

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

R. Lawton McIntosh, Circuit Court Judge

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S.C. Supreme Court

DONALD CARTER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

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STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN) COURT OF GENERAL SESSIONS
05-GS-32-3001

THE STATE OF SOUTH CAROLINA)
PLAINTIFF)
VS.) TRANSCRIPT OF RECORD
DONALD E. CARTER)
DEFENDANT)

NOVEMBER 26, 2007
LEXINGTON, SOUTH CAROLINA

B E F O R E:

THE HONORABLE J. W. JOHNSON, JUDGE.

A P P E A R A N C E S:

SAMUEL R. HUBBARD, III, ASSISTANT SOLICITOR
ATTORNEY FOR THE PLAINTIFF

RICHARD J. BREIBART, ESQ.
ATTORNEY FOR THE DEFENDANT

LISA H. HICKLIN
OFFICIAL COURT REPORTER

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I N D E X O F W I T N E S S E S

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DONALD E. CARTER,

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QUESTIONS BY THE COURT..... 3

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STATEMENT BY MR. HUBBARD..... 7,11

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STATEMENT BY MR. BREIBART..... 3,19

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E X H I B I T S

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QUESTIONS NOTES

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1 (WHEREUPON, ON NOVEMBER 26, 2007 THE FOLLOWING
2 PROCEEDINGS WERE HELD:)

3 THE CLERK: DONALD EUGENE CARTER. INDICTMENT
4 2005-GS-32-3001, THE STATE VERSUS DONALD EUGENE CARTER
5 INDICTED FOR MURDER. HE IS PLEADING TO VOLUNTARY
6 MANSLAUGHTER. IT HAS BEEN TRUE BILLED. HE IS REPRESENTED
7 BY MR. BREIBART.

8 MR. HUBBARD: I BELIEVE THAT'S VOLUNTARY
9 MANSLAUGHTER.

10 THE CLERK: DID I NOT SAY THAT?

11 MR. HUBBARD: IT SOUNDED LIKE INVOLUNTARY.

12 THE CLERK: I'M SORRY.

13 DONALD E. CARTER, AFTER BEING DULY SWORN,
14 TESTIFIED AS FOLLOWS:

15 MR. BREIBART: YOUR HONOR, MAY IT PLEASE THE COURT.

16 THE COURT: YES, SIR.

17 MR. BREIBART: IN MATTERS SUCH AS THIS I NORMALLY GO
18 OVER WITH THE CLIENT IN WRITING MANY OF THE QUESTIONS I
19 KNOW THAT THE COURT IS GOING TO ASK AND JUST SO THERE IS
20 NO CONFUSION I EXCHANGED IT WITH THE SOLICITOR AND THE
21 SOLICITOR HAS NO OBJECTION FOR IT TO BE ENTERED INTO
22 EVIDENCE AS A COURT'S EXHIBIT.

23 THE COURT: ALL RIGHT. YOU'VE GOT THAT DOCUMENT?

24 MR. BREIBART: YES, SIR.

25 THE COURT: ALL RIGHT. THAT WILL BE MARKED AS A

1 COURT'S EXHIBIT.

2 MR. BREIBART: THANK YOU, YOUR HONOR.

3 (WHEREUPON, COURT'S EXHIBIT NO. 1 WAS MARKED FOR
4 IDENTIFICATION ONLY.)

5 THE COURT: ALL RIGHT. THIS IS INDICTMENT
6 05-GS-32-3001, THE STATE VERSUS DONALD EUGENE CARTER. YOU
7 ARE MR. CARTER?

8 THE DEFENDANT: YES, SIR.

9 THE COURT: MR. CARTER, WHAT YOUR AGE, PLEASE, SIR?

10 THE DEFENDANT: FIFTY.

11 THE COURT: FIFTY. AND HOW MUCH FORMAL EDUCATION DO
12 YOU HAVE?

13 THE DEFENDANT: ASSOCIATE'S DEGREE.

14 THE COURT: DO YOU HAVE CHILDREN?

15 THE DEFENDANT: YES.

16 THE COURT: HOW MANY?

17 THE DEFENDANT: FOUR.

18 THE COURT: AND WHAT KIND OF WORK DO YOU DO OR HAVE
19 YOU DONE IN THE PAST?

20 THE DEFENDANT: MECHANICAL ENGINEER.

21 THE COURT: AND ARE YOU CURRENTLY MARRIED?

22 THE DEFENDANT: AS OF TODAY?

23 THE COURT: YES, SIR.

24 THE DEFENDANT: YES, SIR.

25 THE COURT: YOU ARE NOT IN JAIL AT THIS TIME; IS THAT

1 RIGHT?

2 THE DEFENDANT: NO, SIR.

3 THE COURT: AT THE TIME THAT YOU WERE ARRESTED DID
4 YOU SPEND ANY TIME IN JAIL BEFORE BONDING OUT?

5 THE DEFENDANT: YES, SIR.

6 THE COURT: HOW LONG WAS THAT?

7 THE DEFENDANT: THREE MONTHS.

8 THE COURT: THREE MONTHS. DO WE HAVE THOSE DATES?

9 MR. BREIBART: YOUR HONOR, IT WAS 91 DAYS. I
10 APOLOGIZE FOR NOT HAVING THE EXACT DATE.

11 THE COURT: THAT'S FINE. THE STATE AGREES WITH THAT
12 AMOUNT OF TIME THAT HE'S ALREADY SERVED?

13 MR. HUBBARD: I DON'T OBJECT TO THAT. THAT SOUNDS
14 PROBABLY ABOUT RIGHT. I KNOW IT WAS SEVERAL MONTHS.

15 THE COURT: THAT'S FINE.

16 MR. BREIBART, YOU'VE BEEN RETAINED OR APPOINTED?

17 MR. BREIBART: RETAINED, YOUR HONOR.

18 THE COURT: YOUR CLIENT IN THE CASE IS CHARGED WITH
19 MURDER, PLEADING TO A LESSER INCLUDED OFFENSE UNDER A
20 NEGOTIATED PLEA OF VOLUNTARY MANSLAUGHTER. IT CARRIES
21 FROM THREE TO THIRTY YEARS. IS THAT WHAT YOU'VE EXPLAINED
22 AND GONE OVER WITH HIM?

23 MR. BREIBART: YES, YOUR HONOR, I HAVE.

24 THE COURT: AND IN YOUR OPINION HE UNDERSTANDS THE
25 CHARGE IN THE INDICTMENT, THE CHARGE THAT HE'S PLEADING

1 TO, AND THE POSSIBLE SENTENCE ON THIS CHARGE?

2 MR. BREIBART: YES, YOUR HONOR, HE DOES.

3 THE COURT: THE OFFENSE OF VOLUNTARY MANSLAUGHTER IS
4 ALSO CLASSIFIED AS A VIOLENT OFFENSE AND A MOST SERIOUS
5 OFFENSE, AND IT IS AN 85 PERCENT OFFENSE. HAVE YOU
6 EXPLAINED THAT TO HIM?

7 MR. BREIBART: YOUR HONOR, I HAVE EXPLAINED IT TO HIM
8 JUST FOR THE RECORD AS INDICATED IN COURT'S EXHIBIT NO. 1.
9 MR. CARTER AND I HAVE MET ON APPROXIMATELY 26 DIFFERENT
10 OCCASIONS ACCORDING TO OUR RECORDS. HE IS A VERY BRIGHT
11 INDIVIDUAL, AND I HAVE EXPLAINED TO HIM HIS CONSTITUTIONAL
12 RIGHTS. I HAVE EXPLAINED TO HIM THAT YOU WOULD GO OVER
13 THAT WITH HIM TODAY, YOUR HONOR. I HAVE EXPLAINED TO HIM
14 THE 85 PERCENT RULE -- THAT HE NEEDS TO BE PREPARED TO
15 SERVE 20 YEARS. HOPEFULLY, FOR HIS SAKE THAT WON'T BE THE
16 CASE, BUT THAT'S THE WAY I READ THE STATUTE, IF YOU FOLLOW
17 ME, AND THAT HE IS NOT ELIGIBLE FOR PAROLE, NOR IS ANYONE
18 ELSE IN THIS SITUATION.

19 THE COURT: ALL RIGHT. NOW, MR. CARTER, LET ME ASK
20 YOU AT THIS TIME DO YOU HAVE ANY QUESTIONS EITHER ABOUT
21 THE CHARGE YOU'RE PLEADING TO OR THE POSSIBLE SENTENCE
22 THAT COULD BE IMPOSED ON THAT CHARGE?

23 THE DEFENDANT: NO, SIR.

24 THE COURT: YOU HAVE SIGNED YOUR NAME ON THE
25 SENTENCING SHEET INDICATING THAT UNDER A NEGOTIATED

1 PLEA -- THEY'LL TELL ME ABOUT THAT IN A MOMENT, BUT UNDER
2 A NEGOTIATED PLEA THAT YOU DO WANT TO PLEAD GUILTY TO
3 VOLUNTARY MANSLAUGHTER; IS THAT CORRECT?

4 THE DEFENDANT: YES, SIR.

5 THE COURT: IS THAT YOUR DECISION?

6 THE DEFENDANT: YES, SIR.

7 THE COURT: HAVE YOU MADE IT OF YOUR OWN FREE WILL?

8 THE DEFENDANT: YES, SIR.

9 THE COURT: I AM GOING TO HAVE THE SOLICITOR EXPLAIN
10 TO ME THE NEGOTIATED PLEA. LISTEN TO IT AND BE SURE IT'S
11 WHAT YOU AGREED TO.

12 SOLICITOR?

13 MR. HUBBARD: YOUR HONOR, THE PLEA NEGOTIATION IS FOR
14 A 20-YEAR SENTENCE. THERE WAS A PISTOL CHARGE WE'RE
15 DISMISSING.

16 THE COURT: ALL RIGHT. MR. BREIBART, IS THAT YOUR
17 UNDERSTANDING OF THE NEGOTIATED PLEA?

18 MR. BREIBART: IT WILL BE FOR A SENTENCE OF 20 YEARS.

19 THE COURT: ALL RIGHT. AND, MR. CARTER, IS THAT YOUR
20 UNDERSTANDING OF THE NEGOTIATED PLEA?

21 THE DEFENDANT: YES, SIR.

22 THE COURT: OTHER THAN THAT NEGOTIATED PLEA,
23 MR. CARTER, HAVE THERE BEEN ANY OTHER PROMISES MADE BY
24 ANYONE OR HAS ANYONE THREATENED YOU IN ANY WAY TO FORCE
25 YOU TO PLEAD GUILTY AGAINST YOUR WILL?

1 THE DEFENDANT: NO, SIR.

2 THE COURT: ALL RIGHT. SO, YOU HAVE MADE THIS
3 DECISION OF YOUR OWN FREE WILL; IS THAT CORRECT?

4 THE DEFENDANT: YES, SIR.

5 THE COURT: HAVE YOU HAD ENOUGH TIME TO DISCUSS ALL
6 OF THIS WITH MR. BREIBART?

7 THE DEFENDANT: YES, I HAVE.

8 THE COURT: HE HAS HANDED UP THIS LETTER EXPLAINING
9 THE DIFFERENT RIGHTS THAT YOU HAVE THAT YOU'LL BE GIVEN UP
10 AND EXPLAINING THE CONTACTS THAT YOU FOLKS HAVE HAD AND
11 HIS DISCUSSIONS WITH YOU. HAVE YOU HAD ENOUGH TIME TO
12 DISCUSS ALL OF THIS WITH HIM?

13 THE DEFENDANT: YES, SIR.

14 THE COURT: HAVE YOU TOLD HIM EVERYTHING THAT YOU
15 KNOW ABOUT THE CASE SO THAT HE COULD ADEQUATELY PREPARE
16 AND DEFEND YOU IN THIS CASE?

17 THE DEFENDANT: YES, SIR.

18 THE COURT: ALL RIGHT. YOU'RE SATISFIED WITH THE
19 REPRESENTATION HE'S PROVIDED?

20 THE DEFENDANT: IT'S BEEN OUTSTANDING, SIR.

21 THE COURT: ALL RIGHT, SIR. I KNOW THAT HE HAS GONE
22 OVER WITH YOU THE IMPORTANT RIGHTS THAT YOU DO HAVE THAT
23 YOU'RE GOING TO GIVE UP IF YOU ENTER THIS PLEA. I AM
24 REQUIRED TO DO IT HERE IN THE COURTROOM, ALSO. IF YOU
25 DON'T UNDERSTAND ANYTHING, IF YOU NEED ADDITIONAL TIME

1 WITH YOUR ATTORNEY, STOP ME AND I'LL GIVE YOU WHATEVER
2 TIME YOU NEED TO SPEAK WITH HIM. ALL RIGHT?

3 THE DEFENDANT: OKAY.

4 THE COURT: YOU HAVE THE RIGHT TO HAVE A JURY TRIAL.
5 I THINK THIS CASE WAS SCHEDULED FOR A JURY TRIAL FOR THIS
6 WEEK. THE STATE HAS THE BURDEN OF PROVING YOUR GUILT
7 BEYOND A REASONABLE DOUBT, AND THAT WOULD BE THE PURPOSE
8 OF THE TRIAL TO DETERMINE WHETHER THE STATE COULD MEET
9 THAT BURDEN. AS A DEFENDANT YOU'RE NOT REQUIRED TO PROVE
10 THAT YOU'RE NOT GUILTY. THE STATE HAS TO PROVE THAT YOU
11 ARE GUILTY.

12 YOU WOULD HAVE THE RIGHT AS THE DEFENDANT TO SUBPOENA
13 WITNESSES TO COME IN AND TESTIFY ON YOUR BEHALF. I DON'T
14 KNOW ANYTHING ABOUT THE CASE. YOU WOULD HAVE THE RIGHT TO
15 PRESENT WHATEVER DEFENSES MIGHT BE AVAILABLE TO YOU TO THE
16 JURY, BUT, AGAIN, THE BURDEN OF PROOF WOULD REMAIN WITH
17 THE STATE TO PROVE GUILT BEYOND A REASONABLE DOUBT BEFORE
18 YOU COULD BE CONVICTED. DO YOU HAVE ANY QUESTIONS ABOUT
19 WHAT A TRIAL WOULD ENTAIL?

20 THE DEFENDANT: NO, SIR.

21 THE COURT: DO YOU UNDERSTAND THAT YOU WILL GIVE UP
22 AND WAIVE THAT RIGHT AND THERE WILL NOT BE A JURY TRIAL IN
23 THIS CASE IF YOU ENTER THIS PLEA; IS THAT RIGHT?

24 THE DEFENDANT: YES, SIR.

25 THE COURT: ALL RIGHT, SIR. YOU HAVE THE RIGHT TO

1 CONFRONT THE STATE'S WITNESSES. THAT SIMPLY MEANS TO LOOK
2 AT THESE WITNESSES AND TO SEE WHO THEY ARE AND TO HAVE
3 YOUR ATTORNEY CROSS EXAMINE THOSE WITNESSES WHILE THEY
4 TESTIFIED. THE SOLICITOR IS NOT GOING TO BE REQUIRED TO
5 BRING ANY OF HIS WITNESSES TO COURT AND PUT THEM ON THE
6 WITNESS STAND AND HAVE THEM TESTIFY AT A GUILTY PLEA. IT
7 IS ANOTHER IMPORTANT RIGHT THAT YOU WILL GIVE UP BY
8 PLEADING GUILTY. DO YOU UNDERSTAND THAT?

9 THE DEFENDANT: YES, SIR.

10 THE COURT: AND, FINALLY, MR. CARTER, YOU HAVE A
11 CONSTITUTIONAL RIGHT TO REMAIN SILENT. THERE IS NO ONE IN
12 THIS COURTROOM OR ANYWHERE ELSE WHO COULD FORCE YOU TO
13 TAKE THE WITNESS STAND AND TO TESTIFY AGAINST YOURSELF.
14 IF YOU CHOSE NOT TO TESTIFY AND EXERCISE THAT RIGHT, THAT
15 COULD NOT BE HELD AGAINST YOU OR USED AGAINST YOU IN ANY
16 WAY. IF YOU DID WANT TO WAIVE THAT RIGHT AND TAKE THE
17 STAND AND TESTIFY, YOU WOULD BE PERMITTED TO. THE SAME
18 RULES THAT WOULD APPLY TO OTHER WITNESSES AS FAR AS
19 TESTIMONY IS CONCERNED WOULD APPLY TO YOU, BUT BY PLEADING
20 GUILTY YOU ARE REQUIRED TO GIVE UP YOUR RIGHT TO REMAIN
21 SILENT.

22 (WHEREUPON, A CELLPHONE RINGS.)

23 THE COURT: EVERYBODY ELSE IN THIS COURTROOM BETTER
24 CHECK THEIR PHONES RIGHT NOW. I MAY CONFISCATE THAT ONE.

25 YOU DO GIVE UP YOUR RIGHT TO REMAIN SILENT. IF YOU

1 PLEAD GUILTY YOU'RE REQUIRED TO ADMIT YOUR GUILT AND TO
2 ANSWER MY QUESTIONS. DO YOU UNDERSTAND THAT?

3 THE DEFENDANT: YES, SIR.

4 THE COURT: AT THIS TIME DO YOU HAVE ANY QUESTIONS
5 ABOUT ANY OF THE RIGHTS THAT I'VE GONE OVER WITH YOU?

6 THE DEFENDANT: NO, SIR.

7 THE COURT: AND YOU UNDERSTAND THAT YOU'RE GIVING UP
8 ALL OF THOSE RIGHTS BY PLEADING?

9 THE DEFENDANT: YES, SIR.

10 THE COURT: IS THAT STILL WHAT YOU WANT TO DO?

11 THE DEFENDANT: YES, IT IS.

12 THE COURT: ARE YOU GUILTY OF THE CHARGE THAT YOU ARE
13 PLEADING TO?

14 THE DEFENDANT: YES, SIR.

15 THE COURT: TODAY ARE YOU UNDER THE INFLUENCE OF ANY
16 KIND OF DRUGS OR ALCOHOL?

17 THE DEFENDANT: NO, SIR.

18 THE COURT: DO YOU HAVE ANY QUESTIONS ABOUT WHAT'S
19 GOING ON?

20 THE DEFENDANT: NO, SIR.

21 THE COURT: ARE YOU NOW OR HAVE YOU EVER BEEN TREATED
22 FOR ANY KIND OF MENTAL HEALTH PROBLEMS?

23 THE DEFENDANT: NO, SIR.

24 THE COURT: ALL RIGHT. SOLICITOR?

25 MR. HUBBARD: YES, SIR, YOUR HONOR. I'D LIKE TO

1 BEGIN BY RECOGNIZING THE PEOPLE TO MY LEFT IN THE JURY
2 BOX. THESE ARE THE FAMILY MEMBERS OF WESLEY TOBIAS. HE'S
3 THE VICTIM IN THIS CASE. THE ONE PERSON THAT I ESPECIALLY
4 WANT TO RECOGNIZE IS HIS WIFE LISA TOBIAS. SHE'S THE SOLE
5 WITNESS TO THIS CASE, AND WESLEY TOBIAS' SONS ARE SEATED
6 NEXT TO HER -- TRAVIS AND WESLEY, JR. HE'S GOT THREE OF
7 HIS SISTERS HERE, SPOUSES, FRIENDS.

8 YOUR HONOR, AS THE INDICTMENT READ THIS HAPPENED
9 FEBRUARY 1, 2005. REALLY, TO UNDERSTAND WHAT HAPPENED
10 THAT DAY, THAT EVENING, I NEED TO GIVE YOU A LITTLE BIT OF
11 BACKGROUND ABOUT THE RELATIONSHIP THAT DEVELOPED BETWEEN
12 WESLEY TOBIAS AND DON CARTER, AND I CAN POINT OUT BY
13 SAYING THAT OF THE FAMILY MEMBERS SEATED HERE THERE IS ONE
14 FAMILY MEMBER THAT'S NOT. WESLEY TOBIAS HAD TWO SONS.
15 THEY'RE RIGHT HERE, BUT HE HAD A DAUGHTER JESSICA. SHE'S
16 ON THE OTHER SIDE OF THE COURTROOM, YOUR HONOR, SEATED
17 BEHIND THE DEFENDANT'S TABLE. SHE IS WEARING RED.

18 SEVERAL YEARS BACK PRIOR TO THIS INCIDENT JESSICA
19 SIMEON AT THE TIME -- SHE WAS MARRIED TO A MAN BY THE NAME
20 OF SIMEON -- LIVED RIGHT DOWN THE ROAD ON LAND THAT WESLEY
21 AND LISA TOBIAS HAD GIVEN HER -- PROBABLY 500 FEET DOWN
22 THE ROAD, YOUR HONOR, AND THAT'S WHERE EVERYTHING
23 TRANSPIRED ON THIS LITTLE ROAD.

24 I HAVE GOT A BLOWN-UP MAP. I'VE SHOWN MR. BREIBART
25 THIS. THE DEFENDANT LIVES IN THIS RESIDENCE RIGHT HERE OR

1 LIVED IN THIS RESIDENCE AT THE TIME WITH JESSICA. RIGHT
2 UP THIS DIRT ROAD IS THE HOME OF WESLEY AND LISA TOBIAS.
3 IT IS PROBABLY 500 FEET, LIKE I SAID, YOUR HONOR. THIS
4 HOME WAS JESSICA'S HOME WITH HER PRIOR HUSBAND. WHEN THEY
5 SEPARATED A NEW MAN ENTERED INTO HER LIFE. THAT WAS
6 DONALD CARTER.

7 HE WAS A STRANGER TO THIS FAMILY, AND WHEN WESLEY
8 TOBIAS WAS INTRODUCED TO THIS MAN WHO WAS NOW SEEING HIS
9 DAUGHTER AND LIVING WITH HIS DAUGHTER HE WAS KIND OF
10 STARTLED TO REALIZE THAT THIS MAN WAS THE SAME AGE AS
11 HIM -- 47 YEARS OLD LIVING WITH A 20-SOMETHING. HE WAS
12 FURTHER STARTLED TO FIND OUT THAT THE MAN LIVING WITH HIS
13 DAUGHTER WAS MARRIED AND HAD KIDS, AND IT WASN'T LONG
14 AFTER THEY MOVED IN -- OR DON CARTER MOVED IN -- THAT
15 JESSICA BECAME PREGNANT AND WESLEY TOBIAS AT THIS POINT
16 HAD BEEN FINE WITH EVERYTHING. HE WAS HAPPY THAT HIS
17 DAUGHTER WAS GOING TO HAVE A CHILD. HE TRIED TO PUT THE
18 BEST OUTLOOK ON THIS THING ALONG WITH LISA. THEY WERE
19 TRYING TO LOOK AT THE POSITIVE, AND THEY GOT A NEW
20 GRANDCHILD BY THE NAME OF AIDEN, AND THAT KIND OF BECAME
21 WESLEY'S WORLD, TOO, SEEING THAT GRANDCHILD.

22 WELL, YOUR HONOR, THINGS WERE OKAY FOR A LITTLE
23 WHILE, BUT AS YOU CAN IMAGINE WITH WHAT I'VE TOLD YOU
24 THERE THINGS STARTED GOING DOWNHILL BETWEEN WESLEY TOBIAS
25 AND DON CARTER, AND THEY REALLY STARTED GOING DOWNHILL

1 LATE FALL OF 2004, AND THERE HAD BEEN SOME EXCHANGES. IN
2 FACT, THERE WAS A FAMILY CRUISE THAT EVERYONE TOOK
3 INCLUDING DON CARTER AND THEY TOOK -- AS A RESULT OF THAT
4 CRUISE, THINGS JUST KIND OF BLEW UP ON THAT SHIP.

5 WHEN THEY GOT BACK HOME WESLEY TOBIAS AND LISA TOBIAS
6 WERE INFORMED THEY WERE NOT GOING TO BE ABLE TO SEE THEIR
7 GRANDCHILD ANYMORE -- AIDEN. SO, WESLEY HAS NOW LOST HIS
8 DAUGHTER. HE'S LOST HIS GRANDCHILD. SO, HE AND LISA TRY
9 TO FIGURE OUT WHAT CAN THEY DO TO GET JESSICA BACK, TO GET
10 AIDEN BACK INTO THEIR LIVES, AND RIGHTLY OR WRONGLY THEY
11 BELIEVED DON CARTER WAS STEPPING OUT ON JESSICA -- THAT HE
12 WASN'T BEING FAITHFUL. WHETHER IT'S TRUE OR NOT, YOUR
13 HONOR, DOESN'T REALLY MATTER.

14 WHAT THEY DID IS KIND OF CREATIVE AND THEY CAME UP
15 WITH A PLAN. THEY WERE GOING TO GET A CARD JUST FROM A
16 DRUG STORE. THEY WERE GOING TO HAVE A WOMAN SIGN THIS
17 CARD -- A FRIEND OF LISA'S -- SEND IT BY MAIL KNOWING THAT
18 JESSICA WOULD INTERCEPT THAT CARD AND PUT DON CARTER IN
19 THE HOT SEAT AND MAYBE -- JUST MAYBE THAT WOULD BE THE
20 FINAL WEDGE BETWEEN THIS -- THESE TWO PEOPLE DON CARTER
21 AND JESSICA AND DRIVE THEM APART.

22 AND THE CARD -- IT WASN'T BAD. IT WAS KIND OF CUTE,
23 BUT IT SAID, "COLD HANDS, WARM HEART," AND YOU OPEN IT UP
24 AND IT SAYS, "HOT BUNS," AND IN THERE IN A FEMALE'S
25 HANDWRITING IS, ENJOYED LAST WEEK, SOMETHING TO THAT

1 EFFECT. IT JUST SO HAPPENS THAT THE WEEK PRIOR TO THIS
2 DON CARTER HAD BEEN OFF FOR A DAY. SO, WHEN HE SHOWS UP
3 FEBRUARY 1, 2005, COMES HOME, JESSICA HAS GOT THAT CARD
4 AND WANTS AN EXPLANATION, BUT WHAT LISA TOBIAS AND WESLEY
5 TOBIAS DID NOT ANTICIPATE WAS DON CARTER'S REACTION.

6 WHEN HE SAW THAT CARD HE SAID, I'LL BE RIGHT BACK,
7 AND I KNOW WHAT I AM RELATING AT THIS POINT COMES FROM
8 JESSICA WHO GAVE A WRITTEN STATEMENT THAT NIGHT. WESLEY
9 (SIC) CARTER DRIVES RIGHT UP THE ROAD TO THE TOBIAS HOME.
10 IT'S JUST AFTER DINNER TIME. LISA TOBIAS AND WESLEY
11 TOBIAS ARE HOME ALONE. TRAVIS WAS THE ONLY ONE LIVING
12 THERE AT THE TIME -- HAD GONE TO A FRIEND'S. THEY'RE IN
13 THE KITCHEN WASHING UP DISHES. THEY HEAR A KNOCK ON THE
14 DOOR. LISA JUST YELLS OUT, COME ON IN.

15 WESLEY TOBIAS ROUNDS THE CORNER AND SEES IT'S DON
16 CARTER. WESLEY SAYS, WHAT ARE YOU DOING HERE? DON CARTER
17 SAYS, THANKS FOR THE CARD. WESLEY TOBIAS SAYS, WHAT CARD?
18 I DON'T KNOW WHAT YOU'RE TALKING ABOUT. GET OUT OF MY
19 HOUSE. DONALD CARTER TURNS TO LEAVE AND WESLEY FOLLOWS
20 HIM. DONALD CARTER WALKS DOWN THE STEPS AND IS PROBABLY
21 SEVERAL FEET FROM HIS TRUCK. HE HAS -- I THINK IT'S A
22 SEQUOIA -- TOYOTA SEQUOIA HE HAD PULLED RIGHT UP IN.

23 WESLEY TOBIAS IS OUT THERE ON THE STEPS AND HE SAYS,
24 I TOLD YOU GET OFF OF MY LAND, YOU SON OF A BITCH. LISA
25 TOBIAS WAS THERE WATCHING. SHE NOTICED RIGHT BEFORE

1 WESLEY SAID THAT DONALD CARTER SLOWED DOWN IN HIS STEPS,
2 AND AFTER WESLEY SAID THAT DONALD CARTER TURNS AROUND. HE
3 HAD HAD HIS HANDS IN HIS POCKET THE WHOLE TIME -- IT WAS
4 CHILLY -- AND OUT COMES A LITTLE PISTOL AND HE FIRES ONE
5 ROUND RIGHT INTO THE CHEST OF WESLEY TOBIAS.

6 YOUR HONOR, I AM GOING TO SHOW YOU -- IT'S NOT A
7 PARTICULARLY GRAPHIC PHOTO, BUT JUST TO SHOW YOU EXACTLY
8 WHERE IT HIT -- MR. BREIBART HAS SEEN THIS PHOTO.

9 MR. BREIBART: NO OBJECTION TO THAT, YOUR HONOR.

10 THE COURT: ALL RIGHT.

11 MR. HUBBARD: YOUR HONOR, IT IS A LITTLE .32. YOU
12 CAN HOLD IT IN THE PALM OF YOUR HAND. IN FACT, IN MY HAND
13 YOU CAN BARELY SEE IT. THAT .32 SHOT -- THAT ONE SHOT
14 WENT RIGHT INTO THE HEART OF WESLEY TOBIAS. IT ENTERED
15 AND EXITED THE HEART. HE FELL FROM THOSE STEPS, PROBABLY
16 7 FEET FROM THE STAIRS. YOUR HONOR, HE HAD MINUTES TO
17 LIVE. THE PATHOLOGIST SAID, IF YOU HAD HAD HIM ON AN
18 OPERATING TABLE RIGHT WHEN IT HAPPENED THERE IS NOTHING WE
19 COULD HAVE DONE TO SAVE HIM, AND HE BLED OUT.

20 LISA TOBIAS HAD STEPPED IN WHEN SHE REALIZED WHAT HAD
21 HAPPENED BECAUSE WESLEY TOBIAS EVEN HAD THE ABILITY TO
22 SAY, MY GOD, LISA, I'VE BEEN SHOT. SHE IS STUNNED. SHE
23 LOOKS DOWN. SHE SEES DONALD CARTER STILL STANDING THERE.
24 SHE DUCKS INTO THE HOUSE NOT KNOWING IF SHE'S GOING TO BE
25 SHOT AND SHE GRABS HER PHONE. WHEN SHE STICKS HER HEAD

1 BACK OUT AND SHE'S ALREADY DIALED 9-1-1 DONALD CARTER IS
2 GONE. HE HAS SPED ON BACK DOWN TO HIS HOUSE.

3 THE 9-1-1 CALL, YOUR HONOR, IS INCREDIBLE. IT IS A
4 WOMAN LOOKING AT HER HUSBAND BEGGING HIM NOT TO LEAVE HER,
5 AND, YOUR HONOR, DURING THAT TAPE YOU KNOW AT SOME POINT
6 WESLEY TOBIAS DIES. LAW ENFORCEMENT GETS THERE AND THEY
7 GO DOWN TO THE HOUSE WHERE DONALD CARTER LIVES, AND, YOUR
8 HONOR, THEY FIND THE LITTLE PISTOL THAT WAS USED -- AND
9 I'VE SHOWN MR. BREIBART THIS -- ON THE KITCHEN COUNTER AND
10 RIGHT OVER IN THE RIGHTHAND CORNER YOU'LL SEE A CARD AND
11 AN ENVELOPE THAT'S SHREDDED UP. THAT PISTOL ENDS UP RIGHT
12 THERE BY THE CARD THAT PROMPTED DONALD CARTER TO DRIVE UP
13 THAT DRIVEWAY AND TO SHOOT WESLEY TOBIAS. PROBLEM SOLVED.
14 PISTOL DOWN RIGHT BY THAT CARD.

15 LAW ENFORCEMENT ARRESTS HIM, AND, YOUR HONOR, WE'RE
16 HERE TODAY. THEY CHARGED HIM WITH MURDER. YOUR HONOR, WE
17 DID A LOT OF WORK ON THIS CASE. LAW ENFORCEMENT HELPED US
18 OUT QUITE A GOOD BIT TRYING TO GET READY FOR THIS TRIAL.
19 LARRY CRUTCHLOW, OUR INVESTIGATOR, NOW EARGLE, WORKED VERY
20 HARD ON THIS CASE PREPARING FOR EVERY LITTLE FACET THAT WE
21 CAN IMAGINE MIGHT COME UP DURING THIS TRIAL.

22 WE WERE PREPARED TODAY AND WE HAD TRIED TO PREPARE
23 THIS FAMILY FOR TRIAL STARTING TODAY, AND I KNOW
24 MR. BREIBART MENTIONED WE'VE BEEN IN COMMUNICATION. WE
25 HAVE. OVER THE COURSE OF THIS CASE WE'VE TALKED QUITE A

1 GOOD BIT ABOUT THIS CASE, AND, YOUR HONOR, WE FINALLY
2 REACHED AN AGREEMENT ON THIS MATTER THAT THE FAMILY SAYS
3 THEY CAN LIVE WITH. THEY UNDERSTAND THE RISKS OF TRIAL.
4 THEY UNDERSTAND THE TRAUMA OF GOING THROUGH A TRIAL, AND
5 ALTHOUGH THEY BELIEVE PUNISHMENT IN THIS CASE SHOULD FAR
6 EXCEED 20, THEY TELL ME THEY CAN LIVE WITH 20, AND, YOUR
7 HONOR, I BELIEVE IN THE BEST WISDOM OF THE STATE THAT THAT
8 IS THE PROPER THING TODAY.

9 THAT'S THE FACTUAL BASIS FOR THIS CASE, YOUR HONOR,
10 AND THAT'S ALSO THE BASIS FOR THE NEGOTIATED 20-YEAR
11 SENTENCE.

12 THE COURT: ALL RIGHT. ANY PRIOR HISTORY THAT YOU
13 NEED TO TELL ME ABOUT?

14 MR. HUBBARD: YOUR HONOR, MR. CARTER HAS NO RAP
15 SHEET. IT DOES NOT APPEAR HE'S BEEN ARRESTED, MUCH LESS
16 CONVICTED OF ANYTHING.

17 THE COURT: ALL RIGHT. THAT'S A SUFFICIENT FACTUAL
18 BASIS FOR THE PLEA. THIS COURT, BASED ON RESPONSES TO ITS
19 QUESTIONS, FINDS THAT THE PLEA HAS BEEN ENTERED FREELY AND
20 VOLUNTARILY AND WITH THE ADVICE AND WITH THE ASSISTANCE OF
21 COUNSEL WITH WHOM THE DEFENDANT HAS INDICATED HIS
22 SATISFACTION AND THE COURT WILL ACCEPT THE PLEA.

