

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2015-002511

RECEIVED

MAY 23 2016

SC SUPREME COURT

LEMONDE HOLLAND, 322379,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPENDIX
TO
PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Deputy Attorney General

J. BENJAMIN APLIN
Interim Senior Assistant Deputy Attorney General

JESSICA ELIZABETH KINARD
Assistant Attorney General
Post Office Box 11549
Columbia, S. C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TARA DAWN SHURLING
Attorney and Counselor at Law

3614 Landmark Drive, Suite A
Columbia, S. C. 29204
(803)738-8622 Phone
(803)738-1600 Fax
Email: tdslaw@shurlinglaw.com

ATTORNEY FOR PETITIONER

INDEX

VOUME I of II

Index	i
Trial Transcript dated June 11-13, 2007	1
Final Brief of Appellant dated November 17, 2008	379
Final Brief of Respondent dated November 18, 2008	400
Court of Appeals Opinion No. 4609 filed August 18, 2009.....	453
Petition for Rehearing dated August 28, 2009.....	466
Court of Appeal Order Denying Petition for Rehearing dated September 17, 2009	479

VOUME II of II

Remittitur from the Court of Appeals dated February 10, 2012	480
Petition for Writ of Certiorari filed December 18, 2009	481
Return to Petition for Writ of Certiorari filed February 25, 2010	505
Order Denying Petition for Writ of Certiorari filed February 9, 2012	531
Application for Post-Conviction Relief filed January 18, 2013	533
State's Return filed April 18, 2013	546
Clerk of Court Records	551
SCDC Records	563
PCR Hearing Transcript dated February 3, 2015.....	570
Order Granting PCR filed May 19, 2015.....	633
State's Motion to Reconsider filed June 10, 2015	646
Response to Motion to Reconsider filed July 10, 2015.....	653
Order of Dismissal filed September 2, 2015.....	659
Notice of Appeal filed December 4, 2015	671

Attachment A: Affidavit of Service filed November 23, 2015, Supervisor of Common Plea, Office of Horry County Clerk of Court, affiant states Order of Dismissal filed September 2, 2015 had not previously been served.

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
05-CP-22-0804

STATE OF SOUTH CAROLINA,)

vs.)

LEMOND CORNEILUS HOLLAND.)

TRANSCRIPT OF RECORD

JUNE 11-13, 2007

CONWAY, SOUTH CAROLINA

BEFORE:

THE HONORABLE, JOHN L. BREEDEN, JR., JUDGE

APPEARANCES:

BY: FRANCIS A. HUMPHRIES, JR., ESQ, ASSISTANT SOLICITOR
DONNA E. ELDER, ESQ., SENIOR SOLICITOR
ATTORNEYS FOR STATE

BY: ROBERT N. RICHARDSON, JR., ESQ.
JEFFREY E. JOHNSON, ESQ.
ATTORNEYS FOR LEMONH CORNEILUS HOLLAND

BRENDA R. BABB
Circuit Court Reporter

INDEX

<u>WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
YESSICA CARUTHERS				
MR. HUMPHRIES	64		88	
MR. RICHARDSON		78		91
CARLOS ALEJANDRO ADAMS				
MS. ELDER	93			
MR. JOHNSON		107		
ROBYN N. BOWEN				
MS. ELDER	110			
MR. RICHARDSON		116		
DR. EDWARD PROCTOR				
MR. HUMPHRIES	117		124	
MR. JOHNSON		121		125
OFFICER DAVID REIST				
MS. ELDER	128			
MR. RICHARDSON		131		
LT. MIKE BALDASARRE				
MS. ELDER	135			
MR. RICHARDSON		142		
DET. DENNIS PITSINGER				
MR. HUMPHRIES	144		180	
MR. RICHARDSON		161		185
LT. DON REPEC				
MR. HUMPHRIES	187			
MR. JOHNSON		195		

INDEX (CONTINUED)

<u>WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
INVEST. CAROLINE PELLAND				
MR. HUMPHRIES	198			
MR. RICHARDSON (NO CROSS EXAMINATION)				
AGENT DAVID BLACK				
MR. HUMPHRIES	200			
MR. RICHARDSON		214		
SGT. PAUL EUGENE SHEETS (IN CAMERA)				
MS. ELDER	217			
MR. JOHNSON		226		
SGT. PAUL EUGENE SHEETS				
MS. ELDER	231			
MR. RICHARDSON (NO CROSS EXAMINATION)				
JEFFREY D. BENNICK				
MS. ELDER	239			
MR. RICHARDSON		266		
SGT. PAUL EUGENE SHEETS				
MR. HUMPHRIES	276			
MR. RICHARDSON		280		
DARREN L. MALLOY				
MR. HUMPHRIES	281		237	
MR. JOHNSON		293		

INDEX (CONTINUED)

DEFENSE MOTION TO RESTRICT STATE	8
DEFENSE MOTION IN LIMINE	9
DEFENSE MOTION TO EXCLUDE PHOTO LINE UP	18
VOIR DIRE	22
JURY SELECTION	36
OPENING STATEMENT BY STATE	56
OPENING STATEMENT BY DEFENSE	61
<u>BIGGERS</u> HEARING	217
DEFENSE MOTION FOR DIRECTED VERDICT ON MURDER INDICTMENT	299/316
DEFENSE MOTION FOR DIRECTED VERDICT ON ASSUALT AND BATTERY INDICTMENT	300/317
DEFENSE MOTION FOR DIRECTED VERDICT ON POSSESSION OF WEAPON DURING VIOLENT CRIME	302/307
CLOSING ARGUMENT BY STATE	321
CLOSING ARGUMENT BY DEFENSE	330/342
JURY CHARGE	346
DEFENSE MOTION FOR MISTRIAL	364
VERDICT	366
POLLING OF JURY	367
DEFENSE MOTION FOR ARREST OF JUDGMENT	370
SENTENCING	371
CERTIFICATE OF REPORTER	378

EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
S-1	YESSICA CARUTHERS STATEMENT		93
S-2	LARGE DIAGRAM	128	
S-3	PHOTOGRAPH - FRONT OF MACATZ	128	141
S-4	PHOTOGRAPH - INCIDENT LOCATION	128	139
S-5	PHOTOGRAPH - REAR OF MACATZ	128	161
S-6	PHOTOGRAPH - IMMEDIATE CRIME SCENE	128	181
S-7	PHOTOGRAPH - CARUTHER'S VEHICLE	128	189
S-8	PHOTOGRAPH - HOLE IN PROJECTILE	128	190
S-9	PHOTOGRAPH - HOLE IN BABY SEAT	128	191
S-10	PHOTOGRAPH - HOLE IN VEHICLE	128	194
S-11	PHOTOGRAPH - BABY SEAT WITH STRING	128	192
S-12	PHOTOGRAPH - BABY SEAT WITH STRING	128	193
S-13	PHOTOGRAPH - DRIVER'S SEAT W/STRING	128	194
S-14	PLASTIC BAG WITH FIRED CASING FROM 9MM LUGER	155	157
S-15	PLASTIC BAG WITH FIRED CASING	155	157
S-16	PLASTIC BAG WITH FIRED CASING FROM CARUTHER'S VEHICLE	194	195
S-17	S-16 PLASTIC BAG WITH FIRED CASING	199	199
S-18	(BIGGERS HEARING IN CAMERA) SIX COLOR PHOTOGRAPHS FROM DMV	221	223 237
S-19	LIST OF NAMES	278	291

1 THE COURT: I'M JUDGE BREEDEN, I'M A CIRCUIT
2 COURT JUDGE AT VERY LARGE, AT LARGE, SOME PEOPLE SAY VERY
3 LARGE, HAS NOTHING TO DO WITH HOW FAT I AM. IT HAS TO DO
4 FROM THE AREA THAT I'M ELECTED FROM WHICH IS STATE WIDE AS
5 OPPOSED TO JUST THIS JUDICIAL CIRCUIT AND I GUESS JUDGE
6 BIRCH HAS ASKED YOU ALL THE PERTINENT LIKE WHAT SIZE SHOE
7 YOU WEAR AND THINGS OF THAT NATURE, THAT'S A JOKE.

8 WE'RE GOING TO GO TO LUNCH NOW, ABOUT 12:00
9 THEREABOUT, AND I'M GOING TO ASK THAT YOU BE BACK AT 2.
10 WE'LL PICK THE JURY AT 2:00 AND YOU'LL, AS WE GET INTO THIS
11 YOU'LL BE TOLD THIS, LET ME TELL YOU NOW, YOU'RE THE JUDGE
12 OF THE FACTS OF THE CASE. WHETHER IT BE A CIVIL CASE OR A
13 CRIMINAL CASE, YOU'RE THE JUDGE OF THE FACTS; THE COURT IS
14 THE JUDGE OF THE LAW. I CAN'T INVADE YOUR PROVINCE AND YOU
15 CAN'T INVADE MY PROVINCE, THAT WAY, THAT WAY IT WORKS OUT.

16 WE HAVE SOME LEGAL MATTERS, SOME LAW MATTERS,
17 THAT NEED TO BE TAKEN CARE OF. WE NEED TO HEAR THESE LEGAL
18 MATTERS OUTSIDE YOUR PRESENCE. IF YOU WERE PRIVY TO THE
19 ARGUMENTS AND THE DISCUSSIONS OF THESE LEGAL MATTERS IT
20 WOULD PREJUDICE YOU IN YOUR CASE AS THE FINDER OF FACTS OR
21 THE JUDGE OF THE FACTS IN THE CASE, SO WE HAVE SOME LAW
22 MATTERS, SOME LEGAL MATTERS THAT WE NEED TO TAKE CARE OF
23 OUTSIDE OF YOUR PRESENCE AND WE NEED TO DO THAT BEFORE WE
24 SEAT THE JURY SO WE'RE GOING TO GO TO LUNCH AT 12, WELL
25 NOW, BE BACK IN YOUR SEATS AT 2:00. WE'RE GOING TO COME

MOTION TO RESTRICT STATE BY DEFENSE

7

1 BACK A LITTLE BIT EARLIER AND TAKE CARE OF THOSE LEGAL
2 MATTERS AND THE JURY WILL BE CHOSEN FROM YOUR MIDST, A JURY
3 FOR THIS TRIAL, AT 2:00.

4 I DON'T KNOW WHAT, IF ANYTHING, YOU MAY KNOW
5 ABOUT THIS CASE. YOU PROBABLY DON'T KNOW ANYTHING ABOUT
6 IT, HOPE YOU DON'T, BUT IF YOU DO WE'LL FIND OUT ABOUT
7 THAT. BUT RIGHT NOW DO NOT DISCUSS THIS CASE OR ANY CASE
8 THAT MAY COME UP FOR TRIAL DURING THIS TERM OF COURT WITH
9 ANYONE INCLUDING YOUR FELLOW JURORS OVER THE LUNCH BREAK.
10 COME BACK AT TWO AND WE'LL PICK A JURY FROM YOUR MIDST AT
11 THAT TIME. ENJOY YOUR LUNCH AND WE'LL SEE YOU BACK AT
12 2:00, THANK YOU.

13 (WHEREUPON, THE JURY VENIRE WAS EXCUSED FOR LUNCH
14 AT 11:52 A.M.)

15 THE COURT: THINGS THAT I TALKED WITH YOU ALL
16 ABOUT WE'RE GOING TO DISCUSS THAT OVER LUNCH. THANK YOU.

17 MR. HUMPHRIES: THANK YOU, YOUR HONOR.

18 MR. JOHNSON: THANK YOU.

19 (WHEREUPON, COURT WAS RECESSED FOR LUNCH AND THE
20 FOLLOWING TAKES PLACE ON THE RECORD AFTER LUNCH.)

21 MR. RICHARDSON: AT THIS TIME ALSO MAKE SURE THE
22 JURORS DON'T COME IN. I'M SURE THE SHERIFF'S DEPARTMENT IS
23 CONTROLLING THAT.

24 THE COURT: YES, SIR, IF YOU WILL MONITOR THE
25 DOOR. ALL RIGHT, SIR.

MOTION TO RESTRICT STATE BY DEFENSE

8

1 MR. JOHNSON: THANK YOU, YOUR HONOR, MAY IT
2 PLEASE THE COURT, YOUR HONOR. THE FIRST MOTION IS TO
3 RESTRICT THE STATE FROM PROSECUTING THE DEFENDANT ON THE
4 INDICTMENT FOR ASSAULT AND BATTERY WITH INTENT TO KILL. IN
5 THEIR INDICTMENT THEY HAVE IN THERE THE VICTIM AS BRANDT
6 MICHAEL KOEHLER. WELL THE STATE'S ALSO PROSECUTING THE
7 DEFENDANT ON THE CHARGE OF MURDER. YOU CAN'T GO FORWARD ON
8 BOTH OF THEM, YOUR HONOR.

9 THE COURT: ALL RIGHT, SIR.

10 MR. HUMPHRIES: YOUR HONOR, I'M ADVISED THAT
11 THE, AS IT RELATES TO INDICTMENT NUMBER 2006-GS-26-2013,
12 THE INCLUSION OF THE VICTIM BRANDT MICHAEL KOEHLER'S NAME
13 WAS A MINISTERIAL ERROR AND IT SHOULD HAVE SAID RAPHAEL
14 WALKE WHICH IS CONSISTENT WITH THE DISCOVERY PREVIOUSLY
15 PROVIDED THE DEFENDANT. WE ARE PROSECUTING HIM FOR THE
16 MURDER OF BRANDT MICHAEL KOEHLER BUT THE WARRANT AND THE
17 DISCOVERY CONSISTENT WITH THE ASSAULT AND BATTERY WITH
18 INTENT TO KILL COUNT HAS ALWAYS NAMED RAPHAEL WALKE AS
19 THAT, AS THAT VICTIM AND WE MOVE TO AMEND AT THIS TIME.

20 THE COURT: TO AMEND THE INDICTMENT?

21 MR. HUMPHRIES: TO AMEND THE INDICTMENT AS IT
22 RELATES TO THE, TO THE NAME OF THE VICTIM WHICH IS
23 CONSISTENT AND CONFORMS WITH THE EVIDENCE PREVIOUSLY
24 PROVIDED THEM.

25 MR. JOHNSON: YOUR HONOR, OF COURSE WE OBJECT TO

MOTION IN LIMINE BY DEFENSE

9

1 IT. THE INDICTMENT SAYS THAT THE VICTIM IS MR. KOEHLER,
2 THE STATE SAYS IT SHOULD BE MR. WALKE SO WE OBJECT TO THEIR
3 AMENDMENT, YOUR HONOR.

4 THE COURT: WELL HOW LONG WOULD IT TAKE YOU TO
5 PREPARE TO BE READY FOR AN AMENDMENT TO THAT INDICTMENT?
6 I'M GOING TO ALLOW THE AMENDMENT. IF THE WARRANT SAYS THE
7 RIGHT NAME AND THIS WAS AN OBVIOUS SCRIVENER'S ERROR HE
8 CAN, HE CAN CHANGE THAT. WOULD IT TAKE YOU ANY TIME TO
9 PREPARE FOR THAT?

10 MR. JOHNSON: WE'RE PREPARED TO GO FORWARD, YOUR
11 HONOR.

12 THE COURT: VERY WELL.

13 MR. JOHNSON: YOUR HONOR, OF COURSE NOTE MY
14 OBJECTION FOR THE RECORD ON THE AMENDMENT.

15 THE COURT: VERY WELL.

16 MR. HUMPHRIES: DO YOU WANT ME TO MAKE THE
17 CHANGE?

18 THE COURT: YES, IF YOU WILL MAKE IT ON THE
19 INDICTMENT. ALL RIGHT, SIR?

20 MR. JOHNSON: YOUR HONOR, WE ALSO HAVE ANOTHER -
21 - JUDGE, MAY I APPROACH?

22 THE COURT: YES, SIR.

23 MR. JOHNSON: HAND THESE MOTIONS UP. YOUR
24 HONOR, IF IT MAY PLEASE THE COURT. THE DEFENDANT HAS THIS
25 MOTION IN LIMINE TO PROHIBIT THE STATE FROM INTRODUCING THE

1 DEFENDANT'S PRIOR CRIMINAL RECORD. WE SEE NOTHING ON
2 THERE, YOUR HONOR, THAT WE BELIEVE THAT WOULD BE ADMISSIBLE
3 IN THIS CASE AND IF WE COULD WE'LL JUST GO DOWN EACH ITEM
4 AND YOUR HONOR WOULD RULE ON EACH ITEM.

5 THE COURT: WELL LET'S FIND OUT. IS THERE
6 ANYTHING IN THERE THAT YOU THINK IS ADMISSIBLE?

7 MR. HUMPHRIES: YES, SIR, A NUMBER OF OFFENSES.

8 THE COURT: ALL RIGHT, SIR, LET'S, MAYBE WE NEED
9 TO GO DOWN THEM. WELL WHAT ARE THE TWO, HOW CAN WE GET TO
10 THOSE THINGS YOU WANT TO ASK ABOUT?

11 MR. HUMPHRIES: I'LL TELL YOU WHAT WE INTEND TO.

12 THE COURT: WELL LET'S ZERO IN ON THOSE AND THE
13 REST WE WON'T GO INTO.

14 MR. HUMPHRIES: YOUR HONOR, THERE IS A
15 CONVICTION FOR FELONY LARCENY MARCH OF '95. THE SENTENCE
16 OF WHICH WAS, THE SENTENCE HE RECEIVED WAS 20 YEARS
17 SUSPENDED ON THE SERVICE, YOU GOT THE SENTENCING, ACTUALLY
18 THERE WERE THREE INDICTMENTS THAT WERE DISPOSED OF AT THE
19 SAME TIME AND ON THAT CONVICTION THEY VACATED THE 20 YEARS
20 AND GAVE HIM A FIVE-YEAR SENTENCE ON APRIL 4TH, OF 1995,
21 WHICH IS WITHIN THE 10 YEARS.

22 THE COURT: THAT'S OVER 10 YEARS.

23 MR. JOHNSON: THAT'S OVER 10.

24 MR. HUMPHRIES: YES, SIR. HUH?

25 MR. JOHNSON: THAT'S OVER 10.

1 THE COURT: THAT'S OVER 10 YEARS.

2 MR. HUMPHRIES: I'M SORRY, YOUR HONOR. HE GOT A
3 SENTENCE OF FIVE YEARS. ADD THE FIVE YEARS TO THE 1995 IS
4 THE YEAR 2000 WHICH IS WITHIN THE 10 YEARS. THE RULE
5 STATES THAT THE CONVICTION AND/OR ITS RELEASE FROM CUSTODY
6 AND THE COURT'S INTERPRETED CUSTODY TO MEAN RELEASED FROM
7 THE PENITENTIARY, PROBATION OR PAROLE.

8 THE COURT: ALL RIGHT, WHAT DO YOU SAY TO THAT?

9 MR. JOHNSON: YOUR HONOR, IT'S MY UNDERSTANDING
10 THAT YOU CAN'T INTRODUCE A CONVICTION THAT'S MORE THAN 10
11 YEARS OLD. IT'S MY UNDERSTANDING THAT WOULD BE AT THE TIME
12 IT'S BEING PRESENTED.

13 MR. HUMPHRIES: IT'S RULE 609, YOUR HONOR,
14 SUBSECTION (B), ENTITLED TIME LIMIT. IT'S EVIDENCE OF A
15 CONVICTION UNDER THIS RULE IS NOT ADMISSIBLE IF A PERIOD OF
16 MORE THAN 10 YEARS HAS ELAPSED SINCE THE DATE OF THE
17 CONVICTION OR OF THE RELEASE OF THE WITNESS FROM
18 CONFINEMENT IMPOSED FOR THAT CONVICTION, WHICHEVER IS THE
19 LATER DATE, AND IT GOES ON TO TALK ABOUT THE INTEREST OF
20 JUSTICE.

21 THE COURT: FIVE YEARS STARTED ON 1995.

22 MR. HUMPHRIES: JANUARY OF 1995.

23 THE COURT: STARTED IN '95 AND ENDED IN 2000?

24 MR. HUMPHRIES: YES, SIR. YES, SIR.

25 THE COURT: ALL RIGHT.

MOTION IN LIMINE BY DEFENSE

12

1 MR. HUMPHRIES: IT'S PAROLE OR, PAROLE OR
2 PROBATION.

3 THE COURT: ALL RIGHT.

4 MR. HUMPHRIES: IT'S APRIL, ACTUALLY APRIL OF
5 '95 FOR THAT GRAND LARCENY.

6 THE COURT: SOUNDS TO ME LIKE THEY COULD TALK
7 ABOUT THAT.

8 MR. HUMPHRIES: YOUR HONOR, IN REGARD TO WHAT
9 THEY CALL CRIMINAL NUMBER 86-110, THIS IS ALSO OUT OF THE
10 STATE OF VIRGINIA, GRAND LARCENY RECEIVED ON JUNE 10TH OF
11 1996. HE RECEIVED A SENTENCE OF TWO YEARS AND A PERIOD OF
12 PROBATION. I'LL ADDRESS THIS PROBATION MATTER, YOUR HONOR,
13 BECAUSE IT APPEARS THAT ON THOSE OFFENSES HIS PROBATION WAS
14 STILL ACTIVE AS LATE AS 2002 BECAUSE HE'S BEING REVOKED IN
15 2002. SO CLEARLY THAT WOULD COME UNDER THE RULE AS IT
16 RELATES TO THE GRAND LARCENY.

17 THE CUSTODY STATUS AS OF JANUARY 5TH, 2005, ON
18 HIS NATIONAL CRIME INDEX COMPUTER RAP SHEET INDICATES THAT
19 HE IS SERVING PROBATION SINCE JANUARY 5TH OF 1905, OF 2005,
20 AS A RESULT OF THE VIRGINIA ARREST. SO HE'S STILL ON
21 PROBATION AS OF JANUARY OF 2005, WHICH OBVIOUSLY IS WITHIN
22 THE 10 YEARS AND THAT, IN THIS PARTICULAR RAP SHEET WAS RUN
23 ON DECEMBER 30TH OF 2005 SO HE CLEARLY WAS ON PROBATION AT
24 THAT TIME AND WAS ALSO WELL WITHIN THE 10 YEARS, TWO YEARS
25 AGO.

1 THE COURT: YES, SIR?

2 MR. JOHNSON: YOUR HONOR, ALSO IT'S THE
3 DEFENDANT'S POSITION THAT INTRODUCTION OF SUCH A CHARGE OF
4 CONVICTION IS NOT RELATED TO THE CURRENT CHARGES WHICH HE
5 FACES AND ALSO IT WOULD BE THE PREJUDICIAL EFFECT OF
6 INTRODUCING SUCH A CHARGE OF CONVICTION WHICH OUTWEIGHS
7 PROBATIVE VALUE.

8 THE COURT: THAT IS IF IT'S OVER 10 YEARS OLD
9 BUT I THINK IT COMES WITHIN THE RULE BEING UNDER 10 YEARS
10 OLD. IF HE WAS CONFINED FOR THAT OFFENSE AND HE WAS BEING
11 RELEASED FROM CONFINEMENT IMPOSED FOR THAT CONVICTION
12 WITHIN 10 YEARS THEN YOU DON'T HAVE TO CONSIDER -- JUST A
13 MOMENT. WHAT WOULD BE THE PROBATIVE VALUE OF THIS,
14 SOLICITOR?

15 MR. HUMPHRIES: THE ONLY, THE ONLY ISSUE
16 OBVIOUSLY IS, IS THE DEFENDANT'S CREDIBILITY IN THIS CASE.
17 AND OBVIOUSLY IT, IT'S A, IT'S A CRIME OF DISHONESTY WHICH
18 CLEARLY GOES TO THE ISSUE OF THE DEFENDANT'S CREDIBILITY
19 WERE HE TO TESTIFY, THAT'S THE PROBATIVE VALUE. CERTAINLY
20 I MEAN, AND, AND CLEARLY IF IT WERE CONNECTED TO THIS CASE
21 THE COURT WOULD HAVE TO ENGAGE IN, YOU KNOW, THAT BALANCING
22 TEST. IT IS ABSOLUTELY NOT RELATED TO THIS CASE WHICH
23 ACTUALLY IS IN THE STATE'S BENEFIT AS IT RELATES TO AN
24 INTRODUCTION OF THOSE, OF THESE CONVICTIONS.

25 THE COURT: WELL MY UNDERSTANDING AFTER READING

1 THE RULE IS THAT THE INTRODUCTION OF ANY PRIOR CONVICTION
2 THE PROBATIVE VALUE HAS TO OUTWEIGH THE PREJUDICIAL EFFECT
3 AND ONLY THOSE ARE CONSIDERED THAT COME WITHIN 10 YEARS.

4 MR. HUMPHRIES: YES, SIR, UNLESS THERE'S A,
5 UNLESS IT'S A CRIME INVOLVING DISHONESTY BUT IN, BUT IN ANY
6 EVENT IT HAS TO SUBSTANTIALLY OUTWEIGH THE PROBATIVE. IT
7 SUBSTANTIALLY OUTWEIGHS AND IT'S A PREJUDICIAL EFFECT AND
8 IN THIS CASE IF THE DEFENDANT TAKES THE STAND AND WHAT
9 WE'RE TALKING ABOUT A CASE WHERE WE HAVE EYEWITNESSES
10 VERSUS POTENTIALLY THE TESTIMONY OF THE DEFENDANT, THE
11 CREDIBILITY OF ALL THOSE WITNESSES IS SINGULARLY AT ISSUE
12 IN THIS CASE.

13 THE COURT: WELL THAT WAS MY UNDERSTANDING,
14 LYING, STEALING, OR CHEATING.

15 MR. HUMPHRIES: YES, SIR.

16 THE COURT: A CRIME THAT USED TO BE CALLED A
17 CRIME OF MORAL TURPITUDE.

18 MR. HUMPHRIES: YES, SIR.

19 THE COURT: BUT NOW IT'S CALLED DISHONESTY OR
20 FALSE STATEMENT.

21 MR. HUMPHRIES: YES, SIR.

22 THE COURT: I THINK IT IS ADMISSIBLE. YES, SIR?

23 MR. JOHNSON: YOUR HONOR, IF I MAY FOR THE
24 COURT'S CONSIDERATION, THE COURT CASE OF STATE V. THOMAS
25 BRYANT IN THAT CASE THEY CITED UNITED STATES V. SMITH, MR.

1 RICHARDSON PULLED THIS LAW, WHERE IT STATES IN THERE A
2 CONVICTION FOR ROBBERY, BURGLARY, THEFT, AND DRUG
3 POSSESSION BEYOND THE BASIC CRIME ITSELF IS NOT PROBATIVE
4 OF TRUTHFULNESS. I'LL ALSO SUBMIT THAT TO YOUR HONOR AS IT
5 NOT BEING ADMISSIBLE. IF YOU'D LIKE I CAN HAND IT UP TO
6 YOUR HONOR?

7 THE COURT: I'LL BE GLAD TO CONSIDER IT.

8 MR. JOHNSON: THE COURT'S INDULGENCE.

9 MR. HUMPHRIES: IT SAYS FURTHERMORE A CONVICTION
10 OF ROBBERY, BURGLARY, THEFT, AND DRUG POSSESSION BEYOND THE
11 BASIC CRIME ITSELF.

12 MR. JOHNSON: THAT'S WHAT I JUST SAID.

13 MR. HUMPHRIES: IS NOT -- I UNDERSTAND, IS NOT
14 PROBATIVE OF TRUTHFULNESS, THE CRIME ITSELF, IT'S BEYOND
15 THE CRIME ITSELF. THE CRIME ITSELF IS PROBATIVE OF
16 TRUTHFULNESS.

17 THE COURT: I DON'T KNOW WHAT A CONVICTION
18 BEYOND THE BASIC CRIME ITSELF WHAT THEY'RE TALKING ABOUT.

19 MR. HUMPHRIES: I DON'T, I DON'T, I DON'T KNOW
20 BUT THE CRIME ITSELF IS PROBATIVE OF TRUTHFULNESS.

21 THE COURT: I DON'T UNDERSTAND THAT.

22 MR. HUMPHRIES: I DON'T EITHER.

23 THE COURT: BEYOND THE BASIC CRIME ITSELF.

24 MR. HUMPHRIES: UNLESS IN THAT CASE THEY WANTED
25 TO GO INTO THE FACTS OF EACH OF THOSE CASES WHICH, OF

1 COURSE, WE'RE NOT, WE'RE NOT ATTEMPTING TO DO IN THIS CASE.

2 THE COURT: WELL I'M GOING TO ALLOW YOU TO TALK
3 ABOUT OR TO INTRODUCE OR TO ASK HIM A QUESTION ABOUT THE
4 CONVICTION OF GRAND LARCENY, ONE IN '95 AND THE ONE IN '96.
5 ONE WAS A FELONY LARCENY AND THE OTHER WAS A GRAND LARCENY.
6 BUT ONCE YOU GET PAST THE CONVICTION ITSELF ---

7 MR. HUMPHRIES: THAT'S ALL WE INTEND TO DO.

8 THE COURT: --- THAT'S ALL YOU CAN DO.

9 MR. HUMPHRIES: CERTAINLY. THERE ARE FEW OTHERS
10 ---

11 THE COURT: THAT'S BEING INTRODUCED ONLY FOR
12 PURPOSES OF CREDIBILITY OF THE WITNESS.

13 MR. HUMPHRIES: WHICH, OF COURSE, THE COURT WILL
14 CHARGE THE JURY.

15 THE COURT: AND IF HE ADMITS THOSE THEN THAT'S
16 THE END OF IT.

17 MR. HUMPHRIES: YES, SIR. YOUR HONOR, AS IT
18 RELATES TO THE COMMONWEALTH OF VIRGINIA'S CRIMINAL NUMBER
19 89-857 IT'S A CONVICTION FOR ATTEMPTED ROBBERY FOR WHICH HE
20 RECEIVED A SENTENCE OF THREE YEARS AND THAT SENTENCE WAS
21 ENTERED ON JUNE THE 6TH OF 1996. SO ADD THE THREE TO 19,
22 AND HE'S ALSO, THERE'S A VIOLATION OF PROBATION AS IT
23 RELATES TO THAT OFFENSE, TOO, THAT COMES WELL INTO PAST
24 2000 SO THAT'S WELL WITHIN THE 10 YEARS AS WELL.

25 MR. JOHNSON: AND, YOUR HONOR, OF COURSE I HAVE

1 THE SAME ARGUMENT.

2 THE COURT: WELL THIS ---

3 MR. HUMPHRIES: AND THAT'S ALL WE INTEND TO
4 INTRODUCE, YOUR HONOR.

5 THE COURT: IT'S A CRIME FOR ATTEMPTED ROBBERY,
6 WHAT IS THE CRIME COMMITTED FOR ROBBERY?

7 MR. HUMPHRIES: THAT'S RIGHT, IT WAS ATTEMPTED
8 ROBBERY, YOUR HONOR.

9 THE COURT: I'LL LET YOU TALK ABOUT THE FIRST
10 TWO BUT NOT THE -- ANYTHING FURTHER?

11 MR. HUMPHRIES: NO, YOUR HONOR.

12 THE COURT: VERY WELL.

13 MR. JOHNSON: YOUR HONOR, NUMBER TWO AND NUMBER
14 THREE ON THE MOTION THAT THEY CONSENTED TO. NUMBER FOUR
15 THERE'S A PRIOR, OF COURSE, MUG SHOT TAKEN AT THE
16 DEPARTMENT OF CORRECTIONS OF THE DEFENDANT. WE MOVE THAT
17 THE COURT EXCLUDE THAT AND PROHIBIT THE STATE ---

18 MR. HUMPHRIES: WE'RE NOT INTRODUCING ANY MUG
19 SHOT FROM THE DEPARTMENT OF CORRECTIONS FOR ANY PURPOSE.

20 MR. JOHNSON: YOU CONSENTED TO THAT ONE, TOO?

21 MR. HUMPHRIES: YEAH, TO THE MUG SHOT FROM THE
22 DEPARTMENT OF CORRECTIONS THERE WILL BE NO INTRODUCTION OF
23 THAT PHOTOGRAPH AT LEAST TO THE STATE'S CASE IN CHIEF
24 UNLESS IT BECOMES RELEVANT AS A RESULT OF CROSS EXAMINATION
25 OF THE DEFENDANT'S CASE.

1 THE COURT: WHAT ABOUT NUMBER THREE?

2 MR. HUMPHRIES: WE CONSENTED TO THAT, YOUR
3 HONOR.

4 THE COURT: WHAT ABOUT NUMBER TWO?

5 MR. HUMPHRIES: CONSENTED, YOUR HONOR.

6 THE COURT: NUMBER FIVE, IS THAT WHERE WE ARE?

7 MR. JOHNSON: YES, WE ARE, YOUR HONOR. YOUR
8 HONOR, WE HAVE ALSO A PICTURE OF THE DEFENDANT AND AT THE
9 BOTTOM IT HAS SOME WRITING DOWN THERE THAT WE BELIEVE, OF
10 COURSE, IT IS PREJUDICIAL UNDULY ---

11 THE COURT: WHAT DOES IT SAY?

12 MR. JOHNSON: --- AND SELF SERVING.

13 MR. HUMPHRIES: LET ME TELL YOU WHAT IT IS,
14 JUDGE ---

15 MR. JOHNSON: IF I MAY HAND IT UP, JUDGE.

16 MR. HUMPHRIES: --- JUST TO GIVE YOU SOME
17 CONTEXT. IT'S A PHOTO LINEUP WHERE THERE WERE SIX
18 PHOTOGRAPHS WHICH WERE SEPARATE NOT ON, I MEAN WE DIDN'T
19 HAVE A PHOTO PACK. WE HAD SIX PHOTOGRAPHS OF INDIVIDUALS
20 WHICH WERE PRESENTED TO ONE WITNESS WHO ULTIMATELY
21 IDENTIFIED THE DEFENDANT AS THE PERSON HE SAW SHOOT THE
22 VICTIM AND IN ORDER TO INDICATE HIS SELECTION OF THE
23 DEFENDANT HE WROTE ON THE BOTTOM OF THE PAGE, THIS IS THE
24 PERSON OR WHATEVER IT SAYS. THIS IS THE PERSON I SAW SHOOT
25 THE VICTIM ON WHATEVER NIGHT IT WAS. WE'LL INTRODUCE THAT

DEFENSE MOTION TO EXCLUDE PHOTO LINE-UP

19

1 PURSUANT TO A HEARING TO DETERMINE WHETHER OR NOT, FIRST OF
2 ALL WHETHER OR NOT THE COURT APPROVES OF THE PHOTO LINEUP.

3 THE COURT: A JACKSON V. DENO.

4 MR. HUMPHRIES: NOT, NOT JACKSON V. DENO,
5 BIGGERS. BUT WE'LL DO THAT TOMORROW MORNING PRIOR TO
6 PUTTING UP THOSE WITNESSES.

7 THE COURT: WELL LET'S TAKE THAT WHOLE MATTER UP
8 AT THAT TIME.

9 MR. JOHNSON: AS WELL AS THE LINEUP ITSELF, TOO?

10 MR. HUMPHRIES: THAT'S WHEN WE INTEND TO PUT IT
11 UP.

12 THE COURT: THAT'S RIGHT, THERE'S NOT A
13 STATEMENT IN THERE?

14 MR. HUMPHRIES: NO, SIR, THIS IS, THE STATEMENT
15 WAS ACTUALLY WRITTEN BY THE WITNESS WHO SAID THIS IS THE
16 PERSON I SAW. THAT'S THE WAY HE INDICATED HIS CHOICE.

17 THE COURT: I'M SORRY, I'M SORRY, OKAY. SO
18 THERE IS NO JACKSON V. DENO MOTION?

19 MR. HUMPHRIES: NO, SIR, I DON'T BELIEVE SO. I
20 DON'T BELIEVE THERE'S ANY CAUSE FOR ONE.

21 MR. JOHNSON: NO, YOUR HONOR.

22 THE COURT: ALL RIGHT, SO FIVE AND SIX WILL BE
23 TAKEN UP AT THE TIME OF THE OFFERING OF THAT OR RIGHT PRIOR
24 TO THE OFFERING OF THAT?

25 MR. HUMPHRIES: YES, SIR.

1 THE COURT: HOW ABOUT SEQUESTERING THE STATE'S
2 WITNESSES?

3 MR. HUMPHRIES: I DON'T HAVE ANY PROBLEM WITH IT
4 AS LONG AS IT'S RECIPROCAL, YOUR HONOR, WITHOUT, WITH THE
5 EXCEPTION OF THE CHIEF INVESTIGATING OFFICER.

6 THE COURT: THAT'S RIGHT. WE'LL LEAVE THE CHIEF
7 INVESTIGATING OFFICER SEQUESTERED THE REMAINDER AND ANY
8 WITNESSES THAT YOU INTEND TO CALL NEED TO BE SEQUESTERED.
9 I DON'T WANT YOU TO TIP YOUR HAND BUT IF YOU HAVE ANY THAT
10 YOU'RE GOING TO CALL YOU NEED TO, NEED TO LET THEM KNOW
11 THEY'RE GOING TO BE SEQUESTERED.

12 MR. JOHNSON: OF COURSE THE DEFENDANT IS
13 EXCLUDED FROM THAT.

14 THE COURT: I'M SORRY?

15 MR. JOHNSON: THE DEFENDANT WILL, OF COURSE, BE

16 ---

17 THE COURT: YES, SIR.

18 MR. JOHNSON: WE HAVE NO PROBLEM WITH THAT, YOUR
19 HONOR.

20 THE COURT: ALL RIGHT, IS THERE ANYTHING
21 FURTHER?

22 MR. JOHNSON: THAT'S ALL.

23 MR. HUMPHRIES: NOTHING FROM THE STATE, YOUR
24 HONOR.

25 THE COURT: ALL RIGHT, ARE WE READY FOR THE

CALL OF CASE

21

1 JURY?

2 MR. HUMPHRIES: THE STATE IS READY.

3 THE COURT: BRING THE JURY IN.

4 THE COURT: ONE ALTERNATE IS ENOUGH?

5 MR. HUMPHRIES: ONE IS SATISFACTORY TO THE
6 STATE.

7 MR. JOHNSON: THAT WOULD BE FINE.

8 THE COURT: TWO AND ONE.

9 (WHEREUPON, THE JURY VENIRE RETURNED TO THE
10 COURTROOM.)

11 THE COURT: I HOPE YOU ENJOYED YOUR LUNCH.
12 WE'RE NOW READY TO PROCEED WITH THE DRAWING OF THE JURY FOR
13 THE NEXT CASE. SOLICITOR, CALL YOUR CASE.

14 MS. ELDER: YOUR HONOR, THE STATE AT THIS TIME
15 WOULD CALL THE STATE V. LEMOND CORNEILUS HOLLAND, 2006-GS-
16 26-2012. THIS IS TRUE BILL INDICTMENT FOR POSSESSION OF A
17 WEAPON DURING THE COMMISSION OF A VIOLENT CRIME;

18 ALSO, 2006-GS-26-2013 IT'S A TRUE BILLED
19 INDICTMENT FOR ASSAULT AND BATTERY WITH INTENT TO KILL;

20 ALSO, 2006-GS-26-2014, THE STATE V. LEMOND
21 CORNEILUS HOLLAND, IT IS A TRUE BILLED INDICTMENT FOR THE
22 CHARGE OF MURDER.

23 THE COURT: VERY WELL. LADIES AND GENTLEMEN,
24 YOU'VE HEARD THE SOLICITOR'S CALLING OF THESE CASES AGAINST
25 LEMOND CORNEILUS HOLLAND FOR ASSAULT AND BATTERY WITH

1 INTENT TO KILL, MURDER, AND POSSESSION OF WEAPON DURING THE
2 COMMISSION OF A VIOLENT CRIME. AS IN ANY CASE, CRIMINAL
3 CASE, THE BURDEN IS ON THE STATE TO PROVE THE GUILT OF THE
4 DEFENDANT BEYOND A REASONABLE DOUBT. TO THESE CHARGES THIS
5 DEFENDANT HAS PLED NOT GUILTY WHICH PLACES THAT BURDEN ON
6 THE STATE.

7 WE'RE ABOUT TO DRAW A JURY IN THIS CASE, OR THESE
8 CASES ALL OF WHICH WILL BE TRIED AT THE SAME TIME, AND I
9 NEED TO ASK YOU SOME QUESTIONS. YOU'VE BEEN QUALIFIED TO
10 BE QUALIFIED JURORS GENERALLY. NOW WE NEED TO ASK YOU
11 QUESTIONS CONCERNING YOUR QUALIFICATIONS SPECIFICALLY FOR
12 THIS CASE, AND WHEN I SAY SPECIFICALLY FOR THIS CASE, OF
13 COURSE, THE REASON IS TO FERRET OUT ANY CONFLICTS OF
14 INTEREST THAT YOU MAY HAVE TO FIND OUT IF YOU HAVE ANY
15 CONFLICTS OF INTEREST. THAT'S WHY WE'RE ASKING THESE
16 QUESTIONS.

17 IS THERE ANY MEMBER OF THE JURY PANEL RELATED BY
18 BLOOD OR CONNECTED BY MARRIAGE WITH THE DEFENDANT LEMOND
19 CORNEILUS HOLLAND? WOULD YOU, PLEASE, STAND, MR. HOLLAND
20 AND TURN AROUND AND FACE THE JURORS, THANK YOU, SIR, YOU
21 MAY BE SEATED.

22 ANY MEMBER OF THE JURY PANEL RELATED BY BLOOD,
23 CONNECTED BY MARRIAGE OR HAVE ANY CLOSE SOCIAL RELATIONSHIP
24 WITH THIS DEFENDANT, AND BY CLOSE SOCIAL RELATIONSHIP I
25 MEAN THINGS LIKE BEING A MEMBER OF THE SAME ORGANIZATIONS,

1 THE SAME CIVIC ORGANIZATIONS, GO TO THE SAME CHURCH, SING
2 IN THE SAME CHOIR OR WHATEVER THAT MAY BE, EMPLOYED BY THE
3 SAME EMPLOYER OR HAVE ANY CLOSE SOCIAL RELATIONSHIP LIKE
4 THAT, AND WHEN I SAY YOU I'M TALKING YOU OR ANY MEMBER OF
5 YOUR IMMEDIATE FAMILY. IF I SHOULD FORGET TO SAY YOU OR
6 YOUR IMMEDIATE FAMILY, AND I HOPE I DON'T, THAT'S WHAT I'M
7 TALKING ABOUT. YOU OR ANYBODY, YOUR IMMEDIATE FAMILY HAVE
8 ANY RELATIONSHIP OR ANY CONNECTION WITH THIS DEFENDANT
9 THROUGH BLOOD OR MARRIAGE OR THROUGH ANY SOCIAL
10 RELATIONSHIP, IF SO, PLEASE STAND AND TELL US ABOUT IT?

11 THERE APPEAR TO BE NONE.

12 THE VICTIM IN THE MATTER INVOLVING THE MURDER IS
13 ALLEGED TO BE BRANDT MICHAEL KOEHLER, K-O-E-H-L-E-R. IS
14 ANY MEMBER OF THE JURY PANEL RELATED BY BLOOD, CONNECTED BY
15 MARRIAGE OR HAVE ANY CLOSE SOCIAL RELATIONSHIP AS I HAVE
16 AFOREMENTIONED WITH THE VICTIM IN THE MURDER CASE AND THAT
17 IS OF BRANDT MICHAEL KOEHLER, K-O-E-H-L-E-R, IF SO, PLEASE
18 STAND?

19 THERE APPEAR TO BE NONE.

20 IS THERE ANY MEMBER OF THE JURY PANEL RELATED BY
21 BLOOD OR CONNECTED BY MARRIAGE WITH ANY OF THE ATTORNEYS IN
22 THIS CASE WITH REGARD TO THE STATE AND THE SOLICITOR'S
23 OFFICE, DONNA ELDER. WOULD YOU STAND, PLEASE, AND FRAN
24 HUMPHRIES, MR. HUMPHRIES, WOULD YOU STAND, PLEASE, OR FOR
25 THAT MANNER ANYBODY THAT YOU KNOW OF THAT'S INVOLVED WITH

VOIR DIRE

24

1 THE SOLICITOR'S OFFICE, GREG HEMBREE'S OFFICE HERE IN HORRY
2 COUNTY, RELATED BY BLOOD, CONNECTED BY MARRIAGE OF HAVE ANY
3 CLOSE SOCIAL RELATIONSHIP WITH THEM, EVER BEEN REPRESENTED
4 BY OR SUED BY OR ANY PROFESSIONAL RELATIONSHIP WITH ANY OF
5 THESE ATTORNEYS THAT MAY HAVE SUBSEQUENTLY JOINED THE
6 SOLICITOR'S OFFICE?

7 YES, MA'AM, YOUR NAME, PLEASE?

8 JURY PANEL MEMBER: CHRISTINA JARRARD, MY MOM
9 WORKS AS A LEGAL ASSISTANT.

10 THE COURT: I'M A LITTLE HARD OF HEARING.

11 JURY PANEL MEMBER: MY MOM WORKS AS A LEGAL
12 ASSISTANT HERE.

13 THE COURT: YOUR MOTHER WORKS AS A LEGAL
14 ASSISTANT IN THE SOLICITOR'S OFFICE?

15 JURY PANEL MEMBER: YES, SIR.

16 THE COURT: FOR WHAT ATTORNEY DOES SHE WORK, DO
17 YOU KNOW?

18 JURY PANEL MEMBER: SCOTT.

19 THE COURT: SCOTT.

20 MR. HUMPHRIES: SCOTT GRAUSTEIN.

21 THE COURT: I'M GOING TO EXCUSE YOU FROM THIS
22 CASE, MA'AM, BUT STAY WITH US, THOUGH, IF YOU WOULD?
23 ANYONE ELSE?

24 YES, MA'AM, PLEASE STAND AND TELL US YOUR NAME?

25 JURY PANEL MEMBER: MY NAME IS MEREDITH NEAL, I

1 UNDERSTAND THAT MY COUSIN IS ENGAGED TO SOMEONE IN THE
2 SOLICITOR'S OFFICE BUT I HAVE NOT MET HER.

3 THE COURT: YOU HAVE A COUSIN THAT'S ENGAGED TO
4 SOMEONE IN THE SOLICITOR'S OFFICE THAT YOU DON'T KNOW?

5 JURY PANEL MEMBER: RIGHT.

6 THE COURT: WOULD THAT PREVENT YOU, MA'AM, FROM
7 BEING A FAIR WITNESS IN A, IN THIS, EXCUSE ME, NOT A
8 WITNESS, BUT A JUROR IN THIS CASE?

9 JURY PANEL MEMBER: NO, SIR.

10 THE COURT: YOU COULD STILL BE FAIR TO BOTH THE
11 STATE AND FAIR TO THIS DEFENDANT?

12 JURY PANEL MEMBER: YES, SIR.

13 THE COURT: VERY WELL, YOU MAY BE SEATED.
14 ANYONE ELSE?

15 MS. ELDER: WHAT'S HER NUMBER?

16 THE COURT: GIVE US YOUR JUROR NUMBER, PLEASE?

17 JURY PANEL MEMBER: TWO TWENTY-SIX.

18 THE COURT: TWO TWENTY-SIX.

19 THE DEFENDANT IN THIS CASE IS REPRESENTED BY
20 BOBBY RICHARDSON AND JEFFREY JOHNSON. MR. JOHNSON, WOULD
21 YOU STAND AND, MR. RICHARDSON, WOULD YOU STAND? THANK YOU,
22 YOU MAY BE SEATED.

23 IS ANY MEMBER OF THE JURY PANEL RELATED BY BLOOD
24 OR CONNECTED BY MARRIAGE OR HAVE ANY CLOSE SOCIAL
25 RELATIONSHIP WITH EITHER OF THESE TWO ATTORNEYS, EVER BEEN

1 SUED BY OR REPRESENTED BY OR DEFENDED BY OR REAL ESTATE
2 CLOSING INVOLVING THEIR PROFESSIONAL SERVICES OR ANYTHING
3 LIKE THAT. IF SO, PLEASE STAND AND TELL US ABOUT IT?

4 THERE APPEAR TO BE NONE.

5 I'M GOING TO READ YOU A LIST, LADIES AND
6 GENTLEMEN, OF POTENTIAL WITNESSES IN THIS CASE AND BY
7 POTENTIAL WITNESSES THAT'S JUST WHAT THEY ARE. THEY DON'T
8 HAVE TO BE WITNESSES AND SHOULD SOME OF THESE PEOPLE, ANY
9 OF THESE PEOPLE WHOSE NAMES I'M ABOUT TO CALL NOT BE CALLED
10 AS A WITNESS. THAT SHOULDN'T RAISE ANY ALARM WHATSOEVER,
11 SHOULDN'T RAISE ANY INFERENCE OF PRESUMPTION OR ANYTHING,
12 IT SHOULDN'T CAUSE ANY CONCERN WHATSOEVER WITH YOU. IT'S
13 SIMPLY THAT THEY WEREN'T CALLED AS A WITNESS, BUT IF THEY
14 MAY BE A WITNESS I NEED TO PUT THEM ON THIS LIST TO CHECK
15 AND MAKE SURE THAT YOU DON'T ANY CONFLICTS OF INTEREST WITH
16 THEM. SO THEY MAY NOT ALL BE CALLED AND AGAIN THEY MAY BE
17 BUT IT SHOULDN'T MAKE ANY DIFFERENCE TO YOU. I'M GOING TO
18 READ THESE NAMES OUT AND AT THE END OF CALLING THESE NAMES
19 OUT I'M GOING TO ASK THE VERY SAME QUESTION THAT I'VE BEEN
20 ASKING WITH REGARD TO THE ATTORNEYS AND THE DEFENDANT AND
21 THAT'S IS, ARE YOU OR ANY MEMBER OF YOUR IMMEDIATE FAMILY
22 RELATED BY BLOOD, CONNECTED BY MARRIAGE OR HAVE ANY CLOSE
23 SOCIAL RELATIONSHIP WITH ANY OF THESE POTENTIAL WITNESSES
24 IN THIS CASE? AND THEY ARE:

25 JAMES B. FINCHUM OF GOLDSBORO, NORTH CAROLINA;

1 DR. EDWARD L. PROCTOR OF GRAND STRAND REGIONAL
2 MEDICAL, REGIONAL MEDICAL CENTER, RMC. IT'S HARD FOR ME TO
3 REMEMBER WHAT, I CAN REMEMBER SOME INITIALS BUT NOT ALL OF
4 THEM;

5 CHRIS L. HEMINGWAY OF TABOR CITY, NORTH CAROLINA;
6 ROBYN N. BOWEN OF, B-O-W-E-N OF NORTH MYRTLE
7 BEACH;

8 RAPHAEL WALKE, W-A-L-K-E, OF MYRTLE BEACH;
9 JEFFREY D. BENNICK, B-E-N-N-I-C-K, OF NORTH
10 MYRTLE BEACH;

11 CARLOS ADAMS OF NORTH MYRTLE BEACH;
12 THIS SAYS YESSICA, IS THAT RIGHT?

13 MR. HUMPHRIES: YES, YOUR HONOR.

14 THE COURT: IT'S NOT JESSICA?

15 MR. HUMPHRIES: IT IS YESSICA.

16 THE COURT: YESSICA, -Y-E-S-S-I-C-A CARUTHERS OF
17 CONWAY;

18 A. BEST OF NORTH MYRTLE BEACH POLICE DEPARTMENT;
19 J. A. MARRERO, M-A-R-R-E-R-O, OF NORTH MYRTLE
20 BEACH POLICE DEPARTMENT;

21 OFFICER DAVID REIST OF THE NORTH MYRTLE BEACH
22 POLICE DEPARTMENT, R-E-I-S-T;

23 AGENT STEVE WRIGHT OF THE SOUTH CAROLINA LAW
24 ENFORCEMENT DIVISION KNOWN AS SLED;

25 AGENT DAVID BLACK OF SLED;

1 RENEЕ BEST OF NORTH MYRTLE BEACH POLICE
2 DEPARTMENT;

3 INVESTIGATOR CARRIE PELLAND, P-E-L-L-A-N-D, OF
4 NORTH MYRTLE BEACH POLICE DEPARTMENT;

5 LIEUTENANT DON REPEC, R-E-P-E-C, OF THE NORTH
6 MYRTLE BEACH POLICE DEPARTMENT;

7 DETECTIVE DENNIS PITSINGER OF NORTH MYRTLE BEACH
8 POLICE DEPARTMENT;

9 LT. MIKE BALDAZARRE, BALDAZARRE?

10 MR. HUMPHRIES: YES, YOUR HONOR.

11 THE COURT: B-A-L-D-A-Z-A-R-R-E, OF NORTH MYRTLE
12 BEACH POLICE DEPARTMENT;

13 LT. PAUL SHEETS OF NORTH MYRTLE BEACH POLICE
14 DEPARTMENT;

15 AND DAVID MALLOY.

16 IS THERE ANY MEMBER OF THE JURY PANEL NOW RELATED
17 BY BLOOD OR CONNECTED BY MARRIAGE OR HAVE ANY CLOSE SOCIAL
18 RELATIONSHIP WITH ANY OF THESE POTENTIAL JURORS, IF SO,
19 TELL ME ABOUT IT?

20 YES, SIR, YOUR NAME, PLEASE?

21 JURY PANEL MEMBER: EVERETTE FOWLER.

22 THE COURT: MR. FOWLER?

23 JURY PANEL MEMBER: I WORKED ON AN AMBULANCE IN
24 NORTH MYRTLE BEACH FOR TWO YEARS, FAMILIAR WITH MOST OF THE
25 POLICE OFFICERS YOU NAMED.

1 THE COURT: YOU WORK FOR WHOM?

2 JURY PANEL MEMBER: FOR HORRY COUNTY FOR THE
3 FIRE AND RESCUE. I WORKED ON AN AMBULANCE STATIONED IN
4 NORTH MYRTLE BEACH FOR ABOUT TWO YEARS.

5 THE COURT: ALL RIGHT, SIR.

6 JURY PANEL MEMBER: I FAMILIAR WITH MOST OF THE
7 POLICE OFFICERS YOU NAMED.

8 THE COURT: SO YOU KNOW MOST OF THESE POLICE
9 OFFICERS? HOW LONG AGO WAS THAT?

10 JURY PANEL MEMBER: FEBRUARY WILL BE TWO YEARS
11 AGO, I GOT MOVED.

12 THE COURT: BUT YOU'RE NOT WORKING FOR THEM OR
13 YOU'RE NOT WORKING FOR THEM ANYMORE?

14 JURY PANEL MEMBER: NO, SIR, I WORK FOR HORRY
15 COUNTY BUT I WORK IN LORIS NOW.

16 THE COURT: WOULD THE FACT THAT TWO YEARS AGO
17 YOU WORKED FOR THE FIRE DEPARTMENT IN THAT AREA AND WAS
18 ASSOCIATED WITH SOME OF THESE POLICE OFFICERS AS A FIREMAN
19 WOULD THAT, COULD YOU STILL BE FAIR AND IMPARTIAL AS A
20 JUROR IN THIS MATTER?

21 JURY PANEL MEMBER: YES, SIR.

22 THE COURT: YOU MAY BE SEATED, THANK YOU.
23 ANYONE ELSE?

24 YES, MA'AM?

25 JURY PANEL MEMBER: I KNOW ONE OF THE NAMES THAT

1 YOU CALLED.

2 THE COURT: GIVE ME YOUR NAME, MA'AM?

3 JURY PANEL MEMBER: MY NAME IS SALLY ISAAC.

4 THE COURT: AND, MS. ISAAC, WHICH PERSON DO YOU
5 HAVE A RELATIONSHIP WITH?

6 JURY PANEL MEMBER: DR. PROCTOR.

7 THE COURT: ALL RIGHT, IS HE YOUR DOCTOR?

8 JURY PANEL MEMBER: NO, SIR.

9 THE COURT: WHAT KIND OF RELATIONSHIP DO YOU
10 HAVE WITH HIM?

11 JURY PANEL MEMBER: HE'S A FRIEND.

12 THE COURT: HE'S JUST A PERSONAL FRIEND. IS HE
13 A CLOSE PERSONAL FRIEND?

14 JURY PANEL MEMBER: YES, SIR.

15 THE COURT: WOULD, WOULD THAT FACT, MA'AM,
16 PRESENT YOU, PREVENT YOU RATHER FROM BEING A FAIR AND
17 IMPARTIAL JUROR IN THIS CASE?

18 JURY PANEL MEMBER: NO, SIR.

19 THE COURT: YOU COULD STILL BE FAIR AND
20 IMPARTIAL?

21 JURY PANEL MEMBER: YES, SIR.

22 THE COURT: THANK YOU, MA'AM, YOU MAY BE SEATED.
23 ANYONE ELSE?

24 THERE APPEAR TO BE NONE.

25 IS THERE ANY MEMBER OF THE JURY PANEL WHO HAS

1 FORMED OR EXPRESSED AN OPINION AS TO THE GUILT OR INNOCENCE
2 OF THIS DEFENDANT? LET ME TELL YOU THIS INCIDENT IS
3 ALLEGED TO HAVE TAKEN PLACE AT MACATZ ESTABLISHMENT IN
4 NORTH MYRTLE BEACH IN THE PARKING LOT OF THAT, OF THAT
5 ESTABLISHMENT ON OR ABOUT DECEMBER THE 30TH OF 2005. IT'S
6 ALLEGED IN THE INDICTMENT THAT THIS TOOK PLACE DECEMBER THE
7 30TH AND THAT THE DEFENDANT WAS INVOLVED IN THESE CRIMES OR
8 COMMITTED THESE CRIMES ON THAT DATE AND THAT PLACE.

9 NOW THAT'S NOT MUCH ABOUT THAT INCIDENT BUT THAT
10 IS THE INCIDENT IN QUESTION AND I NEED TO KNOW IF THERE'S
11 ANYBODY WHO HAS EXPRESSED ANY OPINION ABOUT THE GUILT OR
12 THE INNOCENCE OF THIS DEFENDANT AND IF YOU HAVE COULD THAT
13 OPINION THAT YOU'VE FORMED OR EXPRESSED AN OPINION THAT
14 COULD BE NOT BE CHANGED IF THE FACTS IN THIS CASE WARRANTED
15 CHANGING YOUR OPINION? FOR INSTANCE --

16 YES, SIR?

17 MR. FOWLER: I THINK I WAS ON THE AMBULANCE THAT
18 RESPONDED TO THAT CALL.

19 THE COURT: VERY WELL, IF YOU ARE THEN WE'LL --

20 JURY PANEL MEMBER: I DON'T REMEMBER, IT'S BEEN
21 SO LONG AGO.

22 THE COURT: WELL IF IT'S POSSIBLE THEN WE'LL
23 EXCUSE YOU FROM THIS CASE AS WELL. THANK YOU.

24 IS THERE ANY MEMBER OF THE PANEL WHO KNOWS
25 ANYTHING ABOUT THIS INCIDENT AND HAS FORMED AN OPINION

1 ABOUT IT? LET'S FIND THAT OUT FIRST.

2 THERE APPEAR TO BE NONE SO I DON'T NEED TO GO
3 INTO -- COULD YOU SET THAT OPINION ASIDE AND LISTEN TO THE
4 EVIDENCE AND CHANGE IT IF THE FACTS WARRANT IT, SO IF YOU
5 DON'T, HAVEN'T FORMED AN OPINION THAT'S GOOD.

6 IS THERE ANY MEMBER OF THE JURY PANEL AWARE OR
7 CONSCIOUS OF ANY BIAS OR PREJUDICE FOR OR AGAINST THIS
8 DEFENDANT OR FOR OR AGAINST THE STATE OF SOUTH CAROLINA?
9 IF SO, PLEASE STAND AND TELL US ABOUT IT.

10 THERE APPEAR TO BE NONE.

11 IS THERE ANY MEMBER OF THE JURY PANEL A PERSON
12 WHO COULD NOT GIVE BOTH THE STATE AND THIS DEFENDANT A FAIR
13 AND IMPARTIAL TRIAL? IF SO, PLEASE STAND.

14 IS THERE ANY MEMBER OF THE JURY PANEL WHO IS
15 RELATED BY BLOOD OR MARRIAGE OR HAVE ANY CLOSE RELATIONSHIP
16 WITH ANY LAW ENFORCEMENT OFFICER OR OFFICIAL?

17 YES, MA'AM, YOUR NAME, PLEASE?

18 JURY PANEL MEMBER: DORIS STOLTE. MY HUSBAND IS
19 A RETIRED JERSEY STATE TROOPER AND FBI AGENT.

20 THE COURT: IN WHAT STATE?

21 JURY PANEL MEMBER: IN NEW JERSEY.

22 THE COURT: AND HE'S RETIRED AND HOW LONG HAS HE
23 BEEN RETIRED, MA'AM?

24 JURY PANEL MEMBER: HE'S BEEN RETIRED FROM THE
25 FBI FOR FOUR YEARS.

VOIR DIRE

33

1 THE COURT: AND YOU'VE BEEN LIVING HERE FOR --

2 JURY PANEL MEMBER: FOUR YEARS.

3 THE COURT: FOR FOUR YEARS. WOULD THAT FACT,
4 MA'AM, PREVENT YOU FROM BEING A FAIR AND IMPARTIAL JUROR IN
5 THIS CASE?

6 JURY PANEL MEMBER: I DON'T THINK SO.

7 THE COURT: YOU COULD STILL BE FAIR TO THE STATE
8 AND FAIR TO THIS DEFENDANT?

9 JURY PANEL MEMBER: YES.

10 THE COURT: VERY WELL, YOU MAY BE SEATED.
11 ANYONE ELSE?

12 YES, MA'AM, YOUR NAME, PLEASE?

13 JURY PANEL MEMBER: YES, MY HUSBAND WAS IN
14 CHARGE OF THE MANASSAS COUNTY POLICE DEPARTMENT IN NEW
15 YORK.

16 THE COURT: AGAIN, MA'AM, I'M HARD OF HEARING
17 AND --

18 JURY PANEL MEMBER: OH, I'M SORRY.

19 THE COURT: YOU CAN YELL AT ME I'M MARRIED, I'M
20 USED TO IT.

21 JURY PANEL MEMBER: RETIRED FROM THE MANASSAS
22 COUNTY POLICE DEPARTMENT IN NEW YORK.

23 THE COURT: AND HOW LONG HAS HE BEEN RETIRED?

24 JURY PANEL MEMBER: TWENTY YEARS.

25 THE COURT: AND COULD YOU STILL BE A FAIR AND

VOIR DIRE

34

1 IMPARTIAL JUROR?

2 JURY PANEL MEMBER: SIR?

3 THE COURT: COULD YOU BE FAIR TO THIS DEFENDANT
4 AND FAIR TO THE STATE?

5 JURY PANEL MEMBER: YES.

6 THE COURT: YOU MAY BE SEATED. YOUR NAME,
7 PLEASE, MA'AM?

8 JURY PANEL MEMBER: CAROLE ROGERS.

9 THE COURT: THANK YOU, MS. ROGERS. SOMEONE ELSE
10 OVER HERE? YES, SIR?

11 JURY PANEL MEMBER: YOUR HONOR, I WORKED FOR THE
12 SURFSIDE POLICE DEPARTMENT DURING THE SUMMER. WE WERE
13 CLOSE FRIENDS WITH REPEC OF NORTH MYRTLE BEACH, GO TO THE
14 SAME CHURCH, SAME CHOIR. I ALSO REMEMBER HIM FROM THE
15 MYRTLE BEACH POLICE DEPARTMENT AS WELL AND THE SAME CHURCH.

16 THE COURT: AND YOU'RE A POLICE OFFICER NOW?

17 JURY PANEL MEMBER: I WORKED FOR THE SURFSIDE
18 POLICE DEPARTMENT DURING THE SUMMER.

19 THE COURT: I'M GOING TO EXCUSE YOU FROM SERVICE
20 IN THIS CASE. THANK YOU. GIVE US YOUR NAME.

21 JURY PANEL MEMBER: JONATHAN MCKELVEY, 205.

22 THE COURT: THANK YOU, MR. MCKELVEY. ANYONE
23 ELSE? YES, MA'AM?

24 JURY PANEL MEMBER: MY BROTHER IN LAW IS A
25 POLICE OFFICER FOR THE CITY OF MYRTLE BEACH.

1 THE COURT: YOUR BROTHER IN LAW?

2 JURY PANEL MEMBER: MY BROTHER IN LAW.

3 THE COURT: THAT'S YOUR --

4 JURY PANEL MEMBER: MY SISTER'S HUSBAND.

5 THE COURT: SISTER'S HUSBAND?

6 JURY PANEL MEMBER: YES, SIR.

7 THE COURT: AND HE WORKS FOR THE CITY OF MYRTLE
8 BEACH?

9 JURY PANEL MEMBER: YES, SIR.

10 THE COURT: WOULD THAT, MA'AM, PREVENT YOU FROM
11 BEING FAIR AND IMPARTIAL IN THIS CASE?

12 JURY PANEL MEMBER: NO, SIR.

13 THE COURT: YOU COULD STILL BE A FAIR AND
14 IMPARTIAL JUROR?

15 JURY PANEL MEMBER: YES, SIR.

16 THE COURT: VERY WELL, AND YOUR NAME IS?

17 JURY PANEL MEMBER: ELIZABETH MERCER.

18 THE COURT: THANK YOU, MS. MERCER, YOU MAY BE
19 SEATED. ANYONE ELSE?

20 IS THERE ANY MEMBER OF THE JURY PANEL THAT'S BEEN
21 THE VICTIM OF A CRIME OF VIOLENCE? IF SO, PLEASE STAND AND
22 TELL US ABOUT IT. EITHER YOU OR A MEMBER OF YOUR IMMEDIATE
23 FAMILY BEEN THE VICTIM OF A CRIME OF VIOLENCE?

24 YES, MA'AM, YOUR NAME?

25 JURY PANEL MEMBER: GRACE POLE.

JURY SELECTION

36

1 THE COURT: MS. POLE, WHAT'S YOUR SITUATION?

2 JURY PANEL MEMBER: I WAS RAPED.

3 THE COURT: AND HOW LONG AGO DID THIS TAKE
4 PLACE? WAS IT A LONG TIME AGO?

5 JURY PANEL MEMBER: YEAH, I WAS ---

6 THE COURT: YOU DON'T HAVE TO TELL ME EXACTLY,
7 MA'AM, BUT A LONG TIME AGO?

8 JURY PANEL MEMBER: I WAS 13.

9 THE COURT: WOULD THAT FACT, MA'AM, PREVENT YOU
10 FROM BEING A FAIR AND IMPARTIAL JUROR?

11 JURY PANEL MEMBER: NO, SIR.

12 THE COURT: YOU MAY BE SEATED, THANK YOU, MA'AM.
13 ANYONE ELSE?

14 THERE APPEAR TO BE NONE OTHERS.

15 ANY OTHER QUESTIONS FROM THE STATE?

16 MR. HUMPHRIES: NONE FROM THE STATE, YOUR HONOR.

17 THE COURT: ANY FROM THE DEFENSE?

18 MR. HUMPHRIES: NOTHING, YOUR HONOR.

19 THE COURT: GIVE US A JURY, PLEASE.

20 MADAM CLERK: WHEN I CALL YOUR NAME, PLEASE,
21 COME UP IN THE MIDDLE OF THE COURTROOM AND FACE THAT WAY
22 AND I'LL ASK SOME QUESTIONS AND WE'LL SEAT THE JURY.

23 THE COURT: LET ME, BEFORE YOU DO THAT LET ME
24 GIVE THEM A LITTLE BLURB HERE. IN CIVIL COURT WHEN WE
25 CHOOSE A JURY WE NORMALLY STRIKE, EXCLUDE, BY NUMBER AND

JURY SELECTION

37

1 YOU'RE ASSIGNED A NUMBER DIFFERENTLY THAN THE NUMBER OF
2 YOUR, THAT YOU KNOW ABOUT, NOT YOUR JURY NUMBER, BUT THAT'S
3 ACTUALLY THE NUMBER AND THE ORDER IN WHICH YOU WERE DRAWN
4 OR SELECTED BY THE COMPUTER. YOU'RE ASSIGNED A RANDOM
5 NUMBER AND IT'S NOT A NUMBER YOU KNOW SO YOU DON'T KNOW IF
6 YOU'VE BEEN STRUCK OR EXCLUDED OR NOT. IF YOU DO IT
7 DOESN'T REALLY MAKE ANY DIFFERENCE BUT YOU WON'T KNOW
8 USUALLY IF YOU'RE IN CIVIL COURT, BUT IN CRIMINAL COURT
9 IT'S A LITTLE DIFFERENT. WE ASK YOU TO COME FORWARD, TURN
10 AROUND AND FACE THE BACK OF, OR THE FRONT OF THE COURTROOM,
11 THE BACK OF THE COURTROOM I GUESS THAT IS, AND THE STATE
12 WILL SAY EITHER PRESENT THE JUROR OR EXCUSE THE JUROR ON
13 THIS CASE AND IF HE SAYS PRESENT THE JUROR THEN THE DEFENSE
14 WILL SAY EITHER SEAT THE JUROR OR EXCLUDE THE JUROR ON THIS
15 CASE OR EXCUSE THE JUROR ON THIS CASE.

16 NOW IT'S A LITTLE MORE PERSONAL, AND I GUESS
17 THERE'S THE POSSIBILITY THAT YOU'LL FEEL REJECTED, DON'T
18 FEEL THAT WAY, DON'T FEEL THAT WAY. YOU MAY BE TICKLED TO
19 DEATH TO HAVE THE CUP SLIP FROM YOUR LIPS, BUT I WANT YOU
20 TO KNOW THAT IT'S NOT BECAUSE THEY DON'T THINK YOU'RE SMART
21 OR THEY THINK THERE'S SOMETHING WRONG WITH YOU. ALL IT
22 MEANS IS THAT YOU DON'T MEET THE PROFILE OF THE TYPE JUROR
23 THAT THEY'RE LOOKING FOR.

24 IN AN ADVERSARIAL SITUATION LIKE WE'RE IN
25 OBVIOUSLY THE STATE'S LOOKING FOR THE KIND OF WITNESS THAT

JURY SELECTION

38

1 THEY THINK WILL AGREE WITH THEIR VERSION OF THE FACTS OF THE
2 CASE AND THE DEFENDANT'S OBVIOUSLY LOOKING FOR JURORS THAT
3 THEY THINK WILL AGREE WITH THEIR VERSION OF THE FACTS OF
4 THE CASE SO I DON'T KNOW WHAT THE PROFILE IS THAT THEY
5 HAVE. THEY CAN EXCLUDE YOU FOR VIRTUALLY ANY REASON
6 WHETHER THEY'RE LOOKING FOR PEOPLE FROM THE UPPER PART OF
7 THE COUNTY OR THE LOWER PART, PEOPLE WITH A LOT OF
8 EDUCATION OR A LITTLE EDUCATION, PEOPLE THAT ARE RIGHT
9 HANDED OR LEFT HANDED, I DON'T KNOW. BUT IF YOU'RE
10 EXCLUDED BY BOTH OR BY EITHER DON'T, DON'T FEEL LIKE
11 THERE'S SOMETHING DEROGATORY ABOUT YOU, IT'S JUST SIMPLY
12 YOU DON'T MEET THE PROFILE OF THE TYPE JUROR THEY'RE
13 LOOKING FOR AND THAT'S ALL IT MEANS. HAVING SAID THAT NOW
14 IF YOU'LL, DIDN'T MEAN TO INTERRUPT YOU, GO AHEAD.

15 MADAM CLERK: 91, MORGAN EMSLEY.

16 WHAT SAYS THE STATE?

17 MS. ELDER: PLEASE PRESENT THIS JUROR.

18 MADAM CLERK: WHAT SAY THE DEFENSE?

19 MR. JOHNSON: PRESENT THE JUROR.

20 MADAM CLERK: HAVE A SEAT IN THE JURY BOX,
21 PLEASE.

22 303, SALLY STOLTE.

23 WHAT SAY THE STATE?

24 MS. ELDER: PLEASE PRESENT THIS JUROR.

25 MADAM CLERK: WHAT SAY THE DEFENSE?

JURY SELECTION

39

1 MR. JOHNSON: EXCUSE THE JUROR.

2 MADAM CLERK: YOU'RE EXCUSED IN THIS PARTICULAR
3 CASE.

4 275, JOSEPH ROTH, III.

5 WHAT SAY THE STATE?

6 MS. ELDER: PLEASE PRESENT THIS JUROR.

7 MADAM CLERK: DEFENSE?

8 MR. JOHNSON: EXCUSE THE JUROR.

9 MADAM CLERK: YOU'RE EXCUSED IN THIS PARTICULAR
10 CASE.

11 THE COURT: LET ME ADD IF YOU'RE EXCUSED THAT
12 DOESN'T MEAN EXCUSED FOR THE EVENING; IT MEANS EXCUSED TO
13 TAKE YOUR SEAT. YOU MAY BE EXCUSED LATER ON BUT NOT RIGHT
14 NOW.

15 MADAM CLERK: 154, SALLY ISAAC.

16 WHAT SAY THE STATE?

17 MS. ELDER: PLEASE PRESENT THIS JUROR.

18 MADAM CLERK: WHAT SAY DEFENSE?

19 MR. JOHNSON: EXCUSE THE JUROR.

20 MADAM CLERK: YOU'RE EXCUSED IN THIS PARTICULAR
21 CASE.

22 80, FRANCES DESANTOS.

23 WHAT SAY THE STATE?

24 MS. ELDER: PLEASE PRESENT THIS JUROR.

25 MADAM CLERK: DEFENSE?

JURY SELECTION

40

1 MR. JOHNSON: EXCUSE THE JUROR.

2 MADAM CLERK: YOU'RE EXCUSED IN THIS PARTICULAR
3 CASE.

4 69, KATHY COX.

5 WHAT SAY THE STATE?

6 MS. ELDER: PLEASE PRESENT THIS JUROR.

7 MADAM CLERK: DEFENSE?

8 MR. JOHNSON: EXCUSE THE JUROR.

9 MADAM CLERK: YOU'RE EXCUSED IN THIS PARTICULAR
10 CASE.

11 85, AMY DEZAMORA.

12 WHAT SAY THE STATE?

13 MS. ELDER: PLEASE EXCUSE THE JUROR FROM THIS

14 CASE.

15 MADAM CLERK: YOU'RE EXCUSED IN THIS PARTICULAR

16 CASE.

17 166, JEFF JONES.

18 WHAT SAY THE STATE?

19 MS. ELDER: PLEASE PRESENT THIS JUROR.

20 MADAM CLERK: DEFENSE?

21 MR. JOHNSON: PRESENT THE JUROR.

22 MADAM CLERK: HAVE A SEAT IN THE JURY BOX,
23 PLEASE.

24 223, CARRIE MOORE.

25 WHAT SAY THE STATE?

JURY SELECTION

41

1 MS. ELDER: PLEASE PRESENT THIS JUROR.
2 MADAM CLERK: DEFENSE?
3 MR. JOHNSON: PRESENT THE JUROR.
4 MADAM CLERK: HAVE A SEAT IN THE JURY BOX,
5 PLEASE.
6 NUMBER 6, ANTHONY AMBUHL.
7 WHAT SAY THE STATE?
8 MS. ELDER: PLEASE PRESENT THIS JUROR.
9 MADAM CLERK: DEFENSE?
10 MR. JOHNSON: EXCUSE THE JUROR.
11 MADAM CLERK: YOU'RE EXCUSED IN THIS PARTICULAR
12 CASE.
13 214, SYLVIA MILLER.
14 WHAT SAY THE STATE?
15 MS. ELDER: PLEASE PRESENT THIS JUROR.
16 MADAM CLERK: DEFENSE?
17 MR. JOHNSON: SEAT THE JUROR.
18 MADAM CLERK: HAVE A SEAT IN THE JURY BOX,
19 PLEASE.
20 52, LAURA CARMINE.
21 WHAT SAY THE STATE?
22 MS. ELDER: PLEASE PRESENT THIS JUROR.
23 MADAM CLERK: DEFENSE?
24 MR. JOHNSON: PRESENT THE JUROR.
25 MADAM CLERK: HAVE A SEAT IN THE JURY BOX,

JURY SELECTION

42

1 PLEASE.

2 105, CAROLYN GAINNEY.

3 WHAT SAY THE STATE?

4 MS. ELDER: PLEASE PRESENT THIS JUROR.

5 MADAM CLERK: DEFENSE?

6 MR. JOHNSON: PRESENT THE JUROR.

7 MADAM CLERK: HAVE A SEAT IN THE JURY BOX,

8 PLEASE.

9 273, CAROLE ROGERS.

10 WHAT SAY THE STATE?

11 MS. ELDER: PLEASE PRESENT THIS JUROR.

12 MADAM CLERK: DEFENSE?

13 MR. JOHNSON: EXCUSE THE JUROR.

14 MADAM CLERK: YOU'RE EXCUSED IN THIS PARTICULAR

15 CASE.

16 331, RICHARD VEREEN.

17 WHAT SAY THE STATE?

18 MS. ELDER: PLEASE PRESENT THIS JUROR.

19 MADAM CLERK: DEFENSE?

20 MR. JOHNSON: PRESENT THE JUROR.

21 MADAM CLERK: HAVE A SEAT IN THE JURY BOX,

22 PLEASE.

23 325, SHANNON VAN MARTEN.

24 WHAT SAY THE STATE?

25 MS. ELDER: PRESENT THE JUROR, PLEASE.

JURY SELECTION

43

1 MADAM CLERK: DEFENSE?
2 MR. JOHNSON: PRESENT THE JUROR.
3 MADAM CLERK: HAVE A SEAT IN THE JURY BOX,
4 PLEASE.
5 188, WILLIAM LONGACRE.
6 WHAT SAY THE STATE?
7 MS. ELDER: PLEASE PRESENT THIS JUROR.
8 MADAM CLERK: DEFENSE?
9 MR. JOHNSON: PRESENT THE JUROR.
10 MADAM CLERK: HAVE A SEAT IN THE JURY BOX,
11 PLEASE.
12 42, COLIN BURCH.
13 WHAT SAY THE STATE?
14 MS. ELDER: PLEASE PRESENT THIS JUROR.
15 MADAM CLERK: DEFENSE?
16 MR. JOHNSON: PRESENT THE JUROR.
17 MADAM CLERK: HAVE A SEAT IN THE JURY BOX,
18 PLEASE.
19 209, ELIZABETH MERCER.
20 WHAT SAY THE STATE?
21 MS. ELDER: PLEASE PRESENT THIS JUROR.
22 MADAM CLERK: DEFENSE?
23 MR. JOHNSON: WHAT NUMBER IS THAT JUROR, PLEASE?
24 MADAM CLERK: 209.
25 MR. JOHNSON: EXCUSE THE JUROR.

JURY SELECTION

44

1 MADAM CLERK: YOU'RE EXCUSED IN THIS PARTICULAR
2 CASE.

3 278, TIMOTHY RUTLAND.

4 WHAT SAY THE STATE?

5 MS. ELDER: PLEASE PRESENT THIS JUROR.

6 MADAM CLERK: DEFENSE?

7 MR. JOHNSON: PRESENT THE JUROR.

8 MADAM CLERK: HAVE A SEAT IN THE JURY BOX,
9 PLEASE.

10 270, BRIAN RICHARDSON.

11 WHAT SAY THE STATE?

12 MS. ELDER: PLEASE PRESENT THIS JUROR.

13 MADAM CLERK: DEFENSE?

14 MR. JOHNSON: PRESENT THE JUROR.

15 MADAM CLERK: HAVE A SEAT IN THE JURY BOX,
16 PLEASE.

17 95, WILLIE FERGUSON.

18 WHAT SAY THE STATE?

19 MS. ELDER: PLEASE PRESENT THIS JUROR.

20 MADAM CLERK: DEFENSE?

21 MR. JOHNSON: PRESENT THE JUROR.

22 MADAM CLERK: HAVE A SEAT IN THE JURY BOX,
23 PLEASE.

24 THE COURT: ANY OBJECTIONS TO THE SELECTIONS OF
25 THE JURY FROM THE STATE?

COURT TO JURY

45

1 MS. ELDER: NO, SIR, YOUR HONOR.

2 THE COURT: FROM THE DEFENSE?

3 MR. JOHNSON: NOTHING FROM THE DEFENSE?

4 THE COURT: VERY WELL, LADIES AND GENTLEMEN,
5 THOSE OF YOU NOT SELECTED I'M GOING TO EXCUSE YOU NOW TO
6 COME BACK WHENEVER YOU'RE CALLED. I THINK THAT YOU'VE BEEN
7 GIVEN A MAGIC NUMBER ON YOUR JURY NOTIFICATION, JUST CALL
8 THAT NUMBER. WHAT TIME, DONNA, AFTER SIX?

9 MADAM CLERK: AFTER SIX.

10 THE COURT: AFTER 6:00 THIS AFTERNOON AND YOU'LL
11 BE GIVEN YOUR FURTHER JURY INSTRUCTIONS. THAT CALL, OR
12 THAT CALL DON'T TELL YOU ANYTHING, BUT THE RECORDING AT THE
13 END OF THE CALL WILL, IT MAY TELL YOU TO CALL BACK IN THE
14 MORNING. IT MAY TELL YOU TO COME IN IN THE MORNING, MAY
15 TELL YOU TO CALL BACK TOMORROW AFTER 6:00, BUT YOUR
16 INSTRUCTIONS WILL BE GIVEN YOU ON THAT TELEPHONE CALL. IF
17 YOU DON'T GET THROUGH THE FIRST TIME KEEP TRYING YOU'LL
18 EVENTFULLY GET THROUGH. IF SOMETHING SHOULD HAPPEN LIKE A
19 BUFFALO HERD COME THROUGH AND KNOCK DOWN ALL THE LINES THE
20 PRESUMPTION IS THAT YOU'LL BE HERE TOMORROW MORNING AT
21 9:30. IF YOU CAN'T GET THROUGH FOR SOME REASON, SOMETHING
22 TERRIBLE HAPPENS, BE HERE AT 9:30 AND WE'LL TELL YOU IN
23 PERSON. BUT THE REASON WE DO THIS IS TO NOT TO INTERFERE
24 WITH YOUR NORMAL ACTIVITIES ANY MORE THAN POSSIBLE SO IF
25 YOU'LL, PLEASE, MAKE THAT CALL AFTER SIX YOU'LL GET YOUR

COURT TO JURY

46

1 INSTRUCTIONS AT THAT TIME. THANK YOU VERY MUCH, YOU'RE
2 EXCUSED.

3 (WHEREUPON, THE JURY VENIRE WAS EXCUSED FOR THE
4 EVENING.)

5 THE COURT: GIVE ME YOUR NAME, PLEASE MA'AM,
6 RIGHT HERE ON THE CORNER?

7 JURY MEMBER: CAROLYN GAINNEY.

8 THE COURT: MS. GAINNEY, I'M GOING TO ASK YOU, IF
9 YOU WILL, TO SERVE AS THE FOREPERSON OF THIS JURY, JUROR.
10 YOU MAY BE SEATED NOW. YOU'RE SITTING IN THE FOREPERSON'S
11 SEAT AND YOU LOOK LIKE A PERSON THAT WILL DO THE JOB WELL.
12 LET ME EXPLAIN TO YOU WHAT YOUR DUTIES AND RESPONSIBILITIES
13 ARE OTHER THAN THOSE OF A NORMAL JUROR ARE THREEFOLD.

14 NUMBER ONE, YOU WILL BE THE SPOKESPERSON FOR THE
15 JURY. ANY TIME THE JURY MAY HAVE A MATTER THEY NEED TO
16 BRING TO THE ATTENTION OF THE COURT IF THEY WANT TO TURN UP
17 THE HEAT IN THE JURY ROOM OR ANY QUESTIONS THEY MAY HAVE,
18 WHATEVER IT MAY BE, YOU WILL RELAY THOSE QUESTIONS TO THE
19 COURT IN THE PRESENCE OF THE OTHER JURORS. OF COURSE IN
20 THE PRESENCE BECAUSE I WANT TO MAKE SURE THAT YOU'RE ASKING
21 THE RIGHT QUESTION OR TELLING ME THE SAME THING THEY
22 INSTRUCTED YOU TO DO.

23 SECONDLY, YOU WILL BE THE PRESIDING JUROR. ONCE
24 THE JURY HAS HEARD ALL THE EVIDENCE IN THE CASE AND WHILE
25 YOU'RE DELIBERATING IN YOUR JURY ROOM YOU WILL PRESIDE OVER

PRELIMINARY CHARGE

47

1 THOSE DELIBERATIONS MAKING SURE THAT EACH AND EVERY JUROR
2 HAS A COMPLETE AND FULL OPPORTUNITY TO EXPRESS THEIR VIEWS
3 ON ANY AND ALL ASPECTS OF THE CASE.

4 AND, THIRDLY, ONCE THE JURY HAS REACHED A
5 UNANIMOUS VERDICT IN THIS CASE, AND YOUR VERDICT MUST BE
6 UNANIMOUS, YOU WILL WRITE THAT VERDICT FOR THE, FOR THE
7 JURY ON A FORM THAT WILL BE PROVIDED FOR YOU AND YOU WOULD
8 BE THE ONE THAT TO SIGN YOUR NAME TO THE VERDICT OF THE
9 JURY. OTHER THAN THAT YOUR DUTIES AND RESPONSIBILITIES ARE
10 THE SAME AS ANY OTHER JUROR.

11 IF YOU WILL SWEAR THE JURY.

12 (WHEREUPON, THE JURY WAS SWORN.)

13 THE COURT: LADIES AND GENTLEMEN, LET ME GIVE
14 YOU OR TELL YOU A FEW THINGS BEFORE WE PROCEED. THIS MAY
15 BE THE FIRST TIME YOU'VE SERVED ON A, ON A JURY, IT MAY NOT
16 BE, IT'S NOT REALLY IMPORTANT WHETHER YOU HAVE OR HAVE NOT,
17 BUT LET ME EXPLAIN A LITTLE BIT HOW WE'RE GOING TO PROCEED
18 IN THIS MATTER.

19 THE FIRST THING THAT'S GOING TO TAKE PLACE IS
20 THE, THE ATTORNEY FOR THE STATE WILL ADDRESS YOU IN WHAT'S
21 KNOWN AS A OPENING STATEMENT. THIS WILL BE FOLLOWED BY AN
22 OPENING STATEMENT BY THE DEFENSE COUNSEL. THESE OPENING
23 STATEMENTS ARE NOT EVIDENCE IN THE CASE AND CANNOT BE
24 CONSIDERED BY YOU AS EVIDENCE IN THE CASE. I WILL TELL YOU
25 NOW AND TELL YOU AGAIN LATER THAT ANYTHING THAT AN ATTORNEY

PRELIMINARY CHARGE

48

1 SAYS DURING THIS TRIAL IS NOT EVIDENCE IN THE CASE. THAT'S
2 NOT TO MEAN IT'S NOT IMPORTANT WHAT THEY SAY IT'S JUST NOT
3 EVIDENCE.

4 EVIDENCE COMES FROM THREE SOURCES AND THREE
5 SOURCES ALONE. EVIDENCE COMES FROM ANY TESTIMONY THAT
6 COMES FROM THE WITNESS STAND, ANY SWORN TESTIMONY THAT
7 COMES FROM THAT STAND, ANY EXHIBITS THAT MAY BE INTRODUCED
8 AND ALLOWED INTO EVIDENCE BY THE COURT. BY EXHIBITS I MEAN
9 TANGIBLE THINGS, THINGS YOU CAN TOUCH, MIGHT BE PHOTOGRAPHS
10 OR, OR DOCUMENTS, GRAPHS, CHARTS, REPORTS, WEAPONS, IT
11 COULD BE ANYTHING, ANYTHING YOU CAN TOUCH, AND THE THIRD
12 SOURCE OF ANY EVIDENCE IS ANY STIPULATION THE PARTIES MAY
13 MAKE.

14 NOW WHAT IS A STIPULATION? A STIPULATION IS NO
15 MORE THAN AN AGREEMENT TO A PARTICULAR FACT OR SET OF FACTS
16 THAT'S AGREED TO BY THE, BY THE STATE AND THE DEFENSE IN
17 THIS MATTER. FOR INSTANCE TO GIVE YOU AN EXAMPLE OF A
18 STIPULATION HAS NOTHING TO DO WITH THIS CASE BUT IT'S BY
19 WAY OF AN EXAMPLE. IF THE PARTIES STIPULATE THAT DECEMBER
20 THE 27TH IN 1957 IT WAS SNOWING, WELL THAT MAY BE A
21 PARTICULAR DAY IN YOUR MIND, MAY BE YOUR BIRTHDAY OR YOUR
22 FATHER'S BIRTHDAY AND YOU MIGHT REMEMBER THAT DAY AND IT
23 WASN'T SNOWING THAT DAY, BUT FOR PURPOSES OF THIS TRIAL IT
24 WAS SNOWING. IN OTHER WORDS, A STIPULATION AS TO A FACT OR
25 SET OF FACTS IS CONCLUSIVE ON THAT POINT IN THIS PARTICULAR

PRELIMINARY CHARGE

49

1 CASE. THERE MAY NOT BE ANY STIPULATIONS IN THE CASE.
2 THERE'S USUALLY NOT ANY STIPULATIONS BUT THERE COULD BE
3 STIPULATIONS IN THIS CASE AND IF THERE ARE ANY THE COURT
4 WILL BRING TO YOUR ATTENTION AND REMIND YOU OF WHAT THAT
5 STIPULATION MEANS. SO THAT'S THE THREE SOURCES OF THE
6 EVIDENCE IN THE CASE, SWORN TESTIMONY, EXHIBITS, AND ANY
7 STIPULATIONS.

8 THE SOLICITOR, WHEN HE APPEARS, HE MAY TELL YOU
9 SOMETHING ABOUT THE INDICTMENT. HE MAY NOT, I DON'T KNOW
10 WHAT HE MAY TELL YOU. BUT THE INDICTMENT IS NO MORE THAN A
11 PIECE OF PAPER AND IT'S THE CHARGING DOCUMENT IN THE CASE
12 THAT TELLS THE DEFENDANT WHAT THE CHARGES ARE AGAINST HIM
13 AND WHAT HE HAS TO. HE CAN EXPECT TO BE, EVIDENCE TO BE
14 PRESENTED IN REGARD TO THOSE, THOSE CHARGES. HE MAY NOT DO
15 THAT BUT IT'S NOT GOING TO BE EVIDENCE IN THE CASE; IT'S
16 SIMPLY A CHARGING DOCUMENT. HE MAY EXPLAIN THAT TO YOU, HE
17 MAY NOT, BUT HE'LL TELL YOU ABOUT HIS CASE. THE SOLICITOR
18 WILL TELL YOU WHAT HE INTENDS TO SHOW IN THE CASE AND THIS
19 WILL BE FOLLOWED, AS I SAY, BY AN OPENING STATEMENT BY
20 DEFENSE COUNSEL.

21 THESE OPENING STATEMENTS ARE PERMITTED BUT
22 THEY'RE NOT EVIDENCE IN THE CASE. UPON THE COMPLETION OF
23 THE PRESENTATION OF THE EVIDENCE, THAT'S THE FIRST PHASE
24 WILL BE THE OPENING STATEMENTS, THE SECOND PHASE WILL BE
25 THE PRESENTATION OF THE EVIDENCE. EACH SIDE WILL BE GIVEN

PRELIMINARY CHARGE

50

1 AN OPPORTUNITY TO PRESENT EVIDENCE IN SUPPORT OF THEIR SIDE
2 OF THE CASE. THEY DON'T HAVE TO BUT THEY HAVE THE
3 OPPORTUNITY TO.

4 AFTER THE EVIDENCE IS IN AND IS PRESENTED THE
5 ATTORNEYS WILL THEN APPEAR BEFORE YOU IN WHAT'S KNOWN AS A
6 CLOSING ARGUMENT, SOMETIMES CALLED A SUMMATION, AND THEY
7 WILL APPEAR BEFORE YOU AND TRY TO GET YOU TO AGREE WITH
8 THEIR VERSION OF THE FACTS OF THE CASE. THESE CLOSING
9 ARGUMENTS ARE JUST THAT, THEY'RE ARGUMENTS. THEY'LL ARGUE
10 TO YOU. IT'S NOT AN ARGUMENT LIKE A FUSS, BUT IT'S A, IT'S
11 A LEGAL ARGUMENT. THEY WILL TRY TO GET YOU TO AGREE WITH
12 THEIR VERSION, PERSUADE YOU TO AGREE WITH THEIR VERSION OF
13 THE FACTS OF THE CASE USUALLY BY POINTING OUT SOME PART OF
14 THE EVIDENCE THAT TENDS TO SHOW THAT THEIR PART OF THE CASE
15 IS RIGHT AND THAT'S, THAT WILL BE DONE BY BOTH SIDES.

16 WHAT THEY SAY, BOTH THE ATTORNEYS OR WHOEVER
17 ARGUES ON BEHALF OF THE STATE AND THE DEFENSE, WHATEVER
18 THEY SAY IN THESE CLOSING ARGUMENTS IS IMPORTANT BUT AGAIN
19 IT'S NOT EVIDENCE IN THE CASE AND CAN'T BE CONSIDERED BY
20 YOU AS EVIDENCE IN THE CASE.

21 NOW YOUR FUNCTION AS JURORS IS AS I INDICATED TO
22 YOU PREVIOUSLY IS TO DETERMINE THE FACTS IN THIS CASE.
23 YOU'RE THE JUDGE OR IN CHARGE OF THE FACTS OF THE CASE AND
24 THEN YOU ARE TO APPLY THE LAW AS I INSTRUCT IT TO YOU TO
25 THOSE FACTS AND THEREBY COME UP WITH YOUR VERDICT IN THE

PRELIMINARY CHARGE

51

1 CASE.

2 NOW A VERDICT MUST BE A UNANIMOUS VERDICT, THE
3 VERDICT OF ALL 12 JURORS. ALL 12 OF YOU MUST AGREE ON THE
4 VERDICT WHICH YOU AUTHORIZE MS. GAINNEY TO WRITE FOR YOU,
5 THE FOREPERSON OF THIS JURY TO WRITE FOR YOU.

6 THE LAW REQUIRES THAT YOUR DECISION BE REACHED
7 SOLELY AND EXCLUSIVELY ONLY ON THE COMPETENT EVIDENCE
8 BEFORE YOU AND THAT IS AGAIN THE SWORN TESTIMONY FROM THE
9 WITNESS STAND, THE EXHIBITS IN THE CASE, AND ANY
10 STIPULATIONS THAT MAY BE MADE IN THIS CASE, TOGETHER WITH
11 THE INSTRUCTIONS ON THE LAW BY THE COURT.

12 WHEN I SAY THE COURT OR THE JUDGE OR ME THOSE ARE
13 INTERCHANGEABLE TERMS. THEY'RE ALL THE SAME PERSON OR THE
14 SAME ENTITY. THE TRIAL JUDGE, MYSELF, IS THE SOLE JUDGE OF
15 THE FACTS AND THE EXCLUSIVE JUDGE, EXCUSE ME, OF THE LAW IN
16 THIS CASE AND, AND I'M IN CHARGE OF THOSE, OF THE, OF THE
17 LAW AND WHEN I INSTRUCT THE LAW TO YOU YOU MUST ACCEPT THAT
18 LAW PRECISELY AS I, AS I CHARGE IT TO YOU AND, AND APPLY IT
19 AS I INSTRUCT YOU TO APPLY IT. EVEN THOUGH YOU MAY
20 DISAGREE WITH WHAT THE LAW IS THE LAW IS WHAT I WILL
21 INSTRUCT IT TO YOU TO BE. AND EVEN THOUGH YOU MAY THINK IT
22 OUGHT TO BE SOMETHING ELSE I MAY THINK IT OUGHT TO BE
23 SOMETHING ELSE BUT THE LAW THAT I INSTRUCT TO YOU WILL BE
24 THE LAW THAT YOU MUST APPLY TO THE FACTS AS YOU FIND THE
25 FACTS TO BE IN THIS CASE AND THEREBY REACH YOUR VERDICT.

PRELIMINARY CHARGE

52

1 NOW THE DEFENDANT IN THIS CASE HAS BEEN CHARGED
2 WITH THREE OFFENSES. HE'S BEEN CHARGED WITH MURDER. HE'S
3 BEEN CHARGED WITH BEING IN POSSESSION OF A WEAPON DURING
4 THE COMMISSION OF A VIOLENT CRIME AND ASSAULT AND BATTERY
5 WITH INTENT TO KILL. NOW TO THESE INDICTMENTS THIS
6 DEFENDANT HAS PLED NOT GUILTY WHICH PLACES THE BURDEN OF
7 PROVING THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT.

8 A PERSON CHARGED WITH COMMITTING A CRIME IN THIS
9 STATE IS NEVER REQUIRED TO PROVE HIMSELF INNOCENT. HE'S
10 PRESUMED TO BE INNOCENT. HE'S NEVER REQUIRED TO PROVE
11 HIMSELF THAT WAY. IT'S THE STATE'S BURDEN TO PROVE HIS
12 GUILT BEYOND A REASONABLE DOUBT AND I CHARGE YOU THAT IT'S
13 A VITAL AND AN IMPORTANT RULE OF THE LAW OF EVIDENCE THAT
14 THE DEFENDANT IN A CRIMINAL TRIAL NO MATTER HOW GREAT OR
15 SERIOUS MAY BE THE OFFENSE WITH WHICH HE IS CHARGED MUST
16 ALWAYS BE PRESUMED INNOCENT UNTIL HIS GUILT HAS BEEN PROVEN
17 BEYOND A REASONABLE DOUBT.

18 THIS PRESUMPTION OF EVIDENCE REMAINS WITH THE
19 DEFENDANT AT ALL TIMES FROM THE MOMENT OF HIS ARRAIGNMENT
20 AND THROUGHOUT THE TRIAL UNTIL THE JURY HAS UPON THE
21 TESTIMONY AND THE EVIDENCE PRESENTED REACHED A VERDICT OF
22 GUILTY BEYOND A REASONABLE DOUBT FOR IT'S THE SOLEMN DUTY
23 OF THE JURY IF NOT CLEARLY CONVINCED OF HIS GUILT BEYOND
24 EVERY REASONABLE DOUBT TO THE CONTRARY TO FIND THE
25 DEFENDANT NOT GUILTY.

PRELIMINARY CHARGE

53

1 ON THE OTHER HAND, IF THE STATE HAS PROVEN TO
2 YOUR SATISFACTION THE GUILT OF THE ACCUSED BEYOND EVERY
3 REASONABLE DOUBT IT WOULD THEN BE YOUR SOLEMN DUTY TO FIND
4 THE DEFENDANT GUILTY SO THE BURDEN OF PROOF IS UPON THE
5 STATE NOT THE DEFENDANT. IT'S UPON THE STATE TO ESTABLISH
6 BY THE EVIDENCE TO YOUR SATISFACTION THE GUILT BEYOND A
7 REASONABLE DOUBT OF THIS DEFENDANT HERE ON TRIAL FOR THOSE
8 CRIMES THAT I MENTIONED.

9 NOW THE NORMAL HOURS OF COURT -- WE DON'T EXPECT
10 THIS TO BE A LONG TRIAL -- THE NORMAL HOURS OF COURT WILL
11 BE FROM 9:30 IN THE MORNING TO ABOUT 5:00 IN THE AFTERNOON.
12 NOW YOU MIGHT IMAGINE THAT IT'S DIFFICULT TO MAINTAIN AN
13 ABSOLUTE TIME SCHEDULE. FOR INSTANCE, IF THERE'S SOMEONE
14 ON THE STAND TESTIFYING IT BECOMES 5:00 WE'RE NOT GOING TO
15 STOP IN THE, IN THE MIDDLE OF THAT WITNESSES TESTIMONY AND,
16 AND LEAVE AND GO HOME. WE'RE GOING TO TRY TO FIND A
17 REASONABLE STOPPING PLACE, HOPEFULLY AT THE END OF HER OR
18 HIS TESTIMONY, AND, AND STOP AT THAT TIME AND IF IT MEANS
19 THAT WE GO UNTIL 5:30 OR 5:45 EVEN WE MAY, WE MAY HAVE TO
20 DO THAT. I DON'T ANTICIPATE GOING PAST THAT TIME OR EVEN
21 TO THAT TIME AND WE WILL ONLY GO TO THAT TIME IF THERE'S
22 NOT A REASONABLE STOPPING POINT EARLIER ON OR ABOUT 5:00.
23 IF THERE'S A WITNESS THAT'S GOING TO BE A LONG WITNESS AND
24 HAVE TO TESTIFY FOR AN HOUR OR MORE AND IT'S 4:45 WE'RE NOT
25 GOING TO PUT THAT WITNESS UP. WE'RE GOING TO WAIT UNTIL

PRELIMINARY CHARGE

54

1 THE NEXT DAY TO PUT THAT WITNESS UP SO THAT WE CAN STOP
2 ABOUT 5:00. I KNOW SOME OF YOU HUSBANDS HAVE TO GO HOME
3 AND COOK DINNER. I KNOW THAT FROM PERSONAL EXPERIENCE.
4 I'M JUST JOKING.

