

VOLUME THREE OF FOUR

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

Benjamin H. Culbertson, Circuit Court Judge

RECEIVED

SEP 14 2015

S.C. Supreme Court

JOHN B. FRAZIER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002774

APPENDIX

ROBERT M. PACHAK

Appellate Defender

**South Carolina Commission on Indigent
Defense**

Division of Appellate Defense

PO Box 11589

Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON

Attorney General

JOSHUA L. THOMAS

Assistant Attorney General

P. O. Box 11549

Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

INDEX

INDEX.....	i
TRIAL TRANSCRIPT.....	1
APPLICATION FOR POST-CONVICTION RELIEF	1342
AMENDED APPLICATION FOR POST-CONVICTION RELIEF	1350
RETURN AND MOTION TO DISMISS.....	1374
AMENDED RETURN.....	1378
POST-CONVICTION RELIEF HEARING TRANSCRIPT	1382
ORDER OF DISMISSAL	1647
POST-TRIAL MOTION	1677
STATE'S MOTION TO STRIKE	1691
REPLY TO MOTION TO STRIKE	1700
INDICTMENTS	1703

1 University of Rochester, a Masters in psychology from the
2 State University of New York, and a doctorate degree in
3 Psychology from the University of Wisconsin at Madison.

4 MR. HEMBREE: May it please the Court, Your Honor, if I
5 knew, if I know what field Dr. Cutler is, I believe he's --
6 that Mr. Brittain is attempting to qualify him as an expert.
7 If I knew in what field I'm familiar with Dr. Cutler's CV
8 provided by Defense and I may be able to stipulate to that.

9 MR. BRITTAIN: Eyewitness identification, human memory
10 and psychology.

11 MR. HEMBREE: Very well, Your Honor, we have no
12 objection to qualifying Dr. Cutler as an expert in the field
13 of human psychology, and certainly could offer an opinion as
14 to eyewitness testimony and identification

15 MR. BRITTAIN: Thank you very much, Mr. Solicitor. I
16 appreciate that.

17 THE COURT: Okay, thank you.

18 Q: And therefore, not to, as they say, belabor the point,
19 what about any specialization that you have in the field we
20 just talked about?

21 A: I'm trained as a social psychologist and my
22 specialization is in the area of psychology and law,
23 specifically in the psychology of eyewitness memory.

24 Q: All right, sir, what type of teaching and research
25 have you done in this field?

1 A: I've been conducting research on the psychology of
2 eyewitness memory for over 20 years. With respect to teaching
3 I teach courses in or have taught courses in general
4 psychology, social psychology, research methods, psychology
5 and law at both the undergraduate and graduate levels.

6 Q: All right, sir, professional associations, your
7 involvement in those.

8 A: Yes, I'm a member of the American Psychological
9 Society and a member of the American Psychology Law Society.
10 I'm also a member of the executive committee of the American
11 Psychology Law Society.

12 Q: All right, tell us a little bit about memory and
13 eyewitness identification for starters.

14 A: Well, as I say I've been doing research on this for
15 many years. Psychologists have been studying memory for well
16 over a hundred years, and there are actually studies on the
17 psychology of eyewitness memory dating back over a hundred
18 years. The study of eyewitness memory is really a subset of
19 the broader field of human memory. There are literally
20 thousands of articles, books, book chapters on topics
21 associated with human memory. There are scientific journals
22 devoted specifically to the study of memory.

23 Q: Have you written any books on the subject?

24 A: I've written, yes, I've written two books on the
25 psychology of eyewitness memory.

1 Q: And what about publications of papers in referee
2 journals?

3 A: I've published about 30 articles in referee journals
4 on various topics associated with eyewitness memory.

5 Q: What is a referee journal?

6 A: The -- in scientific research and psychology our
7 research is disseminated through publication in what we call
8 referee journals. The referee process is a process of peer
9 review. It's our quality control mechanism in science.
10 Before a paper is published in a referee journal it is
11 submitted to a journal. It is subjected to review by experts
12 in the field, that is an editor will literally send it to
13 other experts in the field and the other experts will comment
14 on the quality of the paper, identify its strengths and
15 weaknesses, reply to the editor and the editor will make an
16 editorial decision about whether the submitted manuscript
17 meets standards for publication in the discipline. That's a
18 referee journal is one that uses that process for maintaining
19 quality control for published research.

20 Q: And do you have any of those that have made it through
21 that process and been published?

22 A: Yes, I have published, authored about 30, 32 articles
23 in referee journals on topics associated with eyewitness
24 memory.

25 Q: All right, sir, now, what about teaching any of this

1 to professional conferences, that sort of thing, any
2 experience in that regard?

3 A: Yes as part of the research process we normally
4 present our research at professional conferences. I've
5 authored over a hundred presentations at professional meetings
6 over the years. I also teach workshops on eyewitness memory
7 to groups of attorneys, bar associations.

8 Q: Have you ever taught any prosecutors about it?

9 A: I have not been invited to speak to a group of
10 prosecutors but I have published in a journal that's geared
11 toward prosecutors.

12 Q: All right, well, give us the -- kind of give us a
13 history and a current status of the research in the field in
14 human memory, eyewitness identification, that sort of thing,
15 where we are now and where we've come from.

16 Q: Well, as I say, we've been studying this, this --
17 these phenomenon for many years with respect to eyewitness
18 memory, although there's some very old studies dating back to
19 a hundred years. The vast majority of the research has been
20 done since the mid-70s or so. There's been a great deal of
21 research in the 1970's, eighties, nineties and today on a wide
22 range of topics associated with eyewitness memory. These
23 topics include the accuracy of eyewitness memory, factors that
24 influence the accuracy of eyewitness memory, how to improve
25 eyewitness memory and other sorts of aspects associated with

1 safeguards used in court regarding eyewitness memory.

2 Q: Now, can you kind of explain to us how the human
3 memory works in some way that's important for the matters at
4 hand here?

5 A: Sure, well, it's, of course, this is, this is a topic
6 that we could go on for a long time, and I'll try to keep it
7 brief by using an analogy that memory is sometimes compared to
8 a video recorder, and a memory definitely does not operate
9 like a video recorder. There's several important differences
10 and I'll explain this in part by example. If I were to take a
11 video recorder and scan this courtroom, the recorder would
12 record whatever data the lens can record without reference to
13 information such as what's important in the scene, what
14 details are more important. It'll just sort of an unbiased
15 way record that information.

16 Perception and memory work considerably differently.
17 When we acquire information into our memory what happens is
18 that when we -- if you were to scan the courtroom you would
19 encode certain information into a very short-term memory that
20 lasts literally less than a second. Not all of the
21 information in your visual field would go into your memory. A
22 portion of that visual memory will get stored into what we
23 call short-term memory and then a portion of that information
24 gets coded into what we call long-term memory. The amount --
25 the information that you acquire into your memory will

1 dependent -- will be dependent on a variety of factors, some
2 of them associated with -- with yourselves. There are
3 individual differences. Some people just naturally encode
4 more information than others. Some information will also
5 depend on the particular mental state the observer is in. When
6 we're distracted we encode less information than when we're
7 not distracted. If we're under extreme stress we encode less
8 information than when we're not under extreme stress. Some
9 information also comes from -- one factor is also the
10 information itself. We're more likely to encode information
11 into our memory that we perceive as important. To give you an
12 example, if I asked you to scan the room with the idea of
13 remembering the people in the room, you would encode different
14 information than if I asked you to scan the room and remember
15 the details of the furniture. Some information would be more
16 important than others. So, in that since memory works
17 differently at the -- what we call the acquisition stage of
18 memory.

19 Q: What is that, what is the acquisition stage?

20 A: That is the stage of acquiring information in our
21 environment into our memories.

22 Q: Now, let me ask you first, what have you -- have you
23 considered and consulted a variety of documents, transcripts,
24 statements in connection with this case?

25 A: Yes, I have.

Brian Cutler - Direct by Mr. Brittain

989

1 Q: And what have you studied and reviewed? What's been
2 your participation here?

3 A: I've reviewed various documents that were sent to me
4 by your office, including statements from the witnesses, and I
5 have also -- I've been here -- I was here yesterday and heard
6 the testimony from the officers involved in the investigation
7 and Mark and Donna Hobbs.

8 Q: All right, sir, and you were here to see the video of
9 the ---

10 A: Yes sir.

11 Q: All right, tell us about the stages of eyewitness
12 identification first in a general way.

13 A: Okay, well, I've explained the -- what we call
14 the acquisition stage. The second phase is what we call
15 the retention phase or sometimes called the storage phase and
16 once memory is -- once information is encoded into our
17 memories going back to our video camera analogy, if I made a
18 tape of information in this room, I can basically play that
19 back at anytime, a day, a month, a year later, and get a
20 relatively accurate picture of what was here. The information
21 doesn't decay very much and it's not influenced by things that
22 happen later. We also have the level of control with a video
23 camera that we can play it slowly, we can pause it and look at
24 information, take more details out. Our memories work much
25 differently. Once we encode information into our memory it

1 gets stored as a trace. The quality of that trace is
2 dependent upon factors such as I mentioned earlier, those
3 factors that affect our ability to acquire information to
4 begin with. Once memory is in our storage it's subject to
5 influence and decay. The mere passage of time can cause
6 memory to decay. We've all forgot information over time but
7 it is also subject to influence by information we learned
8 later and also our general knowledge. Our knowledge
9 influences the information that we have in memory. Give you
10 an example, if you're -- if I asked you to look around the
11 courtroom and remember everything everybody is wearing you
12 might find that difficult after a short period of time even
13 more difficult later. That's associated with general decay,
14 but what we remember can also be influenced by what we know.
15 So, for example, if there was somebody in the courtroom
16 wearing a suit, a jacket, pants and a tie and no belt, if I
17 were to ask you a month or a year later to describe what that
18 person is wearing you might infer that that person was wearing
19 a belt based on what you know what people wear when they dress
20 up. So, sometimes our knowledge influences what we remember.

21 While our memories are in storage they can also be
22 influenced by what we learned later, suggestions about, in
23 this example, who else was in the room or what they were
24 wearing. So, our memories are malleable while they're in
25 storage. It's even possible for our memories to be replaced

1 with new information while they're in storage.

2 So, I've talked about the acquisition stage, the
3 retention stage and the third stage is the retrieval stage.
4 That's the point where we're asked to recollect or recognize
5 information that were remembered. Going back to the analogy of
6 the videotape, simply plug it in, rewind it and replay it and
7 you get an accurate picture of what went on.

8 Q: Let's go back to the acquisition stage for a minute.

9 A: Okay.

10 Q: What are the important factors about an acquisition
11 stage, for example, say language?

12 A: Well, there are many important factors. Lighting is
13 one and it affects. The nature of the information you
14 perceive in an event can be influenced by lighting.

15 Q: I mean, it does make sense ---

16 A: Sure.

17 Q: --- you have to see something in order to remember it.

18 A: That's fair to say.

19 Q: All right, so, duration, how about duration of the
20 time you had to see it?

21 A: The more time you have to look at something, the more
22 time you have to encode information, the more likely you're
23 going to store information and accurately recall it.

24 Conversely, the less time you have to look at something, the
25 less detail you're able to take in, the less able you are to

1 remember it later.

2 Q: And what about lighting, I mean, the better the
3 lighting the better the chance to observe? Is that a general?

4 A: Well, lighting speaks to the ability to perceive
5 information in the environment to begin with, and there are
6 several aspects. Obviously in an extreme case if it's pitch
7 dark there's no, no information to acquire and, consequently,
8 no information to recall, but lighting, dark, dark, relatively
9 dark conditions can make it difficult to encode information
10 into memory. Relatedly, there's a phenomenon that's referred
11 to as dark adaptation, and that's the phenomenon of when you
12 come from a well-lit room into a dark area it takes some time
13 for your eyes to adjust, and it can take a full 20 minutes to
14 get a full adjustment. You may have had the experience where
15 you walk from a well-lit room outside in the darkness and at
16 first it's hard to see but then over time your eyes adjust so
17 that eventually you are able to see as well as you can see.

18 Q: Let's talk about this the circumstances in this case.

19 A: Right.

20 Q: The one at hand, the one where you've seen the
21 witnesses testify and read the documents that you've talked
22 about, how about discuss what you observed, what your opinions
23 are concerning those phases in connection with Mr. and Mrs.
24 Hobbs?

25 A: Well, the -- there are a couple of factors that I

1 observed about the acquisition stage.

2 Q: Right.

3 A: And those are two, the two that you mentioned, the fact
4 that there were issues associated with the lighting under
5 which the suspect was seen and issues associated with the
6 exposure time, the -- with lighting appearing to be more of an
7 issue in the beach area, but also potentially an issue in the
8 pool area. In both instances the witnesses claimed to have
9 seen the individual's facial features for at most a couple of
10 seconds.

11 Q: All right, sir, let's talk about the second phase with
12 respect to the Hobbsses, the retention phase.

13 A: Well, the main factor here I would point to is the
14 passage of time between the event and the identification,
15 which I understood to be about 19 days.

16 Q: All right, sir, and the retrieval phase?

17 A: Well, the retrieval phase, again, first generally refers
18 to how we go about retrieving or recognizing information and
19 generally speaking, the -- how we retrieve information can be
20 significantly affected by how our memories are tested. For
21 example, are you asked to recall information or recognize
22 information and even the various ways of asking people to
23 recall or recognize information can influence the accuracy of
24 our memories.

25 Q: So, in this case what is the test for the Hobbsses here,

1 what's the test of their memory in common sense terms?

2 A: Well, the photo array ---

3 Q: Okay.

4 A: --- would be a test of their ability to recognize.

5 Q: Talk generally about that in this case. Tell me about it
6 in general. You know which exhibit number it is? Here it is.
7 Tell me about them in general, what we're doing, why we're
8 doing it, what's trying to be accomplished, that sort of
9 thing.

10 A: Okay, well, a photo array is a way of testing whether a
11 suspect is a perpetrator, and let me give you just a little
12 bit of background on it. The -- when a witness makes a
13 positive identification from a photo array, a good test is one
14 that -- in which you can be relatively sure that a positive
15 identification from the photo array is a product of the
16 witness's memory for a perpetrator, rather than some other
17 alternative explanation which is not associated with the
18 witness's memory. So, a good test is one that allows you to
19 isolate the witness's memory and rule out other factors that
20 could explain why the witness is making an identification.
21 I'll explain it also by comparison. Why is it that we don't
22 just show witnesses one photo? Why do we show them multiple
23 photos? If you show a witness one photo and say is this the
24 person, you have several, several explanations for why a
25 witness might make a positive identification under that

1 circumstance. One, the witness could be guessing as to which
2 one is the suspect, and if you only have one photo it's easy
3 to guess who it is. Another is that the witness could deduce
4 who was the suspect. Again, you only have one photo. A third
5 is that the witness could be influenced by the person giving
6 the test, and here again, the answer is obvious. So, use of a
7 photo array in theory should help you rule out some of these
8 alternative explanations if it's done well. So, that's why we
9 do photo arrays.

10 Q: All right, let's talk about this one. What concerns do
11 you have about the way this photo array was conducted?

12 A: Well, there are several concerns and they're associated
13 with the instructions to the witness, the manner in which the
14 photo was composed, and by that specifically I mean the number
15 of photos used, the way that the -- the foils, the photos of
16 persons other than the suspect were selected for the photo
17 array, the manner in which the photos were presented to the
18 witness. The match between the clothing worn by the suspect
19 and the clothing as described by the witnesses is a concern to
20 me and those are my main concerns.

21 Q: All right, let's talk about them though ---

22 A: Okay.

23 Q: --- in specifics. When you say instructions you're saying
24 the admonition of the Winston-Salem Police Department; right?

25 A: Yes.

1 Q: And you heard Robey testify?

2 A: Yes.

3 Q: So, what's your concern about that?

4 A: Well, first, the main concern with instructions in
5 general and witnesses, we know from our research, when
6 witnesses are confronted with photo arrays that they tend to
7 make a relative judgment. If you look at a photo array, if
8 you turn it around ---

9 Q: What do you mean by relative judgment?

10 A: Well, I'll explain. This -- the structure of a photo
11 array test it's like a multiple choice test, and there is a
12 natural tendency when you have a multiple choice test to try
13 to pick the best answer, in this case the one that looks, the
14 photo that looks most like the perpetrator. Well, that
15 strategy works fine when the suspect is, in fact, the
16 perpetrator. It's a reasonable strategy, but it doesn't work
17 well when the suspect is not the perpetrator. It leads the
18 witness to make a positive identification when the perpetrator
19 is not there. So, when you have an innocent suspect the
20 relative judgment leads to more errors, and the instructions
21 are important because instructions can influence the witness's
22 tendency to use a relative judgment or the witness's tendency
23 to make a positive identification. So, we know from research,
24 for example, that research that does not inform witnesses that
25 they can say -- that the perpetrator might not be present,

Brian Cutler - Direct by Mr. Brittain

997

1 that they can say he's not there, lead to more positive
2 identifications and more false identifications.

3 Q: Yeah, but didn't the Winston-Salem Police Department
4 admonition say that?

5 A: It did. In this case the admonition did tell -- did
6 explain that the -- if I may look at my copy of it -- did
7 clearly explain that the perpetrator might not be in the photo
8 array.

9 Q: So, what's the problem with the instruction?

10 A: The problem -- well, the complaint that I had about
11 the instruction was that when Officer -- before Officer Robey
12 read the instruction he explained to Mr. and Mrs. Hobbs that,
13 and I'm going to see if I can find his, the words, "I
14 advised, I advised them that I was there to show them a photo
15 lineup of the person that they saw at Myrtle Beach prior to
16 the murder," which is a suggestion that the person is in the
17 photo array, and my concern is whether that statement can
18 offset the beneficial effects of what comes later saying that
19 he's not -- that he might not be in the photo array right.

20 Q: Counter-indicating, instructions that say two ---

21 A: Right, right.

22 Q: --- two different things.

23 A: So, that ---

24 Q: How about the, how about the selection of the photograph
25 in the photo array?

1 A: Well, just another couple of things on the instruction
2 itself, and some of these, some of these are interrelated.
3 I've reviewed many instructions from, you know, from other
4 cases and although this instruction seemed, you know, it's not
5 unlike many that I've reviewed that some instructions go a
6 little bit further in -- by informing witnesses that, for
7 example, it's just important to clear innocent people than to
8 implicate guilty people, which is something that this
9 instruction did not do and because I'll mention later the, the
10 point about the clothing, although this instruction did, did
11 warn witnesses that hairstyles, beards and moustaches may
12 easily be changed, it didn't mention anything about clothing
13 that, that witnesses should keep in mind that, that the
14 clothing worn in the photos may not, may not be relevant,
15 doesn't say anything about them.

16 Q: Well, how about, how about -- I got you on the
17 instructions. How about the selection of the photographs in
18 the photo array because this is the test; right? This is the
19 test for the retrieval of their memory.

20 A: Yes.

21 Q: Okay.

22 A: Okay.

23 Q: Talk to me about that a little bit.

24 A: Well, to begin with, just the number of them, six, six
25 photos were used. Remember one of the alterative explanations

1 we're concerned about with, you know, when witnesses make
2 positive identifications is that they could just be guessing.
3 If you have six photos the likelihood if you're guessing, the
4 likelihood of identifying the suspect is one out of six, about
5 17 percent which is not a terribly small probability. So, in
6 general, where departments have reformed their procedures they
7 use more photos to reduce the likelihood of ---

8 Q: And what type process do they use as opposed to all of
9 them being shown at once or being handed up one at the time?

10 A: Well, if I may just finish on the composition issue ---

11 Q: Sure.

12 A: --- and then move on to presentation. As I understood
13 the procedure for selecting these photos as explained by
14 Officer Rowe ---

15 Q: Right.

16 A: --- from Winston-Salem was that they were selected by a
17 computer based on their match to the characteristics of the
18 suspect. There are various ways of going about selecting
19 photos for a photo array. That's one of them, matching them,
20 matching photos to the characteristics of the suspect.
21 Another way that is more advisable is to choose photos that
22 match the characteristics of the perpetrator as described by
23 the witnesses at the time of the crime. Let me explain why
24 that's important. I mentioned earlier that one of the
25 alternative explanations for why a witness would make a

1 positive identification is that the witness can deduce which
2 photo is of the suspect without having seen or without having
3 a good memory for the perpetrator. Sometimes it's possible
4 for them to figure it out. Well, how would they figure it
5 out? If the witness remembers the description that he or she
6 gave and one or only a couple of photos match that description
7 it's possible to figure out which one is the suspect.

8 Now, here we have a case where again if I understood
9 correctly Donna Hobbs had described the man she saw as having
10 a high forehead, and I'm not sure at what point she described
11 that he had large round eyes but she had that -- she seemed to
12 have that in her memory, and as Officer Rowe had explained the
13 purpose of the photo array is to see if we can identify faces.
14 Well, the system that was used which chose photos to match on
15 the -- match the suspect matched on characteristics such as
16 height and weight and hair and hair color. Height and weight
17 is somewhat of a non-factor here because you only see the head
18 and the upper body. You can't really tell how tall these
19 people are. So, it's not -- well, the -- but the forehead and
20 the eyes are more distinctive features that theoretically
21 could have been used to pick people for the photo array. So,
22 the question is, the question becomes if these -- if the other
23 fillers in the photo array are useful for the purpose of
24 making it difficult or impossible for the witness to figure
25 out which one is the suspect they should have those same

Brian Cutler - Direct by Mr. Brittain

1001

1 characteristics.

2 Q: Is there any way to test the suggestiveness of this
3 particular photo array?

4 A: Yes, and that appears to have been done.

5 Q: All right, well, let me ask you about that.

6 A: Okay

7 Q: According to what you have reviewed have you reviewed
8 a test on that particular photo array done by Dr. Alliston
9 Reid at Wofford College?

10 A: Yes, I've reviewed that report.

11 Q: All right, tell us about that test.

12 A: Okay, Dr. Reid from Wofford College was asked to
13 conduct an analysis of the photo array and he did so using a
14 commonly accepted methodology and research on the psychology
15 of eyewitness memory, and ---

16 Q: He's a psychologist; right?

17 A: He's a psychologist.

18 Q: You know his work?

19 A: I'm aware of some of it yes.

20 Q: Okay.

21 A: Then, so, what he did, and again, this is accepted
22 methodology, is he took the photo array. He modified it only
23 in a slight way by putting numbers above the photo array. So
24 they were numbered one through six with the suspect's photo
25 being number one. He then took a description of the suspect

1 as gleaned from reports from the witness and the description
2 was as follows, if I may read it: ``The person we saw at 11:00
3 p.m. from a distance in excess of 40 feet for a few seconds in
4 a reasonably well-lit area near a hotel in Myrtle Beach had as
5 distinguishing characteristics a high forehead and large round
6 eyes. It was also mentioned that the person was approximately
7 six foot one and approximately 185 pounds," and individually
8 he showed the description and the photo array to 60 students
9 and staff members at Wofford College over the course of a day
10 and asked each one of them to guess which one or to identify
11 which photo is the one that's most likely to be the suspect
12 based on this description. So, these are people who had
13 obviously never seen the person at Myrtle Beach. They're
14 relying only on the description and they're guessing which one
15 is the suspect. So, this is a way of bringing data to bear on
16 the question of how well can you tell from these photos of how
17 well those photos match the description that the witness had.
18 That's what he did.

19 Q: Okay.

20 A: What he found was that 48 of the 60 identified number
21 one. One person identified number two, and this would be
22 going across the top. Five identified number three. None
23 identified number four and three identified number five and
24 three identified number six but 48 out of 60 had identified
25 the suspect without ever having seen the suspect, and that's a

Brian Cutler - Direct by Mr. Brittain

1003

1 -- that is a statistically significant finding. If all of the
2 people in the photo array matched that description you would
3 expect each one to be selected about one out of six times.

4 Q: So, what does that tell you about this particular
5 photo array under these circumstances with respect to
6 suggestiveness?

7 A: Well, it's telling us that it's suggestive, that for
8 the most part only one person in the photo array matches the
9 description that I read before that the witnesses apparently
10 had and what that means is that it may have been possible that
11 the witness was able to deduce which one was the suspect
12 rather than retrieve that information from his or her original
13 memory.

14 Q: In other words, if you're looking for round eyes, big
15 eyes and a large forehead that's where you're going, to number
16 one?

17 A: That's where 48 of the 60 participants in the study
18 went to.

19 Q: All right, sir, what about the comments of Mr. Hobbs
20 when he is doing the photo array? What does he say -- did you
21 note what he said to Robey in terms of his retrieval of
22 information to pick a number?

23 A: The comments of lieutenant?

24 Q: Of Hobbs, no, Mr. Hobbs.

25 A: Oh, as I recall he said that, "This is the one that

1 most looks like the man I saw."

2 Q: What does that tell you?

3 A: Well, it's consistent with what we know about relative
4 judgments, that that's the kind of conclusion that people
5 reach when using a relative judgment strategy.

6 Q: And is that good or bad in terms of trying to figure
7 out whether you are properly testing the memory, relative
8 judgment?

9 A: Well, it's kind of hard to say because relative
10 judgments can be accurate or inaccurate.

11 Q: What, if anything else, bothers you about this
12 particular photo array?

13 A: Okay, let me just consult my notes. Well, I talked
14 about the composition of the photo array. Another factor is
15 the manner in which the photos were presented. The photos
16 used what we call a simultaneous presentation where all the
17 photos were shown to the witness simultaneously and we know
18 based on considerable research many studies now with literally
19 thousands of witnesses in the research that simultaneous
20 presentation, that when the -- when you have an innocent
21 suspect, the suspect in the photo array is not the perpetrator
22 we get many more false identifications using simultaneous
23 presentation than sequential presentation. When the suspect
24 is the perpetrator then it doesn't really matter too much
25 which procedure you use. You get slightly more correct

Brian Cutler - Direct by Mr. Brittain

1005

1 identifications with simultaneous than sequential, but when
2 the perpetrator is not in the photo array you get many more
3 false identifications with simultaneous presentation than
4 sequential presentation.

5 Q: Dr. Cutler, what about when a witnesses is -- are so
6 sure ---

7 A: Uh-huh (affirmative response).

8 Q: --- so sure they saw what they say they saw? When you
9 get a witness that, "I don't care what the lighting was like,
10 I don't care what the distances were," they are certain they
11 saw what they saw, is there something in research about that
12 phenomenon?

13 A: Yes, yes.

14 Q: All right, sir, talk to us about that.

15 A: There's been a great deal of research on the relation
16 between a witness's confidence and accuracy, and what that
17 research shows is that when the confidence of the witness is
18 measured what we call relatively cleanly without external
19 influence that there is at best a modest correlation between
20 confidence and accuracy. It is the case that the more
21 confident witnesses are more likely to be correct than the
22 less confident witnesses but there's a lot of room for error.
23 Now that's when confidence is measured relatively cleanly, and
24 by that I mean confidence is assessed formally immediately
25 after the identification is made without any external

1 influence and on some kind of quantitative scale like, "How
2 confident are you on a scale from zero to 100 in the accuracy
3 of your identification," before the witnesses is told whether
4 they're right or wrong or given any other information. In
5 that circumstance we expect a modest relation between
6 confidence and accuracy, but we also find that confidence is
7 pretty highly malleable. I should explain also because it
8 often seems counterintuitive why there's not stronger
9 relationship between confidence and accuracy. There are
10 different factors that influence confidence than accuracy.
11 For example, confidence is to some extent a trait, a
12 personality trait. Some people are just more confident than
13 others. Some people you might know are always confident but
14 not always correct. Other people are rarely confident but
15 usually correct. Confidence can also be influenced by aspects
16 of the situation as well. So, there are certain things that
17 can happen that can further influence a witness's confidence
18 such as learning that your judgment is correct. There's been
19 research showing that when an investigator validates a
20 witness's confidence by saying, "That's the one. That's the
21 suspect," confidence goes way up. Likewise if the
22 investigator invalidates the witness's accuracy, then
23 confidence goes way down. Learning that another witness
24 identified the same person can cause confidence to go up as
25 well. So, confidence is malleable and it can be influenced by

Brian Cutler - Direct by Mr. Brittain

1007

1 other factors. In this case I did not find in the materials a
2 very clear assessment of confidence at the time of the
3 investigation. I didn't find one with Mr. Hobbs, and I did
4 find one with Mrs. Hobbs, but I also was concerned about one
5 of the statements made by Lieutenant Robey during the course
6 of her identification which was, "I need you" -- let me see
7 if I have it. I think I might have written it down verbatim.
8 "Make sure you look at the whole lineup to be absolutely sure
9 that the person looks most like the person you saw at Myrtle
10 Beach," and my concern was that that could be interpreted, I
11 don't know how it was intended, but it could have been
12 interpreted as, "We need you to be absolutely sure," and
13 that's something that could effect a witness's confidence.

14 Q: Dr. Cutler, what, based on the research and activities
15 in this field that you're in, what does the science tell us
16 about the most common cause of wrongful conviction in this
17 country? What is the answer to that question?

18 A: Well, there have been various studies on this and the
19 common conclusion is that it's mistaken identification.

20 Q: All right, sir, and that doesn't really have anything
21 to do with whether the witnesses are good people or not; does
22 it?

23 A: No, this has nothing to do with whether the witnesses
24 are good people. It's just been found in these studies that
25 mistaken identification is the largest leading factor in

1 erroneous conviction.

2 Q: And these are measured psychological events?

3 A: Yes.

4 Q: A willingness to do right?

5 A: Yes.

6 Q: That's a factor.

7 A: Yes, these are our mistakes not -- this is typically
8 not deliberate attempts to mislead.

9 Q: And one of the most crucial things is what kind of
10 chance you had to observe things to start with?

11 A: Well, that is, as I mentioned, one of the main factors
12 that affects our ability to acquire information are the
13 conditions under which we witness these events.

14 Q: Now, what about contamination of memory in these
15 circumstances between the two Hobbses? What are we dealing
16 with and what are the issues there?

17 A: Well, I was -- I didn't become aware of any -- on any
18 suggested information to them, but I did point out some
19 factors that may have affected their confidence in their
20 identification.

21 Q: What types of -- are you familiar with the North
22 Carolina Innocence Commission?

23 A: Yes.

24 Q: What types of recommendations are coming out of there?

25 A: Well, the Innocence Commission took on the project of

Brian Cutler - Direct by Mr. Brittain

1009

1 reviewing the eyewitness identification procedures used in
2 North Carolina, and they made several recommendations for
3 improving how photo arrays and lineup -- photo arrays mainly
4 are conducted with the idea of improving their reliability, of
5 reducing the number of mistakes and the suggestions that they
6 gave were to give, well, some of the suggestions are to give
7 clear instructions that the perpetrator might not be present,
8 to use at least eight photos in total, that the suspect and
9 seven others, to present the photos sequentially rather than
10 simultaneously to do what we call blind administration, that
11 is the officer conducting the identification test does not
12 know the identity of the suspect, and to assess, to do other
13 things to minimize the influence, potential influence of an
14 investigator on a witness during the process, saying nothing
15 during the process, and to assess confidence immediately after
16 the identification in the witness's own words before the
17 witness is given any additional information about their
18 judgment.

19 Q: And some of that was done here and some of it wasn't?

20 A: That's correct.

21 Q: And is there any question in terms of your opinion as
22 to whether or not this was a suggestive photo array?

23 A: Well, I thought the data from the Wofford study was
24 pretty compelling about the suggestiveness of the composition
25 of the photo array.

1 MR. BRITTAIN: One second please, Your Honor.

2 THE COURT: Yes, sir.

3 BY MR. BRITTAIN:

4 Q: What is a blank lineup, Dr. Cutler?

5 A: A blank lineup?

6 Q: Yeah, yes, sir.

7 A: That as I understand it is a lineup that does not
8 include a suspect.

9 Q: And how are those used?

10 A: I know how they're used in research. I don't know the
11 extent to which they are used in actual investigations but
12 there's one study that I know of that used a blank lineup as
13 identifying witnesses who are -- who use a relative judgment
14 strategy who are prone to making an identification and what
15 they found was that, as I recall, when they excluded those
16 witnesses who made a positive identification from the blank
17 lineup, then the accuracy among subsequent witnesses from the
18 remaining witnesses on a subsequent lineup containing the
19 suspect was much higher. They essentially ruled out
20 inaccurate witnesses with the use of a blank lineup.

21 Q: Thank you, sir.

22 CROSS EXAMINATION

23 BY MR. HEMBREE:

24 Q: Good afternoon, Dr. Cutler.

25 A: Good afternoon.

Brian Cutler - Cross by Mr. Hembree

1011

1 Q: It's not your testimony here today that the Hobbses
2 were lying?

3 A: That's correct.

4 Q: And it's not your testimony here today that the
5 Hobbses are mistaken?

6 A: That's correct.

7 Q: It's not your testimony today that you were out behind
8 the Carolina Winds Motel on June the 9th of 1998?

9 A: I was not.

10 Q: And you don't know anything about the circumstances as
11 they existed out there that night?

12 A: Nothing other than what I've learned through this
13 process.

14 Q: You don't know about the lighting conditions yourself
15 from personal knowledge?

16 A: Well, I did visit the scene, but it wasn't, wasn't
17 that night. It was just Tuesday night.

18 Q: Okay, and would you -- have you visited Myrtle Beach
19 before?

20 A: No, I haven't.

21 Q: Let me ask you a few questions about the three stages
22 ---

23 A: Yes, sir.

24 Q: --- of memory. You first had the acquisition stage?

25 A: Yes.

1 Q: And I'm just going to talk with you about the Hobbsses'
2 acquisition in this case?

3 A: Uh-huh (affirmative response).

4 Q: Would you find it significant if the Hobbsses had told
5 you that they had been drinking prior to their walk out on the
6 patio deck?

7 A: That would be a relevant factor, yes.

8 Q: Yes, so, when we start looking at the -- really
9 looking at the entire picture here there's a lot of factors
10 here that support the Hobbsses' testimony that they saw this
11 Defendant behind the Carolina Winds; isn't that true?

12 A: There are other factors, yes.

13 Q: And one of those factors is that Mrs. Hobbs was not
14 drinking?

15 A: That's correct.

16 Q: That would be a positive factor for her?

17 A: Yes, sir.

18 Q: And another factor would be that Mr. Hobbs was not
19 drinking?

20 A: Yes.

21 Q: Positive for him?

22 A: That's correct.

23 Q: All right, from a lighting standpoint, and I know
24 you're not a lighting expert. Certainly it's interesting that
25 in the experiment done by Wofford College students it was

Brian Cutler - Cross by Mr. Hembree

1013

1 described as a relatively well-lit area to them?

2 A: Yes.

3 Q: I don't know who made that judgment, I suspect
4 whomever proposed the experiment drafted the parameters for
5 that; is that correct?

6 A: I would assume so, yes.

7 Q: And that would have been Dr. Reid who assembled the
8 basic parameters for the question that went to the Wofford
9 College students?

10 A: I would assume so.

11 Q: But he at least said it was a relatively well-lit
12 area?

13 A: That's how it was described.

14 Q: The witnesses have both described that it was -- that
15 the lighting was sufficient?

16 A: Yes.

17 Q: Both the Hobbses did; correct?

18 A: Yes they did, uh-huh (affirmative response).

19 Q: So, the Hobbses, Mrs. Hobbs said the lighting was
20 okay?

21 A: Uh-huh (affirmative response).

22 Q: And Mr. Hobbs said the lighting was okay?

23 A: Yes.

24 Q: And we could see from the videotape and did you see
25 that, did you see any of the videotape presentation?

- 1 A: Yes, I did.
- 2 Q: You could see that there were actually light sources
3 coming from a lot of different directions; weren't there?
- 4 A: Yes.
- 5 Q: They were coming down from the hotel?
- 6 A: Right.
- 7 Q: Up from the swimming pool?
- 8 A: Yes, and the swimming pool area, yes.
- 9 Q: The swimming pool area was well-lit and actually
10 lights inside the swimming pool were casting light up his
11 direction?
- 12 A: Yes, uh-huh (affirmative response).
- 13 Q: There was light from behind?
- 14 A: Uh-huh (affirmative response) yes.
- 15 Q: As you walk out onto the beach there was some bright
16 lights just to the right as you went through the, as you went
17 through the fence out the gate of the pool area.
- 18 A: Uh-huh (affirmative response).
- 19 Q: There was some fairly bright light just to your right.
20 It was well-lit, a fence post ---
- 21 A: I -- yeah.
- 22 Q: --- that you might notice.
- 23 A: I honestly don't recall from the videotape.
- 24 Q: Okay, but regardless ---
- 25 A: Yes.

Brian Cutler - Cross by Mr. Hembree

1015

1 Q: --- they have, they have testified to this jury that
2 the lighting was sufficient, the lighting was okay?

3 A: Yes.

4 Q: Now let's take them to the opportunity to observe.
5 They're standing out on the pool deck. They come out and they
6 see this individual staring at them full face?

7 A: Right.

8 Q: Now, Mr. Hobbs indicated -- is it significant to you
9 that they got a full frontal view of his face?

10 A: Yes.

11 Q: That would be a good thing for the Hobbses?

12 A: Yes.

13 Q: All right, a good thing for Mr. Hobbs, would help him
14 in his identification?

15 A: I would think so, yes.

16 Q: And would help Mrs. Hobbs in her identification as
17 well?

18 A: Yes.

19 Q: And that he stared?

20 A: Well, I don't recall that she saw him at that point,
21 if I understood correctly that ---

22 Q: I'll -- let me, let me?

23 A: Okay.

24 Q: I'll take one of my check marks off here.

25 A: Okay.

1 Q: That Mr. Hobbs, though, testified clearly that he
2 stared at this guy.

3 A: Yes.

4 Q: I mean, he thought, "Hey, you know, this guy is kind
5 of giving me the eyeball here."

6 A: Yes, yes, he did say that.

7 Q: And so, he fixed his stare on him ---

8 A: Uh-huh (affirmative response).

9 Q: --- an unusual event; fair to say?

10 A: Yes.

11 Q: And isn't it fair to say that a person will recall
12 more accurately an unusual event like that as opposed to just
13 seeing somebody walk down the street what they would consider
14 a normal event or a routine event?

15 A: Yes, I think that's fair to say.

16 Q: So, that would assist Mr. Hobbs in his ---

17 A: Yeah, for the period of time that he had to view.

18 Q: Understood.

19 A: Yes.

20 Q: And we know that it wasn't a long period of time but
21 for that period of time ---

22 A: Yes.

23 Q: --- he did fix his stare on that man. He looked at
24 him carefully?

25 A: He appeared to be vigilant, yes.

Brian Cutler - Cross by Mr. Hembree

1017

1 Q: And he even had some maybe concern or a funny feeling
2 about it he said.

3 A: Yes.

4 Q: And that would assist him in recalling that
5 information accurately ---

6 A: Yes.

7 Q: --- as opposed to seeing it routinely.

8 A: Yes.

9 Q: Now, they see this man kind of jog down the fence way
10 there and go this direction?

11 A: Yes.

12 Q: At this point I think you've heard Mrs. Hobbs testify
13 that she saw him, too, and saw him, you know, at some point
14 before she spotted him in the sand, well, in the grass area
15 next to the dune crossover?

16 A: Yes.

17 Q: Okay, and she saw him as well and it gave her concern,
18 also?

19 A: Yes.

20 Q: So, this is not a routine event for her either.

21 A: That was apparent.

22 Q: And it would, once again, make it an event that she
23 would recall more accurately as opposed to a routine event.

24 A: Yes, I think that's fair to say.

25 Q: Okay, they go out of the gate, walk around to the dune

1 crossover, start up the dune crossover and Mr. Hobbs is
2 hugging his wife on their anniversary and she's facing north
3 and he's facing south?

4 A: Right.

5 Q: And she says, "There he is." She described him as
6 being 12 to 15 feet away?

7 A: Yes.

8 Q: Doctor, would distance play a role in their ability to
9 accurately acquire that information?

10 A: Yes, I think it would particularly under partly dark
11 conditions.

12 Q: So, 12 or 15 feet we could agree this is a fairly
13 short distance?

14 A: Yes.

15 Q: And her testimony was, if I remember correctly, he was
16 crouching down looking up at the hotel with the light coming
17 down off the hotel?

18 A: That's, that's what she testified, yes.

19 Q: And that when she saw him, as she's watching him she's
20 seeing one side of his face ---

21 A: Uh-huh (affirmative response).

22 Q: --- a full face. At that point he turns and looks at
23 her like that. Do you recall her testimony ---

24 A: Yes.

25 Q: --- as to that?

Brian Cutler - Cross by Mr. Hembree

1019

1 A: Yes.

2 Q: So, the fact that she got multiple views of this
3 Defendant, multiple views from the side as he's running from
4 the full face ---

5 A: Uh-huh (affirmative response).

6 Q: --- crouching as well as standing, the fact that she
7 saw multiple views of him would that make her acquisition or
8 her memory of that event more or less accurate?

9 A: Well there's certainly more information than if it was
10 only one view, yes.

11 Q: Understood.

12 A: Yes.

13 Q: So, she said she had seen him in different poses.
14 She's seen him in different, from different angles and ---

15 A: Uh-huh (affirmative response).

16 Q: --- and she's seen him now in several different
17 lighting conditions, and that would make -- that would lead
18 you to believe that her recall of that would be more accurate.

19 A: That would be a positive factor, yes.

20 Q: That would be a positive thing?

21 A: Uh-huh (affirmative response).

22 Q: Those were listing what these are, getting kind of
23 long.

24 Now, likewise, Mr. Hobbs saw him from several different
25 poses. Did you understand his testimony?

1 A: Yes.

2 Q: In that way he saw him -- I'm sorry?

3 A: Well, at one -- I recall that at one point when, when
4 she said, "There he is," and he turned around, when Mr.
5 Hobbs turned around to look, I don't recall the position of
6 the person at that point, yeah.

7 Q: If you'll just let me give you a hypothetical ---

8 A: Okay.

9 Q: --- that he testified that he actually did see his
10 face at that position?

11 A: Oh, he did, yes, he did say he saw his face at that
12 position.

13 Q: So he's likewise seen the suspect in several different
14 positions under several different lighting conditions;
15 correct?

16 A: Well, the one part I'm not sure of in that scenario is
17 whether he also saw him from a side view or a profile, yeah.

18 Q: Let me tell you what I think the testimony was ---

19 A: Okay.

20 Q: --- and you tell me if you remember it this way. As
21 to Mr. Hobbs, of course he viewed him as he was on the other
22 side of the fence there at the, about as far from here to this
23 door back there.

24 A: Right.

25 Q: Across the pool and he viewed him again approximately

Brian Cutler - Cross by Mr. Hembree

1021

1 12 to 15 feet away at the dune crossover.

2 A: Right.

3 Q: And when he observed him at the dune crossover he saw
4 him as he was standing up, turned around and facing.

5 A: Uh-huh (affirmative response).

6 Q: Is that your recollection of Mr. Hobbs's testimony?

7 A: It's pretty close.

8 Q: And at that point he got to look at him and the
9 suspect turned and ran away?

10 A: Yes, that I recall.

11 Q: All right, would the fact that Mr. Hobbs saw him in
12 several different positions, saw him under different lighting
13 conditions assist him in remembering this information
14 accurately?

15 A: The several different positions, yes. That would
16 assist him.

17 Q: Would the fact -- I think I already asked you this. I
18 have. I'm sorry. So, your concern with the acquisition
19 really boils down to the time, the amount of time or is it --
20 do you have a concern about their ability to acquire the
21 information?

22 A: Well the concerns -- well, the factors that I
23 mentioned were the exposure time, the dark conditions and the
24 dark adaptation. Those were the factors that I identified.

25 Q: Okay, exposure time, dark conditions which they say

1 were sufficient, you say are dark, but you don't really know
2 that other than what you've been told.

3 Q: Well, I only know what I've been told and what I've
4 read and I understood the conditions were not perfectly well
5 lit and that any degradation in the lighting should have some
6 effect.

7 Q: Would have some effect?

8 A: Yes.

9 Q: Now, let's go to retention, and just talk briefly
10 about retention. Mrs. Hobbs testified that when she went home
11 that night she replayed this information in her mind. That
12 would be normal?

13 A: Yes.

14 Q: When people have an unusual event that occurs in their
15 life, something they don't expect, they do that; don't they?

16 A: I would suspect so.

17 Q: Well, I mean, you're the memory expert. I mean, I'm
18 asking you is that what people do?

19 A: No, I would think people do that, yes.

20 Q: Okay, and so, this replaying of this information
21 without any suggestion, without any outside influences, no
22 media exposure, just laying down, laying in your bed at night
23 thinking about this unusual experience you just had an hour
24 ago would that help to solidify that memory?

25 A: If it -- that sounds like a form of rehearsal and

Brian Cutler - Cross by Mr. Hembree

1023

1 provided that there's been no information to bias that could
2 strengthen memory.

3 Q: Understood, so, police haven't talked to her?

4 A: Uh-huh (affirmative response).

5 Q: Right? Nobody in the media doesn't even know that
6 somebody has been killed yet. Don't even know -- nobody knows
7 about it.

8 A: Right.

9 Q: Or they're just finding out. So, there are no news
10 reports. There are no photographs of the suspect because he
11 wasn't a suspect until some time later. That would be the
12 kind of information that could corrupt that ---

13 A: Right.

14 Q: --- that rehearsal, but wouldn't you agree with me,
15 Doctor, that if the rehearsal is of an accurate event without
16 any corruption that it helps the person to recall and retain -
17 - to retain the information?

18 A: I would agree with that.

19 Q: We're going to talk a little bit about the photo
20 lineup and then we'll talk about the test, the test from
21 Wofford. The photo -- let me talk about the photo lineup
22 procedures. You're familiar, I am sure, with the National
23 Institute of Justice Guide for Law Enforcement?

24 A: Yes, yes.

25 Q: And this was a document that was prepared by the

- 1 National Institute for Justice in an effort to help law
2 enforcement improve the policies and procedures that they use
3 in the investigation of a crime.
- 4 A: Yes.
- 5 Q: And there were a number of topics that were covered in
6 this study, not just identification, but there are a number of
7 topics; isn't that ---
- 8 A: All in the guidelines, yes, yes.
- 9 Q: Correct, in the guidelines.
- 10 A: They cover -- they go well beyond photo array
11 procedures.
- 12 Q: They go well -- lots of different issues that they
13 cover.
- 14 A: Right.
- 15 Q: However, they do spend a fair amount of time on
16 eyewitness identification procedures ---
- 17 A: Yes.
- 18 Q: --- and recommendations for those procedures; correct?
- 19 A: Yes.
- 20 Q: Now, let me ask you a little about that. Now, they
21 talk about and the whole section is sort of a checklist; isn't
22 that the format of the guidelines if you recall?
- 23 A: I actually have them if I may consult them.
- 24 Q: I've got them right here.
- 25 A: Okay.

Brian Cutler - Cross by Mr. Hembree

1025

1 Q: You don't have to do that.

2 A: Okay.

3 Q: Composing lineups, under the guidelines, fair
4 composition of a lineup enables the witness to provide a more
5 accurate identification or non-identification; fair enough?

6 A: Yes.

7 Q: Okay, that's what we're all trying to get to?

8 A: Yes.

9 Q: Now, and the policy is the investigator shall compose
10 the lineup in such a manner that the suspect does not unduly
11 stand out.

12 A: Right, right.

13 Q: That's the policy. Now, the guideline for composing a
14 photo lineup, the investigator should, one, include only one
15 suspect in each identification procedure?

16 A: Yes.

17 Q: And we got him. So, in this photo lineup, composing
18 the lineup only one suspect was included in the identification
19 procedure; is that true?

20 A: That's true.

21 Q: That's true as to Mr. Hobbs?

22 A: Yes.

23 Q: And that's true as to Mrs. Hobbs?

24 A: Right.

25 Q: Number two, select fillers who generally fit the

1 witness description of the perpetrator. When there is a
2 limited inadequate description of the perpetrator provided by
3 the witness or when the description of the perpetrator differs
4 significantly from the appearance of the suspect, fillers
5 should resemble the suspect in significant features. So, who
6 generally fit the witness description of the perpetrator,
7 would you tell me, Doctor, in your opinion do all five of
8 these, all six of these individuals generally resemble one
9 another?

10 A: Well, in the sense that they are of the same age and I
11 guess from the report the same height and weight that's
12 possibly so but.

13 Q: Roughly the same hairstyle?

14 A: Well ---

15 MR. BRITTAIN: Excuse me, just let him answer, just
16 let him complete it, please, Mr. Solicitor.

17 Q: I'm sorry. I'm sorry. I apologize.

18 MR. BRITTAIN: That's all right.

19 A: But I thought the data from the Reid study was pretty
20 compelling showing that they don't fit the description.

21 Q: I appreciate that, Dr. Cutler.

22 A: Yeah.

23 Q: And I'm going to talk with you about the Reid study in
24 a little while. I'm asking you just as if you walked in the
25 door today and we handed you this photo lineup and said,

Brian Cutler - Cross by Mr. Hembree

1027

1 "Doctor, tell us do you think these six people generally fit
2 this, you know, they all, all fit generally the same
3 description?"

4 A: Perhaps at the most general level.

5 Q: Okay.

6 A: And that they are the same, seem to be of the same
7 age, race, yes.

8 Q: Okay, they're the same age?

9 A: Roughly, yeah.

10 Q: Roughly, the same race, generally the same build?

11 A: It's kind of hard to tell. It's kind of hard to tell.

12 Q: But I mean, you don't have -- well, a bunch of gaunt
13 guys and a couple of really fat guys, I mean, generally ---

14 A: Perhaps.

15 Q: --- the same build, all have brown hair?

16 A: Yes.

17 Q: Okay, they all have a fairly -- their complexions
18 aren't different significantly in any way; are they, roughly
19 the same complexion?

20 A: Roughly.

21 Q: Okay, how about none of them have or would you say
22 that any of them have any significant facial hair that makes
23 them stand out ---

24 A: No.

25 Q: --- any particularly more than the other? I guess

1 generally I'm trying to figure out what might be the only --
2 are there any, any features that, if you'll just look at
3 general characteristics any features that stand out?

4 A: General meaning excluding eyes and high forehead?

5 Q: Well, we'll talk about that. If I gave you that
6 parameter and I said, "I want you to pick out somebody with,
7 you know, high forehead and eyes that might be different."

8 A: Right.

9 Q: But I'm just saying general features.

10 A: Yeah, well, excluding that I would say they generally
11 look alike.

12 Q: And would you agree with me that otherwise this is a
13 pretty fair lineup?

14 A: Yes.

15 Q: Okay, "If multiple photos of the suspect are
16 reasonably", this is point number three, "if multiple photos
17 of the suspect are reasonably available to the investigators
18 select a photo that resembles the suspect description or
19 appearance at the time of the incidence," and of course this
20 is the photo that they obtained when they arrested him?

21 A: Right.

22 Q: So that would be -- that would be complied with?

23 A: Yes.

24 Q: Both the Hobbses and the -- for both Hobbs, "Include
25 a minimum of five fillers non-suspects per identification

Brian Cutler - Cross by Mr. Hembree

1029

1 procedure."

2 A: Yes.

3 Q: So, we have five fillers there?

4 A: Uh-huh (affirmative response).

5 Q: "And consider that complete uniformity of features is
6 not required. Avoid using fillers who so closely resemble the
7 suspect that a person familiar with the suspect might find it
8 difficult to distinguish the suspect from the fillers?"

9 A: Right.

10 Q: So, what that's saying is you don't want to put six
11 people -- six pictures in there that people look almost
12 exactly the same?

13 A: Yeah, what they're saying there is that you certainly
14 don't want to end up with six people who look so closely to
15 one another that even a good witness couldn't distinguish
16 them.

17 Q: And somebody who accurately remembers it?

18 A: Right.

19 Q: And a good witness is someone who accurately
20 remembers?

21 A: Right.

22 Q: And they didn't do that, I mean, they didn't create a
23 weighted test here where everybody looks the same?

24 A: That's correct; that's correct.

25 Q: They followed step number five. "Create a consistent

1 appearance between the fillers with respect to any unique or
2 unusual features, scars or tattoos, things like that." No
3 problem with that with this one; were there?

4 A: Well, except for the two characteristics that, you
5 know, we've mentioned, the eyes and the forehead but there
6 aren't scars or other ---

7 Q: Okay, unique or unusual though and no scars, no
8 tattoos ---

9 A: Right.

10 Q: No, okay, big earrings sticking out.

11 A: Right.

12 Q: Things of that nature, so, and except as to the two
13 characteristics you pointed out.

14 A: Yes.

15 Q: They followed number six; true?

16 A: Yes.

17 Q: "Consider placing suspects in different positions in
18 each lineup. Position the suspect randomly in the lineup."
19 Did you hear the testimony that the computer places the
20 suspect in a position at random?

21 A: Right.

22 Q: Okay, so, that was done in this case?

23 A: Well, what was the first part of that?

24 Q: Consider placing suspects in different positions
25 in each lineup both across, both across cases and

Brian Cutler - Cross by Mr. Hembree

1031

- 1 with multiple witnesses in the same case?
- 2 A: Right..
- 3 Q: Okay.
- 4 A: So, that wasn't followed.
- 5 Q: So, that wasn't done.
- 6 A: Right, yeah.
- 7 Q: So, in other words they didn't put number one and
- 8 number three and show him one and show her ---
- 9 A: Right, they didn't change the position of the photos
- 10 between the witnesses.
- 11 Q: But wouldn't you agree with me, Dr. Cutler, that the
- 12 manner in which it was administered separately, apart from
- 13 each other that that really kind of resolved that problem?
- 14 A: Yeah, I don't -- I don't see that as terribly
- 15 problematic they didn't do that.
- 16 Q: Okay, fair enough, that's fair. So, but positioning
- 17 the suspect randomly in the lineup the computer did that;
- 18 true?
- 19 A: Yes, yes.
- 20 Q: That was the testimony. So, they complied with that
- 21 step number seven.
- 22 A: Uh-huh (affirmative response), yes.
- 23 Q: Number eight, when showing a new suspect avoid
- 24 reusing fillers in lineup shown to the same witness. Didn't
- 25 do that, didn't have occasion to do that?

1 A: Right.

2 Q: Right, insure that no writings or information
3 concerning previous arrest will be visible to the witness.
4 They didn't -- they made sure there were no writings or other
5 things that were visible to the witnesses.

6 A: Right.

7 Q: As to both Mr. and Mrs. Hobbs?

8 A: Yes.

9 Q: So, they complied with number nine. View the spread
10 once completed to insure the suspect does not unduly stand
11 out. You heard that the sergeant or Detective Rowe did just
12 that, he viewed it himself?

13 A: I heard he did that, yes.

14 Q: Okay, so, he complied with number ten and preserve the
15 presentation order of the photo lineup. In addition the
16 photos themselves should be preserved in their original
17 condition which we have here in court today. So, step number
18 11 was followed?

19 A: Yes.

20 Q: So, Doctor, tell which one of the steps suggests that
21 in the study -- I'm sorry, in these recommendations by the
22 National Institute for Justice did they not follow?

23 A: May I?

24 Q: Sure.

25 A: Well, there is some question I have about the extent

Brian Cutler - Cross by Mr. Hembree

1033

1 to which they selected fillers who generally fit the
2 description of the perpetrator. I think in the most general
3 terms that they may have succeeded, but there -- I think there
4 were important descriptors that may have been available to the
5 officer or could have been available to the officer that might
6 have led to different selection of the witnesses. In general,
7 they're using -- they used, if I understood correctly from the
8 testimony of Officer Rowe, they used a match to suspect
9 procedure for selecting the photos and I think what the
10 guidelines are suggesting is more of a match to perpetrator
11 description procedure.

12 Q: Got you.

13 A: Then there are other aspects of the guidelines I
14 recall that this section deals with the composition of the
15 photo array but there were other aspects that deal with the
16 instructions to the witness and how photos are presenting --
17 presented.

18 Q: And I'm going to ask you about that right now.

19 A: Okay, we're turning to that next.

20 Q: Okay, all right, fair enough?

21 A: Good, okay.

22 Q: These are regarding the instructions because that's
23 the section that follows next.

24 A: Right.

25 Q: And I'm going to try to -- I'll try to move through

1 these a little quicker.

2 A: Okay.

3 Q: Instruct the witness that he or she will be asked to
4 view a set of photographs.

5 A: They did -- he did that.

6 Q: Okay, now, instruct the witness that it is just as
7 important to clear innocent persons from suspicion as to
8 identify guilty parties and that was not done?

9 A: Correct.

10 Q: That specific language was not used?

11 A: Correct.

12 Q: However, there was language used that said the suspect
13 may or may not be in there?

14 A: That's correct.

15 Q: And would you agree with me, Doctor, that in substance
16 that means virtually the same thing?

17 A: It's a matter of degree. I think the point about
18 saying he may or may not be in here is to say -- is to say
19 that it is acceptable to indicate that he's not present but to
20 say that it is just as important to clear innocent people is a
21 bit stronger statement. I wouldn't say -- I would not equate
22 them.

23 Q: So, it would be a good idea to include that.

24 A: Yes.

25 Q: Okay, so it wouldn't be a good idea to equate them?

Brian Cutler - Cross by Mr. Hembree

1035

1 A: Yes.

2 Q: Okay, instruct the witness that individuals depicted
3 in lineup photos may not appear exactly as they did on the
4 date of the incident because the features such as head and
5 facial hair are subject to change and that was ---

6 A: That was done.

7 Q: --- that was done in the instructions. The --
8 instruct the witness that the person who committed the crime
9 may or may not be in the set of photographs being presented.
10 That was done?

11 A: Yes.

12 Q: Assure the witness that regardless of whether an
13 identification is made the police will continue to investigate
14 the incidents. I don't know that they really had any
15 discussion about that.

16 A: No.

17 Q: So, that wasn't done, and instruct the witness that
18 the procedure requires the investigator to ask the witness to
19 state in his or her own words how certain he or she is of any
20 identification. The -- I don't know that he instructed the
21 witness of that. I'm not sure of that testimony, but I do
22 recall that there were -- that they did indicate their level
23 of confidence to the detective, their responses and he noted
24 those responses in his report? Is that ---

25 A: I don't recall that being done in the case of Mark.

1 In the case of Donna Hobbs, of Mrs. Hobbs I recall she did
2 give a confident statement, but I think again here is where my
3 memory might fail me. I recall that I thought that her
4 statement of confidence came after the investigator said, ``We
5 need you to be absolutely sure, `` and I suspect that if --
6 I've seen a number of guidelines and those are some of the
7 older guidelines that are used, but they usually indicate, you
8 know, do not influence the witness, do not say anything during
9 the procedure.

10 Q: One way or the other?

11 A: Right.

12 Q: One way or the other, and I believe that the officer
13 testified that he was concerned because she was so quick in
14 identifying John Boyd Frazier as the perpetrator?

15 A: Yes.

16 Q: And he was concerned about it and says, you know, just
17 take your time and make sure, you know, make sure. Now, would
18 she -- would you have considered her a reluctant witness or an
19 eager witness?

20 A: Well, it sounded to me that she was an eager witness
21 and I didn't mean to imply that that -- that his intention was
22 to increase her confidence. I was just concerned about the
23 interpretation of that phrase.

24 Q: So, Doctor, you interpreted her as an eager witness.

25 Q: Well, eager in that not -- not -- by that I don't mean

Brian Cutler - Cross by Mr. Hembree

1037

1 eager to be involved and to go further in this. I meant in
2 her identification.

3 Q: You thought she was highly confident in her
4 identification?

5 A: Well, she stated so, yes.

6 Q: Yes, I'm talking about her desire to be involved in
7 this case.

8 A: That I thought clearly was not the case.

9 Q: She was reluctant in that respect?

10 A: Yes.

11 Q: And she, by him giving her that opportunity, that's to
12 say, "Well, you know, you make darn sure here," but you
13 think that was almost an invitation for her to kind of bail
14 out on it?

15 A: Well, I think that statement, we need you to be
16 absolutely sure, can be interpreted multiple ways.

17 Q: But don't you think that with a reluctant witness, the
18 likelihood is higher that she would then decline to identify
19 someone?

20 A: I don't know.

21 Q: All right, conducting the identification procedure,
22 provide instructions, one of the criteria, that was done here;
23 correct?

24 A: Yes.

25 Q: Conduct -- the witness understands the nature of the

1 lineup procedure -- confirm that the witness understands the
2 nature of the lineup procedure, step two, that was done here?

3 A: Yes.

4 Q: Number three, avoid saying anything to the witness
5 that may influence the witness selection?

6 A: Well, I'm not sure that was done.

7 Q: In what way?

8 A: Well, I don't -- I'm confident nothing was done to
9 influence which photo the witness selected, but I am concerned
10 about the statement that the officer opened with that, "I'm
11 here to show you a lineup of the person you saw in Myrtle
12 Beach," could influence whether or not the witness makes an
13 identification.

14 Q: I heard you say that on direct and it struck me and
15 I'm glad you brought it up because it seems to me, and just
16 tell me if I understand what you're saying, but it seems to me
17 that a police officer shows up at your house with a photo pack
18 he has to provide or she has to provide some background, some
19 reason that they are there so you know what you're doing. I
20 mean, if he just drives in the driveway and says ---

21 A: Yes.

22 Q: --- that would be a bit curious; would it not. You
23 would need -- that person needs some instruction on ---

24 A: Sure.

25 Q: --- I want to take you back to the beach in Myrtle

Brian Cutler - Cross by Mr. Hembree

1039

1 Beach that night, you know, on June the 9th, can you identify
2 any of these peoples as the one who was there that night?

3 A: Well, clearly some instruction is needed and there are
4 many different types of instructions one could give that could
5 affect the witness, such as an officer could have approached
6 to say, "We have a suspect. We really don't know whether
7 this person is the one or not or we don't think it's the
8 person but we want to show it to you anyway."

9 Q: That wouldn't be truthful though; would it?

10 A: Well ---

11 Q: It would be misleading in a, in a ---

12 A: --- but I don't know what's accurate in this case. My
13 point was that there are many different ways of approaching
14 the witness and explaining why you're there. It struck me
15 that the statement of, "I'm here to show you a photo array of
16 the person you saw," implied that the person is in the photo
17 array.

18 Q: "If an identification is made avoid reporting to the
19 witness any information regarding the individual he or she
20 selected prior to obtaining the witness statement of
21 certainty." That was done here.

22 A: No, that I don't -- I didn't think was done.

23 Q: Well, the witness statement of certainty wouldn't
24 that be this process where they go back and take this one and
25 sign it and date it and say, "This is the guy. I'm

1 certain''?

2 A: No, I don't think that's what they mean by certainty.
3 I mean, I interpret that to mean a statement about the
4 witness's level of certainty, not, not just the identification
5 itself. I don't recall seeing. I may have missed it. I
6 don't recall seeing a statement of certainty on the part of
7 Mr. Hobbs. On the part of Mrs. Hobbs I do recall seeing a
8 statement of certainty, but I thought it was after the remarks
9 made by Lieutenant Robey during the procedure, ``We need you
10 to be absolutely sure.''

11 Q: Right, but I'm -- make it -- I'm sorry maybe I didn't
12 make this clear. Point number four is if an identification is
13 made ---

14 A: Right.

15 Q: --- avoid reporting to the witness any information
16 regarding the individual he or she has selected. So, you
17 can't tell them, ``Yes, you got it right,'' or, ``No, you
18 didn't get it right,'' or tell them anything about it until
19 prior to obtaining their statement of certainty. So, are you
20 saying that he did -- you consider that that was somehow
21 violated?

22 A: Well, yeah, I did not see a statement of certainty on
23 the part of Mr. Hobbs ---

24 Q: Okay.

25 A: --- before they learned that they had identified the

Brian Cutler - Cross by Mr. Hembree

1041

1 suspect.

2 Q: And then ``record any," number five is ``record any
3 identification results and witness statement of certainty as
4 outlined in subsection D.'" There wasn't -- identification
5 results were recorded. We've reviewed those; correct?

6 A: Right.

7 Q: And then a statement of certainty would have been --
8 the only statement of certainty we had would have been
9 contained in Robey's notes?

10 A: Correct.

11 Q: ``Document in writing," number six, ``the photo lineup
12 procedures," which was done by the statements of Rowe and
13 Robey; is that fair to say?

14 A: Yes, yes.

15 Q: Number seven, ``Instruct the witness not to discuss
16 the identification procedure as a result of other witnesses
17 involved in the case. Discourage contact with the media,"
18 and I believe the last line of this admonition form says, ``Do
19 not discuss this lineup with other witnesses"; correct?

20 A: I believe, I believe so.

21 Q: And obviously, Doctor, what I'm trying to get at here
22 is ---

23 A: Yes.

24 Q: --- if you look at the procedure they were followed
25 nearly to the T?

1 A: Well, they followed pretty closely many of the
2 guidelines mentioned in the National Institute of Justice
3 guidelines but the National Institute of Justice guidelines
4 there are, there are other more recent sets of guidelines that
5 take into consideration advances in the knowledge. In fact,
6 there were advances in the knowledge at the time the National
7 Institute of Justice guidelines were developed that were not
8 incorporated in the guidelines.

9 Q: And one of those things would be that it's preferable
10 to do a sequential lineup as opposed to a photo pack?

11 A: Yes.

12 Q: Right, and you write about that in your book, that one
13 is preferable to the other?

14 A: Yes.

15 Q: Of course, you also write that this photo
16 identification procedure is preferable to a show up?

17 A: Yes.

18 Q: So, there, as there's sort of good, better and best
19 and this isn't the best but it's better?

20 A: Yes, that's fair to say.

21 Q: Now, you indicate in your book that an eyewitness may
22 be highly motivated to make an identification in order to be a
23 good eyewitness, to feel like, you know, kind of wanting to
24 please, you know, wanting to be involved?

25 A: Yes.

Brian Cutler - Cross by Mr. Hembree

1043

1 Q: And you note that victims in cases, people that have
2 been victimized oftentimes are -- they want to see somebody
3 caught. They're sort of eager to spot somebody?

4 A: Yes.

5 Q: And that was not the case here; was it?

6 A: I didn't get that impression, no.

7 Q: So, it would -- would that be a factor that would
8 favor an accurate recollection, accurate memory as opposed to
9 an actual victim who might be ---

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

12 Q: --- who might be overly eager to try to pick somebody
13 out, and you even mention in your book that foils as you call
14 them or the ---

15 A: Fillers or foils.

16 Q: --- fillers ---

17 A: Yes.

18 Q: --- shouldn't necessarily look just like the suspect?

19 A: Correct, well, they shouldn't look so similar that one
20 can't tell them apart.

21 Q: Got you. Now, let me talk to you about -- I want to
22 talk to you about the photo lineup study Dr. Reid did.

23 A: . Okay.

24 Q: Now, you heard -- you heard -- you remember who did,
25 who requested the photo lineup, that this photo lineup be put

1 together?

2 A: That was requested by the police in Myrtle Beach,
3 requested that of Winston Salem.

4 Q: And Detective Rowe?

5 A: Rowe requested that of the identification technicians.

6 Q: The ID, the ID section?

7 A: Yes.

8 Q: And when detective -- do you recall Detective Rowe
9 testifying about what information he had regarding the
10 description of the Defendant or the suspect?

11 A: Yes.

12 Q: And could you tell this Court what description he
13 supplied to the ID section, the description that he had?

14 A: I believe, and I could consult my notes if we want
15 more detail, but I believe it was height, weight and hair
16 information, hair color, hairstyle.

17 Q: And he didn't give them any -- he didn't -- he didn't
18 provide to them any special unusual, what you might call
19 unusual or maybe I wouldn't say unusual but particularly
20 distinctive features regarding the suspect or anybody
21 else?

22 A: No.

23 Q: Just general, just do me a general features and we'll
24 go from there?

25 A: Yes.

Brian Cutler - Cross by Mr. Hembree

1045

- 1 Q: Right, and of course this is what was generated?
- 2 A: Uh-huh (affirmative response).
- 3 Q: Now, this photo pack, photo lineup was reviewed by the
- 4 sergeant?
- 5 A: Uh-huh (affirmative response).
- 6 Q: And he did what you refer to as the first test to
- 7 determine the suggestibility of any photo lineup is the inner
- 8 ocular test.
- 9 A: Right.
- 10 Q: And that's a test where you basically just say ---
- 11 A: You look at it.
- 12 Q: --- you don't know anything about anything.
- 13 A: Uh-huh (affirmative response.)
- 14 Q: You sit there and you look at it and you go, "Well,
- 15 those guys generally kind of favor one another."
- 16 A: Uh-huh (affirmative response).
- 17 Q: Is that basically what you do?
- 18 A: That's, yes.
- 19 Q: And that's what he did?
- 20 A: Uh-huh (affirmative response).
- 21 Q: And he said it was satisfactory to him.
- 22 A: Yes.
- 23 Q: He said he just looked at it, reviewed it and said it
- 24 was satisfactory to him?
- 25 A: He did.

1 Q: And you know, I left something out and I'm sorry to
2 have to go back to this, but on the identification procedure
3 one last thing I meant to mention, the blind test.

4 A: Yes.

5 Q: That's when you use an officer who doesn't know
6 anything about the suspect, who doesn't know what the suspect
7 looks like and doesn't even know which one he is in the photo
8 pack ---

9 A: Uh-huh (affirmative response).

10 Q: That's kind of important; isn't it?

11 A: Yes, that's, that's, that's an important aspect.

12 Q: That's important because if he doesn't know anything
13 about it then he can in no way, even through some sort of
14 nonverbal cue or by mistake, signal in any way ---

15 A: Uh-huh (affirmative response).

16 Q: --- who the right person is?

17 A: That's correct.

18 Q: And in this case, of course, you had Lieutenant Robey
19 who didn't know who the suspect was ---

20 A: Uh-huh (affirmative response).

21 Q: --- didn't really know much about the case, very
22 little as far as detail, didn't know which one he was in the
23 photo pack; correct?

24 A: Right, yes, that's correct.

25 Q: So, wouldn't you agree that the use of Lieutenant

Brian Cutler - Cross by Mr. Hembree

1047

1 Robey as a -- in this blind test fashion leads to a more
2 likely correct identification than had he not been?

3 A: I think it's a positive feature of this identification
4 test, yes.

5 Q: That was a very significant part of your book.

6 A: Uh-huh (affirmative response).

7 Q: You had a -- you had a very -- it was clear you had a
8 very strong feeling and you felt like that had a significant
9 impact?

10 A: Well, I do have a strong feeling about that and I
11 thought it was a positive feature of this test.

12 Q: Very good. Sorry I had to go back over that.

13 A: Okay.

14 Q: I just forgot about it. Now, going back to the
15 Alliston Reid study at Wofford College. So, the fellows who
16 put this or the people who put this test together are given
17 this general description and in your judgment or in your
18 opinion, you've already rendered that, that based on that
19 general information this photo lineup is a good photo lineup.
20 It meets those general criteria that they were given in
21 building this photo lineup.

22 A: Well, with the exceptions that I mentioned earlier,
23 yes.

24 Q: I understand.

25 A: Yeah.

1 Q: But if you don't know, okay, if you're Rowe and you're
2 asked to put this thing together and you don't know that this
3 guy has a high forehead and this guy has eyes that somebody
4 might have found significant, then you can't build it that way
5 can you?

6 A: Well, I don't know. I mean, he had the photo of the
7 suspect.

8 Q: Right.

9 A: So, he might have recognized some features about them,
10 and I guess what I wondered about is why the information
11 wasn't transmitted to him as aspects that the witness
12 described about the suspect.

13 Q: I appreciate that, but that's not where we are.

14 A: I understand.

15 Q: Where we are is he got this general information and he
16 built a photo, a photo lineup that fit that general
17 information. He built one that was what he was asked to do.
18 Wouldn't -- I think we've already agreed about that. I'm just
19 looking for you to confirm that for me.

20 A: I agreed that he did what he was asked to do, yeah.

21 Q: All right, now, if I want to give, so, that's what he
22 did ---

23 A: Uh-huh (affirmative response).

24 Q: They showed it to these folks. They picked out John
25 Boyd Frazier, one did, and went back in the room and low and

Brian Cutler - Cross by Mr. Hembree

1049

1 behold as luck would have it the other one did, too.

2 A: Right.

3 Q: Okay, now, they didn't say pick out the guy with the
4 big eyes and the high forehead.

5 A: Right.

6 Q: They said, ``Take a look at this. See if you recognize
7 the fellow you saw in Myrtle Beach that night'?

8 A: Yes.

9 Q: Might not be in there?

10 A: Yes.

11 Q: But he might, and they both independently through a
12 procedure that overall you have approved of, I think, I think
13 that's a fair characterization, picked him out, picked out
14 John Boyd Frazier.

15 Now, if I want to do an experiment, okay, and I want to
16 create a forced choice for my subjects and I want to create a
17 forced choice ---

18 A: Uh-huh (affirmative response).

19 Q: --- and I take this photo lineup and I take my suspect
20 because the way I want to do this is I want people to identify
21 my suspect because that's going to help me later. That's my
22 objective is I want to have a forced choice. Then I could
23 take any particular distinguishing feature of any one of these
24 guys, true, put it in my description, give it to my students
25 who don't know anything about it, and ask them to identify say

1 the fellow in the striped shirt?

2 A: Sure you could do that.

3 Q: I could do that and if I said that then in this case
4 probably a hundred percent would say the fellow in the striped
5 shirt is number four?

6 A: That's fair to say.

7 Q: Fair to say. If I said, "I tell you what, pick me
8 out the guy with the closest eyes, with the closest eyes,"
9 who would you pick out?

10 A: Probably number four or number five, number five.

11 Q: Okay, number five. I could go through this all day
12 long?

13 A: Sure.

14 Q: But that's the flaw, wouldn't you agree, that to try
15 to judge this photo lineup without the proper description that
16 was given to the officer because you're saying the officer put
17 together a flawed photo lineup and that's what the assertion,
18 to do that wouldn't it be more fair to give those students the
19 description that was given to the officer when he put the
20 photo lineup together?

