.

9 Q: All right, and you got a two second look; is that
10 right?

11 A: Yes, sir.

12 Q: All right, and it was in the nighttime and you got a
13 good enough look at that distance in the nighttime in two
14 seconds to positively, certainly, without any problem
15 identify the man you saw.

16 A: Yes, sir, we saw him then and then when you saw him
17 again after the boardwalk you knew exactly it was the same
18 person.

19 Q: All right, but could you make your identification from
20 what you saw here or did you need what you saw on the
21 beach?

22 A: I don't know. I saw both ways. So, I really
23 couldn't tell you which.

24 Q: All right, but this is an accurate photograph here;
25 isn't it?

- 1 A: Yes, sir.
- 2 Q: No question about that.
- 3 A: Yes, sir, pretty close.
- 4 Q: The lighting was dim at best; was it not?
- 5 A: Probably so.
- 6 Q: And you could not tell from the look you got whether
- 7 this person had a hood behind his sweatshirt or whether he
- 8 had a ponytail hanging back there; could you?
- 9 A: From that angle, no, sir.
- 10 Q: All right, let's talk about the angle now. I've
- 11 understood you to testify that the person that you saw was
- 12 looking, that you first saw them from the side, a side
- 13 view.
- 14 A: The -- when I first saw him he was looking right at
- 15 us.
- 16 Q: All right, when you saw him he was looking right at
- 17 you; right?
- 18 A: Yes, sir; yes, sir.
- 19 Q: And then he -- and he didn't appear to be trying to
- 20 hide from you; did he?
- 21 A: No, he was staring at us.
- 22 Q: Looked right at you.
- 23 A: Yes, sir.
- 24 Q: Staring right at you?
- 25 A: Yes, sir.

1 Q: Didn't have a ball cap or anything on his head.

2 A: No, sir.

3 Q: All right, and then he turned back around and then he
4 turned away from you and walked on down the beach.

5 A: Running more, I mean, fast pace, yes, sir.

6 Q: All right, so, you saw him from the front, from the
7 side and from the back; did you not?

8 A: I did, but when he turned away I didn't really --
9 when he was turned at first you didn't really have a --
10 wasn't looking at him. It's hard then because he had
11 turned away, but it's -- you just don't really quit looking
12 now but then when he started running.

13 Q: I understood you to say that you had a ---

14 A: Well, we were eye to eye, yes, sir.

15 Q: --- heightened degree of attention at what this person,
16 as you observed this person, okay.

17 A: Yes, sir.

18 Q: Is that right or wrong?

19 A: That's right.

20 THE COURT: One at a time, one at a time, please.

21 MR. MARTIN: I'm sorry. I'm sorry, Your Honor.

22 BY MR. MARTIN:

23 Q: Right or wrong?

24 A: That's correct.

25 Q: All right, and I understood you to testify that you

1 got a full frontal look, a side look and he turned away
2 from you; right?

3 A: I had a full frontal look and then he just took off
4 running; yes, sir.

5 Q: No, now, well, now, you say he took off running. You
6 said, "Well, when he took off and started the other way" --

7 A: Yes, sir.

8 Q: --- whether he'd be walking or running then you got a
9 look at the back side of him; didn't you?

10 A: Yes, sir.

11 Q: All right, so, my question to you, Mr. Hobbs, and I
12 don't want to belabor it again but did you -- could you
13 tell that whether it was a hood or a ponytail?

14 A: No, sir.

15 Q: Could have been either one; couldn't it?

16 A: Yes, sir.

17 Q: All right, sir, but in spite of the fact that you
18 couldn't tell whether it was a hood or a ponytail you're
19 saying you can pick out his eyes in the dark; am I right?

20 A: Yes, sir.

21 Q: All right, now, I believe that you had -- you said
22 that when you saw him on the beach it was about this
23 distance, which was 12 to 15 feet; right?

24 A: Yes, sir.

25 Q: Now, when you gave a statement, the first recorded

Mark Hobbs - Cross by Mr. Martin

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1 statement that you gave to anybody about what you saw was
2 September the 3rd of '98 at your home up in Virginia;
3 wasn't it?

4 A: I think so. I'm not positive about the date or
5 anything.

6 Q: Okay.

7 A: Yes, sir.

8 Q: But it was the one up in Virginia.

9 A: Yes, sir.

10 Q: All right, and you had estimated at that time I think
11 that distance to be 50 feet.

12 A: I may have, yes, sir.

13 Q: Well, you did; didn't you, Mr. Hobbs?

14 A: If I wrote -- if it's on the report, yes, sir.

15 Q: All right, and you were just mistaken as to what else
16 was really, you know, whether this distance was approximately
17 15 or 50 feet.

18 A: That is not the first time I saw him at that distance.

19 Q: All I'm trying to say, and again, is that at one point
20 in time you said in a statement you thought the person was
21 approximately 50 feet; is that not right?

22 A: I guess so, yes, sir.

23 Q: And today you're telling us that he was approximately
24 12 to 15 feet.

25 A: That's off the boardwalk. The first time was further

1 away.

2 Q: I'm talking, I'm talking on the beach now.

3 A: Oh, you're on the beach, all right, sir.

4 Q: All right, and is that not correct?

5 A: I don't know what I put in the report, no, sir.

6 Q: All right, on the beach you don't know what you put
7 in the report?

8 A: No.

9 Q: Do you want me to get the report for you?

10 A: No, I can -- if you're saying it's on the report I
11 believe you. I mean, that's fine.

12 MR. HUMPHRIES: Well, let's see it. Let's let him see
13 it. That'd be the proper way to cross him.

14 THE COURT: All right, we can refresh his
15 recollection with it. He's indicating he doesn't know.

16 Q: Let me show you your statement here, Mr. Hobbs,
17 September 3rd, '98 ---

18 A: All right, sir.

19 Q: --- and let you look down and the question was, "How
20 close was he to you at that time," and what was your answer?

21 A: Probably 40 to 50 feet.

22 Q: All right, thank you, sir, and all I'm trying to say is
23 I think your story has changed, not that you're being
24 dishonest, okay, not that you're lying, but that your story
25 has changed so that now it's 12 to 15 feet.

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1 A: I just don't know how far I saw him away from me,
2 yes, sir.

3 Q: All right, now, and then you went down to do -- you made
4 a call to the police department; right?

5 A: Yes, sir.

6 Q: And you went down to do a composite.

7 A: All right, sir.

8 Q: Let's try the composite up here.

9 MS. ROBERTS: Could you press the arrow key on the top
10 of the podium for me? Thank you, and you may need to put that
11 pen.

12 MR. MARTIN: You're going to have to help me.

13 A: I don't ---

14 MS. ROBERTS: You may need to put that pen back. No,
15 that's okay. That did it. Thank you.

16 BY MR. MARTIN:

17 Q: And you went down to the Myrtle Beach Police
18 Department to do a composite; right?

19 A: Yes, sir.

20 Q: And this is the composite that was completed by you
21 and your wife, I believe; is that right?

22 A: I think so, yes, sir.

23 Q: All right, what is distinctive about these eyes that
24 lead you to the identification or the picking out of John
25 Frazier from the lineup?

1 A: What is distinctive about those eyes there or on the
2 composite?

3 Q: Yeah.

4 A: We weren't satisfied with those eyes.

5 Q: Well, then let me ask you this -- well, let me show you
6 what is marked as Defense Exhibit Number Three for
7 identification. What are these, Mr. Hobbs?

8 A: Those are eyes.

9 Q: All right, and they are what you look at when you do
10 a composite; are they not?

11 A: Yes, sir.

12 Q: All right, and these are samples of the eyes that you
13 had to choose from at the Myrtle Beach Police Department on
14 the late afternoon of June 10th, '98, when you prepared this
15 composite; are they not?

16 A: Yes, sir.

17 Q: And of course I think they said there's about a
18 hundred, is it a hundred set of eyes?

19 MR. HUMPHRIES: Two hundred, 250.

20 Q: Two-hundred and fifty sets of eyes.

21 A: Yes, sir.

22 Q: All right, but you couldn't find any in there of the
23 ones there that you could do this composite with other than
24 the ones you saw?

25 A: Well ---

1 Q: Other than the ones that you placed in the composite;
2 is that right?

3 A: Well, I wasn't -- when you -- they look different from
4 one to -- when you're over here and you put them over here
5 they change. I don't think I could make my wife's picture on
6 that thing.

7 Q: I understand that, and I'm not trying to say you can
8 -- I'm not -- but I'm just, what is so hard about telling that
9 these are the kind of big white eyes that you folks later
10 started talking about ---

11 A: It wasn't later.

12 Q: --- compared to that, well, whenever. What's so hard
13 about picking these out instead of those if that's what you
14 were looking for?

15 A: I don't know, but it was really, we weren't really too
16 concerned a whole lot about that. I mean, we ---

17 Q: All right, well, how about ---

18 A: --- didn't really want to do that.

19 Q: You weren't concerned?

20 A: We were concerned, but we really didn't want to get
21 involved.

22 Q: Well, once you're involved you're involved.

23 A: Yes, sir, I understand that now.

24 Q: And obviously you're involved now. Wish you weren't
25 involved now.

1 A: Yes, sir.

2 Q: All right, let me ask you again about the forehead
3 here. You didn't see any higher foreheads in the composite
4 kit that night?

5 A: I may have not have. I mean, we -- I don't know.

6 Q: About a hundred different foreheads to choose from
7 and these are, and I'm referring to State's Exhibit Number
8 Four are ---

9 MR. HUMPHRIES: Defense Exhibit Number Four.

10 Q: --- yeah, Exhibit Number Four, Defense Exhibit Number
11 Four, those are some of the foreheads that you had to
12 choose from.

13 A: Yes, sir.

14 Q: All right, but you didn't choose any of these. You and
15 Mrs. Hobbs chose this one.

16 A: Yes, sir.

17 Q: Correct? All right, and that was all done the day
18 after you saw whoever you saw.

19 A: Yes, sir.

20 Q: Right?

21 A: I think so.

22 Q: Okay, and then you returned home on June the 13th the
23 following Sunday; right?

24 A: I think so, yes, sir.

25 Q: And of course, you had seen something on the news

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- 1 about the murder on the 10th.
- 2 A: Yes, sir.
- 3 Q: The day after.
- 4 A: Yes, sir.
- 5 Q: All right, and did you follow any of the newscasts
- 6 from the 9th to the 13th when you went back?
- 7 A: I don't think so, no, sir.
- 8 Q: All right, how about the newspaper, you read -- did you
- 9 see the local newspapers there in the Carolina Winds as you're
- 10 walking in and out that have the ---
- 11 A: I doubt it.
- 12 Q: --- front line stories on it?
- 13 A: No, sir. We had so many family members there we
- 14 were just, we were constantly busy doing something.
- 15 Q: All right, but out of curiosity you didn't follow any
- 16 more news at all.
- 17 A: I don't think so, no, sir.
- 18 Q: You sure about that?
- 19 A: I'm not positive, but I don't, but I don't think so.
- 20 Really, we really didn't think we had that much
- 21 information.
- 22 Q: All right, you didn't think you had that much
- 23 information.
- 24 A: No, sir.
- 25 Q: Because when you called the police all you said is,

1 "We saw a white man dressed in black clothes."

2 A: I don't know what, exactly what I said but that's all --
3 we could tell him that, yes, sir.

4 Q: Now, did you -- after you went back to Virginia did
5 you have any conversation with anybody from the Myrtle
6 Beach Police Department yourself?

7 A: I don't recall it, no, sir.

8 Q: Did your wife?

9 A: May have, yes.

10 Q: To your knowledge?

11 A: Yes, sir. Did my wife to my knowledge?

12 Q: Have a conversation with somebody from the Myrtle
13 Beach Police Department?

14 A: One of us did, yes, sir.

15 Q: Do you remember which one was, which one of you
16 had the conversation?

17 A: No, sir.

18 Q: Could have been you, could have been her.

19 A: Yes, sir.

20 Q: You and she discussed whatever the conversation was.

21 A: We probably -- I'm sure we did, yes, sir.

22 Q: Okay, you knew that Mr. Robey was going to be
23 coming out to show you a photographic lineup; didn't
24 you?

25 A: I don't remember that for sure, no, sir.

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1 Q: But he called you and let you know he was coming at any
2 rate.

3 A: Yes, sir; yes, sir.

4 Q: All right, and you were both there.

5 A: Yes, sir.

6 Q: All right, and you knew that the police had been
7 gathering information about this crime; right?

8 A: I would assume so, yes, sir.

9 Q: And either you or your wife had talked to the police
10 about it, they were coming to show you a lineup. When you
11 knew that they were coming to show you that lineup you figured
12 that whoever they had that they had a suspect; didn't you?

13 A: No, sir.

14 Q: You didn't?

15 A: I don't know that much about ---

16 Q: You don't know much about police work?

17 A: I didn't know much stuff about this.

18 No, sir.

19 Q: Well, did it give you any thought about why those folks
20 were coming all the way up in Virginia to show you a set of
21 six pictures to choose from?

22 A: Not ---

23 Q: All I'm trying to say is it was pretty obvious,
24 wasn't it Mr. Hobbs, that they had a suspect that they
25 wanted you to take a look at.

- 1 A: I really couldn't say that, no, sir.
- 2 Q: Okay, and then you did take a look at it.
- 3 A: Yes, sir.
- 4 Q: For approximately ten minutes.
- 5 A: I don't know how long.
- 6 Q: And you said that number one is the person that most
- 7 closely resembles the person you saw; right?
- 8 A: May have, yes, sir.
- 9 Q: All right, put -- go back to the lineup. All right, is
- 10 this the lineup that you saw, Mr. Hobbs?
- 11 A: I think so, yes, sir.
- 12 Q: You can see it better it's on that telestrator over
- 13 there. Well, what you did now, as I understand it correct, is
- 14 that you looked at these things for a few minutes and then you
- 15 eventually started looking at this area; right?
- 16 A: I may have, yes, sir.
- 17 Q: Well, I'm asking you now.
- 18 A: I don't remember.
- 19 Q: You don't remember?
- 20 A: No, sir.
- 21 Q: Well, how in the world do you remember for sure
- 22 that's the man you saw at the beach that night?
- 23 A: I, I remember that.
- 24 Q: And you're certain about that; aren't you?
- 25 A: Yes, sir.

- 1 Q: And your mind will never change; will it?
- 2 A: No, sir.
- 3 Q: It is -- you've got it here and there's no way to
- 4 take it out.
- 5 A: Some things stand out, yes, sir.
- 6 Q: Some things you never forget; right?
- 7 A: Yes, sir.
- 8 Q: But at any rate in trying to reach that decision that
- 9 you made you did go through this process; right?
- 10 A: I may have.
- 11 Q: And the eyes were what was distinctive to you.
- 12 A: Probably so.
- 13 Q: Am I right?
- 14 A: Probably so.
- 15 Q: All right, and it was the eyes that allowed you to
- 16 make the identification.
- 17 A: I don't remember. You know, I just -- I don't
- 18 remember that.
- 19 Q: Well, now, this is -- and -- this, obviously, you know
- 20 this is important. So, I'm going to ask you again. Wasn't it
- 21 the eyes that allowed you to make the identification that
- 22 you made?
- 23 A: Yes, sir.
- 24 Q: All right, without the distinguishing feature of
- 25 these eyes which you separated and looked at you couldn't

1 have made it; could you?

2 A: Well, I wouldn't say that, no, sir.

3 Q: When did you get a call from Lieutenant Robey to tell
4 you that you had picked out the suspect?

5 A: I didn't get a call from him.

6 Q: All right, when did you learn you had picked out the
7 suspect?

8 A: I don't remember the day. I was at work. My wife
9 called me.

10 Q: You were at work and your wife called you?

11 A: Yes, sir.

12 Q: Mr. Robey didn't call you back at home that night?

13 A: I don't recall it.

14 Q: Well, again, trying to be as specific with you as I
15 can be because it is important, Mr. Hobbs, did he call you
16 at home that night?

17 A: I don't recall it.

18 Q: Okay, your wife didn't tell you anything until when?

19 A: She -- I was at work. I remember her calling me at work
20 one day.

21 Q: You just remember her calling you at work.

22 A: Yes, sir.

23 Q: All right, and -- but you at some point shortly
24 thereafter learned that you had picked the person that was the
25 suspect; am I right?

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1 A: Yes, sir.

2 Q: All right, and then on September the 3rd of '98 the
3 Myrtle Beach Police Department came and took a statement from
4 you and I know you don't know the exact date but there came a
5 time after all this when the Myrtle Beach Police Department
6 came and took a recorded statement from you; right?

7 A: Yes, sir.

8 Q: Do you recall any other recorded statement from the
9 police?

10 A: I don't recall one, no, sir.

11 Q: Let me ask you something, Mr. Hobbs -- what did I do
12 with the composite -- the composite here, if I refer to this
13 as test number one, in your opinion did you pass it or fail
14 it?

15 A: Everything but the eyes, I wasn't -- I didn't -- I
16 didn't really like it, no, sir.

17 Q: Okay, now, this is a multiple choice test you had here;
18 isn't it, Mr. Hobbs?

19 A: I guess you could say that.

20 Q: Now, and of course your intentions through all of
21 this have been good; have they not?

22 A: Yes, sir.

23 Q: All right, and that is to do the best that you could
24 to identify whoever it was you saw on the beach that night
25 for whatever it was worth.

- 1 A: Yes, sir.
- 2 Q: And of course, when you were in school you took
3 multiple choice tests; didn't you?
- 4 A: Yes, sir.
- 5 Q: And that was always easier than the fill in the blank
6 test to some extent; wasn't it?
- 7 A: I'm not sure about that.
- 8 Q: You're not sure about that?
- 9 A: No, sir.
- 10 Q: And a lot of time you had that multiple choice test
11 and you could rule some out to start with and then find you
12 another one and then pick one and go with it; couldn't
13 you?
- 14 A: I guess you could.
- 15 Q: All right, and sometimes you knew the answer outright
16 and sometimes you kind of had to guess; didn't you?
- 17 A: Yes, sir, I guess so. I guess. That's ---
- 18 Q: Well, you were in school; weren't you?
- 19 A: It's been a few years ago, yes, sir.
- 20 Q: Me, too, but you took multiple choice tests, too;
21 didn't you?
- 22 A: I guess so, yes, sir.
- 23 Q: And if you didn't -- if you had one of those
24 questions you just didn't know the answer to, you ever had
25 one of those you ain't sure whether you got the answer

1 right or not?

2 A: Yes, sir.

3 Q: And you asked the teacher what the right answer was
4 and they told you, it made you feel a lot better about it;
5 didn't it?

6 A: If she told -- well ---

7 Q: If she told you that number was the answer, number one
8 is what you picked you felt better about it; didn't you?

9 A: Well, if I hadn't answered it, no, sir, it'd be wrong.

10 Q: If you hadn't answered it.

11 A: Yes, sir.

12 Q: If you picked number one you felt better about it;
13 didn't you?

14 A: Yes, sir.

15 Q: All right, and then wouldn't you agree with me that
16 there's something about the human psyche that once you are
17 told you're right that you kind of know then that you were
18 right all along even if you had any questions about it before,
19 that that confirmation strengthens your ---

20 A: It could be.

21 Q: --- level. Wouldn't you agree with me about that?

22 A: It probably would. If you were sure about it though
23 it wouldn't, it wouldn't matter.

24 Q: Wouldn't make any difference if you were sure.

25 A: No, sir.

1 Q: Just one second. Let me show you what's marked for
2 identification -- no, it's into evidence, State's Exhibit
3 Number 37, Mr. Hobbs, that's the photograph that you're in,
4 I believe? Is that you?

5 A: Yes, sir.

6 Q: All right, and that's a picture taken in the daytime
7 again; right?

8 A: Yes, sir.

9 Q: And of course, your viewing was in the nighttime;
10 right?

11 A: Yes, sir.

12 Q: All right, but this is a picture taken in the daytime
13 and accurately represents the scene there at the beach; is
14 that right?

15 A: Pretty close, yes, sir.

16 Q: Now, you have received a payment of \$10,000?

17 A: Yes, sir.

18 Q: From the Pooles?

19 A: Yes, sir.

20 Q: And that money you still have I suppose?

21 A: Yes, sir, haven't touched it.

22 Q: Thank you, Mr. Hobbs.

23 THE COURT: Redirect.

24 MR. HUMPHRIES: Just briefly.

25 REDIRECT EXAMINATION

1 BY MR. HUMPHRIES:
2 Q: Let's talk about multiple choices questions.
3 Multiple choice questions, A, B, C, D, all of the above,
4 none of the above, agree with me?
5 A: Yes, sir.
6 Q: State's 23, "this group of photographs may or may
7 not contain a picture of the person who committed a crime
8 now being investigated."
9 A: Yes, sir.
10 Q: That's consistent with none of the above; isn't it?
11 A: Yes, sir.
12 Q: Had that option; didn't you?
13 A: Yes, sir.
14 Q: You chose the one in the number one position; didn't
15 you?
16 A: Yes, sir.
17 Q: How you feel about that?
18 A: Well, how do I feel about, well ---
19 Q: How do you feel about your choice?
20 A: My choice I feel good about it, I mean, as far as the
21 -- as far as knowing who it was, yes, sir, I feel good
22 about it. As far as the circumstances I didn't feel good
23 about it.
24 Q: I understand that; and if you knew that money that
25 the Pooles gave you would be an issue in this case what

1 would you do right now?

2 A: If they -- if I knew the money would be an issue?

3 Q: Uh-huh (affirmative response).

4 A: I wouldn't have accepted it. In fact, I can give it
5 back to them right now if they wanted it.

6 Q: Thank you, Mr. Hobbs.

7 RECROSS EXAMINATION

8 BY MR. MARTIN:

9 Q: Just one more question, where's the money now?

10 A: It's in the bank.

11 Q: How long has it been in there?

12 A: How long has it been? Since we got it.

13 Q: How long has that been?

14 A: I don't remember.

15 Q: You don't know?

16 A: No, sir.

17 Q: Okay, thank you, Mr. Hobbs.

18 A: Yes, sir.

19 MR. HUMPHRIES: Nothing further of this witness.

20 THE COURT: You may step down, sir.

21 A: Thank you.

22 THE COURT: The jury in need of a break at this time
23 or are you prepared to go forward? All right, very good.

24 Call your next witness, please.

25 MR. HUMPHRIES: The State calls Donna Hobbs.

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1 THE COURT: Let me let people know as you come in and
2 out if you go out you're out. That's going to be the rule
3 for right now.

4 AT THIS TIME DONNA HOBBS WAS CALLED TO THE STAND, DULY
5 SWORN BY THE CLERK AND TESTIFIED AS FOLLOWS:

6 THE CLERK: Thank you. Please be seated. Talk right
7 into this microphone.

8 MRS. HOBBS: Okay.

9 THE CLERK: Talk a little bit louder.

10 MRS. HOBBS: All right.

11 THE CLERK: State your full name, spell your
12 last name for the Court.

13 MRS. HOBBS: Donna Hobbs, H-O-B-B-S.

14 DIRECT EXAMINATION

15 BY MR. HUMPHRIES:

16 Q: How you doing this afternoon?

17 A: Hi, fine.

18 Q: You are the bride of Mark Hobbs; is that correct?

19 A: Yes, sir.

20 Q: Mrs. Hobbs, did you have an occasion to come with your
21 family to Myrtle Beach the week which also had in it June 9th,
22 1998?

23 A: Yes, sir.

24 Q: Okay, and you recall who came with you? Who'd you
25 meet down here?

1 A: At least my immediate family, my mom and dad, my
2 sister and her husband. There were some other family
3 members. I can't remember exactly.

4 Q: And is that an annual trip?

5 A: It is.

6 Q: And tell the jury -- of course, you know your
7 husband's already testified and I'll tell you he got it right.
8 June 9th, is that significant to you and your husband?

9 A: It is.

10 Q: That is what?

11 A: That's, that's our anniversary.

12 Q: Okay, tell the jury what you did that afternoon.

13 A: Okay, that afternoon we would have been on the beach.
14 That evening we got together with family and went to
15 dinner. I remember we did go to Barefoot Landing, the Crab
16 House there and we had dinner and we were out pretty late,
17 come back and we were at my -- at our room a little bit and
18 we'd settled, got the kids settled down and my mom and dad
19 were there. We asked them to watch our kids while we took
20 a walk.

21 Q: And did you go for that walk?

22 A: Well, we started out for that walk.

23 Q: Okay, that's what we want to talk about. Do you
24 recall where you came out of the hotel to go on that walk?

25 A: Yes, we come out downstairs where the pools are, the

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1 indoor pools. There's a back door that leads out to the
2 outdoor pools and then on out to where the beach area is.

3 Q: Let me show you State's 35 which is in evidence. Do
4 you recognize that as the Carolina Winds Hotel?

5 A: Yes, sir, I do.

6 Q: Okay, if you look at this photograph can you point
7 to the general area in which those doors are located?

8 A: There.

9 Q: And you've indicated where this MH is.

10 A: Yes, sir.

11 Q: Okay, I know the jury's already seen that. When you
12 came out was there anything after you came out of those doors
13 that caught your attention?

14 A: Yes, there was a man. I assumed it was a man at that
15 time. Somebody went running by on the street pretty quick.

16 Q: Pretty quick?

17 A: Uh-huh (affirmative response).

18 Q: And how did that make you feel?

19 A: Well, at first I just wondered kind of what he was
20 running from it seemed like to me.

21 Q: Okay, did that cause you any concern?

22 A: It did.

23 Q: And in what direction did this person run?

24 A: He was running toward the beach. There was a
25 boardwalk area, and he was running toward the beach the same

- 1 way that we were headed.
- 2 Q: Okay, and in what area did you see him first?
- 3 A: Coming out the doors that I pointed out as we were
- 4 headed toward the -- would have been the little sidewalk
- 5 area ---
- 6 Q: Uh-huh (affirmative response).
- 7 A: --- where you go to the left to head toward the little
- 8 boardwalk area to go out.
- 9 Q: Okay, and he ran towards the beach.
- 10 A: Yes, sir, he was headed that way.
- 11 Q: Okay, now, what were you and Mark's plans?
- 12 A: We were planning on heading out that way and walking
- 13 on the beach.
- 14 Q: Okay, now, having seen that individual and let me ask
- 15 you this, I'm not sure if you said, do you recall in what
- 16 manner he moved, slowly, quickly?
- 17 A: He was moving quickly. He paused. At one point when
- 18 Mark and I were coming out he paused and looked our way and
- 19 he paused for a second and then he ran on again.
- 20 Q: Okay, now, at that point did you get a good
- 21 opportunity to view his face when he paused?
- 22 A: I seen it but not real good there.
- 23 Q: Okay, now, did your husband get you up on the boardwalk?
- 24 A: He did.
- 25 Q: Did he get you much further?

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1 A: Not much further.

2 Q: Okay, and tell the jury why.

3 A: Well, I was suspicious of this man. He had -- it was a
4 hot summer night in June and he had on dark clothes, long
5 sleeves and long pants. He was running and that's the way
6 I was going to the beach. So, I was watching him he -- as he
7 was headed that way, I was just looking for him because that's
8 the way I was going to go, and I was just suspicious of him.
9 He seemed kind of odd in just the way he looked at us coming
10 out. It looked like he was looking for somebody to me.

11 Q: Now, do you recall about how far you got down the
12 boardwalk before you stopped?

13 A: No, when we first got on the whole time I'm looking
14 for this individual. When we first got on, my husband said,
15 "Do you want to walk ahead?" I said, "No, let's just wait
16 a minute. I'm looking for him."

17 Q: And tell the jury how you and your husband were
18 positioned on the boardwalk.

19 A: Okay, I would have been facing north. He would have
20 been facing south.

21 Q: Let me, let me stop you just one moment.

22 MR. HUMPHRIES: May we approach?

23 THE COURT: Yes, you may.

24 (Whereupon, a Bench conference was held in the
25 presence, but out of the hearing, of the jury.)

1 THE COURT: All right, let me have you come back for
2 just a moment.

3 (Whereupon, a Bench conference was held in the
4 presence, but out of the hearing, of the jury.)

5 THE COURT: We'll continue.

6 BY MR. HUMPHRIES:

7 Q: Okay, I'm sorry, Mrs. Hobbs. That was my fault.

8 A: That's all right.

9 Q: Let's, let's go back and tell the jury what your
10 positions were, your and your husband's position as you were
11 on the boardwalk.

12 A: Okay, as you come out of the hotel and on that boardwalk
13 Area, the individual, I lost sight of him for a minute there.
14 So, we're standing on the boardwalk area. At the time I'm
15 facing this way he's facing, looking this way.

16 Q: Okay, and the way you're facing is north?

17 A: The way I'm facing would be north.

18 Q: Okay, and your husband's south?

19 A: Yes, sir.

20 Q: Okay, what happened next?

21 A: I spotted him again. I said, "There he is." He was
22 stooped down behind the motel looking up at the motel, the
23 back of the motel.

24 Q: Okay.

25 A: He -- at that time he stood up. He turned to his

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1 left and looked around at us. Then he stared. I said, "He's
2 looking at us now," and my husband at that point turned around
3 and looked, too, and it's just -- and then after just a
4 couple, three seconds he ran on down the beach, not where you
5 would get on a beach, up in the high weeds, which was
6 different, too. Most everybody that walks on the beach goes
7 down to the beach and walks, and I really probably would have
8 never paid any attention to him if he had been in shorts or
9 dressed normal at the time, you know, because I usually, you
10 know, I never think about anybody on the beach. I'm never
11 really afraid of anybody. It's just he was just suspicious.

12 Q: All right, let's talk about the conditions, the
13 lighting conditions and specifically your ability to see
14 the facial features of that individual on that evening.

15 A: Yes, sir.

16 Q: What was your ability to see the facial features of
17 that individual when you were on the boardwalk and he was
18 in the sea oats as you've described?

19 A: I could see him good. There must have been some
20 lighting off of the back of the motel that you could make
21 out a face fine.

22 Q: Okay, and let me show you State's 37. Have you seen
23 this photograph before?

24 A: I have.

25 Q: Okay, and do you know when this photograph or about

1 when this photograph was taken? Let's -- let me do it
2 this way, with a little indulgence, did you and your
3 husband later go to the motel for the purpose of
4 determining better the position that you saw the -- or this
5 person in, this individual in and then have photographs
6 taken to do that?

7 A: Yes, we did.

8 Q: And is this one of those photographs?

9 A: It is.

10 Q: Okay, that was a mouthful. And that's your husband
11 there; is it not?

12 A: That is my husband.

13 Q: Okay, and this photograph it's taken from the
14 boardwalk where you all were?

15 A: Yes, sir.

16 Q: Okay, and is your husband in the position that the
17 individual you saw that night was in or approximately was
18 in?

19 A: Yes.

20 Q: Okay, and I've been forewarned not to ask you distances.
21 What I'm going to do and I understand this is an estimate.

22 A: Okay.

23 Q: But I'm going to back away from you and I want you to
24 sort of stop me when you think I'm as far away as that
25 individual was from you when you were on the boardwalk and

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- 1 he was in the sea oats.
- 2 A: Okay.
- 3 Q: Okay.
- 4 A: Probably there.
- 5 Q: Okay.
- 6 A: Uh-huh (affirmative response).
- 7 Q: Twelve, 15 feet.
- 8 A: Probably.
- 9 Q: Were you in the courtroom when your husband
- 10 testified?
- 11 A: No, sir.
- 12 Q: Okay, let me ask you, what was your degree of
- 13 attention, how focused were you on the individual you saw
- 14 in the sea oats that evening?
- 15 A: Then he was the only thing I was paying attention to.
- 16 He had my attention a hundred percent.
- 17 Q: And about how long, if you can estimate, did you have a
- 18 chance to view him in that fashion?
- 19 A: The whole time?
- 20 Q: Uh-huh (affirmative response.)
- 21 A: It seemed like a while to me, and I, you know, when
- 22 you're just standing watching somebody. It seemed like a
- 23 pretty good while. I don't know maybe 10 minutes or so. I
- 24 don't know for sure.
- 25 Q: Now, tell the jury though how long you had an

1 opportunity to actually see his face.

2 A: Well, when his face turned toward us I probably I'm

3 going to guess two to three seconds just looking straight at

4 me.

5 Q: He was looking straight at you.

6 A: Yes.

7 Q: You were looking straight at him.

8 A: Yes.

9 Q: What if anything did you say to your husband at that

10 time?

11 A: I think I said then, "He's looking at us."

12 Q: Your husband turned around right away?

13 A: He turned around, uh-huh (affirmative response).

14 Q: Now, when you first saw him there in the sea oats was

15 he standing or stooping?

16 A: When I first seen him he was stooping.

17 Q: And did he then later stand?

18 A: He did.

19 Q: Okay, after you had that opportunity to observe him did

20 he remain in that position or did he ultimately leave?

21 A: After he stood back up and looked over he did leave

22 going down north.

23 Q: He went north.

24 A: Uh-huh (affirmative response).

25 Q: Now, did he go all the way down to the beach and go

1 north?

2 A: No.

3 Q: How did he go?

4 A: He stayed up in the brushes area like.

5 Q: Okay, and did at some point in time did you lose
6 sight of him?

7 A: I did.

8 Q: And did you go on that walk?

9 A: No, no. My husband asked me if I wanted to go. I
10 was like, "No, let's just go in."

11 Q: And why is that?

12 A: Because of him.

13 Q: Now, did you think any more of it that night?

14 A: Oh, yeah, I would have. I thought about him.

15 Q: Replay it in your mind?

16 A: Yes.

17 Q: The next morning was there something that you saw or
18 heard that made what you and your husband had seen that
19 night seem of importance to the Myrtle Beach Police
20 Department?

21 A: There was. Somebody was watching the news. I don't
22 think it was me.

23 MR. MARTIN: I would object to what was heard other
24 than where we are.

25 THE COURT: Sustained.

1 Q: And let's do this. Without saying what you may have
2 heard on the news report ---

3 A: Okay.

4 Q: --- tell this jury what you, and your husband if you
5 did it together ---

6 A: Uh-huh (affirmative response).

7 Q: --- did in response to what you heard or saw.

8 A: Okay, well, we, we heard that it was ---

9 Q: Well, you can't -- see, here we go, and that's my
10 fault. You can't say what you heard, but what did you do
11 as a result of what you heard?

12 A: Okay, we called the police and I don't know if it was
13 my husband or myself. We called and told them that --
14 well, there I go again. I'm going to have to say it. I
15 don't know how you say it without saying.

16 Q: Well, let's do this, let's do this. You called the
17 police.

18 A: Okay.

19 Q: And as a result of that call did you ultimately speak
20 with the police?

21 A: We did.

22 Q: Okay, and what did you tell the police?

23 A: That we did see somebody that had dark clothing
24 around that time of night and we called. We thought that
25 we could just give them information and let them know that

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1 we did see somebody in dark clothing that was a white male.
2 We knew we had that information that we could tell them,
3 and at the time we thought that's all we would have to tell
4 them. We didn't know.