23 MR. BREIBART, I'LL BE GLAD TO HEAR FROM YOU.

24 MR. DONNIE MYERS: YOUR HONOR, MAY I INTERRUPT FOR A
25 MINUTE? JUDGE MCMAHON WANTS YOUR ADVICE ON THE JURY.

1 (WHEREUPON, A BREAK WAS TAKEN.)

2 THE COURT: ALL RIGHT. I HAVE ACCEPTED THE PLEA.
3 I'LL BE GLAD, MR. BREIBART, TO HEAR FROM YOU AND ANYTHING
4 THAT MR. CARTER MIGHT LIKE TO SAY.

5 ANY FURTHER PRESENTATION FROM THE STATE, MR. HUBBARD?

6 MR. HUBBARD: NO, SIR, YOUR HONOR, AND I HAVE SPOKEN
7 WITH THE FAMILY, AND THEY DID NOT WISH TO SPEAK AT THIS
8 TIME.

9 MR. BREIBART: YOUR HONOR, OF COURSE, I DON'T WANT
10 THE COURT TO FEEL OR, MORE IMPORTANTLY, MY CLIENT TO FEEL
11 THAT I'M DELINQUENT IN ANY WAY. AS A NEGOTIATED PLEA AND
12 A VERY DIFFICULT SITUATION SUCH AS THIS WHERE MR. CARTER'S
13 SPOUSE -- IT INVOLVES HER DAD. MOST OF WHAT MR. HUBBARD
14 SAYS WE TAKE VERY LITTLE EXCEPTION TO, IF YOU FOLLOW ME.
15 THERE ARE CERTAIN THINGS THAT EVEN GOOD PEOPLE LOOKING AT
16 THINGS CAN SEE THINGS DIFFERENTLY, AND I AM SURE THAT YOUR
17 HONOR IS AWARE OF THAT, IF YOU FOLLOW ME.

18 THIS IS AN ABSOLUTELY TRAGIC SITUATION. WHEN I SAY
19 THAT, THESE FOLKS ARE MARRIED. THEY HAVE CHILDREN. I'M
20 TALKING ABOUT MR. CARTER AND MR. TOBIAS' DAUGHTER. IT'S
21 NOT EVER FOR ME TO JUDGE OR CRITICIZE ANYBODY FOR WHAT
22 THEY DID.

23 I WILL SAY THIS ABOUT MR. CARTER. HE WAS PLACED OUT
24 ON BOND. IN TERMS OF HIS RELIABILITY, HE NEVER FAILED TO
25 MAKE AN APPEARANCE. HE NEVER FAILED TO, YOU KNOW, COME TO

1 MY OFFICE ON TIME, IF YOU FOLLOW ME. IRONICALLY, WE HAD
2 MADE PLANS. WE MET LAST, I THINK, TUESDAY AND WEDNESDAY,
3 IF I REMEMBER CORRECTLY. WEDNESDAY WE MADE PLANS TO MEET
4 AT 2 O'CLOCK ON SUNDAY IN PREPARATION FOR TODAY. THAT IS
5 YESTERDAY, AND HE CALLED ME AND SAID IF IT WASN'T TOO MUCH
6 OF AN IMPOSITION HE WANTED TO SPEND SOME TIME WITH HIS
7 FAMILY AND COULD WE MAKE IT 3 O'CLOCK ON SUNDAY.

8 HE IS A PERSON THAT'S CARRIED OUT HIS
9 RESPONSIBILITIES. IT'S A TOUGH CALL. IT IS A TOUGH CASE.
10 WITH HIM TODAY IS HIS SPOUSE, HIS BROTHER, HIS SISTER, HIS
11 PASTOR. I HAVE EXPLAINED TO THEM THAT NORMALLY IN A
12 NEGOTIATED PLEA IT'S NOT LIKE A REGULAR PLEA, IF YOU
13 FOLLOW ME. IF YOUR HONOR IS OF THE OPINION THAT THE
14 NEGOTIATIONS ENTERED INTO BETWEEN THE STATE -- AND I CAN
15 TELL YOU THEY'VE BEEN FIERCE WOULD BE THE MOST ADEQUATE
16 WORD, IF YOU FOLLOW ME, BY PEOPLE WHO FEEL VERY STRONGLY
17 ABOUT THEIR RESPECTIVE POSITIONS. I WANT TO ANSWER ANY
18 QUESTIONS THAT THAT COURT MAY HAVE IF THE COURT HAS
19 QUESTIONS REGARDING THE EFFICACY OF A PLEA.

20 ON THE OTHER HAND, EVERYBODY IN THIS COURTROOM TODAY
21 IS GOING TO HAVE TO LIVE WITH WHAT HAPPENED AND I AM NOT
22 HERE TO OPEN UP WOUNDS, IF YOU FOLLOW ME, THAT HOPEFULLY
23 SOME DAY WILL BE, IF NOT CLOSED, HEALED UP A LITTLE BIT.

24 THE COURT: ALL RIGHT.

25 MR. BREIBART: BUT, I MEAN, I JUST WANT IF THE COURT

1 HAS ANY QUESTIONS AT ALL ABOUT THE APPROPRIATENESS OF THE
2 PLEA, I DON'T WANT TO BE DEFICIENT IN MY REPRESENTATION.

3 THE COURT: AT THIS POINT IN TIME I DON'T HAVE ANY
4 QUESTIONS. I THINK MR. HUBBARD HAS EXPLAINED THAT AND
5 WITH WHAT YOU HAVE INDICATED HAVE ANSWERED WHATEVER
6 QUESTIONS I HAVE.

7 MR. BREIBART: THANK YOU, YOUR HONOR.

8 THE COURT: ALL RIGHT. DOES THE DEFENDANT WISH TO
9 SPEAK?

10 THE DEFENDANT: NO, SIR.

11 THE COURT: ALL RIGHT. MR. HUBBARD, ANYTHING FURTHER
12 AT THIS TIME?

13 MR. HUBBARD: NO, SIR, YOUR HONOR.

14 THE COURT: THIS HAS BEEN PRESENTED TO THE COURT AS A
15 NEGOTIATED PLEA. I HAVE ACCEPTED IT. I'M NOT ONE WHO
16 COMMENTS A WHOLE LOT ON SENTENCING, PARTICULARLY IN A
17 NEGOTIATED-PLEA SITUATION. THE SENTENCE OF THE COURT IS
18 THAT MR. CARTER PURSUANT TO THE NEGOTIATED PLEA BE
19 CONFINED TO THE DEPARTMENT OF CORRECTIONS FOR A PERIOD OF
20 20 YEARS. HE WILL GET CREDIT FOR THE 91 DAYS THAT HE HAS
21 PREVIOUSLY SERVED.

22 MR. BREIBART: THANK YOU, YOUR HONOR.

23 MR. HUBBARD: THANK YOU, YOUR HONOR.

24 (END OF TRANSCRIPT OF RECORD.)

25

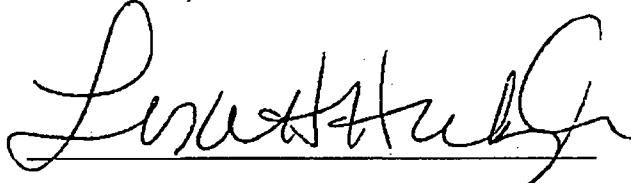
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

I, LISA H. HICKLIN, OFFICIAL COURT REPORTER FOR THE
SECOND 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
LEXINGTON COUNTY, SOUTH CAROLINA, ON THE 26TH DAY OF
NOVEMBER, 2007.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL NOR INTEREST TO ANY PARTY HERETO.

MARCH 28, 2009



LISA H. HICKLIN, COURT REPORTER

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

FILED

IN THE COURT OF COMMON PLEAS

DONALD CARTER, 325307,

2008 MAY 22 A 9 00

Applicant,

BETH A. CARRIGG
CLERK OF COURT

2008CP3202149

v.

LEXINGTON SC

APPLICATION FOR

POST-CONVICTION RELIEF

THE STATE OF SOUTH CAROLINA,

Respondent.

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten, or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make it clear to which question any such continued answer refers.

Since every application must be sworn to 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 applicant 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 applicant was convicted.

1. Place of detention: Lee Correctional Institution
2. Name and location of Court which imposed sentence: Lexington County General Sessions Court
3. Name(s) of co-defendant(s) (if any): N/A
4. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) 2005-GS-32-03001- Murder
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) November 26, 2007 - twenty (20) years

6. Check whether a finding of guilty was made
- (a) after a plea of guilty YES
 - (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? No
8. If you answered "yes" to (7), list
- (a) the name of each Court to which you appealed:
 - i. N/A
 - ii. N/A
 - iii. N/A
 - (b) the result in each such Court to which you appealed:
 - i. N/A
 - ii. N/A
 - iii. N/A
 - (c) the date of each such result:
 - i. N/A
 - ii. N/A
 - iii. N/A
 - (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. N/A
 - ii. N/A
 - iii. N/A
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
 - (b) N/A

(c) N/A

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) The Applicant received Ineffective Assistance of Counsel prior and during his plea in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14 of the South Carolina Constitution.

(b) The Applicant's Plea of Guilty were not Voluntary and Intelligently entered. The judgment and sentence against the Applicant were entered in violation of his rights pursuant to due process of law, and effective assistance of counsel.

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Trial Counsel failed to adequately investigate the Applicant's charge, failed to investigate and interview potential witnesses and failed to give his client adequate legal advise prior to the Applicant's guilty plea proceeding. Trial counsel failed to fully advise the Applicant of the consequences of his plea and further failed to investigate defenses against the charge against the Applicant.

(b) Counsel failed to provide client effective assistance of counsel prior to and during his guilty plea proceeding. The Applicant's plea of guilt were coerced by counsel's failure to provide adequate representation.

(c) _____

12. Prior to this application, have you filed with respect to this conviction:

(a) any petitions in a State Court under South Carolina law? n/a

(b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief? n/a

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? n/a

(d) any other petitions, motions or applications in this or any other Court? n/a

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. n/a

ii. n/a

iii. n/a

iv. n/a

(b) the name and location of the Court in which each was filed:

i. n/a

ii. n/a

iii. n/a

iv. n/a

(c) the disposition thereof:

i. n/a

ii. n/a

iii. n/a

iv. n/a

(d) the date of each such disposition:

i. n/a

ii. n/a

iii. n/a

iv. n/a

(e) if know, citations of any written opinions or orders entered pursuant to each such disposition:

i. n/a

ii. n/a

iii. n/a

iv. n/a

14. Has any ground set forth in (10) been previously presented to this or any other Court, State of Federal, in any petition, motion or application which you have filed? NO

15. If you answered "yes" to (14), identify:

(a) which grounds have been presented:

i. n/a

ii. n/a

iii. n/a

(b) the proceedings in which each ground was raised:

i. n/a

ii. n/a

iii. n/a

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Collateral review through PCR represents the first appropriate opportunity the Applicant has had to raise these issues.

(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? There was no trial

(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 "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Richard J. Breitbart, Esquire, P. O. Box 310, Lexington, S.C. 29071

ii. n/a

iii. n/a

(b) the proceedings at which each such attorney represented you:

i. Guilty Plea and Sentencing

ii. _____

iii. _____

19. State clearly the relief you seek in filing this application. Vacation of judgments and sentences. Applicant seeks a new trial.

20. Are you now under sentence from any other court that you have not challenged? no

STATE OF SOUTH CAROLINA

VERIFICATION

COUNTY OF LEXINGTON

2008CP3202149

I, Tara Dawn Shurling, retained counsel for the Applicant, 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.

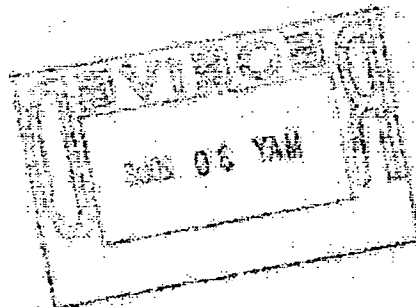
Tara Dawn Shurling
TARA DAWN SHURLING
Attorney and Counselor at Law

SWORN to and subscribed before me this 14th
day of May, 2008.

Dunnette Graham
Notary Public for South Carolina
My Commission Expires: 3/12/2013

FILED

2008 MAY 22 - 4 P 00

BETH A. CARRIG
CLERK OF COURT
LEXINGTON, SC

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

Donald Carter, #325307,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE 11TH JUDICIAL CIRCUIT
Case No.: 2008-CP-32-2149

**RETURN AND REQUEST FOR
APPOINTMENT OF COUNSEL**

Respondent, making its Return to the application for post conviction relief (PCR) filed May 22, 2008, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Applicant was indicted at the September 2005 term of the Lexington County Grand Jury for murder (2005-GS-32-3001). Richard J. Breibart, Esquire, represented the Applicant. On November 26, 2007, Applicant pled guilty to voluntary manslaughter. The Honorable James W. Johnson, Jr., sentenced him to confinement for a period of twenty (20) years for voluntary manslaughter. The Applicant did not appeal his conviction or sentence.

Attached herewith and incorporated herein by reference are the records of the Lexington County Clerk of Court regarding the subject convictions; Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript.

II.

In his current application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel;
2. Involuntary Guilty Plea; and

III.

In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). First, a PCR applicant must show that his counsel's performance was deficient such that it falls below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); Alexander v. State, 303 S.C. 539, 541, 402 S.E.2d 484, 485 (1991). Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry v. State, 300 S.C. 115 at 117, 386 S.E.2d 624 at 625 (1989), *citing* Strickland.

Second, an applicant must show there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693; Alexander, 303 S.C. at 541-42, 402 S.E.2d at 485. The Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, *Id.* Applicant must overcome this presumption in order to receive relief. Cherry, *Id.*

Where there has been a guilty plea, the applicant must prove prejudice by showing that, but for counsel's errors, there is a reasonable probability he would not have pleaded guilty and instead would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203, 210 (1985); Jordan v. State, 297 S.C. 52, 54, 374 S.E.2d 683, 684 (1988). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harres v. Leeke, 282 S.C. 131, 133, 318

S.E.2d 360, 361 (1984).

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.

Applicant alleges that he did not plead guilty freely and voluntarily. The State submits this allegation has no merit. To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

The State submits the transcript reflects that the pleas were knowingly and voluntarily entered with a full understanding of the charges and consequences of the plea. Boykin, supra; Dover, supra. Further, because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. U.S., 519 F.2d 317 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976). The

State submits Applicant should not be allowed to depart from the truth of the statements he made during his guilty plea hearing.

A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993). Given Applicant's burden of proof and the analysis to be applied to this claim, Respondent submits that Applicant's claim of involuntary plea is, in essence, a claim of ineffective assistance of counsel, and it should therefore, be treated as such.

V.

Each and every allegation contained within the application not hereinbefore expressly admitted, qualified or explained is hereby denied.

VI.

WHEREFORE, having made its Return, the State requests that an attorney be appointed to represent the Applicant and that a hearing be held.

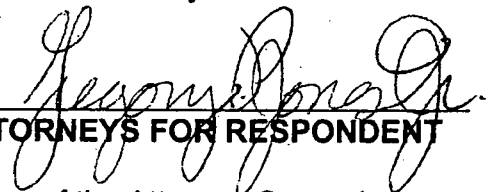
Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

GREGORY P. JONES, JR.
Assistant Attorney General

By: 

ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

November 10, 2008.

ORIGINAL

STATE OF SOUTH CAROLINA
COUNTY OF EVANSTON

Debra L. G. G.

PLAINTIFF
PER HEARING

STATE OF SOUTH CAROLINA

DEFENDANT

BEFORE THE HONORABLE R. LAWTON MCNEESH, JUDGE
PERMANENTLY

EVANSTON, SOUTH CAROLINA

IN PRESENCE OF

DAVID SHULTZ, ESQ.
FOR THE PLAINTIFF

AND
JAMES E. G.

CLERK OF COURT

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1 (The defendant, together with counsel, was
2 personally present in the courtroom.)

3 THE COURT: The only other case that will
4 be heard today is Donald Carter versus State. Now,
5 to the extent you may be here on that case, let me
6 remind each and every one of you -- I've spoken to
7 the attorneys. I have no clue about what this case
8 is about. I understand historically there may be a
9 certain amount of acrimony between witnesses,
10 families, and parties.

11 If you are going to stay in this
12 courthouse and in this courtroom, you will be
13 expected to conduct yourself in a civil manner. And
14 I will not tolerate any outbursts in this courtroom.
15 If you do, I will tell you that you will be subject
16 to criminal contempt, and we'll have a hearing to
17 determine whether or not you'll be incarcerated.
18 That includes not only while you are present in this
19 courtroom but while you're leaving this courthouse
20 and the premises of Lexington County.

21 Anything further from the State
22 before we go forward?

23 MR. LEE: Nothing from the State, Your
24 Honor.

25 THE COURT: Ms. Shurling, anything further

1 from the applicant?

2 MS. SHURLING: No, Your Honor. Thank you
3 for those words.

4 THE COURT: Okay. Would you bring the
5 applicant around, please?

6 MS. SHURLING: Your Honor, may I ask that
7 my client be uncuffed for the proceeding so that he
8 can help with the documents, at least one hand?

9 THE COURT: Do you have any objection to
10 that?

11 BAILIFF: No, sir, Your Honor.

12 THE COURT: Okay, just uncuff one hand.

13 BAILIFF: Yes, Your Honor.

14 THE COURT: Are you asking for both or
15 one? Are his legs shackled?

16 BAILIFF: Yes, sir.

17 THE COURT: All right, you can uncuff both
18 of them.

19 MS. SHURLING: Thank you. I apologize to
20 everyone for my foghorn cough. It's persistent.

21 THE COURT: Are ready to proceed?

22 MS. SHURLING: I am, Your Honor.

23 THE COURT: Could you give me a little
24 history, please, before we get started and before
25 you call your first witness?

1 MS. SHURLING: Certainly, Your Honor. I
2 would ask whether the State had wanted to introduce
3 the case. If not, I'll be happy to give you the
4 procedural background myself.

5 You want me to go forward?

6 MR. LEE: Sure, since you're already
7 started.

8 MS. SHURLING: Sure. Your Honor, my
9 client was indicted by the September 2005 term of
10 the Lexington County Grand Jury for murder. He was
11 represented in the Trial Court by Richard Breibart,
12 Esquire, Your Honor.

13 It was also my understanding that
14 initially another Lexington County attorney, whose
15 practice is primarily civil, Adrian Falgione -- I'm
16 pronouncing that incorrectly, I'm sure -- was also
17 retained in this matter.

18 My client pleaded guilty on November
19 26, 2007, to the charge of voluntary manslaughter,
20 whereupon he was sentenced by the late James
21 Johnson, Jr., for a period of 20 years for the crime
22 of voluntary manslaughter.

23 He did not file or pursue a direct
24 appeal from that judgment or sentence, as would
25 generally be the case with a guilty plea, Your Honor.

1 This application for post-conviction
2 relief was filed on May 22, 2008. In his
3 application for post-conviction relief, my client
4 alleges generally that both prior to and during his
5 guilty plea proceeding, he received ineffective
6 assistance of counsel in violation of his rights
7 pursuant to the Sixth and Fourteenth Amendments to
8 the United States Constitution, as well, of course,
9 as Article I, Section 13, of our State Constitution.

10 In addition, he alleges that his plea
11 of guilty was not knowingly, voluntarily, and
12 intelligently entered, inasmuch as it was in large
13 part the product of the inadequate and insufficient
14 counsel he received concerning various matters
15 relative to the charge to which he pleaded guilty.
16 Your Honor, at this time, the applicant would call
17 as his first witness Richard Breibart.

18 THE COURT: Okay.

19 Mr. Lee, would you pass up the manila
20 folder, please, sir?

21 MR. LEE: Yes, Your Honor, I apologize.

22 (The witness was sworn.)

23 THE COURT: Please have a seat and state
24 your name for the record.

25 MR. BREIBART: My name is Richard Breibart

1 -- B-R-E-I-B-A-R-T.

2 RICHARD BREIBART, having first been
3 duly sworn, testified as follows:

4 DIRECT EXAMINATION

5 BY MS. SHURLING:

6 Q Mr. Breibart --

7 A Yes, ma'am.

8 Q -- would you state your full name for the
9 record, please?

10 A My name is Richard Breibart --
11 B-R-E-I-B-A-R-T.

12 Q Madam Court Reporter thanks you, and I
13 thank you. First things first, you and I went to
14 law school together, didn't we?

15 A Yes, ma'am.

16 Q And in fact we knew each other rather well
17 in law school, didn't we?

18 A Yes, ma'am.

19 MS. SHURLING: I would like to state for
20 the record, Your Honor, that I disclosed to my
21 client the fact that Mr. Breibart and I were
22 classmates, that we knew each other well and even
23 studied together on occasion, that in my judgment
24 that would in no way affect my ability to perfect
25 this collateral case for him.

Richard Breibart - Direct

11

1 I explained to him that I've had
2 occasion, regrettably, to be counsel in a number of
3 PCR cases involving classmates, and it is just part
4 of the business I do. And Mr. Carter has indicated
5 that he understands that and doesn't have any
6 problem.. But just for the record, Your Honor --

7 Mr. Carter, if you would stand
8 up.

9 THE COURT: Would you raise your right
10 hand, Mr. Carter?

11 (The applicant was sworn.)

12 THE COURT: You heard your counsel advise
13 you of -- really I don't know of any ethical rule
14 whatsoever that prevents her from proceeding in this
15 matter.

16 However, out of an abundance of
17 caution and hopefully for the sake of avoiding the
18 appearance of impropriety, she has advised you that
19 she went to school with Mr. Breibart, who was your
20 trial attorney, that she studied with him and
21 obviously has some type of friendship relationship
22 with him.

23 And you shook your head a minute ago,
24 acknowledging that Ms. Shurling advised you of this
25 information and that you wanted her to continue

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1 representing you in this matter, is that correct?

2 MR. CARTER: Yes, sir.

3 THE COURT: Okay.

4 MS. SHURLING: Thank you.

5 THE COURT: Yes, ma'am.

6 MS. SHURLING: We'll proceed.

7 Q Good morning.

8 A Good morning.

9 Q How did you happen to get involved in this
10 case?

11 A In late January or early February of 2005,
12 I was contacted by Adrian Falgione, who is a sole
13 practitioner doing different types of work,
14 including some criminal work. And I believe Mr.
15 Carter's family had contacted Mr. Falgione. He
16 asked me to meet with his parents, because he didn't
17 feel that this was a matter that he wanted to take
18 on himself.

19 Q Would you pronounce his name for me one
20 more time?

21 A Falgione -- F-A-L-G-I-O-N-E -- first name
22 Adrian -- A-D-R-I-A-N.

23 Q Now, you said Mr. Falgione practices law
24 in various areas, including criminal law?

25 A Yes, ma'am.

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1 Q Now, did Mr. Falgione already have a
2 contract with the Carter family at the time he
3 contacted you?

4 A I'm not aware of that one way or the
5 other.

6 Q Had he already retained Mr. Falgione? Had
7 the applicant or his family already retained Mr.
8 Falgione?

9 A The only document that I have is where I
10 was retained. So I do not know whether or not Mr.
11 Falgione was retained.

12 Q Okay. Well, were you paid directly by the
13 Carter family, or was your fee given to you as part
14 of a fee split from funds previously given to Mr.
15 Falgione?

16 MR. BREIBART: May it please the Court,
17 may I get this one out?

18 THE COURT: Yes, sir.

19 A Bear with me a second, please.

20 Q I've reviewed your file. I know how
21 extensive it is. I'll be patient.

22 A On the fourth of February, 2005, is a fee
23 agreement exercised by Mr. Otis E. Carter, which I
24 believe is Mr. Donald Carter's father. And I was to
25 be paid a particular amount, and some portion of

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1 that either went or was kept by Mr. Falgione,
2 because he was to play a role in this in terms of
3 dealing with the family, because apparently they
4 either knew him beforehand, or there was some prior
5 relationship.

6 Q So the fee was paid to you and split with
7 Mr. Falgione?

8 A I don't remember that it was split -- I
9 mean, when I say "split," I take that to mean a
10 50/50 arrangement. I know Mr. Falgione kept some of
11 the money, when I say that, or I may have
12 transferred him some of the money. I know the
13 source of the money was Mr. Carter's father, I
14 believe.

15 Q Okay. And did Mr. Falgione go with you
16 the first time you met with Donald Carter?

17 A No, the first time -- well, strike that.
18 I was retained before I met with Mr. Carter. On the
19 same day that it happened, I ran a SLED report on
20 Mr. Carter and did certain other things. Then I
21 visited Mr. Carter where he was incarcerated.
22 Because it was a capitol case, obviously, no bond
23 had been set. And after some time, we arranged for
24 him to be released on bond.

25 Q Now, when you say it's a capitol, you mean

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1 because it was a homicide?

2 A He was charged with murder. So therefore
3 a Circuit Court Judge rather than a Magistrate is to
4 set bond.

5 Q I understand. But for purposes of those
6 not quite as familiar --

7 A Okay.

8 Q -- with the system as we are, you're not
9 suggesting this was a capitol murder case in the
10 sense of the death penalty was involved at all?

11 A There was never a notice where the State
12 sought the death penalty.

13 Q Okay. Now, did Mr. Adrian Falgione ever
14 go with you to see Donald Carter?

15 A I do not have an independent recollection
16 of that.

17 Q Can you tell us briefly what his role was
18 --

19 A Sure.

20 Q -- in this case?

21 A I received a telephone call from Mr.
22 Falgione that a client of his or a client of his
23 father wanted to discuss the matter with me. The
24 potential client was Mr. Carter, who was accused of
25 murder.

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1 I met in Mr. Falgione's office, which is a
2 block or two down from mine, with I believe Mr.
3 Carter, Sr., I believe his brother, and I believe
4 one other person.

5 And they started asking me questions about
6 what -- what you'd normally expect, our my
7 qualifications, my experience, and issues such as
8 punishment, trial, fees, things like that.

9 Q And if I understood you correctly a moment
10 ago, you have a written fee agreement?

11 A Yes, ma'am. In any case, I have a written
12 fee agreement.

13 Q And that fee agreement was signed by whom,
14 sir?

15 A The fee agreement was signed by Otis E.
16 Carter for Donald E. Carter, and it's dated February
17 the 4th. And at that time, we normally do a -- I
18 have an internal memo here. I have an internal memo
19 that I met with Otis Carter -- strike that. I have
20 an internal memo that appears to have been given to
21 me by Mr. Falgione.

22 And it was work that he had done before
23 and during the period of time -- some work had been
24 done before I met Mr. Carter -- Mr. Carter's family,
25 excuse me -- and before I met Mr. Carter.

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1 Q And there's an internal memorandum in your
2 file documenting that work?

3 A Yes, ma'am.

4 Q May I see that document, please?

5 MS. SHURLING: Your Honor, may I approach?

6 THE COURT: Yes, ma'am.

7 A This is in Mr. Falgione's handwriting. It
8 says "privileged," but I assume it's no longer
9 privileged.

10 Q Given the fact that my client has raised a
11 claim of ineffective assistance of counsel --

12 A Sure.

13 Q -- by the statute it's no longer
14 privileged.

15 MS. SHURLING: Your Honor, if I may have
16 just a moment.

17 A I also have that date, Ms. Shurling, 2/4
18 at 1:39 in the afternoon, I ran from the computer in
19 my office a SLED check on Mr. Carter, which is my
20 recollection -- I know it was before I met. I met
21 with these folks in the afternoon on February 4,
22 2005.

23 Q Thank you.

24 MS. SHURLING: Your Honor, just one
25 moment, please.

1 Q After February 8, 2005, which is the date
2 of the last entry on this memorandum, what, if any,
3 further involvement in this case did Mr. Falgione
4 have?

5 A Mr. Falgione would meet with me as
6 information came in. He apparently had some
7 relationship with Mr. Carter's family. What, I'm
8 not sure of. And he would meet with me, and I would
9 ask him for certain background information, because
10 he knew these folks better than I did.

11 Q And I believe you said earlier that when
12 you say he knew these folks better, he had
13 represented Mr. Donald Carter's father in the past?

14 A He told me he represented some members of
15 the family, Ms. Shurling. I'm not really sure which
16 ones.

17 Q Thank you.

18 MS. SHURLING: Your Honor, I would move to
19 introduce this as Applicant's One. And I'll see to
20 it that a copy is returned for your file.

21 A Great. Thank you so much.

22 THE COURT: Any objection, Mr. Lee?

23 MR. LEE: No objection, Your Honor.

24 MS. SHURLING: I'm sorry.

25 THE COURT: Admitted without objection.

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1 Do you want to take a look at that?

2 (Applicant's Exhibit Number One,
3 Memorandum, was entered in evidence.)

4 Q And may I see your --

5 COURT REPORTER: Hold on.

6 A Sure.

7 MS. SHURLING: Sorry. I know better than
8 that, Madam Court Reporter. I apologize.

9 A This is my agreement. It was filled out,
10 I believe, by Mr. Falgione's secretary, if I
11 remember, Beth Lineberry, who was also present
12 during the initial consultation.

13 MS. SHURLING: I move to enter the fee
14 agreement as Applicant's Two.

15 MR. LEE: Without objection, Your Honor.

16 THE COURT: Admitted without objection.

17 (Applicant's Exhibit Number Two, Fee
18 Agreement, was entered in evidence.)

19 Q To keep from being redundant, Mr.
20 Breibart, any documents that I borrow from your
21 file, I will see to it that you get copies back.

22 A Thank you so much, ma'am.

23 Thank you, sir.

24 THE COURT: Yes, sir.

25 Q With regard to the fee agreement, is there

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1 any language in the fee agreement that indicates
2 that the applicant and his family are hiring you and
3 Adrian Falgione, or is this relevant only to you?

4 A This is relevant only as to me.

5 Q And does it have any generic language in
6 it about your being authorized to associate other
7 attorneys or split your fee in any way you see fit
8 with other attorneys you consult in the case?

9 A It does not.

10 Q Now, ultimately, when this case went to
11 court for the plea proceeding -- well, let's back up
12 for a little bit. Let's talk about the history.
13 You were hired in 2005.

14 A February 4, 2005.

15 Q And your client was initially in jail, and
16 then he got out, correct?

17 A I believe he served 90 or 91 days in the
18 county and then a tortured history of bond hearings.
19 He was released, and then family members of the
20 decedent, who had moved to have his bond revoked,
21 and it became a -- I think there were three
22 different bond hearings.

23 Q So if I told you that the record reflects
24 that your client was in jail from roughly February
25 '05 until May 1, 2005, does that sound about right?

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1 A Yes, ma'am.

2 Q Now, this plea came about when, sir?

3 A I believe it was --

4 Q Well, let me rephrase.

5 A -- November 27, 2007. The reason I say
6 that, I have documents from my last meeting before
7 the plea with Mr. Carter, where I went over that I
8 met with him on 26 occasions, had 42 telephone
9 calls, and that we had reviewed together large
10 amounts of evidence in this case.

11 And the reason I said I believe it was
12 November 27th is because I remember going and
13 preparing for a potential trial. And I believe this
14 letter says, "This is your decision as it relates to
15 tomorrow."

16 We talked about a meeting that I had twice
17 the week before at lunch with Jessica, who her
18 status was unclear, but apparently she was soon to
19 be his wife. Mr. Carter was married to another lady
20 at the time. Jessica is the daughter of the victim
21 in the case.

22 Q Okay. If the record reflects that the
23 plea was actually November 26, 2007, that's about
24 the time frame you recall correctly?

25 A Yes, ma'am. He could have signed this

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1 document the morning of. He did sign the document
2 the morning of.

3 Q And what document are you referring to,
4 sir?

5 A I have original and two duplicates that he
6 signed, was made part of the record in this case, as
7 is my practice in cases where there is certain legal
8 defenses and the client wishes to plead guilty.
9 It's my document 05-4953.

10 Q And may I see --

11 A Sure.

12 Q -- a copy of that document, please?

13 A Yes, ma'am. It's a copy -- two copies and
14 the original.

15 MS. SHURLING: A moment's indulgence, Your
16 Honor.

17 THE COURT: Yes, ma'am.

18 MS. SHURLING: I move to introduce this as
19 Applicant's Three, Your Honor.

20 THE COURT: No objections?

21 MR. LEE: No objection, Your Honor.

22 THE COURT: Admitted without objection.

23 (Applicant's Exhibit Number Three,
24 11/26/07 Letter, was entered in evidence.)

25 Q And, Mr. Breibart, is that an extra copy?

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1 A Yes, ma'am, it is.

2 Q Mr. Breibart, is this an extra copy?

3 A Yes, ma'am, it does.

4 Q Okay, thank you.

5 A I have the original.

6 Q Now, this document dated November 26,
7 2007, reviews certain matters concerning your
8 preparation of the case, and your times that you met
9 with your client, and so forth, is that correct?

10 A That's correct.

11 Q Is there any portion of this document that
12 addresses what, if any, defenses would have been
13 available to your client had he chosen to go forward
14 with his jury trial?

15 A Let me take a look. Paragraph two talks
16 about conflicting evidence both ways regarding the
17 parties' intent to conduct was familiar with and had
18 been discussed with him that date, where it says,
19 "You could be found not guilty. There's no question
20 if you pulled the trigger, you would either be found
21 not guilty by way of self-defense in my mind, not
22 guilty of either murder or manslaughter." I
23 discussed those with him as well as discussing them
24 that day.

25 Q And where were you just reading from --

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1 I'm sorry, Mr. Breibart -- referencing self-defense?

2 A Excuse me, I apologize. Paragraph two,
3 "As you know, there have been sensitive negotiations
4 over the several months regarding this matter. And
5 this is one of those unfortunate cases there is
6 conflicting evidence both ways regarding all
7 parties' intent and conduct."

8 Later on, it explains, "The jury may find
9 you not guilty of anything since there was a
10 statement you pulled the trigger, and the only
11 defense that we ever discussed was one of
12 self-defense, which we discussed on numerous
13 occasions."

14 That's the only portion of this letter
15 that I take to mean the question of self-defense,
16 which was the only issue that -- this was a
17 one-issue case. I mean, the guy pulled the trigger
18 and shot somebody. The question is why he did it.