21 A: No, I'm not sure I'd agree with that because I didn't
22 get, first of all, the point of the description is to try to
23 put together what the description that the witness has in his
24 or her mind, and as I understood, the witness had described to
25 the investigating officer that the guy which Donna had, Mrs.

Brian Cutler - Cross by Mr. Hembree

1051

1 Hobbs had described, the guy had a high forehead.

2 Q: Right, he had a high forehead, that was out there?

3 A: Right, and I don't recall exactly where or when the
4 description about the big round eyes came out. I don't know,
5 I don't recall if that came out before the photo array was
6 made. Some aspect of it came out in the composite production
7 that there was something about the eyes, but I don't recall
8 seeing that specific phrase "big round eyes". So, the idea
9 behind choosing this particular description was, was to try to
10 capture what the witness may have had in her, in her mind at
11 the time she saw the photo array.

12 Q: Well, what she may have had in her mind at the time
13 isn't that somewhat speculative, Doctor?

14 A: Well, it -- based on the information that they had. I
15 mean, that's, that's the information they apparently had when
16 they put it together.

17 Q: Well, we're talking about high forehead now?

18 A: Uh-huh (affirmative response).

19 Q: And we know that she said that at some point early in
20 the investigation. Now, wouldn't you agree with me, Doctor,
21 that number one and number two and number four, and it could
22 even be argued number six and number three have kind of a high
23 forehead there?

24 A: Well, perhaps more relevant, you know, than the way I
25 see it was the way the Wofford students and staff saw it. I

1 mean that was the point of the study is to collect more than
2 one opinion on it to systematically sample people's opinions
3 on who best matches this description.

4 Q: But if you take it and work it backwards as they did
5 here where the professor took this detailed description of --
6 two detailed features of a person and inserted that into the
7 equation does that not create a forced choice for those
8 students who were taking the test?

9 A: Well, the purpose, the methodology here demands the
10 forced choice. I mean, what other alternative would you have
11 but a forced choice.

12 Q: I would -- the other alternative I would have would be
13 the description that was given to the person that put the
14 photo lineup together, white male, 6-1, 185 pounds?

15 A: Well, I guess it's not clear to me what you would
16 accomplish by doing that.

17 Q: Right.

18 A: If you're trying to create a photo that's fair for a
19 specific witness to rule out the possibility that the witness
20 can deduce which one is the suspect, you would want to use the
21 description to the best of your knowledge that you think the
22 witness knows and I thought that's what he had.

23 Q: At that point all we had -- and at that point all we
24 had was high forehead and, I mean, it's a matter of opinion,
25 Doctor, but it looks to me like five of, five of the six of

Brian Cutler - Cross by Mr. Hembree

1053

1 these guys have a high forehead and the only one number six,
2 the only reason number -- the number five doesn't have a high
3 forehead because he's doing the swoop. He's combing his hair
4 down to cover his high forehead.

5 A: Well, it is a matter of opinion.

6 Q Certainly.

7 A: That's why we collect data on the matter, why Dr. Reid
8 collected data on the matter.

9 Q: Let me ask you about some of your other business
10 interests.

11 A: Okay.

12 Q: You're a professor at -- and I believe department
13 chair.

14 A: Yes.

15 Q: At the University of North Carolina Charlotte?

16 A: Correct.

17 Q: All right, and that's a full-time job?

18 A: Yes, sir.

19 Q: And how much does that pay?

20 A: I have a 12-month salary of about \$105,000.

21 Q: And you also have certain business interests outside
22 of your full time employment with the University of North
23 Carolina at Charlotte; is that true?

24 A: Well, I do this type of consulting.

25 Q: And you're the founder of Jury Tactics, a jury

1 consulting firm in Chapel Hill; is that true?

2 A: I was the founder of it, yes.

3 Q: Are you still not -- are you affiliated with that
4 company?

5 A: No, it doesn't exist.

6 Q: And the other business interests that you have involve
7 offering expert testimony in trials just like this?

8 A: I do, I do that, yes.

9 Q: Okay, on a, on a variety of topics or just on
10 eyewitness memory?

11 A: No, strictly on this issue of eyewitness memory. This
12 is the area of my scholarship.

13 Q: And on how many occasions have you testified regarding
14 eyewitness identification?

15 A: Before a jury or generally.

16 Q: In general altogether?

17 A: In general perhaps about 20.

18 Q: And in front of a jury how many times?

19 A: About 10.

20 Q: On how many occasions have you testified for the
21 State?

22 A: I have not testified for the State.

23 Q: What is your general -- what is your rate that you
24 charge to work on a case of this nature?

25 A: It varies.

Brian Cutler - Cross by Mr. Hembree

1055

1 Q: Well, what is your rate today?

2 A: Well, I haven't decided yet given the amount of time
3 that I've put into it. I don't have an agreement. I charge,
4 sometimes I charge \$225 an hour, sometimes 150, sometimes 100.
5 I discounted for travel and it depends on the total amount of
6 time I put into a case.

7 Q: Fair enough, and you have reviewed this file for how
8 long prior to coming to -- you've been to Court yesterday,
9 started yesterday?

10 A: Yes, sir.

11 Q: And you reviewed this file for how long before that?

12 A: Five or six hours.

13 Q: At what rate?

14 A: Well, I haven't decided that yet. I'm going to ---

15 Q: Well, what was the agreed upon rate with Defense
16 counsel?

17 A: Well, the agreement with the Defense counsel is after
18 I've put all my time in I'm going to send him a bill and he's
19 going to, he's going to pay me for my time.

20 Q: Well, what do expect your rate to be, Doctor? I
21 don't want to dicker with you over this. Just tell me what
22 you think you're going to charge in this case.

23 A: Maybe three or \$4,000 total for all the time I've put
24 in.

25 Q: Does that including travel and expenses?

1 A: Other than the expenses that they've already paid for,
2 yes.

3 Q: All right, got him locked in for you, Tommy.

4 MR. BRITTAIN: Good job, Mr. Solicitor.

5 Q: You're welcome.

6 MR. HEMBREE: Bear with me one moment.

7 BY MR. HEMBREE:

8 Q: Once again, Dr. Cutler, your testimony today is not
9 that the Hobbses were inaccurate in any way?

10 A: That's correct.

11 Q: Thanks very much.

12 REDIRECT EXAMINATION

13 BY MR. BRITTAIN:

14 Q: Dr. Cutler, just as we always say at this stage,
15 briefly, the Innocence Commission, that National Institute of
16 Justice business is kind of old news, really; isn't it?

17 A: Well, it was really just the first set of standards to
18 be produced on this matter.

19 Q: I mean, why are we making all these changes? What
20 have we learned?

21 A: Well, the -- there are many places that are undergoing
22 reform in their identification procedures.

23 Q: Listen to me, why?

24 A: Because we've learned that mistaken identifications is
25 one of the leading causes of erroneous conviction.

Brian Cutler - Cross by Mr. Hembree

1057

1 Q: Right, and that lineup photo array is not fairly
2 composed in your opinion; is it, sir?

3 A: That is correct.

4 Q: Thank you. No further questions.

5 MR. HEMBREE: Nothing on recross, Your Honor.

6 THE COURT: You may step down. You want this witness
7 released?

8 MR. BRITTAIN: Yes, ma'am.

9 THE COURT: Any objection?

10 MR. HEMBREE: No objection, Your Honor.

11 THE COURT: All right, you're free to go as well.

12 A: Thank you.

13 THE COURT: I think it's a good point for us to take a
14 quick break with a reminder please do not discuss the case.
15 I'll allow you to go back at this time.

16 (Whereupon, the following takes place outside the
17 presence of the jury.)

18 THE COURT: Anything from the State at this time?

19 MR. HEMBREE: No, Your Honor.

20 THE COURT: Anything from the Defense?

21 MR. MARTIN: Not from the Defense.

22 THE COURT: All right. We'll take a ten-minute break.

23 *****OFF THE RECORD*****

24 (On the record.)

25 (The following takes place outside the presence of the jury.)

1 THE COURT: Is there anything from the State prior to
2 bringing the jurors out?

3 MR. HEMBREE: No, Your Honor.

4 THE COURT: Anything from the Defense?

5 MR. BRITTAIN: No, ma'am.

6 THE COURT: All right we're ready for them.

7 (Whereupon, the following takes place in the presence of
8 the jury.)

9 THE COURT: Mr. Foreman and ladies and gentlemen of
10 the jury, welcome back. We continue in the phase of the case
11 where the Defense is presenting evidence and testimony. Call
12 your next witness, please, sir.

13 MR. BRITTAIN: Ms. Hanna is going to put up our next
14 witness, Your Honor.

15 THE COURT: Very good, yes, ma'am.

16 MS. HANNA: Thank you, Your Honor. Our next witness
17 is Scott Michelotti.

18 WHEREUPON, SCOTT MICHELOTTI WAS CALLED TO THE STAND, DULY
19 SWORN BY THE CLERK AND TESTIFIED AS FOLLOWS:

20 THE CLERK: Please state your full name, spell your
21 last name for the Court and talk right into that microphone.

22 MR. MICHELOTTI: Scott Michelotti, M-I-C-H-E-L-O-T-T-I.

23 THE COURT: All right, yes, ma'am. Oh, where are you?
24 There you are.

25 MS. HANNA: Thank you, Your Honor.

Scott Michelotti - Direct by Ms. Hanna

1059

1 DIRECT EXAMINATION

2 BY MS. HANNA:

3 Q: Good afternoon, Scott. Can you tell me how old you
4 are?

5 A: I'm 21.

6 Q: And where do you live?

7 A: In Greensboro, North Carolina.

8 Q: And what is your relationship to John Frazier?

9 A: He's my uncle.

10 Q: Okay, now, Scott, I want to take you back to June 6th
11 of 1998. That was seven years ago. Can you remember back
12 that far?

13 A: Yes.

14 Q: And how old were you at that time?

15 A: I was 14.

16 Q: Okay, specifically on June 6th, 1998, do you remember
17 that day?

18 A: Yes, I do.

19 Q: Tell me about that day.

20 A: That day my parents were going to a party for the shag
21 club and I stayed with my uncle.

22 Q: Okay, was that a Saturday? Do you recall?

23 A: I think so.

24 Q: Do you remember what time that you arrived at John's
25 house?

1 A: That morning around nine, ten o'clock.

2 Q: Okay, and was there anyone with you?

3 A: My brother.

4 Q: And who dropped you off that morning?

5 A: My mother did.

6 Q: Do you remember what you did that day?

7 A: Yeah, me and my uncle played videogames and looked at

8 the computer.

9 Q: I'm sorry. I didn't catch that last part?

10 A: Looked at the computer.

11 Q: Okay, and was your brother with you all day?

12 A: Yes.

13 Q: At anytime on Saturday, June 6th, did John Frazier

14 leave the house?

15 A: No.

16 Q: And what time that evening did you leave John's house?

17 A: Late, it was really late, probably 10:30, 11 o'clock.

18 Q: And who picked you up that night?

19 A: My mother did.

20 Q: Okay, now, Scott that's been quite a while back. How

21 after seven years at your young age did you specifically

22 remember this day?

23 A: It was the last full day I got to spend with my uncle

24 and he got arrested a week later, so.

25 Q: That's all the questions I have. Please answer ---

Scott Michelotti - Direct by Ms. Hanna

1061

1 MR. BRITTAIN: Wait a minute. I don't think -- I
2 couldn't hear that not to interrupt, but ---

3 THE COURT: Did the jurors hear? Did all the jurors
4 hear his response?

5 A: It was the last full day I got to spend with my uncle
6 at his house and he was arrested a week later.

7 THE COURT: Okay, I think all the jurors heard, too.
8 All right, is there anything further?

9 MS. HANNA: No, nothing further from the Defense,
10 Your Honor. Please answer any questions the State has.

11 THE COURT: Cross.

12 CROSS EXAMINATION

13 BY MR. HUMPHRIES:

14 Q: Michelotti.

15 A: Yes, sir.

16 Q: Okay, the -- this party and the plan for you to stay
17 at your uncle's house, had that been planned in advance?

18 A: Yes, sir.

19 Q: And you ever read your parent's Shag Times newsletter?

20 A: I can't say that I ever had.

21 Q: And you've not seen this one before?

22 A: No, I don't think so.

23 Q: And you are Scott?

24 A: Yes, sir.

25 Q: Okay, thank you.

1 THE COURT: All right, you may step down, sir.

2 MR. BRITTAIN: Your Honor, we want to play the
3 deposition of Dr. Elizabeth Loftus now, and I've had a chance
4 to go over it with the Solicitor, and I believe everything is
5 in order for us to begin to run that, and you may want to
6 explain what we're doing.

7 THE COURT: I'll be glad to do that.

8 Ladies and gentlemen of the jury, this is a deposition of
9 is it, Dr. Loftus?

10 MR. BRITTAIN: Yes, ma'am, Elizabeth Loftus.

11 THE COURT: Dr. Elizabeth Loftus. Now, this was
12 testimony that was taken out of court, but it was taken under
13 oath and in the presence of the parties. It's to be treated
14 as if that individual were testifying here live before you.
15 We'll begin at this time.

16 (Whereupon, deposition of Dr. Elizabeth Loftus, Court's
17 Exhibit Number Six, played in open court.)

18 (End of Direct Examination of Loftus Deposition.)

19 (Whereupon, a bench conference was held in the presence
20 but out of the hearing of the jury.)

21 THE COURT: We are just finished the direct
22 examination, getting ready to start the cross, but I'm going
23 to allow you to go back just for a quick break and we'll have
24 you back out for the cross examination. Please do not discuss
25 the case. You may go back at this time.

1 (Whereupon, the following takes place outside the
2 presence of the jury.)

3 THE COURT: Anything from the State at this time?

4 MR. HEMBREE: No, Your Honor.

5 THE COURT: Anything from the Defense?

6 MR. BRITTAIN: No, ma'am.

7 THE COURT: I'll just note on the record that there
8 was something found in the deposition that's coming up that is
9 going to be redacted dealing with the prior trial, the Poole
10 trial and that's going to be taken care of while we take this
11 break. See you back in here in about 10 minutes.

12 MR. HEMBREE: Thank you, Your Honor.

13 *****OFF THE RECORD*****

14 (On the record.)

15 THE COURT: All right, and it's page 80, what line
16 that's being redacted just for purposes of this latest
17 redaction? 80 at line 6?

18 MR. BRITTAIN: Halfway through line 6.

19 THE COURT: Halfway through the line beginning with
20 "I spent", and going through to what line?

21 MS. ROBERTS: Line 10.

22 THE COURT: Through line 10. Thank you very much.

23 (Scheduling discussed.)

24 THE COURT: Anything from the State prior to bringing
25 the jury in?

1 MR. HEMBREE: No, Your Honor.

2 THE COURT: Anything from the Defense?

3 MR. MARTIN: No, ma'am.

4 THE COURT: We're ready for them.

5 (Whereupon, the following takes place in the presence of
6 the jury.)

7 THE COURT: Mr. Foreman and ladies and gentlemen of
8 the jury, welcome back, and we continue now in the cross
9 examination of this witness. We'll begin.

10 (Whereupon, deposition of Dr. Elizabeth Loftus, Court's
11 Exhibit Number Six, played in open court.)

12 THE COURT: All right, Mr. Foreman, ladies and
13 gentlemen of the jury, there's a matter that we need to tend
14 to. I'm going to send you back to the jury room. I've been
15 informed, though, that we only have about 10 more pages of
16 this deposition. I just thought that you ought to know that
17 as well. Please do not discuss the case. I'm going to send
18 you back to the jury room at this time.

19 (Whereupon, the following takes place outside the
20 presence of the jury.)

21 THE COURT: All right, it's come to the Court's
22 attention that there was a matter in this deposition that is
23 coming up that -- where this witness refers to a prior trial
24 or possibly the question refers to a prior trial. That's
25 going to be redacted at this time. When you can tell me let

1 me know what page and line number that is for the record.

2 MR. BRITTAIN: I can tell you right now.

3 THE COURT: All right.

4 MR. BRITTAIN: Your Honor, it's page 122, I suggest
5 halfway through the second line.

6 THE COURT: All right, to the State.

7 MR. BRITTAIN: She says, ``These witnesses have given in
8 other proceedings. The statements these witnesses have given
9 in other proceedings or at another time,'' and then my
10 Solicitor says, ``So, the testimony from a prior trial,''
11 which you know, nothing intended there but I say take out
12 everything after given down to my objection and his withdrawal
13 which would be two through -- half of two through seven.

14 THE COURT: All right, see if that flows and if you
15 agree with that.

16 MR. HEMBREE: What page are you on, Tommy?

17 MR. BRITTAIN: 122.

18 (Mr. Brittain and Mr. Hembree confer.)

19 MR. BRITTAIN: Okay, well, just take out 4, 5, 6 and 7
20 then. That's where I'm objecting.

21 MR. HEMBREE: No objection.

22 THE COURT: All right, now, we might as deal with it.
23 This came up earlier in the testimony. We heard about Court
24 TV. What do you want to do about that if anything?

25 MR. BRITTAIN: We don't want to mention it.

1 THE COURT: All right, anything from the State on
2 that?

3 MR. HEMBREE: As long as the Defense has no ---

4 THE COURT: The Court is willing to do a curative
5 charge, a strike, anything that you may want. I'm offering it
6 at this time.

7 MR. BRITTAIN: Don't want to draw any attention, don't
8 want to draw any more attention to it.

9 THE COURT: All right.

10 MR. HEMBREE: Strategic decision by the Defense. We
11 have no, no objection at all to their position.

12 MR. MARTIN: One thing we would note, if for any reason
13 the jury wanted to see this during the deliberations that
14 other incident should be ---

15 MR. HEMBREE: No, we have no objection to that at all,
16 Your Honor.

17 THE COURT: Very good and that, that will be taken
18 care of then. We'll, we'll go ahead and redact it because it
19 is evidence that's going to go to the jury if -- I mean, that
20 they could rehear. I'm not going to send it back. All right,
21 that's all right, okay, very well. Is there anything else we
22 need to address at this time?

23 All right, see if they're ready for us. Let me know when
24 you've made that change.

25 *****OFF THE RECORD*****

1 (On the record.)

2 (Whereupon, the following takes place outside the
3 presence of the jury.)

4 THE COURT: And are you back to where we were? Let me
5 alert everybody that I'm getting ready to let the jury in.
6 Anything from the State prior to the jury coming back out?

7 MR. HEMBREE: No, Your Honor.

8 THE COURT: Anything from the Defense?

9 I'll take that as a no. We're ready for them.

10 (Whereupon, the following takes place in the presence of
11 the jury.)

12 THE COURT: Welcome back once again. Let me remind
13 you that this is the cross examination of this witness and
14 that we are completing that. We're coming to a close of that,
15 also give you some idea of the schedule. We're going to
16 complete this testimony and then we'll release you for the
17 night, have you back here at ten o'clock in the morning.
18 We'll be here at nine, but we're going to have you here at
19 ten, and once again, we're going to be prompt as we were today
20 and bring you out at ten. So, please be here on time.

21 We'll continue at this time.

22 (Whereupon, deposition of Dr. Elizabeth Loftus, Court's
23 Exhibit Number Six, played in open court.)

24 (Video Deposition stops.)

25 THE COURT: If you can't get it back up, you can do

1 one of two things. You can delete them or you can finish,
2 just read them from the deposition and read what -- how she
3 finished, which would be the Court's preference so long as the
4 ---

5 MR. BRITTAIN: You want to just read it. That'll be
6 quicker.

7 MR. MARTIN: Just read it.

8 MR. BRITTAIN: Whereabouts did we stop exactly?

9 (Mr. Brittain and staff confer.)

10 MR. BRITTAIN: Yeah, I'll just read it. This is Dr.
11 Loftus.

12 "It's about how horrible a thing is that you watch."

13 Q: Maybe. How about this? The victim or bystander,
14 well, maybe bystander is not appropriate. I mean, the
15 Solicitor made a comment that people see people in parking
16 lots, you know, all day long all over the place. This is a
17 different set of circumstances than if a person is under an
18 assault. It is. It's not, it's not particularly significant
19 event and the factors that you mentioned in the direct
20 testimony were the factors that gave you concerns about the
21 reliability of the memory, recollection and the retrieval
22 stage in this particular case. Yes. Okay, I have no further
23 questions." Mr. Hembree says, "Nothing further. Thank you,
24 Doctor." Mr. Brittain, "All right."

25 THE COURT: Very good. Thank you. All right, ladies

1 and gentlemen of the jury, we have come to a closing point for
2 tonight. I'm going to give you those same instructions and
3 you know what they are. Please do not read anything, listen
4 to anything, watch anything that even remotely resembles this
5 case, and the reason for that is quite simple. Everything
6 that you need in order to decide this case you'll get in this
7 courtroom under our rules of law and evidence. Also do not
8 discuss the case with anyone and I know that's difficult and I
9 had initially indicated that possibly by now you could talk
10 with them about it, definitely this time tomorrow you'll be
11 able to or I would think this time tomorrow you'll be able to
12 speak to them about it or thereabouts this time. So, let them
13 know and you'll have to put them off again another 24 hours or
14 so and let them know that you can discuss this case later with
15 them but not until it's completed, not until you have finished
16 you work on this case and that you've given that indication to
17 the judge that you would follow those instructions. Any
18 questions about the instructions I've given you?

19 I've decided to go ahead and let's get biscuits for the
20 jury for two reasons, that will entice you to come a little
21 earlier. I'll be sure that you'll be back there and another
22 reason is we may be having lunch just a little bit later. So,
23 go ahead and come on early and enjoy those biscuits before we
24 have to bring you out at ten o'clock. Come a little earlier
25 than ten so you can enjoy that. We will see you in the

1 morning at ten o'clock.

2 (Whereupon, the following takes place outside the
3 presence of the jury.)

4 THE COURT: All right, anything from the State at
5 this time?

6 MR. HEMBREE: No, Your Honor.

7 THE COURT: Anything from the Defense?

8 MR. MARTIN: Not at this time.

9 THE COURT: All right, there's a couple of things I
10 want to do. First thing in the morning and I'm going to
11 remind you about this, I'm going to question the Defendant
12 about his Fifth Amendment constitutional right. That's going
13 to happen first thing in the morning. I need for you to talk
14 with him about that so he'll be prepared for those questions.
15 Then we'll deal with the charge that you all have in your
16 hands. Please don't say we want an additional charge on
17 whatever. Bring it in hand so that we can insert it if need
18 be and that will save some time and my law clerk would
19 appreciate that very much. Anything else?

20 MR. MARTIN: Does your law clerk by chance have another
21 copy of this charge?

22 THE COURT: She'll have to print it out. So, no.

23 MR. MARTIN: All right.

24 THE COURT: I mean, what she does and we've got a
25 printer that prints a page at a time.

1 MR. MARTIN: All right.

2 THE COURT: I'm sorry. It'd be much faster if we
3 could give it to you in the morning. When we go down to the
4 Master's Office and use his ---

5 MR. HUMPHRIES: We've got a copy -- we've got a copy
6 machine back in our little office back here.

7 THE COURT: Do you? We'd copy it back there then.

8 MR. HUMPHRIES: Anything to help.

9 THE COURT: The Solicitor's Office is willing to make
10 a copy for you I heard. That's what I thought I heard.

11 THE COURT: Very good. Are there any other matters
12 that we can address tonight before we adjourn for the day?

13 MR. HEMBREE: Nothing at all, Your Honor.

14 THE COURT: All right, very good. Have a good night.
15 We'll see you tomorrow morning at nine o'clock.

16 *****OFF THE RECORD*****

17 (On the record, Friday, May 20, 2005.)

18 (Whereupon, the following takes place outside the
19 presence of the jury.)

20 THE COURT: All right, I did hand the proposed
21 charges to the parties yesterday. That was just a rough draft
22 of the proposed charge. I have in my hand now a State's
23 request to charge number one. Has that been provided to the
24 Defense as well?

25 MR. HUMPHRIES: It has.

1 THE COURT: All right, is there any objection? I'm
 2 looking over it myself right now.
 3 MR. MARTIN: Now, Judge, you're talking -- I'm sorry,
 4 is there any objection to the entire charge or ---
 5 THE COURT: Any objection to the State's request to
 6 charge number one. We'll just deal with this right now. Have
 7 you looked at it? I'll give you a minute. I thought that
 8 that was -- is that not substantially in mine other than
 9 saying that it need not be?
 10 MR. MARTIN: I like yours better even though it says
 11 the same thing, Judge.
 12 THE COURT: State v. Grippon basically deals with your
 13 issue about it could be proved by circumstantial evidence
 14 alone.
 15 MR. HUMPHRIES: It -- I don't believe -- well, Grippon
 16 is a charge on circumstantial evidence. There's no question
 17 about it, but as it directly relates to the crime of
 18 conspiracy, which is the law in this State, I don't believe
 19 that that is addressed specifically in your charge.
 20 THE COURT: But Grippon says that it can be proved by
 21 circumstantial evidence. Really it's saying that any of these
 22 offenses could be proved by circumstantial evidence and that
 23 one's no better than the other. It just has to meet that
 24 burden if we look at it.
 25 MR. HUMPHRIES: I'm looking at the, I'm looking at the

1 Grippon charge and I just ---

2 THE COURT: Because I hate, I hate to point it out,
3 "Oh, this can be proved by circumstantial evidence," and not
4 say that for murder, which also can.

5 MR. HUMPHRIES: Well, what I'm saying is this, in reading
6 the Grippon charge it really doesn't -- it says basically the
7 law makes absolutely no distinction between the weight or
8 value given to either direct or circumstantial evidence, nor
9 is a greater degree of certainty required for circumstantial
10 evidence than of direct evidence. You should weigh all the
11 evidence. After weighing the evidence if you're not
12 convinced, see, you don't -- the Grippon charge doesn't really
13 address and this is again conspiracy.

14 THE COURT: There's no distinction between the two.

15 MR. HEMBREE: I understand, but conspiracy in the law
16 has been recognized as an offense which is most often proved
17 ---

18 THE COURT: Oh, well, guess what? It's in there
19 already.

20 MR. HUMPHRIES: Where?

21 THE COURT: Have you seen it? My law clerk just
22 pointed it out. Is it showing on page 25? Were they numbered
23 for you all?

24 MR. HUMPHRIES: I've got -- they're handwritten. Just a
25 second.

1 THE COURT: On page 25 towards the bottom I do -- this
2 is the -- this is our standard.

3 MR. HUMPHRIES: I see. I see.

4 THE COURT: No overt acts need be shown and then it
5 does go on to say conspiracy may be shown by circumstantial
6 evidence of the conduct of the parties.

7 MR. HUMPHRIES: And the only -- given that, if the word
8 is inserted consistent with State versus Condrey that a
9 conspiracy may be shown by circumstantial evidence alone and
10 the conduct of the parties then I would withdraw my request
11 because that's the, that's basically the gravamen of Condrey
12 if I'm being clear. I don't know if I'm being clear or not
13 but that's ---

14 THE COURT: All right, I can just say a conspiracy
15 may be shown by circumstantial evidence alone and the conduct
16 of the parties.

17 MR. HUMPHRIES: Yes, I don't have -- that's, that's fine.

18 THE COURT: Okay, that does clarify it. All right,
19 any objection to that?

20 MR. MARTIN: No.

21 MR. HUMPHRIES: That was too easy.

22 THE COURT: And does that take care of one ---

23 MR. HUMPHRIES: There's only one.

24 THE COURT: --- in its entirety, okay, all right.

25 Now, for the entire charge, there may have been some things in

1 the charge that you want -- I've noted that you don't think
2 are relevant. This was put together prior to the conclusion
3 of the case obviously since the case hasn't concluded.

4 Anything from either? I'll be glad to hear from the Defense.

5 MR. MARTIN: Yes, number one, we would not want you to
6 charge the hand of one the hand of all ---

7 MR. HUMPHRIES: We concur.

8 THE COURT: Okay, yeah, good.

9 MR. MARTIN: --- kind of language.

10 THE COURT: We'll omit it.

11 MR. MARTIN: Where a Defendant's good character and
12 reputation we intend to ask his sister if he has any criminal
13 record. He does not, by the way.

14 THE COURT: He didn't, okay.

15 MR. MARTIN: So, I would think if we do that and she
16 confirms he has no criminal record that you should charge some
17 version of what you've x'ed out there about character and
18 reputation.

19 MR. HUMPHRIES: And the State's objection and there will
20 be an objection at the point in time that question is asked
21 because that's not the proper inquiry regarding character
22 evidence. It's not the proper form of a question. They can't
23 testify that way.

24 MR. MARTIN: Well, I think she could -- well, help me
25 with your opinion of this. I think she can testify he has no

1 criminal record, but now, you may be right whether or not that
2 goes to character and reputation, the fact that he doesn't.

3 THE COURT: No, in fact, we have a charge about, but
4 we limit the use ---

5 MR. MARTIN: May not necessarily mean.

6 THE COURT: --- of a criminal record. That's all.
7 That's what the charge does. So, I really don't think it goes
8 to good character but you have an objection to the question
9 general that she's ---

10 MR. MARTIN: If ---

11 MR. HUMPHRIES: And I think obviously it's for the
12 purpose of addressing his character, whether good or bad, the
13 fact that he doesn't have a prior criminal history, and in
14 order to ask about a Defendant's good character the proper
15 question is, number one, do you know this person, how long
16 have you known him, what is his reputation for ---

17 THE COURT: There is a procedure.

18 MR. HUMPHRIES: --- and a specific ---

19 MR. MARTIN: Well, I agree, I agree with Mr. Humphries.
20 The fact that he doesn't have a criminal record does not
21 necessarily stand for the proposition that he is of good
22 character and reputation. You're right.

23 MR. HUMPHRIES: But you see ---

24 THE COURT: Which would preclude the charge.

25 MR. MARTIN: Yes.

1 MR. HUMPHRIES: But I believe in asking the question that
2 if the question is allowed to be asked in that fashion that it
3 does impact on his character, does bring his character into
4 evidence and then would allow the State to ask the follow-up
5 questions just as they would if he asked how long have you
6 known this person, do you know his reputation for whatever.
7 Because the problem here number one in the manner in which
8 that question is asked is number one you're not pointing out a
9 particular trait which is required which then in my estimation
10 means that I'm, you know, I'm in a position where I have to
11 try and discern what that character trait is they're trying to
12 elicit and then be allowed to ask those questions.

13 THE COURT: I think they're just basically saying his
14 -- it's a trait for abiding by the law.

15 MR. HUMPHRIES: Lawfulness?

16 THE COURT: Yeah, I mean, I think it is -- it is
17 narrow.

18 MR. HUMPHRIES: Well, and -- but when we do that ---

19 THE COURT: And it's only to her knowledge. I mean,
20 she may or may not know what kind of record he's got.

21 MR. HUMPHRIES: But I can ask the questions, "Did you
22 know? Would this change your opinion," because there is ---

23 MR. MARTIN: No ---

24 MR. HUMPHRIES: No, just let me finish.

25 MR. MARTIN: Well, you're right. Go right ahead.

1 MR. HUMPHRIES: Because we do have information of prior
2 uncharged criminal behavior by this Defendant, which I could
3 ask her about then, and I'll tell you the specific examples if
4 you wish, theft from his employer and theft and this has been
5 -- this has been provided in the discovery in that vast
6 discovery and particularly and Bruce Wolford is the source of
7 it, but -- and of course, we didn't ask him about it, but
8 theft of a computer, a flat screen or a 17-inch whatever
9 computer monitor that came boxed from his employer and which
10 he purchased for \$50 and Bruce Wolford was either present or
11 present immediately after a point in which there is this
12 scheme where they take vehicles, that is John Frazier and
13 others, take vehicles which they own, take them to a remote
14 place, strip them down, turn them in for insurance money and
15 then buy the parts back and reassemble their cars. So, here's
16 the problem if we're talking about lawfulness and that's why I
17 just as soon not get into it, but if we're talking about
18 lawfulness I can ask her because I have a good faith belief to
19 ask the questions, "Were you aware of, and if you were would
20 that change your opinion regarding his character for
21 lawfulness?"

22 THE COURT: Well, generally when you bring in evidence
23 of prior criminal record you're bringing that in on the
24 credibility of the witness, the person who is testifying.
25 That's the reason that usually comes in. This time when it's

1 coming in it's not on the credibility of that witness who is
2 testifying. It is a character trait ---

3 MR. HUMPHRIES: No question.

4 THE COURT: --- if to you say that he's lawful.
5 There's no question about that and I would think that you
6 would need to ask those questions leading up to it
7 appropriately and I would think then you would have the
8 opportunity to respond ---

9 MR. HUMPHRIES: Thank you.

10 THE COURT: --- because it's not limited just to on
11 the issue of credibility. Now it does become a character
12 trait. If you've got anything to show me otherwise I can't
13 see because that has to be why you are bringing it in, you
14 want that jury to understand that he has a lawful background,
15 that he abides by the law. Isn't that correct ---

16 MR. MARTIN: Yes, but I mean ---

17 THE COURT: --- which clearly ---

18 MR. MARTIN: --- what I'm -- you all agree.

19 THE COURT: Not that he's credible because he's ---

20 MR. MARTIN: The two of you have really convoluted the
21 rules on this thing and got me confused, but well, yes, I
22 mean, you're right. If you bring it up it would be to let
23 them know he's got no prior criminal record.

24 THE COURT: And generally the prior criminal record
25 comes in though to discredit their testimony somewhat or at

1 least to be considered when determining their credibility or
2 believability. That's the reason it comes in.

3 MR. HUMPHRIES: If they testify.

4 THE COURT: If they testify.

5 MR. HUMPHRIES: And in this case if he does not testify
6 then the only thing it can go to is his lawfulness.

7 THE COURT: That's right.

8 MR. MARTIN: Well, I'll be so warned.

9 THE COURT: All right, speaking of that and speaking
10 of whether or not he's going to testify let me deal -- well,

11 I'm jumping around.

12 MR. MARTIN: Well, let's get -- we need to go on with

13 the charges, Judge, if we can.

14 THE COURT: Let's go ahead, all right, be glad to do

15 that.

16 MR. MARTIN: I think we agreed the accomplice liability

17 was out. Let's see, and you've got expert witnesses which is

18 fine. The hand of one the hand of all needs to come out.

19 THE COURT: We agreed to that, that's out.

20 MR. HUMPHRIES: We've agreed to that already.

21 MR. MARTIN: Okay, now, we believe mere presence should

22 be charged on page 13.

23 MR. HUMPHRIES: And the State would say to that that the

24 Defense's position throughout this case is that he was not

25 present and it's a case of mistaken identity and the State's

1 evidence has always been directed toward his being the person
2 who shot and killed Brent Poole and there is no middle room
3 under the -- based on the presentation of the evidence and the
4 position that the Defense has taken. So, to ask for a mere
5 presence charge when they maintain that it is a case of
6 mistaken identity and he's asleep at home in Winston-Salem is
7 not an appropriate charge on the law in this case based on
8 the facts and the Defendant's position, which is relevant in
9 requesting a charge.

10 THE COURT: Let me ask you, are you asking for an
11 alibi charge at all.

12 MR. HUMPHRIES: They can't.

13 THE COURT: Anything?

14 MR. MARTIN: Yeah, we can.

15 MR. HUMPHRIES: No, you can't because you haven't noticed
16 us of an alibi.

17 THE COURT: Oh, that was my next question if there's
18 been any notice.

19 MR. MARTIN: Well, the alibi that they've been noticed
20 of the fact through the statements themselves he was at home.

21 MR. HUMPHRIES: And that absolutely is not enough ---

22 THE COURT: Right.

23 MR. HUMPHRIES: --- and they know that. We went down
24 that road last time.

25 THE COURT: All right, all right.

1 MR. MARTIN: Well, I understand we don't have ---

2 THE COURT: Okay, so, they haven't noticed of alibi.
3 They're not going to request that charge and now your request
4 is mere presence.

5 MR. MARTIN: It is, and let me say very adamantly that
6 Mr. Humphries's statement is it inaccurate that all we're
7 going to argue is that the Defendant was at home. That is a
8 defense. Another defense is going to be as the evidence
9 allows and indicates it should be is that even if he were
10 present in Myrtle Beach there is no evidence he committed a
11 murder. So, I don't know how in the world you could take that
12 charge away from us.

13 MR. HUMPHRIES: Okay, well, let's do this ---

14 MR. MARTIN: They're trying to say he's present but
15 they have no evidence that he committed the murder itself here
16 but they don't want us to get that charge. It just don't seem
17 fair.

18 MR. HUMPHRIES: All right, well, then let's do this. If
19 we're going to put mere presence in, then we need to put hand
20 of one in.

21 MR. MARTIN: No, sir.

22 MR. HUMPHRIES: Well, now, listen to me because here's
23 what -- here's what they're saying and Mr. Morgan has asked
24 questions and there is a -- there is an inference and I don't
25 know if it's reasonable but an inference based on Mr. Martin's

1 questions of the GSR, the SLED expert regarding GSR couldn't
2 Renee Poole have gone down to the beach, washed her hands and
3 then not have had a reading on the GSR kit. That's there.
4 That's in the record. So, if that's something that they
5 intend to argue, and that John Frazier might merely have been
6 present, then the State is entitled to hand of one hand of
7 all. So, if he wants mere presence in we want hand of one
8 hand of all in.

9 MR. MARTIN: Absolutely not, Judge. Those two are not
10 mutually exclusive of one another. They -- there is -- the
11 first is the accomplice liability, which we all agree without
12 question is inadmissible. Now, mere presence, again, is it
13 not true that John Frazier could have been in Myrtle Beach and
14 not murdered Brent Poole. Do you know what happened exactly?
15 Do I know what happened exactly? But now, their argument has
16 got to be, there's no way -- you can't be -- that his presence
17 in Myrtle Beach by the Hobbses allows you to convict him of
18 murder.

19 THE COURT: I don't think that would ever be their
20 argument, that his presence would allow. I think that would
21 be ---

22 MR. MARTIN: Well, you watch.

23 MR. HUMPHRIES: Certainly not alone.

24 MR. MARTIN: You watch them.

25 THE COURT: That would be not alone, that in

1 conjunction with.

2 MR. HUMPHIRES: No, certainly not.

3 MR. MARTIN: Well, not alone, but I mean, obviously
4 that's got to be it because if it wasn't they have nobody to
5 say he shot -- "I saw him shoot him. We got the gun from him
6 that did it." It would -- it'd have to be. I would argue
7 that if I were them, not that I think there's anything wrong
8 with it.

9 MR. HUMPHRIES: And let me be -- and let me be clear.
10 Mr. Martin says that we all agree that accomplice liability is
11 not to be charged. That's if mere presence is not charged,
12 the hand of one hand of all and accomplice liability.

13 THE COURT: And I agree because listen to this.
14 Basically it even refers to, it says "Mere association with a
15 person who commits a crime does not make a Defendant an
16 accomplice or an aider and abetter of the person committing
17 the crime." It even refers to an accomplice. It says, it
18 says what it is. I mean, if you are an accomplice how that's
19 handled, the hand of one is the hand of all, but if you're
20 just merely present how it's handled and they do, they do tend
21 to go hand-in-hand, especially with the facts of this
22 particular case.

23 MR. MARTIN: So, your ruling would be that if you
24 charge one you've got to charge the other?

25 THE COURT: My ruling is, yes, that I have a concern

1 about talking about the Defendant's mere presence, oh, it's or
2 mere association with the person who commits a crime. When I
3 say mere presence or an association does not make them an
4 accomplice or an aider and abetter then I need to describe to
5 them what an accomplice and an aider and abetter is and ---

6 MR. MARTIN: Well, Judge, I just don't follow your
7 logic on that. I mean, it appears to me that the mere
8 presence charge makes the point that I'm trying to make when
9 it says that a Defendant's presence where a crime is being
10 committed or mere association with the person who commits a
11 crime does not make a Defendant an accomplice, an aider of
12 liability, but I tell you what you could do, as far as I'm --
13 I don't know what -- read the rest of it, you could leave that
14 part of it out and just say mere presence at the crime scene
15 is not sufficient to prove someone guilty of a crime.

16 MR. HUMPHRIES: And that wouldn't be a complete charge on
17 the law.

18 MR. MARTIN: Well, I mean, well, you all -- I mean,
19 I'm just telling you I don't -- if you want -- this is what I
20 will say to you, if you got to charge accomplice liability I
21 don't want any of it charged, but I think it's a mistake to
22 link them together, and I would want that on the record.

23 THE COURT: Let me, I'll look at that. Give me an
24 opportunity and we'll look it up. We'll look up the case and
25 see and if you have anything you can hand me I'll be glad to

1 take a look at it.

2 MR. HUMPHRIES: I quite frankly didn't know that would be
3 an issue.

4 THE COURT: The accomplice charge does also say, this
5 is accomplice liability, it also says that mere presence is
6 not enough. That's located actually in that charge, which
7 makes me believe that they probably are separate and distinct
8 charges but I'm pulling that case and we'll see.

9 MR. MARTIN: Let's see. As we move forward through
10 it I don't -- let's see, prior inconsistent statements, prior
11 record. Well, now, we don't have any witness with any prior
12 records; do we?

13 MR. HUMPHRIES: Right, now.

14 MR. MARTIN: So, you wouldn't charge that.

15 THE COURT: No, that was just because we haven't
16 heard all the testimony, prior, prior record.

17 MR. MARTIN: I don't think that's relevant, prior
18 record of the Defendant, that's not applicable.

19 THE COURT: Okay, out, prior record of Defendant is
20 not in, and again, we didn't know at that time.

21 MR. MARTIN: Statement of the Defendant would be.

22 THE COURT: And if you'll notice, statement of the
23 Defendant has been modified. I have crossed out language
24 about Miranda in light of the fact it was a non-custodial. I
25 left the freely and voluntarily.

1 MR. MARTIN: I don't have a problem with that, Judge.

2 I think ---

3 MR. HUMPHRIES: No.

4 MR. MARTIN: --- it's probably, probably proper.

5 THE COURT: Okay, I didn't anticipate that being a
6 problem. I just wanted to point it out.

7 MR. MARTIN: Intent, murder, they haven't changed the
8 law on murder recently; have they?

9 MR. HUMPHRIES: Not lately.

10 THE COURT: I got rid of the pistol as the example
11 because the law says you don't give examples that are right on
12 target. So, I left the other examples of deadly weapons,
13 rifles, knives, but I crossed out pistol.

14 MR. HUMPHRIES: The -- well, okay, let me say this.
15 There have -- I have certainly -- we stipulate, I think, that
16 the murder weapon, I mean I think we could agree that the
17 murder weapon is a pistol.

18 THE COURT: Give this jury some credit.

19 MR. HUMPHRIES: Okay.

20 THE COURT: If a knife and a rifle, they know a
21 handgun.

22 MR. HUMPHRIES: Well, my question is ---

23 THE COURT: I don't have to give that as an example.

24 MR. HUMPHRIES: Well ---

25 THE COURT: I mean, I'm giving examples, that's all.

1 MR. HUMPHRIES: Can we just, can we say generically
2 firearm?

3 THE COURT: I don't -- I ---

4 MR. HUMPHRIES: I just, I -- because, because I don't
5 know how they're going to think on that.

6 THE COURT: Oh, please.

7 MR. HUMPHRIES: I understand but there may -- well, you
8 know, she didn't say pistol.

9 THE COURT: Those are examples only.

10 MR. HUMPHRIES: I understand, but I think the -- well,
11 you understand what I'm saying.

12 THE COURT: Yeah, do you have any objection to as
13 examples I say firearms rather than saying rifle?

14 MR. MARTIN: I don't have any objection.

15 MR. HUMPHRIES: Thank you.

16 THE COURT: Okay, we just amend that and say firearm,
17 and I'm not going to go into the molotov cocktail or any of
18 those. I just don't think they're relevant.

19 MR. HUMPHRIES: That's good. I still don't know what
20 that is.

21 THE COURT: I'm not sure what it is, but it is
22 considered a deadly weapon.

23 MR. HUMPHRIES: And on page -- is it still page 23 for
24 you, again, examples of instruments which may be deadly
25 weapons.

1 THE COURT: We'll do firearm instead by consent.

2 MR. HUMPHRIES: Firearms, thank you. I hate to be so
3 particular.

4 THE COURT: That's okay, that's what, that's what
5 we're going over it for to get it detailed.

6 MR. HUMPHRIES: We're not charging the lesser included.

7 THE COURT: No.

8 MR. HUMPHRIES: On armed robbery.

9 THE COURT: The evidence doesn't, doesn't support
10 that. It's one or the other on armed robbery, yeah.

11 MR. HUMPHRIES: Very good.

12 THE COURT: There's no question that there was a
13 firearm used.

14 MR. HUMPHRIES: I don't have anything further.

15 MR. MARTIN: I would, the only thing I would ask since
16 I agreed to the firearm part of that that when you charge them
17 there's only two possible forms of the verdict that you list
18 not guilty first.

19 MR. HUMPHRIES: That's the Court's discretion. I don't
20 -- it doesn't matter to me because you're going to say that,
21 "The order in which I give them is no significance." I
22 don't care.

23 THE COURT: There's no significance whatsoever. I
24 say it every time and the order is simply one must precede the
25 other. I say that every time but I'll do it if that's the

1 request. We'll just reverse.

2 Anything else? There's one other thing that we could
3 discuss, of course, this means more work, too, for my law
4 clerk is if we clean this up and really gave them a nice clean
5 copy with the idea that they could take it back to the jury
6 room with them.

7 MR. HUMPHRIES: I have no objection to that.

8 MR. MARTIN: What are we talking about?

9 THE COURT: Letting them have the charge ---

10 MR. MARTIN: The charge.

11 THE COURT: --- if we clean this charge up which
12 would take us a little while but I think we could do it, it
13 would be unique but it -- so, it would have to be by consent
14 but I think it's also helpful.

15 MR. HUMPHRIES: It's not, actually it's not so unique.

16 THE COURT: I mean, it has happened, but it's not the
17 commonplace.

18 MR. HUMPHRIES: It's happened, and we've done it, we've
19 done it here in Horry County.

20 MR. MARTIN: Can we think about it?

21 THE COURT: Yeah, it is -- yeah, I wanted to point
22 out it's not, it's not done often but it is done as Mr.
23 Humphries was saying and it has, in fact, been done in Horry
24 County.

25 MR. HUMPHRIES: Did it in the last trial.

1 THE COURT: It's -- I think that it's the way we will
2 go in the future, but it is not the standard now. It would be
3 only done by consent and if you don't want to do it that is
4 fine. If they have a particular request we can bring them
5 back out and charge them on that particular area of the law.
6 It was just a thought since we had time.

7 MR. BRITTAIN: I'm afraid you're dealing with too many
8 old timers over here, Judge.

9 THE COURT: That's okay. That is no problem. So, the
10 answer is no? Is that ---

11 MR. BRITTAIN: No, no, we'll ---

12 MR. MARTIN: Let's think about it.

13 THE COURT: You're still talking about it, okay.
14 Yeah, whenever you decide just we need enough time to clean it
15 up, that's all.

16 State v. Green it was aiding and abetting, I mean, both
17 charges were. Let's see if we can find something else. It
18 does appear -- just to let you know, where it look -- it looks
19 like we're going is aiding and abetting and mere presence
20 would be hand in hand. Even on our key searches it's first
21 aiding and abetting and then mere presence under that.

22 MR. MARTIN: I would ask that neither one be charged.

23 THE COURT: All right, and we'll keep, we'll keep
24 looking, and mere presence, but let's see if we can keep
25 looking.

1 MR. HUMPHRIES: We still going to take up the waiver of
2 the Defendant to testify?

3 THE COURT: Yeah, thanks, absolutely.

4 *****OFF THE RECORD*****

5 (On the record.)

6 (Whereupon, the following takes place outside the
7 presence of the jury.)

8 THE COURT: Let me just note this for the record, all
9 we need for mere presence is accomplice liability charge. We
10 don't need hand of one hand of all.

11 MR. HUMPHRIES: That's fine.

12 THE COURT: We need accomplice liability charge and
13 mere presence. If you want that I'll do that. Otherwise,
14 I'll take both out.

15 MR. MARTIN: Can I look at it back there again for just
16 a minute?

17 THE COURT: Sure.

18 *****OFF THE RECORD*****

19 (On the record.)

20 (Whereupon, the following takes places outside the
21 presence of the jury.)

22 THE COURT: Any other matters that need to be
23 addressed?

24 MR. HUMPHRIES: Not from the State at this time.

25 THE COURT: Anything from the Defense?

1 MR. BRITTAIN: Well, we -- just that -- your admonishment
2 there when Morgan will be here in just a second.

3 THE COURT: Okay.

4 MR. BRITTAIN: You had done that while I was gone; had
5 you, discussed the ---

6 THE COURT: The Fifth Amendment?

7 MR. BRITTAIN: Right.

8 THE COURT: No, no, I'm getting ready to do that.
9 You want Mr. Martin here for that?

10 MR. BRITTAIN: I kind of would.

11 THE COURT: All right.

12 MR. BRITTAIN: He's just stepped out for just a second.
13 He'll be right here.

14 THE COURT: Okay.

15 *****OFF THE RECORD*****

16 (On the record.)

17 (Whereupon, the following takes places outside the
18 presence of the jury.)

19 THE COURT: All right, if we can get the Defendant put
20 under oath at this time, please.

21 (Whereupon, the Defendant is sworn by the Clerk.)

22 THE COURT: Mr. Frazier, I advise you now that you
23 have the right to invoke the protections given to you by the
24 Fifth Amendment to the Constitution of the United States and a
25 similar counterpart provision of the Constitution of the State

1 of South Carolina. The Fifth Amendment to the Constitution of
2 the United States provides in part no person shall be
3 compelled in any criminal case to be a witness against
4 himself. This provision of constitutional law means that you
5 cannot be compelled or required to testify in this case. This
6 is a right and a privilege which the law extends to you. It's
7 a personal privilege and no one can waive this right except
8 you. You have the right not to testify but you also have the
9 right to testify. The Court will grant you the right to
10 further consult with your attorney before you make a final
11 decision. If you elect not to testify your failure to testify
12 cannot be used by the State as an inference of guilt and your
13 failure to testify cannot be considered by the jury in its
14 deliberations and this Court will instruct that jury very
15 clearly on that point.

16 Now, if you elect to testify and you waive the privilege
17 that's extended to you by the Fifth Amendment to the
18 Constitution of the United States I advise you that you will
19 then assume the role of a witness in a case and you then waive
20 or give up your constitutional privilege against self-
21 incrimination. This means that if you voluntarily take the
22 witness stand and testify you subject yourself to the same
23 rules that govern other witnesses and you may be examined and
24 cross-examined on any relevant issue in this case and you may
25 be impeached to the same extent as any other witness, all of

1 which are subject, however, to our rules of law and court. I
2 further advise you that if you elect to take the witness stand
3 to testify this decision on your part must be made freely and
4 voluntarily, intelligently and with knowledge of the
5 protections given to you by the Fifth Amendment to the
6 Constitution of the United States and with knowledge of the
7 consequences of your election to testify. Do you need to
8 further consult with their attorney?

9 MR. FRAZIER: Yes, ma'am, I believe so.

10 THE COURT: I'll allow you to do that.

11 MR. FRAZIER: Thank you.

12 (Mr. Frazier and Mr. Martin confer.)

13 MR. MARTIN: Judge, after talking to Mr. Frazier he
14 understands the charge you're giving. His question to me is
15 he would like to defer that decision until all the testimony
16 is in the record.

17 THE COURT: All right, that will be fine. Let me ask
18 you this, have you discussed this with your attorney whether
19 you should or should not testify?

20 MR. FRAZIER: Yes, ma'am.

21 THE COURT: All right, do you understand everything
22 that I've just explained to you?

23 MR. FRAZIER: Yes ma'am.

24 THE COURT: All right, do you have any questions about
25 what I've explained to you?

1 MR. FRAZIER: No ma'am.

2 THE COURT: All right, and my understanding through
3 your attorney is that understanding then what we've presented
4 to you you want to wait and hear all of the testimony before
5 you make that decision; is that correct?

6 MR. FRAZIER: Yes ma'am.

7 THE COURT: All right, I'll be questioning you at
8 that point once again, very good.

9 MR. FRAZIER: Okay.

10 THE COURT: All right, is there anything further?
11 Anything from the State?

12 MR. HEMBREE: No, Your Honor.

13 THE COURT: Anything from the Defense? All right,
14 anything from the Defense?

15 MR. MARTIN: Nothing from the Defense. I'll just
16 tell the Court, what I would intend to do is when the jury
17 comes in is to publish the couple of exhibits, stipulations
18 we've got and enter those first and then proceed.

19 THE COURT: All right, any objection?

20 MR. HEMBREE: No, Your Honor.

21 THE COURT: All right, we're ready for them.

22 I'm going to question them about whether they've seen or
23 heard anything. If you have any additional requests just ask
24 to approach and I'll be glad to ask any additional questions
25 that may come to mind.

1 (Whereupon, the following takes place in the presence of
2 the jury.)

3 THE COURT: Mr. Foreman and ladies and gentlemen of
4 the jury, welcome back. You know I'm going to ask you about
5 whether or not you have heard or read or seen anything or
6 discussed anything regarding this case and I need to know that
7 at this time. If you have heard, if you've read, if you've
8 seen anything about this case, if you've discussed this case
9 with anyone, please raise your hand.

10 (No response.)

11 THE COURT: All right, thank you very much for
12 following those instructions. We remain now in the phase of
13 the case where the Defense has the opportunity to present
14 evidence and testimony. We'll turn now for their next
15 witness. Yes, sir, Mr. Martin.

16 MR. MARTIN: If it please the Court.

17 THE COURT: Yes.

18 MR. MARTIN: Your Honor, initially I would enter into
19 evidence by way of stipulation of fact between the State and
20 the Defense a couple of pieces of evidence and upon doing so
21 hopefully establish for the jury their -- the way they fit in.
22 The first is a stipulation of fact that was entered into by
23 the parties relating to the testimony that would have been
24 made by a North Carolina SBI Agent Jerry Webster who examined
25 the automobile, this Acura automobile that John Frazier had

1 borrowed from Schettler, and it reads as follows: "SBI agent
2 Jerry Webster," it is on the screen and will be in evidence
3 for you, "SBI Agent Jerry Webster, at the request of the
4 Myrtle Beach Police Department examined the 1990 Acura
5 automobile of Kahle Schettler, Schettler on June the 16th,
6 '99. SBI Agent Webster indicated that Kahle's car was very
7 clean. After checking the interior he did not notice any
8 visible blood droplets. He indicated that from his
9 preliminary overview there was most likely no blood in the
10 interior and recommended not using luminal to look for any
11 blood. He then gathered the floor mats," which are into
12 evidence. "He then gathered the floor mats and two navy blue
13 towels that Kahle had on the seats of the car. Kahle had
14 advised him that he always had the towels on the seats to
15 protect the interior of the seats from fading. Agent Webster
16 listing the evidence gathered as follows: number one,
17 passenger side blue towel from the seat; number two, passenger
18 side floor mat; number three, driver's side blue towel from
19 seat; number four, driver's side floor mat; number five, lift
20 print from windshield. Number one was taken at approximately
21 12:30 p.m.; number two, 12:40; number three, 12:48; number
22 four, 12:50; and number five 13:31. Agent Webster also
23 checked underneath the undercarriage for any possible sand or
24 dirt. He also checked the wheel wells and inside the wheel
25 rims. No significant sand was evident in either place. It

1 was noted that all four tire treads on the car were worn out
2 and not deep. Terry Altman received this evidence from Agent
3 Webster at approximately 13:35 p.m., secured them in his car.
4 Items one, two, three and four were secured by him in a brown
5 paper bag and marked. Tape was used to secure the bags.
6 Agent Webster indicated to Altman that each towel was folded
7 in on itself and laid flat into the bag. Therefore, when it
8 was to be removed it should be lifted straight out, opened
9 outward from its folded position to resemble how it originally
10 was in the car. Altman indicated this on the SLED paperwork
11 when he returned from Myrtle Beach."

12 All right, and then put up the second page up there if
13 you would, the next -- the third page after because we don't
14 need the signature. I just need the SBI report.

15 We don't have that?

16 MR. BRITTAIN: Yes, yeah, yeah, that's what it is. No,
17 no, no, no, no. There should be a third page to that exhibit.

18 MR. MARTIN: Well, here. The items that were taken by
19 Agent Webster were sent from, I believe, from the South
20 Carolina State Law Enforcement Division to the FBI in
21 Washington for examination and that was -- and you will notice
22 some different numbers here Q instead of samples one, two,
23 three and four we're talking Qs. That's the FBI language,
24 Q10 through 13 and 10 through 16. That is the items exhibit
25 31 which is -- you will see are little canisters of sand and

1 debris and material or whatever that was taken from these
2 floor mats, towels, whatever they got out of that car, sent up
3 to the SBI along with debris and sand and such from the body
4 of Brent Poole or from the crime scene. The SBI report
5 results are that, "The soil contained in the debris from the
6 victim's clothes is dissimilar to soil contained in the debris
7 from the vehicle floor mats Q15 and 17. Consequently, the
8 soil from the floor mats cannot be associated with the soil
9 from the victim."

10 The next paragraph, "The geological material recovered
11 from the debris from the blue towels, Q14 and 16 is extremely
12 limited and only exclusionary comparisons can be performed.
13 Accordingly, no association can be made between the soil from
14 the victim and the geological material from the blue towels."

15 In addition to that into evidence in the case is State's
16 -- wait a minute, Defense Exhibit 25 is a pair of white tennis
17 shoes that were removed from the victim. All right, put the
18 Glock. The second stipulation was entered into by attorneys
19 for Mr. Frazier and for the State and read that, "On February
20 the 18th, 1999, Defendant's investigator Darrell Wilson
21 initiated the telephone conversation with Detective Terry
22 Altman of the Myrtle Beach Police Department. During said
23 conversation Wilson disclosed information to Detective Altman
24 that John Frazier's nine millimeter Glock semiautomatic
25 firearm was in the possession of the Carolina Forensics

1 Laboratory located in Raleigh, North Carolina. The detective
2 was given the telephone number of said laboratory and the name
3 of the laboratory technician to contact. Investigator Wilson
4 sent via fax testing results that had been performed on the
5 nine millimeter Glock firearm by Carolina Forensic
6 Laboratory."

7 Paragraph two, "That on February the 18th of '99
8 Investigator Wilson agreed to furnish to Myrtle Beach Police
9 Department with any and all information he had, he had
10 knowledge of as it relates to the above referenced case
11 relevant to prior testimony about the ownership of a Glock
12 pistol."

13 That's the two stipulations, Judge, that I'm familiar
14 with at the moment. I believe that's all.

15 THE COURT: And you will recall that stipulations are
16 agreements between the parties and they are now in evidence
17 for your consideration.

18 MR. MARTIN: The Defense would call Sharon Haymaker.

19 AT THIS TIME SHARON JEANETTE HAYMAKER WAS CALLED TO THE
20 STAND, DULY SWORN BY THE CLERK AND TESTIFIED AS FOLLOWS:

21 THE CLERK: Thank you. Please be seated. Please
22 talk right into that microphone and talk kind of loud. State
23 your full name, spell your last name for the Court.

24 MS. HAYMAKER: Sharon Jeanette Haymaker, H-A-Y-M-A-K-E-R.

25

DIRECT EXAMINATION

1 BY MR. MARTIN:

2 Q: And Sharon, where do you live presently?

3 A: Roanoke, Virginia.

4 Q: All right, and how did -- what kind of work do you do,
5 Sharon?

6 A: I'm a dancer.

7 Q: You're a dancer. All right, in addition to being a
8 dancer are you one of those who is going to school?

9 A: Yes.

10 Q: All right, and what kind of school have you been going
11 to?

12 A: I just recently graduated nursing at Virginia Western
13 in Roanoke, Virginia, and I'm waiting to take the State
14 boards.

15 Q: All right, I'm going to ask you to speak up a little
16 bit so we make sure everybody can hear what you have to say.

17 A: Okay.

18 Q: Say that again. You have just graduated where?

19 A: I've graduated nursing from Virginia Western in
20 Roanoke, Virginia.

21 Q: All right.

22 A: And I'm waiting ---

23 Q: And are you practicing as a nurse yet?

24 A: No, I'm waiting to take my state boards as of the
25 moment.

Sharon Haymaker - Direct by Mr. Martin

1103

1 Q: All right, now, let me ask you if you know the
2 Defendant in this case John Frazier?

3 A: Yes.

4 Q: When did you meet him?

5 A: August of '97.

6 Q: August of '97, where did you meet him?

7 A: At Crystal's house.

8 Q: Crystal Pedersen?

9 A: Yes.

10 Q: And her husband's name was what?

11 A: Thomas.

12 Q: Thomas, so, you met him at the house of Thomas and
13 Crystal Pedersen?

14 A: Yes.

15 Q: And did you thereafter move into John's house with
16 him?

17 A: Yes, I stayed with him four to five days a week.

18 Q: All right, explain to the jury on what regularity or
19 how it was that you lived with him over the next several
20 months.

21 A: I came down on Thursdays and stayed through Sundays.

22 Q: All right, and you would come from Roanoke to Winston-
23 Salem to dance?

24 A: Uh-huh (affirmative response).

25 Q: All right, now, were you and John boyfriend and

1 girlfriend?

2 A: No.

3 Q: Was there any intimate or sexual relationship between
4 the two of you?

5 A: No.

6 Q: You just did what as it relates to being at his house?

7 A: We just hung out and spent time together and talked.

8 Q: Well, I guess when you -- you used -- he let you stay
9 in his house when you came down; is that right?

10 A: Uh-huh (affirmative response).

11 Q: All right, and is there any particular reason that
12 there wasn't a relationship between you and John at the time?

13 A: I was currently involved in another relationship in
14 Virginia.

15 Q: Now, did you know Renee Poole?

16 A: I've met her, yes.

17 Q: All right, and where did you meet her?

18 A: I met her at the Silver Fox.

19 Q: At the Silver Fox, all right, and did you -- were you
20 aware of the time when Renee had moved in with John and then
21 moved out from John's residence?

22 A: Yes.

23 Q: All right, and if you could tell the jury John's
24 reaction to Renee's moving out and returning to -- apparently
25 to her marital home?

Sharon Haymaker - Direct by Mr. Martin

1105

1 A: He just basically said that, you know, he liked her
2 but it, it didn't work out that it was done with.

3 Q: Was John crying about it?

4 A: No.

5 Q: Was John mad about it?

6 A: No.

7 Q: Did he appear to be hurt about it?

8 A: No.

9 Q: Now, let me ask you if you had an occasion to talk to
10 John Frazier on June the 4th of 1998?

11 A: Yes.

12 Q: All right, and describe to the jury how you -- in what
13 manner you talked to him?

14 A: I called him to let him know that I wasn't coming down
15 to work that weekend.

16 Q: All right, and because you usually came down on what
17 nights?

18 A: Thursday nights.

19 Q: And you would, as you have said, stay at John's house?

20 A: Uh-huh (affirmative response).

21 Q: All right, so, this particular weekend you were not
22 coming down.

23 A: That's right.

24 Q: All right, and you called him by telephone and did you
25 call his home?

- 1 A: Yes.
- 2 Q: At approximately what time?
- 3 A: It was about 9:00 p.m.
- 4 Q: About 9:00 p.m. and did you get John at home then?
- 5 A: Yes.
- 6 Q: Did you call a cell phone or his residence phone?
- 7 A: His residence.
- 8 Q: And John was at his residence about 9 or 9:30
- 9 Thursday, June the 4th?
- 10 A: Yes.
- 11 Q: Are you sure about that?
- 12 A: Yes.
- 13 Q: Well, now, how do you know? It's been a long time
- 14 obviously. How do you know that it was Thursday night,
- 15 Thursday night, June the 4th, that you had the conversation
- 16 with him?
- 17 A: Well, one because I took the entire month off for my
- 18 birthday, and two because it was the last time I spoke to him.
- 19 Q: That's the last time you spoke to John?
- 20 A: Before, yes.
- 21 Q: Tell me a little bit about John and his sweating, his
- 22 profuse sweating. During the several months that you were
- 23 there with him what did you come to observe about that?
- 24 A: He kept a rag in his pocket at all times. He just --
- 25 it wouldn't matter. He would sweat in air conditioning. He

Sharon Haymaker - Direct by Mr. Martin

1107

1 just -- I figured it was genetics or something. He said that
2 he had had it since he was young, so.

3 Q: Did you observe then that to be something that he did
4 on a consistent basis ---

5 A: Yes.

6 Q: --- as opposed to only when he was under stress?

7 A: Yes, I bought him handkerchiefs for Christmas.

8 Q: Any question about that, Sharon?

9 A: No.

10 Q: Did you also know an individual by the name of Bruce
11 Welford?

12 A: Yes.

13 Q: And how did you know Bruce?

14 A: From the Silver Fox and from Courtney his wife.

15 Q: All right, let me ask you this, back in June of '98
16 did Bruce Welford have a ponytail?

17 A: Yes, he did.

18 Q: Did you have an opportunity to observe Bruce and Renee
19 the latter part of May, that is after May the 12th at the
20 Silver Fox?

21 A: Yes.

22 Q: Would you describe for the jury what you observed?

23 A: They were having a relationship, a sexual
24 relationship.

25 Q: How do you know that without being too specific but

1 how do you -- and I'm talking the latter part of May now,
2 after May the 12th how do you know that?

3 A: Because they, they would express it in the dressing
4 room very immensely.

5 Q: Any question about that?

6 A: No.

7 Q: And this is Bruce Wolford?

8 A: Uh-huh (affirmative response).

9 Q: And this is after May the 12th?

10 A: Uh-huh (affirmative response).

11 Q: Have you ever heard John Frazier during the time that
12 you lived with him and lived with him is probably is a loosely
13 term, at the -- during the time you stayed at his house you
14 ever heard him express any hatred for Brent Poole?

15 A: No.

16 Q: That's all the questions I have for Ms. Haymaker.

17 THE COURT: Cross.

18 MR. HEMBREE: We have nothing on cross for this witness,
19 Your Honor.

20 MR. MARTIN: Come down, Ms. Haymaker.

21 THE COURT: Call your next witness, please.

22 MS. HANNA: Your Honor, the Defense calls our next
23 witness Ms. Christine Michelotti:

24 AT THIS TIME CHRISTINE MICHELOTTI WAS CALLED TO THE STAND,
25 DULY SWORN BY THE CLERK AND TESTIFIED AS FOLLOWS:

Christine Michelotti - Direct by Ms. Hanna

1109

1 THE CLERK: Please be seated. Please talk loudly
2 into that microphone.

3 MS. MICHELOTTI: Okay.

4 THE CLERK: State your full name and spell your last
5 name for the Court.

6 MS. MICHELOTTI: I'm Christine Michelotti, M-I-C-H-E-L-O-
7 T-T-I.

8 THE COURT: Yes, ma'am.

9 MS. HANNA: Thank you, Your Honor.

10 DIRECT EXAMINATION

11 BY MS. HANNA:

12 Q: Good Morning, Christine?

13 A: Good morning.

14 Q: I want the jury to get to know a little bit about you.
15 So, I'm going to ask you some questions about your background.
16 Where do you live?

17 A: I live in Greensboro, North Carolina.

18 Q: And where do you currently work?

19 A: I work for CTX Mortgage.

20 Q: And back in 1998 what did you do?

21 A: I was a real-estate broker for Century 21 All-Star.

22 Q: Okay, and tell us about your relationship, what is
23 your relationship to John Frazier?

24 A: He's my brother.

25 Q: And how would you describe your relationship with your

1 brother?

2 A: Very close.

3 Q: We're going to talk a little bit about geographics
4 now. Do you remember back in 1998 where John lived?

5 A: I do.

6 Q: And where was that?

7 A: That was

8 Q: What town was that in?

9 A: I'm sorry, Winston-Salem, North Carolina.

10 Q: Winston-Salem, okay, did he own his own home?

11 A: Actually it was a home that my grandfather had bought
12 for me and my children and I was getting ready to remarry and
13 when I moved out my grandfather gave the house to my brother.
14 So, it was paid for but in my grandfather's name.

15 Q: Did you know Renee Poole?

16 A: I did.

17 Q: And how did you know her?

18 A: Through John.

19 Q: Do you know where Renee Poole lived back in 1998?

20 A: She lived in Mocksville, North Carolina.

21 Q: Okay, now, in relation to John's house and Renee's
22 house do you recall how long it would take to drive from
23 John's house to Renee's house?

24 A: Thirty to 35 minutes.

25 Q: Okay, and did -- do you know where John worked at the

Christine Michelotti - Direct by Ms. Hanna

1111

1 time?

2 A: Yes, Champion Industries or Sara Lee Champion.

3 Q: Okay, and what town was that in?

4 A: Winston-Salem, North Carolina.

5 Q: Now, do you know how long it would take to drive from
6 Renee's house to Champion?

7 A: You're going to add about 10 minutes to it, so, 45
8 minutes.

9 Q: Let's talk about the kind of car that John drove back
10 in 1998. Do you know what that was?

11 A: It was a Chevrolet Blazer. I believe -- I think it
12 was a '90 -- it was used. So, I think it was a '96, '95, '96.
13 It was a black Blazer.

14 Q: Do you know when he purchased that vehicle?

15 A: I do.

16 Q: When was that?

17 A: In March.

18 Q: March?

19 A: It was mid March and because of notes and checkbooks
20 and he -- March the 13th was the day he bought it.

21 Q: So, he didn't own it the last week of February or the
22 first two weeks of March?

23 A: No.

24 Q: Now, did you ever have an occasion to drive that
25 vehicle after this incident?

1 A: I did.

2 Q: Did you know of any problems with the vehicle?

3 A: Yes.

4 Q: Can you tell us about that, please?

5 A: After John was -- this happened and he was arrested I
6 was moving some things from Winston to Yadkinville where we
7 had moved to and I asked my parents since he obviously wasn't
8 going to be driving it could I borrow it; and so, I drove it
9 for two to three months and when it got up to, it was highway
10 driving. So, when it would get up to a higher speed, 60, 65
11 there was a noise in the front end of the car, and I had had
12 it -- I had been driving it this way for about two months and
13 in August it was getting -- it was getting on my nerves. So,
14 I took it to a tire place in Winston and had them look at it
15 because I thought maybe it was the brakes because it was
16 coming from the front end of the car and it was. That's and
17 they fixed it for me and I paid for it, took care of it.

18 Q: Well, there have been several witnesses who have got
19 up on the stand and talked about an embarrassing problem for
20 John and that's his sweating. Do you know anything about
21 that?

22 A: Oh, yeah.

23 Q: Well, tell, tell the jury what you can recall about
24 John's sweating.

25 Q: Well, he's my brother. So, he's -- we've been

Christine Michelotti - Direct by Ms. Hanna

1113

1 together a long time. So, even from the time he was little
2 John has had a sweating problem since he was a little boy and
3 it was a joke when he was growing up because when it first
4 started he had these little beads. When he started sweating
5 there'd be little beads all over his face and we'd tease him
6 because it looked like freckles, sweat freckles, and as he got
7 older it got a lot worse, and I mean, in here to me it's
8 pretty cool and he's over there sweating, but he always did.
9 He kept a rag with him. That was one of his little signature
10 things. He took it to bed with him and I know that because
11 John stayed with me several months out of the year after I
12 moved out of the house and he sweats like a pig, sorry.

13 Q: Okay, now, Christie, did you ever know or did you know
14 anything about John's friends and girlfriends?

15 A: I did.

16 Q: Did you ever know him to have girls move in and out of
17 his house?

18 A: I did.

19 Q: Can you give us some of those names?

20 A: Well, I know Sharon personally and I knew that Sharon
21 lived there not full time but Sharon stayed with him. Tanya,
22 I think Tanya's last name was Sapp, Tanya Sapp. She lived
23 there for a couple of months. There was a young lady -- I
24 only met these two on a couple of occasions. One's name was
25 Julia, and I do not remember her last name and there was one

1 her name was Harley.

2 Q: Let's talk about, you mentioned Tanya. What kind of a
3 relationship did he have with Tanya?

4 A: Tanya he had a sexual relationship with Tanya and
5 Tanya had a daughter.

6 Q: Do you recall how long Tanya lived in his house?

7 A: About two, it was about two months. They started
8 seeing each other around Christmas and I bring up the daughter
9 because John -- Tanya didn't have the money to give her
10 daughter Christmas. So, my brother called me and said he was
11 going to, what did I think and he said he felt like that was
12 something he needed to do because she needed Christmas, and my
13 grandfather passed away in February and Tanya was still with
14 him then and attended the funeral of my grandfather with him.

15 Q: Do you know was John in love with Tanya?

16 A: No, no, I mean, they -- he liked her obviously because
17 he had her living in his home but it wasn't an in love
18 situation.

19 Q: Was his relationship with Tanya any different than any
20 of the other girls that you knew that lived with him?

21 A: No, not that it's a good thing by any means and we
22 certainly didn't approve of those activities, but he had
23 sexual relationships with all of them, that he shared that
24 information with me with the exception of Sharon who turned
25 him down.

Christine Michelotti - Direct by Ms. Hanna

1115

1 Q: Did John ever ask you to do anything to help Tanya?

2 A: Yes, when Tanya moved in and she had the -- she had
3 the daughter. Tanya had another child that she had lost
4 custody to her mother, and ---

5 MR. HUMPHRIES: Your Honor, at this time I'm going
6 to object as to relevance unless a foundation has been laid.

7 A: Tanya had a ---

8 THE COURT: Wait, wait, wait.

9 MR. MARTIN: I object as to relevance unless a
10 foundation is further laid in regard to this case and what
11 happened with Tanya.

