

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Marlboro County

Thomas A. Russo, Circuit Court Judge

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S.C. Supreme Court

ALLEN J. GATHINGS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000358

APPENDIX

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1 Q. You did not provide an affidavit to this Court saying
2 that there was an immense amount of blood in the car?

3 A. I do not recall signing an affidavit saying that
4 there was an immense amount of blood evidence in the
5 vehicle.

6 Q. All right. Is that your signature?

7 A. That's my signature.

8 Q. Okay?

9 A. But that's what it says.

10 Q. Okay. Well, read for me what that says.

11 A. It says, "When the defendant was picked up in Horry
12 County he did have some healing injuries to his facial
13 area. The defendant's shoes were seized and nine swabs
14 were taken from them for analysis. The vehicle was also
15 processed for evidence and a swab was taken from an ice
16 pick in the glove box of the car. Based on the immense
17 amount of blood evidence at the scene and the victim's car
18 and on the victim's shoes it is necessary to obtain a
19 blood sample from the defendant in order to compare these
20 various samples to determine if any matched."

21 Q. Thank you. So what do you think that means? You
22 don't think that implies that there was a lot of blood in
23 that area?

24 A. No, that's not what I meant.

25 Q. I'm sorry. Well, what did you mean?

1 A. There was an immense amount of blood evidence at the
2 scene. That's -- that has to do with where you put a
3 comma and where you don't put a comma.

4 Q. So, basically, "The immense amount of blood evidence
5 at this scene, in the victim's car and on the defendant's
6 shoes," you don't think those three things are linked?

7 A. No, the fact of the matter is there was no immense
8 amount of blood evidence in the victim's car.

9 Q. And you think that that's not what this implies?

10 A. No.

11 Q. Okay. Do you know how many swabs were taken of the
12 shoes?

13 A. I don't cause I didn't take them.

14 Q. You didn't take them. So you have no idea how many
15 swabs are taken?

16 A. No.

17 Q. Do you know if all the swabs that were taken were
18 tested?

19 A. I don't know if all the swabs that were taken were
20 tested. I don't know that.

21 Q. You do not know that, okay. And do you know if it's
22 the procedure for -- to test all of swabs taken or do
23 y'all test a certain number or?

24 A. It would depend. Sometimes you may test all the
25 evidence and sometimes you may not. It just depends on

1 the consultation with the prosecutor would even go along
2 with determining what's tested and what's not tested.
3 Particular if it's not necessarily needed in a particular
4 case.

5 Q. So have you spoken to Ms. Riley who tested these
6 swabs? Have you spoken to her about what swabs to test
7 and what not to test?

8 A. I have relayed to them at the lab some items that the
9 Solicitor particularly wanted tested. Yes, ma'am.

10 Q. Okay. Did you do that on the case?

11 A. I did.

12 Q. You did?

13 A. Yes.

14 Q. Okay. You told her which items to test? Is that
15 your testimony?

16 A. I don't recall if this was particularly Ms. Riley or
17 another individual at the lab to relate in this case, but
18 we were told that specific items related to them --
19 specific items that the Solicitor requested be tested.

20 Q. Okay. But you don't remember what items those were?

21 A. Not completely I don't.

22 Q. Okay. And it wasn't all the items?

23 A. I'm sure all of the items that were collected for
24 evidence were not tested. No.

25 Q. Okay. Is that standard procedure not to test all the

1 items?

2 A. I don't think it's standard to test all of them or
3 not. It just depends on each particular case.

4 Q. Well, then why are you sure that all of the evidence
5 was not tested?

6 A. Because like I said it depends on each particular
7 case. Some cases we may test it all if you need to. Some
8 cases you might not test it all if you need to.

9 Q. Okay. So you did not feel it was necessary to test
10 all the evidence in this case?

11 A. Well, what I did was consult with the Solicitor based
12 on what we had, and she's the prosecutor in this
13 particular case. So she would determine what, you know,
14 what actually should be tested to begin with or what she
15 didn't necessarily need to be tested.

16 Q. Okay. So it's the prosecutor's responsibility to
17 determine what is tested by your lab and what's not?

18 A. It's the prosecutor's responsibility to oversee the
19 case. As the prosecutor she knows what will or will not
20 be needed to prosecute the case.

21 Q. But aren't you the chief investigator?

22 A. I am the lead investigator for S.L.E.D, yes, ma'am.

23 Q. The lead investigator, I'm sorry. Did you tell
24 Ms. Riley not to test certain swabs?

25 A. We wouldn't -- I don't think I told her not to test

1 certain swabs. What it was I would contact her and say,
2 "You know, perhaps we need this tested, this tested and
3 this tested," but no specific mention of I want you to do
4 this or not.

5 Q. Would she go on her own behalf and test items that
6 you did not tell her to test, how about that?

7 A. That would be a question she could only answer.

8 Q. Okay. You're not sure if she would test items
9 without your approval or not?

10 A. Again, you would have to ask her.

11 Q. Okay. Do you know if the shoe strings for the shoes
12 were tested?

13 A. I don't know if they were or were not.

14 Q. Okay. What about the shirt that Mr. Gathings was
15 wearing? Was the tested?

16 A. I don't know that it was. To my knowledge it was not
17 tested, and that's according to Agent Kenley's testimony.

18 Q. Okay. What about the pants?

19 A. To my knowledge they were not tested.

20 Q. Wouldn't this be things that you would know if you
21 were the lead investigator, what was tested and what was
22 not and what evidence was proven?

23 A. That would be something that I wouldn't know if it
24 was tested or not. When you're conducting an
25 investigation nobody can know every single thing all the

1 time. But I do know what I need to be thorough with an
2 investigation and aid in the prosecution.

3 Q. Okay.

4 MS. CRAYTON: Court's indulgence, Your Honor?

5 THE COURT: Yes, ma'am.

6 BY MS. CRAYTON:

7 Q. Do you have the report -- let's see. I think it's
8 right here. Can you tell me what that is you're looking
9 at?

10 A. This is the lab report from the D.N.A. Department
11 from S.L.E.D.

12 Q. Okay. So your agency did that, and I believe it has
13 your name on the top of it, does it not?

14 A. That is correct. It's addressed to me.

15 Q. Okay. It was sent to you?

16 A. Correct.

17 Q. And it shows what was tested and what was not; is
18 that correct?

19 A. It shows that the -- one section shows items
20 submitted and the other section shows results of the
21 examination.

22 MS. MUNNERLYN: Your Honor, if I could interrupt.
23 This particular exhibit is not yet in evidence. If she's
24 going to question him about it I'd like to go ahead and
25 move it in evidence.

1 THE COURT: All right. You want to move it in
2 evidence?

3 MS. MUNNERLYN: Yes, Your Honor.

4 THE COURT: All right. You have any objection?

5 MS. CRAYTON: No, Your Honor.

6 THE COURT: All right. What's the number?

7 THE WITNESS: 198.

8 THE COURT: All right. 198 is admitted into evidence
9 without objection .

10 (WHEREUPON, State's Exhibit No. 198 was admitted into
11 evidence.)

12 BY MS. CRAYTON:

13 Q. Okay. Sorry about that. Can you tell me the date on
14 that document?

15 A. It's dated May 24th 2010.

16 Q. Okay. Of this year?

17 A. That is correct.

18 Q. And do you know when the crime occurred? When y'all
19 investigated?

20 A. This was 2007.

21 Q. Okay. Do you know why it took three years to test --
22 to do these tests?

23 A. That's a question for the analyst, but I will say
24 that a lot of times, because we have an enormous amount of
25 items going to the lab from all across the State, a lot of

1 times items are submitted and sometimes cases come to
2 trial and sometimes they don't. And I don't think they
3 analyze everything. If you let them know, well, hey, I'm
4 going to need this. I'm going to need that, then they
5 will analyze. Evidence is still there and in place and if
6 need be it will be analyzed.

7 Q. Okay. So from 2007 to May of 2010 those items were
8 sitting at S.L.E.D. waiting to be tested; is that correct?

9 A. I can't say that they were just waiting to be tested.

10 Q. As far as you know?

11 A. I don't know if they had proceeded to do it or not.
12 I couldn't tell you that.

13 Q. But as far as you know from that report?

14 A. Yes, ma'am.

15 Q. And when did you speak to Ms. Riley about doing the
16 test on those items; do you remember?

17 A. It was -- I don't remember the specific date.

18 Q. Was it prior to May 24th?

19 A. I don't recall the specific date. I know I did, but
20 I don't remember.

21 Q. Did she test all the items that you wanted tested?

22 A. The items that I had spoke with the Solicitor about

23 ---

24 Q. Yeah.

25 A. --- and asked her to test? So far as I know those

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1 items were tested.

2 MS. CRAYTON: Court's indulgence, Your Honor. Thank
3 you, Your Honor.

4 THE COURT: Redirect, Ms. Munnerlyn?

5 MS. MUNNERLYN: Thank you, Your Honor.

6 BY MS. MUNNERLYN:

7 Q. Agent McLellan, is it normal protocol at S.L.E.D. to
8 test every item of evidence with every test that's
9 available?

10 A. As I was saying earlier, that's not normally done
11 because you may be testing stuff that's not even
12 necessary.

13 Q. You maybe testing stuff that's not realize probative?

14 A. That is correct.

15 Q. Okay. Of anything?

16 A. Is that correct.

17 Q. Okay. And does S.L.E.D. have the resources and the
18 money to conduct every single test available?

19 A. Absolutely not.

20 Q. Okay. And so are you aware of what the D.N.A.
21 Department's protocol is in determining what items or how
22 many to test normally in a case?

23 A. What I do know from my experience is they're just not
24 going to start testing the items. When you're
25 investigating a case if you will let them know what you

1 need done then they will be glad to do that because they
2 know that's what's necessary for your case.

3 Q. Okay. Now, the affidavit that she was referring to
4 and questioning you about?

5 A. Correct.

6 Q. That was actually about affidavit that you had to
7 submit to the Court; is that right?

8 A. Correct.

9 Q. In regards to a hearing for -- to obtain the
10 defendant's blood?

11 A. Correct.

12 Q. Okay. And your understanding of the way that
13 affidavit was written meant what in regards to the blood
14 in the vehicle?

15 A. It was. There was an immense amount of blood at the
16 scene, and as been testified to. But there can be no
17 doubt that there wasn't an immense amount of blood in the
18 vehicle and that was not my intention even in this.

19 Q. Okay. And at that time of executing that affidavit
20 you didn't not know the results of any of the D.N.A. from
21 the vehicle or any other items, did you?

22 A. That is correct.

23 Q. And that was because you did not yet have the blood
24 standard from the defendant?

25 A. That is correct.

1 Q. And that was the purpose of that affidavit and that
2 hearing?

3 A. That is correct.

4 Q. Okay. Well, let's go back to how does S.L.E.D. get
5 involved in murder cases throughout the State?

6 A. Typically what would happen is the Chief or sheriff
7 or someone else would contact S.L.E.D. and request our
8 assistance in that particular investigation. And as a
9 result of that request the supervisor will in turn send an
10 agent or agents to assist them as needed.

11 Q. Okay. You don't -- you're not involved in every
12 murder investigation in the State?

13 A. Oh, no. Absolutely not.

14 Q. But you are occasionally called or maybe more than
15 occasionally called to assist particularly with smaller
16 agencies?

17 A. That is correct.

18 Q. And the agency in this particular case, the
19 jurisdiction where this occurred was actually what agency?

20 A. The Clio P.D.

21 Q. Clio Police Department?

22 A. Yes, ma'am.

23 Q. Do you know how many officers they have at Clio
24 Police Department?

25 A. I think they listed less than a handful. Only two or

1 three that I'm aware of.

2 Q. Okay. All right. And do you have any idea how often

3 they have murders in Clio?

4 A. That I'm aware of? Not very often at all. I think

5 this one was the first one they had in a while.

6 Q. Okay. Any member of that law enforcement agency can

7 call and simply orally request your assistance?

8 A. If need be.

9 Q. Okay. And then you come in and you assist the level

10 that you're requested?

11 A. That is correct.

12 Q. So you can do as little as just process a scene and

13 then step out?

14 A. That is correct.

15 Q. Or you can handle the entire investigation?

16 A. That is correct.

17 Q. To include interviewing all witnesses and that sort

18 of thing?

19 A. That is correct.

20 Q. And in this particular case what was your

21 involvement? Was it on the over end or was it on the end

22 where you are much, much more heavily more responsible?

23 A. Had a great presence in this investigation primarily

24 due the fact that that is a small agency. They don't have

25 a whole lot of murders, and so my role might be a little

1 bit larger than if I was assisting a larger agency.

2 Q. Okay. All right. And then in regards to the crime
3 scene, when you arrived was the crime scene secured?

4 A. It was secured when I arrived.

5 Q. Okay. Could anyone just off the street or a neighbor
6 could have -- could they have walked into the house?

7 A. No, because it was roped off and not unless they were
8 approved by somebody.

9 Q. It was taped off and there were Clio P.D. officers
10 there at the scene?

11 A. That is correct.

12 Q. So it was secured?

13 A. That is correct.

14 Q. And were you advised when you arrived whether or not
15 it had been secured?

16 A. I could see it was secured whenever I went there.

17 Q. Whether or not it had been secured since the bodies
18 had been found?

19 A. Right. It was.

20 Q. And you knew who had been in and who hadn't?

21 A. Yeah, I was advised of that.

22 Q. All right. But you did not actually go in until
23 after the processing of the scene?

24 A. I did not.

25 Q. Okay.

1 MS. MUNNERLYN: I don't have any further questions.

2 THE COURT: Recross.

3 MS. CRAYTON: No, Your Honor. Thank you.

4 THE COURT: All right. Thank you, Mr. McLellan. You
5 may step down.

6 MS. MUNNERLYN: Adrienne Riley.

7 THE COURT: Come around, Ms. Riley.

8 ADRIENNE RILEY HEFNEY, after being duly sworn,
9 testified as follows:

10 CLERK OF COURT: Be seated and state your full name.

11 THE WITNESS: Adrienne Riley Hefney.

12 DIRECT EXAMINATION

13 BY MS. MUNNERLYN:

14 Q. Where are you employed?

15 A. South Carolina Law Enforcement Division more commonly
16 known as S.L.E.D.

17 Q. Okay. And how long have you been employed at
18 S.L.E.D?

19 A. Since November of 1997, so a little shy of 13 years.

20 Q. Okay. And in what capacity are you employed with
21 S.L.E.D.?

22 A. As a Forensic D.N.A. Analyst.

23 Q. Okay. And prior to November, 1997 do you have any
24 other law enforcement experience?

25 A. No, ma'am. I've worked in a clinical laboratory

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1 known as Laboratory Corporation of America.

2 Q. Well, tell us about your education and your training
3 in the area of D.N.A. analysis?

4 A. I have a Bachelor of Science in biology from the
5 University of South Carolina. I have a MBA from Winthrop
6 University. I was trained at S.L.E.D. under a Court
7 qualified analyst. I've since become a D.N.A. Advisory
8 Board Honor where we go and audit our D.N.A. labs
9 throughout the southeast region. And I have testified in
10 Court several times.

11 Q. Okay. You've been qualified as an expert witness in
12 this area before?

13 A. I have.

14 Q. And you've testified a number of times as an expert?

15 A. Yes, approximate about 50 times maybe.

16 Q. All right.

17 MS. MUNNERLYN: Your Honor, I would move at this time
18 that Agent Riley Hadley ---

19 THE WITNESS: Hefney, H-E-F-N-E-Y.

20 MS. MUNNERLYN: H-E-F-N-E-Y, Hefney.

21 THE WITNESS: Hefney.

22 MS. MUNNERLYN: Be qualified as an expert in the
23 field of D.N.A. analysis and comparison.

24 THE COURT: Voir dire with regard to qualifications?

25 MS. CRAYTON: No objection.

1 THE COURT: The court will qualify Agent Riley Hefney
2 as an expert in the field of forensic D.N.A. analysis.
3 Ladies and gentlemen, again, you will recall that I told
4 you that ordinarily a witness who is not qualified as an
5 expert cannot give an opinion, but a witness who is
6 qualified by experience, training, education or otherwise
7 and can offer testimony that will help you as the trier of
8 facts determine a fact in issue may give an opinion. And
9 I have qualified this expert -- this witness as an expert
10 in the field of forensic D.N.A. analysis. All right.

11 MS. MUNNERLYN: Thank you, Your Honor.

12 BY MS. MUNNERLYN:

13 Q. First of all, if you can tell us -- just tell the
14 jury, explain basically what D.N.A. is?

15 A. Okay. D.N.A. is genetic material that is found in
16 all nuclear cells of our body. What I mean by nuclear
17 cells is a cell with the nucleus in it. Usually white
18 blood cells D.N.A. is found in. This is information we
19 receive from each one of our parents. We get half of our
20 D.N.A. from our mother, and half of our D.N.A. from our
21 father.

22 And how we use it forensically is that no one's
23 D.N.A. is the same with the exception of identical twins.
24 So we compare unknown which are samples we collect from
25 the crime scene to known standards which are standards

1. that we collect from the victim subject involved in the
2. case and make comparisons that way.

3. Q. Okay. And how do you do this testing to determine
4. the D.N.A..

5. A. Well, we do it by develop a D.N.A. profile through
6. various mean as far as releasing the D.N.A. from the cells
7. and putting it into a form that we can visually see it.

8. Q. Okay. And the D.N.A. profile is actually a series of
9. letters and numbers?

10. A. Yes, it's a series of what we know as alleles which
11. is just your unique pattern of D.N.A, basically.

12. Q. So each individual human being has a unique D.N.A.?

13. A. They have a -- each individual has a unique D.N.A.
14. profile to that person. And as I say no two persons will
15. have the D.N.A. with the exception of identical twins.

16. Q. Did you receive evidence in this particular case
17. related to the incident occurred on June 30th 2007 having
18. Lab Number LF709575?

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

20. Q. Okay. and I'm going to show you State's Exhibit
21. Number 144. This is the certified chain of custody for
22. this particular case number through S.L.E.D; is that
23. correct?

24. A. Yes, ma'am, that is correct.

25. Q. Okay. And could you look through and make sure it

1 accurately reflects those items that you received?

2 A. Yes, ma'am, this appears to be the chain that I
3 reviewed and approved.

4 Q. Okay. And it accurately sets forth the people and
5 the items that they had custody of?

6 A. Yes, ma'am.

7 Q. While at S.L.E.D?

8 A. Yes, ma'am.

9 Q. Now, when you receive items of evidence, in
10 particular swabs, how do they come to you?

11 A. They usually come in envelopes. Just they look like
12 maybe a Q Tip swabs for some type of substance. Sometimes
13 it's physical. Sometimes it is not.

14 Q. Are they -- okay. Are they sealed in any way?

15 A. Yes, ma'am, they are. They're sealed and usually
16 initialed with the person who seals them and dated.

17 Q. Okay. And so can you determine whether or not they
18 have been tampered with?

19 A. Yes, ma'am. If they're not sealed or dated.

20 Q. Okay. All right. I'm going to show you State's
21 Exhibits 184 and 183 as well as 193, 194 and 195 and see
22 if you recognize those items?

23 A. Yes, these are items that were received from Forensic
24 Scientist or Crime Scene Agent Karl Kenley.

25 Q. Okay?

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1 A. And State's Exhibit 184.

2 Q. And can you just hold those up and show the jury how
3 they come to you.

4 A. They come like this with the S.L.E.D. seal and his
5 date. I mean his initials and the date on the back.

6 Q. And that's sealed with a tape?

7 A. Yes, ma'am.

8 Q. So you can determine whether or not they have been
9 opened?

10 A. Yes, ma'am.

11 Q. Okay. So when you analyze evidence in a case if
12 there is any evidence that they have been opened what do
13 you do? Do you proceed or do you go back at that point?

14 A. No, we don't proceed. At that point we make a call
15 to the agent to find out and make sure the chain hadn't
16 been compromised at all.

17 Q. Okay. So all items that you received and analyzed in
18 this particular case did they come to you in a fashion
19 which you were comfortable that they were sealed and had
20 not been tampered with?

21 A. Yes, ma'am.

22 Q. And I'm going to show you what's now in evidence as
23 State's Exhibit 198. Do you recognize that?

24 A. Yes, this is a copy of my D.N.A. report with my
25 signature.

1 Q. Okay. So this is the actual written port that you
2 issued in this particular case?

3 A. That's correct.

4 Q. And it lists on the first page the items that were
5 submitted to you?

6 A. Yes, ma'am.

7 Q. Okay. And those item numbers -- and, again, the item
8 number that you have list that's a -- the same number
9 throughout the entire time they were with S.L.E.D.?

10 A. That is correct.

11 Q. Whether those items are handled in your department or
12 another department?

13 A. Correct.

14 Q. Okay. And now did you analyze all of the items which
15 were submitted to you?

16 A. No, ma'am, I did not.

17 Q. Okay. And why is that?

18 A. Well, D.N.A. over time can be a consuming, very
19 expensive science. What we do is we work in conjunction
20 with the investigator and the Solicitor's Office to
21 determine which items are going to be the most probative.
22 We will look at those items first, and if we don't have
23 anything that is probative towards the case then we will
24 go on to additional items at that time.

25 Q. Is there any specific number that y'all usually look

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1 at doing first?

2 A. We typically look at five items on homicide cases to
3 look at first, but in this case I looked at a few more
4 than five.

5 Q. Okay. All right. And do you -- do you do the
6 comparison or proceed with any testing before you have
7 blood or do you have to have the blood standards for
8 comparison before you even proceed?

9 A. Typically, unless we're special requested to do the
10 case, we wait until all the standards have been submitted
11 before we run the evidence.

12 Q. Now, when you say, 'standard' you mean a sample from
13 a victim or a defendant, whoever is involved in the case?

14 A. Yes, ma'am, the known D.N.A. standard.

15 Q. All right. And did you also receive those known
16 standards in this case?

17 A. I did. I received three known blood standards. One
18 from Robbie Polston. One from Loyce Locklear. And one
19 from Allen Joe Gathings.

20 Q. Okay. All right. And so you picked -- or a number
21 of items was determined would be analyzed?

22 A. I'm sorry.

23 Q. It was determined that a certain number of these
24 items were going to be analyzed?

25 A. That is correct.

1 Q. And tell us what you did with those particular items?

2 A. Okay. In this case I analyzed Item One, which was
3 swab from kitchen floor near the back door. Item Eight, a
4 swab from the baseball bat. Item Nine, a swab from the
5 small end of the baseball bat under the knob. Item Ten,
6 swab from black tape on baseball bat. And Item 11,
7 another swab from black tape on baseball bat.

8 Item Two is a swab from the ice pick found in the
9 glove box in blue Corsica, South Carolina Tag Number
10 776WBS. Item 23.1, swab from blue and white New Balance
11 Sneaker, the right side. And 23.9, the swab from the blue
12 and white sneaker, New Balance sneaker on the left, so the
13 right shoe and the left shoe.

14 Q. You actually had multiple swabs from the shoes; is
15 that correct?

16 A. That is correct.

17 Q. All right. But it was determined that you would only
18 analyze one from each shoe?

19 A. Yes, we looked at what's going to be -- what makes
20 logical sense. So I did one from the left shoe and one
21 from the right shoe.

22 Q. And tell how you proceeded from that point.

23 A. Once we determined which items we were going to do we
24 did presumptive testing to see -- in homicide cases we're
25 typically looking for blood. So we're going to do a

1 presumptive test to see whether it's positive for blood.
2 If it's positive or we'll go on to D.N.A. analysis. And
3 sometimes if it's not positive and we suspect some other
4 fluid we will do -- we will still go on to do D.N.A.
5 analysis to see if we get any human D.N.A. at all.

6 Q. And so the presumptive tests, the results of the
7 presumptive tests, are actually indicated here on your
8 report, are they not?

9 A. That is correct.

10 Q. Okay. That would be the first part of your report --
11 or the results portion?

12 A. Right, the serology analysis which is designed to
13 identification of body fluids which is included in my
14 D.N.A. report, and that would be what we say whether it
15 was blood or some other body fluid.

16 Q. Okay. All right. And wasn't you -- well, go ahead
17 and tell us as a result of the analysis of these items
18 which you've already indicated were you able to determine
19 or find any D.N.A. present?

20 A. I was on some of the items.

21 Q. All right. Were you able to make a comparison to the
22 standards which were provided?

23 A. Yes, ma'am, I was.

24 Q. Okay. Well, tell us what your resulted were of your
25 testing?

1 A. I'm going to read directly from my report. "The
2 D.N.A. profile developed from Item Eight which was swab
3 from bat and Item 23.9 which was swab from the left side
4 shoe matches the D.N.A. profile of Robbie Polston. The
5 probability of randomly selecting an unrelated individual
6 having the D.N.A. profile matching these items is
7 approximately one in 490 quadrillion.

8 The D.N.A. profile developed from Item Ten which was
9 the black tape on the bat and Item 23.1 which was the
10 right side shoe matches the partial D.N.A. profile of
11 Loyce Locklear. The probability of randomly selecting an
12 unrelated individual having the D.N.A. profile matching
13 these items is approximately one in 2.5 billion.

14 The D.N.A. profile developed from Item Nine which was
15 the small end of the bat under the knob matches the D.N.A.
16 profile of Allen Joe Gathings. The probability of
17 randomly selecting an unrelated individual having the
18 D.N.A. profile matching this items is approximately one in
19 9.1 quadrillion.

20 The partial D.N.A. profile developed from the Item 11
21 which is another swab of black tape on the bat also
22 matches the D.N.A. profile of Allen Joe Gathings.

23 There was no D.N.A. profile developed from Item 2.1
24 which was the ice pick. And there was no human D.N.A.
25 obtained from Item One which was the kitchen floor -- the

1 swab from the kitchen floor near the back door."

2 Q. Okay. So essentially what you're saying is the swabs
3 taken from this item, Item 12 ---

4 A. Yes.

5 Q. --- which would be the bat ---

6 A. Okay.

7 Q. --- as well as the swabs taken from these shoes ---

8 A. Um hum.

9 Q. --- did have a match to D.N.A. which was presented to
10 you from the blood standards?

11 A. That is correct.

12 Q. Okay. And, actually, what you concluded was that on
13 one of those shoes that Loyce Locklear's blood was
14 present?

15 A. That is correct, on the right side.

16 Q. And on the right side. And on the other shoe, the
17 left shoe, Robbie Polston's blood was, present?

18 A. That is correct.

19 Q. And on this bat, the swabs that were taken from this
20 bat, you determined that both Robbie Polston's and Loyce
21 Locklear's blood was present?

22 A. That is correct.

23 Q. And that the D.N.A. of the defendant, Joe Gathings,
24 was present on the handle, on the tape and the end of the
25 handle?

1 A. The small knob end, yes, ma'am.

2 Q. I don't have any further questions. If you would
3 answer any questions that Ms. Crayton or Mr. Jones might
4 have.

5 THE COURT: Cross examination, Ms. Crayton.

6 MS. CRAYTON: Yes, Your Honor. Thank you.

7 CROSS-EXAMINATION

8 BY MS. CRAYTON:

9 Q. Ms. Hefney?

10 A. Um hum.

11 Q. I apologize already if I call you Ms. Riley.

12 A. That's fine. I'm still calling myself Ms. Riley.

13 Q. You just got back from your honeymoon, right?

14 A. Yes, last week.

15 Q. Great. Well, congratulations.

16 A. Thank you.

17 Q. So when you received -- you received this swabs not
18 the items; am I correct?

19 A. That is correct.

20 Q. Okay. So the only thing you received are these
21 enveloped that are in front of you?

22 A. Yes, ma'am.

23 Q. And is the first time you're seeing these items?

24 A. That bat, yes, ma'am, and the shoes, yes, ma'am.

25 Q. Okay. So you do not actually take the swabs

1 yourself?

2 A. No, ma'am.

3 Q. Are you present when the swabs are taken?

4 A. No, ma'am.

5 Q. The only way for you to know where the swabs came
6 from is from what's written on those envelopes?

7 A. That is correct.

8 Q. And there is no way for you to personally guarantee
9 that that swab was taken from that bat or whatever the
10 item is listed?

11 A. Yes, I have to go by what's written.

12 Q. Okay. Not your responsibility. You don't to the
13 crime scene?

14 A. No, ma'am.

15 Q. Okay. You're specifically in the lab, right?

16 A. Yes, ma'am.

17 Q. Okay. All right. In terms of determining what is
18 tested and what's not tested is that your job?

19 A. Well, that's my job along with the Solicitor and the
20 investigator.

21 Q. Okay. So the investigator calls you and asks you to
22 perform tests on items?

23 A. Yes, and we talk and determine you know given the
24 facts of the case which items are actually most probative.

25 Q. Did that occur in this case?

1 A. Yes.

2 Q. And who contacted you?

3 A. Well, actually our case manager according to the
4 narrative, the case manager talked to agent McLellan and
5 asked him to narrow down the items that needed testing.
6 And he did that, and we talked about the items and decided
7 to go from there.

8 Q. Okay. And do you know him to be the lead detective
9 or investigator in this case, Officer McLellan?

10 A. According to my report he was the one I addressed the
11 report to; that is correct.

12 Q. So as far as you knew he was the one that was making
13 these decisions?

14 A. He's the field agent on the case.

15 Q. Okay. So as you've already stated you don't go to
16 crime scene. You would not have dusted anything for
17 prints or swabbed anything or done any of that?

18 A. That is correct.

19 Q. Okay. All right. And I assume that you also did not
20 attend the autopsy; that would not be part of your job?

21 A. That is correct.

22 Q. Okay.

23 A. I have before but not this time..

24 Q. All right. So looking at your report dated
25 May 124th, Item Number Two, was that tested?

1 A. No, ma'am. There was no analysis performed. And
2 Item Two is a swab from the kitchen floor near the trash
3 can.

4 Q. And what about Item Three?

5 A. No analysis performed. That was the swab from the
6 dining room floor. Neither Item Number Four, also a swab
7 from the dining room floor.

8 Q. Okay. What about Item Number Five?

9 A. Swab from hallway floor near the female victim. No
10 analysis performed.

11 Q. What about Item Number Six?

12 A. Cigarette butts from the back door outside on the
13 ground. No analysis performed.

14 Q. Okay. Number Seven?

15 A. Cigarette butts from the front bedroom on the floor.
16 No analysis performed.

17 Q. Okay. What about 23.2?

18 A. 23.2 is another swab from the blue and white New
19 Balance sneakers. No analysis performed.

20 Q. Okay. 23.3?

21 A. Same.

22 Q. Okay. What about 23.4?

23 A. Same. Another swab from the shoe.

24 Q. Okay. 23.5?

25 A. Another swab from the shoe. No analysis.

1 Q. 23.6?

2 A. No analysis. Another swab from the shoe as well as
3 23.7 and 23.8. We had nine swabs from the same pair of
4 shoes.

5 Q. You had nine swabs from that pair of shoes or you're
6 assuming from that pair of shoes cause you didn't take the
7 swabs.

8 A. I didn't take the swabs. I'm assuming, yes.

9 Q. Okay. And you tested how many of them?

10 A. We tested one from the right shoe and one from the
11 left shoe which was 23.1 and 23.9.

12 Q. And then you sent this set of results to
13 Mr. McLellan; is that correct?

14 A. That is correct.

15 Q. Okay. And he decided that he liked that evidence and
16 didn't want anything else tested; is that correct?

17 A. Well, he didn't request anything else.

18 Q. He did not request anything else through you. Okay.
19 Did you receive any fingernail scrapings to be tested for
20 D.N.A.?

21 A. I did not.

22 Q. You did not. Do you know if fingernail scrapings
23 were taken?

24 A. I didn't receive them. I'm not sure.

25 Q. And since you don't go to the crime scene you

1 wouldn't know?

2 A. That is correct.

3 Q. Or the autopsy. Did you test any swabs from the
4 bottom of these shoes?

5 A. I'm not sure where the swabs came from. It just said
6 right. 23.9 was the swab taken from the side of left --
7 the side of the left New Balance shoe. 23.1 was swab
8 taken from the right New Balance shoe. And then it looks
9 like from where Karl made a diagram it was the right side
10 of the shoe.

11 Q. Okay. So you tested 23.1 and 23.9; do I have that
12 correct?

13 A. That is correct.

14 Q. Okay. And do either of those swabs come from the
15 bottom of the shoe?

16 A. The bottom, no. They come from the bottom towards
17 the side.

18 Q. Okay. What about the tops of the shoes? Do either
19 of those swabs come from the top of the shoes?

20 A. Well, I only see a diagram on one that, according to
21 the script, you know, side of left and the diagram shows
22 here side of right.

23 Q. Okay. Did you receive the shoe laces from those
24 shoes?

25 A. No, I just had swabs from the shoes.

1 Q. You just have swabs from the shoes?

2 A. That is correct.

3 Q. Would you have tested shoe laces had they been
4 provided to you?

5 A. If the shoe laces had been provided, and it was
6 requested for them to be done, I would have.

7 Q. Then you would have tested them, but they were not
8 provided to you?

9 A. I was looking through these to see if any swabs from
10 the shoe laces. No, no shoe laces.

11 Q. Okay. Were you provided any clothing to test?

12 A. No. Just -- other than the shoes, no.

13 Q. Okay. Can you -- is there any way to I guess age
14 D.N.A. evidence? Can you tell us when this evidence was
15 taken rather than -- or when this evidence was developed
16 rather than when some other evidence was developed?

17 A. No, we can't determine an age of the stain. We
18 develop D.N.A. profile from the stain.

19 Q. Okay. So there is no way to develop that?

20 A. No.

21 Q. In looking at your report it says, "Partial D.N.A. of
22 Ms. Locklear." Why is it only a partial D.N.A.?

23 A. It's a partial because I'm assuming that there are
24 several things. The body has started to decompose and
25 break down. That would lead to a partial profile because

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1 the D.N.A, it would be degradating. The blood standard
2 would have started to degrade which means the D.N.A. had
3 started to degrade. So we may not get a complete 16
4 profile D.N.A.

5 Q. Okay. And from what I gather from your earlier
6 testimony that you receive half your D.N.A. from your mom
7 and half from your dad; is that correct?

8 A. Is that correct.

9 Q. And in this case we have a mother and son. Is --
10 does that make a difference in the D.N.A. profile?

11 A. No, cause we did an individual D.N.A. profile. I
12 didn't compare to two together. We compare it against the
13 evidence.

14 MS. CRAYTON: Court's indulgence, Your Honor?

15 THE COURT: Yes, ma'am.

16 MS. CRAYTON: Thank you, Your Honor.

17 THE COURT: Redirect, Ms. Munnerlyn.

18 DIRECT EXAMINATION

19 BY MS. MUNNERLYN:

20 Q. Agent Hefney, the mom's and the son's D.N.A. in this
21 particular case, I mean they are unique and distinct
22 D.N.A, each of them, are they not?

23 A. That is correct. In looking at it I can see that
24 they're mother and son, now that it was brought to my
25 attention that they are. They were treated as individual

1 D.N.A. profiles.

2 Q. How can you tell they're mother and son?

3 A. Because half of Robbie's D.N.A. and half -- matches
4 Loyce's D.N.A.

5 Q. Okay.

6 A. As far as like the alleles, which is the pattern of
7 D.N.A. as I said, Robbie for example, when you look at --
8 we looked at 16 different chromosomal locations to
9 determine a D.N.A. profile, and that same one chromosome
10 that I looked at is D.21, Chromosome 21. Robbie is a
11 30/31 and Loyce is a 30 -- a 29/30. So Robbie would have
12 obtained his 30 from Loyce and the 29 from his father.

13 Q. Okay. If you say ---

14 A. I'm sorry. The 31 from his father.

15 Q. Okay. Just so they can understand. You actually
16 have a chart that displays the D.N.A. on the back of our
17 report; is that correct?

18 A. That is correct.

19 Q. Okay. If you could come around and stand up and try
20 to explain the chart and how that works to the jury?

21 THE COURT: What is she referring to?

22 MS. MUNNERLYN: The last page of her report which,
23 Your Honor, is State's Exhibit 198.

24 THE COURT: Okay.

25 THE WITNESS: Up here this is ---

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1 THE COURT: All right keep your voice up. This lady
2 has got to hear you. Step back a little bit.

3 THE WITNESS: About right here. Okay. Up here this
4 is the chart is where we put all the evidence of the known
5 standard. Up here you see the known standard. All the
6 evidence about the known standard is listed on the left
7 side of the chart. Up at the top is all the genetic
8 markers that we look at. Okay. Right here I have Item 27
9 which is our Item 27 which is the blood standard from
10 Robbie Polston.

11 Right here, Item 28, is a blood standard from Loyce
12 Locklear, and item 29 is the blood standard from Allen Joe
13 Gathings. So if we look at D8S1179 which means that's
14 from the D.N.A. packaged in the chromosome. We've got 23
15 pairs. We look at, of those 23 pairs of chromosomes, we
16 look at 15 of them. Plus your six chromosomes known as
17 allogeneic. Allogeneic is said that if you are a male you
18 get XY and if you're a female you get XX which is
19 displayed here as just X.

20 Right here we got D8 at Site 1179 on that chromosome.
21 Robbie was 12/13. Loyce was a 13, and Allen Joe Gathings
22 a 14/16. So we can tell that Robbie and Loyce are related
23 because the 13 right here in Robbie's is 13 right here in
24 Loyce's, and the 30/31 in Robbie, and she's 29/30, so you
25 can tell he got the 30 from Loyce. And he got the 29 from

1 his father.

2 Right here, this is where her standard, Loyce, starts
3 to get kind of thready. We have 11 there. But the 11 is
4 low level and that's why it's in parentheses. So we
5 interpret that as weak. There is a dash right here. Is
6 strong again with a 14/18, and as we look at that we can
7 tell that the 18 that Robbie has came from his mother,
8 Loyce.

9 Now, you go all the way around -- go all the way on
10 the chart and each one of these. and what we did was to
11 compare for -- that to evidence to see who the known --
12 here, let's just take one, the baseball bat, Item Eight,
13 right here at D8 is 12/13. So what I'm doing is I'm
14 looking and seeing if anybody is a 12/13. And you see
15 right here that Robbie Polston is. All right. Y'all see
16 that.

17 All right. So I go to the next one. 30/31, I'm
18 looking. And I see that Robbie is 30/31. So I'm going
19 all the way across and looking and comparing, comparing.
20 When I see I've got a visual match then I supply
21 statistics to it, and you remember when I read the
22 statistics of 1 in 490 quadrillion. Yeah, one in 490
23 quadrillion. That's just saying that if you were to lien
24 up 490 quadrillion people you should only expect to see
25 that D.N.A. profile one time. And that statistic is

1 supplied you know through a computer program that you put
2 these numbers in and it gives you the frequency.

3 Let's look at Item Nine right here. We've got a 14.
4 This is the baseball bat underneath the knob. We got a
5 14/16 right here. Okay, at D8, again, I would look at the
6 three standards and see if anybody is 14/16. I see Allen
7 Joe Gathings is right here. Going over here I see at D21
8 I've got a 31.2 and 32.2 so I look to see if anybody is a
9 31.2, 32.2 and I see Allen Joe Gathings.

10 All right. So I do that for each one of them. And
11 then again I say, okay, I've got a visual match and I
12 apply the statistical match to it saying how I guess rare
13 that profile is. And that's what we do for all of them.
14 Right here, the ice pick, I've got dashes all the way
15 across. That means that I didn't get a D.N.A. profile for
16 whatever reason I couldn't get a profile from it. It may
17 not have been enough D.N.A. to obtain a D.N.A. profile
18 from that one.

19 That's the same thing right here with the baseball
20 bat. Like 14/16 here and this is the black tape on it, and
21 I see 14/16 in there; Allen Gathings. And I have a little
22 partial from somebody else, and that looks like it was
23 Loyce Locklear. She was also on that bat as well.

24 Q. All right If you will just have a seat again. So
25 even though there are similarities between the D.N.A. of

1 Loyce Locklear and Robbie Polston because they are mother
2 and son they're still are differences so you can determine
3 that it's two separate and distinct D.N.As?

4 A. Yes, that's correct.

5 Q. So if there is an unknown sample then you can
6 determine as between the two of them which it actually
7 matches?

8 A. That is correct.

9 Q. Okay.

10 MS. MUNNERLYN: I don't have any further questions,
11 Your Honor.

12 THE COURT: Recross.

13 MS. CRAYTON: Non, Your Honor. Thank you.

14 THE COURT: All right. Thank you, ma'am. I was
15 about to say the wrong name, too, but thank you for
16 coming. You would like to have this witness excused?

17 MS. MUNNERLYN: Yes, Your Honor.

18 MS. CRAYTON: We have no objection.

19 THE COURT: Thank you for coming. You are excused.
20 Counsel, approach.

21 (WHEREUPON, a bench conference was held off the
22 record in the presence of the jury, but out of the
23 hearing of the jury.)

24 THE COURT: All right, ladies and gentlemen of the
25 jury, I've been advised that our next witnesses will run

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1 us into the lunch hour, and so I think that it is
2 appropriate that we top at this time, and we are going to
3 do that. I am going to allow you to go and get your lunch
4 and ask you to be back in your jury room, please, at
5 two o'clock. By that clock on the wall up there it's 20
6 minutes to 1:00. I have about 25 to 1:00. I'm not sure
7 which is right.

8 Be that as it may if you'll be back in your jury
9 room at two o'clock the State will continue the
10 presentation of their case. Over the lunch recess do not
11 discuss the case with anyone. Do not allow anyone to
12 discuss it with you. And do not discuss it amongst
13 yourselves while you're reassembling in the jury room. It
14 is still premature for you to begin any discussion of the
15 evidence in this case.

16 Ms. Munnerlyn, I think there are a couple of exhibits
17 on the rail that need to be given back to the court
18 reporter, and you need to get these exhibits before we
19 move around too much. Back to the court reporter if you
20 will take care of these right here, too.

21 MS. MUNNERLYN: I will. Thank you, Your Honor.

22 THE COURT: All right. Fine. Thank you. All right,
23 the jury is excused for lunch. Everyone else please
24 remain seated.

25 (WHEREUPON, the jury panel was excused from the

1 courtroom at 12:34 p.m.)

2 THE COURT: All right. Let's wait another few
3 minutes to give the jury an opportunity to clear the
4 building.

5 MS. MUNNERLYN: Your Honor, let's go back on the
6 record just a minute.

7 THE COURT: Sure.

8 MS. MUNNERLYN: I was just discussing with the court
9 reporter about the exhibits that are in evidence, and she
10 indicated that she recalled only that you admitted 192A,
11 which was the first picture. But my recollection is that
12 you did indicate that the three by agreement that we were
13 admitting B, C, and D. by -- without objection.

14 THE COURT: Those were without objection, and I did
15 admit those without objection. So the record should
16 reflect that 192A was admitted over objection. 192B, C,
17 and D. were admitted without objection.

18 All right. Counsel, we will be in recess until
19 two o'clock. Thank you. See you this afternoon.

20 (WHEREUPON, Court was in recess at 12:36 and
21 reconvened at 1:59 p.m.)

22 THE COURT: All right. We're back on the record with
23 regards to State v. Gathings, 07-887, 888 and 0909. The
24 defendant and his counsel are present in Court. The State
25 the present, represented by Ms. Munnerlyn.

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1 MS. MUNNERLYN: Your Honor, if I could just -- I want
2 to clear up one matter. We that the motion regarding the
3 search warrant for the car before we started, and I handed
4 you up my copy of that search warrant. I didn't know if
5 you wanted to make that a Court's exhibit. I think I
6 would just ask you to do that.

7 THE COURT: Well, let's see if I've got it. I don't
8 remember. Yeah, you're right. All right. Yes, I did
9 rule on the search warrant, and I will make that as -- is
10 this the first Court's exhibit, Ms. Gordon? Whatever
11 Court exhibit it is make it a Court's exhibit.

12 MS. MUNNERLYN: Thank you, Your Honor.

13 (WHEREUPON, Court's Exhibit No. 2 was marked for
14 identification and received into evidence.)

15 THE COURT: All right. Ready to go forward,
16 Ms. Munnerlyn?

17 MS. MUNNERLYN: Yes, Your Honor.

18 THE COURT: Defense?

19 MS. CRAYTON: Yes, Your Honor.

20 MS. MUNNERLYN: All right. Bring the jury in,
21 please.

22 (WHEREUPON, the jury enters the courtroom at
23 2:02 p.m.)

24 THE COURT: Good afternoon, ladies and gentlemen. We
25 are now ready to proceed. The State is continuing to

1 present their case to you, and they will call their next
2 witness. Ms. Munnerlyn.

3 MS. MUNNERLYN: Thank you, Your Honor. Call Dr. Erin
4 Presnell to the stand.

5 ERIN PRESNELL, after being duly sworn, testified
6 as follows:

7 CLERK OF COURT: Please be seated and state your full
8 name.

9 THE WITNESS: My name is Susan Presnell,
10 P-R-E-S-N-E-L-L.

11 DIRECT EXAMINATION

12 BY MS. MUNNERLYN:

13 Q. Dr. Presnell, where are you employed?

14 A. I'm a forensic pathologist at the Medical University
15 of South Carolina in Charleston.

16 Q. How long have you worked for them?

17 A. Since 1999, so 11 years.

18 Q. And can you tell us about your educational and
19 training in the area of forensic pathology?

20 A. I'm a forensic pathologist, and kind of to go over
21 what everybody knows, and get more familiar with what
22 forensic pathologist do. But forensics is actually a
23 subspecialty of the field of pathology which is a medical
24 specialty. And pathology and general pathology is the
25 study of disease. So if you go to your doctor and they

1 take a skin biopsy or breast biopsy or something that you
2 need surgery --

3 THE COURT: Excuse me, Doctor. Let me ask you to
4 slow down just a little bit. She's having a hard time
5 keeping up.

6 MS. CRAYTON: Your Honor, we would be happy to
7 stipulate.

8 THE COURT: All right. Do you her offer as an
9 expert?

10 MS. MUNNERLYN: Yes, Your Honor. I was going to ask
11 her ---

12 THE COURT: Do you stipulate to her

13 MS. CRAYTON: Yes, sir, Your Honor.

14 THE COURT: In the field of forensic pathology?

15 MS. CRAYTON: Yes, Your Honor.

16 THE COURT: All right. That being the case then I
17 will qualify the doctor as an expert in the field of
18 forensic pathology. Ladies and gentlemen of the jury, you
19 will recall that I told you before that when a witness is
20 qualified as an expert they may give an opinion on any
21 fact in issue. All right.

22 MS. MUNNERLYN: Thank you, Your Honor.

23 BY MS. MUNNERLYN:

24 Q. Dr. Presnell, just for the jury's information, if you
25 could just give them a brief explanation of your education

1 and your experience.

2 A. Okay. What I was saying is that with pathology if
3 there is any tissue that comes off of a patient that
4 tissue goes to the pathologist and they examine it and
5 look at grossly under the microscope and they come up with
6 a diagnosis. If it is cancer or not cancer. If it is
7 infection or if it is not infection.

8 And as a forensic pathologist I have that training;
9 that subspecialty training where if I was looking at a
10 piece of tissue, if I was looking at a whole entire
11 diseased person, and we are evaluating for diseases. But
12 we're also trained in looking at and interpreting trauma.
13 And, ultimately, this whole process of the autopsy will
14 end up in a produced autopsy report that has the cause and
15 manner of death.

16 Q. Okay. Can you give just a little information about
17 what your education was and your total experience in this
18 area?

19 A. Well, a pathologist or a medical doctor, so that I
20 went to Clemson for four years and got my degree there.
21 And went to medical school for four year. After finishing
22 medical school that's where you pick your specialty.
23 Pediatrics, family medicine, and I chose pathology. So
24 that was a five year training program and forensics was a
25 year beyond that. And during this process you have to

1 take boards and be certified. I'm board certified in
2 anatomic and clinical pathology and forensic pathology.

3 Q. All right. And did you have the opportunity to
4 perform an autopsy on the bodies of Robbie Polston and
5 Loyce Locklear?

6 A. Yes, ma'am, we performed autopsies on Mr. and Ms --
7 Robbie Polston and Loyce Locklear on July 1st 2007.

8 Q. On July 1st? And where did these occur?

9 A. At M.U.S.C. Coroner made arrangements for
10 transportation down to Charleston and for us to do the
11 autopsy at M.U.S.C.