5 Q: And was that your intention that is that was all you
6 were going to tell them?

7 A: Yes, sir.

8 Q: And did the Myrtle Beach Police Department let you off
9 that easy?

10 A: No.

11 Q: Okay, what happened next?

12 A: They contacted us again and they asked us if we would
13 come down and try to make a composite, and I think I talked to
14 them at that time, and I told them, "I don't know," we'd see
15 if we can. We're on vacation and I felt like at the time that
16 that's all we knew and that's all I was going to tell them.
17 I know I had seen the individual, but I didn't really want
18 to get into it. So, I told them we'll see and I think they
19 called back again the next day and asked us at that time. My
20 husband said he would go. He would go. I said, "Okay, you
21 go for us then or whatever." So, he went and he tried to
22 put together a composite, but he said he wasn't pleased
23 with it, and he asked me if I would go and I think they may
24 have called again and asked if I would come, too. So, I
25 did go with him and we were like, no, both us weren't

1 happy with what he did, and they had several eyebrows,
2 several eyes, different things to pick out. I had never
3 done anything like that.

4 Q: Let me, and let me just clarify for you the State and
5 the Defense has entered into a stipulation of fact. We
6 agree that the options presented to you in that computer
7 program regarding the eyes ---

8 A: Uh-huh (affirmative response).

9 Q: --- were approximately 250 choices.

10 A: Okay.

11 Q: And as to the forehead approximately 100 choices, okay.

12 A: Okay, thank you. I knew it was a lot.

13 Q: Okay.

14 A: And I know I didn't even look at all of them. I know
15 that. I know I was looking, "Does it look like this? Does
16 it look like this?" I'm like, "No, no," and kept going and,
17 you know, finally I said, "Yeah, that could look close, but
18 then when he puts it on the face it doesn't look like it."

19 Q: Well, let's talk about that. Did all of these
20 features go immediately to the face so you could observe
21 them or did you see them standing alone first?

22 A: All standing alone, first.

23 Q: Okay, ultimately as a result of that process let me
24 show you Defense Exhibit Two. Do you recognize it?

25 A: Yes.

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1 Q: And is this the composite that you and your husband
2 attempted to complete in respect to the person you saw on
3 that beach that night?

4 A: Yes, sir, it is.

5 Q: Okay, and tell the jury how do you feel about this?

6 A: We weren't pleased with it.

7 Q: What particularly were you not pleased with?

8 A: The eyes, the eyes. I -- you know, I looked for a
9 high forehead. I could tell he had dark features and I said
10 the eyes are more round and we left being not pleased with
11 it.

12 Q: Okay, finish out your vacation?

13 A: We did.

14 Q: Think you were done?

15 A: I did think we were done.

16 Q: Okay, were you done?

17 A: No, far from done.

18 Q: Okay, were you contacted or was your husband
19 contacted by a representative from the Myrtle Beach Police
20 Department in connection with this case after you returned
21 home to Goodview?

22 A: You know, I can't really remember. I can't remember.

23 Q: Okay, but in any event did you ultimately get a call
24 from Lieutenant Kent Robey with a request that he come out
25 to your residence to talk to you about this?

1 A: Yes.

2 Q: Okay, June 28th, I believe.

3 A: Okay, that's sound right.

4 Q: Okay, and did he come out and see you?

5 A: He did.

6 Q: And when he came out did he tell you why he was

7 there?

8 A: He did.

9 Q: Do you recall your initial conversation with

10 Lieutenant Robey?

11 A: When he come to the house?

12 Q: Uh-huh (affirmative response).

13 A: Okay, pretty much I think he probably told us that he

14 had a picture of some criminal suspects that he would like

15 us to look at and see if we could identify, he did mention,

16 it was written in there that he may or may not be on this

17 page, but just to see if we could identify the person that we

18 seen that night at Myrtle Beach.

19 Q: Okay, so, you were told from the beginning they may

20 or may not be in this photo lineup.

21 A: Yes.

22 Q: Okay, now, who went first?

23 A: Mark.

24 Q: Okay, and where did you go?

25 A: I went to a back room, bedroom.

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1 Q: And did you leave the door open or did you close it?

2 A: We had it closed, I had it closed, uh-huh (affirmative
3 response).

4 Q: At some point in time did they call for you?

5 A: They did.

6 Q: Okay, and when they called for you did you and your
7 husband change places?

8 A: Yes, sir.

9 Q: In changing places did you speak to your husband,
10 gesture to him or did he gesture to you indicating either
11 he had made a choice or what choice he had made?

12 A: No.

13 Q: No, so, when you went to the living room did you have
14 any idea as to whether or not your husband had made a choice
15 at all?

16 A: No, sir, dining room.

17 Q: Dining room, I'm sorry.

18 A: That's okay.

19 Q: Let's talk about the procedure that Lieutenant Robey
20 used with you in the photo lineup identification process;
21 okay?

22 A: Okay.

23 Q: Let me show you State's 23. Do you recognize that
24 form?

25 A: Yes, sir.

1 Q: Okay, and was this a form that was read to you by
2 Lieutenant Robey at the beginning of this process?

3 A: Yes.

4 Q: Okay, and when he read this form to you did he have
5 all the other papers out on the table?

6 A: No, sir.

7 Q: Okay, was that the only one he had out?

8 A: Yes.

9 Q: Okay, did he read that form fully to you?

10 A: He did.

11 Q: Okay, and did he ask you if you had seen a picture of
12 the suspect either presented by the media or law enforcement?

13 A: Yes, I believe he did ask that.

14 Q: And what did you respond?

15 A: No.

16 Q: Let me ask you this, do you even have a TV in your
17 house?

18 A: No, sir.

19 Q: Have a TV in your house for any number of years?

20 A: No, sir.

21 Q: Now, after having read that form to you did he then
22 ask -- did he then -- it's getting late, did he then ask
23 you to read it yourself?

24 A: He did.

25 Q: And did you?

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- 1 A: Yes.
- 2 Q: Okay, and after having read it did you understand it?
- 3 A: I did.
- 4 Q: Did you have any questions for Lieutenant Robey?
- 5 A: No.
- 6 Q: And did he ask you to sign it ---
- 7 A: He did.
- 8 Q: --- indicating that you understood it?
- 9 A: Yes.
- 10 Q: And you did sign it.
- 11 A: I did.
- 12 Q: Okay, now, the next thing, showing you State's 20,
- 13 you recognize that?
- 14 A: I do.
- 15 Q: Okay, is that a color photo lineup that Lieutenant Robey
- 16 presented to you on that evening?
- 17 A: It is.
- 18 Q: And when he presented it to you did he give you any
- 19 further directions?
- 20 A: No. I don't remember any.
- 21 Q: Put it in front of you?
- 22 A: Uh-huh (affirmative response).
- 23 Q: Okay, and when he put it in front of you, what did you
- 24 do?
- 25 A: I looked at the individuals and I spotted the man

- 1 that I had seen right off.
- 2 Q: Right off.
- 3 A: Right off.
- 4 Q: Any question about that?
- 5 A: No.
- 6 Q: Okay.
- 7 A: I looked at the other ones and went right back to
- 8 him.
- 9 Q: Okay, how long would that process have taken?
- 10 A: It probably only a second or two.
- 11 Q: Now, did you receive any further instructions from
- 12 Lieutenant Robey, if you recall specifically about how
- 13 quickly you came to your decision, if you recall?
- 14 A: No, I don't recall anything.
- 15 Q: Okay, but in any event you -- you saw -- well, let me
- 16 ask you this, is the person that you saw or the
- 17 subject that you saw in the photo lineup is that the person
- 18 that you saw on the beach that night, June 9th, 1998?
- 19 A: Yes.
- 20 Q: Any question?
- 21 A: No.
- 22 Q: And at the point that you made that identification how
- 23 certain were you regarding your identification?
- 24 A: I was a hundred percent certain.
- 25 Q: Hundred percent, and today as you sit there how

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1 certain are you regarding your identification of that
2 person as being the person you saw on the beach, June 9th,
3 1998?

4 A: Hundred percent.

5 Q: No question.

6 A: No.

7 Q: After having made that identification were you then
8 presented another form?

9 A: I was.

10 Q: Showing you State's 22.

11 A: That's right.

12 Q: And did Lieutenant Robey ask you anything in
13 connection with that form or give you any instructions in
14 regard to that form?

15 A: Just told me above my choice to put my initials and
16 date it.

17 Q: Now, let ask you this throughout the -- this
18 identification process, particularly when you were looking
19 at State's 20 ---

20 A: Uh-huh (affirmative response).

21 Q: --- color photo array, did Lieutenant Robey ever
22 indicate to you, number one, that you must choose somebody?

23 A: No.

24 Q: In fact, did he indicate the exact opposite, that they
25 may or may not be in there?

- 1 A: Yes.
- 2 Q: Okay, did he ever suggest to you which person you
3 should select?
- 4 A: No.
- 5 Q: In any way?
- 6 A: No.
- 7 Q: By hand gesture?
- 8 A: No.
- 9 Q: Anything?
- 10 A: No.
- 11 Q: After you signed this form, that is State's 22, and
12 let's say for the record which person did you identify as the
13 person you saw on June 9th, 1998?
- 14 A: The first one in the photo.
- 15 Q: This one?
- 16 A: Uh-huh (affirmative response).
- 17 Q: And then did you indicate that by signing it on State's
18 22?
- 19 A: I did.
- 20 Q: Did you all then get Mark out the room?
- 21 A: Yeah, I think so.
- 22 Q: Okay, now, did Lieutenant Robey tell you and Mark, "Hey,
23 you guys picked the same guy?"
- 24 A: No.
- 25 Q: In fact, did you know whether or not your husband

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1 picked anyone out?

2 A: No, I didn't know.

3 Q: Later did you learn that he had picked someone?

4 A: I did.

5 Q: Okay, and did you know until Lieutenant Robey called
6 you that you had picked the same one?

7 A: Not until Lieutenant Robey called. I don't think. I
8 can't remember if we talked about it or not after that.

9 Q: Okay, and in any event it's not a distinct
10 recollection; is it?

11 A: No.

12 Q: Ultimately you did receive a call from Lieutenant
13 Robey; did you not?

14 A: We did.

15 Q: Okay, and in fact do you recall if you were the one
16 who received the call?

17 A: I probably was. I think so.

18 Q: Okay, and do you recall what he told you?

19 A: I really don't recall it exactly.

20 Q: Okay, but the nature of it what did you gather from
21 the conversation that you had?

22 A: That I think that the one that I did choose and even
23 marked that that was the one they had held as a suspect.

24 Q: Okay, now, let me ask you this, Mrs. Hobbs, how would
25 you have felt if the person you saw at the beach on June

1 9th, 1998, had not been contained in State's 20?

2 A: I would have felt a lot better. It would have been
3 easier not to have identified anybody.

4 Q: But did you have that option?

5 A: Well, no, because if I hadn't I wouldn't have been
6 telling the truth.

7 Q: You wouldn't have been telling the truth. Now, you've
8 had the opportunity to provide prior sworn under oath
9 statements on at least three occasions in connection with this
10 matter; have you not?

11 A: That's right.

12 Q: And on each of those occasions your identification of
13 John Boyd Frazier have been entirely consistent; is that
14 correct?

15 A: Yes, sir.

16 Q: And in fact, today is the fourth day; is it not?

17 A: I think so. I think so.

18 Q: Now, let me ask, did there come a time when you and
19 your husband were contacted by the parents of Brent Poole,
20 the victim in this case?

21 A: Yes.

22 Q: They called you and they asked you to come to -- for
23 the opportunity to take you to dinner.

24 A: They did. They asked if they could come take us to
25 dinner at a place of our choice.

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1 Q: And in terms of timing how long after the last time
2 with the exception of today, the last time that you provided
3 prior sworn under oath statement identifying John Boyd
4 Frazier, the person you saw on the beach, how long after
5 that last time was this contact by the Poole family made?
6 You understand the question?

7 A: Yeah, I think so, and I couldn't say exactly how long
8 it had been. It had been a while.

9 Q: They took you to dinner.

10 A: They did.

11 Q: And tell the jury was there something that was
12 remarkable that occurred?

13 A: Yes, yes. After we had dinner they gave us a card
14 and we opened it up and read it and they had written in it
15 that they were going to give us \$20,000, they
16 appreciated us coming forth, and at that time we didn't want
17 to accept the card or the money or, I mean, the money.
18 They said that they would give it to us later in the form
19 of a check or something. At that time they didn't know,
20 but I know at the time we tried to turn it down and tell
21 them, no, they had been through a lot. We didn't deserve
22 that, but they wanted to give it to us and we accepted.

23 Q: Mrs. Hobbs, let me ask you this, June 28th of 1998, the
24 date you identified John Boyd Frazier by way of this
25 photo lineup as the individual you saw on the beach

1 on June 9th, 1998, up until today has your level of
2 certainty regarding your identification increased at all?

3 A: Yes.

4 Q: Tell me why. Tell me and maybe I need to ask the
5 question a little differently.

6 MR. MARTIN: Objection.

7 MR. HUMPHRIES: I can rephrase my question.

8 MR. MARTIN: No, I don't think you need to. She's
9 answered.

10 THE COURT: I'm going to -- he just said tell me why
11 and then he said maybe I need to ask. Okay, go ahead, ask.

12 BY MR. HUMPHRIES:

13 Q: Here's my question.

14 THE COURT: All right.

15 Q: Are you as certain on June 28th, 1998, about the
16 identification of John Boyd Frazier as you are today
17 testifying before this jury under oath?

18 A: Yes.

19 Q: Any question about that?

20 A: No. The face is still the same. When I walked in
21 the court yesterday, I walked in, I looked to my right,
22 which would have been over that way. Mr. Frazier at that
23 time turned and looked to the left and looked at us and I
24 had made the comment to my husband he shouldn't have done
25 that. That was the same way he had looked at us that night,

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1 the same face.

2 Q: Any question in your mind?

3 A: No.

4 Q: And can you, Mrs. Hobbs, based exclusively on your
5 opportunity to observe the individual on that beach, here on
6 our beach on June 9th, 1998, can you based on those
7 observations exclusively identify for this jury the person
8 you saw on the beach that night if he's in the courtroom?

9 A: Yes.

10 Q: Do that for us.

11 A: (Complies with request.)

12 Q: The Defendant, that's all.

13 CROSS EXAMINATION

14 BY MR. MARTIN:

15 Q: Ms. Hobbs, does your memory get better or worse with
16 time?

17 A: I'm sorry?

18 Q: Does your memory have the tendency to get better or
19 worse with time?

20 A: It depends on what it is.

21 Q: It depends on what it is. In what instances does
22 your memory get better with time?

23 A: Well, just a while ago I was introduced earlier
24 yesterday I remember the man's face but I didn't remember
25 his name. I'm really bad with names.

- 1 Q: Got you.
- 2 A: And that kind of thing, but I do remember things that
- 3 I see.
- 4 Q: So, basically it gets better over time with you?
- 5 A: No, not better.
- 6 Q: Okay, all right, now, over this period of time have you
- 7 gotten to be friends with the Poole family?
- 8 A: I have talked to them and I feel like we are friends.
- 9 Q: All right, and you all have conferred with each other on
- 10 how many occasions since June the 9th, 1998?
- 11 A: I want to say three, four, maybe.
- 12 Q: Okay.
- 13 A: Not on a regular basis.
- 14 Q: They've called you and you've called them.
- 15 A: Yes.
- 16 Q: And then there came a point in time in which they
- 17 gave you \$10,000.
- 18 A: Myself and my husband 10, 20.
- 19 Q: A total of 20?
- 20 A: Uh-huh (affirmative response).
- 21 Q: And you took that money and put it in the bank.
- 22 A: Yes, sir.
- 23 Q: All right, and that's been some while ago; hasn't it?
- 24 A: It has, about -- almost seven years, I believe.
- 25 Q: All right, and when you came out of the motel that

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1 night ---

2 A: Yes.

3 Q: --- you didn't see the person standing on the other
4 side of the fence at that time looking at you; did you?

5 A: Not right then.

6 Q: All you saw was the person as it ran towards the
7 beach.

8 A: As he ran, yeah.

9 Q: Did it strike you that he could have just been
10 jogging out there?

11 A: He wasn't jogging.

12 Q: He wasn't jogging?

13 A: No.

14 Q: All right, at that point in time could you tell how he
15 was dressed?

16 A: Yes.

17 Q: How was he dressed?

18 A: He was dressed in long black shirt or dark shirt, I
19 should say, and long pants.

20 Q: You could see the long pants through the fence.

21 A: I don't remember a fence.

22 Q: You don't remember a fence ---

23 A: I don't remember.

24 Q: --- between you and the person on the street?

25 A: No, at that time, at that time I may have only seen

1 his head until he paused in front of us.

2 Q: Well, let me get it straight now, paused in front of
3 you where, Mrs. Hobbs?

4 A: As we were coming out there's an opening there. You
5 could see a whole body at that, at that area.

6 Q: I'm not sure, coming out of where the hotel ---

7 A: Coming out of the back of the ---

8 Q: --- doors or where?

9 A: Out of the motel around where the pools are and then
10 to go out to where the boardwalk is there's a -- just a
11 street area there.

12 Q: All right, now, let me be sure I'm clear with you.

13 A: Uh-huh (affirmative response).

14 Q: Your identification is based on what you saw on the
15 beach that night; correct, on the beach as you were on the
16 boardwalk.

17 A: I did see him there, that's right.

18 Q: Well, now, it's my understanding ---

19 A: Uh-huh (affirmative response).

20 Q: --- in the prior statements that you have given ---

21 A: Uh-huh (affirmative response).

22 Q: --- is that you did not get a look at the man's face
23 until he was on the beach and you were on the boardwalk; is
24 that right?

25 A: Probably not a definite look, not a definite look.

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- 1 Q: Well, what kind of look did you get?
- 2 A: Just a glimpse, a glimpse.
- 3 Q: Where?
- 4 A: When we were coming out and he paused.
- 5 Q: Coming out of where?
- 6 A: Coming out from the back of the pool where I just
- 7 said.
- 8 Q: All right, so, what you're saying is the guy was at
- 9 one end of the pool on the street and he runs down towards
- 10 the other and he stands in here and then he runs down and
- 11 then he stops before he goes across the boardwalk; is that
- 12 what you're telling me?
- 13 A: He's running down the street. I see the top of a
- 14 head. We were coming out of the back of the pool where the
- 15 pools are. We're headed towards the street to get over to
- 16 where the boardwalk is.
- 17 Q: I just want to be sure I understand, Mrs. Hobbs.
- 18 A: Sure.
- 19 Q: This is State's Exhibit Number 36.
- 20 A: Uh-huh (affirmative response).
- 21 Q: Is that you standing there approximately
- 22 where your husband first saw the fellow; right?
- 23 A: I'm not sure where he first seen him.
- 24 Q: All right, well, is that you standing in that picture?
- 25 A: I don't even know. I'm not sure if that was me or

1 not.

2 Q: You can't tell whether it's you or not; can you?

3 A: I can't see if that's me or not there.

4 Q: This is in the daytime; isn't it?

5 A: That's a little, a little more blurred and not as

6 good as what I seen that night.

7 Q: That's not as good ---

8 A: No.

9 Q: --- as what you saw in the nighttime.

10 A: No, look, you can't make out that face.

11 Q: You can't; can you?

12 A: No.

13 Q: And it's in the daytime; isn't it?

14 A: That's right.

15 Q: And how many seconds are you getting to look at it

16 here?

17 A: I'm looking at it the whole time.

18 Q: How about put away a couple of seconds. What kind of --

19 could you identify him then?

20 A: Makes no difference; makes no difference.

21 Q: Let me ask you something, Mrs. Hobbs, honest to

22 goodness now are you telling this jury that based on your two

23 two second observations on the beach and on the street that

24 you can remember John Frazier just from what you saw on the

25 beach that night?

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1 A: Yeah, you compare the size of you to that little
2 picture there.

3 Q: Well, I'm not doing that. I want to -- but I just want
4 to be sure now.

5 A: And he was bigger than you.

6 Q: Isn't there, isn't there, isn't there a chance as you
7 look back seven years ago that you could be mistaken?

8 A: No.

9 Q: No? No chance?

10 A: No.

11 Q: You ever made a mistake?

12 A: Oh, yes, yeah.

13 Q: So, you're possible -- it is possible for you to make
14 mistakes; isn't it?

15 A: Yes, it is.

16 Q: And then as you, show you State's Exhibit Number
17 37. Can you tell me who that is?

18 A: Yes.

19 Q: Who is that?

20 A: That's my husband.

21 Q: Okay, and of course, now, that's a picture taken in the
22 daytime, too; isn't it? Right?

23 A: That's right.

24 Q: And of course, you were looking at him in the nighttime;
25 weren't you?

1 A: That's right, and he was bigger than that, too.

2 Q: He was bigger than that?

3 A: Than that picture.

4 Q: Okay, of course, you're trying to pick out the eyes
5 and the face; aren't you? Isn't that the way you make your
6 identification?

7 A: That's what they were trying to have me pick out when
8 I was doing the composite.

9 Q: Well, when you looked at the photo lineup that's
10 what you looked at; wasn't it, the face and the eyes?

11 A: I looked at the whole face, the whole face.

12 Q: And did you not say, "That's the eyes, that's him"?

13 A: When I was looking at the composite I can't remember
14 if I said that or not.

15 Q: You want to look at one of your prior statements?

16 A: No, not really.

17 MR. HUMPHRIES: Why don't we, why don't we make sure
18 we know what we're talking about. She's talking about a
19 composite. He's talking about a photo lineup.

20 MR. MARTIN: Well, if she's talking about a composite --
21 you're right. I'm now over to ---

22 BY MR. MARTIN:

23 Q: Do you think I was talking about the composite?

24 A: Well, you're going back and forth. I'm not really
25 sure.

1 Q: All right, let me go back. I'm talking about the photo
2 lineup that Mr. Robey showed you and I thought I was clear
3 on that, but now did you not tell him, "That's him, that's
4 the eyes"?

5 A: I could have. That's been seven years ago. I don't
6 remember exactly, but I probably did.

7 Q: It's hard to remember what you said or did or saw
8 seven years ago; isn't it?

9 A: It could be.

10 Q: Especially when you get a two-second glimpse in the
11 dark of a man you have never seen before.

12 A: It wasn't dark.

13 Q: It wasn't dark?

14 A: It was dark outside but where I seen was not dark.

15 Q: All right, let's talk about that then.

16 A: Okay.

17 Q: It was -- there was no light on the beach; was there,
18 Mrs. Hobbs?

19 A: No, no.

20 Q: And there was no moonlight that night; was it?

21 A: I don't remember the moonlight.

22 Q: You don't?

23 A: I remember seeing his face. It was light enough to make
24 out a person's eyes.

25 Q: But still now, okay, okay, but now, it was at best

1 dimly lit; wasn't it, Mrs. Hobbs?

2 A: No, I wouldn't say dimly lit, no.

3 Q: How would you describe it?

4 A: It was dark outside. There was light from the motel

5 I suspect or assume and I could see fine.

6 Q: Whatever light that you have was coming from the

7 motel; right?

8 A: That's right. It would have been shining right down

9 on him.

10 Q: Okay, but there's no question that it was a quick

11 glimpse, two seconds; right?

12 A: No, I was watching him the whole time, not two

13 seconds.

14 Q: Well, did you not just tell Mr. Humphries that your

15 full frontal look at his face was two seconds?

16 A: A real good look staring right at me was two seconds.

17 Q: All right, well, that's what I'm asking.

18 A: Okay, but I was watching him the whole time.

19 Q: All right, but it was his face, and I want to be clear

20 on this now. It was his face that you made the identification

21 from and you said in several statements, including today, that

22 it was a two-second look; is that right or wrong of his face?

23 A: That's right.

24 Q: All right, now, is that quick in your opinion?

25 A: No.

1 Q: Well, then why do you argue with me when I say you got a
2 quick glimpse ---

3 A: I'm not arguing.

4 Q: --- in the dark.

5 A: I'm not arguing with you.

6 Q: At a distance of approximately 15 feet of a person
7 that you had never seen before; right?

8 A: Right.

9 Q: That was the basis of your identification today in
10 this courtroom.

11 A: That's right.

12 Q: Seven years later.

13 A: Yes.

14 Q: And nothing that happened in between had any effect
15 on that.

16 A: No.

17 Q: But don't you think it's human nature to think that
18 you've heard things, that you have been told, pictures that
19 you've saw could contaminate your memory and cause you not to
20 be able to distinguish what you saw that night from what your
21 mind recalls today?

22 A: No, I remember what I saw that night.

23 Q: Okay, now, based on what you did, you called the
24 police department and tell them you saw a white man with
25 black clothes; right? That's what you were going to tell

1 them.

2 A: A white, a white male with black clothing.

3 Q: And that's all you told them.

4 A: The first time.

5 Q: Right, and then you go down to do a composite.

6 A: Uh-huh (affirmative response).

7 Q: Your husband goes first.

8 A: Uh-huh (affirmative response).

9 Q: And you go next.

10 A: Uh-huh (affirmative response).

11 Q: Right?

12 A: That's right.

13 Q: And when you look at his you don't like it and say, "I

14 don't like that. Let me work with it." Well, they ask you

15 to work with it. You don't really want to be working with it.

16 A: Right.

17 Q: Well, is the fact that you don't want to be working with

18 it could that have anything to do with you aren't really sure

19 of what you saw in the dark on the beach at that distance in

20 such a quick manner?

21 A: No, that had nothing to do with it. I didn't want to

22 be involved.

23 Q: Nothing to do with it.

24 A: I don't want to be sitting here today.

25 Q: I believe that, and I know and, Mrs. Hobbs, you are well

1 intended; aren't you? You are well intended in everything
2 you've done in this case.

3 A: Yes, I am.

4 Q: All right, and you're being as honest as you can be.

5 A: Yes.

6 Q: But you would agree with me that in spite of all that
7 you are capable of making a mistake.

8 A: Yes.

9 Q: And it is possible that when things are suggested to
10 you in ways that maybe you don't even realize that they can
11 effect the choices you make; can they not?

12 A: They could. In this instance, no. I remember what I
13 seen.

14 Q: I understand that. I understand that and I know
15 that's your story and you are sticking to it, but what I'm
16 asking you is the distinctive eyes, when they showed you
17 this photographic lineup wherever it is ---

18 A: This here?

19 Q: Flip it up there on the screen. When they showed you
20 this photographic lineup and you told Mr. Robey in your
21 identification, "That's him. That's the eyes," there's no
22 question that the eyes were distinctive about it; were
23 they not?

24 A: Well, maybe it's because whenever we tried to do the
25 composite I never could find eyes that matched the face

1 that fit, that looked like it did that night.

2 Q: Say that again. I don't know that I understood it.

3 A: Maybe when I said, "That's the eyes," maybe it's the
4 eyes I could never find in the pictures for the composite.

5 Q: So ---

6 A: So ---

7 Q: --- you think the fact that you never could find the
8 set of eyes in the composite ---

9 A: I could never -- whenever I made it I could never
10 find any that looked like what I seen that night.

11 Q: Well, now, and I'll go to that in just a second, but
12 this, this -- the lineup they've got here the only one
13 that's got any eyes that are distinctive or round or big or
14 white is number one; isn't it?

15 A: Yeah, I guess it is.

16 Q: And so, my point to you is ---

17 A: Uh-huh (affirmative response).

18 Q: --- if you kind of got in your mind at that time, "I'm
19 looking for -- I remember the eyes. They're distinctive, the
20 big eyes, the distinctive eyes," and of course they've
21 narrowed your choices to a field of six with this lineup;
22 haven't they?

23 A: Yes.

24 Q: And they drove all the way up to -- well, they didn't
25 drive. They faxed that thing all the way up to Virginia and

1 out to you in the middle of the night. So, you figure that
2 they've got a suspect in there or they wouldn't be wasting
3 their time doing all this; don't you?

4 A: No, actually I didn't figure that.

5 Q: Okay.

6 A: I didn't know.

7 Q: Well, what did you -- what did you figure then?

8 A: I don't know that I figured anything at the time.

9 Q: What did you think that Mr. Robey was coming out
10 there for then?

11 A: To see if we could identify a suspect in this lineup.

12 Q: All right, which meant they had a suspect and he
13 would be in the lineup; right?

14 A: Could be. I didn't know that.

15 Q: All right, so, and that -- when they brought them out
16 and you told them that my point to you is it is basically
17 suggested to you. If you're looking for big eyes you only got
18 one choice.

19 A: No, I looked at the whole face, too.

20 Q: The whole face.

21 A: The whole face is the face I seen.

22 Q: All right, did the chin have anything to do with your
23 identification of John Frazier?

24 A: The chin?

25 Q: Yes, ma'am.

- 1 A: No, the overall face, the shape of his head.
- 2 Q: All that, okay, and the shape of that head is different
3 than the others; right?
- 4 A: Yeah, I guess it is, yeah.
- 5 Q: All right, but at any rate, now, when you did go down to
6 do the composite you couldn't find the right eyes; right?
- 7 A: That's right, but like I said, I wasn't looking real
8 hard.
- 9 Q: Why weren't you looking real hard?
- 10 A: Well, I should have if I'd known it'd led up to this.
- 11 Q: Well, I mean, you would agree with me you knew by that
12 time when you were looking at the composite that this was
13 a murder investigation.
- 14 A: I guess I did.
- 15 Q: All right.
- 16 A: I don't -- I've never been in any cases myself.
- 17 Q: I understand that. I do understand that, but I guess
18 basically you, the police had asked you to please come down
19 to the police department and help us and tell us about the
20 man you saw last night.
- 21 A: Right.
- 22 Q: And that a man had been killed; right?
- 23 A: I guess so, yeah.
- 24 Q: And maybe I'm wrong. What did you think ---
- 25 A: That's right.

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1 Q: --- you were doing down there?

2 A: No, that's right. I did hear someone had been shot.

3 Q: All right.

4 A: I did hear that.

5 Q: And so, it was a murder investigation.

6 A: Okay.

7 Q: So, it was important; wasn't it?

8 A: Yes, it was important.

9 Q: All right, and I can tell by talking to you that
10 you're the kind of person that is not flippant and
11 careless. You would have been thorough; wouldn't you, Mrs.
12 Hobbs?

13 A: I would have been thorough.

14 Q: All right.

15 A: I didn't take the time that I should have been. I
16 will say that.

17 Q: Well, you were there and, for example, these are and
18 I'm referring to State's -- Defense Exhibit Number Three,
19 these are a set of -- these are eyes that were available to
20 you that night; aren't they?

21 A: I have no idea.

22 Q: Okay, well, by stipulation the State has agreed that
23 these are eyes that came from the composite kit that you
24 used that night; right?

25 A: If they said that I guess they are.

1 Q: Well, I mean, right, if they have and you don't know
2 that but these eyes look nothing at all like the ones in the
3 composite that you worked on; did they?

4 A: I don't think they do.

5 Q: All right, so, if we're talking about the eyes you
6 just messed up on the composite, didn't find the right kind
7 for whatever reason; right?

8 A: Right.

9 Q: Okay, and the composite, who helped you work on it?

10 A: I guess my husband and I were both working on it
11 together.

12 Q: Well, was there a policeman there to help you?

13 A: There was a policeman there.

14 Q: All right, do you see him in the courtroom?

15 A: I see a lot of people.

16 Q: You don't see him in the courtroom, Mrs. Hobbs?

17 A: I can't be sure.

18 Q: You can't be sure.

19 A: No.

20 Q: How can you be sure then that that's the man you saw
21 on the beach in the dark that night?

22 A: Because I was watching him because I was suspicious
23 of him. I was afraid of him.

24 Q: You didn't watch that policeman that helped you?

25 How long were you there with that policeman in the well-lit

- 1 building looking at the composites?
- 2 A: I have no idea and I wasn't paying too close attention
3 to him.
- 4 Q: Well, you did see him; didn't you, Mrs. Hobbs?
- 5 A: I'm sure I did see him if I was talking to him.
- 6 Q: And you saw, and you saw him in a lighted room as
7 opposed to the dark.
- 8 A: That's right. I guess so.
- 9 Q: And you saw him for way yonder more than two seconds.
- 10 A: Uh-huh (affirmative response).
- 11 Q: I'm asking you if you would point him out to us in
12 this courtroom.
- 13 A: And I don't see him.
- 14 Q: Okay, all right, now, when you went back to Winston --
15 to -- not Winston-Salem.
- 16 A: Virginia.
- 17 Q: Virginia, did you -- and you were there till Saturday, I
18 mean Sunday; am I right? You went back from Myrtle Beach on
19 Sunday?
- 20 A: Could have been Saturday or Sunday; I'm not sure.
- 21 Q: All right, and when you -- did you talk with anybody
22 while you were here at Myrtle Beach -- no, let me strike that.
23 Did you talk with anybody, a friend of yours after you got
24 back to Virginia about this case at all?
- 25 A: I may have. I won't deny it. I just don't know.

- 1 Q: All right, which friend would that have been?
- 2 A: That's what I mean. I may have. I don't know who it
3 would have been.
- 4 Q: Did you tell Detective Terry Altman that you talked
5 with a friend in Myrtle Beach?
- 6 A: I can't remember.
- 7 Q: You don't remember that?
- 8 A: I can't remember.
- 9 Q: Okay, and then when you got back to Myrtle Beach did
10 -- I mean, home did you talk to a Myrtle Beach policeman
11 before they came with the lineup?
- 12 A: I can't remember that either.
- 13 Q: You don't remember talking to Detective Terry Altman
14 on June the 24th?
- 15 A: I don't remember it. I'm sure I could have.
- 16 Q: Do you remember talking to Detective Terry Altman on
17 June the 26th?
- 18 A: I don't remember it.
- 19 Q: Any reason you wouldn't remember that?
- 20 A: I guess I just had no reason to remember it.
- 21 Q: Well ---
- 22 A: And had I known it would have gone this far I would
23 have wrote them down every time.
- 24 Q: Well, I understand everything, but if -- obviously you
25 don't remember talking to him you don't remember what your

1 conversation was; do you?

2 A: No.

3 Q: All right, when Robey came out to see you did you
4 know he was coming?

5 A: He called and said he was coming. I do remember
6 that.

7 Q: All right, and he came, and he came out, looked at the
8 lineup ---

9 A: Uh-huh (affirmative response).

10 Q: --- and you looked at yours and you, I believe, says
11 that -- well, his testimony was that you looked at it, pretty
12 quick said, "It's not him," looking, "It's not him, not him,
13 not him, not him, him. That's the eyes." Right?

14 A: I don't remember that.

15 Q: You don't remember that?

16 A: But if he said it I'm sure he's right.

17 Q: Okay, and then he left and did he call you back that
18 night to tell you about who you had picked out?

19 A: I can't remember if he called back that night. I'm
20 not sure about that.

21 Q: Did he call you at some point in time?

22 A: He did.

23 Q: All right, when was it that he called you?

24 A: I'm not sure. The only thing I know it could have
25 been maybe the next day or so because I called my husband,

1 I believe, I called him, and he would have been working at
2 that time and just told him that we had picked out the same
3 and it was the person they had held in custody.

4 Q: Let me go back and ask you this after, after Robey left
5 that night did you and your husband Mark discuss the lineups
6 you had looked at and who you had picked out?

7 A: We may have. I can't remember.

8 Q: You don't remember that either?

9 A: No, but you have to remember this is not the only thing
10 in our life.

11 Q: I understand that but how many murder investigations
12 have you been involved in?

13 A: This is the only one I've been involved in.

14 Q: Okay, and when you -- he called you back he told you
15 You had picked out the suspect; is that correct?

16 Q: I think so.

17 A: All right, when was the next time you talked to
18 anybody from law enforcement or the Solicitor's Office
19 about this?