12 THE COURT: All right, you want to come forward?

13 MS. HANNA: I'll keep going, Your Honor. Thank you.

14 THE COURT: All right.

15 BY MS. HANNA:

16 Q: Well, let's talk about John's calendar.

17 A: Okay.

18 Q: Do you know anything -- did John ever carry a calendar
19 around?

20 A: Always.

21 Q: Okay, tell me about that calendar. What kind of dates
22 did he keep in it that you know of?

23 A: He kept everything in his calendar. That's how he
24 kept up with his life, birthdays, anniversaries, events, to
25 remember his times.

1 Q: Well, let's take a look at February of 1998. Can you
2 see that from where you're at, Christine?

3 A: No.

4 MR. BRITTAIN: I'll turn it around.

5 A: Okay.

6 MR. BRITTAIN: You have to speak up over there.

7 A: Okay.

8 MR. BRITTAIN: You can look, you probably need to look at
9 it and then turn around and talk into the microphone.

10 A: Okay.

11 Q: Let's just look at a couple of these months. If
12 you'll look at February 11th for me. What name is on there?

13 A: That's McKana [spelled phonetically].

14 Q: And who is McKana?

15 A: That's Tanya's daughter.

16 Q: Okay, what about February 16th, whose name is that
17 right there?

18 A: Thomas's on the bottom and ---

19 Q: Okay, and who is Thomas?

20 A: That's Thomas Pedersen, that's one of his best
21 friends.

22 Q: Now let's take a look at -- let's do April. Tell me
23 about April. Do you recognize any names on there,
24 specifically April 29th?

25 A: That's Scott and Bryan, my sons.

Christine Michelotti - Direct by Ms. Hanna

1117

1 Q: Okay, and why would John write down or do you know why
2 John would write down that date on his calendar?

3 A: Because he would have been seeing them that day.

4 Q: How about July, let's look at another month, July.
5 What about July 11th, do you know who that is?

6 A: That's Donald And Christy.

7 Q: And what would that date signify?

8 A: That's Donald and Chris, that's their anniversary.

9 Q: What about the ?

10 A: That's Tanya. That would be her birthday.

11 Q: What about the ?

12 A: That's Donald and that would be his birthday.

13 Q: And whose birthday is that?

14 A: That's my brother's birthday.

15 Q: He even recorded his own birthday on his own calendar.

16 Okay, any other specific events that you remember that John
17 recorded on his calendar, birthdays, anniversaries?

18 A: Well, he -- in light of what he always did he would
19 have my anniversary on there, my aunts' birthdays on there,
20 which I saw as you were showing me, my aunt's daughter's
21 anniversary with an ex-husband is actually on there.

22 Q: Okay. Let's switch gears a little bit. Did you know
23 about his relationship with Renee Poole?

24 A: I did, I did.

25 Q: Do you know how long that relationship lasted?

- 1 A: A couple of months.
- 2 Q: Was it any different than any other relationship he
3 had had with these other women that you knew?
- 4 A: No.
- 5 Q: Do you know if he loved Renee Poole?
- 6 A: He was not in love with Renee.
- 7 A: Now, did you have an occasion to know that Renee Poole
8 moved in with him?
- 9 A: I did.
- 10 Q: And how did you know that?
- 11 A: Because he told me that he was moving her in.
- 12 Q: Okay, do you know when Renee Poole moved out of John's
13 home?
- 14 A: I do.
- 15 Q: And how long was she there?
- 16 A: She was there -- she moved out May the but she
17 did not stay there every night during that two-week period.
- 18 Q: Well, how do you remember it was May the ? Was
19 there anything significant about that day? Was there anything
20 significant about that day?
- 21 A: That would have, that would have been my grandfather's
22 birthday and we had -- he had just passed.
- 23 Q: Was John upset that day, Christine?
- 24 A: Well, I'm sorry.
- 25 Q: Well, was he upset about Renee Poole moving out?

Christine Michelotti - Direct by Ms. Hanna

1119

1 A: He was disappointed that he was helping her and she
2 needed to leave but we were talking about my grandfather and
3 remembering him and all the things that he did for us. So, it
4 was an emotional day for our entire family.

5 Q: Okay, you said that he was disappointed because he was
6 helping her out. What do you mean by that?

7 A: He wanted, he wanted to help her as though -- the same
8 way he wanted to help other people and she wanted to better
9 herself and he was disappointed that she had decided not to do
10 that.

11 Q: Was he crying over her moving out?

12 A: No.

13 Q: Let's talk about the week before this incident
14 occurred. Do you know if John worked any that week?

15 A: The incident are we talking about Brent?

16 Q: Yes.

17 A: Did he work during that week?

18 Q: Do you know if he worked any that week?

19 A: Are we talking about the week that -- I'm sorry. I
20 just want to make sure I understand.

21 Q: I'm sorry, the week of June 1st. I'll be more
22 specific. I apologize.

23 A: The week of June 1st.

24 Q: If you don't know that's okay.

25 A: Yeah.

- 1 Q: Okay.
- 2 A: I'm in my head I know my dates, June the 1st. I don't
3 know.
- 4 Q: Well, let's specifically -- let's get real specific.
- 5 A: Okay.
- 6 Q: Let me take you back to June 6th of 1998, which was
7 seven years ago. Do you remember that day?
- 8 A: I do.
- 9 Q: Okay, let me show you what's been marked as Defense
10 Exhibit 15.
- 11 A: Okay.
- 12 Q: Can you identify that for the jury, please?
- 13 A: It's a newsletter from the Winston-Salem shag club
14 called Shag Times.
- 15 Q: And were you a member of this shag club back in 1998?
- 16 A: Yes, I do.
- 17 Q: Well, I notice on the Shag Times newsletter there's a
18 marking on June 6th. Tell me about that day.
- 19 A: That was a lake party at Terry and Kenny Green's High
20 Rock Lake house.
- 21 Q: Okay, and did you go to the party on that day?
- 22 A: I did.
- 23 Q: Okay, and who kept your children on that day?
- 24 A: My brother did.
- 25 Q: Do you recall what time that you took your children to

Christine Michelotti - Direct by Ms. Hanna

1121

1 or where did your children stay that day?

2 A: They stayed with my brother at his house.

3 Q: At his house, okay, and do you recall what time that
4 you took the children over to the house?

5 A: I took them over there, the exact time between 9:30
6 and 10 they were there.

7 Q: Well, what time did that party start?

8 A: Well, the party itself started according to the
9 newsletter was 6, and that was for everybody but Terry and
10 Kenny were close personal friends with my parents and myself
11 and my husband and they had a boat down there and they had
12 invited us because of our relationship to come down earlier,
13 lunchtime or shortly thereafter, to go boat riding before
14 everyone else got there.

15 Q: Okay, did you do anything else that morning after you
16 dropped your children off?

17 A: I did. I had an appointment to show a property in
18 Clemmons.

19 Q: Okay.

20 A: I was supposed to be there at 11 o'clock and I talked
21 to my brother going over keeping the children and how his work
22 was and we talked for maybe about 45 minutes or so. When I
23 left I was about 10 to 15 minutes late getting to the
24 appointment. I had to call the folks and let them know I was
25 on my way but I did go show the property.

1 Q: Now, do you recall when you asked John to baby-sit
2 your children?

3 A: Well, actually my mother made the call the weekend
4 before is when we made a firm decision that, yes, we all
5 wanted to go, and we were going to ride together, putting the
6 plan together, and my mother said she would call my brother to
7 ask him if he could keep the children that day and she called
8 me and said yes, and then I, of course, I called my -- well,
9 not of course, but I called my brother mid to later week just
10 to confirm that we were still on, verify when I was, you know,
11 when I was bringing them because he would have been getting
12 off of work and make sure he was awake to let me in.

13 Q: And do you recall what time you picked your children
14 up on June 6th?

15 A: It was about 10:30 because John actually called us.
16 John had to be at work and we stayed longer than we intended
17 to stay. We were going to leave earlier, but we got there
18 about 10:30.

19 Q: Is that 10:30 in the evening?

20 A: In the evening, p.m.

21 Q: Okay, do you know if John and your children left any
22 -- left the house any that day?

23 A: Not to knowledge.

24 Q: Okay, specifically, you just testified that you
25 dropped the children off at 9:30 that morning. Is there any

Christine Michelotti - Direct by Ms. Hanna

1123

1 way that you could confuse June 6th, Saturday, June 6th, with
2 any other shag party that you've been to or any other party on
3 that newsletter?

4 A: Well, the next one after Terry and Kenny's is
5 at 9:00 p.m., and I would not have attended that one
6 because that's my grandmother's birthday, and we were all
7 actually at dinner because that's what we do every year, and
8 it wouldn't have -- certainly would not have attended June the
9 13th because that's the day my brother was arrested, and the
10 weekend of July 4th my brother was extradited here to Horry
11 County, and my parents and I came down and stayed, and I did
12 not have any involvement with the shag club and have not had
13 any involvement with the shag club since then.

14 Q: Is there any way on the morning of June 6th, Saturday,
15 June 6th, that John Frazier could have been at Renee Poole's
16 house?

17 A: That would have been impossible.

18 Q: And why is that?

19 A: Well, he had gotten off of work and I was there at
20 9:30 with the children.

21 Q: Okay, Christine, how is it after so long, from 1998,
22 how is it after so long that you vividly remember that day?

23 A: Well, number one, we've kept notes but that is a date
24 that I'll never forget because it has been such an issue and
25 it's something that protects my brother. He knows my children

1 were there. I took my children there that day and that's how
2 we can verify his whereabouts that day.

3 Q: Thank you.

4 MS. HANNA: Give me just one minute, please, Your
5 Honor.

6 BY MS. HANNA:

7 Q: Christine, I've got one more question for you about
8 John's calendar again?

9 A: Okay.

10 Q: Let's go to June 6th that's the day we've been talking
11 about here.

12 A: Okay.

13 Q: Can you tell me what's written right there on the top
14 of June 6th?

15 A: That's Scott and Bryan, my sons, which that would be a
16 day he would be with them.

17 Q: Okay, thank you, Christine. I don't have any further
18 questions for you. If you'll please answer any questions that
19 the State may have.

20 CROSS EXAMINATION

21 BY MR. HUMPHRIES:

22 Q: Good morning, Ms. Michelotti. The Shag Times, this is
23 the June 1998 issue?

24 A: It is.

25 Q: And I was looking at it. Let me see if I can find it.

1 There was a mention of new members. Do you recall that

2 mention of new members in the ---

3 A: It's not my newsletter.

4 Q: I'm sorry, but in the June issue you were noted -- you
5 and I -- is that your, John, is that your husband?

6 A: That's my ex-husband, yes.

7 Q: That's your ex-husband, okay?

8 A: Uh-huh (affirmative response).

9 Q: But you're mentioned as new members?

10 A: Right.

11 Q: I assume that would have been since the -- well, does
12 it come out every month? Do you know?

13 A: It comes -- yeah, it's monthly, so, yes.

14 Q: Okay, and there's no question that the notation
15 regarding the 6th is that the party starts at 6 p.m.

16 A: Right.

17 Q: You were aware, and of course, you said that you
18 didn't approve and I understand that. I have a sister, too.
19 You were aware that John had a number of women that moved into
20 the home with him?

21 A: Yes.

22 Q: Your grandfather's home?

23 A: Yes.

24 Q: Okay, and all of them with the exception of the
25 witness who testified today he had some sort of sexual

1 relationship with them?

2 A: Yes.

3 Q: And these are things that he told you?

4 A: Yes.

5 Q: You, of course, knew Renee Poole?

6 A: I did.

7 Q: Had met her?

8 A: Yes, I did.

9 Q: In fact, John brought her to the family and introduced
10 her around; did he not?

11 A: He didn't bring her to the family. There were two
12 functions that she came to that other members of the family
13 had the opportunity to meet her.

14 Q: Okay, and what were the functions if you recall?

15 A: She only did two things with us. The first one was my
16 brother has a daughter and her birthday was -- her birthday is
17 the and that Saturday prior to it was her birthday
18 party and he brought her to that and that -- then on Sunday
19 she went to a -- she went to a restaurant with us for dinner
20 for Mother's Day.

21 Q: Which Sunday, I'm sorry?

22 A: If I can look at the ---

23 Q: Here let me show it to you. I won't ask you to look
24 at that little screen. I can't hardly read it either.

25 A: Okay.

Christine Michelotti - Cross by Mr. Humphries

1127

1 Q: Let me go around here.

2 A: Okay, this the is my mother's birthday and my
3 brother's daughter's birthday. It's on the same day. It's
4 during the week. So, we do -- we celebrate birthdays the
5 weekend before somebody's birthday is what we do, and that's
6 what -- it's right here. It says 2nd Alana party. That's,
7 that was my daughter's second birthday and then Mother's Day
8 was that -- this year was on the 10th, that Sunday and we all
9 met at a seafood restaurant to have dinner so nobody would
10 have to cook and she came to that dinner with us.

11 Q: Now, Renee was at dinner with you all on Sunday,
12 Mother's Day that year.

13 A: Yeah, we had a -- or my grandmother likes to eat at
14 four o'clock. So, she came and met us at the restaurant and
15 then she left to go see her mother after that.

16 Q: Okay, so, she was with John earlier in the day; is
17 that fair enough, on Mother's Day?

18 A: That -- dinner is when I saw them, and I say dinner
19 that would be four o'clock.

20 Q: That's what I'm trying to say.

21 A: Okay, yeah, four o'clock.

22 Q: And I'm really not trying to ---

23 A: No, no, four o'clock would be it.

24 Q: Okay, do you know where you had the dinner? Was it at
25 a home or did you all go to a restaurant?

- 1 A: We went to a restaurant, Coronets. That was where my
2 grandmother always goes.
- 3 Q: Okay, I understand, and then Renee left at some point?
- 4 A: Yes.
- 5 Q: Okay, do you know about what time she might have left,
6 what time after dinner she might have left?
- 7 A: She would have left before six o'clock because we left
8 before six.
- 9 Q: Okay, and do you know if she and John left together or
10 she left separately if you recall?
- 11 A: I do not recall.
- 12 Q: Okay, well, let me ask you this, do you recall whether
13 or not they arrived together?
- 14 A: Yes.
- 15 Q: They did?
- 16 A: They did.
- 17 Q: Okay, now, your testimony is that John cared about
18 Renee and cared about her well-being?
- 19 A: Yes.
- 20 Q: Hoping she would improve herself or her situation?
- 21 A: She had expressed that she wanted to.
- 22 Q: And clearly there was a time that Renee moved back
23 into her martial home?
- 24 A: Yes, sir.
- 25 Q: Which would have been the 12th?

1 A: May 12th, yes.

2 Q: And, and of course, as consistent with your brother's
3 practices, Renee back with Brent?

4 A: Right.

5 Q: Okay, let me ask you this. Do you know or are you
6 aware that your brother assisted Renee in her move out of her
7 marital residence on the 1st, and if you don't know that's
8 fine?

9 A: I'm sorry. I didn't hear.

10 Q: Okay, I'm sorry. I had my back to you and that's
11 rude. Did you know or are you aware that your brother
12 assisted Renee in her move out of the marital home?

13 A: No, he did not.

14 Q: Well, okay, tell me how you know that?

15 A: Her stepfather, Jack, was there and he was moving,
16 helping her move out.

17 Q: When she moved out or when she moved back in?

18 A: When she moved -- I thought you had asked me when she
19 moved out.

20 Q: Not when she moved out of John's residence.

21 A: Oh, okay.

22 Q: When she moved out of her marital residence.

23 A: I'm sorry. I misunderstood

24 Q: That's all right. Yeah, I agree with you on the other
25 point clearly.

1 A: I'm sorry.

2 Q: Okay.

3 A: No, when, when she moved out of Brent and Renee's
4 home, okay ---

5 A: I got you.

6 Q: --- are you aware that your brother assisted her in
7 that move?

8 A: Yes.

9 Q: Now, there are, clearly, a number of references to a
10 number of girls and you've identified a few of them including
11 Tanya?

12 A: Right.

13 Q: And apparently he had an extended relationship with
14 Tanya?

15 A: Two months.

16 Q: Two months, well, well, let's do it this way. Tanya
17 is there two months and he has a relationship you've testified
18 with Renee for approximately two months?

19 A: Two months.

20 Q: Okay, and there was -- and Tanya lived with him?

21 A: She did.

22 Q: And Renee lived with him?

23 A: She did.

24 Q: And you certainly had an opportunity to go through his
25 day timer to look at, look at the copies of the day timer

Christine Michelotti - Cross by Mr. Humphries

1131

1 fairly close.

2 A: Well, yes, and I saw it with him because he carried it
3 all the time ---

4 Q: Okay.

5 A: -- and used it with me. He -- if he was questioning a
6 date about something he'd open it up and say, "Where do I,
7 where do I need to put this," and I'd tell him.

8 Q: Sure, do you recall when Tanya would have moved out?

9 A: Tanya moved out the end of February. I couldn't go
10 for that move out. So, my mother and my aunt went over to --
11 we just always wanted to make sure that somebody was there so
12 that if anybody got upset or wanted to cause a scene so
13 because he had asked Tanya to move out.

14 Q: Now, did you go on May the 12th to make sure there was
15 no upset?

16 A: Yes.

17 Q: You were there.

18 A: I was there because John and I were talking in the
19 living room about my grandfather.

20 Q: Sure, but in February of 1998, and which this is
21 Defense Exhibit 18, the end of February ---

22 A: I don't know the exact date.

23 Q: That's fine.

24 A: Okay.

25 Q: That's fine. No, I'm not going to ask you.

1 A: Okay.

2 Q: I'm not going to ask you that. Is there any reference
3 to Tanya moving out? Do you -- I don't have it any bigger
4 than that.

5 A: I'm sorry. I know. No, I'm looking.

6 Q: I'm in the same position. There's only -- there's one
7 entry I can't read and there's an entry that's been scribbled
8 out. There's Tanya 11:30 to 5, I believe.

9 Q: What date does that appear?

10 A: That's on February the 2nd.

11 Q: Right, she would have still been there at that point.

12 A: The only reason I know she was still there because she
13 -- John brought her to my grandfather's funeral. So, other
14 than that I do not see her on here anywhere else.

15 Q: I don't want to rush you here.

16 A: No, it was dinner with another girl that day. Sorry,
17 I didn't know, sorry.

18 Q: Okay.

19 A: Sorry, I thought that was it.

20 Q: That's all right. Macaroni with Megan, okay, that's
21 actually a restaurant; isn't it, Macaroni's?

22 A: It is. It is.

23 Q: Okay, otherwise that wouldn't be much of a date; would
24 it?

25 A: No.

1 Q: But there was no such reference to her moving out?

2 A: Not that I saw.

3 Q: There, there was clearly a reference. This is State's
4 39 regarding a reference when Renee moved out?

5 A: Right.

6 Q: And again, you've had and you had the opportunity to
7 review this particular exhibit; have you not?

8 A: Yes.

9 Q: This is a Defense exhibit?

10 A: Yes, I have.

11 Q: Okay, and is there any reference consistent with the
12 reference your brother made about Renee on May the 31st and my
13 mother would wash my mouth, but ---

14 A: I would, too.

15 Q: Yeah, I'm not even going to say it, but everybody
16 knows what we're talking about. If you don't I'll let you
17 read it, May 31st -- in any event there certainly is no
18 reference to another girl with that kind of expletive attached
19 to it in this calendar.

20 A: No, sir.

21 Q: Okay.

22 MR. HUMPHRIES: Beg the Court's indulgence just one
23 moment.

24 THE COURT: Yes, sir.

25 MR. HUMPHRIES: Thank you very much. Anything further?

1 MS. HANNA: Your Honor, we have no further questions
2 for Christine.

3 THE COURT: You may step down. Call your next
4 witness.

5 MR. MARTIN: Your Honor, can we approach the bench
6 just a minute?

7 (Whereupon, a bench conference was held in the presence
8 but out of the hearing of the jury.)

9 THE COURT: All right, we have come to a good
10 breaking point. I'm going to allow you to go back to the jury
11 room with a reminder please do not discuss the case. You may
12 go back at this time.

13 (Whereupon, the following takes place outside the
14 presence of the jury.)

15 THE COURT: All right, the Court has been informed
16 that that is the -- that those are the witnesses for the
17 Defense with the decision still out there as to whether or not
18 this Defendant chooses to take the witness stand.

19 MR. MARTIN: I would like a moment to talk with him.

20 THE COURT: I will give you that opportunity.

21 MR. MARTIN: We do have, while I'm thinking about it,
22 Judge, just asked the Solicitors about it, one of the
23 stipulations that is in evidence for some reason was approved
24 by Judge Rodney Peeples, and we needed to offer it to the
25 extent that we ---

1 MR. HEMBREE: I can tell you, Your Honor, we don't have
2 any objection to that.

3 MR. MARTIN: It's on the page -- there's a couple of
4 ways -- here's what we've got -- we could do another page and
5 sign it again and stick it on there before it goes to the
6 jury.

7 MR. HEMBREE: Any way you want to do it is fine with
8 me.

9 MR. MARTIN: Before it goes to the jury.

10 THE COURT: Usually stipulations are read unless
11 there are -- if they're -- they're just in evidence from
12 having read.

13 MR. HUMPHRIES: I'd just pull ---

14 MR. MARTIN: Well, let's pull that second page off
15 and leave it out.

16 THE COURT: You can. You can.

17 MR. HUMPHRIES: But let's mark it as a Court's Exhibit
18 just to keep it in the record.

19 THE COURT: That's fine. Just put that third as a
20 Court's Exhibit.

21 (Whereupon, Court's Exhibit Number Three [Signature Page]
22 marked for identification.)

23 THE COURT: No, no, no, wait just a minute. There's
24 a couple of issues. One is that I understand the third page
25 is being made a Court's exhibit. The other issue is generally

1 unless they're -- now, they are a document but the
2 stipulations are simply read into the record and they're
3 testimony like any other testimony.

4 MR. HUMPHRIES: That's right.

5 THE COURT: I have some concern about sending
6 back a portion of testimony as if it were more important than
7 another portion of testimony. All of the stipulations should
8 really be made a Court's Exhibit, not just part of it in the
9 Court's opinion.

10 MR. MARTIN: Well, Judge, then if that's the case
11 we've got the, we've got the bullet points over here that they
12 want to send back ---

13 THE COURT: And we haven't decided. You hadn't
14 decided about that yet. The Court has not decided. It may
15 just be demonstrative evidence in the closing. That has not
16 been determined yet.

17 MR. MARTIN: Anyway.

18 THE COURT: Now, if you guys can work something out
19 with that I'll be glad to hear it, any agreements that you
20 reach that changes the Court's ruling, but as it stands now
21 when it's a stipulation it's read just like anything else, and
22 if they need to hear that testimony again they come back out
23 and hear it just as they would hear any other testimony.

24 MR. HEMBREE: It would be -- I would liken it to Mr.
25 Sirles's testimony that was read into the record ---

1 THE COURT: That's right.

2 MR. HEMBREE: --- same kind of thing. We're not going
3 to send his sworn statement back.

4 THE COURT: That's correct, nor the doctor, her
5 testimony will not go back.

6 Yeah, we need to go through them with this in mind, too,
7 that if we have a written stipulation that I don't want the
8 stipulations to go back. I want them simply read into the
9 record and make sure that that does not happen.

10 MR. HUMPHRIES: Do we want to address the issue of
11 summaries at this point, the summary chart?

12 THE COURT: Be glad to. Well, I don't know. I think
13 Mr. Martin is wanting to talk to his client.

14 MR. HUMPHRIES: That's fine.

15 THE COURT: So, we'll -- we better take a break.

16 MR. HUMPHRIES: That's fine. We can do that.

17 THE COURT: Why don't we do this? Let's take a
18 ten-minute break at this time. See you back here in ten
19 minutes. If you do have any case law that you want to get it
20 to either myself or to Mary Margaret.

21 MR. HUMPHRIES: And I can give you the -- I didn't
22 bring it up. If you have -- it's State versus Gullede which
23 is the criminal case, and if you can't find it I'll be glad to
24 run downstairs and grab it.

25 *****OFF THE RECORD*****

1 (On the record.)

2 (Whereupon, the following takes place outside the presence of
3 the jury.)

4 THE COURT: The case that was cited for the
5 compilation or for the time line or the summary I guess is
6 really what the case is about basically is the summary that
7 was done by the State's witness that summarized I think about
8 money or checks or something, records.

9 MR. HUMPHRIES: Records, there's no question about it.

10 THE COURT: And the objection on the part of the
11 Defense was hearsay objection, but the Court found it wasn't
12 hearsay. There was a full opportunity to cross-examine on it.

13 MR. HUMPHRIES: Right, the witnesses were available.

14 THE COURT: I mean, it was just not -- so, it's a bit
15 different from what we've got here. What we've got here we
16 have the opportunity to cross-examine, clearly.

17 MR. HUMPHRIES: Uh-huh (affirmative response), no
18 question.

19 THE COURT: --- because anything that was put on
20 there was put prior to cross-examination. Hearsay, I mean, I
21 don't even have a concern about that and I think you had a
22 right to confront and deal with it. The only concern that I
23 have is that it is a portion of the testimony but I mean
24 that's the, that's the only concern that I have. I did note
25 though from the Defense that they basically took a portion,

1 too, and said, "Is this a fair summary of your testimony?"
2 They just didn't write it on or put it on the board but that
3 was -- it was, it was asked and answered. I'll be glad to
4 hear from each of you.

5 MR. BRITTAIN: Your Honor, I don't see how you could
6 read Gulledge to allow this particular document to go back in
7 there. I read it just a minute ago thinking of it more in
8 terms of admissibility and discoverability, and what is truly
9 a summary of one witness's testimony. This is, this is a
10 document that has been created by asking a last question of a
11 witness highlighting their testimony and summarizing it in one
12 sentence. Now, maybe that's proper legal work, but to somehow
13 memorialize that and send it back into the jury improperly
14 enhances that portion of the testimony.

15 THE COURT: It's a time line. I mean ---

16 MR. HUMPHRIES: It is a time line.

17 THE COURT: --- it clearly is a time line; and so,
18 what I -- what I need is case law on a time line, and I know
19 that time lines have gone in, but they have gone in by
20 consent. I've never had it disputed as in a case such as
21 this. So, I really need something on the time line. I'm sure
22 a time line would aid and assist the trier of fact. I feel
23 sure the Defense will argue that it could confuse the trier of
24 fact and that it's only highlighting the times the State
25 wanted to highlight. I know the arguments.

1 MR. HUMPHRIES: Of course, now, in fairness the State
2 certainly didn't object to the Defense applying the same
3 procedure in fleshing out more fully their time line. I mean,
4 that clearly was the -- our position from the very beginning
5 that they had the same opportunity to do that and just
6 declined to do that.

7 MR. BRITTAIN: Aren't we really talking about whether
8 this goes back to the jury or not?

9 THE COURT: Yeah, it can clearly be used ---

10 MR. BRITTAIN: He can, he can put that up on his easel
11 and go and tell them that's all Kahle Schettler said all day
12 long.

13 THE COURT: It can clearly be used demonstratively in
14 your closing without a doubt. The Court doesn't have a
15 concern about that at all in an argument type of form.

16 MR. HUMPHRIES: If -- we'll have a few minutes I believe
17 between the -- well, maybe we won't. You got somebody working
18 on it?

19 THE COURT: Well, let me ---

20 MR. HUMPHRIES: That's all right. We've got somebody
21 that's working on it now. Quite frankly, any time -- and
22 we've done, the Court may or may not know, although I'm trying
23 to remember if we did it in Bryant, but we've done it as a
24 practice since ---

25 THE COURT: It's done.

1 MR. HUMPHRIES: --- and I did it in Lexington.

2 THE COURT: I know, and because we've always done it
3 that way is not always the right answer, but -- and I do
4 recall it being done and it's been done in my courtroom but
5 it's not been challenged.

6 MR. HUMPHRIES: Well, and I guess that's the issue
7 because in -- since 1994 I have done it in virtually every
8 capital case, all of which have been reviewed and none of
9 which have been reversed or the Court has not commented
10 negatively on the use of a time line.

11 THE COURT: But it wouldn't have been an appealable
12 issue if it hadn't been preserved and that's the issue that I
13 see, that it has not been -- it just hasn't been challenged
14 until now, and it does feel very comfortable to do that
15 because we always have, but I do see the challenge and pay
16 close attention to it and see if there's any case law you can
17 give me.

18 MR. HUMPHRIES: Very good.

19 THE COURT: As it stands now it's for demonstrative
20 purposes in closing.

21 MR. HUMPHRIES: I understand.

22 THE COURT: All right, now, I need to go ahead and
23 question once again. Mr. Frazier, if you would please stand.

24 (Complies with request.)

25 THE COURT: Let me remind you that you are under

1 oath. Let me ask you also do you recall what I had given you,
2 the information I had given you regarding your Fifth Amendment
3 Rights?

4 MR. FRAZIER: Yes, ma'am.

5 THE COURT: All right, do you have any questions about
6 what I told you, what I went over with you?

7 MR. FRAZIER: No, ma'am.

8 THE COURT: All right, do you need to speak with your
9 attorney about that?

10 MR. FRAZIER: No, ma'am.

11 THE COURT: All right, have you made a determination
12 as to whether or not you are going to testify?

13 MR. FRAZIER: I believe so.

14 THE COURT: Okay, and what is that determination?

15 MR. FRAZIER: I'm not going to.

16 THE COURT: All right, I'm going to note for the
17 record that the Defendant has made his decision freely and
18 voluntarily, knowingly and intelligently and with the advice
19 of counsel. His decision is not to testify. I will charge
20 the jury that it cannot be used against you and cannot even be
21 discussed in the jury room. You may be seated.

22 (Complies with request.)

23 THE COURT: All right, we have really come to that
24 point in time where we will be -- well, we've got motions and
25 then we'll be -- the closing arguments as well as the charge

1 on the law. So, I need to get any information if you're still
2 -- if it's still your request to get this time line in. I
3 need to get whatever you can give me on that point.

4 MR. HEMBREE: And Your Honor, the -- we sent someone
5 downstairs to try to pull some cases on that right away. I
6 don't know that it will be essential to make that ruling right
7 now because we won't be sending the items back to the jury
8 room until the conclusion of the closing arguments and I
9 anticipate that the closing arguments might go on for a
10 significant period of time. Your Honor, one ---

11 THE COURT: That's a good point. I'll ask about that
12 in just a moment. Go ahead.

13 MR. HEMBREE: Thank you, Your Honor, and one last thing
14 is that the State does have one reply witness.

15 THE COURT: Okay, very well, all right.

16 MR. HEMBREE: Whenever the -- at the point and the time
17 when the Defense rests.

18 THE COURT: What we'll do for continuity and my
19 understanding is the Defense is going to rest when the jury
20 comes out.

21 MR. MARTIN: Well, yes, other than we have a
22 stipulation of fact here that we've agreed on which I would
23 read to the jury and that would be it.

24 MR. HUMPHRIES: And as long as Mr. Martin just reads it
25 to the jury and doesn't expound on it and I didn't object the

1 last time and I understand he's just trying to make things
2 more clear for the jury regarding the items, but we've taken
3 great pains when we read the stipulations just to read the
4 stipulations.

5 MR. MARTIN: I will just read the stipulation.

6 MR. HUMPHRIES: Very good.

7 THE COURT: All right.

8 MR. HUMPHRIES: Not to belabor.

9 THE COURT: All right, there'll be no expounding.

10 All right, okay, very well, then once you have -- you will
11 rest on the record. We'll go right into the reply testimony
12 and I will send the jury back.

13 All right, very good, we are ready for them.

14 (Whereupon, the following takes place in the presence of
15 the jury.)

16 THE COURT: All right, Mr. Foreman, ladies and
17 gentlemen of the jury, welcome back. We continue now in the
18 phase of the case where the Defense has the opportunity to
19 present evidence and testimony. Yes, sir.

20 MR. MARTIN: If it please the Court there is an
21 additional stipulation of fact which would be for the jury's
22 consideration and that is that the attorneys for the State and
23 for the Defendant have agreed as follows: that ---

24 MR. HUMPHRIES: Let me -- hang on just a second. I am
25 going to help because it -- do need some clarification. Let

1 me hold up the exhibit as you talk about it.

2 MR. MARTIN: Okay, okay.

3 MR. HUMPHRIES: Which one you got?

4 MR. MARTIN: State's Exhibit 35. They are that State's
5 Exhibit 35 at -- State's -- Defendant 35 at the triangle the
6 fence is 65 inches high, the sidewalk is 7 inches high.
7 State's Exhibit 34 at the X the fence is 70 inches high. The
8 sidewalk again is 7 inches high. State's Exhibit 36, Donna
9 Hobbs is 5 foot 4 inches in height and is standing on the
10 sidewalk.

11 In addition to that Your Honor, we have agreed by
12 stipulation that in this case a reward of \$50,000 was offered
13 on June 11th and was publicized in the Myrtle Beach and
14 Winston-Salem papers for some period of time after that.

15 MR. HUMPHRIES: That's correct.

16 THE COURT: All right, very good, that is now in
17 evidence for your consideration. Anything further?

18 MR. MARTIN: That's it. The Defendant would rest,
19 Your Honor.

20 THE COURT: Any reply?

21 MR. HEMBREE: Yes, Your Honor, the State has one reply
22 witness. The State calls Dee Mishler to the witness stand.
23 the State calls Dee.

24 THE COURT: All right.

25 WHEREUPON, DEE MISHLER WAS CALLED TO THE STAND, DULY SWORN BY

1 THE CLERK AND TESTIFIED AS FOLLOWS:

2 THE CLERK: Thank you. Please be seated. Speak right
3 into that microphone.

4 MS. MISHLER: Okay.

5 THE CLERK: State your name and spell your last name
6 for the record.

7 MS. MISHLER: My name is Dee Mishler, M-I-S-H-L-E-R.

8 DIRECT EXAMINATION

9 BY MR. HEMBREE:

10 Q: Ms. Mishler, if you would where do you live?

11 A: In Clemmons, North Carolina.

12 Q: And who are your mom and dad?

13 A: Bill and Agnes Poole.

14 Q: Those folks seated right back over here in the brown
15 jacket and your mom's in the white coat, white jacket?

16 A: Yes.

17 Q: Could you tell us about any relationship -- family
18 relationship you had with the victim in this case, Brent
19 Poole?

20 A: He was my brother.

21 Q: And Ms. Mishler, was there a point in time that you
22 became aware of a relationship between his wife, Renee Poole,
23 and the Defendant, John Boyd Frazier?

24 A: Yes.

25 Q: Do you recall when you became aware of that

Dee Mishler - Direct by Mr. Hembree

1147

1 relationship?

2 A: I don't recall exactly what date it was. I know that
3 he moved in on or she moved in on with him. I
4 don't know how long they were seeing each other before then.
5 I just remember that because that's my birthday.

6 Q: is your birthday?

7 A: Yes.

8 Q: And do you recall when Renee abandoned the marital
9 home and moved in with John Boyd Frazier?

10 A: Right.

11 Q: Now, I want to take you to Mother's Day 1998. Do you
12 recall that day?

13 A: I do.

14 Q: Now, where were you the late afternoon early evening
15 hours of Mother's Day?

16 A: At my mom and dad's house.

17 Q: And did you make preparations for a special event in
18 addition to Mother's Day?

19 A: We -- at some point my whole family was there.

20 MR. MARTIN: Your Honor, could we approach the bench
21 just a second.

22 THE COURT: Yes you may.

23 (Whereupon, a bench conference was held in the presence
24 but out of the hearing of the jury.)

25 THE COURT: Mr. Foreman, ladies and gentlemen of the

1 jury, we have a matter of law we need to put on the record.
2 We're going to allow you to go back to the jury room with a
3 reminder please do not discuss the case. We're going to have
4 you out very soon.

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

7 THE COURT: All right, I'll just note for the record
8 there was an objection -- actually, there was a request to
9 approach, and of course by the Defense, to find out where this
10 was going with this particular witness. The State then
11 informed the Defense that this witness was going to testify to
12 something that the Defendant said, that the Defendant had
13 allegedly cussed her out over the phone. That's the gist of
14 the testimony that's going to be presented. Then the Defense
15 objected saying they had never been provided that. Let me
16 though for the record though let the Defense put on the record
17 at this time specifically your objections.

18 MR. MARTIN: I would object to the introduction of
19 any statement through any witness made by the Defendant which
20 has not been provided under the rules of disclosure ---

21 MR. BRITTAIN: Rule 5.

22 MR. MARTIN: --- in the case, Rule 5 of the Criminal
23 Rules of Disclosure, a Brady motion was filed. Everybody
24 knows how old this case is and I believe that the rules and
25 Brady would require that this have been disclosed prior to the

Dee Mishler - Direct by Mr. Hembree

1149

1 commencement of the trial in order for it to be introduced as
2 evidence.

3 MR. HEMBREE: And Your Honor, I would -- obviously
4 Brady doesn't apply here because the statement will not in any
5 way be exculpatory, but let's go to Rule 5, Section A(1)(A),
6 statement of the Defendant, certainly any copy if it was a
7 written statement that we had regarding this matter that
8 certainly would have been appropriate to provide to the
9 Defense, but we didn't have that, didn't know of it until Ms.
10 Michelotti testified and Ms. Mishler came up to me during the
11 break to point out that there had been another conversation on
12 that same date about, about on May the 10th, Mother's Day, but
13 the appropriate part of this rule is the substance of any oral
14 statement which the Prosecution intends to offer into evidence
15 at the trial made by the Defendant, whether before or after
16 arrest, and this is the key part, in response to interrogation
17 by any person then known to the Defendant to be a Prosecution
18 agent. This was a conversation between the Defendant, John
19 Frazier, and a citizen witness, no -- prior to any crime being
20 committed, prior to any prosecution agents or law enforcement
21 being involved in this case. Rule 5 simply doesn't apply in
22 this instance.

23 THE COURT: I'd speak -- I think State v. Kington
24 indicates that statements to third parties does not apply but
25 let me hear from the Defense if there's anything that you need

1 to bring to -- if that's the grounds or the basis of this
2 objection it appears that that would be overruled but I will
3 be glad to hear from you on anything further.

4 MR. MARTIN: Just one second, Your Honor.

5 THE COURT: Certainly.

6 MR. MARTIN: Well, Judge, I think maybe what would
7 be proper if I knew exactly what the statement was going to
8 be.

9 MR. HEMBREE: Be glad to make a proffer, Your Honor.

10 THE COURT: All right.

11 EXAMINATION

12 BY MR. HEMBREE:

13 Q: Ms. Mishler, you had a conversation with John Boyd
14 Frazier on the -- in the evening of May the 10th, 1998?

15 A: Yes.

16 Q: Approximately what time?

17 A: By the time I talked to him it was probably around
18 nine or 9:30.

19 Q: And where were you when you had this telephone
20 conversation?

21 A: At Brent and Renee's house.

22 Q: You knew it was him?

23 A: Yes.

24 Q: And what did he say to you on the telephone?

25 A: We were waiting for Renee to come home. She had

Dee Mishler - Direct by Mr. Hembree

1151

1 indicated that she was moving back in that night. So, we had
2 gotten -- my brother had asked -- requested that I come help
3 him clean the house, and we had cleaned and waited and waited
4 and she didn't come. So, he called.

5 Q: He being?

6 A: Brent, my brother called.

7 Q: To?

8 A: To John's house.

9 Q: Okay.

10 A: Renee was there supposedly packing up her clothes to
11 come back home and I had mentioned she should be here by now;
12 and so, my brother tried to call and left a message or a pager
13 number and when the phone rang he said, "You" -- when his
14 phone at his house rang back, he said, "You get it. You get
15 it," and when I answered it it was John.

16 Q: And what did you say to him?

17 A: I asked where Renee was.

18 Q: What was his response?

19 A: "She's here with me."

20 Q: All right, did you have any other questions for him?

21 A: I said, "She should be here by now," and I was told
22 she wasn't coming back home, she was staying with him. I
23 said, "Well, we're here waiting. She's told my brother she's
24 coming, and may I speak to her?" He said, "She's not
25 talking to you. She's not coming back."

1 Q: And what sort of language was used in the course of
2 the conversation by the Defendant, John Boyd Frazier?

3 A: Extremely vulgar, every other word it seemed like was
4 a cuss word, and I finally at some point said, "Can Renee
5 hear what you're saying," because I was so shocked.

6 Q: The -- based on what you heard over the phone do you
7 have an opinion about the Defendant's emotional state at the
8 time he was talking to you on the telephone?

9 A: Based on how he was talking he was extremely angry.

10 Q: At whom?

11 A: At Brent for calling over there and bothering them.
12 He made very ugly references about our entire family.

13 Q: What did he say about your family?

14 A: That we were F'ing crazy and Brent was F'ing crazy and
15 I just know the next day I told my parents, "In all my life
16 I've never been talked to as disgustingly," as he had talked
17 to me that night.

18 Q: And how did the conversation conclude?

19 A: I just kept asking if I could speak to Renee and at
20 some point she spoke up.

21 Q: And I'm not going to ask you anything about that.

22 A: Yeah.

23 Q: Don't want to go into what Renee Poole might have said
24 to you or what you -- I'm not even going to ask you what you
25 might have said to her. We're not going to talk about that.

Dee Mishler - Direct by Mr. Hembree

1153

1 MR. HEMBREE: Your Honor, that would be the substance,
2 the proffer of the State as to this witness.

3 THE COURT: All right, yes, sir.

4 MR. MARTIN: Just a couple, could I ask a couple of
5 questions?

6 THE COURT: Yes, sir.

7 EXAMINATION

8 BY MR. MARTIN:

9 Q: Ma'am, how did you know who you were talking to?

10 A: Because he called back. I don't know if he said this is
11 John or if I just -- I'm not sure.

12 Q: Had you ever talked to John Frazier before?

13 A: No.

14 Q: And you say that a call came into your brother's home.

15 A: Brent's house.

16 Q: And you answered the phone or did he answer the phone?

17 A: That's not what I said.

18 Q: All right, I'm sorry. Tell me again then.

19 A: My brother picked up the phone and said, "You talk to
20 him."

21 Q: So, you're the one that spoke up ---

22 A: Uh-huh (affirmative response).

23 Q: --- and there was a male that you assumed to be John on
24 the other end of the line.

25 A: I didn't assume.

1 Q: Okay, okay, I'm just wondering how did you know? What
2 was it that -- you didn't know him. You'd never heard his
3 voice, how did you know?

4 A: I don't know if I said, "Is this John," or if he said
5 this was John, but I know that he started making -- I asked to
6 speak to Renee and she was there.

7 Q: Okay, let me be sure. So, you said he identified
8 himself one way or the other.

9 A: At some point.

10 Q: At some point and he asked to speak to Renee?

11 A: That's not what I said.

12 Q: Well, I thought you did.

13 A: I asked to speak to Renee.

14 Q: You asked to speak to Renee.

15 A: Renee was there with him.

16 Q: Okay, and this was on Sunday, May the 10th?

17 A: Right.

18 Q: At what time?

19 A: By the time we talked to him it was probably between 9
20 and 9:30 and I said, "Where is Renee, she's supposed to be
21 back home by now," and he said, "She's not coming back home.
22 She's staying with me."

23 Q: Okay.

24 MR. MARTIN: Two things, Your Honor.

25 MR. HEMBREE: No.

Dee Mishler - Direct by Mr. Hembree

1155

1 MR. MARTIN: Oh, I'm sorry.

2 MR. HEMBREE: That's all right. I've got one question.

3 REEXAMINATION

4 BY MR. HEMBREE:

5 Q: Ms. Mishler, have you since heard the voice of John
6 Boyd Frazier?

7 A: Yes.

8 Q: And was the voice you heard on that telephone on May
9 the 10th the voice of John Boyd Frazier?

10 A: Absolutely.

11 MR. HEMBREE: No further questions, Your Honor.

12 REEXAMINATION

13 BY MR. MARTIN:

14 Q: Did you talk to Renee Poole on the phone then?

15 A: Yes.

16 MR. MARTIN: I would object, Your Honor, as to the
17 introduction of the evidence. Number one it's improper reply;
18 second, as to the relevance of it.

19 THE COURT: All right, yes, sir.

20 MR. MARTIN: Thirdly, and let me say thirdly ---

21 THE COURT: Okay.

22 MR. MARTIN: --- as to the disclosure of the evidence
23 after the State has rested its case, this case is six to seven
24 years old. This information has never been provided, and I
25 think that under any rules, and if I need to go to the due

1 process aspects of the constitution, to call up a witness
2 after the Defense has rested its case that it is not provided
3 evidence on is improper.

4 THE COURT: You said improper reply and what was the
5 second one, I'm sorry?

6 MR. MARTIN: Relevance.

7 THE COURT: Okay, and then disclosure.

8 All right, yes, sir.

9 MR. HEMBREE: Well, Your Honor, I think the improper
10 reply and relevance are tied together. The objection really
11 is tied together. It's -- it is proper because it is
12 relevant. The Defense put up a witness, Christine Michelotti,
13 who went to great, in great detail talking about the fact that
14 Mr. Frazier and Mrs. Poole, that he didn't love her, that he
15 didn't care about her, that, you know, she was gone out of his
16 life, he really didn't, you know, it really wasn't any big
17 deal to him. Clearly the conversation with Ms. Mishler shows
18 that he is emotionally engaged in this relationship. He has a
19 very strong feeling about it. He expresses that feeling in
20 very, very strong terms and it goes, it is direct --
21 impeaches, directly impeaches the testimony of Christine
22 Michelotti, and we've already dealt with the issue on the
23 discovery, Your Honor, by point number three.

24 THE COURT: All right.

25 MR. MARTIN: Well, I'll say it again, Your Honor, this

Dee Mishler - Direct by Mr. Hembree

1157

1 is direct -- this is a statement that they allege the
2 Defendant made and after he exercises his right, and he told
3 you he wanted to wait to exercise that right to make that
4 determination whether to testify. Six years later and I don't
5 think these fellows had known about it until today apparently.
6 I agreed with that, but it is just unfair, unfair to bring
7 this kind of evidence of a statement made by the Defendant,
8 and if you're going to let it in I want to recess to look at
9 some rules. I just can't figure how this could be fair. The
10 Defense has rested its case. The Defendant has made that
11 determination. This isn't fair.

12 MR. HEMBREE: Well, he may not like it, Your Honor, may
13 not -- Mr. Martin may not like it because it impeaches one of
14 his witnesses that he's put up and relies a lot on. That's
15 clear, but it -- just because you don't like it doesn't mean
16 it's not fair. The rules say it's fair. It's the typical,
17 it's actually the typical way reply testimony works. This
18 isn't -- this isn't an unusual or some sort of off the wall
19 manner in which we're using reply testimony. This is exactly
20 what it's intended for is to give the State an opportunity to
21 address issues raised by the Defense. That's what we have
22 done. I don't have any problem if Mr. Martin needs, needs to
23 recess half a day to ---

24 MR. MARTIN: Well, I don't ---

25 THE COURT: --- look up the rules and read over them

1 and cogitate over them, we'll be happy to accommodate him in
2 any way.

3 MR. MARTIN: Well, not necessarily the rules as well as
4 to try to ascertain the facts surrounding the statement.
5 Again, it's out of the blue from nowhere, a statement by the
6 Defendant. If it was something other than that but I don't
7 ---

8 MR. HEMBREE: Well, Your Honor, even -- it doesn't even
9 matter. The rules don't require that it be disclosed when
10 used for this purpose.

11 THE COURT: No, and I've already said that it's not
12 Brady material and it doesn't fall under the Rule 5 and I've
13 cited the case that specifically says that to third parties
14 does not apply. So, that, the disclosure issue, I think, has
15 been, has been resolved at least unless there's something more
16 than Brady and Rule 5, which are the obligations of the State,
17 unless there's something else you can point to the disclosure
18 has been dealt with. I do see it's relevant in that it does
19 respond to the Defendant's sister's testimony where she was
20 basically saying they just were not in love, there was not
21 that emotional connection. This would indicate otherwise.
22 Therefore, it's relevant and I do think it's proper in
23 reply, but I'm going to give you an opportunity to bring to
24 the Court if that's your desire, and since you're surprised by
25 it and there's an admission here from the State that they've

Dee Mishler - Direct by Mr. Hembree

1159

1 just learned of it themselves I'm going to allow you the
2 opportunity to research whatever you need to research if
3 there's any other objection or concern you want to bring to
4 the Court's attention to rule on.

5 How much time do you need?

6 MR. BRITTAIN: We would want to look in ---

7 MR. MARTIN: May not, may not need much.

8 THE COURT: All right.

9 MR. BRITTAIN: We, of course, want to look into any
10 potential witnesses to verify this and that sort of thing.

11 THE COURT: Okay.

12 MR. BRITTAIN: That's what we're trying to do.

13 MR. MARTIN: Give us, give us just 10 minutes, Judge.

14 THE COURT: Okay, can do that.

15 You may step down, but you cannot discuss your testimony
16 with anyone. You're still under oath and in the midst of it,
17 all right.

18 ***** OFF THE RECORD *****

19 (On the record.)

20 (Whereupon, the following takes place outside the
21 presence of the jury.)

22 MR. MARTIN: We're trying to, I'm trying to ascertain
23 what effect if any it has on -- it is the first time I've seen
24 the statement. They may have given it to me, but I haven't
25 seen it.

1 THE COURT: Oh, is there some evidence now that the
2 statement has been previously provided?

3 MR. BRITTAIN: Yeah.

4 THE COURT: Okay, all right.

5 MR. MARTIN: Judge, just another moment.

6 THE COURT: Certainly. I'll note for the record that
7 they are given some additional time to take a look, oh, and
8 since you're here, Natasha, I'm going to say this because it's
9 been something that's on my mind, too, to the spectators that
10 are here, to the families that are here, this is serious
11 business and we all know that. The State realizes that. The
12 Defense knows that. We try these cases week in and week out.
13 We understand the seriousness of it, but because of the nature
14 of our profession quite often we will try to add some levity,
15 and you will see sometimes as we talk or we'll smile or we'll
16 chat about something, don't think for one moment that we don't
17 understand the seriousness of the proceedings around us. As
18 professionals we deal with this day to day and we need to
19 because of the stress of the -- and the nature of what we do
20 add some levity to it and we want to do it for your benefit
21 and for the jury's benefit as well because everyone here is
22 put under that type of stress; and so, I didn't want for one
23 moment for you to think that there are times when we're
24 smiling or that we may be laughing about something that we in
25 any way were acting unprofessionally, and I hope that you

Dee Mishler - Direct by Mr. Hembree

1161

1 didn't get that impression, and I hope to the contrary
2 that we've put you more at ease and put that jury more at
3 ease. So, if that has not been your impression, please inform
4 the Court and what I'll do is just have some stricter rules in
5 that regard, but I really want everyone here to feel welcome
6 even under these conditions and to feel as at ease as you
7 possibly can under these conditions.

8 *****OFF THE RECORD*****

9 (On the record.)

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

12 MR. HUMPHRIES: Just for the record, Your Honor, and let
13 me show you all this, furnished, let me see, furnished,
14 evidence furnished by the State the following audiocassette
15 tapes. In fact, what we did was later transcribe it but we
16 provided the Poole family interview with Detective Altman,
17 Sergeant King which was done on June 10th, 1998, and it was
18 signed by Morgan Martin on September 28th, 1998. So, they had
19 that in their possession. It was just in the form of a
20 cassette tape as opposed to a transcript.

21 THE COURT: All right, very well, even the Court had
22 made a finding it did not have to be disclosed. It was, in
23 fact, disclosed within one of the Pooles's statements.

24 MR. MARTIN: Could I -- what I'd like to do since
25 apparently we did get it, that may be true, what I'd like to

1 do if it is permissible to ask Ms. Mishler a couple of more
2 questions about the conversation under -- in the in-camera
3 proceedings.

4 THE COURT: And to determine what?

5 MR. MARTIN: The time, the time of the conversation.

6 MR. HEMBREE: Your Honor, there's no -- the statement
7 has been provided to Defense counsel. He's had an opportunity
8 to look at it. This is just a, this is just wasting time to
9 preview this witness, to do some discovery on his own, putting
10 her up here asking her questions. There is absolutely no
11 basis for that. Now, the Court's -- I don't, I don't -- the
12 Court's ruled, but I think the -- it sounds like to me the
13 objection as to the discovery violation would be withdrawn by
14 Defense counsel; is that true?

15 MR. MARTIN: No.

16 THE COURT: The Court, the Court ruled on it, but it's
17 been ---

18 MR. MARTIN: The Court has ruled I think.

19 THE COURT: --- since that time it's been determined
20 that it was in fact disclosed but the Court ruled on improper
21 reply and relevance and ruled against the Defense on that.

22 MR. MARTIN: Okay, let's go.

23 THE COURT: So, you're withdrawing your request to ---

24 MR. MARTIN: I'll withdraw my ---

25 THE COURT: --- proffer?

Dee Mishler - Direct by Mr. Hembree

1163

1 MR. MARTIN: I will withdraw my objection, the proffer,
2 the whole thing, let's go.

3 THE COURT: Okay, all right, let me let you know I've
4 rearranged our schedule a little bit. I know that we were
5 going to go ahead and charge. I said go ahead and order the
6 pizza. We're going to finish this testimony. We can be doing
7 motions and hopefully it will arrive soon thereafter. So,
8 we're going to take things in a little different order just to
9 let you know.

10 All right, is the State prepared to go forward at this
11 time?

12 MR. HEMBREE: The State's ready to go forward, Your
13 Honor.

14 THE COURT: Defense?

15 MR. MARTIN: Ready.

16 THE COURT: All right, we're ready for them. Yeah,
17 let me go ahead and put you back up on the stand, please,
18 before they come in.

19 (Whereupon, the following takes place in the presence of
20 the jury.)

21 THE COURT: Welcome back, Mr. Foreman and ladies and
22 gentlemen of the jury. We will continue now with the
23 examination of this witness, direct examination, yes, sir.

24 MR. HEMBREE: Thank you, Your Honor.

25 DIRECT EXAMINATION

1 BY MR. HEMBREE:

2 Q: Ms. Mishler, I believe when we last left you you were at
3 your parents' home on Mother's Day afternoon.

4 A: Okay.

5 Q: Is that -- do you recall where we left off your
6 testimony there?

7 A: Yes.

8 Q: Now, let me ask you this, did you have occasion later
9 that day to go to your brother, Brent Poole's house?

10 A: I did.

11 Q: Approximately what time did you arrive there?

12 A: Approximately seven o'clock.

13 Q: And what was the purpose of your visit?

14 A: We were going to clean the house and get it ready for
15 Renee to come home.

16 Q: And at this point she was not living in the marital
17 home.

18 A: No, she was living ---

19 Q: On the 10th of May.

20 A: Right.

21 Q: Who all -- who was there, who else was there besides
22 yourself at that point in time, seven o'clock that night?

23 A: My brother and my daughter, Kelly, and K.P.

24 Q: And K.P. is who?

25 A: K.P. is Brent's daughter.

Dee Mishler - Direct by Mr. Hembree

1165

1 Q: Now, what did you -- how long did it take you to get
2 things in order?

3 A: We worked at least a couple of hours, could have worked
4 a lot longer, but I felt like it was Mother's Day. That was
5 my extent of helping.

6 Q: And what other preparations were made to welcome home
7 Renee Poole?

8 A: Brent had stopped and got steaks. He was going to grill
9 out steaks. He bought her flowers, just -- and we were just
10 basically we were trying to get things looking nice for her.

11 Q: What time was she expected to return home that evening?

12 A: There was not a definite time. All we knew was that she
13 was going to John's house to pick up her clothes and she would
14 meet Brent there.

15 Q: Brent, Brent at his house.

16 A: At his house.

17 Q: Did she have a vehicle?

18 A: Yes.

19 Q: A pickup truck?

20 A: I think that's what she had.

21 Q: Now, did she arrive home that evening?

22 A: No.

23 Q: And at some point did you or your brother become
24 concerned that she wasn't there?

25 A: Actually I did. I kept asking, "Don't you think she

1 should be here by now?" Part of my asking was because I
2 wanted to head back to my house. I had my daughter with me
3 who was only eight at the time and, you know, I kept saying,
4 "She should be here by now. She's had enough time to get to
5 his house and to get back here." I suggested that he call and
6 find out where she was.

7 Q: And did he make a phone call?

8 A: Yes, he did.

9 Q: Do you know if he spoke to anybody?

10 A: I think he left a message. He didn't actually speak to
11 someone at that time, no.

12 Q: You didn't observe him have a conversation with anyone?

13 A: No, no.

14 Q: And was there a return phone call made to Brent's house?

15 A: Yes.

16 Q: Tell us about that.

17 A: The phone rang and Brent was very excited and nervous
18 and he picked it up and handed it to me and said, "You talk."

19 Q: Who was on the other end of the line?

20 A: John.

21 Q: The Defendant, John Boyd Frazier?

22 A: Yes.

23 Q: Dee, I want you to tell this jury what he said to you.

24 A: I asked if I could speak to Renee and he said I
25 couldn't, and I asked several times to speak to her and I

Dee Mishler - Direct by Mr. Hembree

1167

1 said, "Renee is supposed to be here. We're waiting. We've
2 got things ready. She should be here by now," and I was told
3 I couldn't talk to her, that she was not coming home to
4 Brent's house, that she was staying with him.

5 Q: What kind of language did he use in his conversation
6 with you?

7 A: Extremely vulgar, extremely.

8 Q: What type and I want to ask you specifically what words
9 did he use and in what fashion did he use those words? When
10 you say vulgar that's fairly general. I want to be more
11 specific.

12 A: The F word, GD, I mean, all sorts of language. It was
13 interspersed throughout the entire conversation, a very angry
14 tone to the point where I was scared.

15 Q: Was he screaming?

16 A: Loud voice, not screaming.

17 Q: Fair enough and it scared you?

18 A: Absolutely.

19 Q: How long did this conversation go on?

20 A: This probably lasted I would say at least five minutes
21 and in between I kept saying, "May I speak to Renee?"

22 Q: And were you ever, were you ever allowed to talk to
23 Renee?

24 A: Yes.

25 Q: Okay, ultimately.

1 A: Ultimately.

2 Q: Did he turn you down -- did John Boyd Frazier refuse
3 your request to talk to Renee on more than one occasion in
4 this conversation?

5 A: Yes, I was told I couldn't talk to her and she wasn't
6 coming home, that we were F'ing crazy and all these terms.

7 Q: Who was, and who was F'ing crazy?

8 A: My family.

9 Q: Who else?

10 A: Brent.

11 Q: What was -- in substance -- five minutes is a pretty
12 long time. What other substance of the conversation? Was it
13 pretty much a repeat of the same thing or did he say anything,
14 add additional comments to this discussion?

15 A: He -- I kept asking if I could speak to ---

16 MR. MARTIN: I object, I object to him leading the
17 witness.

18 THE COURT: All right.

19 A: I kept asking if I could ---

20 THE COURT: Wait, wait, wait just a minute. Please
21 ask you to rephrase your -- the question was did he have any
22 additional?

23 MR. HEMBREE: The witness has testified the primary
24 substance was that she wasn't coming home and that wasn't
25 going to happen. I just asked was there anything, anything of

Dee Mishler - Direct by Mr. Hembree

1169

1 substance in addition to that.

2 THE COURT: In addition, all right, I'm going to allow
3 it.

4 MR. HEMBREE: Thank you, Your Honor.

5 BY MR. HEMBREE:

6 Q: And maybe I didn't ask that question very clearly, but
7 was there -- you understand my question? Was there anything
8 of substance in addition to the representations that she
9 wasn't coming home? Anything in addition to that?

10 A: He was adamant that she was staying with him, that
11 that's where she was going to be, and during that five-minute
12 conversation he told me she was on the other end of phone. I
13 said, "So, she can hear everything," and he said, "Yes."

14 Q: After the phone conversation what did you do?

15 MR. MARTIN: I would ---

16 THE COURT: Please approach.

17 MR. HEMBREE: Your Honor, I just -- it's just to give it
18 some context. I don't have any ---

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

21 BY MR. HEMBREE:

22 Q: Ms. Mishler, what time did you go home that night?

23 A: Probably not -- probably ten or 10:30.

24 Q: And so, you hung around a little while after the phone
25 conversation?

1 A: Because I handed the phone to my brother and he began a
2 conversation with him.

3 Q: Very good. Please answer any questions the Defense
4 counsel might have for you.

5 THE COURT: Cross.

6 CROSS EXAMINATION

7 BY MR. MARTIN:

8 Q: Ms. Mishler, there's no question that the conversation
9 that you're referring to was May the 10th; right?

10 A: Right.

11 Q: And of course, obviously, the telephone conversation
12 wasn't recorded because it was just over family lines; right?

13 A: Right.

14 Q: Okay, now, it was Sunday night or was it Friday night?

15 A: Sunday night.

16 Q: Sunday night. You all were cleaning house on Mother's
17 Day?

18 A: Yes.

19 Q: Okay, there's no question this was during the period of
20 time when Renee was -- had moved out of the home and was
21 seeing John Frazier; is that right?

22 A: She was living with John.

23 Q: All right, and on that particular night either you or
24 Brent or somebody had been calling to John's house to talk, to
25 try to find Renee, I guess.

Dee Mishler - Cross by Mr. Martin

1171

- 1 A: Right.
- 2 Q: Had Renee been over at the house earlier that day or you
3 hadn't seen her at all that day?
- 4 A: Whose house?
- 5 Q: Your house or your mother's house or her house.
- 6 A: I don't remember that.
- 7 Q: Had you seen her earlier that day is all I'm asking.
- 8 A: I don't remember.
- 9 Q: Okay, all right, but you or whoever called to John's
10 house looking for her; right?
- 11 A: Right.
- 12 Q: Because you -- I mean, she had told you, you knew that
13 she was staying at John's house while she was moved out of her
14 home.
- 15 A: Right.
- 16 Q: All right, and the call that came back was a return
17 call; right?
- 18 A: Over at Brent's house now?
- 19 Q: Right.
- 20 A: Yes.
- 21 Q: At Brent's house, call back, when you say John called
22 back at Brent's house.
- 23 A: Right.
- 24 Q: All right, and it's fair to say you all got into an
25 argument about what was going on. Did you argue any with him

1 or did he do all the talking? That's all I'm wondering.

2 A: I don't know if you want to call it an argument. It
3 wasn't like we were having a pleasant conversation.

4 Q: I guess what I'm saying is you got aggravated with him,
5 I'm sure; didn't you?

6 A: I probably did.

7 Q: And you probably used some words yourself you wouldn't
8 want to use in public.

9 A: Absolutely not.

10 Q: You didn't?

11 A: I was sitting there. I had my nine year old daughter
12 was there and K.P. was there and that's why I kept saying,
13 "Can Renee hear what you're saying?" I never, ever used a
14 curse word.

15 Q: And it was after that then that Renee did come back to
16 the marital home; is that right?

17 A: Not that night.

18 Q: No, I know not that night. But the next day or two, you
19 said the 10th, this was the 10th and it was the next day or
20 two that she had come back to the -- to her home; right?

21 A: Brent waited up all night for her. She did not return
22 that night.

23 Q: I understand that. She did the next day or so.

24 A: The 12th.

25 Q: The 12th, which is two days later; right? That's all

Dee Mishler - Cross by Mr. Martin

1173

1 the questions I have.

2 THE COURT: Anything else?

3 MR. HEMBREE: Nothing on redirect, Your Honor. Thank
4 you. We'd ask that -- I know Ms. Mishler wants to stay in the
5 courtroom, ask her to be excused from the stand.

6 THE COURT: All right, you may step down, ma'am.

7 Is there anything further, any further witnesses?

8 MR. HEMBREE: Nothing further in reply, Your Honor.

9 THE COURT: All right, once, again, ladies and
10 gentlemen of the jury, I'm sending you back to the jury room
11 with a reminder please do not discuss the case. You may go
12 back at this time.

13 (Whereupon, the following takes place outside the
14 presence of the jury.)

15 MR. HEMBREE: Your Honor, I've got one point of personal
16 privilege made that I need to raise right now. It's just been
17 brought to my attention that Mr. Frazier made a comment to Ms.
18 Mishler as she passed by, "Thanks for lying." We're not going
19 to tolerate that, Judge.

20 THE COURT: No, absolutely not, I absolutely will not
21 tolerate that. I want to make that very clear. There'll be
22 no speaking in those kinds of terms back and forth to one
23 another. All right.

24 MR. MARTIN: We understand that, Judge, and we
25 apologize.

1 THE COURT: All right, now, because of the timing I at
2 one point said we're going to order pizza. Now I've asked her
3 to please cancel it as quickly as possible because I think we
4 can just take them to a meal like we've done before rather
5 than -- it will be faster than sit around waiting on something
6 to come to us. So, we're going to allow them to exit and go
7 to a meal. We'll remain here. We'll make sure our exhibits
8 are right. We'll get some parameters for our closing
9 argument. I think we have gotten the charge in place but I'll
10 make sure we do, and then we'll break for lunch as well. So,
11 let me make sure we can cancel that and I'll give you a heads
12 up as to when that jury is leaving. In the meantime we've got
13 some matters that we can deal with.

14 First of all, are we clear now on the charge? It appears
15 to me that we would have an accomplice charge with a mere
16 presence charge and we can have both or by consent you could
17 have neither if that's your desire.

18 MR. MARTIN: I think we would desire to have neither.

19 THE COURT: Okay, so, we won't have the accomplice or
20 the mere presence.

21 MR. HUMPHRIES: No, right, there's no problem with that.

22 THE COURT: Okay, all right, so, the charge is
23 complete. Is that the State's understanding?

24 MR. HEMBREE: Yes.

25 THE COURT: And Defense?

1 MR. MARTIN: It is.

2 THE COURT: Okay, all right, now, there's another
3 issue and you, I know, I have issues as well. We've got some
4 motions and things we need to be put on the record. Let's do
5 the motions first, but while it's on my mind I also want to be
6 sure that you are willing to come forward and let's go through
7 all of these exhibits because there is some confusion in
8 regards to the exhibits and we need to get that straight.
9 Also, as I had indicated previously I don't want written
10 stipulations sent back. They were read into the record.
11 If there is a document that has been stipulated to, of course,
12 that's in evidence. That's different.

13 MR. HUMPHRIES: Let me suggest that we not attempt to do
14 that until after the close of the arguments because these
15 exhibits are going to be everywhere.

16 THE COURT: Yeah, the problem with that though is
17 that I have is that you might want to pick up an exhibit and
18 you can't pick up a Court's Exhibit and you can't argue with
19 the Court's Exhibit.

20 MR. HUMPHRIES: That's fine.

21 THE COURT: And there's a big delay then after. You
22 know, they've heard the argument and it takes quite a while to
23 get it straight. You will go back through it, but hopefully
24 very quickly.

25 MR. HUMPHRIES: I understand.

1 THE COURT: I'd prefer to do it up front.

2 MR. HUMPHRIES: No, that's, that's fine.

3 THE COURT: All right.

4 MR. HUMPHRIES: Be glad to do that.

5 THE COURT: All right, we will do that next.

6 MR. HUMPHRIES: I guess it wouldn't be any faster to send
7 them to the pizza place.

8 THE COURT: No, at this point we'll just go ahead.

9 MR. HUMPHRIES: I'm just trying.

10 THE COURT: Me, too, but this will be fine. This
11 will work fine, and which means there will be pizza here for
12 us as well and while I know some of you may not want pizza I'm
13 going to encourage you to stay and eat here rather than go
14 because we may have questions or issues to deal with.

15 MR. MARTIN: So, we are just going to kind of stand
16 adjourned until the jury gets through eating?

17 THE COURT: No, we're going to have our motions at
18 this time and we're going to get our exhibits straight. Let's
19 go ahead with the motions first and then let's do the
20 exhibits. By then the pizza may have arrived.

21 MR. MARTIN: Then if it please the Court the Defense
22 would move at this time again for a directed verdict of not
23 guilty in the above-referenced case. We had argued at length
24 at the directed verdict stage at the close of the State's
25 evidence. I don't think that it is necessary for me to repeat

1 the extensive argument that was made at that time other than
2 to refer to it by reference and say that I make all of those
3 arguments, all of those points again in asking that each of
4 the charges as to the conspiracy, armed robbery and murder be
5 dismissed as they're even when considered in the light most
6 favorable to the State that there is an insufficient amount of
7 circumstantial evidence to send this case to the jury.
8 Again, the case law is that all -- that the cases that are
9 wholly circumstantial, which this is, that there must be
10 substantial circumstantial evidence of the guilt of the
11 accused and we believe that is not present and accordingly
12 would ask for a directed verdict of not guilty on all counts.

13 THE COURT: All right, yes, sir.

14 MR. HUMPHRIES: And I would incorporate by specific
15 reference my prior arguments on those matters and wouldn't add
16 anything further at this time.

17 THE COURT: And I was more specific previously and
18 will incorporate what's been said previously as well, but I'm
19 looking at the evidence in the state most -- I mean, in the
20 most favorable to the State, which is the non-moving party in
21 this case and I find there is substantial circumstantial
22 evidence to present the issue to the jury as to all three and
23 we did deal very specifically with the armed robbery, but the
24 finding of the Court was as to armed robbery as well.

25 All right, is there anything else? Any other motions or

1 anything at this time?

2 MR. MARTIN: Judge, the only thing that I would bring
3 up while we are still in session is that obviously it's a
4 retrial. All of us were involved in the last trial. The
5 evidence is somewhat different which is before the record and
6 so I would ask that we all be mindful in the argument of this
7 case to the jury not to confuse what might have been admitted
8 last time.

9 MR. HUMPHRIES: I think that's a, that's a fair warning
10 for both sides.

11 MR. MARTIN: And what was this time so that hopefully
12 we don't have to object a lot to each other's statements.

13 THE COURT: Absolutely.

14 MR. HUMPHRIES: And really quite frankly there are those
15 issues that aren't before the jury are pretty few in number
16 and actually the Solicitor and I have talked about those
17 specifically to -- so, we won't, in Judge Peeples's words,
18 crave reference to them in that view, but there are those
19 things that are out there because not only is this a retrial,
20 but it's basically almost a mere image of another trial as
21 well. So, we're mindful of that.

22 THE COURT: Well, it's primarily the Crawford the
23 statements that we've dismissed.

24 MR. HUMPHRIES: Primarily, there are some other
25 differences.

1 THE COURT: Some others as well, okay.

2 MR. MARTIN: Judge, there are. There's -- you know,
3 they had some points that they used the last time, but there's
4 a good bit that's not into evidence and they know a lot of
5 what it is, but you know, for example, I don't even know
6 whether -- an example is last time there was evidence about
7 this thing taking, she waited around five minutes before she
8 called the police. I don't believe that's in evidence now.

9 MR. HUMPHRIES: Well ---

10 MR. HEMBREE: Well, that is in evidence, Your Honor.

11 MR. HUMPHRIES: That the shots were at a certain time and
12 she approached the police officer at another time. It's a
13 reasonable inference.

14 MR. MARTIN: Well, well, maybe it's that, but I guess
15 my point would be they don't have the shots. They got
16 firecrackers from Ms. Jensen that were three instead of two
17 separate times. It's just not there, but I mean that's,
18 that's the kind of thing I'm talking about is that I want to
19 be sure we stick to what's in evidence.

20 MR. HEMBREE: Your Honor, if we -- if we -- if I go
21 outside the parameters of the evidence I'm certain that Mr.
22 Martin will object appropriately and I'll encourage him to do
23 that.

24 THE COURT: What he's trying to avoid though is many
25 objections, but, but we'll deal with them.

1 MR. HEMBREE: And quite frankly, Your Honor, we've done
2 -- I've done a good bit of editing based on the changes. I
3 mean, there's been a conscious effort -- there has been a
4 conscious effort, I'm sure Mr. Martin has done the same and
5 Mr. Brittain has done the same, there's been a conscious
6 effort to conform our closing arguments to this set of facts
7 and I'm confident that we'll both -- both sides will be able
8 to do that.

9 THE COURT: I will also let them know that what the
10 attorneys says in their closing arguments is not evidence and
11 they're to recall the evidence as they heard it from the
12 witness stand or see it in the documents that have been
13 entered into evidence.

14 MR. MARTIN: That's it. That's all I have at this
15 time, Judge.

16 THE COURT: All right, let's have you come forward.
17 We're off the record at this time. Take a look at these
18 exhibits. See if there's anything we need to argue about.

19 (Exhibits reviewed by attorney for the State and for the
20 Defense.)

21 ***** OFF THE RECORD *****

22 (On the record.)

23 (Whereupon, the following takes place outside the
24 presence of the jury.)

25 THE COURT: All right, we do need to put on the record

1 at this time -- I know I'm a pain about this, but I really
2 want to make sure that record is clear that we have, although
3 they have been entered into evidence by stipulation, the
4 parties have agreed that the videotape testimony as well as
5 the -- that the videotape testimony of the doctor and any
6 stipulations, written stipulations would not go back to the
7 jury.

8 MR. HUMPHRIES: In addition there have been several other
9 exhibits which are either duplicate or for some other basis
10 the State and the Defense chose to consent not to send back to
11 the jury. Would you like me to designate? Would you like me
12 to call them out for the record?

13 THE COURT: Yeah, let's do that for the record.

14 MR. HUMPHRIES: As to State's Four, the calendar time
15 line, that is ID purposes only, will be used for demonstrative
16 purposes in closings.

17 As to State's 26, that is ID only and that is the
18 statement of Renee Poole which was excluded by the order of
19 the Court.

20 As to State's 42, that is the micro-cassette interview
21 between Frontz and Frazier which will not go back to the jury
22 because it's been previously published.

23 State's 43 is a stipulation of fact by the parties. That
24 is not going back to the jury as it has been published.

25 And you want me to read yours?

1 MR. BRITTAIN: Yeah, yeah, go ahead. You just got your

2 ---

3 MR. HUMPHRIES: As to Defense Nine, there is no nine. As
4 to Defense 11, the Reid Study, it is for ID only and it's not
5 going back to the jury. That is the actual folder of the Reid
6 study.