12 Q. And if you could let's just take them one at a time,
13 and we'll start with Robbie Polston. And I want to show
14 you first of all before we begin to discuss it State's
15 Exhibit 196. See if you recognize that?

16 A. This is a copy of the autopsy report.

17 Q. Okay. It includes your findings?

18 A. Yes, ma'am.

19 Q. Okay. And it does have your signature on it?

20 A. It's an electronic signature.

21 Q. Okay.

22 A. And, yes, it does.

23 Q. And?

24 A. And this is -- you have the toxicology report as well
25 attached to that.

1 Q. All right.

2 MS. MUNNERLYN: Your Honor, I would move to admit
3 State's Exhibit 196.

4 MS. CRAYTON: No objection, Your Honor.

5 THE COURT: State's Exhibit 196, the autopsy
6 report -- that's the one on Mr. Polston?

7 MS. MUNNERLYN: Yes, sir.

8 THE COURT: Okay. Is admitted into evidence without
9 objection.

10 (WHEREUPON, State's Exhibit No. 196 was admitted into
11 evidence.)

12 BY MS. MUNNERLYN:

13 Q. And I also want to show you State's Exhibit 197 and
14 see if you recognize that document.

15 A. This is a copy of the autopsy report on Loyce
16 Locklear and also attached the toxicology report and the
17 autopsy report is electronically verified by me.

18 Q. All right.

19 MS. MUNNERLYN: Your Honor, I also move to admit this
20 as State's Exhibit 197.

21 MS. CRAYTON: No objection, Your Honor.

22 THE COURT: Admitted without objection.

23 (WHEREUPON, State's Exhibit No. 197 was admitted into
24 evidence.)

25 BY MS. MUNNERLYN:

1 Q. All right. If we could let's start then with Robbie.
2 Polston. And when you begin an autopsy can you tell us
3 how that process begins?

4 A. Well, the process begins with gathering whatever
5 information is known. Usually that information is
6 provided to us by the coroner and then at the actual start
7 of the autopsy we do an external exam to include
8 photographs, documentation of the clothing, etc. And then
9 we clean them up and examine the external -- look at the
10 external surfaces for any findings. That includes trauma
11 but also any disease process.

12 After that and the documentation of all that we do
13 that with photographs and diagrams. Then we look
14 internally and we'll look inside all the organs and
15 document any disease or injury process.

16 Q. Okay. And once you have all the initial information
17 documented then you actually begin the autopsy itself?

18 A. Well, let me say again. The beginning of what I call
19 autopsies is where we're actually examining the person and
20 looking at the external. After we've done the external
21 exam then make a Y incision, you know reflect the skin and
22 take off the chest plate and look inside at the internal
23 organs.

24 Q. Okay. And as you did the autopsy of Robbie Polston
25 did you notice evidence of injury?

1 A. Yes, both of the cases had an abundant injury. What
2 I though might be most helpful is if I use the diagrams
3 and copy of the diagrams that I did at the time of the
4 autopsy that I kind of highlighted the injuries and would
5 be able to kind of go over the injuries that way instead
6 of just reading out to you a list of injuries.

7 Q. Okay. Did you bring those diagrams with you today?

8 A. Yes, I did.

9 Q. And they were prepared by you?

10 A. Yes.

11 Q. And you would like to use them to assist you in
12 explaining the injuries?

13 A. Yes.

14 Q. Okay. Do you have them with you?

15 A. These are the ones from Mr. Polston.

16 Q. Okay?

17 MS. MUNNERLYN: I think I'm going to move to admit
18 them. I think it will be without objection.

19 MS. CRAYTON: It will be, Your Honor. No objection.

20 THE COURT: You're going to mark them as a group?

21 MS. MUNNERLYN: Yes, Your Honor. And we'll staple
22 them together.

23 THE COURT: Miss Gordon, what the next number is.

24 COURT REPORTER: Number 199.

25 THE COURT: That will be State's Number?

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1 MS. MUNNERLYN: 199.

2 THE COURT: State 199 admitted without objection.

3 (WHEREUPON, State's Exhibit No. 199 was admitted into
4 evidence.)

5 BY MS. MUNNERLYN:

6 Q. And also before we proceed with that you also brought
7 diagrams in regard to Loyce Locklear?

8 A. Yes, I did.

9 Q. Okay. And are these the documents here?

10 A. Yes.

11 Q. They were prepared by you?

12 A. Yes, ma'am, they were.

13 MS. MUNNERLYN: Then, Your Honor, I move to admit
14 these also. That would be State's Exhibit 200.

15 MS. CRAYTON: Without objection, Your Honor.

16 THE COURT: Okay, admitted into evidence as State's
17 Number 200 without objection.

18 (WHEREUPON, State's Exhibit No. 200 was admitted into
19 evidence.)

20 BY MS. MUNNERLYN:

21 Q. All right. Okay. If we can go back to State's
22 Exhibit 199 and begin to discuss the evidence and injuries
23 that you found as you began the autopsy on Robbie Polston?

24 A. May I approach the jury to show them?

25 Q. Yes.

1 MS. MUNNERLYN: Yes, please, Judge, may the witness
2 approach?

3 THE COURT: Yes, but you're going to have to keep
4 your voice up and talk loud. Talk loud and slowly.

5 THE WITNESS: Okay. Because the diagram -- the way
6 to project a diagram and they're relatively small. I do
7 this side of the jury and do it again over on the other
8 side of the jury. First, before I kind of go over the
9 injury. There are three terminologies I was going to
10 explain just to make sure that we're all on the same page.
11 One is an abrasion. An abrasion is a scratch. There are
12 different type injuries, so something scrapes the skin and
13 causes the top of the skin to scrape off.

14 Another, contusion, which is a bruise. So some type
15 of blunt trauma strikes the skin, causes bleeding
16 underneath it and make a bruise.

17 And the last, and for this case, is a laceration.
18 And a laceration is where some type of blunt trauma
19 strikes the skin and causes that skin to split. So it's
20 not a cut or a stab wound. It's a split caused from this
21 blunt trauma.

22 Okay, so this is the overall diagram that we see on
23 Mr. Polston, and what I've done is I've colored the
24 contusions or the bruises in purple, and the abrasions in
25 orange. So he has a bruise on the right knee and on the

1 back of the right hand kind of right hand wrist area.

2 This injury here is consistent with a defensive type
3 injury. He also has several areas of abrasion or
4 scratches on the abdomen, and the other knee and on his
5 left lower leg.

6 Q. Okay. Before you proceed, if I could just ask you,
7 you said that there was a defensive injury on his knee?

8 A. No, he has a -- he has a bruise on the right knee and
9 a scratch or abrasion on the left knee. This could just
10 be from falling to the ground, fall down on your knee.
11 Certainly could be from something striking his knee as
12 well. What I said was that there was a bruise or
13 contusion on the back of the right hand wrist area. That
14 location is classic for a defense type injury meaning that
15 a person is trying to protect themselves from a blow.

16 Q. And you indicated that that was on the right hand
17 wrist?

18 A. Right.

19 Q. Yes.

20 A. Right. See where the purple is on this diagram in
21 the over all diagram that contusion on the back right
22 wrist, the right knee, the left knee, left lower leg and
23 the abdomen.

24 Q. Okay.

25 A. Most of the injuries are in the head area. What

1 we'll do is we'll just start on the front of the face and
2 drop to the sides and then the back. On the front of the
3 face we have some non-specific -- it doesn't really match
4 up to anything, little scratches or abrasions. But we
5 also have these pink areas that we color lacerations.
6 These are something that blunt force hit the head and
7 caused the skin to slip.

8 Now, a lot of times when something blunt strikes the
9 skin causes the skin to split because it often scratches
10 the edges of the skin leaving abrasions on either side of
11 the laceration, so that's what that injury appears to be
12 on the right forehead. We have a major laceration to the
13 right forehead. It's split down to the skull. You can
14 see the skull under the laceration. We also have a small
15 laceration above the left upper lip.

16 I'm moving to the side of his face. There -- the
17 main injuries here is his face swelling contusion. Big
18 swollen contusion around the ear area. A little bit of
19 scratches, but look on the back of the diagram there is a
20 laceration back behind the ear. So there is a big blunt
21 trauma injury to the side of his head, to the right side
22 of his head.

23 Looking at the left side of his head he had a number
24 of areas of abrasion. Again, the scratching of the head,
25 and also I started coloring the contusions or bruises of

1 pencil color just because the purple would have colored
2 over everything. So he has contusion on the left side of
3 the head, around the eye, the left side as well. Now, is
4 that a blunt trauma injury or is that possibly saying he
5 was against the ground and being struck on this side of
6 the head causing injury to the left side? That could be
7 an explanation, too.

8 And then on the back of the head we have three major
9 lacerations: One at the top, and then two right down at
10 the mid -- further down on the head. These lacerations
11 you can actually see inside skull that's fractured
12 underneath, and the skull is moved apart. You can see the
13 layer over the brain called the dura which is the layer
14 over -- that is under the skull and over the brain.

15 As I said a lot of it points to the areas outside.
16 The orange areas are not specific abrasions. There is a
17 manual laceration on the right forehead, and on the right
18 side of the head there is a contusion or swollen area
19 around here and a laceration behind the ear. The right --
20 excuse me. The left side of the head had an abrasion, a
21 rather acute abrasion and swollen and a contusion or
22 bruising there. And then finally the back of the head had
23 a major laceration with the skull.

24 This picture is a little confusing. If we look
25 internally at all of the organs as well, well to get to

1 the brains what we do is we make a cut behind one ear all
2 the way through the back of the scalp to behind the other
3 ear. And then we take that scalp and reflect it forward
4 so that -- so this scalp right here is open. The scalp is
5 actually inside out and over your face. So that's this
6 picture here.

7 The scalp is reflected forward and these areas of
8 purple coloration are hemorrhages underlying all the blunt
9 trauma to the head which is pretty reasonable. Again.
10 This is scalp reflected forward and the hemorrhages are on
11 the scalp. And this is the skull surface related to what
12 is reasonable.

13 And then the last diagram that I was going to use for
14 Mr. Polston requires a little explanation, too. Again,
15 we're going to now look at the brain. We have the scalp
16 is reflected forward, and we take the saw and remove what
17 we call the skull cap right at the very top. We take off
18 the skull cap, out comes the brain, and the base of the
19 skull is what this diagram represents.

20 So in this picture we are looking down into the base
21 of this person -- of his skull. Here is where the spinal
22 cord would come out. This would the front of his face up
23 here, and the back of his head here. On this diagram
24 right here the fractures are colored and highlighted in
25 yellow. You can see the massive fractures involving the

1 front, middle and back part of the base of the brain.

2 This right here is the skull cap, and that's the back of
3 the skull. Again, correlating with these fractures here.

4 Inside we have defused hemorrhage to the brain. We
5 have the bruising of the brain, and some inter-hemorrhage.
6 So that's basically the trauma reflected of the fractures.
7 All right, so, again, we're looking at the base of the
8 brain. Excuse me. Base of the skull. The top of the
9 skull comes out. The brains come out, and you're looking
10 at that bowl of the skull.

11 And all of the yellow highlights are areas of
12 fracture. It was pretty extensive both to the front and
13 the back of his head. The front, middle and back of the
14 base of the skull were completely fractured as well as the
15 upper skull cap. It sits up a little higher on the back
16 of the head. And those are Mr. Polston's injuries.

17 Q. Okay. All right. Just have a seat for a minute.
18 Let me ask you a few questions. You just testified that
19 there was defused hemorrhage over the brain. If you can
20 explain what exactly you mean when you say hemorrhage for
21 the jury just so we all understanding?

22 A. Okay. Defused bleeding, because of the trauma, the
23 blood vessels over the brain bled. So he has defused
24 bleeding over the brain.

25 Q. Okay. And are these injuries consistent with an

1 assault using a baseball bat?

2 A. Yes, a baseball bat would be a blunt type of
3 instrument, and would be consistent with these injuries.

4 Q. Okay. Well, let me ask you this. Upon death, if you
5 can explain to us, rigor mortis, liver mortis and how that
6 works and how quickly that sets in?

7 A. Well, unlike C.S.I. there is no real answer other
8 than there have been a lot of experimental studies done
9 within adults in temperate conditions like 75 degrees, and
10 they came up with a general timeframe of what things that
11 happen after death. One of the things that happens is
12 that your heart quits beating and all the blood in your
13 body starts settling down towards gravity.

14 So if you're laying down on the floor, face up, back
15 down, and all your blood is going to start to drain
16 towards your back. And you're going to start to get a
17 pink color on the back. This is called liver mortis or
18 liver mortis. And that happens -- you can start to see it
19 anywhere from a half an hour to two hours after death.

20 Now, after -- for -- this is a long lecture. For a
21 while, hours after death and the liver has developed you
22 can actually push on the liver mortis, push on it, and it
23 will the blanch. That little pink area will turn kind of
24 white. That's because when the blood is first settling
25 it's settling in your blood vessels. So as -- when you

1 push on the blood vessels it squishes them shut and the
2 fact that the area blanches and when we let go the liver
3 comes back.

4 After eight the 12 hours that blood starts leaking
5 out of the vessels. And when you push on it it doesn't
6 blanch any more. The blood is stuck in the soft tissues.
7 So that's unfixed liver mortis is what that is initially.
8 And once it starts to come out into the tissues and you
9 press on it that's fixed liver mortis. So that happens
10 sometime around 12, 12 plus hours.

11 Rigor mortis another thing we look at. The
12 stiffening of the body after death. If you -- think of it
13 as -- let me back up. The -- if you -- the body is a
14 muscle. The body's muscles actually need energy to
15 release each other. So if you have two muscle fibers like
16 this you need A.T.P. or you need energy for them to be
17 able to slide apart.

18 After death your muscles are in a certain position
19 however that person is lying. There is still some energy
20 after death. There is still some A.T.P. around. So you
21 don't develop instantaneous stiffening of the muscles.
22 But after hours and after hours have gone by and the
23 energy is used up then your muscle fiber no longer can
24 release and they're stuck in that area. They can't
25 release, and that's when you start to see the stiffening.

1 Your muscles fibers are not releasing. You will start to
2 see rigor after about two hours and then it will slowly
3 get stiffer around stiffer and stiffer up to the next 12
4 hours. Stay really stiff for about 12 hours and then it
5 will start to go away as the body actually starts to
6 decompose and the muscle proteins start to break down and
7 to fall apart.

8 So the stiffness will start to go away. So this is a
9 process that you can take 36 plus hours for the rigor
10 mortis to fully come and go. That being said there is a
11 lot of subjective judgment in trying to evaluate how stiff
12 was that rigor mortis. There are a lot of variables. Did
13 the person struggle before death and use up energy more
14 quickly so they didn't start with a bigger reserve. Was
15 it warmer in the environment to speed things up. Was it
16 really cool in that environment to slow things down.

17 So really what we do when we're assessing these
18 things is to help support a certain scenario or not. Do
19 our findings support that happened an hour ago? No. Do
20 our findings support that the death happened two days ago?
21 Yes, it could be consistent with that. Could it be a day
22 and a half? Yes, that could be the case, too. So,
23 anyhow, I think what you're asking me as far as the first
24 thing that happens after death before someone they start
25 to decompose.

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1 Q. Okay. That being said, if you perform the autopsy on
2 July the 1st around the middle of the day, if the
3 paramedics actually arrived somewhere between 3:00 and
4 four o'clock on June the 30th which would be the day
5 before you performed the autopsy and indicated at that
6 time that rigor mortis or liver mortis had set in would
7 that be consistent with these two victims having been
8 killed late in the evening of Friday the 29th and maybe
9 early morning hours of the 30th?

10 A. Well, see you put me in a quandary cause you said
11 that the responder said that they think the rig mortis is
12 fixed or it's there. I don't know it that's just starting
13 to get stiff or really stiff or was it starting to go away
14 or the coloration from the liver mortis on them, is that
15 present or not.

16 We did do the autopsy at 12:30 on the 1st. At that
17 time at autopsy, and keep in mind, too, that the further
18 you get away from the time of death the less reliable this
19 becomes, but we did the autopsy at 12:30 on the 1st. And
20 at that time his liver mortis was fixed. So we pushed on
21 it and pushed on it, it wouldn't blanch at all. And rigor
22 mortis was about two on a scale of two to four. So it
23 was -- because the liver mortis was fixed that means that
24 the rigor mortis had already come, been in its maximum
25 stiffness, and then started to go away. So we're back

1 down to a -- we rated it on a scale of 0 to 4, and his was
2 about a two. These findings are consistent with the death
3 of the late evening of the 29th or in the morning of the
4 30th.

5 Q. Okay. With both of them being then or just the
6 female victim?

7 A. Oh, both of -- we hadn't started talking about Loyce
8 yet, but she has the same findings.

9 Q. Okay. All right. So your findings would certainly
10 be consistent with the death having occurred in that
11 timeframe?

12 A. Yes.

13 Q. Okay. All right. Now, you've already discussed or
14 indicated that there was at least one defensive injury on
15 Robbie Polston. You said that was on the back of the --
16 when you said the back you mean this portion of the wrist
17 or this portion of the wrist?

18 A. Yes. When I say the back I'm referring to
19 anatomic positions so we're referring -- if you put your
20 rings on where the stones would be that side of the hand.

21 Q. Okay. All right. So it would be back over here.
22 All right. Other than that defensive injury did you see
23 any other defensive injuries?

24 A. No. Nothing that I can say definitively was a
25 defensive injury.

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1 Q. Okay. In looking at various fractures and
2 lacerations that you observed throughout the autopsy could
3 you make a determination as to how much blows we're
4 talking about?

5 A. Well, I think -- I feel like I'm always prefacing my
6 answer, but I keep in mind that a blow doesn't necessarily
7 have to produce a laceration. If I counted up the
8 individual lacerations each of those definitely equals a
9 blow or a blunt trauma. And there is the five around the
10 head which include the ear area. There is also -- we know
11 the blunt trauma -- sorry. To the back of the right hand
12 wrist. So that is in the neighborhood of six. So more
13 than six, but as far as my individual strike marks I
14 couldn't.

15 Q. Okay. So it's at least six and very well more?

16 A. Correct.

17 Q. Okay. So more than six individual blows?

18 A. Yes.

19 Q. Okay. All right. And as a result of all of the
20 injuries which you found were you able to make a
21 determination as to the cause of death for Robbie Polston?

22 A. His cause of death was the blunt trauma to the head
23 due to a beating.

24 Q. And you also -- you did do a toxicology regarding his
25 blood; that is correct?

1 A. Yes, we did.

2 Q. And was there anything found in his blood as far as
3 drugs are concerned?

4 A. He has an antidepressant drug in his blood as well as
5 a nicotine and a nicotine metabolite.

6 Q. All right. Any evidence of any crack or cocaine of
7 that nature?

8 A. No.

9 Q. Okay. All right. Well, let's move then to Loyce
10 Locklear.

11 A. All right. May I approach the jury?

12 Q. Yes, if you would, please. And I would like for you
13 to use your diagrams which are Exhibit 200 and explain the
14 evidence of injury to Ms. Locklear?

15 A. Okay. I will go through the same process with
16 Ms. Locklear. This is her external diagram of the overall
17 body. There are several nonspecific abrasions on her the
18 back of her left arm and right on the left hip area.
19 What's more kind of significant for us is that the
20 contusion, this bruising on the right chest area here, two
21 strikes of bruises with a pale area in between. This is
22 really consistent with a baseball bat. A baseball bat
23 being a long, linear, straight object that can create an
24 injury such as this.

25 Straight, the back or something like a bat, would

1 strike the skin and actually compresses the blood vessels
2 in that area and causes the bruising to happen on either
3 side of it. So basically just hours of the offending
4 object. Again, we're external diagrams with non-specific
5 abrasions. Right knee left, arm left, left hip, and then
6 there is this bruising area over the right chest with the
7 blanching in the middle.

8 She has some more defensive injuries so a little more
9 extensive. So we had used the hand diagram. This is her
10 right hand on here. We can see the, again, the purple is
11 bruising or contusions. She has multiple contusions
12 across the base of the fingers on the right as well as the
13 back of the right hand.

14 On the left hand it's one defused swelling from the
15 mid hand all the way to the left thumb, the furthest
16 finger, so it's about the mid finger area. Also you see
17 with that, remember yellow is the fracture. The ring
18 finger and the pinky finger, those are both fractured
19 right were they join the hand.

20 The right hand has a distinctive injury at the base
21 of the fingers as well as a contusion on the back of the
22 hands. Left hand has defused swelling. Completely
23 swollen from fingers down to mid hand as well as two
24 fractures of the ring finger. On that head diagram I
25 started, again, using pencil for contusions on the face.

1 Basically, all the contusions and swelling all across to
2 face. She has, underneath her skin, you can feel it she
3 has multiple fractures of the jaw. Her mandible which is
4 the upper jaw with at least eight teeth that were
5 traumatically dislodged or were out.

6 The nasal bone, her eye bones, the right eye, she had
7 blood in her eye as well. The pinkness, again, the
8 lacerations. So we have a different type of head picture
9 on the top of the head. She had a big, long complex
10 laceration that all interconnect. When you have a
11 laceration that interconnects like that, this complex
12 laceration which goes across the right eyebrow and the mid
13 forehead and ends on the top of the head.

14 We'll do the next one, too, and then I'll go over
15 this. The two, if you remember these two lacerations,
16 kind of come to a point here on the forehead, so that's
17 this right here. We're looking at the top of the head
18 with the nose up front and here is the ears. And here is
19 that point of laceration coming up. And then we have
20 this, again, extensive laceration. I counted in the area
21 of four. One, two, three, four. Then we have another
22 bridge here, would be five. One over the eyebrow, six.
23 Base, at least seven. And also the laceration over the
24 lips. So eight on the head and neck area.

25 Here the front of the face and we have again and the

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1 complex laceration there as well as swelling left eye down
2 under -- or above the left lip. And the defused bruising
3 and contusion -- contusion is abusing. Swelling of the
4 face with all the facial bones underneath fractured. And
5 looking at that copy of the top of the head here is the
6 nose and here on either side here is that point of
7 laceration. So it's coming up from the forehead. The
8 forehead is about right here, around we have again complex
9 lacerations underlying the laceration there is abundant.

10 Skull fractures with depressed or dislodged pieces of
11 skull that are actually dislodged and pushed into the
12 brain. We're going to reflect the scalp down so we're
13 going to make that cut behind and put the scalp up over
14 the face. So here we're looking at her head on, and the
15 yellow fracture lines are what we -- kind of piece the
16 skull back together. And this is where the yellow
17 fracture lines ran involving most of the head underlying
18 the brain.

19 And this area is just lacerated because of the
20 extensive fracturing on the facial and forehead area.
21 When it does extend some to the left side of the head as
22 well. And again the purple is associate with those
23 lacerations. The reflected scalp diagram, this is looking
24 at her head on. Again most of the fractures are facial
25 and put up on the forehead under what we call the frontal

1 bone. A little bit on the left side as well. These are
2 the bones that we can fact back together and are embedded
3 in the brain tissue underneath.

4 Q. All right. So, Dr. Presnell, based on all of those
5 injuries it sounded like you gave us eight to the head and
6 neck area; that would be at least eight separate blows
7 there?

8 A. Yes. And then the one to the chest that looks like
9 it is consistent with the back. And then to the back of
10 the hands. So there is at least two areas of striking on
11 the back of the left hand. That's 11, and then the
12 defused area here, since they're not distinctive, I'll
13 just count that as one. So at least 12.

14 Q. Okay. At least 12, but very likely could be more?

15 A. Could be more.

16 Q. And, again, you indicated that she did have defensive
17 injuries that you discussed. I think these were on her --
18 both hands, and those are on the back of the hands?

19 A. Yes.

20 Q. And with two fractures to at least two of those
21 fingers?

22 A. Yes.

23 Q. And those, again, those would come from where someone
24 is lifting their hand up to stop a blow?

25 A. Their location is consistent with that. That is

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1 what -- where we would see defensive injuries.

2 Q. Okay. And, again, I know you've already testified
3 that the injury here to the upper right chest is
4 consistent with an assault by a bat or with a bat?

5 A. Yes.

6 Q. The remaining injuries to the head and the face and
7 the hands, are those also consistent with an assault with
8 a bat?

9 A. Yes, a bat.

10 Q. And based on all of these injuries and what you found
11 as part of your autopsy what is your opinion as to cause
12 of death for Ms. Polston?

13 A. She has the same cause of death as Mr. Polston which
14 is blunt trauma to the head due to beating.

15 Q. And did you also receive a toxicology results for
16 her?

17 A. Yes, she had a therapeutic level of antidepressants.
18 She also actually had a blood alcohol level of
19 13-milligrams per deciliters which is .013; .08 being the
20 level for driving. That being said, you can get some
21 post-mortum production of alcohol by bacteria. I made a
22 notation in the microscopic tissues that I looked at. The
23 tissues I sampled and looked at microscopically. They
24 were starting to breakdown so that very low, low level of
25 alcohol, .013, could be from just post-mortum production

1 from before death from drinking of alcohol as well.

2 Q. Okay, but it's a very low level?

3 A. Very low level.

4 Q. All right. Other than that though she did have some
5 indication of an antidepressant in her bloodstream?

6 A. Yes.

7 Q. Anything else other than those?

8 A. No.

9 Q. Okay. Did you receive -- did the bodies come to you
10 with the clothing?

11 A. Yes, they did.

12 Q. And do you remember what the or do you have an
13 indication as to what the two bodies were clad in at the
14 time you first saw them?

15 A. Yes. Ms. Locklear was wearing a pajama top and
16 pajama bottoms and white panties. And Mr. Polston was
17 wearing a white tee shirt and green shorts.

18 Q. Okay. And did you transfer to -- a sample or a
19 standard of blood for each of those victims to Agent Glenn
20 McLellan?

21 A. Let me double check here. Yes, we did.

22 Q. Okay. Do you remember the date you did that?

23 A. April 16th 2008.

24 Q. Okay. And that was the blood standard for both
25 Robbie Polston and Loyce Locklear?

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1 A. Yes, ma'am.

2 Q. Okay. I don't have any further questions. If you
3 would answer any questions Ms. Crayton has.

4 THE COURT: Cross-examination, Ms. Crayton.

5 MS. CRAYTON: Thank you, Your Honor.

6 CROSS-EXAMINATION

7 BY MS. CRAYTON:

8 Q. Dr. Presnell, tell me a little bit about why there is
9 no time of death listed on your report?

10 A. We have listed as the date of death is June 29th to
11 the 30th and time of death is unknown. We would be able
12 to narrow it down just by the autopsy examination.

13 Q. Okay. And can you explain to me a little more about
14 the rigor and how that -- how you determine if it's -- if
15 it could be within those dates or not?

16 A. Again, the whole development of the labor mortis or
17 rigor mortis or liver mortis. I'm not exactly sure which
18 way to say it. It's so variable.

19 Q. And are you saying that the findings are consistent
20 with the late evening of the 29th, early morning of the
21 30th?

22 A. Yes, they are. It certainly could have happened at
23 6:00 a.m. as well, too. It doesn't exclude that. To
24 further expound on, for example, these two individuals.
25 Their lividity was fixed, and they've been deceased long

1 enough for the blood to settle. For it to settle and come
2 down their blood vessels. For it to start to go out of
3 the blood vessels in the soft tissues and stay there. And
4 then -- so that process is an eight to 12 plus hour
5 process.

6 We also know that her rigor mortis or rigidity of two
7 out of four, so the full stiffness. Because we know that
8 liver mortis is already on the after being fixed stage we
9 know that the rigor mortis, at it being since it's a two,
10 is probably not just getting it's maximum stiffness. It's
11 already been at its maximum stiffness and now it's
12 starting to dissipate.

13 The dissipation, remember I said that when we were
14 looking at a tissue microscopically you start to see
15 breakdown of the structures. That is supported, again, of
16 the decomposition starting to set in. The proteins that
17 would normally hold the muscles together for rigor mortis
18 are starting to breakdown. That's why it's starting to
19 let go and slide apart.

20 Again, being on opposite side of the whole spectrum
21 of developing and having it leave. So in that manner
22 that -- if you say a 24 to 36 hour process plus then that
23 does put it back in that timeframe of late evening, early
24 morning. But it doesn't hold it there. It doesn't mean
25 that it couldn't have happened four hours before or six

1 hours later.

2 Q. And are there things that speed up or slow down this
3 process?

4 A. I kind of referred to it earlier that with rigidity
5 you -- or rigidity develops because the energy in your
6 body is gone. It's used up. A.T.P. is gone. If you have
7 some kind of struggle before death then you can use up a
8 lot of that energy before you actually die so you don't
9 have the same reserve. And that actually hastens the
10 process. Certainly, in these two cases you would expect
11 that there was a certain degree of struggling especially
12 with defensive injuries.

13 Q. When you were performing these autopsies are there
14 any law enforcement present?

15 A. No, law enforcement did not attend the autopsies.

16 Q. Do you have law enforcement attend regularly in your?

17 A. Well, it's really the coroner's decision, but often
18 times in a homicide case, law enforcement will attend.

19 Q. Okay. And did law enforcement provide you with what
20 they thought the murder weapon was for comparison?

21 A. No. We did not see the suspected murder weapon.

22 Q. And do they often times bring you the murder weapon
23 in homicide cases?

24 A. Well, we try to get them to. I'd say we don't have a
25 great success rate on that. We do ask if they're

1 attending if they could.

2 Q. Did you take fingernail scrapings from both of the
3 autopsies?

4 A. I think one -- I think Robbie had his nails bit down
5 to the quick. Hold on. Let me check. What we did for
6 Ms. Locklear is instead of scrapings we just did
7 fingernail clippings so we would get everything. So we
8 obtained fingernail clippings on her.

9 Q. I'm sorry. You did or didn't?

10 A. We did.

11 Q. Okay?

12 A. And then, Mr. Polston, we do not have fingernail
13 clippings. I made a note in here that the fingernails are
14 cut to the nail bed. They're cut to the quick, so there
15 really wasn't anything to clip off.

16 Q. But you did take it from her's, correct?

17 A. Yes. Yes.

18 Q. And did you -- did law enforcement come to you and
19 pick that up for testing?

20 A. We transferred the clothing and the fingernail
21 clippings from her on March 20th 2008.

22 Q. Okay. And do you know if those were tested?

23 A. I don't know what they did with them after that.

24 Q. Okay. All right. And just one last question. Do
25 you have anything, any physical evidence that anything

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1 that shows Mr. Gathings was connected to these murders?

2 A. I'm not sure who Mr. Gathings is. So, no.

3 Q. Okay. He's the defendant in this case. Thank you so
4 much. Dr. Presnell.

5 THE COURT: Re-direct?

6 MS. MUNNERLYN: Court's indulgence just one minute,
7 Your Honor.

8 THE COURT: Yes, ma'am.

9 MS. MUNNERLYN: No further questions, Your Honor.

10 THE COURT: All right, Doctor. Thank you very much.
11 You want to make sure that you get these exhibits,
12 Ms. Munnerlyn. Make sure they are in order. Would you
13 like to have this witness excused?

14 MS. MUNNERLYN: Yes, sir, Your Honor.

15 THE COURT: Objection, Mr. Jones?

16 MR. JONES: No, Your Honor.

17 THE COURT: All right, Ms. Munnerlyn.

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19 MS. MUNNERLYN: Your Honor, the State would rest at
20 this time.

21 THE COURT: All right. All right, ladies and
22 gentlemen of the jury, you heard the Assistant Solicitor
23 announce that the State has rested. That means that you
24 have heard all of the evidence that you will hear from the
25 State at this time. There are matters of law which I now

1 need to take up with the attorneys involved, and I have to
2 do this on the record and outside of your presence. So I
3 am going to ask that you go to your jury room, but I will
4 caution against discussing this matter at that time.

5 It is still premature for you to begin any discussion
6 of this matter. You have not heard everything that you
7 will hear. So if you would go to your jury room, relax
8 for a minutes while I take up these matters of law, and we
9 will send for you very shortly. But do not discuss the
10 case amongst yourselves. Thank you. You may go with the
11 bailiffs.

12 (WHEREUPON, the jury panel was excused from the
13 courtroom at 12:50 p.m.)

14 THE COURT: All right. Counsel, are there motions on
15 behalf of the Defendant.

16 MR. JONES: Yes, sir, Your Honor. At this time
17 defense makes a motion for a directed verdict as to all
18 three charges. We feel that there is a failure of
19 competent evidence linking this defendant to either the
20 murders or the larceny of the car. Simply, as to the
21 larceny, Your Honor, I think the bulk of the testimony
22 that I recall is that Mr. Gathings actually had permission
23 to drive that car frequently. Actually drove both of the
24 victim's two cars, the red car and the blue car.

25 Simply as to the grand larceny, we ask for directed

1 verdict due to a failure of competent evidence. As to the
2 murder with feel the same way, Your Honor.

3 THE COURT: All right. Ms. Munnerlyn.

4 MS. MUNNERLYN: Your Honor, as to the car there was
5 testimony that he was allowed to drive that car to and
6 from work, and there had been some -- there is testimony
7 in the record that they were looking for him and having
8 others look for him on that day and for the car. There
9 was a concern for where they were. So I think that
10 certainly is a question.

11 And if in fact they find that he murdered them then I
12 think it's certainly up to the jury to determine whether
13 or not they feel the larceny was taken without permission.
14 And so I think that is certainly an issue for the jury
15 based upon their determination in the two murder counts.

16 THE COURT: All right. Rule 19 of th South Carolina
17 Rules of Criminal Procedure, 19A, provides that's "On
18 motion of the defendant the Court shall direct a verdict
19 in the defendant's favor on any offense charged in the
20 indictment after the evidence on either side the closed if
21 there is a failure of competent evidence tending to prove
22 the charge in the indictment."

23 I've always thought that the use of the word,
24 'competent' in that rule is an unfortunate choice of words
25 because it implies weighing the evidence or determining

1 the truthfulness of the evidence. That's not true at all.
2 Failure of competent evidence as used in the rule means
3 admissible evidence or evidence in the record. The rule
4 goes on to say, "In ruling on the motion of trial judge
5 should consider only the existence or non-existence of the
6 evidence and not its weight," and that pretty well
7 clarifies the term, 'competent evidence'.

8 However, in the task force that I chair to make
9 recommendations to the Supreme Court for changes in the
10 criminal rules one of the changes that has been
11 recommended is to remove to words, 'competent evidence'
12 and to make the rule read, "If there is a failure of
13 evidence in the record." In this case think there is
14 evidence in the record to prove all three charges.

15 It's not my job to weight the evidence; that is the
16 jury's determination. But there is definitely evidence in
17 the record, all be it some of it circumstantial, but some
18 of it direct, of the offense of all three charges. There
19 is evidence in the record that ties this defendant to
20 those homicides through the shoe impressions, through the
21 bat and especially through the D.N.A.

22 I also feel like there is evidence in the record that
23 would prove the larceny of the vehicle if it has been
24 shown that during the period of time, either before and
25 after the homicides in this case, that the defendant was

1 in possession of the vehicle in Horry County. And I think
2 it is a jury issue as to whether he was in possession of
3 that vehicle lawfully. I would therefore respectfully
4 deny the motion for directed verdict on all three charges.

5 Now, we'll need to determine, Mr. Jones and
6 Ms. Crayton, from the defendant about what he wishes to do
7 with regard to his Fifth Amendment rights. However, in --
8 before doing that, Ms. Munnerlyn, I think it's appropriate
9 to advise the defendant and advise the defense counsel of
10 what you think would be impeachable offenses under Rule
11 609. 608, 609. Let me look at it.

12 MS. MUNNERLYN: Okay, Your Honor.

13 THE COURT: 609, yeah.

14 MS. MUNNERLYN: Okay, Your Honor, I'm just going
15 through his record. In 2005 he, of course, had the
16 charges that are already in evidence that he pled to.

17 THE COURT: What is it. Just outline them. What are
18 they.

19 MS. MUNNERLYN: The strong armed robbery and the
20 grand larceny and the assault and battery. Of course,
21 those are already -- there is evidence of those already in
22 evidence.

23 THE COURT: Okay. All right.

24 MS. MUNNERLYN: And then in addition, at that same
25 time, he had a conviction for criminal domestic violence

1 of a high and aggravated nature.

2 THE COURT: That was in '05 as well?

3 MS. MUNNERLYN: Yes, sir.

4 THE COURT: Okay.

5 MS. MUNNERLYN: In 2001, Your Honor, he had a strong
6 armed robbery and an assault and battery of a high and
7 aggravated nature he was convicted of.

8 THE COURT: Okay. And use of vehicle without
9 permission in 2004?

10 MS. MUNNERLYN: I think that's it, Your Honor.

11 THE COURT: All right, Mr. Crayton, Mr. Jones, do you
12 agree or disagree that these offenses were all fall within
13 the purview of 609 and could be used for impeachment
14 purposes?

15 MR. JONES: One second, Your Honor.

16 MS. MUNNERLYN: There is forgery. Five counts of
17 forgery in 2001 as well.

18 THE COURT: In 2001, five counts of forgery. All
19 right.

20 MR. JONES: Your Honor, we agree that's the
21 defendant's record.

22 THE COURT: All right then, those five offenses or
23 five separate matters, '01, five counts of forgery; 2001,
24 strong armed robbery and A.B.H.A.N.; 2004, use of vehicle
25 without permission; '05, strong armed robbery, grand

1 larceny, assault and battery; and '05, C.D.V. H.A.N. would
2 be offenses that could be used for impeachment purposes.
3 All right. Mr. Jones and Ms. Crayton, is your client
4 ready to advise the Court of his position with regard to
5 the Fifth Amendment?

6 MS. CRAYTON: Yes, sir.

7 MR. JONES: Yes, sir.

8 THE COURT: All right. Mr. Gathings, of you will
9 stand again, please. Yesterday I advised you of your
10 rights under the Fifth Amendment to the Constitution of
11 the United States and your privilege against
12 self-incrimination. At that time you advised me that you
13 understood those rights; is that correct?

14 MR. GATHINGS: Yes, sir.

15 THE COURT: Have you also had an opportunity to
16 discuss these rights with your attorneys?

17 MR. GATHINGS: Yes, sir.

18 THE COURT: Do you have any question you wish to ask
19 me or your attorneys with regard to your Fifth Amendment
20 rights?

21 MR. GATHINGS: No, sir.

22 THE COURT: Have you made a decision as to whether
23 you wish to -- do or do not wish to testify in this case?

24 MR. GATHINGS: Yeah, I made a decision.

25 THE COURT: You made a decision. All right. Is that

1 decision on your part freely and voluntarily made?

2 MR. GATHINGS: Yes, sir.

3 THE COURT: And what is that decision?

4 MR. GATHINGS: Not to testify.

5 THE COURT: You do not wish to testify?

6 MR. GATHINGS: No, sir.

7 THE COURT: All right. The defendant, after having
8 been advised of his Fifth Amendment privilege against
9 self-incrimination by both the Court and his attorneys has
10 made a freely, voluntarily and knowingly and intelligent
11 decision to exercise that right and not testify in this
12 case. Thank you, sir. You may be seated.

13 All right. Mr. Jones, Ms. Crayton, does the
14 defendant intend to offer any other testimony, other
15 evidence in this matter?

16 MR. JONES: He does, Your Honor.

17 THE COURT: All right. Then we will take about a ten
18 minute recess and we will be ready to go forward with the
19 defendant's presentation of his case. Thank you.

20 (WHEREUPON, Court is in recess at 3:01 p.m. and
21 reconvened at 3:11 p.m.)

22 THE COURT: All right. We're back on the record with
23 regards to the matter of the State v. Allen Joe Gathings.
24 Indictment Number 07-887, 888 and 909. The defendant is
25 present with his counsel. The State is present and

1 represented by Ms. Munnerlyn. Prior to the break the
2 defendant advised the Court that he wished to exercise his
3 constitutional right to remain silent. The Court will
4 respect that decision. The Court is also advised that the
5 defendant does have evidence that he wishes to have
6 presented to the jury. And we will go into the
7 defendant's case that this time. Anything before we bring
8 the jury in, Ms. Munnerlyn?

9 MS. MUNNERLYN: Your Honor, I was just reviewing the
10 record of one of their witnesses.

11 THE COURT: Okay.

12 MS. MUNNERLYN: I'm assuming they're going to call
13 Carl Moore.

14 MR. JONES: We are.

15 THE COURT: All right. Let me look at the witness
16 list. Okay, I have the Defendant's witness list.

17 MS. MUNNERLYN: And he does have petit larceny and
18 ---

19 THE COURT: Had what, petit larceny?

20 MS. MUNNERLYN: Yes, sir, petit larceny. And Court
21 date is 6/17/97. Looking for dispositions after that
22 date. Does have some other convictions, Your Honor.
23 They're beyond the ten year.

24 THE COURT: Well, wouldn't the petit larceny be
25 beyond the ten year?

1 MS. MUNNERLYN: It is. Well, as far as -- well, it's
2 beyond the ten years from today, yes, sir.

3 THE COURT: Well, isn't that the test?

4 MS. MUNNERLYN: Yes, sir. I think for a witness it
5 is.

6 THE COURT: It is. Well, it's not something that
7 would be punishable by imprisonment for more than a year.
8 But fall under that portion of the rule which allows
9 evidence that the witness has been convicted of a crime
10 involving dishonesty regardless of the punishment. And
11 that would be a crime involving dishonesty, however, I
12 think the time limit is still applicable.

13 MS. MUNNERLYN: Yes, Your Honor, that would be the
14 one I would be going under.

15 THE COURT: 609(b).

16 MS. MUNNERLYN: That is right.

17 THE COURT: So do you contend that the evidence of
18 the petit larcenies is or is not admissible for
19 impeachment purposes?

20 MS. MUNNERLYN: Your Honor, my only thing is it is
21 probative as to the credibility of this witness, and it is
22 just outside of the -- it was 13 years ago on the issue of
23 dishonesty. But, obviously, the question is does that
24 time limit apply to all of those particular convictions,
25 and I would just like the Court to consider that rule and

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1 determine if in fact the time limit requirement is
2 applicable to all conviction for even witnesses.

3 THE COURT: All right. I'll hear from the Defense.

4 MR. JONES: Your Honor, we would just contest the use
5 of that. Clearly, it is outside of the ten year statute,
6 and it is highly prejudicial of the fact for its use.

7 THE COURT: Well, it doesn't fall within the
8 punishment by more than a year portion of the rule. It
9 falls within the 609(a)2 involving the crime of
10 dishonesty. The question come as to whether or not the
11 fact that it was in 2007 makes it an exclusion under
12 609(b).

13 It's my view that in view of the particular crime of
14 petit larceny and the time limit length of 13 years that
15 the probative value of the conviction does not
16 substantially outweigh its prejudicial effect. I find
17 that the prejudicial evidence outweighs the probative
18 value. I would not allow that conviction to be used for
19 impeachment purposes.

20 MS. MUNNERLYN: Thank you, Your Honor.

21 THE COURT: All right. Anything else, Ms. Munnerlyn?

22 MS. MUNNERLYN: No, Your Honor. Your Honor, I
23 just -- they have handed me an exhibit they wanted to
24 introduce regarding some S.C.D.C. records, and indicated
25 they didn't have the witness. Couldn't get the witness

1 until later. Although I don't really have a specific
2 objection because I don't know what one sheet in there is
3 really for. It just confirms that Robbie Polston did go
4 and visit ---

5 THE COURT: Well, as I understand it you don't --
6 your objection is not from the authenticity of the
7 records; is that correct? You're not requiring somebody
8 to come and authenticate the record?

9 MS. MUNNERLYN: Right. Except for the page I don't
10 know what it is.

11 THE COURT: All right.

12 MR. JONES: We'll figure it out. Your Honor, I think
13 we do have an agreement now. We have pulled ---

14 THE COURT: All right. Now, you have -- you propose
15 to introduce something. Tell me what it is.

16 MR. JONES: I have a -- and I have not counted cause
17 we just pulled some pages out, but I have a group of pages
18 which are records -- inmate records from South Carolina
19 Department of Corrections that reflect that during the
20 time Mr. Gathings was incarcerated from 2005 until 2007 in
21 April that his visitor list, is the first page, and his --
22 the source of any funds that he received are all the rest
23 of the pages.

24 Q. All right. You want to staple it together and make
25 it one exhibit?

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1 MR. JONES: Yes, sir. That would be great.

2 THE COURT: You agreeable to that, Ms. Munnerlyn?

3 MS. MUNNERLYN: Yes, sir. We've removed the pages
4 that I have objection to.

5 THE COURT: All right. So then it would become
6 Defendant's Exhibit One. Okay, Defense Exhibit One
7 admitted into evidence by agreement. Let her mark it.

8 (WHEREUPON, Defendant's Exhibit No. 1 was marked for
9 identification and received into evidence.)

10 THE COURT: All right. Anything else before we bring
11 the jury in?

12 MR. JONES: No, sir.

13 THE COURT: All right. Bring the jury in.

14 (WHEREUPON, the jury panel enters the courtroom at
15 3:12 p.m.)

16 THE COURT: All right, ladies and gentlemen, thank
17 you for your patience. We have now finished all the legal
18 matters that we needed to do, and as I told you before the
19 recess the defendant or the State has presented their case
20 to you and you have heard all the exam that you will hear
21 from tell at this time or at the present time. However,
22 the Defense does have the right to present any testimony
23 or evidence to you that they wish to present and will be
24 permitted to do so at this time. Mr. Jones or
25 Ms. Crayton, you may provide.

1 MR. JONES: Thank you, Your Honor. At this time the
2 Defense calls Mr. Carl Moore.

3 THE COURT: All right.

4 CARL MOORE, after being duly sworn, testified as
5 follows:

6 CLERK OF COURT: Thank you. Please be seated and
7 state your full name for me.

8 THE COURT: All right. All right, Mr. Jones.

9 DIRECT EXAMINATION

10 BY MR. JONES:

11 Q. Mr. Moore, would you please state your full name for
12 me, please?

13 A. Carl Francis Moore.

14 Q. Mr. Moore, where do you live?

15 A. Horry County. Conway. Right outside of Conway.

16 Q. And how long have you lived in Conway?

17 A. All my life I lived there.

18 Q. All right, sir. And are you employed? Do you work
19 anywhere?

20 A. Yes, sir.

21 Q. What do you do?

22 A. I finish Drywall.

23 Q. That's construction type work?

24 A. Yeah, sheetrock.

25 Q. And how long have you been doing that?

- 1 A. Forty years.
- 2 Q. How long?
- 3 A. Forty years.
- 4 Q. Forty years. And, Mr. Moore, do you know Mr. Allen
- 5 Joe Gathings?
- 6 A. I know him by Joe.
- 7 Q. You know him as Joe?
- 8 A. Yeah.
- 9 Q. Okay. How long have you known Joe?
- 10 A. All his life.
- 11 Q. Did he grow up around you?
- 12 A. Not far from me.
- 13 Q. All right. Mr. Moore, let me move you back till the
- 14 weekend of June 29th 2007. You recall that weekend?
- 15 A. Yes, sir.
- 16 Q. All right. Did you have occasion to see Joe that
- 17 weekend?
- 18 A. Yeah.
- 19 Q. Can you tell me when you first saw him?
- 20 A. About, between 3:30 and four o'clock on Friday
- 21 evening.
- 22 Q. Friday evening?
- 23 A. Yes, sir.
- 24 Q. All right. And that's the 29th; is that correct?
- 25 A. Well, I don't know the date.

1 Q. All right, sir. But it was Friday?
2 A. Yes.
3 Q. How you know it was Friday?
4 A. I know he stayed three nights and they got him
5 Wednesday. I meant Monday.
6 Q. Okay. All right. We'll get to that in just a
7 minute?
8 A. Okay.
9 Q. Tell me about what time you first saw Joe on Friday
10 afternoon?
11 A. I'm going to say 3:30.
12 Q. Why do you say 3:30?
13 A. Well, I was fixing to walk to my landlord's house.
14 And I went over there every evening about 3:30,
15 four o'clock.
16 Q. And was there a specific reason why you went to your
17 landlord's?
18 A. He's a real good friend of mine, and I went over
19 there every day and talked to him.
20 Q. Okay. So that was a routine you had back then?
21 A. Yes.
22 Q. All right. Did Joe appear at your hour before you
23 went over there or after you came back?
24 A. I started out the door to go over there, and Joe
25 pulled up.