5 OF COURSE YOU HAVE YOUR RESPONSIBILITIES AT HOME
6 AS DO ALL OF US, BUT I CAN TELL YOU RIGHT NOW YOU 13
7 JURORS, IT WILL BE 12 LATER BUT RIGHT NOW THERE ARE 13 OF
8 YOU, ARE THE MOST IMPORTANT PEOPLE IN THE WORLD TO THIS
9 DEFENDANT AND TO THE STATE. THEY'VE CHOSEN YOU TO BE THE
10 PERSONS TO DETERMINE THE OUTCOME OF THIS TRIAL. THEY WANT
11 YOUR FEELINGS ABOUT THIS TRIAL AND ONLY YOUR FEELINGS.
12 THEY DON'T WANT YOUR SPOUSE'S FEELINGS, YOUR SIGNIFICANT
13 OTHER'S FEELINGS OR ANYBODY THAT MIGHT BUMP INTO YOU IN THE
14 STREET, SO FROM THIS POINT UNTIL YOU'VE REACHED A VERDICT
15 DO NOT DISCUSS THIS CASE WITH ANYBODY AND THAT INCLUDES
16 YOUR FELLOW JURORS BECAUSE ANY DISCUSSION ABOUT THIS CASE
17 WITH YOUR FELLOW JURORS BEFORE YOU KNOW ALL THE EVIDENCE IN
18 THE CASE AND YOU'VE HEARD ALL THE ARGUMENTS IN THE CASE AND
19 YOU'VE HEARD THE JUDGE'S CHARGE TO YOU OR INSTRUCTIONS TO
20 YOU ON THE LAW WOULD BE A PREMATURE DELIBERATION, SO AS MY
21 FRIEND GEDNEY HOWE IN CHARLESTON SAYS, DON'T DO THAT. DON'T
22 DISCUSS IT. DON'T TALK ABOUT IT, DON'T LET ANYBODY TALK TO
23 YOU ABOUT IT UNTIL IT'S THE PROPER TIME AND THE PROPER TIME
24 IS ONCE YOU'VE HEARD ALL THE EVIDENCE, THE JUDGE'S
25 INSTRUCTIONS, CLOSING ARGUMENTS BY THE ATTORNEYS, AND YOU

OPENING STATEMENT BY DEFENSE

55

1 RETIRE TO YOUR JURY ROOM. SO WHEN YOU'RE OUT AT LUNCH OR
2 AT ANY OTHER TIME DURING A BREAK OR SOMETIME DON'T LET
3 SOMEONE DISCUSS IT WITH YOU. IF THEY PERSIST IN TRYING TO
4 DISCUSS THIS WITH YOU, PLEASE, GET THEIR NAME. IF YOU'RE
5 AT LUNCH AND SOMEONE COMES UP TO YOU AND SAYS, I UNDERSTAND
6 YOU'RE ON THE SUCH AND SUCH CASE, LET ME -- NO, SIR, I
7 CAN'T TALK TO YOU ABOUT IT, I'M ON THE JURY. IF THEY
8 PERSIST GET THEIR NAME OR AT LEAST THEIR DESCRIPTION AND
9 BRING IT BACK TO THE COURT AND THEY WILL BE DEALT WITH IN
10 THE APPROPRIATE FASHION. SO AS LONG AS WE HAVE THAT
11 UNDERSTANDING YOU'RE NOT TO DISCUSS THIS UNTIL, UNTIL THE
12 APPROPRIATE TIME AND THAT'S AT THE CLOSE OF THE CASE WHEN
13 YOU RETIRE TO DELIBERATE YOUR VERDICT WE'LL GET ALONG REAL
14 FINE.

15 I DON'T KNOW IF THERE'S ANYTHING ELSE I NEED TO
16 DISCUSS WITH YOU. CELL PHONES OR THINGS OF THAT NATURE YOU
17 SHOULDN'T HAVE THEM HERE BUT IF YOU DO GIVE THEM TO THE
18 BAILIFF AND SHE'LL KEEP THEM GOOD FOR YOU UNTIL YOU GO HOME
19 OR GO TO LUNCH OR WHATEVER THE CASE MAY BE. ANYTHING ELSE
20 YOU THINK I NEED TO DISCUSS WITH THEM, GENTLEMEN, ANY OF
21 THE ATTORNEYS, LADIES?

22 MR. HUMPHRIES: NO, SIR.

23 THE COURT: ANYTHING FROM THE DEFENSE?

24 MR. JOHNSON: NOTHING, YOUR HONOR.

25 THE COURT: VERY WELL, ARE WE READY TO PROCEED

OPENING STATEMENT BY DEFENSE

56

1 WITH OUR OPENING STATEMENTS?

2 MR. HUMPHRIES: I AM, YOUR HONOR, MAY IT PLEASE
3 THE COURT.

4 OPENING STATEMENT

5 BY MR. HUMPHRIES:

6 MADAM FORELADY AND LADIES AND GENTLEMEN OF THE
7 JURY, MY NAME IS FRAN HUMPHRIES. I'M THE DEPUTY SOLICITOR
8 OF THE FIFTEENTH CIRCUIT SOLICITOR'S OFFICE, FIFTEENTH
9 CIRCUIT SERVES HORRY AND GEORGETOWN COUNTY. I ALONG WITH
10 DONNA ELDER WILL BE REPRESENTING THE STATE IN THIS MATTER
11 AND IT'S MY HONOR AND PRIVILEGE.

12 WHEN I WAS COMING UP IN ELEMENTARY SCHOOL AND
13 THEN LATER IN JUNIOR HIGH I ENDED UP IN SOME SCIENCE CLASS,
14 AND I WON'T TELL YOU HOW WELL I DID IN IT, BUT I DO
15 REMEMBER THIS. IT GOT TO A POINT WE WERE TALKING ABOUT THE
16 MAKEUP OF THE HUMAN BODY AND WHAT VALUE THERE WAS IN THE
17 COMPONENTS OR THE MATERIAL OF THE HUMAN BODY AND IT WAS
18 LESS THAN TWO BUCKS. IT SHOCKED ME, AND I THOUGHT TO
19 MYSELF EVEN THEN, WELL CERTAINLY A HUMAN LIFE IS WORTH MORE
20 THAN \$2.00. WELL I TELL YOU ON DECEMBER 30TH OF 2005 AT AN
21 ESTABLISHMENT CALLED MCCATZ IN NORTH MYRTLE BEACH INFLATION
22 HAD NOT TOUCHED THAT BODY BECAUSE FOR THE COST OF A SPILLED
23 DRINK BRANDT MICHAEL KOEHLER LOST HIS LIFE.

24 HE PAID THAT PRICE TO THE DEFENDANT LEMOND
25 HOLLAND IN THE EARLY MORNING HOURS OF DECEMBER 30, 2005, A

OPENING STATEMENT BY DEFENSE

57

1 SPILLED DRINK.

2 WHAT YOU'LL HEAR FROM A NUMBER OF WITNESSES
3 PRESENTED BY THE STATE IS THAT THE VICTIM IN THIS CASE,
4 BRANDT KOEHLER, WAS AT MCCATZ FOR A PERIOD OF TIME WITH HIS
5 GIRLFRIEND AT THE TIME, YESSICA CARUTHERS. THEY HAD BEEN
6 THERE FOR SOME TIME AND IT WAS IN THE EARLY MORNING HOURS.
7 MCCATZ YOU'LL LEARN, IF YOU DON'T KNOW, IS A, IS A PLACE
8 THAT CATERS TO SERVICE INDUSTRY FOLKS AND AS MANY OF YOU
9 KNOW SERVICE INDUSTRY FOLKS THEY HAVE TO WORK LATE AND THEY
10 LIKE TO RELAX AFTER THEY WORK LATE, TOO. THE PROBLEM IS
11 MOST PLACES ARE CLOSED BUT MCCATZ IS NOT AND IT'S A COMMON,
12 IT'S A SIGNIFICANT PORTION OF THEIR BUSINESS, SO IT STAYS
13 OPEN VERY LATE.

14 THEY WERE THERE MINDING THEIR OWN BUSINESS AND
15 THEY HAD BEEN THERE FOR SOME PERIOD OF TIME. THE
16 DEFENDANT, LAMOND HOLLAND COMES IN AND THEY DON'T KNOW
17 LAMOND HOLLAND, BUT AT SOME POINT BRANDT GOES UP TO THE
18 BAR, TO CLOSE THEIR TAB. I'M READY TO GO HOME, AND SOMEHOW
19 IN SOME WAY THE VICTIM IN THIS CASE, BRANDT KOEHLER, EITHER
20 MISTAKENLY OR BY INVITATION PICKED UP THE DRINK OF THE
21 DEFENDANT AND TOOK A SIP. I CAN'T EXPLAIN THAT TO YOU, BUT
22 I KNOW WHEN THAT DRINK HIT THE BAR IT SPILLED AND WHEN THAT
23 HAPPENED THERE WAS A VERBAL ALTERATION, THAT IS NO BLOWS
24 WERE EXCHANGED BUT THERE WERE WORDS PASSED AND DEFENDANT
25 HOLLAND WAS ABSOLUTELY INFURIATED.

OPENING STATEMENT BY DEFENSE

58

1 BRANDT KOEHLER AND HIS GIRLFRIEND ARE LEAVING
2 WHICH IS WHAT THEIR INTENTION WAS TO BEGIN WITH. THEY HEAD
3 OUT ONE DOOR, DEFENDANT HOLLAND GOES OUT ANOTHER. BRANDT
4 KOEHLER AND HIS GIRLFRIEND GO TO HER VEHICLE, THEY GET IN
5 IT, THEY BACK UP AND THEY'RE READY TO LEAVE THE PROPERTY.
6 DEFENDANT HOLLAND GOES TO HIS VEHICLE RETRIEVES A HANDGUN
7 AND RUNS TO THE PASSENGER SIDE OF THIS VEHICLE WHERE OUR
8 VICTIM IS SITTING BANGS ON THE WINDOW WITH A HANDGUN, TRIES
9 TO OPEN THE DOOR, ULTIMATELY THE DOOR IS OPENED, THERE AT
10 THAT TIME IS A PHYSICAL ALTERCATION AS THE VICTIM TRIES TO
11 GET THE GUN FROM THE DEFENDANT AND THE DEFENDANT FIRES THE
12 GUN THREE TIMES, THE THIRD TIME HITTING THE VICTIM IN THE
13 HEAD AND KILLED HIM. HE RUNS TO HIS VEHICLE AND FLEES THE
14 SCENE AND IS SUBSEQUENTLY ARRESTED SOMETIME LATER THE NEXT
15 DAY; A SPILLED DRINK.

16 YOU WILL HEAR NO LESS THAN THREE WITNESSES TALK
17 ABOUT THIS ALTERCATION IN THE PARKING LOT. SOMEONE WHO
18 DOESN'T KNOW THE DEFENDANT, SOMEONE WHO KNOWS THE DEFENDANT
19 BY FACE AND THEREAFTER BY NAME, AND SOMEONE WHO IS HIS
20 CLOSE PERSONAL FRIEND. THERE WILL BE ABOUT 13 OR SO
21 WITNESSES THAT THE STATE WILL PUT UP. SOME OF THEM WILL
22 TESTIFY TO THE VERY SPECIFIC THINGS IN A VERY, VERY BRIEF
23 FASHION. SOME WILL BE WHAT WE CALL FACT WITNESSES AND WILL
24 TESTIFY ABOUT THE FACTS OF THIS PARTICULAR CASE, WHAT THEY
25 OBSERVED, WHAT THEY HAD THE VANTAGE POINT TO SEE, WHAT THEY

OPENING STATEMENT BY DEFENSE

59

1 HEARD. THERE WILL BE SOME SCIENTIFIC WITNESSES IN VARIOUS
2 AREAS OF SCIENCE EITHER CRIME SCENE OR FIREARMS.

3 YOUR JOB QUITE SIMPLY IS TO DO WHAT YOU DO EVERY
4 DAY AND THAT IS TO JUDGE THE CREDIBILITY OF THE WITNESSES
5 AND IN DOING SO DECIDE WHAT IS TRUTH AND WHAT IS NOT AND
6 ONCE THAT'S DECIDED YOU APPLY WHAT YOU FOUND TO BE THE
7 TRUTH IN THIS CASE AND APPLY IT TO THE LAW THE JUDGE
8 CHARGES. YOU DO IT EVERY DAY.

9 NOW YOU DON'T SIT IN THE JURY BOX AND YOU DON'T
10 TAKE NOTES. BUT WHEN YOU ENGAGE IN A CONVERSATION WITH
11 SOMEONE ON THE STREET, IN YOUR CHURCH, AT YOUR HOUSE, YOU
12 HAVE TO SAY TO YOURSELF, EVEN IF IT'S NOT OUT LOUD, THESE
13 THINGS THAT THE PERSON IS TELLING YOU ARE THE TRUTH. HOW
14 DO YOU DETERMINE THAT, WHAT I KNOW ABOUT THIS PERSON, WHAT
15 I KNOW ABOUT HE'S TOLD ME IN THE PAST, HOW DO I COMPARE
16 WHAT HE'S TELLING ME NOW TO WHAT I ALREADY KNOW OR WHAT
17 SOMEBODY ELSE HAS TOLD ME. TRULY THIS IS SOMETHING YOU DO
18 EVERY DAY.. IN THIS COUNTRY WE DON'T HAVE PROFESSIONAL
19 JURORS FOR GOOD REASONS. WE HAVE JURORS WHO HAVE COMMON
20 EXPERIENCES, UNIQUE EXPERIENCES, AND GOOD COMMON SENSE.
21 AND THAT, LADIES AND GENTLEMEN, IS WHY YOU'RE SITTING WHERE
22 YOU ARE TODAY.

23 THE JUDGE TOLD YOU I'D TELL YOU A LITTLE BIT
24 ABOUT THE INDICTMENT. I WILL. THE INDICTMENTS ARE
25 CHARGING PAPERS. THEY TELL THE DEFENDANT WHAT THE STATE

OPENING STATEMENT BY DEFENSE

60

1 INTENDS TO PROVE HE DID ON A PARTICULAR DAY. HE'S CHARGED
2 WITH MURDER, THAT'S THE UNLAWFUL KILLING OF ONE HUMAN BY
3 ANOTHER IN MALICE AFORETHOUGHT.

4 MALICE AFORETHOUGHT IS A TERM OF ART. MALICE
5 MEANS WICKED, DEPRAVITY OF HEART, THE INTENTIONAL DOING OF
6 AN UNLAWFUL ACT. MALICE IS EASY TO UNDERSTAND. WHEN YOU
7 TAKE A FIREARM AND USE IT TO SHOOT SOMEONE IN THE HEAD OVER
8 SPILLED DRINK MALICE IS EASY TO UNDERSTAND.

9 MALICE AFORETHOUGHT. AFORETHOUGHT MEANS THAT THE
10 MALICE MUST EXIST IN THE MIND OF THE DEFENDANT AT THE TIME
11 THE FATAL BLOW OR FATAL SHOT WAS MADE. AT THE TIME THE
12 FATAL SHOT WAS FIRED IT MUST EXIST.

13 HE'S CHARGED WITH ASSAULT AND BATTERY WITH INTENT
14 TO KILL ON A COMPLETELY SEPARATE PERSON. IT IS MURDER BUT
15 FOR THE DEATH OF THE VICTIM, HAS BASICALLY THE SAME
16 ELEMENTS AS MURDER. IN THIS CASE IT'S GOING TO INVOLVE THE
17 DOCTRINE OF TRANSFERRED INTENT.

18 WHAT THAT MEANS BASICALLY IS THIS, AT THE TIME
19 THE DEFENDANT WAS FIRING HIS WEAPON WITH THE INTENT TO
20 SHOOT AND KILL THE VICTIM BRANDT KOEHLER ONE OF THOSE SHOTS
21 RICOCHETED AND STRUCK ANOTHER INDIVIDUAL RAPHAEL WALKE IN
22 THE LEG. DID HE HAVE A SPECIFIC INTENT TO KILL RAPHAEL
23 WALKE, PROBABLY NOT. RAPHAEL WALKE WAS A BYSTANDER, AN
24 OBSERVER. DID HE INTEND TO KILL BRAND KOEHLER, YES, AND HE
25 DID IT. THE INTENT THAT HE HAD TOWARDS THE KILLING OF

OPENING STATEMENT BY DEFENSE

61

1 BRAND KOEHLER TRANSFERS TO RAPHAEL WALKE AND THAT'S THE
2 SECOND CHARGE.

3 THE THIRD CHARGE IS POSSESSION OF A FIREARM
4 DURING THE COMMISSION OF A VIOLENT CRIME. BY NECESSITY HE
5 POSSESSED A FIREARM BECAUSE THAT'S THE INSTRUMENT HE USED
6 TO KILL BRANDT KOEHLER.

7 THE JUDGE WILL CHARGE YOU WITH BOTH MURDER AND
8 ASSAULT AND BATTERY WITH INTENT TO KILL FOR VIOLENT CRIMES.
9 THE QUESTION THEN FOR YOU TO ANSWER IS DID HE POSSESS THAT
10 FIREARM AT THE TIME.

11 AS THE JUDGE HAS TOLD YOU I DON'T EXPECT THIS TO
12 BE AN EXTREMELY LONG CASE, BUT THE BREVITY OF THIS CASE IN
13 NO WAY SIGNIFIES THE IMPORTANCE OF THIS CASE. A MAN'S LIFE
14 IS LOST, HIS FAMILY GRIEVES. OUR COMMUNITY HAS BEEN
15 GRIEVES AS A RESULT. THIS IS AN IMPORTANT CASE. I ASK YOU
16 TO PAY CLOSE ATTENTION TO THE EVIDENCE. YOU'LL HEAR THREE
17 OR FOUR WITNESSES TODAY AND MORE TOMORROW. AND AT THE
18 CLOSE OF THE EVIDENCE I WANT YOU TO USE YOUR GOOD COMMON
19 SENSE AND COMMON AND UNIQUE EXPERIENCES AND I WANT YOU TO
20 DO THIS ONE THING FOR ME. I WANT YOU TO SPEAK THE TRUTH
21 AND I SUBMIT TO YOU THE TRUTH FROM YOU IS THE LAST THING
22 THE DEFENDANT WANTS. THANK YOU.

23 MR. RICHARDSON: PLEASE THE COURT.

24 THE COURT: YES, SIR.

25 OPENING STATEMENT

OPENING STATEMENT BY DEFENSE

62

1 BY MR. RICHARDSON:

2 MADAM FORELADY AND LADIES AND GENTLEMEN OF THE
3 JURY, I'M BOBBY RICHARDSON. I PRACTICE LAW HERE IN CONWAY
4 AND LIKE THE SOLICITOR I APPRECIATE YOU BEING HERE AND I
5 APPRECIATE YOU TAKING THE TIME TO VOLUNTEER OR WHATEVER YOU
6 WERE SELECTED TO BE ON THIS JURY. IT'S IMPORTANT TO YOU,
7 IMPORTANT FOR THE STATE. IT'S IMPORTANT FOR ALL OF US IN
8 HERE AND I'M GOING TO TELL YOU THAT WHEN YOU GO THROUGH
9 THIS CASE YOU LOOK AT IT VERY CAREFULLY. YOU LISTEN TO
10 EACH AND EVERY WITNESS. YOU THINK ABOUT WHERE WERE THEY?
11 WHAT WERE THEY DOING? WHAT WAS THE CIRCUMSTANCES ABOUT
12 WHAT HAPPENED? WHAT WAS GOING ON? YOU THINK ABOUT WHAT
13 OPPORTUNITY THEY HAD TO SEE THIS OR SEE THAT, DID THEY SEE
14 IT ALL. WERE THEY CORRECT OR WERE THEY MISTAKEN; DID THEY
15 HAVE A REASON NOT TO TELL THE TRUTH OR DID THEY JUST THINK
16 THAT THEY SAW SOMETHING.

17 EACH WITNESS THAT COMES BEFORE YOU IS TO BE TAKEN
18 INDEPENDENT. YOU CAN BELIEVE ALL OF WHAT A WITNESS SAYS,
19 NONE OF WHAT A WITNESS SAYS. YOU CAN SIFT IT, YOU CAN SORT
20 IT, YOU'RE TRYING TO FIND THE TRUTH.

21 IT'S NOT ALWAYS EASY TO FIND AND IT'S NOT ALWAYS
22 IN THE BIG THINGS THAT, THAT ARE PRESENTED AS THE TRUTH.
23 AN OLD LAWYER FRIEND OF MINE USED TO SAY YOU CAN'T TELL
24 WHICH WAY THE WIND IS BLOWING BY LOOKING AT THE TRUNK OF
25 THE TREE, YOU GOT TO LOOK AT THE LITTLE LEAVES AND THE

1 LITTLE BRANCHES AND YOU'LL SEE WHICH WAY THE WIND IS
2 BLOWING AND YOU'LL FIND THE TRUTH. AND I SUBMIT TO YOU
3 THAT IT'S NOT GOING TO NECESSARILY BE LOOKING AT THE TRUNK
4 THAT YOU'RE GOING TO FIND OUT WHAT HAPPENED IN THIS CASE.

5 EVERY DAY GOOD COMMON HORSE SENSE, JUST THE SENSE
6 THAT YOU USE EVERY DAY LOOKING AT THINGS, THINKING ABOUT
7 THINGS, REASONING. WHY WOULD THIS HAPPEN OR WHY WOULD THAT
8 HAPPEN, WAIT A MINUTE, I'VE GOT A QUESTION ABOUT THAT, THIS
9 DOESN'T MAKE SENSE. THERE'S MORE THAN ONE WAY TO LOOK AT
10 THIS, MORE THAN ONE WAY TO LOOK AT THAT.

11 THAT'S WHAT THIS IS ALL ABOUT AND THAT'S EXACTLY
12 WHAT YOU'RE CALLED TO DO. YOU'RE CALLED TO STUDY IT,
13 YOU'RE CALLED TO LISTEN TO IT AND ANALYZE THE FACTS, TO
14 LOOK AT THE FACTS, TO LOOK AT EVERY ISSUE IN THE CASE AND
15 ARRIVE AT A VERDICT THAT DOES SPEAK THE TRUTH.

16 I WANT YOU TO VERY CAREFULLY LOOK AT THE LITTLE
17 TWIGS AND LEAVES AND WHEN YOU GET THROUGH WHATEVER THAT
18 DECISION IS YOU DO IT THE BEST YOU CAN. AND WHEN YOU GET
19 THROUGH I SUBMIT TO YOU THE STATE -- THERE'S GOING TO BE
20 SOME QUESTIONS. HAS THE STATE PROVEN THIS CASE BEYOND A
21 REASONABLE DOUBT AND THAT'S WHAT YOU'RE HERE TO DECIDE,
22 WHETHER OR NOT THE STATE HAS PROVEN THIS CASE BEYOND EVERY
23 REASONABLE DOUBT. AND IF YOU DO THAT AND LISTEN
24 ATTENTIVELY CAREFULLY, WATCH THE EVIDENCE, LISTEN TO THE
25 EVIDENCE AND THINK ABOUT IT, YA'LL DISCUSS IT. I SAY TO

1 YOU YOU'RE GOING TO HAVE A LOT OF QUESTIONS. AND I SUBMIT
2 TO YOU IF YOU HAVE A QUESTION ABOUT ANY SPECIFIC IMPORTANT
3 FACT IN THIS CASE, YOU'VE GOT A REASON FOR THAT QUESTION.
4 AND IF YOU'VE GOT A REASON FOR THAT QUESTION YOU CARRY THAT
5 QUESTION OVER. DO I HAVE A REASONABLE DOUBT TO BELIEVE THE
6 DEFENDANT'S GUILTY?

7 THAT'S YOUR JOB. GIVE HIM EVERY DOUBT. GIVE HIM
8 EVERY BENEFIT OF EVERY REASONABLE DOUBT. MAKE THE STATE
9 PROVE ITS CASE. YOU'RE GOING TO FIND WHAT THE TRUTH IS IN
10 THIS CASE AND YOU'RE GOING TO FIND THE DEFENDANT NOT
11 GUILTY, THANK YOU.

12 MR. HUMPHRIES: THE STATE CALLS YESSICA
13 CARUTHERS.

14 THE COURT: COME AROUND, PLEASE, MA'AM.

15 YESSICA CARUTHERS

16 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

17 MADAM CLERK: STATE YOUR FULL NAME AND SPELL
18 YOUR LAST NAME FOR THE COURT.

19 THE WITNESS: YESSICA NICOLETTE CARUTHERS, C-A-
20 R-U-T-H-E-R-S.

21 DIRECT EXAMINATION

22 BY MR. HUMPHRIES:

23 Q MS. CARUTHERS, YOU LIVE IN THE MYRTLE
24 BEACH, NORTH MYRTLE BEACH AREA?

25 A I DO.

- 1 Q ARE YOU A STUDENT?
- 2 A I AM.
- 3 Q ARE YOU EMPLOYED?
- 4 A BOTH.
- 5 Q WHAT ARE YOU STUDYING?
- 6 A NURSING.
- 7 Q AND HOW ARE YOU EMPLOYED AT THIS TIME?
- 8 A CASHIER.
- 9 Q CALL YOU YESSICA, IS THAT ALL RIGHT?
- 10 A THAT'S FINE.
- 11 Q LET ME ASK YOU, YESSICA, DID YOU KNOW A
- 12 YOUNG MAN NAMED BRANDT KOEHLER?
- 13 A I DID.
- 14 Q HOW DID YOU KNOW HIM?
- 15 A WE WERE TOGETHER.
- 16 Q FOR APPROXIMATELY HOW LONG?
- 17 A I'D SAY A COUPLE OF MONTHS OR MAYBE A
- 18 MONTH.
- 19 Q WHAT I NEED TO DO, YESSICA, IS TAKE YOU
- 20 BACK TO THE EARLY MORNING HOURS, MAYBE A FEW HOURS
- 21 PROCEEDING THAT DECEMBER 30TH, 2005, DO YOU RECALL THAT
- 22 EARLY MORNING?
- 23 A I DO.
- 24 Q LET ME ASK YOU, WHEN DID YOU FIRST MEET UP
- 25 WITH BRANDT THAT LATE NIGHT OR EARLY MORNING?

1 A I BELIEVE THAT NIGHT I MET HIM AT PARADISE.

2 Q DID YOU HAVE AN OCCASION TOGETHER TO GO TO
3 AN ESTABLISHMENT CALLED MCCATZ IN NORTH MYRTLE BEACH?

4 A YES.

5 Q TELL THE JURY A LITTLE BIT ABOUT THE KIND
6 OF PLACE MCCATZ IS?

7 A BAR, A LOT OF DIFFERENT THINGS GOING ON IN
8 THERE. I'M NOT REALLY FAMILIAR MORE THAN THAT, DIDN'T
9 BOTHER WITH ANYTHING ELSE.

10 Q THAT'S FINE, HAD YOU BEEN THERE BEFORE THAT
11 EVENING?

12 A ONE OTHER TIME WITH BRANDT.

13 Q WITH BRANDT?

14 A YES.

15 Q DO YOU RECALL APPROXIMATELY WHAT TIME YOU
16 MIGHT HAVE ARRIVED AT MCCATZ?

17 A MAYBE 12 SOMETHING, IT HAD TO BE AFTER 12.

18 Q IS THAT MIDNIGHT?

19 A YES.

20 Q HAD YOU JUST GOTTEN OFF WORK?

21 A YES.

22 Q WHEN YOU AND BRANDT GOT TO MCCATZ WHAT DID
23 YOU DO?

24 A WE JUST GOT SOMETHING TO DRINK AND SAT DOWN
25 ON THE COUCH AND JUST TALKED.

1 Q HOW LONG DO YOU THINK YOU WERE AT MCCATZ
2 BEFORE YOU LEFT?

3 A NOT LONG, IT WASN'T LONG, MAYBE 45 MINUTES
4 TO AN HOUR.

5 Q DID YOU GET SOMETHING TO EAT WHILE YOU WERE
6 THERE?

7 A WE DID.

8 Q LET ME ASK YOU, YESSICA, DID THERE COME A
9 TIME THAT IT APPEARED TO BE THAT BRANDT GOT INTO SOME KIND
10 OF ARGUMENT WITH ANOTHER PATRON THERE IN MCCATZ?

11 A HE DID.

12 Q HE DID, WHERE WERE YOU WHEN THE ALTERCATION
13 FIRST STARTED?

14 A COMING FROM THE BATHROOM.

15 Q THE BATHROOM, WHERE IN THE BAR OF MCCATZ
16 DID THIS ALTERCATION OCCUR?

17 A IT WAS TOWARDS I GUESS THAT WOULD BE THE
18 BACK OF THE BAR, IT WAS AT THE BAR.

19 Q AT, PHYSICALLY AT THE BAR WHERE THEY SERVE
20 THE DRINKS?

21 A YES.

22 Q OKAY, DO YOU KNOW WHY BRANDT WAS AT THE BAR
23 AT THAT TIME?

24 A PROBABLY TO GET A DRINK OR JUST
25 SOCIALIZING, WE ALL JUST END UP THERE I THINK JUST

1 SOCIALIZING WITH EVERYBODY.

2 Q WHAT DID YOU OBSERVE ABOUT THIS
3 ALTERCATION, WHAT DID YOU ACTUALLY SEE?

4 A SEEN AS FAR AS FROM, YOU KNOW --

5 Q LET ME ASK YOU THIS WAY, LET ME ASK YOU
6 THIS WAY, DID YOU SEE THE PERSON THAT BRANDT WAS INVOLVED
7 IN THIS ARGUMENT WITH?

8 A YES.

9 Q OKAY, AND DID THAT PERSON APPEAR AGITATED
10 OR UPSET?

11 A YES.

12 Q LET ME ASK YOU, DID, DID OTHER PATRONS OF
13 THE BAR HAVE TO RESTRAIN THAT INDIVIDUAL THAT WAS INVOLVED
14 IN THE ARGUING WITH BRANDT?

15 A YES.

16 Q AS A RESULT OF THAT ARGUMENT WHAT DID YOU
17 AND BRANDT DO?

18 A LEAVE.

19 Q LEAVE, HAD YOUR TAB BEEN PAID?

20 A YES.

21 Q DID YOU SEE ANY PHYSICAL BLOWS TRADED
22 BETWEEN THIS INDIVIDUAL AND BRANDT AT THAT TIME?

23 A NO.

24 Q NO, JUST WORDS?

25 A YES.

1 Q BUT THIS INDIVIDUAL HAD TO BE RESTRAINED?

2 A YES.

3 Q THERE ARE A COUPLE OF DOORS TO MCCATZ?

4 A YES.

5 Q IS THAT FAIR, THE DOOR THAT YA'LL CAME IN

6 AND EXITED WAS IT NEAREST THE PARKING LOT WHERE YOUR

7 VEHICLE WAS PARKED?

8 A YES.

9 Q AND WHOSE VEHICLE WAS IT THAT YOU CAME AND
10 WENT IN?

11 A MINE.

12 Q AND WHAT TYPE OF VEHICLE?

13 A A 2003 SATURN VUE.

14 Q IS THAT A SPORT UTILITY TYPE VEHICLE?

15 A IT IS.

16 Q WHO WAS DRIVING THAT NIGHT THERE AND GOING
17 AWAY?

18 A I WAS.

19 Q DID YOU KNOW WHEN YOU LEFT MCCATZ, AT THE
20 TIME YOU WERE LEAVING MCCATZ THROUGH THE DOORS GOING TO THE
21 PARKING LOT DID YOU KNOW THAT YOU WERE BEING PURSUED OR
22 NOT?

23 A AS I WAS GOING OUT THE DOOR, YES.

24 Q YOU DID?

25 A YES.

1 Q AS YOU WERE GOING OUT THE DOOR, WHAT DID
2 YOU DO WHEN YOU, WHEN YOU KNEW YOU WERE BEING PURSUED?

3 A KEEP GOING TO THE CAR, TRY TO KEEP GOING TO
4 THE CAR.

5 Q DID YOU ACTUALLY, WERE YOU ABLE TO ACTUALLY
6 GET INTO THE VEHICLE?

7 A I WAS, YES, WE WERE.

8 Q AND ULTIMATELY WAS BRANDT ABLE TO GET INTO
9 THE VEHICLE?

10 A YES.

11 Q HE WAS?

12 A YES.

13 Q ONCE INSIDE THE VEHICLE DID YOU ATTEMPT TO
14 LEAVE MCCATZ?

15 A YES.

16 Q YESSICA, WHAT I NEED YOU TO DO, TRY TO KEEP
17 YOUR VOICE UP, AND TELL THE JURY WHAT HAPPENED ONCE YOU AND
18 BRANDT WERE IN THE VEHICLE?

19 A STARTING FROM WHEN WE GOT IN THE VEHICLE?

20 Q YES, MA'AM?

21 A HE JUST CAME TO THE WINDOW AND STARTED
22 YELLING POINTING A GUN AT THE WINDOW.

23 Q OKAY, LET'S, WHEN YOU SAY HE, DID YOU, LET
24 ME ASK YOU THIS, HAD YOU EVER SEEN THAT PERSON BEFORE?

25 A NO.

1 Q DID YOU KNOW THAT PERSON?

2 A NO.

3 Q OKAY, THE PERSON THAT CAME TO THE WINDOW,
4 WHOSE WINDOW DID HE COME TO?

5 A BRANDT'S.

6 Q BRANDT'S, AND BRANDT WAS SITTING IN THE
7 FRONT PASSENGER SEAT?

8 A YES.

9 Q WAS THE PERSON THAT CAME TO BRANDT'S WINDOW
10 THE SAME PERSON THAT HE HAD BEEN INVOLVED IN THE ARGUMENT
11 WITH INSIDE THE BAR?

12 A YES.

13 Q NOW YOU SAID HE CAME TO BRANDT'S WINDOW,
14 WHAT DID HE DO ONCE HE CAME TO THE WINDOW?

15 A STARTED YELLING AND POINTING THE GUN AT THE
16 WINDOW AND TRYING TO GET HIM TO GET OUT OF THE CAR.

17 Q LET ME ASK YOU, WERE YOU ACTUALLY ABLE TO
18 SEE THE HANDGUN?

19 A YES.

20 Q OKAY, WAS IT A REVOLVER OR WAS IT A
21 SEMIAUTOMATIC HANDGUN, DO YOU KNOW THE DIFFERENCE?

22 A NO.

23 Q DID IT HAVE A CYLINDER THAT HAD THE BULLETS
24 IN IT LIKE THIS OR WAS IT, DID IT HAVE A CLIP, A MAGAZINE?

25 A IT WASN'T ROUND SO I GUESS IT HAD A CLIP,

1 IT WASN'T --

2 Q YOU'RE NOT FAMILIAR WITH HANDGUNS?

3 A NO.

4 Q OKAY, YOU SAW THIS WEAPON?

5 A YES.

6 Q COULD YOU DESCRIBE IT IN TERMS OF ITS COLOR
7 OR SIZE FOR THE JURY?

8 A IT WAS SILVER AND BLACK, I'M NOT SURE HOW
9 YOU WOULD SAY ABOUT THE SIZE.

10 Q OKAY, DO YOU KNOW WHAT THE, THIS INDIVIDUAL
11 WAS SAYING, YOU SAID HE WAS YELLING, DO YOU KNOW WHAT HE
12 WAS SAYING?

13 A AT THE TIME NOT REALLY SURE JUST, JUST
14 TRYING TO GET HIM OUT OF THE CAR, TOLD HIM TO GET OUT OF
15 THE CAR, COME ON AND JUST SOME DIFFERENT THINGS TRYING TO
16 GET HIM OUT OF THE CAR, I'M NOT AFTER THAT --

17 Q TRYING TO GET BRANDT OUT OF THE CAR?

18 A YES.

19 Q THAT WAS THE PERSON WHO WAS AT THE DOOR?

20 A YES.

21 Q LET ME ASK YOU THIS, DID THERE ULTIMATELY
22 COME AN OCCASION WHEN BRANDT EITHER WAS TAKEN OUT OF THE
23 CAR OR GOT OUT OF THE CAR?

24 A YES.

25 Q DO YOU KNOW EXACTLY HOW THAT HAPPENED?

- 1 A HOW HE GOT OUT OF THE CAR?
- 2 Q HOW HE GOT OUT OF THE CAR, DO YOU KNOW IF
- 3 BRANDT OPENED THE DOOR OR THIS INDIVIDUAL OPENED THE DOOR?
- 4 A I BELIEVE HE OPENED THE DOOR BECAUSE HE WAS
- 5 PULLING ON THE DOOR AND EVERYTHING AND THEN HE JUST OPENED
- 6 IT THE REST OF THE WAY.
- 7 Q OKAY, I'M SORRY, I DON'T WANT TO CONTINUE
- 8 TO INTERRUPT YOU, BUT WHEN YOU SAY HE WAS PULLING ON THE
- 9 DOOR ARE YOU TALKING ABOUT THE INDIVIDUAL THAT CAME FROM
- 10 THE BAR AND RAN UP TO YOUR CAR?
- 11 A YES.
- 12 Q OKAY, ALL RIGHT, SO HE'S PULLING ON
- 13 BRANDT'S DOOR?
- 14 A YES.
- 15 Q OKAY, THE DOOR COMES OPEN?
- 16 A YES.
- 17 Q BRANDT COMES OUT OF THE VEHICLE?
- 18 A YES, HE GETS OUT.
- 19 Q WHAT HAPPENS WHEN BRANDT GETS OUT OF THE
- 20 VEHICLE?
- 21 A THEY JUST STARTED TUSSLING.
- 22 Q TUSSLING?
- 23 A UH-HUH.
- 24 Q WHERE WERE YOU?
- 25 A OUT OF THE CAR.

1 Q OKAY, YOU'RE IN THE DRIVERS SEAT, YOU GET
2 OUT OF THE DRIVERS SIDE DOOR?

3 A YES.

4 Q WHICH WAY, DO YOU RUN AROUND THE FRONT OF
5 THE VEHICLE OR THE BACK OF THE VEHICLE?

6 A THE BACK.

7 Q THE BACK, AND IN WHAT PROXIMITY, HOW CLOSE
8 WERE YOU TO BRANDT AND THIS OTHER INDIVIDUAL TUSSLING?

9 A REALLY CLOSE.

10 Q LET ME DO THIS ---

11 MR. RICHARDSON: YOUR HONOR, COULD SHE SPEAK UP,
12 WE'RE HAVING A HARD TIME.

13 THE COURT: YES, PLEASE SPEAK UP, IF YOU WOULD,
14 A LITTLE BIT. SOME OF US A LITTLE HARD OF HEARING AND IF
15 YOU COULD JUST GET A LITTLE CLOSER TO THE MIKE OR STAY BACK
16 AWAY FROM IT AND SPEAK A LITTLE LOUDER.

17 MR. HUMPHRIES: (CONTINUING)

18 Q HOW ABOUT STOP ME WHEN I GET AS CLOSE AS
19 YOU WERE TO BRANDT AND THIS INDIVIDUAL TUSSLING, OKAY?

20 A STOP.

21 Q STOP RIGHT HERE, DO I NEED TO BACK UP?

22 A NO.

23 Q NO.

24 A IT STARTED ABOUT RIGHT THERE AND WENT
25 FURTHER.

1 Q NOW, WERE YOU ABLE TO SEE THE TWO TUSSLING
2 THE ENTIRE TIME THEY WERE ENGAGING AT EACH OTHER?

3 A YES.

4 Q OKAY, DO YOU KNOW IF ANYONE ELSE WAS ABLE
5 TO SEE?

6 A NO.

7 Q WHAT WERE YOU DOING WHILE THEY WERE
8 TUSSLING? WERE YOU SAYING ANYTHING?

9 A I WAS YELLING, TRYING TO GET THEM TO STOP,
10 EVERYTHING, CALLING FOR HELP.

11 Q NOW LET ME ASK YOU, WHAT DID YOU OBSERVE
12 OCCUR WHILE THEY WERE TUSSLING?

13 A AS FAR AS?

14 Q WELL LET'S TALK ---

15 MR. RICHARDSON: YOUR HONOR, I CANNOT HEAR HER,
16 I APOLOGIZE TO THE COURT BUT I CAN'T HEAR HER.

17 THE COURT: GET UP CLOSER TO THE MICROPHONE.

18 MR. HUMPHRIES: YESSICA, IF YOU'LL DO THIS, IF
19 YOU'LL JUST, YOU'LL SPEAK CLOSER INTO THE MICROPHONE, OKAY,
20 IF YOU'LL PULL THE CHAIR UP JUST A TOUCH MORE, VERY GOOD.

21 Q (CONTINUING) LET'S TALK ABOUT THE GUN,
22 OKAY?

23 A OKAY.

24 Q DID YOU SEE THE GUN, SEE OR HEAR THE GUN
25 FIRE?

- 1 A YES.
- 2 Q AND COULD YOU SEE IN WHOSE HAND THE GUN WAS
- 3 WHEN IT FIRED?
- 4 A YES.
- 5 Q AND WAS IT BRANDT'S OR WAS IT THIS OTHER
- 6 INDIVIDUAL WHO WAS INVOLVED IN THIS ALTERCATION WITH
- 7 BRANDT?
- 8 A THE OTHER PERSON.
- 9 Q AND TO YOUR RECOLLECTION HOW MANY TIMES DID
- 10 THE GUN FIRE?
- 11 A THREE OR FOUR, I'M NOT SURE.
- 12 Q AND LET ME ASK YOU THIS, YESSICA, THAT, ALL
- 13 THESE EVENTS THAT WERE OCCURRING WERE THEY UPSETTING TO
- 14 YOU?
- 15 A YES.
- 16 Q AT THE TIME?
- 17 A YES.
- 18 Q THREE OR FOUR SHOTS, LET'S TALK ABOUT THE
- 19 LAST SHOT THAT YOU HEARD. YESSICA, AFTER YOU HEARD OR SAW
- 20 THE LAST SHOT WHAT HAPPENED TO BRANDT?
- 21 A HE FELL DOWN.
- 22 Q AFTER THE LAST SHOT YOU SAW OR HEARD WHAT
- 23 DID THIS INDIVIDUAL ENGAGED IN THIS ALTERCATION WITH BRANDT
- 24 DO?
- 25 A HE RAN.

1 Q ONCE THAT INDIVIDUAL RAN AWAY WHAT THEN DID
2 YOU DO?

3 A I WENT TO BRANDT AND YELLED FOR HELP.

4 Q AND COULD YOU DETERMINE AT THAT TIME WHAT
5 KIND OF INJURY BRANDT HAD RECEIVED?

6 A I COULDN'T REALLY TELL UNTIL I GOT UP
7 BECAUSE I HAD LAID HIS HEAD ON ME, ON MY LEG AND I COULDN'T
8 TELL UNTIL THE AMBULANCE GOT THERE AND FINALLY PULLED ME
9 AWAY FROM HIM. THERE WAS BLOOD ALL OVER HIM AND HE WAS
10 SHOT IN THE HEAD.

11 Q THANK YOU, MA'AM. AND YOU SAY THIS
12 INDIVIDUAL FLED?

13 A YES.

14 Q DO YOU KNOW IF HE GOT IN A VEHICLE?

15 A YES.

16 Q DID YOU SEE THE VEHICLE LEAVE THE PARKING
17 LOT?

18 A YES.

19 Q THE AMBULANCE CAME?

20 A YES.

21 Q YESSICA, DID YOU ULTIMATELY GIVE STATEMENTS
22 TO LAW ENFORCEMENT CONCERNING WHAT YOU SAW?

23 A YES.

24 MR. HUMPHRIES: BEG THE COURT'S INDULGENCE.

25 THANK YOU, YESSICA, I'D LIKE YOU TO ANSWER ANY QUESTIONS

1 THE DEFENSE COUNSEL MAY HAVE.

2 MR. RICHARDSON: PLEASE THE COURT?

3 THE COURT: YES, SIR.

4 CROSS EXAMINATION

5 BY MR. RICHARDSON:

6 Q YESSICA, I KNOW THIS HAS BEEN A TOUGH TIME
7 FOR YOU FROM WHAT HAPPENED, LET ME ASK YOU A FEW QUESTIONS
8 IF YOU DON'T MIND. NOW YOU SAY YOU ARRIVED AT THE
9 ESTABLISHMENT AT ABOUT 12:00; IS THAT CORRECT?

10 A ABOUT 12, MAYBE SOMETIME THEREAFTER.

11 Q SOMEWHERE AFTER 12 AND YOU SAID YOU WERE
12 LEAVING ABOUT 45 MINUTES LATER?

13 A YES.

14 Q ALL RIGHT, IF YOU ARRIVED AT 12 ISN'T IT
15 TRUE THE INCIDENT TOOK PLACE AFTER ABOUT 4:00?

16 A IT WAS ACTUALLY BEFORE 4, BUT I SAY
17 SOMETIME AFTER 12 BECAUSE I KNOW 12 IS WHEN I GOT OFF OF
18 WORK.

19 Q ALL RIGHT.

20 A AFTER THAT I'M NOT SURE WHAT TIME IT WAS, I
21 DIDN'T KEEP TRACK OF TIME.

22 Q BUT IT HAPPENED ABOUT 4:00, DIDN'T IT?

23 A OKAY.

24 Q MA'AM?

25 A YES.

1 Q ALL RIGHT, AND MR. KOEHLER HE HAD BEEN
2 DRINKING A GOOD BIT, HADN'T HE?

3 A NO.

4 Q NO?

5 A NO, HE HAD A COUPLE OF DRINKS BEFORE THEN,
6 NOT LIKE --

7 Q JUST TWO DRINKS THAT'S ALL HE HAD?

8 A AS FAR AS I KNOW, YES.

9 Q AND SO HE WASN'T INTOXICATED, WAS HE?

10 A NO.

11 Q HE HADN'T HAD TOO MUCH TO DRINK?

12 A NO.

13 Q AND DID HE EVER GET UPSET THAT NIGHT AT
14 ALL?

15 A UPSET, NO, TOWARDS THE END WHEN WE WERE
16 GOING OUTSIDE, YES.

17 Q ALL RIGHT, LET'S GO BACK TO THE BAR INSIDE.
18 THERE WAS KIND OF AN ARGUMENT, WASN'T THERE?

19 A NO.

20 Q WELL AT SOME POINT IN TIME DIDN'T YOU HAVE
21 TO ASK HIM TWO OR THREE TIMES FOR YOUR CAR KEYS AND TELL
22 HIM TO LET'S GO?

23 A YES.

24 Q ALL RIGHT, SO HE HAD YOUR KEYS AND YOU ON
25 AT LEAST TWO OR THREE OCCASIONS HAD TO SAY, GIVE ME MY KEYS

1 AND LET'S GO, ISN'T THAT RIGHT?

2 A YES.

3 Q ALL RIGHT, SO YA'LL LEFT OUT ON THE SOUTH
4 SIDE OF THE BUILDING NEAR WHERE YOUR CAR WAS, DIDN'T YOU?

5 A YES.

6 Q AND WHO WAS THE FIRST ONE TO GET TO YOUR
7 CAR, YOU OR MR. KOEHLER?

8 A WE GOT THERE ABOUT THE SAME TIME, I WAS THE
9 FIRST ONE TO REACH MY DOOR, WE GOT AT THE CAR THE SAME
10 TIME.

11 Q BUT YOU GOT IN THE CAR?

12 A YES.

13 Q WERE YOU STANDING THERE WITH MR. KOEHLER
14 WHEN HE WAS IN THE PARKING LOT ARGUING WITH THE OTHER
15 PEOPLE THAT WERE COMING OUT THE SOUTH SIDE, THE TIME THAT
16 HE TOOK HIS SHIRT OFF? WERE YOU IN THE CAR OR WERE YOU OUT
17 THERE WITH HIM WHEN HE WAS HOLLERING AND TAKING HIS SHIRT
18 OFF?

19 A WELL I WAS THERE WE WERE WALKING THE SAME
20 WAY. WE WERE WALKING TOGETHER TO THE CAR AND THEY'RE
21 YELLING BACK AND FORTH BUT HE WAS STILL WALKING TOWARDS THE
22 CAR.

23 Q DIDN'T HE TURN AROUND AND TAKE HIS SHIRT
24 OFF?

25 A I DON'T RECALL THAT PART.

1 Q LET ME ASK YOU THIS QUESTION, WHEN HE GOT
2 IN THE CAR DID HE HAVE HIS SHIRT ON?

3 A I DON'T RECALL.

4 Q WHEN HE GOT OUT THE CAR DID HE HAVE HIS
5 SHIRT ON?

6 A I DON'T RECALL.

7 Q ALL RIGHT, SO THERE'S NO QUESTION ABOUT IT
8 THAT, THAT HE WAS NOT INTOXICATED, THAT YOU DON'T RECALL
9 WHETHER HE HAD A SHIRT ON BUT THERE WAS SOME LOUD YELLING
10 IN THE PARKING LOT, WASN'T THERE?

11 A YES.

12 Q ALL RIGHT, AND THIS WENT ON FOR A LITTLE
13 BIT OF TIME?

14 A YES.

15 Q AND ACTUALLY YOU GOT IN THE CAR FIRST AND
16 THEN HE GOT IN AND YOU BACKED UP, DIDN'T YOU?

17 A YES.

18 Q AND YOU WERE DRIVING?

19 A YES.

20 Q AND YOU GOT A 2003, IT'S A LITTLE SMALL SUV
21 PONTIAC; IS THAT CORRECT?

22 A SATURN VUE.

23 Q SATURN, I'M SORRY, EXCUSE ME, AND YOU HAD
24 PULLED OUT FROM YOUR PARKING LOT AND STARTED, OUT OF THE
25 PARKING PLACE, AND STARTED OUT OF THE PARKING LOT TOWARDS

1 HIGHWAY 17, HADN'T YOU?

2 A YES.

3 Q AND YOU HAD YOUR VEHICLE IN DRIVE?

4 A IT WAS STILL IN REVERSE. IT WAS STILL IN
5 REVERSE.

6 Q STILL IN REVERSE. YOU NEVER TURNED TO GO
7 TO HIGHWAY 17?

8 A NO, I WAS BACKING UP, YES, BUT I NEVER GOT
9 TO GO.

10 Q YOU BACKED UP, MADE YOUR TURN AND STARTED
11 TO HIGHWAY 17?

12 A NO, I WAS JUST BACKING UP.

13 Q AND YOU'RE SURE YOU NEVER BACKED UP AND
14 THEN STARTED FORWARD?

15 A NO, I WAS JUST BACKING UP OUT OF THE
16 PARKING LOT.

17 Q BUT YOU HAD CONTROL OF THE CAR?

18 A YES.

19 Q HAD THE CAR DOORS ON YOUR VEHICLE LOCKED
20 WHEN YOUR CAR IS IN PARK OR DRIVE, DO THEY NOT?

21 A NO.

22 Q YOUR CARS DON'T LOCK AUTOMATICALLY WHEN YOU
23 PUT IT IN REVERSE OR PUT IT IN DRIVE?

24 A THEY'LL UNLOCK WHEN I PUT IT IN DRIVE, I
25 GUESS, I'M NOT SURE.

1 Q THEY UNLOCK?

2 A I JUST GOT THAT CAR, I'M NOT SURE.

3 Q WELL YOU HAD IT SINCE, DO YOU STILL HAVE
4 IT?

5 A NO.

6 Q YOU SOLD IT?

7 A YES.

8 Q HOW LONG DID YOU KEEP IT?

9 A NOT LONG.

10 Q ALL RIGHT, SO YOU HAD IT FOR A WHILE, SO
11 WAS THE DOORS LOCKED WHEN THE INDIVIDUAL CAME UP TO THE
12 PASSENGER SIDE OR NOT?

13 A NO.

14 Q MA'AM?

15 A NO.

16 Q THEY WERE NOT LOCKED?

17 A THEY COULDN'T, NO.

18 Q NOW AT SOME POINT IN TIME DID YOU GET OUT
19 OF THE VEHICLE BEFORE THE GENTLEMAN AND, AND, AND MR.
20 KOEHLER THAT DOOR, THE PASSENGER DOOR OPENED? DID YOU GET
21 OUT BEFORE THE PASSENGER DOOR OPENED?

22 A NO, THE DOOR WAS ---

23 Q DID YOU GET OUT, DID YOU GET OUT AND HOLLER
24 SOME STATEMENTS TO THE GENTLEMAN ON THE OTHER SIDE OF THE
25 CAR?

- 1 A NOT ---
- 2 Q WHILE MR. KOEHLER ---
- 3 A --- BEFORE THE DOOR WAS OPENED.
- 4 Q MA'AM?
- 5 A NOT BEFORE THE DOOR WAS OPENED.
- 6 Q WHEN THE DOOR WAS OPENED YOU MOVED FROM
- 7 YOUR PASSENGER SIDE OF THE VEHICLE WHERE YOU WERE SITTING
- 8 IN THE PASSENGER SEAT AND YOU CAME ALL AROUND, ALL THE WAY
- 9 AROUND TO THE PASSENGER DOOR, DIDN'T YOU?
- 10 A NO.
- 11 Q HOW CLOSE TO THE PASSENGER DOOR DID YOU
- 12 GET?
- 13 A I WAS AT LIKE THE BACK TAIL LIGHT OF THE
- 14 CAR.
- 15 Q YOU NEVER WENT FORWARD, MORE FORWARD THAN
- 16 THE BACK TAIL LIGHT?
- 17 A NO, I COULDN'T. THERE WAS TOO MANY PEOPLE
- 18 AT THE DOOR.
- 19 Q HOW MANY PEOPLE WERE AT THE DOOR?
- 20 A I DON'T KNOW.
- 21 Q TWO, THREE, FOUR?
- 22 A THERE WAS MORE THAN, I DON'T KNOW.
- 23 Q SIX?
- 24 A THERE WAS A LOT OF PEOPLE.
- 25 Q A LOT OF PEOPLE WERE AT THE DOOR?

1 A FOUR, TWO TO FOUR, I'M NOT SURE, THERE WAS
2 AT LEAST FOUR, THERE WAS PEOPLE AT THE DOOR.

3 Q AT LEAST FOUR PEOPLE AT THE DOOR?

4 A I BELIEVE, I'M NOT SURE.

5 Q AND YOU WERE BEHIND THE CAR AND YOU WASN'T
6 ONE OF THOSE FOUR?

7 A NO.

8 Q ALL RIGHT, AT WHAT -- WAS THERE A LOT OF
9 HOLLERING AND TALKING GOING ON, FUSSING GOING ON?

10 A YES.

11 Q BY A NUMBER OF PEOPLE?

12 A YES.

13 Q ALL RIGHT, EVERYBODY WAS FUSSING AND
14 HOLLERING, WEREN'T THEY?

15 A YES.

16 Q ALL RIGHT, A LITTLE RUCKUS GOING ON RIGHT
17 THEN, WASN'T IT?

18 A YES.

19 Q ALL RIGHT, AND, AND, AND AT SOME POINT IN
20 TIME WHEN YOU TALKED TO THE LAW ENFORCEMENT OFFICIALS YOU
21 SAID THAT THE PERSON AT THE WINDOW HAD SOMEBODY WITH HIM,
22 DIDN'T YOU, AND HAD A BLACK CAP ON, BLACK HAT ON, DIDN'T
23 YOU?

24 A I BELIEVE SO, YES.

25 Q ALL RIGHT, SO THE PERSON WITH THE PERSON AT

1 THE DOOR WHO WAS ALSO AT THE DOOR HAD A BLACK HAT ON? ALL
2 RIGHT, NOW AT THIS POINT IN TIME HOW LONG DID IT TAKE FROM
3 THE TIME YOU GOT IN THE CAR UNTIL, AS YOU SAY, THE PERSON
4 RAN OFF TO GET IN HIS CAR? WASN'T IT ABOUT 20 SECONDS,
5 WASN'T IT REAL QUICK? IT ALL HAPPENED AS FAST ---

6 A FROM THE TIME I GOT OUT OF MY CAR UNTIL THE
7 TIME THE PERSON RAN TO THEIR CAR?

8 Q ABOUT 20 SECONDS?

9 A I HAD ALREADY BEEN OUT OF THE CAR BEFORE
10 THEY RAN TO THEIR CAR.

11 Q ABOUT A SECOND OR TWO, TWO OR THREE
12 SECONDS, IT WAS ALL QUICK IS WHAT YOU'RE SAYING, RIGHT?

13 A YES.

14 Q IT JUST HAPPENED REAL QUICK?

15 A I'M NOT SURE WHAT PART OF GOING TO THE CAR
16 YOU'RE TALKING ABOUT, COMING OUT OF THE CLUB AND GOING TO
17 THE CAR?

18 Q NO, I'M TALKING ABOUT FROM THE TIME YOU GOT
19 OUT OF YOUR DRIVERS ---

20 A I WAS ALREADY OUT OF THE CAR.

21 Q WHEN YOU GOT OUT OF THE DOOR OF YOUR
22 DRIVERS DOOR OF YOUR CAR UNTIL IT WAS ALL OVER WITH WHAT
23 DID IT TAKE ABOUT 20 SECONDS?

24 A JUST ABOUT, IT HAPPENED FAST.

25 Q ALL RIGHT, NOW AND YOU SAY THERE WAS FOUR,

1 FIVE, SIX PEOPLE RIGHT THERE AT THE DOOR WHERE YOU COULDN'T
2 EVEN GET UP THERE AND ALL OF THEM HOLLERING AND HAVING A
3 RUCKUS GOING ON?

4 A THERE'S A COUPLE OF PEOPLE AT THE DOOR.
5 YES, I'M NOT SURE HOW MANY.

6 Q BUT THERE WAS A LOT GOING ON AT THAT DOOR,
7 WASN'T THERE?

8 A YES.

9 Q EXCUSE ME A SECOND. WHAT COLOR WAS THE CAR
10 THAT THE PERSON THAT YOU'RE TALKING ABOUT AT THE DOOR LEFT
11 IN?

12 A I'M NOT SURE.

13 Q NOT SURE?

14 A I THOUGHT IT WAS A GRAYISH COLOR.

15 Q YOU THOUGHT IT WAS SILVER OR WHITE, DIDN'T
16 YOU?

17 A YES, BUT IT WAS ALSO DARK.

18 Q ALL RIGHT, AND IT WAS DARK ALL AROUND IN
19 THAT AREA, WASN'T IT?

20 A YES, IT WAS.

21 Q ALL RIGHT, AND SO ACTUALLY WHERE YOU PARKED
22 THE CLUB IS OVER HERE AND THEN THERE'S A PARKING LOT AND
23 THERE WAS A LITTLE WOODED AREA AND THEN ACTUALLY PEOPLE
24 PARK KIND OF OFF THE PROPERTY EVEN, WAY OVER THERE IN THE
25 BACK. THAT'S WHERE YOU WERE PARKED, WASN'T IT? THERE WAS

1 NO LIGHTS AROUND YOUR CAR?

2 A THE LIGHTS FROM MCCATZ, I WASN'T WAY IN THE
3 BACK.

4 Q BUT THEY WERE WAY BACK THERE BUT THE AREA
5 YOU WERE IN DIDN'T HAVE A SPOT LIGHT OR A FLOOD LIGHT OR A
6 STREET LIGHT, DID IT?

7 A NO, I DON'T BELIEVE SO.

8 MR. RICHARDSON: NO FURTHER QUESTIONS.

9 THE COURT: REDIRECT?

10 MR. HUMPHRIES: JUST BRIEFLY.

11 REDIRECT EXAMINATION

12 BY MR. HUMPHRIES:

13 Q YESSICA, YOU'VE ALREADY TOLD THIS JURY THAT
14 YOU GAVE A STATEMENT TO LAW ENFORCEMENT THAT EVENING; IS
15 THAT CORRECT?

16 A YES.

17 Q AND MR. RICHARDSON ASKED YOU ABOUT WHETHER
18 THERE WAS A PERSON THERE WITH A BLACK HAT ON?

19 A YES.

20 Q LET ME SHOW YOU THIS AND SEE IF YOU CAN
21 IDENTIFY IT?

22 A YES.

23 Q AND IS THAT THE STATEMENT YOU GAVE LAW
24 ENFORCEMENT ON THE EVENING OR THE EARLY MORNING HOURS WHEN
25 BRANDT WAS SHOT?

1 A YES.

2 Q OKAY, NOW DOES THIS REFRESH YOUR
3 RECOLLECTION AS TO THE PERSON YOU SAW WITH THE BLACK HAT?

4 A YES.

5 Q OKAY, LET ME ASK YOU THIS. THE PERSON THAT
6 WAS FIGHTING WITH BRANDT, THE PERSON THAT CAME OUT OF THE
7 BAR WITH THE GUN AND WAS FIGHTING WITH BRANDT AT YOUR CAR
8 DOOR DID HE HAVE A HAT ON?

9 A NO.

10 Q THE PERSON ---

11 A I DON'T BELIEVE --

12 Q TAKE ANOTHER LOOK AT YOUR STATEMENT AND SEE
13 IF IT REFRESHES YOUR RECOLLECTION, TO THE LAST RIGHT AT THE
14 BOTTOM OF THE PAGE; DO YOU SEE WHERE I'M TALKING ABOUT?

15 A YES.

16 Q AND YOU GAVE THAT STATEMENT IN THE EARLY
17 MORNING HOURS, DID YOU NOT?

18 A YES.

19 Q AND LET ME ASK YOU THIS, IT'S PRETTY
20 UPSETTING, ISN'T IT?

21 A YES.

22 Q AND IT'S BEEN SOME TIME AGO, HOW WOULD YOU
23 SAY YOUR MEMORY IS, WOULD YOUR RECOLLECTION OF THE EVENTS
24 THAT TOOK PLACE THAT EVENING WOULD HAVE BEEN BETTER THAT
25 EVENING OR TODAY?

1 A DEFINITELY IN THAT EVENING.

2 Q AND HOW ON THAT EVENING DID YOU DESCRIBE
3 THE GUY THAT ENGAGED IN A FIGHT WITH BRANDT AND SHOT BRANDT
4 AS IT RELATES TO A HAT?

5 A HE WAS WEARING A BLACK HAT AND A BLACK
6 JACKET AND HE ALSO HAD ON A GRAY SHIRT WITH A GUY ON HIS
7 SHIRT.

8 Q IS THAT THE PERSON THAT HE WAS FIGHTING
9 WITH THAT ULTIMATELY SHOT HIM?

10 A YES.

11 Q OKAY, SO HE HAD A BLACK HAT ON?

12 A YES.

13 Q AND WHEN WE'RE TALKING ABOUT, LET'S MAKE
14 SURE WE'RE TALKING ABOUT THE RIGHT DOORS, OKAY? WHEN WE'RE
15 TALKING ABOUT THE PASSENGER SIDE DOOR OF YOUR VEHICLE WHERE
16 BRANDT AND THIS INDIVIDUAL IN THE BLACK HAT WERE IN A
17 FIGHT, WAS THERE ANYBODY ELSE INVOLVED IN THAT FIGHT BUT
18 THE TWO OF THEM?

19 A NO.

20 Q NO. WERE THERE OTHER PEOPLE IN THE PARKING
21 LOT?

22 A YES.

23 Q AND TOWARDS THE DOOR OF THE BAR?

24 A YES.

25 Q BUT AS IT RELATES TO THE FIGHT HOW MANY

1 PEOPLE WERE INVOLVED?

2 A TWO.

3 Q ONE OF THEM BEING BRANDT?

4 A YES.

5 MR. HUMPHRIES: THANK YOU, MA'AM.

6 MR. RICHARDSON: PLEASE THE COURT? MAY I BORROW
7 THIS A SECOND?

8 MR. HUMPHRIES: GOT A COPY.

9 RECROSS EXAMINATION

10 BY MR. RICHARDSON:

11 Q PLEASE, MA'AM, READ THE LAST TWO LINES OF
12 YOUR STATEMENT THAT THE SOLICITOR HAS JUST HANDED YOU.
13 PLEASE, MA'AM, READ THEM WORD FOR WORD?

14 MR. HUMPHRIES: I'M GOING TO, WELL, YOUR HONOR,
15 IT HAS TO BE IN RESPONSE TO WHAT I JUST ASKED HER AND JUST
16 TO READ THE STATEMENT I DON'T HAVE ANY PROBLEM WITH ---

17 MR. RICHARDSON: I'LL ASK HER, I'LL ASK HER THE
18 QUESTION.

19 Q (CONTINUING) DID YOU MAKE A STATEMENT THAT
20 MORNING HOUR THAT THE GUY THAT SHOT BRANDT WAS WITH A HEAVY
21 SET GUY THAT HAD A BLACK HAT ON AND A BLACK JACKET?

22 A YES, BUT I WAS REFERRING HE WAS WITH THE
23 HEAVY SET GUY AS WELL, THAT WAS THE MAIN PERSON THAT WAS
24 STANDING AT THE DOOR THAT I SEEN.

25 Q YOU'RE REFERRING TO THE MAN THAT SHOT HIM

1 WAS WITH A MAN THAT HAD A BLACK HAT ON?

2 A NO, THAT'S HOW I WROTE IT DOWN BUT AT THAT
3 TIME OF THE MORNING WHEN EVERYTHING IS CRAZY AND I TALKED
4 TO THEM AFTER THAT.

5 Q BUT THAT'S WHAT YOUR STATEMENT SAID AT THAT
6 MOMENT?

7 A BUT IT WAS REFERRING TO BEING WITH THE
8 HEAVY SET GUY.

9 Q ALL RIGHT, LET'S TALK ABOUT IT. LET'S GO
10 ONE MORE TIME, THE GUY THAT SHOT BRANDT WAS WITH A HEAVY
11 SET GUY THAT HAD A BLACK HAT ON, THAT'S WHAT IT SAYS, ISN'T
12 IT?

13 A YES.

14 MR. RICHARDSON: ALL RIGHT, NO FURTHER
15 QUESTIONS.

16 MR. HUMPHRIES: LET'S PUT IT IN, I MOVE TO
17 INTRODUCE IT.

18 THE COURT: ANY OBJECTIONS?

19 MR. RICHARDSON: YOUR HONOR, I THINK THE BEST
20 EVIDENCE IS THE TESTIMONY AS IT'S PRESENTED.

21 MR. HUMPHRIES: I CAN'T IMAGINE THE BEST
22 EVIDENCE BEING THE TESTIMONY WHEN HE'S READING FROM THE
23 STATEMENT.

24 THE COURT: WELL I'M GOING TO ALLOW IT IF
25 THERE'S NO OBJECTION TO IT.

1 MR. RICHARDSON: I DON'T HAVE ANY PROBLEM WITH
2 IT.

3 MR. HUMPHRIES: THANK YOU.

4 THE COURT: VERY WELL, IT'S ADMITTED.

5 (WHEREUPON, STATE'S EXHIBIT NUMBER 1 MARKED AND
6 ENTERED INTO EVIDENCE.)

7 MR. HUMPHRIES: THAT'S STATE'S NUMBER 1, YOUR
8 HONOR.

9 THE COURT: REDIRECT?

10 MR. HUMPHRIES: NOTHING.

11 THE COURT: YOU MAY STEP DOWN, THANK YOU. CALL
12 YOUR NEXT WITNESS, PLEASE?

13 MS. ELDER: THE STATE WOULD CALL CARLOS ADAMS.

14 THE COURT: COME AROUND HERE, PLEASE, SIR, AND
15 BE SWORN.

16 CARLOS ALEJANDRO ADAMS

17 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

18 MADAM CLERK: SPEAK YOUR WHOLE NAME AND SPELL
19 YOUR LAST NAME FOR THE COURT?

20 THE WITNESS: I'M CARLOS ALEJANDRO ADAMS, A-D-A-
21 M-S.

22 DIRECT EXAMINATION

23 BY MS. ELDER:

24 Q MR. ADAMS, DO YOU LIVE IN HORRY COUNTY?

25 A YES.

- 1 Q AND WHAT KIND OF, ARE YOU EMPLOYED?
- 2 A YES.
- 3 Q WHAT KIND OF WORK DO YOU DO?
- 4 A I'M A SERVER.
- 5 Q AND HOW LONG HAVE YOU BEEN DOING THAT KIND
- 6 OF WORK?
- 7 A SINCE I'VE BEEN HERE.
- 8 Q AND HOW LONG HAVE YOU BEEN HERE IN THE
- 9 AREA?
- 10 A FIVE YEARS.
- 11 Q AND YOU'RE HERE TODAY, WHAT BRINGS YOU HERE
- 12 TODAY?
- 13 A THERE WAS AN INCIDENT AT MCCATZ.
- 14 Q AND WERE YOU ISSUED A SUBPOENA BY THE STATE
- 15 OF SOUTH CAROLINA?
- 16 A YES.
- 17 Q IS THAT WHAT BROUGHT YOU HERE TODAY?
- 18 A YES.
- 19 Q AND IS IT SOMETHING THAT YOU REALLY WANT TO
- 20 BE DOING?
- 21 A NO.
- 22 Q AND DO YOU KNOW THE DEFENDANT IN THIS CASE
- 23 LEMONHOLLAND?
- 24 A YES.
- 25 Q AND YOU WERE, WERE YOU FRIENDS WITH HIM AT

1 THE TIME THIS INCIDENT HAPPENED?

2 A YES.

3 Q IS THAT DIFFICULT FOR YOU TO TESTIFY HERE
4 TODAY FOR THE STATE?

5 A YEP.

6 Q NOW BEFORE WE START AND YOU TESTIFY, MR.
7 ADAMS, SO WE'LL GO AHEAD AND GET THIS OUT OF THE WAY YOU
8 HAVE, YOU HAVE SOME PRIOR CONVICTIONS, DO YOU NOT?

9 A YES.

10 Q I BELIEVE IN 1996 YOU HAD SOME TYPE OF
11 MARIJUANA CONVICTION?

12 A YEP.

13 Q AND IN 2002 YOU HAD ANOTHER TYPE OF DRUG
14 CONVICTION; IS THAT CORRECT?

15 A YES.

16 Q DID YOU SERVE PROBATION OR ANYTHING FOR
17 THOSE?

18 A YEP.

19 Q DO YOU HAVE ANY CURRENT PENDING CHARGES
20 WITH OUR, OUR OFFICE?

21 A YEAH.

22 Q AND HAVE WE, HAVE YOU ASKED FOR ANYTHING IN
23 EXCHANGE FOR YOUR TESTIMONY FROM THE STATE HERE TODAY?

24 A NO.

25 Q AND HAS THE STATE OFFERED YOU ANYTHING OR

1 GUARANTEED YOU ANYTHING IN CONNECTION WITH YOUR TESTIMONY?

2 A NO.

3 Q WHAT TYPE OF OFFENSE DO YOU HAVE PENDING IN
4 OUR OFFICE?

5 A IT'S A ZANAX CHARGE.

6 Q NOW I WANT TO GO TO DECEMBER 30TH, 2005,
7 WHERE WERE YOU THAT NIGHT?

8 A I WAS IN MCCATZ.

9 Q AND IS THAT A PLACE THAT YOU FREQUENTED
10 REGULARLY?

11 A YEAH, WE HANG OUT THERE.

12 Q AND WHAT KIND OF PLACE WAS IT?

13 A IT'S LIKE SERVICE INDUSTRY PEOPLE AFTER
14 WORK GO THERE TO HAVE A DRINK.

15 Q AND SO THOSE OF US WHO MAY NOT KNOW WHEN WE
16 SAY SERVICE INDUSTRY PEOPLE WHAT TIME, YA'LL GET HOME LATE
17 TYPE THING?

18 A YEAH.

19 Q IS IT A LATE NIGHT PLACE?

20 A YEAH, LATE NIGHT.

21 Q SO WHAT TIME, DO YOU RECALL WHAT TIME YOU
22 GOT TO MCCATZ THAT EVENING?

23 A IT WAS AROUND 1:00 MAYBE, I COULDN'T TELL
24 YOU, 1:00 MAYBE.

25 Q THAT WOULD BE IN THE MORNING?

1 A IN THE MORNING, YEAH.

2 Q AND HAD YOU BEEN WORKING THAT EVENING?

3 A YEAH, I WAS WORKING.

4 Q SO YOU WENT THERE AFTER YOU GOT OFF OF
5 WORK?

6 A YES.

7 Q NOW AT SOME POINT IN TIME DID YOU SEE YOUR
8 FRIEND LEMOND HOLLAND COME IN?

9 A YES.

10 Q AND WHAT DID YOU DO WHEN HE CAME IN?

11 A WE HUGGED AND WE WERE JUST FRIENDS, WE
12 SAID, YOU KNOW, WHAT WAS GOING ON, YOU KNOW.

13 Q AND HAD YOU TALKED TO HIM ON HIS CELL PHONE
14 PRIOR TO THAT TIME?

15 A YEAH.

16 Q AND SO YOU HAD HIS CELL PHONE NUMBER?

17 A YEAH.

18 Q DID HE HAVE YOURS?

19 A YEAH.

20 Q DID HE CALL YOU?

21 A I THINK I CALLED HIM.

22 Q OKAY, AND HOW LONG HAD YOU KNOWN HIM PRIOR
23 TO THIS NIGHT?

24 A FOR ABOUT FIVE MONTHS, SIX MONTHS.

25 Q AND HAD YOU BEEN OUT WITH HIM BEFORE OR IN

1 HIS PRESENCE OUT SOMEWHERE BEFORE?

2 A YEAH, UH-HUH.

3 Q HAVE YOU EVER SEEN MR. HOLLAND IN
4 POSSESSION OF ANY TYPE OF FIREARM OR WEAPON?

5 A I HAVE ---

6 MR. RICHARDSON: OBJECTION, YOUR HONOR, I DON'T
7 THINK THAT WOULD BE RELEVANT TO THE NIGHT IN QUESTION.

8 THE COURT: WHAT'S THE RELEVANCE OF IT?

9 MS. ELDER: I'LL REPHRASE THE QUESTION.

10 MR. RICHARDSON: COULD WE TAKE A MATTER UP OUT
11 OF THE PRESENCE OF THE JURY?

12 THE COURT: JUST WITHDRAW THE QUESTION.

13 MS. ELDER: I'LL, YES, I'LL RE-ASK.

14 Q (CONTINUING) WERE YOU WITH LEMONHOLLAND
15 WITHIN A COUPLE OF WEEKS PRIOR THIS INCIDENT ON DECEMBER
16 30TH, 2005?

17 A YEAH.

18 Q AND DURING THOSE FEW WEEKS LEADING UP TO
19 THIS INCIDENT HAD YOU EVER SEEN MR. HOLLAND ---

20 MR. RICHARDSON: YOUR HONOR, MAY I TAKE A MATTER
21 UP ---

22 THE COURT: LADIES AND GENTLEMEN, PLEASE STEP
23 BACK TO YOUR JURY ROOM, DON'T DISCUSS THE CASE WHILE YOU'RE
24 BACK THERE. WE NEED TO TAKE UP A MATTER OF LAW OUTSIDE
25 YOUR PRESENCE.

1 (WHEREUPON, THE JURY RETIRED TO THE JURY ROOM AT
2 3:59 P.M.)

3 THE COURT: YES, SIR?

4 MR. RICHARDSON: YOUR HONOR, IF THE COURT
5 PLEASE, I DON'T KNOW WHAT RELEVANCE A GUN FROM TWO WEEKS
6 BEFORE WOULD HAVE ON THE MATTER IN QUESTION THIS NIGHT AND
7 I THINK SHE WITHDREW A QUESTION AND THEN WAS COMING IN THE
8 BACK DOOR WHERE I FELT LIKE SHE SHOULDN'T BE GOING; AND I
9 DIDN'T WANT THE JURY TO HEAR IT AND WOULD OBJECT TO HER
10 TALKING ABOUT A GUN THAT HE MIGHT HAVE SEEN BEFORE THIS
11 NIGHT.

12 MR. HUMPHRIES: YOUR HONOR, LET'S DO IT THIS
13 WAY. THE EVIDENCE FROM THIS WITNESS IS GOING TO BE THAT HE
14 SAW HIM LEAVE THE BAR FROM ANOTHER DOOR, RUN AROUND TO HIS
15 VEHICLE, OPEN THE DOOR, REACH AND GET SOMETHING, CLOSE THE
16 DOOR, AND RUN OVER AND ENGAGE IN THIS ALTERCATION WITH THE
17 VICTIM. HE'S GOING TO TESTIFY THAT WITHIN THAT PERIOD OF
18 TIME THAT PRECEDING THE EVENT THAT THE DEFENDANT SHOWED HIM
19 A HANDGUN WHICH HE HAD IN HIS VEHICLE. IT IS ABSOLUTELY
20 RELEVANT THAT HE KNEW THE DEFENDANT HAD A HANDGUN AND THAT
21 HE KEPT IT IN HIS VEHICLE WHICH WAS CONSISTENT WITH HIS
22 OBSERVATIONS.

23 THE COURT: I'LL ALLOW IT.

24 MR. HUMPHRIES: THANK YOU.

25 MR. RICHARDSON: MAY WE TAKE A SHORT BREAK, YOUR

1 HONOR, SINCE WE'VE BROKE --

2 THE COURT: YES, WE'LL TAKE A SHORT BREAK.

3 MR. RICHARDSON: COULD I NOTE MY OBJECTION ON
4 THE RECORD?

5 THE COURT: YES, SIR. WE'LL TAKE ABOUT 10
6 MINUTES, WE'LL START BACK ABOUT 10 AFTER.

7 MR. HUMPHRIES: THANK YOU, YOUR HONOR.

8 (WHEREUPON, A RECESS WAS TAKEN AND THE FOLLOWING
9 TAKES PLACE ON THE RECORD AFTER THE RECESS.)

10 MR. RICHARDSON: IF IT PLEASE THE COURT, YOUR
11 HONOR, IN FULLNESS OF THAT MOTION I MADE I WOULD MAKE IT
12 UNDER RULE 403 EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF
13 PREJUDICE. I JUST FEEL LIKE THAT THAT WOULD BE TOO
14 PREJUDICIAL TO TALK ABOUT A GUN THAT WAS TWO WEEKS BEFORE.
15 JUST NOTE THAT FOR THE RECORD, PLEASE, YOUR HONOR.

16 THE COURT: I'LL NOTE YOUR OBJECTION. ARE WE
17 READY?

18 MR. HUMPHRIES: YES, SIR.

19 THE COURT: GET THE JURY BACK, PLEASE.

20 (WHEREUPON, THE JURY RETURNED TO THE COURTROOM AT
21 4:32 P.M.)

22 THE COURT: LADIES AND GENTLEMEN, WE HAVE A FEW
23 WITNESSES WE NEED TO GET IN TODAY. WE MAY TODAY GO PAST,
24 WE WILL GO PAST 5:00, BUT IT'S BECAUSE OF SCHEDULING AND WE
25 NEED TO DO THAT. THERE'S WITNESSES HERE THAT HAVE TOLD

1 THEIR TESTIMONY WILL TAKE PLACE TODAY. I TELL YOU THAT NOW
2 IF ANYONE NEEDS TO MAKE A CALL, I DON'T THINK WE'LL BE HERE
3 PAST 6, BUT WE MAY BE HERE UNTIL THEN. IF ANYONE NEEDS TO
4 MAKE A CALL NOW LET'S GO DO THAT NOW. WE'LL TAKE A MINUTE
5 FOR ANYONE TO DO THAT NOW.

6 (WHEREUPON, FOUR JURY MEMBERS WERE EXCUSED FROM
7 THE COURTROOM TO MAKE TELEPHONE CALLS AT 4:35 P.M.)

8 (WHEREUPON, FOUR JURY MEMBERS ENTERED THE
9 COURTROOM AT 4:38 P.M.)

10 THE COURT: ALL RIGHT, YOU MAY PROCEED.

11 MS. ELDER: THANK YOU, YOUR HONOR.

12 MS. ELDER (CONTINUING)

13 Q MR. ADAMS, IT'S BEEN A FEW MINUTES, LET'S
14 GO BACK, YOU WERE IN MCCATZ BAR ON THE NIGHT OF DECEMBER
15 30TH, 2005; IS THAT CORRECT?

16 A YES.

17 Q AND YOU HAD BEEN THERE FOR SOME TIME AND
18 SAW MR. HOLLAND COME IN?

19 A YES.

20 Q NOW TELL ME AGAIN WHAT DID YOU DO WHEN YOU
21 SAW YOUR FRIEND MR. HOLLAND, LEMOND HOLLAND?

22 A I HUGGED HIM AND WE SAID, WHAT WAS GOING
23 ON.

24 Q AND AT SOME POINT IN TIME AFTER HE CAME
25 INTO THE BAR DID YOU SEE HIM APPROACH THE ACTUAL BAR

1 ITSELF?

2 A YEAH, WE WERE JUST STANDING AT A BAR, YEAH.

3 Q AT ANY POINT IN TIME DID YOU SEE ANYONE
4 THERE ENGAGE IN A VERBAL DISPUTE OR ALTERCATION?

5 A YEAH, BUT I COULDN'T REALLY TELL WHO WAS
6 ARGUING. IT WAS LIKE A, LIKE ESCALATED SO I REALLY DIDN'T
7 KNOW WHO WAS ARGUING BUT I CAN SEE LIKE TEMPER ARE LIKE,
8 YOU KNOW.

9 Q WAS YOUR FRIEND LEMONHOLLAND INVOLVED IN
10 THAT GROUP OF PEOPLE?

11 A I THINK SO, YEAH.

12 Q OKAY, AND AT SOME POINT IN TIME, DID YOU
13 SEE ANY BLOWS, ANY PHYSICAL BLOWS ---

14 A NO.

15 Q --- IN THE BAR ITSELF?

16 A UH-UH.

17 Q AND AFTER, DID ANYBODY SEPARATE THE PEOPLE
18 THERE AT THE BAR THAT WERE ARGUING?

19 A NOT REALLY, NO.

20 Q OKAY, DID IT SOMEHOW DISSIPATE?

21 A YEAH.

22 Q OKAY, AND WHAT DID, WHAT DID LEMONHOLLAND
23 DO AT THAT POINT?

24 A YEAH, LIKE PEOPLE WENT TO THE LIKE THE BACK
25 WHICH IS, YOU KNOW, WHERE THE PORCH IS AND THEN HE WENT TO

1 THE FRONT.

2 Q OKAY, AND DID HE EXIT THE BAR?

3 A YEAH.

4 Q AND DID YOU SEE AN INDIVIDUAL AND A FEMALE
5 EXIT THE OTHER SIDE OF THE BAR?

6 A I COULDN'T TELL YOU, YOU KNOW.

7 Q WHEN, WHEN LEMOND HOLLAND EXITED THE DOOR
8 OF THE BAR WHAT DID YOU DO?

9 A I, I WENT BEHIND HIM, I WAS TRYING TO
10 FIGURE OUT WHAT WAS GOING ON.

11 Q WHY WERE YOU GOING BEHIND HIM?

12 A JUST TO SEE, I FIGURED THERE WAS GOING TO
13 BE AN ALTERCATION BUT I WAS JUST LIKE BEHIND HIM, BUT HE
14 WAS JUST LIKE CURSING AND HE WAS LIKE IN FRONT OF ME THE
15 WHOLE TIME LIKE HE WAS WALKING TOWARDS HIS CAR.

16 Q DID HE SEEM ANGRY?

17 A YEAH.

18 Q AND WHEN HE LEFT THE BAR WHAT DID HE DO?

19 A HE WENT TO HIS CAR.

20 Q AND WHEN YOU AND, AND LEMOND WENT TO HIS
21 CAR WAS THERE ANYBODY ELSE WITH YOU?

22 A NO.

23 Q SO THERE WAS NOBODY ELSE THERE, WAS ANYBODY
24 ELSE THERE AT THAT TIME YELLING AT HIM OR SCREAMING OR ---

25 A NO.

- 1 Q --- TRYING TO FIGHT HIM?
- 2 A NO.
- 3 Q AND WHAT DID HE DO WHEN HE WENT TO HIS CAR?
- 4 A HIS CAR WAS PARKED THE OTHER WAY AROUND.
- 5 HE WENT TO HIS DRIVER'S SIDE AND HE REACHED IN AND THEN HE
- 6 SLAMMED THE DOOR AND THEN LOCKED IT.
- 7 Q DO YOU KNOW IF HE GOT ANYTHING OUT OF HIS
- 8 VEHICLE?
- 9 A I DON'T KNOW.
- 10 Q OKAY.
- 11 A HE REACHED BUT I DON'T KNOW IF HE GOT
- 12 ANYTHING OUT OF THE CAR.
- 13 Q OKAY, NOW YOU HAD INDICATED BEFORE THAT YOU
- 14 HAD KNOWN LEMOND HOLLAND FOR ABOUT FIVE MONTHS?
- 15 A YEAH.
- 16 Q AND PRIOR TO THIS INCIDENT WITHIN A FEW
- 17 WEEKS LEADING UP TO THIS INCIDENT HAD YOU EVER KNOWN LEMOND
- 18 HOLLAND TO HAVE A WEAPON?
- 19 A YEAH, ONE DAY HE SHOWED IT TO ME IN THE
- 20 CAR.
- 21 Q AND WAS THAT WEAPON, WHAT KIND OF WEAPON
- 22 WAS IT?
- 23 A IT WAS A, IT WAS A GUN. I DON'T KNOW A LOT
- 24 ABOUT GUNS SO I COULDN'T TELL YOU.
- 25 Q DO YOU KNOW WHAT A, THE DIFFERENCE BETWEEN

1 A SEMI AUTOMATIC WEAPON AND A REVOLVER IS?

2 MR. RICHARDSON: YOUR HONOR, I RENEW OUR
3 OBJECTION FOR THE RECORD.

4 THE COURT: IT'S ON THE RECORD, IT'S OVERRULED.

5 MR. HUMPHRIES: (CONTINUING)

6 Q YOU CAN ANSWER THE QUESTION.

7 A YEAH.

8 Q OKAY, WAS IT, WHICH ONE WAS IT?

9 A IT'S SEMI AUTOMATIC.

10 Q OKAY, SO IT HAD A CLIP IN IT, NOT A
11 REVOLVER?

12 A YEAH.

13 Q OKAY, AND HE SHOWED YOU THAT AND WHERE WAS
14 HE WHEN HE SHOWED YOU THAT?

15 A IT WAS IN HIS CAR, I COULDN'T TELL YOU
16 WHERE WE WERE.

17 Q AND WAS THAT IN A SHORT PERIOD OF TIME ---

18 A YEAH.

19 Q --- PRIOR TO THIS INCIDENT?

20 A LIKE I SAID IT WAS MAYBE A MONTH OR FEW
21 WEEKS.

22 Q NOW GETTING BACK TO THIS NIGHT DECEMBER
23 30TH, WHEN HE REACHED IN THE CAR DID YOU HAVE ANY CONCERNS
24 AT THAT TIME?

25 A YEAH, I JUST DIDN'T WANT NOBODY TO FIGHT

1 OR, I WAS JUST TRYING TO TELL THEM, I WAS JUST TRYING TO
2 SEE WHAT WAS GOING ON AND I COULDN'T EVEN TALK TO HIM SO --

3 Q WHY COULDN'T YOU EVEN TALK TO HIM?

4 A BECAUSE HE WAS, HE WAS REALLY MAD.

5 Q AND WHAT DID HE DO AFTER HE REACHED INTO
6 HIS CAR AND DID WHATEVER HE DID IN THERE AND LOCKED THE
7 DOOR?

8 A WELL HE TOOK OFF TOWARD THE OTHER CAR AND
9 THEN I JUST STOPPED AND I SAW ---

10 Q DID YOU FOLLOW HIM A SHORT WAY?

11 A A SHORT WAY AND THEN I JUST STOPPED AND HE
12 WENT AROUND THE OTHER VEHICLE.

13 Q AND WHEN YOU SAID HE WENT AROUND THE OTHER
14 VEHICLE WHAT SIDE OF THE VEHICLE WAS HE ON?

15 A ON THE, ON THE PASSENGER SEAT.

16 Q AND WHAT DID YOU SEE HIM DO WHEN HE AROUND
17 THE VEHICLE PASSENGER SIDE?

18 A THE GUY, THE GUY THAT WAS SITTING ON THE
19 PASSENGER SIDE HE TRIED TO GET OUT AND THEN IT WAS LIKE AN
20 ALTERCATION AND THEN I SEE LIKE THREE SHOTS GET FIRED.

21 Q DID YOU HEAR THEM?

22 A YEAH, YEAH.

23 Q AND DID YOU SEE, DO YOU KNOW WHAT A MUZZLE
24 FLASH IS?

25 A YEAH.

1 Q WAS IT AT NIGHT TIME?

2 A YEAH.

3 Q AND DID YOU SEEN ANY MUZZLE FLASH?

4 A YEAH.

5 Q AND IN WHAT GENERAL AREA DID YOU SEE THAT
6 MUZZLE FLASH COME FROM?

7 A IT WAS LIKE ON TOP OF THE CAR LIKE.

8 Q WAS IT WHERE YOU SAW YOUR, WHERE YOU SAW
9 LEMOND HOLLAND GO AND APPROACH THE VEHICLE?

10 A YEAH.

11 Q AND DID YOU SEE WHAT HAPPENED AS A RESULT
12 OF THOSE SHOTS OR WHAT DID YOU GO AFTER YOU HEARD THOSE
13 SHOTS?

14 A I, I WENT BACK IN THE BAR.

15 MS. ELDER: OKAY, I HAVE NO FURTHER QUESTIONS,
16 YOUR HONOR.

17 THE COURT: CROSS?

18 MR. JOHNSON: MAY IT PLEASE THE COURT?

19 CROSS EXAMINATION

20 BY MR. JOHNSON:

21 Q MR. ADAMS, DO YOU MIND IF I CALL YOU
22 CARLOS?

23 A GO AHEAD.

24 Q AND IN MCCATZ ---

25 A YEAH.

1 Q --- YOU SAID THERE WAS AN ALTERCATION AT
2 THE BAR, CORRECT?

3 A YES.

4 Q ALL RIGHT, NOW WASN'T CHRIS HEMINGWAY DOWN
5 THERE AT THAT ALTERCATION?

6 A I COULDN'T TELL YOU, IT WAS, I KNOW A LOT
7 OF PEOPLE SO I COULDN'T TELL YOU WHO, IT WAS CRAZINESS
8 THERE, IF I SEE A FACE MAYBE I KNOW BUT --

9 Q THERE WERE A GOOD MANY PEOPLE DOWN THERE AT
10 THE END OF THAT BAR AT THAT ALTERCATION, WASN'T THERE?

11 A YES.

12 Q CORRECT?

13 A YES.

14 Q OKAY, AND YOU WENT OUT THE NORTH EXIT WITH
15 LEMOND, CORRECT?

16 A YES.

17 Q ALL RIGHT, AND YOU WENT TO HIS CAR YOU
18 SAID, CORRECT?

19 A YES.

20 Q ALL RIGHT, YOU DIDN'T SEE HIM GET ANYTHING
21 OUT OF HIS CAR, DID YOU?

22 A NO.

23 Q HE MAY HAVE PUT HIS CAR KEYS OR ANYTHING IN
24 HIS CAR, COULDN'T HE?

25 A YEAH, BUT HE LOCKED THE CAR DOORS SO --

- 1 Q ALL RIGHT, HE EVEN LOCKED HIS CAR DOORS?
- 2 A YEAH.
- 3 Q OKAY, AND YOU SAID YOU SAW LEMOND GO OVER
- 4 TO MS. CARUTHERS CAR, CORRECT?
- 5 A YES.
- 6 Q ALL RIGHT, NOW YOU WERE A GOOD WAYS AWAY
- 7 FROM THAT CAR, WEREN'T YOU, YOU DIDN'T FOLLOW HIM?
- 8 A NO.
- 9 Q ALL RIGHT, AND YOU SAW SHADOWS OVER THERE,
- 10 DIDN'T YOU?
- 11 A YEAH.
- 12 Q OKAY, AT NO TIME YOU NEVER SAW A GUN IN
- 13 LEMOND'S HAND, DID YOU?
- 14 A NO.
- 15 Q NOW DID YOU EVER SEE MR. KOEHLER EVER TAKE
- 16 HIS SHIRT OFF?
- 17 A WHO WAS THAT?
- 18 Q MR. KOEHLER, THE PASSENGER?
- 19 A NO, I DIDN'T SEE ANYTHING, I COULDN'T EVEN
- 20 TELL YOU WHO WAS THE PASSENGER.
- 21 Q IN THE PARKING LOT, DID YOU SEE HIM IN THE
- 22 PARKING LOT WITH HIS SHIRT OFF?
- 23 A NO.
- 24 Q NO.
- 25 MR. RICHARDSON: THANK YOU, THAT'S ALL THE

1 QUESTIONS I HAVE AT THIS TIME.

2 MS. ELDER: WE HAVE NO FURTHER QUESTIONS, YOUR
3 HONOR, WE ASK THIS WITNESS BE EXCUSED.

4 THE COURT: ANY OBJECTIONS TO HIS BEING EXCUSED?

5 MR. RICHARDSON: I HAVE NO OBJECTION, YOUR
6 HONOR.

7 THE COURT: THANK YOU, SIR, YOU MAY STEP DOWN
8 AND BE EXCUSED.

9 MS. ELDER: THE STATE WOULD CALL ROBYN BOWEN.

10 THE COURT: COME AROUND, PLEASE, MA'AM, AND BE
11 SWORN.

12 ROBYN BOWEN

13 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

14 MADAM CLERK: STATE YOUR FULL NAME AND SPELL
15 YOUR LAST NAME FOR THE COURT?

16 THE WITNESS: I'M ROBYN NATALIE BOWEN, B-O-W-E-
17 N.

18 DIRECT EXAMINATION

19 BY MS. ELDER:

20 Q MS. BOWEN, YOU LIVE IN HORRY COUNTY?

21 A YES, MA'AM.

22 Q AND WHAT KIND, ARE YOU EMPLOYED?

23 A YES, MA'AM.

24 Q WHAT DO YOU, WHAT KIND OF WORK DO YOU DO?

25 A I WORK AND GO TO SCHOOL.

1 Q OKAY, AND WHERE DO YOU GO TO SCHOOL?

2 A HORRY GEORGETOWN TECH.

3 Q NOW I WANT TO TAKE YOU BACK TO THE NIGHT OF
4 DECEMBER 29, DECEMBER 30TH, EARLY MORNING HOURS, 2005. DO
5 YOU KNOW A PLACE CALLED MCCATZ IN NORTH MYRTLE BEACH?

6 A YES, MA'AM.

7 Q AND HOW ARE YOU FAMILIAR WITH THAT
8 ESTABLISHMENT?

9 A MY BEST FRIEND'S BEEN A BARTENDER THERE FOR
10 QUITE SOME TIME, A COUPLE OF YEARS.

11 Q AND WERE YOU THERE THAT EVENING?

12 A YES.

13 Q AND WHAT TIME, ABOUT WHAT TIME DID YOU
14 ARRIVE THERE?

15 A I THINK IT WAS AROUND LIKE 2:30 MAYBE, 2:45
16 SOMEWHERE AROUND THERE, I'M NOT POSITIVE.

17 Q IS IT KIND OF A LATE NIGHT PLACE?

18 A YEAH.

19 Q OKAY.

20 A DEFINITELY.

21 Q NOW WHEN YOU GOT THERE WHAT WERE YOU DOING,
22 WHAT DID YOU DO?

23 A I CAME UP THERE TO SEE IF MY BEST FRIEND
24 NEEDED A RIDE HOME FROM WORK BECAUSE I HAD JUST GOTTEN OFF
25 WORK AS WELL.

1 Q OKAY, AND DID YOU HAVE AN OPPORTUNITY TO
2 STAY THERE?

3 A I WAS THERE FOR ABOUT MAYBE TEN MINUTES.

4 Q OKAY, AND DID YOU SEE ANY OTHER INDIVIDUALS
5 THERE THAT YOU KNEW?

6 A YES, I SAW SEVERAL PEOPLE THERE I KNEW.

7 Q OKAY, AND DO YOU KNOW AN INDIVIDUAL CALLED,
8 NAMED RAPHAEL WALKER?

9 A YES.

10 Q AND HOW DO YOU KNOW HIM?

11 A HE WAS A MUTUAL FRIEND OF A FRIEND OF MINE.
12 HE WAS JUST AN ACQUAINTANCE, THAT'S HOW I KNOW HIM.

13 Q AND WAS HE ALREADY IN THE BAR WHEN YOU
14 ARRIVED?

15 A YES, HE WAS.

16 Q OKAY, DID YOU SPEAK TO HIM?

17 A YEAH. I DID.

18 Q ALL RIGHT, DID YOU OBSERVE ANYTHING INSIDE
19 THE BAR THAT EVENING?

20 A NOTHING OUT OF THE ORDINARY.

21 Q OKAY, NOW AT SOME POINT IN TIME DID RAPHAEL
22 LEAVE THE BAR?

23 A YES.

24 Q AND DO YOU KNOW WHERE HE WENT?

25 A HE WENT OUT THE LEFT DOOR TO MCCATZ.

1 Q DO YOU KNOW WHY HE LEFT?

2 A NO, HE SAID, HOLD ON ONE MINUTE ---

3 MR. RICHARDSON: I'D OBJECT TO ANYTHING HE SAID,
4 YOUR HONOR, HEARSAY, YOUR HONOR.

5 THE COURT: SUSTAINED.

6 MS. ELDER: (CONTINUING)

7 Q OF YOUR OWN PERSONAL KNOWLEDGE DO YOU KNOW
8 WHY HE LEFT?

9 A NO.

10 Q DID HE HAVE AN OPPORTUNITY TO COME BACK IN?

11 A HE DID AFTER IT HAPPENED.

12 Q ALL RIGHT, TELL ME, TELL ME WHAT HAPPENED?

13 A HE WALKED OUT OF THE BAR AND THEN FIVE
14 MINUTES LATER HE WALKED BACK IN AND SCREAMED CALL 911.

15 Q OKAY, AND DID YOU GO TO HIM AT THAT POINT?

16 A I DID WHEN I SAW THAT HE ---

17 MR. RICHARDSON: I OBJECT, YOUR HONOR, IF SHE
18 KNOWS WHAT, SHE CAN TALK ABOUT WHAT SHE SAW BUT NOT MAKE
19 CONCLUSIONS AS TO WHAT CAUSED IT.

20 THE COURT: JUST TELL US WHAT YOU SAW AND WHAT
21 AND WHAT YOU KNOW TO YOUR OWN KNOWLEDGE.

22 THE WITNESS: I SAW HIS WHITE SNEAKER TURN RED.

23 MR. RICHARDSON: OKAY.

24 MS. ELDER: (CONTINUING)

25 Q AND DID YOU GO TO HIM AT THAT POINT?

1 A YES, I DID.

2 Q AND WHAT DID YOU DO WHEN YOU WENT TO HIM?

3 A I GRABBED TOWELS AND APPLIED PRESSURE TO
4 THE WOUND.

5 Q OKAY, AND DID YOU LOOK AND SEE WHAT KIND
6 OF, HOW HE WAS INJURED OR ANYTHING LIKE THAT?

7 A I LOOKED AT HIS PANTS AND SAW A BIG HOLE
8 THAT WAS GAPING BLOOD EVERYWHERE.

9 Q OKAY, AND WOULD YOU DESCRIBE THE WOUND THAT
10 YOU SAW?

11 A IT APPEARED TO BE A GUNSHOT WOUND. IT WAS
12 ABOUT THAT BIG, IT WAS MAYBE A LITTLE SMALLER THAN A
13 QUARTER.

14 Q WAS IT ROUND, CIRCULAR?

15 A YES, IT WAS CIRCULAR.

16 Q AND WHAT WAS RAPHAEL'S INITIAL STATE AT
17 THAT POINT IN TIME, COULD YOU TELL?

18 A HE WAS VERY SHAKEN UP.

19 Q DID HE SAY ANYTHING TO YOU?

20 A HE SAID SOMEONE GOT SHOT.

21 Q DID HE SAY ANYTHING ABOUT HIS INJURIES?

22 MR. JOHNSON: I OBJECT, YOUR HONOR, ON HEARSAY.

23 MR. RICHARDSON: YOUR HONOR, OBJECT AGAIN TO
24 HEARSAY.

25 THE COURT: SUSTAINED.

1 MS. ELDER: (CONTINUING)

2 Q DID YOU ASSIST MR. WALKE IN GETTING HELP?

3 A YEAH.

4 Q FOR HIS INJURY, WHAT DID YOU DO?

5 A BESIDES ME APPLYING PRESSURE SOMEONE CALLED
6 911 AND THERE'S PEOPLE ALL AROUND WHEN THEY REALIZED HE WAS
7 SHOT.

8 MR. RICHARDSON: I'D OBJECT, YOUR HONOR, AND
9 MOVE TO HAVE THAT STRUCK.

10 THE COURT: I DIDN'T HEAR WHAT SHE SAID. WOULD
11 THE LAWYERS APPROACH, PLEASE?

12 (WHEREUPON, A BENCH CONFERENCE WAS HELD OFF THE
13 RECORD IN THE PRESENCE OF THE JURY, BUT OUT OF THE HEARING
14 OF THE JURY AND THE COURT REPORTER.)

15 THE COURT: STRIKE THE LAST PART OF HER ANSWER
16 TO THAT QUESTION, DISREGARD THAT, LADIES AND GENTLEMEN OF
17 THE JURY.