19 Q And, once again --

20 A Sure.

21 Q -- a moment ago when you were publishing
22 portions of this letter, were you paraphrasing?

23 A Well, there's conflicting evidence both
24 ways regarding all parties' intent and conduct.
25 That referred to the conduct of each party and the

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1 party's intent.

2 And Mr. Carter and I had gone over maps
3 and everything and discussed the issue of
4 self-defense on numerous occasions, because there
5 was no question that a gun had been fired and a
6 person died.

7 Q And, once again, will you point out to me
8 where you were just reading from.

9 A I apologize, paragraph two. "And as you
10 know, there have been sensitive negotiations over
11 the past several months regarding this matter. And
12 this is one of those unfortunate cases that there is
13 conflicting evidence both ways regarding all
14 parties' intent and conduct."

15 Q I got that part. But a moment ago, you
16 were talking about self-defense. And I don't see
17 anything about self-defense in this letter. I
18 confess I may be overlooking it. But is it in here?

19 A I did not use the words "self-defense."

20 Q Okay. Now, did you discuss the
21 affirmative defense of self-defense with your client
22 before his decision to plead was made?

23 A I discussed the affirmative defense,
24 explained to him the different elements, whether he
25 was on his property, whether he was on someone

1 else's property, the duty to retreat, how he came to
2 be upon the property of the decedent, what duties he
3 had to retreat if he was on his property versus the
4 decedent's property, his location, the location of
5 the decedent, other people inside the house, and his
6 choice of weapon. So that was -- this case was
7 either going to be a self-defense case, or a
8 voluntary manslaughter case, or a guilty of murder
9 case.

10 Q Okay, we'll start very basically.

11 A Sure.

12 Q Did you think, given the facts in this
13 case, that there was much real risk of it ever being
14 a murder verdict?

15 A Yes.

16 Q You did?

17 A Sure did.

18 Q Okay.

19 MS. SHURLING: And, Your Honor, we'll go
20 over factually some more background in a moment to
21 make this clear.

22 THE COURT: Sure.

23 Q But there was evidence in this case, was
24 there not, that the deceased and his wife lived very
25 near where the applicant his later wife, then

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1 girlfriend, lived, correct?

2 A The location between the two houses?

3 Q Yes.

4 A Yes, ma'am.

5 Q They were very near one another?

6 A That's correct. In the country, they
7 would be very near. In the city, they would not.
8 There was a distance. There was a dirt road. There
9 was a question of easement on the road. We looked
10 over maps.

11 So, for example, when I say the city
12 versus the country, okay, if this was in a
13 subdivision, no, they would not be very close. If
14 this was a more rural area, they would be considered
15 close. Ballparking it, I've been out to the scene.

16 I'm just giving you a general idea. I'm
17 horrendous with distances. House to house is
18 probably 350 feet. So I don't perceive that to be
19 very close where I live, but I can see how folks in
20 the country would perceive it to be close.

21 Q Okay. And there had been a history of
22 acrimony between the applicant and the man that
23 would eventually -- would have been his father-in-
24 law had he not been killed?

25 A Sure.

1 Q Okay. Did you discuss with your client as
2 a threshold matter procedurally how it works if you
3 assert the affirmative defense of self-defense at
4 trial? Did you explain to him --

5 A Sure.

6 Q -- that if he raised self-defense, the
7 State would then have certain duties --

8 A Sure.

9 Q -- with regard to that assertion?

10 A I told him that the Fourth Circuit Court
11 of Appeals, in interpreting South Carolina case law
12 as related to by intent with a deadly weapon in
13 self-defense, he did not have to prove anything.

14 It was my understanding of the law that
15 the State was almost in a position of having to
16 disprove self-defense once he put it into play.

17 Q Okay. Did you discuss with him the
18 various types of evidence that he would have a right
19 to introduce that might support a claim of self-
20 defense?

21 A Sure did.

22 Q Now, let's talk about the client for a
23 moment. This was a client that had no prior
24 criminal record, correct?

25 A That's correct.

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1 Q And what was his profession?

2 A He was kind of like a -- when I say
3 Midlands Tech engineer, I don't mean that in a wrong
4 way. He was not like a certified professional
5 engineer, but he had extensive technical training.
6 And so I was perfectly capable of communicating with
7 him and developed some rather professional fondness
8 for Mr. Carter.

9 Q He was working as an engineer for a large
10 company and had a positive work record, correct?

11 A No question.

12 Q And did you discuss with him what, if
13 anything, the law said with regard to introducing
14 evidence of prior bad acts by the victim?

15 A I explained to him that the law permitted
16 the introduction of prior bad acts by the victim.
17 It was even my understanding of the law that they
18 could be introduced, even if he did not have
19 specific knowledge of them at the time, which I've
20 never quite understood, but that appears to be the
21 law.

22 Q And that the -- did you tell him the law
23 had been for some time that matters that he would be
24 aware of that would go to his state of mind at the
25 time of the shooting would be relevant?

1 A Relevant two ways: one, as it relates to
2 manslaughter; and, number two, as it relates to the
3 objective criteria to assert a defense of self-
4 defense.

5 Q And you were aware, were you not, that
6 there was a history of escalating acrimony between
7 the deceased and your client?

8 A There was a history both ways because my
9 client, who was living with and conceivably there
10 was a marriage and then finds out the offspring was
11 the daughter of the deceased, while he had a wife
12 and/or children with another lady, but he was still
13 legally married.

14 Q Wasn't the daughter in fact also still
15 legally married, as well?

16 A Yes, I apologize. I thought you were
17 talking about Mr. Carter.

18 Q My point is both Mr. Carter and the young
19 woman he was living with were both still technically
20 legally married to other people?

21 A It's my understanding that at the start of
22 the process, that is in 2005, that they were
23 technically married to other people. They referred
24 to themselves in my presence as "my wife," which is
25 why that letter talks about common-law wife.

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1 Q And in fact, you were aware, were you not,
2 that your client had already had one child with
3 Jessica --

4 A Yes, ma'am.

5 Q -- and had another child on the way?

6 A I was aware she was pregnant.

7 Q Okay. You didn't think there was any
8 dispute about who the father of that child on the
9 way was, did you?

10 A No, ma'am.

11 Q Okay. So he had a long -- fairly long-
12 term, committed relationship with this woman he was
13 living with, who was the daughter of the man who was
14 killed?

15 A That's correct.

16 Q Okay. And in the discovery materials that
17 you received from the State, you received
18 documentation concerning police reports involving
19 prior incidents of violence between the deceased and
20 the applicant, is that correct?

21 A Yes, ma'am.

22 Q And can you tell us briefly about those?

23 A Forgive my geography. The client pulls in
24 kind of I call it a dirt road or driveway to the
25 left, Mr. Carter, and Jessica. The victim and his

1 folks live to the right.

2 And there was an ongoing battle about who
3 could use or who would use the mailbox, who could
4 drive down the road, who owned the road. There was
5 -- the police were called out there on a fairly
6 frequent basis -- "He did this," "She did this,"
7 "They did this."

8 Q Were you aware of incidents that occurred
9 in which the deceased and his wife were engaging in
10 actions that could be described as meddling in the
11 personal relationship of the applicant and his
12 common-law wife?

13 A Yes. And, again, I don't want to be
14 tricky here. I don't know how you can have a
15 common-law wife if you're married. But to the
16 extent that you can --

17 Q Jessica.

18 A Right.

19 Q Let's just call her Jessica.

20 A I was aware that -- and in fact that was
21 the whole subject of a bond hearing that we had,
22 about Judge Keesley reduced the cash amount of bond
23 because of -- I think meddling is probably an
24 appropriate word.

25 Q Okay. Now, in the discovery materials --

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1 MS. SHURLING: Your Honor, I'm leading a
2 little bit through here, but all of these materials
3 are from Mr. Breibart's file, and I'll offer copies
4 of the documents and it'll go a little bit faster,
5 if you'll bear with me.

6 THE COURT: Yes, ma'am.

7 Q You had statements from the deceased's
8 wife concerning the incident where her husband was
9 shot, correct?

10 A Yes, ma'am.

11 Q And in that statement, she indicated that
12 some of the hard feelings had begun when she and the
13 deceased told Jessica about someone that your client
14 was supposedly flirting with at a tan spa?

15 A Yes, more exactly, I think the date of
16 that -- either that date or the day before -- within
17 four or five days of the homicide.

18 Q And --

19 A The decedent allegedly sent a letter to
20 Jessica, I believe you're showing, which would lead
21 one to believe that Mr. Carter was having an affair
22 with some lady to the exclusion of her.

23 Q Well, we're getting a little bit ahead of
24 ourselves.

25 A I apologize.

1 Q Let's back up for a minute.

2 A Sure.

3 Q And let me refresh your recollection.

4 A Yes, ma'am.

5 Q I'm handing up this statement of Linda
6 Miles. She refers to an incident, the relationship
7 going downhill around September or October, when --

8 A Excuse me. Let me take a look at that
9 with you.

10 Q And I apologize. That is a statement from
11 Linda Miles, not Lisa.

12 A That's correct. I apologize.

13 Q This statement indicates that the
14 relationship began seriously going downhill in
15 September or October of '04 over the incident with
16 the girl at the tan spa, correct?

17 A Among other things.

18 Q Among other things?

19 A Yes, ma'am. There were other things in
20 here.

21 MS. SHURLING: I will move to introduce
22 this.

23 THE COURT: Any objection?

24 MR. LEE: No objection.

25 THE COURT: That's Linda Miles' statement?

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1 MS. SHURLING: It is, Your Honor. And it
2 will be Plaintiff's Four.

3 (Applicant's Exhibit Number Four,
4 Statement of Linda Miles, was entered in evidence.)

5 Q Now, I apologize. This is the statement
6 that I took a little out of the order. I intended
7 to. Lisa Tobias' statement concerning the incident
8 on the date of the shooting starts out with a
9 description of how she and her husband had found out
10 about some incident with this girl at the tan spa,
11 correct?

12 A Give me ten seconds.

13 Q Certainly.

14 A Yes, this is a statement made by Ms.
15 Tobias that says a variety of things. One of is
16 that "Wes and I found out that Mr. Donald Carter
17 said something out of the way to a young girl who
18 worked at the tanning place."

19 Q Okay.

20 MS. SHURLING: Your Honor, I would move
21 that Ms. Tobias' statement be introduced.

22 MR. LEE: Without objection.

23 THE COURT: Admitted without objection.

24 (Applicant's Exhibit Number Five,
25 Statement of Lisa Tobias, was entered in evidence.)

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1 MS. SHURLING: Your Honor, if I might
2 approach?

3 THE COURT: Yes, ma'am..

4 Q Do you recall getting this in the
5 discovery materials?

6 A Yes.

7 Q And this report from the Lexington County
8 Sheriff's Department indicates that on November 19,
9 2004, the deceased came to the home shared by
10 Jessica and our client, Donald Carter, and tried to
11 kick in the door?

12 A That's what it says.

13 Q Okay. And --

14 A Again, among other things.

15 Q Among other things.

16 A Yes, ma'am.

17 Q But it indicates that he came, beating on
18 the door, and tried to kick the door in, and there
19 was an altercation between the parties on that date?

20 A Yes, ma'am.

21 Q Okay.

22 MS. SHURLING: Move to introduce this as
23 Applicant's Six.

24 West?

25 MR. LEE: No objection.

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1 THE COURT: Admitted without objection.

2 (Applicant's Exhibit Number Six,
3 11/19/04 Lexington County Sheriff's Department
4 Report, was entered in evidence.)

5 Q Were there other indications of violence
6 or threatened violence between the deceased and your
7 client?

8 A I specifically remember other indications
9 of conduct which would have caused people to get
10 pretty upset. There was tit-tat back and forth, for
11 want of a better word, about "He said that she did
12 this," "She said that he did that," "They said that
13 they did this," back and forth.

14 Q Okay.

15 A Yes, ma'am.

16 Q In the discovery package, did you not also
17 receive a police incident report documenting that
18 Jessica had reported her father to the police when
19 he said that if he caught her boyfriend, husband,
20 whatever -- we're going to call him your client --
21 in public, he was going to kick his ass? Do you
22 recall seeing that?

23 MS. SHURLING: Pardon the language, Your
24 Honor, I'm just quoting.

25 A Yes, ma'am, this is all comments from a

1 previous report.

2 MS. SHURLING: I move to introduce this as
3 Plaintiff's Seven.

4 THE COURT: Any objection?

5 MR. LEE: No objection.

6 THE COURT: Admitted without objection.

7 (Applicant's Exhibit Number Seven,
8 Incident Report, was entered in evidence.)

9 Q Mr. Breibart --

10 A Yes, ma'am.

11 Q -- in your discovery materials provided by
12 the State, you have a copy of the paperwork that was
13 done when Mr. Carter bought the pistol used in this
14 case, don't you?

15 A I believe I do.

16 MS. SHURLING: If I may approach --

17 THE COURT: Yes, ma'am.

18 MS. SHURLING: -- I believe it's one of
19 the very first ones in the top.

20 A Okay. In this pile here?

21 Q I think it is. Is that it?

22 A Yes, there was a gun sold to Mr. Carter
23 on -- sure.

24 Q Eleven thirty?

25 A Yes.

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1 Q So, Mr. Breibart, as part of supplemental
2 discovery delivered to you on October 26, 2007, you
3 were given a copy of a sales receipt and a gun
4 licensing application showing that the Beretta
5 Tomcat was purchased on November 30, 2004, is that
6 correct?

7 A Yes, ma'am.

8 MS. SHURLING: Your Honor, I would move to
9 introduce these documents.

10 MR. LEE: Without objection.

11 THE COURT: Admitted without objection.
12 It's number eight?

13 COURT REPORTER: Plaintiff's Eight.

14 (Applicant's Exhibit Number Eight,
15 Sales Receipt and Gun Licensing Application, was
16 entered in evidence.)

17 Q So the chronology that we have is that the
18 event occurred on 11/19/04 where the deceased tried
19 to kick the door down at the applicant's house on
20 the 19th of November.

21 And then on the 30th of November, he
22 purchased a gun, and then on December 1st, the
23 father-in-law, the deceased, Jessica's father, is
24 down at the house verbalizing threats to physically
25 harm your client?

1 A That's what the police reports say.
2 Obviously, the purchase of the gun is not disputed.
3 When I say "the police reports," as you know,
4 they're not admissible in court, and it's basically
5 the police comes out, and I say that I yelled at the
6 Judge. That's what the police are going to put
7 down.

8 But that's what the police reports do
9 indicate. Obviously, it's objective evidence. The
10 clerk sells a gun which was used in the homicide.
11 It is what it is.

12 Q Well, when you were provided discovery by
13 the Solicitor's Office, you were provided copies of
14 police reports concerning those two incidents, were
15 you not?

16 A Sure was, yes, ma'am.

17 Q And you were provided copies of the call
18 list, if you will, from the Sheriff's Department
19 documenting that those two incidents had been
20 reported to the Sheriff's Department?

21 A Right. That's how the police got there.

22 Q Okay. Again, did you discuss with Mr.
23 Carter what role that evidence might play in
24 supporting a claim of self-defense?

25 A Sure.

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1 Q On the day of the incident --

2 A Yes, ma'am.

3 Q -- your client came home from work to
4 discover that he had received what in the mail?

5 A The way I understand it in talking to
6 Jessica and Mr. Carter, a card, letter, some device
7 had been sent to Jessica, I believe, and she
8 confronted Mr. Carter with it, which indicates that
9 he may be having a relationship or inappropriate
10 knowledge of another lady.

11 Q Okay. And it caused an argument between
12 your client and the mother of his child, Jessica?

13 A That's what I understood and I believe to
14 be true.

15 Q Immediately following the receipt of that
16 card is when the applicant went to the Tobias
17 residence, correct?

18 A That's what I understand, and I believe it
19 to be true.

20 Q And that's what the witness statements
21 reflect, do they not?

22 A Yes. I mean, what happened there
23 obviously is -- what happened is not reflective of
24 all of that. But everybody seems to agree that
25 after she confronted -- "she" being Jessica,

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1 confronted Mr. Carter about this letter, card, or
2 communication that he went from the house where he
3 was residing to the house where the decedent was
4 residing.

5 Q Do you recall the statement written by
6 Jessica Simeon following the shooting of her father?

7 A If you show it to me, I'll be happy to
8 tell you. There's this letter, which I've never
9 been given, but I do recall it.

10 Q So Jessica recalls the events leading up
11 to when Donald left the house, and those include?

12 A That he went to his car with a gun to
13 confront his father-in-law.

14 Q But she indicates that he went up there
15 because she'd gotten -- they'd gotten that card in
16 the mail that had caused a fight between them?

17 A That's correct.

18 Q Okay.

19 MS. SHURLING: This would be Applicant's
20 Nine, Your Honor.

21 MR. LEE: No objection.

22 THE COURT: Admitted without objection.

23 (Applicant's Exhibit Number Nine,
24 Card, was entered in evidence.)

25 Q Going back to Lisa Tobias' statement given

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1 February 1, 2005, the day of the shooting --

2 A Yes, ma'am.

3 Q -- she indicates that --

4 MS. SHURLING: And I'm going to read
5 verbatim, Your Honor.

6 Q -- "Today Don came to our house. He
7 knocked on the door." I said to come in. Don walked
8 in. Wesley met him at the door. Don said, 'I got
9 your card.'

10 "Wesley said, 'I do not know what you're
11 talking about,' and told Don to get off our
12 property. Don opened the door and walked outside.
13 Wesley was behind him."

14 And it goes on to describe, "Wesley said,
15 'Get off our property, you'" -- again quoting, Your
16 Honor -- "'son of a bitch,'" and describes that Don
17 then turned around, pulled out a gun, and shot him,
18 got in his truck and left. Do you recall reading
19 this statement?

20 A He shot him, and then got in his truck and
21 left.

22 Q Okay.

23 A Yes, ma'am, I do.

24 Q So she acknowledges that when the
25 applicant arrived at the home that the first words

1 out of his mouth were about this card?

2 A Yes, ma'am.

3 Q Okay. Now, there's nothing in the
4 discovery package, is there, where the State tells
5 you that Lisa Tobias has admitted that they actually
6 sent that card, that they put somebody up to it, and
7 that they had somebody mail it?

8 A There was a concession made -- that's
9 incorrect, ma'am. At a hearing in front of Judge
10 Keesley, everybody conceded, including the statement
11 Judge Keesley found, that the decedent himself, a
12 family member, or somebody, was actually the person
13 who -- somebody on that side of their -- just
14 generically, the Court found, if I remember
15 correctly, that in fact the event that you talk
16 about, the place -- so I guess that was in the
17 discovery.

18 Q Well, you're saying --

19 A There was never a dispute, because the
20 Solicitor's Office was also involved with it and Mr.
21 Mobley had been hired by the victim's family.
22 Nobody ever disputed the fact that somebody on his
23 or the other side -- okay, the victim's side -- had
24 sent the card to Jessica.

25 Q And you think that came out during the

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1 motion to revoke bond or --

2 A There were three different --

3 Q -- what kind of hearing?

4 A There were three different bond hearings.
5 The first one was before Judge Keesley. Then there
6 was another -- not necessarily in this order, Ms.
7 Shurling. There was a motion where the alleged
8 victim -- I'm going to get them all for you -- that
9 the alleged victim contended that he had -- Mr.
10 Carter had violated the conditions of his bond.

11 And then there was another hearing wherein
12 Judge Keesley permitted some of the money that was
13 put up in bond to be returned. And during in front
14 of His Honor, "It is undisputed the victim did not
15 approve of the relationship and attempted to cause a
16 split by having another woman send a suspicious note
17 through the mail to be intercepted by his daughter."

18 That is on August 31, 2005, in a bond
19 order signed by Judge Keesley, who was the resident
20 judge at that time.

21 Q And would you read the first part of that
22 sentence again?

23 A Sure. I want to make sure I do it in the
24 right order, so bear with me a second, please. "Mr.
25 Carter was released on bail on the charge of murder

1 of Mr. Tobias. He is living with a daughter of the
2 victim, and they are expecting a child.

3 "It is undisputed the victim did not
4 approve of the relationship and attempted to cause a
5 split by having another woman send a suspicious note
6 through the mail to be intercepted by his daughter."

7 Q Okay.

8 A That's when you asked me whether it was in
9 discovery, I don't know how you characterize that.

10 Q My question was intended to address the
11 fact that there was nothing in any of the statements
12 or the police incident reports to indicate that
13 Linda Tobias had admitted that she and Wesley had in
14 fact sent the card.

15 But you're clearing up for us now in fact
16 that that was acknowledged in hearings before the
17 Court concerning bond matters?

18 A Judge Keesley, who writes his orders,
19 unlike a lot of folks who are too busy to do that,
20 found that -- what I just read.

21 Q And certainly by the time you got to court
22 for the guilty plea proceeding, the Assistant
23 Solicitor on this case made it very clear that Lisa
24 Tobias had admitted that she and her husband had
25 conspired to cause trouble between these people by

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1 having this card signed and sent, correct?

2 A. I'm on the rail, so --

3 Q Yes.

4 A -- I have no independent recollection
5 whether it was Lisa, the decedent. But everybody in
6 the world admitted that some combination of some
7 folks related to Wesley had caused this letter to be
8 sent to Jessica.

9 MS. SHURLING: One moment's indulgence,
10 Your Honor.

11 THE COURT: Ms. Shurling, at this point,
12 let's take about a five-minute break to give
13 everybody a morning break, and we'll come back at
14 about 11:35, please.

15 MR. LEE: Yes, Your Honor.

16 MS. SHURLING: Yes, Your Honor.

17 THE COURT: Mr. Breibart, you understand
18 you're not to talk to anybody.

19 MR. BREIBART: Yes, sir.

20 (Court in recess.)

21 THE COURT: All right, Ms. Shurling, are
22 you ready to proceed?

23 MS. SHURLING: I am, Your Honor. However,
24 we don't have Mr. Breibart, I don't believe.

25 THE COURT: Yes, he said that he had some

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1 matters he had to take care of personally.

2 All right, Mr. Lee, when Mr. Breibart
3 gets here, are you ready to proceed?

4 MR. LEE: Yes, Your Honor.

5 MR. BREIBART: I apologize, Your Honor.

6 MS. SHURLING: Thank you.

7 MR. BREIBART: Yes, ma'am.

8 EXAMINATION CONTINUED

9 BY MS. SHURLING:

10 Q Mr. Breibart, did you discuss with your
11 client, Mr. Donald Carter, the fact that the
12 eyewitness, the wife of the deceased, had not
13 admitted the fact that she and her husband had sent
14 the card in her statements to the police following
15 the shooting?

16 A I discussed with Mr. Carter that the card
17 issue and admission was not made in the statements
18 obviously. He became aware of it after the Judge
19 ruled four months or five months after, six months,
20 that that in fact had occurred.

21 Q Did you discuss with him the fact that you
22 could make use of the fact that Lisa Tobias did not
23 acknowledge responsibility for sending the card in
24 her statement to undermine the credibility of her
25 testimony if the case went to trial?

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1 A Sure, yes, ma'am.

2 Q You did discuss that with him?

3 A Yes, ma'am.

4 Q Okay. Did you discuss with him the fact
5 that -- let me rephrase.

6 A Yes, ma'am.

7 Q You said you discussed with him how much
8 better a self-defense case would have been if they
9 had been on his property instead of Mr. Tobias'
10 property?

11 A Yes, we went through maps, and I asked him
12 where he was. And I ordered -- not from the State,
13 but I paid to get aerial maps and asked him where he
14 was, where everybody was. And I went over that, and
15 he made some marks on the maps.

16 Q And where they were, whether or not this
17 occurred on Mr. Carter's property, was relevant to
18 the self-defense claim how?

19 A The State's case is that a man comes onto
20 another man's property in Lexington County with a
21 gun. And according to the State, the gun was fired
22 fairly close to the residence of the decedent. Mr.
23 Carter said that he was not near the residence of
24 the decedent when the gun was fired. Where he was I
25 thought was relevant for two reasons, (a) to be able

1 to use the self-defense, you just can't wait a
2 period of time. There has to be, my understanding,
3 a clear and present danger, an objective view.

4 Number two, the question of self-defense
5 is a different standard when you're on your own
6 property in terms of a duty to retreat. So I
7 discussed it for both of those reasons.

8 Q Well, if you're not on your own property -
9 -

10 A Yes, ma'am.

11 Q -- and someone comes at you, you still
12 have potentially a self-defense claim, correct?

13 A Sure, sure.

14 Q And that self-defense claim is heightened
15 by any evidence that you can use to demonstrate that
16 at the time of that incident, you had a reasonable
17 basis to believe that you were in danger of great
18 bodily injury or death, correct?

19 A Of course.

20 Q So the evidence that we've been going over
21 would be germane to whether or not your client had a
22 reasonable fear that Wesley Tobias would harm him?

23 A Without that, there is no self-defense.

24 Q Okay. Now, did you ever ask your client
25 whether, other than these incidents -- the door

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1 beating and the threatening through the daughter
2 incident -- whether there were any other things that
3 he was aware of that gave him reason to fear that
4 Wesley Tobias would harm him physically?

5 A Yes.

6 Q And what did he tell you?

7 A He told me about a -- bear with me a
8 second -- an issue that had occurred when a for-sale
9 sign was up, where later on Mr. Tobias filed a
10 report where it says -- when this gentleman filed a
11 report saying he was going to kick his whatever,
12 "this gentleman" being our respective client.

13 And he had indicated to me before the
14 event that when there was contact between them at or
15 near the property, particularly one time I
16 recollect, either Mr. Carter was coming onto the
17 property or Mr. Tobias was leaving -- there was some
18 whatever. And there was the -- there were remarks
19 passed. I guess that's the best way to say it.

20 Q Well, did you investigate what, if any,
21 evidence was available to show what the deceased's
22 general reputation for peaceability or violence was
23 in the community?

24 A Yes.

25 Q And what were you able to find?

1 A Mr. Tobias had a temper.

2 Q And were you able to verify that your
3 client was aware of previous incidents in which
4 Wesley Tobias had been physically violent with
5 people?

6 A No.

7 Q Did you ask?

8 A I asked him -- "him," excuse me, being Mr.
9 Carter, okay. And your question was physically
10 violent. And I received no information that Mr.
11 Carter knew of physical violence. In terms of
12 threats, in terms of -- I don't want to hurt
13 anybody's feelings about talking about things -- the
14 answer to that is yes.

15 Q And did your client tell you that he was
16 aware of Wesley Tobias' reputation for being
17 violent?

18 A Not from anybody other than himself or his
19 -- Jessica, however you want to define her, if you
20 follow me.

21 Q But he did acknowledge to you that he had
22 information that came to him through Jessica that
23 the father had a history of being violent?

24 A That I do not recollect.

25 Q Okay. You mentioned a little while ago

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1 the problem with the fact that they were living
2 together, and they had a child together, and they
3 weren't married, and they were married to other
4 people.

5 A Yes, ma'am.

6 Q Did you discuss with your client the
7 possibility of filing a motion in limine prior to a
8 trial to limit the State from introducing any
9 evidence concerning adultery or their respective
10 marital statuses as not relevant to this case?

11 A No, because -- the answer to your question
12 is no. If you want to know why, I'll let you know
13 that. But the answer to your question is no.

14 Q Well, they were living together, correct?

15 A Correct.

16 Q They'd had one child together?

17 A Correct.

18 Q They had a -- she was pregnant with a
19 second?

20 A Correct.

21 Q And the issue, if you had gone to trial,
22 would have revolved around whether or not your
23 client acted either in self-defense or sudden heat
24 of passion upon sufficient legal provocation,
25 correct?

1 A Sure.

2 Q All of those factors -- the fact that they
3 were living together, that they had had a child
4 together -- all of that could have been used to
5 demonstrate the issues involving self-defense and
6 voluntary manslaughter without any discussion about
7 their relative marital statuses, couldn't it?

8 A No. When you try a case and you say, "Hi,
9 my father-in-law hates me, and he's a threat because
10 of 'x,'" if that's not opening up the door for the
11 prosecution to say, "And isn't it true the reason he
12 hates you is because he hates the fact of what you
13 do to his daughter?"

14 So that was going to come out. I could
15 not try a case and say, "Yes, he's a mean SOB"
16 because of the daughter unless once I did that, it
17 was clear to me from day one, and clear to Mr.
18 Carter not from day one, okay, that no judge that
19 I've ever appeared in front of in this county would
20 then say, "Oh, okay, we can't get into the fact of
21 his personal -- Mr. Carter's personal conduct."

22 Q Well, isn't it true that Lisa Tobias said
23 that the reason she and Wesley were not happy with
24 Don was not because he was married but because they
25 thought he was messing around on her? She said they

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1 were upset because they thought Don was messing
2 around on Jessica, isn't that true?

3 A No. What Jessica told me was not that.
4 Jessica was going to be a witness in this case under
5 any circumstances, okay. This -- I looked at it in
6 the totality of the circumstances when I say that.

7 You're asking me about Lisa, Ms. Tobias,
8 okay. Jessica would have to be a witness -- strike
9 that, doesn't have to be a witness, but in a
10 logically tried case would be a witness and would be
11 a powerful witness, because essentially she was
12 going against her family, for want of a better word,
13 her blood family, if you want the better word.

14 Q Okay.

15 A Okay. So I don't see --

16 Q Moving back to the self-defense issue for
17 a moment.

18 A Sure.

19 Q Did you tell your client that he had, in
20 your professional experience --

21 A Uh-huh.

22 Q -- a chance of prevailing on a claim of
23 self-defense?

24 A Sure did. That's why if you note the time
25 and the place, and if you locate what exhibit you

1 have over there, you'll see something scratched out
2 because the State had consistently stated that the
3 only potential deal would be a 30-year manslaughter.

4 I believe that's on the second page, if I
5 remember correctly. He pled under a negotiated
6 plea, which is, as you know, a different situation,
7 to a 20-year sentence. Everybody knew it was a
8 matter of percentages what was going to happen.

9 Q Okay, let's talk about that. What was the
10 State's first offer?

11 A The State never made an offer at the
12 beginning of the case. They thought that they had a
13 clear case and they could prevail on a murder
14 conviction, okay. After that, I didn't offer
15 anything, because if they say they're going to trial
16 on murder, they're going to go to trial on murder.

17 Because of certain issues regarding the
18 State and their not being too happy with "the
19 victim's side," as I've told a victim hiring -- a
20 family hiring a private lawyer who wanted to have
21 all of the discovery, at that point in time let's
22 just say the bloom went off the rose, so to speak,
23 in terms of the State's position.

24 The reason that this case took two and a
25 half or almost three years to resolve with Mr.

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1 Carter out on bond for most of that period of time
2 is because, dependent upon how the facts circulated,
3 I thought that he would have a better chance of
4 self-defense.

5 Every time they filed a report that he had
6 violated -- excuse me, when I say "he," Mr. Carter -
7 - had alleged violated the bond, which was
8 repudiated by Judge Keesley, as he said in his order
9 of August 2005, two and a half years or three years
10 before the trial, he's real candid with me.

11 I had -- was operating under the
12 assumption that people would get more -- every time
13 that Ms. Tobias or the family would tend to show out
14 or make accusations against Mr. Carter that a Court
15 found not to be correct, that would help him in
16 terms of either trial or if there was a plea. Does
17 that make sense, what I'm saying?

18 Q Did you discuss the fact with Mr. Carter
19 that the ultimate admission by Ms. Tobias that she
20 and the deceased had gotten this card and had
21 somebody else sign it and somebody else mail it in
22 order to try to cause trouble with this marriage
23 that the factor that might have been used to cast
24 doubt in credibility concerning the other alleged
25 incident where he supposedly said untoward things to

1 the lady at the tan spa?

2 A Not only did I do that, I had a
3 conversation with Judge Keesley and told him he was
4 going to be a witness in the case because of what he
5 put in his order. And I thought that would be a
6 powerful witness, much more powerful than Ms. Tobias
7 saying "x" or the tanning spa lady saying "y."

8 If a Circuit Judge finds that there's
9 subterfuge and puts it in writing about somebody, I
10 can't imagine a better impeachment of a witness,
11 with all due respect. So, sure.

12 Q My point being that if they were not above
13 having someone else sign the card and send it, that
14 you could raise the inference that they would
15 certainly not have been above having the girl at the
16 tan spa make the claims about the inappropriate
17 flirtation, as well?

18 A Yes, everybody knew that horse was a dead
19 horse.

20 Q Okay.

21 A It was all scam.

22 Q When the State -- when your client was
23 finally released on bond in May of '05 --

24 A Uh-huh.

25 Q -- would you agree that it was sometime

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1 around September of '07 that you started actively
2 talking to your client about possible plea
3 negotiations?

4 A Yes, because I was looking at trial.

5 Q Well, you indicate in this letter that you
6 had my client sign -- our client sign --

7 A Right.

8 Q -- that -- how many times you had met with
9 him and so forth?

10 A That's correct.

11 Q Do you have any notes or other documents
12 in your file that indicate that you had any meetings
13 with him between May of '05 and September of '07,
14 after he got out on bond but before you began
15 talking plea negotiations in September of '07?

16 A I don't think so, and that is well-
17 intentioned by myself, to be very candid with you.

18 Q Pardon?

19 A To be very candid with you -- because I
20 don't respond to reciprocal Rule 5 discoveries. I
21 think -- with all due respect, Your Honor, I think
22 it's unconstitutional to require any defendant to
23 give information that he may have regarding
24 statements made by other people, okay.

25 So Mr. Carter and I would meet normally

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1 after work, if I remember correctly, on weekends. I
2 would ask him to review documents, which we did. I
3 asked him to review this document, which I did. I
4 was intimately familiar with Mr. Carter's position.
5 And for the record, he was an excellent client to
6 have.

7 Q Okay. So I'm a little confused. Are you
8 saying there were no meetings between May of '05 --

9 A No, ma'am, I'm not saying that.

10 Q -- and September of '07?

11 A No, ma'am. I saw Mr. Carter -- Mr. Carter
12 would travel on his job, which was one of the issues
13 why he had a GPS, okay. I represented him from
14 February 2005 through whatever date it was in
15 November of 2007, okay.

16 I cannot remember a month that went by
17 that we didn't meet, and those meetings averaged an
18 hour or two to accommodate Mr. Carter and only
19 happened on his day off or after my regular work
20 hours. No, ma'am, I met with him on a very frequent
21 basis.

22 I met with him -- when you say May 5th, I
23 met with him before they were attempting to revoke
24 his bond. He had been concerned about the finances
25 of a GPS when I met with him.