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- 1 Q. And what was he driving?
- 2 A. A blue car. I don't know what kind. Blue. It was a
- 3 blue car.
- 4 Q. All right. And back then tell me where you were
- 5 living?
- 6 A. Morris Carter Road.
- 7 Q. And is that right outside of Conway?
- 8 A. Yes, sir.
- 9 Q. Okay.
- 10 A. On down the road.
- 11 Q. Okay. And were you living in a house, mobile home?
- 12 A. A camper.
- 13 Q. In a camper?
- 14 A. Yes.
- 15 Q. Did you own that camper? Was it yours?
- 16 A. Yes.
- 17 Q. And was it in a -- where was it located? I know you
- 18 gave me the address. Describe where it was located?
- 19 A. Well, it was behind trailer facing the dirt road.
- 20 Q. Okay. And I guess my ---
- 21 A. Mine was facing the landlord's house.
- 22 Q. All right. And I guess my question is was it off by
- 23 itself or was it in a neighborhood?
- 24 A. It was between -- well, there were two trailers.
- 25 There was the man that lived in front of me and then there

1 is a lady that lives on the right hand side there.

2 Q. Okay. And how long have you been living there before
3 that weekend?

4 A. Probably about two, two and a half years.

5 Q. Okay. All right. Now, when Joe came to your house
6 on Friday afternoon somewhere around 3:30 or 4:00 what did
7 y'all do?

8 A. I just told him to come on in. I didn't even walk to
9 the landlord's house right then, and asked him later to
10 take me to the store and he did.

11 Q. All right. From Friday afternoon until -- was it
12 Sunday or Monday?

13 A. It was Monday when they come out there.

14 Q. All right. When you -- we're going to get there, but
15 when you talk about they that's when he was arrested?

16 A. Yes, the police.

17 Q. Okay. From Friday until Monday tell me what y'all
18 did?

19 A. We rode around. We drank a little, and we told a few
20 jokes.

21 Q. From that time Friday afternoon until the time he was
22 arrested were you ever apart from him or did you stay
23 together the whole time?

24 A. He was right there with me the whole time.

25 Q. All right.

- 1 A. Where he went I went.
- 2 Q. Okay. When you went somewhere what vehicle did you
- 3 go in?
- 4 A. That blue car.
- 5 Q. Okay. He was the driver all the time?
- 6 A. Yes, sir.
- 7 Q. Okay, sir. Now, you said you drank a little bit and
- 8 you did a few drugs. Truth of the matter is you drank a
- 9 lot and did a lot of drugs, didn't you?
- 10 A. Well, Joe didn't drink they much. I drank a lot of
- 11 beer.
- 12 Q. Yeah, okay. Was he doing some drugs of some sort?
- 13 A. We both were.
- 14 Q. What kind?
- 15 A. Cocaine.
- 16 Q. Cocaine. Where did it come from? Did he bring it
- 17 with him?
- 18 A. No. We went and bought it. I purchased it myself.
- 19 Q. With your money?
- 20 A. Yeah.
- 21 Q. Okay. Did he spend any money?
- 22 A. Not that I seen.
- 23 Q. All right. So you entertained him that whole
- 24 weekend?
- 25 A. Yeah.

1 Q. All right. While he was there that weekend you rode
2 around some. Did you go in stores? Did you go anywhere
3 else?

4 A. I went to Waccamaw Grocery, and I believe we went to
5 the Quick Shop. That's the only two stores that I
6 remember going to except the liquor store one time.

7 Q. How far away are those stores from your house?

8 A. Well, Waccamaw was 1 mile, and the Quick Shop was
9 about 3-miles.

10 Q. Okay. And do you recall your purchases there? What
11 did you buy?

12 A. Beer and gas.

13 Q. How about food? Did you have food at the place or
14 did you have to buy food?

15 A. Oh, yeah, I got food at my house.

16 Q. Okay. Now, Carl, how about on Saturday morning. Do
17 you remember going to the bank with Joe?

18 A. Bank?

19 Q. Yes.

20 A. No.

21 Q. You remember what time you got up Saturday morning?

22 A. Well, I get up early every morning. I get up at
23 daylight.

24 Q. Okay. If Joe went to the bank you didn't go with
25 him?

1 A. He didn't go to the bank that I know of.

2 Q. You don't remember him going to the bank?

3 A. No.

4 Q. Okay. Now, during the whole time that he was with

5 you do you recall any marks that he had anywhere on his

6 face?

7 A. Uh huh. No, sir.

8 Q. Did he have any injuries on his face of any kind?

9 A. No, sir.

10 Q. Specifically on nose and above his eyebrows?

11 A. No, sir.

12 Q. On Monday the police came to your house; is that

13 correct?

14 A. Monday evening, yes, sir.

15 Q. All right. And I believe after that time after quite

16 on ordeal ---

17 A. Joe was arrested.

18 Q. --- Joe surrendered to the police; is that correct?

19 A. Yes, sir.

20 Q. Were you present when he was -- when he actually came

21 out of your house?

22 A. I was right there at the landlord's daughter's house.

23 Q. Okay. So you weren't right there when he came out?

24 A. No, sir. I was sitting on the door steps when they

25 brought him by the door steps.

1 Q. All right. So you did see him after he was arrested?

2 A. Yes.

3 Q. Very good. And I believe that you actually talked to
4 the police yourself that day, did you not?

5 A. Yes. I talk to Joe Sellers.

6 Q. And he's an officer?

7 A. Yeah, I knew him.

8 Q. All right. And did you pretty much tell him the same
9 thing that you and I are talking about right now?

10 A. Yes.

11 Q. Okay. Anything else significant about that weekend
12 that Joe was with you?

13 A. No, sir.

14 Q. All right. The car that he drove did she park it by
15 your camper?

16 A. Yes.

17 Q. Did he hide it from anybody?

18 A. No. It sitting right in front of the yard.

19 Q. Okay. Did he have any visitors of any kind while he
20 was there other than you?

21 A. No, sir.

22 Q. All right.

23 MR. JONES: One second, please, Your Honor. Thank
24 you. That's all I have.

25 BY MR. JONES:

1 Q. Please answer any questions the State might have.

2 THE COURT: Cross-examination, Ms. Munnerlyn.

3 MS. MUNNERLYN: Thank you, Your Honor.

4 CROSS-EXAMINATION

5 BY MS. MUNNERLYN:

6 Q. Mr. Moore, how old are you?

7 A. Fifty-four.

8 Q. And you've been doing construction for 40 years?

9 A. Yes, ma'am.

10 Q. So you've been work since you were 14?

11 A. I had to quit school when I was 13 to help my momma.

12 Q. Okay. And you've known Joe all your life? All his
13 life?

14 A. All his life, yes.

15 Q. Did he live in that trailer park where you're living?

16 A. No.

17 Q. Where did you grow up together?

18 A. Well, where he lived at was up on Edge Bay Road and
19 that's in Conway. That's where ---

20 Q. You knew his mother?

21 A. Yeah. She was a real good friend of mine.

22 Q. Okay. She's not here today, is she?

23 A. She passed away.

24 Q. Okay. When did she pass away?

25 A. A year ago. I think it was somewhere around there.

- 1 Q. She was living at the time of this incident, wasn't
2 she?
- 3 A. Yes.
- 4 Q. In fact she didn't live far from where you lived?
- 5 A. She stayed somewhere next up -- somewhere up that
6 way.
- 7 Q. Not too far from where you live?
- 8 A. About 40-miles.
- 9 Q. Quarter of a mile?
- 10 A. Forty or 50-miles.
- 11 Q. Forth or 50-miles? Was it in Horry County?
- 12 A. Wideville, North Carolina.
- 13 Q. Into North Carolina?
- 14 A. Yeah.
- 15 Q. So you're saying that she wasn't living close to you
16 at that time?
- 17 A. Uh huh.
- 18 Q. What was her name?
- 19 A. Nola.
- 20 Q. Nola?
- 21 A. Nola.
- 22 Q. Nola. N-O-L-A?
- 23 A. I really don't know. I know how she spells it.
- 24 Q. No question that you were doing a lot of drinking and
25 drugging that weekend?

- 1 A. Yes.
- 2 Q. You and Joe both?
- 3 A. Yeah.
- 4 Q. And you saw him doing some cocaine?
- 5 A. We done it in my trailer.
- 6 Q. You did it together?
- 7 A. Yeah.
- 8 Q. Quite a bit of it?
- 9 A. Well, not a whole lot. I mostly drank, and he, well,
- 10 he didn't drink, I don't think, hardly any alcohol.
- 11 Q. Okay?
- 12 A. He went and got a little bit of cocaine. That was
- 13 it. It wasn't that much.
- 14 Q. But you did it for three days?
- 15 A. Yeah.
- 16 Q. While he was there?
- 17 A. Yeah.
- 18 Q. Okay. And you said you recall talking with Doug
- 19 Sarvis? Doug Sarvis?
- 20 A. Yes, ma'am.
- 21 Q. You did talk with him?
- 22 A. He was the only one I did. He was the only one of
- 23 the police officers that I knew.
- 24 Q. He's the only one you knew?
- 25 A. Yeah, personally.

1 Q. He interviewed you, did he not?

2 A. Yeah.

3 Q. Okay. And you gave him a taped statement?

4 A. Yes.

5 Q. He was ---

6 A. Well, I told him what went down all weekend except I
7 didn't tell him that we done no drugs. I told him we were
8 together.

9 Q. So you remember giving that statement?

10 A. Ha?

11 Q. You remember giving him a statement?

12 A. I remember talking to him about it.

13 Q. Okay. All right. And you gave him that statement on
14 the same date that they were trying to get Joe out of your
15 house?

16 A. Yeah.

17 Q. In fact ---

18 A. That's the only time I seen him.

19 Q. That's the only time you saw him?

20 A. That's the only time I seen Doug.

21 Q. That was on that Monday, July 2nd, right?

22 A. Well, yeah, whatever day it was. I don't know.

23 Q. Because you came out of the house and that's when
24 they approached you. And they asked you if Joe was in
25 your house?

1 A. He says if Allen Joe Gathings. I thought Joe's name
2 was Joe Gaskins. I didn't even know it was Gathings.

3 Q. So you didn't even know what his true last name was?
4 You don't even know what his real last name was?

5 A. No.

6 Q. You thought it was Gaskins?

7 A. I asked Vernon Martin what his last name was, and he
8 said Gaskins cause Joe used to help him.

9 Q. But you told him, yeah, there was a Joe in your
10 camper?

11 A. I did. I said, "Joe is in there."

12 Q. Okay. And he went out and he questioned you about
13 that, about when Joe got there; didn't he?

14 A. Yeah; that was a little later on when he walked over
15 to the trailer where I was at with my landlord's daughter
16 cause she gave me cigarettes while I was sitting over
17 there.

18 Q. While you were talking to him?

19 A. Well, they wouldn't let me go back in my house cause
20 he was in there.

21 Q. Okay. I'm just asking you about when you talked to
22 Doug Sarvis?

23 A. A little while after I got out the house.

24 Q. Okay. But it was on the same date they were
25 arresting Joe from your house?

1 A. Yes, ma'am.

2 Q. That was on July 2nd?

3 A. Yes, ma'am.

4 Q. Okay. All right. And you told him on that date,
5 first of all, you said that, "He came here yesterday
6 evening;" isn't that right? You said, "Yes, sir." Didn't
7 you tell him that?

8 A. No.

9 Q. You deny that? All right. Okay and then you ---

10 A. I know they didn't. That would have been a Sunday,
11 and there was no way cause he done spent three nights
12 there.

13 Q. Okay. Then you went on -- he went on to question
14 you. He was asking you, "What's his name," and you
15 stated, "Joe Gathings."

16 A. I said Joe Gaskins? I said Joe Gathings.

17 Q. And he said to you, "That's the name he give you?
18 How long has Joe been here?" And you responded, "He come
19 here Friday evening."

20 A. Yeah.

21 Q. That's what you said?

22 A. Right?

23 Q. Friday evening?

24 A. Well.

25 Q. Isn't that right?

- 1 A. I just told him about 3:30, four o'clock.
- 2 Q. But that's not what you told Doug Sarvis? You said
- 3 he came Friday evening?
- 4 A. 3:30, four o'clock is evening.
- 5 Q. But you didn't say 3:30 to 4:00 to Doug, did you?
- 6 A. No, I didn't. I figured he didn't need to know all
- 7 that.
- 8 Q. Then ---
- 9 A. I didn't know what was going on.
- 10 Q. You didn't have any idea anything was going on with
- 11 Joe? You didn't have any idea?
- 12 A. I didn't have no idea that the law was even hunting
- 13 him or I wouldn't have been riding around with him.
- 14 Q. Okay. Didn't he ask you, "Okay. Did you know that
- 15 you were telling me earlier that you suspected something
- 16 maybe wrong?" And you responded, "Well, when I went to
- 17 the store with him he said he didn't want to park in front
- 18 of the door cause he didn't want nobody out there to know
- 19 he was here." Didn't you tell Doug that?
- 20 A. He pulled in front of the gas pumps, but no, I ain't
- 21 told Joe not to park in front of the door.
- 22 Q. Okay. That's not what I'm asking you. What I'm
- 23 asking you is did you tell Doug Sarvis, "When I went to
- 24 the store with him he said he didn't want to park in front
- 25 of the door cause he didn't want nobody out there to know

1 he was here." Are you denying that?

2 A. Yeah, because he didn't want to momma to know he was
3 there.

4 Q. He said that he didn't want his momma to know he was
5 there. Why was that?

6 A. I have no idea.

7 Q. You asked him about the car. Why he was parking the
8 car there, wasn't in the front; isn't that right? You
9 said you asked him about that, and he said that he didn't
10 want his momma to pull up here and see him here?

11 A. He parked in front of the gas pump. That's right in
12 the front of the door.

13 Q. I'm asking you at your house now?

14 A. Oh, at the house he parked right in my front yard.
15 He didn't know that was the car that he was even driving.

16 Q. And then he went on to ask you and you took it that
17 he was trying to hide the car that night; is that correct?
18 And you responded, "Yeah."

19 A. No, he never tried to hide the car.

20 Q. So you're denying you said any of this?

21 A. I didn't tell the law that. No.

22 Q. Where did he tell you he was living at the time?

23 A. He told me he was heading into Surfside. He didn't
24 say nothing about where he lived. And he asked me if he
25 could crash at the house for a couple nights, and I said,

1 yeah, fine.

2 Q. Okay. And you brought some gas for him?

3 A. Yes, ma'am.

4 Q. When was that?

5 A. I brought gas all three days he was there.

6 Q. All three days you brought gas?

7 A. Yes.

8 Q. You spent at least \$30 worth on one day?

9 A. No, I ain't never bought that much in one day.

10 Q. So how much did you spend?

11 A. I spent \$5 worth at a time. Gas wasn't as high as it

12 is now.

13 Q. So are you saying you spent \$5 each day?

14 A. I spent \$5 about every trip we went to the store.

15 Q. And how often did you go to the store?

16 A. At least a couple times a day, ma'am.

17 Q. Okay. And but I thought you just testified you only

18 went to Waccamaw and Quick Shop and then the liquor store

19 ---

20 A. And that's the only two stores ---

21 Q. --- One time?

22 A. In the neighborhood we went to and then I had him

23 drive me to the liquor store. And one time up and down.

24 Q. And then you had to drop him at the liquor store one

25 time?

1 A. He drove me to the liquor store.

2 Q. So how much did you spend in gas?

3 A. Probably no more than \$20, \$25 at the most.

4 Q. Okay. So you would deny that you told Doug Sarvis
5 that, "He said he was going to stay the night because he
6 didn't no gas so I bought him \$30 worth of gas?"

7 A. No, I never said.

8 Q. You never said any of that?

9 A. No, ma'am.

10 MS. MUNNERLYN: Your Honor, may we approach.

11 THE COURT: Yes, ma'am.

12 (WHEREUPON, a bench conference was held off the
13 record in the presence of the jury, but out of the
14 hearing of the jury.)

15 THE COURT: All right. Ms. Munnerlyn, you propose to
16 offer a prior inconsistent statement under Rule 613(b); Is
17 that correct.

18 MS. MUNNERLYN: That is correct, Your Honor.

19 THE COURT: All right. And that's in the form of
20 what? A tape?

21 MS. MUNNERLYN: Yes, Your Honor.

22 THE COURT: All right. Is there any objection from
23 the Defense.

24 MR. JONES: Your Honor, we have a transcript of that,
25 and as long as the statement conforms to the transcript we

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1 don't have an objection.

2 MS. MUNNERLYN: Your Honor, if they would rather I
3 would be happy to present the tape -- the transcript into
4 the record. But I do have the actual tape here.

5 MR. JONES: Let's approach.

6 MS. MUNNERLYN: Okay.

7 (WHEREUPON, a bench conference was held off the
8 record in the presence of the jury, but out of the
9 hearing of the jury.)

10 THE COURT: All right. I will allow the State the --
11 as I understand it the Defense does not object to the use
12 of the transcript of the tape as opposed to the tape
13 itself. And you would then offer the transcript in
14 evidence, Ms. Munnerlyn?

15 MS. MUNNERLYN: That is correct, Your Honor.

16 THE COURT: Any objection to that?

17 MR. JONES: No, sir.

18 THE COURT: All right. The transcript of the --
19 let's identify it as being a transcription of the tape of
20 the statement made by this defendant to Officer Sarvis; is
21 that correct.

22 MS. MUNNERLYN: That is correct, Your Honor. This
23 was an interview of Carl Francis Moore conducted by
24 Detective Doug Sarvis who at that time was with Horry
25 County Police.

1 THE COURT: It is dated?

2 MS. MUNNERLYN: It was given on July 2nd 2007.

3 THE COURT: All right. The transcription of the tape
4 will be admitted into evidence without objection as the
5 next State's number, whatever that is.

6 MS. MUNNERLYN: I believe it's 201, Your Honor.

7 THE COURT: All right. Let Ms. Gordon mark it.
8 State's 201.

9 (WHEREUPON, State's Exhibit No. 201 was marked for
10 identification and received into evidence.)

11 THE COURT: Proceed, Ms. Munnerlyn.

12 MS. MUNNERLYN: Thank you, Your Honor.

13 BY MS. MUNNERLYN:

14 Q. I'm going to show you State's Exhibit 201?

15 A. Okay.

16 Q. Can you read?

17 A. A little bit, but I'm about half blind.

18 Q. Okay. I'm going to direct you here were it says
19 "Detective." Does it in fact say, "That's the name he
20 give you. How long has Joe been here," you see that?

21 A. Um Hum.

22 Q. Okay. And your response -- Moore, that's you,
23 correct?

24 A. Right.

25 Q. Your response was, "He come here Friday evening?"

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1 A. Um hum.

2 Q. Okay, that's what you told him?

3 A. Yeah.

4 Q. Okay. And then on the next page you're discussing
5 the vehicle he comes in, and he asked what color it is.
6 And you indicate blue. Then he says, "It's blue and he
7 come here yesterday evening; is that correct," and your
8 response is?

9 A. He asked me this on Monday.

10 Q. Okay. Wait. Hold on. I'm just asking you what your
11 response is here. Your response here to his question
12 during this interview was, "Yes, sir." The question was,
13 "And he come here yesterday evening;" is that correct.
14 And, Moore, that's you, responded, "Yes, sir."

15 A. I don't recall saying that.

16 Q. But it's in your interview here?

17 A. Well, I don't remember saying that because I know he
18 didn't come Sunday.

19 Q. Okay. And then we go on further down. He goes and
20 the detective says all over on the night he showed up you
21 asked him about the car. Why he was parking the car
22 there; is that correct? And you said, yeah. And the
23 detective says, "What did he tell you?" He said, "He
24 didn't want him gonna to pull up here and see him here,"
25 is that right?

1 A. Yes, ma'am.

2 Q. Okay. And the detective asked you again, "And you
3 took it that he was trying to hide the car that night," is
4 that correct. And your response -- that's you, Moore, is,
5 "Yeah," correct?

6 A. Yeah.

7 Q. That's what you said?

8 A. From her.

9 Q. The detective said, "Okay. And he hasn't said
10 anything about the police looking for him or anything like
11 that," and your response was, "No, sir. I asked him. I
12 said are you cool." You said that, right? You told the
13 officer that?

14 A. Yeah, I asked Joe was he cool.

15 Q. You were concerned enough that you asked him, "are
16 you cool? Is everything okay? You're not in trouble with
17 the law, are you?" You were concerned enough about what
18 he was doing with the car hiding it to ask him that, isn't
19 that right?

20 A. No. Not really. The way you're put it it's not.

21 Q. But you asked him, are you cool?

22 A. Yes.

23 Q. Meaning you're not in any trouble, are you?

24 A. --- about hiding in the car. He didn't want his
25 momma to know that he was there. And I didn't go through

1 all them questions with Doug Sarvis neither.

2 Q. So you're denying that you answered all these
3 questions?

4 A. I didn't answer what -- all the stuff that's on
5 there, no. I didn't cause I didn't talk to Doug that
6 long. They were busy trying to get Joe out the house.

7 MS. MUNNERLYN: Court's indulgence just one moment.

8 BY MS. MUNNERLYN:

9 Q. Okay. And then further on down in the transcript of
10 the tape the detective asked you right here, "Did the car
11 gas in it when you went to get gas?" And, Moore, your
12 response is, "No, he was dead on empty." The detective
13 said, "Dead on empty. So you gave him \$30 worth of gas,"
14 and your response was "So I sheetrock for my brother last
15 week. So I bought him a little bit of gas, and he was
16 supposed to leave at one o'clock today to go back to
17 Surfside."

18 Cause you had told him that you bought \$30 worth of
19 gas?

20 A. Not at one time, no. I didn't say that.

21 Q. So now you're saying you did buy him \$30 worth of
22 gas?

23 A. The car wouldn't hold \$30 worth of gas, I wouldn't
24 think.

25 Q. A Corsica wouldn't hold \$30 worth of gas?

1 A. I never put over \$10 worth in the car at one time.

2 Q. How much did you spend?

3 A. Probably \$30.

4 Q. So now you did spend probably \$30?

5 A. \$25 to \$30 I know.

6 Q. How much did you make working construction?

7 A. I make \$35 an hour. We were working for ourselves.
8 We made more than that, really.

9 Q. Did you have a vehicle?

10 A. No, my brother picked me up to go to work.

11 MS. MUNNERLYN: Court's indulgence just one moment.

12 BY MS. MUNNERLYN:

13 Q. You testified that Joe was with you all weekend;
14 isn't that right?

15 A. Yes, ma'am.

16 Q. That you were together all weekend long?

17 A. Yep.

18 Q. All day Saturday?

19 A. Yes, ma'am.

20 Q. When he left in his car you went with him?

21 A. Yeah.

22 Q. You sure of that?

23 A. The only place he ever went was to the store, ma'am.

24 Q. Okay.

25 MS. MUNNERLYN: I don't have any further questions.

1 THE COURT: Redirect.

2 MR. JONES: Yes, sir.

3 REDIRECT EXAMINATION

4 BY MR. JONES:

5 Q. Mr. Moore, on Friday afternoon, Friday evening until
6 Sunday whenever Joe was arrested. Monday, excuse me?

7 A. Monday.

8 Q. Monday. Did you continue to drink and do cocaine
9 that whole time?

10 A. No. He didn't do any Monday evening. No.

11 Q. Did not do any cocaine Monday evening?

12 A. No.

13 Q. Did you drink a little bit?

14 A. Yeah. I did. I kep beer in the house all the time.

15 Q. Okay. And you pretty much drank a lot of it during
16 the day, do you not?

17 A. Yeah.

18 Q. Okay. Do you recall Joe being arrested at your house
19 on Monday?

20 A. Sure.

21 Q. After that weekend?

22 A. Sure.

23 Q. All right. Be real clear. Do I remember what day of
24 the week Joe came to your house?

25 A. Friday.

1 Q. Did he stay at your house from Friday until Monday?

2 A. Yes.

3 MR. JONES: That's all I have.

4 THE COURT: All right. Thank you. You may step
5 down. You said no recross?

6 MS. CRAYTON: No, sir.

7 THE COURT: All right.

8 MR. JONES: Your Honor, may this witness be excused?

9 THE COURT: Any objection, Ms. Munnerlyn?

10 MS. MUNNERLYN: No, Your Honor.

11 THE COURT: All right. Yes. You maybe excused. All
12 right, Mr. Jones.

13 MR. JONES: Your Honor, we have one additional
14 witness I believe.

15 THE COURT: Call your next witness.

16 MS. CRAYTON: Defense calls Monroe Carter.

17 MONROE CARTER, after being duly sworn, testified
18 as follows:

19 DIRECT EXAMINATION

20 BY MS. CRAYTON:

21 Q. Mr. Carter, would you state your full name for us?

22 A. Oscar Monroe Carter.

23 Q. Thank you. Mr. Carter, what do you do for a living?

24 A. Residential home builders construction.

25 Q. And do you own a company?

- 1 A. Yes, ma'am.
- 2 Q. And you build houses?
- 3 A. Yes, ma'am.
- 4 Q. And did the defendant, Mr. Gathings, ever work for
- 5 you?
- 6 A. He did.
- 7 Q. And what did he do working for you?
- 8 A. He put some shingles on.
- 9 Q. So roofing work?
- 10 A. Yes, ma'am.
- 11 Q. Okay. And do you know what town he was working in?
- 12 What area?
- 13 A. Well, it's -- there is Dunbar. I call it Dunbar?
- 14 Q. I'm sorry?
- 15 A. Dunbar. Right outside of Clio.
- 16 Q. Right outside of Clio. Not from Clio, so unaware.
- 17 Thank you. And when did you normally pay your employees?
- 18 A. Well, he subbed the shingles from me for a price. I
- 19 think it was probably like \$30 a square.
- 20 Q. And when did you pay them? What day of the week did
- 21 you normally pay your employees or yourself?
- 22 A. Well, I don't know if it was normally a day. I think
- 23 it was on Friday I paid him.
- 24 Q. Do you remember how much you paid him?
- 25 A. No exactly. Somewhere in between -- I think probably

1 between \$300, \$500 in that rage.

2 Q. And let's be more specific. What Friday are we
3 talking about? Are we talking about June 29th?

4 A. Can't answer that. I don't remember exactly the day.

5 Q. But you do remember that you paid him on the Friday?

6 A. Well, I'm saying Friday. I don't really know if it
7 was Friday. I know it was ---

8 Q. Towards the end of the week?

9 A. Towards the end of the week, yes, ma'am.

10 Q. Okay. So it could be a Thursday or a Friday, but
11 you're not really sure which one?

12 A. That's true.

13 Q. But you normally pay your employees on Friday?

14 A. Yes, ma'am.

15 Q. Okay. And you're not sure what date it was?

16 A. Well, let me rephrase that.

17 Q. Okay.

18 A. People that worked for me by the hour I paid them on
19 Friday.

20 Q. Okay.

21 A. If they were subbing it might have been any day of
22 the week. It's just according to what kind of labor they
23 had done and how much they needed or not necessarily on
24 Friday.

25 Q. Well, you would also front them money if that needed

1 it?

2 MS. MUNNERLYN: Your Honor, I would object to leading
3 here.

4 THE COURT: Sustained. Your witness.

5 MS. CRAYTON: Sorry, Your Honor.

6 BY MS. CRAYTON:

7 Q. So on June 19th you don't remember if you paid him or
8 not?

9 THE COURT: Same objection, isn't it?

10 MS. MUNNERLYN: Yes, Your Honor.

11 THE COURT: That's still leading.

12 MR. JONES: Okay. Court's indulgence, Your Honor.

13 BY MS. CRAYTON:

14 Q. Do you remember what year Mr. Gathings worked for
15 you?

16 A. As far as remembering, no. I think it was 2007. I'm
17 not sure of that.

18 Q. Okay. And do you know how long he worked for you?

19 A. Possibly I'm going to say a week or less. Somewhere
20 around a week.

21 Q. So a very short period or time?

22 A. That is right.

23 Q. Okay. And you don't remember what month it was,
24 perhaps, do you?

25 A. I don't know.

1 Q. You don't. Okay. But during that week at some point
2 you paid him?

3 A. Yes, ma'am.

4 Q. Why did he not work for you for longer?

5 A. Well, I didn't know him. He came by this house and
6 wanted to do shingles on the roof and all and
7 subcontractor price. And after I paid him that one time I
8 never saw him again.

9 Q. You never saw him begin after you paid him?

10 A. No.

11 Q. Okay. And you do not remember what day of the week?

12 A. Now, I don't.

13 Q. But you never paid him again?

14 A. No.

15 Q. I mean never saw him again?

16 A. No, ma'am.

17 Q. Okay. Thank you, Mr. Carter. If you would answer
18 any questions Ms. Munnerlyn may have for you.

19 MS. MUNNERLYN: I don't have any questions of Mr.
20 Carter.

21 THE COURT: All right. Thank you, sir. You may step
22 down. Would you like to have this witness excused?

23 MS. MUNNERLYN: Yes, sir, Your Honor.

24 THE COURT: Thank you. Your excused.

25 MR. JONES: May we have one second, Your Honor.

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1 THE COURT: Yes.

2 MR. JONES: Defense rests, Your Honor.

3 THE COURT: All right. Anything in reply?

4 MS. MUNNERLYN: No, Your Honor.

5 COLLOQUY

6 THE COURT: All right. Ladies and gentlemen of the
7 jury, you have heard the Defense announce that they rest
8 their case, and the State has indicated they do not have
9 anything to offer in reply. And that means that you have
10 heard all of the testimony in this matter. There are some
11 matters of law which I now need to take up with the
12 attorneys and that will probably take us 10 or 15 minutes
13 to accomplish those and then there will be some other
14 matters that will need to be discussed with the lawyers
15 and it is after four o'clock.

16 There are only two things that remain to be done in
17 this case. Those are the arguments of the attorneys; that
18 is their closing statements or summations to you. After
19 which I will instruct you on the law of South Carolina as
20 it pertains to the facts of this case as you may find
21 those facts to be. And then you will be allowed to
22 deliberate your verdict.

23 However, because of the lateness of the hour and the
24 matters of law that we need to do we're not go to go into
25 closing arguments and charge this afternoon but we will do

1 that the first thing in the morning. So I am going to
2 excuse you for the rest of the day and allow you to go to
3 your home and families and ask you to reassemble in your
4 jury room tomorrow morning at 9:30. Not nine o'clock.
5 9:30 at which time we will completed all the matters that
6 we need to complete, and we will be ready to go forward
7 with the argument and charge.

8 Over the evening recess do not discuss the case with
9 anyone, and do not allow anyone to discuss it with you.
10 And do not discuss it amongst yourselves when you're
11 reassembling in the jury room. It is still premature for
12 you to begin any deliberations until you have heard the
13 arguments of the attorneys and the instructions on the law
14 by the Court.

15 So, again, take the night off of this cae and go
16 about your business and get a good nights rest and come
17 back tomorrow morning for the final summations of counsel
18 and the arguments and -- I mean the instructions on the
19 law by the Court. Again, do not read any news stories.
20 Do not do any research about this matter. Do not make any
21 investigations about the case on your own. But come back
22 tomorrow prepared to make a decision based on the evidence
23 that you have heard in this courtroom.

24 With that you are excused for the evening. I'll see
25 you tomorrow morning at 9:30. Not nine o'clock, but 9:30.

1 Thank you.

2 (WHEREUPON, the jury panel was excused from the
3 courtroom at 4:08 p.m.)

4 THE COURT: All right, counsel, motions on behalf of
5 the defendant.

6 MR. JONES: We will just renew our motion for
7 directed verdict, Your Honor. Same reason.

8 THE COURT: All right. Again, under Rule 19 of the
9 close of all the evidence the defense does have the right
10 to make a motion for directed verdict requesting dismissal
11 of the charge if there is no evidence in the record that
12 would justify the matter being submitted to the jury.

13 As I've said the issue is not the weight that is to
14 be given to the evidence, but the existence of the
15 evidence. And I would find that there is evidence in the
16 record of all three charges against this defendant, and
17 will respectfully deny the motion for directed verdict.

18 All right, counsel, let's talk about any special
19 requests for charge or requests to charge. I will tell
20 you that my general felony charge contains a -- the
21 presumption of innocence, reasonable doubt, burden of
22 proof. Then, of course, I will charge the substantive
23 offense of murder and grand larceny and the defendant not
24 testifying. Are there any other requests on behalf of the
25 State, Ms. Munnerlyn?

1 MS. MUNNERLYN: No other specific requests. No, Your
2 Honor.

3 THE COURT: All right. On behalf of the Defense?

4 MR. JONES: One second, please.

5 MS. CRAYTON: Your Honor, we ask for a charge on
6 voluntary manslaughter as well. I believe that Mr. Kenley
7 did testify that there was some evidence of a struggle, so
8 we would ask for that as well.

9 THE COURT: What say you, Ms. Munnerlyn?

10 MS. MUNNERLYN: Your Honor, she asking you for a
11 self-defense charge?

12 MS. CRAYTON: No.

13 MS. MUNNERLYN: No, I'm sorry. I misunderstood.

14 THE COURT: Voluntary manslaughter.

15 MS. MUNNERLYN: Oh, voluntary. Oh, no, sir. I would
16 object to that. I think either the jurors -- they have
17 presented evidence essentially of alibi, and in our case I
18 think that's certainly -- our evidence would be either he
19 brutally murdered these people or he didn't. I think it's
20 either murder or not.

21 THE COURT: Is that the only thing -- the only issue,
22 Ms. Crayton, that he was there or he wasn't there? If he
23 wasn't there then how can there be no voluntary
24 manslaughter?

25 MS. CRAYTON: Well, Your Honor, I mean her witness

1 was the one that testified there was evidence of a
2 struggle, and that's why we're requesting the charge.

3 MS. MUNNERLYN: Your Honor, if I can just respond.
4 There may have been a struggle, but the only injury, only
5 possible injury to the defendant is a very small injury to
6 his face. If there was much of a struggle put up by
7 either of these defendant it wasn't much of a threat at
8 all to him. Obviously, I mean the injuries to them were
9 just horrendous.

10 THE COURT: Well, to be entitled to the lessor
11 included offense of voluntary manslaughter, Ms. Crayton,
12 doesn't it require some evidence in the record of a
13 homicide in the heat of passion. And there is no evidence
14 of heat of passion in this case. There is no evidence
15 that he was even there other than involved in any kind of
16 a fight or argument. I don't see where voluntary
17 manslaughter comes into it at all.

18 First, if he wasn't there, and secondly, where is
19 there evidence in the record of it being a homicide
20 created during the heat of passion?

21 MS. CRAYTON: Well, Your Honor, Julius Lynch also
22 testified that it was done in the heat of passion, I
23 believe.

24 THE COURT: Who testified to that?

25 MS. CRAYTON: Julius Lynch. He was the jailhouse

1 snitch. And also there was a -- there was testimony from
2 the State's witness about a relationship so we would ask
3 for -- a relationship between the victim and the
4 defendant. And for those reasons we would ask for a
5 voluntary manslaughter.

6 THE COURT: I'm going to respectfully deny. I don't
7 think -- the Court is charged with the responsibility of
8 charging the law applicable to the facts of the case. Not
9 just what happens to be the law. It's got to be some
10 nexus between the requested charge and the facts that have
11 been presented. And there is no nexus between voluntary
12 manslaughter charge in this case even though it is a
13 lessor included offense of murder.

14 The facts just don't justify a charge on voluntary
15 manslaughter in view of his position from his witness that
16 he wasn't even there. And there is no evidence, I don't
17 think, in the record that there was -- that it was done as
18 a result of a -- in heat of passion which would make it
19 voluntary. And I just don't think the facts justify a
20 charge on voluntary manslaughter.

21 That's why we's got the Court of Appeals in Columbia
22 and the Supreme Court in Columbia. If I'm wrong then it
23 will be up to them, but I will respectfully deny your
24 request for voluntary manslaughter.

25 MS. CRAYTON: Thank you, Your Honor.

Colloquy

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1 THE COURT: All right. Anything else?

2 MS. CRAYTON: No, Your Honor. Thank you.

3 THE COURT: Okay. You're going to waive opening, Ms.

4 Munnerlyn?

5 MS. MUNNERLYN: Yes, sir, Your Honor.

6 THE COURT: How much time -- tell me about your

7 argument. What do y'all anticipate, Mr. Jones.

8 MR. JONES: Your Honor, I think no more than 30, 45

9 minutes.

10 THE COURT: Okay. You're going to argument?

11 MR. JONES: I am.

12 THE COURT: How much time do you need?

13 MS. MUNNERLYN: I think no longer than 30 minutes or

14 so, Your Honor.

15 THE COURT: All right. When I was practicing law I

16 never like to argue against the clock, but at the same

17 time when I first got this job I failed to asked a law

18 lawyer one time how much time he needed in the argument.

19 And it was a little routine run of the mill accident case

20 that I thought could be argued in ten minutes. And 55

21 minutes later he was still going strong. So I'll give you

22 both 40 minutes. That ought to give you sufficient time,

23 and I'll call time on you if it is more than 40 minutes.

24 All right, counsel, come up just a minute. Let me

25 show you the proposed verdict forms.

1 (WHEREUPON, a bench conference was held off the
2 record, but out of the presence of the jury.)

3 THE COURT: Before you go, counsel, I would suggest
4 that you get your exhibits straight, and have an idea, Mr.
5 Jones, what exhibits you want to use in your argument so
6 you can put your hands on them. The same thing for you so
7 you will have all those lined up. All right. We will be
8 in recess then until 9:30 in the morning. Let's plan for
9 all counsel and the defendant and everybody to be here at
10 9:15 so we can start at 9:30 promptly with the jury.
11 Thank you. See you tomorrow.

12 END OF TRANSCRIPT OF RECORD

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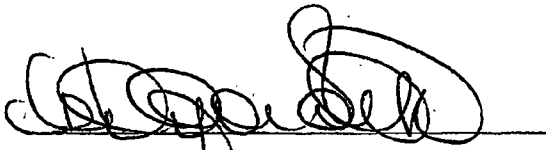
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
)
COUNTY OF MARLBORO)

I, HATTIE O. GORDON, Official Court Reporter for the
4th Judicial Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true, accurate and
complete Transcript of Record of the proceedings had and
evidence introduced in the trial of the captioned case,
relative to appeal, in the Court of General Sessions for
Marion County, South Carolina, on the 20th day of October,
2010.

I do further certify that I am neither of kin,
counsel nor interest to any party hereto.

March 20, 2011

A handwritten signature in black ink, appearing to read 'Hattie O. Gordon', is written over a horizontal line.

HATTIE O. GORDON, Court Reporter

STATE OF SOUTH CAROLINA	)	
	)	COURT OF GENERAL SESSION
COUNTY OF MARLBORO	)	2007-GS-34-1008
		2007-GS-34-0888
		2007-GS-34-0909

STATE OF SOUTH CAROLINA	)	
PLAINTIFF	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
ALLEN JOE GATHINGS	)	
DEFENDANT	)	

October 18-21, 2010
 Bennettsville, South Carolina
VOLUME NO. 04 OF 04

B E F O R E:

THE HONORABLE HOWARD P. KING, JUDGE; and a jury.

A P P E A R A N C E S:

ELIZABETH MUNNERLYN, ASSISTANT SOLICITOR
 Attorney for the Plaintiff

JOHN HOLT, ASSISTANT SOLICITOR
 Attorney for the Plaintiff

EMILY CRAYTON, PUBLIC DEFENDER
 Attorney for the Defendant

RICHARD JONES, PUBLIC DEFENDER
 Attorney for the Defendant

Colloquy

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COLLOQUY

THE COURT: All right. We're back on the record with regard to the State v. Allen Joe Gathings in Indictment Numbers 07-GS-43-887, 888 and 909. Mr. Gathings is present in Court with his counsel. The State is present and represented by Ms. Elizabeth Munnerlyn.

Yesterday, counsel, we concluded all the testimony and I had the charge conference with counsel and advised of what I will charge. We are now ready to go forward with closing arguments. Anything before we bring the jury in, Ms. Munnerlyn?

MS. MUNNERLYN: No, Your Honor.

MS. CRAYTON: No, Your Honor.

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

(WHEREUPON, the jury panel enters the courtroom at 9:28 a.m.)

THE COURT: All right. Good morning, ladies and gentlemen, and thank you for your promptness in being back here and we are now ready to proceed. As I advised you yesterday we have concluded all the testimony in this case and there are only two things remain to be done. Those are the arguments of counsel and the instructions on the law by the Court. I will tell you now as I told you yesterday that -- or told you at that beginning of this trial the arguments of counsel are not evidence in this

1 case. They are simply the lawyer's view of what they
2 think the evidence shows.

3 You will decide this case based upon the testimony
4 that you have heard from this witness stand and from any
5 exhibits that have been introduced into evidence. But the
6 lawyer do have the right, and not only the right but the
7 duty on behalf of their client to address you now and give
8 to their closing arguments and summation. When they have
9 concluded their arguments I will then instruct you on the
10 law of South Carolina as it pertains to the issues in this
11 case as your may find those fact to be. And then you will
12 be allowed to go to your jury room to deliberate your
13 verdict.

14 You will hear first from Mr. Jones on behalf of the
15 defendant. And then from Ms. Munnerlyn on behalf of the
16 State. Mr. Jones.

17 CLOSING STATEMENT BY MR. JONES

18 MR. JONES: Thank you, Your Honor. Solicitor and
19 forelady and ladies and gentlemen of the jury, going to go
20 back and start all over again from the start. My name is
21 Rick Jones. Along with Emily Crayton we, obviously, have
22 been representing Mr. Allen Joe Gathings this week. When
23 we start this thing on Monday I think there were several
24 statements made not only by the Solicitor but by
25 Ms. Crayton when they opened, in other words, gave us some

1 brief remarks to you concerning what they expected or what
2 might happen this week.

3 And I got to thinking last night I want to review a
4 couple of those things. First of all, as I remember Ms.
5 Munnerlyn -- I won't say she made some promises, but she
6 basically outlined what she intended to do on behalf of
7 the State in their case and chief. And what we're going
8 to do today. What I would like to do before you go back
9 to your room to deliberate is I'd like to review the goals
10 that were set out and how well those goals were
11 accomplished. Not only by the State, but also by
12 Ms. Crayton, as she made some remarks to you on Monday.

13 Before I do that let me do one or two other things.
14 The Judge gave you some brief instructions as we started
15 this case. In South Carolina, Marlboro County
16 specifically, but in South Carolina, the United States of
17 America, we have a criminal justice system that's
18 basically unmatched by any other civilized country. We --
19 you, ladies and gentlemen, are really what sets us apart
20 from criminal justice systems in most of the other
21 civilized countries in the whole.

22 It's not just one person or a panel of judges that
23 hear the evidence and ruling. It's a jury of your peers
24 that sits and makes decisions. Now, Judge briefly
25 outlines the jobs on Monday that everybody has when we

1 come to Court to try a criminal case. His Honor is the
2 trier of the law. He is the one that is in charge of
3 making sure that the law of our State is followed as we
4 proceed through the trial as evidence is presented both on
5 the witness stand and through exhibits that are presented.

6 Ms. Munnerlyn is the Solicitor. She represents the
7 State of South Carolina. State of South Carolina is the
8 charging agency. In other words that's how we got here.
9 The State of South Carolina says we think -- not only do
10 we think. We know a crime has been committed, but we
11 think the defendant, Allen Joe Gathings, committed this
12 crime. So they begin the process.

13 His Honor will show you -- I think he did on Monday,
14 an indictment. A piece of paper. It's not evidence at
15 all, but it's an indictment that starts the whole process.
16 And there are some safeguards along the way until we get
17 to this point in time. But that piece of paper charges a
18 defendant, and in this case Mr. Allen Joe Gathings, with a
19 crime. Actually, charges three crimes cause there are
20 three indictments. Two murders and the stealing of a car,
21 grand larceny, that's what this defendant, Mr. Gathings,
22 is charged with this week.

23 It's what the evidence has been all about. And that
24 piece of paper starts us off. Said His Honor tries the
25 law. He tells us what the law is, and when we get

Closing Statement by Mr. Jones

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1 finished he's going to tell all of you what the law is and
2 then you're going to take the law as he tells you back to
3 your jury room and you're going to do your job which is
4 you're going to decide what happened. You try the facts
5 and then apply the law that His Honor gives you to the
6 facts as you find them. So that's your job.

7 And it's a very, very important job as you've already
8 seen from Monday at the time that you were chosen until
9 9:30 on Thursday morning we have been involved in the
10 process of trying to get information in front of you so
11 that you can do your job and figure out what happened.
12 Nobody else in this courtroom but the 12 of you can decide
13 what happened sometime between June 29th '07 and June 30th
14 '07. That's your job.

15 I'm going to review the evidence with you. I'm sure
16 Ms. Munnerlyn is going to review the evidence with you,
17 and I'm going to tell you before that that not only do we
18 in Marlboro County, South Carolina, United States of
19 America, have one of the if not the best criminal justice
20 system in the world but the criminal justice system here
21 is based on three major premises. And you've already
22 heard them, but I'm going to repeat them several times
23 today because they are extremely important.

24 Number One, and I think you heard it from Ms. Crayton
25 on Monday, any defendant, and specifically Joe, when he

1 walks into a criminal courtroom or General Sessions as His
2 Honor has told you, when a defendant walks into a
3 courtroom that person is presumed to be innocent. You've
4 heard those words before. You've seen them on television.
5 You've read them in books, but it's a bedrock of our
6 criminal justice system. That defendant the presumed to
7 be innocent when they walk into the courtroom. But it
8 didn't go away as soon as the defendant walks in.

9 It only goes away, and may never go away, but only
10 goes away if the second premise, the State of South
11 Carolina, in this case represented by the Solicitor's
12 Office, carries its burden of proof. You've heard those
13 words, too. The burden of proof. The Judge told us one
14 time, and I never paid any attention to it, but the Judge
15 said, "The Solicitor sits at this table, at that table
16 closest to you because they have the burden." The
17 defendant, not trying to alienate the defendant from you,
18 the defendant doesn't have anything to prove to you when
19 he walks into this courtroom. The State of South Carolina
20 does.

21 That's why they're sitting close. That's why they're
22 going to speak to you last today because they have to
23 carry -- they have a heavy burden. They have the burden
24 of proof to prove to you. And there is this third premise
25 that I want you to remember, that Mr. Allen Joe Gathings

Closing Statement by Mr. Jones

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1 has committed whatever crimes he's charged with beyond a
2 reasonable doubt. That's the standard that you must apply
3 to the proof that's been presented:

4 If you find that the State of South Carolina has
5 proven to you beyond a reasonable doubt, and can't just be
6 your decision or your decision. It has to be a joint
7 decision. All 12 of you must unanimously agree that
8 that's happened.

9 If you find that the State has carried it's burden,
10 prove to you beyond a reasonable doubt that Joe has
11 committed these three crimes then his presumption of
12 innocence goes away and then you may find him guilty.

13 But if they haven't you can't. You cannot find him
14 guilty. That's your duty. Thank you. Let me do one
15 other thing, and I apologize to you. I made a mistake
16 yesterday as the defendant's case was being presented, and
17 it was very short. Had two short witnesses. Another
18 paper of paper got admitted by agreement of the
19 Solicitor's Office and the Defense. And I apologize. I
20 didn't tell you about it.

21 Well, I'm going to tell you what it is and put it
22 down and then we're going to talk about it in just a few
23 minutes. There was testimony from one, at least one,
24 perhaps two witnesses that during the time that
25 Mr. Gathings was incarcerated in Columbia in the

1 Department of Corrections from sometime in '05 until
2 sometime I think it was April of '07, that the victim,
3 Robbie Polston, had contact with him.

4 What was admitted without objection was the -- were t
5 he records that that in fact did happen. I believe this
6 first page is the visits where Mr. Polston visited Mr.
7 Gathings in jail. And then the next several pages behind
8 that are records of where Mr. Polston sent Mr. Gathings
9 money while he was in jail for his canteen or whatever to
10 make certain purchases while he was in jail cause,
11 obviously, people don't have a lot of money while in jail.