18 MS. ELDER: (CONTINUING)

19 Q DID YOU ASSIST MR. WALKE IN GETTING
20 ASSISTANCE FOR HIS INJURY?

21 A WHAT DO YOU MEAN BY ASSISTANCE?

22 Q DID YOU TAKE HIM ANYWHERE, DID HE GO BY
23 AMBULANCE OR --

24 A I DROVE HIM TO THE HOSPITAL AFTER WE GAVE
25 TESTIMONIES TO THE POLICE OR WHATEVER YOU CALL THEM.

1 Q OKAY.

2 A STATEMENTS.

3 Q ALL RIGHT, AND YOU DROVE HIM THERE?

4 A YES.

5 Q OKAY, HAVE YOU HAD ANY CONTACT WITH MR.
6 WALKE SINCE THAT TIME?

7 A NO MA'AM.

8 Q ALL RIGHT, AND SO YOU, HAVE YOU SPOKE TO
9 HIM AT ALL?

10 A NOT SINCE ABOUT A WEEK AFTER.

11 Q OKAY, DO YOU KNOW WHERE HE IS?

12 A I HAVE NO IDEA.

13 MS. ELDER: NO OTHER QUESTIONS, YOUR HONOR.

14 CROSS EXAMINATION

15 BY MR. RICHARDSON:

16 Q AND YOU DIDN'T SEE THE ALTERCATION INSIDE?

17 A NO, SIR.

18 Q YOU DIDN'T SEE ANYTHING OUTSIDE?

19 A NO, SIR.

20 Q AND YOU DIDN'T SEE THE DECEASED PULLING HIS
21 SHIRT OFF AND ARGUING OUTSIDE, DID YOU?

22 A NO, SIR.

23 MR. RICHARDSON: NO FURTHER QUESTIONS.

24 MS. ELDER: NOTHING FURTHER FROM THE STATE, YOUR
25 HONOR, WE'D ASK THAT THIS WITNESS BE EXCUSED?

1 THE COURT: ANY OBJECTION?

2 MR. JOHNSON: NO OBJECTION.

3 THE COURT: YOU MAY BE EXCUSED, THANK YOU.

4 MR. HUMPHRIES: THE STATE CALLS EDWARD LEE
5 PROCTOR, PLEASE.

6 THE COURT: COME AROUND, DOCTOR.

7 MR. HUMPHRIES: BEG THE COURT'S INDULGENCE WHILE
8 SOME OF THE FAMILY LEAVES?

9 THE COURT: VERY WELL.

10 DR. EDWARD L. PROCTOR

11 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

12 MADAM CLERK: PLEASE STATE YOUR FULL NAME AND
13 SPELL YOUR LAST NAME FOR THE COURT?

14 THE WITNESS: I'M EDWARD LEROY PROCTOR, JR., AND
15 THAT'S P-R-O-C-T-O-R.

16 DIRECT EXAMINATION

17 BY MR. HUMPHRIES:

18 Q DR. PROCTOR, HOW ARE YOU EMPLOYED, SIR?

19 A I'M SELF EMPLOYED.

20 Q AND IN WHAT CAPACITY ARE YOU SELF EMPLOYED?

21 A I AM A PHYSICIAN IN THE PRACTICE OF
22 PATHOLOGY TO INCLUDE ANATOMIC PATHOLOGY, CLINICAL PATHOLOGY
23 AND FORENSIC PATHOLOGY.

24 MR. HUMPHRIES: YOUR HONOR, AT THIS TIME I
25 BELIEVE THAT THE DEFENSE COUNSEL FOR THE DEFENDANT WOULD

1 STIPULATE TO HIS QUALIFICATIONS AS A FORENSIC PATHOLOGIST.

2 MR. JOHNSON: HE'S A VERY QUALIFIED, DOCTOR.

3 THE COURT: VERY WELL, HE'S QUALIFIED TO RENDER
4 HIS OPINION IN THE AREA OF FORENSIC PATHOLOGY.

5 MR. HUMPHRIES: THANK YOU, YOUR HONOR.

6 Q (CONTINUING) DR. PROCTOR, VERY BRIEFLY,
7 TELL THE JURY WHAT FORENSIC PATHOLOGY IS?

8 A FORENSIC PATHOLOGY IS THE BRANCH OF
9 PATHOLOGY THAT INVOLVES THE MEDICAL LEGAL INVESTIGATION OF
10 A DEATH, USUALLY DEATH UNDER UNUSUAL OR SUSPICIOUS
11 CIRCUMSTANCES. AND AS A FORENSIC PATHOLOGIST I PERFORM AN
12 EXAMINATION AND USE MY FINDINGS ALONG WITH THOSE, THE
13 HISTORY AND WHAT NOT, FROM LAW ENFORCEMENT OFFICIALS TO
14 COME UP WITH A CAUSE AND MANNER OF DEATH.

15 Q AND LET ME ASK YOU IN CONNECTION WITH YOUR
16 DUTIES AND OBLIGATIONS AS A FORENSIC PATHOLOGIST DID YOU
17 HAVE AN OCCASION TO PERFORM AN AUTOPSY ON THE BODY OF A
18 BRANDT KOEHLER?

19 A YES, SIR, I DID.

20 Q WHAT I'D LIKE FOR YOU TO DO, DOCTOR, IS TO
21 TELL THE JURY, NOT WITH GREAT SPECIFICITY, BUT WHAT YOU DID
22 IN TERMS OF THE AUTOPSY AND WHAT YOUR SIGNIFICANT FINDINGS
23 WERE?

24 A OKAY. I WAS CONTACTED BY THE CORONER TO DO
25 AN AUTOPSY ON A GENTLEMAN BY THIS NAME AND I WAS TOLD THAT

1 THERE HAD BEEN A DISPUTE AT A LOCAL BAR AND THERE HAD BEEN
2 GUNSHOTS AND THAT THIS MAN HAD BEEN SHOT. AT THE TIME OF
3 AUTOPSY THAT IS THE ONLY HISTORY I HAD.

4 MY AUTOPSY CONSISTED OF AN EXTERNAL EXAMINATION
5 LOOKING FOR WOUNDS ON THE BODY, AN INTERNAL EXAMINATION,
6 AND THEN TAKING OF SPECIMENS AND THEN LOOKING AT
7 MICROSCOPIC SPECIMENS, GETTING TOXICOLOGY AND FORMULATING A
8 CAUSE AND MANNER OF DEATH.

9 IN THIS CASE THIS GENTLEMAN HAD A SINGLE GUNSHOT
10 WOUND TO THE HEAD BASICALLY IN THE MIDLINE FORWARD JUST
11 BELOW THE HAIRLINE. IT PASSED BASICALLY SUPERIOR TO
12 INFERIOR, TOP TO BOTTOM, AND OFF TO THE LEFT SIDE GOING
13 THROUGH THE LEFT SIDE OF THE BRAIN THROUGH THE BASILAR
14 SKULL AND THROUGH THE SKULL AND WAS RECOVERED FROM THE SOFT
15 TISSUES IN THE POSTERIOR HEAD AND NECK AREA JUST BEHIND THE
16 ANGLE OF THE JAW.

17 THIS WOUND CAUSED EXTENSIVE INJURY TO THE BRAIN,
18 FRACTURES OF THE SKULL AND RESULTED IN THE DEATH OF THIS
19 GENTLEMAN.

20 Q LET ME ASK YOU IN REGARD TO A GUNSHOT WOUND
21 OBVIOUSLY POWDER IS EXPELLED FROM A FIRED CARTRIDGE CASING
22 BEHIND THE PROJECTILE --

23 A YES, SIR.

24 Q HOW DO, HOW DO FORENSIC PATHOLOGISTS
25 CHARACTERIZE GUNSHOT WOUNDS IN TERMS OF DISTANCE?

1 A OKAY. MANY TIMES WHEN A WEAPON IS FIRED
2 THERE IS ACTUAL THE SMOKE AND THE FIRE THAT COMES OUT OF
3 THE END OF THE GUN. WHEN THIS OCCURS -- SOME PROJECTILES
4 DO NOT DO THAT -- BUT WHEN THIS OCCURS WE CAN USE THE
5 PRESENCE OR ABSENCE OF THE SOOT OR THE BLACK RESIDUE ON THE
6 SKIN AS WELL AS THE ACTUAL BURNING POWDER WHICH LEAVES
7 LITTLE TINY BURNS WHICH WE CALL STIPPLING TO GAUGE THE
8 DISTANCE; AND WITH MOST HANDGUNS YOU CAN SEE STIPPLING AND
9 THE POWDER RESIDUE UP TO A DISTANCE OF ABOUT 18 INCHES TO
10 24 INCHES.

11 Q LET ME ASK YOU IF, IF THE WOUND IS WHAT'S
12 BEEN TERMED A CONTACT WOUND WHAT WOULD YOU EXPECT REGARDING
13 THE GUN POWDER?

14 A IN A CONTACT WOUND MANY TIMES YOU WILL NOT
15 SEE ANY POWDER ON THE SKIN SURFACE. DEPENDING ON THE
16 AMOUNT OF BLOOD OR THE AMOUNT OF BLEEDING TO THE WOUND SITE
17 YOU MAY OR MAY NOT SEE IT WITHIN THE WOUND.

18 Q AND WE'RE TALKING ABOUT A CONTACT WOUND.
19 WE'RE ACTUALLY TALKING ABOUT LET'S SAY FOR INSTANCE THE GUN
20 BARREL PLACED AGAINST THE, THE SURFACE ---

21 A THAT'S CORRECT.

22 Q --- IN THIS CASE THE SKIN?

23 A THAT IS CORRECT.

24 Q AND REGARDING YOUR FINDINGS ABOUT GUN
25 POWDER RESIDUE IN THIS CASE DID YOU FIND ANY GUN POWDER

1 RESIDUE OR STIPPLING AROUND THE ENTRANCE OF THE WOUND IN
2 THIS CASE?

3 A I DID NOT.

4 Q NOW LET ME ASK YOU, DO YOU HAVE AN OPINION
5 TO A REASONABLE DEGREE OF MEDICAL CERTAINTY REGARDING THE
6 CAUSE OF DEATH IN THIS CASE?

7 A THE CAUSE OF DEATH IN THIS CASE WAS GUNSHOT
8 WOUND TO THE HEAD WITH MASSIVE TRAUMA TO THE BRAIN.

9 Q AND MANNER OF DEATH?

10 A MANNER OF DEATH, MANNER OF DEATH DETERMINED
11 BASED ON CLINICAL INFORMATION FROM THE INVESTIGATIVE
12 AUTHORITIES, THE CORONER'S OFFICE AND WHAT NOT, BASED UPON
13 THAT INFORMATION THAT I HAD AT THE TIME OF THIS AUTOPSY I
14 DETERMINED THE MANNER OF DEATH TO BE HOMICIDE WHICH IN
15 FORENSIC DEFINITION IS DEATH AT THE HANDS OF ANOTHER.

16 MR. HUMPHRIES: THANK YOU, DOCTOR, ANSWER ANY
17 QUESTIONS THE DEFENSE MAY HAVE FOR YOU.

18 A YES, SIR.

19 MR. JOHNSON: THANK YOU, YOUR HONOR, MAY IT
20 PLEASE THE COURT?

21 THE COURT: YES, SIR.

22 CROSS EXAMINATION

23 BY MR. JOHNSON:

24 Q GOOD AFTERNOON, DOCTOR?

25 A HI.

1 Q MR. KOEHLER YOUR NOTES REFLECT HE WEIGHED
2 ABOUT 225, 250 POUNDS, DIDN'T HE?

3 A LET'S SEE, HE WAS 72 INCHES IN LENGTH AND
4 HAD AN ESTIMATED WEIGHT OF ABOUT 225 THEREABOUTS, YES, SIR.

5 Q SEVENTY-TWO INCHES IS ABOUT SIX FEET,
6 CORRECT?

7 A SIX FEET.

8 Q ALL RIGHT, AND OF COURSE WHEN ALL THIS
9 HAPPENED YOU WEREN'T AT THE SCENE AT ALL, WERE YOU?

10 A I WAS NOT.

11 Q OKAY, YOU JUST TESTIFIED WHENEVER THE
12 SOLICITOR ASKED THE QUESTION ABOUT GUN POWDER RESIDUE ---

13 A YES, SIR.

14 Q --- YOU REALLY CAN'T SAY HOW FAR THAT
15 WEAPON WAS FROM HIS HEAD, CAN YOU?

16 A IN THIS PARTICULAR CASE THERE WAS NO
17 RESIDUE AROUND THE ENTRANCE SITE NOR DID I FIND RESIDUE
18 WITHIN THE WOUND. HAD I SEEN RESIDUE I COULD MAKE AN
19 ABSOLUTELY STATEMENT. WITHOUT RESIDUE IT VERY WELL COULD
20 HAVE BEEN A CONTACT WITH THE BLOOD WASHING IT ALL OUT OF
21 THE WOUND SITE. IT MAY HAVE BEEN, BUT I CANNOT GIVE YOU AN
22 ABSOLUTE UNEQUIVOCAL CONTACT VERSUS NOT CONTACT.

23 Q OKAY, SO TO GO BACK TO MY QUESTION YOUR
24 ANSWER WOULD BE, NO; IS THAT CORRECT?

25 A THAT'S CORRECT.

1 Q THE ONLY THING YOU KNOW IS THAT THERE WAS
2 NO GUN POWDER RESIDUE ON HIM?

3 A I DID NOT FIND RESIDUE.

4 Q OKAY, AND YOU ALSO CONDUCTED A BLOOD
5 ALCOHOL TEST; CORRECT?

6 A THAT IS CORRECT?

7 Q AND WHAT DID THAT REFLECT?

8 A THIS MAN'S BLOOD ETHANOL AT THE TIME I
9 PERFORMED THE AUTOPSY WAS 192 MILLIGRAMS PER DECILITER.

10 Q THAT'S BEYOND LEGALLY DRUNK; CORRECT?

11 A THAT'S CORRECT.

12 Q I BELIEVE THAT'S TWO TIMES, ISN'T IT?

13 A WELL --

14 Q PRETTY INTOXICATED. CORRECT?

15 A HE WAS ABOVE, HE WAS ABOVE THE LEGAL LIMIT,
16 YES, SIR.

17 Q SO HE HAD TO HAVE HAD JUST MORE THAN A
18 COUPLE OF DRINKS?

19 A APPROXIMATELY, APPROXIMATELY TWO 12 OUNCE
20 BEERS CAN GIVE YOU A LEGAL, ILLEGAL ALCOHOL LEVEL, THAT'S
21 ABOUT ALL IT TAKES.

22 Q DEPENDING ON HOW LONG IT IS THAT YOU DRINK
23 IT, CORRECT?

24 A I AM NOT REALLY QUALIFIED TO DETERMINE
25 METABOLISM OF ALCOHOL OTHER THAN THE FACT I CAN TELL YOU

1 EXACTLY WHAT IT WAS AT THE TIME THAT I PERFORMED THE
2 AUTOPSY; WHETHER IT WAS ON THE RISE OR ON THE FALL I, I, I
3 DO NOT KNOW.

4 Q YOU'D HAVE TO GET THE WEIGHT, THE TIME, AND
5 ALL THAT STUFF; CORRECT?

6 A YOU'D HAVE TO HAVE WITNESSES THAT CAN
7 ATTEST TO HOW MUCH THEY'VE SEEN SOMEONE DRINKING AND EATING
8 AND THEY'RE PEOPLE THAT CAN EXTRAPOLATE SOME OF THOSE
9 THINGS BUT IT'S BEYOND MY REALM OF EXPERTISE.

10 Q THAT'S EXACTLY WHAT I WAS ASKING YOU,
11 RIGHT, THAT WOULD BE, YES, TO MY QUESTION; CORRECT, DOCTOR?

12 A ALL I CAN TELL YOU IS HE WAS DRUNK.

13 MR. JOHNSON: THANK YOU, DOCTOR, I HAVE NO
14 FURTHER QUESTIONS.

15 A YES, SIR.

16 MR. HUMPHRIES: VERY BRIEFLY.

17 REDIRECT EXAMINATION

18 BY MR. HUMPHRIES:

19 Q DID YOU NOTE WHETHER THE VICTIM IN THIS
20 CASE HAD HEAD HAIR?

21 A HAD HEAD HAIR?

22 Q YES, SIR?

23 A I DESCRIBED HIM AS HEAD IS COVERED BY BLACK
24 HAIR.

25 Q OKAY, AND JUST FOR ARGUMENT SAKE IF YOU'RE

1 DEALING WITH A GUNSHOT WOUND WITHIN THAT RANGE OF 18 TO 24
2 INCHES WITH A FULL HEAD OF HAIR CAN THE HAIR ABSORB THE
3 GUNSHOT POWDER OR GUNSHOT RESIDUE THAT MIGHT BE PRESENT?

4 A THE HAIR CAN CERTAINLY ABSORB A GREAT DEAL
5 OF IT, YES, SIR.

6 MR. HUMPHRIES: THANK YOU. THAT'S ALL WE HAVE,
7 YOUR HONOR.

8 THE COURT: ANYTHING FURTHER FROM THIS WITNESS?

9 MR. HUMPHRIES: NOTHING FROM THIS WITNESS NOT
10 FROM THE STATE.

11 MR. JOHNSON: YOUR HONOR, I MAY HAVE ONE MORE
12 QUESTION.

13 RECROSS EXAMINATION

14 BY MR. JOHNSON:

15 Q YOU WERE JUST ASKED BY THE SOLICITOR ABOUT
16 THE GUN POWDER RESIDUE IN HIS HAIR. HE MAY HAVE ALSO A
17 CHANCE OF HAVING SPECKLING OR GUN POWDER RESIDUE ON HIS
18 FOREHEAD, TOO, CORRECT, COULD BE A CHANGE?

19 A THERE IS A CHANCE, YES, SIR.

20 MR. JOHNSON: THANK YOU, I HAVE NO FURTHER
21 QUESTIONS.

22 THE COURT: THANK YOU, SIR, YOU MAY STEP DOWN.

23 MR. HUMPHRIES: THANK YOU, DOCTOR.

24 MR. JOHNSON: THANK YOU, DOCTOR.

25 MR. HUMPHRIES: YOUR HONOR, THAT'S ALL WE HAVE

1 THIS EVENING. IT'S PRETTY DOGGONE CLOSE TO FIVE FOR THE
2 RECORD.

3 THE COURT: WOW, YOU DON'T HAVE ANY MORE
4 WITNESSES TO CALL TODAY?

5 MR. HUMPHRIES: NOT TODAY, YOUR HONOR.

6 THE COURT: YA'LL NEED TO MAKE ANOTHER CALL AND
7 TELL THEM TO DISREGARD THE FIRST CALL. YOU DO REMEMBER
8 WHAT WE TALKED ABOUT ABOUT TALKING TO THE OTHER FOLKS ABOUT
9 THIS CASE? PLEASE DON'T DO THAT, DON'T ALLOW ANYONE TO
10 DISCUSS IT WITH YOU. IF YOUR SPOUSE OR SIGNIFICANT OTHER
11 WANTS TO TALK ABOUT IT JUST SAY THE JUDGE TOLD ME I COULD
12 NOT TALK ABOUT IT. AFTER THIS CASE IS OVER I WOULD
13 ENCOURAGE YOU TO TALK ABOUT IT, I THINK THAT'S HEALTHY.
14 BUT FOR RIGHT NOW, PLEASE, DON'T TALK ABOUT IT OR LET
15 ANYONE TALK TO YOU ABOUT IT. ENJOY YOUR EVENING, BE BACK
16 IN YOUR JURY ROOM AT 9:30 IN THE MORNING, THANK YOU.

17 MADAM FORELADY: YOUR HONOR?

18 THE COURT: YES, MA'AM?

19 MADAM FORELADY: I HAD A FEW JURORS WHO WANTED
20 TO KNOW IF THEY COULD BRING NOTE PADS AND MAKE ANY TYPE OF
21 NOTES?

22 THE COURT: YOU MAY BRING NOTE PADS. SOMEBODY
23 SAID SOMETHING AND I FORGOT TO TELL YOU ABOUT THAT. LET ME
24 TELL YOU THAT IT'S OKAY FOR YOU TO TAKE NOTES. I USED TO
25 SAY, NO, JUST LISTEN TO WHAT THE WITNESS IS SAYING, BUT I

1 HAD A LAW CLERK ONE TIME THAT SAID, JUDGE, YOU TOOK NOTES
2 IN LAW SCHOOL, DIDN'T YOU? I SAID, YES, AND SO I'M GOING
3 TO LET YOU TAKE NOTES BUT THIS IS REAL IMPORTANT. BECAUSE
4 YOU'VE WRITTEN DOWN SOMETHING DOES NOT MAKE IT ANY MORE
5 ACCURATE THAN SOME OTHER JUROR'S RECOLLECTION OF WHAT WAS
6 SAID. IT'S SIMPLY THAT'S THE WAY YOU RECALL IT. HOPEFULLY
7 AMONG YOU YOU CAN DECIDE WHAT WAS SAID OR WHAT WAS NOT SAID
8 OR WHAT THE TESTIMONY WAS OR WAS NOT AND, PLEASE, WHEN YOU
9 TAKE DOWN SOMETHING THAT YOU THINK IS IMPORTANT, TRY TO DO
10 THAT WHILE YOU'RE LISTENING TO WHAT THE TESTIMONY IS
11 BECAUSE WHILE WRITING YOU MAY MISS SOMETHING THAT'S MORE
12 IMPORTANT THAN THAT WHICH YOU'RE WRITING DOWN. BUT I WILL
13 ALLOW YOU TO TAKE NOTES IF YOU WISH TO DO SO. I HOPE THAT
14 ANSWERS YOUR QUESTION. JUST BE REAL PARTICULAR ABOUT WHAT
15 YOU, TRY TO LISTEN TO WHAT THE TESTIMONY IS. THANK YOU,
16 I'LL SEE YOU AT 9:30 IN THE MORNING.

17 IF YOU NEED PENCIL AND PAPER IT WILL BE PROVIDED
18 FOR YOU. YOU DON'T NEED TO WORRY ABOUT BRINGING IT
19 YOURSELF.

20 (WHEREUPON, THE JURY WAS EXCUSED FOR THE EVENING
21 AT 5:05 P.M.)

22 THE COURT: ALL RIGHT, FOLKS, WE'LL SEE YOU IN
23 THE MORNING.

24 MR. JOHNSON: THANK YOU, YOUR HONOR.

25 MR. HUMPHRIES: THANK YOU, JUDGE.

1 MR. RICHARDSON: THANK YOU, YOUR HONOR.

2 (WHEREUPON, COURT WAS ADJOURNED FOR THE EVENING.)

3 (WHEREUPON, COURT RESUMED ON JUNE 12, 2007 AT
4 9:30 A.M.)

5 (WHEREUPON, STATE'S EXHIBITS NUMBERS 2, 3, 4, 5,
6 6, 7, 8, 9, 10, 11, 12 AND 13 MARKED FOR IDENTIFICATION.)

7 THE COURT: WE'RE READY FOR THE JURY.

8 (WHEREUPON, THE JURY RETURNED TO THE COURTROOM AT
9 10:20 A.M.)

10 THE COURT: GOOD MORNING, MADAM FORELADY, AND
11 LADIES AND GENTLEMEN OF THE JURY, WE'RE READY TO PROCEED
12 WITH THE TRIAL. CALL YOUR NEXT WITNESS.

13 MS. ELDER: THANK YOU, YOUR HONOR, THE STATE
14 WOULD CALL OFFICER REIST.

15 OFFICER DAVID REIST

16 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

17 MADAM CLERK: PLEASE STATE YOUR FULL NAME AND
18 SPELL YOUR LAST NAME FOR THE COURT.

19 THE WITNESS: OFFICER DAVID REIST, R-E-I-S-T.

20 DIRECT EXAMINATION

21 BY MS. ELDER:

22 Q OFFICER REIST, WERE ARE YOU CURRENTLY
23 EMPLOYED?

24 A THE CITY OF NORTH MYRTLE BEACH.

25 Q AND WERE YOU EMPLOYED WITH THE CITY OF

1 NORTH MYRTLE BEACH DECEMBER 30TH, 2005?

2 A YES, MA'AM.

3 Q IN WHAT CAPACITY?

4 A AS A POLICE OFFICER.

5 Q DID YOU HAVE AN OPPORTUNITY TO RESPOND TO A
6 SCENE AT MCCATZ BAR THAT EVENING?

7 A YES, MA'AM.

8 Q AND COULD YOU BRIEFLY DESCRIBE WHAT YOU DID
9 WHEN YOU ARRIVED ON THE SCENE?

10 A UPON MY ARRIVAL I OBSERVED A WHITE MALE IN
11 THE SOUTHWEST CORNER OF THE PARKING LOT ON HIS BACK AND
12 UNDER FURTHER INVESTIGATION, YOU KNOW, GOING UP TO HIM
13 THERE WAS BLOOD COMING FROM THE TOP OF HIS HEAD. IT
14 APPEARED THAT THERE WAS A HOLE IN THE TOP OF HIS HEAD AT
15 WHICH TIME THE SCENE WAS SECURED. EMS AND FIRST RESPONDERS
16 WERE NOTIFIED SO THEY COULD PERFORM FIRST AID.

17 Q AND WERE YOU THE FIRST POLICE OFFICER TO
18 ARRIVE ON THE SCENE?

19 A YES, MA'AM.

20 Q OKAY, AND WHEN YOU ARRIVED WHAT, WHAT DID
21 YOU YOURSELF DO?

22 A LIKE I SAID, I SECURED THE SCENE AND ONCE
23 THE SCENE WAS SECURED I NOTIFIED EMS AND FIRST RESPONDERS.
24 I THEN ADMINISTERED BASIC FIRST AID BY PACKING THE WOUND TO
25 TRY TO STOP ANY FURTHER BLEEDING.

1 Q AND WERE, WERE ANY VEHICLES MOVED OR
2 ANYTHING LIKE THAT TO ALLOW EMS TO APPROACH THE VICTIM?

3 A I CAN'T RECALL THAT.

4 Q NOW WAS THERE ANYONE ELSE ON THE SCENE THAT
5 WAS INJURED?

6 A THERE WAS ANOTHER BLACK MALE THAT HAD A ---

7 MR. RICHARDSON: I'D OBJECT TO ANYTHING UNLESS
8 HE CAN SAY JUST WHAT HE OBSERVED, YOUR HONOR, AND NOTHING
9 ELSE.

10 MS. ELDER: THAT'S ALL ON THAT.

11 THE COURT: WHAT WAS THE QUESTION?

12 MR. RICHARDSON: YES.

13 THE WITNESS: THERE WAS, THERE WAS ANOTHER BLACK
14 MALE IN THE, BY THE BACK DECK OF THE PARKING LOT THAT HAD
15 WHAT APPEARED TO BE A GUNSHOT WOUND TO THE LEG.

16 MR. RICHARDSON: I'D OBJECT TO THAT AND MOVE IT
17 BE STRICKEN. HE CAN SAY WHAT HE SAW BUT I DON'T THINK HE
18 CAN --

19 THE COURT: OVERRULED.

20 MS. ELDER: (CONTINUING)

21 Q AND DID HE, DID YOU APPROACH HIM TO SEE
22 THAT WOUND?

23 A YES, MA'AM.

24 Q NOW WHEN YOU SAY YOU SECURED THE SCENE JUST
25 BRIEFLY TELL US WHAT YOU DO TO SECURE THE SCENE WHEN YOU

1 GOT THERE?

2 A THAT MAKE SURE -- THAT THE CALL CAME IN AS
3 SHOTS FIRED, TO MAKE SURE THAT THE GUNMAN WAS EITHER IN
4 CUSTODY OR HAD ALREADY LEFT THE SCENE TO MAKE IT SAFE FOR
5 OTHER OFFICERS APPROACHING AND FOR EMERGENCY PERSONNEL AND
6 TO ROPE IT OFF WITH CRIME SCENE TAPE; AND THAT WHICH I
7 BELIEVE LT. BALDASARRE DID AFTER WE'D STARTED FIRST AID ON
8 THE VICTIM.

9 Q SO YOU DID CLEAR THE SCENE AND IN FACT YOU
10 DIDN'T SEE THE ALLEGED PERSON, THE GUNMAN THERE ---

11 A YES, MA'AM.

12 Q AT THE TIME, IS THAT RIGHT?

13 MS. ELDER: I HAVE NO FURTHER QUESTIONS, YOUR
14 HONOR.

15 MR. RICHARDSON: PLEASE THE COURT?

16 THE COURT: YES, SIR.

17 CROSS EXAMINATION

18 BY MR. RICHARDSON:

19 Q NOW IN REFERENCE TO THE CRIME SCENE DID YOU
20 PUT UP TWO CRIME SCENE TAPES?

21 A NO, SIR.

22 Q WHO PUT UP THE TAPE?

23 A I BELIEVE THAT WOULD HAVE BEEN LT.
24 BALDASARRE, SIR.

25 Q AND WHERE WERE THEY PUT UP?

1 A THERE WAS A SMALL ONE PUT UP AT THE INITIAL
2 CRIME SCENE AND THEN THERE WAS A LARGE ONE THAT WAS PUT UP
3 LATER.

4 Q WHERE?

5 A THE ENTIRE PARKING LOT OF MCCATZ.

6 Q HOW MUCH LATER?

7 A THAT I COULDN'T TELL YOU.

8 Q ALL RIGHT. AND IN REFERENCE TO THE CRIME
9 SCENE LOG, DID YOU HAVE ANYTHING TO DO WITH A CRIME SCENE
10 LOG?

11 A NO, SIR.

12 Q AND WHEN YOU ARRIVED AT THE SCENE HOW MANY
13 PEOPLE -- WERE THERE A NUMBER OF PEOPLE MILLING AROUND,
14 STANDING AROUND IN THE PARKING LOT ---

15 A THERE WAS ---

16 Q --- ALL AROUND?

17 A THERE WAS APPROXIMATELY, I BELIEVE, FOUR
18 PEOPLE IN THE PARKING LOT OTHER THAN THE VICTIM.

19 Q HOW ABOUT UP ON THE DECK AND ON THE BACK
20 PORCH?

21 A THERE WERE TWO ON THE BACK PORCH, I
22 BELIEVE, AND THEN TWO NEXT TO THE VICTIM.

23 Q OKAY, NOW IN REFERENCE TO THE SEARCH OF THE
24 SCENE OR GOING AROUND THE SCENE, DID YOU SEARCH THE SCENE
25 FOR ANY EVIDENCE?

1 A NOT AT THAT TIME, I BELIEVE OUR DETECTIVE
2 DIVISION CAME IN AND DID THAT. WE JUST LOOKED FOR THE
3 GUNMAN AT THE IMMEDIATE TIME.

4 Q ALL RIGHT, SO YOU YOURSELF DIDN'T CONDUCT
5 ANY SEARCH?

6 A JUST AROUND THE AREA OF THE VICTIM.

7 Q ALL RIGHT, AND IN REFERENCE TO THAT YOU
8 WERE IN THE CRIME SCENE?

9 A YES, SIR.

10 Q HOW MANY EMS PEOPLE WERE IN THE CRIME SCENE?

11 A TWO I BELIEVE.

12 Q WHO ELSE WAS IN THE CRIME SCENE WHILE YOU
13 WERE THERE?

14 A I BELIEVE THERE WERE TWO FIRE FIGHTERS
15 ALSO.

16 Q AND BALDASARRE?

17 A YEAH, BALDASARRE, YES, SIR.

18 Q EXCUSE ME, BALDASARRE, WAS PITSINGER THERE
19 WHILE YOU WERE THERE?

20 A HE CAME IN WHILE I WAS STILL ON SCENE, YES,
21 SIR.

22 Q AND HE WENT INTO THE CRIME SCENE?

23 A YEAH.

24 Q AND CAUSEY, CAUSEY GO INTO THE CRIME SCENE?

25 A THAT I DON'T KNOW.

1 Q SHEETS?

2 A THAT I COULDN'T TELL YOU.

3 Q ALL RIGHT. AND HOW LONG DID YOU STAY

4 AROUND THERE?

5 A IT WAS PROBABLY A HOUR I'M GUESSING.

6 Q ROUND AN HOUR?

7 A ROUND AN HOUR AND THEN THE DETECTIVE

8 DIVISION CAME UP.

9 Q HOW ABOUT DIRECTOR KING, WAS HE THERE, TOO?

10 DID HE GO IN THE SCENE?

11 A I DON'T KNOW IF HE WENT IN THE SCENE. I

12 KNOW HE WAS THERE SOMEWHERE IN THE VICINITY.

13 Q AND THAT'S YOUR PUBLIC SAFETY DIRECTOR THE

14 CHIEF OF THE CHIEF; IS THAT RIGHT?

15 A YES, SIR.

16 Q AND IN THE INITIAL REPORT WASN'T THERE

17 GIVEN THREE OR FOUR DIFFERENT COLORS OF THE CAR TO BE

18 LOOKING OUT FOR?

19 A I BELIEVE THERE WAS TWO DIFFERENT COLORS, I

20 CAN'T RECALL.

21 Q AT LEAST TWO?

22 A YES.

23 MR. RICHARDSON: NO FURTHER QUESTIONS.

24 MS. ELDER: NO FURTHER QUESTIONS FROM THE STATE,

25 WE'D ASK THIS WITNESS BE EXCUSED, YOUR HONOR.

1 THE COURT: ANY OBJECTION?

2 MR. RICHARDSON: NO, SIR, YOUR HONOR.

3 THE COURT: THANK YOU, SIR, YOU'RE EXCUSED.

4 MS. ELDER: THE STATE WOULD CALL LT. BALDASARRE,
5 YOUR HONOR.

6 LT. MICHAEL BALDASARRE

7 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

8 MADAM CLERK: STATE YOUR FULL NAME AND SPELL
9 YOUR LAST NAME FOR THE COURT.

10 THE WITNESS: MY FULL NAME IS MICHAEL
11 BALDASARRE, THAT'S SPELLED B-A-L-D-A-S-A-R-R-E.

12 DIRECT EXAMINATION

13 BY MS. ELDER:

14 Q LT. BALDASARRE, WHERE ARE YOU CURRENTLY
15 EMPLOYED?

16 A FOR THE CITY OF NORTH MYRTLE BEACH.

17 Q AND DECEMBER 30TH, 2005, WERE YOU EMPLOYED
18 THERE?

19 A YES, MA'AM.

20 Q IN WHAT CAPACITY?

21 A AT THAT TIME I WAS A PATROL SERGEANT.

22 Q AND IN YOUR CAPACITY AS PATROL SERGEANT

23 DIDN'T YOU HAVE AN OPPORTUNITY TO RESPOND TO A SCENE AT THE
24 MCCATZ BAR IN NORTH MYRTLE BEACH?

25 A YES, MA'AM, UNFORTUNATELY I DID.

1 Q AND COULD YOU EXPLAIN UPON YOUR ARRIVAL
2 WHAT YOUR OBSERVATIONS WERE?

3 A MY INITIAL RESPONSE WAS TO THE NORTHWEST
4 CORNER OF THE BUILDING. THERE'S ACTUALLY A FENCE LINE
5 THERE. WHAT I KNEW MOSTLY WAS FROM RADIO TRAFFIC. WE HAD
6 RECEIVED A CALL INITIALLY THAT SHOTS HAD BEEN FIRED IN THE
7 AREA OF THE ESTABLISHMENT. THEN WE GOT FURTHER INFORMATION
8 FROM THE FIRST OFFICER ON THE SCENE, OFFICER REIST, WHO
9 SAID THAT THEY GAVE A DESCRIPTION OF A BLACK MALE ---

10 MR. RICHARDSON: I'D OBJECT TO ANY DESCRIPTION
11 HE WAS SAID SOMEBODY TOLD HIM, YOUR HONOR.

12 THE COURT: I'LL HEAR YOU ON THAT.

13 MS. ELDER: YOUR HONOR, IT'S NOT BEING OFFERED
14 FOR THE TRUTH OF THE MATTER ASSERTED.

15 THE COURT: VERY WELL, YOU MAY PROCEED.

16 MS. ELDER: (CONTINUING)

17 Q YOU CAN CONTINUE, OFFICER.

18 A THEY WERE UNSURE HOW THAT GENTLEMAN HAD
19 LEFT THE SCENE. I STARTED TO THAT POSITION TO SET UP
20 PARAMETER TO TRY TO CONTAIN HIM IF HE WAS STILL IN THE
21 AREA. I SEARCHED FROM THE NORTHWEST CORNER TO THE
22 SOUTHWEST CORNER WHERE I CAME UPON OFFICER REIST, THE
23 VICTIM THAT WAS LAYING ON THE GROUND, A FEMALE THAT WAS
24 RIGHT THERE WITH HIM, AND A GROUP OF PEOPLE TOWARDS THE
25 ENTRANCE OF THE BUILDING. I GOT OFFICER REIST TO EXPLAIN

1 TO ME WHAT HAD TRANSPIRED AND STARTED TALKING TO SOME OF
2 THE PEOPLE THAT WERE THERE AND THEY ADVISED THAT THEY HAD
3 ACTUALLY SEEN ---

4 MR. RICHARDSON: I'D OBJECT, YOUR HONOR, TO WHAT
5 PEOPLE SAY.

6 THE COURT: APPROACH, IF YOU WOULD, PLEASE?

7 (WHEREUPON, A BENCH CONFERENCE WAS HELD OFF THE
8 RECORD IN THE PRESENCE OF THE JURY, BUT OUT OF THE HEARING
9 OF THE JURY AND THE COURT REPORTER.)

10 THE COURT: LET ME TELL YOU ABOUT HEARSAY.
11 HEARSAY IS AN OUT OF COURT STATEMENT OFFERED FOR THE TRUTH
12 OF THE MATTER ASSERTED THAT THE PERSON WHO MADE THAT
13 STATEMENT IS NOT IN COURT AND IF IT'S OFFERED FOR THE TRUTH
14 OF WHAT WAS SAID THEN THAT'S HEARSAY. IF A STATEMENT OR
15 SOMEONE IS QUOTED OR SOMEONE SAID HE SAID TO SHOW WHY
16 SOMETHING ELSE WAS DONE OR TO SHOW WHY HE DID A CERTAIN
17 THING OR WENT A CERTAIN PLACE OR TO SHOW FOR A REASON WHY
18 HE DID SOMETHING ELSE, HE OR SHE DID SOMETHING ELSE, IT'S
19 NOT OFFERED FOR THE TRUTH OF WHAT THEY SAID BUT TO SHOW HIS
20 MOTIVATION FOR DOING SOMETHING ELSE.

21 WE'RE ABOUT TO GET INTO AN AREA NOW WHERE THE
22 QUESTION IS BEING ASKED, THIS OFFICER IS BEING ASKED TO
23 SHOW HIS MOTIVATION FOR THE REST OF HIS INVESTIGATION,
24 SOMETHING ELSE THAT HE DID. IT'S NOT BEING OFFERED TO, TO
25 TRY TO TELL YOU THAT WHAT THEY SAID WAS TRUE. YOU NEED TO

1 UNDERSTAND THE DISTINCTION. THANK YOU, YOU MAY PROCEED.

2 MS. ELDER: (CONTINUING)

3 Q OFFICER, YOU CAN CONTINUE WITH YOUR ANSWER.

4 A I JUST SAY, THROUGH THE INFORMATION THAT WE
5 RECEIVED AT THE SCENE WE HAD REASON TO BELIEVE THAT THE
6 SUSPECT WAS NO LONGER ON THE SCENE AND HAD LEFT IN A
7 VEHICLE. AT THAT POINT I GAVE A VEHICLE DESCRIPTION OUT
8 AND HAD PATROLMEN SET UP AT EITHER END OF OUR CITY IN HOPES
9 OF INTERCEPTING THIS VEHICLE.

10 I THEN RETRIEVED WHAT WE CALL CRIME SCENE TAPE,
11 THE YELLOW TAPE WITH THE BLACK LETTERING THAT SAYS CRIME
12 SCENE ON IT, FROM MY PATROL VEHICLE AND INITIALLY TAPED OFF
13 AN AREA IMMEDIATELY RIGHT AROUND WHAT WE COULD INITIALLY
14 DESCRIBE AS THE INCIDENT LOCATION.

15 I THEN TRIED TO SECURE ALL THE WITNESSES THAT I
16 COULD FIND IN THE AREA AND HELP ADMINISTER ANY FIRST AID TO
17 THE VICTIMS OF THE SCENE.

18 Q DID YOU ASSIST IN ADMINISTERING FIRST AID?

19 A NO MA'AM, AT THAT PARTICULAR TIME EMS HAD
20 ARRIVED AND OUR DEPARTMENT'S FIRST RESPONDERS HAD ARRIVED.
21 THEY IMMEDIATELY ATTENDED TO THE INITIAL VICTIM THAT I HAD
22 SEEN ON THE GROUND AND WHAT TURNED OUT TO BE A SECOND
23 VICTIM THAT HAD A LEG WOUND.

24 Q SIR, IF YOU'LL TAKE A LOOK AT WHAT'S BEEN
25 MARKED AS STATE'S EXHIBIT 4 FOR IDENTIFICATION. DO YOU

1 RECOGNIZE THAT?

2 A YES, MA'AM, THIS IS THE INITIAL AREA THAT I
3 MYSELF CORDONED OFF.

4 Q AND IS THAT, IS THAT AT MCCATZ BAR?

5 A YES, MA'AM.

6 Q PARKING LOT?

7 A IT'S THE SOUTHWEST CORNER OF THE PARKING
8 LOT. THE ESTABLISHMENT IS ACTUALLY TO THE RIGHT HERE.

9 Q AND IS THAT THE LOCATION OF WHERE THE
10 DECEASED VICTIM OR THE VICTIM THAT WAS ON THE GROUND AT
11 THAT TIME IS THAT WHERE HE WAS LOCATED?

12 A YES, MA'AM, HE WAS ACTUALLY STILL INSIDE OF
13 THAT AREA AS I TAPED IT OFF.

14 Q OKAY, AND THEN WAS HE LATER REMOVED?

15 A YES, MA'AM.

16 Q OKAY, IS THAT AN ACCURATE DEPICTION OF WHAT
17 YOU OBSERVED WHEN YOU TAPED OFF THE PARKING LOT?

18 A YES, MA'AM, THAT IS.

19 MS. ELDER: YOUR HONOR, WE'D LIKE TO MOVE INTO
20 EVIDENCE STATE'S, WHAT'S BEEN MARKED AS STATE'S EXHIBIT 4
21 FOR IDENTIFICATION.

22 THE COURT: ANY OBJECTION?

23 MR. RICHARDSON: NO OBJECTION, YOUR HONOR.

24 THE COURT: WITHOUT OBJECTION, IT'S ADMITTED.

25 (WHEREUPON, STATE'S EXHIBIT NUMBER 4 ENTERED INTO

1 EVIDENCE.)

2 MS. ELDER: (CONTINUING)

3 Q I ALSO WANT TO SHOW YOU WHAT'S BEEN MARKED
4 AS STATE'S EXHIBIT 3 FOR IDENTIFICATION. DO YOU RECOGNIZE
5 THAT?

6 A YES, MA'AM, THIS IS A PICTURE OF THE
7 PORTION OF THE BUILDING FACING HIGHWAY 17.

8 Q AND IS THAT MCCATZ?

9 A THIS IS MCCATZ, YES, MA'AM, THIS BUILDING
10 WITH THE ---

11 Q IS THAT THE FRONT OF IT OR --

12 A IT WOULD BE THE FRONT AS FAR AS SAYING THAT
13 THE BUILDING IS FACING HIGHWAY 17. THERE'S NO ACTUAL
14 ENTRANCE AT THIS PORTION OF THE BUILDING. THERE'S
15 ENTRANCES IS ON EITHER SIDE, IF YOU WILL, SO DEPENDING ON
16 HOW YOU WANT TO LABEL FRONT, IT WOULD BE FRONT AS FAR AS
17 FACING HIGHWAY 17.

18 Q AND IS THAT, IS THAT AN ACCURATE DEPICTION
19 OF WHAT YOU OBSERVED THAT EVENING?

20 A YES, MA'AM, IT IS.

21 Q AND THERE IS SOME TAPING IN THERE. IS
22 THAT, DID YOU DO THAT TAPING?

23 A I DID NOT DO THIS MYSELF. I HAD ONE OF THE
24 LATER RESPONDING OFFICERS TO TAPE THIS PORTION OFF.

25 Q WAS THAT, THAT WAS AT YOUR DIRECTION?

1 A YES, MA'AM.

2 MS. ELDER: YOUR HONOR, I'D LIKE TO MOVE INTO
3 EVIDENCE STATE'S, WHAT'S BEEN MARKED AS STATE'S
4 IDENTIFICATION 3.

5 MR. RICHARDSON: NO OBJECTION.

6 THE COURT: WITHOUT OBJECTION IT WOULD BE
7 STATE'S NUMBER 3 ADMITTED.

8 (WHEREUPON, STATE'S EXHIBIT NUMBER 3 ENTERED INTO
9 EVIDENCE.)

10 MS. ELDER: (CONTINUING)

11 Q NOW YOU, YOU CORDONED OFF IN THOSE PICTURES
12 THERE'S A SMALLER CRIME SCENE THAT YOU TAPED OFF AND THEN
13 IT WAS EXPANDED; IS THAT CORRECT?

14 A YES, MA'AM.

15 Q WOULD THAT BE NORMAL OPERATIONAL PROCEDURE?

16 A IT WOULD, IT WOULD DEPEND, SEEING THE SCENE
17 AT THAT POINT I WANTED TO SECURE THAT IMMEDIATE AREA AND I
18 DIDN'T HAVE THE MANPOWER ON THE SCENE TO CONTROL ALL THE
19 PERSONS THERE AND GET THAT JOB DONE SO THAT'S WHY I
20 INITIALLY SECURED THAT FIRST PORTION JUST TO KEEP THAT
21 SAFE.

22 Q AND THEN AT SOME POINT DURING YOUR
23 INVESTIGATION YOU EXPANDED THAT; IS THAT CORRECT?

24 A AS SOON AS THE NEXT RESPONDING OFFICER CAME
25 ON SCENE I HAD HIM EXPAND THE CRIME SCENE OUT.

1 MS. ELDER: THAT'S ALL THE QUESTIONS THE STATE
2 HAS, YOUR HONOR.

3 MR. RICHARDSON: PLEASE THE COURT?

4 THE COURT: YES, SIR.

5 CROSS EXAMINATION

6 BY MR. RICHARDSON:

7 Q LIEUTENANT, NOW AS FAR AS THESE PICTURES
8 THESE WERE TAKEN THE NEXT DAY?

9 A YES, SIR.

10 Q DAYLIGHT?

11 A FROM THE PICTURES IT APPEARS TO BE JUST
12 AROUND SUNRISE.

13 Q ALL RIGHT, AND WHEN YOU GOT THERE IT WAS
14 DARK?

15 A YES, SIR.

16 Q ALL RIGHT, IT WAS ABOUT 4:00 IN THE MORNING
17 FOUR, SOMEWHERE AROUND FOUR, 4:15?

18 A IN THAT AREA.

19 Q ALL RIGHT, AND WHEN YOU GOT THERE DID YOU
20 AT ANY POINT IN TIME WHILE YOU WERE THERE OR WHEN YOU GOT
21 THERE ESTABLISH A CRIME SCENE LOG?

22 A I DID NOT PERSONALLY, I ALSO ASSIGNED AN
23 OFFICER TO DO THAT TASK.

24 Q SO YOU NEVER WROTE ANYTHING DOWN ON A CRIME
25 SCENE LOG OR ESTABLISH WHO WAS GOING IN OR COMING OUT OF

1 THE SCENE; IS THAT CORRECT?

2 A I PERSONALLY DID NOT WRITE THE LOG; I
3 ASSIGNED ONE OF MY OFFICERS TO THAT TASK.

4 Q ALL RIGHT, SIR.

5 A TO TAKE CARE OF THE LOGGING OF PERSONNEL
6 ENTERING OR EXITING THE CRIME SCENE.

7 Q AND YOU WERE THERE IN THE SCENE ACCORDING
8 FROM ABOUT 4:40 TO 6:30; IS THAT RIGHT?

9 A THAT WOULD BE CORRECT, APPROXIMATE TIMES,
10 I'D HAVE TO LOOK TO --

11 Q AND YOU LEFT THE SCENE AND LATER CAME BACK
12 30, 45 MINUTES LATER; IS THAT RIGHT?

13 A THAT IS CORRECT.

14 Q AND WENT BACK IN THE SCENE AGAIN?

15 A I GUESS YOU WOULD, YES, SIR, THE LARGER
16 SCENE, I NEVER WENT INTO THAT SMALLER SCENE.

17 Q YOU WENT IN, NEVER WENT INTO THE SMALLER
18 SCENE?

19 A THE INITIAL TAPED OFF AREA I NEVER
20 REENTERED.

21 Q REENTERED, OKAY, I GOT YOU, AND WAS THERE
22 SOME CONFUSION TO START WITH ABOUT WHICH WAY THE SUSPECT
23 LEFT?

24 A THERE, WE, WE RESPONDED TO THE INITIAL
25 CALLS OF HIM BEING IN THE AREA. ONCE WE SPOKE WITH

1 WITNESSES WE FOUND THAT HE HAD ACTUALLY LEFT IN A VEHICLE.

2 Q TO START WITH THERE WAS SOME DISCUSSION
3 ABOUT HAVING RAN OUT TO 17, WASN'T THERE?

4 A HE, THE FIRST INITIAL INFORMATION WE GOT
5 THAT HE HAD FLED ON FOOT; IT DIDN'T GIVE A TRUE DIRECTION
6 OF, OF WHICH WAY HE HAD GONE.

7 MR. RICHARDSON: NOW I THINK THAT'S ALL THE
8 QUESTIONS.

9 MS. ELDER: NO FURTHER QUESTIONS FROM THE STATE,
10 WE'D ASK THAT THIS WITNESS BE EXCUSED AS WELL, YOUR HONOR.

11 THE COURT: ANY OBJECTION TO HIS BEING EXCUSED?

12 MR. RICHARDSON: NO, SIR, YOUR HONOR.

13 THE COURT: YOU'RE EXCUSED, THANK YOU.

14 MR. HUMPHRIES: THE STATE CALLS DENNIS
15 PITSINGER.

16 DETECTIVE DENNIS PITSINGER

17 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

18 MADAM CLERK: PLEASE STATE YOUR FULL NAME AND
19 SPELL YOUR LAST NAME FOR THE COURT?

20 THE WITNESS: MY NAME IS DENNIS PITSINGER,
21 THAT'S P-I-T-S-I-N-G-E-R.

22 DIRECT EXAMINATION

23 BY MR. HUMPHRIES:

24 Q HOW ARE YOU EMPLOYED?

25 A WITH THE CITY OF NORTH MYRTLE BEACH.

1 Q IN WHAT CAPACITY ARE YOU EMPLOYED?

2 A DETECTIVE.

3 Q AND HOW LONG HAVE YOU BEEN SO EMPLOYED?

4 A TWENTY-THREE YEARS.

5 Q LET ME ASK YOU, WERE YOU A DETECTIVE WITH
6 THE NORTH MYRTLE BEACH DEPARTMENT OF PUBLIC SAFETY IN
7 DECEMBER OF 2005?

8 A YES, I WAS.

9 Q LET ME TAKE YOU BACK TO DECEMBER 30TH,
10 2005, IN THE EARLY MORNING HOURS, DID YOU HAVE AN OCCASION
11 TO RESPOND TO A CRIME SCENE AT MCCATZ BAR?

12 A YES, I DID.

13 Q NOW LET ME ASK YOU IN RESPONDING TO THAT
14 CRIME SCENE WHAT, FIRST OF ALL HOW DID THE CALL COME OUT?

15 A I WAS NOTIFIED ON A NEXTEL PHONE AS THE ON
16 CALL DETECTIVE THROUGH DISPATCH.

17 Q AND WHAT WERE YOUR RESPONSIBILITIES UPON
18 ARRIVING AT THE SCENE?

19 A A NUMBER OF, OF FACETS ARE, ARE, ARE PLACED
20 UPON US AT THAT TIME TO INTERVIEW ANY WITNESSES, VICTIMS OR
21 SUSPECTS; TO SECURE THE CRIME SCENE IF NOT ALREADY SECURED;
22 TO LOCATE AND PRESERVE ANY EVIDENCE THAT, THAT MAY STILL BE
23 THERE AT THE CRIME SCENE; AND TO COLLECT IT FOR EITHER
24 PROCESSING IN HOUSE OR SENDING OUT TO THE, THE STATE LAW
25 ENFORCEMENT DIVISION FOR THEIR FORENSICS EXPERTS TO ANALYZE

1 AND, AND GIVE A DETERMINATION.

2 Q LET'S TALK ABOUT WHEN YOU FIRST ARRIVED AT
3 THE SCENE, TELL THIS JURY WHAT YOU OBSERVED WHAT YOU FOUND
4 THERE?

5 A WHEN I FIRST ARRIVED INITIALLY AS I WAS
6 COMING UP THE ROAD I NOTICED THAT THE, THE ENTIRE PARKING
7 LOT FROM THE SOUTH ENTRANCE TO THE NORTHERN ENTRANCE WAS
8 TAPED OFF WITH CRIME SCENE TAPE.

9 Q LET ME SHOW YOU STATE'S 3 IN EVIDENCE, AND
10 IF YOU RECOGNIZE THAT?

11 A YES, I DO.

12 Q IS THAT A PORTION OF THE CRIME SCENE TAPE?

13 A YES, IT IS.

14 Q THAT WAS SECURING THE ENTIRE PARKING LOT?

15 A YES, SIR, WHEN I ARRIVED, YES, SIR.

16 Q NOW UPON NOTICING THAT WHAT THEN DID YOU
17 DO?

18 A INSTEAD OF ENTERING THE, THE, THE LARGER
19 CRIME SCENE I PARKED JUST OUT OF VIEW OF THAT PICTURE. I
20 BELIEVE WHEN I TOOK THAT PICTURE I'M AT THE, THE REAR
21 PORTION OF MY VEHICLE WHICH IS ON THE HIGHWAY BEHIND THE
22 FIRE TRUCK AND THE CURB LANE.

23 Q AND YOU IN FACT TOOK THIS PHOTOGRAPH?

24 A YES, I DID.

25 Q SO THAT WOULD HAVE BEEN YOUR VANTAGE POINT

1 FROM YOUR VEHICLE THEN?

2 A YES, SIR, STANDING AT THE REAR PORTION OF
3 MY VEHICLE.

4 Q PARKED ON THE ROADWAY TOWARDS THE SIDEWALK,
5 WHAT THEN DID YOU DO?

6 A I TOOK A NUMBER OF PHOTOGRAPHS THERE AS I
7 WENT IN.

8 Q WELL LET ME ASK YOU THIS. IN PHOTOGRAPHING
9 THE SCENE OBVIOUSLY THAT'S ONE OF YOUR RESPONSIBILITIES AT
10 A CRIME SCENE?

11 A YES, SIR.

12 Q DO YOU START ON THE OUTSIDE AND MOVE IN
13 TOWARDS THE IMMEDIATE CRIME SCENE?

14 A GENERALLY, YES, SIR, YOU TAKE WHAT THEY
15 CALL LONG RANGE, MID RANGE, AND CLOSE UP.

16 Q ALL RIGHT, PLEASE CONTINUE?

17 A ONCE I TOOK SEVERAL PHOTOGRAPHS LT.
18 BALDASARRE BEING THE, THE RANKING OFFICER THERE AT THE
19 SCENE I APPROACHED HIM AND KIND OF GOT AN OVERVIEW OF, OF
20 WHAT HE KNEW AT THAT POINT, WHAT HE WAS TOLD, WHAT HE HAD
21 DONE, IF ANYTHING, AND THEN I PROCEEDED ON TO CONTACT YOUR
22 OFFICE. I CONTACTED LIEUTENANT REPEC TO, TO BRING HIM
23 ABREAST AS TO, TO WHERE I WAS AT. I MEAN HE'S MY
24 SUPERVISOR SO I HAVE TO NOTIFY HIM IN CERTAIN SERIOUS
25 INCIDENCES AS, AS TO WHAT I'M DOING AND SEEK ADVISE OR HIS

1 ASSISTANCE WHATEVER MAY BE NEEDED.

2 Q LET ME ASK YOU, DID LIEUTENANT REPEC
3 ULTIMATELY RESPOND?

4 A YES, HE HAD ALREADY BEEN NOTIFIED. I
5 DIDN'T KNOW THAT BUT HE HAD ALREADY BEEN NOTIFIED.

6 Q ALL RIGHT, AFTER MAKING THOSE NOTIFICATIONS
7 WHEN THEN DID YOU DO?

8 A I ENTERED THE OUTER PERIMETER OF, OF THE
9 CRIME SCENE AND BEGAN SPEAKING TO LIEUTENANT BALDASARRE
10 WHERE HE INFORMED ME WHAT HIS OFFICERS HAD DONE THUS FAR,
11 WHAT HE HAD DONE WITH SECURING THE, THE INNER PERIMETER,
12 THE SHOOTING SCENE IF YOU WILL, AND ---

13 Q LET ME INTERRUPT YOU JUST A MOMENT, SHOW
14 YOU STATE'S 4 IN EVIDENCE, TELL ME IF YOU RECOGNIZE THAT
15 PHOTOGRAPH?

16 A YES, THIS IS ACTUALLY A, A LATER PHOTOGRAPH
17 THAT I TOOK BUT IT ACCURATELY ---

18 MR. RICHARDSON: COULD WE SEE THAT, PLEASE?

19 MR. HUMPHRIES: IT'S ONE THAT I PREVIOUSLY
20 SHOWED YOU.

21 MR. RICHARDSON: I CAN'T REMEMBER WHICH ONE,
22 OKAY.

23 A THIS IS A PHOTOGRAPH THAT I TOOK LATER AS
24 THE, THE SUN CAME UP BUT IT ACCURATELY DEPICTS THE, THE
25 CRIME SCENE AS IT WAS WHEN I INITIALLY ARRIVED AND

1 EVERYTHING WAS DARK.

2 Q LET ME ASK YOU WHEN TALKING ABOUT DARK, ARE
3 YOU TALKING ABOUT THE TIME OF DAY OR EARLY MORNING?

4 A CORRECT, CORRECT.

5 Q DO YOU HAVE A RECOLLECTION BASED ON YOUR
6 OBSERVATIONS REGARDING THE LIGHTING PRESENT IN THAT PARKING
7 LOT IN THAT AREA, THIS PARTICULAR AREA?

8 A YES, I DO. THE, THE, THE BUILDING ITSELF
9 MCCATZ HAS, I DON'T KNOW HOW MANY, PROBABLY FOUR OR FIVE
10 DUAL BULB FLOOD LIGHTS LIKE YOU WOULD SEE ON A CORNER OF
11 YOUR RESIDENCE ALL, I MEAN FOUR OR FIVE ON EACH SIDE OF THE
12 ACTUAL BUILDING FACING OUTWARD.

13 Q LET ME ASK YOU, WHEN YOU ARRIVED, WHEN YOU
14 ARRIVED SHORTLY AFTER, EXCUSE ME FOR INTERRUPTING --

15 A PROBABLY ABOUT 20 MINUTES, ABOUT 15 OR 20
16 MINUTES.

17 Q WHAT, WHAT WERE YOUR OBSERVATIONS REGARDING
18 THE LIGHTING AT THAT TIME IN THE PARKING LOT?

19 A I MEAN, YOU KNOW, OBVIOUSLY IT WASN'T
20 DAYLIGHT BUT IT WAS, I MEAN I COULD, I COULD SEE FROM THE
21 ROADWAY, YOU KNOW, LIEUTENANT BALDASARRE SO, YOU KNOW, SOME
22 PEOPLE. I DON'T KNOW THEM, BUT THE OTHER PEOPLE THAT I
23 DIDN'T KNOW I COULD SEE THEM MILLING AROUND ON THE DECK ON
24 THE SOUTH SIDE, OBVIOUSLY THE FIRE PERSONNEL, YOU KNOW,
25 WALKING BACK AND FORTH; AND I THINK THEY WERE ATTEMPTING TO

1 SET UP THE LIGHTING POLES THAT WERE IN THE SECOND PHOTO.

2 Q NOW ONCE YOU OBSERVED THE INCIDENT LOCATION
3 THE IMMEDIATE CRIME SCENE HAD BEEN SECURED BY THAT YELLOW
4 TAPE, WELL LET ME ASK YOU THIS. WAS THE VICTIM STILL ON
5 THE SCENE WHEN YOU GOT THERE?

6 A NO, HE HAD ALREADY BEEN TRANSPORTED BY
7 AMBULANCE.

8 Q OKAY, NOW IS THAT STANDARD PROTOCOL?

9 A YES.

10 Q NOW DO YOU KNOW WHETHER OR NOT THE VEHICLE
11 IN WHICH THE VICTIM WAS TRAVELING HAD BEEN MOVED SOME
12 DISTANCE IN ORDER TO ALLOW EMS TO GET IN TO PICK HIM UP?

13 A IT WAS, IT WAS MY UNDERSTANDING IN, IN
14 TALKING TO LIEUTENANT BALDASARRE THAT ONE OF HIS MEN HAD
15 INSTRUCTED THE, THE VEHICLE TO MOVE OUT THE WAY UNBEKNOWNST
16 TO THEM THAT IT WAS BASICALLY PART OF THE CRIME SCENE TO
17 ALLOW THE, THE FIRE AND EMS PERSONNEL TO, TO ENTER AND
18 RENDER AID TO THE, TO THE VICTIM.

19 Q AND THAT WAS OBVIOUSLY THE PRIMARY CONCERN
20 AT THAT POINT WAS RENDERING AID TO, TO THE SHOOTER?

21 A OH, YEAH, OH, YEAH, YEAH, THE AID ALWAYS
22 SUPERSEDES ANYTHING ELSE.

23 Q BUT IT'S NOT OPTIMAL THAT YOU MOVE
24 SOMETHING AS LARGE AS A VEHICLE OR ANYTHING OUT OF THE
25 IMMEDIATE CRIME SCENE ---

1 A NO.

2 Q --- WHEN YOU LATER GO AND TRY TO PROCESS
3 THAT CRIME SCENE?

4 A NO, THAT'S CORRECT.

5 Q BUT IN ANY EVENT THAT WAS DONE IN THIS
6 CASE?

7 A YES, IT WAS.

8 Q NOW AFTER THAT WAS DONE WHAT WERE YOUR
9 RESPONSIBILITIES AND WHAT DID YOU DO?

10 A WELL THERE'S A LOT GOING ON RIGHT THEN, I
11 WAS TRYING TO, TO GET INFORMATION ON EXACTLY WHAT HAD
12 HAPPENED, BRIEFLY KIND OF LISTEN IN. SOME OTHER INTERVIEWS
13 WERE GOING ON BY THE, ALL THE OTHER ROAD OFFICERS AT
14 LIEUTENANT BALDASARRE'S REQUEST AND I KIND OF LISTENED IN
15 ON, ON A NUMBER OF INTERVIEWS. I KNEW THE CRIME SCENE
16 WASN'T GOING ANYWHERE AND IT WAS, IT WAS PROTECTED BY AN
17 OFFICER OUTSIDE OF IT AND IT WAS TAPED OFF, SO, YOU KNOW,
18 BASICALLY WHAT I DID WAS WANTING TO WAIT FOR LIGHT,
19 DAYLIGHT, TO, TO GO IN AND SEARCH FOR ANYTHING THAT MAY BE
20 THERE.

21 Q AND LET ME ASK YOU THIS. IS IT IMPORTANT
22 WHEN YOU'RE GOING TO PROCESS A CRIME SCENE AND PERHAPS
23 COLLECT EVIDENCE RELATED TO THE CRIME TO HAVE SOME
24 BACKGROUND ABOUT THE CRIME ITSELF BEFORE YOU START LOOKING
25 FOR ITEMS?

1 A ABSOLUTELY.

2 Q DOES IT HELP YOU DETERMINE WHETHER OR NOT
3 ITEMS THAT YOU MAY LOCATE MAY BE RELEVANT?

4 A YES.

5 Q ONCE, IN YOUR OPINION, IT WAS LIGHT ENOUGH
6 TO BEGIN TO CONDUCT THIS SEARCH DID YOU BEGIN THAT SEARCH
7 OR ENLIST ANYBODY'S AID IN ORDER TO BEGIN THAT SEARCH?

8 A YES, YES, I DID. LIEUTENANT BALDASARRE
9 WHEN, WHEN HE WAS INITIALLY PUTTING UP THE CRIME SCENE TAPE
10 NOTED SEVERAL ITEMS IN THERE WHETHER THEY WERE INSTRUMENTAL
11 IN, IN, OR, OR PART OF THIS PARTICULAR INCIDENT HE DIDN'T
12 KNOW BUT HE HAD FLAGGED THOSE ITEMS.

13 Q AND THESE WERE ITEMS THAT WERE ON THE
14 GROUND IN THE PARKING LOT?

15 A YES, AND, AND IN MY UNDERSTANDING TALKING
16 WITH LIEUTENANT BALDASARRE THE WITNESSES HE SPOKE TO
17 DESCRIBED WHERE THINGS STARTED AND WHERE THEY ENDED AND HE
18 BASICALLY FOLLOWED THAT PATH AND, AND PUT UP FLAGS PRETTY
19 MUCH ITEMS THAT WERE WITHIN THAT, THAT SCOPE.

20 Q DID HE KNOW IF THOSE ITEMS WERE ACTUALLY
21 RELATED TO THE CRIME?

22 A NO, HE DIDN'T.

23 Q POTENTIAL ITEMS OF INTEREST?

24 A YES.

25 Q DID YOU LATER NOTE THOSE ITEMS BY ANY KIND

1 OF IDENTIFICATION?

2 A YES, I DID. I LATER PULLED THE STAUBS AND
3 USED YELLOW AND BLACK READILY, THEY'RE READILY IDENTIFIABLE
4 MARKERS AT EACH POSITION.

5 Q NOW DID YOU LEARN THROUGH THIS
6 INVESTIGATION THAT OBVIOUSLY SHOTS HAD BEEN FIRED?

7 A CORRECT.

8 Q AND WHEN YOU AS A CRIME SCENE INVESTIGATOR
9 OR PROCESSOR KNOW THAT SHOTS HAVE BEEN FIRED DO YOU AS A
10 MATTER OF PRACTICE LOOK FOR POTENTIAL SHELL CASINGS, FIRED
11 SHELL CASINGS ON A CRIME SCENE?

12 A YES, WE DO. I DIDN'T KNOW AT THE TIME
13 WHETHER IT WAS A REVOLVER WHICH WOULD MAINTAIN THE SHELL
14 CASINGS OR WHETHER IT WAS A SEMI AUTO THAT WOULD EXTRACT
15 AND EJECT THEM.

16 Q ULTIMATELY DID YOU CONDUCT A SEARCH OR
17 DIRECT A SEARCH TO THAT IMMEDIATE AREA FOR FIRED SHELL
18 CASINGS?

19 A YES, I DID.

20 Q AND TELL THE ---

21 THE COURT: FOR WHAT?

22 MR. HUMPHRIES: FIRED SHELL CASINGS.

23 Q (CONTINUING) TELL THE JURY HOW YOU WENT
24 ABOUT DOING THAT.

25 A I'D INITIALLY PICKED UP THE, THE, THE FIRST

1 ITEMS THAT I HAD MARKED, THAT LIEUTENANT BALDASARRE HAD
2 OBSERVED AND I HAD DOCUMENTED THOSE AND PICKED THOSE UP.
3 NOT KNOWING WHETHER WE WERE GOING TO FIND ANY SHELL CASINGS
4 OR NOT WE, WE BASICALLY DID JUST A CURSORY WALK THROUGH OF
5 THE CRIME SCENE. THEN LATER WE GRIDDED IT OFF WITH
6 BASICALLY KITE STRING ABOUT A TWO, TWO FOOT BY TWO FOOT BOX
7 AND WE JUST GRIDDED THE ENTIRE CRIME SCENE OFF; AND WE WERE
8 DOWN ON OUR HANDS AND KNEES BASICALLY MILLING THROUGH THE
9 GRASS AND, AND, YOU KNOW, THE STONES, WHATEVER WAS THERE IN
10 THE PARKING LOT LOOKING FOR THESE SHELL CASINGS.

11 Q LET ME ASK YOU, OF COURSE WE'VE GOT
12 PICTURES HERE IN STATE'S 4, BUT WHAT TYPE SURFACE IS THAT
13 PARKING LOT?

14 A THE ACTUAL PARKING LOT IS LIKE A STONE OR
15 GRAVEL SURFACE.

16 Q VERY COMMON IN THIS AREA?

17 A YES, IN PARKING LOTS.

18 Q AND LET'S BE CLEAR. THIS WAS A PARKING LOT
19 OF A BAR?

20 A CORRECT.

21 Q WOULD YOU EXPECT TO FIND A LOT OF ITEMS OF
22 DEBRIS AND OTHER THINGS IN A PARKING LOT OF A BAR?

23 A OH, YES.

24 Q OKAY, AND IN FACT DID YOU?

25 A QUITE A FEW.

1 Q OKAY, HOWEVER IN CONDUCTING THE SEARCH WERE
2 YOU ABLE TO LOCATE, EITHER YOURSELF OR AT YOUR DIRECTION,
3 FIRED SHELL CASINGS?

4 A YES, WE WERE.

5 Q OKAY, DO YOU HAVE THOSE WITH YOU?

6 A YES, I DO.

7 Q OKAY, IF YOU'LL RETRIEVE THOSE AT THIS
8 TIME?

9 MR. HUMPHRIES: MARK THESE FOR IDENTIFICATION.

10 (WHEREUPON, STATE'S EXHIBIT NUMBER 14 AND 15
11 MARKED FOR IDENTIFICATION.)

12 MR. HUMPHRIES: (CONTINUING)

13 Q I'M SHOWING YOU NOW 14 AND 15 FOR
14 IDENTIFICATION PURPOSES, TELL ME IF YOU CAN IDENTIFY THOSE
15 ITEMS?

16 A IN, IN SPECIFICS OR JUST THE --

17 Q FIRST TELL IF YOU CAN IDENTIFY THEM?

18 A YES, THESE, THESE WERE TWO SHELL CASINGS
19 THAT WERE RECOVERED WITHIN THE INNER PERIMETER OR THE
20 SMALLER TAPED AREA OF THE CRIME SCENE ON THIS PARTICULAR
21 MORNING.

22 Q AND WERE THEY COLLECTED BY YOU?

23 A YES, THEY WERE.

24 Q LET ME ASK YOU PRIOR TO MOVING THEM INTO
25 EVIDENCE, YOU HAVE MENTIONED REVOLVER VERSUS SEMI AUTOMATIC

1 HANDGUNS?

2 A YES.

3 Q AND YOU MENTIONED THAT REVOLVERS RETAINED
4 THE CASINGS?

5 A YES, THEY DO.

6 Q THEY STAY IN THE CYLINDER?

7 A UH-HUH.

8 Q OKAY, BUT SEMI AUTOMATIC HANDGUNS WILL
9 EJECT THE FIRED CASINGS?

10 A YES, THEY WOULD.

11 Q TELL THE JURY WHAT WE'RE TALKING ABOUT WHEN
12 WE SAY A FIRED CARTRIDGE CASING?

13 A OKAY, THE, THE FIRED CASING IS, IS THE
14 ACTUAL PORTION OF THE BULLET THAT BASICALLY IS RETAINED.
15 IN A REVOLVER THE BULLET OR PROJECTILE IS WHAT IS EXPELLED
16 AT THE END OF A BARREL. THE SHELL CASINGS IN A REVOLVER
17 OBVIOUSLY ARE, ARE MAINTAINED WITHIN THE CYLINDER UNTIL YOU
18 OPEN THE CYLINDER AND, AND FORCE THEM OUT OF THE CYLINDER.

19 ON A SEMI AUTOMATIC WEAPON WHEN A BULLET IS FIRED
20 THE PROJECTILE EXITS THE END OF THE BARREL AND THEN
21 EXTRACTOR CLAW OR, OR BAR GRABS THE SHELL CASING AND FLIPS
22 IT FROM THE GUN.

23 MR. HUMPHRIES: YOUR HONOR, AT THIS TIME WE'D
24 MOVE TO INTRODUCE STATE'S 14 AND 15 INTO EVIDENCE.

25 THE COURT: ANY OBJECTION?

1 MR. RICHARDSON: NO OBJECTION.

2 THE COURT: WITHOUT OBJECTION THEY'RE ADMITTED.

3 (WHEREUPON, STATE'S EXHIBITS NUMBERS 14 AND 15
4 ENTERED INTO EVIDENCE.)

5 MR. HUMPHRIES: (CONTINUING)

6 Q LET ME SHOW YOU STATE'S 2 FOR
7 IDENTIFICATION PURPOSES, CAN YOU IDENTIFY WHAT THIS
8 REPRESENTS?

9 A WITH EXCLUSION OF THE, THE INSIDE OF THE
10 BAR, I'M NOT REALLY FAMILIAR WITH THE INNER PORTIONS. BUT
11 THE, THE OUTER PORTIONS AND, AND THE HIGHWAY AND TREES AND
12 WHERE IT SHOWS PARKING IS A REPRESENTATION OF THE, THE
13 OUTER PORTION OF THE, THE PARKING LOT AND SO FORTH AT
14 MCCATZ.

15 Q AND WOULD THE USE OF THIS STATE'S EXHIBIT
16 NUMBER 2 FOR IDENTIFICATION PURPOSES ASSIST YOU IN YOUR
17 TESTIMONY BEFORE THIS JURY TODAY?

18 A I BELIEVE IT WOULD.

19 Q AND DOES IT FAIRLY REPRESENT THE, AT LEAST
20 IN YOUR CASE, THE EXTERIOR OF MCCATZ AND THE AREA
21 SPECIFICALLY THAT YOU WERE TO PROCESS?

22 A YES, IT WOULD.

23 Q I'M GOING TO ASK YOU TO STEP DOWN, IF YOU
24 WILL, WITH THE COURT'S PERMISSION.

25 (THE WITNESS COMPLIES.)

1 MR. HUMPHRIES: (CONTINUING) NOW YOU NEED TO
2 KEEP YOUR VOICE UP KIND -- I'D LIKE YOU TO STAND HERE IN
3 FRONT OF THE JURY. LET'S DO THIS. AT THIS TIME STATE'S 2
4 FOR IDENTIFICATION PURPOSES I WANT YOU TO LOOK AT STATE'S
5 4, WHICH IS IN EVIDENCE, AND I WANT YOU TO ORIENT THE JURY
6 TO STATE'S, STATE'S 4 TO WHERE THAT WOULD BE LOCATED ON
7 STATE'S 2. REMEMBER YOU GOT PEOPLE BEHIND YOU.

8 A OKAY, WHERE THESE VEHICLES ARE PARKED RIGHT
9 HERE THE SILVER ONE AND THE WHITE ONE, A COUPLE OF BLACKS
10 ONES AND A BLUE TRUCK, THIS, THESE, WHERE THESE VEHICLES
11 ARE PARKED RIGHT HERE WOULD BE CONSISTENT WITH RIGHT
12 THROUGH HERE. EXACTLY I'M NOT SURE BUT THIS IS, YOU KNOW,
13 THIS PARKING AREA RIGHT HERE WHERE THIS RAMP IS INDICATED
14 RIGHT IN THIS AREA.

15 Q AND IS THAT THE AREA IN WHICH YOU SEARCHED?

16 A WELL ACTUALLY WHERE THIS CRIME SCENE, I
17 MEAN THE, THE ENTIRE PARKING LOT AND THE BUILDING WE
18 SEARCHED ---

19 Q CERTAINLY.

20 A --- BUT THIS ENTER PERIMETER AROUND THESE
21 VEHICLES RIGHT HERE WOULD BE CONSISTENT WITH THIS AREA UP
22 HERE WHERE IT SAYS PARKING.

23 Q AND THAT'S WHERE THE BLUE SPORT UTILITY
24 VEHICLE, THE VICTIM'S VEHICLE, WAS WHERE?

25 A HER VEHICLE WAS BACK RIGHT ABOUT THESE

1 TREES.

2 Q. OKAY, THANK YOU, YOU CAN HAVE A SEAT.

3 (THE WITNESS COMPLIES.)

4 MR. HUMPHRIES: (CONTINUING)

5 Q LET'S TALK SPECIFICALLY ABOUT STATE'S 14 AND
6 15, TELL THE JURY HOW THESE THINGS WERE LOCATED, THESE
7 ITEMS, AND HOW THEY WERE RECOVERED.

8 A OKAY, AS, AS I SAID AS THE OTHER EVIDENCE
9 WAS PICKED UP UNKNOWING WHETHER IT WAS A REVOLVER OR A SEMI
10 AUTOMATIC WEAPON, THERE WAS A KIND OF A WALK THROUGH SEARCH
11 BY MYSELF AND I BELIEVE SERGEANT SHEETS AND THERE WERE A
12 COUPLE OF OTHER OFFICERS THAT WERE ASSISTING AT THAT TIME.
13 STATE'S 15 IS THE FIRST SHELL CASING THAT I FOUND AND
14 COLLECTED AND DID THE PAPER WORK ON AND MAINTAINED.

15 STATE'S 14, I MEAN WE'D LOOKED AND LOOKED AND
16 RELOOKED THEN WE HAD TO GRID EVERYTHING OFF. WE'D TAKEN
17 THE KITE STRING AND MADE TWO BY TWO FOOT BOXES AND JUST
18 KIND OF MADE A GRID AND THEN GOT DOWN AND ASSIGNED
19 DIFFERENT PEOPLE TO DIFFERENT GRIDS. AND YOU'D SEARCH THAT
20 AREA BASICALLY PULLING GRASS BACK AND MOVING ROCKS, YOU
21 KNOW, LITTLE GRAVEL THAT WAS IN THE AREA, NO LUCK WITH
22 THAT. SERGEANT SHEETS HAD BROKEN OUT A METAL DETECTOR AND,
23 AND STARTED AT ONE CORNER AND, AND WORKED HIS WAY
24 COMPLETELY THROUGH THE CRIME SCENE AND LOCATED THIS. WHEN
25 HE LOCATED IT I, I WENT OVER AND COLLECTED IT, PHOTOGRAPHED

1 IT, AND PACKAGED IT.

2 Q AND ACTUALLY STATE'S 14 WAS FOUND AFTER
3 THERE HAD BEEN THE INITIAL SEARCH AND WALK THROUGH?

4 A UH-HUH.

5 Q AFTER YOU HAD GRIDDED OUT THE CRIME SCENE?

6 A CORRECT.

7 Q AND THEN ONLY FOUND WITH A METAL DETECTOR?

8 A YES.

9 Q AFTER THE THIRD SEARCH. LET ME SHOW YOU
10 STATE'S 5 FOR IDENTIFICATION PURPOSES AND TELL ME IF YOU
11 CAN IDENTIFY THAT PHOTOGRAPH?

12 A YES, I CAN. THIS IS ANOTHER PHOTOGRAPH I
13 TOOK IN THE EARLY MORNING HOURS.

14 Q AND IS THAT OF THE IMMEDIATE CRIME SCENE
15 FROM A DIFFERENT VANTAGE POINT?

16 A YES, IT IS. THIS IS FROM THE REAR OF THE,
17 THE MCCATZ FACING THE CRIME SCENE IN A SOUTHEASTERLY
18 DIRECTION.

19 Q DOES IT FAIRLY AND ACCURATELY REPRESENT THE
20 CRIME SCENE AS YOU SAW IT THAT EVENING?

21 A YES, IT DOES.

22 MR. HUMPHRIES: MOVE TO INTRODUCE.

23 THE COURT: ANY OBJECTION?

24 MR. RICHARDSON: NO OBJECTION.

25 THE COURT: WITHOUT OBJECTION IT'S ADMITTED.

1 (WHEREUPON, STATE'S EXHIBIT NUMBER 5 ENTERED INTO
2 EVIDENCE.)

3 THE COURT: WHAT'S THE NUMBER?

4 MR. HUMPHRIES: THAT IS STATE'S 5 NOW IN
5 EVIDENCE.

6 Q (CONTINUING) AND AGAIN REFERRING TO STATE'S
7 2 FOR IDENTIFICATION PURPOSES, AGAIN ORIENT WHERE YOU WOULD
8 HAVE BEEN STANDING WHEN THAT PHOTOGRAPH WAS TAKEN, THE
9 PHOTOGRAPH PICTURED IN STATE'S 5.

10 A OKAY, I WOULD HAVE BEEN, EXCUSE ME, I WOULD
11 HAVE BEEN BACK IN THIS AREA OVER HERE SHOOTING THIS WAY
12 WHICH WOULD ACTUALLY PICK UP MS. CARUTHERS' VEHICLE AND,
13 AND THE INITIAL CRIME SCENE HERE.

14 Q OKAY, THANK YOU. NOW WERE YOU RESPONSIBLE
15 FOR THE PROCESSING OF MS. CARUTHERS', THAT IS THE VICTIM'S
16 GIRLFRIEND VEHICLE, OR WAS THAT ASSIGNED TO ANOTHER
17 OFFICER?

18 A NO, LIEUTENANT REPEC AND, AND ANOTHER
19 INVESTIGATOR PROCESSED THAT VEHICLE.

20 Q LET ME ASK YOU JUST FOR THE RECORD, MCCATZ,
21 IS THAT ESTABLISHMENT SITUATION IN HORRY COUNTY?

22 A YES, IT IS.

23 MR. HUMPHRIES: THAT'S ALL I HAVE, YOUR HONOR.

24 MR. RICHARDSON: IF THE COURT PLEASE.

25 CROSS EXAMINATION

1 BY MR. RICHARDSON:

2 Q OFFICER, DETECTIVE PITSINGER, NOW WHEN YOU
3 GOT TO THE SCENE YOU STARTED LOOKING AT EVERYTHING AROUND
4 THERE TO GET KIND OF AN IDEA, A GENERAL IDEA OF WHAT THE
5 PLACE LOOKED LIKE?

6 A YES.

7 Q AND IT'S IMPORTANT TO SECURE THE SCENE,
8 ISN'T IT?

9 A YES, IT IS.

10 Q AND I THINK IN YOUR TESTIMONY YOU ALSO SAID
11 IT'S IMPORTANT TO PRESERVE EVIDENCE; IS THAT CORRECT?

12 A YES, IT IS.

13 Q AND YOU SAY YOU TOOK PHOTOGRAPHS?

14 A YES, I DID.

15 Q ARE YOU THE ONLY ONE THERE THAT TOOK
16 PHOTOGRAPHS?

17 A NO ONE ELSE WAS INSTRUCTED TO BY ME. I
18 DON'T KNOW IF ANY OTHER OFFICERS TOOK ANY.

19 Q ALL THE PHOTOGRAPHS AND ALL YOU TOOK THEM,
20 RIGHT?

21 A CORRECT.

22 Q YOU TOOK THEM?

23 A CORRECT.

24 Q AND YOU TOOK THE ONES THAT WERE IN HERE
25 TODAY, RIGHT, THESE THAT YOU JUST DISCUSSED DID YOU TAKE

1 THOSE PICTURES?

2 A YES, I DID.

3 Q OKAY, YOU DIDN'T TAKE THEM WHEN YOU FIRST
4 GOT THERE, DID YOU?

5 A I TOOK A NUMBER OF PHOTOGRAPHS WHEN I FIRST
6 GOT THERE.

7 Q BUT THESE PARTICULAR ONES WERE NOT TAKEN
8 WHEN YOU FIRST ARRIVED, WERE THEY?

9 A I BELIEVE THEY WERE.

10 Q HOW LONG AFTER YOU GOT THERE DID YOU TAKE
11 THOSE, AS YOU WALKED UP?

12 A NO, I SPOKE TO LIEUTENANT BALDASARRE.

13 Q SHORTLY AFTER YOU GOT THERE?

14 A CORRECT.

15 Q AND WHAT TIME DID YOU ARRIVE AT THE SCENE?

16 A AFTER I WAS NOTIFIED MAYBE 15 MINUTES, NOT
17 LONG AT ALL.

18 Q YOU ARRIVED ON THE SCENE ABOUT 4:40?

19 A THAT COULD BE IT, YES, SIR.

20 Q ALL RIGHT, AND AT 4:30 IS ABOUT 30 MINUTES
21 AFTER ALL THIS HAPPENED?

22 A I WOULD SAY IT WOULD BE A GOOD ESTIMATION.

23 Q SO FROM THE TIME YOU WERE NOTIFIED FROM THE
24 TIME YOU GOT THERE WAS AT LEAST 30 MINUTES?

25 A AGAIN I DON'T KNOW, I LIVE FIVE MINUTES ---

1 Q APPROXIMATELY?

2 A YOU KNOW, FIVE, 10 MINUTES DRIVING TIME,
3 MAYBE.

4 Q OKAY, AND YOU WAITED UNTIL LATER UNTIL THE
5 SUN CAME UP TO TAKE SOME OF THE OTHER PICTURES; IS THAT
6 RIGHT?

7 A SOME OF THE PICTURES, YES.

8 Q AND ARE YOU TELLING ME AT 4:40 THE TIME YOU
9 GOT THERE WAS THIS LIGHT?

10 A OH, NO, SIR.

11 Q ALL RIGHT, SO YOU DIDN'T TAKE THESE
12 PICTURES WHEN YOU FIRST GOT THERE?

13 A THOSE, I TOOK I DON'T KNOW HOW MANY
14 PICTURES, SIR.

15 Q I UNDERSTAND, BUT I THOUGHT YOU TESTIFIED
16 THAT YOU TOOK THESE PICTURES WHEN YOU FIRST GOT THERE?

17 A NO, I TOOK PICTURES ---

18 Q ALL RIGHT ---

19 A --- WHEN I FIRST ARRIVED.

20 Q --- BUT NOT THESE PICTURES WHEN YOU FIRST
21 ARRIVED?

22 A NO, I WOULD, I WOULD HAVE TO SAY, NO.

23 Q OKAY, NOW IN REFERENCE TO PRESERVING
24 EVIDENCE THERE'S A LOT OF THINGS AT A CRIME SCENE THAT'S,
25 THAT'S IMPORTANT, ISN'T THERE?

1 A ABSOLUTELY.

2 Q THE PHYSICAL EVIDENCE IS IMPORTANT, ISN'T
3 IT?

4 A IT IS.

5 Q THE LOCATION OF THE PHYSICAL EVIDENCE IS
6 IMPORTANT, ISN'T IT?

7 A WITHIN TO A CERTAIN DEGREE.

8 Q TO A CERTAIN DEGREE. WELL IT CAN ESTABLISH
9 WHERE BULLET TRAJECTORIES, THE BULLET TRAJECTORIES OR WHERE
10 THE BULLET WAS FIRED FROM MOST OF THE TIME, CAN'T IT? IF
11 YOU HAVE TWO BULLET HOLES IN SOMETHING AND, AND YOU CAN
12 FIND THE POINT AND IF YOU KNOW WHERE THAT SOMETHING IS
13 LOCATED YOU CAN FIGURE OUT WHERE IT CAME FROM, CAN'T YOU?

14 A WITHIN A CERTAIN DEGREE, YES, SIR.

15 Q ALL RIGHT, AND ON THIS PARTICULAR SCENE
16 WHEN YOU GOT THERE THE CAR HAD ALREADY BEEN MOVED, HADN'T
17 IT?

18 A YES, IT HAD.

19 Q ALL RIGHT. NOW WOULDN'T IT HAVE BEEN
20 IMPORTANT -- YA'LL, YA'LL CARRY AROUND SOME MARKERS OR WAS
21 THERE A PIECE OF TWIG OUT THERE THAT SOMEBODY COULD HAVE
22 LAID DOWN, ANYTHING TO MARK WHERE THE CAR WAS LOCATED
23 BEFORE IT WAS MOVED? COULDN'T YOU HAVE MARKED, COULDN'T
24 THAT CAR HAVE BEEN MARKED, ITS EXACT LOCATION, BACKED UP
25 FOR EMS AND PUT BACK JUST WHERE IT WAS IF THE MARKERS HAD

1 BEEN PLACED ON THE GROUND?

2 A MY OPINION THAT WOULD BE ALTERING A CRIME
3 SCENE. THE INITIAL ---

4 Q I'M SAYING IF YOU HAD COME TO COURT AND
5 TOLD ---

6 THE COURT: ARE YOU THROUGH ANSWERING THE
7 QUESTION, OFFICER?

8 MR. RICHARDSON: EXCUSE ME.

9 A NO, SIR, I WASN'T.

10 Q GO AHEAD.

11 THE COURT: COMPLETE YOUR ANSWER.

12 MR. RICHARDSON: EXCUSE ME.

13 THE WITNESS: (CONTINUING)

14 A IN ALL OF MY EDUCATION AND LEARNING A
15 MEDICAL ATTENTION FAR SUPERSEDES RUNNING AFTER A SUSPECT OR
16 ANY EVIDENCE THAT YOU COULD OBTAIN. THE POTENTIAL THAT'S
17 THERE TO SAVE A VICTIM FAR OUTWEIGHS ANY EVIDENCE THAT MAY
18 BE PROBATIVE AT A LATER TIME.

19 Q ALL RIGHT, SIR. THERE WERE ROCKS OUT
20 THERE? THERE WERE PIECES OF PAPER? THERE WAS ANY KIND OF
21 ITEM THAT COULD HAVE BEEN PLACED WHERE A CAR WAS PARKED OR
22 WHERE A PARTICULAR ITEM WAS LOCATED THAT, THAT, ANYTHING
23 YOU COULD HAVE FOUND AROUND THERE THAT WOULDN'T HAVE BLOWN
24 AWAY WITH THE WIND OR MARKED OUT? SOMEBODY COULD HAVE PUT
25 IT BESIDE EACH WHEEL BEFORE IT WAS MOVED, COULDN'T THEY?

1 THAT WOULDN'T HAVE TAKEN BUT A SECOND, WOULD IT?

2 A SOMEONE THAT WAS TRAINED IN CRIME SCENE
3 INVESTIGATION IN PRESERVING OF EVIDENCE ---

4 Q YOUR LIEUTENANT ---

5 A --- WOULD HAVE DONE THAT.

6 Q YOUR LIEUTENANT WAS THERE ON THE SCENE,
7 WASN'T HE?

8 A THE VEHICLE WAS MOVED PRIOR TO MY ARRIVAL
9 AND I WAS THERE MAYBE 10 MINUTES BEFORE LIEUTENANT REPEC
10 ARRIVED.

11 Q BUT, EXCUSE ME, BALDASARRE?

12 A LIEUTENANT BALDASARRE.

13 Q HE WAS THERE, TOO, WASN'T HE?

14 A YES, HE WAS.

15 Q ALL RIGHT, NOW BUT IT WOULDN'T HAVE TAKEN
16 BUT A SECOND TO DO THAT, WOULD IT?

17 A AGAIN I HAVE TO GO BACK, YOU KNOW, I
18 PROCESS CRIME SCENE AS MY PRIMARY JOB. HAD I BEEN THERE I
19 DO THINGS DIFFERENTLY THAN, THAN ROAD INVESTIGATORS DO OR
20 ROAD PATROLMEN DO.

21 Q IT WOULD HAVE BEEN A GOOD IDEA TO HAVE DONE
22 THAT, WOULDN'T IT?

23 A OH, ABSOLUTELY.

24 Q ALL RIGHT. AND, AND IF THAT HAD BEEN DONE
25 YOU COULD HAVE LATER TAKEN A PICTURE OF THE THINGS ON THE

1 GROUND, MARKING WHERE THE CAR WAS AND TAKING A PICTURE
2 WHERE THE CAR WAS MOVED TO AND THEN PUT IT BACK WHERE IT
3 WAS AND TAKEN A PICTURE OF ALL OF IT TO SAY, I PUT IT RIGHT
4 BACK WHERE IT WAS. THAT COULD HAVE BEEN DONE, COULDN'T IT?

5 A YES, IT COULD HAVE.

6 Q ALL RIGHT, NOW IN REFERENCE TO THAT THERE
7 WAS A BULLET HOLE IN THE CAR, WASN'T THERE?

8 A YES, THERE WAS.

9 Q ALL RIGHT, AND THAT WOULD HAVE ESTABLISHED
10 THE TRAJECTORY OF THE BULLET, WOULDN'T IT, IF THE CAR HAD
11 BEEN ABLE TO BE PUT BACK JUST WHERE IT WAS WITHIN A CERTAIN
12 DEGREE?

13 A YES, IT COULD.

14 Q ALL RIGHT, NOW IN REFERENCE TO THAT SCENE
15 YOU SAY YOU TOOK PICTURES OF THE SHELL CASINGS, TOO?

16 A YES, I DID.

17 Q LAYING ON THE GROUND?

18 A I BELIEVE THEY'RE IN, IN THE FILE.

19 Q WOULD YOU SHOW THEM TO ME, THE ONES LAYING
20 ON THE GROUND?

21 A CAN I STEP DOWN, YOUR HONOR, MAY I STEP
22 DOWN?

23 MR. RICHARDSON: I DON'T HAVE ANY OBJECTION TO
24 THAT.

25 Q IS THAT A PICTURE OF A SHELL CASING LAYING

1 ON THE GROUND?

2 A NO, THIS IS, THIS IS, I'M SORRY. THIS IS A
3 PICTURE WHERE I PICKED THE SHELL CASING UP TO MARK THE, OR
4 TO, TO PHOTOGRAPH AS EVIDENCE THE MARKING STAMPED ON THE,
5 THE ---

6 Q SHOW ME THE PICTURE OF WHERE IT WAS LAYING
7 ON THE GROUND BEFORE YOU PICKED IT UP?

8 A THIS, THIS IS NOT A PICTURE.

9 Q DO YOU HAVE ONE OF THAT?

10 A NO, SIR, THESE ARE, THESE ARE PICTURES, I'M
11 SORRY, THESE ARE PICTURES WHERE I HAD TO PICK THE SHELL UP
12 TO IDENTIFY THE, THE STAMPINGS ON THE REAR PORTION OF THE
13 SHELL CASING.

14 Q WHERE DID YOU TAKE THAT PICTURE?

15 A I HAVE TWO SEPARATE PICTURES, ONE PICTURE
16 ON THE SCENE AND ONE PICTURE IN THE LAB.

17 Q BUT YOU NEVER TOOK A PICTURE OF IT WHILE IT
18 WAS LAYING ON THE GROUND?

19 A NO, SIR.

20 Q THANK YOU. NOW IN REFERENCE TO THE
21 LOCATION OF THE SCENE I THINK YOU INDICATED THAT IT WAS
22 IMPORTANT TO PRESERVE A LOT OF THINGS ABOUT THE SCENE. NOW
23 YOU MADE A BIG DEAL THAT THIS IS NOT TO SCALE?

24 A I DIDN'T, I DIDN'T DRAW THAT.

25 Q BUT IT'S NOT TO SCALE, IS IT?

1 A IT SAYS IT'S NOT TO SCALE, NO, SIR.

2 Q ALL RIGHT, IT'S NOT TO SCALE. NOW DON'T
3 YOU THINK IT WOULD HAVE BEEN IMPORTANT WHILE YOU WERE AT
4 THE CRIME SCENE? YOU HAD A PENCIL AND PAPER, DIDN'T YOU?

5 A YES, SIR.

6 Q ALL RIGHT, DID YOU HAVE A TAPE MEASURE?

7 A YES, SIR.

8 Q ALL RIGHT, DID YOU EVER TAKE ANY
9 MEASUREMENTS OF WHERE ANY PIECE OF EVIDENCE WAS FOUND AND
10 LOCATE IT ON A DIAGRAM AND MARK IT SO THAT YOU WOULD KNOW
11 EXACTLY WHERE IT WAS FROM ONE PLACE TO ANOTHER?

12 A NO, I DID NOT.

13 Q DON'T YOU THINK THAT WAS IMPORTANT?

14 A THE RELEVANCY OF WHAT NOW?

15 Q WOULD NOT IT BEEN IMPORTANT TO PUT IT ON A
16 DIAGRAM AND MARK IT WHERE THE RELEVANT EVIDENCE WAS TO BE
17 ABLE TO COME TO COURT AND SHOW THE PEOPLE WHERE YOU FOUND
18 THE STUFF?

19 A IT'S WITHIN THE INNER PERIMETER OF THE
20 CRIME SCENE, NO, SIR.

21 Q BUT THE INNER PERIMETER OF ALL THINGS IS
22 EXTREMELY IMPORTANT, ISN'T IT?

23 A AS FAR AS --

24 Q THE WHOLE CASE GOES AND WHERE THE EVIDENCE
25 WAS LOCATED?

1 A WELL --

2 Q THAT WAS YOUR KEY PLACE TO INVESTIGATE,
3 WASN'T IT?

4 A THAT WAS MY RESPONSIBILITIES TO
5 INVESTIGATE.

6 Q YES, SIR, AND YOU WENT TO SCHOOL FOR CRIME
7 SCENE INVESTIGATION, DIDN'T YOU?

8 A YES, SIR, I DID.

9 Q DID YA'LL EVER DRAW DIAGRAMS AND MAKE
10 MEASUREMENTS IN SCHOOL?

11 A YES, WE DID.

12 Q OKAY, AND THEY TAUGHT YOU IN SCHOOL THAT IT
13 WAS VERY IMPORTANT TO PROBABLY TAKE THAT DIAGRAM, PLACE THE
14 EVIDENCE DOWN, AND MAYBE IF THIS WAS A PIECE OF EVIDENCE IF
15 YOU HAD THAT CORNER THERE AND THIS CORNER HERE AND THE TAPE
16 MEASURE YOU HAD WITH YOU, YOU COULD HAVE DRAWN AND LOCATED
17 IT ON THE GROUND, COULDN'T YOU?

18 A IN CERTAIN CASES, YES, SIR.

19 Q ALL RIGHT, IN THIS CASE YOU COULD HAVE,
20 COULDN'T YOU?

21 A IF I WOULD HAVE FELT IT WAS RELEVANT, YES,
22 SIR, I WOULD HAVE.

23 Q AND WOULDN'T IT BE RELEVANT AS TO WHERE THE
24 CAR WAS PARKED? WHERE THE EVIDENCE WAS FOUND? WHERE THE
25 SHOTS WERE FIRED? THE ANGLE OF THE BULLET AND THAT KIND OF

1 STUFF? AIN'T THAT KIND OF IMPORTANT?

2 A WELL, YOU KNOW, AGAIN I GET BACK TO I
3 DIDN'T MOVE THE VEHICLE. I DIDN'T ORDER IT TO BE MOVED AND
4 THOSE THAT DID WEREN'T TRAINED, TO, TO KNOW TO, TO MARK
5 THOSE THINGS.

6 Q I GIVE YOU THAT. BUT ONCE YOU GOT THERE
7 THE PERIMETER WAS THERE, IT WAS BARRICADED, SUPPOSEDLY.
8 NOBODY WAS COMING IN THERE BUT THREE, FOUR, FIVE, SIX
9 PEOPLE. YOU WERE DOWN ON YOUR HANDS AND KNEES LOOKING FOR
10 THIS STUFF AND YOU DIDN'T DRAW A DIAGRAM. IF IT WAS
11 IMPORTANT ENOUGH TO GET ON YOUR HANDS AND KNEES TO FIND IT,
12 ISN'T IT IMPORTANT ENOUGH TO TAKE A PICTURE OF IT BEFORE
13 YOU MOVE IT, PUT IT ON A PIECE OF PAPER, TAKE YOUR RULER,
14 PUT IT DOWN SO YOU COULD COME HERE AND TELL US EXACTLY
15 WHERE IT WAS FOUND?

16 A AGAIN THERE'S, THERE'S ANY NUMBER OF THINGS
17 I COULD HAVE DONE. I COULD HAVE GOT AERIAL PHOTOS. I
18 COULD HAVE GOTTEN, YOU KNOW, I COULD RUN NAILS DOWN IN THE
19 GROUND AND LEAVE THEM THERE IN CASE, YOU KNOW, THE COURT
20 WANTED TO TAKE YOU TO THE SCENE TO SEE IT. MY PRIMARY
21 FUNCTION IN TRYING TO LOCATE A BULLET CASING IS TO LATER IF
22 WE LOCATE A WEAPON TO HAVE THOSE MARKS ON THE PRIMER CAP BY
23 SOMEONE ELSE WHO IS FAR SMARTER THAN I AM SAY THAT THESE
24 PRIMER STRIKES OR THE FIRING PEN STRIKES WERE CONSISTENT
25 WITH THOSE THAT WOULD COME FROM THIS PARTICULAR GUN, IF A

1 GUN WAS FOUND. IF I COULD GET BACK TO A REVOLV -- A SEMI
2 AUTOMATIC WEAPON EXTRACTING A BULLET CASING I SHOOT THE
3 SAME GUN AND HAVE FOR ---

4 MR. RICHARDSON: YOUR HONOR, I DON'T KNOW THAT
5 THAT'S RELEVANT TO ---

6 A --- A LONG TIME.

7 MR. RICHARDSON: --- RESPONSIVE TO THE QUESTION
8 I'VE ASKED.

9 THE COURT: THE QUESTION WAS AS I RECALL IT,
10 DON'T YOU THINK IT WAS RELEVANT TO TAKE THAT AND LET HIM
11 KNOW WHERE YOU FOUND IT OR WORDS TO THAT AFFECT?

12 MR. RICHARDSON: YES, SIR.

13 THE WITNESS: (CONTINUING)

14 A YES, SIR, IF I COULD ---

15 THE COURT: YOU CAN ANSWER THAT QUESTION AS BEST
16 YOU CAN BUT LET'S TRY TO KEEP THE ANSWER TO THAT QUESTION.

17 THE WITNESS: OKAY, IF I COULD JUST TO EXPLAIN
18 THE EXTRACTOR PORTION OF A SEMI AUTOMATIC WEAPON?

19 THE COURT: WELL YOU MAY EXPLAIN THAT LATER IF
20 SOMEBODY ELSE ASKS YOU THAT QUESTION BUT THAT'S NOT THE
21 QUESTION THAT'S BEING ASKED RIGHT NOW. THEY WANT TO KNOW
22 ABOUT THE LOCATION. DO YOU NOT THINK IT WAS IMPORTANT TO
23 TAKE A PICTURE OF WHERE THEY WERE FOUND AND MARK WHERE THEY
24 WERE FOUND?

25 THE WITNESS: OKAY.

1 MR. RICHARDSON: (CONTINUING)

2 Q YES OR NO?

3 A IS IT IMPORTANT TO ---

4 Q WAS IT IMPORTANT TO HAVE TAKEN A PICTURE
5 THEN AND THERE? YOU HAD YOUR CAMERA. YOU HAD BEEN TAKING
6 PICTURES. WAS IT NOT IMPORTANT TO TAKE A PICTURE OF EACH
7 ONE OF THOSE SHELLS BEFORE THEY WERE PICKED UP OFF THE
8 GROUND?

9 A IT COULD HAVE BEEN, YES, SIR.

10 Q ALL RIGHT, COULD HAVE BEEN, OKAY. NOW YOU
11 HAD A FLAG BY EACH ONE OF THEM BEFORE YOU PICKED THEM UP OR
12 AFTER YOU PICKED THEM UP?