7 As to Defense 12, Carolina Winds video, it's not going
8 back. It's been published to the jury.

9 As to Defense 13, Glock stipulation, it's been published
10 to the jury. It will not go back.

11 MR. MARTIN: Yeah.

12 MR. HUMPHRIES: The stipulation.

13 MR. MARTIN: The stipulation.

14 MR. HUMPHRIES: As to Defense 16, e-mail from Frazier to
15 Harris, that is a duplicate of State's 28 ---

16 MR. BRITTAIN: Right.

17 MR. HUMPHRIES: --- and will not go back to the jury.

18 As to Defense 17, Webster Auto Stipulation that has been
19 published to the jury, it will not go back.

20 As to Defense 18, the entire calendar, that is the day
21 timer. That is a duplicate of the State's original and will
22 not go back to the jury.

23 As to 19, the Hensley Composite, that won't go back to
24 the jury. There's no testimony regarding that exhibit.

25 As to the Defense 27, Statement of Bruce Wofford,

1 actually it's Wolford, but that one -- that was for ID
2 purposes will not go back to the jury.

3 Defense 28, statement of Jim Bollow for ID purposes will
4 not go back to the jury.

5 And 29, and it may be it's just not noted on here.

6 MR. BRITTAIN: North Carolina.

7 MR. HUMPHRIES: Okay, that happened in the Defense case.

8 That's the North Carolina Actual Innocence thing ---

9 THE COURT: Commission.

10 MR. HUMPHRIES: Commission and it will not go back to the
11 jury.

12 MR. BRITTAIN: Now, that check goes back; doesn't it?

13 MR. HUMPHRIES: Yeah, I know, yeah.

14 MR. BRITTAIN: Okay.

15 MR. HUMPHRIES: The only ones that are circled, and I
16 believe that is an accurate assessment of what's going back
17 and what is not based on the court reporter's notes.

18 ***** OFF THE RECORD *****

19 (On the record.)

20 (Whereupon, the following takes place outside the
21 presence of the jury.)

22 THE COURT: There's a couple of things that I did want
23 to address primarily dealing with what we will do now as far
24 as the argument, the closing arguments and the charge. What I
25 ask you to do is if you are here for the closing arguments

1 that you remain throughout an argument and maybe between the
2 argument between say hearing from the State and then hearing
3 from the Defense or right after the Defense before you hear
4 from the State again you will -- you could slip out, but don't
5 slip out in the middle of any arguments and there'll be no
6 slipping out or coming in during the charge. So, let me make
7 that clear. If you sit here for the charge you'll be sitting
8 throughout the charge and just stay still and the reason for
9 this is so that the jury isn't distracted from what the
10 attorneys are saying or what I say when I begin the charge,
11 and once again for those of you who just came in if you -- now
12 that we're going into the phase of the case where you'll be
13 hearing the closing arguments and the charge you can slip out
14 during the end of any argument, just if you'll very quietly
15 slip out during the end of any argument. You can't come back
16 in though because you won't be able to gauge the time. You
17 would just be out and during the charge on the law, that is
18 when I'm speaking there'll be no slipping out or coming in at
19 all. We'll have that door locked; and so, if you want to get
20 out before you -- before the charge you need to go ahead and
21 get out.

22 All right, is there anything from the State at this time?

23 MR. HEMBREE: No, Your Honor.

24 THE COURT: I see that Mr. Humphries is missing and I
25 also see that Mr. Martin is missing. We probably want these

1 individuals here.

2 MR. HEMBREE: Yes, Your Honor.

3 THE COURT: Let's get them here.

4 ***** OFF THE RECORD *****

5 (On the record.)

6 (Whereupon, the following takes place outside the
7 presence of the jury.)

8 MR. MARTIN: Can we approach the bench just a second?

9 THE COURT: Yes, you may.

10 (Whereupon, a Bench conference was held.)

11 THE COURT: All right, there's a bit of an amendment,
12 a change really, an agreement between the State and the
13 Defense in this case, but what we will do because of the
14 length of the arguments in the case is we will take a break
15 between Morgan Martin for the Defense and Greg Hembree for the
16 State. I will send the jury back for a very brief break so
17 that when they return they will be comfortable and attentive
18 and willing to sit through the remainder of the closing as
19 well as the charge.

20 MR. HEMBREE: Thank you, Your Honor.

21 THE COURT: All right.

22 All right, is there anything else that needs to be
23 addressed at this time outside of the presence of the jury?
24 Anything from the State?

25 MR. HUMPHRIES: Not from the State.

1 THE COURT: Anything from the Defense?

2 MR. MARTIN: No, Your Honor.

3 THE COURT: All right, we're ready for them.

4 (Whereupon, the following takes place in the presence of
5 the jury.)

6 THE COURT: Welcome back, Mr. Foreman and ladies and
7 gentlemen of the jury, you have reached now the point in time
8 in this case where you'll be hearing the closing arguments of
9 the attorneys. Now, let me give you an outline of how we will
10 proceed. I want to remind you first of all that what the
11 attorneys have to say in their closing arguments is not
12 evidence in the case. Now, don't misunderstand me. It's
13 designed to assist you in sifting through the evidence, but
14 you're to recall that testimony as you heard it from the
15 witness stand or as you read it or viewed it in the
16 documents that were displayed.

17 You will hear first from the State briefly on the law.
18 Then you will hear from the Defense, after which we are going
19 to take a break because these closing arguments are going to
20 be somewhat lengthy. I will be sending you back for a brief
21 break, bring you back out. You will then once again hear from
22 the State. After that I will charge you as to the law.

23 Now, as you know I need for you to be paying close
24 attention to all of the closing arguments as well as the
25 charge on the law and the reason I'm taking that break is so

Closing Argument by Mr. Humphries

1187

1 that you will have had your opportunity to break and will be
2 attentive to the remainder of the closing as well as the
3 charge on the law.

4 We'll begin at this time, yes, sir, Mr. Humphries.

5 MR. HUMPHRIES: May it please the Court.

6 Mr. Foreman and ladies and gentlemen of the jury, this is
7 the point at which I will for the State do what is
8 traditionally called open on the law and it's at this time
9 I'll discuss with you some of the aspects of the law as it
10 applies to this case that I believe are important for
11 the purposes of this case, and let me say at the onset that
12 while I'll discuss these principles of law with you certainly
13 as the Judge has already advised you she is the judge of the
14 law and you must take the law as she gives it.

15 But first of all, I want to say thank you. This has in
16 the realm of state court, particularly in South Carolina, been
17 a very long trial, and I told you from the very beginning that
18 some of the things that you would hear in this courtroom would
19 be well outside the parameters of your everyday life and you
20 may have found yourself at some point during this trial saying
21 something like, "Oh, my, I never knew, could it be." Well,
22 yes, it could be and yes, it is.

23 It's been disturbing, just the thought of what occurred
24 in this case is horrific, and it's tragic and it is outside
25 the parameters of your everyday life, but it doesn't make it

1 any less true.

2 Let's talk a bit about the charges, murder. It's the
3 unlawful killing of one human being by another with malice
4 aforethought.

5 Now, malice is a term of art we lawyers use, but let me
6 assure you this, you know what malice is. Malice is
7 wickedness. It's evil. It's depravity. It's the intentional
8 doing of an unlawful act. It is present in this case.

9 On this we can agree, William Brent Poole on June 9th,
10 1998, was murdered. About that there can be no question.
11 Armed robbery, armed robbery is the unlawful taking of the
12 goods of another by force or intimidation with the use of a
13 deadly weapon, and I brought these two exhibits out and they
14 weren't really discussed before you but they are into evidence
15 and you'll have them, but notably, this is the victim's
16 wallet. This is Brent Poole's wallet.

17 Now, you will recall this wallet was found in the yard of
18 Mr. Sirles. Brent Poole was killed in front of the Holliday
19 home, and on 10:34 p.m. on June 9th, 1998, we know that
20 William Brent Poole not only was in possession of his wallet
21 but used this credit card to make this transaction. Folks,
22 there really is no issue about that and I'm not sure whether
23 or not there's going to be any fuss about that, but it's
24 clear, and on this I think we can agree that there was an
25 armed robbery that night, taking and carrying away from the

Closing Argument by Mr. Humphries

1189

1 person and presence of William Brent Poole his goods or money
2 by force or intimidation with the use of a deadly weapon, and
3 there is no question about that.

4 Criminal conspiracy, criminal conspiracy is an agreement,
5 and the Court is going to give you a lengthy charge on
6 conspiracy and it will contain a number of elements, but what
7 the Court will say is the bottom line is there must be a
8 combination or an agreement for some mutual benefit and those
9 sound pretty much like innocuous words; don't they? But in
10 this case the mutual benefit was the death of William
11 Brent Poole. There is nothing innocuous about that. What the
12 Court will tell you is that there is not required in the law
13 of South Carolina an express or a spoken agreement.

14 What the Court will also tell you is that criminal
15 conspiracy can be established by the use of circumstantial
16 evidence alone because in truth conspiracies, criminal
17 conspiracies are most often not provable by direct evidence
18 and you'll recall direct evidence is what you taste, what you
19 feel, what you see, what you hear, what you garner with your
20 five senses, and certainly we don't have a witness who will
21 sit on that stand and say to you, "I heard them expressly
22 say," that is John Boyd Frazier and Kimberly Renee Poole,
23 "heard them expressly agree to this plan to kill William
24 Brent Poole," but criminal conspiracy can be proven and most
25 often is proven by circumstantial evidence by the conduct of

1 the parties and by their overt acts, that is the acts they did
2 in the furtherance of this conspiracy, and you may hear, in
3 fact, I can almost assure you you will hear that there's no
4 direct evidence, there's no physical evidence to establish the
5 conspiracy or for that matter any other offense with which the
6 Defendant is charged, and when you hear that argument I want
7 you to hear what the Defendant is really saying.

8 What he's saying, folks, is this. Credit John Boyd
9 Frazier for having enough sense to rid himself, to hide, to
10 secret away, to put in a safe place evidence that would
11 directly tie him to the murder of Brent Poole because when you
12 hear that argument that is precisely, precisely what is being
13 said, but the funny thing about circumstantial evidence, the
14 unique thing about circumstantial evidence is that it is not
15 so easily secreted away or hidden or discarded.

16 Circumstantial evidence, the Court will tell you that
17 circumstantial evidence is just as good, can be just as
18 compelling as direct evidence. There is no distinguishing in
19 the law between direct evidence and circumstantial evidence,
20 none. Despite what you've heard on the TV, despite what your
21 common knowledge may be or what you think you may know about
22 circumstantial evidence and I know we've often heard it,
23 particularly on TV, "Well, that's a circumstantial case,"
24 with the implication being that's not a good case, but the law
25 of South Carolina, the law which you have sworn to apply

Closing Argument by Mr. Humphries

1191

1 in this case is diametrically opposed to that position.
2 Circumstantial evidence alone can carry the day, can convict
3 in this case, should convict John Boyd Frazier but let me say
4 this, you will hear that cry go up, it's only circumstantial
5 evidence. You may hear this as well, it's just an inference,
6 an inference piled upon inference, piled upon inference, piled
7 upon inference. When you hear that, folks, you substitute
8 circumstantial evidence for that cry of inference upon
9 inference.

10 You may even hear unfair inference. You may hear
11 something that has an inference that might have two meanings,
12 three meanings. What I'm telling you today is that
13 circumstantial evidence is just as good and we rely on it but
14 not just that, not just that because the one compelling piece
15 of direct evidence about which there will be a lot of
16 discussion is the identification, the eyewitness
17 identification of this Defendant, John Boyd Frazier, by Mark
18 and Donna Hobbs. That ain't circumstantial. That's direct.

19 Now, all of you have been selected because, quite
20 frankly, both the State of South Carolina and the Defendant
21 believe that you can be fair and impartial and this is a
22 murder case. This is an armed robbery case and this is a
23 criminal conspiracy case and it's important and you may be
24 sitting there and saying to yourself, "Truly how can
25 I be qualified to be a judge of the law in this case?" Well,

1 I tell you perhaps in some other country, some other far off
2 place they may have professional jurors, and I don't know that
3 to be a fact, but we don't do that here and there's a very
4 good reason because our constitution not only allows but
5 demands that a man is judged by a jury of his peers and the
6 reason for that is this, you folks, each and every one of you,
7 have the common sense that the good Lord gave you. You have
8 life experiences which ultimately qualify you for this
9 service. You have ears to hear, eyes to see and minds to
10 comprehend everything that you've been told in this case.

11 One of the main things that you'll have to do in this
12 case is to determine the credibility of the witnesses in the
13 evidence presented to you and you may think there again, "Am
14 I qualified to do that? I don't have any specific training,
15 no psychological or sociological or physiological training in
16 order to do that." Well, folks, let me tell you something,
17 you judge the credibility of people you come into contact with
18 each and every day. You do.

19 Now, you may not say to yourself upon hearing something
20 from another, "You know, I hold your credibility in high
21 esteem," or on the other hand, "I disbelieve what you say
22 and I believe that your credibility is low." You don't say
23 that, but that is exactly the process that you go through.
24 How do you do that? Well, first of all you do it by
25 evaluating how they said it to you. You observe their

Closing Argument by Mr. Brittain

1193

1 demeanor, that is how they present themselves. You
2 compare what they've told you with either what you know
3 to be true or what someone else has said. It's something
4 you do every day, and I can't give you a formula,
5 wouldn't attempt to do it, but when you look at these
6 witnesses as they've testified, as you hear what they
7 say, then what you have to do is look here, "How do I
8 feel about what that person is telling me? Can I believe
9 them? Can I believe them?" It's something you do every day
10 and we're confident that you'll do it and do it well in this
11 case.

12 Again, I'm just opening on the law and you'll hear a
13 great deal more about the facts of this case, but the final
14 thing I want to say to you is this, you've been called upon to
15 render a very, very high service. Each of you is qualified
16 and each of you is sworn to do just that, and you're asked to
17 do one thing, after you sum it all up and all of the various
18 tasks that you have in this case, one thing, to do justice
19 because I tell you, folks, William Brent Poole deserves
20 justice. His family deserves justice, and John Boyd Frazier,
21 he deserves justice, too, and I submit he wants nothing less.
22 Thank you.

23 MR. BRITTAIN: May it please the Court?

24 THE COURT: Yes, sir.

25 MR. BRITTAIN: Mr. Solicitor, both of you.

1 Mr. Foreman and ladies and gentlemen of the jury, it's
2 supposed to be easy right now, easy. That's the way the
3 system is set up. You're not supposed to have any hesitation
4 right now. You've got a duty that you swore to and you come
5 from all walks of life. Some of you have probably been in the
6 service. When this thing gets done and the evidence is
7 finished. This is just lawyer talk now that you've got to put
8 up with. You've seen the evidence. It's you, the evidence
9 and your duty and here's the way the system is set up in this
10 country. We don't make juries struggle and wonder to convict
11 somebody of murder. It proves itself. You don't wonder about
12 it. You don't think about it. It's open, clear.

13 Judge Thomas will tell you what it means. There will be
14 words like firmly convinced. There is no guessing, no
15 wondering. That's other people's responsibility, not yours.
16 Your duty is to weigh the evidence under the standard the
17 Court gives to you. So, I want to talk to you about two parts
18 of the law and a little bit about how the facts in this case
19 play into it. One of them is what we call and I don't want
20 anybody to turn me off when I say this, please, the
21 presumption of innocence. Now, and I feel like when I say
22 this that juries just, "Uh-huh (affirmative response)." No,
23 sir, Americans have bled and died for that concept for
24 hundreds of years. It is precious and it's not just words.
25 Here's what it is.

1 I've got an old daddy who is a good man, a Methodist
2 preacher. We moved here to Conway in 1965 and the preacher
3 that was here ahead of him had a drunk in the church, and the
4 drunk would go down and buy his liquor right down here in
5 Conway and the preacher before my daddy had a deal with the
6 liquor store owner to call the preacher and the preacher would
7 go down there put his arm around the guy but the liquor store
8 owner didn't to sell the liquor so the preacher would buy the
9 liquor and pour it out, keep the guy from drinking.

10 When we moved to town on a Tuesday the preacher told my
11 daddy about this little arrangement. So, over there about
12 Thursday sure enough the liquor store man called. My daddy
13 goes down to the liquor store, goes in, takes the bottle out,
14 is coming out the liquor store and slips the liquor bottle in
15 his pocket.

16 All, right, when my momma goes to the Women's Society
17 Christian Service meeting that Sunday afternoon and they don't
18 -- hadn't really met everybody yet and somebody leans over
19 behind my mother and says, "Our preacher has a drinking
20 problem," and the lady sitting next to that woman said, "Tom
21 Brittain don't have a drinking problem." At home that night
22 at supper my momma asked my daddy what he was doing coming out
23 of the liquor store.

24 Now, there's three women in that story, the one who
25 presumed guilt. He wasn't guilty of drinking no liquor, but

1 she presumed that. My mother, God love her, she's still here,
2 who demanded an explanation, no, sir, and then there's old Ms.
3 Halls who's gone to glory she presumed him innocent. That's
4 what we're talking about. That's your duty. That's the law
5 above all laws, a constitutional law. So, that's where we
6 start with presuming innocence and piece
7 by piece with hard concrete evidence it must be taken from
8 anyone sitting in that chair.

9 So, let's think for a minute together with that and
10 reasonable doubt, firm conviction of guilt as a backdrop and
11 let me just take you through a little bit of how this
12 investigation unfolds, but keep it in mind that as we start
13 Frazier is presumed innocent.

14 Quickly on this evening his name surfaces. They have it
15 in their power to clear this up immediately, but for whatever
16 reason there's dillydallying, but they send a person, a
17 policeman over to the house of John Frazier. Now, they don't
18 expect to find him there. I don't know. I'll bet you one
19 thing whoever it was that took that man's life was not
20 sleeping in his or her bed between five and six a.m. the next
21 morning. I'll bet you that ain't what happened. No, they
22 don't expect to find him there, but low and behind in close
23 time parameters they find him there and that policeman tells
24 you he woke him up. Now, we all know what that means. You've
25 seen people come to the door with their hair all standing up

1 funny or whatever it is. You can tell you woke them up. That
2 is huge. That is a big deal in this case and they go over and
3 find his other car and touch it to see if it's been driven in
4 the night. All they had to do was ask him. He told them
5 Kahle Schettler's name.

6 Now, you're going to hear about well he didn't know
7 exactly where he lived and all that. So what. He got over
8 there and touched that car. All they had to do was touch that
9 other one. Ask Frazier, ask him to search his house. They
10 didn't do any of that. I mean, my good friend and he is my
11 friend, Francis Humphries says, "John Frazier got rid of this,
12 got rid of that." When? This thing happens down here around
13 12 midnight. They got a cop on his door right after
14 five o'clock who woke him up, when is the time? He didn't get
15 rid of this day timer if that hurts him anywhere. That's
16 there. So, my point is his personal whereabouts add to his
17 innocence. Normally we'd be here in a murder case
18 arguing about where was he, where was he, where was he? We
19 went right to his house. Where was he? Well, he was there.
20 So, that helps his side.

21 Let's go to the crime scene. Now, normally somewhere
22 there is a fingerprint, a hair, a footprint. What's a murder
23 case normally look like? We'd sit here for hours arguing
24 about whether that's John Frazier's footprint or somebody
25 else's. They don't even have a footprint. We aren't arguing

1 about any evidence at the crime scene. There ain't one single
2 shred of evidence to put him at that crime scene. That's what
3 murder cases are made of. There isn't that.

4 I mean, when you start looking at the crime scene
5 evidence, now, look, they got the SBI, the FBI checking the
6 sand, checking all this sort of, nothing. Nobody got up there
7 and said, "Here it is," and I'll tell you how bad it gets
8 from the crime scene, their evidence is that there was one of
9 all these different kinds of guns that could have done it.
10 Their own witnesses testified that before this was ever
11 even an issue, in March the conversation was that Frazier
12 didn't even own that kind of gun. He told that a long time
13 ago. Their own evidence on that -- let me tell you what we
14 normally do in a murder case. You've normally got the gun.
15 The gun is here and we're trying to figure out who had it and
16 whether it matches the bullets or not. That's what murder
17 cases look like. We're handling physical evidence. Why?
18 Because this is the kind of evidence that gives a jury firm
19 conviction of guilt. Worry when they start off for the
20 prosecution talking about circumstantial evidence. We
21 don't have a gun. We don't have a hair. We don't have
22 footprints to be talking about. So, as this investigation
23 unfolds where do they go next? They go to John Frazier's
24 house. They go talk to John Frazier. You heard it. He has a
25 conversation with Lieutenant Frontz and they send two North

1 Carolina police over there to talk to him. Well, what we're
2 normally fussing about is what he said and whether or not it's
3 voluntary and should it come into evidence or not. All that's
4 here before you or whether or not he said something that ties
5 him here, ties him there. See, you don't have a confession in
6 this case. You've got cooperation with the police and you
7 have the statements. Now, they did bring the guy in
8 here to say he sweated and all that. Yeah, they got sweating
9 for what it's worth out of those policemen, but what we're
10 normally dealing with, we don't have in this case, that would
11 be the kind of thing that would give you a conviction. If a
12 police officer got up on that witness stand and said, "I asked
13 John Frazier about it and he admitted he did it," now,
14 wouldn't that make you feel a whole lot better about your job
15 of finding him guilty if that's what your job is? Yes. You
16 don't have that. You don't have the hair. He was at home.

17 So, what happens? None of that pans out for them.
18 Nothing is working. They're checking the crime scene, they're
19 checking it all, nothing is working. ``Wait a minute, there
20 was somebody at that hotel, somebody at that hotel that called
21 up the next day. Now, they couldn't really tell us
22 anything." It was nighttime. They said it was a white male,
23 didn't want to come down here, didn't want to participate,
24 but, ``Hey, that's about all we've got. That's about all
25 we've got. Let's get back with that crowd." Good people

1 now, don't get me wrong, good people, and by this time they've
2 got John arrested. So, we go to the old photo lineup
3 business, Photo lineup to get an identification out of the
4 Hobbses.

5 Now, I say this to you, you've got to use your own common
6 sense. I hope I can find it. Here it is. I am an old
7 lawyer, been in that courtroom a long time. I don't know in
8 an eyewitness case if I've ever heard the eyewitness
9 looking at her own photograph admit that she can't recognize
10 herself, and remember it's two seconds.

11 Now, I know they picked him up out of a lineup and that's
12 why all this other information, which is not required by the
13 Defense at all, have been brought to your attention how
14 something like this could occur. It's not that unusual. The
15 evidence before you that is absolutely uncontradicted
16 is that the leading cause for a person being convicted when
17 they are not guilty is when the jury relies on an eyewitness
18 identification. Now, my friends, that is where you are.

19 See, normally, if you've got a confession to go along
20 with it it's just supporting information, or if you've got a
21 hair that's matched it's just supporting information, but in a
22 situation like this it becomes the information. You were
23 taken there. You were taken to the scene. I'm human. I was
24 sitting in here watching your reactions. I saw you when you
25 saw that video, staggering. It makes perfectly good sense as

Closing Argument by Mr. Brittain

1201

1 to why the Hobbsses were uncomfortable the next day about what
2 they could and couldn't do, could and couldn't see. Those
3 photographs are taken in the daytime.

4 Now, all we're saying is this, is the fact that she can't
5 pick herself out on her own picture that she produced as far
6 as evidence is that a reason to doubt? You bet your bottom
7 dollar that's a reason to doubt. You're not trying to figure
8 out whether John Frazier is guilty or not, but look, God knows
9 that. That's not our system. Your job is this, "Have I sat
10 up here and had people come in this courtroom and prove to me
11 beyond a reasonable doubt that he's guilty." That is your
12 job, I submit to you. Now, you listen to what the Judge says.
13 That's where we are in this country. It has got to be proven
14 right in here, not by a suggestion. Sure, I object to
15 inferences on behalf of my client. Doesn't every person?
16 This is serious business for everybody, serious business, and
17 I say to you that when you listen to the charges that you'll
18 get from this Court about what level of confidence you were
19 supposed to be given before you find people guilty of this
20 type serious charge you will have to turn your back on common
21 sense and the evidence in this courtroom in order to convict
22 John Frazier. There is not enough evidence in this courtroom,
23 it would send to those others as a part of this, it would defy
24 imagination to think that the kinds of evidence that support
25 conviction in this country with these charges that are not

1 here. What do they have?

2 Now, look, this case is not about the full texture and
3 substance of the relationship between John Frazier and Renee
4 Poole. Oh, it's certainly a part of it and there's a lot of
5 evidence about it all over the map and I'm willing to submit
6 to you possibly all of it is true. Now, when a man and woman
7 get to laying around outside of marriage it's bad for
8 everybody and kind of like what Mr. Humphries said, I think
9 we've all heard things that rock us to our socks, but listen,
10 none of that equals murder. They are people within the -- a
11 mile of this courthouse doing things they shouldn't
12 be doing and laid up with each other and all that. That's,
13 that's the bad thing that happens in this old world, but you
14 know, I look at it like this, even those dancers, all of them
15 are children of God. We all make mistakes. We all are
16 sinners standing in need of the Lord, but that doesn't get you
17 to murder. In fact, you could take every single piece of
18 evidence they've got and believe it and you don't have murder.
19 Really in the end you've got him, if you believe the Hobbses,
20 in spite of all of the evidence to the contrary, the
21 phenomenon that has been established to you by these experts,
22 that how this can happen and how the research is that it
23 happens often. You still don't have John Frazier. There's
24 really not direct evidence because he's blocks away from
25 wherever this happened. Oh, it all looks suspicious. We're

Closing Argument by Mr. Brittain

1203

1 talking about murder and proof. You haven't been shown
2 sufficient proof to return a verdict of guilty and there
3 should be no shame in it, my friend, for it is not your
4 job.

5 MR. MARTIN: May it please, the Court?

6 THE COURT: Yes, sir.

7 MR. MARTIN: Our legal system has been long haunted by
8 the ghosts of the innocent man convicted, long haunted by the
9 ghosts of the innocent man convicted. Everybody is entitled
10 to a fair trial. Everybody is entitled to justice. Not only
11 though is Mr. Frazier on trial, in a case like this we're all
12 on trial. We're all on trial. This is a day that is so
13 important. I can't tell you how important it is not only to
14 John Frazier but to all of us for it has to deal with the
15 standard by which we rule ourselves, that we govern
16 Ourselves, that we make the decisions of life and death, of
17 penitentiaries, of all of those things.

18 I, I know that each of you want a fair, fair trial. You
19 took a solemn oath to participate in a fair trial. This legal
20 system of ours has been here a long time and there has been a
21 lot thought about over the years that I'd never participated
22 in and certainly you haven't either, but there is a reason for
23 the way we do things, time tested, forged on the anvil of
24 greatness and of history. So, we do trials in a certain way
25 and the foremost pattern of that is the evidence with which

1 you convict a fellow citizen is from witnesses, evidence that
2 comes from the witness stand or as introduced into the
3 evidence -- into evidence for you to consider. There is no
4 other place to get it from. I don't care what you know, about
5 what you read, about what you heard about what somebody's
6 sister may know. That's nothing to do with this case.
7 Shouldn't be. We've taken an oath that it wouldn't be and it
8 wouldn't be fair if it were to be because the only thing that
9 can be tested is that which is brought to the courtroom, and
10 I'll tell you something else, John Frazier didn't testify in
11 this trial, and the Judge is going to tell you that you can't
12 consider that for or against him. Now, you've heard from him
13 and I'm going to talk about that in a minute, but she's going
14 to tell you you can't consider that for or against him, you
15 know. So, boy, that's what people say about a thing like
16 that.

17 So, what you going to do if you get back there in that
18 jury room and one of you looks at the other one and says, "He
19 didn't testify. I don't like that." What are you going to
20 say about that? I tell you what you're going to say, I hope,
21 and that is that the Judge -- "we took an oath to follow the
22 instructions of the Judge in rendering our decision," and as
23 I talk to my client I tell him these good, honest people will
24 follow the instructions of the Judge and if you can't add to
25 whatever information it would take to make their decision

Closing Argument by Mr. Martin

1205

1 there's no need to, a fair trial.

2 Now, you heard from John Frazier for 45 minutes and you
3 did that through his telephone conversation with Frontz, Bill
4 Frontz and with the Agent Bowman of the State Bureau of
5 Investigation of North Carolina, and you know as I know that
6 he has told them he was at home. That is an alibi.

7 Now, it's unconfirmed by another person, but that is all
8 he can tell you if that's the truth. He has told you, he has
9 talked, he has said what there is to say there. The decisions
10 that you have to make will include the evidence of John
11 Frazier. You've got that with you through the testimony I've
12 just talked about and we'll talk about it in detail in just a
13 moment.

14 I'm going to talk to you a few minutes, and I hope to
15 goodness I don't bore you and I hope I don't aggravate you by
16 talking too long, but this day won't come again for the
17 finders of the facts and that's who you are. In this case the
18 prosecutors and I, we've been dealing with it for several
19 years. You've been brought in here in one day, one week,
20 excuse me, not one day, four days you've got to digest all of
21 this. That's a lot and sometimes when you hear things the
22 first time it don't register with you, but please
23 be patient with me and I will not bore you I promise you
24 because I told you when this case started that this case was
25 about eyewitness identification and that's what it's about,

1 and I told you that I would show you step by step how good,
2 honest people make mistakes through the power of suggestion,
3 forced choice, a whole litany of things that I'll tell you
4 about.

5 The red flags that will show you, I will point out to you
6 to show you why you cannot trust the reliability of that
7 eyewitness identification, not because those folks lied to
8 you, not because they're bad people but because of the
9 circumstances in which all this occurred. Now, before I get
10 into that I want to talk just a minute about the other items
11 of evidence that will be forwarded to you and Mr. Humphries is
12 right. Now, he, he is a good lawyer and he tried very well in
13 his lawyerly way to sabotage anything that I or Mr. Brittain
14 may say about inferences. So, we're saying to you that they
15 don't have any evidence that means John Frazier over here
16 hid it somewhere. Well, they can say that in every case. If
17 you ain't got any evidence, well, somebody hid it and so
18 they're real smart. So, you convict them anyway. Now, how
19 much sense does that make? How fair is that? Inference, you
20 want to be convicted upon inference, because you're going to
21 hear a lot of different inferences of some of the facts that
22 were introduced into evidence in this case. Now, and the
23 thing that is critical I believe is that you understand that
24 there is a difference between an inference and evidence.
25 There is no direct evidence that John Frazier is

Closing Argument by Mr. Martin

1207

1 guilty of a crime. There is some direct evidence that the
2 Hobbses says John Frazier was at the Carolina Winds Motel that
3 night. "That's there. I saw him there." That is direct
4 evidence.

5 Now, again that's no evidence he's guilty of murder
6 because they didn't see him with a gun, didn't see him
7 kill anybody, didn't see him at the crime scene, none of that.
8 So, that's a whole 'nother bridge you've got to cross if you
9 ever get past the eyewitness identification, but
10 circumstantial evidence is different from direct in that you
11 don't see it, hear it, smell it, touch it, taste it, all of
12 that. It is a secondary fact from which a principal fact may
13 be inferred. Now, I didn't make that up. That's the law.
14 People a lot smarter than I am figured that out, and in this
15 case all of the evidence is circumstantial.

16 Now, Mr. Humphries, I don't mean -- that don't mean you
17 can't convict him. Circumstantial evidence if there's enough
18 of it, if it's substantial enough and if it is good enough and
19 if it gets you where you need to go that's fine, but the
20 difference between direct and circumstantial is you better be
21 careful with circumstantial evidence that you make the right
22 inference from it because it's dangerous if you don't.

23 For example, there was a relationship between John
24 Frazier and Renee Poole, two or three months long, that it was
25 sexual in nature, no telling as Tommy Brittain said exactly

1 what. Now, is that a fact from which you can infer that he's
2 guilty of murder? Is that the secondary fact is that there
3 was a relationship and you can dress it up and call it an
4 affair and do whatever you want to. It's the
5 same thing. There was a relationship there. Can you infer
6 then the murder? I hope not because if you do, if that's a
7 rational inference that since there was an affair there's a
8 murder there wouldn't be enough undertakers in this country to
9 bury the people that would have to be buried. Your common
10 sense, two witnesses that you didn't hear from are common
11 sense, you know what your common sense you know you cannot
12 rationally infer that.

13 Another one, the TZ75, he, the evidence shows once owned
14 a TZ75 pistol and they would want you to rationally infer that
15 that is a fact, that that's a fact upon which you can convict
16 John Boyd Frazier, hence it rises to the level of
17 circumstantial evidence and I hope I'm not boring you but this
18 is important because it's that subliminal field between
19 inference and circumstantial evidence that is important.

20 You know, a lot of times lawyers in trying to talk about
21 circumstantial evidence and tell you how good it is will
22 talk about a cable. You know how metal cable is put together.
23 You've got a half a dozen strands and you'll wind them
24 together, and if you unwind it and you take them one at the
25 time they aren't so strong, but if you weave them together

1 then they become strong, but that, that's a good argument, but
2 that cable has to be made of circumstantial evidence, each
3 strand has to be a piece of circumstantial evidence, not an
4 inference. You can't weave inferences together. So, I am
5 going to ask you don't pile inference upon inference. It must
6 rise to the level of being more than an inference, but a piece
7 of circumstantial evidence and when you go through the
8 evidence in this case you're only left with one thing and that
9 is the eyewitness identification.

10 Now, and there's another thing. Where is the talking
11 points? I'm going to find it before I go on. I know it's up
12 here somewhere. Where is the board that's got -- oh, I see.
13 That was right in front of my eyes here. I want to talk with
14 you about this just a minute before we go any further. I want
15 -- because this is -- the Prosecutor put this together and
16 they've got a bunch of inferences on it, but I was thinking
17 about it, I was looking at this thing, you know, a witness
18 would testify for either 10 minutes, 30 minutes or 40 minutes
19 and then they would say, "Well, does it fairly summarize your
20 testimony that," whatever it is here and you know what
21 it reminded me of? I call this now my political board. This
22 is like a, this is like a political campaign, those 30 second
23 television commercials you hear, you know, when Kerry is
24 running against Bush and Bush against Kerry and they'll whip
25 him up on the screen and they'll say, you know, "George Bush

1 voted against Medicare for the elderly. We can't elect a man
2 like that president, `` and then they'll go on to something.
3 Well, what they don't tell you is as old Paul Harvey would
4 say, ``They don't tell you the rest of the story, '' and if
5 you're Democrat, I mean, they do the same thing to John Kerry,
6 whichever, but my point is you can't get the truth in a
7 30-second sound bite. That's one of the problems wrong with
8 this country today is all these commercials where you try to
9 sound bite every -- these are sound bites.

10 The relationship, I don't know much what to do about that
11 other than it existed, but I will tell you that there is
12 insufficient evidence in this record to indicate or to prove
13 to you that the relationship, the affair, the fact that she
14 moved out of the marital home in with him, wrong as it can be
15 for both of them, as was a lot of the conduct of them and a
16 lot of the witnesses in this case, it does not -- there's
17 nothing there that rises to the level of making this a motive
18 for murder. It don't get past that one inference to
19 circumstantial evidence hump.

20 You know, if there was some document where they -- it was
21 written out, ``I'll kill him before daybreak, '' or something
22 there, but you know, again, they take frequent meetings. Well,
23 how many meetings have they established? How many meetings
24 have they established, frequent meetings where they could have
25 discussed, could have discussed the crime because central to

Closing Argument by Mr. Martin

1211

1 all this is this conspiracy with Renee Poole. That's where we
2 weave it all in and walk in through the back door what you
3 can't through the front door.

4 Now, the Judge will charge you just like a conspiracy is,
5 in fact, an understanding between people that they're going to
6 do something, in this case between those two that they're
7 going to murder Brent Poole. Now, what's the evidence of
8 that? Well, one, they say is this frequent meetings. I don't
9 know, don't look like to me they proved a lot of meetings.
10 There were probably more meetings than they proved between two
11 people living together, frequenting a club, arguing with each
12 other, breaking up, whatever that may be, but there is no
13 evidence that any, not one shred that in any one of
14 these meetings there was a discussion, a planning to commit a
15 murder. The only one that comes within a hundred miles of
16 there is our old friend Bruce Wolford's testimony that at his
17 house while he lay in another room about to go to sleep from a
18 migraine headache on medication that he heard some obscure
19 conversation while John and Renee were in the other room about
20 a trip to Myrtle Beach and then they probably got on one of
21 these little things down here somewhere and details, details.
22 Well, what kind of details? That's what we want to know;
23 isn't it? Wanting you to speculate. You cannot, you cannot
24 convict John Frazier in this case unless you do it upon
25 speculation, assumption and jumping to conclusions. That's

1 one of those things. Where is the evidence that they -- well,
2 it was in their action. They went to Myrtle Beach. That's
3 not evidence of a conspiracy. They called a babysitter. How
4 many people do that when they're going on vacation? They walk
5 down the beach. All of that just isn't linked up to a plot to
6 kill. Some meetings, you've got to do more than meet. The
7 mere fact that the Defendant may have associated with another
8 person does not rise to the level of conspiracy. That ain't
9 there. Now, you can weave quite a little story about it but
10 if you'll break it down piece by piece where is the evidence
11 for that?

12 The TZ75, the TZ75, all right, another piece of evidence
13 that they would claim, another fact that they would claim
14 rises to the level of circumstantial evidence is this TZ75.
15 What do you remember about that? Has it struck you yet that
16 you wonder just what the relevance of that is? I want to be
17 sure that we do understand what the evidence is on that, and
18 that is and they learn from John Frazier, he's the one
19 told, ain't nobody ever proved that he owned a TZ75 till he
20 told them, okay, Bowman in the yard while he's sweating
21 profusely, another piece of great evidence that they want you
22 to convict him on, just, it is just all so painfully obvious
23 with what they're trying to use underscores the fact they
24 don't have a case. The TZ75 though he once owned it, and the
25 evidence from their witnesses, Todd Fain and Kahle

Closing Argument by Mr. Martin

1213

1 Schettler is that he had sold it at a gun show prior to ever
2 meeting Renee Poole and another little thing on this calendar
3 you'll have in there you'll see where there was a gun show on
4 the calendar. Low and behold, Old Frazier did at least go to
5 a gun show at one point in time, whether he sold it at that
6 one or not that is evidence that he frequences these gun
7 shows, but he had sold the gun.

8 Now, you would -- but nobody ever places him with the gun
9 after that. So, what did he do then to try to make something
10 out of nothing? They said, "Well, was anything particular
11 about that gun? Was there anything?" Well, old Todd Fain
12 who once owned it said, "Well, it jammed with me sometimes
13 when I was shooting reloads," and we went through all of that
14 kind of stuff, but the evidence is that this gun on that night
15 did not jam, and specifically, and I asked Todd Fain
16 specifically did that gun ever fail to fire when
17 you hit -- if you -- when you shot it? No. Well, this gun
18 left four unfired cartridges there. That's a different thing.
19 So, and I asked Collins, I said, "You know, a gun jamming what
20 does that mean?" "Not a lot really. Could mean it's
21 dirty." "Could it -- any gun jam?" "Yeah. Lot of reasons
22 it could," and they can talk about, "Well, this kind of
23 bullet it don't work just right," but the bottom line is,
24 folks, it is just so unbelievable that that is considered
25 evidence from which you ought to make a strand and a cable and

1 convict a man of murder. I mean, the man told you that there
2 -- he -- they had and I'm about to forget myself. They didn't
3 prove he was killed with a TZ75. That was one of at least 38
4 different makes of guns that could have done it, all of which
5 could jam, and I don't know whether I'm beating a dead horse
6 with you or not but I'm learning because they put it out there
7 like it's something and I just hope to goodness you aren't
8 duped by that, one of 38 different guns. "Well, it jammed."
9 Well, that ain't, that ain't what was happening here.
10 That is not evidence. That is not -- that gets you
11 nowhere within the room as to where we are. Look at the
12 bullets. You'll have them back there. They were unfired.
13 Jamming, jamming is when you -- the gun fires and the bullet
14 goes out and the automatic kickback. It doesn't fully or all
15 the way expel the spent shell. That's not what we're talking
16 about here. If it mattered at all, but even if that gun
17 Frazier had did misfire or jam it still gets you nowhere,
18 nowhere.

19 Time off work, there's another piece of evidence. Well,
20 let me back up. I said it myself. Here's another fact from
21 which they want to make evidence. Well, let's analyze that
22 because maybe if you look at it right to start with said,
23 "Well, now, that's, you know, he wasn't at work. He had asked
24 for time off work." Well, on the surface, well, maybe that's,
25 that's strange, gave him opportunity, I guess, didn't it,"

Closing Argument by Mr. Martin

1215

1 but now, look, opportunity to do, opportunity to conspire and
2 frequent meetings equal zero. Opportunity don't get you to
3 where you need to go, but if you look at that evidence even
4 more closely it -- he had worked eight days straight. He
5 worked eight days straight. He had worked his two days off
6 and he asked Calvin Harris on June 2nd through an e-mail, now,
7 a man conspiring to commit a murder that they claim he was
8 doing at the very time he did it he's going to e-mail this to
9 his boss at a place of work so it can be preserved for
10 posterity? Now, where -- "Calvin, I want some time off."

11 MR. BRITTAIN: Number 28 I think is the number.

12 MR. MARTIN: I thought I had them laid out. They've
13 been moved a little bit. "I want to request Monday, Tuesday
14 and Wednesday, 8th, 9th and 10th off so I can have three days
15 off to recoup from the week. Bruce will be here so that the
16 shift could be covered without any problems, but if there is I
17 will be at home to be called if needed. Please let me know if
18 this is okay with you."

19 Now, and that's sent on June 2nd. Now, they've got a
20 little sticky here on June 2nd. They've got another little
21 political bulletin for you, "Requests time off from work."

22 And then -- and they got here Renee Poole meets with
23 Defendant at Welford home. I want to talk about that one,
24 too, but then what they're going to infer to you is, well,
25 they met on the 2nd. There was an opportunity to conspire;

1 and so, he goes to work that night and calls and says, e-mails
2 Calvin, ``Can I have time off?'' Now, me I would have done it
3 by phone. So, if Calvin ever come in and said that I'd say,
4 "You're lying," you know, but there's an e-mail here, but now
5 if -- but again, it's strikingly strange if you will think
6 about this thing. He works from 11 till seven and he sent it
7 at work it appears, and if he'd sent it on the 2nd that's more
8 than likely that's Tuesday night, not Monday night, possibly
9 could have been done Monday in that 30 minutes or so after he
10 got to work, but again, I just tell you those are things you
11 need to consider but what I believe to be overwhelming is that
12 he says in this thing, ``but if there is a problem I will be
13 home to be called if needed."

14 Worked eight days straight, put it in an e-mail, asked
15 for time off and the Solicitor I don't -- I ain't quite got
16 this point myself. Well, has he ever asked for three days off
17 before? I don't -- I think that what he had done is worked
18 eight days straight, worked through his days off and had got
19 another day off in the process, but I know this is a fact.
20 See this calendar here? All this blue, January and this is
21 things the Defense have brought you now, with absolutely no
22 burden to prove anything to you. All of these are days off by
23 John Frazier for one reason or another, three or four days at
24 a time. Isn't that what we're talking about? Ah, three days
25 off, well, January four, three, middle of the week now,

1 they're middle of the week. Those aren't weekend days there
2 okay, February, the whole week. He must have been sick then,
3 laying out or something, here March three days off, Wednesday,
4 Thursday, Friday, Wednesday, Thursday, Friday. It's all over
5 the place. So, I say to you and these are the kind of things
6 you have to look at in examining just what something means,
7 does it get from inference to evidence of. This is not what
8 he did on the week of June the 9th, 8th, 9th, 10th, is not
9 uncommon. It is what? Again, that strand, that cable that's
10 holding the bridge is getting shakier and shakier.

11 The auto exchange, there's another fact from which you're
12 asked to infer murder. Now, again, well he had switched cars.
13 Well, let's examine that. Let's examine that. They call
14 their witness. There's a couple of things I want to talk
15 about with the car. Number one, he told Kahle Schettler, "I
16 want to exchange cars with you so that you can check this
17 thing for a noise." Now, is that the first time he had
18 talked to Kahle Schettler about that? No. He shows up on the
19 afternoon of the 8th, the day before, seems to me like an
20 awfully close time line if you're executing a plan for murder
21 that started weeks before and says to him then and again now
22 think about this, folks, this is the same time he's going to
23 be off work. Isn't that kind of not -- "I'm going to have a
24 few days off, take my car and check it," not, "just let me
25 borrow your car," Monday to Thursday the first time he had

1 ever asked I believe that's on one of the little political
2 points there but as Paul Harvey would say, "Let's look at the
3 rest of the story here."

4 He was off for several days. He wanted him to be able to
5 check the car. He borrowed a car with bald tires that the
6 owner wouldn't drive to Myrtle Beach he says. He left his car
7 with a mechanic. I mean, that's the thing that gets you. You
8 know it's not like he went to some other girlfriend's or over
9 to some stranger's house. It was somebody he knew. It was a
10 mechanic. He traded cars with him. Now, so, you get to the
11 second prong of that story is because there's some more blurbs
12 about it over here.

13 Well, he runs back over there Wednesday morning. "Give
14 me my car back. Don't even ask about the noise, better get it
15 back before something happens." Once again, now, that's
16 their evidence. Those are the, those are the blurbs. Those
17 are the summaries of the testimony. Goes early that morning,
18 don't ask about noise, as Mr. Brittain says kind of pales in
19 comparison to blood, DNA and confessions and all that stuff,
20 but that's what we're dealing with here. So, I am
21 painstakingly trying to go through each of it with you because
22 this is so important as to what you base your decision on and
23 how you read it, but now what would you do, think about
24 this, think about this, if you are at home and somebody knocks
25 on your door at 5:40 in the morning and you go to the door and

Closing Argument by Mr. Martin

1219

1 it's a policeman where is your heart going to go first of all?
2 I know where mine would go, and then he says, then he comes
3 in, well, the good thing is he don't tell you about anybody
4 being dead in your family right off but then he says obtusely,
5 kind of or confuse, what would seem to me maybe to be a little
6 confusing to Frazier, ``Well, we've got a missing person's
7 report out of Myrtle Beach about Myrtle Beach, a black
8 Blazer.'' I don't know exactly what was said, but Mills came
9 in and did all that with him and then comes back to, ``Where
10 is that black Blazer? You got a black Blazer?'' ``Yeah, the
11 other car there, yeah.'' ``Where is the black Blazer?''
12 ``It's with Kahle Schettler. I traded cars with him.'' Well,
13 now if he was trying to hide that fact wouldn't he lie to the
14 policeman at that time? Now, they try to make a big deal out
15 of the policeman said, he said, ``Where does Kahle Schettler
16 live,'' and that Frazier lied to him about that. I don't
17 believe that's the way you get to proving a lie there. We
18 don't really know exactly what Mills said to him; do we? And
19 we don't know exactly what Frazier said, and we know this now.
20 We do know this from the witness that had testified in this
21 case a lot of them try to stretch what ought to stop at A over
22 to B, but in this case they want to turn that into something
23 so, so sinister when, in fact, it's just as reasonable as
24 rain. He doesn't call at 5:40, 20, whatever time it was and
25 in some panic, I guess, that he's got to go get the car,

1 probably waits till Schettler is reasonably up and he's
2 probably thought about it in the meantime, if he's not guilty,
3 "What in the world, what's going on here? What's going on?"
4 And so, he calls over there and says, "Give me my car. I may
5 -- I'll come get my car," and he goes and gets it. Is that
6 that odd that he would do that? Is that evidence of murder?
7 Is that a secondary fact from which you can believe, can
8 rationally infer that he committed murder?

9 You know, the whole thing gets about the car is and as
10 Tommy said they could have checked the car. You know, if they
11 went over there and they checked, they went over and checked
12 the Blazer according to Mills, and of course it ain't been
13 anywhere according to him because the hood's cold, and we
14 always, "Well, why in the world didn't they go back and check
15 the other?" I don't know but people make mistakes. The
16 police make mistakes sometime. They don't do that, you know,
17 but I tell you then what becomes strikingly strange about
18 this car business is they then decide that that car is what
19 got him to Myrtle Beach to do the deed, and so, the SBI and
20 the FBI set out to link it to Myrtle Beach one way or the
21 other and they are, folks, all powerful investigative people
22 armed with the greatest of technology. You know why today you
23 can spit in a trashcan and 17 years later they can get your
24 DNA and convict you of it, but in this case they -- the
25 stipulation had been read into the record. They checked it

1 high, they checked it low. They took these floor mats and
2 they sent them off and they shook them and they scraped
3 them and I told you about your good common sense. Now, what
4 does your common sense tell you about sand sticking? Can you
5 vacuum it out, number one? No. If you took it and beat it
6 against that wall for 30 minutes you wouldn't beat all the
7 sand out of it, and you want to know why I can tell you that?
8 These tennis shoes that the victim was wearing you see the
9 sand still stuck on those things since June 6th, 1998, none
10 out of that car, none. What did that report from the FBI tell
11 you up there? No match to the sand from the victim, to the
12 sand of this automobile and I tell you that if John Frazier
13 had got out of that car in Myrtle Beach, had gone down to the
14 beach and have committed the murder that they're telling you
15 he did, would have got back in that car and driven anywhere at
16 all, I don't care where he took his shoes off or whatever
17 theory you could come up with how he hid evidence, but if
18 he had done that there would be some of that sand on those
19 floor mats today, and they was -- well, now, don't let me
20 forget now. Schettler cleaned the car. Well, he got us
21 another little sticky down here, but like Paul Harvey says
22 now, "Let's look at the rest of the story." What did Kahle
23 Schettler tell you? "I didn't clean all of the car. I
24 vacuumed it, in my shop vac right there for the police
25 to get." He wouldn't have got it all out of there but they

1 had that, too, "and I cleaned the windshield." That's what
2 he said.

3 Now, special Agent Webster's report says, "Car very
4 clean." Well, Kahle Schettler told you what he did to the car
5 from the time that he loaned it to Frazier till he got it back
6 and that was he vacuumed it out and he cleaned the windshield
7 and then there's something about, and again, now, we keep
8 opening up this box and looking at it, well, what about the
9 bug splatter and what about that, now, folks, is that
10 important or not? I don't -- you know, really, it doesn't
11 matter what I think is important. It's what you think is
12 important, but you know it's kind of like I told you in
13 opening statements, you know, sometimes if you want to figure
14 out where the truth is you look at the little things as much
15 as you do the trunk of the tree and the trunk of the tree in
16 this case is Mr. and Mrs. Hobbs, which I'm coming to and I
17 know you all are hoping that I will get to it sooner rather
18 than later, but, but Kahle Schettler tells you, "I drove to
19 Myrtle Beach the Friday night after that, and it struck me of
20 all the bugs on my car when I got down there and they were not
21 like that on my car when John brought it back." The pictures
22 of the car are in evidence. He did not -- he specifically
23 said he didn't wash the hood, the lights and all of those
24 things and I tell you that I believe Kahle Schettler, I know I
25 shouldn't say what I believe, but the evidence would show the

1 appearance and demeanor that he was a truthful witness.

2 Why then was there no bug splatter? Why if the Hobbses
3 are right can they -- can no way put that car in Myrtle Beach
4 and the closer you look at it the more it looks like it didn't
5 go to Myrtle Beach. Maybe that's why they can't put it in
6 Myrtle Beach.

7 Eyewitness identification, the leading cause of wrongful
8 convictions in this country. The North Carolina Actual
9 Innocence Commission, the National Institute of Justice, this
10 is a burgeoning problem, and I told you this was a red letter
11 day and you're part of it. So, let's examine the eyewitness
12 identification of Mark and Donna Hobbs. I told you I was
13 going to tell you about it. I want to do that, and you can
14 judge.

15 Now, I will say from the beginning, put the composite up
16 here, that these, Mark and Donna Hobbs, from all I know are
17 good and decent people. I'm not here to tell you that they
18 are purposely lying to you about what they saw, but
19 they're mistaken and I'll -- and here's how they got there.

20 You've got to look at this thing. You've got to check it
21 and you've got to recheck it, but now there's two tests in
22 this because you know what the eyewitness identification that
23 is -- the evidence there is the memory. It's the memory.
24 There's blood. There's sand. There's hair. In this case
25 it's memory. It's what's in the head. Now, it's not like a

1 video camera. You've got a video which we'll talk
2 about in just a minute which you can go pull back your video
3 camera of what you did on Christmas in 1997 and you can see
4 what you wore. You can see what grandmother wore. I can go
5 back and see what my decedent father had written on his cap
6 at Christmas that time but the human mind does not work that
7 way. Can you remember where you were Christmas of '98 and
8 what everybody had on? No. The human mind don't work that
9 way, and secondly, the human mind don't get better with time.
10 Memory doesn't improve with time. If it did you would
11 remember what happened in the first grade better today
12 than you did the day after it happened.

13 So, now, that being said how do the Hobbses get to where
14 we are? I think there's some -- that the two tests that they
15 did to work off of is one is the composite because you've got
16 to test that memory. You've got to test that trace evidence
17 and if you'll remember when we had this witness on the stand
18 from SLED and she was talking about trace evidence, the one
19 thing I asked her if it was important was isn't it important
20 to secure that evidence from the time it is collected until
21 the time it is tested? Yes, they gather it, they take it,
22 they tape it. They don't let anybody mess with it because
23 it's got to be preserved to be tested and if it is
24 contaminated it will not be proper for tests and the results
25 from the test will not be what, reliable.

1 Now, see, the dangerous thing about memory is you can't
2 put it in there and preserve it and it is, common sense tells
3 you and Elizabeth Loftus told you and Brian Cutler told you
4 that memory is malleable. We can be influenced when we don't
5 even know we're being influenced about what we remember about
6 what we saw, and in this instance, in this instance the first
7 test of what they saw was the composite done a day or two
8 after they saw what they say they saw. Now, I tell you
9 another troubling fact about this is never was a statement
10 taken from these two eyewitnesses by anybody at the
11 Myrtle Beach Police Department keeping for us so we could look
12 at what did they say the person they saw looked like? It's
13 not there. Bill Frontz told you it should have been done, but
14 it's not there. So, we don't have that base line to come back
15 after they make an identification and check it. There's two,
16 two ways to kind of check that memory best. One is that, take
17 a base line so you can go back and measure it. The second is
18 a blank lineup and probably I know most of you say, "I still
19 don't understand what a blank lineup" -- I tell you what a
20 blank lineup is. That is when you put a spread out that
21 doesn't have the suspect and you check the people out. It's
22 just to see are they -- will they pick out somebody that we
23 know was in prison on that date, and if they do then you know
24 that there's some problems there and if they don't, you know,
25 well, maybe they -- maybe they're really clued in, they're

1 not, suggestiveness isn't getting them there or whatever.
2 So, you do it. That wasn't done, and there's no base line to
3 go back on. So, the only test that we've got that we can work
4 with for a base line is this composite drawing over here and
5 they both tell you that it don't look like Frazier and they
6 say now they weren't satisfied with it. That's one of the
7 things they recall. There's a lot they don't recall, but that
8 they recall. They weren't satisfied, that the forehead wasn't
9 right and the eyes wasn't right.

10 Well, guess what these are? Eyes and foreheads that were
11 available. Now, they say there was 250 of one and a hundred
12 of the other and, "We're just busy, I mean, you know, I just,
13 I just couldn't do much with it." Well, you know, I
14 understand all that but this is a murder case now and how hard
15 if you're looking for big round distinctive eyes is it to take
16 one of these or foreheads, if you're talking about a high
17 forehead what's so hard about being able to pick out one of
18 those? I don't know it just troubles me that none, that none
19 of that if we're looking for a man with a high forehead and
20 big eyes, and of course, what's big eyes and round eyes may be
21 subject to inference, too, but this just don't feel good to
22 start, there's a red flag there, there's something ain't right
23 about that, but okay, maybe, you know, they just made a
24 mistake. We've really got to check that memory then through
25 this photographic, go back to the photographic lineup over

Closing Argument by Mr. Martin

1227

1 there. That's what we're going to use.

2 Now, here's, you know, this is important. This is the
3 test. This is the SLED work on the DNA. This is what's so.
4 We want, we want a fair test because the only way, the only
5 way, the only way that you can get a reliable result, it still
6 may be wrong or it may be right, but the only way you can get
7 a result that you can rely on to convict is with a fair test
8 and in this case we didn't get a fair test. What did the
9 expert and there's several -- common sense will tell you that,
10 number one, you can look at them and see, black, black, the
11 forehead is high, the eyes are distinctive, the rest of them
12 you can't even tell they got eyes in this thing, but in trying
13 to figure out to show you there is this Wofford study that was
14 done and 48 out of 60 strangers picked the same guy. They're
15 just as good as the Hobbsses are. I tell you what that is,
16 that is they focus on side, this, that and the other but that
17 is just like this little die I got in my pocket here. It's
18 got one through six on it and it's got a one on it. It's got
19 a one on it and if I lay down here and roll this thing, roll
20 that 60 times, 48 times it's going to come up one. Now, would
21 you gamble your money with that kind of die if you were
22 betting against the house? If you had the one I reckon
23 you would, but if the house had the die would you play against
24 it with your money? How about your life, how about the next
25 50 years in the penitentiary would you play with it that way

1 and that's exactly what this comes down to.

2 This was not a fair test and then to complicate that they
3 did it without the blank lineup, without a base line, and then
4 they do it in this simultaneous fashion which the North
5 Carolina Actual Innocence Commission tells you, "We prefer
6 sequential, one at a time." Why, why, and this is a critical
7 point, why, because if you put them all together it causes
8 people to make relative judgments, to eliminate and maybe pick
9 the one who looks the most like and strikingly strange enough
10 what did Kent Robey tell you that they said when they
11 identified, particularly Mark Hobbs identified, number one,
12 "That's him. He most closely resembles." He didn't say,
13 "That's him." Hobbs told you that, too, but now here's
14 where the power of suggestion and confirmation sets in, but
15 those are the things that they got there, this test, red flag
16 after red flag after red flag.

17 Then they call back. Of course Hobbs can't remember
18 exactly when or where but Robey says he called back that
19 night. They wanted to know, said, "You picked the suspect."
20 What did the doctors tell you that that confirmation, that
21 immediate feedback, which again people who study that say it's
22 a bad thing. What does it do? It builds a false confidence
23 and if there's one thing for sure there's never been two more
24 confident people than Mark and Donna Hobbs. They're certain,
25 sure, and that's a scary thing in and of itself. How can they

Closing Argument by Mr. Martin

1229

1 be so sure of something they saw six years ago? And they
2 didn't tell you anything but, "I make this identification in
3 court from my personal unadulterated observations on the beach
4 that night." It's too good to be true, and when especially,
5 think about this, now, folks, how about that video? How much
6 light? I think they finally said it was dimly lit but enough
7 light to see. Okay, all right, well, now it is in the
8 nighttime. Scott Brown said it was darker than usual, the
9 first officer, cloudy, darker than unusual that night. The
10 only light they got is one coming off of that motel to make
11 that. They get a two-second glance in the nighttime of a
12 stone cold stranger and they call the police the next day and
13 don't have near the information they apparently have later,
14 but you've got that video which shows you and if you don't
15 think that video is an accurate representation or recreation
16 the State has had it. They would have brought you one in here
17 that was. Now, could you make the identification that they
18 say they are so certain about from that scene, and as Mr.
19 Brittain says you don't have to go that far. How about these
20 pictures here? How about these picture? In the daytime, in
21 the daytime, could you do that in the daytime? These are
22 daytime pictures. Could you make that identification across
23 there?

24 And I tell you another troublesome sign is, good as they
25 are their story keeps changing, kept changing about the

1 distance, about where people were. You know, we put in and I
2 tell you why there's a reason for that because when they go
3 back and start trying to check what they said and how they got
4 there it is troublesome. Fifty feet shrinks to 15 feet. What
5 did Mr. Hobbs tell you? The first recorded recollection was
6 on September the 3rd or 8th. I forgot which it is after they
7 made their identification and he read to you that he says on
8 the beach, on the beach 50 feet, 50 feet. Of course, now when
9 they get in this courtroom it's 12 to 15 feet. Well, 50 feet
10 is outside this courtroom. Now, that man is in construction.
11 I know people aren't good at distances. There's the, there's
12 an excuse. Here we start with the excuses. "I'm just not
13 good with distances." I understand some of that, but 15 and
14 50 feet? When they want you to convict that man and send him
15 to the bowels of the penitentiary for the rest of his life and
16 they can't get no closer than that. They can't get close
17 except on, "That's him, that's my story and I am sticking to
18 it. I don't care what you ask me that will never change. I
19 may not know whether Monday is Friday, south is north, east is
20 west, but I know that was him," because they're sealed into
21 that story now and they actually believe it probably, but they
22 still have trouble and then I had -- we put those distances
23 about the height and all of that stuff in because if you will
24 look in that video, if you will look in the video, if you want
25 to look at it when you get back there, you'll see the man

1 standing across. You see the man standing across there and
2 you can't see, well, raises the hand, well, that's directly
3 across from where Mr. Hobbs in his first statement -- Tommy --
4 if one of you find those pictures for me while I'm talking.

5 MR. BRITTAIN: Which ones you talking about?

6 MR. MARTIN: Well, I'm talking about the ones with the
7 -- well, here's one of them here. Mr. Hobbs has marked and
8 ---

9 MR. BRITTAIN: You talking about the one of Donna Hobbs?

10 MR. MARTIN: No, I'm talking about the big -- there's a
11 larger one now than that. Yeah, give me that one, too.
12 There's a larger one here which is Exhibit Number One. Right
13 here, that's it, give me this one. I'm sorry.

14 MR. BRITTAIN: That's all right.

15 MR. MARTIN: And I know I'm taking a long time, but I
16 don't want to rush myself because John Frazier has the rest of
17 his life resting on whether we understand the facts of this
18 case. So, please be patient with me, and if you want to stop
19 I don't mind stopping, but I don't want to just stop because
20 I'm in a hurry or I feel like you're rushed.

21 But this first photograph as you see they put the X and
22 you'll have this back there. Put the X directly across from
23 where they worked out, walked out, and then there's another
24 exhibit where they've got it even -- well, let me do them in
25 chronological order.

1 In the first exhibit you see put an X where you saw the
2 man standing, okay. There's where he put the X, okay. Now,
3 number two on this one, put an X where you saw the man
4 standing. Well, you see he's moved down from approximately
5 here to here. Well, just didn't have a good angle,
6 understand. I know they're not sure. Just didn't quite
7 figure it out. Well, then low and behold we wind up with us a
8 third angle. You take it and you look at them.

9 Now, they went back and now they took Donna's picture
10 here after they had got confused by these statements. They go
11 back down to take another look to see if they can recall
12 what and where and there they've moved her on further down,
13 moved him, not her, the man they saw on further away from the
14 beach. Now, that's important because of the incline that runs
15 down that street because they couldn't have seen him across
16 the pool from where he initially said he was. So, they've got
17 to tweak it. They've got to pull it. They've got to change
18 it just a little but now they've got an excuse for it, but
19 it's troubling. It's troubling. If you don't know where he
20 was standing how are you so darn sure about who it was in the
21 dark? Seconds.

22 Memory doesn't get better with time. I tell you -- give
23 you some more ideas on this time. Put that time line up
24 there. In trying to figure out how this happened -- well,
25 I'll tell you step by step where the problems come in and

Closing Argument by Mr. Martin

1233

1 first of all as I told you they saw the man for several
2 seconds on June the 9th and on Wednesday the 10th they call
3 down and this is the bulk, this is the context, the full text
4 of their description, white man, dark clothes, white man, dark
5 clothes. No talk about, "We can know what his face looked
6 like, might be worth it, think I can tell you what he looks
7 like." Eyes, forehead, anything like that, that's it.

8 Mr. Hobbs goes down and does a composite. Ms. Hobbs
9 comes back. That's what we've got right there. Then on
10 Friday June the 12th is an offer of a reward in the newspaper,
11 \$50,000 Myrtle Beach newspaper, Winston-Salem newspaper,
12 probably other, television, whatever. I don't know whether
13 that had anything to do with this. I can't prove it and if I
14 was like the State I'd want you to infer from that that they
15 had to know, thus they were guilty of having bad information,
16 but I'm not going to go there because I can't prove that, but
17 I do know the reward was out there.

18 Now, I know then that on Saturday the 13th they arrest
19 John Frazier. Altman, Terry Altman and Frontz, according to
20 Bill Frontz, they're there when he's arrested. They look at
21 him. They know what he looks like. They got his picture, and
22 then on Sunday the 14th the Hobbses return to Virginia and
23 we've got no detailed description, no document that you can
24 look at and see what they saw, the man they looked like, saw
25 on the beach that night.

1 The 16th Winston-Salem Police Department does this lineup
2 and they want to tell you, "Well, we did the" -- don't --
3 just leave that where it is -- "We did the best we could with
4 that lineup." Well, you see, Mr. Rowe he didn't have
5 maybe the information he needed, for that's another problem
6 with the lineup and let me make sure you understand. The
7 National Institute of Justice, the North Carolina Actual
8 Innocence Commission has studied and research has shown if you
9 want these things to be reliable then the people, the fillers,
10 that is the people other than who you have as a suspect have
11 to have the same identifying characteristics. In this
12 instance that's going to be the high forehead and the big
13 eyes. Eventually that's what they come up with is what they
14 say they saw. That lineup just doesn't have that.

15 Now, that's not John Frazier's fault. Myrtle Beach and
16 Winston-Salem should have talked if they needed more
17 information. They had him in custody. They had his picture.
18 So, they just didn't set it up right. Then we know that
19 between the 13th and the 24th John Frazier's picture is
20 plastered on every newspaper and television station east of
21 the -- no, it wasn't that widespread, South Carolina, North
22 Carolina and around. Of course, the Hobbses don't have a
23 television and I don't know that they saw a thing. I don't
24 know that they saw a thing. I just don't know, but I know the
25 information was out there, and then I know that on the 24th

Closing Argument by Mr. Martin

1235

1 and on the 26th that the Myrtle Beach Police Department in the
2 form of Terry Altman contacts Ms. Hobbs to discuss this thing
3 with her. She don't recall. Strikingly strange to me she
4 don't recall and wouldn't it be nice if we knew what was in
5 that conversation. Was it recorded for you to hear? No, but
6 there is a conversation and I don't know what's imparted. I
7 can't say but I know this, Robey goes the next day and they
8 make -- two days later and they make an identification.

9 September 3rd, go back that night, you got the right man.
10 Do you think they talked about it? They said they don't
11 recall talking about it. Can you imagine a husband and wife
12 not talking about it. ``Which one did you pick out?'' My wife
13 wouldn't have let me get to the bathroom before I'd have to
14 give the details on that situation.

15 Now, and then they finally take a statement on September
16 3rd, 1998, after the horse is out of the barn. We get us a
17 statement to go back and say, "Yes, sir, that's what we saw."
18 There's nothing to check it against. There's another red flag
19 and they are now they've been down this road. They are
20 positive, and I don't know what it is but then I know and you
21 know they got what? \$20,000 cash.

22 Now, the State is going to tell you and I'm going to
23 agree they had already had their minds made up. They had
24 already said a couple of times, ``Frazier is the man we saw,"
25 before they got the money, but how troubling is that? Do you

1 know the whole story? I don't know. I don't know that I know
2 the whole story.

3 Oh, yeah, I know it's late, but I'm not through. Mr.
4 Bollow, Mr. Wolford because they are a part of this equation
5 that we've got to deal with is how -- when did Poole and
6 Frazier see each other? They brought that out, that after May
7 30th they see each other again. That apparently is an
8 important part of the ongoing opportunity to discuss, which
9 again they don't have. Well, let's talk about that for a
10 minute. Was John Frazier's relationship with her basically
11 over? That don't mean they didn't see each other or
12 show up somewhere because that was just the circles of life
13 they ran in, but now let's talk about Bruce Wolford for just a
14 few minutes.

15 You know, Bruce is the one with which the blurb is
16 attached here on June 2nd. Then it's highlighted. That was
17 kind of highlighted. I don't know whether that's a subliminal
18 suggestion or not, but at any rate, Renee meets Frazier at
19 Wolford's house.

20 Did he meet her there on June the 2nd? Do you believe
21 what Bruce Wolford told you to be the truth, the whole truth,
22 nothing but the truth so help you God? He told you he didn't
23 know. He told you he didn't tell you the truth. There's a
24 letter in here that he talked about going to L and M Computer.
25 That was on May the 27th. Well, what's the big deal whether

Closing Argument by Mr. Martin

1237

1 it's June 2nd or May 27th? I don't really know, but I just
2 know he came in here and for the first time in his life he
3 comes up with this story of June 2nd, June 2nd, and then they
4 want to say, "Yeah, and June 2nd is important because he went
5 to work that night and e-mailed for time off because that's
6 evidence of, you can infer since Wolford said they met that he
7 went to work that night and e-mailed Calvin to get the time
8 off to do the crime." Well, now, let's analyze that for just
9 a minute.

10 Number one, Wolford, Wolford who I handed him those three
11 statements. He gave three statements. I said, "Now, you find
12 in there where you told anybody any time that this thing
13 happened on June 2nd before you walked into this courtroom
14 today," and have you heard from him yet? We're still
15 waiting. You're going to be waiting a lot longer on him than
16 you are waiting on me to get through because he weren't
17 telling you the truth. He's trying to add, trying to stretch,
18 trying to doctor a nothing, tie inference to inference to get
19 them over a hump where there is no evidence, trying to bolster
20 the Hobbses's identification somehow and when they, often this
21 happens when they stretched it it popped.

22 Now, oh, Bruce and his relationship with Renee, what
23 about that? Is the evidence, the fact that John Frazier had
24 an affair with Rene Poole is evidence of murder maybe they
25 ought to lock up Bruce Wolford, too. He had a relationship

1 with her. One time, of course they videotaped it for his
2 wife.

3 And what did little Sharon Haymaker tell you? Renee and
4 Bruce were a thing after she moved out from Frazier's
5 residence and before he was murdered. I don't know what that
6 means, but now here's how the State -- this is what the State
7 would do with this evidence. They'd say, "You know what,
8 blurb, Wolford meets with Poole. Wolford no alibi. Wolford
9 at time has ponytail. Hobbs not sure if ponytail or hood."
10 That's what their case is built on, inference upon inference.
11 I don't ask you to believe that. I don't know. I can't prove
12 any of that, but they can't either. That's the problem.

13 Abraham Lincoln said one time, he was talking to
14 somebody, he said, "If you ask a man how many legs a dog has
15 what would your answer be?" "Four." "And if you call his
16 tail a leg how many does he have then," and the man says,
17 "Five." And he says, "No, he's got four. Just because you
18 call a tail a leg don't make it one," and just because they
19 call this bunch of crap evidence it don't make it one.

20 Bollow, another piece of that evidence, Mr. Bollow
21 they've got to put Frazier back over there because then, you
22 know, they've got to make this relationship tight, ongoing
23 right up to the end here. So, how -- they got Mr. Bollow, Mr.
24 Nightly. Now, he sit right there on that witness stand and I
25 asked him if I recall, and you can have it played back,

1 "What does nightly mean?" "It means nightly." "So,
2 you're telling me John Frazier was there every night from
3 February 24th up until May 1st?" And you know what's so good
4 he knows not to say from May 1st to May 12th because he wasn't
5 living there. Do you think of his independent recollection
6 any time he noticed that, but other than that it was nightly,
7 nightly and then he sat right on that witness stand and says,
8 "Yes, no, uh." I don't know what -- where he's coming from.
9 I just know it's just so strikingly strange. He sees that car
10 over there that much. Number one, he don't -- again this is
11 good. He don't put John Frazier there at all. He says, "I
12 saw a black Blazer," okay, never saw John Frazier. "How
13 about the license tag, Mr. Bollow? Did you ever see this
14 nervous license tag?" "No." I don't know. That's it. You
15 know, looks to me like he was the male version of Gladys
16 Kravitz on that Bewitched show. I mean, he's just got his
17 nose through the window checking things out every time that he
18 can, but even I who do my best to mind my own business would
19 have had to find out sooner or later, hey, what the tag was on
20 that car. I don't know what all that means. I just find it
21 strikingly strange, and you know what, and all of this
22 obviously is inference but Wednesday, Thursday and Friday
23 night he said, Wednesday, Thursday and Friday night he
24 was there from 7:30 till midnight.

25 A couple of things about that I want you to think about

1 in testing, in testing the credibility of it. Of course,
2 Sharon Haymaker told you that she talked with John at 9:30 on
3 Thursday night. Now, maybe she's lying. Maybe she don't
4 remember, but I would rather trust her than Mr. Bollow. The
5 last time she had talked to this man who she had stayed with
6 over the course of months, but besides that think about this,
7 now, 45 minutes from where she lived to where Frazier works he
8 -- you get his work records here and you'll see where he's at
9 work by 10:45 or 11 o'clock every night that he's talking
10 about 3rd, 4th and 5th.

11 He says he was there till around or at least midnight.
12 According to his work records he's at work at 10:45 or 11 and
13 it takes 45 minutes to get there. Now, we know that. We know
14 that. He's not sure about what he's telling you. I don't
15 know why he's telling us what he's telling us but this
16 guesstimation, you know, the guesstimation part of it is just
17 -- the inaccuracies, almost, the I can't recalls, the close
18 to, I will say this for the Hobbses, at least they're
19 sticking to their story.

20 Another thing on Mr. Bollow is he's got the Blazer there
21 in February before apparently the two met, and we know from
22 John's sister before he owned the black Blazer. Just another
23 indication that that testimony is at best unreliable,
24 unreliable and the e-mail. They say I got confused talking
25 about the e-mail. I can't imagine that I got confused but the

Closing Argument by Mr. Martin

1241

1 issue is whether or not the time and did they meet on June the
2 2nd and then John go to work that night on Tuesday night and
3 type this e-mail. Well, the fact of the matter if he typed it
4 on Tuesday night he'd had 30 minutes or so to type it.