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1 I met with him -- of course, there were
2 three bond hearings right at the beginning I met
3 with him. The discovery, as you see, kept on
4 rolling in, and it does not increase, if you follow
5 me.

6 Mr. Carter was a pleasure to represent
7 because, unlike many clients, he could understand,
8 he could read, he could write. We would discuss
9 things. We discussed personal things, if you follow
10 me. I don't mean that in an inappropriate way.

11 But when I saw his name pop up on the
12 calendar, although we sometimes go "Oh, my God,"
13 he'd be a pleasant fellow to be around. He kept his
14 appointments, and --

15 Q So September of '07 was about when it
16 started showing up on the docket, on the roster, is
17 that what you're saying?

18 A No. Every --

19 Q Why did it all of a sudden heat up in
20 September of '07, almost two and a half years after
21 he got out on bond?

22 A It suddenly heated up in September 2007
23 because all along their position was, "Hi, we're
24 going to go to trial." And then when the position
25 is you're going to trial and the potential sentence

1 is 30 years on a murder charge, okay, when I say
2 "heated up," I worked with him throughout the entire
3 time.

4 At that point in time, when Judge Keesley
5 indicated he was going to recuse himself, okay, and
6 I was given information that Mr. Carter had given me
7 of false reports regarding his conduct, at that
8 point in time the State revisited the case.

9 Q And did I understand you correctly, you
10 have no notes in your file from any meetings with
11 your client during that time period from May of '05
12 through September of '07?

13 A My normal practice, ma'am, is not to take
14 notes for the reason that I've indicated to you.

15 Q Well, that was my next question. Do I
16 understand you to say that you are afraid that under
17 any circumstances your attorney notes taken during
18 conferences with your client would be discoverable?

19 A No. What you understand me to say is I
20 use two different software systems. One is called
21 Needles, and one is called Time Matters, okay. And
22 we use an internal e-mail so there's no question
23 that it is entire work product, okay. I believe I
24 turned over some of those to you, if I remember
25 correctly, or I made them available to you, okay.

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1 So when things became extremely important
2 -- bear with me a second -- I would make some
3 entries. For example, there were questions that
4 would be asked by Mr. Carter before and after his
5 plea. They would be e-mailed to me. My definition
6 of notes is me scribbling something down.

7 Q Well, that's what I'm trying to figure out
8 here, because I'm trying -- I'm taking a look at
9 this letter --

10 MS. SHURLING: Excuse me, Your Honor.

11 Q And this just may be a testament to how
12 differently some lawyers work from others. But
13 according to this document --

14 A Uh-huh.

15 Q -- "Our records indicate there have been
16 approximately 26 meetings between us" --

17 A That's correct.

18 Q -- "and 42 telephone calls and certain
19 other meetings that have not been reported on our
20 computer." And my question is, out of 26 meetings
21 with this client, I didn't see when I reviewed your
22 file -- and I'm just asking you if they're somewhere
23 that I didn't see -- any notes that you took during
24 all those meetings with your client?

25 A It would be things that would be put on

1 Time Matters or Needles. Those are two software
2 programs.

3 Q But they don't go in your file?

4 A No. I'm trying to get some of those for
5 you --

6 Q Okay.

7 A -- so you can take a look at them.

8 Immediately upon being hired, I filed the discovery
9 motions. I received a copy on March 8, 2005, from
10 then Assistant Solicitor Hubbard with a reciprocal
11 request for discovery, okay.

12 And he wanted to know who my witnesses
13 would be -- disclose the names of additional
14 witnesses, so and so, so and so, so and so.

15 Q To what are you referring just now?

16 A Yes, ma'am, it's in my file. On -- Mr.
17 Hubbard served myself and Mr. Falgione on March 8,
18 2005, a reciprocal Rule 5 discovery request.

19 Q No, sir, that's not what I asked.

20 A That's why the file does not contain -- I
21 can tell you here today who I spoke to about
22 discussing questions regarding his -- I apologize,
23 Mr. Carter's -- potential witnesses, okay. But I
24 never have honored a reciprocal Rule 5 request which
25 talks about notes, reciprocal request.

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1 THE COURT: Let me stop you here, and let
2 me make sure I get what I'm hearing.

3 MR. BREIBART: Yes, sir.

4 THE COURT: And I think the question
5 involved whether during these 26 meetings and what
6 not there were notes that you took that you put into
7 Needles or Time Matters --

8 MR. BREIBART: Yes, sir.

9 THE COURT: -- and whether or not you had
10 those notes with you. And I thought your answer
11 was, "I don't have it in my file."

12 MR. BREIBART: That's correct, Your Honor.

13 THE COURT: Okay.

14 MR. BREIBART: And the only reason I
15 hesitated is because I thought I saw two Needles
16 things -- two Time Matters things in here when Ms.
17 Shurling was asking me the question.

18 Q Okay.

19 MR. BREIBART: So I apologize for not
20 being clear.

21 THE COURT: That's all right. I just
22 wanted to make that clear.

23 Go ahead.

24 MS. SHURLING: Pardon me, Your Honor.

25 Q Let me rephrase. I thought I asked you a

1 moment ago if it was your position that you don't
2 put those notes in the file because you're afraid
3 they might be discoverable pursuant to the
4 reciprocal discovery rule?

5 A Not because I'm afraid. If I read the
6 reciprocal discovery rule, that's what it says.

7 Q So you think the attorney-client privilege
8 that if you took notes concerning things your client
9 told you in interview that you could be compelled to
10 turn those over?

11 A Ma'am, not what he necessarily said
12 regarding the version of the facts but any reports,
13 any documents, any tangible objects, any lists of
14 witnesses, that's what reciprocal Rule 5 says.

15 Q I'm aware of what Rule 5 says. I'm asking
16 you to -- do you acknowledge that notes that you
17 take when you're interviewing your client that say
18 "I asked him about this, and his answer was" or "I
19 asked him about witnesses, and he suggested I talk
20 to so and so" -- those notes are not discoverable,
21 are they?

22 A Ma'am, the Supreme Court has not ruled on
23 that. The requests are that I'm under a continuing
24 duty to disclose the names and addresses of
25 additional witnesses whose identity is known or

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1 should have been known.

2 Q Okay.

3 A Okay.

4 Q Well --

5 A I think those probably are discoverable.

6 The Supreme Court has not ruled on that. I've

7 argued that in four murder cases when the State has

8 attempted to limit the scope of my presentation of

9 evidence.

10 Q Let me know when that issue comes up, and

11 I'll write an amicus brief, but moving on. When I

12 issued a subpoena to review your file and I came to

13 your office for review of your file --

14 A Uh-huh.

15 Q -- was I given copies of those notes on

16 your computer?

17 A You asked me for my file, and I gave you

18 open access to the file and told you I'd be more

19 than happy to --

20 Q Yes, sir.

21 A -- give you anything in there.

22 Q Did you tell me that there were copious

23 notes in this case that were on a software system

24 and were not in this file?

25 A (A) They are not copious notes.

1 Q Well --

2 A (B) I gave you what's entirely in the
3 file. (C) That's assuming that what's in the file
4 would be remotely helpful to your client, which is
5 not necessarily the case.

6 Q Mr. Breibart, I'm not trying to beat a
7 dead horse, and I'm certainly not trying to make an
8 old friend and colleague angry, but --

9 A I'm not at all angry.

10 Q -- at this point, he's raised a claim of
11 ineffective assistance of counsel.

12 A I understand he has.

13 Q The attorney-client privilege has been
14 waived. You understand that?

15 A Correct.

16 Q And you understand that my job as the
17 lawyer who is investigating whether or not he
18 received reasonable professional assistance of
19 counsel is to review everything you did in the case
20 with an eye toward making that Sixth Amendment
21 claim, correct?

22 A I certainly do, yes, ma'am.

23 Q Okay. And so we now know that there are
24 notes that you took during meetings with the client
25 prior to entry of the guilty plea that, despite my

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1 subpoena for your file, I haven't seen?

2 A No, ma'am. What I'm saying to you is very
3 simple, okay. If there was a huge issue that arose,
4 okay, I may put it in Needles to ask somebody to do
5 something.

6 THE COURT: Let me stop this right here.
7 Mr. Breibart, did you turn over all your records to
8 Ms. Shurling that were found on Needles, or Time
9 Matters, or any other program you may have or other
10 location you may have those with regard to your
11 representation of the defendant in this matter, yes
12 or no?

13 MR. BREIBART: Yes.

14 THE COURT: Thank you, sir.

15 Now move on.

16 MS. SHURLING: Your Honor, I'm confused.

17 THE COURT: I understand your confusion,
18 because it sounded like there were. But Mr.
19 Breibart under oath has told the Court and testified
20 that he has turned over all materials, whether it be
21 a file, whether it be on the Time Matters or Needles
22 or any other location. Is that correct, sir?

23 MR. BREIBART: That's correct, Your Honor.

24 THE COURT: Okay. And notes from the 26
25 some-odd meetings or any other notes, or thoughts,

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1 or impressions taken by you with regard to this
2 matter have been given to Ms. Shurling, correct?

3 MR. BREIBART: Yes, Your Honor.

4 THE COURT: Thank you very much.

5 Let's move on.

6 MR. BREIBART: I was asked a generic
7 question, and I took it that way. I apologize, Your
8 Honor.

9 THE COURT: That's okay. We were just
10 kind of beating around the bush.

11 MS. SHURLING: Well, I'm not trying to,
12 Your Honor. I asked specifically --

13 THE COURT: I understand.

14 MS. SHURLING: -- if he even told me --

15 THE COURT: I heard. I heard.

16 MS. SHURLING: -- that there were notes
17 elsewhere, and he said he didn't. So how could he
18 have turned them over to me if he didn't even tell
19 me they existed?

20 THE COURT: Ma'am, I'm not going to argue
21 with you, Ms. Shurling.

22 MS. SHURLING: We'll move on, Your Honor.

23 THE COURT: I'll just tell you to move on,
24 please.

25 MS. SHURLING: Your Honor, at what point -

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1 - pardon me, not Your Honor.

2 EXAMINATION CONTINUED

3 Q Mr. Breibart, at what point did the State
4 suddenly -- I mean, we know it was roughly September
5 of '07. But how did it come about that you were
6 suddenly aware that the State was amenable to
7 discussing a voluntary manslaughter plea?

8 A The State had gone so far in the summer of
9 2007 to refuse Mr. Mobley, who was the special
10 prosecutor hired by the family, to even meet with
11 him and had told me that they had told various
12 members of the Tobias -- I say the Tobias family.

13 I don't want to -- they had told various
14 members who were people close to the victim they
15 didn't want him in a courthouse, okay. And at that
16 point in time, okay, I had a meeting with Mr.
17 Hubbard and another assistant or another deputy -- I
18 cannot say who -- and said, "Hi, there, we're not
19 offering a plea to anything. But you may want to
20 look at some following situations," okay.

21 And what I did is I made copies of things
22 in their own discovery that I thought was helpful to
23 Mr. Carter, okay, among which are the documents that
24 you have looked.

25 Q I was going to say, such as the documents

1 --

2 A Right.

3 Q -- we reviewed today?

4 A And I went to them, and I said, "Hi, I
5 have no authority to do anything. If your position
6 is going to be that it's murder or nothing, then cue
7 the ball up and we'll hit it down the middle.

8 "If your position is that, it means
9 there's nothing to discuss." About two weeks later,
10 they come talk to me -- I think it was Mr. Hubbard,
11 but I cannot swear to that -- and said that they
12 would take a 30-year manslaughter plea.

13 I indicated at that point in time that dog
14 wasn't going to hunt. Every one of those I talked
15 to Mr. Carter about, because I make a practice of
16 that, okay, because, in effect, a 30-man slaughter
17 plea has the same effect, although it sounds a
18 little bit better, than a murder conviction, okay.

19 And then they came back with they wanted -
20 - I don't like to use the word horse-trading when
21 referring to human beings, but they wanted to put it
22 up. I spoke to Mr. Carter about it, okay.

23 And shortly before the plea was the first
24 time that they said Mr. Carter had told me what was
25 acceptable to him in terms of time, okay. And then

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1 a meeting of the minds was reached literally three
2 days beforehand, and that was after I spoke twice to
3 -- it's in that letter, I apologize.

4 I spoke twice with Jessica and the client,
5 and then to the client alone, okay. And we weighed
6 out, like you would weigh out -- I don't want to use
7 this word "likely" -- trying to gain the possible
8 outcomes, okay. We went over the 85-percent rule,
9 as I do with everybody in situations like this,
10 okay.

11 The plea took place, and after the plea
12 took place, I continued to work with him. He
13 contacted my office. An e-mail was sent to me when
14 he wanted to know if I could represent him on a PCR
15 or if somebody else could.

16 And I handled two other civil matters for
17 him without cost after the plea. What happened is,
18 in my subjective mind -- subjective mind, okay --
19 the State realized that they had some potential
20 downside risk, which is why 30 became 20, okay.

21 Mr. Carter recognized that he had some
22 potential upside gain, where before he had none at
23 all. If somebody's going to say "We're going to
24 trial on murder," it makes your life pretty simple
25 from a practical viewpoint.

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1 And then there was a meeting of the minds
2 that evolved, for want of a better word. Again, I
3 don't talk about human beings like contracts. So
4 when you have a negotiated plea, by definition it's
5 a meeting of the minds.

6 Q I think based on the Supreme Court's
7 decision in the Thrift case, they want us to think
8 of guilty pleas in terms of contracts.

9 A I agree.

10 Q Do you agree that in your discussions with
11 Mr. Carter you had indicated to him that you thought
12 worst-case scenario, if this case went to trial, it
13 would be a voluntary manslaughter?

14 A No. What I told him was as follows. What
15 I told him as follows is if a jury heard all of the
16 facts, it was my impression, particularly after
17 going over the other portion of the self-defense and
18 burden of proof for where he was standing when the
19 gun went off -- that -- and I stand by this -- that
20 six or seven times out of ten he would be convicted
21 of voluntary manslaughter, that one or two times he
22 would be convicted of murder, and maybe there was a
23 five or ten percent chance of proving him not
24 guilty.

25 And that was from looking at all of the

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1 evidence, looking at this county, which is a gold
2 buckle Bible belt, looking at having tried I don't
3 know how many cases over here. It's a tragic event
4 where everybody kind of lost control. That's what I
5 told him.

6 I told him also very simply that if the
7 Judge was to hear everything, it's my experience,
8 and if he went to trial, that there was a reasonable
9 possibility that a Court may give him a greater
10 sentence, which is my experience, even though that's
11 maybe not what everybody thinks happens.

12 I also told him very simply that I thought
13 his entire background may come out, okay. And I
14 presented him with the following set of facts. "If
15 you could let me pick the twelve jurors, I could
16 probably get you pretty good results."

17 If you have twelve middle-class people,
18 and a younger man went into an older man's house
19 with a weapon, the older man came out and told him
20 to leave, he then left, and then while he was some
21 distance from the house turned around and shot him,
22 that people weren't going to be too enthused about
23 that, nor would the Judge.

24 Q Well, first off, given my age, I'm going
25 to ask you to go easy on that older man comment.

- 1 A I apologize.
- 2 Q He was born in 1956.
- 3 A That's correct.
- 4 Q So were he alive today, he would be 54
- 5 years old.
- 6 A That's correct.
- 7 Q Which means back in 2004, he would have
- 8 been how old?
- 9 A Take six off whatever number you have,
- 10 because I'm 60, and I'm an older man.
- 11 Q Okay. My point is he was in his mid-
- 12 forties roughly, mid to late forties?
- 13 A Okay.
- 14 Q He wasn't an older man in the sense of
- 15 being retirement age --
- 16 A No.
- 17 Q -- or elderly by any stretch, was he?
- 18 A No, he had several children, several
- 19 grandchildren. That's correct.
- 20 Q And how big a person is your client? I
- 21 can have him stand up, in case you don't recall
- 22 that.
- 23 A I can cheat and look at a SLED report.
- 24 Q Okay.
- 25 A Which, since he has no record, doesn't

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1 have -- I'm looking at him, and I'm saying he's
2 5'10" and I'm saying he's 175 pounds.

3 Q Do you have the SCDC records that would
4 give you the information about what he -- his size
5 and weight were when he was admitted to SCDC?

6 A No, ma'am, I do not.

7 Q You do not.

8 MS. SHURLING: If I may have a moment's
9 indulgence, Your Honor.

10 The Lexington County -- pardon me. You
11 might have a career with the State Fair, Mr.
12 Breibart. This is the Lexington County booking
13 report. Can you publish for us the size and weight
14 of your client?

15 A Five nine, one seventy-two.

16 Q Okay, five nine, one seventy-two. How big
17 was Mr. Wesley Tobias?

18 A My information is he was born June 13,
19 1956, and he was 5'11" and 160 pounds, the decedent.

20 Q So these two gentlemen were, relatively
21 speaking, well matched in terms --

22 A Sure.

23 Q -- in terms of size?

24 A Yes, ma'am.

25 Q Your client was not much younger or bigger

1 and stronger than the gentleman who was shot and
2 killed?

3 A That's correct, yes, ma'am.

4 Q And for purposes of clarification for the
5 Court, your client was in fact not a lot younger
6 than Jessica's father, was he?

7 A That's correct.

8 MS. SHURLING: A moment's indulgence.

9 Q In fact, your client was born in 1957,
10 does that sound right?

11 A I believe so.

12 Q And that would put him only a year younger
13 than this older man whose home he went to?

14 A Yes. For the record, when you asked me
15 before, there are certain e-mails, either
16 interoffice or otherwise, which you had access to
17 that were in the file that do discuss things that I
18 discussed with Mr. Carter.

19 Q Certainly. There are e-mails between you
20 and Mr. Hubbard and e-mails between you and Mr.
21 Frangione, correct?

22 A And e-mails between -- yes, between myself
23 and staff, between staff and memos to file, things
24 such as that.

25 So I'd like to -- with the Court's

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1 respect, I believe these were given or made
2 available to Ms. Shurling, if you follow me.

3 MS. SHURLING: I don't dispute that, Your
4 Honor. I was only responding to his answer to my
5 question that there were things that I did not
6 receive.

7 THE COURT: All right. We've gone over
8 that.

9 MR. BREIBART: I apologize.

10 THE COURT: That's okay. And it's clear
11 for the record.

12 Q We talked about the location a lot, about
13 --

14 A Yes, ma'am.

15 Q -- where he was standing when this
16 happened.

17 A Yes, ma'am.

18 Q And we all agree that if they had been
19 standing in Donald Carter's yard instead of Wesley
20 Tobias' yard, you would have had a stronger
21 potential self-defense case, correct?

22 A I believe that probably is a correct
23 interpretation of the facts and the law.

24 Q Okay. But you agree with me that the
25 standard for self-defense is more lenient with

1 regard to duty to retreat if you're on your own
2 property?

3 A That's my understanding of it, yes, ma'am.

4 Q Okay. Did you ever tell your client that
5 you felt like he would have had a self-defense case
6 if he'd been in his yard?

7 A I told him that at that point in time, he
8 would have no duty to retreat. And if the jury saw
9 it as two folks at the OK Corral, was the exact
10 words that I used, okay, then there is no duty to
11 retreat. I'm not trying to be a judge. It's more
12 amenable to a self-defense claim.

13 Q Okay.

14 A That if, as told to me by Mr. Carter --
15 forget the State's witnesses -- that the guy had
16 said, "Get off my property," he left his porch, went
17 backwards and fired the gun, that that was going to
18 be a more difficult self-defense case to prove.

19 Q Okay. You're going beyond what I needed
20 to know.

21 A I apologize.

22 Q That's okay.

23 A I apologize.

24 Q My point is once we establish it didn't
25 happen on Carter property --

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1 A Right.

2 Q -- it happened on Tobias property --

3 A Uh-huh.

4 Q -- then the question becomes not where
5 they were standing so much as whether or not at the
6 moment the shot was fired your client had a
7 reasonable belief that he was in danger?

8 A Sure.

9 Q Okay. So it doesn't matter whether it was
10 in the living room, or on the steps, or in the front
11 yard, does it?

12 A Sure, it does.

13 Q Okay. Now, you anticipate my next
14 question.

15 A Sure.

16 Q With regard to how close he was to perhaps
17 his truck, it might be considered relevant, for
18 example, isn't that true?

19 A That's assuming his gun is in the truck.

20 THE COURT: Who is "he," please?

21 MS. SHURLING: I'm sorry.

22 MR. BREIBART: I apologize.

23 Q Your client has gone in the Tobias
24 residence.

25 A That's correct.

1 Q He's told to leave?

2 A That's correct.

3 Q And when he is told to leave, he
4 immediately turns and does what?

5 A He leaves.

6 Q He leaves. And he is in the process of
7 leaving when Wesley Tobias goes charging after him,
8 swearing at him, correct? We know that from the
9 dead man's wife's statement, isn't that true?

10 A No, it's not true. If you want me to look
11 at a statement, I'll be more than happy to. I'll be
12 more than happy to look at the entire statement.
13 Thank you, ma'am.

14 Q Bottom of page one, continuing over to
15 page two.

16 A "Don said, 'I got your card.' Wesley
17 said, 'I do not know what you're talking about' and
18 told Don to get off our property.

19 "Don opened the door and walked outside.
20 Wesley was behind him. Wesley said, 'Get off our
21 property, you son of a bitch.' Don turned around
22 and pulled out the gun and shot him. Don again got
23 in his truck and left," okay.

24 Q Okay. So to restate my question a little
25 bit different way --

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1 A Yes.

2 Q -- your client had gone in the Tobias
3 home --

4 A Correct.

5 Q -- only after Mr. Tobias has said, "Come
6 on in," correct?

7 A Yes.

8 Q And when asked to leave, he left?

9 A Yes.

10 Q And my question was that the eyewitness
11 statement of the deceased's wife confirms that Mr.
12 Wesley Tobias followed after him when he was
13 leaving?

14 A Ma'am, I don't mean to be obtuse. That's
15 not the way I read it. It says, "Don opened the
16 door and walked outside. Wesley was behind him.
17 Wesley said, 'Get off our property, you son of a
18 bitch.'

19 "Don turned around and pulled out the gun
20 and shot him." We all can interpret things
21 differently, okay.

22 Q Well, she also says that Wesley had gotten
23 as far as the second step --

24 A Okay.

25 Q -- when that happened, didn't she?

1 A I'm sure you're correct if you say it is.
2 I don't see any mention.

3 Q A moment's indulgence.

4 A I apologize. I don't see it that way.

5 MS. SHURLING: It's in the police report,
6 I apologize, Your Honor.

7 Q But it does say that "Don opened the door
8 and walked outside. Wesley was behind him. Wesley
9 said, 'Get off our property, you son of a bitch'" --

10 A Yes, ma'am.

11 Q -- correct? So, again, your client left
12 the interior of the residence, went outside. It
13 says went outside --

14 A Right.

15 Q -- with Wesley behind him?

16 A Right.

17 Q So when your client had complied with the
18 owner's request that he leave, the owner then
19 followed him outside?

20 A He called him a son of a bitch, so he shot
21 him -- yes.

22 Q Okay. My question is --

23 A Yes, ma'am.

24 Q -- if at the point Mr. Wesley Tobias was
25 angry, yelling "you son of a bitch," and right

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1 behind him, your client testified that he was in
2 fear of grave bodily injury or death, that he was
3 afraid Wesley Tobias was going to beat the hell out
4 of him, as he had threatened to do, he would have a
5 self-defense case, wouldn't he?

6 A Ma'am, he may have had a self-defense
7 case. Where your client -- our client, excuse me --
8 said he fired the weapon, okay, was nowhere near nor
9 was I told that this guy was holding a gun on him.

10 So does he have a self-defense case?

11 Sure. Is that a self-defense case that's going to
12 fly in this county with twelve people in that box?
13 Possibly. Is it likely? No. That's my opinion. I
14 could be wrong.

15 And if Wes -- if Mr. Tobias had come out
16 with a double-eight shotgun and said, "If you don't
17 leave, you SOB, in four seconds, I'm going to blow
18 your brains out," okay, and he's four feet away --
19 excuse me, Mr. Carter is four feet away -- that may
20 be a different story. That's not the information
21 that was told to me by my client -- our client --
22 where he was when he shot the gun.

23 So even if the wife or Wesley goes to the
24 second step of the house and the guy is 80 or 60
25 feet away, turns around and shoots him, he has a

1 potential self-defense case. I've always thought he
2 had a potential self-defense case. He traded it in
3 on a one- or two-out-of-ten shot to save ten years
4 of his life. That's how I viewed it, in a very
5 friendly way.

6 Q Eighty or sixty feet away -- where do you
7 get that figure from?

8 A I asked your client where he was standing
9 when he shot, okay. I went and got the GPS, the
10 maps. I asked him on what side of the road he was,
11 okay. I asked him to draw where his truck was and
12 where he may have fired from, okay.

13 And it is nowhere near the house. That
14 was the problem with the self-defense case. Having
15 said that, I still think a competent lawyer had a
16 shot at self-defense, which is why I was never going
17 to plead this guy, unless he insisted, to murder.

18 THE COURT: Are those Google Earth
19 documents in your file?

20 MR. BREIBART: I apologize?

21 THE COURT: Are those Google Earth
22 documents that you're referring to?

23 MR. BREIBART: I apologize, Your Honor.
24 They're from lexco.com, which I have given Ms.
25 Shurling a copy of.

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1 THE COURT: I've got it.

2 MR. BREIBART: I apologize.

3 THE COURT: You just referred to it for
4 the record. I want to make sure it's clear.

5 MR. BREIBART: We downloaded them on
6 10/6/06, which is one of the times I met with Mr.
7 Carter, and I asked him to draw on there.

8 THE COURT: And those I assume are
9 satellite photos of the subject property?

10 MR. BREIBART: Yes, Your Honor.

11 MS. SHURLING: A moment's indulgence, Your
12 Honor.

13 Q Where was the spent brass from the Tomcat
14 semi-automatic found, do you recall?

15 A No, ma'am. The only thing I recall is
16 what Mr. Carter showed me on these maps.

17 Q Okay. And do you recall somewhere in the
18 discovery they're referring to the brass being found
19 outside the yellow crime scene tape?

20 A No, ma'am. But if it was outside the
21 yellow crime scene tape, it wouldn't have been --
22 well, strike that. If they were found outside the
23 yellow crime scene tape, the Lexington County
24 Sheriff's Department normally, in my experience, has
25 the whole area as a crime scene.

1 So if they were found outside the crime
2 scene tape, it would logically indicate that it was
3 some distance away.

4 Q Did you discuss the fact with your client
5 that in the discovery materials there were no
6 photographs of where the spent brass was located?

7 A Ma'am, I discussed with my client every
8 document that is in here, which is why we met so
9 many times in a very friendly way. As I'm sitting
10 here, I cannot tell you that I told him that there
11 was no mention of where the discovery of the spent
12 brass casings were or were not.

13 In putting together a potential self-
14 defense case, the first thing I want to hear is what
15 my client says, which is what I did.

16 Q Now, you said that based on where your
17 client said they were standing when he fired the
18 shot --

19 A Yes, ma'am.

20 Q -- that that was greatly disparate, some
21 60 or 80 feet, or you may have said even further,
22 from where Lisa Tobias said they were -- where her
23 husband was on the second step, correct?

24 A I'm only -- I want to answer every one of
25 your questions. Where my client said he was when

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1 the shot was fired was here, okay.

2 Q I'm sorry. You keep referring to that,
3 and I don't know what it is.

4 A Yes, I had given this to you when you were
5 in the office.

6 Q All right. This, for the record, is a map
7 you downloaded from Google, I presume?

8 A No, ma'am, downloaded on 10/26/06 from the
9 Lexington County records where they fly over
10 people's homes.

11 Q Okay. And this is the Tobias residence?

12 A From my understanding of it, yes, ma'am.
13 That's my understanding.

14 Q And the steps that would be referred in
15 Ms. Tobias' statement would be where on this
16 picture, do you know?

17 A I assume, in a light most favorable to my
18 client, that they had to be here, because my client
19 said he was over here. So he wouldn't be seeing
20 anybody coming at him if they were behind there.

21 Q Okay. Isn't it true that your client also
22 said that Wesley Tobias was way over there, that
23 Wesley Tobias wasn't over at the steps either? Your
24 client said both of them had reached that point
25 before the shot was fired, did he not?

1 A No, ma'am -- no.

2 Q Okay.

3 A If that was the case, it boggles my
4 imagination how the alleged victim's wife would say
5 he was shot where he was, and then this gentleman
6 would take a different position. But having said
7 that, that is not what my client told me.

8 Q Okay. So your -- how far did your client
9 tell you he was standing from Wesley Tobias when the
10 shot was fired?

11 A Mr. Tobias was either leaving his porch or
12 had left his porch. When we look at that, I have to
13 assume it is a front rather than a back porch,
14 because, as you can see from the back, you can't see
15 anything, okay.

16 I asked how in how many feet, yards,
17 inches or whatever, okay. And his response was, "I
18 know where I was standing," and that's where I had
19 him make the mark.

20 I also congratulated him on his honesty,
21 to be very candid with you, because his self-defense
22 case would have been a heck of a lot better if he'd
23 been standing on property that was theoretically
24 "his."

25 Q If "he" who had been standing in it?

Richard Breibart - Direct

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1 A If Mr. Carter -- I apologize -- had been
2 standing on his own property, I thought that legally
3 that would have been a better case of self-defense.
4 That's when I said "he," I apologize.

5 Q Now, your client didn't tell you that
6 Wesley Tobias was armed, did he?

7 A Nope.

8 Q Never claimed that he was?

9 A Nope.

10 Q Okay. So whatever --

11 A My client did tell me that, unlike what
12 Ms. Tobias said, was "Get off here, you son of a
13 bitch" -- excuse my language -- or something to that
14 effect, and "I thought he was armed." He did say
15 that.

16 Q You anticipate my next question. Did you
17 discuss with your client whether or not he knew Mr.
18 Tobias to on occasion be armed?

19 A Yes.

20 Q And what was his response?

21 A Yes.

22 Q Okay. When the plea offer was initially
23 made, was it to plead straight up to voluntary
24 manslaughter?

25 A No, ma'am, it was -- the first plea offer

1 was to plead to voluntary manslaughter with a
2 30-year sentence as a negotiated plea.

3 Q And your client turned that down?

4 A I discussed it with my client at length
5 for one night for about two and a half hours, and I
6 quite frankly -- he asked me, as he always did --
7 he's a very accommodating gentleman.

8 He asked me for my opinion, and I told him
9 that I thought that once we got into the realm of
10 potential pleas, that we could do better.

11 Q Now, you mentioned a moment ago that there
12 was no practical difference between 30 years for
13 manslaughter and 30 years for murder. In terms of
14 time of service, there is a significant difference,
15 isn't there?

16 A When you're 40-some-odd years of age,
17 because I'm getting a little bit older, there
18 probably is some significant difference. One you
19 know you can max out obviously, and one you're not
20 necessarily guaranteed to max out.

21 Q Well, aren't you eligible for release
22 after service of 85 percent of a manslaughter
23 sentence?

24 A Sure.

25 Q And murder is day for day?

Richard Breibart - Direct

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1 A Well, not only is murder day for day, but
2 you can get a life sentence for murder.

3 Q But a moment ago you said a 30-year
4 sentence for manslaughter was practically different
5 -- was not different in any practical sense from 30
6 years for murder?

7 A It certainly is practically different,
8 because while you are not guaranteed release after
9 85 percent, you are eligible for release after 85
10 percent. So theoretically that would get you down
11 to 15 times 3 is 45, 25 and a half years, okay.

12 Q Okay. And I presume you discussed those
13 distinctions with your client in deciding whether or
14 not to take the plea?

15 A Yes, ma'am.

16 Q What did your client articulate to you as
17 his reason for deciding --

18 A In fact --

19 Q Let me rephrase. At what point did the
20 client have the epiphany that he was going to plead
21 guilty? Can you describe for us what came about
22 that led your client to suddenly decide to plead
23 guilty?

24 A The client is an engineer. He's a bright
25 human being. Originally, he had talked about

1 pleading guilty if he was to receive a five- to
2 ten-year sentence. I told him that was way before
3 any plea offers.

4 I told him that -- two things: (a) that
5 wasn't going to happen, in my mind, because of the
6 circumstances of the case; and (b) if I went there
7 and said he's going to plead guilty to anything --
8 because of my experience I discussed with Mr. Carter
9 a length -- once you throw it out on the table,
10 you're opening the door in a real friendly way.

11 Q Okay. May I see that map one moment?

12 A Sure.

13 Q During -- this is another one.

14 A I apologize.

15 Q That;s okay. Did you go to the crime
16 scene, Mr. Breibart?

17 A No, I was not allowed to.

18 Q Did you hire an investigator to go to the
19 crime scene?

20 A No, ma'am.

21 Q Did you ask for a plat or any other
22 documentation that might be available from the Tax
23 Office, for example, that would demonstrate how many
24 feet it was from this door to where your client said
25 he was parked?

Richard Breibart - Direct

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1 A No, ma'am. I thought that it would be far
2 easier for him if I went there myself, got the
3 pictures, and he would draw there rather than on a
4 generic plat. I did not get a plat. I got the
5 pictures.

6 Q Okay. So you don't know how many feet it
7 was from that door out to the roadway or to where
8 your client said his car was parked?

9 A No, ma'am.

10 Q Okay. Let's move on to a different
11 subject for a moment.

12 A Yes, ma'am.

13 Q During all these 26 meetings and all the
14 phones calls --

15 A Yes, ma'am.

16 Q -- and all of that, where is Mr. Falgione?
17 Is he involved?

18 A Mr. Falgione --

19 Q Is he still involved in the case?

20 A Mr. Falgione was not involved as a
21 principal. I would contact him, or I'd see him, and
22 he'd ask me about the case. I don't know what his
23 relationship was with Mr. Carter's family.

24 It appeared at that point in time that Mr.
25 Carter and I were getting along pretty well. And

1 with all due respect to my dear friend of 30 years,
2 I don't know what he has to bring to the table --
3 Mr. Falgione. This is not an area he does a good
4 bit of work in.

5 Q Can you recall how the fee that was paid
6 in this case was split? What percentage did Mr.
7 Falgione get?

8 A Ma'am, I really do not remember that. If
9 I -- I know it's on my fee agreement. It was my
10 understanding Mr. Falgione may have -- I know that
11 he had represented them, "them" being the family.