12 But Mr. Polston sent money, and I think that was
13 testified to, and the records of the Department of
14 Corrections were admitted into evidence and will
15 corroborate that fact. And I apologize for not telling
16 you about that yesterday, but I wanted to start out doing
17 that and then I'm come back to it. All right. In order
18 for the State to carry their burden of proof and prove to
19 each and every one of you beyond a reasonable doubt that
20 Mr. Gathings did this they presented evidence. And there
21 was a lot of evidence.

22 His Honor is going to tell you I believe in his
23 closing instructions or in his instructions on the law
24 that as triers of the facts you can believe all of what a
25 witness says. You may believe a part of what a witness

Closing Statement by Mr. Jones

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1 says. You may believe none of what a witness says.
2 That's totally up to you. You've heard them. You're
3 going to see to evidence that's also going to be sent back
4 to the room with you, but the people that came up on the
5 stand you judge them.

6 You judge what happened based on what you heard. And
7 they presented a lot of people. The Defense did not.
8 It's not a contest about who presents more people than the
9 other because the substance is what did they prove by
10 their testimony to you that helps you decide what happened
11 June 29th, June 30th. All right. So I want to say that
12 as we go back and review a little bit about what some of
13 those witnesses may have said.

14 And you know I -- since I began preparing with
15 Ms. Crayton for this case I've been troubled by it because
16 there is a lot of stuff. First of all, there is no
17 question that Ms. Locklear and Mr. Polston met their death
18 in a very terrible fashion. There is no question that
19 that happened, and I think Dr. Presnell yesterday
20 illustrated that way too well; is that someone beat them
21 to death probably with this baseball bat right here. No
22 question about that. That fact is undisputed.

23 What the issue is did Mr. Gathings do it, and that's
24 where it get troubled because all of the evidence that was
25 presented, at great deal of it, goes to the fact that the

1 two people met their death in this terrible fashion. But
2 very, very little of it has anything to do with
3 Mr. Gathings participating in that act. Very little. And
4 that point I think is something that you have to think
5 about as you remember what the witnesses told you on the
6 stand. And as you go back and talk about it. No question
7 you're going to find that the people met death in a very
8 terrible fashion.

9 You have graphic illustrations of that in some of the
10 pictures, and I don't recall if the pictures were all
11 passed around, but you will have an opportunity to view
12 them. Some of them are very unpleasant to look at. But
13 as you think about it think what about that evidence says
14 about whether or not Mr. Gathings had anything to do with
15 this. That's where -- that's the troubling part of this
16 whole situation.

17 Now, I'm going to assume something because when I
18 finish speaking Ms. Munnerlyn is going to get up and
19 speak, and she is going to have a different point of view
20 than I do because the State of South Carolina thinks that
21 Mr. Gathings did this. So she's going to have a very
22 different point of view. If I have guessed right she's
23 going to try too boil all this down, 20 something
24 witnesses, hundred and something exhibits. She's going to
25 boil it all down to its simplest terms. And that is the

Closing Statement by Mr. Jones

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1 witnesses showed, in her opinion, that Mr. Gathings is not
2 a particularly nice person.

3 A lot of those witness that came up here different
4 like him at all. Even some of them who had not been
5 around him very frequently told you, well, I don't like
6 him. He's mean. I think that fact is going to be told to
7 you by Ms. Munnerlyn. She's going to tell you a couple
8 more. She's going to say, well, let's think about what
9 this was all about. Mr. Gathings, who lived in the home
10 with Mr. Polston and Ms. Locklear, he was mean and he
11 liked to do drugs and he needed money and he needed
12 transportation.

13 So he came home Friday from work and he needed money
14 and he needed transportation and he didn't get either one
15 of them and he got mad and he took a baseball bat and he
16 beat them to death and he took off. And what proof do we
17 have of that? Well, we have this baseball bat that's got
18 some of his D.N.A. on it that was located in Mr. Polston's
19 bedroom. And I think several of the witnesses said they
20 had seen it there. It was between his bed and the
21 computer stand and I think some of the pictures show
22 actually where the bat was. No question about it.
23 Several people had seen it.

24 So we've got some D.N.A. of the defendant, Mr.
25 Gathings, on the bat. And then we have a pair of New

1 Balance tennis shoes right here. Pick them up in a minute.
2 and show you, and those tennis shoes could have, not did,
3 but could have made some impressions in the house in the
4 blood of one or both of the victims. And on one shoe was
5 some D.N.A. of one victim. And on the other shoe was some
6 D.N.A. of the other victim. Got it. That's all we need
7 to do. Go back to your room, find him guilty, and come
8 back out. It takes you five minutes, but I want you to
9 think about it. It's not by any means that simple.

10 Let's talk about the witnesses. Let's start off, and
11 I believe Ms. Polston's daughter was the first to testify.
12 And, again, it was Monday around, but you remember when
13 she testified cause she was the first one up there. Think
14 about what she said. I think that I heard her say, and
15 again, as His Honor said what I'm telling you is not
16 evidence. It's my recap of what I think I heard. You are
17 the triers of the facts, so what you heard is what you
18 reply on.

19 But if I heard her correctly she said that she last
20 talked to her mother about 7:15 on Friday, June 29th.
21 Made arrangements to take her cat to the vet the next
22 morning. All right. What does that tell us? It tells us
23 that Ms. Locklear was alive and talking to her daughter at
24 7:15 on Friday. Fair enough. Why is that important, and
25 what does that have to do with reasonable doubt. Well,

Closing Statement by Mr. Jones

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1 yesterday afternoon one of two short witnesses, Mr. Carl
2 Moore, told you -- now, Carl was not the sharpest tack in
3 the box. I know that, and I think everybody could see
4 that. No question about it. He had some alcohol
5 problems. He testified though from the stand and from a
6 written statement that was taken the day that Mr. Gathings
7 was arrested that Mr. Gathings came to his house in Conway
8 Friday evening. Okay.

9 Had a long set of questions with and responses with
10 the Solicitor about what evening means. He said 3:00 or
11 four o'clock was evening to him. But he never changed
12 from the minute that that officer interviewed him back on
13 July the 1st -- excuse me. Not the 1st. Let's see. I
14 don't see the date. Starts off 6:00 p.m. '07, but I don't
15 see what the date is.

16 Very first day, about the 10th or 12th line, he was
17 at my house Friday evening. Okay, that's why the very
18 first witness that says, "I talked to my mother at 7:15 on
19 Friday afternoon here and she was alive: That's why
20 that's important because all of a sudden we've got
21 reasonable doubt because we have a witness who said,
22 "Yeah, he was at my house in Conway on Friday evening."

23 And by the way His Honor is going to charge you on
24 the law. One of the charges that he is going to give to
25 you is the charge of alibi, the defense of alibi. And

1 that alibi is I wasn't there. I was somewhere else.
2 That's why Mr. Moore, even as brief as he was and perhaps
3 as confusing as he was was extremely important because his
4 testimony is Mr. Gathings was in Conway on the evening of
5 June 29th '07 because you remember that he goes to his
6 neighbor every afternoon at 3:30. You remember cause you
7 know Joe shows up at about that time.

8 All right. Mr. Polston, the son, was the next one to
9 testify. He actually found his mother and brother.
10 Terrible thing to have happen. Terrible thing to have
11 happen. But he found them. He alerted the police.
12 Police man right across the street. Came in. First on
13 the scene, and then there was a series of -- I think I
14 counted Mr. Polston, Mr. Mike Goff, Mr. John Lester
15 Mr. Pearlle Thomas, Mr. Jerry Nolan, Mr. Karl Kenley, his
16 partner Mr. Porter or Potter, and I think there were one
17 or two other ones that paraded in and out of the crime
18 scene..

19 All right. Y'all watch enough television. That's
20 not good. When people are tromping all around your crime
21 scene. Even though Mr. Lester did what he was supposed to
22 do, and he marked it all off. Said, "Don't come by here."
23 Well, we still have seven, eight, nine people that were
24 tromping in and out of the crime scene. It's important
25 because there was a great deal of the law enforcement --

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1 well, we've got good law enforcement in Marlboro County.
2 Don't get me wrong, but this situation as some major,
3 major problems. There was some sloppy police work in this
4 situation.

5 First of all, whose in charge. That was a real easy
6 question. For the life of us we could get hardly anybody
7 to say they were in charge. I don't know if everybody
8 didn't want to have responsibility for it. Chief Thomas
9 has a problem. I don't know if y'all picked up on it,
10 Chief Thomas' problem is that on June 29th of '07 he was
11 retired. I believe it's called the Terry Program or
12 whatever its called, but he had to be retired for 15 days
13 before he could come back to work which I assume he did
14 and is now back at work.

15 But he was retired that day so he really didn't have
16 any authority other than Mr. Lester calling him cause he
17 had been the chief. Said, "Chief, we've got a terrible
18 situation here. You've got to come down here." So when
19 he came down I assume from the testimony that he called
20 S.L.E.D. and said, "Hey, somebody come over here and help
21 cause we're in Clio and we don't have the resources.
22 We're going to need to investigate this situation."

23 And you get Agent McLellan, and you get Agent Kenley.
24 You get several other people, but nobody wants to be in
25 charge. And I don't know exactly why, but nobody really

1 wanted to be in charge. So we've got a little bit of a
2 problem there, too. All right. Let's go -- and we still
3 have some other people that came up. We've got Mr. Goff,
4 Lester with Clio Police, Chief Thomas, Ms. Stubbs with the
5 Clerk's Office. What did Ms. Stubbs tell us. Ms. Stubbs,
6 her testimony was fairly important because she had come
7 records from 2005 where Mr. Gathings had had some trouble
8 with these two victims where he had lived in 2005. And he
9 went to jail.

10 And His Honor is going to talk to you about that,
11 about what the information or what you can gather from the
12 fact that there were some prior bad acts. All right. I
13 think it's very important for the State's case because
14 when they try to tell you that this is mean person, and
15 gosh, he pushed them down before and taken their car. So,
16 bingo, you've got to think that he's now killed them and
17 took their car. Well, you can't make that leap without a
18 lot of evidence. And we don't have a lot of evidence.

19 All right. We've got Ms. Stubbs. We've got Rebecca
20 Dew, and there were three or four young ladies, Rebecca
21 Dew, Tiffany Haire, Tracey Ellis, those were the main
22 ones. And as I understood their contribution to the
23 evidence was they were good friend, particularly, of
24 Robbie Polston. I don't know if any of them liked Mr.
25 Gathings. And that was fairly clear from the testimony

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1 that was presented.

2 But what did they contribute? Well, Ms. Dew as I
3 recall her saying, she didn't know Joe, but he had called
4 her looking for some crack Friday night. That didn't make
5 a whole lot of sense, but that was the testimony. All
6 right. And what did she have to do with crack? Don't
7 know. I live in Clio. I know everybody in Clio. So I
8 guess everybody thinks that I can find them crack. That
9 was her words.

10 Now, Ms. Haire and Ms. Ellis, they testified that
11 they spent a lot of time with Mr. Polston, particularly
12 Ms. Haire. And Ms. Haire also worked with Mr. Gathings.
13 They didn't work long. I think Mr. Monroe Carter who was
14 the last witness that was here yesterday and again, he
15 wasn't a particularly good witness. But if you remember
16 some of the earlier testimony particularly Ms. Haire's
17 testimony, Ms. Haire said, "I worked with Mr. Gathings for
18 about a week, week and a half." And what were they doing?
19 They were roofing a house, and roofing a house. And I'm
20 sorry I don't remember the area right near Clio, but about
21 five minutes away from where they live.

22 And Mr. Carter was the supervisor. All right.
23 That's exactly what he said yesterday, and why was he
24 important to Mr. Gathings. He was real important because
25 I'm assuming that the motive for all of this is money.

1 I've got to have me some money. I think they testified
2 that, oh yeah, came home at lunchtime. And Mr. Gathings
3 needed some money, and he didn't get any money. So he
4 punched Robbie in the rib. They got mad with each other.
5 Went back to work. All right. Well, then he came home
6 and he went to sleep. That's kind of the last anybody saw
7 of Mr. Gathings that day.

8 But how about this money. Mr. Carter got up there
9 and pretty much corroborated what Ms. Haire was telling
10 us; is that the roofing job brought Mr. Gathings some
11 money. Now, I don't know if it was Tuesday, Wednesday,
12 Thursday or Friday, and Mr. Carter certainly wasn't very
13 clear about it. But he paid him some money, and he paid
14 him several hundred dollars because he was roofing. He
15 was going a job.

16 Well he's got a pocket pull of money. Why does he
17 need Mr. Polston's money or Ms. Locklear's money. He's
18 got his own money. Reasonable doubt. All right. And I'm
19 sorry. I haven't been clicking them off, but I should
20 have been counting. Who else testified? Well, Ms. Ellis
21 testified, but I think it was Ms. Ellis if I remember
22 correctly that told us that Mr. Polston -- one thing I
23 think was very clear. They may not have liked Mr.
24 Gathings but obviously Mr. Polston did. And I assume that
25 Ms. Locklear did because they let him stay that their

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1 house.

2 And they went -- I think Ms. Ellis told us that
3 Mr. Robbie Polston sent money to Mr. Gathings while he was
4 incarcerated. He went to visit him while he was
5 incarcerated, and she also said that she understood that
6 they went -- they, either Mr. Polston or Ms. Locklear or
7 both -- I think it was just Mr. Polston, they went and
8 picked him up when he got out and brought him back home to
9 their home. That's where he was living.

10 So, obviously, they cared for him whether or not
11 Ms. Haire and Ms. Ellis did. They did. Why is that
12 important. That's reasonable doubt. Are these people
13 that you would take a baseball bat and beat to death; that
14 let you live in their house, drive their car -- we have a
15 gray car. We have a blue car. I don't think there was
16 any testimony up there that he didn't have permission on
17 occasion to drive both of those cars.

18 Took Ms. Haire back and forth to work, and himself
19 back and forth to work usually in the gray car. I think
20 it was Ms. Ellis said, "Yeah, he drives the blue car all
21 the time. It's not unusual to see him drive the car." Is
22 it unusual for him to take it to Conway? That's probably
23 where he overstepped his bounds, but is that a reason to
24 take this baseball bat and beat them to death. I propose
25 that to you, I submit it's not. But that's what we're

1 being lead to believe by the witnesses who were up here.
2 That's the significance of the piece of paper that I told
3 you that I forgot to tell you about yesterday.

4 First page shows Mr. Polston going to S.C.D.C. to
5 visit and the numerous other pages have numerous entries
6 where he provided him money while he was in jail. He
7 liked him. I think Ms. Haire and Ms. Ellis both told you
8 that was a special relationship.

9 All right. We have Mr. Nolan. Mr. Nolan, and I
10 don't know if he was E.M.S. or rescue or if that's the
11 same thing in Clio, but what was significant about him?
12 He just walked around the house, and he had on tennis
13 shoes. And why was that important. Well, Mr. Kenley, who
14 was in charge of the crime scene said there wasn't anybody
15 in there with tennis shoes on. They weren't New Balance
16 tennis shoes, but they was tennis shoes. That's sloppy.
17 He should have known that. He should have had a record of
18 who was in and out of that house, how long they had been
19 there. What the devil they did.

20 Now, Mr. Nolan is probably a very nice person. He's
21 in charge of the E.M.S. If something terrible like this
22 happens in my neighborhood I'm going to see it cause I'm
23 in charge, and he walked around. Good police work? I
24 don't think so. Ms. Jackson, let's talk about -- just a
25 minute about a couple of these witnesses. Ms. Jackson, I

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1 think I understood her to say she was a former girlfriend
2 of Mr. Gathings. And that back before he went to S.C.D.C.
3 in '05 they lived together. And what was her
4 significance? Oh, well, sometimes and I think she finally
5 narrowed it down to sometime between '05 and '07 she got
6 put on a three way conversation with Mr. Polston and
7 Mr. Gathings, and Mr. Gathings said, "Well, hell, I'm
8 going to kill all of y'all." I think that's what she said.

9 Now, that made absolutely no sense to me. But you're
10 the triers of the facts so you give it whatever weight you
11 think it ought to have. But I understood that was the
12 significance of her testimony.

13 Allen Collins was the next witness. Mr. Collins,
14 fairly significant because Ms. Locklear worked taking care
15 of his mother and had been doing it for some time. That
16 Friday, June 29th, he testified that she worked all day.
17 Why is that important? Well, I think that Ms. Haire and
18 Ms. Ellis said, "Oh, no, Ms. Locklear was at the house
19 when we came over there at noon because she'd been to the
20 doctor." Mr. Collins said, "No, she went to the doctor on
21 Thursday. Not Friday." And she would have been at his
22 house because she fixed lunch for his mother.

23 Is that reasonable doubt. That's for you to decide
24 cause we've got a conflict in testimony. Where was she.
25 Does that make one witness more believable than the other?

1 That's your job, and it's a difficult job. Very
2 difficult. But it's an important -- it's an important
3 fact because Mr. Gathings is relying on all of you to
4 determine what the facts are in this case. And when you
5 have conflicts in testimony you've got to resolve those
6 conflicts.

7 And it's my job to point those out to you because
8 it's not, oh, yeah, we've got A and B and C and D. And by
9 the way, he's guilty. Go and do your job. Come right
10 back. No. You have an awesome job to do when you finally
11 go back to your jury room. All right. I'll be quick.

12 Francis Anderson came from Horry County Bank. There
13 is a video from Horry County Bank. Very short video of
14 Mr. Gathings at a drive through thing, teller thing,
15 trying to get some money out. Why is that significant?
16 Significant because Saturday morning at 10:30 he's in
17 Conway or Loris, and I don't recall. I'm sorry. But he's
18 in Horry County at 10:30 in the morning on Saturday. Carl
19 said he came Friday.

20 Now, Ms. Munnerlyn is going to remind you that Carl
21 didn't remember going to the bank with Joe. Did not
22 remember. Said, "Oh, I was with him the whole time." He
23 didn't remember going to the bank with him on Saturday.
24 And I don't know if that had anything to do with the beer
25 or the cocaine or the both. But he said he was there from

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1 Friday to Monday. And I was with him all the time. and
2 didn't go to the bank with him, but she's going to remind
3 you of all that. But there is no question that he was in
4 Conway or Horry County, whether it was Loris or Conway on
5 Saturday morning at 10:27 a.m that's exactly what the tape
6 says.

7 All right. Mr. Sarvis, Mr. Crocker, Mr. Townsend and
8 Ms. Brummett were all Horry County Police having to do
9 with the arrest. Significance, well, I've been talking
10 about sloppy police work, and I don't know if you remember
11 Ms. Crayton talking to officer or agent or Brad Townsend.
12 He is the one that got the search warrant for the car.
13 I'm going to talk about the car in just a few minutes.

14 But he got the search warrant for the car, and it
15 doesn't even -- it described the car which was sufficient
16 enough, and His Honor told us about that. But it didn't
17 even describe the people who were killed. He said, "Oh,
18 we just have a form, and it was a template. And we had
19 names on it and we had stuff that we put on it, but they
20 put somebody's else's name on it. Didn't even have
21 anything to do with our crime. But it worked and it got
22 them the ability to search the car.

23 And let's me stop on this witness list and talk about
24 the car for a minute because I want you to think. And
25 you've got a whole series of pictures that were taken of

1 this blue Corsica. And they've got the outside and you've
2 got the inside and you've got the back and the trunk and
3 everything else. But you don't have any fingerprints and
4 you don't have any blood. Now, why is that important and
5 why would that raise reasonable doubt in your mind that
6 Mr. Gathings committed these crimes?

7 Because remember when Mr. Kenley talked about there
8 was blood everywhere, and you've got some terrible
9 pictures here of the two victims who died in the house.
10 And there are lots -- there is lots of blood around both
11 of them. And you've got Mr -- I tried to find some blood
12 and my gloves don't work, so I'm going use some paper
13 towels. Hold on a second. But you've got somebody taking
14 a bat and swinging it. Mr. Kenley said over twice. He
15 wouldn't tell us anything. He really didn't want to
16 commit to anything because he certainly wasn't the agent
17 in charge. He was in charge of the crime scene.

18 But he's talking about splatter going this way and
19 that way. Well, he said there were at least two blows to
20 each person. And then you see this picture. Pictures
21 where there is blood everywhere, and then Dr. Presnell
22 said, "There were at least six blows to Mr. Polston and 12
23 to Ms. Locklear." Or vice versa, but there are lots of
24 blows which mean there is blood everywhere. So that any
25 person doing that would, I'd ask you to consider, that

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1 person has to be covered in blood. Absolutely cover in
2 blood.

3 And I want you to recall that Mr. Kenley when I asked
4 him, he said, "Well, we got some footprints that could
5 have matched those shoes, but they also could have matched
6 thousands of other shoes that were made. There was
7 nothing distinctive about that pair of shoes that matched
8 that." I guess I'll call that a template which you're
9 going to take back there. The best he could do was the
10 prints could have been made by those shoes.

11 Thousands of dollars of S.L.E.D. technology and
12 forensics, and the best that we can do with those shoes
13 is, oh, they could have matched. Well, that means they
14 might not have the matched. So is there reasonable doubt
15 associated? Sure there is. Sure there is. But back to
16 what I was saying. There had to be blood all over whoever
17 did this, but nowhere in the house is there anything other
18 than footprints proving that could be made by those shoes
19 but might not have been.

20 And most significant is if Mr. Gathings did this and
21 stepped in that blue Corsica after committing this
22 terrible crime wouldn't you expect there to be a little
23 bit of blood anymore in that car. When you get in your
24 car and it's muddy, you walk through wet mud, you get in
25 your car, what's the first thing that's going to happen to

1 your feet? You're going to slide across to carpet before
2 you hit the mat, and you're going to get mud, wet or
3 whatever it is on that carpet. Well, that car was
4 searched, and there wasn't anything related to this crime
5 in the car.

6 Oh, but let me smoke screen you a little bit. We
7 found an ice pick and a tire tool and we seized those.
8 Well, guess what? They didn't have anything to do with
9 anything. Not a thing to do with this crime. And neither
10 was there any spot of any blood anywhere in that vehicle.
11 Does that make sense to you. Does that create reasonable
12 doubt in your mind that Mr. Gathings committed this
13 terrible crime by beating these poor people to death with
14 this baseball bat, splattered an immense amount of blood
15 all over the whole house and then walked out and got in
16 the car and no blood anywhere. Reasonable doubt. Your
17 decision.

18 Who else are we talking about. Oh, let's not forget
19 Mr. Julius Lynch. He was one of my favorite witnesses,
20 and he was the one I asked, "All right. You're what they
21 call a snitch?" And he said, "Oh, you call my anything
22 you want to." All right. Mr. Lynch stood up there and
23 said, "Oh, Joe was my roommate for about 30 days while I
24 was housed at the Dillon County Detention Center I think.
25 And during these 30 days he just told me everything that

1 happened. He just confessed everything to me."

2 And then when I asked him about at a letter he had
3 written, low and behold, he's a federal prisoner. He was
4 awaiting sentencing and he had a letter with I think seven
5 different people that he just had to tell somebody about
6 so that he could get what's called a downward departure
7 under Rule 35(b) of the Federal Rules of Criminal
8 Procedure which was he was real familiar about by telling
9 about other crimes, by helping with other crimes.

10 And how did that work out for him? Not real well
11 because he serve his sentence and didn't get a bit of
12 downward departure over all this snitching.

13 THE COURT: Five minutes more, Mr. Jones.

14 MR. JONES: Yes, sir. And I'm sorry. I think it's
15 going to take a minute or two longer, but I'll rush. All
16 right, we talked about Mr. Kenley. Mr. Kenley was in
17 training at the time. He's got blood flying everywhere.
18 He doesn't know but there is about two blows when
19 Dr. Presnell said there are six or however many blows
20 there are. Oh, but he thought that he probably cleaned
21 up. That was his explanation. Oh, yeah, he cleaned up.
22 There is no evidence of that anywhere.

23 And when you look at the pictures of the vehicle I
24 want you to think whether or not this car had been cleaned
25 up. There is junk everywhere in this car. If somebody

1 cleaned it up they didn't do a heck of a good job, but
2 you're going to get to take those pictures back there with
3 you.

4 All right. Mr. McLellan, Mr. McLellen -- Agent
5 McLellan, excuse me. I assumed he was kind of in charge
6 of this whole investigations. He really didn't want to
7 say that. He was in charge from S.L.E.D, but I think the
8 hesitation was because Chief Thomas really wasn't working
9 for the City of Clio at the time. So somebody had to be
10 in charge. Be that as it may.

11 Ms. Hefney, Ms. Hefney, and I think her report she's
12 called Adrienne Riley rather than Hefney, but she told us
13 she got married. Ladies and gentlemen, we had a crime, a
14 terrible, terrible crime committed sometime, as
15 Dr. Presnell said, sometime between June 29th and
16 June 30th. We really don't know what time it was, but
17 sometime between June 29th and June 30th, and we have --
18 we've got some footprints. And we've got some of this and
19 we've got some of that, and all these clothes. And we
20 took some swabs off of these tennis shoes right here.

21 And if -- and you remember what you remember. I
22 think they were nine or ten swabs taken from the shoes.
23 And the crime was committed June 29th '07. Law
24 enforcement got involved the next day. S.L.E.D. I believe
25 took possession of these shoes either July 1st or July 2nd

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1 of '07, and it wasn't until I think May 21st of 2010 that
2 anybody bothered to test the stuff that had been taken.
3 And guess what happened? Well, we've got one victim's
4 D.N.A. on one shoe and the other victim's D.N.A. on the
5 other shoe. And what a coincidence, and it's even more of
6 a coincidence because they didn't test all of it. They
7 just picked a couple of those swabs to test.

8 And all of a sudden we've got D.N.A. on one shoe and
9 D.N.A. on the other shoe, bingo. But Mr. Gathings was
10 charged with this crime almost three years before that.
11 And we don't have any evidence until May of 2010. Talked
12 about Dr. Presnell. Talked about Karl Kenley. Ladies and
13 gentlemen, I told you I was troubled about this whole
14 case. I was troubled because it appears to me what
15 happened is after this terrible crime law enforcement
16 said, "Ah, he did it." And then took the evidence that
17 they gathered and tried to make it fit their conclusions.

18 Ms. Crayton I think told you that that was like a
19 puzzle and that the pieces -- there weren't many piece --
20 there was a lot of pieces, but they didn't all fit and
21 some of them had been forced. Like taking a round or a
22 square peg and poking it in a round hold. That's the
23 troubling part I have with this situation is all of this
24 evidence and all of this testimony boils down to just a
25 couple of little minute things that would even remotely

1 connect Mr. Gathings to this crime. And it's a crime
2 committed against people that cared for him and that
3 obviously he cared for because he lived with them before
4 he went to S.C.D.C. And they came and got him and he
5 lived with them afterwards. And they sent him money while
6 he was there, and he had money in his pocket because he
7 had been paid because he was working hard roofing.

8 And he drove the car that they said, 'oh, this is
9 what it's all about'. They didn't give him money and they
10 didn't let him drive the car. But their own witnesses
11 said, yes, they did. He had permission. The three
12 premises that I really want you to take back to your jury
13 room. Mr. Gathings walked in here presumed to be
14 innocent, and that presumption stays with him unless the
15 State removes it by meeting its burden of proof and
16 proving to all 12 of you that beyond a reasonable doubt he
17 committed this crime.

18 Unless they do that you can't find him guilty. Thank
19 you.

20 THE COURT: Ms. Munnerlyn.

21 MS. MUNNERLYN: May it please the Court.

22 THE COURT: Yes, ma'am.

23 CLOSING STATEMENT BY MS. MUNNERLYN

24 MS. MUNNERLYN: Mr. Jones and Ms. Crayton. Good
25 morning, ladies and gentlemen. Well, we are finally to

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1 the conclusion of this case, and I know you are anxious
2 for it to be in your hands so that you can conclude your
3 job. And first of all I want to say to you I appreciate
4 what you have done this week. You have been one of the
5 most attentive juries that I have every had in this
6 courtroom, and I appreciate this because this is a very
7 important case.

8 Not for me personally, but for two individuals, Loyce
9 Locklear and Robbie Polston. This, ladies and gentlemen,
10 today is their day for justice. And I'm here, as
11 Mr. Jones has said, I'm here on behalf of the State, and
12 it is my burden to prove to you that the defendant, Joe
13 Gathings, is actually the one who committed these crimes.
14 And I'm going to talk a little bit about that law, but not
15 a lot because the Judge is going to tell you what the law
16 is in a minute.

17 But I want to talk to you a minute about that.
18 Mr. Jones spoke a lot about the burden of proof, and we
19 all have heard it. My burden of proof is that I have to
20 prove to you beyond a reasonable doubt that this defendant
21 committed these crimes. Now, what does that mean, beyond
22 a reasonable doubt? Well, I tell you what it didn't mean.
23 It doesn't mean any doubt. I don't have to remove every
24 single doubt from your mind. I only need to firmly
25 convince you in order for you to not to have been firmly

1 convinced you have to have a reason -- a doubt for which
2 you can assign a specific reason to.

3 Okay, so it's not any doubt in your mind. It's a
4 reasonable doubt. So if, once you've reviewed all this
5 evidence collectively, and there are 12 of you, and you
6 all held and saw everything and you will review it all
7 together, if after all 12 of you have reviewed this, if
8 you're all firmly convinced then you must find him guilty
9 of two counts of murder and to one count of grand larceny.

10 And, briefly, we all know what murder is, but murder
11 is the unlawful killing of another person with malice
12 aforethought. I don't think there is any question, and
13 the defense counsel has indicated that there is no
14 question that Loyce Locklear and Robbie Polston were
15 murdered on this particular day. The only question for
16 you is who did it. Did Allen Joe Gathings do it. It's up
17 to you to put the pieces of the puzzle together.

18 And I have gathered for you as best as I possibly can
19 every piece of evidence that is available. You know it
20 would be great if Big Brother were around in these
21 situations and there was a video camera in every place
22 where a crime occurred. Or if there was a credible
23 eyewitness in every situation where a crime occurred. But
24 that's just not the case. That's just not normally going
25 to happen in a murder case.

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1 And so you have to look at what evidence is there.
2 Was there anybody else there on this night? If there was
3 we don't know who it was. I present to you there was only
4 one other person there, and that was Allen Joe Gathings.
5 And the interesting thing was there was a cat there. If
6 you call Lisa Polston indicated she talked with her
7 mother, Ms. Locklear, that night and she had an indoor cat
8 and they were going to take the cat to the vet the next
9 morning.

10 Well, the cat was there, and unfortunately, the cat
11 can't talk. Took ten days for that cat to come out of
12 hiding from inside that house. That's how brutal a murder
13 this was.

14 Well, let's talk about the facts. How did this even
15 come to be? This all started because the defendant, Allen
16 Joe Gathings, had a relationship with the victim, Robbie
17 Polston. And it wasn't just a friendship. They had a
18 sexual relationship. They were partners, but his mother
19 didn't know about it. His family members didn't know
20 about it, but there was a special relationship between the
21 two of them.

22 You will see even in the defendant's wallet that's in
23 evidence that was taken from him. There is a picture of
24 the two of them, Christmas, 2003. So they had been
25 together for a while. There is a relationship here, and

1 we know sometimes those relationships can get violent and
2 go very bad. You know we presented some evidence
3 regarding an incident that occurred between these victims
4 and there this particular defendant back in 2005. And the
5 reason we presented these is to show common scheme or
6 plan, and the Judge is going to tell you a little bit
7 about that.

8 But you have evidence of those in the record, and
9 their right here. You can look at them. On April the
10 18th of 2005 he was charged with grand larceny, strong
11 armed robbery, and assault and battery for his actions in
12 assaulting Loyce Locklear and Robbie Polston, stealing
13 Ms. Locklear's pocketbook and then from her -- and then
14 stealing the car and fleeing with it. All right. Is that
15 similar? Is that a common scheme? Is that a common plan
16 to what occurred today in this incident? Yes.

17 The defendant had permission to use that car to and
18 from work, but to flee and go to Horry County and stay
19 there for three days. We know they had a close
20 relationship. The defendant admitted the records from the
21 South Carolina Department of Corrections. After the 2005
22 incident he went to prison. And while he was there Robbie
23 continued to visit him. We don't deny that. We present
24 to you that's part of the problem here. If not for that
25 relationship this never would have happened.

1 Robbie went to visit him ten times. And he sent him
2 month on numerous occasions, numerous occasions. The
3 problem was that Allen Joe Gathings was taking advantage
4 of that. He was taking all the money he could and using
5 the vehicle all he could. And when he didn't get what he
6 wanted he got mad and he got violent, and when he used
7 crack he got outrageous I think was the testimony. So we
8 have a combination of things which caused him to flip out,
9 in the words of Julius Lynch or blank out.

10 But remember, Ms. Locklear, she do not know about the
11 relationship with him. She assumed they were just
12 friends. He stayed in the middle bedroom in their house.
13 And she let him, because she loved her son so much, she
14 let hem come back even after that prior incident. Her son
15 said, "It's the Christian thing to do." She felt like it
16 was the Christian thing to do. She could forgive and let
17 him come back into her home. And look where its gotten
18 her.

19 Let's talk about what happened on the 29th and the
20 30th of 2007. We know a little bit about what happened on
21 that friend afternoon. We brought you the witnesses that
22 were in and around the house that day and may have talked
23 to them that day. And we've got to try to put those back
24 together and piece it and see how that makes sense. You
25 know that Robbie was at home. We know that Joe was

1 working on a job with Tiffany Haire, a roofing job. They
2 came back to the house, and Joe wanted money. Joe wanted
3 money.

4 Robbie is given it to him before, many times. Robbie
5 didn't have any money. What did Joe do? He punched him
6 in the stomach, in the rib. Knocked the breath out of
7 him. And he said, and he told him. Remember what she
8 said? He said to him and his momma, "You think this is a
9 game. This ain't a game. You keep on and I'm going to
10 fuck you up." It's what he said to him.

11 Friday afternoon, June the 29th 2007, that's what he
12 said to the person that he had a relationship with.
13 Wasn't going his way, and he didn't like it. After all
14 that they left and went and got something to eat, came
15 back. Joe was gone. He was gone in the car again. All
16 afternoon. What did they do? They called him. Everybody
17 was calling him. Where is Joe. Where is the car. Momma
18 wants her car back.

19 These phone records have not only Joe's cell phone,
20 but Robbie's cell phone and Ms. Locklear's cell phone.
21 They're all in here, and the numbers are all in here so
22 you can easily flip back and forth and see what call were
23 made. But let's look on June the 29th. Robbie's cell
24 phone, and I urge you to go through this. This is what
25 this is all about. This evidence is here for you to look

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1 at and try to figure it out.

2 On June 29th Robbie called Joe's cell phone which is
3 535-1145. He starts calling him 3:33 p.m, 4:23 p.m
4 4:56 p.m, 5:43 p.m. In the meantime he calls Rebecca Dew.
5 Remember Rebecca Dew said that Robbie called, and as a
6 result of him calling I tried to call Joe. Called at
7 5:43. Calls him again at 6:02, 6:37, 6:43, 6:47, 6:49,
8 6:54, 6:55, 6:58, 7:00 p.m. 7:02, 7:06. He's really
9 looking for him.

10 Who calls somebody that much? Something is going on.
11 And what do you recall happened that evening. Rebecca Dew
12 says she got -- she had three missed calls from Robbie's
13 cell phone number. Remember about ten o'clock she was in
14 the shower and she had three missed call, and then on the
15 fourth call she actually talked to him. Only what was
16 unusual about that. It wasn't Robbie on the other end.
17 It was Allen Joe Gathings, and he was asking for crack.
18 The last call to her number was at 10:17 p.m. from
19 Robbie's cell phone. It was only one other call made to
20 that phone at 10:20, and then that's it. That's it.

21 Look also at Loyce's. Loyce's cell phone records are
22 here, too. Take a look at hers. She's calling Joe all
23 throughout that afternoon, 6/29: 3:50 p.m. 3:53 p.m,
24 4:05 p.m. 4:14 p.m. 4:19, 4:27, 4:42, 4:54, 5:03, 5:11,
25 5:49. Why in the world would Ms. Locklear call him at the

1 same time Robbie is calling him? Something is going on.
2 That's what. The last phone call from her phone on 6/29,
3 another 9:14 p.m. That's it. That's it.

4 You look at Joe Gathings's cell phone it goes on and
5 on. Look at those records. They are telling. This
6 evidence has a lot to tell you, but you have to look at it
7 and you have to listen. It's not just the witnesses who
8 sat here and testified to you. It's the pieces of paper
9 and items of evidence that are going to come back to you.
10 They have a lot to tell you.

11 And let's look at the physical evidence. You know
12 Mr. Jones says there is a lot of it. He says, "Oh, yeah,
13 there is a lot of evidence." And then he wants to say
14 that there is no evidence, but there is actually a lot of
15 evidence. And it's very telling and the most telling is
16 the physical evidence because we don't have an eyewitness
17 that was there when it happened. We have to listen to
18 what the physical evidence tells us at the crime scene.

19 And when you all all of those photos that show you
20 exactly how things were when they found it, and exactly
21 how gruesome that scene was. Yes, this was an awful
22 killing. And if you remember the officers went in and the
23 E.M.S. workers went in, but they all went in, and I'll
24 refer you to your sketch. But they all went in the back
25 door, go through the kitchen. They see Robbie and then

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1 they go up and they can see Ms. Locklear.

2 Okay. They were both -- they were all going to see
3 the two bodies. Where were the bloody footprints found?
4 Do you recall? Up in Ms. Locklear's bedroom. They
5 weren't down in the hallway. They weren't over here in
6 his bedroom. Law enforcement was walking back and forth.
7 They were up here. And what's more they all testified,
8 number one, they didn't wear a size 11 shoe and didn't
9 have on New Balance tennis shoes. And, number two, all
10 the law enforcement and E.M.S. people had on these black
11 boots which you've seen most of them wear.

12 Look at the tread on those. That's not the same as
13 this. See that end. Clearly, clearly, not your law
14 enforcement or E.M.S. personnel. What it was, you see it.
15 These New Balance tennis shoes. They didn't say the --
16 Karl Kenley didn't say they didn't match. He said these
17 could have made it. He didn't say they didn't match like
18 Mr. Jones said. He said these shoes could have made that.

19 Well, what else do we know about these shoes. The
20 only reason why he couldn't say these absolutely were the
21 ones that made it is because they don't have the
22 identifying characteristics. Okay. They don't have a
23 cut. They don't have anything specific to this shoe;
24 that's happened just to this shoe as opposed to any other
25 New Balance size 11 tennis shoe. But this shoe could very

1 well have made these bloody footprints in Ms. Locklear's
2 bedroom.

3 But what else do we know about the shoes. Remember
4 what else is on these shoe? Ms. Locklear's blood and Mr.
5 Polston's blood. These shoes didn't magically get from
6 that scene to the defendant's feet in Horry County. The
7 only way they got that blood on these shoes is he was
8 there. And these shoes made those footprints.

9 And what is the other interest fact about that crime
10 scene. If you look at the photos in their bedrooms; that
11 being Ms. Locklear's bedroom and Robbie's bedroom, what
12 was the state of those two rooms? You recall from the
13 testimony and from the pictures? That it was a mess.
14 Look at there. Ms. Locklear's bed, got all her stuff
15 going through it looking for whatever they could find.
16 Robbie's bed, again, stuff scattered all over the bed. He
17 normally keeps a neat room. Bed made. His stuff is all
18 over the bed.

19 Well, what's interest about that is look a here.
20 This is the defendant's room. Neat and clean as it can
21 be. It's not disturbed. Nobody's been rumbling through
22 there looking for money or whatever they could find. This
23 is in perfect order. Look at those pictures. What does
24 that tell you. And the murder weapon. Didn't see it at
25 first. They didn't know. All they knew was that they had

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1 been beaten with something. But low and behold they
2 looked over and there is the bat. It's not laying by the
3 body. It's in laying up in the hallway. It's not thrown
4 down anywhere. Where was it?

5 Now, remember it's got the victim's blood on it.
6 Where was it. It's right where it was always kept,
7 between the bed and the computer desk., Not somewhere you
8 would just stick if you just finished murdering somebody
9 and you weren't familiar. He put it right back where it
10 was always kept cause he was familiar with it. He knew
11 that's where it was. He used it to kill them, and then he
12 walked over and put it right back.

13 Stuck up in between the bed and the computer. Law
14 enforcement didn't even see it at first cause it was stuck
15 out of the way. And what do we hear about the injury.
16 Karl Kenley I think testified to you. He's just the crime
17 scene person. He can't say how many blows, but he can say
18 at least two or probably more. He can't put a number on
19 it. That's what he said, but you remember what he
20 testified to because you have 12 sets of ears and eyes. I
21 only have one so it's what you determine not what I tell
22 you.

23 But what did the doctor say. The doctor who was an
24 expert for forensic pathology, she sat up there and she
25 showed you all the injuries multiple injuries. This is

1 Robbie, to the face and the head. On Loyce, multiple
2 injuries to the face and the head. And what did she say?
3 She said Robbie, she can say there were at least, at
4 least, six blows and probably many more. But she can say
5 there were at least six to the front, back and side of his
6 head.

7 And as for Ms. Loyce Locklear, what did she say. At
8 least 12. Probably many more, but at least 12. She can
9 tell you from the lacerations, the fractures. Tremendous
10 injuries. And she also said that all these injuries were
11 consistent with the use of a bat. Look at that. And,
12 clearly, it's the shape of a bat there on the injury on
13 Ms. Locklear's shoulder. The blunt force trauma.

14 And what else did she say. They both had defensive
15 wounds. You know when you were little and you were
16 fighting with your brothers or sisters or one of the kids
17 in the neighborhood and you throw up that hand to keep
18 from them hitting you. Right there. Right there. The
19 force of Ms. Locklear's was so great that it broke two of
20 her fingers. Both hands, breaking these two. Both hands.

21 Robbie also, back of the hand. They tried to fight
22 back, but it was just too much. Well, let's go to Horry
23 County. Three days later or two days of their bodies were
24 found. Looking for Joe Gathings cause we know he stayed
25 there and one of the cars is gone. And we know this exact

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1 same thing has happened with him before. Common scheme or
2 plan. So where is Joe Gathings? Well, low and behold
3 he's in Conway at Carl Moore's house. They find the car.
4 They go to the camper, trailer where Carl Moore stayed.
5 And they see the car. No question that's the car.
6 License tag, everything, it all fits.

7 Carl Moore is coming out, and Doug Sarvis, who he's
8 familiar with, get him and says, "You know. Is there
9 somebody in your house," and, well, yeah, Joe Gathings is
10 in there. But let's talk about Carl Moore for a minute.
11 The Defense presented him as their alibi witness. Okay.
12 Alibi means he's the one that's going to say that the
13 defendant was somewhere else when this happened, and he
14 couldn't have done it. Is he a credible witness?

15 He gave the statement that day to Doug Sarvis. You
16 have a transcript of it. His testimony was not only
17 inconsistent on the stand, but it was inconsistent when he
18 gave his statement. I encourage you to look at it. I
19 want to point out some of those inconsistencies. The
20 statement, he says -- starts out -- this is on July the
21 2nd, now. They're trying to get Joe out of his trailer
22 and Doug Sarvis is interviewing Carl Moore.

23 And the detective says, "The reason we're here today
24 is we suspect that there is a subject in your house that's
25 wanted. Is there someone else in your house at this

1 time?" And Moore says, "No, sir. There is no one in your
2 house right now," and Moore says, "Nope." And then the
3 officer says, "Who was in there a while ago with you?"
4 And Moore says just him. So there is someone in your
5 house right now; is that correct? Yeah. So first he says
6 no, and then he says yeah. Does he know?

7 "How long has Joe been here," asked the detective.
8 And he responds, "He come here Friday evening." Friday
9 evening. No mention about 3:30, 4:00 in the afternoon
10 Friday evening. Then further up the officers questioned
11 him, and he says, "Okay, and he come here yesterday
12 evening; is that correct? Yes, sir. Yesterday evening
13 now. That would have been on Sunday. So you talked to
14 him on Monday, two days later now.

15 Then he goes on to say, "Now, you were telling me
16 earlier that you suspected may be wrong." The detective
17 is asking Carl Moore. He said he thought something might
18 be wrong. Well, there is Moore now, he says, "Well, when
19 I went to the store with him he said he didn't want to
20 park in front of the door cause he didn't want nobody out
21 there to know he was here." He didn't want nobody out
22 there to know he was here. Why is that?

23 Then when that officer asks further he says, "He said
24 he didn't want his momma to see him over here." And then
25 he says, "Does his momma live close," and he responds,

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1 "She stays somewhere close by. Her name is Nola." But
2 what did he testify to yesterday? He said, "Oh, she lived
3 40, 50-miles away." If she lived 40 or 50 miles away what
4 difference would it make if he parked in front of the
5 trailer. She can't see 40 or 50-miles away.

6 Then he goes on to say, "You asked him about the car.
7 Why was he parking the car there; is that correct. Yeah."
8 Moore says, yeah, I asked him." Something funny was going
9 on. What did he tell you. He said he didn't want his
10 momma to pull up and see him here. Now, she lives
11 40-miles away, and he's afraid she's going to pull up.
12 Does that make sense.

13 And then later he says, "Okay, yeah -- the officer
14 asks, "Okay. He hadn't said anything about the police
15 looking for him or anything like that," and Moore
16 responds, "No, sir. I asked him. I said, are you cool."
17 He knew something was going on. Something wasn't right.
18 He says he asked him, "Are you cool."

19 And he goes on to say that Joe told him that he was
20 living at Surfside now. We know Joe wasn't living at
21 Surfside. Joe is lying to him now. It just goes on and
22 on. He doesn't know what's up and what's down. But he's
23 here. He's known Joe all his life. He came yesterday and
24 he's going to tell you what he can to help him. And what
25 else did he say. He said, "We were together from Friday

1 at 3:30 to 4:00 until y'all showed up on Monday. We were
2 together the whole time. He never left."

3 Did you how see how he acted when they asked him
4 about going to the bank? No, Joe do not go to the bank.
5 Joe never left me. I'm afraid that's not quite right. We
6 do have video of that. Right here. You saw it. You can
7 look at it again any time you want. It will be available
8 to you. But Saturday morning at 10:30 Joe Gathings wasn't
9 with Carl Moore. He was at Horry County State Bank. He
10 was at the A.T.M. machine, and he was in Loyce Locklear's
11 car, and he was trying to get money.

12 The defense wants to tell you, oh, he had plenty of
13 money. He didn't need any money. But Saturday morning at
14 10:30 who was at Horry County State Bank in Loris trying
15 to get money out. In the car when they searched it they
16 found two receipts where he was at the bank. And made not
17 one attempt but two to get money out. And you know what.
18 He didn't have any money. He did not have any money on
19 Saturday morning at 10:30. Funds unavailable. Funds
20 unavailable. He didn't have any money.

21 He already smoked all that up. Snorted it up. Well,
22 let's go back to the trailer now. Joe Gathings was in
23 Carl Moore's trailer camper in Horry County. Got there in
24 Loyce Locklear's car, and the police come. Got a big old
25 loud speaker. Joe come out. Call in the Negotiation

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1 Team. Still got that big megaphone. Still didn't come
2 out. Call in the S.W.A.T. Team. This is a camper trailer
3 now. Still doesn't come out. They send a robot to the
4 door and rip it off and he still doesn't come out. They
5 have to throw tear gas in that camper for him to come out.

6 Two to three hours later he finally comes out. Two
7 to three hours later. And, ladies and gentlemen, if he
8 didn't do this why didn't he come out of that camper. Why
9 is he hiding in there. Why did he flee to Horry County
10 and stay in there until they filled it with tear gas.
11 Well, I'll tell you why. Cause he knew he had just
12 murdered Robbie Polston and Loyce Locklear, and they were
13 on to him. He had a car right outside. This is what I'm
14 talking about. Fit the pieces of the puzzle together.

15 Why did he do that. Why else would he do that. So
16 he was arrested, and what's the interesting thing about
17 when he was arrested. You've got the booking photo from
18 Horry County and the photos from the following day when he
19 was brought back here three days later. Got some injuries
20 to his head. Healing injuries. We know that they are
21 defensive wounds. They tried to fight back. Try, they
22 tried.