13 A LIEUTENANT BALDASARRE PUT THE FLAGS.

14 Q ALL RIGHT, SO WE HAD A SHELL CASING THAT
15 HAD NOT BEEN PICKED UP WITH A ORANGE FLAG OR A BLACK AND --

16 A NO, SIR. LIEUTENANT BALDASARRE OR ANY OF
17 HIS PERSONNEL UNDER HIS SUPERVISION THAT MORNING NEVER
18 LOCATED ANY SHELL CASINGS. THIS WAS ONLY AFTER THE
19 EVIDENCE WAS PICKED UP THAT LIEUTENANT BALDASARRE HAD
20 PREVIOUSLY MARKED DID I GO BACK, GET ON MY HANDS AND KNEES
21 AND SEARCH THE, THE INNER PERIMETER FOR ANY SHELL CASINGS.

22 Q DID, DID YOU EVER MARK THAT WITH A FLAG
23 WHERE YOU PICKED UP THE SHELL CASINGS?

24 A A SHELL, NO, NEITHER ONE OF THEM.

25 Q NEITHER ONE OF THEM WERE MARKED?

1 A NEITHER ONE OF THEM.

2 Q AND, AND NEITHER ONE OF THEM WERE PICTURES
3 ON THE GROUND?

4 A ON THE GROUND, NO, SIR.

5 Q NOW YOU MENTIONED IT IN YOUR ANSWER TO ME A
6 WHILE AGO THAT YOU COULD HAVE DRIVEN A SPIKE IN THE GROUND
7 OR THIS OR THAT AND BEEN ABLE TO, TO FIX THE SCENE WHERE
8 THE JURY COULD GO BACK AND SEE IT, YOU SAID THAT, DIDN'T
9 YOU?

10 A THERE WAS ANY NUMBER OF THINGS, YOU KNOW, I
11 COULD HAVE DONE.

12 Q BUT ONE NUMBER OF THING YOU COULD HAVE DONE
13 IS TO SIMPLY DRAW A DIAGRAM LOCATING THE BUILDING ON THE
14 LOT, HAD A CHART MADE UP ON A SMALLER VERSION LIKE THIS TO
15 WHERE YOU COULD EXACTLY GOT THE CORNER OF THE BUILDINGS
16 LOCATED IN REFERENCE TO THE HIGHWAY 17, EXACT LOCATIONS IN
17 REFERENCE TO THE TREE LINE AND THE PARKING SPACE; YOU COULD
18 HAVE DONE THAT, COULDN'T YOU?

19 A CERTAINLY.

20 Q AND YOU COULD HAVE ALSO TAKEN SAY FROM THE
21 RAMP OR ANY PARTICULAR POINT ON THAT DIAGRAM THAT YOU WOULD
22 HAVE MADE TO SCALE AND HAVE TAPE MEASURED IT FROM HERE TO
23 THERE. THE BUILDING YOU WOULD HAVE TAPE MEASURED. AND
24 THEN YOU COULD HAVE TAPE MEASURED THERE TO ANOTHER POINT
25 AND HAD A COUPLE OF POINTS TO TRAVERSE AND THEN LOCATE

1 PARTICULAR EVIDENCE ON THAT, COULDN'T YOU?

2 A ANYTHING IS POSSIBLE.

3 Q NO, SIR, THAT'S NOT THE POINT.

4 A YES, I COULD HAVE, I COULD HAVE.

5 Q ALL RIGHT, SIR, ALL RIGHT, SIR, BUT YOU
6 DIDN'T?

7 A DID NOT.

8 Q AND IF YOU HAD DONE IT PROPERLY YOU COULD
9 GIVE ---

10 THE COURT: REPHRASE YOUR QUESTION.

11 MR. RICHARDSON: EXCUSE ME.

12 Q (CONTINUING) LET ME BACK UP. IF THAT HAD
13 BEEN DONE YOU COULD HAVE PRESENTED THAT TO THE JURY, THEY
14 COULD HAVE GONE TO THE SCENE WITHOUT YOU EVEN BEING THERE
15 AND HAVE SAW RIGHT WHERE EVERYTHING WAS, IS THAT CORRECT?

16 A CORRECT.

17 Q NOW WHAT SIZE AREA WAS THE MAIN AREA YOU
18 FOUND THE, THE, THE GUN CASINGS AND, YOU PICKED UP FIVE OR
19 SIX PIECES OF EVIDENCE THERE, DIDN'T YOU?

20 A YES, I DID.

21 Q HOW BIG OF AN AREA WAS THE GRIDDED AREA AS
22 YOU CALL IT, THE CONCENTRATED AREA, THE SIZE OF THIS AREA
23 OR THE SIZE OF WHAT AREA IN THE COURTROOM?

24 A THAT WOULD BE 25 BY 30, 30 BY 30 MAYBE.

25 Q SOMETHING LIKE FROM THIS WALL TO WHERE THAT

1 WALL OVER THERE?

2 A THE AREA THAT WAS TAPED OFF BY LT.
3 BALDASARRE WAS EXTRAVASATED. IT WAS, WENT AROUND SEVERAL
4 CARS AND ALL. THE PORTION OF THE INNER PERIMETER THAT WAS,
5 THAT THE EVIDENCE WAS LOCATED IN WAS MAYBE 10 OR 15 FEET
6 WIDE, DEPENDING ON WHERE YOU'RE STANDING, BY 20 FEET MAYBE.

7 Q AND IF YOU TAKE A CAR, LET'S SAY USING THIS
8 NOT TO SCALE DIAGRAM, CAN YOU SEE IT FROM THERE?

9 A YES, I CAN.

10 MR. HUMPHRIES: FOR THE RECORD THAT'S STATE'S
11 PHOTO 2.

12 MR. RICHARDSON: STATES NUMBER 2.

13 Q (CONTINUING) AND YOU SAY BACK OVER HERE
14 NEAR THE TREES, BACK OVER HERE NEAR THE TREES IS WHERE THE
15 BULK OF THE EVIDENCE WAS FOUND OR IN THE PARKING LOT BACK
16 THERE IN THE GRASSY AREA?

17 A WELL THE ---

18 Q IT WAS ALL FOUND RIGHT IN AN AREA SOMEWHERE
19 RIGHT IN HERE?

20 A YES, YES, IT WAS.

21 Q ALL RIGHT, AND THE MAJORITY OF THE EVIDENCE
22 WAS WHAT, AS CLOSE AS 10 FEET EACH, THE MAJORITY FROM ONE
23 TO THE OTHER WAS A DISTANCE OF ABOUT, WHAT, FIVE TO 10 FEET
24 AND THEN MAYBE OVER TWO OR THREE FEET?

25 A YOU TALKING ABOUT FROM THE START OF THE

1 EVIDENCE END TO END?

2 Q YES, SIR, FROM THE START OF THE EVIDENCE?

3 A MAYBE A LITTLE BIT FURTHER THAN FROM YOU TO
4 THE, THE WALL THERE.

5 Q ALL RIGHT, SO LET'S SAY YOU HAD A PIECE OF
6 EVIDENCE THERE, THAT WOULD BE ONE?

7 A OKAY.

8 Q AND THE LAST PIECE OF EVIDENCE WOULD BE
9 OVER HERE; IS THAT RIGHT?

10 A IT WAS IN KIND OF A BENDING, YOU KNOW, BENT
11 OVER THIS WAY TOWARDS ME FURTHER.

12 Q KIND OF LIKE THIS?

13 A THAT WOULD BE ABOUT RIGHT.

14 Q OKAY, AND THEY, A NUMBER OF THEM WERE SORT
15 OF LINED UP, WASN'T THEY?

16 A IN A, IN A LINE, YES, SIR.

17 Q MAYBE A PIECE RIGHT ABOUT THERE?

18 A I CAN GO BACK TO THE CHART THERE AND LOOK
19 AND --

20 Q YOU DON'T HAVE A DIAGRAM, WHICH CHART DO
21 YOU WANT?

22 A THE ONE WITH THE, I DON'T KNOW IF THEY'RE -
23 -

24 Q WELL LET ME JUST ASK YOU THAT, YOU CAN TELL
25 ME THIS, LET'S JUST STAY FOR GENERALITIES WITHIN THIS ---

1 A OKAY.

2 Q --- IT WAS ABOUT FIVE OR SIX PIECES

3 STRAIGHT IN A ROW?

4 A AS I RECALL, YES, SIR.

5 Q AND THEN THERE WAS A COUPLE TO ONE SIDE,

6 WASN'T THERE?

7 A I BELIEVE THE FIRST BULLET CASING WAS OUT

8 LIKE THIS.

9 Q ALL RIGHT, SO THAT, THAT PRETTY WELL, IT

10 WAS KIND OF PRETTY CLOSE TOGETHER?

11 A YES, IT WAS.

12 Q ALL RIGHT, I WANT TO ASK YOU ONE THING. IF

13 THIS IS THE STARTING OF IT AND MCCATZ IS BACK HERE, WHAT

14 WAS THAT PIECE OF EVIDENCE RIGHT THERE?

15 A THE SECOND PIECE?

16 MR. HUMPHRIES: YOU WANT A PICTURE OF IT, MR.

17 RICHARDSON?

18 THE WITNESS: (CONTINUING)

19 A THE SECOND ITEM I BELIEVE WOULD BE A BLACK

20 DISPOSABLE LIGHTER.

21 Q WHAT WAS THE THIRD PIECE?

22 A A BLACK NEW YORK YANKEES BALL CAP WITH THE

23 N.Y. LOGO ON THE FRONT.

24 Q PRETTY WELL RIGHT IN THE MIDDLE OF

25 EVERYTHING, WASN'T IT?

1 A THE BALL CAP YOU TALKING ABOUT, YES.

2 MR. RICHARDSON: NO FURTHER QUESTIONS.

3 MR. HUMPHRIES: I DON'T NEED THIS, DO YOU NEED
4 IT? WELL I DON'T NEED IT ON THE FLOOR EITHER.

5 THE COURT: WOULD THE BAILIFF PICK IT UP,
6 PLEASE, AND PUT IT BACK OVER THERE. THESE FOLKS DON'T WANT
7 TO DO THAT.

8 MR. HUMPHRIES: WELL, I DIDN'T PUT IT DOWN
9 THERE.

10 REDIRECT EXAMINATION

11 BY MR. HUMPHRIES:

12 Q ALL RIGHT, LET'S DO THIS, LET ME SHOW YOU
13 STATE'S 6 FOR IDENTIFICATION PURPOSES?

14 A YES, THIS IS A MARKERS AND A PHOTOGRAPH I
15 TOOK.

16 Q AT THE SCENE?

17 A YES, IT IS.

18 Q THIS STATE'S EXHIBIT 6 FOR IDENTIFICATION
19 PURPOSES DOES IT FAIRLY AND ACCURATELY REPRESENT THE
20 IMMEDIATE CRIME SCENE AND THE LOCATION OF CERTAIN ITEMS YOU
21 RECOVERED?

22 A YES, IT DOES.

23 MR. HUMPHRIES: MOVE TO INTRODUCE AT THIS TIME.

24 MR. RICHARDSON: NO OBJECTION.

25 THE COURT: IT'S ADMITTED.

DET. PITSINGER - REDIRECT EXAMINATION BY MR. HUMPHRIES 181

1 (WHEREUPON, STATE'S EXHIBIT NUMBER 6 ENTERED INTO
2 EVIDENCE.)

3 MR. HUMPHRIES: (CONTINUING)

4 Q ALL RIGHT, HOW ABOUT STEP DOWN. TAKE THIS
5 WITH YOU. THIS IS, IS THIS YOURS?

6 A YES, IT IS.

7 Q OKAY, IS THAT A LISTING OF THE ITEMS THAT
8 YOU RECOVERED AND THEIR DESIGNATIONS BY NUMBER?

9 A YES, IT WAS.

10 Q ALL RIGHT, COME DOWN. I'M TRYING TO DO
11 THIS WITH THE PICTURES INSTEAD OF WITH CUPS. ALL RIGHT,
12 SHOWING YOU STATE'S 6. AND WHAT WE'LL DO IS. LET'S START
13 -- MOVE DOWN HERE, HOW ABOUT THAT SO EVERYBODY CAN SEE.
14 TELL THE JURY WHAT THESE, THESE LITTLE MARKERS ARE AND HOW
15 THEY'RE DESIGNATED, IF YOU DON'T MIND?

16 A THIS IS ---

17 MADAM COURT REPORTER: I CAN'T HEAR YOU, I'M
18 SORRY.

19 MR. HUMPHRIES: (CONTINUING)

20 Q YOU HAVE TO KEEP YOUR VOICE UP.

21 A THIS, THEY'RE NUMBERED NUMBER 1 THROUGH
22 NUMBER 6 AND THEY BASICALLY JUST START AT THE, THE CLOSEST
23 POINT OF ANY EVIDENCE WE FOUND. IF ANYTHING WAS FOUND THAT
24 LIEUTENANT BALDASARRE THOUGHT MIGHT BE RELEVANT TO THE CASE
25 HE PUT YELLOW -- ORANGE, LITTLE STAUBS IN THE GROUND BY

DET. PITTSINGER - REDIRECT EXAMINATION BY MR. HUMPHRIES 182

1 EACH ONE OF THEM. I LATER WENT BACK FOR IDENTIFICATION
2 PURPOSES AND PUT IN NUMBER INDICATORS. I WENT BACK AND BY
3 EACH ITEM THAT HE HAD MARKED I PLACED ONE OF THESE NUMBER
4 INDICATORS AND MARKER INDICATOR AND WHAT IT WAS WITHIN THAT
5 INNER PERIMETER.

6 Q ALL RIGHT, LET'S START WITH NUMBER ONE.
7 WHAT'S NUMBER ONE?

8 A IT'S A BROKEN GOLDEN COLORED BRACELET.

9 MADAM COURT REPORTER: I CAN'T HEAR YOU, I'M
10 SORRY.

11 MR. HUMPHRIES: (CONTINUING)

12 Q YOU HAVE TO SPEAK UP.

13 A IT'S A BROKEN GOLDEN COLORED BRACELET.

14 Q ALL RIGHT, LET'S MOVE DOWN THIS WAY. YOU
15 CAN STAY RIGHT THERE. I'M JUST GOING TO SHOW THEM THIS
16 ONE. NUMBER TWO?

17 A IT'S A BLACK DISPOSABLE LIGHTER, LIKE A BIC
18 LIGHTER.

19 Q HAVE YOU GOT ANY IDEA WHETHER A BROKEN GOLD
20 BRACELET OR A BLACK LIGHTER HAS ANYTHING TO DO WITH THIS
21 CRIME WHATSOEVER?

22 A NO, I DO NOT.

23 Q BUT THESE ITEMS WERE CONTAINED WITHIN THE
24 CRIME SCENE?

25 A YES, THEY WERE.

1 Q NUMBER THREE?

2 A IT'S A BLACK BALL CAP WITH THE N.Y. OR NEW
3 YORK YANKEES LOGO ON THE FRONT.

4 Q NUMBER FOUR?

5 A THAT WAS A JUDD KUHN CHEVROLET DEALERSHIP
6 WRITING PEN.

7 Q GOT ANY IDEA ABOUT THAT ITEM AS BEING
8 RELATED TO THE CRIME SCENE?

9 A I HAVE NO CLUE.

10 Q NUMBER FIVE?

11 A IT'S A 9MM LUGER SHELL CASING.

12 Q THE ONE THAT'S BEEN ADMITTED INTO EVIDENCE?

13 A YES.

14 Q AND NUMBER SIX?

15 A IT'S A 9MM LUGER SHELL CASING MARKED NUMBER
16 TWO. THE FIRST ONE, I'M SORRY, THE FIRST ONE WAS ONE.

17 NUMBER SIX IS MARKED TWO, BUT JUST IN THE ORDER THAT THEY
18 WERE FOUND.

19 Q WELL LET ME ASK YOU THIS, SHOWING YOU
20 STATE'S 5, WHICH IS IN EVIDENCE. CAN YOU ORIENT THE JURY,
21 CAN YOU PLACE SIX WITHIN FIVE SO THEY'LL KNOW WHAT AREA
22 WE'RE TALKING ABOUT AND REMEMBER YOU'VE GOT TO KEEP YOUR
23 VOICE UP AND YOU'VE GOT TO LET THEM SEE?

24 A ALL RIGHT --

25 Q LET ME ASK YOU THIS ---

1 A --- THIS IS ---

2 Q LET ME SHOW YOU STATE'S 4 AND SEE IF THAT'S
3 A LITTLE BETTER FOR YOU?

4 A NOT REALLY.

5 Q OKAY.

6 A LET ME JUST DO THIS, BASICALLY ONE WOULD
7 START ABOUT THE INSIDE THE, THE INNER PERIMETER TAPE AND IT
8 WOULD KIND OF HOOK AROUND SOME. OBVIOUSLY THIS PICTURE WAS
9 TAKEN AFTER THESE VEHICLES WERE MOVED BUT AS IT HOOKS
10 AROUND NUMBER SIX WOULD BE APPROXIMATELY JUST IN FRONT OF
11 THIS, THE PORTION OF THIS CAR BUT OVER TOWARDS THE RIGHT A
12 LITTLE BIT.

13 Q HAVE A SEAT. (THE WITNESS COMPLIES.) SO
14 YOU DID TAKE A PICTURE WHERE THE SHELL CASINGS WERE LOCATED
15 IN THE CRIME SCENE?

16 A WITH THE NUMBER MARKERS, YES.

17 Q NOW LET ME ASK YOU ABOUT THE CRIME SCENE
18 AND I ASK YOU WHY THE LOCATION OF THE SHELL CASINGS WHERE
19 YOU FOUND THEM WAS NOT AS RELEVANT TO YOU BASED ON THE
20 CONDITION OF THE CRIME SCENE AS IT MIGHT HAVE BEEN?

21 A WELL WHEN I, AS I SAID I'VE BEEN A POLICE
22 OFFICER FOR 23 YEARS, I'VE SHOT NUMEROUS WEAPONS AND, AND
23 THE WEAPON I CURRENTLY SHOOT, A GLOCK, HAS AN EXTRACTOR
24 CLAW THAT'S, THAT'S PLACED IN ONE SPECIFIC LOCATION. FROM
25 TIME TO TIME WHEN WE'RE ON THE LINE SHOOTING A PERSON TO

DET. PITSINGER - RECROSS EXAMINATION BY MR. RICHARDSON 185

1 THE LEFT OF ME THEIR BULLET CASINGS MAY HIT ME. THE PERSON
2 TO THE RIGHT OF ME THEIR BULLET CASING MAY HIT ME, SO TO
3 SAY THAT EVERY TIME THE EXTRACTOR CLAW GRABS A SHELL CASING
4 TO EJECT IT IS IT EJECTED IN THE EXACT SAME LOCATION I
5 WOULD SAY, NO. I'M NOT A FIREARM EXPERT BUT I KNOW IT FROM
6 DIRECT, I MEAN HAVING SHELL CASINGS ENTER BEHIND YOUR
7 SAFETY GLASSES FROM THE PERSON NEXT TO YOU WHEN IT'S NOT
8 SUPPOSED TO DO THAT SO, YOU KNOW, WHEN IT STARTS EJECTING
9 SHELLS IF IT GETS HOT, IF IT'S COLD, YOU KNOW, IT COULD
10 EJECT THESE SHELL CASINGS IN ANY NUMBER OF, OF DIFFERENT
11 DIRECTIONS.

12 Q LET ME ASK YOU THIS, FIRED SHELL CASINGS ON
13 A COQUINA PARKING LOT FILLED WITH ROCKS AND GRASS CAN THAT
14 ASSIST YOU IN ANY WAY IN DETERMINING THE LOCATION OF THE
15 SHOOTER AT THE TIME HE DISCHARGES HIS WEAPON?

16 A ON A HARD SURFACE LIKE THAT THAT SHELL
17 CASING COULD HIT AND BOUNCE ANY DIRECTION.

18 MR. HUMPHRIES: THANK YOU.

19 RECROSS EXAMINATION

20 BY MR. RICHARDSON:

21 Q YOU TOOK A PICTURE OF A LAVENDER BIC
22 CIGARETTE LIGHTER, DIDN'T YOU?

23 A I'M SORRY?

24 Q YOU TOOK A PICTURE AT THE CRIME SCENE OF A
25 LAVENDER BIC CIGARETTE LIGHTER?

1 A IT'S NOT LISTED ON MY LOG.

2 Q DO YOU RECALL TAKING THAT PICTURE?

3 A NO, SIR, I DON'T.

4 Q LET ME SHOW YOU THIS, DO YOU RECOGNIZE THAT
5 PICTURE?

6 A YES, I DO.

7 Q NOT LISTED ON YOUR LOG, IS IT?

8 A NO, SIR.

9 Q ALSO SOME BEER CANS RIGHT CLOSE TO THE
10 AREA, TOO, WASN'T THERE?

11 A I'M SORRY, SAY THAT AGAIN?

12 Q THERE WAS ALSO SOME BEER CANS RIGHT CLOSE
13 TO THAT AREA, WASN'T THERE?

14 A UNLESS I HAVE A PICTURE, FAR AWAY PICTURE I
15 WOULDN'T KNOW.

16 Q BUT THEY'RE NOT LISTED, ARE THEY?

17 A IN MY CRIME SCENE LOG, NO, SIR.

18 Q BUT YOU WOULDN'T DENY THERE WAS A COUPLE OF
19 BEER CANS IN THE PICTURE AROUND THERE, WOULD YOU?

20 A IF YOU'LL, IF YOU'LL SHOW ME A PICTURE IF
21 IT'S ONE I TOOK I'LL, I'LL CERTAINLY AGREE TO IT.

22 Q YOU DON'T REMEMBER IT, DO YOU?

23 A NO, SIR.

24 MR. RICHARDSON: THAT'S ALL, THAT'S ALL.

25 MR. HUMPHRIES: NOTHING FURTHER, YOUR HONOR.

1 THE COURT: THANK YOU SIR, YOU MAY STEP DOWN.

2 MR. HUMPHRIES: THE STATE CALLS DON REPEC.

3 MR. JOHNSON: YOUR HONOR, COULD WE APPROACH THE
4 BENCH?

5 THE COURT: YOU MAY.

6 (WHEREUPON, A BENCH CONFERENCE WAS HELD OFF THE
7 RECORD IN THE PRESENCE OF THE JURY, BUT OUT OF THE HEARING
8 OF THE JURY AND THE COURT REPORTER.)

9 THE COURT: YOU MAY PROCEED.

10 DON REPEC

11 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

12 THE COURT: BEFORE YOU TAKE A SEAT WE'RE GOING
13 TO TAKE A BREAK NOW, I'VE BEEN TOLD IT WILL BE A GOOD TIME
14 TO TAKE A BREAK AND I AGREE. YOU CAN TAKE A SEAT BACK OVER
15 THERE, MR. REPEC.

16 LADIES AND GENTLEMEN, STEP BACK TO YOUR JURY
17 ROOM, PLEASE DO NOT DISCUSS THE CASE WHILE YOU'RE BACK
18 THERE. YOU'LL BE CALLED BACK SHORTLY, THANK YOU, AND THE
19 GENTLEMAN THAT WANTED TO SMOKE NOW IS A GOOD TIME.

20 (WHEREUPON, THE JURY RETIRED TO THE JURY ROOM AT
21 11:35 A.M.)

22 THE COURT: ALL RIGHT, WE'LL TAKE A SHORT BREAK
23 AND START BACK SHORTLY.

24 (WHEREUPON, A RECESS WAS TAKEN.)

25 THE COURT: LET'S HAVE THE JURY, PLEASE.

1 (WHEREUPON, THE JURY RETURNED TO THE COURTROOM AT
2 12:14 P.M.)

3 MR. HUMPHRIES: THANK YOU, YOUR HONOR.

4 THE COURT: WE'RE READY TO PROCEED.

5 MR. HUMPHRIES: WE ARE. I DON'T RECALL IF HE
6 HAS BEEN SWORN OR NOT?

7 THE COURT: HE WAS SWORN.

8 THE WITNESS: MY NAME IS DON REPEC, R-E-P-E-C.

9 DIRECT EXAMINATION

10 BY MR. HUMPHRIES:

11 Q WHERE ARE YOU EMPLOYED?

12 A THE CITY OF NORTH MYRTLE BEACH.

13 Q AND HOW ARE YOU EMPLOYED WITH THE CITY?

14 A AS A DETECTIVE LIEUTENANT.

15 Q AND HOW LONG HAVE YOU BEEN SO EMPLOYED?

16 A 27 YEARS.

17 Q LET ME ASK YOU, ON DECEMBER 30TH AND DATES
18 THEREAFTER WERE YOU AT THAT TIME EMPLOYED WITH THE CITY OF
19 NORTH MYRTLE BEACH?

20 A I WAS.

21 Q OKAY, WHAT ARE SOME OF YOUR DUTIES WITH THE
22 CITY OF NORTH MYRTLE BEACH AS A DETECTIVE LIEUTENANT?

23 A I SUPERVISE THE DETECTIVE DIVISION WITH
24 REGULAR INVESTIGATIONS AND NARCOTICS. I'M AN AUTOMATED
25 FINGERPRINT IDENTIFICATION SYSTEM OPERATOR.

1 Q NOW WERE YOU CALLED UPON IN THIS CASE TO
2 PERFORM A SEARCH OF A VEHICLE IN AN ATTEMPT TO RECOVER A
3 PROJECTILE?

4 A I WAS.

5 Q LET ME SHOW YOU STATE'S 7, TELL ME IF YOU
6 CAN IDENTIFY THAT PHOTOGRAPH?

7 A YES.

8 Q AND WHAT IS IT?

9 A IT IS A PHOTOGRAPH OF A VEHICLE I
10 PROCESSED, THE VEHICLE THAT BELONGED TO YESSICA CARUTHERS.

11 MR. HUMPHRIES: THAT IS STATE'S 7, WE MOVE TO
12 INTRODUCE AT THIS TIME.

13 MR. JOHNSON: NO OBJECTION.

14 THE COURT: WITHOUT OBJECTION.

15 (WHEREUPON, STATE'S EXHIBIT NUMBER 7 ENTERED INTO
16 EVIDENCE.)

17 MR. HUMPHRIES: (CONTINUING)

18 Q NOW STATE'S 7 WHICH IS IN EVIDENCE IS THIS
19 THE VEHICLE THAT YOU PROCESSED IN AN ATTEMPT TO RECOVER A
20 PROJECTILE?

21 A YES.

22 Q AND UPON YOUR SEARCH OR PROCESSING OF THE
23 EXTERIOR OF THE VEHICLE WERE YOU ABLE TO DETERMINE A POINT
24 AT WHICH A PROJECTILE ENTERED THE VEHICLE?

25 A YES.

1 Q SHOWING YOU STATE'S 8 FOR IDENTIFICATION
2 PURPOSES, TELL ME IF YOU CAN IDENTIFY THAT?

3 A I CAN.

4 Q WHAT IS IT?

5 A IT'S A HOLE MADE BY A PROJECTILE ON
6 YESSICA'S CAR.

7 Q OKAY, AND DO YOU RECALL WHERE ON THE
8 VEHICLE THIS WOULD HAVE BEEN?

9 A YES, THE REAR PASSENGER SIDE DOOR JUST
10 ABOVE THE WHEEL, WHEEL WELL.

11 MR. HUMPHRIES: STATE'S 8 FOR IDENTIFICATION
12 PURPOSES WE MOVE TO INTRODUCE AT THIS TIME.

13 MR. JOHNSON: NO OBJECTION.

14 THE COURT: WITHOUT OBJECTION IT'S ADMITTED.

15 (WHEREUPON, STATE'S EXHIBIT NUMBER 8 ENTERED INTO
16 EVIDENCE.)

17 THE COURT: EIGHT?

18 MR. HUMPHRIES: THAT IS EIGHT, YOUR HONOR.

19 Q (CONTINUING) AND AGAIN TELL THE JURY WHERE
20 THIS WOULD HAVE BEEN LOCATED?

21 A IT'S THE RIGHT REAR PASSENGER DOOR OF
22 YESSICA'S, YESSICA CARUTHERS VEHICLE, IT'S JUST ABOVE THE
23 WHEEL WELL.

24 Q OKAY, AFTER OBSERVING THAT ON THE EXTERIOR
25 OF THE VEHICLE DID YOU THEN GO INTO THE VEHICLE IN AN

1 ATTEMPT TO FIND THIS PROJECTILE?

2 A YES.

3 Q LET ME SHOW YOU STATE'S 9 FOR
4 IDENTIFICATION PURPOSES, CAN YOU IDENTIFY THAT PHOTOGRAPH?

5 A YES.

6 Q WHAT IS IT?

7 A THIS IS THE, THE BOTTOM OF THE FRAME OF A
8 BABY SEAT THAT WAS RESTING IN THE RIGHT REAR PASSENGER SEAT
9 OF THAT VEHICLE.

10 Q AND I NOTICED SOME ---

11 A WE'RE LOOKING.---

12 Q --- SCALE TAPE?

13 A YES, WHERE THE SCALE TAPE IS PLACED JUST
14 ABOVE A, A HOLE MADE IN THAT FRAME BY A PROJECTILE.

15 MR. HUMPHRIES: THIS IS 9 FOR IDENTIFICATION
16 PURPOSES, THE STATE WOULD MOVE TO INTRODUCE AT THIS TIME.

17 MR. JOHNSON: NO OBJECTION.

18 THE COURT: IT'S ADMITTED.

19 MR. HUMPHRIES: THANK YOU, YOUR HONOR, THAT IS
20 NINE.

21 (WHEREUPON, STATE'S EXHIBIT NUMBER 9 ENTERED INTO
22 EVIDENCE.)

23 MR. HUMPHRIES: (CONTINUING)

24 Q NOW LET ME SHOW YOU STATE'S 10 FOR
25 IDENTIFICATION PURPOSES. WHAT'S PICTURED IN THAT

1 PHOTOGRAPH?

2 A THAT'S A HOLE MADE BY A PROJECTILE THAT'S
3 LOCATED JUST BEHIND OF THE LOWER PORTION OF THE DRIVERS
4 SEAT IN YESSICA'S VEHICLE.

5 Q ALL RIGHT, WE'LL COME BACK TO THAT. LET ME
6 SHOW YOU STATE'S 11. WHAT'S PICTURED ON STATE'S 11 FOR
7 IDENTIFICATION PURPOSES?

8 A THIS IS THE, IT'S A PIECE OF STRING. IT
9 BEGINS THE RIGHT REAR PASSENGER DOOR SKIN YESSICA'S VEHICLE
10 PASSES THROUGH THE UNDERSIDE OF THE BOTTOM PORTION OF THE
11 FRAME OF THE BABY SEAT AND COMES OUT IN A DIRECTION TOWARDS
12 THE DRIVERS SIDE OF THE VEHICLE.

13 MR. HUMPHRIES: STATE'S 11 FOR IDENTIFICATION
14 PURPOSES WE MOVE TO INTRODUCE AT THIS TIME.

15 MR. JOHNSON: NO OBJECTION.

16 THE COURT: IT'S ADMITTED.

17 (WHEREUPON, STATE'S EXHIBIT NUMBER 11 ENTERED
18 INTO EVIDENCE.)

19 MR. HUMPHRIES: (CONTINUING)

20 Q THIS TWINE IS ITS PURPOSE TO SHOW THE PATH
21 OF THE BULLET?

22 A IT IS.

23 Q WHEN I'M TALKING ABOUT THE BULLET, I'M
24 TALKING ABOUT THE FIRED PROJECTILE, CORRECT?

25 A CORRECT.

1 Q I'M SHOWING YOU STATE'S 12 FOR
2 IDENTIFICATION PURPOSES. CAN YOU IDENTIFY THAT PHOTOGRAPH?

3 A YES.

4 Q AND WHAT'S PICTURED THERE?

5 A THE LEFT PORTION OF THE PHOTOGRAPH IS THE
6 EXIT FROM THE BABY SEAT AND THIS IS AGAIN COLORED STRING AS
7 THE PROJECTILE. IT INDICATES THE PATH THE PROJECTILE
8 TRAVELED INTO THE MOLDING IMMEDIATELY BEHIND THE DRIVERS
9 SEAT ON THE DRIVERS SIDE OF THE VEHICLE.

10 MR. HUMPHRIES: STATE'S 12 FOR IDENTIFICATION
11 PURPOSES WE MOVE TO INTRODUCE AT THIS TIME.

12 MR. JOHNSON: NO OBJECTION.

13 THE COURT: IT'S ADMITTED.

14 (WHEREUPON, STATE'S EXHIBIT NUMBER 12 ENTERED
15 INTO EVIDENCE.)

16 MR. HUMPHRIES: (CONTINUING)

17 Q STATE'S 13 FOR IDENTIFICATION PURPOSES.
18 PLEASE IDENTIFY THAT PHOTOGRAPH IF YOU CAN?

19 A OKAY, IN THE PHOTOGRAPH IS THE DRIVERS SEAT
20 OF YESSICA'S VEHICLE, THE STRING IS, BEGINS ON YOUR LEFT
21 THE MOLDING IMMEDIATELY BY THE DRIVERS SEAT AND IT'S MOVING
22 BACK TOWARDS THE BABY SEAT IN HER VEHICLE.

23 Q AND STATE'S 10 WHICH YOU PREVIOUSLY
24 IDENTIFIED IS THAT THE HOLE?

25 A THAT IS, THIS HOLE IS DEPICTED IN BOTH

1 THESE PHOTOGRAPHS.

2 MR. HUMPHRIES: MOVE TO INTRODUCE STATE'S 10 FOR
3 IDENTIFICATION PURPOSES AND 13 FOR IDENTIFICATION PURPOSES
4 AT THIS TIME.

5 MR. JOHNSON: NO OBJECTION.

6 THE COURT: THEY'RE ADMITTED.

7 (WHEREUPON, STATE'S EXHIBIT NUMBERS 10 AND
8 EXHIBIT 13 ENTERED INTO EVIDENCE.)

9 MR. HUMPHRIES: (CONTINUING)

10 Q NOW HAVING DETERMINED THE PATH OF THE
11 PROJECTILE WERE YOU ABLE TO RECOVER A PROJECTILE WITHIN THE
12 VEHICLE OF YESSICA CARUTHERS?

13 A YES.

14 Q DID YOU BRING THAT ITEM WITH YOU TO COURT
15 TODAY?

16 A YES.

17 Q COULD YOU HAND IT TO ME AT THIS TIME?

18 (WHEREUPON, STATE'S EXHIBIT NUMBER 16 MARKED FOR
19 IDENTIFICATION.)

20 MR. HUMPHRIES: (CONTINUING)

21 Q SHOWING YOU STATE'S 16 FOR IDENTIFICATION
22 PURPOSES AT THIS TIME CAN YOU TELL ME WHAT THAT ITEM IS?

23 A YES.

24 Q WHAT IS IT?

25 A PROJECTILE RETRIEVED FROM YESSICA'S

1 VEHICLE.

2 Q BY YOU?

3 A CORRECT.

4 MR. HUMPHRIES: YOUR HONOR, WE MOVE TO INTRODUCE
5 AT THIS TIME STATE'S 16 FOR IDENTIFICATION PURPOSES?

6 MR. JOHNSON: NO OBJECTION.

7 THE COURT: WITHOUT OBJECTION IT'S ADMITTED.

8 (WHEREUPON, STATE'S EXHIBIT NUMBER 16 ENTERED
9 INTO EVIDENCE.)

10 MR. HUMPHRIES: (CONTINUING)

11 Q TELL ME IF YOU KNOW, LIEUTENANT REPEC, WAS
12 THAT ITEM, WHICH I BELIEVE IT WAS 16, WAS IT SUBSEQUENTLY
13 FORWARDED TO THE SOUTH CAROLINA LAW ENFORCEMENT DIVISION
14 FORENSIC SERVICES FOR PURPOSES OF COMPARISON?

15 A IT WAS.

16 MR. HUMPHRIES: THAT'S ALL WE HAVE, YOUR HONOR.

17 MR. JOHNSON: PLEASE THE COURT?

18 CROSS EXAMINATION

19 BY MR. JOHNSON:

20 Q LIEUTENANT REPEC, YOU WERE AT THE SCENE
21 ONLY ABOUT 15 MINUTES?

22 A I DON'T RECALL THE EXACT AMOUNT OF TIME BUT
23 I WASN'T THERE FOR AN EXTENDED PERIOD, MAYBE 30 MINUTES OR
24 A LITTLE LONGER.

25 Q A SHORT PERIOD OF TIME?

1 A RELATIVELY SHORT.

2 Q RIGHT, AND YOU JUST WENT THERE TO PICK UP
3 THE VEHICLE AND TAKE IT BACK?

4 A I WAS THERE LONGER THAN THAT, BUT, YES.

5 Q I MEAN BASICALLY THAT WAS, THAT WAS YOUR
6 ROLE THAT DAY?

7 A YES, SIR, I GOT THERE, I OBSERVED, I
8 LISTENED, AND I ACTUALLY DROVE THAT VEHICLE BACK TO THE
9 POLICE DEPARTMENT.

10 Q AND YOU REALIZED WHEN YOU PICKED IT UP THAT
11 IT WAS NOT LOCATED WHERE IT WAS AT THE TIME OF THE
12 INCIDENT; IS THAT CORRECT?

13 A CORRECT.

14 Q ALL RIGHT, AND THAT AFFECTED EXACTLY WHAT
15 YOU COULD DO IN YOUR INVESTIGATION, DIDN'T IT, AS FAR AS
16 SAYING WHERE THE SHELL CAME FROM, PROJECTILE CAME FROM?

17 A IT HAD SOME INFLUENCE ON HOW I TREATED THE
18 VEHICLE, YES.

19 Q AND YOU, THE BULLET ENTRY IN THE VEHICLE
20 HOW HIGH ABOVE THE GROUND WAS THAT?

21 A JUST ABOVE THE WHEEL WELL AS, AS THE
22 PICTURE DEMONSTRATES.

23 Q ALL RIGHT, HOW HIGH IS THAT ---

24 A PHOTO.

25 Q --- DID YOU MEASURE FROM THE GROUND?

1 A PRECISELY, NO, IT'S SOMEWHERE AROUND 3
2 FEET.

3 Q ALL RIGHT, AND YOU GOT THE ANGLE COMING IN
4 FROM THE DOOR TO THE POST, YOU MENTIONED THAT THERE WAS AN
5 ANGLE?

6 A THE PROJECTILE ENTERED SLIGHTLY UP TO DOWN
7 ANGLE AND SLIGHTLY BACK TO FRONT AS YOU'RE SITTING IN A
8 VEHICLE BACK TO FRONT.

9 Q SO BASICALLY SPEAKING YOU'RE SAYING IT
10 ENTERED THE RIGHT REAR PASSENGER DOOR ABOUT THREE FEET
11 ABOVE THE GROUND TRAVELED FROM MIDWAYS OF THAT DOOR AND
12 STRUCK THE MAIN POST BEHIND THE DRIVERS SEAT GOING IN A
13 DOWNWARD ANGLE?

14 A THE PATH OF THE BULLET ACTUALLY HIT THE
15 BOTTOM OF THE FRAME OF A BABY SEAT SITTING IN THE REAR ---

16 Q YES, SIR.

17 A --- SEAT PASSING ---

18 Q AND THEN PROCEEDED, PROCEEDED ON DOWN TO
19 THE BOTTOM OF THE --

20 A OF THE DRIVERS SEAT JUST BEHIND THE, BOTTOM
21 OF THE DRIVERS SEAT.

22 MR. JOHNSON: OKAY, NO FURTHER QUESTIONS.

23 MR. HUMPHRIES: NOTHING FURTHER.

24 THE COURT: THANK YOU, SIR, YOU MAY STEP DOWN.

25 MR. HUMPHRIES: THE STATE CALLS CAROLINE

1 PELLAND.

2 CAROLINE PELLAND

3 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

4 MADAM CLERK: PLEASE STATE YOUR FULL NAME AND
5 SPELL YOUR LAST NAME FOR THE COURT?

6 THE WITNESS: CAROLINE ALEXANDER PELLAND, P-E-L-
7 L-A-N-D.

8 DIRECT EXAMINATION

9 BY MR. HUMPHRIES:

10 Q HOW ARE YOU EMPLOYED?

11 A I WORK FOR THE CITY OF NORTH MYRTLE BEACH
12 AS A DETECTIVE.

13 Q LET ME ASK YOU, WERE YOU EMPLOYED AS A
14 DETECTIVE OR IN SOME OTHER CAPACITY WITH THE CITY OF NORTH
15 MYRTLE BEACH DECEMBER 30TH OF 2005 AND THE DAYS JUST
16 FOLLOWING THAT?

17 A YES, I WAS.

18 Q AND LET ME ASK YOU, AS PART OF YOUR DUTIES
19 DID YOU ATTEND AN AUTOPSY ON BRANDT MICHAEL KOEHLER?

20 A YES, I DID.

21 Q AND IN THE CONTEXT OF THAT AUTOPSY WAS
22 THERE A PROJECTILE RECOVERED FROM THE HEAD OF BRANDT
23 KOEHLER?

24 A YES, THERE WAS.

25 Q BY DR. PROCTOR OR SOME OF HIS STAFF DURING

1 THE AUTOPSY?

2 A YES.

3 Q AND WAS THAT PROJECTILE THEN TRANSFERRED
4 IMMEDIATELY TO YOU?

5 A YES, IT WAS.

6 Q AND HAVE YOU BROUGHT THAT PROJECTILE WITH
7 YOU THIS MORNING?

8 A YES, I HAVE THIS MORNING.

9 (WHEREUPON, STATE'S EXHIBIT NUMBER 17 MARKED FOR
10 IDENTIFICATION.)

11 MR. HUMPHRIES: STATE'S 17 FOR IDENTIFICATION,
12 YOUR HONOR, WE'D INTRODUCE AT THIS TIME.

13 MR. RICHARDSON: NO OBJECTION.

14 THE COURT: WITHOUT OBJECTION IT'S ADMITTED.

15 (WHEREUPON, STATE'S EXHIBIT NUMBER 17 ENTERED
16 INTO EVIDENCE.)

17 MR. HUMPHRIES: (CONTINUING)

18 Q AND STATE'S 17 IN EVIDENCE THIS PROJECTILE
19 WAS THEN TRANSFERRED SUBSEQUENTLY TO SLED FOR PURPOSES OF
20 COMPARISON?

21 A YES, IT WAS.

22 Q THANK YOU.

23 MR. HUMPHRIES: NO FURTHER QUESTIONS OF THIS
24 WITNESS, YOUR HONOR.

25 MR. RICHARDSON: I HAVE NO QUESTIONS, YOUR

1 HONOR.

2 THE COURT: THANK YOU, YOU MAY STEP DOWN.

3 MR. HUMPHRIES: THE STATE CALLS DAVID BLACK.

4 MR. RICHARDSON: YOUR HONOR, COULD WE TAKE UP A
5 MATTER FOR THE COURT?

6 THE COURT: YES, SIR.

7 (WHEREUPON, A BENCH CONFERENCE WAS HELD OFF THE
8 RECORD IN THE PRESENCE OF THE JURY, BUT OUT OF THE HEARING
9 OF THE JURY AND THE COURT REPORTER.)

10 DAVID BLACK

11 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

12 MADAM CLERK: PLEASE STATE YOUR FULL NAME AND
13 SPELL YOUR LAST FOR THE COURT.

14 THE WITNESS: MY NAME IS DAVID WARREN BLACK, THE
15 LAST NAME IS SPELLED B-L-A-C-K.

16 DIRECT EXAMINATION

17 BY MR. HUMPHRIES:

18 Q WITH WHOM ARE YOU EMPLOYED?

19 A I'M EMPLOYED WITH THE SOUTH CAROLINA STATE
20 LAW ENFORCEMENT DIVISION BETTER KNOWN AS SLED.

21 Q AND HOW ARE YOU SO EMPLOYED, WHAT CAPACITY?

22 A I'M EMPLOYED AS A FIREARMS AND TOOL MARK
23 EXAMINER ASSIGNED TO THE FIREARMS DEPARTMENT IN THE SLED
24 FORENSIC SERVICES LABORATORY.

25 Q LET ME ASK YOU, HOW LONG HAVE YOU BEEN IN

1 LAW ENFORCEMENT?

2 A IN LAW ENFORCEMENT APPROXIMATELY 22 YEARS.

3 Q OKAY, AND EMPLOYED BY SLED FOR HOW LONG?

4 A EMPLOYED BY SLED FOR OVER 15 YEARS.

5 Q ALL RIGHT, LET ME ASK YOU, ARE THERE
6 CERTAIN AREAS OF EXPERTISE WITHIN THE FORENSIC SERVICES
7 DIVISION OF SOUTH CAROLINA LAW ENFORCEMENT DIVISION?

8 A YES, SIR, THERE ARE.

9 Q OKAY, FIREARMS AT THE DEPARTMENT WHAT, WHAT
10 AREAS OF EXPERTISE OR SKILLS ARE REQUIRED IN PERFORMING
11 ANALYSIS IN THE FIREARMS DEPARTMENT?

12 A IN THE FIREARMS DEPARTMENT I HAVE COMPLETED
13 AN EXTENSIVE THREE YEAR IN HOUSE TRAINING. PART OF THIS
14 TRAINING INCLUDED NOT ONLY WRITTEN EXAMINATIONS BUT IT ALSO
15 INCLUDED ORAL TESTS AND ALSO PRACTICAL EXAMS.

16 WITH THESE EXAMS YOU WOULD HAVE TOPIC AREAS IN
17 VARIOUS AREAS OF FIREARM AND TOOL MARK IDENTIFICATION.
18 THEY WERE RANGED IN BLOCKS AND YOU WOULD TAKE A BLOCK AT A
19 TIME.

20 ALSO WHILE I WAS DOING THIS I WAS WORKING CASES
21 UNDER THE DIRECT SUPERVISION OF COURT QUALIFIED TENURED
22 FIREARM AND TOOL MARK EXAMINERS.

23 ONCE ALL THIS TRAINING WAS COMPLETED I WAS GIVEN
24 A CUMULATIVE FINAL EXAMINATION THAT WAS ALSO PRACTICAL,
25 WRITTEN, AND ORAL EXAMS.

1 UPON COMPLETION OF THAT I ALSO HAVE BEEN TO
2 OTHER SCHOOLS. I'VE HAD TRAINING ALSO BY THE UNITED STATES
3 BUREAU OF ALCOHOL, TOBACCO AND FIREARMS IN SERIAL NUMBER
4 RESTORATION.

5 I'VE ATTENDED THE AFTI, WHICH IS THE ASSOCIATION
6 AND FIREARM AND TOOL MARK EXAMINERS TRAINING CONFERENCES,
7 WHERE I ATTENDED MANY DIFFERENT TECHNICAL SESSIONS IN THE
8 AREA OF FIREARM AND TOOL MARK IDENTIFICATION.

9 I HAVE ALSO BEEN TO GLOCK ARMORER SCHOOL THAT IS
10 TAUGHT BY THE EMPLOYEES OF GLOCK.

11 I'VE ALSO BEEN TO A HIGH POINT FIREARMS
12 FAMILIARIZATION SCHOOL SERVANT ARMORERS COURSE THAT WAS
13 TAUGHT BY THE OWNER MR. TOM DEAVES.

14 I'M ALSO A MEMBER OF THE SOUTH CAROLINA DIVISION
15 OF THE INTERNATIONAL ASSOCIATION FOR IDENTIFICATION AND
16 ALSO THE INTERNATIONAL ASSOCIATION FOR IDENTIFICATION, IAI,
17 WHERE I'VE ALSO ATTENDED SEMINARS AND TRAINING IN VARY
18 AREAS OF FORENSIC DISCIPLINES INCLUDING AREAS IN FIREARM
19 TOOL MARK IDENTIFICATION.

20 SINCE I HAVE COMPLETED MY TRAINING I HAVE BEEN
21 RENDERED COMPETENT BY SLED AND I WORK BY OWN CASES BUT ALL
22 MY CASES THAT I'VE WORKED, EVERY EXAMINER THAT WORKS IS
23 INDEPENDENTLY VERIFIED BOTH MICROSCOPICALLY, TECHNICALLY,
24 AND ADMINISTRATIVELY.

25 Q AND LET ME ASK YOU BEFORE WORKING IN THE

1 FIREARM DEPARTMENT AT SLED WHERE DID YOU WORK?

2 A I WAS ASSIGNED TO THE LATENT PRINT AND
3 CRIME SCENE DEPARTMENT.

4 Q AND HOW LONG DID YOU WORK IN THAT
5 PARTICULAR DIVISION?

6 A IN THE LATENT PRINT CRIME SCENE DEPARTMENT
7 AT SLED I WAS THERE 11 YEARS. PRIOR TO THAT I WAS EMPLOYED
8 WITH THE RICHLAND COUNTY SHERIFF'S OFFICE WHERE I WAS A
9 LINE DEPUTY FOR FOUR YEARS AND I ALSO DID CRIME SCENE
10 LATENT PRINT WORK FOR THREE YEARS SO I HAVE A TOTAL OF 14
11 YEARS IN THE AREA OF LATENT PRINT AND CRIME SCENE
12 INVESTIGATION.

13 Q AND HAVE YOU BEEN QUALIFIED AS AN EXPERT IN
14 COURT'S OF RECORD WITHIN THIS STATE?

15 A YES, SIR, I HAVE.

16 MR. HUMPHRIES: YOUR HONOR, AT THIS TIME WE
17 WOULD OFFER AGENT BLACK AS AN EXPERT IN THE FIREARMS AN
18 TOOL MARK IDENTIFICATION.

19 MR. RICHARDSON: I THINK HE'S QUALIFIED, YOUR
20 HONOR.

21 THE COURT: THE COURT FINDS HE'S QUALIFIED TO
22 RENDER AN OPINION IN THE AREA OF FIREARM AND TOOL MARKING -
23 -

24 MR. HUMPHRIES: IDENTIFICATION.

25 THE COURT: I'M SORRY?

1 MR. HUMPHRIES: IDENTIFICATION.

2 THE COURT: IDENTIFICATION.

3 MR. HUMPHRIES: YES, SIR, THANK YOU, YOUR HONOR.

4 Q (CONTINUING) LET ME ASK YOU JUST BRIEFLY
5 BEFORE WE GO INTO THESE ITEMS OF EVIDENCE, LET'S TALK A
6 LITTLE BIT ABOUT FIREARMS AND TOOL MARK IDENTIFICATION.

7 A OKAY.

8 Q VERY BRIEFLY CAN YOU DESCRIBE TO THE JURY
9 THE KIND OF THINGS YOU CAN DO AND THE KINDS OF INSTRUMENTS
10 THAT YOU USE IN ORDER TO PERFORM THESE ANALYSIS?

11 A YES, SIR. FIREARMS IDENTIFICATION IS A
12 DISCIPLINE OF FORENSIC SCIENCE THAT WHERE WE EXAMINE
13 BULLETS, CARTRIDGE CASES AND SOME OTHER TYPES OF AMMUNITION
14 COMPONENTS AND DETERMINE WHETHER OR NOT THEY WERE FIRED BY
15 A PARTICULAR FIREARM OR SPECIFIC FIREARM.

16 THE MARKS THAT ARE PRESENT ON THESE AMMUNITION
17 COMPONENTS LIKE BULLET, FIRED BULLETS AND FIRED CARTRIDGE
18 CASES, THESE MARKS ARE ACTUALLY SCRATCHES AND WHAT WE TRY
19 TO DETERMINE IS WERE THESE MARKS THAT THEY ARE PRESENT WHEN
20 THEY MADE CONTACT WITH THAT FIREARM EITHER THROUGH FIRING
21 OR BEING CYCLED WERE THEY MADE BY THAT PARTICULAR FIREARM
22 BECAUSE THE MARKS THAT ARE PRESENT ARE UNIQUE TO A SPECIFIC
23 FIREARM. ONE OF THE THINGS THAT I DO IS I ACTUALLY EXAMINE
24 THESE MARKS THROUGH A COMPARISON MICROSCOPE.

25 THE COMPARISON MICROSCOPE IS BASICALLY TWO

1 MICROSCOPES THAT ARE, THAT ARE ATTACHED BY AN OPTICAL
2 BRIDGE AND I LOOK THROUGH THE OCULARS THAT ARE BINOCULAR
3 AND I CAN ACTUALLY VIEW TWO ITEMS AT THE SAME TIME AT THE
4 SAME MAGNIFICATION AT THE SAME LIGHT SETTING; AND I CAN
5 ACTUALLY ROTATE THESE ITEMS WHETHER THEY'RE BULLETS OR
6 CARTRIDGE CASES AND LOOK AT THESE MARKS AND SEE IF THE
7 MARKS ARE SIMILAR TO ONE ANOTHER. IF HAVE AN AREA THAT IS
8 SIMILAR I WILL PLACE WHAT IS KNOWN AS A PHASE MARK TO
9 ORIENT THEM AND THEN CONTINUE MY EXAMINATION.

10 Q IN THE COMPARISON OF FIRED CARTRIDGE
11 CASINGS LET'S START THERE, WHAT TYPE MARKINGS CAN BE
12 PRESENT ON A FIRED CARTRIDGE CASING WHICH ARE SUITABLE FOR
13 COMPARISON?

14 A OKAY, THERE ARE MANY DIFFERENT ONES. FIRST
15 AS IN THIS CASE YOU HAVE FIRING PIN IMPRESSIONS. THIS IS
16 WHERE THE FIRING PIN ACTUALLY STRIKES THE PRIMER AND THE
17 PRIMER IS WHAT IGNITES THE GUN POWDER THAT IS PRESENT
18 INSIDE OF A CARTRIDGE OR WHAT'S LEFT THE CARTRIDGE CASE
19 ONCE IT HAS BEEN FIRED.

20 YOU HAVE WHAT ARE KNOWN AS BREACH FACE MARKINGS.
21 BREAK FACE MARKINGS CAN ALSO BE FOUND ON THE PRIMER AND
22 ALSO POSSIBLY ON THE CASE HEAD. THE BREACH IS USED TO
23 SUPPORT THE CARTRIDGE WHILE IT'S IN THE CHAMBER AND ONCE
24 THE CARTRIDGE IS FIRED AND THE CARTRIDGE CASE COMES BACK
25 AND STRIKES THE BREACH FACE AREA THOSE MARKS MAY TRANSFER

1 ALSO.

2 YOU MAY HAVE EXTRACTOR MARKS. EXTRACTOR IS USED
3 TO PULL THE CARTRIDGE OR CARTRIDGE CASE FROM THE CHAMBER.

4 YOU MAY HAVE AN EJECTOR MARK. AN EJECTOR IS WHAT
5 KICKS EITHER THE CARTRIDGE OR CARTRIDGE CASE FROM THE
6 WEAPON.

7 Q LET ME ASK YOU, I'M GOING TO SHOW YOU
8 STATE'S 14 AND 15 WHICH ARE IN EVIDENCE, TELL ME IF YOU CAN
9 IDENTIFY THOSE ITEMS?

10 A YES, SIR, I CAN.

11 Q TELL ME HOW YOU CAN?

12 A STATE'S EXHIBIT 14 AND STATE'S EXHIBIT 15
13 EACH ONE OF THESE ITEMS BEAR ON THE ACTUAL CARTRIDGE CASE
14 THE SLED LAB NUMBER, THE SLED ITEM NUMBER, AND MY INITIALS,
15 DWB. ALSO WHEN I REPACKAGE THE ITEMS I REPACKAGE THEM THE
16 CARTRIDGE CASE INTO THEIR INDIVIDUAL ZIPLOC BAG AND THE
17 ZIPLOC BAG ALSO HAS THE SLED LABORATORY NUMBER, THE SLED
18 ITEM NUMBER AND MY INITIALS, DWB.

19 Q NOW WHEN YOU EXAMINE ITEMS SUCH AS THAT
20 OBVIOUSLY YOU DON'T HAVE THE COURT'S IDENTIFICATION NUMBERS
21 ON THEM AT THAT TIME?

22 A THAT IS CORRECT.

23 Q IS THAT CORRECT?

24 A THAT IS CORRECT.

25 Q WHAT IS YOUR DESIGNATION AT SLED REGARDING

1 THOSE TWO ITEMS?

2 A THE, ON THE SLED LABORATORY REPORT L062699
3 ITEM 2 IS ONE FIRED 9MM LUGER CARTRIDGE CASE THAT BEARS THE
4 HEAD STAMP OF WIN 9MM LUGER.

5 Q AND WHAT IS THE COURT'S NUMBER, THE COURT
6 EXHIBIT NUMBER OF YOUR ITEM 2 JUST SO WE DON'T GET
7 CONFUSED?

8 A OKAY, THE COURT'S ITEM NUMBER FOR MY ITEM 2
9 IS STATE'S EXHIBIT 15.

10 Q VERY GOOD. NOW IF YOU'LL LOOK AT STATE'S
11 14?

12 A YES, SIR.

13 Q CAN YOU IDENTIFY THAT ITEM?

14 A YES, SIR. STATE'S EXHIBIT 14 IS MY ITEM 3
15 AND ITEM 3 IS ONE FIRED 9MM LUGER CARTRIDGE CASE HEAD
16 STAMPED PMC 9MM LUGER.

17 Q DID YOU UNDERTAKE AN EXAMINATION FOR
18 COMPARISON SERVICE PURPOSES OF THOSE TWO ITEMS ONE WITH THE
19 OTHER?

20 A YES, SIR, I DID.

21 Q AND LET ME ASK YOU THIS AS A PRELIMINARY
22 QUESTION. DO YOU HAVE TO HAVE THE ACTUAL FIREARM THAT
23 FIRED THE PROJECTILES FROM THOSE CARTRIDGE CASINGS IN ORDER
24 TO DETERMINE WHETHER OR NOT THOSE TWO CARTRIDGE CASINGS
25 WERE FIRED BY THE SAME GUN?

1 A NO, YOU DO NOT.

2 Q TELL THE JURY ABOUT THAT, IF YOU WOULD?

3 A OKAY, AGAIN PART OF THE PROCESS WHEN THE
4 EVIDENCE IS RECEIVED AFTER I DOCUMENT THE EVIDENCE I ALSO
5 AND IF THERE'S ANY TRACE MATERIAL OR ANYTHING LIKE THAT
6 THAT I MAY COLLECT, AND IN THIS CASE THERE WAS NONE, I
7 ACTUALLY EXAMINE THE EVIDENCE. I PUT, AS I TALKED ABOUT
8 EARLIER THE COMPARISON MICROSCOPE, I PUT STATE'S 14 UNDER
9 ON ONE STAGE AND STATE'S 15 ON THE OTHER STAGE OF THE
10 MICROSCOPE AND I ACTUALLY VISUALLY COMPARED THOSE TWO
11 CARTRIDGE CASES TO ONE ANOTHER. AND WHAT I FOUND WAS IN
12 THE FIRING PIN IMPRESSION THERE WERE INDIVIDUAL IDENTIFYING
13 CHARACTERISTICS THAT WERE PRESENT IN BOTH WHERE I MATCHED
14 THE TWO TOGETHER. AND I, THAT'S HOW I CAME TO THE
15 CONCLUSION THAT THESE TWO WERE FIRED BY THE SAME FIREARM.

16 Q AND LET ME ASK YOU THIS QUESTION. TO A
17 REASONABLE DEGREE OF CERTAINTY IN YOUR FIELD OF EXPERTISE
18 WHAT IS YOUR FINDING REGARDING THOSE TWO CARTRIDGE CASINGS,
19 STATE'S 14 AND 15 IN EVIDENCE?

20 A STATE'S 14 AND STATE'S 15 WERE FIRED BY THE
21 SAME FIREARM.

22 Q NOW REFERRING TO STATE'S 16 AND 17 IF
23 YOU'LL TAKE A LOOK AT THOSE ITEMS AND TELL ME IF YOU CAN
24 IDENTIFY THEM?

25 A YES, SIR, I CAN.

1 Q AND WHAT ARE THOSE ITEMS?

2 A BOTH STATE'S 16 AND STATE'S 17 ARE FIRED
3 BULLETS.

4 Q OKAY, AND LET ME ASK YOU, OR LET ME, LET ME
5 ASK YOU TO DO THIS, REGARDING FIRED BULLETS OR FIRED
6 PROJECTILES WHAT ANALYSIS CAN YOU GO THROUGH AND WHAT CAN
7 YOU COMPARE IN ORDER TO DETERMINE WHETHER OR NOT THESE
8 ITEMS WERE FIRED BY THE SAME GUN?

9 A AS WITH THE CARTRIDGE CASE YOU CAN ACTUALLY
10 INTER COMPARE THE FIRED BULLETS TO EACH OTHER. THEY'RE
11 DIFFERENT THINGS THAT I'M LOOKING FOR. THERE'S SOMETHING
12 THAT'S KNOWN AS GRC WHICH IS GENERAL RIFLING
13 CHARACTERISTICS. THIS IS USED MORE AS A, WHAT I CAN
14 EXCLUDE OR NOT EXCLUDE IT, IT USES A GENERAL SEARCH
15 FEATURE. ONE OF THE THINGS WE LOOK AT IS THE NUMBER OF
16 LANDS AND GROOVES THAT ARE PRESENT. IN THIS PARTICULAR
17 CASE IT'S SIX LANDS AND GROOVES.

18 THE LANDS AND GROOVES WHICH MAKE UP THE RIFLING
19 IN THE BORE OF THE BARREL IS WHAT ACTUALLY CONTACTS THE
20 BULLETS IS IT IS FIRED THROUGH THE BARREL. THE RIFLING
21 TOUCHES THE BULLET, ENGAGES THE BULLET. THE PURPOSE OF
22 RIFLING IS TO STABILIZE THE BULLET IN ITS MOTION TO HELP
23 WITH ITS ACCURACY.

24 THE MARKS THAT ARE PRESENT THERE MAY TRANSFER TO
25 THE SURFACE OF THE BEARING SURFACE OF THE BULLET, THE PART

1 OF THE BULLET THAT COMES IN CONTACT WITH THE LANDS AND
2 GROOVES, SO YOU'RE LOOKING AT THE NUMBER OF LANDS AND
3 GROOVES. YOU'RE LOOKING AT THE TWISTS. THERE'S RIGHT HAND
4 TWISTS WHICH IS CLOCKWISE AND LEFT HAND TWISTS WHICH IS
5 COUNTER CLOCKWISE AND IN THIS CASE THE BULLETS HAD A RIGHT
6 HAND TWIST.

7 YOU ALSO LOOK AT, WE, I ACTUALLY MEASURED THE
8 LANDS AND GROOVES THAT WERE PRESENT ON THE BULLETS AND
9 DETERMINED THAT THEY WERE SIMILAR, THEY WERE IN RANGE WITH
10 EACH OTHER. AND THAT'S PRETTY MUCH THE PART THAT I WENT
11 THROUGH. THEN I PUT THEM ON THE COMPARISON MICROSCOPE LIKE
12 THE CARTRIDGE CASES AND GET AN INNER COMPARISON.

13 Q LET ME ASK YOU THIS. OF COURSE THE
14 TESTIMONY HAS ALREADY BEEN THAT ONE OF THE PROJECTILES WAS
15 FIRED THROUGH A CAR DOOR, A CHILDS SEAT AND ENDED UP ON
16 THE, ON THE OTHER SIDE OF THE VEHICLE WITHIN THE WALL OF
17 THE B PILLAR.

18 A OKAY.

19 Q THE OTHER PROJECTILE WAS FIRED INTO THE
20 HEAD OF BRANDT KOEHLER. DOES THE CONDITION OF THE
21 PROJECTILE HAVE ANY BEARING ON YOUR ABILITY TO COMPARE
22 THOSE ITEMS ONE TO THE OTHER?

23 A YES, SIR, IT DOES.

24 Q TELL THE JURY ABOUT THAT?

25 A BOTH OF THESE BULLETS ARE DAMAGED. WHEN I

1 DID MY EXAMINATION THEY ARE DAMAGED. BOTH BULLETS HAD
2 FLATTENED SOME, ONE MORE SO THAN THE OTHER, PARDON ME.
3 ALSO THERE WERE SECTIONS OF JACKET MISSING FROM THE BULLET
4 AND WITH THAT THE RIFLING IS ACTUALLY MARKING THE JACKET
5 WHICH IS THE EXTERIOR OF THE BULLET. THE JACKET SURROUNDS
6 THE LEAD CORE SO THAT WILL AFFECT THE EXAMINATION THAT IS
7 CONDUCTED. THE FACT THAT THE BULLETS HAVE GONE THROUGH
8 OTHER MATERIAL WHETHER IT'S TISSUE OR BONE OR METAL OR
9 PLASTIC THAT CAN ALSO DAMAGE THE SURFACES AND WILL DEPEND,
10 IT WILL AFFECT WHAT IS LEFT ON THE BULLET WHICH YOU CAN
11 ACTUALLY VIEW AND EXAMINE.

12 Q NOW LET ME ASK YOU, REGARDING STATE'S 16
13 AND 17 WERE YOU ABLE TO DETERMINE ANY PARTICULAR
14 CHARACTERISTICS THAT THEY HAD IN COMMON?

15 A YES, SIR, I DID.

16 Q TELL THE JURY ABOUT THOSE?

17 A OKAY, THROUGH THE EXAMINATION PROCESS OF
18 EACH BULLET I DETERMINED THAT EACH BULLET BY THEIR DIAMETER
19 AND BY THEIR WEIGHT WORKINGS AND HOW THEY WERE MADE WERE
20 CONSISTENT WITH, MOST CONSISTENT WITH 9MM LUGER CALIBER.

21 Q LET ME ASK YOU THIS WHILE WE'RE THERE,
22 STATE'S 14 AND 15 ARE WHAT CALIBER CARTRIDGE CASES?

23 A ON THE HEAD STAMP THEY ARE 9MM LUGER
24 CALIBER CARTRIDGE CASES.

25 Q THE SAME THING?

1 A YES, SIR.

2 Q ALL RIGHT.

3 A SAME CALIBER.

4 Q PLEASE CONTINUE.

5 A OKAY, BOTH BULLETS APPEARED TO BE, THOUGH
6 THEY ARE FLATTENED THEY APPEARED TO BE ROUND NOSED AND
7 THEY'RE KNOWN WHAT'S KNOWN AS TOTAL, TOTAL METAL JACKET,
8 TMJ. IT IS A PROCESS, ELECTRO PLATING PROCESS WHERE THE
9 ACTUAL COPPER JACKET IS BONDED TO THE LEAD CORE BY THE
10 MANUFACTURER. BOTH OF THESE BULLETS WERE TOTAL METAL
11 JACKET. ALSO THE BASE OF THE BULLETS WAS ENCLOSED WITH THE
12 METAL JACKET AND THERE WAS A SLIGHT CONCAVE TO THE BASE OF
13 THE BULLETS FROM THE MANUFACTURING PROCESS.

14 Q NOW HAVING SAID ALL THAT ARE YOU ABLE TO
15 RENDER AN OPINION TO A REASONABLE DEGREE OF CERTAINTY
16 WITHIN YOUR FIELD OF EXPERTISE AS TO WHETHER OR NOT THESE
17 TWO FIRED PROJECTILES CAME FROM THE SAME WEAPON?

18 A YES, SIR, I CAN.

19 Q AND WHAT IS YOUR CONCLUSION?

20 A MY CONCLUSION IS ACTUALLY, IT'S
21 INCONCLUSIVE.

22 Q AND TELL THE JURY WHY?

23 A OKAY, BASED ON SOME OF THE SAME THINGS WE
24 TALKED, MAINLY BECAUSE OF THE DAMAGE TO THE TWO BULLETS I
25 COULD NOT FIND AREAS IN THE BULLETS THAT WOULD LINE UP WITH

1 ONE ANOTHER WHERE I COULD DO A PHASE MARK AND ACTUALLY
2 MATCH THE STRIATIONS TO SCRATCHES THAT I TALKED ABOUT.
3 THAT WAS NOT POSSIBLE SO AT THAT POINT IN TIME THE ONLY
4 THING I CAN TELL YOU I DON'T KNOW IF THE TWO BULLETS WERE
5 FIRED BY ONE FIREARM OR FIRED BY TWO DIFFERENT FIREARMS, I
6 JUST DON'T KNOW.

7 Q AND THAT'S BASED ON THE CONDITION OF THE
8 PROJECTILES?

9 A BASED ON CONDITION OF THE PROJECTILE FROM
10 THE MARKS THAT WERE LEFT FROM THE DAMAGE.

11 Q YOUR EXAMINATION CERTAINLY DOES NOT EXCLUDE
12 ONE FIREARM?

13 A THAT IS CORRECT.

14 Q AND LET ME ASK YOU JUST AS A PRACTICAL
15 MATTER, AGENT BLACK, IS IT COMMON OR UNCOMMON FOR
16 PROJECTILES WHICH HAVE BEEN FIRED THROUGH SOME OTHER
17 MATERIAL EITHER A CAR DOOR, SOMEONES SKULL, WHERE YOU ARE
18 UNABLE, AT LEAST TO THE LEVEL REQUIRED BY YOUR FIELD OF
19 EXPERTISE, TO RENDER AN OPINION REGARDING WHETHER OR NOT
20 THEY'RE FIRED BY ONE GUN; IS THAT COMMON OR UNCOMMON THAT
21 YOU'RE UNABLE TO DO THAT?

22 A THAT IS COMMON.

23 Q VERY WELL, THANK YOU.

24 MR. HUMPHRIES: THAT'S ALL WE HAVE OF THIS
25 WITNESS, YOUR HONOR.

1 MR. RICHARDSON: PLEASE THE COURT.

2 CROSS EXAMINATION

3 BY MR. RICHARDSON:

4 Q NOW YOU PREPARED A REPORT IN THIS CASE, DID
5 YOU NOT?

6 A YES, SIR, I DID.

7 Q GOT A COPY OF IT?

8 A YES, SIR.

9 Q AND CAN YOU TELL ME BASED ON YOUR REPORT
10 THE POSSIBLE ORIGINS OF THE FIREARMS THAT MAY HAVE FIRED
11 ITEM 4?

12 A YES, SIR, DO YOU WANT ME READ THE LIST OUT?

13 Q YES, SIR?

14 A OKAY, PART OF THIS ---

15 MR. HUMPHRIES: IF I COULD JUST ASK FOR A
16 COMPARISON, ITEM 4 IS WHAT STATE'S EXHIBIT?

17 A ITEMS 4, ITEM 4 IS STATE'S EXHIBIT 16.

18 MR. HUMPHRIES: THANK YOU, FOR THE RECORD.

19 A PART OF THE, WHEN I REFERRED TO IT EARLIER
20 ABOUT THE GRC, GENERAL RIFLING CHARACTERISTICS, THERE'S A
21 COMPUTER PROGRAM THAT WE HAVE AVAILABLE TO US WHERE WE CAN
22 PUT THIS INFORMATION IN AND IT WILL GIVE US A POTENTIAL
23 LIST. IT COULD BE ONE OF THESE FIREARMS OR SOME OTHER
24 FIREARM AND I'LL READ OUT THE LIST TO YOU. THE
25 MANUFACTURERS LISTED ARE AS FOLLOWS:

1 AA ARMS INCORPORATED
2 ASTRA
3 BERETTA
4 BROWNING FN
5 BRICO ARMS
6 CALICO
7 COLT
8 ENGLISH/BRITISH
9 FEATHER INDUSTRIES
10 HELWAND
11 HIGH POINT FIREARMS
12 I CAN SPELL THIS NEXT WORD, I CANNOT PRONOUNCE.
13 Q HUSCAVERA?
14 A HUSCAVERA, THANK YOU.
15 Q SOUNDS LIKE A LAWN MOWER, DOESN'T IT?
16 A IT DOES..
17 I.M. METAL
18 INTERRED BYNAMICS
19 INTRATEC
20 ISRAEL MILITARY
21 J & R ENGINEERING
22 JENKINS BRICO
23 GEMINEZ ARMS
24 LATI
25 LAMA

1 MILITARY ARMS CORPORATION
2 PHILLIPS AND ROGERS
3 SEIG ARMS
4 SMITH & WESSON
5 STALLET ARMS
6 STAR
7 SWD
8 TAMPHOGLIO
9 WALTHUR
10 WEAVER ARMS
11 AND WILKERSON ARMS

12 Q ALL RIGHT, AND YOU PREPARED THIS REPORT ON
13 WHAT DATE?

14 A THIS REPORT WAS PREPARED AND SENT OUT ON
15 JUNE THE 8TH OF 2007, FRIDAY.

16 Q WHO WAS IT SENT TO?

17 A I FAXED THE REPORT TO ASSISTANT SOLICITOR
18 FRAN HUMPHRIES HERE AT THE SOLICITOR'S OFFICE.

19 Q IT'S DIRECTED TO DENNIS PITSINGER?

20 A YEAH, IT WAS DIRECTED TO HIM BUT I WAS
21 INSTRUCTED TO SEND THE REPORT TO THE SOLICITOR'S OFFICE.

22 Q AND THIS IS YOUR COMPLETE REPORT?

23 A YES, SIR, THIS IS MY COMPLETE WRITTEN
24 REPORT, YES, SIR.

25 MR. RICHARDSON: NO FURTHER QUESTIONS.

1 MR. HUMPHRIES: THE STATE HAS NO REDIRECT, I ASK
2 THAT THIS WITNESS BE EXCUSED AT THIS TIME.

3 MR. RICHARDSON: NO OBJECTION.

4 A THANK YOU.

5 THE COURT: DO YOU WANT TO CALL ANOTHER WITNESS
6 BEFORE LUNCH?

7 MR. HUMPHRIES: NO, SIR, YOUR HONOR.

8 THE COURT: VERY WELL, LADIES AND GENTLEMEN,
9 IT'S ABOUT SEVEN MINUTES TO ONE, WE'RE GOING TO BREAK NOW
10 FOR LUNCH. AS I REMINDED YOU YESTERDAY, LET ME DO IT AGAIN
11 TODAY, DO NOT DISCUSS THE CASE WITH ANYONE OR ALLOW ANYONE
12 TO DISCUSS IT WITH YOU INCLUDING YOUR FELLOW JURORS. ENJOY
13 YOUR LUNCH, BE BACK IN YOUR JURY ROOM AT 2:30, THANK YOU.

14 (WHEREUPON, THE JURY WAS EXCUSED FOR LUNCH 1:55
15 P.M.)

16 (WHEREUPON, COURT WAS RECESSED FOR LUNCH AND THE
17 FOLLOWING TAKES PLACE ON THE RECORD FOLLOWING THE LUNCH
18 RECESS.)

19 THE COURT: ALL RIGHT, LET'S HAVE YOUR MOTION.

20 BIGGERS HEARING

21 MS. ELDER: WE'D CALL OFFICER SHEETS, YOUR
22 HONOR.

23 THE COURT: COME AROUND, PLEASE, SIR.

24 PAUL SHEETS

25 BEING FIRST DULY SWORN, TESTIFIED IN CAMERA AS FOLLOWS:

1 MADAM CLERK: PLEASE STATE YOUR FULL NAME FOR
2 THE COURT.

3 THE WITNESS: PAUL EUGENE SHEETS.

4 DIRECT EXAMINATION

5 BY MS. ELDER:

6 Q WHERE ARE YOU EMPLOYED?

7 A CITY OF NORTH MYRTLE BEACH.

8 Q IN WHAT CAPACITY?

9 A I'M A SERGEANT OVER INVESTIGATIONS AND
10 NARCOTICS.

11 Q WERE YOU WORKING THERE DECEMBER 30TH, 2005?

12 A YES, I DID.

13 Q AND AT, HOW WERE YOU EMPLOYED AT THAT TIME,
14 WHAT WERE YOUR JOBS OR DUTIES?

15 A SERGEANT OVER INVESTIGATIONS.

16 Q DID YOU HAVE AN OPPORTUNITY TO BE INVOLVED
17 IN THE INVESTIGATION INVOLVING THE DEFENDANT LEMOND
18 HOLLAND?

19 A YES.

20 Q AND DID YOU INTERVIEW SOME WITNESSES IN, IN
21 REGARDS TO THAT INVESTIGATION?

22 A YES.

23 Q ONE OF THOSE WITNESSES A JEFFREY BENNETT?

24 A YES.

25 Q AND THROUGH THE COURSE OF YOUR INTERVIEW

1 WITH HIM DID YOU HAVE AN OPPORTUNITY TO QUESTION HIM
2 REGARDING THE IDENTIFICATION OF THE DEFENDANT LEMOND
3 HOLLAND?

4 A YES.

5 Q AND TELL ME HOW THAT CAME ABOUT?

6 A WE INTERVIEWED HIM AND AFTER THE INTERVIEW
7 I ASKED HIM ABOUT THE IDENTIFICATION AND I WENT AND
8 OBTAINED A PHOTO LINEUP AND PRESENTED IT TO HIM.

9 Q AND AT THAT POINT WHEN YOU PRESENTED THE
10 PHOTO LINEUP TO MR. BENNETT DID YOU, HAD YOU ALREADY
11 IDENTIFIED A POTENTIAL DEFENDANT IN THIS CASE?

12 A IDENTIFIED, NO.

13 Q HOW DID YOU COME TO PUT LEMOND HOLLAND'S
14 PICTURE IN THAT PICTURE LINEUP?

15 A I WAS GIVEN THE NAME FROM THE LEAD
16 INVESTIGATOR AND THAT'S HOW WE, YOU KNOW, OBTAINED HIS
17 PHOTO WITH OTHER, SOME OTHER PHOTO.

18 Q AND WAS THAT NAME GIVEN THROUGH THE COURSE
19 OF YA'LL'S INVESTIGATION ---

20 A YES.

21 Q --- AT THE CITY OF NORTH MYRTLE BEACH?

22 A YES.

23 Q OKAY, AND SO YOU PUT THE DEFENDANT'S
24 PICTURE -- HOW DID YOU OBTAIN THAT PHOTOGRAPH?

25 A I OBTAINED THE PHOTOGRAPH THROUGH DMV

1 RECORDS AND ALSO THE OTHER FIVE I ALSO OBTAINED THROUGH THE
2 DMV RECORDS.

3 Q AND IS THAT A COMMON PRACTICE TO OBTAIN
4 PHOTOGRAPHS FOR A LINEUP IDENTIFICATION THROUGH THE
5 DEPARTMENT OF MOTOR VEHICLE?

6 A YES, MA'AM, WE'VE DONE IT SEVERAL TIMES.

7 Q NOW WHEN YOU OBTAINED THE PHOTOS, HOW, HOW
8 WERE THEY ARRANGED?

9 A ARRANGED WHEN I PRESENTED THEM?

10 Q WERE THEY INDIVIDUALLY ---

11 A YES, THEY WERE ON INDIVIDUAL ---

12 Q --- OR ON THE SAME SHEET OF PAPER?

13 A THEY WERE INDIVIDUAL PAPER. ALL SIX PHOTOS
14 WERE ON THE SAME, A DIFFERENT PIECE OF PAPER, YES, MA'AM.

15 Q OKAY, AND DID YOU TRY TO ATTEMPT TO OBTAIN
16 PHOTOGRAPHS THAT WERE SIMILAR SITUATED AND SIMILAR
17 APPEARANCE WISE?

18 A YES.

19 Q AND WHO, WHO DID THE LINEUP ITSELF? WHO
20 COLLECTED THE SIX PHOTOGRAPHS?

21 A I DID.

22 Q AND YOU COLLECTED THEM ALL FROM DMV?

23 A YES.

24 Q AND WHEN DID YOU SHOW THOSE, OR DID YOU
25 SHOW THOSE TO JEFFREY BENNETT?

1 A YES, I DID.

2 Q AND DO YOU RECALL WHEN YOU SHOWED THEM TO
3 HIM?

4 A IT WAS ON DECEMBER 10TH, THE SAME DAY THAT
5 WE INTERVIEWED HIM.

6 Q SO THE EVENT HAPPENED DECEMBER 30TH --

7 A EXCUSE, DECEMBER 30TH, I'M SORRY.

8 Q OKAY, OF 2005?

9 A YES, 2005.

10 Q OKAY. DO YOU RECALL WHERE YOU WERE WHEN
11 YOU SHOWED HIM THOSE PHOTOGRAPHS?

12 A IN THE DETECTIVE INTERVIEW ROOM.

13 Q OKAY, AND HAD YOU ALREADY INTERVIEWED HIM
14 AT THAT TIME?

15 A YES.

16 Q AND WHEN YOU SHOWED HIM THOSE PHOTOGRAPHS
17 DID YOU GIVE HIM ANY INSTRUCTIONS REGARDING THE
18 IDENTIFICATION OF ANY OF THOSE INDIVIDUALS?

19 A NO, I DIDN'T.

20 Q DO YOU HAVE THOSE PHOTOGRAPHS WITH YOU?

21 A YES, MA'AM.

22 MS. ELDER: IF I COULD MARK THESE FOR THE
23 PURPOSE OF THIS HEARING, YOUR HONOR?

24 THE COURT: VERY WELL.

25 (WHEREUPON, STATE'S EXHIBIT NUMBER 18 MARKED FOR

1 IDENTIFICATION FOR PURPOSES OF BIGGERS HEARING.)

2 MS. ELDER: (CONTINUING)

3 Q NOW WILL YOU TAKE A LOOK AT WHAT'S BEEN
4 MARKED AS STATE'S EXHIBIT 18 FOR IDENTIFICATION; DO YOU
5 RECOGNIZE THOSE?

6 A YES, I DO.

7 Q AND WHAT ARE THOSE?

8 A IT'S SIX PICTURES I OBTAINED TO DO THE
9 PHOTO LINEUP.

10 Q AND THERE'S SOME WRITING ON ONE PHOTOGRAPH,
11 CAN YOU EXPLAIN THAT?

12 A YES, AFTER THE, AFTER, DURING THE INTERVIEW
13 I SHOWED THE PHOTO LINEUP ONCE HE IDENTIFIED THE PHOTO I
14 HAD HIM WRITE A STATEMENT ON IT AND SIGN IT THAT THIS IS
15 THE ONE HE PICKED OUT. (

16 Q AND THOSE WERE DONE IN YOUR PRESENCE?

17 A YES, IT WAS.

18 MS. ELDER: I'D LIKE TO MOVE THIS IN, YOUR
19 HONOR, STATE'S EXHIBIT 18 FOR THE PURPOSE OF THIS
20 PARTICULAR HEARING AT THIS TIME.

21 MR. RICHARDSON: YOUR HONOR, THIS IS NOT FOR THE
22 TRIAL OF THE CASE, IT'S JUST FOR THIS HEARING; IS THAT
23 CORRECT, YOUR HONOR?

24 MS. ELDER: FOR THE HEARING ONLY.

25 MR. RICHARDSON: ALL RIGHT, SIR. WITH THAT

1 NOTATION, THAT'S CORRECT. WE HAVE NO OBJECTION.

2 THE COURT: VERY WELL.

3 (WHEREUPON, STATE'S EXHIBIT NUMBER 18 ENTERED
4 INTO EVIDENCE FOR THE BIGGERS HEARING.)

5 MS. ELDER: (CONTINUING)

6 Q NOW WHEN YOU PRESENTED THOSE TO JEFFREY
7 BENNETT WERE YA'LL AT A TABLE, TELL ME A LITTLE BIT ABOUT
8 HOW THEY WERE PRESENTED TO HIM?

9 A YEAH, HE WAS SITTING AT A TABLE AND I
10 APPROACHED HIM AND TOLD HIM I HAD A, SOME, A SERIES OF
11 PHOTOS THAT I WANTED TO SHOW HIM AND I TOLD HIM THAT THE
12 SUSPECT MAY OR MAY NOT BE IN THIS PHOTO LINEUP, JUST TO
13 LOOK AT IT AND SEE IF HE COULD IDENTIFY HIM THROUGH THESE
14 SIX PHOTOS WHICH I DID.

15 Q OKAY, DID YOU LAY THEM ALL OUT TOGETHER OR
16 ONE SINGULARLY ONE BY ONE OR WHAT DID YOU DO?

17 A I STARTED LAYING THEM OUT ONE BY ONE ON THE
18 TABLE.

19 Q OKAY, AND DID HE OBSERVE ALL THOSE
20 PHOTOGRAPHS?

21 A HE DID, YES, HE DID, HE OBSERVED ALL OF
22 THEM.

23 Q DID YOU GIVE HIM ANY OTHER INSTRUCTIONS
24 OTHER THAN WHAT YOU'VE JUST INDICATED THAT HE MAY OR MAY
25 NOT BE IN THIS LINEUP?

1 A NO.

2 Q AND HOW DID, DID HE INDICATE TO YOU AT SOME
3 POINT DURING THE COURSE OF VIEWING THOSE PHOTOGRAPHS THAT
4 HE RECOGNIZED THE DEFENDANT?

5 A YES, AS I WAS LAYING THEM OUT, I'M NOT SURE
6 OF THE ORDER, I THINK IT WAS THE THIRD OR FOURTH PICTURE HE
7 DID IDENTIFY HIM BEFORE I FINISHED LAYING THEM OUT, YES,
8 MA'AM.

9 Q OKAY, AND HOW DID HE, HOW DID HE MAKE THAT
10 IDENTIFICATION TO YOU?

11 A HE PUT HIS FINGER ON, ON THE PICTURE AND
12 SAID, THAT'S HIM.

13 Q AND AT THAT TIME WHAT DID YOU INSTRUCT HIM
14 TO DO WHEN HE PUT HIS FINGER ON THE PICTURE?

15 A I TOLD HIM TO CONTINUE LOOKING AT ALL THE
16 PICTURES SO HE COULD LOOK AT THEM ALL AND THEN, AND THEN
17 MAKE SURE THAT'S THE PICTURE THE DEFENDANT, THAT WAS THE
18 ONE HE PICKED OUT, HE DID.

19 Q OKAY, AND THEN AT SOME POINT YOU'VE
20 INDICATED THAT THERE'S SOME WRITING ON THE BOTTOM, DID YOU
21 INSTRUCT HIM AS TO WHAT TO WRITE?

22 A NO, I DIDN'T.

23 Q ALL RIGHT, WHAT DID YOU INSTRUCT HIM TO DO
24 AS FAR AS MAKING SOME TYPE OF WRITING ON THAT PICTURE?

25 A I JUST TOLD HIM TO SIGN IT AND STATE ON

1 THERE THAT THERE IS THE SUBJECT HE SAW THAT NIGHT AT, AT
2 MCCATZ.

3 Q AND THAT'S THE, THAT'S THE STATEMENT THAT
4 HE WROTE?

5 A YES, IT IS.

6 Q AT ANY POINT IN TIME DID YA'LL COERCE HIM
7 OR FORCE HIM OR UNDER THREAT REQUIRE HIM TO MAKE AN
8 IDENTIFICATION?

9 A NO, WE DIDN'T.

10 Q WAS HE THERE VOLUNTARILY GIVING A
11 STATEMENT?

12 A YES, HE WAS.

13 Q DID HE VOLUNTARILY AGREE TO LOOK AT THIS
14 LINEUP?

15 A YES, HE DID.

16 Q AND DO YOU KNOW THE INDIVIDUAL THAT HE
17 PICKED OUT IN THAT LINEUP?

18 A YES, I DO.

19 Q WHO IS THAT?

20 A IT'S HOLLAND, MA'AM, THE DEFENDANT.

21 Q LEMOND HOLLAND?

22 A YES, LEMOND HOLLAND, YES.

23 MS. ELDER: YOUR HONOR, I DON'T HAVE ANY OTHER
24 QUESTIONS.

25 THE COURT: CROSS? LET ME ASK ONE, THIS WRITING

1 WAS NOT ON IT WHEN YOU SHOWED HIM THE PICTURE?

2 THE WITNESS: NO, IT WASN'T, SIR.

3 THE COURT: THIS WAS PLACED ON THERE AFTER HE
4 PICKED THIS PICTURE?

5 THE WITNESS: YES, SIR.

6 THE COURT: AND WHO PLACED THAT WRITING ON IT?

7 THE WITNESS: MR. BENNETT DID.

8 MR. JOHNSON: THANK YOU, YOUR HONOR, PLEASE THE
9 COURT?

10 THE COURT: YES, SIR.

11 CROSS EXAMINATION

12 BY MR. JOHNSON:

13 Q OFFICER SHEETS, WHO ELSE WAS IN THE ROOM
14 WHENEVER YOU MET WITH MR. BENNETT?

15 A LT. REPEC.

16 Q SO JUST THE TWO OF YOU AS FAR AS LAW
17 ENFORCEMENT?

18 A YES.

19 Q TOTAL, IN TOTAL HOW MANY PEOPLE WERE IN
20 THAT ROOM AT THAT TIME?

21 A THREE.

22 Q JUST THREE?

23 A YES.

24 Q AND THERE'S SIX PICTURES ALTOGETHER, RIGHT?

25 A YES, SIR.

1 Q ALL RIGHT, AND I THINK YOU JUST TESTIFIED
2 THAT YOU SHOWED THEM TO HIM INDIVIDUALLY, RIGHT, ONE AT THE
3 TIME?

4 A NO, I WAS LAYING THEM OUT ON THE TABLE.

5 Q OKAY, LAID THEM OUT ON THE TABLE?

6 A YES.

7 Q OKAY, AND HOW MANY PICTURES DID YOU HAVE
8 OUT AT THE TIME HE DESIGNATED THAT CERTAIN PICTURE?

9 A I DON'T KNOW, IT WAS THE THIRD OR FOURTH
10 PICTURE, I'M NOT SURE WHICH ONE IT WAS, BUT IT WASN'T, I
11 KNOW IT WASN'T THE FIRST OR SECOND.

12 Q SO YOU DIDN'T HAVE ALL THE PICTURES OUT AT
13 THE TIME HE IDENTIFIED THAT PICTURE?

14 A NO, I DIDN'T.

15 Q OF THESE PICTURES DOES IT APPEAR THAT
16 STATE'S EXHIBIT NUMBER 18 IS WEARING A DIFFERENT SHIRT FROM
17 EVERYBODY ELSE?

18 A I DON'T KNOW, SIR.

19 Q TAKE A MINUTE AND LOOK AT THEM?

20 A ALL OF THEM HAVE DIFFERENT SHIRTS, YES.

21 Q OKAY, WHAT OTHER TYPES OF SHIRTS DO YOU
22 SEE? DON'T YOU SEE A BLACK AND WHITE SHIRTS?

23 A YES.

24 Q AND HIS SHIRT IS KIND OF A PLAID SHIRT?

25 A YES.

1 Q STRIPES?

2 A YES.

3 Q OKAY, IN THIS PICTURE HERE WHAT COLOR SHIRT
4 IS HE WEARING?

5 A IT LOOKS TO BE WHITE.

6 Q ALL RIGHT, IS HE SMILING IN THAT PICTURE?

7 A YES, SIR.

8 Q IS ANYBODY SMILING IN THE REST OF THOSE
9 PICTURES?

10 A NO, SIR.

11 Q WHAT ALL DID YOU SAY TO MR. BENNETT
12 WHENEVER YOU WERE CONDUCTING YOUR INTERVIEW?

13 A YOU MEAN DURING THE WHOLE COURSE OF THE
14 INTERVIEW?

15 Q WHAT YOU CAN REMEMBER?

16 A JUST ABOUT WHAT HAPPENED AND HE ALSO WROTE
17 IT DOWN IN HIS STATEMENT IN REFERENCE TO WHAT WE TALKED
18 ABOUT.

19 MR. JOHNSON: JUST ONE MOMENT, YOUR HONOR?

20 THE COURT: YES, SIR.

21 MR. JOHNSON: (CONTINUING)

22 Q IS THAT THE PICTURE I JUST HAD YOU IDENTIFY
23 AS THAT MAN SMILING?

24 A YES.

25 MR. JOHNSON: YOUR HONOR, I MOVE JUST TO MARK

1 THIS ONE FOR IDENTIFICATION?

2 THE COURT: ONE PICTURE FOR IDENTIFICATION?

3 MR. JOHNSON: JUST THE FIRST ONE MARKED. THE
4 REST ONES ARE NOT.

5 MS. ELDER: THEY'RE MARKED AS A UNIT, YOUR
6 HONOR.

7 MR. JOHNSON: RIGHT, JUST TO IDENTIFY THIS ONE
8 AS SAID THE GUY WAS SMILING IN THE PICTURE.

9 Q YOU GOT A PEN ON YOU?

10 A NO.

11 MR. HUMPHRIES: YOU CAN'T WRITE ON THE ORIGINAL.

12 MR. JOHNSON: IS THAT ALL YOU GOT?

13 MR. HUMPHRIES: THAT'S THE ORIGINAL.

14 MS. ELDER: THAT'S THE ORIGINAL.

15 MR. JOHNSON: MAY I HAVE A MOMENT, YOUR HONOR?

16 THE COURT: YES. I'M NOT SURE I UNDERSTAND WHAT
17 YOU'RE DOING?

18 MR. JOHNSON: ONE SECOND, YOUR HONOR.

19 THE COURT: THERE IS ONE EXHIBIT THERE.

20 MR. JOHNSON: THAT'S ALL THE QUESTIONS I HAVE AT
21 THIS TIME, YOUR HONOR.

22 THE COURT: REDIRECT?

23 MS. ELDER: NO OTHER QUESTIONS, YOUR HONOR.

24 THE COURT: THANK YOU, SIR, YOU MAY STEP DOWN.

25 A THANK YOU.

1 MS. ELDER: THAT WOULD BE ALL THE STATE WOULD
2 PRESENT IN REGARDS TO THE BIGGERS HEARING ON THE LINEUP,
3 YOUR HONOR.

4 MR. RICHARDSON: YOUR HONOR, OUR OBJECTION TO
5 THE LINEUP INFERENCE, PARTICULARLY THE PICTURE THAT HAS THE
6 STATEMENT WRITTEN ON THE BOTTOM OF THE PICTURE, WE SAY
7 THAT'S PREJUDICIAL AND THAT HE CAN TESTIFY TO IT BUT TO
8 PRESENT THAT TO THE JURY IN THAT MANNER WE SAY IT'S
9 PREJUDICIAL, SELF SERVING.

10 THE COURT: IS MR. BENNETT GOING TO TAKE THE
11 STAND?

12 MS. ELDER: YES, SIR, HE'S GOING TO OBVIOUSLY
13 TESTIFY A LOT, THAT'S WHY WE'RE HAVING THE HEARING.

14 THE COURT: I OVERRULE YOUR OBJECTION.

15 MR. RICHARDSON: THANK YOU.

16 THE COURT: ANYTHING ELSE?

17 MS. ELDER: NOT FROM THE STATE, YOUR HONOR.

18 THE COURT: I THINK THEY'VE MADE A PRIMA FACIA
19 SHOWING THAT SUBJECT TO THEY'RE OFFERING IT IN THE TRIAL OF
20 THE CASE IN THE CASE IN CHIEF. WE'LL MAKE THE NECESSARY
21 RULING THEN. BRING THE JURY BACK.

22 MR. RICHARDSON: AND OUR OBJECTION IS NOTED FOR
23 THE RECORD?

24 THE COURT: YES, SIR.

25 MR. RICHARDSON: THANK YOU, YOUR HONOR.

1 THE COURT: BRING THE JURY BACK, PLEASE.

2 (WHEREUPON, THE JURY RETURNED TO THE COURTROOM
3 AT 2:55 P.M.)

4 THE COURT: ALL RIGHT, CALL YOUR NEXT WITNESS.

5 MS. ELDER: THANK YOU, YOUR HONOR, THE STATE
6 WOULD CALL SGT. SHEETS.

7 PAUL SHEETS

8 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

9 MADAM CLERK: STATE YOUR FULL NAME AND SPELL
10 YOUR LAST NAME FOR THE COURT?

11 THE WITNESS: PAUL EUGENE SHEETS, S-H-E-E-T-S.

12 DIRECT EXAMINATION

13 BY MS. ELDER:

14 Q SGT. SHEETS, WHERE YOU EMPLOYED?

15 A THE CITY OF NORTH MYRTLE BEACH DEPARTMENT
16 OF PUBLIC SAFETY.

17 Q IN WHAT CAPACITY?

18 A SERGEANT OVER INVESTIGATIONS.

19 Q AND IN DECEMBER 30TH, 2005, WERE YOU ALSO
20 EMPLOYED THERE?

21 A YES, I WAS.

22 Q AND WHAT WERE SOME OF YOUR DUTIES AT THE
23 TIME?

24 A I WAS SERGEANT OVER INVESTIGATIONS AND
25 NARCOTICS.

1 Q DID YOU HAVE AN OPPORTUNITY TO BE INVOLVED
2 IN THE INVESTIGATION SURROUNDING THE DEATH OF BRANDT
3 KOEHLER?

4 A YES, MA'AM.

5 Q AND DID YOU, DURING THE COURSE OF THAT
6 INVESTIGATION DID YOU INTERVIEW WITNESSES?

7 A YES, I DID.

8 Q DID YOU HAVE AN OPPORTUNITY TO INTERVIEW AN
9 INDIVIDUAL NAMED JEFFREY BENNICK?

10 A YES, MA'AM.

11 Q DURING THAT COURSE OF THAT INTERVIEW IN
12 YOUR INVESTIGATION DID YOU PREPARE ANY TYPE OF
13 IDENTIFICATION OR PHOTO LINEUP ---

14 A YES, I DID.

15 Q --- FOR HIM TO LOOK AT?

16 A YES, I DID.

17 Q AND WHAT LED YOU TO CREATE THAT LINEUP?

18 A I WAS GIVEN THE NAME FROM THE LEAD
19 INVESTIGATOR AND FROM THAT I OBTAINED PHOTO OF HIM AND ALSO
20 SOME OTHERS TO DO THE LINEUP.

21 Q AND WHEN WE'RE TALKING ABOUT HIM WHO ARE WE
22 TALKING ABOUT?

23 A THE DEFENDANT HOLLAND.

24 Q SO YOU OBTAINED A PHOTOGRAPH OF THE
25 DEFENDANT LEMOND HOLLAND?

1 A YES, I DID.

2 Q AND WHO DID YOU OBTAIN THAT PHOTOGRAPH
3 FROM?

4 A FROM THE DMV ON THE COMPUTER, YES, MA'AM.

5 Q OKAY, AND DID YOU OBTAIN OTHER PHOTOGRAPHS
6 TO GROUP WITH THAT IN THAT GROUP OF PHOTOGRAPHS?

7 A YES, I DID.

8 Q AND WHERE DID YOU COLLECT THOSE OTHERS
9 FROM?

10 A THE SAME WEB SITE IS DMV.

11 Q OKAY, AND WHEN YOU'RE PREPARING A LINEUP
12 WHAT KIND OF THINGS DO YOU LOOK AT IN GATHERING PHOTOS TO
13 MAKE UP THAT LINEUP?

14 A SIMILAR AREAS OF THE FACE, THE HAIR, JUST
15 DIFFERENT THINGS ON THE FACIAL.

16 Q WILL YOU TAKE A LOOK AT WHAT'S BEEN MARKED
17 STATE'S IDENTIFICATION NUMBER 18?

18 A YES.

19 Q AND DO YOU RECOGNIZE THAT?

20 A YES, YES, I DO.

21 Q AND WHAT IS THAT?

22 A THIS IS THE LINEUP THAT I DID ON, ON THAT
23 DATE DECEMBER 30TH.

24 Q AND DID YOU, DID YOU PREPARE, ARE THOSE THE
25 PHOTOGRAPHS THAT YOU PREPARED AND COLLECTED?

1 A YES.

2 Q ARE THOSE ALSO THE PHOTOGRAPHS THAT WERE
3 SHOWN TO YOUR WITNESS JEFFREY BENNICK?

4 A YES.

5 Q NOW ONCE YOU COLLECTED WHAT'S BEEN MARKED
6 AS IDENTIFICATION STATE'S EXHIBIT 18 WHAT DID YOU DO AT
7 THAT POINT?

8 A WENT BACK IN INTERVIEW ROOM WHERE MR.
9 BENNICK WAS AND TOLD HIM I HAD SOME SERIES OF PHOTOS I
10 WANTED TO SHOW HIM, TOLD HIM THE GENTLEMAN FOR HIM TO
11 IDENTIFY MAY OR NOT BE IN THIS PHOTO LINEUP AND I PROCEEDED
12 TO SHOW HIM THE LINEUP.

13 Q OKAY, AND LET ME ASK A LITTLE BIT ABOUT THE
14 ROOM, WAS THERE, WHO ELSE WAS IN THE ROOM WITH YOU WHEN YOU
15 WERE SHOWING THIS LINEUP?

16 A JUST ONE OTHER PERSON AND IT WAS LT. REPEC.

17 Q OKAY, OTHER LAW ENFORCEMENT?

18 A YES.

19 Q OKAY, AND MR. BENNICK?

20 A YES.

21 Q OKAY, AND DURING THE COURSE OF YOUR
22 INTERVIEW WAS MR. BENNICK THERE UNDER DURESS OR COERCION
23 FROM THE POLICE DEPARTMENT?

24 A NO.

25 Q DID HE VOLUNTARILY COME TO THE POLICE

1 DEPARTMENT?

2 A YES.

3 Q AND GIVE A STATEMENT?

4 A YES.

5 Q DID HE VOLUNTARILY AGREE TO LOOK AT THE
6 PHOTOGRAPHS YOU PRESENTED TO HIM?

7 A YES, HE DID.

8 Q AND WHEN YOU PRESENTED HIM, EXPLAIN TO ME
9 THESE ARE SIX, WHAT IT LOOKS LIKE SIX SEPARATE SHEETS OF
10 PAPER; IS THAT CORRECT?

11 A YES, MA'AM.

12 Q HOW DID YOU PRESENT THOSE TO YOUR WITNESS
13 MR BENNICK?

14 A I TOLD HIM I WAS GOING TO LAY THEM OUT ON
15 THE TABLE ONE AT A TIME AND WANTED HIM TO LOOK AT ALL THE
16 PICTURES AND MAKE THE DECISION FROM THAT.

17 A . . . OKAY, AND DURING THE COURSE OF YOU LAYING
18 THEM OUT DID YOU POINT, INDICATE, DO ANYTHING THAT WOULD
19 HAVE CAUSED MR. BENNICK TO ALERT ON A PARTICULAR
20 PHOTOGRAPH?

