

Volume II of II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

Alison Renee Lee, Circuit Court Judge

THADDEUSS STARKS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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B. Cleveland - cross (Garfield)

501

1 A Uh-huh.

2 Q But he is right handed, correct?

3 A Uh-huh.

4 Q And you -- he has never had any problems preparing
5 his own food, has he?

6 A Huh-uh.

7 Q And he doesn't have any problems driving; is that
8 correct?

9 A Huh-uh.

10 Q And this is your only son?

11 A Right.

12 Q And essentially, since October, 2006 your whole
13 family has been torn apart?

14 A Oh, yeah.

15 Q And you all, obviously, suffered some problems in
16 your family previously because your husband Al moved out
17 for a period of time?

18 A Uh-huh.

19 Q And who did he move in with?

20 A His sister.

21 Q Ms. Cleveland, can you tell us why he moved out?

22 A You know what, I would like to know myself.

23 Q You don't know why he moved out?

24 A When I came home from work one night, his clothes was
25 out. His closet -- his closet was empty.

B. Cleveland - cross (Garfield)

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1 Q And when he -- how long was he gone?

2 A This was evidently -- well, he had been back home for
3 a year and something.

4 Q When he died --

5 A Yeah.

6 Q -- he had been home for a year or something?

7 A Uh-huh.

8 Q And did you ever talk about why he had left?

9 A I was so hurt until I said, "I'll let the Lord handle
10 it."

11 Q So you had been married for 32 years --

12 A Uh-huh.

13 Q -- and your husband leaves --

14 A Uh-huh.

15 Q -- and then he comes back --

16 A Uh-huh.

17 Q -- but you never have a conversation with him about
18 why he left?

19 A Yeah, he called. He was calling me and telling me,
20 like, you know what, I really don't know, but my husband
21 did have a drug problem. I think that he could get it a
22 lot better with his sister, the drugs. That's why I think
23 he left.

24 Q There were no drugs found in his body when he died.

25 A Well, he had been back home a year or something. His

B. Cleveland - cross (Garfield)

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1 body was clean with drugs.

2 Q Did you ever discuss this?

3 A Yeah.

4 Q Isn't it true he left because he had issues with your
5 son?

6 A No.

7 Q That's not true?

8 A No. My son wasn't even there when he left.

9 Q Well, you testified -- okay. But that your son moved
10 in after he left?

11 A After he left.

12 Q And that's when he moved in with his wife and son?

13 A Right.

14 Q And they left when your husband moved back?

15 A They left when he moved back, yeah.

16 Q Why?

17 A Well, they didn't -- they knew my husband was back,
18 you know. They came -- they moved in to be with me
19 because I was by myself. They didn't have a stable place,
20 you know, because they were just getting married trying to
21 get themselves together, you know.

22 Q Did you ever try to get your husband help for his
23 drugs?

24 A How many times?

25 MR. McMULLEN: Objection as to relevance.

B. Cleveland - cross (Garfield)

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1 THE WITNESS: How many times?

2 THE COURT: Sustained.

3 BY MS. GARFIELD

4 Q On that night that this happened, something had
5 really upset Al. Is that safe to say, the night of his
6 death?

7 A Something had upset him?

8 Q Yes, ma'am.

9 A Yeah, it seemed like it.

10 Q This wasn't normal behavior for him, was it?

11 A No, it wasn't.

12 Q He had no problem paying his own bills; is that
13 correct?

14 A (Indicates in the negative).

15 Q And he was a hard worker?

16 A Yes, he was.

17 Q And he in public referred to Thad as his son?

18 A Uh-huh.

19 Q And likewise, he referred to Al as his father?

20 A Yes.

21 Q Beg the Court's indulgence.

22 (Pause).

23 Ms. Cleveland, again, I am sorry for your loss, and I
24 appreciate your answering my questions.

25 THE COURT: Redirect?

Cleveland - redirect (McMullen)

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REDIRECT EXAMINATION:

1
2 BY MR. McMULLEN

3 Q Very briefly.

4 Ms. Cleveland, would you kindly read to yourself the
5 middle paragraph on the second page of this statement and
6 see if that refreshes your memory, ma'am.

7 A It says, "What time did I call?"

8 "About eight o'clock."

9 Q Does reading that refresh your memory?

10 A Michael, read it for me, so I can understand it. I
11 couldn't -- read it for me so I can -- in my mind, I
12 can't -- I can't understand what you're saying now.

13 Q Are you saying you didn't write this, so you can't
14 read it? Is that...

15 A I didn't write it. No, it's not my writing.

16 Q If it doesn't refresh your memory, that's okay. Just
17 say no.

18 A No.

19 Q Is that the way it is?

20 A Uh, yeah, I didn't write this.

21 Q Do you -- when did you give this statement?

22 A (There was no response).

23 Q How long after your husband's death did you sit down
24 with this Sergeant R. Strange?

25 A Well, they got 10/13 on it.

Cleveland - redirect (McMullen)

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1 Q What time?

2 A 12:53.

3 Q So less than 24 hours?

4 A Well, yeah, because that happened on the 12th, so it
5 was the next day.

6 Q Your husband had just died.

7 A Huh?

8 Q Your husband had just died?

9 A Uh-huh.

10 Q Do you remember much from those few days after the
11 death?

12 A Huh-uh.

13 MR. McMULLEN: Thank you. That's all I have. Thank
14 you, ma'am.

15 THE COURT: All right. Yes, ma'am.

16 MS. GARFIELD: Just one follow up, and that's all.
17 Your Honor, just...

18 THE COURT: Go ahead.

19 MS. GARFIELD: I was just going to ask her to read
20 that entire paragraph under Rule 106 in the entire
21 context, just so the jury won't be misled.

22 THE COURT: She can read it. If she can read it.

23 THE WITNESS: I can't read it. I just told him I
24 can't.

25 Do you want to read it for me? That's not my

Cleveland - redirect (McMullen)

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1 writing. It's slanted. I don't understand it.

2 RE CROSS-EXAMINATION:

3 BY MS. GARFIELD

4 Q Yes, ma'am, I understand.

5 If you'll just stop me if you think I'm not reading
6 something correctly, okay.

7 "What time did you get called back from your home?"

8 Your answer was, "It was around eight o'clock p.m. or
9 before when the police officer called before. He said he
10 was at my home trying to calm down Alphonso and Thaddess.
11 I thought everything was going to be fine.

12 Sometime between 8:30 and nine o'clock, Alphonso
13 called me and said he was calling the police again. I
14 called back a few minutes later. I called Thaddess on his
15 cell phone.

16 Thaddess said Al had called the police again and that
17 Al was cut. Thaddess said Al was pushing him all around.
18 I hung up and left work and came home."

19 Is that -- does that seem to be an accurate
20 reflection of what's written there?

21 A Yeah, it seemed to be pushing around, slapping or
22 whatever.

23 Q But it doesn't say slapping?

24 A I know it says pushing around on this.

25 MS. GARFIELD: Okay. Thank you.

Cleveland - recross (Garfield)

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1 THE WITNESS: And the...

2 THE COURT: All right, ma'am. You may come down.

3 Thank you very much.

4 THE WITNESS: All right. Thank you.

5 THE BAILIFF: Watch your step.

6 (The witness almost falls down).

7 THE BAILIFF: Are you all right?

8 (Pause).

9 THE COURT: The next witness, please.

10 MR. McMULLEN: The defense calls Jennifer Blair,
11 Ms. Jennifer Blair.

12 THE BAILIFF: Place your left hand on the Bible,
13 raise your right, face the clerk.

14 JENNIFER BLAIR, after being duly
15 sworn, testified as follows:

16 THE CLERK: Have a seat. State your full name for
17 me, please.

18 THE WITNESS: Jennifer Blair.

19 DIRECT EXAMINATION:

20 BY MR. McMULLEN

21 Q Good afternoon, Ms. Blair.

22 A Good afternoon.

23 Q Thank you for coming.

24 A Uh-huh.

25 Q Ms. Blair, where are you employed?

Blair - direct (McMullen)

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1 A I am employed with the City of Columbia 911
2 Communications Center.

3 Q What is your job there?

4 A I am the administrative physical officer there, and
5 my responsibilities are procurement, budget, Freedom of
6 Information request, testifying in court, and numerous
7 other responsibilities.

8 Q When lawyers need information for court, they call
9 you?

10 A Yes or either subpoena the information.

11 Q Are you the custodian of the records for 911
12 communications?

13 A I'm not the custodian of the records. It's Michael
14 Cain, who is the director, is the custodian of records,
15 but I'm responsible to make sure they are kept locked 24
16 hours a day in a secure place.

17 Q Are they in your physical custody?

18 A Yes, they are.

19 Q Okay. Do you know how to read printouts generated in
20 the course of business?

21 A Yes. What we call closed incident reports, yes.

22 Q When someone calls 911 and they live in Richland
23 County, where does that call go?

24 A It comes to our 911 center.

25 Q Where is that physically located?

Blair - direct (McMullen)

510

1 A We are located at the fire department at 1800 Laurel.

2 Q Across from Mack's?

3 A Across from Mack's, yes..

4 Q Are those calls recorded?

5 A Yes, they are.

6 Q Did you receive calls from [REDACTED] [REDACTED] [REDACTED] on
7 October 12, 2006?

8 A Yes, we did.

9 Q Did you receive any from [REDACTED] [REDACTED] [REDACTED]?

10 A According to the closed incident report, we received
11 one from [REDACTED] [REDACTED] [REDACTED] on October 12th, and [REDACTED]
12 [REDACTED] [REDACTED] on October 12th, 2006.

13 Q Are you able to determine, ma'am, by looking at your
14 records who placed the call?

15 A Yes. On October 12th, 2006 at 20:57 we received a
16 call from Alphonzo Cleveland.

17 Q Did you receive any calls from Thaddess Starks?

18 A On October 12, 2006 we received a call from a subject
19 identifying himself as Timothy Cornish. We have -- let's
20 see, several other closed incident reports.

21 Q Let's just talk about 10/12/06.

22 A 10/12/06 I'm not showing a call from Thaddess. I'm
23 showing a call from Alphonzo Cleveland, and then on --
24 this is on October 12th, '06 also.

25 Then at 21:08 we are receiving a second call where

Blair - direct (McMullen)

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1 the caller states he had to cut his stepfather, and the
2 stepfather left.

3 Q What time is that, ma'am?

4 A This is at 21:08.

5 Q And in regular time, what time is that?

6 A 21:08 is 9:08 p.m.

7 Q And that call was placed by someone saying he cut his
8 stepfather?

9 A Yes.

10 Q And asking you to send help.

11 A It states, "The complainant states he had to cut his
12 stepfather. The stepfather left."

13 It goes on to say, "Stepfather broke into his room,"
14 and then we received additional calls from another caller
15 at 21:09, which is 9:09 p.m. stating that the subject on
16 her porch was stabbed. This is her neighbor, and these
17 are the comments pertaining to this one call.

18 Q So at 9:08 p.m. you got a call from [REDACTED]

19 [REDACTED] saying, "I cut my stepfather"?

20 A Yes, "Complainant states he had to cut his
21 stepfather."

22 Q And that's at 9:08?

23 A This is at 9:08 p.m., correct.

24 Q And then at 9:09 the next door neighbor, or the
25 person at 1001, Mr. Cornish, called a minute later?

Blair - direct (McMullen)

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1 A A minute later we received another call.

2 MR. McMULLEN: Thank you. That's all my questions.

3 Thank you very much.

4 CROSS-EXAMINATION:

5 BY MS. SHIPLEY

6 Q Good afternoon, Ms. Blair.

7 A Good afternoon.

8 Q Ms. Blair, I'm going to show you a document and ask
9 you if you recognize that.

10 A Yes.

11 Q And tell the jury what that is?

12 A This is a request from Kevin Isenhoward with the
13 Richland County Sheriff's Department requesting 911 calls
14 and radio traffic for a murder at [REDACTED] on
15 10/12/06 at 20:30 hours, which is 8:30 p.m.

16 Q And what date did he request that 911 recorded
17 conversation?

18 A On the date it has 10/16/06.

19 Q And so that was four days after the murder?

20 A Yes.

21 Q And can you tell the jury is that the proper way to
22 request this type of information from your office?

23 A Yes, it is.

24 Q And explain why it was not complied with.

25 A Okay. It was not complied with -- we checked our

Blair - cross (Shiple)

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1 files to see if we ever received this. Apparently,
2 something got lost that we never received this to make the
3 actual recording. Therefore, we were only able to pull
4 what we call a closed incident report.

5 A closed incident report is what was relayed to the
6 caller -- to the call taker when they called 911.

7 (A cell phone rang).

8 (Pause).

9 Q All right. And so, luckily we have these -- these
10 hard copies of what was said by callers, correct?

11 A Yes.

12 Q Okay. And I'm going to bring your attention to
13 October 12th, 2006, incident number L776. What time did
14 911 get a call on October 12th, 2006, according to the
15 report L776?

16 A Okay. L776, we received a call in to 911 at 19:19.
17 That is 7:19 p.m.

18 Q Okay. And if you would just bear with me one second
19 just so we can all look at it together.

20 (Pause).

21 Okay. So at 19:19 the first call is received from
22 this address, [REDACTED] [REDACTED] [REDACTED]?

23 A That's correct.

24 Q So that is 7:19 p.m.?

25 A That is 7:19 p.m.

Blair - cross (Shipley)

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1 Q And who is it from?

2 A The caller is Alphonzo Cleveland.

3 Q And what does Al say to the 911 dispatcher at that
4 time?

5 A At that time he states -- caller states his
6 35-year-old son is at his residence threatening him.

7 Q Okay. When was the next time that Mr. Cleveland
8 called, according to that log?

9 A He calls back again at 19:29 which is 7:29 p.m.

10 Q Okay. And this time what does he state?

11 A Complainant called back for an E.T.A.

12 Q And tell the jury what E.T.A. is?

13 A Estimated time of arrival for the police.

14 Q Okay. And the next call?

15 A The next call comes in at 19:48 which is 7:48 p.m.

16 Q Okay. And what does Mr. Cleveland say this time?

17 A Caller called back. Son is threatening him.

18 Q Okay. Then does a unit respond?

19 A Yes.

20 Q And that unit is unit -- which one?

21 A Richland 111.

22 Q Okay. And that goes to -- corresponds to Deputy
23 Carwell?

24 A Let me find his number just a second.

25 Q It's okay. The jury has already heard that.

Blair - cross (Shipley)

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1 A Okay.

2 Q Now, the next call, moving on later on in the
3 evening, to L865 -- or L865.

4 A Okay.

5 Q And I believe that's the report you went over with
6 Mr. McMullen.

7 A Yes, it is.

8 Q Okay. And you went over already the fact that one
9 call, a second call, came in stating, "Complainant states
10 he had to cut his stepfather, and the stepfather left.
11 Then the stepfather broke into his room," and then the
12 call from the neighbor, "Subject is on her porch and was
13 stabbed." This is her residence. So you already covered
14 that?

15 A Yes.

16 Q But you skipped the call made at 20:57, correct, the
17 very first call?

18 A Yes, at 20:57.

19 Q And that's 8:57 regular time?

20 A Yes.

21 Q Okay. All right. Tell the jury -- and who is the
22 caller?

23 A Alphonso Cleveland.

24 Q Okay. Tell the jury what he said.

25 A "Male states son locked him in room."

1 Q And it goes on to say -- that's the only thing that
2 was said by Mr. Cleveland, correct?

3 A Yes.

4 MS. SHIPLEY: Thank you very much, Ms. Blair.

5 THE COURT: Redirect?

6 REDIRECT EXAMINATION:

7 BY MR. McMULLEN

8 Q Are you looking, ma'am, at L865?

9 A L865, yes.

10 Q Is that the one that contains these notations?

11 A This last one at 20:57, the first statement.

12 Q Yes, ma'am.

13 A "Male subjects states son locked in room."

14 Q The next line says "timer exceeded". What does that
15 mean?

16 A Timer exceeded, we have a timer set on our C.A.D.
17 system, which is Computer Aided Dispatch system, that we
18 have to give these calls out within two minutes. Once we
19 reach that two-minute limit, it will give us a "timer
20 exceeded".

21 Q And then it says changed address from M.F.B.?

22 A Yes. What that means is within the dispatch center,
23 in order for us to know who actually took this call, the
24 call taker goes into the computer system and puts their
25 initials in it. That's how we identify who is responsible

Blair - redirect (McMullen)

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1 for taking each call.

2 Q All right. Then at 21:03, which is I guess -- is it
3 five minutes after the phone call began?

4 A Yes.

5 Q The dispatcher who took this report, it says --

6 MS. SHIPLEY: Objection, Your Honor. This is entered
7 by the dispatcher about her own opinion, not about the
8 statement made by the declarant.

9 THE COURT: I don't know what it is.

10 MS. SHIPLEY: Can we approach?

11 (WHEREUPON, a bench conference was held in the
12 presence, but not within the hearing, of the jury).

13 BY MR. McMULLEN

14 Q What note does the dispatcher say five minutes into
15 this conversation?

16 A Okay. The dispatcher says that the complainant
17 sounds 1068.

18 Q What does that mean?

19 A 1068 code mental, so in other words, what the person
20 is saying that the caller sounds as though he's mental.

21 Q And who was the caller?

22 A The caller is Alphonzo Cleveland.

23 Q How many telephone calls did 911 receive from [REDACTED]

24 [REDACTED]?

25 A On the tenth ---

1 Q No, ma'am.

2 A I'm sorry.

3 Q On the 12th of October.

4 A On the 12th of October I'm showing two.

5 Q Two calls. When did they come in?

6 A The call that we are discussing now came in at 20:57,
7 and then another call came in at 21:09. I'm sorry, [REDACTED]

8 [REDACTED] came in at 20:57. This is one call. I'm sorry.

9 MR. McMULLEN: May I write on this, or should I start
10 a new sheet?

11 MS. SHIPLEY: No. You're welcome to.

12 BY MR. McMULLEN

13 Q So at what time did the dispatcher say that
14 Mr. Cleveland sounded mental?

15 A At 21:03, that is 9:03 p.m.

16 Q 1068. Is that the word you use at 911, "mental"?

17 A Yes.

18 Q And then, I'm sorry. I was thinking when I should
19 have been listening. Did you say you got two calls. What
20 time were they?

21 A I'm sorry. We have two calls on October 12th. One
22 call that we're discussing now came in from [REDACTED] [REDACTED].

23 The second call came in from [REDACTED] [REDACTED].

24 Q So there was just one call?

25 A One call from [REDACTED] [REDACTED].

Blair - redirect (McMullen)

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1 Q Timothy Cornish?

2 A And then Timothy Cornish called in also at 21:09.

3 Q What time did he call in the first time?

4 A Okay. Timothy called in the first time, the first
5 call which was received from [REDACTED] [REDACTED] at 21:09, and
6 then we have a call from Alphonzo Cleveland, that call in
7 at 20:57.

8 Q Okay. So one call from Timothy Cornish the whole
9 night?

10 A One call from him, and one call from Alphonzo
11 Cleveland.

12 Q Were there two calls from Cleveland?

13 A No. One call from Cleveland and one call from
14 Timothy Cornish.

15 Q I'm not trying to confuse you, but the top line that
16 Ms. Shipley wrote talks about something coming in at 10 --
17 at 7:19.

18 A Okay, 7:19 she is referring to [REDACTED] [REDACTED].

19 Q Yes.

20 A Yes.

21 Q And so Mr. Cleveland called that time, and then
22 Mr. Cleveland called at 8:57, 20:57?

23 A Okay. At 20:57 this was the initial call from
24 Alphonzo Cleveland himself --

25 Q What --

Blair - redirect (McMullen)

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1 A From [REDACTED].

2 Q Who called at 7:19 p.m.?

3 A At 7:19 we were on another caller. She went to
4 another incident, so we're on different call.

5 Q Okay.

6 A She went to another incident because we're --

7 Q I'm sorry. When you say a call, it's a term you use
8 in your business, isn't it?

9 A Yes.

10 Q So each -- each request for services would be called
11 a call?

12 A A service, yes.

13 Q Okay. And I think I'm using it in a common person
14 sense, telephone calls placed from Mr. Cleveland to your
15 office.

16 A That's correct.

17 Q How many telephone calls were placed to 911 by
18 Mr. Cleveland?

19 A Okay. Are you just referring to this date?

20 Q Yes. Just that date.

21 A Okay. Just this date from Alphonzo Cleveland on the
22 tenth, only receiving one call.

23 Q On 10/12/06?

24 A On 10/12/06.

25 Q One call?

Blair - redirect (McMullen)

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1 A One call from Alphonzo Cleveland.

2 Q Not two?

3 A Not two.

4 Q All right. Did you -- did you say why there was no
5 tape-recording of this preserved?

6 A Okay. Yes, I did. When this was originally
7 requested, somehow it got lost. So we never made a
8 recording on this.

9 It stated that Mr. Isenhoward had requested it on
10 10/16/06. It got lost, and we never received it. We were
11 not able to make a tape because we only keep 911
12 recordings for 90 days. But what we're speaking of now,
13 closed incident report, we always have.

14 Q May I see Detective Isenhoward's request?

15 A Sure.

16 Q Thank you. Now, when you receive something like
17 this, does your office stamp it in any way to show that
18 it's been received?

19 A Yes. We stamp it, and we also include it in a log.
20 We put the date we received it, and the date we completed
21 it and send the information back out.

22 Q Did that happen here?

23 A Not in this case, no. We never received that.

24 Q Do you know why not?

25 A I couldn't tell you why not, to be honest with you

1 because we have many things that goes on. It could -- we
2 could have received it. It could have been misplaced.
3 Anything could have happened, so I cannot give you a valid
4 answer.

5 Q Human error?

6 A Human error, yes.

7 MR. McMULLEN: Fair enough. Thank you.

8 THE COURT: Redirect?

9 MS. SHIPLEY: Yes, sir.

10 REDIRECT EXAMINATION:

11 BY MS. SHIPLEY

12 Q I'm thoroughly confused. I've counted right here
13 that there are four calls made from Al: There's one, two,
14 three, four.

15 The first call is from the call earlier in the day
16 when Deputy Carwell responds to the scene, and that's
17 incident number L776.

18 A I'm sorry. It is.

19 Q Okay.

20 A We have two different incidents.

21 Q I want to make sure. Okay. At that time it's
22 incident number L776 at 7:19 p.m. Mr. Cleveland called and
23 stated the following: "That his 35-year-old son was
24 threatening him"?

25 A Yes.

Blair - redirect (Shipley)

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1 Q Okay. Then you change incident numbers to L865,
2 correct?

3 A That's correct, yes.

4 Q Okay. And actually -- I'm sorry. That doesn't
5 belong there. Back to L776, isn't it true that the caller
6 called back, meaning Mr. Cleveland, at 7:29 for an E.T.A.
7 and then at 7:48 stated again, "Caller called back. Son
8 is threatening him." Is that correct?

9 A Yes, as long as we're talking about the right
10 incident.

11 Q Yes. So the incident 776, he called three different
12 times.

13 A Okay. On incident L776 he called at 19:19.

14 Q Okay.

15 A Stating that his 35-year-old son is at his residence
16 threatening him.

17 Q Okay. I got that one.

18 A Then he calls back at 19:29. The complainant called
19 back for an E.T.A.

20 Q All right. I got that.

21 A Then he called -- there's another call at 19:48.
22 "Caller called back. Son is threatening him."

23 Q Okay. Then flipping to the following report, L865,
24 and what time did Mr. Cleveland call then?

25 A At 20:57.

Blair - redirect (Shipley)

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1 Q And what did he state?

2 A "Male states son locked him in the room."

3 Q Okay. And when it goes on to say complainant sounds
4 1068, you said 1068 stands for mental?

5 A Mental.

6 Q Okay. And describe circumstances in your experience
7 where a person could be categorized as mental.

8 A Anything such as erratic behavior, just coming across
9 saying things that sound mental, and that's the indication
10 that this call taker perceived it to be when he called in,
11 something about his speech that made him sound as though
12 he was mental.

13 Q Okay.

14 A So that was indicated in this report.

15 Q And would intoxication possibly be involved?

16 A It's a possibility.

17 Q Okay. I just wanted to make sure. That is the way
18 the dispatcher perceived it?

19 A Yes.

20 Q Okay. And on the request, there is a fax -- a fax
21 transmission report at the top of that, correct?

22 A Yes, there is.

23 Q That this was faxed to you all?

24 A Yes.

25 MS. SHIPLEY: Okay. Thank you. No further

Blair - redirect (Shipley)

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1 questions.

2 MR. McMULLEN: Your Honor, just very briefly, please.

3 THE COURT: Yes.

4 REDIRECT EXAMINATION:

5 BY MR. McMULLEN

6 Q And if you'll look further at 865, ma'am.

7 A Uh-huh.

8 Q At 9:03 is when the dispatcher made her note or his
9 note about 1068 --

10 A Uh-huh.

11 Q -- about mental. Five minutes later, 21:08 --

12 A Yes.

13 Q -- you received a call from the stepson --

14 A Yes.

15 Q -- saying, "I had to cut my stepfather"?

16 A "Complainant states he had to cut his stepfather.
17 Stepfather left."

18 Q The one who the dispatcher put down mental five
19 minutes earlier was the one who got cut?

20 A Yes. Now, these are different call takers taking the
21 call.

22 Q Okay. But so then at -- let me just write small with
23 my pen here, but at 9:08, that's when -- that's when
24 Mr. Starks called and said, "I had to cut my father"?

25 A "I had to cut my stepfather," yes.

Blair - redirect (McMullen)

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1 Q So he used term "stepfather" to talk with the person?

2 A Yes.

3 Q "Had to cut." I'll just put that.

4 And then at 9:09, is that when the next door
5 neighbors called, the one and only time?

6 A Yes, at 9:09.

7 Q That's when Timothy Cornish called or someone from --

8 A Someone called and stated that someone was on her
9 porch. It was a female calling.

10 Q All right. Were there any other calls placed to 911
11 communications that night about Congress?

12 A Just let me check to be sure.

13 Q Yes, ma'am.

14 A Make sure we're on the same one.

15 Q Yes.

16 (Pause).

17 A No. I don't believe there's any more calls.

18 Q Do these four pages summarize L776 and L865, the four
19 right there?

20 A Yes, it does.

21 Q We'll move those in as Defendant's Exhibit one, Your
22 Honor.

23 THE COURT: Any objection?

24 MS. SHIPLEY: I'm sorry, Your Honor. I was
25 conferring with counsel. Could you please repeat that?

Blair - redirect (McMullen)

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1 MR. McMULLEN: I just moved in L776 and 765, if
2 that's.

3 MS. SHIPLEY: Sure, no problem. No objection.

4 THE COURT: Without objection.

5 Anything further?

6 MS. SHIPLEY: No, sir, Your Honor.

7 THE COURT: All right. You may come down. Thank you
8 very much, ma'am. You may be excused? Without objection.

9 THE COURT REPORTER: I just want to make sure I have
10 the papers before she leaves.

11 THE COURT: Oh.

12 THE COURT REPORTER: These are the ones I need to
13 mark?

14 THE COURT: Yes.

15 MS. SHIPLEY: Are they --

16 THE COURT: Mr. McMullen, just give the court --
17 before you leave, let's make sure we have the right
18 documents, let the court reporter mark them.

19 MR. McMULLEN: Yes.

20 THE COURT REPORTER: I want to make sure I have the
21 right thing before anyone leaves.

22 MR. McMULLEN: I'm sorry.

23 THE COURT REPORTER: That's okay. I wasn't sure
24 which...

25 MS. SHIPLEY: Let me see that.

1 (Pause).

2 These are correct, yes, sir. I'm going to staple
3 them.

4 MR. McMULLEN: Yes, ma'am.

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

7 THE COURT: All right. You're free to go. Thank you
8 very much.

9 (WHEREUPON, a bench conference was held in the
10 presence, but not within the hearing, of the jury)

11 MS. SHIPLEY: Your Honor, if we could make sure no
12 one knows her on the jury.

13 MR. McMULLEN: The defense would call Lakeisha
14 Tolliver.

15 THE COURT: Come around, Ms. Tolliver.

16 Once again, ladies and gentlemen, the next witness's
17 name was not called out and revealed to you before the
18 beginning of the trial. Her name is Ms. Lakeisha
19 Tolliver.

20 I need to know if any member of the jury panel is
21 related by blood, connected by marriage, or employment or
22 a close personal acquaintance of Ms. Lakeisha Tolliver.
23 If so, raise your right hand.

24 (There was no response).

25 Nobody knows Ms. Tolliver?

Blair - redirect (McMullen)

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1 (There was no response).

2 Thank you very much.

3 THE BAILIFF: Place your left hand on the Bible,
4 raise your right hand, face the clerk.

5 LAKEISHA TOLLIVER, after being duly
6 sworn, testified as follows:

7 THE WITNESS: May name is Lakeisha Tolliver.

8 DIRECT EXAMINATION:

9 BY MR. McMULLEN

10 Q Ms. Tolliver, where, if anywhere, are you employed?

11 A I'm student at the University of South Carolina.

12 Q Do you engage in any extracurricular activities?

13 A Yes. I'm a member of the women's basketball team at
14 the university.

15 Q What position do you play?

16 A I'm forward and I'm a grad student, also.

17 Q I'm going to ask you what everybody else does. How
18 tall are you?

19 A I'm 6'2".

20 Q And what year are you?

21 A I'm a fifth year senior, grad student at the
22 university. I graduated in August.

23 Q Are you related to Mr. Starks?

24 A Yes. He's my first cousin.

25 Q And whose daughter are you?

1 A I'm Roosevelt Starks' daughter, which is Betty
2 Cleveland's brother.

3 Q All right. So then you're also the niece of
4 Mr. Alphonzo Cleveland?

5 A Yes.

6 Q Okay. Were you at [REDACTED] [REDACTED] [REDACTED] on or about
7 October 12th, 2006?

8 A Yes. We -- I arrived there after going to the
9 hospital or meeting my aunt at the hospital.

10 Q Okay. On what date was it that you did this?

11 A It was the date of the accident. I'm not exactly
12 sure exactly what date it was.

13 Q The date your uncle passed away?

14 A Yes, uncle.

15 Q Are you aware of any -- with your firsthand
16 knowledge, of any physical limitations that your cousin
17 has?

18 A Yes. When I was younger I remember my cousin being
19 shot. He -- I remember actually seeing him not being able
20 to eat or walk when it first happened. He was fed by
21 someone, by his mother, and at the time his present
22 girlfriend.

23 He always had seizures. He lived right down the
24 street from me on Chandler (phonetic) Street. I visited
25 him at his home many times because he lived with my father

Tolliver - direct (McMullen)

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1 at one time.

2 He shakes on his left side. I have witnessed many
3 seizures as far as his physical or -- disabilities.

4 Q And as far as his current physical ability or
5 disability, do you know of any current limitations he has?

6 A I noticed that -- I know -- I do know that he has --
7 his nervous system is not functioning correctly on the
8 left side of his body.

9 Q Do you know whether that's due to a stroke?

10 A I'm not exactly sure if it was a stroke or...

11 Q All right. If you don't know, you don't know.

12 A I'm not sure.

13 Q Did you have any occasion to go inside the bedroom of
14 Travis -- of Mr. Starks?

15 A Yes. Me and my aunt actually arrived at her house at
16 the same time. We were going through checking because we
17 were looking for blood, seeing if there's any blood.

18 Apparently, they had cleaned it up, but we went to
19 the bedroom. That's where I found a plate that was lying
20 under -- not completely under the bed but almost under the
21 bed, next to the bed.

22 Q Who else went in the room with you?

23 A Me and my aunt Betty, Betty Ann Cleveland.

24 Q And what time of day was this?

25 A It was at night.

1 Q What time of night?

2 A It was after we went to the hospital, and they pulled
3 us into -- it was well after, after we went from the
4 hospital and then we got back to the house. We went
5 straight from the hospital to the home.

6 Q Was it after midnight?

7 A Could have been near midnight. I'm not exactly sure,
8 but it was well after everything.

9 Q So you found a plate underneath the bed. Is that
10 your testimony?

11 A That's correct.

12 Q And where underneath the bed was it?

13 A It was on -- near -- it was not quite unseen
14 underneath the bed, but it was there halfway. I could see
15 it enough to recognize that something was under the bed
16 and the bed was there.

17 Q Did you also find a knife that was used to cut --

18 A Exactly.

19 Q -- the sandwich?

20 A Yes.

21 Q Or at least find a knife with something on it?

22 A Uh-huh, it had mayonnaise on it, dried up mayonnaise.

23 Q What kind of knife was that?

24 A It was like a steak knife like you would use at a
25 restaurant or something. It wasn't --

Tolliver - direct (McMullen)

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1 Q Was it a butcher knife?

2 A No.

3 Q Was it that knife (indicating)?

4 A No.

5 Q A regular sized knife?

6 A Uh-huh.

7 Q When is the first time you told anybody about this?

8 A As soon as I saw it. I said, "Betty Ann, there's a
9 plate here." She -- she came up and she saw it. She said
10 okay, and we discarded it not really paying, you know,
11 much attention at the time.

12 Q All right. When is the next time you mentioned that
13 to anybody?

14 A Well, we talked about it for a minute, and then he
15 was telling us that he had a sandwich that night. I said,
16 "Yeah, I found the plate," you know. And that was...

17 Q Did you ever tell the police this?

18 A There was a report that came out, but I can't recall
19 exactly if I told the police that or not. I'm not exactly
20 sure, but I was there and I told -- yeah, I told -- it was
21 one of the guys. I wasn't exactly sure which one it was,
22 but I told one of them.

23 Q One of them asked you specifically?

24 A No. They didn't ask me specifically, but I made it
25 known that I saw the plate.

1 Q Why would you think that was important enough to
2 mention to the police?

3 A Because he said as his -- that he was -- that he
4 mentioned that he was making a sandwich. I was like,
5 "Yeah, I seen the plate."

6 He did mention that he was making a sandwich, and I
7 thought that would be -- you know, he made a sandwich, and
8 I seen the plate with the napkin on it.

9 Q Okay. Any paper towels?

10 A Yeah. There was a paper towel underneath it folded
11 it up like as if you held a napkin under the plate.

12 Q Did you find anything else in there?

13 A No, not -- not really. It was just the plate and a
14 napkin.

15 Q Did you see any signs of a struggle?

16 A Yes. When we got there, the door, of course, was --
17 looked like someone had broken into the door on the way
18 that it was not the way it was supposed to be. It was
19 like someone had actually hit it or something.

20 Q Did -- the bedside table, was that sitting where it
21 usually sat or had it been moved or do you know?

22 A I did notice that it was moved to the side a little.
23 I mean, it wasn't just like it was all out of place, but
24 it was shifted, I would -- I would say.

25 MR. McMULLEN: Thank you, ma'am.

Tolliver - direct (McMullen)

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1 THE WITNESS: Thank you.

2 MR. McMULLEN: Answer any...

3 CROSS-EXAMINATION:

4 BY MS. SHIPLEY

5 Q You testified that your -- he's your uncle; is that
6 correct or your cousin?

7 A No, he's my first cousin.

8 Q First cousin, I'm sorry.

9 A That's correct.

10 Q I'm sorry. You testified your first cousin was shot.

11 A Uh-huh.

12 Q And --

13 MR. McMULLEN: May we approach?

14 (WHEREUPON, a bench conference was held in the
15 presence, but not within the hearing, of the jury).

16 THE COURT: All right. Ladies and gentlemen, there's
17 a matter of law I need to take up with the attorneys. I'm
18 going to ask you to go to the jury room for a few minutes.

19 Mr. McMullen, is this your last witness for the day?

20 MR. McMULLEN: Yes, Your Honor.

21 THE COURT: All right. Ladies and gentlemen, I
22 understand this is the last witness for today, so we're
23 going to finish up with her testimony, and then we'll
24 adjourn for the evening.

25 Right now I do need to take up this matter with the

1 attorneys. Just go to your jury room for a few minutes.
2 Relax and we'll call you in just a few minutes. This will
3 be a short break, a shorter break.

4 (WHEREUPON, the jury left open court at approximately
5 4:30 p.m.)

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

7 MR. McMULLEN: May it please the Court. Before the
8 bell -- before the bell was rung, I wanted to anticipate
9 what the next line of questioning was.

10 It's my belief, my understanding, that Mr. Starks,
11 when he was approximately 19 years of age, was involved in
12 grand larceny of an automobile. I believe he tried to
13 escape or resist arrest for that. I believe that a police
14 officer or a deputy sheriff shot him.

15 I believe the deputy thought his life was in danger
16 when he shot Mr. Starks. That bullet went through
17 Mr. Starks' head. It came out his neck and entered his
18 shoulder where it is today in fragments.

19 It's in or near the main artery, and in fact, his
20 physical limitations are partly a result of that and
21 partly the result of a stroke he suffered while on the
22 operating table after being shot.

23 THE COURT: Well, we talked about the stroke.

24 MR. McMULLEN: Yes, sir.

25 THE COURT: But this is totally new information.

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1 MR. McMULLEN: Well, these are interconnected. In
2 other words, the shooting caused the stroke, or the
3 shooting and the surgery and the stroke all happened the
4 same night or the same 24-hour period.

5 My question to the witness was not how he was
6 injured. My question was, "Are you aware of his physical
7 limitations today?"

8 She should not have answered any question about being
9 shot. I didn't ask her about being shot, and as soon as
10 she said something about it, I tried to direct her to
11 speak about -- about what my question was.

12 I certainly don't think I have opened the door for
13 the State to bring up a prior bad act that they would try
14 to use to prejudice Mr. Starks by showing that he had
15 tried to run over a police officer and gotten shot as a
16 result of that.

17 It was a long time ago. He was 19 years old, and his
18 physical limitations are something that we felt are very
19 important that the jury hear about but did not feel like
20 how he became so limited was relevant to that.

21 THE COURT: The State's position?

22 MS. SHIPLEY: The State's position is that they have
23 tried to paint this feeble, weak individual through all
24 these testimonies that he is -- the testimony of all these
25 witnesses.

1 They are putting into evidence a character trait of
2 him being weak and feeble and that he can't do anything
3 for himself.

4 And Your Honor, the defense should prepare his
5 witnesses better. They clearly opened the door when asked
6 about the circumstances of his injury, and this witness
7 did state in direct that her first cousin was shot.

8 I believe I'm allowed to go into further inquiry
9 about that to request her or examine her about the
10 circumstances of that.

11 THE COURT: Well, go ahead and ask her. I mean,
12 proffer the testimony because I don't know how she -- what
13 she is going to say. She may not even know, for all I
14 know.

15 MS. SHIPLEY: Okay.

16 THE COURT: As a matter of fact, how -- she is a
17 young lady. She might --

18 MS. SHIPLEY: Yeah.

19 THE COURT: -- not have even been born.

20 MS. SHIPLEY: She might not have been alive. I have
21 rebuttal witnesses for it, though.

22 THE COURT: Well, just go ahead.

23 MS. SHIPLEY: Okay.

24 Ms. Tolliver, you mentioned on your direct
25 examination that your first cousin started having seizures

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1 when he got shot.

2 THE WITNESS: I said I remember when I was younger
3 that there was an incident that happened. I don't know
4 the details of all of it, but I do know that he got shot
5 at one time.

6 MS. SHIPLEY: He got shot. And do you know who shot
7 him?

8 THE WITNESS: Huh-uh.

9 MS. SHIPLEY: You don't know anything about the
10 circumstances?

11 THE WITNESS: No.

12 MS. SHIPLEY: You don't know that it was a police
13 officer --

14 THE WITNESS: No.

15 MS. SHIPLEY: -- who shot him when he was trying to
16 run over the officer?

17 THE WITNESS: I don't know that it was a police
18 officer, but I do know he got shot.

19 MS. SHIPLEY: Okay. And do you know where he got
20 shot?

21 THE WITNESS: In the mouth. At the time, I was still
22 young.

23 MS. SHIPLEY: You were born in what year?

24 THE WITNESS: Eighty-five.

25 MS. SHIPLEY: Eighty-five, okay, and this happened in

1 '93, so you were eight years old?

2 THE WITNESS: Uh-huh.

3 MS. SHIPLEY: Okay. Your Honor, we'll just save it
4 for rebuttal.

5 THE COURT: All right.

6 MR. McMULLEN: Well, all right. I'm not quite sure I
7 understand that.

8 THE COURT: Well, it's not time.

9 MR. McMULLEN: All right.

10 THE COURT: Bring the jury. She is going to limit --
11 all she has to say is she doesn't know. That ends that,
12 and continue with your cross-examination.

13 Okay. Bring the jury.

14 (WHEREUPON, the jury came into open court at
15 approximately 4:36 p.m.)

16 THE BAILLIF: The jury is all present, Your Honor.

17 THE COURT: All right. Ms. Shipley, you may
18 continue.

19 BY MS. SHIPLEY

20 Q Thank you, Your Honor.

21 Ms. Tolliver, you were testifying on direct
22 examination that this -- the seizures started when your
23 first cousin got shot; is that correct?

24 A Some of those symptoms started, yes.

25 Q Okay. And so the reason for his disabilities or

Tolliver - cross (Shipley)

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1 whatever he's got is due to being shot?

2 A No. Some of them are due to him having a stroke.

3 Q Okay. I'm sorry. He had a stroke while being
4 operated on?

5 A Yes.

6 Q From being shot?

7 MR. McMULLEN: Object as to relevance.

8 THE COURT: Overruled.

9 BY MS. SHIPLEY

10 Q Please answer the question.

11 A Excuse me, what was your question?

12 Q The question was he suffered a stroke on the
13 operating table while the doctors were trying to treat his
14 gunshot wound, correct?

15 A I assume so.

16 Q Okay.

17 A I'm not -- I wasn't there. I was only eight years
18 old.

19 Q You were only eight?

20 A Uh-huh.

21 Q Okay. So you don't know the circumstances around how
22 your first cousin got shot?

23 A No.

24 Q Okay. Where you in the courtroom -- when did you
25 start attending this trial?

1 A I was here in and out at different times. I was back
2 and forth.

3 Q Okay. Were you here on Monday at all?

4 A Excuse me?

5 Q I'm sorry, were you here on Monday at all?

6 A For a short time when they were picking a jury.

7 Q Okay. Then how about yesterday, Tuesday? Whose
8 testimony did you hear yesterday?

9 A I can't recall all of them, but I just -- I heard
10 some of it.

11 Q Okay. Well, your -- I guess she would be your aunt,
12 Betty Ann, testified.

13 A Uh-huh.

14 Q Were you here when she testified?

15 A No.

16 Q No. Okay. Just so you know, she testified that you
17 actually found the plate a day before her. Were you aware
18 of that?

19 A I was the first to find the plate.

20 Q Okay. You testified on direct, however, that you
21 were with Betty Ann when you found the plate.

22 MR. McMULLEN: Object to pitting the witnesses
23 against one another.

24 THE COURT: That's -- I don't think that's pitting.

25 MS. SHIPLEY: It's not, Your Honor.

Tolliver - cross (Shipley)

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1 MR. McMULLEN: Thank you.

2 THE COURT: Go ahead. Overruled.

3 THE WITNESS: We were together in the same household.

4 MS. SHIPLEY: Okay.

5 THE WITNESS: As far as what happened, but I was
6 there when I found the plate.

7 BY MS. SHIPLEY

8 Q Okay. You testified on direct examination that you
9 had a conversation with Betty Ann when you found the plate
10 and you said, "Look, there's the plate."

11 A I drew it to her attention, yes.

12 Q Okay. When you found the plate, is what you
13 testified to on direct examination.

14 A When I found the plate, I picked it up, and I let her
15 know that it was a plate to assure that he did say that he
16 was making a sandwich --

17 Q Okay.

18 A -- and we discarded it, such as anything else like
19 trash.

20 Q Oh, you just threw it away?

21 A Uh-huh.

22 Q So you didn't put it on the nightstand?

23 A I put -- well, actually, what happened was I found
24 the plate. I sat it on the nightstand to draw her
25 attention, let her know it was there, and we discarded it.

1 I picked it up to let her know it was there, and I put it
2 in the trash.

3 Q When did you talk to your first cousin about him
4 making a sandwich?

5 A When did I talk to him?

6 Q Yeah.

7 A No, I was -- I heard. It was hearsay that he was
8 making a sandwich when it -- well, he was making a
9 sandwich or had already eaten a sandwich. That was the
10 hearsay. It wasn't --

11 Q Who told you that?

12 A It wasn't exact. Huh?

13 Q Did Betty Ann tell you that he had told her he had
14 made a sandwich?

15 A No, because he was talking to her. So I was -- I
16 just heard that there was a sandwich that was eaten, and
17 when I found the plate, it was not something that I would
18 -- would make a big deal out of. I just found it and made
19 -- you know, my aunt -- that I seen the plate right here.
20 Apparently, he was making a sandwich and then...

21 Q Okay. So you don't remember if your -- Betty Ann,
22 your aunt, told you about this sandwich, because you
23 didn't talk to him, did you?

24 A No. I didn't talk to him, no.

25 Q Okay. So do you remember if Betty Ann was the one

Tolliver - cross (Shipley)

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1 that told you about the sandwich?

2 A Maybe she didn't tell me directly, but I was hearing
3 about a sandwich being eaten or made.

4 Q Okay. And you also said that you found a napkin.
5 Was it a napkin or a paper towel?

6 A To be honest with you, it was some type of paper that
7 you use.

8 Q Underneath the plate?

9 A To clean your mouth when you're finished eating.

10 Q What side of the bed did you find this?

11 A It was on the left side.

12 Q The left side?

13 A Uh-huh.

14 Q So if you walk in Thad's room -- I'm going to just do
15 this real quick. I'm not the best artist so...

16 A As soon as you walk in, you walk in to the left side
17 of the door --

18 Q Uh-huh.

19 A -- you're facing the foot of the bed.

20 Q Okay. So you walk in --

21 MR. McMULLEN: I'm going to object to the prosecutor
22 testifying making her own map of the room.

23 THE COURT: Overruled. Go ahead.

24 BY MS. SHIPLEY

25 Q All right. Just so the jurors are oriented, you walk

- 1 in the door to his room, correct?
- 2 A Uh-huh.
- 3 Q And at least a nightstand here and the door opens
- 4 that way?
- 5 A Yes.
- 6 Q Where did you find the plate?
- 7 A You want me to stand up?
- 8 Q Yeah. Let me give you this pointer and -- okay. Go
- 9 ahead.
- 10 A The plate was like in this area, but it was halfway.
- 11 You could not see the whole plate.
- 12 Q But it was halfway out?
- 13 A Uh-huh.
- 14 Q Okay.
- 15 A You could not see the whole plate.
- 16 Q Okay. Thank you. Where was the knife?
- 17 A The knife was near the plate but it wasn't quite...
- 18 Q Okay.
- 19 A But when I placed it all together, that's when I kind
- 20 of gathered it to let him know where it was, the plate.
- 21 Q So it wasn't this knife that you saw?
- 22 A No.
- 23 Q It was a steak knife with mayonnaise that appeared
- 24 dry on it?
- 25 A Uh-huh.

Tolliver - cross (Shipley)

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1 Q Okay. And you love your first cousin, right?

2 A Yes, sir.

3 Q You don't want to see him get in trouble?

4 A I loved my uncle also.

5 Q And you don't want to see your cousin get in trouble?

6 A No. I mean, apparently he will because he done
7 something, but I don't think he did it intentionally.

8 Q Okay. You weren't there that night, though, were
9 you?

10 A Not at all.

11 MS. SHIPLEY: Thank you, Ms. Tolliver.

12 THE WITNESS: Thank you.

13 THE COURT: Nothing further?

14 (There was no response).

15 You may come down, ma'am. Thank you very much.

16 Any objection to this witness being excused?

17 MS. SHIPLEY: Nothing further, Your Honor.

18 THE COURT: All right, ladies and gentlemen, that
19 will complete the testimony for today. It's my
20 anticipation that we will finish this trial tomorrow just
21 for -- that's my anticipation.

22 Sometimes I'm not always right, but I believe we
23 will. So I'm going to excuse you now for the afternoon
24 and ask you to be back in the jury room at 9:30 in the
25 morning. Again, don't discuss the case among yourselves

1 when you return to the jury room or with anyone else over
2 the evening hours. We'll be ready to go at 9:30. Thank
3 you very much.

4 (WHEREUPON, the jury left open court at approximately
5 4:44 p.m.)

6 THE COURT: All right, Counsel. Anticipating that
7 there's only more witness, and I don't know what the State
8 plans to put in reply or not. We'll deal with that when
9 it occurs, if it occurs.

10 On the subject of jury instructions, can you tell me
11 now what the State and/or defense will request in terms of
12 jury instructions and whether you have any proposed
13 instructions for the Court to review from the State?

14 MS. SHIPLEY: Yes, sir, Your Honor. We would
15 respectfully request that you charge reasonable doubt
16 under State vs. Darby; charge, obviously, murder, malice;
17 that malice can be expressed or implied by the use of a
18 deadly weapon, and by words expressed, obviously.

19 Voluntary manslaughter, I believe there's evidence
20 sufficient to warrant that, whether malice existed or not.
21 Direct and circumstantial evidence, and we respectfully
22 request that you not charge self-defense.

23 I don't believe that the defendant was without fault
24 in bringing on the difficulty. I don't believe that he
25 actually believed he was in imminent danger of losing his

1 life or sustaining serious bodily injury.

2 THE COURT: Okay.

3 MS. SHIPLEY: So --

4 THE COURT: Go ahead. You don't have to go through
5 it. I'm just asking for bare bones.

6 MS. SHIPLEY: Okay. Depending on your ruling about
7 self-defense, I'll --

8 THE COURT: I understand.

9 MS. SHIPLEY: -- have expert witness and eyewitness
10 testimony and credibility of witnesses.

11 THE COURT: All right. Mr. McMullen?

12 MR. McMULLEN: Well, Your Honor, we're going to
13 request the self-defense, the defense of habitation, the
14 right to act on appearances.

15 I'm going to ask for a circumstantial evidence
16 charge. I'd prefer the Edwards definition of reasonable
17 doubt, but whatever the Court normally does. I wasn't
18 prepared at this point to go into any great detail.

19 THE COURT: I'm not asking you to.

20 MR. McMULLEN: The State vs. Rye is most constructive
21 in the dissent of -- I believe it was Justice Moore wrote
22 pretty good jury instructions.

23 THE COURT: Well, he -- yeah, I mean, I agree with
24 you.

25 MR. McMULLEN: Something to --

1 THE COURT: I read Justice Moore's opinion, but then
2 I have to keep reminding myself it's a dissent.

3 MR. McMULLEN: Yes, sir.

4 THE COURT: I'm not going to charge the --

5 MR. McMULLEN: I suppose that would be a great
6 starting point. If we could just plug in what the
7 majority said should have been added, that would suffice
8 for our purposes. After we finish with this, I did have
9 something else I would like to bring up.

10 THE COURT: Well, I want you to be prepared in the
11 morning, I'm not going to ask do you do it now, to put on
12 the record your justification for a defense of habitation,
13 because at this point I'm a little bit...

14 MR. McMULLEN: Well, may we --

15 THE COURT: Undecided about whether or not that
16 charge should indeed be presented to this jury.

17 MR. McMULLEN: May we make our case? May we finish
18 presenting our defense case before then?

19 THE COURT: Absolutely, absolutely.

20 MR. McMULLEN: I'm think it --

21 THE COURT: I'm not trying to be -- I just said be
22 prepared tomorrow to address that issue, because I think
23 it's a significant issue.

24 MR. McMULLEN: Yes, sir. But I would like to talk to
25 Mr. Starks to see if he's going to testify and --

1 THE COURT: I understand. I understand.

2 MR. McMULLEN: If he does. Also, I expect to have a
3 doctor testify.

4 THE COURT: I think the doctor's testimony should
5 have little, if anything, to do with the defense of
6 habitation, but I don't know that. Maybe the doctor was
7 there. I don't know that.

8 MR. McMULLEN: No, you're right.

9 THE COURT: I'm just suggesting at this point that
10 you be prepared to address that issue in some detail,
11 because as I say, I'm not convinced at this point that
12 it's a proper charge for this jury, even though it may be
13 requested.

14 MR. McMULLEN: Well, yes, sir. I'm just asking
15 before we talk about charges in any detail that we finish
16 our case.

17 THE COURT: I'm just giving you sort of a heads up.

18 MR. McMULLEN: Yes, sir.

19 THE COURT: That's the only purpose --

20 MR. McMULLEN: Certainly.

21 THE COURT: -- in this limited discussion.

22 MR. McMULLEN: I'd like to respectfully move for a
23 mistrial.

24 THE COURT: All right.

25 MR. McMULLEN: I asked to approach. I asked that

1 this bell not be rung. I asked that the other side not go
2 into this. The other side --

3 THE COURT: You're talking about the shooting.

4 MR. McMULLEN: The other side said, "We'll save it
5 for rebuttal," and then that's what she asked about.

6 THE COURT: No, I disagree. None of the details of
7 the shooting were elicited by the Solicitor, and that's
8 what you objected to --

9 MR. McMULLEN: Yes, sir.

10 THE COURT: -- at the sidebar, and the Solicitor did
11 not go into it. Now, the Solicitor -- the only thing she
12 went into is the fact the witness didn't know anything
13 about it.

14 MR. McMULLEN: Yes.

15 THE COURT: And that she asked if the witness
16 attributed the shooting, at least partially, to his
17 disability, which I think was the issue that you brought
18 up anyway.

19 MR. McMULLEN: Yes, sir.

20 THE COURT: And then so...

21 MR. McMULLEN: I understand.

22 THE COURT: I don't think it's grounds for a
23 mistrial, so I respectfully deny your motion.

24 MR. McMULLEN: Well, we came up there to discuss
25 that, and I couldn't hardly finish my thought because the

1 other side kept repeating, "You opened the door. You
2 opened the door." We don't have to lose our manners when
3 we try a case.

4 THE COURT: Well, you take that up with the
5 Solicitor.

6 MR. McMULLEN: Yes, sir.

7 THE COURT: Anything further?

8 MS. SHIPLEY: Yes, sir. If we're going to go -- I
9 just want to make sure if you do decide to charge
10 self-defense, that we would like the language about the
11 relative size, ages, and weights of the defendant and the
12 victim.

13 THE COURT: That would be the normal part of the
14 self-defense charge.

15 All right. We'll stand at ease until 9:30.

16 MS. SHIPLEY: Thank you.

17 THE COURT: Oh, hold on just a minute, Counsel.
18 Approach the bench please.

19 (Whereupon, there was a bench conference.)