23 So he's arrested. He goes to jail, and in December
24 he's housed with Julius Lynch in Dillon. So you heard
25 from Julius Lynch. He came here and he told you he wasn't

1 subpoenaed. He came voluntarily. Yeah, he is a convicted
2 felon. He was in jail with Joe Gathings, but you know
3 what. He doesn't have a single thing to gain by coming
4 here this week and testifying against Joe Gathings. Not a
5 single thing.

6 And you know in that later that he sent if you
7 remember his testimony he said that he sent that letter in
8 December of '08. He was sentenced and pled and sentenced
9 in January of '08. A year after he was sentenced he sent
10 that letter which outlines what information he had about
11 various defendants. And he didn't get any benefit from
12 any of that. He didn't get a -- he was familiar with
13 downward departure. That would have been great if he
14 would have gotten it, but he didn't.

15 And even after that, even now he's concluded his
16 sentence, and he will come forward and tell you what Joe
17 Gathings told him that night when he was housed together.
18 And he told you that he did that for two reasons: His
19 grandmother was here in the courtroom with him. He
20 pointed her out. She was sitting out in the audience.
21 His elderly grandmother, 85 years-old I believe he said.
22 And he said all he could think about when he was talking
23 about killing that 911 director and his elderly mother was
24 his grandmother being beaten with a bat. That's why he
25 came.

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1 And, number two, as a part of his plea negotiations
2 he agreed to give information about any criminal activity.
3 Remember, now, he didn't did have any charges pending
4 against him. he was serving his sentence. Now, he's done.
5 He doesn't gain a single thing, but what did he tell you.
6 "Yes, Joe Gathings, he told me -- we were housed together.
7 He told me he was living with Robbie, who was the former
8 911 -- work at 911 here in Marlboro County and his mother.

9 He had been working a roofing job. He knew many of
10 the details. Left the job. Went and bought some liquor.
11 Lord Calvert, I believe it was. Said he started drinking
12 the liquor, popping pills. Went back to the house,
13 changed clothes. Actually went to get some cocaine.
14 Robbie went with him. When they got back to the house
15 Robbie got out and went inside.

16 Cause, remember, Robbie doesn't do drugs. He doesn't
17 do crack. He doesn't do cocaine. It wasn't in his system
18 when his autopsy was done. He didn't do it. All the
19 witnesses say so. He didn't do it. Yeah, Joe did it, but
20 Robbie didn't. Robbie would do almost anything for Joe.

21 But what did Joe say to Julius Lynch he did. He
22 snorted a line of cocaine off of the dash. Remember he'd
23 already been drink Lord Calvert and been pooping pills.
24 Now he's snorting cocaine. And he said he told Julius
25 Lynch, "I blanked out. I flipped out, and I killed them."

1 THE COURT: Five minutes, Ms. Munnerlyn.

2 MS. MUNNERLYN: Yes, Your Honor, I'll wind it up. "I
3 killed them with an aluminum baseball bat. It was in the
4 house." In fact he said, "Yeah, it's no problem because
5 my fingerprints would be all over because I lived there
6 any way. They will never connect me to it. I killed them
7 with the aluminum baseball," and then he got in the car
8 and he went to Horry County. Told him about staying in
9 the camper, the tear gas coming in, blankets being over
10 the door, about finally surrendering:

11 But, ladies and gentlemen, even without that
12 jailhouse confession of Joe Gathings himself the most
13 telling and important evidence is the physical evidence
14 that's before you. The physical evidence from the scene
15 and the physical evidence which was taken from the
16 defendant himself. And I don't care what Mr. Jones says.
17 That evidence tells you more than just about anything else
18 because that -- Loyce Locklear's and Robbie Polston's
19 blood didn't get on the defendant's shoes by magic.

20 And somebody else wasn't wearing them and they
21 magically got on his feet in Conway. These shoes were at
22 that house that night, and they were being worn by Joe
23 Gathings. All you have to do is look at Ms. Hefner's
24 report, and it's here somewhere. It tells you exactly
25 here, and, no, she tells you they didn't analyze every

1 single thing. If they had all the resources in the world
2 they would analyze everything that came in.

3 But they only analyze those things that are most
4 probative. There are nine swabs in the shoe. Is that
5 going to tell you any more than the first two? If there
6 is blood on -- if there is blood on one spot for one and
7 blood in another from another do we need to know any more?
8 It's all here. You need only now to listen to what it's
9 telling you.

10 Ladies and gentlemen of the jury, this is the most
11 important case. It's the double homicide, and Loyce
12 Locklear and Robbie Polston aren't here any more as a
13 result of what happened on June 29th and June 30th. It's
14 your decision. You have to decide what happened. What
15 happened that night in the early morning hours of June
16 30th. I submit to you that if you go over that testimony
17 and you review all of this evidence that the only verdict
18 you can reach is guilty of two counts of murder and grand
19 larceny. I thank you for your attention.

20 CHARGE OF THE COURT

21 THE COURT: Ladies and gentlemen, you've been in the
22 courtroom now for about an hour and a half. The only
23 thing that remains to be done before you will be allowed
24 to deliberate your verdict are the instructions on the law
25 by the Court. But I do think that maybe we ought to take

1 about a ten minute recess before I go into these
2 instructions. So I am going to allow you to go to your
3 jury room for about ten minutes to relax just a few
4 minutes. Cause as I say you have been in the courtroom
5 for an hour and a half, and I think before I go into my
6 instructions it would be appropriate to take that recess.
7 So if you would go with the bailiffs and we'll send for
8 you very shortly. Do not begin any deliberations yet
9 though.

10 (WHEREUPON, the jury panel was excused from the
11 courtroom at 11:03 a.m.)

12 THE COURT: All right. Counsel, we're take a ten
13 minute recess:

14 (WHEREUPON, Court was in recess at 11:03 a.m. and
15 reconvened at 11:13 a.m.)

16 THE COURT: All right. We're back on the record with
17 regards to the matter of the State v. Allen Joe Gathings
18 in Indictment Numbers 07-GS-43-888, 889. I'm sorry 887,
19 888 and 909. Mr. Gathings is present with his counsel,
20 and the State is present and represented by Ms. Munnerlyn.
21 All right. Bring the jury in please.

22 (WHEREUPON, the jury panel enters the courtroom at
23 11:14 a.m.)

24 THE COURT: All right. Madam Forelady and ladies and
25 gentlemen of the jury, if you would give me your

Charge of the Court

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1 attention. You have followed very patiently and listened
2 very attentively to the presentation of the evidence in
3 this case and also to the able arguments made by the
4 Solicitor, Ms. Munnerlyn, on behalf of the State and
5 Ms. Crayton and Mr. Jones on behalf of the Defendant, and
6 I thank you for that.

7 It now becomes the duty of the trial judge under the
8 constitution of this State to charge and instruct you in
9 the law applicable to this case. And it is your duty as
10 jurors to accept and apply the law as the Court will now
11 state it to you. As jurors it is your exclusive duty to
12 decide all of the issues of fact in this case. And for
13 that purpose to determine the effect, the value, the
14 weight and the truth of the evidence presented.

15 Both the State and the Defendant have the right to
16 expect that you will conscientiously consider and evaluate
17 the evidence and apply the law of the case; thereto, to
18 the end that both the State of South Carolina and the
19 Defendant will receive and obtain a fair and impartial
20 trial.

21 Now, when I use the word, 'defendant' these
22 instructions I refer, of course, to Mr. Allen Joe
23 Gathings. The State of South Carolina by the bill of
24 indictments or three bills of indictment in this case
25 charge the Defendant, Mr. Gathings, with two offenses.

1 Two charges of murder and one charge of grand larceny.
2 And I'm going to summarize the charges of the indictments.

3 Indictment Number 887 charges that Mr. Gathings did
4 in Marlboro County on or about June the 30th of 2007
5 feloniously, willfully and with malice aforethought kill
6 one Robbie Polston by means of striking victim with a
7 baseball bat, and that this incident did occur at 502
8 North Main Street in Clio. And that is a charge of
9 murder.

10 The next indictment is Indictment Number 888, and it
11 charges that Mr. Gathings did in Marlboro County on or
12 about June 30th of 2007 feloniously, willfully and with
13 malice aforethought kill one Loyce Locklear by means of
14 striking her and mortally wounding her with a baseball bat
15 and that she did die as a result therefore. And that this
16 incident occurred at [REDACTED] in Clio.

17 And, finally, in Indictment Number 909, the State
18 charges that the Defendant did in Marlboro County on or
19 about June the 30th feloniously take and carry away the
20 personal goods of Loyce Locklear of value of more than
21 \$1,000 less than \$5,000, specifically a light blue in
22 color 1995 Chevrolet Corsica with the intent to deprive
23 the owner of the property. And this is a charge of grand
24 larceny.

25 To these charges and to those indictments the

Charge of the Court

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1 Defendant has entered a plea of not guilty. This plea of
2 not guilty by the Defendant places the burden of proof on
3 the State to prove by evidence the guilt of the defendant
4 beyond a reasonable doubt before you the jury can find the
5 defendant and find him guilty.

6 The Defendant, Mr. Gathings, is presumed in law
7 innocent of the charge contained in the indictments. It
8 is cardinal and fundamental rule of the law of evidence
9 that a defendant irrespective of enormity of the offenses
10 or charges against him will always be presumed innocent of
11 the crimes which he has been indicted unless and until the
12 guilt of the defendant had been proven by evidence which
13 satisfies you the jury of his guilt beyond a reasonable
14 doubt.

15 The presumption of innocence is not just a mere legal
16 theory. It is not just a legal phrase. The presumption
17 of innocence is a substantial right to which every accused
18 is entitled. Our Supreme Court has declared that the
19 presumption of innocence is like a robe of righteousness
20 placed about the shoulders of this defendant and it
21 remains with him and assigns to him that class, the
22 innocent, until that presumptive robe of righteousness has
23 been striped from his person by evidence satisfying you
24 the jury of his guilt beyond a reasonable doubt.

25 The presumption of innocence accompanies the

1 defendant from the time of his arraignment and appearance
2 in this court and continues with the defendant until --
3 continues with the defendant after you retire to the jury
4 room to deliberate your verdict. The presumption of
5 innocence remains and continues in existence to the
6 benefit of the defendant until you the jury reach the
7 conclusion that the State has proven the guilt of the
8 defendant beyond a reasonable doubt.

9 The State is not required to prove the guilt of a
10 defendant beyond all doubt or beyond every doubt, but
11 beyond a reasonable doubt. What ask a reasonable doubt.
12 It is not an imaginary or fanciful doubt or a weak doubt.
13 It is the substantial doubt. It is a doubt which the
14 words imply. A doubt for which you can give or assign a
15 reason based on the evidence and testimony in this case.
16 A reasonable doubt is not any sort of a doubt.

17 You and I know from every day life experiences that
18 you may have a sort of a doubt about any matter that
19 arises. No matter how trivial it may be or how serious it
20 may be. A reasonable doubt is a doubt which makes an
21 honest, sincere, conscientious juror in search of the
22 truth hesitate to act. Proof beyond a reasonable doubt is
23 proof which leaves you firmly convinced of the defendant's
24 guilt. If you have a doubt for which you give or assign a
25 reason as to the guilt of the defendant then he was

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1 entitled to a verdict of not guilty.

2 Reasonable doubt may arise from evidence which is in
3 the case or from the lack of evidence in the case. You
4 the jury must make the determination of whether or not
5 reasonable doubt exists as to the guilt of this defendant.
6 The very fact, however, that the jury engages in a full
7 and free discussion of issues of guilt or non-guilt in
8 this case with the normal conversational ebb and flow on
9 these issues does not automatically mean that reasonable
10 doubt exists in this case or any in other case.

11 I charge you that the defendant is entitled to every
12 reasonable doubt arising in the whole case or arising in
13 any defenses asserted by the defendant. If upon any issue
14 of fact essential to a conviction you have a reasonable
15 doubt as to how that issue should be resolve it would be
16 your duty to resolve that duty in favor of the defendant.

17 A defendant, ladies and gentlemen, is not required to
18 prove his innocence, but the State is required by law to
19 prove every essential element of the charge against the
20 defendant by evidence which satisfies you the jury of the
21 guilt of the defendant beyond a reasonable doubt before
22 you could convict the defendant and find him guilty.

23 If then upon the whole case you have a reasonable
24 doubt as to the guilt of innocence of the defendant he is
25 entitled to that reasonable doubt and would be entitled to

1 an acquittal and a verdict of not guilty. But on the
2 other hand if upon the whole case you found that the State
3 has proven by the evidence which satisfies you the jury of
4 the guilt of the defendant beyond a reasonable doubt then
5 in such circumstances it would equally be your duty to
6 convict the defendant and find him guilty.

7 Now, I instruct you that the indictment in this case
8 which I hold in my hand is not evidence and cannot be
9 considered by you as evidence of anything. The indictment
10 is simply the formal written instrument which contains the
11 charge against the defendant and it serves as the formal
12 document by which this matter is brought to trial.

13 Now, during this trial, ladies and gentlemen, each of
14 us, you and I, have certain duties to perform. As the
15 trial judge it is my responsibility to preside over the
16 trial of this case and I also have the duty to rule upon
17 or pass upon the admissibility of evidence offered during
18 the progress of the trial. You are to consider only the
19 evidence before you, and you are to disregard and disabuse
20 from your mind any testimony ordered stricken from the
21 record of this case during the progress of the trial if
22 there be any. And you are to consider only the testimony
23 which has been presented from the witness stand together
24 with the exhibits admitted into the record of this case
25 and any stipulations of counsel made into the record if

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1 there be any.

2 I have the additional duty to charge you the
3 applicable law in this case. As the presiding judge I am
4 the sole judge of the law. It is your duty to accept and
5 apply the law as I now state it to you. If you have a
6 preconceived idea as to what the law is or what the law
7 ought to be and it does not agree with what I tell you
8 the law is you are obligated under your oath to abandon
9 this preconception on your part because you are sworn to
10 accept the law precisely as the Court will now state it to
11 you.

12 In every case tried in this Court before a jury the
13 jury becomes the sole and exclusive judge of the facts.
14 You the jury are the judge of the facts in this case. The
15 Court is the judge of the law. The constitution of this
16 State has declared that the trial judge shall not
17 intimate, state, comment upon or make any statement to a
18 trial jury about the facts of the case. Since you are the
19 sole judges of the facts you are not to infer from
20 anything that I have said during the progress of this
21 trial in ruling upon the admissibility of evidence or
22 otherwise or anything that I say to you now during the
23 course of this charge to you that I have an opinion about
24 the facts of this case. I do not.

25 The law does not permit me to have an opinion about

1 the facts in this case. That is a matter solely for you
2 the jury to determine. As jurors then it is your duty to
3 determine as I have states to you the effect, the weight
4 and the truth of the evidence presented during the course
5 of this trial. Necessarily then, you must assess the
6 credibility of the witnesses who have testified in this
7 case. Credibility is simply a legalistic word meaning
8 believability. It becomes your duty then to analyze and
9 evaluate the evidence and to determine that evidence which
10 convinces you of its truth.

11 I charge you that in determining the question of
12 credibility or believability of the witnesses you may
13 believe one witness as against several witnesses or
14 several witnesses as against one witness. You may believe
15 a part of the testimony of a witness and reject the
16 remaining part of the testimony of that same witness. You
17 may believe the testimony of a witness in its entirety or
18 reject the testimony of a witness in its entirety. You
19 may consider whether any witness has exhibited any
20 interest, any bias, or any prejudice in the case.

21 You may consider the demeanor of a witness; that is
22 the appearance of a witness from the witness stand. And
23 you may consider the opportunity for knowledge concerning
24 those things about which a witness testified. These
25 considerations you do not exercise arbitrarily, but if in

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1 your good judgment there is sound reason in the record for
2 so doing because your objective, ladies and gentlemen, is
3 to find the truth whether it comes from a witness or
4 witnesses for the State of South Carolina or from a
5 witness or witnesses from the defendant.

6 And in doing so in exercising your mental processes
7 and in determining what you consider to be true the law
8 simply requires that you exercise your good judgment, you
9 common sense, your experiences in life, your sense of
10 logic and reason, and then you then apply attributes of
11 ability to the evidence and determine what you consider to
12 be the truthful evidence. And to these true state of
13 facts as determined by you the jury you take and apply the
14 law as I now state it to you and thus arrive at a true
15 verdict in this case.

16 Now, as I said the defendant in this cases is charged
17 with two separate offenses, but two charges of murder and
18 I will now define these offenses for you. What is murder?
19 Murder is defined as the willful and felonious killing of
20 a human being by a human being a malice aforethought; that
21 malice being either express malice or implied malice.
22 Section 16-3-10 of the South Carolina Code provides,
23 "Murder is the killing of any person with malice
24 aforethought either express or implied." The State must
25 prove beyond a reasonable doubt that the defendant killed

1 another person with malice aforethought. The presence of
2 malice is a required element of murder. Malice is also
3 defined as being hatred or ill will. Malice in its legal
4 sense does not necessarily import ill will toward the
5 individual injured, but signifies rather a general
6 malignant recklessness of the lives and safety of others
7 or condition of the mind which shows a heart, regardless
8 of social duty and fatally bent on mischief.

9 Malice is the wrongful intent to injury another
10 person. It indicates a wicked or depraved spirit intent
11 on doing wrong. Malice is a legal term implying
12 wickedness and excluding a just cause or excuse. It is
13 the doing of a wrongful act intentionally and without just
14 cause or excuse. The term of malice indicates a formed
15 purpose and design to do a wrongful act under the
16 circumstances that exclude any legal right to do it.

17 Malice maybe express or implied. The words 'express
18 or implied' add nothing to the meaning of the word malice.
19 They do not imply different kinds of malice, but merely
20 the manner in which the only kind known in the law maybe
21 shown to exist; that is either by positive evidence or by
22 inference.

23 Express malice is where there is a deliberate
24 intention to unlawfully take the life of another. Implied
25 malice is when circumstances demonstrate a wanton or

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1 reckless disregard for human life or a reasonably prudent
2 man would have known according to common experience is
3 such a plane and strong likelihood that death would follow
4 the contemplated act.

5 The law says if one intentionally kills another with
6 a deadly weapon the implication of malice may arise. If
7 facts are proven beyond a reasonable doubt sufficient to
8 raise an inference of malice to your satisfaction this
9 inference would be simply an evidentiary fact to be taken
10 into consideration by you the jury along with other
11 evidence in this case. And you may give it such weight as
12 you determine it should receive.

13 A deadly weapon is any article, instrument or
14 substance which is likely to cause death or great bodily
15 harm. Whether an instrument or object has been used as a
16 deadly weapon depends on the facts and circumstances of
17 each case. Although malice must be a forethought there is
18 no requirement that it must exist for my appreciable
19 length of time before the commission of the act. It may
20 be conceived at the very moment the act occurs. There
21 must be a combination of the evil intent and of the act
22 producing the result.

23 Now, the defendant is also charged with offense of
24 the grand larceny. Section 16-13-30(b) of the Code of
25 Laws of South Carolina provides, "Larceny of goods,

1 chattels, instruments or other personalty valued in excess
2 of \$1,000 is grand larceny. Larceny is the felonious
3 taking and carrying away of the goods of another against
4 the own's will or without the consent with the intent to
5 permanently deprive the owner of the possession." There
6 are five elements which the State must accomplish beyond a
7 reasonable doubt to convict the defendant of grand
8 larceny.

9 These elements are: A taking, the carrying -- the
10 act of carrying the property away. This is called
11 exportation in the law. Exportation is the act of
12 carrying away of the personal property of another valued
13 in excess of \$1,000 without the consent or against the
14 will of the owner and with the intent to steal."

15 To convict of grand larceny the State must show that
16 the defendant took the property of another and carried it
17 away with the intent to steal. The exportation of stolen
18 property is an indispensable element of the offense of
19 grand larceny, and can be established by the slightest
20 removal of the chattels with felonious intent. It must be
21 shown the taking and carrying away was without the consent
22 or against the will of the owner of the property.

23 The State must prove the value of the property taken
24 was in excess of \$1,000. The defendant must intent to
25 permanently deprive the owner of the procession by

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1 converting the property to his own use.

2 Now, ladies and gentlemen, the defendant in this case
3 has raised the defense of alibi. This means the defendant
4 cause not at the scene of the crime at the time it was
5 committed, but was elsewhere and had nothing to do with
6 it. The word, 'alibi' means elsewhere. There is no
7 burden upon the defendant to prove that he was not at the
8 scene of the crime.

9 There is no burden upon the defendant to prove his
10 alibi. The defendant need not prove he was somewhere
11 else. The burden is on the State to prove beyond a
12 reasonable doubt that the defendant was present at the
13 scene of the crime, actually participated in the crime,
14 and was not somewhere else. Thus the State has the burden
15 of proving beyond a reasonable doubt that the defendant
16 was present and committed the crime. The State has the
17 burden of disproving the defendant's alibi defense.

18 Now, ladies and gentlemen, with regard to evidence of
19 over crimes, the evidence is limited to the consideration
20 by you as it relates to:

21 One, motive for the offense charged in this case.

22 Two, intent in regard to the commission of the
23 offenses charged in this case.

24 Three, absence of mistake or accident in reference to
25 the offenses charged in this case.

1 Four, a common scheme or plan embracing the
2 commission of two or more crimes so related to each other
3 that proof of one tends to establish the other, or.

4 Five, the identity of the person charged with the
5 commission of the crime on trial.

6 The evidence is limited to those purposes and uses.
7 This evidence cannot be used for any other purpose. This
8 type of evidence must not be considered in any other
9 fashion.

10 Now, ladies and gentlemen, there are generally two
11 types of evidence that are presented in any case, direct
12 and circumstantial evidence. Direct evidence is the
13 testimony of a person who asserts or claims to have actual
14 knowledge of the fact such as an eyewitness.
15 Circumstantial evidence is proof of a chain of facts and
16 circumstances indicating the existence of a fact. The law
17 makes absolutely no distinction between the weight or
18 value to be given to either direct or substantial
19 evidence. Nor is a greater degree of certainty required
20 of circumstantial evidence than is required of direct
21 evidence.

22 You should weigh all of the evidence in this case,
23 and after weighing all of the evidence if you are not
24 convinced of the guilt of the defendant beyond a
25 reasonable doubt you would find the defendant not guilty.

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1 On the other hand if after weighting all of the evidence
2 if you are convinced of the guilt of the defendant beyond
3 a reasonable doubt you would find the defendant guilty.
4 Also there has been testimony in this case from expert
5 witnesses. Although lay witnesses are limited to
6 testifying about facts within their knowledge and are not
7 allowed to give opinions certain witnesses who by their
8 education, training or experience are considered experts
9 in a particular field may give their opinions in that
10 particular field based upon the facts of the matter and
11 their conclusions.

12 These opinions constitute evidence to be considered
13 by you in connection with the other testimony and
14 evidence. You may consider the expert's opinion just as
15 you do all other evidence in this case. It is for you the
16 jury to give it such weight as you in your experience and
17 discretion determine. You must weigh such evidence and
18 accept or reject it in the same manner as you treat all
19 other evidence in this case.

20 All right, now, ladies and gentlemen, the defendant
21 in this case has not testified. This is his
22 constitutional right. It is not a circumstance you can
23 take into consideration or even allow to enter into your
24 discussion in the jury room. Under the Constitution of
25 South Carolina and the United States Constitution it is

1 the defendant's constitutional right not to testify. The
2 burden of proof is on the State of South Carolina to
3 establish his guilt beyond a reasonable doubt. The fact
4 that the defendant did not take the witness stand and
5 testify in this case or in his own behalf does not create
6 any inference against him.

7 The jury must not permit that fact to weigh in the
8 slightest degree against the defendant, and nor should
9 this fact enter into the discussions of the jury in their
10 deliberations.

11 Now, ladies and gentlemen, I have just about finished
12 my instructions to you. I would tell you that you do not
13 serve on the jury. You are not partisans or advocates of
14 the State of South Carolina or for the Defendant. You do
15 not serve on the jury to reward your friends or punish
16 your enemies. Obviously, such a perverted system of
17 justice would be intolerable. You have been selected by
18 both the State of South Carolina and the Defendant as fair
19 and impartial jurors.

20 It is your duty then by your joint deliberations to
21 determine the truth in this case giving to the defendant
22 the benefit of every reasonable doubt on each and every
23 issue and to the facts which you determine to be true.
24 You then take and apply the law which has been given to
25 you by this Court and thus arrive at a verdict which does

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1 speak the truth. For the word, 'verdict', ladies and
2 gentlemen, has a Latin derivative. It comes from the
3 Latin phrase, 'verus dictum meaning to speak the truth or
4 truth saying. And when you have done that you will have
5 accomplished your responsibilities and satisfied your oath
6 as jurors and discharged your duty to this Court.

7 Now, I want to instruct you on your forms of verdict
8 in this case. If the State has failed to prove the guilt
9 of the defendant beyond a reasonable doubt on any or --
10 charge your verdict would be two words, 'not guilty'. If
11 the State has proven the guilt of the defendant beyond a
12 reasonable doubt your verdict would be one word, 'guilty'.
13 And you will consider each indictment separately.

14 The verdict that you render in this case must be the
15 verdict of each and every juror. It must be your
16 unanimous verdict. All 12 jurors must agree on the
17 verdict which you authorize your forelady to sign. Now,
18 Madam Forelady, I have prepared a verdict form or three
19 verdict forms for your use, and I will tell you the order
20 and consequence which I have put the possible verdicts on
21 the verdict form has no significance whatsoever.

22 You should not infer from the order in which I have
23 put the possible verdicts on these verdict forms as any
24 opinion on my part as to what your verdict should be. The
25 law does not permit me to have an opinion. That is a

1 matter solely up to you. But, obviously, when putting
2 something down on paper I had to put something first and
3 something second. On the top on each one of the cases we
4 have the State and the County and the Court and the
5 Indictment Number and the State of South Carolina v.
6 Allen Joe Gathings, defendant. And on the right, verdict.
7 And in Indictment Number 887 it's, "We the jury by
8 unanimous agreement on the charge of murder of Robbie
9 Polston find the defendant, Allen Joe Gathings, guilty or
10 not guilty."

11 On Indictment Number 888, "We the jury by unanimous
12 agreement on the charge of murder of Loyce Locklear find
13 the defendant, Allen Joe Gathings, guilty or not guilty.

14 And on the Indictment 909, "We the jury by unanimous
15 agreement on the charge of larceny find the defendant,
16 Allen Joe Gathings, guilty or not guilty," and you would
17 simply put an X or check or whichever one you choose on
18 each verdict form and sign here that all 12 members of the
19 jury have agreed on that verdict.

20 Now, I'm going to send you to the jury room. I'm
21 going to ask that you not begin your deliberations just
22 yet. The law does require that confer with the attorneys,
23 and if it is not necessary for me to give you any
24 additional instructions the bailiffs will bring you the
25 verdict forms. They will also bring you the evidence in

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1 this case. Give you a chance to look at whatever evidence
2 you want. Everything that has been introduced can be
3 taken with you and viewed by you in the jury room. If you
4 should have a need to want to see the video that has been
5 introduced you let us know and we can make arrangements so
6 that video can be played for you if necessary because you
7 do have the right to view and see any of the exhibits that
8 have been introduced.

9 Also I would tell you that we want you to feel
10 comfortable in having as much time to consider this matter
11 as you would like, and when you go into your jury room and
12 begin your deliberations the Clerks are going to ask you
13 about what you would like for lunch, and we will bring
14 lunch in for you. And you will be given several choices,
15 and we will have the lunch here for you. In the event
16 that you have not reached a verdict by the time the lunch
17 gets here we will have it here.

18 And even if you have reached a verdict we will still
19 have lunch for you. In either case we will have lunch for
20 you, but we want you to feel comfortable to give this
21 matter as much consideration and have as much time as you
22 need to consider the matter in full. So the bailiffs will
23 or the Clerk will come in and ask you about lunch. It
24 will take us, of course, over an hour to get it here
25 that's why we go ahead and make this arrangement at this

1 time.

2 Now, having said that with the exception of everybody
3 but the alternate who I'm going to ask to remain seated I
4 will excuse the injury, allow you to go to your jury room
5 and please do not begin your deliberations just yet.
6 Thank you. Mr. Alternate, you go back there with them and
7 pick out what you what for lunch. Stay with me just 15
8 minutes, Mr. Alternate. Mr. Alternate, stay with me just
9 15 minutes.

10 (WHEREUPON, the jury panel was excused from the
11 courtroom at 11:45 a.m.)

12 COLLOQUY

13 THE COURT: Mr. Alternate, we are going to have the
14 jury come back and pick out lunch. But let me tell you
15 the situation with the alternate. The law does not allow
16 me to have but 12 jurors. You've heard all the testimony
17 in this case, but you're not going to make a decision in
18 the matter. You won't be involved in the decision in the
19 case because, fortunately, all 12 jurors have remained
20 healthy and we have not had to replace you on the jury.

21 As a result earlier in this case we did have to
22 replace one of the jurors with an alternate. That means
23 that even though you have heard all the testimony you will
24 not participate in the decision, and I will be able to
25 excuse you at this time. I will tell you that once you

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1 have been excused there is nothing illegal about you're
2 talking with anybody about your service on this cases.
3 There is nothing illegal about anybody talking with you
4 about your service. It is a practice of which I strongly
5 disapprove and I strongly discourage, but it is not
6 illegal.

7 You have the right to talk to anybody, but you also
8 have the right not to talk with anybody, and if somebody
9 wants to talk to you about your service and you don't want
10 to talk about it and they continue to harass you you let
11 the Court personnel know and I will deal with them. Now,
12 as I say can't excuse -- would ask that you not discuss
13 this is matter we anybody until this jury comes back and
14 you won't know what that is, so I ask that you not discuss
15 this case with anybody or allow anybody to discuss it with
16 you until sometime tomorrow cause I feel sure that this
17 matter will be concluded this afternoon.

18 Now, having said that we are happy to furnish you
19 with lunch. It will be about an hour before it gets here
20 or you can leave, but I'll leave that up to you. It's
21 your choice. We're going to order lunch. We'll be glad
22 to order lunch for you as well, but it will probably be
23 about an hour before you get here. But that's up to you.
24 It you would like to go ahead and go you may do so or
25 would you like to have lunch with us.

1 JURY ALTERNATE: I would like to go off.

2 THE COURT: You would like to go off. Okay. All
3 right. So then you are excused and thank you for serving.
4 All right. Any additions or exceptions on the part of the
5 State, Ms. Munnerlyn?

6 MS. MUNNERLYN: No, Your Honor.

7 THE COURT: On behalf of the Defense, Ms. Crayton?

8 MS. CRAYTON: No, Your Honor.

9 THE COURT: All right. Yes, if you will, here are
10 the verdict forms, Mr. Clerk, and if you will send your
11 folks back and get the lunch and get the exhibits together
12 and tell the jury that they may begin their deliberations.
13 Go ahead and get the lunch things while they're gathering
14 up the exhibits.

15 (WHEREUPON, the jury panel was excused from the
16 courtroom to begin deliberations at 12:06 p.m.)

17 THE COURT: And we will be at ease until we hear from
18 the jury.

19 (WHEREUPON, Court was in recess at 12:06 p.m. and
20 reconvenes at 12:35 p.m.)

21 (WHEREUPON, Court's Exhibit No. 3 was marked for
22 identification and received into evidence.)

23 THE COURT: Counsel, I want to put on the record
24 about the three notes. Two notes -- excuse me, from the
25 jury. Before the jury received the evidence they asked a

1 note which has been made a Court's exhibit already, and
2 that question was, "Can we know the defendant's shoe
3 size," and after conferring with counsel I told them that
4 the evidence was being brought to them, and if they still
5 had a question about that that they could ask another
6 question. And that's where we left that first jury
7 question.

8 (WHEREUPON, Court's Exhibit No. 4 was marked for
9 identification and received into evidence.)

10 THE COURT: Thereafter, we received this note which
11 is the next Court's Exhibit. I'm going to give it the
12 court reporter. The three questions: "We would like to
13 know if we can review the video of the bank. Can we see
14 the defendant's tattoos. And can we know exactly what
15 shoe size of the defendant." Again, after conferring with
16 counsel it was agreed that they could view the video. And
17 with counsel's permission have taken the equipment into
18 the jury room with a operator who has been instructed to
19 play the video but not to answer any questions.

20 With regard to the question on the tattoos and the
21 shoe size, I went to the door and advised them that those
22 were matters of fact that I could not comment on, and they
23 would have to decide those matters based on the evidence
24 that was before them. Any objection to the procedure for
25 handling the questions of the jury on behalf of the State.

1 MS. MUNNERLYN: No, Your Honor.

2 THE COURT: From the Defense?

3 MS. CRAYTON: No Your Honor.

4 THE COURT: All right. Thank you. We'll be at ease
5 until the jury has another question.

6 (WHEREUPON, Court is in recess at 12:38 p.m. and
7 reconvenes at 2:13 p.m.)

8 VERDICT OF THE JURY

9 THE COURT: All right. We're back on the record with
10 regard to the matter of the State v. Allen Joe Gathings.
11 Indictment Numbers 07-GS-34-0887, 07-GS-34-0888.
12 07-GS-34-0909. Mr. Gathings is present with his counsel.
13 The State is represented by Ms. Munnerlyn. Counsel, I've
14 been advise that the jury has reached a verdict. Before I
15 bring the jury in I would like to say to everyone here in
16 the courtroom that I know that this is an important matter
17 to everybody concerned, both from the victim's standpoint
18 and from the defendant's stand point.

19 However, I am going to have to insist that order and
20 decorum be maintained in the courtroom when the verdict is
21 announced. The Court will not tolerate any kinds of shows
22 of emotions, explanations or anything else. If there is
23 anyone who thinks that they cannot sit quietly when the
24 verdict is read I would ask that you leave now.

25 All right. Anything before jury is brought in,

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1 Ms. Munnerlyn.

2 MS. MUNNERLYN: No, Your Honor.

3 THE COURT: Ms. Crayton.

4 MS. CRAYTON: No, Your Honor.

5 THE COURT: All right. Bring the jury in, please.

6 (WHEREUPON, the jury panel enters the courtroom at
7 2:15 p.m.)

8 CLERK OF COURT: Madam Forelady, have y'all reached a
9 verdict?

10 JURY FOREPERSON: Yes, sir.

11 THE COURT: All right. From the standpoint of form
12 the verdict appears to be correct. Mr. Jones and Ms.
13 Crayton, would you and your client stand, please. Mr.
14 Clerk, you can publish the verdict.

15 CLERK OF COURT: Indictment 2007-GS-340-887, State of
16 South Carolina v. Allen Joe Gathings. We the jury by
17 unanimous agreement on the charge of murder of Robbie
18 Polston find the Defendant, Allen Joe Gathings, guilty.
19 Foreperson, Ashley Clark. October the 21st 2010.
20 Bennettsville, South Carolina.

21 Indictment Number 2007-GS-34-0888, State of South
22 Carolina v. Allen Joe Gathings. We the jury by unanimous
23 agreement on the charge of murder of Loyce Locklear find
24 the Defendant, Allen Joe Gathings, guilty. Foreperson,
25 Ashley Clark. October the 21st 2010. Bennettsville,

1 South Carolina.

2 Indictment Number 2007-GS-34-0909, the State of South
3 Carolina v. Allen Joe Gathings. We the jury by unanimous
4 agreement on the charge of larceny from \$1,000 less than
5 \$5,000 find the Defendant, Allen Joe Gathings, guilty.
6 Foreperson, Ashley Clark. October the 21st 2010.
7 Bennettsville, South Carolina.

8 Is this your verdict so say you all by raising your
9 right hand. Thank you, Your Honor.

10 THE COURT: Thank you. You may be seated. Anything
11 before the jury is excused, Mr. Jones?

12 MR. JONES: No, sir. You're not ready for motions?

13 THE COURT: No, sir. I'll get those after the jury
14 is excused. All right, ladies and gentlemen of the jury,
15 this will conclude your services in connection with this,
16 and I do want to thank you for your service. In my view
17 the jury's role in the fact finding process is so
18 important that the judge should not comment on the verdict
19 of a jury even after a jury has returned a verdict. And I
20 make it a practice to never to comment on the verdict of
21 the jury. But I will tell you there was evidence in the
22 record by which you could have reached the decision that
23 you did.

24 Now, there is only one other thing that remains to be
25 done in this case, and that will be the sentencing. And

Verdict of the Jury

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1 the Court will go into the sentencing phase right now in a
2 few minutes after I handle some other matters of law. But
3 I'm going to discharge you, but I will tell you that I
4 know lots of times juries are interested in the ultimate
5 outcome of the case. And if you would like to stay for
6 the sentencing phase you are welcomed to do so.

7 And so when I excuse you if you would like to stay
8 for the sentencing phase I will allow you to go out this
9 way, come around and come in the back of the courtroom,
10 and have a seat and we'll go into the sentencing phase.
11 And I will tell you that I will require everyone else to
12 remain in the courtroom after the sentencing phase and
13 give you an opportunity to clear the premises before I
14 release anyone else.

15 So you're welcomed to stay, to go back around and
16 come into the back for the sentencing phase if you would
17 like to. And I ensure you are away from the building
18 before anyone else is released. But this will conclude
19 your services in this case, and I do appreciate your
20 willingness to serve. I know that it is never popular or
21 never easy to serve on the jury. And I certainly do
22 appreciate your services.

23 This will be the only case we will need a jury for
24 this week, and the remainder of your jury panel has been
25 released. And so when I release you you will not have to

1 call back. You will not have to come back, and I will
2 tell you that as a result of having served on the jury
3 this week you have met your citizenship responsibilities
4 for jury service in the Circuit Court; that is up here in
5 this courtroom. Either the Court of Common Pleas or
6 General Sessions for the next three year.

7 The first year if you were to get a summons from the
8 Clerk we couldn't take you even if you wanted to serve.
9 You're actually disqualified, and the second and third
10 years you have an exemption, and you can serve if you
11 wanted to but you don't have to serve. So you can't be
12 required to serve as a juror in the Circuit Court more
13 than once every three years. Now, can't help you with
14 Magistrate's Court or federal court. That's just a matter
15 that you will have to take up with the judge of those
16 courts.

17 Next week sometime you will receive a small check
18 from the Clerk's Office. It will in no way compensate you
19 for the time that you have spent up here this week. But
20 it is a small token of appreciation on behalf of the
21 County for your services this week. I have told jurors
22 this a number of times over the years or many times over
23 the years that I know that it is never convenient to serve
24 on the jury, and I know it is even more difficult to serve
25 in a very difficult case.

Verdict of the Jury

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1 But it is an important citizenship responsibility and
2 it is this jury service which makes our system of justice
3 the best in the world. It's not without it's flaws, but
4 it is still the best it has ever been invented by the mind
5 of man and it is because we have good citizens willing to
6 come forward and serve when they are summoned to do so.
7 Even though I know you didn't have much choice about being
8 here this week, but I do appreciate your service and I
9 appreciate your living up to your citizenship
10 responsibility by serving this week.

11 And you are free to go. If you would like to come
12 back in the courtroom feel free to do so, but you not have
13 to. You can go home if you would like, and the other
14 think that I would tell you is that after you have been
15 discharged as a juror there is nothing illegal about your
16 talking with anybody about your service on this case. You
17 can talk with anyone or not talk with anyone. There is
18 nothing illegal about anybody contacting you about your
19 service on this case.

20 It is a practice of which I strongly disapprove and I
21 strongly discourage, but it is not illegal. You have the
22 right to talk with anyone, but you also have the right not
23 to talk with anyone. And if anybody should want to talk
24 with you about your service on this case and you don't
25 want to discuss it and you tell them that and they

1 continue to harass or bother you you let the Court
2 personnel know and I will deal with them.

3 Thank you for your service and you are free to go.

4 (WHEREUPON, the jury panel was excused from the
5 courtroom at 2:23 p.m.)

6 THE COURT: All right. Mr. Jones, Ms. Crayton, I
7 will hear from you with regard to post-trial motions.

8 MS. CRAYTON: Yes, sir, Your Honor. Just one motion.
9 We make a motion for a new trial. We do not believe the
10 evidence the worth the verdict in this case, and we would
11 respectfully move for a new trial at this time, Your
12 Honor.

13 THE COURT: All right. I would respectfully deny the
14 motion. I think there was evidence in the record by which
15 this jury could have reached the conclusion that they did,
16 and if I were to grant a new trial I would be substituting
17 my judgment for that of the jury. And that I do not
18 believe I can do. Ms. Munnerlyn, you have the sentencing
19 sheets?

20 SENTENCE OF THE COURT

21 MS. MUNNERLYN: Yes, Your Honor.

22 THE COURT: All right. Ms. Crayton, Mr. Jones, Mr.
23 Gathings, if you would come around, please. Just a
24 minute -- let me before I do that, let me ask you,
25 Ms. Munnerlyn, do you want to hear from any -- the victims

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1 want to address the Court? Let them have a seat and let
2 me take care of that first. Let me address just a minute
3 the families of the victims in this case. Several years
4 ago the South Carolina voters passed the amendment to the
5 Constitution that was the Victim's Right Amendment. And
6 it has been enabling legislation that been passed by our
7 legislature that gives the family of the victims the right
8 to be kept advised of everything going on. The right to
9 be present at every stage of the proceeding. And also the
10 right to address the Court. So I'll be glad to hear from
11 representatives of the victim's family. If you will just
12 give me your name and give the court reporter your name
13 I'll be glad to hear from you.

14 MS. MUNNERLYN: Your Honor, this is Debbie Polston
15 and Eddie Polston. They are the son and daughter in law
16 of Loyce Locklear, and therefore, the brother and sister
17 in law of Robbie.

18 THE COURT: All right. Be glad to hear from you.
19 Yes, ma'am.

20 MS. POLSTON: On June 30th 2007 my husband, Eddie,
21 went to his mother's home and found a horrific thing. His
22 mother and brother had been brutally murdered. The facts
23 of the case were proven beyond a reasonable doubt and the
24 jury has returned a verdict of guilty. Words cannot
25 express the pain and anger that our family and friends

1 have endured since their murder. The defendant's decision
2 the take the life of these human beings without any regard
3 for the affect that it may have on others is unimaginable.

4 The loss of a mother and brother is beyond words.
5 There will never be birthday parties, gatherings, holiday
6 celebrations or they will never be able to participate in
7 the activities and the accomplishments of the
8 granddaughter and niece that they lived and adored. The
9 laughter, hugs, guidance, sense of security and those
10 opportunities to say I love you are forever gone. And our
11 family is forever broke.

12 Loyce Locklear and Robbie Polson often showed
13 compassion for others in need of assistance. There was a
14 time prior to meeting Joe Gathings that Robbie and his
15 mother opened their home to a young mother and her
16 children. She needed to escape a bad marital situation
17 where they would stay in my mother in law's home until she
18 found a job in another town.

19 Compassion is a word that is commonly used for and by
20 defendants, but however I ask how much compassion did the
21 defendant consider when the decision was made to brutally
22 murder my mother in law and brother in law. It's ironic
23 that the word, 'compassion' is used because that's what
24 the victims had for their murderer. When my husband asked
25 his mother and brother why they would let Joe Gathings

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1 into their home their response was that he had nowhere to
2 live and no one to help him. He was being given a place
3 to stay until he could find his own home.

4 They went on to say that everyone should be given a
5 chance, and he could change, and most importantly it was
6 the Christian way to treat others who have nothing and
7 need help. It is the request of our family that the
8 maximum penalty for the crimes for which he has been
9 convicted be imposed. It's our belief that this
10 individual is a threat to society and would fully threaten
11 and kill again if he's ever allowed freedom.

12 On behalf of the family of Loyce Locklear and Robbie
13 Polston I wish to express, and my husband wishes to
14 express our sincerest gratitude for allowing us this
15 opportunity of expression.

16 THE COURT: All right. Thank you, ma'am. Yes, sir.
17 Is there anything that you would like to say? Anything
18 else that you would like to add?

19 MS. POLSTON: This statement reflect both ---

20 THE COURT: Okay. Thank you very much.

21 MS. MUNNERLYN: Anybody else?

22 THE COURT: Anyone else? All right. Thank you,
23 Mr. Jones, Ms. Crayton, if y'all will come around, please.
24 Ms. Munnerlyn, I'm familiar with the record. I believe
25 you've already put that in the record. We talked about

1 that at the time of the defendant's -- between the State
2 and the Defense case when we were discussing which would
3 be impeachable offense. Is there anything else from the
4 State at this time?

5 MS. MUNNERLYN: I don't think so, Your Honor. I
6 think we did discuss everything that was on his record.

7 THE COURT: Does the new law, which I refer to as the
8 Malloy Law, make any changes that would affect this case?

9 MS. MUNNERLYN: No, sir, I think the penalty remains
10 the same. My understanding is the minimum is, of course,
11 30 years on the murder. The maximum, of course, being
12 natural life.

13 THE COURT: Right. Life.

14 MS. MUNNERLYN: And ---

15 THE COURT: Zero to five?

16 MS. MUNNERLYN: Zero to five on the larceny.

17 THE COURT: All right. Mr. Jones, Ms. Crayton, be
18 glad to hear from you.

19 MS. CRAYTON: Thank you, Your Honor. We worked with
20 Mr. Gathings for a while on this case. Just a little bit
21 about Mr. Gathings. He's 38 years old. He grew up in
22 Conway. He was raised by his grandmother. His sister is
23 here today. She does -- he doesn't have much of a family.
24 His mother passed away this year, and he's been working
25 since he was in the sixth grade. I think he started

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1 working in tobacco fields and has been doing construction
2 for most of his life. And you've heard the evidence in
3 this case, Your Honor. We would just ask for mercy at the
4 time.

5 THE COURT: Okay, all right. And I'll be glad to
6 hear from the Defendant if there is anything that he would
7 like to say, but Mr. Jones and Ms. Crayton, by sure and
8 ---

9 MS. CRAYTON: He does not wish to speak, Your Honor.

10 THE COURT: I understand. I would understand if he
11 does not wish to say anything, but he could. Whatever he
12 says might affect any appeal in this matter.

13 MS. CRAYTON: He does not wish to speak.

14 THE COURT: All right.

15 MS. MUNNERLYN: Your Honor, if I could address the
16 Court just briefly. Of course, you have heard from the
17 victim's family, and they have indicated their desire for
18 the maximum penalty. And I just wanted to affirm for the
19 State and on behalf of the Solicitor's Office that we
20 would make that same request and ask that you, of course,
21 give the sentence today of a life imprisonment.

22 THE COURT: All right. Thank you, ma'am. Some of
23 you may have been in Court before when I have sentenced
24 defendants in particularly difficult cases. And have
25 heard me say that over 14 years ago when I got this job I

1 was told that the most difficult thing that we would have
2 to do would be criminal sentencing. Nothing has changed
3 in those 14 years to change that idea or that impression.
4 It is the most difficult thing that we have to do.

5 One of my mentors, the Late Chief Justice Bruce
6 Littlejohn, wrote in his book that he used to shutter at
7 that thought of the few words that he would utter in Court
8 would have such a profound effect on another individual.
9 We judges have no crystal balls. We can't see the future.
10 We don't know what's going to happen in the future. We
11 can only sentence individuals based on our experience and
12 the facts that we have heard in Court on a particular
13 case.

14 I will say that the facts in this case are as
15 horrific as any facts that I have heard in any case over
16 which I have presided. I do therefore think that the
17 maximum punishment is appropriate.

18 Therefore, on Indictment Number 07-GS-34-887, the
19 sentence of the Court is -- 887 being the indictment for
20 the murder of Robbie Polston. The sentence of the Court
21 is Defendant is committed to State Department of
22 Corrections for a term of the defendant's natural life.

23 On 07-GS-34-088, the murder of Loyce Locklear, the
24 sentence of the Court is that the Defendant is sentenced
25 to the South Carolina Department of Corrections for a term

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1 of his nature life to run consecutive to the sentence on
2 07-887.

3 And on the larceny the sentence of the Court is the
4 Defendant is committed to the State Department of
5 Corrections for a term of five years to run concurrent
6 with the other two sentences.

7 Good luck to you, Mr. Gathings. It's a bad
8 situation. I know for you and for everyone involved, but
9 I think that's the appropriate sentence in this case.