20 A: I wouldn't know.

21 Q: You don't know that either?

22 A: No.

23 Q: You didn't -- I believe there's a statement that was
24 given on September the 3rd of 1998 and you probably don't
25 remember the date but do you remember a couple of Myrtle

1 Beach policemen and Dale Long from the Solicitor's Office
2 coming up, taking a statement from you?

3 A: I do remember that.

4 Q: All right, and that was the first recorded statement
5 you had given in this case that you recall.

6 A: I remember them recording something but I can't
7 remember now.

8 Q: You don't -- you do remember them recording ---

9 A: I mean I don't know exactly what I said on that tape.

10 Q: Sure, I'm not going to ask you about it, but that was
11 the last recorded statement that you or the only recorded
12 statement that you had given up till that point in time
13 about who you saw on the beach that night; wasn't it?

14 A: I'm sure it probably was, yes.

15 Q: Okay, and what did you and Mark discuss after Robey
16 left? Did you talk about the, "I picked number one. Which
17 one did you pick?"

18 A: You know, I really don't remember ---

19 Q: Okay.

20 A: --- if we did or not. We may have.

21 Q: Okay, thank you, Mrs. Hobbs.

22 THE COURT: Redirect.

23 REDIRECT EXAMINATION

24 BY MR. HUMPHRIES:

25 Q: On June 28th, 1998, who did you identify as the

1 individual you saw on June 9th, 1998, in Myrtle Beach,
2 South Carolina, outside of the Carolina Winds Hotel?

3 A: Mr. Frazier.

4 Q: And during the week of November 13th, 1999, in sworn,
5 in a sworn statement who did you identify as the person
6 that you saw on the beach on June 9th, 1998, in Myrtle
7 Beach, South Carolina?

8 A: Mr. Frazier.

9 Q: And in February, the week of February 14th in the
10 year 2000 who did you identify as the person you saw on
11 the beach on June 9th, 1998, in sworn testimony, sworn
12 statement?

13 A: Mr. Frazier.

14 Q: It's the same today.

15 A: Yes.

16 RE CROSS EXAMINATION

17 BY MR. MARTIN:

18 Q: You don't remember those dates, do you, Mrs. Hobbs?

19 A: No.

20 MR. HUMPHRIES: Do you want me to ask you about the
21 circumstances under which because these dates we can -- the
22 Court can certainly ---

23 MR. MARTIN: Objection.

24 MR. HUMPHRIES: Well, I object to that question.

25 MR. MARTIN: I'll object to what he's objecting to,

1 then.

2 THE COURT: All right, I want you to strike what the
3 attorneys have to say and let me have you approach, gentlemen.

4 (Whereupon, a Bench conference was held in the
5 presence, but out of the hearing, of the jury.)

6 REDIRECT EXAMINATION

7 BY MR. HUMPHRIES:

8 Q: You provided sworn statement under oath regarding
9 your identification of John Boyd Frazier in November of
10 1999. You recall that.

11 A: Yes, and I didn't know the exact dates, but I know the
12 exact time you were talking, referring to with all those
13 dates. So, I have no problem. I mean, I could say what
14 the dates were.

15 Q: Okay, and the last time on two occasions during the
16 week of February 14th in the year 2000 you provided sworn
17 statement under oath identifying John Boyd Frazier as the
18 individual you saw on the beach on June 9th, 1998.

19 A: Yes.

20 Q: Now, just as a point of clarification this meeting
21 that you had with the Pooles when they extended this
22 reward, in terms of time, was it after the week of February
23 14th in the year 2000?

24 A: Yes, it would have been after that.

25 Q: And do you know how much longer?

1 A: No, I don't know how much longer. Quite a, there was
2 quite a lapse of time after that.

3 Q: Thank you.

4 A: Uh-huh (affirmative response).

5 THE COURT: Anything further?

6 MR. HUMPHRIES: No, not of this witness.

7 MR. MARTIN: No questions.

8 THE COURT: You may step down, ma'am.

9 A: Thank you.

10 MR. HUMPHRIES: We do need to approach regarding
11 scheduling.

12 THE COURT: Okay, please.

13 (Whereupon, a Bench conference was held in the
14 presence, but out of the hearing, of the jury.)

15 THE COURT: We need to take a break at this time, but
16 we do have a couple of more witnesses we'd want to get in.
17 We don't anticipate that they're going to be long witnesses,
18 but we do want to get a couple of more witnesses in. With
19 that in mind let me let you take a quick break and we'll bring
20 you back out. Please do not discuss the case.

21 (Whereupon, the following takes place outside the
22 presence of the jury.)

23 THE COURT: I know everybody is as anxious to get out as
24 this jury is. Wait just a moment and we'll let you out but
25 please stay put for right now. Let's let the jury get out

1 and I know everybody is in need of a break. Is there anything
2 from the -- wait till the door closes. Is there anything from
3 the State?

4 MR. HEMBREE: Nothing from the State, Your Honor.

5 THE COURT: Anything from the Defense?

6 MR. MARTIN: No, ma'am.

7 THE COURT: All right, all right, we'll be back in 10
8 minutes.

9 ***** OFF THE RECORD *****

10 (On the record.)

11 (Whereupon, the following takes place outside the
12 presence of the jury.)

13 THE COURT: All right, let's get everybody in place.
14 Is there anything else, anything from the State at this
15 time?

16 MR. HEMBREE: No, Your Honor.

17 THE COURT: Anything from the Defense?

18 MR. MARTIN: No, Your Honor.

19 THE COURT: Are they all back from their smoke break?
20 Would you check on it for me?

21 OFFICER: Yes, ma'am, they're ready.

22 THE COURT: All right.

23 The State ready to bring the jury out?

24 MR. HEMBREE: The State's ready, Your Honor.

25 THE COURT: All right, the Defense?

1 MR. MARTIN: Ready.

2 THE COURT: All right, we're ready for them.

3 (Whereupon, the following takes place in the presence
4 of the jury.)

5 THE COURT: Welcome back, Mr. Foreman and ladies and
6 gentlemen of the jury. We continue now with the State's
7 case. As I had indicated to you we anticipate calling
8 about two more witnesses and then we will call it a night
9 and I'll give you your nightly instructions. We'll begin,
10 yes, sir.

11 MR. HEMBREE: Thank you, Your Honor.

12 The State intends to call two, one SLED agent or,
13 excuse me, two former SLED agents that are involved in
14 forensic services at SLED. Prior to that it's necessary for
15 me to read a stipulation that both the Defense and the
16 State entered into regarding the chain of custody of the
17 items that were tested by these forensic examiners.

18 THE COURT: And you remember, ladies and gentlemen of
19 the jury, the stipulation once it's read into evidence is
20 evidence for your consideration. So, listen carefully.
21 Yes, sir.

22 MR. HEMBREE: Thank you, Your Honor.

23 Stipulation number one, crime scene specialist, Joe
24 Graham, transported from the Myrtle Beach Police
25 Department evidence section a secure holding facility to

1 the South Carolina Law Enforcement Division Forensic
2 Services for examination the following items of evidence:
3 A, two fired nine millimeter casings collected from the
4 crime scene by Crime Scene Specialist David Grazioso; B,
5 four live nine millimeter cartridges collected from the
6 crime scene by crime scene specialist David Grazioso; C,
7 two fired projectiles collected from the body of William
8 Brent Poole at autopsy by crime scene specialist R.K. Lail;
9 and D, a Triple A kit, gunpowder and (gunpowder metals
10 residue) collected from the person of Kimberly Renee Poole by
11 Crime Scene Specialist David Grazioso; and while in the
12 custody and control of Crime Scene Specialist Joe Graham the
13 items stated above were not changed substantially as to form
14 or content.

15 The next stipulation, Your Honor, would be items of
16 evidence delivered to the South Carolina Law Enforcement
17 Division Forensic Services by crime scene specialist Joe
18 Graham being two fired nine millimeter casings and four
19 live nine millimeter cartridges collected at the crime
20 scene, two fired projectiles collected from the body of
21 William Brent Poole at autopsy, and Triple A kit collected
22 from Kimberly Renee Poole were not changed substantially
23 as to form or content by South Carolina Law Enforcement
24 employees transferring the items of evidence to the
25 forensic experts for examination.

1 Third stipulation, items of evidence delivered to
2 Myrtle Beach Police Department evidence section, being two
3 fired nine millimeter casings and four live cartridges
4 collected at the crime scene, two fired projectiles
5 collected from the body of William Brent Poole at
6 autopsy and a Triple A kit collected from Kimberly Renee
7 Poole, while deposited and secured they were not changed
8 substantially as to form or content.

9 Those would be all the stipulations as to these items
10 of evidence, Your Honor, that would be relevant at this
11 time.

12 THE COURT: So, you agree to those stipulations, chain
13 of custody.

14 MR. MARTIN: I do.

15 THE COURT: All right, very well.

16 MR. HEMBREE: Thank you, Your Honor. The State would
17 now call Kimberly Black to the witness stand.

18 AT THIS TIME KIMBERLY BLACK WAS CALLED TO THE STAND, DULY
19 SWORN BY THE CLERK AND TESTIFIED AS FOLLOWS:

20 THE CLERK: Thank you. Please be seated.

21 DIRECT EXAMINATION

22 BY MR. HEMBREE:

23 Q: Good afternoon, Mrs. Black.

24 A: Good afternoon.

25 Q: And with whom are you employed currently?

Kimberly Black - Direct by Mr. Hembree

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1 A: Currently I am a stay-at-home mom.

2 Q: Very good, but back in 1999, March 25th of 1999 with
3 whom were you employed?

4 A: I was employed with the South Carolina Law
5 Enforcement Division, also known as SLED, as a forensic
6 chemist assigned to the trace evidence department.

7 Q: And if you would, please, give this jury the benefit
8 of your qualifications as a trace evidence examiner.

9 MR. MARTIN: I would stipulate that she's qualified as
10 a trace evidence examiner.

11 THE COURT: All right, very well.

12 MR. HEMBREE: Thank you, Mr. Martin.

13 BY MR. HEMBREE:

14 Q: Ms. Black, if you would tell this jury just a little
15 bit, a summary of what trace evidence examiners are called
16 upon to do typically.

17 A: Trace evidence is typically a term that refers to
18 items of evidence that are found in very small amounts.
19 Most trace evidence requires some sort of microscopic
20 technique for analysis and for detection. During my
21 employment with the trace evidence department at SLED I
22 routinely looked at gunshot residue kits which were samples
23 collected from individuals' hands submitted to me for
24 analysis to determine if that person could have come into
25 contact with a gunshot residue cloud. I also looked at the

1 clothing collected from gunshot victims to determine when
2 possible how far the victim may have been from the end of
3 the gun when the gun was fired. I looked at fiber
4 evidence, paint evidence, explosive evidence and trace
5 other evidence, which was a miscellaneous category that
6 includes things like duct tape, rope, cord and any other
7 type of miscellaneous item that may be found at a crime
8 scene that may have some sort of evidentiary value.

9 Q: Mrs. Black, if you would, what were you called upon
10 to examine in this case?

11 A: In this particular case I was asked to do gunshot
12 residue kits.

13 Q: On whom?

14 A: I received two kits in this particular case. I
15 received one that was labeled coming from a B. Poole and
16 one that was labeled as coming from R. Poole.

17 Q: And if you would briefly describe to this jury what a
18 gunshot, it's also known as a Triple A kit, I believe; is
19 that correct?

20 A: They can be referred to as a Triple A kit. That's an
21 older terminology. A gunshot residue kit is the term that's
22 been around more recently.

23 Q: More modern terms.

24 A: Yes, sir.

25 Q: And explain to this jury what the purpose of a

1 gunshot residue test is.

2 A: First I'd like to explain gunshot residue if I may.

3 Q: That'd be appropriate. Thank you.

4 A: When a gun is fired there is a cloud of material
5 which is expelled from any opening in that gun. The
6 majority of this cloud will actually come from the muzzle
7 end or the barrel end of the gun with a smaller portion of
8 the cloud coming from the ejection port if you're talking
9 about a semiautomatic handgun or from a cylinder gap if
10 you're talking about a revolver. This cloud of material
11 will actually travel a short distance away from the gun and
12 will then curve back around and encircle or engulf the gun
13 and the area in close proximity to the gun. This cloud is
14 composed of microscopic particles that contain metals that
15 are actually being contributed by the ammunition fired in
16 the gun. This cloud of material is what we refer to as a
17 gunshot residue cloud and the particles are gunshot
18 residue particles. The theory here or the idea is that
19 any object located within that cloud has the potential to
20 have these particles deposited upon it. For instance, I
21 would expect to find gunshot residue particles deposited on
22 the gun, on the hands of the shooter, on the victim if the
23 victim is in close enough proximity to the gun when the gun
24 is fired and if their hands are positioned outward in that
25 cloud. I may also find gunshot residue particles on the

1 hands of a witness if that person is standing right next to
2 the shooter or right next to the victim. The key here is
3 if a person's hands are extended into that cloud then the
4 potential is there for the material to be deposited there.
5 The gunshot residue kit is simply a kit that contains all
6 the materials needed to collect samples from a person's
7 hands. One type of -- one sample collection technique that
8 can be used, which was incorporated in this particular case,
9 uses cotton swabs or Q-tips. The kit contains Q-tips, test
10 tubes and a small vial of a dilute nitric acid. The nitric
11 acid is applied to the tip of the swab and then the swab is
12 rubbed across the surface of the skin. Any particles,
13 materials that would be on a person's hands are collected
14 and preserved on the tip of that Q-tip or cotton swab and
15 then placed in the test tube. When I receive those
16 samples at the laboratory I then take a look at the
17 materials that are present there to determine if this
18 person may have come into contact either with a firearm or
19 with that gunshot residue cloud.

20 Q: Understood. Now, you indicated in your explanation
21 there that you might expect to find gunshot residue on the
22 hands of a victim if their hands were extended into the
23 cloud that's produced by the gun when it's fired.

24 A: Yes, sir, that is correct.

25 Q: So, if someone had their hands up like this you might

1 expect to find gunshot residue on the palms of their hands.

2 A: I would expect in that particular case to find
3 higher concentrations perhaps on the palms, but I could
4 still find the material on the backs because it is a
5 gaseous cloud and it does sort of engulf and encircle
6 objects.

7 Q: I follow you. Now, let me take you to your results
8 in this case. You tested two gunshot residue tests, one on
9 a kit labeled B. Poole and one on a kit labeled R. Poole.
10 If you would share with this jury the results of those
11 examinations.

12 A: In both of those kits I actually have a negative
13 result. The quantities of metals that I detected on the
14 hands of both individuals did not indicate to me that I had
15 the presence of gunshot residue.

16 Q: Let me ask you this, if a, if a gun were placed
17 against the chin of the victim and fired would you expect
18 to find gunshot residue on the hands of the victim?

19 A: Most of the gunshot residue cloud in that particular
20 case would be propelled into the body. However, because a
21 small portion of the cloud is contributed by the ejection
22 port or the cylinder gap there could still be some material
23 deposited on their hands. Barring other factors, I would
24 expect to still find some materials, some gunshot residue
25 on their hands in that case but not as much, obviously, as

1 I would if it were not a contact shot.

2 Q: Understood. Now, let me ask you about the, about
3 the policy at SLED regarding these tests and how often or,
4 excuse me, is there a time limit that is SLED policy for
5 even doing a gunshot residue test?

6 A: Yes, sir, gunshot residue material is a very fragile
7 material. It's just -- it's lightly deposited on the
8 surface of the skin; and therefore, it's very easily
9 removed. For instance, if someone washes their hands with
10 soap and water or simply just using water that can serve to
11 immediately remove all the materials from their hands.
12 Aside from washing of the hands, normal activity can also
13 serve to remove the material. If someone rubs their hands
14 together, rubs their hands on their pants, places their
15 hands in their pockets, basically anytime they touch
16 another object it will serve to diminish the material or
17 remove some of the material. Therefore, it was the policy
18 of the trace department at SLED during my employment and as
19 my understanding it still is any kit taken beyond six hours
20 from the time of the shooting will not be analyzed because
21 there would not be an expectation of the material still
22 being present.

23 Q: Okay, so, it's sort of that time limit of six hours
24 from the shooting itself until the kit was collected that
25 is, is under SLED policy would be tested.

Kimberly Black - Cross by Mr. Martin

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1 A: Yes, that is correct.

2 Q: If the kit was collected within six hours of the
3 actual shooting.

4 A: Yes, sir, and ---

5 Q: Anytime thereafter you all would not test it.

6 A: That is correct and obviously the closer to the time
7 of shooting, the closer to the time of the shooting
8 that the samples can be collected the better because as
9 more time progresses you are going to have a diminishing
10 effect on the material there even within that six-hour time
11 frame.

12 Q: But you did not detect any gunshot residue metals in
13 either one of these tests?

14 A: No, sir, I did not.

15 Q: I don't believe I have any further questions, Mrs.
16 Black. If you'll answer any questions the Defense counsel
17 has for you, please.

18 CROSS EXAMINATION

19 BY MR. MARTIN:

20 Q: Two questions, Mrs. Black. Number one, ask you this,
21 trace evidence is it important that trace evidence be secured
22 after it's collection so that it's not contaminated prior to
23 its testing?

24 A: Yes, sir.

25 Q: And if I were to shoot a gun on the beach and go to

1 the ocean and wash my hands could I wash away the gunshot
2 residue that would have been deposited on my hands?

3 A: Yes, sir.

4 Q: That's all I have.

5 THE COURT: Anything further?

6 MR. HEMBREE: Nothing further from this witness, Your
7 Honor.

8 THE COURT: All right, you may step down.

9 A: Thank you, Your Honor.

10 THE COURT: You want this witness released?

11 MR. HEMBREE: We would ask that Mrs. Black be
12 released.

13 THE COURT: Any objection?

14 MR. MARTIN: No objection.

15 THE COURT: You're free to go.

16 A: Thank you.

17 THE COURT: Call your next witness.

18 MR. HEMBREE: Thank you, Your Honor.

19 The State calls Special Agent David Collins.

20 AT THIS TIME DAVID COLLINS WAS CALLED TO THE STAND, DULY
21 SWORN BY THE CLERK AND TESTIFIED AS FOLLOWS:

22 THE CLERK: Thank you. Please be seated. State your
23 full name and spell your last name for the Court.

24 MR. COLLINS: David Jeffrey Collins, C-O-L-L-I-N-S.

25 DIRECT EXAMINATION

David Collins - Direct by Mr. Hembree

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1 BY MR. HEMBREE:

2 Q: And I referred to you as Special Agent Collins. That
3 was your rank when you were with SLED back in 1988, 1999.
4 You left SLED's employ when?

5 A: I left SLED's employ in September of 2002.

6 Q: September 2002. Who do you work for now, sir?

7 A: I now am an investigator or forensics investigator
8 with the Richland County Sheriff's Department in Columbia,
9 South Carolina.

10 Q: And let me take you back to 1999 when you were called
11 upon to conduct a -- excuse me, 1998 when you were called
12 upon to conduct some analysis relating to the case of
13 State versus John Boyd Frazier. You were employed then
14 with South Carolina Law Enforcement Division.

15 A: That is correct.

16 Q: In what capacity?

17 A: I was a firearms and tool marks examiner in the
18 forensic services laboratory.

19 Q: And if you would, I think Mr. Martin may be willing to
20 stipulate as to your qualifications as a ---

21 MR. MARTIN: I will stipulate to his qualifications.

22 Q: --- thank you, firearms and tool mark examiner. Very
23 briefly, Investigator, if you'll tell this jury a little bit
24 about the science of firearm and tool marks identification.

25 A: A firearms and tool mark examiner is primarily

1 responsible for the examination of firearm and tool mark
2 evidence of any sort that is submitted to the laboratory.
3 This can include fired bullets, other projectiles such as
4 shot pellets or wads, fired cartridges cases, ammunition
5 components or firearms themselves. The largest portion of
6 our examinations that are requested are the comparison of
7 fired bullets and cartridge cases either with each other
8 or with a suspect firearm to determine if they're fired by
9 that specific firearm. If you don't have the firearm
10 submitted you're attempting to determine if more than one
11 firearm is involved or if all the evidence items were fired
12 by one gun. The way we can do this type of examination is
13 that when a firearm is manufactured there are various
14 machining processes used that leave behind microscopic
15 defects on the metal surfaces of the gun. One area of
16 specific interest to us is the bore or the inside of the
17 barrel. In most firearms, excluding many shotguns,
18 spiraling grooves called rifling are placed in the barrel
19 of the firearm. The machining process that produces this
20 rifling leaves those same types of microscopic defects
21 behind, and when a bullet is fired through that barrel those
22 defects mark the surface of that bullet or scratch it in a
23 way that is unique to that particular firearm. When a
24 cartridge case, or excuse me, a cartridge is fired in a gun
25 there are various portions of the gun that come into contact

1 with the ammunition or the cartridge and mark it also in a way
2 that's unique to that gun. These can be the breech face,
3 the firing pin, the extractor or the ejector. All of those
4 items can also mark a cartridge case in a way that's unique to
5 the gun in the same way that a fingerprint is unique to an
6 individual. An ammunition component does not even need to be
7 fired in a firearm in order to be identified to it or to
8 another component. Simply loading ammunition into and then
9 removing it from a firearm can mark it in a way unique to that
10 firearm. This can be done by -- caused by the magazine itself
11 or various parts of the loading process that move the
12 ammunition into and out of the gun. Those are metal parts and
13 they're coming into contact and marking that ammunition.

14 What we have to do in the laboratory is to take two
15 items, either two fired bullets for instance or two fired
16 cartridge cases and examine them side by side under a
17 comparison microscopic to look for areas where these markings
18 are present that match. If we find sufficient matching
19 characteristics we can conclude that those two items were
20 fired by the same gun.

21 Q: And Investigator, if you could, relate to this jury
22 what tests you were called upon to conduct in this case.

23 A: In this particular case I received as evidence two
24 fired bullet jackets or bullets. One was actually a bullet
25 that had the core material still within it. The other was

1 a jacket, that is the copper portion around --- from the
2 outside of the bullet. The core material was missing. I also
3 received two fired nine millimeter Luger caliber cartridge
4 cases and four unfired nine millimeter Luger caliber
5 cartridges.

6 What I was asked to do in this case was first to
7 examine the bullets and determine what caliber of bullets
8 they were and originally before they were fired or what type
9 of ammunition they came from, and if possible to determine
10 what type of firearm or what brand of firearm could have fired
11 them. The way that we can do that is by microscopic
12 measurement of the rifling impressions that are left on the
13 surface of that bullet. The number of those impressions
14 and the direction of twists and we can put all that
15 information into a computerized database that's provided to
16 us by the FBI and then from that get a list of possible
17 brands of firearms that could have fired those bullets. The
18 process also involves microscopically comparing those
19 bullets against each other to determine if they are fired
20 by the same gun if possible or by more than one gun. The same
21 process would have been done with the cartridge cases, the
22 two fired cartridge cases would have been microscopically
23 compared against each other to determine if they are fired
24 by one gun.

25 Q: And let me ask you to take a look at the two fired

1 projectiles in evidence as State's Exhibit Number 24 and
2 both of those projectiles came out of the same evidence
3 bag, although they're packaged in two different bottles.
4 If you'll take a look at those and tell us if you can
5 identify them.

6 A: (Complies with request.) Yes, I can identify both
7 of these items as being the bullets that I examined in this
8 case. Both the items themselves and the containers that
9 they're in bear my markings.

10 Q: And what significant findings did you make as to
11 these two fired projectiles?

12 A: During the course of my examination the first thing
13 that I do is I take notes as to their dimensions, their
14 appearance, any damage that's present, and also weigh the
15 items and that's a good way to determine the possible
16 caliber of bullets that they are. My examinations of these
17 items revealed them to be most consistent with bullets that
18 are commonly found in nine millimeter Luger caliber
19 ammunition and then from the -- moving forward into the
20 next stage of the comparison, which was the measurement of
21 the rifling characteristics, I was able to generate a list
22 of possible brands of firearms that could have fired these
23 items.

24 Q: And it's a somewhat extensive list; is that fair to
25 say?

1 A: Yes, there are -- on the nine millimeter Luger
2 caliber firearms there are a total of 38 potential brands
3 or sources of firearms that could have fired these
4 particular bullets. Due to the fact that it is possible in
5 some circumstances for people to physically extract a nine
6 millimeter Luger caliber bullet and load it into some other
7 similar dimension ammunition such as, for instance, 38
8 special ammunition uses bullets that are almost the same
9 diameter as a nine millimeter. You can potentially expand
10 that list if someone was doing something very unusual with
11 the ammunition; and so, that also generated additional
12 possibilities which are somewhat remote, but they had to be
13 listed just to be thorough, and that further lengthens the
14 list somewhat. Also, my microscopic -- I should go ahead
15 and say that the microscopic inner comparisons of these
16 bullets also reveal that both of these were fired by one
17 gun.

18 Q: Very good. Now, the list of the 38 possible makes
19 of firearm, nine millimeter firearm that could have fired
20 these bullets, do you have any idea, do you have any
21 knowledge of how many total, I mean, it's 38 out of how
22 many that could have?

23 A: Oh, there's hundreds of possible brands of nine
24 millimeter Luger caliber firearms that have ever been
25 produced because you're looking at all nine millimeter

1 Luger, all manufacturers that have produced nine millimeter
2 Luger caliber firearms it would be extremely extensive.

3 Q: Okay, very good. Hundreds?

4 A: Possibly hundreds, yes.

5 Q: Now, on that list is there a firearm known as a TZ75?

6 A: This -- the TZ75 is a model designation for a
7 firearm. The manufacturer that produced or marketed the
8 TZ75 is Tanfoglio and that is on the list.

9 Q: And that is a -- where is that gun made?

10 A: The TZ75 is either manufactured or assembled in Italy
11 and the -- and marketed from Italy from the Tanfoglio Company.
12 The firearm itself is actually a modification of, if not a
13 direct copy of a Czechoslovakian gun known as a CZ75 and
14 there are several other companies that have made similar
15 copies of that gun over time.

16 Q: But that TZ75 is one of the weapons that could have
17 fired these nine millimeter rounds.

18 A: Yes, I would not exclude a TZ75 at all as being
19 possible -- as a possible source for these rounds.

20 Q: Now, you did not have a weapon to compare against in
21 this case; did you?

22 A: I never had a firearm submitted to me at the SLED
23 laboratory for comparison with these times, no.

24 Q: Understood. Now, let me ask you to take a look at
25 the other items and these were State's Exhibit Number Nine

1 in evidence. There are six items here, two fired casings,
2 nine millimeter casings, four unfired nine millimeter rounds.

3 A: Yes, I have examined these items as well. The
4 containers themselves also bear my markings and the seal
5 that was placed on them is initialed by me as well. The
6 evidence that you see before you in this particular
7 instance, two fired nine millimeter Luger caliber cartridge
8 cases and what was originally submitted to me as four
9 unfired nine millimeter Luger caliber cartridges, there's
10 one that you will see that's in a white cardboard box.
11 That is one that I received intact and I simply
12 disassembled it. That is I pulled the bullet from the
13 cartridge so that I could further identify it and then just
14 placed all the components of that disassembled cartridge in
15 that box.

16 Q: And was part of the purpose of disassembling this
17 cartridge to analyze the projectile against -- did you have
18 an opportunity to analyze them against the two fired
19 projectiles?

20 A: Yes, I was able to compare the bullets present --
21 really in all of the unfired cartridges with the fired
22 bullets that were recovered at autopsy and there's one of
23 the fired bullets was significantly intact enough to be
24 able to state that it was consistent with the bullets that
25 were found in the unfired cartridges. It is -- there's a

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1 specific design feature on that bullet that is unique to a
2 particular line of ammunition. There is, there is the Star
3 Fire jacketed hollow point ammunition that is manufactured
4 by PMC and sold under their Eldorado cartridge line and that
5 is the type of bullet present here and it is also the type
6 of ammunition represented by the unfired cartridges.

7 Q: And the Star Fire what does that indicate?

8 A: That is simply -- it isn't any more effective or any
9 -- typically than any other jacketed or hollow point in my
10 experience. It's just that's a visible -- visual
11 appearance of the jacket, the cavity in the bullet looks
12 like a star; and so, they decided to give it this name
13 called Star Fire.

14 Q: Understood. Now, as to your comparison of the fired,
15 the fired cartridge casings and the unfired rounds what
16 significant findings did you make regarding those items?

17 A: The first thing I did was I compared the two fired
18 cartridge cases with each other and was able to determine
19 that both of them had been fired by one gun. I then
20 compared the cycling marks or the marks that are placed on
21 them by the simple feeding into it out of the firearm of
22 all of the -- either the fired and the unfired cartridges with
23 each other and was able to determine that one of the fired
24 cartridge cases, which I believe is this one right here, was
25 -- had been cycled through the same firearm as three of the

1 unfired cartridges. Now, simply to say it had been loaded
2 into and extracted from the same gun at some point.

3 Q: That's item seven you're referring to.

4 A: That is correct.

5 Q: Is that correct?

6 A: That's ---

7 Q: Item seven, with the seven on the envelope.

8 A: That would be my item seven.

9 Q: Very good.

10 A: In comparisons of my item eight which is the other,
11 the other fired cartridge and with all -- and also one of
12 the unfired cartridges my item ten, the comparisons of the
13 other cartridges and cartridge casings with those two items
14 were inconclusive, simply there weren't enough cycling
15 marks present on the outside of the cartridge -- those
16 particular cartridges and cartridge cases to make a decision.

17 Q: Now, the unfired cartridges.

18 A: Yes.

19 Q: On three of the four unfired cartridges was there
20 anything unique that you -- that your investigation
21 revealed?

22 A: There was on three of the four unfired cartridges a
23 very light firing pin impression noted on the primer. It
24 wasn't significantly enough of an impact for me to have the
25 thought that the ammunition misfired or there was some

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1 malfunction in the ammunition. It was such a light impact
2 that it indicated to me that perhaps it was consistent with
3 the ammunition not being fully in the chamber when the
4 hammer falled. It could have been slightly out of battery is
5 the term that we often use and that is not uncommon, not an
6 uncommon malfunction in some semiautomatic firearms.
7 Additionally, some of those impacts were slightly off center,
8 which means that they weren't directly in the center of the
9 primer, which is another indication that perhaps it was
10 slightly out of battery, but this type of -- well, excuse me,
11 with many types of semiautomatic pistols the back of the
12 barrel that the bullet fits into or the cartridge fits into
13 actually moves up and down during the cycling process, but
14 when the gun is ready to fire it is pulled up into a locked
15 position, but when the gun is cycling and loading it drops
16 down slightly to unlock the slide so that the slide can move
17 freely. What happens often is that the cartridge, as it's
18 going into the chamber, if it stops before it's fully seated
19 in the chamber and the barrel has not moved back up into the
20 locked position then the primer is out of position from the
21 firing pin and you -- and it will not strike square on the
22 firing pin. So, that is another indication that perhaps these
23 firing pin impressions were caused by a malfunction in the gun
24 during the feeding process.

25 Q: So, one doesn't have a -- this impression.

1 A: Correct.

2 Q: But three of them have this slight impression and say
3 it in laymen's terms, kind of characterize what you said in
4 laymen's terms. This is a bullet that was struck by the
5 firing pin but not struck with enough force to ignite the
6 primer and, therefore, ignite the powder and fire the bullet.

7 A: That is correct.

8 Q: Just didn't hit hard enough.

9 A: It just -- it simply didn't hit hard enough, and to
10 me that's an indication that it wasn't mechanically capable
11 of hitting it hard enough due to the way it was positioned
12 in the firearm.

13 Q: Something was wrong.

14 A: Something was wrong with the gun.

15 Q: But nothing -- there's nothing in your investigation
16 or analysis that revealed there was anything wrong with the
17 ammunition.

18 A: That is correct.

19 Q: All right. Investigator, if you would, please answer
20 any questions Mr. Martin might have for you.

21 CROSS EXAMINATION

22 BY MR. MARTIN:

23 Q: How are you, Mr. Collins?

24 A: Doing fine, sir.

25 Q: Do you watch CSI?

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1 A: No, sir, I try to avoid it.

2 Q: Try to avoid that. You do that every day; don't you?

3 A: Yes, sir.

4 Q: Did any of the testing that you did link these
5 bullets to John Frazier in any way?

6 A: No, sir.

7 Q: And the bullets that you examined were factory
8 ammunition or reload ammunition.

9 A: They appear to be. There's noting on the actual
10 fired bullets that would indicate to me that they were
11 either factory or reloads. There's nothing -- I couldn't
12 tell from looking at the bullets. The, the, excuse me, the
13 unfired ammunition was consistent with being factory
14 ammunition.

15 Q: All right, and what is reload just so the jury will
16 understand. When we say reload ammunition what is that?

17 A: There's two terms for it. It can be called reloaded
18 ammunition or remanufactured ammunition. Typically what
19 this is you'll -- when you're firing a gun and you have as a
20 waste product the cartridge case which is on the ground. Many
21 people will often pick that up and will physically
22 replace the primer, replace the powder and replace the
23 bullet to reuse that, and basically it's called reloading
24 the ammunition. When it's done on an industrial level
25 sometimes people will submit buckets of ammunition to a

1 manufacturer to be reloaded. That's called remanufactured.

2 Q: All right, what's one of the problems you'll
3 sometimes have in a gun with reload ammunition that is not
4 factory or industrial reload?

5 A: If you don't set your equipment up correctly when
6 you're performing -- doing reloading or using an improper
7 technique it's possible to deform the ammunition slightly
8 in a way that perhaps you won't even visually detect but
9 you're creating a condition where you've made the
10 ammunition be out of spec is the -- or larger or smaller
11 than it should be. You have compressed something or
12 otherwise misshapen or created a misshapen condition in the
13 ammunition and that can cause it to jam when it's trying to
14 load into the firearm.

15 Q: And when you say jam explain to the jury what --
16 technically what jamming is.

17 A: Well, there's various things that or people refer to
18 as jamming. In this particular case what I'm referring to
19 is usually a failure to feed malfunction wherein the
20 ammunition just simply does not fit into the chamber
21 properly and causes it and it stops while it's going into
22 the chamber.

23 Q: As opposed to a misfire, what is a misfire?

24 A: A misfire technically is a failure of the ammunition
25 to fire when it is struck by the firing pin in a normal

1 fashion, that is to say that the firing pin is striking the
2 primer with a sufficient force that it should have fired
3 the primer if the primer was functional. Usually this is
4 -- the cause for this is a faulty primer or primer that has
5 been somehow contaminated with oil or some other material
6 during the loading process.

7 Q: Okay, so, in this case whatever you examined here the --
8 you were able to determine that the cartridges that were fired
9 were not from a Glock pistol.

10 A: That is correct. The firing pin impression that it
11 was -- that was on the fired cartridge cases at the scene
12 was not consistent with that that is produced by Glock
13 brand firearms. Glock places a very distinctive shaped
14 firing pin impression on the cartridges cases.

15 Q: All right, so, whatever gun might have fired these
16 rounds it wasn't a Glock; was it?

17 A: No, sir, it was not.

18 Q: All right, now, how far -- I believe you said that in
19 spite of your knowledge in the area the best you could do was
20 to narrow it down to over a hundred different brands of
21 weapons that could have fired the fatal shot?