20 THE COURT: We'll stand at ease until 9:30 in the
21 morning.

22 (There was an overnight recess.)

23 THE COURT: Is the State ready to proceed?

24 MS. SHIPLEY: Oh, here it is. I found it.

25 Yes, sir. I just want to remind the Court that juror

1 298 wrote a note, and I think we asked Mr. McMullen to
2 inquire about that, the fact that he works at the same
3 place.

4 THE COURT: Is the defense ready to proceed?

5 MR. McMULLEN: Yes, sir.

6 THE COURT: Would you rather I do that in camera or
7 in the courtroom? In other words, I can call the juror
8 out.

9 MR. McMULLEN: Whichever Your Honor prefers.

10 THE COURT: Is that satisfactory?

11 MS. SHIPLEY: That's fine with us, yes, sir.

12 THE COURT: I'll report.

13 (WHEREUPON, a short break was taken.)

14 (His Honor met privately with juror 298.)

15 THE COURT: All right. I inquired of the juror. The
16 juror is employed at the same place, but has no knowledge
17 of the witness, never seen the witness. It's just a big
18 place to work.

19 Anything further before we call the jury?

20 MR. McMULLEN: Yes, sir. Just one moment, please.

21 (Pause).

22 I've got the medical records of the defendant and the
23 doctor here to testify about it. I wanted to see if I
24 could last minute, get the State --

25 MS. SHIPLEY: Yeah, I don't have a copy of this. I

1 would appreciate it. Thank you very much.

2 MR. McMULLEN: Could we have just a bit of time for
3 her to get copies? I'm just getting it.

4 THE COURT: What are you going -- what are you going
5 -- what are you going to do? You have got a stack of --

6 MR. McMULLEN: This is the medical records of the
7 defendant.

8 THE COURT: I understand that. What are you asking
9 me?

10 MR. McMULLEN: Just for enough time to get a copy to
11 Ms. Cooper -- to Ms. Shipley.

12 THE COURT: She is going to copy it? Is that what
13 you're saying?

14 MR. McMULLEN: Yes, sir.

15 THE COURT: All right.

16 MS. SHIPLEY: Your Honor, I'm not going to have time
17 to, you know, read all of this. So let's just proceed.
18 If you can hand me your copy when you're done.

19 MR. McMULLEN: I'll be glad to.

20 We are ready now, sir.

21 THE COURT: Bring the jury, please.

22 (WHEREUPON, the jury came into open court at
23 approximately 9:44 a.m.)

24 (WHEREUPON, Court's Exhibit No. 1 was marked for
25 identification only.)

1 THE BAILIFF: The jury is present.

2 THE COURT: Good morning. We'll continue with the
3 trial.

4 Mr. McMullen, call your next witness.

5 MR. McMULLEN: May it please the Court. The defense
6 calls Dr. Theodore Faber.

7 THE BAILIFF: Place your left hand on the Bible,
8 raise your right. Face the clerk.

9 THEODORE FABER, after being duly
10 sworn, testified as follows:

11 THE CLERK: Thank you. Please have a seat in the
12 witness box. State your full name for the record, and
13 please spell your last name.

14 THE WITNESS: My name is Theodore Tom Faber,
15 F-A-B-E-R.

16 DIRECT EXAMINATION:

17 BY MR. McMULLEN

18 Q Good morning, Dr. Faber. Thank you for coming.

19 Dr. Faber, would you please describe your education
20 for the jury?

21 A I was an Air Force brat, so we moved around a lot. I
22 finished high school in Atlanta, in a suburb of Atlanta,
23 and then went to Furman University. I graduated in 1975
24 with a B.S. in biology.

25 From there I did a couple of years in the Army and

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1 then decided I was interested in medicine. I didn't have
2 any premed courses behind me, so I went ahead and signed
3 up for premed courses at Georgia State University and was
4 working as a graduate student.

5 I taught chemistry at a preparatory academy,
6 Woodcreek Academy in Atlanta. The following year, I
7 matriculated at the Medical College of Augusta in Georgia.
8 I graduated in 1985 with an M.D. and then went to Boston
9 for postgraduate training.

10 I did an internship at Carnie Hospital in Boston, and
11 then I did the neurology residency at Boston City Hospital
12 and then came back down here, entered practice at South
13 Carolina Neurological Clinic and took my boards in 1992
14 and am board certified since that time.

15 Q Have you been practicing medicine in neurology since
16 1992?

17 A Well, I've been practicing since 1989. You practice
18 for a couple of years before you, I guess, are board
19 certified.

20 Q What is neurology?

21 A Neurology is the specialty that covers the brain and
22 the nerves and how they interact with the rest of the
23 body.

24 MR. McMULLEN: Your Honor, I would tender Dr. Faber
25 as an expert in that field.

1 THE COURT: Neurology?

2 MR. McMULLEN: Yes, Your Honor.

3 THE COURT: Is that what you say?

4 MR. McMULLEN: Yes, sir.

5 THE COURT: Any voir dire or objection?

6 MS. SHIPLEY: Yes, sir, Your Honor.

7 Good morning, Dr. Faber. My name is Vanessa Shipley.

8 I work for the Solicitor's Office. I just have a couple
9 of follow-up questions about your qualifications.

10 Have you ever testified or been qualified as an
11 expert in the field of neurology in a court of law?

12 THE WITNESS: Yes.

13 MS. SHIPLEY: How many times?

14 THE WITNESS: Probably -- does this include
15 depositions?

16 MS. SHIPLEY: No, just courtroom testimony.

17 THE WITNESS: Maybe two or three.

18 MS. SHIPLEY: Two or three times, and that was in the
19 field of neurology, sir?

20 THE WITNESS: Yes.

21 MS. SHIPLEY: Okay. Thank you.

22 No further questions, Your Honor. We have no
23 objection to him being found qualified to testify as an
24 expert.

25 THE COURT: All right.

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1 BY MR. McMULLEN

2 Q In your capacity as a neurologist, did you have an
3 occasion to examine Thaddess Starks?

4 A Yes.

5 Q When was that?

6 A I think I first met him in the early '90s on referral
7 from Dr. Bynoe from the trauma service at Richland
8 Memorial.

9 Q And you're -- we've all in this courtroom heard that
10 Mr. Starks suffered a gunshot wound to his head in 1992.
11 Did you treat him as a result of that?

12 A Yes.

13 Q Where did the bullet enter Mr. Starks?

14 A I did not see him in the hospital, and so all of this
15 is based upon -- you know, all of my knowledge about how
16 the bullet entered and so forth is what I read in the
17 written record.

18 Q Okay.

19 A The -- I believe the records indicate that the bullet
20 entered into the right jaw region, and they did reparative
21 surgery and ended up having to do a procedure on the left
22 carotid artery in order to make that artery carry blood
23 flow to the brain.

24 Q Is there any scarring on Mr. Starks from this wound?

25 A Oh, I'm sure there is. I'm not a scar -- you know,

1 so if you're asking me if -- could this scar explain this
2 wound and so forth, I would have to beg ignorance on that.

3 Q I'm just asking you whether there's a scar on him?

4 A I'm sure there is. I don't think that I've ever
5 documented a scar.

6 Q Okay. Well, did the bullet go through his mouth?

7 A Again, this is all in the written record, and I think
8 I read that it was.

9 Q Do you have the record with you?

10 A Yes, I do.

11 Q Would you please look at it?

12 A Sure.

13 (Pause).

14 Okay. I'm reading a record that was from Richland
15 Memorial Hospital dictated by Dr. James Benner (phonetic)
16 with a copy to Dr. Harold Freedman from September 15th,
17 1992.

18 It's a record of the procedure of the irrigation and
19 debridement with primary closure of lacerations because of
20 a gunshot wound to the face.

21 The -- this is the operative procedure note. It says
22 that the patient was prepped and draped in a sterile
23 fashion. Then attention was paid to the entrance of the
24 gunshot wound which was at the angle of the corner of the
25 mouth. Then it says how the area was debrided and how the

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1 edges of the tissues were approximated with sutures,
2 including the tongue. So that's -- that's basically
3 the --

4 Q Where did the bullet exit?

5 A I don't know where the bullet exited. Let's see. I
6 may have another...

7 Let's see now. So it entered the right corner of the
8 mouth, and the next op. note, procedure note, this was
9 dictated by a Dr. Pettigrew, again at Richland Memorial
10 Hospital with a copy to Dr. Daniel Rush who was the
11 attending physician.

12 It says they explored the left neck with carotid
13 artery bypass grafting. They repaired an oropharyngeal
14 laceration, and they replaced a gastrostomy tube.

15 In the findings of the operation, they indicated that
16 they found that the bullet transected the left common
17 carotid artery.

18 So this is, of course, on the left side, so the
19 bullet got to at least the carotid region in the neck
20 right about here, I would say, based on this report.

21 Q Did you yourself examine Mr. Starks on March 6th,
22 2007?

23 A I believe you're correct on the date, but I was
24 looking for my copy of the report so I could be accurate.

25 Q May I show you something that may refresh your

1 memory?

2 A Okay. The patient had his procedure done on the 6th.
3 I saw him on the 1st.

4 Q Would you please describe the reason for the study?

5 A We wanted to do a follow-up scan of his brain, and to
6 evaluate the extent of damage that was done following his
7 surgery.

8 It was because he had been having some episodes of
9 what he called -- or his mother had noticed that he was
10 zoning out, is how it was described.

11 They further went into how he was snoring, waking
12 himself up with snoring. He seemed to be always tired
13 during the day, and he was wondering if he had obstructive
14 sleep apnea.

15 The reason, of course, the obstructive sleep apnea is
16 not a reason to do an M.R.I. scan and the brain, but
17 because of the fact that he had a history of having had
18 seizures, I wanted to make sure that nothing else had gone
19 on inside the brain in the decade or so ensuing the
20 gunshot wound. So we set him up for an M.R.I. scan of the
21 brain.

22 Q Did you make these notes?

23 A The report here is from the pre-M.R.I. evaluation of
24 the neck and skull. Anytime someone has a history of a
25 gunshot wound, they want to make sure that there's no

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1 bullet fragments in say around the eye or something like
2 that to make sure that the M.R.I. scan is safe to do.

3 Q Is that something you rely on in your diagnosis and
4 treatment?

5 A No. This is really something that the radiologists
6 want to do prior to an M.R.I. scan to make sure that it's
7 safe to do that.

8 Q Okay. Do you -- do you rely on the radiologist's
9 report?

10 A Yes.

11 Q Is there a bullet fragment in Mr. Starks' body?

12 A It says multiple bullet fragments and surgical clips
13 seen in the left aspect of the neck.

14 Q I'm sorry, where?

15 A In the left aspect of the neck.

16 Q What is that, sir?

17 A The left side.

18 Q Thank you. Did you do an M.R.I. in 1992 on
19 Mr. Starks?

20 A I think he had had C.T. scans from the
21 hospitalization.

22 (Pause).

23 According to the hospital records, he had had a
24 couple of strokes.

25 Q When did he have the strokes?

1 A They were after -- or they were during this
2 hospitalization after the gunshot wound, and apparently he
3 had some other postoperative complications. He had a deep
4 veinous thrombosis to the leg.

5 Q What's that?

6 A A blood clot in the leg.

7 Q Which leg, sir?

8 A I'd have to look again at the records from '92, and
9 so it's -- I think what most of us would say it is a
10 stormy postoperative course is the one.

11 Q I'm sorry. I can't hear you, sir.

12 A It's what most of us would say is a stormy
13 postoperative course.

14 Q What do you mean?

15 A Stormy meaning fraught with complications.

16 Q Such as?

17 A Such as a deep veinous thrombosis and strokes and
18 problems like that.

19 Q Do strokes cause neurological damage?

20 A Yes.

21 Q And will you tell us about that in as simple terms as
22 -- so I can understand?

23 A Well, a stroke is a blockage of the blood flow to
24 part of the brain, and so if the blood doesn't get to part
25 of the brain, we say that the person has had a stroke.

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1 What that means is that the brain tissue in the area
2 served by the artery that is blocked will die and leave
3 essentially nothing in its place except for perhaps scar
4 tissue.

5 Q Can you a stroke cause paralysis?

6 A Yes.

7 Q Is a person who suffers a stroke normally paralyzed
8 entirely?

9 A It depends on what part of the brain is involved in
10 the stroke. If the person, for instance, has a stroke in
11 the right hemisphere of the brain in an area served by the
12 part of the brain that controls movement, you may see
13 paralysis on the opposite side of the body.

14 The same is true for other parts of the brain, so if
15 a person has a stroke in part of the brain that controls
16 sensation, one might find that that person has reduced the
17 sensation in that part of the body subserved by the area
18 of the brain involved in the stroke.

19 If the person has a stroke in parts of the brain that
20 are not connected to motor systems or sensory systems,
21 sometimes the effects of the stroke can be a little less
22 clear as say, for instance, a stroke in the right parietal
23 cortex which might cause someone to have more confusion in
24 the left part of the brain. Someone might lose the
25 ability to speak.

1 In general terms, wherever the stroke occurs in the
2 brain, whatever that part of the brain is supposed to do
3 is no longer done.

4 Q Did you prescribe medications to Mr. Starks?

5 A Mr. Starks has been on medication that I prescribed
6 for a number of years.

7 Q What medications? Will you please say the medication
8 and what its purpose --

9 A Sure.

10 Q -- and what your purpose in prescribing it is?

11 A Well, Mr. Stark (sic) --

12 Q Mr. --

13 A -- was found to have seizures, and he was prescribed
14 Dilantin in the -- in the hospital. In the years ensuing,
15 a couple of other medications, I think, came and went, but
16 we've had him on Dilantin, as that seemed to work about
17 the best of the medications that he's been on.

18 Q What does Dilantin do?

19 A Dilantin is a seizure medicine. It's hopefully going
20 to prevent seizure activity that might have originated in
21 the part of the brain where there was some seizure focus.

22 Q Are there any side effects?

23 A There's plenty of side effects. The folks with the
24 chronic Dilantin therapy can sometimes get cosmetic
25 changes, dental problems, grow more hair, have difficulty

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1 with coordination, nerve problems, difficulty with bone
2 marrow function, difficulty with liver function,
3 osteoporosis, and the list goes on and on.

4 Q Does it have a sedating effect?

5 A If it's -- if a person is sensitive to that, we do
6 hear occasionally that folks will sometimes report some
7 sedation with Dilantin. Some folks will also say they
8 don't seem to feel as sharp as they would like to feel
9 when they're on medication.

10 Certainly, the amount of medication may be a factor
11 in that, and many of the side effects of the medications
12 aren't dose related, so we aim for a therapeutic level,
13 but it's not a toxic level of the medication in their
14 blood stream.

15 Q Is this epilepsy?

16 A Yes.

17 Q Or --

18 A This is -- in a sense. It's not something that
19 you're born with. Many people kind of use the term
20 epilepsy to indicate that somebody was born with
21 something. Typically, we don't make that distinction.

22 Seizure disorder is another phrase for this, but yes,
23 these are epileptic seizures that we're talking about.

24 Q What is a grand mal seizure?

25 A A grand mal seizure is the fit of the -- the

1 epileptic fit that often will throw the patient to the
2 floor and often last for a minute or two, and they'll be
3 unconscious and shaking for a period of time.

4 Q To your knowledge, has Mr. Starks had such seizures
5 recently?

6 A No, not recently.

7 Q All right. What other medications are there?

8 A Another medication that he's been on for a number of
9 years is a medication called Baclofen, which is for
10 spasticity.

11 Spasticity is a movement problem usually on the side
12 that the person has been paralyzed on, and it's sometimes
13 a painful spasm. Oftentimes, it interrupts their ability
14 to move that side effectively, even on top of the -- the
15 paralysis that they may have.

16 Q Why did you prescribe that to Mr. Starks?

17 A What Baclofen does, it's in a sense a muscle relaxer
18 that works at the level of the nerve supplied to the
19 muscle. So by giving folks Baclofen, we can help reduce
20 some of discomfort and some of the movement trouble that
21 they find with the spasticity.

22 Q Are there any side effects?

23 A There are a lot of side effects with that medication,
24 too. The predominate side effects, however, are
25 drowsiness and sedation.

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1 Q Would it slow a person's reaction time?

2 A It might, yes.

3 Q Would it slow their decision-making time?

4 A It could do that.

5 Q Does Mr. Starks have any paralysis?

6 A Mr. Starks initially had a great deal of paralysis.

7 Over the years, he has had significant improvement in the
8 extent of his paralysis to where we would say now he has a
9 weakness as opposed to a paralysis.

10 Q How do you measure strength or weakness?

11 A We typically measure strength on a five-point scale
12 with five being normal and zero being absence of any
13 movement at all, and we test particular muscles to
14 document about how much strength each -- each muscle group
15 has.

16 So, for instance, we might say that someone has
17 three-over-five strength, say in elbow flexion, for
18 instance. That would indicate that they can move their
19 arm like so (indicating).

20 I'm flexing my elbow, if you're writing.

21 And the -- the patient can overcome gravity and --
22 but it's not quite normal strength.

23 Q Does three-over-five have anything to do with the
24 fraction 60 percent? You said three over five.

25 A No. We don't -- we don't use the percentages. It's

1 -- three over five is just the nomenclature that we use,
2 so two over one, one over five, zero over five, five over
3 five.

4 Q What do those various numbers indicate?

5 A Just on a scale of zero to five, about where the --
6 where the examiner feels that the muscle strength is at
7 that point in time.

8 Q Is five over five the strongest or the weakest?

9 A Five or over is normal, and zero over five is -- is
10 no movement at all.

11 Q Was Mr. Starks ever in a coma?

12 A Let me flip back to the discharge summary from
13 Richland Memorial Hospital just to make sure I answer that
14 question precisely.

15 (Pause).

16 The discharge summary does not indicate that he was
17 in a coma at any time. That doesn't mean that he wasn't.
18 It may just be that the records that I have don't reflect
19 a coma being present.

20 Q What other medications have you prescribed for
21 Mr. Starks?

22 A In the years following his -- his hospitalization,
23 he -- he was given Dilantin. He had a break through --
24 and Baclofen. He had a break-through seizure at one point
25 and someone, not me, put him on some Tegretol in addition

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1 to the Dilantin.

2 We didn't really see the need for that. It looked
3 like probably Dilantin would take care of his seizures, if
4 it was -- if it was in the therapeutic range.

5 So we discontinued the Tegretol. I think he had done
6 so well on the Dilantin that we really didn't see the need
7 to try anything else, and his blood test that we use to
8 evaluate for these other problems and didn't indicate that
9 there was any need to change to any of the other
10 medications.

11 Q I'm going to spell a word that I can't pronounce and
12 ask you to tell me what it is. It's

13 A-T-E-L-E-C-T-A-S-I-S.

14 A Atelectasis. I think that -- where did you read
15 that? That's not really a term that I use in the course
16 of my practice very much.

17 Q Okay.

18 A This is a procedure note in 1992 from the Richland
19 hospital and --

20 Q What is that?

21 A Atelectasis. Now, we're getting out of my field of
22 neurology.

23 Q Okay.

24 A This is the field of pulmonology. That has to do
25 with the lungs.

1 Q Is there anything you can say as an expert about what
2 this decease is?

3 A Well, in the -- in the general -- if I can take
4 another look at that. In the general setting of medicine,
5 what the pulmonologist here is saying that he had some
6 plugs plugging up the bronchial tree of the lungs
7 basically, had plugs in them.

8 Again, this is just another problem that -- that the
9 patient had during his acute hospitalization back in 1992.

10 Q Do you prescribe blood thinners for Mr. Starks?

11 A No, I don't.

12 Q Do you know what the other doctors do?

13 A I'm sorry?

14 Q Do you know whether other doctors do?

15 A I don't think they do. I think he has a green filled
16 filter in his inferior vena cava.

17 Q I'm sorry, sir?

18 A That was a filter designed to keep blood clots from
19 going into his lungs from his legs, and so I don't think
20 that it was felt necessary to give him long-term blood
21 thinners for deep veinous thrombosis. That was the
22 response to the need to stop any blood clots from entering
23 the lung tree. Again, that was the complication of the
24 deep veinous thrombosis, and I believe that I read it was
25 the right leg.

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1 So they took care of that in the acute setting. He
2 may have had some blood thinners at that time in the acute
3 setting. I think that they would probably do that these
4 days, but I don't know if that was -- that was what the
5 surgeons did at that time.

6 Q I'm going to show you another document from this file
7 that you brought with you today. Would you please look at
8 that and tell us what is significant about it, if
9 anything?

10 A This is an operative report signed by Dr. Bynoe from
11 the Richland Memorial Hospital. Basically, this is --
12 they're placing a central line for venous access.

13 When a patient in the hospital has difficulty getting
14 access for I.V.s with a vein, typical intravenously set
15 up, they'll often ask the surgeons or other doctors who
16 perform this procedure to go ahead and put a -- what they
17 call a central line in.

18 The central line is -- basically, it's a big
19 intravenous line that is inserted into one of the larger
20 blood vessels more centrally than say in an arm or a leg.

21 So by doing that, they can ensure that the patient
22 has access for say giving them fluids and other medicines
23 that can only be given by the vein.

24 Q Would you please look at the other document I placed
25 there. Is that something you used? Is that from his file

1 that you brought?

2 A Yes. This is the -- I believe the procedure that I
3 was mentioning a little while ago that --

4 Q How did they repair this carotid artery?

5 A (There was no response).

6 Q They used a vein or an artery from another part of
7 his body?

8 A Well, I'm not a surgeon, so you know, I can read this
9 for you, and I can tell you in general terms what they
10 did, but I wouldn't perform this type of operation myself.

11 Q All right.

12 A So I'm going back to my internship where I did six
13 months of surgery. So, let's see here. They noticed
14 after they dug down a little bit that the carotid artery
15 came into view, and they noticed a large posterior defect
16 on the carotid artery which they thought was secondary to
17 the gunshot wound.

18 They gave a little bit of a blood thinner to make
19 sure that while they were working the artery was not going
20 to clot, and they occluded the artery so that blood
21 wouldn't flow through it while they were trying to patch
22 this. They used a saphenous vein graft to --

23 THE COURT: Excuse me.

24 THE WITNESS: -- fix the...

25 THE COURT: Doctor, Doctor, excuse me just a minute.

Faber - direct (McMullen)

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1 Counsel, could I see you?

2 MR. McMULLEN: Yes.

3 (WHEREUPON, a bench conference was held in the
4 presence, but not within the hearing, of the jury).

5 BY MR. McMULLEN

6 Q Doctor, would you kindly finish your thought and
7 let's just --

8 A Well, your question was about what kind of tissue did
9 they use to patch the -- the artery with, and about
10 halfway down into the procedure it says they used a
11 saphenous vein graft.

12 A saphenous vein is a vein from the leg that is
13 commonly used to patch arteries.

14 Q Let's move into how Mr. Starks is today. How -- when
15 you examine someone and try to determine their strength,
16 do you do physical tests on them?

17 A Yes.

18 MR. McMULLEN: Would you -- would the Court permit
19 him to show, using Mr. Starks, what kind of tests he does,
20 just demonstrate?

21 THE COURT: Certainly, go ahead.

22 BY MR. McMULLEN

23 Q Would you please step down, Doctor.

24 Mr. Starks, come on over here, please.

25 (Complies).

1 Please speak loudly and clearly so everyone can hear
2 you.

3 A Okay. Well, one of the first things I do when I'm
4 first meeting a patient is I watch them walk toward me. I
5 might ask -- go ahead and walk away from me now, then come
6 back, if you don't mind.

7 So just watching gait is an important part of the
8 examination.

9 Can you come back now? I'd like to see if you can
10 walk with one foot right in front of the other.

11 Can everybody heard me okay? I'm sorry.

12 Can you walk single file like this?

13 (The defendant complies.)

14 Okay. Okay. All right. That's fine. Can you go
15 ahead and just stand on one leg?

16 (The defendant complies.)

17 Okay. Can you try the other one?

18 (The defendant complies.)

19 Okay. All right. Don't fall.

20 Now, another -- another thing that I want to look at
21 when I'm evaluating someone's strength is to go ahead and
22 ask them to just raise their arms. Hold your arms up for
23 me and now close your eyes. Way -- put your arms way up,
24 as far towards me as you can and keep your palms to the
25 ceiling.

Faber - direct (McMullen)

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1 (The defendant complies).

2 Okay. Just relax now. Go ahead and open your eyes,
3 Mr. Starks, and put your head -- put your hands down.

4 Okay. Now, what I'm doing now is I'm assessing what we
5 call tone. Here on the right side, you know, the tone
6 seems normal. Just be as limber as you can be. Okay.
7 There you go. Good.

8 Now, on this side, I want to see how your tone feels
9 here. Just relax. Just let everything go loose.

10 You have got a little bit of a jerking thing going
11 on. Just relax. Just let everything relax. Try to be as
12 limber as you can be.

13 Okay. All right. You see, he's got a little
14 movement here, and he's got a little -- it's a little
15 harder for me to push his elbow in this direction than it
16 was on that side.

17 So this is a little bit of this spasticity problem
18 that we see sometimes after someone has had a stroke.

19 All right. I'll need you to sit down. Can I borrow
20 a chair?

21 THE BAILIFF: Sure.

22 THE WITNESS: All right. Why don't you go ahead and
23 have a seat there.

24 (The defendant complies).

25 Okay. Now, we're going to go back to this side again

1 and grab -- go ahead and squeeze my fingers. Squeeze my
2 finger hard, and so he's got good grip on this side.

3 Squeeze over here. Give me a squeeze real hard.

4 Okay. Just relax. Okay, good.

5 All rightie. Now, what we can do is put your arms up
6 like so. Okay. Keep your arms up. Don't let me pull.

7 Don't let me pull. Very strong. Okay. So that would be
8 a five, maybe a little less than that, maybe a four.

9 Okay. We might want to look at your finger strength,
10 so go ahead and spread your fingers far apart. Don't let
11 me squeeze together. Don't let me squeeze. All right.

12 Okay.

13 Can you raise your knee up in the air for me? Keep
14 it up. Keep it up. Keep it up. Okay, good. Try this
15 one. Raise this knee up. Keep it up. Okay. Relax. Can
16 you extend your knee for me? Good. Can you do that on
17 this side? Good. Okay. Just relax. All rightie. Just
18 let everything relax now.

19 Now, pull your heel against my hand. Pull back
20 towards you. Okay. Pull back towards you again. Okay.

21 Do you want to see the entire examination?

22 Q Well --

23 A Can you bring your arms out like so for me? Go back
24 up here and keep them up. Don't let me push down. That's
25 good. Okay. Just relax. All rightie.

Faber - direct (McMullen)

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1 So those -- you know, I don't know if you want the
2 entire thing --

3 Q Well --

4 A -- but this is just an example of some of the
5 elements of the examination.

6 Q Do you -- well, I think that's fine. Thank you.

7 A Right. I mean, this usually gives us a good idea as
8 to where we are in the -- in the course of, you know, how
9 much weakness is persistent.

10 Q Let me ask you to do one more thing.

11 A Yes.

12 Q Would you just look at his neck. See if you can
13 determine where the exit wound was.

14 A (Complies).

15 Q How about the other side?

16 A There is -- there is a scar over here. The problem
17 with looking at scars is, you know, obviously, they had to
18 do some surgery in order to repair this -- I'm sorry. I
19 didn't mean to...

20 They obviously had to do some surgery, and so that's
21 going to cause some scarring there, too. I don't know
22 that anybody could say for sure that there is or isn't an
23 exit wound.

24 Q Please -- thank you very much.

25 (The defendant returns to his seat.)

1 So now, I know you just said that's not a complete
2 examination, but from the examination you just performed,
3 can you characterize his strength for us on the left side?

4 A Well, he has what I would say is about four over five
5 strength on the left side with some increase in tone and
6 some spasticity on that side.

7 Earlier he told me that he took his medication this
8 morning, which if he had not, it might have brought that
9 spasticity out a little bit more.

10 Q And how about his balance, is it diminished at all?

11 A Well, I would say yes. His balance does look as if
12 it's slightly impaired.

13 Q Would these things, in your opinion, if you're able
14 to say to a medical -- a reasonable degree of medical
15 certainty, would these things affect his ability to defend
16 himself?

17 A Well, I -- I think certainly without them he probably
18 would be a lot stronger and a lot more able to defend
19 himself. I guess it would depend upon what he was
20 defending himself against and whom he was defending
21 himself.

22 The short answer to your question is yes. He's not a
23 whole person, so there has to be some -- some degree of
24 deficit in terms of self-defense there, I'd say.

25 Q How many years have you treated Mr. Starks for

Faber - direct (McMullen)

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1 neurological problems?

2 A Since the early '90s, so it's -- I think going on 15
3 years.

4 Q And has he been progressively improving, gaining
5 strength over those years?

6 A Yes. Initially, he was in a wheelchair, and then he
7 progressed to walking with a cane. So he has improved
8 over the years.

9 Q Do -- do some of your tests determine whether someone
10 is malingering, faking it?

11 A Well, we have some tests that can do -- or help us
12 try to decide if somebody is doing that.

13 Q In your opinion, if you're able to give one, is
14 Mr. Starks faking it?

15 A No. I don't -- I don't think he's faking his -- his
16 injury, no.

17 MR. McMULLEN: Thank you. Please answer any of the
18 prosecutor's questions.

19 THE COURT: Do you wish to proceed?

20 MS. SHIPLEY: Should we take a short break, Your
21 Honor?

22 THE COURT: I think that would be appropriate.

23 All right. Ladies and gentlemen, let's just take a
24 short morning break. I'll ask you to go to the jury room.
25 Do not discuss the case among yourselves while you're in

1 the jury room. We'll call you in just a few minutes.

2 (WHEREUPON, the jury left open court at approximately
3 10:31 a.m.)

4 THE COURT: We'll stand at ease about ten, 15
5 minutes.

6 THE BAILIFF: Watch your step for me, please.

7 (WHEREUPON, a short break was taken.)

8 THE COURT: Is the State ready to proceed?

9 MS. GARFIELD: Yes, sir, Your Honor.

10 THE COURT: Is the defense ready?

11 MR. McMULLEN: Yes, sir. The witness is here.

12 THE COURT: Retake the stand, Doctor.

13 All right. Bring the jury, please.

14 MR. McMULLEN: Just so you know, we didn't speak with
15 the doctor.

16 (WHEREUPON, the jury came into open court at
17 approximately 10:52 a.m.)

18 (A cell phone rang.)

19 THE COURT: I can't believe it. That's the fifth
20 phone.

21 THE BAILIFF: The jury is all present, Your Honor.

22 THE COURT: Thank you, ma'am. Ladies and gentlemen,
23 we're now ready to continue with the trial.

24 Ms. Shipley, you may cross-examine.

25 MS. SHIPLEY: Thank you very much, Your Honor.

Faber - cross (Shipley)

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1 CROSS-EXAMINATION:

2 BY MS. SHIPLEY

3 Q Good morning, Dr. Faber. You and I have never met,
4 correct?

5 A Yes, correct.

6 Q And we never discussed any of your testimony that you
7 testified to today?

8 A Correct.

9 Q Okay. You indicated that you went to Boston City
10 Hospital to do your residency; is that correct, or was
11 that at the Carnie Hospital?

12 A The Carnie is where I did my transitional year
13 internship.

14 Q And then you did neurology at Boston City?

15 A That's correct.

16 Q Okay. And do you know Dr. Kessler?

17 A Yeah. We were just going over some -- some folks
18 that we knew there, and I was wondering if I had bumped
19 into him while I was there.

20 Q And you never got a chance to, I guess?

21 A Well, I might have. It's been a long time.

22 Q Okay. And he was the Chief Medical Examiner for the
23 same county, Suffolk County at Boston Hospital?

24 A Right. That was a very pleasant experience to work
25 in his environment there for -- I think I had a

1 three-month neuropath rotation where I examined the brains
2 of the cases that came in.

3 Q Okay. And how long were you up in Boston?

4 A From '85 to '89, I think.

5 Q To '89, four years. Then when was it that you opened
6 your practice in West Columbia?

7 A Well, I joined a practice, which we have our main
8 office on Taylor Street here, the South Carolina.
9 Neurological Clinic. There is -- so I really joined. I
10 didn't so much open.

11 Q Okay.

12 A And they -- we have a satellite office over in the
13 West Columbia area.

14 Q And what year was that, Doctor?

15 A That was 1989.

16 Q Okay. So straight from Boston to Columbia?

17 A Right.

18 Q Okay. Are you affiliated with any hospitals in the
19 city?

20 A We have privileges. Myself and my group, we have
21 privileges at Baptist Hospital, Providence Hospital,
22 Providence Northeast, and the Lexington Hospital. I think
23 that's it.

24 Q Okay. But not Richland Memorial Hospital?

25 A No.

Faber - cross (Shipley)

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1 Q Palmetto Richland Memorial.

2 You were describing what exactly epilepsy is. Does
3 this defendant -- have you diagnosed this man with
4 epilepsy?

5 A Yes.

6 Q Okay. When was it that you diagnosed him with
7 epilepsy?

8 A Well, he was diagnosed with epilepsy in the hospital,
9 and I concurred with the diagnosis. Basically, he was
10 sent to me for control of his seizures, for his -- for his
11 epileptic seizures.

12 Q And the epileptic seizures were as a result of a
13 gunshot wound to his face; is that correct?

14 A Well, I think you can say that the epileptic seizures
15 were a result of a stroke type active, brain type
16 problems.

17 As far as, you know, whether or not the gunshot wound
18 was the proximate cause is difficult to say from my
19 standpoint.

20 Q Okay. And when you joined in the diagnosis of
21 epilepsy, did you rely on the medical records and the
22 opinions of other doctors in reaching your conclusions?

23 A Yes.

24 Q And could you tell this jury exactly the chief
25 complaint that this patient presented at the hospital when

1 he was brought to the trauma unit and seen by Dr. Bynoe,
2 the history that was provided to Dr. Bynoe?

3 A I'd have to go to the chart and read that.

4 Q Okay. Well, I've already gone ahead and pulled the
5 chart. I'll ask you to read.

6 Your Honor, may Mr. McMullen and I approach, please?

7 THE COURT: Yes.

8 (WHEREUPON, a bench conference was held in the
9 presence, but not within the hearing, of the jury).

10 THE COURT: All right. Ladies and gentlemen, the
11 purpose of this conversation the attorneys, the parties,
12 have been willing -- or are willing to enter into a
13 stipulation about this gunshot wound, that it was not from
14 the deceased in this case.

15 In other words, the parties don't want the jury to
16 think that the gunshot wound that the defendant suffered
17 came from the deceased in this case.

18 So that -- the parties are stipulating that that --
19 it came from some other source, but it did not come from
20 Mr. Alphonzo Cleveland.

21 Is that the stipulation, Counsel?

22 MR. McMULLEN: Yes, sir.

23 MS. SHIPLEY: Yes, sir.

24 THE COURT: All right. So I just want you to
25 understand that. Just in case somebody might be thinking

Faber - cross (Shipley)

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1 that's, you know, how this whole thing got started or
2 something.

3 So all right. You may proceed.

4 BY MS. SHIPLEY

5 Q Thank you, Your Honor. I appreciate it.

6 All right. You first started treating this patient,
7 the defendant, Thaddess Starks, in what year?

8 A '90 -- let's see. It would be '92, I believe.

9 Q So the same -- soon after his discharge from the
10 hospital for the surgery from the gunshot wound?

11 A I believe that's correct.

12 Q Okay. And so that is about 15 years that you have
13 been treating this individual, correct?

14 A Yes.

15 Q And Doctor, approximately how many patients do you
16 have total? How many patients do you see in a typical day
17 in your practice?

18 A Twenty people in a typical day so --

19 Q On an average, could you give us an approximation of
20 how many patients you treat at a given time?

21 A I've never really thought about that.

22 Q You have -- but it's so many you can't count; is that
23 right?

24 A A couple thousand, I suppose.

25 Q A couple thousand?

1 A Yes.

2 Q Okay. So that is why you are not familiar with
3 Mr. Starks' -- the scar on the left side of his neck?

4 A Well, I wasn't involved in any of the goings on at
5 the hospital or really being asked to -- to -- to do
6 anything about those issues.

7 My job was to treat his seizure disorder and try to
8 prevent any complications from the medications that we
9 were treating him with.

10 Q Okay. So when you first see a patient, you don't do
11 a full examination of him first in order to become
12 familiar with what their physical limitations might be?

13 A Only as it pertains to the current problem. So if I,
14 for instance, see a gaping neck wound, you know, I'll
15 certainly alert the surgeon and so forth, but if I -- you
16 know, if I don't see anything like that, I'll defer the
17 rest of his examination to his surgeons and his primary
18 care providers.

19 Q Okay. And so you were doing some exercises on the
20 defendant, and most of it seemed to be from the left side
21 of his body. You never noticed the scar on him before
22 today, or had you seen that scar before today?

23 A I'm sure I had, but it wouldn't really be pertinent
24 to my examination. So no, I don't routinely list the scar
25 every time I see it.

Faber - cross (Shipley)

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1 Q All right. So it's -- we can make this clear, he --
2 the gun, the bullet went through the right side of his
3 mouth or lip area; is that correct, the gunshot wound?

4 A I didn't see the wound.

5 Q But reading -- in preparation for your testimony
6 today, did you review his medical charts of how he was
7 treated for that injury?

8 A In A general way but not from a surgical standpoint.

9 Q Okay. Your testimony on direct examination was that
10 the bullet entered the right mouth area and then lodged or
11 exited out the left neck area through the carotid artery;
12 is that correct?

13 A That's what I read in the record --

14 Q All right.

15 A -- here, I believe.

16 Q So as a result of being treated or having surgery for
17 that, the stroke occurred while he was being operated on,
18 or when did the stroke occur?

19 A I can't tell you that.

20 Q You don't know when the stroke occurred?

21 A No.

22 Q But it's your testimony that the stroke caused this
23 epileptic condition?

24 A Well, his -- that's a fair assumption, but I don't
25 know that anybody can prove that.

1 Q So you can't prove that.

2 A (There was no response).

3 Q It's fair to say, then, that these seizures started
4 after his surgery. He didn't have a history of it before.

5 A The seizures, by history, were an event associated
6 with his hospitalization.

7 Q Okay.

8 A The discharge summary indicates that.

9 Q Now, as a result, he was referred to you by
10 Dr. Bynoe; is that right?

11 A That's correct.

12 Q And Dr. Bynoe is an emergency surgeon, trauma
13 surgeon, at the Richland Memorial Hospital; is that
14 correct?

15 A I don't know if he still is or not.

16 Q He is.

17 A Okay.

18 Q And he would have performed the surgery and then
19 noted these seizures and referred him to you, the
20 neurologist?

21 A Correct.

22 Q Okay. And the -- as a neurologist, it would have
23 been up to you to decide exactly how to medicate your
24 patient, right?

25 A Correct.

Faber - cross (Shipley)

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1 Q It is up to you to decide the dosage of the
2 medication, first of all, and then the therapeutic level
3 that is required, as well as the type of dosage; is that
4 correct?

5 A Correct.

6 Q Okay. And back in -- is that when you started him,
7 1992. Is that when you put him on these different drugs
8 to treat his epilepsy and treat the seizures?

9 A Yes. I think to correct my -- my earlier statement,
10 I saw him first in '93.

11 Q Oh, in 1993, a year after the event?

12 A Well, I'm just looking at my initial consultation
13 of -- I think it was -- excuse me, January 12, 1993.

14 Q Okay. And so when you first met with the defendant
15 in January -- on January 12th, 1993, your primary purpose
16 was to, first of all, to confirm the diagnosis by
17 Dr. Bynoe; is that correct?

18 A I'm not sure who in the hospital made the diagnosis
19 of seizures, but if you want to use him as the attending
20 of record.

21 Q Okay.

22 A Yes.

23 Q All right. So you wanted to first confirm that he,
24 indeed, had these seizures, symptoms of epilepsy, correct?

25 A Yes.

1 Q Tell this jury what you did to prove that he had
2 these seizures. What sort of tests did you run to make
3 sure that these were not malingering symptoms, that these
4 were legitimate symptoms?

5 A Well, his reports indicated that he came with --
6 indicated that he did have an abnormal E.E.G. The history
7 that was given from his seizures seemed to -- to confirm
8 that or certainly be consistent with that.

9 Q Consistent with that?

10 A Yes.

11 Q Okay. And you never personally observed him undergo
12 a seizure?

13 A I have never seen him have a seizure, no.

14 Q Never?

15 A Never.

16 Q You indicated that he had an abnormal E.E.G., and
17 that's what you based your decision, your diagnosis on,
18 that E.E.G. and the medical history provided by the
19 hospital.

20 A Correct.

21 Q Explain to this jury what was abnormal about his
22 E.E.G.?

23 A His E.E.G. showed spikes or epileptic type activity
24 in the right hemisphere.

25 Q The right hemisphere?

Faber - cross (Shiple)

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1 A Correct.

2 Q And tell this jury what the right hemisphere of the
3 brain, how that controls the rest of your body.

4 A The right hemisphere affects the left side of the
5 body.

6 Q The left side?

7 A Right.

8 Q Okay. So it's sort of opposites, opposite control;
9 is that correct?

10 A Exactly.

11 Q Okay. So the only portion of Mr. Starks's body
12 affected by this stroke was the left side?

13 A Correct.

14 Q Okay. And according to his wife, he is right handed.
15 He writes with his right hand. He is stronger on the
16 right side of his body. Would you dispute that?

17 A No.

18 Q Now, as a result, you indicated the left side of his
19 body is affected due to the stroke that occurred in the
20 right side of his brain.

21 Describe for the jury -- you testified on direct
22 examination that that can cause paralysis. You were also
23 asked if this defendant -- well, actually, I don't think
24 you were asked. Is this defendant paralyzed?

25 A Well, we would say he is hemiparetic or weak on that

Faber - cross (Shipley)

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1 side.

2 Q I'm sorry. Can you repeat that. I didn't
3 understand.

4 A We would say he is hemiparetic, which is another way
5 of saying weak on half of the body.

6 Q Weak but not paralyzed?

7 A Correct.

8 Q In your experience in talking to your patient,
9 without disclosing any confidential information, did you
10 ever note some sort of loss of speech on your patient?

11 A I don't believe so.

12 Q Okay. So as a result, you confirmed the diagnosis
13 that he was epileptic, and you wanted to control his
14 seizures, correct?

15 A Correct.

16 Q That's why you put him on Dilantin; is that correct?
17 How do you pronounce that medication?

18 A Dilantin.

19 Q Okay.

20 A He was already on that when he came to me.

21 Q And so the hospital had put him on that already?

22 A Yes.

23 Q Okay. Did you have to do any -- make any changes in
24 the dose that he was being already prescribed by the
25 hospital?

Faber -- cross (Shipley)

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1 A Yes.

2 Q And what change did you make and why?

3 A Well, I think the reason that they had sent him to me
4 was that his seizures were under poor control.

5 Q Were not in control?

6 A That's correct.

7 Q Okay.

8 A Let see. I said in my note of January 12th, '93,
9 apparently the seizures had been -- were under less than
10 optimal control with the low Dilantin levels being found
11 in the blood despite his being compliant.

12 Q In laymen's words, I really didn't -- I honestly did
13 not understand what that means. Could you explain that in
14 just laymen's words?

15 A His seizures were -- they were -- the doctors were
16 attempting to treatment his seizures with Dilantin.

17 Q Uh-huh.

18 A But for some reason, they weren't able to get his
19 Dilantin level in the blood stream up to the usual
20 therapeutic levels, despite the fact that he assured them
21 that he was taking his medicine.

22 Q Okay. So therefore, he was still having seizures.
23 Does that mean he was still having seizures?

24 A Yes.

25 Q Okay. And then as a result, you discovered that

1 clearly, they weren't giving him a high enough dosage.

2 Did you increase his dosage?

3 A At that time, you know, he was taking 500 milligrams
4 daily of the Dilantin. So what I wanted to do was observe
5 another Dilantin level to find out where the level was at
6 that time in order to see, because I really didn't want to
7 go much higher than 500 milligrams of Dilantin a day.

8 That's a pretty strong dose.

9 I wasn't altogether clear that either the finding of
10 the subtherapeutic level was actual or perhaps he had
11 forgotten to take some of his medicine despite telling me
12 that he had done so. So we were going to check another
13 blood level to find out where it stayed.

14 Q And so you did that?

15 A According to my records, that was the plan.

16 Q And did you have to eventually increase his level or
17 dosage from 500 milligrams?

18 A Let's see. My -- I next saw him in March of 1993.
19 It said he had only one seizure since I had seen him back
20 in January, and this was only after having gone without
21 his medication for three days. So I reminded him of the
22 need to continue to take his medication and left him where
23 he was.

24 Q And so you left him at 500 milligrams?

25 A Right.

Faber - cross (Shipley)

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1 Q And so the only time that he would suffer seizures is
2 if he failed to take his medication as you prescribed it
3 to him?

4 A Well, assuming everything else is fine. There are
5 some folks who have seizures for no explained reason
6 dispute doing everything the same that they've been doing.
7 So it's not -- it's not 100 percent that somebody might be
8 stable without seizures from month to month depending on a
9 lot of other factors.

10 Q Okay. And so that was back in 1993, some 14 years
11 ago, that he had his last -- that he reported a seizure to
12 you while as your patient, correct?

13 A No, that's -- that's not correct.

14 Q Well, no. I'm saying that that's the first time he
15 reported a seizure while he was under your care to you.

16 A Yes.

17 Q Okay. So the first time he reports one to you is in
18 1993. Do you know approximately when in 1993? You met
19 with him first in January.

20 A It was -- so it was between January and March.

21 Q Okay.

22 A So he had a seizure.

23 Q And just reported one, correct?

24 A Correct.

25 Q And that's because he didn't take his medicine for

Faber - cross (Shipley)

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1 three days?

2 A That's correct.

3 Q All right. And going through your chart, your
4 records on the patient, when is the next time he reports?

5 By the way, you say you kept him on the medicine for the
6 same 500 milligrams of Dilantin, correct?

7 A Yes.

8 Q All right. Tell the jury when is the next time he
9 reported a seizure to you.

10 A Let's see here. I'll just go month by month here,
11 visit by visit.

12 Q Okay.

13 A I think I next saw him in June of '93.

14 Q All right.

15 A And he reiterated that he thought his last seizure
16 was sometime around the middle of February which would
17 coincide with what you had written.

18 Q That was mid February, okay.

19 A And we talked about continuing on the medication at
20 that time. He had been in the hospital and had been --
21 his Dilantin had been increased to 600 milligrams daily by
22 someone else.

23 Q And do you know who that someone else increased your
24 patient's medication?

25 A Do I know who did that?

Faber - cross (Shipley)

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1 Q Yes.

2 A No, I don't.

3 Q And Doctor, I'm sorry to interrupt you, but you know,
4 he is your patient. You are his neurologist. How would
5 you not know who would increase your patient's medicine
6 without your --

7 MR. McMULLEN: Objection, relevance.

8 BY MS. SHIPLEY

9 Q -- knowledge?

10 A Well, unfortunately, it happens all the time.

11 THE COURT: Overruled.

12 BY MS. SHIPLEY

13 Q It does?

14 A Yeah. We try to limit that, but unfortunately, if
15 somebody sees that someone's going to have some other
16 problem -- apparently, he had been admitted to the
17 Richland Memorial Hospital with the Dilantin overdose.

18 Q So an overdose.

19 A The --

20 Q When was that, Doctor?

21 A That was between when I saw him in March --

22 Q Uh-huh.

23 A -- and when I saw him in June.

24 Q And it's --

25 A And he had been admitted to the Richland Memorial

1 Hospital.

2 Q Overdose of Dilantin?

3 A That's what I was told, yes.

4 Q Okay. I'm not really understanding this. If he
5 overdosed on Dilantin, why on earth would someone increase
6 his medication to 600 milligrams?

7 A Well, I guess when -- I mean, I'm just guessing.
8 What happens is when somebody takes too much and they get
9 the therapeutic levels re-established, they find that 500
10 milligrams a day doesn't bring them up to a therapeutic
11 level. They might go ahead and increase his Dilantin
12 level to -- the Dilantin prescription to six a day instead
13 of five a day.

14 Q Okay. And so the overdose on Dilantin would have
15 been the patient's misuse of the prescription drug; is
16 that correct?

17 A I don't know that I can assume that.

18 Q Okay.

19 THE COURT: Counsel, let me see you a minute.

20 (WHEREUPON, a bench conference was held in the
21 presence, but not within the hearing, of the jury).

22 BY MS. SHIPLEY

23 Q And all right. And so when is the next time that he
24 reported a seizure to you while he is your patient?

25 A Let's see. I saw him then again in October, and he

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1 did not report a seizure at that time. Then in August of
2 '94, he had not had a seizure.

3 Q So he reports in August of '04?

4 A '94.

5 Q '94, no seizures.

6 A And our next visit was December of '95, and
7 apparently, he had had a seizure. One of my partners,
8 Dr. Julian Adams, indicated that he got a call from the
9 emergency room and found the Dilantin level was a little
10 bit low.

11 Basically, he left me a note that said the emergency
12 room doctors gave him a little extra Dilantin for that
13 visit to get his Dilantin level up to a therapeutic range.

14 Q Okay. And then any reports of seizures since
15 December of '95?

16 A And then in March of 1996, he reported that he had
17 had that seizure in December when I saw him in follow up.
18 He was still taking Dilantin 600 milligrams daily, as well
19 as the Baclofen, so December of '95.

20 MR. McMULLEN: May it please the Court.

21 THE COURT: Yes.

22 MR. McMULLEN: Can I object on the grounds of
23 relevance? I think this is cumulative and a waste of
24 time.

25 THE COURT: Yes, sir, you can.

1 Approach the bench.

2 (WHEREUPON, a bench conference was held in the
3 presence, but not within the hearing, of the jury).

4 BY MS. SHIPLEY

5 Q Is it fair to say your patient has only reported two
6 seizures in his whole 15 years of having epilepsy? Just
7 to move it along.

8 A I don't -- I don't know that that's correct. I
9 understand that when he was in the hospital, he had
10 several seizures.

11 Q Okay, initially, but since his surgery in 1992, he
12 has only had two episodes of seizures since then; is that
13 correct?

14 MR. McMULLEN: It's been asked and answered.

15 THE COURT: Overruled. Go ahead and ask the answer
16 the question, Doctor.

17 THE WITNESS: That -- yes, that may be correct.

18 BY MS. SHIPLEY

19 Q Okay. Now, you were talking about the strengths
20 versus weaknesses of your paint, five being normal and
21 zero being totally paralyzed; is that correct?

22 A That's right.

23 Q All right. And I believe you did the demonstration
24 in front of the jury, and you said that five over five is
25 normal, and you told this jury that the right side of this

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1 patient, this defendant, is normal; is that correct?

2 A Correct.

3 Q Full strength?

4 A Yes.

5 Q And the left side, you said, is four over five, so is
6 that 75 percent mobility strength?

7 A Well, closer to 80 percent.

8 Q 80 percent, even higher, okay. And if he is right
9 handed then, he would have no problem in defending himself
10 using this knife --

11 MR. McMULLEN: I'm going to object.

12 THE COURT: Overruled.

13 BY MS. SHIPLEY

14 Q -- and causing this injury with his right side, if
15 he's working functioning at 100 percent?

16 A I'm sorry. What was the question?

17 Q If he's functioning at 100 percent on the right side
18 of his body and he is right handed, he would have no
19 problem stabbing this individual with this knife causing
20 this injury.

21 A I can't answer that as an expert. I would say that
22 obviously the -- just from what I know about cutting
23 things, if you have some weakness on one side, you're
24 probably not going to be as effective in cutting things.

25 Q Well, sir, this individual died. Apparently, it was

1 effective.

2 A I understand.

3 Q Okay. And moving on, you were asked towards the end
4 of your testimony on direct examination, which I thought
5 was quite interesting, Mr. McMullen asked you whether or
6 not the fact that your patient has 100 percent functioning
7 capability on his right side but only 80 percent
8 functioning capability on his left side, whether or not in
9 your expert opinion that would affect his ability to
10 defend himself.

11 You answered, and I quote, It would depend against
12 whom and what he was defending himself against;" is that
13 right?

14 A Yes. That's what I said.

15 Q Okay. And so you're not telling this jury that a man
16 of his size who is 6'0", 350 pounds is weaker than a man
17 who is 5'7" to 5'9" and weighs 190 pounds, are you?

18 A Obviously, he has got a height and weight advantage.
19 As far as, you know, what the shape of the other
20 individual is, I guess would have something to do with it,
21 as well, but in general, if you take two fairly evenly
22 matched individuals and give one a weight advantage and a
23 height advantage, I'd have to say I'd probably bet on the
24 person with the advantage there.

25 Q Yes, sir. What about age? Does age have a factor in

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1 it, as well?

2 A I'm sure it does.

3 Q How about a 20-year age difference that the person
4 being defended -- in other words, the bigger man who is
5 younger against a smaller man who is older. Does that
6 have any bearing on your opinion?

7 A In general terms, I'd have to say your point is well
8 taken, and you may be accurate.

9 Q Okay.

10 A You know, I ran a marathon when I was 50, and I
11 couldn't have do that when I was 20.

12 Q Okay.

13 A So the point is there are a lot of other factors
14 involved that you haven't told me about.

15 Q Okay. Well, how about a 33 years old 6'0", 350 pound
16 man versus a 5'7" to 5'9 190 pound 54-year-old man?

17 A And as I already told you, I'd certainly bet on the
18 bigger person first, even if they had some disadvantage,
19 you know, just based on what you have told me.

20 MS. SHIPLEY: Thank you, Doctor. You would have won
21 the bet in this case, sir.

22 MR. McMULLEN: I object to that.

23 THE COURT: Sustained. Strike that from the record.
24 Just disregard that last comment.

25 Any redirect?

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1 MR. McMULLEN: No, sir.

2 THE COURT: All right. Doctor, you may come down.

3 Thank you very much.

4 MR. McMULLEN: Thank you, Doctor.

5 THE COURT: Do you wish him to be excused?

6 MS. SHIPLEY: No objection.

7 THE COURT: Without objection.

8 Next witness?

9 MR. McMULLEN: The defense rests.

10 THE COURT: All right. Ladies and gentlemen, that's
11 the defense. The defense has rested.

12 Any reply?

13 MS. SHIPLEY: No, sir, Your Honor. The State rests.

14 THE COURT: All right. Thank you very much. All
15 right, ladies and gentlemen. That will conclude the
16 evidence in this case.