10 MS. MUNNERLYN: Thank you, Your Honor.

11 END OF TRANSCRIPT OF RECORD
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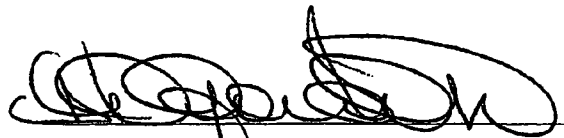
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
)
COUNTY OF MARLBORO)

I, HATTIE O. GORDON, Official Court Reporter for the
4th Judicial Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true, accurate and
complete Transcript of Record of the proceedings had and
evidence introduced in the trial of the captioned case,
relative to appeal, in the Court of General Sessions for
Marlboro County, South Carolina, on the 21st day of
October, 2010.

I do further certify that I am neither of kin,
counsel nor interest to any party hereto.

March 24, 2011

A handwritten signature in black ink, appearing to read 'Hattie O. Gordon', is written over a horizontal line.

HATTIE O. GORDON, Court Reporter

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Marlboro County

Howard P. King, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ALLEN JOE GATHINGS,

APPELLANT

FINAL BRIEF OF APPELLANT

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court judge erred when he allowed the state to elicit improper character evidence at Gathings's trial for two counts of murder and grand larceny when the testimony, involving a physical confrontation two years earlier, was not properly admitted as evidence of common scheme or plan, nor was it relevant to motive?

STATEMENT OF THE CASE

Allen Joe Gathings was indicted by the Marlboro County grand jury for 2 counts of murder and larceny, \$1000 – \$5000 during its September 2007 term. He was tried before the Hon. Howard P. King and the jury between October 18 -- 21, 2010. He was represented by Emily Crayton and Richard Jones, Esquires. He was convicted and sentenced to life in prison.

This appeal timely follows.

ARGUMENT

The trial court judge erred when he allowed the state to elicit improper character evidence at Gathings's trial for two counts of murder and grand larceny when the testimony, involving a physical confrontation two years earlier, was not properly admitted as evidence of common scheme or plan, nor was it relevant to motive.

Allen Joe Gathings was convicted of the murders of Robbie Polston, and his mother, Loyce Locklear. On June 30, 2007, the two victims were fatally beaten by a baseball bat. R. 122, l. 1- 146, l. 11. At the time of the murders, Gathings was living with them in Clio, South Carolina. R. 65, l. 18- 66, l. 6. He had recently been released from prison and the victims had taken him into their home as a roommate. Additionally, it appears that Gathings was involved in a romantic relationship with Robbie Polston. R. 223, l. 25- 224, l. 8. Gathings was later arrested in Horry County, SC and had, in his possession, the car generally driven by Loyce Locklear, a light blue 1995 Chevrolet Corsica. Gathings was located in Horry County after officials in Marlboro County entered his information into the NCIC system. Law enforcement in Horry County located the car, and he was taken into custody after a stand-off with the police. R. 425, l. 16- 429, l. 24.

The only physical evidence tending to connect Gathings to these crimes was testimony that DNA from the victims' was found on Gathings's shoes. Still, no blood was found on the pedal of the car, nor were any fingerprints found on the baseball bat located back at the crime scene. R. 378, 394. Law enforcement testified that the person who committed this crime would have been "covered with blood." R. 397. No blood was found in the car that Gathings was driving. R. 399.

Prior to trial, the State motioned for the admission of evidence relating to prior bad acts. R. 2, II. 19-24:

The prior incident, Your Honor, as I stated occurred on April the 18th of 2005. It involved the very same victims as well as an additional victim, Lisa Polston. And it is -- the circumstances were very similar. The defendant in that case, and it also occurred at the same home.

Your Honor, the defendant was seeking money from the defendant—I mean the victim, who were Loyce Locklear and Robbie Polston. He pushed Miss Polston—Mr. Polston and Ms. Locklear down taking her pocketbook and fled the residence taking the vehicle that they had borrowed from their daughter and the other victim's sister, Lisa Polston.

THE COURT: This is the April of '05 incident?

MS. MUNNERLYN: That's right. This is the April of '05 incident. He fled in that vehicle and as a result of that incident was charged with assault and battery, grand larceny and strong armed robbery. And he did ultimately plead guilty to those three charges here in this court, Your Honor. He actually pled guilty in November of 2005 and was sentenced to three years.

He did go to S.C.D.C. on those three, Your Honor, and was released three to four months prior to the current incident that we are here for in this case. This case occurred -- the incident occurred late on June the 29th, early morning hours of June 30th 2007. The defendant was released in April of 2007 from S.C.D.C. or about April. When he was released from S.C.D.C. he came to live again with Robbie Polston and Loyce Locklear at their home at [REDACTED] in Clio.

And, again, on that day, June the 29th, he was seeking money-- wanted money from the defendant, Robbie Polston. When he did not have any and wanted it from the mother, Loyce Locklear. He was upset that they did not give him money. He came back later.

Initially left in the car. Came back later that day, and he was-- and, of course, the incident occurred. They were assaulted and died as a result of the injuries inflicted upon them with a baseball bat, and he fled in Ms. Locklear's vehicle and was found two days later in Horry County in that vehicle.

R. 3, I. 2- 4, I. 24.

Defense counsel objected to the admission of this testimony, and argued that it did not meet any of the exceptions under SCRE 404(b) and that it was also highly prejudicial evidence. R. 5, ll. 2-22. Defense counsel also argued there was no logical connection between the prior offense and the events alleged by the State in this case. R. 7, l. 20- 8, l. 14.

The trial court judge allowed the State to admit this evidence. R. 25-28. The judge found the incidents sufficiently similar to allow it admissible under the common scheme or plan exception:

But the difference is the fact that the -- most of that time the defendant in this case was in prison in the time lapsed between the time of his release and the time of the actual crime in this case was relatively short. The other thing that makes it very, very similar and close is the fact that the victims were the same in both instances. Both the one for which he was convicted and the ones for which he is on trial for today. So I think there is a close similarity in a relatively short -- in and of it is the same victims in a relatively short time from the release from prison until this crime.

R. 26, l. 21- 27, l. 6.

The judge further found that the evidence would be highly probative of his guilt and therefore was admissible. R. 27, ll. 12-15. The judge also found that admissible to show evidence of the animus that probably existed between the parties. R. 27, l. 22- 28, l. 2.

The State then discussed this evidence during its opening statement. R. 49, l. 15- 50, l. 16. The State also elicited this testimony during Lisa Polston's testimony. R. 62, l. 18-66, l. 8. Eddie Polston also testified to the earlier event. R. 76, l. 12- 78, l. 17. And then the state argued it again during its closing argument. R. 613, ll. 2-16.

The trial court judge erred when he allowed this evidence to be presented to the jury because it constituted improper character evidence and the prejudice to Gathings is overwhelming.

Evidence is relevant if it "ha[s] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. All relevant evidence is admissible, unless constitutionally, statutorily, or otherwise provided. Rule 402, SCRE. However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE.

South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged except to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan, or (5) the identity of the perpetrator. Rule 404(b), SCRE; State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). The evidence of the prior bad acts must be clear and convincing to be admissible. State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001); State v. King, *supra*. The record must support a logical relevance between the prior bad act and the crime for which the defendant is accused. *Id.* Further, even though the evidence is clear and convincing and falls within a *Lyle* exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rule 403, SCRE; State v. Braxton; State v. King, *supra*.

The trial court judge erred when he allowed the state to elicit the testimony regarding the 2005 incident. First, the events were not logically related to one another: "To be admissible, the bad act must logically relate to the crime with which the defendant has

been charged.” State v. Gaines, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008). As the solicitor conceded, the first event involved the other daughter of Loyce Locklear, Lisa Polston, and not the victim in this case, Robbie Polston. Also, although both events involve Gathings’s use of a car, it is important to note that Gathings often had permission to use the cars. The fact that Gathings may have driven away from both scenes does not provide a logical connection between the two events.

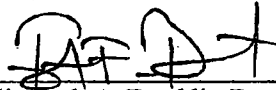
Importantly, though, there is no degree of similarity between the two events. Where there is a close degree of similarity between the crime charged and the prior bad act, South Carolina courts have held prior bad acts are admissible to demonstrate a common scheme or plan. Id. at 30. “When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity. State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009). When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b).” Id. In this case, the prior incident appears to have only involved a shoving incident which is significantly different from the events of this murder. Additionally, the state did not allege that the baseball bat was used in the prior event. The two events simply do not share many similarities at all, and the introduction of the prior event was impermissible character evidence. *Cf. Gaines*, 731, 30, *supra* (“In both cases, HMMRTHEGRT8 engaged in AOL chat room conversations with young females whom he believed to be twelve and thirteen years old. He told both girls he was twenty-seven or twenty-eight years old and explained that it was illegal for him to date them. He proposed to both the idea of taking them to a motel room and also expressed his desire for each to come and live with him. He sought

confirmation from both girls that they had not been intimate with anyone before, requested that each send him photos of themselves, offered to buy them clothing and lingerie, and suggested similar sexual acts for the girls to perform. Accordingly, we find the chats . . . were properly admitted.”); State v. Hallman, 298 S.C. 172, 175, 379 S.E.2d 115, 117 (1989) (“The prior bad acts here occurred while each of the young women was a foster child to appellant and of similar age to the victim. In each instance, appellant took advantage of this relationship for his sexual gratification. The extent of abuse against the victim was even more reprehensible than that against the previous foster children. It commenced, however, in exactly the same manner under similar circumstances.”). State v. Wingo, 304 S.C. 173, 176, 403 S.E.2d 322, 324 (Ct. App. 1991) (“Wingo took each sister in the sister’s cousin to his mobile home for them to help him clean it; Wingo played a pornographic movies for each sister in the cousin on his VCR; he gave each sister and the cousin alcoholic liquors or drugs; each sister and the cousin bathed naked in Wingo’s jacuzzi; Wingo afterward performed cunnilingus on each sister; he either had or attempted to have sexual intercourse with each sister; and he threatened to kill the father or parents of each sister and of the cousin if they told anyone about what had occurred.”); State v. Patrick, 318 S.C. 352, 356, 457 S.E.2d 632, 635 (Ct. App. 1995) (“In both the Georgia case and the Huckabee case, the suspects used the same disguises (gloves, wigs, bandannas) and the same tools (walkie-talkies, flashlights). They cut telephone lines in the same manner. They generally carried the same type of weapons.”) The events in this case lack the degree of similarity that is required under South Carolina law. The evidence was inadmissible character evidence, and Gathings was prejudiced by its admission. Respectfully, Gathings asks this Court to reverse his convictions and remand his case for trial.

CONCLUSION

For the preceding reason, Gathings respectfully asks this Court to reverse his convictions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'EAFB', is written over a horizontal line.

Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of April, 2012.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."



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STATE OF SOUTH CAROLINA

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Appeal from Marlboro County

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THE STATE,

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APPELLANT

CERTIFICATE OF SERVICE

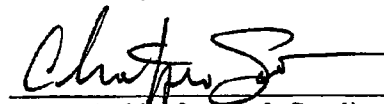
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Brendan J. McDonald, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 18th day of April, 2012.



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SUBSCRIBED AND SWORN TO before me
this 18th day of April, 2012.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: May 16, 2021.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Marlboro County

Howard P. King, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ALLEN JOE GATHINGS,

APPELLANT

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APPELLANT'S QUESTION PRESENTED

- I. Whether the trial court judge erred when he allowed the state to elicit improper character evidence at Gathing's trial for two counts of murder and grand larceny when the testimony, involving a physical confrontation two years earlier, was not properly admitted as evidence of common scheme or plan, nor was it relevant to motive.

RESPONDENT'S COUNTER-QUESTIONS PRESENTED

- I. Whether appellate counsel's failure to appeal from all grounds supporting the trial court's evidentiary ruling makes the ruling law of the case.
- II. Whether the trial court erred in finding the evidence at issue was admissible to show evidence of animus between the parties
- III. Whether the evidence at issue was admissible pursuant to Rule 404(b), SCRE as it established intent.
- IV. Whether the evidence at issue was admissible under a *res gestae* theory.

INTRODUCTION

On June 30, 2007, Eddie Polston discovered the badly beaten body of his brother, Robbie Polston and his mother, Loyce Locklear, in Locklear's home in Clio. (Tr. 121, 130-32). The ensuing investigation culminated in the trial and conviction of Allen Joe Gathings. (Tr. 702-03).

STATEMENT OF THE CASE

Gathings ("Appellant"), in addition to being charged with the murders of Robbie Polston ("Robbie") (#2007-GS-34-0887) and Loyce Locklear ("Loyce") (#2007-GS-34-0888), was charged with grand larceny (#2007-GS-34-0909) for stealing Loyce's car in the aftermath of the event. (Tr. 21-22). Following his indictment, Appellant was tried before the Honorable Howard P. King and a jury on May 18-21, 2010 in Bennettsville. (Tr. 1). At trial, Appellant was represented by public defenders Emily Crayton and Richard Jones, while the State was represented by assistant solicitors Elizabeth Munnerlyn and John Holt. (Tr. 1). At the conclusion of trial, Appellant was found guilty on all charges and received a sentence of life imprisonment. (Tr. 713-14).

STATEMENT OF THE FACTS

On Friday, June 29, 2007, Lisa Polston ("Lisa") and Loyce, her mother, made plans to take Loyce's cat to the veterinarian's office the following morning. (Tr. 103-04). When Loyce and Robbie, Lisa's brother who lived with Loyce, failed to answer Lisa's calls the next morning, Lisa drove to Loyce's residence in Clio to check on them. (Tr. 105-06, 1). Arriving at Loyce's residence, Lisa noticed one of Loyce's two cars, a gray Buick, was parked outside, however, Lisa did not see or hear anyone inside. (Tr. 106). After unsuccessfully attempting to enter the residence via the back door, Lisa left Loyce's residence and returned home. (Tr. 107).

In the early afternoon, Lisa, now concerned that she had not heard from either Robbie or Loyce, called her other brother, Eddie Polston ("Eddie"), and asked him to check on them. (Tr.

109). Following his conversation with Lisa, Eddie drove to Loyce's residence where he was met by Lisa. (Tr. 126). When he arrived at Loyce's residence, Eddie, like his sister, observed that while Loyce's gray Buick was still parked at her residence, her blue Chevrolet Corsica was missing. (Tr. 127-28).

Upon walking to the back door and wiggling the doorknob, Eddie was eventually able to get into the residence. (Tr. 128). After entering the residence, Eddie made his way through the kitchen, dining room and living room, before turning down the hall towards Loyce's bedroom, which he noticed was in disarray. (Tr. 130-31). Thereafter, Eddie found his mother's lifeless body. (Tr. 131-32). Next, Eddie noticed the door to his brother's bedroom was slightly ajar prompting him to approach Robbie's bedroom. (Tr. 132). When he did, Eddie discovered Robbie's dead body laying by the bedroom door. (Tr. 132). Following the discovery of Loyce and Robbie's bodies, Eddie called 9-1-1 and contacted a nearby police officer, John Lester. (Tr. 132, 169). Authorities were immediately dispatched to the crime scene and the area was quickly secured. (Tr. 148, 176-77).

At the crime scene, authorities recovered a bloody baseball bat which was later determined to contain DNA from Robbie, Loyce and Appellant as well as a bloody footprint which was consistent with having been made by a pair of size 11 New Balance 608 tennis shoes. (Tr. 523-24, 413-14). Forensic pathologist Dr. Susan Presnell would later opine that Robbie and Loyce died as a result of blunt force trauma to the head consistent with having been struck with a baseball bat. (Tr. 560, 566, 555).

The ensuing investigation quickly focused on finding Appellant and the blue Corsica, which authorities believed was stolen in the aftermath of the incident. (Tr. 289-90, 291). As a result of this suspicion, authorities issued an advisory to be on the lookout for both Appellant and

the Corsica. (Tr. 289-90). Appellant was subsequently arrested on July 2, 2007 after a five-hour standoff in a trailer park outside of Conway. (Tr. 290-93). Following his apprehension, authorities, in addition to finding the Corisca, which was outside of the trailer, took possession of a pair of size 11 New Balance 608 tennis shoes. (Tr. 294-95, 368, 406). DNA testing would later reveal the tennis shoes contained both Loyce and Robbie's blood. (Tr. 294-95, 368, 406, 523-25).

At trial, the State introduced evidence that Appellant, who was released from the custody of the South Carolina Department of Corrections ("SCDC") on March 30, 2007 for robbing and assaulting Robbie and Loyce in April of 2005, was living with Robbie and Loyce prior to their murder. (Tr. 110-13, 429, 119, 124-25). The State further established that during Appellant's time at SCDC, Robbie, who was in a homosexual relationship with Appellant, gave Appellant money while in prison and actually picked Appellant up from prison following his release. (Tr. 203, 209, 252, 260). The State also introduced testimony that while he was in prison, Appellant threatened to kill Robbie. (Tr. 270-71).

The State further elicited testimony establishing the following: (1) on the afternoon of Friday June 29th, the day before Eddie discovered Robbie and Loyce's dead bodies, Robbie and Appellant had gotten into a fight over money (Tr. 212); (2) the fight turned physical when Appellant punched Robbie in the ribs, knocking the breath out of him (Tr. 212-13); (3) after Appellant punched Robbie, Loyce asked what was going on, prompting Robbie to tell her Appellant punched him, further agitating Appellant (Tr. 215); (4) Appellant then began telling Robbie, "it wasn't no game" and he was going to "fuck him up" (Tr. 216).

Additional evidence established that: (1) Appellant used crack cocaine "every time [he] got money[.]" (Tr. 221-22); (2) Appellant would frequently get money from Robbie or Loyce so

he could use crack cocaine (Tr. 221-22); and (3) Appellant may have been at a local drug house following the altercation with Robbie. (Tr. 221-222, 251).

The State also presented testimony from Julius Lynch, who shared a cell with Appellant in December of 2007 for approximately one month. (Tr. 320). In his testimony, Lynch explained that Appellant confessed to murdering both Robbie and Loyce. (Tr. 321-23). Specifically, Lynch testified Appellant told him that following his initial altercation with Robbie he decided to go to the beach, and had changed into a pair of shorts, a t-shirt and tennis shoes, but before leaving, convinced Robbie to take him to get some cocaine. (Tr. 322). After getting the cocaine, Lynch said Appellant told him he began snorting the cocaine and then "flipped out" beating Robbie and Loyce to death with a baseball bat that was beside Robbie's computer. (Tr. 323). When Lynch asked Appellant why he killed Robbie and Loyce, Appellant responded, "I don't know why. I don't know why I would have done it." (Tr. 323). Lynch further added that Appellant told him he fled in Loyce's blue Corsica and went to a trailer park where he used to live where he began drinking, doing cocaine and taking pills before surrendering to authorities. (Tr. 324).

After the conclusion of the State's case, the defense presented testimony from Carl Moore, who claimed he was drinking and doing cocaine with Appellant from 3:30 Friday afternoon until the following Monday when Appellant was apprehended in Moore's trailer. (Tr. 586, 589). Moore added that while he remembered Appellant was driving a blue car, he did not remember going to the bank with Appellant on Saturday morning despite evidence from the State which clearly showed Appellant had visited a bank in Horry County at approximately 10:30 on Saturday morning. (Tr. 591-92, 279-80).

PRESENTATION OF ISSUE AT TRIAL

Prior to trial, the State sought a ruling regarding the admissibility of the April 2005 incident in which Appellant pushed Robbie and Loyce, took Loyce's pocketbook and fled in Lisa's car. (Tr. 49-50). Specifically, the State argued the event was admissible under Rule 404(b), SCRE as evidence of common scheme or plan explaining there were similar victims and similar circumstances surrounding both incidents, namely that Appellant wanted money and assaulted both Robbie and Loyce in order to get money. (Tr. 50-51). In response, defense counsel maintained the evidence did not meet any of the exceptions listed in Rule 404(b), SCRE, and was highly prejudicial. (Tr. 52). Replying to defense counsel's argument, the State passed up a case, State v. Derrick Ford and Nancy Brown, 334 S.C. 444, 513 S.E.2d 385 (Ct. App. 1999) in which the Court of Appeals found evidence that the accused had robbed and attempted to rob the victim on two prior occasions was admissible under Rule 404(b), SCRE exceptions for motive, intent and common scheme or plan. Ford and Brown, 334 S.C. at 450-53, 513 S.E.2d at 388-89. The trial court then took the matter under advisement telling the parties it would review the case. (Tr. 53).

Thereafter, when court resumed, defense counsel argued that Ford and Brown were distinguishable from the present case in that in addition to having the same victim, the defendants in Ford and Brown always stated that if the victim did not give them \$200, they were going to shoot him in the head. (Tr. 54-55). Responding to defense counsel's attempt to distinguish the present case from Ford and Brown, the State argued that "separate and aside from the prior bad acts and common scheme and plan, there is a separate case, State v. Williams, which addresses the use of evidence of previous quarrels and ill feeling and hostile acts between parties as admissible in homicide cases to show that animosity probably existed between the parties at the time of the homicide." (Tr. 55-56). Continuing, the State added that there would

be other witnesses who would testify that there were additional threats made by Appellant to Robbie while Appellant was still in prison. (Tr. 56).

After briefly dismissing and reconvening again, the trial court found the April 2005 incident was admissible as part of a common scheme or plan citing to Ford and Brown. In his ruling, the trial court explained that like Ford and Brown, the prior bad act at issue in the present case involved similar crimes and the same victims. (Tr. 72-74). Additionally, the trial court noted that while the time frame for the prior bad acts was more remote than in Ford and Brown, the fact that Appellant was in prison during much of this time and the relatively short amount of time between when he was released and when the murder occurred mitigated the remoteness of the time frame. (Tr. 73-74). Performing the Rule 403 analysis, the trial court found the April 2005 incident was highly probative and thus the prejudicial value of the previous conviction did not substantially outweigh its probative value. (Tr. 74).

Additionally, the trial court noted the April 2005 incident was admissible under State v. Williams, 321 S.C. 327, 468 S.E.2d 626 (1996) explaining “[e]vidence of previous quarrels, ill feelings and hostile acts between the parties is admissible to show the animus that probably existed between the parties.” (Tr. 74). Continuing, the trial court summarized its ruling stating “[s]o the court’s ruling is that the proposed evidence does meet the requirements of State v. Lyle, Rule 404(b); that the probative value outweighs prejudicial effect, and further that it is admissible under State v. Williams.” (Tr. 74-75).

Following opening arguments, the State called Lisa who testified regarding the April 2005 incident without objection. (Tr. 109-13). Thereafter, defense counsel extensively cross-examined Lisa regarding the incident. (Tr. 115-16). Similarly, Eddie testified regarding the April 2005 incident without objection. (Tr. 123-24). Four witnesses later however, when the

clerk of court was called to introduce the prior conviction itself, defense counsel, for the first time, renewed its objection. (Tr. 196).

Finally, in its charge to the jury the, trial court instructed:

Now ladies and gentlemen, with regard to evidence of over (sic) crimes, the evidence is limited to the consideration by you as it relates to:

- (1) motive for the offense charged in this case[;]
- (2) intent in regard to the commission of the offenses charged in this case[;]
- (3) absence of mistake or accident in reference to the offenses charged in this case[;]
- (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, or[;]
- (5) the identity of the person charged with the commission of the crime on trial.

The evidence is limited to those purposes and uses. This evidence cannot be used for any other purpose. This type of evidence must not be considered in any other fashion.

(App. 690-91).

STANDARD OF REVIEW

In criminal cases, appellate courts sit only to review errors of law and are bound by the factual findings of the trial court unless they are found to be clearly erroneous. State v. Hernandez, 386 S.C. 655, 659, 690 S.E.2d 582, 584 (Ct. App. 2010). The materiality, relevance and admissibility of evidence are within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. State v. Rosemond, 335 S.C. 593, 596, 518 S.E.2d 588, 589 (1999). "An abuse of discretion occurs when the conclusions of the trial court lack evidentiary support or are controlled by an error of law." State v. Anderson, 386 S.C. 120, - --, 687 S.E.2d 35, 38 (2009). Moreover, the trial court is afforded considerable latitude in ruling

on the admissibility of evidence and its rulings will not be disturbed absent a showing of probable prejudice. State v. Kornahrens, 290 S.C. 281, 288, 350 S.E.2d 180, 185 (1986).

ARGUMENTS

I. Appellate counsel's failure to appeal from all grounds supporting the trial court's evidentiary ruling makes the ruling law of the case

The State submits Appellant, by failing to appeal from all grounds supporting the trial court's evidentiary ruling on the April 2005 incident, specifically, the trial court's finding that the April 2005 incident was admissible as "[e]vidence of previous quarrels, ill feelings and hostile acts between the parties" under State v. Williams, 321 S.C. 327, 468 S.E.2d 626 (1996), results in the trial court's ruling becoming law of the case. See State v. Branham, 392 S.C. 225, 230-31, 708 S.E.2d 806, 809 (Ct. App. 2011) (concluding an appellant's failure to appeal from an alternative ground supporting the trial court's ruling renders the ruling law of the case); Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case."); State v. Hicks, 387 S.C. 378, 379, 692 S.E.2d 919, 920 (2010) (affirming the ruling of the trial court where the appellant failed to appeal all grounds supporting the ruling).

It is well settled law that an unappealed ruling, right or wrong, becomes law of the case. ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997). Moreover, as reiterated in Jones v. Lott, while the "two issue rule" generally applies in the context of general jury verdicts, "the rule is applicable in other circumstances including affirmance of orders of trial courts." 387 S.C. at 346, 692 S.E.2d at 904. Indeed, such is the case here, where the trial court clearly ruled the April 2005 incident was admissible under multiple legal theories namely Rule 404(b), SCRE's "common scheme or plan" exception as well as the

Williams' Court holding that in a homicide prosecution, "[e]vidence of previous quarrels, ill feelings and hostile acts between the parties is admissible to show the animus that probably existed between the parties." (Tr. 74). Thus, as Appellant's issue on appeal clearly only deals with whether the trial court "properly admitted [the April 2005 incident] as evidence of common scheme or plan" and whether the April 2005 incident was relevant to motive,¹ two of the Rule 404(b), SCRE exceptions, the trial court's alternative ruling must be affirmed as being law of the case.²

II. Even assuming appellate counsel did appeal from all grounds supporting the trial court's evidentiary ruling, the trial court correctly found the evidence at issue was admissible to show evidence of animus between the parties

Even assuming appellate counsel's statement of the issue on appeal amounts to an appeal from both of the trial court's evidentiary rulings, the State submits the trial court correctly found, under State v. Williams, 321 S.C. 327, 336, 468 S.E.2d 626, 631 (1996), that the evidence at issue was admissible to show evidence of animus between the parties. Indeed, as noted in footnote two above, South Carolina law clearly allows for the admission of previous quarrels, ill feelings or hostile acts between the parties in a homicide prosecution. See State v. Braxton, 343 S.C. 629, 636, 541 S.E.2d 833, 836-37 (2001) ("In homicide cases, evidence of previous quarrels

¹ The State notes, as it relates to motive, that the trial court never ruled on and was never asked to rule on whether the April 2005 incident was relevant to motive under Rule 404(b), SCRE.

² It is without question that the trial court, in ruling the April 2005 incident was admissible under Williams, was ruling the evidence was admissible independent of Rule 404(b), SCRE based upon the summary of his ruling. See Tr. at 74-75 ("So the court's ruling is that the proposed evidence does meet the requirements of State v. Lyle, Rule 404(b); that the probative value outweighs prejudicial effect, and further that it is admissible under State v. Williams."). Furthermore, as noted in State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001), South Carolina law clearly allows for the admission of previous quarrels, ill feelings or hostile acts between the parties in a homicide prosecution. 321 S.C. at 636, 541 S.E.2d at 836-37 (citing Williams, 321 S.C. at 336, 468 S.E.2d at 631 (1996); State v. Clinkscales, 231 S.C. 650, 654-55, 99 S.E.2d 663, 665 (1957); State v. Brooks, 79 S.C. 144, —, 60 S.E. 518, 518 (1908); see also Blakely v. State, 360 S.C. 636, 639, 602 S.E.2d 758, 759 (2004) ("It is well-settled that evidence of previous threats by the defendant is admissible to show malice."); State v. Alford, 264, S.C. 26, 33, 212, S.E.2d 252, 254 (1975) (holding previous threats made against the companion of the victim at the time of assault is also admissible as evidence of malice).

and ill feelings or hostile acts between parties is admissible to show that animus probably existed between the parties at the time of the homicide.”).

In Williams, the Supreme Court of South Carolina determined that evidence of marital difficulties, including loud altercations and controversial conversations between the appellant and his wife, who he was accused of murdering, were admissible to show “that animus probably existed at the time of the homicide.” 321 S.C. at 336, 468 S.E.2d at 631. Similarly, in Braxton, the Supreme Court of South Carolina determined that a previous encounter between the victim and the appellant which demonstrated the victim was scared of the appellant was admissible as evidence of the relationship between the parties. 343 S.C. at 636, 541 S.E.2d at 836-37. Furthermore, in State v. Clinkscales, 231 S.C. 650, 654-55, 99 S.E.2d 663, 665 (1957) the Supreme Court of South Carolina affirmed the trial court’s admission of evidence indicating the appellant had previously shot the victim six or seven weeks prior as it was probative of animus as well.

Here, the State submits the April 2005 incident clearly qualifies as a hostile act from which the jury could find animus between the parties.³ Specifically, the trial court, much like the trial court in Williams and Clinkscales, identified the hostile act, in the present case, an assault and strong armed robbery, was probative of the relationship between Appellant and his victims. In fact, the April 2005 incident serves as a manifestation of Appellant’s will to get money, by whatever means necessary, in order to purchase drugs. Moreover, the April 2005 incident was

³ At the outset of this analysis, the State highlights that defense counsel only renewed his objection from the pre-trial ruling when the state sought to introduce the actual previous conviction into the record via the clerk of court. Indeed, defense counsel never objected to the specific testimony from Lisa or Eddie regarding the facts surrounding the April 2005 incident and as such, the State argues any objection based upon testimony regarding specific facts related to the prior conviction are not preserved for appellate review. See I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding an appellant must present both his issues and arguments to the lower court and obtain a ruling before presenting the issues and arguments on appeal); State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) (concluding appellate courts will generally not address an issue unless the issue was raised to and ruled upon by the trial court).

probative in that it detailed Appellant had no problem confronting his lover or his lover's mother, the specific victims in this case, to get what he wanted.

Additionally, the April 2005 incident gave the jury a background of the history of the relationships between the parties, much like the evidence in Braxton that the victim was scared of the appellant based upon a previous encounter. Indeed, had the jury not been able to hear of the April 2005 incident it would have been unable to completely assess the volatility of the relationship between Robbie and Appellant, nor would they have understood the significance of Appellant's threat that he was going to "fuck [Robbie] up." Further, the jury would not have had a context in which to evaluate Lisa and Eddie's concern in regards to Appellant moving in with Robbie and Loyce. Accordingly, the State submits the trial court correctly found the April 2005 incident was admissible to show evidence of animus between the parties.

III. The evidence at issue was admissible pursuant to Rule 404(b), SCRE as it established intent

In the alternative, the State submits, as an additional sustaining ground, that even assuming the April 2005 incident is inadmissible under 404(b), SCRE's common scheme or plan exception, the incident would be admissible as it established intent under Rule 404(b), SCRE. See State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) (concluding evidence which is logically relevant to establish a material element of the offense charged should not be excluded simply because it reveals that the defendant is guilty of another crime); State v. Sweat, 362 S.C. 117, 124, 606 S.E.2d 508, 512 (Ct. App. 2004) (holding evidence demonstrating the appellant was previously jailed on criminal domestic violence charges and had recently been released from jail prior to the incident which lead to his being charged with assault with intent to kill was admissible as evidence of intent under Rule 404(b), SCRE). In particular, the State maintains that because murder requires proof of malice, the State should be allowed to introduce evidence

regarding the April 2005 incident as the commission of the previous incident made it more likely Appellant was acting with malice when he beat Robbie and Loyce to death in order to get more drug money since he had previously assaulted them in an attempt to get drug money.

“Evidence is relevant and admissible if it tends to establish or make more or less probable the matter in controversy.” Wiles, 383 S.C. at 157-58, 679 S.E.2d at 175-76. Furthermore, “evidence of other crimes, wrongs, or acts is generally not admissible to prove the character of a person in order to show action in conformity therewith; however, such evidence may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.” Wiles, 383 S.C. at 158, 679 S.E.2d at 176 (internal quotations omitted) (citing Rule 404(b), SCRE). Additionally, evidence which is “logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused’s guilt of another crime.” Id.

A. Relevance Pursuant to Rule 401, SCRE

Here, the April 2005 incident was relevant because it made it more probable Appellant was acting maliciously when he killed Robbie and Loyce since he had previously assaulted and robbed them, presumably for the same reason, to procure drug money. See Sweat, 362 S.C. at 127, 606 S.E.2d at 514 (holding previous criminal domestic violence charge made it more probable that the appellant was acting with malice when he attempted to harm his wife who had left him when he was jailed for the criminal domestic violence charges).

B. Admissibility Pursuant to Rule 404(b), SCRE

Similarly, because the April 2005 incident is probative as to intent and, as demonstrated by the clerk of court records, was proven by Petitioner’s pleading guilty to it, it is indisputable the prior bad act took place. See Sweat, 362 S.C. at 128, 606 S.E.2d at 514 (“If there is any

evidence to support the admission of the bad act evidence, the trial judge's ruling will not be disturbed on appeal.") (emphasis in original)(internal quotations omitted).

C. Admissibility Pursuant to Rule 403, SCORE

Additionally, it is clear the April 2005 incident would be admissible pursuant to Rule 403, SCORE.⁴ Admissible evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" Rule 403, SCORE. "Unfair prejudice means an undue tendency to suggest decision on an improper basis." Wiles, 383 S.C.at 158, 679 S.E.2d at 176. Furthermore, "[t]he determination of the prejudicial effect of the challenged evidence must be based on the entire record, and the result will generally turn on the facts of each case." State v. Holder, 382 S.C. 278, 293, 676 S.E.2d 690, 698 (2009).

Here, the State submits the April 2005 incident is highly probative of Appellant's guilt, as: (1) it highlights the relationship between the parties; (2) it makes it more probable Appellant acted with malice aforethought, since he previously assaulted and robbed both victims for drug money; and (3) the existence of the prior bad act is not disputed. Furthermore, since the jury was instructed on the limited purpose for which it could consider prior bad acts, and there is a presumption juries follow the law, the State submits the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. See State v. Dunlap, 346 S.C. 312, 319, 550 S.E.2d 889, 893 (Ct. App. 2001), aff'd as modified on writ of cert., 353 S.C. 539; 579 S.E.2d 318 (2003) (quoting Foye v. State, 335 S.C. 586, 590 n.1, 518 S.E.2d 265, 267 n. 1 (1999) ("A jury is presumed to [have followed the trial judge's] instructions.")).

⁴ Initially, the State notes that Appellant never appealed from the trial court's ruling pursuant to Rule 403, SCORE and therefore asserts the trial court's ruling is law of the case. See State v. Branham, 392 S.C. 225, 230-31, 708 S.E.2d 806, 809 (Ct. App. 2011) (concluding an appellant's failure to appeal from an alternative ground supporting the trial court's ruling renders the ruling law of the case).

Accordingly, the State submits that even assuming the trial court erred in finding the April 2005 incident was admissible as evidence of common scheme or plan, the record reflects the April 2005 incident was admissible as evidence of intent under Rule 404(b), SCRE. See Rule 220(c), SCACR (explaining the appellate court may affirm any ruling, order or judgment for any ground appearing in the record on appeal).

IV. The evidence at issue was admissible under a *res gestae* theory

The State further argues the April 2005 incident is admissible under a *res gestae* theory. Specifically, the State submits the incident furnishes part of the context of the crime and is necessary for the full presentation to the jury so as to completely understand the relationship between Appellant, Robbie and Loyce. Moreover, the State maintains the exclusion of the April 2005 incident simply would not provide the jury with the relevant information to make an accurate determination regarding Appellant's *mens rea*.

In State v. Adams, 322 S.C. 114, 116-17, 470 S.E.2d 366, 370-71 (1996) the Supreme Court of South Carolina, citing to U.S. v. Masters, 622 F.2d 83, 86 (4th Cir. 1980) found prior bad acts evidence may also be admissible under a *res gestae* theory when "such evidence furnishes part of the context of the crime[,] is necessary to a full presentation of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its environment that its proof is appropriate in order to complete the story of the crime on trial." (internal quotations omitted) (internal citations omitted in original). Continuing, the Adams court further explained prior bad acts evidence may also be admissible pursuant to a *res gestae* theory where "the uncharged offense is so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other . . . [and] is admissible to provide . . . full presentation of the offense." 322 S.C.

122, 470 S.E.2d 370-71 (citing Masters, 622 F.2d at 86) (internal quotations omitted) (internal citations omitted in original).

In Adams, the Court, pursuant to a *res gestae* theory, found a defendant's drug use immediately prior to the robbery and murder with which he was subsequently charged, was admissible where the evidence showed the robbery and murder were perpetrated in an effort to purchase more drugs and were so much part of the environment of the crime that suppression of the cocaine use would "unnecessarily fragmentize the State's case." 322 S.C. at 122, 470 S.E.2d at 371. Similarly, in Wiles, the South Carolina Supreme Court found evidence of a defendant's escape from prison a week prior to the factual genesis of his assault and battery with intent to kill charge, was admissible under a *res gestae* theory as it constituted "the first link in a chain of circumstances" which led to the criminal charges then before the Court. Id. at 158-59, 679 S.E.2d at 176.

Here, while the April 2005 incident occurred more than two years prior to Robbie and Loyce's murders, the incident was clearly a large part of the context of the case and was required in order to fully present the case. Indeed, as noted by the trial court, the long time frame between the two incidents was due to the fact that Appellant was in prison during much of this time between the two events and does not mitigate the value of the April 2005 incident as far as reflecting upon the relationship amongst the parties. In fact, Appellant's threats against Robbie actually continued while he was incarcerated making the time frame even less attenuated and establishing a more continuous picture of Appellant's view of his relationship with Robbie, a relationship which is integral in assessing Appellant's *mens rea* in this case. Furthermore, as the inclusion of the April 2005 incident essentially provides the jury with a more thorough understanding of the living arrangements in regards to Appellant, Robbie and Loyce, and the

affect the living arrangement had on Robbie and Loyce, the State submits the April 2005 incident is integral to the case. Had the jury not been able to hear of the April 2005 incident it would have been unable to completely assess the volatility of the relationship between Robbie and Appellant, and would not have understood the significance of Appellant's threat that he was going to "fuck [Robbie] up." Further, the jury would not have had a context in which to evaluate Lisa and Eddie's concern in regards to Appellant moving in with Robbie and Loyce. Accordingly, the State submits the April 2005 incident was also admissible pursuant to *res gestae* theory. See State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999) ("The *res gestae* theory recognizes that evidence of other bad acts may be an integral part of the crime with which the defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred."); State v. Sweat, 362 S.C.117, 133, 606 S.E.2d 508, 517 (Ct. App. 2004) (concluding previous bad act evidence of domestic violence which occurred more than two months before the attack at issue was admissible pursuant to a *res gestae* theory where it provided the jury with an appropriate context in which to place the later attack).

CONCLUSION

For the aforementioned reasons, the State respectfully requests this Court affirm the judgment imposed by the trial court.

Respectfully Submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

BRENDAN J. McDONALD
Assistant Attorney General

WILLIAM B. ROGERS, JR.
Solicitor, Fourth Judicial Circuit

South Carolina Office of Attorney General
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-3188



Brendan J. McDonald
ATTORNEY(S) FOR RESPONDENTS

March 12, 2012.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Marlboro County
The Honorable Howard P. King, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

ALLEN JOE GATHINGS,

APPELLANT.

**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Respondent agrees with Appellant's initial proposal to include the following in the
Record on Appeal:

- (1) True-billed indictment(s);
- (2) Tr. Pages 49-714

I certify that this designation contains no matter that is irrelevant to this appeal.

Respectfully Submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

BRENDAN J. McDONALD
Assistant Attorney General

WILLIAM B. ROGERS, JR.
Solicitor, Fourth Judicial Circuit

South Carolina Office of Attorney General
Capital and Collateral Litigation Unit
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-3188



Brendan J. McDonald
ATTORNEY(S) FOR RESPONDENTS

March 12, 2012.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Marlboro County
Howard P. King, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

ALLEN JOE GATHINGS,

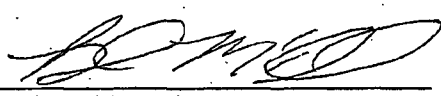
APPELLANT

PROOF OF SERVICE

I, Brendan J. McDonald, Counsel for Respondent, certify that I have served the Initial Brief of Respondent and Designation of Matter, dated March 12, 2012, on Appellant by depositing two copies of the same in the United States mail, first class postage prepaid, addressed to his attorney of record:

Elizabeth A. Franklin-Best, Appellate Defender
South Carolina Office of Indigent Defense
Post Office Box 11589
Columbia, South Carolina 29201

This 12th day of March, 2012.


Brendan McDonald
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

ATTORNEY FOR RESPONDENT

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Allen Joe Gathings, Appellant.

Appellate Case No. 2010-176326

Appeal From Marlboro County
Howard P. King, Circuit Court Judge

Unpublished Opinion No. 2012-UP-494
Submitted August 1, 2012 – Filed August 22, 2012

AFFIRMED

Appellate Defender Elizabeth A. Franklin-Best, of
Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney
General John W. McIntosh, Senior Assistant Deputy
Attorney General Donald J. Zelenka, and Assistant
Attorney General Brendan J. McDonald, all of Columbia;
and Solicitor William B. Rogers, Jr., of Bennettsville, for
Respondent.

PER CURIAM: Affirmed¹ pursuant to Rule 220(b), SCACR, and the following authority: *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case.").

AFFIRMED.

HUFF, THOMAS, and GEATHERS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

September 07, 2012

The Honorable William B. Funderburk
PO Drawer 996
Bennettsville SC 29512-0996

REMITTITUR

Re: The State v. Gathings, Allen Joe
Lower Court Case No. 2007GS3400909, 2007GS3400887, 2007GS3400888
Appellate Case No. 2010-176326

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Brendan Jackson McDonald
Elizabeth Anne Franklin-Best *BRS*

RECEIVED

SEP 10 2012

SC OFFICE OF
APPELLATE DEFENSE

FORM 5

STATE OF SOUTH CAROLINA)

County of Marlboro)

IN THE COURT OF COMMON PLEAS

Allen Joe Gethings #279208)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

2012-CP-34-217

APPLICATION FOR

POST-CONVICTION RELIEF

2012 OCT 16 AM 10 05
 FILED
 WILLIAM B. HENDERSON
 CLERK OF COURT
 MARLBORO COUNTY, S.C.

INSTRUCTIONS B READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention LEE C.I.
2. Name and location of Court which imposed sentence General Sessions Court, Marlboro 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) 2007-GS-34-0887, Murder

- (b) 2007-GS-34-0888, Murder
- (c) 2007-GS-34-0909, Larceny
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) Oct 21, 2010 Life Sentence
- (b) Life Sentence
- (c) 6 years
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered Ayes@ to (7), list:
- (a) the name of each Court to which you appealed:
- i. S.C. Appeals Court
- ii. ~~Marlboro County~~
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. Aug 22, 2012
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. 2012-UP-494 The State v. Allen Joe Grahams
- ii. 2010-176326
- iii. _____
9. If you answered Ano@ to (7), state your reasons for not so appealing:
- (a) N/A

FILED
2012 OCT 16 AM 10 05
WILLIAM B. FUNDERBURK
CLERK OF COURT
MARLBORO COUNTY, S.C.

- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistant of Appellate Council
- (b) Prosecutor Misconduct
- (c) Ineffective Assistant of Trial Council
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Fell to appeal all grounds upon which a decision is based conviction was affirmed upon two issue rule
- (b) Character evidence prior to defence opening door, 110, 113, 203, 204, 251, 252, 270
- (c) Fell to object to character witness to preserve for Appellate review 110, 113, 203, 204, 251, 252, 270
12. Prior to this application have you filed with respect to this conviction. SEE AH.
- (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 Ayes@ to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. _____
- iii. _____

FILED
2003 OCT 16 AM 10 05
CLERK OF COURT
WILLIAM B. FUNDEBUNK
MORRIS COUNTY, S.C.

11. (C)

Fell to object to prior record - "Bad Acts"introduced to jury for Appellate review - page
194

FILED

2012 OCT 16 AM 10 05

WILLIAM B. FUNDERBURK
CLERK OF COURT
MARLBORO COUNTY, S.C.

iv. _____

(c) the disposition thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. N/A

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. N/A

ii. _____

iii. _____

FILED
2012 OCT 15 PM 10 05
WILLIAM B. FENNER, CLERK
MARLBORO COUNTY, S.C.

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) not available for Direct Appeal
 (b) _____
 (c) _____

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? yes

18. If you answered Ayes@ to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Emily Crayton, Richard Jones,
Marlboro County Public Defenders
 ii. Breen Stevens, Appellate Defense

iii. _____

(b) the proceedings at which each such attorney represented you:

i. 17) A, B, C, Above

ii. 17) D, Above

iii. _____

2012 OCT 16 AM 10 05
 WILLIAM B. FUNDERBURK
 CLERK OF COURT
 MARLBORO COUNTY, S.C.

FILED

19. State clearly the relief you seek in filing this application:

Reverse Sentences and remand for a
New trial

20. Are you now under sentence from any other court that you have not challenged?

no

Revised 3/2003

STATE OF SOUTH CAROLINA)

County of Marlboro)

VERIFICATION

I, Allen Joe Gathings SCDC # 279208, 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.

Allen Gathings

SWORN to and subscribed before me this 5
day of Oct, 2012.

Debra Sene (L.S.)
Notary Public

My Commission Expires: 11-4-2015

FILED
2012 OCT 16 AM 10 05
WILLIAM B. FINDERBUNK
CLERK OF COURT
MARLBORO COUNTY, S.C.

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Allen Joe Gathings SCDC # 279208, 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.

Allen Gathings
Applicant

SWORN or affirmed to and subscribed before me this

5 day of Oct, 2012.

Debra Sikes
Notary Public

My Commission Expires: 11-4-2015

FILED
2012 OCT 16 AM 10 05
WILLIAM B. FUNDERBURK
CLERK OF COURT
MARLBORO COUNTY, S.C.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF MARLBORO	)	
	)	
	)	2012-CP-34- 217
	)	
Allen Joe Gathings, 279208,	)	
	)	
Applicant,	)	
	)	RETURN
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

Respondent, making its Return to the Application for post conviction relief (PCR) filed October 16, 2012, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections. Applicant was indicted by the Marlboro County Grand Jury for larceny (2007-GS-34-909) and two counts of murder (887 and 888). Richard Jones, Esquire, represented Applicant.

On October 21, 2010, Applicant was tried before the Honorable Howard P. King, who sentenced Applicant to five years imprisonment on the larceny charge and to life imprisonment on the murder charge. Applicant appealed to the South Carolina Court of Appeals, and his conviction and sentence were affirmed. The Remittitur was sent September 7, 2012.

Attached herewith and incorporated herein are the records of the Darlington County Clerk of Court regarding the subject conviction, Applicant's SCDC records, and if available, the transcript. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Appellate Counsel"
2. "Prosecutor Misconduct"
3. "Ineffective Assistance of Trial Counsel"

III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Respondent submits that Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The State therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the State moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

V.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

VI.

WHEREFORE, having made its Return, the State requests that the Application be denied and the matter dismissed with prejudice.

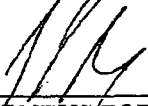
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

TYSON ANDREW JOHNSON, SR.
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

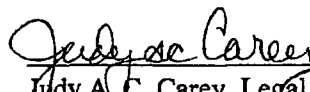
February 22, 2013.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF MARLBORO	)	
	)	
	)	2012-CP-34-0217
	)	
ALLEN JOE GATHINGS, 279208	)	
	)	AFFIDAVIT OF SERVICE BY MAIL
Applicant,	)	
	)	
vs.	)	
	)	
STATE OF SOUTH CAROLINA	)	
	)	
Respondent.	)	
	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

J. Marshall Biddle, Esquire
Post Office Box 50460
Myrtle Beach SC 29579

DATED this 22nd day of February, 2013.