21 A NO, I DIDN'T.

22 Q DID YOU TELL HIM THAT THE SUSPECT WAS IN
23 THAT GROUP OF PHOTOGRAPHS?

24 A NO, I DIDN'T.

25 Q AND AS YOU WERE LAYING THEM OUT DID IN FACT

1 THE WITNESS MAKE AN IDENTIFICATION?

2 A YES, MA'AM, HE DID.

3 Q AND HOW DID HE DO THAT?

4 A HE, HE POINTED AT IT AND, AND SAID, THAT'S
5 HIM BEFORE I FINISHED LAYING THEM OUT.

6 Q BEFORE YOU FINISHED?

7 A YES.

8 Q WHAT DID YOU INSTRUCT HIM TO DO AT THAT
9 POINT?

10 A TO CONTINUE LOOK AT ALL THE PICTURES TO
11 MAKE A DECISION AT THE END.

12 Q OKAY, AND DID HE IN FACT DO THAT?

13 A YES.

14 Q AND DID HE RETURN TO THE SAME PHOTOGRAPH HE
15 HAD INDICATED TO YOU PREVIOUSLY?

16 A YES.

17 Q AND WHEN HE IDENTIFIED THAT PARTICULAR
18 PHOTOGRAPH DID YOU GIVE HIM ANY INSTRUCTION HOW AS TO NOTE
19 IT OR DOCUMENT IT IN SOME WAY, SHAPE OR FORM?

20 A YES, I TOLD HIM TO SIGN IT AND ALSO DATE IT
21 AND THEN INDICATE WHO THIS PERSON WAS THAT HE IDENTIFIED.

22 Q OKAY, AND DID HE IN FACT DO THAT?

23 A YES, HE DID.

24 Q AND IS THAT INDICATED OR REPRESENTED ON
25 STATE'S IDENTIFICATION NUMBER 18?

1 A YES, IT IS.

2 Q AND WHOSE HANDWRITING IS THAT ON THERE?

3 A MR. BENNICK'S HANDWRITING.

4 Q WAS THAT DONE IN YOUR PRESENCE?

5 A YES, IT WAS.

6 Q AND IS THAT ACTUALLY THE ORIGINAL THAT MR.
7 BENNICK SIGNED?

8 A YES, IT IS.

9 MS. ELDER: YOUR HONOR, I'D LIKE TO ENTER, MOVE
10 STATE'S EXHIBIT 18 INTO EVIDENCE AT THIS TIME.

11 MR. RICHARDSON: AS NOTED, YOUR HONOR.

12 THE COURT: VERY WELL, YOUR OBJECTION IS
13 OVERRULED.

14 (WHEREUPON, STATE'S EXHIBIT NUMBER 18 ENTERED
15 INTO EVIDENCE.)

16 MS. ELDER: (CONTINUING)

17 Q AND IF YOU'LL LOOK AGAIN AT STATE'S 18 DO
18 YOU KNOW THE INDIVIDUAL THAT MR. BENNICK IDENTIFIED THROUGH
19 THAT LINEUP?

20 A YES, I DO.

21 Q AND WHO IS THAT PERSON HE IDENTIFIED?

22 A MR. LEMOND HOLLAND.

23 Q AND WHAT WAS THE NOTATION HE WROTE AT THE
24 BOTTOM OF MR. HOLLAND'S PHOTOGRAPH?

25 A THIS IS THE MAN I SAW SHOOT AND KILL A MAN

1 AT MCCATZ ON 12-30-05 AT APPROXIMATELY 4:15 A.M. AND IT'S
2 SIGNED JEFFREY D. BENNICK.

3 Q NOW LET ME ASK YOU SINCE YOU WERE OBSERVING
4 HIS IDENTIFICATION, DID YOU MAKE ANY NOTATIONS OR DID YOU
5 NOTICE IF HE WAS, DID YOU ASK HIM ABOUT HOW SURE HE WAS?

6 A WELL HE, NO, I ---

7 MR. RICHARDSON: I OBJECT TO THAT, YOUR HONOR.
8 I THINK THAT THEY'VE GOT IN THE IDENTIFICATION BUT I THINK
9 BEYOND THAT THE CONVERSATION THEY HAD BETWEEN THEM THE
10 WITNESS IS GOING TO TESTIFY HE CAN TEST -- IT WOULD BE
11 HEARSAY, YOUR HONOR.

12 THE COURT: WHAT'S YOUR QUESTION?

13 MS. ELDER: MY QUESTION WAS, DID HE ASK THE
14 WITNESS IF HE WAS SURE ABOUT THAT IDENTIFICATION?

15 ~~THE COURT: I OVERRULE YOUR OBJECTION.~~

16 THE WITNESS: (CONTINUING)

17 A YES.

18 Q OKAY, DID HE APPEAR FROM YOUR OBSERVATIONS
19 TO HAVE ANY DIFFICULTY PICKING OUT AN INDIVIDUAL OF THAT
20 LINEUP?

21 A NO, HE DIDN'T HAVE ANY TROUBLE AT ALL.

22 Q AND DID IT TAKE HIM A VERY LONG PERIOD OF
23 TIME TO IDENTIFY THAT PHOTOGRAPH?

24 A NO, ONCE THE, ONCE I LAID THAT PHOTOGRAPH
25 DOWN HE IMMEDIATELY FOCUSED ON THAT PHOTOGRAPH. AS I WAS

1 LAYING THE OTHER ONES DOWN HE WAS OBVIOUS THAT HE STOPPED
2 AT THAT ONE.

3 Q OKAY, WAS THAT THE FIRST ONE YOU LAID DOWN?

4 A NO, IT WASN'T.

5 Q DO YOU RECALL IN SEQUENCE?

6 A IT WASN'T THE FIRST OR SECOND, IT WAS MAYBE
7 THIRD, FOURTH OR FIFTH, I'M NOT SURE WHICH ONE BUT I KNOW
8 THERE WAS SOME AFTER, I DID LAY DOWN SOME AFTER, AFTER HE
9 HAD POINTED AT THIS ONE..

10 Q AND SOME BEFORE?

11 A YES.

12 MS. ELDER: THE STATE HAS NO FURTHER QUESTIONS,
13 YOUR HONOR.

14 THE COURT: CROSS?

15 MR. RICHARDSON: I DON'T HAVE ANY QUESTIONS OF
16 THIS WITNESS.

17 THE COURT: THANK YOU, YOU MAY STEP DOWN.

18 THE WITNESS: THANK YOU.

19 MS. ELDER: WE WOULD LIKE THIS WITNESS SUBJECT
20 TO RECALL, YOUR HONOR.

21 THE COURT: VERY WELL.

22 JEFFREY BENNICK

23 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

24 MADAM CLERK: STATE YOUR FULL NAME AND SPELL
25 YOUR LAST NAME FOR THE COURT.

1 THE WITNESS: MY NAME IS JEFFREY BENNICK, B-E-N-
2 N-I-C-K, JEFFREY DEWAYNE BENNICK.

3 DIRECT EXAMINATION

4 BY MS. ELDER:

5 Q MR. BENNICK, YOU LIVE IN THE HORRY COUNTY
6 AREA?

7 A YES, MA'AM.

8 Q AND ARE YOU EMPLOYED?

9 A YES, MA'AM.

10 Q IN WHAT CAPACITY?

11 A I'M A BARTENDER FOR CAPTAIN POO'S IN NORTH
12 MYRTLE BEACH.

13 Q OKAY, AND WERE YOU PREVIOUSLY, WHERE WERE
14 YOU EMPLOYED ON DECEMBER 30TH, 2005?

15 A ~~FOR MCCATZ COFFEE AND TAVERN IN NORTH~~
16 MYRTLE BEACH.

17 Q AND IN WHAT CAPACITY WERE YOU EMPLOYED
18 THERE, WHAT DID YOU DO THERE?

19 A I WAS A MANAGER AND A BARTENDER.

20 Q OKAY, NOW I WANT TO TAKE YOU STRAIGHT BACK
21 TO THAT EVENING, DO YOU RECALL THAT NIGHT THAT, THAT I'M
22 TALKING ABOUT?

23 A YES, MA'AM, I DO.

24 Q OKAY, WHY DON'T YOU START FROM THE
25 BEGINNING, WHAT TIME DID YOU ARRIVE AT MCCATZ?

1 A I ARRIVED AROUND 12:15, 12:20 WHICH IS ---

2 Q IS THAT WHAT TIME YOU, DID YOU COME THERE
3 TO WORK, WERE YOU WORKING THAT NIGHT?

4 A YES, MA'AM, I CAME ON TO WORK, YES, MA'AM.

5 Q OKAY, IS THAT A NORMAL TIME FOR YOU TO COME
6 TO WORK?

7 A YES, MA'AM.

8 Q OKAY, WHAT DID YOU DO WHEN YOU ARRIVED
9 THERE?

10 A I DID MY INVENTORY AND BASICALLY JUST
11 CLEANED UP FROM THE EARLY IN THE NIGHT AND CHECKED TO MAKE
12 SURE EVERYTHING WAS IN ORDER.

13 Q OKAY, AND AS YOU WERE CHECKING AROUND DID
14 YOU NOTICE THE PATRONS IN THE BAR?

15 A YES, MA'AM.

16 Q OKAY, AND TELL ME WHAT, WHAT YOUR
17 OBSERVATIONS WERE AT THAT TIME?

18 A THERE WAS MAYBE 15, 20 PEOPLE IN THE BAR, I
19 WALKED AROUND CLEANED UP A LITTLE BIT, KIND OF SAW WHO WAS
20 IN THE BAR AND THEN WENT BEHIND THE BAR AND CONTINUED MY
21 WORK.

22 Q OKAY, AT SOME POINT IN TIME DURING THE
23 COURSE OF THAT EVENING WERE YOU ALERTED TO A POTENTIAL
24 VERBAL ALTERCATION AT THE BAR?

25 A YES, YES, MA'AM, I WAS.

1 Q AND HOW WERE YOU ALERTED TO THAT?

2 A MY CO-WORKER, I WAS CLEANING UP IN THE POOL
3 ROOM AREA AND MY CO-WORKER TOLD ME THERE WAS AN ARGUMENT
4 GOING ON NEAR THE MEN'S BATHROOM.

5 Q OKAY, WHAT KIND OF ARGUMENT?

6 A HE JUST POINTED THAT, POINTED TO ME AND
7 SAID THAT LOOKED THERE WAS LITTLE ARGUMENT.

8 Q OKAY, WAS THERE A PHYSICAL FIGHT?

9 A I NEVER SAW ANY PUNCHES OR ANYTHING THROWN,
10 NO MA'AM.

11 Q OKAY.

12 A OR NO PUSHING OR SHOVING OR ANYTHING LIKE
13 THAT.

14 Q SO NO CONTACT?

15 A ~~NO CONTACT, NO MA'AM.~~

16 Q WHAT DID YOU DO WHEN THAT WAS BROUGHT TO
17 YOUR ATTENTION?

18 A I WALKED UP TO WHERE THE ARGUMENT WAS GOING
19 ON AND AT THAT TIME THERE WERE SEVERAL OTHER CUSTOMERS THAT
20 HAD KIND OF STEPPED IN ALSO; AND BASICALLY EVERYONE WAS
21 JUST TELLING THE TWO PEOPLE THAT WERE ARGUING TO RELAX AND,
22 YOU KNOW, HAVE, HAVE A GOOD TIME, DON'T TRY TO ARGUE AND
23 FIGHT AND FUSS.

24 Q OKAY, SO THERE WERE SOME PEOPLE THAT WERE
25 TRYING TO INTERVENE?

1 A YES, MA'AM.

2 Q AND DID YOU KNOW ANY OF THOSE PEOPLE THAT
3 WERE TRYING TO HELP?

4 A I KNEW TWO OF THE PEOPLE THAT WERE TRYING
5 TO HELP, A GENTLEMAN NAMED RAPHAEL AND A GENTLEMAN NAMED
6 CHRIS.

7 Q OKAY, NOW DID, WHAT HAPPENED WHEN YOU
8 WALKED OVER THERE?

9 A WHEN I WALKED OVER THEY HAD PRETTY MUCH
10 ALREADY GOT THEM TO QUIT ARGUING WITH ONE ANOTHER. I COULD
11 STILL HEAR ONE OF THE GUYS KIND OF MUMBLING AND TALKING A
12 LITTLE BIT BUT THE, ONE OF THE GENTLEMAN THAT WAS ARGUING
13 HE WAS WITH A YOUNG LADY AND THEY HAD ACTUALLY PAID THEIR
14 BAR TAB, THEY WERE LEAVING. SO WE JUST KIND OF STOOD AND
15 WATCHED AS THEY LEFT AND TRIED TO MAKE SURE THAT NO OTHER
16 ARGUMENT STARTED.

17 Q AND THE, THE INDIVIDUAL THAT YOU INDICATED
18 THAT WAS WITH THE YOUNG LADY --

19 A YES, MA'AM.

20 Q WAS HE A BLACK MALE OR A WHITE MALE?

21 A HE WAS A WHITE MALE.

22 Q OKAY, AND THE INDIVIDUAL THAT HE WAS
23 ARGUING WITH?

24 A HE WAS A BLACK MALE.

25 Q A BLACK MALE, OKAY. NOW AFTER THIS VERBAL

1 DISPUTE DISSIPATED WHERE DID THE WHITE MALE AND FEMALE GO?

2 A THE WHITE MALE AND THE FEMALE WENT TO THE
3 SOUTH SIDE DOOR; THERE'S TWO DOORS. THEY WENT TO THE SOUTH
4 SIDE DOOR AND THEY STOOD FOR A SECOND AND TALKED MAYBE FOR
5 MAYBE 20, 25 SECONDS, AND THE BLACK MALE THAT WAS ARGUING
6 WITH THEM WENT TO THE NORTH SIDE DOOR AND STOOD AND WATCHED
7 THEM, WAITING FOR THEM TO LEAVE I GUESS, AND KIND OF SORT
8 OF AGITATED, WALKED OUT THE DOOR ONE TIME AND THEN CAME
9 RIGHT BACK IN AND --

10 Q WAS HE, WAS THE BLACK MALE WATCHING HIM THE
11 WHOLE TIME?

12 A THE BLACK MALE WAS WATCHING THE COUPLE THE
13 WHOLE TIME, YES, MA'AM.

14 Q OKAY, NOW WAS THE COUPLE WERE THEY DOING

~~15 ANYTHING AT THAT POINT TO CAUSE ANY AGGRAVATION TO THAT~~

16 OTHER INDIVIDUAL?

17 A NO MA'AM.

18 Q ALL RIGHT, SO THEY WEREN'T MOUTHING OFF OR
19 ANYTHING?

20 A NO MA'AM.

21 Q NOW DID THE COUPLE AT SOME POINT IN TIME
22 EXIT THE BAR?

23 A YES, THEY DID.

24 Q AND WHAT DID THE OTHER INDIVIDUAL HE WAS
25 ARGUING WITH DO?

1 A THE OTHER INDIVIDUAL AS SOON AS THEY LEFT
2 THE BAR HE IMMEDIATELY WALKED OUT THE NORTH SIDE DOOR AND I
3 LOST SIGHT OF HIM AT THAT POINT.

4 Q OKAY, WHAT DID YOU DO?

5 A I, WHEN I SAW HIM GO OUT THE NORTH SIDE
6 DOOR I WAS AFRAID THAT MAYBE THEY WOULD BE, THEY WOULD
7 CIRCLE AROUND AND SEE EACH OTHER IN THE PARKING LOT. SO
8 MYSELF AND A GENTLEMAN NAMED RAPHAEL WE BOTH WENT OUT THE
9 SOUTH SIDE DOOR TO THE DECK AREA TO MAKE SURE THAT
10 HOPEFULLY THAT THERE WASN'T ANOTHER ARGUMENT.

11 Q OKAY, LET ME GO BACK AND ASK, DID YOU KNOW
12 THE WHITE MALE AND THE FEMALE?

13 A I DID NOT.

14 Q OKAY, WHAT ABOUT THE BLACK MALE, DID YOU
15 KNOW HIM?

16 A I HAD SEEN HIM MAYBE THREE OR FOUR TIMES.

17 Q DID YOU KNOW HIM BY NAME OR ANYTHING LIKE
18 THAT?

19 A I DIDN'T KNOW HIM BY NAME, I JUST, I HAD
20 SEEN HIM IN THERE SEVERAL TIMES.

21 Q OKAY, NOW WHAT DID YOU DO AFTER, YOU SAID
22 BOTH PARTIES EXITED?

23 A YES, MA'AM.

24 Q YOU AND RAPHAEL WENT OUT?

25 A YES, MA'AM.

1 Q WHICH DOOR DID YOU GO OUT?

2 A I WENT OUT THE SOUTH SIDE DOOR.

3 Q IS THAT THE ONE THE COUPLE WENT OUT?

4 A YES, MA'AM.

5 Q OKAY, AND WAS MR. WALKE, WAS RAPHAEL WITH
6 YOU AT THE TIME?

7 A YES, HE WAS.

8 Q DID ANY OTHER INDIVIDUALS, CHRIS THAT YOU
9 MENTIONED GO OUT WITH YOU?

10 A NO MA'AM.

11 Q OKAY, SO IT WAS JUST THE TWO OF YOU?

12 A YES, MA'AM.

13 Q TELL ME ABOUT WHAT YOU OBSERVED WHEN YOU
14 WALKED OUT?

15 A ~~WHEN I WALKED OUT THE WHITE MALE THEY WERE~~
16 WALKING GETTING, GETTING READY TO GET IN THEIR VEHICLE AND
17 HE ACTUALLY TURNED AROUND AND I DON'T KNOW IF HE THOUGHT
18 THAT WE WERE WALKING OUTSIDE TO SAY SOMETHING TO HIM, HE
19 TURNED AROUND AND PULLED HIS SHIRT OFF. AT THAT MOMENT I
20 KIND OF LOOKED AT HIM AND SAID, YOU KNOW, GET IN YOUR CAR.
21 IT'S OKAY, NOBODY IS GOING, YOU KNOW, GO AHEAD. RAPHAEL
22 HAD STEPPED DOWN THE HANDICAP RAMP. HE IS DOWN KIND OF AT
23 THE ANGLE OF THE BUILDING. AT THAT TIME HE, I SAW HIM
24 LOOKING AT SOMEBODY AND SAYING DON'T COME AROUND HERE.

25 MR. RICHARDSON: I OBJECT TO WHAT HE WOULD HAVE

1 SAID, YOUR HONOR.

2 MS. ELDER: (CONTINUING)

3 Q JUST WHAT YOU OBSERVED, PLEASE.

4 A YES, MA'AM. WHEN I OBSERVED THE BLACK MALE
5 COME AROUND THE SIDE OF THE BUILDING AND RUN TO THE
6 PASSENGER SIDE OF THE CAR AS THE CAR WAS EXITED THE PARKING
7 LOT.

8 Q OF WHOSE CAR?

9 A THE BLACK FEMALE WAS DRIVING A CAR AND THE
10 WHITE MALE WAS IN THE PASSENGER SIDE.

11 Q OKAY.

12 A BLACK MALE RAN AROUND TO THE PASSENGER SIDE
13 OF THE CAR STARTED BANGING ON THE WINDOW REAL HARD. THE
14 FEMALE STOPPED THE VEHICLE, GOT OUT OF THE CAR, WALKED
15 AROUND, TRIED TO PUSH HIM AWAY FROM THE CAR, TOLD HIM NOT
16 TO HIT HER CAR, TO LEAVE THE CAR ALONE. HE WAS GRABBING A
17 HOLD OF THE DOOR HANDLE TRYING TO OPEN THE PASSENGER SIDE
18 DOOR.

19 Q WHO, WHEN YOU SAY HE, WHO WAS THAT?

20 A THE BLACK MALE.

21 Q OKAY.

22 A HE WAS JERKING ON THE CAR DOOR. I DON'T
23 KNOW IF THE DOOR WAS LOCKED AND HE WAS, OR HE WAS MISSING
24 THE HANDLE OR WHAT, BUT HE WAS GRABBING IT TRYING TO JERK
25 THE DOOR OPEN. THE DOOR OPENED UP AND, I WON'T SAY, HE

1 DIDN'T LUNGE INTO THE CAR, BUT HE STEPPED INTO THE, TO THE
2 DOORWAY OF THE CAR. THE WHITE MALE SPUN AROUND OUT OF THE
3 PASSENGER SIDE AND THEY KIND OF LOCKED UP WITH EACH OTHER,
4 GRABBED A HOLD OF EACH SHIRTS OR JACKET, NOT SHIRT, BUT THE
5 WHITE MALE HAD A HOLD OF THE BLACK MALE'S JACKET AND SHIRT
6 AND THE BLACK MALE HAD A HOLD OF THE WHITE MALE'S NECK AND
7 THEY WOULD KIND OF GRASP EACH OTHER.

8 Q OKAY, WHAT HAPPENED NEXT?

9 A THEY SORT OF WRESTLED WITH ONE ANOTHER
10 ABOUT 15 OR 20 FEET FROM THE BACK OF THE CAR AND WITHIN
11 ABOUT SEVEN SECONDS OF THAT HAPPENING A GUNSHOT WENT OFF
12 AND ABOUT THREE SECONDS AFTER THAT A SECOND GUNSHOT WENT
13 OFF AND ABOUT THREE SECONDS AFTER THAT THE THIRD GUNSHOT
14 WENT OFF AND THE WHITE MALE FELL TO HIS BACK.

15 ~~AT THAT POINT THE BLACK MALE RAN AROUND TO THE~~
16 BACK OF THE BUILDING, HOPPED INTO A VEHICLE AND SPED OFF.

17 Q NOW I WANT TO GO BACK AND TAKE YOUR STORY A
18 LITTLE BIT AT A TIME.

19 A YES, MA'AM.

20 Q WHEN YOU AND MR. WALKE OR RAPHAEL WALKED
21 OUT WERE EITHER OF YOU, DID EITHER OF YOU SAY ANYTHING
22 AGGRESSIVE TO ALTERCATE, OR TRY TO ALTERCATION WITH THE
23 MALE AND THE FEMALE?

24 A NO MA'AM.

25 Q OKAY, AND AT THAT POINT IN TIME WHEN YOU

1 WALKED OUT WAS THE BLACK MALE HE HAD BEEN FIGHTING WITH IN
2 THAT VICINITY IN YOUR VISUAL VICINITY?

3 A I COULDN'T SEE HIM AT THAT POINT. I COULD
4 SEE HIM ABOUT FIVE OR SIX SECONDS LATER HE CAME AROUND THE
5 CORNER.

6 Q OKAY, SO WHEN BRANDT KOEHLER TOOK OFF HIS
7 SHIRT HE WAS DIRECTING YOU AND RAPHAEL?

8 A YES, MA'AM.

9 Q OKAY, AND AFTER HE TOOK OFF HIS SHIRT DID
10 ANYBODY FIGHT WITH HIM AT THAT POINT?

11 A NO ONE, NO MA'AM.

12 Q OKAY, AND DID HE GET IN THE CAR?

13 A YES, MA'AM, HE DID.

14 Q NOW WHEN YOU FIRST OBSERVED THE DEFENDANT
15 COMING FROM AROUND THE BAR, FROM BEHIND THE BAR, YOU
16 INDICATED THAT HE WENT UP TO THE PASSENGER SIDE WINDOW?

17 A YES, MA'AM.

18 Q AND HOW, YOU SAID, WHAT WAS HE DOING WHEN
19 HE APPROACHED THE PASSENGER SIDE?

20 THE COURT: WHEN HE WAS COMING WHERE?

21 MS. ELDER: FROM BEHIND THE BAR, THE BUILDING.

22 THE COURT: THE BAR OR THE BUILDING?

23 MS. ELDER: THE BUILDING, I APOLOGIZE.

24 Q HE WAS, YA'LL WERE OUTSIDE THE BAR?

25 A YES, MA'AM.

1 Q OKAY.

2 A RAPHAEL ACTUALLY TRIED TO STOP HIM FROM ---

3 MR. RICHARDSON: I'D OBJECT, YOUR HONOR, UNLESS
4 HE SAW IT AND HEARD IT.

5 A I DID SEE RAPHAEL, AT THIS POINT I HAD A
6 VANTAGE POINT WHERE I WAS ABLE TO SEE RAPHAEL TRY TO ASK
7 THE GENTLEMAN NOT TO GO TOWARDS THE CAR.

8 Q OKAY, BUT DID HE GO TOWARDS THE CAR?

9 A HE ACTUALLY KIND OF PUSHED RAPHAEL AWAY AND
10 TROTTED TO THE CAR.

11 Q OKAY, AND AS HE WAS TROTTING TO THE CAR
12 WHAT DID HE DO WHEN HE GOT THERE?

13 A HE RAN DIRECTLY TO THE PASSENGER SIDE DOOR
14 AND STARTED BANGING ON THE PASSENGER SIDE OF THE WINDOW AND
15 TRYING TO OPEN THE PASSENGER SIDE DOOR.

16 Q AND YOU SAID HE WAS BANGING ON THE WINDOW,
17 HOW, HOW DID YOU KNOW, WHAT DID IT SOUND LIKE?

18 A SOUNDED LIKE, ALMOST SOUNDED LIKE IT,
19 SOUNDED LIKE METAL HITTING, HITTING GLASS IS WHAT IT
20 SOUNDED LIKE.

21 Q OKAY, AND THE NEXT THING YOU INDICATED YOU
22 SAID HE, WHO OPENED THE DOOR?

23 A I'M NOT SURE EXACTLY IF THE MALE OPENED THE
24 DOOR FROM THE INSIDE OR IF HE ACTUALLY WAS ABLE TO GET A
25 GRIP ON THE HANDLE AND OPEN IT. THE FEMALE WAS TRYING TO

1 PUSH HIM AWAY FROM THE CAR. HE WAS TRYING TO SNATCH THE --

2 Q HOW COULD YOU TELL THAT THE DEFENDANT WAS
3 TRYING TO OPEN THE CAR DOOR?

4 A CAUSE I HAD WALKED AROUND TO THE BACK OF
5 THE CAR I WOULD EASILY SEE HE WAS TRYING TO SNATCH THE CAR
6 DOOR OPEN.

7 Q OKAY, AND LET'S TALK ABOUT PLACEMENT. I
8 WANT TO, TO TAKE A LOOK AT WHAT'S BEEN MARKED AS STATE'S
9 EXHIBIT 2 FOR IDENTIFICATION --

10 MS. ELDER: IF I COULD ASK THE WITNESS TO STEP
11 DOWN, YOUR HONOR?

12 THE COURT: VERY WELL.

13 (THE WITNESS COMPLIES.)

14 MS. ELDER: (CONTINUING)

15 Q MR. BENNICK, IF YOU'LL COME OVER HERE AND
16 AND I'M GOING TO TRY TO KEEP OUR VOICE UP, IF YOU'LL TALK
17 OVER THERE NEAR THAT MICROPHONE SO ALL THESE PEOPLE CAN
18 SEE?

19 A YES, MA'AM.

20 Q DOES THIS LOOK LIKE, LET ME ASK YOU FIRST
21 IS THAT A ACCURATE DEPICTION OF MCCATZ BAR?

22 A YES, MA'AM, IT IS.

23 Q OKAY, AND THE INNER SIDE, THE INSIDE OF THE
24 BAR IS THAT A DEPICTION OF IT?

25 A YES, MA'AM.

1 Q OKAY, NOW WHEN YOU FIRST CAME IN AND YOUR
2 ATTENTION WAS DRAWN TO THE TWO INDIVIDUALS IN THE VERBAL
3 DISPUTE WHERE WERE THEY?

4 A THAT HAPPENED RIGHT HERE.

5 Q OKAY.

6 A I WAS IN THIS AREA AND MY CO-WORKER WAS
7 STANDING HERE YELLING AT ME THAT THERE WAS A VERBAL
8 ALTERCATION. I WALKED TO THIS AREA. AT THAT TIME THE
9 COUPLE TURNED TO THE EXIT. THEY WERE WALKING AROUND THE
10 BAR TO THIS AREA. THE OTHER GENTLEMAN STOOD HERE. THAT'S
11 WHERE HE WAS WATCHING THEM WHEN THEY LEFT OUT THIS DOOR IS
12 WHEN HE CAME AROUND AND CAME BACK AROUND THE BUILDING.

13 Q OKAY.

14 A I WAS STANDING HERE ON THE DECK. RAPHAEL
~~15 CAME DOWN THIS RAMP AND WAS STANDING HERE. HE HAD A LITTLE~~
16 BIT BETTER, HE HAD A BETTER VIEW AROUND THE BUILDING. I
17 HEARD RAPHAEL SAYING THAT ---

18 Q ALL RIGHT, NOT WHAT HE SAYS, JUST WHAT YOU,
19 WHAT YOU GOT AND WHAT YOU OBSERVED, OKAY?

20 A YES, MA'AM, AT THAT POINT RAPHAEL STEPPED
21 INTO THE PARKING LOT, THE COUPLE HAD BACKED THE CAR UP AND
22 THEY WERE LEAVING THIS WAY. THE CAR WAS LOCATED
23 APPROXIMATELY HERE. I OBSERVED THE BLACK MALE RUNNING,
24 RIGHT HERE RAPHAEL TRIED TO STOP HIM FROM GOING AROUND. HE
25 TOOK OFF RUNNING, TROTTED THIS WAY AROUND TO THE PASSENGER

1 SIDE OF THE CAR. AT THAT POINT MYSELF AND RAPHAEL BOTH
2 FOLLOWED THIS WAY. THERE WAS ANOTHER GENTLEMAN NAMED
3 CARLOS HAD WALKED AROUND THE BUILDING WITH HIM. I ACTUALLY
4 LOOKED AT CARLOS AND BECAUSE I KNEW CARLOS FROM COMING IN
5 THE BAR, I ASKED CARLOS NOT TO COME OVER THERE.

6 MR. RICHARDSON: I'D OBJECT TO WHAT HE SAID.

7 THE COURT: SUSTAINED.

8 MS. ELDER: YOUR HONOR, THIS IS THE, THIS IS THE
9 WITNESS AND WHAT HE STATED NOT WHAT THE OTHER INDIVIDUAL
10 STATED.

11 THE COURT: THIS IS WHAT THIS WITNESS SAID?

12 MS. ELDER: YES, SIR.

13 THE COURT: TO ANOTHER PERSON?

14 MS. ELDER: YES, SIR.

15 MR. RICHARDSON: I'LL WITHDRAW THE OBJECTION.

16 THE COURT: VERY WELL.

17 MS. ELDER: (CONTINUING)

18 Q JUST WHAT DID YOU REMARK, DID YOU MAKE ANY
19 REMARK TO CARLOS?

20 A I ASKED CARLOS NOT TO, NOT TO COME OVER
21 THERE. I TOLD CARLOS BECAUSE I KNOW HIM WELL ENOUGH TO SAY
22 DON'T WANT ANY TROUBLE HERE, STOP, AND HE STOPPED AND HE
23 STOPPED RIGHT ABOUT HERE. THE CAR WAS RIGHT ABOUT HERE.
24 BLACK MALE RAN AROUND TO THE SIDE OF THE CAR HERE. MYSELF
25 AND RAPHAEL BOTH WALKED TO THE EDGE OF THE CAR.

1 Q AND WHERE WERE YOU AT AT THE EDGE OF THE
2 CAR?

3 A I WAS AT THE BACK PASSENGER SIDE TAIL LIGHT
4 AREA.

5 Q AND WHERE WERE THE TWO INDIVIDUALS, THE
6 WHITE MALE AND THE BLACK MALE?

7 A AT THIS POINT THE WHITE MALE IS STILL IN
8 THE PASSENGER SIDE AND THE BLACK MALE WAS TRYING TO OPEN
9 THE CAR DOOR UP.

10 Q OKAY.

11 A RAPHAEL AND THE BLACK FEMALE ACTUALLY HAD
12 PHYSICALLY PUT THEIR HANDS ON THE BLACK MALE TRYING TO GET
13 HIM TO GET AWAY FROM THE CAR.

14 Q OKAY, WERE THEY SUCCESSFUL IN THAT?

15 A NO-MA'AM.

16 Q OKAY, NOW WHAT HAPPENED AT THAT POINT?

17 A AT THAT POINT WAS WHEN THE CAR DOOR WAS
18 OPENED UP. LIKE I SAID I'M NOT SURE EXACTLY WHO OPENED THE
19 CAR DOOR UP BUT WHEN THE CAR DOOR OPENED UP THEY BOTH
20 GRABBED EACH OTHER.

21 Q NOW WHILE ALL THIS IS GOING ON YOU'VE
22 MENTIONED YOURSELF, THE FEMALE, THE WHITE MALE AND THE
23 BLACK MALE AND RAPHAEL?

24 A YES, MA'AM.

25 Q WERE THERE ANY OTHER INDIVIDUALS AROUND

1 THAT CAR DURING THE COURSE OF THIS PHYSICAL ALTERCATION?

2 A NO MA'AM, ONLY CARLOS WAS STANDING BACK A
3 LITTLE, GOOD LITTLE BIT AWAY AND HE HAD ACTUALLY STOPPED
4 RIGHT THERE.

5 Q SO HE DIDN'T APPROACH WHERE YOU WERE?

6 A HE DID NOT APPROACH THE VEHICLE, NO MA'AM.

7 Q WAS HE FURTHER AWAY FROM THE VEHICLE THAN
8 YOU?

9 A CARLOS WAS, YES, MA'AM.

10 Q OKAY, AND DID HE EVER COME UP TO THE
11 VEHICLE AT ANY POINT IN TIME?

12 A NO MA'AM.

13 Q ALL RIGHT, SO WE'RE TALKING ABOUT YOU FOUR?

14 A YES, MA'AM.

15 Q NOW WHEN YOU SAW THE BLACK MALE AND WHITE
16 MALE ENGAGE WHERE WERE THEY?

17 A THEY WERE RIGHT IN THIS AREA, THE VEHICLE
18 WAS RIGHT HERE AND WHEN THEY, THE MOMENTUM OF THEM
19 WRESTLING AROUND THEY WENT DIRECTLY BACK AT THIS ANGLE.

20 Q WERE YOU STILL AT THE BACK OF THE CAR?

21 A YES, I STAYED AT THE BACK OF THE CAR. THEY
22 WERE DIRECTLY BACK AT THIS ANGLE. THERE'S A OPEN GRASSY
23 AREA FOR PARKING RIGHT HERE AND THEY STEPPED BACK THERE,
24 IT'S PROBABLY 10, MAYBE 10 YARDS AWAY FROM THE CAR ITSELF.

25 Q OKAY, IF YOU COULD TAKE YOUR SEAT, PLEASE?

1 WHEN THEY MOVED BECAUSE OF THEIR TUSSLING YOU SAY THEY
2 MOVED BACK TO THE GRASSY AREA?

3 A YES, MA'AM.

4 Q AND COULD YOU OBSERVE THEM AT THAT POINT?

5 A YES, I COULD.

6 Q WERE YOU STILL IN CLOSE PROXIMITY?

7 A YES, MA'AM.

8 Q OKAY, WHEN THEY WERE WRESTLING WAS THERE
9 ANYBODY ELSE OVER THERE OTHER THAN THOSE TWO INDIVIDUALS?

10 A NO MA'AM.

11 Q HAD CARLOS COME UP TO THEM?

12 A NO MA'AM.

13 Q SO IT WAS JUST THOSE TWO. NOW YOUR
14 POSITION YOU INDICATED WAS WHERE DURING THE COURSE OF THIS?

15 A I WAS STANDING ABOUT 4 OR 5 FEET FROM THE

16 BACK OF THE CAR.

17 Q OKAY AND THEY INITIA -- THEY INITIALLY THE
18 TWO INDIVIDUALS THAT WERE FIGHTING WERE WHERE?

19 A THEY WERE 10 YARDS, MAYBE 10 YARDS FROM THE
20 BACK OF THE CAR BUT AT A LITTLE BIT DIFFERENT ANGLE FROM
21 ME.

22 Q WERE THEY ON THE PASSENGER SIDE?

23 A THEY WERE ON THE PASSENGER SIDE, YES,
24 MA'AM.

25 Q OKAY, AND YOU SAID THEY KIND OF LOCKED UP?

1 A YES, MA'AM.

2 Q TRY AND DESCRIBE WHAT THAT IS?

3 A WELL THEY BOTH HAD A HOLD OF EACH OTHER AND

4 ---

5 Q OKAY, SO ---

6 A --- THE WHITE MALE ACTUALLY HAD HIS HEAD
7 DOWN LIKE THIS AND WAS LIKE THIS AND THE MOMENTUM OF THE
8 TWO OF THEM THEY WERE LIKE JOSTLING BACK AND FORTH BUT THEY
9 WOUND UP GOING LIKE I SAID ABOUT 10 YARDS FROM THE CAR BUT
10 THE WHITE MALE'S HEAD WAS ACTUALLY DOWN THE ENTIRE TIME.

11 Q OKAY.

12 A THERE WAS NEVER ANY, THERE WAS NEVER ANY
13 PUNCHES THROWN. HIS, HE WAS HOLDING ON AND HIS HEAD WAS
14 DOWN ACTUALLY IN THE BLACK MALE'S CHEST THE ENTIRE TIME.

15 Q ALL RIGHT, AND WHAT WAS THE, WHAT WAS THE
16 DEFENDANT DOING DURING THIS; WHAT WAS HIS POSITIONING?

17 A HE WAS, HE HAD HIS HANDS OVER THE TOP OF
18 THE WHITE MALE'S ARMS AND HE WAS, IT APPEARED TO ME THAT HE
19 WAS TRYING TO DO ANYTHING HE COULD TO, LOOKED LIKE HE WAS
20 ALMOST LIKE KIND OF HITTING HIM IN THE TOP OF THE HEAD KIND
21 OF.

22 Q DO YOU KNOW IF HE HAD ANYTHING IN HIS
23 HANDS?

24 A I COULD NOT TELL IF HE HAD ANYTHING IN HIS
25 HANDS, NO MA'AM.

1 Q OKAY, WHEN YOU HEARD THE FIRST SHOT WHAT,
2 WHAT HAPPENED?

3 A WHEN THE FIRST SHOT WENT OFF I ACTUALLY
4 FELT A SHOCK. RAPHAEL AND I WERE STANDING SIDE BY SIDE
5 WHEN THE FIRST SHOT WENT OFF IT FELT LIKE STATIC
6 ELECTRICITY HAD HIT ME AND I DIDN'T REALLY UNDERSTAND WHAT
7 WAS GOING ON; AND I JUST KIND OF, IT STARTLED ME AND I KIND
8 OF FROZE AND THEN A COUPLE OF SECONDS LATER A SECOND SHOT
9 WENT OFF AND THEN I LIKE I SAID A FEW SECONDS AFTER THAT
10 THE THIRD SHOT WENT OFF AND I SAW THE MAN FALL DOWN.

11 Q OKAY, WERE THE SHOTS COMING FROM THE
12 DIRECTION, DO YOU KNOW WHAT DIRECTION THE SHOTS WERE COMING
13 FROM?

14 A THEY WERE COMING FROM THE ALTERCATION FROM
15 THE FIGHT.

16 Q AND WERE THERE ANY OTHER INDIVIDUALS AROUND
17 THOSE TWO PEOPLE?

18 A NO MA'AM.

19 Q AND POSITIONING WISE WAS THE WHITE MALE
20 FACING YOU OR DID HE HAVE HIS BACK TO YOU?

21 A THE WHITE, THEY BOTH HAD, THEY WERE BOTH
22 SIDEWAYS TO ME, I COULD SEE BOTH OF THEM. ACTUALLY IT WAS
23 MORE LIKE THEY WERE LIKE THAT TO ME. THE WHITE MALE'S BACK
24 WAS A LITTLE BIT TO ME BUT MORE OR LESS SIDEWAYS TO ME.

25 Q OKAY, SO YOU HAD A GOOD VISUAL OF THE BLACK

1 MALE?

2 A YES, MA'AM.

3 Q WHEN THE SECOND SHOT WENT OFF WHAT DID YOU
4 DO?

5 A IT HAPPENED, THE SHOTS WENT OFF SO QUICK I
6 DIDN'T REALLY HAVE, THERE WASN'T REALLY ANYTHING I COULD
7 DO. I KIND OF SORT OF DUCKED DOWN A LITTLE BIT, NOT THAT
8 THAT WOULD HAVE DONE ANY GOOD, BUT I JUST KIND OF, LIKE I
9 SAID I KIND OF FROZE UP AND BASICALLY I JUST SAT THERE AND
10 WATCHED AND WITHIN A COUPLE OF SECONDS I SAW THE, THE THIRD
11 SHOT WENT OFF AND THE WHITE MALE FELL TO HIS BACK.

12 Q WHAT DID THE OTHER INDIVIDUAL DO?

13 A HE RAN, TOOK OFF IMMEDIATELY RUNNING AROUND
14 TO THE BACK SIDE OF THE BUILDING, AROUND THE BACK OF THE
15 BUILDING.

16 Q DID YOU SEE HIM LEAVE?

17 A I DIDN'T ACTUALLY SEE HIM LEAVE BUT I HEARD
18 THE CAR TIRES SPINNING AND IT'S A GRAVEL PARKING LOT AND
19 YOU COULD HEAR IT SPINNING AND GRAVEL FLYING.

20 Q WHAT DID YOU DO ONCE THIS WAS ALL OVER?

21 A AS SOON AS THE BLACK MALE RAN AROUND THE
22 BACK OF THE BUILDING I RAN TO THE MAN THAT HAD BEEN SHOT
23 AND TRIED TO TOUCH HIM ON THE CHEST TO SEE IF, YOU KNOW,
24 AND I WAS ACTUALLY TRYING TO TALK TO HIM ASKING HIM IF HE
25 WAS OKAY. THE BLACK FEMALE SAT, KNEELED DOWN BESIDE OF

1 HIM. AT THAT POINT I RAN IN THE BUILDING AS FAST AS I
2 COULD, TOLD MY CO-WORKER TO CALL 911. I RAN BACK OUTSIDE.
3 WHEN I GOT BACK OUTSIDE THE BLACK FEMALE HAD LIFTED THE
4 MAN'S HEAD UP AND YOU COULD SEE WHERE HE HAD BEEN SHOT IN
5 THE BACK OF THE HEAD.

6 Q OKAY, AND ---

7 A AND HE ---

8 Q I'M SORRY, GO HEAD?

9 A AND THAT A FEW MINUTES LATER THE POLICE
10 SHOWED UP.

11 Q AND WERE YOU OUT THERE WITH, YOU WENT TO
12 THIS INDIVIDUAL IMMEDIATELY?

13 A YES, MA'AM, IMMEDIATELY.

14 Q AFTER THE THIRD SHOT?

15 A YES, MA'AM.

16 Q AND OTHER THAN CALLING 911 DID YOU, YOU
17 STAYED OUT THERE UNTIL THE POLICE GOT THERE?

18 A YES, MA'AM.

19 Q WHEN YOU APPROACHED THE WHITE MALE THAT WAS
20 ON THE GROUND DID YOU NOTICE OR OBSERVE ANY WEAPONS OR
21 ANYTHING LIKE THAT HE HAD IN HIS HANDS?

22 A NO MA'AM.

23 Q DID YOU EVER SEE THAT WHITE MALE INDIVIDUAL
24 WITH A WEAPON?

25 A NO MA'AM.

1 Q AND FROM YOUR OBSERVATION WERE YOU ABLE TO
2 TELL WHO THE AGGRESSOR WAS IN THAT PARTICULAR INCIDENT?

3 A YES, MA'AM.

4 Q AND WHO WAS THAT?

5 A IT WAS THE BLACK MALE.

6 Q DID YOU GIVE A STATEMENT TO THE POLICE
7 REGARDING WHAT YOU OBSERVED?

8 A YES, MA'AM.

9 Q DID YOU DO THAT, THAT EARLY MORNING?

10 A I GAVE, I GAVE A STATEMENT THAT MORNING AND
11 THEN I WENT BACK TO THE POLICE STATION MAYBE AN HOUR LATER
12 AND GAVE ANOTHER STATEMENT AND THEN I GAVE ANOTHER
13 STATEMENT A FEW DAYS LATER I BELIEVE IT WAS.

14 Q OKAY, AND DO YOU RECALL SGT. SHEETS SHOWING
15 YOU SOME PHOTOGRAPHS?

16 A YES, I DO.

17 Q AND I WANT YOU TO TAKE A LOOK AT WHAT'S
18 BEEN MARKED AS STATE'S EXHIBIT 18, IF YOU'LL JUST LOOK
19 THROUGH THOSE FOR ME?

20 A YES, MA'AM. YES, MA'AM, THESE WERE THE
21 PICTURES SHOWN TO ME.

22 Q AND LET ME ASK YOU A LITTLE BIT ABOUT HOW
23 SGT. SHEETS SHOWED YOU THOSE, HOW WERE THEY PRESENTED TO
24 YOU?

25 A HE TOLD ME THAT HE WAS GOING TO SHOW ME

1 SOME PHOTOS AND HE SAID THAT THE PHOTOS MAY OR MAY NOT BE
2 OF THE PEOPLE THAT WERE AT THE BAR, THAT HAD JUST GOT IN AN
3 ALTERCATION AND HE SPREAD THEM OUT ON THE TABLE.

4 Q WERE YOU ABLE TO PICK SOMEONE OUT?

5 A YES, MA'AM.

6 Q DID HE POINT OR GIVE YOU ANY INDICATION TO
7 MAKE YOU INDICATE THE DEFENDANT AS THE PERSON THAT YOU
8 OBSERVED?

9 A NO MA'AM.

10 Q AND DID YOU FEEL COERCED OR, OR ---

11 A NO MA'AM.

12 Q --- IN ANY WAY FORCED TO MAKE THAT
13 IDENTIFICATION?

14 A NONE AT ALL.

15 Q ~~AND WERE YOU IN FACT ABLE TO MAKE~~

16 IDENTIFICATION OF THOSE PHOTOGRAPHS?

17 A IMMEDIATELY, YES, MA'AM.

18 Q HOW SURE ARE YOU WHEN YOU PICKED OUT THAT
19 PARTICULAR PERSON?

20 A ABSOLUTELY 100 PERCENT SURE.

21 Q HAVE ANY HESITATION?

22 A NO HESITATION WHATSOEVER.

23 Q DID YOU HAVE A GOOD OBSERVATION ABILITY TO
24 SEE THE INDIVIDUAL THAT SHOT BRANDT KOEHLER?

25 A YES, MA'AM.

1 Q IS THAT THE MAN THAT YOU PICKED OUT OF THAT
2 LINEUP?

3 A THE MAN I PICKED OUT OF THIS LINEUP IS THE
4 MAN THAT SHOT THAT OTHER GENTLEMAN.

5 Q AND THAT IS THE BLACK MALE THAT WE'VE BEEN
6 REFERRING TO ---

7 A YES, MA'AM.

8 Q --- IN THIS FACTUAL SITUATION?

9 A YES, MA'AM.

10 Q NOW WHEN YOU PICKED HIM OUT DID YOU MAKE
11 ANY INDICATION ON THE BOTTOM OF THE PHOTOGRAPH THAT THAT'S
12 THE PERSON THAT YOU SAW?

13 A I SIGNED AND WROTE A STATEMENT THAT THAT
14 WAS THE MAN I HAD CHOSEN.

15 Q OKAY, WAS THAT YOUR STATEMENT?

16 A THAT'S MY STATEMENT, YES, MA'AM.

17 Q AND YOU WROTE THAT YOURSELF?

18 A YES, MA'AM.

19 Q NOBODY FORCED YOU TO DO THAT?

20 A NO MA'AM.

21 THE COURT: ANYTHING FURTHER?

22 MS. ELDER: YEAH, JUST A MOMENT, YOUR HONOR, I'M
23 SORRY.

24 Q (CONTINUING) ALL RIGHT, JEFFREY, RIGHT
25 AFTER ALL THIS HAPPENED AND YOU INDICATED THE POLICE GOT ON

1 THE SCENE; IS THAT CORRECT?

2 A YES, MA'AM.

3 Q OKAY, DID YOU GIVE A STATEMENT AT THE
4 SCENE?

5 A I GAVE A STATEMENT AT THE SCENE. IT WASN'T
6 AS IN DETAIL OR IN DEPTH AS MY OTHER STATEMENTS BUT, YES, I
7 GAVE A STATEMENT AT THE SCENE.

8 Q OKAY, AND DO YOU KNOW CARLOS ADAMS?

9 A I DON'T KNOW HIS LAST NAME BUT IF IT'S THE
10 SAME CARLOS THAT WAS THERE. YES, I DO KNOW HIM.

11 Q AT THE BAR THAT NIGHT?

12 A YES, MA'AM.

13 Q OKAY. AND DID YOU HAVE ANY CONVERSATIONS
14 WITH CARLOS AFTER THIS INCIDENT?

15 A YES, I DID.

16 Q DID YOU GIVE HIM ANY ADVICE REGARDING ---

17 MR. RICHARDSON: YOUR HONOR, I'D OBJECT TO ANY
18 ADVICE GIVEN TO ANOTHER PERSON. I DON'T KNOW THE RELEVANCE
19 THERE.

20 THE COURT: WHAT'S THE RELEVANCE OF WHAT ADVICE
21 HE GAVE?

22 MR. RICHARDSON: MAYBE OUTSIDE THE PRESENCE OF
23 THE JURY IF SHE'S GETTING INTO SOMETHING THAT'S NOT
24 RELEVANT.

25 THE COURT: YA'LL APPROACH.

1 (WHEREUPON, A BENCH CONFERENCE WAS HELD OFF THE
2 RECORD IN THE PRESENCE OF THE JURY, BUT OUT OF THE HEARING
3 OF THE JURY AND THE COURT REPORTER.)

4 THE COURT: I SUSTAIN THE OBJECTION, PROCEED.

5 MS. ELDER: THANK YOU, YOUR HONOR.

6 Q (CONTINUING) DID YOU OBSERVE RAPHAEL AFTER
7 THIS INCIDENT?

8 A YES, I DID.

9 Q DID HE HAVE ANY INJURIES, DID YOU NOTE ANY
10 INJURIES THAT HE HAD?

11 A AFTER THE INCIDENT HE HAD A GUNSHOT WOUND
12 TO HIS LEG.

13 MR. RICHARDSON: I'D OBJECT TO -- HE COULD --
14 YOUR HONOR, WHAT CONCLUSION HE DREW. HE CAN TALK ABOUT
15 WHAT HE SAW BUT NOT THE CONCLUSION HE WOULD DRAW FROM IT
16 AND I'D MOVE THAT IT BE STRICKEN.

17 THE COURT: OVERRULED, YOU MAY PROCEED.

18 THE WITNESS: (CONTINUING)

19 A HE HAD A GUNSHOT WOUND TO THE LEG AND HE
20 TOLD ME THAT HE HAD JUST BEEN SHOT.

21 MR. RICHARDSON: OBJECT AGAIN, YOUR HONOR.

22 THE WITNESS: OKAY, I'M SORRY.

23 MS. ELDER: JUST WHAT YOU OBSERVED.

24 THE WITNESS: I'M SORRY.

25 MR. RICHARDSON: MOVE THAT IT BE STRICKEN.

1 THE COURT: STRIKE THAT FROM THE RECORD AND THE
2 JURY WILL DISREGARD THE LAST STATEMENT.

3 MS. ELDER: (CONTINUING)

4 Q YOU OBSERVED THE INJURIES ON RAPHAEL?

5 A YES, MA'AM.

6 Q WERE THEY IMMEDIATELY PRECEEDING THIS
7 INCIDENT OUT IN THE PARKING LOT?

8 A YES, MA'AM.

9 MS. ELDER: YOUR HONOR, THE STATE HAS NO OTHER
10 QUESTIONS AT THIS TIME.

11 THE COURT: CROSS.

12 CROSS EXAMINATION

13 BY MR. RICHARDSON:

14 Q YOU OBSERVED THE INJURIES TO RAPHAEL'S LEG
15 OR THE BANDAGES AROUND HIS LEG?

16 A I SAW A BLOODY BANDAGE. I SAW HIS LEG.

17 Q ALL RIGHT, NOW GOING BACK INSIDE ---

18 THE COURT: WELL IN THAT CASE, IN THAT CASE
19 DISREGARD THE STATEMENT ABOUT WHAT IT WAS, LADIES AND
20 GENTLEMEN.

21 MR. RICHARDSON: THANK YOU, YOUR HONOR, AND MOVE
22 IT BE STRICKEN, TOO.

23 THE COURT: ALL RIGHT, WE'LL STRIKE IT.

24 MR. RICHARDSON: (CONTINUING)

25 Q NOW IN REFERENCE TO WHAT HAPPENED INSIDE,

1 YOU GOT THERE ABOUT 12 TO GO TO WORK?

2 A 12:30, 12:20, 12:15, YES, SIR.

3 Q ALL RIGHT, AND THE INCIDENT OCCURRED ABOUT
4 4:00, DIDN'T IT?

5 A YES, SIR.

6 Q NOW HOW MANY PEOPLE WERE AROUND THE BAR
7 WHERE THE INCIDENT WAS HAPPENING ON THE INSIDE, YOU SAID
8 CHRIS, RAPHAEL, BUT THERE WAS A NUMBER OF PEOPLE AROUND THE
9 BAR WHERE IT WAS GOING ON, WASN'T THERE?

10 A MAYBE AT THAT INCIDENT THERE WAS MAYBE SIX
11 OR SEVEN PEOPLE.

12 Q ALL RIGHT, AND THEY WENT OUTSIDE; IS THAT
13 CORRECT?

14 A EXCUSE ME?

15 Q THE MALE AND THE FEMALE WENT OUT THE SOUTH
16 DOOR AND THE OTHER GENTLEMAN AND CARLOS WENT OUT THE NORTH
17 DOOR, DIDN'T THEY?

18 A YES, SIR.

19 Q AND WHEN YOU WENT OUT THE DECEASED WAS,
20 WHEN YOU GOT IN THE PARKING LOT HE WAS AGITATED, WASN'T HE?

21 A I DON'T THINK HE WAS AGITATED AS MUCH AS HE
22 WAS CURIOUS AS TO WHY SOMEBODY WAS FOLLOWING HIM OUT THE
23 DOOR.

24 Q HE HAD HIS SHIRT ON WHEN HE WENT OUTSIDE?

25 A YES, SIR.

1 Q AND HE JERKED HIS SHIRT OFF IN THE PARKING
2 LOT AND DID SOME HOLLERING, DIDN'T HE?

3 A HE DIDN'T NECESSARILY, I DON'T KNOW ABOUT
4 HOLLERING OTHER THAN --

5 Q HE TURNED AROUND AT YOU AND JERKED HIS
6 SHIRT OFF AND WHAT DID HE DO?

7 A HE WAS, HE WAS PREPARED FOR IF POSSIBLY
8 TROUBLE WOULD HAVE CAME OUT BUT THERE WASN'T ANY TROUBLE SO
9 --

10 Q WAS HE AGITATED?

11 A I GUESS YOU, I MEAN I DON'T KNOW THAT I'D
12 CALL IT AGITATED LIKE I SAID, MORE PREPARED ---

13 Q READY?

14 A WHEN WE WALKED OUT THE DOOR HE WAS READY TO
15 SEE IF SOMEBODY WAS GOING TO COME START TROUBLE WITH HIM.

16 Q NOW WHEN YOU GET OUTSIDE YOU AND RAPHAEL
17 WERE ON THE BACK DECK THERE SOMEWHERE?

18 A YES, SIR.

19 Q AND THE GUY WAS IN THE PARKING LOT TAKING
20 HIS SHIRT OFF AND THE LADY WAS IN THE CAR; IS THAT RIGHT?

21 A THEY WERE GETTING IN THE CAR, YES, SIR.

22 Q ALL RIGHT, BUT SHE GOT IN FIRST?

23 A I THINK THEY BOTH PRETTY MUCH GOT IN AT THE
24 SAME TIME.

25 Q AND SHE BACKED, SHE CRANKED THE CAR UP,

1 BACKED THE CAR OUT FROM WHERE SHE WAS PARKED?

2 A YES, SIR.

3 Q THERE WAS CARS ON BOTH SIDES, ONE SIDE?

4 A I DON'T KNOW, I THINK MAYBE THERE WAS MAYBE

5 A CAR ON, I DON'T NECESSARILY KNOW IF IT WAS, THERE WASN'T

6 ANY CARS IN THAT ONE LITTLE AREA. THERE MIGHT HAVE BEEN A

7 CAR ON THE OTHER SIDE BUT --

8 Q THERE WAS SOME CARS RIGHT THERE ON THE LEFT
9 OF WHERE SHE WAS PARKED, WASN'T THERE?

10 A MAYBE ON THE LEFT, YES, SIR, I BELIEVE SO.

11 Q AND, AND SHE BACKED OUT WITH A TURNING
12 MOTION; IS THAT CORRECT?

13 A YES, SIR.

14 Q AND THEN SHE STARTED FORWARD?

15 A YES, SIR.

16 Q HOW FAR FORWARD DID SHE GO?

17 A NOT VERY FAR, MAYBE 10, 15 FEET.

18 Q ALL RIGHT. AND SO FROM HER PARKING PLACE
19 WHERE SHE WAS PARKED SHE PULLED FORWARD 10 OR 15 FEET?

20 A MAYBE 10 OR 15 FEET, MIGHT NOT HAVE BEEN
21 THAT MUCH.

22 Q AND, AND THEN IS WHEN THE PERSON CAME UP TO
23 THE PASSENGER SIDE DOOR?

24 A YES, SIR.

25 Q ALL RIGHT; AND SHE STOPPED HER VEHICLE?

1 A YES, SHE DID.

2 Q AND SHE GOT OUT?

3 A YES, SIR.

4 Q AND SHE HOLLERED, AS SHE GOT OUT OF HER CAR
5 SHE HOLLERED, DIDN'T SHE?

6 A FOR HIM TO QUIT HITTING HER CAR AND GET
7 AWAY FROM HER VEHICLE.

8 Q AND SHE WENT ALL THE WAY BACK AROUND TO THE
9 BACK OF THE CAR, DIDN'T SHE?

10 A YES, SIR.

11 Q AND SHE WENT UP TO THE PASSENGER DOOR AND
12 WAS AT THE DOOR BEFORE THE DOOR EVER OPENED, DIDN'T SHE?
13 SHE WAS AT THE PASSENGER DOOR BEFORE THE DOOR WAS OPENED?

14 A YES, SIR.

15 ~~Q AND YOU SAY SHE WAS PUSHING ON THE MAN THAT~~
16 HAD BEEN BEATING ON THE WINDOW?

17 A I DON'T NECESSARILY KNOW IF I, THE TERM
18 PUSHING IS CORRECT. SHE WAS TRYING TO TELL HIM, HEY, GET
19 AWAY FROM MY CAR.

20 Q SHE WAS RAISING CANE AT HIM, WASN'T SHE?

21 A I WOULDN'T CALL IT RAISING CANE BUT SHE
22 WASN'T HAPPY THAT HE WAS HITTING ON HER CAR.

23 Q SHE WAS FUSSING, FUSSING?

24 A SHE WASN'T HAPPY A BIT ABOUT THAT.

25 Q ALL RIGHT, AND WHEN THIS WAS GOING ON YOU

1 AND RAPHAEL HAD WALKED OVER THERE RIGHT TO THE REAR TAIL
2 LIGHT OF THE PASSENGER SIDE ALMOST, HADN'T YOU?

3 A YES, SIR.

4 Q BUT RAPHAEL WENT ON UP THERE WAS A PUSHING
5 AND A TALKING, WASN'T HE?

6 A YES, SIR.

7 Q AND HE WAS PUSHING?

8 A WELL HE WASN'T NECESSARILY PUSHING BUT HE
9 WAS TRYING TO, HE WAS SAYING, YOU KNOW, HEY, QUIT, QUIT.

10 Q THERE WAS A RUCKUS GOING ON, RIGHT?

11 A HE WAS SAYING, HE WAS ASKING THE GENTLEMAN
12 TO QUIT TRYING TO JERK ON THE CAR HANDLE AND QUIT TRYING TO
13 GET IN THE DOOR.

14 Q THERE WAS A RUCKUS GOING ON RIGHT THERE,
15 WASN'T THERE?

16 A IF THAT'S WHAT YOU CONSIDER A RUCKUS.

17 Q OKAY, AND YOU WERE RIGHT AT THE BACK OF THE
18 CAR?

19 A YES, SIR.

20 Q AND THEN THE DOOR OPENED AND WHEN THE DOOR
21 OPENED IT WAS ALL ON THEN, WASN'T IT? THE MAN CAME OUT OF
22 THE CAR LIKE A JACK IN THE BOX, DIDN'T HE?

23 A NO, LIKE A MAN TRYING TO GET IN THE CAR AND
24 THE MAN THAT WAS IN THE CAR BOTH AT THE SAME TIME.

25 Q HE EXITED THE CAR AND THE MOMENTUM PUSHED

1 HIM BACK HOW FAR?

2 A 10, 10 FEET, 10 YARDS MAYBE.

3 Q 10 YARDS, MAYBE?

4 A UH-HUH.

5 Q AND YOU WERE STILL AT THE BACK OF THE CAR
6 OR HAD YOU AND RAPHAEL AT SOME POINT MOVED ON DOWN?

7 A RAPHAEL ACTUALLY WALKED OVER TO WHERE, HE'D
8 KIND OF WALKED, HE WALKED TO WHERE I WAS STANDING AND HE
9 WAS STANDING RIGHT BESIDE OF ME AT THIS POINT.

10 Q ALL RIGHT. BUT YA'LL HAD KIND OF EASED
11 OVER TO SEE THE SHOOTING, TO SEE WHAT WAS GOING ON AND
12 DECIDED TO ---

13 A WELL AT THIS POINT ---

14 Q BEFORE YOU SAY THE SHOOTING OCCURRED YA'LL
15 MOVED OVER A LITTLE BIT, DIDN'T YOU?

16 A AT THIS POINT I, I MEAN I WASN'T BEHIND THE
17 CAR IN ANY WAY SHAPE OR FORM, I --

18 Q AND WHEN THE FIRST SHOT WENT OFF DIDN'T YOU
19 SAY THAT YOU KIND OF DUCKED?

20 (A I KIND OF SQUATTED.

21 Q WENT BACK THE OTHER WAY BUT KEPT YOUR EYES
22 ON WHAT WAS GOING ON?

23 A YES, SIR, I KIND OF SQUATTED DOWN AND KIND
24 OF SORT OF --

25 Q AND WHEN THE THREE SHOTS ENDED UP YOU WERE

1 ALL THE WAY OVER ON THE RAMP WITH RAPHAEL, WEREN'T YOU?

2 A NO, SIR.

3 Q YOU WEREN'T ON THE RAMP OR ON THE DECK BACK
4 THERE SOMEWHERE OR THE STEPS OF THE PLACE?

5 A NO, SIR, I HAD ACTUALLY TRIED TO WALK -- I
6 HAD DUCKED DOWN AND KIND OF LIKE A DUCK SQUAT JUST DUCKED
7 DOWN AND KIND OF, I GUESS YOU'D CALL IT I KIND OF WADDLED
8 AWAY FROM WHERE IT WAS GOING BUT I WAS STILL FACING THEM
9 AND LOOKING.

10 Q YOU WERE FACING AND LOOKING BUT WHEN IT WAS
11 ALL OVER WITH YOU WERE BACK OVER NEAR THE BUILDING AND RAN
12 BACK UP THERE LATER TO HELP THE MAN, DIDN'T YOU?

13 A WELL I WASN'T NEAR THE BUILDING ACTUALLY.
14 THE PARKING LOT IS FAIRLY BIG AND I WAS STILL A GOOD
15 DISTANCE --

16 Q BUT YOU'D ---

17 MS. ELDER: YOUR HONOR, IF THE WITNESS COULD
18 FINISH HIS RESPONSE.

19 THE COURT: LET HIM ANSWER THE QUESTION BEFORE
20 YOU ASK ANOTHER.

21 THE WITNESS: (CONTINUING)

22 A I WASN'T NEAR THE BUILDING BY ANY MEANS, I
23 WAS A GOOD DISTANCE AWAY FROM THE BUILDING. I WAS CLOSER
24 TO THE ALTERCATION THAN I WAS TO THE BUILDING.

25 Q ALL RIGHT, SO THEY HAD GONE 10 YEARS BACK

1 AND THEN YOU HAD GONE BACK 10 OR 15 YARDS?

2 A NO, I'D PROBABLY GONE BACK 10 OR 15 FEET
3 MAYBE.

4 Q ALL RIGHT, NOW IT WAS DARK IN THAT AREA,
5 WASN'T IT? YOU COULD SEE SILHOUETTES WAS WHAT YOU SAW IN
6 THE BACK ???

7 A I COULD SEE PRETTY MUCH. WE HAD FLOOD
8 LIGHTS AROUND THE BUILDING AND I COULD, YOU COULD SEE
9 PRETTY DECENT OUT THERE.

10 Q YOU PREVIOUSLY HAD GIVEN STATEMENTS IN THIS
11 THING, YOU SAID, WOULD YOU SAY THAT YOU COULD SEE GOOD OR
12 WERE YOU SEEING SILHOUETTES?

13 A I DON'T THINK I EVER USED THE WORD
14 SILHOUETTE BUT IT WAS, IT WAS FAIR, IT WAS DARK BUT YOU
15 COULD STILL, YOU COULD STILL SEE.

16 Q THERE'S NO FLOOD LIGHT IN THERE, I MEAN
17 THERE'S NO NIGHT LIGHT IN THE PARKING LOT IN THAT AREA?

18 A THERE'S A LIGHT ON THE TELEPHONE POLE IN
19 THE BACK CORNER OF THE PARKING LIGHT THAT KIND OF --

20 Q WAY BACK OVER ON THE OTHER SIDE OF THE
21 BUSHES?

22 A YEAH, BUT IT'S LIKE A TELEPHONE POLE LIGHT
23 IT LIGHTS UP A GOOD BIT.

24 Q BUT IT WAS ON THE OTHER SIDE OF THE BUSHES?

25 A NO BUSHES.

1 Q SIR?

2 A THERE WASN'T ANY, NO BUSHES WHERE THAT
3 TELEPHONE LIGHT WAS AT THAT I WOULD, I MEAN IT WASN'T
4 HINDERING, THE BUSHES WEREN'T HINDERING THE LIGHT OR
5 ANYTHING.

6 Q BUT YOU SAY IT WAS DARK BACK THERE, WASN'T
7 IT, FAIRLY DARK? ALL RIGHT SIR, NOW, AND YOU SAY WHEN THE
8 LAST SHOT WAS FIRED THE MAN FELL AND THE MAN THAT HAD BEEN
9 BEATING ON THE DOOR RAN OFF AND GOT IN HIS CAR?

10 A YES, SIR.

11 Q ALL RIGHT, AND THEN YOU TRIED TO HELP THE
12 PEOPLE THERE IN WHAT WAS GOING ON?

13 A YES, SIR.

14 Q ALL RIGHT.

15 MR. RICHARDSON: EXCUSE ME ONE SECOND.

16 Q (CONTINUING) AND YOU SAW NO GUN, DID YOU?

17 A I DID NOT SEE A GUN, NO, SIR.

18 Q AND WHEN ASKED ABOUT MUZZLE BLAST YOU SAW
19 NO MUZZLE BLAST, DID YOU?

20 A I DID NOT SEE A MUZZLE BLAST, NO, SIR.

21 MR. RICHARDSON: THANK YOU, NO FURTHER
22 QUESTIONS.

23 MS. ELDER: NO FURTHER QUESTIONS FROM THE STATE,
24 YOUR HONOR.

25 THE COURT: THANK YOU, SIR, YOU MAY STEP DOWN.

1 MR. HUMPHRIES: MAY WE APPROACH, JUDGE?

2 (WHEREUPON, A BENCH CONFERENCE WAS HELD OFF THE
3 RECORD IN THE PRESENCE OF THE JURY, BUT OUT OF THE HEARING
4 OF THE JURY.)

5 MR. HUMPHRIES: WE ASK THAT THIS WITNESS BE
6 EXCUSED?

7 MR. RICHARDSON: NO OBJECTION.

8 THE COURT: YOU MAY BE EXCUSED. I THINK HE
9 ALREADY IS.

10 GO TO YOUR JURY ROOM. DO NOT DISCUSS THE CASE
11 WHILE YOU'RE IN THE JURY ROOM.

12 (WHEREUPON, THE JURY RETIRED TO THE JURY ROOM AT
13 3:45 P.M.)

14 THE COURT: WE'LL STAND AT EASE FOR ABOUT 15
15 MINUTES.

16 (WHEREUPON, A RECESS WAS TAKEN.)

17 THE COURT: LET US HAVE THE JURY BACK, PLEASE.

18 (WHEREUPON, THE JURY RETURNED TO THE COURTROOM AT
19 4:16 P.M.)

20 THE COURT: CALL YOUR NEXT WITNESS.

21 MR. HUMPHRIES: THANK YOU, YOUR HONOR, THE STATE
22 RECALLS PAUL SHEETS.

23 THE COURT: YOU'RE STILL UNDER OATH.

24 MR. SHEETS: YES, SIR.

25 DIRECT EXAMINATION

1 BY MR. HUMPHRIES:

2 Q SGT. SHEETS, SOMETIME AFTER THIS INCIDENT
3 OCCURRED, DID YOU HAVE AN OCCASION TO SPEAK TO SOMEONE IN
4 REFERENCE TO THIS MURDER WHO INDICATED HE HAD INFORMATION
5 ABOUT THE DEFENDANT?

6 A YES, I DID.

7 Q TELL THE JURY, IF YOU WILL, HOW THAT CAME
8 ABOUT?

9 A WE RECEIVED A PHONE CALL FROM THE
10 SOLICITOR'S OFFICE HERE IN REFERENCE TO A GENTLEMAN AT THE
11 COURTHOUSE THAT WAS IN, HAD, HAD COURT, A COURT DATE THAT
12 HAD INFORMATION IN REFERENCE TO THIS MURDER AND THAT WOULD
13 WE GO OVER AND INTERVIEW THIS GENTLEMAN.

14 Q OKAY, AND DID YOU DO THAT?

15 A YES, I DID.

16 Q DO YOU RECALL WITH WHOM YOU MET?

17 A DARREN MALLOY.

18 Q OKAY, AND WHAT WAS MR. MALLOY'S STATUS AT
19 THE TIME?

20 A HE WAS GETTING READY TO BE RELEASED FROM
21 JAIL AND HE HAD SAID HE HAD SOME INFORMATION HE WANTED TO
22 GIVE TO US.

23 Q DO YOU RECALL WHERE YOU MET WITH HIM?

24 A HERE AT THE COURTHOUSE IN ONE OF THE SIDE
25 ROOMS; I'M NOT QUITE SURE WHICH, I THINK IT WAS ON THIS

1 FLOOR BUT I THINK IT WAS A DIFFERENT COURTROOM.

2 Q OKAY, DID YOU COME BY YOURSELF OR WITH
3 ANOTHER DETECTIVE?

4 A A DETECTIVE OWEN LIONEL ACCOMPANIED ME TO
5 THE, TO THE INTERVIEW.

6 Q NOW IF YOU KNOW, WAS THERE, DID YOU MAKE
7 ANY AGREEMENT WITH DARREN MALLOY IN RETURN FOR THIS
8 INFORMATION HE PROVIDED?

9 A NO, I DIDN'T.

10 Q OKAY, NOW DID HE IN FACT HAVE INFORMATION
11 IN CONNECTION WITH THIS CASE?

12 A YES, HE DID.

13 Q WERE YOU FAMILIAR WITH THE INVESTIGATION AT
14 LEAST GENERALLY?

15 A YES, I WAS.

16 Q AND WITHOUT BEING SPECIFIC AS TO WHAT HE
17 TOLD YOU, BECAUSE HE'LL TESTIFY, WAS THE INFORMATION THAT
18 HE PROVIDED TO YOU CONSISTENT WITH WHAT YOU KNEW ABOUT THE
19 INVESTIGATION INTO THIS CASE?

20 A YES, IT WAS.

21 Q LET ME SHOW, WELL FIRST OF ALL LET ME MARK
22 IT FOR IDENTIFICATION.

23 (WHEREUPON, STATE'S EXHIBIT NUMBER 19 MARKED FOR
24 IDENTIFICATION.)

25 MR. RICHARDSON: MAY WE SEE THAT?

1 MR. HUMPHRIES: THERE IT IS.

2 Q LET ME SHOW YOU WHAT'S BEEN MARKED AS
3 STATE'S 19 FOR IDENTIFICATION PURPOSES, TELL ME IF YOU CAN
4 IDENTIFY THAT DOCUMENT?

5 A YES, I CAN.

6 Q TELL ME HOW THAT DOCUMENT CAME TO BE
7 GENERATED AND WHO THE AUTHOR OF THAT DOCUMENT WAS?

8 A DURING OUR INTERVIEW WITH MR. MALLOY HE
9 STATED, HE WAS GIVING ME SOME, SOME NAMES OF SOME
10 INDIVIDUALS THAT HE HEARD THROUGH THE CONVERSATION WITH HIS
11 CELL MATE. HE COULDN'T QUITE GIVE ME ALL THE NAMES SO I
12 TOLD HIM I WAS GOING TO WRITE SOME NAMES DOWN AND SEE IF HE
13 CAN IDENTIFY THE NAMES THAT HIS ROOMMATE WAS, WAS TELLING
14 HIM.

15 Q OKAY, AND WAS HE ABLE TO DO THAT?

16 A YES, HE WAS.

17 Q AND DID HE IN FACT MAKE OR WRITE SOMETHING
18 ON THE PAPER TO INDICATE THE PEOPLE THAT HE WAS FAMILIAR
19 WITH THROUGH HIS CELL MATE?

20 A YES, HE DID.

21 Q OKAY, AND ARE THOSE NOTED ON THAT FORM?

22 A YES, THEY ARE.

23 Q OKAY, AFTER, AFTER SPEAKING WITH THIS
24 INDIVIDUAL DO YOU KNOW WHAT HAPPENED TO HIM?

25 A TO MR. MALLOY?

1 Q UH-HUH?

2 A I THINK HE WAS RELEASED THAT DAY.

3 MR. HUMPHRIES: YOUR HONOR, THAT'S ALL WE HAVE
4 OF THIS WITNESS AT THIS TIME.

5 THE COURT: ANY QUESTIONS?

6 MR. HUMPHRIES: BEG THE COURT'S INDULGENCE.

7 Q WHAT DAY DID YOU COME UP TO SEE THIS DARREN
8 MALLOY?

9 A NOVEMBER 8TH, 2006.

10 MR. HUMPHRIES: THANK YOU, THAT'S ALL.

11 MR. RICHARDSON: PLEASE THE COURT.

12 CROSS EXAMINATION

13 BY MR. RICHARDSON:

14 Q AT THE TIME YOU WERE TALKING WITH HIM YOU
15 WERE AWARE THAT HE HAD REVIEWED CERTAIN DOCUMENTS AND MR.
16 HOLLAND'S THAT HE HAD IN HIS POSSESSION WHILE THEY WERE IN
17 JAIL TOGETHER; IS THAT CORRECT?

18 A EXCUSE ME, SIR, CAN YOU ASK THE QUESTION
19 AGAIN?

20 Q WERE YOU AWARE OR ASKED HIM HAD HE LOOKED
21 AT SOME PAPERWORK THAT MR. HOLLAND HAD IN HIS JAIL CELL IN
22 REFERENCE TO THE CASE?

23 A I'M NOT QUITE SURE IF HE LOOKED AT IT BUT
24 HE DID MENTION SOMETHING ABOUT PAPERWORK THAT MR. HOLLAND
25 HAD IN REFERENCE TO THE CASE, YES.

1 Q AND DID YOU ASK HIM A QUESTION ABOUT

2 WHETHER OR NOT HE HAD SEEN PAPERWORK AND DID HE TELL YOU HE
3 HAD?

4 A I MAY HAVE, I'M NOT, I DON'T REMEMBER, SIR.

5 Q YOU WON'T DENY THAT?

6 A NO...

7 MR. RICHARDSON: NO FURTHER QUESTIONS, YOUR
8 HONOR.

9 MR. HUMPHRIES: NO, SIR.

10 THE COURT: THANK YOU, SIR, YOU MAY STEP DOWN.

11 MR. HUMPHRIES: THE STATE CALLS DARREN MALLOY.

12 DARREN MALLOY

13 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

14 MADAM CLERK: STATE YOUR FULL NAME AND LAST NAME
15 AND SPELL BOTH FOR THE COURT REPORTER.

16 THE WITNESS: MY NAME IS DARREN LEE MALLOY, D-A-
17 R-R-E-N L-E-E M-A-L-L-O-Y.

18 DIRECT EXAMINATION

19 BY MR. HUMPHRIES:

20 Q GOOD AFTERNOON, MR. MALLOY.

21 A GOOD AFTERNOON, HOW ARE YOU?

22 A I'M GOOD. LET'S TAKE CARE OF SOME

23 PRELIMINARY MATTERS, OKAY, WHERE ARE YOU PRESENTLY
24 RESIDING?

25 A J. REUBEN LONG DETENTION CENTER.

1 Q AND WHAT PURPOSE ARE YOU IN J. REUBEN LONG
2 DETENTION CENTER?

3 A FOR POSSESSION OF DRUGS.

4 Q NOW LET ME ASK YOU, WHEN WAS THIS ARREST,
5 WHEN WERE YOU PLACED INTO J. REUBEN LONG DETENTION CENTER
6 FOR THE CHARGE THAT YOU'RE SPEAKING OF NOW?

7 A JANUARY THE 3RD OF THIS YEAR.

8 Q OKAY, NOW THOSE PENDING CHARGES ARE THEY
9 BEING HANDLED BY OUR OFFICE, THE SOLICITOR'S OFFICE,
10 FIFTEENTH CIRCUIT SOLICITOR'S OFFICE ARE WE PROSECUTING
11 YOU?

12 A YES.

13 Q OKAY, YOUR APPEARANCE HERE TODAY HAVE YOU
14 ASKED FOR OR HAVE WE PROMISED ANYTHING IN CONNECTION WITH
15 YOUR TESTIMONY TODAY?

16 A NO, SIR, THIS STEMS FROM MY PRIOR TIME WHEN
17 I WAS IN JAIL.

18 Q AND THAT'S WHAT WE WANT TO TALK ABOUT, BUT
19 I WANT TO MAKE, I WANT TO BE CLEAR ABOUT THAT. YOU BEEN
20 PROMISED ANYTHING IN RETURN FOR YOUR TESTIMONY BEFORE THIS
21 JURY TODAY AS IT RELATES TO YOUR NEW CHARGE?

22 A NO, SIR.

23 Q OKAY, LET'S TALK ABOUT THE PRIOR TIME YOU
24 WERE IN JAIL, OKAY, THE PRIOR TIME YOU WERE IN JAIL
25 APPROXIMATELY HOW LONG WERE YOU IN JAIL?

1 A FOR SIX MONTHS.

2 Q SIX MONTHS, AND FOR A SIGNIFICANT PORTION
3 OF THAT TIME WHO WAS YOUR CELL MATE?

4 A LEMOND HOLLAND.

5 Q AND TELL ME DO YOU SEE HIM IN THE
6 COURTROOM?

7 A YES, SIR, HE'S SITTING OVER THERE IN THE
8 WHITE SHIRT RIGHT THERE.

9 MR. HUMPHRIES: LET THE RECORD REFLECT HE'S
10 INDICATED THE DEFENDANT.

11 THE COURT: VERY WELL.

12 MR. HUMPHRIES: (CONTINUING)

13 Q DID YOU HAVE AN OCCASION TO, WELL YOU WERE
14 IN THE CELL TOGETHER, DID YOU HAVE AN OCCASION TO SPEAK TO
15 HIM?

16 A PRACTICALLY EVERY DAY.

17 Q OKAY, DID YOU TALK ABOUT A LOT OF DIFFERENT
18 THINGS?

19 A NO, NOT A WHOLE LOT, JUST ABOUT PEOPLE ON
20 THE STREET AND, AND HIS CHARGES AND MY CHARGES.

21 Q OKAY, LET ME ASK THIS, DID THERE EVER COME
22 A TIME WHEN YOU BECAME ALARMED ABOUT THE CONVERSATIONS THAT
23 THE DEFENDANT HAD WITH YOU ABOUT HIS CHARGES?

24 A YES.

25 Q OKAY, WHAT I WANT YOU TO DO, MR. MALLOY, IS

1 TO TELL THE JURY THE SUBSTANCE OF THOSE CONVERSATIONS AND
2 WHAT RAISED YOUR CONCERNS?

3 A OKAY, IN LATE AUGUST, EARLY SEPTEMBER OF
4 LAST YEAR MR. HOLLAND ASKED ME IF I HAPPENED TO KNOW ANYONE
5 OR IF I WOULD BE INTERESTED IN TAKING OUT HIS WITNESSES.
6 HE WANTED THEM DEALT WITH, TO DISAPPEAR AS HE PUT IT. AND
7 I IMMEDIATELY, OF COURSE, WAS ALARMED AND I TOLD HIM I
8 SAID, WELL MAYBE, YOU KNOW, BECAUSE I THOUGHT SOME
9 AUTHORITIES OUGHT TO KNOW ABOUT WHAT, WHAT HE WAS INTENDING
10 TO DO SO I TOLD HIM POSSIBLY. WELL I WENT TO SEE MY LAWYER
11 AND FOR MY, TO DISPOSE OF MY CASE AND I TOLD HIM I SAID ---

12 MR. RICHARDSON: I'D OBJECT TO WHAT HE TELLS HIS
13 LAWYER, YOUR HONOR.

14 MR. HUMPHRIES: HE CAN CERTAINLY ---

15 THE COURT: SUSTAINED.

16 MR. HUMPHRIES: HE CAN SAY WHAT HE TOLD HIS
17 LAWYER NOT WHAT HIS LAWYER TOLD HIM.

18 THE COURT: WHO'S HE QUOTING?

19 MR. HUMPHRIES: HE'S QUOTING HIMSELF.

20 THE COURT: VERY WELL.

21 MR. HUMPHRIES: THANK YOU.

22 Q (CONTINUING) NOT WHAT YOUR LAWYER SAID BUT
23 WHAT YOU SAID TO YOUR LAWYER?

24 A CORRECT.

25 Q YES, GO AHEAD.

1 A I TOLD MY LAWYER, I SAID, THERE'S A GUY IN
2 JAIL WANTING ME TO KILL SOMEBODY AND I SAID THEY'RE WANTING
3 SOMEBODY TO KILL HIS WITNESSES AND YOU MIGHT WANT TO INFORM
4 THE POLICE ON HIS CASE ON THAT AND I GAVE HIM HIS NAME.

5 Q OKAY, LET ME DO THIS. TELL THE JURY
6 SPECIFICALLY, IF YOU CAN RECALL, WHAT HE SAID ABOUT THE
7 PARTICULAR WITNESSES AND LET ME DO THIS, LET ME. I TELL
8 YOU LET'S MOVE FORWARD JUST A LITTLE BIT, OKAY. DID YOU
9 ULTIMATELY HAVE AN OPPORTUNITY TO SPEAK TO LAW ENFORCEMENT
10 ABOUT THESE CONVERSATIONS WITH LEMOND HOLLAND?

11 A YES, I DID, THE SAME DAY I WENT TO COURT TO
12 DISPOSE OF MY CHARGES.

13 Q ALL RIGHT, AND LET'S TALK ABOUT THAT DAY.
14 ON THAT DAY DID YOU HAVE ANY DEAL WITH THE SOLICITOR'S
15 OFFICE WHO WAS PROSECUTING YOU ABOUT YOUR COOPERATION IN
16 THIS CASE FOR THE DISPOSITION OF THE CHARGES YOU WERE IN
17 COURT THAT DAY ON?

18 A NO, MY CHARGES WERE ALREADY DISPOSED OF.

19 Q YOU HAD ALREADY PLED GUILTY?

20 A THAT'S CORRECT.

21 Q ALREADY RECEIVED A SENTENCE?

22 A THAT'S CORRECT.

23 Q BEFORE ANYBODY KNEW ANYTHING ABOUT THIS
24 INFORMATION?

25 A YES, SIR.

1 Q OKAY.

2 A YEAH, I TOTALLY OFFERED IT.

3 Q WELL I JUST STARTED TO SAY, WHAT, WHAT WAS
4 YOUR INCENTIVE FOR PROVIDING THAT INFORMATION AT THAT
5 POINT? IT COULDN'T HELP YOU AT THAT POINT?

6 A WELL I THINK IT'S MY OBLIGATION AS A
7 CITIZEN. I MEAN JUST BECAUSE I'M CONVICTED OF A DRUG
8 CHARGE DOESN'T MAKE ME A CRIMINAL ELEMENT. IT MIGHT MAKE
9 ME A CRIMINAL ELEMENT IN THAT PARTICULAR SENSE BUT I MEAN
10 I'M NOT A, A MURDERER OR SOMEONE OUT TO HURT ANYONE.

11 Q AND DID, DID SOME INVESTIGATORS FROM NORTH
12 MYRTLE BEACH COME TO SEE YOU?

13 A YES THEY DID, TWO OF THEM.

14 Q LET ME SHOW YOU, WELL -- AND DID YOU, DID
15 YOU TELL THEM WHAT YOU HAD TO KNOW?

16 A YES.

17 Q WHAT YOU KNEW, OKAY?

18 A I TOLD THEM AND I, I WROTE A STATEMENT FOR
19 THEM.

20 Q ALL RIGHT, AND DID YOU ATTEMPT TO IDENTIFY
21 THEM, THESE PEOPLE THAT THE DEFENDANT WANTED KILLED DID YOU
22 ATTEMPT TO IDENTIFY THEM BY NAME?

23 A YEAH, THEY GIVE ME A LIST OF NAMES AND TOLD
24 ME, ASKED IF I COULD PICK THEM OUT.

25 Q LET ME SHOW YOU WHAT'S BEEN MARKED AS

1 STATE'S 19 FOR IDENTIFICATION PURPOSES. TAKE A LOOK AT
2 THAT AND TELL ME IF YOU CAN IDENTIFY IT?

3 A YEAH, I REMEMBER THIS.

4 Q OKAY, AND IS THAT THE LIST OF NAMES
5 PROVIDED TO YOU BY THE DETECTIVE?

6 A YES.

7 Q OKAY, I NOTE SOME OTHER WRITING THAT
8 DOESN'T APPEAR TO BE THE SAME WRITING, WHOSE WRITING IS
9 THAT?

10 A THAT'S MY WRITING.

11 Q WHOSE INITIALS ARE THEY?

12 A MINE.

13 Q OKAY, NOW LET'S DO THIS. LET'S TALK ABOUT
14 SPECIFICALLY AS YOU CAN WHAT LEMOND HOLLAND TOLD YOU HE
15 WANTED ACCOMPLISHED AND FOR WHAT PURPOSE, OKAY? CAN YOU DO
16 THAT FOR US?

17 A HE TOLD ME THAT HE WANTED THESE PEOPLE
18 TAKEN OUT. HE PUT IT IN VARIOUS DIFFERENT WAYS DURING
19 DIFFERENT CONVERSATIONS. SOMETIMES HE WOULD SAY HE WANTED
20 THEM TO DISAPPEAR; SOMETIMES HE WANTED TO SAY HE WANTED
21 THEM JUST TAKEN OUT, DEALT WITH, PERMANENT VACATION HE USED
22 BEFORE. SO THERE WAS TWO DIFFERENT PURPOSES ACTUALLY. ONE
23 OF THEM, OF COURSE, WAS TO GET RID OF HIS WITNESSES AND FOR
24 THE PURPOSE THAT HE WAS WANTING TO GET RID OF LAST
25 WITNESSES PLUS HE WAS GOING, HE HAD TOLD ME HE HAD FIRED

1 HIS LAWYER. HE WAS TRYING TO GET A BOND REDUCTION OR
2 ACTUALLY A BOND SET SO HE COULD GET OUT OF JAIL SO CAN GET,
3 GET THAT, YOU KNOW GET OUT OF DODGE.

4 Q OKAY, DID HE EVER INDICATE TO YOU ANY
5 PARTICULAR PRICE FOR THESE ACTIONS?

6 A HE OFFERED ME \$10,000 FOR THREE DIFFERENT
7 PEOPLE, 10,000 EACH.

8 Q AND WHO WERE THOSE THREE PEOPLE?

9 A ONE OF THEM WAS THE, WAS THE GIRLFRIEND OF
10 THE GUY THAT, OF THE INCIDENT, I DON'T KNOW IF I'M SUPPOSED
11 TO SAY THE GUY HE SHOT OR --

12 Q SURE.

13 A OKAY.

14 Q IF THAT'S WHAT HE SAID?

15 A RIGHT, OKAY. HIS GIRLFRIEND, THE BARTENDER
16 AT THE BAR WHERE THE INCIDENT OCCURRED, AND, AND THAT OTHER
17 INDIVIDUAL.

18 Q ALL RIGHT, NOW IN ORDER TO, TO IDENTIFY
19 THESE PEOPLE BY NAME YOU'VE TESTIFIED THE DETECTIVE
20 PROVIDED YOU A LIST OF NAMES?

21 A THIS IS THE LIST RIGHT HERE.

22 Q OKAY, THAT'S STATE'S 19 IN EVIDENCE,
23 APPEARS TO BE ONE, TWO, THREE, FOUR, FIVE, SIX, SEVEN,
24 EIGHT, NINE NAMES. YOU HAVE NOTATIONS ABOUT A NUMBER OF
25 THOSE NAMES. WHAT DID YOU TELL DETECTIVE SHEETS ABOUT

1 THOSE PEOPLE THAT YOU HAVE NOTATIONS BY AND WHAT DID THEY
2 MEAN? WHAT DO THOSE NOTATIONS ON STATE'S 19 MEAN?

3 A THESE ARE THE NAMES THAT I RECOGNIZE THAT
4 WE, THAT WE DISCUSSED. THE YESSICA CARUTHERS, THAT WAS THE
5 VICTIM'S GIRLFRIEND, I RECALL THAT. CHRIS HEMINGWAY, I
6 DON'T RECALL WHO THAT WAS.

7 Q WELL LET ME ASK YOU THIS. DID HE WANT
8 ANYTHING DONE TO CHRIS HEMINGWAY?

9 A HE DID NOT SAY, NO.

10 Q ALL RIGHT.

11 A JEFFREY BENNICK, THAT WAS THE BARTENDER.

12 Q OKAY.

13 A HE TOLD ME TO EITHER, HE TOLD ME FIRST TO
14 TRY TO BRIBE HIM, FIRST TRY TO BRIBE HIM WITH DRUGS AND
15 THEN. AND THEN CARLOS ADAMS HE WAS, HE WAS JUST A PATRON
16 AT THE BAR THAT HE WAS FAMILIAR WITH AND THEN A RAPHAEL
17 WATKINS. HE WAS, HE WAS, HE DIDN'T OFFER ME TO, WANTED ME TO
18 KILL HIM OR ANYTHING, THAT WAS THE GUY THAT HE SHOT IN THE
19 ANKLE.

20 Q THAT'S WHAT HE TOLD YOU?

21 A RIGHT.

22 Q OKAY.

23 A IN FACT, HE TOLD ME THAT HOURS AFTERWARDS
24 THAT, THAT RAPHAEL HAD ACTUALLY CAME [SIC] TO HIM AND HE
25 APOLOGIZED TO HIM FOR SHOOTING HIM ACCIDENTALLY.

1 Q LET ME ASK YOU, DID THE TWO OF YOU HAVE
2 DISCUSSIONS ABOUT WHO WAS GOING TO GET OUT OF JAIL FIRST?

3 A YES, HE KNEW I WAS GOING TO GET OUT OF JAIL
4 BECAUSE I HAD ALREADY SPOKE WITH MY LAWYER AND I WAS JUST
5 WAITING FOR TO GO SEE THE JUDGE.

6 Q OKAY, SO YOU'D BE OUT ON THE STREET?

7 A YES.

8 Q OKAY, NOW ONCE YOU GOT OUT ON THE STREET,
9 OF COURSE AT THAT TIME YOU HAD ALREADY SPOKE WITH THE LAW
10 ENFORCEMENT; IS THAT RIGHT?

11 A THAT'S CORRECT.

12 Q WERE YOU IN FACT CONTACTED BY THE
13 DEFENDANT?

14 A ON SEVERAL OCCASIONS.

15 Q OKAY, AND WHAT WAS THE SUBSTANCE OF THOSE
16 CONVERSATIONS?

17 A HE DIDN'T REALLY SAY ANYTHING OUTRIGHT
18 BECAUSE, NUMBER ONE, THEY RECORD THINGS FROM THE JAIL PHONE
19 AND ALSO IT WAS THROUGH A THREE-WAY CONVERSATION THROUGH
20 HIS MOTHER. BUT HE ASKED ME DID I, HAD I GOTTEN IN CONTACT
21 WITH THE INDIVIDUALS THAT HE'D ASKED ME TO GET IN CONTACT
22 WITH.

23 Q OKAY, AND LET ME ASK YOU THIS, DID YOU EVER
24 TAKE ANY STEPS TO, TO DO THE THINGS LEMOND HOLLAND ASKED
25 YOU TO DO?

1 A ABSOLUTELY NOT.

2 Q OKAY, IN FACT YOU HAD ALREADY TOLD LAW
3 ENFORCEMENT ABOUT IT?

4 A ABSOLUTELY.

5 MR. HUMPHRIES: YOUR HONOR, AT THIS TIME WE MOVE
6 STATE'S 19 INTO EVIDENCE.

7 THE COURT: ANY OBJECTION?

8 MR. RICHARDSON: NO OBJECTION.

9 THE COURT: WITHOUT OBJECTION IT'S ADMITTED.

10 (WHEREUPON, STATE'S EXHIBIT NUMBER 19 ENTERED
11 INTO EVIDENCE.)

12 MR. HUMPHRIES: (CONTINUING)

13 Q MR. MALLOY, YOU HAVE A HISTORY OF PRIOR
14 CRIMINAL CONVICTIONS, DO YOU NOT?

15 A YES, SIR, PARTICULARLY DRUG CHARGES. I'M
16 NOT, I DON'T DENY IT, YOU KNOW, I'VE HAD PROBLEMS WITH
17 DRUGS MOST OF MY LIFE.

18 Q BUT IN ALL OF THAT WHETHER IT'S CHARGES
19 THAT WERE PREVIOUSLY DISPOSED OF OR CHARGES PENDING YOU'VE
20 ASKED FOR NO HELP AT ALL ---

21 A THAT IS CORRECT.

22 Q --- IN REGARD TO YOUR TESTIMONY?

23 A I HAVE, NOT ONLY THAT I HAVEN'T BEEN
24 OFFERED ANY HELP SO I MEAN I'M, IT'S MY CIVIC DUTY I FEEL.
25 YOU KNOW, I MEAN IF SOMEBODY WAS JUST DOING SOMETHING ON

1 THE STREET LIKE STEALING SOMETHING FROM A STORE OR
2 SOMETHING LIKE THAT I WOULD PROBABLY CONSIDER THAT NONE OF
3 MY BUSINESS BUT WHEN SOMEBODY WANTS TO KILL SOMEONE THAT'S,
4 IF SOMEONE KNOWS ABOUT IT THAT'S THEIR BUSINESS TO TELL
5 SOMEONE ABOUT IT.

6 Q FAIR ENOUGH. LET ME ASK YOU THIS, WITHIN
7 THE CELL THERE IS, THAT LEMOND HOLLAND AND YOU WERE STAYING
8 IN, WERE YOU AWARE THAT LEMOND HOLLAND HAD SOME PAPER WORK
9 IN CONNECTION WITH THIS CASE?

10 A YES.

11 Q OKAY, DID YOU REVIEW THAT PAPER WORK?

12 A YES, I DID.

13 Q TELL ME HOW THAT HAPPENED?

14 A HE WAS TALKING ABOUT WHAT HE WANTED DONE
15 AND HE, INITIALLY IT CAME UP WHERE I SAID, WELL, HE WAS
16 TALKING ABOUT THE GIRL THAT HE WANTED TAKEN OUT. THAT WAS,
17 THAT WAS THE INDIVIDUAL'S GIRLFRIEND THAT HE SHOT, AND HE
18 SAID HE HAD HER ADDRESS AND HE SAID HE WASN'T SUPPOSED TO
19 HAVE HER ADDRESS BUT THEY ACCIDENTLY LEFT IT ON THE PAPER
20 WORK. SO HE SHOWED THAT TO ME AND HE STARTED SHOWING ME
21 EVERYTHING SO THEN WE KIND OF PRETTY MUCH WENT OVER
22 EVERYTHING. HE WOULD GIVE ME A PAGE HERE AND A PAGE THERE,
23 MAYBE THREE PAGES AT A TIME, SAY, HERE LOOK AT THIS RIGHT
24 HERE.

25 Q AND LET ME ASK YOU, DID YOU EVER LOOK AT

1 THAT PAPER WORK WITHOUT IT BEING PROVIDED TO YOU DIRECTLY
2 BY THE DEFENDANT?

3 A ABSOLUTELY NOT.

4 Q OKAY.

5 A NO, IN FACT, IN FACT I BELIEVE I'M PROBABLY
6 THE ONLY PERSON HE EVER SHOWED IT TO. HE NEVER EVEN
7 DISCUSSED, NO ONE ELSE IN THE CELL EVEN KNEW WHAT HE WAS IN
8 JAIL FOR AT THAT POINT IN TIME ANYWAY. I MEAN HE WAS VERY
9 PROTECTIVE OF EVERYTHING, VERY RARELY EVEN EVER LEFT THE
10 CELL.

11 MR. HUMPHRIES: THANK YOU, MR. MALLOY.

12 A YOU'RE WELCOME.

13 CROSS EXAMINATION

14 BY MR. JOHNSON:

15 Q GOOD AFTERNOON, MR. MALLOY.

16 A GOOD AFTERNOON, HOW ARE YOU?

17 Q DOING GOOD, DOING GOOD. WHEN DID YOU FIRST
18 GO IN A CELL WITH MR. HOLLAND?

19 A THAT WOULD BE --

20 Q BACK IN SEPTEMBER?

21 A NO, SIR, THAT WOULD BE IN MAY OF 2006.

22 Q MAY OF 2006?

23 A THAT WOULD BE CORRECT.

24 Q AND YOU GAVE YOUR STATEMENT TO DETECTIVE OR
25 OFFICER SHEETS BACK ON NOVEMBER THE 8TH OF 2006, CORRECT?

1 A I BELIEVE IT WAS OCTOBER 8TH.

2 Q IF I TOLD YOU IT WAS NOVEMBER 8TH, WOULD
3 YOU DENY THAT FROM YOUR PAPER WORK?

4 A PARDON?

5 Q FROM YOUR PAPER WORK IF IT SHOWS NOVEMBER
6 THE 8TH WOULD YOU DENY THAT?

7 A NO, I WOULDN'T DENY IT.

8 Q OKAY, ALL RIGHT, ON NOVEMBER THE 8TH, OR
9 WHENEVER YOU WENT TO COURT THAT DAY, YOU GAVE THAT
10 STATEMENT TO OFFICER SHEETS, RIGHT?

11 A ON OCTOBER 8TH THAT IS CORRECT.

12 Q OKAY, AND ON THAT DATE YOU HAD THREE
13 CHARGES PENDING AGAINST YOU, DIDN'T YOU?

14 A YES, I DID.

15 Q ALL RIGHT, AND YOU SAID THAT YOU DISPOSED
16 OF HOW MANY OF THEM?

17 A ALL OF THEM. I HAD, THERE WAS AN
18 ARRANGEMENT MADE FOR PROBATION WITH MY, WITH MY ATTORNEY.
19 HAD NOTHING TO DO, MY, MY CHARGES WERE ALREADY DISPOSED OF
20 WHEN I SPOKE WITH THE DETECTIVES. IN FACT, THE DETECTIVES
21 ASKED ME DID I EXPECT ANYTHING. I SAID, NO, MY CHARGES ARE
22 ALREADY DONE.

23 Q NOW ON THAT DATE TWO OF YOUR CHARGES WERE
24 DISMISSED, WEREN'T THEY?

25 A ALL OF MY CHARGES WERE DISMISSED. I MEAN

1 THEY WERE, THEY WERE DISPOSED OF.

2 Q YOU PLED TO ONE, RIGHT?

3 A CORRECT.

4 Q AND TWO WERE DISMISSED, WEREN'T THEY?

5 A THAT WOULD BE CORRECT, I BELIEVE.

6 Q ALL RIGHT, WHO WAS THE SOLICITOR WHO
7 DISMISSED THOSE TWO CHARGES?

8 A THAT I COULDN'T TELL YOU.

9 Q YOU DON'T REMEMBER?

10 A NO.

11 Q WAS THAT SOLICITOR DONNA ELDER WHO
12 DISMISSED THOSE TWO CHARGES ON THAT DATE?

13 A I COULDN'T TELL YOU TO BE HONEST WITH YOU.

14 Q COULDN'T TELL ME, YOU DON'T REMEMBER WHAT
15 THE SOLICITOR LOOKED LIKE?

16 A I WASN'T PAYING ATTENTION. I MEAN I WAS, I
17 WAS IN THE COURTROOM FOR LIKE ABOUT LESS THAN A MINUTE
18 PROBABLY, YOU KNOW.

19 Q TELL ME THAT YOU COME TO COURT, GOT THREE
20 CHARGES AGAINST YOU, YOU GOT INFORMATION THAT YOU WANT TO
21 GIVE TO LAW ENFORCEMENT, THE SOLICITOR'S OFFICE, THAT'S
22 WHAT YOU'RE TELLING ME, RIGHT?