17 The remainder of the case will consist of the final
18 instructions, arguments by counsel, their summations by
19 counsel and my instructions to you on the law of the State
20 of South Carolina as it applies in this case.

21 Now, before that takes place, and that will take a
22 fair amount of time, there are a number of matters that I
23 need to go over with the attorneys, just to make sure
24 everything is in place for the final arguments.

25 So I'm going to dismiss you now for the lunch hour,

1 which as you know doesn't always end up being an hour, but
2 we might as well take our lunch break a little earlier
3 because I'm going to take some time with the attorneys
4 before we actually start with final arguments.

5 I'll ask you to be back -- since it's 11:30, I'll ask
6 you to be back in the -- hold on.

7 (Pause).

8 All right. I'm going to ask you to be back in the
9 jury room at one o'clock. It's 11:30 now. I ask you to
10 be back in the jury room at one o'clock, at which time
11 we'll conclude the trial. Again, don't discuss the case
12 among yourselves when you return to the jury room or with
13 anyone else over the lunch hour.

14 Have a pleasant lunch. We'll see you at one o'clock.
15 Thank you very much.

16 (WHEREUPON, the jury left open court at approximately
17 11:30 a.m.)

18 THE COURT: Any motions?

19 MR. McMULLEN: Yes, sir, Your Honor. I would renew
20 the directed verdict motion made previously.

21 THE COURT: On the same grounds?

22 MR. McMULLEN: Yes, sir.

23 May we also please put something on the record about
24 the defendant's decision? I know you had a colloquy with
25 him yesterday.

1 THE COURT: Yes, sir.

2 MR. McMULLEN: Over the evening break and sometime
3 this morning, we discussed at length what his testimony
4 would be and whether he wanted to testify or not.

5 Obviously, since we have rested Mr. Starks chose --
6 stand up, please. Mr. Starks chose to exercise his right
7 to not testify.

8 I just want to put on the record, for what it's
9 worth, that would not have been my advice, but Mr. Starks
10 understands it's his decision, and he understands it when
11 he comes to it.

12 I tried to answer any and all of his questions
13 pertaining to this, but of course, it's his decision.

14 THE COURT: All right. Mr. Starks, as I explained to
15 you yesterday, you have a perfect right, you have a
16 constitutional right to remain silent. You understand
17 that, do you not?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: You understood everything I -- you
20 indicated you understood everything I told you yesterday
21 about your fifth amendment rights; is that correct?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: And you consulted with your attorney.
24 Since that time that I gave you that information
25 yesterday, you have consulted with your attorney,

1 particularly over the evening hours; is that correct?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: And is it -- your attorney tells me it's
4 your decision not to testify in this case. Is that
5 correct?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: All right. And that decision is -- has
8 been made by you freely and voluntarily?

9 THE DEFENDANT: Is it working?

10 MR. McMULLEN: Go ahead.

11 THE COURT: Oh, you don't have to bend down.

12 THE DEFENDANT: Okay. My family has went through so
13 much stress of the incident on both sides, you know, the
14 Cleveland side and my mom's side. I'm deeply hurt. You
15 know, I'm just tired of seeing my family go through it.
16 So I have nothing to say. You know, the evidence proves
17 the case, and I just rest.

18 THE COURT: Okay. Well, I will tell the jury, as I
19 told you, that they cannot consider your silence as any
20 evidence of guilt. Do you understand that?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: I will tell them that.

23 THE DEFENDANT: Yes, sir.

24 THE COURT: That the State has to prove their case
25 beyond a reasonable doubt in order for them to convict

1 you. Do you understand that?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: All right. As long as you understand and
4 are freely and voluntarily -- nobody has coerced you or
5 told you or threatened you or anything like that?

6 THE DEFENDANT: No, sir.

7 THE COURT: All right. All right. I accept your
8 decision, and I will so instruct the jury that they are
9 not to infer or imply anything from your silence and that
10 they are not even to discuss it in the jury room, all
11 right.

12 THE DEFENDANT: All right.

13 THE COURT: Thank you very much.

14 MR. McMULLEN: Thank you, Your Honor.

15 THE COURT: All right. With respect to the -- what's
16 the State's position on the directed verdict motion?

17 MS. SHIPLEY: Your Honor, we stand on State vs. Long.
18 We have clearly established all of the elements of the
19 crime beyond a reasonable doubt or enough for the jury to
20 make it a jury question.

21 THE COURT: All right. Well, let me just put on the
22 record that I feel that the evidence presented in this
23 trial goes beyond mere conjecture or suspicion; that
24 there's evidence here, direct or circumstantial, or some
25 combination of both which reasonably tends to prove the

1 guilt of the defendant or from which that guilt might be
2 logically and reasonably deduced if that evidence is taken
3 in the light most favorable to the State. So I must
4 respectfully deny the motion for a directed verdict.

5 Now, as to the request to charge, are you prepared to
6 move toward with that issue?

7 MR. McMULLEN: Yes, sir.

8 May I make one more motion, Your Honor?

9 THE COURT: Absolutely.

10 MR. McMULLEN: May it please the Court. I was able
11 to find a case, and it happens to be attached to my first
12 request to charge, so I'll give a copy to the State, other
13 side.

14 MS. SHIPLEY: Thank you. I appreciate it.

15 MR. McMULLEN: And then these are the ones, Your
16 Honor, that I've prepared in written form.

17 The first request to charge references the State vs.
18 Petit, petite but it's Petit. Then at page 458, 10. In
19 Petit, the fact that the defendant was only renting the
20 premises in which the killing took place in no way
21 affected his rights under the law.

22 In other words, he had the right to act the same as
23 on a rented premises as he would have had the property
24 been his own.

25 Your Honor, I would then -- the 12th paragraph or the

1 12th exception in that case on page two of my request to
2 charge, the Castle Doctrine.

3 I would respectfully move the Court to dismiss the
4 case based on Mr. Starks' room being his castle within
5 that house and the Protection versus the Property Act
6 directly addresses that.

7 I would move separate from my directed verdict motion
8 to dismiss the charges on the grounds that protection of
9 the Persons and Property Act applies in this situation.
10 The prosecution should not have been brought, and that it
11 is barred by that statute. I would ask you to dismiss it
12 on that ground.

13 THE COURT: What is the statute number again? I had
14 it out a minute ago.

15 MS. GARFIELD: 16-11-440.

16 MR. McMULLEN: 16-11-440, thank you.

17 THE COURT: Well, again, as you correctly pointed out
18 yesterday, the statute in (B)(1) says it doesn't apply to
19 a household member, a lawful resident of dwelling.

20 So I understand your position, and your position may
21 be well taken, but I'm afraid it's going to have to be
22 taken by the appellate courts as opposed to this court.

23 MR. McMULLEN: Thank you, Your Honor.

24 THE COURT: You may proceed.

25 MR. McMULLEN: Thank you, sir.

1 Should -- do you want me to go first with the request
2 to charge? Do you want me --

3 THE COURT: Well, the State indicated yesterday what
4 their position on charges would be. The -- as I
5 understand it, the only thing that they would not want
6 charged is self-defense.

7 So other than a standard charge on murder and the
8 lesser-included offense of voluntary manslaughter, I think
9 those are the two charges the State believes are
10 appropriate.

11 They do not think self-defense is an appropriate
12 charge, so I think that sort of handles the State; is that
13 correct?

14 MS. SHIPLEY: That is, yes, sir.

15 THE COURT: Okay. So I guess it is your turn,
16 Mr. McMullen.

17 MR. McMULLEN: May it please the Court.

18 THE COURT: Yes.

19 MR. McMULLEN: Well, let me just address that first,
20 if I may. We asked, respectfully, for a charge on
21 self-defense and charge on habitation.

22 I would say State vs. Rye, State vs. Wiggins, the
23 self-defense must be charged if there is any evidence to
24 support it.

25 I would submit, Your Honor, that it may be a

1 circumstantial case, but we through our witnesses and the
2 State's established that the door to Mr. Starks' room was
3 intact when Mr. Starks' mother went to work that day and
4 that it was not when she was returned home, and that one
5 inference the jury could draw from that is the one that
6 Mr. Starks has told the police and the police reported.

7 THE COURT: It was a right interesting the 911
8 recording that indicated that the positions were reversed,
9 that the defendant came through the door and that
10 Mr. Cleveland was in the bedroom. Now, I'm just
11 commenting on that, I mean, just pointing that out.

12 MR. McMULLEN: Yes, sir.

13 THE COURT: That was the first time I considered that
14 as an option; that perhaps the defendant broke down the
15 door, if Mr. Cleveland was in there, but that's a jury
16 issue. I understand.

17 MR. McMULLEN: And I would believe and argue that
18 that's the kind of error that was made by someone in that
19 capacity, human error.

20 THE COURT: Well, it's not for me to decide.

21 MR. McMULLEN: I don't want to move forward to --
22 unless we've decided this part, but I think we -- I would
23 also add, Your Honor, that once the defendant establishes
24 or asserts the defense of self-defense, the defense of
25 habitation, then the burden becomes, or it remains, the

1 State's to disprove it beyond a reasonable doubt.

2 THE COURT: That's correct.

3 MR. McMULLEN: I think we have done that, and I think
4 that the issue should go to the jury.

5 THE COURT: Okay. What's the State's position on
6 self-defense?

7 MS. SHIPLEY: Your Honor, the State's position is
8 that the four elements of self-defense have not been
9 established by the defense. Number one, there is ample
10 evidence on the record.

11 THE COURT: Now, hold on. Hold on.
12 Go ahead. Remember, it's your burden to disprove it.

13 MS. SHIPLEY: Yes, sir but --

14 THE COURT: Not their burden to prove it.

15 MS. SHIPLEY: But they have to satisfy the elements
16 first before we can disprove it --

17 THE COURT: Okay.

18 MS. SHIPLEY: -- if I understand it correctly.
19 Regardless, we have disproven element number one, Your
20 Honor, that the defendant was without -- he must be
21 without fault in bringing on the difficulty.

22 We have direct testimony, eyewitness testimony, from
23 Timothy Cornish that the defendant told him and provoked
24 him and used words of provocation to -- to agitate the
25 victim or by saying, "You punk M.F.'er. You got nowhere

1 to go just like me," but he did not obey the officer and
2 his mother and go straight to his room and lock himself in
3 his room. He stayed out on the porch and was taunting the
4 victim while he was talking to his neighbor asking to get
5 out of there.

6 THE COURT: And then -- and then what happened?

7 MS. SHIPLEY: And then, Your Honor, Mr. Cornish could
8 not give Mr. Cleveland a ride and he had to go back to his
9 home, and both individuals then went inside. The arguing
10 continued, according to the testimony of Timothy Cornish.
11 It continued for 45 minutes to an hour, according to
12 Mr. Cornish when he then hears, "Tim, Tim," and it's the
13 victim coming up to his front porch, and he's been stabbed
14 and he's bleeding.

15 Your Honor, we also believe that number two, the
16 defendant must have been in actual imminent danger of
17 losing his life or sustaining serious bodily injury, or he
18 must have actually believed he was in imminent danger of
19 losing his life or sustaining serious bodily injury.

20 Your Honor, there's been nothing on the record shown
21 by either what the defendant said to the officers at the
22 scene or what has been said to defense witnesses in this
23 case that he was in actual danger of anything.

24 He, from the get go, stated it was only a slap, and
25 he stabbed Mr. Cleveland in response to a slap. I don't

1 know of anything less minimal than a slap.

2 According to Investigator Isenhoward, because he was
3 slapped like a woman, that's what made him mad and made
4 him grab a knife and stabbed Mr. Cleveland.

5 Then the other issue, if his defense is based on his
6 belief of imminent danger, and I think that's what the
7 whole defense's strategy has been in this case is that he
8 had a belief of some sort due to his physical condition.

9 The question is this: Would a person, a reasonable
10 person, a prudent person of ordinary firmness and courage
11 entertain the same belief that he was actually in imminent
12 danger, and the circumstances were such as would warrant a
13 person of ordinary prudence, firmness and courage to
14 streak the fatal blow in order to save himself from
15 serious bodily injury or loss of his own life.

16 Your Honor, their own expert doctor said that he
17 would bet on the defendant, given the defendant's physical
18 condition, that he would bet on him over the victim.

19 I believe, Your Honor, that a reasonable juror, any
20 reasonable person, would not have felt that their life was
21 in danger due to a slap, and that that was not a
22 legitimate belief or a reasonable belief for the defendant
23 to have at that time.

24 Then lastly, the defendant had no other probable
25 means of avoiding the danger. Well, Your Honor, if he was

1 at fault in bringing on the difficulty, then he does have
2 a duty to retreat. He is still required to retreat if he
3 was at fault.

4 He had a car, a Mercury Mountaineer, that he had just
5 driven, according to his wife, all day back from Santee to
6 Eastover. Clearly, he didn't roll in with an empty gas
7 tank when he came home. He obviously had enough gas to
8 leave. He could have left.

9 And I rely on State vs. Light. In that case it was
10 Judge Westbrook, did not instruct the jury on the use
11 of -- on the self-defense, because in that case the victim
12 in that case was not armed, no longer posed a threat to
13 the armed defendant.

14 The defendant in that case could not have reasonably
15 believed that the victim was armed or a danger to himself
16 and either great bodily injury or death.

17 Then also in State vs. Wiggington, and it's a brand
18 new case from January -- actually, it's cited July of '07,
19 that's Judge Early, held that the defendant was not
20 entitled to a jury instruction on self-defense.

21 In that case, Your Honor, the Court held any act of
22 the accused in violation of the law and reasonably
23 calculated to produce the occasion and amounts to bringing
24 on the difficulty and bars his right to assert
25 self-defense as a justification or excuse for a homicide.

1 In that case where Judge Early ruled the defendant --
2 or the victim in that case did not approach the appellant
3 and did not confront the appellant with a gun or any type
4 of weapon.

5 In this case, there is no evidence that the victim
6 was armed with any type of weapon. A person -- and also,
7 this case explains that if you are responsible for
8 bringing on the difficulty, then you cannot fall on the no
9 duty to retreat principle.

10 And then lastly, in State v. Lockemy, Judge Lee also
11 did not charge to the jury the law of self-defense, and
12 the reason she was affirmed on appeal is because the
13 fourth element was not proven to the Court, and therefore,
14 she did not err by refusing the instruction.

15 In that case, Your Honor -- I'm not sure if you're
16 already aware of the facts in the case, I'll have to
17 refresh my memory because it's been a while since I read
18 it, but the Lockemy's owned a 38-parcel acre of land in
19 Marlboro County.

20 Oh, this is where the brothers get in a fight. They
21 all live on the same property, and there's two different
22 houses on the same property.

23 The victim's brother goes to the defendant's brother
24 to give him -- lend him some tools. For some reason, an
25 altercation ensued, and the defendant brother ended up

1 beating the victim brother quite severely to the point
2 where his glass eye was knocked out of his eye socket.

3 So the victim brother got in his car and realized he
4 need to get his glass eye back, so he turned around and
5 went back to get his glass eye. The defendant and
6 brother -- actually, I've got the roles mixed, Your Honor.
7 The one with the glass eye is the defendant. He's the one
8 that fired the shot while his brother was running to the
9 back of the tree.

10 In any case, Judge Lee ruled that was -- although he
11 claimed self-defense, he was not entitled to an
12 instruction on self-defense. That is all from the State,
13 Your Honor.

14 THE COURT: Mr. McMullen?

15 MR. McMULLEN: May it please the Court, Your Honor.

16 Let me start, please, with the State vs. Wiggins,
17 quote, unquote. "The evidence presented at trial in terms
18 of arguing and charge," and it gives a cite of cases, "if
19 there is any evidence in the record to support
20 self-defense, the issue should be submitted to the jury.
21 Additionally, if any evidence exists to warrant a jury
22 charge on the lesser-included offense of manslaughter,
23 then the charge must be given."

24 The first element of being without fault in provoking
25 the difficulty -- let me talk first about State vs.

1 Santiago. It's a very new case out of -- heard April of
2 2006, June 2006.

3 In that, it is stated if the defendant provokes or
4 initiated the assault, he cannot invoke self-defense.
5 However, he may restore his right to self-defense if he
6 withdraws from the conflict and communicates that decision
7 to his adversary.

8 I would suggest that Mr. Starks was wrong to stand on
9 the porch and to egg on his deceased stepfather, but that
10 he restored his right to self-defense when he withdrew to
11 his room and locked the door and waited, basically lying
12 on the bed watching T.V., in the other room.

13 I would cite also State vs. Slayer, "One who provokes
14 or initiates an assault cannot escape criminal liability
15 by invoking self-defense. However, a defendant can
16 restore his right to self-defense if he withdraws from the
17 conflict and communicates that decision to the opponent."

18 I think these cases go on to say that that
19 communication to the opponent can be by conduct as well as
20 by words, and actions do speak louder, and Mr. Starks was
21 in his room behind the locked door.

22 The second prong of self-defense, whether Mr. Starks
23 believed he was in that danger, I believe that's been met
24 by the circumstances themselves, the jury could find from
25 the circumstances. I think rye says that; that he

1 wouldn't even have to take the stand, that they can infer
2 from the circumstances that the defendant was either in
3 actual danger of serious bodily injury or death or
4 perceived danger.

5 The third prong is whether a reasonable person of
6 ordinary firmness and courage would come to the same
7 conclusion. I think the part that is often omitted in
8 that is a reasonable person of ordinary firmness and
9 courage in the position of the defendant.

10 I would argue that that includes his physical
11 limitations which we established. As far as the fourth
12 prong of self-defense, I would argue that we have shown as
13 a matter of law that the defendant had every right to be
14 in the house and every right to be in his room within the
15 house, and that the evidence shows, or it certainly could
16 be interpreted by the jury to show that the fatal blow was
17 struck in the defendant's room where the blood trail
18 began. He has the right to be there. He has no duty to
19 retreat.

20 I could address habitation whenever Your Honor is
21 ready but that's self-defense.

22 THE COURT: Well, go ahead and address habitation.

23 MR. McMULLEN: Yes, sir.

24 In habitation, the test is -- I'm looking at my
25 request to charge number two. The test is not whether

1 there was testimony of an intended attack, but whether or
2 not Mr. Starks believed he was in imminent danger of death
3 or serious bodily harm.

4 He's not required to show that that actually existed.
5 He had a right to act upon appearances, and I would
6 suggest that that is what Mr. Starks did. He had heard --
7 there's testimony from the State's witness, Timothy
8 Cornish, that the decedent asked him loudly for a gun.

9 There's also testimony that it was heard over the
10 telephone by the defendant's wife. There's testimony that
11 Mr. Cornish heard everything or heard a lot of yelling
12 coming from 1007 -- I mean 1007 Congress.

13 I would argue that the reciprocal could be true, too,
14 that Mr. Starks -- it could be inferred or deduced that he
15 heard from Mr. Cleveland asking for that weapon.

16 So I think that moves us into defendant's request to
17 charge three when he stands upon the right to protect his
18 habitation, apart from the plea of self-defense.

19 I'm -- this is quotes from Bradley: "A man who
20 attempts to force himself into another's dwelling or who
21 being in the dwelling by invitation or license refuses to
22 leave is a trespasser.

23 The law permits the owner to use as much force, even
24 to the taking of his life, as it make be reasonably
25 necessary to prevent the intrusion or to accomplish the

1 expulsion."

2 Then I would ask for an instruction to the jury about
3 the Castle Doctrine, and while a man keeps the door of his
4 house closed, no other may unlawfully break and enter it.

5 The dwelling house of a man is his castle. He may
6 not only defend the same, but when someone who manifestly
7 endeavors to enter the same in a wanton, riotous, or
8 violent manner, or with intent to commit a felony on him
9 or the habitation itself, then one who is only attempting
10 to commit -- or even if one who attempts to commit the
11 misdemeanor of a forcible entry, that the -- the person
12 being assailed may, even to the extent of killing the
13 assailant, use reasonable force necessary to accomplish
14 the ejection."

15 Let's see.

16 (Pause).

17 The second page there, "Even though one should enter
18 the habitation of another without consent or permission,
19 if he came peacefully and is not misbehaving, he should
20 first be ordered away.

21 However, if the entry itself was made in a reckless,
22 riotous, or violent manner or is affected by overcoming
23 the physical or verbal opposition of the opponent or it
24 was made under such circumstances as manifestly evidence a
25 purpose to endanger the life or limb of any inmate or to

1 commit a felony on the habitation of the property therein,
2 in other words, is not quiet and peaceable, no request to
3 depart, or the laying on of -- on of hands need precede,
4 as legal requirement the act of ejectment by such force as
5 is necessary, even to the killing of the assailant."

6 For the very obvious reason, as is well said in one
7 of the cases, since the trespasser knows, as well, without
8 expressed words as with -- that his absence is desired.

9 These principles are a part -- I won't read the whole
10 thing, Your Honor, but --

11 THE COURT: Thank you.

12 MR. McMULLEN: -- but these principals are so
13 established in the law, as they're called the Castle
14 Doctrine. The case is from 1923. It's never been
15 overturned.

16 I would ask Your Honor also to charge on the law of
17 the Castle Doctrine that's been codified in 16-11-410 et
18 sequim.

19 I would ask that you respectfully let the jury decide
20 whether that room, if not the whole dwelling, was
21 Mr. Starks' castle, just like it was his mother's, just
22 like it was his stepfather's.

23 THE COURT: All right. Anything further from the
24 State?

25 MS. GARFIELD: Your Honor, I just don't believe we

1 need to continue laboring on this defense of habitation
2 and Castle Doctrine.

3 It's not a question for the jury as to whether this
4 was his castle. The question is whether or not Al
5 Cleveland was a trespasser there. He was clearly not.

6 State vs. Bradley clearly outlines the four elements
7 that qualify for the defense of habitation. The one that
8 Mr. McMullen quotes, which is section number one, will
9 explain a man who attempts to force himself into another's
10 dwelling, or who being in the dwelling by invitation or
11 license, refuses to leave when the owner makes that
12 command is a trespasser.

13 The law permits an owner to use as much force as may
14 be reasonable and necessary to prevent the obstruction --
15 I'm sorry, intrusion to accomplish the expulsion.

16 There's been -- clearly, Al Cleveland was not a
17 trespasser. Therefore, the defense of habitation does not
18 apply, neither does the Castle Doctrine that has been
19 codified in our statute. I would just ask that we move on
20 and stop belaboring on this point.

21 THE COURT: Well, I'm not going to stop the defendant
22 from requesting a charge.

23 Let me just -- let me just say at this point I feel
24 it's appropriate to charge the lesser-included offense of
25 voluntary manslaughter.

1 I also find it's appropriate -- there's evidence in
2 the record from which the jury could determine that the
3 defendant acted in self-defense, and I'm going to charge
4 self-defense.

5 I have a proposed set of charges. I'll be glad to
6 let you look at them at this time. If you have any
7 modifications, changes, or requests, please let me know.
8 They're right here, along with the verdict.

9 We'll see you at one o'clock.

10 (WHEREUPON, a lunch break was taken.)

11 THE COURT: Anything from the State regarding
12 proposed charges?

13 MS. SHIPLEY: No. No objection to any of the
14 charges, Your Honor. Also, we are waiving closing on the
15 law so we can do it one time at the end.

16 THE COURT: Oh, you're waiving?

17 MS. SHIPLEY: On closing, yes. I'm opening on the
18 law, and we're going to go with the closing argument, Your
19 Honor.

20 THE COURT: Wait a minute. I didn't quite follow
21 you.

22 MS. SHIPLEY: Okay. We're going to waive the law
23 section and do it with the arguing section.

24 THE COURT: Okay. Are you going to open?

25 MS. SHIPLEY: No.

1 THE COURT: You're not?

2 MS. SHIPLEY: I'm going to let Mr. McMullen proceed
3 at one time to save the Court some time.

4 THE COURT: That's fine, that's fine. As to the
5 charges?

6 MR. McMULLEN: Yes, sir. May I refer to page 17?

7 THE COURT: Yes, sir.

8 MR. McMULLEN: At the very bottom, third row from the
9 bottom -- third line from the bottom, you should consider
10 all the facts and circumstances.

11 THE COURT: Wait a minute, line 17?

12 MR. McMULLEN: Yes, page 17.

13 THE COURT: Seventeen?

14 MR. McMULLEN: Yes, sir.

15 THE COURT: Second element of self-defense?

16 MR. McMULLEN: The third line from the bottom, "You
17 should consider all the types of circumstances surrounding
18 the crime." We would ask you to call it an "incident" or
19 something other than a crime.

20 THE COURT: Wait a minute. Just hold on.

21 MR. McMULLEN: Yes, sir.

22 THE COURT: We just got a pagination problem, that's
23 all.

24 You're talking about the imminent danger paragraph,
25 in deciding? I don't know why mine is different than

1 yours.

2 MR. McMULLEN: In self-defense.

3 THE COURT: Yes, right before the accident -- right
4 at appearances?

5 MR. McMULLEN: Yes, sir.

6 THE COURT: Okay. Keep going.

7 MR. McMULLEN: Three lines before that, facts and
8 circumstances surrounding a crime. We would ask that --

9 THE COURT: Event.

10 MR. McMULLEN: Yes, sir, that would be fine.

11 THE COURT: All right. How about the alleged crime?
12 I'll say --

13 MR. McMULLEN: I like "the event".

14 THE COURT: All right.

15 MR. McMULLEN: Incident.

16 MS. SHIPLEY: Incident is better, Your Honor.

17 THE COURT: All right, incident.

18 MR. McMULLEN: "Stabbing".

19 MS. SHIPLEY: Okay. We'll taking stabbing.

20 MR. McMULLEN: No, incident.

21 On page -- well, let's see, under size and age.

22 THE COURT: Yes.

23 MR. McMULLEN: I would request respectfully that you
24 add "physical condition".

25 THE COURT: All right.

1 MR. McMULLEN: And that you strike the word "victim".
2 That appears three times on that page.

3 THE COURT: Well, you realize that that's just the
4 way that these things come out of the computer. It's
5 always...

6 MR. McMULLEN: Yes, sir. Just in a self-defense case
7 we're not contesting that somebody is dead and "victim",
8 as that term is used in the law, you know, applies to the
9 crime as committed.

10 THE COURT: All right.

11 MR. McMULLEN: I would ask also, Your Honor, that you
12 charge that invitee, under duty of retreat, an invitee has
13 the same rights -- somehow cover the fact that the law
14 recognizes Mr. Starks had a right to be in that home, and
15 that there should be no duty to retreat or something to
16 that effect if they find that he had a legal right to be
17 in the home.

18 THE COURT: Well, doesn't it say that, that the
19 defendant was on his own premises?

20 MR. McMULLEN: Yes, sir.

21 THE COURT: The defendant had no duty to retreat.
22 How is -- what you suggest any different than that?

23 MR. McMULLEN: That if Mr. Starks -- the jury would
24 believe that Mr. Starks was not in his own home but was
25 merely invited there by his mother to stay in his own

1 room. We would just like some clarification on that.

2 THE COURT: Well, I think it's -- I think it's
3 splitting hairs. I'm not -- I don't want the jury to have
4 to decide what his rights in the bedroom were. I mean,
5 it's fairly -- there's no contest that he had a right to
6 be there.

7 MS. SHIPLEY: In fact, Your Honor, that came out
8 through Deputy Carwell.

9 THE COURT: I can't get too specific, but I can't say
10 he was in his own bedroom.

11 MR. McMULLEN: It appears the State would stipulate
12 he had a right to be there.

13 MS. SHIPLEY: That's never been an issue in this
14 trial, Your Honor.

15 THE COURT: All right. I think I'm going to leave it
16 the way it is.

17 MR. McMULLEN: All right. And I'm not sure if it's
18 State vs. King or some other case, but I would ask that
19 you charge if they have no reasonable doubt as to the
20 greater versus the lesser or the lesser versus the not
21 guilty, that you must --

22 THE COURT: That is the King case, but King has been
23 overruled.

24 MR. McMULLEN: Oh, it has?

25 THE COURT: It's no longer the law.

1 MR. McMULLEN: Uh-oh. What's the law on that now?

2 None of that?

3 THE COURT: None of that.

4 MR. McMULLEN: All right.

5 THE COURT: They decide each one individually.

6 MR. McMULLEN: And then -- can I just -- I need, I
7 guess, to put on the record we do ask that the Defense of
8 Habitation as described in the recent case of State vs.
9 Rye, they ought to be charged that. Rye was overturned
10 just because it wasn't charged properly, and I would ask
11 that --

12 THE COURT: I think that stands, that is the correct
13 statement. It wasn't charged properly. There was clearly
14 a Defense of Habitation.

15 The issue in that case -- I mean, there were
16 trespassers on the man's land, and all the Supreme Court
17 said in the majority opinion was it was not charged
18 properly.

19 MR. McMULLEN: Yes. I would just cite State vs.
20 Petit that in that case two people shared a piece of land.

21 THE COURT: I'm just not going to do it.

22 MR. McMULLEN: Yes, sir. I'm just trying to put it
23 on the record.

24 THE COURT: Put it on the record.

25 MR. McMULLEN: In that case, two people shared the

1 land, had equal access and equal rights to it. In that
2 case, they did charge habitation. Each person had an
3 equal right to be there, and if that case is in the
4 record, then that's all I need to say about it.

5 THE COURT: Okay.

6 MR. McMULLEN: The other habitation charges -- and
7 you already put act on own appearance -- act on
8 appearances, "a man arming himself on his own land in a
9 legal manner," my request number four, "arming himself on
10 his own land in a legal manner after he has been
11 threatened is not evidence of his being at fault in
12 bringing about the difficulty."

13 I would ask that you charge something about that if
14 you retreat, that the right of self-defense is restored if
15 you retreat and communicate that either by action, overt,
16 verbally, that that restores the right of self-defense, my
17 charge number six.

18 And I won't go through everything we did before, but
19 finally, request to charge number five, I would ask that
20 you include that about the right to strike, the
21 self-defense, once the right arises, the defendant must --
22 need not wait until the adversary gets a drop on him to
23 strike the first blow.

24 THE COURT: Of course, Hendrix was a completely
25 different set of facts.

1 What about the request to charge number five,
2 self-defense is not required to wait until his adversary
3 is on equal terms?

4 MR. McMULLEN: Thank you, Your Honor.

5 MS. SHIPLEY: Your Honor, if you feel that it's
6 necessary and appropriate to charge it, we have no
7 objection.

8 THE COURT: All right. All right. Approach the
9 bench. Off the record.

10 (Whereupon, there was a bench conference.)

11 THE COURT: Mr. McMullen.

12 MR. McMULLEN: May it please the Court.

13 THE COURT: Yes, sir.

14 MR. McMULLEN: Let me also just request for the
15 record that Your Honor charge the law as contained in
16 67-4-10, the defense of the Property Act. I have a copy
17 handy if you should decide to do that, but that's the law
18 as stated. I would ask that you let the jury determine
19 whether that act applies to this.

20 THE COURT: All right. I respectfully deny your
21 request. If the Supreme Court says that should be a part
22 of our jurisprudence in a trial such as this, then -- I
23 learned some law, but at this point, I'm not prepared to
24 make new law.

25 MR. McMULLEN: Thank you, sir.

1 THE COURT: Yes.

2 Are you ready to proceed?

3 MR. McMULLEN: Yes, sir.

4 THE COURT: Do you need a minute to sort those out?

5 MR. McMULLEN: No, sir.

6 THE COURT: Is the State ready for the jury?

7 MS. SHIPLEY: The State is ready for jury.

8 THE COURT: Is the defense ready for jury?

9 MR. McMULLEN: The defense is ready.

10 THE COURT: Bring the jury, Mr. Hollis.

11 THE BAILIFF: I'll be glad to.

12 (WHEREUPON, the jury came into open court at
13 approximately 1:23 p.m.)

14 THE BAILIFF: The jury is all present, Your Honor.

15 THE COURT: All right. Thank you very much.

16 Ladies and gentlemen, I hope you had a pleasant
17 lunch. We're now ready to conclude the trial with the
18 final arguments or summations of counsel and my charge to
19 you on the law of the State as it applies to this case.

20 Now, let me make just a few opening remarks before we
21 actually start that process. I have placed in your chairs
22 pencils and pads which you're free to use or not use as
23 you choose.

24 There are some matters of law that may sound a little
25 bit difficult to understand, to start with, but I think

1 they will become clear as the arguments take place, and
2 then I give you the final say, so to speak, on what the
3 law is with regard to this charge.

4 In South Carolina, we have -- and I think everywhere
5 there are charges that we call lesser-included charges.
6 In other states, you probably -- if you watch law and
7 order or some of these T.V. shows, you'll hear murder
8 referred to as murder one, murder two, or murder three.

9 There are different degrees of culpability with
10 regard to a murder charge. In South Carolina, we don't
11 have that exactly. It's probably the same thing. We just
12 call it something different. What we refer to is a lesser
13 degree of murder or a lesser-included charge of something
14 called voluntary manslaughter.

15 So when the lawyers get up and talk to you about
16 murder and they -- and then they talk to you about
17 voluntary manslaughter, I have ruled that that is a
18 legitimate finding that you could make in this case.

19 They're going to tell you, I think, that the -- and I
20 will go over this in more detail when I give you my
21 instructions, but I think they're going to tell you that
22 murder is the taking of the life of another with malice
23 aforethought.

24 The voluntary manslaughter verdict that you can
25 return is the taking of a life of another without malice

1 aforethought. I mean, that's a very general overview of
2 it, but that's basically what it amounts to. It's the
3 same taking of the life of another without malice.

4 So when I give you the final verdict form, it's going
5 to contain both of those charges. You can decide. It's
6 up to you to decide if the defendant is guilty of either.

7 Of course, you can find him not guilty of either or
8 both -- not both, or, either/or. The second thing, or the
9 third thing, that the attorneys are going to talk to you
10 about is something called self-defense.

11 Now, you heard it referred to from time to time
12 during the trial, and I have also decided based on the law
13 that the defendant is entitled to an instruction to you on
14 self-defense.

15 In other words, you could find -- if you find the
16 defendant acted in self-defense, and there's some sort of
17 technical parts of the definition of self-defense that the
18 lawyers are going to talk to you about and I'm going to
19 talk to you about, but basically, if you were to find that
20 the defendant acted in self-defense, he would be not
21 guilty of anything.

22 In other words, not -- I mean, self-defense is what's
23 called an absolute defense. It means if you found all of
24 the elements of self-defense were present, that you would
25 find the defendant not guilty of either of the charges.

1 So those are -- that's sort of an overview of what
2 the attorneys are going to talk to you about. Of course,
3 they're going to talk to you about the facts of this case
4 and how they applied to this law or these laws, but just
5 keep in mind that murder has certain elements that the
6 State has to prove beyond a reasonable doubt.

7 Voluntary manslaughter has elements that the State
8 has to prove beyond a reasonable doubt, and
9 self-defense -- in the case of self-defense, the State has
10 to prove it was not self-defense beyond a reasonable
11 doubt.

12 The State has to prove that the defendant was not
13 acting in self-defense when the death occurred, so I hope
14 that will give you sort of a framework when you hear the
15 attorneys talk and hear them argue about the facts in the
16 case and how they applied the law, that there are three
17 things, basically, that you need to be thinking about or
18 try to put it in a category.

19 Was this murder? Was this taking of the life with
20 malice? Was it voluntary, voluntary manslaughter, the
21 taking of the life without malice, or was it, in fact,
22 truly self-defense?

23 So with those sort of -- that's sort of a preamble.
24 The attorneys are now going to present their closing
25 arguments, and the defense will present the closing

1 argument first followed by the State.

2 Now, under our law, as you know, the State -- as I
3 said before, the State has the burden of proof. They have
4 the responsibility to try to prove the elements of the
5 indictment beyond a reasonable doubt, so they are
6 traditionally given the last comment to the jury followed
7 by which I'll go through these elements. I won't talk
8 about the facts when I talk to you about what the law is.

9 I'll explain, perhaps in a little greater detail,
10 what I just talked to you about, but I'm not allowed to
11 comment on the facts, you know that. I have sort of
12 indicated that -- that to you in my opening remarks.
13 That's up to you to decide what the facts are, and which
14 of these slots, if any, the proof proves to you.

15 So with that as a preliminary remark, Mr. McMullen,
16 you may conclude with your final remarks.

17 MR. McMULLEN: May it please the Court.

18 THE COURT: Yes, sir.

19 CLOSING STATEMENT:

20 MR. McMULLEN: Ladies and gentlemen, good afternoon.
21 I sure do appreciate your attention over the last four
22 days, your attendance here, punctuality and none of your
23 cell phones going off, at least not from the jury.

24 It was obviously a tragic case, and I appreciate the
25 attention you've been giving.

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1 The first thing I guess I want to talk about is the
2 law that you must apply. I'll try to get through that and
3 apply the facts and make my arguments to you about that
4 and argue why you should check not guilty on this verdict
5 form twice.

6 The verdict form is going to come to you when the
7 Judge says you can begin deliberating after -- after all
8 of us have had our chance to speak to you. You get the
9 last word. We hope that word is not guilty and not
10 guilty.

11 I think with all respect to the State, I can compare
12 them to a "C" student who wants a "B". So they go to the
13 professor at the beginning of the semester, and they say,
14 "I really want to make an A. What do I do to make an A?"

15 They charged Thaddess Starks with murder when I think
16 what they're really after is voluntary manslaughter,
17 because the facts of this case are more in line with
18 sudden heat of passion than they are with any premeditated
19 malice aforethought, dark heart bent on evil, how ever you
20 want to define malice aforethought. His Honor will get
21 into that more with you when he charges you.

22 I think they want you to compromise. Oh, okay. It's
23 not murder. Let's just vote for the voluntary
24 manslaughter and go home.

25 Well, I submit to you, respectfully, that the real

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1 question is whether this is voluntary manslaughter or not
2 guilty.

3 Now, I don't want to have a cavalier attitude about
4 that. I want to address the murder. The man's life and
5 future are at stake, so I will argue a bit about it, but I
6 hope it's really unnecessary in the final analysis.

7 Murder, His Honor will define -- will tell you in a
8 little more detail than he just did. Murder is the taking
9 of a life of another with malice aforethought, ill will,
10 hostility, hatred. It requires a premeditation.

11 Now, that could be an instant decision to take the
12 life of another. It doesn't have to take weeks of
13 planning or an intricate plan. It just takes a conscious
14 decision to take the life of another.

15 I submit to you, ladies and gentlemen, that
16 Mr. Starks never intended to kill his stepfather. In
17 fact, he intended to protect himself and to repel his
18 attacker.

19 The fact that his attacker died as a result of one
20 stab wound is tragic, but it is certainly not something
21 Mr. Starks ever intended. In fact, the evidence shows
22 that this is an 8-inch long knife and that it went in four
23 inches.

24 Obviously, Mr. Starks has no strength to have pressed
25 harder, and the testimony from the officers, at least, was

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1 that it was a jig. I would compare that to a jigsaw. It
2 just goes in and comes straight out.

3 The diagram the doctor drew or draw on has a T-shape.
4 That was not twisted. There were not multiple stab
5 wounds. It was one stab wound very near the armpit area
6 of the chest. It went in halfway, came right out, and
7 Mr. Starks' attacker left.

8 I want to add just, you know, a little bit to what
9 His Honor has already told you about voluntary
10 manslaughter. I would respectfully submit to you that
11 voluntary manslaughter is the taking of the life of
12 another without malice aforethought, but it's more than
13 that. You still have to intend to do it.

14 It's taking someone's life, perhaps with some sort of
15 provocation, but it does not rise to the level of
16 self-defense, defense of property, other affirmative
17 defenses or -- I should take out the word "affirmative"
18 because the State of South Carolina says we don't have to
19 prove self-defense.

20 There are four elements of it that the State must
21 disprove once we assert the defense. They must prove
22 beyond a reasonable doubt that all four of those elements
23 don't exist.

24 Now, any one of them not existing, if they prove any
25 one of those four elements doesn't exist, then they have

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1 taken away our defense of self-defense.

2 Let me talk to you just a bit about those four
3 elements. The first element is that a person can't be at
4 fault in bringing about the difficulty, and I think that's
5 an important thing to talk about and spend a little bit of
6 time on.

7 At fault in bringing about the difficulty generally
8 means something like going on another person's property or
9 breaking into their house or breaking into their car.

10 Some cases have talked about that. You break into
11 somebody's car, and then they come and confront you about
12 it. You can't break in their car and then stab them with
13 a screwdriver and claim self-defense, as an example.

14 Once a person brings about a difficulty, and perhaps,
15 if anything in this evidence, in the testimony,
16 establishes that Mr. Starks had anything to do with
17 bringing about this difficulty, other than arriving home,
18 perhaps the one thing is when he went out on that porch
19 and yelled at his stepfather, to Mr. Cornish, across about
20 50 yards or so of distance and said basically, "Yeah,
21 M.F., you don't have any place to go either, just like
22 me."

23 It might be a true statement, but it is provocative,
24 but, ladies and gentlemen, once a person does something
25 like that, they have the ability to cure it.

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1 The law says that you can regain the right to
2 self-defense by withdrawing from the situation, by
3 communicating that in some way to the other side.

4 I would submit to you that that's exactly what
5 Mr. Starks did when he went back in the house, went pack
6 in his room, locked the door, laid down on his bed to
7 watch T.V. Basically, he did what his mother and the
8 police officer told him to do.

9 Once you do that, you're allowed to assert the claim
10 of self-defense. I would submit to you that by going back
11 to his room, he did just that. You can take away his
12 bringing about the difficulty if you consider his going
13 out on the porch doing that. Now, I would submit to you
14 that his going out on the porch really didn't bring about
15 this difficulty.

16 Now, the testimony was basically that Thaddess Starks
17 had moved into the house about a year or so earlier when
18 his stepfather moved out for awhile because his mother was
19 all alone there. He and his wife moved in for a while,
20 and then later on his stepfather came back home. Thaddess
21 moved out for awhile with his wife.

22 They were in Santee for a while, and then they
23 started having trouble. Thaddess went back home, about
24 two weeks before this killing, about the beginning of
25 October of last year.

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1 Like anybody, Thaddess' stepfather didn't really like
2 his stepson coming back home at the age of 33, 34, 35,
3 whatever he was a year ago, but Thaddess is an only child
4 and his mother probably indulged him a little bit, and in
5 fact, she let her husband come back and forth, too.

6 When he moved out, she welcomed him back when he was
7 ready to come back. She did the same thing for Thaddess.
8 Maybe a mother with ten children wouldn't be able to do
9 that, but Thaddess was an only child.

10 So Thaddess moved back in, and Al wasn't happy about
11 it, Mr. Cleveland. The testimony was, as you'll recall,
12 that Thaddess had actually taken his father, stepfather,
13 to work on Tuesday and Wednesday the week of the killing.

14 Then on Thursday morning, it was again Thaddess'
15 mother who took her husband to work, not Thaddess. The
16 reason? Thaddess was down in Santee with his wife that
17 Wednesday night. They were trying to patch things up.
18 They seemed to have done so now. They have a child
19 together now that's about a year old.

20 But when Thaddess came back home, his father,
21 stepfather, wasn't happy when he drove him to work Tuesday
22 and Wednesday and then he wasn't there Thursday morning, I
23 think the stepfather said to himself maybe he's back out
24 of the nest again for a while, but then Thursday came.
25 The stepfather got paid, did what he almost always did or

1 always did on Thursday, started drinking after work.

2 He's got every right to do that in his own home, just
3 like the officer told him, every right to do that, but
4 when Thaddess came rolling in about six o'clock that
5 night, Al was already three sheets to the wind.

6 You'll recall the testimony was he was three times
7 the legal limit. He was .25, .255, actually. The legal
8 limit is .08. He was .25.

9 Now, they put it in deciliters instead of
10 milliliters, so you can move the decimal point, but in any
11 event, he was three times the legal limit in our state to
12 drive.

13 The testimony shows that when Mr. Cleveland drank,
14 the more angry and mean he became. He changed his
15 personality from one of a nice guy, a hardworking man, to
16 a belligerent man.

17 I think we all know people who are angry drunks. I
18 mean no offense. I'm trying to do my job and trying to
19 say things the way they are.

20 The doctor testified he had cirrhosis, and he was
21 slippery. He tried to say oh, a lot of thing cans cause
22 that, but I hope you didn't leave your common sense at the
23 door.

24 In any event, Al wasn't happy to see his stepson
25 driving up on Thursday. He let his stepson know that

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1 immediately, repeatedly, loudly, so loudly that the
2 neighbors could hear it 50 yards away.

3 Now, did the State talk to other neighbors? We don't
4 know. They didn't put it up there. It's certainly not
5 our burden to prove anything in this case at all, but we
6 know that Tim Cornish next door, his drinking buddy, heard
7 it, the man that Al went and asked for a gun.

8 He heard yelling enough that he, I guess, was not
9 surprised to see the police roll up when Officer Carwell
10 showed up.

11 He brought him in the house, according to his
12 testimony. He said, "You need to calm down, sir. You're
13 drunk. Sit down. I can tell you have been drinking, calm
14 down. He did that. He told the son leave him alone, keep
15 away from him, go to your room. Let's not make this
16 worse."

17 The officer testified he spoke with Al,
18 Mr. Cleveland, about the eviction process, said well, what
19 did you tell him about that, because his mother said -- is
20 the rightful owner of the land. He's got a room in the
21 house, and his mother says he can be there.

22 Actually, the officer actually got on the phone,
23 spoke to the mother, and after that conversation said, "I
24 can't make him leave. He has got a right to be here."

25 Now, the officer didn't have any authority to tell

1 him to stay in the room, but for most part, that's what
2 the testimony shows Thaddess did do, except for going out
3 on the porch.

4 In any event, Al was drunk. He accosted his stepson
5 repeatedly when he didn't leave, because he didn't have
6 any gas in his car. He didn't have any money. Al called
7 the police trying to get them to make him leave.

8 When Officer Carwell, Master Deputy at the time
9 Carwell, told him basically, "You have got to calm down.
10 I can't make him leave. Go see the magistrate,"
11 Mr. Cleveland was left with, basically, two choices: He
12 can stay upset visibly, and the officer would stay there
13 probably until he calmed down.

14 He would pretend he calmed down, say what the officer
15 wanted to hear until he left, and that's what happened.
16 Mr. Cleveland calmed down until the officer left.

17 Now, what did the officer say in his report? Do you
18 remember when he read it? What did he say? He said he
19 showed up. One man was very drunk, very agitated, and I
20 told him that's okay because he's in his own home, and the
21 other guy was calm, was not contributing to this
22 situation. That's the first element to this. The second
23 element is that the man has to be in fear of serious
24 bodily injury or death.

25 Now, I do not think that Thaddess Starks contends he

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1 was in fear of death, although the evidence will show, did
2 show, that Thaddress was on the phone with his wife on the
3 porch, and his wife over the telephone heard Mr. Cleveland
4 yell, "Give me a gun. Give me a gun."

5 She told her husband, "You know, Al is asking for a
6 gun. You better be careful. You better watch out," but I
7 contend, ladies and gentlemen, we contend, that Thaddress
8 was afraid of serious bodily injury being inflicted on him
9 by his stepfather because his stepfather was that drunk.

10 He had physical limitations that we talked about. We
11 demonstrated. You have seen them. This is not a
12 situation where Mr. Starks was standing up in a defensive
13 posture waiting for somebody to barge in his door.

14 You notice, ladies and gentlemen, he was lying down
15 on his bed watching T.V. in a pretty defenseless position,
16 and for him to get up and him to move his 350-pound body
17 from lying down to getting up and defending himself is not
18 an easy task for any 350-pound man, but you heard
19 testimony that he's had two strokes.

20 The left side of his body is weaker. He doesn't have
21 very good balance. You have seen him tremble. You saw
22 the doctor examine him here in court. I'm not saying that
23 he's a weakling, but I'm not saying that he couldn't move
24 some weight around or exercise muscle ability.

25 I'm just saying that in the situation he found

1 himself, lying down, he didn't have much of a chance
2 against his intoxicated stepfather who weighed and what I
3 do, 190 pounds, except he was about two inches shorter
4 than I am, about 5'9". So he was a pretty stocky fellow.

5 I would submit to you, ladies and gentlemen, that all
6 these other scars that the doctor found at the autopsy,
7 there's only one of them that Travis -- I mean, that
8 Mr. Starks inflicted. It's the fatal one, but this was
9 not the first time Alphonso Cleveland had been cut with a
10 knife.

11 You can make of that what you will, but this is not a
12 man who had never been cut before. I can say he was in a
13 few scrapes before this, and that's something Mr. Starks
14 knew about. There's no evidence of it in the record, but
15 please just use your common sense and please know that,
16 you know, basically Thaddess and Al spent about the same
17 number of years with Mrs. Cleveland.

18 Thaddess was about a year old when Mr. Cleveland
19 married his mother. So he knew how this man got these
20 scars, even if we don't.

21 Mr. Starks' belief that he was about to suffer
22 serious bodily injury was justified based on his belief
23 that Al might be, or was, packing a gun, based on his
24 history, based on the intoxication level, based on the
25 condition of the kitchen and the house and the front porch

1 and all the stuff that had been knocked around and
2 cluttered around.

3 You know, when Master Deputy Carwell got there, there
4 was no rice cooking or beans or whatever it was, but that
5 happened some time after the deputy left at about eight
6 o'clock and before the deputy and the others got back at
7 about nine o'clock, give or take.

8 The third element, someone of reasonable firmness and
9 courage in the same position as Thaddess Starks would have
10 acted the same way.

11 So not only did Thaddess have to think he was in
12 danger of serious bodily injury or death, a person of
13 reasonable firmness and courage in that situation would
14 have to come to the same conclusion.

15 But now, it's important to add to that or to expound
16 on the idea that it's someone in the same circumstances,
17 someone with Mr. Starks' physical limitations.

18 His Honor will instruct you that the size and
19 physical condition and weight and age of the parties are
20 things you can consider, and those things go both ways.
21 Those work both ways.

22 Mr. Starks, admittedly, was younger than his
23 stepfather by about 20 years, and he outweighed him by
24 150 pounds. I think he's taller, but there is no evidence
25 that Mr. Cleveland had any physical defects. There's no

1 evidence that he was unable to break through the door or
2 run after he had been stabbed even.

3 In fact, the evidence shows he worked. He worked
4 hard, and I don't want to hold that against him, but his
5 physical condition was fine. There's no evidence to the
6 contrary.

7 It is, indeed, the State that must disprove these
8 elements beyond a reasonable doubt, all four of them. I'm
9 sorry, any one of the four, any one of the four.

10 Finally, the fourth element: Duty to retreat, no
11 reasonable means of escape. However, when you're in your
12 own home, when you're on your own premises, there is no
13 due to retreat. That's the way it is. That's the way it
14 should be. We have a right in our house, in our own
15 castles, to defend ourselves from attack.

16 If you can't retreat to your own house and stay there
17 and stand your ground, then I submit to you we would all
18 be on the run.

19 No, Mr. Starks endured all he needed to that night,
20 and he locked himself in his room like his mother told him
21 a reasonable person would do under the circumstances, but
22 having heard about the gun that was being sought, he did
23 arm himself with a steak knife or a butcher knife, a big
24 long knife. They'll probably waive it around. We've all
25 seen it. It's eight inches. We probably all have one

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1 like it at home, too.

2 Ladies and gentlemen, it's not evidence of malice or
3 intent or anything else. You can't -- you should not hold
4 it against him.

5 When a man or a woman has been threatened, they have
6 a right to become armed. They have a right to defend
7 themselves, especially in their own home. Again, that's
8 the way it is, and that's the way it should be.

9 A person has the right to use deadly force to protect
10 themselves in their own home. They are not required to
11 leave.

12 I want to go through, now that we have some idea of
13 the law, and go through the facts. I won't go over every
14 single witness's testimony. You paid attention to them.
15 It's been a long week already, but I would like to just
16 point out a few things about some of the witnesses.

17 Tim Cornish, the first witness we heard from, the
18 next door neighbor, said he called 911 or asked his
19 daughter or his wife to call 911 twice. That's not what
20 the 911 operator said when she got there.

21 He said that he found -- that he heard yelling. He
22 heard yelling. He said that he saw the police come. He
23 said about as soon as the police left, he heard more
24 yelling across a distance of some 50-yard or more, maybe
25 less. You decide, but a good distance.

1 He probably had a couple himself that night, not that
2 that matters a whole lot, but he also -- instead of having
3 the decedent propped up, put him down on the ground.

4 I'm no doctor. I don't have any medical training.
5 I've never served in the Marines, but I submit to you that
6 when somebody is punctured high and they end up dying from
7 blood in their throat, it probably would be a good idea to
8 leave their head elevated rather than put them on the
9 ground.

10 Mr. Cleveland had slurred speech at three times the
11 legal limit. He was probably quite unsteady on his feet.
12 Again, all indications are that Mr. Cleveland was a good
13 man when he wasn't drinking. Unfortunately, October 12th
14 of last year he was.

15 One of the things Mr. Cornish testified was that Al
16 didn't think his stepson was pulling his fair share around
17 the house, although for a year Mr. Cleveland himself left.

18 He said Mr. Cleveland asked for a ride, but
19 Mr. Cornish didn't give it to him because he was busy.
20 It's a shame, and in hindsight I'm certain he would have.
21 I'm not trying to imply it's his fault. It's just the way
22 things went.

23 Even he testified that Mr. Starks was calmer. Now,
24 he would have you believe that Mr. Starks ran that
25 50 yards over there, and he changed his story about

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1 whether Mr. Starks had a phone up to his ear or not, and
2 he said he ran up in an aggressive manner like he was
3 going to kick him.

4 Now, either Mr. Cornish has extrasensory perception
5 or maybe he's fibbing but -- and he did say I think that
6 he -- Mr. Starks raised his foot like he was going to kick
7 him. However, he also admitted that Mr. Starks left as
8 soon as he told him to. When we showed him the statement
9 from the day after this, that he had said that Mr. Starks
10 was on the telephone.

11 Now, that's important, too, because the 911 operator
12 said that the son called -- stepson called a minute before
13 the next door neighbor did.

14 It might not be up in here, but it is in evidence as
15 one of the few Defense exhibits. The 911 operator, a
16 different one who spoke to the decedent, Mr. Cleveland,
17 five minutes before the fatal wound was inflicted, five
18 minutes before Thaddess called saying, "I just cut him,"
19 said "1068".

20 She was nice enough to say that means mental. That
21 means crazy. That's what they say to each other. Man,
22 this guy is crazy. He's 1068. You ask somebody what it
23 means, they don't say mental. He's crazy, sounds crazy,
24 was acting crazy. At least that's what his voice sounded
25 like to somebody who answers these calls for a living.