22 A: Based on the bullets from the autopsy, the list of
23 nine millimeter Luger caliber firearms is a 38 brand list.
24 There are other -- there are -- that is to say there are
25 other possibilities if you look at the realm of everything

1 possible, that is somebody reloading some esoteric 38
2 caliber ammunition with a nine millimeter bullet, but the
3 list that I had that I produced that I had the most
4 confidence in is that of the nine millimeter Luger calibers
5 and it's 38 brands long.

6 Q: It's how many?

7 A: 38.

8 Q: What was the hundred, you said something about
9 hundreds a while ago.

10 A: I believe the Solicitor was asking me how many total
11 brands of nine millimeter Luger firearms that there are and
12 I was saying that it would go into the hundreds, but that
13 is not what is represented in my list.

14 Q: Your list doesn't show all the different brands is
15 what you're saying.

16 A: That is correct because there are many brands that
17 would not be consistent with having fired these bullets
18 because the rifling specifications on the bullets were not
19 consistent with those brands.

20 Q: Okay, but there's 38 different brands.

21 A: That is ---

22 Q: That they were consistent with.

23 A: Yes, sir, that is correct.

24 Q: And all 38 of those brands are guns that are, I
25 assume, sold throughout the United States.

1 A: Yes, sir.

2 Q: All right, and there are literally how many guns out
3 there that could have fired?

4 A: Thousands.

5 Q: Maybe millions?

6 A: I would -- it could be as high as a million. I would
7 hesitate to say without having the information.

8 Q: I understand. I understand. So, and there's no way in
9 the world that you could say and you certainly aren't trying
10 to tell this jury that the fatal shots were fired with a T275
11 gun; are you?

12 A: No, sir, I'm not.

13 Q: And the rifling -- what is rifling characteristics?

14 A: When we're looking at, we're talking about the rifling
15 characteristics on a bullet, there are -- well, the --
16 actually the more specific term is general rifling
17 characteristics, that is the number of rifling grooves that
18 are impressed on the bullet, the direction in which they
19 twist, which will be either left or right, and then the
20 actual physical dimensions of those impressions. You have
21 two different dimensions that you're looking at. You're
22 looking at the dimension of the land impression which is
23 the raised -- caused by the raised portion of the rifling,
24 and the dimensions of the groove impression which is the
25 depressed portion of the rifling. Those measurements are

1 made under a microscope using what we call the air gap
2 technique with a micrometer. We take all of that
3 information. We put that into the FBI database and it
4 produces this list of possible brands for us.

5 Q: Did these bullets that you have have sufficient rifling
6 characteristics to have matched them against a gun barrel
7 or another bullet fired from that gun had you had one to
8 compare?

9 A: Yes, they were suitable for identification with a
10 specific gun if I had had one to compare it with.

11 Q: Okay, if you had a gun you could have compared it?

12 A: Yes, sir, well, I could have at least made the
13 attempt.

14 Q: Right, right.

15 A: Yes, sir.

16 Q: I mean, there was enough there to have checked that.

17 A: Yes, sir.

18 Q: All right, or if you had had another bullet that was
19 fired by the gun.

20 A: That is correct, sir.

21 Q: You could have checked and said either that gun --
22 well, you'd have to compare it, but there was enough there
23 if there had been sufficient on both of them you could have
24 said this pistol fired or didn't fire the fatal bullet.

25 A: Yes, sir, I was able to positively identify both of

1 the fired bullets as having been fired by one gun.

2 Therefore, it would have -- I would have also been able to
3 at least make the attempt and there would have been a good
4 likelihood of making a comparison against the firearm.

5 Q: When you talk about guns jamming, why would guns jam?

6 A: There's many reasons that can cause a firing
7 malfunction or a failure to feed or a failure to eject. It
8 can be the ammunition itself can be faulty as previously
9 mentioned. The gun can be very dirty or it can be simply
10 a matter of how the shooter is holding the gun. It can be
11 any number of variables that could come into play that can
12 cause a failure to fire appropriately.

13 Q: And is any gun that has ever been made capable of
14 jamming?

15 A: It's been my experience that just about any
16 semiautomatic firearm especially is prone to jamming or
17 having a failure to feed or failure to eject malfunction
18 under some circumstances.

19 Q: From time to time.

20 A: From time to time. Some will ---

21 Q: Sometimes it's nothing more than just being dirty.

22 A: Yes, sir, that's correct.

23 Q: And so, it may jam today and not jam tomorrow.

24 A: Yes, sir, that is correct

25 Q: If you just clean it up.

1 A: That's, that's accurate, sir.

2 Q: So, the fact that a gun jammed at one point in time is
3 no indicator of whether it would jam again in the future;
4 is it?

5 A: No, sir, it's not.

6 Q: And I believe you testified that three of the four
7 unspent or unfired cartridges found on the beach had a
8 firing pin impression on them.

9 A: Yes, sir, the common -- the term that we use in the
10 laboratory for what we found is what we call a light hit.

11 Q: That's all I have for Mr. Collins.

12 MR. HEMBREE: Just very briefly, Your Honor.

13 REDIRECT EXAMINATION

14 BY MR. HEMBREE:

15 Q: Investigator, could you tell me, do you know anything
16 about -- have you heard of Blazer ammunition?

17 A: Yes, sir.

18 Q: Familiar with that type of nine millimeter
19 ammunition?

20 A: Yes, sir. It's manufactured by the CCI and Spear
21 Company and it's typically made, sold with an aluminum
22 cartridge case that is very distinctive.

23 Q: And is it -- would you consider it a high quality
24 ammunition or a low quality ammunition?

25 A: Is it the -- it's at the -- it's not a low quality

1 ammunition in that it typically functions appropriately in
2 most firearms, but it's on the low end of the cost range.

3 Q: All right, thank you. No further questions.

4 THE COURT: All right, you may step down, sir. You
5 want this witness released?

6 MR. HEMBREE: We would ask that Investigator Collins
7 be released.

8 MR. MARTIN: No objection.

9 THE COURT: You're free to go.

10 All right, we have come to a good breaking point for
11 the evening. Madam Alternate, and Mr. Foreman and ladies and
12 gentlemen of the jury, listen carefully once again to my
13 instructions and that is that you're to stay away from
14 anything that even remotely resembles this case. That means
15 staying away from the TV or any of the news on TV. Some
16 people get their news from the internet now, off the computer.
17 You'd have to refrain from that as well, newspaper and radio.
18 You also need to refrain from discussing this case with
19 anyone, that's spouse, loved one, neighbor, friend, even
20 amongst yourselves. I'm going to have you reconvene here
21 tomorrow, and I'm going to talk to the attorneys before I
22 dare tell you when. Let me have you come forward for just
23 a moment. We're going to share the responsibility this
24 time.

25 (Whereupon, a Bench conference was held in the

1 presence, but out of the hearing, of the jury.)

2 THE COURT: All right, there was a committee decision
3 this time. We're going to have you all in at ten o'clock.
4 We're going to be here at nine. We feel sure that we will
5 have finished all of our business by then. Please be here
6 promptly at ten o'clock and I'll also let you know that
7 tomorrow it's our intention that we will be ordering in.
8 So, lunch will be coming into us. So, we should be able to
9 get a lot of work accomplished tomorrow. I thank you for
10 the attention that you've been paying. I've been watching
11 you during the course of the trial and you've been paying
12 close attention to the evidence and testimony. On behalf
13 of both the State and the Defense I wish to thank you for
14 that. Remember the instructions that I gave you about
15 refraining from discussing or listening or talking or
16 reading anything about this case and we will see you tomorrow
17 morning. I'll be questioning you about that then. Have a
18 good evening. See you in the morning ten o'clock.

19 (Whereupon, the following takes place outside the
20 presence of the jury.)

21 THE COURT: Very good. All right, anything from the
22 State at this time?

23 MR. HEMBREE: No, no, Your Honor.

24 MR. HUMPHRIES: Nothing.

25 THE COURT: Anything from the Defense?

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1 MR. MARTIN: No, Your Honor.

2 THE COURT: All right, have a good night. I'll see
3 you here in the morning, 9:30, I mean, nine o'clock.

4 ***** OFF THE RECORD *****

5 (On the record, Thursday, May 19, 2005.)

6 (Whereupon, the following takes place outside the
7 presence of the jury.)

8 THE COURT: I understand that we have motions before
9 the Court this morning.

10 MR. HEMBREE: Yes, Your Honor, we have and I don't
11 really know how we -- who made the motion specifically but
12 we have worked toward determining what parts of Dr.
13 Elizabeth Loftus videotape deposition should be admitted in
14 this trial. Your Honor, the State's position is that there
15 are portions of it in the first trial that we, that we did --
16 some of it we agreed to, some the Court ruled upon. One
17 section that the Court ruled upon in the first trial was the
18 section of her testimony discussing the eyewitness
19 experiment. It was -- I'm sorry, the photo lineup study that
20 was conducted by Wofford College Professor Dr. Alliston
21 Reid. The Court in the, in the Supreme Court opinion,
22 State v. John Boyd Frazier that reversed this case found
23 that the discussion that Dr. Loftus ---

24 THE COURT: Just one, just one minute. The Defendant
25 is not out. Let's see if we can take care of that. I

1 apologize. I just realized that. He has a ---

2 OFFICER: Your Honor, he's on his way up. I think
3 he just got his clothes.

4 THE COURT: Is he?

5 OFFICER: He is. He just got the clothing that was
6 sent down there to him. That's what the delay was changing
7 his clothes.

8 THE COURT: Okay, do you want to proceed without him
9 or do you prefer to wait until he's here?

10 MR. HEMBREE: I think we better wait, Your Honor.

11 THE COURT: All right.

12 MR. BRITTAIN: Might better wait till he gets here,
13 Your Honor.

14 THE COURT: That's fine. He'll be here shortly.

15 ***** OFF THE RECORD *****

16 (On the record.)

17 (Whereupon, the following takes place outside the
18 presence of the jury.)

19 THE COURT: All right, we have everybody in place. We
20 can go forward at this time.

21 MR. HEMBREE: Thank you, Your Honor. May it please
22 the Court.

23 THE COURT: Yes, sir.

24 MR. HEMBREE: As I begin to address this issue, before
25 the Court this morning is a motion to exclude certain

1 portions of the videotape deposition of Dr. Elizabeth
2 Loftus. She was an eyewitness expert that was proffered by
3 the Defense in -- on February 11th of 2000. By stipulation
4 we agreed to allow her deposition to serve as her testimony in
5 Frazier one and we've agreed to do that as well in Frazier
6 two.

7 The issue before the Court is what portions of this
8 testimony will be allowed before this jury. Your Honor, we
9 have objected to certain specific portions and let me -- I
10 think I need to step back as I started to to talk about what
11 has changed.

12 In Frazier one the Court excluded certain aspects of
13 her testimony. One aspect that was excluded were -- there
14 were some aspects excluded referencing a study done by
15 Wofford College professor Dr. Alliston Reid that was termed
16 a photographic lineup study. The Supreme Court in State v.
17 John Boyd Frazier, the appeal in this case, ruled that the
18 discussion of that study should come into evidence. That
19 was, that was error. What I have done, Your Honor, is go
20 back through this testimony and I have included every
21 reference to that study and her lengthy discussion of that
22 study in compliance with the Supreme Court's ruling in the
23 case. However, there are other aspects of her testimony
24 that we still would submit are confusing, that are
25 prejudicial, and that are unnecessary and not really

1 helpful to the jury in reaching their determination in this
2 case. Some of the material I objected to, I think were
3 just some kind of going back and forth on some objections
4 and things like that, things just to clean up out of the
5 videotape so it flows smoother for the jury. Other aspects
6 are more substantive. The portions I would ---

7 THE COURT: Why don't we just start with the list,
8 page 17.

9 MR. HEMBREE: Page 17, and this is a reference, page
10 17, line 15 through page 18, line 3. So, we're talking
11 approximately 13 lines of testimony where Dr. Loftus sort
12 of on her own launches into a discussion of 28 cases of
13 wrongful conviction on a study that had been done by an
14 organization that were -- these 28 folks were exonerated by
15 DNA analysis and that these cases, in some of these cases,
16 in the majority of these cases, there have been some
17 eyewitness identification and that therefore sort of
18 extrapolating from that that, "Well, since we've got 28 cases
19 that are wrong this case must be wrong, too." I think
20 that's what the implication is. Your Honor, I would submit
21 that that, again, that is confusing, that we don't have any
22 DNA in this case. It's not that kind of a case. It's
23 merely -- it would merely be offered to the jury to kind of
24 throw it out there and say, "Well, 28 cases in the United
25 States of America we've had wrongful convictions that have

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1 been overturned by DNA," and we're not going to get DNA in
2 this case. This isn't -- it is just a confusing fact. It
3 takes the jury off the scent, and we would submit, Your
4 Honor, that it's prejudicial, it's in violation of Rule 403
5 and it's confusing as well.

6 MR. BRITTAIN: Your Honor, first I want to say that
7 I believe my Solicitor takes a very limited view of what the
8 Supreme Court held in this, in this case, and I've pulled up,
9 I know you've read it very carefully. It's not a very long
10 opinion, what the Supreme Court said about Dr. Loftus's
11 testimony. It's very clear that they are giving an expansive
12 role to Dr. Loftus here. They talk about the crucial nature
13 of the eyewitness identification here, and they mention two
14 cases that are very important, not just in connection with Dr.
15 Reid's study, which is clearly admissible now, but they say as
16 noted previously the Hobbsses's identification was crucial to
17 the State's case against Frazier. We find that Frazier should
18 have been permitted to impeach the reliability of the
19 identification procedure through Dr. Loftus's testimony.

20 Now, the Supreme Court had it all. They had everything
21 that was excluded, her videotape, all her testimony and they
22 cite Council. This is very important because they are relying
23 on the case which establishes almost a benchmark for
24 scientific testimony and they cite State versus Council. That
25 means Loftus is given the credibility of, as they say, a

1 qualified witness and that the underlying science is reliable.

2 These, these tests she talks about, these studies she
3 talks about, they form the very heart and soul of the
4 science, and Judge, this is kind of the like pink elephant in
5 the room. We all know that unfolding around us, factually, is
6 the attack on eyewitness identification. It is, it is taking
7 over the country. These are tests that were, were beginning
8 then. They have expanded and wrongly convicted people based
9 on eyewitness identification as fact with DNA as a, as a
10 verifier are leaving the jails of this country, not 28 by the
11 hundreds now.

12 To take this admonition from the Supreme Court and
13 refuse to let an expert witness who is duly qualified, with
14 underlying science reliable, discuss portions of the
15 research that are learned treatises, part and parcel of her
16 activity as an expert, where she is getting her information,
17 is excluding typical testimony that is used to buttress an
18 expert's reliability and sophistication within the field.

19 Now, my Solicitor does a great job. He is allowed to
20 and does cross examine her on these studies, and if I may
21 say so, I think he brings up several challenging points to
22 them. So, the issue is fairly discussed in the deposition.
23 It's not some sort of isolated incident that he doesn't
24 challenge. That's the way the courtroom works. To exclude
25 it, respectfully I say, would be to fly in the face of the

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1 direction of the Supreme Court and would be to minimize her
2 participation in the trial. I think the Supreme Court has
3 told us what her role here is and to take this evidence out
4 would be to minimize her role in violation of the Supreme
5 Court's direction.

6 MR. HEMBREE: Your Honor, if I may be heard, the --
7 first off, the Supreme Court is very specific in what they
8 address as being admissible in this opinion. They're
9 specific in saying that the photo lineup study, they
10 specifically reference that is it should have been
11 discussed. They don't say she should be able to testify
12 about anything that strikes her. I'm not challenging her --
13 the fact that she is an expert, she is duly qualified
14 expert and that the underlying science is reliable. What
15 I'm saying is and let's keep in mind we're talking, at this
16 stage we're talking about 18 lines out of a 131 page
17 deposition. It's not as if we're talking about cutting out
18 half of her testimony and rendering her hopelessly, you
19 know, inadequate in offering this testimony. She's offering
20 a lot of testimony and we've got to talk about Dr. Loftus a
21 little bit here. She's been doing this research for 25
22 years. She's one of the leading experts in the country. She
23 will testify about retention. She'll testify about
24 acquisition. She'll testify about recall. She'll talk
25 about studies she's been involved in for years and years

1 and years. She's not going to be -- her testimony is not
2 hamstrung by excluding this reference to a study that all
3 it says was, "We've had 28 people that were wrongfully
4 convicted." There's a reason they're trying to get into
5 that and they're fighting about that. It doesn't add to --
6 this -- these lines all they say is, "We've had people that
7 were wrongfully convicted." It doesn't say, "Well, the
8 underlying science is this." The reason for -- the reason
9 that we need to look hard at these, this eyewitness
10 testimony is because of their failure to, to acquire the
11 information accurately. She goes into that in great detail
12 later. This is simply kind of a reference stuck in there
13 to try to get that in front of the jury so the Defense can
14 come back and argue later, "Hey, we've had 28 people let go
15 on DNA evidence, you know, can you live with yourself if
16 you do that?" I know what's going on here. It's just not
17 -- it is not the testimony that the Supreme Court was
18 concerned about and it's not testimony that's going to help
19 the trier of fact in this case. That's the fundamental
20 question. Is it, is it more prejudicial than it is probative?
21 I submit to you, Your Honor, there is no probative value in
22 this part of the testimony, this limited part of the testimony
23 and it is unduly prejudicial and confusing to the jury.

24 THE COURT: All right, I've got that marked. Let's
25 move on. I'm going to -- I'll make a decision after I hear

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1 all of these, to page 40, line 2.

2 MR. BRITTAIN: I can agree with that one. Let's take
3 that out.

4 THE COURT: You're going to go out.

5 MR. BRITTAIN: I agree to take it out because I
6 don't believe there's sufficient evidence in here to make
7 that germane. So, I agree to take that out.

8 THE COURT: Okay. We're going to strike that.
9 Let's go to page 40, line 2.

10 MR. BRITTAIN: No, that's the one I was talking about
11 now.

12 THE COURT: Oh, page 40, okay.

13 MR. BRITTAIN: What were you talking about?

14 THE COURT: The first one, page 17.

15 MR. BRITTAIN: Oh, no, no, no, I'm fighting hard on
16 that.

17 THE COURT: I thought you were backing up.

18 MR. BRITTAIN: Now, that's very important to me.

19 THE COURT: Okay, page 40, line 2, that's out, got
20 you, okay, remains as first one, all right, I've got it.
21 That brings us down to page 55, line 23.

22 MR. BRITTAIN: Yes.

23 MR. HEMBREE: Right.

24 THE COURT: Let me look at page 40, too, before -- bear
25 with me just one second. I'm just going to mark it on my --

1 okay, we're moving on to 55, and I'll be glad to hear from
2 you.

3 MR. HEMBREE: Your Honor, as to these -- this fairly
4 long section, I want to take you to page 57, down to lines
5 9 and 10 and 11. In this area, what Dr. Loftus does here
6 and the reason for my objection to her sort of opinion on
7 the ultimate issue is that she's assuming facts that were
8 not accurate. She's sort of taking things and saying,
9 "Well, you know, I'm going to assume that they were under
10 questionable lighting conditions." The witnesses have
11 testified that the lighting was sufficient. That fact is
12 inaccurate. She's making a -- she's going to make a
13 conclusion based on an inaccurate fact, something that is
14 not in the record. Looking at an individual from some
15 distance, now, that certainly implies that there is a long
16 distance. What the testimony in this courtroom is, Your
17 Honor, that they saw this individual from 12 to 15 feet and
18 on the first occasion at about 35 to 40 feet. So, I think
19 there -- once again, I believe that she is maybe assuming
20 something that is inaccurate, no fault of her own, she's
21 just operating without the benefit of having sat through this
22 proceeding during the course of the week and hearing the
23 testimony of the Hobbsses.

24 "They are apparently," here we go again, see this is,
25 this is troubling.

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1 THE COURT: Which line are you on now?

2 MR. HEMBREE: "They are apparently in one another's
3 presence having conversations."

4 THE COURT: Which?

5 MR. HEMBREE: I'm sorry, I'm still page 57 line 12,
6 "exposing each other to each other's versions, working on a
7 composite together," that's accurate, "19 days passed,"
8 that's accurate. There was -- there's a reference here at
9 line 19 on page 57, "They were still in Myrtle Beach at the
10 time of the arrest and many days passed during which there is
11 a lot of media coverage." Well, the testimony has been that
12 the media coverage in no way influenced them. They never saw
13 a photograph of the suspect during that media coverage.

14 MR. BRITTAIN: I don't -- if he wants to take that
15 one part out I don't object to that.

16 THE COURT: The media coverage?

17 MR. BRITTAIN: Uh-huh (affirmative response).

18 MR. HEMBREE: And ---

19 THE COURT: Which, no, which line are you agreeing
20 to? First of all, let me ---

21 MR. BRITTAIN: I agree to 19, starting with they down
22 through 22.

23 THE COURT: Okay.

24 MR. BRITTAIN: Page 57.

25 THE COURT: Got you, page 57, okay, and that we will

1 omit that.

2 Let me back us up just a minute because you started on
3 page 55. Can we all agree from line 23 to line, line 23 on
4 55 through line 17 on 56 would be out?

5 MR. BRITTAIN: Yes.

6 THE COURT: Okay, let's just go ahead and get rid of
7 that, too, then.

8 MR. HEMBREE: Now, what -- let me have that again.

9 THE COURT: Oh, I'm sorry, because it's just an off-
10 the-record. I would ---

11 MR. BRITTAIN: That's going to clean it up some.

12 MR. HEMBREE: Oh, yeah, okay.

13 THE COURT: That's just all off-the-record stuff.

14 Okay, when it goes back on the record on line 18.

15 MR. HEMBREE: Line 18, great and that was the only
16 reason we struck that, Your Honor, was some we struck just
17 to clean it up.

18 THE COURT: Yeah, well, that still looked like it was
19 in dispute. So, it's no longer in dispute. That's out.
20 All right, now, starting on line 18 with Mr. Brittain he
21 continues. Do you have any objection to the question
22 that's asked?

23 MR. BRITTAIN: Where are you now, Your Honor?

24 THE COURT: I'm all the way back up to 56.

25 MR. HEMBREE: Your Honor ---

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1 THE COURT: Right after you've gone back on the
2 record. We've cleaned up the off-the-record and ---

3 MR. HEMBREE: I don't have any objection to the
4 question itself.

5 THE COURT: Okay, that brings us all the way down
6 then to line 4 where she begins her answer. You seem to agree
7 with some of the answer and not with some of it. Let's see
8 what is your concern?

9 MR. HEMBREE: ``You have a situation with many
10 problematic factors from a scientific point of view are
11 present.'' I don't have any problem with that statement.
12 ``So, you have two people who claim they have had a sighting
13 of an individual or to a very or two very brief sightings a
14 matter of a second or two under questionable lighting
15 conditions,'' I object to under questionable lighting
16 conditions and I also object to ``looking at an individual
17 from some distance.'' I think that's misleading because it's
18 -- she's assuming -- it just has the implication that
19 they're way off somewhere and they were 12 feet away.

20 MR. BRITTAIN: Well, Your Honor, I mean, there is
21 evidence in the record that it was nighttime and there is
22 evidence in the record that they were at some distance. I
23 mean, I don't -- and plus, if that ends up not being true
24 that could be pointed out, that, you know, she was relying
25 on so and so and such and such. That doesn't make it

1 inadmissible.

2 THE COURT: I agree. I'm going to allow it. I
3 think you've got testimony and you've got your argument on
4 the record.

5 All right, and then that ---

6 MR. HEMBREE: I don't have any objection, Your Honor,
7 to line 12 to line -- to the next sentence where they are
8 working on a composite together.

9 THE COURT: Okay.

10 MR. HEMBREE: Nineteen days passed during which there
11 is substantial forgetting or decaying of memory, now, that
12 conclusion I think is -- I don't know how she reaches that.

13 THE COURT: I don't know how she reaches that either.

14 MR. HEMBREE: I don't how she just jumps up and says
15 well, there, you know, it's conclusory.

16 MR. BRITTAIN: What now?

17 THE COURT: Mr. Brittain, can you help us out with
18 that?

19 MR. BRITTAIN: Wait a minute.

20 MR. HEMBREE: Line 15.

21 THE COURT: Where does she get any evidence of 19
22 days passed during which there's substantial forgetting or
23 decaying of memory?

24 MR. MARTIN: Oh, well, that's just -- no, no, and you
25 have to read the whole deposition. That is the science of

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1 this. Now, that's her opinion of what takes place over that
2 time is that memory fades, memory decays and she goes ahead
3 and explains that. That's part and parcel.

4 THE COURT: All right, there's an explanation of
5 that.

6 MR. BRITTAIN: Sure.

7 MR. HEMBREE: Your Honor, my problem with that is she
8 can't testify that there was substantial decaying of memory
9 in these two witnesses.

10 MR. BRITTAIN: Well, now, wait a minute now.

11 MR. HEMBREE: She can say, she can say that, that, "In
12 studies we have found that memory decays, that there is a
13 decrease in the memory." I'm not going to fuss about that.
14 That's not the point, but the point is she can't say, she
15 has no basis to say that in this instance with these
16 witnesses their memory decayed in 19 days.

17 MR. BRITTAIN: Well, now, listen, let me make sure. My
18 Solicitor points out over here very successfully so we don't
19 end up somewhere we don't think we're headed, he says, "You
20 can't say what happened specifically, whether these are
21 accurate witnesses or not accurate witnesses," and in
22 accordance with the dictates of Whaley she says, "No, I
23 cannot and I do not." So, he brings out later on that she is
24 not giving an opinion as to the accuracy of the Hobbsses.

25 MR. HEMBREE: That's not what we're talking about,

1 Your Honor.

2 MR. BRITTAIN: Well, I'm just saying though in terms
3 of context, you know, you, you -- it's just like any other
4 witness that's testifying, they may make some statements
5 that end up being challengeable. That doesn't make them
6 inadmissible and he challenges these and has the -- you
7 wouldn't go back through, you know, Mrs. Hobbs said some
8 things yesterday that surprised people. We don't go back and
9 strike that out because it was said. It's all part and
10 parcel of the record. It doesn't make it inadmissible.

11 MR. HEMBREE: Your Honor, when we began this process
12 of doing this videotape deposition we had the understanding
13 that both of us would be able to object to any part of the
14 deposition that we didn't agree with.

15 MR. BRITTAIN: Oh, sure, sure.

16 MR. HEMBREE: And we could ask that the Court strike
17 that. It was not as if we said, "Well, it's out there now
18 and, you know, there's nothing we can do about it."

19 MR. BRITTAIN: Oh, no, no, no.

20 MR. HEMBREE: That was not what we agreed to.

21 MR. BRITTAIN: I'm not meaning from that point, Mr.
22 Solicitor.

23 THE COURT: It, it -- this, this seems to follow very
24 well, and if she's talked about memory then why can't she
25 just state the fact that 19 days have passed, 19 days

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1 passed, period, that's it and then we run all the way down
2 to line 23 where it says, "They are given a test of their
3 memory."

4 MR. BRITTAIN: That's fine.

5 THE COURT: Which is exactly what happened after 19
6 days.

7 MR. HEMBREE: I don't, I don't have any objection to
8 that.

9 MR. BRITTAIN: I don't have -- that's -- I mean, it's
10 not that big a deal ---

11 THE COURT: Okay.

12 MR. BRITTAIN: --- if you want to do that.

13 MR. HEMBREE: All right.

14 THE COURT: All right.

15 MR. BRITTAIN: I'll go ahead and agree to that.

16 THE COURT: That'll take out 16, 17, 18, 19, you all
17 have already agreed to some of 19, 20, 21, 22, brings us
18 down to 23 and it flows.

19 MR. BRITTAIN: Are you all getting, you getting all this
20 down?

21 (Mr. Brittain and Ms. Hanna confer.)

22 THE COURT: You want me to repeat it?

23 MS. HANNA: Recap it for us.

24 THE COURT: Okay, let me repeat now while it's on my
25 mind.

1 MS. HANNA: Thank you very much, Your Honor.

2 THE COURT: We have omitted line, on page 55, line 23
3 through 25, on page 56, line 1 through let's say 18, on
4 page 57, line 15 beginning with "during, we allow it to go 19
5 days past." 16 is omitted, 17, 18, 19, 20, 21 and 22. We
6 resume at 23.

7 MR. HEMBREE: And Your Honor, I have no objection to,
8 "That they're given a test of their memory which takes the
9 form," this is line -- I have no objection to line 23, 24, 25
10 on page 58, line 1, 2, 3 and 4. I don't have any objection to
11 up to line 9 on page 58.

12 THE COURT: All right.

13 MR. HEMBREE: I do have an objection to line 10
14 regarding the Department of Justice study and the DNA. So,
15 my objection runs from line 10 on page 58 through all of
16 page 59.

17 THE COURT: It's still talking about the DNA.

18 MR. HEMBREE: Still talking about the DNA and the
19 Department of Justice study, yes, Your Honor.

20 THE COURT: Okay, let's see.

21 MR. HEMBREE: The next page sort of -- page 60 is a
22 lot of back and forth and marking exhibits and so forth up
23 to page 60, I object to everything up to page 61, line 3.
24 Let me go through that again because I know that we did that
25 haphazard in the way I referred to it. My objection runs from

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1 page 58, line 10 through page 61, line 3.

2 THE COURT: All right, and all of this, let me just
3 Ask you, if my ruling as to the first lines, page 17 line 15
4 through page 18, line 3, if I rule that that is excluded it
5 would follow that these are excluded. This all deals with the
6 DNA. Do you agree or not?

7 MR. HEMBREE: It's the same issue, yes, Your Honor. It
8 is the same issue.

9 THE COURT: Okay, all right, I'll look at that.

10 MR. BRITTAIN: Can I just make one more point on
11 that, Your Honor?

12 THE COURT: Certainly.

13 MR. BRITTAIN: Our point on that would not be that
14 it's the DNA part of that that makes a difference. It's --
15 it's what happened -- what has happened in those studies is
16 that DNA has entered the picture as a verifier to establish
17 a principle that eyewitness identification has an issue
18 with respect to reliability. So, I don't accept the
19 proposition that because DNA is mentioned in the Department
20 of Justice study it doesn't make it germane as background
21 and learned treatise for those who function in the field.
22 That's -- I don't want to argue the point more than ---

23 MR. HEMBREE: Be naught for your side, yeah.

24 MR. BRITTAIN: --- than more than is fair with the
25 Solicitor but I didn't get a chance to point out why I

1 didn't think that the DNA part of it was so critical to
2 determine whether or not it was germane to this case.

3 MR. HEMBREE: And just a quick point on -- to address
4 that and as you may get the same sense sort of going over
5 the same stuff, but the -- another expert who was not as
6 experienced that may, that might be important. I don't know
7 but I know this, Dr. Loftus has been doing this a long
8 time. She goes for pages and pages and pages discussing
9 the science of eyewitness identification, why it's good,
10 why it's bad, the factors involved with it. I mean, it's a
11 lengthy, I know, reviewed a good bit of this deposition. It's
12 a lengthy, she has a full opportunity to explain and express
13 her opinions about the problems with identification. It
14 wasn't this particular study that all of a sudden happened
15 and Dr. Loftus rushes out and says, "You know, we might
16 have a real problem here." She's been doing this years and
17 years and years. This is just something that is kind of
18 icing on the cake on the back side to, I feel like, to throw
19 that DNA in there. This jury is going to be going, "Yeah,
20 where is the DNA?" They watch CSI. They think you can
21 just walk up to a guy on the street and pick it up and it's
22 going to confuse them. It's going to take -- it's going to
23 really be unfair to them when we ask them to try to make a
24 decision based on the evidence we have in this case.

25 THE COURT: All right, is there any indication and I

1 didn't see any, that this is something that she relied, she
2 relied upon in forming her opinion in this situation?

3 MR. HEMBREE: No.

4 MR. BRITTAIN: Just as part and parcel of all of
5 learned treatises. I mean, she, she recites it to shore up,
6 support and be a part of her overall research in the field.
7 Yeah, we have another expert witness that will testify, Dr.
8 Cutler; and so, maybe we can agree that we'll take some of
9 it out here and let him testify about it.

10 MR. HEMBREE: I'm going to fuss about it then, too.

11 MR. BRITTAIN: You're going to fuss about it then,
12 too.

13 MR. HEMBREE: Your Honor ---

14 MR. BRITTAIN: Okay, well, I'm just, I'm just saying.
15 I'm trying to get along. I'm trying to get along and get
16 what I think is fair evidence in. The Court had a chance
17 here to characterize Dr. Loftus in a different way. I
18 think under Council we're dealing with scientific evidence
19 that flat out say it; and therefore, all of these studies and
20 things they rely on would be part and parcel of any
21 expert's testimony. To exclude it would try to diminish
22 what -- where the Court has put this sort of evidence in my
23 opinion, but I give the Solicitor the last word on it.
24 Sorry to keep arguing.

25 THE COURT: I'll go ahead and share with you, I

1 have concerns about it, and I don't have a concern about
2 saying that there have been faulty identifications in the
3 past, but the way that it was determined in here I have
4 concerns about it, it causing this jury some confusion, the
5 DNA aspect of it causes this Court some concern.

6 MR. BRITTAIN: We trust your judgment on it.

7 THE COURT: We'll see what we can, what we can do
8 about it. There may be a way we can deal with that.

9 MR. BRITTAIN: All right.

10 THE COURT: All right, let's go -- let's move down.
11 That brings us down to page 131, line 23.

12 MR. HEMBREE: Your Honor, this was just, just too
13 speculative. There are only a few lines here and she's
14 referring to, she's talked and talked about the, about the
15 Dr. Reid study and she's, I guess what they're -- what Mr.
16 Brittain was trying to do here was to establish the
17 reliability of the study procedure, and we're not fussing
18 about that. We're not, we're not going to -- we're not
19 fighting about that issue but he says, "Well, could --
20 basically he's saying could you go out and replicate this
21 study," and certainly you could replicate the study. What
22 she goes on to say and kind of throws in there and adds,
23 "Yeah, not only could you replicate, but I expect you'd get
24 the exact same result," and that's just very, very
25 speculative. I don't know where she comes up with a figure

1 like that and I'm -- I'll -- at that I'll -- that's
2 the basis of my objection. It's speculative. There's no
3 way she could get enough information off of that opinion.
4 She's saying that if you did the study again at Wofford
5 College you'd get 80 percent again that would identify John
6 Boyd Frazier. I have no idea why she says that. You could
7 replicate the study and you could do it over again and over
8 again and I don't have a problem with that part of it.

9 MR. BRITTAIN: Your Honor, that's -- I don't
10 understand really the objection there other than that
11 hurts. I mean, she is an expert and what we're doing here
12 is subjecting this test to the Council criteria, which is
13 very commonplace and appropriate. The case is mentioned
14 in the, in Frazier one there, and she is -- I mean, those
15 are legitimate questions to ask about a study that's done.
16 In fact, that's what we're required to do in the civil
17 field.

18 THE COURT: I agree. Did you cross on it or challenge
19 her as to how she came to that conclusion because you had
20 that opportunity, but I think it goes more to the weight of
21 the testimony than its admissibility.