 Judy A. C. Carey, Legal Assistant
 For Respondent

1 STATE OF SOUTH CAROLINA

2 COUNTY OF MARLBORO

3

4 Allen J. Gathings,
5 Plaintiff

PCR
2012-CP-00217

6 vs.

7 The State of South Carolina,
8 Defendants

July 24, 2014
Bennettsville, S.C.

9

10 BEFORE THE HONORABLE Thomas A. Russo, Judge.

11 A P P E A R A N C E S:

12 Mr. James Marshall Biddle,
13 Attorney for Plaintiff

14 Mr. Joshua L. Thomas,
15 Attorney for Defendant

16 Margaret T. Sullivan,
17 Court Reporter

18

19

20

21

22

23

24

25

	<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
1	Allen Gathings				
2	by Mr. Biddle	4		21	
	by Mr. Thomas		19		
3	Emily M. Crayton				
	by Mr. Biddle	25		53	
4	by Mr. Thomas		43		
	Rick Jones				
5	by Mr. Biddle	57			
	by Mr. Thomas		67		
6					
7	Closing:				
8	by Mr. Thomas	69, 71			
	by Mr. Biddle	70			
9					
10					
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12					
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14					
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25					

1 THE COURT: Yes, sir.

2 MR. THOMAS: The next case is Allen
3 Gathings versus the State of South Carolina. It's
4 case No. 2012-CP-34-217. Mr. Gathings was
5 indicted in September of 2007, for two counts of
6 murder and one count of grand larceny. He was
7 represented on that charge by Rick Jones and Emily
8 Crayton.

9 He went to trial October 18th through the
10 21st of 2010. The jury convicted him as indicted.
11 The Honorable Howard P. King sentenced him to life
12 imprisonment on one murder count. A consecutive
13 life imprisonment sentence on the second murder
14 count. And a concurrent 5 years on the grand
15 larceny. He did file an appeal. And he is
16 represented on that appeal by Betsy Franklin Best.
17 The Court of Appeals affirmed that conviction in
18 an unpublished opinion No. 2012-UP-494. He filed
19 this PCR action in October of 2012. Alleging
20 ineffective assistance of counsel or and
21 prosecutorial misconduct. He is represented by
22 Marshall Biddle. He is present court, and the
23 State is ready to proceed.

24 THE COURT: Mr. Biddle.

25 MR. BIDDLE: Judge, how are you this

Allen Gathings-Direct by Biddle

1 morning.

2 THE COURT: I am doing well. Thank you,
3 sir.

4 MR. BIDDLE: We are ready. We would call
5 Allen Joe Gathings to the stand.

6 Allen Gathings, Being first duly sworn,
7 testified as follows:

8 Direct Examination by Mr. Biddle:

9 Q Mr. Gathings, this is your PCR
10 application. And if you would tell me the
11 grounds, and then we will go through each one of
12 those allegations regarding your post conviction
13 relief application. What's the first thing. Well
14 let's talk about. In your application you've got
15 ineffective assistance of appellate counsel,
16 prosecutorial misconduct, and ineffective
17 assistance of trial counsel.

18 If you would, give me your understanding
19 of the issues relating to and let's just talk
20 about prosecutorial misconduct and do them in that
21 order if that's okay with you. Talk to me about
22 the prosecutorial misconduct.

23 A The problem I have is with the
24 prosecutorial misconduct is them prior to opening
25 the door to character evidence.

Allen Gathings-Direct by Biddle

1 Q I'm sorry, I was having a hard time
2 hearing you. Say that one more time.

3 A The prosecutor opened the door to the
4 character.

5 Q Character evidence? Prior to door being
6 opening, is that what your testimony was?

7 A Yes, sir.

8 Q So what you're saying is that the
9 prosecutor brought character witnesses in to
10 testify about your character.

11 A Yes, sir.

12 Q But you didn't open the door for them to
13 get into your character, is that correct?

14 A No, sir.

15 Q Did your attorney object to that?

16 A No, sir.

17 Q Did they ask the court to disallow that
18 testimony?

19 A No, sir.

20 Q Do you believe that that was ineffective
21 assistance of counsel?

22 A Yes, sir.

23 Q Did your appellant counsel raise that
24 issue on appeal?

25 A No, sir.

Allen Gathings-Direct by Biddle

1 Q And do you believe that was ineffective
2 assistance on appellate counsel?

3 A Yes, sir.

4 Q Is there anything else with respect to the
5 prosecutorial misconduct? Were there other issues
6 during the trial that you believe prejudiced you
7 in your trial?

8 A Yes. Due to my restraints, as I was
9 coming in the courtroom to pick my jurors, I had
10 leg braces on the outside of my trousers.

11 Q So you had leg braces on the outside of
12 your restraints?

13 A Yes, sir.

14 Q And that was in the presence of the jury?

15 A Yes, sir. As we were picking the jury.

16 Q So you all were picking the jury. So
17 every potential juror for your case saw you in leg
18 restraints.

19 A Yes, sir.

20 Q And did your attorney object to that?

21 A No, sir.

22 Q Did they ask for a curative direction from
23 the judge with respect to that?

24 A No, sir.

25 Q Did they ask that the court -- did they

Allen Gathings-Direct by Biddle

1 ask a continuance so that the jurors -- for you to
2 have a new jury pool?

3 A No, sir.

4 Q Do you believe that was ineffective
5 assistance of trial counsel?

6 A Yes, sir.

7 Q Did your appellant counsel appeal on that
8 ground?

9 A No, sir.

10 Q Do you believe that that was ineffective
11 assistance of appellate counsel?

12 A Yes, sir.

13 Q Do you believe that you were prejudiced by
14 appearing before the jury with those on your legs?

15 A Yes, sir, I do.

16 Q And do you believe that you -- that you're
17 counsel should have objected to that?

18 A Yes, sir.

19 Q Okay, tell me what else your trial
20 counsel failed to do that you believe was
21 ineffective assistance of counsel.

22 A On the indictment they tried to get the
23 indictment squashed, but it didn't happen. I
24 don't think they pushed it hard enough.

25 Q What was the grounds that they were

Allen Gathings-Direct by Biddle

1 seeking to get the indictment quashed on?

2 A That, I think it was the facial
3 discrepancy of me. The dates on the indictment
4 wasn't right. They were true billed on the 6th.
5 And it reads on the front that the grand jury does
6 not convene until the 10th.

7 Q So do you know what month that was?

8 A September.

9 Q So September the 10th, is when the grand
10 jury was impaneled.

11 A Yes, sir.

12 Q And you're saying that your indictments
13 were signed on the 6th.

14 A Yes, sir.

15 Q Prior to---

16 A Yes, sir. Signed in pen on the 6th.

17 Q Prior to the impanelment of the grand
18 jury.

19 A Yes, sir.

20 Q And that would of course make the
21 indictment invalid.

22 A Yes, sir. Because they don't have --
23 Marlboro County does not have -- the grand larceny
24 don't preside in September in Marlboro County.

25 Q And did your attorney object to that? I

Patricia Sloop-Direct by McCutchen

1 Q I am going to show what's been marked for
2 identification purposes only as Plaintiff's
3 Exhibit 2. Do you recognize that document?

4 A Yes, I do.

5 Q Would you tell the court what that is?

6 A This is a letter that I had sent to
7 Mr. Sloop explaining the things that needed to be
8 taken care of in the household. And also the
9 gentleman that I has called as far as getting
10 estimates from people that would be able to help
11 me do the work, as far as fixing the house.

12 Q Is this a letter that you in fact wrote?

13 A Yes.

14 Q Does it reflect the substance of the
15 letter, as well as the date of when you wrote it?

16 A Yes, it does.

17 Q Did you get a response from Mr. Sloop
18 about this letter?

19 A I did not.

20 MR. MCCUTCHEN: Your Honor, I would offer
21 this into evidence as Plaintiff's 1. Or
22 Plaintiff's 2, I'm sorry.

23 THE COURT: Any objection?

24 MR. CHANDLER: No objection, Your Honor.

25 THE COURT: So admitted.

Allen Gathings-Direct by Biddle

1 and stuff then Rick Jones did.

2 Q So who do you think was your lead counsel?

3 A Ms. Crayton.

4 Q And how much time did you spend with

5 Ms. Crayton talking about your case?

6 A I don't know. Off and on probably for
7 about 7 or 8 months.

8 Q So you spent a considerably amount of time
9 with her.

10 A Yes, sir.

11 Q And do you know -- do you know what her
12 background was at that time that this case was
13 tried?

14 A No, just only what she had told me. She,
15 you know, she said that she didn't have the
16 experience to carry me to trial on a murder trial,
17 much less a double homicide trial.

18 Q So she told you that she didn't have the
19 experience.

20 A Yes, sir.

21 Q So when did you meet with Rick Jones? Do
22 you think that he was brought in to represent you
23 with the experience?

24 A Yes, sir, I do.

25 Q And tell me about meeting with him.

Allen Gathings-Direct by Biddle

1 A The first time I seen Rick Jones was
2 24 days before my trial was to start.

3 Q And how long have you been in jail?

4 A Until my trial started?

5 Q Yes.

6 A I think 3 years, 4 months and 18 days.

7 Q Roughly. So you met with him 24 days
8 prior to your trial.

9 A Yes, sir.

10 Q And what did you all talk about it?

11 A The first time I seen him, we talked about
12 my case about 30 minutes or so.

13 Q So you met with him for 30 minutes, and
14 then tell me the next time you met with.

15 A It was about a week later to talk to him.
16 He come, and they asked about who I needed to
17 subpoena or who I want to subpoena for trial.

18 Q And did you give them that information?

19 A Yes, sir.

20 Q Did you all talk about any defenses that
21 you may have that you might want to bring out?
22 Did they talk about the strategy of the trial or
23 any of that?

24 A No, sir.

25 Q They just asked you bring witnesses you

Allen Gathings-Direct by Biddle

1 wanted to subpoena.

2 A Yes, sir.

3 Q And then you said you met with him one
4 more time.

5 A Yes, sir. It was the Thursday before
6 trial. Him and Ms. Crayton came, and asked me
7 what size clothes I wore; to tell me that
8 Ms. Munnerlyn was offering me 70 years. And
9 that's about it.

10 Q And how long did that meeting last?

11 A 10, 15 minutes at the most.

12 Q Did you all discuss the plea offer that
13 was made?

14 A No. She just told me that he had -- that
15 she had offered -- oh, the other thing she talked
16 to her about the prior bad acts; said that she was
17 trying to get that allowed. And like I said,
18 asked me about what size clothes I wore, and that
19 was it.

20 Q Let me back up, because I am not sure I
21 understood what you said about the prior bad acts.
22 She was trying to get that allowed. Who is the
23 she you are referring to?

24 A Ms. Munnerlyn.

25 Q The prosecutor.

Allen Gathings-Direct by Biddle

1 A Yes, sir.

2 Q And what did your attorney determine about
3 that? What was her discussion with you, if you
4 would, regarding the prior bad acts?

5 A She told me if -- I think Mr. Jones told
6 me if they allowed the prior bad acts, I was going
7 to prison.

8 Q So that was a pretty significant issue,
9 don't you think?

10 A Yes, sir.

11 Q Do you believe that Ms. Crayton was
12 qualified to represent you in this trial?

13 MR. THOMAS: Objection, Your honor,
14 that's a legal conclusion he's asking the witness.

15 THE COURT: Sustained.

16 MR. BIDDLE: I'll rephrase the question.

17 Q Did Ms. Crayton tell you that she wasn't
18 qualified to try this case?

19 A Yes, sir.

20 Q Which was a double homicide, is that
21 correct?

22 A Yes, sir.

23 Q And did you think that that's why
24 Mr. Jones was there?

25 A Yeah, that was -- yeah.

Allen Gathings-Direct by Biddle

1 Q Do you believe that you spent enough time
2 with Mr. Jones to -- for him to substantially and
3 effectively represent you?

4 A No, sir.

5 Q How long did this trial last?

6 A 3 days, 4 days.

7 Q What parts did Mr. Jones cover in this
8 trial?

9 A He questioned and cross examined a few
10 people. And did I think it was a closing
11 argument.

12 Q Do they hire an expert witness?

13 A No, sir.

14 Q Did the State have an expert witness?

15 A Yes, sir.

16 Q Did your counsel talk to you about an
17 expert witness?

18 A No, sir.

19 Q Now at this trial, there was a pretrial
20 motion regarding the prior bad acts. Is that
21 correct?

22 A Yes, sir.

23 Q And what did the judge do with that? Did
24 he allow the prior bad acts to come in?

25 A Yes, sir.

Allen Gathings-Direct by Biddle

1 Q So your attorneys argued that motion. The
2 judge said, no, it's coming in. And they did let
3 it out. So they objected to that.

4 A Yes, sir.

5 Q During the trial, what happened? Did they
6 bring in testimony regarding those acts?

7 A Yes, sir.

8 Q At that time, did your counsel object to
9 that testimony?

10 A No, sir.

11 Q Did they renew their objection from the
12 previous ruling from the court?

13 A No, sir.

14 Q Was it just one witness or was it multiple
15 witnesses?

16 A Multiple witnesses.

17 Q When did you your counsel raise the
18 objection on prior bad acts after the trial had
19 started?

20 A I don't think they....

21 Q Do you recall?

22 A No, sir, I don't recall.

23 Q Do you know if they objected during the
24 trial to the prior bad acts coming in?

25 A The only thing I remember about the prior

Allen Gathings-Direct by Biddle

1 bad acts was at the pretrial motions, they were
2 arguing about the prior bad acts then. But going
3 through the trial, I never -- I don't remember
4 them saying anything else about it.

5 Q Do you believe that they should have
6 objected to that?

7 A Yes, sir.

8 Q Do you think they should have renewed
9 their objection?

10 A Yes, sir.

11 Q But they didn't, did they?

12 A No.

13 Q Do you believe that was ineffective
14 assistance of counsel?

15 A Yes, sir.

16 Q Do you believe that Mr. Jones should have
17 known to object to that?

18 A Yes, sir.

19 Q And Ms. Crayton as well.

20 A Yes, sir.

21 Q And their failure to do that prejudiced
22 you, didn't it?

23 A Yes, sir.

24 Q And do you believe that was ineffective
25 assistance of counsel?

Allen Gathings-Direct by Biddle

1 A Yes, sir.

2 Q I believe your testimony was that they did
3 not hire an expert. Did you talk to them about an
4 expert witness on your behalf?

5 A Yes, sir, I did.

6 Q Did they tell you that they could have
7 gotten an expert witness and the State would have
8 paid for it.

9 A They didn't say one way or the other.

10 Q Did you think it was a little late 24 days
11 prior to the trial that, whether you were going to
12 get an expert or not?

13 A Yes, sir.

14 Q But you had been there, I believe you
15 said, 3 years, 4 months and 18 days approximately.

16 A Yes, sir.

17 Q And no experts were hired, were they?

18 A No, sir.

19 Q Did -- now this was a double murder trial,
20 is that correct?

21 A Yes, sir.

22 Q And with respect to that, what were the --
23 were there any pieces of evidence that were
24 involved in this trial that your counsel failed to
25 object to?

Allen Gathings-Direct by Biddle

1 A Yeah. I think the testimony of the lab
2 techs where they testified that they were told to
3 only test certain things and not other things.

4 Q So that was the expert testimony.

5 A Yes, sir.

6 Q Was there any testimony about any weapons
7 used?

8 A Yes, sir.

9 Q Tell me about that testimony.

10 A There was testimony of a bat being used.

11 Q And what was the -- did your counsel
12 object to that?

13 A No, sir.

14 Q And do you believe that that prejudiced
15 you?

16 A Yes, sir.

17 Q And based on the ineffective assistance of
18 trial counsel both Ms. Munnerlyn and Mr. Jones,
19 prosecutorial misconduct and the ineffective
20 assistance of appellate counsel for failing to
21 appeal all of the issues in your trial, what are
22 you asking this court to do in conjunction with
23 this post-conviction relief application?

24 A I'm asking for the court to reverse this
25 and reprimand for a new trial.

Allen Gathings-Cross by Thomas

1 Q So you're asking them to reverse your
2 sentences and remand this for a new trial..

3 A Yes, sir.

4 Q To be held in Marlboro County?

5 A Yes, sir.

6 Q Is there anything else that you can think
7 that would prove or show to this court, the
8 ineffective assistance of appellant counsel?
9 Would prove and show the prosecutorial misconduct,
10 and or the ineffective assistance of trial
11 counsel? Is there any other thing you want to add
12 to that?

13 A No, sir.

14 MR. BIDDLE: Please answer any questions
15 of the attorney general.

16 Cross Examination by Mr. Thomas:

17 Q I think you've been thorough here,
18 Mr. Gathings. I'm sorry, may it please the court.
19 You said you had several meetings with
20 Ms. Crayton?

21 A Yes, sir.

22 Q And you had a couple of meetings with
23 Mr. Jones.

24 A Yes, sir.

25 Q During those meetings did they go over

Allen Gathings-Cross by Thomas

1 with you what the State's version of the case was?

2 A No, sir. When me and Ms. Crayton talked,
3 she just asked me about my case, you know what I'm
4 saying. She told me because at the time she
5 wasn't my attorney. She was coming to see me. I
6 had Michael Stevens was my attorney at the time.
7 And he was -- she told me that he was sending her,
8 when she came to see her people at the county jail
9 detention center, for her to see me and see if I
10 had any questions. Or do I need to talk about
11 anything or whatever. And when she come to see
12 her people she would call me in and ask me did I
13 have any questions or anything like that.

14 Q So you had an opportunity to tell her your
15 version of events and what happened that night?

16 A Yes, sir.

17 Q And you had an opportunity to discuss with
18 her the alibi defense you were going to put forth?

19 A Yes. Right there at the end, yes.

20 Q And they actually -- she actually went out
21 and brought in a witness, a Mr. Moore, to testify
22 about where you were at the time these crimes
23 allegedly happened?

24 A Yes, sir.

25 Q You declined that 70-year plea offer?

Allen Gathings-Cross by Thomas

1 A Yes, sir.

2 Q Your attorney made a motion to exclude the
3 evidence that you had previously assaulted the two
4 victims in this case?

5 A Yes, sir.

6 Q And she also made a motion for a mistrial
7 when the judge mentioned the thing about the
8 braces. You had -- let me rephrase that, Mr.
9 Gathings, scratch that. You had leg braces as a
10 restraint device?

11 A Yes, sir.

12 Q Those basically look kind of like a knee
13 brace that you would wear if you were like an
14 athlete or something and tore your knee?

15 A That's the way the judge described it.

16 Q So the judge did address that?

17 A Yes.

18 Q They moved to quash the subpoenas based on
19 your asking them to do that, didn't they?

20 A Yes.

21 MR. THOMAS: That's all the questions I
22 have. Thank you.

23 THE COURT: Anything in redirect?

24 Redirect Examination by Mr. Biddle:

25 Q Were there were any other plea offers

Allen Gathings-Redirect by Biddle

1 offered to you prior to trial?

2 A Not prior to trial.

3 Q Were there any discussions about a
4 possible offer?

5 A No, sir.

6 Q Prior to your trial you meet with them
7 just prior to going into the courtroom after the
8 jury was drawn, is that correct?

9 A Yes, sir.

10 Q And they didn't make any ideas of whether
11 you were taking something more or less than the 70
12 years?

13 A No, sir.

14 Q Did you have a conversation with
15 Ms. Crayton regarding 20 years or 40 years?

16 A Yes, sir. The Tuesday after the trial had
17 started, I was in the little holding room, lunch
18 break eating a sandwich. And she came in and sat
19 down and she asked me she said, I need you take
20 20 years. And I told her that, I said,
21 Ms. Crayton, you know, that Ms. Munnerlyn,
22 wouldn't give me 20 years of two bodies. And she
23 said, I know, she said well let's ask.

24 She walked out the door. She wasn't even
25 out the door 45 seconds and right back in. She

Allen Gathings-Redirect by Biddle

1 said you are right. She said that she'd give you
2 40 if you take them now. And I told her, no,
3 let's finish what we started.

4 Q So she made, remade an offer of 40. And
5 you went forward with the trial, is that correct?

6 A Yes, sir.

7 Q Do you believe those were true offers
8 made?

9 A No.

10 Q And what do you base that on? What do you
11 base your opinion that those weren't true offers?

12 A I don't understand why I hadn't gotten one
13 before then. An offer of a plea before, the
14 Thursday before trial, or during trial.

15 Q And again you had been sitting in jail for
16 how long?

17 A Three -- I would said three and a half
18 years.

19 Q And you believe the fact that you hadn't
20 had any offers, you believe that was ineffective
21 assistance of counsel.

22 A Yes, sir, I do.

23 Q You testified regarding Mr. Stevens. So
24 Ms. Crayton was not your attorney.

25 A No, sir, she was not.

Allen Gathings-Redirect by Biddle

1 Q Michael Stevens was. Is that correct?

2 A Yes, sir.

3 Q How many times did you meet with Mr.

4 Stevens?

5 A I actually talked to him one time. Maybe
6 10 minutes, late one evening. And then the second
7 time Ms. Crayton called me in to see her on a
8 Thursday, and I showed her the paper that I had
9 wrote, that I sent off about him. And she had
10 signed the bottom and dated it, and told me she
11 couldn't talk to me no longer. So I went back to
12 the pod. The next morning, was a Friday morning,
13 her and Michael Stevens was there and that's when
14 Michael Stevens was arguing with me about there
15 wasn't no judge; relieve him off of my case. This
16 that and the other. And I told him to put me in
17 front of one who would see. So they set up
18 transportation from Dillon to Chesterfield in
19 front of Paul Burch, Mr. Paul Burch, and he
20 relieved Michael Stevens. And supposedly had gave
21 Delton Powell. And but I never got to see
22 Mr. Powell. Ms. Crayton came and said he had
23 something to do the following week; that he would
24 be the following week to come see me then. He had
25 a conflict of interest supposedly, and then that's

Emily Crayton-Direct by Biddle

1 when I seen Mr. Jones 24 days before trial.

2 Q So Delton Powell was going to represent
3 you. He had a conflict and then that's how you
4 ended up with Mr. Jones.

5 A Yes, sir.

6 Q And that was all right there before you
7 started your trial.

8 A Yes, sir.

9 Q Do you believe that you had sufficient
10 time to meet with Mr. Jones regarding this trial?

11 A No, sir, I don't.

12 MR. BIDDLE: I have no further questions,
13 Your Honor.

14 THE COURT: Anything on this recross?

15 MR. THOMAS: Nothing, Your Honor.

16 THE COURT: Thank you, sir. You may step
17 down.

18 MR. BIDDLE: Your Honor, the applicant
19 calls Ms. Emily Crayton to the stand.

20 Emily Crayton, being first duly sworn,
21 testified as follows:

22 Direct Examination by Mr. Biddle:

23 Q Ms. Crayton, you represented or how did
24 you come to represent Mr. Gathings?

25 A Mr. Gathings was actually assigned

Emily Crayton-Direct by Biddle

1 originally to Michael Stevens who is currently and
2 at that that time, was the chief public defender
3 for our office. At that time he had written a
4 letter, and I don't remember who. It was either
5 to ODC or someone saying that he not been visited
6 by Mr. Stevens for a considerable amount of time.
7 Mr. Stevens then asked myself and Myesha Brown who
8 is also in that office, to speak with Mr. Gathings
9 at the Dillon County Detention Center. We met
10 with him then. Spoke with him shortly. I think
11 that -- we actually, he requested an updated Rule
12 5 at that time. And we informed him that it was
13 unlikely that his case would be tried I think
14 before the summertime. At this point it was like
15 February, I believe.

16 I believe I told him that I visited the
17 Dillon County jail a lot. I was there at least
18 once a week. And would come by and meet with him
19 if he needed anything when I was there. At that
20 point, I met with him numerous times. Mr. Stevens
21 came in and met with him. He and Mr. Stevens had
22 a disagreement. Mr. Stevens was, I believe,
23 trying to establish a defense and asked if
24 Mr. Gathings was in a relationship with the male
25 victim. This upset Mr. Gathings very much. It

Emily Crayton-Direct by Biddle

1 was very aggressive between the two of them, and
2 that's when he asked that he did not want
3 Mr. Stevens to be on his case anymore. We had him
4 transported to Chesterfield County and he was
5 placed in front of Judge Burch, who given the
6 relationship between the two, Judge Burch did
7 relieve Mr. Stevens from his case.

8 I think even at that hearing, Mr. Gathings
9 said that he had no problems with me remaining on
10 his case, but wanted Mr. Stevens relieved at that
11 time.

12 At that time, he assigned Delton Powers.
13 I contacted Mr. Powers shortly after that hearing
14 because he was not present in court, and informed
15 him of the appointment by telephone. He told me
16 that he had some sort of conflict. I believe he
17 represented the victim's family at some point.
18 And then I believe we contacted Judge Burch who
19 then had Mr. Jones, because we always in the 4th
20 Circuit, and I don't know if they still do it.
21 But when we had a murder trial we would always
22 have two attorneys on it.

23 Q Was Mr. Jones in the public defender's
24 office?

25 A Yes, he was.

Emily Crayton-Direct by Biddle

1 Q And this was a double homicide case, is
2 that correct?

3 A Correct.

4 Q And is it abnormal for the chief public
5 defender to be appointed in a big case like that?

6 A I would say for say for normal offices
7 probably not. Mr. Stevens didn't take on a ton of
8 clients. He had some of the larger murder trials,
9 yes.

10 Q Okay. So this -- so the fact that he was
11 appointed on this case was not out of the
12 ordinary.

13 A Not particularly.

14 Q This is a pretty big case, is that
15 correct?

16 A Yes.

17 Q And how long had you been practicing at
18 the time that you were dealing with Mr. Gathings?

19 A I was admitted to the bar in 2009. I
20 began working for the public defender's office the
21 December after I was -- I mean, you know, after I
22 was admitted to the bar that December, I began
23 working for the 4th Circuit Public Defender's
24 Office.

25 Q How many cases had you tried prior to

Emily Crayton-Direct by Biddle

1 Mr. Gathings case?

2 A I really have no idea. I'm sorry, we
3 tried a lot cases.

4 Q How many murder trials have you tried?

5 A I think just one actually. Which was---

6 Q And you were the sole counsel on that?

7 A I was not. As I stated, we always had two
8 attorneys on every murder case that I tried when I
9 was in the office.

10 Q Were you lead counsel on those?

11 A I was not. Ms. Myesha Brown was lead
12 counsel.

13 Q Were you lead counsel on this case?

14 A I would probably say, yes, I had much more
15 contact with Mr. Gathings than Mr. Jones did. But
16 in terms of the trial, we really kind of split it
17 equally.

18 Q Kind of double teamed.

19 A Yeah.

20 Q Do you believe that you would have been
21 prepared by yourself to try this case? Do you
22 think you were qualified at the time? Not
23 qualified as an attorney, but had the experience
24 and knowledge and skill to try a double homicide
25 case.

Emily Crayton-Direct by Biddle

1 A Yes.

2 Q By yourself?

3 A Yes.

4 Q You heard Mr. Gathings' testimony where he
5 said that you told him that you didn't have the
6 experience to try this case. What do you say to
7 that?

8 A I don't where he's getting that from. I
9 certainly don't have as much as experience as
10 Mr. Jones does.

11 Q Did you all talk about, and obviously you
12 spent a considerable amount of time with
13 Mr. Gathings. When his trial was over and the
14 verdict was done, I mean did you talk with
15 appellant counsel?

16 A Yes, I did.

17 Q And what were the discussions regarding
18 what was to be appealed in this matter?

19 A After I filed the notice of appeal, I was
20 informed and I'm not exactly sure how I was
21 informed. But I was informed that one of the
22 witnesses had testified. One of the federal -- I
23 think one of the federal inmates. I don't know if
24 it was a federal inmate or the state inmate.
25 Actually I can't really speak to that. But one of

Emily Crayton-Direct by Biddle

1 the inmates was actually getting some
2 consideration that had not been disclosed to us.
3 And in fact I believe even on the stand he said he
4 was not getting any consideration for his
5 testimony when in fact he did.

6 I brought that up to Cat Huggins at
7 Appellate Defense. And I think it was Julius
8 Lynch was the inmate. That was what my notes say.

9 Q Okay.

10 A And I informed her of what we were told,
11 and she took it from there. I spoke to her after
12 that again. She told me that she thought that
13 Mr. Gathings had a good shot at his appeal, given
14 the fact that Judge King let in a lot of
15 photographs that, given the nature of the deaths
16 of these of two individuals by a baseball bat,
17 there was a lot of blood spatter. It was very
18 gruesome. He let in a lot of photographs. And
19 she thought that the case might have been won on
20 appeal because of that reason. Unfortunately it
21 was not.

22 Q Did she raise those issues?

23 A It's my understanding she did raise the
24 photography issues in the appeal.

25 Q Have you seen the final brief of the

Emily Crayton-Direct by Biddle

1 appellate matter?

2 A I have, but it's been quite some time.

3 Q Would it surprise you know if there was
4 only one issue on appeal? Do you have a copy of
5 the brief?

6 A I think I do. I think this is the -- is
7 it the final brief of respondents? Is that what
8 it is?

9 Q Final brief of appellants.. Well let's
10 talk about before we go into that, let's talk
11 about what you talked to her about. What were
12 the issues that you saw as the trial counsel?

13 A Well I mean, we didn't speak about every
14 issue at appellant defense. Once we have tried
15 the case and there is a guilty verdict, we go
16 ahead and appeal that. And it goes to appellate
17 defense. And sometimes they never even contact
18 us, and it goes from there.

19 In this circumstance, the reason I
20 contacted her and we started that dialogue, was
21 because of the evidence that we received that
22 someone had given some testimony that wasn't
23 exactly right.

24 Q But you also talked to her about -- seeing
25 some pictures, I believe your testimony was.

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1 A Yeah. That was something that she just
2 said well I think we've got a good chance at his
3 appeal, because of the photographs that were
4 admitted that were gruesome.

5 Q Did you all talk about the prior bad acts?

6 A I don't remember. I'm sorry those are the
7 two things I remember. I remember calling her,
8 and I remember her talking -- saying that we had a
9 good chance because of the photographs.

10 Q Did you all talk about expert testimony?

11 A No, I don't believe so.

12 Q So you say you now that. And if you
13 would, how many issues does she raise on appeal?

14 A It looks like---

15 Q And that would be on page 3.

16 A Thank you. That's all right. Yeah, it
17 looks like she is raising the Lyle evidence, as
18 Mr. Gathings has said, the character evidence, but
19 essentially it's Lyle evidence.

20 Q Sure.

21 A That was admitted. Apparently that is
22 what she appealed.

23 Q And does that surprise you?

24 A I am not an appellant attorney, so I can't
25 tell you what would be the proper thing to appeal.

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1 If I had done it, I did think that some of the
2 pictures that came in were prejudicial. That was
3 my argument to Judge King. Judge King overruled
4 that. I think some were excluded, but numerous
5 pictures were introduced to the jury and presented
6 to the jury. And I did believe they were
7 prejudicial to Mr. Gathings.

8 Q Did you talk to Mr. Gathings where you all
9 discussed expert witnesses?

10 A I have to go back and look at my notes.
11 They're not extremely detailed, but we spoke so
12 many times that I couldn't even tell you. I spent
13 more time with Mr. Gathings than I did any other
14 client up to---

15 Q Sure.

16 A ---this point.

17 Q And well I would think so because it's a
18 double homicide case, is that correct?

19 A Well we had other cases that were just as
20 gruesome that were murder trials that
21 unfortunately I wasn't allowed as much time with
22 individuals. Mr. Gathings' case took it so long
23 to get it to trial, so we had more time to
24 discuss.

25 Q Did you discuss with Mr. Jones regarding

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1 an expert witness?

2 A An expert witness for what?

3 Q For the defense?

4 A Regarding what?

5 Q To refute the expert that the State.

6 A What expert that the State had?

7 Q They didn't bring in guys from sled in
8 this case?

9 A Okay. That's what I'm asking so someone
10 from sled about the DNA or is that what?

11 Q The blood and those kinds of things. And
12 I believe there was testimony regarding, you know,
13 the amount of blood that should have been -- that
14 would have been present in this case.

15 A No, we didn't have any DNA experts to
16 refute the blood testimony.

17 Q How much, I mean, do you recall blood
18 testimony? I mean how, and obviously it's in the
19 transcript. But, you know, what was ultimate
20 result of the testimony from sled agents regarding
21 the amount of DNA found on Mr. Gathings' articles,
22 do you recall?

23 A I think it was very slight. I don't
24 remember. I mean this trial had been several
25 years ago, so I don't remember exactly. But I

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1 remember that there wasn't as much as you might
2 have expected given the nature of the crime. But
3 he also was not arrested the day of. He was
4 arrested 2 or 3 days later.

5 Q But you all didn't specifically discuss
6 hiring an expert to refute the State's theory.

7 A Not that I remember.

8 Q Were you aware that an expert could have
9 been hired?

10 A That we could, yes.

11 Q I mean just for the record, you know, I
12 understand. But you don't recall discussing it
13 with Mr. Jones.

14 A I don't recall specifically discussing
15 that, no.

16 Q Tell me about the indictment issues.

17 A Mr. Gathings after we had provided the
18 Rule 5, he and I discussed numerous things about
19 it. One thing that we discussed was that there
20 appeared to be an error in the dates of the
21 indictment. It had appeared that the case had
22 been true billed prior to be presented. The judge
23 saw it as a scrivener's error, and did not grant
24 our Motion to Quash the indictments as we
25 requested.

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1 Q And did you object to the indictments when
2 they came in?

3 A When were they admitted in the trial?

4 Q Well were they admitted in the trial?

5 A No.

6 Q So that -- so without regard to that
7 though, so you're saying that the jury came
8 without an indictment?

9 A Well I mean they're not admitted. They're
10 not admitted as evidence in the case, and I think
11 the judge gives that instruction. I mean....

12 Q But you -- but was that raised on appeal?
13 Do you know?

14 A As far as I am aware.

15 Q And you saw the appellant's brief.

16 A Apparently not.

17 Q Okay.

18 A As far as I am aware.

19 Q Do you think that was a pretty significant
20 issue?

21 A I really didn't know.

22 Q And is that because you were just freshly
23 out of law school maybe two years?

24 A No.

25 Q It wasn't. Well why didn't you then?

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1 A No, I'm saying I really didn't believe.

2 I'm sorry, I really didn't believe that it was a
3 significant issue. I'm sorry, the way I said that
4 I can understand.

5 Q I apologize. I misunderstood you. Tell
6 me about the leg restraints.

7 A The county had just purchased these leg
8 restraints. And they are what you kind of
9 describe them. It looks like somebody who had a
10 significant leg injury. They come pretty far up,
11 and go pretty far down on the leg. They do look
12 like braces, essentially. Some sort of a brace.
13 He had them on both legs. The county had just
14 purchased them. And I guess that the jail people
15 did not understand that they needed to be going
16 under the clothing instead on top of the clothing.

17 When Mr. Gathings came out from the back
18 where the holding cells are, he was -- he came out
19 and he had those on. He walked over to our table.
20 I immediately said, Oh my gosh, what's going on
21 here. Why do you have them on the outside of the
22 clothing. We made a mistrial motion. Asked the
23 judge for a mistrial given that fact. The judge
24 indicated it just kind of looked like Mr. Gathings
25 had some sort of handicap and did not grant it.

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1 Q And did you -- was that raised on appeal?

2 A Not that I'm aware of.

3 Q Do you think that that prejudiced
4 Mr. Gathings?

5 MR. THOMAS: Objection, Your Honor.

6 Again, that calls for her to make a legal
7 conclusion. That's within your province.

8 THE COURT: She's a lawyer. She was his
9 attorney so, sustained.

10 Q Did you object to the character evidence
11 coming in after you had objected initially or the
12 judge ruled against your motion? Did you object
13 when that testimony was provided by the State?

14 A To be to be clear, you're speaking of the
15 Lyle evidence?

16 Q Yes.

17 A We had a motion about the Lyle evidence
18 pretrial. I don't know if we objected to it
19 during the trial or not. I don't know who
20 questioned that witness. Judge King specifically
21 had a ruling. I don't know if you've been in
22 front of Judge King. And most judges only allow
23 the person that is cross examining the witness to
24 object. So I don't know who would have been
25 responsible for the specific witness objecting,

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1 but I don't know that we objected during or not.

2 Q And I believe the transcript shows that
3 there were two witnesses that testified regarding
4 the incidents. And then when they sought to get
5 the records in from the clerk, that's when the
6 objection was made. Does that reflect your
7 memory? Or does that recall your---

8 A I really don't remember where. I mean, we
9 objected numerous times.

10 THE COURT: Do you have a page or a line
11 in the transcript where that appears?

12 MR. THOMAS: Your Honor, if I may, it's on
13 page 195. Starting at line 10. And then over on
14 page 196 to line 12.

15 A It appears that he did. Judge King did
16 admit them subject to our previous objection.

17 Q And the objection was not renewed until
18 after the two witnesses had already been examined
19 and cross examined, is that correct?

20 A Well I mean, I'm confused by your
21 question. We objected on page 195. Subject, he
22 admitted to evidence prior to our subject, or our
23 previous objection. So he would have noted our
24 objection there. What are you asking?

25 Q Well my understanding is, is that the two

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1 witnesses testified and were cross examined. And
2 then upon the clerk entering the prior record,
3 that's when the objection was made. There was no
4 objection made when the evidence -- when the
5 testimony was being given by the two witnesses,
6 and cross examined by I believe either you or
7 Mr. Jones.

8 A I would have to look back through the
9 transcript. I can't answer that without looking
10 back. If you can point me back to a page, I will.

11 Q Well the previous page is 199, where the
12 objection was actually raised. Where that
13 testimony starts with, I believe it was the
14 brother and or and then followed by the sister.

15 A Well the previous few pages are
16 Chief Thomas who did not present any Lyle
17 evidence.

18 Q Eddie Polston.

19 A What page was that?

20 Q Lisa Polston. Well this is referring to
21 the record from the -- the record on appeal. It
22 was during Lisa Polston's testimony and Eddie
23 Polston's testimony.

24 A If you will just give me a second.

25 Q Sure.

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1 A It appears no, that I did not object at
2 that time, but objected later. I am not sure I
3 questioned both. Let me see.

4 Q Did Mr. Jones object?

5 A Not that I aware of, no. Not until we
6 objected later on.

7 Q Which was after the testimony was
8 provided. Then cross, testimony, cross and then
9 for the record, is that correct?

10 A It appears so, yes. Although I am not
11 sure that was an initial on appeal that we didn't
12 object.

13 Q Well it wasn't raised, was it?

14 A I don't know.

15 Q Well I mean you looked at the brief. So
16 if it's not in there. It doesn't appear to have
17 been raised.

18 A No, I looked -- she raised the Lyle issue.
19 I don't know what the other brief. I haven't
20 looked at the other brief to see if they raised
21 the issue. It was not preserved.

22 Q That's correct. And do you believe that
23 that, the fact that it wasn't preserved was
24 ineffective assistance of counsel?

25 A I am saying I don't know that it wasn't

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1 preserved. I haven't reviewed that brief. Is
2 that of other brief?

3 Q If the court had found that it wasn't
4 preserved, would that have been ineffective
5 assistance of counsel for failure to object at
6 that time?

7 MR. THOMAS: Objection, Your Honor.

8 THE COURT: Sustained. That's the court's
9 calling.

10 MR. BIDDLE: I have no further questions
11 of this witness, Your Honor.

12 THE COURT: Mr. Thomas.

13 MR. THOMAS: May it please the court.

14 THE COURT: Yes, sir.

15 Cross Examination Mr. Thomas:

16 Q Good morning, Ms. Crayton, thanks for
17 being here.

18 A Absolutely.

19 Q Just briefly, how many meetings did you
20 have with Mr. Gathings, roughly?

21 A What I can tell you is that I noted 17
22 times that I met with him and had some sort of
23 significant discussion. I would expect that it
24 would be a lot more than that. But I would only
25 note the file. We had electronic files at that

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1 time. We didn't have a paper file. So you
2 actually had to go back to your office and make a
3 note in the file that you met with this person and
4 what you discussed. Which I tried to do if we
5 discussed anything significant. If I just saw him
6 and said, do you need anything, do you have any
7 questions. I would not have noted the file. So
8 at least, I can guarantee you 17 times.

9 Q And I'm assuming because Mr. Stevens was
10 first appointed, is he the one that filed the Rule
11 5 and the Brady motions, or did you do that?

12 A Actually our office -- they would always
13 be filed Mr. Stevens name no matter who was
14 representing that individual in our office. They
15 were always filed under Mr. Stevens name.

16 Q But you had an opportunity to review the
17 State's response to that?

18 A Yes.

19 Q And did you get a chance to go over that?
20 Well let me ask you this. What was just in broad
21 strokes, what was the State's case against
22 Mr. Gathings?

23 A They allege that Mr. Gathings killed two
24 people with a baseball bat; that was in the home
25 of Robbie Poston. Mr. Gathings was residing at

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1 the residence at that time. Mr. Gathings was not
2 there when the bodies were found. He was in Horry
3 County where he was picked up. He was driving one
4 of the victim's vehicles. And I believe he also
5 had blood evidence on his shoes and maybe even in
6 the car. It's been a long time. I'm sorry. And
7 his fingerprints were on the baseball bat as well.

8 Q Were his fingerprints on the baseball bat,
9 or was his DNA was on the baseball bat?

10 A I think you might be right. I think it
11 might have been DNA.

12 Q So there was DNA evidence linking him to
13 the crime scene that was on -- at the crime scene,
14 and on his person when he was captured a few days
15 later?

16 A Yes.

17 Q Did you go over all that with him?

18 A Yes, we discussed his rule extensively.
19 We discussed our trial strategy extensively. What
20 motions I intended to file. We had numerous
21 conversations about that.

22 Q I guess just briefly, sort of what was
23 your trial strategy? What was your defense to
24 these charges?

25 A Unfortunately, he didn't have a great

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1 defense. It was our alibi defense. But the alibi
2 witness was unfortunately when he came to court,
3 he was not extremely credible. He was someone who
4 drank a lot and was a little fuzzy on the dates.
5 And couldn't really tell us if he -- if Mr.
6 Gathings showed up one day or the next day. So he
7 was a little fuzzy. And I don't think he held up
8 very well in cross.

9 Q And was part of that also that there was
10 some video evidence of Mr. Gathings at an ATM?

11 A Yes, Mr. Gathings had gone to the ATM.
12 And unfortunately our alibi witness said he did
13 not leave his side the entire weekend. And
14 unfortunately, he had gone to an ATM, in which he
15 was photographed alone in a vehicle. So our alibi
16 witness' statement was kind of impeached. And
17 that problem, caused a little problem.

18 Q I guess just sort of briefly give us an
19 overview of what the plea negotiations were with
20 the solicitor's office.

21 A Mr. Gathings had no interest in a plea
22 whatsoever from the beginning, from the moment I
23 met him. He was waiting for his trial. He never
24 wanted a bond hearing. Never requested a bond
25 hearing. I asked him if he wanted a bond hearing.

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1 He had no interest in that. At some point I
2 entered into plea negotiations with Ms. Munnerlyn
3 regarding this case, because I thought I should
4 give him at least a plea offer. I don't remember
5 what the initial offer was. I know that
6 Mr. Gathings is correct, that right before we
7 began the trial, it was 40 years. He had no
8 interest in that whatsoever.

9 I thought it was a reasonable offer given
10 the circumstances of the case. But he had never
11 had an interest in a plea offer, period.

12 Q So you did communicate those to him, and
13 he told he didn't want to enter any of those
14 pleas?

15 A He did. And we even asked Judge King for
16 a little more time to continue talking about the
17 plea offer, me and Ms. Munnerlyn, to see if we
18 could get anything a little better. And the judge
19 you know, said at this point we need to just go
20 ahead and go forward. And again, he had no
21 interest in it. So I didn't think it was
22 something we were going to be able to convince him
23 of.

24 Q And I've got here, it says he had
25 Mr. Stevens relieved. Sort of what defense was

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1 Mr. Stevens? Was he going for sort of a voluntary
2 defense or mitigating type thing?

3 A Yes, he was. He was -- I mean, he didn't
4 tell me that directly, but that's what I would
5 expect from the line of questioning he was going
6 through. I don't know if something in the
7 evidence indicated that Mr. Gathings and one of
8 the victims were in that relationship or what, or
9 how he came to that. But he was trying to
10 determine if there might some sort of defense for
11 a lesser included that maybe would allow
12 Mr. Gathings to serve less time.

13 Q So it's fair to say he was intimately
14 involved in the preparation of his defense in this
15 case?

16 A Extremely, yes.

17 Q And just real quick, so you discussed with
18 him the Lyle evidence and how that was damaging to
19 him if it came in.

20 A Yes, we did.

21 Q And you did make a motion to exclude that
22 pretrial.

23 A I believe we did. We made numerous
24 motions. I can look back.

25 Q And so the first two witnesses who

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1 testified are the ones that elicited the Lyle
2 evidence.

3 A It looks that way, yes.

4 Q But when they went to introduce the actual
5 certified conviction, you objected to that?

6 A We did. We -- and the judge noted our
7 previous objection.

8 Q And in fact on page 196 there, he says
9 your objection is. Your objection is preserved.

10 A Yes.

11 Q What's -- did you ever -- I mean did you
12 ever, did Mr. Gathings ever tell you he wanted you
13 to hire an expert to challenge this blood
14 evidence, this DNA evidence?

15 A No.

16 Q Why wouldn't you do that on your own?

17 A I don't see how an expert, I don't know
18 what an expert is going to say other than what
19 they said. You know, that the DNA seemed to be
20 pretty clear. There didn't seem to be any
21 question about it, or any indication that another
22 expert was going to tell us any different. And I
23 don't believe they would have.

24 Q And we talked about Mr. Lynch, the sort of
25 jail house snitch. You said something some

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1 information that he got some consideration. He
2 actually did get some consideration. Did that
3 ever pan out? Did that ever come to any fruition
4 for you?

5 A And I don't even know. If I can look back
6 at my notes. I don't even know how I came upon
7 that information that Mr. Lynch was given
8 consideration. But I did note it in the file, and
9 noted that I called appellate defense to make sure
10 they were aware of that. And I also called -- oh,
11 I am sorry, it says right here. I received an
12 e-mail from actually Elizabeth Munnerlyn. She
13 found out that he was given consideration that she
14 was unaware of at the time of the trial.
15 Ms. Munnerlyn is a very honest attorney. So she
16 immediately notified me so I could seek that issue
17 with appellate defense.

18 Q But you were aware at the time that he
19 had -- I don't want call him, let me phrase it
20 this way. You cross examined him and over the
21 State's objection on the fact that he had also
22 provided information on several other people that
23 he had been housed with?

24 A I am sure we did. A lot of those guys in
25 the Dillon County whether they were federal or

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1 state, we had a lot of jail house snitches. So
2 that happened often.

3 Q Let's go back to you speaking with
4 appellate defense. You spoke to Cat Hudgens.

5 A That's why my file notes, yes.

6 Q So you never spoke to Betsy Best about
7 this case.

8 A Not that I recall. I've spoken to Betsy
9 before. I've spoken to Cat before in my career,
10 but I couldn't tell you what cases.

11 Q But you don't recall having any
12 conversations with Betsy about this---

13 A No,---

14 Q ---case.

15 A ---I don't.

16 Q And you didn't represent Mr. Gathings on
17 appeal.

18 A No.

19 Q You moved to quash the indictments.

20 A We did move to quash the indictments I had
21 filed. That was one of my numerous pretrial
22 motions that we filed in this case. It was denied
23 by Judge King. I filed a Motion to Quash the
24 indictment. A Motion in Limine to exclude the
25 defendant's statement, to exclude Lyle evidence,

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1 to exclude a search warrant in that evidence, to
2 sequester witnesses for voir dire. And what we
3 call the motion to reveal the deal, which is
4 essentially like if you have any witnesses that
5 have pending cases or have already been convicted,
6 to reveal if they are receiving any sort of
7 benefit. And then the motion to exclude the
8 photographs.

9 Q Regarding those photographs, a couple of
10 them did get kept out, correct?

11 A Yeah, the judge did excuse some, but I
12 don't remember how many or which ones. But he let
13 in numerous others. There were -- I think he kept
14 out some on the basis of cumulative.