5 Whereas, we would argue and it makes more sense that he did it
6 on Monday night when he had from midnight till seven the next
7 morning to do it. Not a big thing but a thing, a thing.

8 The wallet was wet. I don't know what to make of that.
9 Gunshot residue test doesn't show anything. Have they proven,
10 have they proven who murdered John -- Brent Poole? This is a
11 tragic thing. The death of that young man I simply cannot
12 imagine. My 16 year old son is in this courtroom. I feel for
13 these parents. I can't imagine that. It is horrible. They
14 deserve justice. Yes, they do. So do you. So does everybody
15 within the sound of my voice, but what a tragedy it would be
16 to compound one senseless loss of life with the wrongful
17 conviction of another human being. Will that make it better?
18 Will that change the tragedy they've had? And if you get past
19 all of that I tell you again the evidence of the conspiracy
20 simply and wholly does not exist. Did they have a chance to
21 meet, yes. Have you and I had a chance to meet, yes. Have
22 Tommy Brittain and I had a chance to meet, yes. Have we
23 conspired to crimes? There's no evidence of that and there's
24 no evidence in this case either.

25 And if it were John Frazier on the beach what does that

1 prove? I don't know. I don't know, I don't know that she did
2 -- how do you know Renee Poole didn't do that, throw the gun
3 away, run across the street and throw the wallet, wash her
4 hands. I'm not saying she did. I just don't know, but I will
5 tell you this, there's insufficient evidence in this record
6 that John Frazier did it, and I know that I have been talking
7 for a long time. I don't know that I've ever talked any
8 longer to a jury, and I've been doing this a long time, and I
9 hope to God that I haven't bored you because if I have I've
10 lost you and if I've lost you then we're in trouble, but this
11 is an awfully important day to every one of us, every one of
12 us and I ask that you go back and you look at all this stuff.
13 You look at that videotape. You listen to what all these
14 witnesses say. You use your good common sense in measuring
15 here and if it don't get there, it don't get there, no matter
16 how sad, horrific, the incident may be or any of that.

17 If you have a reason to hesitate to act you should. You
18 should not convict. I told you when we started that the 1923
19 Supreme Court Justice Ernest Hernehan says that in our legal
20 system the ghost of the innocent man convicted haunts us all
21 and I'll tell you that today that ghost still walks this land
22 hand in hand with mistaken eyewitness identification
23 testimony. Thank you..

24 THE COURT: Mr. Foreman and ladies and gentlemen of
25 the jury, we're going to send you back to the jury room for a

Closing Argument by Mr. Hembree

1243

1 brief break. We'll have you back out at which time you'll be
2 hearing from the State and then receiving the charge on the
3 law. You may go back at this time. Do not discuss the case.

4 (Whereupon, the following takes place outside the
5 presence of the jury.)

6 THE COURT: We'll take a 10-minute break. See you
7 back in here in 10 minutes.

8 ***** OFF THE RECORD *****

9 (On the record.)

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

12 THE COURT: The State prepared to go forward at this
13 time?

14 MR. HEMBREE: Yes, Your Honor.

15 THE COURT: The Defendant prepared to go forward?

16 MR. MARTIN: Yes, yes, ma'am.

17 THE COURT: All right, we're ready for them.

18 (Whereupon, the following takes place in the presence of
19 the jury.)

20 THE COURT: Mr. Foreman, Madam Alternate and ladies
21 and gentlemen of the jury, welcome back. We are now and
22 continue in the phase of the case where you're hearing the
23 closing arguments of the attorneys. This is the final
24 argument that you will be hearing and it is from the State.
25 Yes, sir, Mr. Hembree.

1 MR. HEMBREE: May it please the Court, Your Honor?

2 THE COURT: Yes, sir.

3 MR. HEMBREE: Defense counsel.

4 Ladies and gentlemen, Mr. Foreman, there's been a lot of
5 discussion in this courtroom that this is an important day and
6 it is. It's important to the State of South Carolina. It's
7 important for the family of Brent Poole, and it's important to
8 this Defendant, John Boyd Frazier, but folks, I want to tell
9 you that today is not the most important day for John Boyd
10 Frazier. The most important day in John Boyd Frazier's life
11 was June the 6th, June the 9th of 1998, because on June the
12 9th John Boyd Frazier made a decision. John Boyd Frazier took
13 action. John Boyd Frazier chose to commit the ultimate sin
14 for the love of a very bad woman. At that point June the 9th,
15 1998, the life of John Boyd Frazier was changed and many other
16 lives were changed also.

17 Ladies and gentlemen, this case and I'm going to talk
18 with you, too, about it is largely about circumstantial
19 evidence. Mr. Humphries has talked about it, Mr. Brittain has
20 talked about it, Mr. Martin has talked about it. I'm going to
21 talk about it a little bit, too, and I'm going to say just a
22 couple of things.

23 First, Judge Thomas will charge you that circumstantial
24 evidence is exactly the same as direct evidence. There's no
25 difference. One's not better. One's not worse. It's just

1 evidence all for your consideration. Now, Defense counsel
2 they tried to sit up here and say, "No, no, you know, this is
3 different. You know, it's circumstantial. It's an inference
4 upon an inference and, you know, it is a secondary fact from
5 which you may infer a primary fact." That's exactly right.
6 It requires an inference and the law says that inference is
7 equivalent to direct evidence. It's equivalent. It's the
8 same, worth the same, worth your consideration in the same
9 way.

10 The second thing I want to say about it is this. Mr.
11 Humphries touched on this but it's been a long time ago since
12 he talked. So, I want to remind you, that any time that the
13 murder is planned -- this wasn't some kind of random, you
14 know, two people are fighting, one gets mad, one pulls out a
15 gun and there's a shot made. That's not the kind of killing
16 this is. This was a premeditated, a planned murder, carefully
17 considered, thought out, coordinated. The instrumentalities
18 needed were collected, put together. Any time it's that type
19 of murder, the likelihood of recovering a hair, a footprint, a
20 DNA sample becomes less because it's planned. The murderer is
21 thinking about it. The murderer is taking time to carry out
22 the crime and they're taking steps to try and hide the
23 evidence, to get rid of the evidence or fail to leave the
24 evidence. So, all that being said in cases of premeditated
25 murder it is very common that the State relies heavily, even

1 solely on circumstantial evidence. That's not the case here.
2 There's direct evidence as well as circumstantial evidence but
3 in many instances the State relies solely on circumstantial
4 evidence and the law says that that can be sufficient.

5 Finally, circumstantial evidence is very much like this
6 target, these concentric circles that I've put on this board.
7 I've done that for a reason. I think it's a good way to
8 explain and understand circumstantial evidence because you
9 take one circumstance and you say, "Well, that's, that's
10 pretty bad. That could be bad for the Defendant and it
11 narrows the field." You've got all the human beings on the
12 earth that could have committed this crime and now we take
13 these circumstances and in considering these circumstances
14 that field becomes smaller. Then you take additional
15 circumstances and that field of possible Defendants
16 becomes smaller still, narrower and narrower until there is
17 only one inescapable conclusion. That's how circumstantial
18 evidence works, builds on itself. You only have one, you've
19 got problems. In this case I submit to you, ladies and
20 gentlemen, we have circumstance after circumstance, issue
21 after issue, evidence after evidence that conclusively points
22 to John Boyd Frazier.

23 I want to talk about some of these. First is the motive,
24 and I've broken these down into motive, plan, execution and
25 cover-up. You ever notice it's always the cover-up that gets

1 them. It's always the cover-up. You will see that in this
2 case as we start talking about this.

3 The motive in this case, there was a relationship
4 here. There is no doubt of that. There was a sexual
5 relationship. There was a close relationship, a loving
6 relationship, an emotional, let me put it that way, an
7 emotional relationship. There were lots of visits, lots of
8 chances to be together. They spent a lot of time together,
9 John Boyd Frazier and Renee Poole. Jim Bollow testified
10 he saw the truck over there a lot. He wasn't clear. He can't
11 tell you and I'm not going to stand here and try to tell you
12 that he can say, "Well, on that Wednesday night in March, and
13 well, that Tuesday night in April the car was there." This
14 was what he said. When he finally got pushed to the wall,
15 which is, you know, got right down to it he said, "The black
16 Blazer was there more often than not when Brent Poole's car
17 was gone. When he was at work, it was more often than not."
18 He wasn't working as his private detective. He wasn't keeping
19 track of it in a notebook. He just was noticing it and it was
20 bothering him because he figured it out. He knew what
21 was going on and it troubled him that his next-door-neighbor
22 this, you know, this kind of young guy who's got a little baby
23 at home who's out working hard at the, you know, at the Mack
24 truck plant, at the Mack truck station working on diesel
25 engines, he's trying to do all the right things and what's

1 happening behind his back? And he's kind of annoyed and he
2 told -- he said that, talked to his wife about it. It
3 bothered him, but there was an extensive relationship for
4 several months, a deep relationship, so deep that the
5 Defendant and Renee Poole decided to move in together and in
6 the middle of the night, folks, like a thief in the night
7 while Brent Poole, Brent Poole's gone to work. He's providing
8 for his family and what happens? John Boyd Frazier shows up
9 out in the driveway, got his black Blazer out there helping
10 Renee Poole move the stuff out, loading up the pickup truck
11 with the family belongings and the three year old, not so much
12 as a note, not so much as a Dear John letter, no, cold. What
13 did she do? She takes off. Brent comes home. He's baffled.
14 He doesn't know where everything is. He's scared to death.
15 He goes over to his neighbor's house trying to figure out
16 what's going on, and finally the neighbor says, "Yeah, there
17 was some guy, you know, they moved the stuff out," and then
18 he realized she had left him and he knows.

19 She stays gone for 12 days. At some point decides that
20 she wants to come back home. Now, I don't know, folks, I
21 don't know what sent her back home. I don't know if it was
22 the comfort of her home, of her situation. She's got a
23 husband who is providing for her. She's got a pickup truck to
24 drive. She's got a house that he's paying for. She's got,
25 you know, her baby there, little child there and it sounds to

1 me like she's got a pretty good thing going on here.
2 Maybe that's what it was. Maybe she realized, "Hey, I, you
3 know, maybe this living in, living in with Frazier ain't so
4 great after all." Maybe that was it. Maybe, maybe she says,
5 "You know, I want a divorce from Brent." What's the lawyer
6 going to tell her? "You abandoned the marital home. You
7 took the little baby in the middle of the night and the last
8 meaningful employment you had, ma'am, was a topless dancer. I
9 don't think you're going to get your baby. I don't think --
10 you can get you a divorce," but that wasn't going to suit
11 her.

12 She heads back home. How does the Defendant respond to,
13 that? Now, we heard from his sister and there's a lot of
14 cover-up in this case, a lot of cover-up. We heard from his
15 sister today, Christine Michelotti. Said, "Oh, no, she -- he
16 didn't care about her. She was just one of these girls that
17 kind of came in and out, wasn't any big deal, and you know,
18 she went on home and he wasn't particularly upset and no
19 problem," and we put up a witness in reply as you will
20 recall for the very purpose to establish that John Frazier
21 was furious. John Frazier was angry. John Frazier had a
22 plan. He wanted Renee Poole in his life. He wanted her to be
23 part of his life. He had reached that point. He had reached
24 that conclusion and he gave Dee Mishler an earful on the
25 telephone about it, cussing her, cussing her family, cussing

1 her brother. "She's not coming home. No, you can't talk to
2 Renee," furious. You know, he was emotionally engaged in
3 this relationship. Wolford said, "Yeah, he liked her a lot,
4 talked about her all the time."

5 One of the most telling exhibits in this case is this
6 copy of the day planner of Frazier. Now, as you will recall
7 this day planner was recovered from his apartment in North
8 Myrtle Beach in February of '99. The actual day planner was
9 never recovered, only a copy. Now, we also know that John
10 Frazier told one of his friends, "I got rid of all the stuff
11 that had anything to do with Renee. I can't tell you where.
12 I got rid of it." Maybe that's where it is. Don't know, but
13 I know we got a copy here, a copy that was recovered from his
14 place. Now, he may have gotten rid of the original and he
15 just couldn't stand it. He had to have something to keep
16 track of his dates on and he took this and it tells you how
17 truly engaged in this relationship he was.

18 First, the first entry on the 13th of March Kyoto's,
19 Renee, and then on the 24th of March and you need to look at
20 this. When you get it back there you all look at this.
21 There's a lot of reasons to look at it. "Renee and John
22 sex," underlined, it's a special day. That's a special day
23 for John Boyd Frazier.

24 "Renee with John", underlined on May the 1st, the day
25 that she moved out, that she abandoned her marital home, and

Closing Argument by Mr. Hembree

1251

1 took up with John Frazier, a special day, an underlined day.
2 ``Renee back with Brent'', not underlined, and then we bring
3 it up to May the 30th, ``Renee gone,'' underlined, underlined,
4 underlined, exclamation points, ``with Brent forever'',
5 exclamation point, exclamation point and then on the 31st
6 and excuse my language, ``fuck you, Renee.'' That's what it
7 says. There's a man who's emotionally involved. There's a
8 man who is in love with a bad woman, and maybe the most
9 interesting entry in this day planner about his love for her
10 was the birthday in of of K.P. , their two
11 year old at the time, puts down ``K.P. , three.'' He wanted
12 to have a family. That was his plan, only one way to get it.
13 He hated -- he told Welford that he hated the way Brent
14 controlled Renee with K.P. , that that was the reason Renee
15 went back home because of the baby, controlling her with the
16 baby. She couldn't have the baby, she can't have the baby,
17 John can't have her Brent said. Constant references to the
18 Defendant's hatred. Bruce Welford said it. Said he was in
19 the bar frequently talking at the bar and was always talking
20 about how much he hated Brent, said Brent constant references.
21 The confrontation at the Silver Fox, this is incredible.
22 Brent, on the 30th, Brent, Renee are at the Silver Fox,
23 probably shouldn't have been there. That was a bad idea, but
24 guess who comes in and what does he do? What does he do to
25 try to bait and humiliate Brent Poole, to try to maybe drive a

1 wedge? He takes Renee Poole's panties, he's got himself a new
2 kind of scarf now. This isn't a handkerchief that his friend
3 was buying for Christmas, took her panties and used them to
4 wipe his sweat. What, you know, what's going through
5 somebody's mind like that? Has a videotape that he kind of
6 waves around, you know, kind of flashes it at them, shows it
7 to them, what, you know, what's he trying, you know, what kind
8 of a message is he trying to convey? I don't know but I know
9 he's trying to intimidate. I know he's trying to humiliate.
10 I know he's trying to bait him out and I know that
11 he went outside, called him out, Brent wouldn't fight him,
12 comes back in bragging about it and uses ugly names to
13 describe Brent to the other folks in the bar. He hated him.
14 He hated the fact that Renee was controlled by him, by Brent
15 in some form or fashion, that she felt that way at all. He
16 wanted to be in control. He wanted it.

17 Who has the motive? How many people have the motive to
18 see Brent Poole dead? Now, we know that Renee Poole had other
19 boyfriends at some point. It sounds like she had her share of
20 them. I'm not going to argue that point, but we know also who
21 her last one was. Her last one was John Boyd Frazier.

22 The plan, Renee Poole calls, makes arrangements at the
23 Carolina Winds. It's their anniversary, want to try to make
24 things right, going to go to the Carolina Winds. She finds
25 out that the Carolina Winds happens to be at the end of the

1 commercial district, past that, very quiet. It's residential
2 area, not much going on down there. ``This will be perfect
3 for you.'' ``That's fine because I want to spend some time
4 alone with Brent.''

5 Contacts the babysitter, makes those arrangements, makes
6 changes. It's interesting and there was a reason that we put
7 these bullet points on this time line because the timing of
8 these events becomes significant when you begin to take those
9 circumstances and lay them down next to each other and analyze
10 them and study them and try to decide what went on here.

11 Poole calls Murphy about babysitting, asks for ten p.m.
12 to two p.m.; very late, very late. Said Black Chevrolet
13 Blazer seen parked at Poole home in the evening hours that
14 same night, and then on the 5th Renee Poole calls Murphy with
15 room number, the babysitter once again to confirm with her,
16 making sure, double check, got that all set; right, with the
17 room number and low and behold as luck would have it, what a
18 coincidence, guess what, the black Blazer happens to be at
19 Renee Poole's house that night, also.

20 The -- his job, there were frequent meetings, and you
21 know, they got together a lot, but the point of it is to say
22 that they had the opportunity, that there were times that they
23 were together presumably alone, his vehicle is at her house,
24 she's there. There's lots of chances for them to talk about a
25 plan should they choose to do that. Then we know from Bruce

1 Welford there's a little more than just the opportunity to
2 talk. They're actually at the Welford home, spent the day
3 with them, Bruce Welford and his wife. His wife goes with
4 Renee Poole. Bruce goes with John Frazier. They go mess
5 around. They go to the computer store. They come back.
6 Bruce has got a headache. He goes to lay down, but he hears
7 the conversation. The conversation is, yeah, he hears
8 specifically that Brent and Renee are going to Myrtle Beach
9 for their anniversary. He doesn't know what the details were.
10 He knows that there were other things discussed. If he wanted
11 to make stuff up folks, if he wanted to, as Mr. Martin would
12 have you believe, you know, make this great testimony because
13 he's so eager about helping, well, fill in the blanks right
14 there, brother. He didn't do that because he can't remember
15 that. He's being honest with you. His lack of ability to
16 recall those details implies to me that he's really telling
17 the truth about what he can remember. He's really trying.
18 He just doesn't remember all of it, or if he wanted to lie he
19 could lie. We wouldn't know, wouldn't know the difference.
20 They have the opportunity to discuss it. They do discuss the
21 anniversary trip, talk about some other issues, but they've
22 had lots of opportunities to do that. Curiously, on the 2nd,
23 guess what happens? Our Defendant John Boyd Frazier asks
24 off work.
25 Now, Defense counsel has made this big deal about,

Closing Argument by Mr. Hembree

1255

1 "Well, it could have been Monday night but it might have been
2 Tuesday night," and it's dated Tuesday. I can tell you that,
3 folks. This request is dated Tuesday and Mr. Brittain went on
4 kind of a long bit of discussion with Calvin Harris about how,
5 "Well, maybe, maybe, you know, when you first get to work
6 you've kind of got stuff to do and then you, you know, you
7 sort of put your request for vacation in later when things
8 kind of settle down." I don't know about you all, but if I'm
9 requesting vacation I've got that on my mind first. I fill
10 that out first because I want to make sure to get that in.
11 I've got to get, you know, I don't want to forget about that
12 because I'm making a plan, even if it's legitimate vacation
13 and what's he going to put on here about where he's going to
14 be? "Well, Boss, I'm going to Myrtle Beach to murder my
15 girlfriend's husband. So, if you need me I won't be around."
16 What is he going to say about that? What does everybody say?
17 "Oh, I'll be at home. You all call me if you need me," but
18 he has to create the opportunity. That's his part of the plan
19 and it is significant, it is significant that he took off
20 three days in the middle of the week, never had done it before
21 in the six months that Calvin Harris had managed him, never
22 had asked for three days off consecutively and low and behold
23 coincidentally what three days is it? The day before the
24 murder plan and the day after the murder plan, one day to get
25 ready, one day to clean up, what a coincidence.

1 Transportation, got to get another vehicle, his vehicle
2 is known, black Blazer. Brent knows his car, can't be driving
3 that down to Myrtle Beach just blowing in down there, and you
4 know, I mean, that's a bad plan. "I've got to do something
5 about this." So, he goes to his old friend, his high school
6 buddy Kahle Schettler whose car he has borrowed in the past,
7 never overnight, but he has borrowed his car in the past for
8 other reasons. He knew Kahle would very likely say yes when
9 he asked him to borrow the car but curiously he said, "I need
10 your car for Tuesday, Wednesday and Thursday. I need it for
11 the next three days." Monday, "I need to pick it up today
12 and I'll need it Tuesday, Wednesday, Thursday and I'll bring
13 it back to you after that."

14 Now, this is a rattle in his truck he's getting
15 checked out that he's had since it started. He's had it for
16 months, this rattle and he has tolerated this rattle.
17 Apparently it was no big deal to him. It was just a little
18 thing because he hasn't gotten it checked. He hadn't taken
19 care of it. He hadn't dealt with it. Low and behold all of a
20 sudden, "I need you to check that rattle out for me. So,
21 I'll need your car for four days." Kahle says, "All right,
22 that's okay with me. I got no problem with that." What a
23 coincidence that he's asking off for the time and trading
24 cars, getting another vehicle all at the same time.

25 The next part of the plan, and this is -- well, I'll --

1 such a, such an interesting fact it almost goes more to cover-
2 up but he never asks Schettler about the car repair, never
3 asks him about it when he picked it up. Who ever, ever has
4 taken their car to the mechanic and when you go to pick it up
5 not ask about the problem you took it in for? John Boyd
6 Frazier has. It's because it wasn't part of that. He didn't
7 care. It wasn't about getting the car fixed. It was getting
8 -- about getting Schettler's car, about getting cover,
9 camouflage, another means of transportation.

10 The TZ75, picks a TZ75 over the Glock. Folks, let
11 me settle something for you real quick about this and I don't
12 want to talk about this gun very much because I'll tell you
13 it's just not that important in this case. We cannot tell you
14 that a TZ75 was used. We can tell you that a nine millimeter
15 was used. That evidence is in the record. We have forensic
16 evidence to prove that. We can tell you that the Defendant
17 once owned a TZ75. We can tell you that the TZ75 is a nine
18 millimeter. We can tell you that the TZ75 is one of 38 makes
19 of gun that could have been used in this murder. Does that
20 mean the TZ75 was the gun? Don't know, you know, it's I just
21 can't tell you that, but I lay it out there for your
22 consideration whatever weight you choose to give it. I will
23 say this though. It's interesting to me that we got a guy
24 here who is a note-taker. He's a record-keeper. That's his
25 nature. That's his personality and he bought a Glock nine

1 millimeter. The Glock was not involved in this case in any
2 way. He just happens to have a Glock also, and he has got the
3 original receipts, the paperwork for this handgun. Well,
4 that's a good idea. That's a prudent thing to do when you buy
5 a gun or sell a gun to keep paperwork on it. It's
6 real interesting to me that the paperwork on that T275 that
7 was sold at the gun show nowhere to be found, doesn't have it,
8 not interested in that. Did he sell it? Maybe. Did he trade
9 it for another nine millimeter? Could be. I can't say, but I
10 can say he doesn't have the paperwork on it.

11 And finally, his part of the plan is staking out the
12 hotel, and we'll talk a lot about this later because the
13 identification in this case is very important, but it's real
14 interesting what his movements are leading up to the murder.
15 He's in the parking lot and he's watching, and if you recall
16 the Hobbses as they came out one of them testified, "It was
17 as if he was watching us, watching the hotel, watching for
18 somebody or something to happen." Then once he departs they
19 get a look at him and he ways, "Hey, I better move on, you
20 know. I don't want anybody to remember me." He runs on down
21 to the beach to past the dune crossover and he's crouching
22 down looking up at the hotel. He's staking out the hotel.
23 He's watching for something, part of the plan. He's watching
24 for the victim. He's watching for Renee Poole. He's trying
25 to find out where they are. He got a little disjointed there

1 at some point. The planning narrows the field, narrows the
2 scope, the bands of the circumstantial evidence begin to weave
3 together to start to form a more clear picture.

4 The cover-up, no, excuse me, the execution. She rushes
5 Brent out the door as if she's on a schedule. The baby is
6 crying, ``Give me the baby. We've got to go,'' rushes him out
7 the door, we're on a -- we've got a time schedule. That was
8 what the -- how the -- that was the perception of the
9 babysitter that Renee Poole was rushing him out the door. She
10 had a place, she had someplace to take him. She did have a
11 plan. She did have a schedule, get Brent alone on the beach.
12 They go to a residential area near the dunes that is deserted.

13 Now, I mentioned before Frazier stakes out the Carolina
14 Winds. This is part of the -- this is kind of transitioning
15 from the plan, now the execution of the plan. There are two
16 pops heard at 11:45. Karole Jensen hears that. She hears two
17 pops first or she thinks she hears two pops first, then a
18 pause, then a man's voice, then another pop. She described it
19 sounded like firecrackers all coming from the same direction,
20 all coming from the beach area just out behind her house.

21 The crime scene, Brent doesn't put up a fight. He had no
22 defensive wounds, no opportunity to fight. Two shots, one,
23 close range gunshot wound within 18 inches, the second gun is
24 pressed up against the bottom of his chin, shot close contact
25 wound. Either one of these shots could be fatal. One of

1 these shots is just for good measure. The pause I submit to
2 you, ladies and gentlemen, was the gun not firing properly,
3 leaving the four unspent shells on the ground. Here's four
4 rounds, the robbery is staged.

5 The Defendant, the perpetrator goes through the pockets
6 of Brent Poole, pulls change out, a pocketknife on the ground,
7 grabs his wallet, and it's important to try to cover this
8 thing. That's part of the plan. That's part of the plan.
9 You've got to come up with some cover and they're going to
10 stage it like an armed robbery. This screams out in this
11 case. It screams. It was an armed robbery and it was
12 armed with a deadly weapon and goods of Brent Poole were taken
13 and carried away from his person. So, there's no doubt
14 there's an armed robbery, but I submit to you, ladies and
15 gentlemen, this was not a real armed robbery. This was a
16 staged armed robbery. The wedding ring, the wedding ring was
17 left at the crime scene, the jewelry, has some value left at
18 the crime scene, 50 bucks or money, Brent Poole's pocket, left
19 at the crime scene, and what's most telling is the wallet,
20 takes, robbed of his wallet to make it look like a robbery.
21 Finally, oh my gosh, this is it, this is it right here. There
22 are two huge, huge pieces of circumstantial evidence in this
23 case that are undeniable, did not kill Renee Poole. If this
24 is a robbery murder you don't leave witnesses. You don't
25 leave witnesses, period, end of story. You kill them if

Closing Argument by Mr. Hembree

1261

1 that's what it's about, you kill them, whoever is there, and
2 rob them of whatever they've got. Whoever wanted Brent Poole
3 dead wanted Renee Poole alive. There is no -- absolutely no
4 other conclusion that can be drawn from that fact. They left
5 her alive because he wanted her. He loved her. He hated
6 Brent. He wanted her.

7 Folks, the cover-up, as I said before, is always, is
8 always what catches them. The first, the very first problem
9 with this well conceived, well thought out, perfect murder,
10 okay, perfect murder, starts to unravel within minutes. Five
11 minutes, Karole Jensen heard the pops at 11:45. She is
12 certain of that. She woke up. She looked at her clock. It
13 was 11:45, no doubt about it. Officer Scott Brown drives down
14 the beach, easy going, just taking his time. He's patrolling,
15 no big deal. He pulls up and Renee Poole is kind of
16 meandering about. She sort of raises a hand to flag him down.
17 She's not screaming. She's not flailing her arms. She's not
18 running for help. She does sort of one of these. He was
19 shocked. He was shocked when she said, "My husband has just
20 been shot," and he said, "What?" That's what he testified,
21 "What?" That's how he felt. That's what he said. He
22 couldn't believe it. He was overcome.

23 He called it in. Within less than a minute, within a
24 minute, stretch it out to a minute. I'll stretch it to a
25 minute, which is a long time, and the dispatcher says, locks

1 the time in at 11:51. So, let's give him a minute. There's
2 six minutes there unaccounted for. Subtract a minute. Let's
3 see how long five minutes is. That's just over 60 seconds. I
4 won't make you sit for five minutes. I've got too much to
5 say, but she for five minutes waited. She could have gone.
6 There are houses. Folks, there are houses here, here, here,
7 here, here, here, here, here, over across the street, within,
8 within yards of where she's standing. Her husband has just
9 been murdered in cold blood right in front of her. What does
10 she do? She waits. She waits some more and she waits
11 some more and she waits because John Boyd Frazier needs a
12 little time and he needs to put a little distance between
13 himself and this crime scene.

14 Now, let's walk through this with this diagram. Carolina
15 Winds Motel, here we are, swimming pool, he's seen here. He
16 goes down here and he's seen again here looking back up at the
17 hotel. This is sometime after 11 by the Hobbses. We don't
18 know exactly what time. We know it was after 11. We know it
19 was late. He takes off not down the beach, takes off through
20 the dunes and the grass, headed this, headed in a northerly
21 direction. The murder occurs here.

22 Now, the wallet is found here. Where is the car? We
23 don't know. Can't tell you that, but I can tell you there's a
24 pattern falling here. It's like a big loop to me. It looks
25 like he's headed back to the Carolina Winds Motel or some area

1 down here where he's got the car parked making his get away,
2 but he's got to have a little time and that's just exactly
3 what Renee Poole is willing to give him, at least five
4 minutes. That's a long time, folks. That's a lot of time
5 with your -- the life blood of your husband seeping out on the
6 sand.

7 The wallet itself and I got kind of tickled about this,
8 this sort of inference or suggestion that Renee Poole did the
9 killing, you know, that she did the shooting and then she just
10 kind of went down to the water and washed her hands in the
11 water and, you know, came back up there and waited for the
12 police, but the wallet, folks, is here. I'm going to tell you
13 that woman has an arm like Randy Johnson if she can throw
14 this wallet from here across the street and down two blocks.
15 That's a long way. That's a long way to get that wallet.
16 This wallet is telling in so many ways. It tells us
17 conclusively that this robbery was a fake robbery. It was not
18 a real robbery. The wallet is complete with cash, credit
19 cards, everything a robber would want. So, why, why would
20 John Frazier throw it in that yard, a yard he couldn't make
21 access to. He wasn't running through it. Mr. Sirles's
22 testimony was, "My yard is kind of blocked off between
23 the shrubs and the fence," but he pitches it over there and
24 I'm going to tell you why because this wallet right here at
25 that moment in time, at that moment in time was the most

1 obvious evidence that he was connected with this crime. If by
2 some happnstance he gets stopped with this wallet in his
3 pocket he's done and a gun would be just about as bad. That
4 would be just about as bad but with the wallet they're going
5 to solve that crime in a quick hurry. So, this is the thing
6 that was panicking him. This is the thing that he had to
7 throw. He had to get that out of his hands in short order. A
8 month later it's recovered soaking wet.

9 The next as this, as this plan starts to, starts to break
10 up a little bit, starts to get a little shaky, you've got the
11 car returned the next morning. Here we go. Here we go.
12 You've got Frazier. He gets home and he gets in his, you
13 know, gets to bed or maybe -- well, I don't know if he's in
14 bed or not in bed. I know he's at his house. He's at
15 his house by 5:40 the next morning. So, roughly six hours
16 later, murder is at 12:45, he's at home by 5:40. That's six
17 hours later.

18 Six hours, five hours and 55 minutes later he gets home
19 and he gets a knock on the door and it's a police officer.
20 Now, this police officer has been told, "We want you to
21 locate John Frazier. We want you to try to locate his black
22 Chevy Blazer. Those are your instructions, just locate him
23 for us. That's all we're asking you to do." He gets further
24 instructions later on that, "Well, this might involve a
25 shooting down in Myrtle Beach," but he's got his

1 instructions. His instructions are not kick in the door,
2 search the house, go through the car and find any evidence of
3 this crime you can. His instructions are coming from Myrtle
4 Beach to Winston-Salem Police Department to him to see if you
5 can locate, see if you can locate his vehicle. They don't
6 know anything about Kahle Schettler's car. Law enforcement
7 can't give him those instructions. They can't say go locate
8 this silver Acura and check it out and he doesn't. He follows
9 his instructions. He goes to the door. He identifies
10 himself. He gives him this sort of ruse about, "There's a
11 missing person's report in Myrtle Beach and we're
12 checking it out and, you know, but you're here, okay, that's
13 fine. We got that straightened out, you know, where is your
14 -- you have a black Blazer?" "Well, yes I do." "Who has
15 it?" "Kahle Schettler." "Can you tell me where he
16 lives?" "No." "Can you tell me how I can get
17 in touch with him?" "Huh-uh (negative response), no." He
18 knows. It's already starting to -- the foundation of this
19 plan is already starting to fade away, starting to wash away
20 like the sand with the tide. It's just getting eroded. He's
21 got problems. He's in a panic. Things are going to start
22 happening fast now. John Frazier, the officer leaves. He
23 doesn't go into the back behind the fence, the gated fence
24 where the car is parked. Let me tell you, folks, these
25 lawyers -- Mr. Brittain can stand up here all day and talk

1 about, "Well, if he'd done that, you know, that'd be the end
2 of the story and we, you know, we wouldn't even be here."
3 That's not so because he has no right. He's got no legal
4 rights at that point, no search warrant and no legal right to
5 go into that man's backyard and start going through his stuff.
6 That would be a violation of his constitutional rights and
7 that officer knows that, not to mention that he's not being
8 told to go check on every car the guy might be around. He's
9 being told to go check on the black Blazer. So, what does he
10 do? He leaves. He calls him on the computer, finds out where
11 Kahle Schettler lives, low and behold he goes to the apartment
12 and there's the black Blazer, and of course the black Blazer
13 is cold to the touch because the black Blazer that hadn't been
14 driven all night. Kahle drove it home from work that evening.
15 That's the end of it. He was at home, said he was, testified
16 he was at home that night. There's no mystery about this, but
17 I'm going to tell you, folks, had he gone back there in
18 violation of this Defendant's constitutional rights and
19 checked out that car and found the murder weapon and found the
20 shoes and found the towels and found, you know, the sand and
21 found the clothes, you would have never seen it. So, it
22 wouldn't be -- it wouldn't have been right. It would have
23 been suppressed as it should be if it's illegally obtained.
24 It's obtained in ---

25 MR. MARTIN: I hate to object, but that's a far field

1 argument under the fact. That issue hadn't been determined
2 whether or not such was legal.

3 THE COURT: Yeah, I'm just going to strike that. Just
4 disregard it and we'll continue.

5 MR. HEMBREE: Things start moving. He's got a limited
6 amount of time. The police have already stopped by once and
7 he's got to get some things straight. So, what does he do?
8 He within hours, within a few -- within two hours he's in
9 touch with Kahle Schettler. He says, "I've got to bring my
10 car, I've got to trade cars back with you. I've got to switch
11 cars again before something happens."

12 He knew. He knew. He was scared. He had cause to be.
13 He returns what Kahle Schettler described, you can look in
14 this picture, he returns a very clean car. That was Kahle
15 Schettler's testimony and he said it was in the condition that
16 ---

17 MR. MARTIN: I object again. Again I swear I hate to,
18 that's not Kahle Schettler's testimony. That's a misstatement
19 of the facts in the record.

20 THE COURT: Gentlemen, let me have you come forward.

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

23 THE COURT: Disregard, that last sentence is not in
24 evidence for your consideration and I want to remind you just
25 very briefly that what the attorneys say in their closing

1 arguments is not evidence in the case. You recall the
2 evidence as you heard it from the witness stand or as you see
3 it in the documents. My apologies, please continue.

4 MR. HEMBREE: Thank you, Your Honor, and thank you, Mr.
5 Martin.

6 The SBI agent was the one who described it as a very
7 clean car. Kahle Schettler described it as being in this
8 condition. He testified that this was the condition the car
9 was in when he got it. I submit to you look at it yourself,
10 make your own judgment. He's cleaning up his mess. He was
11 -- cleaned up the car before he delivered it back to his
12 friend. He had two hours to do it, starting to take care of
13 business.

14 The next thing, the next thing he's got to get to he's
15 got to get his car back. So, he goes over to Kale Schettler's
16 house and he carries two bagfuls of stuff from the Schettler
17 vehicle to his vehicle.

18 MR. MARTIN: I object.

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

21 MR. HEMBREE: I would ask you to recall from your own
22 memory what Kahle Schettler said. Items, but no doubt, items
23 were transferred from Kahle Schettler's vehicle to the black
24 Blazer and they traded cars.

25 The Defendant suggests low miles to Schettler, calls him

1 later, sometime later and suggests to him that it would be
2 helpful if he could remember the mileage on the car and that
3 it was low miles. Folks, he's simply floating a story out
4 there to this friend trying to see if he'll bite on it. He
5 knew Kahle wouldn't. Kahle's not built that way. He's an
6 honest kind of a guy and he didn't take it. He said, "I
7 don't know. I can't say that, John," but floats the concept,
8 the idea that low mileage would be helpful.

9 He sees Pedersen and these two it's interesting that
10 these are the people that he goes to see right away and I tell
11 you why because there were two people that by noon that day
12 two of his friends, two of his buddies that he had drawn in to
13 the cover-up, drawn into the plan. One of them was Schettler.
14 He had drawn Schettler in by borrowing his car. The other one
15 was Pedersen, Tom Pedersen and he'd drawn Pedersen in because
16 he tells Bill Frontz with the Myrtle Beach Police Department
17 over the telephone that, "Yeah, yeah, I talked to Pedersen
18 yesterday. As a matter of a fact he told me about his little
19 dog. They got a little dog," and he goes on to give
20 this detail about the new pet. Pedersen said that didn't
21 happen. There was no phone call. "I never heard from him,"
22 but it's interesting that the two people that he goes to see
23 are the very people that he draws into this conspiracy.

24 Later when he goes to see Pedersen that night, we're
25 talking about the night of the 10th, Pedersen gets home from

1 work. He goes to visit his friend. He's kind of asleep when
2 Pedersen gets home that night, that evening from work, and he
3 suggests, he tells Pedersen, "You know, you know, Buddy, I
4 got no alibi. I don't have an alibi." The second person
5 he's floated that plan to. One was Kahle Schettler
6 with the mileage. "It would be helpful if I could get low
7 mileage," and one was Pedersen, "I don't have an alibi," to
8 see if he'll maybe take the bait out here. Pedersen didn't
9 take the bait. Pedersen wasn't going to lie for him. He's
10 his friend. He'd try to help him all he could but he wasn't
11 going to tell a story for him.

12 And then the -- well, the SBI agents go by and see him
13 and he's wearing brand new tennis shoes. I don't know what
14 that means, maybe nothing, maybe, maybe he had sand in his
15 other shoes and he wanted to get rid of them, maybe not.
16 Maybe he just had new tennis shoes.

17 Truth versus cooperation. This is important because
18 there's a big difference. You can be cooperative and be
19 dishonest. As a matter of a fact many who are trying to get
20 away with a lie are very nice about it. They're very
21 cooperative, even helpful, but they're lying because if he
22 says when the police call, "Hey, you're the boyfriend
23 of Renee Poole. We're kind of looking at it. What's the
24 story on that," and he says, "You know what, I don't want to
25 talk to you guys. Don't bother me again, good bye," wham,

Closing Argument by Mr. Hembree

1271

1 law enforcement is going to get suspicious. He's cooperative
2 in an effort to move that suspicion away from him, to take
3 that focus off of him.

4 He lied about Schettler's home. He knew how to get in
5 touch with Kahle Schettler. He lied about it. He lied about
6 the nature of his relationship with Renee Poole. "Oh, yeah,
7 we broke up," talk to, talk to Bill Frontz about it. You've
8 got his statement. You can listen to it if you want to, but
9 you heard that before. "Yeah, we broke up. You know, we're
10 going to be friends if we can. You know, she, she's -- we're
11 done, no big deal," kind of played it off, no problem, no
12 problem. This was the same guy who is saying, "F you,
13 Renee."

14 Lied about the last meeting with Renee Poole. He lied to
15 Myrtle Beach Police about that, said it was on the 30th, lied
16 to Myrtle Beach and we know that it was -- we know at least,
17 we have a witness, the Wolfords, Bruce Wolford that can say,
18 "Yeah, they were at my house on the 2nd. We went to the mall
19 together. We went shopping together, and we spent, roughly
20 spent the whole day together on the 2nd," and that was after
21 the 30th. Then you've got Bollow that sees the car over there
22 three nights and then that Saturday morning for a couple of
23 hours. Lied about the last meeting to SBI, to Myrtle Beach
24 Police and got Wolford and Bollow.

25 Lied about the alibi, you know this, and this little dog

1 story and touched on the movements after he was -- after the
2 police had contacted him. He goes and sees the two people
3 that he's most concerned about. He calls and says that he has
4 removed the evidence of Renee Poole, "But I can't tell you
5 where it is," but I think in the cover up in this case just
6 on the circumstantial evidence the most damning, the most
7 telling is this.

8 Telephone conversation with Frontz, Frontz, "Mr.
9 Frazier, I guess to tell you -- I don't know how as a police
10 detective, it's, I guess, the most serious instance we deal
11 with. We've got a homicide, a homicide." "Oh, my God."
12 Frontz, "Mr. Poole is no longer with us." "Oh, shit."
13 Then the conversation goes on about Renee Poole's name and
14 how her name is spelled and how they can't remember names
15 and how Frazier, he says, "Well, I guess you were home
16 last night, Mr. Frazier," and he says, "Oh, yeah, I was."
17 You can listen to that yourself, but here's the thing
18 that I think is most telling if you've just been told that
19 your girlfriend's husband was killed, not shot, but
20 killed. There was a homicide. What are you going to ask?
21 There's a follow-up question and the follow-up question
22 isn't, "Oh, shit." The follow-up question is, "What
23 happened? What, what happened to him. How did, how did he
24 die?"

25 MR. MARTIN: Again, I hate to object.

Closing Argument by Mr. Hembree

1273

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

3 MR. HEMBREE: That's the question. That's the question
4 number one. What would question number two be? Question
5 number two, if you know that Brent Poole was with Renee Poole
6 as the Defendant admits to Captain Frontz, he says he knows
7 that they were going to Myrtle Beach on their anniversary. He
8 didn't ask about Brent. Who'd you ask about next? You all
9 know. ``Well, how is Renee doing? How is she? Did she get
10 hurt? Is she all right? Is she okay?'' Why wouldn't you ask
11 that question? It's because you know the answer. That's the
12 second notice. That's a huge, huge fact, but larger still,
13 larger still was that afternoon when Brent Poole went to visit
14 his friend, Kahle Schettler you will recall Mr. Schettler, a
15 slender guy, works as a carpenter, been friends since high
16 school. Mr. Martin said he seemed like a guy that tells the
17 truth, seemed like an honest fellow, and he, John Boyd Frazier
18 tells his friend, Kahle Schettler, ``Brent was shot and
19 killed.'' Frontz never told him how he was killed.

20 This -- I'm going to talk a little bit about the Defense
21 case and I want to talk about some direct evidence and we'll
22 be done but I'm taking a long time, too, and there's a lot of
23 evidence in this case, folks, and that's why it's taking us
24 all a lot of time to talk about it, and I appreciate, in the
25 middle of this I will take a 30-second time out and say thank

1 you for your attention so far. Stay with us because there's
2 more very important information we need to talk about.

3 One of them is this, when I was -- talk about the Defense
4 case a little. When I was -- a few months ago it was my 17
5 year old daughter's birthday in and she is a real fan of
6 the musical Chicago. She went to see it at the -- she went to
7 see it at the movie and then she -- they came to town and they
8 were playing at the Palace and we bought tickets. She and I
9 went to go see the show. We had a great time, a great show
10 and the story of Chicago, this musical, Broadway musical is
11 about this woman who kills her boyfriend, he's getting ready
12 to leave her and she shoots and kills him and in the movie
13 she's played by Renee Zellweger and Richard Gere plays the --
14 her lawyer and he's a guy named Billy Flynn and he's like
15 just, you know, this, this, you know, criminal defense lawyer
16 and in one scene Billy Flynn is kind of talking about how he
17 does his work, you know, how he works his magic and he sings
18 this song, Richard Gere sings this song and I'm not going to
19 sing for you because that would be the end of this case, but
20 Richard Gere sings this song and he says, "Give them the old
21 razzle dazzle." He says, "How can they hear the truth above
22 the roar? How can they see with sequins in their eyes," and
23 essentially he says if you put on a good enough show it
24 doesn't really matter what the truth is because the
25 crowd will love you and the final, one of the final lines in

Closing Argument by Mr. Hembree

1275

1 the song is, ``Give them the old razzle dazzle and they'll let
2 you get away with murder,' and I couldn't help it but as I
3 watched this case think about that song because you look, I
4 mean, I'll give the Defense, I'll give the Defense their due.
5 I mean, they've got a set up here that is -- they've got
6 all the technology, you know, the latest stuff, you know,
7 cutting edge technology available for the courtroom. I mean,
8 they could pull off -- this is Alabama Theater kind of stuff.
9 This is good stuff. They go out and they hire the coast to
10 coast experts, \$11,600 for one over here, you know, three to
11 \$4,000 for that one over here. They've gone out and
12 commissioned this Wofford College student study with the
13 psychologists, you know, and we'll talk about that in a
14 minute. They do that. You know, they're just -- you know,
15 they give you a little razzle dazzle. I mean, they're putting
16 on this tremendous show. It's a show.

17 It's troubling to me that in our country, in our system
18 of justice that we have a system where our college professors
19 have figured out a way to work these little side businesses
20 and become paid experts. It's troubling. Maybe we don't pay
21 our teachers enough. I don't know. In colleges I know that
22 one of them made over \$100,000 and Loftus made \$95,000 from
23 her college salary but they have found a way to make more
24 money, to generate a little side income. They, you know,
25 they're really kind of interesting and as you watch them

1 they're pretty predictable. They are very predictable. It's
2 kind of like and I think the analogy is like the little horse
3 that's at the Wal-Mart, you know, that they have out
4 front for the kids to ride. As you sort of stick your quarter
5 in and you put the little child on the horsy and it goes
6 around. It's very predictable. You know what you're going to
7 get. You put the money in the top and you know exactly what
8 you're going to get and it kind of has this little, you know,
9 the music plays and the child rides and that's it, you know,
10 and it's over. The experts strike me very much the same way.
11 You sort of put the money in the top. They really don't need
12 you to ask the questions. If you watched even the way that
13 Mr. Brittain questioned Dr. Cutler it was as if Dr. Cutler was
14 like, "Get out of my way. Let me just say what I want to
15 say, you know, I've got this stuff. I want to tell this jury
16 this. I've got my script here. I've rehearsed it a hundred
17 times. I'm ready to go. Let me just read them my stuff
18 here," and you've got to kind of wonder about the rehearsal
19 that goes into that, but that's what we have. It's a great
20 country. We have -- but I do want to talk a little bit about
21 these two, these two experts.

22 You've got Cutler. I think Cutler is, he has one
23 hundred percent of the time, every time he's ever testified
24 has been for the Defense. You have Loftus 95 percent of the
25 time she -- I think she had five cases in her career she said

Closing Argument by Mr. Hembree

1277

1 that she's -- she may have testified for the State but 95
2 percent of the time she's testified for the Defense. You've
3 got the -- basically saying that, you know, people can make
4 mistakes, you know, memories can fade and people can make
5 mistakes and we all know that and we didn't need them up
6 here for that, but \$11,600 people make mistakes, 3 or \$4,000
7 people can make mistakes.

8 Cutler, though, Cutler actually confirmed a great deal of
9 the State's procedure in this case, said it would lead to a
10 reliable identification and I'll talk with you a little more
11 about that in a minute. Loftus, now Loftus said and she
12 seemed to take great pain in telling us about or effort in
13 telling us about, "Well, we've got this study of 28 people
14 and in the majority, the vast majority of these 28
15 People, these 28 cases where people were exonerated they were
16 exonerated because there was eyewitness identification
17 involved in some way." So, we've got 28 cases in the United
18 States people that were exonerated where eyewitness
19 identification and in the majority of those, she didn't say
20 all of them, she said the majority of those 28 that there was
21 a problem with the identification.

22 Folks, they went and found 28 cases in the whole United
23 States, the whole nation, millions of criminal convictions
24 but they went out and found 28 so they could build the study
25 working -- they're working their way backwards. They find the

1 cases first, then they find the problem. It's what -- when I
2 was in chemistry in high school and I wasn't very good at it
3 and we call it fudge factor. Your sort of knew what the
4 answer was supposed to be. So, you sort of worked the
5 experiment backwards and you could make it work out any way
6 you want. What is the age old saying that, "There's lies,
7 damn lies and statistics," and this was statistics and it's
8 really interesting that when I'm listening to this 28 case
9 study that seems to have all this, you know, it seems kind of
10 like it's worked backwards it brings me up to the Wofford
11 College student study, this study.

12 There is a gaping problem with this study. There is a
13 huge problem with this study. What they did is they took
14 the pictures, found, found the criteria, the characteristics
15 that were the most outstanding, and then gave that as the
16 description to the student and said -- didn't say, "Well, you
17 don't have to make a choice." Told the student to make a
18 forced choice, "Choose the one, choose the one that has these
19 characteristics." Now, I can make that work a hundred
20 percent of the time if I do it right, if I pick the right
21 characteristic, if I pick the one that says, "You know, this
22 fellow here I'll tell you what, college students at Wofford, I
23 want you to identify the man wearing a striped shirt." Guess
24 what, I just got a hundred percent. I can roll the die 60
25 times and I'm going to get number four 60 times. So, you can

Closing Argument by Mr. Hembree

1279

1 build experiments backwards in such a way that you can get the
2 results you want. This is important because Dr. Cutler said
3 that based on the description the Winston-Salem officers were
4 given to do the photo lineup, white male, approximate height,
5 weight and age, that this was a good lineup. He didn't have a
6 problem with it. He didn't object to it; however, and you
7 noticed when I would ask him about that he'd say, "However,
8 when we talk about the Wofford College study that becomes
9 problematic at that point." This thing was bought and paid
10 for with the result at the end in mind ---

11 MR. MARTIN: I object. I object. I ask that be
12 stricken from the record, that test was bought and paid for.

13 THE COURT: Let me have you come forward.

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

16 THE COURT: And I am going to strike that last comment
17 that it was bought and paid for. That is not for your
18 consideration and remember you are to recall the evidence as
19 you heard it from the witness stand.

20 MR. HEMBREE: Thank you, Your Honor.

21 You've got the videos and the photos. I don't know what
22 those really tell us. The video, I would ask you as people,
23 as citizens, folks that have, that know what your eyes can see
24 and know what a camera does and know what a videotape does to
25 use your own common sense and good judgment in determining

1 whether or not an eye can see better than a video camera from
2 this far away, from this far away, but if you look at those
3 pictures just by the nature of photography it's not
4 intentional on anybody's part, it looks like he's a long way
5 off, like he's a long way off, but you use your eyes looking
6 at me 12 to 15 feet away, now you know what they saw.

7 John Adams was a lawyer and a president and he was quoted
8 as saying that the truth is a stubborn thing, and I'm going to
9 submit to you that no amount of money, that no amount of
10 technology, that no amount of psychology, expert witnesses
11 from coast to coast can hide under a bushel, can suppress, can
12 crush the truth. The truth in this case will come out and
13 that that technology and those experts and that razzle dazzle
14 not be allowed to strangle justice and, folks, I -- my last
15 comment about the Defense case is the thing that's most
16 disturbing.

17 You saw the Hobbsses testify. There was a reward
18 offered in this case early on in the investigation. Initially
19 there was a reward offered of \$50,000 by the Poole family and
20 the Hobbsses testified clearly that they were not aware of that
21 reward, had no knowledge of that reward. They don't live
22 here. They don't live in North Carolina. They don't live in
23 Winston-Salem. They didn't know anything about it. The
24 Pooles have lost their son, the father of their granddaughter.
25 There's not a whole lot they can do for him in the days that

1 followed that murder. Just not much they can do, but there is
2 one thing they can try and do, try and help, do the only thing
3 they can and that's to post a reward. The Hobbsses didn't want
4 the money. They didn't know anything about it. They offered
5 sworn statements repeatedly for any knowledge over and over
6 again, no knowledge, but at some point the Pooles wanting to
7 do a good turn to recognize the Hobbsses's willingness to stand
8 up when it would have been so easy, so much simpler to say,
9 "I didn't see it. Let's not call them. I don't want to
10 get involved," to acknowledge their willingness to go
11 above and beyond the duty of a normal citizen, offer them
12 \$20,000, and they don't want it and they turn it down but
13 the Pooles are persistent. They're -- this is what they
14 want. Out of respect for the Pooles the Hobbsses accept
15 it and they take it, stick it in the bank, it's still in
16 there and you heard Mr. Hobbsses testify, "I'd write a
17 check back to them right now." To imply, for this Defense
18 team to imply that the Hobbsses are somehow motivated by that
19 money that the Pooles offered to do the only thing they
20 could for their dead son is simply not right. It's just not
21 right.

22 The Hobbsses, folks, you will judge based on your common
23 sense, your normal everyday powers of observation. You saw
24 them testify. You heard them and you evaluated them as you do
25 anybody else. You watched them get knocked around for a long

1 time by a real good Defense lawyers. Did they change? Did
2 they alter? Did they lie? Did they hedge? Were their
3 responses clear, honest, direct, did they clearly recall their
4 experiences? The identification in this case is critical.
5 That's why the Defense has spent so much time on it because
6 we've got these circumstances, the motive, the plan, the
7 execution and the cover-up narrowing, narrowing ever tighter
8 around the Defendant, but the Hobbsses, the Hobbsses they put
9 him on the bull's-eye. They finish him off. That's the end of
10 the story, and if you believe the Hobbsses they're done, and
11 that's why they come so hard at them and that's why they spent
12 so much money and made such an effort to try to shake your
13 belief in their identification.

14 I want to talk just a very short time about their
15 identification. I think the most important part of it is that
16 you saw them testify. You evaluate them based on what you saw
17 from this witness stand. Even Dr. Cutler, I asked him,
18 "Doctor, they saw him in different positions with different
19 lighting conditions. Does that make their recollection better
20 or worse?" "Better." "They weren't drinking. That make it
21 better or worse?" "Better." "They saw him in different
22 poses, better or worse?" "Better." Okay, lighting was
23 adequate, that was what the testimony was. It was not great
24 but it was adequate. They could see and he's looking up at the
25 hotel, you're getting the cast off from the hotel, he turns

1 around, looks right at them, and I asked Dr. Cutler, "If this
2 is an unusual event you got more likelihood of remembering it
3 or not?" "The more likelihood you'll have an accurate
4 memory." It's an unusual event. It was an unusual
5 event. This guy was staring at them. He gave them the creeps
6 and then he's hiding in the weeds. They were watching him.
7 They were, you know, not scared-scared, but concerned, nervous
8 about this guy, something they don't normally see and you've
9 got to remember, folks, these, these dark people that they,
10 you know, they don't live here. They're not accustomed to
11 this tourist activity like this all the time, all this action.
12 They live kind of out in a small town and, you know, these
13 kind of events they don't occur to them out there much. They
14 don't have these things come into their lives. This was a big
15 deal. It was something that they focused on, they remembered.
16 Mrs. Hobbs, she went home and replayed it in her mind thinking
17 about it. "Doctor, would that make her recollection better
18 or worse?" "Better."

19 I've got to give Cutler credit. You ask him the
20 right question, he told the truth. He conceded to me that
21 there were in many, many ways the Hobbses's recollections
22 would be good. I went through the procedure with him and I
23 know that's painful. It was painful for me, but the procedure
24 with him regarding the photo lineup and step by step by step,
25 National Institute of Justice, one, two, three, four, five,

1 six, seven, the next stage, six steps, one, two, three, four,
2 five, six, and I asked him, you know, did we comply with that
3 one, did we comply with that one, did we comply with that one?
4 All these recommendations, and I took count of it and I found
5 that out of 28 items on the checklist, suggestions,
6 recommendations that we had followed to a tee 23 of them. He
7 outright agreed with me about 23 of them. He agreed -- he was
8 waffled on a couple, we were kind of -- couldn't kind of -- we
9 couldn't come to an agreement on a couple and on three of them
10 I said, "Well, you know, you got us on that one. We didn't do
11 that one at all." So, it was a good procedure. The
12 identification procedure was not suggestive in any way. Went
13 back to him at the end if you remember. I said, "Now, we had
14 an officer that did this lineup, didn't know anything about
15 the case, kind of a blind -- I can't remember what it was
16 called -- sort of a -- I'm not sure that was a blind lineup,
17 whatever the term was, he didn't know anything about the case.
18 So, he can't give them any clues. He can't tip them off and
19 say, "Well, you know, one looks pretty good, you know, or have
20 even any facial expression, any nonverbal clues that might,
21 might give it away?" "No, what you did there was good." He
22 said, and I asked him about it because it was in his book.
23 You remember me pushing him about it a little bit. I says,
24 "You, in your book this was a book issue for you. You took a
25 lot of time explaining this. You find that to be very

1 important; don't you?" He says, "Yeah, I do find that to be
2 very important." Again, it indicates the procedure was good,
3 the Hobbsses were telling the truth, they got an adequate view
4 of the Defendant. "I don't know this guy from anybody."
5 They weren't looking for this. The fact that they were
6 reluctant it's important. They didn't want to be. It's
7 different when you're a victim of a
8 crime and you want somebody arrested right away. I asked the
9 doctor about that. "You want them arrested quick, you know,
10 you're nervous and you want to get somebody behind bars
11 because, you know, you were the one that got your house broken
12 into." That's a witness that has a different kind of a
13 problem. They may be overly eager. They're looking to
14 please. These folks they're not looking to please
15 anybody. As a matter of a fact if they identify somebody it
16 means trouble. It means that Morgan Martin gets to cross
17 examine you for an hour or so. The Hobbsses, good folks that
18 did a good thing that were right, they were right. The
19 farthest away they were, they testified the farthest away from
20 this witness stand to that door jamb. The closest they were
21 was 12 to 15 feet, two different opportunities to observe a
22 man dressed in all black, long sleeves, long pants, June
23 on the beach, summertime. The Hobbsses have left this
24 Defendant in a desperate situation.

25 I'm going to -- I left something out and I'll touch on

1 and then I want to finish. I want you to go back and look at
2 this calendar. I already said that. I should have talked
3 about this when we were talking about covering things up, but
4 you'll notice in this calendar that there are notations made
5 that look like they were written perhaps with a pen and copied
6 like Xeroxed in black. It looks like black Xeroxed markings,
7 and there are a lot of them in here and they go through the
8 entire year. However, there are some of the notations that
9 are in pencil as if someone has come back after they copied
10 the pages and attempted to add information. Look at that when
11 you get it in the back. A man, a man will commit a lot of
12 sins for the love of a bad woman. John Boyd Frazier committed
13 a lot of sins because he wanted the love of Kimberly Renee
14 Poole. John Boyd Frazier sinned when he entered into an
15 adulterous relationship with Kimberly Renee Poole. John Boyd
16 Frazier sinned when he convinced and assisted Kimberly Renee
17 Poole to abandon the holy bonds of her marriage and leave the
18 marital home. John Boyd Frazier sinned when he took advantage
19 of his friends and brought them into this conspiracy. He
20 sinned when he lied in an effort to cover up his crimes. He
21 sinned on June the 9th of 1998 in so many ways. He sinned
22 when he put a gun to the head of William Brent Poole and
23 pulled the trigger, but ladies and gentlemen, his greatest
24 sin, his most diabolical and evil sin was the robbery, and I
25 don't mean the fake robbery he and Kimberly Renee Poole

Closing Argument by Mr. Hembree

1287

1 staged to cover this crime. I mean the robbery of a two and a
2 half year old girl of a father. He's gone. She will never
3 get him back. Brent Poole, because of the sins of John Boyd
4 Frazier, was not there when K.P. went to kindergarten, her
5 first day of school. Brent Poole, because of the sins of John
6 Boyd Frazier, will not have her father K.P. , Brent Poole will
7 not be able to buy K.P. her first prom dress, and folks,
8 because of the sin of John Boyd Frazier Brent Poole will not
9 be there when she walks down the aisle with a ring like this
10 on her finger.

11 MR. MARTIN: I object. I object, and ask that this
12 entire line of argument be stricken from the record.

13 THE COURT: Let me have you come forward.

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

16 THE COURT: All right, ladies and gentlemen of the
17 jury, if you will disregard the last argument and that is
18 about the impact that it may or may not have on the daughter
19 in this case. That is not for your consideration, and I'll
20 tell you more about that in just a moment. You recall the
21 testimony as you heard it from the witness stand and base any
22 decision you make on the evidence and testimony presented in
23 this courtroom. Go right ahead.

24 MR. HEMBREE: Thank you.

25 The circumstances are there. The picture has been woven

Charge

1288

1 and the icing on the cake is the identification, the positive
2 identification of two separate people, separate times,
3 identifying this Defendant as the man that was in Myrtle Beach
4 on June the 9th, 1998, within blocks of the crime scene. I
5 ask, I submit to you that do not let, do not allow the old
6 razzle dazzle to crush justice in this case. Find justice.
7 Find justice for John Boyd Frazier. Find justice for William
8 Brent Poole.

9 THE COURT: Thank you, sir. Mr. Foreman, ladies and
10 gentlemen of the jury, let me let you know that I anticipate
11 this charge taking about 20 minutes. Is there a need for a
12 break prior to the charge or are you prepared to go forward?
13 If there's a need for the break if you'd raise your hand.

14 (No response.)

15 THE COURT: Very well, the indictment in this case
16 alleges several different offenses against the Defendant, John
17 Boyd Frazier. The charges are count one, murder; count two,
18 armed robbery; and count three, criminal conspiracy. Each
19 indictment charges a separate and distinct offense. You must
20 decide each indictment, and again, there's one indictment with
21 the three charges. You must decide each charge separately on
22 the evidence and the law applicable to it, uninfluenced by
23 your decision as to any other charge. The Defendant may be
24 convicted or acquitted on any or all of the offenses charged.
25 You will be asked to write a separate verdict of guilty or not

Charge

1289

1 guilty for each charge.

2 Now, the Defendant has pled not guilty to this
3 indictment. That plea puts the burden on the State to prove
4 the Defendant guilty. A person charged with committing a
5 criminal offense in South Carolina is never required to prove
6 himself innocent. I charge you that it is an important rule
7 of law that the Defendant in a criminal trial, no matter what
8 the seriousness of the charge may be, will always be presumed
9 to be innocent of the crime for which he has been indicted
10 unless guilt has been proven by evidence satisfying you of
11 that guilt beyond a reasonable doubt. This presumption of
12 innocence doesn't end when you begin your deliberations, but
13 it accompanies the Defendant throughout the trial until you
14 reach a verdict of guilt based on evidence satisfying you of
15 that guilt beyond a reasonable doubt. The presumption of
16 innocence is like a robe of righteousness placed around the
17 shoulders of the Defendant which remains with the
18 Defendant until it's been stripped from the Defendant by
19 evidence satisfying you of the Defendant's guilt beyond a
20 reasonable doubt. The presumption of innocence is not mere
21 legal theory. It is not just a legal phrase. It is a
22 substantial right to which every Defendant is entitled unless
23 you the jury are satisfied from the evidence of the
24 Defendant's guilt beyond a reasonable doubt.

25 Now, what is a reasonable doubt in the law? A reasonable

1 doubt is the kind of doubt which would cause a reasonable
2 person to hesitate to act. The State has the burden of
3 proving the Defendant guilty beyond a reasonable doubt, and
4 some of you may have served as jurors in civil cases where you
5 were told that it was only necessary to prove that a fact is
6 more likely true than not true, such as by the greater weight
7 or the preponderance of the evidence. In criminal cases the
8 State's proof must be more powerful than that. It must be
9 beyond a reasonable doubt. Proof beyond a reasonable doubt is
10 proof that leaves you firmly convinced of the Defendant's
11 guilt.

12 Now, there are very few things in this world that we know
13 with absolute certainty, and in criminal cases the law doesn't
14 require proof that overcomes every possible doubt. If based
15 on your consideration of the evidence you are firmly convinced
16 that the Defendant is guilty of the crime charged you must
17 find the Defendant guilty. If on the other hand you think
18 there is a real possibility that the Defendant is not guilty
19 you must give the Defendant the benefit of doubt and find him
20 not guilty.

21 Now, I remind you that during this trial you and I have
22 certain duties to perform. As the trial judge it's been my
23 responsibility to preside over this trial. I also have the
24 duty to rule on the admissibility of evidence that's offered
25 during the trial. You are to consider only the competent

Charge

1291

1 evidence before you. If there was any testimony ordered
2 stricken from the record in this case during this trial, you
3 must disregard that testimony, and I'm telling you now, you
4 will recall that there was, in fact, evidence that was ordered
5 stricken in this trial. You are to consider only the
6 testimony which has been presented from the witness stand, any
7 exhibits which have been made a part of the record in this
8 case and any stipulations of counsel.

9 Now, I have the additional duty to charge you as to the
10 law that's applicable to this case. As the presiding judge I
11 am the sole judge of the law of the case, and it is your duty
12 as jurors to accept and apply the law as I state it to you.
13 If you already have an idea as to what the law is or what the
14 law ought to be and it doesn't agree with what I tell you the
15 law is you must abandon this idea because you are sworn to
16 accept the law and apply the law exactly as I state it to you.

17 In every case tried in this court before a jury the jury
18 becomes the sole and exclusive judge of the facts of the case.
19 A trial judge cannot intimate, state, comment on or make any
20 statement to a trial jury about the facts of a case. Since
21 you, the jury, are the sole judge of the facts of the case you
22 are not to infer from what I say during the progress of this
23 trial or in ruling upon the admissibility of evidence or
24 otherwise or anything that I say to you now during the course
25 of these instructions to you that I have any opinion about the

1 facts of the case. The law doesn't allow me to have an
2 opinion about the facts in this case. This is a matter solely
3 for you, the jury, to determine. As jurors it's your duty to
4 determine the effect, value, weight and truth of the evidence
5 presented during this trial.

6 Excuse me for just one second.

7 There are two types of evidence which are generally
8 presented during a trial, direct evidence and circumstantial
9 evidence. Direct evidence is the testimony of a person who
10 claims to have actual knowledge of a fact, such as an
11 eyewitness. It is evidence which immediately establishes the
12 main fact to be proved. Circumstantial evidence is proof of a
13 chain of facts and circumstances indicating the existence of a
14 fact. It is evidence which immediately establishes collateral
15 facts from which the main fact may be inferred.
16 Circumstantial evidence is based on inference and not on
17 personal knowledge or observation.

18 Now, the law makes absolutely no distinction between the
19 weight or value to be given either direct or circumstantial
20 evidence, nor is a greater degree of certainty required of
21 circumstantial evidence than that of direct evidence. You
22 should weigh all of the evidence in the case and after
23 weighing all of the evidence if you are not convinced of the
24 guilt of the Defendant beyond a reasonable doubt you must find
25 the Defendant not guilty.

Charge

1293

1 Now, necessarily, you must determine the credibility of
2 witnesses who have testified in this case. Credibility simply
3 means believability. It becomes your duty as jurors to
4 analyze and to evaluate the evidence and determine which
5 evidence convinces you of its truth.

6 In determining the believability of witnesses who have
7 testified in this case you may believe one witness over
8 several witnesses or several witnesses over one witness. You
9 may believe a part of the testimony of a witness and reject
10 the remaining part of the testimony of that same witness. You
11 may believe the testimony of a witness in its entirety or
12 reject the testimony of a witness in its entirety. You may
13 consider whether any witness has exhibited to you any
14 interest, bias, prejudice or other motive in this case. You
15 may also consider the appearance and the manner of a witness
16 while on the witness stand, sometimes called the demeanor of
17 the witness.

18 Now, the rules of evidence ordinarily do not permit
19 witnesses to testify as to opinions or conclusions. An
20 exception to this rule exists for witnesses we call expert
21 witnesses. A witness who by education or experience has
22 become an expert in some art, science, profession or calling
23 may state an opinion as to any relevant and material matter in
24 which the witness claims to be an expert and may also
25 state the reasons for the opinion.

1 You should consider any expert opinion received in
2 evidence in this case and like any other evidence give it the
3 weight you think it deserves. If you decide that the opinion
4 of an expert witness is not based on sufficient education and
5 experience, or if you conclude that the reasons given in
6 support of the opinion are not sound or that the opinion is
7 outweighed by other evidence, you may disregard the opinion
8 entirely. An expert witness's testimony is to be given no
9 greater weight than that of any other witness simply because
10 the witness is an expert. Further, you are not required to
11 accept an expert's opinion even though it is not contradicted.

12 Now, I instruct you and emphasize the fact that the
13 Defendant did not testify is not a factor to be considered by
14 you in any way in your deliberations and in your consideration
15 on the question of the guilt of this Defendant. It must not
16 be considered by you in any manner whatsoever. A Defendant
17 has the constitutional right to remain silent, and the
18 assertion of this right must not be considered by you
19 in your deliberations, in your deliberations. I repeat, under
20 your oath, you are to draw no conclusion whatsoever from the
21 fact that the Defendant in this case did not testify. The
22 fact that this Defendant did not testify should not even be
23 discussed in the jury room. The burden of proof, as I have
24 stated to you, is on the State. The Defendant is not required
25 to prove his innocence. The burden of proof remains on the

Charge

1295

1 State to prove guilt beyond a reasonable doubt.

2 An issue in this case is the identification of the
3 Defendant as the person who committed the crime charged. The
4 State has the burden of proving identity beyond a reasonable
5 doubt. You must be satisfied beyond a reasonable doubt of the
6 accuracy of the identification of the Defendant before you may
7 convict the Defendant. Identification testimony is an
8 expression or belief or impression by a witness. You must
9 determine the accuracy of the identification of the Defendant.
10 You must consider the believability of each identification
11 witness in the same way as any other witness. You may
12 consider whether the witness had an adequate opportunity to
13 observe the offender at the time of the offense. This will be
14 effected by things like how long or how short a time was
15 available, how far or how close the witness was, the lighting
16 conditions and whether the witness had any chance to see
17 or know the person in the past. Once again I instruct you the
18 burden of proof is on the State. It extends to every element
19 of the crime charged and this specifically includes the burden
20 of proving beyond a reasonable doubt the identify of the
21 Defendant as the person who committed the crime. If after
22 examining the testimony you have a reasonable doubt as to the
23 accuracy of the identification you must find the Defendant not
24 guilty.

25 Now there has been evidence presented that witnesses have

1 made prior statements which are not consistent with the
2 witness's present testimony. You may use this evidence to
3 decide whether to believe the witness. You may also use
4 evidence of the earlier contradictory statements to determine
5 the truth of those statements. It's up to you to decide
6 whether to believe the earlier statements or the testimony
7 given at trial. If a witness is shown to have knowingly
8 testified untruthfully concerning any material matter you
9 may consider this in determining whether to trust the
10 witness's testimony as to other matters. You may reject all
11 the testimony of that witness or give all or part of the
12 testimony the weight you think it deserves.

13 Now, a statement alleged to have been made by the
14 Defendant has been admitted into evidence in this case. While
15 the Court has determined that the statement is admissible I
16 instruct you that you make the ultimate decision of whether or
17 not the Defendant made the statement. If the Defendant did
18 make the statement you must determine whether the statement
19 was made by the Defendant voluntarily and of his own free
20 will. These means that the statement was not caused by
21 pressure, force, fear, threats, coercion or intimidation or by
22 hope or promise of leniency or a reward of any kind. In
23 determining whether the statement was voluntary you should
24 consider both the characteristics of the Defendant and the
25 details of the questioning. Some of the factors that you must

Charge

1297

1 consider are the age of the Defendant, the Defendant's
2 education or lack of education, the Defendant's mental ability
3 or capacity, the Defendant's IQ or intelligence, the
4 Defendant's background and environment, place and length of
5 detention and the nature of the questioning. You must
6 carefully consider all of the surrounding circumstances before
7 you give any weight to an alleged statement. The State has
8 the burden of proving beyond a reasonable doubt that the
9 alleged statement was voluntary. If you determine it was you
10 may give the statement any further consideration that you deem
11 proper. You must decide what weight, if any, should be given
12 to the alleged statement. If you determine the alleged
13 statement was not the free and voluntary statement of the
14 Defendant you should not consider the statement at
15 all.

16 In order to establish criminal liability criminal intent
17 is required. For example, the mental state required to be
18 proven by the State for a particular crime might be purpose,
19 intent, knowledge, recklessness or criminal negligence.
20 Criminal intent must be proven by the State beyond a
21 reasonable doubt. Criminal intent is always a matter that
22 must be determined by you the jury from the circumstances
23 surrounding the situation. There's no way to prove intent to
24 a mathematical certainty. There is no way medical science can
25 dissect a person's brain and determine what that person had in

1 mind. So, the law says that criminal intent may be inferred
2 from the circumstances shown to have existed. This is how you
3 will make a determination of whether or not the element
4 requiring intent was present. It is not necessary to
5 establish intent by direct and positive evidence, but intent
6 may be established by inference in the same way as you take
7 any other fact, the same way as any other fact by taking into
8 consideration the acts of the parties and all the facts
9 and circumstances of the case. Criminal intent is a mental
10 state, a conscious wrongdoing. It's up to you to determine
11 what the Defendant intended to do based on the circumstances
12 shown to have existed.

13 Criminal intent can arise from an action or a failure to
14 act. It may arise from negligence, recklessness or an
15 indifference to duty or to consequences. That is considered
16 by the law to be the equivalent of criminal intent.

17 The Defendant is charged with murder. The State must
18 prove beyond a reasonable doubt that the Defendant killed
19 another person with malice aforethought. Malice is hatred,
20 ill-will or hostility towards another person. It is the
21 intentional doing of a wrongful act without just cause or
22 excuse and with an intent to inflict an injury or under
23 circumstances that the law will infer an evil intent. Malice
24 aforethought does not require that malice exist for any
25 particular time before the act is committed, but malice

Charge

1299

1 must exist in the mind of the Defendant just before and at the
2 time the act is committed. Therefore, there must be a
3 combination of the previous evil intent and the act. Malice
4 aforethought may be express or inferred. These terms express
5 and inferred don't mean different kinds of malice but merely
6 the manner in which malice may be shown to exist, that is
7 either by direct evidence or by inference from the facts and
8 circumstances which are proved.