22 MR. HEMBREE: I don't believe I did, Your Honor. I
23 did not.

24 THE COURT: All right, I'm going to allow that in.

25 MR. HEMBREE: Thank you.

1 THE COURT: All right, I'm still concerned about the
2 DNA. Let me look at that and ---

3 MR. BRITTAIN: Your Honor, you going to give us a
4 summary of what's out?

5 THE COURT: Yes, I think I did. Now, I'm not -- I
6 haven't ruled though as to the page 17 and on, nor have I
7 ruled -- I've got some -- I'm considering some portions of
8 that page 55 through page 61, but I've given you what's
9 been -- I mean, you're clear on that?

10 MS. HANNA: I think so, Your Honor. What about page
11 111 through 115?

12 MR. HEMBREE: That's out.

13 THE COURT: All of it's out.

14 MR. BRITTAIN: That's out.

15 MS. HANNA: Okay, thank you.

16 THE COURT: Page -- line 21 through page 115 line 19
17 is out.

18 MS. HANNA: I'm sorry.

19 THE COURT: What's been requested, page 111, line 21
20 through page 115, line 19.

21 MS. HANNA: Thank you.

22 THE COURT: And I kept in, though, page 131, line 23
23 through page 132, line 2, and I'm just now dealing with this
24 -- the issue about the National Institute of Justice and
25 its analysis of the 28 cases.

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1 It appears the State's concern is that the issue of
2 DNA would make this jury believe and could be confusing to
3 the jury and make the jury believe that DNA could resolve
4 this issue and, you know, why didn't the State bring DNA in
5 in this case; is that the concern?

6 MR. HEMBREE: That is my concern that it's
7 prejudicial, I mean, confusing to the jury.

8 THE COURT: Would you concede that it's relevant in
9 this case that there have been wrongful convictions.
10 There's studies and known cases of wrongful convictions
11 based on an identification? I don't think it's relevant
12 how long it took before the people got out of prison.

13 MR. BRITTAIN: I don't either. I agree with that.
14 The seven year business that can come out.

15 THE COURT: But what, what I'm seeing is, "There's
16 also been and this is part of recent developments comes in
17 studies of known cases of wrongful convictions. One of the
18 most important recent studies is the type that was done
19 National Institute of Justice an analysis of 28 cases of
20 wrongful conviction, people who were convicted of crimes and
21 later exonerated." Then all the rest would come out. It
22 would show ---

23 MR. HEMBREE: My, my concern is this, Your Honor. I'm
24 not going to -- certainly there -- I'm not fighting about
25 the contents of the study itself as far as -- well, I'm not

1 dickering over did they find that or did they not. My concern
2 is that -- well, my concern is that it's confusing. My
3 concern is also that Dr. Loftus never relied on this study in
4 reaching her conclusion here. She had already reached the
5 point in her professional career where she realized there are
6 -- there could be problems with identification
7 testimony. She's been writing and teaching and testifying
8 about it for 25 years. This study didn't add or detract from
9 her belief and her concerns regarding that particular aspect
10 of criminal investigation. She had that point already. So,
11 I'm trying to figure out why it's relevant to throw in, just
12 to sort of gratuitously throw in that -- oh, and by the way
13 we've got this Department of Justice say they found 28 people
14 were not -- you know, were found, were exonerated. I'm just
15 at a loss. I think it has, I think it has -- seems very
16 prejudicial. I mean, it'd have -- it could be very confusing.
17 We don't know how many of, how many cases they looked at. You
18 know, we don't -- I tried to ask her that, couldn't get
19 a straight answer out of her about that. I tried to ask her,
20 "\"Well, how many were rightfully convicted,\" and she couldn't
21 tell me about that. So, we don't really get to fully develop
22 the whole point on cross examination. She kind of, kind of
23 ditched me on that one. So, without the counterpoint to that
24 I believe that it's very confusing to this jury. They don't
25 know. They might, for all they know it was 28 people in Horry

1 County. For all they know it was 28 people in South Carolina.
2 They're just, they're just at a loss of what this means and
3 it's not necessary. That's the key. It's just not necessary.
4 If you read her entire testimony and look at all she, all the,
5 all the sciences that she does offer and all the challenges to
6 their, to the ID procedure and the witness's opportunity to
7 observe, you read that in total, this is something that was in
8 my judgment was just stuck in there, clearly to -- not to
9 really add anything or to -- she didn't say, "I relied on
10 this study heavily to make my decision in this case." It
11 didn't have anything to do with this case. She just sort of
12 throws it in there to say, "You know, yeah, guess what? We
13 caught, we caught them on a few."

14 MR. BRITTAIN: Your Honor, with all due respect, Your
15 Honor, it isn't just thrown in there. My Solicitor wouldn't
16 be arguing so hard to have it out of there. This is important
17 testimony that's true. The study itself was introduced
18 into evidence. He did a, he did a good job on cross
19 examination with it. I choose to disagree with his
20 characterization of the way he cross examined her. I think it
21 was very good and appropriate and she didn't seem, you know, I
22 think she answered the questions properly. This is -- you
23 can take the DNA part out of this, but to say this doesn't add
24 to her opinion, I mean, this is kind of like the crowning
25 achievement of all that she has done. What's happening here

1 is that the research that has been challenged by these
2 psychologists since 1932 is entering the scientific world and
3 it is entering in a factual way to us. This is important
4 testimony that all of a sudden people who have been convicted
5 based on eyewitness identification are being turned out of
6 jail, and like I said, it falls within all of the guidelines
7 for expert testimony. It is, it is proper for her to rely on
8 it. It does add to her opinion. She wouldn't mention it if
9 it didn't, and if you want to take out the DNA part I think
10 that's fair. If you want to take out the part about how long
11 they were in jail improperly, I think that's fair, but it's a
12 crucial part of our culture, our law that expertise in a field
13 that this type of identification is often wrong, and a
14 Department of Justice, a National Institute study setting that
15 forward upon which she has testified as an expert is
16 clearly admissible in this case. I think the Supreme
17 Court's paragraph, I refer to it again, "We find that
18 Frazier should have been permitted to impeach the
19 reliability of the identification procedure through Dr.
20 Loftus's testimony. " Well, this is part of her testimony.

21 THE COURT: All right, here's what I'm going to do.
22 I'm going to allow the testimony up through, "There's been
23 it's part of a recent development comes in studies of wrongful
24 conviction," I think that that's relevant in the case. "One
25 of the most important and recent case studies," she just gets

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1 specific about the wrongful convictions, "is one done by
2 National Institute of Justice, an analysis of 28 cases
3 wrongful conviction, people who are convicted of crimes and
4 later exonerated." It would end there. So, on line 22 we
5 begin omitting when it says, "By analysis of DNA evidence."
6 It goes down through line 25 all the way through line 3 on
7 page 18. Those will all be omitted.

8 MR. HEMBREE: Thank you, Your Honor.

9 THE COURT: All right, that takes us over, though, to
10 page 58. You want me to go over that again?

11 MR. BRITTAIN: We're trying to keep up again.

12 MS. HANNA: Sorry.

13 THE COURT: All right, I'm sorry.

14 MS. HANNA: I'm sorry, Your Honor.

15 MR. BRITTAIN: Listen up to her, listen up to her.

16 THE COURT: Let me, let me go back to it.

17 On page 17, I'm allowing lines -- well, all of that, all the
18 way down through line 22, and it will end when it says "and
19 later exonerated." Put a period there.

20 MR. HEMBREE: I'm sorry, Your Honor. What page are we
21 on now?

22 THE COURT: We're on page 17, line 22.

23 MR. HEMBREE: Oh, I'm sorry. I got you.

24 THE COURT: And it will -- the period will be after
25 exonerated. It will be deleted "That by analysis of DNA,"

1 the rest of line 22, all of line 24, all of line 25. On page
2 18, line 1, 2 and 3. They're gone.

3 MS. HANNA: Thank you, Your Honor. I do have one more
4 question. On the State's objection on this page on where it
5 starts page 111 did you say 114 and 115 were in or out?

6 MR. HEMBREE: All of that's out.

7 THE COURT: On page 111, all of that's out.

8 MS. HANNA: Okay, that whole line.

9 MR. HEMBREE: Let me, let me go back and ---

10 THE COURT: Yeah.

11 MS. HANNA: Thank you.

12 MR. HEMBREE: Let me go back and look at that, Your
13 Honor, because there may be some, there may be some cross
14 examination.

15 THE COURT: To make it just flow, okay.

16 MR. HEMBREE: Yeah, I need to, I need to reevaluate,
17 to reevaluate that one.

18 THE COURT: Go -- you better take a look at it then.

19 MR. HEMBREE: I'll do that after, after the Court's
20 ruling.

21 THE COURT: Okay, that was agreed out by the parties.

22 MR. HEMBREE: Well, well, let me just, it was but I may
23 need to reevaluate that.

24 THE COURT: That's fine. I understand.

25 All right, we need to move now to page 55. Is it page --

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1 actually we need to move to page 58. On page 58, line 10
2 is where we begin again questioning about this Department
3 of Justice study and it looks as if there's going -- since
4 there is reference to DNA in this I've allowed in reference
5 to the study.

6 MR. BRITTAIN: Right.

7 THE COURT: It appears that we could have, ``Okay, all
8 Right, you referred earlier to the Department of Justice
9 study.'' She answers yes. The question, ``That involved
10 an examination of several actual criminal cases where there
11 had been a verdict of guilty based on, some extent on
12 eyewitness identification,'' she responds uh-huh (affirmative
13 response). Here's where we have a problem, ``And that DNA,''
14 we're going to have to get rid of that or actually
15 release.

16 MR. BRITTAIN: Well, you just take, ``and that DNA had
17 since then been applied to the facts of the case,'' take that
18 out, eyewitness identification and then just put, ``and
19 indicated that some 28 of those individuals were actually
20 released.''

21 THE COURT: Yes, that would work and it still stands
22 with the ruling and I'm allowing the information but not
23 why they were not -- what the basis of their release was or
24 how long they stayed in average, leave those, but none of
25 that's relevant. We'll get rid of line 23, 24, 25.

1 Here's where she's explaining the study.

2 MR. HEMBREE: Right, and based on your ruling, Your
3 Honor ---

4 THE COURT: You're fine with that.

5 MR. HEMBREE: --- I'm fine with that.

6 THE COURT: Okay.

7 MR. HEMBREE: We may want to strike that, line 23, 24
8 and 25 out that are just objections.

9 THE COURT: Yeah, 23, 24 and 25 are out. That's on
10 page 58.

11 MR. BRITTAIN: 58, so, really you got 18 and half of
12 19, 23, 24 and 25.

13 THE COURT: Yes.

14 MR. HEMBREE: And I'm object -- I still will object to
15 the introduction -- what were you putting in there, Mr.
16 Brittain?

17 MR. BRITTAIN: We put in the study and that should
18 come out if you don't want it in there.

19 MR. HEMBREE: Okay.

20 THE COURT: Okay, now, that's all of 59 remains in; is
21 that correct, this the explanation of it?

22 MR. HEMBREE: Yes, Your Honor.

23 THE COURT: All right, we're on page 60 and you have
24 agreed to something.

25 MR. BRITTAIN: Yeah, if -- I don't, you know, I think

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1 it's only fair for that report to come in if he wants it
2 in. If he doesn't want it in I don't think we can get it
3 in.

4 THE COURT: Well, wouldn't the report go into some of
5 the things that we've fought over that would be excluded
6 that would deal with the DNA? Is that, is that ---

7 MR. BRITTAIN: Yes.

8 MR. HUMPHRIES: Yes, yes.

9 THE COURT: So, wouldn't it follow that it would be
10 ---

11 MR. HEMBREE: I don't want it in.

12 THE COURT: Okay, all right.

13 MR. HEMBREE: I mean, I'm objecting to the introduction.

14 THE COURT: So, line 25 on page 59 will be omitted
15 because it says, "Mr. Brittain, I'm going to move to
16 introduce these documents."

17 MR. BRITTAIN: Yeah, well, I was putting them all
18 into evidence just in case.

19 THE COURT: Okay.

20 MR. HEMBREE: And Your Honor ---

21 THE COURT: And it -- looks as if that would take care
22 of all of -- all the way through line 3, page 61.

23 MR. HEMBREE: I agree, Your Honor.

24 THE COURT: All of that's out.

25 MR. BRITTAIN: Uh-huh (affirmative response).

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1 MR. HEMBREE: 60's out.

2 THE COURT: Page 60's out and 1 through 3 of 61
3 is out.

4 All right, does that deal now with the deposition and
5 is there -- well, I do know, I'm sorry, Mr. Solicitor. I
6 know that you want to take a look again at page 111 through
7 page 115.

8 MR. HEMBREE: I'm taking a look right now, Your Honor.

9 THE COURT: Okay.

10 MR. HEMBREE: I can probably tell you real quick if
11 you'd bear with me one moment.

12 THE COURT: Certainly.

13 MR. BRITTAIN: Have you been writing down what you
14 ---

15 THE COURT: I've got it.

16 MR. BRITTAIN: Just in case.

17 THE COURT: Well, I've actually got it on my, on the
18 copy of the deposition.

19 MR. BRITTAIN: Okay. We're going to make it by 10,
20 Your Honor.

21 MR. HEMBREE: And it's interesting to me, Your Honor.

22 THE COURT: I'm glad we said ten.

23 MR. HEMBREE: I would like to go on the record. I
24 believe Mr. Brittain said 10 minutes yesterday.

25 MR. BRITTAIN: I'm sorry.

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1 MR. HEMBREE: We just fussed about this the first
2 time. I knew it too us longer than 10 minutes.

3 THE COURT: It takes long just to read through it and
4 get it straight..

5 MR. HEMBREE: Okay, let me, let me go through this,
6 Your Honor, with, with my objection on page 111, we would
7 continue to object to ---

8 THE COURT: All right, let me catch up with you. I'm
9 sorry, just one second, let me get to page 111 so I have it
10 on mine.

11 I'm ready, yes, sir.

12 MR. HEMBREE: Page 111, line 21, we would -- our
13 objection would continue up to -- all the way through 112.

14 THE COURT: So, all of these are omitted, line 21, 22,
15 23, 24 and 25; is that correct?

16 MR. HEMBREE: Correct, Your Honor.

17 THE COURT: On page 111.

18 MR. HEMBREE: All of page 112.

19 THE COURT: All of page 112, all right.

20 MR. HEMBREE: And the first line of page 113.

21 THE COURT: All right.

22 MR. HEMBREE: And we'll go over to -- that would, that
23 would -- line 2, page 113 through line 5 of 114 would be in.

24 THE COURT: All right.

25 MR. HEMBREE: Line six of page 114 through line 19 of

1 page 115 would be out.

2 MR. BRITTAIN: It's up to him, if he -- that's fine.

3 THE COURT: All right, so you can agree to that?

4 MR. BRITTAIN: Yeah.

5 THE COURT: All right, I've got it.

6 Anything I didn't do is -- put in your page 44 that
7 you've agreed to and you're sure about page 44, line 8
8 through page 45, line 2.

9 MR. BRITTAIN: 44 what now, Your Honor?

10 THE COURT: Line 8, yeah, it looks like you would be.

11 MR. BRITTAIN: Uh-huh (affirmative response).

12 THE COURT: Through page 45.

13 MR. HEMBREE: Yeah, that's just a cleanup.

14 MR. BRITTAIN: That's just cleanup, yeah.

15 THE COURT: Good, okay, got you.

16 Okay, anything further?

17 MR. BRITTAIN: Could we get a copy from Mary Margaret
18 or something of what she's written down so we could
19 be working on it?

20 THE COURT: All right.

21 MR. BRITTAIN: Because see we're trying to get it
22 actually taken off on the tape.

23 THE COURT: All right, let me make sure that --
24 here's what I'm going to do. Let's do this and let's just
25 make sure you have it. I'm going to go through it and you

1 double check. So, I'm going to go through it actually on
2 my, on my deposition.

3 Beginning on page 17, line 22, about the middle of the
4 line right after exonerated there's a period, the rest of
5 22 is gone, 23 is gone, 24 is gone, 25 is gone, page 18 1,
6 2 and 3, they're all omitted.

7 So, we move to page 40. Page 40, line 2 through page 40
8 line 16 that's all omitted. Page 44, line 8 through page 45,
9 line 2, that's all omitted. Page 55, are you with me or am I
10 going too fast? You okay, okay?

11 MS. HANNA: Yes, Your Honor, I am, right, right along
12 with you. Thank you.

13 THE COURT: On page 55, beginning at line 23 and 24
14 and 25 they are out. Page 56, line 1 through 18 is out.
15 Page 57 on line 15 after the phrase, "19 days passed," there
16 would be a period. "During" is the only word of that line
17 that's out. Then line 16, 17, 18, 19, 20, 21 and 22 are
18 all omitted.

19 MS. HANNA: Okay.

20 THE COURT: We resume back at 23. Let's see what
21 happens. Okay, on page 58, line 18 and half of line 19 are
22 omitted, and when I say half of line 19 it's "the facts of
23 the case" would be omitted. It resumes with "and indicated
24 that some 28 of those individuals were actually released."
25 Then we omit line 23, 24 and 25. Then on page 59 we omit

1 line 25. All of page 60 is out, 61, line 1, 2 and 3 are
2 out and that's, that's it.

3 Wait a minute, let's go to line 111, I mean, page 111,
4 forgive me. On page 111, beginning on line 21, that's out.
5 21, 22, 23, 24, 25, they're all out. Page 112, the entire
6 page is out, 113 just the first line, that is line 1 is
7 out, and that's it, yes.

8 MR. HEMBREE: Your Honor, page 114, did you mention
9 That ---

10 THE COURT: Let me double-check.

11 MR. HEMBREE: Page 114, line 6.

12 THE COURT: Let me take a look at that, page 114, I
13 have ---

14 MR. HEMBREE: Line 6 is out through ---

15 THE COURT: Yeah, page 114, you're right, page 114,
16 line 6 all the way through to the end of the page.

17 MR. HEMBREE: And page 115 through line 19.

18 THE COURT: Yeah, and then page 115 through line 19,
19 including line 19 are all out. I do, I have that written
20 on mine.

21 MR. BRITTAIN: Yes, that's fine.

22 THE COURT: Okay, all right.

23 MS. HANNA: Thank you, Your Honor, I appreciate it.

24 THE COURT: Thank you.

25 MR. HEMBREE: Your Honor, I'm curious how this will be

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1 -- are you all going to edit the tape and cut those ---

2 MR. BRITTAIN: Right.

3 MR. HEMBREE: --- portions out?

4 MS. HANNA: Right, we have the capability. We have
5 the transcript there and all we have to do is just cut out
6 those portions of the transcript that we don't want in and
7 then it'll automatically work -- it'll take it out of the
8 video portion as well.

9 THE COURT: Nice.

10 MR. HEMBREE: Very good.

11 MS. HANNA: So, it may be somewhat choppy but it
12 works.

13 THE COURT: So, you won't be up there stopping and
14 starting.

15 MR. BRITTAIN: No.

16 MS. HANNA: No, it goes pretty much seamless.

17 THE COURT: Very good, which I've seen many times.

18 All right, you want a quick break? That means you'll
19 have about four minutes because we're going to bring that jury
20 out at ten or a minute before, quick break and we'll see you
21 back here just before ten.

22 ***** OFF THE RECORD *****

23 (On the record.)

24 (Whereupon, the following takes place outside the
25 presence of the jury.)

1 THE COURT: Anything from the State prior to bringing
2 the jurors out?

3 MR. HEMBREE: No, Your Honor.

4 MR. HUMPHRIES: Nothing from the State.

5 THE COURT: Anything from the Defense?

6 MR. BRITTAIN: Let me ask you, Your Honor, you know
7 we say we'd be in and stay in. In terms of trying to move
8 it along is there a problem if I come and go a little bit?

9 THE COURT: No, and I meant to clarify that. Now,
10 that's unless you're being invited in by an officer of the
11 court or court personnel.

12 MR. BRITTAIN: Okay.

13 THE COURT: And certainly the officers of the court
14 and court personnel are going to come and go and when I say
15 when you're in you're in and if you go out I'm not going to
16 let you back in till the next break there's exceptions to that
17 and court personnel will know those. If you have to go, you
18 know, there's some reason just quietly get out. It's just
19 the coming in and out that I think is distracting to a
20 jury. So, you, you know, catch court personnel's eye and
21 they'll say and they'll give you the signal of when is a
22 good time to slip out.

23 All right, and I'm glad you brought that up to clarify
24 that. We're ready for them.

25 (Whereupon, the following takes place in the presence

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1 of the jury.)

2 THE COURT: Good morning, welcome back.

3 Mr. Foreman, and ladies and gentlemen of the jury,
4 welcome. I want to ask you as I have asked you every
5 morning if you have been able to refrain from discussing
6 this case with anyone, also whether or not you have seen
7 anything about this case or heard anything about this case
8 or read anything about the case, and if that applies to you
9 if you have discussed the case with anyone or you have seen
10 or heard or read anything about the case please raise your
11 hand.

12 (No response.)

13 THE COURT: All right, I thank you for following those
14 instructions so carefully. I want you to know that we
15 remain in the phase of the case where the State is
16 presenting evidence and testimony and we'll continue at
17 this time. Yes, sir.

18 MR. HUMPHRIES: Thank you, Your Honor.

19 The State calls Todd Fain to the stand.

20 AT THIS TIME TODD FAIN WAS CALLED TO THE STAND, DULY SWORN
21 BY THE CLERK AND TESTIFIED AS FOLLOWS:

22 THE CLERK: Please be seated. Please talk right into
23 that microphone.

24 MR. FAIN: Okay.

25 THE CLERK: Say your first name -- I mean, say your

1 full name, spell your last name for the Court.

2 MR. FAIN: Kevin Todd Fain. Fain is spelled F-A-I-N.

3 THE COURT: Okay, Mr. Fain, you're going to need to
4 speak up..

5 MR. FAIN: I'm sorry.

6 THE COURT: All right, that's fine. Just speak up,
7 yes, sir.

8 DIRECT EXAMINATION

9 BY MR. HUMPHRIES:

10 Q: Good morning, Mr. Fain.

11 A: Good morning.

12 Q: Let's do this. In what community do you reside?

13 A: Winston-Salem, North Carolina.

14 Q: And do you know the Defendant in this case, John Boyd
15 Frazier?

16 A: Yes, sir.

17 Q: And how do you know him?

18 A: He was a friend of mine and I've known him for probably
19 quite a while, I guess.

20 Q: Fair enough. Let me ask you, did you go to school
21 with the Defendant? Did you meet him after school?

22 A: No, we all rode motorcycles together.

23 Q: Okay, in June, well, March, April, May, June of 1998 how
24 were you employed?

25 A: I was a bouncer at a club.

1 Q: And the name of the club?

2 A: Silver Fox.

3 Q: And the Defendant, was he a customer at that club?

4 A: Yes, sir.

5 Q: And would you term him a regular customer?

6 A: Yes, sir, he knew several people.

7 Q: Okay, knew Kimberly Renee Poole?

8 A: Yes, sir.

9 Q: Take you back to May 30th, which has already been
10 testified to, May 30th of 1998, take you back to the club
11 that evening. Do you recall a confrontation or disturbance
12 between John Boyd Frazier and the victim in this case, William
13 Brent Poole?

14 A: Yes.

15 Q: Tell the jury what you recall of that.

16 A: I came down towards the last part of it because I was
17 upstairs and it had something to do with -- he came in, spoke
18 to the bartender, Bruce. I think Bruce was actually
19 the person who let him in. I was upstairs, came down and
20 what I actually saw was them getting into like a verbal
21 shouting match, so on and so forth, and the two had to be
22 separated and Mr. Frazier was asked to leave and so was
23 Brent but he left second.

24 Q: And in fact, were you the one who ultimately had the
25 Defendant leave?

- 1 A: Yes, that was my job.
- 2 Q: That was your job.
- 3 A: Right.
- 4 Q: Okay, tell the jury you've said that you used to ride
5 motorcycles with Mr. Frazier.
- 6 A: Yes, sir.
- 7 Q: Still riding motorcycles?
- 8 A: Yes, sir.
- 9 Q: What other things if any did you do to socialize with
10 the Defendant?
- 11 A: Well, we, we all hung out with the same group of people.
- 12 Q: Is Kahle Schettler one of those people?
- 13 A: Yes, he -- we would all just varied depending on what
14 night, but a lot of times we would all end up at the same
15 place, never by planning, just usually we would go down to a
16 place where Kahle worked at the time, Cloverdale Shell,
17 because he used to do work on his own stuff after hours and,
18 you know, and friends of his after hours.
- 19 Q: And he was pretty good with cars ---
- 20 A: Yes, sir.
- 21 Q: --- and bikes?
- 22 A: Yes, sir.
- 23 Q: Let me do this, let me, let me go directly at this issue
24 at this point, did you at one time own a TZ75 nine millimeter
25 semiautomatic handgun?

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1 A: Yes, sir.

2 Q: And let me show you a document. I believe you actually
3 provided those document to us; did you not?

4 A: Uh-huh (affirmative response), yes, I did.

5 Q: And those documents do they relate to your purchase
6 and a prior purchase of that handgun?

7 A: Yes.

8 Q: Okay, when did you acquire that handgun?

9 A: It says April 13th, 1994.

10 Q: Okay, describe very briefly that handgun in terms of
11 size and that kind of thing.

12 A: I would say from the tip of my thumb to probably my
13 middle finger it would fit within there. It's very compact.

14 Q: Was that one of the things that you appreciated about
15 the gun?

16 A: It was -- that was the whole reason -- I had a large
17 frame Ruger and the motorcycle that I had at the time it
18 would not fit under the rear seat. So, I traded the Ruger
19 to Mr. -- I think his name is Harland for the TZ.

20 Q: Okay, now, did you have an occasion to shoot or test
21 fire the TZ75?

22 A: Yes, I shot two full magazines through the, through
23 the gun.

24 Q: Okay, were they the same type of ammunition or
25 different?

1 A: No, the first type was the real cheap Blazer ammunition.

2 I believe you said it's not even good for ---

3 Q: Well, we can't go on what I said. Let me ask you
4 this, did you purchase this ammunition from a store?

5 A: Yes.

6 Q: Do you remember what store?

7 A: It was a -- it's called the Gun Rack in Walkertown.

8 Q: Okay, but in any event you had Blazer ammunition.

9 A: Right.

10 Q: And you had what kind of ammunition?

11 A: Black Tallon.

12 Q: Okay.

13 A: I had one magazine loaded with Blazer ammunition and
14 one magazine loaded with Black Tallon.

15 Q: Okay, and no question about the Blazer ammunition was
16 less expensive than the Tallon.

17 A: It was far less expensive and a very, very cheap
18 grade might I add.

19 Q: Okay, when you shot the Blazer ammunition ---

20 MR. MARTIN: Your Honor, can we -- I have an
21 objection. Can we approach the bench?

22 THE COURT: Yes, you may.

23 (Whereupon, a Bench conference was held in the
24 presence, but out of the hearing, of the jury.)

25 BY MR. HUMPHRIES:

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1 Q: Now, when you used the Blazer ammunition, the less
2 expensive ammunition, tell the jury how your weapon, this
3 TZ75 functioned.

4 A: When you use -- when you would use the very cheap
5 practice ammunition that that's what, I mean, that's what
6 those are for, about every two or three the gun would jam
7 because, I would assume because it's not a hot enough load,
8 enough powder. The gun would fire, but the shell casing
9 would, as the slide comes back, the shell casing would get
10 stuck between the slide and the top of the gun right there.
11 It wouldn't eject it all the way. and you would have to
12 ratchet the gun or pull the ratchet back to finish ejecting
13 the shell. That, in turn, would bring another bullet up to
14 the firing pin.

15 Q: Okay, now, that handgun, do you still have it?

16 A: No, sir.

17 Q: Okay, and how did you transfer it away from your
18 possession into whom?

19 A: I sold it to John.

20 Q: Okay, and talking about the Defendant.

21 A: Yes, sir.

22 Q: Correct? Okay, and do you recall about when you
23 might have sold it?

24 A: I can't remember. I can't remember exactly when I
25 sold it to him, but I mean, it was like I would say '95,

1 '94.
2 Q: '95?
3 A: Somewhere around there.
4 Q: Okay, fair enough. Sounds like you didn't have it
5 all that long.
6 A: No, I really didn't, wasn't real happy with it.
7 Q: Okay, primarily because sometimes when you pull, when
8 you pull the trigger and try to pull it again it didn't go
9 back.
10 A: No, it -- I mean, it always, it always, it always, it
11 always fired.
12 Q: But it never -- but sometimes it would hang up.
13 A: Right.
14 Q: Wouldn't give you a second shot.
15 A: The shell casing would not go through, would not ---
16 Q: That's what I mean.
17 A: Right.
18 Q: Right, and that's not suitable.
19 A: Well, I mean, now ---
20 Q: For protection or any other.
21 A: Well, if you, if you -- no, like I said, when I changed
22 the bullets to the black Tallons it fired every single time
23 and never jammed.
24 Q: And then, okay, then why weren't you satisfied
25 with it?

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1 A: Well, I just -- if something doesn't work a hundred
2 percent for me I just -- I get rid of it. I mean, that's
3 just the way it is.

4 Q: Fair enough, fair enough. Do you recall whether you
5 sold it, gave it, traded it to Mr. Frazier?

6 A: I sold it to him.

7 Q: Okay, and that was back sometime in '95.

8 A: Somewhere around.

9 Q: An estimate.

10 A: Right, somewhere around, somewhere around there.

11 Q: I understand it's been a long time.

12 A: Right.

13 Q: Okay, now, did you have an occasion to inquire of the
14 Defendant about that gun again at some later time?

15 A: Yes.

16 Q: Okay, and was that in 1998?

17 A: Yes, I believe it was.

18 Q: Okay, first of all, let's try and as best we can
19 narrow it down, the time. Do you have any recollection of
20 that, that occasion say by virtue of the weather.

21 A: Right.

22 Q: Okay.

23 A: It was -- the weather in Winston-Salem or in
24 North Carolina, Winston-Salem, North Carolina, where I'm
25 from is usually, you know, still cool up through say like

1 March. So, I would have to say it would be somewhere
2 between, you know, mid January to, you know, the first of
3 March maybe because it was still cool outside, and I was
4 wearing jeans when I was down there, and I don't ever wear
5 ---
6 Q: Go ahead and tell the jury about when you wear jeans.
7 A: I very rarely wear jeans. I always wear shorts about
8 11 months out of the year.
9 Q: Okay.
10 A: If it's below 50, 45, 50 degrees I don't -- I wear
11 jeans. It's above that I wear shorts.
12 Q: And could have been as late as March of 1998.
13 A: It could have been.
14 Q: Okay, and then of course, you just -- you don't know.
15 There was no reason to remember that.
16 A: Right. It's very insignificant.
17 Q: Now, when you asked Mr. Frazier about that handgun ---
18 A: Right.
19 Q: --- and what did you ask him?
20 A: I asked him about purchasing it back and he had told
21 me that he had sold the gun, but I can't remember if he said
22 he sold it at a gun show or he sold it to a friend of his.
23 I can't -- I just can't remember.
24 Q: Just don't recall.
25 A: Right.

Todd Fain - Direct by Mr. Humphries

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1 Q: The important thing for you was he didn't have it
2 anymore. So, you couldn't get it from him.

3 A: Right, he didn't have it anymore, so.

4 Q: Okay, let me ask you this, if you recall, do you recall
5 a period of time when Kimberly Renee Poole moved into the
6 home of John Frazier?

7 A: No.

8 Q: Okay, you don't remember a period of time when she
9 would have moved into his house.

10 A: No, I ---

11 Q: Just weren't aware of that?

12 A: I was not aware of that.

13 Q: Okay, did you talk with the Defendant or did he talk
14 with you about his relationship with Kimberly Renee Poole?

15 A: He would, he would come to, you know, he would come
16 back down to the club where I was working at, and he and I
17 would talk, you know, on a regular basis when he would come
18 by and, you know, he -- I actually told him, I said, "You
19 know, what are you messing with a stripper for?" I said,
20 "Nothing ever good comes of that." So, and at the time he
21 agreed. He says, "I know. I know I shouldn't, you know."

22 Q: And help the jury out if you can in terms of the time
23 frame, in relation let's say to May 30th when this
24 confrontation between he and Brent Poole occurred.

25 A: I would say probably it might have been a week maybe.

1 Q: On either side, or ---

2 A: No, no, no, after that, after the -- after the
3 confrontation it would be somewhere around ---

4 MR. MARTIN: Your Honor, what I would if he knows ---

5 THE COURT: Wait, wait, wait just a minute.

6 MR. MARTIN: I think the time is relevant here, and if
7 he knows the times fine, but probablys and guesses I would
8 object to.

9 THE COURT: All right, just see if he knows.

10 A: I don't -- I don't know exactly. I do not know exactly.

11 Q: Around that time?

12 A: Yes, sir.

13 Q: Okay, and finally, did you ever have the occasion to
14 go on a vacation with the Defendant and others?

15 A: Yes, but that was way before.

16 Q: Sure, sure.

17 A: Yeah.

18 Q: Do you know when it was?

19 A: I would say back in '95, '96, something like that
20 maybe.

21 Q: Where was that vacation to?

22 A: It was down here.

23 Q: Okay, and let me ask you, do you know if the
24 Defendant at that time had a relative or relatives that
25 lived in Myrtle Beach?

Todd Fain - Direct by Mr. Humphries

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1 A: Yes.

2 Q: And how do you know that?

3 A: We actually went to -- when we got here we couldn't
4 check into our room till like three o'clock and we went by
5 his place and dropped off ---

6 Q: When you say his place help me out.

7 A: John's cousin. We went by there, dropped off the --
8 I mean, dropped off our stuff and then we went and road
9 around.

10 Q: Okay, and did you go eat dinner that night?

11 A: We then, we then went to dinner at a place called
12 Dick's Last Resort where John's cousin worked and that was
13 the last time I saw -- I mean, that was the last time I saw
14 him.

15 Q: Saw, the cousin?

16 A: John's cousin.

17 Q: Okay.

18 A: Yes, sir.

19 Q: Thank you, Mr. Fain.

20 THE COURT: Cross.

21 CROSS EXAMINATION

22 BY MR. MARTIN:

23 Q: Mr. Fain.

24 A: Yes, sir.

25 Q: Let me be sure we get some, some times straight.

1 A: Okay.

2 Q: You bought, you bought this TZ75 in '94; right?

3 A: I believe so, yeah, April 13th, 14th.

4 Q: You sold it to John Frazier in probably '95 or
5 thereabouts.

6 A: Yes, sir.

7 Q: And of course, in North Carolina when you're selling
8 person to person you don't have to do paperwork; do you?

9 A: No, sir.

10 Q: So, there's no documentation of that transfer from
11 you to him; is there?

12 A: No, sir.

13 Q: All right, and then at some point in time you were at
14 -- you decided you might want to buy the gun back. So, you
15 went and asked John about buying the gun back.

16 A: Yes, sir.

17 Q: And that was in, according to your testimony as I
18 understood it, January or February of '98; right?

19 A: Yes, sir, it was still cool outside.

20 Q: Well before June of '98; right?

21 A: Oh, yes, sir.

22 Q: Okay, no doubt about that.

23 A: No.

24 Q: All right, and he told you that he had sold the gun
25 you think at a gun show or to somebody.

Todd Fain - Cross by Mr. Martin

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1 A: He told me he had sold it. I just can't remember if
2 he said he sold it at a gun show or to a friend of his. I
3 just -- that was irrelevant. He just didn't have it.