15 Q Did you ever tell Mr. Gathings that you
16 weren't experienced enough to handle this case?

17 A No.

18 Q And I'm assuming all your conversations
19 you had with Mr. Gathings, you relayed to
20 Mr. Jones?

21 A Yes, Mr. Jones and I met several times and
22 spoke about our trial strategy, about the
23 evidence. Mr. Jones was housed, you know, his
24 office is here in Darlington. Mine at the time
25 was in Dillon. So I just had easier access to

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1 Mr. Gathings. But Mr. Jones and I met numerous
2 times to discuss trial strategy, what motions we
3 would prepare, which witnesses we would question.
4 Mr. Jones did the closing. I did the opening
5 statement. We divided the trial that way.

6 MR. THOMAS: Thank you, Ms. Crayton. I
7 think that's all I have.

8 THE COURT: Redirect.

9 MR. BIDDLE: Thank you, Your Honor.

10 Redirect Examination by Mr. Biddle:

11 Q Do you recall a conversation with
12 Mr. Gathings about some DNA evidence regarding the
13 shoes or those kind of things?

14 A We spoke about it. I mean, we spoke
15 about all the evidence. You're speaking of
16 something specifically we talked about?

17 Q Well I believe there was a conversation,
18 and correct me if I'm wrong, regarding some kind
19 of spray that you can put something if blood had
20 been washed off, it will show up regarding the
21 DNA?

22 A I don't remember that specifically.

23 Q Did you talk to him about the fact that he
24 was a resident in that home with respect to the
25 DNA being there because of that?

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1 A Yes. And I think that was actually part
2 of our trial strategy was that, his DNA could have
3 gotten on the bat from his being in the home. And
4 he specifically did tell me that he often took it
5 when he was playing on the computer, and would tap
6 it on something. So it would not be unusual for
7 his fingerprints to be on bat.

8 Q And you didn't think that an expert to say
9 that's why his DNA was there, you didn't think
10 that was sufficient enough to require an expert
11 for the defense?

12 A Well I didn't think -- an expert is not
13 going to say that that's why his DNA is there.
14 The expert that they had did testify that his DNA
15 could, I believe the expert did testify his DNA
16 could have been on it from earlier use.

17 Q During a criminal trial, we don't deal
18 with facts. And we're just looking for reasonable
19 doubt, is that correct?

20 A Yes, we are asking for reasonable doubt.
21 Hoping we have reasonable doubt.

22 Q So an expert, do you believe, well
23 again, an expert saying well he lived in the
24 house, he had a bat, he used the bat. It could
25 have been there from that, not necessarily from

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1 the actual murder. You don't think that would
2 have been helpful?

3 A I believe their experts testified to
4 something similar to that.

5 Q But again those are the State's experts,
6 not a defense expert.

7 A Yes. The testimony was admitted that
8 you're talking about though.

9 Q But again from the State's expert, not
10 defense expert. You testified about video
11 evidence with an alibi witness at an ATM. What
12 did those pictures show? Do you recall?

13 A Mr. Gathings was in the vehicle, one of
14 victim's vehicles. I think it was the mother's
15 vehicle that was taken from her property. And he
16 was leaning out the window. It was a very clear
17 shot of him going into -- you know, taking money
18 out of an ATM. There was---

19 Q Did it show the whole car? Did it show?

20 A It did show most of the car, if I remember
21 correctly. And you could tell that he was the
22 only occupant. I am not sure if I have a copy of
23 the pictures with me though. Yeah, there were
24 numerous photographs. So one would show the car
25 driving up. One showing him in the vehicle

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1 specifically, and his arm, he has very distinct
2 tattoos that were shown as well. But you do also
3 see one of him driving up. And you can see, I
4 have a terrible copy. But that's printed from
5 the---

6 Q Those were all admitted, do you recall?

7 A I would think they would all have been
8 admitted, but she may have just admitted one of
9 them. But we did have them in our Rule 5. I have
10 two that are currently with me. I am not sure how
11 many they had of him. But you see one, and you
12 can tell how many people are in the vehicle.

13 MR. BIDDLE: No further questions.

14 MR. THOMAS: Nothing further.

15 THE COURT: Thank you, ma'am. Any
16 objection to Ms. Crayton being excused?

17 MR. THOMAS: I was just about to ask that
18 question.

19 MR. BIDDLE: None whatsoever. Thank you.
20 The applicant would call Rick Jones.

21 THE COURT: Mr. Jones, if you would come
22 around and be sworn.

23 Rick Jones, being first duly sworn,
24 testified as follows:

25 MR. BIDDLE: Thank you, Your Honor. May

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1 It Please the Court.

2 THE COURT: Yes, sir.

3 Direct Examination by Mr. Biddle:

4 Q Mr. Jones, you served as co-counsel for
5 Mr. Gathings' trial, is that correct?

6 A It is.

7 Q What did you do in preparation for this
8 trial in terms of meeting with Mr. Gathings and
9 discussing strategy, if you will.

10 A I listened to his testimony, and he's
11 probably right about the number of times that I
12 met with him. I don't know if the times -- if the
13 time periods are correct. But the number of
14 times, you are probably absolutely correct.

15 Q And were you lead counsel on this case?

16 A I was not, Ms. Crayton was.

17 Q Tell me your experience in murder trials
18 at the time of this trial. And how long have you
19 been practicing?

20 A Since 1976.

21 Q So you've tried a number of cases.

22 A A number of cases, yes, sir.

23 Q And how long have you been employed with
24 the public defender's office?

25 A This December it will full-time, it will

Rick Jones-Direct by Biddle

1 be 6 years. Prior to that, it was probably 8 or
2 10 part-time. But I have always done criminal
3 work in my general practice.

4 Q So you've tried a number and defended a
5 number of murder trials, is that correct?

6 A I have.

7 Q Are you death penalty approved, if you
8 will?

9 A I am.

10 Q So you certainly were qualified to defend
11 this case.

12 A Yes, sir.

13 Q And I presume that based on that
14 experience, well maybe I shouldn't presume. Do
15 you believe that you maybe should have been lead
16 counsel on this case?

17 A Not at all. Ms. Crayton actually, the
18 case she talked about where she was second chair,
19 I sat, third chair, if you will, just because I
20 was the oldest, most experienced guy in the 4th
21 Circuit. I sat with Myesha Brown and Ms. Crayton
22 on that case, and they did an excellent job.

23 Q Did you, again you heard Mr. Gathings
24 testimony regarding the amount of time you spent.
25 Did you, and tell me about your preparation. Did

Rick Jones-Direct by Biddle

1 you have any post-trial discussions regarding
2 appellate issues and those kind of things?

3 A None whatsoever.

4 Q Did you consider any of the issues that
5 may have been addressed on appeal?

6 A I did not. Ms. Crayton I think filed the
7 motion for the appeal. And generally that is --
8 that's the extent of our involvement. I was
9 not -- actually I wasn't aware that the snitch had
10 received some benefit. As I recall, I questioned
11 him and he, if I remember right, I think he had
12 actually served his sentence and was out. Because
13 I tried to get him to stay just that; that he was
14 getting some consideration. And he said he
15 already served his sentence and was not getting
16 any.

17 Q Do you recall -- I mean what is the
18 procedure? Is there any post-trial stuff? Do you
19 all kind of sit down postmortem in a trial, as to
20 would have, should have, could have?

21 A No. If appellate defense calls and asks
22 for some stuff, we certainly will help them. If
23 they want to talk about anything, we'll certainly
24 talk with him about it. But once we send it off,
25 it's theirs.

Rick Jones-Direct by Biddle

1 Q Do you believe there were appellate issues
2 that should have been addressed in this appeal
3 that weren't?

4 A We, every case I've ever had with
5 pictures, we always fight pretty hard to keep the
6 pictures out. To be honest, I thought Judge
7 King's ruling were probably correct. He did
8 exclude a number of them. The crime scene photos
9 were just, they were very gruesome. There was a
10 lot of blood.

11 Q Are you surprised that that wasn't raised
12 on appeal?

13 A Sure.

14 Q Are you surprised that -- and did you seek
15 any appeal when it was going on?

16 A I did not.

17 Q And apparently that's not normal once you
18 guys try the case and it's an appellate and
19 everything.

20 A We pass it out. We've got plenty to do.

21 Q You're on to the next case.

22 A Yes, sir.

23 Q How many cases do you normally handle on a
24 yearly basis?

25 A It's actually down a good bit. I think

Rick Jones-Direct by Biddle

1 I've got in the neighborhood of 150, 200 cases
2 right now.

3 Q And how many of those are murder, double
4 murders?

5 A I have probably had more murders than most
6 of them, because I am the oldest, you know, in the
7 circuit besides Mr. Stevens. And I think I'm
8 older than Mr. Stevens.

9 Q More seasoned.

10 A More seasoned, correct.

11 Q More seasoned attorney.

12 A Correct.

13 Q Did you -- I mean obviously you and
14 Ms. Crayton made pretrial motions and argued
15 those. Did you argue any of those more so than
16 her or were you all?

17 A I think she's probably right in that we
18 split it up fairly evenly. She had -- she had
19 been involved more with Mr. Gathings than I. We
20 interestingly enough, we had an investigator, a
21 full time investigator, who was in Darlington, who
22 we all got in the car. We went to Horry County at
23 least a couple of times I think trying to find the
24 gentleman that Mr. Gathings had stayed with. And
25 some other witnesses.

Rick Jones-Direct by Biddle

1 Q Did you all discuss expert witnesses and
2 maybe the defense having one?

3 A We did not. As I remembered, there was
4 one spot of blood on his tennis shoes. The DNA on
5 the bat is exactly like Ms. Crayton described.
6 Mr. Gathings said that that bat was in his room.
7 And I don't know if that was made clear during her
8 testimony. But he lived in this house.

9 Q Yes, sir.

10 A And as I remember, he said that the bat
11 was in his room, and he did just kind of carry it
12 around and swing it, you know, just had it in his
13 hands all the time. So, and she is correct, the
14 sled guy, I think said at that one point and time,
15 if he had handled it before, that the DNA would
16 have been on there. So but to answer your
17 question, no, we did not talk about an expert.

18 Q In hindsight, do you think that would have
19 probably been a good opportunity to have an
20 expert?

21 A Not necessarily. We had one spot of
22 blood on the tennis shoes. And there, one of the
23 things that still strikes me about the case; is
24 that, if Mr. Gathings had been in the house, done
25 that, there should have been blood all over him.

Rick Jones-Direct by Biddle

1 Because as the sled guys talked about, the blood
2 was just splattered everywhere, because of the
3 striking with the baseball bat. The fact that
4 they had only one little spot of blood on the
5 shoes was -- it was damaging obviously, but not as
6 damaging as it could have been.

7 Q You didn't think that having an expert
8 that would testify to that, and discredit you if
9 you would, the State's expert, do you think that
10 would available?

11 A We did not think that it would be
12 worthwhile. We had numerous discussions
13 concerning trial strategy. Ms. Crayton and I
14 talked a great deal about the case. She met with
15 Mr. Gathings. She and I met and talked concerning
16 that. And that was not something that we felt
17 that was needed.

18 Q Have you ever had an expert in the
19 criminal cases that you've tried?

20 A Sure.

21 Q On the defense side?

22 A Sure.

23 Q In I'm assuming in some of your murder
24 cases, what kind of testimony were those experts,
25 were similar to what you would have been asking

Rick Jones-Direct by Biddle

1 the expert in this case to testify to?

2 A Well I don't -- I don't really know if I
3 can answer the question. We've had gun experts.
4 We've had medical experts. We've had more medical
5 experts than anything else concerning,
6 psychological experts.

7 Q What's significant about this case, you
8 just didn't think that an expert was needed. It seemed
9 that there was less, pretty specific blood
10 testimony from their expert that may or may not
11 have been able to raise a significant reasonable
12 doubt? Did you just not think that was the case,
13 or was it money or was it?

14 A No, the money is available through
15 indigent defense. We had one tiny spot of blood
16 on a pair of tennis shoes; that if the State's
17 case was correct, had walked around all that
18 bloody room or bloody house.

19 Unfortunately, Mr. Gathings was not
20 arrested at the scene. He was arrested several
21 days later. And I don't remember if he was
22 actually wearing those shoes or not.

23 Q So do you think it was just possible the
24 fact that it was, you know, 30 days before trial,
25 that it was kind of well, we don't have time to

Rick Jones-Direct by Biddle

1 get an expert at this point?

2 A No, Mr. Stevens had been involved in the
3 case since, I don't know, since the beginning.
4 But he had been involved with it. I don't recall
5 any specific conversations with him about experts.
6 We did talk about the reason that Mr. Gathings did
7 not want him on the case. But that was about it.

8 Q Did you argue any of the issues dealing
9 with leg restraints or indictments or object to
10 the deadly weapons or those kind of things
11 throughout any of those motions?

12 A I don't remember. We all -- well
13 Ms. Crayton and I were very concerned when he
14 walked out of the back. And if you've been to
15 Marlboro, you know how they come out in back. The
16 jury sits on the -- looking at the courtroom,
17 sits on the right hand side. Mr. Gathings would
18 have walked out on the left hand side. There's a
19 rail. There's tables. I'm not sure how much the
20 jury saw if anything. She and I definitely saw
21 it. We didn't like it. I described those things
22 kind of as Forest Gump braces. That's exactly
23 what they looked like to me, but they were on the
24 outside of the clothes instead of the inside. And
25 so once that was raised, Judge King ruled on it.

Rick Jones-Direct by Biddle

1 I think they might have taken him back, and they
2 put them on the inside.

3 Q Sure.

4 A So the jury wouldn't have.

5 Q Do you think that that should been
6 something that was raised on appeal?

7 A I kind of agreed with Judge King on that
8 too. They looked more like braces for someone
9 with physical problems rather than restraints for
10 prisoners.

11 Q But the fact that he was a prisoner and he
12 was in restraints, and I think the case on
13 those -- I mean what do you think the case law
14 says regarding restraints on prisoners in the
15 presence of the jury?

16 A I think if they come in shackled, that's
17 very prejudicial.

18 Q And do you believe that was the case at
19 this time?

20 A I do not. Because like I said, they
21 looked more Forest Gump physical type braces for
22 someone who had had trouble walking.

23 Q But of course during the trial he didn't
24 have them on, or he had them on under his pants.
25 So it was different.

Rick Jones-Cross by Thomas

1 A Correct. If they saw them at all.

2 MR. BIDDLE: I have no further questions.

3 Please answer any questions the attorney general
4 may have.

5 MR. THOMAS: May it please the court.

6 THE COURT: Yes, sir.

7 Cross Examination by Mr. Thomas:

8 Q Thank you for being here, Mr. Jones.

9 A Sure.

10 Q So you said your only had two, give or
11 take, a couple of meetings with Mr. Gathings?

12 A That's probably right, 2 or 3.

13 Q But you, you were aware of everything him
14 Ms. Crayton discussed when they had meetings. She
15 filled you in on all that.

16 A She did. And as I said, Mr. Stevens and I
17 talked about it also. He had a pretty violent
18 reaction action to Mr. Stevens, I think, when
19 he -- when they discussed the relationship
20 problems.

21 Q So it's fair to say that the defense to
22 this was, he wasn't there. He didn't do it. He
23 had an alibi. That was the only defense you were
24 all going to go with?

25 A Yes and no. That was the defense.

Rick Jones-Cross by Thomas

1 Because he lived there, and because he and the
2 gentleman had known each other prior to his coming
3 back to Marlboro County, it was kind of one of
4 those things where you weren't sure they were
5 friends. And yes, he had been there. But no he
6 wasn't there at the time the person was killed.

7 Q And in fact that was sort of -- I was just
8 reading, flipping through your closing argument.
9 That was sort of tried to highlight in the
10 closing was that there was no blood in the car.

11 A Absolutely.

12 Q And that there was -- I guess they took
13 all of the swabs and different samples from the
14 shoes that he had on, but they only tested two of
15 them?

16 A Yes.

17 Q So you argued all that to the jury; that
18 the only physical evidence was these two swabs
19 really, and then the DNA that could have been
20 there because he lived there?

21 A Correct.

22 Q Do you recall Julius Lynch's testimony?
23 He was the person who was incarcerated with him?

24 A Yes. I think I questioned him if I not
25 mistaken.

Rick Jones-Cross by Thomas

1 Q And you asked him about all the other
2 people he had given information on.

3 A Correct. He admitted on the stand. It
4 surprised me. I said, I think I said, and I guess
5 you're what they call a snitch. And he said,
6 yeah, I guess I am.

7 Q And but basically his testimony was that
8 he talked with Mr. Gathings, and Mr. Gathings
9 said, they can't prove I did it, because my DNA
10 was there, because I lived there.

11 A Correct.

12 Q So that's consistent with sort of what
13 your defense was?

14 A Absolutely.

15 MR. THOMAS: I think that's all I have.
16 Thank you, Mr. Jones.

17 A Sure.

18 THE COURT: Anything on the redirect?

19 MR. BIDDLE: No questions, Your Honor.

20 MR. BIDDLE: That's the applicant's case,
21 Your Honor.

22 THE COURT: Anything from the State?

23 MR. THOMAS: The State would just preface
24 it on the record and submit that the applicant has
25 not shown either that Mr. Jones or Ms. Crayton

1 were deficient. And he's certainly not shown
2 there was prejudice, because there was
3 overwhelming evidence. That's the State's
4 position.

5 THE COURT: Mr. Biddle, I'll be happy to
6 hear any closing argument you would like to make.

7 MR. BIDDLE: Your Honor, just with
8 respect, I believe Mr. Jones and Ms. Crayton were
9 deficient in their representation of Mr. Gathings.
10 I don't think they've shown, they didn't hire an
11 expert. I believe that there was certainly an
12 opportunity that that would have shown that at
13 least would have raised some reasonable doubt.
14 You know there some position where they failed or
15 either absolutely didn't object or objected after
16 the fact as to some issues. And I believe that,
17 you know, with the conversations that they had
18 with appellate counsel, there certainly was
19 opportunity to address all of the issues. And I
20 would ask that this matter, that the sentences,
21 that his PCR be granted and the sentence be
22 reversed. And it be remanded to have a new trial
23 here in Marlboro County.

24 THE COURT: Thank you, sir.

25 MR. THOMAS: And if I could just briefly.

1 THE COURT: Yes, sir.

2 MR. THOMAS: As far as the expert
3 testimony goes, any testimony about an expert is
4 purely speculative at this point. No expert has
5 testified. Didn't the non-preservation of
6 objections the Lyle evidence. The case law is
7 clear that if you have a motion in limine, if the
8 first witness that testifies, testifies to the
9 evidence you're trying to keep out in limine, you
10 don't have to object to that to preserve it. And
11 they did object when they actually tried to
12 introduce the physical documents. And they
13 objected to -- I apologize, Your Honor. They
14 objected to those instruments being introduced.
15 So there is, that's preserved for appellate
16 counsel.

17 Obviously, we would just position that
18 appellant counsel hasn't testified. There is a
19 presumption she chose the viable issues, and
20 obviously again overwhelming evidence, so no
21 prejudice.

22 THE COURT: Regarding the expert issue, I
23 am not sure I quite follow Mr. Biddle. I mean,
24 and don't get me wrong, I absolutely understand
25 and appreciate your argument on behalf of your

1 client. But it doesn't appear in this case that
2 that would have made any difference in the case.
3 If anything, it may have solidified the State's
4 case. Without any -- with nothing else, the fact
5 that the State's expert tested blood on a tennis
6 shoe, without anything further to have counsel
7 believe that that was anything other than the
8 blood, to hire an expert only to basically
9 reaffirm the State's expert. And then as far as
10 for expert to say, well I would have expected to
11 see more blood. I don't think you would have
12 gotten that out of a DNA expert. I don't know if
13 you've questioned them often in trial, but they
14 stick to what that do. And that is, they tell you
15 what the probably is that that is what it is. And
16 they are very reluctant to speculate that they
17 would have expected to see more. You would get
18 that typically from common sense as well as an
19 investigator or something of that nature.

20 And as to the objection with regards to
21 the Lyle evidence, I believe that the objections
22 were there. And I agree with Mr. Thomas that it
23 wasn't necessary on that initial witness.
24 However, when the State attempted to admit the
25 documentation, the objection was renewed from the

1 pretrial matter. Or at least the judge observed
2 that that objection was made pretrial, and that it
3 was preserved for the record. The indictment
4 issue, my experience of whether that was raised at
5 the appellate level would not have changed the
6 outcome here. I don't believe the appellate
7 issue, I don't think there was one. That's
8 discretionary for the court. But the fact that
9 the court considered that as a scrivener's error,
10 there was an issue made, and there as a motion for
11 a mistrial regarding the leg brace.

12 Again, I think that's in the court's
13 discretion in ruling on that. And I do believe
14 the attorneys appropriately covered those issues.
15 I am not aware of anything that's in this record
16 that would cause me to believe that anything that
17 the attorneys did or did not was deficient. Or
18 that that would have created any issue that would
19 have changed the outcome. And so I am going to
20 respectfully deny the application.

21 --End of Requested Transcript of Record--

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23

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C-E-R-T-I-F-I-C-A-T-E

I, Margaret T. Sullivan, Court Reporter, for the Third Judicial Circuit of the State of South Carolina, do hereby Certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced on July 24, 2014, in the Common Pleas Nonjury Court, Marlboro County, Bennettsville, South Carolina.

I do further that I am neither kin, counsel nor interest to any party hereto.

6-3-15

DATE

Margaret T. Sullivan

COURT REPORTER

My Commission expires: 9/7/2021

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF MARLBORO) FOR THE FOURTH JUDICIAL CIRCUIT

Allen J. Gathings, #279208,) Case No. 2012-CP-34-217

Applicant,)

v.)

State of South Carolina,)

Respondent.)

A CERTIFIED ORDER OF DISMISSAL
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William B. Funderburk

CLERK OF COURT
MARLBORO COUNTY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed October 16, 2012. Respondent made a timely Return on or about February 22, 2013. The Court convened an evidentiary hearing into the matter on July 24, 2014, at the Darlington County Courthouse. Applicant was present at the hearing and represented by James Marshall Biddle, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsels, Emily M. Crayton, Esquire, and J. Richard Jones, Esquire, also testified. The Court had before it a copy of the trial transcript, the records of the Marlboro County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the return. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Marlboro County Clerk of Court. In September 2007, the Marlboro County Grand Jury indicted Applicant for two counts of murder (2007-CR-34-217).

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MARLBORO COUNTY, SC

888) and one count of grand larceny (2007-GS-34-909). Emily M. Crayton, Esquire, and J. Richard Jones, Esquire, represented Applicant. On October 18-21, 2010, Applicant proceeded to trial before the Honorable Howard P. King and a jury. The jury found Applicant guilty as indicted. Judge King sentenced Applicant to consecutive terms of life imprisonment without the possibility of parole for the murder convictions, and a concurrent term of five (5) years imprisonment for the grand larceny conviction.

Applicant filed a timely notice of appeal, and Elizabeth Franklin-Best, Esquire ("appellate counsel"), perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on August 22, 2012. State v. Gathings, Op. No. 2012-UP-494 (S.C. Ct. App. filed August 22, 2012). The remittitur was returned to the circuit court on September 7, 2012.

II. ALLEGATIONS

In his application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistant of Appellate Council"
 - a. "Fell to appeal all grounds upon which a decision is based conviction was affirmed upon two issue rule"
2. "Prosecutor Misconduct"
 - a. "Character evidence prior to defense opening door."
3. "Ineffective Assistant of Trial Council"
 - a. "Fell to object to character witness to preserve for Appellate review"
 - b. "Fell to object to prior record - "Bad Acts" introduced to jury Appellate review"

At the evidentiary hearing, Applicant proceeded on the following allegations:

1. Ineffective assistance of trial counsel for failing to object to the State's eliciting improper character evidence.
2. Ineffective assistance of trial counsel for failing to quash the indictments.

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3. Ineffective assistance of trial counsel for failing to retain an expert witness.
4. Ineffective assistance of appellate counsel for failing to challenge on appeal the trial judge's admission of evidence of Applicant's prior bad acts.
5. Ineffective assistance of appellate counsel for failing to challenge on appeal the trial judge's refusal to declare a mistrial after the jury may have seen Applicant in leg restraints.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

A. Summary of Testimony

Applicant testified the State improperly elicited character evidence from its first witness, and his attorneys did not object. He further testified appellate counsel did not raise an appeal to all of Judge King's grounds for allowing the testimony. Applicant also testified appellate counsel did not appeal Judge King's denial of a mistrial when trial counsel objected to the jury seeing Applicant in leg restraints. Applicant testified trial counsel should have moved to quash the indictments because the body indicates the grand jury met on September 10, 2007, but the face of the indictment was signed on September 6, 2007.

Applicant also testified Mr. Jones was supposed to be lead counsel on the case, but allowed Ms. Crayton to ask most questions. Applicant alleged Ms. Crayton told him she did not have enough experience to try a murder case. Applicant testified he only met with Mr. Jones

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once before trial, but admitted he had several meetings with Ms. Crayton. He testified he discussed his potential defense with Ms. Crayton, and told her who to subpoena as alibi witnesses. Applicant further alleged he told Ms. Crayton to hire a DNA expert to review his case.

Ms. Crayton testified she met with Applicant seventeen (17) times after being appointed. She denied ever telling Applicant she did not have enough experience to handle his case. Ms. Crayton testified this may have been her second murder case, and that a senior attorney always sits on murder cases. She testified she felt sufficiently prepared to go forward with trial. She recalled discussing the State's evidence with Applicant and with Mr. Jones. She also recalled discussing Applicant's alibi defense.

Ms. Crayton testified Applicant never asked her about hiring an expert for this case. She also testified she did not discuss an expert with Mr. Jones because an expert would not have been helpful. Mr. Crayton testified Applicant's DNA was on the murder weapon, and that part of the trial strategy was to argue his DNA would have been there because he lived in the house and regularly handled the weapon. She also recalled cross examining the State's DNA expert on the fact the DNA could have been on the weapon before the murder. Ms. Crayton testified she did discuss the indictment dates with Applicant, but advised him it was not a significant issue.

Mr. Jones testified he met with Applicant once or twice, but that Ms. Crayton discussed the case with him regularly. He recalled traveling to Horry County to meet with the alibi witness. He recalled not looking into an expert because one would not have been able to add any useful information the case in light of the fact the State's expert could not say Applicant's DNA was transferred to the weapon at the time of the murder. Mr. Jones testified they moved for a

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mistrial even though Applicant's leg restraint was not obviously a restraint device and he could not be sure the jury even saw the device.

B. Ineffective Assistance of Trial Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "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." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that there is a

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reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

1. Character Evidence

The Court finds Applicant failed to meet his burden of showing trial counsel ineffective for failing to object to improper character evidence. Mr. Jones argued against admission of applicant's prior convictions for crimes against the victims. (Trial Tr. 54:20). Trial counsel was under no duty to renew the objection when the first two witnesses testified as to the nature of those crimes. See State v. Mueller, 319 S.C. 266, 268, 460 S.E.2d 409, 410 (Ct. App. 1995) (motion in limine need not be renewed when first witness at trial testifies to matters sought to be excluded by the motion). Furthermore, Ms. Crayton renewed the motion when the State introduced certified copies of Applicant's convictions. (Trial Tr. 195:10-11). Accordingly, Applicant has not shown trial counsel was ineffective in failing to object to the introduction evidence of his prior convictions.

2. Indictments

The Court finds Applicant has failed meet his burden to prove trial counsel ineffective for failing to quash the indictments. Ms. Crayton moved prior to trial to quash the indictment based on the inconsistent dates. (Trial Tr. 56:16). Accordingly, there can be no deficiency in failing to make such a motion. Furthermore, the motion was properly denied. A presumption of regularity attaches to proceedings in the Court of General Sessions. Pringle v. State, 287 S.C. 409, 411, 339 S.E.2d 127, 128 (1986) (citing State v. Britt, 235 S.C. 395, 111 S.E.2d 669 (1955); State v. Jones, 211 S.C. 319, 45 S.E.2d 29 (1947); State v. Waring, 109 S.C. 52, 95 S.E.2d 143 (1956)).

Absent evidence to the contrary, the Court must presume that a properly returned indictment is

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valid. State v. James, 321 S.C. 75, 472 S.E.2d 38, 40 (Ct. App. 1996) (citing Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995); State v. Thompson, 305 S.C. 496, 409 S.E.2d 420 (Ct. App. 1991). Here, there is no evidence the indictments were irregular in any manner whatsoever. The indictments are valid on their face because they state all the necessary elements of the charges, the dates of the offenses, and the name of the accused. Id. at 75, 472 S.E.2d at 40. Likewise, the indictments are stamped "True Billed" and signed by the foreman. Pringle, 287 S.C. at 410, 339 S.E.2d at 128. Therefore, the Court finds Applicant has not shown a further objection to the indictments would have yielded a different result.

3. Expert Witness

The Court finds Applicant failed to meet his burden of showing trial counsel was ineffective in failing to procure an independent DNA expert. Regarding this allegation, the Court finds the testimony of Ms. Crayton and Mr. Jones to be very credible, and the testimony of Applicant to be not credible. Both trial counsels articulated a valid strategy in not retaining an independent expert in that such an expert would not have been able to add any information to the case. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992))). Furthermore, Ms. Crayton thoroughly cross-examine the State's expert on the lack of testing of certain samples. Likewise, the State's expert testified she could not date Applicant's DNA found on the murder weapon. (Trial Tr. 531:13-20). In light of the evidence presented at trial, the Court finds trial counsel was not deficient in failing to call an independent DNA expert. Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (decision not

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CLERK OF COURT
MARLBORO COUNTY, SC

to call an expert witness to rebut the state's expert witness was a legitimate trial strategy." (citing McLaughlin v. State, 352 S.C. 476, 483-484, 575 S.E.2d 841, 844-845 (2003))).

Regardless, Applicant has not shown he was prejudiced by the decision not to retain independent experts. Applicant presented no expert testimony at the evidentiary hearing, and the Court will not speculate as to what Applicant's desired experts would have found. Id. Furthermore, the record reflects trial counsel thoroughly cross-examined the State's experts to attempt to discredit their testimony. See Lorenzen v. State, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008) ("[C]ounsel's failure to procure expert witnesses did not render her representation deficient given she vigorously cross-examined the State's witnesses and attacked the accuracy of the evidence." (citing Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991))). In sum, Applicant had not proven any testimony by independent experts would have bolstered his defense at trial. Therefore, trial counsel was not ineffective in this regard.

C. Ineffective Assistance of Appellate Counsel

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 396 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones, 463 U.S. at 753. Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226, 1235 (4th Cir. 1985).

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MARLBORO COUNTY, SC

The applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thriff, 302 S.C. at 537, 397 S.E.2d at 526; Strickland, 466 U.S. at 687. When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id. Furthermore, the applicant must prove prejudice by showing "there is a reasonable probability he would have prevailed on appeal." Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003) (citations omitted).

1. Prior Bad Acts

The Court finds Applicant failed to meet his burden of showing ineffective assistance of appellate counsel for failing to fully challenge Judge King's ruling regarding evidence of his prior convictions. Initially, the Court notes Applicant failed to present any testimony from appellate counsel on that issue. As such, the Court cannot speculate as to why Judge King's second ground for admitting the evidence was not briefed. Cf. Dempsey, 363 S.C. at 370, 610 S.E.2d at 815 (finding that, without a witness's testimony, "any finding of prejudice is merely speculative").

Regardless, the Court finds Applicant failed to demonstrate he would have been successful on appeal had this issue been raised. The evidence was clearly admissible under State v. Williams, 321 S.C. 327, 468 S.E.2d 626 (1996). There, the South Carolina Supreme Court reiterated the rule that "evidence of previous quarrels and ill feelings or hostility between

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parties is admissible to show that animus probably existed between the parties at the time of the homicide[.]” Williams, 321 S.C. at 336, 468 S.E.2d at 631. See also State v. Braxton, 343 S.C. 629, 636, 541 S.E.2d 833, 836-37 (2001) (“In homicide cases, evidence of previous quarrels and ill feelings or hostile acts between parties is admissible to show that animus probably existed between the parties at the time of the homicide.”); State v. Clinkscales, 231 S.C. 650, 654, 99 S.E.2d 663, 665 (1957) (“[I]n assault and battery and homicide cases, evidence that the accused and prosecuting witness or the deceased had a previous difficulty is admissible[.]”).

Here, Applicant’s prior convictions for similar crimes constitutes hostile acts from which the jury could determine prior animosity between Applicant and the victims. Furthermore, the convictions were probative of the relationship between Applicant and the victims. In light of the similarity of prior incidents and the clear precedent regarding prior hostile acts in a homicide case, the Court finds Applicant has failed to demonstrate the outcome of his appeal would have been different had appellate counsel raised this issue. Anderson, 354 S.C. at 434, 581 S.E.2d at 835.

2. Leg Restraints

The Court finds Applicant failed to meet his burden of showing ineffective assistance of appellate counsel for failing to fully challenge Judge King’s denial of a mistrial when Applicant appeared in court in a leg restraint. Again, the Court notes Applicant failed to present any testimony from appellate counsel on that issue. Cf. Dempsey, 363 S.C. at 370, 619 S.E.2d at 715. Regardless, the Court finds the Applicant failed to demonstrate appellate counsel failed to exercise sound judgment in choosing which issues to present on appeal. This is not a case where Applicant appeared dressed in prison clothing. See, e.g., Humbert v. State, 345 S.C. 332, 337,

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William B. Zundel

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WILLIAM B. ZUNDEL

548 S.E.2d 862, 865 (2001). Instead, Applicant was wearing a device that immobilized his legs. From the trial transcript and the testimony at the evidentiary hearing, the device likely resembled a knee brace worn by athletes when recovering from a knee injury. Thus, the Court finds Judge King properly denied the motion for a mistrial and Applicant would not have been successful on appeal had appellate counsel raised the issue. Anderson, 354 S.C. at 434, 581 S.E.2d at 835. Furthermore, the Court finds credible the testimony of Mr. Jones that he was not sure the jury even saw Applicant wearing the device. Therefore, the Court cannot speculate about whether the presence of the device on Applicant deprived him of a fair trial.

C. Overwhelming Evidence of Guilt

Independent of the above analysis, the Court finds Applicant has not demonstrated he was prejudiced by the performance of counsel because there was overwhelming evidence of his guilt. Applicant had prior difficulties with the victims. Applicant was the last person seen with the victims while they were alive, and was located days later with the car of one of the victims. When apprehended, Applicant had blood from the victims on his shoes. Applicant's alibi witness failed to corroborate Applicant's whereabouts for the entire time during which the crime could have occurred. In light of this overwhelming evidence, the Court finds Applicant has not demonstrated the outcome of his trial would have been different in any way. See Harris v. State, 377 S.C. 66, 79, 659 S.E.2d 140, 147 (2008). (no prejudice where there is overwhelming evidence of guilt). The Court further finds Ms. Crayton and Mr. Jones adequately conferred with Applicant, conducted a proper investigation, and were thoroughly competent in their representation.

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MARLBORO COUNTY

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D. All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Department Corrections to complete service of his sentence.

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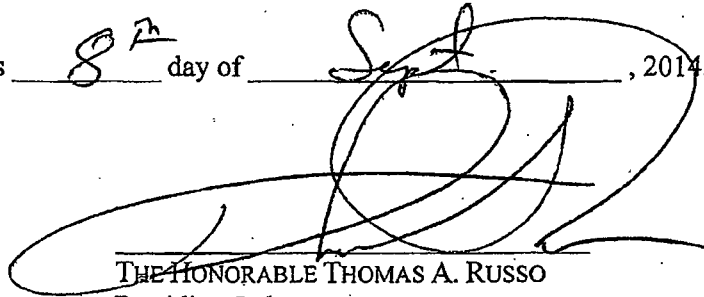
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William B. Sunderburg

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MARLBORO COUNTY, SC

AND IT IS SO ORDERED this 8th day of Sept, 2014.



THE HONORABLE THOMAS A. RUSSO
Presiding Judge

Darlington, South Carolina

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CLERK OF COURT
MARLBORO COUNTY, SC

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MARLBORO COUNTY

WITNESSES

John Lester

Clio PD

[Handwritten signature]

FILED

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WILLIAM B. FUNDERBURK

CLERK OF COURT

MARLBORO COUNTY, S.C.

ARREST WARRANT #:

E343461

Arrested on July 03, 2007

ACTION OF GRAND JURY

6sep07

Foreman:

Grand Jury

True Bill

VERDICT

Foreman:

Petit Jury

Date:

DOCKET #: 07GS34-0887

THE STATE OF SOUTH CAROLINA

County of Marlboro

COURT OF GENERAL SESSIONS

Term: September, 2007

THE STATE

vs.

Allen Joe Gathings

INDICTMENT FOR

0116

MURDER

16-3-10

STATE OF SOUTH CAROLINA)
)
County of Marlboro) INDICTMENT #07GS34-0887

At a Court of General Sessions, convened on September 10, 2007
the Grand Jurors of Marlboro County present upon their oath:

COUNT: MURDER
16-3-10

That Allen Joe Gathings in the County of Marlboro on or about June 30, 2007, feloniously, wilfully and with malice and aforethought, kill one Robbie Polston by means of striking victim with a baseball bat and that the said Robbie Polston did die in Marlboro County as a proximate result thereof. This incident occurred at [REDACTED] in Clio, SC.

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.

SOLICITOR:

J. G. Thompson

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

VS.

DARLINGTON MarlboroAllen Joe Gathings

AKA:

Race: W Sex: M Age: _____

DOB: _____ SS#: _____

Address:

City, State, Zip: N. Myrtle Beach, S.C.

DL# _____

SID# _____

CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

2007-GS-1034-887AW#: E-343461Date of Offense: 6/30/07S.C. Code §: 16-3-10CDR Code #: 0116

SENTENCE SHEET

TO: Murder In violation of § 16-3-10 of the S.C. Code of Laws,

bearing CDR Code

0116☐ NON-VIOLENT☒ VIOLENT☒ SERIOUS☐ MOST SERIOUS☐ Mandatory GPS☐ \$17-25-45(CSC w/minor 1st or Lewd Act)

The charge is:

☒ As indicted,☐ Lesser Included Offense,☐

Defendant Waives Presentation to Grand Jury.

Def's initials

The plea is:

☒ Without Negotiations or Recommendation,☐ Negotiated Sentence,☐ Recommendation by the State.

ATTEST:

Elizabeth R. Maff

Solicitor

SC Bar # 66284

Defendant

Attorney for Defendant

SC BAR#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center,for a determinate term of the 180 days Natural LIFE days/months/years or ☐ Under the Youthful Offender Act not to exceed _____ years and/or

to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____;

plus costs and assessments as applicable, the balance is suspended with probation for _____ months/years and subject to

South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or☐ CONSECUTIVE to sentence on: _____☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION:

Total: \$ _____

☐ Deferred

plus 20% fee: \$ _____

☐ Def. Waives Hearing☐ Ordered

Payment Terms:

Set by SCDPPPS

Recipient:

*Fine:

\$14-1-206 (Assessments 107.5%)

\$14-1-211 (A)(1)(Conv. Surcharge)

\$14-1-211 (A)(2)(DUI Surcharge)

\$56-5-2995 (DUI Assessment)

\$56-1-286 (DUI Breath Test)

\$47.12 (Public Def/Prob)

\$14-1-212 (Law Enforce. Funding)

\$14-1-213 (Drug Court Surcharge)

\$50-21-114 (BUI Breath Test Fee)

\$56-5-2942(J) (Vehicle Assessment)

\$90.7 (SCCJA Surcharge)

3% to County (if paid in installments)

TOTAL

Clerk of Court/Deputy Clerk

William B. Junderland

Court Reporter:

Hattie Gordon

White—Clerk

Green—Jail

Canary SCDPPPS

Pink—Solicitor

Gold—Defendant

SCCA/217 (11/09)

PTUP _____

_____ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. Or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ Beginning _____

Other:

☐ Appointed PD or appointed other counsel,

\$47.12 requires \$500 to be paid to Clerk

during probation.

Presiding Judge Glenn P. KingJudge Code: 2107Sentence Date 10/21/10

FILED

2007 OCT 22

WITNESSES

John Lester

Clio PD

FILED

2007 SEP 6 PM 2 50

WILLIAM B. FUNDERBURK

CLERK OF COURT

MARLBORO COUNTY, S.C.

ARREST WARRANT #:

E343462

Arrested on July 03, 2007

ACTION OF GRAND JURY

65 Sep 07
Foreman:C. D. E.
Grand Jury

True Bill

VERDICT

Foreman:

Petit Jury

Date:

DOCKET #: 07GS34-0888

THE STATE OF SOUTH CAROLINA

County of Marlboro

COURT OF GENERAL SESSIONS

Term: September, 2007

THE STATE

vs.

Allen Joe Gathings

INDICTMENT FOR

0116

MURDER

16-3-10

STATE OF SOUTH CAROLINA)
) INDICTMENT #07GS34-0888
County of Marlboro)

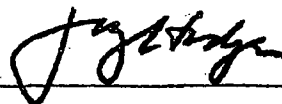
At a Court of General Sessions, convened on September 10, 2007
the Grand Jurors of Marlboro County present upon their oath:

COUNT: MURDER
16-3-10

That Allen Joe Gathings in the County of Marlboro on or about June 30,
2007, feloniously, wilfully and with malice and aforethought, kill one Loyce
Locklear by means of striking and mortally wounding Loyce Locklear with a
baseball bat, and that the said Loyce Locklear did die in Marlboro County as a
proximate result thereof. This incident occurred at [REDACTED] in Clio,
SC.

Against the peace and dignity of the State, and contrary to the statute
in such cases made and provided.

SOLICITOR: _____



STATE OF SOUTH CAROLINA

COUNTY OF
STATE

VS.

DARLINGTON

Marlboro

Allen Joe Gathings

AKA:

Race:

W

Sex:

M

Age:

DOB:

Address:

City, State, Zip:

DL#

SID#

CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

07-GS-34-888

ANW#:

E-343462

Date of Offense:

6/30/07

S.C. Code §:

16-3-10

CDR Code #:

0116

SENTENCE SHEET

TO: Murder In violation of § 16-3-10 of the S.C. Code of Laws,

bearing CDR Code

0116

☐ NON-VIOLENT☒ VIOLENT☒ SERIOUS☐ MOST SERIOUS☐ Mandatory GPS ☐ §17-25-45
(CSC w/minor 1st or Lewd Act)

The charge is:

☒ As indicted,☐ Lesser Included Offense,☐ Defendant Waives Presentment to Grand Jury.

The plea is:

☒ Without Negotiations or Recommendation,☐ Negotiated Sentence,☐ Recommendation by the State.

ATTEST:

Solicitor

SC Bar #

Defendant

Attorney for Defendant

SC BAR#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center,for a determinate term of the Defendant's natural LIFE. days/months/years or ☐ Under the Youthful Offender Act not to exceed _____ years and/or

to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and or payment of \$ _____;

plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to

South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or☒ CONSECUTIVE to sentence on:

07-GS-34-887

☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION:☐ Deferred☐ Def. Waives Hearing☐ Ordered

Total: \$ _____

plus 20% fee: \$ _____

Payment Terms:

Set by SCDPPPS

Recipient:

*Fine:

\$14-1-206 (Assessments 107.5%)

\$14-1-211 (A)(1)(Conv. Surcharge)

\$14-1-211 (A)(2)(DUI Surcharge)

\$56-5-2995 (DUI Assessment)

\$56-1-286 (DUI Breath Test)

\$47.12 (Public Def/Prob)

\$14-1-212 (Law Enforce. Funding)

\$14-1-213 (Drug Court Surcharge)

\$50-21-114 (BUI Breath Test Fee)

\$56-5-2942(J) (Vehicle Assessment)

\$90.7 (SCCJA Surcharge)

3% to County (if paid in installments)

TOTAL

Clerk of Court/Deputy Clerk

Court Reporter:

White—Clerk

Green—Jail

Canary SCDPPPS

Pink—Solicitor

Gold—Defendant

SCCA/217 (11/08)

PTUP _____

_____ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. Or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ Beginning _____

Other:

☐ Appointed PD or appointed other counsel,
\$47.12 requires \$500 be paid to Clerk
during probation.

Presiding Judge

Judge Code:

Sentence Date

2107

10/21/10

FILED
2009 OCT 22 PM 4
CLERK OF COURT
MARLBORO

Howard P. King

WITNESSES

John Lester

Clio PD

[Signature]

FILED

2007 SEP 6 PM 2 50

WILLIAM B. FUNDERBURK
CLERK OF COURT
MARLBORO COUNTY, S.C.

ARREST WARRANT #:

E343460

Arrested on July 03, 2007

ACTION OF GRAND JURY

65ep07

Foreman:

C. De...
Grand Jury

True Bill

VERDICT

Foreman:

Petit Jury

Date:

DOCKET #: 07GS34-0909

THE STATE OF SOUTH CAROLINA

County of Marlboro

COURT OF GENERAL SESSIONS

Term: September, 2007

THE STATE

vs.

Allen Joe Gathings

INDICTMENT FOR

0478

LARCENY \$1,000.01 - \$4,999.99

(16-13-30) (B) (1)

STATE OF SOUTH CAROLINA)
) INDICTMENT #07GS34-0909
County of Marlboro)

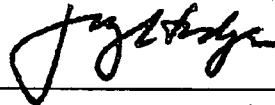
At a Court of General Sessions, convened on September 10, 2007
the Grand Jurors of Marlboro County present upon their oath:

COUNT: LARCENY \$1,000.01 - \$4,999.99
(16-13-30) (B) (1)

That Allen Joe Gathings in the County of Marlboro on or about June 30,
2007, feloniously take and carry away the personal goods of Loyce Locklear, of
the value of more than \$1,000.01 but less than \$4,999.99 described as follows: a
light blue in color 1995 Chevrolet Corsica, with intent to deprive the owner
permanently of such property. This incident occurred at [REDACTED] in
Clio, SC.

Against the peace and dignity of the State, and contrary to the statute
in such cases made and provided.

SOLICITOR: _____



STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 07-GS-34-0909
 A/W#: E 343460
 Date of Offense: 6/30/07
 S.C. Code §: 16-13-30(B)(1)
 CDR Code #: 0478

SENTENCE SHEET

DL# _____ SID# _____
 CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

☒ CONVICTED OF or ☐ PLEADS

TO: Larceny > \$1000 but < \$5000 in violation of § 16-13-30(B)(1) of the S.C. Code of Laws,

bearing CDR Code

0478

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS ☐ \$17-25-45
 (CSC w/minor 1st or Lewd Act)
 The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. Def's Initials
 The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: Elizabeth R. Mumf 66284
 Solicitor SC Bar # Defendant Attorney for Defendant SC BAR#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center,
 for a determinate term of 5 days/months/years or ☐ Under the Youthful Offender Act not to exceed _____ years and/or
 to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and or payment of \$ _____;
 plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to
 South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 07-887 and 07-888
☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.
 Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered
 Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____ Set by SCDPPPS

Recipient: _____

*Fine:

\$14-1-206 (Assessments 107.5%)	\$	_____
\$14-1-211 (A)(1)(Conv. Surcharge)	\$100	\$ _____
\$14-1-211 (A)(2)(DUI Surcharge)	\$100	\$ _____
\$56-5-2995 (DUI Assessment)	\$12	\$ _____
\$56-1-286 (DUI Breath Test)	\$25	\$ _____
\$47.12 (Public Def/Prob)	\$500	\$ _____
\$14-1-212 (Law Enforce. Funding)	\$25	\$ _____
\$14-1-213 (Drug Court Surcharge)	\$100	\$ _____
\$50-21-114 (BUI Breath Test Fee)	\$50	\$ _____
\$56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$ _____
\$90.7 (SCCA Surcharge)	\$5	\$ _____
3% to County (if paid in installments)	\$	_____
TOTAL	\$	_____

Clerk of Court/Deputy Clerk

Court Reporter:

White-Clerk

Green-Jail

Canary SCDPPPS

Pink-Solicitor

PTUP _____

_____ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. Or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ Beginning _____

Other:

☐ Appointed PD or appointed other counsel, \$47.12 requires \$500 be paid to Clerk during probation.
 Presiding Judge Glenn P. King

Judge Code: 2107

Sentence Date

10/21/10

Gold-Defendant

SCCA/217 (11/09)