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1 Yes, Mr. Starks did have a car, and it probably did
2 have a little gas in it for Mr. Starks to drive away, but
3 ladies and gentlemen, [REDACTED] [REDACTED] [REDACTED] is about five
4 miles, give or take, from 601, about 25 miles from 378.
5 It's a long way from anywhere. I don't know the closest
6 gas station. The State hasn't shown where it is either.
7 Anyway, he says he asked his wife to call twice to 911.

8 When Officer Carwell got to the scene of the
9 incident, Mr. Starks was on the steps of his home waiting
10 for him, basically.

11 One of the investigators testified it's rather rare
12 to find the subject, the defendant, at the scene where
13 he's just killed someone, but Mr. Starks didn't run. Most
14 people would, even if they didn't do anything wrong.

15 You would be instructed, under those circumstances,
16 that evidence of running can be used against the
17 defendant. So I submit to you, ladies and gentlemen, that
18 his staying should operate to his credit.

19 I don't want to put him down, but I will say, and I
20 mean this as a compliment, he's not a sophisticated man.
21 He's not a cleaver man. He's not devious or conniving.
22 He didn't contrive this story in the short time it took
23 between his call to 911 and their arrival.

24 His story, his version of the facts, has never
25 changed. "Al was drunk when I got there. He was raising

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1 cain with me the whole time yelling at me, cussing at me,
2 asking for a gun. He threw things around all over the
3 place. I locked myself in my room, and he came through
4 the door. He slapped me, backhanded me, and I stabbed
5 him. I'll show you where the knife is."

6 I want to talk for just a minute about what this case
7 is not about. It's not about sandwiches or napkins or
8 mustard or sausage, rice and beans, or hamburgers being
9 cooked next door, not about the contents of the stomach,
10 not about the crumbs on the floor. None of that amounts
11 to anything.

12 The knife that was used, was it washed after or not?
13 Well, I don't care what you just used the knife for, what
14 do you with it when you're done? You put it in the sink.

15 When the police arrived, there was no hidden knife or
16 anything. They asked him, "What did you use to stab him?"
17 He said, "The knife over there." I mean, it's not like
18 he's trying to hide anything. So whether he made a
19 sandwich or whatever reason he armed himself doesn't
20 matter. It's all a waste a time.

21 This case is not about Investigator Livingston. He
22 marked three spots where there were blood droplets on the
23 front porch, and then he went over here to the next door
24 neighbor's and marked two, and he ended up with two
25 samples. Now, it doesn't matter where they came from.

1 What matters is they were Mr. Cleveland's blood. We
2 stipulated to that.

3 It's a tale told by an idiot, full of sounding furry,
4 signifying nothing. It does not matter. Two swabs here,
5 four swabs there. Three on the floor. It's
6 Mr. Cleveland's blood. We're sorry it was spilled. We're
7 sorry he had to spill it.

8 Again, it's not why the knife was in the room. The
9 man has the right to arm and defend himself, especially
10 after he's been threatened. The conduct plus words give
11 Mr. Starks the right to defend himself, the threat plus an
12 action.

13 When you hear somebody asking for a gun, you don't
14 have to wait until they get the drop on you but he did.
15 He shut himself in the room. Mr. Cleveland burst through
16 the door. He was two feet away. He slapped the man while
17 he was lying down. And Mr. Cleveland -- in a dimly lit
18 room, Mr. Starks defended himself with one knife, one stab
19 wound.

20 It's a tragedy that that is all it took to kill
21 Mr. Cleveland, and the first one to admit it is
22 Mr. Starks.

23 Mr. Starks, who was sitting in the police car when
24 the police told him that his stepfather had expired. His
25 immediate reaction was to burst into tears and to reach

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1 out and grab the officer and hold him. Is that a heart
2 bent on evil?

3 Thaddess told the truth from the beginning, his
4 explanation has never changed.

5 I think, actually, he was right that Mr. Cleveland
6 didn't have anywhere to go either. They both had a right
7 to be there. They both should have lived there peacefully
8 as a family. I know that's what Mrs. Cleveland wishes had
9 happened.

10 The testimony was that Mr. Cleveland drank about two
11 six packs or some combination of alcohol, hard liquor, and
12 beer. Vodka was his liquor of choice, Miller High Life is
13 the kind of beer he liked to drink.

14 In one of these photographs that will be in the jury
15 room with you, you see a beer can, at least one Miller
16 High Life. You see the door that was burst through.

17 The State's investigators were some of our best
18 witnesses. I submit to you that this Sheriff's Department
19 did a good job, and they have honest people.

20 If Investigator Livingston just took two swabs or
21 four, it's an honest mistake. The 911 operator writes
22 down that the son had the stepfather locked in the room.
23 That's an honest mistake. I think we're all intelligent
24 enough to realize that they got it backwards.

25 Defendant's Exhibit 1 says: "Male states son locked

1 him in the room." Five minutes later: "Complainant
2 sounds 1068."

3 Now, that's after a 911 operator had five minutes to
4 talk with this man, and he's crazy. That was at three
5 minutes after nine. At eight minutes after nine, the
6 complainant states he had to cut his stepfather. The
7 stepfather left.

8 At a subsequent line, stepfather broke into his room.
9 Please use your common sense, but I submit to you that the
10 first statement: "Male states son locked him in the
11 room," that's backwards. You decide.

12 The evidence sure shows that there was a scuffle or
13 something happened in the bedroom.

14 Please notice that the door almost knocked off its
15 hinge, it appears. The bedside table is on the
16 defendant's right. His hand, his left hand, doesn't work.
17 It doesn't work well. He has got everything on the right
18 side of his bed, his phone. That's obviously where he
19 lies, and this bedside table was knocked off-line. They
20 didn't find any crumbs in this room, but here's a big old
21 bag of chips, medicine. You'll have all of this back
22 there with you.

23 I submit to you that the mess that was made in the
24 kitchen was made by an angry intoxicated man, the same as
25 what's on the porch. There's no evidence whatsoever that

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1 there was a struggle out there.

2 Now, if there had been, one way to prove it would be
3 to check out whose fingerprints were on the broom or the
4 dustpan or what was in the vacuum, if anything.

5 If somebody is trying to cover-up a crime scene, they
6 didn't do a very good job of it. But again, I say
7 Mr. Starks is not sophisticated enough to do that. His
8 version of the events has never changed. There was no
9 fight in the kitchen.

10 Now, I'm not going to get to come back and talk to
11 you again. That might be a good thing, but the State is
12 going to perhaps bring things up. I just want to make
13 sure I address them.

14 I'm anticipating that they may say there was a fight
15 in the kitchen. There was a fight on the porch because
16 they see all these things knocked around, but they just
17 don't have any evidence of that.

18 If they ask you to believe it, they're asking you to
19 speculate. That's one thing I hope you will not do,
20 because the burden is beyond a reasonable doubt.

21 You know, today, if you got up and looked at the
22 paper and it said, "Thaddess Starks on trial for murder,
23 jury to deliberate," I want you to say, "There's no way
24 Thaddess could have done this. They have to prove that to
25 me. You have to prove to me that he did that." I submit

1 to you that they have not.

2 There was no evidence that there was a fight out
3 there other than speculation, and I submit to you that
4 there's a great deal of evidence that this all happened in
5 Thaddess Starks' room within the greater household.

6 The trail of blood that the investigator saw that
7 began at the doorway and got heavier the further away from
8 it you go. That's consistent with what we would expect,
9 according to the doctors.

10 If investigator Carwell or Deputy Carwell had to
11 decide, he said that Mr. Cleveland was the primary
12 aggressor. Mr. Cleveland was using profanity. He was
13 more agitated. He was more intoxicated. Thaddess Starks
14 was none of those things. He didn't even drink. Even if
15 he does, he wasn't drinking that day.

16 The second time Deputy Carwell arrived at the scene
17 Thaddess Starks was waiting inside the house walking down
18 the stairs. He was detained by the officer. He was
19 cooperative with the officer. It wasn't hard for the
20 officer to secure the scene.

21 They detained him in handcuffs. They say they took
22 this photograph so that you would be able to see whether
23 he had been slapped on the face or not.

24 Now, I submit to you, ladies and gentlemen, that they
25 could have gotten a little closer than this, and they

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1 could have used more light than this, and maybe that was a
2 bit disingenuous.

3 I believe what they're trying to show you is they had
4 to use two pairs of handcuffs on this gigantic man. I
5 think that's why they took the picture. Look how big he
6 is. Look at the expression on his face.

7 They could have fingerprinted the beer cans. They
8 didn't need to. They could have fingerprinted the
9 ashtrays, see if Mr. Starks' fingerprints were on them.
10 They didn't do that. We don't know what they would show.

11 They say it appeared someone tried to wash the blood
12 off of the knife. Again, it's unimportant. Mr. Starks
13 led him to the knife. He never denied he used that knife,
14 never did.

15 All of these pages I'm turning are things I'm not
16 saying. Give me a moment, please.

17 (Pause).

18 Again, there's no significance to whether a sandwich
19 was made. We say it was. It doesn't matter. The man
20 went in his room. That's the thing that counts. He had a
21 knife in there to defend himself with. That's the thing
22 that counts.

23 Please bear with me.

24 (Pause).

25 Thaddess Starks supposedly stumbled over his words a

1 bit when he was asked whether he was in fear of serious
2 bodily injury or death. Who wouldn't? Who wouldn't be
3 nervous in that situation when the police have you
4 handcuffed and you just told them you had to kill your
5 stepfather, and they asked you, "Were you in fear of
6 serious bodily injury or death?" They call that not
7 interrogating, although they have him in a police car,
8 handcuffed, wearing a uniform. I don't know whether they
9 were wearing a uniform or not, but asking them about it,
10 that's pretty much custodial interrogation. They had
11 given him his Miranda warnings, and he spoke to him.

12 His physical condition: You saw the examination
13 today just like I did. You all paid attention. It took
14 the pathologist to give us the accurate weight, which is
15 closer to 200 than it is to 150.

16 I asked the pathologist if you would expect the knife
17 to be covered in blood. No. It was sharp. It wasn't
18 serrated. It was plunged in and out quickly.

19 He had a shirt on that might have absorbed it.
20 Again, whether it was washed or not, Thaddess Starks never
21 denied it was the weapon he had to use.

22 The blood alcohol level was 2.55-milligrams per
23 decaliter. That is .255-milligrams per milliliter.
24 That's the way the State defines the D.U.I. In any event,
25 three times.

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1 Their witness, their doctor, testified consistently
2 with our witness, our doctor, that those medications are
3 used to combat seizures. These are Thaddess' medications.

4 The important thing is not that he had seizures. His
5 arm didn't involuntarily go in the man's chest with a
6 knife.

7 The important thing is why did he have seizures? Why
8 is he medicated? He has a neurological problem as a
9 result of the gunshot wound, as a result of the bullets in
10 him, in his neck. It's the result of two strokes. The
11 man has very limited mobility and motor skills on his left
12 side.

13 He was handcuffed when had he pulled the officer into
14 the car as a result of hearing about his stepfather's
15 death. So where one hand went, the other followed.

16 Now, we don't dispute -- in fact, we showed you, I
17 think, that his health has steadily improved since the
18 shooting, since 1992, '93.

19 I'm not trying to overstate things, but he still is
20 suffering from those things. He still is somewhat
21 disabled, and he doesn't use his left arm for much of
22 anything.

23 Mrs. Cleveland, that is her only child, but I submit
24 to you she is just as honest as anybody who testified.
25 She testified, if nothing else, that that door was intact

1 when she left for work.

2 Like her husband was, she is a very hardworking
3 woman, apparently, and the couple of days when Thaddess
4 took Al to work instead of his mother, that allowed her to
5 come home from work at about midnight and not have to get
6 up at five in the morning to take her husband to work like
7 she routinely did.

8 She testified Al drank every day, and he drank
9 Smirnoff and Miller. A lot of times it was half a pint or
10 a pint, and then they went back to the same place the next
11 day. So I assume then, or I would argue then, that he
12 consumed whatever he had in the house.

13 She testified two weeks before the killing that
14 Thaddess took Al to work on Tuesday or Wednesday.
15 Thaddess didn't come home Wednesday night. He was with
16 his wife.

17 Thursday morning she took her husband to work. They
18 talked about maybe they were patching things up. Al got
19 paid on Thursday. After calling her about 12 times -- I
20 submit to you it doesn't much matter whether it's 12 times
21 or six.

22 She also said that she didn't like having Thaddess do
23 things because -- in the kitchen or around the house
24 because he would spill. "It's not like he could do
25 anything for me because of the nerves in his arm."

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1 He was disabled, survived by Social Security, lacked
2 strength on his left side and balance; that he used to
3 play football at Dreher before the injury.

4 A slap can hurt without heaving a mark. I do know
5 this from -- well, let me just say a schoolboy getting
6 slapped for doing something wrong at recess by a nun's
7 ruler, I have some experience in this, that goes away
8 pretty quickly, but it could sting for a while.

9 Just because a person doesn't show a mark doesn't
10 mean they weren't slapped, especially someone with a dark
11 complexion.

12 I think it's very significant, I hope you do, that --
13 and what I think doesn't really matter. What you think is
14 what counts. What's significant to me, though, is that he
15 called 911 before he walked out of the house. He called
16 911 before the next door neighbors did, the ones that say
17 he was running up to try to kick him.

18 Well, he had already called 911 asking them to send
19 help. Had they arrived right then, the doctor testified
20 he might not have lived, he might have. They need to get
21 him sutured up. They have to stop the bleeding
22 internally, too. They need equipment to do that. The
23 scars on the body, make what you will of them.

24 Law enforcement officers were our best witnesses.
25 They were truthful, in my view, I would argue. I hope you

1 think so, too.

2 The first on the scene said the man was acting wild.
3 Isenhoward saw drops of blood, Detective Isenhoward, drops
4 of blood going down the hallway originating where Thad
5 said he was stabbed; the door broken down, the officers
6 were good enough to document that; the 911 operator said
7 he sounded crazy. Thad's statement has never changed.

8 Again, I say to you that he's not devious or cunning
9 or clever enough to come up with some story like this in
10 such a quick time. He told the police immediately after
11 the incident about what happened. That's the truth of the
12 matter. If he could change it, he would.

13 I think like Carwell who said the first time he went
14 out there, he did everything he could. He thought they
15 were calm and he left. If he knew then what he knows now,
16 he still couldn't have done anything differently.

17 I think that's the way it is for Thaddess Starks.
18 Sure, he wishes he had gotten in the car and driven away,
19 ran out of gas somewhere.

20 If he knew then what he knows now, I'm sure that's
21 what he would have done, but ladies and gentlemen, we have
22 to make decisions like this in an instant.

23 Thaddess had the length of time between one smack and
24 another to decide what he had to do, and he did not know
25 whether he was about to get shot or pistol whipped or

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1 beaten severely.

2 He used the force necessary to repel his attacker,
3 one stab wound, and then he called 911. These are not the
4 actions of someone who intended to kill. These are the
5 actions of someone acting in self-defense. I hope you so
6 find.

7 Thank you.

8 THE COURT: Solicitor?

9 MS. SHIPLEY: Your Honor, could I request a brief
10 break? I drank too much water.

11 (Pause).

12 THE COURT: All right. Let's take a short break.

13 MS. SHIPLEY: Thank you, Your Honor.

14 THE COURT: The jury can take a short break also.
15 Again, don't discuss the case among yourselves while
16 you're in the jury room. I had planned to take a break
17 after the Solicitor's argument, but we'll take it now.
18 We'll continue, once she finishes, with the instructions
19 to the jury from the Court.

20 All right. Let's take a short break.

21 (WHEREUPON, the jury left open court at approximately
22 2:27 p.m.)

23 (WHEREUPON, a short break was taken.)

24 THE COURT: Is the State ready for the jury?

25 MS. SHIPLEY: Yes, sir.

1 THE COURT: Is the defense ready?

2 MR. McMULLEN: Yes, sir.

3 THE COURT: Bring the jury, please.

4 (WHEREUPON, the jury came into open court at
5 approximately 2:39 p.m.)

6 THE BAILIFF: The jury is all present, Your Honor.

7 THE COURT: Thank you very much.

8 Ms. Shipley, you may proceed.

9 MS. SHIPLEY: Thank you, Your Honor. May it please
10 the Court.

11 CLOSING STATEMENT:

12 MS. SHIPLEY: Mr. McMullen.

13 Life is precious. Alphonzo Cleveland's life was
14 precious. It was precious to his family. It was precious
15 to his friends. It was precious to him.

16 Alphonzo Cleveland was a hardworking man. He worked
17 18 years for Wabtec. He was married for 32 years. He
18 raised a child that wasn't his own as his own. He called
19 him his son. He enjoyed to garden.

20 His routine on Thursdays, because he was off on
21 Friday, was to come home, do yard work, mow the grass,
22 drink some beers with his neighbor, go inside, fix him
23 some supper, because his wife was at work, lay down on the
24 couch and watch T.V. That was his routine on Thursday
25 nights.

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1 On October 12th of 2006, that Thursday night was much
2 different. He was disrespected in his home by a
3 35-year-old man. Actually, he was 33 at the time,
4 disrespected him in his home, not working, not
5 contributing to the household, eating all of his food.

6 He had had enough. He did not want a grown man who
7 has a wife and infant child living off of his hard-earned
8 money.

9 Ladies and gentlemen, he drank. Some of you might
10 find that distasteful, but it's not a crime to drink
11 alcohol in your own home. It certainly doesn't deserve
12 being murdered over it.

13 I want to begin by thanking all of you for the
14 attention, undivided attention, that you have given to
15 both sides. I've watched you while Mr. McMullen was doing
16 his witnesses, his direct examination. I watched you
17 while he was cross-examining. You have given both sides
18 equal attention, and I really appreciate it.

19 I'm going to begin by talking to you a little bit
20 about the law that applies in this case, and I want to
21 begin with the charge of murder. Murder: In South
22 Carolina, is defined as the unlawful killing of any person
23 with malice aforethought either expressed or implied or
24 inferred.

25 Malice: In its popular sense, the term "malice" is a

1 term of art, a legal term. In its popular sense, the term
2 means to convey the meaning of hatred, ill will, hostility
3 towards another.

4 Malice is a term importing wickedness excluding just
5 cause or excuse. It is something that springs from
6 wickedness, from depravity, from a heart devoid of social
7 duty and fatally bent on mischief.

8 Malice may be inferred from the willful, deliberate
9 and intentional doing of an act without just cause or
10 excuse or from the use of a deadly weapon, such as a
11 knife, deadly weapon.

12 It goes on, the law, to describe malice. Malice:
13 It's an intentional act of violence, reckless disregard
14 for the welfare of another. Conduct that signifies a
15 conscious effort of creating a high risk of serious bodily
16 injury to another, again use of a deadly weapon.

17 Malice aforethought: It's kind of like an
18 afterthought, aforethought. It has to exist at the time
19 of the fatal blow. It doesn't have to be premeditated.
20 It's not like Mr. Starks had to lie in wait in order to
21 strike the fatal blow, as long as when he thrust that
22 knife into Mr. Al Cleveland's chest it existed, that's ill
23 will, hostility existed at that time.

24 As I stated before, it can be expressed through words
25 or implied by action, and again, by using a deadly weapon,

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1 that infers malice.

2 There are very few things that we know with absolute
3 certainty about a person's state of mind, what they are
4 thinking. There's no mathematical certainty of what is
5 going through a person's mind. You can't cut open their
6 heads and look inside and know what they were thinking at
7 the time.

8 You, as jurors, can depend on the actions of a
9 defendant in determining whether or not his state of mind
10 was malicious, when he takes a weapon like a knife and
11 thrusts it into a man who has raised him, who he has known
12 through his entire life.

13 Therefore, ladies and gentlemen, the use of a deadly
14 weapon in this case, you can use that to infer that
15 Mr. Starks did have malice in his mind.

16 Expressed malice: Words. Well, ladies and
17 gentlemen, the words used by this defendant, and I
18 apologize for the profanity in advance, "You punk M.F.'er.
19 You got nowhere to go just like me." Those are words of
20 provocation, hostility, of ill will towards another.

21 Action can also be used to determine whether or not
22 malice existed at the time the fatal blow was given. It
23 also spills into after, how did he behave after the
24 stabbing?

25 You heard from Tim Cornish as he is trying to render

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1 first aid to Mr. Cleveland on the ground in front of his
2 house. The man is bleeding to death.

3 What does Mr. Starks do? He comes up to
4 Mr. Cleveland while he is laying there defenseless. You
5 saw the witness get off the stand to demonstrate exactly
6 what his actions were.

7 He told him, "No. Stop. Go away. Get back. Get
8 back." That speaks volumes. Mr. Starks' actions speak
9 louder than words. That's what was going through his
10 mind, that ill will was still present, and it was
11 witnessed by Tim Cornish.

12 Judge Cooper is the judge of the law, as you are the
13 judges of the facts. It will be up to you to determine
14 what took place inside of [REDACTED] [REDACTED] [REDACTED] on October
15 12, 2006.

16 Judge Cooper, as a matter of law, has ordered that he
17 will charge you on the law of voluntary manslaughter. As
18 he indicated to you in the beginning, murder is killing
19 another human being intentionally with malice.

20 Voluntary manslaughter is also killing another human
21 being intentionally without malice, without that ill will
22 of hostility.

23 Ladies and gentlemen, the law of voluntary
24 manslaughter in South Carolina simply states: "To prove
25 voluntary manslaughter, the State must prove beyond a

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1 reasonable doubt that the defendant took the life of
2 another in the sudden heat of passion based on sufficient
3 legal provocation. Both the heat of passion and
4 sufficient legal provocation must be present at the time
5 of the killing in order to constitute voluntary
6 manslaughter."

7 The exercise of a legal right, no matter how
8 offensive it is to another, so no matter how offensive
9 Mr. Cleveland's actions were to Mr. Starks, it's never
10 sufficient legal provocation for voluntary manslaughter.

11 If in the heat of passion, if the heat of passion had
12 cooled -- in other words, we call this the "cooling off
13 period", or if there was enough time between the
14 provocation, if any, and the killing for the passion of a
15 reasonable person to cool, the killing would not be
16 voluntary manslaughter.

17 In deciding whether a reasonable person would have
18 had enough time to cool off, you should consider all the
19 circumstances surrounding the killing. The heat of
20 passion, something so aggravating and making a person so
21 angry that he loses reason and kills another human
22 intentionally, along with sufficient legal provocation.
23 Judge Cooper is going to define those to you.

24 The State of South Carolina has the burden of proof
25 in this case, as it should in every criminal case, and it

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1 does. It's proof beyond a reasonable doubt. Not proof
2 beyond any doubt or beyond a shadow of a doubt. It's
3 proof beyond a reasonable doubt. It's a term of art, a
4 legal term. It has a very lengthy definition.

5 "Proof beyond a reasonable doubt is proof that leaves
6 you firmly convinced of the defendant's guilt. There are
7 very few things in this world that we know with absolute
8 certainty, and in criminal cases, the law does not require
9 proof that overcomes every possible doubt.

10 If based on your consideration of all the evidence,
11 you are firmly convinced that the defendant is guilty of
12 the crime charged, you must find him guilty. If, on the
13 other hand, you think there is a real possibility that he
14 is not guilty, you must give him the benefit of the doubt
15 and find him not guilty."

16 Reasonable doubt: That is up to you to decide, what
17 is reasonable, and that is what this case is all about.

18 You heard from Investigator Isenhoward and also
19 Deputy Watford that prior to talking to Mr. Starks, he was
20 advised of his Miranda warnings.

21 I just wanted to touch base on that law. He gave a
22 statement after he waived it. You have to make sure that
23 you find his statements to be voluntary before you can
24 consider them in the jury room in your deliberations.

25 Voluntary statement: Did the defendant make the

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1 statement? I don't think anyone is disputing that. Was
2 the defendant warned of his Constitutional Rights? You
3 heard from both Investigator Isenhoward who pulled out his
4 card from his wallet and demonstrated to you exactly how
5 he did it that night, and you also heard the corroboration
6 from Deputy Watford that that was done.

7 Did the defendant knowingly and intelligently waive
8 his Constitutional Rights? He told them both, "Yeah, I
9 understand my rights. I want to continue talking without
10 a lawyer. I want to talk."

11 Was the statement given voluntarily? Those are the
12 factors that you determine and consider in deciding
13 whether or not what he said that night was voluntarily
14 given, and I don't believe that the defense was disputing
15 that at all.

16 Judge Cooper is also going to charge the law of
17 self-defense in this case. As we're all aware, the
18 defendant is claiming his version of the facts; that he
19 was in his room when the victim -- excuse me, Mr. Al
20 Cleveland kicked the door in and came and slapped him, and
21 he had the knife right there and stabbed him. He is
22 claiming self-defense.

23 Mr. McMullen already went over these with you, so
24 I'll try to go over them briefly. The first element of
25 self-defense: The defendant must be without fault in

1 bringing on the difficulty.

2 We have the burden of proof to disprove that beyond a
3 reasonable doubt. Ladies and gentlemen, remember when
4 Deputy Carwell left? The defense will have you believe
5 that Mr. Starks went straight to his room and did as he
6 was told by his mother and the deputy; that he just went
7 right back to his room, but no, that's not what happened.

8 You heard from Timothy Cornish that the arguing
9 continued. It picked up right as soon as that deputy
10 left, and that they were both arguing back and forth, and
11 yes, Mr. Cleveland was more agitated, but the defendant
12 was calmer, not calm, calmer.

13 He was contributing to that argument with the comment
14 that we've already gone over, "You have nowhere to go, you
15 punk." Disrespecting Mr. Starks -- excuse me,
16 Mr. Cleveland.

17 That arguing continued, according to Tim Cornish, for
18 45 minutes to an hour. It continued. He could hear it
19 through the window of his trailer next door. He could
20 hear it continuing back and forth for 45 minutes to an
21 hour. That is proof beyond a reasonable doubt that this
22 defendant was without fault -- that he was with fault in
23 bringing on the difficulty.

24 He did not quit or retreat, as he claims. That's
25 irrefutable that he continued arguing with Mr. Cleveland

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1 on the front porch.

2 What else do we know? We know that Mr. Cleveland was
3 asking Timothy for a ride. We know that he was asking for
4 a ride.

5 We also know that he asked for a gun, and Mr. Starks
6 was on the porch and heard that, and he heard Mr. Cornish
7 tell him, "I don't have a gun, and I can't give you a
8 ride."

9 They both went inside, according to Mr. Cornish, and
10 he returned back to his residence, but he could still hear
11 arguing for the next 45 minutes to an hour when the last
12 thing he heard was "Tim, Tim," from Al on his front porch.

13 The second element, right there, we have disproven
14 that beyond a reasonable doubt. I could stop right here,
15 and they don't get their claim of self-defense, because I
16 only have to disprove one of those four, not all four,
17 just one. I'm not going to stop there, ladies and
18 gentlemen. We're going to continue going through.

19 The defendant must have actually believed he was in
20 imminent danger of losing his life or sustaining serious
21 bodily injury or he was in actual imminent danger. He
22 actually had to believe it.

23 Ladies and gentlemen, if you want to believe the
24 defendant's version, and I submit there is plenty of
25 physical evidence at the scene to challenge that, which I

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1 will do at this time so that I can apply it to the law of
2 self-defense.

3 We have a time line. 7:15, Al calls 911 and reports
4 that his 35-year-old son is at his residence threatening
5 him, provocation with fault.

6 7:29, ten minutes later, and you have the records,
7 ladies and gentlemen, so feel free to review this when you
8 go back to the jury room. 7:29, Al calls 911 for E.T.A.,
9 estimated time of arrival. "Where are you guys? Where
10 are you guys?" 7:48, Al calls again and reports his son
11 is threatening him. Provocation with fault in bringing on
12 the altercation.

13 Deputy Carwell arrives around 7:50, and when he gets
14 there, he said the victim -- excuse me, Mr. Cleveland, is
15 extremely upset. He wants this man out of his house.

16 Mr. Starks explains that he was allowed to live there
17 because of his mother, and Deputy Carwell cannot eject
18 people who are lawfully allowed to live in a residence.
19 He double checked with Betty Ann Cleveland to make sure
20 that that was the case. When he confirmed that, he
21 explained to Al Cleveland the procedures to be used for a
22 formal eviction process.

23 He said he didn't need back up units. He canceled
24 back up units. He had the situation under control, and
25 that Mr. Starks was calm and cool as a cucumber. The

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1 victim -- excuse me, Mr. Cleveland was upset.

2 Ladies and gentlemen, isn't it interesting that after
3 Deputy Carwell leaves, as soon as he leaves, Mr. Starks'
4 behavior changes immediately. It went from being calm to
5 "You punk M.F.'er. You got nowhere to go," arguing with
6 him, yelling at him. He is a chameleon.

7 When officers are around, he is calm, cool,
8 collected, but as soon as they're out of sight, you heard
9 from Timothy Cornish how he was behaving. The arguing
10 began right away, as soon as Deputy Carwell left.

11 I submit to you at this point that's when Mr. Cornish
12 talks to both Mr. Starks and to Al, and this conversation
13 wasn't by Mr. Cornish's house.

14 You heard the testimony. They were right there, and
15 Al was pacing back and forth. That's where Mr. Starks
16 was. He could hear fine what was going on.

17 I mean, if Mr. Cornish can hear them yelling from his
18 trailer, certainly, you know, all the way here, certainly
19 if Mr. Starks is on the front porch, he can hear what's
20 going on and what's being said.

21 In fact, he heard Mr. Cleveland ask for a gun. Do
22 you remember when his wife testified, I asked, "Well, what
23 did he do after that?"

24 "He went to go lie down."

25 It didn't seem to startle him or make him fear for

1 his safety. He just went and laid down. He didn't get in
2 his car and leave. He had enough gas to go to Santee that
3 day and come back. I'm sure he didn't pull into his house
4 in a rural area of town on fumes, but no, he stayed.

5 He wasn't in fear for his safety or his life, and he
6 heard. If he heard that, he heard Mr. Cornish say, "No.
7 I'm not giving you a gun, and I'm not giving you a ride.
8 My wife is on the phone with the mortgage company, and I
9 have to be there to answer questions. I'm going back
10 home. Y'all calm down." He said that the arguing went on
11 and on for 45 minutes to an hour.

12 We know from Mr. Cleveland's cell phone, and you can
13 turn this on, those of you that are familiar with this
14 kind of phone, that his phone registers at 8:53 calling
15 911. That phone call lasted three minutes and eight
16 seconds.

17 I submit to you, ladies and gentlemen, it's
18 registered at 8:57 with the 911 dispatcher. What is Al
19 telling them? "Male states that son locked him in the
20 room."

21 I'm going to go over what really happened, because we
22 don't have to take Mr. Starks' version of the facts.
23 Unfortunately, Mr. Cleveland is not around to tell us what
24 really happened but physical evidence is.

25 We know the T.V. was on. If you look at the photos,

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1 there's a pillow propped up right there. I submit to you
2 that after they argued on the porch and after Mr. Cornish
3 said, "Y'all calm down. I got to go home," they went
4 inside the house. Al went into the living room to watch
5 T.V.

6 Mr. Starks went into the kitchen, got a pot, got some
7 rice, got some beans, got some hot dogs and started
8 cooking his food on the stove.

9 Mr. Cleveland, after being disrespected, saw him
10 eating his food, and that made him mad again, and he went
11 into that kitchen and he told him, "You're not eating my
12 food," and they struggled over that pot.

13 Ladies and gentlemen, how do we know there's a pot?
14 It's in the sink next to the cleaned off knife. I submit
15 to you a struggle ensued over that pot. "You're not going
16 to eat my food. You don't contribute anything to this
17 household," and Mr. Starks and Mr. Cleveland started
18 struggling over that pot. It fell on the floor, and the
19 food spread everywhere.

20 How do we know that? There's hot dogs over there.
21 It spread around. It was probably spread out all over the
22 floor before it got swept up.

23 At that point, ladies and gentlemen, right there in
24 the corner, what is that? A knife block. Mr. Starks
25 grabbed the butcher knife, this butcher knife that

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1 belonged in that block.

2 Al sees him, and he's really scared and he runs. He
3 runs to the farthest room in the house to save himself.
4 He ends up in the room belonging to Mr. Starks. How do we
5 know that? The 911 call.

6 He callid at 8:50 -- well, they register at 8:57,
7 "Male states that son locked him in the car." Not my
8 room. He didn't say, "My son locked me in my room," like
9 Mr. Starks said to the police -- to the 911 dispatcher, he
10 broke into my room, no. He said "the room" because we
11 know that Al's room was on the other side of the house.
12 He said "the room".

13 At that point, ladies and gentlemen -- and
14 Mr. McMullen will have you believe that the 911 dispatcher
15 was wrong about that, but she is definitely not wrong
16 about what Mr. Starks' calls were about, "I had to cut my
17 stepfather, stepfather left, stepfather broke into my
18 room." That's all accurate, and apparently, all the calls
19 from the previous incident that evening are all accurate.

20 The only one he has a problem with is the one that
21 hurts his case because he can't explain how on earth
22 Mr. Al Cleveland is in the room locked in. He has locked
23 himself in the room to keep from getting hurt by his
24 stepson.

25 And guess what, ladies and gentlemen, let's see --

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1 let me find the time real quick. At that point, Carwell
2 is dispatched. So we know that 9:03, Deputy Carwell is
3 already en route. So clearly, Al's call is what gets
4 officers coming over.

5 The next timeline, 9:08, five minutes after Deputy
6 Carwell is already en route, and I missed the part about
7 the mental. It's on here, 9:03, right at the time that
8 Carwell is en route, the dispatcher put "Complainant
9 sounds 1068".

10 Perhaps that is when the defendant is breaking in the
11 door. Perhaps that's when he hears the defendant at the
12 door banging on it. He knows he's got a knife that he
13 just grabbed from the butcher block, the knife block in
14 the corner of the kitchen right next to the stove.

15 Then the next call, 9:08, and I submit to you, ladies
16 and gentlemen, at that point when the dispatcher says
17 "1068", at that point Mr. Starks breaks in the door, and
18 he cuts Al. He stabs him in the right chest with enough
19 force, not a jig, not a little jig like he'd try to
20 describe it to the deputies, but with enough force as the
21 trajectory that you saw Dr. Kessler, he demonstrated it on
22 me, with enough force to go through two rib bones and
23 enough force for it to go four inches deep.

24 I asked Dr. Kessler, "Well, you know, if
25 Mr. Cleveland stumbled on it, what would you expect?"

1 "If he fell on it, the whole thing would have gone
2 in."

3 No, something stopped it. Either the length of the
4 arm. He ran out of -- the arm, just fell back, that sort
5 of stops it or he pulled back before he let it go in all
6 the way.

7 We don't give brownie points for not inserting an
8 eight-inch blade all the way in. It caused his death. We
9 don't get brownie points because we're trying to stab
10 someone on the opposite side where there's not a vital
11 organ like the heart. He stabbed him in his chest deep
12 enough to puncture his lung so that he would bleed to
13 death. You could have stabbed him in the arm.

14 Ladies and gentlemen, when Al is stabbed, he runs
15 past the defendant down the hall. He runs out the front
16 door.

17 He is running for his life, and how do we know that?
18 There is all kinds of evidence of him running out of that
19 house and running straight to Mr. Cornish's house. He --
20 this right here is the closest side of the porch to
21 Mr. Cornish's house. He jumps down there, knocks the
22 grill over, and runs straight over to Mr. Cornish's house.

23 Mr. Starks is in the house at this time. Man,
24 Mr. McMullen is not giving him enough credit. Mr. Starks
25 is an intelligent person. He knows that the police knew

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1 he was there alone with Mr. Cleveland.

2 Who else would have inflicted this fatal injury? Who
3 else? So he gets on the phone. At 9:08, he reports he
4 had to stab his stepfather. Remember, I find this really
5 interesting, all the calls that Al makes to 911, he refers
6 to him as his son, and Mrs. Cleveland testified that to
7 the outside world, they referred to each other as "son"
8 and "father".

9 No. Mr. Starks refers to him as "stepfather". He
10 made that clear. He had to stab his stepfather. His
11 stepfather left, and if you look at the log, where I
12 misplaced it, but down -- here it is, down a ways, then
13 it's registered "stepfather broke into his room". This is
14 what he first says, and then later on "stepfather broke
15 into his room."

16 Ladies and gentlemen, he had to explain the damage to
17 the door that he just caused before he stabbed Al. At
18 that point, a minute later at 9:09, Tim instructs
19 Mrs. Monica Watkins, his wife, to call the police or call
20 an ambulance. We know it's a female calling. "Subject on
21 her porch," so it's his wife, "was stabbed." This is her
22 neighbor, that's Al.

23 And remember Mr. Cornish's testimony? He sees Al
24 slumped over on the fourth step of his staircase to his
25 house. He's gurgling. He can't speak. He can't tell him

1 what's happening.

2 At that point, ladies and gentlemen, he grabs
3 Mr. Cleveland and puts him down to the ground trying to
4 render first aid. He's a U.S. Marine with combat
5 experience in Lebanon, in Beirut in the '80s. He knew
6 from training that he had to open the air pathway, so this
7 man could breathe.

8 Unfortunately, unbeknownst to Mr. Cornish,
9 Dr. Kessler said there was nothing anyone could do for Al
10 Cleveland. There was nothing anyone could do. He was
11 bleeding to death.

12 While he gets the pillow under Mr. Cleveland's head,
13 what does the defendant do? "I talked about this
14 earlier." Comes at him in an aggressive manner.

15 Now, whether he walked or ran is irrelevant. The
16 point is, he was trying to kick Al while he's laying there
17 bleeding. That speaks volumes about his mental state.
18 That's the ill will, the hostility, that was going on in
19 that man's head around that time of the stabbing.

20 At 9:15 -- or remember, Starks comes at him. Tim
21 tells him, "Get back to the house. Go back to the house."
22 I submit to you, ladies and gentlemen, from about 9:09 to
23 9:15, some five or six minutes, that man is in the house.
24 He's cleaning off the knife. He's cleaning the pot in the
25 sink. He's sweeping up the hot dogs and the rice and the

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1 beans.

2 Why is that important? Why did I ask Dr. Kessler
3 about that? It's not Mr. Cleveland cooking that. Why do
4 we know that? Because Mr. Cleveland had meat, vegetables,
5 and starch, like a potato or bread.

6 We know that was a meal that he was eating. He had
7 just ate, and he was in the process of digesting it. I
8 takes two hours for food to digest in his stomach. So we
9 know that he had already eaten his supper. That was food
10 that Mr. Starks was preparing for himself.

11 At that point, he goes back and he's cleaning. In
12 the process of sweeping up the food on the floor and,
13 ladies and gentlemen, this is a rural area of town. The
14 driveways are long. There's not a lot of traffic. The
15 kitchen isn't facing. He could hear cars coming.

16 He put the broom down, didn't have enough time to
17 clean it, saw the cars coming up, saw Deputy Carwell
18 pulling up and meets him on the front porch in front of
19 the house.

20 What does he tell Deputy Carwell? "I was in my room
21 like you told me to" and he's calm. He's around an
22 officer now. "I was in my room like you and my mom told
23 me to, and Al kicked in the door and slapped me. And so I
24 had to grab a knife and stab him." Slap, okay. That's
25 what he says to him.

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1 We know that at that point Watford and Haddock showed
2 up, and then E.M.S. arrives around 9:25. They do what
3 they can for Mr. Cleveland, to no avail.

4 Investigator Isenhoward arrives, and then at 9:50 Ray
5 Livingston, the Crime Scene Investigator, arrives.
6 Haddock puts the crime scene tape up. Carwell secured the
7 scene. Nobody was allowed in that house except for
8 Carwell, Watford, Haddock, Isenhoward, and Livingston.
9 That's it. Not Betty Ann Cleveland, not Lakeisha Toliver.
10 Nobody was allowed in that house.

11 They photographed the scene, processed the scene.
12 Investigator Isenhoward at that time talks to the
13 defendant. What does he say? He has to come up with a
14 reason on how, if he was in his room, how did he have a
15 knife in there? Why did he have a knife in there? Oh, I
16 got to explain that. I was in the room. I got to explain
17 how I had access to a knife, how I had access to this
18 butcher knife.

19 So guess what, ladies and gentlemen? I had just made
20 a sandwich, and I cut the sandwich with the knife taking
21 both to the bedroom, and I locked the door and laid on my
22 bed. That's what he told Investigator Isenhoward.

23 Then all of the sudden, the door is kicked in, and
24 all of the sudden Al backhands me. Now, he changed it
25 from a slap to backhand.

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1 He's trying to make it more aggressive on Al's
2 behavior, on Al's part. Then what happens? He cuts Al or
3 stabs Al and that Al had to leave. When asked "Were you
4 in fear for your life," he stumbles over his words, and he
5 says, "I have a disability. I can't defend myself."
6 That's what he tells Investigator Isenhoward.

7 "Well, was Al armed with anything?"

8 "No, not that I saw, but I couldn't see because it
9 was dark."

10 "Okay. Well, then how can you explain, Mr. Starks,
11 the lighting conditions in the room? A person is standing
12 an arm length away from you, and you can't see whether or
13 not he's around? You're only saying he slapped you or
14 used his hand to hit you."

15 Ladies and gentlemen, it's plenty light in there. He
16 could have seen that, but it was funny on
17 cross-examination of Dr. Kessler, "Well, can't a slap
18 caused blurred vision or your eyes to water, because they
19 have to come up with a reason of, you know, how it's
20 impossible for him to have seen any weapon in this man's
21 hand because he was blurred. He was hit so hard he
22 couldn't see." That's not what happened, ladies and
23 gentlemen.

24 There's also zero, zero signs of struggle in that
25 room. Look right there next to the doorway, the clothes

1 are fine. The bed looks slept in or laid on. There's a
2 telephone right there. The T.V. is on.

3 Also, I find it interesting that when Investigator
4 Isenhoward went to go follow up on Mr. Starks' version of
5 the facts about the sandwich and a knife, that he is
6 purposely looking to find any corroboration of Mr. Starks'
7 version of the facts.

8 He is actively looking, a career investigator, and
9 sees nothing, not a plate, not a sandwich, nothing. Yet,
10 Lakeisha stumbles up on it right there in front of the
11 room.

12 I accidentally wrote over it, but she said it was
13 sticking halfway out underneath the bed in front of the
14 door, but she just stumbled up on it, and Investigator
15 Isenhoward, I guess, is so incompetent that he just missed
16 it. I find it interesting that Mr. McMullen finds him
17 very competent when he noticed the blood trail because it
18 helps his case.

19 At that point, after Investigator Isenhoward gets
20 Mr. Starks' version of the facts, he has Investigator
21 Livingston photograph him, but this is already after he
22 has documented in his file that I took my flashlight, and
23 I looked all over his face to see if there were any marks
24 whatsoever on his face consistent with a slap or anything
25 done to his face, negative, negative. That is what the

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1 defendant looked like on the night that he was arrested.

2 There is no signs of injuries on this man, and at
3 that point when Investigator Isenhoward, knowing that Al
4 was unarmed, that all Al did was slap this man, and that
5 this man is big, huge, compared to Al, and he confers with
6 his superiors at his job. He goes up to tell Mr. Starks,
7 "Al didn't make it. He died." And Mr. Starks reaches
8 over as he's leaning into the patrol car and with both
9 arms, both hands, he's -- he could move one hand without
10 the other, ladies and gentlemen. It's not like he went
11 "oh". He was moving with both hands. Investigator
12 Isenhoward told you he used both hands and pulled him into
13 the back of that patrol car where he could barely touch --
14 his toes were touching the ground.

15 This man is strong, and so going back to the elements
16 of self-defense, he must have actually believed he was in
17 imminent danger of either losing his life or sustaining
18 great bodily injury, a slap versus a stabbing.

19 If -- if his defense is based upon his belief of
20 imminent danger, a reasonably prudent person of ordinary
21 firmness and courage would have entertained the same
22 belief.

23 If the defendant was actually in imminent danger, the
24 circumstances were such that would warrant a person of
25 ordinary firmness, prudent firmness and courage, to strike

1 the fatal blow to save himself from serious bodily harm or
2 losing his own life.

3 Let's say for argument's sake that it happened the
4 way Mr. Starks said it did, it is not reasonable to take a
5 knife and to bury a butcher knife into the chest of
6 somebody that you have known your whole life in response
7 to a slap.

8 It is not reasonable, and a person of ordinary
9 prudence, firmness, and courage would have done something
10 different. Like Tim Cornish said, "You didn't have to
11 stab him. You could have fought him." A slap does not
12 warrant a stab wound.

13 Lastly, if the defendant had no other probable means
14 of avoiding the danger of losing his own life or
15 sustaining serious bodily injury than to act as he did in
16 this particular instance.

17 Ladies and gentlemen, Mr. McMullen told you that if
18 you are in your own dwelling, you have no duty to retreat,
19 but the law is if you are at fault in bringing on the
20 difficulty, then you don't get that freedom of staying and
21 standing your ground if you were at fault in bringing on
22 the difficulty. You lose that, and that's the duty to
23 retreat.

24 In South Carolina we've got a new law that passed in
25 June of '06, a right four months before this crime

Closing - Shipley

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1 happened, and it's "presumption of reasonable fear of
2 imminent peril when using deadly force against another
3 unlawfully entering your residence, a car, or a place of
4 business."

5 It starts with, "A person is presumed to have a
6 reasonable fear of imminent peril of death or great bodily
7 injury to himself or another person when using deadly
8 force that is intended or likely to cause death or great
9 bodily injury to another person if the person is an
10 intruder," and so forth.

11 But it does not apply against -- this presumption
12 does not apply against whom the deadly force is used, and
13 that person has the right to be, or is a lawful resident,
14 of a dwelling.

15 This presumption of having a reasonable fear of
16 danger of bodily injury or death does not apply when the
17 other person is a household member, when you live with
18 them. Why is that, ladies and gentlemen? I submit
19 because you ought to know the people you live with.

20 You don't know what an intruder is capable of, and
21 the law treats them differently. Al was not an intruder.
22 He lived there. Thad was not an intruder. He lived
23 there. They know each other. You don't just kill
24 somebody for no real reason.

25 The law also recognizes the relative sizes, ages,

1 weight of the defendant and decedent may be considered in
2 determining the apparent or the actual need of force in
3 self-defense, and that the amount of force that was
4 needed.

5 So I ask you, ladies and gentlemen, was it
6 proportional? Was excessive force used? Was it
7 reasonable? Was it necessary? Was it necessary to stab
8 Al if you're claiming all he did was slap you, slapping
9 vs. stabbing.

10 Ladies and gentlemen, the reason why the sandwich
11 incident came up is because Mr. Starks said he made a
12 sandwich and he went with the sandwich and the knife, the
13 butcher knife, into his bedroom.

14 Law enforcement and photographs looked for that
15 sandwich, that plate, and it was nowhere to be found. He
16 admits that he used the knife to stab Al, and the defense
17 was the one that called all of these witnesses to talk
18 about it: Betty Ann Cleveland, Lakeisha Toliver. That's
19 what they talked about, and they were completely
20 inconsistent with one another.

21 I totally understand that their -- they love Thad
22 Starks. They love him. They don't want to see him get in
23 trouble, but if you're going to come and take the witness
24 stand in a Court of law, you better stick to the truth
25 because the truth never changes. Only lies get you mixed

Closing - Shipley

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1 up.

2 They should have conferred more about what they were
3 going to say before they got on the witness stand because
4 it was so inconsistent. They just weren't following each
5 other.

6 Betty Ann said that the next day is when Lakeisha
7 brought to it her attention that she had found this plate
8 and a knife, a steak knife. That doesn't go along with
9 Mr. Starks' version of the facts, does it? Because he
10 said he used that -- the knife that he had used to cut the
11 sandwich, that he had used that to stab Al, a big
12 difference in this versus this (indicating).

13 If Mr. Starks made a sandwich and cut it taking both
14 the knife and the sandwich into his room, and he used that
15 knife to stab Al, and that knife ended up in the sink with
16 Al's D.N.A. on it, and Dr. Kessler said, "This is
17 consistent with the injury I observed on Al," then where
18 is this mysterious knife coming from, the one with the
19 day-old mayo on it?

20 It doesn't fit his story. They tried. They love
21 him. They're biased and when you're determining the
22 credibility of witnesses, ask yourselves whether or not
23 they're biased because that has a huge bearing on their
24 credibility, whether you should believe them or not.

25 Lastly, their own expert witness, Dr. Faber, got up

1 here, and I asked him about the physical conditions of the
2 parties, and what did he say? "I'd bet on the big guy
3 even with the disability." He would have won that bet,
4 ladies and gentlemen.

5 Tomorrow, October 12th, 2007 is the one-year
6 anniversary of Al's death. I ask you to bring him justice
7 on the eve of his death.

8 Thank you.

9 JURY CHARGE:

10 THE COURT: All right. Ladies and gentlemen, you
11 heard all the evidence and the arguments of both the State
12 and the defendant in this case. I'll now explain the law
13 as it applies to this case.

14 Under our constitution and code of laws, only the
15 jury can make the findings of fact in this case. I am not
16 permitted to indicate to you how I may feel about the
17 facts.

18 If I have done or said anything during the course of
19 this trial which indicate to you that I have an opinion
20 concerning the facts of the case, you should disregard
21 that. The jury must independently weigh the evidence
22 presented in this trial and render a verdict based solely
23 on that evidence.

24 Now, the same constitution and laws which designate
25 and make you the finders of fact also make me the

Jury charge

699

1 instructor of the law.

2 If you have some idea of what the law is or what the
3 law ought to be and it does not agree with what I now tell
4 you the law is, you're obligated under your oath which you
5 have taken to abandon this preconception and apply the law
6 precisely as I now state it to you.

7 I remind you, again, that the fact the defendant was
8 arrested, charged, and indicted in this chase is not
9 evidence in this case, cannot be considered by you as
10 evidence of guilt in this case, nor does it create any
11 presumption or inference of guilt.

12 The document is simply the formal written instrument
13 which contains the charge made against the defendant.
14 It's the formal document by which the case was brought
15 into court.

16 Now, the defendant has pled not guilty to this
17 indictment, and that plea puts the burden on the State to
18 prove the defendant guilty.

19 A person charged with committing a criminal offense
20 in South Carolina is never required to prove himself
21 innocent. I charge you that that is an important rule of
22 law, that the defendant in a criminal trial, no matter
23 what the seriousness of the charge may be, will always be
24 presumed to be innocent of the crime for which the
25 indictment was issued unless guilt has been proven by

Jury charge

700

1 evidence satisfying you of that guilt beyond a reasonable
2 doubt.

3 This presumption of innocence does not end when you
4 begin your deliberations, but it accompanies the defendant
5 throughout the trial until you reach a verdict of guilt
6 based on evidence satisfying you of that guilt beyond a
7 reasonable doubt.

8 It has been said that the presumption of innocence is
9 like a robe of righteousness placed about the shoulders of
10 the defendant which remains with the defendant until it
11 has been stripped from the defendant by evidence
12 satisfying you of the defendant's guilt beyond a
13 reasonable doubt.

14 The presumption of innocence, in other words, is not
15 a mere legal theory. It's not just a legal phrase. It is
16 a substantial right to which every defendant is entitled
17 unless you, the jury, are satisfied from the evidence of
18 the defendant's guilt beyond a reasonable doubt.

19 Well, what is a reasonable doubt in the law? A
20 reasonable doubt is the kind of doubt that would cause a
21 reasonable person to hesitate or to hesitate to act.

22 Let me say that again. A reasonable doubt is the
23 kind of doubt that would cause a reasonable person to
24 hesitate or to hesitate to act.

25 The State has the burden of proving the defendant

Jury charge

701

1 guilty beyond that reasonable doubt. Some of you may have
2 served as jurors in a civil case where you were told it's
3 only necessary to prove that a fact is more likely true
4 than not or that a -- or that the fact may be proven by
5 the greater weight or preponderance of the evidence.

6 However, in criminal cases, the State's proof must be
7 more powerful than that. It must be beyond a reasonable
8 doubt.

9 Proof beyond a reasonable doubt is proof that leaves
10 you firmly convinced of the defendant's guilt. Now, there
11 are very few things in this world that we know with
12 absolute certainty.

13 In criminal cases, the law does not require proof
14 that overcomes every possible doubt. If, based on your
15 consideration of the evidence, you are firmly convinced
16 that the defendant is guilty of the crime charged, you
17 must find the defendant guilty.

18 If, on the other hand, you think there is a real
19 possibility the defendant is not guilty, you must give the
20 defendant the benefit of the doubt and find him not
21 guilty.

22 Now, there are two types of evidence which are
23 generally presented during the trial: Direct evidence and
24 circumstantial evidence.

25 Direct evidence is the testimony of a witness who

Jury charge

702

1 claims to have actual knowledge of a fact, such as an
2 eyewitness. It's evidence which immediately establishes
3 the main fact to be proved.

4 Circumstantial evidence, on the other hand, is proof
5 of a chain of facts and circumstances indicating the
6 existence of a fact. It is evidence which immediately
7 establishes collateral facts from which the main fact may
8 be inferred.

9 Circumstantial evidence is based on inference, in
10 other words, and not on personal knowledge or observation.
11 The law makes absolutely no distinction between the weight
12 or value to be given either direct or circumstantial
13 evidence, nor is a greater degree of certainty required of
14 circumstantial evidence than direct evidence.

15 You should weigh all of the evidence in the case.
16 After weighing all of the evidence, if you are not firmly
17 convinced of the guilt of the defendant beyond a
18 reasonable doubt, you must find the defendant not guilty.

19 Now, necessarily, you must determine the credibility
20 of the witnesses who have testified this case.

21 Credibility simply means believability. It becomes your
22 duty as jurors to analyze and evaluate the evidence and
23 determine which evidence convinces you of its truth.

24 In determining the believability of witnesses who
25 testified in this case, you may believe one witness over

Jury charge

703

1 several witnesses, several witnesses over one witness.
2 You may believe a part of the testimony of a witness,
3 reject the remaining part of the testimony of the same
4 witness.

5 You may believe the testimony of a witness in its
6 entirety or reject the testimony of a witness in its
7 entirety.

8 You may consider whether any witness has exhibited to
9 you any interest, bias or prejudice or other motive in
10 this case. You may also consider the appearance and the
11 manner of a witness while on the witness stand.

12 Now, normally a person, that is an individual, cannot
13 give what is called opinion testimony in a trial.
14 Normally, when a person testifies, they must testify as to
15 what they saw or heard or sensed or by smell or heard or
16 something of that nature.