4 Q: All right, now, as to that gun I want to be real
5 clear so in case it comes up again about this gun.

6 A: Yes, sir.

7 Q: That gun, while you owned it, never failed to fire the
8 cartridge that was put into the chamber when you pulled the
9 trigger; did it?

10 A: No, sir, it always fired.

11 Q: Always fired. The problem, if any, was after it had
12 fired sometime it wouldn't fully eject.

13 A: Right, only if you were using the cheap ammunition.

14 Q: I understand that.

15 A: Okay.

16 Q: Good ammunition fair to go.

17 A: Fired every time.

18 Q: Bad ammunition sometimes it would jam.

19 A: Yes, sir.

20 Q: All right, but it always fired, always fired the shell.

21 A: Yes, sir.

22 Q: And if you had the jacket out you may have to clean
23 it out to get another one in to shoot again.

24 A: Right, the empty cartridge after it fired.

25 Q: Right, okay. Now, you were a bouncer at the Silver

1 Fox from -- during March, April, May, June; right?

2 A: Yes, sir.

3 Q: All right, and you say that there was a verbal
4 altercation between Mr. Frazier and Mr. Poole on the night
5 of the 30th.

6 A: Yes, sir.

7 Q: And I believe you testified that -- did you say that
8 you kind of separated them or whatever?

9 A: Yes, sir.

10 Q: All right, and that they both were asked to leave;
11 right?

12 A: Yes, sir.

13 Q: And that they left separately.

14 A: Yes, sir, John left first and then after John was --
15 after John had left and we made sure that he was gone,
16 Brent left.

17 Q: And John didn't come back in there that night.

18 A: No.

19 Q: Talking about any of it; did he?

20 A: No, John didn't come back at all. He wasn't allowed
21 to come back the rest of that week, I believe.

22 Q: All right, and that was May the 30th; right?

23 A: Right.

24 Q: And you were there to make sure nobody followed anybody
25 out but that they left separately.

1 A: Right, dancers or otherwise.

2 Q: All right, now, during that period of time you did
3 know Renee Poole by virtue of the fact that she danced there
4 at the Silver Fox?

5 A: Yes, sir.

6 Q: All right, and you knew that she was, I guess, seeing
7 John in some fashion?

8 A: Yes.

9 Q: I don't -- or did you, I don't?

10 A: Oh, I did.

11 Q: All right, and of course, Renee was also at some point
12 in time, too, there seeing Bruce Wolford; was she not?

13 A: Yes.

14 Q: All right, how about other people that she may meet
15 there at the Silver Fox, do you have knowledge of her going
16 out with or seeing other men?

17 A: It wasn't uncommon.

18 Q: Say that again?

19 A: It wasn't uncommon.

20 Q: And during the same time that she was seeing John
21 Frazier; wasn't it?

22 A: Yes, sir.

23 Q: Sir?

24 A: Yes, sir.

25 Q: All right, I want to be clear about now. At the same

1 time that she's seeing John Frazier you know she's seeing
2 other men that she meets there at the Silver Fox; isn't she?

3 A: Yes, sir all of them pretty much do.

4 Q: All of them pretty much do?

5 A: For the most part.

6 Q: Just one second.

7 MR. MARTIN: That's all the questions I have for Mr.
8 Fain.

9 MR. HUMPHRIES: Just briefly.

10 REDIRECT EXAMINATION

11 BY MR. HUMPHRIES:

12 Q: And this is a small point, Mr. Fain, but I believe you
13 testified on direct that it was January, February or as early
14 as the beginning of March, could have been?

15 A: And it could have been March, I mean, it was still
16 cool outside.

17 Q: That's it, that's just a small point, and this
18 handgun, the T275, did you clean it while you had it?

19 A: I never cleaned it because I really didn't own it that
20 long.

21 Q: Okay.

22 A: And just to be honest with you, it was too -- I didn't
23 have an instruction, like a repair manual or anything.

24 Q: Sure.

25 A: And it -- I tried to take it apart to clean it, but it

1 did not come apart like my Ruger. So, I was not familiar with
2 how it came apart. So, I was not able to take it apart.

3 Q: Got you, and tell the jury then how you know and the
4 names of the people that you saw Renee Poole with say from May
5 until the date of Brent's death?

6 A: When the dancers would leave, sometimes they, I mean,
7 it's -- it was against club policy, but sometimes they would
8 go home with other people. As far as names, it's just
9 something, I mean, I don't know. It's just something you see
10 them do, never really agreed with it, but you know, you're
11 very aware that it goes on.

12 Q: Sure, and this was just a general observation of
13 pretty much all the dancers there?

14 A: Pretty much.

15 Q: Pretty much.

16 A: I mean, there's a few that, you know, believe it or
17 not were actually stripping to pay tuition.

18 Q: Right.

19 A: But for the most part that wasn't the case.

20 Q: Okay, but you don't know anybody specifically that she
21 might have seen other than John Frazier during that time
22 period.

23 A: Not specific and that's only just because I knew John.

24 Q: Right, okay, thank you.

25 MR. MARTIN: Nothing further.

1 THE COURT: You may step down, sir.

2 MR. HUMPHRIES: Your Honor, I ask that this witness be
3 excused if he wishes.

4 THE COURT: Any objection?

5 MR. MARTIN: None.

6 THE COURT: All right, you're free to go, sir.

7 A: Thank you.

8 THE COURT: Call your next witness.

9 MR. HUMPHRIES: The State calls Kahle Schettler.

10 WHEREUPON THEODORE KAHLE SCHETTLER WAS CALLED TO THE STAND,
11 DULY SWORN BY THE CLERK AND TESTIFIED AS FOLLOWS:

12 THE CLERK: Thank you. Please be seated. Please talk
13 right into that microphone. State your name, spell your last
14 name for the Court.

15 MR. SCHATTLER: Theodore Kahle Schettler, S-C-H-E-T-T-L-E-
16 R.

17 DIRECT EXAMINATION

18 BY MR. HUMPHRIES:

19 Q: Good morning, Mr. Schettler.

20 A: Good morning.

21 Q: Are you the fellow we've been talking about the
22 mechanic?

23 A: Yes.

24 Q: Okay, and tell the jury in what community you reside?

25 A: Winston-Salem, North Carolina.

- 1 Q: Okay, and tell the Defendant or I'm sorry, tell the
2 jury if you know the Defendant?
- 3 A: Yes, I do.
- 4 Q: And how do you know him?
- 5 A: We've been friends since high school.
- 6 Q: Since high-school, that's been some time ago now. I'm
7 not going to make you name the number.
- 8 A: Yes, it has.
- 9 Q: You worked at the Cloverdale Shell station at that
10 time?
- 11 A: Correct.
- 12 Q: You're working someplace else now.
- 13 A: Yes.
- 14 Q: Still in the business?
- 15 A: Yes.
- 16 Q: Okay, now, how would you characterize and you've said
17 that you were friends since high-school but in terms of how
18 close you were with the Defendant what would you consider him?
- 19 A: Close friend.
- 20 Q: Close friend, and in fact, did you socialize with him
21 on a regular basis?
- 22 A: Yes.
- 23 Q: And tell the jury just a bit about what the two of you
24 might have done together?
- 25 A: Oh, it could have been anything from just going to

- 1 dinner that night or spend an entire day riding motorcycles.
2 It didn't really matter.
- 3 Q: Okay, now, did you know Kimberly Renee Poole?
4 A: Yes.
- 5 Q: Okay, and how would you have come to meet Kimberly
6 Renee Poole?
7 A: Through John.
- 8 Q: And where would you have met Kimberly Renee Poole and
9 John?
10 A: They came to my place of employment.
- 11 Q: At the Shell Station?
12 A: Yes.
- 13 Q: Okay, on how many occasions?
14 A: One, maybe two.
- 15 Q: Okay, and do you recall when that might have been?
16 A: No, not really, no.
- 17 Q: Now, did you have the occasion to work on the
18 Defendant's cars over the period of your friendship?
19 A: Yes.
- 20 Q: Regular basis?
21 A: Yes.
- 22 Q: Now, let me ask you, Mr. Schettler, did you have an
23 occasion to see the Defendant on June 8th, 1998?
24 A: Yes.
- 25 Q: Where were you?

- 1 A: At work.
- 2 Q: At work?
- 3 A: Yes.
- 4 Q: Okay, and did Mr. Frazier at that time have a request
- 5 of you?
- 6 A: Yes, he did.
- 7 Q: And what was that request?
- 8 A: He wanted to leave his vehicle with me for a few days
- 9 so I could look at it in exchange for mine.
- 10 Q: Okay, now, June 8th is a Monday?
- 11 A: Correct.
- 12 Q: Specifically what period of time did he ask you if
- 13 you recall?
- 14 A: Monday through Thursday.
- 15 Q: Monday to Thursday, okay, and what was the -- why did
- 16 he want to leave his car with you; do you recall?
- 17 A: There was a complaint of a noise in the front end of
- 18 it.
- 19 Q: Okay, and had he previously complained of such a noise
- 20 to you?
- 21 A: Yes.
- 22 Q: How long ago?
- 23 A: Several months.
- 24 Q: Several months before that?
- 25 A: Yes.

- 1 Q: Okay, and again, that would not be unusual for him to
2 bring a problem with a car to you?
- 3 A: No.
- 4 Q: Okay, he asked to borrow your car?
- 5 A: Yes.
- 6 Q: Okay, now, let me ask you this, did he ever ask you to
7 borrow your car overnight?
- 8 A: No.
- 9 Q: No. Did -- when you saw him on the 8th about what
10 time of day was it; do you recall?
- 11 A: Mid afternoon.
- 12 Q: Okay, when you saw him at that time when was the last
13 time he had mentioned the front-end noise? Do you recall?
- 14 A: Yeah, it was several months.
- 15 Q: Several months before that?
- 16 A: Yeah, several months prior to that.
- 17 Q: Okay, I just wasn't clear. On this occasion, and let
18 me be clear, what was the request of John Boyd Frazier
19 regarding borrowing the car on this occasion your car?
- 20 A: As far as length of time?
- 21 Q: Yes.
- 22 A: Three or four days.
- 23 Q: He wanted to borrow it from the 8th of June?
- 24 A: Monday, right.
- 25 Q: The 9th Tuesday, the 10th Wednesday, the 11th

1 Thursday?

2 A: Yes.

3 Q: And return it at that time?

4 A: Right.

5 Q: Okay, and again, as you testified, he'd never asked to
6 borrow your car overnight before?

7 A: Not overnight, no.

8 Q: Okay, did he call you beforehand and say, "I'm coming
9 to bring my car"?

10 A: Yes.

11 Q: Okay, and when he arrived ---

12 A: Excuse me, what?

13 Q: I'm sorry.

14 A: Did he call to tell me he was going to bring his to me
15 or to bring mine back to me?

16 Q: No, no, no, no, called you at the Shell Station
17 saying, "I'm coming to see you. I want you to look at my
18 car"?

19 A: No, he did not.

20 Q: He just showed up.

21 A: Yes.

22 Q: So, that's not unusual?

23 A: No.

24 Q: Okay, and did you loan him your car?

25 A: Of course.

- 1 Q: Okay, and tell me a little bit about your car.
- 2 A: It's a gray 1990 Acura Integra.
- 3 Q: 1990?
- 4 A: Yeah.
- 5 Q: That was 1998. Tell the jury, you still got that car?
- 6 A: Yes, I do.
- 7 Q: Okay, still treating you good?
- 8 A: Fair.
- 9 Q: Let me show you State's 29 and 30 which are in
10 evidence. Do you recognize those photographs?
- 11 A: I do.
- 12 Q: That being sort of the front passenger's side of your
13 vehicle and that's the rear, that's your license tag?
- 14 A: That's it.
- 15 Q: Okay, when, when you changed over cars, did you switch
16 over things in the vehicles in order to do that? Do you
17 understand my question?
- 18 A: When he came to borrow mine?
- 19 Q: Uh-huh (affirmative response).
- 20 A: Of course.
- 21 Q: Right, and that was mid-afternoon on the 8th, Monday?
- 22 A: Right.
- 23 Q: Okay, now, did you see him or speak to him the rest of
24 the 8th?
- 25 A: No.

Kahle Schettler - Direct by Mr. Humphries

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1 Q: The 9th?

2 A: No.

3 Q: Let's talk about the 10th, which would have been

4 Wednesday, okay, and on the 10th did you receive a call from

5 John Boyd Frazier?

6 A: Yes, I did.

7 Q: Approximately what time?

8 A: About 7:45.

9 Q: 7:45.

10 A: A.M., yes.

11 Q: A.M., very good, at that time were you at home or at

12 work?

13 A: At home.

14 Q: Okay, and what if anything did John Boyd Frazier tell

15 you or ask you at that time?

16 A: He said he wanted to bring his car back or bring mine

17 back and come get his.

18 Q: Okay, did he say why he wanted to bring his car back?

19 A: He had said that a police officer had arrived at his

20 house earlier that morning saying someone had filed a missing

21 persons report on him from Myrtle Beach and wanted to bring

22 mine, return my car back to me before anything happened.

23 Q: Before anything happened?

24 A: Yes, sir.

25 Q: Okay, and how shortly after that did he bring the car

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
) 99-GS-26-2249
 COUNTY OF HORRY)

State of South Carolina,)
)
 Plaintiff,) Transcript of Record
)
 versus)
)
 John Boyd Frazier,) May 16-20, 2005
)
 Defendant.) VOLUME IV
)

B E F O R E :

Honorable Paula H. Thomas
 Horry County Courthouse
 Conway, South Carolina

A P P E A R A N C E S:

Gregory Hembree, Esquire
 Fran Humphries, Esquire
 Attorneys for Plaintiff

Morgan Martin, Esquire
 Thomas Brittain, Esquire
 Natasha Hanna, Esquire
 Attorneys for Defendant

Grace L. Hurley, CVR-CM
 Circuit Court Reporter

Kahle Schettler - Direct by Mr. Humphries

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1 back?

2 A: Within 15 minutes.

3 Q: Okay, and did he bring it to your house or to your
4 place of work?

5 A: My home.

6 Q: Your home, okay, now when he got to your home was
7 there a transfer of items from one vehicle to the other?

8 A: Yes, sir.

9 Q: Did -- well, let me ask it this way, did John Frazier
10 ever ask you about the noise that he had asked you to take a
11 look at?

12 A: Not as I recall.

13 Q: When you got the vehicle, Mr. Schettler, and there's
14 nothing sinister about this, okay, but when you got the
15 vehicle, your Acura back from John Boyd Frazier, what if
16 anything did you do in connection with your vehicle?

17 A: I vacuumed the inside and washed the windshield.

18 Q: All right, now, let's talk a little bit about how you
19 maintain your vehicles, okay. Is that something you do on a
20 regular basis?

21 A: Yes.

22 Q: Okay, in fact, you keep all of your vehicles in just
23 obscenely good condition?

24 A: Yes, I do.

25 Q: Okay, and so, it wouldn't be unusual upon having

1 received it back from the Defendant that you would do that?

2 A: No.

3 Q: Okay, did there come a time later that day, and let me
4 ask you this, was there any other conversation that morning?

5 A: No, not much because I was running a little bit behind
6 and needed to go on to work.

7 Q: You were going to work?

8 A: Yes, sir.

9 Q: And you get to work at -- you're supposed to be at
10 work about what time?

11 A: Supposed to be there at eight but usually I roll in
12 about 8:30.

13 Q: Okay, all right, did you have an occasion to later see
14 the Defendant at your place of business that day?

15 A: Yes, I did.

16 Q: Okay, and do you know about what time that might have
17 been?

18 A: Probably mid-afternoon again.

19 Q: Mid-afternoon, do you -- can you tell this jury
20 specifically when that was?

21 A: No, I cannot.

22 Q: Okay, and it has been some time ago?

23 A: Yes.

24 Q: All right, now, when he came to see you later or mid-
25 afternoon let's say on the 10th, what if anything did he tell

1 you at that time?

2 A: He said that, excuse me, that Brent had been shot and
3 killed.

4 Q: You recall that shot and killed?

5 A: Yes.

6 Q: Okay, did that give you some concern for your friend?

7 A: Yes, it did.

8 Q: Do you recall what else you might have talked about at
9 that time?

10 A: I had asked him the whereabouts of that TZ75.

11 Q: You asked him about the TZ75?

12 A: Yes, I did.

13 Q: Any particular reason at that point that you would
14 have asked about the TZ75 -- well, let me ask you this, did
15 you know if he owned some other handgun?

16 A: Yes, he did.

17 Q: Okay, and we're not talking about the TZ75 there?

18 A: No.

19 Q: What kind of handgun do you recall?

20 A: A Glock nine millimeter.

21 Q: Okay, now, but you asked him about the TZ75?

22 A: Yes, I did.

23 Q: Okay, and Mr. Schettler do you remember why you might
24 have inquired about the TZ75 at that point?

25 A: I had not seen that gun in a long time and John being

1 a friend of mine I was naturally concerned about him.

2 Q: Sure, fair enough, and what did he say at that point

3 about the TZ75?

4 A: He said he no longer had it, that he had gotten rid of

5 it about a year earlier at a gun show.

6 Q: Okay, about a year earlier.

7 A: Yes.

8 Q: Okay, and again this is in June.

9 A: Yes.

10 Q: Okay, now, let me ask you, did John Frazier tell you

11 what he had been doing since he borrowed your car?

12 A: No, and I never asked.

13 Q: Okay, well, let me ask you this, did you and he ever

14 drive out or by Brent and Renee Poole's home? Do you ever

15 recall that?

16 A: I don't recall it, no.

17 Q: Okay, there was -- there came a time obviously when

18 your friend was arrested; is that correct?

19 A: Yes.

20 Q: Okay, I mean, to your knowledge; that's correct?

21 A: Yes.

22 Q: Did you continue to communicate with him at that

23 point, have conversations with him?

24 A: Yeah, there was at different times when he, you know,

25 when he was able to.

- 1 Q: Sure, certainly to be expected?
- 2 A: Yeah.
- 3 Q: Okay, now, let me ask you, did the Defendant John Boyd
- 4 Frazier ever make a request of you or question you regarding
- 5 the mileage in the Acura?
- 6 A: Yes, he did.
- 7 Q: All right, tell the jury a little bit about that.
- 8 A: He had asked me if I knew how many miles that he had
- 9 put on it. He had said that it would be a great help to him
- 10 and his attorney if I knew if it was a small amount of miles
- 11 or not.
- 12 Q: If it was a low number?
- 13 A: Right, if it was a low number.
- 14 Q: But you didn't know?
- 15 A: No, I had no way of knowing.
- 16 Q: Okay, you didn't check it before it went out?
- 17 A: No reason to.
- 18 Q: Sure, let me ask you if this is a fair summary of your
- 19 statement on this issue today before this jury. One June 8th
- 20 Schettler loaned the car to Defendant.
- 21 A: Correct.
- 22 MR. MARTIN: Your Honor ---
- 23 THE COURT: Yes, sir.
- 24 MR. MARTIN: --- when he gets through doing that can
- 25 we approach the bench just a second?

1 THE COURT: Yes.

2 MR. HUMPHRIES: Just this one or you want, you want me to
3 stop now or you want me to stop later?

4 MR. MARTIN: I want to talk about your sticky. Come
5 on.

6 (Whereupon, a Bench conference was held in the presence
7 but of the hearing of the jury.)

8 BY MR. HUMPHRIES:

9 Q: And on this point, June 10th, 1998, the Defendant returns
10 car before eight a.m.?

11 A: That's right.

12 Q: On June 11th Schettler cleans windshield and vacuums car?

13 A: That's close. I don't know if it was exactly the 11th,
14 but it was close.

15 Q: Well, now, if it's not you just need to let me know. I
16 mean, I don't want ---

17 A: A day or two after, yes.

18 Q: I tell you what, if there's a question about that we just
19 won't stick that one up there. How about that?

20 A: All right.

21 Q: There's no question that there was, and again, certainly
22 not implying anything sinister, but you did vacuum the car and
23 clean the windshield at some point after you received it from
24 Mr. Frazier?

25 A: Yes.

1 Q: Okay, let me show you Defense's Exhibit 21 and 22. I
2 believe they're in evidence. Well, let me ask, these are your
3 exhibits.

4 MR. MARTIN: Yeah, go ahead.

5 MR. HUMPHRIES: All right.

6 BY MR. HUMPHRIES:

7 Q: Twenty-one and 22 is that the interior of your
8 vehicle?

9 A: Yes.

10 Q: Okay, and I note that there appear to be towels on the
11 front seats.

12 A: Yes.

13 Q: Okay, and tell the jury is that a common practice of
14 yours?

15 A: Very common.

16 Q: In fact, did you put them on shortly after you
17 purchased the vehicle?

18 A: Yes.

19 Q: Still on the vehicle?

20 A: They're in the floor, but not on the seats right now.

21 Q: Okay, that's just one more thing that shows just how
22 you maintain your vehicle.

23 A: Thank you.

24 Q: Okay, I started to use an adjective but I won't.

25 Thank you, Mr. Schettler, appreciate it.

1 THE COURT: Cross.

2 MR. MARTIN: Thank you, Your Honor.

3 CROSS EXAMINATION

4 BY MR. MARTIN:

5 Q: Mr. Schettler, you've known John Boyd Frazier for a
6 good while; haven't you?

7 A: Yes, sir.

8 Q: He didn't talk with you about wanting to exchange cars
9 with you until that Monday afternoon, June the 8th; is that
10 right?

11 A: That's correct.

12 Q: And you had spoken to him earlier, I believe you said a
13 month or two, about the noise or he had mentioned to you a
14 month or so prior to June the 9th that there was a noise in
15 his truck; is that right?

16 A: That's correct.

17 Q: And as a matter of a fact he had mentioned that on
18 more than one occasion to you; had he not?

19 A: Yes.

20 Q: And he told you that -- well, let me do it this way
21 and I think you testified this certainly wasn't the first time
22 John has ever swapped cars with you?

23 A: That's correct.

24 Q: And you've testified that he told you that he would
25 bring the car back Thursday, that was okay?

1 A: That was right, yes.

2 Q: All right, and that was fine with you?

3 A: That was fine.

4 Q: All right, and so, because if you're going to listen

5 for a noise like that sometimes you may have to drive a car a

6 while?

7 A: Yes, if it's intermittent, yes.

8 Q: And John's car was a Chevrolet Blazer?

9 A: That's correct.

10 Q: You're a mechanic?

11 A: Yes.

12 Q: How long you been a mechanic?

13 A: At that time 11 years.

14 Q: How long now?

15 A: Eighteen.

16 Q: Eighteen years?

17 A: Eighteen.

18 Q: You know a lot about cars?

19 A: I'd like to think so.

20 Q: What you think about front end noises in Chevy

21 Blazers? Is that unusual?

22 A: No, it's not. It's actually quite common.

23 Q: All right, what could be the cause of such a noise?

24 A: Brakes, CV axle, if they're four-wheel-drive, and

25 suspension pieces.

- 1 Q: Now, John called you back Wednesday morning 7:45 a.m.;
- 2 right?
- 3 A: Right.
- 4 Q: And did he ask you where his car was?
- 5 A: No.
- 6 Q: Okay, he told you that he wanted to come over and
- 7 trade cars back?
- 8 A: Right.
- 9 Q: All right, and he gave you a reason for that right?
- 10 A: Yes, yes.
- 11 Q: And that was that the police had come over that
- 12 morning asking about Myrtle Beach, reports, his car and
- 13 different things.
- 14 A: That's correct.
- 15 Q: Now, at that time you say he didn't ask you about the
- 16 -- if you heard noise on the car?
- 17 A: No, he did not.
- 18 Q: Well, he talked to you later than afternoon, didn't
- 19 he?
- 20 A: Yes.
- 21 Q: I mean, he came back by the station?
- 22 A: Yes.
- 23 Q: He ask you about the noise in the car at that time?
- 24 A: I don't recall.
- 25 Q: You don't recall whether he did or not?

1 A: No, no.

2 Q: Could have?

3 A: Possible.

4 Q: Now, let's talk about this mileage business for a
5 minute. It was later on that John called you back at some
6 point in time and I believe your testimony was do you know how
7 many miles he had put on the car?

8 A: Yes.

9 Q: And you told him what?

10 A: No, I did not.

11 Q: All right, and he said and did you ask him why he
12 wanted to know?

13 A: No, I didn't ask him.

14 Q: All right, did he tell you then that it would be
15 helpful if he knew if it were a low number?

16 A: Yes.

17 Q: All right, now, did John ask you in any shape, form or
18 fashion to tell anything untrue about how many miles had been
19 put on that car?

20 A: No, he did not.

21 Q: Did you take any of the conversation you had with him
22 as a suggestion that you make up some number for him?

23 A: No, I did not.

24 Q: Now, Kahle, let's talk about cleaning up the car, you
25 a detailed person; aren't you?

- 1 A: Try to be.
- 2 Q: And you kind of want things like you want them?
- 3 A: Yes.
- 4 Q: And this car, how many miles did the car have on it at
5 the time?
- 6 A: At that time it was in excess of 100,000 miles.
- 7 Q: And what condition was the car in, in terms, by that
8 I mean mechanically, tire wise and that kind of thing?
- 9 A: Mechanically the car was in pretty good condition.
10 The tires were pretty bald though.
- 11 Q: How bald were the tires?
- 12 A: Bald enough I should have replaced them long before
13 then.
- 14 Q: Would you have driven the car to Myrtle Beach with the
15 tires that were on it?
- 16 A: No, I would not have.
- 17 Q: Now, cleaning the car, let's talk about cleaning the
18 car for a minute because I want to be precise about that,
19 okay. Now, first of all did John ask you to clean this car up
20 in any way?
- 21 A: No, he did not.
- 22 Q: And did you wash the car?
- 23 A: No, I did not.
- 24 Q: And what you specifically did was vacuum the floor
25 mats?

- 1 A: Yes.
- 2 Q: Right.
- 3 A: Yes.
- 4 Q: And what you did was vacuum the floor mats; right?
- 5 A: Yes.
- 6 Q: And you did, excuse me, you did that with a vacuum
- 7 cleaner at the station?
- 8 A: Yes.
- 9 Q: All right, and you've got a shop vac there?
- 10 A: Yes.
- 11 Q: All right, was the shop vac still there when the
- 12 police came and started investigating the car and all of that?
- 13 A: Yes.
- 14 Q: All right, and you sat down with them and explained to
- 15 them everything you did and where everything was and all the
- 16 information you give them; didn't you?
- 17 A: Yes.
- 18 Q: And you say then that you cleaned the windshield?
- 19 A: Yes.
- 20 Q: Did you clean the hood?
- 21 A: No.
- 22 Q: Did you clean the bumper?
- 23 A: No.
- 24 Q: Did you clean the lights?
- 25 A: No.

- 1 Q: All right, was there any bug splatter on the car?
- 2 A: No, there was not.
- 3 Q: And would that -- well, so, you didn't clean any bug
- 4 splatter off of that car unless it was on the windshield?
- 5 A: Correct.
- 6 Q: Am I right?
- 7 A: Right.
- 8 Q: Okay, now, did you yourself come to Myrtle Beach
- 9 either the Saturday before or the Saturday after June the 9th?
- 10 A: The Saturday after.
- 11 Q: The Saturday after, and you didn't drive that Acura
- 12 down here?
- 13 A: No, I did not.
- 14 Q: And how long, by the way, how long did it take you to
- 15 get from Winston-Salem to Myrtle Beach that night?
- 16 A: Three and a half, four hours.
- 17 Q: Okay, and did you drive what?
- 18 A: I drove a Chevrolet Dually.
- 19 Q: And what time of the night were you going?
- 20 A: We left somewhere around 6:30 or seven o'clock and
- 21 arrived at just shortly after 11.
- 22 Q: Shortly after 11. Did you take note at that time of
- 23 the bug splatter on your car?
- 24 A: Yes, on the truck.
- 25 Q: On the vehicle you were driving?

- 1 A: Yes, I did.
- 2 Q: All right, and how did it strike you?
- 3 A: Just on the way down the truck was covered in a lot of
- 4 bugs.
- 5 Q: Covered in a lot of bugs?
- 6 A: Yes.
- 7 Q: Now, when John brought your car back to you on
- 8 Wednesday morning was it covered with bug splatter?
- 9 A: No, it was not.
- 10 Q: Now, we're talking bug splatter here, Kahle, because I
- 11 want to be as specific as we can be. Was there a marked
- 12 difference in the amount of bug splatter on your car when John
- 13 brought it back that Saturday morning as opposed to the truck
- 14 that you drove down three or four nights later?
- 15 A: Yes, there was a big difference.
- 16 Q: Did that strike you as odd in any way?
- 17 A: Yes, it did.
- 18 Q: Did you think that your car was driven to Myrtle Beach
- 19 on the night of June the 9th?
- 20 A: No, I do not.
- 21 Q: Just one thing, you said three and a half to four
- 22 hours. I thought you had told me at one time five to five
- 23 and a half hours. Am I mistaken about that?
- 24 A: You must be mistaken.
- 25 Q: Okay, now, let me talk to you about the TZ75. At one

1 time John, it appears that John owned a TZ75?

2 A: Right.

3 Q: You knew that?

4 A: Yes.

5 Q: You had seen the gun; right?

6 A: Yes.

7 Q: And then you also know that at the -- on June the 9th
8 John owned a nine millimeter Glock; didn't you?

9 A: Yes.

10 Q: Now, have you ever seen John Frazier in possession of
11 both of those guns at the same time?

12 A: No, I've never seen him with both of them.

13 Q: John told you when you asked him about the TZ75 the
14 same thing that he told Todd Fain, and that is that he had
15 sold it at a gun show in '97; is that right?

16 A: That's right.

17 Q: Did you ever see John with that gun during the
18 calendar year of '98 up until June the 9th?

19 A: No, I did not.

20 Q: Now, you -- let me ask you this. You knew John and
21 you knew some of the girls that he had dated?

22 A: Yes.

23 Q: All right, was John constantly dating different girls?

24 A: At different points.

25 Q: At different points, okay, and did at different times

- 1 different girls move into John's house with him?
- 2 A: Yes.
- 3 Q: Did girls other than Renee do that, move in and then
4 move out?
- 5 A: Yes.
- 6 Q: Kahle, are you married?
- 7 A: No.
- 8 Q: Do you live alone?
- 9 A: Yes.
- 10 Q: Did you still live at that same apartment?
- 11 A: Yes, I do.
- 12 Q: Now, let me ask you about this, let me ask you about
13 this. To your knowledge did John have a reason to know your
14 physical address?
- 15 A: No.
- 16 Q: To say, you know, Kahle lives at :?
- 17 A: No.
- 18 Q: Did you know John's address there in Winston-Salem?
- 19 A: No.
- 20 Q: You live alone right?
- 21 A: Yes.
- 22 Q: Do you have nights when you're at home and nobody is
23 there with you?
- 24 A: Yes.
- 25 Q: How about on that night of June the 9th and I'm not

1 insinuating anything sinister, but on the night of June the
2 9th when you got home from work until John called you the next
3 morning, were you alone by yourself?

4 A: Yes, I was.

5 Q: Could you have proven that you didn't go to Myrtle
6 Beach that night?

7 A: No.

8 MR. MARTIN: Just one second, Your Honor.

9 BY MR. MARTIN:

10 Q: Kahle, I want to go over a couple of things with you
11 here. Defense Exhibit Number 27, let me ask you to take a
12 look at this. Do you recognize those?

13 A: Yes, I do.

14 Q: What are they?

15 A: That would be one of the floor mats out of my car.

16 Q: One of the floor mats out of your car?

17 A: Yes.

18 Q: All right, and I believe the other floor mat of your
19 car is this one as well; right?

20 A: That's correct.

21 Q: All right, now, the police took those.

22 A: Yes, they did.

23 Q: Within the week after this occurred; right?

24 A: Right.

25 Q: Right, now, of course, you had vacuumed them right?

1 A: Yes.

2 Q: Of course, you would agree with me when you vacuum
3 floor mats you don't get all the sand out of them; do you?

4 A: No, you don't.

5 Q: And by the way, when John brought the car that morning
6 was there noticeable sand in the floorboard on the mats of
7 this car?

8 A: No, there was not.

9 Q: Why did you -- again, now, just so we don't make
10 anything curious. Why did you vacuum it and/or clean the
11 windshield if it wasn't really dirty?

12 A: I just like to keep a clean car.

13 Q: All right, how about cigarette ashes?

14 A: I don't smoke.

15 Q: All right, John does smoke?

16 A: Yes.

17 Q: All right, was there some ashes in the car?

18 A: Not as I recall.

19 Q: Okay, do we have the blue towels out of the car. I
20 should know. We don't have the blue towels out of the car. I
21 thought we had, well, all right.

22 MR. BRITTAIN: What's in, what's in that package down
23 there?

24 MR. MARTIN: Well, that's the towel from the beach I
25 believe there. I don't see it.

1 BY MR. MARTIN:

2 Q: Anyway, the police take, the police take the towels,
3 too?

4 A: Yes.

5 Q: All right, I mean, they've got whatever they wanted to
6 out of that car; right?

7 A: Right.

8 Q: And the agent, when they, when they got your car down
9 there they looked at it at your place and then they had you
10 bring it down to the police department; didn't they?

11 A: There was an agent that came by and looked at it, yes.

12 Q: All right, and he looked at that car, got up under
13 that car, examined the tires, looked at it from stem to stern;
14 didn't he?

15 A: Well, a brief look, yes.

16 Q: All right, and then you took it down to the police
17 department?

18 A: That's correct.

19 Q: And there they, again, examined it -- where is those
20 pictures, Fran?

21 MR. HUMPHRIES: Up there on the banister.

22 Q: They took that and again this Defense Exhibit 22 put it
23 up on the board and let's see what the board looks like.

24 TECHNICIAN: Which side is that, the driver or the
25 passenger?

1 MR. MARTIN: That is the -- put up either one of them.

2 This is the passenger side I'm looking at now.

3 BY MR. MARTIN:

4 Q: But let me let you be looking at that, Kahle. That
5 appears to be your car I take it.

6 A: Yes.

7 Q: And the towels are in the seat just as they were when
8 John borrowed it?

9 A: That's correct.

10 Q: All right, same floor mats that we just introduced in
11 court are there; right?

12 A: Yes.

13 Q: All right, put up the driver's side. Let me show you
14 what is the Defense Exhibit 21. That again is a picture of
15 your car?

16 A: Yes, it is.

17 Q: All right, and this, of course this wasn't taken at
18 your shop. This was down at the police station where they
19 were giving it the once over?

20 A: That's correct.

21 Q: All right, and of course you don't know what those
22 little yellow stickers on there are; do you?

23 A: I didn't put them there.

24 Q: Okay, all right, and then do we have, do we have this
25 photograph? All right, put this one up. This Exhibit 20,

1 again, Kahle, that's a picture of your car; right?

2 A: That's right.

3 Q: As far as the bug splatter and the things on the car
4 is that in the same condition it was when John brought it
5 back?