9 Express malice is shown when a person speaks words which
10 express hatred or ill-will for another or when the person
11 prepared beforehand to do the act which was later
12 accomplished, for example, lying in wait for a person. Malice
13 may also be inferred from conduct showing a total disregard
14 for human life. Inferred malice may also arise when the deed
15 is done with a deadly weapon. A deadly weapon is any article,
16 instrument or substance which is likely to cause death or
17 great bodily harm. Whether an instrument has been used as a
18 deadly weapon depends on the facts and circumstances of each
19 case. The following are examples of instruments which may be
20 deadly weapons: a firearm, a dirk, a dagger, a knife, a
21 slingshot, metal knuckles, these are simply examples.

22 If one intentionally kills another during the commission
23 of a felony the inference of malice may arise. If facts are
24 proved beyond a reasonable doubt sufficient to raise an
25 inference of malice to your satisfaction this inference would

1 simply be an evidentiary fact to be taken into consideration
2 by you along with all the other evidence in this case, and you
3 may give it the weight that you decide it should receive.

4 The Defendant is charged with armed robbery. In order to
5 prove this offense the State must first prove beyond a
6 reasonable doubt that the Defendant took personal property
7 from the person or presence of another person. Property is
8 within the presence of a person if it is within the person's
9 reach, inspection, observation or control so that the person
10 could, if not overcome with violence or prevented by fear,
11 keep possession of the property. The State must also prove
12 beyond a reasonable doubt that the Defendant carried the
13 property away intending to permanently deprive the owner of
14 the property and to keep the property for the Defendant's own
15 use. The slightest removal of the property or the complete
16 possession of the property even for an instant by the
17 Defendant is sufficient to show a taking and carrying away of
18 the property. The taking and carrying away of the property
19 must have been done with violence or by putting the owner of
20 the property in fear of violence.

21 Finally, the State must prove beyond a reasonable doubt
22 that the Defendant was armed with a deadly weapon during the
23 robbery. A deadly weapon as I had indicated before is any
24 article, instrument or substance which is likely to cause
25 great bodily harm or death. Whether an instrument has been

Charge

1301

1 used as a deadly weapon depends on the facts and circumstances
2 of each case. Once again, the following are examples of
3 instruments which may be considered deadly weapons: a
4 firearm, a dirk, a dagger, a knife, a slingshot, metal
5 knuckles, these are all examples.

6 Now, the Defendant is also charged with conspiracy. The
7 State must prove beyond a reasonable doubt that the Defendant
8 combined with one or more persons for the purpose of
9 committing an unlawful act or of committing a lawful act by
10 unlawful means. There must be a mutual understanding,
11 agreement or common intention and plan. Mere passive
12 knowledge of, mere passive knowledge of or consent to the
13 criminal conduct of another is not enough to make a person a
14 conspirator. There must be guilty knowledge and
15 participation.

16 Similarly, the mere fact that the Defendant may have
17 associated with another person or met with another person and
18 discussed common aims and interests does not necessarily
19 establish proof of the existence of a conspiracy or that the
20 Defendant was involved in a conspiracy. On the other hand it
21 is not necessary that the agreement be a formal one, that it
22 be in writing or that the persons hold a meeting and expressly
23 state the terms of the common plan or that the agreement be
24 stated in words between them. The agreement of a criminal
25 conspiracy may come into being through an implied mutual

1 understanding. The willful, intentional and knowing adoption
2 by two or more person of a common plan is sufficient.

3 Overt acts need to be -- no overt acts need to be shown
4 to establish a conspiracy. A conspiracy may be shown by
5 circumstantial evidence only and the conduct of the parties.
6 Now, in order to convict the Defendant of conspiracy the State
7 must prove beyond a reasonable doubt not only that the
8 Defendant knew of the unlawful conduct but that the Defendant
9 agreed to combine with the other person for the purpose of
10 accomplishing the unlawful conduct.

11 Now, I'm going to show you three verdict forms, one being
12 for the charge of murder, the other being for the charge of
13 armed robbery and finally the final charge that is of criminal
14 conspiracy. Now, any verdict that you reach in this case must
15 be a unanimous one. Each of these verdict forms indicate the
16 charge and they say, we the jury by unanimous consent find the
17 Defendant John Boyd Frazier and you check off either not
18 guilty or guilty. Now, please don't read anything into the
19 fact that I have indicated not guilty before guilty. It's
20 simply that one must precede the other. There is nothing to
21 that. You make that determination and any determination that
22 you make must be a unanimous one. I indicate that once again
23 you all must agree. Now, you can find the Defendant as
24 I had indicated earlier guilty of one, two or all three, or
25 not guilty of all three or anything in between. That -- that

Charge

1303

1 is for you. In other words, your decision for one count is
2 not based on a not guilty on the other. If you found him not
3 guilty of one you still have to go to the other and make a
4 determination or if you found him guilty of one you still go
5 to the other and make that determination until you have made a
6 determination as to all three counts. Is that clear?
7 Now, your verdict must not be based on passion or prejudice or
8 on public opinion but must be based on the law and the
9 evidence and I remind you once again that the evidence that
10 you heard in this case are the stipulations, the exhibits that
11 are entered in that you'll have back with you in the jury room
12 and the testimony that was presented by way of a video
13 deposition and by way of and here before you in the witness
14 stand. That is the evidence before you. Nothing that you may
15 have heard outside of this courtroom and nothing that you
16 heard in the opening or closings are considered evidence in
17 this case. I want to remind you of that.

18 Now, ladies and gentlemen, I'm going to send you back to
19 the jury room. Madam Alternate, I'm going to put you in a
20 different location, and the reason for that is I simply am
21 going to release you if all of these jurors are well and able
22 to go ahead with deliberations, but I will not forget you.
23 We'll keep you separate until they begin deliberations. You
24 may go back at this time. Just one minute before you go back
25 and I know you're probably anxious to, but I want to make it

Charge

1304

1 very clear. Even though you have heard now the evidence and
2 testimony and the charge you are not to begin deliberations
3 until you receive the verdict forms and the exhibits in this
4 case. Do not begin discussions in this case until
5 you receive that signal. There is a chance that we would have
6 to bring you back out and recharge you on some portion of the
7 law. So, you know the signal, when you receive these verdict
8 forms and the exhibits you may begin deliberations at that
9 time, but not until. You may go back at this time.

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

12 THE COURT: All right, is there anything from the
13 State at this time?

14 MR. HEMBREE: No, Your Honor.

15 MR. MARTIN: Not from the Defense.

16 THE COURT: All right, very good. Please come
17 forward, take a look at the exhibits and make sure that
18 nothing goes back to that jury room that has not been entered
19 into evidence.

20 The verdict forms are the same. We have just switched
21 them at the request of the Defendant to have not guilty first.

22 I'll just note now we'll be at ease until we hear
23 further. It'll be going back soon.

24 *****OFF THE RECORD*****

25 (On the record.)

Charge

1305

1 (Whereupon, the following takes place outside the
2 presence of the jury.)

3 (Whereupon, exhibits and verdict forms reviewed by
4 attorneys for the State and for the Defense and approved.)

5 THE COURT: Is there anything from the State at this
6 time?

7 MR. HEMBREE: No, Your Honor.

8 THE COURT: The jury is back. They're about to get
9 the verdict forms. So, they have not begun deliberations yet.

10 MR. HUMPHRIES: No.

11 THE COURT: All right, anything from the Defense?
12 (No response.)

13 THE COURT: Okay.

14 (Whereupon, deliberations begin at 6:35 p.m.)

15 ***** OFF THE RECORD *****

16 (On the record.)

17 (Whereupon, the following takes place outside the
18 presence of the jury.)

19 THE COURT: Let's have order. I've got a matter that
20 needs to be addressed at this time, please. The jury has now
21 begun deliberations. I'm getting ready to let the alternate
22 go, but we still do have a hole in this record and that is
23 that, Mr. Martin, you had asked for the medical information in
24 regard to the non-available witness. He was not here because
25 of a medical condition. Has that arrived?

1 MR. HEMBREE: Your Honor, I have not -- it's not been
2 provided to me personally. I'll check downstairs and make
3 sure, and let me say this, we will supplement the record -- if
4 we would be allowed to supplement the record. I mean, if I
5 walk downstairs there and it's not there I guess I want to be
6 able to do that.

7 THE COURT: Yeah, let's try to see if we can get it or
8 if you all can come to some sort of agreement and get this
9 record sealed up now, not with the supplement.

10 One other thing, we need a copy of the doctor's
11 deposition, the video deposition. It needs to be a Court's
12 Exhibit to make -- what we're trying to do is make sure this
13 record is whole.

14 ***** OFF THE RECORD *****

15 (On the record, question from jury at 6:52 p.m.)

16 (Whereupon, the following takes place outside the
17 presence of the jury.)

18 THE COURT: This is going to be marked or it will
19 eventually be Court's Exhibit Number Seven. It is a note from
20 the jury signed by the bailiff [sic]. It says we need the
21 calendar with the stick-ons. They basically want the time
22 line that there was some argument about that is not in
23 evidence.

24 Now, what I generally say is that is not in evidence for
25 your consideration, but I think that could be misleading in

Verdict and Sentencing

1307

1 this particular case because it is almost a summation of
2 evidence. If there's a way, if you have a preference in the
3 way I say it I could say that board is not in evidence.

4 MR. HUMPHRIES: Why don't we say this, why don't we say
5 it was for demonstrative purposes and is not available for
6 your deliberation.

7 THE COURT: Well, do you think they'd understand that
8 or would it be better to say that was for use at closing and
9 is not available?

10 MR. HEMBREE: Yeah, in argument that would be. You
11 could say it was for demonstrative purposes to be used in
12 argument only.

13 MR. BRITTAIN: That'll be fine.

14 MR. MARTIN: That's fine.

15 THE COURT: You okay with that? Okay, do you mind if
16 I just -- let me ask you two things, do you mind if this gets
17 marked as a Court's Exhibit and goes back to the jury?

18 MR. HEMBREE: No, Your Honor.

19 THE COURT: The reason I want to do that is they are
20 less likely to throw it out. It doesn't mean they won't but
21 they are less likely to throw it out if it's got a sticker on
22 it. Any problem with that?

23 MR. BRITTAIN: No.

24 MR. MARTIN: No.

25 MR. HEMBREE: No, Your Honor.

1 THE COURT: All right, what did you all say exactly?

2 It is for -- it was for demonstrative purposes only.

3 MR. BRITTAIN: In argument.

4 MR. HUMPHRIES: Just say it was ---

5 MR. HEMBREE: Well, now, that's not really fair because
6 we used it for demonstrative purposes throughout the trial.

7 MR. HUMPHRIES: Why don't you say, why don't you say it's
8 a ---

9 MR. HEMBREE: For demonstrative.

10 MR. HUMPHRIES: Why don't you say it's a demonstrative
11 exhibit and ---

12 THE COURT: Do you think they're going to know what that
13 means?

14 MR. HUMPHRIES: Well, they might not. I'm just trying to
15 think of a good word. I don't know. I don't know.

16 MR. MARTIN: I just think you would say that it was --
17 I mean, there's only one way to say it basically and that is
18 that it was ---

19 MR. BRITTAIN: We had an agreement.

20 MR. MARTIN: It was for argument but not admissible.
21 I mean, it's like the other board that he's got over there,
22 essentially. I don't have any great preferences as to how you
23 say that, but it was -- the way it turned out it was
24 admissible for argument but not ---

25 MR. HUMPHRIES: Why don't you say this, it was for use in

Verdict and Sentencing

1309

1 closing arguments.

2 MR. MARTIN: That's fine.

3 MR. HUMPHRIES: And is not available for your
4 deliberations.

5 MR. MARTIN: It's not evidence.

6 MR. HEMBREE: And it's not into evidence, right, not
7 in evidence.

8 MR. MARTIN: Not in evidence, used for argument but
9 it's not in evidence.

10 THE COURT: All right, here's what I'm going to say.
11 Here's what I'm going to say, okay, it was for -- it is --
12 here's what I'm going to say, it was for use in closing
13 argument and the board itself is not in evidence.

14 MR. HUMPHRIES: I think that's fair.

15 MR. HEMBREE: Perfect.

16 THE COURT: All right.

17 (Whereupon, Court's Exhibit Number Seven [Question from
18 Jury] appropriately marked.)

19 THE COURT: Anyone want to see it? It was for use in
20 closing argument and the board itself it not in evidence.

21 Yeah, we can give it to them if it's acceptable then ---

22 MR. HUMPHRIES: Acceptable to the State.

23 THE COURT: Give that back to them, very good. It's
24 acceptable to the Defense?

25 MR. BRITTAIN: Yes.

Verdict and Sentencing

1310

1 THE COURT: All right, thank you.

2 (Reply back to jury at 6:58 p.m.)

3 ***** OFF THE RECORD *****

4 (On the record. Verdict reached at 7:52 p.m.)

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

7 THE COURT: It's come to the Court's attention that
8 the jury has reached a verdict in this case. Is there
9 anything from the State prior to bringing the jury out?

10 MR. HEMBREE: No, Your Honor.

11 THE COURT: Anything from the Defense?

12 MR. MARTIN: No.

13 THE COURT: Let me state now before we bring the jury
14 out I have no idea what the verdict is but I want you to know
15 that there will be no outbursts, no emotion, no show of any
16 emotion of any kind. If you are not going to be able to abide
17 by that rule of court then I'm going to need for you to exit
18 at this time. I'd expect that everybody who remains will
19 abide by those instructions. All right, we're ready for them.

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

22 THE COURT: Mr. Foreman and ladies and gentlemen of the
23 jury, I understand the jury has reached a verdict in the case;
24 is that correct?

25 FOREPERSON: Yes, we have.

Verdict and Sentencing

1311

1 THE COURT: If you would hand it to the clerk, please.

2 (Complies with request and Court reviews.)

3 THE COURT: It is correct as to its form. It will be
4 published at this time. The Defendant will remain standing.

5 THE CLERK: This is indictment number 99-GS-26-2249,
6 the State of South Carolina versus John Boyd Frazier on the
7 charge of murder, we the jury by unanimous consent find the
8 Defendant, John Boyd Frazier, guilty.

9 On the charge of armed robbery, we the jury by unanimous
10 consent find the Defendant, John Boyd Frazier, guilty.

11 On the charge of criminal conspiracy, we the jury by
12 unanimous consent find the Defendant, John Boyd Frazier,
13 guilty.

14 Joseph Nappy, foreman, dated May 20th, 2005. Mr. Foreman
15 and ladies and gentlemen of the jury, if this is your verdict
16 so signify by raising your right hand.

17 (All jurors raise right hand.)

18 THE CLERK: Thank you.

19 THE COURT: Let the record reflect that all the jurors
20 did, in fact, raise their right hand. Is there anything from
21 the State at this time?

22 MR. HEMBREE: No, Your Honor.

23 THE COURT: Anything from the Defendant?

24 MR. MARTIN: No, Your Honor.

25 THE COURT: All right, anything in the presence of the

1 jury?

2 MR. MARTIN: No, no.

3 THE COURT: All right, Mr. Foreman, ladies and
4 gentlemen of the jury, thank you for your service. On behalf
5 of both the State and the Defendant I wish to thank you. I
6 watched you during the course of the trial and you paid close
7 attention to the evidence and testimony. I want to let you
8 know that we will now be dealing with the sentencing
9 phase. If you want to remain for that you may. If you want
10 to exit at this time you may do so. That is your desire,
11 whichever you desire to do. If you do exit just drop your
12 juror button off and you will exit out the back. If you want
13 to remain you may do so. Make that decision now though.

14 (Whereupon, the following takes place outside the
15 presence of the jury.)

16 THE COURT: I'll note for the record that all of the
17 jurors have exited. It was not their desire to stay for
18 sentencing. We can come forward for sentencing at this time.

19 MR. HEMBREE: Your Honor, we are retrieving the
20 sentencing sheets right now.

21 THE COURT: All right. Yes, sir.

22 MR. MARTIN: Your Honor, if it please the Court,
23 obviously the jury has spoken. I understand the parameters of

24 ---

25 THE COURT: I need the verdicts, please. I'm sorry.

Verdict and Sentencing

1313

1 You have the verdict forms? Thank you.

2 MR. MARTIN: I understand the parameters of the sentence.
3 We would ask the Court to consider in this instance a sentence
4 of life imprisonment with the eligibility of parole in 30
5 years. I think that is the extent of the options other than
6 as to armed robbery or conspiracy but we would ask that the
7 Court consider the sentence of life imprisonment with
8 eligibility of parole in 30 years. There's not, again, a need
9 to go into the facts. The Judge has heard the case. You
10 understand the case. Mr. Frazier has no criminal record and I
11 think that it merits consideration on the more lenient
12 sentence.

13 THE COURT: All right, anything else? Anything from
14 the State?

15 MR. HEMBREE: Yes, Your Honor, the -- I know that
16 several members of the family would like to address the Court.

17 MR. HUMPHRIES: Let me say just for the record in terms
18 of the options for sentencing and I believe what Mr. Martin
19 was referring to was that the Court has the option of
20 sentencing either to 30 years or life and I understand, the
21 Court understands that a life sentence is a life sentence.
22 He's not eligible for parole in 30 years. Just so the record
23 is clear in that regard.

24 MR. MARTIN: I think the Defendant's mother likewise
25 would like to say something, Your Honor. I did not ---

1 THE COURT: All right.

2 MR. MARTIN: --- whichever you would like to go
3 first.

4 THE COURT: I'll hear from the Defendant's family
5 first and then I'll be glad to hear from the Defense.

6 MR. MARTIN: This is Ms. Jane Lovett, this is John's
7 mother.

8 MS. LOVETT: Yes, I am.

9 THE COURT: Yes.

10 MS. LOVETT: And I just want to let the Court know
11 that we know that John didn't commit this crime. We know that
12 the evidence against him is circumstantial and it doesn't do
13 any good but we know he did not kill Brent Poole. He would
14 not take anyone's life, and we stand by that. We stood by it
15 at the first trial and we stand by it now, and I just want for
16 the Court's record to know that whoever killed Brent Poole is
17 still out there, and I know that the Pooles think that my son
18 did it, but he did not, and at some point in time in the
19 future the person who really did this will be found. Thank
20 you.

21 THE COURT: Thank you, ma'am.

22 MS. MICHELOTTI: I'm Christine, his sister, and I've been
23 very close to my brother all his life and there's no way he
24 could take someone else's life. He wasn't raised like that.
25 We regret the lifestyle that he got involved with and regret

Verdict and Sentencing

1315

1 terribly that Brent was murdered and I like my mother know
2 that the persons that did this is out there and I just pray
3 every day that that person will be brought to justice so that
4 the Pooles can truly have justice and so my brother can truly
5 have justice and come home.

6 THE COURT: All right, thank you.

7 Yes, sir, did you want to address the Court? I'll give
8 you the opportunity as well.

9 MR. FRAZIER: Your Honor, I did not kill Brent Poole. I
10 would not kill anybody. I've been doing this for the last
11 seven years. I've been stuck in the system for seven years for
12 this crime that I did not commit. I would ask if you would
13 take it under consideration to give me credit for the time
14 that I have done and give me a parole date so that I might
15 have the opportunity at some point in time in the future to
16 have a life because I did not do this.

17 THE COURT: All right, all right, thank you.

18 MR. HEMBREE: Your Honor, I would now -- I'd now call on
19 Agnes Poole.

20 MS. AGNES POOLE: Your Honor, this a picture of my son
21 taken the last day that he lived with his daughter, K.P. . He
22 was just 24 years old and a life ahead of him. He had just
23 come back to the Lord and to church five weeks before this
24 happened. K.P. did not have her father the day she started
25 kindergarten. My son has a little girl 18 hours older than

1 K.P. and we watched C.P. and Craig go to kindergarten that
2 first day and Craig squatted down like this and put C. in
3 his arms and K.P.'s father wasn't there. We watched her
4 start first grade. She talks about her daddy all the time.
5 She will never have him, never, and this was the last
6 Christmas that we ever had our son with us. For Mother's Day
7 I have to go to the cemetery. For Brent's birthday there's no
8 cake, there's nothing and I would ask that you would give John
9 Boyd Frazier life without the possibility of parole because my
10 son is not here.

11 MR. WILLIAM POOLE: Your Honor, it's really difficult to
12 explain if you've never been in this position what this does
13 to a family. Since June the 9th, 1968 [sic] our family has
14 just struggled with life from day to day. It's been so
15 difficult. It's just hard to explain and I can tell you this
16 nearly seven years later it hasn't changed, and I see the
17 rest of our lives dealing with this and I would ask you not to
18 allow John, who committed this horrible crime that put us
19 where we can never touch, hold or love our son, put him away
20 for life without parole, bring justice and closure to this
21 thing. Thank you, Your Honor.

22 MR. HEMBREE: Your Honor, Dee Mishler who had testified
23 earlier today.

24 MS. MISHLER: Your Honor, this is twice we've had to go
25 through this and seven years just seems like a drop in the

Verdict and Sentencing

1317

1 bucket compared to what the rest of our lives are going to be
2 like. My family is never going to be the same. We heard the
3 same evidence that we heard back then and I would just ask
4 that John get life without parole so that we don't have to
5 deal with this. Thank you.

6 MR. HEMBREE: Your Honor, this is Craig Poole. He's --
7 he was Brent's brother.

8 MR. CRAIG POOLE: You think at one trial you're going to
9 have closure and you know this thing never ends. It just --
10 it continues to take. It's not just the life but all of our
11 lives and it's not just one taking. I don't -- I don't know
12 if you understand what I'm trying to say. For me personally
13 I trust your judgment, but for my parents I just want some
14 peace, ma'am, so they don't have to worry about this anymore.
15 I appreciate it. Thank you.

16 THE COURT: Thank you.

17 MR. HEMBREE: Your Honor, there is no point in the State
18 reviewing the facts of the case. The Court is well aware of
19 those facts. The Defendant has no prior criminal record.
20 However, due to the nature of the crime and the premeditated
21 efforts undertaken, the level of premeditation undertaken by
22 this Defendant the State would join in requesting that the
23 Court consider a life sentence without the possibility of
24 parole.

25 THE COURT: All right, anything further from the

1 Defendant?

2 MR. FRAZIER: Your Honor.

3 THE COURT: Yes, sir.

4 MR. FRAZIER: I do have a daughter myself. She just
5 turned nine last Friday. I haven't there been for any of her
6 birthdays but the first one in . . . I beg of you to give me
7 a parole date so that I can at least spend a birthday with her
8 at some time in the future.

9 THE COURT: All right.

10 MR. HUMPHRIES: Your Honor, I'm approaching at this time.
11 These are the sentencing sheets. They are not completely
12 filled out yet.

13 THE COURT: Thank you. This is -- it's most difficult
14 making this decision. On the one hand I agree, the jury has
15 spoken in regard to this and justice has been served and the
16 decision of the jury is that you did with malice aforethought,
17 that this was a premeditated, this was a planned, an arranged
18 conspiracy and you've arranged to come here and this, and
19 according to this jury's decision Brent Poole was lured out
20 into this area, and you were there and you shot him twice.
21 That's -- that is what has been determined this week in this
22 courtroom. I also factor in the fact of a record of somebody
23 and their propensity to violence. I factor that in, too.
24 Serious, extremely serious situation, been determined you've
25 been found guilty of murder. There is no record. What I

Verdict and Sentencing

1319

1 generally do in a case where there's no record and this is not
2 in any way to lessen the severity of the crime, but I do give
3 that break, that is a parole date, that is the extent of what
4 I can do in a case like that. There's a couple of reasons for
5 it. The reason that I would do it is because of the lack of a
6 past record but also because that means something in a prison
7 setting and it means a great deal in a prison setting for
8 control of prisoners and that type of thing. So, I'm not
9 going to take everybody who has been convicted of murder
10 and give them life. I have to weigh these factors and I
11 wanted to give you my reasons for weighing the decision I have
12 made. The decision I have made in this case is that it would
13 be 30 years. That means that you would be parole eligible and
14 you will get credit for time. As to armed robbery, the
15 sentence of the court is 30 years. As to conspiracy the
16 sentence of the Court is five years, which is the maximum as
17 to each. Thank you very much.

18 Is there anything further?

19 MR. MARTIN: Again, Your Honor, let me make sure. He
20 asked me. I believe it's statutory that he gets credit for
21 the time that he has served.

22 THE COURT: I've indicated that.

23 MR. HUMPHRIES: And Your Honor, just for the record, just
24 so the record is clear, when we're talking about parole
25 eligibility, not intending to correct the Court, but a 30 year

1 sentence there is no parole. There's supervised release. I
2 just wanted to be sure.

3 THE COURT: Well, that's -- yeah, that's what -- that
4 would be the supervised release and I'm sorry for not making
5 that clear.

6 MR. HUMPHRIES: Correct, I just wanted to make sure the
7 record was clear.

8 THE COURT: There is, no, you're exactly right. It
9 is, is considered such a serious offense that it is not parole
10 eligible.

11 MR. HUMPHRIES: Correct.

12 THE COURT: And there wouldn't even be any
13 consideration or looking at anything for ---

14 MR. HUMPHRIES: Till 85 percent.

15 THE COURT: --- 85 percent.

16 MR. HUMPHRIES: Yes, ma'am.

17 THE COURT: So, I'll let you know that, okay.

18 Anything further, any clarifications in regard to the
19 sentence that's been given here?

20 I've sentenced. Have I missed something?

21 MR. MARTIN: No, I didn't know ---

22 MR. HUMPHRIES: No, no.

23 THE COURT: There's nothing further.

24 MR. MARTIN: Thank you, Your Honor.

25 THE COURT: I've sentenced.

Verdict and Sentencing

1321

1 *****OFF THE RECORD*****

2 (On the record.)

3 THE COURT: All right, let's get everybody in place.
4 The sentencing is complete and if there's anybody when you --
5 trying to look down and handle that. I need to ask about at
6 this time and it would be appropriate to ask at this time
7 about any post trial motions and be glad to hear from you.

8 MR. MARTIN: Your Honor, the Defense would move at this
9 time for a judgment notwithstanding the verdict and for a --
10 or in the alternative for a new trial under the rules,
11 whichever would be appropriate. Again, reiterating our
12 motions through the directed verdict and at the end of the
13 State's evidence taken in the light most favorable to the
14 State it's not sufficient to justify or uphold the jury's
15 verdict and ask that it be set aside, that he be granted a new
16 trial.

17 THE COURT: All right, yes, from the State.

18 MR. HEMBREE: Your Honor, the jury has spoken. They
19 have obviously reached their decision and felt that there was
20 sufficient evidence. The Court has considered those matters
21 as well and we'd ask that that motion be denied.

22 THE COURT: There is substantial circumstantial
23 evidence upon which this jury could convict and I do uphold
24 the verdict as it stands and respectfully deny your motions.

25 MR. MARTIN: Thank you, Your Honor.

Verdict and Sentencing

1322

1 THE COURT: Thank you.
2 (Adjourned.)
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

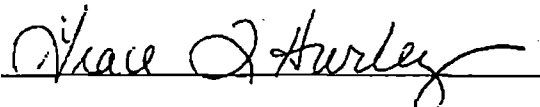
Certificate

C E R T I F I C A T E

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I, the undersigned, Grace L. Hurley, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing in the case of State v. John Boyd Frazier, held in the Court of General Sessions for Horry County, Horry County Courthouse, Conway, South Carolina, on May 16 through May 20, 2005.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.


Grace L. Hurley, CVR-CM
Official Reporter

December 15, 2005.

1342
JALP

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

John Boyd Frazier - 264488
Full name and prison number (if any) of Applicant.

v.

State of South Carolina)

IN THE COURT OF COMMON PLEAS

|| 8038
APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Perry Correctional Institution
2. Name and location of Court which imposed sentence Circuit Court of Horry County
3. Name(s) of co-defendant(s) (if any) None
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) Murder 99-GS-26-2249
 - (b) Armed Robbery
 - (c) Conspiracy
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 5-20-2005 30 years
 - (b) 5-20-2005 30 years

Revised 3/2003

- (c) 5-20-2005 5 years
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty X
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. South Carolina Supreme Court
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed in part and reversed in part (armed robbery)
- ii. Affirmed in part and reversed in part (armed robbery)
- iii. _____
- (c) the date of each such result:
- i. 11-8-2007
- ii. 2-16-2010
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. State v. Frazier, 375 S.C. 575, 654 S.E.2d 280 (S.C. Ct. App 2007)
- ii. State v. Frazier, 386 S.C. 526, 689 S.E.2d 610 (SC 2010)
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) n/a
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) ineffective assistance of counsel at trial (2005)

(b) _____

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Hearsay evidence presented during trial (2005)

(b) and defense attorney did not preserve

(c) Crawford objection

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? NO

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO

(d) any other petitions, motions or applications in this or any other Court? NO

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application: N/A

(a) the specific nature thereof:

i. _____

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

- iv. _____
- (d) the date of each such disposition:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. _____
- ii. _____
- iii. _____
- iv. _____
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
- NO
15. If you answered "yes" to (14) identify: N/A
- (a) which grounds have been presented:
- i. _____
- ii. _____
- iii. _____
- (b) the proceedings in which each ground was raised:
- i. _____
- ii. _____
- iii. _____
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) Appellate defense attorney Katherine Hudgin's
- (b) failed to raise ineffective assistance of
- (c) counsel claim.
17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? yes
- (b) your trial, if any? yes
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? no (none filed)

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
- i. Morgan Martin - 1121 Third Ave., Conway, SC., 29526
- ii. Katherine Hudgins - 1330 Lady St., Suite 401
- iii. Columbia, S.C. 29201
- (b) the proceedings at which each such attorney represented you:
- i. 2005 trial and sentencing
- ii. 2007 appeal and 2010 appeal
- iii. _____

19. State clearly the relief you seek in filing this application:

Set aside conviction based on violation of constitutional rights

20. Are you now under sentence from any other court that you have not challenged?

no

STATE OF SOUTH CAROLINA)

County of Horry)

VERIFICATION

8038

I, John Boyd Fazio 24488 being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

SWORN to and subscribed before me this 14th
day of September, 2011.

[Signature] (L.S.)
Notary Public

My Commission Expires: February 21, 2012

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, John Boyd Frazier ⁰⁶⁴⁴⁸⁸, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

[Signature]
Applicant

SWORN or affirmed to and subscribed before me this
14th day of September, 2011.

[Signature]
Notary Public

My Commission Expires: February 21, 2012

11 SEP 26 PM 3:40
2011

State of South Carolina
County of Horry

Vs

State of South Carolina

In The Court Of South
Carolina

Certificate of Service

By U.S. Mail

11

8038

This is to certify that on the 21 Day of September 2011
the undersigned John B. Trazier served a copy of correspondence
To: Clerk of Court Horry County
For: PCR application / motion to amend PCR application.
By depositing a copy of the same into the United States Mail
Postage Prepaid.

Sincerely,

[Signature]
11 SEP 21 PM 3:40

SWORN TO BEFORE ME ON THIS

21st DAY OF September 2011

[Signature]
NOTARY PUBLIC OF SOUTH CAROLINA

November 7 2016
MY COMMISSION EXPIRES

State of South Carolina
County of Horry

John B Frazier 264488

Applicant

VS.

State of South Carolina

In The Court Of Common
Pleas

||

8038

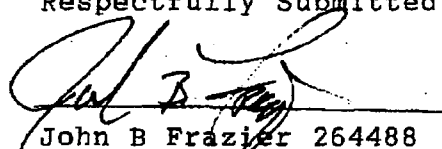
Case No. _____

Motion to Amend P.C.R.

The Applicant reserves the rights available to him pursuant to the P.C.R. Act, S.C. Code Ann. § 17-27-10 rt. seg. and the South Carolina Rules of Civil Procedure to amend and supplement the accompanying application as well to invoke discovery.

11 SEP 26 PM 3:40
CLERK OF COURT

Respectfully Submitted



John B Frazier 264488

Perry C.I. Q 4A 221

430 Oaklawn Rd.

Pelzer S.C. 29669

CEPILIED MAIL RECEIPT
 (Domestic Mail Only. No Insurance Coverage Provided)
 For delivery information visit our website at www.usps.com

JOE FICHA BUREAU

Postmark
 PELZER SC 29859

Postage	\$ 1.05 (2)
Certified Fee	\$ 2.80
Return Receipt Fee (Endorsement Required)	\$ 2.30
Restricted Delivery Fee (Endorsement Required)	\$ 0.15
Total Postage & Fees	\$ 6.15

Sent to
 Horry Co Clerk of Courts
 Street Apt. No. 1391 2nd Ave
 City, State, ZIP+4
 Columbia, SC 29528

7009 3410 8000 8985 8152

UNITED STATES POSTAL SERVICE

14 FEB 2011 PM 2

First Class Mail
 Postage & Fees Paid
 USPS
 Permit No. 549

• Sender: Please print your name, address, and ZIP+4 in this box •

John B. Frazier 217
 864488-PELZER
 430 Oaklawn Rd
 Pelzer, S.C. 29869



☒ Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
☒ Print your name and address on the reverse so that we can return the card to you.
☒ Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Harry County Circuit Court
 Clerk of Courts
 1301 2nd Avenue
 Conway, S.C. 29528

A. Signature

X *[Signature]* ☐ Agent ☐ Addressee

B. Received by (Printed Name)

C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes ☐ No
If YES, enter delivery address below:

E. Service type

☒ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

F. Restricted Delivery? (Extra Fee) ☒ Yes

2. Article Number (Transfer from service label): 7009 3410 0000 8985 8152 11

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

1352

STATE OF SOUTH CAROLINA
County of Horry

John Boyd Frazier, 264488,
Applicant,

V.

State of South Carolina,
Respondent.

COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

2011-CP-26-08038

Amendment to PCR Application

13 APR 23 PM 1:25

CLERK OF COURT

The above named applicant moves this Honorable Court to amend his application for PCR relief pursuant to SC.R.Civ.Proc.Rule 15(A) to include the following grounds for relief;

Inappropriate Charge of Criminal Conspiracy

The charge of criminal conspiracy is without merit. The State claimed that there was a conspiracy between Defendant John Frazier and Renee Poole to murder her husband Brent Poole. The problem with the State's theory is that there is no evidence and the circumstantial evidence does not rise to the, required, substantial level to support the charge.

The Law

For the State to prove criminal conspiracy there must be a mutual understanding, agreement or common intention and plan. Mere passive knowledge of or consent to the criminal conduct of another is not enough to make a person a conspirator. There must be guilty knowledge and participation. The mere fact that the Defendant may have associated with another person and discussed common aims and interests does not necessarily establish proof of the existence of a conspiracy or that the Defendant was involved in a conspiracy. In order to convict the Defendant of conspiracy the State must prove beyond a reasonable doubt, not only that the Defendant knew of the unlawful conduct but that the Defendant agreed to combine with the other person for the purposes of accomplishing the unlawful conduct.

Argument

Bruce Wolford recanted his testimony from Direct on Cross by conceding to Mr. Martin that the "mall trip" was not June 2, '98, based on the check written to L & M Computers dated for May 27, '98. Mr Wolford then further admitted that he did not hear any of the conversations between Frazier and Poole because he was asleep in another room on the evening of May 27, '98.

James Bollow admitted on Direct and Cross that he could not identify the easily remembered personalized license tag on John Frazier's Blazer that read "NERVUS". Nor could Mr. Bollow identify Frazier, specifically, as being in the Blazer he was seeing at the Poole residence. This brings in the SC Supreme Courts ruling in State v Martin, 533 SE2d. 572 (2000), "There is no evidence (such as a license tag number)... that it was the same car..."

Additionally, in James Bollow's June 12, '98 interview with NC SBI SA SS. Gregory at the Davie County Sheriff's Office, Bollow makes reference that Renee Poole told him that she communicated to her boyfriend "John" through e-mail and internet messages. Now, even though all of Renee Poole's statements, to the police were ruled, by the trial Judge, as inadmissible except for, "My husband has been shot." So, any communications between her and a boyfriend named "John" would not be ruled testimonial in nature and therefore could be presented as evidence by the State. Yet there were no e-mail or internet communications between Renee Poole and a "John" found in any of the police searches of the Poole or the Defendant Frazier's homes or computers. Nor were there any communications presented into evidence by the State to corroborate Mr. Bollow's statements to confirm the State's theory of an ongoing relationship between Renee Poole and a "John" or Renee and the Defendant Frazier.

Also, Sharon Haymaker testified on Direct trp.1102 (nothing on Cross by the State) that she called Defendant Frazier at home, on his home phone number, on Thursday June 4, '98 at approximately 9am, to let him know that she would not be coming down, from Roanoke, VA. that weekend (Friday 5th, Saturday 6th, Sunday 7th or Monday 8th), to stay with him. She remembered it specifically because it was the last time she spoke with Frazier. And her testimony was that she "stayed with him for four (4) or five (5) days a week," so Ms. Haymaker would not have left until the morning of Tuesday June 9, '98. So Defendant Frazier would have been expecting her to be at his house from the 5th through the 8th. But he did not find out otherwise until as late as Thursday the 4th when she called to let him know.

This completely debunks the State's theory of a conspiracy between Frazier and Renee Poole because he would have been expecting Ms. Haymaker to be at his house and did not know about her cancelled plans until the 4th. Additionally, Frazier would have had access to Ms. Haymaker and her car instead of having to borrow Schettler's Acura, at all, while his Blazer was being worked on. And with no further continued communications between Frazier and Poole to further a conspiracy theory, ~~the State's speculation of criminal~~ conspiracy is not substantiated and therefore should have been ruled on directed verdict by the trial Judge.

Conclusion

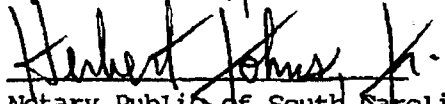
The requirements for the charge of criminal conspiracy have not been met in this case. The State did not show that Defendant Frazier and Poole agreed to combine in any unlawful conduct to accomplish anything. The fact that there is no evidence whatsoever that places Frazier at the actual scene of the crime, State v Schrock, 322 SE2d 450 (1984). And that the testimony in the record creates nothing more than mere speculation of conspiracy. So the State's speculation of criminal conspiracy does not even rise to the circumstantial level let alone meet the substantial circumstantial level that is required by the law.

This fully shows trial counsel Martin's ineffectiveness for not trying to argue these points against the conspiracy charge by the State against his client John Frazier. So the petitioner moves this Honorable Court to reverse his conviction and vacate the sentence for Criminal Conspiracy.


 S/ _____
 John Boyd Frazier,
 264488 - TRC1: U6-45b
 200 Prison Road
 Enoree, S.C. 29335

Sworn To Before Me on This

16th Day of April 2013



Notary Public of South Carolina

1-14-2019

My Commission Expires

1356

John Boyd Frazier,
264488

vs.

State of South Carolina

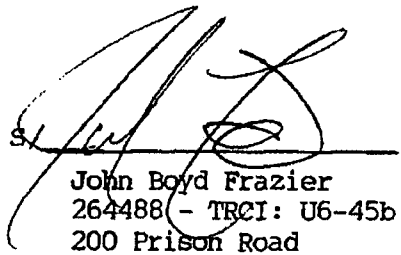
In the Courts of
South Carolina

13 APR 23 PM 1:26

CLARENCE J. HARRIS, JR.
CLERK OF COURT

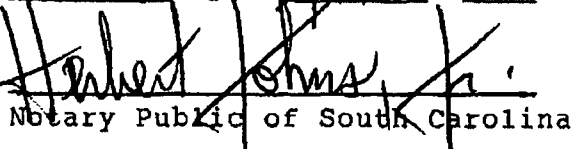
Certificate of Service
by U.S. Mail

This is to certify that on the 17 day of April, 2013
the undersigned John Boyd Frazier served a copy of a correspondence
to: Horry County Clerk of Court
from: Airtel mail to PCR Application
by depositing a copy of the same into the U.S. Mail, postage paid.


John Boyd Frazier
264488 - TRCI: U6-45b
200 Prison Road
Enoree, S.C. 29335

Sworn To Before Me This

17th Day of April 2013


Notary Public of South Carolina

1-14-2019

My Commission Expires

STATE OF SOUTH CAROLINA
County of Horry

John Boyd Frazier, 264488,
Applicant,

V.

State of South Carolina,
Respondent.

COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

2011-CP-26-08038

Amendment to PCR Application

13 APR 23 PM 1:26

CLERK OF COURT

The above named Applicant moves this Honorable Court to amend his application for PCR relief pursuant to SC.R.Civ.Proc. Rule 15(A) to include the following grounds for relief;

Failure by the State to present Competent Evidence of Guilt

One of the most significant issues with the State's case against Frazier is the complete lack of evidence. There is no physical or forensic evidence to place Defendant John Frazier in Myrtle Beach, S.C., let alone at the actual scene of the crime, nor to the murder of Brent Poole. At the time of Frazier's arrest, and even up until now, all the State had was a theory and a few circumstances that looked out of the ordinary, to a suspicious mind. But just because some circumstances might look odd, that does not elevate them to malicious intent, nor do they rise to meet the Substantial Circumstantial Evidence level required by the law.

Even State Solicitor Hembree admitted in his Closing Arguments, "But to say circumstantial evidence is enough to convict is a miscarriage of justice, when it is a secondary fact that can be sufficient, should not be enough." trp.1244. And he is absolutely correct because circumstantial evidence is a secondary fact from which a principle fact may be inferred. Yet, when it is undertaken by the prosecution in a criminal case to prove guilt of the accused by circumstantial evidence, not only must the circumstances be proven but they must point conclusively, that is to a moral certainty to the guilt of the accused. Yet the evidence presented by the State in this case does not meet these requirements, at best the evidence only raises a mere suspicion of guilt and therefore does not meet the requirements of South Carolina Law.

Law/Analysis

In State v. Schrock, 283 SC 129, 322 SE2d 450 (1984), "The closest that any of the witnesses could place Schrock to the Strickland home was approximately one mile 'as the crow flies....' The State presented evidence in an effort to link Schrock to the deaths. An oil can... was admitted into evidence, also cigarette butts found at the scene were

admitted, that were the same brand Schrock smoked. Extensive tests were run on the cigarette butts by the FBI... The tests did not indicate that Schrock had smoked them. Tests on the oil can did not... connect Schrock to the scene."

When a motion for a directed verdict is made in a criminal case, the judge is concerned with the existence or non-existence of evidence not its weight. The trial judge should grant a directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. It is his duty to submit the case to the jury if there is any evidence, either direct or circumstantial, which reasonably tends to prove the guilt of the accused, or from which guilt may be fairly and logically deduced. State v. Irvin, 270 SC 539, 243 SE2d 195 (1978). Here the evidence is exclusively circumstantial. Nothing in evidence places Schrock at the scene of the crime. Experts could not definitely testify, SLED forensic scientist could not conclusively identify the shoes nor could the State establish that the cigarettes found at the scene had been smoked by Schrock. The hand print was not his, and the shoes presented as evidence were not identified by any witness.

In a prior case dealing with circumstantial evidence in a criminal context, the South Carolina Supreme Court held:

Where it is undertaken by the prosecution in a criminal case to prove the guilt of the accused by circumstantial evidence, not only must the circumstances be proven, but they must point conclusively - that is, to a moral certainty - to the guilt of the accused; they must be wholly and in every particular perfectly consistent with each other, and they must further be absolutely inconsistent with any other reasonable hypothesis than the guilt of the accused.

...All of the facts proved must be consistent with each other, and, taken together, should be of a conclusive nature and tendency, producing a reasonable and moral certainty that the appellant and no one else committed the offense charged. It is not sufficient that they create a probability, though a strong one; and if, therefore assuming all the facts to be true, which the evidence tends to establish, they may yet be accounted for upon any hypothesis which does not include the guilt of the appellant, then the proof fails... [It] is not sufficient to establish a probability of guilt arising from the doctrine of chances that the fact charged is likely to be true.

By bringing the case, the State assumes the burden of proving that the accused was at the scene of the crime when it happened and that he committed the criminal act. See; State v. Mayfield, 235 SC 11, 109 SE2d 716, cert denied, 80 S.Ct. 1616, 4 LE2d 92d 1728, rehearing denied, 364 US 857, 81 S.Ct. 36, 5 LE2d 2d 81 (1959). State v. Bealin, 201 SC 490, 23 SE2d 746 (1943).

In, State v. Martin, 340 SC 597, 533 SE2d 572 (2000), "The trial Court has a duty to submit the case to the jury where the evidence is circumstantial, if there is substantial circumstantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced. State v. Williams, 321 SC 327, 468 SE2d 626 (1996), The trial Judge should grant a directed verdict motion when the evidence merely raises a suspicion that the accused is guilty.

State v. Irvin, 270 SC 539, 243 SE2d 195 (1978).

In Martin, the State failed to meet the "any substantial evidence" standard. Most significantly, the State's evidence failed to place...defendant inside the apartment. The Solicitor himself summed up the State's failure of proof by confessing, "...we don't know which person actually[killed him]... the whole point is we don't know..." the State had no proof... about the victim's death. Taken in the light most favorable to it's position, the State has shown that a car resembling the one in possession of the Defendant was parked at the victim's apartment complex the night the murder was committed. There is no evidence (such as a license tag number) that the black car was Bhagwandin's black mustang. The State also presented no evidence that... defendant arrived... in that car.

This case is similar to State v. Schrock, 283 SC 129, 322 SE2d 450 (1984), the State presented evidence the defendant was in the area of the murders and that footprints at the scene were similar to the ones found in the area Schrock had been. In this case, the black car seen at the apartment is not identified as Bhagwandin's car. Like the footprints in Schrock, the possibility that it was the same car, without any other evidence placing the defendant at the scene, is not enough evidence..."

In this instance, the State Solicitor confesses that they do not know if a TZ-75 was used to fire the fatal shots, all the State can do is say that the Glock owned by Frazier, "was not involved in any way." Also, not one of the State's witnesses have identified defendant's black Chevy Blazer (such as a license tag number) in or around the scene between 76th and 82nd Avenues North beach access, where cars were parked and subsequently blocked in by MBPD Officer Aiossa. Especially considering that the license tag on Frazier's Chevy Blazer was a personalized tag that read "NERVUS".

In, State v. Arnold, 605 SE2d 529 (2004), " The Court of Appeals Majority found there was no substantial evidence to submit the case to the jury and a directed verdict of acquittal should have been granted." The trial court has a duty to submit the case to the jury where the evidence is circumstantial if there is substantial circumstantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt maybe fairly and logically deduced. State v. Martin, 340 SC 597, 533 SE2d 572 (2000); State v. Williams, 321 SC 327, 468 Se2d 626 (1996). Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error. State v. Irvin, 270 SC 539, 243 SE2d 195 (1978). The trial judge should grant a directed verdict, however, when the evidence merely raises a suspicion that the accused is guilty. State v. Martin, supra.

In, Arnold, the respondents fingerprints on the coffee cup lid tab establishes he was in the borrowed BMW on the same day the victim was last seen alive. The fact that the BMW was found abandoned in Tennessee, the same state where respondent was located

after his stay in Savannah, raises a suspicion of guilt but is not evidence that respondent killed Dr. Cox. Further, there is no evidence respondent was at the scene of the crime...see State v. Martin; State v. Schrock, (directed verdict should have been granted where there was no substantial evidence establishing defendant's presence at the scene of the murder)."

In this instance case there are no fingerprints or any other evidence found on victim's wallet or other possessions to establish Frazier's presence at the scene of the crime.

Unchanging Issues of Fact

Distances:

the Carolina Winds Hotel is at: 76th Avenue

the Actual Crime Scene is at: 82nd Avenue

According to "Google Maps" from 76th Ave. to 82nd Ave. in Myrtle Beach, SC. it is 6/10 (.6) of a mile. There is 5280 feet in 1 mile; 528 feet in 1/10 (.1) of a mile. So 528 feet x .6 mile = 3168 feet.

(76th Ave. -- 6/10 (.6) mile or 3168 feet -- 82nd Ave.)
Over half a mile from Hotel to the Actual Crime Scene

Time line:

approx. 10:45pm - Brent and Renee left 'Fast Eddie's' (stopped at ATM for cash)
(stopped at 'Wings' for beach towel)
approx. 11:15pm - Exxon gas station - across the street from Wings (to use restroom)
(parked at Hotel - walk North on beach)
(1/2 mile stopped at wooded area past 82nd Ave - made love)
approx. 11:30pm - Brent and Renee walk South back to Hotel (saw headlights coming)
(3 men standing at 82nd Ave. beach access)
approx. 11:40pm - Brent Poole shot (approx. 5 minutes after Renee saw headlights coming closer, stood-up and waived her arms)
11:45pm - MB Beach Patrol Scott Brown (noticed Renee Poole waiving arms)
("My husband has been shot")
11:51pm - MBPD Peter Aiossa (responded to Brown's radio call)
(blocked in cars at 82nd Ave. beach access)
11:50 - 11:55pm - Mark Hobbs September 3, '98 statement = "It was going on 12 o'clock"
(when he saw the man in black at the Hotel)
12:00am - Brent Poole taken to the Hospital
12:05 - 12:10am - Brent Poole **"Died shortly after midnight"**

State v. Poole, 2002-UP-029 (SC. Ct. App. - filed January 16, 2002)

State v. Frazier, 357 SC 161, 592 SE2d 621 (2004)

Additionally, in Schrock, "The closet that any of the witnesses could place Schrock to the Strickland home was approximately one mile, "as the crow flies..." In this instance if the Hobbses are to be believed, the Carolina Winds Hotel is at 76th Avenue North and the actual crime scene is at 82nd Avenue North, over half a mile walk through sand dunes in the heat of June. This theory seems unlikely given the fact that according to Mark Hobbs initial statement, made on Sept. 3, '98, "it was going on midnight," when they say they saw the person in black at the Hotel; and that Brent Poole was shot at approximately 11:40pm.

Arguments - Facts from the Record

Calvin Harris testified on Direct trp.924, that he was the Operations Manager in charge of the data/computer center of Champion Products Division of Sara Lee Brand Apparel. Mr Harris confirmed that John Frazier did send him the following e-mail, State's Exhibit #28 & Defense Exhibit #16:

Calvin,

I wanted to request Monday, Tuesday and Wednesday, 8th, 9th and 10th of next week. If I could have these ~~three days off~~ to recoup from this week. Bruce will be here so the shift should be covered without any problems. I will be at home to be called in if needed. Please let me know if this is okay with you. trp.929.

In reviewing Frazier's time cards from Champion, Defense Exhibit #7, from January 1998 to June 1998. Mr Frazier had multiple instances of three (3) consecutive days off. Additionally, on Cross trp. 927, Mr Harris testified that, as Frazier's supervisor, it was common place for him to have off three (3) days in a row, "nothing unusual." And that before Frazier sent the e-mail requesting the days off, he had actually worked eight (8) nights in a row, because his co-worker had been on vacation. According to the e-mail, just "to recoup from this week," but, "I will be at home to be called in if needed."

Also, Sharon Haymaker testified on Direct, trp. 1102 (nothing on Cross by the State), that she called defendant Frazier at home, on his house phone number, on Thursday June 4, '98 at approximately 9am, to let him know that she would not be coming down, from Roanoke, VA. that weekend (Friday 5th, Saturday 6th, Sunday 7th, Mnday 8th) to stay with him. She remembered it, specifically, because it was the last time she spoke with Frazier. Her testimony was that she "stayed with him for four (4) or five (5) days a week So Ms. Haymaker probably would not have even left Frazier's until Tuesday or Wednesday. This clearly shows that Frazier would have been expecting her to be at his house from Friday the 5th through the 9th or even the 10th. But did not find out otherwise until as late as Thursday the 4th when Ms. Haymaker called. This also debunks the State's theory of a conspiracy between Frazier and Renee Poole, because there are no further communications between them to corroborate a conspiracy and because he would have been with Ms. Haymaker.

Ms. Haymaker did also commit, under oath, that she did have the opportunity to observe Renee Poole and Bruce Wolford at the Silver Fox, where they all worked, on the three weekends after May 12, 1998 (after Renee moved out of Frazier's residence). And that "they were having a sexual relationship... they would 'express it' in the dressing room, very immensely."

There are so many issues with the State's theory concerning the Wallet. The trial Court should have ruled it inadmissible, because there is absolutely no forensic evidence to link it to Frazier. Nor is there any testimony, in this record, that ties Frazier to the wallet.

The State's only witness concerning the wallet was that of the surrogate reading of the testimony of Harold A. Sirles by state investigator Dale Long, trp. 244. Yet nothing in the testimony shows Armed Robbery or that Frazier ever had possession of the wallet. The vacation home of the Sirles is at 8001 Beach dr., Myrtle Beach, SC., their primary residence is in Richmond , Va. Harold had not been to MB since February. Mr. Sirles testimony was that he arrived at his beach house around 2:30pm or 3pm and that "everything was in operation because my son left on the 4th and I got there on the 5th," of July, '98. He went out in the yard to pull weeds and prune flowers and, "I found a wallet... lying open with the leather part facing up and everything else facing down (lying face down)... This was soaking wet... I don't have a spinkler system... I had not run the hose out there ...But the wallet was soaking wet, everything in it." When asked if it had been raining that day or the previous, "I don't think so." So he, "picked it up and looked at it, and I realized there was money in it... and I thought to myself... if it was a robbery I don't know of many robberers... that leave money."

At this point Mr. Brittain makes an objection to Mr. Sirles opinion about a robbery, the Court allows it. Mr. Sirles continued, "I couldn't figure out why money would be in a wallet if it had been part of a robbery." He then confirmed that he was not in MBSC on June 9, '98 and that he did not know "nothing about anything," about anybody staying at his house during that period. Mr. Brittain , for defense had no questions, nor could he ask any of the questions, during this trial, that his client Frazier wanted to ask. If Mr. Sirles' son had been at their residence and, "left on the 4th." Was he there alone or did he have a friend or friends; did he or anyone that might have been with him see anything in the yard; did he not go out into the yard. Yet due to the ineffectiveness of defense counsel, Mr. Sirles' son was not called to testify, so Defendant Frazier was not afforded the opportunity to completely defend himself.

These questions and the whole of Mr. Sirles' Testimony is put into question based on the above and Lieutenant Frontz's notes, "On 6-10-98 FRONTZ. At approximately 0700 this date, myself, Cpl. Hull and 8 other patrolmen did conduct an out doors search around the murder scene. We started at the beach and went west from that spot in a line abreast. apx. 5 feet or so apart. In this or like manner, our group continued west through residential yards and alleys all the way to Ocean Blvd... This search did not result in any items being located which could be considered as evidence in this case."

So, if the wallet of Brent Poole had been in Mr. Sirles' yard since June 9, '98. The outdoors search resulted in nothing being found that could be evidence in this case.

Mr. Sirles' son is at the residence for an undetermined amount of time until July 4, '98. And yet the wallet of Brent Poole somehow shows up in the Sirles' yard on July 5, '98, almost a month later, with cash and all of it's contents still intact and soaking wet. MBPD Officer David Blubaugh testified that he received the wallet from Mr. Sirles and turned it over to Officer Grazioso from crime scene. And then admitted, on Cross, that they never figured out why the wallet was soaking wet. The only reason the trial Court ruled against defendant's Armed Robbery directed verdict motion was because deputy Solicitor Humphries claimed that the Visa card used at Fast Eddie's was signed by Brent Poole. Yet by the Solicitor's own admission, "that Visa card is neither present in the wallet as it was found or in the contents of -- it's not found." trp.952. Granted Mr. humphries does try to back peddle by claiming he's mistaken that the card is in the wallet. But he does not provide any proof to substantiate this claim for the Court to consider.

In Solicitor Hembree's Closing Arguments he claims, "The wallet is found with cash. why would John Frazier throw it in that yard... this is the thing that he had to throw. He had to get that out of his hands in short order." Yet, there is no testimony or evidence (such as a fingerprint), in this record, to suggest or infer that the wallet was ever in John Frazier's hands, to throw or otherwise, in any kind of order. This is an unreasonable inference from the record by the Solicitor that should not have been allowed. The defendants fingerprints were not found in or on the wallet nor did any of the forensic testing link it to ever being in the possession of Frazier. Then by officer Blubaugh and crime scene officer Grazioso's own admission, none of the forensic tests concluded what kind of water (fresh, rain, sewer or salt water - such as having washed back onto shore after being thrown into the ocean) was soaking the wallet.

Similar to the oil can and cigarette butts in Schrock, were FBI and other testing could not conclusively connect Schrock to the scene. Here without the fingerprints of Frazier on the wallet or fornsic testing to determine the origin of the water soaking the wallet. There is nothing to connect this scene to Frazier, nor to support Armed Robbery. Here the wallet is exclusively circumstantial, it does not place Frazier at the scene of the crime, because it cannot be tied to him.

Donald Clayton Smith trp. 962, is a videographer and the owner of Lucky Dog TV Productions. He made the videotape Defense Exhibit #12, at the Carolina Winds Hotel at approximately 11:30pm on February 11, 2000. He did confirm that the exterior lighting conditions on Feb. 11.'00 were the same as those on June 9, '98. Mr. Smith testified that he followed the path that Mark and Donna Hobbs said they took on June 9, '98. He had an actor "standing" in the parking lot/road area, where the Hobbses said the person they said they saw "running" by was." Yet, one can hardly make out his figure let alone see any details (such as eyes). This is because the lights on top of the building shine

straight down onto the pool deck and that it immediately gets darker once you leave the pool area. The reason is there is no other source of lighting on the other side of the fence, in the parking lot, such as street lights.

In the video, continuing east towards the ocean, there is a little board walk, the camera pans left just past the sign at the parking lot end of the boardwalk and there is the top of the lifeguard stand, over the bushes. At the beach end of the boardwalk, 45 steps, "looking over bushes and the sand dunes it's hard to see... We turn and look at the Motel -- an image of our actor and all you see is a (his) silhouetted image, because of the back lighting... And the principle of lighting is consistent whether we're talking about lay versus expert, that backlighting effects the ability to see the object you're looking at. But you have to take into consideration what the natural eye sees when you set up a video shoot even though the principles of lighting are the same. Yet backlighting effects one's ability to see an object (or suspect) they are looking at; it gives you a silhouette, you do not see any features." trp.974. Mr. Smith then confirmed that the images he captured on the video were "substantially similar with his naked eye."

On Cross, Mr. Smith testified that on his professional level, "you do not get darker quality videos than intended," as Solicitor Humphries tries to imply. Mr. Humphries does admit that "we've all seen on TV when they're trying to keep someone's identity secreted they backlight the person." Mr. Smith confirms that the technique of backlighting is just as effective on the naked eye as it is on video.

Then Mr. Humphries tries to interject former Judge Peebles rulings from Frazier's first trial in 2000, by implying that "atmospheric conditions effect what someone can see." But Mr. Smith counters with, "it does not matter as long as that light does not overpower the back light... Which from viewing the video it does not, you cannot see the actors features in the video." Defense Exhibit #12 - Carolina Winds Video

Additionally, MB Beach Patrol Officer Scott Brown confirmed just how dark it was on the beach on June 9, '98, "it was darker than normal... yes, it was fairly dark." trp. 130&140

Then there's the fact that Frazier did not even purchase his black Chevy Blazer until March 13, 1998, the same day he met Renee Poole, for the first time, at the Pedersens apartment. We also know from multiple sources that Frazier had a personalized license tag on his Blazer that read "NERVUS". Yet not one of the State's witnesses can testify that it was actually Frazier's Blazer they were seeing anywhere the State claims it as being seen. Similar to the black mustang in MARTIN, there is no evidence (such as a license tag number) that Frazier's black Blazer is ~~the one being seen~~.

Kahle Schettler testified on Direct trp.893, that Frazier had previously complained of a noise in the front end of his vehicle for several months, before he brought it to be looked at in June. And that it was not unusual for the Defendant to just show up with a problem with his cars. Then on Cross trp. 908, Mr. Schettler confirmed that it

was not unusual or even the first time Frazier had swapped cars with him. Yet, "because if you going to listen for a noise, if it's intermittent, sometimes you have to drive it for awhile. And because it was a Chevy Blazer it was quite common to have front end noises. Could have been anything from brakes, cv axles, suspension pieces, etc..."

(emphasis added) Also that Frazier did not ask about "heard noises" at 7:45 in the morning when Schettler was late for work. But "later that afternoon," at the station, Frazier and Schettler talked about the noise and other things.

Ms. Micelottà trp. 1109, testified that she did happen to drive Frazier's Blazer after June 9, '98 for two or three months and there was a noise in the front end, at highway speeds, between 60 to 65 mph. "It was getting on my nerves so I took it to a tire place in Winston. I thought maybe it was the brakes, it was and they fixed it." (a copy of the invoice for this fix is in Defense exhibits.)

Mr. Schettler testified that when, his close personal friend Frazier, asked about the mileage on his car, it was not out of malice. Frazier did not ask, in any shape, form or fashion, to tell anything untrue about how many miles had been put on Schettler's car. Frazier did not suggest for Schettler to make up some number for him. Schettler also testified that there were "in excess of 100,000 miles on his car, but it was mechanically sound, except for the tires, "they were pretty bald." More specifically, "bald enough that they should have been replaced long before then." Also that he "would not have driven the car to Myrtle Beach, SC. and back with those tires, they would not have made that trip."

It was observed by police investigators and testified to that Mr. Schettler, "keeps all of his vehicles in just obscenely good condition." So it was not unusual for him to vacuum or wash the windshield, daily, but he testified that he did NOT perform either of these until after June 11, '98. Mr. Schettler states, specifically, that what he did "was vacuum the floormats with the Cloverdale Shell Shop-Vac," and that he "Told the police investigators who took his car that the Shop-Vac was still there and had not been emptied since." But he "had not washed the car since Frazier returned it," not the hood, front bumper, lights nor the front of his car at all."

The floormats from Mr. Schettler's car, Defense Exhibit #27, were taken by police investigators and subsequently sent to the FBI for testing, see Report of Examination and stipulation of fact by Parties, Defense Exhibit #29, trp 1097.

"NC SBI SA Jerry Webster, at the request of the MBPD, examined the 1990 Acura automobile of Kahle Schettler on June 16, 1998. SBI Agent Webster indicated that Kahle's car was very clean. After checking the interior he did not notice any visible blood droplets. He indicated that from his preliminary overview there was most likely no blood in the interior and recommended not using Luminol to look for any blood. He gathered the

floormats... He then gathered two navy blue towels that Kahle had on the seats of the car. Agent Webster also checked underneath the undercarriage for any possible sand or dirt. He also checked the wheel wells and inside the wheel rims. No significant sand was evident in either place. It was noted that all four tires treads on the car were worn out and not deep."

The items that were taken by Agent Webster were sent from SLED to the FBI in Washington DC for examination. The FBI report results are that, "The soil contained in the debris from the victim's cloths is dissimilar to soil contained in the debris from the vehicle floormats... Consequently, the soil from the floormats cannot be associated with the soil from the victim... The geological material removed from the debris from the blue towels... is extremely limited and only exclusionary comparisons can be performed. Accordingly, no association can be made between the soil from the victim and the geological material from the blue towels." (emphasis added)

Schettler even offered to provide Cloverdale Shells Shop-Vac for testing. But he also confirmed that there was no noticeable sand in the floor or floormats when Frazier returned it. Also that Mr. Schettler does not smoke, Defendant Frazier did, yet there were also no ashes or the smell of cigarette smoke in Schettler's car after being in Frazier's possession for over 16 hours. Mr. Schettler further testified that there was not any bug splatter on the front of his car when Frazier brought it back nor had Frazier washed the car. And as a matter of fact, Schettler testified that the Saturday the 13th, after the murder, he drove a Chevy Dually to Mytle Beach from Winston-Salem between 6:30 and 7pm and arrived in South Carolina, "just shortly after 11pm," and that the front of the truck was "covered in a lot of bugs." But what struck him as odd was the considerable difference in the front of his car when Frazier brought his car back and just the sheer amount of bugs on the front of the truck only three or four nights later on a single trip down to MBSC; not including the trip back to WSNC. Mr. Schettler stated that he concluded that, after that trip in the Dually, that his car could NOT have been driven to MBSC and back to WSNC on the night of June 9, 1998.

When Taking into consideration the TZ-75 as the murder weapon, several key statements and testimony need to be examined carefully. In MBPD Detective Kings notes, he called and talked to an Alan Link, who lived with Frazier for a while. Mr. Link advised Det. King that Frazier purchased the Glock from Grandview Firearms in WSNC about a year ago, approx. June of 1997. The exact date of purchase can be seen on Defense Exhibit #14, Glock receipt. North Carolina, Forsyth Co Sheriff's Office has the records of the "permit to purchase" for the Glock 19 mm of John Frazier.

Kahle Schettler on Direct trp. 893, testified that he inquired of Frazier about the TZ-75 because he "had not seen that gun in a long time and being afraid he was naturally concerned...yet Frazier told him he had sold it about a year earlier at a gun show. When Mr. Schettler was asked on Cross about the TZ-75 that Frazier had

owned he testified that he had never seen the defendant in possession of both guns at the same time. Additionally that he never saw Frazier with the TZ-75 during the calendar year of 1998. And again when he asked Frazier about the TZ-75, defendant stated that he had sold it at a gun show in 1997.

Todd Fain trp. 875, testified on Direct and Cross that he purchased the TZ-75 on April 13, 1994, That "the gun would fire but the spent shell casing would get stuck between the slide and the top of the gun... you would have to pull the ratchet back to finish ejecting the shell... and that in turn would bring another bullet up to the firing pin." It was not that the gun "misfired" as the Solicitor tried so hard to infer. Mr. Fain even argues with Solicitor Humphries implications by repeating, multiple times that the gun "always fired, everytime." (emphasis added)

Additionally, on Direct Mr. Fain stated that he sold the TZ-75 to Frazier "sometime back in 1995." And that when he inquired in January or February of 1998 that Frazier "had sold the gun at a gun show."

On Cross, Mr. Fain explained that in North Carolina, where Defendant is from, "when you're selling a gun person to person you don't have to do paperwork... no documentation of the transfer from person to person."

(WSNC LJVM Collisium records show the dates of the gun shows held at the Annex in 1997) Also note that all of the interactions between Mr. Fain and Frazier about buying and selling the TZ-75 was held before defendant Frazier ever met Renee Poole.

David Collins trp 811, SLED Toolmarks examiner in the SLED forensic laboratory. Mr. Collins testified that he investigated all of the ballistic evidence in this case. And when asked if "any of the testing you did linked these bullets to John Frazier in anyway?" Mr. Collins answered, "no, sir." trp 824.

Mr. Collins did opine to the Solicitor that a TZ-75 could have been a possible source for the rounds being fired. But in reviewing the SLED Forensic Laboratory Report prepared by Mr. Collins, the list of "possible makes or origins of 9mm Luger firearms" which may have fired the rounds is 38 different brands. Mr. Collins did testify that the number of those different brands that were sold in the United States; that could have fired those bullets were in the "Thousands," maybe even "Millions." Yet this report does not stop with just 9mm Luger fireamrs. Mr. Collins admitted that he "had to generate additional possibilities... just to be thorough... and that further lengthens the list," to include "other '38' caliber firearms," by an additional 28 possible makes that could have been used. This affirms Mr. Collins implication that there are Millions of different brands of guns in the United States that could have fired those rounds. (This implication is similar to inferring that, "because he drove a Honda he was drinking and driving." It is just not a reasonable inference from the evidence or testimony in this record.)

And when Mr. Collins was asked, "if he was trying to imply that a TZ-75 was the gun that fired the fatal shots?" Mr. Collins testified, "no, I'm not." trp 828. (emphasis added) So SLED agent Collins did not testify or conclude that any of the ballistic evidence he was asked to investigate could be linked directly or indirectly to Defendant Frazier. This instance is similar to Schrock, where neither the ballistics nor the firearms testimony could generate any evidence to connect Frazier to the crime scene.

This argument is further strengthened by the State's Solicitor Greg Hembree, in his Closing Arguments, trp 1257-1258, where he talks about the TZ-75. "I don't want to talk about this gun very much because I'll tell you it's just not that important in this case. We cannot tell you that a TZ-75 was used... a TZ-75 is one of 38 makes of gun. [9mmLuger] that could have been used... Does that mean the TZ-75 was the gun? Don't know... I just can't tell you that. The Glock, Frazier, owned, was not involved in this case in any way. He just happens to have a Glock also, has got the original receipts, Defense Exhibit #14, the paperwork yet the paperwork on that TZ-75 that was sold at the gunshow nowhere to be found... I can say he doesn't have the paperwork on it." (emphasis added) So here the State Solicitor admits that the TZ-75 is just not that important because it was sold at the gunshow before John Frazier ever met Renee Poole; that the Glock owned by Frazier could not have been used. And by Todd Fain's testimony that in North Carolina, where the defendant is from, it is not required to have a permit or any "paperwork" when you buy and sell handguns person to person, at a gunshow. A permit is only required when you purchase from a licensed dealer, as the Glock was. And similar to the Solicitor's failure of proof confession in State v. Martin, State Solicitor Hembree him self summed up the State's failure of proof by confessing, "we cannot tell you that a TZ-75 was used... I just can't tell you that... Don't know." So the State had no proof of what kind of gun was used to shoot Brent Poole, all they do know is that the Glock owned by defendant Frazier "was not involved in any way." (emphasis added)

If Brent Poole was shot with possibly a TZ-75, yet by the State Solicitor's own admission is "just not that important" because Frazier did not even own one when he met Renee Poole. Then consequently, all of the forensic ballistic evidence, including but not limited to, the mention of a TZ-75 as the weapon that fired the fatal rounds should have been ruled inadmissible and subsequently stricken from the record as evidence for consideration.

Summary

In this case there is a pronounced lack of evidence, ie. no DNA, blood, blood droplets, hair, fibers, fingerprints or a murder weapon. Nothing from the crime scene technicians or the SLED forensic lab specialists to directly or indirectly connect the

Defendant John Frazier to the actual crime scene nor to the murder of Brent Poole. The circumstantial evidence presented by the State amounted to nothing more than a speculated theory that could not rise to any circumstantial evidence let alone the substantial circumstantial evidence required by the Law.

The e-mail sent to Calvin Harris, along with the Champion time cards, confirmed that Frazier had worked excessive days in a row and that he was due a couple of extra days off work. Also that it was not an unusual occurrence for Frazier to have consecutive days off work.

Although the wallet was found a month later, soaking wet, in the Sirles yard. This is the State's only argument for the Armed Robbery charge. Yet there were no fingerprints found on the wallet to connect it to defendant Frazier. So, there is clearly no evidence or testimony to support the Armed Robbery charge and therefore directed verdict should have been ruled on by the trial Judge. Yet she believed the Solicitors claim about the ATM card, without any proof, to deny the defendants motion.

The video by Donald Clayton Smith clearly indicates the poor lighting conditions around the Carolina Winds Hotel and just how little the Hobbsses would have been able to actually see, let alone identify any details of a person running by, forty feet away.

The defendants black Chevy Blazer was not the only one in existence in and around WSNC, even though Frazier did not even purchase his Blazer until March 13, 1998, the same day he met Renee Poole. And the fact that Frazier's Blazer had a very easily remembered personalized license tag that read, "NERVUS". Yet this license tag could not be identified by any of the State's witnesses to confirm its theory, as being at the Poole residence nor in the vicinity of the crime scene in Myrtle Beach, SC.

Kahle Schettler's small silver Acura had tires so bald, before this incident that Schettler as a mechanic, testified that they would not have made the over 400 mile 'round trip between WSNC and MBSC. Schettler also testified that there were no significant miles on his car when returned. The fact that there was NO bug splatter on the front of his Acura nor had the car been washed before Frazier returned it to Schettler. Then there is the FBI report on items tested from the Acura that showed no sand or debris to connect the car as being in the Myrtle Beach, SC. area.

Also, there was no evidence presented by the State, such as credit card receipts or statements or rental car agreements to show that Frazier had any other means of transportation to and from MBSC. The State also cannot place Frazier's black Chevy Blazer nor Kahle Schettler's small silver Acura in Myrtle Beach, SC., nor in the relative vicinity of the crime scene. Neither vehicle is in the list of cars from the MBPD detectives notes from the questioning of witnesses between 76th and 82nd Avenues or the cars parked at and subsequently blocked in by MBPD officer Aiossa at 82nd Avenue North beach access.

In considering this list of cars and people at 82nd Avenue North beach access after the

murder, similar to Kyles v. Whitley, 514 US 419 (1995), while its suppression does not rank with the failure to disclose the original Hobbses statements, it would have had some value as exculpation and impeachment, and it counts accordingly in determining whether Bagly's standard of materiality is satisfied. On the police's assumption, the Solicitor argued to the jury, that Frazier drove to MBSC. Yet the list without Frazier or Schettler's registrations would obviously have helped Frazier's defense. It would have had some value in countering the argument by the State's Solicitor that Frazier drove seven hours, round trip from WSNC to MBSC., to commit murder.

Either way, the defense would have had further support for arguing that the police were irresponsible. If the State had to admit that the list of cars at 82nd Avenue North beach access, was incomplete by not containing Frazier or Schettler's registration's. It would have simply underscored the unreliability of the investigation and complemented the defense. But however the evidence would have been used, it would have had some weight and its tendency would have been favorable to Frazier. In assessing the significance of any evidence withheld, one must of course bear in mind that not every item of the State's case would have been directly undercut if the BRADY evidence had been disclosed. It's significant, however, that the circumstantial evidence, remaining unscathed, would hardly have amounted to overwhelming proof of Frazier's guilt.

In reviewing SLED forensic lab technician David Collins' testimony and the SLED Forensic Services Laboratory Report, prepared by Mr. Collins. There is no physical or forensic ballistic evidence, in this case, such as a fingerprint on a shell casing or similar ammunition found during searches of Frazier's residence, that can be linked directly or indirectly to Frazier.