17 However, there is an exception under our rules of
18 evidence when someone is qualified because of some
19 education or experience, they are permitted to give an
20 opinion in certain areas if the Court qualifies them in
21 that way. We had several witnesses in this case who were
22 qualified as witnesses and were allowed to offer their
23 opinion.

24 Now, in order to establish criminal liability,
25 criminal intent is required. For example, the mental

Jury charge

704

1 state required to be proven by the State for some
2 particular crime might be a purpose or an intent or
3 knowledge of certain facts or recklessness.

4 Criminal intent must be proven by the State beyond a
5 reasonable doubt. Criminal intent is always a matter that
6 must be determined by the jury from the circumstances
7 surrounding the situation.

8 There's no way to prove intent to a mathematical
9 certainty, and there's certainly no way medical science
10 can dissect a person's brain and determine what the person
11 had in mind, so the law says criminal intent may be
12 inferred from the circumstances shown to have existed at
13 the time and place. This is how you make a determination
14 of whether or not the element requiring intent was
15 present.

16 It's not necessary to establish intent by direct or
17 positive inference -- evidence, but intent may be
18 established by inference in the same way as any other fact
19 by taking into consideration the acts of the parties and
20 all the facts and circumstances in the case.

21 In other words, criminal intent is a mental state of
22 conscious wrongdoing. It's up to you to determine what
23 the defendant intended to do based on the circumstances
24 shown to have existed at the time and place of the
25 incident.

Jury charge

705

1 Criminal intent can arise from action or failure to
2 act. It also may arise from negligence, recklessness, or
3 an indifference to duty.

4 Now, as you know, the defendant is charged with
5 murder. The State must prove beyond a reasonable doubt
6 the defendant killed another person with malice
7 aforethought.

8 Malice is hatred, ill will or hostility towards
9 another person. It is the intentional doing of a wrongful
10 act without just cause or excuse and with an intent to
11 inflict an injury or under circumstances that the law will
12 infer as an evil intent.

13 Malice aforethought does not require that malice
14 exist for any particular time before the act is committed,
15 but malice must exist in the mind of the defendant just
16 before and at the time of the act, the act is admitted.
17 Therefore, there must be a combination of the previous
18 evil intent and the act.

19 Malice aforethought may be expressed or inferred.
20 These terms, expressed or inferred, do not mean different
21 types of malice, but merely mean the manner in which
22 malice may be shown to exist. That is either by direct
23 evidence or by inference from the facts and circumstances
24 which are proved.

25 Express malice is shown when a person speaks words

Jury charge

706

1 which express hatred or ill will for another or when the
2 person prepared beforehand to do the act which was later
3 accomplished. For example, lying in wait for a person or
4 any other acts of preparation going to show the deed was
5 within the defendant's mind would be express malice.

6 Also, malice may be inferred from conduct showing a
7 total disregard for human life. Inferred malice may also
8 arise when the deed is done with the deadly weapon.

9 Deadly weapon is any article, instrument, or
10 substance which is likely to cause death or great bodily
11 harm. Whether an instrument has been used as a deadly
12 weapon depends on the facts and circumstances of each
13 case. Some examples of deadly weapons are a pistol,
14 shotgun, rifle, a dagger, or a knife.

15 Now, if you find that the State has failed to prove
16 beyond a reasonable doubt that the defendant committed
17 murder, you may also consider whether the State has proved
18 beyond a reasonable doubt that the defendant committed
19 voluntary manslaughter.

20 Included within the offense of murder, as I explained
21 earlier, is the lesser-included offense of voluntary
22 manslaughter.

23 To prove voluntary manslaughter, the State must prove
24 beyond a reasonable doubt that the defendant took the life
25 of another in the sudden heat of passion based on

Jury charge

707

1 sufficient legal provocation.

2 Both the heat of passion and sufficient legal
3 provocation must be present at the time of the killing to
4 constitute voluntary manslaughter.

5 Sudden heat of passion may, for a time, affect a
6 person's self-control, temporarily disturb a person's
7 reason.

8 Sudden heat of passion must be the type that would
9 make an ordinary person unable to coolly reflect on his
10 actions and would produce an uncontrollable impulse to do
11 violence.

12 Sufficient legal provocation must be the type that
13 would make a person of ordinary reason and caution become
14 enraged and to lose control temporarily. Provocation
15 needed for voluntary manslaughter must come from some act
16 of or related to the victim.

17 Words alone, however, how ever vulgar or insulting
18 are not enough to be legal provocation. Where death is
19 caused by the use of a deadly weapon, the words, if used,
20 must be accompanied by some overt or threatening act which
21 could have produced the heat of passion.

22 If the heat of passion is cooled or if there was
23 enough time between the provocation, if any, and the
24 killing for the passion to be -- of a reasonable person to
25 cool down, the killing would not be voluntary

Jury charge

708

1 manslaughter.

2 In deciding whether a reasonable person would have
3 had enough time to cool off, you should consider all the
4 circumstances surrounding the killing. You may consider
5 the nature of the provocation, if any, the defendant's
6 mental and physical state, and the circumstances and
7 relationship between the parties.

8 Now, the defense has raised the defense of
9 self-defense. Self-defense is a complete defense, and if
10 it is established, you must find the defendant not guilty.

11 The State has the burden of disproving self-defense
12 by proof beyond a reasonable doubt. If you have a
13 reasonable doubt about the defendant's guilt after
14 considering all of the evidence, including evidence of
15 self-defense, then you must find the defendant not guilty.

16 On the other hand, if you have no reasonable doubt of
17 the defendant's guilt after considering all of the
18 evidence, including the evidence of self-defense, then you
19 must find the defendant guilty.

20 A person cannot be required to make an exact
21 calculation as to the degree or amount of force which may
22 be needed to avoid death or serious bodily harm.
23 Therefore, in self-defense, the defendant has the right to
24 use the force needed to avoid death or serious bodily
25 harm.

Jury charge

709

1 The force used in self-defense does not have to be
2 limited to the degree or amount of force used by the
3 victim.

4 The defendant has the right to use so much force as
5 appeared to be necessary for complete self-protection and
6 which a person of ordinary reason and firmness would have
7 believed to have been needed to prevent death or serious
8 bodily harm.

9 Now, the following elements are needed -- or are
10 required to establish self-defense: First, the defendant
11 must be without fault in bringing on the difficulty.

12 If the defendant's conduct was the type which was
13 reasonably calculated to and did provoke a deadly assault,
14 the defendant would be at fault in bringing on the
15 difficulty and would not be entitled to an acquittal based
16 on self-defense.

17 The second element of self-defense is that the
18 defendant was actually in imminent danger of death or
19 serious bodily injury or that the defendant actually
20 believed he was in imminent danger of death or serious
21 bodily injury.

22 If the defendant was actually in imminent danger, it
23 must be shown that the circumstances would have warranted
24 a person of ordinary firmness and courage to strike the
25 fatal blow to prevent death or serious bodily injury.

Jury charge

710

1 If the defendant believed he was in imminent danger
2 of death or serious bodily injury, it must be shown that a
3 reasonably prudent person of ordinary firmness and courage
4 would have had the same belief.

5 Once the right to strike the first blow in
6 self-defense arises, a defendant is not required to wait
7 until his adversary is on equal terms with him or until
8 his assailant gets the drop on him. He has the right to
9 act under the law of self-preservation and prevent his
10 assailant from getting the drop on him.

11 In deciding whether the defendant actually was or
12 believed he was in imminent danger of death or serious
13 bodily injury, you should consider all of the facts and
14 circumstances surrounding the incident, including the
15 physical condition and characteristics of the defendant
16 and the deceased.

17 Now, the defendant does not have to show that he was
18 actually in danger. It's enough if the defendant believed
19 he was in imminent danger and a reasonably prudent person
20 of ordinary firmness and courage would have had the same
21 belief.

22 The defendant has the right to act on appearances
23 even though the defendant's beliefs may have been
24 mistaken.

25 It's for you to decide whether the defendant's fear

Jury charge

711

1 of imminent danger or death or serious bodily injury was
2 reasonable and would have been felt by an ordinary person
3 in the same situation.

4 I further charge you that evidence of prior
5 difficulties between the defendant and the deceased may be
6 considered in deciding whether a threat existed and
7 whether the defendant had a reason to believe a threat
8 existed and how serious that threat was.

9 I further charge you that the physical condition,
10 relative sizes, ages, and weights of the defendant and the
11 deceased may be considered in deciding the apparent or
12 actual need for force in self-defense and the amount of
13 force needed.

14 Threats made by the deceased may also be considered
15 in determining whether the defendant actually was, or
16 believed he was, in imminent danger.

17 Intoxication of the deceased may also be considered
18 in deciding whether the defendant's fear of death or
19 bodily harm was reasonable.

20 The final element of self-defense is that the
21 defendant had no other probable way to avoid the danger of
22 death or serious bodily injury than to act as the
23 defendant did in this particular instance.

24 If the defendant was on his own premises, the
25 defendant had no duty to retreat before acting in

Jury charge

712

1 self-defense. The defendant has no duty to retreat if by
2 doing so the danger of being killed or suffering serious
3 bodily injury would increase.

4 Now, ladies and gentlemen, this is an important part
5 of my charge. I instruct you and emphasize the fact that
6 the defendant did not testify in this case is not a factor
7 to be considered by you in any way in your deliberation
8 and your consideration of the question of guilt or
9 innocence of the defendant. It must not be considered by
10 you in any manner whatsoever.

11 A defendant has the constitutional right to remain
12 silent, and the assertion of this right must not be
13 considered by you in your deliberations. I repeat: Under
14 your oath, you are to draw no conclusion whatsoever from
15 the fact the defendant in this case did not testify.

16 The fact that this defendant did not testify should
17 not even be discussed in the jury room. The burden of
18 proof, as I have stated to you is on the State.

19 The defendant is not required to prove his innocence.
20 The burden of proof remains on the State to prove guilt
21 beyond a reasonable doubt.

22 Now, ladies and gentlemen, and Mr. Foreman, I'm going
23 to send to you -- I'm going to send to the jury room with
24 you a verdict form. The form contains two -- as I
25 indicated earlier, two verdicts that you may find. I'll

Jury charge

713

1 read it to you: "We, the jury, by unanimous consent on
2 the charge of murder find the defendant, Thaddess Starks,
3 not guilty or guilty, or "we, the jury, by unanimous
4 consent on the lesser-included charge of voluntary
5 manslaughter find the defendant, Thaddess Starks, not
6 guilty or guilty."

7 When you have completed your deliberations,
8 Mr. Foreman, knock on the jury room door and -- I'm sorry.
9 Fill out the form, sign it, date it, knock on the jury
10 room door, and we will receive your verdict.

11 Now, ladies and gentlemen, your verdict must be
12 unanimous. That means all jurors must agree.

13 All right. I'm going to ask you to retire to the
14 jury room now. Do not begin your deliberations until you
15 receive all of the evidence and the verdict form.

16 Mr. Foreperson, if you'll just caution the jury not
17 to begin deliberations. Just relax for a minute while I
18 send to you all of the evidence and the verdict form.

19 You may retire to the jury room and begin your
20 deliberations when you receive all of those documents.
21 Thank you.

22 (WHEREUPON, the jury left open court at approximately
23 3:49 p.m.)

24 THE COURT: Any exceptions to the charge from the
25 State?

Jury charge

714

1 MS. SHIPLEY: No, sir, Your Honor.

2 THE COURT: From the defense?

3 MR. McMULLEN: Just very briefly, for the record.

4 THE COURT: Yes, sir.

5 MR. McMULLEN: I would respectfully renew the
6 requests I had before, and secondly, sir, Ms. Shipley
7 showed the jury the statute that I was hoping to have
8 charged, read part of it.

9 I sure don't claim any prejudice from that, but then
10 section B talks about the presumption doesn't apply in
11 "A", if it's a household member. It doesn't use that
12 exact word but that's okay, too.

13 The thing I take exception to, Your Honor,
14 respectfully is section "D" of that statute. It stands on
15 its own. It doesn't negate or require any help from any
16 other subsection.

17 It states, "A person who unlawfully by force enters
18 or attempts to enter a person's dwelling, residence, or
19 occupied vehicle is presumed to be doing so with the
20 intent to commit an unlawful act involving force or a
21 violent crime as defined in 16-160."

22 I would, sir, just simply ask that Your Honor charge
23 that.

24 THE COURT: She didn't read that, did she?

25 MS. SHIPLEY: I didn't and my board didn't have it

Jury charge

715

1 either, Judge. I'll pulling it to show you.

2 MR. McMULLEN: No, sir. I'm not saying she did. I'm
3 just saying she talked about "A" and "B", which is fine,
4 but section "D" of that statute --

5 THE COURT: Well, I said I was not going to charge
6 the statute.

7 MR. McMULLEN: Yes, sir, but -- all right. I'm just
8 putting it on the record, Your Honor.

9 THE COURT: All right.

10 MR. McMULLEN: I'm respectfully requesting that.
11 That's all.

12 THE COURT: All right.

13 MS. SHIPLEY: And I'd like the record to reflect it
14 did not contain subsection "D". It only showed (A)(1),
15 (2) and then (B)(1).

16 THE COURT: All right. Let me -- I respectfully deny
17 your request, Mr. McMullen.

18 Now, let me ask you, just sitting up over pondering
19 over the verdict form, if that should be an "or", or
20 should I just delete that?

21 (There was no response).

22 Look at the jury form.

23 MS. SHIPLEY: Yeah, I think it's fine, Your Honor.

24 THE COURT: Well...

25 MR. McMULLEN: I see what you're saying.

Jury charge

716

1 THE COURT: If -- what if the jury finds on the
2 charge of murder the defendant not guilty? In other
3 words, it appears that that's the end of it.

4 MS. SHIPLEY: Yes, sir. Maybe we should add another
5 "or" and then --

6 THE COURT: Why not just --

7 MS. SHIPLEY: Why don't we just do like --

8 THE COURT: Why don't we just delete the "or"?

9 MR. McMULLEN: Or -- or --

10 MS. SHIPLEY: Okay.

11 MS. GARFIELD: Why don't we have three options:
12 Guilty of murder or guilty of manslaughter or --

13 MS. SHIPLEY: Not guilty by reason of self-defense?

14 THE COURT: No, that's not it either because --

15 MR. McMULLEN: How about put two --

16 THE COURT: He can be not -- he can be not guilty of
17 murder and have nothing to do with self-defense.

18 MS. SHIPLEY: Okay. I see what you're saying. Why
19 not just --

20 MR. McMULLEN: Why don't we just --

21 MS. SHIPLEY: Why not just -- just not guilty alone?

22 MR. McMULLEN: How about if we ask them to put one
23 check above the big "or" and one check below the big "or".
24 Either blank they've -- it's --

25 THE COURT: I've lost you.

Jury charge

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1 MR. McMULLEN: Okay. That won't work. They need to
2 put two check marks on this form.

3 THE COURT: That's what I say, delete the "or".
4 Think about it.

5 MR. McMULLEN: Does that make sense?

6 THE DEFENDANT: Yeah.

7 MS. GARFIELD: What I'm concerned about, Your Honor,
8 is that they find a guilty verdict on both. I mean,
9 that's happened before.

10 THE COURT: Then I'd send them back.

11 MS. SHIPLEY: That's happened.

12 MS. GARFIELD: I think -- I remember this with Judge
13 Johnson one time. He had a case, and we had the same
14 dilemma, that if a jury does come back finding him guilty
15 on both, you have to accept the lesser-included.

16 THE COURT: Well, that's the King charge but
17 nevertheless, let's -- let's try to get it right.

18 (Pause).

19 I can do guilty, guilty, not guilty. In other words,
20 I think that's what Ms. Justice -- I mean Ms. Garfield --

21 MS. GARFIELD: It is.

22 MS. SHIPLEY: -- is suggesting.

23 MR. McMULLEN: Of course, I did tell them.

24 THE COURT: Well, I know, but that's....

25 All right. Let's redo it.

Jury charge

718

1 (Pause).

2 MR. McMULLEN: That's the only problem I have is that
3 I told her in my closing that I was going to --

4 THE COURT: Well, I know. I mean, it's just -- I'm
5 thinking now it's confusing, so...

6 Check -- let's get the evidence.

7 MS. SHIPLEY: Yeah, I'll start getting them in order,
8 your Honor.

9 (Pause).

10 We have no objection to the judge saying they changed
11 the format.

12 THE COURT: I'm worried about the form itself. Any
13 objection to the form itself?

14 MR. McMULLEN: No.

15 MS. GARFIELD: No.

16 MR. McMULLEN: Thank you. We've agreed on this.
17 This is ready to go..

18 (WHEREUPON, the jury began their deliberations at
19 3:57 p.m.)

20 (Whereupon, the jury sent out a note).

21 (Whereupon, there was a bench conference.)

22 MS. SHIPLEY: That's perfect, Judge.

23 (WHEREUPON, Court's Exhibit No. 2 was marked for
24 identification only.)

25 THE COURT: And you can bring the alternates?

1 (Whereupon, the alternate jurors came into the
2 courtroom at 4:07 p.m.)

3 THE COURT: I've got to look at the numbers.
4 Ms. 293, and Mr. 275, obviously, you were selected as
5 alternates on this jury.

6 Sometimes in the course of a week's trial, a lengthy
7 trial, things happen and we need alternates. I hope you
8 understand that.

9 I probably need to thank you more than I thank the
10 members of the regular jury because you sat through the
11 entire trial and yet you can't sort of finish things off
12 the way you may have wanted to, and that is in terms of
13 voting with your fellow jurors.

14 I do want to take this opportunity to thank you for
15 your service this week. This week will constitute,
16 obviously, all of your obligation for jury service this
17 year. You also have an additional two years of exemption
18 from jury service, if you wish to exercise that.

19 I always tell jurors this system can work well
20 without me. This system can work well without these
21 lawyers, but it cannot work without you. It does not
22 function -- the system of justice we have in this country
23 does not function without jurors that are willing to come
24 and sit and hear and decide these disputes.

25 These are -- you can tell just from the trial we

1 conducted this week, this is a difficult situation. I
2 mean, it's a difficult case.

3 I have no idea what the jurors are thinking back
4 there, but these things need to be decided because they
5 are serious matters in our community, and they need to be
6 decided, and they need to be decided by people like you
7 who, as I say, are willing to come, sit, listen, and make
8 a decision.

9 So I want to thank you for your service. Ms. Falcone
10 is going to -- if you need anything from her, she is going
11 to collect your badges and any work certificates you may
12 need. She will give that to you.

13 The check is in the mail for your service. Don't
14 plan on making your car payment or a house payment with
15 it. That won't work, but it might buy you a nice meal or
16 something like that. Thank you again for your service.
17 You're now excused, and good luck to both of you.

18 Let me say this to both of you: If you wish to stay,
19 you're certainly welcome to. You can sit out in the
20 audience. It's a public courtroom. Anybody can sit, and
21 you can wait for the decision, if you wish to do so. You
22 don't have to.

23 If anyone wants to talk to you after the -- after I
24 release you, you don't have to talk to them. You can talk
25 to them if you wish to, but if anybody gives you any

1 problem or wants to talk to you and you just decide not to
2 talk to them, you let me know, and I'll deal with that.
3 Good luck to both of you, and thank you very much again.

4 ALTERNATE JUROR: Thank you.

5 ALTERNATE JUROR: Thank you.

6 THE COURT: We'll stand at ease.

7 (Whereupon, there was a recess.)

8 (The jury sent out a note at 5:45 p.m.)

9 THE COURT: All right, counsel.

10 MS. SHIPLEY: "We can only play back the audio tape
11 for you. You will have to specify what you would like to
12 hear, I.E., witness's testimony." Perfect.

13 (WHEREUPON, Court's Exhibit No. 3 was marked for
14 identification only.)

15 THE COURT: Lawyers.

16 MS. SHIPLEY: For us?

17 THE COURT: Do these things come down?

18 MR. McMULLEN: Should they come down now?

19 MS. SHIPLEY: I'll take them down.

20 THE COURT: Yes. I'm going to bring them in.

21 (Whereupon, there was a bench conference.)

22 THE COURT: Any objection to giving them the murder
23 charge and letting them take notes?

24 MS. SHIPLEY: No objection, Your Honor.

25 MR. McMULLEN: Would you give them the whole,

1 everything?

2 THE COURT: Just what they asked for.

3 MR. McMULLEN: Yes, sir.

4 (WHEREUPON, the jury came into open court at
5 approximately 5:57 p.m.)

6 THE BAILIFF: The jury is all present, Your Honor.

7 THE COURT: All right. Thank you.

8 Ladies and gentlemen of the jury, I have your note
9 about -- we're getting to be pen pals. I have your note
10 about the testimony.

11 The court reporter has cued up the tape for the --
12 Tim Cornish testimony, and we're prepared to play it for
13 you.

14 What happens in some of these -- sometimes when
15 jurors want to hear testimony replayed, there are only
16 certain amounts -- I mean, certain parts of it that once
17 you hear what you want to hear, if you want to continue
18 through the testimony, that's fine, but if you hear what
19 you are questioning or can't remember and you're satisfied
20 from what he says, I mean what you hear, if you'll just
21 raise your hand and the foreman, Mr. Foreman, if you'll
22 just tell us if that's enough or if you want to hear the
23 entire direct and cross-examination.

24 I will tell you right now that the court reporter
25 tells me that she has estimated it will take approximately

1 45 minutes.

2 Now, before we go any further, I'm going to offer you
3 dinner on Richland County. We're prepared to -- I'll tell
4 you, it's the best we can do, is to get you a meal for
5 supper from Lizards Thicket.

6 Now, if you have got cholesterol problems, you may
7 want to think this thing over, but now seriously, and
8 Ms. Falcone, have you got menus?

9 THE CLERK: Yes, sir.

10 THE COURT: If -- in other words, if you're going to
11 play you 45 minutes of tape, it will take 45 minutes to
12 get a meal here, we can go ahead and do that so that when
13 you go back to continue deliberations, you'll have a meal.
14 Is that satisfactory?

15 (There was no response).

16 Yes, sir?

17 THE FOREMAN: Your Honor, who requested the -- the
18 Tim Cornish testimony.

19 THE COURT: Yes.

20 THE FOREMAN: So let us know what you have heard --

21 JUROR: Could she que it to the part where Mr.
22 Cleveland is already coming to the steps?

23 THE COURT: Okay.

24 THE COURT REPORTER: That's fine. Let me just get it
25 ready.

1 THE COURT: All right. The next question before we
2 start that, I'm going to answer all questions. The
3 question was what is murder, malice.

4 Rather than read that back to you, I'll just give it
5 to you the way I read it to you. Would that be
6 satisfactory?

7 THE FOREMAN: That would be great.

8 THE COURT: Okay. Are we ready to play the tape?
9 Everybody signed up for lunch -- dinner?

10 Let's go.

11 (Testimony of Tim Cornish was replayed for the jury.)

12 THE COURT: Cross-examination, too?

13 THE FOREMAN: That's enough.

14 THE COURT: All right, turn it off.

15 Ladies and gentlemen, this is the -- Mr. Hollis, if
16 you'll hand this to the jury foreman. Lunch is -- dinner
17 is on the way.

18 THE FOREMAN: Thank you.

19 (WHEREUPON, the jury left open court at approximately
20 6:22 p.m.)

21 THE COURT: We'll stand at ease.

22 (WHEREUPON, a short break was taken.)

23 THE COURT: Note from the jury.

24 (Whereupon, there was a bench conference.)

25 (WHEREUPON, Court's Exhibit No. 4 was marked for

1 identification only.)

2

3 THE COURT: I wanted to inquire of the jury what the
4 status of deliberations are and what are your respective
5 thoughts about letting the jury go home?

6 MS. SHIPLEY: I think that's a good idea tonight.
7 It's been a long day.

8 MR. McMULLEN: We get to go home, too?

9 THE COURT: Well...

10 MR. McMULLEN: Yes, sir, if that's what Your Honor
11 would like to do.

12 THE COURT: Well, you know, some people feel that we
13 should keep them together. I mean, I'd do it without
14 hesitation in a civil case. I'm a little more reluctant
15 to do it in a criminal case, particularly a murder case,
16 but with the consent of both parties, I don't have a
17 problem with that.

18 MS. SHIPLEY: Let me confer.

19 (Pause).

20 We're fine with that, Your Honor.

21 THE COURT: I mean, I'll tell them to stay away
22 from -- I mean, don't discuss the case. I mean, don't go
23 home and talk to your wife about it, but I think we need
24 to find out where they are at this present time.

25 THE DEFENDANT: Yes, I think that would be good.

1 THE COURT: And if it's satisfactory with the
2 parties, I'll ask them if they'd like to continue to
3 deliberate or whether they'd prefer to come back in the
4 morning.

5 MS. SHIPLEY: I agree.

6 MR. McMULLEN: Leaving it up to them, you said?

7 THE COURT: You're both in agreement on the record?

8 MR. McMULLEN: Yes, sir.

9 THE COURT: All right. Mr. Hollis, bring just the
10 foreman.

11 THE BAILIFF: All right, sir.

12 THE COURT: And I'll let him inquire.

13 (Whereupon, the foreman of the jury returned to the
14 courtroom at 10:06 p.m.)

15 THE COURT: You can have a seat.

16 Mr. Foreman, let me ask you just a couple of
17 questions. I don't want -- I don't want you to tell me
18 what the -- if there's a count, I don't want to know that.
19 All I need to know is are you making progress, first, and
20 secondly, if -- and I'm going to let you go back to the
21 jury room and talk to your fellow jurors, if they feel
22 that by going home and coming back in the morning they may
23 feel fresh and would be willing to continue their
24 deliberations at that point, or whether you're getting the
25 feeling that no matter what you do you may not reach a

1 decision.

2 So can you tell me, and we're on the record now, if
3 you think that the jury is making some progress in terms
4 of their discussions and deliberations?

5 THE FOREMAN: I do think we -- we are making progress
6 in our deliberations.

7 THE COURT: All right.

8 THE FOREMAN: I think we assumed that we couldn't go
9 home tonight until we had reached a verdict, and I'm not
10 sure we're going to reach a verdict --

11 THE COURT: That's true. Generally, that is true.
12 We would much rather reach the verdict this evening. If
13 everybody is there and they're willing to continue to
14 work, it's ten o'clock.

15 THE FOREMAN: And I think just the fact that it's
16 ten o'clock is -- we're working well together.

17 THE COURT: That's very encouraging.

18 THE FOREMAN: But -- but we're -- I think people are
19 kind of tired, but they're -- they're very open and
20 respective of all the discussions that's taking place, and
21 we are making progress.

22 If there is the possibility I could ask of them
23 ending tonight and coming back tomorrow?

24 THE COURT: Yes, sir.

25 THE FOREMAN: I'd like to.

1 THE COURT: We've got all day tomorrow to do it.

2 THE FOREMAN: I'd like to do that.

3 THE COURT: Or if they think within the hour they
4 could -- would like to stay here and it be over, perhaps,
5 I mean, if they could reach a decision.

6 Just, if you will, get a feel from them, and I'll
7 wait here. We'll wait here, to hear your --

8 THE FOREMAN: Okay.

9 THE COURT: What you -- what you learned from the
10 jury and how they would prefer to proceed.

11 THE FOREMAN: Very good.

12 THE COURT: All right. Thank you very much.

13 (Whereupon, the foreman left the courtroom at
14 10:09 p.m. and returned momentarily.)

15 THE COURT: All right, sir.

16 THE FOREMAN: We would really love to go home tonight
17 and come back in the morning.

18 THE COURT: All right.

19 THE FOREMAN: We feel like we can make a --

20 THE COURT: All right. Why don't we bring the entire
21 jury in just so I can caution them again about --

22 THE FOREMAN: All right.

23 THE COURT: -- not discussing the case with anyone
24 else. You can stay. Just have seat.

25 Bring the rest of the jury.

1 (WHEREUPON, the remainder of the jury came into open
2 court at approximately 10:11 p.m.)

3 THE COURT: Was everyone happy with 9:30?

4 THE FOREMAN: It seems like nine o'clock would be
5 fine with us. We're all usually here about 8:45.

6 THE COURT: All right.

7 THE BAILIFF: The jury is all present, Your Honor.

8 THE COURT: All right. Thank you very much, ladies
9 and gentlemen.

10 Your foreman has advised me that -- and we talked
11 about this, among the attorneys and myself, advised the
12 Court that you are continuing to deliberate, maybe making
13 some progress working through these issues, but everybody
14 is getting a little tired.

15 It might be best if we adjourn for the evening and
16 reassemble tomorrow morning at -- would nine o'clock suit
17 everybody or is that too early?

18 THE JUROR: I'd rather have 9:30 again.

19 THE COURT: 9:30, okay.

20 THE JUROR: If that's okay.

21 THE COURT: Let's put it this way: You have got all
22 day.

23 THE FOREMAN: That's what I was thinking.

24 THE COURT: You might as well come in at what you
25 consider an appropriate hour.

1 I will caution you, since you have begun to
2 deliberate, again not to discuss this case among -- with
3 anyone else over the evening hours is what I mean to say.

4 This is a -- this is obviously a difficult decision
5 for you, and it would be improper if you sort of went
6 outside the confines of the jury to discuss it with
7 someone else and ask what you should do, that sort of
8 thing.

9 I know that would be a natural tendency with your
10 spouse at home or something like that to say "Gee, we're
11 having a hard time. What do you think about this? What
12 do you think about that?" That would be improper because
13 someone else could influence you one way or the other.

14 You really need to decide among yourselves, just the
15 12 of you, what the issues are in this case. So I'm going
16 to ask you again not to -- and this time I probably mean
17 it with more fervor than I have earlier not to discuss the
18 case with anyone over the evening hours, not to -- you
19 know, sometimes -- this is not accusatory, jurors think
20 maybe I'll do a little research. I'll look it up on the
21 internet or do something like that.

22 You need to be able to deliberate with the evidence
23 in the jury room. I'm just trying to protect the sanctity
24 of the jury and the confidentiality of the jury and
25 obviously, the level of trust that you have with each

1 other at this point.

2 So again, don't -- please don't either try to look
3 things up or investigate it yourself or discuss it with
4 anyone else over the evening hours. If you'll do that, I
5 think the jury will stay intact and we won't have any
6 problems, so -- in the long run, because these things
7 sometimes take a life of their own even after the juries
8 decide cases. So I guess we all need to keep that in
9 mind.

10 All right. Thank you very much for your work today.
11 We'll see you at 9:30 in the morning, and maybe, maybe
12 we'll have a surprise for you when you get here.

13 Have a pleasant evening.

14 THE JUROR: Thank you.

15 THE JUROR: Thank you.

16 (WHEREUPON, the jury left open court at approximately
17 10:15 p.m.)

18 (There was an overnight recess.)

19 (The jury resumed deliberations the following day.)

20 (WHEREUPON, Court's Exhibits Nos. 5 - 10 were marked
21 for identification only.)

22 THE COURT: All right, counsel. I'm informed the
23 jury has reached a verdict. Are you ready to receive the
24 verdict?

25 MS. SHIPLEY: Yes, sir.

1 THE COURT: Bring the jury, please.

2 (WHEREUPON, the jury returned to open court with the
3 verdict at 1:51 p.m.)

4 THE BAILIFF: The jury is present, Your Honor.

5 THE COURT: Mr. Foreman, has the jury reached a
6 verdict?

7 THE FOREMAN: We have, Your Honor.

8 THE COURT: All right. Would you hand it to the
9 bailiff, please?

10 (Complies).

11 VERDICT:

12 THE COURT: All right. Madam clerk, if you would
13 publish the verdict, please.

14 THE CLERK: Yes, sir.

15 Indictment number 2007-GS-40-9503, the State of South
16 Carolina vs. Thaddess Starks. We, the jury, by unanimous
17 consent on the lesser-included charge of voluntary
18 manslaughter find the defendant, Thaddess Starks, guilty
19 signed number 19, foreperson, October 12th, 2007.

20 Mr. Foreman, was this your verdict and the verdict of
21 the entire jury?

22 THE FOREMAN: Yes.

23 THE CLERK: Thank you.

24 THE COURT: Any desire to poll the jury?

25 MR. McMULLEN: Yes, sir. Yes.

1 THE COURT: Be seated.

2 THE CLERK: Ladies and gentlemen of the jury panel,
3 I'll ask you two questions related to your verdict.
4 Please answer "yes" or "no" related to both questions as I
5 call your number.

6 Number 19, was this your verdict?

7 JUROR: Yes.

8 THE CLERK: Is it still your verdict?

9 JUROR: Yes.

10 THE CLERK: Number 5, was this your verdict?

11 JUROR: Yes.

12 THE CLERK: Is it still your verdict?

13 JUROR: Yes.

14 THE CLERK: Number 117, was this your verdict?

15 JUROR: Yes.

16 THE CLERK: Is it still your verdict?

17 JUROR: Yes.

18 THE CLERK: Number 251, was this your verdict?

19 (Pause).

20 JUROR: Yes.

21 THE CLERK: Is it still your verdict?

22 JUROR: Yeah.

23 THE CLERK: Number 296, was this your verdict?

24 JUROR: Yes.

25 THE CLERK: Is it still your verdict?

1 JUROR: Yes.

2 THE CLERK: Number 200, was this your verdict?

3 JUROR: Yes.

4 THE CLERK: Is it still your verdict?

5 JUROR: Yes.

6 THE CLERK: Number 255, was this your verdict?

7 JUROR: Yes.

8 THE CLERK: Is it still your verdict?

9 JUROR: Yes.

10 THE CLERK: Number 126, was this your verdict?

11 JUROR: Yes.

12 THE CLERK: Is it still your verdict?

13 JUROR: Yes.

14 THE CLERK: Number 278, was this your verdict?

15 JUROR: Yes.

16 THE CLERK: Is it still your verdict?

17 JUROR: Yes.

18 THE CLERK: Number 298, was this your verdict?

19 JUROR: Yes.

20 THE CLERK: Is it still your verdict?

21 JUROR: Yes.

22 THE CLERK: Number 158, was this your verdict?

23 JUROR: Yes.

24 THE CLERK: Is it still your verdict?

25 JUROR: Yes.

1 THE CLERK: Number 116, was this your verdict?

2 JUROR: Yes.

3 THE CLERK: Is it still your verdict?

4 JUROR: Yes.

5 THE CLERK: The jury has been polled, Your Honor.

6 THE COURT: All right. All right. Ladies and
7 gentlemen, that will complete your service on this --
8 obviously on this case and this week.

9 I'm going to dismiss you now, but I'm going to do --
10 I'm going to say a couple of things to you. First of all,
11 sentencing will take place probably in about 15 minutes
12 here in Richland County.

13 Probably throughout South Carolina we have -- it's
14 not quite like law and order. We have a heavy caseload, a
15 heavy caseload beginning Monday, probably more trials and
16 we just -- we -- it's imperative based on our time
17 schedule that we go ahead and do sentencing immediately
18 after a jury verdict.

19 I'm going to let you -- I want to invite you, if you
20 wish to do so, after I dismiss you to come and sit in the
21 audience, in the gallery, if you'd like to do so and
22 witness the sentencing procedure.

23 I think frequently jurors -- a lot of times jurors
24 want to see that as part of -- sort of a closure process
25 for the entire trial proceeding.

1 You are certainly welcome to come and sit. We're
2 going to take about ten or 15 minutes, because a good bit
3 of paperwork needs to be done before that takes place.

4 Please be seated.

5 (Mr. McMullen nods in the affirmative).

6 THE COURT: Before we even start that process,
7 though, I want to -- some of you may choose to leave and
8 go about your business.

9 I want to take this opportunity to thank you for your
10 service this week. I know it's been a long week. I know
11 it's probably been difficult for you, because I know you
12 deliberated long and hard.

13 I know from the questions you asked and the fact that
14 you came back in and wanted to hear testimony again, the
15 fact that you looked at the charges again, all of those
16 things indicate to me that you were very, very contentious
17 about your deliberations and your decision in this case.

18 So I want to congratulate you, and it really -- it
19 sounds funny to say I congratulate you, but I want to
20 commend you, I guess is a better word, for being
21 contentious and responsible citizens in making this
22 difficult decision.

23 So on behalf of myself and on behalf of the judiciary
24 system, on behalf of these attorneys, the entire body of
25 politic of Richland County, I want to thank you for being

1 willing to come sit and serve this week and resolve this
2 difficult issue. It had to be resolved. If you hadn't
3 done it, somebody else, some other juror or jury would
4 have to come and sit and hear the same evidence and hear
5 the same lawyers and the same argument and would have had
6 to make the decision that I often say that I can't imagine
7 that any other jury that was impaneled in Richland County
8 would have been any more bright, conscientious, and
9 intelligent than the group that has assembled here.

10 So I do want to thank you on behalf of everybody
11 involved in the system for your work this week. It's an
12 invaluable service.

13 I tell jurors all the time this system can do without
14 me. It can do without these lawyers. It cannot do without
15 you. You're such an important part of the judicial
16 system, this county, this state, this country. You are to
17 be commended for your service, so I do thank you.

18 Now, the clerk is going to go with you and collect
19 your badges and determine if anybody needs any work
20 excuses, things of that nature.

21 As I say, in about 15 minutes we are going to
22 reconvene after the paperwork is done, at which time
23 sentencing will take place. You're now excused. Good
24 luck to all of you. Thank you again.

25

1 (WHEREUPON, the jury left open court at approximately
2 1:58 p.m.)

3 THE COURT: Any motions?

4 MR. McMULLEN: May it please the Court. I certainly
5 meant no disrespect when standing while you were
6 addressing the jury. I was merely trying to get your
7 attention because I did not hear an audible response to
8 the question posed to juror 251 whether this was still her
9 verdict, and I was hoping to get some clarification about
10 that on the record.

11 THE COURT: I heard it. I think I heard it.

12 MR. McMULLEN: I just heard yes to the first question
13 posed, not to the second one.

14 THE COURT REPORTER: If I didn't think someone
15 responded, I would have said something.

16 MR. McMULLEN: All right. That's all I guess I need
17 to put on the record.

18 THE COURT: Okay.

19 MR. McMULLEN: I move for a new trial or for Your
20 Honor to set aside the verdict. Obviously, they
21 deliberated, not counting the time they were away, it was
22 close to 22 hours ago when they got the case, except for
23 the overnight break.

24 They deliberated for all of that time. I know they
25 were contentious, but I just say there must have been some

1 reasonable doubt along the way for them to have taken so
2 long.

3 I would also, while I'm on that, renew all of my
4 objections. I would ask Your Honor that you include my
5 proposed charges in the record so that if there is some
6 review, that be part of the record. That's all I have.

7 THE COURT: All right. I'll be glad to include those
8 as a part of the record.

9 MR. McMULLEN: Thank you.

10 THE COURT: Any objection?

11 MS. SHIPLEY: No. No objection to having his
12 proposed charges --

13 THE COURT: Proposed charges made a part of the
14 record.

15 MS. SHIPLEY: No, sir, no objection.

16 THE COURT: All right. All right. I feel the
17 jury -- I think I expressed it. I think they took their
18 time. They reviewed all of the evidence. They reviewed
19 all of the charges. They even listened to some testimony
20 again. I think, probably in my experience, they are one
21 of the most conscientious juries I've had to deal with, so
22 I respectfully deny your motion.

23 All right. Sentencing will commence in about 15
24 minutes. There's some paperwork that needs to be done.
25 We need to dismiss the jury. We'll just stand at ease for

1 about 15 minutes.

2 MR. McMULLEN: Thank you, Your Honor.

3 (WHEREUPON, a short break was taken.).

4 THE COURT: All right, Solicitor, Mr. McMullen.

5 SENTENCING:

6 MS. SHIPLEY: May it please the Court, Your Honor. I
7 just wanted you to -- to introduce you to some family
8 members of Al Cleveland's.

9 Standing with me is one of his sisters, Connie
10 Cleveland. He came from a very large family. He was one
11 of 12 siblings.

12 Standing up -- seated up there in the gallery are
13 Willie Mae Porterfield, Gertrude Flowers, Julia Mae
14 Cleveland, and Bridgett Cleveland. They were all related
15 to Al Cleveland, Your Honor.

16 Yesterday Marty Sylvester and David Cleveland, Al's
17 brothers, were present for part of the day. They had to
18 be at work today, Your Honor.

19 I just wanted the court to understand the defendant's
20 prior criminal history to take into consideration in
21 sentencing. In 1990, he was convicted of grand larceny.
22 He received ten years suspended to five years probation.
23 In 1991, he was convicted of three counts of resisting
24 arrest, and apparently in 1991, he was also convicted of a
25 possession of a stolen vehicle. In 1992, driving under

1 suspension. In 1993, grand larceny of a motor vehicle;
2 assault with intent to kill was dismissed. That is when
3 he tried to run over Deputy Dwight King, and Deputy King
4 shot at him and hit him in the face. In 1994, he was
5 revoked, his parole was revoked. In 1999 -- actually, he
6 was arrested for trafficking in crack cocaine, but he
7 ended up pleading guilty in 2002 to that offense and
8 received a three-year sentence.

9 THE COURT: Three year active sentence?

10 MS. SHIPLEY: Three year active sentence, yes, sir.

11 THE COURT: In 2002, he went to the Department of
12 Corrections for three years?

13 MS. SHIPLEY: That's what my rap sheet shows, yes,
14 sir.

15 THE COURT: On what? Possession.

16 MS. SHIPLEY: Trafficking crack.

17 THE COURT: Trafficking crack?

18 MS. SHIPLEY: Yes, sir.

19 THE COURT: All right.

20 MS. SHIPLEY: And also, Your Honor, he did about
21 nine-and-a-half months in jail in pretrial detention for
22 that offense, and apparently, he received credit for that
23 jail sentence towards his prison sentence.

24 THE COURT: Okay.

25 MS. SHIPLEY: And then in federal court he was

1 convicted of a crime of -- withholding information on a
2 crime of conspiracy to possess and utter forged
3 securities. In exchange for that guilty plea, about 18
4 other counts of uttering forged counterfeit security and
5 possession of counterfeit instruments were dismissed by
6 the federal government.

7 Your Honor, I've spoken to the family of
8 Mr. Cleveland, and Ms. Connie Cleveland would like to
9 address the Court on behalf of the family as the
10 spokesperson for the family.

11 THE COURT: All right. Ms. Cleveland, I'll be glad
12 to hear from you, ma'am.

13 VICTIM'S SISTER: Yes. Your Honor, Al was my
14 mother's ninth child. She had eight boys and four girls.
15 He was the ninth child. We loved Al much because he just
16 did so much for everybody.

17 Al was a lovable person, and we just miss him so
18 much. Today is a year, and it seems just like
19 yesterday -- you know, we miss him so much. My grandkids,
20 they love him so much. One of my grands didn't know how
21 to talk for a long time. Al always spoke like he lived in
22 New York City, but he was from Columbia.

23 My grandchild is seven years old today, and he
24 learned how to talk through Al. We love Al much. He
25 didn't deserve to die this way, but today justice has been

1 served.

2 We miss him so much, and we just thank the Lord for
3 the time that he had to spend with him, and we love him so
4 much. Thank you.

5 MS. SHIPLEY: Thank you very much, Your Honor.

6 THE COURT: How has this affected your family, ma'am?
7 I mean, your family was close?

8 VICTIM'S SISTER: Very close. Like my brother, Van
9 and Al, they did a lot of gardening together. Van hadn't
10 been to the trial one day. He loved Al so much to -- he's
11 just trying to -- you know, just trying to find closure
12 and just stay away.

13 Al was a jack of all trades. My mother taught her
14 boys how to wash clothes, how to cook. Al was a butcher.
15 He could -- we raised hogs. He just was a family that --
16 we just did everything together, and I used to tell my
17 family all the time I wish when I grew up I could get a
18 husband like my brother because they are men among men.

19 Al was one of those guys, when we was growing up --
20 I'm the 11th child. When we was growing up, Al would feed
21 the whole community during the days that we was out of
22 school, and my mother worked as a nursing assistant at the
23 hospital.

24 He would wash her uniforms. He would cook for the
25 whole community, feed them, and then he would clean up

1 there. Then he would prepare dinner for her.

2 He was so lovable, and he would never do nothing to
3 harm or hurt you. He just was lovable, and we have --
4 it's been hard. We miss him. You know, he -- you know,
5 if you had to say, he was -- you left -- your left, your
6 right -- he just -- he just was there for us.

7 THE COURT: All right. Thank you, ma'am.

8 MS. SHIPLEY: Your Honor, and I did fail to mention
9 that he was currently on federal probation for that
10 offense when this crime occurred, and I would like the
11 Court to take that into consideration.

12 THE COURT: All right.

13 MS. SHIPLEY: Thank you.

14 THE COURT: Mr. McMullen.

15 MR. McMULLEN: May it please the Court.

16 THE COURT: Yes, sir.

17 MR. McMULLEN: Your Honor, this has been a long week
18 for all of us, I know. I know the last 24 hours or so
19 have been especially long, and I know that the jury paid
20 attention, as I said in my closing statement, and that
21 they deliberated for a long time and carefully considered
22 all of the evidence.

23 I know that we all really appreciate the time that
24 they did devote to this and the attention they gave. I
25 certainly won't argue with their verdict.

1 I would have been really pleased had they decided
2 differently, but I trust this jury system and our system
3 and will not equivocate with that at all.

4 This was a tragedy, and no one feels the pain more
5 than his stepson and his widow.

6 I would point out and note for the Court for those
7 present that, according to the state constitution and the
8 victim's bill of rights, it is anyone's -- of the spouse
9 who lives, in this case the widow, who stands in the shoes
10 of the victim.

11 I know that the Court considers the entire family and
12 what they have to say, and I just hope that when his widow
13 speaks that perhaps as the victim, her voice is heard
14 loudest.

15 Mr. Starks, against my advice, chose to not testify.
16 I know that one of the reasons he made that decision is
17 because my adversaries are so good at their job. I think
18 he was sincerely afraid of the cross-examination he would
19 have to undergo.

20 Another factor, though, is he knew that if he took
21 the stand, I was going to ask him to testify about the
22 prior difficulties between the parties. He told me his
23 family had been through enough, and he wasn't going to let
24 me ask him those kinds of questions.

25 As I think we made quite clear, I tried -- we tried

1 very hard not to disrespect the man or his memory, but I
2 -- we did have a job to do and I feel that Mr. Cleveland
3 was an entirely different person when he became
4 intoxicated.

5 I know that's the case with many people, but what he
6 kept me from telling the Court or what he kept me from
7 having him testify was that he watched Al sometimes be
8 domestically -- be abusive to his wife, to his mother.

9 Mr. Cleveland had two convictions for the domestic
10 violence, and there were more incidents than were
11 reported.

12 I say that not to tarnish his memory on the
13 anniversary of his death, but to point out what was in
14 Thaddess' mind when he struck what turned out to be the
15 fatal blow.

16 I do think he intended to strike a blow, and there's
17 no question about that, and the jury certain had none. I
18 don't think he meant to kill him, but that is what
19 happened, and we all are left with the consequences of it.

20 Mr. Cleveland himself in 1972 was convicted of armed
21 robbery and received a youthful offender sentence. He was
22 born in 1952 or '53, according to the rap sheet,
23 June 23rd, one of those two years.

24 He was held in prison for that for five years. That
25 was his sentence. In 1977, he was charged with murder

1 because his car struck another person or another motorist,
2 and that person was killed. He pled guilty to or was
3 convicted of involuntary manslaughter and got a sentence
4 of five years for it.

5 In 1978, he was arrested for auto breaking and
6 convicted and received a seven-year sentence.

7 In 1981, he was convicted of a D.U.I., and in '82 a
8 D.U.I. second.

9 There was a simple assault, public drunk, resisting
10 arrest charges in the same incident in February of '82,
11 and resisting arrest and drunk again. I think I'm looking
12 at the sentencing twice.

13 D.U.I. fourth in 1984 for which he served 18 months
14 and was paroled. He was found an habitual traffic
15 offender, convictions in, I think, 1980. The sheet
16 doesn't show convictions, but his widow tells me that
17 there were convictions.

18 Both times in incidents where he had called the
19 police, they responded to their home and arrested him, and
20 then had other D.U.I.'s in 2002. That's why he didn't
21 drive, thank goodness, in the end, but his widow did take
22 him to work, and he did work hard. As I say, when he was
23 not intoxicated, apparently, he was a very good person.

24 Mr. Starks' record is no better, and as you have
25 heard, I did want to add that he tells me he was convicted

1 of that trafficking charge, had given us a three-year
2 sentence on 5/21/02 and was released, he thinks, in April
3 of '03.

4 So he did serve -- in addition to the pretrial
5 detention, he served that additional time. I found him to
6 be a very gentle person in my dealings with him, and when
7 our discussions have been strained, I never once thought,
8 "Oh my goodness, I better not anger him." I think I gave
9 him plenty of chances to get angry with me during the
10 course of our representation.

11 Your Honor heard the facts of the case, along with
12 all of us, and paid as much attention as anyone. I'm sure
13 Your Honor has a sentence in mind.

14 I hope that you'll be as lenient as you think the
15 facts allow. I know this family has not come any closer
16 together as a result of this, and I hope that the
17 anniversary of his death and the day that his stepson is
18 sentenced maybe marks a turning point for the family that
19 maybe they can get beyond this and heal.

20 I know that he wants to speak to the Court, and that
21 his mother does. I'll ask that they do that.

22 THE COURT: Yes, ma'am.

23 THE MOTHER: Judge.

24 MR. McMULLEN: Speak up, please, ma'am.

25 THE MOTHER: I never would have thought anything like

1 this would have ever happened to my family. First, my
2 husband's family never accepted me and my son.

3 I felt like they always was against my son because
4 he's not -- wasn't Al's. Me and Al, we tried to have kids
5 and we couldn't. We never was accepted in the family.

6 Me and my son, we are going to suffer for what
7 happened the rest of our lives. We both took counseling,
8 on medication, you know, for what happened. I know that
9 I'll never forget about it. I just ask you to have a
10 little mercy on my son.

11 THE DEFENDANT: Your Honor, I have a bad history. It
12 came from my upbringing dealing -- you know, not being
13 able to stay with my mom when I was 13 years old, getting
14 kicked out by Al when I was 13 years old, in the street
15 with my uncle when I was 13, 14 years old.

16 This has caused me to steal car, caused me to
17 stealing -- selling drugs because my mom loved Al more
18 than she loved me.

19 I got to speak from my heart. This is me.

20 THE MOTHER: Al is -- this is what I went through,
21 too.

22 THE DEFENDANT: Okay. I went though, you know, a lot
23 of things. I'm not -- I'm not saying that I'm not wrong.
24 I loved my stepfather, but he didn't love me.

25 I tried to do everything I could for him. I mean 16,

1 17 years old, I was looking good -- I mean 16, I was
2 looking good at Dreher High School playing football. He
3 took me off the team for punishment.

4 I mean, things I always wanted to do, he never came
5 to a football game. I never had a father. My real father
6 wasn't there for me. I grew up on my own.

7 I really don't know how to be a father to my son. I
8 mean, it's like I was protecting myself and this -- I
9 mean, it's like he's still making me suffer because I was
10 protecting myself.

11 I mean, I didn't mean to -- I mean, I didn't mean to
12 stab him where he'd bleed to death or he'd die. I mean, I
13 swear to God. I mean, if I could take my own life, I
14 would.

15 I mean, I've been to his grave more than his family
16 probably visited his grave. I mean, this man -- I mean, I
17 tried to love this man. That's all I ever wanted. I
18 wanted a father. I wanted somebody to there for me,
19 somebody to talk to me when I -- when me and my wife got
20 married, I got married, I went to him.

21 I said man, you know, how is married life? How is
22 this? You know, how is the married life, you know? He
23 talked to me like -- I mean like -- like my mom said, he's
24 a perfect gentlemen when he's not drinking, but he hates
25 everybody around him when he's not drinking -- I mean when

1 he's drinking.

2 He even hates his own sister when he's drinking. He
3 went over there and cursed them out when he's not -- they
4 didn't even tell you that.

5 I mean, I'm just emotional because they don't know Al
6 like I know Al. I've been with Al for 34 years. He just
7 never did -- I mean, we done had trials and tribulations,
8 but tomorrow I'd get up and take him to work, I mean, the
9 next day. You know, "Al, can I borrow a couple dollars
10 for some gas."

11 I mean, my job, I used to work straight on Two Notch,
12 and my job was getting rid of people because they had to
13 cut back on the hours. So I was one of the ones they got
14 rid of. So I went on unemployment, and then I went back
15 on disability after I had been on unemployment.

16 I was coming up there to get -- to get on the
17 Internet to find me another job. I lucked up and found a
18 job.

19 Now, I work at Gaffney, in Gaffney, South Carolina at
20 Nestle. My mom was talking about turning the trays over
21 but I mean -- I mean, I got married, man. I changed my --
22 I've changed my whole life. I have nothing. This is the
23 only trouble I got in since 2003. I got saved. I changed
24 my life. I did everything I could do to stay away from
25 trouble.

1 When I got out of jail, yes, I had friends saying,
2 "Man, we're going to get back in the drug game. We're
3 going to do this. We're going to do that."

4 I turned the right way, gave God my life and told
5 him, "Do what you want with me." This is my mom here.
6 She changed me. She changed me. I mean, she changed me.
7 My whole life has been -- since this has happened, I've
8 been up and down, up and down, I mean, I know I committed
9 a crime. I know I did that because of the simple fact I
10 was trying to protect myself.

11 I want to -- I feel like I need to do something
12 because I can't sleep at night. I moved to Spartanburg,
13 South Carolina just because I couldn't even relate, you
14 know what I'm saying, about killing my stepfather. That's
15 the only way I could see people in my area, "Man, you
16 killed your stepfather."

17 You know, it's killing me. I mean, it's killing me.
18 I'm not -- I'm finally glad it's over, but I want to be
19 able to raise my son. I never had a father. I tried to
20 make Al my father, my daddy, but he -- alcohol took that
21 place.

22 I just want to raise my son like he's supposed to be
23 raised. I want to be a man that I can say that I raised
24 my son, but I mean, as far as -- they're saying about "Al
25 was a good damn man. He was a good man. He was good man.

1 I mean, he was a good man," but when you get alcohol in
2 you, you change.

3 Her father was the same way. Her father is the same
4 way. I mean, alcohol changes people, drugs change people.
5 I mean, I mean, I respect the jury for its decision.

6 I mean, I have no hate or nothing for nobody because
7 I live for God. No matter what I do or what God do (sic),
8 God got the last answer.