6 A: Yes, it is.

7 Q: Any question about that?

8 A: No question.

9 MR. MARTIN: Just one second, Your Honor, just one
10 second. That's all the questions I have for Mr. Schettler.

11 THE COURT: Redirect.

12 MR. HUMPHRIES: Just briefly and just need to be clear
13 about this.

14 REDIRECT EXAMINATION

15 BY MR. HUMPHRIES:

16 Q: You all have been friends since high school?

17 A: That's correct.

18 Q: Do you know where he lives?

19 A: Yes, I know where he lives.

20 Q: Been to his house?

21 A: Yes.

22 Q: He knows where you live, been to your apartment?

23 A: Yes.

24 Q: Lots of times?

25 A: Yes.

1 Q: You know his phone number.
2 A: I did at the time, yes.
3 Q: Or did, yes, sure, sure, and he knew your phone
4 number.
5 A: Yes.
6 Q: No question about that.
7 A: No.
8 Q: And if he told a police officer he didn't know where
9 you were or how to get in touch with you that wouldn't be
10 true; would it?
11 MR. MARTIN: I object.
12 MR. HUMPHRIES: I'll withdraw.
13 THE COURT: Sustained, withdrawn.
14 MR. HUMPHRIES: Nothing further.
15 THE COURT: You may step down.
16 Call your next witness, please.
17 MR. HEMBREE: Thank you, Your Honor. The State calls
18 Calvin Harris to the witness stand.
19 MR. HUMPHRIES: And let me, let me do this just for the
20 purposes of the record, we don't have any objection to Mr.
21 Schettler being excused, I don't.
22 THE COURT: Any objection?
23 MR. MARTIN: Well, I'd like to keep him just a few
24 minutes.
25 THE COURT: All right.

1 WHEREUPON CALVIN HARRIS WAS CALLED TO THE STAND, DULY SWORN BY
2 THE CLERK AND TESTIFIED AS FOLLOWS:

3 THE CLERK: Thank you. Please be seated. Please
4 state your full name and spell your last name for the Court
5 and talk right into that microphone.

6 MR. HARRIS: Calvin Harris, H-A-R-R-I-S.

7 DIRECT EXAMINATION

8 BY MR. HEMBREE:

9 Q: Mr. Harris, with whom do you work?

10 A: Sara Lee Brand Apparel.

11 Q: And back in June of 1998 a period let's say from January
12 to June of 1998 who were you working for?

13 A: Sara Lee Brand Apparel, the Champion Products Division.

14 Q: And what does the Champion Products Division of Sara Lee
15 Brand Apparel make?

16 A: Athletic wear.

17 Q: What was your job back in that time with Champion
18 Products?

19 A: I was the senior manager of operations.

20 Q: And where were you stationed?

21 A: I split time between Winston-Salem and Fayetteville.

22 Q: Now, what was your job and I understand your title
23 but if you could tell the jury a little bit about what
24 your job actually involved with Champion back in that
25 time.

Calvin Harris - Direct by Mr. Hembree

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1 A: I was the operations manager in charge of the
2 computer center, the data center.

3 Q: And did you have a gentleman working for you by the
4 name of John Boyd Frazier?

5 A: Yes, sir, I did.

6 Q: When you took over or when did you start with the
7 Winston-Salem office of Champion?

8 A: I want to say it was approximately December, January
9 of -- December of '97, January of '98, if I recall.

10 Q: Was Mr. Frazier working there at the time you were
11 assigned the responsibilities for the Winston-Salem office?

12 A: Yes, sir.

13 Q: Now, did there come a time when Mr. Frazier requested
14 three days off Monday, Tuesday, Wednesday, June 8th, 9th and
15 10th of 1988?

16 A: Yes, sir.

17 Q: Let me show you what's in evidence as State's Exhibit
18 Number 28, and if you would identify that for us, sir?

19 A: This is an e-mail dated June 2nd, 1998, 1998, from
20 John Frazier to me requesting Monday, Tuesday and Wednesday
21 off, June 8th, 9th and 10th.

22 Q: And was Mr. Frazier given those three days off?

23 A: Yes, sir he was.

24 Q: Now, let me take you back a ways. At my request did
25 you pull records or have you reviewed employment records of

1 John Boyd Frazier from January of '98 through June of '98?

2 A: Yes, sir.

3 Q: In your review of those records at any time did Mr.
4 Frazier request three days off consecutively?

5 A: No, sir.

6 Q: So, June 2nd was the first time since you had
7 responsibility for him that he asked for three days off
8 consecutively?

9 A: Correct.

10 Q: And I'm going to ask if this is a fair
11 characterization of your testimony, Defendant requests June
12 8th, 9th and 10th off and placed that on June 2nd, 1998. Is
13 that a fair characterization of your testimony?

14 A: Yes, it is.

15 Q: Let me hand you -- you may need to make reference to
16 this, Defense Exhibit Seven and ask if you can identify that
17 for us, Mr. Harris?

18 A: These are copies of time cards for Mr. Frazier.

19 Q: From what time period?

20 A: This first one here is in January of '98 and they go
21 through June 13th of 1998, I believe so, yes.

22 Q: And Mr. Harris, you've indicated that he never
23 requested three days off consecutively. Did he ever have
24 three days off consecutively?

25 A: Yes, sir.

1 Q: And how would -- how did he accomplish that?

2 A: He would accomplish that by taking a vacation day or a
3 sick day associated with his regular days off.

4 Q: Okay, so, like around a weekend if he had the weekend
5 off he might take a sick day or a vacation day on Friday.

6 A: Friday or Monday.

7 Q: Monday.

8 A: Yeah.

9 Q: So, he would build it around other time off that he
10 knew he had.

11 A: Correct.

12 Q: But again he never requested three consecutive days
13 off until June 2nd?

14 A: Yes, sir.

15 Q: I don't have any further questions for you, Mr.
16 Harris. Please answer any questions Defense counsel may have

17 THE COURT: Cross

18 CROSS EXAMINATION

19 BY MR. BRITTAIN:

20 Q: Mr. Harris, the truth of it is there's not a thing
21 unusual about John Frazier being off three days in a row
22 during that period; is there?

23 A: No, there were times he was off three days in a row.

24 Q: I mean, it's commonplace when you look at the schedule
25 of his work record; isn't it? I mean, it's almost kind of

1 | overwhelming how often he's off. You've got the time records
2 | there?

3 | A: He was off quite a bit because he missed a lot of time
4 | from work.

5 | Q: But I know, but he I mean he's off three days in a row
6 | in every single month from January to June; isn't he?

7 | A: When you take the time off plus his normal days off,
8 | yes.

9 | Q: Yes, and this time he had worked, what, seven or eight
10 | days in a row?

11 | A: I believe so.

12 | Q: So, you're his supervisor now, and the truth of the
13 | matter is it is commonplace for John Frazier while he was
14 | working for you to be off three days in a row throughout the
15 | week, on the weekends, there's nothing unusual about that?

16 | A: He was out many times three days in a row.

17 | Q: All right, now, let's look at the e-mail you got
18 | there, the exhibits that -- we've got that for the jury. Can
19 | you bring that up for me, please. Now, on that e-mail he
20 | would have probably filled that out on June the 1st. He was
21 | working on June the 1st; wasn't he?

22 | A: Yes, sir.

23 | Q: Okay, and putting in a request of you for these three
24 | days off; right?

25 | A: Yes.

- 1 Q: Any question about that? I mean, this is coming to
2 you. He probably did that the night before he left. He
3 worked at night; didn't he?
- 4 A: Well, it's time-stamped June 2nd. That would have
5 been the time he sent the e-mail.
- 6 Q: Okay, now, here's the part I want to ask you about.
7 Have you got a copy of it?
- 8 A: No, sir.
- 9 Q: You don't. Let me get you a copy of it. Now, you
10 need to scoot that over so I can see it a little bit there.
11 Don't ask me to put this up there. Okay, you've got your copy
12 there; right?
- 13 A: Yes, sir.
- 14 Q: "Calvin," that's you, "I wanted to request Monday,
15 Tuesday and Wednesday, 8th, 9th and 10th of next week. If I
16 could have these three days off to recoup from this week."
17 Now that's because he had worked a bunch of days in a row
18 which was unusual; right?
- 19 A: Yes and no, I mean, if he filled -- if it was a month
20 end or he was filling in for somebody else on vacation or sick
21 it was ---
- 22 Q: He had worked several days in a row though?
- 23 A: Yes, sir.
- 24 Q: No question, "Bruce," that's somebody else that
25 works there at Champion; right?

1 A: Correct.

2 Q: "Bruce will be here," here again indicating he's
3 probably typing this thing at work; fair enough?

4 A: Yes.

5 Q: "Bruce will be here," he's sitting there writing it,
6 "Bruce will be here so the shift should be covered without
7 any problems," fair enough?

8 A: Yes.

9 Q: But if there is where will John Frazier be? "I will
10 be at home to be called if needed." Isn't that what he put
11 in that e-mail to you?

12 A: Yes, sir.

13 Q: He said, "If you need me now I will be there at
14 home," that's fair; isn't it?

15 A: Yes.

16 Q: Thank you. One second. Here again on the date on
17 the e-mail ---

18 A: Yes.

19 Q: --- when does June the 2nd start technically?

20 A: Midnight.

21 Q: Midnight, so, he's talking about Bruce being here, it
22 makes sense that that would have happened sometime in the wee
23 hours of the morning on June the 2nd; right?

24 A: Correct.

25 Q: Okay, thank you, no further questions.

1 REDIRECT EXAMINATION

2 BY MR. HEMBREE:

3 Q: Let me just clarify. I understand that Mr. Brittain is
4 trying to move it back to June the 1st. It says the June the
5 2nd. He's asked you about that, but the document says June
6 the 2nd and it was sent June the 2nd, no question about that.

7 A: No question.

8 Q: And it could have been sent during the night of June the
9 2nd when Mr. Frazier was working?

10 A: Yes.

11 Q: Prior to midnight?

12 A: I believe if he would have sent it before midnight it
13 would have had the first date on it.

14 Q: All right, and let me, and let me, if he had sent it
15 before midnight on the 1st it would have said the first?

16 A: Yes.

17 Q: I understand.

18 A: At 12:01 it would have said the 2nd on it.

19 Q: But if it were the 2nd, he also worked on the 2nd;
20 didn't he?

21 A: Yeah, well, his normal shift was like 11:30 p.m. till
22 7:30 a.m. So, if he'd come in on the 1st ---

23 Q: And take a look, take a look ---

24 MR. BRITTAIN: Let him answer, please.

25 Q: I'm sorry.

1 A: If he would have come in on the 1st, 11:30 on the 1st
2 he would have worked through the 2nd, into the 2nd.

3 Q: If you will take a look at his, take a look at his
4 work record for June the 2nd that is Defense Exhibit that we
5 provided with you. I think it's Defense Exhibit Seven?

6 A: Yes.

7 Q: Okay, now, he came in on the 2nd; true, on June the
8 2nd to work.

9 A: Yes, he did.

10 Q: And he came in at 10:45 in the evening; correct?

11 A: Yes, he did.

12 Q: So, he would have had an hour and 15 minutes to type
13 these three or four lines and send to you?

14 A: Correct.

15 Q: So, no question could have been, could have been ---

16 A: It, it could have been, could have been ---

17 Q: --- the end of the 2nd, the end of the day on the 2nd
18 because he was there?

19 A: Yes, sir.

20 Q: I don't have any further questions.

21 MR. BRITTAIN: Mr. Solicitor, the time records are all in
22 evidence; right? We agree to that. Right?

23 MR. HEMBREE: Uh-huh (affirmative response).

24 MR. BRITTAIN: Okay.

25 RECROSS EXAMINATION

1 BY MR. BRITTAIN:

2 Q: Okay, when you, when you come in, now, Frazier's
3 getting there, it really says on those time records he gets
4 there at 11 o'clock; right? Isn't that generally when he gets
5 there?

6 A: That's when his shift starts.

7 Q: His shift starts?

8 A: Yes.

9 Q: And when you get there to start your shift there's a
10 little activity going on, that's sort of a busier time for
11 him; would you agree with that?

12 A: It could be.

13 Q: Okay, and once you get into it, as time passes on by,
14 you would have time for other things you were thinking about
15 doing, but at first you're kind of focusing on getting there
16 and getting started; is that a fair statement?

17 A: Yes, in most cases.

18 Q: Did you -- were you able to get any of the December
19 time records?

20 A: No, sir.

21 Q: Nothing further.

22 THE COURT: Yes.

23 MR. HEMBREE. Your Honor, we would ask that this witness
24 be excused.

25 THE COURT: Any objection?

1 MR. BRITTAIN: No, ma'am.

2 THE COURT: All right, you may step down, sir, and
3 you're free to go.

4 A: Thank you.

5 THE COURT: Call your next witness

6 MR. HEMBREE: Thank you, Your Honor, with that the State
7 of South Carolina would rest in the case of State versus John
8 Boyd Frazier.

9 THE COURT: Very good, ladies and gentlemen of the
10 jury, I'm going to send you back to the jury room with
11 instructions please do not discuss the case. We have some
12 matters of law that need to be addressed. We'll have you out
13 in the near future.

14 (Whereupon, the following takes place outside the
15 presence of the jury.)

16 THE COURT: Anything from the State at this time?

17 MR. HEMBREE: Nothing from the State, Your Honor.

18 THE COURT: Be glad to hear from the Defense.

19 MR. MARTIN: Your Honor, the State would at this time
20 move for a directed verdict of not guilty.

21 MR. HUMPHRIES: Defense.

22 MR. MARTIN: Sorry, that's right, I might better let
23 you all do this. The Defense, I was a prosecutor for eight
24 years.

25 MR. HUMPHRIES: You were, a good one, too.

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1 MR. MARTIN: The Defense would move for a directed
2 verdict of not guilty as to all three counts against the
3 Defendant John Frazier and I'll start first of all with the
4 conspiracy count. You know, we had this discussion before the
5 trial began as to what the evidence of this conspiracy was,
6 any evidence independent of the statements which the Court has
7 already ruled on, and I would submit to the Court that there
8 is insufficient, if any evidence, of the existence of a
9 conspiracy between John Frazier and Renee Poole to accomplish
10 the murder of Brent Poole. Obviously, at this stage of the
11 proceedings, the State is entitled to the benefit of viewing
12 the evidence in the light most favorable to it. I don't know
13 what the evidence of the conspiracy is that's in this record,
14 and so, before I go any further I would like somebody to tell
15 me what it is.

16 THE COURT: We can stop and let me hear from the
17 State at this point as to the conspiracy, the evidence
18 presented as to conspiracy.

19 MR. HUMPHRIES: Let me refer the Court to the case of
20 The State versus Timothy Hammitt. That is ---

21 THE COURT: Repeat that. I'm sorry.

22 MR. HUMPHRIES: I'm sorry. Timothy Hammitt.

23 THE COURT: All right.

24 MR. HUMPHRIES: And that case stands for the proposition
25 that the intent to act together for a shared mutual benefit

1 that's all you have to establish. It's not necessary to show
2 direct contact or explicit agreement. Now, in this case we
3 have to look and the Court will note that conspiracies most
4 often as the case law has held, most often are proved by
5 circumstantial evidence versus direct evidence. In this case
6 we have an illicit relationship between John Frazier and
7 Kimberly Renee Poole established. We have John Boyd Frazier
8 and Kimberly Renee Poole living together for a period of 12
9 days, May 1st to May 12th, after which time we have statements
10 of the Defendant to law enforcement that they no longer had
11 any contact with the exception of seeing each other on one
12 time for the payment of \$75 owed to the Defendant by Ms. Poole
13 and beyond that they had no contact. To the contrary ---

14 THE COURT: And we've got the Defendant, we've got
15 the Defendant's statement.

16 MR. HUMPHRIES: The Defendant's statement to law
17 enforcement that he had no contact. To the contrary we have
18 statements both from Tom Pedersen indicating that he and
19 Kimberly Renee Poole were present at his house after that
20 period of time. We have statements from Bruce Wolford that
21 they were, in fact, together and depending on how you view the
22 evidence either a few days before Brent Poole died or on June
23 the 2nd before Brent Poole died. In addition, you have the
24 testimony of Jim Bollow who testified that in the week
25 preceding, including the Saturday, June 6th, the week

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1 preceding the trip to Myrtle Beach for the anniversary John
2 Boyd Frazier, at the very least his vehicle was present at her
3 house after Brent went to work.

4 In connection with the animus between Brent Poole and
5 John Boyd Frazier there is the testimony from two witnesses
6 regarding, number one, a taunting by John Frazier of Brent
7 Poole and an attempt to draw him out into a fight, that is the
8 Defendant attempting to draw the victim out in a fight and or
9 according to Todd Fain a verbal confrontation from which they
10 had to be separated on May 30th.

11 We have in terms of the forensic evidence, for whatever
12 weight the jury wishes to give that, this Defendant owning a
13 TZ75 semiautomatic handgun which cannot be excluded as a make
14 of handgun which could have fired the fatal bullets in this
15 case. We have according to Bruce Wolford a meeting for a time
16 at which Kimberly Renee Poole and John Boyd Frazier were
17 together again either a few days before Brent's death or on
18 June the 2nd, in any event prior to Brent Poole's death where
19 there was a discussion with details regarding the Myrtle Beach
20 trip planned for Brent Poole and Kimberly Renee Poole, I mean,
21 Brent Poole and Kimberly Renee Poole.

22 We have in close proximity to that time, either June 2nd
23 or a few days thereafter, a request by John Boyd Frazier of
24 his employer for three consecutive days off surrounding the
25 relevant time period, that is 8th, 9th and 10th, the 9th being

1 the date of the murder. We have testimony from his supervisor
2 that he never requested three consecutive days off but that if
3 he had three consecutive days off they would have been in
4 combination with his regular days off. We have his showing up
5 without notice to his friend, Kahle Schettler, in the
6 afternoon of June 8th where he arrives and asks Kahle
7 Schettler to look at his vehicle and to borrow Kahle
8 Schettler's vehicle for that period of time, four days, Monday
9 through Thursday, the 8th through the 11th. We have the
10 testimony of Kahle Schettler who says, "While I have loaned
11 him my car before I have never -- he has never requested nor
12 have I loaned my car to him overnight," and in this case he
13 asked for a period of four days, that period of time which
14 contains June 9th 1998.

15 When Officer Darrell Mills arrived at John Frazier's
16 house at 5:40 a.m. on the 10th, he asked him about his vehicle
17 and the whereabouts of his vehicle. He did indicate that he
18 had loaned it or that a friend, Kahle Schettler, had it and
19 was asked directly, "Do you know where Kahle Schettler is?
20 Do you know how to get in touch with him," and he responded
21 to that officer, "No, I do not," and at that time he was
22 still in possession of the Acura that he had borrowed from
23 Kahle Schettler.

24 Kahle Schettler testified that John Frazier called him
25 very early in the morning about 7:40, 7:45 on June the 10th

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1 and asked him or told him that he needed to trade out vehicles
2 before something happened and was there within 15 minutes,
3 traded out vehicles, changed over items from one vehicle to
4 another and never inquired about the problem that he had
5 presumably intended Kahle Schettler to address.

6 Beg the Court's indulgence.

7 In addition as it relates to his co-conspirator we have
8 Kimberly Renee Poole who on May the 30th which coincidentally
9 is the day that the confrontation occurred between Brent Poole
10 and John Boyd Frazier calling the Carolina Winds Motel and
11 asking a series of questions regarding the location of the
12 hotel when she learned that the hotel was at the end of the
13 commercial district, if you will. It was residential beyond
14 that and very secluded. She further asked about baby-sitting
15 services and upon being referred to Ms. Murphy, Carolyn Murphy
16 she asked specifically for a period of time from 10 till 2 in
17 the morning a time when the beach most likely would be either
18 very less populated or abandoned.

19 When, when Kimberly Renee Poole -- when Ms. Murphy
20 arrived at the motel of Kimberly Renee Poole and Brent Poole
21 it was according to Ms. Murphy Kimberly Renee Poole who was
22 rushing Brent out of the door as if to meet some schedule.

23 In terms of the robbery or the incident itself she
24 indicated there is a robbery. There are, there are items
25 taken from Brent Poole. There are also notably items left at

1 the scene, his wedding band. The wallet that was taken there
2 is money still in Brent Poole's pocket.

3 THE COURT: I don't know if we've got a robbery
4 though because the only way that we had the robbery was from
5 the statement of ---

6 MR. HUMPHRIES: The wallet.

7 THE COURT: That the wallet was missing ---

8 MR. HUMPHRIES: The wallet was ---

9 THE COURT: --- and was found and belonged to him.

10 MR. HUMPHRIES: Yes.

11 THE COURT: Yeah, that would be circumstantial
12 evidence of a robbery but her statement isn't evidence.

13 MR. HUMPHRIES: Right, no, no, no, and that's -- and
14 that's why I've tried to avoid that.

15 THE COURT: Okay, all right.

16 MR. HUMPHRIES: Okay, the wallet was found some blocks
17 away and we've got diagrams of it in the yard of Mr. Sirles
18 with the money still in it. In addition -- well, and of
19 course, the Hobbses's ID of this Defendant at Carolina Winds
20 in the late evening hours after 11 o'clock on the relevant
21 date also serves to support evidence regarding a conspiracy.
22 I would submit to the Court based on that evidence that there
23 is sufficient circumstantial evidence to establish at the very
24 least that there was an intent to act together for a shared
25 mutual benefit and we don't have to show, all though we have,

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1 but we don't have to show direct contact or an explicit
2 agreement as these cases are proved by circumstantial
3 evidence.

4 THE COURT: Many times yes, sir.

5 MR. MARTIN: Judge, and I've noted every point that he
6 made, and I would reiterate again that there is not evidence
7 of a conspiracy. I agree with his definition of conspiracy,
8 but the state law of South Carolina specifically says that you
9 can't reach that level by piling inference upon inference and
10 that's exactly what's happening here. If you go down them,
11 they had an illicit relationship, within that there's no
12 evidence of a conspiracy to commit murder. They lived
13 together for 12 days, no evidence of a conspiracy to commit
14 murder. Statement to law enforcement that they weren't
15 together after May 30th, all right, and of course, I've got
16 the statement there, but now what he, what he does say within
17 that statement is, yes, he had seen her since she moved out.
18 He talks about seeing them at the Silver Fox, the Silver Fox
19 on the 30th, talks about her coming by his house but within
20 that statement there is absolutely no evidence either that --
21 well, there's just no evidence of a conspiracy from that
22 statement. There's the Pedersen that he was present at his
23 house, that's the one thing, I don't know -- I can't recall
24 right now what day Pedersen said he was at his house. I think
25 he said he didn't know, but he also said that they weren't

1 together as a couple, that they were friends. Again, the fact
2 that he was there at the same place with her or got in a car
3 and rode with her somewhere no evidence of a conspiracy.
4 Wolford, together on the 27th or the 2nd, well again, there
5 within that is no evidence of a conspiracy because if you will
6 recall the testimony of Mr. Wolford upon cross examination and
7 refreshing of his memory through those statements, it was that
8 John came over to his house and they went to L and M
9 Computers, and his wife Courtney, who was friends with Renee
10 independent of Frazier here because they'd danced together at
11 the club, they were at the mall, that then they all went back
12 to their house. There's no evidence that they were together
13 in any improper way at that time at all, and even if they were
14 there again is no evidence of a conspiracy. Again, you can't
15 do it by inference. It at least has to rise to the level of
16 circumstantial evidence, and that is, I would repeat again, is
17 a secondary fact by which you can infer a principal fact. Can
18 you infer a conspiracy because they had an affair? Can you
19 infer a conspiracy because they might have been together at
20 Bruce Woford's house, and they say, "Well, they discussed
21 the trip to Myrtle Beach," well, a lot of people probably
22 discuss the trip to Myrtle Beach. They discussed a trip to
23 Myrtle Beach with detail. Now, if Mr. Woford had said they
24 discussed the trip to Myrtle Beach and somebody and John said,
25 "Be sure you go out by nine o'clock. I'll be there," or you

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1 know, then maybe you've got evidence of a conspiracy, but I'm
2 telling you again, now, this is inference upon inference and
3 no evidence has arisen yet. Then you've got Bollow, Bollow,
4 well, Bollow never puts John Frazier at that house. He don't
5 know whose black Blazer that is. He never saw John Frazier
6 there. He never saw a tag. He never puts John Frazier at the
7 house. Now, some of the jury may believe he's there but
8 technically from the sense of evidence he never puts John
9 Frazier at that house, no time, not on the Saturday morning
10 before, not on the Wednesday, Thursday or Friday night before.
11 All he puts there is a black Blazer.

12 You go on down, the forensic, the TZ75, I mean, I'm not
13 laughing at it because there's no telling what'll happen in
14 this courtroom before it's over, but that's laughable that we
15 are trying to use a pistol that their witnesses say John
16 Frazier didn't own on June the 9th, and it is one of probably
17 hundreds of thousands of guns that could have -- they narrowed
18 it down, Judge, to 38 different makes. I don't know 38
19 different makes of guns.

20 There is absolutely no evidence in a conspiracy that
21 Frazier at one time owned a TZ75. Then you go down to request
22 a few days off. There is the chart. He requested days off
23 all the time. Now, the Solicitor says, "Well, he requested
24 three days off. That's the only time that they recall he did
25 that." The testimony is that he had worked eight days

1 straight. He was entitled to a couple of days off. He asked
2 for another day off. How is that evidence of a conspiracy?
3 You know, it would be much better evidence if let's say he
4 would have had three days off or a week off, been on vacation
5 for a week, had to be back in on Monday, goes in Monday asking
6 for Tuesday and Wednesday off for some obscure reason and then
7 says in the e-mail, ``If you need me I will be at home.``

8 There's just no evidence arising from that of a
9 conspiracy. Borrowed the car, once again, you know, once you
10 examine what happened it loses its suspicion. The inference,
11 the fact that he borrowed a car from Kahle Schettler is
12 evidence of a conspiracy between he and Renee Poole? Darrell
13 Mills, Frazier didn't tell Schettler where they lived or
14 didn't say where Schettler lived, and Mills did say he asked
15 him where to find him or whatever it was. He didn't. But
16 again what evidence is there of a conspiracy in that? The
17 evidence would be if he didn't tell him that he had a black
18 Blazer or wouldn't tell him where it was. It's at Kahle
19 Schettler's. Now, I submit to you that between the
20 cup and the lip there's been a slip and exactly what
21 conversation took place between Frazier and Mills will never
22 be known as to exactly whether there was any evasiveness in
23 that answer.

24 Calls Schettler to bring the car back on the Wednesday,
25 that's the next time. Well, what is so odd about that? The

1 policeman wakes you up at 5:40 in the morning, probably first
2 of all scares the heck out of you, how many of us wouldn't be
3 afraid with a policeman knocking on our door 5:40 in the
4 morning. I know the first thought I've got somebody has been
5 killed in a car wreck that is close to me. That's the first
6 thing I think about, and then he leaves and Frazier and he's
7 asked about Myrtle Beach, a Blazer, "Where is your car?
8 Report in Myrtle Beach." Well, what you going to do? You
9 wait till your friend Schettler may be up at 7:45 and you call
10 him and say, "Hey, you know, I'm coming over, getting my
11 car." Where is the -- there's no, no evidence of a
12 conspiracy. Let me go on down.

13 Renee makes reservations to come to the beach. That is
14 done millions of time every year. People call and make
15 reservations to come to the beach. They ask for a
16 babysitter's service. Why else would Carolina Winds so
17 readily be prepared to recommend babysitters? What is the
18 big deal? Ten to 2, you know, that is late for me and
19 probably the Solicitor here, but for the young people of the
20 world today, and I would suggest to you the people who dance
21 in these strip clubs, life just got going about midnight.

22 You've got Renee rushes Brent out so they could meet a
23 deadline. Mr. Humphries is clever with his words, but that
24 ain't what she said. She said the baby was sitting on Brent's
25 lap and was crying and Renee suggested, I suggest just like

1 you and me, he, anybody else would, ``Brent, you go on out.
2 Let me get the baby straight.'' Children get attached to one
3 more than the other, vice versa, but there was -- she didn't
4 say rushed him out. She didn't say they were meeting a
5 deadline.

6 A wallet was found. Well, I again say no evidence of a
7 conspiracy. The Hobbsses's identification, now, they obviously
8 have said they saw John Frazier at the Carolina Winds that
9 night. They've not said they saw him at the crime scene.
10 They've not said they saw him anywhere else. They've not said
11 they saw him with a weapon. I would just say, Your Honor,
12 that all of this is inference upon inference and never rises
13 to the level of circumstantial evidence of conspiracy, for if
14 it is circumstantial only and it is only circumstantial
15 evidence, not one shred of direct evidence, it must be
16 substantial in nature.

17 THE COURT: All right.

18 MR. HUMPHRIES: Let me just direct the Court to one
19 other case.

20 THE COURT: Uh-huh (affirmative response).

21 MR. HUMPHRIES: And it's State versus Richard Condrey.
22 This is an appeal that was filed on April 1st, 2002, and the
23 writer for the Court was Judge Anderson. I'm not going to
24 read all of it, but specifically regarding criminal conspiracy
25 as he writes for the Court, ``Although the offense of

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1 conspiracy may be complete without proof of overt acts, such
2 acts may nevertheless be shown since from them an inference
3 may be drawn as to the existence or the object of the
4 conspiracy. It sometimes happens that the conspiracy can be
5 proved no other way. To establish sufficiently the existence
6 of the conspiracy, proof of an express agreement is not
7 necessary and direct evidence is not essential, but the
8 conspiracy may be sufficiently shown by circumstantial
9 evidence and the conduct of the parties. Circumstantial
10 evidence and the conduct of the parties may consist of concert
11 of action. It is axiomatic that a conspiracy may be proved by
12 direct or circumstantial evidence or by circumstantial
13 evidence alone. Often proof of conspiracy is necessarily
14 proved by circumstantial evidence alone."

15 THE COURT: State v. Fleming says that ---

16 MR. HUMPHRIES: Condrey.

17 THE COURT: --- that same thing.

18 MR. HUMPHRIES: Yes, yes.

19 THE COURT: Yeah, and I agree, and Mr. Martin, I
20 agree with you in that if it were any one of these that even
21 Mr. Frazier was witnessed and was actually seen there and I
22 have to look at the evidence in the light most favorable to
23 the non-moving party, that wouldn't be enough. It is the
24 combination of all of this, and again it's as if it's all true
25 and has been proven. There is substantial circumstantial

1 evidence to present this case to the jury. It rises more than
2 a mere suspicion.

3 MR. MARTIN: Well, Judge, I understand that as to
4 the law, the charge of conspiracy. I would further move for a
5 directed verdict in this case as to the charge of murder.
6 Pursuant to a memorandum that I have handed up to the Court,
7 again, the law is the same, but in this instance as to the
8 crime of murder they have not placed the Defendant at the
9 crime scene. State versus Schropp, State versus Martin, that
10 is a critical element, cannot be dispensed with. State versus
11 Arnold, which is the most recent court case on it and I can
12 talk about the facts of them, but it's pretty clear about this
13 if we go back the law is the same. If you're talking about
14 circumstantial evidence and that's what they've got in this
15 case, then it must be substantial in nature, number one. It's
16 not that, mainly because never places him at the crime scene
17 and an independent requirement of the case law, as I read it,
18 Arnold, Schropp and Martin is you've got to place the
19 Defendant at the crime scene and there's no evidence linking
20 John Frazier to the crime scene.

21 THE COURT: Let me hear from you on that

22 MR. HUMPHRIES: Be glad to. First of all, surely the
23 Defense doesn't maintain that the State has to establish by
24 forensic evidence the immediate presence of a Defendant at a
25 crime scene ignoring all other evidence. In this case what

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1 are we talking about in terms of crime scene? What we have
2 established to this jury through the eyewitness testimony is
3 that John Frazier was on the beach in the late evening hours
4 after 11 o'clock dressed in dark clothing, long shirt, long
5 pants at the Carolina Winds Motel. The Carolina Winds Motel
6 is just south of the immediate crime scene and the last time
7 they saw John Frazier was traveling north towards the crime
8 scene, with ample time to reach the area in which the crime
9 scene, the immediate crime scene was. Now, that's the crime
10 scene, and I submit that there is substantial evidence in this
11 regard in combination with all the other evidence to establish
12 that we've met our burden regarding murder.

13 THE COURT: Yes, sir.

14 MR. MARTIN: I know the charge has changed on
15 circumstantial evidence but the burden of getting to the jury
16 hasn't, and the case law reads and has been cited many times,
17 "When it is undertaken by the prosecution in a criminal case
18 to prove the guilt of the accused by circumstantial evidence
19 not only must the circumstances be proven but they must point
20 conclusively that is to a moral certainty to the guilt of the
21 accused. They must be wholly and in particularly and in every
22 particular consistent with each other and they must further
23 and absolutely inconsistent with any other reasonable
24 hypothesis to the guilt of the accused." I go back again and
25 the seminal case on it is Schropp in which there is the

1 requirement to place the Defendant at the crime scene.

2 THE COURT: But for the eyewitnesses.

3 MR. MARTIN: But the eyewitnesses placed the
4 Defendant at the crime scene six, five to six blocks away, a
5 quarter of a mile away. The only other testimony in this
6 record is that Renee Poole said that, "A man shot my
7 husband." That's all the evidence there is in this record.
8 You can't get there even if you believe the Hobbsses that John
9 Frazier was at the Carolina Winds you still don't get him to
10 the crime scene.

11 THE COURT: All right, let me hear from you.

12 MR. HUMPHRIES: He's on his way to the crime scene, the
13 immediate crime scene at the time they see him heading that
14 direction, no question about that, and the other thing is the
15 charge, if you will, that Mr. Martin has told the Court is the
16 standard of proof is not the standard of proof. That's been
17 advocated by the Supreme Court. We don't have that standard
18 anymore. The burden of proof is as it's always been. We
19 prove each and every element to a jury beyond a reasonable
20 doubt, and at this stage we don't even have that burden, but
21 in the light most favorable to the State there is any evidence
22 and I submit to the Court that we've provided more than ample
23 evidence in that regard.

24 MR. MARTIN: Well, let me say this, and I may be
25 wrong, but I was under the impression that though the charge

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1 had changed as to circumstantial evidence, it still doesn't
2 change the definition of circumstantial evidence that is
3 required to get to a jury. I may be wrong about that but
4 well, you can show -- I don't ---

5 THE COURT: Well, it takes substantial circumstantial
6 evidence and it's got to rise to more than a mere suspicion.
7 That doesn't -- hasn't changed.

8 MR. MARTIN: Well, I don't know of a case -- if they
9 got -- if there's a case that shows me that I'd be glad to
10 accept it and read it but I haven't found it. Now, what is
11 the name of the case which changes the charge?

12 MR. HUMPHRIES: Grippon.

13 THE COURT: Grippon.

14 MR. MARTIN: Grippon, that infamous case, that sure don't
15 stand for that proposition and there's cases after that which
16 point out it don't stand for that proposition and I'm telling
17 you again, they don't place him at the crime scene.

18 MR. HUMPHRIES: Well, now, let me say this, you know,
19 there is evidence placing him at the crime scene. Now, it
20 depends on how the jury weighs that evidence, but there is
21 evidence that the TZ75 cannot be excluded as a weapon. When
22 we're talking about evidence placing him at the immediate
23 crime scene there is that evidence. Again, that's a question
24 of weight, not admissibility and it's evidence that this jury
25 can consider in addition to everything else.

1 THE COURT: Circumstantial, that's right.

2 MR. MARTIN: Substantial circumstantial evidence and
3 if there is any one element in this case that ain't, ain't
4 substantial that's it.