And lastly, the TZ-75 that the State had been so enamored with is on the forensic list of 66 different types of guns that could have been used. Although Mr. Collins could not confirm that a TZ-75 was the actual weapon that fired the fatal rounds. He did testify that the 66 different types that could have been used probably equaled Millions of those types in circulation in the United States. And that does NOT constitute an actual murder weapon. Then there's the testimony from Sharon Haymaker, Kahle Schettler and Todd Fain that Frazier had sold his TZ-75 at a gun show at least a year before he ever met Renee Poole. And in considering that the Glock actually owned by Frazier, at the time, is not on the SLED forensic list at all. Solicitor Hembree even stated that, "the Glock owned Frazier was not involved in this case in any way." (emphasis added) And here, similar to the Solicitors "failure of proof confession" in State v. Martin, State Solicitor Hembree summed up the State's failure of proof by confessing, "We cannot tell you that a TZ-75 was used...I just can't tell you that...Don't know."

The State has no physical or forensic ballistic proof of what kind of gun was used to kill Brent Poole. All they do know is that the Glock owned by defendant Frazier "was not involved in any way." So, it becomes blindingly clear that John Frazier could not have committed this crime. Consequently, all of the ballistic evidence, including but not limited to any mention of or testimony that a TZ-75 was the weapon used to fire the fatal rounds, should not have been admitted into evidence or allowed as testimony. Or at the very least it should have been ruled inadmissible and stricken from the record for consideration.

Yet, this clearly shows Mr. Martin's complete ineffectiveness in assistance of counsel for his failure to make a motion to suppress this forensic and ballistic evidence that was irrelevant, immaterial and detrimental to the fundamental fairness in the defense of his client John Frazier. Because the State's theory is crumbling before them, and given these very weak inferences from speculation, the State simply has not been able to muster direct or circumstantial evidence to warrant a finding of guilty beyond a reasonable doubt. Although the jury weighs the evidence, when there is an absence of evidence it becomes the duty of the trial Judge to grant a directed verdict motion, especially when the evidence merely raises a suspicion that the accused is guilty.

In this instance, the evidence presented by the State may raise a suspicion of guilt, similar to Schrock, it does not point conclusively nor to a moral certainty, nor beyond a reasonable doubt to Frazier's guilt. The State failed to meet the "any substantial evidence" standard required by SC Law. Most significantly, the State's evidence failed to place Frazier at the actual crime scene. So just as in Bealin, Mayfield, Irvin, Schrock, Williams, Martin and Arnold, the trial Judge should have granted the defendant's motion for a directed verdict of not guilty.

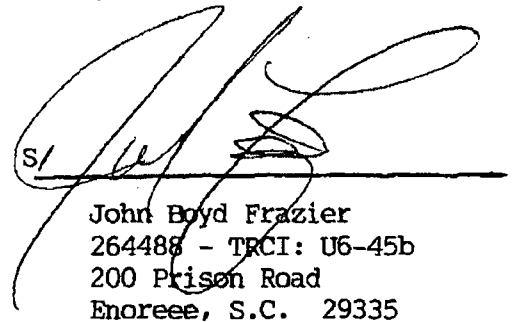
Petitioner argues that the trial Court erred by not directing a verdict. Most significantly, the State failed to place him at the scene of the crime or show his participation in the killing of Brent Poole. Petitioner's entire defense was that there was no physical or forensic evidence to connect him to the crime and from the facts in the record, no other conclusion can be reached but that Frazier was entitled to a directed verdict of not guilty based on the complete lack of evidence against him.

Conclusion

Due to trial counsel Martin's ineffectiveness for failing to argue these issues in pre-trial motions, that could have resulted in this case against his client, John Boyd Frazier, being dismissed. Due to Mr. Martin's lack luster, at best, directed verdict arguments, the trial Judge did not see that the law clearly affirmed the Defendant's arguments for directed verdict. In Mr. Martin's continued ineffectiveness,

he allowed speculative theory of mere circumstances to be drilled into the minds of the jurors, by the State, to the point that his client, John Frazier, could not be afforded his opportunity to present a full and complete defense. Thereby denying the defendant his Constitutional right to the fundamental fairness of an impartial trial.

Petitioner argued that based on the foregoing reasons, his convictions be reversed and sentences be set aside by this Honorable Court.


S/ John Boyd Frazier
John Boyd Frazier
264488 - TRCI: U6-45b
200 Prison Road
Enoree, S.C. 29335

Sworn To Before Me On This

16th Day of April 2013

Herbert Johns, Jr.

Notary Public of South Carolina

1-14-2019

My Commission Expires

John Boyd Frazier
264488

vs.

State of South Carolina

In the Courts of
South Carolina

Certificate of Service
by U.S. Mail

13 APR 23 PM 1:26

RELAND W. GRIFFIN
CLERK OF COURT

This is to certify that on the ____ day of April, 2013 the
undersigned John Boyd Frazier served a copy of a correspondence
to: Horry County Clerk of Court
for: Amendment to PCR Application
by depositing a copy of the same into the U.S. Mail, postage paid.

S/

John Boyd Frazier
264488 TR01: U6-45b
200 Prison Road
Enoree, S.C. 29335

Sworn To Before Me On This

17th Day Of April 2013

Herbert Jones Jr.
Notary Public of South Carolina

1-14-2019
My Commission Expires

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
	)	
John Boyd Frazier, # 264488,	)	2011-CP-26-8038
	)	
Applicant,	)	
	)	
v.	)	
	)	RETURN AND MOTION TO DISMISS
State of South Carolina,	)	
	)	
Respondent.	)	

Respondent, making its Return and Motion to Dismiss to the Application for post-conviction relief filed September 26, 2011, by John Boyd Frazier, would respectfully show this Court:

I. – Procedural History

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to convictions from Horry County. The Applicant was indicted in August of 1999 for murder, armed robbery, and criminal conspiracy (1999-GS-26-2249, Counts I-III). He was initially tried on February 14-18, 2000, before the Honorable Rodney A. Peeples. He was represented by L. Morgan Martin and Thomas C. Brittain. The jury found him guilty on all three counts and Judge Peeples sentenced him to life for murder, 30 years for armed robbery, and 5 years for criminal conspiracy. A timely notice of appeal was filed, and on January 5, 2004, the South Carolina Court of Appeals reversed the convictions based upon three instances of trial court error. See State v. Frazier, 357 S.C. 161, 592 S.E.2d 621 (Ct. App. 2004). The Applicant was re-tried before the Honorable Paula H. Thomas on May 16-20, 2005. He was represented by L. Morgan Martin, Thomas C. Brittain, and Natasha M. Hanna. The jury again found the Applicant guilty on all three counts, and Judge Thomas sentenced him to 30 years for murder, 30

years for armed robbery, and 5 years for criminal conspiracy. All sentences were to run concurrently.

A timely notice of appeal was filed, and Aileen P. Clare and Kathrine H. Hudgins represented the Applicant on appeal. On November 8, 2007, the South Carolina Court of Appeals affirmed the conviction for murder but reversed the conviction for armed robbery. See State v. Frazier, 375 S.C. 575, 654 S.E.2d 280 (Ct. App. 2007). On December 20, 2007, the Court of Appeals denied both parties' petitions for rehearing. On December 4, 2008, the South Carolina Supreme Court granted both parties' petitions for writ of certiorari and ordered briefing. On February 16, 2010, the South Carolina Supreme Court issued an Opinion affirming in part and reversing in part. The Supreme Court found that the Court of Appeals properly affirmed the trial court's denial of directed verdict as to murder, but erred in reversing the conviction for armed robbery. Therefore, the Supreme Court concluded that directed verdicts were properly denied as to both charges. The matter was remitted to the circuit court on March 4, 2010.

Incorporated herein by reference are the records of the Horry County Clerk of Court regarding the conviction and the direct appeal records from the 2005 trial. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II. – Allegations and Relief Sought

In his Application and attachment, Mr. Frazier alleges that his custody is unlawful for the following reason(s):

- (1) Ineffective assistance of counsel at 2005 trial – hearsay evidence was presented during trial and defense attorney did not preserve Crawford objection.

The Applicant states he is seeking to have his conviction set aside based upon a violation of constitutional rights.

III. – The Application is Barred by the Statute of Limitations

Respondent submits that the Application must be dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160 (Supp. 2003). S.C. Code Ann. §17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or *within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal*, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations applies to all applications after July 1, 1996. See Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The South Carolina Supreme Court has also held that ignorance of the statute of limitations is not an excuse for late filing. Leamon v. State, 363 S.C. 432, 435, 611 S.E.2d 494, 496 (2005); see also Pelzer v. State, 378 S.C. 516, 522, 662 S.E.2d 618, 621 (Ct. App. 2008) (filing application in wrong venue does not toll the statute of limitations); Gary v. State, 347 S.C. 627, 629, 557 S.E.2d 662, 663 (2001) (mailing of an application does not constitute filing; application must actually be filed within the statute of limitation period).

The Applicant in this case was sentenced on May 20, 2005, and the remittitur from his direct appeal was sent to the lower court on March 4, 2010. Therefore, Mr. Frazier had until March 4, 2011 to file a timely PCR application. However, this Application was not filed until about 7 months later, on September 26, 2011. Therefore, Respondent submits that this Court is required to dismiss the Application because it is barred by the statute of limitations.

IV.

Each and every allegation, claim, or statement contained within the Application not expressly admitted, qualified, or explained is DENIED.

V.

WHEREFORE, having made its Return, the Respondent requests that the Application be summarily dismissed without appointment of counsel and without a hearing. See S.C. Code Ann. § 17-27-70(c); Rule 71.1(d), SCRCP.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

CHRISTINA J. CATOE
Assistant Attorney General


ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

December 1, 2011

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

John Boyd Frazier, # 264488,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

2011-CP-26-8038

AMENDED RETURN

Respondent hereby **withdraws** its Return and Motion to Dismiss dated December 1, 2011, and submits this Amended Return to take the place of the Return and Motion to Dismiss.

Respondent, making its Amended Return to the Application for post-conviction relief filed September 26, 2011, but received by the Horry County Clerk of Court on February 12, 2011, would respectfully show this Court:

I. – Procedural History

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to convictions from Horry County. The Applicant was indicted in August of 1999 for murder, armed robbery, and criminal conspiracy (1999-GS-26-2249, Counts I-III). He was initially tried on February 14-18, 2000, before the Honorable Rodney A. Peeples. He was represented by L. Morgan Martin and Thomas C. Brittain. The jury found him guilty on all three counts and Judge Peeples sentenced him to life for murder, 30 years for armed robbery, and 5 years for criminal conspiracy. A timely notice of appeal was filed, and on January 5, 2004, the South Carolina Court of Appeals reversed the convictions based upon three instances of trial court error. See State v. Frazier, 357 S.C. 161, 592 S.E.2d 621 (Ct. App. 2004). The Applicant was re-tried before the Honorable Paula H. Thomas on May 16-20, 2005. He was represented by L. Morgan Martin, Thomas C. Brittain, and Natasha M. Hanna. The jury again found the Applicant guilty on all three

counts, and Judge Thomas sentenced him to 30 years for murder, 30 years for armed robbery, and 5 years for criminal conspiracy. All sentences were to run concurrently.

A timely notice of appeal was filed, and Aileen P. Clare and Kathrine H. Hudgins represented the Applicant on appeal. On November 8, 2007, the South Carolina Court of Appeals affirmed the conviction for murder but reversed the conviction for armed robbery. See State v. Frazier, 375 S.C. 575, 654 S.E.2d 280 (Ct. App. 2007). On December 20, 2007, the Court of Appeals denied both parties' petitions for rehearing. On December 4, 2008, the South Carolina Supreme Court granted both parties' petitions for writ of certiorari and ordered briefing. On February 16, 2010, the South Carolina Supreme Court issued an Opinion affirming in part and reversing in part. The Supreme Court found that the Court of Appeals properly affirmed the trial court's denial of directed verdict as to murder, but erred in reversing the conviction for armed robbery. Therefore, the Supreme Court concluded that directed verdicts were properly denied as to both charges. The matter was remitted to the circuit court on March 4, 2010.

Incorporated herein by reference are the records of the Horry County Clerk of Court regarding the conviction and the direct appeal records from the 2005 trial. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II. – Allegations and Relief Sought

In his Application, Mr. Frazier alleges that his custody is unlawful for the following reason(s):

- (1) Ineffective assistance of counsel at 2005 trial – hearsay evidence was presented during trial and defense attorney did not preserve Crawford objection.

The Applicant states he is seeking to have his conviction set aside based upon a violation of constitutional rights.

III. – Ineffective Assistance of Counsel

The Applicant has raised an allegation of ineffective assistance of counsel. In a post-conviction relief action, the applicant bears the burden of proving his or her allegations by a preponderance of the evidence. Stalk v. State, 375 S.C. 289, 297, 652 S.E.2d 402, 405 (Ct. App. 2007) (citations omitted); Rule 71.1(e), SCRPC. “Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that ‘counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.’” Dalton v. State, 654 S.E.2d 870, 873 (Ct. App. 2007) (citing Strickland v. Washington, 466 U.S. 668, 669 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985)). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id.

A two-pronged test is used to evaluate allegations of ineffective assistance of counsel. Dalton v. State, 654 S.E.2d 870, 873 (Ct. App. 2007). “In order to prove that counsel was ineffective, a PCR applicant must show that: (1) counsel’s performance was deficient; and (2) there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different.” Smith v. State, 375 S.C. 507, 515, 654 S.E.2d 523, 527-28 (2007) (citations omitted). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Id. (citations omitted). “Furthermore, when a defendant’s conviction is challenged, ‘the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. Id. (citations omitted). “There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.” Id. (citations omitted). The applicant must overcome this strong presumption in order to obtain relief. Stalk, supra (citation omitted).

Respondent submits that the Applicant will not be able to meet his burden of proof regarding any claims of ineffective assistance of counsel. Specifically, Respondent submits that there was no Crawford violation and therefore trial counsel's failure to preserve such an objection for appellate review did not prejudice the Applicant. However, because the ineffective assistance of counsel allegation may raise questions of fact that the record does not conclusively refute, Respondent requests an evidentiary hearing to fully resolve any issues. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Each and every allegation, claim, or statement contained within the Application not expressly admitted, qualified, or explained is DENIED.

V.

WHEREFORE, having made its Amended Return, the Respondent requests that counsel be appointed and an evidentiary hearing held.

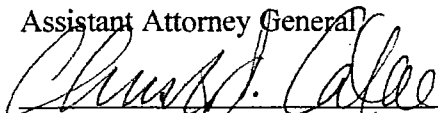
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

CHRISTINA J. CATOE
Assistant Attorney General


ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

December 9, 2011

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY) 2011-CP-26-8038

John Boyd Frazier,	)	
	)	
Plaintiff,	)	Transcript of Record
	)	
vs.	)	June 16-17, 2014
	)	
The State,	)	PCR Hearing
	)	
Defendant.	)	

B E F O R E :

Honorable Benjamin H. Culbertson
Horry County Courthouse
Conway, South Carolina

A P P E A R A N C E S:

Brana J. Williams, Esquire
Attorney for Plaintiff

Joshua Thomas, Esquire
Attorney for Defendant

Grace L. Hurley, CVR-CM-M
Circuit Court Reporter

Frazier v. State

1

1	I N D E X	
2	(June 16, 2014.)	
3	Christopher Hensley	
4	Direct by Ms. Williams.	10
5	Cross by Mr. Thomas	19
6	Redirect by Ms. Williams.	21
7	Kahle Schettler	
8	Direct by Ms. Williams.	22
9	Cross by Mr. Thomas	30
10	Redirect by Ms. Williams.	33
11	Courtney Fox	
12	Direct by Ms. Williams.	35
13	Cross by Mr. Thomas	41
14	Sharon Haymaker Aldridge	
15	Direct by Ms. Williams.	43
16	Cross by Mr. Thomas	50
17	Jane Lovette	
18	Direct by Ms. Williams.	52
19	Cross by Mr. Thomas	66
20	John Boyd Frazier	
21	Direct by Ms. Williams.	68
22	(June 17, 2014.)	
23	John Boyd Frazier	
24	Cross by Mr. Thomas	164
25	Redirect by Ms. Williams.	177

Frazier v. State

2

1	Morgan Martin	
2	Direct by Mr. Thomas.	185
3	Cross by Ms. Williams	203
4	Redirect by Mr. Thomas.	223
5	Francis Humphries, Jr.	
6	Direct by Mr. Thomas.	226
7	Cross by Ms. Williams	236
8	Redirect by Mr. Thomas.	254
9	Reply	
10	John Boyd Frazier	
11	Direct by Ms. Williams.	257
12	Certificate	264
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

Frazier v. State

3

E X H I B I T S			
		ID	EVD
1			
2			
3	A-1 Sketch		12
4	A-2 Photograph		15
5	A-3 Interview of Hensley		17
6	A-4 Chat Log - Renee and Bruce (ID only)		
7	A-5 Investigative Report - Wilson Security		205
8	A-6 Interview of Amy Marie Dudas		205
9	A-7 Portion of Trial Transcript 2005 - Mishler		76
10	A-8 Composite Drawing - Hobbs		81
11	A-9 Photograph	89	90
12	A-10 Photograph	89	90
13	A-11 Transcript Mark Hobbs - 2000 Trial		96
14	A-12 Interview of Mark Hobbs - 9-3-98		96
15	A-13 Interview of Donna Hobbs - 9-3-98		96
16	A-14 Testimony of Mark Hobbs - 2005 Trial		96
17	A-15 Testimony of Donna Hobbs - 2005 Trial		96
18	A-16 Interview of Mark Hobbs - Second - 9-3		96
19	A-17 Testimony of Donna Hobbs - 2000 Trial		96
20	A-18 Transcript of Closing Humphries - 2005 Trial		103
21	A-19 E-Mail		110
22	A-20 Sketch		128
23	A-21 Transcript of Hearing on Identification		139
24	A-22 Indictment		154
25	A-23 Indictment		154

Frazier v. State

4

1	A-24 Indictment	154
2		
3		
4		
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

Frazier v. State

5

1 (On the record, June 16, 2014.)

2 THE COURT: All right, sir.

3 MR. THOMAS: May it please the Court?

4 THE COURT: Yes, sir.

5 MR. THOMAS: The next case is John Boyd Frazier versus
6 the State of South Carolina. It's case number 2011-CP-26-
7 8038. Mr. Frazier was indicted August, August of 1999 for
8 murder, armed robbery and conspiracy. He was represented on
9 those charges initially by Morgan Martin, Thomas Brittain and
10 Peter Hearn. He had a trial in February of 2000, but that
11 guilty verdict was eventually overturned by the Supreme Court
12 in January 2004. He was subsequently retried May 16th through
13 the 20th, 2005, again with Mr. Martin, Mr. Brittain and this
14 time with Natasha Hanna as third counsel.

15 The jury convicted him again as indicted. The Honorable
16 Paula Thomas sentenced him to 30 years for the murder, 30
17 years for the armed robbery and five years for conspiracy, all
18 to run concurrent.

19 He did have an appeal from that conviction. He was
20 represented by Aileen Clare and Kathrine Hudgins on that.
21 Ultimately, the Supreme Court affirmed his conviction on --
22 and remittitur was sent on March 4th, 2010.

23 He filed this PCR application on September 26th, 2011.
24 He's filed a subsequent amendment alleging ineffective
25 assistance of counsel, prosecutorial misconduct and on various

1 grounds, and he is represented by Brana Williams, and the
2 State is prepared to proceed.

3 THE COURT: All right. So he was convicted, sentenced to
4 30 years for murder, 30 years for armed robbery and what for
5 conspiracy?

6 MR. THOMAS: Five.

7 THE COURT: And those all ran concurrently?

8 MR. THOMAS: Yes, sir.

9 THE COURT: Okay.

10 All right. Mr. Frazier, if you'd please stand.

11 MR. FRAZIER: Yes, sir.

12 (Complies with request.)

13 THE COURT: Raise your right hand.

14 (Mr. Frazier is sworn by Court.)

15 THE COURT: All right, sir. Your name is John Boyd
16 Frazier?

17 MR. FRAZIER: Yes, sir.

18 THE COURT: All right. Mr. Frazier, you have filed a
19 petition seeking post-conviction relief from your conviction
20 and/or sentence for the charges of murder, armed robbery and
21 conspiracy. Do you understand that?

22 MR. FRAZIER: Yes, sir.

23 THE COURT: Okay. Now, before we go forward in this
24 case, I want to ask you some questions to be sure that you
25 understand what's going on in these proceedings and that you

Frazier v. State

7

1 know the consequences of going forward with your request for
2 post-conviction relief.

3 MR. FRAZIER: Okay.

4 THE COURT: All right. Now, at this time are you under
5 the influence of alcohol, drugs or any other undue influence
6 that might affect your ability to know why you're here?

7 MR. FRAZIER: No, sir.

8 THE COURT: Do you understand why you're here today?

9 MR. FRAZIER: Yes, sir.

10 THE COURT: Is there anything about this hearing that you
11 want to ask your lawyer or ask me before we proceed?

12 MR. FRAZIER: No, sir.

13 THE COURT: Okay. All right. Now, when you ask for
14 post-conviction relief two things can happen. Okay? We'll go
15 through this trial, and if I grant your relief, I mean, if I
16 deny your relief for post-conviction relief, you'll simply
17 return to the Department of Corrections and complete your
18 sentence that you're now under. You understand that?

19 MR. FRAZIER: Yes, sir.

20 THE COURT: All right. If I grant your request for post-
21 conviction relief, then I can set aside these convictions, but
22 then you would be back to square one for a retrial on these
23 charges. Now, if I do grant your post-conviction relief, if I
24 do set these convictions aside, if you do go through another
25 retrial, if you are convicted again -- were there any charges

1 that were dismissed?

2 MR. THOMAS: No, Your Honor. These are the three
3 original.

4 THE COURT: All right. So if you're convicted again,
5 then these sentences can be enhanced. For murder it carries
6 up to life in prison without the possibility of parole. So
7 where you now have a 30-year sentence that could be converted
8 to a lifetime sentence. You understand that?

9 MR. FRAZIER: Yes, sir.

10 THE COURT: All right. Armed robbery carries a maximum
11 of what?

12 MR. THOMAS: Thirty, Your Honor.

13 THE COURT: Thirty years, okay. So he's got the maximum
14 on that and conspiracy carries a maximum of what?

15 MR. THOMAS: Five.

16 THE COURT: Five, okay. So the sentences could be
17 changed. In other words, murder could be increased to life in
18 prison, or if you received these same sentences, they could be
19 ordered to run consecutively, which means that rather than
20 serving them at the same time you could go to jail for 65
21 years. Do you understand that?

22 MR. FRAZIER: Yes, sir.

23 THE COURT: So in other words, even if you might prevail
24 at this post-conviction relief hearing, the end result you
25 might be serving a longer sentence than you're now serving at

Frazier v. State

9

1 this time. Do you understand that?

2 MR. FRAZIER: Yes, sir.

3 THE COURT: All right. Now, do you have any questions
4 regarding the consequences of going forward with this post-
5 conviction relief hearing?

6 MR. FRAZIER: No, sir.

7 THE COURT: All right. Do you want to go forward with
8 your request for post-conviction relief?

9 MR. FRAZIER: Yes, sir.

10 THE COURT: All right. Anything further the State wants
11 placed on the record in that regard?

12 MR. THOMAS: No, Your Honor.

13 THE COURT: Anything further you want placed on the
14 record?

15 MS. WILLIAMS: No, sir.

16 THE COURT: All right. Thank you very much.

17 All right. Ms. Williams, you can call your first
18 witness.

19 MS. WILLIAMS: Your Honor, may we approach?

20 THE COURT: Yeah.

21 (Whereupon, a bench conference is held.)

22 MS. WILLIAMS: Your Honor, the first person we'll call to
23 the stand is Mr. Christopher Hensley.

24 Whereupon, Christopher Hensley was called to the stand,
25 duly sworn by the clerk and testified as follows:

1 THE CLERK: Please be seated and please spell your last
2 name.

3 MR. HENSLEY: H-E-N-S-L-E-Y.

4 DIRECT EXAMINATION

5 BY MS. WILLIAMS:

6 Q Good morning, Mr. Hensley.

7 A Good morning.

8 Q All right. Will you please tell the Court where your
9 current residence, where you actually live now?

10 A Fairfax County, Virginia, right outside of D.C.

11 Q Okay. And --

12 A Okay.

13 Q Sorry.

14 A Sorry. Fairfax County, Virginia.

15 Q All right. And let me just tell you, we spoke. Ms.
16 Hurley is taking down everything you say. So the one thing
17 that sometimes it's uncomfortable is uh-huh, huh-uh and she --
18 you just have to say yes or no out loud and loud enough so
19 that she can hear so we can take this down. Okay?

20 A Yes, ma'am.

21 Q All right. So you currently reside in Virginia; correct?

22 A Yes, ma'am.

23 Q And you are familiar with why we're here today?

24 A Yes, ma'am.

25 Q All right. And you were one of the original witnesses

Christopher Hensley - Direct by Ms. Williams

11

1 interviewed by the police. Correct?

2 A Yes, ma'am.

3 Q All right.

4 MS. WILLIAMS: Beg the Court's indulgence for just one
5 moment. Your Honor, I'm going to place these here so you can
6 see what I've at least marked as identification.

7 BY MS. WILLIAMS:

8 Q Mr. Hensley, I'm going to ask you what's been marked as
9 identification as Applicant's Exhibit Number One, do you
10 recognize that?

11 A This, the composite drawing that I -- me and Tommy, the
12 other person that went to the police, that we drew up.

13 Q Okay. So this is -- is this an accurate -- I mean, this
14 is the copy of a composite that you created; right?

15 A To the best of my knowledge, yes, ma'am.

16 Q And you created this for whom at that time?

17 A The police department, Myrtle Beach Police Department, I
18 believe.

19 Q Okay. And tell the --

20 MS. WILLIAMS: I would move the Applicant's Number One
21 into evidence.

22 MR. THOMAS: No objection.

23 THE COURT: All right. So this would be Applicant's --
24 how do you have it marked Plaintiff's or Applicant's?

25 REPORTER: Applicant's.

1 THE COURT: Applicant's Exhibit One admitted into
2 evidence without objection.

3 (Applicant's Exhibit Number One [Composite Drawing]
4 entered into evidence and appropriately marked.)

5 BY MS. WILLIAMS:

6 Q Now, Mr. Hensley, so the Court is aware, will you tell
7 the Court briefly your involvement and how you got to creating
8 that composite.

9 A Yes, ma'am. I was down in Myrtle Beach on a senior trip
10 which brought me to the area. A friend and I, Tommy, that
11 went to the police department, had went down to that area of
12 the beach that night just to take a walk on the beach, and we
13 had walked down the beach and, and, and saw two people in the,
14 in the sand, and we didn't really -- it was dark. We really
15 didn't know what they were doing, but we passed by them. We
16 then turned south and went back the other direction, and I
17 remember the couple was gone or whoever was -- that we had saw
18 was gone. Shortly thereafter, a man was walking towards us
19 in, in black clothing and that was pretty much it. That was
20 when we walked to a pagoda and kind of sat down, and we didn't
21 know anything had happened and police came shortly thereafter.

22 Q All right. And then based on your eventual conversations
23 with the police, you created, you and your friend Tommy
24 created that composite; correct?

25 A Yes, ma'am. The, the night of the shooting the police

Christopher Hensley - Direct by Ms. Williams

13

1 had asked us if we had seen anything, heard anything. We had
2 not. Nothing made sense to us at that time. The next day was
3 when went to the police department to provide the information
4 that we had.

5 Q Okay. And so, now, you gave the police that composite
6 and that was kind of that with regard to that. Now, a little
7 bit later you had some more interaction with the police as
8 well back when you were living -- you actually lived in
9 Charlotte at that time; correct?

10 A Yes, ma'am.

11 Q At that time the Charlotte police came to you; correct?

12 A I was unaware of what police department, but I was aware
13 that it was -- yeah.

14 Q The police.

15 A The police were coming to ask me questions.

16 Q And, and basically at that time they brought a photo
17 lineup to you; correct?

18 A Yes, ma'am.

19 Q And you and your friend actually looked at a photo
20 lineup; right?

21 A I was not aware that Tommy had -- this was -- they did it
22 at separate times. They approached me at work. So I remember
23 just seeing it on my own. So I don't know what, what Tommy
24 was shown.

25 Q Can you tell the Judge just briefly about if you picked

1 anyone, if you told them you would testify if you -- with
2 regard to that photo lineup?

3 A I remember him asking me about, you know, if anyone
4 looked familiar, and I told him that, you know, the body type,
5 the clothing was what stood out to me, not facial features,
6 and I told him to the best of my ability I picked the person
7 that I thought resembled, you know, the person that I had seen
8 the closest. He asked me if, if I would feel comfortable
9 testifying in a court of law without any doubt, and I said no,
10 I could not.

11 Q Okay. And then later on did you have some interaction
12 with Investigator Daryl Wilson who worked for Mr. Frazier?

13 A Yes, ma'am.

14 Q All right.

15 A I was very young. So I don't know -- I get them -- I get
16 the meetings mixed up and the names mixed up, but, yes, ma'am,
17 absolutely.

18 Q All right. I'm going to hand you what's been marked for
19 identification as Applicant's Number Two and ask you if you
20 recognize that.

21 A Yes, ma'am.

22 Q Tell me what -- how you recognize that photo?

23 A The person on the left was the -- Daryl, the person who
24 approached me asking me questions, and if I'm not mistaken he
25 asked me before I saw the lineup picture if this person on the

Christopher Hensley - Direct by Ms. Williams

15

1 right had resembled, if it was, if I felt this was familiar,
2 if I had seen this person, and I said no, I believe I didn't
3 recognize that person. I believe.

4 Q Do you know if Mr. Wilson recorded your interview?

5 A Yes. I believe so.

6 Q All right.

7 A Yes, ma'am.

8 Q So he would have -- he did record your interview?

9 A Yes, ma'am.

10 Q All right. And I'm going to ask you if you recognize
11 Applicant's Number Three?

12 A Yes, ma'am.

13 Q Tell me what you recognize that to be.

14 A The interview between Daryl and I.

15 Q So he recorded what you said and what you didn't say?

16 A Yes, ma'am.

17 Q All right.

18 A Yes, ma'am.

19 MS. WILLIAMS: So, at this time I will move in
20 Applicant's Number Two.

21 MR. THOMAS: No objection.

22 THE COURT: All right. Applicant's Exhibit Number Two
23 admitted into evidence without objection.

24 (Applicant's Exhibit Number Two [Photograph] admitted
25 into evidence and appropriately marked.)

1 THE COURT: All right.

2 Q All right. Do you recall that interview with Mr. Wilson,
3 some parts maybe?

4 A Vaguely. Yes, ma'am.

5 Q All right. Have you seen Applicant's Number Three?

6 A Yes, ma'am.

7 Q All right. Let me ask you this. Is that -- and you have
8 reviewed that; correct?

9 A Yes, ma'am.

10 Q Is that an accurate reflection of the interview that was
11 recorded and what you would have told him at that time? It
12 refreshed your memory; did it?

13 A Yeah. Absolutely. Yes, ma'am.

14 Q All right.

15 MS. WILLIAMS: At this time I'll move in Number Three.

16 MR. THOMAS: I would object to that, Your Honor. I think
17 he can testify to the substance of the conversation, but the
18 transcript itself he's already said it doesn't -- he doesn't
19 recall it exactly. He just said this refreshed his
20 recollection. He can certainly use this as a recorded writing
21 to refresh his recollection, but I don't -- I'd be
22 uncomfortable admitting it into evidence.

23 THE COURT: Yeah. I'm trying to recall did he say that
24 he knew that to be the exact transcript or he couldn't recall
25 the accuracy of it?

Christopher Hensley - Direct by Ms. Williams

17

1 BY MS. WILLIAMS:

2 Q Well, let me ask you. Does this accurately reflect your
3 conversation?

4 A Yes. I, I reviewed it. There was no information in it
5 that I would object to or say that, that was incorrect.

6 THE COURT: Okay. All right. I'll admit Applicant's
7 Exhibit Number Three over Respondent's objection.

8 MS. WILLIAMS: Thank you, Your Honor.

9 (Applicant's Exhibit Number Three [Interview of Hensley]
10 admitted into evidence and appropriately marked.)

11 MS. WILLIAMS: Beg the Court's indulgence for just one
12 moment.

13 THE COURT: All right.

14 BY MS. WILLIAMS:

15 Q Let me ask you if you recall looking at this interview
16 and some things when you talked to the different folks. Do
17 you recall telling the police about a person -- the person you
18 saw on the beach having a ponytail?

19 A Vaguely. Yes, ma'am. I remember stating that, that it
20 appeared that the person had long hair, longer hair. Yes,
21 ma'am.

22 Q All right. Now, let me ask you, did you testify at Mr.
23 Frazier's second trial in 2005?

24 A Oh, the, the dates are very, very confusing. I'm not
25 really sure. I was --

1 Q So, let me ask you this, if you weren't in the trial
2 transcript it would be safe to assume you didn't testify;
3 correct?

4 A That would be correct.

5 Q Okay. And do you recall coming to here to testify maybe
6 for the trial? You came to South Carolina more than once;
7 right?

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

9 Q All right. And but to your knowledge you did not testify
10 in the 2005 trial?

11 A I, I don't think -- I'm not really sure. I can't --
12 again, I was very young, and I didn't really know what was
13 going on, and I was just doing what I was told so.

14 Q Got you.

15 MS. WILLIAMS: Beg the Court's indulgence for just one
16 moment.

17 THE COURT: All right.

18 BY MS. WILLIAMS:

19 Q Mr. Hensley, just briefly, let me ask you, do you recall
20 if it was Myrtle Beach Officer Beatty that helped you with the
21 composite? Do you recall the officer who did help you?

22 A I'm sorry. I do not.

23 Q Okay. And let me ask you, when you and your friend left
24 the beach after you had passed those folks and you went back
25 to, I think you said the pagoda?

Christopher Hensley - Cross by Mr. Thomas

19

1 A Yes, ma'am.

2 Q Were there other folks at that pagoda at that -- there?

3 A Yes. Yeah. And, and we just walked up and kind of sat
4 down. I don't know if they arrived shortly thereafter or if
5 they were there when we arrived, but yes, when the police
6 arrived we were talking with other folks.

7 Q And, and how far off the beach was this pagoda, give or
8 take? Like, did you, you know, did you walk down a mile past
9 it, maybe a football field? I'm just trying to get a --

10 A Maybe a football field.

11 Q Okay. All right. Lastly, I do want to ask you this.

12 Well --

13 MS. WILLIAMS: Beg the Court's indulgence for just one
14 moment.

15 BY MS. WILLIAMS:

16 Q Mr. Hensley, that's all the questions that I have. If
17 you would answer any questions the State or the Court may
18 have.

19 A Thank you.

20 MR. THOMAS: May it please the Court?

21 THE COURT: Yes, sir.

22 CROSS EXAMINATION

23 BY MR. THOMAS:

24 Q Mr. Hensley, you testified at the Co-Defendant's trial,
25 Kimberly Poole?

1 A Yes, Renee Poole.

2 Q Renee Poole. That's correct. Kimberly Renee Poole. At
3 her trial it's fair to say your testimony was that you did not
4 agree that the composite was the person you saw on the beach?

5 A I mean, I do not remember the exacts. I remember
6 providing the information to the best of my ability to the
7 police at, at the time. I can't confirm or deny.

8 Q As we sit here today, do you have any -- you might not
9 have any recollection because it's been so long ago, but
10 Applicant's Number One, the composite, is it fair to say your
11 testimony at Ms. Poole's trial and at Mr. Frazier's first
12 trial was that you had a difficult time creating the
13 composite?

14 A Yes.

15 Q And does this composite accurately reflect, in your mind,
16 the person you saw on the beach that night?

17 A I really can't say that 15 years later. That was the --
18 again, I provided the information to the best of my ability at
19 that time.

20 Q But at the prior trial you definitely testified that this
21 didn't reflect the person you saw?

22 A If that's what the court documents reflect, then, yes,
23 sir.

24 Q Regarding Applicant's Exhibit Number Two, the -- do you
25 still have copies of these up there with you?

1 A I do not. Thank you. Yes, sir.

2 Q Was it your testimony that you don't recognize the person
3 on the right in that photo?

4 A I had never seen this person before. I don't, I don't,
5 don't think I'd ever seen him or a picture before.

6 MR. THOMAS: I think that's all I have, Your Honor.

7 THE COURT: All right. Redirect?

8 REDIRECT EXAMINATION

9 BY MS. WILLIAMS:

10 Q Mr. Hensley, I just want to make sure I understand your
11 response to the Prosecutor's -- the, the Attorney General's
12 question is that in regards to Number Two, the photograph,
13 nobody had ever actually given you a picture; correct?

14 A No. The first time I had seen it was when Darrell
15 interviewed me.

16 Q That picture?

17 A Yes, ma'am.

18 Q And that -- is that what you're talking about?

19 A Yes, ma'am.

20 Q Okay. And that -- that's all.

21 THE COURT: All right.

22 MS. WILLIAMS: That's what I need. Thank you, Your
23 Honor.

24 THE COURT: You may step down.

25 MS. WILLIAMS: Your Honor, if I may, Mr. Hensley is in

1 from out of state, and I would -- I -- he came here under a
2 South Carolina subpoena type deal to come here. I would
3 appreciate it if he could be excused if we have no more desire
4 to call him.

5 MR. THOMAS: No objection.

6 THE COURT: All right. You're free to go. Thank you.
7 All right. You can call your next witness.

8 MS. WILLIAMS: Yes, sir. I would call Kahle Schettler to
9 the stand.

10 THE COURT: All right.

11 Whereupon, Kahle Schettler was called to the stand, duly
12 sworn by the clerk and testified as follows:

13 THE CLERK: And please spell your first and last name for
14 the record.

15 MR. SCHETTLER: K-A-H-L-E, S-C-H-E-T-T-L-E-R.

16 DIRECT EXAMINATION

17 BY MS. WILLIAMS:

18 Q Mr. Schettler, will you please tell the Court where you
19 currently live and kind of how you're here, why you're
20 involved in this matter?

21 A I live in Winston-Salem, North Carolina. John had my car
22 at the time.

23 Q And was it -- is it safe to say that you and John were
24 friends, are friends?

25 A Yes.

1 Q Okay. So, at the time he actually had your car in his
2 possession and you had his car; is that right?

3 A That's right.

4 Q All right. And you actually testified at both trials,
5 the original trial and the second trial; correct?

6 A That's correct.

7 Q All right. And just for the record, I will say your
8 testimony then was accurate. Your testimony today is
9 accurate; correct?

10 A That's correct.

11 Q All right. And based on your knowledge, can you tell the
12 Court what you recall, if any, about your car when you got it?
13 How -- do you recall how quickly you got your car back from
14 Mr. Frazier from the night that Mr. Poole was killed?

15 A It was the next morning.

16 Q So the next morning you actually got it back?

17 A Yes.

18 Q And what, if any, observations did you make about the
19 car, i.e., I think your testimony had something to do with
20 were there bugs on the windshield, miles, anything like that,
21 that we went over with regard to that car possibly traveling
22 to the beach and back in the middle of the night the prior
23 night?

24 A Yeah. It looked just like it did when I give it to him.

25 Q Was there any sand around?

1 A No.

2 Q And you -- did you testify to that as well, correct?

3 A Yes. Correct.

4 Q All right. Now, how long had he had that car?

5 A I believe a day or two at most.

6 Q Okay. All right. So, let me ask you something else, how
7 long had you known Mr. Frazier prior to the incident when Mr.
8 Poole was killed?

9 A Many years. Went to high school together.

10 Q So you all are longtime friends?

11 A Yeah.

12 Q All right. At that trial, you know, there was testimony
13 about a gun and a gun that he had previously owned?

14 A Yes.

15 Q Will you tell the Court what you know about that, i.e.
16 let me ask it this way. You testified about, about him owning
17 a gun and prior knowledge of him having a gun; correct?

18 A Correct.

19 Q And what, if anything, do you recall testifying about
20 and/or possibly the police talking to you about prior to your
21 testimony?

22 A That that gun had a problem jamming.

23 Q Okay. And, and tell me what you mean by the jamming as
24 opposed to misfiring. What's the difference?

25 A The best I can remember at this point right now it just

1 wouldn't load the next round. That's all I can remember.

2 Q Okay. And let me ask you this just for, for me who's not
3 totally tech -- gun savvy. If a gun jams, you can't put
4 something in there. If it misfires sometimes it'll spit out
5 the bullets that aren't shot?

6 A That could be close. Yes.

7 Q Okay. And the gun that, that Mr. Frazier owned was a
8 TZ75 that you knew about; correct?

9 A Correct.

10 Q And did you know whether or not he still was in
11 possession of that at the time of Mr. Poole's murder?

12 A At the time of the murder, no, I did not.

13 Q I'm sorry. I didn't understand.

14 A At the time of the murder, no, I did not know whether he
15 still had it.

16 Q Okay. Did, did he ever own a Glock to your knowledge?

17 A Yes.

18 Q And when was that?

19 A It was also before the murder.

20 Q And to your knowledge, I think, did you testify about
21 whether or not he still had possession of that Glock?

22 A That one I was aware of, yes.

23 Q And what were you aware of?

24 A That he still had the Glock and not the other one.

25 Q All right. Let me ask you this, do you recall any

1 testimony at the trial or being inquired at all about whether
2 or not -- about his relationship with Renee Poole, about Mr.
3 Frazier's relationship with Renee Poole?

4 A Yes. I was aware of a relationship.

5 Q All right. Do you recall testifying about that?

6 A Yes.

7 Q Do you recall testifying about whether or not John was in
8 love with her?

9 A Not at this time I don't.

10 Q All right. And that's, that's fine. Let me ask you
11 this, were you aware of John's history with women and like
12 girlfriends coming and going and that kind of thing?

13 A Sure.

14 Q And what would you say that history was?

15 A Well, they would come and go like the rest of us.

16 Q He had had a bunch, a little bit, a few?

17 A Few.

18 Q All right.

19 MS. WILLIAMS: Beg the Court's indulgence for just one
20 moment.

21 BY MS. WILLIAMS:

22 Q Mr. Schettler, I just want to clarify, and I know this is
23 kind of a silly question, but I'm going to ask. Would you sit
24 here today and tell me that the testimony you gave at trial
25 was accurate for your knowledge at that time?

Kahle Schettler - Direct by Ms. Williams

27

1 A Yes.

2 Q And would it be fair to ask -- tell you that the
3 testimony you gave them might be more accurate with regard to
4 your memory then versus your memory now?

5 A Yes.

6 Q All right. Now, let me ask you, one of the things the
7 State talked about in our arguments, when you, when you came
8 to pick up your car that next morning, what time did you come
9 pick it up, the morning after Mr. Poole, after Mr. Poole's
10 murder? Do you recall?

11 A Oh, John brought it to me. It was probably 8:00 o'clock
12 in the morning.

13 Q All right. And were you on your way to work then?

14 A Yes.

15 Q All right. Do you recall testifying that that morning
16 that Mr. Frazier never told you about Mr. Poole's murder, that
17 when he brought you the car back, you didn't know that Mr.
18 Poole had been murdered at that point?

19 A No. I did not.

20 Q And you only learned about it later that afternoon;
21 correct?

22 A That is correct.

23 Q All right. Do you recall how you learned about it later
24 that afternoon?

25 A Just through conversation with John.

1 Q All right. So John did tell you, but he didn't tell you
2 till later?

3 A Right.

4 MS. WILLIAMS: All right. Beg the Court's indulgence
5 just one more time.

6 BY MS. WILLIAMS:

7 Q Do you recall anything at all about the kind of personal
8 license -- did, did Mr. Frazier have a personal license tag on
9 his Blazer?

10 A Yes.

11 Q Tell me about it.

12 A Said nervous.

13 Q Spell it.

14 A Oh, now you're asking for a lot.

15 Q Was it a regular nervous like -- now, I'm not a good
16 speller.

17 A No. Because you can't fit all the letters in.

18 Q So it was an odd spelling, but you could figure out --

19 A Yes.

20 Q -- it was nervous?

21 A Yes.

22 Q All right. And, and if you flat out looked at it you
23 could see it; right?

24 A Yeah.

25 Q I mean, it was, it was -- wasn't one of those -- did he

1 have it like you know how some license plates have that dark
2 tint and things like that?

3 A I don't remember.

4 Q No. But when you looked at his Blazer you could see it;
5 right?

6 A Yeah.

7 Q All right. And he definitely had a personalized license
8 tag?

9 A Yes.

10 Q All right. That's all --

11 MS. WILLIAMS: Beg the Court's indulgence.

12 BY MS. WILLIAMS:

13 Q Last question. I'm going back to Mr. Frazier's
14 girlfriends. You knew him for how long prior to Mr. Poole's
15 murder?

16 A Ten years or so, high school.

17 Q All right. And I'm going to say this and understand that
18 I'm not trying to throw off on him, but I'm going to ask, he,
19 is it fair to say, that, that he had a -- that numerous
20 girlfriends and he had different girlfriends live with him or
21 move in and out, let me, let me phrase it like that.

22 A I can't answer that.

23 Q You just don't recall?

24 A I don't recall.

25 Q Okay. That's all the questions that I have. Answer any

1 questions the Attorney General may have or the Court, please.

2 THE COURT: All right. Mr. Thomas.

3 MR. THOMAS: May it please the Court?

4 THE COURT: Yes, sir.

5 CROSS EXAMINATION

6 BY MR. THOMAS:

7 Q Mr. Schettler, am I pronouncing that right?

8 A That's correct.

9 Q So you've been friends with Mr. Frazier since high
10 school?

11 A Yes.

12 Q In all the time you've ever been friends with him, how
13 many times did he ask you to borrow your car?

14 A One or two times.

15 Q Was that a common practice for him to borrow it, or if he
16 needed a ride, would you just give him a ride places?

17 A Either/or.

18 Q As far as the reason you had his car, no doubt in your
19 mind you had his car the evening of June 9th?

20 A That's correct.

21 Q It was, it was at your house?

22 A Yes.

23 Q The reason he gave that to you was to work on a noise,
24 there was a rattling in the front end?

25 A That is correct.

1 Q Did you get a chance to work on that?

2 A I did not. I never looked.

3 Q Did he -- and he didn't ask you about it when he came to
4 pick it up either; did he?

5 A I do not recall at this time.

6 Q Did you speak to him at any point on June 9th that year?

7 A Possible.

8 Q But you don't remember?

9 A No. Not, not by the date. No.

10 Q Well, the day of the murder, did you speak to him at all
11 the day of the murder when you had his car?

12 A I don't remember.

13 Q Fair enough. When we were talking about the TZ75, the
14 handgun, do you know who he bought that handgun from?

15 A Yes. I do.

16 Q Who was that?

17 A Todd Fain.

18 Q Did you know where he bought the Glock, who he bought the
19 Glock from?

20 A I do not.

21 Q When did he tell you he sold -- let me ask this first
22 part. At what point did you ask him about the TZ75?

23 A When he had said that Brent had been killed.

24 Q And what did he tell you about the TZ75 at that point?

25 A That he had gotten rid of it sometime prior.

1 Q Did he tell you who he sold it to?

2 A He said it was sold at a gun show.

3 Q And when we're talking about that TZ75, a misfire is
4 probably not the accurate description of it, it, it failed to
5 load a round, it failed to cycle?

6 A I would say fail to cycle. I, I -- but I can't, at this
7 point I just saw that it, it hung up.

8 Q Okay. Yeah. It would stove pipe, if you will. The fact
9 that a bullet, and this might be beyond your expertise, but
10 the fact that a bullet has been struck on the primer that has
11 nothing to do with whether it cycles or not; right?

12 A Correct.

13 Q And I'm asking this in-artfully, but let me, let me try
14 and phrase this differently. A bullet can get struck on the
15 primer and not fire; correct?

16 A That's correct.

17 Q Okay. If that doesn't -- if the bullet doesn't fire
18 after being struck on the primer, the gun's not going to eject
19 that; is it?

20 A No, sir.

21 Q You're going to have to eject that manually?

22 A Yes.

23 Q Okay. But that malfunction has nothing to do with the
24 handgun itself. It has to do with the ammunition?

25 A I can't accurately answer that.

1 Q And, and if you can't, that's fine. I'm not an expert
2 either. I don't know about that. When John called you the
3 day after the murder, he specifically told you that Mr. Poole
4 had been shot?

5 A He did not call. I saw him that -- later that afternoon.

6 Q Oh, I'm sorry. Well, when you spoke to him, he told you
7 that Mr. Poole had been shot?

8 A Yes.

9 Q He also -- you also had a discussion with him about the
10 mileage on your car?

11 A There was a phone call about that. Yes.

12 Q Okay. He asked you how many miles he had put on the car
13 essentially?

14 A He said it would be helpful if I could, could say.

15 Q Could you say how any miles he had put on the car?

16 A Not to this day I cannot say.

17 Q That's all I have. Thank you.

18 THE COURT: All right. Redirect.

19 MS. WILLIAMS: Just briefly.

20 REDIRECT EXAMINATION

21 BY MS. WILLIAMS:

22 Q Let me ask you, when, when Mr. Frazier called you and
23 said it would be helpful if you could remember about the
24 mileage, what if anything was your take on that?

25 A I told him that I didn't know what he was asking, but

1 that I couldn't lie for anybody because I did not know how
2 many miles was put on the car.

3 Q Did you feel any pressure from him to, to make something
4 up?

5 A Not at that point. No.

6 Q Okay. Let me ask you this, when we talk about misfire
7 versus jammed, did you ever feel any, I'm going to use the
8 term pressure loosely with regard to that, those particular
9 terms or that kind of function about the gun?

10 A There was a bit of, of pressure. Yes.

11 Q Tell me about that. Who was it from?

12 A The solicitors at the time. What I had witnessed was a
13 gun just jammed, and I had felt that they had wanted me to say
14 that it had misfired, but that was not what I had observed.

15 Q And so you just told simply what you knew?

16 A Right. Right. Correct.

17 Q Okay. Which is the same thing you told about the
18 mileage?

19 A Correct.

20 Q Okay. He asked you that Mr. Frazier told you he'd sold
21 it at a gun show; right?

22 A Yes.

23 Q Did you ever see him having that gun, Mr. Frazier having
24 that gun?

25 A No. I had not seen it in a long time.

Courtney Fox - Direct by Ms. Williams

35

1 Q When was the last time you had seen it?

2 A Well prior to this, but I couldn't give an exact date.

3 Q Okay. All right. Thank you.

4 A You're welcome.

5 THE COURT: All right. You may step down.

6 MS. WILLIAMS: Your Honor, Mr. Schettler is from North
7 Carolina. He is here kind of under subpoena for me to be
8 here. I would ask if it would be okay if he could be released
9 and allowed to leave as we don't desire to recall him.

10 MR. THOMAS: No objections.

11 THE COURT: All right. You're free to go. Thank you.

12 MS. WILLIAMS: Thank you.

13 THE COURT: All right. You can call your next witness.

14 MS. WILLIAMS: Your Honor, I'm going to call Courtney Fox
15 to the stand.

16 THE COURT: All right.

17 Whereupon, Courtney Fox was called to the stand, duly
18 sworn by the clerk and testified as follows:

19 THE CLERK: Please be seated. Please spell your last
20 name for the record.

21 MS. FOX: F-O-X.

22 DIRECT EXAMINATION

23 BY MS. WILLIAMS:

24 Q Ms. Fox, will you please tell the Court your -- the best
25 way for me to phrase it is your relationship to this case.

1 How do you -- do you know John Frazier and how do you know
2 him?

3 A A friend.

4 Q All right. And where do you currently -- you -- did you
5 used to reside in North Carolina?

6 A I reside in North Carolina. Yes.

7 Q Now?

8 A Now.

9 Q All right. Let me ask you this. Have you had -- were
10 you -- do you feel comfortable in telling the Court about any
11 traumatic accident you may have had that would it affect your
12 ability to testify?

13 A Yes. I can tell.

14 Q Okay. Let me ask you -- let me, let me phrase it this
15 way so you understand. You, after -- you know that Mr. Poole
16 was murdered; correct?

17 A Yes.

18 Q And then shortly thereafter, were you in a pretty severe
19 accident?

20 A It was supposed to be fatal. They didn't expect me to
21 live through it.

22 Q And so it, it was really severe, and you had some really
23 severe injuries; correct?

24 A Yes.

25 Q All right. And were you married at that time to Mr.

Courtney Fox - Direct by Ms. Williams

37

1 Bruce Wolford?

2 A Yes.

3 Q Are you, are you married to him today?

4 A No.

5 Q You have since divorced him; correct?

6 A Yes.

7 Q I'm going to show you Applicant's Number Two and ask you
8 if you recognize the person in that picture?

9 A Yes.

10 Q Will you point to the person that you recognize? Who is
11 that?

12 A My ex-husband, Bruce Wolford.

13 Q That's Mr. Wolford.

14 A Uh-huh.

15 Q All right. Let me also ask you for the Court's knowledge
16 and, and let's specify that that is the person so we'll know,
17 the person in this picture that when you look at it is wearing
18 the black vest and the white shirt?

19 A The black vest and the sunglasses on his head and his
20 ponytail.

21 Q Okay. Thank you. And is that how he looked back at the
22 basic time of Mr. Poole's murder?

23 A That's how I always knew him.

24 Q So, yes.

25 A Yes.

1 Q I mean, I'm not trying to put words in your mouth.

2 But --

3 A Yes.

4 Q Okay. All right. And let me ask you this so the Court
5 can be aware. Are you scared of Mr. Wolford?

6 A Yes.

7 Q Are -- and you're scared of -- actually testifying today
8 is scary for you?

9 A Yes.

10 Q All right. And can you tell the Court why?

11 A He -- I'm scared of what he might do, Mr. Wolford that
12 is.

13 Q Okay. Now, let me pause for a second. You were
14 interviewed by the police and by the folks helping Mr.
15 Frazier's defense; correct?

16 A Correct.

17 Q And after you got out the hospital you moved to
18 California; right?

19 A Yes.

20 Q And you actually were flown back from California to come
21 to trial to testify; correct?

22 A Yes.

23 Q But you -- did you testify?

24 A No.

25 Q All right. Did some folks interview you or talk to you

Courtney Fox - Direct by Ms. Williams

39

1 then?

2 A Yes.

3 Q All right. Do you recall the incidences prior to your
4 accident that made you worry about when you woke up from your
5 accident?

6 A I, I don't remember anything.

7 Q Okay. So you don't remember if you were coming to the
8 police with some information that you had?

9 A No.

10 Q Okay. Is it safe to say to the Court that the majority
11 of your memory post-accident has just gone away?

12 A I -- yes. It's just gone.

13 Q Okay.

14 MS. WILLIAMS: Beg the Court's indulgence for just one
15 moment.

16 BY MS. WILLIAMS:

17 Q Ms. Fox, I'm going to ask you a couple of questions and
18 you may or may not remember, but that's okay. Okay?

19 A All right.

20 Q Applicant's Exhibit Number One, does that look familiar
21 to you? Does that look kind of like your ex-husband to you?

22 A That doesn't look like anybody I know even.

23 Q Do you recall if -- did your ex-husband -- you, you said
24 he had a ponytail in that picture. Did he normally wear a
25 ponytail? Do you recall?

1 A Yes. Always.

2 Q Do you recall if he cut off his ponytail prior to the
3 trial, to Mr. Frazier's trial?

4 A Not that I know of.

5 Q You don't recall or don't know if he did or didn't?

6 A I don't, I don't, I don't recollect that he did or didn't
7 because I don't recollect when the trial was.

8 Q Okay. Do you have any recollection of the ongoing affair
9 between Ms. Kimberly Renee Poole and your ex-husband?

10 A No. I did not know.

11 Q Okay. Do you have any recollection that you can talk to
12 the Court about about Mr. Wolford's guns?

13 A I had bought him a belt buckle gun and what looked like
14 it was an Army, it looked like a sawed-off shotgun.

15 Q Okay. Do you have a recollection of other guns he may or
16 may not have had?

17 A That was the only ones I knew of.

18 Q Okay. Do you recall if Mr. Wolford had a presence in
19 Myrtle Beach at the time of Mr. Poole's murder?

20 A I, I, I don't know.

21 Q Okay.

22 MS. WILLIAMS: Beg the Court's indulgence.

23 BY MS. WILLIAMS:

24 Q Ms. Fox, let me ask you, you told the Court that you're
25 scared of Mr. Wolford. Do you have any idea -- tell me if you

Courtney Fox - Cross by Mr. Thomas

41

1 think or if you have any idea if your accident is in any way
2 related to Mr. Welford?

3 A There were assumptions that he had cut my break line and
4 he got rid of the car before I even came home so that and my
5 father and we've discussed it many times that we believe that
6 he messed with the car.

7 Q But he was never charged; right?

8 A Well, the car was destroyed before anything could be
9 done.

10 Q Okay. That's all the questions that I have. Please
11 answer any the Attorney General may have or the Court.

12 THE COURT: Cross examination.

13 CROSS EXAMINATION

14 BY MR. THOMAS:

15 Q I really only have one question for you, Ms. Fox, and
16 then we'll let you get out of here. Were you living with Mr.
17 Welford in June of 1998?

18 A Yes.

19 Q And do you recall, and if you don't recall that's fine,
20 but do you recall any nights that he would have been gone and
21 didn't spend the evening with you at the home or was he there
22 every night with you?

23 A I remember him being gone. He often said that he was at
24 work, but he would come home with stories of, "Well, I'm late
25 because of this," and it would be like hours late and he'd

1 always come up with an excuse.

2 Q And do you recall specifically the night of June 9th,
3 1998? Was he home that evening with you?

4 A I, I don't know.

5 Q Thank you so much.

6 A You're welcome.

7 Q That's all the questions I have.

8 THE COURT: Redirect?

9 MS. WILLIAMS: Nothing, Your Honor. Ms. Cox is here from
10 North Carolina -- I'm sorry, Ms. Fox is here from North
11 Carolina, and we would ask that she be free and allowed to go
12 if he doesn't --

13 MR. THOMAS: No objection.

14 MS. WILLIAMS: Thank you.

15 THE COURT: All right. You're free to go. You can step
16 down. Thank you. All right. You can call your next witness.

17 MS. WILLIAMS: We would call Sharon Haymaker Aldridge.

18 Whereupon, Sharon Haymaker Aldridge was called to the
19 stand, duly sworn by the clerk and testified as follows:

20 THE CLERK: Please be seated. Please state your --
21 please spell your full name for the record, first and last.

22 MS. ALDRIDGE: S-H-A-R-O-N, and last is Aldridge, A-L-D-
23 R-I-D-G-E.

24 REPORTER: How about your middle name?

25 MS. ALDRIDGE: Haymaker, H-A-Y-M-A-K-E-R.

Sharon Aldridge - Direct by Ms. Williams

43

1 DIRECT EXAMINATION

2 BY MS. WILLIAMS:

3 Q Ms. Aldridge, would you please explain to the Court why
4 you're here and what if any connection you may have to the
5 Defendant in this, to Mr. Frazier in this case.

6 A I used to stay at his house on the weekends throughout
7 the year.

8 Q All right. And, and explain that to me. You -- did you
9 live somewhere else and come to town or --

10 A Yeah. I lived in Roanoke, and I would come down to North
11 Carolina to work, and I would stay at this house normally from
12 around Thursday to Sunday.

13 Q All right. And, and so we're all clear, you actually did
14 come testify at both trials; correct?

15 A Yes.

16 Q All right. And, and it's fair to say that the testimony
17 you're here to give today is true and honest and accurate?

18 A Yes, ma'am.

19 Q To the best your recollection?

20 A Uh-huh.

21 Q I'm sorry. You have to say yes or no like you said.

22 A Oh, yes.

23 Q And the testimony you gave in the prior two trials was
24 honest and correct and true to the best of your knowledge;
25 right?

1 A Yes.

2 Q All right. So did you know about John's relationship
3 with Ms. Renee Poole?

4 A Yes.

5 Q All right. And I believe part of what you testified to
6 and about was about whether or not he was in love with Ms.
7 Poole?

8 A Yes.

9 Q All right. Now, did you know about Mrs. Poole's
10 relationships with other folks?

11 A Yes.

12 Q Tell me about what you knew.

13 A Well, I knew that she was married.

14 Q Okay.

15 A And only from what I had heard of, of it from her was
16 that it was an unhappy marriage and they were separated. I
17 knew that she was dating Bruce after she dated John.

18 Q And Bruce is? Bruce's full name for the record?

19 A It was Courtney's ex-husband.

20 Q All right. Mr. Wolford?

21 A Yeah. I don't remember his last name.

22 Q All right. But it's Ms. -- it is the --

23 A Yes.

24 Q -- her ex-husband.

25 A It was Courtney's, Courtney's husband.

Sharon Aldridge - Direct by Ms. Williams

45

1 Q All righty. And, and you said she was involved, to your
2 knowledge, she was involved with him when?

3 A At the time of the murder.

4 Q All right. And did you ever actually catch them, so to
5 speak?

6 A Yes.

7 Q Tell me -- tell us about what you caught and what you
8 saw.

9 A You would see them at the club or like at bars around
10 town out together. I saw them messing around in Courtney's
11 house once.

12 Q And by messing around, I'm safe to say you didn't mean
13 playing Twister or --

14 A Making out in the hallway.

15 Q Okay. Now, the weekend that -- when, when Mr. Poole was
16 murdered, do you recall that weekend specifically?

17 A I recall certain events of it. Yes.

18 Q All right. Tell me what, if any, you recall about that
19 weekend and about your plans or what you were doing then.

20 A I remember calling John and talking to him about how I
21 wasn't coming down the next couple of weeks because I wanted
22 to stay in Roanoke because it was my birthday and I just
23 didn't feel like taking the drive down, and it was the next
24 day when Crystal called me and said that Renee's husband had
25 been murdered and the phone call I had with John was the night

1 before and it was, it was nighttime. I don't recall the
2 actual time of the call, but it was nighttime, the sun was
3 down.

4 Q So prior to your calling him, your plan had been to come
5 spend the weekend at his house?

6 A Uh-huh.

7 Q Because?

8 A To work.

9 Q Okay.

10 A Sometimes I work, sometimes we just hung out, but --

11 Q Okay. Now, let me ask you this. Are, are you -- do you
12 consider yourself friends with Mrs. Fox?

13 A Well, now, yeah, I mean. At the time of the murder, I
14 didn't know her, but --

15 Q Okay. Let me ask you this. You see that today she had
16 a, and apparently has had real problems with her memories;
17 correct?

18 A Yes.

19 Q Okay. What, if anything, do you know about that?

20 A Oh, I know one time I was at Courtney's house with John
21 and Renee. That was the time that I saw Bruce and Renee in
22 the hallway, and I recall that time they were watching a like
23 a crime show and Renee and Bruce were talking about how they
24 could get away with murder if they really wanted to and Bruce
25 was talking about his guns. Then shortly after the murder I

Sharon Aldridge - Direct by Ms. Williams

47

1 was working with Courtney one night, and she told me that she
2 knew things and she knew that Bruce was involved, that he had
3 buried something and that she was going to the police and the
4 very next day she had her accident.

5 Q And that accident was?

6 A The car accident.

7 Q And obviously, was it a, safe to say, a very?

8 A Extremely traumatic.

9 Q Did she almost die in that accident?

10 A She did. She did almost die, and the times I saw her
11 after that she said she was too terrified to come to trial and
12 that she was going to California to get away from him because
13 she was scared he was going to kill her.

14 Q All right. And in those conversations about what you
15 knew, did you let Mr. Frazier's attorney know about those
16 conversations and that information that you knew?

17 A Yes. I did.

18 Q All right. And when you came to trial, were you allowed
19 or were you asked questions about that information?

20 A No, ma'am.

21 Q About what you knew specifically about Bruce Wolford and
22 what he, he and Renee said or did?

23 A No, ma'am.

24 Q Okay.

25 MS. WILLIAMS: Beg the Court's indulgence for just one

1 moment.

2 THE COURT: All right.

3 BY MS. WILLIAMS:

4 Q Ms. Aldridge, did you -- let me ask you this. You said
5 you came to Mr. Frazier's house -- I'm sorry if I don't -- I
6 don't recall the frequency that you came and stayed with him.

7 A Every weekend.

8 Q All right. So did you have access to his house or did
9 you have to wait on him to get like unlock the door for you
10 and that kind of stuff or --

11 A Yeah. He -- well, I think there was once or twice that
12 he left the door unlocked for me, but I didn't have my own key
13 or anything like that.

14 Q Okay. Were you supervised while you were in his house or
15 you were kind of there and it was okay?

16 A I was there and it was okay.

17 Q Okay. And did you have any knowledge about any guns he
18 may or may not have had or what you saw?

19 A I, I know that he had one that he, that he had gotten
20 because he had had some threats because of a paint job having
21 to do with this truck.

22 Q Uh-huh.

23 A And I know that when it was in the house it was locked
24 and it was in a drawer because I told him I was extremely
25 uncomfortable with guns, and he assured me and showed me how

Sharon Aldridge - Direct by Ms. Williams

49

1 he kept it, and it was completely unloaded and it was locked
2 in a box so that I was --

3 Q Do you recall what kind of gun it was?

4 A It was a small black gun. I don't.

5 Q So you don't know if like if it was a Glock or a TZ75.
6 You're not -- are you --

7 A I have no knowledge of guns. So if you tell me that's
8 what it was, then I, you know, can agree to it, but I can't
9 honestly say exactly what is because I don't know anything
10 about guns.

11 A Okay. But to your knowledge he only had one?

12 A Yeah. He only had that one.

13 Q Okay.

14 A I, I mean, his house didn't have much of anything in it.
15 So, I mean, it would be very hard to have a gun somewhere else
16 because I helped him set up for Christmas. I mean, there
17 wasn't really anything in that house that I hadn't gone
18 through nor seen. It was pretty much empty.

19 Q Okay. Okay.

20 MS. WILLIAMS: The Court's indulgence one moment. That's
21 -- I'm sorry. That's all the questions that I have. Please
22 answer any that the Attorney General may have or the Court.

23 THE COURT: All right. Cross examination.

24 MR. THOMAS: May it please the Court?

25 CROSS EXAMINATION

1 BY MR. THOMAS:

2 Q The last time you spoke to Mr. Frazier before he was
3 arrested was June 4th, 1998?

4 A I don't exactly remember the date at this point. I knew
5 it was the, the day that the murder happened because the next
6 day was the call that Renee's husband had been murdered the
7 night before.

8 Q So if you testified at trial that the last time you spoke
9 to him was June 4th were you lying when you said that or was
10 that just a mistake?

11 A No. No. I wasn't lying. I don't remember exact dates.
12 We're talking ten plus years ago. All I know is the next day
13 I got the call from Crystal, and Crystal said, "Oh, my God,
14 you're not going to believe what happened last night."

15 Q Okay. And so if I told you also at trial that you were
16 asked if you'd had an opportunity to observe Mr. Wolford and
17 Ms. Poole, and you said that -- all you described is they were
18 having a sexual relationship. Why didn't you tell anybody
19 about all this other stuff about a buried object in the
20 backyard?

21 A They didn't ask me.

22 Q What about the conversation about they could get away
23 with murder?

24 A They didn't ask me. They asked -- the lawyers asked me
25 what I knew about it. I told them what I knew about it, but

Sharon Aldridge - Cross by Mr. Thomas

51

1 they didn't ask me when I was up here.

2 Q And when he told you at trial to describe for the jury
3 what you observed, you didn't think that it was important to
4 tell them that you observed them having a conversation about
5 how they could get away with murder?

6 A I mentioned it to them. I thought if they thought it was
7 important they would ask me about it.

8 Q That's all the questions I have. Thank you.

9 THE COURT: Redirect?

10 MS. WILLIAMS: That's all the questions that I have.
11 Your Honor, Ms. Aldridge is from North Carolina, and we would
12 ask --

13 A No. I'm from Virginia.

14 MS. WILLIAMS: I'm sorry. She's out of state. If, if it
15 would be okay we would ask that she be excused and allowed to
16 leave and released from any subpoena that she may be under.

17 MR. THOMAS: No objection.

18 THE COURT: All right. You may step down. You're free
19 to go. Thank you. Call your next witness.

20 MS. WILLIAMS: May we approach?

21 THE COURT: Yes.

22 MS. WILLIAMS: May we approach, Your Honor?

23 THE COURT: Yeah. (A bench conference is held.)

24 THE COURT: All right. Let's take about a 15-minute
25 recess and we'll come back.

1 ***** OFF THE RECORD *****

2 (On the record.)

3 THE COURT: All right. Ms. Williams, you can call your
4 next witness.

5 MS. WILLIAMS: Thank you, Your Honor. We'll call Jane
6 Lovette to the stand.

7 THE COURT: All right.

8 Whereupon, Jane Lovette is called to the stand, duly
9 sworn by the clerk and testified as follows:

10 THE CLERK: Please spell your last name for the record.

11 MS. LOVETTE: L-O-V-E-T-T-E.

12 REPORTER: First name is Jane?

13 MS. LOVETTE: Jane, J-A-N-E.

14 THE COURT: Ms. Williams.

15 MS. WILLIAMS: Thank you, Your Honor.

16 DIRECT EXAMINATION

17 BY MS. WILLIAMS:

18 Q Ms. Lovette, you are John Frazier's mother; correct?

19 A Yes. I am.

20 Q All right. And let me just ask you this, his attorneys
21 of record were Mr. Martin and Mr. Brittain and their firm;
22 correct?

23 A Yes. It is.

24 Q And who paid for their services?

25 A I did.

1 Q All right. And tell me about what, if any, involvement
2 you had in their preparation of the defense of your son.

3 A I had all involvement with it.

4 Q Tell me what that means.

5 A I hired a private investigator. His name is Daryl
6 Wilson. I hired him before even Morgan Martin became involved
7 in the case.

8 Q Okay.

9 A And I spent day after day after day with Mr. Morgan, and
10 we lived down here at the beach for 18 months from the time
11 John was out on bond until his trial in February 2000. So we
12 had contact constantly, office visits, telephone calls,
13 everything pertaining to John's case.

14 Q Is it, and I'm assuming that Mr. Frazier, with regard to
15 attorney-client privilege, Mr. Frazier gave his attorneys the
16 authority to be as open and upfront with you as they were with
17 him; correct?

18 A Yes. He told them that they were to tell me any and
19 everything that was going on involving his case and not to
20 leave anything out.

21 Q Is it fair to say that, that you were intimately -- I
22 mean, would you describe how, if there was a term for how
23 involved you were in the actual preparation of the defense?

24 A Okay. I would call -- I could call Morgan any time of
25 the day or night. He could call me. If I found out anything

1 about the case, I could call him on the phone. I had his cell
2 phone number, his office number, his home number. I had every
3 way and he never -- always took my calls. We were always
4 constantly talking to each other, and it was just an ongoing
5 thing all the time trying to make sure that he was aware of
6 everything we were finding out in North Carolina.

7 Q All right. And so with regard to that, do you know that
8 -- did, did you provide him with information and ensure that
9 he was aware of information?

10 A Yes.

11 Q Tell me about that.

12 A Well, anytime I found out anything that was going on, the
13 names of people that John knew, situations that had happened
14 prior to the incident, I would just make him aware of
15 everything that was happening. All the information that I had
16 gathered or found out we e-mailed and talked about. I
17 provided him with pictures, photographs, I mean, you just --
18 all kinds of things, anything you could think of that might
19 help in John's case.

20 Q All right. And did you, did you actually receive a copy
21 of the evidence that Mr. Martin had from the State?

22 A Yes. Every piece of evidence that was given to Morgan
23 Martin from the police department, their interviews, notes,
24 typed notes from the lieutenants, the detectives, captain,
25 whomever typed them up that were passed on to him, I got a

1 copy of them and we also provided a copy of these to the
2 private investigator, Daryl Wilson.

3 Q Okay. All right. So tell me what, if anything, you and,
4 and Mr. Martin discussed regarding the possibility that it
5 wasn't your son but possibly another person who had committed
6 the crime?

7 A Well, the first incident was I was in Morgan's office,
8 and we were aware of Renee's relationship with Bruce Welford,
9 and that it had been, it had been an ongoing relationship
10 prior to her meeting my son, John Frazier. So Daryl and I
11 made -- came down to Morgan's office. He wanted to show us
12 some evidence that he had received. We had found out there
13 was another composite drawing. He had that information and
14 interviews about the people, the two boys that had done this
15 composite. So we were --

16 Q Let me, let me pause for just one second.

17 A Okay.

18 Q Hold that thought.

19 A Okay.

20 Q That composite that you're aware of, is this Applicant's
21 Number One?

22 A It is.

23 Q And that's a second composite; correct?

24 A Yes.

25 Q The first -- tell me about the first composite. Who had

1 -- what if any had happened with that? I mean, what was that?

2 A That was a composite done by Mark and Donna Hobbs that
3 was staying at the same hotel, at Carolina Winds. We had seen
4 that composite.

5 Q Okay.

6 A And then he said he wanted to, wanted to talk about the
7 other, and plus Daryl came. He wanted to give him some
8 evidence that he had uncovered about Bruce Wolford,
9 relationships with other men in her life, which was numerous.
10 I think at one point he'd probably interviewed ten different
11 men that she had sexual relations with and affairs with.

12 Q Now, was it Mr. Wilson's practice to tape an interview
13 and then type it?

14 A Yes.

15 Q And were you provided with copies of the typed reports as
16 well?

17 A All of them.

18 Q Tell me approximately how many there may have been.

19 A Probably at least 20 interviews, at least, word-for-word
20 typed interviews.

21 Q Okay.

22 A He would have them transcribed and give me a copy and
23 give Morgan a copy.

24 Q All right.

25 MS. WILLIAMS: Beg the Court's indulgence for just one

1 moment.