9 I mean, my record can say one thing, but I'm telling
10 you I'm throwing myself on the mercy of the Court. I hope
11 you just -- you all can forgive me for, you know, what
12 happened, but most of all, I got to forgive myself.

13 Do you want to say something, Tasha?

14 THE WIFE: I would like to say, first of all, that I
15 loved Al. My father is an alcoholic, but one thing about
16 Al I can say, like they said, when he wasn't drinking --

17 THE DEFENDANT: Go to work every day. He worked
18 every day.

19 THE WIFE: As a matter of fact, I was closer to Al
20 than my own father, cut up with Al on the phone. So you
21 know, this is -- you know, this is a no-win situation for
22 everybody.

23 THE DEFENDANT: No win.

24 THE WIFE: I mean, ever since he's gone -- because I
25 don't have much of a relationship with my dad. I love

1 him, but he drinks all the time. He's an alcoholic, but I
2 used to be able to talk to Al. I could call Al.

3 You know, I was in nursing school. I'd call Al
4 because it was wearing me out. I'd call to talk to Al.
5 You know, I can say about Thaddess that Thaddess changed,
6 you know. All of that has passed down before I met him,
7 you know, but I know that he wanted to change his life
8 because when he met me, that's what he was looking for, to
9 settle down and change his life.

10 I just beg for the mercy of the Court. As they say,
11 I'm an only child, and I don't want to raise my child by
12 myself. Your Honor, I don't want to be the single parent.

13 I just ask for the mercy of my child, and I know he
14 was -- I know what Thaddess has gone through. He has had
15 to get on medication. He's in extensive counseling going
16 to a psychologist, going to the mental health center over
17 there in Columbia, Winston & Associates, in counseling
18 because he couldn't sleep at night, and it's just hard for
19 him.

20 I mean, even if he didn't get the sentence, I mean,
21 he still has to live with this the rest of his life
22 because even though him and Al had their differences, he
23 still would say, "That's my dad," and that's just all I
24 have to say.

25 MR. McMULLEN: Thank you, Your Honor.

1 MS. SHIPLEY: Your Honor, may I clarify
2 Mr. Cleveland's prior criminal history?

3 THE COURT: Unless you have some marked or
4 significant change from what was read, I don't think
5 that's necessary.

6 MS. SHIPLEY: He was not convicted of the domestic
7 violence, according the rap sheet, and the last time he
8 was ever involved in the law was in 1988.

9 Also, I want the Court to -- to remind the Court
10 about the testimony from Connie Cleveland under the Lyle
11 motion that we had in pretrial that this man has stabbed
12 his stepfather in the past.

13 THE COURT: I understand that. I've got to deal with
14 what's here today.

15 MS. SHIPLEY: Yes, sir.

16 THE COURT: Mr. Starks, I certainly empathize with
17 your life and your position that you're in right now. I
18 can't really sympathize, but I think I can feel your pain
19 and your wife's pain, but I can also feel the family of...

20 THE DEFENDANT: It is the family, the Cleveland
21 family.

22 THE COURT: His family.

23 THE DEFENDANT: Uh-huh.

24 THE COURT: As you know, your attorney has told you,
25 this crime carries penalty of up to 30 years in jail;

1 isn't that correct?

2 MR. McMULLEN: Yes, sir.

3 THE COURT: You knew that, didn't you? You know
4 that?

5 THE DEFENDANT: Well...

6 THE COURT: I mean, you know that.

7 MR. McMULLEN: Yes, sir.

8 Let him finish.

9 THE COURT: Now, just let me finish.

10 THE DEFENDANT: Yes, sir.

11 THE COURT: And the jury has spoken. They found --
12 and I don't think you ever denied, or at least your
13 attorney has indicated that you never denied that Al
14 Cleveland died at your hands.

15 THE DEFENDANT: Yes, sir.

16 THE COURT: The question ultimately was, was it
17 intentional and with malice --

18 THE DEFENDANT: No, sir.

19 THE COURT: -- or was it not or was it in pure
20 self-defense? The jury has determined, and that's the --
21 that is the crime that you have been found guilty of.

22 I can't really consider anything else other than the
23 fact that the jury found you guilty of the death,
24 responsible for the death of Alphonzo Cleveland, even
25 though it may have been done in the heat of passion or in

1 the heat of the moment.

2 THE DEFENDANT: Yes, sir.

3 THE COURT: So I cannot disregard the fact that there
4 is a deceased member of another family in this community.

5 And I don't -- I told the jury, you heard me tell
6 them, I don't have an opinion about the facts. That's
7 their job. My job is to try to bring some justice to this
8 whole incident and temper that with some mercy, because
9 that's why they put me here.

10 THE DEFENDANT: Yes, sir.

11 THE COURT: I hope you understand that.

12 Your child is a year old. You will be here -- you'll
13 be able to be with that child. Unfortunately, the rest of
14 this family, Mr. Cleveland's family, doesn't have that
15 option, but you're going to have to spend some time away
16 from your child.

17 What you do with that child -- with that time is up
18 to you. You can either use it for good or for bad. You
19 say you turned your life around.

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Even in the Department of Corrections
22 there are people who have turned their lives around and
23 live by that even in -- under those circumstances, or you
24 can go the other way and get involved with the worst
25 elements of our society, in which case you may end up

1 spending the rest of your life within those walls.

2 I never know what's the right thing to do. I never
3 know what is the right thing to do. All I can do is try
4 to weigh the scales. I don't think you deserve the
5 maximum punishment. I don't think you deserve the
6 minimum.

7 You're aware of the fact that whatever sentence I
8 give you, your parole eligibility, your eligibility for
9 release is going to be at least 85 percent of that
10 sentence. You do understand that?

11 THE DEFENDANT: Eighty-five, yes, sir.

12 THE COURT: Eighty-five.

13 THE DEFENDANT: Yes, sir.

14 THE COURT: All right. Mr. Starks, the sentence of
15 the Court is you be committed to the State Department of
16 Corrections for a period of ten years. Good luck to you,
17 sir.

18 MR. McMULLEN: Thank you, Your Honor.

19 THE MOTHER: Let me give him a hug first.

20 THE DEPUTY: No.

21 MR. McMULLEN: Thank you, sir.

22 THE COURT: Court's adjourned.

23 MS. SHIPLEY: Thank you, Your Honor.

24 (Whereupon, the proceedings were concluded.)
25

FORM 5

STATE OF SOUTH CAROLINA

County of RICHLAND

IN THE COURT OF COMMON PLEAS

THADDESS STARK'S

Full name and prison number (if any) of Applicant

v.

State of South Carolina

APPLICATION FOR

POST-CONVICTION RELIEF

08 FEB 26 AM 9:23
MARGARA A. SCOTT
C.C.C. & G.S.INSTRUCTIONS B READ CAREFULLY

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

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention 386-REDEMPTION WAY, Mc COMICK CORRECTIONAL
Mc Comick, SC 29899
2. Name and location of Court which imposed sentence 1701- MAIN ST. Columbia
South Carolina
3. Name(s) of co-defendant(s) (if any) NONE
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2007-LS-40-9503

- (b) _____
- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) _____
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence? No
8. If you answered Yes to (7), list:
- (a) the name of each Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered No to (7), state your reasons for not so appealing:
- (a) _____

(b) _____

(c) _____

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

(a) INEFFECTIVE ASSISTANCE OF COUNSEL.

(b) _____

(c) _____

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

(a) Court WAS WITHOUT JURISDICTION, TO CHANGE APPLICANT AT

(b) FIRST FOR MURDER, WHEN IT SHOULD HAVE BEEN A LESSER CHARGE.

(c) _____

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

(a) any petition in a State Court under South Carolina Law? No

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NONE

(d) any other petitions, motions or applications in this or any other Court? NONE

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

(a) the specific nature thereof:

i. _____

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NONE.

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

(a) which grounds have been presented:

i. N/A

ii. _____

iii. _____

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

i. N/A

ii. _____

iii. _____

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) _____
(b) _____
(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? _____
(b) your trial, if any? ☒ _____
(c) your sentencing? _____
(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____
(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

18. If you answered Ayes 3 to one or more parts of (17), list:

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

i. THE LAW OFFICE OF - MICHAEL D. McMULLEN
1720-MAIN STREET - SUITE-301 COLUMBIA, SOUTH CAROLINA - 29201

ii. _____
iii. _____

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

i. TRIAL BY JURY.
ii. _____
iii. _____

19. State clearly the relief you seek in filing this application:

REVERSE / AND / VACATE.

20. Are you now under sentence from any other court that you have not challenged?

No

Revised 3/2003

STATE OF SOUTH CAROLINA)

County of RICHLAND)

VERIFICATION

I, THAODESS STARKS, 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.

Thaless Starks

SWORN to and subscribed before me this 10th
day of February, 2008.

William H. Couch Jr. (L.S.)
Notary Public

My Commission Expires: May 23rd, 2008

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, THADESS STARKS # 284256, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Thadess Starks
Applicant

SWORN or affirmed to and subscribed before me this
10th day of February, 2008.

William H. Crouch
Notary Public

My Commission Expires: May 23rd, 2011

Respondent.

I.

Grand Jury Term	Indictment Number	Charged Offense	Sentence Received	Sentenced to Lesser Offense
1-07	2007GS409503	0118 16-03-0020 * 30 - L/D * Murder / Murder	10	Yes
Sentenced to: 0217 16-03-0050 * 30 * Manslaughter / Voluntary manslaughter			as a lesser offense.	
NOTES: Lesser offense of voluntary manslaughter has a maximum of 30 years			TOTAL 10	POSSIBLE Life

1

II.

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

10.	State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
(a)	<u>INEFFECTIVE ASSISTANCE of Counsel.</u>
(b)	_____
(c)	_____
11.	State concisely and in the same order the facts which support each of the grounds set out in (10):
(a)	<u>Court WAS WITHIN Jurisdiction, TO CHANGE Applicant AT</u>
(b)	<u>Past for MURDER, WHEN IT SHOULD HAVE BEEN A LESSER CHARGE.</u>
(c)	_____

19.	State clearly the relief you seek in filing this application:
	<u>RELEASE / AND VACATE.</u>

III.

The Respondent interprets each of the Applicant's allegations to be claims that he received ineffective assistance of counsel. The Respondent contends that the Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Id. Where ineffective assistance of counsel is alleged

as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The Respondent therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

V.

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

VI.

WHEREFORE, having made its Return, the Respondent requests that an evidentiary hearing be held.

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

BRIAN T. PETRANO
Assistant Attorney General

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

March 5, 2009

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

)
) IN THE COURT OF COMMON PLEAS

2008-CP-400-1439

Thaddess R. Starks, 284256

Applicant,

vs

State of South Carolina,

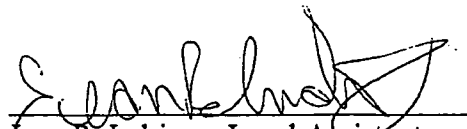
Respondent.

)
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) AFFIDAVIT OF SERVICE BY MAIL
)
)
)
)

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Jeremy A. Thompson, Esquire
3614 Landmark Drive, Suite D
Columbia, South Carolina 29204

DATED this 10th day of March, 2009.


Jean R. Indriago, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

THADDESS STARKS, #284256,)

Applicant,)

v.)

STATE OF SOUTH CAROLINA,)

Respondent.)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO.: 08-CP-40-1439

AMENDED APPLICATION FOR
POST-CONVICTION RELIEFJANETTE W. McBRIDE
J.C.P. & C.S.

2008 MAR 30 PM 3:24

RICHLAND COUNTY
FILED

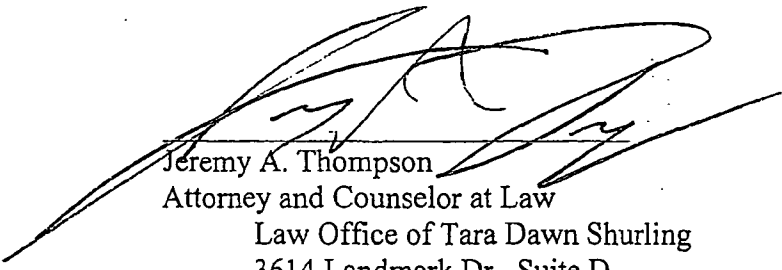
NOW COMES the Applicant in the above-captioned case, acting by and through undersigned counsel, respectfully moving to amend his Application for Post-Conviction Relief. In general, the Applicant would allege that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as pursuant to Article I, Section 14 of the South Carolina Constitution, were violated prior to and during his trial. The Applicant would further amend his Application for Post-Conviction Relief to contain the following specific allegations of ineffective assistance of counsel:

1. Defense counsel was ineffective for failing to properly advise the Applicant about the consequences of not testifying at trial;
2. Defense counsel was ineffective for failing to move for a mistrial during the State's examination of Dr. Theodore Faber;
3. Defense counsel was ineffective for failing to rehabilitate Dr. Faber's testimony;
4. Defense counsel was ineffective for failing to request a jury charge on the lesser-included offense of involuntary manslaughter;
5. Defense counsel was ineffective for failing to consult with the Applicant before requesting the lesser-included offense of voluntary manslaughter;
6. Defense counsel was ineffective for failing to file a Notice of Appeal for the Applicant following his conviction for voluntary manslaughter.

JAI

The Applicant asks that the above-referenced allegations be considered in addition to those allegations previously raised in his original Application for Post-Conviction Relief.

Respectfully submitted,



Jeremy A. Thompson

Attorney and Counselor at Law

Law Office of Tara Dawn Shurling

3614 Landmark Dr., Suite D

Columbia, S.C. 29204

(803) 738-8622

(803) 738-1600 (fax)

jthompson@shurlinglaw.com

Attorney for the Applicant

This 30th day of March, 2009.

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

THADDESS STARKS, #284256,)
Applicant,)

v.)

STATE OF SOUTH CAROLINA,)
Respondent.)IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

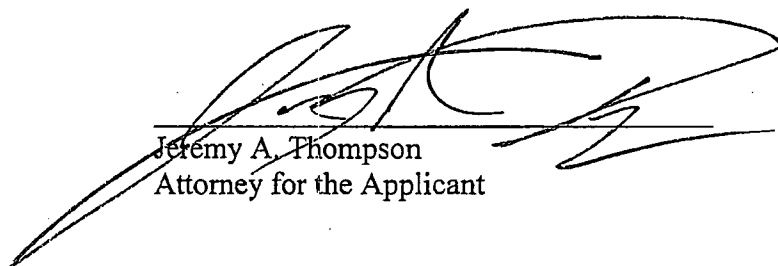
CASE NO.: 08-CP-40-1439

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Amended Application for Post-Conviction Relief in the above matter has been served on opposing counsel this 30th day of March, 2009, by hand-delivery to:

Brian T. Petrano, Assistant Attorney General
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211

The original having been sent to the Richland County Clerk of Court for filing.


 Jeremy A. Thompson
Attorney for the Applicant

SWORN TO BEFORE ME this 30th day of
March, 2009.

Sharon H. McCallister (L.S.)
Notary Public for South Carolina

My Commission Expires: Jan. 16, 2017

RICHLAND COUNTY
FILED
2009 MAR 30 PM 3:24
JEANETTE W. MCBRIDE
Clerk of Court

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State of South Carolina
Court of General Sessions
County of Richland
2008-CP-40-01439

Thaddeuss Starks

VS.

State of South Carolina

Columbia, South Carolina

March 17, 2010

Before the Honorable Allison Lee

APPEARANCES

For the State: Brian Petrano

For the Applicant: Jeremy Thompson

REPORTED BY: Karen Ambroziak (Michael C. Watkins)

Official Court Reporter

1	MICHAEL MCMULLEN:	6
2	THEODORE FAVOR, M.D.:	36
3	LATASHA STARKS:	56
4	THADDEUSS STARKS:	63
5	CERTIFICATE:	94

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NO EXHIBITS

1 THE COURT: Mr. Starks, if you'll come over and sit
2 next to your attorney, please. We ask everybody to make
3 sure your telephones are turned off, please. Yes, sir,
4 Mr. Petrano.

5 MR. PETRANO: Thank you, Your Honor. May it please
6 the Court? This is 2008-CP-40-01439, Mr. Thaddeuss R.
7 Starks. It's a PCR application filed February 26th, 2008.
8 It was a jury trial with Judge Cooper on October 1st,
9 2007, the Applicant was represented at that time by
10 Mr. Michael McMullen of the private bar. The Applicant
11 had been indicted by the January 2007 term of the Richland
12 County grand jury, 2007-GS-40-9503, he was indicted for
13 murder, he was convicted of voluntary manslaughter, he
14 received ten years. There was no direct appeal. I will
15 turn it over to Mr. Jeremy Thompson, the Applicant's
16 current counsel of record.

17 MR. THOMPSON: May it please the Court, Your Honor?
18 Good afternoon.

19 THE COURT: Good afternoon.

20 MR. THOMPSON: Just briefly, Your Honor, my client
21 does allege that he received ineffective assistance of
22 counsel in violation of his Sixth and Fourteenth Amendment
23 Rights to the United States Constitution, as well as the
24 corresponding provisions of the South Carolina
25 Constitution. Specifically he alleges that he received

1 ineffective assistance of counsel both prior to and during
2 his trial, as well as following his trial when his?
3 Attorney failed to file a direct appeal for him. Judge,
4 by way of brief factual background, Your Honor, this case
5 stems out of an argument between my client and his
6 stepfather, the decedent, they were having an argument at
7 the home that they were both living in at the time. My
8 client was told to go back into his room, lock himself in
9 his room, stay away from the situation, his stepfather
10 broke into the room and slapped him on the back and across
11 the face. My client then had a knife that he had in his
12 room from making a sandwich, reached up and stabbed the
13 decedent once and that punctured his lung and is what he
14 evidently died from. As Mr. Petrano said, my client was
15 charged with murder. The jury was charged on voluntary
16 manslaughter and self-defense, they returned a verdict
17 after many hours of deliberation to voluntary
18 manslaughter. Judge Cooper sentenced him to ten years in
19 prison. I filed an amended application for post
20 conviction relief when this case came up for a hearing
21 last March, Your Honor, March 30th, 2009, I believe that
22 is in your packet, there are a couple of changes and I've
23 talked to Mr. Petrano about this. Specifically, Your
24 Honor, we will be withdrawing allegation number five, that
25 defense counsel was ineffective for failing to consult

1 with the Applicant before requesting the lesser-included
2 offense of voluntary manslaughter. After reviewing the
3 transcript, I realized that the State is the one who
4 requested the voluntary manslaughter, I don't believe
5 there was any reason to object to that so that's why we
6 are withdrawing that allegation. Your Honor, we are
7 alleging defense counsel was ineffective for failing to
8 request a charge of involuntary manslaughter in this case,
9 that he was ineffective in failing to prepare numerous
10 witnesses for court, Your Honor, specifically Dr. Favor
11 who is here in the courtroom and was my client's
12 neurologist, he did testify at trial. As well as
13 ineffective for failing to object to a couple of things
14 that came up during his testimony which we'll get into.
15 Ineffective in preparing my client to testify, he
16 ultimately did not testify at the trial in this case, Your
17 Honor. We would also allege that he was ineffective for
18 failing to object to a couple of the portions of the jury
19 charge on self-defense, Your Honor. Essentially the claim
20 on that is that there are portions of the jury charge that
21 say it must be shown, it must be shown, implying that my
22 client has to show something to receive a charge of
23 self-defense, and as we know the self-defense requires
24 that the State disprove the elements beyond a reasonable
25 doubt, my client doesn't have to show anything. Finally,

1 ineffective assistance of counsel for failing to file a
2 notice of appeal. And going back to the thing with
3 Dr. Favor, there was an objection that was sustained and
4 struck, a comment made by the State at the very conclusion
5 of Dr. Favor's testimony, that statement by the solicitor,
6 which we'll get into, was made at the very end of her
7 closing argument and that was not objected to during the
8 closing. So with that background in mind, Your Honor, we
9 would call Mr. Michael McMullen as the Applicant's first
10 witness.

11 The witness, MICHAEL MCMULLEN, was first sworn and
12 testified as follows, on:

13 THE COURT: Thank you. If you'd have a seat and
14 state your full name, please.

15 THE WITNESS: Michael Dennis McMullen.

16 DIRECT EXAMINATION

17 BY MR. THOMPSON

18 Q How are you doing this afternoon, Mr. McMullen?

19 A Fine. Thank you.

20 Q Do you recall your representation of the Applicant in
21 this case?

22 A Yes, sir.

23 Q How did you come to represent him? Were you retained
24 or appointed?

25 A I was hired, I was retained.

1 Q Do you recall who hired you to represent him?

2 A I think he and his mother.

3 Q And how long approximately did you represent him
4 prior to the trial? Were you involved right after he was
5 arrested?

6 A Let me see here. They came to see me first May 24th,
7 2007, and hired me on May 30th, 2007.

8 Q And again, just to -- I know we've been over it today
9 already, but what was your client charged with?

10 A Murder.

11 Q Were there any plea offers made by the State in this
12 case to your recollection?

13 A He was offered a plea to voluntary manslaughter.

14 Q Was it a negotiated plea or was it a --

15 A There would be no recommendation.

16 Q So he could have gotten all the way up to 30 years in
17 prison?

18 A I guess.

19 Q Did your client accept or reject that offer?

20 A Rejected that.

21 Q Was this case pretty certain for trial in your mind?

22 A Sir?

23 Q Was this case pretty certain to go to trial in your
24 mind?

25 A Yes, sir.

TESTIMONY OF MICHAEL MCMULLEN

1 Q Now, in preparing for trial, how many discussions did
2 you have with your client after testifying at the trial?

3 A I'd say, you know, numerous, I don't know a number.
4 But it's the kind of thing we would speak about I would
5 imagine every time we got into the talks about the case.

6 Q Would you do like -- how long did those discussions
7 take, I mean, would they be like five minutes? Would they
8 be lengthy?

9 A Somewhere between five minutes and lengthy. I
10 never -- I didn't feel that I had as much time with
11 Mr. Starks as I would have liked. He missed a couple of
12 meetings that we had set up at my office, and in order to
13 speak with his mother I had to go to their house and he
14 wasn't able to be there that day. Then the day before the
15 trial, or the Saturday before the trial we were supposed
16 to get together at my office, he didn't come. And then
17 the same was true Sunday before the trial, which began on
18 Monday, he went to church and he took a nap that day and
19 as I recall, wouldn't come to the phone. So I think we
20 spoke that night by telephone and he said he felt he
21 needed to be in church more than at my office.

22 Q And the times that you did have the opportunity to
23 speak to him, did you do extensive, you know, I guess
24 question and answer sessions about what you would ask him
25 if he did have to testify?

1 A Not so much in those terms. We talked extensively
2 about what happened and the facts of the matter, you know,
3 facts of the case. Of course, you know, I don't know how
4 much preparation we did for his testimony because he
5 didn't intend to testify, and then as I say, any meetings
6 that we would have had to talk about that he missed a
7 couple of those right before the trial.

8 Q And you said he didn't intend to testify. Was it
9 your intent to present him as a witness if you had the
10 option or --

11 A No. In fact, had it been up to me we would have put
12 up no case at all.

13 Q So you didn't want to present him as a witness at the
14 trial?

15 A You know, again, it's not my decision. But had it
16 been up to me, I would have suggested that -- yes, that he
17 not testify.

18 Q Now, did you also speak to my client's treating
19 neurologist, Dr. Favor, in preparation for trial?

20 A Yes.

21 Q How and why did you contact Mr. Favor?

22 A I think that was at Mr. Starks' suggestion. Mr.
23 Starks had been treated over the years by that doctor,
24 that doctor probably knew more about Thaddeuss Starks than
25 any other physician. When we did put witnesses up there

TESTIMONY OF MICHAEL MCMULLEN

1 at that point, you know, I thought it was a good idea to
2 put the doctor up there to show the physical limitations
3 Mr. Starks had and that those would have been, you know,
4 in his mind at the critical moment.

5 Q How soon prior to trial, if you remember, did you
6 talk to Dr. Favor?

7 A I would say it was within a week or so of the trial.
8 You know, I asked the family to come up with the funds for
9 experts such as the doctor, in the end I paid the doctor's
10 \$500 fee myself.

11 Q Did you ever meet with Dr. Favor face to face prior
12 to the trial?

13 A We spoke by telephone only prior to the trial.

14 Q Did you tell Dr. Favor if you would have -- did you
15 want to meet with Dr. Favor in person?

16 A Yes. Once I went to the office but I think it was
17 just kind of without an appointment, he wasn't in, he was
18 I think at one of the other -- they may have had another
19 location.

20 Q Did you want to talk to him in person prior to
21 presenting his testimony at the trial?

22 A Yes.

23 Q Did you have an opportunity to do that?

24 A Just very briefly.

25 Q Yes. And you asked him about the physical aspect of,

TESTIMONY OF MICHAEL MCMULLEN

1 I guess, Thaddeuss' disability. Did you go into any
2 detail about his mental aspect at all, about the mental
3 disability, the damage to his brain? Did you discuss that
4 at all?

5 A I believe so, yes.

6 Q And you said that Thaddeuss' mother and Thaddeuss
7 came to hire you. Did you speak with any of Thaddeuss'
8 other family members prior to trial?

9 A With his wife, yes, sir.

10 Q And did you have an opportunity -- when you said that
11 you wanted Thaddeuss to come over to your office prior to
12 trial, was that to meet with Thaddeuss or to meet with the
13 whole family or to get prepared for just Thaddeuss?

14 A Well, there were things -- both. I had wanted to
15 talk to him individually and we did some of that but, you
16 know, I wanted to talk to his entire family; Ms. Cleveland
17 and Thaddeuss' wife. They all needed to have, I think,
18 input into these important decisions Mr. Starks was going
19 to be faced with.

20 Q And did you inform Ms. Cleveland or Ms. Starks that
21 you might call them as witnesses at the trial?

22 A Yes. Especially Ms. Cleveland, his mother.

23 Q Now, about -- did you present the testimony of
24 Lakeisha Tolliver in this case, Thaddeuss' cousin?

25 A Yes. That was something that was a decision that was

1 made by the defendant and his family during the trial.
2 She -- if this is the person I'm thinking of, she was on
3 the USC lady basketball team and was unavailable for
4 interviews generally, and when I finally did talk with
5 her, you know, we talked about what she would testify
6 about which was that she had helped clean the bedroom
7 where this incident occurred. And during the trial she
8 testified -- or they approached me, they said they wanted
9 to put her up there and she was going to testify and did
10 testify as to finding a knife and about a plate I believe
11 in the room.

12 Q Now, has Thaddeuss been shot before?

13 A I believe so. I think that's one of the reasons he
14 had neurological damage.

15 Q Were you trying to keep that evidence out at trial,
16 the fact that he had been shot before?

17 A I don't recall one way or another on that. Yeah. It
18 seems like we had some discussions on the record about
19 that. It seems like the State wanted to keep out some of
20 that, I just -- I don't remember.

21 Q Do you have a copy of the transcript in front of you?

22 A I do. I do.

23 Q Can you flip to page 530 in that transcript?

24 A Yes, sir. I'm there.

25 Q Can you start at page -- just read to yourself lines

TESTIMONY OF MICHAEL MCMULLEN

1 15 through, I guess, 22.

2 A All right. I see that.

3 Q What was she testifying about? What did you ask her
4 about and what was she testifying about?

5 A I asked her whether she was aware with firsthand
6 knowledge of any physical limitations Mr. Starks has. And
7 then she answered that by volunteering, "When I was
8 younger I remember my cousin being shot," which, of
9 course, is not a physical limitation, it might be the
10 cause of it.

11 Q Did you warn her prior to her testimony that she
12 shouldn't talk about anything -- you know, him being shot
13 at all?

14 A No, sir, not that I recall.

15 Q Now, what was your primary defense heading into this
16 trial?

17 A Mr. Starks' defense was that it was self-defense.

18 Q And obviously -- well, do you remember what the -- I
19 guess comparatively what the sizes between Mr. Starks and
20 his stepfather were?

21 A Yes, sir. His stepfather was, I think, 5'9", 190,
22 and Mr. Starks was about 6'1", 350.

23 Q So when -- obviously when you were preparing a
24 self-defense claim you obviously have a bit of a handicap
25 dealing with their sizes, don't you?

TESTIMONY OF MICHAEL MCMULLEN

1 A Well, it's certainly a factor, yes, sir.

2 Q And was that why you kept asking all your witnesses
3 about Thaddeuss' physical condition and his lack of
4 balance?

5 A Yes. As I --

6 Q And --

7 A As I recall he was not as strong with one of his arms
8 as he was with the other.

9 Q And did you have all of the family members testify
10 before Dr. Favor?

11 A I don't remember the order, it was a big family. As
12 I recall, Dr. Favor's schedule needed to be accommodated
13 and I don't remember him being in order.

14 Q Did you want to have the evidence, I guess, about how
15 the family knew about Thaddeuss' physical disabilities
16 before presenting Dr. Favor?

17 A I guess I didn't think that the order in which they
18 testified, you know, was significant.

19 Q And did you -- I know you talked generally about
20 strength and Thaddeuss' -- how he was weaker on one side
21 than the other. Was it also important for you to get
22 evidence in about Thaddeuss' lack of balance?

23 A You know, I thought that was important. As I recall
24 the way I understood the facts to be, Al -- what's his
25 last name, Cleveland?

TESTIMONY OF MICHAEL MCMULLEN

1 Q Cleveland.

2 A Mr. Cleveland, the decedent, burst in the doorway
3 where Mr. Starks was lying down on his bed watching
4 television, to me balance wasn't as important as strength.

5 Q But Thaddeuss didn't strike with the weak side, did
6 he, he struck with the stronger side.

7 A I just -- I don't know. I frankly don't remember.

8 Q But you were asking people about balance, you think
9 that was at least of some importance.

10 A Yes.

11 Q If you thought it was of some importance, why did you
12 only ask Dr. Favor one question about his balance?

13 MR. THOMPSON: And I refer Your honor to page 580,
14 lines ten through 12.

15 A May I refresh my memory about this?

16 THE COURT: He said 580, lines ten through 12.

17 MR. THOMPSON: 580, lines ten through 12.

18 A I asked him one question, he answered it.

19 Q Was there any reason why you didn't ask Dr. Favor
20 any -- well, let me backtrack on that. Did you talk to
21 Dr. Favor at all about any -- about how Thaddeuss -- the
22 damage to Thaddeuss' brain could have affected his mental
23 reaction time? Did you talk to Dr. Favor at all about
24 that?

25 A I don't think so. Again, let me remind you,

TESTIMONY OF MICHAEL MCMULLEN

1 Dr. Favor doesn't work free of charge and there were no
2 funds provided me to pay Dr. Favor, and evidently I spent
3 money that was my own money to pay Dr. Favor for what we
4 did get into the record. So I would have loved to have
5 had more time to speak with him and develop his testimony,
6 but that was limited by the amount I had available in my
7 bank account.

8 Q Nevertheless, though, you did have him at trial,
9 though. You're not suggesting you were trying to get him
10 off the stand quickly so he didn't cost you more money.

11 A No. I'm suggesting that I didn't know the answer to
12 some of the questions that you're talking about and
13 therefore didn't ask them.

14 Q Now, I want to ask you to turn to page 603, line 17
15 through 604, line two.

16 A Yes, sir.

17 Q Who's testifying at this point?

18 A This is cross-examination of Dr. Favor.

19 Q And obviously the State is cross-examining Dr. Favor,
20 right?

21 A Yes, sir.

22 Q And what's the State asking Dr. Favor about this
23 portion of the record?

24 A The functionality of the right side of Mr. Starks'
25 body.

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1 Q And whether it would be effective or not?

2 A Would you like me to read it in?

3 Q Sure. Go ahead.

4 MR. PETRANO: Your honor, I object to this. The
5 transcript is a part of the record.

6 A I mean --

7 MR. THOMPSON: I'll --

8 THE COURT: You want to rephrase the question?

9 Q They asked -- Dr. Favor testified that cutting things
10 would probably not be as effective given Thaddeuss'
11 physical handicap, and the State responds, "Well, sir,
12 this individual died, apparently it was effective." Did
13 you consider objecting at all about that comment made by
14 the State?

15 A No, apparently, I didn't. I mean, I didn't object.

16 Q Do you have any -- did you think that comment was
17 improper?

18 A Yes.

19 Q Do you have any strategic reasons for why you didn't
20 object to that comment?

21 A No.

22 Q And could you flip to the following page, page 605,
23 where you did object to a comment where the State said --
24 where the State was asking Dr. Favor if he would bet on
25 the larger man or the smaller man. Was there any

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1 reason -- you objected to the State's comment that you
2 would have won the bet in this case, sir, didn't you?

3 A Yes.

4 Q And did you have that comment struck?

5 A Yes.

6 Q Was there any -- did you move for a mistrial in
7 response to that comment?

8 A No, sir.

9 Q Obviously, you thought that comment was pretty
10 prejudicial since you asked that it be struck, and that
11 objection was sustained, wasn't it?

12 A Yes.

13 Q Was there any reason why you didn't think a mistrial
14 was warranted at that point?

15 A I guess because it's just such an obvious thing that
16 Mr. Starks was present in the courtroom and he is a big
17 man and I knew it was something that we had to deal with
18 in the beginning.

19 Q And if you could flip to page 698.

20 A Yes, sir.

21 Q At the very top of that page, is this the solicitor's
22 closing argument?

23 A Yes.

24 Q And does she repeat her comment that she made at the
25 close of Dr. Favor's testimony that he -- that Dr. Favor

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1 would have made the right bet by betting on Thaddeuss in
2 this case?

3 A Yes, she did say that. It was in my opinion
4 improper, and in Judge Cooper's opinion improper, I should
5 have objected to it.

6 Q And the record will reflect you didn't.

7 A I did not.

8 Q And obviously, is that something that you think
9 should have been objected to?

10 A Yes.

11 Q Since the comment was struck by Judge Cooper in the
12 first place?

13 A Certainly.

14 Q And is there any strategic reason why you didn't
15 object to that comment?

16 A No strategic reason.

17 Q Now, at the very end of this -- at the very end of
18 Dr. Favor's testimony when you make that objection she's
19 just gotten Dr. Favor to testify that he'd take your
20 client in a fight essentially over to decedent. Is there
21 any reason why you didn't ask any followup questions of
22 Dr. Favor at that point to try to rectify that?

23 A I didn't want him to get up there and repeat it if
24 that's what you're saying. I don't know -- other than
25 getting it struck, I don't know what purpose would have

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1 been served on that.

2 Q Did you consider asking him any questions about how,
3 you know, size isn't the only thing to take into account
4 when you're talking about a physical altercation?

5 A No. I mean, you know, I asked him those sorts of
6 things I think the first time around.

7 Q You didn't think it was important to get that --
8 since he has already testified to something like that to
9 get it back in front of the jury --

10 MR. PETRANO: Objection. Leading. It's been asked
11 and answered.

12 THE COURT: Rephrase.

13 Q Did you think that comment was harmful? Did you
14 think his testimony was harmful?

15 A Yes. In isolation, yes.

16 Q Yes. And if you don't recall the record will
17 reflect, is this the very last testimony the jury heard
18 before arguments?

19 A I don't recall, but --

20 Q If the record reflects that he was the last
21 witness --

22 A Yeah, then he was.

23 Q And you weren't planning on -- Thaddeuss was not
24 planning on testifying at that point, right?

25 A That's correct.

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1 Q So since you didn't ask any followup questions, why
2 didn't you think it would be a good idea to try to
3 rehabilitate this testimony if this is going to be the
4 last thing the jury heard?

5 A Well, I guess I didn't figure it needed
6 rehabilitation. You know, I think that sometimes when you
7 dwell on something that has already been struck from the
8 record you just bring it back in front of the jury and
9 that's counter productive.

10 Q But you objected to the State's comment, not the
11 actual testimony.

12 A Yes. But now, the testimony was if I had to choose
13 between the bigger guy and the smaller guy I'd take the
14 bigger guy, but what I objected to was yeah, you would
15 have won that bet, I think that's the part that was
16 objectionable.

17 Q The State's comment.

18 A Yes, sir. And so then in the closing argument, I
19 think, when she says, "Well, this is what the doctor
20 testified, that's their witness, this is what he said,"
21 you know, I don't think that necessarily it was the
22 doctor's statement that was struck from the record. It
23 was a comment to which might be fair game during a closing
24 where it's not during cross-examination.

25 Q Now, you testified earlier and it's pretty clear from

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1 the record that your theory of the case was self-defense.

2 A Yes, sir.

3 Q Did you want a voluntary manslaughter charge?

4 A As I recall that's the kind of thing I consulted with
5 Mr. Starks about, but if it had been left up to me, no. I
6 didn't think they had proved murder, I thought we had a
7 pretty good chance of getting acquitted.

8 Q And since you didn't want it, was it actually the
9 State who requested that voluntary manslaughter charge?

10 A Yes, sir.

11 Q To the best of your recollection?

12 A Yes, sir.

13 Q Is there any reason why you didn't request
14 involuntary manslaughter?

15 A You know, I honestly don't remember. But, you know,
16 to the extent that I have refreshed my memory the facts
17 just didn't seem to fit that. He was either guilty of the
18 voluntary manslaughter, heat of passion kind of fighting
19 or he was acting in self-defense.

20 Q Did you consider arguing that because he was not --
21 he was just trying to fend off Mr. Cleveland he wasn't
22 trying to kill Mr. Cleveland, that you could argue the
23 killing was unintentional?

24 A I think we did argue the killing was unintentional,
25 yes, sir.

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1 Q Did you consider using that as a basis to consider
2 argument for involuntary manslaughter in this case?

3 A I did not, no, sir.

4 Q Now, I know you said if given the choice between
5 murder and voluntary manslaughter and self-defense you
6 would have just wanted murder and self-defense.

7 A Yes, sir.

8 Q If you had murder, involuntary and self-defense,
9 would you have wanted involuntary manslaughter included?

10 A Sure, yes.

11 Q Now, after Dr. Favor finished testifying there was a
12 colloquy with the Court about your client's decision to
13 testify, and I'll refer you to page 608, lines eight to
14 11, "I just want to put on the record that would not have
15 been my advice to not testify, but he understands that's
16 his decision." When did your advice to your client to
17 testify change?

18 A You know, I -- I think that the way things occurred
19 was that Mr. Starks and I finally did get to meet on one
20 of the -- the evening before he was to testify and we
21 spoke in my office for awhile, he had come to the decision
22 that that would be a good idea, I concurred with that.
23 And then the next morning he came to my office with his
24 family and said he had prayed on this matter and that, you
25 know, as a result of the prayer that he felt it was not in

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1 his best interest to testify. He also expressed
2 considerable concern over being cross examined by
3 Ms. Shipley who, I think, had demonstrated during the
4 trial she was a very good lawyer. So, you know, for
5 reasons I don't blame him, but obviously it was his
6 decision to make. I guess to answer your question more
7 succinctly, when we decided to put up any case at all then
8 I guess I decided in my opinion he should testify.

9 Q And was it your -- was it your intent going into the
10 trial to present any testimony at all?

11 A Not -- yeah, I wanted us to be flexible about that.
12 In fact, I think I commented on the record at one point to
13 Judge Cooper that we were keeping our options open in that
14 regard. But now I had met with the witnesses and I felt
15 like their witnesses were some of our best witnesses just
16 on cross-examination.

17 Q How long I guess in total would you say these
18 conversations were -- I guess that evening before he made
19 this decision not to testify, how long would you say you
20 talked to Thaddeuss about not testifying?

21 A Two to three hours.

22 Q Is that both the night of and in the morning
23 followup?

24 A In the morning we didn't have much time at all, it
25 would have been mostly the night before. But in the

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1 morning he had changed his mind.

2 Q I want to shift gears a minute and go toward the jury
3 charge in this case, specifically with regard to
4 self-defense. You argued and the Judge charged at one
5 point that the State must disprove the law of self-defense
6 beyond a reasonable doubt, is that your understanding of
7 the law?

8 A Yes.

9 Q If you could, please, flip to page 709, line 22
10 through page 710, line four. Just in general -- yeah. It
11 says that the defendant was actually in imminent danger,
12 it must be seen that the circumstances would have
13 warranted -- going on to the next page it says if the
14 defendant believed he was in imminent danger of death or
15 other serious bodily injury it must be shown -- when the
16 Judge is instructing the jury about that, who must be
17 doing that showing?

18 A If I understand your question correctly you're asking
19 me to say who did Judge Cooper intend the injury to be
20 shown by and I don't think that this passive voice says
21 who has to show it. But I think the point you're getting
22 at is valid, that that is something that I should have
23 objected to and I should have asked His Honor to instruct
24 the jury that the State had to disprove these things.

25 Q Not that -- to make any --

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1 A Not that --

2 Q -- I guess implication clear that you had any burden
3 of proof with regard to this, that -- do you believe you
4 should have objected and asked that the Judge issue an
5 instruction --

6 A Yes, sir, yes, sir.

7 Q -- that the State must disprove that?

8 A Yes, sir.

9 Q And if -- I know logic on this can be hard sometimes
10 to follow, but if -- if you raised self-defense, must it
11 be disproven by the State beyond a reasonable doubt before
12 they can find anybody guilty just in general?

13 A Yes.

14 Q Did you consider then asking for a jury charge that
15 the jury must consider the evidence of self-defense before
16 considering either of the charges?

17 A I didn't think of that, no, sir.

18 Q In retrospect do you think you should have asked for
19 a jury instruction to that affect?

20 A Yes.

21 Q Now, ultimately -- obviously, of course, your client
22 was convicted. Did you have any discussions with him or
23 his family about an appeal following the trial?

24 A Yes.

25 Q Who did you talk to?

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1 A I talked to him in the holding cell downstairs and
2 then I want to say I went to the jail and talked to him
3 about it but that may not be accurate. I remember he
4 was -- as he was transported away he was injured like
5 getting into the van to be transported so I'm not sure
6 that he went to the jail or to the hospital, but it seems
7 like I was able to talk to him either by telephone or --
8 maybe it wasn't in person. We spoke twice and I remember
9 his telling me with tears in his eyes that he could do
10 ten, you know, that he thought I did a good job and that
11 things -- you know, he said some things to comfort me. Of
12 course, it's not about me. But he said, "I can do ten,
13 it's not the end of the world," and he did not want me to
14 appeal.

15 Q Did he specifically tell you that he did not want you
16 to file an appeal?

17 A Yes. But to answer the second part of your question,
18 his family came to me and said he had changed his mind
19 about that and I asked him to have him communicate that to
20 me if they could, and that didn't happen. Having said all
21 of that, I now know I should have filed an appeal, filed
22 the notice, I didn't know it at the time and I should have
23 done so.

24 MR. THOMPSON: Beg the Court's indulgence one moment,
25 Your Honor.

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1 (Break in proceedings.)

2 MR. THOMPSON: No further question of this witness,
3 Your Honor.

4 THE COURT: Any cross?

5 MR. PETRANO: Yes, Your Honor.

6 CROSS EXAMINATION

7 BY MR. PETRANO

8 Q You said that you should have filed an appeal even
9 though he didn't want you to? I'm not following you.

10 A Well, I think I am supposed to file notice of intent
11 to appeal after not winning a trial.

12 Q Now -- and I understand that that might be the
13 standard approach, but in a case like this where you have
14 an acquittal of the murder, the State can never seek that
15 again, there's double jeopardy unless the Applicant files
16 an appeal. There is a real strategic decision in a case
17 like this that's abnormal. Now, did you discuss that part
18 with him, that part of the reasoning? He was happy with,
19 "I can do ten," that's better than risking murder all over
20 again, isn't it?

21 A Well, does -- you know, I guess I should just say yes
22 to all of that.

23 Q Now, when you discussed him testifying, was it
24 your -- well, I'm sorry, let's back up here. Did he ever
25 tell you that he -- from day one, was it his claim this

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1 was self-defense?

2 A Yes.

3 Q He thought he was in fear of his life?

4 A Yes.

5 Q Were you concerned that -- or was he concerned -- did
6 you discuss if he testified it was whether the prior
7 stabbing was going to come out?

8 A That was a concern.

9 Q Because he had actually stabbed the victim before,
10 correct?

11 A Yes, that was a concern. And I felt like we had
12 protected the record pretty well in that regard. I
13 didn't -- I didn't think His Honor should have allowed
14 that since it wasn't subject to the conviction since it
15 hadn't been proved by clear and convincing evidence.

16 Q And you're talking about the Lyle issue and how that
17 came in, as you just said your position was it was not
18 clear and convincing.

19 A Yes.

20 Q But -- and if I'm understanding your answer
21 correctly, and I'm not trying to put words in your mouth
22 so stop me if I am, but you were concerned that door would
23 basically be opened again if he testified.

24 A Yes.

25 Q And more would come out about the --

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1 A Yes.

2 Q -- prior stabbing. Were you also concerned that
3 Ms. Shipley -- let me stop you. Is Ms. Shipley in your
4 opinion an effective prosecutor?

5 A Yes.

6 Q Was it your concern that if he testified that she
7 would be able to hone in on the fact that he washed the
8 blood off the knife?

9 A Yes. That -- yes.

10 Q Okay.

11 A That and more, you know.

12 Q And more. Tell us about that.

13 A Well, her theory of the case seemed to be the
14 struggle occurred in the kitchen and there was never
15 really a way for her to get that up in front of the jury
16 with direct testimony, but I think on cross-examination of
17 Mr. Starks whether you agreed with it or not she could
18 have used leading questions to get that theory across to
19 the jury.

20 Q And you're walking into my next point. That leads to
21 whether there was a knife in the bedroom and whether he
22 had a sandwich in his bedroom, right? Did I get that
23 right?

24 A Yes, sir.

25 Q Now, it was the State's position that there was never

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1 a sandwich in the bedroom, was there.

2 A That's right, seemed to be.

3 Q And that the knife actually came from the kitchen and
4 that's where the stabbing happened.

5 A That seemed to be their position, yes, sir.

6 Q And that was a specific concern if he takes the stand
7 that all of that would come out in a negative fashion,
8 right?

9 A Yes, sir.

10 Q And if all of that came out you can pretty much toss
11 self-defense out and you'd be really concerned about the
12 murder, right? You had the prior stabbing, that's the
13 motive -- and these are your words throughout the trial
14 and the objections so stop me if I'm putting words in your
15 mind -- you have the prior stabbing which would be the
16 State's motive and intent that Ms. Shipley argued. You
17 have that he washed the knife off and that the knife came
18 from the kitchen and that would take away his story that
19 the victim came in and slapped him in the face in his
20 room. Am I getting all of that right?

21 A Yes. I would say that she was going to have to
22 speculate during her closing argument about those things
23 without any real evidence of that in the record, and had
24 Mr. Starks taken the stand, again, he would have told the
25 facts the way he told me the facts. My belief from

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1 Mr. Starks is that the incident did occur in Mr. Starks'
2 bedroom, but yes, that Ms. Shipley would have used that
3 opportunity to put forth her theory.

4 Q And for instance the only source -- the only evidence
5 all comes from him that he was ever slapped, there's no
6 witness to that, right?

7 A That's correct.

8 Q And the same goes for that this happened in the
9 bedroom, right?

10 A He's the only one that says that. However, there
11 were State's witnesses who corroborated damage to the
12 door.

13 Q Okay.

14 A For the record I should say the bedroom door.

15 Q And you had said earlier that if it had been up to
16 you you would have put up no case.

17 A Yeah.

18 Q I just wanted to ask, is that so you would get the
19 final argument?

20 A Yes, sir.

21 Q So that was a strategic decision on your part
22 depending on how the case went.

23 A Yes, sir. I didn't think that with their own
24 witnesses they could prove murder, and thought if we gave
25 them more witnesses to cross examine then they'd have a

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1 better shot at doing that.

2 Q So at the end of the State's case, whose idea was it
3 to go ahead and put up some witnesses?

4 A It was Mr. Starks' with substantial urging from his
5 family.

6 Q And because of that you lost your opportunity for
7 last argument, right?

8 A Yes, sir.

9 MR. PETRANO: If I could have just one moment, Your
10 Honor.

11 (Break in proceedings.)

12 Q Oh, you had indicated a few moments ago that you
13 perhaps would have wanted an involuntary manslaughter, did
14 I write that down correctly -- an involuntary?

15 A Yes, sir. I believe the question was if you knew
16 that the judge was going to charge voluntary then wouldn't
17 you also like to have involuntary.

18 Q And what facts as you recall them -- and I know it's
19 been a number of years -- would support an involuntary?

20 A Well --

21 Q Just an imperfect self-defense?

22 A Well, I don't see that that was supported. I think
23 the argument was that it wasn't intended to kill him, it
24 was intended merely to repel him. But to me, that -- I
25 still don't think those facts fit involuntary.

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1 Q The two kind of overlap, though, right, the
2 self-defense and the I didn't mean to kill him?

3 A Yes.

4 Q Was there any evidence as far as you knew, and I'm
5 talking about beyond the record, discussing it with the
6 Applicant, was there any evidence in your mind of a
7 struggle over the knife?

8 A No, sir.

9 MR. PETRANO: Nothing further. Thank you.

10 THE COURT: Any redirect?

11 MR. THOMPSON: Just briefly, Your Honor.

12 REDIRECT EXAMINATION

13 BY MR. THOMPSON

14 Q Do you happen to know what the maximum punishment is
15 for involuntary manslaughter?

16 A No, I don't know.

17 Q If it was five years in prison, would that surprise
18 you?

19 A You know, that does actually sound right but I just
20 don't know as a matter of fact.

21 Q If you had the option between presenting something to
22 the jury -- if they had an option between the maximum
23 penalty of life, a maximum penalty of 30 and a maximum
24 penalty of five, would you want them to have the five
25 option?

TESTIMONY OF MICHAEL MCMULLEN

1 A Sure, yes.

2 MR. THOMPSON: Beg the Court's indulgence one moment.

3 (Break in proceedings.)

4 Q Mr. Petrano was asking you some questions about where
5 the actual incident occurred. When Ms. Shipley was
6 speculating during her closing arguments about how it
7 happened, didn't she also argue that the stabbing had
8 occurred in the bedroom?

9 A I'll have to look at it again.

10 Q Well, the record will reflect that.

11 MR. THOMPSON: I have no further questions, Your
12 Honor.

13 THE COURT: You may step down.

14 THE WITNESS: Thank you.

15 MR. PETRANO: Your Honor, could we just confer one
16 second?

17 THE COURT: Yes, sir.

18 (Break in proceedings.)

19 MR. PETRANO: Your Honor, may this witness be excused
20 from this subpoena?

21 MR. THOMPSON: No objection.

22 THE COURT: You may be excused. Thank you. You may
23 call your next witness.

24 MR. THOMPSON: Your Honor, the applicant would call
25 Dr. Theodore Favor.

TESTIMONY OF THEODORE FAVOR, M.D.

1 The witness, THEODORE FAVOR, M.D. was first duly
2 sworn and testified as follows:

3 THE COURT: Thank you. If you will have a seat and
4 state your full name, please.

5 THE WITNESS: My name is Theodore Tom Favor.

6 DIRECT EXAMINATION

7 BY MR. THOMPSON

8 Q Good afternoon, Dr. Favor, thank you for coming.
9 Could you tell the Judge a little bit about your
10 educational background and work experience?

11 A I went to college and got a B.S. in Biology at Furman
12 up in Greenville, and then I went from there up to the
13 Army for a few years, and then after that went to medical
14 school and graduated in 1985. And then I went to the
15 Boston area to do internship and residency training in
16 neurology.

17 Q And how have you been working the last 20, 25 years
18 or so?

19 A I've been a neurologist at the South Carolina
20 Neurological Clinic.

21 Q And have you been qualified as an expert in court in
22 the field of neurology before?

23 A Yes.

24 Q Approximately how many times?

25 A I guess 20 to 30.

TESTIMONY OF THEODORE FAVOR, M.D.

1 MR. THOMPSON: Your Honor, I'd like to proffer
2 Dr. Favor as an expert in neurology.

3 MR. PETRANO: No objection.

4 THE COURT: Then without objection I'll find him so
5 qualified.

6 Q How do you know the Applicant in this case,
7 Mr. Thaddeuss Starks?

8 A Mr. Starks was my patient for probably 18 years or
9 so, I guess, starting in about 1993.

10 Q And what were you treating him for?

11 A He was referred to me for treatment of a seizure
12 disorder.

13 Q And explain why was he diagnosed with a seizure
14 disorder.

15 A Well, he had seizures as a result of brain damage.

16 Q What was the brain damage caused by?

17 A He had a stroke while he was in the hospital after a
18 gunshot wound.

19 Q And did he have physical and mental damages as a
20 result of that stroke and those seizures?

21 A Yes. He had left side weakness and spasticity in
22 addition to his seizures.

23 Q And had you been treating the Applicant until right
24 up basically to the time of this trial?

25 A The time of the trial in 2007?

TESTIMONY OF THEODORE FAVOR, M.D.

1 Q Yes.

2 A Yes.

3 Q And just on average how often would you meet with the
4 Applicant?

5 A I think I met with him a total of about 14 times over
6 that many years so it averaged out to be about once a
7 year.

8 Q Now, had the -- had Mr. Starks' brain been damaged by
9 a stroke and subsequent seizures?

10 A Yes.

11 Q In what way?

12 A Well, his control over the left side of his body was
13 impaired, and he had significant difficulty with a
14 condition called spasticity in addition to the weakness
15 which caused him to move the left side in an unnatural
16 manner, in kind of a stiff manner. And he had subsequent
17 seizures as well as a result of the injury.

18 Q Now, would that brain injury impact his reaction time
19 in any way?

20 A Right. The reaction time would be abnormal based on
21 the area of the brain involved in the injury.

22 Q And would that injury affect his ability to react
23 quickly or would it affect his ability to reason quickly
24 or both or not?

25 A Both most likely. The area involved is the frontal

TESTIMONY OF THEODORE FAVOR, M.D.

1 lobe of the brain, and this is the part of the brain that
2 controls processing and decision making and how one might
3 respond to various types of circumstances.

4 Q Now, hypothetically speaking, if Thaddeuss was
5 attacked, would his -- would the damage to his brain
6 affect his ability to consider options quickly?

7 A Well, the damage to the brain is hard to quantify,
8 but you can pretty much be assured that processing or the
9 decision making apparatus would be hindered somewhat. And
10 so I would expect people with this type of damage to have
11 significant delay in being able to process correct
12 decisions quickly.

13 Q In terms of processing decisions quickly, would he
14 have the ability to -- I know it's hard to quantify, you
15 can't say with any degree of actual certainty -- but would
16 his reaction time, for example if he was attacked, say,
17 "Hang on, I need to stop this," or would he just react?