5 THE COURT: I don't find that that's substantial
6 circumstantial evidence to make that tie.

7 MR. HUMPHRIES: And I didn't ---

8 THE COURT: But I do feel and I know you're saying
9 blocks away but the fact that he was seen by eyewitnesses
10 heading towards what's been to determined to be the crime
11 scene is enough to allow it to go to the jury. He was
12 actually seen here. Without that I would be right there with
13 you. They just wouldn't have it with just the conspiracy
14 elements but they've got him here and it rests on that
15 eyewitness testimony.

16 MR. HUMPHRIES: Thank you, Your Honor.

17 THE COURT: So, I respectfully deny.

18 MR. MARTIN: We would like, excuse me, Judge.

19 THE COURT: Go ahead

20 MR. MARTIN: Likewise move for a directed verdict as
21 to the charge of armed robbery under the same arguments.

22 THE COURT: Armed robbery I thought might have been
23 gone in light of the fact that some of Ms. Poole's statements
24 were gone, but I understand now the State's position is
25 there's evidence of armed robbery because of the billfold. I

1 don't know where you stand on that. That's pretty weak.

2 MR. HUMPHRIES: Well, let me say this, and you're right
3 and that's one of the problems with Crawford, okay, at least
4 one of the problems for practitioners with Crawford, but the
5 fact remains that we have established that Brent Poole was no
6 longer in possession of his wallet, that it contained, it
7 appeared to be undisturbed and it was in Sirles.

8 THE COURT: We have no way of knowing that Brent
9 Poole didn't throw it out of the car at some point. There's
10 just no -- there's just nothing that links those events. Do
11 you see?

12 MR. HUMPHRIES: Well, let's, let's -- I see your point.

13 THE COURT: I'm having to clear my mind of things ---

14 MR. HUMPHRIES: Sure.

15 THE COURT: --- of things that we heard ---

16 MR. HUMPHRIES: I understand.

17 THE COURT: --- that are not.

18 MR. HUMPHRIES: Well, I have to, too. Here's what we've
19 got.

20 THE COURT: Okay. It may be that the Defense will --
21 I don't know. We'll hear from you.

22 MR. HUMPHRIES: Here's what we've got. The incident
23 scene is approximately here. You want to see this or have you
24 already seen this?

25 MR. MARTIN: Go ahead. I'm just moving around.

1 MR. HUMPHRIES: And the Sirles's residence is here. The
2 Carolina Winds Motel is here. To believe, it is beyond belief
3 that Brent Poole would take his wallet or anybody else with
4 consent would take his wallet and throw it in Mr. Sirles's
5 yard. I mean that -- and we have to deal with reasonable
6 inferences and that is not reasonable. What is most
7 reasonable, the most reasonable inference is that from this
8 incident scene the person who stole the wallet and, of course,
9 we all -- we've got, clearly got the weapon, there's no
10 question about that, the deadly weapon, the most clear
11 inference is that the wallet was taken at this point and later
12 discarded at this point. I mean, that's -- that is really the
13 only reasonable inference under the circumstances.

14 THE COURT: I'm struggling with that.

15 MR. MARTIN: And I say there's not circumstantial
16 evidence and I tell you the fatal flaw in his argument is they
17 don't know when it was put there. If they had found it the
18 next day they might have something, but you know, they
19 brought up and it'll come out in testimony that it was wet
20 for one thing but it's found what I think is three weeks
21 later.

22 MR. HUMPHRIES: Hang on a second.

23 MR. MARTIN: And when you, again when you have to deal
24 with the substantial circumstantial evidence burden it's just
25 not met, Judge.

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1 THE COURT: We don't even know or did we is the
2 testimony that the wallet was even on him before?

3 MR. HUMPHRIES: That's what we're about to get to.

4 THE COURT: Okay.

5 Was there, in fact, testimony that there was change
6 around him while he lay on the beach?

7 MR. HUMPHRIES: Yes, there was. In fact, there was
8 found, there was found his ring. There was found at that
9 time, let's see the change. Hang on a second. It's a little
10 package.

11 MR. MARTIN: Found money in his pocket as well.

12 MR. HUMPHRIES: Found money in his pocket, that's true.
13 There was change.

14 THE COURT: But the wedding band was where again?

15 MR. HUMPHRIES: The wedding band was in the sand, had to
16 be recovered through the use of a ---

17 THE COURT: Metal detector.

18 MR. HUMPHRIES: Metal detector and a knife which was
19 also found on the ground and there was a receipt signed, let
20 me get the time, 10:34 p.m., which is in evidence, a Visa card
21 signed by Brent Poole June 9th, 1998, 10:43, 34 p.m. for \$35
22 at Fast Eddie's which is an establishment at 9915 Highway 17,
23 North Myrtle Beach, South Carolina.

24 And that Visa card is neither present in the wallet as it
25 was found or in the contents of ---

1 THE COURT: Oh, it's not?

2 MR. HUMPHRIES: It's not found.

3 MR. MARTIN: That doesn't mean she didn't have the
4 credit card. There's no evidence that he had the credit card
5 other than that was there, but that doesn't again, doesn't get
6 you back to establishing. The bottom line is is that the only
7 thing that you're dealing with is the wallet is away from the
8 body, but there is not circumstantial evidence of that in that
9 that it is a robbery. For all we know under testimony in the
10 record somebody else picked it up before Brown got there.
11 Maybe she ---

12 MR. HUMPHRIES: No, hang on a second. I take that back.
13 I apologize. It's here. I misread it, thought it was a nine
14 and not a three. Yeah, there it is. It is in the wallet.

15 THE COURT: I mean, for all we know he lost it walking
16 on the beach and someone took it. It just, I have such a
17 struggle with that because there's no evidence of the actual
18 -- there's nothing other than the billfold being in another
19 location.

20 MR. HUMPHRIES: Well, clearly we know that he used it and
21 it was contained within his wallet and we know that he used it
22 at 10:34 p.m. No question about that.

23 THE COURT: All right, I'm going to have to give this
24 one some thought. Let me ---

25 MR. MARTIN: Well, let me just say this, and I know

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1 you need to think about it. Judge, all of this is a stretch,
2 and it's pushed an envelope to get where they are with the
3 evidence as it relates to armed robbery. It just is not
4 there and I don't think it's there. Obviously, I've made my
5 arguments on the other and you've ruled. All of it is a
6 stretch, and I don't see how in the world you can stretch the
7 armed robbery to that.

8 THE COURT: What's difficult and what's making it
9 more difficult for the Court is the fact that we've had
10 statements that now -- that cannot even be considered and from
11 other trials that can't be considered and information that I
12 have in considering this that are not -- is not of record in
13 this case.

14 MR. MARTIN: I tell you another thing, Judge.

15 THE COURT: So, I've got to be cautious about that.

16 MR. HUMPHRIES: Well, let's do this. You finished what
17 you had to say? I mean are you still going?

18 THE COURT: Go ahead and put it on the record if you
19 need to.

20 MR. MARTIN: No, no.

21 MR. HUMPHRIES: Let's do this, the wallet was in Sirles's
22 yard. We know that the wallet was on the person of Brent
23 Poole, 10:34 p.m. on that evening. The murder occurs five to
24 10 minutes before midnight.

25 THE COURT: Well, or it was, yeah, we don't know that

1 for sure.

2 MR. HUMPHRIES: Yeah.

3 THE COURT: But it was used by him.

4 MR. HUMPHRIES: Certainly. We know at the scene, the
5 immediate crime scene there were various items that clearly
6 had come out of the pocket, change, a knife. So, clearly he's
7 gone in his pocket and his wedding band, all of which was
8 either lost or dropped onto the sand. That evidence I submit
9 the only reasonable evidence and that it is substantial
10 evidence that an armed robbery occurred at that time.

11 MR. MARTIN: Let me add this and then I'll go on. I'm
12 not sure whether it's in evidence or not, and I want to check
13 that out and figure it out, but if not I'm pretty sure Mr.
14 Humphries said in his opening statement that she had lured him
15 to the beach to have sex.

16 MR. HUMPHRIES: No, I didn't say that.

17 MR. MARTIN: You didn't?

18 MR. HUMPHRIES: Huh-uh (negative response), didn't say
19 that. Said that last time but didn't say that this time.

20 MR. MARTIN: Well, my thought was ---

21 THE COURT: That is not in evidence in this case.

22 MR. HUMPHRIES: That is not in evidence.

23 MR. MARTIN: If it's not in evidence then probably
24 doesn't occur, but I -- that was a thought that I had but it
25 comes back down to it, Judge, you can only go so far with

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1 these inferences when they have to reach to the level of
2 substantial circumstantial evidence.

3 THE COURT: All right, let, just let me give that
4 one some thought. Do we have any further motions? Is that it?

5 MR. MARTIN: That's it.

6 THE COURT: All right, it won't take me but just a
7 moment. I'm just going to make sure I cleared my mind of all
8 that is not in evidence and look at what we do have in.

9 MR. MARTIN: Judge, I do. I got one other.

10 THE COURT: Yes, sir.

11 MR. MARTIN: And it would be to ask the Court at this
12 time to strike from the record the testimony of the Hobbsses as
13 being not competent testimony in the light of the fact that
14 they were paid \$10,000 each in connection with their testimony
15 in this case. You take, back that out of it, you obviously
16 have a whole different ballgame.

17 THE COURT: All right, that testimony came out that
18 they were in fact paid. It also came out that they weren't
19 paid until after they had testified on numerous occasions,
20 although this jury was not told that it was at numerous, I
21 mean that there were also other trials. I respectfully deny.
22 I think it's something that I've allowed in for the Court to
23 -- I mean, for the jury to make a determination as to their
24 credibility and that's the sole purpose of it.

25 MR. MARTIN: Thank you, Your Honor.

1 THE COURT: We'll just take a quick break, about a
2 10-minute break. See you back in here in ten minutes. I'll
3 rule and then we'll get the jury back out. Are you prepared
4 to go forward with the Defense case when we come back in?

5 MR. MARTIN: We'll be ready.

6 THE COURT: All right, very good.

7 *****OFF THE RECORD*****

8 (On the record.)

9 (Whereupon, the following takes place outside the
10 presence of the jury.)

11 THE COURT: All right, let me go ahead and in regard
12 to the armed robbery while I've tried to analyze it without
13 any of the extraneous, the testimony from prior trials, that
14 type of thing, I resolved it in this fashion, that there would
15 be evidence of a larceny or a robbery, that we've got evidence
16 that it was on him just before this happened and that it has
17 been taken away. We've then got evidence that it was taken
18 away by more than likely, clearly there's evidence that there
19 was a gun that was used, and so that rises to the level, I
20 believe that it is evidence substantial enough to go to the
21 jury for their determination.

22 MR. HUMPHRIES: Thank you, Your Honor.

23 MR. MARTIN: Very well, Your Honor.

24 THE COURT: The plan is this, that we will take this
25 -- that we will hear from the first witness that's going to be

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1 presented by the Defense and then we will take our lunch break
2 right after.

3 All right, the State prepared to go forward at this time?

4 MR. HEMBREE: Yes, Your Honor.

5 MR. HUMPHRIES: The State's ready.

6 THE COURT: The Defense prepared?

7 MR. MARTIN: Ready, Your Honor.

8 THE COURT: All right, we are ready for them. There
9 was one other matter we'll need to tend to which is
10 questioning the Defendant about -- we'll do that at the next
11 break.

12 (Whereupon, the following takes place in the presence of
13 the jury.)

14 THE COURT: All right, Mr. Foreman, ladies and
15 gentlemen of the jury, welcome back. We have reached the
16 phase of the case now where you will be hearing or where the
17 Defendant is afforded the opportunity to present evidence and
18 testimony as well. If you would call your first witness.

19 MR. MARTIN: The Defense would call Donald Smith.
20 WHEREUPON, DONALD CLAYTON SMITH WAS CALLED TO THE STAND, DULY
21 SWORN BY THE CLERK AND TESTIFIED AS FOLLOWED:

22 THE CLERK: Thank you. Please be seated. Please
23 state your full name, spell your last for the Court and talk
24 right into that microphone.

25 MR. SMITH: Donald Clayton Smith, S-M-I-T-H.

1

DIRECT EXAMINATION

2

BY MR. MARTIN:

3

Q: Donald, where do you live?

4

A: I live here in Conway.

5

Q: How long have you lived in Horry County?

6

A: Thirty-nine years.

7

Q: And how are you employed?

8

A: I'm employed by Lucky Dog Television Productions.

9

Q: All right, and who owns Lucky Dog Productions?

10

A: I do.

11

Q: And would you describe for the jury generally what

12

kind of work you do there?

13

A: We're a full-service television, video production

14

company.

15

Q: And what is a videographer?

16

A: Probably the easiest way, a photographer has a still camera, they still -- shoot still photos. A videographer has a video camera and they shoot continuous images.

17

18

Q: All right, and during the 22 years that you've been with your company have you received any training or instructions relating to videography?

21

22

A: Yes, of course, the 22 years of hands-on experience.

23

24

THE COURT: Mr. Martin, that's a microphone.

25

MR. MARTIN: Uh-oh, uh-oh, I'm sorry.

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1 A: Of the 22 years that I've been in business and done
2 video work, of course, there's that natural stuff that you
3 learn along the way. Kind of informally though when I first
4 started in the business I was, was taught by some very bright
5 people, had the opportunity work with some very talented
6 people that had worked with major companies across the
7 country, that's kind of informally. Formally, probably the
8 first 10, 12 years that I was in business I attended numerous
9 workshops, training seminars, work studies. For example, a
10 half a day, maybe one with a half a day workshop in Charleston
11 to a 40-hour week of hard training in Las Vegas and everything
12 in between.

13 Q: You can't get any hard training in Las Vegas; can you?
14 Let me ask you this, during your 22 years with your company,
15 how many -- on how many occasions would you guess if you had
16 the occasion to shoot or produce a video?

17 A: Thousands.

18 Q: Have you and your company worked with other companies
19 in conjunction with the production of videos?

20 A: Yeah, we -- we've been involved with -- we've done work
21 with every major network, NBC, ABC, CBS and Fox, most, most of
22 your cable channels, A&E, Discovery, ESPN. Locally we're --
23 we do stuff for HTC, Santee Cooper, Conway Medical Center, do
24 stuff for the County. Right now, today we've got a shoot with
25 the South Carolina Commission with the Blind.

1 Q: Well, let me ask you this, what role does lighting play
2 in videography production?

3 A: It's the major role.

4 Q: All right, and when we say videography production we're
5 talking about taking a camera and making a video just like
6 people do with a home video to some extent.

7 A: To some, yes.

8 Q: Yeah, but lighting when you're a professional at that you
9 -- lighting plays what role?

10 A: It's the major role. It -- of course, you have to, you
11 have to have light, the camera has to be able to see the
12 image, no different than your eye. If you walk in a dark room
13 and you don't turn the light on you don't see anything, if
14 you're with a video camera and it's dark and you don't light
15 it you won't see anything.

16 MR. MARTIN: All right, Your Honor, we would offer
17 Donald Smith as an expert in the field of videography and the
18 principles of lighting and lighting conditions applicable to
19 videography.

20 THE COURT: Yes, sir.

21 MR. HUMPHRIES: Let me just make sure I understand we're
22 talking about -- got no problem with the videography,
23 ultimately qualified. Lighting principles as it relates to
24 videography no problem. Was there another area?

25 MR. MARTIN: I don't think.

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1 MR. HUMPHRIES: Lighting principles related to
2 videography and videography.

3 MR. MARTIN: Principles of lighting and ---

4 MR. HUMPHRIES: As it relates -- go ahead. I'm sorry.

5 MR. MARTIN: Principles of lighting and/or lighting
6 conditions applicable to videography.

7 MR. HUMPHRIES: I guess we just -- we'll just have to see
8 how it goes.

9 THE COURT: Let me have you come forward, yeah, let
10 me, let me -- as it stands now here's what the Court will find
11 is that he is an expert in the area of videography and
12 lighting in regards to videography.

13 MR. HUMPHRIES: I have no problem with that.

14 BY MR. MARTIN:

15 Q: All right, having said that, Mr. Smith, did you at my
16 request make a videotape at approximately 11:30 p.m. on the
17 evening of February the 11th, 2000, at the Carolina Winds
18 Motel?

19 A: I did.

20 Q: All right, and that videotape is in that machine and
21 you probably don't -- Defendant's Exhibit, Defense Exhibit
22 Number 12, which the State has stipulated or has no objection
23 to coming into evidence ---

24 MR. HUMPHRIES: Correct.

25 Q: --- is that video. Would you take my word for that?

1 A: I'll take your word for that.

2 Q: Would you tell the jury generally what is captured on
3 the video?

4 A: The video depicts the -- a nighttime shot. It was
5 11:30 when we shot it of the Carolina Winds Motel and the path
6 that Mr. and Mrs. Hobbs took on June the 9th, 1998.

7 Q: All right, and have you confirmed that the exterior
8 lighting conditions present at the motel on the evening of
9 February the 11th, 2000, when you shot this video were the
10 same as those exterior lighting conditions on the night of
11 June the 9th, '98?

12 A: Yes, I have.

13 Q: All right, and you did that through Mr. Rhett
14 Sansbury, who is the general manager at the Carolina Winds
15 Motel?

16 A: Correct.

17 Q: All right, how long is the videotape, Mr. Smith?

18 A: About two and a half to three minutes.

19 Q: All right.

20 MR. MARTIN: Your Honor, it having been admitted, we
21 would ask permission to play the videotape for the jury.

22 MR. HUMPHRIES: No objection

23 THE COURT: Without objection.

24 (Defense Exhibit Number 12 [Videotape] played for jury.)

25 BY MR. MARTIN:

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1 Q: Now you, of course, obviously have seen the tape, Mr.
2 Smith?

3 A: Yes, sir.

4 Q: All right, and can you tell the jury what kind of
5 lighting conditions are reflected in the exhibit?

6 A: There's probably four or five different things that
7 are happening. There is a down light. There's accent
8 lighting. There's spill that comes maybe from the rooms.
9 There's fall off on different areas. There's backlighting.
10 It's a hodgepodge of ---

11 Q: All right, I'm going to ask you to come down and let's
12 play the tape, again, and let you as you go through explain to
13 the jury what kind of lighting is involved at different
14 depictions in the video, okay?

15 A: Uh-huh (affirmative response).

16 Q: I think I've got it rewound. I might let -- you want
17 to hold this thing so you can stop it and start it if you want
18 to. Do you know how to work it?

19 A: I'll try.

20 THE COURT: Let me, let me have you step on the other
21 side so that you're speaking this way and speak up since you
22 don't have the benefit of a microphone.

23 A: Okay.

24 THE COURT: All right.

25 Q: You need to move, Donald, Donald, this gentleman down

1 here can't see.

2 A: Over here is fine?

3 THE COURT: That's fine. There's a microphone right
4 there by your hand.

5 A: Okay, are we ready?

6 THE COURT: If you'll speak up, yes.

7 A: Okay.

8 THE COURT: Ready.

9 A: This is where you actually come out the two -- it's
10 about the middle ways of the hotel that the Hobbsses said that
11 they exited onto the pool deck. If you'll notice in this --
12 let me back it up. I'll come back to -- we actually had an
13 actor out in the parking lot, road area. You can see the top
14 of his head, see his hand raised up. It's -- that's part of
15 the -- that's where the light on the pool deck starts falling
16 off. That light is a downward light from the hotel. If
17 you'll look at the shadows underneath the chairs, the webbed
18 chairs that's a downward light. The light comes straight
19 down. It's at the top of the -- and that -- the purpose of a
20 light like that is to light just straight down on that -- on
21 the pool deck area.

22 There's a fall off of light which you'll see when it
23 comes around because the way a light like that is designed to
24 do and when I mean fall off I mean that once it does -- if you
25 -- you see how, how darker it's getting once you leave the

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1 pool area? That's where the light falls off. There's no
2 other light on that side of the pool, pool deck. Now, on the
3 left you can see a bright light coming down. You can see the
4 shadows going next the lifeguard stand. I probably need
5 -- can I turn that VCR? It's not picking it up where I'm at.

6 THE COURT: All right, yeah.

7 A: Let me see if I can get this -- can I back it up a
8 little bit? I missed an area. May I?

9 Q: You may.

10 THE COURT: That's fine, yes.

11 A: But you can see the fall off what I was talking about
12 right there and how you know that it's fall off? Now you can
13 see the shadows changing. See the shadow there on that chair
14 on the left? So, it wasn't overhead then. It was just coming
15 from that little building, that shadow. So, you lost the
16 light there. Then on the left as you can see the light, the
17 strong light coming there, you'll see the shadows now facing
18 the lifeguard stand, my shadow. That's facing the ocean.
19 Walking around like they said that they did we have the -- our
20 actor in the parking lot. You'll notice there's no ---

21 Q: Stop it right there just a second. Let me ask you
22 something. Go back to that sidewalk. Can you back it up a
23 little bit?

24 A: Well, I think I can.

25 Q: All right, stop right there. Hit, there, you got the

1 sidewalk. Stop it, there you go, right there. Stop it a
2 minute. Now, you've been down to that area, and I want to ask
3 you about the incline that -- you can't stop that thing any
4 better than I can. Wait a minute. Let me get down here.
5 I'll back it up for you.

6 A: Okay.

7 Q: You don't have to stop it. Just let it go.

8 A: Okay.

9 Q: But when you get to the walkway.

10 A: Uh-huh (affirmative response).

11 Q: I want to ask you about the incline. Are you familiar
12 with the incline, and by that I mean that as you, as you get
13 closer to the beach that the fence gets higher because the
14 street gets lower?

15 A: Right.

16 Q: Explain that to the jury.

17 A: Well, it's -- you mean right here.

18 Q: No, I mean on the -- running down by the pool as you
19 walk down by the pool.

20 A: Oh, that ---

21 Q: If you start at the Boulevard side of the pool ---

22 A: Right.

23 Q: --- and walk dead to the ocean.

24 A: The fence gets higher.

25 Q: The fence gets higher because the street ---

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1 A: Gets lower.

2 Q: --- gets lower.

3 A: And well, let me back it up because I -- the -- once
4 again. So, as you -- so, we walk -- we walk out and show that
5 area there. As you -- if you notice there's no lighting in
6 that parking lot or see there's no street lights. The only
7 lighting, the only spill off is from that right there and the
8 fall off from the light on the Carolina Winds Motel. We'll go
9 -- there's a little boardwalk, a walkway down that we're
10 fixing to go take a left. There's the ocean. You can see the
11 ocean in the back. Then we pan left. There's the lifeguard
12 stand right past the sign. That's the top of the lifeguard
13 stand. There's bushes.

14 Q: Now, that is across what? You're looking at the ---

15 A: Sand dunes.

16 Q: --- lifeguard stand across what?

17 A: The sand dunes.

18 Q: Shrubbery there?

19 A: Yeah, there's bushes there, and when we walked, we
20 walked down I think it's, if I can recall, it was 45 steps or
21 -- and we -- you can still see the ocean there. We turn back
22 and look at the motel and you will see a -- it's hard to see,
23 but you'll see a -- an image right here. Our actor is now at
24 that point and you will see him walk off. You'll see a
25 silhouetted image.

1 Q: All right, thank you. You can retake the witness
2 stand. Now, Mr. Smith, what do you mean by backlighting?

3 A: Well, if you recall, when I turned the camera back
4 towards the motel, that light that you saw the shadows fall
5 towards that lifeguard stand the -- our actor that we had was
6 in between myself and that light, and that -- we, in the
7 business we call that backlighting, and what that basically
8 means is your key light, your strongest light is behind the
9 individual, not in front.

10 Q: All right, let me show you State's Exhibit Number 35
11 and ask you if you could point out for the jury the location
12 of that light on the motel that you're talking about?

13 A: It's right there.

14 Q: All right.

15 A: And we were here.

16 Q: Okay, now, what effect, if any, does backlighting have
17 with the ability to see the object you're looking at?

18 MR. HUMPHRIES: As it relates to videography, I mean,
19 that's where we're going. Otherwise we're talking about lay
20 versus expert, and I would have an objection.

21 MR. MARTIN: Well, I think, I mean, Judge, I think it
22 would be one in the same. The principle of lighting is
23 consistent whether it's videography or ---

24 MR. HUMPHRIES: Well, that's, well, that's, that's what
25 we haven't established yet and that's why I'm concerned in

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1 terms of his status as an expert where we go with that.

2 That's why I was trying to be very careful.

3 THE COURT: Do you need to come forward, please come
4 forward just for a second?

5 (Whereupon, a bench conference was held in the presence
6 but out of the hearing of the jury.)

7 Q: Let me ask you this, Mr. Smith. The principle of
8 backlighting, is it consistent from videography to other
9 lighting situations? Is that a clear question?

10 A: No, I, I ---

11 Q: All right, in what area other than videography would
12 lighting be relative?

13 A: It's the, it's the -- I mean, we -- you take into
14 consideration what the natural eye sees when we set up a video
15 shoot.

16 Q: All right, let me ask you this way, is the principle
17 of lighting the same in videography, picture with a still
18 camera or what the human eye sees?

19 A: Yes.

20 Q: All right, then having said that, the backlighting
21 that you have discussed in this videotape and pointed out,
22 what effect does it have on one's ability to see the object
23 they're looking at?

24 A: It, it's a -- what it gives you is a silhouette, and
25 if I may I'll give you probably the most common example and we

1 all see it almost daily, on a TV program or a news show if you
2 have an individual that they want to keep their identity
3 concealed what they do is they set them up and they backlight
4 them so all you see is that silhouette. You don't even --
5 when they speak you don't even know they're talking. They're
6 totally -- you don't see anything from the front.

7 Q: Is this backlighting or silhouette effect caused by
8 the backlighting now, is that hampered by or effected by
9 moonlight, atmospheric conditions, temperature or anything of
10 that nature?

11 A: Well, it's -- of course, if, if -- it wouldn't matter
12 if it was moonlight or what. If the light in front is
13 stronger than the light in back then you wouldn't have a
14 backlight. As long as the light, the key light behind you is
15 stronger then you're going to get that backlight effect.

16 Q: How does the images captured on this exhibit compare
17 with the images that you saw the night out there with your
18 eyes?

19 A: Substantially they're similar.

20 Q: Answer any questions they have for you.

21 THE COURT: Cross.

22 CROSS EXAMINATION

23 BY MR. HUMPHRIES:

24 Q: I want to -- I just want to be clear regarding the
25 parameters of your testimony. You in no way are -- and I'm not

1 going to suggest that you have, but you are in no way
2 attempting to convey to this jury that you are an expert in
3 terms of the eye's ability to perceive, focus or anything like
4 that. You're not a medical doctor?

5 A: No.

6 Q: That's not your specialty?

7 A: No.

8 Q: Videography?

9 A: Yes, sir.

10 Q: Perhaps we all have had occasions when we've been very
11 disappointed about the quality of our videos thinking we've
12 captured a special moment and found that they were just darker
13 than we had intended. That's a common experience; is it not?

14 A: Common not on a professional end.

15 Q: Oh, certainly not a professional, no, no, no.

16 A: But I'm -- no, no.

17 Q: I'm with you. That wouldn't ---

18 A: Might be common with you but the home user, yes.

19 Q: Certainly, okay, and in addition, you're not
20 attempting to convey to this jury that a video camera can
21 approach the ability to focus at the rate that the natural eye
22 could focus?

23 A: Actually the focus part?

24 Q: Right.

25 A: No.

1 Q: And let's talk just a touch about backlighting, and
2 you mentioned, of course, that's something we've all seen on
3 TV when they're trying to keep somebody's identity secreted.
4 They -- they'll put a pretty strong light in back and that is
5 -- that event is captured by a video camera; correct?

6 A: Uh-huh (affirmative response).

7 Q: That, that technique would be less effective to the
8 natural eye than it would be by virtue of the video camera;
9 is that fair to say?

10 A: No.

11 Q: It's not fair to say?

12 A: No, it could be -- it could, it could go either way.
13 I mean, backlighting happens every day with every individual.
14 You could -- I know you've been at an area where somebody was
15 -- the sun was behind them and you could not see them.
16 Sometimes it would be right the opposite. Sometimes the
17 camera it would either -- the camera would show more than your
18 natural eye.

19 Q: There's been testimony in this courtroom -- let me
20 slip back just a little bit -- that they were able to observe
21 the individual they saw on the beach that night at this
22 distance. Well, let's do this first. You, you talked with
23 Rhett Sansbury who is the general manager?

24 A: I read a statement from Mr. Sansbury.

25 Q: You read a statement from Mr. Sansbury?

1 A: Yes, sir.

2 Q: You didn't have an opportunity to consult with him
3 directly about it?

4 A: No.

5 Q: And well, let me ask you this, do you have that
6 statement? It's something upon which you relied; is it not?

7 A: It was a deposition.

8 MR. HUMPHRIES: Do you have that deposition?

9 MR. MARTIN: I don't know that I have it right
10 this moment on me here.

11 MR. HUMPHRIES: And I'm not -- and again, like Mr.
12 Martin, I'm not trying to belabor the point but if he did in
13 fact base his opinion on that.

14 MR. BRITTAIN: We can find it. Let's go find it.

15 MR. MARTIN: Let's find it. I don't mind if I can find
16 it if it's important to you. It's in my office.

17 THE COURT: Let's see if he -- he said it was a
18 deposition. Let's see if he -- if it was a basis.

19 MR. HUMPHRIES: Well, I tell you what, that's all right.
20 I really don't want to belabor the process.

21 BY MR. HUMPHRIES:

22 Q: You read a statement of Mr. Sansbury regarding the
23 conditions that is in this -- and you took this video when?

24 A: February the 11th, 2000.

25 Q: And you're aware now that the incident date is June

1 9th, 1998.

2 A: Yes.

3 Q: Okay, a year and a half or so, a little over a year
4 and a half, and of course, you can't tell this jury that even
5 based on Mr. Sansbury's statement the condition of the bulbs
6 and the lights, and certainly we haven't talked about the
7 relative atmospheric conditions, and I understand that you --
8 what you've told this jury is the atmospheric conditions don't
9 matter. Is that what you said?

10 A: No.

11 Q: You didn't say that?

12 A: They don't matter as long as that the light doesn't
13 overpower the backlight. You know, if it was sunlight and you
14 had that light on that corner of that building, sure, you
15 wouldn't have a backlight situation.

16 Q: And we've got the individual, and you had a -- this
17 actor that you had with you ---

18 A: Uh-huh (affirmative response).

19 Q: --- that day, how far away was he when you took this
20 video back in 2000?

21 A: Uh-huh (affirmative response).

22 Q: How far away was he?

23 A: Probably about like we are now, maybe ---

24 Q: And I understand probably, but it's -- do you know
25 exactly? Did you, did you place an ---

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1 MR. MARTIN: I object, now, I object. He asked him
2 the question ---
3 MR. HUMPHRIES: Well, now, I ---
4 MR. MARTIN: --- he needs to let him answer.
5 MR. HUMPHRIES: I can ask if, okay.
6 THE COURT: I'm going to allow the question,
7 overruled. He said probably. I'm going to allow you to ask
8 him to be more specific if he can.
9 Q: Probably and how do you base that? I mean, how would
10 -- how do you come to that conclusion?
11 A: Just, just from, just from memory.
12 Q: From memory?
13 A: Uh-huh (affirmative response) ---
14 Q: Do you recall ---
15 A: I did not measure it, I didn't, no.
16 Q: You did not measure it?
17 A: No.
18 Q: Okay, fair enough, fair enough. Thank you.
19 A: And ---
20 MR. MARTIN: Come down, Mr. Smith.
21 THE COURT: You want this witness released?
22 MR. MARTIN: I don't have any objection to it.
23 THE COURT: All right, you're free to go.
24 Mr. Foreman, ladies and gentlemen of the jury, we've come
25 to a good breaking point. They have lunch. I think it's back

1 there ready for us. I'm going to remind you that over lunch,
2 even though you're not going anywhere, please remember not to
3 discuss the case. I know that you will be refrained from
4 seeing any media or anything about the case because there
5 won't be anything back there for you to see, but I do want to
6 remind you not to discuss the case. If you would, please, you
7 can go back at this time.

8 (Whereupon, the following takes place outside the
9 presence of the jury.)

10 THE COURT: Anything from the State at this time?

11 MR. HUMPHRIES: Nothing at this time.

12 THE COURT: Anything from the Defense?

13 MR. MARTIN: Nothing at this time.

14 THE COURT: I'm going to question the Defendant as to
15 his Fifth Amendment rights; and so, I'd ask you to be speaking
16 with him about that and I'll make sure that I take that
17 opportunity maybe right after lunch. Let me remind you, too,
18 about lunch that I need for you to remain here with us for
19 lunch and that way as soon as we hear that the jury is ready
20 we're going to come back out. Those of you who are free to
21 leave for lunch I'm going to allow you if we have already
22 started to just quietly come in, but please, come in very
23 quietly so as to not distract our jury.

24 MR. HUMPHRIES: Is our lunch here? Is the lunch here?

25 THE COURT: It is actually here now.

1 MR. HUMPHRIES: Okay.

2 THE COURT: All right.

3 MR. HUMPHRIES: Do you think we have 20 minutes?

4 THE COURT: That we're breaking 20 minutes for lunch,
5 oh, yeah, we'll be breaking probably 30, 35, 40 minutes,
6 something like that. We'll try to eat in a reasonable amount
7 of time and come back out. Let me put it that way, but I
8 can't tell everyone. I would think about 30 minutes would
9 probably be about it to give you some idea.

10 *****OFF THE RECORD*****

11 (On the record, the following takes place outside the
12 presence of the jury.)

13 THE COURT: Thank you. Please be seated. Is there
14 anything from the State prior to bringing the jurors out?

15 MR. HUMPHRIES: No, Your Honor.

16 THE COURT: Anything from the Defense?

17 MR. MARTIN: No, Your Honor.

18 OFFICER: You said bring them on out?

19 THE COURT: Yes, sir. We're ready for them.

20 (Whereupon, the following takes place in the presence of
21 the jury.)

22 THE COURT: Welcome back. Come right in. Mr. Foreman
23 and ladies and gentlemen of the jury, welcome back. We hope
24 you enjoyed your lunch, and I'll remind you that we are in the
25 phase of the case where the Defense has the opportunity to

1 present evidence and testimony. Call your first witness,
2 please.

3 MR. BRITAIN: Thank you, ma'am. I'd call Dr. Brian
4 Cutler to the stand.

5 THE COURT: Well, actually your next -- your second
6 witness, I'm sorry.

7 MR. BRITAIN: Second one, second one. Come around Dr.
8 Dr. Cutler and be sworn.

9 WHEREUPON, BRIAN CUTLER WAS CALLED TO THE STAND, DULY SWORN BY
10 THE CLERK AND TESTIFIED AS FOLLOWS:

11 THE CLERK: Thank you. Please be seated. Please
12 state your full name, spell your last name for the Court and
13 talk right into the microphone.

14 MR. CUTLER: My name is Brian Cutler, C-U-T-L-E-R.

15 DIRECT EXAMINATION

16 BY MR. BRITAIN:

17 Q: Where you from, Dr. Cutler?

18 A: I live in Concord, North Carolina.

19 Q: All right, and how are you presently employed?

20 A: I'm a professor of psychology and chair of the
21 Department of Psychology at the University of North Carolina
22 at Charlotte.

23 Q: All right, could you give me your educational
24 background, please?

25 A: I have a bachelor's degree in psychology from the