12 I know at the beginning of the case there
13 was a concern about Mr. Carter being sued that Mr.
14 Carter and I had talked about on several occasions,
15 and documents were prepared later on about that fact
16 by myself in consultation with Mr. Falgione. It was
17 pretty clear that he thought -- excuse me, Mr.
18 Carter thought someone may bring a claim against
19 him.

20 Q Pardon?

21 A That somebody may bring a claim against
22 him -- excuse me, a civil claim against him.

23 Q Okay. But the fee that was paid in this
24 case was originally paid to Adrian Falgione,
25 correct?

Richard Breibart - Direct

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1 THE COURT: Let's move on. We went over
2 that earlier in his testimony.

3 MS. SHURLING: Okay.

4 THE COURT: Let's move on to something
5 new, please.

6 A I really don't remember that, seriously.

7 THE COURT: Let's move on to something
8 new, please.

9 MS. SHURLING: I will. Thank you, Your
10 Honor.

11 Q Did Mr. Falgione participate in the plea
12 negotiation discussions you had with your client?

13 A Not that I'm aware of -- not in my
14 presence.

15 Q Did he appear on behalf of your client at
16 the guilty plea proceeding?

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

18 Q Okay.

19 A I do not remember that.

20 Q Did you discuss with your client the fact
21 that if he went to trial, he would have the
22 opportunity to enter favorable character evidence
23 about himself?

24 A I certainly did, because we discussed
25 that. I also explained to him once you put your

1 character affirmatively into evidence, as in the
2 case of State v. Poor, I think it is, and then they
3 can bring in a whole train about things they don't
4 like about you. And do I discussed the good and the
5 bad of that.

6 Q Okay. But there, again, your client had
7 no prior criminal record, correct?

8 A That's correct.

9 Q And he had a very positive work history?

10 A That's correct.

11 Q Were you able to determine from speaking
12 with others what his reputation was for peacefulness
13 in the community?

14 A My conversations with two of his -- I'm
15 going to use the word "employers" -- may have been
16 supervisors -- and that basically went to where he
17 was, a particular place, and whether he was
18 reliable. And I thought he was reliable. I still
19 to this day think he's fairly reliable in terms of
20 keeping appointments and stuff like that.

21 Q Did you investigate whether there were any
22 skeletons in the closet with regard to whether your
23 client had a history of volatility or violence in
24 the community?

25 A I discussed with my client at length some

Richard Breibart - Direct

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1 issues in his life that I thought the State would be
2 able to bring out that would not make him to be the
3 best witness in the world -- his handling of certain
4 personal matters, his information that he gave to
5 different females, his promise to the present female
6 about his marital status.

7 And I didn't think that that would score
8 too many points with a jury. And once you open the
9 door and say "I'm a good guy," then they could hit
10 you over the head, my understanding of the law, with
11 every thing in the world that "You're not a good
12 guy."

13 If you don't push character into evidence,
14 you don't have to worry about that, except a
15 conviction or similar act under Rule 604 or whatever
16 it is.

17 Q What in your mind was the deciding factor
18 in deciding to plead -- your client's decision to
19 plead to voluntary manslaughter instead of go to
20 jury trial for murder?

21 A He wanted to have a specific time, a
22 specific date, that if he knew he behaved himself in
23 prison that he could get out of jail. And he asked
24 me the percentages, and I gave it to him pretty much
25 like I gave it to you.

1 I told him that if he tried the case and
2 he got a voluntary manslaughter conviction, okay,
3 that when everybody heard everything, a potential
4 sentence would be greater -- a potential sentence --
5 would be greater than 20 years.

6 MS. SHURLING: A moment's indulgence, Your
7 Honor.

8 THE COURT: Yes, ma'am.

9 Q Did Mr. Carter give you a list of
10 witnesses that he thought would be helpful to his
11 case if he went to trial?

12 A Not that I recall. Any information that
13 he gave me is contained in here. His bail papers
14 are contained in here. The satellite agreements are
15 contained in here.

16 Q The two witnesses you say that worked with
17 Mr. Carter, are those the only two witnesses that
18 you recall interviewing in terms of character
19 evidence, with the exclusion of Jessica?

20 A Right, yes, ma'am.

21 Q Okay.

22 A Because I thought he had a good work
23 record, and I thought that that spoke for itself.
24 If he's charged with murder and people are keeping
25 him on, he probably did a pretty good job on work.

Richard Breibart - Direct

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1 Q Where did your client tell you Lisa Tobias
2 was when the shot was fired?

3 A Physically, was behind her deceased --
4 behind the alleged -- the victim.

5 Q Okay. So he told you that she was outside
6 when the shooting occurred?

7 A If I remember correctly, he told me there
8 was a screen door. They invited him in, told him to
9 leave, go, whatever. The husband came out first.
10 She was a short distance behind him.

11 Q Mr. Breibart, you've been very patient.

12 A I apologize if I've been rude.

13 Q No. It's been a long examination.

14 A Sure.

15 Q Thank you for your patience, and if you
16 will answer any questions the State's lawyer has,
17 please.

18 THE COURT: Mr. Lee?

19 MR. LEE: May it please the Court?

20 THE COURT: Certainly.

21 CROSS-EXAMINATION

22 BY MR. LEE:

23 Q Mr. Breibart, I believe you entered into
24 evidence through Ms. Shurling a detailed letter that
25 you sent to the applicant and had him sign on the

1 morning of the entry of his guilty plea, in which
2 you described your interaction with him, including
3 your meetings, telephone conversations, things you
4 discussed together, etc., correct?

5 A Yes, sir.

6 Q And so that is in the record now for the
7 Court to review?

8 A Yes -- yes, sir.

9 Q Okay. So we'll move along from that.
10 Now, just so I can get it clear, just a couple of
11 quick questions about Mr. Falgione. If I was
12 hearing you correctly, it sounded like the fee
13 agreement that you signed was relevant to yourself,
14 correct -- it was for you?

15 A Yes.

16 Q Okay. And it also sounded like Mr.
17 Falgione was given -- basically, it sounded to me --
18 and correct me if I'm wrong -- that he was contacted
19 first. And because of his lack of experience in
20 criminal matters, he referred them to you, correct?

21 A We all met in his office. I think I met
22 with Mr. Walters -- excuse me, Mr. Carter. I have a
23 good friend of mine named Mr. Walters, who looks
24 like this gentleman -- with his dad and one or two
25 other family members.

Richard Breibart - Cross .

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1 Q But his referral basically to you was
2 because of his own lack of experience in criminal
3 matters?

4 A In certain criminal matters. He does a
5 lot of DUIs and things like that.

6 Q And so one potential way to look at any
7 money that may have been paid to him would be
8 possibly as a referral fee or something to that
9 effect?

10 A I guess, yes.

11 Q And that's actually a pretty common
12 practice in the practice of law, correct?

13 A Right. Today, all of my fee agreements
14 state in there that I have the right to do whatever
15 I want in terms of hiring other lawyers to assist
16 me. That is a fairly standard practice, to be very
17 candid with you.

18 Q Now, let's talk about the ultimate
19 admission of meddling, I guess, that was discussed a
20 little while ago. If there is an instance of
21 someone meddling in your business or generally
22 making your life a pain, so to speak, and you can
23 prove that -- and obviously in this case, you can
24 prove it because you have an order to that effect
25 where Judge Keesley says this -- are there other

1 legal routes that you can take, such as perhaps
2 seeking a restraining order, etc., to kind of put an
3 end to that meddling?

4 A You're talking about after this event?

5 Q No, I'm talking about just in general. Is
6 that something --

7 A Yes.

8 Q -- you'd consider doing?

9 A Yes, sir.

10 Q And certainly there is a legal option as
11 opposed to going to someone's house with a gun,
12 correct?

13 A Yes.

14 Q Okay. Now, in this case, you stated that
15 you talked to your client, the applicant, about a
16 self-defense claim, correct?

17 A That is correct.

18 Q And I believe in support of theory you
19 discussed the fact that there had been I guess a
20 prior history of the deceased with having a temper,
21 correct?

22 A Correct.

23 Q There had also been I guess an altercation
24 where the deceased said that he was going to kick
25 his ass, correct?

Richard Breibart - Cross

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1 A Correct.

2 Q Okay. Was there ever any indication to
3 you or based on any of your notes from maybe
4 incident reports or just anyone that you talked to -
5 - was there ever any indication the deceased said
6 "I'm going to kill" the applicant -- "I'm going to
7 kill you," anything like that?

8 A Not that I remember.

9 Q Okay. Was there ever any indication that
10 the deceased ever got physical with the applicant,
11 that he struck him in any way?

12 A Not that I remember.

13 Q Okay. So on the night question, the
14 applicant who, if I heard you correctly, gets - I
15 guess the applicant's would-be wife, wife, whatever,
16 she got a card in the mail that essentially said the
17 applicant "is fooling around on you" or something to
18 that effect?

19 A The card allegedly came from the woman
20 herself.

21 Q Okay. And she confronts the applicant
22 about this, and he I guess assumes that it came from
23 his wife's parents, is that correct?

24 A I guess that's correct.

25 Q Okay. So he then gets his gun and goes to

1 the deceased's house?

2 A Correct.

3 Q Okay. And goes in and says, "I got your
4 card." And the deceased at that point says, "Get
5 off my property"?

6 A The deceased denied sending the card, the
7 way I recollect it. Then he said, "Get off my
8 property."

9 Q And at this point, the applicant does turn
10 around and begin to leave the property?

11 A Correct.

12 Q So according to the incident report in
13 which the victim's wife was talking, at that point
14 the applicant is leaving, and he -- the victim is
15 behind him, correct?

16 A That's correct.

17 Q And that is -- there are certainly other
18 ways to read it than the victim was charging behind
19 him?

20 A That's correct.

21 Q Okay. One of those ways to read that
22 would be that maybe he walked outside to confirm
23 that the applicant was actually leaving?

24 A I guess that would be one.

25 Q Okay. And so he gets out there, and he

Richard Breibart - Cross

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1 says, again, "Get off my property, you son of a
2 bitch," correct?

3 A I thought it was only one time, but it may
4 have been twice.

5 Q Okay, fair enough. Any indication in that
6 whole scenario that there was ever a threat made by
7 the victim?

8 A I think subjectively, yes; objectively, in
9 terms of a threat to someone's life, I was not aware
10 of any.

11 Q Okay. And there is a further indication,
12 based on your conversations with your own client,
13 that he wasn't near the victim at the time that he
14 feared the shot that killed him?

15 A He wasn't extremely close.

16 Q Okay. And, again, there was no indication
17 throughout this altercation that the victim ever
18 struck the applicant?

19 A No.

20 Q Okay. So essentially he is walking away
21 to his car or whatever -- basically, he's just
22 leaving, and he turns around, and he shoots the
23 applicant -- or not the applicant, he shoots the
24 victim?

25 A He's leaving. I cannot state under oath

1 whether he was looking towards or away, to be very
2 candid with you.

3 Q Okay. Now, with self-defense claims, one
4 of the issues is that you have a responsibility --
5 and you kind of touched on this earlier -- but
6 perhaps the responsibility is lessened when you're
7 on your own property. But you have a responsibility
8 to leave, to walk away from the conflict
9 essentially?

10 A My understanding of it, and I'm certainly
11 not judge, is that also includes the amount of
12 threat given to you and the opportunity to leave --

13 Q And I think you touched on another --

14 A -- and the level of threat.

15 Q I'm sorry.

16 A I apologize -- the level of threat.

17 Q And that's actually what my next question
18 was going to be. You touched on it. With relation
19 to the level of threat in self-defense claims, your
20 response or retaliation, if you are the person
21 claiming self-defense, has to sort of on par with
22 the perceived threat, correct? Like if someone
23 tries to punch you, you can't turn around and shoot
24 them.

25 A Depending upon location, circumstances,

Richard Breibart - Cross

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1 size, history, that's one of the factors, the way I
2 understand it.

3 Q Okay. And, again, we discussed location
4 already. But in terms of size, these guys are
5 pretty well matched?

6 A Correct.

7 Q So it wasn't as if the victim was a 6'4",
8 250-pound lineman?

9 A No, I think they were an inch or so apart
10 in height and five pounds in weight.

11 Q Okay. So based upon all this -- you
12 already touched on this -- you felt that there was a
13 potential claim for self-defense?

14 A Sure.

15 Q But you also felt that it wasn't
16 necessarily a very good claim for self-defense?

17 A There's a potential claim for everything,
18 and juries never surprise me. I told Mr. Carter I
19 thought there was a ten to twenty percent chance of
20 him being found not guilty.

21 Q Okay. And so you, of course, have
22 discussed that with your client?

23 A That's correct.

24 Q And you touched on this earlier. But at
25 that point, you would have advised him that you felt

1 it perhaps in his best interest to think about a
2 plea?

3 A He asked me that question. I never --
4 strike that. He asked me that question, and we
5 started discussing it, that's correct.

6 Q Okay. And whose decision was it
7 ultimately to plead guilty in the case?

8 A It was Mr. Carter's.

9 Q Did you force, coerce, pressure him in any
10 way to do so?

11 A Not at all.

12 Q Okay. Did you discuss with him the
13 benefits and drawbacks of taking a plea versus going
14 to trial?

15 A I did.

16 Q Okay.

17 MR. LEE: Beg the Court's indulgence one
18 second, Your Honor.

19 THE COURT: Yes, sir.

20 Q Do you have any independent recollection
21 of where the deceased's body was found?

22 A I can't swear to that.

23 Q Okay. There was some discussion of the
24 amount of investigation that you did, if you had
25 hired an investigator. If the -- let me just ask

Richard Breibart - Cross

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1 you this. If the applicant hadn't elected to plea,
2 would he have been forced to go to trial on the
3 exact same day?

4 A I was going to file a motion to recuse
5 about everybody in the world, which I informed Mr.
6 Carter of. I was going to move to recuse Mr. Myers
7 and his office, anybody who had any touch with this
8 case.

9 So if he didn't want to plead on that day,
10 he didn't have to, because once I filed those
11 motions -- in fact, I had prepared beforehand to
12 file motions. I saw a memorandum up over here,
13 dated November 19th, from myself to an associate who
14 handled legal matters, a week beforehand about
15 starting to get motions together and reviewing in
16 there that it would be the bond orders, because I
17 remembered what Judge Keesley had said.

18 Q Well, let me get to my point, then.

19 A Sure.

20 Q If he had elected not to plead, do you
21 feel you would have had additional time to do
22 additional investigation in preparation for trial if
23 necessary?

24 A If necessary, yes. I mean, I could have
25 stopped the train from going out of the station that

1 day, if that's what you're asking me.

2 Q Yes.

3 A Yes.

4 Q So if he had elected to go to trial and
5 you had that additional time, is it possible that
6 you would have considered doing additional
7 investigation if you found it necessary in the case?

8 A If I had thought it necessary, I would
9 have.

10 Q Okay. But, again, whose decision was it
11 to plead in the case?

12 A Mr. Carter's. Mr. Carter is not the type
13 of person you can tell what to do. He's a man.
14 He's not a boy. I don't mean it in a bad way.

15 Q Okay. Mr. Breibart, I think you've done a
16 pretty good job of answering questions on direct and
17 cross, so I don't want to beat a dead horse so much.
18 So I'll go ahead and cut myself there.

19 A Thank you.

20 THE COURT: Any redirect?

21 MS. SHURLING: My redirect is very brief,
22 Your Honor.

23 THE COURT: Is it new matter?

24 MS. SHURLING: It's responsive, actually.

25 THE COURT: Very good, thank you.

Richard Breibart - redirect

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1 REDIRECT EXAMINATION

2 BY MS. SHURLING:

3 Q Mr. Breibart, do you have a copy of the
4 autopsy report in your file?

5 A Let me take a look, and I'll let you know
6 that. Well, it was Baumgardner's report regarding
7 where the body was, but the ME guy -- and I'm just
8 going--

9 Q Well, let me interrupt you for just a
10 moment.

11 A Sure.

12 Q You have just referenced a document I was
13 going to ask you about.

14 A Sure.

15 Q And that's Mr. Baumgardner's report, which
16 reveals who performed the autopsy, the fact that a
17 single slug was found. But it also says that a
18 medical examiner's report will be forwarded to the
19 Lexington County Sheriff's Department.

20 A Uh-huh.

21 Q Do you recall ever getting a copy of an
22 autopsy report?

23 A I recall seeing one. So I'm trying to
24 find it right now.

25 Q Okay.

Richard Breibart - redirect

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1 A And there was a gunshot wound to the
2 chest, and I thought the gentleman was approximately
3 --

4 MS. SHURLING: While we're looking, Your
5 Honor, I would move to introduce this February 2,
6 2005, report from Officer Baumgardner documenting
7 who did the autopsy as Applicant's --

8 MR. LEE: No objection.

9 THE COURT: Admitted without objection.
10 It's number thirteen?

11 COURT REPORTER: Ten.

12 MS. SHURLING: Ten.

13 THE COURT: Ten.

14 (Applicant's Exhibit Number Ten,
15 2/2/05 Report regarding Autopsy, was entered in
16 evidence.)

17 MS. SHURLING: I haven't been quite as
18 prolific as Your Honor thought. Your Honor, while
19 he looks for that document, may respondent's counsel
20 and I approach?

21 THE COURT: Yes, ma'am.

22 A Ma'am, I cannot find that. But my
23 recollection of talking with Mr. Harmon and seeing a
24 copy of it was looking for anything like stippling
25 or whatever for how close someone may have been.

Richard Breibart - redirect

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1 Q But you don't see a copy there in your
2 file?

3 A No, I don't.

4 Q Do you keep a running list of the
5 documents turned over to you in discovery, Mr.
6 Breibart?

7 A Now we scan everything in the second it
8 gets there. We didn't have that capability in 2005.
9 So every document that comes into the office now is
10 scanned in. Back then, we didn't. But I did get a
11 copy of the autopsy report after that.

12 Q Pardon?

13 A Bear with me. I was provided a copy of
14 the autopsy, I apologize. I've looked through this.
15 If this was thorough life would be a lot simpler.

16 Q Did you say you documented that you were
17 provided a copy?

18 A Yes, ma'am.

19 Q And how did you do that?

20 A I got a letter from Mr. Hubbard. I
21 already knew what the results were beforehand. I
22 have a letter from Mr. Hubbard on November 14, 2007.

23 I previously met with Mr. Harmon in his
24 car, reviewed it, because I was concerned if I could
25 find any stippling or anything, that the shooting

1 was close range, if you follow me. But I did not
2 have it. He provided it with some Bates stamped
3 numbers, so it's in here.

4 Q So it's your recollection here today that
5 you had an opportunity to review it, but you don't
6 believe you have an actual copy in your file?

7 A I probably do here right now, to be very
8 honest with you, ma'am. I met with Mr. Harmon, who
9 was kind enough to give me -- he's the coroner.

10 He was kind enough to give me and let me
11 review a copy of the report shortly after it was
12 completed. What I was looking for was evidence of
13 close contact or anything along those lines, if you
14 follow me.

15 Q Now, you have tried many cases over the
16 years or represented many people accused in cases
17 involving gunshots, haven't you, Mr. Breibart?

18 A Yes, ma'am, I have.

19 Q And is it fair to say that in any case
20 where the gun was as little as -- well, anything in
21 excess of 18 inches away from your body, you can
22 count on not finding stippling?

23 A No, it all depends on the size and caliber
24 of the gun, how close it was. If you've got a .45 -
25 - well, strike that. I'm not a forensics expert.

Richard Breibart - redirect

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1 I've tried cases with larger guns or with shotguns
2 where stippling may be further away, if you follow
3 me.

4 This was a .22 or .32 caliber Beretta, if
5 you follow me. A lot of the information that I
6 attempted to rely on came from Mr. Carter, to be
7 real honest with you.

8 Q And in your experience, do pathologists or
9 coroners, refer to gunshots fired from a distance of
10 more than 18 inches to 24 inches away as distant?

11 A They refer to them as noncontact, is my
12 understanding, but --

13 Q You were asked earlier whether or not the
14 victim had threatened physical harm to Mr. Carter?

15 A I thought I was asked whether there was a
16 use for a weapon, but you may be correct.

17 Q Okay. And I believe you were asked
18 whether or not there was any evidence that the
19 victim had actually threatened physical harm to Mr.
20 Carter. Did I understand the question incorrectly?

21 A No. I mean, when he came to his house or
22 the police report says he came to his house --

23 Q Okay.

24 A -- to me implicit in that was there was
25 going to be physical harm if you show up at

1 someone's and threaten them.

2 Q Okay. And isn't it true, in fact, that in
3 Jessica's statement concerning that incident on
4 December 1st, she says that her father made threats
5 toward Don saying he'll kick his ass or kill him if
6 he runs into him?

7 A Sure.

8 Q So your client was aware of one previous
9 recent incident in which the victim had threatened
10 to kill him?

11 A Right. I believe he asked me whether he
12 had been threatened, not what Jessica had said.

13 Q Okay.

14 A There's one thing that I just noticed in
15 here.

16 Q Yes.

17 A So I just want the record to be clear --
18 about a weapon or no weapon. When the house was
19 searched by the police -- don't know what happened
20 before then -- the weapon was found in Mr. Tobias'
21 house, found in his bedroom.

22 It was a .25 caliber handgun. Don't know
23 how it got there. All I'm trying to say to you is
24 there was no other weapon that was found at the
25 scene. You had asked me whether or not anybody said

Richard Breibart - redirect

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1 he was carrying a gun.

2 Q You anticipated my next question. And
3 we're sounding redundant now, but I had earlier
4 asked you whether there was any basis -- whether
5 your client had articulated to you any basis to be
6 fearful that he would be harmed by the victim.

7 And I believe I asked you whether or not
8 there was any claim that a weapon was involved,
9 whether he'd seen a weapon.

10 A He never told me he saw a weapon. He told
11 me he carried weapons. In looking through here, the
12 only weapon that was found was in the master
13 bedroom, which was a .25 caliber weapon. That's in
14 the decedent's house.

15 Q So your client did tell you that he knew
16 the victim to on occasion carry a weapon?

17 A Yes.

18 Q And a weapon, a handgun, was in fact found
19 at the house?

20 A According to the police records that he
21 sent that their whatever -- I don't mean that in a
22 negative way -- there was a .25 caliber handgun
23 found in the master bedroom suite.

24 Q Certainly.

25 MS. SHURLING: A moment's indulgence, Your

Richard Breibart - redirect

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1 Honor.

2 THE COURT: Yes, ma'am.

3 MS. SHURLING: Nothing further from this
4 witness, Your Honor. I would ask -- and we can take
5 this up at more length at the end of the hearing --
6 but if I might be given an opportunity to review any
7 notes from any conversations with my client that are
8 on a database that are not printed out and in that
9 file.

10 THE COURT: I'm going to deny that motion.
11 Mr. Breibart has stated in his testimony that he
12 gave all the documentation, whether it be on
13 Timeline, Time Matters, or Needles, all the
14 documentation in this case.

15 Isn't that correct, Mr. Breibart?

16 MR. BREIBART: Yes, Your Honor, I also --

17 THE COURT: I'm sorry.

18 MR. BREIBART: That's correct.

19 MS. SHURLING: Your Honor, I make that
20 motion as much for the record because --

21 THE COURT: I understand.

22 MS. SHURLING: -- I have to respectfully
23 object because the record will also reflect that at
24 another juncture in his testimony, he acknowledged
25 that he never told me of such notes and didn't give

Richard Breibart - redirect

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1 me those.

2 THE COURT: You are correct. But I would
3 still deny your motion.

4 MS. SHURLING: Thank you, Your Honor. No
5 further questions of this witness.

6 THE COURT: Thank you.

7 Mr. Lee?

8 MR. LEE: Just a couple, Your Honor.

9 THE COURT: They need to be responsive to
10 --

11 MR. LEE: They are, completely.

12 RECROSS EXAMINATION

13 BY MR. LEE:

14 Q There was reference to the prior threat
15 made about kick his ass or kill him. Again, in the
16 incident itself, was there any indication that the
17 victim either threatened or struck the applicant?

18 A There's no objective threat.

19 Q Okay. In fact, objectively speaking, all
20 the victim said was, "Get off my property," and at
21 most added some foul language to that?

22 A "You son of a bitch."

23 Q Okay.

24 A Excuse my language.

25 Q Well, again, I believe it was your

Richard Breibart - Recross

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1 testimony just now that the victim knew that the --
2 or the applicant knew that the victim sometimes
3 carried weapons?

4 A Yes, that's correct.

5 Q But he never told you that he actively saw
6 one?

7 A That's correct.

8 Q Okay. So he's standing a distance of
9 several feet, if I'm correct, hasn't actually seen a
10 weapon but shoots the victim, correct?

11 A That's my understanding of it.

12 Q Okay. And, again, finally, just whose
13 decision was it, again, to enter a guilty plea?

14 A Mr. Carter's.

15 Q Okay, thank you.

16 THE COURT: May Mr. Breibart be excused?

17 MS. SHURLING: As far as I'm concerned, he
18 may, Your Honor.

19 MR. LEE: Certainly.

20 THE COURT: Thank you.

21 MR. BREIBART: Thank you, Your Honor. I'm
22 only two blocks away if you need me.

23 THE COURT: All right, ladies and
24 gentlemen, we're going to take a break. We're going
25 to resume back at 2:15. I want there to be an

Richard Breibart - Recross

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1 orderly transition of people leaving the courtroom.

2 I'm going to ask, number one, that
3 you remember my cautionary instructions at the
4 beginning of this hearing. Number two, I'm going to
5 ask the left side of the courtroom to exit first,
6 and then let them clear, and then we'll let the
7 right-hand side clear next.

8 If the left side of the courtroom
9 wants to clear now, please do so. All right, ladies
10 and gentlemen on the right-hand side of the
11 courtroom, you may exit now. Thank you. We'll
12 resume at 2:15.

13 (Court in recess for lunch.)

14 (Jury in at 2:15 p.m.)

15 MR. LEE: We're ready to go.

16 THE COURT: Ms. Shurling, are you ready to
17 continue?

18 MS. SHURLING: I am, Your Honor. At this
19 time, I would call Jessica Simeon Carter -- sorry, I
20 can't get it right -- Jessica Simeon Carter to the
21 stand.

22 (The witness was sworn.)

23 CLERK OF COURT: Have a seat and state
24 your name for the record, please.

25 MS. CARTER: I'm Jessica Carter.

Jessica Carter - Direct

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1 JESSICA S. CARTER, having first been
2 duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 BY MS. SHURLING:

5 Q Ms. Carter, I apologize for butchering
6 your name. I wasn't certain which name you were
7 going by these days. Can you explain to the Court
8 what your marital status was at the time of your
9 father's death?

10 A We were not married. Don and I were not
11 married. I was not married to anyone at that time.

12 THE COURT: Could you speak up a little
13 bit, please, ma'am?

14 MS. CARTER: Yes.

15 Q I was going to say, Jessica, in my
16 experience, you are very soft-spoken. If you can
17 try just to speak up just a little bit --

18 A Okay.

19 Q -- so that the Court Reporter can get a
20 good record here today and so everybody can hear
21 you. So your divorce from Mr. Simeon -- am I
22 pronouncing that correctly? --

23 A Yes, ma'am.

24 Q -- was final --

25 A Yes, ma'am.

Jessica Carter - Direct

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1 Q -- by the time your father died?

2 A Yes, ma'am.

3 Q Okay. And you were living with my client,
4 Donald Carter?

5 A Yes, ma'am.

6 Q You already had one child with him?

7 A Yes, ma'am.

8 Q How old was that baby at the time?

9 A He would have been two in July of '05.

10 Q Okay. And you were expecting another
11 child with Mr. Carter?

12 A Yes.

13 Q And were the two of you planning to be
14 married?

15 A We had talked about it, but it wasn't set
16 in stone at that time.

17 Q Okay. And were you eventually married?

18 A Yes.

19 Q Okay. When were you married?

20 A It was November -- it was the day of the
21 sentencing, November 26th, I believe, 2007.

22 Q All right. It goes without saying that
23 this entire situation has been difficult and painful
24 for you, and I apologize. I'm going to try to not
25 make it any harder than it has to be. But the

1 victim in this case was your father, Wesley Tobias,
2 is that correct?

3 A Yes, ma'am.

4 Q And how long had you and Donald Carter
5 been living right down the little road from your dad
6 and his wife?

7 A I guess it had been three years at that
8 time or almost three years at that time.

9 Q Okay. And how long before the shooting
10 had the relationship between your father and Don
11 started to deteriorate?

12 A I believe it was probably around September
13 or October of '04 where it really started to get
14 bad.

15 Q Okay. Prior to that time, had they
16 enjoyed a fairly decent relationship?

17 A Yes, ma'am.

18 Q Okay. Your father had been close to your
19 little boy?

20 A Yes, ma'am.

21 Q Okay. Do you recall a point in history
22 where you were told about an incident at a tan
23 salon?

24 A Yes, ma'am.

25 Q Who conveyed that information to you?

Jessica Carter - Direct

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1 A It was either my dad or my stepmom at the
2 time. I don't remember which one it was, but I know
3 it came from them.

4 Q Okay. And did that cause hard feelings
5 between you and your fiance and your father?

6 A Yes.

7 Q Okay. Was the trip that you all took as a
8 family, the cruise, was it after that time?

9 A It was after the information came to me,
10 yes, ma'am.

11 Q When you returned from the family cruise,
12 did there come a time when your father actually came
13 to your home and acted violently?

14 A Yes, ma'am.

15 Q Can you tell us a little bit about that
16 and when it occurred?

17 A I believe it was towards the end of
18 October, he had come to the house banging on the
19 door, kicking on the door, threatening, him telling
20 Don to come outside, that he was going to kick his
21 ass, left dents in the door from where he was
22 pounding and kicking.

23 Q And if I tell you that that was actually
24 November 19th, would that sound approximately right?

25 A Whatever you say.

Jessica Carter - Direct

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1 Q After the November 19th incident where
2 your father was kicking on the door, was there
3 another time when you reported to the Lexington
4 County Sheriff's Department that your father was
5 threatening your boyfriend?

6 A Yes. I don't remember if that was when he
7 was at the -- there's a landfill garbage dump where
8 we would take our trash, and I believe he had ran
9 into my dad there. But he had called me before, as
10 well, and told me that he better not see him out in
11 public or he'd kick his ass and cause problems.

12 Q And at one point, did you give a statement
13 to law enforcement in which you said that your
14 father had on a previous occasion said he would kill
15 him?

16 A Yes.

17 Q And by "him," I mean Donald Carter.

18 A Yes, ma'am.

19 Q Now, after the incident in November of '04
20 when your father was trying to kick in the door, did
21 you have further discussions with Donald about your
22 father's propensity for violence?

23 A Yes. I mean, we had talked about things
24 like that before -- I mean, just talking about our
25 pasts, you know, sometimes that would come up.

Jessica Carter - Direct

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1 Q Okay. And did you relay to Donald Carter
2 incidents that had occurred within the family where
3 you had personally become aware of your father being
4 violent toward other family members?

5 A Yes, ma'am.

6 Q Can you relay those to the Court?

7 A Yes, ma'am. I remember being at my dad
8 and my stepmom's house when my brother Wesley was
9 there. And my dad and my brother had gotten in an
10 argument, and they got into a fistfight, a physical
11 fight.

12 There was also an incident where me and my
13 first husband had gone out with some friends, and my
14 friend left her daughter with my stepmom to babysit.
15 And when we came back home to pick up the baby,
16 there was a hole in the wall from where my uncle and
17 my dad had gotten into an altercation.

18 Q Okay. And after the incident with your
19 father trying to kick the door in, you conveyed
20 these stories to Donald Carter?

21 A Yes, ma'am. I believe it was after, could
22 have been before.

23 Q Are you familiar with what your father's -
24 - and, again, I am so sorry. I know this is
25 difficult. But are you familiar with your father's

Jessica Carter - Direct

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1 general reputation in the community as to whether he
2 was considered a peaceful or a violent man?

3 A I would say most people did not see him as
4 very peaceful.

5 Q Okay. Were you genuinely afraid that your
6 father would harm Donald Carter?

7 A Yes, ma'am.

8 Q And did you express that fear to Mr.
9 Carter?

10 A Yes, ma'am.

11 Q Okay. When this tragic event happened,
12 were you involved in picking a lawyer for Mr.
13 Carter?

14 A No, ma'am.

15 Q Who took care of that? Who hired the
16 lawyer?

17 A I believe it was Amy, which is Don's
18 sister-in-law, and Billy, and I believe Amy knew
19 Adrian or knew someone that knew Adrian that she
20 worked with.

21 Q Okay. And were there any subsequent
22 meetings -- well, first off, who was your
23 understanding -- what was your understanding as to
24 who they hired at first?

25 A My understanding was that Adrian was Don's

Jessica Carter - Direct

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1 lawyer, that they had hired him for the case.

2 Q And when did you become aware that there
3 was another lawyer involved other than Adrian?

4 A It wasn't very long after. I don't know
5 the exact date, but it wasn't long at all, maybe a
6 few days.

7 Q Okay. Were there meetings with Mr.
8 Richard Breibart and Donald Carter that you
9 attended? Did you go to some meetings with him?

10 A Yes, ma'am. I remember probably two
11 times. I know I've been to one or two, at least.

12 Q Okay. And were there any occasions when
13 you met with Mr. Breibart alone and were interviewed
14 by him privately?

15 A I don't remember that, no, ma'am. The
16 only time I remember meeting with him alone was
17 right after the sentencing date.

18 Q Okay. When you did have joint meetings
19 with Mr. Breibart and Mr. Carter, did you share with
20 Mr. Breibart the fact that your father had a
21 tendency to be violent?

22 A Yes, ma'am. I believe I told him about
23 the same ones, the same incidents that I talked
24 about today.

25 Q And did you tell him that you had shared

Jessica Carter - Direct

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1 that information with Donald?

2 A I believe so.

3 Q Okay. Did he ask you, if the case went to
4 trial, if you would be willing to be a witness on
5 behalf of Donald Carter?

6 A I believe he did say that, because I
7 remember something that he said about how we're not
8 married, so I would probably have to testify, I
9 believe. It was something to do with the way the
10 law is.

11 Q Okay. Did he explain to you what would
12 happen if you got legally married before the trial?

13 A No, ma'am, I don't remember -- I mean, he
14 brought up the fact that the law was that since we
15 weren't married, I believe I would have to testify
16 if I was subpoenaed, or something like that.

17 Q Okay. And were you -- I understand that
18 you gave a statement -- and it's been marked here
19 today as Plaintiff's Number Nine -- to law
20 enforcement the day of the shooting, correct?