23 A THAT'S CORRECT.

24 Q OKAY, AND TWO OF YOUR CHARGES ARE BEING
25 DISMISSED WHEN YOU GO TO COURT AND YOU DON'T RECALL WHO THE

1 SOLICITOR WAS?

2 A THAT'S CORRECT. I'D BEEN IN COURT ANOTHER
3 TIME AND I DIDN'T KNOW WHO THE SOLICITOR WAS THAT TIME
4 EITHER.

5 Q WOULD YOU DENY THAT IT WAS SOLICITOR DONNA
6 ELDER?

7 A NO, I WOULDN'T DENY IT.

8 Q YOU USED TO WEAR YOUR HAIR A LOT LONGER
9 THAN YOU DO TODAY, CORRECT?

10 A YES.

11 Q DID YOU CUT YOUR HAIR FOR COURT TODAY?

12 A THAT WOULD BE ONE REASON, THAT IS CORRECT.
13 I WANTED TO MAKE MYSELF PRESENTABLE FOR THE COURT.

14 MR. JOHNSON: THE COURT'S INDULGENCE.

15 Q (CONTINUING) MR. MALLOY --

16 A YES, SIR?

17 Q YOU JUST TESTIFIED THAT YOU HAD BEEN IN A
18 CELL WITH MR. HOLLAND FROM MAY UNTIL OCTOBER OR NOVEMBER,
19 CORRECT?

20 A THAT'S CORRECT.

21 Q ALL RIGHT, AND YOU SAID THAT HE KEPT DURING
22 THAT TIME MENTIONING THESE THINGS TO YOU THAT YOU JUST
23 TESTIFIED TO, RIGHT?

24 A THAT'S CORRECT.

25 Q AND YOU NEVER ONCE GOT A TAPE RECORDER, DID

1 YOU?

2 A I TOLD THE ----

3 Q YES OR NO?

4 A NO, IT'S NO, I DO NOT.

5 THE COURT: YOU CAN EXPLAIN YOUR ANSWER IF YOU
6 WISH.

7 MR. JOHNSON: (CONTINING)

8 Q IF YOU WISH, GO AHEAD?

9 A DO YOU WANT ME TO EXPLAIN IT?

10 Q THE COURT'S THE ONE THAT ASKED YOU.

11 THE COURT: IF YOU ---

12 MR. JOHNSON: I DON'T WANT YOU TO EXPLAIN IT.
13 THE COURT'S ASKED YOU TO.

14 THE COURT: IT SOUNDED TO ME LIKE HE WAS TRYING
15 TO.

16 THE WITNESS: NO, SIR, THAT'S FINE, I ANSWERED,
17 NO, THAT'S FINE.

18 MR. JOHNSON: THANK YOU, THAT'S ALL THE
19 QUESTIONS I HAVE AT THIS TIME.

20 THE COURT: ANYTHING ON REDIRECT?

21 MR. HUMPHRIES: VERY BRIEFLY.

22 REDIRECT EXAMINATION

23 BY MR. HUMPHRIES:

24 Q DID YOU KNOW YOU WERE GETTING OUT BEFORE
25 THE DEFENDANT?

1 A YES.

2 Q ANY, ANY REASON TO RUSH TO GET THAT
3 INFORMATION TO LAW ENFORCEMENT WHEN YOU KNEW YOU WERE
4 GETTING OUT BEFORE HIM?

5 A NO, WHAT I DID WAS IF YOU'D LIKE ME TO
6 EXPLAIN?

7 Q SURE YOU CAN?

8 A WHAT I DID WAS I DIDN'T WANT TO, I KNEW THE
9 POLICE WOULD WANT MORE INFORMATION, OKAY. SO I DIDN'T WANT
10 TO HAVE TO KEEP ASKING HIM THE SAME STUFF OVER AND OVER AND
11 OVER, OKAY. SO WHAT I DID WAS I DIDN'T WANT TO GET, TAKE
12 AS MUCH INFORMATION AS I COULD AT ONE TIME IN CASE THE
13 POLICE WANTED TO MAKE A RECORDING THEN I COULD DISCUSS THAT
14 WITH HIM AND GET IT ON TAPE WITHOUT HIM BEING SUSPICIOUS OF
15 ME ASKING HIM FOR THE SAME INFORMATION OVER AND OVER AND
16 THAT WAS THE REASON OF THAT.

17 Q ALL RIGHT, AND JUST FOR A MATTER OF
18 CLARIFICATION, THEY ASKED YOU IF YOU USED TO WEAR YOUR HAIR
19 LONG, DID YOU HAVE A BEARD, TOO?

20 A I HAD A BEARD, TOO, THAT IS CORRECT. I
21 JUST FELT THAT I WAS COMING IN PUBLIC IN FRONT OF PEOPLE
22 AND I NEEDED TO MAKE MYSELF PRESENTABLE, YOU KNOW, FOR THE
23 COURT. I MEAN, THAT'S JUST RESPECTFUL.

24 Q TELL THE, TELL THE JURY WHY YOU WEAR YOUR
25 HAIR LONG AND WEAR A BEARD WHILE YOU'RE IN JAIL?

1 THE REASON IS BECAUSE THERE'S A WHOLE
2 BUNCH OF YOUNG GUYS IN JAIL. I TOLD THEM THAT BEFORE,
3 THERE'S A BUNCH OF YOUNG GUYS IN JAIL. IN FACT IT'S
4 PROBABLY PREDOMINATELY YOUNG PEOPLE AND THEY'RE BUCK WILD
5 AND THERE'S ALL KIND OF FIGHTS AND STUFF LIKE THAT IN THERE
6 AND USUALLY THE OLDER GUYS THEY KIND OF DON'T MESS WITH YOU
7 BECAUSE YOU'RE OLDER GUY. AND I GOT GRAY HAIR SO I LET IT
8 ALL GROW OUT AND SHOW THE GRAY IN IT TO MAKE MYSELF LOOK
9 OLDER.

10 Q THANK YOU.

11 MR. HUMPHRIES: THAT'S ALL WE HAVE, YOUR HONOR.

12 THE COURT: YOU MAY STEP DOWN, THANK YOU.

13 MS. ELDER: YOUR HONOR, AT THIS TIME THE STATE
14 WOULD REST.

15 THE COURT: - VERY WELL. LADIES AND GENTLEMEN OF
16 THE JURY, PLEASE STEP BACK TO YOUR JURY ROOM. DO NOT
17 DISCUSS THE CASE WHILE YOU'RE BACK THERE AND WE'LL CALL YOU
18 OUT SHORTLY.

19 (WHEREUPON, THE JURY RETIRED TO THE JURY ROOM AT
20 4:45 P.M.)

21 THE COURT: MOTIONS?

22 MR. JOHNSON: YOUR HONOR, AT THIS TIME THE
23 DEFENDANT MAKES A MOTION FOR A DIRECTED VERDICT ON THE
24 INDICTMENT FOR MURDER AS THERE HAS BEEN A FAILURE OF THE
25 STATE TO PUT FORTH ANY COMPETENT EVIDENCE TO PROVE THE

DEFENSE MOTION FOR DIRECTED VERDICT ASSAULT AND BATTERY 300

1 CHARGE SET FORTH IN THE INDICTMENT FOR MURDER AS WELL AS
2 MEETING THE ELEMENTS ON THE CHARGE OF MURDER. THERE HAS
3 BEEN SOME ISSUES OF THE DEFENDANT WHETHER HE WAS THE
4 FIGHTER. I DON'T BELIEVE THE STATE HAS PROVEN THAT HE IS
5 THE MAN WHO ACTUALLY SHOT THE VICTIM IN THIS CASE.

6 THE COURT: I THINK THERE IS AMPLE EVIDENCE IN
7 THE RECORD THAT IF BELIEVED THE JURY COULD COME TO THE
8 CONCLUSION THAT THERE IS CIRCUMSTANTIAL EVIDENCE IF NOTHING
9 ELSE THAT THAT WAS THE CASE AND I RESPECTFULLY DENY YOUR
10 MOTION, THANK YOU.

11 MR. JOHNSON: YOUR HONOR, THE DEFENDANT ALSO
12 MAKES A MOTION FOR A DIRECTED VERDICT ON THE INDICTMENT FOR
13 ASSAULT AND BATTERY WITH INTENT TO KILL FOR THE REASON THAT
14 THE STATE HAS FAILED TO PUT FORTH COMPETENT EVIDENCE
15 TENDING TO PROVE THE CHARGE AND THE ELEMENTS SET FORTH IN
16 THE INDICTMENT FOR ASSAULT AND BATTERY WITH INTENT TO KILL.
17 THE EVIDENCE HAS BEEN, THE TESTIMONY HAS BEEN THAT THAT
18 VICTIM HAS NOT BEEN IN COURT GIVEN ANY TESTIMONY. THERE'S
19 NO MEDICAL EVIDENCE SETTING FORTH THAT IT WAS A GUNSHOT
20 WOUND TO HIS LEG, COULD HAVE VERY EASILY HAVE BEEN, HE
21 COULD HAVE RUN INTO A POST, STEPS, NO TELLING WHAT IT WAS.
22 AS A MATTER OF FACT THE LAST ONE ROBIN, OR WHOEVER IT WAS,
23 JEFFREY BENNICK I THINK THE COURT EVEN STRUCK HIS STATEMENT
24 IT WAS A GUNSHOT WOUND BECAUSE REALLY IT'S A CONCLUSION.
25 EVERY WITNESS BEEN UP THERE SAID IT WAS A GUNSHOT WOUND IT

1 WAS MERELY CONCLUSION. I DON'T BELIEVE THERE'S COMPETENT
2 EVIDENCE SETTING FORTH THE ELEMENTS FOR ASSAULT AND BATTERY
3 WITH INTENT TO KILL.

4 THE COURT: WELL LET ME TELL YOU WHY I CHANGED
5 MY RULING. NUMBER ONE, HE SAID HE HAD A GUNSHOT WOUND,
6 OBJECTION. I ASSUME HE SAW THE WOUND, AND IF THERE HADN'T
7 BEEN A GUNSHOT, THREE, AND HIM HAVING A WOUND OR A ROUND
8 HOLE LIKE THAT THAT HE SAW, HOWEVER, AFTER WE GOT INTO IT
9 HE SAID I SAW A BANDAGE. HE NEVER SAW THE HOLE. THAT'S
10 WHEN I CHANGED MY RULING AND THAT'S WHY I INSTRUCTED --
11 HOWEVER, THE LAST WITNESS SAID THAT THE DEFENDANT HIMSELF
12 TOLD HIM THAT HE SHOT HIM, THIS RAPHAEL, IN THE ANKLE AND
13 THEN LATER APOLOGIZED TO HIM FOR SHOOTING HIM ACCIDENTALLY.
14 HE KNOWS ABOUT TRANSFERRED INTENT AND THE JURY COULD TAKE
15 THIS EVIDENCE IN THE CASE AND JURY COME TO THE CONCLUSION
16 THAT HE INTENDED TO SHOOT THE DECEASED AND IN SO DOING IT
17 SHOT MR. RAPHAEL -- WHAT IS ---

18 MR. JOHNSON: WALKER.

19 THE COURT: WALKER, W-A-L-K-E, SO I WITH RESPECT
20 DENY YOUR MOTION.

21 MR. JOHNSON: THE COURT'S INDULGENCE. YOUR
22 HONOR, THE DEFENDANT ALSO MOVES FOR A DIRECTED VERDICT ON
23 THE INDICTMENT FOR POSSESSION OF A FIREARM DURING THE
24 COMMISSION OF A VIOLENT CRIME REASON BEING THAT THE STATE
25 HAS FAILED TO SET FORTH ANY COMPETENT EVIDENCE TENDING TO

1 PROVE THE CHARGE AND THE ELEMENTS IN THAT INDICTMENT FOR
2 POSSESSION OF A FIREARM DURING THE COMMISSION OF A VIOLENT
3 CRIME.

4 THE COURT: FOR THE SAME REASON THAT I DENIED
5 YOUR MOTION ON THE OTHER CHARGES I'M GOING TO DENY THEM
6 HERE. THE TESTIMONY WAS, AS I RECALL IT, THAT SOMEONE HAD
7 SEEN HIM HAVE A GUN IN HIS GLOVE COMPARTMENT. HE LEFT
8 SHORTLY AFTER AN ALTERCATION WITH WHOM LATER TURNED OUT TO
9 BE THE VICTIM IN THIS CASE, WENT TO HIS CAR GOT SOMETHING
10 OUT OF HIS GLOVE COMPARTMENT, CAME BACK AND IN A MATTER OF
11 SECONDS OR MINUTES HE GOT LOCKED UP WITH THIS GUY AND HE
12 GOT SHOT. I THINK THE JURY COULD COME TO THE CONCLUSION
13 THAT HE SHOT HIM AND IF HE DID HE HAD TO HAVE A GUN TO
14 SHOOT HIM WITH, HE COULDN'T HAVE SHOT HIM WITH HIS FINGER,
15 SO I RESPECTFULLY DENY YOUR MOTION FOR A DIRECTED VERDICT
16 ON THAT.

17 MR. JOHNSON: ONE MOMENT, YOUR HONOR. THANK
18 YOU, YOUR HONOR.

19 MR. HUMPHRIES: YOUR HONOR, JUST IN TERMS OF
20 SCHEDULING --

21 THE COURT: YES, SIR?

22 MR. HUMPHRIES: BY THE TIME I ASSUME THAT WE
23 WILL NOT GO INTO THE DEFENSE CASE IF IN FACT WE'VE GOT ONE,
24 BUT I WOULD REQUEST AFTER THE JURY IS EXCUSED THAT THE
25 COURT INQUIRE OF THE DEFENDANT REGARDING HIS DESIRE TO ---

1 THE COURT: I'M GOING TO DO THAT RIGHT NOW.

2 MR. HUMPHRIES: YES, VERY GOOD.

3 THE COURT: DO YOU KNOW WHETHER THE DEFENDANT IS
4 GOING TO TAKE THE STAND?

5 MR. RICHARDSON: NOT AT THIS TIME, YOUR HONOR.

6 THE COURT: HE'S NOT GOING TO TAKE THE STAND OR
7 YOU DON'T KNOW?

8 MR. RICHARDSON: NOT AT THIS TIME WE DON'T KNOW.
9 WE'VE GOT TO HAVE A DISCUSSION WITH HIM.

10 MR. JOHNSON: IF YOUR HONOR WOULD IF WE COULD
11 HAVE SOME TIME TO SPEAK WITH OUR CLIENT?

12 THE COURT: SURE.

13 MR. JOHNSON: BEFORE WE MAKE THAT DECISION?

14 THE COURT: SURE, I THINK IT WOULD PROBABLY BE
15 BEST IF WE COULD FIND THAT OUT NOW IN A MATTER OF MINUTES.
16 YOU'RE NOT TALKING ABOUT TOMORROW, ARE YOU?

17 MR. RICHARDSON: IF THEY'VE RESTED THEIR CASE
18 COULD WE HAVE THE NIGHT TO TALK WITH HIM, YOUR HONOR. WE
19 WOULD LIKE TO GO OVER THIS IN DETAIL WITH HIM AND JUST COME
20 BACK IN THE MORNING AND SEE WHERE WE ARE?

21 THE COURT: ARE THERE ANY OTHER WITNESSES?

22 MR. RICHARDSON: NO, SIR, YOUR HONOR, NO OTHER
23 WITNESS.

24 THE COURT: THAT WILL BE FINE.

25 MR. HUMPHRIES: YOUR HONOR, LET, IN LIGHT OF

1 THAT COULD WE AT THE VERY LEAST DISCUSS POTENTIAL CHARGES
2 BECAUSE THE SITUATION OBVIOUSLY IS GOING TO PUT US IN WITH
3 THEM NOT GIVING US ANY INDICATION ABOUT WHETHER HE'S
4 TESTIFYING OR NOT TOMORROW HE MAY SHOW UP TOMORROW AND SAY,
5 HE AIN'T TESTIFYING AND WE'LL GO RIGHT INTO ARGUMENTS OF
6 THE CHARGE AND WE'D LIKE AT LEAST SOME INDICATION OF WHAT
7 THE COURT WILL CHARGE IN REGARD TO THIS CASE.

8 THE COURT: YES, WE CAN DO THAT.

9 MR. HUMPHRIES: THANK YOU, YOUR HONOR. ARE YOU
10 GOING TO LET THE JURY GO FIRST OR --

11 THE COURT: WE CAN DO THAT, BRING THE JURY BACK.

12 (WHEREUPON, THE JURY RETURNED TO THE COURTROOM AT
13 4:55 P.M.)

14 THE COURT: LADIES AND GENTLEMEN, THE STATE HAS
15 RESTED IN THIS MATTER. THERE WILL BE NO MORE TESTIMONY
16 FROM THE STATE IN THIS MATTER. WHEN WE STARTED I TOLD YOU
17 THIS TRIAL WOULD BE BROKEN UP INTO PHASES. WE'VE HAVE
18 OPENING STATEMENTS WHICH YOU'VE HEARD. WE'VE HAVE THE
19 PRESENTATION OF THE EVIDENCE AND YOU'VE HEARD THE STATE'S
20 SIDE OF THE PRESENTATION OF THE EVIDENCE. IT'S FIVE
21 MINUTES TO FIVE AND WE'RE GOING TO STOP NOW AND COME BACK
22 TOMORROW.

23 PLEASE AGAIN LET ME ADMONISH YOU NOT TO DISCUSS
24 THIS CASE WITH ANYONE OVER, OVER THE EVENING HOURS. DON'T
25 TALK ABOUT IT WITH YOUR HUSBAND OR YOUR WIFE OR YOUR

1 GIRLFRIEND OR BOYFRIEND, JUST TELL THEM THAT YOU CAN'T TALK
2 ABOUT IT. COME BACK TOMORROW MORNING. IF YOU SEE ANYTHING
3 ON TELEVISION THAT REMOTELY LOOKS LIKE IT MIGHT BE
4 SOMETHING ABOUT THIS CASE JUST TURN IT OFF, CHANGE THE
5 CHANNEL, WATCH I LOVE LUCY. OH, I SHOULDN'T HAVE SAID
6 THAT, THAT DATED ME BAD, WATCH SOMETHING ELSE. BE BACK IN
7 YOUR JURY ROOM TOMORROW MORNING AT 9:30 AND WE'LL RESUME
8 THE CASE AT THAT TIME, THANK YOU.

9 (WHEREUPON, THE JURY WAS EXCUSED FOR THE EVENING
10 AT 4:56 P.M.)

11 THE COURT: ALL RIGHT, IS THERE ANY REQUEST TO
12 CHARGE FROM EITHER SIDE?

13 MR. HUMPHRIES: WELL WE OBVIOUSLY IN REGARD TO
14 THE ASSAULT AND BATTERY WITH INTENT TO KILL WE WOULD
15 REQUEST A CHARGE ON THE DOCTRINE OF TRANSFERRED INTENT. IF
16 THE COURT DOES NOT HAVE OF THESE CHARGES I'LL BE GLAD TO
17 PROVE ONE.

18 THE COURT: WELL I DON'T KNOW WHETHER I DO OR
19 NOT, I CAN'T RECALL ---

20 MR. HUMPHRIES: WE'VE GOT ONE.

21 THE COURT: --- IN THE LAST FIVE OR SIX YEARS
22 CHARGING THAT, IT MAY HAVE MOLDED AWAY. IF I CAN FIND ONE,
23 FINE, I WOULD ASK YOU, THOUGH, TO SEE IF YOU CAN FIND ONE
24 IN THE MEANTIME, I AM GOING TO CHARGE THAT.

25 MR. HUMPHRIES: GLAD TO DO IT, THANK YOU, YOUR

1 HONOR, AND WE WOULD INQUIRE AS TO WHAT CHARGE YOU'RE GOING
2 TO GIVE ON REASONABLE DOUBT.

3 THE COURT: VICTOR V. NEBRASKA.

4 MR. HUMPHRIES: THANK YOU, YOUR HONOR.

5 THE COURT: WHERE IN IT SAYS THE JURY MUST BE
6 FIRMLY CONVINCED.

7 MR. HUMPHRIES: YES, SIR, THAT WOULD BE OUR
8 REQUEST.

9 THE COURT: ANYTHING FURTHER?

10 MR. HUMPHRIES: NOTHING, YOU HONOR.

11 MR. RICHARDSON: ONE SECOND, YOUR HONOR. YOUR
12 HONOR, WE HAVE SOME WRITTEN CHARGES WE'RE GOING TO HAND UP.
13 I'M SURE THE JUDGE MIGHT COVER IT ELSEWHERE BUT WE JUST HAD
14 SOME WE WANTED TO THINK ABOUT.

15 ALSO, YOUR HONOR, WE WOULD REQUEST WHAT VERDICTS,
16 WELL ALSO LIKE YOUR HONOR TO CHARGE ASSAULT AND BATTERY IN
17 THIS CASE BECAUSE IF THEY FIND OUR CLIENT WAS NOT THE
18 SHOOTER THE THE INFERENCE COULD BE THAT HE WAS THE FIGHTER
19 ONLY AND COULD BE FOUND GUILTY OF ASSAULT AND BATTERY
20 ALONE.

21 MR. HUMPHRIES: AND AS, HAVE YOU GOT A COPY OF
22 IT, HAVE THEY HANDED YOU A COPY OF IT, YOUR HONOR? JUST,
23 AND I DON'T KNOW THAT WE WANT TO, WELL LET ME STATE OUR
24 POSITION REGARDING TO ALL THREE CHARGES. WE OBJECT TO ALL
25 THREE FOR THIS REASON. WHAT WE HAVE TO, WHAT WE HAVE TO DO

1 IS, IS GLEAN FROM THE RECORD WHAT THE FACTS SUPPORT WHAT
2 CHARGES.

3 THERE IS AT THIS POINT NO EVIDENCE WHICH WOULD
4 SUPPORT A VOLUNTARY MANSLAUGHTER CHARGE. WHAT WE HAVE IN
5 THE BAR IS A VERBAL ALTERCATION, NO EVIDENCE OF ANY
6 PHYSICAL ALTERCATION WHATSOEVER. WORDS ALONE OBVIOUSLY DO
7 NOT PROVIDE SUFFICIENT PROVOCATION. THE ONLY OTHER
8 EVIDENCE REGARDING THE PHYSICAL ALTERCATION WHICH OCCURRED
9 OUT IN THE PARKING LOT WAS AS A RESULT OF THE VICTIM WHO
10 WAS RETREATING IN THE VEHICLE, THE DEFENDANT APPROACHING
11 THE VEHICLE WITH A HANDGUN WITH AN ATTEMPT TO GET THE
12 VICTIM OUT OF THE VEHICLE WHEN THEN THEY ENGAGED IN SOME
13 CONTACT AND THE DEFENDANT BEING FULLY EXCUSED BY WAY OF
14 SELF DEFENSE.

15 THOSE ARE THE ONLY FACTS IN THE RECORD SO AT THIS
16 POINT VOLUNTARY MANSLAUGHTER CHARGE IT'S THE STATE'S
17 POSITION IS NOT A VITAL ONE. IT'S NOT SUPPORTED BY AND NOT
18 REQUIRED BY THE FACTS AND THE EVIDENCE.

19 THE SAME POSITION ON DEFENDANT'S TWO. THE ONLY
20 FACTS IN EVIDENCE ARE THAT THE DEFENDANT WAS THE SHOOTER
21 AND, THEREFORE, THE DEFENDANT'S REQUEST TO NUMBER TWO
22 WOULDN'T BE SUPPORTED BY THE FACTS AND DEFENDANT'S NUMBER
23 THREE HAS BEEN DISAPPROVED BY THE SUPREME COURT.

24 THE COURT: I USE GRIPPON.

25 MR. HUMPHRIES: YES, SIR, THAT'S THE ONE THE

1 SUPREME COURT APPROVES.

2 THE COURT: I WILL CHARGE, I WILL CIRCUMSTANTIAL
3 EVIDENCE.

4 MR. RICHARDSON: YES, SIR, YOUR HONOR.

5 THE COURT: THEY DO HAVE A CHARGE ON TRANSFERRED
6 INTENT.

7 MR. HUMPHRIES: AND WE'VE GOT AND I'M GOING TO -
8 - IT'S PROBABLY THE SAME ONE.

9 THE COURT: WELL THIS IS WHERE THE DEFENDANT
10 INTENDS TO KILL OR SERIOUSLY INJURE ONE PERSON BUT KILLS
11 ANOTHER, AND I WILL ADD OR INJURES ANOTHER, A DEFENDANT MAY
12 BE FOUND GUILTY OF MURDER OR MANSLAUGHTER OR ASSAULT AND
13 BATTERY OF A HIGH OR WITH INTENT TO KILL.

14 IF MALICE IS FOUND AT THE TIME OF THE KILLING
15 EVEN IF A THIRD PARTY IS KILLED RATHER THAN THE INTENDED
16 VICTIM THE DEFENDANT IS GUILTY OF MURDER. THIS RESULT IS
17 SOMETIMES DESCRIBED AS THE FUNCTION OF THE DOCTRINE OF
18 TRANSFERRED INTENT WHEREBY THE ACT WAS AN ATTEMPT TO KILL
19 HIS INTENDED VICTIM IT'S SAID TO BE TRANSFERRED TO HIS
20 ACTUAL VICTIM.

21 ALL THAT IS REQUIRED OF MURDER IS THE MENTAL
22 STATE OF MALICE PROVIDED BY THE INTENT TO KILL A HUMAN
23 BEING BEING COUPLED WITH AN ACT WHICH CAUSES DEATH OF A
24 HUMAN BEING. THEY'VE GOT A DOCTRINE ---

25 MR. HUMPHRIES: YES, SIR, I UNDERSTAND.

1 THE COURT: BECAUSE THE OTHER PERSON DIDN'T DIE.

2 MR. HUMPHRIES: YES, SIR.

3 THE COURT: BUT THAT WOULD BE ---

4 MR. HUMPHRIES: YES, SIR, THAT'S SATISFACTORY TO
5 THE STATE.

6 THE COURT: --- TRANSFERRED INTENT.

7 MR. HUMPHRIES: I DON'T MEAN TO INTERRUPT THE
8 COURT'S READING OF THEIR CHARGE BUT I THINK IT IMPORTANT TO
9 NOTE IN TERMS OF FACTUALLY THE ONLY EVIDENCE IN THIS CASE
10 IS THAT THE VICTIM WAS ACTUALLY THE PASSENGER OF THE
11 VEHICLE. THERE MAY BE SOME SUGGESTION THAT IF HE HAD
12 DRIVEN OFF THEN HIS DEFENSE, HIS PHYSICAL DEFENSE OF
13 HIMSELF WOULDN'T BE REQUIRED BUT HE WAS A PASSENGER AND THE
14 ONLY EVIDENCE ---

15 THE COURT: I MUST TELL YOU THAT I, YOU POINTED
16 THAT OUT ADROITLY, MY RECOLLECTION OF THE TESTIMONY WAS
17 THAT SHE BACKED OUT, SHE WAS HEADED OUT 10 TO 15 FEET AND
18 STOPPED AND GOT OUT OF THE CAR, BUT RIGHT AFTER THAT, AND
19 MR. RICHARDSON [SIC] GOT OUT OF THE CAR AND STARTED YELLING
20 AND SCREAMING THAT SHE SAID OR HE SAID GOT OUT OF THE CAR
21 AND CAME AROUND TO THE OTHER SIDE YELLING AND SCREAMING FOR
22 HIM TO QUIT BEATING ON THE WINDOW. SO THE BEATING ON THE
23 WINDOW WAS OCCURRING BEFORE OR AT THE TIME SHE STOPPED.

24 MR. HUMPHRIES: CLEARLY.

25 THE COURT: I DON'T KNOW HOW CLEAR IT IS BUT ---

1 MR. HUMPHRIES: WELL I MEAN ---

2 THE COURT: --- THAT'S ONE INTERPRETATION OF IT.

3 MR. HUMPHRIES: WELL HE WAS BEATING ON THE
4 WINDOW.

5 THE COURT: HERE'S THE SIGNIFICANT THING, IS
6 THAT THE DEFENDANT, EXCUSE ME, THE VICTIM DIDN'T DO
7 ANYTHING EXCEPT SIT IN THE DRIVERS SEAT AT THAT TIME.

8 MR. HUMPHRIES: PASSENGER SEAT.

9 THE COURT: PASSENGER SEAT IN THE CAR.

10 MR. HUMPHRIES: YES, SIR.

11 THE COURT: SHOTGUN, IF YOU WILL.

12 MR. HUMPHRIES: I'M WITH YOU.

13 THE COURT: I'M GOING TO HAVE TO THINK ABOUT
14 THAT. I'M NOT INCLINED AT THIS TIME. LET ME THINK ABOUT
15 IT OVER THE EVENING HOUR BUT RIGHT NOW MY FEELING IS THAT
16 IT'S MURDER OR NOTHING.

17 WHAT DO YOU SAY TO THE CHARGE OF ASSAULT AND
18 BATTERY?

19 MR. HUMPHRIES: AS IT RELATES TO WHO, THE
20 DECEASED VICTIM?

21 THE COURT: AS IT RELATES TO THE DEFENDANT?

22 MR. HUMPHRIES: NO, NO, I MEAN ASSAULT AND
23 BATTERY ON THE DECEASED VICTIM OR TO RALPH WALKER?

24 THE COURT: ON THE DECEASED VICTIM?

25 MR. HUMPHRIES: THE ONLY EVIDENCE IN THE RECORD

1 IS THE DEFENDANT, EVERY WITNESS WHO TESTIFIED AS A WITNESS
2 REGARDING THAT FINAL ALTERCATION TESTIFIED THERE WERE SHOTS
3 FIRED. THERE WERE ONLY TWO PEOPLE ENGAGED IN THAT FIGHT
4 AND ALL THE SHOTS CAME DIRECTLY FROM THAT CONFRONTATION.
5 CARLOS ADAMS SAID HE SAW THE MUZZLE FLASHES DIRECTLY FROM
6 THAT CONFRONTATION. YESSICA CARUTHERS TESTIFIED THAT SHE
7 SAW THE GUN IN THE DEFENDANT'S HAND, AND JEFFREY BENNICK
8 TESTIFIED THAT HE HEARD THE SHOTS. THEY ALL CAME DIRECTLY
9 FROM THAT CONFRONTATION AND AFTER THE THIRD SHOT THE VICTIM
10 FELL TO THE GROUND AND THE DEFENDANT RAN AWAY.

11 THERE IS NO EVIDENCE IN THE RECORD THAT WOULD
12 TEND TO INDICATE THAT IT WAS SIMPLY A FIGHT. ALL THE
13 EVIDENCE IN THE RECORD REGARDING THAT CONFRONTATION IS THAT
14 SHOTS WERE FIRED BY THE DEFENDANT. THOSE SHOTS, AT LEAST
15 ONE OF THOSE SHOTS, STRUCK THE VICTIM AND HE DIED AS A
16 RESULT THEREOF SO ASSAULT AND BATTERY DOESN'T APPLY UNDER
17 THOSE FACTS.

18 THE COURT: YES, SIR?

19 MR. RICHARDSON: YOUR HONOR, IF THE COURT
20 PLEASE, PLEASES, THERE IS AMPLE TESTIMONY OR LACK THEREOF
21 THAT WOULD SHOW THAT THERE WAS MORE THAN THOSE TWO OR THREE
22 PEOPLE AROUND THERE. MS. CARUTHERS SAYS THERE WAS SIX OR
23 EIGHT AND THERE WAS A RUCKUS. SHE ---

24 THE COURT: I DON'T KNOW HOW MANY PEOPLE IT
25 TAKES TO HAVE A RUCKUS.

1 MR. RICHARDSON: I DON'T EITHER, YOUR HONOR, BUT

2 ---

3 THE COURT: IT TAKES TWO TO TANGO ---

4 MR. RICHARDSON: THERE WAS A GOING ON.

5 THE COURT: --- BUT I DON'T KNOW HOW MANY IT
6 TAKES TO HAVE A RUCKUS.

7 MR. RICHARDSON: --- AND THERE IS TESTIMONY,
8 TOO, THAT THEY HAD THEIR HANDS ON EACH OTHER AND NOBODY SAW
9 THE GUN. THERE'S A LOT OF ASSUMING THAT OUR CLIENT HAD THE
10 GUN. MS. CARUTHERS SAID SHE SAW, I THINK HIM BEATING ON
11 THE WINDOW WITH THE PISTOL. THAT DOESN'T ADD UP IF SHE
12 GETS OUT THE CAR ON SOMEBODY SHE DOESN'T KNOW, WALKED ALL
13 THE WAY AROUND AND STARTS PUSHING IN THE ACTION.

14 YOUR HONOR, THE JURY COULD FIND THAT SHE DIDN'T
15 SEE A PISTOL. IF YOU TAKE THAT AWAY THAT'S THE ONLY PERSON
16 THERE THAT HAD A PISTOL THERE AND THEN IF YOU TAKE THE,
17 THE, THE GENTLEMAN THAT'S RESIDING AT J. REUBEN LONG AND
18 THEY DON'T BELIEVE HIM THIS STORY IS A WHOLE LOT DIFFERENT
19 THAN THE STATE MAKES OUT IT TO BE BECAUSE IT'S A
20 CREDIBILITY FROM BEGINNING TO END. THIS IS, THIS IS, IT IS
21 QUITE DIFFERENT AS HOW THE JURY COULD FIND EACH VERSION OF
22 THE FACTS.

23 THE COURT: I DON'T KNOW EVERY CASE HAS A
24 CREDIBILITY ISSUE.

25 MR. RICHARDSON: YES, SIR, BUT I THINK THIS IS

1 UNUSUAL.

2 THE COURT: MY INCLINATION IS, AND I'M NOT GOING
3 TO RULE AT THIS TIME, MY INCLINATION IS TO NOT CHARGE
4 MANSLAUGHTER AND NOT CHARGE YOUR REQUEST NUMBER ONE AND TO
5 NOT CHARGE ASSAULT AND BATTERY AND DENYING YOUR REQUEST TO
6 CHARGE NUMBER TWO. I'M NOT GOING TO CHARGE YOUR NUMBER
7 THREE THAT VERSION OF CIRCUMSTANTIAL EVIDENCE. I'M NOT
8 INCLINED TO CHARGE THESE TWO BUT I'LL GIVE IT SOME MORE
9 THOUGHT OVER, OVER THE EVENING.

10 LET ME TELL YOUR CLIENT AT THIS TIME, I'M NOT
11 GOING TO MAKE HIM MAKE THE DECISION NOW, BUT, MR. HOLLAND,
12 YOU CAN TAKE THE STAND IF YOU WISH TO DO SO AND TESTIFY.
13 YOU DON'T HAVE TO DO THAT.

14 IF YOU TAKE THE STAND AND TESTIFY, OF COURSE, YOU
15 WILL OPEN YOURSELF UP TO CROSS EXAMINATION BY THE
16 SOLICITOR'S OFFICE. THEY MAY ASK YOU QUESTIONS TENDING TO
17 SHOW YOUR LACK OF CREDIBILITY OR BELIEVABILITY AND THEY CAN
18 ASK YOU QUESTIONS CONCERNING ANY PRIOR BAD ACTS THAT YOU
19 HAVE DONE THAT MAY BE ADMISSIBLE OR QUESTIONS ABOUT YOUR
20 CRIMINAL RECORD. OF COURSE WE'VE DISCUSSED THAT PREVIOUSLY
21 WHAT MAY BE ADMISSIBLE OR WHAT MAY NOT BE AND THAT'S IF YOU
22 TAKE THE STAND AND TESTIFY.

23 IF YOU DO NOT TAKE THE STAND AND TESTIFY THE
24 COURT WOULD EXPLAIN TO THE JURY THAT YOU DON'T HAVE TO TAKE
25 THE STAND AND TESTIFY AND YOU HAVE A RIGHT TO REMAIN

1 SILENT, THAT YOU'RE PRESUMED TO BE INNOCENT. YOU HAVE
2 NOTHING TO PROVE IN THIS CASE; THE STATE HAS BURDEN OF
3 PROVING YOU GUILTY. YOU DON'T HAVE TO PROVE YOUR OWN
4 INNOCENCE. SO AS A RESULT OF THAT PRESUMPTION OF INNOCENCE
5 YOU DON'T HAVE TO SAY A WORD AND THEY CANNOT AND THEY SHALL
6 NOT HOLD THAT SILENCE AGAINST YOU IN ANY WAY. IT DOESN'T
7 RAISE ANY INFERENCE OF GUILT OR PRESUMPTION OF GUILT OR
8 ANYTHING ELSE. IT'S NOT TO BE CONSIDERED AT ALL IN THEIR
9 DETERMINATION OF WHETHER YOU ARE GUILTY OR NOT GUILTY AND
10 THEY WILL BE INSTRUCTED IN THAT REGARD.

11 FURTHER THE COURT, I, WILL EVEN INSTRUCT THEM
12 THAT WHEN THEY RETIRE TO THEIR JURY ROOM THEY SHOULDN'T
13 EVEN BRING THAT FACT UP FOR DISCUSSION. FOR INSTANCE SAY,
14 THEY CAN'T BRING UP A DISCUSSION AND SAY, WELL YOU KNOW MR.
15 HOLLAND DIDN'T TAKE THE STAND, HE MUST BE GUILTY, HE DIDN'T
16 DENY IT, HE DIDN'T EXPLAIN HIMSELF. YOU DON'T HAVE TO
17 EXPLAIN YOURSELF. YOU DON'T HAVE TO SAY NOTHING AND THEY
18 WILL BE TOLD THAT THEY CAN'T BRING THAT UP FOR DISCUSSION
19 IN THE JURY ROOM.

20 IS THERE ANYTHING ELSE YOU WOULD HAVE ME TELL THE
21 DEFENDANT ABOUT FROM THE STATE?

22 MR. HUMPHRIES: NOTHING FROM THE STATE, YOUR
23 HONOR.

24 THE COURT: ANYTHING FROM THE DEFENSE?

25 MR. RICHARDSON: NOTHING, YOUR HONOR.

1 THE COURT: VERY WELL, THOSE ARE THE THINGS YOU
2 MIGHT CONSIDER IN MAKING THAT DECISION, MR. HOLLAND, IN
3 WHETHER YOU WISH TO TESTIFY OR NOT. I'M NOT GOING TO ASK
4 YOU FOR YOUR ANSWER TONIGHT BUT IN THE MORNING I WILL AND
5 WE'LL SEE YOU BACK AT 9:30 IN THE MORNING.

6 MR. HUMPHRIES: THANK YOU, YOUR HONOR.

7 MS. ELDER: THANK YOU, YOUR HONOR.

8 (WHEREUPON, COURT WAS ADJOURNED FOR THE EVENING.)

9 (WHEREUPON, COURT RESUME ON JUNE 13, 2007 AT 9:30
10 A.M.)

11 THE COURT: WE TALKED ABOUT THE CHARGE AND
12 WHETHER OR NOT I WAS GOING TO CHARGE MANSLAUGHTER AND
13 SIMPLE ASSAULT, I'M NOT. ARE THERE ANY OBJECTIONS TO THAT
14 DECISION FROM THE DEFENSE?

15 MR. RICHARDSON: YOUR HONOR, WE WOULD, WE WOULD
16 STILL REQUEST THAT AND OBJECT TO IT AND REQUEST THAT IT BE
17 CHARGED.

18 THE COURT: VERY WELL. ALSO YESTERDAY, MR.
19 HOLLAND, WE DISCUSSED WHETHER OR NOT YOU WERE GOING TO
20 TESTIFY AND WE TALKED ABOUT YOUR RIGHT TO TESTIFY AND YOUR
21 RIGHT NOT TO TESTIFY. THAT WAS ON THE RECORD, WAS IT NOT?
22 AND I TOLD YOU THAT I WOULDN'T ASK FOR AN ANSWER YESTERDAY,
23 GIVE YOU OVERNIGHT TO DECIDE WHAT YOUR ANSWER WOULD BE;
24 HAVE YOU REACHED AN ANSWER?

25 DEFENDANT HOLLAND: YES.

1 THE COURT: WHAT IS YOUR ANSWER?

2 DEFENDANT HOLLAND: I'M NOT GOING TO TESTIFY.

3 THE COURT: VERY WELL. AND YOU DO UNDERSTAND
4 THAT THE JURY WILL BE EXPLAINED AND INSTRUCTED THAT THEY
5 CAN'T HOLD THAT SILENCE AGAINST YOU?

6 DEFENDANT HOLLAND: YES, SIR.

7 THE COURT: AND ALL THOSE THINGS I TOLD YOU
8 YESTERDAY?

9 DEFENDANT HOLLAND: YES, SIR.

10 THE COURT: VERY WELL. THERE WON'T BE ANY OTHER
11 WITNESSES EITHER?

12 MR. RICHARDSON: NO, SIR.

13 THE COURT: MR. RICHARDSON, MR. JOHNSON?

14 MR. JOHNSON: NO, SIR, YOUR HONOR.

15 MR. RICHARDSON: NO, YOUR HONOR.

16 THE COURT: ANYTHING FURTHER BEFORE WE CALL THE
17 JURY BACK?

18 MR. JOHNSON: YES, SIR, YOUR HONOR, THERE IS
19 FROM THE DEFENSE, YOUR HONOR. YOUR HONOR, AT THIS TIME THE
20 DEFENDANT RENEWS ALL OF ITS PRIOR MOTIONS THAT ITS MADE IN
21 THE TRIAL OF THIS CASE AS WELL AS SPECIFICALLY MAKES A
22 MOTION FOR DIRECTED VERDICT AS TO THE CHARGE IN THE
23 INDICTMENT FOR MURDER AS THE STATE HAS FAILED TO PUT FORTH
24 ANY COMPETENT EVIDENCE TO MEET THE ELEMENTS OF MURDER WHICH
25 IS IN THE INDICTMENT.

DEFENSE RENEWED MOT. FOR DIR. VERDICT ASSAULT AND BATTERY17

1 ALSO THE DEFENDANT MOVES FOR A DIRECTED VERDICT
2 ON THE INDICTMENT FOR ASSAULT AND BATTERY WITH INTENT TO
3 KILL AS THE STATE HAS AGAIN FAILED TO PUT FORTH ANY
4 COMPETENT EVIDENCE THAT MEETS THE ELEMENTS FOR ASSAULT AND
5 BATTERY WITH INTENT TO KILL AS ALLEGED IN THE INDICTMENT.

6 AND AGAIN THE DEFENDANT MAKES A MOTION FOR A
7 DIRECTED VERDICT ON THE INDICTMENT FOR POSSESSION OF A
8 WEAPON DURING THE COMMISSION OF A VIOLENT CRIME AS AGAIN
9 THE STATE HAS FAILED TO PUT FORTH ANY COMPETENT EVIDENCE TO
10 MEET THE ELEMENTS FOR THAT CHARGE AS SET FORTH IN THE
11 STATE'S INDICTMENT.

12 THE COURT: SO IN ESSENCE YOU'RE RENEWING YOUR
13 MOTIONS YOU MADE EARLIER?

14 MR. JOHNSON: YES, YOUR HONOR.

15 THE COURT: I'M GOING TO DENY THEM WITH RESPECT
16 FOR THE SAME GROUNDS I STATED YESTERDAY.

17 MR. JOHNSON: YES, YOUR HONOR.

18 THE COURT: ANYTHING FURTHER FROM THE STATE?

19 MR. HUMPHRIES: NO, YOUR HONOR. ARE THEY GOING
20 TO, ARE THEY GOING TO REST IN FRONT OF THE JURY, THEY'VE
21 ALREADY MADE THEIR MOTIONS, I JUST, I MEAN, I DON'T CARE.

22 MR. RICHARDSON: I DON'T THINK SO, YOUR HONOR,
23 I'M READY TO GO FORWARD.

24 THE COURT: I'LL JUST TELL THEM THEY CHOSE NOT
25 TO PUT UP A DEFENSE.

DEFENSE RENEWED MOT. FOR DIR. VERDICT ASSAULT AND BATTERY18

1 MR. RICHARDSON: RATHER THAN SAYING THAT, YOUR
2 HONOR, I THINK I WOULD SAY THAT AT THIS POINT IN TIME WE'D
3 REST OUR CASE.

4 THE COURT: VERY WELL, HOWEVER YOU WANT TO DO
5 IT. YOU'LL HAVE THE FIRST ARGUMENT. I THINK THE DEFENSE
6 HAS TOLD YOU YOU'RE GOING TO SPLIT YOUR ARGUMENT UP?

7 MR. JOHNSON: YES, SIR, YOUR HONOR.

8 THE COURT: VERY WELL.

9 MR. RICHARDSON: TOTAL TIME?

10 THE COURT: GO AHEAD.

11 MR. RICHARDSON: I'M SORRY?

12 THE COURT: GO AHEAD.

13 MR. RICHARDSON: TOTAL TIME FOR EACH SIDE WOULD
14 BE WHAT, YOUR HONOR?

15 THE COURT: I'M NOT GOING TO HOLD YOU TO
16 ANYTHING BUT I DON'T THINK YOU OUGHT TO GO OVER 30 MINUTES.

17 MR. RICHARDSON: I GOT YOU, I AGREE.

18 THE COURT: I THINK THAT IS AMPLE TIME. YOU
19 WILL HAVE THE SAME OPPORTUNITY IF YOU WISH TO DO THAT?

20 MS. ELDER: NO, SIR, I'LL BE CLOSING.

21 THE COURT: VERY WELL, LET'S CALL THE JURY BACK.
22 I'LL CHARGE EXPERT WITNESSES SINCE WE HAD AN EXPERT.

23 MR. JOHNSON: YES, SIR.

24 THE COURT: THREE DIFFERENT INDICTMENTS?

25 MR. HUMPHRIES: YES, SIR.

DEFENSE RENEWED MOT. FOR DIR. VERDICT ASSAULT AND BATTERY19

1 THE COURT: THE VERDICT DOESN'T HAVE TO BE THE
2 SAME, ANY OBJECTION TO THAT?

3 MR. HUMPHRIES: NO, SIR.

4 (WHEREUPON, THE JURY RETURNS TO THE COURTROOM AT
5 10:24 A.M.)

6 THE COURT: GOOD MORNING, MADAM FORELADY AND
7 LADIES AND GENTLEMEN OF THE JURY, WHEN WE STARTED THIS
8 TRIAL I TOLD YOU THE TRIAL WOULD BE DIVIDED UP OR BROKEN UP
9 IN PHASES. THE FIRST PHASE, OF COURSE, WOULD BE THE
10 OPENING STATEMENTS BY THE ATTORNEYS AND THEN YOU'VE HEARD
11 THE REMINDING YOU WHAT THEY SAID WAS IMPORTANT BUT NOT
12 EVIDENCE IN THE CASE.

13 I TOLD YOU THAT WOULD BE FOLLOWED BY THE
14 INTRODUCTION OF EVIDENCE IN THIS CASE, THAT EVIDENCE CAME
15 FROM THREE SOURCES AND THREE SOURCES ALONE, SWORN
16 TESTIMONY, FROM ANY EXHIBITS THE COURT ALLOWED INTO THE
17 EVIDENCE, AND STIPULATIONS THAT THE PARTY MAY MAKE. TO MY
18 KNOWLEDGE THERE'S BEEN NO STIPULATIONS SO WE DON'T HAVE TO
19 WORRY ABOUT ANY STIPULATION.

20 MR. HUMPHRIES: YES, SIR.

21 THE COURT: THE ONLY THING, THE ONLY TWO SOURCES
22 OF THE EVIDENCE THEN FOR YOU TO BE CONCERNED WITH AND
23 THAT'S TESTIMONY FROM THAT WITNESS STAND AND ANY EXHIBITS
24 THAT ARE IN EVIDENCE.

25 IF YOU GET BACK THERE AND SAY, WELL WE WOULD LIKE

(DEFENSE RENEWED MOT. FOR DIR. VERDICT ASSAULT AND BATTERY20

1 TO KNOW SO AND SO, WELL I CAN'T TELL YOU SO AND SO IF IT'S
2 NOT IN EVIDENCE. IF YOU WANT A FURTHER INSTRUCTION ON THE
3 LAW OR A CLARIFICATION OR TO BE RECHARGED ON SOMETHING WE
4 CAN DO THAT, BUT DON'T ASK FOR ANYTHING THAT'S NOT WITH
5 YOU. YOU WILL HAVE ALL OF THE EVIDENCE BACK THERE WITH YOU
6 IN THE FORM OF YOUR RECOLLECTION OF THE TESTIMONY AND IN
7 THE FORM OF THE EXHIBITS THAT ARE ALLOWED INTO EVIDENCE.

8 NOW, AFTER THE PRESENTATION OF THE EVIDENCE AND
9 YOU HAVE HEARD THE PRESENTATION OF THE EVIDENCE, I BELIEVE
10 --

11 MR. JOHNSON: WE REST, YOUR HONOR.

12 THE COURT: THE DEFENSE RESTS IN THE CASE. THE
13 DEFENDANT IS NOT GOING TO TESTIFY AND I'LL TELL YOU
14 SOMETHING ABOUT THAT LATER TO THE EFFECT THAT YOU CAN'T
15 HOLD HIS SILENCE AGAINST HIM. I'LL TELL YOU THAT IN MY
16 CHARGE BECAUSE HE HAS NOTHING TO PROVE. THE STATE HAS THE
17 BURDEN OF PROVING HIM GUILTY. HE DOESN'T HAVE TO PROVE HIS
18 INNOCENCE AND I'LL TELL YOU ALL ABOUT THAT SHORTLY. BUT
19 YOU'VE HEARD ALL THE EVIDENCE IN THIS CASE.

20 WHAT'S LEFT IN THIS CASE NOW IS THE ATTORNEYS
21 FINAL ARGUMENTS TO YOU, SOMETIMES CALLED A SUMMATION, I
22 THINK I TOLD YOU THAT YESTERDAY OR DAY BEFORE YESTERDAY.
23 THEY WILL ARGUE TO YOU HOW THEY FEEL LIKE OR WHY THEY FEEL
24 LIKE YOU OUGHT TO AGREE WITH THEIR VERSION OF THE FACTS OF
25 THE CASE AND THEY'LL GENERALLY POINT OUT SOME, USUALLY THIS

1 IS HOW IT'S DONE, THEY'LL POINT OUT SOME PART OF THE
2 EVIDENCE THAT SUPPORTS THEIR POSITION IN THIS MATTER. BUT
3 I REMIND YOU THAT WHAT THEY SAY IN THESE CLOSING ARGUMENT
4 JUST LIKE WHAT THE LAWYERS SAID IN THEIR OPENING STATEMENTS
5 IS NOT EVIDENCE IN THE CASE. IT'S IMPORTANT BUT NOT
6 EVIDENCE IN THE CASE.

7 THAT WILL BE FOLLOWED BY THE COURT, THE JUDGE'S
8 INSTRUCTIONS TO YOU ON THE LAW THAT'S APPLICABLE TO THIS
9 CASE AND YOU WILL APPLY THE LAW JUST LIKE THE COURT
10 INSTRUCTS IT TO YOU TO THE FACTS AS YOU FIND THE FACTS TO
11 BE, YOU BEING THE JUDGE OF THE FACTS IN THE CASE, AND
12 THEREBY REACH YOUR VERDICT IN THE CASE AND REMIND YOU THAT
13 THE VERDICT MUST BE UNANIMOUS.

14 NOW WITH THAT JUNCTURE WE'RE READY TO GO FORWARD
15 WITH OUR CLOSING ARGUMENTS IN THE CASE. PLEASE GIVE THESE
16 ATTORNEYS YOUR CLOSEST ATTENTION, THANK YOU.

17 MS. ELDER: THANK YOU, YOUR HONOR.

18 CLOSING ARGUMENT

19 BY MS. ELDER:

20 DECEMBER 30TH, 2005, YESSICA, HER FRIEND BRANDT,
21 WENT TO THE PLACE CALLED MCCATZ, IT'S IN NORTH MYRTLE
22 BEACH, WENT THERE TO HAVE A GOOD TIME. THEY WERE THERE
23 HANGING OUT. SOMETIME AROUND 4 A.M., YOU KNOW THIS IS A
24 LATE NIGHT PLACE, AROUND 4 A.M., A LITTLE AFTER, LEMOND
25 HOLLAND WENT INTO THE BAR. BRANDT KOEHLER WAS AT THE BAR.

1 LEMOND HOLLAND GOES, GAUGES IN A VERBAL ALTERCATION, NO
2 PHYSICAL FIGHT, THEY WERE ARGUING, JUST WORDS OVER A DRINK,
3 A SPILLED DRINK. TWO PEOPLE IN THE BAR TRYING TO HELP OUT,
4 TWO PATRONS, CHRIS, RAPHAEL, SEPARATE THEM, THEY ALL GO ON
5 THEIR WAYS. JEFFREY BENNICK COMES OVER THERE. BRANDT AND
6 HIS FRIEND YESSICA LEAVES, DECIDE TO LEAVE, DON'T WANT ANY
7 TROUBLE, THEY DECIDE TO LEAVE. THAT'S WHERE THAT, THAT
8 LITTLE VERBAL ARGUMENT ENDS.

9 THEY'RE GOING TO THE SOUTH SIDE DOOR OF THE BAR,
10 THEY STAND THERE. WHAT IS THE DEFENDANT DOING, THE
11 DEFENDANT IS ON THE NORTH SIDE AND HE'S WATCHING EVERYTHING
12 THAT GOES, HE'S WATCHING. RAPHAEL SEES HIM OR JEFFREY
13 SAYS, HE AND RAPHAEL ARE WATCHING LEMOND HOLLAND. BRANDT
14 LEAVES, HE AND YESSICA LEAVE OUT THAT DOOR. LEMOND HOLLAND
15 LEAVES OUT THE OTHER DOOR. HE GOES OUT THAT ONE SIDE DOOR.
16 CARLOS HIS FRIEND IS WATCHING, TOO. CARLOS KNOWS SOMETHING
17 IS ABOUT TO HAPPEN. HE FOLLOWS LEMOND OUT THE DOOR. HE'S
18 TRYING TO TALK TO HIM. CARLOS TELLS YOU, LEMOND HOLLAND SO
19 IN A RAGE, SO INTENT HE COULDN'T EVEN GET HIM TO TALK TO
20 HIM.

21 HE GOES TO HIS CAR OUTSIDE OF THAT BAR AND
22 RETRIEVES SOMETHING. CARLOS IS STILL WITH HIM. CARLOS IS
23 STILL TRYING TO TALK HIM DOWN.

24 WE KNOW THAT LEMOND HOLLAND HAD A GUN AT SOME
25 POINT IN TIME BECAUSE CARLOS, HE SHOWS IT TO CARLOS, HIS

1 FRIEND. CARLOS DIDN'T WANT TO BE HERE TO TESTIFY. HE WAS
2 HERE BECAUSE I SUBPOENAED HIM HERE. I FORCED HIM TO COME.
3 THIS WAS A FRIEND OF HIS. HE HAD NOTHING TO GAIN BY BEING
4 HERE AND TESTIFYING.

5 HE TOLD YOU LEMOND HOLLAND SHOWED ME A PISTOL, IT
6 WAS IN HIS CAR. WHAT KIND OF PISTOL WAS IT, NOT FAMILIAR
7 WITH GUNS, STARTS DESCRIBING, IT'S A SEMI AUTOMATIC WEAPON,
8 NOT A REVOLVER BUT A SEMI AUTOMATIC PISTOL, THE SAME KIND
9 OF PISTOL, SEMI AUTOMATIC THAT WAS RECOVERED THE NIGHT
10 BRANDT KOEHLER LOST HIS LIFE IN THAT PARKING LOT.

11 LEMOND HOLLAND GETS SOMETHING OUT OF THAT CAR.
12 HE LOCKS HIS CAR AND HE RUNS OR HE WALKS AROUND THE BACK OF
13 THAT BAR. WHERE IS HE GOING? HE'S GOING TO THE OTHER SIDE
14 BECAUSE HE KNOWS BRANDT KOEHLER AND HIS FRIEND YESSICA
15 WALKED OUT THAT SIDE DOOR AND THEY'RE OUT THERE ON THE
16 OTHER SIDE OF THE PARKING LOT. HE GOES AROUND THAT
17 BUILDING. CARLOS IS STILL FOLLOWING HIM, WHY, HE KNOWS
18 SOMETHING IS GOING TO HAPPEN.

19 WHO ELSE KNOWS SOMETHING IS GOING TO HAPPEN?
20 JEFFREY BENNICK AND RAPHAEL WALKE. THEY'RE EXITING THE
21 BAR. THEY'RE TRYING TO HELP. THEY GO OUT BUT LEMOND
22 HOLLAND IS NOT GOING TO BE DETERRED IN DOING WHAT HE IS
23 INTENDING TO DO. HE DOESN'T STOP FOR HIS FRIEND CARLOS.

24 RAPHAEL WALKE GOES OUT THERE. JEFFREY BENNICK
25 TELLS YOU, GETS UP IN FRONT OF HIM, TRIES TO STOP HIM FROM

1 GOING AROUND TO WHERE BRANDT KOEHLER IS. WHAT DOES HE DO?
2 DOES HE STOP? NO. HE GOES AROUND HIM, TROTS TOWARD THAT
3 CAR. HE IS IN INTENT IN GETTING TO THAT CAR.

4 YESSICA AND BRANDT ARE LEAVING. THEY ARE IN A
5 CAR. THEY'RE NOT PROVOKING HIM. THEY'RE NOT SAYING
6 ANYTHING TO HIM. THEY'RE NOT FIGHTING HIM. THEY'RE DOING
7 NOTHING TO LEMOND HOLLAND. THEY'RE LEAVING.

8 LEMOND HOLLAND COMES AROUND TO THAT PASSENGER
9 SIDE DOOR. AND WHY DO YOU THINK GOES TO THE PASSENGER SIDE
10 DOOR? THAT IS WHERE BRANDT KOEHLER IS SITTING, AND HE
11 BANGS ON THAT WINDOW. YESSICA TELLS YOU, YES, I SAW THAT
12 PISTOL. WHAT KIND OF PISTOL WAS IT? DON'T KNOW A WHOLE
13 LOT ABOUT GUNS BUT IT WAS A SEMI AUTOMATIC, SAME KIND OF
14 GUN THAT EXPELLED THOSE CASINGS, I SAW IT.

15 JEFFREY BENNICK, WHAT DID IT SOUND LIKE? I
16 DIDN'T SEE ANYTHING IN HIS HAND, GOT TO BE HONEST, SOUNDED
17 TO ME LIKE METAL HITTING GLASS, VERY DISTINCTIVE SOUND,
18 BANGING ON THAT WINDOW. WHAT ALL ELSE DID YOU HEAR? I
19 HEARD HIM TRYING TO GET THAT DOOR OPEN. NOT ONLY DID I
20 HEAR HIM BUT I COULD SEE HIM BECAUSE AT THAT POINT RAPHAEL
21 WALKED AND I WERE AT THE BACK OF CAR AND WE COULD SEE IT,
22 SEE AND HEAR TRY TO GET THAT DOOR OPEN.

23 AT SOME POINT IN TIME THAT DOOR DOES COME OPEN.
24 JEFFREY BENNICK TELLS YOU LEMOND HOLLAND HAS REACHED IN.
25 HE DON'T KNOW HOW BRANDT GOT OUT, OF HIS OWN ACCORD OR

1 WHETHER LEMOND PULLED HIM OUT, DON'T KNOW, BUT SOMEHOW GOT
2 OUT OF THE CAR.

3 HE PUTS HIS HANDS, BRANDT PUTS HIS HANDS ON
4 LEMOND HOLLAND'S SHOULDERS AND HE'S GOT HIS HEAD DOWN.
5 JEFFREY IS IN A SPOT HE CAN SEE, HE'S WATCHING IT. YESSICA
6 IS WATCHING IT. HE'S DOWN LIKE THIS. THE DEFENDANT HAS
7 HIS HANDS OVER THE TOP OF HIM, THREE SHOTS. JEFFREY
8 BENNICK, YESSICA, THREE SHOTS, CARLOS, THREE SHOTS, WELL,
9 THREE SHOTS.

10 WE KNOW ONE SHOT GOES INTO YESSICA'S CAR. NOW
11 THINK ABOUT THE PLACEMENT OF EVERYBODY. WE'VE GOT A CAR,
12 WE'VE GOT JEFFREY BENNICK, RAPHAEL WALKE, YESSICA. WE'VE
13 GOT BRANDT AND THE DEFENDANT FIGHTING RIGHT HERE WERE ALL
14 ON THE PASSENGER SIDE OF THE CAR. THAT ONE SHOT GOES
15 THROUGH THE REAR TIRE OR ABOVE THE REAR TIRE ON THE
16 PASSENGER SIDE OF THE VEHICLE, GOES THROUGH YESSICA'S CAR,
17 GOES THROUGH, GOES THROUGH A BABY SEAT, ENDS UP ON THE
18 OPPOSITE SIDE OF THE CAR.

19 WE KNOW THERE'S A SECOND SHOT. WHAT HAPPENS TO
20 THE SECOND SHOT? JEFFREY BENNICK, RAPHAEL STANDING AT THE
21 BACK OF THAT CAR, JEFFREY SAYS I FELT A SPARK GO BY ME.
22 RAPHAEL IS HIT AND INJURED.

23 AND THE THIRD SHOT, WHERE IS THE THIRD SHOT?
24 EVERYBODY HEARS THAT LAST SHOT. YESSICA HEARS IT, SEES IT,
25 JEFFREY BENNICK HEARS IT, CARLOS HEARS IT, THEY SEE WHAT

1 HAPPENS ON THAT THIRD SHOT. BRANDT KOEHLER GOES DOWN AND
2 WHERE DOES THAT THIRD SHOT GO? THAT THIRD SHOT GOES RIGHT
3 IN BRANDT KOEHLER'S HEAD AND THAT'S WHAT KILLS HIM. THAT'S
4 THE TESTIMONY THAT YOU'VE HEARD.

5 WHAT DOES LEMOND HOLLAND DO AT THAT POINT? HE
6 RUNS. YESSICA TELLS YOU THAT, JEFFREY BENNICK TELLS YOU
7 THAT. HE RUNS FROM THE SCENE. HE HAS A COMPLETE DISREGARD
8 FOR WHAT HAPPENED, WHETHER THAT MAN HE JUST SHOT LIVED,
9 DIED, GOT HELP, WHETHER THOSE OTHER TWO SHOTS HIT SOMEBODY,
10 WHETHER THEY WERE INJURED, HAD NO IDEA, DIDN'T CARE, GOT IN
11 THAT CAR AND LEFT.

12 THEN ONCE HE'S ARRESTED HE'S IN JAIL SHARING A
13 CELL WITH ANOTHER INMATE, DARREN MALLOY, WHAT DOES HE DO?
14 HEY, I GOT A COUPLE OF WITNESSES IN MY TRIAL I WANT YOU TO
15 TAKE CARE OF. DARREN MALLOY TESTIFIED AND HE TOLD YOU
16 EVERYTHING HE KNEW AND WHY DID HE TELL YOU THAT. WE
17 QUESTIONED YOU, QUESTIONED HIM EXTENSIVELY, DEFENSE
18 QUESTIONED HIM EXTENSIVELY. WHY ARE YOU DOING THIS? YOU
19 GETTING A DEAL FROM YOUR CHARGES, THE STATE HASN'T PROMISED
20 ME A THING. WHAT ABOUT THOSE OTHER CHARGES THE DAY THAT
21 YOU PLED BEFORE IN NOVEMBER? YOU TALKED TO THE POLICE GOT
22 A DEAL THERE? NO, I PLED, TOOK CARE OF ALL MY CHARGES THEN
23 I GAVE THE INFORMATION TO MY ATTORNEY WHO THEN CONVEYED IT
24 TO THE SOLICITOR'S OFFICE AND THE POLICE DEPARTMENT.
25 THAT'S WHEN I GAVE THE STATEMENT.

1 WHY WOULD A MAN COME IN AND TELL YOU THAT? HE
2 HAD ABSOLUTELY NOTHING TO GAIN BY DOING THAT. HE CAME IN
3 TO TELL YOU BECAUSE EVEN TO HIM IT WAS THE RIGHT THING TO
4 DO BECAUSE HE DOESN'T DISREGARD HUMAN LIFE LIKE LEMOND
5 HOLLAND. HE THINKS IT'S IMPORTANT THAT POLICE KNOW THAT
6 THIS MAN WHO IS CHARGED WITH MURDER IS TRYING TO TAKE OUT
7 HIS WITNESSES AND IT'S FUNNY BECAUSE HE SHOWS POLICE THE
8 THREE PEOPLE WHO HE WANTS TO HAVE TAKEN CARE OF AND WHO ARE
9 THOSE THREE PEOPLE. IT JUST SO HAPPENS IT'S THE THREE
10 PEOPLE WHO ARE TESTIFYING THEY SAW HIM, THEY KNOW IT WAS
11 HIM, AND THAT HE MURDERED BRANDT, YESSICA, CARLOS, AND
12 JEFFREY. OUT OF THAT LIST OF NAMES DARREN MALLOY TESTIFIES
13 TO THE EXACT THREE NAMES AND PICKS OUT THE EXACT THREE
14 PEOPLE THAT GET ON THAT STAND AND SAY I SAW HIM. HE DID
15 IT. HE MURDERED BRANDT KOEHLER.

16 THE JUDGE IS GOING TO CHARGE YOU IN A FEW MINUTES
17 WITH THE LAW AND IN OUR OPENING WE TOUCHED ON WHAT THE LAW
18 IS IN THIS CASE. LEMOND HOLLAND IS CHARGED WITH MURDER.
19 IT'S THE KILLING OF ANOTHER WITH MALICE AFORETHOUGHT AND
20 MALICE AND ILL WILL, HATRED, HOSTILITY AFORETHOUGHT.
21 LEAVING A BAR, GETTING A GUN, FOLLOWING SOMEBODY, BANGING
22 ON A CAR, GETTING HIM OUT OF THE CAR AND SHOOTING HIM IN
23 THE HEAD. WHAT ELSE COULD THAT BE OTHER THAN ILL WILL,
24 HATRED, HOSTILITY?

25 ASSAULT AND BATTERY WITH INTENT TO KILL, THE

1 OTHER CHARGE. DID LEMOND HOLLAND INTEND TO HURT WITH THE
2 INTENT TO KILL RAPHAEL WALKE? PROBABLY NOT, BUT THE LAW
3 ALLOWS US TO TRANSFER THE INTENT HE HAD AGAINST BRANDT
4 KOEHLER TO THE VICTIM RAPHAEL WALKE. WHEN HE SHOT THAT GUN
5 WHEN HE WAS ENGAGED WITH BRANDT HE INTENDED TO KILL BRANDT.
6 NOW THAT FIRE HIT SOMEBODY ELSE, THAT, THAT BULLET HIT
7 SOMEONE ELSE, BUT THAT'S ALL YOU NEED. YOU TRANSFER THAT
8 INTENT TO THAT SECOND VICTIM.

9 POSSESSION OF A WEAPON DURING A VIOLENT CRIME,
10 IT'S THE THIRD CHARGE YOU'LL GET. WE KNOW BRANDT DIED OF A
11 SINGLE GUNSHOT WOUND TO THE TOP OF HIS HEAD. WE KNOW IT
12 COULDN'T HAVE HAPPENED, THE GUNSHOT COULDN'T HAVE HAPPENED
13 WITH ANYTHING OTHER THAN A GUN.

14 YOU HEAR A LOT ABOUT RENDERING A VERDICT THAT
15 SPEAKS THE TRUTH AND THE TRUTH IN THIS CASE COMES FROM THIS
16 WITNESS STAND. IT DOESN'T COME FROM THE DEFENSE ATTORNEYS
17 TRYING TO PUT THE WORDS OR CHANGE THE WORDS FROM THE
18 WITNESSES MOUTH AND THEIR TESTIMONY. YESSICA, DEFENSE
19 ASKED, OH, THERE'S A BUNCH OF PEOPLE AROUND THE CAR, SIX,
20 SEVEN, EIGHT, THERE WAS A RUCKUS. THERE WAS AN AFFRAY.
21 WELL, NO, THERE WERE FOUR PEOPLE. ALL RIGHT, WE KNOW WHO
22 THOSE FOUR ARE. SURE WE DO, BRANDT, LEMOND HOLLAND,
23 RAPHAEL WALKE, JEFFREY BENNICK, FOUR, WE KNOW THAT.

24 ANYBODY ELSE AROUND THERE? ANYBODY ELSE
25 FIGHTING? NO, BRANDT, LEMOND HOLLAND. JEFFREY BENNICK

1 TOLD YOU, I ASKED HIM, WAS THERE ANYBODY ELSE IN THE AREA
2 WHERE THEY WERE, NO, JUST THOSE TWO.

3 OH, IT MUST HAVE BEEN THE LIGHTING. NO, MCCATZ
4 HAS FLOOD LIGHTS ALL AROUND THE BUILDING, HAS FOUR OR FIVE
5 BIG FLOOD LIGHTS AND THERE'S AN OUTDOOR LIGHT ON A BIG
6 TELEPHONE POLE THAT BY THE WAY IS NOT ENCUMBERED BY BUSHES.
7 YEAH, WE COULD SEE. JEFFREY BENNICK, I KNOW 100 PERCENT
8 THAT IS THE MAN THAT I SAW, THE TRUTH.

9 THE TRUTH, DOES IT MATTER HOW FAR APART THOSE
10 SHELL CASING WERE? DOES IT CHANGE THE FACT THAT THREE
11 PEOPLE OBSERVED THIS, HEARD IT, SAW IT? DOES IT MAKE A
12 DIFFERENCE? NO, JUST DIVERSION, JUST TO CLOUD IT OUT. IT
13 DOESN'T MATTER.

14 SHOULD THE POLICE HAVE COMPLETELY DISREGARDED
15 CONCERN FOR BRANDT AS HE LAID ON THE GROUND WITH A GUNSHOT
16 WOUND TO THE HEAD AND TOOK THE TIME TO MEASURE THE EXACT
17 LOCATION OF THAT CAR BEFORE THEY ALLOWED EMS TO COME IN AND
18 TREAT HIM? OF COURSE NOT. PRIMARY CONCERN IS HELPING
19 BRANDT. IT DOESN'T CHANGE WHAT HAPPENED THAT NIGHT. WHAT
20 HAPPENED THAT NIGHT LEMOND HOLLAND SOUGHT HIM OUT, GOT A
21 GUN AND KILLED HIM.

22 THAT NIGHT LEMOND HOLLAND SET A PRICE ON BRANDT
23 KOEHLER'S LIFE, \$2.00, THE PRICE OF A SPILLED DRINK, \$2.00.
24 THIS FAMILY BACK HERE, BRANDT'S MOM, HIS DAD, STEPMOM,
25 STEPDAD ---

1 MR. RICHARDSON: YOUR HONOR, I OBJECT TO THAT.

2 MS. ELDER: --- GRANDPARENTS, AUNTS, THEY PAID
3 THE PRICE.

4 THE COURT: EXCUSE ME, PLEASE.

5 MR. RICHARDSON: I'D OBJECT TO CALLING OUT THE
6 FAMILY BEING IN THE COURT.

7 THE COURT: LET'S AVOID THAT.

8 MS. ELDER: BRANDT'S FAMILY ---

9 MR. RICHARDSON: I OBJECT, YOUR HONOR.

10 THE COURT: CONTINUE WITHOUT.

11 MS. ELDER: YES, SIR. PAID THE PRICE. BRANDT
12 KOEHLER PAID THE ULTIMATE PRICE, HIS LIFE OVER \$2.00. IT
13 IS TIME FOR LEMOND HOLLAND TO PAY HIS PRICE. IT IS NOT
14 REVENGE THAT THE STATE SEEKS IN TRYING THIS CASE. IT IS A
15 RECKONING AND TODAY JUNE 13TH, 2007, IT'S LEMOND HOLLAND'S
16 DAY OF RECKONING. YOU GIVE HIM EXACTLY WHAT HE DESERVES.

17 MR. RICHARDSON: PLEASE THE COURT?

18 THE COURT: YES, SIR.

19 CLOSING ARGUMENT

20 BY MR. RICHARDSON:

21 MADAM FORELADY AND LADIES AND GENTLEMEN OF THE
22 JURY, LET'S TALK ABOUT THIS CASE. YOU'VE BEEN GIVEN THE
23 OPPORTUNITY THE HAVE PENCIL AND PAPER, SOME OF YOU HAVE
24 TAKEN NOTES. ALL OF YOU HAVE LISTENED ATTENTIVELY AND WE
25 APPRECIATE IT AND I STOOD BEFORE YOU THE FIRST DAY AND

1 SAID, WHAT. I SAID THE STATE HAS THE BURDEN OF PROOF IN
2 THIS CASE BEYOND EVERY REASONABLE DOUBT.

3 NOW I SUBMIT TO YOU NOW IS THE TIME TO TAKE AT
4 THE EVIDENCE. I TOLD YOU THE FIRST DAY THAT YOU DON'T LOOK
5 AT THE WAY THE WIND BLOWS BY LOOKING AT TRUNK OF THE TREE.
6 THE STATE IS ASKING YOU TO LOOK AT THE TRUNK OF THE TREE.
7 I'M ASKING YOU TO LOOK AT THE LITTLE LIMBS, THE LITTLE
8 BRANCHES, THE LITTLE TWIGS, THE LITTLE LEAVES, THAT'S WHERE
9 THE TRUTH OF THIS CASE IS GOING TO COME FROM.

10 YEAH, THERE'S A LOT OF THINGS GOING ON HERE AND
11 IT'S NO QUESTION ABOUT IT, LEMONHOLLAND WAS AT THE BAR.
12 LEMONHOLLAND WENT TO THAT CAR AND LEMONHOLLAND FOUGHT
13 WITH MR. KOEHLER, NO QUESTION ABOUT THAT BUT FIGHTING AND
14 SHOOTING IS TWO DIFFERENT THINGS.

15 NOW LET'S TALK ABOUT THE CASE. SHE HAS COME UP
16 AND, MS. DONNA HAS ARGUED THE CASE TO YOU. NOW LET'S TAKE
17 IT APART. SHE'S ARGUED THE BIG PICTURE. LET'S TALK ABOUT
18 THE LEAVES AND THE TWIGS AND THE LIMBS AND THE BRANCHES AND
19 LET'S GET DOWN TO THE NITTY GRITTY AND IF I MISS SOMETHING
20 OR MISSTATE SOMETHING I APOLOGIZE. BUT YOU LOOK AT THIS
21 CASE AND YOU LOOK AT EVERY WITNESS AND EVERY PIECE OF
22 EVIDENCE AND I SUBMIT TO YOU THERE'S A REASONABLE DOUBT OR
23 THERE'S QUESTIONS IN EVERYTHING IN THIS CASE BECAUSE THE
24 STATE FROM THE VERY BEGINNING, YOU HEARD THE OFFICERS
25 TESTIFY. THEY TOOK SOME OF THESE VICTIMS STATEMENTS AND

1 FROM THE OUT, OUT THE VERY FIRST MOMENT WHAT THEY DID DO,
2 THEY ASSUMED LEMOND IS THE SHOOTER. THEY ALL IDENTIFIED
3 MR. HOLLAND, PUT HIS NAME ON IT.

4 LET'S TALK ABOUT SOME THINGS. I DON'T KNOW,
5 THERE'S NOT ANY GOOD WAY TO DO THINGS BUT I'M JUST GOING TO
6 PICK UP SOME EVIDENCE AND START TALKING ABOUT IT. THAT'S
7 ALL I KNOW TO DO. YOU'RE GOING TO HAVE THIS STUFF IN THE
8 JURY ROOM AND YOU'RE GOING TO BE ABLE TO LOOK AT IT AND
9 SIFT IT AND SORT IT.

10 YOU KNOW SOMETIMES WHEN YOU MAKE ARGUMENTS
11 THERE'S THERE'S NO RHYME OR REASON AS TO WHICH WAY YOU GO
12 AND I DON'T KNOW WHAT I'M GOING TO DO BUT WE'RE GOING TO
13 GET STARTED AND WE'RE GOING TO TALK ABOUT THIS CASE.

14 SOMETHING YOU KNOW WE ALL HATE WHAT HAPPENED, I
15 MEAN THERE'S NO QUESTION ABOUT IT, I HATE MR. KOEHLER DIED
16 AND I FEEL SORRY FOR HIM. THE QUESTION IS AND I SUBMIT TO
17 YOU HAVE THEY PROVEN BEYOND A REASONABLE DOUBT THAT MY
18 CLIENT IS THE ONE THAT SHOT HIM.

19 YOU WILL HAVE IN THE JURY ROOM TWO SHELL CASINGS.
20 NOW FROM THE BEGINNING WE HAVE TALKED ABOUT THIS CASE AND
21 TALKED ABOUT EVIDENCE FOUND AND NOT FOUND. THESE SHELL
22 CASINGS, IF I'M WRONG CORRECT ME, SOME OF THEM SAID, MAYBE
23 I THINK IT WAS YESTERDAY, MAYBE AS MANY AS FOUR SHOTS, BUT
24 YOU HEARD THE TESTIMONY. THEY WENT OUT THERE AND LOOKED
25 WITH PLENTY OF DAYLIGHT LEFT THEY FOUND SHELLS CASINGS.

1 NOW IT'S INDICATED TO YOUR THAT THESE WERE THE SHELL
2 CASINGS PICKED UP AT THE SCENE, GIVE THE SLED, SLED
3 INVESTIGATED BROUGHT BACK AND THEY SAID THESE TWO SHELL
4 CASINGS CAME OUT THE SAME GUN. THEY'VE NEVER CONNECTED
5 THESE SHELL CASINGS NECESSARILY TO THE ONES THAT WENT INTO
6 THE CAR OR THE FATAL PROJECTILE. THAT IS INCONSISTENT.

7 MS. ELDER DIDN'T SAY A THING ABOUT THE THIRD
8 SHELL CASING. YOU KNOW, YOU'RE GOING TO HAVE THESE IN THE
9 JURY ROOM. NOW, THE OFFICER WROTE ON THE BOTTOM ALONG WITH
10 NOTES AS TO THE HEAD STAMP ON THE CASING. IF I'M NOT
11 MISTAKEN AND I'M READING IT RIGHT, HE HAS WRITTEN A
12 DIFFERENT HEAD STAMP. I THINK HE THOUGHT THAT THE -- DWB,
13 IT LOOKS LIKE. THE SHELL CASINGS HEAD STAMP AND HE WRITES
14 THE SAME THING ON BOTH CASINGS LIKE HE PICKED IT UP HE
15 WRITES THE SHELL CASING HEAD STAMP.

16 ONE OF THEM IS A WINCHESTER WESTON IF YOU'LL LOOK
17 AT IT AND THE OTHER ONE IS A LUGER. THE PROJECTILES
18 THEMSELVES THEY CAN'T EVEN SAY THAT THEY CAME OUT THE SAME
19 GUN. NOW REMEMBER THERE WERE MULTIPLE SHOTS, TWO SHELL
20 CASINGS.

21 NOW AS I TOLD YOU BEFORE THEY'VE SHOWN YOU A
22 LINEUP AND THEY DID SOME ASSUMING. THEY'VE GOT LEMOND'S
23 PICTURE RIGHT ON TOP TELLING YOU THAT MR. BENNICK SAID THIS
24 WAS THE MAN THAT SHOT AND KILLED HIM. I THINK WHAT HE WAS
25 SAYING THIS IS THE MAN HE ASSUMED FIRED THE SHOT.

1 WHAT DID MR. BENNICK SAY THE LAST THING BEFORE I
2 SAT DOWN. I TURNED AROUND AND ASKED HIM DID YOU SEE A GUN.
3 NO, DIDN'T SEE A GUN. DID YOU SEE ANY MUZZLE FLASHES?
4 DIDN'T SEE ANY MUZZLE FLASHES'S. BUT REMEMBER HE'S THE MAN
5 THAT SAID I NEVER TOOK MY EYES OFF THE TWO PEOPLE. THEY
6 WERE LOCKED UP TOGETHER, THEY WERE LOCKED UP. I WAS
7 CONCENTRATING ON WATCHING THOSE TWO PEOPLE.

8 WHAT DID DR. PROCTOR SAY AND MOST ALL OF YA'LL
9 KNOW HOW A GUN DOES WHEN YOU SHOOT IT. THERE'S A BLACK
10 FLASH, BLACK POURING OUT OF A FIRECRACKER. COULD YOU TELL
11 ME IF I WERE MR. BENNICK STANDING THERE CLOSE ENOUGH TO
12 HAVE OBSERVED EVERYTHING THAT YOU COULD POP THREE
13 FIRECRACKERS OUT THERE AND NOT SEE THE POP OR THE FLASH OR
14 SOMETHING. MR. BENNICK I DON'T THINK HE'S UP HERE TRYING
15 TO NOT TELL THE TRUTH. I THINK HE WAS SEEING SOMETHING
16 WITH HIS EYES AND HE'S GOING GONE TO ASSUME SOMETHING ELSE.
17 HE SAID SINCE THEY WERE FIGHTING.

18 INTERESTING ABOUT MR. BENNICK. REMEMBER JUST
19 BECAUSE, ALL OF THEM WE ADMIT WERE TUSSLING AT THE CAR.
20 WHAT ELSE DID MR. BENNICK TELL YOU? IT'S INTERESTING HOW
21 THINGS COME OUT IN A TRIAL. YOU NEVER WHAT'S GOING TO
22 HAPPEN. HE SET RIGHT THERE ON THE STAND AND SAID, THE
23 HANDS AROUND THE NECK. WHAT WAS THE FIRST THING OUT OF
24 THAT CAR. THE FIRST THING OUT OF THAT CAR WHEN MR. KOEHLER
25 GOT OUT WAS HIS HEAD. DO YOU REMEMBER HOW HE SAID HANDS

1 AROUND HIS NECK? MR. HOLLAND WAS THERE. HE GRABBED RIGHT
2 BEHIND, RIGHT BY THE NECK JUST LIKE A MAN RIDING A BULL
3 WOULD GRAB A BULL. THE FIRST THING HE GRABBED A HOLD OF,
4 IT WAS ON, AND WHY WAS IT ON MR. KOEHLER?

5 THEY'VE PRINTED THIS STORY UP THAT, THAT THIS
6 THING JUST GOES OUT, THAT THERE'S NOTHING GOING ON IN THE
7 PARKING LOT, OH MY GOODNESS. MAN, MR. KOEHLER GETS IN THAT
8 PARKING LOT AND RIPS HIS SHIRT OFF AND HOLLERING. NO,
9 THERE'S NO PROVOCATION OUT THERE. THEY WERE JUST GOING TO
10 GET IN THE CAR. MR. BENNICK STRAIGHTENED US OUT NOW.

11 THERE WAS SOMETHING GOING ON, RUCKUS OUT THERE. DEFINE IT
12 ANY WAY YOU WANT TO, THERE WAS A GOING ON, THERE WAS SOME
13 HOT TEMPER. THERE WAS SOME MORE HOT TEMPER INSIDE AND I
14 SAY THERE WAS SOME MORE PEOPLE OUT THERE. IF LEMOND HADN'T
15 BEEN THERE, MR. HOLLAND HADN'T BEEN THERE? TEN OR 15

16 MINUTES THESE OTHER PEOPLE, I MEAN EVEN THOUGH YESSICA SAYS
17 SHE GOT THERE AT 12 AND THIS HAPPENED 45 MINUTES LATER I
18 MEAN IT WAS FOUR HOURS LATER. THERE'S SOME GOING ON.

19 REMEMBER THEY HAD ALREADY TABBED OUT. THEY HAD PROBABLY
20 BEEN ALREADY TOLD TO LEAVE, YOU CAN READ THAT INTO IT.
21 THERE WAS SOME GOING ON THERE. THERE WAS SOME GOING ON
22 OUTSIDE.

23 NOW WHAT ELSE DID MR. BENNICK TELL YOU? MR.
24 BENNICK SAID, IF I REMEMBER CORRECTLY AND IF I'M WRONG YOU
25 TAKE IT THE WAY YOU REMEMBER IT, HE SAID MR. KOEHLER'S BACK

1 WAS KIND OF TO HIM. WHAT WAS THE OTHER THING MR. BENNICK
2 SAID? HE SAID HE HAD HIS HANDS ON THE TOP OF EACH OTHER.
3 HOW DID HE HAVE HIS HANDS, JUST LIKE THAT, BEATING ON EACH
4 OTHERS BACK OR HIS BACK WAS GETTING BEAT ON? HE SAID
5 NOTHING ABOUT THE GUN. HANDS OUT, HANDS DOWN AND HANDS ON.
6

7 NOW LET'S TALK ABOUT SOME MORE THINGS, THE LITTLE
8 THINGS THAT MAKE A DIFFERENCE. IS THERE SOME LITTLE TWIGS,
9 SOME TREES, AND LEAVES. LET'S THINK ABOUT SOMETHING ELSE.
10 WE GET A SITUATION HERE MR. BENNICK AND WHAT ELSE?
11 REMEMBER I ASKED OFFICER PITSINGER ABOUT THE EVIDENCE HE
12 PICKED UP. HE PHOTOGRAPHED SOME EVIDENCE BEFORE HE PICKED
13 IT UP. HE GOT A PICTURE OF EACH PIECE OF EVIDENCE, HE TOLD
14 YOU THAT. HE SAID TWO SHELL CASINGS AND YOU'LL SEE THE
15 PICTURES, THERE'S SOME BEER CANS OUT THERE. HE TOLD YOU
16 THERE WAS CIGARETTE LIGHTERS OUT THERE. HE DIDN'T EVEN
17 KNOW WHERE, HE TOOK A PICTURE OF ONE CIGARETTE LIGHTER AND
18 HE DIDN'T EVEN LIST AS EVIDENCE.

19 THEY ASSUMED FROM THE BEGINNING THAT BECAUSE MR.
20 HOLLAND WAS THE FIGHTER HE WAS THE SHOOTER. DID THEY COME
21 IN HERE AND TELL YOU THAT THEY PICKED UP ANY OF THOSE BEER
22 CANS. THERE WAS TWO RIGHT AT THE SCENE. THERE WAS
23 TESTIMONY OF A NUMBER OF CIGARETTE LIGHTERS AND ALL THE
24 OTHER EVIDENCE LAYING OUT THERE THEY DIDN'T BRING IN TO
25 SHOW YOU. THEY GOT SOME NUMBERS ON A STICK, YELLOW AND

1 BLACK NUMBERS, BUT THEY DIDN'T THINK IT WAS IMPORTANT TO
2 BRING YOU THAT OTHER STUFF. DID THEY EVER TELL YOU THAT
3 THEY TOOK FINGERPRINTS OFF THE DOOR, THE DOOR HANDLES OR
4 ANY OF THOSE PIECES TESTED?

5 WHAT'S THE OTHER INTERESTING THING TO ME THAT MS.
6 ELDER DIDN'T WANT TO TALK ABOUT? WHAT IS THE OTHER THING,
7 PIECE OF EVIDENCE THAT THE PICTURE WASN'T PRESENTED? THAT
8 THE LOCATION I HAD TO DRAG OUT, WELL, ANYWAY, MR. PITSINGER
9 TOLD ME WHERE IT WAS, THE BLACK HAT, AND THEN MR. HUMPHRIES
10 AND I GOT GOING BACK AND FORTH WITH MS. CARUTHERS ON THE
11 BLACK HAT, DON'T WANT TO TALK ABOUT THE BLACK HAT. THEY
12 DON'T WANT TO SHOW YOU A CLOSE UP PICTURE OF THE BLACK HAT,
13 NEW YORK YANKEES HAT I THINK MR. PITSINGER TESTIFIED TO.
14 DO YOU HAVE, WERE YOU SHOWN A PICTURE OF THE HAT? THE NEW
15 YORK YANKEES HAT SITTING, WHEN THE CUPS WERE LINED UP RIGHT
16 IN THE MIDDLE AND WHERE WERE THE SHELL CASINGS IN REFERENCE
17 OF THAT HAT? THEY DIDN'T WANT TO TALK ABOUT THE HAT.

18 NOW WHY DIDN'T THEY WANT TO TALK ABOUT THE HAT?
19 WHY HAVEN'T THEY TALKED ABOUT THE HAT? WHY HAVEN'T THEY
20 TOLD YOU ABOUT THE HAT? YOU'RE GOING TO HAVE IT IN THE
21 ROOM. MS. YESSICA STATED THE MAN WITH THE SHOOTER HAD A
22 BLACK HAT, THE MAN WITH THE SHOOTER. NOW IF THE BLACK HAT
23 THAT'S SITTING RIGHT IN THE MIDDLE OF ALL THE EVIDENCE
24 WHERE WAS THE MAN WITH THE SHOOTER AND SHE'S REFERRING TO
25 MR. HOLLAND AS BEING THE SHOOTER.

1 NOW LET'S TALK ABOUT YESSICA SOME MORE, THAT SHE
2 PUT SOMEBODY ELSE IN THE MIDDLE OF THE MALAY OUT THERE WHEN
3 MR. KOEHLER GOT SHOT. LET'S TALK SOME ABOUT THAT, THAT IS
4 CRITICAL.

5 SOMETHING ELSE IS CRITICAL. MS. YESSICA SAYS SHE
6 BACKED HER CAR UP AND SHE NEVER SAID SHE STARTED GOING
7 FORWARD. I THINK IT'S PRETTY WELL ESTABLISHED BY MR.
8 BENNICK THAT SHE STARTED FORWARD AND GOT BACK UP BASICALLY
9 PAST HER PARKING SPACE, PULLED OUT AND STARTED FORWARD 10
10 OR 15 FEET. THAT CAR DIDN'T HAVE TO BE MOVED TO HELP MR.
11 KOEHLER. THERE WAS A WHOLE TWO OR THREE SPACES, YOU GOT
12 THE PICTURES IN THERE, THE AMBULANCE COULD HAVE GONE RIGHT
13 AROUND PROTECTED HIM TO GET AWAY FROM THAT CAR.

14 NOW WHERE ARE -- LET'S TALK ABOUT YESSICA, YOU
15 REMEMBER HOW YESSICA WAS. I COULDN'T EVEN HEAR HER OVER
16 THERE, I DON'T WHETHER YA'LL COULD OR NOT, MEEK, MILD
17 YESSICA. SHE WASN'T MEEK AND MILD THAT NIGHT, SHE WAS A
18 TIGER. SHE HAD HER CAR IN DRIVE; SHE WAS HEADING OUT TO 17
19 AND SHE STOPPED THAT CAR. YOU KNOW GOOD AND DOGGONE WELL,
20 MOST OF YOU, YA'LL CAN FIGURE IT OUT, THAT THE DOORS ARE
21 LOCKED AS LONG AS IT'S IN DRIVE. SHE COULD HAVE DRIVEN
22 RIGHT ON BUT SHE'S MAD, SHE IS MAD, SHE IS UPSET. SHE
23 SAYS, SOMEBODY IS AROUND THERE BEATING ON HER CAR.

24 NOW WHAT DID SHE SAY? BEATING ON IT WITH, SILVER
25 AND BLACK PISTOL. LET ME TELL YOU SOMETHING, I'M GOING TO

1 ASK YA'LL A QUESTION. IF YOU GOT A CAR IT'S DRIVING, IT'S
2 GOING, IT'S IN DRIVE. YOU GOT YOUR FOOT ON THE GAS AND YOU
3 SAY A MAN IS AT THE OTHER WINDOW WITH A SILVER AND BLACK
4 PISTOL BEATING ON IT, WHAT YOU GOING TO DO? I'M GOING
5 LEAVE. WHAT YOU GOING TO DO? UH-UH, SHE SEES THAT PISTOL,
6 SHE PUTS IT IN PARK, GETS OUT ON HER SIDE AND STARTS
7 RAISING CANE, NOT THAT LITTLE MEEK LADY IN HERE, OH, NO,
8 SHE WOULDN'T DO SOMETHING LIKE THAT. SHE GETS OUT THERE
9 AND RAISES CANE ACROSS THE CAR. NOW THIS IS A MAN THAT
10 SHE'S ALREADY SEEN WITH A PISTOL IN HIS HAND AND THEN WHAT
11 DOES SHE DO? SHE GETS AROUND GOES TO THE OTHER SIDE AND BY
12 SOME TESTIMONY PUSHING ON THE MAN THAT'S BEATING ON THE
13 SIDE OF THE CAR.

14 HOW MANY PEOPLE, FIRST OF ALL IS GOING TO STOP
15 THE CAR, GOING TO GET OUT THE CAR ON THE OTHER SIDE? NOW
16 IF I STOPPED IT AND GOT OUT WHAT WOULD I DO? ZOOM, I'D GO
17 THE OTHER WAY. UH-UH, SHE GOES AROUND, GETS IN THE MIDDLE
18 OF IT WITH A MAN SHE DOESN'T KNOW WITH A PISTOL IN HIS HAND
19 THAT SHE'D SEEN. DOES THAT MAKE ONE BIT OF SENSE, DON'T TO
20 ME.

21 MR. BENNICK WAS STANDING WITHIN FIVE FEET OF THE
22 BACK OF THE CAR HE AIN'T NEVER SEEN THIS GUN. YESSICA IS
23 THE ONLY PERSON THERE THAT NIGHT THAT PUTS THE GUN IN MR.
24 HOLLAND'S HAND AND SHE WOULDN'T HAVE DONE WHAT SHE DID IF
25 SHE HAD SEEN A GUN.

1 NOW THIS HOGWASH ABOUT CARLOS SEEING IT THREE
2 WEEKS EARLIER. YOU GOT A MAN THAT'S COME IN HERE, DOES HE
3 LOOK LIKE SOMEBODY THAT WOULD STAND AWAY FROM A FIGHT? I
4 SUBMIT TO YOU I'M NOT SURE WHERE HE WAS BUT THAT'S FOR YOU
5 TO DETERMINE. HE'S GOT CHARGES AGAINST HIM, GOT ANYTHING
6 TO LOSE. HAVE YOU BEEN PROMISED ANYTHING? LET ME TELL YOU
7 SOMETHING, FOLKS, I DON'T KNOW ANY OF YOU AND YOU DON'T
8 KNOW ME. IF I DO YOU A BIG FAVOR THEN DO I HAVE TO TELL
9 YOU IN RETURN. THERE'S GOING TO BE A DAY OF RECKONING.
10 MR. CARLOS IS GOING TO GET SOME HELP.

11 LET'S TALK ABOUT -- THAT LEADS ME INTO MR.
12 MALLOY. MS. ELDER GETS UP HERE AND ARGUES HE PICKED OUT
13 THE EIGHT NAMES OR THREE NAMES OUT OF EIGHT. WELL WHOOPEE
14 DO. WHAT ELSE DID HE TELL YOU? HE HAD READ ALL OF HIS
15 PAPER WORK. WHAT KIND OF PAPER WORK, PAPER WORK JUST LIKE
16 THIS. EVERY WITNESSES STATEMENT THAT WAS IN THERE THAT HE
17 READ HE SAW WHAT HAPPENED. HE COULD LEARN EVERYTHING HE
18 TOLD YOU IN THIS COURTROOM FROM READING FROM THAT
19 PAPERWORK. IF HE READ IT OR IF HE HEARD IT HE COULD TELL
20 YOU THE NAMES AND CHECK IT OFF BY READING IT PROBABLY
21 BETTER THAN HEARING IT. HE GOT RELEASED, GOT CHARGES
22 DISMISSED. HE'S BACK HERE AGAIN BUT HE AIN'T NO CRIMINAL.
23 HE'S GOING TO COME DO HIS CIVIC DUTY. HUH, HE'S WANTING
24 SOME HELP, TOO. NOW HAS HE CUT A DEAL WITH THE SOLICITOR?
25 OH, NO, HE'S JUST LIKE THE OTHER MAN. COME ON, MAN, I

1 HELPED YOU AND YOU'RE GOING TO HELP ME. YOU'RE GOING TO
2 HELP ME AND I TELL YOU EVERYTHING HE'S TOLD YOU. AIN'T NO
3 -- YOU READ THIS STATEMENT AND SEE IF YOU WOULD PICK OUT
4 YESSICA'S NAME ON HERE AND SAY SHE WAS THE DRIVER OF THE
5 CAR AND YOU WOULD DO IT ON EVERYONE OF THEM.

6 NOW I'M TALKING A LONG TIME BUT I'M WOUND UP,
7 FOLKS. THERE'S A LOT OF STUFF IN THIS CASE YOU CAN GO ON
8 AND ON. DR. PROCTOR, YESSICA, THE MAN FROM SLED, MR.
9 BLACK, INCONCLUSIVE, CAN'T SAY THAT THE TWO SHELLS
10 PROJECTILES CAME FROM THE SAME GUN. I WANT YOU TO TAKE
11 THIS EVIDENCE AND LOOK AT IT AND YOU CAN GET AN IDEA, BUT
12 YOU CAN'T, YOU KNOW, NOTHING. IT'S ALL BEEN MOVED, BUT YOU
13 CAN GET SOMEWHAT OF AN IDEA WHAT WAS GOING ON AND IF YOU
14 TAKE THE TESTIMONY THAT WAS PRESENTED TO YOU BY BENNICK, IF
15 YOU BELIEVE THAT THIS CAR WAS PARKED OVER HERE BY THE TAN
16 CAR, BACKED OUT AND WENT 10 FEET FORWARD. THERE'S ALL KIND
17 OF ROOM IN THERE THAT FOR THE POLICE TO GET THERE BUT YOU
18 KNOW WHAT'S INTERESTING THAT WAS THE FIRST PICTURE THEY
19 SHOWED YOU, DIDN'T HAVE A BLACK HAT IN IT, DIDN'T HAVE A
20 BLACK HAT IN IT.

21 THEY WANT TO SHOW YOU THE NUMBERS OUT THERE. LET
22 ME SHOW YOU THE NUMBERS. WHY DIDN'T THEY SHOW YOU A
23 PICTURE WITH ALL THE EVIDENCE LAYING THERE, NO. THEN THEY
24 HAD INDIVIDUAL PICTURES, TOO. GOT THE CAR, IT'S PRETTY.
25 GOT A BLACK HAT LAYING WAY BACK THERE, WAY BACK THERE.

1 THEY WANT TO TELL YOU ALL THIS HAPPENED RIGHT WHERE THAT
2 HAT IS.

3 HOW MANY PICTURES DID THEY HAVE TO SHOW THE HAT?
4 DIDN'T SHOW IT TO YOU BUT IT HAPPENS TO BE IN THOSE
5 PICTURES, BULLET HOLE, BULLET HOLE, BULLET HOLE, TAKE IT
6 ALL. I SUBMIT TO YOU THAT EVERY WITNESS, EVERY STATEMENT
7 AND EVERY PIECE OF EVIDENCE THAT YOU CAN FIND QUESTION IN,
8 EVERY BIT OF IT. AND I SUBMIT TO YOU IF YOU'VE GOT A
9 QUESTION YOU'VE GOT A REASONABLE DOUBT AND I GUARANTEE YOU
10 THERE'S A BUNCH OF REASONABLE DOUBTS IN THIS CASE. AND I
11 WANT YOU TO LOOK AT EVERY BIT OF IT, THANK YOU.

12 MR. JOHNSON: MAY IT PLEASE THE COURT?

13 THE COURT: YES, SIR.

14 CLOSING ARGUMENT

15 BY MR. JOHNSON:

16 AS YOU ALREADY KNOW THIS IS A VERY IMPORTANT
17 CASE, OF COURSE, TO MR. HOLLAND, THANK YOU FOR BEING HERE.
18 THANK YOU FOR LISTENING TO IT AND THANK YOU FOR CONSIDERING
19 THE EVIDENCE AND TESTIMONY.

20 I WANT TO TALK TO YOU JUST LIKE MR. RICHARDSON
21 DID ABOUT REASONABLE DOUBT. LET'S TALK ABOUT YESSICA, JUST
22 LIKE HE SAID, SHE WAS SMALL. SHE SAID THAT THEY WERE
23 PULLING FORWARD IN THAT PARKING LOT, AND YOU SAW IN THE
24 PICTURES HOW LONG THAT PARKING LOT IS, AND THAT MR. HOLLAND
25 RAN UP TO THE WINDOW BEATING ON THE WINDOW WITH A GUN.

1 WHAT DID SHE DO? SHE STOPPED. WHAT WOULD ANY REASONABLE
2 PERSON DO, THEY'RE GOING TO HIT THE GAS. THEY'RE GOING TO
3 TAKE OFF. IT DOESN'T MAKE SENSE.
4 WHAT DID SHE HAVE TO DO. SHE HAD TO PUT HER FOOT
5 ON THE BRAKE, STOP, UNLOCK THE DOOR, HAD TO. REMEMBER THE
6 DOORS WERE LOCKED, WHAT DOES THAT TELL YOU, IT WAS IN
7 DRIVE. SHE HAD TO PUT IT IN PARK. WHEN YOU PUT IT IN PARK
8 WHAT HAPPENS? THE DOORS UNLOCK, THEN SHE OPENS HER DOOR
9 AND GETS OUT. THAT DOESN'T MAKE ANY SENSE. WHEN YOU SEE A
10 MAN AT YOUR WINDOW WITH A GUN ARE YOU GOING TO DO ALL THAT
11 AND GET OUT, THAT DOESN'T MAKE ANY SENSE, LADIES AND
12 GENTLEMEN. IT JUST DOESN'T MAKE SENSE.

13 LET'S ALSO TALK ABOUT MR. CARLOS, CARLOS ADAMS,
14 BIG FELLOW WHEN HE WALKED IN HERE. TOLD YOU THAT HE SAW
15 THAT MR. HOLLAND WENT TO HIS CAR, DIDN'T SEE IF HE GOT
16 ANYTHING OUT. COULD HAVE VERY WELL PUT SOMETHING IN, COULD
17 HAVE VERY WELL PUT HIS WALLET IN, WATCH, KEYS, COULD HAVE
18 PUT ANYTHING IN HIS CAR. DIDN'T SEE HIM TAKE ANYTHING OUT,
19 DIDN'T SAY HE SAW HIM WITH A GUN. HE WAS RIGHT THERE WITH
20 HIM.