18 A That's the problem with the individuals with frontal
19 lobe damage, one might have kind of an act before you
20 think kind of response to a situation.

21 Q And you mentioned spasticity and weakness. What are
22 common physical problems associated with individuals who
23 have had the type of brain damage that Thaddeuss has
24 suffered from?

25 A Well, when they -- when they -- in terms of their

TESTIMONY OF THEODORE FAVOR, M.D.

1 physical attributes when somebody moves typically they
2 move the afflicted side, you know, what neurologists see
3 as a statistic manner. And what this refers to is the
4 fact that muscles that are generally acting in a smooth
5 coordinated manner tend not to do so and they tend to be
6 less coordinated and more jerky, and the spasticity can
7 influence say the ability to walk and stand and move that
8 side more than even the weakness causes trouble.

9 Q And just in general, how -- if you can physically
10 demonstrate for the Judge -- how does someone who is
11 spastic move on one side? Is it slow or is it jerky? How
12 is the movement?

13 A Would you like me to get down and show you how
14 someone might walk with the spasticity?

15 MR. PETRANO: Do we have a knife? Let's go all the
16 way, I mean, I wasn't being joking.

17 A I'm not going to hurt anybody. They took my knife at
18 the station.

19 MR. PETRANO: Just my point was no one is claiming he
20 can't walk, I just -- let's do a demonstration if that's
21 actually relevant.

22 MR. THOMPSON: I'm just trying to demonstrate what,
23 for example, Mr. Starks -- just a general physical
24 condition. I'm not asking Dr. Favor to recreate the
25 incident in any way.

TESTIMONY OF THEODORE FAVOR, M.D.

1 THE COURT: I understand.

2 MR. PETRANO: I object as to relevance.

3 THE COURT: I'll find it relevant.

4 Q Do you want to give the physical demonstration?

5 A Sure. So when someone has say spasticity to one side
6 or the other I'll assume for instance that I have left
7 sided brain damage and so the right side of my body might
8 be difficult to move. So that when for instance I would
9 normally exhibit just a movement like this, what happens
10 with spasticity is that this muscle -- in the normal
11 situation this muscle has to contract while this muscle is
12 relaxing.

13 Q And just for the record, what muscles are you
14 referring to?

15 A This is the flexion muscle of the arm called the
16 biceps and the relaxation muscle or the extension muscle
17 called the triceps. And so in order to have a smooth
18 fluid movement like this that just doesn't happen anymore
19 with somebody with this type of brain damage and we see
20 jerky kind of movement like this. We have medications to
21 help dampen the amplitude of those jerks but a lot of the
22 medication will also cause trouble with causation and so
23 forth, drowsiness and intellectual slowing. And so
24 somebody that is trying to say walk with spasticity might
25 actually have kind of a lurching kind of gate and if they

TESTIMONY OF THEODORE FAVOR, M.D.

1 were trying to move this arm, for instance, they might
2 have movements that are jerking like that.

3 MR. PETRANO: Thank you.

4 Q Now, did Thaddeuss exhibit symptoms of spasticity?

5 A Yes.

6 Q To what degree?

7 A The degree of spasticity over the years improved with
8 medication, so he had mild to moderate spasticity, there
9 are various grading scales. But typically one with this
10 degree of spasticity can walk and can do basic movements
11 with his extremity, although more difficult than the
12 normal person.

13 Q And you testified earlier and you testified at trial,
14 for example, that regarding Thaddeuss' strength, is his
15 strength weaker on his left side than it is on his right
16 side?

17 A Correct.

18 Q To what degree if you can quantify it?

19 A We have various grade scales for strength testing.
20 In his case he would have a scale of one to five, five
21 being normal, he would have a grade of four.

22 Q On his left side?

23 A On his left side.

24 Q And on his right side is --

25 A On his right side he would have a five of five.

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1 Q Now, does spasticity to a certain degree affect
2 someone's sense of balance?

3 A In order for the human body to move normally you
4 really need both halves to be working in concert and in
5 unison.

6 Q And so you described the lurching motion earlier.

7 A Yeah.

8 Q Is that basically the way to compensate for the
9 spasticity so you don't have to move that leg as much?

10 A I guess it is a kind of compensation in that regard,
11 yes.

12 Q To someone who is not consistent with spasticity,
13 does that affect how quickly they can move with that side?

14 A Yes.

15 Q And just hypothetically speaking, I'm not trying to
16 do a demonstration here, but just hypothetically speaking
17 if someone with say Thaddeuss' degree of spasticity were
18 to punch forward, would his spasticity affect I guess
19 whether the blow was harder or softer? Could it affect?

20 A Yes, sir, it could.

21 Q In what way?

22 A Well, it could cause the blow that was otherwise of a
23 certain magnitude to be less than its magnitude. Also, it
24 could cause the blow to strike off target as opposed to
25 the intended target.

TESTIMONY OF THEODORE FAVOR, M.D.

1 Q Could it cause it to become a stronger blow?

2 A I suppose that's possible.

3 Q Would that be consistent -- you know, I guess across
4 the board -- like for example, if Thaddeuss were lying
5 down and trying to make an action with his arm, could the
6 spasticity affect the degree in which he's acting with his
7 arm?

8 A The spasticity wouldn't necessarily covet any
9 particular position, so yes, that would apply to all
10 positions.

11 Q Now, did you testify at the trial in this case?

12 A Yes.

13 Q To the best of your recollection was -- did
14 Mr. McMullen, or Ms. Shipley for that matter, ask you many
15 of the same questions I just asked you at the trial?

16 A I don't recall the particulars, but I don't recall
17 too many of these types of questions.

18 Q To the best of your recollection, what was
19 Mr. McMullen's primary focus in asking you questions at
20 the trial? Was he concerned about strength? Was he
21 concerned about spasticity? Was he concerned about brain
22 damage? What did he ask you about?

23 A I don't really recall too many things except about
24 strength. I think he had me examine Mr. Starks in front
25 of kind of like how I just demonstrated.

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- 1 Q And you just testified that while Thaddeuss is weaker
2 on his left side he's not like debilitated on his left
3 side or anything like that, he does have strength, doesn't
4 he?
- 5 A Correct.
- 6 Q Now, how did you become involved in this case?
- 7 A Mr. McMullen called me.
- 8 Q And was Mr. McMullen asking you similar questions
9 like what he asked you about at trial regarding Thaddeuss'
10 strength?
- 11 A Pretty close, I guess.
- 12 Q How many times would you say you talked to
13 Mr. McMullen before you came to court to testify?
- 14 A I think twice.
- 15 Q And were there any in-person meetings or were they on
16 the telephone?
- 17 A I think they were on the telephone.
- 18 Q And how long would you say you talked to Mr. McMullen
19 prior to the trial?
- 20 A I'd say no more than 15 minutes.
- 21 Q Now, when did you finally get to meet Mr. McMullen?
- 22 A A few minutes before the trial.
- 23 Q Did you want to meet with Mr. McMullen prior to the
24 trial and go over the testimony before you actually
25 testified?

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1 A Yes.

2 Q Were you told that you were going to have that
3 opportunity?

4 A Well, I think that the -- we were planning on meeting
5 and then something happened, and the next thing basically
6 that I heard was that he was going to meet me about a half
7 an hour before the trial to go over some of the items that
8 he wanted to cover. But basically the doors were opening
9 and he came up to me and said, "Let's go in."

10 Q So did you have an opportunity to talk to him very
11 much before trial?

12 A No.

13 Q What did you think you were going to be testifying to
14 when you came to court?

15 A Well, I basically didn't think of myself as being on
16 the defense team or anything like that. I thought I was
17 kind of there as a -- kind of a friend of the court and
18 for that matter I thought I was going to be helping the
19 prosecution in terms of their understanding of what
20 Mr. Starks' limitations were and so forth so that justice
21 could be served. So I kind of had this I guess maybe TV
22 show idea of what I was supposed to be doing.

23 Q And did you believe the primary focus, obviously as a
24 neurologist, of your testimony was going to be of
25 Thaddeuss' mental disability?

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1 A I thought it was really going to be restricted to the
2 brain and the rest of the nervous system and how it might
3 affect his ability to respond and move and so forth.

4 Q And again, were the primary questions almost
5 exclusively about strength?

6 A Well, part of the trial itself that I remember the
7 best was having to read the documents that had nothing
8 pertaining to my specialty which was all about entry
9 wounds and exit wounds which was the gunshot wound.

10 Q Now, were you present for Mr. McMullen's testimony
11 earlier?

12 A Yes.

13 Q Do you recall him testifying about how he couldn't
14 meet with you because he didn't have the money to pay you?
15 Is that accurate to the best of your recollection? Were
16 you refusing to meet with him because he didn't have the
17 money to pay you up front?

18 A I don't think that I knew that there was any issue
19 about money. We basically discussed a fee that we
20 typically charged, and basically the -- I think the -- I
21 guess the -- I guess before we went into the courtroom he
22 said there had been some problem that but that he had
23 brought a check. I didn't really know anymore about
24 whether it was anybody's money in particular, I didn't
25 know who was behind that, or perhaps I thought maybe it

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1 was and even a pro bono case that he was taking, so I
2 didn't know who was paying the money.

3 Q Would you have refused to meet with him if he was --
4 would you have refused to meet with him in person prior to
5 trial if he didn't have the money to pay you right at the
6 time of that meeting?

7 A No.

8 Q Now, do you recall the solicitor asking you, I guess,
9 numerous questions about who would -- who would
10 essentially win in a fight between Mr. Starks and his
11 stepfather?

12 A Yes.

13 Q What were you thinking when you were being asked
14 those questions?

15 A Well, I was trying to be helpful and I was trying to
16 be honest, and basically I answered the questions as
17 truthful as I could. The fact of the matter is that the
18 bigger guy usually does win. But, you know, the fact is
19 if I had been smart and knowing how to answer a trick
20 question I would have said, well, this is what the Bible
21 is all about, David and Goliath, sometimes the little guy
22 does win.

23 Q And after the solicitor was asking you these
24 questions did Mr. McMullen get up and ask you anymore
25 questions?

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1 A I don't believe so.

2 Q Just in -- just -- and what did the solicitor -- what
3 were the aspects that the solicitor asked you to take into
4 account? Was it just physical size?

5 A I guess that was about it.

6 Q Is just size the only thing to take into account when
7 talking about, you know, hypothetically who would win in a
8 fight?

9 A Well, obviously not, I think that most of us know
10 that's not true. But, you know, as far as whether or not
11 somebody would bet that way or not is a different story.
12 The fact is I really should have told her I wasn't a fight
13 handicapper and I should have refused to answer that
14 question.

15 Q But regardless, defense counsel didn't get up and ask
16 you any questions about that.

17 A No.

18 MR. THOMPSON: Beg the Court's indulgence one moment,
19 Your Honor.

20 (Break in proceedings.)

21 Q Was Mr. Starks prescribed any medication to help with
22 his seizures?

23 A Yes.

24 Q What kind of medication?

25 A He was prescribed Dilantin.

TESTIMONY OF THEODORE FAVOR, M.D.

1 Q Does -- what are some common side effects of
2 Dilantin?

3 A Drowsiness, difficulty with coordination, tingling
4 and numbness, double vision, depending on if, you know,
5 the person is taking the right amount or too much or too
6 little. If someone is not taking enough, of course,
7 seizures could go unchecked.

8 Q And you said coordination. How would it affect
9 coordination?

10 A There's a fairly unusual side effect that it can
11 cause significant amounts of cerebellar degeneration, I've
12 only seen that a few times. But it can cause neuropathy
13 that can affect coordination.

14 Q So if you know it's someone whose got Thaddeuss'
15 physical disability, could Dilantin exacerbate those,
16 difficulty with coordination? Could it affect his -- for
17 lack of a better term, his balance, as well?

18 A It could. You know, we try to find medication that
19 doesn't have any side effects but it's not always easy.

20 MR. THOMPSON: Beg the Court's indulgence.

21 (Break in proceedings.)

22 MR. THOMPSON: No further questions of this witness,
23 Your Honor.

24 THE COURT: Any cross?

25 CROSS EXAMINATION

TESTIMONY OF THEODORE FAVOR, M.D.

1 BY MR. PETRANO

2 Q Did the Applicant himself complain to you of any side
3 effects from those medications specifically?

4 A At what point? Over the years?

5 Q At any point.

6 A Yes.

7 Q And so you would correct his medications along the
8 way?

9 A Yes.

10 Q And so what specific side effects was he complaining
11 of that you couldn't get rid of that he would be
12 experiencing in the end?

13 A In 2007? I don't know that he was complaining of any
14 side effects at that time.

15 Q You said that you had testified as an expert in
16 neurology about 20 times give or take?

17 A Many more than that. I've been in practice for about
18 22 years and I've probably been in depositions and
19 courtrooms about 20 or 30 times maybe.

20 Q And I'm not trying to be difficult but that's pretty
21 much the same answer at the time of the trial, back in
22 '07?

23 A Probably.

24 Q That's all I wanted to check. Thank you. Typically,
25 though, are you for the prosecution or the defense in

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1 criminal cases?

2 A I've never been in a criminal case before as far as I
3 know.

4 Q Oh, okay. The tests you said would indicate it was a
5 mild spastic, am I getting it right? Is that the right
6 term?

7 A Can you say that again?

8 Q You said it was a -- the question was what degree and
9 I think you side mild?

10 A Yes.

11 Q How do you determine that? How is the test?

12 A It's a clinical assessment, in other words it's a
13 judgment call.

14 Q And that judgment call, is it based on any type of
15 diagnostic test or do you just ask him what he can and
16 can't do?

17 A Watch him doings things while you watch him moving an
18 so forth.

19 Q What kind of fail safes do you have knowledge of when
20 someone is faking it?

21 A Knowledge of what to look for when people are faking
22 it.

23 Q Was the Applicant on disability as far as you know?

24 A I don't know.

25 Q So you had never offered any type of paperwork to

TESTIMONY OF THEODORE FAVOR, M.D.

1 qualify him for disability whether state, local, federal
2 or anything like that?

3 A I don't recall.

4 Q Did you ever see any signs of him -- and I don't know
5 if malingerer is the correct term, but faking is.

6 A Probably.

7 Q And one of the questions was -- and I completely lost
8 my notes. I apologize. Give me one moment, sir.

9 (Break in proceedings.)

10 Q -- that if he was -- if he had made a strike or
11 intended to make a strike he might be off target or that
12 it would be less strength than he intended, and then the
13 followup question would be could it possibly be a stronger
14 blow than he intended and you said that would be possible;
15 is that right?

16 A Sure.

17 Q Would a stronger blow be possible, or would it be
18 probable based on his condition?

19 A No.

20 Q The probable outcome would be a lesser strike, right?

21 A No.

22 Q Which one?

23 A Either.

24 Q Okay. And you said that you thought you were going
25 to be doing a TV show type of appearance just in the

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1 interest of justice, I didn't quite catch all of that.

2 A Well, thank you for allowing me to participate in
3 that phraseology again. When I say that, no, I know I'm
4 not going to be on a TV show. The point is the -- I had
5 very little knowledge of what to expect, and so like
6 pretty much everybody else in the country who doesn't
7 frequent courtrooms, my information about courtrooms comes
8 from shows on television like Law and Order and so forth.
9 So I really was relying more on information like I had
10 seen on television to guide what I would expect as opposed
11 to any instruction from an attorney, so I hope that
12 answers your question. But I knew I wasn't going to make
13 a TV appearance.

14 Q And I didn't mean it like that but thank you so much
15 for clearing that up. What I was getting at is were you
16 doing that out of the goodness of your heart or did you
17 expect a fee?

18 A I expected a fee.

19 Q And how much was that fee?

20 A I believe it was -- let's see -- I think it was \$500.

21 Q And how much is your fee for today? Not just today,
22 but the whole PCR, any preparation for that?

23 A I think \$500.

24 Q And part of the 18 years of your treatment of the
25 Applicant, did any of that include physical therapy?

TESTIMONY OF THEODORE FAVOR, M.D.

1 A I don't recall.

2 Q So what's your treatment?

3 A Medication.

4 Q Okay.

5 THE COURT: Thank you.

6 MR. THOMPSON: Just briefly, Your Honor.

7 REDIRECT EXAMINATION

8 BY MR. THOMPSON

9 Q Were you qualified as an expert when you testified in
10 the trial of this case?

11 A I believe so.

12 Q And Mr. Petrano asked you about malingering and the
13 possibility that Mr. Starks might be faking his
14 disability. Was he in a wheelchair when he first -- after
15 the surgery?

16 A Yes.

17 Q Has his condition improved over time?

18 A Yes, it has.

19 Q And in all your meetings with the Applicant, did it
20 appear to you that he was just out and out faking it?

21 A Oh, no. But I think in order for a layman to
22 understand that physicians use the word malingering or
23 functional or things like that, we're referring to
24 psychological elements that can impact upon the total
25 picture. So we're not necessarily saying that somebody is

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1 trying to pull the wool over our eyes or fake us out or
2 anything like that, but they may have some psychological
3 factors that are causing some -- some lesser power out for
4 instance than they might be expected to have.

5 Q And Mr. Petrano asked you if he had -- if the
6 Applicant had mild spasticity. You actually diagnosed it
7 as mild to moderate spasticity?

8 A Okay.

9 Q Was that your testimony earlier, that it was mild to
10 moderate?

11 A I think mild to moderate, this is the kind of thing
12 that -- you know, spasticity kind of fluctuates from
13 day-to-day and have significant changes based on the
14 medication that we give, so you can't be real exact when
15 you're talking about degree. And so when I say mild to
16 moderate I'm including both mild as well as moderate.

17 MR. THOMPSON: I have no further questions. Thank
18 you.

19 THE COURT: You may step down. Thank you. Any
20 additional witnesses?

21 MR. THOMPSON: Your Honor, the Applicant would call
22 Latasha Starks.

23 The witness, LATASHA STARKS, was first duly sworn
24 and testified as follows:

25

TESTIMONY OF LATASHA STARKS

1 THE COURT: Thank you. If you have a seat and state
2 your full name, please.

3 THE WITNESS: Latasha Clinton Starks.

4 DIRECT EXAMINATION

5 BY MR. THOMPSON

6 Q You go by Ms. Starks, or Clinton-Starks?

7 A Either or.

8 Q I'll just simplify it and say Ms. Starks. How are
9 you doing this?

10 A I'm fine. Thank you.

11 Q What is your relationship to the applicant?

12 A That's my husband.

13 Q And were you married to him at the time of the trial?

14 A Yes.

15 Q Who hired the defense attorney, Mr. McMullen?

16 A I was the one who initially went and met with
17 Mr. McMullen.

18 Q And were you the one who paid his fee or did his
19 mother pay the fee?

20 A His mother.

21 Q Now, did you have regular meetings with defense
22 counsel leading up to the trial at all?

23 A I met with him several times.

24 Q And how much of the conversation was geared towards
25 preparing the case for trial?

TESTIMONY OF LATASHA STARKS

1 A We would discuss the -- what happened about the
2 trial, but like I said, I only met with him several times.

3 Q In these several meetings did you ever have any
4 conversations about you possibly testifying at trial?

5 A It may have been mentioned. It was never like,
6 "Well, you're actually going to be a witness."

7 Q What about the Applicant? Was he present for these
8 meetings?

9 A Yes.

10 Q And were there any discussions about Mr. Starks
11 having testified?

12 A No. Basically we would talk about the events that
13 happened that night.

14 Q Now, when you got to trial when did you know you were
15 going to have to testify?

16 A We came back from lunch and Mr. McMullen said to us
17 "I'm going to call you as witnesses." And he asked me to
18 go call my husband's cousin, Lakeisha, to come and be a
19 witness, so it was quite a shock.

20 Q Now, I believe he described it earlier as y'all
21 making the call, but did y'all ask him to call?

22 A No. He asked me to go call Lakeisha, I was the one
23 that called her.

24 Q As for you, did you say you wanted to get up and
25 testify?

TESTIMONY OF LATASHA STARKS

1 A No. I would have preferred not to.

2 Q And with regard to the rest of the family, who else
3 was present at this meeting when he said we needed to have
4 people testify?

5 A When we were sitting waiting for court to reconvene
6 and it was my mother-in-law and myself and we were
7 together and that's when he made the statement and asked
8 us -- told us he wanted us to testify.

9 Q So did Ms. Cleveland seem like she wanted to get up
10 and testify as well?

11 A Oh, I know she didn't want to do that.

12 Q And was Thaddeuss pushing Mr. McMullen to call people
13 as witnesses?

14 A No.

15 Q And you said you had to go call Keisha, am I
16 pronouncing it correctly?

17 A Yes.

18 Q Was she present at any meeting at any point in time
19 with Mr. McMullen?

20 A No. She met -- not that I can recall, no. She met
21 him when we were out waiting in the area.

22 Q And after you were done testifying and after
23 Ms. Cleveland and Ms. Tolliver were done testifying, what
24 was your -- I guess what was your impression of, for lack
25 of a better term, how prepared Mr. McMullen was to

TESTIMONY OF LATASHA STARKS

1 question you?

2 A It just seemed as though it was a last minute thing,
3 it was something he decided at the last minute, "Well, I'm
4 just going to call them up." None of us was -- none of us
5 were prepared for that. Lakeisha was at home, you know,
6 we were here, we just were not prepared for that.

7 Q And was your husband out on bond at the time of
8 trial?

9 A Yes.

10 Q So you weren't -- were you able to talk to him, you
11 know, after court and things of that nature?

12 A Yes.

13 Q What did y'all tell him about testifying, about his
14 testifying?

15 A Well, we just discussed that Mr. McMullen hadn't
16 prepared us, he hadn't prepared him. Because basically
17 when they met they would just discuss, you know, the
18 things that happened, but it wasn't never preparing him to
19 testify or preparing any of us to testify.

20 Q And so it was y'all's advice to Thaddeuss based on
21 the lack of Mr. McMullen's preparedness that he shouldn't
22 testify?

23 A Yes. Well, he didn't feel comfortable testifying as
24 well because he knew -- he knew that Mr. McMullen hadn't
25 prepared him for testimony.

TESTIMONY OF LATASHA STARKS

1 Q And this was the night after -- this was -- I guess,
2 was this conversation occurring the night after y'all --

3 A Yes.

4 Q -- testified?

5 A Yes.

6 Q Was that before Dr. Favor had testified?

7 A I believe this was after, because I believe we all
8 testified that same day.

9 Q Now, after the trial was over and Thaddeuss was
10 convicted, did you and Thaddeuss have any discussions
11 about an appeal?

12 A Yes.

13 Q And what did those conversations entail?

14 A Well, I told him that immediately after everything
15 was over, my mother-in-law and myself, we went back to
16 Mr. McMullen's office right across the street and we were
17 asking him questions about an appeal and he told us that
18 an appeal would run about \$20,000 and we had -- I know it
19 was less than two weeks, I don't remember the exact amount
20 of days we had to file it. And he just knew -- He said,
21 "The transcript would cost about \$1,000 to get." He just
22 knew we didn't have that kind of money to do that so that
23 pretty much shut the door on us for any appeal.

24 Q Was it at Thaddeuss' insistence that you wanted to go
25 talk to him?

TESTIMONY OF LATASHA STARKS

1 A We just went to talk to him because we didn't get to
2 talk to him after the verdict and everything, so we just
3 went over there to talk to him to see what was the next
4 step.

5 Q Did Mr. McMullen tell you, "I could file the appeal
6 and have appellate defense represent him?"

7 A No, I never heard that. He told us it would cost
8 about an average of \$20,000 for an appeal.

9 MR. THOMPSON: No further questions, Your Honor.

10 CROSS EXAMINATION

11 BY MR. PETRANO

12 Q What sorts of income does the Applicant have?

13 A Now or at the time?

14 Q Both.

15 A At that time he was working for the Nestle
16 Corporation.

17 Q Okay. And what about now?

18 A Through my mother-in-law and myself.

19 Q He doesn't get any disability or anything?

20 A No.

21 Q And what did you mean by you weren't prepared to
22 testify or he didn't prepare you?

23 A I mean, it was never said like days before or weeks
24 before, "I'm going to call you as a witness, these are
25 some things you might be maybe asked," or anything like

TESTIMONY OF THADDEUSS STARKS

1 that.

2 MR. PETRANO: Nothing further. Thanks.

3 MR. THOMPSON: No further questions, Your Honor.

4 THE COURT: You may step down. You may call your
5 next witness.

6 MR. THOMPSON: Your Honor, the Applicant would call
7 Mr. Thaddeuss Starks as his own witness.

8 The witness, THADDEUSS STARKS, was first duly sworn
9 and testified as follows:

10 THE COURT: Thank you. Have a seat and state your
11 full name, please.

12 THE WITNESS: Thaddeuss McDeal Starks.

13 THE COURT: Yes, sir.

14 DIRECT EXAMINATION.

15 BY MR. THOMPSON

16 Q How are you doing this afternoon, Mr. Starks?

17 A I'm doing all right.

18 Q In my conversations with you, you've -- by your size,
19 your relatively soft spoken. I ask that you speak up and
20 speak clearly today, the nice lady sitting down has to
21 take down everything you have to say and the Judge has to
22 understand everything that you say in order to properly
23 rule on your allegations here today.

24 A Okay.

25 Q And if you've got any questions or anything like that

TESTIMONY OF THADDEUSS STARKS

- 1 just ask me to rephrase the question.
- 2 A All right.
- 3 Q Was defense counsel, Mr. McMullen, appointed or
- 4 retained in this case?
- 5 A He was --
- 6 Q Did y'all hire him?
- 7 A Yeah. We hired him, yes, sir.
- 8 Q And were you paying the fee or was your mom paying
- 9 the fee?
- 10 A Well, me and my mom.
- 11 Q And how many times would you say you met with
- 12 Mr. McMullen prior to trial?
- 13 A I'd say about seven.
- 14 Q And how -- I guess how long after you hired him did
- 15 you go to trial?
- 16 A About four or five months, something like that.
- 17 Q Now, in preparing for trial, did you and Mr. McMullen
- 18 have any discussions about your testimony before trial?
- 19 A He didn't want me to -- he didn't want me to testify.
- 20 Q And was that basically consistent throughout the
- 21 course of your meetings with him?
- 22 A Yes, sir.
- 23 Q When did that advice change?
- 24 A After he lost the directed verdict.
- 25 Q At the trial?

TESTIMONY OF THADDEUSS STARKS

1 A Yes, sir.

2 Q What was he telling you right before that? Was he
3 telling you don't worry?

4 A "Don't worry, we got it, we got the case won," and
5 there wasn't no problem.

6 Q Now, after your family members testified there was an
7 overnight recess, but before Dr. Favor was going to
8 testify the following morning, did you and defense counsel
9 have a discussion that night about your testimony the
10 following day if you were going to testify?

11 A No, sir.

12 Q Did you meet with him at all?

13 A No, sir. You're talking before Dr. Favor?

14 Q The night before Dr. Favor testified.

15 A No, sir.

16 Q Did you bring a copy of the transcript up there with
17 you?

18 A No, sir, it's there.

19 MR. THOMPSON: May I approach, Your Honor?

20 THE COURT: Yes, sir.

21 Q Now, on page 606 -- 608, lines two through four,
22 Mr. McMullen: "Over the evening break and sometime this
23 morning we discussed at length what his testimony,"
24 referring to you, "would be and whether he wanted to
25 testify or not." Do you recall that conversation that

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1 he's referring to there?

2 A What page was that again?

3 Q 608.

4 A The question again?

5 Q Mr. McMullen says, "Over the evening break and
6 sometime this morning we discussed at length what his
7 testimony would be and whether he wanted to testify or
8 not." Do you recall him telling the judge that?

9 A Yeah. Well, he told me that because it's in the
10 statement but I don't remember him saying that to me.

11 Q Do you remember having those conversations with
12 Mr. McMullen?

13 A No, sir.

14 Q Now, you said after the directed verdict motion was
15 lost he said, "You're going to need to testify. You're
16 going to need to testify." Is that accurate?

17 A Yes, sir.

18 Q And obviously if you were going to testify, would you
19 be the last witness, do you know?

20 A Probably would.

21 Q Presumably?

22 A Yes, sir.

23 Q Obviously you were in the courtroom, did you see
24 Mr. McMullen examine your family members at the trial?

25 MR. PETRANO: Your Honor, these have all been leading

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1 yes/no questions, I can't tell whose testifying, Your
2 Honor.

3 THE COURT: Rephrase the question.

4 Q Were you at the trial?

5 A Yes, sir.

6 Q Were you present when your witnesses testified?

7 A Yes, sir.

8 Q Who was examining those witnesses?

9 A Yes, sir.

10 Q Who?

11 A McMillan (sic.)

12 Q What were you thinking as he was examining them?

13 A Why is he doing it because he had -- I mean, they
14 wasn't prepared.

15 Q Did that -- did that lack of preparation have, I
16 guess -- why did you not want to testify?

17 A Well, back at the office he told me that he wouldn't
18 want me to testify because I had been shot and -- I had
19 been shot and that would bring up a whole nother incident.
20 So he didn't want me to testify because of that reason and
21 that would make me look bad in front of the jury.

22 Q And that advice changed?

23 A It changed when he lost the directed verdict.

24 Q Were you concerned at all about the lack of
25 preparedness to testify?

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1 A Yes, I was, yes.

2 Q Were you concerned about your witnesses who had
3 already testified?

4 A Yes, sir.

5 Q Were you at all concerned that that lack of
6 preparation that you had seen with your witnesses would
7 impact your testimony?

8 A Yes.

9 Q Now, did -- what did defense counsel tell you about
10 testifying? Why did he want you to testify?

11 A I mean, he wanted me to testify at the last minute, I
12 really don't know why. I mean, he had already told me
13 from the beginning that I didn't need to testify, he
14 changed, I didn't change, and then, you know. So that's
15 my aunt, that's my mom, you know, that's my stepfather for
16 36 years, I mean, I loved him just like they did, you know
17 what I'm saying? The family was hurt.

18 Q And you gave a very long statement to the Judge
19 during sentencing, did you not?

20 A Yes, sir.

21 Q And during that -- during that statement, did you
22 explain that you were concerned about the impact of your
23 potential testimony on your family members?

24 A Yes, sir.

25 Q Did Mr. McMullen explain to you that the family

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1 members had already all testified?

2 A Yes.

3 Q Did he -- did you express that concern to him, that
4 you were concerned that you would put your family members
5 through that?

6 A Right.

7 Q What did he tell you in response to that?

8 A I mean, at the time he was like he had to pull out
9 some more artillery because he didn't have nothing else,
10 he came with an unloaded gun.

11 Q But did you express a concern to him that you'd be
12 putting your family through I guess additional trauma by
13 testifying?

14 A I did.

15 Q Did he say anything to you about, you know, they've
16 already all testified? Did he say anything like that to
17 you?

18 A Yes.

19 Q Did he explain to you that the only true way to get
20 your full story out was to testify yourself?

21 A Yeah. He said that but he didn't say it in that
22 sense. I mean, I'm not -- I'm not the brightest apple on
23 the tree because I had strokes and stuff like that, but if
24 he told me I had a chance of getting self-defense point
25 blank if I get on the stand I would have gotten on the

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1 stand.

2 Q So if he had explained to you -- if I'm understanding
3 it correctly -- if he had explained to you that the best
4 way to get your side of the story, to get self-defense out
5 there in front of the jury was for you to testify, would
6 you have made a decision to testify?

7 A I would have.

8 Q Now, on the night of the incident, did you and your
9 stepfather get into an argument?

10 A Yes, sir.

11 Q Why?

12 A He -- he was mad because I was there and he didn't
13 want me there. I mean, he didn't want me there.

14 Q And did anybody call the police?

15 A Yes, sir, he called the police.

16 Q What did the police do?

17 A The police tried to explain to him that he would have
18 to go through various paperwork to get me evicted because
19 I had clothes in the house and I was -- I was -- I had the
20 right to be there.

21 Q Why did you have the right to be there?

22 A Because my mom owns the house and the land.

23 Q And had she given you permission to be there?

24 A Yes, sir.

25 Q Now, did the police eventually leave?

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1 A Yes, they did.

2 Q Why did they leave?

3 A He left because he got a phone call to the house, and
4 it was my mom, my mom told him that, you know, I could --
5 I could stay, just go ahead and go on in the room and
6 told -- you know, he just talked to Al. And when he
7 talked to Al he took Al on the porch and they talked.

8 Q Who talked?

9 A The officer and the -- I mean, the officer and Al.

10 Q And did the officer confirm that you had a right to
11 be there?

12 A Yes, sir.

13 Q Is that why the police officer left?

14 A Yes, sir.

15 Q Did you speak to your mother?

16 A Yes. She called me after that on my cell phone in
17 the room.

18 Q And what was her advice to you?

19 A "Stay in your room until I get there."

20 Q So what did you do?

21 A I had already -- well, the time that he was on the
22 porch with -- the officer was on the porch with Al I went
23 and fixed me something to eat. So what I did, I went and
24 took everything out of the room and that's when my mom
25 called, she said, "Just stay there a minute."

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- 1 Q And what did you make yourself to eat?
- 2 A A sub sandwich.
- 3 Q What kind of bread did you use to make that sandwich?
- 4 A Hoagie bread.
- 5 Q Big long sub bread?
- 6 A Yes, sir.
- 7 Q How did you have to cut that bread to make a
- 8 sandwich?
- 9 A I had to use a large knife and use one hand because I
- 10 can't control my other hand so I had to press down on it.
- 11 If I use a small knife I kind of saw it and tear the bread
- 12 up.
- 13 Q So is that why you had to have such a large knife?
- 14 A Yes, sir.
- 15 Q And again, is that -- if -- if you were to try and
- 16 cut the bread, I guess, with a smaller knife using your
- 17 left hand, what would happen?
- 18 A It would tear up.
- 19 Q And where did you go after you made that sandwich?
- 20 A I went to my bedroom.
- 21 Q Did you hear your stepfather, you know, hooping and
- 22 hollering outside?
- 23 A Yes, sir.
- 24 Q What was he yelling about?
- 25 A Well, after that officer had left he was yelling

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1 about, "Oh, you're going to get out of here tonight,
2 you're going to leave here tonight." Then Tim came over
3 and they discussed -- he asked him -- I mean, he asked for
4 a gun, and --

5 Q When you say he, who is he?

6 A My stepfather.

7 MR. PETRANO: I'm going to object, it's hearsay.

8 MR. THOMPSON: Excited utterance, Your Honor.

9 THE COURT: Is all of this reflected in the record?

10 MR. THOMPSON: Yes, Your Honor.

11 MR. PETRANO: Yes, Your Honor.

12 THE COURT: Then I have the entire record.

13 MR. PETRANO: Who would be excited?

14 MR. THOMPSON: Mr. Clinton?

15 MR. PETRANO: According to whom?

16 MR. THOMPSON: Mr. Cornish.

17 THE COURT: I intend to read the transcript. If it's
18 in the transcript I don't need to hear it again.

19 Q Did you hear your stepfather asking for a gun?

20 A Yes, sir.

21 Q Did you hear Mr. Cornish say anything in response?

22 A No, sir.

23 Q Now, what happened after -- did you hear Mr. Cornish
24 leave?

25 A My room is on the front of the house and you can hear

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1 everything on the porch. Actually, they walked off
2 together so I just don't know which, you know.

3 Q Now, what happened after that? Did you stay in your
4 room?

5 A Yeah. I was on the phone with my wife the whole time
6 and she even heard it.

7 Q And did she testify at trial she heard Al ask for the
8 gun?

9 A Yes, sir.

10 Q Did you ever hear Al come back in the house?

11 A Yes, sir.

12 Q How long after that conversation was that?

13 A It was like I'd say 25, 30 minutes, something like
14 that.

15 Q And what was he doing when, you know, he came back in
16 the house?

17 A Throwing stuff around the house saying, "Oh, you're
18 going to get out of here, you're going to do this," you
19 know. That's when I think my mom called again and said,
20 "You know, Al, you know, Al." I mean, you know, it's a
21 normal thing, you know, for us -- it's not out of the
22 ordinary for him to be arguing, me an him to be arguing,
23 we always argue, you know what I'm saying? When he drinks
24 we always argue. It's the fact that I guess just because
25 I'm there you know what I'm saying? But I had been there

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1 two weeks, you know what I'm saying? I -- and I was -- at
2 the time I was getting unemployment, so his -- the case
3 was that I wasn't paying my way and my mom knew I was
4 going to give her something for the bills but I hadn't
5 been there but two weeks.

6 Q Now, what happened after you heard Al, your
7 stepfather, you know, banging around in the kitchen?

8 A Well, while Al was banging around in the kitchen, it
9 got quiet, I was thinking -- I told my wife, "Well, he
10 must be going to bed," you know, that's normally what he'd
11 do, he'd bang around and then he'd go to bed. All of the
12 sudden I'm laid back and watching TV and bam, the door
13 kicks in and I'm in shock and I try get up and he hit me.
14 When he hit me I went back down and I saw the plate and
15 stuff over there and I grabbed a knife.

16 Q And what did you do with the knife?

17 A I jugged him.

18 Q Jugged him?

19 A That's the comment I made -- I told 911 because I was
20 the first one to call 911.

21 Q And just describe for the record, what do you mean by
22 jugged him?

23 A I mean, just jug a person enough to get them off of
24 you, not stab them or try to kill them, just enough to get
25 them off of you, you know what I mean? I mean, Al works

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1 at -- he lifted 50-pound pistons all day, he's not an
2 impaired man, he was a very strong man. So trying to get
3 this man off of me is like struggling so I'm like I see
4 the knife and I jugged him.

5 Q Did you intend to kill him?

6 A No, sir. No, sir. That's my stepfather for 34 or 35
7 years, never meant to. That's the first time he ever hit
8 me, never meant to kill him.

9 Q How many times did you stab him?

10 A Once, one jug.

11 Q Do you recall where you stabbed him?

12 A Well, the paperwork says it was under his arm.

13 Q Were you off balance at all when all of this was
14 happening?

15 A Yes, sir, I was off balance. I was laying down
16 trying to get up. That's a problem with me, it's hard to
17 just get up, get up like that.

18 Q Did you intend for that knife to go even halfway in?

19 A No, sir.

20 Q And again, were you off balance when you struck him?

21 A No, sir.

22 Q Were you trying to lighten the blow when you did?

23 A Yes, sir. I mean, it wasn't meant to kill Al, it was
24 just meant to -- actually it was meant to like stab him
25 but he was coming, so, you know, that's what he does, you

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1 know.

2 Q Now, after you stabbed him what happened?

3 A He ran, he ran out the door. He ran out the room
4 door down the hallway and out the front door.

5 Q What did you do?

6 A Called 911.

7 Q Why --

8 A Called my wife.

9 Q Sorry?

10 A Called 911, then I called my wife and told my mom.

11 Actually she called back and I told her "I just cut Al."

12 And I walked -- as I was walking out I still had that

13 knife in my hand and I was looking for him and I just

14 threw it in the sink and then went outside. When I went

15 outside I saw him laying over there in the yard next door

16 and I walked over to see what was going on. So I walked

17 over there and Tim said, "Back up, man, what happened?" I

18 said, "Man, he kicked the door in and I jugged him." He

19 said, "Just back up, back up. Don't mess with him no

20 more." I said, "I ain't trying to mess with him," I

21 walked back over to my yard. By that time, about five

22 minutes -- five minutes go by the Richland County

23 Sheriff's Department is standing in the yard. It wasn't

24 no -- like they got the whole case like we was fighting or

25 no -- there wasn't no fist fight. It's impossible for me

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1 to fist fight standing on two feet, you know what I'm
2 saying? I can't do that to a person, I can't fight. I
3 can't fight.

4 Q Why is that?

5 A I mean, I got nerve damage on one side. I had two
6 strokes. I done -- you know -- Al -- my wife could knock
7 me down, my mom done pushed me down. I mean, I'm like a
8 piece of paper as far as, you know, pushing me down and
9 stuff like that, that's easy. I would never fight a
10 person, you know, like that.

11 Q And just -- you said you had -- you said he was your
12 stepfather. How long did you live with your stepfather?

13 A I lived with my stepfather all my life ever since I
14 was like from one to what, 23. Well, I've been -- well, I
15 mean, because of the situation that I was the stepchild it
16 kind of like put a burden on the whole situation as far as
17 my mom and Al had that alcohol problem and his family kind
18 of rejected us, and it was like a whole twist and turn
19 between the whole thing. You know, regardless of, you
20 know, I still look at them as my uncles because I went to
21 go visit them and stuff like that. Still, I'm a child,
22 you know what I'm saying, at the time, but as I grew up,
23 you know, I thought it would get better but it didn't, you
24 know what I'm saying, it kind of like got worse.

25 Q How long did you live with your stepfather after you

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1 had the strokes?

2 A After I had my stroke I wasn't able to stay with my
3 stepfather, I stayed probably about a year. But my mom
4 had to buy me a trailer so I could live by myself but I
5 had to like take off myself because Al was giving me so
6 many problems about being at the house. At the time I
7 couldn't walk so I stayed at home until I could start
8 walking.

9 Q So was it any kind of secret, you know, as to the
10 disability that you had?

11 A No. It was 100 percent disability. I was
12 100 percent disability up until I started working at
13 Nestle. They found a job that I could do at the Nestle
14 Factory. For me -- Nestle -- I mean, Nestle is in
15 Gaffney, South Carolina. I was in Columbia and everybody
16 was saying, "Man, you killed your stepfather." I was in
17 Columbia and everybody was saying, "Man, you killed your
18 stepfather, you killed your stepfather." So when I found
19 the job on the internet I took the job and I had to get
20 away from that. I went to Gaffney, South Carolina and
21 actually lived. My wife lived in Holly Hill, I lived in
22 Gaffney, South Carolina, my mom lived in Columbia. I
23 mean, my life has been, you know, it's been like that
24 since, you know, just crazy man. I mean, if I could
25 switch out, I would have.

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1 Q Now, were you -- I believe Mr. Cornish testified at
2 trial that you came up in a threatening manner towards
3 your stepfather.

4 A Timothy Cornish?

5 Q Yes.

6 A Yeah. He said I was aggressive towards Al even
7 though he was already laying down.

8 Q Did you try to kick Al?

9 A No, I didn't.

10 Q Did you try to hurt your stepfather in any way?

11 A No, I didn't.

12 Q What were you trying to do?

13 A I was trying to see what was going on, was he okay.
14 When I came over there I had my Blue Tooth in my ear and
15 me and my wife was on the phone and I was walking over
16 there aggressive because he was down and I was like, "I
17 just called 911," and he sent his wife in the house to
18 call 911 and he told me to go back, you know what I'm
19 saying? And when I went back that's when the black and
20 white came up.

21 Q Did you give the police a hard time?

22 A No, sir.

23 Q Were you cooperative with them?

24 A Yes, sir.

25 Q Now, I believe that one of the officers testified

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1 that after you were told that your stepfather had died
2 that you were being charged with murder --

3 A Yeah.

4 Q -- that you grabbed him and broke down
5 uncontrollably. Was your reaction to -- was that your
6 reaction because you're stepfather had died or because you
7 were being charged with murder?

8 A No. It wasn't -- he told me at first that -- that my
9 stepfather died and that's when I grabbed his arm and he
10 said I almost pulled him in the car. That's where I
11 showed strength but it's strength with the right hand.
12 Everybody knows when you are handcuffed you have both
13 hands cuffed so he tried to make it sound like I was
14 strong in both arms. The doctor will tell you like one
15 side is stronger than the other, he tried to make a big
16 scene out of that. First he told me that Al was dead and
17 that's what happened, and he came back -- he came back a
18 few minutes later because I was upset and then he said --
19 told me that I would be charged with murder. That's when
20 he took me out of the car and I mean, he wanted me to sign
21 a statement. I was like -- "I mean, that's my stepfather,
22 I'm not signing a statement, I didn't intend to kill him."
23 You know what I'm saying? I didn't know -- for what it's
24 worth, man, this is an honest statement and I'm really
25 very touched by it and I'm still very touched by it even

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1 though it was a couple of years ago, I got my family on
2 both sides. Some people don't look at it like that but
3 it's like that, that's how I grew up. I grew up like
4 that.

5 Q Now, you were, of course, charged with murder.

6 A Yes, I was.

7 Q When you went to trial, would you have wanted your
8 attorney to ask for a charge of involuntary manslaughter?

9 A Yes, I would.

10 Q Why?

11 A I mean, I would have wanted to ask for it because
12 that's what it was, involuntary. I didn't mean to kill
13 him, it was unintentional, you know, I didn't intend to do
14 it.

15 Q Did he discuss requesting that at all with you?

16 A No. Actually me and my wife thought that I wasn't
17 going to jail for involuntary manslaughter. But when the
18 ballot came out and it said -- that said I was guilty,
19 guilty of voluntary manslaughter, I'm thinking it was
20 involuntary, but the whole time it was voluntary and, you
21 know, we was kind of lost in the trial.

22 Q And, of course, you know now that you were convicted
23 of voluntary manslaughter.

24 A Yes, sir.

25 Q Involuntary manslaughter wasn't submitted to the

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1 jury.

2 A Right.

3 Q Now, after the trial, after you had been convicted,
4 did you talk with Mr. McMullen at all about having an
5 appeal?

6 A They snatched me up and took me downstairs.

7 Q So he testified earlier that, you know, you said you
8 could do ten years. Did that conversation occur?

9 A No, sir.

10 Q So did you ever have discussions with defense counsel
11 about filing an appeal?

12 A No, sir.

13 Q Would you have wanted him to file an appeal?

14 A Yeah. I called my wife as soon as I got to the
15 county jail and asked, "Did you ask for an appeal?" And
16 they said, "Yes."

17 Q Now, you're currently doing a ten year sentence for
18 voluntary manslaughter; is that correct?

19 A Yes, sir.

20 Q I know we have gone over this lots of times but I've
21 just got to make sure it's clear on the record --

22 A Yes.

23 Q -- do you understand that you did not get the maximum
24 penalty for voluntary manslaughter, do you understand
25 that?

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1 A I do.

2 Q That voluntary manslaughter carries a range of
3 anywhere from two to 30 years in prison, do you understand
4 that?

5 A Right.

6 Q And that the State requested voluntary manslaughter
7 in this case based on the facts that they presented, do
8 you understand that?

9 A Yes, sir.

10 Q And that if they wanted to, they got that voluntary
11 manslaughter, they can re-prosecute you for voluntary
12 manslaughter if you win this proceeding here today.

13 A Yes, sir.

14 Q You understand that.

15 A Yes, sir.

16 Q And you understand a new solicitor, new judge,
17 they're not bound by whatever happened before and you
18 could be sentenced to a harder sentence than what you're
19 currently serving.

20 A Yes, sir.

21 Q Knowing all of that, do you still want to go forward
22 with this action here today?

23 A Yes, sir.

24 Q Okay. Now, I believe I've covered everything that we
25 discussed before the hearing but this is your one and only

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1 chance at a PCR application, this is your one and only
2 chance for you to tell the Judge what you believe went
3 wrong during the trial. If there's anything else you want
4 to tell Judge Lee, tell her now. Is there anything else
5 you want to tell her?

6 A Yes. I feel like I was abandoned by my lawyer. And
7 after he lost the directed verdict, I feel like I was
8 abandoned because all up until that point we had it -- he
9 was saying that it was go. And then after that he was
10 like telling my wife, telling my mom, telling Keisha that
11 they had to go up, and this was like immediately, like
12 they're sitting over here now and in trial, he could have
13 just called them up just like that. He said, "Y'all got
14 five minutes to get ready, we're going to call you up." I
15 wasn't happy with that. And I just feel like it would
16 have been a -- if things could have went -- the trial
17 would have went different if that didn't happen. I think
18 I would have had a better chance. I don't know. I
19 just -- I think that's about all I want to say. I'm kind
20 of nervous so I'm --

21 MR. THOMPSON: Please answer any questions
22 Mr. Petrano may have for you.

23 CROSS EXAMINATION

24 BY MR. PETRANO

25 Q You said just a moment ago you're willing to go back

1 and risk another voluntary manslaughter sentence, right?

2 A Yes, sir.

3 Q You want to get what's called a belated direct
4 appeal, though, too?

5 A What does that mean, belated?

6 Q That's one of your claims, you want an appeal, right?

7 A Right.

8 Q I'm going to be handling that so if I don't do
9 anything, if I forgot the deadline you're going to get a
10 new trial on murder.

11 A Okay.

12 Q Murder. That's a mandatory minimum of 30.

13 A Right.

14 Q You're okay with that?

15 A Yes, sir.

16 Q Okay. Thanks. I didn't mean to put it to you
17 harshly, I just wanted to make sure I had it right. What
18 did you do for Nestle?

19 A I would tote like -- pick up trays and put them in
20 the washer.

21 Q You weren't a driver or anything?

22 A No.

23 Q What did you pick up, just like --

24 A Trays are -- okay. Nestle makes like macaroni and
25 they make meatballs and stuff like that, all I had to do

1 was make sure the trays go inside the machine so they can
2 go down the row, I was the row operator. The trays were
3 like 20 pounds and I put them in, bam, it goes down the
4 line, that's what my job was.

5 Q You keep up with that assembly line, you keep them up
6 as they go along.

7 A Yeah, just put them in there.

8 Q Now, you had stabbed your stepdad before, right?

9 A No, sir.

10 Q You didn't?

11 A No, sir.

12 Q You're aware that other people think you did, right?

13 A (Shaking no.)

14 Q You don't think other people think you stabbed your
15 dad? Are you answering? You're just shaking your head.

16 THE COURT: You have to give a verbal answer yes or
17 no.

18 A No, sir, I didn't stab my stepfather.

19 Q Are you aware that other members of your family think
20 that you did?

21 A Yes, sir.

22 Q Okay. Could you tell us why they think that?

23 MR. THOMPSON: Objection, speculation.

24 MR. PETRANO: Withdrawn.

25 Q Were you concerned that that was going to be a

1 subject that was going to be brought up if you testified?

2 A No, sir.

3 Q And were you concerned -- I think you had just
4 testified a few minutes ago that you were concerned
5 about -- or you were told by your attorney that you being
6 shot was going to be a problem.

7 A Yes.

8 Q And basically you tried to run over a cop and they
9 shot you, right?

10 A Yes, sir. That's what -- that's what the paper says.

11 Q Okay. And were you concerned that if you testified
12 all your fraud charges and all of that stuff was going to
13 come out? You were actually on probation, right?

14 A Yes, sir.

15 Q I think you still are, right?

16 A No. I'm doing time for it.

17 Q So for the probation?

18 A Yes, sir.

19 Q They revoked that?

20 A They ran it concurrent.

21 Q Thank you for correcting me. Now, you thought he
22 went and got a gun, right?

23 A Yes, sir.

24 Q So you thought he had a gun?

25 A I don't know what he had.

1 Q You thought he might have had one?

2 A He might have had one.

3 Q So you were in fear of your life? I don't
4 understand. Did you think he had a gun?

5 A Yes.

6 Q Okay. When you stabbed him you thought he had a gun?

7 A I mean, yes. That's my reason for protecting myself.
8 Can I add something in?

9 Q Please. I'd love you to.

10 A About being arrested and shot the police, the person
11 sitting behind you made that statement to the newspaper
12 for me.

13 Q Okay. And no one witnessed the victim slap you,
14 right? It's just you and him, that was all that was in
15 the room, right?

16 A Yes, sir.

17 Q Now, you're saying now that you want to -- you would
18 have wanted to testify, right?

19 A Basically I'm -- I'm here because I've been -- I've
20 been doing time and I've been thinking about what's right
21 and what's wrong. I realize that I have a young child, I
22 have a three year old son that I also should have been
23 taking care of and I just came up with the fact that I'm
24 locked up for the wrong reasons. I mean, if I would have
25 gotten involuntary manslaughter I could have kind of like

1 suffered with that, but I got voluntary and that's on my
2 record, you know what I'm saying? It's like that's kind
3 of harsh, involuntary manslaughter, that's kind of harsh.

4 Q And you're saying --

5 A Involuntary. Excuse me.

6 Q I'm sorry, I didn't mean to speak over you. You're
7 saying that you stabbed him but you didn't mean to kill
8 him.

9 A Yes, sir.

10 MR. PETRANO: Nothing further.

11 MR. THOMPSON: Just briefly, Your Honor.

12 REDIRECT EXAMINATION.

13 BY MR. THOMPSON

14 Q You said just a second ago that there was somebody
15 behind Mr. Petrano who made the statement to the
16 newspaper?

17 A Yeah, when I got --

18 Q What are you referring to?

19 A When I got shot by a police officer I was on Two
20 Notch Road and my aunt made the -- she made the statement
21 to the police -- I mean, she made the statement to the
22 newspaper so they could put it in the paper.

23 Q What statement?

24 A The statement that -- I had the newspaper. But I
25 mean the clipping was that, you know, a 19 year old got

1 shot at the hotel and they didn't -- you know, I mean,
2 nobody put it in the paper, she went and put it in the
3 paper.

4 Q And what's the name of the person you're referring
5 to?

6 A Connie Caldwell.

7 Q Now, Mr. Petrano was asking you if, you know, about
8 your decision to testify and you said that you had been
9 thinking about it after the fact. If those things that
10 you had been thinking about after the fact, if they had
11 been explained to you by Mr. McMullen prior to the
12 decision to testify, would you have made the decision to
13 testify?

14 A Yes. If he would have told me that I had a chance of
15 getting -- I admitted to, you know, what I did, I admitted
16 to what I did. It wasn't no factor of that, you know, me
17 and my stepfather had an argument, it wasn't no factor
18 that he got jugged with a knife, it wasn't a factor of
19 that, it was a factor of how it happened. It happened by
20 he surprised me, he came in and it wasn't intentional, it
21 was -- meant to -- it wasn't meant for him to die, it was
22 meant for say --

23 Q Were you just trying to get him to back off?

24 A Right, you know what I'm saying? It wasn't supposed
25 to be like that. I mean, I didn't --

1 Q And Mr. Petrano asked you if you thought, you know,
2 that your stepfather had a gun. Did you think he had a
3 gun?

4 A I mean, definitely he could have because I heard the
5 conversation, yes.

6 Q Now, did you see any evidence of a gun?

7 A No, sir.

8 Q But you weren't trying to kill him, were you?

9 A No, sir.

10 Q You were just trying to repel the attack --

11 A Right.

12 Q -- that happened.

13 A Right.

14 MR. THOMPSON: No further questions, Your Honor.

15 THE COURT: You may step down. Let's take a break
16 and we'll come back.

17 (WHEREUPON, a short break was taken.)