2 BY MS. WILLIAMS:

3 Q So you, you are testifying that you were involved with
4 Mr. Wilson and Mr. Martin in investigating this case; correct?

5 A That's correct.

6 Q All right. Now, I'm going to hand you what's been marked
7 for identification as Number Four. Tell me if you recognize
8 that.

9 A Yes. This is a chat log between Renee and Bruce.

10 Q And, and, and how would you recognize it? Have you seen
11 it? Tell me about what you may know about why you would
12 recognize that.

13 A Because I knew his password and her password, and Morgan
14 gave this to me as it was -- this was given to the police by
15 Bruce Welford.

16 Q So that was actually provided in discovery from the State
17 to Mr. Frazier's case?

18 A Right.

19 Q And that's an accurate copy of -- what is it?

20 A A chat log. Yes.

21 MS. WILLIAMS: Okay. At this point I'd move into
22 evidence Applicant's Number Four.

23 MR. THOMAS: Your Honor, I'm going to object to that. I
24 mean, everything in here is clearly hearsay. This is not the
25 witness's -- it's not her chats. It would all be hearsay.

1 THE COURT: All right.

2 MS. WILLIAMS: And Your Honor, I understand, and here,
3 and here's my purpose for that. It's not -- what my purpose
4 for this is one of our arguments is that Mr. -- one of Mr.
5 Frazier's defenses should have been a third-party guilt with
6 Mr. Wolford. This was provided to Mr. Martin that shows Mr.
7 Wolford and Ms. Poole, the other Co-Defendant, Mr. Poole's
8 wife, were obviously actively involved in a sexual
9 relationship at that time, and I just want it just part of it
10 that we knew that he was involved with her prior to because
11 we've had testimony that we knew he was involved prior, post
12 their breakup.

13 THE COURT: Okay. But it's still hearsay. I sustain the
14 objection.

15 MS. WILLIAMS: Okay.

16 BY MS. WILLIAMS:

17 Q So you were aware of and Mr. Martin was aware of a
18 relationship; correct?

19 A Yes.

20 Q Tell me what, if anything, that, that you knew that Mr.
21 Martin was aware of regarding that relationship between Mr.
22 Wolford and Ms. Poole.

23 A Trying to think if -- I mean, it was just -- once we
24 found out about Mr. Wolford, Daryl, Daryl made him aware of
25 that by talking to friends of both of them. These were women

1 that worked at the club where he worked and where Renee
2 worked, and when Daryl interviewed these people, they were
3 making him aware that they knew that Renee had been seeing
4 Bruce long before she met John.

5 Q Okay. Tell me what, if anything, do you know about Amy
6 Marie Dudas?

7 A Amy Marie Dudas, he interviewed her because she was a
8 friend of Sharon's, good friend, excuse me, Courtney Wolford.
9 She was a good friend with her and also with Bruce. Bruce had
10 a relationship with her, also.

11 Q All right. Do you know where Ms. Dudas is today?

12 A No. We have not been able to relocate her.

13 Q Where do we -- what is your understanding of where she is
14 and why we are unable to locate her?

15 A Now, I don't -- we, we just haven't been able to find her
16 nowhere. The other girl is on -- there's another girl
17 involved, but she's in witness protection, but not Amy Marie
18 Dudas. She -- we just cannot seem to locate her. We have
19 tried to find her and cannot.

20 Q Okay. And regarding information Mr. Martin knew about
21 Amy Marie Dudas, let me show you what's been marked for
22 identification as Number Six.

23 A Yes. This is his chat log.

24 Q I'm sorry. It is what?

25 A This is the chat -- this is, I mean, excuse me, this is

1 the transcribed interview between Daryl Wilson and Amy Marie
2 Dudas.

3 Q And Mr. Martin was provided with a copy of that --

4 A Yes.

5 Q -- as well.

6 A Yes. He was.

7 Q Okay.

8 MS. WILLIAMS: I would move this into evidence.

9 MR. THOMAS: The same hearsay objection, Your Honor, and
10 again, as far as authentication goes, we're talking about
11 things Mr. Morgan was provided. Mr. Morgan's subpoenaed.
12 He'll be here to testify.

13 THE COURT: Okay.

14 MR. THOMAS: I mean, if she wants to introduce it through
15 him. I'd probably still have the same hearsay objection, but
16 I have an authenticity objection to this one as well.

17 THE COURT: Okay. I'm going to sustain the objection.

18 MS. WILLIAMS: Okay.

19 BY MS. WILLIAMS:

20 Q And we'll do that, and, and this is Applicant's Number
21 Five.

22 A This is a confidential investigation report from Daryl
23 Wilson that was provided to me and to Morgan Martin where he
24 investigated this case.

25 Q All right. And that contains his findings and

Jane Lovette - Direct by Ms. Williams

61

1 information that was provided to Mr. Martin; correct?

2 A Yes.

3 MS. WILLIAMS: I would move Number Five into evidence.

4 MR. THOMAS: I haven't really looked through this, but I
5 would also probably say that I have a hearsay objection and
6 also again the same authenticity objection. Again, Mr. Martin
7 or the actual investigator himself could authenticate this
8 document, but I don't believe this witness can.

9 THE COURT: All right. I sustain the objection.

10 BY MS. WILLIAMS:

11 Q Ms. Lovette, tell me what you knew about Becky Pedersen,
12 who is she and why would she matter at all to this case?

13 A She was the office manager at Net, Unlimited, in Winston-
14 Salem, North Carolina.

15 Q And, and --

16 A And at one time Bruce Wolford worked for them.

17 Q Okay. And what, if anything, did you learn about Mr.
18 Wolford's interactions with Ms. Pedersen?

19 A He told her that if anybody came around wanted to know if
20 he was --

21 MR. THOMAS: Objection. Hearsay, Your Honor.

22 THE COURT: Sustained.

23 MR. THOMAS: And I'd move to strike that as well.

24 THE COURT: So stricken.

25 Q All right. Let me ask it this way. Was there

1 information provided to Mr. Martin about Becky Pedersen that
2 would have or could have risen to a level of suspicions about
3 Mr. Wolford's actions?

4 A Yes.

5 Q And was Mrs. Pedersen called to testify at trial?

6 A No.

7 Q Do you know if, if Mr. Martin contacted Mrs. Pedersen or,
8 or followed up with any reports that she may have -- he may
9 have received?

10 MR. THOMAS: Objection. Calls for speculation.

11 MS. WILLIAMS: Well, I think she can testify if she knows
12 or not.

13 THE COURT: Of her own personal knowledge, not based upon
14 hearsay from anyone else, if she was present when it was
15 disclosed.

16 MS. WILLIAMS: Yeah. If she know -- well, my question is
17 does she knows if Mr. Martin himself followed up or talked to
18 Ms., Ms. Pedersen.

19 A I asked him.

20 THE COURT: I sustain the objection. That's still based
21 on hearsay.

22 MS. WILLIAMS: Okay. Beg the Court's indulgence for just
23 one moment.

24 BY MS. WILLIAMS:

25 Q Ms. Frazier [sic], let me ask you, prior to Mr. Poole's

Jane Lovette - Direct by Ms. Williams

63

1 murder, what if any kind of -- did you know about John's life
2 and his activities prior to Mr. Poole's murder?

3 A I did.

4 Q Did you know about his relationship with Ms. Poole?

5 A I did.

6 Q What, if anything, did you know about that?

7 A Can I give you a little background? John lived in the
8 house that I -- my father when he passed away gave me.

9 Q Okay.

10 A He was living in that home, and he from time to time had
11 females coming and going that needed a place to stay.

12 Q Okay.

13 A And finally I told him, I said, "You need -- this -- I'm
14 going to change the locks and not let you in if you don't quit
15 letting these women come here and stay at this house." I said
16 -- then I found out that Renee was at his house. He came by
17 our house one day with her, and I said, "Who is this one," and
18 he said, "Well, she's having some marital problems," and he
19 says, "I'm trying to help her out." So I come to find out
20 that she brought some boxes of stuff and moved into his house,
21 never unpacked them, was there about a week when her father
22 came and got her stuff and took them back to her -- his house,
23 I guess. I don't know where he took them, but somewhere, and
24 I told John, I said, "Okay. She's to go next." He said,
25 "Well, I told her she could just stay here for just a little

1 while, she needed to get a job and a place to stay." The
2 terms was that Bruce was abusing her and she needed to get out
3 of the relationship. I said, "That's her problem, not yours,
4 and you cannot save the world by helping all these women out,"
5 and that was my words to him. I said, "She's got to go." He
6 said, "Well, she's going to move out." So then he told me
7 that she was going to go back home. Well, on Mother's Day --
8 he told me she was leaving. On Mother's Day we went to take
9 my mother and all of us out for Mother's Day, and she shows up
10 with John, and I looked at her, and I said, "What are you
11 doing here?" She said, "Oh, well, I'm going home. I'm going
12 home." It turns out she was too drunk to drive home. So she
13 decided to come have dinner with us, lunch with us on Mother's
14 Day, and I said, "Well, this'll be the last time you stay
15 there." So at that point she left staying at John's. She
16 kept coming over to see him, but she wasn't living there.

17 Q Okay. All right.

18 MS. WILLIAMS: Beg the Court's indulgence just one more
19 moment.

20 BY MS. WILLIAMS:

21 Q Let me ask you this, do you have any knowledge about or
22 did you have any knowledge about John's guns?

23 A Yes.

24 Q Tell me what, if any, knowledge you had.

25 A He had a permit to have the gun. He had, at one time he

Jane Lovette - Direct by Ms. Williams

65

1 had a TZ75, and his friends, Kahle who was here, and another
2 friend, Donald Powell, they bought Glocks. Well, John wanted
3 a Glock, and he said, "But I have to get rid of my TZ before I
4 can buy a Glock." I said, "Yeah, because you're not going to
5 get any money from me." So in July of 1997 he sold the Glock
6 at a gun show. He went to a place there in Winston that sells
7 guns. It's a gun -- it's a firing range and ordered a Glock,
8 but he sold the TZ so he could buy the Glock.

9 Q So he did have a Glock?

10 A Yeah. He had the Glock in his possession and we gave it
11 to Daryl. The police never asked for it. They wanted to know
12 where it was and we told them we had it.

13 Q Okay.

14 A And then Daryl sent it to a forensics lab, and then once
15 it came back from there, it came back into my possession and
16 the police never wanted it.

17 Q Okay. So the police never got that Glock?

18 A They never had, they never had possession of the Glock at
19 any time.

20 Q Okay. But you all got it and did analysis of it?

21 A Yes. John gave it to Daryl. I mean, he gave the gun to
22 Daryl immediately right after the incident happened. When we
23 met with Daryl for the first time, he asked John if he had a
24 gun. He said yes, he had a Glock. He said, "Well, give me
25 the gun." So we signed over a chain of evidence, I guess, or

1 whatever property to him, and then he took it to -- sent it
2 off to a lab to be tested.

3 Q Okay. That's all the questions that I have. Please
4 answer any the Attorney General or the Court may have.

5 THE COURT: Cross examination.

6 MR. THOMAS: May it please the Court?

7 THE COURT: Yes, sir.

8 CROSS EXAMINATION

9 BY MR. THOMAS:

10 Q So, Ms. Lovette, your testimony is that you discussed Ms.
11 Poole's other relationships with men with Mr. Martin?

12 A I did.

13 Q And you specifically discussed Bruce Welford among those?

14 A Yes.

15 Q But she also had many other relationships with other men;
16 correct?

17 A Yes. Uh-huh.

18 Q You aware she gave a confession?

19 A Oh, yes.

20 Q And that confession implicated Mr. Frazier?

21 A I understand.

22 Q You said she brought or Mr. Frazier brought Ms. Poole to
23 your house on Mother's Day?

24 A No. I meant, meant she came to the restaurant.

25 Q Restaurant, okay. But he had brought her to your house?

Jane Lovette - Cross by Mr. Thomas

67

1 A One time.

2 Q Was that common practice for him to bring his girlfriends
3 over to, to your house?

4 A Oh, once in a while if they were out riding around or
5 something he might stop in with one. No. So it was common
6 practice, and she was there about ten minutes and that was it.

7 Q So it's fair to say that during this time he was -- she
8 was living with him and their relationship was ongoing, he was
9 trying very hard to help her out?

10 A He just wanted -- she said she needed a place to live and
11 that she was going to get a job and find her a place to live,
12 and it was for a week, one week. He just met her on March the
13 13th, the first time he ever laid eyes on her, and the
14 relationship didn't even start till about a month later, and
15 it was very brief, as most of his were.

16 Q Thank you, Ms. Lovette. That's all I have.

17 THE COURT: Redirect?

18 MS. WILLIAMS: That's all the questions that I have, Your
19 Honor.

20 THE COURT: All right. You may step down.

21 A Thank you.

22 THE COURT: Let me see the attorneys for a second.

23 (Whereupon, a bench conference is held.)

24 THE COURT: All right. We'll go ahead and break for
25 lunch. We'll be in recess until 1:30.

1 OFF THE RECORD.

2 (On the record.)

3 THE COURT: All right. Ms. Williams, you can call your
4 next witness.

5 MS. WILLIAMS: Your Honor, I call my client, John Frazier
6 to the stand.

7 THE COURT: All right.

8 MS. WILLIAMS: Your Honor, while he's approaching may we
9 approach?

10 THE COURT: Yeah.

11 (Whereupon, a bench conference is held.)

12 Whereupon, John Boyd Frazier was called to the stand,
13 duly sworn by the clerk and testified as follows:

14 THE CLERK: Please have a seat. State your first and
15 last name and spell it.

16 MR. FRAZIER: John Frazier, F-R-A-Z-I-E-R, J-O-H-N.

17 DIRECT EXAMINATION

18 BY MS. WILLIAMS:

19 Q Mr. Frazier.

20 A Yes, ma'am.

21 Q You are here today for your PCR regarding -- tell the
22 Court what the overall claims -- your claims against the
23 attorney, against the State and, and other -- the, the, the
24 areas that you are claiming that there are problems.

25 A I'm claiming that Mr. Martin was ineffective in his

John Frazier - Direct by Ms. Williams

69

1 assistance in my defense. I'm claiming that he was not
2 properly prepared. I'm claiming he did not do the majority of
3 the things that I asked him to do to be prepared for the
4 trials. I'm claiming that the State subordinated perjury.
5 I'm claiming that the State withheld evidence. I'm claiming
6 that the State coerced. I'm claiming that the police coerced,
7 coerced witnesses and perjured themselves.

8 Q Okay. All right. So, so that's the big picture, and
9 then we had -- you have itemized it out; correct?

10 A Yes. But I need my notes. If I could have my notes,
11 please, Your Honor, to help refresh. There's so much. Just
12 the, the two, the two black books and the one little
13 composite, composition book. Thank you.

14 Q Now.

15 A The individual items that I am claiming are failure by
16 Mr. Martin to sequester the jury.

17 Q All right. Wait. Let's, let's do this one at a time as
18 we've got them itemized out so it's not confusing and we can
19 present it methodically. Okay?

20 A Okay.

21 Q All right. So the first issue you had you just said is
22 jury sequestration.

23 A Yes.

24 Q And, and, and in your -- in your motion you also mention
25 change of venue; correct?

1 A Yes, ma'am.

2 Q All right. Explain those to me.

3 A I asked Mr. Martin, I asked Mr. Martin if we could get a
4 change of venue because it was all over the news, every single
5 news broadcast there was something about myself or Ms. Poole
6 on every single broadcast, and I asked him if there was any
7 way possible we could do a change of venue because there was
8 no way that I would get a fair trial out of the jury pool from
9 Horry County. He said, "There's nothing I can do." He said,
10 "I can try. I can ask, but they're going to tell me no." I
11 said, "Well, Morgan, this, this is an issue because the jury
12 pool is from Horry County and it's all over the news down
13 here. I need you to try and get a change of venue."

14 Q Was a motion for a change of venue made?

15 A Not that I know of. I don't think there was. I never
16 heard one.

17 Q Okay. And what about jury sequestration?

18 A I asked him about that because, like I said just a minute
19 ago, that it was all over the news, every single broadcast.
20 When we were doing the jury voir dire, I -- there were several
21 jury members, jury members that -- out of the pool that was in
22 the big courtroom upstairs, I believe, that a great number of
23 them, as a matter of a fact, that moved to the side when it
24 was asked, "Do any, do any of you all have any prior knowledge
25 or seen anything on the news or whatever," and there was a

John Frazier - Direct by Ms. Williams

71

1 large group of people that moved to the side that said that
2 they had seen something or read something or had an opinion,
3 the questions that they ask about the jury. So then I asked
4 him at that -- so then I asked Morgan, I said, "Well, you
5 know, are we going to be able to sequester them because it's
6 still going to be all over the news every single day," and he
7 says, "Well, we can do that, but it's going to cost too much
8 money, and the Judge is not going to go for it," and I said,
9 "Morgan, that's not the point. The point is is I'm trying to
10 get a fair trial, and if the jury's not sequestered well they
11 can go home and watch the news, they're going to face the
12 cameras outside the courthouse every single day, they're
13 questioned every single day coming in and going out. They're
14 going to sit down with their loved ones and be eating dinner,
15 and say, 'Oh, well, look, there's the news,' because their
16 husband or wife is watching the news and there it is on the
17 news again, swaying the jury with their opinions instead of
18 what the facts of the trial," and I asked him again
19 repeatedly, "Will you please sequester the jury? Will you
20 please make a motion to sequester the jury?" I never heard
21 him make one.

22 Q All right. So specifically in your notes and in your
23 proffer you discuss certain jurors. There were -- there was
24 one, Juror Number 245 who was excused. Correct?

25 A I don't have that. Do you have that, the, the amendment

1 book? Get the, get the amendment book. I'm sorry. I
2 remember there were very specific ones that had very specific
3 issues that came forward during the course of the trial.
4 She's got the book right there, Brana.

5 Q Well, I'm going to hand you this which is you prepared
6 that -- what that would refresh your memory?

7 A Yeah. During the course of the trial certain jury
8 members came forward. The first one, 245, Mr. Sperry [spelled
9 phonetically], who actually drove Renee Poole's attorney back
10 and forth to Columbia, and he made the statement that Mr.
11 Diggs, the attorney Mr. Diggs for Ms. Poole actually gave him
12 facts about the case, but he had already been seated on the
13 jury at this point. So either -- I guess he just ignored the
14 earlier questioning or decided that he could figure out some
15 way, but then realized that he couldn't.

16 Q Was he left on the jury?

17 A He was excused.

18 Q Okay.

19 A Laura Berry [spelled phonetically], Juror Number 18, she
20 came forward and said that she had overheard other jury
21 members talking about this being, that it -- this was a
22 retrial, the 2005 was a retrial and that she said that I
23 looked, that the Defendant, myself, looked familiar from the
24 news and the fact that she used to live in Winston-Salem,
25 North Carolina, where I am from and where a majority of the

John Frazier - Direct by Ms. Williams

73

1 witnesses were from, and knew something from the news up there
2 and had discussed the points, key points with family members.
3 Unfortunately, she was retained. They, they kept her on as a
4 jury member.

5 Q Did Mr. Martin object to her?

6 A No. I don't think he did.

7 Q Okay.

8 A Juror 201, Mr. Provincher [spelled phonetically], he said
9 that he remembered events when they happened back in '98. He
10 was retained even though he said that he remembered the
11 events, he remembered the events, but that was, that was when
12 Mr. Humphries came forward and said that he didn't, he didn't
13 see where he had -- that we had any jury members that
14 remembered anything. This is after the second, the third
15 juror had come forward stating that they remembered something.
16 At that time I did ask Morgan again about sequestering, and he
17 said, "Well, the trial's already started now," one of those
18 kind of deals. I -- most of the time when I asked Mr. Martin
19 a question he blew me off and pushed me aside. The -- Mr.
20 Provincher was also the one who was, I think he was moved from
21 an alternate position, and he stated that he had heard rumors
22 in the jury room about the fact that he would be moving
23 forward from an alternate to being an actual seated juror,
24 showing that obviously they had been discussing it, discussing
25 the case and aspects about the case before, while, when the

1 trial first started.

2 Q And when he came forward was a motion for mistrial made?

3 A No.

4 Q Okay.

5 A No. Steven Rainey [spelled phonetically] came forward.

6 He said he had concerns about because he had stress because he
7 was working third shift. He had a lot of lack of sleep. Said
8 he -- he said that he would try and tough it out but he didn't
9 know if, if he would be able to continue if, if, if, if the
10 stress of the trial and everything kept getting to him. No
11 motions were made. He was retained.

12 I asked Morgan -- I continued to ask Morgan every time
13 another jury member came forward about sequestering the jury,
14 and he said, "Well, it's too late. We're already seated.
15 We've already been -- we've already started." He just kind of
16 blew, blew off my suggestions.

17 Q All right. The second issue you raised you talked about
18 an improper reply witness in Ms. Dee Mishler.

19 A Yes.

20 Q Tell me what you were talking about and what if any error
21 you think occurred in regard to her reply testimony.

22 A It was brought in, it was brought -- the -- her, her
23 testimony was brought in as a reply witness to my sister's
24 testimony, and while I might know -- while I don't know the
25 law. I don't agree with how it was brought in. It was still

John Frazier - Direct by Ms. Williams

75

1 brought in, but the issue was was -- the argument was that we
2 had already known about Ms. Mishler or her potential testimony
3 under Rule 5 and Brady because her statements were provided
4 to, to the Defense in the Poole family interview.

5 Q All right. Let's pause for a moment so that we're all
6 clear. Your, apparently your sister testified basically that
7 you and Ms. Poole were not in love?

8 A Right.

9 Q And then Ms. Mishler came on stand and part of her
10 testimony was to contradict --

11 A Right.

12 Q -- that?

13 A Right.

14 Q Okay. So your argument was is that if we'll recall from
15 the --

16 MS. WILLIAMS: Your Honor, just so you'll have the
17 specific part. This is part of the proffer.

18 THE COURT: When you say part of the proffer, proffered
19 at trial?

20 MS. WILLIAMS: Yes, sir. Part of the proffer at trial.

21 THE COURT: So it didn't go to the jury. It was just
22 proffered to the Court and nobody else?

23 MS. WILLIAMS: It's about Mr. Morgan's argument that's
24 coming in. This would be Applicant's Number Seven. All
25 right. Your Honor, Applicant's Number Seven so the Court is

1 clear is the, the -- this is part of Mr. Frazier's 2005 trial
2 where -- when the Defense initially objected to Ms. Mishler as
3 a reply witness during the proffer there was back and forth
4 argument over was it proper reply testimony. This is that
5 discussion. So it's kind of a hybrid of her testimony and the
6 argument regarding her testimony. That argument was
7 ultimately withdrawn by Mr. Martin, but that's what -- this is
8 the specific language about that. So I wanted the Court to be
9 aware that it's pages 1150 through 1163.

10 THE COURT: Any objection to Applicant's Exhibit Number
11 Seven?

12 MR. THOMAS: No objection, Your Honor.

13 THE COURT: All right. Admitted into evidence without
14 objection.

15 (Applicant's Exhibit Number Seven [Portion of Trial
16 Transcript from 2005 Trial Re: Mishler] admitted into
17 evidence and appropriately marked.)

18 BY MS. WILLIAMS:

19 Q Now, Mr. Frazier, regarding that testimony, tell the
20 Court how that happened and transpired.

21 A The --

22 Q That, that.

23 A Sorry.

24 Q When you were saying what you had a problem with with
25 what happened and why you think there was an error in why that

John Frazier - Direct by Ms. Williams

77

1 reply witness' testimony was erroneous before the Court.

2 A The, the, the testimony from Ms. Mishler was, was her
3 opinion testimony that I was in love with Renee Poole, when I
4 had never had any, any conversations with Ms. Mishler about
5 Renee Poole or anybody in her family for, for that matter.

6 Q And Mr. Martin initially objected; correct?

7 A He initially, he initially objected to her, to her
8 testimony and that's when the State came in to and claimed
9 Crawford to allow it because when Ms. -- when my sister, Ms.
10 Michelotti testified that I was not in love, the State came
11 forward and said that it was allowed under Crawford because
12 during Ms. Michelotti's testimony Ms. Mishler came up to the
13 prosecution during that testimony and claimed that that was
14 not true, she had testimony --

15 Q It, it -- let me interrupt you just to cut to it. It was
16 newly discovered evidence?

17 A Newly discovered, exactly, I'm sorry.

18 Q Okay.

19 A It was newly discovered that they just, they just found
20 out during Ms., Ms. Michelotti's testimony.

21 Q And the Court allowed it?

22 A And the Court allowed it.

23 Q And then after the Court allowed it what happened?

24 A Then after the Court allowed Ms. Mishler to testify
25 Solicitor Hembree came forward and said, "No, Your Honor, I

1 want, I want to clarify," I don't remember the exact words,
2 "but this is not newly discovered testimony. This, this
3 actually falls under, under Rule 5 and Brady because Ms.
4 Mishler's statements were already provided to the Defense in
5 the Poole family interview." So I asked Mr. Martin, I said,
6 "Well, where is the Poole family interview?" Mr. Martin says,
7 "Well, I don't know." So he -- they had a discussion back and
8 forth where the Poole family interview was and Mr. Hembree
9 advised Mr. Martin that it was an audiocassette that the, that
10 the police made with the entire Poole family and Ms. Mishler's
11 statements were on the tape. I asked, I asked Mr. Martin, I
12 said, "Mr. Martin, did you listen to the tape?" And he said,
13 "No. I haven't listened to the tape."

14 Q And what if anything do you think is problematic about
15 that with us being here today?

16 A Well, the problem is is he didn't do his job in listening
17 to the, listening to the tape or all the evidence for that
18 matter in the case to be properly prepared to present a
19 defense on my behalf. If he had listened to the tape, if Mr.
20 Martin had listened to the Poole family interview and Ms.
21 Mishler said X, Y, Z in the tape, and then got on the stand
22 and said A, B, C, then obviously there is a discretion, there
23 is a discrepancy there. Mr. Martin was not prepared by not
24 listening to the tape to say, "Hey, wait a minute. Excuse me.
25 Ms. Mishler, you said X, Y, Z on the tape, but now you're

John Frazier - Direct by Ms. Williams

79

1 saying A, B, C. This is not, this is not, this is not what
2 you're saying. You're making something completely different."

3 Q Was her testimony damaging to your case?

4 A I believe it was. Yes.

5 Q How? Why?

6 A Because, because, because her testimony swayed the jury
7 into believing that I was in love with Ms. Poole when I was
8 not.

9 Q Okay. All right. Now, issue number three in your brief
10 as you go forth you talk about the testimony of Mark and Donna
11 Hobbs.

12 A Okay.

13 Q All right. Tell the Court what if anything you think is
14 problematic and what went wrong with their testimony. What
15 was wrong with it?

16 A Oh, there's so many things wrong with Mark and Donna
17 Hobbs's testimony.

18 Q Okay.

19 A Mark and Donna Hobbs's testimony was inconsistent from
20 everything they said each and every time they spoke. Every
21 time they gave a statement to the police they said one thing.
22 Every time they gave testimony at a trial they said another
23 thing. Every time -- when they testified at an in-camera
24 hearing they said another thing. When they testified at the
25 next hearing, next trial they said a third thing. When they

1 testified in an in-camera hearing at the, at the next trial
2 they said a fourth thing. Every time Mark and Donna Hobbs
3 opened their mouth something significant changed in their
4 testimony, either distances changed, lighting changed, the
5 time of day, the time of night changed, something consistently
6 changed, but I feel where -- what, what I feel is the most
7 damaging thing is the simple fact that we were never provided
8 their original statements from June the 10th. Mark and Donna
9 Hobbs gave statements to the Myrtle Beach Police Department on
10 June the 10th, 1998, the day after the crime, and on June the
11 10th, 1998, they gave a statement, a recorded statement that we
12 have knowledge that the statement was recorded from Myrtle
13 Beach Police Department.

14 Q And that was specifically which detective?

15 A That was Detective Bill Frontz testified at the second
16 trial in 2005 that they tape every single interview they do as
17 a protocol for their section. He said they taped their
18 interview, their, their -- from, from June the 10th. There was
19 a composite drawing done by Mark and Donna Hobbs with an
20 Officer Beatty.

21 MS. WILLIAMS: If I could pause for a moment, Your Honor.

22 BY MS. WILLIAMS:

23 Q I'm going to hand you what's been marked for
24 identification as Applicant's Number Eight. Do you recognize
25 that?

John Frazier - Direct by Ms. Williams

81

1 A Yes, ma'am.

2 Q What is that?

3 A That is a composite drawing done by Mark and Donna Hobbs.

4 Q All right.

5 MS. WILLIAMS: I would move Applicant's Number Eight.

6 THE COURT: Any objection?

7 MR. THOMAS: No objection.

8 THE COURT: All right. Applicant's Exhibit Number Eight
9 admitted into evidence without objection.

10 (Applicant's Exhibit Number Eight [Composite Drawing]
11 admitted into evidence and appropriately marked.)

12 BY MS. WILLIAMS:

13 Q All right. So this is the composite that was done by the
14 Hobbses shortly after Mr. Poole's murder; correct?

15 A Yes. This was done from, from all the notes that we've
16 been able to find, was done either on June the 10th and/or both
17 June the 11th, 1998, because Mark Hobbs, I believe, I believe
18 it was Mark Hobbs came to the police station first and started
19 working on it and then they had to convince Donna Hobbs to
20 come down to the police station to work on it some more or to
21 help work on it. There's two issues. There's two main issues
22 with the composite drawing that I'd like to bring forward if I
23 can, Ms. Williams.

24 Q Go ahead. What, what are the issues that you see with
25 regard to the composite?

1 A The composite drawing was done with Mark and Donna Hobbs
2 to a Myrtle Beach Police Department Officer Beatty. Okay.
3 And we know this from, from notes. The problem is is Morgan
4 Martin never called Officer Beatty to testify to verify what
5 Mark and Donna Hobbs actually described to him while doing the
6 composite drawing. So we never got a chance to hear from the
7 man, the officer who took their statements for the composite
8 drawing in testimony.

9 Q And you never received?

10 A And we never received the statements to him or the
11 statements from the 10th before him to whichever officer they
12 were given to. My second issue with the composite drawing,
13 Your Honor, if I may, I declare that I have never in my life
14 looked like George Clooney.

15 MR. THOMAS: Objection, Your Honor.

16 A The composite drawing looks like George Clooney.

17 THE COURT: Overruled.

18 A Okay.

19 Q All right. So, so there was a composite done by Hobbs --

20 A Yes.

21 Q -- shortly after the murder, and your belief, based on
22 the testimony of Detective Frontz, is that that whole
23 interaction was -- it was standard procedure for the Myrtle
24 Beach police to record; right?

25 A Yes.

1 Q And did you or did you not ever get that, anything
2 regarding that?

3 A We never, we never received anything from June the 10th or
4 June the 11th.

5 Q Okay. And what about and, and Officer Beatty?

6 A We never received -- well, the only thing we received
7 from Officer Beatty were, were, were notes. I think there was
8 only one page of notes that had his name at the top and that
9 was it and there was no detail about what he actually did
10 besides the fact that he took the composite drawing from the
11 Hobbses.

12 Q All right. At trial was any motion ever made regarding
13 the Hobbses' composite, the way it was taken, what was
14 happening about that? Did Mr. Martin make any motions about
15 that?

16 A I don't remember. There were issues with, with the way
17 they tried to describe how they did the composite drawing.
18 Mark and Donna Hobbs kept -- continued to claim that they were
19 -- that they did not like it. They were not satisfied with
20 it, that they had never done anything like this before. So
21 they didn't know what they were doing. I asked Mr. Martin, I
22 said, "Well, Morgan, the, the issue is is nobody has done
23 anything like this until they have to do it. So that is an
24 irrelevant point. The point needs to be that the composite
25 drawing looks nothing like me or nothing like the mug shot

1 that was taken of me. So them claiming that they weren't
2 satisfied with the eyes or the forehead or the hair is
3 irrelevant because we don't have anything to compare them to,
4 to compare what they're saying to because we never received
5 the statements from the 10th."

6 Q And did he make any motions about that?

7 A Not that - the only thing that I heard Mr. Martin say
8 they went back and forth, Mr. Martin and Mr. Hembree went back
9 and forth about which officer would have access to those
10 statements and which officer would have those statements, and
11 Mr. Hembree said in open court that, "You have those officers
12 subpoenaed, you need to call them in. Your Honor, he's doing
13 -- he's, he's" -- what was the word that he -- I'm sorry,
14 "He's playing parlor games to try and, to try and glean
15 information about what the Hobbsses said."

16 Q Okay.

17 A I asked Mr. Martin at the time, I said, "Well, Morgan,
18 the issue is is weren't they supposed to be provided to us?
19 This is -- this shouldn't be an issue that we have to, that we
20 have to glean information from any officer when this
21 information should have been provided to us," and he shushed
22 me.

23 Q All right. And so after the Hobbsses did a composite,
24 they later -- excuse me -- participated in a photo lineup;
25 correct?

John Frazier - Direct by Ms. Williams

85

1 A Yes.

2 Q Do you have any issues regarding that that you wish to
3 relay to the Court?

4 A Oh, yes.

5 Q Okay.

6 A We know from memorandums. We know from testimony that
7 both Mark and Donna Hobbs were contacted by the Myrtle Beach
8 Police Department officers on multiple occasions before they
9 were shown the photo lineup. None of those conversations were
10 ever provided to us so that we would know the context or the
11 contents of those conversations whether they might have been
12 leading, so to speak, or leading. We have memorandum from
13 Detective Frontz that states, "Detective Altman will have
14 spoken to Mark and Donna Hobbs prior to you -- to officer --"
15 I forgot his name -- Bedford County Sheriff's Office.

16 MS. WILLIAMS: Your Honor, may I hand him, may I hand him
17 this to refresh his memory?

18 A I forgot the officer's name.

19 THE COURT: All right.

20 A Sorry. Kent Robey, Officer Robey with the Bedford County
21 Sheriff's Department. I'm sorry I forgot his name. "Terry
22 Altman, Detective Terry Altman will have spoken to the Hobbses
23 before you come to show them the photo lineup." The issue
24 that should not -- first off, that should not have happened,
25 but a bigger issue is if Myrtle Beach Police Department is

1 speaking to Mark and Donna Hobbs before they're shown the
2 photographic lineup then we should have been privy to the
3 contents of that conversation to verify that they weren't
4 giving leading information before they were shown a photo
5 lineup containing me in it. So we don't know if they were
6 ever shown another photo lineup without me in it to say, "Hey,
7 wait a minute, that could have been the guy." We don't know
8 what was said because we were never provided that information.

9 Q Okay. Were you provided a copy of the report of the
10 actual interview with the Hobbses when they did the photo
11 lineup? You were provided with the photo lineup and then
12 there was a -- Officer, Officer Robey was the one that met
13 with the Hobbses that completed the photo lineup; correct?

14 A Yes.

15 Q Okay.

16 A He, he gave, he gave, he gave a testimony.

17 Q Okay.

18 A I never saw a report from him, but he gave testimony that
19 they picked out number one as the person with the largest
20 eyes.

21 Q Okay.

22 A That was, that was what, that was what he said, "They
23 picked out the person with the largest eyes." Well, the
24 person with the largest eyes is number one.

25 Q Okay. And was there -- were there any other issues that

John Frazier - Direct by Ms. Williams

87

1 you had that you wish to tell the Court about with regard to
2 that photo lineup and the development of the photo lineup?

3 A Yes. We have from both Mark and Donna Hobbs both
4 admitted during the second trial that they had spoken to and
5 become friends with the Poole family. There was, there was,
6 there was the fact that the Poole, that the Pooles paid the
7 Hobbses \$20,000 in the guise of, in my opinion, the guise of
8 reward money for their participation in this hearing, in the,
9 in the trial.

10 Q Was that issue addressed at trial by Mr. Martin?

11 A There was a proffer done about payment where Mr. Hobbs
12 says that he already, that he had the money still in the bank,
13 that he could give it back to them at any moment. I brought
14 to Mr. Martin's attention, "You need to read what they said
15 before because not only has, not only has the Hobbses, Mr.
16 Hobbs quit his job as a diesel mechanic for Caterpillar, a
17 field service mechanic for Caterpillar, but now he owns his
18 own home improvement business and they have since moved the
19 family from the house that they lived in in Goodview,
20 Virginia, to a new house." I told Mr. Martin, I said, "Well,
21 the issue -- I mean, obviously the money was paid. So they --
22 so he -- yeah, he has his own money now because he started his
23 own business. He's, he's, he's, he's moved the family home
24 because he's gotten paid, because that family's been paid this
25 reward money," but another issue comes up with regard to the

1 reward money as well because both Mark and Donna Hobbs gave
2 inconsistent statements, inconsistent testimony about how they
3 received the reward money, and while I agree with Ms. Williams
4 that that might be a minor issue, when you have a couple who
5 has received \$20,000 from the victim's family and they can't
6 even be in agreement on how they received \$20,000, that
7 becomes an issue.

8 Q Was that issue raised at the trial?

9 A No. It was not.

10 Q Okay. So in part of and, and, and you're not here saying
11 that Mr. Martin didn't argue at all about their testimony;
12 correct?

13 A No. I'm saying he didn't argue like he should have or
14 fully.

15 Q Okay.

16 A There were, there were larger issues that he could've
17 argued that he didn't. There were, there were issues that he
18 should have brought up but did not, and any time that I tried
19 to, to bring them to his attention I got shushed.

20 Q All right. With regard to their testimony and issues
21 that you asked him to bring up that did not come up --

22 MS. WILLIAMS: Your Honor, these are the actual exhibits
23 from the underlying trial. It was State's Exhibit Number 36
24 and State's Exhibit Number 37. I have discussed it with the
25 Attorney General and it creates a chain of custody kind of

1 nightmare. So what we have is I have photographs of these two
2 for entry into our record, but this is actually what we're
3 talking about.

4 THE COURT: All right. Any objection to the copies?

5 MR. THOMAS: No objection, Your Honor.

6 THE COURT: All right.

7 MS. WILLIAMS: And I -- I'll, I'll mark those.

8 (Applicant's Exhibit Number Nine [Photograph] and
9 Applicant's Exhibit Number Ten [Photograph] marked for
10 identification.)

11 MS. WILLIAMS: Your Honor, I'm --

12 BY MS. WILLIAMS:

13 Q May I ask you what's been marked for identification as
14 Applicant Number Nine, it is a photograph of State's Exhibit
15 Number 36; correct?

16 A Yes.

17 Q And that Number Nine is an accurate photograph of and an
18 accurate depiction of State's Number 36 in your underlying
19 trial; correct?

20 A Yes, ma'am.

21 Q And Applicant's Number 10 is a photograph of State's
22 Number 37.

23 A Yes.

24 Q And it's an accurate depiction of State's Exhibit Number
25 37?

1 A Yes.

2 MS. WILLIAMS: Your Honor, I would move into evidence
3 Applicant's Number Nine and Ten.

4 THE COURT: Any objection?

5 MR. THOMAS: No, sir.

6 THE COURT: All right. Applicant's Exhibit Number Nine,
7 Applicant's Exhibit Number Ten admitted into evidence without
8 objection.

9 (Applicant's Exhibit Number Nine [Photograph] and
10 Applicant's Exhibit Number Ten [Photograph] admitted into
11 evidence and appropriately marked.)

12 BY MS. WILLIAMS:

13 Q Now, Mr. Frazier, you asked me as your attorney to get
14 Applicant's Nine and Applicant's Ten.

15 A Yes, ma'am.

16 Q Can you explain to the Court what you were -- your -- can
17 you explain to the Court why you wanted these exhibits here
18 today?

19 A The issue with 36 is, Applicant Number Nine, this is a
20 photograph from the vantage point where Mark and Donna Hobbs
21 claim they came out of the hotel and where they claim, they
22 claim that I was standing on the other side of the fence
23 across the pool, pool deck and through the fence. The issue
24 -- there are two issues with this. One issue is is the person
25 in the photograph is higher up the side the incline of the

1 sidewalk than what they gave in the -- the only provided
2 statements before trial were September 3rd, and this places the
3 person higher up the incline of the sidewalk meaning that
4 they're -- they are higher above the fence line than would be
5 if they were down the incline of the sidewalk. The second
6 issue is is this is a photograph that Mark Hobbs took of Donna
7 Hobbs. This is Donna Hobbs on the other side of the fence,
8 and during the trial when Ms. Hobbs was shown this blown up
9 photograph, she did not recognize the person in the
10 photograph.

11 Q And this was admitted at trial --

12 A That was --

13 Q -- live testimony at your trial?

14 A -- that was admitted at trial, in live, in live testimony
15 and she argued with Mr. Martin on pages 778 through 779 that
16 she did not recognize the person in that photograph as being
17 herself. She actually made the comment, "You can't see their
18 face." Mr. Martin said, "No, ma'am, you can't see their
19 face."

20 Q Okay. Applicant's Number 10, which is State's Number 37.

21 A That's a photograph of Mark Hobbs that Donna Hobbs took
22 at the end of the boardwalk on the beach end of the boardwalk
23 to where they claim that I was standing in the sand dunes
24 behind the hotel. The issue with this, the issue with this
25 photograph is is in the, in the initial, in the initial

1 provided statements from September 3rd they claimed that they
2 were standing on the, the parking lot end of the boardwalk,
3 not the beach end of the boardwalk, and through the course of
4 the trials, they continued to move themselves further down the
5 boardwalk to the beach end of the boardwalk because the issue
6 being on the parking lot end of the boardwalk there were seven
7 to eight foot tall bushes that you could not see through or
8 over to a person standing in the sea grass on the sand dune by
9 the fence.

10 Q Was that inconsistencies in their -- you're saying that
11 that is inconsistencies?

12 A That was one of the, one of the major inconsistencies in
13 their testimony that they continued to move themselves not
14 only on the boardwalk, but move the suspect in the sand dunes,
15 and then in 36 the inconsistencies were not only that they
16 started the suspect further down this way down the incline to
17 where the entire body and head would be below the fence line,
18 but continued to move the suspect further up the sidewalk
19 being up further, further the incline to be higher above the
20 fence. They also claimed that the distances continued to
21 change, the distance from here to here, the distances in this
22 photograph from the end of the boardwalk to where the person
23 was standing.

24 Q And that is Applicant's Number 10?

25 A Number 10. That distance continued to change from, I

John Frazier - Direct by Ms. Williams

93

1 believe from 40 to 50 feet down to 12 feet.

2 Q Okay.

3 A And then 36 it changed from --

4 Q Which is Applicant's Number Nine.

5 A Applicant's Number Nine, the distance changed from I
6 think it was 60 to 80 feet down to 15 feet by the time we got
7 to the actual jury testimony. It had shrunk down to 15 feet
8 and 12 feet, respectively.

9 Q Did Mr. Martin, to your knowledge, make an objection
10 regarding their testimony with the change and inconsistencies?

11 A He tried to bring, he tried to bring that up, but
12 Solicitor Hembree said, "Well, just guess, just guess, just
13 give us a guess. If I back up is this close enough?" That
14 was the only argument that was really had, "Is this close
15 enough? Am I, am I, am I far enough back? Is this close
16 enough?" My issue is is that is not an accurate
17 representation of what they claim they saw. When, when a
18 State's key witness does not recognize themselves in State's
19 evidence that should be an issue, and Mr. Martin should've
20 jumped all over that issue more so than, than, than what he
21 did.

22 Q Okay. Regarding Mark and Donna Hobbs's testimony --

23 A Yes, ma'am.

24 MS. WILLIAMS: Beg the Court's indulgence.

25 MR. THOMAS: Beg the Court's indulgence.

1 THE COURT: All right.

2 MS. WILLIAMS: Your Honor, for identification purposes
3 Applicant's Number 11 is Mark and Donna Hobbs -- is, is Mark
4 Hobbs's testimony from the 2000 trial.

5 A Yes.

6 MS. WILLIAMS: Number 12 is a taped interview of -- it is
7 a transcription of a taped interview by Investigator Long with
8 the Solicitor's Office of Mark Hobbs from September 3rd, 1998.
9 13 is a second taped -- is it a taped interview of Donna Hobbs
10 by the Solicitor's Office, Dale Long, September 3rd, 1998. 14
11 is marked as Mr. Hobbs's testimony from the 2005 trial. 15 is
12 Ms. Hobbs's testimony from the 2005 trial. 16 is a second
13 transcription of that -- of the September 3rd interview of Mark
14 Hobbs. Your Honor, if I will point out, as the Attorney
15 General and I discussed, Number 12 and Number 16 were both
16 admitted into evidence at the first trial because they were --
17 there was a discrepancy in these of whether -- of what Mr.
18 Hobbs was saying with regard to was the person that they
19 initially saw, did he have a ponytail, was it eight feet,
20 there were some things like this, and this -- these two
21 interviews were both discussed, argued and eventually admitted
22 into evidence at the first trial, but Judge Peeples only let
23 one of them go back to the jury, but that's what these two
24 are, and then Number 17 is Ms. Hobbs's testimony from the 2000
25 trial. Your Honor, we would submit into evidence these --

John Frazier - Direct by Ms. Williams

95

1 Applicant's Exhibits 11, 12, 13, 14, 15, 16 and 17 as the
2 varying testimonies of Mark and Donna Hobbs in the
3 investigation and the various trials of Mr. Frazier.

4 THE COURT: Any objections?

5 MR. THOMAS: Just so I'm clear, I don't think so, but I
6 just want to clarify. I think Numbers 12 and 13, at least
7 Number 12 is, in fact, Defense Exhibit Five from the first
8 trial.

9 A Yes.

10 MR. THOMAS: So that is fine. 13, I believe that's in
11 the transcript. It's a Court's Exhibit. So that's fine.
12 What was Number 16 again?

13 MS. WILLIAMS: Number 16 was -- it was the other
14 transcription of that interview that in, in the initial trial
15 when there was a discussion in the courtroom over which
16 description Mr. Hobbs said, and if I am correct --

17 A I don't think they even brought it up at Judge -- with
18 Judge Thomas.

19 MS. WILLIAMS: At the first trial because there was such
20 a discrepancy in them and they were arguing over, Judge
21 Peebles I think let them listen to it, and then at the second
22 trial I don't even know that they brought it up and argued,
23 but there's a, there's a very distinct difference in what
24 happened over the discussion of these two interpretations of
25 the transcript between the first trial and the second trial.

1 MR. WILSON: Your Honor, yeah, no objection, Your Honor.
2 These were exhibits in the first trial.

3 THE COURT: All right. Applicant's Exhibits Numbers 11,
4 12, 13, 14, 15, 16 and 17 are admitted into evidence without
5 objection.

6 (Applicant's Exhibit Number 11 [Mark Hobbs' testimony
7 from the 2000 trial], Applicant's Exhibit Number 12 [Taped
8 interview by Investigator Long with the Solicitor's Office of
9 Mark Hobbs from September 3rd, 1998], Applicant's Exhibit
10 Number 13 [Taped interview of Donna Hobbs by the Solicitor's
11 Office, Dale Long, September 3rd, 1998], Applicant's Exhibit
12 Number 14 [Mr. Hobbs's testimony from the 2005 trial],
13 Applicant's Exhibit Number 15 [Ms. Hobbs's testimony from the
14 2005 trial], Applicant's Exhibit Number 16 [Second
15 transcription of the September 3rd interview of Mark Hobbs] and
16 Applicant's Exhibit Number 17 [Ms. Hobbs's testimony from the
17 2000 trial] admitted into evidence and appropriately marked.)

18 BY MS. WILLIAMS:

19 Q Mr. Frazier, what if anything do you wish to tell the
20 Court regarding Exhibits 12, 16 and/or 13?

21 A 12, 13 and 16, excuse me, can I get some water? 12, 13
22 and 16 were the only provided statements that we were ever
23 given by Mark and Donna Hobbs. There were no other statements
24 from June the 10th or June the 11th that were provided to the
25 Defense from Mark and Donna Hobbs. These were the first

John Frazier - Direct by Ms. Williams

97

1 provided statements that were given to us -- thank you -- by
2 the Solicitor's Office. When we received them, the initial,
3 the initial thought was, well, we had two different statements
4 from Mark Hobbs because we had two different transcribed
5 copies that are obviously different in their, in their
6 transcription from Mark Hobbs. So we thought, okay, well,
7 they finally gave us their earlier interviews, but then when
8 we read the, the, the transcript of the, of the interview,
9 they're both, they're both dated September 3rd, 1998, at 4:50
10 p.m. Both of these interviews are the exact same. So when we
11 started reading over them, we were trying to figure out why we
12 had two different copies of the same interview. So as we read
13 through them, we found the large discrepancies being the
14 distances, one being eight feet, the other one being 80, and
15 then the ponytail, I'm sorry, where Mark Hobbs said, I've got
16 it highlighted in mine. I can't find the place. It was
17 marked in mine. Where Mark Hobbs when they asked him about
18 the hair Mark Hobbs in 16 said it was hard -- no, it had a --
19 I can't find it.

20 Q You can tell the Court what you know that it said.

21 A It said that he saw what was probably a ponytail hanging
22 behind his head. I've got it highlighted in mine.

23 Q It's okay. Just keep going so we can do it.

24 A I'm sorry. But in, but in --

25 Q But there was -- was there a discrepancy between the two

1 interviews regarding the potential ponytail?

2 A But the, but the one, the one that was allowed to the
3 jury it said it was hard to tell about the hair, whereas in,
4 whereas in the one that was not submitted to the jury it said
5 that the person that he saw had either a hood or a ponytail
6 hanging from behind his head.

7 Q All right. And that was in the first trial; correct?

8 A That was in the first trial.

9 Q So take us to the second trial. What if any discussions
10 were had about the discrepancies in these interviews at the
11 second trial?

12 A There were none because the, the, the second interview,
13 the first -- the, the interview that talks about the ponytail
14 was never brought up. They never brought up that issue.

15 Q So never brought up by who?

16 A Morgan.

17 Q So when he was going through and challenging their
18 identification and their memories and their descriptions of
19 you, that was ever discussed in the second trial?

20 A No. Not that I recall.

21 Q Okay.

22 A I don't remember them talking about the ponytail at all
23 in the second trial.

24 Q Okay.

25 A There was some, there was some motions that -- there were

John Frazier - Direct by Ms. Williams

99

1 motions outside the presence of the jury where they were
2 arguing back and forth, but I wasn't present for several of
3 those discussions where they talked about the description of
4 the suspect. There were lots of discussions that were had,
5 motions that were had where I wasn't in the, in the courtroom.
6 So I do not remember. There is another issue with that that
7 I'd like to bring forward if I could.

8 Q Okay.

9 A While, while there are the distance discrepancies and the
10 description discrepancies, the one thing that remains constant
11 in both of those interviews from Mark Hobbs and from Donna
12 Hobbs is the fact that they say that when they saw the person
13 they saw at the hotel it was going on 12:00 o'clock, not
14 11:15, not 11:20, 11:30, 11:40. It was going on midnight.
15 One says 12:00 o'clock and the other one says midnight. I
16 think that's significant considering the timeframe.

17 Q Tell me why you think that is consistent -- significant?

18 A That is significant because Myrtle Beach Police
19 Department Officer Scott Brown testified that he responded,
20 that, that he arrived at the scene with Renee Poole waving her
21 hands at 11:45 p.m. At 11:46 p.m. he radioed in -- no. He
22 said it took him a few minutes to get radio time, air time.
23 Once he got radio time, then he reported that he had a shooter
24 in the area, and Officer Aiossa testified that he responded at
25 11:51 p.m. My issue with that is is if Mr. Poole was shot at

1 82nd Avenue at approximately 11:40 p.m. Mark and Donna Hobbs
2 saw the person, saw a suspect dressed in black at the hotel
3 going on 12:00 o'clock. The distance between the beach access
4 at 76th Avenue where the hotel is and 82nd Avenue where the
5 crime scene was is over half a mile. It's six-tenths of a
6 mile, 3,168 feet away. Now, where even, even, even a veteran
7 sprinter might be able to make that distance, going backwards
8 in time there's no way that I could have possibly done it or
9 anybody that I know of could possibly done it --

10 Q Were those --

11 A -- especially through sand.

12 Q Were those time discrepancies addressed by Mr. Martin at
13 your second trial?

14 A The thing that was addressed -- it was addressed about
15 why they kept changing the time, and they said, "Well, we" --
16 well, they -- "I don't remember." That's, that's what they
17 said. "I don't remember." Mark and Donna Hobbs said, "I
18 don't remember or I don't recall," more times during the
19 second trial than they said, "That's who we saw."

20 Q So what is your position to the Court that Mr. Martin
21 should have done that he did not do or where was he lacking --

22 A In my --

23 Q -- with regard to Mark and Donna Hobbs's testimony?

24 A In my opinion, Mr. Martin should have made, should have
25 made adamant motions to have Mark and Donna Hobbs impeached

John Frazier - Direct by Ms. Williams

101

1 not only for their inconsistencies in the distances in all of
2 their statements, but they should have been -- all of their
3 testimonies should have been stricken because of the, because
4 of the Rule Five and Brady violations for not providing us
5 with their original statements with their original
6 description. Every time you go back to read the September 3rd
7 the only description that was ever given was white male, dark
8 clothes, white male, dark clothes. It wasn't until after
9 September 3rd and the subsequent trials that large round eyes
10 and a high forehead ever came into existence, after I had been
11 arrested, after they had taken my mug shot, the one and only
12 mug shot I've ever had in my life, and the police saw that I
13 had large round eyes and a high forehead in multiple phone
14 conversations between Mark and Donna Hobbs and the Myrtle
15 Beach Police Department before they were shown the photo
16 lineup.

17 Q And conversations that you were not privy to, provided
18 copies of?

19 A Conversations we were never provided to and then also
20 phone conversations between the Hobbses and the Pooles that
21 they admitted to at the second trial. Mr. Martin should been
22 jumping up and down and screaming from the rooftops that Mark
23 and Donna Hobbs should not have been allowed to testify not
24 only under Rule Five and Brady, but because of the
25 inconsistencies and, and, and impeached because of all the

1 inconsistencies that they gave every time they spoke.

2 Q And if he had moved that, that -- so you're asking --
3 you think that he should have asked for them to have been
4 suppressed?

5 A Yes. Everything from Mark and Donna Hobbs should have
6 been suppressed.

7 Q Okay.

8 A All statements, all descriptions, everything.

9 Q All right. You filed another issue with regard to
10 improper closing by the Solicitor.

11 A The inflammatory comments.

12 Q Correct.

13 A Thank you. Can I get a copy of that book? Can I get a
14 copy of the book that she's got to help me --

15 Q Will that refresh your memory?

16 A It will help me find exactly where it's at. Inflammatory
17 comments.

18 Q All right. I'm going to hand you what's been marked for
19 identification as Applicant's Number 18 which is the page 1186
20 through 1289 which are the closing arguments at your 2005
21 trial.

22 A Yes.

23 MS. WILLIAMS: I would move Applicant's Number 18 into
24 evidence.

25 MR. THOMAS: No objection.

John Frazier - Direct by Ms. Williams

103

1 THE COURT: Applicant's Exhibit Number 18 admitted into
2 evidence without objection.

3 (Applicant's Exhibit Number 18 [Pages 1186 through 1289,
4 the closing arguments at 2005 trial] admitted into evidence
5 and appropriately marked.)

6 BY MS. WILLIAMS:

7 Q Now, Mr. Frazier, tell me what if anything you think the
8 Solicitor did that was improper.

9 A Mr. Solicitor Hembree, Mr. Solicitor Hembree basically
10 preyed on the religious biases of the jury. Solicitor Hembree
11 claimed approximately 13 times the sins that I had committed.

12 Q He actually said the word sins?

13 A He actually said his most diabolical and evil sin, quote
14 unquote, on pages 1286 to 1287.

15 Q Did Mr. Martin object to that?

16 A No. He did not.

17 Q Okay. Please continue.

18 A He not -- not only did he prey on the, on the, on the
19 religious biases of the jurors by claiming the number of sins
20 that I had committed and the most diabolical and evil sins,
21 but he actually called the Defense a show. I'll tell you the
22 exact page.

23 Q I don't need the exact page. I need for you to tell me
24 the itemizations. We've got the transcript and it's actually
25 in the transcript.

1 A Right. He said, he said, he said he wanted to talk about
2 the Defense a little bit and he compared the Defense to the
3 movie Chicago, and he said that the -- that -- that the woman
4 killed her boyfriend and shot him and, and, and the criminal
5 defense lawyer was, was a, was a sleazy, what did he say, he
6 said he was a sleazy defense lawyer and all you had to do was
7 give them the old razzle-dazzle. He said, "You give them the
8 old razzle-dazzle and they'll let you get away with murder.
9 I'll give the Defense their due. They've got a set up. All
10 the technology, latest stuff, cutting edge technology
11 available for the courtroom, good stuff. They did that. They
12 gave them a little razzle-dazzle." He said, he called the
13 expert witnesses puppets, little machines that you put, that
14 you put change in. You, you put, you put your money in and
15 they give you a little ride and they tell you -- and, and they
16 tell you what they -- and they tell you exactly what they've
17 already scripted to say, but then he said that we were a show.

18 Q Did he make any reference to Renee Poole's statements?
19 You don't have to get the exact one. I just need -- you know
20 --

21 A Oh, yeah.

22 Q Tell me what you know.

23 A He, he said, I mean he, he quoted from Renee Poole's
24 statements. Judge Thomas had -- Judge Thomas ruled all of
25 Renee Poole's statements inadmissible as testimonial in nature

John Frazier - Direct by Ms. Williams

105

1 except for, "My husband has been shot." Mr. Hembree continued
2 to not only misquote from statements that she had made, but he
3 actually quoted from statements that she had made to the jury
4 when those statements had already been ruled inadmissible.

5 Q Okay. Did Mr. Martin object?

6 A No.

7 Q All right. What about -- did -- were there any other
8 things that Mr. Hembree may have done? Let me put it this
9 way. You itemized everything that you -- he had in your
10 actual brief that you initially had me file with the court;
11 correct, my amended supplement?

12 A Yes.

13 Q Okay. And so that actually details item after item after
14 item that you say were improper; correct?

15 A Yes.

16 Q All right. And during those -- during all of those or
17 each one of those what you allege is an infraction did Mr.
18 Martin object?

19 A No. The only thing Mr. Martin ever objected to were a
20 few statements, a few misquoted statements from Kahle
21 Schettler. Those are about the only things that, that Mr.
22 Martin ever objected to -- during his closing -- during Mr.,
23 Mr. Hembree's closing arguments. Now, I had nudged him a few
24 times to, to, to point out the fact that there were other
25 multiple times where Mr. Hembree misquoted testimony from the

1 record or testimony from the stand that he shushed me.

2 Q Let me ask you about the gun. There was testimony, and
3 we'll address that under another issue, but there was
4 testimony that came in from Agent Collins. Was that addressed
5 at all in the closing, the gun testimony?

6 A By Hembree?

7 Q Yes.

8 A Be more specific if you would please. I'm sorry.

9 Q Because -- well, let me ask you this. Let me, let me
10 strike that and let me ask you this. What about, was there
11 any comment about your car and, and the, the heat of the car
12 or the lack thereof of that?

13 A The heat of the --

14 Q You got to -- listen to my question. When, when, when --
15 after Mr. Poole was murdered the police department came to
16 your house; correct?

17 A Yes.

18 Q And they interviewed you?

19 A Officer Mills came, but later the next day SBI Agents
20 Pendergrass and I don't remember the other one's name, North
21 Carolina State Bureau of Investigation officers came to the
22 house.

23 Q Was there any testimony during your trial about them
24 searching your car or at that point when they, when they came
25 to your house immediately that night or that early that next

John Frazier - Direct by Ms. Williams

107

1 morning did they search your car?

2 A No.

3 Q Did they ask you about searching your car?

4 A Oh, no. When -- okay. You're talking about Officer
5 Mills, Winston-Salem Police Department Officer Mills -- Myrtle
6 Beach Police Department called Winston-Salem Police Department
7 to find -- to, to do a -- to, to, to locate basically. So
8 Officer Cruz, Winston-Salem Police Department Officer Cruz in
9 the communications department radioed Winston-Salem Police
10 Department Officer Mills who testified at the trial to go and
11 locate me. So he drove from wherever -- he said that he was
12 at -- he's, he's close to downtown. So he drove across town
13 to the house, to my house and arrived at my house shortly --
14 right around 5 a.m. He testified that he found me at my home.
15 He testified that he did not expect to find me at home because
16 during his drive he had found out that I was a suspect in a
17 shooting in Myrtle Beach. So he testified he did not expect
18 to find me at home. When he got to the house, he said that he
19 was surprised that he did find me at home, and as a matter of
20 a fact he found me asleep at my home, in my home.

21 Q Yeah. But what about your car?

22 A Now, he asked -- he said, "Where's your car?" I said,
23 "Well, a friend of mine has got it working on it." He said,
24 "Okay. What's his address?" I said, "I don't know his
25 address. I don't write letters to him. He lives right down

1 the street in Brandamere at these apartments over here." He
2 says, "Where does he live," and I explained to him then. He
3 said, "Is that your car in the back?" I said, "No. That's my
4 friend's car that's in the back." He said, "Okay." Mr.
5 Hembree in his closing arguments said that the one and only
6 time that they did not violate my constitutional rights was
7 when the officer did not go to -- go through the fence to the
8 backyard to put his hand on the hood of the car to see if the
9 hood was warm. That was the one and only time that they had
10 the right to go back there because Mr. -- because Officer
11 Mills had testified that he had probable cause because he had
12 been informed by communications that I was a suspect in a
13 shooting in Myrtle Beach. So he testified that he did have
14 the right and was within the law to go into my backyard and
15 touch the hood of the car back there to see if it was warm or
16 to even search the car to see if anything was back there or
17 see if there was anything in the car in the backyard.

18 Q Did Mr. Martin object to any of that closing argument?

19 A No.

20 Q All right. Tell me -- well, summarize what, if anything,
21 do you think Mr. Martin should have done during Mr. Hembree's
22 closing argument?

23 A He should have called for a mistrial. As many times, as
24 many times as Mr. Hembree made misquotes from the testimony,
25 from the trial testimony or testimony from the stand, as many

1 times as he made inappropriate statements or all the things
2 against my constitutional rights that he said or did, Mr.
3 Martin should have been jumping up and down screaming for a
4 mistrial, but he didn't.

5 Q Okay. All right. The next issue that you raise was an
6 improper charge of criminal conspiracy. Tell me about that.

7 A There were statements from -- there were statements from
8 James Bollow given to the police department that Renee Poole
9 told him that she communicated with her boyfriend John through
10 the computer. There were statements made that I recorded
11 conversations between Renee Poole and myself. There were
12 statements made that there were videotapes made of our
13 liaisons between Renee Poole and myself.

14 Q Statements from where?

15 A From Renee Poole.

16 Q Okay.

17 A Okay. The issue is is they searched the Poole residence.
18 They searched my residence. There are no tapes anywhere to be
19 found. There were no computer chat rooms or computer chat
20 logs or internet conversations or e-mails back and forth
21 between Rene Poole and myself. There was nothing to show any
22 kind of conspiratorial plot to kill her husband. There were
23 no recorded voice conversations. There were no videotapes of
24 us having sex. There were, there were no kind of recordings
25 of any kind between Renee Poole and myself because there were

1 none to be had.

2 Q Mr. Frazier, I'm going to hand you what's been marked for
3 identification as Applicant's Number 19.

4 A Yes.

5 Q Can you tell me what Number 19 is?

6 A That's an e-mail that I sent --

7 Q No.

8 A Oh.

9 Q What is this?

10 A Oh, oh, sorry. State's Exhibit 28.

11 Q So this was actually admitted at your 2005 trial?

12 A Yes. And there's -- it's also marked as -- it's also
13 marked as a Defense Exhibit as well. It was presented twice.

14 Q All right.

15 MS. WILLIAMS: At this time I would move into evidence
16 Applicant Number 19.

17 THE COURT: Any objection?

18 MR. THOMAS: No objection.

19 THE COURT: Applicant's Exhibit Number 19 admitted into
20 evidence without objection.

21 (Applicant's Exhibit Number 19 [E-mail] admitted into
22 evidence and appropriately marked.)

23 BY MS. WILLIAMS:

24 Q Mr. Frazier, tell me why, if any, you asked me to bring
25 that to court today?

John Frazier - Direct by Ms. Williams

111

1 A This is the e-mail that I sent to my boss, Calvin
2 Harris, at Champion where -- at Champion Apparel Products
3 where I worked. The relevance, the relevance of this e-mail
4 is is because I asked for days off. The significance is I
5 worked third shift at Champion Apparel Products, and from --
6 excuse me -- from May the 30th, 1998, until June the 6th, 1998,
7 eight days straight, I worked third shift by myself. They've
8 got the gentleman who worked with me. I don't remember his
9 name. He was on vacation for eight days straight. So I
10 worked third shift by myself eight days straight, eight nights
11 straight because I worked third shift.

12 Q And what did the State use this Number 28, our Number 19,
13 and their Number 28 for?

14 A They used it to show that, that, that I had asked for
15 time off and the, in the plot to, to have days off from work
16 to go kill Brent.

17 Q So this was part of their, their evidence of the
18 conspiracy?

19 A Exactly. That was the only, that's the only computer-
20 generated thing of anything they had that they used for their
21 arguments. I would like to point something else out though.
22 Where I had worked eight days straight, I was due two days off
23 work as any normal person would. So I would normally be given
24 the 7th and the 8th off. In the e-mail, I asked for Monday
25 Tuesday and Wednesday, why, if I could, to recoup from this

1 week. I asked for three extra days off to recoup from the
2 week where I had worked eight days straight. That's the only
3 reason that I asked for any extra days off because I worked
4 eight nights straight together. There is another significant
5 issue is, is on Saturday, June the 6th, and it's a significant
6 date as well and we'll, we'll get to that when you're ready to
7 get to that, Saturday, June the 6th, my mother, my father, my
8 sister went to a friend's shag party on the lake. I don't
9 remember which lake you all went to, and my sister -- my
10 mother called me and asked me if I could babysit my nephews,
11 Scott and Brian. I said, "Yeah. Sure." I said, "I'm working
12 third shift so you got to make sure that my sister is there on
13 time to pick them up because I got to be at work Saturday
14 night, June the 6th." She said, "Don't worry about it. I'll
15 make sure she leaves early." My sister brought my two nephews
16 to my house, what, 9:30, 10:00 o'clock that morning. I think
17 it was about 10:00 o'clock Saturday morning and dropped my
18 nephews off. We stayed at the house. My nephew Scott
19 testified at the last trial that we were at the house all day
20 long playing videogames and whatnot all day on Saturday until
21 10:00 p.m. when my sister came to pick me up, and it's
22 significant because I had to be at work at 10:00 p.m. and she
23 didn't arrive until 10:00 p.m. So I had to immediately get
24 them in the car to her and get to work because I was supposed
25 to be at work at 10:00 p.m. Saturday, June the 6th. I make all

John Frazier - Direct by Ms. Williams

113

1 this as a point because the State and Mr. -- the State brought
2 Mr. Bollow up to say, "Oh, well, Mr. Frazier was at the Poole
3 residence all day on Saturday." I was not at the Poole
4 residence all day on Saturday. I was not at home as testimony
5 from my nephew all day on Saturday, June the 6th.

6 Q So that evidence was presented?

7 A Yes. The, the issue is is they keep -- they keep making
8 an issue of the fact that I was there when I was not there.

9 Q Okay. But that was presented at trial?

10 A Yes.

11 Q All right. And you were talking about Mr. Bollow's
12 testimony?

13 A Yes.

14 Q Tell me what if anything else that you had issues with
15 that you wanted to make the Court aware of regarding Mr.
16 Martin's activities or non-activities regarding Mr. Bollow's
17 testimony?

18 A Mr. Martin completely dropped the ball on Mr. Bollow and
19 I say that because the way Mr. Bollow described how he worked
20 at home, his office was in the upstairs of his house on the
21 back side of his house facing out the back of the house where
22 he was next-door-neighbors to the Poole family or to, to Brent
23 and Renee Poole. His window faced out the back of the house
24 and their house was this way (indicating). The other
25 significant issue is the fact that there was a line of pine

1 trees. I wish we had a photograph, but there were pine --
2 there were evergreen pines that separated the Bollow property
3 from the Poole property that ran the entire length of the
4 property line from the mailbox to the backyard.

5 Q Let me ask you this, did Mr. Bollow testify about your
6 Blazer being there?

7 A He said he saw my Blazer there.

8 Q Did he testify about --

9 A No.

10 Q -- your license plate?

11 A He said he saw a black Blazer there, but he never
12 described the person that he saw and he never could describe
13 the license plate.

14 Q Was that brought out by Mr. Martin?

15 A I don't think it was.

16 Q So what is your issue with Mr. Bollow's testimony?

17 A The issue, the issue with that is the simple fact that I
18 had a very easily recognizable personalized plate on my Blazer
19 that spelled nervous, N-E-R-V-U-S, as Mr. Schettler tried to
20 remember earlier. While it is not easy to remember 16 years
21 later, but for somebody who had the personalized plate for a
22 specific reason, I had that plate on my Blazer and anybody
23 that ever saw it did not forget it because they usually ask me
24 about it. So for Mr. Bollow to claim that he saw my Blazer at
25 any time at the Poole residence is inappropriate because you

John Frazier - Direct by Ms. Williams

115

1 would not, because you would remember if you saw the license
2 plate with no cover on it that said nervus and he never
3 described the plate. Ms. Williams says I shouldn't bring up
4 Martin, but I think I should bring up Martin in that issue
5 because that case was overturned because they couldn't
6 remember the license plate.

7 Q Well, that's for you -- if you want to tell the Judge,
8 tell the Judge. This is your day in court. You need to tell
9 him what you think the issues are.

10 A Well, I want get my full bite at the apple so.

11 Q Go ahead. Tell him what you think your issues are.

12 A I don't know the law. All I know is what I've read, and
13 I know that there are cases, State v. Martin one of them,
14 where the Mustang next door, with the person driving the
15 Mustang next door that case was overturned because the person
16 who said they saw the Mustang next door in State v. Martin
17 couldn't recognize the license plate number and that was a
18 standard issue license plate. My issue with that is is I had
19 a personalized plate that was easily recognizable and Mr.
20 Bollow never claimed -- never said that he recognized the
21 plate.

22 Q And your issue here is that Mr. Martin should have
23 objected --

24 A Mr. Martin--

25 Q -- and tried -- should have had that suppressed?

1 A Exactly. Mr. Martin should have had every bit of Mr.
2 Bollow's testimony suppressed because he never described me as
3 being the driver of the Blazer and he never described the
4 license plate as being a personalized plate that spelled
5 nervus at the Poole residence house and he never made an
6 objection to have Mr. Bollow removed or stricken or whatever
7 the terminology is.

8 Q All right. There were other -- there was other testimony
9 presented at the trial that you filed -- that you thought
10 should have been suppressed and Mr. Martin should have argued
11 against that was not suppressed or argued against; correct?

12 A Yes.

13 Q One being SLED Agent David Collins?

14 A SLED Agent David Collins testified that he had a list.
15 He was the tool marks examiner for SLED and had a list of
16 possible guns that could have fired the fatal rounds.

17 Q Let's pause for a second because I want Your Honor to
18 understand. The murder weapon in this case was what?

19 A A nine millimeter.

20 Q Not a Glock?

21 A Not a Glock.

22 Q But it was a TZ75?

23 A No. No. It was never determined that it was a TZ75.
24 The only thing that was determined was that it was one of 66
25 possible makes of guns that could have been used to fire the

John Frazier - Direct by Ms. Williams

117

1 fatal rounds.

2 Q And one of which is a TZ75?

3 A Technically no, but the company who make -- who made the
4 TZ75 was on the list, but the specific model TZ75 was not on
5 the list.

6 Q Okay.

7 A While that is a technicality, and I know where you're
8 trying to go with that, it's still significant that the TZ75
9 was not actually listed as one of the possible weapons, just
10 the manufacturer of the TZ75.

11 Q So, the murder weapon was a nine millimeter?

12 A Yes. That's what they determined without proving weight.

13 Q Okay. And Agent Collins testified about that the TZ75
14 could have been one of the ones, and I know we're getting into
15 the technicalities --

16 A Right.

17 Q -- but it could have been one of the nine millimeters
18 that could have fired that?

19 A Right.

20 Q The, the --

21 A The fatal shot.

22 Q The fatal shot?

23 A Your --

24 Q Did he also testify that a Glock could have fired that
25 fatal shot?

1 A No. No. The issue with the Glock is because the Glock
2 has -- the Glock has an opposite twist in its rifling, in its
3 barrel rifling than any of the guns on the SLED list from
4 David Collins. Mr. Collins testified and, and, and, and I
5 want to bring this up, Mr. Collins testified because it's,
6 because it's significant they said repeatedly during the
7 course of the trial that there were 38 different types of
8 guns. Well, there were 38 different types of nine millimeter
9 guns, but you have to take into consideration the entire list
10 which included 380s, 308s and a couple of other -- 357s that
11 could also have fired the fatal rounds which raised the list
12 to 66 different types of guns that could've been used. I made
13 the point to Morgan, I said, "Well, Mr." -- I said, "Morgan,"
14 I said, "If there's 66 different types of guns, how many guns
15 of those makes could there be in circulation?" So he asked
16 Mr. Collins. Mr. Collins says, "Well, there's probably
17 thousands." Mr. Martin said, "Maybe even millions." So I
18 said, "Well," I asked Mr. Martin, I said, "Isn't that a
19 relative comparison to saying a person driving a Honda is
20 guilty of DUI?" Mr. Martin said, "Shush." But the fact is I
21 did not own the TZ75 at the time of the crime. I had sold it
22 at a gun show in July of 1997. I owned the Glock and I had to
23 sell, as my mother testified, I had to sell the TZ75 to have
24 the money to pay for the Glock.

25 Q Under David Collin's testimony on page 827, when he