21 WHAT DID HE DO NEXT? HE TESTIFIED RIGHT THERE ON
22 THAT STAND. CARLOS SAID MR. HOLLAND THEN LOCKED HIS CAR,
23 LOCKED HIS CAR, LADIES AND GENTLEMEN. IF WAS GOING TO GO
24 OVER THERE WITH A GUN WOULDN'T HE HAVE WANTED A QUICK GET
25 AWAY? OF COURSE HE WOULD, THAT MAKES SENSE. YOU DON'T

1 LOCK YOUR CAR, THAT'S REASONABLE DOUBT, THAT DOESN'T MAKE
2 SENSE.

3 ALSO MR. CARLOS SAID THAT HE SAW A LOT OF SHADOWS
4 OVER THERE, YOU REMEMBER THAT, SITTING RIGHT THERE ON THAT
5 STAND. HE SAID HE STAYED BACK, NEVER SAW A GUN, OVER THERE
6 AT THE CAR JUST SAW A LOT OF SHADOWS. JUST LIKE MR.
7 RICHARDSON SAID, THERE WAS A RUCKUS GOING ON, VICTIM HAD
8 HIS SHIRT OFF. THERE'S MORE OF A GOING ON THERE, THERE'S A
9 LOT OF PEOPLE OUT THERE.

10 JUST LIKE THE SOLICITOR TOLD YOU THE FIRST DAY OF
11 THIS TRIAL, THIS PLACE STAYS OPEN REAL LATE, AFTER HOURS.
12 IT'S EARLY IN THE MORNING, EARLY IN THE MORNING, AROUND
13 4:00, BEER CANS OUT IN THE PARKING LOT, LOT OF PEOPLE OUT
14 THERE.

15 MS. ELDER JUST ARGUED TO YOU THAT THE PLACE WAS
16 WELL LIT, CARLOS SAID HE SAW SHADOWS. CARLOS SAID HE SAW
17 SOME SHADOWS.

18 DR. PROCTOR, REMEMBER I ASKED DR. PROCTOR A
19 COUPLE OF QUESTIONS WHILE HE WAS ON THE STAND ASKED HIM
20 ABOUT THE GUN POWDER RESIDUE. MR. RICHARDSON TOLD YOU THAT
21 WITNESSES TESTIFIED THAT THEY WERE LOCKED UP, HAD THEIR
22 HANDS ON EACH OTHER, HAD THEIR HANDS ON EACH OTHER JUST
23 LIKE THIS. REMEMBERING HIM DEMONSTRATING RIGHT THERE ON
24 THE WITNESS STAND? SAW NO GUN, NO GUN POWDER RESIDUE. MR.
25 KOEHLER HAD HIS SHIRT OFF. REMEMBER DR. PROCTOR SAID

1 GUNSHOT BULLET NO SPECKLING, NO GUN POWDER ON HIS FOREHEAD.
2 I ASKED HIM COULDN'T THERE BE, SHOULDN'T THERE BE? YES,
3 COULD BE. THERE WAS NONE, NO GUN POWDER RESIDUE. THEY
4 WERE THAT CLOSE TOGETHER, THREE SHOTS, REASONABLE DOUBT.

5 I THINK MR. BENNICK ALSO SAID THAT HE HEARD METAL
6 HITTING GLASS ON THE WINDOW OF THE CAR. OUR SUPREME COURT
7 IN AN OLD CASE ONE TIME SAID EARS OFTEN HEAR WHAT THE EYES
8 WANT TO SEE. THAT'S EXACTLY WHAT HAPPENED HERE. LOT OF
9 PEOPLE THERE AT THE DOOR, LOT OF PEOPLE THERE AT THE
10 OUTSIDE. YESSICA CARUTHERS EVEN SAID THAT, A LOT OF
11 ASSUMING GOING ON SEEMS. THAT'S REASONABLE DOUBT.

12 THERE'S ALSO TALK ABOUT MR. MALLOY, THE VERY LAST
13 WITNESS THEY PUT UP, GOT A CRIMINAL RECORD. THE SOLICITOR
14 TRIES TO TELL YOU HE HAS NOTHING TO GAIN OUT OF THIS.

15 REMEMBER I ASKED HIM ON THAT DAY THAT HE GAVE HIS STATEMENT
16 TO THE POLICE OFFICERS, OFFICER SHEETS, ON NOVEMBER THE
17 8TH, 2006, THAT SAME DAY HE HAD THREE PENDING CHARGES WITH
18 THE SOLICITOR'S OFFICE. REMEMBER I ASKED HIM, WEREN'T THEY
19 MS. DONNA ELDER SITTING RIGHT THERE FROM SOLICITOR'S
20 OFFICE, YOU REMEMBER ME ASKING HIM THAT. TWO OF THOSE WERE
21 DISMISSED, WEREN'T THEY? OUT OF THREE TWO CHARGES WERE
22 DISMISSED.

23 REMEMBER HE SAID ALSO WHEN HE GOT OUT HE CLAIMS
24 TO HAVE TALKED WITH MR. HOLLAND. THEY BROUGHT NO RECORDING
25 IN HERE, DID THEY, BROUGHT ABSOLUTELY NO RECORDING OF ANY

JURY CHARGE

346

1 CONVERSATIONS WITH THAT MAN MR. MALLOY WHO WAS IN JAIL THEY
2 BROUGHT IN HAD FROM MR. HOLLAND, NO RECORDING.

3 HE SAID HE LOOKED AT HIS PAPER WORK. THEY'RE
4 CELL MATES, LOOKED AT HIS PAPER WORK AND GOT THESE NAMES.
5 LADIES AND GENTLEMEN, EVEN HERE ON NEW CHARGES, CUT A DEAL
6 WITH THE SOLICITOR'S OFFICE, GOT OUT OF JAIL, GOT RIGHT
7 BACK IN A MONTH OR TWO LATER FOR DRUGS. DOESN'T MAKE
8 SENSE, THERE'S REASONABLE DOUBT. THERE'S REASONABLE DOUBT.

9 THANK YOU.

10 JURY CHARGE

11 THE COURT: LADIES AND GENTLEMEN OF THE JURY,
12 UNDER THE CONSTITUTION AND LAWS OF THIS STATE YOU ARE THE
13 SOLE FINDERS OF THE FACTS OF THIS CASE. I DON'T HAVE THE
14 RIGHT TO PASS UPON THE FACTS OR EVEN INTIMATE TO YOU HOW I
15 MIGHT THINK ABOUT IT NOR MAY I GIVE YOU THE IMPRESSION IN
16 ANY WAY WHAT I MIGHT THINK ABOUT THE GUILT OR THE INNOCENCE
17 OF THIS DEFENDANT. IF I HAVE THROUGHOUT THIS TRIAL GIVEN
18 YOU ANY KIND OF IMPRESSION THROUGH SOME FACIAL EXPRESSION,
19 SOME GESTURE, VOICE INFLECTION, OR ANYTHING THAT I FAVOR
20 ONE SIDE OR THE OTHER I ASK YOU NOW TO, PLEASE, DISREGARD
21 THAT IT WOULD HAVE BEEN PURELY UNINTENTIONAL ON MY PART FOR
22 I TELL YOU THAT NOT ONLY DO I NOT HAVE A FAVORITE I CANNOT
23 HAVE A FAVORITE AND I DON'T.

24 BECAUSE YOU ARE THE SOLE JUDGES OF THE FACTS IN
25 THIS CASE YOU ARE THE SOLE JUDGES OF THE CREDIBILITY OR

JURY CHARGE

347

1 BELIEVABILITY OF THE WITNESSES AND THE VALUE OR WEIGHT TO
2 BE GIVEN TO THEIR TESTIMONY. YOU ALONE MUST DECIDE THE
3 FORCE AND AFFECT AND THE TRUTH OF THE TESTIMONY AND IN
4 MAKING THIS DECISION THERE ARE MANY THINGS YOU MAY AND
5 SHOULD TAKE INTO CONSIDERATION SUCH AS THE APPEARANCE OR
6 THE MANNER OF THE WITNESS ON THE STAND SOMETIMES CALLED THE
7 DEMEANOR OF THE WITNESS.

8 THE MANNER IN WHICH A WITNESS TESTIFIED, WAS HE
9 OR SHE FORTHRIGHT OR HESITANT.

10 WHAT WAS THE ABILITY OF THE WITNESS TO KNOW THE
11 FACTS ABOUT WHICH THAT WITNESS MAY HAVE TESTIFIED?

12 THE EXTENT OF A WITNESSES CAPACITY TO PERCEIVE,
13 TO RECOLLECT OR TO COMMUNICATE ABOUT ANY MATTER ABOUT WHICH
14 HE OR SHE TESTIFIED.

15 THE EXISTENCE OR NON EXISTENCE OF A BIAS, AN
16 INTEREST OR OTHER MOTION.

17 DID THE WITNESS HAVE A CAUSE OR A REASON TO BE
18 BIASED?

19 WAS THE TESTIMONY CORROBORATED AND MADE STRONGER
20 BY OTHER TESTIMONY OR WAS IT MADE WEAKER?

21 AS JURORS YOU HAVE A RIGHT TO BELIEVE A SMALL
22 PORTION OF A WITNESSES TESTIMONY AND DISCARD THE LARGER
23 PORTION OR VICE VERSA.

24 YOU MAY BELIEVE ALL OF A WITNESSES TESTIMONY OR
25 YOU MAY BELIEVE NONE OF IT.

1 YOU MAY BELIEVE THE TESTIMONY OF A SINGLE WITNESS
2 AGAINST THAT OF MANY WITNESSES OR THE OTHER WAY AROUND.
3 ALL THESE THINGS YOU WILL CONSIDER BEARING IN MIND THAT YOU
4 MUST GIVE THE DEFENDANT THE BENEFIT OF EVERY REASONABLE
5 DOUBT.

6 NOW BY THE SAME CONSTITUTION AND LAW THAT MAKES
7 YOU THE FINDERS OF THE FACTS AND THE EVIDENCE AS I HAVE
8 STATED TO YOU I AS THE TRIAL JUDGE I'M MADE THE SOLE JUDGE
9 AND ONLY INSTRUCTOR IN THE LAW. YOU MUST ACCEPT AS CORRECT
10 THE LAW WHICH I CHARGE AND APPLY IT, EXCUSE ME, APPLY TO IT
11 THE EVIDENCE AS YOU FIND IT AND REACH YOUR VERDICT IN THAT
12 FASHION.

13 YOUR VERDICT MUST BE A UNANIMOUS VERDICT, A
14 VERDICT OF ALL 12 JURORS, A VERDICT WHICH SPEAKS THE TRUTH,
15 A TRUE VERDICT.

16 I CHARGE YOU IN THIS REGARD THAT NEITHER YOU NOR
17 I SHOULD BE CONCERNED ABOUT WHAT WE THINK THE LAW OUGHT TO
18 BE BUT RATHER THE LAW THAT I CHARGE YOU BECAUSE THAT IS THE
19 LAW AS I WILL CHARGE IT TO YOU.

20 IT WOULD BE A VIOLATION OF YOUR OATH TO BASE YOUR
21 VERDICT UPON ANYTHING OTHER THAN THE LAW AND THE FACTS IN
22 THIS CASE.

23 YOU MUST NOT CONSIDER AS EVIDENCE ANY EVIDENCE
24 THAT WAS STRICKEN BY THE COURT. IT'S TO BE TREATED AS
25 THOUGH YOU HAD NEVER HEARD IT.

1 QUESTIONS, AND THIS IS KIND OF A HARD CONCEPT TO
2 UNDERSTAND, QUESTIONS AREN'T EVIDENCE. QUESTIONS ARE ONLY
3 IMPORTANT WHEN THEY GIVE MEANING TO THE ANSWERS.

4 NOW, MADAM FORELADY AND LADIES AND GENTLEMEN OF
5 THE JURY, THE STATE CHARGES THIS DEFENDANT WITH THREE
6 OFFENSES. IT CHARGES HIM WITH ASSAULT AND BATTERY OF A
7 HIGH AND AGGRAVATED NATURE, EXCUSE ME, ASSAULT AND BATTERY
8 WITH INTENT TO KILL, POSSESSION OF A WEAPON DURING THE
9 COMMISSION OF A VIOLENT CRIME, AND MURDER.

10 NOW TO THESE INDICTMENTS THIS DEFENDANT HAS PLED
11 NOT GUILTY. THAT PLACES THE BURDEN OF PROOF ON THE STATE
12 TO PROVE HIS GUILT BEYOND A REASONABLE DOUBT.

13 THE STATE HAS ACCUSED THIS DEFENDANT OF THESE, OF
14 THESE CRIMES AND A BASIC CONCEPT OF OUR LEGAL SYSTEM IS
15 THAT A PERSON IS PRESUMED INNOCENT UNTIL YOU THE JURY
16 UNANIMOUSLY FIND HIM OR HER GUILTY BEYOND A REASONABLE
17 DOUBT.

18 THIS PRESUMPTION OF INNOCENCE REMAINS WITH THE
19 DEFENDANT FROM THE TIME THAT HE'S FIRST CHARGED UNTIL THE
20 TIME YOU RETURN A VERDICT. A DEFENDANT IS NEVER REQUIRED
21 TO PROVE HIMSELF INNOCENT, THEREFORE, THE STATE HAS THE
22 BURDEN TO PROVE TO YOU BEYOND A REASONABLE DOUBT THAT THE
23 DEFENDANT IS GUILTY.

24 THE STATE ALWAYS HAS THE BURDEN OF PROOF IN
25 BEYOND A REASONABLE DOUBT ANYTHING THEY ALLEGE TO BE TRUE.

JURY CHARGE

350

1 IF AFTER LISTENING TO ALL TESTIMONY AND
2 CONSIDERING ALL THE EVIDENCE PRESENTED TO YOU YOU HAVE A
3 REASONABLE DOUBT IN YOUR MIND AS TO THE DEFENDANT'S GUILT
4 OR INNOCENCE IT IS YOUR DUTY TO RETURN A VERDICT OF NOT
5 GUILTY. HOWEVER IF YOU FIND THAT THE STATE HAS PROVEN THE
6 DEFENDANT GUILTY BEYOND EVERY REASONABLE DOUBT THEN YOU
7 HAVE A DUTY TO FIND THE DEFENDANT GUILTY.

8 REMEMBER THE BURDEN OF PROOF IS UPON THE STATE
9 FROM BEGINNING TO END TO ESTABLISH BY THE EVIDENCE BEYOND A
10 REASONABLE DOUBT THE GUILT OF THE DEFENDANT FOR THE CRIMES
11 WITH WHICH HE'S CHARGED.

12 NOW THE PROPER MANNER TO WEIGH THE EVIDENCE
13 PRESENTED DURING THE TRIAL OF THE CASE REGARDLESS OF ITS
14 SOURCE IN ORDER TO DETERMINE IF THE STATE HAS MET ITS
15 BURDEN OF PROOF IS THROUGH THE EXERCISE OF YOUR GOOD COMMON
16 SENSE AND JUDGMENT NOT SIMPLY BY COUNTING WITNESSES. YOU
17 MUST ASK YOURSELF WHAT EVIDENCE CONVINCES ME THAT IT'S
18 TRUE. IT'S ENTIRELY A MENTAL PROCESS. IN THIS MANNER YOU
19 SHALL WEIGH THE EVIDENCE AND RENDER A FAIR AND IMPARTIAL
20 AND A JUST VERDICT.

21 NOW THE GOVERNMENT HAS THE PROOF OF PROVING THE
22 DEFENDANT GUILTY BEYOND A REASONABLE DOUBT. SOME OF YOU
23 MAY HAVE SERVED AS JURORS IN CIVIL CASES WHERE YOU WERE
24 TOLD IT'S ONLY NECESSARY TO PROVE THAT A FACT IS MORE
25 LIKELY TRUE THAN NOT TRUE. IN CRIMINAL CASES THE

1 GOVERNMENT'S PROOF MUST BE STRONGER THAN THAT. IT MUST BE
2 BEYOND A REASONABLE DOUBT.

3 PROOF BEYOND A REASONABLE DOUBT IS PROOF THAT
4 LEAVES YOU FIRMLY CONVINCED OF THE DEFENDANT'S GUILT.
5 THERE ARE VERY FEW THINGS IN THIS WORLD THAT WE KNOW WITH
6 ABSOLUTELY CERTAINTY. IN CRIMINAL CASES THE LAW DOES NOT
7 REQUIRE PROOF THAT OVERCOMES EVERY POSSIBLE DOUBT. IF
8 BASED ON YOUR CONSIDERATION OF THE EVIDENCE YOU ARE FIRMLY
9 CONVINCED THAT THE DEFENDANT IS GUILTY OF THE CRIMES
10 CHARGED THEN YOU MUST FIND HIM GUILTY. IF ON THE OTHER
11 HAND YOU THINK THERE IS A REAL POSSIBILITY THAT HE IS NOT
12 GUILTY YOU MUST GIVE HIM THE BENEFIT OF THE DOUBT AND FIND
13 HIM NOT GUILTY.

14 I CHARGE YOU, LADIES AND GENTLEMEN, WITH
15 CIRCUMSTANTIAL EVIDENCE. THERE ARE TWO TYPES OF EVIDENCE
16 THAT ARE GENERALLY PRESENTED DURING THE TRIAL OF A CASE,
17 DIRECT EVIDENCE AND CIRCUMSTANTIAL EVIDENCE.

18 DIRECT EVIDENCE IS THE TESTIMONY OF A PERSON WHO
19 ASSERTS OR CLAIMS TO HAVE ACTUAL KNOWLEDGE OF A FACT SUCH
20 AS AN EYEWITNESS.

21 CIRCUMSTANTIAL EVIDENCE IS PROOF OF A CHAIN OF
22 FACTS AND CIRCUMSTANCES INDICATING THE EXISTENCE OF A FACT.

23 NOW THE LAW MAKES ABSOLUTELY NO DISTINCTION
24 BETWEEN THE WEIGHT OR VALUE TO BE GIVEN TO EITHER DIRECT OR
25 CIRCUMSTANTIAL EVIDENCE NOR IS A GREATER DEGREE OF

1 CERTAINTY REQUIRED OF CIRCUMSTANTIAL EVIDENCE THAN THAT OF
2 DIRECT EVIDENCE. YOU SHOULD WEIGH ALL THE EVIDENCE IN THE
3 CASE AND AFTER WEIGHING ALL OF THE EVIDENCE IF YOU'RE NOT
4 CONVINCED OF THE GUILT OF THE DEFENDANT BEYOND A REASONABLE
5 DOUBT YOU MUST FIND THE DEFENDANT NOT GUILTY.

6 I GIVE YOU AN EXAMPLE OF CIRCUMSTANTIAL EVIDENCE.
7 WHEN YOU GO TO SLEEP AT NIGHT YOU LOOK OUTSIDE YOUR WINDOW
8 AND THERE'S NO SNOW ON THE GROUND, YOU WAKE UP IN THE
9 MORNING YOU LOOK OUTSIDE YOUR WINDOW AND THERE'S SNOW ON
10 THE GROUND. YOU DIDN'T SEE IT SNOW BUT THROUGH
11 CIRCUMSTANTIAL EVIDENCE YOU CAN CONCLUDE THAT IT SNOWED
12 DURING THE NIGHT. THAT'S CIRCUMSTANTIAL EVIDENCE.

13 ANOTHER EXAMPLE IS IF WHEN YOU GO TO BED THE
14 JELLY JAR IS IN THE REFRIGERATOR AND YOU HAVE A SIX-YEAR
15 OLD SON. YOU WAKE UP IN THE MORNING AND HE'S GOT JELLY
16 SMEARED ALL OVER HIS FACE AND THE JELLY GLASS IS ON THE
17 COUNTER. YOU CAN CONCLUDE THROUGH CIRCUMSTANTIAL EVIDENCE
18 THAT HE WAS THE ONE THAT LEFT THE JELLY GLASS ON THE
19 COUNTER.

20 THOSE ARE EXAMPLES OF CIRCUMSTANTIAL EVIDENCE.
21 YOU DIDN'T SEE HIM EAT THE JELLY, IT DIDN'T APPEAL TO ONE
22 OF YOUR SENSES OF TASTE, TOUCH, SMELL, HEARING, BUT IT'S
23 CIRCUMSTANTIAL EVIDENCE.

24 DURING THE TRIAL OF THIS CASE, LADIES AND
25 GENTLEMEN, IN ADDITION TO THE TESTIMONY OF LAY WITNESSES

1 YOU'VE HEARD TESTIMONY FROM INDIVIDUALS WHO ARE GENERALLY
2 CALLED EXPERTS. AS I STATED DURING THE TRIAL OF THIS
3 MATTER ORDINARILY WITNESSES ARE NOT PERMITTED TO COME IN
4 AND TESTIFY TO ANYTHING OTHER THAN MATTERS WHICH ARE
5 CAPABLE OF BEING PERCEIVED BY ONES SENSES.

6 USUALLY WITNESSES ARE NOT PERMITTED TO GIVE THEIR
7 OPINIONS ON ISSUES. OUR RULES DO PERMIT IN SOME CASES AND
8 CERTAIN CIRCUMSTANCES, HOWEVER, THAT SOME PERSONS WHO
9 BECAUSE OF EDUCATION, EXPERIENCE, OR TRAINING PROFESS SOME
10 EXPERTISE THEY MAY BE PERMITTED TO GIVE AN OPINION IN
11 REGARD TO THEIR FIELD OF EXPERTISE. NOW THAT DOESN'T MEAN
12 THAT THEIR TESTIMONY NECESSARILY HAS TO RECEIVE MORE WEIGHT
13 THAN ANY OTHER WITNESS. YOU SHOULD CONSIDER THE EXPERT
14 TESTIMONY IN THE SAME MANNER AS YOU DO ANY OTHER TESTIMONY
15 AND GIVE TO IT SUCH WEIGHT AS YOU MAY BELIEVE IT TO BE
16 ENTITLED WHEN CONSIDERED WITH ALL THE OTHER EVIDENCE IN THE
17 CASE.

18 SUCH TESTIMONY IS GIVEN FOR THE PURPOSE OF
19 HELPING YOU TO UNDERSTANDING THE EVIDENCE AND NOT FOR THE
20 PURPOSE OF CONTROLLING YOUR JUDGMENT. THE VALUE OF IT DOES
21 NOT DEPEND UPON THE SKILL OR THE KNOWLEDGE PROFESSED BY THE
22 EXPERT BUT RATHER UPON THE SKILL AND THE KNOWLEDGE THAT HE
23 OR SHE ACTUALLY POSSESSES AND IT'S FOR YOU TO JUDGE WHETHER
24 AN EXPERT DOES POSSESS SUCH KNOWLEDGE.

25 IN THIS REGARD YOU MAY CONSIDER HIS OR HER

1 TRAINING, EXPERIENCE, ABILITY TO COMMUNICATE HIS OR HER
2 IDEAS, THE LOGIC OF THE EXPERT'S OPINION, THE FACTUAL
3 SUPPORT FOR THE OPINION AND ALL OTHER FACTORS YOU USE TO
4 JUDGE AND WEIGH THE TESTIMONY OF ANY OTHER WITNESS.

5 NOR MERE OPINION OF AN EXPERT CAN BE ACCEPTED IN
6 AND OF ITSELF TRUTHFUL OR RELIABILITY. IT FIRST MUST BE
7 WEIGHED BY YOU AND CONVINCE YOUR JUDGMENTS BEYOND A
8 REASONABLE DOUBT AND WITH THE SAME FORCE AND AFFECT AS ANY
9 OTHER FACT PROVEN IN THIS CASE BEFORE YOU CAN RELY UPON IT.
10 THEREFORE, LADIES AND GENTLEMEN, GIVE SUCH EXPERT TESTIMONY
11 THE WEIGHT, IF ANY, TO WHICH YOU DEEM IT ENTITLED.

12 NOW IN THIS CASE THERE ARE THREE DIFFERENT COUNTS
13 OR THREE DIFFERENT CHARGES ALLEGED AGAINST, OF CRIMINAL
14 CONDUCT ALLEGED AGAINST THIS DEFENDANT AND THEY ARE ALL
15 BEING TRIED TOGETHER. WHATEVER VERDICT YOU FIND MUST BE
16 SEPARATE AS TO EACH COUNT OR AS TO EACH INDICTMENT OR AS TO
17 EACH CHARGE, HOWEVER, THE VERDICT DOES NOT HAVE TO BE THE
18 SAME AS TO EACH COUNT.

19 YOU TAKE EACH COUNT SEPARATELY, CONSIDER THE
20 EVIDENCE AS TO THAT COUNT AND WRITE YOUR VERDICT
21 ACCORDINGLY AND IN ACCORDANCE AND IN CONFORMITY WITH THE
22 EVIDENCE AND THE INSTRUCTIONS THAT I'VE GIVEN YOU AND WILL
23 HEREAFTER GIVE YOU.

24 YOU MAY FIND THE DEFENDANT GUILTY OR NOT GUILTY
25 ON EACH COUNT IN THE INDICTMENT.

1 LET ME GIVE YOU DEFINITIONS OF WHAT THESE
2 OFFENSES ARE.

3 MURDER; MURDER IS THE WILLFUL, FELONIOUS KILLING
4 OF A HUMAN BEING BY ANOTHER HUMAN WITH MALICE AFORETHOUGHT
5 EITHER EXPRESSED OR IMPLIED. THE PRESENCE OF MALICE
6 AFORETHOUGHT IS A DISTINGUISHING CHARACTERISTIC OF MURDER.

7 MALICE IS A STATE OF MIND CHARACTERIZED BY AN
8 EXTREME DISREGARD FOR HUMAN LIFE.

9 MALICE AFORETHOUGHT MAY BE ESTABLISHED WHERE
10 THERE IS AN INTENT TO KILL WITHOUT PROVOCATION OR EXCUSE OR
11 AN INTENT TO DO SERIOUS BODILY HARM OR CONDUCT WHICH
12 CONSCIOUSLY CREATES A VERY HIGH RISK OF DEATH WHERE THE
13 CIRCUMSTANCES SURROUNDING THE KILLING EVIDENCE OF MALIGNANT
14 HEART BENT UPON THIS FATAL ACT.

15 MALICE AFORETHOUGHT IS THE PRESENCE OF MALICE IN
16 THE MIND OF THE ONE DOING THE KILLING AT ANY TIME BEFORE
17 THE ACT. MALICE NEED NOT BE PRESENT IN THE ACTORS MIND ANY
18 PARTICULAR LENGTH OF TIME BUT ONLY SOME TIME BEFORE THE
19 ACT.

20 MALICE SUGGEST WICKEDNESS, HATRED AND
21 DETERMINATION TO DO WHAT ONE KNOWS TO BE WRONG. MALICE MAY
22 NOT BE FOUND WHERE THERE IS A LEGAL JUSTIFICATION OR EXCUSE
23 OR ILLEGALLY ADEQUATE PROVOCATION FOR THE ACT. MALICE MAY
24 BE EXPRESSED OR IMPLIED. MALICE MAY EITHER BE EXPRESSED OR
25 IMPLIED. THESE WORDS EXPRESSED OR IMPLIED MALICE DO NOT

1 MEAN DIFFERENT KINDS OF MALICE BUT MERELY MEANS THE MANNER
2 IN WHICH THE ONLY KIND OF MALICE KNOWN IN THE LAW MAY BE
3 SHOWN TO EXIST, THAT IS TO SAY EITHER BY DIRECT EVIDENCE OR
4 BY INFERENCE.

5 EXPRESSED MALICE; MALICE MAY BE EXPRESSED AS
6 WHERE PREVIOUS THREATS OF VENGEANCE OR LYING IN WAIT OR
7 OTHER CIRCUMSTANCES SHOW DIRECTLY WHAT AN INTENT TO KILL
8 WAS IN THE MIND OF THE DEFENDANT.

9 ASSAULT AND BATTERY WITH INTENT TO KILL; ASSAULT
10 AND BATTERY WITH INTENT TO KILL IS AN UNLAWFUL ACT OF A
11 VIOLENT NATURE TO THE PERSON OF ANOTHER WITH MALICE
12 AFORETHOUGHT EITHER EXPRESSED OR IMPLIED. TO FIND THE
13 DEFENDANT GUILTY OF ASSAULT AND BATTERY WITH INTENT TO KILL
14 YOU MUST FIND THAT THE DEFENDANT COMMITTED AN UNLAWFUL ACT
15 OF VIOLENCE OR VIOLENT INJURY TO ANOTHER PERSON WITH THE
16 INTENT TO KILL THE VICTIM AND WITH MALICE AFORETHOUGHT
17 EITHER EXPRESSED OR IMPLIED.

18 WHAT IS AN ASSAULT? AN ASSAULT IS THE OFFER TO
19 DO VIOLENCE TO THE PERSON OF ANOTHER IN A RUDE AND ANGRY
20 MANNER, THE PERSON OFFERING THE ASSAULT BEING WITHIN
21 STRIKING DISTANCE OF THE OTHER.

22 A BATTERY; A BATTERY IS THE ACTUAL INFLICTION OF
23 A PERSONAL INJURY UPON THE BODY OF ANOTHER IN A RUDE AND
24 ANGRY MANNER. TO CONSTITUTE A BATTERY THE FORCE OF
25 VIOLENCE CAUSING THE INJURY MUST BE PHYSICAL. IT MAY BE

1 ANY, IT MAY BE OF ANY KIND OR DEGREE. EVEN THE LEAST
2 ACTUAL FORCE OF VIOLENCE CAN CONSTITUTE A BATTERY.

3 THE INTENT TO KILL; SPECIFIC INTENT TO KILL NEED
4 NOT BE SHOWN TO CONVICT OR ASSAULT AND BATTERY WITH INTENT
5 TO KILL. IT'S SUFFICIENT IF THERE IS SHOWN SOME GENERAL
6 INTENT WHICH THE JURY MAY NATURALLY AND REASONABLY INFER
7 FROM THE DEFENDANT'S ACTS AND CONDUCT.

8 MALICE; MALICE MUST BE AN INTENT TO KILL
9 ACCOMPANIED BY MALICE. MALICE IS A STATE OF MIND
10 CHARACTERIZED BY AN EXTREME DISREGARD FOR HUMAN LIFE.
11 MALICE AFORETHOUGHT MAY BE ESTABLISHED OR INTENT TO DO
12 SERIOUS BODILY HARM OR CONDUCT WHICH CONSCIOUSLY CREATES A
13 VERY HIGH RISK OF DEATH WHERE THE CIRCUMSTANCES SURROUNDING
14 THE AWFUL ACT, UNLAWFUL ACT EVIDENCED A MALIGNANT HEART.

15 I CHARGE YOU, LADIES AND GENTLEMEN, WITH TRANSFER
16 INTENT. WHEN A DEFENDANT INTENDS TO KILL OR SERIOUSLY
17 INJURE ONE PERSON BUT SERIOUSLY INJURES ANOTHER A DEFENDANT
18 MAY BE FOUND GUILTY OF ASSAULT AND BATTERY WITH INTENT TO
19 KILL. IF MALICE IS FOUND AT THE TIME OF THE INJURY EVEN IF
20 A THIRD PARTY IS INJURED RATHER THAN THE INTENDED VICTIM
21 THE DEFENDANT IS GUILTY OF ASSAULT AND BATTERY WITH INTENT
22 TO KILL.

23 THIS RESULT IS SOMETIMES DESCRIBED AS THE, AS, AS
24 THE DOCTRINE OF TRANSFERRED INTENT WHEREBY THE ACTOR'S
25 INTENT TO KILL HIS INTENDED VICTIM IS SAID TO BE

JURY CHARGE

358

1 TRANSFERRED TO THE ACTUAL VICTIM HE SERIOUSLY INJURED. ALL
2 THAT IS REQUIRED OF THIS IS THE MENTAL STATE OF MALICE
3 PROVIDED BY THE INTENT TO KILL A HUMAN BEING BEING COUPLED
4 WITH AN ACT WHICH CAUSED THE INJURY OF ANOTHER HUMAN BEING.

5 I CHARGE YOU WITH POSSESSION OF A FIREARM DURING
6 THE COMMISSION OF A VIOLENT CRIME. IT IS ILLEGAL TO
7 POSSESS A FIREARM OR REASONABLY DISPLAY WHAT APPEARS TO BE
8 A FIREARM DURING THE COMMISSION OF A VIOLENT CRIME. FOR
9 YOU TO FIND THE DEFENDANT GUILTY OF THIS SEPARATE STATUTORY
10 OFFENSE OF POSSESSING A FIREARM DURING A VIOLENT CRIME YOU
11 MUST FIRST FIND THE DEFENDANT GUILTY OF A VIOLENT CRIME.
12 THEN YOU MUST DETERMINE WHETHER THE STATE HAS PROVED BEYOND
13 A REASONABLE DOUBT THAT THE DEFENDANT WAS IN POSSESSION OF
14 A FIREARM OR VISIBLY DISPLAYED WHAT APPEARED TO BE A
15 FIREARM DURING THE COMMISSION OF A VIOLENT CRIME.

16 I TOLD YOU I'D TELL YOU MORE ABOUT THE SITUATION
17 WHEREIN A DEFENDANT SUCH AS THIS DEFENDANT DOES NOT TESTIFY
18 IN A CASE. I INSTRUCT TO YOU NOW AND EMPHASIZE TO YOU THAT
19 THE FACT THAT A DEFENDANT DOES NOT TESTIFY IN HIS OWN
20 BEHALF IN A CRIMINAL TRIAL IS NOT A FACTOR TO BE CONSIDERED
21 BY YOU IN ANY WAY IN YOUR DELIBERATIONS. YOU MUST NOT
22 CONSIDER THE FACT THAT A DEFENDANT HAS CHOSEN NOT TO
23 TESTIFY WHEN YOU DETERMINE THE GUILT OR INNOCENCE OF A
24 DEFENDANT. IT MUST NOT BE CONSIDERED BY YOU IN AN MANNER
25 WHATSOEVER AGAINST THE DEFENDANT OR FOR THE DEFENDANT.

1 A DEFENDANT HAS A CONSTITUTIONAL RIGHT TO REMAIN
2 SILENT. THE ASSERTION OF THAT RIGHT CANNOT AND MUST NOT BE
3 CONSIDERED BY YOU IN YOUR DELIBERATIONS. UNDER YOUR OATH
4 THEN YOU ARE TO REACH NO INFERENCE AND DRAW NO CONCLUSION
5 WHATSOEVER FROM THE FACT THAT A DEFENDANT IN THIS CASE DID
6 NOT TESTIFY.

7 THE FACT THAT THE DEFENDANT DID NOT TESTIFY
8 SHOULD NOT EVEN BE DISCUSSED IN YOUR JURY ROOM. THE BURDEN
9 OF PROOF AS I HAVE STATED TO YOU IS UPON THE STATE, IT'S
10 NOT UPON THE ACCUSED TO PROVE HIS INNOCENCE. THE BURDEN OF
11 PROOF REMAINS UPON THE STATE TO PROVE GUILT BEYOND A
12 REASONABLE DOUBT. AGAIN I EMPHASIZE THE FACT THAT A
13 DEFENDANT DID NOT TESTIFY IS NOT A FACTOR TO BE CONSIDERED
14 BY YOU IN DETERMINING HIS GUILT OR INNOCENCE OR IN ANY
15 OTHER ASPECT OR YOUR DELIBERATIONS.

16 NOW, LADIES AND GENTLEMEN, YOU'VE BEEN SELECTED
17 TO BE FAIR AND IMPARTIAL JURORS, SWORN TO IMPARTIALLY TRY
18 AND DETERMINE THE FACTS OF THIS CASE AND WHEN YOU COMPLY
19 WITH YOUR OATH TO DO SO THEN NO ONE WILL HAVE A RIGHT TO
20 CRITICIZE YOUR VERDICT AND YOU WILL HAVE FULLY DISCHARGED
21 YOUR DUTY AS JURORS.

22 YOUR VERDICT MUST NOT BE BASED ON PASSION OR
23 PREJUDICE OR PUBLIC OPINION BUT MUST BE BASED ON THE
24 EVIDENCE AND THE LAW ONLY AND WHEN YOU DO THAT, BASE YOUR
25 VERDICT ON THE EVIDENCE AND THE LAW, NO ONE CAN FIND FAULT

JURY CHARGE

360

1 WITH YOUR VERDICT.

2 THERE ARE TWO VERDICTS WHICH YOU MAY FIND ON EACH
3 COUNT OR EACH INDICTMENT IN THIS CASE. YOU'LL BE GIVEN
4 SEPARATE FORMS FOR EACH CHARGE, MADAM FORELADY. THERE'S NO
5 SIGNIFICANCE WHATSOEVER TO THE ORDER IN WHICH I STATE THESE
6 POSSIBLE VERDICTS, SOMETHINGS GOT TO GO FIRST AND SOMETHING
7 HAS GOT TO COME SECOND, IT MAKES NO DIFFERENCE WHICH COMES
8 WHICH AND IT'S NOT TO, IT'S NOT TO SUGGEST ANYTHING TO YOU
9 WHATSOEVER. IT'S SIMPLY ONE MUST BE STATED FIRST.

10 NOW, LADIES AND GENTLEMEN, YOUR VERDICT MUST BE A
11 UNANIMOUS VERDICT, THAT IS THE VERDICT OF ALL 12 JURORS AND
12 YOU MUST ARRIVE AT THE SAME VERDICT. NOW WHEN THE JURY
13 AGREES ON THE VERDICT, MADAM FORELADY, YOU WILL WRITE IT ON
14 THE FORM THAT I WILL SHOW YOU IN JUST ONE MOMENT AND SIGN
15 YOUR NAME AS THE FOREPERSON.

16 I ASK IN JUST A MOMENT THAT YOU RETIRE TO YOUR
17 JURY ROOM TO DELIBERATE YOUR VERDICT BUT FIRST OF ALL LET
18 ME SHOW YOU THESE VERDICT FORMS AND THEY ARE THREE FORMS ON
19 EACH COUNT. THIS SAYS VERDICT FORM, THE STATE OF SOUTH
20 CAROLINA V. LEMOND C. HOLLAND DEFENDANT, WE THE JURY ON THE
21 CHARGE OF POSSESSION OF A WEAPON DURING THE COMMISSION OF A
22 VIOLENT CRIME IN VIOLATION OF SECTION 16-23-0490 OF THE
23 SOUTH CAROLINA CODE OF LAWS OF 1976 UNANIMOUSLY FIND THE
24 DEFENDANT MR. LEMOND CORNEILUS HOLLAND AND YOU HAVE TWO
25 CHOICES, GUILTY OR NOT GUILTY. WHICHEVER IS YOUR UNANIMOUS

1 CHOICE, MADAM FORELADY, YOU CHECK THE APPROPRIATE LINE OUT
2 BY THAT VERDICT AND SIGN YOUR NAME AND DATE IT.

3 I TELL YOU YOU MAY NOT FIND THE DEFENDANT GUILTY
4 OF THIS COUNT UNLESS YOU FIND HIM GUILTY OF A VIOLENT
5 CRIME.

6 NOW THIS IS THE SECOND VERDICT FORM. THE STATE
7 OF SOUTH CAROLINA V. LEMOND C. HOLLAND DEFENDANT, WE THE
8 JURY ON THE CHARGE OF ASSAULT AND BATTERY WITH INTENT TO
9 KILL IN VIOLATION OF 16-03-0620 SOUTH CAROLINA CODE OF LAWS
10 OF 1976, WHEN IT WAS PRINTED AND DON'T LET THAT THROW YOU,
11 UNANIMOUSLY FIND THE DEFENDANT MR. LEMOND CORNEILUS HOLLAND
12 GUILTY OR NOT GUILTY. YOU HAVE TWO CHOICES, WHICHEVER IS
13 YOUR UNANIMOUS CHOICE CHECK THAT APPROPRIATE BOX AND SIGN
14 YOUR NAME HERE AS THE FOREPERSON AND PUT TODAY'S DATE.

15 THE THIRD VERDICT FORM, THE STATE OF SOUTH
16 CAROLINA V. LEMOND C. HOLLAND WE THE JURY ON THE CHARGE OF
17 MURDER IN VIOLATION OF 16-03-0010 SOUTH CAROLINA CODE OF
18 LAWS 1976 UNANIMOUSLY FIND THE DEFENDANT MR. LEMOND
19 CORNEILUS HOLLAND GUILTY OR NOT GUILTY, AGAIN CHECK THE
20 APPROPRIATE BOX ONCE YOU'VE REACH A UNANIMOUS VERDICT AND
21 SIGN YOUR NAME AND PUT TODAY'S DATE ON IT.

22 ONCE YOU HAVE DONE THAT KNOCK ON THE DOOR AND
23 SOMEONE WILL COME RETRIEVE BOTH THE JURY AND YOUR VERDICT
24 AND WE'LL COME BACK IN AND IF THEY'RE IN THE PROPER FORM
25 WE'LL PUBLISH YOUR VERDICT.

JURY CHARGE

362

1 I'M GOING TO ASK YOU IN JUST ONE MOMENT TO STEP
2 OUTSIDE TO GO BACK INTO YOUR JURY ROOM FOR JUST A MOMENT
3 AND I'M GOING TO TELL YOU WHAT I'M GOING TO DO. I'M GOING
4 TO ASK THESE ATTORNEYS IF I HAVE MISSPOKEN MYSELF IN THIS
5 CHARGE. IF I HAVE SAID SOMETHING THAT I SHOULDN'T HAVE
6 SAID OR IF I HAVE OMITTED SOMETHING THAT I SHOULD HAVE SAID
7 OR IF I HAVE BUNGLED CHARGE IN SOME RESPECT IF I HAVE THEN
8 IT MAY VERY WELL BE NECESSARY TO BRING YOU BACK IN HERE AND
9 CORRECT THAT CHARGE.

10 I WANT TO TELL YOU NOW SHOULD THAT HAPPEN I DON'T
11 WANT YOU TO THINK BECAUSE I'M SINGLING OUT ONE AREA OF MY
12 CHARGE THAT IT'S ANY MORE IMPORTANT THAN WHAT I'VE JUST
13 FINISHED TELLING YOU. IT'S SIMPLY THAT I'VE MADE A MISTAKE
14 AND I'M TRYING TO CORRECT THAT MISTAKE. I HOPE I HAVEN'T,
15 DON'T THINK I HAVE, BUT THEY'RE GOING TO TELL ME IF I HAVE,
16 SO I'M GOING TO ASK YOU TO, PLEASE, STEP BACK TO YOUR JURY
17 ROOM, DO NOT START DISCUSSING THE CASE UNTIL TOLD TO DO SO.
18 IF I DON'T HAVE TO BRING YOU BACK OUT WE WILL SEND IN THE
19 EXHIBITS AND SEND IN THE VERDICT FORMS AND TELL YOU TO
20 COMMENCE YOUR DELIBERATIONS. IF I DO, OF COURSE, I'LL
21 BRING YOU BACK OUT AND CORRECT ANY MISTAKES THAT I MAY HAVE
22 MADE, BUT, PLEASE, STEP BACK TO YOUR JURY ROOM BUT DON'T
23 DISCUSS THE CASE UNTIL TOLD TO DO SO.

24 (WHEREUPON, THE JURY RETIRED TO THE JURY ROOM AT
25 11:42 A.M.)

1 THE COURT: ARE THERE ANY EXCEPTIONS TO THE
2 CHARGE?

3 MR. RICHARDSON: YOUR HONOR, AS TO THE CHARGE OF
4 TRANSFERRED INTENT WE WOULD OBJECT TO THAT AS TO THE FACT
5 THAT WE HAVE REQUESTED AND A CHARGE ON ASSAULT AND BATTERY
6 WITH INTENT TO KILL WE'VE PREVIOUSLY REQUESTED THAT THAT BE
7 DISMISSED AND WE'VE REQUESTED THAT VOLUNTARY MANSLAUGHTER
8 BE CHARGED ALSO, YOUR HONOR.

9 THE COURT: VERY WELL. I RESPECTFULLY DENY YOUR
10 MOTIONS AGAIN AND THE REASON I'M NOT CHARGING MANSLAUGHTER
11 IS IN MY JUDGMENT THERE WAS NO SUFFICIENT JUSTIFICATION OR
12 PROVOCATION, THAT'S WHY I DIDN'T CHARGE THEM THAT. YES,
13 SIR?

14 MR. HUMPHRIES: QUITE FRANKLY, YOUR HONOR, I
15 DON'T KNOW THAT IT'S NECESSARY THAT THEY BE BROUGHT IN TO
16 BE TOLD THIS ALTHOUGH IT IS AN ELEMENT OF THE OFFENSE. I
17 DON'T BELIEVE THE COURT TOLD THE JURY THAT MURDER AND
18 ASSAULT AND BATTERY WITH INTENT TO KILL WERE STATUTORY
19 VIOLENT OFFENSES. I DON'T THINK THAT IS WHAT THIS ABOUT.

20 THE COURT: I DID NOT TELL THEM THAT.

21 MR. HUMPHRIES: I'LL LEAVE IT UP TO THE COURT'S
22 DISCRETION, IT'S AN ELEMENT OF THE OFFENSE. I MEAN,
23 CERTAINLY YOU'VE TOLD ---

24 THE COURT: I DON'T KNOW THAT IT'S NECESSARY TO
25 TEL THEM THAT.

1 MR. HUMPHRIES: I DON'T KNOW THAT IT IS.

2 THE COURT: AND I'M NOT GOING TO TELL THEM THAT.
3 IF THEY DON'T THINK THAT MURDER IS A VIOLENT OFFENSE ---

4 MR. HUMPHRIES: I'M WITH YOU.

5 MR. RICHARDSON: YOUR HONOR, ONE OTHER MATTER.
6 WE WOULD MAKE A MOTION FOR A MISTRIAL BASED UPON THE FACT
7 THAT MS. ELDER ARGUED IN HER FINAL ARGUMENT IN SUCH A WAY
8 THAT IT INFLAMED THE PASSIONS AND PREJUDICED THE JURY IN
9 SYMPATHY.

10 THE COURT: OVERRULED AND DENY YOUR MOTION. I
11 DON'T THINK, I THINK YOU STOPPED HER BEFORE SHE SAID
12 ANYTHING AND I'M NOT SURE THAT WOULD CONSTITUTE GROUNDS FOR
13 A MISTRIAL ANYWAY BUT WITH RESPECT I DENY YOUR MOTION FOR A
14 MISTRIAL.

15 ANYTHING FURTHER?

16 MR. HUMPHRIES: NO, SIR.

17 THE COURT: LET'S, PLEASE, SEND IN THE VERDICT
18 FORMS IN AND THE EXHIBITS, GO OVER THE EXHIBITS AND MAKE
19 SURE THEY'RE IN THE PROPER ORDER.

20 (WHEREUPON, THE VERDICT FORMS AND EXHIBITS WERE
21 DELIVERED TO THE JURY ROOM WITH INSTRUCTIONS TO BEGIN
22 DELIBERATIONS BEGAN AT 11:45 A.M.)

23 THE COURT: LET ME THANK YOU FOR YOUR
24 WILLINGNESS TO BE A PART OF OUR JURY AND HELP US IN THE
25 ADMINISTRATION OF JUSTICE. YOU KNOW WHEN YOU CHOOSE AN

1 ALTERNATE YOU'RE CHOOSING THEM IN THE EVENT SOMETHING
2 HAPPENS TO ONE OF THOSE 12 IF THEY SHOULD HAVE A SICKNESS
3 AT HOME OR EMERGENCY THAT WOULD KEEP THEM FROM BEING ABLE
4 TO DELIBERATE OR BECOME PREGNANT. I DON'T GUESS THAT'S
5 REALLY POSSIBLE, PERHAPS IN CASES WHERE A JURY IS
6 SEQUESTERED OVER A LONG PERIOD OF TIME MAYBE THAT'S
7 POSSIBLE. IN ANY EVENT I THANK YOU, SIR. YOU'RE EXCUSED,
8 IF YOU WANT TO GO ON ABOUT YOUR BUSINESS I'VE EXCUSED THE
9 REST OF THE JURORS. YOU WON'T BE BOTHERED AGAIN FOR
10 SERVICE OF THIS TYPE IN THREE YEARS. YOU'RE WELCOME TO
11 STAY AROUND WITH THE REST OF US AND WAIT THE VERDICT IF YOU
12 LIKE BUT IF YOU WANT TO GO ON ABOUT YOUR BUSINESS YOU'RE
13 EXCUSED, THANK YOU VERY MUCH.

14 (WHEREUPON, THE JURY KNOCKED WITH A VERDICT AT
15 1:30 P.M.)

16 THE COURT: IS THE STATE READY TO RECEIVE THE
17 VERDICT?

18 MS. ELDER: YES, YOUR HONOR, WE ARE.

19 THE COURT: DEFENSE READY TO RECEIVE THE
20 VERDICT?

21 MR. JOHNSON: WE ARE, YOUR HONOR.

22 THE COURT: BRING THE JURY BACK, PLEASE. WHEN
23 THE VERDICT IS ANNOUNCED I DON'T WANT ANY OUTBURSTS FROM
24 THE CROWD.

25 (WHEREUPON, THE JURY ENTERED THE COURTROOM AT

VERDICT

366

1 2:39 P.M. TO DELIVER ITS VERDICT AS TO DEFENDANT HOLLAND.)

2 THE COURT: MADAM FORELADY, I'M TOLD YOU'VE
3 REACHED A VERDICT IN THIS MATTER?

4 MADAM FORELADY: YES, SIR, WE HAVE.

5 THE COURT: WOULD YOU PASS IT UP, PLEASE, TO THE
6 CLERK? YOU MAY PUBLISH THE VERDICT.

7 MADAM CLERK: THIS IS INDICTMENT NUMBER 2006-GS-
8 26-2012, THE STATE OF SOUTH CAROLINA V. LEMOND C. HOLLAND
9 WE THE JURY ON THE CHARGE OF POSSESSION OF A WEAPON DURING
10 THE COMMISSION OF A VIOLENT CRIME UNANIMOUSLY FIND THE
11 DEFENDANT MR. LEMOND CORNEILUS HOLLAND GUILTY.

12 THE STATE OF SOUTH CAROLINA V. LEMOND HOLLAND
13 INDICTMENT NUMBER 2006-GS-26-2013 WE THE JURY ON THE CHARGE
14 OF ASSAULT AND BATTERY WITH INTENT TO KILL UNANIMOUSLY FIND
15 THE DEFENDANT MR. LEMOND CORNEILUS HOLLAND GUILTY.

16 INDICTMENT NUMBER 2006-GS-26-2014 THE STATE OF
17 SOUTH CAROLINA V. LEMOND C. HOLLAND WE THE JURY ON THE
18 CHARGE OF MURDER UNANIMOUSLY FIND THE DEFENDANT MR. LEMOND
19 CORNEILUS HOLLAND GUILTY, CAROLYN GAINES FOREPERSON DATED
20 JUNE 13TH, 2007.

21 MADAM FORELADY AND LADIES AND GENTLEMEN OF THE
22 JURY, IF THIS IS YOUR VERDICT SO SIGNIFY BY RAISING YOUR
23 RIGHT HAND.

24 (WHEREUPON, ALL JURORS RESPONDED AFFIRMATIVELY.)

25 MADAM CLERK: THANK YOU.

1 THE COURT: WOULD YOU HAVE THE JURY POLLED?

2 MR. JOHNSON: WE DO, YOUR HONOR.

3 THE COURT: WOULD YOU POLL THEM, PLEASE, DONNA.

4 MADAM CLERK: WHEN I CALL YOUR NAME, PLEASE,
5 STAND. I WILL ASK YOU TWO QUESTIONS. PLEASE ANSWER THEM
6 AND YOU MAY BE SEATED AGAIN.

7 CAROLYN GAINEY, IS THIS YOUR VERDICT?

8 JURY MEMBER: YES, MA'AM.

9 MADAM CLERK: IS IT STILL YOUR VERDICT?

10 JURY MEMBER: YES, MA'AM.

11 MADAM CLERK: THANK YOU.

12 MORGAN EMSLEY, IS THIS YOUR VERDICT?

13 JURY MEMBER: YES, MA'AM.

14 MADAM CLERK: IS IT STILL YOUR VERDICT?

15 JURY MEMBER: YES, MA'AM.

16 MADAM CLERK: THANK YOU.

17 JEFF JONES, IS THIS YOUR VERDICT?

18 JURY MEMBER: YES, MA'AM.

19 MADAM CLERK: IS IT STILL YOUR VERDICT?

20 JURY MEMBER: YES, MA'AM.

21 MADAM CLERK: THANK YOU.

22 CARRIE MOORE, IS THIS YOUR VERDICT?

23 JURY MEMBER: YES, MA'AM.

24 THE COURT: IS IT STILL YOUR VERDICT?

25 JURY MEMBER: YES.

1 MADAM CLERK: THANK YOU.
2 SYLVIA MILLER, IS THERE YOUR VERDICT?
3 JURY MEMBER: YES.
4 MADAM CLERK: IS IT STILL YOUR VERDICT?
5 JURY MEMBER: YES.
6 MADAM CLERK: THANK YOU.
7 LAURA CARMINE, IS THIS YOUR VERDICT?
8 JURY MEMBER: YES, IT IS.
9 MADAM CLERK: IS IT STILL YOUR VERDICT?
10 JURY MEMBER: YES.
11 MADAM CLERK: THANK YOU.
12 RICHARD VEREEN, IS THIS YOUR VERDICT?
13 JURY MEMBER: YES.
14 MADAM CLERK: IS IT STILL YOUR VERDICT?
15 JURY MEMBER: YES.
16 MADAM CLERK: THANK YOU.
17 SHANNON VAN MARTEN, IS THIS YOUR VERDICT?
18 JURY MEMBER: YES.
19 MADAM CLERK: IS IT STILL YOUR VERDICT?
20 JURY MEMBER: YES.
21 MADAM CLERK: THANK YOU.
22 WILLIAM LONGACRE, IS THIS YOUR VERDICT?
23 JURY MEMBER: YES, MA'AM.
24 MADAM CLERK: IS IT STILL YOUR VERDICT?
25 JURY MEMBER: YES, MA'AM.

1 MADAM CLERK: THANK YOU.

2 COLIN BURCH, IS THIS YOUR VERDICT?

3 JURY MEMBER: YES.

4 MADAM CLERK: IS IT STILL YOUR VERDICT

5 JURY MEMBER: YES.

6 MADAM CLERK: THANK YOU.

7 TIMOTHY RUTLAND, IS THIS YOUR VERDICT?

8 JURY MEMBER: YES.

9 MADAM CLERK: IS IT STILL YOUR VERDICT?

10 JURY MEMBER: YES.

11 MADAM CLERK: THANK YOU.

12 BRIAN RICHARDSON, IS THIS YOUR VERDICT?

13 JURY MEMBER: YES, MA'AM.

14 MADAM CLERK: IS IT STILL YOUR VERDICT?

15 JURY MEMBER: YES, MA'AM.

16 MADAM CLERK: THANK YOU.

17 THE COURT: LADIES AND GENTLEMEN OF THE JURY, I

18 WANT TO THANK YOU FOR YOUR SERVICE IN THIS CASE. THE COURT

19 IS ALWAYS CONCERNED ABOUT WHETHER OR NOT THE JURY PAYS

20 ATTENTION, NOT SO MUCH ABOUT WHAT THEIR VERDICT WAS, BUT

21 HOW YOU REACHED YOUR VERDICT. YOU PAID CLOSE ATTENTION

22 THROUGHOUT THE TRIAL, I THANK YOU FOR YOUR ATTENTION. I

23 THANK YOU FOR YOUR SERVICE AND NOT ONLY DO I THANK YOU BUT

24 THE CITIZENS OF HORRY COUNTY AND THE STATE OF SOUTH

25 CAROLINA THANK YOU.

1 YOUR DUTIES AND RESPONSIBILITIES WITH REGARD TO
2 NOT ONLY THIS CASE BUT THIS TERM OF COURT HAVE COME TO A
3 CONCLUSION. AS YOU KNOW AS I'VE TOLD YOU AND I TELL YOU
4 AGAIN OUR SYSTEM OF JUSTICE COULD NOT AND WOULD NOT WORK
5 WITHOUT YOUR ASSISTANCE SO I THANK YOU FOR YOUR SERVICE.
6 YOU WON'T BE CALLED UPON TO SERVICE IN THIS COURT FOR THREE
7 MORE YEARS. THANK YOU SO MUCH, YOU MAY BE DISMISSED.

8 (WHEREUPON, THE JURY WAS EXCUSED AT 2:44 P.M.)

9 THE COURT: ANY MOTIONS?

10 MR. JOHNSON: YES, YOUR HONOR, MAY IT PLEASE THE
11 COURT?

12 THE COURT: YES, SIR.

13 MR. JOHNSON: YOUR HONOR, AT THIS TIME THE
14 DEFENDANT RENEWS ALL HIS PRIOR MOTIONS MADE DURING THE
15 TRIAL OF THIS CASE AND RENEWS THEM. ALSO FURTHER THE
16 DEFENDANT AT THE TIME WOULD MAKE A MOTION IN ARREST OF
17 JUDGMENT BECAUSE OF ERRORS APPEARING ON THE FACE OF THE
18 RECORD IN INDICTMENTS ESPECIALLY THE INDICTMENT, AS THE
19 DEFENDANT PREVIOUSLY MADE A MOTION TO QUASH THE INDICTMENT,
20 FOR ASSAULT AND BATTERY WITH INTENT TO KILL AS THERE IS A
21 DEFECT IN THAT INDICTMENT, YOUR HONOR.

22 AT THE SAME TIME THE DEFENDANT MOVES FOR A NEW
23 TRIAL ON THE FOLLOWING GROUNDS, THAT THERE IS NO EVIDENCE
24 IN THE RECORD THAT THE DEFENDANT COMMITTED THE CRIMES SET
25 FORTH IN THE INDICTMENTS FOR MURDER, ASSAULT AND BATTERY

1 WITH INTENT TO KILL, AND POSSESSION OF A FIREARM DURING THE
2 COMMISSION OF A VIOLENT CRIME. ADDITIONALLY FOR THE REASON
3 THAT THERE IS A VARIANCE BETWEEN THE TESTIMONY AND
4 ALLEGATIONS IN THE INDICTMENT AS WELL AS SOME EVIDENCE WAS
5 IMPROPERLY ADMITTED AND SOME IMPROPER TESTIMONY WAS GIVEN.

6 THE COURT: VERY WELL I RESPECTFULLY DENY YOUR
7 MOTIONS. I WILL NOTE, HOWEVER, WITH REGARD TO THE
8 INDICTMENT OF ASSAULT AND BATTERY WITH INTENT TO KILL THERE
9 WAS A MOTION MADE TO AMEND THE INDICTMENT AND THERE WAS NO
10 OBJECTION TO IT BUT IN ANY EVENT I'LL DENY YOUR MOTION.

11 ANYTHING FROM THE STATE?

12 MR. HUMPHRIES: THERE'S A MATTER OF HIS PRIOR
13 RECORD AND WE HAVE THE FAMILY PRESENT, YOUR HONOR, AND THEY
14 MAY WANT TO ADDRESS THE COURT.

15 MS. ELDER: DO YOU WANT ME TO GIVE YOU THE PRIOR
16 RECORD, YOUR HONOR?

17 THE COURT: YES, MA'AM.

18 MS. ELDER: YOUR HONOR, IN 1993 THE DEFENDANT
19 WAS SENTENCED TO A POSSESSION OF MARIJUANA CONVICTED AND
20 FOUND GUILTY OF THAT. ALL THESE ARE OUT OF STATE
21 CONVICTIONS.

22 IN 1995 THE DEFENDANT WAS CONVICTED OF A FELONY
23 LARCENY,

24 IN 1994 HE WAS CONVICTED OF A FELONY ROBBERY,

25 IN 1996, YOUR HONOR, THAT ROBBERY APPEARS AGAIN

1 AS A PROBATION VIOLATION.

2 THERE WAS A CONVICTION IN '96 ALSO FOR A LARCENY.

3 IN 1999 THERE WAS A INDICATION OF A PROBATION
4 VIOLATION.

5 IN 2002 THERE IS A FELONY CONVICTION FOR SELLING
6 CONTROLLED DRUGS.

7 IT APPEARS THAT HE WAS PLACED ON PROBATION FOR
8 THAT, YOUR HONOR. THAT PROBATION WAS THEN TRANSFERRED INTO
9 THE STATE OF SOUTH CAROLINA IN 2005 WHERE HE RECEIVED A
10 CONVICTION FOR ANOTHER POSSESSION OF DRUGS, YOUR HONOR, AND
11 THEN HE LOOKS LIKE HE WAS ON PROBATION AT THE TIME OF THIS
12 EVENT.

13 IF I COULD PASS UP A CERTIFIED CONVICTIONS I JUST
14 READ, YOUR HONOR.

15 THE COURT: BRING THE DEFENDANT AROUND, PLEASE.

16 MS. ELDER: AND, YOUR HONOR, I'M SORRY, THE
17 FAMILY WOULD LIKE TO MAKE, THE PARENTS WOULD LIKE TO MAKE
18 BRIEF COMMENT PRIOR TO SENTENCING.

19 THE COURT: ALL RIGHT.

20 MS. ELDER: CAN I BRING THEM UP NOW?

21 THE COURT: YES. BRING THEM TO THE MICROPHONE
22 OVER HERE, IF YOU WOULD, OR THAT WILL BE FINE RIGHT THERE,
23 THAT'S GOOD.

24 FAMILY MEMBER: YES, YOUR HONOR, MY NAME IS
25 SHARON PELLON, I'M BRANDT'S MOM AND I WOULD JUST LIKE TO

1 ADDRESS THE COURT OF HOW THE INCIDENT OF HIS DEATH HAS
2 AFFECTED ME. MY SON, BRANDT, WAS MY ONLY CHILD. I WILL
3 NEVER PLAN A WEDDING, I WILL NEVER HAVE GRANDCHILDREN, I
4 WILL NOT EVEN HAVE THE EXPERIENCES AND NEGATIVITY OF BEING
5 A MOTHER IN LAW.

6 THIS GRIEVING PROCESS IS A CHRONIC ILLNESS. IT'S
7 NOT SOMETHING THAT THERE'S A CURE FOR. I WILL HAVE
8 RELAPSES THE REST OF MY LIFE. THE DEATH OF BRANDT HAS
9 CERTAINLY IMPACTED MY FAMILY. HE WAS THE FIRST GRANDCHILD
10 AND MY PARENTS LOST A GRANDSON. MY TWO SISTERS WHO ARE
11 HERE THEY'RE THE AUNTS AND GODMOTHERS AND HIS YOUNGER
12 COUSINS LOOKED UP TO HIM.

13 I CAN'T WALK INTO A GREETING CARD STORE, YOU
14 KNOW, THE SECTIONS FOR MOTHER AND SON WILL NEVER BE AGAIN
15 TO ME. MY HOUSE IS SILENT ON MOTHER'S DAY. I FEEL LIKE
16 I'M THE POSTER CHILD FOR THAT COMMERCIAL FOR DEPRESSION. I
17 CAN'T BE A WIFE. I CAN'T CONCENTRATE AT WORK. I FIND NO
18 PLEASURES, I HAVE NO INTEREST, I DON'T SEE THE BEAUTY IN
19 ANYTHING ANYMORE BECAUSE OF THE LOSS I FEEL.

20 I MEAN, I GO TO MY CELL PHONE EVERY DAY. I HIT
21 VOICE MAIL, AS I WAS SITTING HERE TODAY I JUST NOW CRINGED.
22 HE WAS ONLY 25 YEARS OLD. HE HAD A WHOLE LIFE OF
23 OPPORTUNITY AHEAD OF HIM SO THAT'S HOW IT PERSONALLY HAS
24 AFFECTED ME.

25 I MEAN I DON'T, I DON'T HATE MR. HOLLAND. I HATE

1 THAT HE HAD A GUN. I HATE THAT HE DIDN'T HAVE ANY SELF
2 CONTROL, SELF DISCIPLINE, ANY ANGER MANAGEMENT.

3 YOU KNOW MY SON PAID FOR HIS ACTIONS THAT NIGHT
4 THE ULTIMATE PRICE NOW IT'S TIME FOR MR. HOLLAND TO PAY FOR
5 HIS ACTIONS. I FEEL THERE SHOULD BE NO LENIENCY. HE
6 PLAYED GOD. ONLY GOD CAN TAKE A LIFE AND I'M GOING TO ASK
7 THE JUDGE TO CONSIDER THAT WHEN IT COMES TO THE SENTENCING,
8 THANK YOU.

9 THE COURT: THANK YOU, MA'AM.

10 MR. HUMPHRIES: YOUR HONOR, THERE ARE A FEW
11 PHOTOGRAPHS AND ONE LETTER THAT THE MOTHER WOULD LIKE FOR
12 YOU TO CONSIDER. I'VE SHOWN THEM TO DEFENSE COUNSEL, THEY
13 TELL ME THEY OBJECT TO YOU SEEING THESE BUT ---

14 FAMILY MEMBER: THEY'RE JUST MEMORIALS MADE TO
15 MY SON. MY HUSBAND AND I ADOPTED A HIGHWAY IN MEMORY OF
16 BRANDT. WE HAVE A CONTRACT FOR THE NEXT FOUR YEARS TO GIVE
17 BACK TO THE COMMUNITY AND TO PAVING THE ROAD. HIS AUNTS
18 BOUGHT A FAMILY STAR REGISTRY SO IN THE STARS ABOVE THERE'S
19 A STAR NAMED FOR BRANDT. THE FAMILY PLANTED THE TRIBUTE
20 TREE IN NORTH CAROLINA OUTSIDE OF NASHVILLE AND YOU CAN SEE
21 THE PICTURES THERE AND THAT'S WHERE MY SON IS. WE BURIED
22 SOME OF HIS ASHES THERE SO HIS LIFE SHOULDN'T BE DEVALUED
23 AND IT MEANT SOMETHING TO A LOT OF US, THANK YOU.

24 FAMILY MEMBER: I'M BRANDT KOEHLER'S FATHER.
25 WHAT I'VE BEEN THROUGH FOR THE LAST YEAR AND A HALF HAS

1 BEEN HORRIBLE. THERE'S A HOLE IN MY HEART I'LL NEVER FILL
2 AGAIN, NEVER, NEVER HEAL.

3 I DON'T HAVE NO ANGER TOWARDS THE DEFENDANT BUT I
4 THINK HE DESERVES EVERYTHING HE SHOULD GET. IT WAS
5 RECKLESS AND CARELESS AND NO FEELINGS TOWARDS OTHER HUMAN
6 BEINGS ESPECIALLY MY SON SO I THINK HE DESERVES THE
7 MAXIMUM. I HAVE NO HATE TOWARDS HIM, IT HAPPENED, IT WAS
8 CARELESS AND RECKLESS.

9 I MISS MY SON DEARLY. EVERY DAY I THINK ABOUT
10 HIM. IT HAS AFFECTED MY FAMILY, MY OTHER CHILDREN AND
11 EVERY DAY IS NOT A GOOD DAY BUT SOME DAYS ARE A LITTLE
12 BETTER. IT'S HORRIBLE AND NOBODY WILL EVER UNDERSTAND
13 UNLESS THEY'VE LOST A CHILD AND I HAVE.

14 HIS MOTHER HAS EXPLAINED IT VERY WELL. WE HAD
15 THE MEMORIAL FOR BRANDT. HE DESERVES WHAT HE GETS. HE
16 CAUSED THIS AND NOBODY ELSE. HE DOESN'T HAVE THE RIGHT TO
17 PLAY GOD, NOBODY DOES. THANK YOU.

18 THE COURT: ANYTHING FURTHER?

19 MS. ELDER: NO, SIR, YOUR HONOR, THAT WOULD BE
20 THE STATE'S PRESENTATION.

21 THE COURT: YES, SIR, YOU CAN STAND THERE YOU
22 DON'T HAVE TO SPEAK. I'LL BE GLAD TO HEAR FROM YOU.

23 MR. RICHARDSON: YOUR HONOR, IF THE COURT
24 PLEASE, HE STANDS BEFORE YOU ABOUT 32 YEARS OLD. WE'VE
25 TALKED WITH HIM AT LENGTH, SPENT MANY, MANY HOURS WITH HIM

1 AND WE JUST ASK THE COURT UNDER THE CIRCUMSTANCES TO BE AS
2 LENIENT AS POSSIBLE.

3 THE COURT: IS THERE ANYTHING YOU'D LIKE TO SAY,
4 MR. HOLLAND?

5 DEFENDANT HOLLAND: I JUST WANT TO APOLOGIZE FOR
6 THE COURT, THE DECISION THE JURY HAD MADE, I THANK THE
7 COURT'S TIME. I THANK EVERYBODY FOR, I MEAN THAT'S REALLY
8 ALL I CAN SAY IN THIS MATTER.

9 THE COURT: THESE FOLKS PUT IT PRETTY WELL, MR.
10 HOLLAND, NOBODY HAS THE RIGHT TO UNLAWFULLY TAKE THE LIFE
11 OF ANOTHER. I DON'T KNOW HOW MAD SOME PEOPLE CAN BE MADE
12 TO BE MOVED TO SHOOT SOMEBODY TO TAKE THEIR LIFE. I CAN'T
13 IMAGINE BEING THAT MAD AT ANY PERSON.

14 WHAT'S OVERWHELMING ABOUT THIS CASE IN COURT IS
15 THE EVENT THAT PRECIPITATED THIS ANGER WAS OVER. IT WAS
16 OVER. NOW CONTRARY TO WHAT MR. RICHARDSON SAID IN YOUR
17 DEFENSE ABOUT THE VICTIM TAKING OFF HIS SHIRT AND HOLLERING
18 AND SCREAMING, HE DIDN'T HAVE ANYBODY TO HOLLER AND SCREAM
19 AT UNLESS HE SAW YOU. THAT EVENT WAS OVER AND IT LOOKS TO
20 ME LIKE, MY FEELING OF THE FACTS OF THE CASE, I DON'T KNOW
21 WHAT THE JURY FELT ABOUT THIS PARTICULAR INCIDENT, BUT I
22 FELT LIKE THE EVENT WAS OVER AND THE CAR ACCORDING TO AT
23 LEAST ONE WITNESS WAS HEADED FORWARD UNTIL THE DRIVER, NOT
24 THE VICTIM IN THIS CASE, THE DRIVER GOT OUT AND WENT AROUND
25 THE CAR TO STOP TO GET YOU AWAY FROM THE CAR. HAD YOU NOT

1 BEEN AT THE CAR IT APPEARS TO THE COURT THAT THEY WOULD
2 HAVE BEEN ALLOWED TO DRIVE OFF. THAT MAY NOT HAVE BEEN THE
3 FACTS IN THIS CASE. THAT'S THE WAY IT APPEARED TO THE
4 COURT AND IT WAS OVER AND SOMEBODY BECAUSE OF SOME ARGUMENT
5 ABOUT A DRINK OR SOMETHING, DON'T KNOW WHAT PRECIPITATED
6 THE ARGUMENT, BUT SOMEBODY LOST THEIR LIFE. WHEN YOU TAKE
7 SOMEBODY'S LIFE THAT'S THE ULTIMATE PUNISHMENT YOU CAN DO
8 TO SOMEONE.

9 THE SENTENCE OF THE COURT IN THIS MATTER IS THAT
10 YOU BE COMMITTED TO THE DEPARTMENT OF CORRECTIONS FOR A
11 PERIOD OF 50 YEARS ON THE MURDER CHARGE,

12 THAT YOU BE COMMITTED TO THE DEPARTMENT OF
13 CORRECTIONS FOR A PERIOD OF 20 YEARS ON THE ASSAULT AND
14 BATTERY WITH INTENT TO KILL CHARGE TO RUN CONCURRENT,

15 AND ON THE POSSESSION OF A WEAPON IN THE
16 COMMISSION OF A VIOLENT CRIME THE SENTENCE OF THE COURT IS
17 5 YEARS TO RUN CONSECUTIVELY, THANK YOU.

18 MR. HUMPHRIES: THANK YOU, YOUR HONOR.

19 MS. ELDER: THANK YOU, YOUR HONOR.

20 END OF REQUESTED TRANSCRIPT....

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED BRENDA R. BABB, OFFICIAL COURT REPORTER THE SOUTH CAROLINA COURT ADMINISTRATION, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF ALL PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE COURT OF GENERAL SESSIONS FOR HORRY COUNTY, SOUTH CAROLINA.

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

August 27, 2007
Brenda R. Babb
BRENDA R. BABB, CVR
OFFICIAL REPORTER

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

John L. Breeden, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LEMOND CORNEILUS HOLLAND

APPELLANT

FINAL BRIEF OF APPELLANT

ROBERT M. DUDEK
Deputy Chief Attorney for Capital Appeals

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS.....	1
TABLE OF AUTHORITIES	2
STATEMENT OF ISSUES ON APPEAL	3
STATEMENT OF THE CASE	4
STATEMENT OF FACTS	5
Prior weapon possession objections	6
The parking lot altercation	7
The purported jail house snitch	10
Request to Charge	10

ARGUMENT

1.

The court erred by refusing to instruct the jury on voluntary manslaughter. There was evidence of an argument inside the bar, evidence the decedent angrily took his shirt off in the parking lot of the bar. There was also evidence decedent's girlfriend stopped the car because she was angry appellant was hitting on her car. A physical altercation with the decedent then occurred where they were "wrestling" and "tussling," and the decedent was shot during this fight. This evidence entitled appellant to an instruction on voluntary manslaughter

11

2.

The court erred by admitting evidence appellant had a gun in his car a few weeks or a month before the altercation in this case. Even if this evidence was somehow relevant, it still should have been excluded as unduly prejudicial under Rule 403, SCRE.....

15

CONCLUSION.....

18

TABLE OF AUTHORITIES

Cases

<u>Carter v. State</u> , 301 S.C. 396, 392 S.E.2d 184 (1990).....	12
<u>Mitchell v. State</u> , 298 S.C. 186, 379 S.E.2d 123 (1989)	16
<u>State v. Allen</u> , 266 S.C. 468, 224 S.E.2d 881 (1976).....	16
<u>State v. Bright</u> , 323 S.C. 221, 473 S.E.2d 851 (1997).....	16
<u>State v. Bryant</u> , 369 S.C. 511, 633 S.E.2d 152 (2006).....	15, 16
<u>State v. Cole</u> , 338 S.C. 97, 525 S.E.2d 511 (2000).....	12
<u>State v. Cottrell</u> , 376 S.C. 260, 657 S.E.2d 451 (2008).....	14
<u>State v. Davis</u> , 278 S.C. 544, 298 S.E.2d 778 (1983)	13
<u>State v. Douglas</u> , 302 S.C. 508, 397 S.E.2d 98 (1990).....	15
<u>State v. Evans</u> , 307 S.C. 477, 415 S.E.2d 16 (1992).....	16
<u>State v. Gilliam</u> , 296 S.C. 395, 373 S.E.2d 596 (1988).....	11
<u>State v. Grubbs</u> , 353 S.C. 374, 577 S.E.2d 493 (Ct. App. 2003).....	13
<u>State v. Knoten</u> , 347 S.C. 296, 555 S.E.2d 391 (2001).....	12
<u>State v. Linder</u> , 276 S.C. 304, 278 S.E.2d 335 (1981).....	14
<u>State v. Lowery</u> , 315 S.C. 396, 434 S.E.2d 272 (1993)	13
<u>State v. McConnell</u> , 290 S.C. 278, 350 S.E.2d 179 (1986).....	16
<u>State v. McElveen</u> , 280 S.C. 325, 313 S.E.2d 298 (1984).....	16
<u>State v. Norris</u> , 253 S.C. 31, 168 S.E.2d 564 (1969).....	13
<u>State v. Swords</u> , 279 S.C. 554, 309 S.E.2d 750 (1983).....	16
<u>State v. Taylor</u> , 333 S.C. 159, 508 S.E.2d 870 (1998)	16

Rules

Rule 403, SCRE	7, 15, 17

STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by refusing to charge voluntarily manslaughter where there was evidence of an argument inside the bar, evidence the decedent took his shirt off after leaving the bar, evidence a physical altercation occurred between the decedent's girlfriend and appellant when appellant hit her car, and that the decedent and appellant were then "wrestling" or "tussling" in the parking lot when the gunshots were fired since the shooting occurring on these circumstances entitled appellant to a voluntary manslaughter instruction?

2.

Whether the court erred by allowing Carlos Adams to testify that "a month or a few weeks" before the incident in this case appellant showed him a gun that was in his automobile since this was not relevant to what happened on the night of the incident, and any probative value the evidence had was outweighed by its danger of undue prejudice under Rule 403, SCRE?

STATEMENT OF THE CASE

Appellant was indicted at the April 27, 2006 term of the Horry County grand jury for the offenses of murder, assault and battery with intent to kill (ABIK) and possession of a weapon during the commission of a violent crime. All three counts arose out of an early morning argument and altercation at the McCatz Bar in North Myrtle Beach. R. 298 - 303.

Appellant's case came on for trial on June 11, 2007 before the Honorable John L. Breeden, Jr., and a jury. Robert Richardson, Jr. and Jeffrey E. Johnson represented appellant. Francis A. Humphries, Jr. and Donna Elder were the solicitors. R. 1.

On June 13, 2007 the jury found appellant guilty on each count. R. 294, ll. 7-20. Judge Breeden sentenced appellant to fifty years imprisonment for murder, twenty years imprisonment for A.B.I.K. and five years consecutive for possession of a weapon during the commission of a violent crime. R. 297, ll. 9 - 17.

This appeal follows.

STATEMENT OF FACTS

Yessica Caruthers had been dating the decedent for a month when they went to the McCatz Bar on December 30, 2005 at some time after midnight. McCatz was a late night bar where many in the service industry went after they got off work. R. 3, l. 11 – 4, l. 25.

Yessica remembered that the decedent became involved in an altercation “coming from the bathroom.” There was evidence this argument was with appellant. R. 5, ll. 8 – 14. Yessica said that other patrons at the bar intervened to stop the exchange. Yessica recalled that she then left the bar with the decedent around four a.m after settling their tab. There was evidence the decedent had a blood-alcohol reading of .192 at the time. R. 6, ll. 12 – 20; R. 16, ll. 22-25.

Yessica admitted she had to ask the decedent two or three times for her car keys and she also had “tell him to let’s go” before he finally complied. Yessica claimed she did not recall if the decedent took his shirt off in the parking lot. However, as will be seen infra, there was other clear evidence that the decedent angrily pulled off his shirt in the parking lot following the verbal altercation inside the bar.¹ R. 18, l. 13 – 19, l. 11.

Yessica described the “loud yelling in the parking lot,” and she said “at least four” people approached her car as she was attempting to drive away from the bar. R. 19, l. 20 – 23, l. 15. During this encounter, with Yessica driving, she recalled a man, who bar manager Jeffrey Binnick later identified as appellant, came to the passenger window “and starting yelling [and] pointing a gun at the window” “trying to get him [the decedent] to get out of the car.” R. 8, l. 19 – 9, l. 16.

¹ There was other evidence that the shooting occurred at about four o’clock in the morning. R. 78, ll. 16 – 18.

Yessica said the man "told him [the decedent] to get out of the car, come on and just some different things trying to get him out of the car . . . I believe he opened the door because he was pulling on the door and everything and then he just opened the rest of the way." The decedent got out of the car and "they just started tussling." R. 10, l. 10 – 13, l. 6.

Yessica acknowledged she was also outside of the car at this time and there would later be evidence she hit appellant prior to his fight with the decedent because appellant had hit her car, and she pushed appellant to get him to stop hitting her car. R. 10, l. 10 – 13, l. 6. During the fight between the decedent and appellant, Yessica heard gunshots and the decedent "fell down." R. 14, ll. 2 – 21. Yessica said the shooter got in his car and drove away. R. 15, ll. 14 – 18.

The state then called Carlos Adams as a witness. Adams testified he was appellant's friend. R. 31, l. 23 – 33, l. 2. Adams was also at the McCatz Bar during the early morning hours of December 30, 2005. He saw appellant inside the bar. R. 34, l. 6 – 35, l. 12. Adams and appellant conversed for a while inside the bar. R. 35, l. 7 – 36, l. 2.

Prior weapon possession objections

When the solicitor asked Adams if he had "ever seen Mr. Holland in possession of any type of firearm or weapon?" Defense counsel objected on the grounds of relevance. The judge told the solicitor to "just withdraw the question." Instead, the solicitor replied: "I'll re-ask." R. 36, ll. 6 – 13. The judge then sent the jury out of the courtroom. R. 36, ll. 12 – 25.

Defense counsel then said he did not know what relevance appellant having a gun weeks before or even longer before December 30, 2005 had in this case, and he objected to this line of inquiry. The solicitor argued it was relevant that Adams knew appellant had a

handgun and that he kept it in his car. R. 37, ll. 12 – 22. The judge ruled he would allow this testimony. Defense counsel then put his further objection on the record that the evidence should also be excluded under Rule 403, SCRE because it was unduly prejudicial. R. 37, l. 12 – 38, l. 15.

In the presence of the jury Adams then testified that he witnessed a verbal altercation inside the bar and he followed appellant outside following the altercation “trying to figure out what was going on.” R. 39, l. 20 – 41, l. 10. Adams said appellant was angry and cursing when went to his car. Adams said he did not know if appellant got anything out of his car at the time. The solicitor then inquired about appellant possessing a gun. Adams responded, “maybe a month or a few weeks” before the incident, at some unknown location, appellant showed him a gun that was in his car at the time. R. 42, l. 13 – 43, l. 21.

The parking lot altercation

Adams described how appellant approached the passenger side of Yessica’s vehicle and he recalled “the guy that was sitting on the passenger side [the decedent] he tried to get out and then it was like an altercation and then I see like three shots get fired.” R. 44, l. 3 – 45, l. 14. Adams described the scene as involving “a lot of people” and he recalled “it was craziness there.”² R. 46, ll. 4 – 8.

Dr. Edward Proctor testified the decedent was six feet tall and he weighed two hundred twenty-five pounds. As stated, the decedent had a blood-alcohol reading of .192. When asked whether the level of intoxication was affected by how much the decedent had

² There was evidence that Raphael Walke was accidentally shot in the leg during the altercation between the decedent and appellant. That was the ABIK count. R. 50, l. 7 – 54, l. 7.

eaten and over what time period he drank the alcohol, Dr. Proctor responded: "All I can tell you is he was drunk." R. 55, l. 18 – 62, l. 12.

Jeffrey Bennick was a manager and a bartender at McCatz on the morning of December 30, 2005. R. 176, ll. 13 – 19. When Bennick arrived for work shortly after midnight there were about fifteen or twenty people in the bar. Bennick remembered a little later that morning there was a verbal altercation inside the bar. R. 176, l. 24 – 178, l. 14.

Bennick recalled that he was told there was an argument going on "near the men's bathroom." Bennick remembered several customers "kind of stepped in," and these patrons told the people not "to argue and fight and fuss." R. 178, ll. 16 – 23. Bennick testified that Raphael, the man who was accidentally shot in the parking lot shortly thereafter, and Chris Hemingway were two of the people who tried to intervene during the verbal altercation. R. 179, ll. 2 – 6.

Bennick remembered that the decedent was a white male and that his girlfriend was a black female. Bennick testified appellant was a black male and his testimony described the altercation with these racial and gender descriptions. R. 179, l. 7 – 183, l. 18. When the decedent and his girlfriend, Yessica, left the bar Bennick recalled observing appellant watched them leave. Bennick went outside because he was afraid there was going to be another altercation in the parking lot. R. 180, l. 10 – 182, l. 12. Bennick recalled:

When I walked out the white male they [the decedent and Yessica] were walking getting, getting ready to get in their vehicle and he actually turned around and I don't know if he thought that we were walking outside to say something to him, *he turned around and pulled his shirt off. At that moment, I kind of looked at him and said, you know, get in your car.* It's okay, nobody is going, you know, go ahead. Raphael had stepped down the handicap ramp. He is down kind of at the angle of the building. At that time he, I saw

him looking at somebody and saying don't come around here

...

R. 182, ll. 15 – 24. (emphasis added).

Bennick remembered: “[T]he black female was driving the car and the white male was in the passenger side.” Bennick said appellant ran to the passenger side of the car and started banging on the car window. “The female stopped the vehicle, got out of the car, walked around, tried to push him away from the car, told him not to hit her car, to leave the car alone.” R. 183, ll. 3 – 18. Bennick recalled:

The white male [the decedent] spun around out of the passenger side and they kind of locked up with each other, grabbed a hold of each [others] shirts or jacket, not shirt, but the white male had a hold of the black male's jacket and shirt and the black male had a hold of the white male's neck and they would kind of grasp each other. . .

R. 184, ll. 2 – 7.

They sort of wrestled with one another about 15 or 20 feet from the back of the car and within about seven seconds of that happening a gunshot went off and about three seconds after that the third gunshot went off and the white male fell to his back.

R. 184, ll. 9 -14.

Bennick described how Yessica had backed the automobile up and it started forward -- about ten to fifteen feet -- before she stopped and got out of the car. This was when she confronted appellant about hitting her car. R. 205, l. 11 – 207, l. 24. Bennick later identified appellant as the man in the fight and the shooter from a photographic array. R. 197, l. 17 – 199, l. 20.

The purported jail house snitch

The state's final witness was Darren Malloy. Malloy was an inmate in the detention center and he was being prosecuted by the solicitor's office on other charges at the time of appellant's trial. R. 217, l. 20 – 218, l. 17. Malloy said that he talked to appellant when they were cellmates in the county jail during Malloy's incarceration on an earlier charge. Malloy claimed appellant offered him ten thousand dollars to make three different witnesses "disappear." R. 219, l. 2 – 226, l. 5.

Malloy did not deny that the solicitor in appellant's case also appeared in court when two of his earlier charges were dismissed and he then pled guilty on the third and was released. He denied that he was currying favor with the solicitor on his pending charges through his testimony in appellant's case. R. 230, l. 12 – 232, l. 13.

Request to Charge

Defense counsel requested an instruction on voluntary manslaughter and the judge took the matter under advisement overnight. R. 237, l. 11 – 246, l. 10.

The following morning the judge stated he was not going to charge voluntary manslaughter. Defense counsel objected to this ruling, and he requested "that it be charged." R. 246, ll. 9 – 17.

After the judge only gave the jury the options of guilty of murder or not guilty defense counsel took exception to the judge's refusal to charge voluntary manslaughter.

The judge again refused to change his ruling. R. 288, l. 16 – 291, l. 13.

ARGUMENT

1.

The court erred by refusing to instruct the jury on voluntary manslaughter. There was evidence of an argument inside the bar, evidence the decedent angrily took his shirt off in the parking lot of the bar. There was also evidence decedent's girlfriend stopped the car because she was angry appellant was hitting on her car. A physical altercation with the decedent then occurred where they were "wrestling" and "tussling," and the decedent was shot during this fight. This evidence entitled appellant to an instruction on voluntary manslaughter.

In State v. Gilliam, 296 S.C. 395, 373 S.E.2d 596 (1988) there was evidence that Gilliam assaulted his former lived-in girlfriend of seven years because he was angry that she persisted in making harassing phone calls to appellant's new wife. Gilliam's former girlfriend told appellant that her lover, John Austin, wanted to see him which prompted Gilliam to go to the Brown Derby Bar to find Austin. When Gilliam found Austin at the Brown Derby he motioned for him to come outside. The two men argued and Austin made threatening statements to Gilliam. Austin shot at appellant and appellant shot back at Austin killing him.

Our Supreme Court held the trial judge erred by refusing to charge voluntary manslaughter given these facts, and by only charging self-defense. The Court noted that the evidence justified a voluntary manslaughter instruction. This was true even though Gilliam sought out the decedent where he obviously had to know a confrontation was very likely to occur.

Similarly, in State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001) the Court found Knoten was entitled to an instruction on voluntary manslaughter where there was evidence that after an altercation inside his girlfriend's apartment where she assaulted him that she then chased Knoten out of her apartment and he went to his car. Knoten retrieved a metal pipe from the trunk of his car. Knoten re-entered the apartment and killed the decedent when she assaulted him again.

The majority of the court in Knoten rejected the state's argument that a sufficient cooling time had past between the incident inside the apartment, and appellant retrieving the pipe from his car, and re-entering the apartment. In short, the majority rejected the argument that Knoten was not entitled to a voluntary manslaughter instruction because he could have gotten into his automobile and left rather than re-entered the apartment.

In Carter v. State, 301 S.C. 396, 392 S.E.2d 184 (1990), the Court found ineffective assistance of counsel since Carter was entitled to a jury instruction on voluntary manslaughter. In Carter the evidence showed that Carter had gone to the victim's home, and while there Carter got in a fight with the victim. The victim ejected Carter, and Carter went to his car, retrieved a knife, and returned to fatally stab the victim. This evidence entitled Carter to an instruction on voluntary manslaughter.

It is elementary that the law to be charge must be determine from the evidence presented at trial. State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000). Here there was evidence appellant was engaged in a heated verbal altercation with the decedent inside the bar. The decedent left the bar with his girlfriend and he pulled his shirt off in the parking lot of the bar. Removing one's shirt is widely understood to be a signal for being ready for a fight.

That fight occurred when the decedent's girlfriend stopped her car and hit or pushed appellant while yelling at him for hitting on her automobile. During the fight between the decedent and appellant, the decedent was shot. Although it is undisputed there was a physical fight in this case between the decedent and appellant even words when coupled with the mere threat of violence will suffice to mandate that a voluntary manslaughter instruction be given.

In State v. Lowery, 315 S.C. 396, 434 S.E.2d 272 (1993), the Court held that where there was evidence the decedent "bumped chests" with Lowery, and evidence he then approached Lowry in a threatening manner, and Lowery then shot the decedent -- a voluntary manslaughter instruction was mandated. This was true even though Lowery cursed at the decedent after he fell and Lowery then shot him in the head.

It was a jury question whether this was murder or voluntary manslaughter since to warrant a court in eliminating the offense of manslaughter, it should very clearly appear that there is no evidence whatsoever tending to reduce the crime for murder to manslaughter. State v. Norris, 253 S.C. 31, 168 S.E.2d 564 (1969).

Voluntary manslaughter is the unlawful killing of a human being in a sudden heat of passion upon a sufficient legal provocation. Fighting has been held to constitute a sufficient legal provocation. State v. Grubbs, 353 S.C. 374, 577 S.E.2d 493 (Ct. App. 2003); State v. Davis, 278 S.C. 544, 546, 298 S.E.2d 778, 779 (1983).

In Grubbs this Court found the evidence that the decedent pushed Grubbs and punched her in the eye entitled Grubbs to an instruction on voluntary manslaughter when she shot and killed him.

Finally, and recently, in the death penalty case of State v. Cottrell, 376 S.C. 260, 657 S.E.2d 451 (2008), the Court held the defendant was entitled to an instruction on voluntary manslaughter based upon his confrontation with a police officer. See also State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981). The Court in Cottrell found it was permissible to infer, as did the trial judge, that the police officer acted as he did when he observed a gun in appellant's possession. However, the Court also reasoned it was also a fair inference that the police officer reacted in an impermissibly aggressive manner when Cottrell attempted to walk away from him. The court reasoned it was reversible error when the trial judge refused to give Cottrell a voluntary manslaughter instruction in that cop killer case based on the evidence of the confrontation or altercation between Cottrell and the police officer.

Appellant was entitled to voluntary manslaughter instruction under the facts of this case. Appellant should be granted a new trial.

2.

The court erred by admitting evidence appellant had a gun in his car a few weeks or a month before the altercation in this case. Even if this evidence was somehow relevant, it still should have been excluded as unduly prejudicial under Rule 403, SCRE.

Carlos Adams, as seen, described the “craziness” of the parking lot altercation. Defense counsel correctly argued that evidence appellant had a gun in his car a month or a few weeks before the fatal altercation in the parking lot was not relevant, and that even if it was relevant, the evidence should still be excluded under Rule 403, SCRE.

The state obviously sought to have the jury infer a negative inference from the fact appellant had a gun in his car weeks or a month prior to the altercation in this case. The clear implication the state wanted the jury to draw was that appellant was illegally in possession of a weapon on a prior occasion, and that this was a prior bad act which showed appellant was a person of bad character.

In State v. Douglas, 302 S.C. 508, 397 S.E.2d 98 (1990), the Court held it was reversible error for the trial judge to allow evidence that Douglas pulled a gun the night before he murdered the decedent Barber while “horse playing” with another man because there was no connection or relation between the two incidents, and the evidence did not establish appellant’s state of mind at the time of the fatal altercation. The jury in Douglas was also impermissibly being asked to conclude that appellant was a person of bad character who carried a gun around with him.

In State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006), appellant was on trial for murder by shooting the decedent with a gun following an earlier altercation with a

questionable nexus. The Court held that Bryant's prior firearm convictions should not have been allowed to be used to impeach Bryant. This Court noted this was particularly true given that Bryant was on trial for a gun related offense. While the procedural posture of Bryant is different, the reasoning of Bryant is instructive on the prejudice caused by prior evidence involving possession of a firearm.

Here, appellant did not take the stand and he did not put his character at issue. Cf. State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1998); State v. Allen, 266 S.C. 468, 224 S.E.2d 881 (1976), *overruled on other grounds*; State v. Evans, 307 S.C. 477, 415 S.E.2d 16 (1992). Consequently, the state could not put in evidence appellant was a person of bad character. Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989); State v. McElveen, 280 S.C. 325, 313 S.E.2d 298 (1984); State v. Swords, 279 S.C. 554, 309 S.E.2d 750 (1983).

The purported relevance of this evidence was that because appellant had a gun in his car a month or weeks before this altercation he probably also had one in his car on the night of the altercation, and that appellant retrieved the gun from his car prior to the fatal altercation. Defense counsel correctly argued that even if this evidence had any probative value it still should have been excluded under Rule 403, SCRE because of its unduly prejudicial effect.

The state clearly wanted the jury to conclude that appellant was a dangerous person because there was evidence of his temper on the night of the altercation, and this evidence that the state wanted the jury to conclude established that appellant routinely carried a gun around with him in his car. This evidence encouraged a guilty verdict on an impermissible basis by suggesting past criminal behavior. See State v. McConnell, 290 S.C. 278, 350 S.E.2d 179 (1986); State v. Bright, 323 S.C. 221, 473 S.E.2d 851 (1997). The judge erred

by admitting the evidence of the prior occasion -- a month or weeks before -- where appellant had a gun in his car. Rule 403, SCRE. Appellant should be granted a new trial.

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed and this case remanded to the Horry County Court of General Sessions for a new trial.

Respectfully submitted,



Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

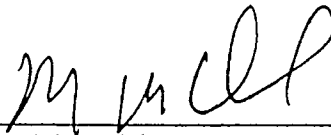
ATTORNEY FOR APPELLANT.

November 17, 2008

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

November 17, 2008

A handwritten signature in black ink, appearing to read "R. M. Dudek", is written over a horizontal line.

Robert M. Dudek

Deputy Chief Attorney for Capital Appeals

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM Horry County

John M. Brecken Jr., Circuit Court Judge

THE STATE

RESPONDENT

LEMOND CORNELIUS HOLLAND

APPELLANT

FINAL BRIEF OF RESPONDENT

HENRY D. MCMASTER
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENA
Assistant Deputy Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-6307

J. GREGORY HEMBREE
Solicitor Fifteenth Circuit
P.O. Drawer 1276
Conway, SC 29526

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS.....	I
TABLE OF AUTHORITIES	II
APPELLANT'S STATEMENT OF ISSUES ON APPEAL.....	1
RESPONDENT'S STATEMENT OF ISSUE ON APPEAL.....	2
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	7
ARGUMENT.....	14
I. HOLLAND'S MURDER CONVICTION SHOULD BE AFFIRMED BECAUSE NONE OF THE EVIDENCE PRESENTED INDICATED THE VICTIM INITIATED AN ADEQUATE LEGAL PROVOCATION: THE VICTIM NEVER INITIATED ANY PHYSICAL CONTACT WITH HOLLAND, AND ANY PHYSICAL CONTACT HE HAD WITH HOLLAND WAS IN SELF-DEFENSE.....	14
A. THE TRIAL COURT WAS CORRECT IN DENYING HOLLAND'S REQUEST FOR A JURY INSTRUCTION ON VOLUNTARY MANSLAUGHTER BECAUSE NONE OF THE ACTIONS TAKEN BY THE VICTIM CONSTITUTED AN ADEQUATE LEGAL PROVOCATION.....	15
B. THE VICTIM'S INVOLVEMENT IN THE FINAL ALTERCATION WAS NOT SUFFICIENT LEGAL PROVOCATION TO WARRANT A VOLUNTARY MANSLAUGHTER JURY INSTRUCTION; THE VICTIM WAS ENGAGED IN LAWFUL SELF-DEFENSE IN RESPONSE TO THE DEADLY THREAT POSED BY HOLLAND.	29
II. ADAMS' TESTIMONY THAT HOLLAND SHOWED HIM HIS HANDGUN IN HIS CAR A FEW WEEKS BEFORE THIS SHOOTING WAS PROPERLY ADMITTED: IT WAS RELEVANT TO SHOW HOLLAND POSSESSED THE MURDER WEAPON; IT CORROBORATED OTHERS' TESTIMONY THAT HOLLAND HAD A GUN WHEN HE RAN TO THE VICTIM'S VEHICLE; AND ITS PROBATIVE VALUE WAS NOT SUBSTANTIALLY OUTWEIGHED BY ANY PREJUDICIAL EFFECT.....	34
CONCLUSION.....	46

TABLE OF AUTHORITIES

Cases

<u>Carter v. State</u> , 301 S.C. 396, 392 S.E.2d 184 (1990).....	25, 26
<u>Clark v. Cantrell</u> , 339 S.C. 369, 529 S.E.2d 528 (2000).....	15
<u>Harris v. State</u> , 354 S.C. 382, 581 S.E.2d 154 (2003)	22
<u>State v. Adams</u> , 354 S.C. 361, 580 S.E.2d 785 (S.C. Ct. App. 2003).....	38
<u>State v. Baccus</u> , 367 S.C. 41, 625 S.E.2d 216 (2006).	34
<u>State v. Beck</u> , 342 S.C. 129, 536 S.E.2d 679 (2000).....	40
<u>State v. Braxton</u> , 343 S.C. 629, 541 S.E.2d 833 (2000).....	35, 41, 42
<u>State v. Bryant</u> , 369 S.C. 511, 633 S.E.2d 152 (2006).....	44
<u>State v. Byers</u> , 277 S.C. 176, 284 S.E.2d 360 (1981).....	40
<u>State v. Cheatham</u> , 349 S.C. 101, 561 S.E.2d 618 (S.C. Ct. App. 2002).....	40
<u>State v. Cole</u> , 338 S.C. 97, 525 S.E.2d 511 (2000).....	16
<u>State v. Cottrell</u> , 376 S.C. 260, 657 S.E.2d 451 (2008).....	15, 16, 27, 28
<u>State v. Douglas</u> , 302 S.C. 508, 397 S.E.2d 98 (1990).....	38, 39
<u>State v. Fletcher</u> , 379 S.C. 17, 664 S.E.2d 480 (S.C. 2008).	41
<u>State v. Forney</u> , 321 S.C. 353, 468 S.E.2d 641 (1996).....	41
<u>State v. Frazier</u> , 375 S.C. 575, 654 S.E.2d 280 (2007).....	35
<u>State v. Gilchrist</u> , 329 S.C. 621, 496 S.E.2d 424 (S. C. Ct. App. 1998).	36
<u>State v. Gilliam</u> , 296 S.C. 395, 373 S.E.2d 596 (1988).....	24
<u>State v. Grubbs</u> , 353 S.C. 374, 577 S.E.2d 493 (S.C. Ct. App. 2003)	26
<u>State v. Hamilton</u> , 344 S.C. 344, 543 S.E.2d 586 (S.C. Ct. App. 2001).	36
<u>State v. Johnson</u> , 324 S.C. 38, 476 S.E.2d 681 (1996).	19

<u>State v. Knoten</u> , 347 S.C. 296, 555 S.E.2d 391 (2001).....	25
<u>State v. Linder</u> , 276 S.C. 304, 278 S.E.2d 335 (1981).....	27
<u>State v. Locklair</u> , 341 S.C. 352, 535 S.E.2d 420 (2000).....	22, 23
<u>State v. Lowry</u> , 315 S.C. 396, 434 S.E.2d 272 (1993)	16, 17, 20
<u>State v. Lyle</u> , 125 S.C. 406, 118 S.E. 803 (1923)	40
<u>State v. Lyles</u> , – S.C. –, 665 S.E.2d 201 (S.C. Ct. App. 2008).....	36
<u>State v. McConnell</u> , 290 S.C. 278, 350 S.E.2d 179 (1986).....	37
<u>State v. McDonald</u> , 343 S.C. 319, 540 S.E.2d 464 (2000).....	34
<u>State v. Nix</u> , 288 S.C. 492, 343 S.E.2d 627 (S.C. Ct. App. 1986).....	40
<u>State v. Patterson</u> , 367 S.C. 219, 625 S.E.2d 239 (S.C. Ct. App. 2006).....	15
<u>State v. Perez</u> , 334 S.C. 563, 514 S.E.2d 754 (1999).....	38
<u>State v. Pittman</u> , 373 S.C. 527, 647 S.E.2d 144 (2007).....	16, 34
<u>State v. Quattlebaum</u> , 338 S.C. 441, 527 S.E.2d 105 (2000).	34
<u>State v. Rogers</u> , 320 S.C. 520, 466 S.E.2d 360, (1996).	17
<u>State v. Shuler</u> , 344 S.C. 604, 545 S.E.2d 805 (2001).....	31, 32
<u>State v. Stroman</u> , 281 S.C. 508, 316 S.E.2d 395 (1984)	43
<u>State v. Sweat</u> , 362 S.C. 117, 606 S.E.2d 508, (S.C. Ct. App. 2004).....	40
<u>State v. Tucker</u> , 319 S.C. 425, 462 S.E.2d 263 (1995).....	38
<u>State v. Tucker</u> , 324 S.C. 155, 478 S.E.2d 260 (1996).....	23
<u>State v. Tyson</u> , 283 S.C. 375, 323 S.E.2d 770 (1984)	31
<u>State v. Wharton</u> , 367 S.C. 71, 624 S.E.2d 654 (S.C. Ct. App. 2005).....	22, 23
<u>State v. Williams</u> , 367 S.C. 192, 624 S.E.2d 443 (S.C. Ct.App.2005).....	15

Statutes

S.C. Code § 16-23-20(9)(2008) 38

S.C. Code § 16-23-490 (2006).....35

Rules

Rule 401, S.C. R. EVID.....35

Rule 402, S.C. R. EVID.....35

Rule 403, S.C. R. EVID.....36

Rule 404(b), S.C. R. EVID. 40

APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the court erred by refusing to charge voluntarily manslaughter where there was evidence of an argument inside the bar, evidence the decedent took his shirt off after leaving the bar, evidence a physical altercation occurred between the decedent's girlfriend and appellant when appellant hit her car, and that the decedent and appellant were then "wrestling" or "tussling" in the parking lot when the gunshots were fired since the shooting occurred on these circumstances entitled appellant to a voluntary manslaughter instruction?
2. Whether the court erred by allowing Carlos Adams to testify that "a month or a few weeks" before the incident in this case appellant showed him a gun that was in his automobile since this was not relevant to what happened on the night of the incident, and any probative value the evidence had was outweighed by its danger of undue prejudice under Rule 403, S.C. R. EVID.?

RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

1. Whether the trial court abused its discretion in refusing to charge voluntary manslaughter when there was no evidence presented that the defendant was provoked by an adequate legal provocation arising from actions by the victim; there was no evidence that the victim said anything to the defendant; and there was no evidence that the victim made any threatening action towards the defendant in the altercation that ended with the defendant shooting the victim?
2. Whether the trial court abused its discretion in allowing a friend of the defendant to testify that the defendant showed him a semiautomatic handgun that the defendant kept in his car a few weeks prior to the shooting when the identity of the shooter was relevant, the handgun shown to the witness was consistent with the one used in the shooting, and the defendant was not unfairly prejudiced by the testimony?

STATEMENT OF THE CASE

On June 11-13, 2007, Lemond Corneilus Holland ("Holland") was tried by a jury on the following charges: murder, possession of a weapon during the commission of a violent crime, and assault and battery with intent to kill. He was tried in the Fifteenth Circuit Court of General Sessions in Horry County before Judge John L. Breeden, Jr.

At trial, the State asked witness Carlos Adams, an acquaintance of Holland's, if he had ever seen Holland in possession of any type of firearm or weapon. R.p. 36, lines 3-4. Holland's counsel objected to the question. Counsel's objection was initially a relevance objection. "I don't know what relevance a gun from two weeks before would have on the matter in question this night . . . I didn't want the jury to hear it and would object to her talking about a gun that he might have seen before this night." R.p. 37, lines 5-6, 8-11. In response, the State outlined the witness's testimony for the court.

He's going to testify that within that period of time that preceding the event that the defendant showed him a handgun which he had in his vehicle. It is absolutely relevant that he know the defendant had a handgun and that he kept it in his vehicle which was consistent with his observations.

The court ruled that it would allow the testimony. There was immediately a short break. After the break, Holland's counsel asked if he could note his objection on the record. R.p. 38, lines 3-4. "[I]n fullness of that motion I made I would make it under Rule 403 exclusion of relevant evidence on grounds of prejudice. I just feel like that that would be too prejudicial to talk about a gun that was two weeks before." R.p. 38, lines 11-14. The court noted the objection. Adams resumed testifying. He later testified that Holland showed him a gun in his car. R.p. 42,

lines 19-24. When the State asked Adams if he knew the difference between a semiautomatic weapon and a revolver, Holland's counsel objected. R.p. 42, line 25 – R.p. 43, line 5. The court overruled the objection. R.p. 43, line 4.

Holland submitted proposed jury charges including a request that the judge instruct the jury on voluntary manslaughter in regards to the murder indictment. See R.p. 237, lines. The State argued that there was no evidence to support a voluntary manslaughter charge:

What we have in the bar is a verbal altercation. No evidence of any physical altercation whatsoever. Words alone obviously do not provide sufficient provocation. The only other evidence regarding the physical altercation which occurred out in the parking lot was as a result of the victim who was retreating in the vehicle, the defendant approaching the vehicle with a handgun with an attempt to get the victim out of the vehicle when then they engaged in some contact and the defendant being fully excused by way of self defense.

R.p. 238, lines 4-14. The court briefly addressed the State's objection. The court also stated its understanding of the facts:

I must tell you that I, you pointed that out adroitly, my recollection of the testimony was that she backed out, she was headed out 10 to 15 feet and stopped and got out of the car, but right after that, and Mr. Richardson [sic] got out of the car and started yelling and screaming that she said or he said got out of the car and came around to the other side yelling and screaming for him to quit beating on the window. So the beating on the window was occurring before or at the time she stopped . . . Here's the significant thing, is that the defendant, excuse me, the victim didn't do anything except sit in the drivers seat at that time . . . passenger seat in the car. I'm going to have to think about that. I'm not included at this time. Let me think about it over the evening hour but right now my feeling is that it's murder or nothing.

R.p. 240, lines 15-23; R.p. 241, lines 5-7, 9; R.p. 241, lines 13-16. The next day, the court declined to give a voluntary manslaughter jury instruction. R.p. 246, lines 11-14. Holland's counsel objected, and requested that it be charged. R.p.

246, lines 15-17. After the jury was charged, Holland's counsel took exception and objected to the court's decision not to give a charge on voluntary manslaughter. R.p. 291, lines 3-8. The court denied the motion by Holland's counsel again, stating "the reason I'm not charging manslaughter is in my judgment there was no sufficient justification or provocation, that's why I didn't charge them that." R.p. 291, lines 9-13.

On June 13, 2007, Holland was convicted on all three charges. R.p. 294, lines 7-25. Holland's counsel renewed all of the prior motions made during the trial. Supp. R.p. 370, lines 13-15. Counsel also moved in arrest of judgment because of errors on the face of the record in indictments, especially in regard to the assault and battery with intent to kill indictment. Supp. R.p. 370, lines 15-21. Further, counsel moved for a new trial on the grounds that 1) there was no evidence in the record that Holland committed the crimes set forth in the indictments, 2) there was a variance between the testimony and allegations in the indictments, and 3) some evidence was properly admitted and some improper testimony was given. Supp. R.p. 370, line 22 – R.p. 295, line 5. The court denied all of the motions. R.p. 295, lines 6-10. Holland received a fifty (50) year sentence for the murder charge. R.p. 297, lines 9-11. He also received a twenty (20) year sentence on the assault and battery with intent to kill charge to run concurrent with the murder charge. R.p. 297, lines 12-14. For the possession of a weapon in the commission of a violent crime, Holland received a five (5) year sentence to run consecutive. R.p. 297, lines 15-17.

Holland timely filed a notice of appeal on June 20, 2007. Before this Court is Holland's direct appeal of his convictions. The State respectfully requests this Court deny Holland's appeal and affirm all three convictions.

STATEMENT OF FACTS

On the early morning of December 30, 2005, Holland fired a handgun three times in the parking lot of McCatz Tavern and Bar in North Myrtle Beach, SC. One shot pierced through the head of Brandt Michael Koehler, killing him. R.p. 59, lines 4-15. Another shot hit Raphael Walke, a bystander, in the leg. See R.p. 51, line 22 – R.p. 52, line 15. The third shot struck the vehicle of Yessica Caruthers, the victim's girlfriend. See R.p. 130, line 25 – R. 131, line 7. Koehler, the murder victim, and his girlfriend, Yessica Caruthers went to McCatz Tavern sometime after midnight on December 30. R.p. 4, lines 15-19. McCatz Tavern was a late night establishment where service industry workers would go after work. R.p. 34, lines 12-20. Ms. Caruthers had just got off from work. R.p. 4, lines 20-21.

There is an argument inside the bar.

Sometime after Caruthers and Koehler arrive, Koehler got into an argument with Holland inside the bar. R.p. 5, lines 8-11. No one who testified could say why they were arguing. Nor did anyone testify as to what was said during the argument. Caruthers stated that she saw the argument as she was returning from the restroom. R.p. 5, lines 12-14. Carlos Adams, a friend of Holland's,¹ testified that he saw an argument, but he could not tell who was involved. R.p. 40, lines 3-8. However, he believed that Holland was involved in some way. R.p. 40, lines 9-11. Jeffrey Bennick, a manager and bartender at McCatz that evening,² also testified that he was informed of an argument that

¹ R.p. 32, line 22 – R.p. 33, line 2.

² R.p. 176, lines 15-19.

occurred near the men's restroom. R.p. 177 line 22 – R.p. 178, line 7. None of the witnesses saw any physical contact between Holland and the victim. R.[. 6, lines 21-23, R.p. 40, lines 12-16, R.p. 178, lines 8-15. There was only a heated exchange of words. R.p. 6, lines 24-25. According to both Caruthers and Bennick, other patrons intervened and restrained Holland. R.p. 6, lines 12-15, R.p. 7, lines 1-2, R.p. 178, line 18 – R.p. 179, line 12.³ Holland was still angry and upset after the argument ended. R.p. 41, lines 16-17, R.p. 179, lines 10-12. Shortly thereafter, Koehler paid his tab. R.p. 179, lines 12-14, see R.p. 6, lines 19-20. He and Caruthers left the bar. R.p. 6, lines 16-18, R.p. 179, lines 12-16.⁴

The victim and Caruthers go to her car.

Koehler and Caruthers headed out to the parking lot to Caruthers' 2003 Saturn Vue. R.p. 7, lines 5-14. Bennick stood and watched as they left to make sure that no new argument arose between any of the patrons. R.p. 179, lines 14.16. According to Bennick,

They [the victim and Caruthers] went to the south side door and they stood for a second and talked maybe for maybe 20, 25 seconds, and the black male that was arguing with them went to the north side door and stood and watched them, waiting for them to leave I guess, and kind of sort of agitated, walked out the door one time and then came right back in.

R.p. 180, lines 3-9. Bennick and Walke, the other shooting victim, walked out the south side door to make sure there was not going to be another argument. R.p. 181, lines 7-10.⁵ When Bennick and Walke walked outside, Koehler and

³ One of the patrons who intervened was Raphael Walke, the second individual who was shot by Holland. Walke was the victim on the assault and battery with intent to kill charge.

⁴ Adams did not recall seeing the victim and Caruthers leave the bar. R.p. 41, lines 4-6. He was following Holland. R.p. 41, lines 9-11.

⁵ Bennick saw Holland run out the north side door of the bar around the time the couple left. R.p. 181, lines 5-7. He was concerned the two would run into one another in the parking lot. Id.

Caruthers were getting ready to get in her vehicle. R.p. 182, lines 15-17.

Koehler turned around and pulled his shirt off. R.p. 182, lines 18-19.⁶ According to Bennick, Koehler was looking directly at him and Walke when he removed his shirt. R.p. 185, lines 6-9. Bennick stated that Koehler was not hollering at anyone. R.p. 204, lines 1-4. "When we walked out the door he was ready to see if somebody was going to come start trouble with him." R.p. 204, lines 14-15.

Adams, who was following Holland at the time, did not recall seeing Koehler remove his shirt or seeing him with his shirt off. R.p. 47, lines 15-23. At trial, Bennick stated that "[a]t that moment I kind of looked at him and said, you know, get in your car. It's okay, nobody is going, you know, go ahead." R.p. 182, lines 19-21.⁷ Both Koehler and Caruthers then got into her vehicle. R.p. 8, lines 5-8, see R.p. 183, lines 8-10.

Holland goes to his car.

As Koehler and Caruthers were leaving the bar out of the south side entrance, Holland left out of the north side entrance. R.p. 40, line 22 – R.p. 41, line 8, R.p. 181, lines 5-7. Bennick lost sight of Holland at that point. R.p. 181, lines 1-3. Adams followed his friend Holland out the north side exit. R.p. 41, lines 9-10. Adams "figured there was going to be an altercation but I was just like behind him, but he was just like cursing and he was like in front of me the whole time like he was walking towards his car." R.p. 41, lines 12-15. Holland went to his car. R.p. 41, lines 18-19. Nobody else was there. R.p. 41, lines 20-25.

Adams watched Holland go "to his driver's side and he reached in and then he

⁶ Caruthers did not remember Koehler pulling his shirt off. R.p. 18, line 23 – R.p. 19, line 6.

⁷ Caruthers did recall that Koehler was yelling with the individuals who had followed them out of the south side of the bar. R.p. 18, lines 13-22.

slammed the door and then locked it." R.p. 42, lines 3-6. Adams does not know if Holland got anything out of the car. R.p. 42, lines 7-12. However, Adams did know that Holland had a semiautomatic pistol in his car a few weeks prior to the shooting. R.p. 42, lines 16-20, R.p. 43, lines 8-9, lines 15-21. According to Adams, "one day he showed it to me in the car." R.p. 42, lines 19-10.

At that point, Adams had concerns about what was happening. R.p. 43, lines 22-25. Adams tried to talk to Holland, but he could not because Holland was still very angry. R.p. 44, lines 1-4. After Holland locked his car door, he took off towards Caruthers' vehicle. R.p. 44, lines 5-9.

Holland runs to Caruthers' vehicle.

As Caruthers is backing out of her parking spot, Holland runs from the other side of the parking lot to the passenger side of the SUV. R.p. 8, line 13 – R.p. 9, line 8. Koehler was sitting on the passenger side. R.p. 9, lines 6-8. According to Caruthers, Holland "started yelling and pointing the gun at the window and trying to get him to get out of the car." R.p. 9, lines 15-16. Adams observed Holland run to the passenger side of the car. R.p. 44, lines 13-20. Bennick also observed Holland run from around the side of the McCatz building and run to the passenger side of Caruthers' vehicle. R.p. 183, lines 4-7, R.p. 185, lines 14-23. He also saw Walke attempt to stop Holland from heading towards the vehicle. R.p. 186, lines 5-7. Holland pushed Walke away and continued towards the vehicle. R.p. 186, lines 9-10.

Caruthers saw Holland had a handgun. R.p. 9, lines 15-19. She indicates that while she is not familiar with guns, it appeared this gun had a clip. R.p. 9,

line 20 – R.p. 10, line 9. According to Caruthers, Holland was yelling and trying to get Koehler out of the vehicle. R.p. 10, lines 10-16. She could not recall exactly what he said. Id. Bennick also testified that he observed Holland as he banged on the passenger side window really hard. R.p. 183, lines 12-13. He thought the banging on the window sounded like metal hitting glass. R.p. 186, lines 16-20.

There was some conflict in the testimony of the three witnesses of exactly what happened next. According to Caruthers, she stopped her vehicle as she was backing out. R.p. 20, lines 3-16. Bennick testified that she had already backed out and had driven about ten (10) to fifteen (15) feet before she stopped. R.p. 205, lines 14-21. After Caruthers stopped the vehicle, she jumped out and started yelling at Holland. R.p. 183, lines 13-16.⁸ According to Bennick, “[t]he female stopped the car, got out of the car, walked around, tried to push him away from the car, told him not to hit her car, to leave the car alone.” R.p. 183, lines 13-16; see R.p. 186, line 25 – R.p. 187 line 1. While Koehler was still in the vehicle, Caruthers and Walke actually physically pushed Holland in an attempt to get him away from the vehicle. R.p. 190, lines 11-13.

Bennick and Caruthers both testify that Holland was pulling on the door latch and was attempting to get the door open. R.p. 11, lines 2-6, 12-13, R.p. 183, lines 22-25, R.p. 187, lines 1-6. Bennick stated, “[h]e was jerking on the car door. I don’t know if the door was locked and he was, or he was missing the

⁸ Caruthers’ testimony conflicts with Bennick’s testimony. She stated that she exited the vehicle after the passenger side door was opened. R.p. 21, line 18 – R.p. 22, line 5. Bennick’s testimony clearly indicates that she had exited the vehicle and was confronting Holland before the passenger side door was opened.

handle or what, but he was grabbing it trying to jerk the door open." R.p. 183, line 22-25. It is unclear who actually opened the passenger side door. See R.p. 186, line 23 – R.p. 187, line 1. Caruthers indicates Holland was the one who opened the door. R.p. 11, lines 2-6. Adams stated that he thought Koehler was trying to get out of the vehicle. R.p. 44, lines 18-19. Bennick said "[t]he door opened up and, I won't say, he didn't lunge into the car, but he stepped into the, to the doorway of the car." R.p. 183, line 25 – R.p. 184, line 2.

The final encounter.

After the door is opened, Koehler gets out of the vehicle and he and Holland started "tussling." R.p. 11, lines 16-23.

The white male [Koehler] spun around out of the passenger side and they kind of locked up with each other, grabbed a hold of each shirts or jacket, not shirt, but the white male had a hold of the black male's [Holland] jacket and shirt and the black male had a hold of the white male's neck and they would kind of grasp each other.

R.p. 184, lines 2-7. Caruthers testified that Holland still had the gun in his hand at this point. R.p. 13, line 24 – R.p. 14, line 8. No one ever saw Koehler with a weapon in his hand. R.p. 196, 19-25, see R.p. 14, lines 2-8. Bennick testified that Koehler had his head down, and 'the momentum of the two of them they were like jostling back and forth but they wound up going like I said about 10 yards from the car but the white male's head was actually down the entire time." R.p. 193, lines 7-10. No punches were thrown in the confrontation. R.p. 193, lines 12-13. Holland "had his hands over the top of the white male's arms and he was, it appeared to me that he was trying to do anything he could to, looked like

he was almost like kind of hitting him in the top of the head kind of." R.p. 193, lines 17-21. According to Bennick,

They sort of wrestled with one another about 15 or 20 feet from the back of the car and within about seven seconds of that happening a gunshot went off and about three seconds after that a second gunshot went off and about three seconds after that the third gunshot went off and the white male fell to his back.

R.p. 184, lines 9-14. Caruthers also saw three or four shots fired. R.p. 14, lines 9-20. She also says that after the last shot, Koehler fell. R.p. 14, lines 18-21.

Adams stated that "The guy that was sitting on the passenger side he tried to get out and then it was like an altercation and then I see like three shots get fired."

R.p. 44, lines 18-20. Adams both heard the shots and saw the muzzle flash from the shots. R.p. 44, line 21 – R.p. 45, line 7.

Koehler was shot in the head. R.p. 15, lines 6-10. Walke was shot in the leg. After it was over, Holland took off, running to the back side of the building.

R.p. 14, lines 22-25, R.p. 195, lines 13-15. Holland then hopped into his vehicle and sped off. R.p. 15, lines 14-18, R.p. 184, lines 15-16, R.p. 195, lines 17-19.

ARGUMENT

I. HOLLAND'S MURDER CONVICTION SHOULD BE AFFIRMED BECAUSE NONE OF THE EVIDENCE PRESENTED INDICATED THE VICTIM INITIATED AN ADEQUATE LEGAL PROVOCATION: THE VICTIM NEVER INITIATED ANY PHYSICAL CONTACT WITH HOLLAND, AND ANY PHYSICAL CONTACT HE HAD WITH HOLLAND WAS IN SELF-DEFENSE.

The State respectfully requests this Court deny Holland's appeal and affirm his three convictions. The trial court was correct and did not abuse its discretion in denying Holland's request for a jury instruction on voluntary manslaughter. None of the evidence presented at trial indicated that the victim did anything that could constitute legally adequate provocation to warrant a voluntary manslaughter charge. The victim neither initiated any physical contact with Holland, nor made any threatening acts or gestures towards Holland. In fact, the testimony at trial indicated that when Holland shot the victim, he was acting in response to what was said inside the bar, which was not sufficient legal provocation to warrant a voluntary manslaughter jury instruction. The physical contact between the victim and Holland in the final confrontation was in response to Holland's clearly threatening actions immediately prior to the shooting. Any aggressive action taken by the victim was therefore done in self-defense. Since an instruction on voluntary manslaughter requires evidence of both sudden heat of passion and sufficient legal provocation, a lack of evidence for either element of voluntary manslaughter would suffice to disallow an instruction on voluntary manslaughter. There is clearly no evidence of sufficient legal provocation, and

there is arguably no evidence that Holland acted in a sudden heat of passion.

Therefore, the court had no basis upon which to grant a jury instruction on voluntary manslaughter.

Standard of Review

"An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." State v. Williams, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (S.C. Ct.App.2005), (quoting Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). Furthermore, "[t]o warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." State v. Patterson, 367 S.C. 219, 232, 625 S.E.2d 239, 245 (S.C. Ct. App. 2006). "The law to be charged must be determined from the evidence presented at trial." Id. If there is any evidence to support the requested charge, the trial court should grant the request. Williams, at 195, 624 S.E.2d at 445. The evidence must be reviewed in the light most favorable to appellant. State v. Cottrell, 376 S.C. 260, 262, 657 S.E.2d 451, 452 (2008).

A. The trial court was correct in denying Holland's request for a jury instruction on voluntary manslaughter because none of the actions taken by the victim constituted an adequate legal provocation

Holland was not entitled to a voluntary manslaughter jury instruction because there was no evidence presented at trial that would support a finding of sufficient legal provocation. "Voluntary manslaughter is the unlawful killing of a

human being in sudden heat of passion upon sufficient legal provocation.” State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000).

“Sudden heat of passion upon sufficient legal provocation” that mitigates a felonious killing to manslaughter must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called “an uncontrollable impulse to do violence.”

State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993)(quoting State v. Gardner, 219 S.C. 97, 64 S.E.2d 130 (1951)).

In determining whether voluntary manslaughter should be charged as a lesser offense of murder, the trial court must view the evidence in the light most favorable to the defendant. State v. Cottrell, 376 S.C. 260, 262, 657 S.E.2d 451, 452 (2008). The charge need not be given “where it clearly appears that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter.” State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007). The trial court here did not abuse its discretion in denying Holland’s request for a voluntary manslaughter jury instruction. There was no evidence the victim initiated any physical contact with Holland, except when provoked by Holland. Nor was there any evidence that indicated that the victim threatened Holland with physical harm. Further, there was no evidence the victim instigated any threatening acts towards Holland. Since the trial court had no basis upon which to believe a jury could find sufficient legal provocation, a jury instruction on voluntary manslaughter was not warranted.

1. Argument inside the bar

The argument between Holland and the victim inside of McCatz Tavern was insufficient legal provocation to warrant a voluntary manslaughter charge. The testimony at trial indicated the argument was only verbal. Holland and the victim never made any physical contact with one another. Since words alone cannot sustain a finding of sufficient legal provocation, the incident inside the bar was not sufficient to warrant the requested voluntary manslaughter charge. None of the testifying witnesses recalled what was said between the victim and Holland. Further, none of the witnesses indicated that the victim made any threats or intimidated Holland. Thus, there was not a sufficient basis upon which a finding of sufficient legal provocation could rely to warrant a charge for voluntary manslaughter.

"[M]ere words, no matter how opprobrious, are insufficient to constitute adequate legal provocation when death is caused by the use of a deadly weapon." State v. Rogers, 320 S.C. 520, 525, 466 S.E.2d 360, 362 (1996). "Instead, when death is caused by use of a deadly weapon, offending words must be accompanied by an overt, threatening act ... which could have produced the heat of passion." Rogers, 320 S.C. at 525, 466 S.E.2d at 362-3 (quoting Lowry, 315 S.C. at 399, 434 S.E.2d at 274).

Three witnesses testified that they observed the argument between the victim and Holland in the bar. Both Caruthers and Bennick testified that they saw no physical contact between Holland and the victim. R.p. 6, lines 21-25, R.p. 178, lines 1-15. Bennick specifically stated, "I never saw any punches or anything thrown . . . or no pushing or shoving or anything like that." R.p. 178,

lines 9-10, 12-13. Bennick also stated that several patrons interceded to calm the situation. R.p. 178, line 16 - R.p. 179, line 16. Bennick also noted that the two involved in the argument went to different sides of the bar. R.p. 180, lines 2-9. Carlos Adams also saw an argument at the bar. R.p. 40, lines 3-8. While he could not tell who the participants were, he thought Holland was in the group involved in the argument. R.p. 40, lines 5-11. He also did not see any physical blows exchanged. R.p. 40, lines 12-16.

No one testified as to what was said during the argument, or stated why the two were arguing. There was no testimony that the victim made any overt, threatening act toward Holland in the bar. Since the testimony only indicated that at most, there was a heated exchange of words, and there was no evidence of any threat, the argument inside McCatz could not constitute legally adequate provocation.

The victim removes his shirt on the way to Caruthers' vehicle.

Nothing that occurred between the victim and Caruthers' exit from McCatz Tavern and the final confrontation between the victim and Holland constituted sufficient legal provocation to warrant a voluntary manslaughter charge. Specifically, the victim's removal of his shirt in the parking lot was insufficient provocation to justify a voluntary manslaughter charge. There was no evidence presented that Holland saw the victim remove his shirt. The only person who testified that he saw the victim remove his shirt was Bennick. Bennick stated that he could not see Holland when the victim removed his shirt. R.p. 184, line 25 – R.p. 185, line 8. Further, Carlos Adams, who followed Holland out of the north

door of the bar, stated he did not observe the victim remove his shirt. R.p. 47, lines 15-24. Adams was the only witness who had a view of the parking lot from the same vantage point as Holland. Thus, there was no evidence presented from which one could infer that Holland saw the victim remove his shirt.

If Holland saw the victim remove his shirt, and, as Holland asserts in his brief, "[r]emoving one's shirt is widely understood to be a signal for being ready for a fight," it would still be insufficient to establish legal provocation for a voluntary manslaughter jury instruction. Displaying a willingness to fight, without an accompanying overt threatening act towards a defendant, is insufficient to establish provocation. State v. Johnson, 324 S.C. 38, 40-41, 476 S.E.2d 681, 682 (1996). In Johnson, the court found there was not enough evidence to support a finding of sufficient legal provocation even when an individual removed his hat and "'stepped out a little bit' demonstrating a willingness to fight" because there was no evidence that indicated any individual made an overt threatening act towards the appellant. Id. The same is true here. Even if Holland saw the victim remove his shirt, there was no evidence presented that indicated the victim's action was directed towards Holland. Bennick clearly confirms that Holland exited from the opposite door from the victim and Caruthers. R.p. 180, line 21 – R.p. 181, line 7.⁹ Their vehicles were in different parking lots. Bennick stated that when the victim removed his shirt, he was clearly directing his attention to the individuals (Bennick and Walke) who followed him out of the

⁹ While Adams does not recall observing the victim and Caruthers leave the bar, he does confirm that he followed Holland outside the north side door. R.p. 44, lines 14-16. This was consistent with Bennick's testimony that the victim and Caruthers left out the south side door while Holland left out the north side door.

south side doors of McCatz Tavern. R.p. 182, lines 15-21; R.p. 204, lines 5-8.

Holland, who had exited out of the north side doors, was not in that group. There was no testimony that indicated that the victim made any threats against Holland. Thus, at best, the victim merely demonstrated that he was ready to fight. His actions could not constitute sufficient legal provocation to warrant a voluntary manslaughter jury instruction.

A voluntary manslaughter charge is also not warranted under State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993). In Lowry, the court held that a voluntary manslaughter instruction was warranted because the victim threatened the defendant, and the victim was "about to initiate a physical encounter when the shooting occurred." Id. at 399, 434 S.E.2d at 274. The facts indicate that in Lowry, the victim initiated the dispute by berating the defendant in front of a group of his friends. Id. at 398, 434 S.E.2d at 273. The two started arguing, and they then 'bumped chests.' Id. The group of friends broke up the fight. Id. The victim then went inside a store. Id. The defendant loaded his pistol and went into the store. Id. They had words again. Id. The victim showed the defendant that he was unarmed. Id. There was testimony that the victim again berated the defendant, and then approached him "in a menacing fashion with his arms and hands outstretched toward Lowry as if to grab him. with his arms outstretched." Id.

The facts of this case are clearly distinguishable from those set forth in Lowry. At no point did the victim move towards Holland while he was removing his shirt. No one testified that the victim said anything to Holland in the parking

lot. There was no evidence presented at trial that indicated that the victim made any overt, threatening acts towards Holland. To this point, there had not been any physical contact between the victim and Holland. Nor is there any testimony that indicates that Holland said anything to the victim at this time. Since the victim initiated no overt, threatening act towards Holland, there was no adequate basis for a finding of sufficient legal provocation to warrant a jury instruction on voluntary manslaughter.

Furthermore, there was no evidence presented at trial that indicated that the victim's removal of his shirt was what led Holland to shoot him. Adams testified that when Holland exited McCatz Tavern, Holland was angry and was cursing as he walked to his car. R.p. 41, lines 11-17. Holland then reached into his car. R.p. 42, lines 3-6. After he walked away from the car, Adams attempted to talk with his friend, but he could not because he was still really angry about what was said inside the bar. R.p. 43, line 22 – R.p. 44, line 4. There was no testimony from Adams or any other witness that indicated Holland ever calmed down after the argument inside the bar. Thus, there would not have been an adequate basis for the trial court to find the victim's removing his shirt as being sufficient legal provocation to warrant a voluntary manslaughter jury instruction.

Holland runs to Caruthers' vehicle.

There was no evidence presented at trial that indicated the victim provoked Holland while he was sitting in Caruthers' vehicle. The fact that Caruthers and Walke, the bystander who was also shot, may have physically confronted Holland outside the vehicle just prior to the shooting is not evidence to

support a finding of sufficient legal provocation to warrant a voluntary manslaughter jury instruction. "Sufficient legal provocation must come from the victim, not from a third party." State v. Wharton, 367 S.C. 71, 74, 624 S.E.2d 654, 656 (S.C. Ct. App. 2005); Harris v. State, 354 S.C. 382, 387, 581 S.E.2d 154, 156 (2003). "South Carolina has not recognized sufficient legal provocation from a third party that can be transferred to the victim." State v. Locklair, 341 S.C. 352, 363, 535 S.E.2d 420, 425 (2000). In Locklair, the defendant shot and killed his girlfriend, with whom he had previously been arguing. During the final confrontation, the girlfriend turned her back to the defendant and started to walk away. Id. at 362, 535 S.E.2d at 425. Her mother threw a cigarette case at defendant at the same time. Id. On appeal, the defendant claimed he was entitled to a voluntary manslaughter instruction based on the fact that he was struck by the cigarette case. Id. The court rejected the argument, noting that actions of a third party cannot suffice as adequate legal provocation.¹⁰ Id. at 363, 535 S.E.2d at 425-26.

Similarly here, Holland argues, in part, that he was provoked by the conduct of Ms. Caruthers. Holland was attempting to engage in a confrontation with the victim. Instead, there was testimony that indicated that Caruthers responded. According to Bennick, she stopped the vehicle, hopped out, "walked around, tried to push him away from the car, told him not to hit her car, to leave the car alone." R.p. 183, lines 14-16. Caruthers was the one who may have hit

¹⁰ The court also stated that the throwing of a cigarette case was also not adequate legal provocation because it "would not naturally render the mind of an ordinary person incapable of cool reflection and produce an uncontrollable impulse to do violence." Locklair, at 363, S.E.2d at 426.

Holland, not the victim. Thus, their confrontation could not serve as the basis for a finding of sufficient legal provocation for a voluntary manslaughter charge. Locklair, 341 S.C. at 362-63, 535 S.E.2d at 425; Wharton, 367 S.C. at 74, 624 S.E.2d at 656. Further, there was some testimony that Walke may have tried to intercede and pushed Holland away from the vehicle. R.p. 190, lines 11-13. His actions also could not constitute sufficient legal provocation. Locklair, 341 S.C. at 362-63, 535 S.E.2d at 425; Wharton, 367 S.C. at 74, 624 S.E.2d at 656.

There was no testimony indicating the victim did anything to provoke Holland while the victim was sitting in the passenger seat of his girlfriend's car. There was no testimony that the victim said anything to Holland. Nor was there any testimony that the victim made any threatening gestures. There was no evidence that Koehler did anything when Holland started tugging on the passenger side door. "The provocation must come from some act of or related to the victim in order to constitute sufficient legal provocation." State v. Tucker, 324 S.C. 155, 171, 478 S.E.2d 260, 269 (1996). Since there was no evidence presented at trial that indicated the victim did anything to provoke Holland while he was sitting in the car, there was no evidence to support a finding of sufficient legal provocation to warrant a jury charge on voluntary manslaughter.

The final encounter.

The final encounter between Holland and the victim was also not sufficient legal provocation to warrant a jury instruction on voluntary manslaughter. Holland asserts that a voluntary manslaughter charge was warranted essentially because there was a physical fight. However, the evidence presented at trial

showed the victim was not the aggressor in the altercation. Nor was there any evidence the victim threw a punch or ever had the upper hand on Holland. The victim merely reacted to the violence being imposed upon him by Holland. Since none of the testimony at trial indicated that the victim did anything that would render the mind of an ordinary person incapable of cool reflection and produce an uncontrollable impulse to do violence, there was no sufficient legal provocation.

Holland cites a panoply of cases to support his assertion that the altercation in the parking lot was enough to warrant a voluntary manslaughter charge. None of these cases apply to Holland's case because 1) the victim, Koehler, was unarmed, and 2) the victim was not an aggressor in the confrontation. In State v. Gilliam, the court reversed the trial court's decision not to grant a voluntary manslaughter charge. 296 S.C. 395, 396-97, 373 S.E.2d 596, 597 (1988). The trial court refused to grant an instruction on voluntary manslaughter because it considered voluntary manslaughter and self-defense to be mutually exclusive as a matter of law. Id. A voluntary manslaughter charge was clearly warranted based on the facts in Gilliam. The victim in Gilliam was clearly an aggressor in the altercation. The court noted that the two argued, the victim made threatening statements, and the victim shot at the defendant before the defendant could even reach for his gun. Id. The victim in this case, Koehler, clearly did not engage in aggressive behavior as the victim in Gilliam had. There was no testimony that indicated that Koehler made any threatening statements to Holland. Koehler did not have a weapon. He did not even take a swing or make

an aggressive move towards Holland. R.p. 193, lines 12-13. In fact, Bennick testified that the victim's "head was actually down the entire time." R.p. 193, lines 9-10. Koehler's head was down and in Holland's chest the entire time. R.p. 193, lines 13-14. Holland, on the other hand, appeared to try "to do anything he could to, looked like he was almost like kind of hitting him in the top of the head kind of." R.p. 193, lines 19-21. Thus, Gilliam does not support a finding of sufficient legal provocation to warrant a voluntary manslaughter instruction in this case.

Similarly, State v. Knoten and Carter v. State support the trial court's finding of insufficient legal provocation to warrant a voluntary manslaughter instruction. In Knoten, there was evidence presented that indicated the victim may have cut the defendant twice before he struck her. 347 S.C. 296, 303-305, 555 S.E.2d 391, 395-6 (2001). At trial, the State introduced a statement by the defendant in which he stated the victim cut him in the leg and chased him out of her house. Id. According to the statement, the defendant then went to his car and retrieved a steel bar. Id. at 301, 555 S.E.2d at 394. He returned to her front door, and she cut him again. Id. In finding that a voluntary manslaughter charge should have been given by the trial court, the South Carolina Supreme Court noted, "an unprovoked knife attack constitutes sufficient legal provocation to warrant the requested charge." Id. at 307, 555 S.E.2d at 397. Similarly, in Carter v. State, the facts supported a voluntary manslaughter charge. The defendant went to the victim's house. Carter, 301 S.C. 396, 397, 392 S.E.2d 184, 185 (1990). Some time during the evening, there was a dispute between

the two. Id. The victim struck the defendant, and then forcibly removed him from his home. Id. The defendant then returned to the house with a knife and stabbed the victim. Id. Unlike the defendants in Knoten and Carter, the victim Koehler did not attack Holland with a weapon prior to the murder. The victim here had no weapon. There was not even evidence that the victim punched or swung at Holland. The only evidence of any prior confrontation is that of the argument in the bar. As noted earlier, there was no physical contact between the two in that argument. Nor was there any evidence that the victim forcibly moved Holland. Thus, neither Knoten nor Carter supports a finding of sufficient legal provocation in this case.

State v. Grubbs, 353 S.C. 374, 577 S.E.2d 493 (S.C. Ct. App. 2003), also does not support a finding of sufficient legal provocation to warrant a voluntary manslaughter jury instruction in this case. In Grubbs, this Court held that the defendant was entitled to a voluntary manslaughter charge despite the fact that her testimony at trial disavowed a previous statement that contained facts that supported a voluntary manslaughter charge. Id. at 382-83; 577 S.E.2d at 497-98. The defendant in Grubbs had given several statements to police prior to trial. Id. at 376-77; 577 S.E.2d at 494-95. In one statement, she claimed the victim (her common law husband) argued with her, pushed her around, and punched her in the eye prior to the shooting. Id. At trial, the defendant claimed self-defense. The trial court refused to grant a voluntary manslaughter instruction, finding that a defendant does not have the right to submit several inconsistent theories of a defense and see which one works. Id. at 381, 577 S.E.2d at 497.

This Court reversed the trial court's decision. Its decision was based on the holding in Knoten, which held that a voluntary manslaughter jury charge was warranted even though the evidence supporting the charge was one of several inconsistent statements introduced at trial. Id. Grubbs is not applicable here because in Grubbs, there was clear evidence that suggested the victim was the aggressor. In Grubbs, there was a statement in evidence that indicated the victim argued with the defendant, pushed the defendant, and struck the defendant in the eye. In Holland's trial, there was no evidence presented that indicates the victim was the aggressor. There is only limited evidence to support a finding that they argued inside McCatz Tavern. However, there is no evidence that the victim argued with the defendant during the final altercation, nor was there any evidence that the victim pushed or struck the defendant. The only physical contact between the two occurred when they grabbed one another in the parking lot, but even then the victim's head was down the entire time.

A finding of sufficient legal provocation in this case is not supported by State v. Cottrell, 376 S.C. 260, 657 S.E.2d 451 (2008). In Cottrell, the South Carolina Supreme Court reversed a trial court's refusal to grant a voluntary manslaughter instruction in the shooting of a police officer. Id. at 265, 657 S.E.2d at 454. The victim, a police officer, was shot and killed by the defendant after the victim attempted to conduct a Terry stop on the defendant in a parking lot. Id. at 263-64, 657 S.E.2d at 452-53. There was some evidence in Cottrell that indicated the victim both physically assaulted and possibly shot the defendant prior to the killing. Id. The trial court denied the jury instruction

because of State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981), in which the South Carolina Supreme Court held a lawful arrest or detention in a lawful manner cannot serve as adequate legal provocation. Cottrell, 376 S.C. at 264, 657 S.E.2d at 453. The trial court in Cottrell found that as a matter of law, the attempted Terry stop was a lawful detention conducted in a lawful manner. Cottrell, 376 S.C. at 265, 657 S.E.2d at 453. Thus, no voluntary manslaughter instruction was warranted. Id. The South Carolina Supreme Court disagreed. "The evidence in this case presented a jury question whether the arrest was lawful but effectuated through the victim's unnecessary use of violence." Id., 657 S.E.2d at 454. Therefore, a voluntary manslaughter instruction was warranted. Id.

A voluntary manslaughter charge was not warranted in Holland's case because there was no evidence presented at trial that indicated that the victim physically assaulted Holland. Unlike the victim in Cottrell, Koehler was unarmed. Holland was the only one who brought a weapon to the scene. Koehler did not initiate the confrontation with Holland. Holland instigated the confrontation by running across the parking lot and hitting Caruthers' vehicle. Holland was the one attempting to open the vehicle's passenger side door to get to the victim. There was no evidence presented at trial that Koehler, the victim, physically assaulted Holland. He only came into physical contact with Holland after the vehicle's door was opened and he attempted to get out with armed Holland standing right outside. Thus, there was insufficient evidence to support a finding of sufficient legal provocation. Since there was not enough evidence to support

such a finding, the trial court did not abuse its discretion in denying Holland's request for a voluntary manslaughter jury instruction at trial.

B. The victim's involvement in the final altercation was not sufficient legal provocation to warrant a voluntary manslaughter jury instruction; the victim was engaged in lawful self-defense in response to the deadly threat posed by Holland.

The trial court did not abuse its discretion in denying Holland's request for a voluntary manslaughter charge because no sufficient legal provocation arose during the final altercation between the victim and Holland. The fact that Holland and the victim grappled one another after the passenger side door of Caruthers' vehicle opened was not a sufficient legal provocation because Mr. Koehler was attempting to defend himself, which is lawful under South Carolina law. Holland ran to Caruthers' vehicle carrying a gun. See R.p. 8, line 16-22; R.p. 44, lines 5-9; R.p. 188, line 20 – R.p. 189, line 1. He hit the passenger side door and window and pointed the gun at the vehicle. R.p. 8, lines 20-22; R.p. 9, lines 15-19; R.p. 183, lines 12-18. He further attempted to open the door in his effort to get the victim out of the vehicle. R.p. 183, lines 16-25. While none of the testimony could clarify whether it was Holland or the victim who opened the door to the car, all of the testimony clearly indicated that Holland presented his handgun and was using the gun to bang on the passenger's side window before the door was opened. The testimony only showed Holland as the one making threats and trying to get the victim out of the car. Since Holland was making threats and presented his gun, the victim clearly had reason to fear for his life

and safety. Thus, his grappling with Holland was clearly an act of self-defense. The victim did not use lethal force, and his actions were not more forceful than those of the aggressor, Holland. His use of force was lawful. Since lawful acts cannot serve as the basis for a factual finding of legally adequate provocation, it would have been improper for the court to grant a jury instruction on voluntary manslaughter in this case.

"The law does not reduce from murder to manslaughter every homicide committed in the heat of passion; it must be passion justly excited by legal provocation." State v. Norris, 253 S.C. 31, 38, 168 S.E.2d 564, 567 (S.C. 1969). If adequate provocation does not exist, then a homicide cannot be manslaughter, even if it was committed in the heat of passion. Id. "The exercise of a legal right, no matter how offensive to another, is never in law deemed a provocation sufficient to justify or mitigate an act of violence." Id. at 39, 168 S.E.2d at 567.

It is fairly evident that Mr. Koehler had reason to fear for his safety when he grappled with Holland. It is undisputed that prior to the confrontation, Holland ran to Caruthers' vehicle and started banging on the passenger side door. R.p. 8, line 21 – R.p. 9, line 16; R.p. 44, lines 11-17; R.p. 183, line 12 – 25. Caruthers testified that she saw a gun in Holland's hand. R.p. 8, lines 21-22. Bennick testified that the banging on the passenger side window sounded "like metal hitting, hitting glass." R.p. 186, lines 18-20. R.p. 232 lines 14-18. It was also undisputed that Holland was pulling on the handle of the vehicle's passenger side door where the victim was sitting. R.p. 11, lines 2-14; R.p. 183, lines 16-25. While it is unclear from the testimony who opened the vehicle's door, it is clear

that Holland was attempting to get the victim out of the vehicle. R.p. 10, lines 10-18; R.p. 183, line 12 – R.p. 184, line 7. Based on the testimony presented at trial, there was sufficient reason for Koehler to believe that he was in imminent danger of death or serious bodily injury. Further, as noted in the discussion in Section IA, the victim did not engage in any conduct to provoke the assault waged by Holland. Also, the victim had no means by which to avoid the final altercation. Caruthers, who was driving that morning, got out of the vehicle to confront Holland after he started hitting the vehicle with his gun. The victim was left in a precarious situation. He could not leave the vehicle because Holland was standing right outside the passenger door. However, he could not drive away because the driver stopped the vehicle and got out. Thus, the victim was left with the only option of defending himself.

"A victim's attempts to resist or defend himself from a crime cannot satisfy the sufficient legal provocation element of voluntary manslaughter." State v. Shuler, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001). The South Carolina Supreme Court has consistently held it is improper to instruct on voluntary manslaughter when the alleged provocation arose from the victim's attempt to protect himself from the defendant's crime. In State v. Tyson, 283 S.C. 375, 323 S.E.2d 770 (1984), the court rejected the defendant's request for a voluntary manslaughter instruction when the victim struggled with the defendant during an attempted robbery. Id. at 379, 323 S.E.2d at 772. The Court held that there was no evidence of sufficient legal provocation; "it is clear the victim simply was defending himself against an armed robber and was killed in that attempt." Id.

Similarly, the court in Shuler held a voluntary manslaughter instruction was not warranted where the victim fired a gun at the defendant during an attempted kidnapping and robbery. 344 S.C. at 633, 545 S.E.2d at 820.

Any involvement that victim had in the alleged altercation was clearly in self-defense. Holland was armed. Holland initiated the altercation. Holland was attempting to assault Koehler. Holland had run from the opposite parking lot to Caruthers' vehicle. Holland was pointing the gun at the victim's window and was yelling at the victim in his attempt to get him to get out of the vehicle. Koehler had reason to fear for his safety. It was during the "tussle" that ensued that Holland shot Koehler in the back of the head with the handgun. Koehler's involvement in the confrontation clearly did not go as far as the actions of the victims in Tyson and Shuler. Koehler was unarmed. He only had limited involvement in the altercation. He threw no punches. According to Bennick, Koehler's head was down for the duration of the altercation. Further, Bennick testified that Holland was wailing on the back of Koehler's head the entire time. Clearly, Koehler's actions were an attempt to defend himself from Holland and his handgun. Since Koehler was merely exercising his legal right to defend himself, the final altercation was insufficient to serve as legal provocation for a voluntary manslaughter charge. The trial court did not abuse its discretion in not granting such a charge.

Since Koehler engaged in clearly lawful conduct, the trial court had no facts before it to support a finding there was sufficient legal provocation.

Therefore, the trial court's decision to not instruct the jury on voluntary manslaughter was correct.

II. ADAMS' TESTIMONY THAT HOLLAND SHOWED HIM HIS HANDGUN IN HIS CAR A FEW WEEKS BEFORE THIS SHOOTING WAS PROPERLY ADMITTED: IT WAS RELEVANT TO SHOW HOLLAND POSSESSED THE MURDER WEAPON; IT CORROBORATED OTHERS' TESTIMONY THAT HOLLAND HAD A GUN WHEN HE RAN TO THE VICTIM'S VEHICLE; AND ITS PROBATIVE VALUE WAS NOT SUBSTANTIALLY OUTWEIGHED BY ANY PREJUDICIAL EFFECT.

The testimony from Carlos Adams stating that Holland showed him a gun in his car a few weeks prior to the shooting was relevant, admissible evidence. Any prejudicial effects that may have resulted in its admission did not substantially outweigh the probative value of the testimony. Thus, the trial court did not abuse its discretion in admitting the testimony.

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). An appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000). The admission of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). To constitute an abuse of discretion, the conclusions of the trial court must lack evidentiary support or be controlled by an error of law. Pittman, 373 S.C. at 570, 647 S.E.2d at 166-67.

Holland cannot establish that the trial court abused its discretion in allowing Adams to testify that he saw Holland with a gun in his car a few weeks

prior to the shooting. First, the testimony was relevant to the case. Evidence is relevant if it "ha[s] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, S.C. R. EVID. All relevant evidence is admissible, unless constitutionally, statutorily, or otherwise provided. Rule 402, S.C. R. EVID.

Adams testified that a few weeks prior to the shooting, Holland showed him a handgun that he was keeping in his car. R.p. 42, line 16 – R.p. 43, line 21. He described the gun that Holland showed him as a semiautomatic handgun. R.p. 42, line 23 – R.p. 43, line 12. This testimony was relevant because it tended to show that Holland possessed the murder weapon in this case. See State v. Braxton, 343 S.C. 629, 634, 541 S.E.2d 833, 836 (2000) (testimony stating that defendant owned a handgun matching murder weapon admissible); see also State v. Frazier, 375 S.C. 575, 582, 654 S.E.2d 280, 283-84 (2007) (one of facts shown was that defendant owned gun that could have been the murder weapon). Also, Holland was charged with possession of a firearm during the commission of a violent crime. The fact that he possessed the murder weapon would be relevant in establishing the elements of that crime. See S.C. Code § 16-23-490 (2008). Two shell casings were found on the scene. R.p. 91, lines 17-21. Both were determined to be 9 mm Luger caliber cartridge casings. R.p. 147, lines 21-24. Agent David Black, the State Law Enforcement Division ("SLED") firearms and toolmarks examiner who examined the evidence in this case, determined that the same gun fired the two casings. R.p. 144, lines 16-21. The fatal bullet

was retrieved from the victim's head. R.p. 134, line 18 – R.p. 135, line 21. Also, a bullet was retrieved from the inside of Caruthers' vehicle. R.p. 130, line 10 – R.p. 131, line 7. Agent Black testified that the each bullet was consistent with 9mm Lugar caliber bullets. R.p. 147, lines 17-20. He also stated that based on the condition of the bullets, he could not conclude whether they were fired from the same gun. R.p. 148, line 19 – R.p. 149, line 22. There was no question that a handgun was used in this crime. Based on the evidence presented, it was clear that the handgun used was a semiautomatic. Thus, Adams' testimony that Holland showed him his semiautomatic handgun observations from three weeks prior was clearly relevant because it tended to show that Holland possessed the murder weapon.

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, S.C. R. EVID. "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." State v. Gilchrist, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (S. C. Ct. App. 1998). "When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case." State v. Lyles, -- S.C. --, 665 S.E.2d 201, 206 (S.C. Ct. App. 2008). "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in 'exceptional circumstances.'" State v. Hamilton, 344 S.C. 344, 357, 543 S.E.2d 586, 593 (S.C. Ct. App. 2001).

Contrary to Holland's assertion, the probative value of the testimony to which he objects was not substantially outweighed by the danger of unfair

prejudice. Holland was not unfairly prejudiced by Adams' testimony that Holland owned a semiautomatic handgun that he kept in his car. The State never intimated that Holland illegally possessed the gun. Nor did the State claim that Holland used the handgun at any time prior to this shooting. This case is unlike State v. McConnell, 290 S.C. 278, 350 S.E.2d 179 (1986). In McConnell, the State introduced bullets and a pistol that were not related to the murder for which the defendant was charged. Id. at 279-80, 350 S.E.2d at 180. The murder weapon was a .357 caliber handgun, but the State introduced .22 caliber bullets, .25 caliber bullets, and a .22 caliber handgun that the defendant did not possess at the time of the shooting. Id. Here, Adams' testimony about the gun he was shown by Holland is consistent with the murder weapon, a semiautomatic handgun. His statement does not tend to suggest any decision on an improper basis.

Further, in his brief Holland objects to the admission of the statement from Adams because he believes it is improper character evidence because it relates to a prior bad act. To the extent that Holland argues that the testimony is improper character evidence, his argument should be dismissed because Holland's trial counsel never objected to the testimony being improper character evidence at trial. When the objection was to this testimony was made at trial, Holland initially argued that the testimony was irrelevant. R.p. 37, lines 4-11. He later objected that its introduction would be more prejudicial than probative. R.p. 38, lines 10-15. However, he never argued that it was improper character evidence. Since no objection was ever made on the grounds the evidence was

improper character evidence, such an argument cannot be considered on appeal. State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (S.C. Ct. App. 2003); see State v. Perez, 334 S.C. 563, 565-66, 514 S.E.2d 754, 755 (1999) (issue not raised and ruled upon by trial court is procedurally barred and not preserved for appeal); see also State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995) (party cannot argue one ground below and then another on appeal).

Further, the disputed testimony was not character evidence. The fact that Holland showed Adams a semiautomatic pistol in his car is not testimony of a prior bad act.¹¹ There was no testimony that indicated Holland illegally possessed the pistol. Nor was there any testimony that Adams observed Holland using the gun prior to this shooting. When discussing his earlier viewing of the handgun, Adams only testified that Holland showed him the gun that Holland kept in his car. No evidence was introduced to show Holland had a record of any weapon-related offenses. Thus, Holland has no basis for claiming that his character was impugned by the testimony.

Holland's case is clearly distinguishable from State v. Douglas, 302 S.C. 508, 397 S.E.2d 98 (1990). In Douglas, the State introduced testimony that on the night before the murder, the defendant "produced a pistol from a purple bag, cocked it and threatened to kill" a friend with whom he had been "horseplaying." Id. at 510, 397 S.E.2d at 99. The prior bad act challenged by the defendant on appeal was not just the fact that the defendant had a gun. The testimony at trial

¹¹ See S.C. Code § 16-23-20(9)(2008) (stating it is lawful for an individual to carry a gun in a vehicle in a closed glove compartment, console, trunk, or container).

in Douglas revealed the defendant cocked the gun and threatened to kill his friend with it. Id. In the State's closing in Douglas, the State argued that the prior incident was evidence of the defendant's state of mind when he later committed the murder. Id. at 510-11, 397 S.E.2d at 99. On appeal, the court held that the testimony was improperly admitted. Id. at 511, 397 S.E.2d at 99. The State failed to establish a logical connection between the prior night's events and the murder, and it was unable to show that the prior night's events had any effect on the defendant's state of mind. Id. The court also found the testimony about the prior night's incident was more prejudicial than probative because it served as a substantial part of the State's case and revealed the defendant's bad character. Id.

The testimony in dispute in Holland's case in now way compares to the testimony in Douglas. In this case, the testimony was very limited. There was no discussion of Holland engaging in any bad acts with the handgun prior to the shooting. The testimony only established that Holland possessed a handgun, and he kept the handgun in his car. Unlike the testimony in Douglas, there was a clear, logical connection established between Adams' prior viewing of the gun and the night of the incident. Before running over to Caruthers' vehicle, Holland went to his car, opened the door, reached in for something, and then closed the door. Three witnesses testified that shots were fired from a handgun at the scene. It is clearly logical that the item Holland reached for in his car was the gun that was used to kill the victim. Thus, Douglas is inapplicable here.

Even if this Court finds that this testimony was character evidence of a prior bad act, the testimony was still admissible under Rule 404(b) of the South Carolina Rules of Evidence and under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), as evidence of identity. Evidence of other crimes is generally admissible when it is necessary to establish a material fact or element of the crime charged. State v. Byers, 277 S.C. 176, 178, 284 S.E.2d 360, 361 (1981); State v. Cheatham, 349 S.C. 101, 108, 561 S.E.2d 618, 622 (S.C. Ct. App. 2002).

Evidence of prior bad acts is admissible when it tends to establish (1) motive; (2) intent; (3) absence of mistake; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; and (5) the identity of the person charged with commission of the present crime.

State v. Sweat, 362 S.C. 117, 123, 606 S.E.2d 508, 511-12 (S.C. Ct. App. 2004) (citing Lyle, 125 S.C. 406, 118 S.E. 803 (1923); see Rule 404(b), S.C. R. EVID. "[T]he 'bad act' must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." State v. Beck, 342 S.C. 129, 135, 536 S.E.2d 679, 682-83 (2000). If the prior bad act evidence is "logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime." State v. Nix, 288 S.C. 492, 497, 343 S.E.2d 627, 630-631 (S.C. Ct. App. 1986)). "If there is any evidence to support the admission of the bad act evidence, the trial judge's ruling will not be disturbed on appeal." Sweat, 362 S.C. at 128, 606 S.E.2d at 514.

Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially

outweighed by the danger of unfair prejudice to the defendant. The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case.

State v. Fletcher, 379 S.C. 17, 23-24, 664 S.E.2d 480, 483 (2008)(internal citations omitted).

If Adams' statement is deemed a prior bad act, it clearly falls within the identity exception under Rule 404(b) and Lyle. In State v. Forney, 321 S.C. 353, 468 S.E.2d 641 (1996), the South Carolina Supreme Court found no error in a trial court's decision to allow testimony of the defendant's involvement in an armed robbery involving a firearm that occurred a few hours prior to the murder of a police officer. The victims of the robbery testified that the defendant confronted one of them with a gun, forced the victim to the pavement while holding the gun to his head, and later threatened to kill the other victim if he moved. Id. at 357-58, 468 S.E.2d at 644. At trial, the defendant claimed he was present, but was not the shooter. Id. The court held that the testimony was admissible under Lyle to establish intent and identity. Id.

Similarly, in Braxton, the South Carolina Supreme Court held that a witness's testimony that he knew his friend owned a 9mm pistol was relevant because it tended to identify the defendant as the possessor of the murder weapon. 343 S.C. at 634, 541 S.E.2d at 836. In Braxton, the defendant was charged with murder in the shooting death of a convenience store clerk. Id. at 632, 541 S.E.2d at 835. During a search of defendant's home, the police found a 9 mm pistol in some vines beside the home. Id. at 633, 541 S.E.2d at 835. The defendant claimed the gun was not his. Id. At trial, a friend of the defendant

testified that on the night before, the defendant and his brother got into an argument. Id. When the defendant ran into the back room, the friend ran out of the house because he thought the defendant was going to get the gun and that he might use it. Id. On appeal, the defendant challenged the introduction of the testimony from the friend as being improper character evidence. Id. In denying the defendant's appeal, the South Carolina Supreme Court noted that the portion of the testimony regarding the defendant's ownership of the gun was relevant and admissible. Id. at 634, 541 S.E.2d at 836. The court also noted that the testimony regarding the argument between the defendant and his brother was irrelevant to identification and constituted improper character evidence.¹² Id. at 635, 541 S.E.2d at 836. Nevertheless, the admission of the testimony regarding the argument was deemed harmless error because it was cumulative to other testimony. Id.

As was the case in both Forney and Braxton, the fact that Holland possessed the murder weapon was a relevant, material fact at trial. Adams' testimony that Holland showed him the gun in his car a few weeks prior was clearly probative as it identified Holland as the possessor of the murder weapon in this shooting. Unlike Forney and Braxton, Adams' testimony on being shown the gun did not include additional testimony regarding Holland's use of the gun or Holland's character. Adams' testimony mirrors exactly what the South Carolina Supreme Court noted was appropriate in Braxton.

¹² While the court deemed the evidence to be improper character evidence, it did note that the case was different from Douglas because the testimony did not involve a prior bad act. Braxton, 343 S.C. at 635 n.2, 541 S.E.2d at 836. The testimony only stated there was an argument. Id.

Further, the evidence was highly probative because it corroborated with the testimony of the other eyewitnesses in regards to Holland's pointing the handgun at the victim shortly before the shooting. "Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness. Evidence is admissible to corroborate the testimony of a previous witness, and whether it in fact corroborates the witness' testimony is a question for the jury." State v. Stroman, 281 S.C. 508, 510, 316 S.E.2d 395, 397 (1984) (internal citations omitted). Prior to Adams' testimony, Caruthers testified that she saw a gun in Holland's hand when he ran over and banged on her car. R.p. 8, lines 20-22. The victim died from a gunshot to the head. R.p. 59, lines 4-8. Bennick testified that he heard three gunshots come from the area where Holland and the victim were engaged. R.p. 120, lines 9-14. Shell casings were later found at the scene. R.p. 91, lines 13-23. Adams' testimony about knowing Holland kept a gun in his car was also consistent with his testimony about that evening. Adams testified that on the night of the shooting, he followed Holland outside. R.p. 41, lines 7-15. He observed Holland go to his car and reach for something. R.p. 41, line 19 – R.p. 42, line 6. He did not know if Holland retrieved anything. R.p. 42, lines 7-12. Adams then watched Holland run over to Caruthers' vehicle to the passenger side door. R.p. 44, lines 8-20. Adams stated that he both saw and heard three gunshots. R.p. 44, lines 18-22. Adams testified that he saw muzzle flashes from the confrontation. R.p. 45, lines 1-7. Holland suffered no unfair prejudice from the introduction of the testimony. The testimony, as presented, did not reflect Holland's involvement in

any illegal or improper activity prior to the night of the shooting. Further, nothing in the statements made by Adams regarding the handgun implied that Holland had engaged or planned to engage in any criminal activity. The statement was limited only to the fact that Holland possessed a semiautomatic handgun that he kept in his car.

Finally, State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006), is not applicable to the facts of this case. In Bryant, the issue on appeal was whether the defendant's prior firearms' convictions could be introduced to impeach his testimony in a trial on charges of murder and unlawful possession of a weapon by a felon. Id. at 515, 633 S.E.2d at 154-155. The defendant testified that the shooting was in self-defense, and his credibility was an issue. Id. at 518-19, 633 S.E.2d at 156. The South Carolina Supreme Court held that the admission of the firearms convictions were improper because firearms charges are not typically probative for truthfulness, and the similarity of the prior convictions to the charges the defendant faced at trial created undue prejudice. Id. The facts in this case are completely incongruent to holding in Bryant. None of Holland's convictions¹³ were introduced at trial. Adams' testimony was not introduced to impeach any statement made by Holland. The fact that he owned a semiautomatic handgun and kept it in his car was clearly probative and relevant to his case. Further, Holland was not unduly prejudiced by the inclusion of the statement because the

¹³ During sentencing, it was noted that Holland was convicted of possession of marijuana in 1993; felony larceny in 1995; felony robbery in 1994; larceny in 1996; selling a controlled substance in 2002; possession of drugs in 2005; and for probation violations in 1996 and 1999. R.p. 295, line 18 – R.p. 296, line 12.

statement neither expressed nor implied that Holland engaged in any illegal activity by keeping a handgun in his car.

The trial court did not abuse its discretion in allowing Adams to testify that Holland showed him the semiautomatic handgun he kept in his car. The evidence was clearly relevant to show Holland possessed the weapon used to kill the victim. Holland was not unduly prejudiced by the inclusion of the testimony. Also, the testimony was not improper character testimony or excludable testimony regarding a prior bad act. Since the testimony was clearly admissible, Holland's claim for relief should be denied, and his convictions should be affirmed.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court to deny Holland's appeal and affirm his murder conviction, his assault and battery with intent to kill conviction, and his possession of a firearm in the commission of a violent crime conviction.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

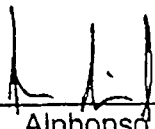
JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

J. GREGORY HEMBREE
Solicitor, Fifteenth Circuit
Post Office Drawer 1276
Conway, SC 29526

ATTORNEYS FOR RESPONDENT

By: 

Alphonso Simon Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

November 18, 2008.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Horry County
John L. Breeden, Jr., Circuit Court Judge

THE STATE,

Respondent,

-VS-

LEMOND CORNEILUS HOLLAND,

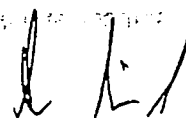
Appellant.

CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the within Final Brief of Respondent, Motion to Supplement the Record on Appeal, and Supplemental Record on Appeal, by depositing three (3) copies of the same in the inter-office mail, addressed to the attorney of record, Robert M. Dudek, Esquire, South Carolina Comm. on Indigent Defense, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 18th day of November, 2008.



ALPHONSO SIMON, JR.
Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Horry County
John L. Breeden, Jr., Circuit Court Judge

THE STATE,

Respondent,

-vs-

LEMOND CORNEILUS HOLLAND,

Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007) (requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 18th day of November, 2008.



ALPHONSO SIMON, JR.
ATTORNEY FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Lemond Corneilus Holland,

Appellant.

Appeal From Horry County
John L. Breeden, Jr., Circuit Court Judge

Opinion No. 4609
Heard June 9, 2009 – Filed August 18, 2009

AFFIRMED

Deputy Chief Appellate Defender for Capital Appeals
Robert M. Dudek, South Carolina Commission on
Indigent Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Donald J.
Zelenka, Assistant Attorney General Alphonso

Simon, Jr., Office of the Attorney General, of Columbia; and Solicitor John Gregory Hembree, of Conway, for Respondent.

GEATHERS, J.: Lemond Holland (Holland) seeks review of his convictions for murder, assault and battery with intent to kill, and possession of a weapon during the commission of a violent crime. Holland challenges the trial court's admission of testimony about his possession of a handgun prior to the incident and the trial court's failure to charge the jury on voluntary manslaughter. We affirm Holland's convictions.

FACTS/PROCEDURAL HISTORY

Shortly after midnight on December 30, 2005, Brandt Koehler (Koehler) and his girlfriend, Yessica Caruthers (Caruthers), went to McCatz Tavern and Bar in North Myrtle Beach. The two socialized and bought drinks at the bar. Before leaving the bar, Koehler became involved in a verbal altercation with Holland. None of the eyewitnesses could determine the subject of the argument, but they all confirmed that there was no physical contact between the two men. After the argument dissipated, Koehler and Caruthers left the bar through the south exit. Jeffrey Bennick (Bennick), the bar's manager and bartender, witnessed Holland watching Koehler and Caruthers exit. Holland then exited the bar through the north door. Bennick and Raphael Walke (Walke) followed Koehler and Caruthers to try to prevent another altercation in the parking lot. Bennick testified that Koehler took off his shirt while facing Bennick and Walke, as if preparing for an altercation. Bennick assured Koehler that nothing was going on and told him to get into his car. Koehler and Caruthers then proceeded to get into Caruthers' car.

Holland's friend, Carlos Adams (Adams), realized that Holland was still agitated over his verbal altercation with Koehler, and, therefore, Adams followed Holland out of the bar's north door in an attempt to calm him down and determine what was happening. According to Adams, Holland went to his car, reached inside, and then locked the door. He then ran toward the passenger side of Caruthers' car, where Koehler was sitting. At this point,

Caruthers was attempting to drive out of the parking lot. Holland began banging on the car's passenger side window and pulling on the passenger door. Caruthers testified that Holland was pointing a gun at Koehler through the window. Bennick never saw a gun, but he testified that the banging on the window sounded like metal hitting glass. Adams testified that while he did not see Holland pull anything out of his car that night, a few weeks earlier Holland had shown him a semi-automatic gun that he had in his car.

Caruthers got out of her car and went around to the passenger side of the car, yelling for Holland to stop hitting her car. Holland continued to pull on the passenger door. Both Caruthers and Walke tried to pull Holland away from the car, but they were unsuccessful. Bennick then saw the passenger door open, but he was unsure whether Holland was able to pull the door open or whether Koehler opened the door himself. Holland and Koehler then grabbed each other and locked arms, moving about fifteen to twenty feet away from Caruthers' car. According to Bennick, Koehler had his head down at this time, while it appeared that Holland was hitting Koehler over the head. Then, three shots were fired. After the third shot, Koehler fell to the ground. Holland then ran to his car and drove away. Koehler received a gunshot wound to the head that led to his death, and Walke received a gunshot wound to his leg. Holland was charged with murder, possession of a weapon during the commission of a violent crime, and assault and battery with intent to kill (ABIK).

Crime scene investigators found two shell casings at the scene. South Carolina State Law Enforcement Division (SLED) agent David Black determined the shell casings to be 9 mm Luger caliber cartridge casings. Agent Black also determined that the same gun fired the two casings. Also, the fatal bullet retrieved from Koehler's head was consistent with 9 mm Luger caliber bullets.

At trial, defense counsel objected to the State's questioning of Adams about his observation of a weapon in Holland's possession weeks prior to the incident. Counsel initially argued that the testimony was not relevant, and the trial court overruled the objection. After a break in the trial, defense counsel

asserted that he was making his objection pursuant to Rule 403, SCRE, on the ground the testimony's prejudicial effect outweighed its probative value. The trial court allowed Adams to answer the question, and Adams testified that a few weeks prior to the incident, Holland had shown him a semi-automatic gun that he kept in his car.

The trial court also denied counsel's request for a jury charge on voluntary manslaughter on the ground there was no evidence of sufficient legal provocation.¹ The jury returned a verdict of guilty for all three charges against Holland, and the trial court denied all of Holland's post-trial motions. The trial court sentenced Holland to fifty years of imprisonment for the murder conviction; twenty years for the ABIK conviction, concurrent, and five years for possession of a weapon during the commission of a violent crime, to run consecutively to the other sentences. This appeal followed.

ISSUES ON APPEAL

1. Did the trial court err in refusing the charge the jury on voluntary manslaughter?
2. Did the trial court err in allowing Adams to testify about his observation of a weapon in Holland's possession prior to the incident?

STANDARD OF REVIEW

The conduct of a criminal trial is left largely to the discretion of the trial court, and this Court will not interfere unless the rights of the appellant were prejudiced. State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982). Therefore, this Court reviews errors of law only and is bound by the

¹ "Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000).

trial court's factual determinations unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006).

LAW/ANALYSIS

I. Charge on Voluntary Manslaughter

Holland asserts that the trial court erred in refusing to charge the jury on voluntary manslaughter because the evidence showed he acted in a sudden heat of passion upon sufficient legal provocation. We disagree.

"The law to be charged must be determined from the evidence presented at trial." Cole, 338 S.C. at 101, 525 S.E.2d at 512. In determining whether the evidence requires a charge of voluntary manslaughter, the Court views the facts in a light most favorable to the defendant. State v. Byrd, 323 S.C. 319, 321, 474 S.E.2d 430, 431 (1996). However, "[a]n instruction should not be given unless justified by the evidence." State v. Moultrie, 273 S.C. 532, 534, 257 S.E.2d 730, 731 (1979). "If a jury instruction is provided to the jury that does not fit the facts of the case, it may confuse the jury." State v. Blurton, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002). This Court will not reverse the trial court's ruling regarding jury instructions unless the trial court abused its discretion. State v. Williams, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct. App. 2005).

Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. Heat of passion alone will not suffice to reduce murder to voluntary manslaughter. Both heat of passion and sufficient legal provocation must be present at the time of the killing.

Cole, 338 S.C. at 101, 525 S.E.2d at 513 (internal citations omitted).

"The sudden heat of passion, upon sufficient legal provocation, which mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out knowledge and volition,

must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence."

Id. at 101-02, 525 S.E.2d at 513 (quoting State v. Byrd, 323 S.C. 319, 474 S.E.2d 430 (1996)).

"[M]ere words, no matter how opprobrious, are insufficient to constitute adequate legal provocation when death is caused by the use of a deadly weapon." State v. Rogers, 320 S.C. 520, 525, 466 S.E.2d 360, 362 (1996). Further, merely displaying a willingness to fight, unaccompanied by any overt threatening act toward a defendant, does not constitute sufficient legal provocation. See State v. Johnson, 324 S.C. 38, 40-41, 476 S.E.2d 681, 682 (1996) (holding that the trial judge properly refused to charge voluntary manslaughter despite testimony that individuals approached the defendant as they were "trash talking" and that one of the individuals removed his hat and "stepped out a little bit," demonstrating a willingness to fight, because there was no evidence that anyone made an overt threatening act toward the defendant).

Moreover, "[t]he exercise of a legal right, no matter how offensive to another, is never in law deemed a provocation sufficient to justify or mitigate an act of violence." State v. Ivey, 325 S.C. 137, 142, 481 S.E.2d 125, 127 (1997). "A victim's attempts to resist or defend himself from a crime cannot satisfy the sufficient legal provocation element of voluntary manslaughter." State v. Shuler, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001).

Here, there is no evidence, nor any reasonable inferences from the evidence, that at the exact moment Holland killed Koehler, Holland's rage was justified by legal provocation. The rage experienced by Holland when he fired the fatal shot had already been continuously sustained from the moment of his initial fury during the verbal argument inside the bar. Although the argument ended inside the bar, Holland's fury never subsided as

he relentlessly pursued a retreating Koehler. Holland saw Koehler and Caruthers leaving through the bar's south exit, and he immediately stepped outside through the north exit and went directly to his car to retrieve his gun. He then ran toward the passenger side of Caruthers' car where Koehler was sitting as Caruthers was trying to drive out of the parking lot. Holland banged on the car's passenger side window, pointed a gun at Koehler, and repeatedly yanked on the passenger door to get to Koehler. Holland also rebuffed attempts by Caruthers and Walke to stop him from pursuing Koehler.

At this point, Bennick saw the passenger door open, but he was unsure whether Holland was finally able to open the door or whether Koehler himself opened the door. However, even if Koehler opened the door, that act could not be considered sufficient legal provocation because it was obvious that Holland wanted to get Koehler out of the vehicle; Holland, who was already furious and was armed, was on a mission to inflict harm. Further, the witnesses' vague characterizations of the physical contact between Holland and Koehler as "tussling" and "wrestling" does not permit an inference that Koehler threw any punches or otherwise posed a genuine threat to Holland through any specific, identifiable hostile act. There was absolutely no evidence that Koehler did anything to pose a genuine threat to the armed and determined Holland.

Holland argues that the following evidence showed sufficient legal provocation: (1) the argument inside the bar; (2) Koehler taking off his shirt in the bar's parking lot; (3) the altercation between Holland and Caruthers; and (4) "wrestling" between Holland and Koehler when the gunshots were fired. We disagree.

First, the argument inside the bar was not accompanied by any physical contact between Koehler and Holland or any threatening gestures by Koehler. Therefore, the argument itself could not serve as sufficient legal provocation because "mere words, no matter how opprobrious, are insufficient to constitute adequate legal provocation when death is caused by the use of a deadly weapon." Rogers, 320 S.C. at 525, 466 S.E.2d at 362. When "death

is caused by use of a deadly weapon, the offending words must be accompanied by an overt, threatening act." Id. at 525, 466 S.E.2d at 362-63 (quoting State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993) (internal quotations omitted)).

Further, there is no evidence, nor any reasonable inferences from the evidence, that Holland saw Koehler remove his shirt in the parking lot. Even if Holland had seen Koehler remove his shirt, and even if this was a signal that Koehler was ready for a fight, merely displaying a willingness to fight, unaccompanied by any overt threatening act toward a defendant, does not constitute sufficient legal provocation. See Johnson, 324 S.C. at 40-41, 476 S.E.2d at 682 (holding that the trial judge properly refused to charge voluntary manslaughter, despite testimony that an individual approached the defendant and demonstrated a willingness to fight, because there was no evidence of any overt threatening act toward the defendant).

Moreover, evidence of the confrontation between Caruthers and Holland could not support a voluntary manslaughter charge because there is no evidence that she posed a threat to Holland either by possessing a weapon or through hostile acts.² Her attempt to pull Holland away from her car as he was trying to open the passenger door to get to Koehler was justified and, therefore, did not rise to the level of legal provocation. See Ivey, 325 S.C. at 142, 481 S.E.2d at 127 ("The exercise of a legal right, no matter how offensive to another, is never in law deemed a provocation sufficient to justify or mitigate an act of violence.").

Additionally, the "wrestling," as described by one of the witnesses, between Holland and Koehler was initiated by Holland and showed nothing more than Koehler's attempt to defend himself from Holland's aggression. "The exercise of a legal right, no matter how offensive to another, is never in

² Cf. State v. Wharton, 381 S.C. 209, 214-15, 672 S.E.2d 786, 788-89 (2009) (holding that there was no evidence of sufficient legal provocation on the part of an individual who argued with the defendant because he did not pose a threat to the defendant either by possessing a weapon or through hostile acts).

law deemed a provocation sufficient to justify or mitigate an act of violence." Ivey, 325 S.C. at 142, 481 S.E.2d at 127. "A victim's attempts to resist or defend himself from a crime cannot satisfy the sufficient legal provocation element of voluntary manslaughter." Shuler, 344 S.C. at 632, 545 S.E.2d at 819; see also State v. Tyson, 283 S.C. 375, 379, 323 S.E.2d 770, 772 (1984) (holding that the trial court properly refused to charge the jury on voluntary manslaughter because evidence of a struggle as the victim resisted an armed robbery showed that the victim was defending himself).

During oral arguments, Holland's counsel insisted that the instant case is a classic case of voluntary manslaughter. In support of his argument, he discussed the following cases: State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001); State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993); Carter v. State, 301 S.C. 396, 392 S.E.2d 184 (1990), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999); and State v. Gilliam, 296 S.C. 395, 373 S.E.2d 596 (1988). The instant case is clearly distinguishable from these cases.

In Knoten, one of the defendant's statements given to police indicated that the victim cut the defendant with a knife and chased him out of her apartment into the frigid weather while he was naked and that he reached into his trunk to obtain a metal pipe, presumably to defend himself as he went back into the apartment to retrieve his clothes. 347 S.C. at 303-04, 555 S.E.2d at 395. As he entered the apartment, the victim cut him with a knife a second time, and the defendant then hit the victim on the head with the metal pipe. 347 S.C. at 304-05, 555 S.E.2d at 395-96. Unlike the evidence of the victim's second assault of the defendant in Knoten, there is simply no evidence in the instant case that any action of Koehler after he retreated from the bar precipitated a new provocation rising to the level of "legal provocation," sufficiently distinct from any provocation Holland had already experienced inside the bar.

The facts in the instant case are also different from those in Lowry, in which there was testimony that the victim moved toward the defendant in a menacing fashion with his arms and hands outstretched toward the defendant

as if to grab him. 315 S.C. at 398, 434 S.E.2d at 273. The Lowry Court stated that this testimony tended to show that the victim was about to initiate a physical encounter when the shooting occurred. 315 S.C. at 399, 434 S.E.2d at 274. There was no testimony in the instant case that could be similarly characterized.

In Carter, the defendant's heat of passion was provoked by the victim's striking the defendant and forcefully ejecting him from the victim's house. 301 S.C. at 397, 392 S.E.2d at 185. And in Gilliam, the defendant's heat of passion was provoked by the victim's firing a gun at the defendant. 296 S.C. at 397, 373 S.E.2d at 597. Here, Holland's rage was provoked by a mere verbal argument inside a bar, which does not rise to the level of legal provocation. Again, there is no **reasonable** inference of a specific, identifiable hostile act of Koehler that posed a genuine threat to Holland. The requirement that we view the evidence in the light most favorable to the defendant does not allow us to throw out all reason from our analysis or to ignore the overwhelming, clear evidence of Holland's mission of violence against Koehler—a state of mind that began before Koehler even stepped out of Caruthers' vehicle. Cf. Collins v. Bisson Moving & Storage, Inc., 332 S.C. 290, 296, 504 S.E.2d 347, 350 (Ct. App. 1998) ("In reviewing the grant of a directed verdict, the appellate court should not ignore facts unfavorable to the opposing party.").

In sum, the trial court could have determined that based on the lack of evidence of any genuine threat posed by Koehler, a charge on voluntary manslaughter would have confused the jury. Therefore, the trial court properly declined to give this charge. See Blurton, 352 S.C. at 208, 573 S.E.2d at 804 ("If a jury instruction is provided to the jury that does not fit the facts of the case, it may confuse the jury."); Ivey, 325 S.C. at 142, 481 S.E.2d at 127 (holding that where no actions by the victim constitute legal provocation, a charge on voluntary manslaughter is not required). We find no abuse of discretion. Therefore, we are unable to reverse on this ground. See Williams, 367 S.C. at 195, 624 S.E.2d at 445 (holding that this Court will not reverse a ruling on a jury instruction unless the trial court abused its discretion).

II. Testimony concerning handgun

Holland argues that the trial court erred in allowing Adams to testify about his observation of a weapon in Holland's possession prior to the incident because the danger of the testimony's undue prejudicial effect outweighed its probative value. We disagree.

Rule 403, SCRE, states, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

"Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis." State v. Gilchrist, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct. App. 1998). The determination of whether the danger of unfair prejudice outweighs the probative value of evidence must be based on the entire record and will turn on the facts of each case. State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008).

This Court reviews a trial court's decision regarding the admissibility of evidence under Rule 403 pursuant to the abuse of discretion standard and must give great deference to the trial court's judgment. State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 593 (Ct. App. 2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). "A trial [court's] balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise due to a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." Id. at 358, 543 S.E.2d at 593-94. The trial court's determination should be reversed only in exceptional circumstances. Id. at 357, 543 S.E.2d at 593.

Here, Adams' testimony concerning Holland's storage of a semi-automatic gun in his car within weeks prior to the incident was consistent

with the ballistic evidence gathered by investigators after the shooting. Further, it solidified Caruthers' identification of Holland as the person who possessed the weapon used to kill Koehler and injure Walke. Therefore, Adams' testimony was indispensable in proving the elements of all three charges against Holland—possession of a weapon during the commission of a violent crime, murder, and ABIK. The trial court acted within its discretion in determining that the probative value of Adams' testimony outweighed any danger that the jury might base its decision on improper considerations. See State v. Braxton, 343 S.C. 629, 634, 541 S.E.2d 833, 836 (2001) (holding that the probative value of a witness' testimony that he knew the defendant possessed a nine millimeter pistol, which tended to identify the defendant as the possessor of the murder weapon, outweighed any prejudice because the identity of the user of the murder weapon was the critical issue at trial).

Holland also argues that Adams' testimony was unduly prejudicial because it was evidence of a prior bad act, showing Holland as a person of bad character. However, he did not raise this specific ground before the trial court. Therefore, this specific argument is not preserved for this Court's review. See State v. Bailey, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (holding that an issue is not preserved for review when a party argues one ground in the trial and then an alternative ground on appeal).

In any event, there is nothing in Adams' testimony concerning the handgun from which the jury could infer a prior bad act on Holland's part. The testimony did not indicate that Holland's mere possession of the handgun was illegal, that Holland had used the gun to commit any bad acts prior to the incident, or that Holland had a criminal record involving weapon-related offenses. Notably, during oral arguments, Holland's counsel conceded that there was no negative inference that could be drawn from the mere possession of a weapon unaccompanied by any other act.

Further, even if a prior bad act could be inferred from the testimony, this evidence solidified Caruthers' identification of Holland as the person who possessed the weapon used to kill Koehler and injure Walke. The probative value of this identification evidence outweighed any prejudicial effect.

Hence, it was admissible under both Rule 403 and Rule 404(b), SCRE, which provides that evidence of other crimes, wrongs, or acts may be admissible to show identity.³ Therefore, Adams' testimony did not constitute improper character evidence. Cf. State v. Dickerson, 341 S.C. 391, 396-97, 535 S.E.2d 119, 121-22 (2000) (holding that a murder defendant's drug use was admissible because the medical examiner's testimony connected it to the violent "overkill" nature of the murder, which involved multiple stab wounds, and thus it served to identify the defendant as the "overkill" murderer).

CONCLUSION

Accordingly, Holland's conviction is

AFFIRMED.

HUFF and PIEPER, JJ., concur.

³ Rule 404(b), SCRE, states, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

LEMOND CORNEILUS HOLLAND,

PETITIONER.

Appeal from Georgetown County

John L. Breeden, Jr., Circuit Court Judge

Opinion No. 4609

PETITION FOR REHEARING

Pursuant to Rule 221 (a), SCACR, petitioner seeks rehearing because the Court respectfully did not view “the facts in the light most favorable to the defendant” when considering whether he was entitled to a voluntary manslaughter instruction, and it impermissibly substituted its judgment of what occurred in the bar and in the parking lot that night where that was the sole province of the jury: “The requirement that we view the evidence in the light most favorable to the defendant does not allow us to throw out all reason from our analysis or to ignore overwhelming, clear evidence of Holland’s *mission of violence* against Koehler – a state of mind that began before Koehler even stepped out of Caruther’s vehicle.” State v. Lemond Corneilus Holland, Op. No. 4609 (Filed August 18, 2009) at pp. 5 & 8. (emphasis added).

The Court also drew a distinction between "wrestling" and "tussling" and "throwing a punch" for purposes of the "heat of passion" and "legal provocation" for voluntary manslaughter that petitioner strongly submits is unsupported by precedent. State v. Lemond Corneilus Holland, Op. No. 4609 (Filed August 18, 2009) at p. 8. The Court also seems to misapprehend that the concept of being "without fault in bringing on the difficulty" which is an element of self-defense, and not a requirement for voluntary manslaughter, which is a recognition of human frailty that is often best on display late at night in bars when alcohol driven confrontations occur such as in this case.

Further, the Court also wrote that "there is no evidence, nor any reasonable inferences from the evidence, that *at the exact moment* Holland killed Koehler, Holland's rage was justified by legal provocation." (italics emphasis by petitioner). State v. Lemond Corneilus Holland, Op. No. 4609 (Filed August 18, 2009) at p. 6. This is a finding by the Court of a sufficient cooling time -- as a matter of law existed -- that the evidence in this case does not support as will be shown again infra.

The Court found that petitioner "relentlessly pursued a retreating Koehler," he "was on a mission to inflict harm, the "tussling and wrestling" does not permit an inference the decedent "posed a genuine threat," and the argument inside the bar was not accompanied by "any physical contact," or "any threatening gestures by Koehler." State v. Lemond Corneilus Holland, Op. No. 4609 (Filed August 18, 2009) at p. 7. This language respectfully shows that the Court not only drew its inferences in the light most favorable to the state, it shows that the Court substituted its view of what occurred during that early morning bar fight for that of the jury.

Review of the facts

McCatz was a late night bar where many in the service industry went after they got off work. R. 3, l. 11 - 4, l. 25. The decedent's girlfriend, Yessica, remembered that the decedent

became involved in an *altercation* "coming from the bathroom." There was evidence this altercation was with petitioner. R. 5, ll. 8 – 14. (emphasis added). Yessica said that *other patrons at the bar intervened to stop the exchange*. Jeffrey Bennick, the manager and a bartender at McCatz on the morning of December 30, 2005 recalled that when he arrived for work shortly after midnight there were about fifteen or twenty people in the bar. Bennick remembered a little later that morning there was a verbal altercation inside the bar. R. 176, l. 24 – 178, l. 14. Bennick recalled that he was told there was an argument going on "near the men's bathroom." Bennick remembered several customers "kind of stepped in," and these patrons told the people not "to argue *and fight* and fuss." R. 178, ll. 16 – 23. (emphasis added).

Yessica recalled that she then left the bar with the decedent around four a.m after settling their tab. Yessica admitted she had to ask the decedent two or three times for her car keys and she also had "tell him to let's go" before the six foot two hundred twenty-five pound decedent with a blood-alcohol reading of .192 finally complied. Dr. Edward Proctor, the pathologist testified simply: "All I can tell you is he was drunk." R. 6, ll. 12 – 20; r. 16, ll. 22-25; r. 55, l. 18 – 62, l. 12.

When the decedent and Yessica left the bar Bennick recalled observing petitioner watch them leave. Bennick went outside because he was afraid there was going to be another altercation in the parking lot. R. 180, l. 10 – 182, l. 12. Bennick recalled:

When I walked out the white male they [the decedent and Yessica] were walking getting, getting ready to get in their vehicle and he actually turned around and I don't know if he thought that we were walking outside to say something to him, *he turned around and pulled his shirt off. At that moment, I kind of looked at him and said, you know, get in your car.* It's okay, nobody is going, you know, go ahead. Raphael [a bar employee] had stepped down the handicap ramp. He is down kind of at the angle of the building. At that time he, I saw him looking at somebody and saying don't come around here . . .

R. 182, ll. 15 – 24. (emphasis added).

State's witness, Carlos Adams, recalled the "craziness there [in the parking lot]," and he testified "a lot of people" were involved. R. 46, ll. 4-8. Bennick remembered: "[T]he black female [Yessica] was driving the car and the white male [the decedent] was in the passenger side." Bennick said petitioner ran to the passenger side of the car and started banging on the car window. "The female stopped the vehicle, got out of the car, walked around, tried to push him away from the car, told him not to hit her car, to leave the car alone." R. 183, ll. 3 - 18. Bennick recalled:

The white male [the decedent] spun around out of the passenger side and they kind of locked up with each other, grabbed a hold of each [others] shirts or jacket, not shirt, but the white male had a hold of the black male's jacket and shirt and the black male had a hold of the white male's neck and they would kind of grasp each other.

R. 184, ll. 2 - 7. (emphasis added).

They sort of wrestled with one another about 15 or 20 feet from the back of the car and within about seven seconds of that happening a gunshot went off and about three seconds after that the third gunshot went off and the white male fell to his back.

R. 184, ll. 9 -14. (emphasis added).

Yessica also described the "loud yelling in the parking lot," and she said a "lot of people" were at her car door as she was attempting to drive away from the bar. She admitted "everyone was fussing and hollering." R. 19, l. 20 - 23, l. 15. During this encounter, with Yessica driving, she said a man, whom bar manager Jeffrey Binnick later identified as petitioner, came to the passenger window and she claimed he "starting yelling [and] pointing a gun at the window" "trying to get him [the decedent] to get out of the car." R. 8, l. 19 - 9, l. 16.

Yessica testified petitioner "told him [the decedent] to get out of the car, come on and just some different things trying to get him out of the car . . . I believe he opened the door because he

was pulling on the door and everything and then he just opened the rest of the way.” The decedent got out of the car and “*they just started tussling.*” R. 10, l. 10 – 13, l. 6. (emphasis added).

There was evidence Yessica hit petitioner prior to his fight with the decedent because petitioner had hit her car, and she pushed petitioner to get him to stop hitting her car. R. 10, l. 10 – 13, l. 6. During the fight between the decedent and petitioner, Yessica heard gunshots and the decedent “fell down.” R. 14, ll. 2 – 21.

Application of the law

When viewing the evidence in the light most favorable to petitioner he was entitled to a voluntary manslaughter instruction. Voluntary manslaughter is the unlawful killing of a human being in a sudden heat of passion upon a sufficient legal provocation. Fighting has been held to constitute a sufficient legal provocation, and there was clearly evidence in this case that the fight and the argument inside the bar continued outside into the parking lot with the decedent being shot during a physical fight. State v. Grubbs, 353 S.C. 374, 577 S.E.2d 493 (Ct. App. 2003); State v. Davis, 278 S.C. 544, 546, 298 S.E.2d 778, 779 (1983).

For that reason petitioner submits the Court should reconsider its attempt to distinguish State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001). In Knoten the Supreme Court held petitioner was entitled to an instruction on voluntary manslaughter where there was evidence that after an altercation inside his girlfriend’s apartment where she assaulted him that she then chased Knoten out of her apartment and he went to his car. Knoten retrieved a metal pipe from the trunk of his car. Knoten re-entered the apartment and killed the decedent when she assaulted him again.

The majority of the court in Knoten rejected the state’s argument that a sufficient cooling time had past between the incident inside *her apartment*, and petitioner retrieving the pipe from his car, and re-entering the apartment. In short, the majority rejected the argument that Knoten was not

entitled to a voluntary manslaughter instruction because he could have gotten into his automobile and left rather than re-entered the apartment.

Petitioner also submits that the 3-2 holding in State v. Johnson, 324 S.C. 38, 476 S.E.2d 681 (1996), relied on by the Court was inapplicable. That case involved an incident at Goose Creek High School where Johnson, an outsider and not a student, injected himself into a prearranged fight between two students that was over at the time of his altercation. The majority found that while there was "trash talking" going on at the time that there was no evidence of an overt threatening act towards Johnson. There was certainly never any physical contact between Johnson and the decedent as occurred in this case. State v. Johnson, 324 S.C. 38, 40-41 476 S.E.2d 681, 682 (1996).

Justices Waller and Finney dissented citing State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993), also relied on by petitioner here, where the Court held that where there was evidence "the decedent was about to initiate a physical encounter." State v. Johnson, 324 S.C. 38; 43, 476 S.E.2d 681, 683 (1996). The dissenting Justices found that the facts of Johnson were not distinguishable from Lowry. As petitioner noted in his brief, this was true even though Lowry cursed at the decedent after he fell and Lowry then shot him in the head.

Here, there was evidence the decedent removed his shirt, a sign he wanted to fight, and the manager of the bar told him to "get in your car" when he showed his clear desire to fight petitioner. R. 182, ll. 15-24. Therefore, the Court's finding that the decedent was only protecting himself was not supported by the record. Further, there was clearly a physical fight in this case.

The fight in this case occurred at a bar at four o'clock in the morning where the physically large and drunk decedent was obviously hard to control as a fair reading of his girlfriend's testimony reveals. On much worse facts than this case the Supreme Court has held that a defendant was entitled to an instruction on voluntary manslaughter. While the Court cites Carter v. State, 301

S.C. 396, 392 S.E.2d 184 (1990) and State v. Gilliam, 296 S.C. 395, 373 S.E.2d 596 (1988) in its opinion it respectfully does not appear to comprehend the context of those cases in comparison with the facts of this case.

In Carter, the Court found ineffective assistance of counsel since Carter was entitled to a jury instruction on voluntary manslaughter where that instruction was not requested. In Carter the evidence showed that Carter had gone to *the victim's home*, and while there Carter got in a fight with the victim. The victim ejected Carter, *and Carter went to his car, retrieved a knife, and returned to fatally stab the victim.* This evidence entitled Carter to an instruction on voluntary manslaughter.

In State v. Gilliam, 296 S.C. 395, 373 S.E.2d 596 (1988) there was evidence that Gilliam assaulted his former lived-in girlfriend of seven years because he was angry that she persisted in making harassing phone calls to Gilliam's new wife. Gilliam's former girlfriend told him that her lover, John Austin, wanted to see him which prompted Gilliam to go to the Brown Derby Bar to find Austin. When Gilliam *sought out and found* Austin at the Brown Derby he motioned for him to come outside. The two men argued and Austin made threatening statements to Gilliam. Austin shot at Gilliam and Gilliam shot back at Austin killing him.

Our Supreme Court held the trial judge erred by refusing to charge voluntary manslaughter given these facts, and by only charging self-defense. The Court noted that the evidence justified a voluntary manslaughter instruction. This was true even though Gilliam sought out the decedent where he obviously had to know a confrontation was very likely to occur.

Petitioner was entitled to a voluntary manslaughter instruction in this case. The Court's distinction between "wrestling and tussling," and throwing a punch is not supported by precedent. Precedent reveals there does not even have to be a physical fight to mandate a voluntary

manslaughter instruction. See State v. Penland, 275 S.C. 537, 272 S.E.2d 765 (1981)(pointing a gun sufficient to mandate voluntary manslaughter instruction); State v. Gallman, 79 S.C. 229, 240, 60 S.E. 682, 687 (1908) and State v. Petit, 144 S.C. 452, 472, 142 S.E. 725, 733 (1928) (humiliating assaults such as spitting in the face or grabbing the ear and leading one around in the presence of others); State v. Martin, 216 S.C. 129, 57 S.E.2d 149 (1949)(assault of a family member); State v. Smith, 304 S.C. 129, 403 S.E.2d 162 (Ct.App. 1991)(blows to a third person). Even an offense against one's property has been held to justify a voluntary manslaughter instruction. State v. Gallman, 79 S.C. 229, 60 S.E. 682 (1908). Finally, sudden mutual combat in which one participant is killed by another without a previously informed intent to do so has been held sufficient to justify a voluntary manslaughter instruction. See State v. McCants, 28 S.C.L. (1 Speers) 384 (1842); See, also, McAninch, Fairey, and Coggiola The Criminal Law of South Carolina at 180-190 (5th ed. 2007)

Further, while the Court notes that "this Court will not reverse the trial judge's ruling regarding jury instructions unless the trial court abused its discretion," that discretion here is limited to determining if there was "any evidence whatsoever" of voluntary manslaughter. State v. Gardner, 219 S.C. 97, 104, 64 S.E.2d 130, 134 (1951). Petitioner respectfully submits one of the most common grounds for reversible error occurs when the trial judge subconsciously does not believe the evidence supporting a conviction for a lesser-included offense, and therefore substitutes his judgment for that of the jury. That occurred in this case, and since the Court respectfully did not view the evidence of voluntary manslaughter in the light most favorable to petitioner, applying the standard of "any evidence whatsoever" of that lesser-included offense, rehearing should be granted.

Rule 403, SCRE and the prior weapon possession objections

Petitioner submits it is important to remember the context of how this issue arose at trial. The state called Carlos Adams as a witness. Adams testified petitioner was his friend. R. 31, l. 23 – 33, l. 2. Adams was also at the McCatz Bar during the early morning hours of December 30, 2005. He saw petitioner inside the bar. R. 34, l. 6 – 35, l. 12. Adams and petitioner conversed for a while inside the bar. R. 35, l. 7 – 36, l. 2.

When the solicitor asked Adams if he had “ever seen Mr. Holland in possession of any type of firearm or weapon?” Defense counsel objected on the grounds of relevance. The judge told the solicitor to “just withdraw the question.” Instead, the solicitor replied: “I’ll re-ask.” R. 36, ll. 6 – 13. The judge then sent the jury out of the courtroom. R. 36, ll. 12 – 25.

Defense counsel then said he did not know what relevance petitioner having a gun weeks before or even longer before December 30, 2005 had in this case, and he objected to this line of inquiry. The solicitor argued it was relevant that Adams knew petitioner had a handgun and that he kept it in his car. R. 37, ll. 12 – 22. The judge ruled he would allow this testimony. Defense counsel then put his further objection on the record that the evidence should also be excluded under Rule 403, SCRE because it was unduly prejudicial. R. 37, l. 12 – 38, l. 15.

In the presence of the jury Adams then testified that he witnessed a verbal altercation inside the bar and he followed petitioner outside following the altercation “trying to figure out what was going on.” R. 39, l. 20 – 41, l. 10. Adams said petitioner was angry and cursing when he went to his car. Adams said he did not know if petitioner got anything out of his car at the time. The solicitor then inquired about seeing petitioner in possession of a gun. Adams responded, “maybe a month or a few weeks” before the incident, at some unknown location, petitioner showed him a gun that was in his car at the time. R. 42, l. 13 – 43, l. 21.

The Court held that the judge did not abuse his discretion by admitting this evidence under Rule 403, SCRE, State v. Lemond Corneilus Holland, Op. No. 4609 (Filed August 18, 2009) at pp. 10-13. The Court found this was consistent "with the ballistic evidence gathered by investigators after the shooting. Further, it solidified Caruthers's identification of Holland as the person who possessed the weapon used to kill Koehler and injure Walke [who was shot accidentally]." State v. Lemond Corneilus Holland, Op. No. 4609 (filed August 18, 2009) at pp. 10-11. However, neither reason, respectfully, justified the admission of this unduly prejudicial evidence where it was clear that was not the state's intent in placing it before the jury.

Petitioner submits that a segment of society views possession of handguns negatively, and handguns taken in public even more disapprovingly. Handguns are obviously not for any legitimate purpose other than protection. Showing off a handgun is in all likelihood going to be viewed by the jury as inconsistent with any legitimate purpose, and it leads to the impermissible inference that the person showing the gun is "itching" for a situation in which to use the gun.

The state here obviously sought to have the jury infer a negative inference from the fact that petitioner had a gun in his car weeks or a month prior to the altercation in this case. The clear implication the state wanted the jury to draw was that petitioner was illegally in possession of a weapon on a prior occasion, or that he was itching to use the gun.

In State v. Douglas, 302 S.C. 508, 397 S.E.2d 98 (1990), the Court held it was reversible error for the trial judge to allow evidence that Douglas pulled a gun the night before he murdered the decedent while "horse playing" with another man because there was no connection or relation between the two incidents, and the evidence did not establish petitioner's state of mind at the time of the fatal altercation. The jury in Douglas was also impermissibly being asked to conclude that petitioner was a person of bad character who carried a gun around with him. While petitioner

understands that the Court held the bad character or other bad act argument is procedurally barred since it was not raised to the trial judge Douglas is also instructive on undue prejudice under Rule 403, SCRE.

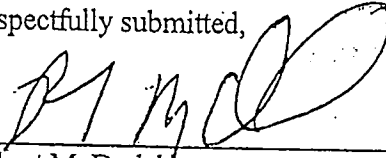
In State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006), petitioner was on trial for murder for shooting the decedent with a gun following an earlier altercation with a questionable nexus. The Court held that Bryant's prior firearm convictions should not have been allowed to be used to impeach Bryant. The Court noted this was particularly true given that Bryant was on trial for a gun related offense. Again, while the procedural posture of Bryant is different, the reasoning of Bryant is instructive on the prejudice caused by prior evidence involving possession of a firearm.

The state here wanted the jury to impermissibly conclude based on this evidence that petitioner was a dangerous person because there was evidence of his temper on the night of the altercation, and that he was itching to use the gun. This evidence was unduly prejudicial pursuant to Rule 403, SCRE, given the facts of this case. Rehearing should be granted.

CONCLUSION

The petition for rehearing should be granted.

Respectfully submitted,



Robert M. Dudek

Deputy Chief Appellate Defender for Capital Appeals

This 28th day of August, 2009.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Georgetown County
John L. Breedon, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

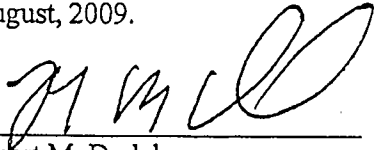
V.

LEMOND CORNEILUS HOLLAND,

PETITIONER

CERTIFICATE OF SERVICE

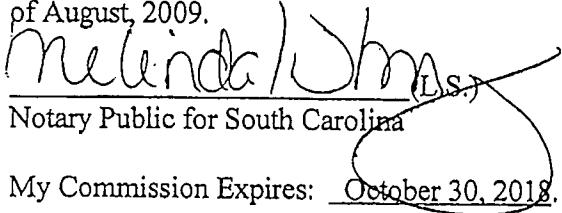
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Alphonso Simon, Jr., Esquire, Assistant Deputy Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201 this 28th day of August, 2009.



Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 28th day
of August, 2009.



Notary Public for South Carolina

My Commission Expires: October 30, 2018.

The South Carolina Court of Appeals

The State,

Respondent,

v.

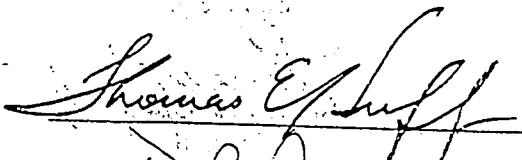
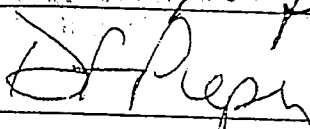
Lemond Corneilus Holland,

Appellant.

The Honorable John L. Breeden, Jr.
Horry County
Trial Court Case No. 2006-GS-26-02012
2006-GS-26-02013
2006-GS-26-02014

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied.

 J.
 J.
 J.

Columbia, South Carolina

September 17, 2009



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

February 10, 2012

REMITTITUR

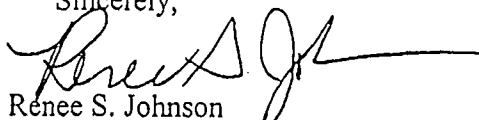
The Honorable Melanie Huggins
Government & Justice Center
PO Box 677
Conway, SC 29528-0677

Re: The State v. Holland, Lemond Corneilus
2006-GS-26-02012 2006-GS-26-02013 2006-GS-26-02014

Dear Ms. Huggins-Ward:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Sincerely,


Renee S. Johnson
Case Specialist II

TAG/tj

cc: Deputy Chief Appellate Def. for Capital Appeals Robert M. Dudek
Assistant Attorney General Alphonso Simon, Jr.
John Gregory Hembree, Esquire

RECEIVED

FEB 13 2012

Referred to Simon ds
Answered _____