18 MR. THOMPSON: Your Honor, the Applicant has no
19 further witnesses.

20 THE COURT: All right. Anything on behalf of the
21 State?

22 MR. PETRANO: Just by way of argument, Your Honor,
23 but I don't know which order you want to do that, might be
24 a pretty brief, a couple, three or four minutes maybe.

25 THE COURT: If you all can just put it on in an

1 order.

2 MR. PETRANO: Your Honor, if I could just get a
3 couple of things on the record, especially the amendment
4 that came last night regarding the self-defense charge.
5 But if Your Honor would rather I do it in an order, I
6 will, I'll stand down.

7 THE COURT: So there's another amended application or
8 you just amended verbally?

9 MR. THOMPSON: I amended it verbally. I sent an
10 e-mail to Mr. Petrano last night or yesterday afternoon --

11 MR. PETRANO: And we did talk about it.

12 MR. THOMPSON: -- and I asked if he had any issues
13 with my raising those issues here today and he said he did
14 not.

15 MR. PETRANO: I have no objection to it, I just
16 wanted to address that.

17 THE COURT: You can briefly state it but I really
18 don't want argument on it because you can preserve
19 whatever argument on the proposed order.

20 MR. PETRANO: Just very briefly, it's literally one
21 sentence. There's nothing wrong with shifting the burden
22 on self-defense, and that is Martin vs. Ohio. Even if our
23 state supreme court had not decided, I believe it is
24 Davis, that suggested that it may have been a burden
25 shifting, the supreme court on the argument, it's a

1 constitutional one, has said it is not. Thank you. I'll
2 put the rest in the form of a proposed order.

3 THE COURT: And we'll make those orders due on
4 April 2nd.

5 (End of proceedings.)

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1 I, the undersigned, Michael C. Watkins, Official
2 Court Reporter for the Sixth Judicial Circuit of the State
3 of South Carolina, do hereby certify that the foregoing is
4 a true, accurate and complete transcript of record of the
5 proceedings had and evidence introduced in the trial of
6 the captioned case, relative to appeal, in the Court of
7 Common Pleas for Richland County, South Carolina, on the
8 17th days of March, 2010.

9 I do further certify that I am neither of kin,
10 counsel, nor interest to any party hereto. This hearing
11 was reported by Karen Ambroziak, edited and proofed by
12 Michael C. Watkins.

13

14

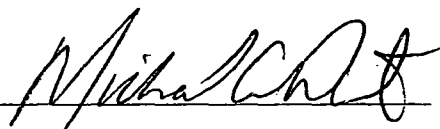
April 23, 2012.

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Michael C. Watkins
Court Reporter

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

THADDESS STARKS, #284256,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO.: 2008-CP-40-1439

ORDER

RICHLAND COUNTY
FILED
2011 SEP 23 AM 11:04
JENNIFER W. MOORE
CLERK C.P. & G.S.

This matter comes before the Court by way of an Application for Post-Conviction Relief filed on February 26, 2008, and an Amended Application filed on March 30, 2009. An evidentiary hearing was convened in this case on March 17, 2010. The Applicant was present and was represented by Jeremy A. Thompson, Esquire. The State was represented by Brian T. Petrano, Assistant Attorney General.

PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Richland County Clerk of Court's orders of commitment. The Richland County Grand Jury indicted the Applicant at the January 24, 2007 term of General Sessions for Murder (07-GS-40-9503). On October 8-12, 2007, the Applicant proceeded to trial by jury. He was represented at trial by Michael D. McMullen, Esquire. At the conclusion of the trial, the jury found the Applicant guilty of the lesser-included offense of voluntary manslaughter. The Honorable G. Thomas Cooper, Jr. sentenced the Applicant to ten years imprisonment. The Applicant did not appeal his conviction or sentence.

ALLEGATIONS RAISED

In his Application for Post-Conviction Relief, the Applicant alleged that he is being held in custody unlawfully due to ineffective assistance of trial counsel and appellate counsel. He alleged generally that 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, were violated before, during, and after his trial.

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In an Amended Application for Post-Conviction Relief filed on March 30, 2009, the Applicant more narrowly defined his allegations in support of his claim that he received ineffective assistance of counsel. In the Amended Application, he alleged:

1. Defense counsel was ineffective for failing to properly advise the Applicant about the consequences of not testifying at trial;
2. Defense counsel was ineffective for failing to move for a mistrial during the State's examination of Dr. Theodore Faber;
3. Defense counsel was ineffective for failing to rehabilitate Dr. Faber's testimony;
4. Defense counsel was ineffective for failing to request a jury charge on the lesser-included offense of involuntary manslaughter;
5. Defense counsel was ineffective for failing to consult with the Applicant before requesting the lesser-included offense of voluntary manslaughter;
6. Defense counsel was ineffective for failing to file a Notice of Appeal for the Applicant following his conviction for voluntary manslaughter.

At the outset of the hearing in this case on March 17, 2010, the Applicant expressly withdrew allegation #5 and added additional allegations through the testimony of his witnesses. This Court accepts those allegations as additional amendments to his Application for Post-Conviction Relief made pursuant to the evidence adduced at the hearing. See Simpson v. Moore, 367 S.C. 587, 599, 627 S.E.2d 701, 708 (2006); Rule 15(b), SCRCP. At the evidentiary hearing, the Applicant specifically alleged:

7. Defense counsel was ineffective for failing to object to comments made by the State during closing argument which had been objected to and struck during the trial;
8. Defense counsel was ineffective for failing to object to burden-shifting portions of the self-defense charge to the jury;
9. Defense counsel was ineffective for failing to properly prepare Dr. Faber to testify at trial.

EVIDENCE BEFORE THE COURT

At the Post-Conviction Relief hearing, the Applicant presented testimony from defense counsel Michael D. McMullen, Esquire ("Trial Counsel"), his neurologist Dr. Theodore Faber, and his wife Natasha Clinton-Starks, as well as his own testimony. In addition to this testimony, this Court had before it a transcript of the trial, a copy of the records of the Richland County

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Clerk of Court regarding the subject convictions, and a copy of the Applicant's records with the South Carolina Department of Corrections.

RELEVANT FACTS FROM TRIAL

For the purpose of evaluating this action, this Court would note the following relevant facts. The Applicant was the victim's stepson. On October 12, 2006, the Applicant was living at his mother's home with the victim. That night, while his mother was away from the home working, the Applicant and the victim got into a verbal argument because the victim wanted the Applicant to leave. A Richland County Sheriff's Deputy was called to the scene where he noticed the victim was visibly drunk. Tr. p. 156. The deputy contacted the Applicant's mother, who told the deputy that the Applicant had a right to be at the home. Tr. p. 137. Deputy then informed the victim that he could not force the Applicant to leave the premises and he left the scene, leaving the Applicant and the victim alone. Tr. pp. 137-140.

However, the victim remained angry with the Applicant. While he was on the phone with his wife, the Applicant overheard the victim yelling for a gun from his next-door neighbor. Tr. p. 446. The Applicant called his mother and informed her of the situation; she told him to get out of the victim's way and go into his room. Tr. p. 466. The Applicant then went to his room after making a sandwich.

There is significant dispute as to what happened next. During an altercation at the home, the Applicant stabbed the victim once, puncturing his lung and mortally wounding him. The Applicant called 911 immediately after the stabbing and stated that the victim had broken into his room and that "he had to cut" the victim. Tr. pp. 510-511. The Applicant told Investigator Kevin Isenhoward the same rendition of the events, informing the investigator that the victim had broken into his bedroom, backhanded him, and that he had stabbed the victim in response. Tr. pp. 281-282. Investigator Ray Livingston confirmed that there had been significant damage to the frame of the Applicant's bedroom door. Tr. pp. 228-229. The 911 operator testified that the victim had called and indicated that Applicant had locked him in the room. Tr. pp. 515, 524.

During closing argument, the State argued that the Applicant had fought with the victim in the kitchen and that the victim had fled to the bedroom after the Applicant grabbed a knife. Tr. pp. 683-684. The State also argued that the Applicant had broken into his own bedroom and stabbed the victim. Tr. p. 685.

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At the time of the incident, the Applicant was significantly larger than the victim. However, the Applicant has been diagnosed with epilepsy, which stems from a stroke he suffered in 1992. The damage done to the Applicant by the stroke and subsequent seizures has caused him to have slower reaction times and a lack of balance and strength, primarily on the left side of his body.

The Applicant was charged with murder. Following the submission of the case to the jury, the jury deliberated for approximately ten hours. The jury returned a verdict of guilty for the lesser-included offense of voluntary manslaughter. While the Applicant did not testify at trial, he gave an extensive statement during sentencing in mitigation where he explained that "I didn't mean to stab him where he'd bleed to death or he'd die." Tr. pp. 749-753.

STANDARD OF REVIEW

The burden of proof is on the Applicant in a Post-Conviction Relief proceeding to prove the allegations raised in his Application and at the hearing on Post-Conviction Relief. Bell v. State, 321 S.C. 238, 467 S.E.2d 926 (1996); Rule 71.1(e), SCRPC. In evaluating an Application for Post-Conviction Relief, the moving party must demonstrate that trial counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668 (1984). In other words, the Applicant must show that but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.; Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability has been defined by our Supreme Court as a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007).

On the one hand, where trial counsel articulates a valid reason for employing certain trial strategies, such conduct should not be deemed ineffective assistance of trial counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). On the other hand, counsel may not explain away errors and omissions which acted to prejudice his client's ability to receive a fair trial simply by labeling them matters of trial strategy or tactics. In the case of Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002), the Supreme Court of South Carolina found that

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Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness. Where counsel articulates a strategy, it is measured against an objective standard of reasonableness.

(Emphasis in original) (Internal citations omitted).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. Further, this Court has had the opportunity to observe the witnesses presented at the hearing, assess their credibility and weigh the testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (Rev. 2003).

Trial Counsel testified that he was retained by the Applicant's family sometime around May 30, 2007. There was an offer to plea to voluntary manslaughter but the Applicant rejected that offer. Trial Counsel testified there were numerous discussions about whether the Applicant should testify at the trial. Trial Counsel really wanted more time with his client who was out on bond, but Applicant did not show up for several of their meetings including one scheduled the day before the trial. Trial Counsel initially did not want the Applicant to testify because he did not want to introduce any evidence and lose his right to have the last argument before the jury. Trial Counsel wanted to remain flexible about whether to present testimony and evidence; some of the State's witnesses were the defense's best witnesses. There was a concern if the Applicant testified the State would be able to bring up his prior criminal record which included a conviction for federal securities fraud; that he allegedly stabbed the victim previously; that he washed off the knife; and some specifics about whether the stabbing occurred in the kitchen or the bedroom. The only evidence that the victim ever slapped the Applicant came from the Applicant himself. Trial Counsel explained that the Applicant also did not want to testify because he was afraid of the Solicitors. Tr. p. 745¹.

Trial Counsel talked with Dr. Faber at the Applicant's suggestion. The family would not pay the expert fee and Trial Counsel paid Dr. Faber out of his own pocket; therefore, his abilities

¹ Trial Counsel told the Court during sentencing that "[Applicant], against my advice, chose not to testify. I think he was sincerely afraid of the cross-examination he would have to undergo. Another factor, though, is he knew that if he took the stand I was going to ask him to testify about the prior difficulties between the parties. He told me his family had been through enough, and he wasn't going to let me ask him those kinds of questions." Tr. p. 745.

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to discuss issues extensively with the doctor were limited. He met with Dr. Faber prior to his testimony. They also talked on the phone. Trial Counsel explained the Applicant and his family "insisted" that he call the witnesses to testify. They knew ahead of time they were going to testify. Trial Counsel's strategy did not consider the order of the defense witnesses. Trial Counsel had difficulty in speaking with witness Tolliver prior to the trial because she was a college basketball player with a demanding schedule. He did not coach Tolliver not to mention that the Applicant had been shot in the past. Previously, the Applicant had been shot and suffered a stroke which explained some of his neurological problems. Trial Counsel was undecided whether this information should be admitted into evidence.

Trial Counsel explained that the only real theory of the case was self-defense. The disparity in size between the Applicant, who was larger in size and weight, and the victim was an issue affecting self-defense. That is the reason Trial Counsel sought to elicit testimony about Applicant's lack of balance and the use of his arm. Trial Counsel explained that although he wanted to get evidence of Applicant's lack of balance before the jury, there was also some evidence that the Applicant was lying in bed which would negate the balance issue.

Trial Counsel testified that he did not consider objecting to the Solicitor's prodding during Dr. Faber's testimony:

A. [Dr. Faber] I can't answer that as an expert. I would say that obviously the -- just from what I know about cutting things, if you have some weakness on one side, you're probably not going to be as effective in cutting things.

Q. [by Solicitor] Well, sir, this individual died. Apparently, it was effective.

A. I understand.

Tr. p. 603-604. The Court sustained the objection and struck the remark and instructed the jury to disregard the comment. When that same issue was discussed during closing argument he did not object because the Court only struck the Solicitor's comment not the testimony by the doctor. The Solicitor's statement was a fair comment for the closing argument. Trial Counsel did not re-examine Dr. Faber because he did want to risk that the doctor would repeat some of his testimony from cross-examination. Additionally, Trial Counsel did not think the doctor's testimony needed rehabilitation. Trial Counsel did not consider moving for a mistrial after the Solicitor's comment regarding who would win a bet regarding the winner in a fight between a 33

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year old man who is six feet tall and weighs 350 pounds against a 54 year old man who is approximately 5'7" to 5'9 and weighs 190 pounds. Trial Counsel explained that the size difference was obvious; the comment was just not prejudicial.

Trial Counsel explained that the State wanted a voluntary manslaughter charge. He believed the defense would be better off with just the murder charge. He did not think that the facts of the case supported an involuntary charge even though he was arguing self-defense. Trial Counsel explained that reading the jury charge from the transcript does not clearly explain who has the burden of proving/disproving self-defense and perhaps he should have asked for a better instruction.

Trial Counsel talked with the Applicant after the conviction. Applicant was content with the ten (10) year sentence for voluntary manslaughter. He told Trial Counsel, "I can do ten." Later, the family told him that the Applicant changed his mind and did want to appeal but that the Applicant never contacted him about it. Trial Counsel testified that he probably should have filed an appeal for him.

Dr. Faber, an expert in neurology, testified during the post-conviction relief hearing. Dr. Faber had been the Applicant's neurologist for about eighteen (18) years since he experienced a stroke after being shot in the head. Dr. Faber met with the Applicant about fourteen (14) times approximately once a year. His treatments were not physical therapy, he prescribed pharmaceuticals. As Dr. Faber explained it, the Applicant suffered damage to his frontal lobe and that his ability to make decisions could be abnormal, probably somewhat delayed. Applicant suffered impairment to his left side that manifested as weakness and seizures including spasticity and "jerky" motions. Dr. Faber also demonstrated the jerkiness to this Court. He discussed some of the side-effects of the medications Applicant was taking but towards the latter part of Applicant's treatment he made no complaints about side effects. Dr. Faber's diagnosis was not based on any diagnostic testing; he relied on Applicant's statements about his abilities and limitations. Applicant's spasticity level was mild and had improved considerably over the eighteen years of care. Dr. Faber did not completely discuss his testimony with Trial Counsel prior to the trial. The process of testifying was not as he expected because he had a preconceived television show type idea of what would occur.

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The Applicant presented testimony from Ms. Natasha Starks who also testified at the trial. Ms. Starks acknowledged she was on standby as a witness. Ms. Starks explained that they

had all discussed the events of the night in question. She and her family were asked to call one or more of the other witnesses to testify at trial but that it seemed to be "last minute". The family discussed the issue of an appeal with Trial Counsel but that they had not discussed the appeal with the Applicant prior to their meeting with Trial Counsel.

The Applicant testified that he and his family retained Trial Counsel. The Applicant explained that the case changed once the directed verdict motion was denied. The Applicant denied stabbing the victim in the past. He was concerned about Trial Counsel's lack of preparation. The Applicant was inconsistent in his testimony about wanting to testify at the trial. He explained it was normal for him and the victim (his step-father) to argue. The victim called the police to try and have Applicant "evicted" but that it was Applicant's mother's place and *she* did not want to evict him, the victim became enraged that he could not kick the Applicant out. Applicant's mother told him to stay in his room. Applicant made himself a hoagie and brought a large kitchen knife with him into his room in order to cut the hoagie. The victim was cooking food in the kitchen and yelling. The Applicant claimed that the victim came into his room and slapped his face. He thought the victim had a gun and he stabbed him with the kitchen knife. The Applicant never meant to kill the victim; he only meant to thrust the knife toward him to make him back up. The Applicant wanted an involuntary manslaughter charge. The Applicant never discussed appeal procedures with Trial Counsel and that he never told Trial Counsel he "could do ten years." The Applicant testified that he felt abandoned by his lawyer.

DISCUSSION

ISSUE 1: Failing to properly advise Applicant about the consequences of not testifying at trial.

The essential issue in this case is whether the Applicant intended to kill the victim, i.e. malice. The jury was properly instructed regarding voluntary manslaughter and they found the Applicant guilty of that lesser offense. This Court finds the testimony of Trial Counsel credible that the Applicant did not want to testify at trial. During the trial, the Court advised Applicant of his right to testify in the case. After the witnesses had been presented, Trial Counsel informed the court of the Applicant's decision not to testify. The Court then questioned Applicant about his decision. Tr. pp. 608-609. Applicant indicated that he was "tired of seeing my family go

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through it. So I have nothing to say.” Accordingly, this Court does not find the Applicant’s testimony credible in now claiming he wanted to testify.²

ISSUES 2, 3, 9: Dr. Faber’s Testimony

This Court does not find that the Applicant satisfied his burden of proof regarding Dr. Faber’s testimony and whether Trial Counsel was ineffective or that there is any prejudice. Dr. Faber testified that the Applicant could have miscalculated a thrust with his left side, that it could be more powerful or less powerful. There is no prejudice because there is no evidence to suggest that the Applicant was weak on his right side. The State argued throughout the trial that the Applicant is right handed and that there was no “weakness” on that side. The Applicant simply failed to satisfy his burden of proof that Trial Counsel was ineffective regarding the testimony of Dr. Faber or that there was any prejudice to the Applicant.

ISSUE 6: Failure to File a Notice of Appeal

If a criminal defendant did not knowingly, voluntarily, and intelligently waive his right to a direct appeal, he is entitled to a belated direct appeal. See White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974); Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986). Absent a valid waiver, if a criminal defendant is found guilty after a trial, defense counsel *must* file a Notice of Appeal for him. See In re Anonymous Member of the Bar, 303 S.C. 306, 400 S.E.2d 483 (1991).

In this case, Trial Counsel testified that he spoke with the Applicant briefly about filing an appeal after the trial, but that the Applicant expressed satisfaction with the ten year sentence he received. There is no evidence that Trial Counsel explained to the Applicant his appellate rights and what he would be waiving if he decided not to appeal. Furthermore, Trial Counsel testified that he was informed by the family that the Applicant wanted to appeal. He acknowledged that, at the time of the trial, he did not understand that he had an obligation to file a Notice of Appeal for the Applicant, but that he would have certainly done so had he realized he had such an obligation. The evidence is clear that the Applicant did not have a direct appeal.

Based upon the foregoing, this Court finds that there was no intelligent, voluntary, or knowing decision made by the Applicant upon competent advice by counsel to waive his right to a direct appeal. Defense counsel acknowledged that he should have filed an appeal on the

² While not addressed by the Applicant or Trial Counsel, there is obviously also the issue of his recorded conversations from the detention center regarding the stabbing and self-defense that the State intended to use to impeach the Applicant if he testified. Tr. 332-344, 408.

Applicant's behalf. Accordingly, this Court finds that the Applicant is entitled to a belated direct appeal. See White v. State, *supra*.

Applicant was adamant that he wanted to appeal but that Trial Counsel "abandoned" him. Trial Counsel testified credibly that he thought the Applicant was satisfied in that "he could do ten" years. However, Trial Counsel testified that he should have filed a notice of appeal following a conviction at trial without specific waiver. Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). Accordingly, the Applicant is entitled to a belated direct appeal pursuant to White v. State.

ISSUE 7: Solicitor's comments

Applicant asserts that Trial Counsel should have objected to the Solicitor's remarks during closing argument. As recited in the summary of testimony, the Solicitor made remarks during the testimony of Dr. Faber in which she was argumentative and editorializing. Trial Counsel objected to the comments which the Court sustained. The Court struck the comments and told the jury to disregard them. During the closing argument, the Solicitor repeated those comments. At that time, Trial Counsel did not object because he thought the comments were proper as argument to the jury. Trial Counsel gave a valid reason for not objecting and seeking a mistrial. The argument made by the Solicitor was reasonable in light of the evidence that was presented. Trial Counsel was not ineffective for failing to object.

ISSUES 4, 8: Jury Instruction

A. Failure to Request a Jury Charge on the Lesser-Included Offense of Involuntary Manslaughter

"Involuntary manslaughter is (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others." State v. Wharton, 381 S.C. 209, 216, 672 S.E.2d 786, 789 (2009). If there is any evidence supporting a charge of involuntary manslaughter, the trial court must give the charge. State v. Reese, 370 S.C. 31, 633 S.E.2d 898 (2006).

The Applicant alleges that Trial Counsel was ineffective for failing to request a jury charge on the lesser-included offense of involuntary manslaughter. The Applicant argues that had such a request been made, such a charge would have been given. Accordingly, the Applicant contends that he is entitled to a new trial. This Court disagrees.

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This Court finds that an involuntary manslaughter charge was not warranted on the facts of this case as presented at trial. Under the second definition of involuntary manslaughter, four elements must be shown: (1) the unintentional killing of another; (2) without malice; (3) while engaging in a lawful act; and (4) while acting in reckless disregard for the safety of others. This Court finds that the Applicant has met these elements.³

With regard to the first element, the testimony presented at the hearing was that the Applicant did not intend to kill the decedent, only to fend him off from attacking him. The State argues that an intentional act is sufficient to defeat a claim of involuntary manslaughter, this Court agrees. In State v. Crosby, 348 S.C. 387, 559 S.E.2d 352 (Ct. App. 2001), the Court of Appeals considered whether an involuntary manslaughter charge should have been given. Relying on the language of State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994), the Court stated:

The record here demonstrates that Smith acted intentionally in wielding the knife. When Evans grabbed Smith, Smith pulled the knife, a dangerous instrumentality, and stabbed at Evans. Just as in Craig [267 S.C. 262, 227 S.E.2d 306 (1976)], whether Smith intended to harm Evans is irrelevant. The stabbing is clearly not a lawful act, and the intentional use of a dangerous instrumentality does not support the allegation of mere criminal negligence.

348 S.C. at 397.

In this case, Applicant did more than just grab the knife for self-defense. He wielded the knife at the victim in an attempt to get him to back up. He testified at the PCR hearing that he "jigged" the victim. Thus, his action in thrusting the knife towards the victim was intentional even though the ultimate consequence of the action was unintentional. This is not the same as those cases in which the defendant picks up a weapon and it discharges accidentally. Applicant intentionally wielded the knife in a manner consistent with stabbing. Additionally, he intended to stab the victim, he just did not "mean to stab him where he'd bleed to death or he'd die." Trial Counsel's performance was not deficient in failing to request a jury charge on the lesser-included offense of involuntary manslaughter. Applicant is not entitled to a new trial on this basis.

³ Under the first definition of involuntary manslaughter, the criminal defendant must also meet four elements: (1) the unintentional killing of another; (2) without malice; (3) while engaged in an unlawful activity; (4) not normally tending to cause death or great bodily injury. The two definitions diverge after the second element. This Court finds that the Applicant would not have been entitled to a charge of involuntary manslaughter under the first definition because the act—stabbing the decedent—would normally cause death or great bodily injury.

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B. Failure to Object to the Jury Charge on Self-Defense

A defense attorney's failure to object to a burden-shifting jury charge constitutes ineffective assistance of counsel. Lowry v. State, 376 S.C. 499, 657 S.E.2d 760 (2008). A charge is burden-shifting if it relieves "the State's burden of proof on an element of the offense" or defense. Id. at 505, 657 S.E.2d at 764 (citing Francis v. Franklin, 471 U.S. 307, 314 (1985)). A reviewing court should examine the challenged charge in the context of the entire charge and not view the challenged charge in isolation. Id.

Under South Carolina law, once the defense of self-defense is raised, the State bears the burden of disproving self-defense beyond a reasonable doubt. State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998). "When self-defense is properly submitted to the jury, the defendant is entitled to a charge, if requested, that the State has the burden of disproving self-defense by proof beyond a reasonable doubt." State v. Addison, 343 S.C. 290, 294, 540 S.E.2d 449, 451 (2000).

The jury was given the following charge, which was mandated by Addison:

The State has the burden of disproving self-defense by proof beyond a reasonable doubt. If you have a reasonable doubt about the defendant's guilt after considering all of the evidence, including evidence of self-defense, then you must find the defendant not guilty.

On the other hand, if you have no reasonable doubt of the defendant's guilt after considering all of the evidence, including the evidence of self-defense, then you must find the defendant not guilty.

Tr. p. 708. The Applicant contends, however, that the remainder of the trial court's instruction on self-defense placed the burden of proof on him to establish self-defense, and that defense counsel was ineffective for failing to object to these portions of the charge. This Court disagrees.

Prior to the closing arguments the Court instructed the jury about the pending charge, the lesser included offense and the defense of self-defense. The Court stated, "Voluntary manslaughter has elements that the State has to prove beyond a reasonable doubt, and self-defense – in the case of self-defense, the State has to prove it was not self-defense beyond a reasonable doubt. The State has to prove that the defendant was not acting in self-defense when the death occurred..." Tr. p. 638.

The Applicant contends that counsel should have objected to an issue concerning the standard self-defense instruction as applied during his trial. His assertion about the instruction is

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without merit because it is inconsistent with substantive state law related to the defense of self-defense. In order to have a self-defense charge there must be some evidence of the elements of self-defense. That requires evidence that: (1) the defendant was without fault in bringing on the difficulty; (2) he was in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) a reasonably prudent person of ordinary firmness and courage would have entertained the same belief; and (4) he had no other probable means of avoiding the danger. State v. Bryant, 336 S.C. 340, 344-45, 520 S.E.2d 319, 321-22 (1999); State v. Rye, 375 S.C. 119, 124, 651 S.E.2d 321, 323 (2007). The trial judge's instructions stated the elements of self-defense and were a correct statement of the law. The Court did not instruct the jury that the defendant has to prove these elements. For all these reasons, the allegation must be denied.

ALL OTHER ALLEGATIONS

As to any and all other allegations presented at the evidentiary hearing convened in this case, this Court finds that there was insufficient evidence introduced to support granting the requested relief. Accordingly, those allegations are denied and dismissed.

CONCLUSION

This Application for Post-Conviction Relief is hereby **GRANTED IN PART**. The Applicant's conviction and sentence are vacated, and this matter is remanded to the Richland County Court of General Sessions for a new trial. In the event that the Respondent seeks to appeal this Order, this Court makes a separate finding that the Applicant did not knowingly and voluntarily waive his right to a direct appeal, and that he is entitled to seek a belated direct appeal pursuant to White v. State, *supra*. The Applicant is directed to the provisions of Rule 243, SCACR, in the event that the Respondent files an appeal from this Order for the applicable provisions regarding seeking White v. State review.

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AND IT IS SO ORDERED.


ALISON RENEE LEE
Fifth Judicial Circuit

Columbia, South Carolina.
September 22, 2011

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Form 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2008CP4001439

Thaddress #284256 Starks

vs.

State of South Carolina

Plaintiff

Defendant

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other:
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

☒ See attached order;☐ Statement of Judgment by the Court:

Dated at Columbia, South Carolina, this ____ day of _____, 2011.

PRESIDING JUDGE

This judgment was entered on the ____ day of _____, 2011, and a copy mailed first class this 29 September 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Thaddress #284256 Starks
Jeremy A Thompson

Brian T Petrano

ATTORNEY(S) FOR THE PLAINTIFF(S)_____
ATTORNEY(S) FOR THE DEFENDANT(S)

Jeanette W. McBride

Clerk of Court

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

THADDESS STARKS, #284256,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO.: 2008-CP-40-1439

AMENDED ORDER

2011 SEP 29 AM 9:06
JEANETTE W. McBRIDE
C.C.P. & G.S.
RICHLAND COUNTY
FILED

This matter comes before the Court by way of an Application for Post-Conviction Relief filed on February 26, 2008, and an Amended Application filed on March 30, 2009. An evidentiary hearing was convened in this case on March 17, 2010. The Applicant was present and was represented by Jeremy A. Thompson, Esquire. The State was represented by Brian T. Petrano, Assistant Attorney General.

PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Richland County Clerk of Court's orders of commitment. The Richland County Grand Jury indicted the Applicant at the January 24, 2007 term of General Sessions for Murder (07-GS-40-9503). On October 8-12, 2007, the Applicant proceeded to trial by jury. He was represented at trial by Michael D. McMullen, Esquire. At the conclusion of the trial, the jury found the Applicant guilty of the lesser-included offense of voluntary manslaughter. The Honorable G. Thomas Cooper, Jr. sentenced the Applicant to ten years imprisonment. The Applicant did not appeal his conviction or sentence.

ALLEGATIONS RAISED

In his Application for Post-Conviction Relief, the Applicant alleged that he is being held in custody unlawfully due to ineffective assistance of trial counsel and appellate counsel. He alleged generally that 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, were violated before, during, and after his trial.

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In an Amended Application for Post-Conviction Relief filed on March 30, 2009, the Applicant more narrowly defined his allegations in support of his claim that he received ineffective assistance of counsel. In the Amended Application, he alleged:

1. Defense counsel was ineffective for failing to properly advise the Applicant about the consequences of not testifying at trial;
2. Defense counsel was ineffective for failing to move for a mistrial during the State's examination of Dr. Theodore Faber;
3. Defense counsel was ineffective for failing to rehabilitate Dr. Faber's testimony;
4. Defense counsel was ineffective for failing to request a jury charge on the lesser-included offense of involuntary manslaughter;
5. Defense counsel was ineffective for failing to consult with the Applicant before requesting the lesser-included offense of voluntary manslaughter;
6. Defense counsel was ineffective for failing to file a Notice of Appeal for the Applicant following his conviction for voluntary manslaughter.

At the outset of the hearing in this case on March 17, 2010, the Applicant expressly withdrew allegation #5 and added additional allegations through the testimony of his witnesses. This Court accepts those allegations as additional amendments to his Application for Post-Conviction Relief made pursuant to the evidence adduced at the hearing. See Simpson v. Moore, 367 S.C. 587, 599, 627 S.E.2d 701, 708 (2006); Rule 15(b), SCRCP. At the evidentiary hearing, the Applicant specifically alleged:

7. Defense counsel was ineffective for failing to object to comments made by the State during closing argument which had been objected to and struck during the trial;
8. Defense counsel was ineffective for failing to object to burden-shifting portions of the self-defense charge to the jury;
9. Defense counsel was ineffective for failing to properly prepare Dr. Faber to testify at trial.

EVIDENCE BEFORE THE COURT

At the Post-Conviction Relief hearing, the Applicant presented testimony from defense counsel Michael D. McMullen, Esquire ("Trial Counsel"), his neurologist Dr. Theodore Faber, and his wife Natasha Clinton-Starks, as well as his own testimony. In addition to this testimony, this Court had before it a transcript of the trial, a copy of the records of the Richland County

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Clerk of Court regarding the subject convictions, and a copy of the Applicant's records with the South Carolina Department of Corrections.

RELEVANT FACTS FROM TRIAL

For the purpose of evaluating this action, this Court would note the following relevant facts. The Applicant was the victim's stepson. On October 12, 2006, the Applicant was living at his mother's home with the victim. That night, while his mother was away from the home working, the Applicant and the victim got into a verbal argument because the victim wanted the Applicant to leave. A Richland County Sheriff's Deputy was called to the scene where he noticed the victim was visibly drunk. Tr. p. 156. The deputy contacted the Applicant's mother, who told the deputy that the Applicant had a right to be at the home. Tr. p. 137. Deputy then informed the victim that he could not force the Applicant to leave the premises and he left the scene, leaving the Applicant and the victim alone. Tr. pp. 137-140.

However, the victim remained angry with the Applicant. While he was on the phone with his wife, the Applicant overheard the victim yelling for a gun from his next-door neighbor. Tr. p. 446. The Applicant called his mother and informed her of the situation; she told him to get out of the victim's way and go into his room. Tr. p. 466. The Applicant then went to his room after making a sandwich.

There is significant dispute as to what happened next. During an altercation at the home, the Applicant stabbed the victim once, puncturing his lung and mortally wounding him. The Applicant called 911 immediately after the stabbing and stated that the victim had broken into his room and that "he had to cut" the victim. Tr. pp. 510-511. The Applicant told Investigator Kevin Isenhoward the same rendition of the events, informing the investigator that the victim had broken into his bedroom, backhanded him, and that he had stabbed the victim in response. Tr. pp. 281-282. Investigator Ray Livingston confirmed that there had been significant damage to the frame of the Applicant's bedroom door. Tr. pp. 228-229. The 911 operator testified that the victim had called and indicated that Applicant had locked him in the room. Tr. pp. 515, 524.

During closing argument, the State argued that the Applicant had fought with the victim in the kitchen and that the victim had fled to the bedroom after the Applicant grabbed a knife. Tr. pp. 683-684. The State also argued that the Applicant had broken into his own bedroom and stabbed the victim. Tr. p. 685.

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At the time of the incident, the Applicant was significantly larger than the victim. However, the Applicant has been diagnosed with epilepsy, which stems from a stroke he suffered in 1992. The damage done to the Applicant by the stroke and subsequent seizures has caused him to have slower reaction times and a lack of balance and strength, primarily on the left side of his body.

The Applicant was charged with murder. Following the submission of the case to the jury, the jury deliberated for approximately ten hours. The jury returned a verdict of guilty for the lesser-included offense of voluntary manslaughter. While the Applicant did not testify at trial, he gave an extensive statement during sentencing in mitigation where he explained that "I didn't mean to stab him where he'd bleed to death or he'd die." Tr. pp. 749-753.

STANDARD OF REVIEW

The burden of proof is on the Applicant in a Post-Conviction Relief proceeding to prove the allegations raised in his Application and at the hearing on Post-Conviction Relief. Bell v. State, 321 S.C. 238, 467 S.E.2d 926 (1996); Rule 71.1(e), SCRPC. In evaluating an Application for Post-Conviction Relief, the moving party must demonstrate that trial counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668 (1984). In other words, the Applicant must show that but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.; Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability has been defined by our Supreme Court as a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007).

On the one hand, where trial counsel articulates a valid reason for employing certain trial strategies, such conduct should not be deemed ineffective assistance of trial counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). On the other hand, counsel may not explain away errors and omissions which acted to prejudice his client's ability to receive a fair trial simply by labeling them matters of trial strategy or tactics. In the case of Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002), the Supreme Court of South Carolina found that

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Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness. Where counsel articulates a strategy, it is measured against an objective standard of reasonableness.

(Emphasis in original) (Internal citations omitted).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. Further, this Court has had the opportunity to observe the witnesses presented at the hearing, assess their credibility and weigh the testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (Rev. 2003).

Trial Counsel testified that he was retained by the Applicant's family sometime around May 30, 2007. There was an offer to plea to voluntary manslaughter but the Applicant rejected that offer. Trial Counsel testified there were numerous discussions about whether the Applicant should testify at the trial. Trial Counsel really wanted more time with his client who was out on bond, but Applicant did not show up for several of their meetings including one scheduled the day before the trial. Trial Counsel initially did not want the Applicant to testify because he did not want to introduce any evidence and lose his right to have the last argument before the jury. Trial Counsel wanted to remain flexible about whether to present testimony and evidence; some of the State's witnesses were the defense's best witnesses. There was a concern if the Applicant testified the State would be able to bring up his prior criminal record which included a conviction for federal securities fraud; that he allegedly stabbed the victim previously; that he washed off the knife; and some specifics about whether the stabbing occurred in the kitchen or the bedroom. The only evidence that the victim ever slapped the Applicant came from the Applicant himself. Trial Counsel explained that the Applicant also did not want to testify because he was afraid of the Solicitors. Tr. p. 745¹.

Trial Counsel talked with Dr. Faber at the Applicant's suggestion. The family would not pay the expert fee and Trial Counsel paid Dr. Faber out of his own pocket; therefore, his abilities

¹ Trial Counsel told the Court during sentencing that "[Applicant], against my advice, chose not to testify. I think he was sincerely afraid of the cross-examination he would have to undergo. Another factor, though, is he knew that if he took the stand I was going to ask him to testify about the prior difficulties between the parties. He told me his family had been through enough, and he wasn't going to let me ask him those kinds of questions." Tr. p. 745.

to discuss issues extensively with the doctor were limited. He met with Dr. Faber prior to his testimony. They also talked on the phone. Trial Counsel explained the Applicant and his family "insisted" that he call the witnesses to testify. They knew ahead of time they were going to testify. Trial Counsel's strategy did not consider the order of the defense witnesses. Trial Counsel had difficulty in speaking with witness Tolliver prior to the trial because she was a college basketball player with a demanding schedule. He did not coach Tolliver not to mention that the Applicant had been shot in the past. Previously, the Applicant had been shot and suffered a stroke which explained some of his neurological problems. Trial Counsel was undecided whether this information should be admitted into evidence.

Trial Counsel explained that the only real theory of the case was self-defense. The disparity in size between the Applicant, who was larger in size and weight, and the victim was an issue affecting self-defense. That is the reason Trial Counsel sought to elicit testimony about Applicant's lack of balance and the use of his arm. Trial Counsel explained that although he wanted to get evidence of Applicant's lack of balance before the jury, there was also some evidence that the Applicant was lying in bed which would negate the balance issue.

Trial Counsel testified that he did not consider objecting to the Solicitor's prodding during Dr. Faber's testimony:

A. [Dr. Faber] I can't answer that as an expert. I would say that obviously the -- just from what I know about cutting things, if you have some weakness on one side, you're probably not going to be as effective in cutting things.

Q. [by Solicitor] Well, sir, this individual died. Apparently, it was effective.

A. I understand.

Tr. p. 603-604. The Court sustained the objection and struck the remark and instructed the jury to disregard the comment. When that same issue was discussed during closing argument he did not object because the Court only struck the Solicitor's comment not the testimony by the doctor. The Solicitor's statement was a fair comment for the closing argument. Trial Counsel did not re-examine Dr. Faber because he did want to risk that the doctor would repeat some of his testimony from cross-examination. Additionally, Trial Counsel did not think the doctor's testimony needed rehabilitation. Trial Counsel did not consider moving for a mistrial after the Solicitor's comment regarding who would win a bet regarding the winner in a fight between a 33

year old man who is six feet tall and weighs 350 pounds against a 54 year old man who is approximately 5'7" to 5'9 and weighs 190 pounds. Trial Counsel explained that the size difference was obvious; the comment was just not prejudicial.

Trial Counsel explained that the State wanted a voluntary manslaughter charge. He believed the defense would be better off with just the murder charge. He did not think that the facts of the case supported an involuntary charge even though he was arguing self-defense. Trial Counsel explained that reading the jury charge from the transcript does not clearly explain who has the burden of proving/disproving self-defense and perhaps he should have asked for a better instruction.

Trial Counsel talked with the Applicant after the conviction. Applicant was content with the ten (10) year sentence for voluntary manslaughter. He told Trial Counsel, "I can do ten." Later, the family told him that the Applicant changed his mind and did want to appeal but that the Applicant never contacted him about it. Trial Counsel testified that he probably should have filed an appeal for him.

Dr. Faber, an expert in neurology, testified during the post-conviction relief hearing. Dr. Faber had been the Applicant's neurologist for about eighteen (18) years since he experienced a stroke after being shot in the head. Dr. Faber met with the Applicant about fourteen (14) times approximately once a year. His treatments were not physical therapy, he prescribed pharmaceuticals. As Dr. Faber explained it, the Applicant suffered damage to his frontal lobe and that his ability to make decisions could be abnormal, probably somewhat delayed. Applicant suffered impairment to his left side that manifested as weakness and seizures including spasticity and "jerky" motions. Dr. Faber also demonstrated the jerkiness to this Court. He discussed some of the side-effects of the medications Applicant was taking but towards the latter part of Applicant's treatment he made no complaints about side effects. Dr. Faber's diagnosis was not based on any diagnostic testing; he relied on Applicant's statements about his abilities and limitations. Applicant's spasticity level was mild and had improved considerably over the eighteen years of care. Dr. Faber did not completely discuss his testimony with Trial Counsel prior to the trial. The process of testifying was not as he expected because he had a preconceived television show type idea of what would occur.

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The Applicant presented testimony from Ms. Natasha Starks who also testified at the trial. Ms. Starks acknowledged she was on standby as a witness. Ms. Starks explained that they

had all discussed the events of the night in question. She and her family were asked to call one or more of the other witnesses to testify at trial but that it seemed to be "last minute". The family discussed the issue of an appeal with Trial Counsel but that they had not discussed the appeal with the Applicant prior to their meeting with Trial Counsel.

The Applicant testified that he and his family retained Trial Counsel. The Applicant explained that the case changed once the directed verdict motion was denied. The Applicant denied stabbing the victim in the past. He was concerned about Trial Counsel's lack of preparation. The Applicant was inconsistent in his testimony about wanting to testify at the trial. He explained it was normal for him and the victim (his step-father) to argue. The victim called the police to try and have Applicant "evicted" but that it was Applicant's mother's place and *she* did not want to evict him, the victim became enraged that he could not kick the Applicant out. Applicant's mother told him to stay in his room. Applicant made himself a hoagie and brought a large kitchen knife with him into his room in order to cut the hoagie. The victim was cooking food in the kitchen and yelling. The Applicant claimed that the victim came into his room and slapped his face. He thought the victim had a gun and he stabbed him with the kitchen knife. The Applicant never meant to kill the victim; he only meant to thrust the knife toward him to make him back up. The Applicant wanted an involuntary manslaughter charge. The Applicant never discussed appeal procedures with Trial Counsel and that he never told Trial Counsel he "could do ten years." The Applicant testified that he felt abandoned by his lawyer.

DISCUSSION

ISSUE 1: Failing to properly advise Applicant about the consequences of not testifying at trial.

The essential issue in this case is whether the Applicant intended to kill the victim, i.e. malice. The jury was properly instructed regarding voluntary manslaughter and they found the Applicant guilty of that lesser offense. This Court finds the testimony of Trial Counsel credible that the Applicant did not want to testify at trial. During the trial, the Court advised Applicant of his right to testify in the case. After the witnesses had been presented, Trial Counsel informed the court of the Applicant's decision not to testify. The Court then questioned Applicant about his decision. Tr. pp. 608-609. Applicant indicated that he was "tired of seeing my family go

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through it. So I have nothing to say.” Accordingly, this Court does not find the Applicant’s testimony credible in now claiming he wanted to testify.²

ISSUES 2, 3, 9: Dr. Faber’s Testimony

This Court does not find that the Applicant satisfied his burden of proof regarding Dr. Faber’s testimony and whether Trial Counsel was ineffective or that there is any prejudice. Dr. Faber testified that the Applicant could have miscalculated a thrust with his left side, that it could be more powerful or less powerful. There is no prejudice because there is no evidence to suggest that the Applicant was weak on his right side. The State argued throughout the trial that the Applicant is right handed and that there was no “weakness” on that side. The Applicant simply failed to satisfy his burden of proof that Trial Counsel was ineffective regarding the testimony of Dr. Faber or that there was any prejudice to the Applicant.

ISSUE 6: Failure to File a Notice of Appeal

If a criminal defendant did not knowingly, voluntarily, and intelligently waive his right to a direct appeal, he is entitled to a belated direct appeal. See White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974); Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986). Absent a valid waiver, if a criminal defendant is found guilty after a trial, defense counsel *must* file a Notice of Appeal for him. See In re Anonymous Member of the Bar, 303 S.C. 306, 400 S.E.2d 483 (1991).

In this case, Trial Counsel testified that he spoke with the Applicant briefly about filing an appeal after the trial, but that the Applicant expressed satisfaction with the ten year sentence he received. There is no evidence that Trial Counsel explained to the Applicant his appellate rights and what he would be waiving if he decided not to appeal. Furthermore, Trial Counsel testified that he was informed by the family that the Applicant wanted to appeal. He acknowledged that, at the time of the trial, he did not understand that he had an obligation to file a Notice of Appeal for the Applicant, but that he would have certainly done so had he realized he had such an obligation. The evidence is clear that the Applicant did not have a direct appeal.

Based upon the foregoing, this Court finds that there was no intelligent, voluntary, or knowing decision made by the Applicant upon competent advice by counsel to waive his right to a direct appeal. Defense counsel acknowledged that he should have filed an appeal on the

² While not addressed by the Applicant or Trial Counsel, there is obviously also the issue of his recorded conversations from the detention center regarding the stabbing and self-defense that the State intended to use to impeach the Applicant if he testified. Tr. 332-344, 408.

Applicant's behalf. Accordingly, this Court finds that the Applicant is entitled to a belated direct appeal. See White v. State, *supra*.

Applicant was adamant that he wanted to appeal but that Trial Counsel "abandoned" him. Trial Counsel testified credibly that he thought the Applicant was satisfied in that "he could do ten" years. However, Trial Counsel testified that he should have filed a notice of appeal following a conviction at trial without specific waiver. Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). Accordingly, the Applicant is entitled to a belated direct appeal pursuant to White v. State.

ISSUE 7: Solicitor's comments

Applicant asserts that Trial Counsel should have objected to the Solicitor's remarks during closing argument. As recited in the summary of testimony, the Solicitor made remarks during the testimony of Dr. Faber in which she was argumentative and editorializing. Trial Counsel objected to the comments which the Court sustained. The Court struck the comments and told the jury to disregard them. During the closing argument, the Solicitor repeated those comments. At that time, Trial Counsel did not object because he thought the comments were proper as argument to the jury. Trial Counsel gave a valid reason for not objecting and seeking a mistrial. The argument made by the Solicitor was reasonable in light of the evidence that was presented. Trial Counsel was not ineffective for failing to object.

ISSUES 4, 8: Jury Instruction

A. Failure to Request a Jury Charge on the Lesser-Included Offense of Involuntary Manslaughter

"Involuntary manslaughter is (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others." State v. Wharton, 381 S.C. 209, 216, 672 S.E.2d 786, 789 (2009). If there is any evidence supporting a charge of involuntary manslaughter, the trial court must give the charge. State v. Reese, 370 S.C. 31, 633 S.E.2d 898 (2006).

The Applicant alleges that Trial Counsel was ineffective for failing to request a jury charge on the lesser-included offense of involuntary manslaughter. The Applicant argues that had such a request been made, such a charge would have been given. Accordingly, the Applicant contends that he is entitled to a new trial. This Court disagrees.

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This Court finds that an involuntary manslaughter charge was not warranted on the facts of this case as presented at trial. Under the second definition of involuntary manslaughter, four elements must be shown: (1) the unintentional killing of another; (2) without malice; (3) while engaging in a lawful act; and (4) while acting in reckless disregard for the safety of others. This Court finds that the Applicant has met these elements.³

With regard to the first element, the testimony presented at the hearing was that the Applicant did not intend to kill the decedent, only to fend him off from attacking him. The State argues that an intentional act is sufficient to defeat a claim of involuntary manslaughter, this Court agrees. In State v. Crosby, 348 S.C. 387, 559 S.E.2d 352 (Ct. App. 2001), the Court of Appeals considered whether an involuntary manslaughter charge should have been given. Relying on the language of State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994), the Court stated:

The record here demonstrates that Smith acted intentionally in wielding the knife. When Evans grabbed Smith, Smith pulled the knife, a dangerous instrumentality, and stabbed at Evans. Just as in *Craig* [267 S.C. 262, 227 S.E.2d 306 (1976)], whether Smith intended to harm Evans is irrelevant. The stabbing is clearly not a lawful act, and the intentional use of a dangerous instrumentality does not support the allegation of mere criminal negligence.

348 S.C. at 397.

In this case, Applicant did more than just grab the knife for self-defense. He wielded the knife at the victim in an attempt to get him to back up. He testified at the PCR hearing that he "jigged" the victim. Thus, his action in thrusting the knife towards the victim was intentional even though the ultimate consequence of the action was unintentional. This is not the same as those cases in which the defendant picks up a weapon and it discharges accidentally. Applicant intentionally wielded the knife in a manner consistent with stabbing. Additionally, he intended to stab the victim, he just did not "mean to stab him where he'd bleed to death or he'd die." Trial Counsel's performance was not deficient in failing to request a jury charge on the lesser-included offense of involuntary manslaughter. Applicant is not entitled to a new trial on this basis.

³ Under the first definition of involuntary manslaughter, the criminal defendant must also meet four elements: (1) the unintentional killing of another; (2) without malice; (3) while engaged in an unlawful activity; (4) not normally tending to cause death or great bodily injury. The two definitions diverge after the second element. This Court finds that the Applicant would not have been entitled to a charge of involuntary manslaughter under the first definition because the act—stabbing the decedent—would normally cause death or great bodily injury.

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B. Failure to Object to the Jury Charge on Self-Defense

A defense attorney's failure to object to a burden-shifting jury charge constitutes ineffective assistance of counsel. Lowry v. State, 376 S.C. 499, 657 S.E.2d 760 (2008). A charge is burden-shifting if it relieves "the State's burden of proof on an element of the offense" or defense. Id. at 505, 657 S.E.2d at 764 (citing Francis v. Franklin, 471 U.S. 307, 314 (1985)). A reviewing court should examine the challenged charge in the context of the entire charge and not view the challenged charge in isolation. Id.

Under South Carolina law, once the defense of self-defense is raised, the State bears the burden of disproving self-defense beyond a reasonable doubt. State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998). "When self-defense is properly submitted to the jury, the defendant is entitled to a charge, if requested, that the State has the burden of disproving self-defense by proof beyond a reasonable doubt." State v. Addison, 343 S.C. 290, 294, 540 S.E.2d 449, 451 (2000).

The jury was given the following charge, which was mandated by Addison:

The State has the burden of disproving self-defense by proof beyond a reasonable doubt. If you have a reasonable doubt about the defendant's guilt after considering all of the evidence, including evidence of self-defense, then you must find the defendant not guilty.

On the other hand, if you have no reasonable doubt of the defendant's guilt after considering all of the evidence, including the evidence of self-defense, then you must find the defendant not guilty.

Tr. p. 708. The Applicant contends, however, that the remainder of the trial court's instruction on self-defense placed the burden of proof on him to establish self-defense, and that defense counsel was ineffective for failing to object to these portions of the charge. This Court disagrees.

Prior to the closing arguments the Court instructed the jury about the pending charge, the lesser included offense and the defense of self-defense. The Court stated, "Voluntary manslaughter has elements that the State has to prove beyond a reasonable doubt, and self-defense – in the case of self-defense, the State has to prove it was not self-defense beyond a reasonable doubt. The State has to prove that the defendant was not acting in self-defense when the death occurred..." Tr. p. 638.

The Applicant contends that counsel should have objected to an issue concerning the standard self-defense instruction as applied during his trial. His assertion about the instruction is

without merit because it is inconsistent with substantive state law related to the defense of self-defense. In order to have a self-defense charge there must be some evidence of the elements of self-defense. That requires evidence that: (1) the defendant was without fault in bringing on the difficulty; (2) he was in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) a reasonably prudent person of ordinary firmness and courage would have entertained the same belief; and (4) he had no other probable means of avoiding the danger. State v. Bryant, 336 S.C. 340, 344-45, 520 S.E.2d 319, 321-22 (1999); State v. Rye, 375 S.C. 119, 124, 651 S.E.2d 321, 323 (2007). The trial judge's instructions stated the elements of self-defense and were a correct statement of the law. The Court did not instruct the jury that the defendant has to prove these elements. For all these reasons, the allegation must be denied.

ALL OTHER ALLEGATIONS

As to any and all other allegations presented at the evidentiary hearing convened in this case, this Court finds that there was insufficient evidence introduced to support granting the requested relief. Accordingly, those allegations are denied and dismissed.

CONCLUSION

This Application for Post-Conviction Relief is hereby **GRANTED IN PART**.

1. The Applicant's request for a belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) is hereby granted and he is directed to Rule 243(i), SCACR and the White opinion in that he must file a timely notice of appeal after this order concerning his underlying conviction.
2. All other allegations in the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
3. The Applicant must be remanded to the custody of the Respondent.

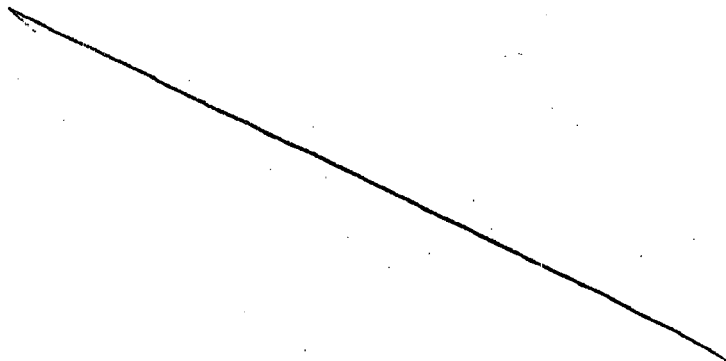
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AND IT IS SO ORDERED.



ALISON RENEE LEE
Fifth Judicial Circuit

Columbia, South Carolina.
September 28, 2011



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STATE OF SOUTH CAROLINA)

INDICTMENT

COUNTY OF RICHLAND)

At a Court of General Sessions, convened on January 24, 2007, the Grand Jurors of Richland County present upon their oath:

MURDER

That Thaddess Starks did in Richland County on or about October 12, 2006, feloniously, willfully and with malice aforethought, kill one Alphonso Cleveland by means of a stab wound and that the said victim died as a proximate result thereof. All in violation of SC Code of Laws § 16-3-10

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Warren B. Giese
Warren B. Giese, SOLICITOR

WITNESSES

(S) INV. ISENHOWARD - RCSD

ARREST WARRANT NUMBER

1979346

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date:

JAN 25 2007

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2007-GS-40-9503

The State of South Carolina

County of Richland

COURT OF GENERAL SESSIONS

JANUARY TERM 2007

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THE STATE
vs.

THADDESS STARKS

Indictment for

MURDER

SC Code: 16-3-10

CDR Code: 0116

Class FEL/EXM(V)

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

ATTEST
A TRUE COPY

Barbara C. Scott

C. C. C. P. & G. S.