21 A Yes, ma'am.

22 Q Were you interviewed subsequently by
23 anyone else in law enforcement? Were there any
24 additional interviews by law enforcement after this
25 statement was taken?

Jessica Carter - Direct

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1 A Not that I remember.

2 Q Were you ever interviewed by anyone from
3 the Solicitor's Office?

4 A I do remember meeting with someone. I
5 don't remember now who that person was. But I do
6 remember having to come I believe here to this
7 courthouse. And it was one time. It was so long
8 ago, I don't remember who it was.

9 Q And were -- I'm going to rephrase that.
10 In your conversations with someone from the
11 Solicitor's Office, was the information you gave
12 them consistent with what you'd already given in
13 your statement?

14 A I believe so.

15 Q And do you recall whether or not you were
16 questioned by that individual about your father's
17 propensity for anger and violence?

18 A I don't remember if I was or not.

19 Q Okay. What is your current matrimonial
20 state?

21 A Married.

22 Q You're still married?

23 A Yes.

24 Q Okay. And you're obviously separated
25 because Mr. Carter is in prison, correct?

1 A Yes, ma'am.

2 Q Okay. Were Mr. Carter granted the
3 privilege of a new trial, would you be available as
4 a witness on his behalf at trial?

5 A Yes, ma'am.

6 MS. SHURLING: A moment's indulgence.

7 THE COURT: Yes, ma'am.

8 Q Do you recall an incident where your
9 father threatened your stepfather with a weapon?

10 A Where -- oh, yes. When you said
11 "stepfather" -- anyway, that's a long story. But,
12 yes, my -- I was living with I believe my mom and my
13 stepdad at the time.

14 And my dad found out that my stepdad had
15 threatened to hit us or hit us, or me or my brother.
16 I don't remember who it was. But I do remember my
17 dad coming to the mobile home that we lived in at
18 the time, and there was a fight between him and my
19 stepdad.

20 Q And was your father armed at that time?

21 A I do know he had a -- I don't if it was a
22 rifle or -- it was a long gun. It wasn't like a
23 handgun.

24 Q Okay. But he came to your stepfather's
25 home armed?

Jessica Carter - Direct

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1 A Yes.

2 Q Okay. And did you convey that story to
3 Don Carter, as well?

4 A Yes.

5 Q The card that was sent that started the
6 tragic chain of events on the day your father died,
7 it was actually addressed to Donald Carter, wasn't
8 it?

9 A Yes, ma'am.

10 Q Okay. And it was purportedly from a
11 woman?

12 A Uh-huh.

13 Q And it was suggestive of an extramarital
14 relationship?

15 A Yes, ma'am.

16 Q Okay. And did it have the desired effect?

17 A Yes, ma'am.

18 Q It caused a big argument between you and
19 Don?

20 A Uh-huh -- yes, ma'am.

21 Q And did he immediately say, "I know who's
22 behind this"? I mean, what -- how did he respond to
23 the card?

24 A Pretty much. I mean, he said just like,
25 "He knows better. No, I'm not seeing anyone else,"

Jessica Carter - Direct

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1 you know, "because I'm always here with you." He's
2 like, "But I know or I have an idea who's behind
3 it."

4 Q Okay. Were you aware when Don went out
5 and bought a gun after the incident with door
6 kicking?

7 A Was I aware?

8 Q Were you aware when he bought the gun?

9 A Yes.

10 Q Why did he buy a gun?

11 A For protection.

12 Q Protection from whom?

13 A I thought from my dad because of all the
14 things that were going on at the time.

15 Q Thank you.

16 MS. SHURLING: No further questions.

17 THE COURT: Cross-examination?

18 MR. LEE: Just briefly, Your Honor.

19 CROSS-EXAMINATION

20 BY MR. LEE:

21 Q You stated that you had told Mr. Carter
22 about a prior incident in which your late step -- I
23 guess your late father had threatened someone with a
24 weapon, correct?

25 A Yes.

Jessica Carter - Cross

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1 Q Did you ever see your father threaten or
2 brandish any weapons at Mr. Carter?

3 A Not brandish weapons at him, no.

4 Q Okay. Did you ever see your dad
5 physically strike Mr. Carter?

6 A No.

7 Q You stated that you were afraid that your
8 dad would hurt the applicant. Your dad was roughly
9 the same size as the applicant, correct?

10 A He was taller than me, and I'm about five-
11 eleven. So he was probably about six feet.

12 Q Okay. If the records that were brought
13 out in the Court today suggest that he was about
14 five-eleven, would you say that's about accurate?

15 A No, I'd probably say maybe a little bit
16 more.

17 Q Okay. And he was roughly the same build
18 as Mr. Carter too, perhaps a little skinner and
19 weighed a little less?

20 A I think they probably weigh about the
21 same, not a lot of difference.

22 Q Okay. So it would have been a pretty even
23 matchup, correct?

24 A Yes.

25 Q Okay. Now, there was a letter, and this

1 is the one that was just referenced, the one that
2 was I guess forged by your parents or they put
3 someone up to it. And in response to receiving that
4 letter, isn't it true that the applicant got a gun
5 and went to your father's house --

6 A I don't --

7 Q -- to confront him about it?

8 A I did not see him get a gun when he left.

9 Q But using logic, you understand that he
10 did have a gun with him?

11 A I don't know if he had it on him when he
12 walked out the door. I have no idea.

13 Q Finally -- I'll withdraw that question.
14 That will be all my questions, thank you.

15 MS. SHURLING: Nothing further for
16 Jessica. Thank you.

17 THE COURT: May she be excused?

18 MS. SHURLING: She may.

19 THE COURT: Thank you, ma'am.

20 MS. SHURLING: Your Honor, I would call
21 Donald Carter.

22 (The witness was sworn.)

23 CLERK OF COURT: Have a seat and state
24 your name for the record, please.

25 DONALD E. CARTER, having first been

Jessica Carter - Cross

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1 duly sworn, testified as follows:

2 DIRECT EXAMINATION

3 BY MS. SHURLING:

4 Q State your full name for the record.

5 A Donald E. Carter.

6 Q Mr. Carter, after the shooting incident,
7 you went back to your home that you shared with
8 Jessica?

9 A Yes, ma'am.

10 Q And I believe the first person you called
11 was your father?

12 A Yes, ma'am.

13 Q Did you give a statement to law
14 enforcement that day?

15 A Excuse me?

16 Q Did you give a written statement to law
17 enforcement that day?

18 A I've never given law enforcement a
19 statement.

20 Q Let's take it one step at a time.

21 A Okay.

22 Q Did you give them a statement that day?

23 A No.

24 Q And why didn't you?

25 A I wasn't asked for a statement.

Donald Carter - Direct

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1 Q Okay. Had you also been advised by your
2 father to wait until you got a lawyer to talk?

3 A No.

4 Q Okay. Who hired a lawyer for you?

5 A I have no idea.

6 Q Well, how did you come to be aware that
7 you had a lawyer?

8 A Adrian showed up at the detention center.

9 Q And how did he introduce himself?

10 A He said his name was Adrian Falgione, and
11 he was representing me, that my family had hired
12 him. And I had no clue who this man was, because I
13 hadn't spoken to anyone in my family. And so I
14 wouldn't give him any information.

15 I wouldn't even talk to him. So he
16 started telling me how he knew my family. And after
17 five minutes or so of this discussion of who they
18 were and how he knew them, then I started talking to
19 him as if he was hired to be my attorney.

20 Q Okay. So prior to him showing up at the
21 Lexington County Detention Center, you had no idea
22 that anybody had hired you a lawyer or anything?

23 A No.

24 Q When did Richard Breibart get introduced
25 into the picture?

Donald Carter - Direct

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1 A It was at least a week after I was at the
2 detention center before I ever saw him.

3 Q And how did that come about?

4 A He showed up with Adrian one day, and
5 Adrian introduced him.

6 Q And what were you told?

7 A That he was the criminal attorney that
8 would be handling the case, that he had been --

9 Q In the interim between the first visit and
10 the second, had you had an opportunity to speak to
11 your family about the issue of hiring a lawyer?

12 A I don't remember talking to them about an
13 attorney.

14 Q Okay. When Mr. Breibart and Adrian showed
15 up at the jail, did anyone ask you whether you
16 wanted to be represented by either Adrian Falgione
17 or Richard Breibart?

18 A No.

19 Q They just told you they were your lawyer?

20 A Right.

21 Q After that initial visit, how long was it
22 before you had a bond hearing that resulted in you
23 getting out in May?

24 A It was probably three months.

25 Q During that time period, how often did you

Donald Carter - Direct

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1 see Richard Breibart?

2 A I think I saw him three times.

3 Q In those subsequent visits, was Adrian
4 Falgione with him?

5 A I believe he was there pretty much every
6 time Richard showed up. They were together every
7 time.

8 Q Okay. He came with him every time?

9 A Right.

10 Q Once you got a date for a bond hearing and
11 you had a bond hearing, were you represented at the
12 bond hearing by Adrian or by Richard?

13 A Richard. Adrian wasn't there.

14 Q Adrian wasn't there?

15 A Was not there for the bond hearing.

16 Q At that point in time, had you given
17 permission to anyone for you to be represented by
18 Mr. Breibart alone?

19 A No.

20 Q Had you ever signed anything or in any way
21 formally acquiesced to Mr. Breibart being your
22 lawyer?

23 A No.

24 Q You got out on bond in May 2004, correct?

25 A Right.

Donald Carter - Direct

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1 Q Two thousand five, pardon me.

2 A Right.

3 Q From that time forward until about
4 September of '07, you were out on bond, correct?

5 A Right.

6 Q And actually you were on bond through your
7 plea in November?

8 A Right.

9 Q During that time period, how many meetings
10 did you have with Richard Breibart?

11 A Initially, I would go to roll call every
12 month, and I would meet him at that point in time.
13 We may have had a couple of meetings outside of roll
14 call. That was discontinued after about four or
15 five months, and I occasionally saw him after that.

16 Q Okay. Now, when you say you would see him
17 at roll call, when you would go to court for roll
18 call, would you have an opportunity either before or
19 after to sit down and have lengthy discussions with
20 Mr. Breibart, or would you just see him at roll
21 call?

22 A I would see him at the office, and either
23 he would come over here or I would come over with
24 another attorney from his practice. And, in fact,
25 Mr. Miller that was in here earlier brought me over

Donald Carter - Direct

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1 here like three times for roll call.

2 Q Okay.

3 A And apparently Richard had something
4 worked out where he didn't have to show up as long
5 as a representative from his office showed up. Then
6 I would sign the paperwork saying I attended roll
7 call, and then it would start over again for the
8 next month.

9 Q Until after about five months, you all of
10 a sudden weren't required to come to roll call
11 anymore?

12 A No.

13 Q Once you got out on bond and once the roll
14 call appearances stopped five months later, there's
15 still about a two-year gap before the entry of the
16 plea in November of '07.

17 A Right.

18 Q How often did you see Mr. Breibart during
19 that time period?

20 A Not very often. In fact, there was at
21 least a one-year period before I got that panicky
22 phone call, and I never spoke to him for at least a
23 year.

24 Q Okay. Well, let's bounce ahead to that
25 panicky phone call for a second. In September of

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1 2007, were you contacted by Mr. Breibart's law firm?

2 A Yes, ma'am.

3 Q Who called you?

4 A One of the secretaries.

5 Q And what were you told?

6 A That I needed to come in, that Mr.

7 Breibart wanted to speak to me about this case, and
8 that it needed to be settled.

9 Q Okay. Prior to that phone call, how long
10 had it been since you had had any discussion about
11 your case with anybody in Mr. Breibart's firm?

12 A At least a year.

13 Q And how long had it been since you had
14 talked to Adrian Falgione?

15 A The last time I talked to him was right
16 after I was bonded out. In fact, Jessica and I went
17 to a Waffle House on Highway 6 and ran into Mr.
18 Falgione in there. And that was probably the last
19 time I spoke to him. That was shortly after I was
20 bonded out.

21 Q Okay. Of the \$35,000 fee that was paid
22 for your representation, how much were you told was
23 given to Adrian Falgione?

24 A I was told it was split 50/50. Richard
25 told me that in his office one day when we were

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1 talking, because Richard was always bringing up the
2 fact of how little he was paid for representing me.

3 Q Okay. When you say he was always saying,
4 you mean he was complaining?

5 A Basically, he was complaining. I took it
6 as complaints.

7 Q Okay.

8 A He would phrase it as "Even though I was
9 only paid \$17,500, I will represent you to the best
10 of my ability." That's what he would say.

11 Q Okay. Let me ask you this. Did you ever
12 question what Adrian Falgione did for his portion of
13 the fee?

14 A I assumed part of it was like a finder's
15 fee. He found a client for Richard, so he got a fee
16 for that or a percentage for that.

17 Q Okay. When did you get the discovery
18 materials?

19 A When I was in Lexington County.

20 Q Before you were released on bond?

21 A Right.

22 Q The first big batch, anyway?

23 A That's the only discovery I've ever
24 received.

25 Q Okay. And who brought that to you?

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1 A Adrian.

2 Q Adrian. And did he bring you your very
3 own copy --

4 A Right.

5 Q -- or did you go over his copy?

6 A He gave me my own copy.

7 Q Okay.

8 A We had an attorney-client visit, and he
9 slid the pages underneath the glass. It was a stack
10 about an inch and a half tall of paper, of copies.

11 Q Did he review those documents with you?

12 A No.

13 Q Did he discuss them with you in a way that
14 gave you the indication he had read them?

15 A No.

16 Q Did he ever come back at a later date and
17 discuss the discovery materials with you?

18 A No. It was a very short meeting. It was
19 basically, you know, "Here's your discovery
20 package," slid it underneath the glass. I put it
21 back in the envelope that he had it in, and we may
22 have said a few other things, but nothing of any
23 detail.

24 Q Was that the last time you saw him in the
25 capacity as your lawyer?

1 A Pretty much. I saw him at roll call a
2 couple of times, but it was just saying hello, and
3 that was about it.

4 Q Okay. Did you ever have a chance to sit
5 down and discuss the discovery materials and the
6 strength or weaknesses of the State's case with
7 Adrian Falgione?

8 A Never.

9 Q Did you have an opportunity to go through
10 the discovery materials with Richard Breibart and
11 discuss their significance as it pertained to your
12 case?

13 A No, we never went page by page through any
14 of that stuff and talked about any of the details.

15 Q Okay. Did you ask Mr. Breibart whether
16 you could assert self-defense in this case?

17 A I told him from the very beginning it was
18 self-defense. But he never seemed to bite on that.
19 You know, to him, he had already made up his mind.

20 Q What did he tell you about self-defense as
21 it related to the facts in your case?

22 A I really don't remember any specific
23 details about how it related to my case. He was
24 telling me about duty to retreat, and he was very
25 big on this duty to retreat, more so than I had a

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1 right to protect myself.

2 I even asked him one time, "What if I was
3 at somebody's house sitting on a couch, and somebody
4 in the house came and attacked me while I'm sitting
5 on their couch in their house? Don't I have a right
6 to protect myself?" And he gave me a real vague
7 answer.

8 Q Okay. Do you recall him telling you that
9 you would have had a better self-defense case if you
10 had been on your own property?

11 A Yes.

12 Q Did he discuss with you under what
13 circumstances you could still have a viable claim of
14 self-defense, even if you were on somebody else's
15 property?

16 A Not really. We didn't go into that.

17 Q Did he ever talk with you about
18 procedurally how you would go about asserting self-
19 defense at a jury trial?

20 A No, we didn't go into that.

21 Q Did he explain to you that once you raised
22 a claim of self-defense, the burden would be on the
23 State to disprove your claim?

24 A He never mentioned that to me.

25 Q Did you talk to Mr. Breibart about what,

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1 if any, use you could make of evidence that you knew
2 your father-in-law -- and I'm calling him your
3 father-in-law loosely -- Jessica's father. Did he
4 discuss with you what use you could make of the fact
5 that you had been warned that Mr. Tobias was a
6 violent man?

7 A No, he didn't mention that. When I would
8 bring things to him that I felt were relevant, he
9 would always just pass it off as not anything
10 significant to even spend time discussing.

11 Q Well, did you tell him about the incident
12 with the door being kicked down or your father-in-
13 law trying to kick the door down?

14 A Yes. In fact, when I told him there were
15 three incident reports, he said that the first, at
16 the beginning of this situation, nobody even knew
17 about those three incident reports. If it wasn't
18 for me or Jessica telling them about it, I don't
19 know that they would have ever known about those
20 three incidents.

21 Q Well, we -- you and I have subsequently
22 had conversations in which I confirmed for you that
23 those reports are in the discovery materials --

24 A Right.

25 Q -- correct?

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1 A Right.

2 Q All right. Now, my question is, though,
3 in your conversations with Mr. Breibart, did you
4 tell him that you were aware that your father-in-law
5 was a violent person?

6 A Right. I told him some of the stories.

7 Q Okay. Did you tell him the things Jessica
8 had told you about her father's violent reputation?

9 A Yes.

10 Q Did you tell him that you didn't even have
11 the handgun until after the incident where your
12 father-in-law tried to kick in the door?

13 A Yes.

14 Q Did you tell him why you bought the
15 handgun?

16 A I don't remember if I told him
17 specifically why I bought it, but I told him I had
18 bought it.

19 Q In response to what?

20 A Just one of our discussions we had, I just
21 told him I went out --

22 Q No. You bought the handgun in response to
23 what?

24 A Oh, the threat from Tobias.

25 Q And you told him that?

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1 A Right.

2 Q Okay. Did you also tell him that there
3 had subsequently been incidents that you were told
4 about by Jessica where your father-in-law -- your
5 girlfriend's father, whatever we're going to call
6 him -- had threatened to kill you?

7 A Yes.

8 Q So you told him about all of that?

9 A Right.

10 Q All right. And what did he tell you about
11 your chances of establishing self-defense at a jury
12 trial?

13 A He told it would be extremely difficult.
14 And he told me that if I had a jury of my peers that
15 I would probably have a chance of winning it. But
16 if I did not have a jury of my peers, I would
17 probably lose. And the chance of me getting a jury
18 of my peers would be very slim.

19 Q What did he tell -- let me rephrase this.
20 You've heard us go over here today Lisa Tobias'
21 statement where she says that Mr. Tobias got to
22 about the second step, following behind you, calling
23 you a son of a bitch --

24 A Right.

25 Q -- when you took out a gun and fired the

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1 shot, okay?

2 A Uh-huh.

3 Q What did you tell your lawyer about where
4 the two of you were standing when the shot was
5 fired?

6 A I was standing over by my vehicle. I had
7 a SUV at the time, and I was standing over there.
8 And I turned around because he was out in the yard
9 close to the road. And I said, "Look, we need to
10 talk about all this harassment."

11 And that's when he came at me. And I had
12 the pistol in my jacket pocket, and I pulled it out
13 and fired one shot.

14 Q How far was he from you when he began
15 advancing on you?

16 A Eight to ten feet, something like that.

17 Q Did you have time or the ability in your
18 estimation to get in the truck and get away?

19 A No, because it was locked. I'd have to
20 unlock it and then climb in.

21 Q Why did you take in the pistol that day to
22 begin with?

23 A Well, it was in the console of my truck,
24 and when I --

25 Q Let's stop there for a minute and clear up

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1 this.

2 A Okay.

3 Q You didn't get it from the house and
4 deliberately take it with you?

5 A No, it was pretty much in the console of
6 the truck all the time.

7 Q Okay.

8 A I wasn't worried about when I'm at my
9 house. It's when I'm out traveling around that I
10 was concerned.

11 Q And, in fact, Jessica had reported to the
12 police that he had threatened to beat you up or kill
13 you if he caught you out in public --

14 A Correct.

15 Q -- correct?

16 A That's correct.

17 MS. SHURLING: Your Honor, this is all in
18 exhibits.

19 Q All right. So -- but the gun was in the
20 console of the car, and you did put it in your
21 pocket when you went to the house?

22 A When I got out of my truck, I got out and
23 put it in my pocket.

24 THE COURT: Say that again, please, sir?

25 MR. CARTER: When I got out of my vehicle,

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1 I took the pistol out of the console and put it in
2 my jacket pocket.

3 Q And why did you do that, Donald?

4 A Because of his history of violence,
5 because I knew I was going up there to confront him
6 about an issue that -- just because of the way he
7 tried to kick in our front door and all the threats.

8 You know, those three police reports are
9 just a tip of the iceberg of all the threats this
10 man made on me. I repeatedly called Lexington
11 County Sheriff's Department, and they refused to
12 write anything down, to do any reports.

13 They told us that if the officer wasn't
14 there to witness the incident, there was not going
15 to be a report written. They would do nothing about
16 it.

17 I even went out and purchased a motion
18 detector video camera to set it up to record them
19 coming by the house, blowing the horn, yelling
20 obscenities, doing everything else they did, in
21 front of our house.

22 I gave that tape to Richard, or it was
23 given to Adrian. I'm not sure which one, because
24 Jessica gave it to them. I have no idea where that
25 tape is. I have no idea what was on that tape.

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1 Q Well, let me ask you another question. At
2 this point in history, you had actually put your
3 house on the market for sale?

4 A Right.

5 Q Why had you done that?

6 A So we could move to another area to get
7 away from them. We figured if there was some
8 distance between us, then this situation would cool
9 down and the problem go away.

10 Q Okay. Knowing the acrimony that existed
11 between the two of you, why did you go up to the
12 house?

13 A I guess because I was tired of all of the
14 harassment. I had been dealing with this man for,
15 what, four or five months now, kicking in the door,
16 the threat of when we put the house up for sale, the
17 telephone -- or the threat at the trash dump.

18 When I'd pass him on the street, he's
19 giving me the finger. I mean, constant harassment
20 from these people. And even they tried to get my
21 bond revoked, just another sample or example of
22 harassment.

23 You know, just like when I tried to
24 transfer from Lee Correctional Institute to Broad
25 River, they protested it, so I couldn't get

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1 transferred.

2 Q Okay. Let's not get off --

3 A Okay.

4 Q -- focus for a minute. It's fair to say
5 you were really angry when they sent this card to
6 the mother of your child, correct?

7 A Well, they sent it to me for her --

8 Q To you --

9 A Right.

10 Q Pardon me. They sent it to you but for
11 her benefit?

12 A Right.

13 Q And you knew --

14 A I knew that --

15 Q -- in your heart of hearts as to who had
16 done it --

17 A Right.

18 Q -- and you were angry?

19 A Right.

20 Q But once you got to the house, first off,
21 you knocked --

22 A Right.

23 Q -- and heard someone say, "Come in"?

24 A Right.

25 Q Or rather heard Lisa -- you knew her

1 voice?

2 A Right.

3 Q Confronted Mr. Tobias about the card?

4 A Right.

5 Q When he told you to leave his property,
6 what did you do?

7 A Turned around to leave, started walking.

8 Q Without any argument, right?

9 A No, I didn't say anything to him.

10 Q You just left?

11 A I just started walking down the steps to
12 leave, and he was behind me, shoving me in my back
13 as I was going to leave.

14 Q Okay, physical contact. According to Lisa
15 Tobias' statement, her husband came out behind you.
16 She was also following, that he yelled at you,
17 called you a son of a bitch. But she doesn't say
18 anything about him touching you.

19 A She wasn't out there.

20 Q Well, let's take that two pieces at a
21 time.

22 A Okay.

23 Q Do you refute her claim that she came out
24 behind Mr. Tobias and saw the whole thing?

25 A Yes, I do.

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1 Q Where was she?

2 A On the telephone. When you're standing at
3 their front door, you're looking at the living room.
4 And there's a wall to your left, and they were
5 around the corner when I knocked on the storm door.

6 And she said, "Come in," and he said, "You
7 don't know who's there. You shouldn't say that."
8 He came around the corner, and I had opened the
9 glass storm door.

10 And as he's coming towards me, I said
11 something about "I need to talk to you about the
12 card." She came around the corner, and she grabbed
13 the telephone and went over into the living room.

14 Q And got on the phone?

15 A Right.

16 Q Okay. Now, let's stop there for a second.

17 A Okay.

18 Q You just said he was shoving you, is that
19 what you just said?

20 A When I was on the steps, he was shoving me
21 in the back.

22 Q As you were trying to go down the steps?

23 A Right.

24 Q And did he maintain physical contact with
25 you any more after you got to the bottom of the

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1 steps?

2 A No, after we got to the bottom of the
3 steps, I was far enough ahead of him that he didn't
4 shove me. He didn't touch me.

5 Q At what point did you stop?

6 A When I got down to my truck.

7 Q Okay. And why did you stop?

8 A To ask him one more time to talk about
9 this harassment that he's been dishing out.

10 Q And at that point, what happened?

11 A He got -- he was mad, I guess, and he
12 started charging at me.

13 Q Okay. And that's when you shot him?

14 A Right.

15 Q Did you relay this information just as
16 you've relayed it here today to Mr. Breibart?

17 A Yes, I did.

18 Q Okay. At some point, Mr. Carter, you had
19 to decide between a jury trial and entering a plea
20 of guilty. You were indicted for murder, correct?

21 A Yes.

22 Q And you knew you'd been told the sentence
23 for murder was 30 years to life?

24 A No, I was never told that.

25 Q What were you told the sentence for murder

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1 was?

2 A We never discussed murder, other than that
3 I was indicted for murder. But we never discussed
4 anything about the sentencing of murder. We pretty
5 much talked about voluntary manslaughter --

6 Q Okay.

7 A -- as being what I was going to be charged
8 with.

9 Q Well, let's talk about that. Did Mr.
10 Breibart ever indicate to you what he thought your
11 chances were of being convicted of murder if you
12 went to trial by jury?

13 A We never discussed being charged with
14 murder as far as going to trial for murder, even
15 though I was indicted for murder. We pretty much
16 talked about voluntary manslaughter as being the
17 charge.

18 Q So it's your testimony here today that Mr.
19 Breibart always dealt with you from the prospective
20 that it was at worst a voluntary manslaughter case
21 and possibly self-defense?

22 A That's correct.

23 Q But he indicated your chances at self-
24 defense were minimal because why?

25 A The likelihood I would get a jury that

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1 would favor a self-defense case. He said that the
2 Solicitor's Office would take the autopsy
3 photographs and blow them up poster-size and present
4 them to the jury so they could have all this graphic
5 information.

6 And he said once a jury sees graphic
7 photographs like that, it doesn't matter what your
8 case is, you have very little chance of winning it.

9 Q All right, that's interesting. Did he
10 ever discuss with you the fact that he could make a
11 motion to prohibit the State from introducing
12 gruesome photographs, that he could object to their
13 probative value being outweighed by their relative
14 little relevance?

15 A No, he never mentioned anything like that.

16 Q Or rather their probative value be
17 outweighed by their potential for inflaming the
18 passions of the jury -- he never discussed that with
19 you?

20 A No.

21 Q So he didn't discuss with you that you
22 could introduce the deceased's previous threats
23 against you, is that correct?

24 A We didn't discuss that.

25 Q And he did not discuss with you how you

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1 could -- whether you could introduce the deceased's
2 general reputation for violence in the community?

3 A No, we didn't discuss that either.

4 Q Did he discuss with you the fact that you
5 could put up character witnesses at trial -- if you
6 went to trial by jury, that you could put up people
7 to testify to what your general reputation in the
8 community was, whether you had a reputation of being
9 a peaceful man or a violent man or a truthful man?

10 A He never once asked me for any names of
11 anybody that would testify on my behalf, not one
12 time.

13 Q You didn't answer my question.

14 A Okay.

15 Q I was going to get to that, but first
16 answer my question. Did he ever discuss with you
17 that if you went to trial by jury, you could put up
18 witnesses to testify to your good character and your
19 good reputation, and that might help you make a case
20 of self-defense?

21 A No.

22 Q Did he discuss that with you?

23 A No, we didn't discuss that.

24 Q And then it would logically follow, if you
25 never discussed that, then he never got around to

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1 asking you for the names of witnesses, of people who
2 could provide such positive evidence on your behalf,
3 correct?

4 A Correct.

5 Q Okay. You and I have spent a lot of time
6 discussing self-defense, haven't we?

7 A Yes.

8 Q I've gone over a lot of case law with you?

9 A Yes.

10 Q If you had known back in November of 2007
11 everything you know about self-defense now that you
12 and I have been reviewing the case law together,
13 would you have pled guilty?

14 A No, I'd have never pled guilty.

15 Q Would you have exercised your right to
16 trial by jury?

17 A Yes.

18 Q And I have to make this real clear for His
19 Honor. You do understand that if he decides to
20 grant you the privilege of a new trial, the State
21 can still retry you for murder. You understand
22 that?

23 A I understand that.

24 Q Because you pled to voluntary
25 manslaughter, you weren't found guilty of it by a

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1 jury?

2 A Right.

3 Q We talked about that difference, didn't
4 we?

5 A Yes.

6 Q And you do -- you say you were never
7 provided the penalties for murder before, but you
8 know them now, don't you?

9 A Yes.

10 Q What's the sentence for murder?

11 A Thirty to life.

12 Q And thirty for life, with anything other
13 than life, how much of the sentence do you serve?

14 A Day for day.

15 Q Day for day, exactly. So even knowing
16 that, that there's a chance you could be convicted
17 of murder and there's a chance you could get a 30 to
18 life sentence -- if you were convicted, you would
19 get a 30 to life sentence -- you still want a new
20 trial?

21 A Yes.

22 Q How old are you, Don?

23 A Fifty-three.

24 Q Fifty-three?

25 A Yes.

1 Q How long a sentence do you have?

2 A Twenty.

3 Q Realistically, do you feel like your
4 chances are good of living to max out a 20-year
5 sentence?

6 A Not in SCDC, not with their medical care.

7 Q Okay. So if you had understood self-
8 defense the way you understand it now, you would not
9 have pled guilty, and you would have taken a jury
10 trial?

11 A Yes.

12 Q Let's go back to voluntary manslaughter
13 for a minute, too, though. Did you really
14 understand the difference in the various degrees of
15 homicide when you were represented by Mr. Breibart?

16 A No.

17 Q Did you understand that in South Carolina
18 we have murder, voluntary manslaughter, and even
19 involuntary manslaughter?

20 A I do now.

21 Q Okay. And who first went over with you
22 the law as it relates to the definition of each of
23 those offenses?

24 A You did.

25 Q Okay. Had anyone explained to you what

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1 the requirements for finding a voluntary
2 manslaughter versus murder were prior to being
3 represented by me?

4 A No.

5 Q If you had understood better what is
6 required legally to justify the reduction of a
7 homicide from murder to voluntary manslaughter,
8 would you have been less afraid of going to trial by
9 jury?

10 A Would you repeat that, please?

11 Q If you had understood the requirements for
12 a finding of voluntary manslaughter versus murder,
13 would that have made you less afraid to go to trial
14 by jury?

15 A Yes.

16 Q Knowing what you know now about the
17 definition of voluntary manslaughter and the kinds
18 of evidence that the Court has historically accepted
19 as sufficient to sustain a finding of voluntary
20 manslaughter, would you have given up your right to
21 a trial by jury --

22 A No.

23 Q -- if you had known that?

24 A No.

25 Q You've heard us say this today, but I want

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1 to hear it out of your own mouth. Do you have any
2 prior criminal record?

3 A No.

4 Q Have you ever in your life been arrested
5 for even public drunk or anything?

6 A No.

7 Q How far did you go in school?

8 A Two-year associate degree.

9 Q You have an associate degree in
10 engineering?

11 A Right.

12 Q And no prior problems with the law at all?

13 A No.

14 Q If you had known that you had a right to
15 participate in selecting your lawyer, that you
16 didn't have to take the one that your family hired
17 for you, would you have gone forward with Mr.
18 Breibart as your lawyer?

19 A I have no experience with attorneys. The
20 only time I've ever needed an attorney was property
21 transfer. So I would have been in complete darkness
22 on what to do about that. In fact, I was at the
23 time.

24 Q Well, I didn't word that very well. Let
25 me rephrase it. Your family, not you, hired Adrian

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1 Falgione, and then subsequently Mr. Falgione brought
2 in Richard Breibart, correct?

3 A Right.

4 Q And you knew your family had paid a lot of
5 money to hire these men, correct?

6 A Right.

7 Q If you had known that you had a right to
8 say that you wanted to decline them being your
9 lawyers and that you might could have gotten your
10 family's money back or a significant portion of it
11 back to hire someone else, would you have wanted to
12 interview lawyers on your own?

13 A Yes, because of being in engineering, you
14 do a lot of research on what you're about to do as
15 far as whatever project. And that's what I did when
16 I hired you. I didn't just go out and hire you just
17 off somebody saying your name.

18 I would have done the same thing before I
19 hired Richard or Adrian. In fact, I would have
20 never considered Adrian because he's not a criminal
21 attorney.

22 Q And did you feel that Mr. Falgione getting
23 a significant portion of the fee paid in this case
24 in some way affected the job you got from the lawyer
25 who was a criminal lawyer?

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1 A Yes. He repeatedly, when we would meet,
2 bring up the fact of what he was paid. He
3 repeatedly brought that up. And it was as if he had
4 an issue with how much he was being paid. He would
5 mention to me about other attorneys and their large
6 fees that they would get, forty, fifty, sixty
7 thousand dollars, to represent someone with the same
8 charge as what I had.

9 Q Okay. I have explained to you that
10 barring very unusual circumstances, you only get one
11 post-conviction relief case. You understand that,
12 don't you?

13 A Yes, ma'am.

14 Q A couple of little things I want to go
15 over right quick. But after I do that, I want to
16 give you a chance to raise any issues that I haven't
17 covered.

18 And let's real quickly, Mr. Breibart had
19 mentioned repeatedly that he was worried about how
20 the jury was going to take the fact that you and
21 Jessica were living together and had a child
22 together when you were still legally married to
23 someone else.

24 A Uh-huh.

25 Q Did he ever discuss with you any effort

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1 that he might undertake at a jury trial to keep that
2 out of evidence?

3 A No.

4 Q Did he ever discuss with you specifically
5 what he thought your odds of getting a self-defense
6 verdict were?

7. A No.

8 Q What turned the table for you? What made
9 you all of a sudden in September -- somewhere
10 between September '07 and November '07 -- decide to
11 give up your right to trial by jury and plead
12 guilty?

13 A Because he called me or the secretary
14 called me. When I met with him, it was this big
15 panic that we had to resolve this thing.

16 And when we started talking about the
17 sentencing, he gave me three options. He said the
18 first one is zero to thirty if you go to trial. The
19 second one was fifteen to thirty, and you let the
20 Judge decide what your sentence is.

21 And the third choice was the twenty-year
22 negotiated plea. And so when we talked about zero
23 to thirty, you know, again, you're looking at the
24 jury making the decision.

25 You're looking at those photographs that

1 he kept talking about being blown up poster-size,
2 the likelihood that I wouldn't have a jury of my
3 peers so that would be going against me.

4 So I would probably end up on the high end
5 of the thirty years or the zero to thirty. I'd be
6 on the high end of that. The next thing was the
7 fifteen to thirty range that he told me about.

8 And he said, "You can predict that in the
9 fifteen years, you'll probably get a minimum of
10 eighteen. So now you're looking at eighteen to
11 thirty. So when you're looking at eighteen to
12 thirty, why not give up two years so that you don't
13 get the additional ten."

14 That's why I went with the twenty-year
15 negotiated, because I knew I'd save at least ten
16 years on that sentence. Those were my three
17 choices.

18 Q Did you feel at that time that if your
19 case went to trial that either Adrian Falgione or
20 Richard Breibart were prepared to advocate for you
21 with a jury for a finding of self-defense?

22 A Would you repeat that, please?

23 Q Did you feel as though Richard Breibart
24 was prepared as a lawyer at a jury trial to argue
25 for you to get a self-defense verdict?

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1 A No. I don't think he was prepared,
2 because I specifically asked him to obtain some
3 information. And as far as I know, he still has
4 never done that.

5 Q Okay. Did your feelings about his level
6 of preparation play into your decision to plead?

7 A Yes. He was very unprepared.

8 Q Okay. And, once again -- I don't want to
9 beat a dead horse, but if you knew everything then,
10 in November of 2007, that you know today about self-
11 defense and voluntary manslaughter, would you have
12 gone forward with a jury trial?

13 A Yes, I would have asked for a jury trial.

14 Q Would you have pled guilty?

15 A No.

16 Q Okay. I said a minute ago I was giving
17 you a couple of minutes' fair warning. I think I've
18 covered all the issues that you wanted me to raise.
19 But this is your PCR, and it's important to me that
20 you have a chance to raise anything else that you
21 feel I've neglected to tell His Honor about.

22 So you and I have talked about Strickland
23 v. Washington errors and omissions standard. And if
24 there's anything else that you feel your trial
25 attorney did wrong or that he didn't do that he

1 should have done that would have made a difference
2 in whether or not you pleaded guilty, you need to
3 say so now and explain to His Honor why you feel
4 that way.

5 A I really can't think of anything else at
6 the moment.

7 Q Well, this is the moment.

8 A I know.

9 Q This is the only moment.

10 A I really just don't feel like I got a fair
11 deal from him. You heard his testimony today. It
12 sounded like he was on the victim's side. He wasn't
13 on my side.

14 You know, that's the way I felt when I was
15 dealing with him. I would tell him I needed -- "How
16 about get this information for me?" And he would
17 say, "Oh, I can't do that. It's too late."
18 Specifically, telephone records.

19 Now, when I got my information from the
20 Sheriff's Department, SLED, and the previous
21 information I had from Richard, I found that there
22 were subpoenas for my cell phone, my dad's cell
23 phone, our home -- Jessica and our home phone.

24 But there were no subpoenas issued for
25 Tobias' phone number, any of their phones. And I

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1 specifically asked for that. Adrian told me it was
2 too late, and Richard never acted on it -- because
3 that would have proven she was on the telephone, and
4 she was not outside witnessing what happened.

5 So there's issues like that through the
6 whole thing. When I would talk to Richard and tell
7 him something specific, it was like in one ear and
8 out the other, as if he'd already made up his mind.

9 You can tell from what he said today,
10 reading those incident reports that were written by
11 detectives. He believes what they said before he
12 believed what his client said.

13 Q Okay. Well, let's discuss one other
14 thing. As it pertains to the phone records --

15 A Right.

16 Q -- when you were asking him about whether
17 or not he'd ever gotten those phone records, are you
18 talking about after the year when you hadn't talked
19 to one another?

20 A No, this was -- this was back when I asked
21 Adrian, when he came into the county jail. When he
22 came to Lexington County Detention Center, I asked
23 Adrian, and he did nothing about it.

24 Then when I started meeting with Richard,
25 I asked Richard about it. And as far as I know,

1 they never did anything about it.

2 Q My point being, when did you discover that
3 they had not gotten those phone records?

4 A When I talked to Richard and asked him
5 about it, he never -- on subsequent meetings, when
6 I'd ask, "Did you get the phone records?" he said,
7 "No, we didn't do anything about it."

8 Q Okay. And I'm sorry, at what point in
9 time was that? Was that close to the time of the
10 plea or back when you first got out on bond?

11 A Oh, that was --

12 Q When was that?

13 A That was probably within the first nine
14 months of all of this. This was back when they were
15 trying to get my bond revoked, saying I violated
16 some of the bond conditions.

17 Q And were you subsequently able to find out
18 how long such phone records are available?

19 A I was told by an inmate at Lee
20 Correctional Institute, which doesn't carry any
21 water, that you have up to nine years, I believe, to
22 get phone records. But I have no idea.

23 MS. SHURLING: Your Honor, I can make a
24 proffer as an officer of the court under the cabbage
25 top that local phone records on a hard line are

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1 available for a period of 90 days, has been my
2 experience.

3 THE COURT: So noted.

4 Q All right, Mr. Carter, do you believe that
5 I have adequately covered the shortcomings of your
6 defense counsel that we've gone over preparing this
7 case?

8 A I believe so.

9 Q Will you please answer any questions that
10 the State's lawyer has truthfully?

11 A Sure.

12 THE COURT: Mr. Lee?

13 CROSS-EXAMINATION

14 BY MR. LEE:

15 Q Mr. Carter, you heard Mr. Breibart testify
16 earlier, correct?

17 A Yes.

18 Q You heard him testify that he went over
19 things like the discovery with you, discussed self-
20 defense earlier, etc. You heard his testimony to
21 that effect?

22 A Yes, I did.

23 Q Are you saying that that's not correct?

24 A That's not correct.

25 Q Okay. And just for housekeeping, you were

1 originally charged with murder, which you stated
2 carried thirty to life, correct?

3 A Right.

4 Q And you ultimately pled to voluntary
5 manslaughter and got twenty, correct?

6 A Right.

7 Q Which is ten less than the maximum you
8 could get under voluntary manslaughter, correct?

9 A Right.

10 Q Now, you said this much in some of your
11 questions with Ms. Shurling. But you'd rather have
12 for a criminal case a lawyer who practices criminal
13 law than one who doesn't, correct?

14 A Yes.

15 Q Okay. And you stated that Mr. Falgione,
16 your family had hired him?

17 A Yes.

18 Q And originally you wouldn't talk to him
19 because you didn't know who he was, is that right?

20 A That's correct.

21 Q And once he explained that your family
22 hired him, you said okay, and you kind of went with
23 it, is that correct?

24 A After they -- he explained how he knew my
25 sister-in-law, and he had met my parents, and things

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1 like that.

2 Q Right. So once you were sure that your
3 family actually had hired him, you were okay with
4 that?

5 A Well, it was questionable if they actually
6 hired him. You know, we just had a conversation. I
7 mean, he could have been anybody that knew my family
8 on the street.

9 Q But you trust your family as well, is that
10 correct?

11 A Well, I had to go out on the limb to trust
12 him. But I do trust my family.

13 Q Okay. So if your family hired Mr.
14 Falgione and it was also your family -- it was Otis,
15 is that correct --

16 A Right.

17 Q That's your father?

18 A That's my father.

19 Q -- that signed the fee agreement with Mr.
20 Breitbart, would you again trust your family in
21 making that decision?

22 A I didn't have any options.

23 Q So you did say, generally speaking, you
24 trust your family?

25 A Oh, yes, I trust my family.

1 Q Now, I believe you stated that you didn't
2 review the discovery page for page with Mr.
3 Breibart. Did you review the discovery at all, or
4 is that you're just saying you didn't giving over
5 each and every -- you didn't go over each and every
6 thing individually, is that what you're saying?

7 A We never pulled that pack of discovery out
8 and actually even went through the pages. We just
9 had general discussions about the contents of what
10 was in the discovery.

11 Q All right. And let's walk through this.
12 You got a letter that was addressed to you but sort
13 of done for the benefit of Jessica, correct?

14 A Right.

15 Q And in response to this letter, I believe
16 it was your testimony that you were tired of all the
17 things that had been going on about the harassment,
18 the previous threats, the incidents where I guess he
19 kicked the door?

20 A Right.

21 Q And sort of the letter was just I guess
22 the straw that broke the camel's back?

23 A Right.

24 Q So in response to this, you actively go
25 this property, get out of your truck, put a handgun

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1 in your pocket, and go to his door to end it, to end
2 the -- I guess the harassment?

3 A To talk to him about the harassment.

4 Q Okay. But you were prepared for some sort
5 of violence, correct?

6 A Only if he provoked it.

7 Q So -- but I am hearing correctly in that
8 you left your house to go to his. Once you got out
9 of the truck, you put a gun in your pocket and went
10 and knocked on his door, correct?

11 A Correct.

12 Q So essentially you started the
13 altercation, is that right?

14 A No. They started the altercation when he
15 tried to kick in the front door, all the other
16 things he did to me, and then sending us that card,
17 trying to create problems between me and my wife.

18 Q So you weren't in a position to where you
19 could stop the altercation after you got the letter?
20 I mean, that was the thing--

21 A I had repeatedly --

22 Q -- that you could do --

23 A I had repeatedly called the Sheriff's
24 Department about these problems, and they didn't
25 even respond.

1 Q Why didn't you seek a restraining order
2 after all this?

3 A The first incident report, at the bottom
4 of the incident report, states that there was a no
5 trespass order issued. I never contacted any of
6 those people. But if you'll read my wife's
7 statement, it states in there that they repeatedly
8 contacted us by telephone and e-mail after that no
9 trespass order was issued on that first incident
10 report.

11 Q No trespass order means they can't come on
12 your property, correct?

13 A They told us it was no -- can't go on your
14 property and no contact by any means whatsoever --
15 no letters, no phone calls, no e-mails.

16 Q Now, you stated that this was a situation
17 of self-defense. I guess my question is, he was
18 roughly the same size as you, right?

19 A That's what the paperwork says, but he was
20 larger than me, taller than me.

21 Q By an inch at most, correct?

22 A No, it was more than that.

23 Q Okay. Roughly the same weight as you?

24 A I think he was heavier than me.

25 Q Maybe at most, he was a year older than

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1 you?

2 A Right.

3 Q So what were you protecting yourself from?
4 If he had made threats about kicking your ass or if
5 he was charging you, why not just fight him? Why
6 pull a gun and shoot him?

7 A I'm not a fighter. I don't go around
8 threatening people. I don't have a history of
9 violence. I'm not the one who pulled the weapon on
10 Jessica's stepfather.

11 Q Did he pull a weapon on you?

12 A No, but there was a potential for it.

13 Q Now, you made the comparison to where
14 you're sitting on -- if you were sitting on
15 someone's couch and they were to attack you, would
16 that be self-defense? You weren't sitting on
17 someone's couch, were you?

18 A No.

19 Q You were standing several feet away from
20 him, correct?

21 A Right. But we were talking about an
22 example with Breibart.

23 Q And he was -- I guess by your own
24 testimony, he was shoving you in the back?

25 A Right.

1 Q And calling you a son of a bitch?

2 A No, he never called me a son of a bitch.

3 He told me to get the "f" off his property, is what
4 he told me.

5 Q Okay, fair enough.

6 A Repeatedly.

7 Q Shoving you in the back, telling you to
8 get the "f" off his property. Did this -- did that
9 create sufficient fear inside of you to where you
10 felt it necessary to pull a gun on the man and shoot
11 him?

12 A No. I only was fearful when he charged
13 me. And if you read my father's written statement,
14 at the bottom of that statement it states that when
15 I talked to him on the phone, I told my dad that
16 Tobias charged at me, and that's when I shot him.

17 Q Charged you not brandishing a weapon while
18 he was charging?

19 A No.

20 Q Okay. Now, I just have a couple more
21 questions here. I want to walk through the
22 transcripts, just things that happened at the guilty
23 plea proceeding.

24 A Okay.

25 Q And do you recall the Judge asking you if

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1 you were entering a guilty plea, was your decision
2 made of your own free will?

3 A Yes.

4 Q Do you recall saying yes?

5 A I remember.

6 Q And do you recall him explaining what the
7 negotiated plea was, and your saying you understand
8 it, and them saying, you know, "Did anyone promise
9 you anything else?" and your saying no?

10 A Right.

11 Q Okay. And do you recall him asking you if
12 you were satisfied with the representation provided
13 by your attorney and your response being "It's been
14 outstanding, sir"?

15 A I remember that. That was a huge mistake,
16 saying that.

17 Q And do you recall him asking if you were
18 guilty of the charge you were pleading to and your
19 saying yes?

20 A Yes.

21 Q Now, are you saying that -- I mean, based
22 on your testimony today, you had several complaints
23 throughout the process with Mr. Breibart's
24 representation. Is that a fair statement?

25 A Yes.

1 Q So why the representation to the Court
2 that his representation had been outstanding?

3 A I don't know -- just a lapse in thinking,
4 I guess.

5 Q Okay. That would be all my questions at
6 this time. Thank you.

7 REDIRECT EXAMINATION

8 BY MS. SHURLING:

9 Q All of the knowledge that you have now
10 obtained concerning self-defense and voluntary
11 manslaughter you have gained after the date of that
12 plea --

13 THE COURT: That's a plea on the record.

14 Q You referenced your father's statement to
15 the police. Did your lawyer ever talk to you --
16 once you told your lawyer it was self-defense and
17 you told him all about it, did your lawyer ever talk
18 to you about making a statement to law enforcement?

19 A No.

20 Q Did he ever suggest to you that it might
21 have been advisable for you to tell your side of the
22 story?

23 A I told him my side of the story. I
24 thought that was sufficient. I didn't know I had to
25 tell the law enforcement.

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1 Q But he didn't discuss with you whether it
2 would be advisable for you to give law enforcement a
3 statement?

4 A No, he never recommended it.

5 MS. SHURLING: May we approach?

6 THE COURT: Let me tell you that's not
7 responsive to the cross-examination. I've got
8 plenty of information here. I'll let you proffer
9 what you want to bring forward on this, but that's
10 not responsive to cross-examination. I've got a lot
11 here.

12 MS. SHURLING: Your Honor, in response to
13 a specific question from the respondent, he
14 mentioned his father's statement to law enforcement.

15 THE COURT: Your question is his
16 statement, whether his attorney asked him about him
17 giving a statement?

18 MS. SHURLING: Yes, sir, that's why I was
19 moving on.

20 THE COURT: Okay.

21 MS. SHURLING: I wanted to ask him to
22 identify his father's statement.

23 THE COURT: Okay, very well.

24 MR. LEE: I asked about Otis' signing a
25 fee agreement.

1 MS. SHURLING: Pardon?

2 MR. LEE: I asked about -- you're talking
3 about Otis Carter? I asked about him signing a fee
4 agreement, not a statement.

5 MS. SHURLING: In response to one of your
6 questions, the record will show that --

7 THE COURT: Go ahead.

8 MS. SHURLING: -- you mentioned the
9 father's statement.

10 THE COURT: Go ahead.

11 Q In response to a statement from -- a
12 question from the respondent a while ago, you
13 mentioned a statement signed by your father?

14 A Right.

15 Q Is this the statement you're referring to?

16 A Yes, that's it.

17 Q Okay.

18 MS. SHURLING: And have you seen this?

19 MR. LEE: Yes. I have no objection.

20 MS. SHURLING: Your Honor, I would move to
21 introduce this as Petitioner's Eleven.

22 THE COURT: Any objection?

23 MR. LEE: No objection, Your Honor.

24 THE COURT: Admitted without objection.

25 (Applicant's Exhibit Number Eleven,

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1 Statement of Otis Carter, was entered in evidence.)

2 Q Thank you. And I have no further
3 questions.

4 THE COURT: Thank you. You may step down,
5 sir.

6 MS. SHURLING: Your Honor, I just noticed
7 that Otis Carter's statement is for some reason --
8 it's apparently two one-page statements made at the
9 same time. I'll just introduce this as a separate
10 exhibit, what appears to be the second of two one-
11 page statements.

12 THE COURT: The same date?

13 MS. SHURLING: Same date, Your Honor.

14 THE COURT: That would be number twelve?

15 MS. SHURLING: Yes, sir. It actually
16 looks like the gentleman forgot something, and they
17 let him just do another little short one. But in
18 the interest of a clear record.

19 (Applicant's Exhibit Number Twelve,
20 Second Statement of Otis Carter, was entered in
21 evidence.)

22 THE COURT: Who is your next witness,
23 please?

24 MS. SHURLING: I'm going to call Mr. Otis
25 Carter very briefly, and then we will do a group

1 proffer on character and move on, Your Honor.

2 THE COURT: Very good, thank you, ma'am.

3 MS. SHURLING: Mr. Otis Carter.

4 (The witness was sworn.)

5 CLERK OF COURT: Have a seat and state
6 your name for the record, please.

7 OTIS EARL CARTER, having first been
8 duly sworn, testified as follows:

9 DIRECT EXAMINATION

10 BY MS. SHURLING:

11 Q State your full name, sir.

12 A Otis Earl Carter.

13 Q Mr. Carter, you are the father of the
14 applicant, Donald Carter?

15 A Yes.

16 Q And who's your wife?

17 A Ma'am?

18 Q Who is your wife?

19 A Bobbie O. Carter.

20 Q She's here in the courtroom -- well, she
21 was.

22 A She had to go pick up the grandkids.

23 Q Okay. Now, on the day of this shooting,
24 did your son call you?

25 A Yes, ma'am.

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1 Q And after he was taken to jail, did you
2 and your wife undertake getting him a lawyer?

3 A Yes, ma'am.

4 Q Did anyone else in the family assist you?

5 A Yes, ma'am.

6 Q Who was that?

7 A Billy Carter.

8 Q And who is Billy Carter?

9 A His brother.

10 Q Okay. And as a result of conversations
11 with Mr. Carter, you went to see Mr. Adrian
12 Falgione?

13 A Yes, ma'am.

14 Q Did you know anything about Mr. Falgione
15 other than the fact that he had represented these
16 people in previous civil actions?

17 A I knew nothing of it. I was going by
18 Billy's recommendation.

19 Q When you met with Adrian Falgione, did he
20 tell you that he did not actively practice criminal
21 law?

22 A He may have. I'm not positive.

23 Q Okay.

24 A But it was just the first meeting with
25 him.

1 Q Okay. Did you hire him and pay him at
2 that first meeting?

3 A No, sir -- no, ma'am.

4 Q That's okay. You can call me "sir."
5 After the first meeting, what happened next?

6 A About a few days or so later, he called
7 and wanted another meeting.

8 Q And --

9 A And the family attended.

10 Q Okay. And who attended that meeting?

11 A Adrian -- Mr. Falgione and Mr. Breibart.

12 Q Mr. Breibart -- Richard Breibart?

13 A Breibart, yes, ma'am.

14 Q And you and your wife were present?

15 A Yes, ma'am.

16 Q Was Donald present?

17 A No.

18 Q He was in jail, wasn't he?

19 A Yes, ma'am.

20 Q Okay. And at that time, what were you
21 told about why Richard Breibart was there? What was
22 he doing there?

23 A It was explained to us that he would take
24 over the case because he knew more about the
25 situation.

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1 Q He knew more about the situation. Did
2 they discuss his background, his experience?

3 A Yes, ma'am, his background.

4 Q Okay. And did you hire him at that
5 meeting?

6 A Yes, ma'am.

7 Q And did you pay him at that meeting?

8 A Yes, ma'am.

9 Q Did you ever have any discussion with your
10 son about who you were interviewing to represent him
11 before you hired Adrian and Mr. Breibart?

12 A No, ma'am. We couldn't speak to him.

13 Q You could not speak to him?

14 A No, ma'am.

15 Q Had you tried to visit him at the jail?

16 A We were told we couldn't speak to him at
17 the time.

18 Q Had he been able to call you?

19 A No, ma'am. We didn't find out about
20 setting up a system where he could call us.

21 Q Did either Mr. Breibart or Mr. Falgione
22 ever discuss with you the fact that they would need
23 to meet with your son and see whether or not he was
24 in agreement with having them as his attorneys --

25 A I think so.

1 Q -- before you reached an agreement and
2 paid him?

3 A Well, it was too late by that time. We
4 had already paid him.

5 Q So there was no discussion about your son
6 having a say-so about who he wanted as a lawyer?

7 A No, ma'am.

8 Q Was there any discussion about how the
9 fees were going to be split?

10 A No, ma'am.

11 Q Was there any discussion about what role
12 Mr. Falgione was going to have in the case?

13 A I can't remember exactly.

14 Q Okay.

15 A All I remember is that he was going to be
16 the lawyer to handle it.

17 Q "He," who?

18 A Mr. Breibart.

19 Q Thank you. No further questions.

20 THE COURT: Cross-examination?

21 MR. LEE: Nothing for this witness, Your
22 Honor.

23 THE COURT: You may step down, sir. Thank
24 you.

25 You have a group proffer of character

1 witnesses, is that correct?

2 MS. SHURLING: I do, Your Honor. What we
3 have established through testimony here today is
4 that the possibility of using character witnesses in
5 support of the defense was not discussed with the
6 applicant.

7 I believe that in order to meet the
8 prejudice prong of the errors and omissions
9 standard, I would also have to show prejudice. My
10 only way to do that is to demonstrate that had they
11 gone forward with a jury trial, such witnesses would
12 have been available.

13 I have a number of such people here
14 today. Rather than calling one at a time, which
15 could be extremely tedious and time-consuming, what
16 I would propose to do is ask the general question,
17 "Who among you is here today to testify that you
18 would have been available either as a witness
19 concerning the general positive character and
20 reputation in the community of Donald Carter, or as
21 someone familiar with his general reputation for
22 truth and veracity, or someone familiar with his
23 general reputation in the community for
24 peacefulness?" and so have those persons stand and
25 be sworn as a group.

1 THE COURT: Let's do it this way. If you
2 would call -- I know you know who you want to call.
3 Ask them just to stand, call their name, "If your
4 name is called, please stand." I'm going to swear
5 them. I'm going to let you ask your question. To
6 be clear, just say yes or no.

7 MS. SHURLING: Terrific. Just where they
8 stand, terrific.

9 THE COURT: Yes, ma'am.

10 MS. SHURLING: Mr. Leonard Jackson. Mr.
11 Jackson --

12 THE COURT: No, do the group, please. I
13 don't mean to cut you off, counsel. Just do the
14 entire group.

15 MS. SHURLING: Oh, do the entire group?

16 THE COURT: Yes, ma'am.

17 MS. SHURLING: Sorry. Carolyn Potter,
18 Laura Jackson, Brian Adams -- a moment's indulgence,
19 Your Honor -- David Hancock, Pamela Gleaton, David
20 Benton, Stuart Frazier, Billy Carter, Amy Carter,
21 Myra Carter, and, lastly, Vincent Carter. Pardon?

22 MS. CARTER: He left.

23 MS. SHURLING: He had to leave, okay.
24 These would be the individuals who are present, Your
25 Honor. Would you like to swear them as a group?

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1 THE COURT: I will be glad to. Would you
2 raise your right hand, please, ladies and gentlemen?

3 (The witnesses were sworn.)

4 THE COURT: Okay, now, ladies and
5 gentlemen, if you had been called to testify at
6 trial of Donald Carter, if in fact there was a
7 trial, were you prepared to speak of the general
8 good character and reputation of Mr. Carter, his
9 reputation for peacefulness, as well as his
10 reputation for truthfulness. If so, would you raise
11 your right hand?

12 For the record, that means all
13 witnesses called would testify along those lines.

14 Anything further?

15 MS. SHURLING: No, sir, Your Honor.

16 THE COURT: Okay, thank you, ladies and
17 gentlemen. You may sit down.

18 MS. SHURLING: Respondent?

19 MR. LEE: No questions for these
20 witnesses, Your Honor.

21 MS. SHURLING: Thank you. Your Honor,
22 that would constitute the applicant's case, other
23 than legal arguments.

24 THE COURT: Were you planning on calling
25 any witnesses?

1 MR. LEE: Your Honor, the only potential
2 would have been a recall of Mr. Breibart, who's
3 gone. But, no, the State has no witnesses.

4 THE COURT: Okay, I'll be glad to hear
5 from you.

6 CLOSING REMARKS

7 MS. SHURLING: Your Honor, we believe that
8 the applicant has met his burden of proof with
9 regard to his allegation that he received
10 ineffective assistance of counsel prior to and
11 during his guilty plea proceeding.

12 Specifically, as a threshold matter,
13 we would argue that he was deprived of the
14 opportunity to participate in the selection of his
15 attorney, that an attorney was initially hired by
16 his family, and that attorney then brought in
17 another attorney, Mr. Richard Breibart.

18 And it's clear that the applicant had
19 no participation whatsoever in that process. It is
20 equally clear that a sizable fee was paid in this
21 case and that the applicant was never involved in
22 any discussion as to whether or not he would consent
23 for both of these attorneys to be his defense
24 counsel, and in my view, more importantly, whether
25 he would consent to this sizable fee being split

1 with one attorney who had obviously very little
2 involvement in the case, making it -- creating a
3 situation whereby the attorney who had the primary
4 responsibility for defending him did not receive as
5 much -- received no more of the fee, according to
6 the testimony of the applicant, than the attorney
7 who simply referred the case.

8 I think that's a fundamental problem
9 from the beginning. The American Bar Association
10 has now developed ethical advisory opinions
11 concerning the attachment and retainer of attorneys,
12 and there's one such opinion -- I apologize, I don't
13 have the cite with me, but I can get it -- where the
14 American Bar Association has very specifically
15 recommended -- and I do in every case -- that if a
16 lawyer is hired by someone other than the client
17 that that client then signs a form document in which
18 he acquiesces to the selection of that lawyer as his
19 counsel and has explained to him that a third party
20 does not have the right to choose a lawyer for him,
21 that if the third party has selected an attorney
22 that he must then endorse that decision.

23 I do that in every case. The
24 American Bar Association recommends that it be done
25 in every case. And nothing close to that was done

1 in this case. Moving along to the actual
2 representation, it is clear in my judgment that the
3 applicant was represented by an able attorney with a
4 very good reputation in the legal community.

5 I don't dispute that. I think he's a
6 fair lawyer who's generally regarded highly for
7 representing his clients well. But it is clear --
8 equally clear in this case -- that defense counsel
9 for some reason was so focused on the fact that
10 there would have been a better self-defense claim
11 had this taken place on Mr. Carter's soil that he
12 did not fully and adequately explain to Mr. Carter
13 the circumstances under which he could still have a
14 viable claim for self-defense, even though this
15 occurred in the yard of the Tobias home as opposed
16 to the Carter home, number one.

17 It's equally clear to me that defense
18 counsel failed to explain to Mr. Carter that it
19 wouldn't simply be his word standing alone for the
20 proposition that this was self-defense, that he
21 would under our laws have the opportunity to present
22 testimony and evidence that would establish that
23 there was a reasonable basis for his fear that he
24 might be subjected to great bodily injury or harm at
25 the hands of Mr. Wesley Tobias if he did not defend

1 himself.

2 We've demonstrated that such evidence
3 existed, that Jessica, the daughter of the victim,
4 had warned her then-boyfriend, subsequently now-
5 husband, that her father had a reputation for
6 violence, that she had seen him engaged in physical
7 altercations with other family members, and that she
8 was afraid he would harm her husband.

9 Additionally, it's clear that there
10 was not adequate discussion with the defendant as to
11 how they could use the fact that there were previous
12 incidents on November 19th and December 1st wherein
13 the deceased tried to kick in the door to the family
14 home at the Carter residence and on December 1st,
15 very shortly before the killing, had specifically
16 told his daughter that if he caught the defendant
17 out in public, the applicant out in public, he would
18 kick his "a" or kill him.

19 It should have been discussed with
20 the applicant clearly what use the defense could
21 have made of that testimony to bolster the
22 credibility of his assertion of self-defense.
23 Additionally, we would argue that this is a
24 gentleman with a spotless record, a positive career,
25 no trouble with the law, and that defense counsel

1 should have explained in full detail to his client
2 the ways in which they could use that spotless
3 record and witnesses to his general reputation for
4 peacefulness and veracity in the community as yet
5 another leg to build up the strength of that self-
6 defense claim.

7 It's clear from the testimony of Mr.
8 Donald Carter that those things were not explained
9 to him in detail and that, had they been explained
10 in detail, it would have made a difference in his
11 decision to waive his right to jury trial and plead
12 guilty.

13 Equally important, it's clear from
14 the testimony of Donald Carter that no one had ever
15 adequately explained to him the distinctions between
16 the definitions of murder and voluntary manslaughter
17 and that, had he received adequate advice concerning
18 the law as it relates not just to self defense but
19 also voluntary manslaughter, that he would have been
20 less afraid of proceeding to trial, would have felt
21 more confident that this case was at worst voluntary
22 manslaughter and at best self-defense, which would
23 have emboldened his ability to make the decision to
24 exercise his right to trial by jury.

25 We believe that all of these factors

1 combined together with -- and, Your Honor, there
2 have been multiple smaller points made throughout
3 the day, but I know Your Honor will recall and take
4 into consideration. I'm not trying to recount the
5 whole day's testimony. But that's the large picture
6 here.

7 I believe that there's a per se
8 violation of his Sixth Amendment rights when a
9 lawyer is picked for him, and those lawyers do not
10 make it clear to him that he has a right to
11 participate in the selection of his attorney.

12 And then having said that, I believe
13 the larger question is whether or not we've met the
14 standard under Strickland versus Washington and
15 Butler v. State and their progeny concerning errors
16 and omissions. And I believe that we have.

17 And for that reason, Your Honor, I
18 would sincerely pray that you would grant Mr. Carter
19 the chance to have a new trial.

20 THE COURT: Thank you, ma'am.

21 Mr. Lee?

22 CLOSING REMARKS

23 MR. LEE: Thank you, Your Honor. I'll try
24 to be brief. This is a threshold matter. As Ms.
25 Shurling adequately stated, Mr. Breibart is an

1 experienced criminal attorney in this area. He does
2 have an outstanding representation for being a good
3 attorney.

4 And even the applicant stated, you
5 know, in part and parcel with his testimony that Mr.
6 Breibart apparently claimed that he was only being
7 paid so much, according to the applicant's
8 testimony.

9 He still said that he would do his
10 best job representing him, represent him to the best
11 of his ability. And just as a top-off to all that,
12 Mr. Carter stated in his guilty plea proceeding not
13 only that he was satisfied with the services of his
14 attorney but that his attorney had done an
15 outstanding job for him.

16 So even if you could somehow
17 establish that he should have been allowed to
18 participate in the selection of his attorney with
19 his parents -- along with his parents -- the State
20 would argue that with respect to that, there's no
21 resulting prejudice because even by the applicant's
22 own admission, said attorney had done an outstanding
23 job.

24 Secondly, the record will bear out
25 before this Court that the guilty plea was entered

1 freely, intelligently, knowingly, and voluntarily.
2 The applicant stated that he was entering it of his
3 own free will, that he had not been promised
4 anything other than the negotiated plea, that he
5 hadn't been threatened, or coerced, or forced into
6 doing it, and that he was guilty of the charges
7 against him, and that he was fully satisfied with
8 his attorney.

9 That is all borne out in the record
10 that is before Your Honor. So you'll see that the
11 guilty plea was voluntarily and freely entered. A
12 validly entered guilty plea waives all non-
13 jurisdictional defenses, and the State would submit
14 that this is a validly entered guilty plea.

15 So you kind of get away from all the
16 questions about, "Well, could he have done a motion
17 to suppress?" etc., etc. Speaking specifically to
18 the weight of the evidence with regard to a claim of
19 self-defense, the State would submit that the record
20 before the Court today, based on the testimony in
21 the guilty plea transcript, will show that the
22 weight of the evidence was against the applicant at
23 all times.

24 When you look at a self-defense
25 claim, you look at things like you cannot start the

1 altercation, you must retreat from what's going on,
2 you must respond with light force, for lack of a
3 better word. None of those things are present here.

4 There are certain things in the past.
5 There were previous threats made. There was
6 apparently some brandishing of a weapon against
7 someone else. But those things, while they do go
8 towards self-defense, you still have to have those
9 other elements. So while he might have had a
10 possible self-defense claim, frankly, it was a weak
11 one.

12 And his attorney communicated that to
13 him and said, you know, "We can forward on self-
14 defense, but we have this plea," based on the
15 attorney's testimony, "that might work out better
16 for you and would give you a definite date to go
17 home."

18 And he communicated that to the
19 applicant, said the applicant was a very intelligent
20 man, and the applicant made his own decision, his
21 own free and voluntary decision to do so. With
22 regard to the specific discussions such as
23 discussion of the discovery, discussion of the
24 definition of murder and voluntary manslaughter,
25 involuntary manslaughter, and self-defense, the

1 State would just submit that ultimately that's a
2 question of credibility.

3 You know, you have the attorney,
4 again, who's got a good reputation in town, who's
5 all these things. He even submitted a letter to the
6 Court in evidence -- I guess Ms. Shurling introduced
7 that -- in which he detailed all the various things
8 he had done throughout his representation.

9 And it also mentions the parties'
10 intent, the parties' conduct, things relating to
11 self-defense. So it comes down to a question of
12 credibility. Do you believe the attorney's
13 testimony, or do you believe the applicant's?

14 And I'm not here to say that the
15 applicant is not a peaceful man. There's a very --
16 I believe him when he says he's a peaceful man. I
17 believe his family and the people in the audience
18 when they said that he was a peaceful man.

19 But there are peaceful people in the
20 world every day who reach their breaking point, and
21 they do non-peaceful things. So the fact that he
22 was a peaceful man in the past, that alone would not
23 make a self-defense case.

24 The State would just submit that Mr.
25 Breibart weighed all of the evidence, communicated

1 that with the applicant, and ultimately the
2 applicant made a free and knowing decision to enter
3 a guilty plea.

4 In sum, the State would submit that
5 the applicant has not been able to prove ineffective
6 assistance of counsel. And even if he somehow had
7 been able to prove ineffective assistance of
8 counsel, he has not been able to prove resulting
9 prejudice, because ultimately counsel was able to
10 get the original charge of murder down to a
11 voluntary manslaughter plea.

12 And on top of that, it wasn't even a
13 maximum sentence. It was for ten years less than
14 that. So the State would submit that the
15 applicant's petition for post-conviction relief
16 should be denied. Thank you.

17 THE COURT: Yes, ma'am?

18 MS. SHURLING: Briefly, Your Honor, with
19 regard to the respondent's position that self-
20 defense always has to be responding to the type
21 force, the case law is replete with examples of --

22 THE COURT: All right.

23 MS. SHURLING: Okay. With regard to Mr.
24 Breitbart being a good lawyer, I've said and I'll
25 stick to it, but all God's children make mistakes.

1 And just because someone is a good lawyer doesn't
2 mean they didn't on the particular facts of a case
3 fall short of even their own normally high
4 standards.

5 And we believe that in this case, Mr.
6 Breibart did unfortunately. And sort of a bad
7 situation arose with the fact that Adrian Falgione
8 was originally hired, and Mr. Breibart was brought
9 in, you know, recognize that all of that was
10 somewhat awkward and a little confusing in the
11 beginning, and that maybe contributed to a situation
12 with the client not having adequate involvement in
13 the selection process.

14 The problem exists nevertheless. And
15 I have to tell you. Your Honor knows I do probably
16 more retained PCR work than any lawyer in this
17 state. I hate those questions at guilty pleas,
18 where they ask the client if he's satisfied with his
19 lawyer's services.

20 I would ask Your Honor, you during
21 the proceeding said you were aware before I even
22 opened my mouth, as always, that's based on the
23 knowledge the person has at the time he's asked the
24 question. And obviously he has testified here today
25 that if he had known everything that he has learned

1 through my representation at the time of the plea,
2 he would not have pled.

3 And I would assert to you that his
4 statement that he was satisfied with his lawyer or
5 even thought his lawyer was doing a good job was
6 likewise based on the knowledge he had at the time.
7 And he clearly didn't have the degree of knowledge
8 he needed to have and I would dare say would not
9 have said he was satisfied if he did. Thank you.

10 THE COURT: Thank you, ma'am.

11 All right, counsel, I want to thank
12 both of you for being so fair to put on a case like
13 you did. I am going to take this matter under
14 advisement. I'm going to read my notes through
15 again. I've read all the submissions from the
16 State, but I want to go back through and really make
17 sure that I'm intimately familiar with the facts
18 before I make a decision.

19 That being said, I'm going to speak
20 out to the gallery, for lack of a better term. I'm
21 going to remind that there's not to be any
22 interaction amongst both sides of this case. I
23 understand the strong feelings one way or the other.

24 Since the left side of the courtroom
25 went out first at lunchtime, I'm going to ask the

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1 right side to leave first, and I'm going to ask the
2 left side of the courtroom to remain seated.

3 Remember that there's no actual
4 prohibition that accompanies you throughout your
5 leaving this premises and your leaving to your
6 homes. Thank you for being here. You've been here
7 all day. Thank you.

8 MS. SHURLING: Your Honor, if I might add
9 that the family members that want to talk to me,
10 I've got a mad dash to court in Richland County.
11 I'll be in my office tomorrow. Please feel free to
12 call me with any questions you have. Thank you.

13 MR. LEE: Thank you, Your Honor.

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

COURT REPORTER'S CERTIFICATION

I, REMA K. GANTT THOMAS, OFFICIAL COURT
REPORTER, AND NOTARY PUBLIC IN AND FOR 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 ABOVE-CAPTIONED CASE ON FEBRUARY
1, 2011, IN LEXINGTON, SOUTH CAROLINA.

I FURTHER CERTIFY THAT I AM NEITHER OF COUNSEL
NOR KIN TO ANY OF THE PARTIES TO THIS CAUSE OF
ACTION, NOR AM I INTERESTED IN ANY MANNER IN ITS
OUTCOME.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND
AND SEAL AT LEXINGTON, SOUTH CAROLINA, THIS THE
ELEVENTH DAY OF MAY, 2011.


REMA K. GANTT THOMAS
OFFICIAL COURT REPORTER
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES 11/31/2013

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

Donald Carter, #325307,

Applicant,

v.

State of South Carolina,

Respondent.

2008-CP-32-2149

ORDER OF DISMISSAL

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed May 22, 2008. Respondent made its Return on November 10, 2008. An evidentiary hearing into the matter was convened on February 1, 2011 at the Lexington County Courthouse. The Applicant was present at the hearing and was represented by Tara D. Shurling, Esquire. The Respondent was represented by A. West Lee of the South Carolina Attorney General's Office.

At the hearing, the Applicant offered the testimony of Richard J. Breibart, Esquire, (Mr. Breibart), Jessica Carter (Ms. Carter), Otis Carter (Otis Carter), and a group testimony from Leonard Jackson, Carolyn Potter, Laura Jackson, Brian Adams, David Hancock, Pamela Gleaton, David Benton, Stuart Frazier, Billy Carter, Amy Carter, and Myra Carter, as well as Applicant's own testimony. The State did not offer any witness testimony. This Court also had before it the records of the Lexington County Clerk of Court, the transcript of the proceedings against the Applicant, and the Applicant's records from the South Carolina Department of Corrections.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Applicant was indicted at the September 2005 term of the Lexington County Grand Jury for murder (2005-GS-32-3001). The Applicant was represented by Richard J. Breibart, Esquire. On November 26, 2007, Applicant pled guilty to voluntary manslaughter. The Honorable James W. Johnson, Jr., sentenced him to confinement for a period of twenty (20) years for voluntary manslaughter. The Applicant did not appeal his conviction or sentence.

In his current application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel;
 - a. Applicant received Ineffective Assistance of Counsel prior and during his plea in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14 of the South Carolina Constitution.
 - b. Trial counsel failed to adequately investigate the Applicant's charge, failed to investigate and interview potential witnesses and failed to give his client adequate legal advice prior to the Applicant's guilty plea proceeding.
2. Involuntary Guilty Plea.
 - a. The judgment and sentence against the Applicant were entered in violation of his rights pursuant to due process of law, and effective assistance of counsel.
 - b. Applicant's guilty plea was coerced by counsel's failure to provide adequate representation.

II. SUMMARY OF TESTIMONY AND EVIDENCE PRESENTED AT THE PCR EVIDENTIARY HEARING

Mr. Breibart's Testimony

Mr. Breibart testified he was obtained as counsel for the Applicant through another attorney, Adrian Falgione, around February 2005. (Tr. p.12, lines11-18). He testified Mr. Falgione was contacted by the Applicant's family but Mr. Falgione did not want to take the case by himself. (*Id.*) Mr. Breibart testified that the Applicant's father signed a fee agreement for services that he was to render for the Applicant. (Tr. p. 16, lines9-21). He testified that he met with the Applicant twenty-six times (26) and had forty-two (42) telephone conversations. (Tr. p 2, lines5-10). Mr. Breibart testified that he met with the Applicant frequently. (Tr. p. 60, lines11-25). Mr. Breibart testified that he documented each meeting with the Applicant and he also documented notes for his preparation of the Applicant's case. (Tr. p.23, lines6-10). Mr. Breibart testified that he examined maps with the Applicant of where the shooting took place and also the issue of self-defense. (Tr. p.25, lines2-6). Mr. Breibart further testified that he and the Applicant discussed potential affirmative defenses, elements of crimes, whether he was on someone else's property, the Applicant's duty to retreat, his location during the incident, and the choice of weapon used. (Tr. p.25, line23 – p.26, line6). He testified that he informed the Applicant that if he raised self-defense then the State would have to disprove it. (Tr. p.28, lines4-20). Mr. Breibart testified that even though the Applicant had a self-defense case, it was not likely that the jury would rule in his favor based on the facts he was given. (Tr. p.85, lines6-14).

Mr. Breibart testified that the discovery material he received from the State revealed the deceased victim and the Applicant had a violent previous history. (Tr. p.31, lines16-21). He testified that there were other police reports about the violent verbal threats between the

Applicant and the victim. (Tr. p.37, line5 – p.38, line1). Mr. Breibart testified that he recalled a statement written by Jessica Carter concerning a letter, allegedly was written by her father to Mr. Carter, which sparked the events that lead up to Mr. Tobias' death. (Tr. p.42, lines5-16). He testified that the letter allegedly revealed that Mr. Carter said something inappropriate to a woman at a tanning salon. (Tr. p.45, lines5-10). He testified that the victim was unhappy that the Applicant was seeing his daughter and especially the fact that they were both married to other people while they were living with each other. (Tr. p.30, lines5-13). Mr. Breibart testified that there was never a dispute that someone on the Victim's side of the family sent the card to Jessica. (Tr. p.44, lines8-24). He testified that information came out during a bond hearing. (Tr. p.45, lines11-17).

Mr. Breibart testified that he informed the Applicant that the only eye witness, Lisa Tobias, did not admit that she or the Victim that they sent the letter to Jessica. (Tr. p.48, line16 – p. 49, line3). Mr. Breibart testified that he informed the Applicant his chances would be much greater for a self-defense claim had they been on his property and not the Victim's. (Tr. p.49, lines11-15). Mr. Breibart further testified that he even paid for aerial maps in order to locate exactly where the incident took place because the Applicant and the Victim lived relatively close to each other. (Tr. p.49, line19 – p.50, line3). He testified he thought the Applicant's location when the shooting occurred was significant for two reasons: 1) there has to be an objective view of a clear and present danger; and 2) the standard for self-defense is different for the Applicant if he was on his own property. (Tr. p.49, line24 – p.50, line7). Mr. Breibart testified that he investigated other evidence that led to a conclusion that the Victim had a short temper. (Tr. p.51, line20 – p.52, line1). Mr. Breibart testified that his trial strategy was to get the Applicant out of jail on bond for the longest time period possible because he thought it would give the Applicant

the best chance to raise self-defense. (Tr. p.56, line24 – p.57, line4). He testified that if they had gone to trial he planned to have Judge Keesley testify in regards to his opinion that the Victim and or his family was deceitful in sending the card to Jessica. (Tr. p.58, lines2-7).

Mr. Breibart testified that he and the prosecution discussed different pleas and he explained to the prosecution that it was his client's decision to make. (Tr. p.72, lines4-22). He testified he spoke with the Applicant and Jessica about the plea offers and discussed different sentencing situations. (Tr. p.73, lines4-20). Mr. Breibart testified that he told the Applicant his odds of being convicted of voluntary manslaughter, murder, and not guilty. (Tr. p.74, lines14-24). He further testified that he explained to the Applicant the judge may give a greater sentence and his entire background may be presented before the court. (Tr. p.75, lines6-16). Mr. Breibart testified that he discussed with the Applicant different issues he believed the State would use against him and that is why he did not "push [his] character into evidence." (Tr. p.99, lines1-16). Mr. Breibart testified that he explained to the Applicant the sentence ranges and percentages of a voluntary manslaughter plea. (Tr. p.99, lines17-25). Mr. Breibart testified that he informed the Applicant he had a ten to twenty percent chance of being found not guilty. (Tr. p.109, lines17-23). He testified that he told the Applicant the sentence ranges because the Applicant specifically wanted an exact date and time. (*Id.*). Mr. Breibart testified that he discussed with the Applicant the benefits and drawbacks of taking a plea versus going to trial. (Tr. p.110, line12-15). He testified that the Applicant made the decision to plead guilty. (Tr. p.110, lines6-8). Mr. Breibart testified that if the Applicant decided not to plead, he could have conducted additional research to prepare for trial, if need be. (Tr. p.111, line20 – p.112, line9).

Ms. Carter's Testimony

Ms. Carter testified that she was informed Mr. Breibart was involved with the

Applicant's case shortly after Adrian Falgione was hired. (Tr. p.130, line25 – p.131, line6). She testified she joined several meetings with Mr. Beibart and the Applicant and explained how violent her father had become towards the Applicant. (Tr. p.131, lines7-11).

Ms. Carter testified that she was not married to the Applicant or to anyone else at the time of the shooting. (Tr. p.124, lines6-11). Ms. Carter testified that she and the Applicant lived next to her father and step mother for about three years prior to the shooting. (Tr. p.126, lines4-8). She testified that the relationship between her father and the Applicant turned bad around September 2004. (Tr. p.126, lines-9-14). Ms. Carter testified that the Victim started acting violently towards the Applicant after the family returned back from vacation. On one incident around November 19th the Victim came to Ms. Carter and Applicant's house and beat and kicked the door while threatening the Applicant. (Tr. p.127, line11 – p.128, line5). Ms. Carter testified that after an incident with her father and the Applicant, she gave a statement to law enforcement saying her father had on a previous occasion said he would kill the Applicant. (Tr. p.128, lines12-18). Ms. Carter testified that she informed the Applicant of the occasions in which her father acted violently towards other members of her family. (Tr. p.129, lines1-22). Ms. Carter testified about one event in which her father was armed with a weapon and seemed very upset towards her stepdad. (Tr. p.134, line8 – p.135, line1). Ms. Carter testified that she was afraid that her father would harm the Applicant and she expressed her concern to the Applicant. (Tr. p.130, lines5-10).

Ms. Carter testified about the incident that led up to the shooting. (Tr. p.135, lines5-9). She testified that she and Applicant got into a big argument after receiving a letter, which suggested an extramarital relationship. (Tr. p.135, lines13-20). Ms. Carter testified that when the Applicant read the letter he said "I know or I have an idea who's behind it," referring to her

father. (Tr. p.135, line21 – p.136, line3). She testified that the Applicant purchased a gun and she thought it was for protection against her father because of the events that recently took place. (Tr. p.136, lines4-14). Ms. Carter further testified that she had never seen her father threaten or brandish any weapons at the Applicant nor did she see her father physically strike the Applicant. (Tr. p.137, lines1-6). She also testified that her father was approximately the same physical size as the Applicant and that it would probably have been an even matchup between the two. (Tr. p.137, lines8-21).

Applicant's Testimony

The Applicant testified that he did not know that his family hired a lawyer to represent him until Mr. Falgione visited him at the Lexington County Detention Center. (Tr. p.140, lines6-23). He testified that at a meeting a week later with Mr. Falgione, he met Mr. Breibart, who explained to Applicant that he would be handling the case. (Tr. p.141, lines1-20). The Applicant testified that he never formally gave permission to Mr. Breibart to represent him. (Tr. p.142, lines16-23). The Applicant testified he was out on bond starting in May 2005. (Tr. p.142, line24 – p.143, line2). He testified that during his time out on bond, he met with Mr. Breibart monthly for about five months and then Mr. Breibart met with him occasionally after that. (Tr. p.143, lines9-15). The Applicant testified that Mr. Breibart did not meet with him often after the roll call meetings ended. (Tr. p.144, lines9-23). The Applicant testified after a year of no contact with Mr. Breibart or anyone from his office Applicant received a “panicky” phone call from one of Mr. Breibart’s secretaries, who requested that Applicant come to the office. (Tr. p.144, line24 – p.145, line12). He testified that Mr. Breibart never sat down with Applicant to review the discovery materials in detail. (Tr. p.148, lines9-14).

The Applicant testified that he informed Mr. Breibart that he shot the victim out of self-

defense but Mr. Breibart focused on the "duty to retreat" concept instead. (Tr. p.148, line15 – p.149, line7). He explained that Mr. Breibart never explained to him the burden will shift to the State if he claimed self-defense. (Tr. p.149, lines17-24). The Applicant testified that every time he explained to Mr. Breibart essentials that he believed to be relevant to his case, Mr. Breibart would pass it off as if it had no significance. (Tr. p.150, lines7-10). He testified that he told Mr. Breibart about the prior violent threats from the Victim and he purchased a hand gun in response to those threats. (Tr. p.151, line2 – p.152, line1). The Applicant testified that he told Mr. Breibart that Jessica informed Applicant that the Victim threatened to kill him. (Tr. p.152, lines2-9). The Applicant testified that Mr. Breibart informed him he had a slim chance of getting a jury of his peers and if he did not get a jury of his peers then he would have a small chance of establishing self-defense. (Tr. p.152, lines10-18).

The Applicant testified that he discussed with Mr. Breibart where he was standing when Applicant fired a bullet at the Victim. (Tr. p.153, lines3-10). He testified he was standing over his vehicle at the time the Victim charged at him and he did not have time to get his keys out and unlock the door to his vehicle. (Tr. p.153, line8-20). The Applicant testified that he did not deliberately get his pistol from his house when he went to confront the Victim. He testified that he kept the pistol in the consol of the truck and he put it in his jacket when exiting the vehicle because of the prior violent incidents and threats from the Victim. (Tr. p.154, line3 – p.155, line7).

The Applicant testified that he contacted the Lexington County Sherriff's Department on several occasions and they refused to write an incident report because an officer did not witness anything. (Tr. p.155, lines8-16). He further testified that he purchased a motion detector video camera and recorded "them coming by the house, blowing the horn, yelling obscenities, doing

everything else they did in front of our house.” (Tr. p.155, lines17-21). The Applicant testified that he is not sure where the video was because he gave it to Jessica to give to Mr. Breibart or Mr. Falgione. (Tr. p.155, lines22-25). The Applicant testified that he put his house on the market during the confrontation in order to let the situation between the Victim and himself cool down. (Tr. p.156, lines1-9). He testified that he went to the Victim’s house because he was tired of all of the harassment and threats from the Victim. (Tr. p.156, lines13-22). The Applicant testified that he knew the letter sent to Jessica was from the Victim. (Tr. p.157, lines15-19).

The Applicant testified that when he arrived at the Victim’s home he knocked on the door and the Victim’s wife said “come in.” (Tr. p.158, line20 – p.159, line2). The Applicant testified that he confronted the Victim about the card. (Tr. p.159, lines3-4). The Applicant testified that as he came in the Victim’s home, the Victim came around the corner. At that point, the Victim’s wife grabbed the telephone and walked into the other room. The Victim told the Applicant to get out of his house and as the Applicant walked out of the house, the Victim shoved him. The Applicant then walked to his vehicle and then asked the Victim if they could talk about all the harassment. (Tr. p.160, lines7-8). The Applicant testified that the Victim then charged at him and then he shot the Victim. (Tr. p.160, lines8-14).

The Applicant testified that he relayed the same information to Mr. Breibart that he testified to at the PCR hearing. (Tr. p.160, lines15-17). He testified that he was never informed by Mr. Breibart about the sentence for murder, he was only informed about voluntary manslaughter. (Tr. p.161, lines2-17). The Applicant testified that Mr. Breibart explained to him the Solicitor’s Office would show photographs from the autopsy and it did not matter what his case was because he had a very little chance of winning. (Tr. p.162, lines2-8). He testified that Mr. Breibart never discussed with him he could make a motion to prohibit the State from

introducing gruesome photographs or that he could introduce the Victim's previous threats. (Tr. p.162, lines9-24). The Applicant testified that Mr. Breibart never discussed with him that they could use character witnesses to testify on his general reputation of being a peaceful or violent man. (Tr. p.163, lines4-23). He testified that he did not understand the various degrees of homicide while he was represented by Mr. Breibart. (Tr. p.166, lines12-20). The Applicant further testified that if he had a better understanding of the requirements for finding voluntary manslaughter versus murder, he would have been less hesitant to go to trial. (Tr. p.167, lines11-15). The Applicant testified that if he knew the definition of voluntary manslaughter and the evidence courts historically accepted, he would not have given up his right to a trial by jury. (Tr. p.167, lines16-24). The Applicant testified that he has an associate degree in engineering, has never been arrested, and has never had any prior problems with the law. (Tr. p.168, lines1-13). The Applicant testified that if he could have gotten his family's money back from Mr. Breibart, he would have researched and sought an attorney on his own. (Tr. p.169, lines7-17). He further testified that he believes that because Mr. Falgione received a portion of the fees, it affected the quality of representation that he received from Mr. Breibart because he was always complaining he was not getting paid enough. (Tr. p.169, line22 – p.170, line8).

The Applicant testified that he decided to plead guilty after Mr. Breibart's office urgently contacted him to come to his office. (Tr. p.171, lines8-15). He testified that he went with the negotiated sentence of twenty-years because he knew he would save at least ten years off of the largest sentence. (Tr. p.172, line14-17). He further testified that had he gone to trial he did not feel like Mr. Falgione or Mr. Breibart would have been prepared to handle a proper self-defense argument. (Tr. p.172, line23 – p.173, line4). The Applicant testified that he requested from Mr. Breibart phone records to prove that the Victim's wife was on the telephone during the shooting

but Mr. Breibart told the Applicant he did not get the records. (Tr. p.176, lines4-16).

Otis Earl Carter's Testimony

Otis Carter testified that the Applicant called him after the shooting occurred. (Tr. p.190, lines23-25). He testified that after the Applicant was taken to jail, he and his wife sought the services of an attorney and their son, Billy Carter, recommended Mr. Falgione. (Tr. p.191, lines1-13). Otis Carter testified that it was during the second meeting with Mr. Falgione that they met Mr. Breibart, who would take over the case because he was more familiar with the situation. (Tr. p.192, lines6-25). Otis Carter testified that Mr. Breibart, during their first meeting, discussed his credentials and background and subsequently they decided to hire him to represent the Applicant. (Tr. p.193, lines1-8). Otis Carter testified that they never discussed with the Applicant who they were interviewing to represent him because they were unable to speak with the Applicant. (Tr. p.193, lines9-12). Otis Carter testified that there was neither any discussion about whether the Applicant would have a say so in who was representing him nor how the attorney's fees were split between Mr. Falgione and Mr. Breibart. (Tr. p.194, lines5-7).

Group Testimony

The group, compiled of Leonard Jackson, Carolyn Potter, Laura Jackson, Brian Adams, David Hancock, Pamela Gleaton, David Benton, Stuart Frazier, Billy Carter, Amy Carter, and Myra Carter, testified that they are willing and prepared to speak of the Applicant's good character, reputation among the community, his reputation for peacefulness as well as his reputation for truthfulness. (Tr. p.197, lines4-13).

III. APPLICABLE LAW

Ineffective Assistance of Counsel

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441,442, 334 S.E.2d 813, 814 (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 function of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984)

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, 466 U.S. at 690. 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 trial 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, 466 U.S. 668). 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. With respect to guilty plea counsel, the Applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

Involuntary Guilty Plea

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the applicant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984). The transcript reflects that the guilty plea was knowingly and voluntarily entered with a full understanding of the charges and consequences of the plea. Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, [an Applicant's] right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63 (1977). Statements made during a guilty plea should be considered conclusively, unless an [an Applicant] presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975) *overruled on other grounds by* U.S. v. Whitley, 759 F.2d 327 (4th Cir. 1985).

An Applicant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that trial counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for trial counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993). Given the Applicant's burden of proof and the analysis to be applied to this claim, the Applicant's claim of involuntary plea is, in essence, a claim of ineffective assistance of counsel, and it will be treated as such.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcript and documents from the prior proceedings, the exhibits introduced into evidence at the hearing, and legal arguments of counsel. Pursuant to S.C. Code Ann § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

1. Ineffective Assistance of Counsel

This Court finds the Applicant failed to meet his burden of proof as to ineffective assistance of counsel. This Court finds the Applicant's allegations that counsel was ineffective because counsel failed to adequately investigate the Applicant's case is without merit. The Applicant alleges his counsel failed to adequately interview potential witnesses and failed to give proper legal advice prior to the plea proceeding. In assessing an attorney's investigation, "a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. Strickland does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy." Wiggins v. Smith, 539 U.S. 510 (2003). "A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland v. Washington, 466 U.S. 668, 689 (1984).

Specifically with regards to Applicant's complaint concerning the issue of self-defense, this Court finds that Applicant and counsel had in-depth and detailed discussions about Applicant's claim of self-defense. Counsel testified that Applicant told him the Victim had never gotten physical with Applicant prior to the incident (Tr. p.105, lines9-12), and that objectively, there was not a threat made to Applicant's life by the Victim during the incident. (Tr. p.107, lines4-10). Counsel explained the elements and reasoning behind self-defense and also explained the potential downside of opening the door for the prosecution with respect to Applicant's personal conduct. (Tr. p.108-109, line14; p.54, lines2-21). Counsel testified that he told Applicant that based on his professional experience that Applicant had a chance of prevailing on a self-defense claim. (Tr. p.55, lines19-25). Counsel further testified that he and the Applicant discussed the chances of prevailing on a self-defense claim, particularly in regards to the burden of proof and where the Applicant was standing when the gun went off (Tr. p.74, lines14-19), as well as the potential difficulties with the self-defense claim based on the evidence. (Tr. p.80, lines4-18). Counsel testified that Applicant provided him with the location of where Applicant was standing when Applicant shot the gun and upon investigating the location with a GPS, counsel discovered the location was nowhere near the Victim's house, and that was the problem with the self-defense case. (Tr. p.86, lines6-14). This Court finds that counsel discussed with the Applicant the opportunity to present favorable character evidence as well as the state's opportunity in response to present unfavorable character evidence. (Tr. p.97, line20 – 98, line5). This Court finds Applicant was fully apprised of the nature of his self-defense claim and all of the evidence concerning said claim. Counsel and Applicant were able to meet numerous times and thoroughly cover the evidence, facts, and circumstances in relation to Applicant's claim of

self-defense. This Court finds that counsel's performance, specifically with respect to Applicant's self-defense claim, was not deficient.

This Court further finds that counsel investigated and handled the Applicant's case in a way that a reasonable attorney would. Applicant's counsel had full and lengthy conferences with the Applicant and his family members during which counsel discussed the nature of the charge, possible sentences, the Applicant's version of the facts, and possible defenses or lack thereof. Counsel's investigation of the Applicant's case included the purchasing of maps where the incident took place, obtaining evidence that would support self-defense, and investigating the Victim's past aggressive behavior. Furthermore, counsel testified that he and the Applicant reviewed the discovery materials, which included police report, discussed eyewitness Lisa Tobia's possible testimony, and counsel's potential witness, Judge Keesley.

This Court finds that, contrary to Applicant's claim, counsel conducted an investigation into the Applicant's case and the Applicant's assertions are mere speculation. Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result. Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998). To establish counsel failed to adequately prepare for trial, Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). Here, the Applicant did not present any evidence of what counsel failed to discover or other defenses that could have been pursued had counsel more fully prepared. This Court finds there has been no showing by the Applicant of what counsel could have discovered based upon additional investigation. Id. This Court finds that Applicant has failed to meet his burden of showing that counsel was deficient in his investigation; therefore this allegation is denied and

dismissed.

2. Ratification of Retainer Agreement

This Court finds that counsel's testimony that the Applicant's family contacted Mr. Falgione to represent the Applicant and subsequently Mr. Falgione asked counsel to take over the case because he was more seasoned at litigating criminal cases to be credible. (Tr. p. 12, lines 11-18). Counsel testified that the Applicant's father signed a fee agreement for counsel's services. (Tr. p. 16, lines 9-21). This Court finds that the Applicant ratified the retainer agreement to include his father to act on his behalf. This Court finds the Applicant signed counsel's letter that was submitted into evidence, acknowledging counsel's efforts on his behalf. This Court finds that exhibit three at the PCR hearing to be a letter signed by the Applicant of the services, fees, and agreement he received from Mr. Breibart on his behalf. (Tr. p. 22, lines 5-22) The Applicant signed and accepted the services of his counsel. "The authority of an attorney, or a ratification of his unauthorized acts, may be inferred from circumstances, as for instance, from the silent acquiescence of the client for a long period, or from client's acceptance and retention of the fruits of the unauthorized act of the attorney." Foxworth v. Murchison Nat. Bank, 136 S.C. 458, 134 S.E. 428 (1926). This Court finds that the Applicant ratified the retainer agreement to include his father. "As a general rule under such circumstances the principal will be held to have ratified the unauthorized act of the agent, unless he disaffirm it within a reasonable time." Id. at 431. Applicant failed to show that he did not intend to include his father because Applicant never took any steps to repudiate the agreement within a reasonable amount of time once Mr. Breibart's services began. This Court finds that the Applicant is now estopped and barred from challenging that he did not accept counsel's services.

RECEIVED
CLERK OF COURT
LEXINGTON, SC

SEP 10 12 PM '07

FILED

3. Involuntary Guilty Plea

The Applicant alleges that his guilty plea was coerced by counsel's failure to provide adequate representation and failure to adequately advise of ranges of sentences. This Court finds that the Applicant's allegation that his guilty plea was not voluntarily and intelligently entered is without merit. Mr. Breibart testified that he informed the Applicant of the sentence ranges. (Tr. p.99, lines17-20). Mr. Breibart further testified that he discussed with the Applicant the benefits and drawbacks of taking a plea versus going to trial, the elements of the crimes Applicant was charged with, what the state would offer at trial, and the likelihood of success with a self-defense strategy. (Tr. p.25-28; p.110, line12-15). Mr. Breibart testified that it was the Applicant made the decision to plead guilty. (Tr. p.110 lines6-8). This Court finds the Applicant was properly and thoroughly advised of the range of potential sentences.

This Court finds that Applicant knowingly and voluntarily elected to enter a guilty plea in the absence of inducement, promise, threat or coercion and with a full understanding of the possible sentencing consequences, available options, and consequences. The record reflects Applicant understood the plea would waive his ability to challenge his confession and the Applicant elected to accept the State's favorable plea offer rather than take the chance with a trial. Moreover, Applicant testified that he accepted the negotiated sentence of twenty (20) years because he knew such a sentence would save at least ten (10) years from the potential maximum sentence. (Tr. p.172, lines14-17). Pleading guilty to avoid a possibly greater sentence, without more, does not render a guilty plea involuntary. Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed. 2d 747 (1970); Wicker v. State, 310 S.C. 8, 12, 425 S.E.2d 25, 27 (1992).

This Court finds and the record reflects the Applicant understood the possible range of punishment. When questioned directly by the judge during the guilty plea proceeding, the

Applicant expressly stated no promises or threats had been made to coerce or induce the guilty plea. Applicant also expressed satisfaction with his attorney's representation and acknowledged his confession. These statements nullify the Applicant's testimony at the PCR hearing. The Applicant freely, voluntarily, and intelligently chose to plead guilty to voluntary manslaughter. Mr. Breibart adequately advised the Applicant and did not force the Applicant to plead guilty against his free will. Applicant has the burden of proving that he was coerced by counsel, and this Court finds that Applicant has failed to meet that burden. Mr. Breibart testified that he and the Applicant discussed the scenarios of voluntary manslaughter, murder, and not guilty. (Tr. p.74, lines 14-24). Also, counsel testified that all plea offers were presented to the Applicant. (Tr. p.72, lines 4-22).

This Court finds that the Applicant elected to enter a guilty plea knowingly and voluntarily and with a full understanding of the nature of the charges, possible sentencing, consequences, and available options. This Court finds the Applicant failed to meet his burden of proving either deficient performance on the part of plea counsel, or any prejudice arising from the alleged deficiencies. The overwhelming evidence in the record and presented through the testimony of the witnesses at the hearing reflects that the plea was knowingly and voluntarily entered. Boykin v. Alabama, 395 U.S. 238 (1969); Vickery v. State, 258 S.C. 33, 186 S.E.2d 827 (1972). Therefore, this allegation is denied and dismissed.

V. CONCLUSION

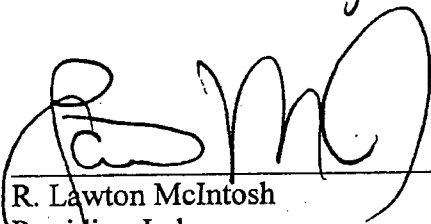
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that the Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate review. *See* Rule 203, SCAR. Rule 71.1 (g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 10 day of August, 2011.


 R. Lawton McIntosh
 Presiding Judge
 Eleventh Judicial Circuit

Anderson, South Carolina

CLERK OF COURT
 ELECTION SO
 2011 08 12 PM 12:30

WITNESSES

LCSD
Baumgardner, S

DOCKET NO. 2005-GS-32-3001

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

SEPTEMBER TERM 2005

THE STATE

vs.

Donald Eugene Carter

A-2005-32-00615

7/29/2005 9:23 AM

ARREST WARRANT NUMBER

H821979

ACTION OF GRAND JURY

TRUE BILL

[Signature]
Foreperson of Grand Jury

Date: 8-8-05

VERDICT

Foreperson of Petit Jury

Date:

CDR# 0116

Indictment for

Murder

§16-3-10

DONALD V. MYERS, SOLICITOR

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

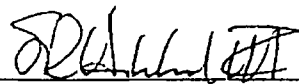
INDICTMENT FOR
Murder

§16-3-10

At a Court of General Sessions, convened on SEPTEMBER, 2005, the Grand Jurors of Lexington County present upon their oath:

That Donald Eugene Carter did in Lexington County on or about February 01, 2005, unlawfully, feloniously, and with malice aforethought, kill one Wesley Jan Tobias by means of a gunshot wound with a pistol and Wesley Jan Tobias died in Lexington County on or about February 1, 2005, as a result of laceration of the heart to due a fatal gunshot wound to the left chest, in violation of § 16-3-10, Code of Laws of South Carolina, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


DEPUTY SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Lexington
 STATE VS.
Donald Eugene Carter
 AKA:
 Race: W Sex: M Age:
 DOB: SS#:
 Address:
 City, State, Zip:
 DL# SID#

INDICTMENT/CASE#: 05 -GS- 32 - 3001
 A/W#: #821977
 Date of Offense: 2/1/05
 S.C. Code §: 16-3-10
 CDR Code #: 2711

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS

TO: Voluntary Manslaughter

in violation of 16-3-50 of the S.C. Code of Laws, bearing CDR Code #

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☐ As Indicted, ☒ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant initial)

The plea is: ☐ Without Negotiations or Recommendation, ☒ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: [Signature] Solicitor [Signature] Defendant [Signature] Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 90 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. 91 days

☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ 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
§35.13 (Public Def/Prob)	\$500
§73.3, 1B TP (Law Enforce. Funding)	\$25
§33.7, 1B TP (Drug Court Surcharge)	\$100
§50-21-114(BUI Breath Test Fee)	\$50
§56-5-2942(J) (Vehicle Assessment)	\$40/ea
3% to County (if paid in installments)	\$
TOTAL	\$ <u></u>

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
 \$ paid to Public Defender Fund
 Other:

☐ Appointed PD or appointed other counsel, \$35.13 TP
 Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code: 2101515

Sentence Date: 11-26-07

Clerk of Court/ Deputy Clerk

Court Reporter: