

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Kershaw County

Alison Renee Lee, Circuit Court Judge

ROBERT CANNON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002143

A P P E N D I X

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INDEX

INDEX	i
RECORD ON APPEAL.....	1
FINAL BRIEF OF APPELLANT	1776
FINAL BRIEF OF RESPONDENT.....	1795
<u>STATE V. CANNON</u> , OP. NO. 2011-UP-267 (S.C. Ct. App. filed June 8, 2011)	1831
REMITTITUR.....	1833
APPLICATION FOR POST-CONVICTION RELIEF	1834
RETURN AND MOTION TO DISMISS IN PART	1841
AMENDED APPLICATION FOR POST-CONVICTION RELIEF	1849
POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED MARCH 17, 2014.....	1855
PETITIONER'S EXHIBIT # 1 (STATEMENT OF DERRICK MCDONALD).....	2053
PETITIONER'S EXHIBIT # 2 (STATEMENT OF DERRICK MCDONALD).....	2057
PETITIONER'S EXHIBIT # 3 (NOTES).....	2060
PETITIONER'S EXHIBIT # 4 (ORDER SETTING BOND).....	2061
PETITIONER'S EXHIBIT # 5 (SUBPOENA FOR ADRIAN DORAN).....	2066
PETITIONER'S EXHIBIT # 6 (SUBPOENA FOR CHAD RODDEN).....	2068
ORDER OF DISMISSAL	2070
INDICTMENTS AND SENTENCE SHEETS	2101

THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS COURT:
STATE'S EXHIBITS # 37 (PHOTO), # 39 (PHOTO), # 92 (PHOTO), # 111 (PHOTO),
STATE'S EXHIBIT # 113 - # 119 (PHOTOS)

1 that there is still two pending charges against him
2 as to his reliability. And it's important to note
3 that he's a former friend. He admitted to me that he
4 had done -- he had drank with him on at least some
5 occasion and done some drug, although he didn't
6 identify which, with Josh. So of course he would be
7 upset. You know, on that fringe of circumstantial.

8 I think what's most telling about his piece of
9 evidence though, Your Honor, his statement deals with
10 what's going to happen in the future. His statement
11 has to do with, you know, whoever he is referring to
12 and whoever he heard and whoever he heard, whoever he
13 is talking to, his statement has to do with the
14 future. Oh, we're going to be heros when we go back
15 to school. It doesn't have to do with the past. It
16 doesn't say that Christopher Whitehead had anything
17 to do with it.

18 And I'm not as learned as my colleagues who sit
19 at this table and feel honored to even be here to
20 help with this, but it is important to go back to Law
21 101. The State has the burden through some form of
22 evidence, either direct, circumstantial or
23 presumptive, to prove not only the crime, the death,
24 but they've got to prove a criminal act as it relates
25 to Christopher Whitehead related to the death of the

1 deceased, as horrible as that death is.

2 And, Your Honor, they've got no direct -- and I
3 won't read the whole motion because I know Your Honor
4 can. But they've got no directed verdict summarily.
5 They've got no -- they only have the slightest
6 circumstantial evidence. And I believe both pieces
7 of the slight circumstantial evidence I would submit
8 to the Court, one is mere suspicion and the other
9 doesn't even rise to that level.

10 And then of course, Your Honor, we have the
11 confessory statements by two co-defendants with all
12 the privileges, et cetera, that have already been
13 mentioned.

14 So with all due respect, Your Honor, based on
15 Cherry v. State and State v. Cherry and State v.
16 Lolis which I've submitted up and State v. Littlejohn
17 which also goes back; of course the further back you
18 go, the same issue applies, which is careful
19 examination of the testimony convinces us, convinces
20 us, that all the facts and circumstances disclosed by
21 it considered together fall short of that degree of
22 substantiality required for fair and logical
23 inference of guilt.

24 And it's fair and logical inference for guilt as
25 it relates to Christopher Whitehead. And we submit

1 that the State has failed to meet its burden
2 altogether there and would move that we get a
3 directed verdict, Your Honor. Thank you.

4 **THE COURT:** All right.

5 **MR. MOAK:** Your Honor, we respectfully would
6 strenuously disagree with Mr. Reuwer's argument we
7 have no circumstantial evidence or direct evidence to
8 this crime. Your Honor, the phone calls, I
9 understand Mr. Whitlark is taking the position that
10 they never happened. But if you read the phone
11 records, Your Honor, our argument is those last three
12 phone calls are the ones that Mr. Waltemath testified
13 to. And again, this is in the light most favorable
14 to the State.

15 Our argument is those phone calls took place.
16 We have the records of those phone calls. The
17 testimony from those phone calls is that Mr.
18 Whitehead who is Mr. Reuwer's client in those phone
19 calls is asking for Mr. Waltemath to help him go beat
20 Josh's ass; and then in the second or third phone
21 call to check to make sure Josh is there for whatever
22 purpose, Your Honor. So that's our first piece of
23 direct evidence.

24 Other evidence is more circumstantial, Your
25 Honor. The door was kicked in. I believe Ms. Zoch's

1 testimony is that is a two-inch steel door that was
2 kicked in. Mr. Whitehead was seen at work on
3 Tuesday, the 12th, was not injured when he left, had
4 no physical injuries, did not have a limp; was seen
5 later that night by Mr. Brown and another co-worker
6 at the Sonics when they were kicked out of the Sonics
7 for being there when they were not working or the
8 other two co-defendants not being employees at the
9 time.

10 Again, at that time he was with the two
11 co-defendants. He is not injured and is not limping.
12 The next morning, approximately six hours after this
13 incident took place, Mr. Whitehead has a noticeable
14 limp. And remember, Your Honor, we have a two-inch
15 steel door that's kicked in. He also has a visible
16 mark on his face, Your Honor.

17 He actually has told Cecile Trapp the injury was
18 sustained while I was playing with friends the night
19 before. Your Honor, we would submit that the
20 evidence would show the two friends he was with that
21 we can show are Mr. Cannon and Mr. McDonald, and the
22 inference is he's with -- those are the friends he's
23 playing with that he got injured with.

24 At that point the hand of one, hand of all I
25 would submit would kick in. And those two actually

1 confessed to going to the home and murdering Mr.
2 Zoch. And again, you know, his physical injury I
3 think would be some pretty strong circumstantial
4 evidence to that.

5 Reading this brief they wrote, Your Honor, I
6 haven't had a chance to go through it at length. But
7 I'm looking on page 4. They're actually putting
8 information in here that's not even on the record.
9 In the paragraph under corpus delicti, not proved by
10 circumstantial evidence, they actually put in here
11 that Mr. Whitehead's car had stock pipes on it.
12 That's not in evidence, Your Honor. What's in
13 evidence is that Mr. Baccomo who has a lot of
14 experience with cars and vehicles testified that it
15 either was extensions or a malfunctioning muffler.

16 **THE COURT:** Yeah. I know.

17 **MR. MOAK:** And there was another witness who
18 testified Mr. Whitehead's car was actually loud to
19 the point of being noticeable which tends to
20 corroborate what Mr. Baccomo heard of a loud vehicle,
21 Your Honor. So we have some evidence that Mr.
22 Whitehead's car was also at the scene leaving the
23 scene at the same time that we are alleging that this
24 crime actually occurred, Your Honor.

25 And after all of that, we have Mr. Jenkins'

1 statement, which, Your Honor, State v. Plyler, I
2 believe that held that the voice I.D. is actually
3 direct evidence. But I think it's -- it's actually
4 direct evidence, Your Honor. He's asking saying, we
5 are going to be heros; they have nothing against us.
6 So we would take the position that --

7 **THE COURT:** It doesn't matter what he said. It
8 doesn't matter what he said. The question is whether
9 his voice was identifiable by the witness. That's
10 the question. Regardless of what he said. That's
11 jury argument.

12 **MR. MOAK:** But I understand part of their motion
13 is we don't have enough evidence, that they're
14 alleging we don't have enough evidence outside of his
15 admission that was heard by Mr. Jenkins. I believe
16 we have sufficient evidence to go to the jury on
17 that.

18 And in addition to that, to the extent their
19 motion is not based on that, we have the addition of
20 that admission, Your Honor. So the State's position
21 is we do have sufficient evidence in a light most
22 favorable to the State that tends to prove Mr.
23 Whitehead is guilty, was at that scene and was an
24 active participant in this crime, Your Honor.

25 **THE COURT:** All right. I think -- let me make

1 sure. Let me just check one thing. Just respond to
2 some of the last comments. State v. Plyler, I just
3 want to check it, that's a 1980 case. As I
4 previously indicated, voice identification is a
5 legitimate and competent method to establish
6 identification in criminal cases. "While there is
7 contrary authority, it appears to be the general
8 rule, and we think the sound one, that voice
9 identification is direct and not circumstantial
10 evidence." And that's a Supreme Court case.

11 So as to the question of whether it is all --
12 particularly with regard to Whitehead, whether it's
13 circumstantial evidence and the level and the weight
14 of circumstantial evidence that would require the
15 case to be taken from the jury, I think when there is
16 direct evidence, I don't think I have a choice as to
17 what the weight of the evidence is.

18 I mean, if the court said, if I have ruled that
19 there is voice identification evidence and the courts
20 have said that that's direct evidence, that's direct
21 evidence. Whether it's good evidence or not. I
22 mean, Mr. Reuwer, I think you made an eloquent jury
23 argument, but as far as whether or not there is any
24 evidence against your client, there is evidence. The
25 weight of it is --

1 **MR. REUWER:** Agreed. May I briefly?

2 **THE COURT:** -- not for me.

3 **MR. REUWER:** May I briefly respond to one thing?

4 **THE COURT:** Well, yeah.

5 **MR. REUWER:** Just very briefly. But it still
6 has to jump the hurdle of competency, Your Honor.
7 And on the very stand we had some evidence that he
8 wasn't being trustworthy.

9 **THE COURT:** Well, I think that's a jury issue.
10 I think it's a jury issue.

11 **MR. REUWER:** Thank you, Your Honor.

12 **THE COURT:** Yes, sir. And I was re-reading
13 Cherry. Cherry talks a lot about the -- and by the
14 way, Cherry was a conviction, and there was no
15 directed verdict motion granted in Cherry. And of
16 course Cherry, I think the holding of Cherry
17 primarily is that the Edwards circumstantial evidence
18 charge is no longer a charge that should be given in
19 the courts of the state of South Carolina.

20 The Grippon charge which is a 1997 case, Cherry
21 says that's the charge that must be given to the
22 jury. And I think that the primary holding of
23 Cherry. It is certainly -- there is certainly talk
24 about the directed verdict in Cherry. And they do
25 talk about if there's any direct evidence or

1 substantial circumstantial evidence reasonably
2 tending to prove the guilt of the accused and the
3 appellate court must find the case was properly
4 submitted to the jury.

5 So, if I find that the evidence is direct, as in
6 Plyler, then I think I have to submit it to the jury.
7 As I say, it may be very unreliable but there is
8 evidence there. So I must respectfully deny all
9 three motions for directed verdict.

10 **MR. REUWER:** Thank you, Your Honor.

11 **THE COURT:** Now, as to Mr. Whitehead, Mr.
12 Whitehead, do you plan to testify in this case?

13 **MR. WHITEHEAD:** With due respect; no, sir.

14 **THE COURT:** All right. Thank you very much,
15 sir. Mr. Cannon, do you choose to testify in this
16 case?

17 **MR. CANNON:** No, sir.

18 **THE COURT:** All right. And, Mr. McDonald, do
19 you choose to testify in this case?

20 **MR. MCDONALD:** No, Your Honor.

21 **THE COURT:** All right. Mr. Whitehead's
22 attorneys, do you plan to offer any evidence other
23 than the testimony of your client?

24 **MR. RILEY:** No, sir.

25 **THE COURT:** All right. Mr. Kendrick, do you

1 plan to offer -- on behalf of Mr. Cannon, do you plan
2 to offer any testimony other than the testimony of
3 your client?

4 **MR. KENDRICK:** No, Your Honor.

5 **THE COURT:** And, Mr. Whitlark, does Mr. McDonald
6 plan to offer any evidence other than his own
7 testimony?

8 **MR. WHITLARK:** No, sir.

9 **THE COURT:** All right. Thank you very much.
10 All right, counsel. It's 3:00. Approach the bench,
11 please.

12 (Whereupon, a bench conference is had)

13 **THE COURT:** We'll stand at ease for about ten
14 minutes.

15 (Whereupon, a break is taken)

16 **THE COURT:** Let me see you one more time,
17 counsel. Approach the bench, please.

18 (Whereupon, a bench conference is had)

19 **MR. MEADORS:** Your Honor, for the record, the
20 State will consent to everybody else. We're fine
21 with whatever Your Honor or everybody decide.

22 **MR. WHITLARK:** McDonald doesn't oppose it, Your
23 Honor.

24 **THE COURT:** All right. The matter on the floor
25 is juror number 26, Sheila T. Brown, has expressed to

1 the Court that she needs to leave this afternoon for
2 a personal matter. And I'm just concerned that if we
3 keep her on and lose the alternate and then she has
4 to leave, there would be insufficient time for
5 deliberation, and it could upset the whole -- we'd
6 have to do all this over again. Now, the alternate
7 has said he is prepared to stay. So the State has
8 not objected to releasing Sheila Brown. Any
9 objection from Mr. Whitehead's counsel?

10 **MR. RILEY:** No objection.

11 **THE COURT:** Mr. McDonald's counsel?

12 **MR. WHITLARK:** No objection, Your Honor.

13 **THE COURT:** Mr. Cannon's counsel?

14 **MR. KENDRICK:** No objection, Your Honor.

15 **THE COURT:** I'm going to do that and then be
16 prepared to do closing argument.

17 (Pause)

18 **THE COURT:** All right. Is the State ready to
19 proceed?

20 **MR. MEADORS:** Yes, sir. Judge, in the charge --
21 and thank you -- I briefly looked over this. There's
22 also Mr. Moak's charge there was in there. Are you
23 planning on that? I didn't know if you had it.
24 Thank you.

25 **THE COURT:** I just didn't retype it entirely

1 from Mr. Moak's charge. The State is ready?

2 MR. MEADORS: Yes, sir.

3 THE COURT: Defense ready?

4 MR. WHITLARK: McDonald is ready, Your Honor.

5 MR. KENDRICK: I'm ready. I do have one issue
6 on the charge I'd just like to put on the record.

7 THE COURT: All right.

8 MR. KENDRICK: Would you like me to do it now or
9 do it later?

10 THE COURT: Well, tell me now so if I need to --

11 MR. KENDRICK: Your Honor, on page 23, when it
12 talks about a deadly weapon depends on the facts and
13 circumstances of the case, we agree with that. The
14 following sentence lists or says: "The following are
15 examples of instruments which he may be deadly
16 weapons."

17 THE COURT: Do you want me to take them all out?

18 MR. KENDRICK: Yes, sir. I think that the
19 sentence above sufficiently explains to the jury that
20 they may find --

21 THE COURT: All right. That's fine.

22 MR. MEADORS: Well, Judge, I've always heard --

23 THE COURT: I know. They know what a deadly
24 weapon is.

25 MR. KENDRICK: Thank you, Your Honor.

1 **THE COURT:** Anything else from Cannon? From
2 Whitehead?

3 **MR. RILEY:** Judge, on page 3 of your charges.

4 **THE COURT:** Yes, sir.

5 **MR. RILEY:** The tenth line down under multiple
6 defendants.

7 **THE COURT:** Mm-hmm (affirmative).

8 **MR. RILEY:** I request that that line should
9 read: "May convict one and acquit the others."

10 **THE COURT:** Okay. Well, yeah. I probably will
11 do that. I mean, some of these things are in the
12 singular. And I would just as a matter of course put
13 them in the plural. But I'll be glad to do it. Yes,
14 sir.

15 **MR. RILEY:** I've got a couple of other instances
16 of that same sort of thing. Do you want me to just
17 skip over them?

18 **THE COURT:** Well, I mean, those are grammatical.
19 I'm more concerned about the substantive charges.

20 **MR. RILEY:** Okay.

21 **THE COURT:** But I understand there are multiple
22 defendants. And I will speak in the plural where
23 that is appropriate.

24 **MR. RILEY:** Going to a substantive point, Judge,
25 on page 7.

1 **THE COURT:** Yes, sir.

2 **MR. RILEY:** The eighth line, "the defendant is
3 guilty of the crime charged", I would request "beyond
4 a reasonable doubt".

5 **THE COURT:** "If you're firmly convinced beyond a
6 reasonable doubt".

7 **MR. RILEY:** Yes, sir. Yes, sir.

8 **MR. MEADORS:** Your Honor, I don't think that's
9 -- I think it's beyond a reasonable doubt. Firmly
10 convinced is the way to explain beyond a reasonable
11 doubt as a definition of it. But not firmly
12 convinced of beyond a reasonable doubt.

13 **THE COURT:** Well, I've got a definition.

14 **MR. MEADORS:** It's just Grippon, which I think
15 Your Honor is always --

16 **THE COURT:** All right. I understand. I may not
17 make that change.

18 **MR. RILEY:** Yes, sir.

19 **THE COURT:** Anything else?

20 **MR. RILEY:** No, sir.

21 **MR. WHITLARK:** Nothing.

22 **THE COURT:** All right. Bring the jury, please.

23 **MR. WHITLARK:** Your Honor. Your Honor, one
24 thing, Your Honor.

25 **THE COURT:** Oh, I'm sorry.

1 **MR. WHITLARK:** Yes. On the statement of the
2 defendants, there is no phrase characterizing the --
3 when the court says they found it admissible, can you
4 describe for them the different quantum of proof in
5 that, from beyond a reasonable doubt to
6 preponderance, that you only need a preponderance and
7 it's up to them to decide beyond a reasonable doubt?

8 **MR. MEADORS:** Your Honor, I don't think that's
9 appropriate for the jury. Your Honor makes the
10 initial determination in camera. That's why it's in
11 camera. And then it's like one standard for the jury
12 all alone. They don't need to know about your
13 standard.

14 **THE COURT:** I've got reasonable doubt
15 throughout. They've got to find --

16 **MR. WHITLARK:** It's page 12, Your Honor. Yeah.
17 No. I'm sorry, Your Honor. Page 13 I think. Where
18 is it? Your Honor, that's clearly the law of --

19 **THE COURT:** Just show me. Tell me what you're
20 talking about. Where are you talking about?

21 **MR. WHITLARK:** Okay. It says 30 under there,
22 Your Honor. That's fine.

23 **THE COURT:** On 12 I say: "The State has the
24 burden of proving beyond a reasonable doubt that the
25 alleged statement was voluntary." I say it at the

1 bottom of page 12.

2 **MR. WHITLARK:** Yes, sir.

3 **THE COURT:** Does that satisfy your concern?

4 **MR. WHITLARK:** Yes, sir. I just don't like that
5 sentence where it says that the Court has already
6 found it admissible. That's all.

7 **THE COURT:** I think it's the law. Bring the
8 jury, please.

9 **MR. MEADORS:** Judge, they are going to rest in
10 front of the jury. Will you take a break then or
11 will we proceed right then?

12 **THE COURT:** We'll proceed. Do you want to rest
13 in front to the jury, or do you want me to do it?

14 **MR. KENDRICK:** You can do it. That's fine with
15 me, Your Honor. I don't know if everybody else is
16 along.

17 **THE COURT:** It's a formality.

18 **MR. KENDRICK:** Yes, sir.

19 **THE COURT:** I'll do it unless somebody has an
20 objection.

21 (Jury in at 3:42 p.m.)

22 **THE COURT:** Mr. Newman, you figured it out,
23 didn't you?

24 **JUROR:** Yes, sir.

25 **THE COURT:** All right. Thank you very much.

1 Mr. Newman has been seated, is seated as of this
2 moment as one of the regular jurors. Ms. Brown just
3 had a compelling reason to leave. And we'll continue
4 the trial.

5 Now, at this time I been advised that the
6 defendants also rest. So you will hear no more
7 evidence in this case. The remaining portion of the
8 trial will consist of the summation of the lawyers at
9 that time and my instructions on the law of South
10 Carolina as it applies to this case.

11 And at that time, once that is completed, the
12 case will be turned over to you for deliberation.
13 And that will be in -- I don't know how long it's
14 going to take; but, nevertheless, it will be turned
15 over to you this afternoon, and you can deliberate
16 and we'll go from there.

17 So, at this time, Mr. Meadors, you may conclude
18 with your final summation.

19 **MR. MEADORS:** If it please the Court?

20 **THE COURT:** Yes, sir.

21 **MR. MEADORS:** Solicitor, Ms. McDuffie, Mr. Moak,
22 defense counsel, Madam Forelady: Good afternoon,
23 ladies and gentlemen. I want to start off by
24 thanking you like I did Monday for being here,
25 thanking each and every one of you for listening,

1 paying attention, for being here and for fulfilling
2 you all's oath. As I said in my opening, being a
3 juror is not an easy job; but without you all, the
4 system would fail. So thank you all for being here
5 and thank you for your attention.

6 What we're doing right now is called closing
7 arguments. It's never made sense to me, because we
8 can't really argue. You can't say, John, Joanna or
9 Moak or Mark or Dave or any of us, what about this
10 and back and forth. We can't do that. But it's a
11 chance for us to let you all know what we think the
12 evidence is and the reasonable inferences from that
13 evidence. And that's it. That's what we're allowed
14 to argue to you all from, evidence that came from
15 that witness stand and the reasonable inferences.

16 And that's what you all must decide the case on,
17 from the evidence that came from this stand and this
18 enclosed right around here, beside Jenny, the court
19 reporter. That's what you have to decide the case
20 on.

21 I'm going to briefly go through now the law as I
22 did in the beginning very briefly, and then I want to
23 talk again about the burden and some of the types of
24 evidence, and then we're going to go through it.

25 Presumed innocent unless and until, unless and

1 until the State proves them guilty beyond a
2 reasonable doubt. I submit to you the evidence has
3 met that and gone beyond it. And as I go through,
4 I'll show you. The burden, you all know it, I'm
5 going to briefly say it again. Your Honor is going
6 to charge it to you. Beyond a reasonable doubt, not
7 beyond all doubt. It's not a whimsical, fanciful,
8 imaginary doubt. If I told you the river is going to
9 stop tomorrow, that's not a reasonable doubt.

10 Beyond a doubt that makes reasonable people
11 hesitate to act. But more, if you're firmly
12 convinced, firmly convinced of the defendant's guilt,
13 under the oath you took you must find him guilty. If
14 you think there's a real possibility, a real
15 possibility that he's not guilty, a real possibility
16 we haven't met our burden, then you should find him
17 not guilty.

18 As I told you in my opening, it wrecks of common
19 sense. That's what it is. You didn't leave it out
20 there. You brought it in here. And I submit to you,
21 you know it. Reasonable doubt is you know it. And
22 as we go through this evidence, ladies and gentlemen,
23 I submit to you you know it.

24 You know, there were two references to one of
25 the last witnesses about playing football, Mark

1 Austin, sitting up there. Mr. Whitlark asked him a
2 question and then I asked him a question. My brother
3 played football at Wofford. He, like Mr. Austin, was
4 an was a guard. He was an All American at Wofford.
5 I know that's a smaller school. You may not have
6 known that. But he was good. And I used to love to
7 go watch him with his girlfriend play when I was in
8 college. Invariably I would watch my brother. He
9 was a guard and he was cool. I'd watch him and I'd
10 watch make him good blocks. And I was proud of him.
11 But in do doing that, I couldn't keep my eye on the
12 ball all the time. He wasn't always going with the
13 ball. I was looking for him.

14 In this case, in this trial, and as you listen
15 to these closing arguments, the ball is here and the
16 ball has been here. I respectfully submit they have
17 tried to distract you watching guards, playing fakes,
18 going the other way. But in trials, in trial you
19 have to keep your eye on the ball, keep your eye out
20 on what the case is about, the evidence.

21 I won't tell any more stories. I just thought
22 of that story after Mr. Austin was talking. But the
23 key is, reasonable doubts, sometimes questions are
24 just questions. Just because you've got a question
25 about something doesn't make it a reasonable doubt.

1 It doesn't. You can't answer everything. If that
2 was our burden, let's go home. We'd never convict
3 anybody.

4 And what they have done throughout this trial in
5 their cross, and what I submit to you all three of
6 them are going to do in their closings, is try to
7 suggest to you some things that are reasonable doubts
8 that aren't. Maybe some of them are just questions.
9 Some of them got up there and talked to them. And I
10 submit to you, you can answer every one of them.
11 There are no reasonable doubts. Some people call
12 them red herrings that they'll throw out here and
13 here. It's like a shotgun approach. Boom. And you
14 go all over here. Well, the target is here in the
15 middle. Keep focused on the target. Keep your eye
16 on the balls.

17 This is The State of South Carolina vs.
18 Christopher Whitehead, Robert Cannon and Derrick
19 McDonald. It's not The State of South Carolina vs.
20 Melissa Davy, J.D. Davy, her dad, Danny Catoe,
21 Captain Thomley, George Marthers, Phil Crawford, me,
22 The State of South Carolina, John Meadors. It's not
23 me. It's not against Helen Zoch. It's not The State
24 of South Carolina against Zack Waltemath or Molly
25 Waltemath.

1 Throughout this trial -- and Mr. Whitlark in
2 particular -- or Adrian Duran. It's not about them.
3 This trial is not about them. But those are examples
4 of the smoke screens they want to take you away.
5 There is no evidence that those folks are anything
6 more than a smoke screen. None.

7 How many people have told somebody we're going
8 to be heros when we get out of here? They ain't got
9 anything on us. How many people said, we're going to
10 go beat somebody's ass; we're going to go beat Josh's
11 ass? That's what this case is about. Stay focused
12 on it.

13 Evidence and the reasonable inferences in there.
14 That's all you're allowed to consider. And I hope
15 that's all they're going to argue in their closings.
16 What are some other examples? See, this is the last
17 time I get to argue to you. There are three going to
18 go up, and then you'll hear the judge's charge and
19 you all will go back and reach a verdict. I am going
20 to cover all of them. I may have miss some. I may
21 give some they didn't think of. I don't know. But
22 when you get back there, discuss it all. Use your
23 common sense.

24 What are some other potential things I think
25 they may bring up? They are implying I think, I

1 guess, I know, that these officers cheated, that they
2 lied. Through their questioning of them on cross,
3 they're saying, well, didn't they ask for so-and-so,
4 didn't they ask for so-and-so, didn't they tell you
5 this here? Didn't you threaten the death penalty?
6 And they said no. And this is not a death penalty
7 case, just to make that clear. They are charged with
8 murder and burglary. But they're not on trial.

9 But that's what you'll do. When you have a very
10 strong direct and circumstantial evidence case, which
11 this is, that's what they'll try to do. That's what
12 they'll try to do, take your attention away from that
13 statement of where they said, I got a bat and hit
14 him. That's direct evidence.

15 I don't believe I heard any of these other
16 witnesses, Mr. Duran or Melissa Davy or anybody else,
17 say they got a bat and hit somebody. That's what
18 this case is about. But they don't want to you focus
19 on that. That's a smoke screen.

20 Phone call from Zack. And I'm going to go over
21 this more in detail, too. You all saw that young man
22 on the stand. You saw him on the stand. You saw his
23 demeanor. That's what you decide this case on, the
24 demeanor, the credibility of these people you saw
25 here. Did somebody call you? Yeah. Who? It was

1 Christopher Whitehead. Have you heard his voice
2 before? Yes. What did he say? Why don't you go
3 help me beat Josh's ass. Excuse my language. I
4 don't want to. He called back. Don't worry about
5 it. We've got it handled now. We've got it handled
6 now.

7 Now, he said 7 or 8:00 he thought it was. And I
8 can remember specifically Mr. Whitlark asked one
9 witness, would you and Mr. Meadors stretch that? I
10 guess he's implying I'm lying. Well, if I did, I
11 didn't do a good job of it, did I? But not one
12 question about the content of that statement on
13 cross, just about anything else. Because they
14 couldn't cross him on it. He was said beat. You
15 want to go? Let's go beat Josh's ass. There's no
16 question about that. You saw his demeanor.

17 The phone calls are there to support it. And
18 I'm going to go through when I go through the
19 statement. He might have been off on his time. That
20 doesn't mean that conversation didn't happen. You
21 judge his credibility. You look at the phone calls
22 in relation to Wal-Mart. And don't let me forget
23 Wal-Mart. Please don't let me forget Wal-Mart before
24 I sit down.

25 And if it was exactly right that that young man

1 remembered when these phone calls were made exactly,
2 then maybe you should worry. That's a smoke screen.
3 I hope they won't talk about it long.

4 A couple of other things they may or may not
5 bring up. The Workers' Comp form. You heard Pat,
6 you heard Cecile say, you know, he was fine Tuesday.
7 He came back Tuesday night with a mask. He and
8 Robert and Christopher, they were all there. He was
9 fine. The next day he came in, you heard Cecile say
10 he was limping. What happened? I'll tell you what.
11 I got hurt playing around. I'm going to tell Ms.
12 Pat, I'm going to tell Ms. pat I got hurt here at the
13 job so she'll have to pay for it.

14 Cecile said, I'm not having any part of that.
15 She tells Pat later on in the week about that. The
16 form says the 12th the injury happened. It got sent
17 to Columbia and it comes back. Well, it's got 12
18 everywhere. That's a question. Is that a reasonable
19 doubt they're going to argue about? Maybe. But
20 there's no question he got injured when he kicked
21 that metal door in, that new metal door in. That's
22 what the circumstantial evidence shows you. There's
23 no question that Cecile says it was Wednesday when he
24 came in and said he was hurting. He wasn't hurt the
25 day before. And it was Pat who said that. Are they

1 lying? That's a smoke screen.

2 You know, Melissa Davy, I'm sure they're going
3 to talk about her. She's sitting in the courtroom.
4 She testified. Melissa Davy didn't kill Josh. They
5 had an argument. They were separated. Somebody
6 asked Lieutenant Crawford, when you talked to her,
7 did you have an uneasy feeling about her? Did you
8 think she might be holding something back? Yeah.
9 Could that perhaps be that phone call came into Zack,
10 she knew about it, said they're going to beat his
11 ass. And, I mean, maybe they didn't go over there.
12 Maybe there's a little guilt there, with no offense
13 to anybody out in the audience. I don't know. But
14 she didn't kill him. She didn't kill him.

15 She didn't say, I got a bat and went over there
16 and beat him up. She didn't say anything about a
17 chicken put down on the side of the head or a tree
18 being thrown over on him. She went over there and
19 found him and called Helen and was on the phone with
20 Helen when they came over. Those are in the records.
21 Go look at them.

22 And, you know, no forensics. I bet we'll be
23 here -- just watch the clock. Maybe each and every
24 one of these folks will say, no forensic, no
25 forensic. Well, congratulations, gentlemen. You

1 wore Latex gloves and you didn't leave anything.
2 You're watching TV, too. CSI, too. They tried to
3 get prints. Congratulations. Congratulations. You
4 didn't leave anything. But guess what folks? You
5 don't come into a criminal courtroom and get rewarded
6 for that. You know, they did a good job killing him,
7 didn't leave any forensics. Reward them for being a
8 good criminal? No, ma'am. No, sir.

9 You know why we didn't find any forensics.
10 Because they made sure they didn't leave any. With
11 gloves. That's why. That's why. They planned on
12 not leaving anything. They worked on not leaving
13 anything. They burned their clothes so there
14 wouldn't be any. They're the reason we don't have
15 any.

16 Joshua Zoch is dead. He's in a cemetery and
17 hopefully some better place. But he's not on trial
18 in this courtroom. They tried to put him on trial.
19 Talking about a prior charge which has got nothing to
20 do with this. He's not on trial. He didn't kill
21 himself. You remember how Dr. Sexton said one of the
22 things they look at to make sure it's not suicide,
23 well, he ruled that out. This isn't The State of
24 South Carolina vs. Joshua Zoch. It's not a suicide
25 case or your coroner's inquest.

1 Putting the victim on trial, which they did.
2 They even asked his mom or grandmama about, did you
3 know he was a snitch? Did you know he was snitching?
4 I knew he talked to the police. Mr. Whitlark asked
5 him grandmama.

6 Now, that throws in one thing though. You know,
7 in this state we don't have to have motive. We don't
8 have to have it. You don't have to have
9 premeditation, a plan. They put it in here. One of
10 these fellows, somebody said thought he was a snitch.
11 Another one said, well, he wasn't a snitch. I don't
12 think he's a snitch, not on me. But that's a motive.
13 There was a reason they went over there. We didn't
14 have to show it, but that sure was a reason they went
15 over there.

16 And finally -- I don't know how many times we'll
17 here this -- but finally a rush to judgment. A rush
18 to judgment, that they rushed in deciding this case.
19 Well, I thought I heard somebody saying, why didn't
20 you all arrest Robert that first night? Well, do you
21 want them to rush to judgment or not? Well, they
22 didn't arrest Robert that first night that had given
23 a statement and he said he touched him. He was
24 cooperating. You come down tomorrow, we'll talk to
25 you. They then go get McDonald who at that point --

1 Mr. Cannon -- that told them he hit him with a bat.
2 Well, now they're saying, why didn't you rush to
3 judgment there?

4 But then they get to Mr. McDonald the next day.
5 Why are you rushing to judgment? I don't understand
6 that. It's common sense law enforcement, as I'll go
7 over with this statement. I hope we don't hear rush
8 to judgment.

9 You know, the elements of a burglary, entering a
10 dwelling of another without consent with intent to
11 commit a crime. Clearly it's Kershaw County.
12 Clearly it's a residence, 2505 Joshua Zoch was
13 staying at, his grandparents had and were leasing to
14 him. Intent to commit a crime. Robbery, murder.
15 The place was ransacked. And one of the elements, as
16 the judge will charge you, is during the nighttime
17 hours. Well, there's no doubt about that. Those
18 elements were there. I'm going to go through that in
19 a minute as we go through.

20 Murder, briefly. And Mr. Kendrick I think said
21 after my opening I was throwing out these things to
22 appeal to you all's passions or whatever. No, ma'am.
23 No, sir. I am explaining the facts to you. And
24 we've got to show malice to you. And that's not a
25 game. It's not funny or something we take lightly,

1 explaining the injuries to Joshua's body. And my
2 boss would fire me if I got up here and just stood
3 here and said, well, he got hit with a baseball bat.
4 I can't do that.

5 And the facts bring it out to you all that show
6 malice and feel malice. And in a minute I'm going to
7 ask you all to go back there and touch and hold
8 malice, because you've got something to touch and
9 hold in this case.

10 Murder is the unlawful killing of another human
11 being with malice aforethought, the intentional
12 unlawful killing of another with malice aforethought.
13 And the person died as a proximate result thereof.
14 We talked about it before. Intentional. You can't
15 open somebody's mind, but you can look at their
16 actions or inactions. They intend to do it. I'm
17 going to beat your ass. They go buy gloves.

18 Intention. You don't have to see it. You can
19 see it in actions before, or actually intent before
20 and after. Leaving, packing up, quitting Sonic, crew
21 chief, "F" Sonic. Leaving.

22 Malice aforethought. We've got so much malice
23 here to show you. Malice: Evilness, wickedness.
24 Boating him while he's on the couch. And there's no
25 doubt about that. I can't wait to go over Dr.

1 Sexton's testimony with you all in a minute. I can't
2 wait. I mean, I cannot wait. That shows malice.

3 Meanness, evilness, wickedness. It can be
4 express. We don't always have it. We've got it in
5 this case. We've got it from Christopher Whitehead.
6 Let's go beat Josh's ass, shortly before they did. I
7 don't know if they meant to kill him or not. If they
8 thought he was a snitch, they just wanted to beat him
9 up real bad, I don't know. But they did kill him.
10 And they did it with the bat and the potpourri bowl,
11 six, seven times and the injuries on his head.
12 Meanness, evilness, wickedness. It can be express
13 and it can be inferred. And I'm going to ask you to
14 infer it.

15 The judge will tell you this law. Inference
16 with the use of a deadly weapon. This will kill you.
17 And that he died as a proximate result thereof.
18 Well, you know, you heard Dr. Sexton. You heard Dr.
19 Sexton. And, ladies and gentlemen, finishing up on
20 the law here before we get into the facts, there are
21 two, as I told you, types of evidence. Direct
22 evidence is something you hear, feel, taste; and you
23 come in here and take the stand and tell you all
24 about it. Zack Waltemath saying that was his voice,
25 Chris Whitehead, that said, I'm going to go beat

1 Josh's ass.

2 Michael Jenkins who comes in here doesn't know
3 anybody. I'd never seen him until last February. He
4 comes in here and says I see and hear. Hear. Direct
5 testimony. Somebody nextdoor says, we're going to be
6 heros. They've got nothing on us. We're going to be
7 heros when we get out of here. He hears the name
8 Josh. That's direct evidence. Rocky Branch. That's
9 direct of evidence people coming in here.

10 The law also says circumstantial evidence is
11 another type of evidence. You all listen to this,
12 please. I think I mentioned this to you.
13 Circumstantial evidence. And you'll hear the Judge's
14 charge. Circumstantial evidence is indirect evidence
15 or proof of a chain of facts and circumstances
16 indicating the existence of a fact. Isn't that
17 beautiful? Chain, indirect evidence or proof of a
18 chain of facts and circumstances indicating the
19 existence of a fact.

20 We have incredible circumstantial evidence.
21 And, Ladies and Gentlemen, the law makes absolutely
22 no distinction whatsoever in the weight or value, no
23 distinction whatsoever in the weight or value to be
24 given to direct or circumstantial evidence, nor is a
25 greater degree of certainty required on behalf of the

1 State. Nor is a greater degree of certainty required
2 of circumstantial evidence than of direct evidence.

3 The law says, and the judge will charge you, you
4 weigh all the evidence, direct and circumstantial
5 evidence. And after weighing all of it, if you're
6 not convinced of the guilt of the defendant beyond a
7 reasonable doubt, you've got to find him not guilty.
8 But if you are, if you are with direct and
9 circumstantial evidence, you must find him guilty.
10 That's pure. Direct, circumstantial evidence.

11 The final thing is credibility and
12 believability. Every case in the world, every case.
13 in this county, in Richland County, every other state
14 in this nation comes down to that. Credibility,
15 believability of the witnesses involved in the case.

16 Who has got the most to gain or lose? You know,
17 getting back to these officers and talking about I
18 guess why they cheat and not do this and not do that,
19 you know, I was thinking about it last night. Why do
20 they even keep the notes of these other people? Why
21 did they even keep them? Making a note here, making
22 a note here which has nothing to do with this case?
23 Why did they even keep them? Why didn't they just
24 toss them in the trashcan? They kept everything
25 together. Everything is given to the defense. If

1 they were cheating, they wouldn't keep any of it.
2 Well, they have nothing else to do. They write it
3 all down, what they do, and we provide it over.

4 Credibility, believability. I was thinking
5 about this. Why, why if you were cheating and you
6 were trying to frame these young fellows would you
7 even keep the notes that you initially took from
8 McDonald, from Cannon, initially from McDonald when
9 he said, well, I was with Christopher Rust. I slept
10 in his car, I think he said. And then I went home
11 with him.

12 Of course Mr. Mark Whitlark tried to ask him on
13 the stand, well, he said he went and slept with
14 Christopher Rust's house that night. And the officer
15 said, well, no, sir. That's not he said. He said he
16 went and slept out in the car first, slept out in the
17 car first. Then he went home with Christopher Rust.

18 Well, you all saw Christopher Rust come in here.
19 Credibility? Believability? Let's see. Is Danny
20 thinking, well, you know, back when he told me this,
21 that would be on Monday; you know, I'll bet you old
22 Christopher Rust is going to see this thing on
23 Saturday. I'll bet you he's going to see it on
24 Saturday with his mama and come down this weekend to
25 the Sheriff's Department or down here and give a

1 statement. Look, I saw this guy is arrested. He
2 came to my house, mama's house at 1:30 in the morning
3 that day. Kind of unusual? Unusual coming there at
4 1:30 in the morning.

5 And he initially tells Danny Catoe, I slept in
6 his car and then went home. No, sir. No, ma'am.
7 And you know what that does? That right off the bat,
8 that establishes credibility, the lack of credibility
9 of Derrick McDonald. You saw Christopher Rust.
10 There wasn't much cross on him, was there? He came
11 down with his mama and said, look. This young man
12 came to my house at 1:30. He seemed a little upset.
13 It took him 'til the next day. Credibility,
14 believability.

15 Where is Whitehead's confession? If they're
16 cheating, let's sign him up. Sign him up. Make him
17 sign. George, if you're cheating, why didn't you
18 sign that thing? You said you witnessed the
19 statement. Why didn't George just go on back and
20 sign that after Danny took that statement? That
21 would have been pretty easy to cheat. He didn't. He
22 said, I was sitting there. I watched most of the
23 statement. I wasn't there at the end when they went
24 over. That's honest. Attack him. They're not on
25 trial.

1 Why not get a statement from McDonald right on
2 the scene that first time? Why not, instead of
3 taking those notes I was in Chris Rust's car, I slept
4 in. He said, no, I want to talk wait and talk to my
5 mama before I talk to you all any more. Fine. They
6 let him go. Why not sign him up right then and get
7 that full statement? Credibility, believability.

8 What happened, ladies and gentlemen? Melissa
9 and Joshua Zoch got in a fight. She left I think
10 early that morning, Sunday morning. Everybody knows
11 what this calendar is by now, State's No. 8.
12 Everybody knows. Gets in a fight and she ends up
13 going back to Melissa -- excuse me -- Molly and Zack
14 Waltemath's house that Sunday.

15 I can't remember. I don't think she saw him
16 Sunday. On Monday she says she hooks up. I think
17 she goes and does an application. Melissa says he
18 does an application at a Bi-Lo or something -- I'm
19 not sure -- where he fills out an application.
20 That's where she gives him 60 bucks to buy her a
21 present I think. He ends up spending that on crack.
22 She gets angry about that, too. That's the day
23 initially I think the Waltemaths and Molly and Zack
24 said that they rode in with her or her grandfather
25 that week.

1 Molly didn't remember working that first day,
2 that Monday. Showed her the records. Well, I came
3 in later on that afternoon. But I did see Josh that
4 Monday morning. I did see him. But she's staying
5 with Molly and Zack Sunday night and Monday night,
6 Tuesday night. That's not in dispute. That's not in
7 question.

8 We go into Tuesday. And I think Cecile said she
9 went over to see Joshua Monday night -- I'm not
10 sure -- with some other group of folks. You all
11 remember that better than I do. But I think she did.
12 Tuesday they go into work. Cecile is working crew
13 shift. So is Chris Whitehead. They kind of worked
14 their way up. That's one thing you kind of heard
15 about Chris Whitehead in this. He'd worked himself
16 up with Pat Heathcoe. And Old Pat, she's trying to
17 help these folks with their first job in life, giving
18 them a place to work, establish some credibility.

19 He's worked himself up to crew chief, did a good
20 job. She's about to give him his keys. So they're
21 working that morning shift, working that morning
22 shift. Tuesday they come in. He is not injured on
23 Tuesday at work. He's not injured. He works. They
24 come that night.

25 And here is where the time starts to come in,

1 ladies and gentlemen. That night, Chris has already
2 worked that day. You hear Allen Brown say, well,
3 shortly after 10:00 on December the 12th, 2006,
4 Robert Cannon comes in with a mask. Did know it was
5 Robert Cannon? It was Robert. It was light and all
6 that. It wasn't funny. Robert, you don't work any
7 more, leave.

8 Then who does he see come in? Derrick McDonald
9 right after. You don't work any more, leave. Chris
10 Whitehead, right after. He might have gone to the
11 back as I'm talking to Derrick McDonald. You're not
12 working any more, Chris, how about leaving. Cecile
13 comes in there sometime at that point to check her
14 schedule and leaves. But there's no question the
15 three of them are together shortly after 10:00 or
16 10:20, undisputed.

17 Now, that's in the statement. But I guess they
18 didn't make that up because, you know, there are
19 other witnesses there, too. So that's okay. I guess
20 they did take that down when they said that. But
21 that's in the statement. We know what happened that
22 night. And I'm going to go over that in a minute.
23 We know what happened that night.

24 And, folks, the next morning Wednesday, when
25 they come in, that's when Cecile, co morning crew

1 chief leader, sees Christopher Whitehead limping,
2 sees a scratch under his eye. And that's when he
3 tells her. She said, what happened? I hurt myself
4 last night playing around with some folks. Well, he
5 hurt it as he's knocking down the thick metal door
6 that Helen told you she'd gotten because the house
7 had been broken into. And gotten scratched somehow,
8 with the Christmas tree or tussling with the victim.
9 I don't know. I don't know. But that.

10 And he said, come on and tell me -- I'm going to
11 go tell Pat that I hurt it. He was trying to get
12 Workers' Comp to pay for it. No, sir. No, ma'am.
13 I'm not doing that. Thursday Chris Whitehead comes
14 back in. And Pat says, that's when he told me. He
15 told me Wednesday, the Thursday before he left I've
16 got to fill out this form. I've got to fill it out.
17 The injury happened on the 12th. And he left at
18 10:30.

19 Folks, we go to Friday, the 15th of 2006. And
20 if you say state and county employees don't work
21 hard, maybe a lot of them don't. But December 15th,
22 2006, they busted their tails. In one day -- it
23 almost reminds me of that show Hill Street Blues;
24 when you see so much happen in an episode it will
25 almost wear you out in one day. They had this kind

1 of a day. They had already responded to the scene.
2 Sellers has. And I'm going back over the scene.
3 Don't worry about that. They had already responded
4 to it. They got the name of Melissa Davy. I think
5 Sellers said he got Zack and Molly's name.

6 Thursday they go -- and they do realize that
7 Sonic is a central point here. They go to Sonic that
8 morning. They talk to Cecile briefly and they talk
9 to Pat. Do they have the name at that point of Chris
10 Whitehead? Yes. They do. Do they have the name of
11 Derrick McDonald and Robert Cannon? Yes, they do.

12 There's nothing wrong with that. They're trying
13 to solve a murder. They're looking for people that
14 might be connected, people that had bad blood. It's
15 okay for them to have names of suspects. They go out
16 and start looking for, they go looking for Derrick
17 McDonald.

18 Well, what has Pat Heathcoe told them after they
19 get to Sonic? Crew chief leader to be, crew chief
20 leader who is going to get the keys, came in at 6.
21 He's gone at 6:50. That's what Cecile said, gone at
22 6:50. Mama brought him at 6. He talked to her when
23 he came back and he left. Abruptly left. Been a
24 good worker. Noticed some change in him. You notice
25 it's real? I said, what kind of change? She

1 commented, she said he was a smartie tail the last
2 few weeks. A smartie.

3 So they knew he'd left. They knew Derrick
4 McDonald knew these folks. They'd been seen down at
5 the Sonic on Tuesday night with a mask. Yeah, that
6 makes you wonder a little bit, a mask with these
7 folks. Law enforcement, they go out and look for
8 him. While they're going to look for Derrick
9 McDonald, do they find Derrick McDonald? On their
10 way they see Christopher Whitehead. Well, that's
11 circumstantial evidence. He doesn't live in there.
12 He's supposed to be working. Route restricted. He
13 wasn't going to work. And they run into Christopher
14 Whitehead.

15 So they already know he left that morning at
16 6:50. Danny had run up on him. Danny Catoe had run
17 a D.L. license. He looks at it. That's Christopher
18 Whitehead. I want to talk to you. He didn't arrest
19 him. He didn't arrest him for anything involving
20 this. He arrested him for DUS because he was DUS. I
21 want to talk to you about Joshua Zoch. "I don't have
22 a damned thing to say about it."

23 If that's all we had, let's get out of here.
24 But the first time he talks to him and they talk to
25 him, "I don't have a damned thing to say about that."

1 And what's kind of interesting right before that is
2 Pat has called him that morning after she got there
3 at 10. She wasn't supposed to work that morning.
4 And she said, Chris. And Chris had never left before
5 like that. Chris, what's going on? "F" Sonic. Why
6 would he be talking to Pat that way? Fixing to give
7 you keys. Something has happened to that young man
8 week. His leg, his eye, "F" Sonic, I don't know a
9 damned thing about it.

10 They then go after Christopher Whitehead on back
11 to Derrick McDonald's house. He's not there. They
12 leave a card. They go back to Sonic, get a statement
13 from Allen Brown. He's already told them about what
14 he saw Tuesday. They talked to Cecile Trapp. And
15 then what do they do? They go back to Derrick
16 McDonald's house. And we'll get to that first oral
17 statement.

18 Some of this I may already have covered. Chris
19 Rust's car, at 10:30 he slept there until Chris Rust
20 got off at 11:30. No, sir. No, ma'am. You saw
21 Christopher Rust. So right off the bat, there's
22 credibility starting to go down the tubes for Derrick
23 McDonald.

24 Another person told Derrick he had to go make
25 some moves. I've already been over the notes. Why

1 notes? Why do you keep them if you're trying to give
2 a story to this jury? Why do you keep them? And I
3 covered it a minute ago. I don't want to talk
4 without talking to my mother. They let him go. They
5 didn't try to keep him there. They didn't try to
6 make him write a statement. They let him go.

7 Where do they go from there? They then go to
8 Robert Cannon's house. You all have all these if you
9 want to see them. Straight from the testimony. I'll
10 put them over here so they don't have to get up and
11 come over. They start talking to him. They're at
12 Robert Cannon's house now. They go inside and they
13 read him his rights.

14 And, ladies and gentlemen, His Honor is going to
15 charge you; you all have to decide whether these
16 statements were freely and voluntarily given beyond a
17 reasonable doubt, like everything else. And to do
18 that you use your common sense. You watch the
19 demeanor of the witnesses testifying. You see what
20 they wrote down, their observations, their responses.
21 And the judge -- and you will have to decide what all
22 he's asking the officers. I mean, that's what you
23 all -- that's why I was asking them.

24 You have the right to remain silent. Did they
25 read him that? Did he appear to understand that?

1 Did you have any trouble communicating? Were your
2 responses timely? Could you understand them? Could
3 you understand them? Did they appear to be under the
4 influence of any alcohol or drug? Did you hold out
5 any hope of reward or promise? How do you know he
6 did? I circled it. All the way down.

7 "Anything you say can and will be used against
8 you. You have the right to talk to a lawyer and to
9 have him present with you while you are being
10 questioned. If you cannot afford to hire a lawyer,
11 one will be appointed to represent you before any
12 questioning if you wish. You can decide at any time
13 to exercise these rights and not answer any questions
14 or make my statement."

15 Did you read him those? Yes, sir. Did he
16 understand them in your opinion? Yes, sir. Did he
17 sign that he did? Yes, sir.

18 Waiver of rights. "This is to certify I have
19 read or had read to me" -- that's even on the form --
20 "read or have read to me the above statement of my
21 rights. I understand each of these rights, and
22 having these rights in mind, I waive them and
23 willingly make a statement. No promises or threats,
24 no promises or threats have been made to me and no
25 pressure or coercion of any kind has been used

1 against me."

2 Who signed that? Robert Cannon. Did he
3 understand it? He said he did. Did he appear to?
4 He appeared to.

5 Marthers down here. There is George over there.
6 Sign it. Rights were read at 6:45. In the
7 defendant's house with his parents there his rights
8 were read. He signed it. All these folks are in his
9 house and he signed it right there and he read it.
10 You heard him testify.

11 And then he starts talking. This is real.
12 First he says, well, you know, Chris Rust -- maybe I
13 guess that's somebody else that might have done. Is
14 this State of South Carolina vs. Chris Rust? Chris
15 Rust told Robert Wednesday that Josh was dead around
16 8 p.m. I wonder if he said, I know. Robert doesn't
17 know that another person did it, but he thinks he did
18 or may know who did, is what Robert tells them
19 initially.

20 Another person named Melissa would also get in
21 arguments and Josh would pump, pump, pump this other
22 person out. About two weeks back Robert, another
23 person and B.J. went to Josh's house. Melissa asked
24 them to leave after another person brought the blunt.
25 That was the whole reason of going over there.

1 His parents are in there. He's talking to them,
2 and he says, you all, I want to tell you a little bit
3 more. Maybe he didn't want his parents to know what
4 he had been involved in. I wouldn't. And isn't that
5 real? Let me go talk to you all away from them a
6 little bit. There was even a question, could they
7 hear it? I don't know. But how can you make that
8 up?

9 And they go outside. And now I guess it becomes
10 The State of South Carolina vs. Captain David
11 Thomley. We're now switching to a different
12 courtroom. They come out outside and Captain Thomley
13 is talking to him. And he says Thomley comes, takes
14 him out there to the truck, and he wants to ask
15 Captain Thomley, his boss; as people want to talk to
16 my boss and not me many a time, I want to talk to
17 you.

18 Captain Thomley took the stand. What did he
19 talk to you about? He wanted to know, he'd like to
20 talk but he wants some help. He said I tell him --
21 and he looked at you all and put his hand on the
22 Bible. He said, I told him I'll make your
23 cooperation known to the judge and to the solicitor.
24 And I said, are you doing it? I'm doing it. Did he
25 totally cooperate? He did. He cooperated. I'm

1 telling you all now. He cooperated, Judge. And
2 Thomley told you that that's what he told him, that
3 he'd let him know he cooperated. Did you promise him
4 anything? No, sir. Did you threaten him? I did
5 not. Did you hold out any hope of reward? No, sir,
6 no, ma'am. I didn't.

7 He leaves. Think about this. Please think
8 about this. If these guys weren't telling the truth,
9 why would they even say that? Did he ask you for;
10 anything? No. He didn't say anything to me. I
11 didn't even say anything about cooperation. That is
12 credible. Why not say just say, no, nothing
13 happened. He didn't ask me for anything. Nothing.

14 And then they go back inside and he gives them a
15 statement. I don't think they'll need to come down
16 and see this, so I can do it up here. Who filled in
17 the top part in, Danny? He did. Did he have any
18 trouble doing it? No, sir. Did he have any trouble
19 with his social security?

20 And these weren't questions just to bide time
21 for the courtroom and make copies for the record.
22 It's to show that he had the ability I think to write
23 down social security. Sometimes I forget mine. I
24 have to think for a minute. It doesn't come right
25 out. But he said he didn't have any trouble writing

1 this. He didn't have any trouble writing that. He
2 knew. He was thinking. Was there any hesitation?
3 No.

4 On Tuesday -- and this was after, y'all; this
5 was after Danny Catoe had talked to him. What's your
6 procedure? I talk to him, make some notes of what he
7 said. He read those notes out to you in the record.
8 Did you have any trouble understanding him? No, sir?
9 Did you promise him anything during all that? No, I
10 did not. Did you hold out any hope of reward? No, I
11 not did. Did he appear to understand you? Yes. Did
12 he ask for an attorney ever during the taking of this
13 statement? No, sir. No, ma'am.

14 On Tuesday, the 12th of December, 2006, at
15 2 p.m. another person got off work and picks me up.
16 We got to the mall and I got a new cellphone and
17 shoes. Is Danny just going to write that up, throw
18 that in? We then went to pick up another person and
19 then we went to McDonald's in Blythewood and eat.
20 And from there we went to Sonic.

21 I had on a ski mask. I had on a ski mask and
22 was joking around while another person talked to a
23 girl in the back. And another person was talking to
24 he Leroy. I don't know Leroy's last name. We then
25 left Sonic and went to the Two Notch Wal-Mart, and

1 another person and another person got a ski mask. So
2 we went riding and another. You all will read it.
3 You all can see it. And another person said, you
4 know, we need to do something with these masks.

5 I mean, he'd almost have to be a fiction writer
6 to be coming up with this, just sitting there doing
7 all this. These are the words he said he told him
8 when he's sitting down just writing. He says, do you
9 mind if we put it on one of our statement forms? He
10 said, no. Well, he came in here and showed you all.

11 And I asked -- and the mask -- and we need do
12 something with these masks. And I asked and another
13 person asked, like what? And another person said,
14 like beat Josh's ass. Because he's a snitch.
15 There's your motive. There's your motive. And I
16 told another person I didn't think he was a snitch.
17 Well, I don't think he's a snitch. Another person
18 then asked if me and another person wanted to ride
19 and we said whatever.

20 Whose signature is that at the bottom? Whose
21 signature? Robert Cannon. Eye witnessed. Marthers
22 witnessed it. Did you force him to sign it? No.
23 Did you read the statement: "I have made the
24 foregoing statement freely and voluntarily, without
25 fear, threat, promise of reward or hope of reward of

1 any kind. This is to certify I've read or had read
2 to me the foregoing statement consisting of five
3 pages and a true copy has been given to me."

4 When we got through, did you go over it with
5 him? Yes, I did. Did he sign it? Yes, sir. Did
6 you see him? Did you make him sign it? No.

7 This is page 2. Because I had nothing else to
8 do and no certain time to be home, that was about
9 11 p.m., another person was real quiet in the car
10 while we were going to Josh's house. We pulled up to
11 Josh's about 11:30.

12 Well, you know, that's written, why we pulled up
13 to Josh's house, like, you know, he knew where Josh's
14 house was, and the testimony about he had been out
15 there one time before a couple of weeks ago and
16 Melissa had asked him to leave with somebody else.
17 So he knew that was Josh's house. And how would
18 Danny Catoe have made that up and known he knew that
19 was Josh's house? These are his words. Danny, no
20 offense, is not capable of doing that. Nobody is.
21 Nobody is.

22 We pulled up to Josh's house about 11:30.
23 Another person knocked on the front door and Josh
24 didn't answer. So another -- that's telling, isn't
25 it? He didn't answer it. He was either sleep or had

1 something in his system, but he was out. He didn't
2 answer. So another person said that he was going to
3 pull one of my moves and kick the door. So another
4 person went to the side door and he and another
5 person busted it in. He went in first and me and
6 another person followed him to watch the fight.

7 Josh was asleep on the couch. And another
8 person yelled, hey, bitch. And when Josh looked up,
9 another person hit him with a glass lamp. Right
10 after that Josh was in a daze. And another person
11 drags him off the couch part of the way.

12 This was found in the sofa, one just like this,
13 the glass. And this is what was dropped on his head.
14 It's consistent with the injury on the temple.
15 You've got a picture over here that Doc showed you.
16 When you go back there I want you to sit around the
17 room and pass this around. I want everybody to feel
18 it and touch it because that's what was dropped on
19 his head while he was on the couch and caused these
20 cuts. Go back there. You will actually get to hold
21 up malice in this case. You get to touch it.
22 Because this is what was dropped on him as he lay on
23 the couch. That's real.

24 And another person drags him off the couch part
25 of the way. Then another person started

1 pressuring -- the glass lamp. Josh in a daze. Then
2 another person started pressuring another person to
3 hit Josh with the bat that was in the house. And
4 another person hit Josh in the back of -- signed --
5 indicating that he then back over it -- the head.
6 After that Josh was basically crawling.

7 That's one thing Dr. Sexton said that could have
8 been consistent with, couldn't it? On the socks.
9 Dragged, crawling. Basically crawling trying to get
10 up. And the whole time another person was talking
11 shit to him about being a snitch. Talking shit about
12 him being a snitch. Malice, meanness, evilness,
13 intentional conduct?

14 At that time another person kicked Josh in the
15 ribs and asked Josh where the weed was and Josh just
16 grunted. Grunting. That's when another person asked
17 me to check the room and we started pulling drawers.
18 Another person flipped the mattress and another
19 person was just standing there.

20 Then Josh went unconscious, and I not Josh a
21 towel, got Josh a towel and put it to his head.
22 Another person said F-U-C-K, we don't have anything,
23 and pushed the Christmas tree over. That tree is
24 over.

25 Another person then got mad again, got mad

1 again. He's on the floor beat, bleeding. Because he
2 can't find anything to steal, he gets mad again.
3 Malice? Mad again and took the house phone. But
4 before another person left, he got some frozen
5 chicken from the freezer and put it on Josh's head to
6 try and stop the bleeding. After that we went back
7 out the same way we came in.

8 We left, and another person dropped another
9 person off first and me second, and I guess he went
10 home.

11 Did you and another person and another person
12 have gloves on? Yes. What kind of gloves? Purple
13 Latex. And I had on two pair, white and purple ones
14 on top. Where was the bat that was used to hit Josh?
15 It was in Josh's house. I just looked over there and
16 another person picked it up.

17 Well, you know, they don't get any bonus points
18 for their being an instrument of death in somebody
19 else's house when they break in, any more so than
20 they would if there was a gun there and they picked
21 it up and used it. They came in and used a bat.

22 And, finally, what were you, another person and
23 another person wearing? Black pants and shirts and
24 ski masks. What color was the ski mask? Mine was
25 black and theirs was black or dark blue. Did you all

1 change clothes that night after the incident? Yes,
2 and another person done something with them.

3 And I don't know if anybody is going to get up
4 here and argue he made this up or did that. I don't
5 know. But right here it said, I asked Danny Catoe to
6 write this for me, and this is in my own words as
7 they are written. Robert Cannon, 12-15-06, 9:51.
8 Signature five times. Actually he wrote his
9 signature six if you count the top one when he filled
10 it out. And then when they go back, he reads it over
11 and tells them is it freely and voluntarily given.
12 He looks at it and signs each page. Credibility,
13 believability?

14 And right here, as they read back over it, you
15 actually see a scratch out. It says Chris. And that
16 was a typo or written wrong. And he goes back and
17 writes Josh. And Danny gets him initial it so I can
18 come in here to argue this to you all. Is he making
19 him go over that, too? No. They went over it. No,
20 that's wrong. Let's correct that and change it so
21 nobody will think I cheated.

22 And then what happened? And then what happens?
23 He's just told him some information. And they go
24 talk to see Derrick McDonald. They go see Derrick
25 McDonald. And they didn't arrest him that night.

1 His parents were there. They talked to him. They
2 arrested him the next day. But they didn't arrest
3 him that night. They went to look for another
4 person. And who did they go to look for? Derrick
5 McDonald. On this statement Robert Cannon hadn't
6 even admitted to touching him. I was there and I
7 went in other rooms; kind of easing back, kind of
8 starting off with, you know, I was told about it to
9 start with, don't really know who did it; well, I
10 know something about it. I want to talk to you away
11 from my parents. Okay. I was there, but I didn't
12 really touch him.

13 All right. We're going to start. And we go to
14 Derrick McDonald who they had talked to earlier and
15 he didn't give them any statement. And they go to
16 Derrick McDonald's house. And in the meantime,
17 somewhere during the process, you remember when they
18 left Derrick before, when they left the car there, he
19 said he wanted to talk to his mother, well, his
20 mother called and talked to Danny. They were
21 finishing up with this. Does Danny tell them what
22 they're going there then? No. Would that be a smart
23 thing to do, for a law enforcement officer to do?
24 No.

25 They go to Derrick McDonald's house. They get

1 to Derrick McDonald's house and they have an arrest
2 warrant. They have an arrest for Derrick McDonald.
3 They go inside. Do they tarry? I might have even
4 asked that question. They've got an arrest warrant.
5 The folks are in the house. Do they joke around and
6 talk? No. We have an arrest warrant. They come in
7 with the help of two Richland County deputies I
8 think.

9 And actually I think one of the deputies goes to
10 the wrong son. Danny says, no, that's not him. And
11 they're going out. And they're heading outside. And
12 here, credibility, believability? These officers
13 tell you. Did anybody ask for a lawyer? Well, the
14 mama said, I'll get you a lawyer. But, folks, as the
15 judge is going to tell you, those are individual
16 rights. The person who has to tell you, the person
17 who is being arrested, I want a lawyer. He never
18 told them that.

19 And if these guys are lying and cheating, why
20 wouldn't they even say, well, the mama said I'll get
21 a lawyer as he went out? He didn't say anything.
22 Why did they even tell you that if they're not
23 telling the truth, if they're not being believable,
24 if they're not being credible?

25 They take him outside. Are the parents happy

1 he's arrested? I guess not. The evidence you heard,
2 they went and got him. They brought him out. They
3 took him outside. They put him in the truck and they
4 took him back to the Sheriff's Department. And on
5 the way back to the Sheriff's Department they read
6 him his rights orally, read them like they're doing
7 now, like they did on the stand. Did he say anything
8 then? He said, this is the way we came the other
9 night. This is the way we came the other night.

10 Danny said, well, I don't want to talk with you
11 any more. I don't want to talk with you any more
12 until we get back to the Sheriff's Department. I can
13 either take you to jail or take you to the Sheriff's
14 Department. I'd like to go talk to you.

15 He reads him his rights. You've got to decide
16 the credibility, believability. Credibility,
17 believability. So they go to the Sheriff's
18 Department. What happens when they get to the
19 Sheriff's Department? He reads him his rights again.
20 I know you all don't want me to go through all these
21 again. And I won't. You all are smart. You all
22 know that I went through each one of these questions.
23 Remember the questions I asked and the answers he
24 gave. If you want to hear them more from the
25 stand -- I'm sorry for that -- you can replay any

1 testimony if you all want to hear me talking to him
2 and asking all these questions. But he sat down and
3 he read him his rights at the Sheriff's Department,
4 each right. And he initials it.

5 Did he appear to understand them? Yes, he did.
6 Was he under the influence of alcohol or drugs?
7 Didn't appear to be. Could he understand your
8 questions? Could you understand his answers? Were
9 they timely? And that just means like if I ask you
10 something and you wait two or three minutes. You all
11 know that. Was it appropriate subject matter wise?
12 Yes, appeared to be. Did he sign? Yes, he did. Did
13 I sign? Yes. Did Marthers sign? Yes, he did.

14 Then he started talking to him. His practice,
15 he takes notes as he's talking. And he takes a
16 statement from Derrick McDonald. I think he filled
17 in part of this, and this might have been the officer
18 filled in that part because he left it blank. I
19 can't remember. You all can better than I can. But
20 again, this is to illustrate his mind was thinking
21 where he could write down his social security number.
22 He didn't have to think about it, which shows he's
23 communicating and could at least think. He talked to
24 him, gave his number, gave his address, didn't have
25 any trouble doing it.

1 About 5:30 or 6 p.m. Tuesday, the 12th, 2006, of
2 December, another person and another person came to
3 my house and asked if I wanted to make some money.
4 After a while I decided to go with them. We left and
5 went to Sonic and I checked on trying to get my job
6 back. After we left the Sonic we went to the
7 Wal-Mart on Two Notch and bought a ski mask, and
8 bought a ski mask, and some box of purple gloves. We
9 were still in the parking lot when another person
10 called Zack.

11 You know, they didn't even -- Zack didn't even
12 tell them about this phone call until ten days later
13 when he talked to them. Well, I guess Danny is
14 cheating and got a crystal ball or something and is
15 smart enough to know that Zack is going to tell me
16 this in ten days that he called me. That's when they
17 first learned about it. That's why this is real.
18 You can't get around that.

19 Somebody calls Zack from Wal-Mart.
20 Circumstantial evidence doesn't get any better than
21 that. Remember the example I gave you about it
22 snowing? I'm going to show you some snow here in at
23 the end. It's starting to snow. It's starting to
24 fall.

25 After a while I decided to -- or I checked on

1 trying to get my job back. I'm sorry, y'all. Went
2 to Wal-Mart on Two Notch, Latex gloves. We were
3 still in the parking lot when the other person called
4 Zack and asked him of see if someone was at home.
5 Zack told him that he would call back in ten minutes,
6 but another person called back and told him the
7 situation was being handled.

8 It sure was. That's when they started planning.
9 See that word right there? Planning. We don't have
10 to prove motive, premeditation. They were planning
11 on how we were going to get into the house. Got
12 gloves, got a mask, got a plan. But still didn't
13 know whose house we was going to.

14 Well, that's real. What's the testimony of
15 McDonald? Didn't hang out. Derrick McDonald had
16 never been to that house before. Robert had. Robert
17 said in his statement, well, we went to Josh's house.
18 McDonald didn't know where they're going. Knew they
19 had a plan, knew they were going to mess with
20 somebody and rob somebody, had a plan with some
21 gloves. Did Danny know that he didn't know?

22 I didn't know whose house it was until we were
23 already there. Another person had told me that I was
24 to stay put outside to make sure no one came up. So
25 another person parked beside the road in front of the

1 house and we went to the side door. The door was
2 sturdy and we all -- should be three -- kicked the
3 door on the count of three. Another person and
4 another person went in, and myself and I shut the
5 door behind me and I went to another window to watch
6 out.

7 That's when my name was -- and use common sense
8 there -- and I went into the living room/dining room
9 area. Another person then cut on the lights and
10 picked up a glass bowl with flower petals in it,
11 picked it up over his head and hit Josh in the head
12 with it while Josh was asleep on the couch.

13 Then another person dragged Josh out of the
14 couch, but I first grabbed a bat that was against the
15 wall. I first grabbed a bat that was against the
16 wall and I started hitting Josh in the body. I first
17 grabbed a bat that was against the wall and started
18 hitting Josh in the body. Derrick McDonald's words.

19 Then another person told me to stop to ask Josh
20 a question. Hit him, beat him, now lets ask him
21 something about where the money and dope was. And I
22 called -- I could stop. Again, common sense. Could
23 that be could not stop? Was that a planned thing,
24 too, there? Did they mess that up? I could stop the
25 bat and I hit Josh in the back of the head.

1 You heard how Sexton described those injuries.
2 I also think I hit him one time in the temple area of
3 his head. Josh then started bleeding more, more, and
4 I got scared. That's real. That's when another
5 person and another person started kicking and
6 stomping Josh, kicking and stomping Josh. You
7 remember the injuries Dr. Sexton talked about and
8 they're back there. I won't show them to you now.
9 On the side. Would that be consistent with kicking?

10 Josh and another person kicking. Another person
11 had told me to go get the car and pull it up. The
12 last thing I saw was another person pushing the tree
13 over on Josh. Then another person and another person
14 came out with plastic bags of stuff and told me to
15 pop the trunk. I did and got in the back seat.

16 Then another person dropped me off at my house
17 and gave me some DVD's and stuff that I didn't want.
18 So I burned them and my clothes in a burn barrel at
19 my house. All of my clothes and shoes and everything
20 burned completely up.

21 And all they can out of this is, did you all go
22 check the burned barrel? Well, no, we didn't. But
23 does that mean that didn't happen? He tells them he
24 burns his clothes in the burn barrel after he admits
25 hitting him with a bat?

1 And finally, I asked Danny Catoe to write this
2 statement for me in my own words as it is written,
3 derrick McDonald, 12-16-06. One, two initials signed
4 down here, right here that he read that. No initials
5 here. Do you know what this is? At first there were
6 three pages, three pages of complete things. So he
7 gets him to go back and make it four because he had
8 him write this. Does that make sense that he writes
9 his initials there? Did he make him write all this
10 stuff? Is he over there making him write this?

11 DJM. He changed. He added one more initial
12 there. Changed there. Initialed here. Initialed
13 here. Puts D.J. on the front and then D.J. on the
14 second. I can't explain why. He goes by D.J. That
15 may be a question. It's not reasonable doubt. But
16 it's his hand doing it. Look at all of these and see
17 if they're the same.

18 He is arrested. That all happened the 15th.
19 That's a long day. It look them a long time to get
20 through it. They're out doing their job, looking for
21 what evidence they had that leads them to folks and
22 leads them to other folks.

23 So what happens the next day? And I don't have
24 a blowup of this. But then State vs. Phil Crawford I
25 guess. He talks to Phil Crawford. Phil Crawford

1 reads him his rights. Did he appear to understand
2 them? Yes, sir. Under the influence of alcohol or
3 drugs? No, sir. I can't help the fact his parents
4 went out of town. That's not our fault. That's not
5 my fault. Phil gets him and talks to him. Is there
6 anything you want to add? No, sir. Anything you
7 want to change? No, sir.

8 Ever say it's not his statement that he wrote,
9 Phil, when he took the stand? No, he didn't say
10 that. What did he add? Well, he adds the DVD's,
11 hair dryer, I think phone. I can't find it right
12 now. But you all know what it is. Listed all those
13 things he listed. You all know what they are. He
14 told him about them. Did you threaten him? No. Did
15 he sign it? Yeah, he signed it.

16 He wrote them down. He filled it out. He put
17 what I stole. Did you know what he stole? No. Did
18 you know what was in there? I didn't know what he
19 stole. I didn't know what was in there. Did he give
20 you that information? Yeah. Is that credible? Is
21 that believable? Here's the stuff I took out of
22 there. I do want to add something.

23 And what else do you want to add? Well, I think
24 I want to add, I know I want to add, he grabbed me
25 and I kicked him. I think that's what he said. He

1 grabbed me and I kicked him. So now, think about it.
2 Chris Rust's car went home from Chris. Well, no,
3 sir. No, ma'am. And if you know that now because
4 Chris Rust came in and told you that Saturday.
5 That's credible. You can't get beyond that. No
6 cross, no cross on Chris Rust about that. He comes
7 in at 1:30.

8 Then comes back while he's there. Well, but I
9 didn't really hit him or touch him. And then, well,
10 here's the things I took. Well, okay. He grabbed me
11 and I did kick him. I did kick him. That's the real
12 Robert Cannon as he progresses down the road in
13 trying to tell the truth. And he was arrested.

14 Now, ladies and gentlemen, I am close to summing
15 up. Get my boards out of here. Oh. It's right
16 there. Grabbed me and I did kick him. That's the
17 last thing he told him. Grabbed me and I did kick
18 him.

19 Now, that statement, the circumstantial
20 evidence, the phone calls, all of that is
21 corroborated. But all of that in and of itself is
22 nothing. It's not like you have an inmate or a
23 witness or somebody from jail who is up here and
24 testifying and looking for corroboration.

25 These are sworn police officers here in the line

1 of duty who are telling you what was said to them.
2 So you don't need any more. But, gosh, we've got it.
3 Gosh, we've got it, don't we? You don't need it.
4 But if anybody needs anything else, let me show you a
5 couple of things that just can't be explained any
6 other way, cannot be explained any other way.

7 When you look through these statements, you
8 know, the first thing they said was they went to --
9 do you remember the statements? They go to Wal-Mart.
10 And I meant to do this earlier. You all bear with
11 me. We were still in the parking lot when another
12 person called Zack and asked him to see if someone
13 was at home. Zack told him that he would call back
14 in ten minutes, but he called back and say, hey, it's
15 being handled. It's being handled.

16 Go back here and look at these phone calls from
17 the Waltemath house. I know he's off a little bit.
18 You know, I surely didn't do his testimony right if I
19 was trying to from a trunk number. Trunk number. I
20 don't understand all that, but I know people that do.
21 When an Alltel number calls, it's going to go to a
22 trunk number.

23 And you heard "Dog", Investigator Austin, say
24 that number is 530-1646 which is on that Workers'
25 Comp thing which is Chris Whitehead. It's an Alltel

1 number. And you heard him say he had subpoenaed a
2 lady named Angela Evans that said that 530-1646
3 number had no detailed billing. So if you're going
4 to see a phone call from an Alltel number, which that
5 was, this will go to a trunk line, and that's all you
6 can ever show.

7 And look at this, ladies and gentlemen.
8 9:53 p.m. there's a call from an Alltel trunk line.
9 10:14, a call from an Alltel trunk line. 10:43 p.m.,
10 Wal-Mart receipts, which don't let me forget those.
11 And 11:40:04 a call from an Alltel trunk line. Did
12 Danny know all that was going to be able to show up
13 when he's taking that statement if he's making it up?
14 He said two. Could there have been three calls?
15 Nothing is absolutely perfect. Maybe there were
16 three times he talked to him. Incredible
17 circumstantial evidence.

18 Well, what about the time they've got in there?
19 Not that you question what these folks say. They're
20 up here. You don't need any other corroboration from
21 these officers on the stand. These guys told them.
22 But what did they say? What time did they get over
23 there?

24 Y'all don't get frustrated with me. I'm almost
25 through. We pulled up to Josh's house about 11:30.

1 11:30. Well, I guess, I guess then you knew that
2 Cosmo Bacco, a great American, was going to be out
3 walking, was going to be out walking his son's dog
4 who he doesn't usually keep sometime around the end
5 of Prince of Bel-Air which was about 11:25 to 11:30,
6 tells them I don't know when later. It certainly
7 wasn't then. Cosmo says, I was walking down the
8 street later and talked to him. And, lo and behold,
9 I hear something loud, it sounds like a kick. It
10 sounds like a kick. That's incredible circumstantial
11 evidence, isn't it?

12 And then later hears some yelling and hears
13 voices, male voices leaving. He says he hears what
14 sounds like a muffler or a loud car. He doesn't know
15 what it is. He was a mechanic. I don't exactly what
16 that means, except he knows car. That's incredible
17 circumstantial evidence.

18 What else do we have? You don't need that to
19 corroborate that. But isn't that incredible? The
20 chicken, pictures of the chicken. The tree. And,
21 folks, I talked to you about the phone call. You've
22 got the scene. You've got Dr. Sexton. Dr. Sexton,
23 you looked at these pictures? I looked at them. I
24 do it every time. Show them the pictures. Look at
25 the scene. I know when to shut up. I know when a

1 man has got limitations. I know when to let experts
2 talk.

3 Dr. Sexton, do you have an opinion what
4 happened? Yes, sir, I do. Look at these pictures.
5 You know, Josh Zoch talked to you all. He talked to
6 you all. He didn't come in here and talk to you, but
7 his body talked to you through Dr. Sexton. He talked
8 to you through Dr. Sexton.

9 What happened? Well, the injuries and what I
10 saw on these pictures and the blood spatters are
11 consistent with him being on the couch, that couch
12 being turned over, him being at least once while he
13 was on there. Because remember the spots got formed.
14 Being hit again, that's what makes the blood spatter.
15 I'm not going to go over the pictures with you. Go
16 back and look at them.

17 It's over here. I showed him this picture. On
18 this side it's over here. That's consistent with him
19 getting hit in the back. Did Danny know all that was
20 going to pan out just right? And then he's pulled
21 off the couch and his shirt is up and he's on his
22 back and then he's hit again with his shirt up which
23 means he's been dragged. Of course that's he's gone
24 by the little round table and the glass top has been
25 knocked off and his blood is smeared on the side as

1 he's being dragged off.

2 Socks, blood on top of them, consistent with
3 being dragged. And then you can see it again and
4 again. And the deadly blow probably. You heard him
5 describe how hard that blow had to be to pop open
6 that head. It probably came when he was against a
7 hard surface at the bottom there. Maybe that last
8 below after he wouldn't say where the money and weed
9 was, the money or whatever they were looking for as
10 they ransacked the house. That's corroboration.

11 And finally, finally, as we close in, as we
12 close in, Christopher Whitehead is overheard -- I
13 said it before. I mean he tells Pat "F" sonic. He's
14 overheard telling Mike Jenkins who is in there on
15 checks and got a simple possession of marijuana and
16 has got some other charges which he says are in
17 dispute. He says they're still pending. He says
18 everything has been cleared up. You saw his
19 credibility.

20 He says he was in A2. He's in A3. Harvey comes
21 in here, right there. He says, were they in A pod?
22 Yes, sir. Was he in A2? Yes, sir? Was he in A3?
23 Yes, sir. He was in there one night. He went in
24 there one night because some drunk guy comes in there
25 and doesn't like what's on TV. And then what's his

1 name, Jenkins said on the stand, this ain't no
2 Holiday Inn. And so he puts him there for one night.
3 And he hears him say Josh. He hears him say, we'll
4 be heros when we go back to school. They ain't got
5 anything on us. We'll be heros.

6 That's what -- a not guilty verdict will make
7 them heros. If we go back out we'll be heros. He's
8 bragging about Josh, bragging about killing him,
9 bragging about Rocky Branch.

10 Then he sees him again at a service, telling the
11 priest how much it's bothering him. Did he make that
12 up? Then he leaves out and he sees Christopher
13 Whitehead's name there as he's leaving. And then he
14 sees him again -- I don't know -- some kind of room
15 where they get some kind of shots for something. I
16 don't know. Then he hears that same voice.

17 Even Harvey said, well, it's a little
18 distinctive. He hears that same voice mentioning
19 Josh and Rocky Branch again. Does he know him?
20 Yeah. He's mad about somebody bragging and being a
21 hero about killing somebody. Yes. And he goes after
22 him. That's real.

23 Direct evidence. Let's go beat Josh's ass.
24 That's direct evidence. And finally, you know, my
25 favorite show used to be Columbo. You'd get to see

1 it then. You'd get to see what happened and watch
2 him figure it out. And it would always be, there'd
3 always be something at the end where they'd say, got
4 you.

5 Well, if you look at the two Wal-Mart
6 receipts -- and I don't know what that 31-minute
7 phone call Mr. Whitlark was talking about. I guess
8 somebody was talking to Wal-Mart earlier in the day.
9 It has nothing to do with this.

10 But if you look at these two receipts at the
11 Wal-Mart when you go back there, I almost -- I will
12 get excited talking to you about these. I'm going to
13 get excited. I'm going to get excited. And when you
14 go back and review the evidence, talk about these.
15 Look at them. Every one of you touch these. Because
16 they tell these statements -- in their statements
17 they say we go to Wal-Mart. We go to Wal-Mart on
18 December 12th, 2006. Calls made to Zack.

19 But we go to Wal-Mart. We buy purple Latex
20 gloves and a ski mask. There's no dispute from
21 anybody. There's already one ski mask Robert Cannon
22 has earlier. But on December 15th they tell these
23 investigators we go to Wal-Mart and get purple gloves
24 and ski masks. He can't know that. He's not smart
25 enough. I'm not smart enough. Nobody is smart

1 enough to know that, except the people that did it.

2 This is the case. How do you explain this?

3 They've got a box of purple gloves and a mask. They

4 told him about it December 15th. And guess what?

5 This lady right here, this lady, as she has been

6 trained and taught to do, she don't need

7 corroboration. These guys are good officers. You

8 know they're not lying. These fellows sitting here

9 beat somebody to the death and go into their house

10 without permission.

11 No, we don't need this. But she kept pushing.

12 And I don't care if it's this year, next year, the

13 year after, it wouldn't have matter because thanks to

14 her, they found them. Because it can never change.

15 And that's why it's pure. It's like that snow. This

16 is pure as the driven snow.

17 Because when they went back and we brought in

18 Darla from Wal-Mart, Darla from Wal-Mart, guess what

19 we found? We found that on December 12th at

20 10:43 p.m. -- this is the case, ladies and gentlemen;

21 you can't get around this -- at 10:43:53 there was a

22 box of purple Latex gloves. You heard Darla Harris

23 say that. Well, Darla, can anybody ever go back in

24 time and change that? No, sir.

25 Darla, how many Wal-Marts in the world are

1 there? How many Wal-Marts in the United States? How
2 many Wal-Marts in this state? How many Wal-Marts in
3 the Columbia area or stores? They told about one
4 Wal-Mart on Two Notch. They told them they did it.
5 They did. Darla, how many gloves did you all sell?
6 One box of purple gloves. One on December 12th at
7 10:43. How many boxes of purple gloves were sold in
8 your Wal-Mart on that day? One.

9 That's the case. You can't get around it. They
10 told them that. She doesn't find it until a year and
11 a half later. We tried it next year. I don't care
12 when we found it. I'm glad we found it. I don't
13 think we needed it. That's pure. That's snow.

14 And then 29, 30, 31, 32, 33, 34, 35, 36, 37, 38,
15 39, 40, between 9:39 and 9:49, 20 something seconds
16 later, guess what's bought? Excuse me. 27 seconds
17 right before that -- and I just got them out of
18 order -- guess what's bought? Guess what's bought?
19 What do they tell you in their statements? One
20 three-hole mask. Look at the times. 27 seconds
21 apart. What do did they tell them they bought? A
22 mask and a box of purple gloves. Darla, how many
23 three-hole masks were sold at Wal-Mart on Two Notch
24 on 12-12? One. One.

25 I'm going to use this as an example of

1 circumstantial evidence in every case I try from here
2 on. That's circumstantial evidence, proof of a fact,
3 proof of a chain of facts and circumstances which
4 establishes a fact that they bought those purple
5 gloves and three masks, three-holed masks from
6 Wal-Mart at 12-12, around the same time the calls
7 were being made to Zack Waltemath which they told you
8 about. There is no doubt about it. No doubt about
9 it.

10 As you go back to your room -- and, you know,
11 they can control everything. Oh, they may argue
12 there wasn't a video. It doesn't last for 30 days.
13 You don't have to have a video. I can assure you
14 they'd be arguing the video was wrong. Or like they
15 said, you don't have a recorder or a tape player down
16 there while you're talking to them. Well, I'm sure
17 they'd say, didn't you talk to them before you had
18 it? You said something before you had it or promised
19 them. I'm sure they'd have said that. But this is
20 real. This is real.

21 And they can't control everything. You can
22 control the forensic evidence. Think about this.
23 You can control it by using gloves. You can control
24 it through your lawyer's questioning. It's just a
25 question. You know what? It just hit me. A

1 question is just a question. All a lawyer would have
2 to say is, well, you threatened them the death
3 penalty, didn't you? No. Well, that's a great
4 example of a question is just a question. That ain't
5 a reasonable doubt. As a matter of fact, the only
6 answer you've heard was no. You threaten or promise
7 him? Death penalty? No. That's all you've heard.

8 If you find them not guilty, you'll have to
9 disbelieve every officer you've heard, because that's
10 all you've heard. But one thing they couldn't
11 control just by a question, wearing the gloves or
12 anything else was these. They told them that. They
13 can't control that these are kept by Darla. They can
14 never control that.

15 And not that you all needed it, because the
16 evidence was there. The statements, the phone calls,
17 the beat your ass, we're going to be heros; you all
18 didn't need it. But you got. There's not a
19 reasonable doubt. We submit there's no doubt.

20 When you go back to your jury room, you'll reach
21 a verdict. Verdict simply means to speak the truth.
22 I didn't even pick up this bat and swing it around
23 and put on the gloves. I was going to, but I'm not
24 going to do that. You all know that.

25 When you go back to the jury room, when you

1 reach a verdict, and all verdict means is to speak
2 the truth, my dad has always told me the greatest
3 power we have in life is our power to choose. We can
4 choose to work too much, neglect your family, choose
5 to drink too much, choose to do drugs, what have you.
6 But your greatest power is to choose. Everything we
7 do in life, our greatest power is to choose for
8 ourselves, for others. You all's greatest power.

9 Well, on December 12th, 2006, these three
10 defendants chose for whatever reason, maybe they
11 thought he was snitching on them; I tell you what,
12 from the evidence and them being in Columbia and over
13 there was a Columbia narc, the inference is he wasn't
14 even snitching. And he wasn't snitching on them if
15 he was snitching. But they decided they were going
16 to go get him, going to beat him up. They ended up
17 killing him.

18 And the judge is going to charge you about the
19 hand of one is the hand of all. The act of one is
20 the act of all. If you go to rob somebody and you
21 don't go inside and they get robbed, get killed,
22 you're just as guilty. Act of one, the hand of one
23 is the hand of all. Doesn't that make sense?

24 When they chose to go in and hit and hit and hit
25 and hit and hit and hit and rob, they made their

1 choice. Shortly you'll be making your choice,
2 exercising your greatest power. And it's the end.
3 And we ask you to use your common sense, determine
4 what's credible, believable, determine the
5 corroborating evidence if any you need and return a
6 verdict that says to all three of these defendants
7 you killed Joshua Zoch maliciously with a bat and
8 dropped the potpourri bowl; you killed him, you were
9 angry, you didn't find anything, you went in his
10 house without permission, and then you went away.
11 You left your job, packed up and were heading away.
12 And we're going to find you guilty. Thank you?

13 **MR. KENDRICK:** May it please the Court?

14 **THE COURT:** Yes, sir. I was going to give
15 Mr. Meadors an opportunity to collect his -- all
16 right, Mr. Kendrick.

17 **MR. KENDRICK:** As you all know, my name is Josh
18 Kendrick and I represent Mr. Cannon. I like to watch
19 Mr. Meadors do a closing argument. He is dramatic.
20 He knows how to bring that drama to the courtroom.
21 He started out in his closing argument talking about
22 what we had been doing in this trial, what we were
23 going to say, what we were going to say in this
24 closing, the smoke screens we've been throwing up,
25 the accusations we've been slinging around, I assume

1 to get you to think that we have done something
2 improper.

3 And there was a time in my practice when the
4 solicitor would say that I'd get up, and I'm still
5 not that old but I was a little bit younger, and I'd
6 get fired up and I'd yell and I'd scream and I'd
7 waive my arms and I'd try to bully a jury into
8 believing me and believing my client. I'd try to
9 convince you to overlook things. I'd try to convince
10 you that because I could be louder, because I could
11 be in the right place at the right time, swing my
12 hands the right way, show you the right poster board
13 that I was the person that was right.

14 Since that time I have learned a little bit from
15 lawyers like Mr. Meadors and other lawyers. And I
16 don't know if I've improved at all, but that's not
17 really in my bag of tricks. One of the things that I
18 was thinking about in this case over the week was,
19 you know, how did we get here? What is it that we're
20 doing? What is the problem here? What is it that
21 that's creating all of these questions?

22 Well, I am a fan of books, probably because I'm
23 a nerd. And an old detective named Sherlock Holmes
24 who a lot of you have probably heard of, he is an old
25 British guy that solved most of his cases. And he

1 had a saying that he lived by when he was
2 investigating his cases, that he could never come up
3 with a theory before you have all the facts. Because
4 what happens is you start twisting the facts to match
5 your theory instead of finding the theory that
6 explains your facts.

7 Now, that's what happened here. And it happened
8 in December. It happened the week of May 5th. It's
9 still going on. We are looking at these facts and
10 they are trying to convince us to make these facts
11 fit a theory. That isn't how we do this.

12 From start to finish there have been problems
13 with what people are saying, from Mr. Waltemath
14 getting up here and saying, I got phone calls from
15 between 7 and 8, when the phone records that are in
16 evidence clearly show that couldn't have happened.
17 All the way 'til this morning when a client gets or a
18 person or witness gets up here and says he doesn't
19 have any pending charges. I asked him about the
20 Clerk of Court records that show he does. Well, I
21 don't know. You didn't hear anything else about
22 that. They glossed it over. Because if he came in
23 here and he's lying, if he's not telling the truth,
24 well, that doesn't fit our theory. It doesn't help
25 us at all.

1 It is so important that we follow that rule that
2 you all have been following all week. And the judge
3 every night when you go home has told you, don't
4 discuss this case with anyone. Don't come to any
5 decisions on this case until you've heard all the
6 evidence. Why does he tell you that? To avoid that
7 danger, the danger that you might say, you know what?
8 Man, that was a great opening argument. That was
9 dramatic. That must have been what happened. And
10 then you start looking at these facts in the same
11 slanted view that they have been presented to you
12 this week. You make these facts fit the answer
13 instead of making them give you the answer.

14 Ladies and gentlemen, the reason we're asking
15 these questions, the reason we're cross examining
16 these witness is absolutely not because I have some
17 desire to create a smoke screen, not because I'm
18 trying to distract you, not because I'm trying to
19 throw out a red herring. I don't think I have any
20 more cliches for this type of action. But that's
21 what I was just accused of. From right here when I
22 was sitting right there, that's what I was accused of
23 doing.

24 I was accused of doing that because I want an
25 answer. I do not have the luxury of looking at these

1 facts and making them fit a theory, because I don't
2 have one. All I can tell you is that my client did
3 not do this. I don't know what happened. The State
4 is in a different position because they're coming in;
5 as Mr. Meadors just so dramatically told you, he
6 thinks my client committed a crime. And he comes
7 with these poster boards and he brings you this
8 testimony, he brings you these facts that will help
9 support that.

10 I don't have that luxury. I have got to ask
11 these people about the shortcomings of this
12 investigation. I have got to ask them why they did
13 certain things and why they didn't do certain things.
14 Why? Because that's how we get to the truth. That's
15 how we get to the verdict. That's how you speak the
16 truth. You don't know about this case. You all
17 aren't allowed to know about it. All you know is
18 what comes from that stand.

19 They say the best way to get to the truth is
20 through cross examination. It is one of best methods
21 we have for finding the truth. Following right along
22 with that is a jury trial. Because you are asked by
23 the judge, and I guess we all, at least in my world,
24 when the judge asks you to do something it's not
25 really a request. It's something we have to do. And

1 I think you all have gotten that. You've got to what
2 he tells you to do. Those are your instructions.

3 You all went through a long process to get here
4 and we've got you sitting in this box and you've got
5 to do what we asks you to do. And he says don't
6 deliberate, don't think about this case until we're
7 at the end. You all are in my position. You don't
8 have the luxury either of saying that's what
9 happened. Let's make the facts fit.

10 So, why are we asking these questions? Why are
11 we exploring what really happened here? Why are we
12 trying to find out what went on in this
13 investigation? Because someone has to. Because
14 until May the 6th of 2008 and ending today it has not
15 been done. Nobody has looked at this. Nobody has
16 asked these questions.

17 Look at the testimony that you heard. Allen
18 Brown can't tell us anything. Cosmo Baccamo, he saw
19 the people come in and go out. In ten minutes he
20 heard two voices. And they asked him. He got up and
21 he asked him again, are you sure? How many did you
22 hear? Two voices. Oh, it could have been more. He
23 said he heard two voices. That's what's in the
24 record. Two. And from the first noise to the last
25 noise, ten minutes. Ten minutes.

1 He heard a car and he said he heard a car with
2 what he referred to as extensions, custom pipes that
3 make a car loud, make the car louder. Whoa, whoa.
4 Wait a minute. What if there is a hole in the car or
5 something? Yeah, I guess so. But he was pretty sure
6 that he heard a car with custom pipes.

7 Now, I have no idea how you would make that
8 determination. I don't know all about cars.
9 Mr. Baccomo does. He told you that from the stand.
10 He's a mechanic by trade. He knows vehicles. He
11 knows what he heard. He saw a little car with custom
12 pipes. That's not what Mr. Whitehead drives. That
13 doesn't make sense in their case. But if we dispute
14 what Mr. Baccomo saw as far as the size of the car,
15 we put some old pipes on them, then it does fit the
16 theory now. We've taken those facts and we've
17 twisted them a little bit to match our theory.

18 Mr. Waltemath comes up here. He got those phone
19 calls between 7 and 8. What have they told you to
20 help prove that those calls were made? There is a
21 trunking number that could belong to any Alltel
22 customer on the Alltel network? And those calls were
23 made two hours after Zack says they're made. Ahh.
24 But if we make those the calls that Mr. Whitehead
25 made and if we put them around that timeframe where

1 those trunking numbers are, they fit our theory.
2 Even though with have no way of telling whose phone
3 that was and that the only witness testimony about
4 those calls in fact doesn't link to that night. The
5 times are wrong. Well, if we twist it a little bit,
6 it helps us.

7 But we don't have that luxury. We don't have
8 the ability to take the facts and make them fit our
9 theory, because we're not allowed to have a theory
10 right now.

11 Ms. Heathcoe comes in and insists that this
12 injury happened on the 13th. Why? Well, because
13 that's the night after the killing happened. So if
14 it did, it's great evidence. The only problem is the
15 official form from the Workers' Comp Department of
16 South Carolina says the 12th.

17 Think back on the testimony. Cecile Trapp said
18 the 12th. And the State asked her, whoa, whoa, whoa,
19 don't you mean the 13th? Oh, yeah, I mean the 13th.
20 Think about what she said. She didn't remember
21 anything about this week. Ms. Trapp -- I wrote it
22 down. I write the whole time on these pads. She
23 really didn't remember much. I was at the Sonic for
24 about ten minutes or so. Oh, yeah, I saw everybody
25 out there, saw them all. Well, they were all

1 separate according to any testimony we've heard, but
2 she saw them all ten minutes. She can't verify they
3 were there and doesn't really remember their being
4 there. She doesn't remember. She doesn't know.

5 I mean, what happened on the 12th? Oh, wait
6 wait, wait. I meant the 13th. The forms from the
7 South Carolina government say the 12th, filled out by
8 Ms. Heathcoe. I'm not calling her a liar. I'm not
9 sitting here accusing her of anything. But I think
10 she made a mistake. And I think we're taking that
11 mistake and we're trying to fix it so it fits with
12 what we want to happen here. And that isn't how this
13 works. That isn't what the 12 of you all are allowed
14 to do. It's not what I do.

15 Ms. Trapp talked about being inside of the
16 victim's house. She talked about seeing some guy's
17 I.D. and a social security number that was
18 photocopied and then she got nervous. And there is
19 testimony in there that Mr. Zoch was working for the
20 police. He was trying to catch somebody who was
21 selling drugs to him. And the State accuses of us of
22 putting him on trial and trying to besmirch his name
23 and doing something horrible.

24 Well, what we're doing is we're trying to do
25 what hasn't been done yet. Up to this point nobody

1 has done that. Nobody has explored what he was
2 doing, a clearly dangerous activity. Nobody has
3 looked into that. Nobody picked up the phone and
4 said, hey, Richland County, you guys got a narc
5 working in Kershaw? Who is he working for? Nobody
6 did that.

7 Why? Because that wouldn't really fit. We'd
8 have to maybe change our theory. And we don't want
9 to change your theory because we like it, because
10 it's easy, it's wrapped up. They're not going to do
11 that. The evidence is there that he was in danger.
12 But we don't know, so I have to ask these questions.

13 Melissa Davy, she testified. Again, she had bad
14 blood with my client. She didn't know what Mr. Zoch
15 did. And I'll be honest with you. I don't think you
16 heard any evidence about it at all. But somebody
17 told the police that because they got his name from
18 somewhere.

19 I asked Ms. Davy questions about phone records,
20 about where she was and timelines. And that doesn't
21 make me a bad person. It doesn't mean I'm trying to
22 throw a smoke screen up or sneak something over. I
23 want to know what happened. I want to know why she
24 can't explain these holes in her story. I want to
25 know why the documentary evidence doesn't support

1 what she says. I want them to answer that question.

2 And I've been thinking maybe I'm the only
3 person, and my co-counsels that Mr. Meadors also
4 pointed out were asking these questions. But I hope
5 all 12 of you will join us in looking for the answers
6 to these questions, trying to figure out why these
7 things don't make sense. I think you have to join
8 us. I think you swore you would at the beginning of
9 the week.

10 Mr. Sellers says that this house was thoroughly
11 ransacked. They went through every bit of it. I
12 asked him. I broke my rule. I really wasn't sure
13 how he was going to answer. I said, well, you went
14 through every inch of this. This is worse than the
15 usual? He was like, yep, the worst I've ever seen.
16 Pay particular attention to that office that was
17 tossed. Somebody looking for something. Somebody
18 who was scared. I don't know. We don't have an
19 answer to that. Will we? Not now. They didn't give
20 us one. I tried to get one and I didn't. And I've
21 actually I guess been accused of some terrible thing
22 for doing that.

23 Mr. Catoe gets up here. And I don't have any
24 personal problems with Investigator Catoe. I don't
25 even really know him. I'm not from Kershaw County.

1 But I'll tell you what. That's the man who's in
2 charge of finding out who commits crimes. And when
3 he thinks he's found that out, he has the power to
4 take somebody into custody. Then one day they end up
5 here in this trial which is a very serious business.

6 So I would not stand up here and apologize for
7 asking him those tough questions. I don't feel
8 guilty about it. I don't feel like I did anything
9 wrong. I don't feel like I hurt his feelings. I
10 have to do that. Like you swore in front of that
11 judge that you would do your duty, five years or so
12 ago I swore in front of some judges that I would do
13 my duty. And I take that very seriously.

14 I have rarely ever given an oath. So when I
15 have, I've thought about it. So if that means I have
16 got to make him uncomfortable, if that means I've got
17 to seem like I'm being mean to him, I can't apologize
18 for it. I have to do it. And I think that -- forget
19 about my client deserving me doing it; you all
20 deserve me to do it.

21 We've got you all stuck in a Kershaw County
22 courthouse for five days in a row not for no reason,
23 ladies and gentlemen. You deserve it. You deserve
24 for me to ask those tough questions.

25 He got a list. Catoe tells us we knew we've got

1 the right guy because we got a list. We got a list
2 of stuff he look, like the house phone. You all look
3 through these pictures back there in the jury room.
4 I don't remember which picture it is. 68, 69. Take
5 a look at it. See what's in there. See if there's
6 anything in that picture that they claim was stolen
7 from the house. Does that matter? I don't know.
8 Maybe not to them. Maybe it doesn't matter to you.
9 But it matters to me. Because you've got my client
10 here in a pretty serious situation. And I'm pretty
11 sure I want the facts to support what the State is
12 asking you to do to him. And if they don't, I'm
13 asking you not to convict him. And they don't.

14 They don't support the findings that they want
15 you to make, that big dramatic finding that says the
16 end. They don't support the end that he wants you to
17 give.

18 You heard him on the stand under those tough
19 questions. He didn't do any further investigation.
20 And he said, I quote, he got what he needed. Well,
21 you know what? The investigation that resulted in my
22 client sitting at this table took less than half the
23 time we've been sitting here. Humor me. Look into
24 some of these questions. Find out about these
25 people.

1 You know, the solicitor got up here, and I guess
2 he was daring me to say rush to judgment. Because
3 I'll agree. When you predict what somebody is going
4 to say, then they say it, it seems kind of stupid.
5 He's already told you. It steals my thunder. Well,
6 ladies and gentlemen, I don't know what happened
7 there. I don't even know you can call what they did
8 a judgment. It was just a little decision. They
9 didn't have all the facts. They still don't have all
10 the facts. I don't know why.

11 On Wednesday at the scene of the crime nobody
12 talks to the three people who found the body at all.
13 Nobody questioned them about anything. Again, I'm a
14 jerk for asking him about that, making a big deal out
15 of it.

16 Well, Ladies and Gentlemen, there is a person
17 who has been killed. Let's see what happened. Let's
18 try to find out. The next day something happened
19 that puts my client in that chair. Somebody says
20 something to give them the name Robert Cannon. And
21 wherever that investigative file is that he has,
22 there is nothing in there. Where did the name come
23 from? I don't know.

24 It's funny that Mr. Meadors says I'm accusing
25 him of making it up because I don't know if that's

1 what I'm doing. I don't know what he did to get this
2 out of my client, because it's not there. And you
3 saw him. You got the opportunity to look at the
4 demeanor when he was answering those questions. He
5 didn't want to answer those questions. Maybe I
6 wouldn't either. But he didn't want to answer them.
7 Because there were failings in this investigation he
8 didn't want to talk to about. Because if the
9 investigation was no good, then what do you guys
10 think about the result? Can we trust it? I don't
11 think we can.

12 And you all are going to have to make that
13 decision. But look at what happened to get these
14 people here. Look at the facts and come up with a
15 theory. There isn't one. We don't know who did
16 this.

17 Mr. Marthers came up here and testified, and he
18 didn't say anything. He didn't want to answer my
19 questions. And I don't know what to do on that.
20 Again, I can't apologize for doing my job if he
21 didn't want to talk. He didn't know anything. He
22 didn't hear anything. He didn't see anything at all.

23 And that brings us to the part that I think you
24 all would assume troubles me the most, and that's
25 that my client made a statement in this case. I will

1 be honest with you because that's what you deserve.
2 I said something at the beginning to you, that you're
3 a jury. You have a powerful responsibility, and you
4 deserve a certain level of respect from the attorneys
5 in this case. And I will tell that you statement
6 could be troubling.

7 But look at how it was taken. The judge is
8 going to charge you on the law, that if that
9 statement was involuntary, if you have any doubt that
10 that statement was involuntary, you can't consider
11 it. And he's going to tell you that if you think any
12 slight threat or promise of leniency was made, then
13 that's enough for to you say it wasn't voluntary.

14 Now, why does that matter? Ladies and
15 gentlemen, that is not a technicality. That is not
16 some loophole we've come up with. Because if it was,
17 I would have sat down a long time ago. Because if I
18 thought you all were just going to say that's a
19 loophole, you all wouldn't buy that. I don't want
20 you to. I'm not here for loopholes. I'm not here
21 for smoke screens. I'm here to see if we can find
22 the truth.

23 But a 17-year-old kid who has never been in
24 trouble with the police is told that he's just going
25 to be a witness to something at his house after over

1 an hour of questioning, and you're just going to be a
2 witness because you've got nothing to worry, why does
3 the law require no threats or promises of leniency be
4 made? Because it changes the way we think.

5 The solicitor would have you believe that no one
6 would confess to this crime unless they did it.
7 Really? Think about your experience in life. People
8 don't ever admit to something they did wrong for
9 unknown reasons when it's not true? In your head
10 you're like, wow, this is pretty serious. You're
11 right. It is pretty serious. But my client is
12 pretty young, pretty inexperienced. He doesn't know
13 what's going to happen. He has no idea.

14 And of course these officers came up and denied
15 that they did that because they know the law just as
16 well as I do sometimes. They know they're not
17 supposed to do that. But when you're under pressure
18 to get a conviction, to get an arrest and make
19 something happen, maybe you cut a corner.

20 Look at the circumstances. I was going to
21 explain to you all about circumstances and whatnot,
22 but I don't need to any more. I want you all to
23 think about what Mr. Meadors told you and listen.
24 And that's the best explanation. I couldn't have
25 done it as well if I tried.

1 So look at the circumstances surrounding what
2 happened and how the statement was given and tell me
3 if you really think it was a voluntary thing that
4 happened. My client is in his house denying he's
5 involved. I didn't do it. I didn't do it. I didn't
6 do it. I didn't do it. He says he wants to get away
7 from his parents so we can get him some help. He'll
8 tell us more. He doesn't want to get away from his
9 parents. He wants to get away from the cops. He's a
10 17-year-old kid sitting in his house, never been in
11 trouble with the law going, oh-oh, these guys are in
12 here sweating me over some murder I heard about. He
13 didn't know what to do. Because he's young. He's
14 17. At the time you don't know what you're doing.

15 Think about the decisions you made when you're
16 17. I try not to think about the ones I made. But
17 you don't make the right decisions. You don't have
18 the maturity level to. He goes outside with these
19 offerers when they mention -- I didn't bring this up.
20 They put that in their notes. And really because
21 they put something in their notes, that then makes
22 them, they couldn't possibly have done anything
23 wrong? Under that theory, they'll never do anything
24 wrong. They're just cops. They can come up with an
25 argument either way, that they wouldn't have done it

1 if they wouldn't have put it in their nets. Maybe
2 they left it out. Maybe they put it in. Who knows?

3 Here is the simple fact. In their notes it says
4 he wants to get some help. My client is talking to
5 Investigator Catoe, and then Catoe's boss shows up
6 and has a conversation with my client. And my client
7 says, aha, I'll tell you all what you want to know.

8 What you've heard is that there is no way he
9 could have given that statement without having been
10 there. I'm not going to insult your intelligence. Look
11 at the statement. Look at the evidence from the
12 scene. They knew what happened that night. They had
13 theory. They just didn't have a person to arrest.

14 After they make this arrest with these facts,
15 what supports what happened? I mean, I appreciate
16 what Mr. Meadors says about we can't congratulate
17 them for getting away with something. But really?
18 No forensic evidence makes them more likely to have
19 done this? That's silly. That's insulting. We know
20 about forensic evidence in this day and age.
21 Everybody does. You cannot tell me that the lack of
22 it makes something more likely.

23 Again, under that theory, they're always going
24 to win; much like he said under some theories you'd
25 never convict everybody. Well, under some theories

1 you would convict everybody. And we surely don't
2 want that to happen.

3 Everything that went into that statement was at
4 the scene. I'm not saying that Investigator Catoe
5 made this up out of the blue. No. But he knew what
6 questions to ask. And all he needed was a yes, a
7 maybe or a kind of, and he could get this statement.
8 He had plenty of time, from 6:47 to 9:51, three
9 hours. It's a five-page statement, not a 30-page
10 statement. Five pages. That seems long when it's
11 this big. But look at it on the piece of notebook
12 paper. It's not going to take ten minutes to write
13 it down.

14 So they talked to you about this exciting
15 evidence that we have from the Wal-Mart store, this
16 receipt. Could not get any better than that, right?
17 Well, we've got to switch here again. I didn't hear
18 how we're going to pull this one off. So let's think
19 about it for a minute.

20 They claim my client already had a ski mask.
21 And they claim the other two clients had ski masks.
22 But only one was bought. But if we blow the receipt
23 up real big in front of you and wave it around and
24 get excited about it, maybe you won't think about
25 that. That's why I'm here, to remind you of these

1 holes.

2 Because that receipt by itself they say solely
3 makes this statement absolutely credible. It pins my
4 client to the ground. He cannot escape that Wal-Mart
5 receipt. Except for the fact that Wal-Mart receipt
6 doesn't accurately reflect their theory of the case.
7 Whether it was hoping I wouldn't point it out, was
8 hoping you wouldn't think about it, they didn't give
9 you how that fits into their theory. We didn't get a
10 chance to twist that fact.

11 And I will tell that you the reason we probably
12 didn't get a chance to do that is exactly what
13 Mr. Meadors described that evidence as. It's pure
14 documentary evidence. It can't be twisted. But if
15 we make it exciting enough, if we make it case
16 breaking enough, you'll lose sight of the sight of
17 the search for the truth. And they think you'll find
18 it. You'll think it was given to you when it wasn't.
19 I am the one giving you smoke screens? That doesn't
20 appear to be the case.

21 The pathologist, Mr. Meadors tells you, that's
22 who they used to have the victim talk. And that may
23 be the case. But one thing, you saw me when it was
24 my turn to ask him a question. I'm not going to ask
25 Dr. Sexton questions. He's been a doctor a lot

1 longer than I have been a lawyer. He's one brilliant
2 man. But there is one answer that he will never,
3 ever be able to give. Who did it? He doesn't know.

4 I suppose if there was forensic evidence you
5 might be able to tell. But as Mr. Meadors so ably
6 pointed out to you earlier, there is not. I'm going
7 to leave that to you to tell you what it means, to
8 think about. Does it make it more likely it
9 happened? I don't think so.

10 We finished up this trial with Mr. Jenkins. And
11 that, ladies and gentlemen, for lack of better words
12 is almost ridiculous. He clearly admits he knows
13 this family. He knows this victim. He comes up with
14 a perfect story because without that story the person
15 he is talking about, there's nothing against him at
16 all. There is not a shred of evidence.

17 But you heard what Mr. Meadors was saying, when
18 he said it out in dramatic language, the kind of
19 stuff that makes you forget the reality of what
20 happened right here in this chair. And let's think
21 about the difference between what happens. We didn't
22 have to ask him the tough questions. He couldn't
23 answer them, period. I don't know you. Mr. Meadors,
24 I don't know anybody from your office. I don't know
25 you guys. I don't need any help. You've got some

1 pending charges. You're going to need some help
2 eventually, right? No dispute of that. He was shown
3 records from the Clerk of Court and said, I don't
4 know. And nobody fixed it. There's no dispute about
5 that. He got up in that chair and he lied to you
6 all. He lied to you. He lied to you about his
7 motivation to come in here and be a witness. Is that
8 important to you? Does it bother you? Because he's
9 a pretty important witness because they've got
10 nothing here. They've got nothing.

11 But we take this guy; we wrap it all up all
12 neat. Not today, ladies and gentlemen. He's a liar.
13 Not only did he lie about his prior record, thinking
14 of course, well, maybe he didn't lie about what he
15 was telling us. Really? Because this officer who is
16 sitting right up here with the Clerk of Court got up
17 there and testified and told us the truth. He's not
18 on anybody's side. He just came in here and told you
19 what he knew. And you have heard from one of my
20 buddies over here at the table asking him questions.

21 He asked you who was in the cell next to him? I
22 don't remember that. Is that a common question for
23 somebody to ask him? Maybe he gets asked all the
24 time. No. That's a pretty uncommon question.

25 So, Mr. Jenkins, the liar, he lied to you again.

1 But this time the lie relates directly to this case.
2 We haven't been able to twist that one either. And,
3 luckily, we have officers like this. We have
4 somebody with nothing to gain or lose but just wants
5 to tell the truth. It would have been very helpful
6 for him to get up there and say, yeah, I think I
7 remember that. And you know what? I wouldn't have
8 spent an hour cross examining him, because how do you
9 cross that? But he got up there and said, I don't
10 remember that. I don't remember that guy. Why did
11 they even put that guy up? You can't believe
12 testimony like that.

13 He said he didn't tell anybody about this ever.
14 Investigators from the Solicitor's Office got him.
15 He told somebody. He came forward somehow. But he
16 didn't want to tell us the circumstances under which
17 this information got to the solicitor. Through the
18 grapevine? Hey. Through the grapevine we find out
19 there's a critical witness in a major criminal trial.
20 Does that make any sense?

21 I say that's another piece of evidence that you
22 can't quite twist to make fit other than to say that
23 that was just -- that's a guy who just wants to score
24 something. He wants you all to settle it for him
25 because he can't settle it. He could barely get up

1 there and competently testify because he's a liar.
2 Don't accept that. We're not in here for vengeance.

3 And Mr. Meadors told you that one of us, and I
4 think it's usually Mr. Whitlark he was talking about,
5 who got up here and did just what I had to do and
6 help me seek the truth, help find out what happened,
7 do what the State won't do.

8 He talks about that 31-minute phone call to the
9 Wal-Mart earlier in the day. That doesn't matter.
10 We got so excited about our evidence when yesterday
11 we find out that we got a link to Wal-Mart. We got a
12 link to it. We know what happened. But wait a
13 minute. One of the witnesses who either lied or
14 doesn't remember what happened, he also has a link to
15 Wal-Mart. Forget about it. It's a smoke screen.
16 It's not a smoke screen. It's another fact that
17 can't be twisted. It's another fact that can't be
18 twisted.

19 The argument here, Mr. Meadors has done a very
20 good job. I have nothing but respect for him. I
21 love working against him. He is twisting these
22 facts, and it's not malicious. He is not doing
23 something evil. He's trying to win his case. I am
24 not trying to win this case. I am trying to find out
25 what happened. And when there is no answer to what

1 happened, we cannot convict. It happens sometimes.

2 It is one of the great disappointments of the
3 jury trial that we come in here, and by the last
4 commercial break we don't have the Matlock moment
5 that leads us to the actual verdict; everything
6 wrapped up neatly, somebody confesses, we figure out
7 who did it. In a real trial, that doesn't always
8 happen. And I apologize. Because I know that would
9 probably make this week a lot easier if you all had
10 that exciting moment. But sometimes we can't find
11 out what happened.

12 But our concern here is did my client, Robert
13 Cannon, commit these crimes? If you don't know, then
14 you can't convict him. If you are not sure, then you
15 can't convict him. It's about the levels of
16 certainty. It's about what you do with the
17 information you have that would make you certain.

18 When I was a kid my brother and I used to put
19 puzzles together. My brother is a little more
20 patient. He still is. He's not that little anymore.
21 But he would jam all the pieces together and be done.
22 So I guess he'd go outside and play basketball or
23 something. And I would try to show him you've got a
24 picture here, there's no doubt about it. But hold it
25 up, man. There's a bunch of holes in it. The pieces

1 didn't fit right. He tried to jam them together.

2 Each one of those holes is a reasonable doubt.

3 Now, ladies and gentlemen, because I didn't come
4 up here and give you some alternate story about what
5 that reasonable doubt means, I don't have to do that.
6 The law says you can't even consider that. I just
7 have to show you that the State hasn't proven its
8 case. They haven't given you an answer. They have
9 not found the truth for you. And because they
10 haven't, you cannot convict these people.

11 My client, Robert Cannon, is not guilty. Not
12 guilty. They haven't proved it. That statement
13 wasn't voluntary. The facts don't fit this theory.
14 And they've twisted it for five days in a row now.
15 I'm going to ask you all to take those facts, untwist
16 them, and return a verdict of not guilty. Thank you.

17 **THE COURT:** Mr. Riley.

18 **MR. RILEY:** May it please the Court. Ladies and
19 gentlemen, here we are approaching the end of a very
20 long week, a week that's been an ordeal for everyone
21 concerned. It's been an ordeal for the Zoch family.
22 It's been an ordeal for the defendants' families, the
23 McDonalds, the Cannons, the Whiteheads. It's been an
24 ordeal for all of us that have been working in this
25 courtroom.

1 Pretty soon the work we've been doing will come
2 to an end, and you'll be charged by the judge and
3 asked to retire to your jury room. And your real
4 work will just be beginning. You'll have to decide
5 the fate of these defendants.

6 The difficulty in a case brought by the
7 government that involves three defendants such as
8 this one is that inevitably there is a lot of
9 repetition. And I'll be repeating a lot of things
10 that Mr. Kendrick said. And Mr. Whitlark who will
11 follow me will probably be repeating things also.
12 That's just inevitable. And I ask you to bear with
13 me.

14 I wanted to first of all mention to you the
15 issues of credibility and believability of witnesses
16 that have been mentioned multiple times. There was
17 one point where I was convinced that what I wanted to
18 do with my life was to be an historian. And one of
19 the first things that aspiring historians are taught
20 is the unreliability of human memory, that the more
21 distant in time a person's corrections of any event,
22 the more unreliable they are.

23 We are now 18 months or more away from the
24 events that we're in court and have been in court all
25 week about. Documents, on the other hand,

1 contemporaneous documents, do not lie. They don't
2 have fallible memories. It's all there in black and
3 white. It's written on a piece of paper. It's a
4 record, an indelible record, not like the human
5 memory which is very flexible, very fallible.

6 What does that document that was completed as to
7 Christopher Whitehead's on-the-job injury show? In
8 three different places, in three different places on
9 that document it shows the date of December 12th,
10 2006. Pat Heathcoe remembered a different day,
11 remembered Christopher telling her about his
12 on-the-job injury on the 13th or the 14th. The
13 document doesn't support that. That's an official
14 Workers' Compensation Commission document, a
15 government record. You will have that with you back
16 in your deliberation room. You'll be able to look at
17 it. You'll be able to see that in three different
18 places it says 12-12-06.

19 The other issue, the phone calls that Zack
20 Waltemath testified to that he alleges were made on
21 the night of the 12th to him by Christopher
22 Whitehead, he says he was called two times between
23 7 p.m. and 8 p.m. You will have with you back there
24 the actual phone logs. They do not show that. That
25 is a contemporaneous document, probably computer

1 generated. That isn't Zack Waltemath's memory
2 speaking. That is a document speaking. It shows
3 what it shows. It isn't subject to change. I ask
4 you and urge you to remember these things when you're
5 deliberating on Mr. Whitehead's case.

6 The folks who work at, or did work at Sonic, the
7 State presented Allen Brown and Chris Rust. Of
8 course a lot of these folks do still work or did work
9 there at the Sonic. Allen Brown and Pat Heathcoe,
10 both of them said Chris Whitehead was a good
11 employee. Allen Brown testified as to the fact that
12 he knew for a fact that Chris Whitehead also was
13 working a second job working part time as an
14 assistant manager at a movie theater. He was an
15 eager, industrious young man, working two jobs.

16 Pat Heathcoe testified that she was about to
17 give him keys to the store so that he could open up
18 the store in the morning. She believed in his
19 abilities, his responsibility as an individual that
20 much. She said that he was reliable, dependable, a
21 good employee doing a good job, had gotten several
22 pay raises and was about to be given keys to the
23 store so that he could open up each morning.

24 Cecile Trapp, she also was a Sonic employee at
25 the time. She testified that Christopher left

1 abruptly on Friday, the 15th, without any
2 explanation. But yet there was an explanation. He
3 had told her, and she had stated to the police, that
4 he had gotten word that a cousin of his had been
5 arrested, a cousin of whom he was very close. He was
6 upset. He was disturbed. He was worried. He was
7 concerned. He knew that his cousin needed money in
8 order to post bond. That was a distresses piece of
9 news for Christopher Whitehead. She also admitted
10 that she had walked off the job without explanation,
11 without a word, abruptly left work on two occasions.
12 It wasn't something that Christopher Whitehead had
13 done and no one else had done. She admitted she had
14 done it on two occasions.

15 Okay. Melissa Davy, the young lady has been
16 through a great ordeal. And I don't have anything
17 but sympathy for what she's been through. She in
18 many particulars during her testimony; here again, we
19 get back to reliability of the human memory, she was
20 inconsistent, stumbled over certain things, had
21 certain things wrong or recollected them incorrectly.
22 Josh Kendrick pointed out one particular error in her
23 recollection of the events of that week.

24 Then we get into the police witnesses. I
25 couldn't help but notice, I wanted to draw your

1 attention to the fact that when the government
2 attorneys were directly examining the police
3 officers, it was, yes, sir; no, sir; here, sir; up,
4 sir; down, sir; yes, sir, to the left, to the right.
5 When they were being questioned by the defense
6 attorneys it was like trying to move a mule that
7 didn't want to move. Let's think about that answer,
8 was generally the way they would begin to respond to
9 each of our questions. It was an unfortunate thing.
10 I just couldn't help but remark on it.

11 When they approached Christopher Whitehead on
12 the 15th, Officer Catoe and officer Marthers, you
13 recall, I think it was Officer Marthers said -- I
14 asked him if he -- if Christopher Whitehead could
15 have left the scene at any point. He said he could
16 have walked away. I said why? He said he was
17 driving under suspension. Where were they at that
18 time? Where were those Kershaw County deputies at
19 that time? They were in Richland County. They were
20 across the county line.

21 Mr. Kendrick has already talked extensively
22 about Darla Harris' testimony, the lady from
23 Wal-Mart. Again, I can't but agree with Mr.
24 Kendrick's statement. What we have here is a theory
25 that has been created to fit the facts.

1 The pathologist, Dr. Sexton, I asked him if it
2 was possible that the time of death was the afternoon
3 of December 13th. I think I misspoke when I asked
4 the question. I think I said December 14th, but that
5 was the day he performed the autopsy. So he
6 knew what I meant. It was just an error on my part.
7 He said probably not but he wasn't really sure. The
8 time of death, the afternoon of December 13th,
9 probably not, but he wasn't really sure. That was
10 inconsistent with his findings.

11 Michael Jenkins, Mr. Kendrick discussed his
12 testimony. I want to discuss it as much as anyone.
13 Mr. Jenkins took the witness stand. And as Mr.
14 Kendrick has already pointed out, he lied to you. He
15 lied to the judge. He lied to this court. He lied
16 to our entire judicial system.

17 He said, oh, no, I don't have any pending
18 charges. He sure does. He's got two pending forgery
19 charges here in Kershaw County. He denied that. He
20 didn't remember very clearly the layout, the physical
21 description of A Pod where he allegedly overheard
22 this remark. And that's another key point.

23 Here is an individual, Christopher Whitehead,
24 who when the police approached him about this case
25 for the first time on December 15th, he said, I don't

1 know a thing about it. Or if you prefer Mr. Catoe's
2 version, I don't know a damned thing about it. And
3 throughout the entirety of the 18 months since then
4 he has stuck by that. He has not discussed the case.
5 He has not given statements. He has not confessed to
6 anything. He has not said, I remember this, I
7 remember that. He has been consistent. Is it likely
8 that an individual like that would start shouting out
9 things in the Kershaw County Detention Center? Is
10 that reasonable? Is that sensible? Does that stand
11 up to the smell test?

12 Also I couldn't help but notice before Mr.
13 Jenkins testified he was sitting directly with the
14 Zoch family. I feel nothing but remorse and
15 compassion for the Zochs. Their loss has been
16 terrible. They have suffered enormously. So has
17 Christopher Whitehead.

18 In a few minutes -- now I forgot where I laid my
19 glasses. In a few minutes I'll be through and then
20 Mr. Whitlark will address you. The judge will charge
21 you on the law and you'll begin your deliberations.

22 It been a privilege for me to represent
23 Christopher Whitehead throughout this case. I've
24 enjoyed getting to know him. He's a fine young man.
25 I want to thank also Mr. Meadors and his entire

1 staff. It's been a privilege and an honor working
2 with them and with my co-counsel, Mr. Whitlark and
3 Mr. Kendrick.

4 Tomorrow, May the 10th, is Christopher
5 Whitehead's 20th birthday. Today he is 19. Tomorrow
6 he will turn 20. When you go back to your jury room,
7 you hold in your 12 pairs of hands that young man's
8 entire future. I beg you, I beg you not to make a
9 mistake. Don't make a mistake. Thank you very much.

10 **THE COURT:** Mr. Whitlark, you may proceed.

11 **MR. WHITLARK:** May it please the Court? Good
12 evening.

13 **THE COURT:** Just hold on. She needs to step
14 outside, please. Ask Ms. Tolkey to take her out.
15 All right, Mr. Whitlark.

16 **MR. WHITLARK:** May it please the Court, Your
17 Honor. Good evening. It's no longer afternoon. I
18 know it's been rough. But you are the protectors of
19 our community, the fortresses that guard the rights
20 of every American citizen. I can't begin to tell you
21 the responsibility you've got here today. The lives
22 of these three young men are in your hands.

23 And when you go back there and you are deciding
24 this case, you are setting an example for our
25 children, for our community and for the history of

1 this country. Every time we have the exercise of a
2 jury trial, we reaffirm what we believe in and what
3 we are. And the judge is going to charge you about
4 what the rights of people are. You've heard
5 presumption of innocence. And I'm going to try to go
6 fast because I know we've been sitting here a while.
7 But we don't want to go too fast, not too fast.

8 The presumption of innocence, it's not just a
9 phrase. You took an oath, and the judge is going to
10 charge the law. You must presume they're innocent.
11 You must do it. That's your duty. And when you are
12 considering any fact in this case, any single
13 situation that happened, any set of circumstances
14 that was talked about or any piece of physical
15 evidence, any factor, you have to; if you come down,
16 there's two choices you can make. You've got to take
17 the one that presumes the innocence of these men.

18 Now, we have also what's called the burden of
19 proof. And I know that you've heard it and you're
20 going to hear it once again from the judge. I'm
21 briefly going to tell you, the burden of proof is
22 beyond a reasonable doubt, a very heavy burden.

23 Why is it so heavy? Because you've heard this
24 saying: "It is better to let a 100 guilty men go
25 free than to put one innocent man in prison. And

1 that's the truth. That's a true saying. And that's
2 why the burden of proof is beyond a reasonable doubt.
3 You've seen it. I'm not going to delay you here too
4 much. But preponderance of the evidence in a car
5 wreck case or a medical mal case, 51/49. 51/49, you
6 win the case. But in a criminal case it's got to be
7 100 to nothing before you can convict these men. It
8 starts off weighted heavily in favor of an American
9 citizen. I've told you this. He's presumed
10 innocent. Mr. McDonald is my client, but these young
11 men are in this together. Presumed innocent. And in
12 order to convict, they've got to take that scale all
13 the way down to the other end. If you are even
14 doubting, having a reasonable doubt about one fact
15 that's required to convict him, you have got to find
16 him not guilty under your oath.

17 This case again is an exercise of our American
18 way of life. And we're going to be talking about
19 some stuff here. Is this the way we want things
20 done? Because if you'll look at the way things were
21 done in this case, every single person that was being
22 searched out by the police was arrested before, oh,
23 let's get some information from them. Arrest them
24 and then starting asking them questions. Good way to
25 get answers. They arrested every single person they

1 could get their hands on in this case.

2 And it's a great way to solve cases. But is it
3 what we want in our communities? Is this the way we
4 want things done? If somebody is guilty and they're
5 doing wrong, go get them. But they were looking for
6 anything they could get. On Chris Whitehead, they
7 looked for something on him, and they got him. And
8 you all know that now.

9 They were looking for anything. They heard his
10 name. They heard his name. Ms. Davy told them about
11 him. They've already admitted that. They were
12 looking for him. They got up to Sonic and they heard
13 the name of Mr. Derrick McDonald and Mr. Robert
14 Cannon. And they said let's go get them. And they
15 did the same thing to them.

16 You remember when you're going through the
17 circumstances of what this means. You grab a
18 17-year-old kid at his house and you are going, hi,
19 we're the police. We want to talk to you about a
20 murder. And you're 17 years old. And they're
21 telling you, you want to be a witness in a case or do
22 you want to be a defendant in a death penalty case?

23 Now, folks, I'm not going to talk bad. I'm not
24 talking bad about these policemen here. They're good
25 men. But they made a mistake in this case, and they

1 just can't say they're wrong. Their pride is more
2 important than the lives of these young men. I've
3 been on this case for two months. Two months. And I
4 know one thing for certain. They're innocent. They
5 didn't do this. And I'm a very curious lawyer. I'm
6 a professional lawyer for 27 years. And I'm very
7 curious about this case. And I guarantee you there's
8 some people very interested in this case that may or
9 may not be here, but they're very interested in it; I
10 will tell you that much.

11 When these young men were grabbed by these
12 police, they told the truth. You think back on what
13 their testimony was, what the cops said they said.
14 They told the truth. But because they didn't like
15 this, do you have it perfect? You'd better have it
16 perfect. The guy said, look, I spent the night at
17 this guy's house because he doesn't realize what's
18 going on here.

19 These guys are hot and heavy to get somebody.
20 Why? Why were they pushing so hard on this thing?
21 You've got a civilian working for the police and he's
22 dead. And that's not good for business. That's bad.
23 Do you even know how many -- we don't know how many
24 people work undercover, civilians that turn state's
25 evidence or try to turn people in. Well, there's a

1 lot of them. And when somebody gets killed like
2 this, that is not good. Things don't work. They
3 can't get -- people are scared. They can't get
4 anything done. That's why, one of the reasons that
5 they were moving on this thing so hot and heavy.

6 And you can't forget the name Adrian Duran. I
7 know I said it a thousand times. They arrested him
8 first, ladies and gentlemen. Couldn't remember that.
9 They couldn't remember they arrested this man who is
10 a chief suspect in this case? It doesn't make sense.
11 It kind of worries me.

12 They don't know what the other investigators are
13 doing. There is a bunch of policemen that are
14 involved in this case. Their names came up. They
15 didn't testify. They have pertinent information.
16 I'll guarantee you that. I'll guarantee you that.
17 But it didn't help prosecute these three young men.
18 It's not going to help them.

19 Again, ladies and gentlemen, why is the burden
20 of proof beyond a reasonable doubt so great? Because
21 of what's gone in a case just like this one. Just
22 like this one.

23 Now, the prosecutor is a fine prosecutor for
24 this state. And I know him. He's a good man. But
25 he's lost sight of something. The State always wins.

1 On the oldest courthouse in the United States, it
2 says this: "When justice is done to even the least
3 of our citizens, the state wins."

4 And if not guilty, which it should be in this
5 case, the State wins. And this is not a contest
6 between me and him and the lawyers and everything.
7 This is somebody's life. And it's not a game. This
8 is not a game.

9 Phone calls, the phone calls, things that just
10 didn't happen. The phone calls just didn't happen.
11 What are we going to say about that? I mean, I am
12 looking at this thing, going, okay, let's see what
13 happened. All right. Well, the guy -- there's no
14 proof they called him. But they said they did. Both
15 of them said it. I'll tell you something. That
16 makes me extremely curious right there. Everybody is
17 talking about what's going on over here. Well, I'm
18 looking over here. They both said that.

19 And when Mr. Zack Waltemath was asked the
20 question, I said, did you know he was hurting her, he
21 says, yeah, but I just found that out recently. I
22 said, well, I'm not accusing you of anything. He
23 says, I don't have motive to do this. I said all
24 right. But I just recently found that out. That's
25 curious.

1 You know, what's curious also is on these
2 records on, I think it's Exhibit No. 31 you've heard
3 of that lists the phone calls. He calls her number
4 twice that night, the night they're together watching
5 movies and stuff together. They don't ever leave
6 each other's sight. But he calls him twice. And
7 then our guy, there's no proof, called them.

8 But what we do have them is calling Wal-Mart
9 that day. At 5:00 in the afternoon there's three
10 calls to Wal-Mart from this new boyfriend. Three. I
11 mean, nobody has ever mentioned a word about that. I
12 guess I must be bothering people or something.
13 Because when I found out yesterday, I find this out,
14 because I never looked at it, and I was remiss. I
15 told my client I'm sorry, I've missed something here.
16 That's their number. They brought that thing up here
17 and I wanted a little information. That is
18 Wal-Mart's number. I was going, my eyes bugged out
19 of my head. I said, there's a 31-minute phone call
20 to Wal-Mart of the 12th of December from the new
21 boyfriend's house. I mean, is anybody going to ask
22 about what that means? They must know somebody up
23 there I guess.

24 He said there's no way around this glove thing.
25 Well, I see one. You think about this. I mean,

1 what? Is their best man working at Wal-Mart or
2 something? Is he ordering something? I mean, what?
3 I don't know. You look at that record when you get
4 in there. Look at those first three. It's three of
5 them in a row. And they go up to about 5:30 or 6.
6 How come we don't know this? Why was this never
7 brought up? I must be a pain in people's rear ends
8 here; but, I mean, I see it clearly.

9 Now, the ankle injury, we're going to prove that
10 he came in there and he had done something to this
11 guy and he had a scratch. Well, it happened on the
12 12th. And that's a fact. It happened the day
13 before. I mean, the lady didn't want to say it. She
14 wanted her glasses or whatever. But do you know what
15 the truth was? It did happen the day before.

16 And everybody had hysteria. And that's another
17 thing to think about in this case. Those Kershaw
18 County officers, and I'm telling you, they're good
19 men. I know them. They made a mistake and they
20 can't admit it. When they came up to that Sonic,
21 they had certain information. And when they got
22 there, they heard a couple of things that really like
23 threw gas on the fire. I'll tell you that.

24 They said, the guy was up here with a ski mask.
25 I mean, they're going like this. They're already

1 looking for people and then they hear there's a black
2 man up there with a ski mask. Well, that's great.
3 They're going like this. Where is he at? Of course
4 it turns out it's Robert Cannon. And they heard his
5 name. They said we've heard his name before. They
6 heard it from Ms. Davy. They said, that's that guy,
7 the tennis shoe guy. Well, we don't see any tennis
8 shoes in this case. But he's the tennis shoe guy.

9 My client, they don't even know his name. My
10 client is up there going like this. It's one of
11 those stories you tell your kids. Don't get in the
12 wrong car one night. Be careful who you ride around
13 with or something. Believe me, I've told my kids
14 about this story. Believe me.

15 Now, the facts that you can't get around is what
16 the solicitor is talking about here. And I'm going,
17 all right. I said I agree with you. Let's talk
18 about those facts. Now, this was a brutal killing,
19 ladies and gentlemen. This wasn't something, where
20 is your pot at or something? This was a killing.
21 You heard what the coroner said. Six blows,
22 different blows could have killed him, any one of
23 them, dead. This isn't something like, hey, what's
24 up, Buddy? They went to kill him. This was not some
25 kind of thing where, let's go find some pot or

1 something. He was killed, period.

2 And anybody that's calling that something else,
3 about some buddies being over to rough him up or
4 something, they're not looking at it the right way.
5 And that's why I say these are good men but they've
6 overlooked some things here, big things, things that
7 don't add up.

8 And you start pulling it apart and then you
9 start looking. You go like this. What about this
10 guy he was drug dealing with? See, there's no
11 question that 36 hours before they arrested him, 36
12 hours, then they start finding out stuff. Well, you
13 know, he was out on a bond for burglary and grand
14 larceny of a drug dealer that he knew two months
15 before this. Two months.

16 Of course that's the guy they picked up first.
17 Because you know what? These are pretty good cops.
18 They're going like this, we're going to solve it, you
19 know, right now. And then what happened in this case
20 was this. I told you a little bit ago, don't forget
21 this. We've got a lot of people that are turning
22 people in for drugs and stuff. There is a lot of it
23 going on. And when one of them turns up dead like
24 this, with this kind of publicity on it, that's not
25 good for business. And they were moving. They said

1 we've got to solve this right now. And I know that
2 these men are trying to do the right thing. But when
3 they say a rush to judgment, that's what it was.

4 They went and they saw that ski mask and they
5 said, well, get Whitehead because we heard he said
6 something about a snitch, too. If that word "snitch"
7 came up, they were on it. And it did come from him.
8 And they heard it. Of course he's small potatoes
9 compared to what we're talking about here.

10 But these guys were with him, and he wasn't
11 going to talk. He wasn't going to say anything.
12 They knew it. And they said, well, who was he with?
13 And that's when these young men right here, Mr.
14 Cannon and Mr. McDonald, had their future almost
15 decided.

16 But that's why you're sitting here today,
17 because we are not going to let this happen and they
18 go quietly into prison. You can't let it happen. If
19 you look at the facts of this case it looks like
20 something. It's like cotton candy when you go to the
21 fair. You know, it looks substantial, but you bite
22 into it and there's nothing there but hot air. And
23 that's what this case is.

24 They say don't mention that there's no evidence
25 of fingerprints, no evidence of footprints, no

1 evidence of anything, no DNA. No articles were ever
2 found from a robbery. But do you know what? There's
3 a picture, and I'm not going to dig through here. I
4 know you all are tired. I am, too, because we've
5 been here all week. There's a picture in here of Mr.
6 Whitehead's car. And it shows his trunk open with a
7 bag with some shoes in it.

8 I mean, it just looks like what would have
9 happened in this case. But it's not evidence of
10 anything. It just looks like evidence. Why did they
11 want to put that picture in here? You've got to
12 think about. Oh, leave it open. The trunk is open,
13 shoes and a plastic bag. I said, well, what is it?
14 Is it something to do with the case? No. Nothing.
15 But it looks like something you heard, that they had
16 a plastic bag and some shoes and then they show his
17 car.

18 If his car was what this fellow, the all
19 American guy or whatever you call him, where is it?
20 It should be sitting right here in front of us. They
21 haven't even gone and looked at it.

22 And I know one thing right now. We've been
23 sitting here a long time. Right now we've been
24 sitting here a long time. But I don't want to go too
25 fast, but I just want to try to point out something

1 to you. Why not go to the burned barrel? Just go
2 over there and end this thing? They never even went
3 there. They have no physical evidence that the guy,
4 according to the statement, burned it in the barrel.
5 Take ten minutes, you go get a warrant, you walk up.
6 As a matter of fact, you might not even need one. Do
7 you mind if I go in here and just get some of this
8 plastic and these DVD's and clothes you burned? But
9 you know what? They never even went over there.

10 And why is that important? Because they're not
11 inclined to go over there. They know there's nothing
12 in it. You know why? It's not true. That's why.
13 If it was true, believe me, they'd have been there.

14 These officers have got a rough job, and I don't
15 envy them. They had lot of pressure on them in this
16 case. But once they committed to these three, let's
17 get these three here, they just forgot everybody
18 else.

19 Every single article taken from this scene of
20 this murder shows up in their statements, handwritten
21 by Investigator Catoe. You know what the problem on
22 those statements is? And I'm going to tell you. I'm
23 hoping to make this a short trip for you all back
24 there. I hope so. If you think these guys are
25 guilty, just don't even -- I'm wasting my breath.

1 Just find them guilty. Just send them to prison.

2 Why would they both put in about phone calls
3 that never happened? Why would they be in the
4 statements? Melissa Davy told Catoe that, and so did
5 the young man. That. Both of them. They both knew
6 it. Of course it turns out it's not true.

7 You see, when you're doing that, sometimes you
8 make mistakes. Forget about, you know, maybe
9 somebody is going to get these records some day.
10 There's one mistake that wasn't made though. Robert
11 Cannon has got a ski mask on. Think about that when
12 you're back there.

13 You know, normally even in a criminal case, I
14 like to prove my client didn't do it. I don't want
15 to leave it to the chance of, well, they didn't quite
16 prove it. I like to prove they didn't do it. And I
17 don't have to do that. The judge is going to tell
18 you about that. In this case I'm close. I am close.
19 But I can't do it.

20 As of the date of this thing, I'm almost there
21 but I'm not quite. But when you go back there and
22 you're looking through this stuff, you keep in mind
23 what I said. If you want to, I can go to every
24 single piece of evidence and tell you, and I can
25 point to a flaw in it. And I give you my word on

1 that.

2 You know, some of the witnesses in here, they
3 think they're doing the right thing. These guys did
4 this. Come on, let's give them a little extra to our
5 testimony. You know what I mean? Just a little bit
6 extra. And they all went up and saw the solicitor.
7 And he's trying to do his job, too. Except I told
8 him, I said, not everybody is guilty. My grandma is
9 not guilty is what I told him. I know he thinks
10 everybody else is. But, no. He's a great solicitor.
11 He is. We need him.

12 But I told you he's losing sight of that saying
13 on the courthouse, y'all. The State wins when
14 justice is done. And to convict these men, he is
15 innocent, he is innocent, and he is innocent; and if
16 you convict them, it won't be justice. It will be a
17 horrible injustice and a terrible thing.

18 Now, the phone calls, the Workers' Comp claim,
19 you can just scratch that. We've got documentary
20 proof it's not true.

21 Now, the statements, the statements were trying
22 to be used to do the right thing. But these young
23 men, both of them, they were being pressured, like
24 pressured. And they said this. This is what
25 happened. I want some help. I mean, what's going

1 on? The guy says, look, we're just wanting you to be
2 a witness. Either you be a witness. We want
3 Whitehead. He's going after a snitch. And they told
4 them that. And these boys both asked do we need
5 lawyers? Their parents were there. Do you think
6 Robert Cannon's parents would have left town the next
7 day if he was going to be charged with murder? We're
8 going on a trip. All right, son. Everything is
9 fine. I mean, you've got to think about stuff like
10 that.

11 And Cannon, they leave him there. Do you think
12 that possibly they made a promise to him that
13 violated his Constitutional rights? In this country
14 and in this jury box the end does justify the means.
15 You can't just do anything you want to to get a
16 conviction. That's what they do in East Germany and
17 in Communist countries. I mean, I just want to go
18 round everybody up and say, you ain't getting out of
19 jail until you do what we say. That's not what we
20 believe in. I know I'm going to fight against it.

21 So many things are just so coincidental in this
22 case. And, see, I worked on it two months. You've
23 had it for a week. And it's unfair to you really.
24 You could sift through this thing for a very long
25 time and see all these things.

1 But the most important anything to remember is
2 that to be convicted, it's got to be proof beyond a
3 reasonable doubt. I've pointed out some doubts to
4 you here. And if you -- and I can sit here and I
5 can't communicate with you about who wants to go to
6 the bathroom, who wants to do this. But if you want
7 me to, I can go through every one of these. The bat,
8 they keep calling it a baseball bat. It's a softball
9 bat. Why did they not send it to SLED until a month
10 ago or two months ago? I mean, other things.

11 **MR. MEADORS:** Your Honor, I object. That's a
12 mischaracterization of evidence.

13 **MR. WHITLARK:** Well, it was sent twice. I
14 understand that. But a lot of evidence was starting
15 to be gathered here. Because you know what? They
16 don't want you to do the same thing that everybody
17 did in the beginning on this case. We got 'em. Just
18 sign this thing. Just ship them off to prison. It
19 won't be right. It will be wrong if you do it.

20 Now, since we know that the phone calls did not
21 happen, the ones from Whitehead, and we now know also
22 that there's calls out from that number to Ms. Davy
23 who was there allegedly, you want a reasonable doubt?
24 Called the Wal-Mart three times, too. I guess
25 everybody missed that.

1 Now, like I said, folks, I'm not saying anything
2 bad about these policemen. They're good fellows.
3 They're good men and they're hard workers. But they
4 couldn't get around the fact that there's no
5 fingerprints, no DNA. No eye witnesses put them on
6 scene. No footprints are there, and no stolen items
7 were ever found, ever.

8 And suddenly two men, two young men who are real
9 nervous and who are wanting to know if they can get
10 lawyers and stuff are suddenly just signing right up
11 and volunteer to sign a statement. Now, I do want
12 the police to be successful in their jobs. I don't
13 like crime or criminals either. But I don't want any
14 American facing this if I can help it.

15 Now, since we know that those things are not
16 true, those two big things I keep talking about, the
17 phone calls and the Workers' Comp claim are not
18 correct, and we do know now -- and it's a terrible
19 thing and my heart does go out to Ms. Zoch, I mean,
20 the grandma. I hate this for her. But her son was
21 turning people in for selling drugs. And that's a
22 dangerous job, a very dangerous job.

23 And it won't be the first time, and I'm sorry to
24 say, it won't be the last but there's casualties in
25 that. And, you know, you're messing around with drug

1 dealers of various types out there, and I've met some
2 of them, they are dangerous people. They can be. I
3 mean, these aren't country club people you're dealing
4 with. And if they think like you've got my driver's
5 license, my social security card and they find out
6 about it, you know, that's not going to be good for
7 you. And they did. Remember that? Remember what
8 Trapp said. They had the driver's license and social
9 security card of a black man named Chanin Smith.

10 And the grandma says, well, you know, he was
11 working on turning in a drug dealer. I'm going,
12 well, where is this guy at? I mean, what was he
13 doing that night? And they get all over me because
14 they say, well, he's just trying to bring up third
15 party responsibility. I said no kidding. Look what
16 was happening.

17 I mean, if you had blinders on, you'd still have
18 to feel bad about not saying, well, let's go talk to
19 this fellow we arrested first again. A lot of
20 evidence wasn't gathered in this case until
21 afterwards. A real investigation wasn't done.
22 That's why I said that.

23 And when you get down to it, the policemen in
24 this case, they are good men. They were trying to do
25 the right thing. But they made a very big mistake.

1 And I know you get sick of hearing that from me. But
2 these young men get one chance at this, ladies and
3 gentlemen. One. Their lives are on the line here,
4 and they're innocent. What do you do? How do you
5 tell somebody that you're innocent and that you
6 didn't do it and they won't believe you, nobody
7 believes you? It's a hopeless feeling. And until
8 two months ago they didn't think they had a chance.

9 And I talked to Mr. McDonald, my client, and I
10 said, I believe you. And I think everybody here, if
11 you look at this evidence under the oath and the duty
12 that the judge is going to tell you about and you
13 know about, you sift through this, because everywhere
14 you look you'll see what I'm talking about; there's
15 always some kind of little twist to it. If you're
16 going that could have been this, it was.

17 And remember presumption of innocence. If it
18 can cut the way in favor of an acquittal, a not
19 guilty, you've got to do it under your oath. You
20 can't be 80 percent sure, it looks like. No way, not
21 under this system. You've got to be convinced beyond
22 a reasonable doubt.

23 I know you're getting sick of hearing that from
24 me. But if you were going to buy a house or get
25 married to somebody, I mean, obviously you'd want to

1 know a little bit about it, right? And if you go and
2 look at your house and you see cracks in the
3 foundation and all this other stuff, I mean, you're
4 going to go, well, wait a minute. You start seeing
5 cracks. You're going I don't really want this house
6 any more.

7 The same thing when you're looking at this case.
8 If you see one problem, well, we can just get over
9 it, no. When you see a problem, that doesn't explain
10 this and it doesn't explain this and you start
11 looking at it and the whole things starts folding in.
12 I mean, it looks, like I said, cotton candy looks
13 substantial. Bite into it, there's nothing there.

14 Now, this has been a very grueling week and I
15 know that you are ready to sit down and decide this
16 case. And it's a tough one. Like I said, I could
17 sit here and make you fall asleep with something
18 going through all this evidence. But the things I've
19 already pointed out to you, use that as your guide.
20 Use what I've told you as your guide here. Because
21 these things are, as I said -- and you can look at
22 the evidence, and when you're looking at everything
23 else in this case, keep in mind the presumption of
24 innocence. Because no matter what you say and no
25 matter what you do, if you make a mistake here,

1 that's it for these young men. That's it. You don't
2 go to the Supreme Court and fix it or something like
3 that. Nope. When you decide the facts of a case
4 like this, that's it forever. Forever.

5 So you've seen me and the judge writing. You've
6 seen Mr. Meadors, the solicitor, and all of us
7 writing with pencils. Our pencils have erasers on
8 them. The one you're going to write your verdict
9 with does not. And so it's for all time when you do
10 this.

11 Again, ladies and gentlemen, I've got ten pages
12 of notes on the evidence in this case and testimony.
13 And the way you all are looking at me right now, I
14 think I'd better leave it closed.

15 But I can tell you right now there was a man in
16 Germany right before World War II. He was a
17 philosopher and his name was Martin Niemoller. And
18 he wrote that first they came for the Jews. He said,
19 I didn't say anything. I didn't speak up because I
20 wasn't a Jew. So then they came for the trade
21 unionists and I didn't speak up. I wasn't a trade
22 unionist. He said then they came for the Catholics.
23 He said, I didn't say anything because I was a
24 Protestant. And of course then they came for me, and
25 by that time there wasn't anyone left to stand up.

1 No matter what you've thought during this case,
2 ladies and gentlemen, about the way somebody looks,
3 the way their face is, if they've smiled or not or
4 what they've done, keep in mind that you're deciding
5 the rules we live by and the standards we keep in
6 this country.

7 And we have our children to teach and the spirit
8 of our forefathers here, because when you allow an
9 investigation to grab citizens on anything you want
10 to and hold them in jail or take a teen-ager away
11 from his mom by telling a story to the mom and dad
12 and you get him to sign something and you promise
13 them something you don't mean and you do it for the
14 right reason but you're really wrong, I don't want a
15 country like that. I'm going to fight against that.
16 And I know you know what I'm talking about.

17 And if you have even a slight belief in your
18 mind that these boys were coerced or perceived
19 coercion or were promised and they signed these
20 statements, you've got to throw them out. You've got
21 to do it under your duty. It's beyond a reasonable
22 doubt.

23 And if you -- and the judge is going to charge
24 you the law on this. But it says if any coercion,
25 promise or inducement is used, then you've got to

1 think about the mental capacity of the people, too.
2 If it's used and you can see where it affected, it
3 causes an outcome, you've got to disregard it. The
4 statement is out. Because, ladies and gentlemen,
5 when it comes down to it, a murder case and a
6 burglary case was made against these men on one
7 statement of Robert Cannon. They don't have another
8 thing. They say that you can't explain these
9 Wal-Mart things and you can't explain this glove and
10 all that. Yes, you can. And it's a reasonable
11 doubt. And there's a lot of it in this case.

12 And for the lives of these young men and for
13 what we believe in in this country as Americans, you
14 do justice to these fellows. Thank you, Your Honor.

15 **THE COURT:** All right, ladies and gentlemen of
16 the jury. Would you like to take a short break? I
17 see several heads. Let's do that, and then I'll
18 conclude with the law as it applies to this case.
19 Just again, don't discuss the case among yourselves
20 while you're in the jury room. And I will tell you,
21 if any of you need to make phone calls, the clerk
22 will help you out. All right. Where is the clerk?
23 Let somebody make phone calls if they need to make
24 phone calls. All right.

25 (Jury out at 6:30 p.m.)

1 **THE COURT:** All right. We'll stand at ease for
2 about ten minutes.

3 (Whereupon, a break is taken)

4 **THE COURT:** Is the State ready to proceed?

5 **MR. MEADORS:** The State's ready.

6 **THE COURT:** The defense ready to proceed?

7 **MR. WHITLARK:** Yes, sir.

8 **MR. KENDRICK:** Yes, sir.

9 **THE COURT:** Mr. Reuwer has left, is not here,
10 had to leave. Bring the jury.

11 (Jury in at 6:54 p.m.)

12 **THE COURT:** All right, ladies and gentlemen. We
13 now come to the final portion of the trial which
14 consists of my instructions to you on the laws of the
15 state of South Carolina as it applies to this case.
16 You've heard all of the testimony in the case. You
17 will take with you to the jury room all the evidence.
18 There will be no more evidence. And sometimes jurors
19 request more evidence, but there is no more. This is
20 it.

21 You've heard the arguments of counsel for both
22 the State and each of these defendants. And I'll now
23 explain the law as it applies to this case. Under
24 our Constitution and Code of Laws only the jury can
25 make findings of fact in this case. I am not

1 permitted to indicate to you how I might feel about
2 the facts. If I have said or done anything during
3 the course of this trial which would indicate to you
4 that I have an opinion concerning the facts, then you
5 should disregard that. The jury must independently
6 weigh the evidence presented in this trial and render
7 a verdict based solely on that evidence.

8 And the same Constitution and laws that make and
9 designate you the finders of fact, they designate me
10 at the instructor of the law. If you have some idea
11 as to what the law is or what the law ought to be
12 that does not agree with what I now tell you the law
13 is, you're obligated under the oath which you've
14 taken to abandon this preconception on your part and
15 to accept and apply the law exactly as I now state it
16 to you.

17 Now, I charge you, and I'm sure you're aware,
18 there are three defendants in this case. The case of
19 each defendant and the evidence and the law
20 concerning that defendant should be considered
21 separately and individually. Your verdict does not
22 have to be the same for all defendants. The fact
23 that you may find one defendant guilty or not guilty
24 should not control your verdict as to the other
25 defendants. Where more than one person is charged

1 with a crime, if the evidence warrants it, you may
2 convict one and acquit the others. Or you may acquit
3 all. Or you may convict all. It will depend on what
4 your view is of the testimony and the evidence. You
5 must take each defendant and consider the evidence as
6 to that defendant and my instructions to you on the
7 law. You will then write a separate verdict of
8 guilty or not guilty for each individual defendant.

9 The indictments in this case allege two
10 different offenses against each of the defendants.
11 So you will actually have six charges that you will
12 have to consider. The charges, as you know, are
13 burglary in the first degree and murder. Each
14 indictment contains a separate and distinct offense.
15 You must decide each indictment separately on the
16 evidence and the law applicable to it uninfluenced by
17 your decision as to any other indictment.

18 Each of the defendants may be convicted or
19 acquitted on any or all of the offenses charged. You
20 will be asked to write a separate verdict of guilty
21 or not guilty on each indictment.

22 Now, I remind you, the fact that each defendant
23 was arrested, charged and indicted in this case is
24 not evidence in this case, cannot be considered by
25 you as evidence of guilt in this case, nor does it

1 create any presumption or inference of guilt. These
2 documents are simply the formal written instruments
3 by which these cases are brought into Court and
4 contain the charges made against each defendant.
5 These documents are merely the formal documents by
6 which the case is brought into court.

7 Now, each of the defendants has pled not guilty
8 to each of these indictments, and those pleas put the
9 burden on the State to prove the defendants guilty.
10 A person charged with committing a criminal offense
11 in South Carolina is never required to prove himself
12 or herself innocent. I charge you this is an
13 important rule of law, that the defendant in a
14 criminal case no matter what the seriousness of the
15 charge may be will always presumed to be innocent of
16 the crime for which the indictment was issued unless
17 guilt has been proven by evidence satisfying you of
18 that guilt beyond a reasonable doubt.

19 Now, this presumption of innocence does not end
20 when you begin your deliberations, but it accompanies
21 each defendant throughout the trial until you reach a
22 verdict of guilt based on evidence satisfying you of
23 that guilt beyond a reasonable doubt.

24 The presumption of innocence is not a mere legal
25 phrase. It's not a legal theory. It is a

1 substantial right to which every defendant is
2 entitled unless you, the jury, are satisfied from the
3 evidence of the defendant's guilt beyond a reasonable
4 doubt.

5 Well, what is a reasonable doubt at law? A
6 reasonable doubt is the kind of doubt that would
7 cause a reasonable person to hesitate to act. Let me
8 repeat that. A reasonable doubt is the kind of doubt
9 that would cause a reasonable person to hesitate to
10 act.

11 The State has the burden of proving each
12 defendant guilty beyond a reasonable doubt. Some of
13 you may have served as jurors in civil cases where
14 you were told it's only necessary to prove that a
15 fact is more likely true than not true, such as by
16 the greater weight or preponderance of the evidence.
17 In criminal cases, however, the State's proof must be
18 more powerful than that. It must be beyond a
19 reasonable doubt.

20 Proof beyond a reasonable doubt is proof that
21 leaves you firmly convinced of the defendant's guilt.
22 There are very few things in this world that we know
23 with absolute certainty, and in criminal cases the
24 law does not require proof that overcomes every
25 possible doubt. If based on your consideration of

1 the evidence you are firmly convinced that the
2 defendant is guilty of the crime charged, you must
3 find the defendant guilty. If on the other hand you
4 think there is a real possibility that the defendant
5 is not guilty, you must give that defendant the
6 benefit of the doubt and find him not guilty.

7 Now, there are two types of evidence which are
8 generally presented during a trial, direct evidence
9 and what we call circumstantial evidence. Direct
10 evidence is the testimony of a person who claims to
11 have actual knowledge of a fact, such as an eye
12 witness. It is evidence which immediately
13 establishes the main fact to be proved.

14 Now, circumstantial evidence on the other hand
15 is proof of a chain of facts and circumstances
16 indicating the existence of the fact. It is evidence
17 which immediately establishes collateral facts from
18 which the main fact may be inferred. Circumstantial
19 evidence is based on inference and not on personal
20 knowledge or observation, but the law makes
21 absolutely no distinction between the weight or value
22 to be given to either direct or circumstantial
23 evidence, nor is a greater degree of certainty
24 required of circumstantial evidence than of direct
25 evidence.

1 You should weigh all of the evidence in the
2 case, and after weighing all of the evidence, if you
3 are not convinced of the guilt of each defendant
4 beyond a reasonable doubt, you must find each
5 defendant not guilty. Again, you are not to consider
6 the defendants individually. You are to consider the
7 defendants individually and not collectively.

8 Now, some of the evidence in this case may have
9 been admitted solely because of its relationship to
10 the case against one of the defendants. This
11 evidence cannot be considered in the case of any of
12 the other defendants.

13 Necessarily, in any case you must determine the
14 credibility of witnesses who have testified in this
15 case. Credibility simply means believability. It
16 becomes your duty as jurors to analyze and evaluate
17 the evidence and determine which evidence convinces
18 you of its truth.

19 In determining the believability of witnesses
20 who have testified in this case, you may believe one
21 witness over several witnesses or several witnesses
22 over one witness. You may believe a part of the
23 testimony of a witness and reject the remaining part
24 of the testimony of that same witness.

25 You may believe the testimony of a witness in

1 its entirety or reject the testimony of a witness in
2 its entirety. You may consider whether any witness
3 has exhibited to you any interest, bias, prejudice or
4 other motive in this case.

5 Now, a person who has a past criminal record,
6 that's been testified to in this case, is competent
7 to testify during a trial. A past record does not
8 affect the ability of that person to testify. A past
9 record may only be considered by you, if at all, in
10 determining the witness's believability. Remember
11 you are the sole judges of the facts in the case and
12 the believability of any and all of the witnesses.

13 Now, normally a person or a witness cannot give
14 what we call opinion testimony. Normally when a
15 person testifies, and you've witnessed this during
16 the week, they may only testify as to what they
17 either saw, heard or sensed by smell or something of
18 that nature.

19 However, there is an exception when someone is
20 qualified because of education and experience, they
21 are permitted to give their opinion in certain areas
22 if the Court qualifies them in that way. And we did
23 have such a witness and what we've determined to be
24 an expert witness in this case in the case of the
25 doctor who testified who gave opinions after

1 analyzing what he witnessed.

2 Now, in this case, and I want you to listen
3 carefully to this because this deals with a central
4 issue in this case; and that is the issue of the
5 statements given by the defendants. A statement
6 alleged to have been given made by one or more of the
7 defendants has been admitted into evidence in this
8 case. While the Court, that is me, has determined
9 that the statement is admissible, I instruct you that
10 you make the ultimate decision of whether or not the
11 defendant made the statement.

12 If the defendant did make the statement, you
13 must determine whether the statement was made by
14 defendant voluntarily and of his own free will. This
15 means that the statement was not caused by pressure,
16 force, fear, threats, coercion or intimidation or by
17 hope or a promise of leniency or reward of any kind.

18 In determining whether the statement was
19 voluntary, you should consider both the
20 characteristics of the defendant and the details of
21 the questioning. Some of the factors that you may
22 consider are the age of the defendant or the
23 defendants in this case. The defendant's education
24 or lack of education, the defendant's mental ability
25 or capacity, the place and length of the detention,

1 the nature of the questioning, the advice or lack
2 thereof to the defendant of his Constitutional
3 rights, including, but not limited to, the right to
4 remain silent, that any statement could be used
5 against him in a court of law, the right to have a
6 lawyer present, that if he could not afford a lawyer,
7 a lawyer would be appointed to represent him without
8 cost, and that he could stop making a statement at
9 any time.

10 You must consider also a third party; that is, a
11 party not the person whose statement is being taken
12 cannot invoke these rights. The individual has to
13 invoke these rights himself or herself. You must
14 carefully consider all of the surrounding
15 circumstances before you give any weight to an
16 alleged statement.

17 Now, the State has the burden of proving beyond
18 a reasonable doubt that the alleged statement was
19 voluntary. If you determine it was, you may give the
20 statement any further consideration that you deem
21 proper. You must decide what weight, if any, should
22 be given to the alleged statement. If you determine
23 the alleged statement was not the free and voluntary
24 statement of the defendant, you should not consider
25 the statement at all.

1 Now, in order to establish what we call criminal
2 liability, intent is required or criminal intent.
3 For example, the mental state required to be proven
4 by the State for some particular crime might be some
5 purpose, some obvious intent, knowledge of certain
6 facts or recklessness. Criminal intent must be
7 proven by the State beyond a reasonable doubt.

8 Criminal intent is always a matter that must be
9 determined by the jury from the circumstances
10 surrounding the situation. There is no way to prove
11 intent to a mathematical certainty. There's no way
12 medical science can dissect a person's brain and
13 determine what the person had in mind. So the law
14 says that criminal intent may be inferred from the
15 circumstances shown to have existed at the time and
16 place. This is how you make the determination of
17 whether or not the element requiring intent was
18 present.

19 It is not necessary to establish intent by
20 direct and positive evidence, but intent may be
21 established by inference in the same way as any other
22 fact, by taking into consideration the acts of the
23 parties and all of the facts and circumstances of the
24 case.

25 Criminal intent is a mental state, a conscious

1 wrongdoing. It's up to you to determine what each of
2 the defendants intended to do based on the
3 circumstances shown to have existed. Criminal intent
4 can arise from action or a failure to act. It may
5 arise from negligence, recklessness or an
6 indifference to duty or to consequences that are
7 considered by the law to be the equivalent of
8 criminal intent.

9 Now, one of the theories that the state has
10 relied on is known as the hand of one is the hand of
11 all. And let me explain that to you. If a crime is
12 committed by two or more people who are acting
13 together and committing a crime, the act of one is
14 the act of all. A person who joins with another to
15 commit an unlawful act is criminally responsible for
16 everything done by the other person which happens as
17 a probable or natural consequence of the acts done in
18 carrying out the common plan and purpose.

19 For example, two people can be guilty of killing
20 another person when only one of the two had a gun,
21 there was only one bullet and only one of the two
22 fired the shot that caused the death. If two or more
23 people are acting together, assisting each other in
24 committing the offense, the act of one is the act of
25 all. Or as it has sometimes been said, the hand of

1 one is the hand of all.

2 Now, prior knowledge that a crime is going to be
3 committed without more is not sufficient to make a
4 person guilty of that crime. Mere knowledge that
5 another person is going to commit a crime, even if
6 the defendant is present when the crime is committed,
7 is not sufficient to convict a person, a defendant as
8 a principal.

9 Guilt as a principal is shown by actual or
10 constructive presence at the scene as a result of
11 prior arrangement. Therefore, a finding of a prior
12 arranged plan or common scheme is necessary for a
13 finding of guilt as a principal.

14 The State must prove beyond a reasonable doubt
15 by competent evidence the theory of the hand of one
16 is the hand of all. The principal in a crime is one
17 who either actually commits the crime or who is
18 present aiding, abetting or assisting in committing
19 the crime. When a person does an act in the presence
20 of and with the assistance of another, the act is
21 done by both.

22 Where two or more people acting with a common
23 plan or intent are present at the commission of a
24 crime, it does not matter who actually commits the
25 crime. All are guilty. The hand of one is the hand

1 of all.

2 But being present at the commission of a crime
3 means to be sufficiently near to aid and abet and
4 assist in the commission of that crime. However,
5 mere presence at the scene, as I said a moment ago,
6 is not sufficient to convict one as a principal on
7 the theory of aiding and abetting.

8 Intent is also a necessary element, for there
9 must have been a common design or intent to commit
10 the crime, and the crime must have been committed
11 pursuant thereto with the person aiding and abetting
12 by some overt act.

13 Intent means intending the result which actually
14 occurred, not accidentally or involuntarily. Intent
15 may be shown by acts and conduct of the defendants
16 and other circumstances from which you may naturally
17 and reasonably infer intent. The State must prove
18 these elements beyond a reasonable doubt.

19 As I said, the defendants are charged with
20 burglary and murder. First degree burglary. The
21 definition of first degree burglary under our
22 statutes is as follows. The State must prove beyond
23 a reasonable doubt that each defendant entered a
24 dwelling without consent. A dwelling is any building
25 or portion of a building in which a person ordinarily

1 sleeps. A building constructed as a dwelling that
2 has never been occupied cannot be considered a
3 dwelling for purposes of a burglary, but a building
4 is a dwelling even if the residents are temporarily
5 absent from the building.

6 In order to prove that each defendant entered
7 the dwelling, the State does not have to show that
8 the defendant's entire body entered the dwelling.
9 The smallest entry would be sufficient. It may be
10 any part of a body, such as a hand or foot or even an
11 instrument.

12 In addition, the State does not have to prove
13 that force was used to gain entry. If a person
14 enters a building by using deception, artifice or
15 trick or misrepresentation to get consent to enter,
16 this is entry without consent.

17 Next the State must prove beyond a reasonable
18 doubt that each defendant intended to commit a crime,
19 either a felony or a misdemeanor at the time of the
20 entry. The mere entry into a building without
21 consent is not burglary. If the intent to commit a
22 crime is formed after the entry, it is not a
23 burglary.

24 On the other hand, if the defendants entered to
25 commit a crime at the time of the entry, it is a

1 burglary even if the intent was abandoned after the
2 entry. It does not matter that the intended crime
3 was not completed. Intent may be shown by acts and
4 conducts of the defendants and any other
5 circumstances from which you may naturally and
6 reasonably infer intent.

7 And finally the State must prove one of the
8 following. When entering, while in the dwelling or
9 when fleeing the defendant or an accomplice was armed
10 with a deadly weapon or explosive. A deadly weapon
11 is any article, instrument or substance which is
12 likely to cause death or great bodily harm. And
13 whether an instrument has been used as a deadly
14 weapon depends on the facts and circumstances of each
15 case. Some examples might be a pistol or a shotgun
16 or a knife or in this case as alleged a baseball bat
17 or a softball bat, whatever.

18 Or when entering, while in the dwelling or when
19 fleeing the defendant or an accomplice caused
20 physical -- in other words, the first one was when
21 entering, while in the dwelling or fleeing the
22 defendant or an accomplice was armed with a deadly
23 weapon; or when entering, while in the dwelling or
24 when fleeing the defendant or an accomplice caused
25 physical injury to anyone not participating in the

1 crime; or when entering, while in the dwelling or
2 when fleeing the defendant or an accomplice used or
3 threatened to use a dangerous object; or when
4 entering, while in the dwelling or when fleeing the
5 defendant or an accomplice displayed what appeared to
6 be a knife, pistol, revolver or shotgun or other
7 firearm; or when the defendant entered or remained in
8 the dwelling in the nighttime.

9 Nighttime, simply stated, is the period between
10 sunset and sunrise during which there is not enough
11 daylight to recognize a person's face except by
12 artificial light or moonlight. That's the definition
13 of burglary in the first degree.

14 The definition of murder each of the defendants
15 is charged with murder. The State must prove beyond
16 a reasonable doubt that each defendant killed another
17 person with malice aforethought. Malice is hatred,
18 ill will or hostility towards another person. It is
19 the intentional doing of a wrongful act without just
20 cause or excuse and with intent to inflict an injury
21 or under circumstances that the law will infer an
22 evil intent.

23 Malice aforethought does not require that malice
24 exist for any particular time before the act is
25 committed, but malice must exist in the mind of the

1 defendant just before and at the time the act is
2 committed. Therefore, there must be a combination of
3 the previous evil intent and the act.

4 Malice aforethought may be express or inferred.
5 These terms, express and inferred, do not mean
6 different types of malice but merely the manner in
7 which malice may be shown to exist; that is, either
8 by direct evidence or by inference from the facts and
9 circumstances which are proved.

10 Express malice is shown when a person speaks
11 words which express hatred or ill will for another or
12 when the person prepared beforehand to do the act
13 which was later accomplished. For example, lying in
14 wait for a person or any other acts of preparation
15 going to show that the deed was within each
16 defendant's mind would be express malice.

17 On the other hand, malice may be inferred from
18 conduct showing a total disregard for human life.
19 Inferred malice may also arise when the deed is done
20 with a deadly weapon. A deadly weapon is any
21 article, instrument or substance which is likely to
22 cause death or great bodily harm. Whether an
23 instrument has been used as a deadly weapon depends
24 on the facts and circumstances of each case.

25 Now, ladies and gentlemen, and I want to stress

1 this portion of my instructions to you. I instruct
2 you because it's an important rule of our law. I
3 instruct you and emphasize the fact that a defendant
4 does not testify is not a factor to be considered by
5 you in any way in your deliberation and in your
6 consideration of the question of the guilt or
7 innocence of that defendant. It must not be
8 considered by you in any manner whatsoever.

9 A defendant has the Constitutional right to
10 remain silent, and the assertion of this right must
11 not be considered by you in your deliberations. I
12 repeat, under your oath you are to draw no conclusion
13 whatsoever from the fact that a defendant in this
14 case did not testify. The fact that a defendant did
15 not testify should not even be discussed in the jury
16 room. The burden of proof as I have stated to you is
17 on the State. A defendant is not required to prove
18 his innocence. The burden of proof remains on the
19 State to prove guilt beyond a reasonable doubt.

20 Now, ladies and gentlemen, I am required to
21 declare the law as I have just done with these
22 instructions to help and guide you to a just and
23 lawful verdict. Whether some of these instructions
24 will apply will depend on what you find to be the
25 facts. The fact that I have instructed on various

1 subjects in this case must not be taken as indicating
2 an opinion of this Court as to what you should find
3 to be the facts or which party is entitled to your
4 verdict.

5 Your verdict must represent the considered
6 judgment of each juror. In other words, in order to
7 return a verdict, it is necessary that each juror
8 agree. Your verdict must be unanimous. All 12 of
9 you must agree on the verdict. Your verdict cannot
10 be based on sympathy, passion, prejudice, emotion or
11 any other consideration that's not in evidence in
12 this case.

13 Remember at all times that you are not partisans
14 favoring one party over the other. You are judges,
15 judges of the facts. Your sole interest is to seek
16 the truth from the evidence that's been presented to
17 you in this case.

18 I'm going to ask you, ladies and gentlemen, in
19 just a moment to retire to the jury room. But before
20 I do, Madam Forelady, the indictments will go to the
21 jury room with you. On the back or what we call the
22 face of each indictment in the bottom left-hand
23 corner is a block for your verdict. When you've
24 completed your work on each indictment, if you will
25 fill that in with either not guilty or guilty, sign

1 your name and date it, that will complete your work
2 as to that indictment. Once you have completed all
3 six indictments, if you'll knock on the jury room
4 door and let us know, and we will receive your
5 verdict.

6 Now, the clerk tells me she has ordered
7 something of a meal for you. It may be a few minutes
8 before we can collect up all of this evidence and
9 bring it to you. So just relax for a few minutes.
10 Your meal is probably not going to be here for
11 another 15 or 20 minutes probably. Okay.

12 So, if you will, just -- and don't begin -- what
13 I'm basically saying is don't begin your
14 deliberations until you receive the verdicts and the
15 received. Once you receive the verdict forms -- I
16 mean, the indictment forms and the evidence, you may
17 begin your deliberations. Thank you very much.

18 (Jury out at 7:21 p.m.)

19 **THE COURT:** All right. Any exceptions to the
20 charge?

21 **MR. MEADORS:** Yes, sir. I don't, I believe --
22 and I've checked with my co-counsel -- we heard the
23 Moak charge Your Honor said he was going to do. And
24 we had asked about it once before. And you said it
25 was separate but you were going to --

1 **THE COURT:** And I gave it. I read it right into
2 the record.

3 **MR. WHITLARK:** You did.

4 **MR. RILEY:** Yes, sir.

5 **MR. WHITLARK:** He did.

6 **THE COURT:** Right here. I read it right in the
7 middle of the -- I'll tell you where I read it. And
8 if you don't believe me, I'll have the court reporter
9 read it back.

10 **MR. MEADORS:** I'll be honest with you. I was
11 writing a letter, and they told me they thought it
12 was left out.

13 **THE COURT:** I'm not surprised. I said it at
14 approximately the point on page 12 where I have: "If
15 you cannot afford a lawyer, a lawyer will be
16 appointed to represent him without any cost." And I
17 said, at that point I said: "A third party cannot
18 invoke any individual's Miranda rights for
19 themselves." Now, if you want to check with the
20 court reporter --

21 **MS. MCDUFFIE:** No. I'm fine.

22 **THE COURT:** That's the first time in a week Ms.
23 McDuffie has made a mistake.

24 **MR. MEADORS:** That's why I didn't question her.
25 And I apologize.

1 **MR. WHITLARK:** It was exactly as was in the
2 charge.

3 **THE COURT:** Anything further from the State?
4 Anything further? And besides that, I would never
5 overlook anything Mr. Moak gave me.

6 **MR. WHITLARK:** Nothing from McDonald, Your
7 Honor.

8 **MR. KENDRICK:** Nothing, Your Honor. Thank you.

9 **MR. RILEY:** Nothing, Your Honor.

10 **THE COURT:** All right. Let's collect the
11 evidence and make sure it's in proper form to go to
12 the jury. We'll stand at stand at ease until the
13 jury arrives at a verdict.

14 (Whereupon, the jury begins deliberating at
15 7:30 p.m.)

16 (WHEREUPON, Court's Exhibit No. 3 is marked for
17 identification.)

18 **THE COURT:** Are the lawyers out there? I need
19 some lawyers. All right, counsel. The jury has
20 requested a transcript, a transcript of Detective
21 Catoe's testimony and cross examination. Now, the
22 only thing I can do is tell them they can come in and
23 we can listen to it. It's approximately four hours
24 and 20 minutes?

25 **COURT REPORTER:** That would be my guess, Your

1 Honor, at this point.

2 **THE COURT:** Or the court reporter suggested --

3 **MR. MEADORS:** Your Honor, I don't care, but the
4 defendants aren't here. I guess that doesn't matter.

5 **MR. KENDRICK:** I don't believe so, Your Honor,
6 at this point.

7 **MR. MEADORS:** I'm sorry.

8 **THE COURT:** Well, okay. The court reporter has
9 indicated that if they really want the testimony, the
10 transcript, she could have it ready by about 10:00 in
11 the morning. Is that right?

12 **COURT REPORTER:** Yes, sir.

13 **THE COURT:** Here?

14 **COURT REPORTER:** Here.

15 **THE COURT:** So I think the only thing to do is
16 bring the jury. Are you keyed up to start it?

17 **COURT REPORTER:** No. I'm not keyed up to start
18 the playback yet because I just found out about it.

19 **MR. WHITLARK:** Your Honor, I believe the court
20 report should get triple overtime for having to do
21 that.

22 **MR. MEADORS:** Judge, have you given -- I'm just
23 inquiring, have you given transcripts before?

24 **THE COURT:** No.

25 **MR. MEADORS:** I haven't either. I just

1 didn't --

2 **THE COURT:** Well, I mean, it's certainly
3 something that can be done if they insist on it.
4 Only when you do realtime and then you get what you
5 call a dirty copy. And that doesn't help you a whole
6 lot.

7 **COURT REPORTER:** I wouldn't want to give it to
8 the jury.

9 **THE COURT:** So, all right. Let me bring the
10 jury in and explain to them the process and see if
11 they'd like to key it up and start listening. Bring
12 the jury, please.

13 **MR. KENDRICK:** Your Honor, do we not need the
14 defendants in if we bring the jury back?

15 **THE COURT:** If you want them, I'll --

16 **MR. WHITLARK:** We'll waive. I'll waive their
17 presence.

18 **MR. KENDRICK:** That's fine.

19 **THE COURT:** I think it's going to be a
20 five-minute conference. I mean, if we get a
21 transcript, I think yes.

22 **MR. KENDRICK:** Yes, sir.

23 **THE COURT:** I'm just going to try to get a sense
24 of what they want to do.

25 (Jury in at 9:17 p.m.)

1 **THE COURT:** All right. Thank you, ladies and
2 gentlemen. I have a request from a juror. And it
3 says: "I request a transcript of Detective Catoe's
4 testimony and cross examination." Well, let me just
5 sort of explain to you what we can and what we can't
6 do, because we're not quite maybe as technologically
7 adept as we'd like to be.

8 We can play back the transcript. We can play
9 back the testimony. It lasts approximately four and
10 a half hours. He was on the stand approximately four
11 and a half hours. That is direct examination and
12 cross examination. Unless we knew exactly where in
13 that four and a half hours you wanted to hear
14 testimony, we'd have to just start from page 1.

15 The other option, and it would be an unusual
16 option, would be to adjourn for the night and ask the
17 Court reporter to type a transcript and bring it back
18 tomorrow. She said she could probably do it by 10:00
19 tomorrow. Now, I guess the -- I need for you all to
20 make a decision as to what you would prefer. I think
21 probably Detective Catoe's testimony was the most
22 lengthy testimony in the trial. Is that fair to say?

23 **COURT REPORTER:** (Nods head affirmatively).

24 **THE COURT:** Yeah. So that's where we are. We
25 can only do what we can do. I know it's tough to

1 remember all these things as we go along, but that's
2 the capability we have. As I explained to all of
3 you, I'm trying -- I want to try not to have to carry
4 this into next week, but we will if we have to.
5 We'll do what we have to do. So if you all would
6 retire and make a decision about how you want to
7 proceed on this issue.

8 **JUROR:** We're going to have one question I know
9 already. If we adjourn for tonight, does that mean
10 we go home?

11 **THE COURT:** Yeah.

12 **MADAM FORELADY:** Okay. We don't know.

13 **THE COURT:** Well, I was kind of hoping you
14 wouldn't ask that question because as long as you
15 think I'm going to hold you here --

16 **MADAM FORELADY:** Exactly. And I understand
17 that. It's very attractive.

18 **THE COURT:** But, yes. We can go home and then
19 resume again tomorrow morning. So consider that also
20 if you wish to do so.

21 **MADAM FORELADY:** All right.

22 **THE COURT:** All right. Just let us know what
23 you want to do. And if you'd do it in writing, just
24 in writing. If you'll just tell me.

25 **MADAM FORELADY:** Sure. Absolutely.

1 **THE COURT:** We'll stand at ease until we hear
2 from the jury.

3 (Whereupon, a break is taken)

4 **THE COURT:** The jury now wants the whole trial
5 transcript.

6 **MR. WHITLARK:** Just double the triple overtime
7 for the court reporter now.

8 **THE COURT:** Did you say Tuesday?

9 **COURT REPORTER:** Tuesday.

10 **THE COURT:** Where is Meadors? Oh, I'm sorry.
11 "We respectfully request transcripts of the testimony
12 of Danny Catoe, Phillip Crawford, Michael Jenkins."
13 Tuesday? Is that what you're saying?

14 **COURT REPORTER:** Mm-hmm (affirmative).

15 **THE COURT:** Anybody want to look at this? I've
16 said: "Unfortunately, the court reporter would have
17 to work all weekend. She underestimated the Catoe
18 testimony but could probably have it by noon on
19 Saturday. She doesn't want to work on Mother's Day.
20 She has plans. And I cannot be here on Monday.
21 Therefore, Tuesday would be the earliest time we
22 could reconvene with these transcripts. Thank you."

23 Hearing no opposition. Mark it.

24 (WHEREUPON, Court's Exhibit No. 4 is marked for
25 identification.)

1 (Break)

2 **THE COURT:** The answer is: "We do not feel we
3 can be fair and do justice to each defendant on each
4 charge without these transcripts. We will be happy
5 to return on Tuesday at 9 a.m."

6 **MR. WHITLARK:** That's fine. Is that all right
7 with you?

8 **COURT REPORTER:** That's fine.

9 **THE COURT:** That's what we'll do.

10 **MR. MEADORS:** Your Honor, will you instruct them
11 not -- I know that you will -- not to read Martin's
12 columns that are coming out? No offense, Martin.

13 **MR. WHITLARK:** We haven't even seen them yet,
14 John. You might like them.

15 **MARTIN:** I don't usually speak out in court, but
16 I would absolutely agree.

17 **THE COURT:** I will. And not discuss it with
18 anyone else over the weekend. It's very unusual.

19 **MR. MEADORS:** So you are talking about Saturday,
20 Sunday, Monday?

21 **THE COURT:** Tuesday. All right. Bring them in.

22 (Jury in)

23 **THE COURT:** All right, ladies and gentlemen. I
24 have your notes. And I've tried to explain about the
25 difficulty in getting transcripts immediately. So

1 this is fine. The Court has no problem with
2 reconvening on Tuesday. We'll have these transcripts
3 for you at that time.

4 Let me caution you about a couple of things.
5 Now, the press is reporting this locally, and there
6 probably will be some coverage I guess Monday. So
7 I'm going to ask you again not to -- I think there
8 probably was -- I haven't even seen the paper but
9 there may be some coverage today. And there
10 certainly probably will be some on Monday. So again
11 I'll ask not to read the local press.

12 And again, don't discuss the case with anyone
13 else over the weekend. We'll see you on Tuesday
14 morning at 9:00. Is that all right?

15 **MADAM FORELADY:** Appreciate it. Thank you, Your
16 Honor. Wonderful.

17 **THE COURT:** Everybody is agreeable?

18 **MADAM FORELADY:** Yes, sir.

19 **THE COURT:** Thank you very much. We'll see you
20 then.

21 (Jury out at 9:43 p.m.)

22 **THE COURT:** We'll stand adjourned until 9:00
23 Tuesday morning.

24 (Whereupon, the proceedings are concluded for
25 the day, to be reconvened Tuesday morning)

Tuesday, May 13, 2008

(WHEREUPON, Court's Exhibit No. 5 is marked for identification.)

THE COURT: Counsel, approach the bench.

(Whereupon, a bench conference is had)

THE COURT: I think we need the defendants.

(Pause)

THE COURT: All right, counsel. Is Mr. Meadors here?

MR. MOAK: I believe Ms. McDuffie is getting him, Your Honor.

THE COURT: Sir?

MR. MOAK: I believe Ms. McDuffie is getting him, Your Honor.

THE COURT: All right, counsel. The jury has indicated that they'd like to hear the Court's instructions again. And I am prepared to do that. Any objection?

MR. MEADORS: No, sir.

THE COURT: Any objection?

MR. WHITLARK: None from McDonald.

MR. REUWER: No, sir.

THE COURT: Bring the jury, please. Court's Exhibit No. 6.

1 (WHEREUPON, Court's Exhibit No. 6 is marked for
2 identification.)

3 (Jury in at 10:50 a.m.)

4 **THE COURT:** Good morning, ladies and gentlemen.
5 Thank you for being here and being in attendance and
6 being conscientious about this case.

7 I have a note from the jury that you'd like to
8 hear the instructions again, which I am prepared to
9 do at this time. And I will -- it may sound
10 repetitious, but I'm doing it exactly the way I did
11 it the first time.

12 Ladies and gentlemen of the jury, you've now
13 heard all of the testimony in the case. You will
14 take with you to the jury room all the evidence in
15 the case that's been introduced. You've heard the
16 arguments of counsel, both the State and each of the
17 defendants, and I will now explain to you the law as
18 it applies to this case.

19 Under our Constitution and Code of Laws only the
20 jury can make findings of fact in this case. I am
21 not permitted to indicate how I may feel about the
22 facts. If I have said anything or done anything in
23 this case which would indicate to you that I have an
24 opinion concerning the facts in this case, then you
25 should disregard that. This jury must independently

1 weigh the evidence presented in this trial and render
2 a verdict based solely on that evidence.

3 Now, the same Constitution and laws which
4 designate and make you the finders of fact also make
5 me the instructor of the law. If you have some idea
6 as to what the law is or what the law ought to be and
7 it does not agree with what I now tell you the law
8 is, you are obligated under the oath which you have
9 taken to abandon this preconception on your part and
10 accept and apply the law precisely as I now state it
11 to you.

12 I charge that you there are three defendants in
13 this case. The case of each defendant and the
14 evidence and the law concerning that defendant should
15 be considered separately and individually. Your
16 verdict does not have to be the same for all
17 defendants. The fact that you may find one defendant
18 guilty or not guilty should not control your verdict
19 as to any other defendant. Where more than one
20 person is charged with a crime, if the evidence
21 warrants it, you may convict one and acquit the other
22 or you may acquit all or you may convict all. It
23 will depend on your view of the testimony and
24 evidence. You must take each defendant and consider
25 the evidence as to that defendant and my instruction

1 to you on the law. You will then write a separate
2 verdict of guilty or not guilty for each individual
3 defendant.

4 Now, the indictments in this case allege two
5 different offenses against each of the defendants.
6 The charges are burglary in the first degree and
7 murder. Each indictment charges a separate and
8 distinct offense. You must decide each indictment
9 separately on the evidence and the law applicable to
10 it, uninfluenced by your decision as to any other
11 indictment.

12 Each of the defendants may be convicted or
13 acquitted on any or all of the offenses charged. You
14 will be asked to write a separate verdict of guilty
15 or not guilty for each indictment.

16 I remind you again, the fact that each defendant
17 was arrested, charged and indicted in this case is
18 not evidence in this case, cannot be considered by
19 you as evidence of guilt in this case, nor does it
20 create any presumption or inference of guilt. Those
21 documents or these documents are simply the formal
22 written instruments by which the charges are made
23 against each defendant. These documents are the
24 formal documents by which the court is brought into
25 court.

1 Each of the defendants has pled not guilty to
2 each of these indictments and those pleas put the
3 burden on the State to prove the defendant's guilt.
4 A person charged with committing a criminal offense
5 in South Carolina is never required to prove himself
6 or herself innocent.

7 I charge you that this is an important rule of
8 law, that the defendant in a criminal trial no matter
9 what the seriousness of the charge may be will always
10 be presumed to be innocent of the charge for which
11 the indictment was issued unless guilt has been
12 proven by evidence satisfying you of that guilt
13 beyond a reasonable doubt.

14 This presumption of innocence does not end when
15 you begin your deliberations but it accompanies each
16 defendant throughout the trial until you reach a
17 verdict of guilt based on evidence satisfying you of
18 that guilt beyond a reasonable doubt.

19 The presumption of innocence is not a mere legal
20 theory. It's not just a legal phrase. It is a
21 substantial right to which every defendant is
22 entitled unless you, the jury, are satisfied from the
23 evidence of the defendant's guilt beyond a reasonable
24 doubt.

25 Well, what is a reasonable doubt at law? A

1 reasonable doubt is the kind of doubt that would
2 cause a reasonable person to hesitate to act. Let me
3 repeat that. A reasonable doubt is the kind of doubt
4 that would cause a reasonable person to hesitate to
5 act.

6 The State has the burden of proving each
7 defendant guilty beyond a reasonable doubt. Some of
8 you may have served as jurors in civil cases where
9 you were told it's only necessary to prove that a
10 fact is more likely true than not true, such as by
11 the greater weight or preponderance of the evidence.
12 In criminal cases, however, the State's proof must be
13 more powerful than that. It must be beyond a
14 reasonable doubt.

15 Proof beyond a reasonable doubt is proof that
16 leaves you firmly convinced of the defendant's guilt.
17 Now, there are very few things in this world we know
18 with absolute certainty, and in criminal cases the
19 law does not require proof that overcomes every
20 possible doubt. If based on the circumstances and
21 the evidence you are firmly convinced that the
22 defendant is guilty of the crime charged, you must
23 find the defendant guilty. If on the other hand you
24 think there is a real possibility that the defendant
25 is not guilty, you must give the defendant the

1 benefit of the doubt and find him not guilty.

2 Now, there are two types of evidence which are
3 generally presented during a trial, direct evidence
4 and circumstantial evidence. Direct evidence is the
5 testimony of a person who claims to have actual
6 knowledge of a fact, such as an eye witness. It's
7 evidence which immediately establishes the main fact
8 to be proved.

9 Circumstantial evidence on the other hand is
10 proof of a series or chain of facts and circumstances
11 suggesting or indicating the existence of some fact.
12 It is evidence which immediately establishes
13 collateral facts from which the main fact may be
14 inferred. Circumstantial evidence is based on
15 inference, not on personal knowledge or observation,
16 but the law makes absolutely no distinction between
17 the weight or value to be given either direct or
18 circumstantial evidence, nor is a greater degree of
19 certainty required of circumstantial evidence than of
20 direct evidence.

21 You should weigh all of the evidence in the
22 case, and after weighing all the evidence, if you are
23 not convinced of the guilt of each of the defendants
24 beyond a reasonable doubt, you must find each of the
25 defendants not guilty. Again, you are to consider

1 the defendants individually and not collectively.

2 Now, some of the evidence in this case may have
3 been admitted solely because of its relationship to
4 the case against one of the defendants. This
5 evidence cannot be considered in the case against any
6 other defendant.

7 Now, necessarily you must determine the
8 credibility of the witnesses who have testified in
9 this case. Credibility simply means believability.
10 It becomes your duty as jurors to analyze and
11 evaluate the evidence and determine which evidence
12 convinces you of its truth.

13 In determining the believability of witnesses
14 who have testified in this case, you may believe one
15 witness over several witnesses or several witnesses
16 over one witness. You may believe a part of the
17 testimony of a witness and reject the remaining part
18 of the testimony of that same witness.

19 You may believe the testimony of a witness in
20 its entirety or reject the testimony of a witness in
21 its entirety. You may consider whether any witness
22 has exhibited to you any interest in the case, bias,
23 prejudice or other motive in this case.

24 Now, a person who has a past criminal record is
25 competent to testify during a trial. A past record

1 does not affect the ability of that witness to
2 testify. The past record may only be considered by
3 you, if at all, in determining the witness's
4 believability. Remember you are the sole judges of
5 the facts in the case and of the believability of all
6 of the witnesses.

7 Now, normally an individual or a person we refer
8 to as a lay person, you and I, cannot give what we
9 call opinion testimony. Normally when a person
10 testifies they must testify as to what they either
11 saw, heard or sensed by smell or something of that
12 nature.

13 However, there is an exception. When someone is
14 qualified because of education and experience, we let
15 them testify, designate them as experts, and we allow
16 them to give their opinions. They are permitted to
17 give their opinion in certain areas as the Court
18 qualifies them in that way. And as I said earlier
19 last week, Dr. Sexton was such a witness.

20 Now, there are several statements in this case.
21 There are statements in this case allegedly given by
22 the defendants. A statement alleged to have been
23 given by one or more of the defendants has been
24 admitted into evidence in this case. While the Court
25 has determined that the statements are admissible, I

1 instruct you that you make the ultimate decision of
2 whether or not the defendants made that statement.

3 If the defendant did make the statement, you
4 must then determine whether the statement was made by
5 the defendant voluntarily and of his own free will.
6 This means that the statement was not caused by
7 pressure, force, fear, threats, coercion or
8 intimidation or by hope or promise of leniency or
9 reward of any kind.

10 In determining whether the statement was
11 voluntary, you should consider both the
12 characteristics of the defendant and the details of
13 the questioning. Some of the factors you may
14 consider are the age of the defendant, the
15 defendant's lack of education or education or lack of
16 education, the defendant's mental ability or
17 capacity, the place and length of the detention, the
18 nature of the questioning, the advice or lack thereof
19 to the defendant of his Constitutional rights but not
20 limited to the right to remain silent, that any
21 statement could be used against him in a court of
22 law, the right to have a lawyer present, that if he
23 could not afford a lawyer a lawyer would be appointed
24 to represent him at any cost, that he could stop
25 making the statement at any time.

1 Now, a third party, that would be any third
2 party, could not invoke the rights, the Miranda
3 rights or these rights for an individual. An
4 individual has to revoke those rights him or herself.
5 You must consider carefully all the surrounding
6 circumstances before you give any weight to an
7 alleged statement.

8 Now, the State has the burden of proving beyond
9 a reasonable doubt that the alleged statement was
10 voluntary. If you determine it was, you may give the
11 statement any further consideration that you deem
12 proper. You must decide what weight, if any, should
13 be given to the alleged statement. If you determine
14 the alleged statement was not the free and voluntary
15 statement of the defendant, you should not consider
16 the statement at all.

17 Now, in order to establish criminal liability
18 criminal intent is required. For example, the mental
19 state required to be proven by the State for a
20 particular crime might be some specific purpose, some
21 obvious intent, knowledge of certain facts or
22 recklessness. Criminal intent must be proven by the
23 State beyond a reasonable doubt.

24 Criminal intent is always a matter that must be
25 determined by the jury from the circumstances

1 surrounding the situation. There is no way to prove
2 intent to a mathematical certainty. There is no way
3 medical science can dissect a person's brain and
4 determine what the person had in mind. So the law
5 says that criminal intent may be inferred from the
6 circumstances shown to have existed at the time and
7 place. This is how you make a determination of
8 whether or not the element requiring intent was
9 present.

10 It is not necessary to establish intent by
11 direct and positive evidence, but intent may be
12 established by inference in the same way as any other
13 fact, by taking into consideration the acts of the
14 parties and all the facts and circumstances of the
15 case.

16 Criminal intent is a mental state, a conscious
17 wrongdoing. It's up to you to determine what each of
18 the defendants intended to do based on the
19 circumstances shown to have existed. Criminal intent
20 can arise from action or a failure to act. It may
21 result from negligence, recklessness or an
22 indifference to duties or to consequences that are
23 considered by the law to be the equivalent of
24 criminal intent.

25 Now, if a crime is committed by two or more

1 people who are acting together in committing a crime,
2 the act of one is the act of all. A person who joins
3 with another to commit an unlawful act is criminally
4 responsible for everything done by the other person
5 which happens as a probable and natural consequence
6 of the acts done in carrying out the common plan and
7 purpose.

8 For example, two people can be guilty of killing
9 another person when only one of the two had a gun,
10 there was only one bullet and only one of the two
11 fired the shot that caused the death. If two or more
12 people are acting together, are together and acting
13 together, assisting each other in committing the
14 offense, the act of one is the act of all. Or as it
15 has sometimes been said, the hand of one is the hand
16 of all.

17 Prior knowledge that a crime is going to be
18 committed without more is not sufficient to make a
19 person guilty of that crime. Mere knowledge that
20 another person is going to commit a crime, even if
21 the defendant is present when the crime is committed,
22 is not sufficient to convict the defendant as a
23 principal.

24 Guilt as a principal is shown by actual or
25 constructive presence at the scene as a result of

1 prior arrangement. Therefore, a finding of a prior
2 arranged plan or common scheme is necessary for a
3 finding of guilt as a principle.

4 The State must prove beyond a reasonable doubt
5 by competent evidence the theory of the hand of one
6 is the hand of all. A principle in a crime is one
7 who either actually commits the crime or is present
8 aiding, abetting or assisting in the commission of
9 the crime. When a person does an act in the presence
10 of and with the assistance of another, the act is
11 done by both.

12 Where two or more acting with a common plan or
13 intent are present at the commission of a crime, it
14 does not matter who actually commits the crime. All
15 are guilty. The hand of one is the hand of all.

16 Present at the commission of a crime means to be
17 sufficiently near to aid and abet and assist in the
18 commission of the crime. However, mere presence at
19 the scene of a crime is not sufficient to convict one
20 as a principal on the theory of aiding and abetting.

21 Intent is also a necessary element, for there
22 must have been a common design or intent to commit
23 the crime and the crime must have been committed
24 pursuant thereto with the person aiding and abetting
25 by some overt act.

1 Intent means intending the result which actually
2 occurs, not accidentally or involuntarily. Intent
3 may be shown by acts and conduct of the defendants
4 and other circumstances from which you may naturally
5 and reasonably infer intent. The State must prove
6 these elements beyond a reasonable doubt.

7 What is first degree burglary? Each of the
8 defendants is charged with first degree burglary.
9 The State must prove beyond a reasonable doubt that
10 each defendant entered a dwelling without consent. A
11 dwelling is any building or portion of a building in
12 which a person ordinarily sleeps. A building
13 constructed as a dwelling that has never been
14 occupied cannot be considered a dwelling for purposes
15 of a burglary, but a building is a dwelling even if
16 the residents are temporarily absent from the
17 building.

18 In order to prove that each defendant entered
19 the dwelling, the State does not have to show that
20 the defendants' entire bodies entered the dwelling.
21 The smallest entry is sufficient. It may be any part
22 of a body, such as a hand or a foot or even an
23 instrument.

24 In addition, the State does not have to prove
25 that force was used to gain entry. If a person

1 enters a building by using deception, artifice or
2 trick or misrepresentation to get consent to enter,
3 this is an entry without consent.

4 Next the State must prove beyond a reasonable
5 doubt that each defendant intended to commit a crime,
6 either a felony or a misdemeanor at the time of the
7 entry. The mere entry into a building without
8 consent is not burglary. If the intent to commit a
9 crime is formed after the entry, it is not burglary.

10 On the other hand, if the defendant intended to
11 commit a crime at the time of the entry, it is a
12 burglary even if the intent was abandoned after the
13 entry. It does not matter that the intended crime
14 was not completed. Intent may be shown by acts and
15 conduct of the defendants and other circumstances
16 from which you may naturally and reasonably infer
17 intent.

18 And finally the State must prove beyond a
19 reasonable doubt one of the following. When
20 entering, while in the dwelling or when fleeing the
21 defendant or an accomplice was armed with a deadly
22 weapon or explosive. A deadly weapon is any article,
23 instrument or substance which is likely to cause
24 death or great bodily harm. Whether an instrument
25 has been used as a deadly weapon depends on the

1 circumstances and facts of each case. And some
2 examples of deadly weapons may be pistols or shotguns
3 or rifles or knives.

4 Or when entering, while in the dwelling or when
5 fleeing the defendant or an accomplice caused
6 physical injury to anyone not participating in the
7 crime; or when entering, while in the dwelling or
8 when fleeing the defendant or an accomplice used or
9 threatened to use a dangerous object; or when
10 entering, while in the dwelling or when fleeing the
11 defendant or an accomplice displayed what appeared to
12 be a knife, pistol, revolver, shotgun or other
13 fireman; or the defendant or defendants entered or
14 remained in the dwelling in the nighttime.

15 Nighttime is the period between sunset and
16 sunrise during which there is not enough daylight to
17 recognize a person's face except by artificial light
18 or moonlight.

19 Each of the defendants is also charged with
20 murder. The State must prove beyond a reasonable
21 doubt that each defendant killed another person with
22 malice aforethought. Malice is hatred, ill will or
23 hostility towards another person. It is the
24 intentional doing of a wrongful act without just
25 cause or excuse and with an intent to inflict an

1 injury or under circumstances that the law will infer
2 an evil intent.

3 Malice aforethought does not require that malice
4 exist for any particular time before the act is
5 committed, but malice must exist in the mind of the
6 defendant just before and at the time that the act is
7 committed. Therefore, there must be a combination of
8 the previous evil intent and the act.

9 Malice aforethought may be express or inferred.
10 These terms, express and inferred, do not mean
11 different types of malice but merely the manner in
12 which malice may be shown to exist; that is, either
13 by direct evidence or by inference from the facts and
14 circumstances which are proved.

15 Express malice is shown when a person speaks
16 words which express hatred or ill will for another or
17 when the person prepared beforehand to do the act
18 which was later accomplished. For example, lying in
19 wait for a person or any other acts of preparation
20 going to show that the deed was within each
21 defendant's mind would be express malice.

22 On the other hand, malice may be inferred from
23 conduct showing a total disregard for human life.
24 Inferred malice may also arise when the deed is done
25 with a deadly weapon. A deadly weapon again is any

1 article, instrument or substance which is likely to
2 cause death or great bodily harm. Whether an
3 instrument has been used as a deadly weapon depends
4 on the facts and circumstances of each case.

5 Now, ladies and gentlemen, I want to emphasize
6 this last point of law. I instruct you and emphasize
7 the fact that a defendant does not testify is not a
8 factor to be considered by you in any way in your
9 deliberation and in your consideration on the
10 question of the guilt or innocence of the defendant.
11 It must not be considered by you in any manner
12 whatsoever.

13 A defendant has the Constitutional right to
14 remain silent. The assertion of this right must not
15 be considered by you in your deliberations. I
16 repeat, under your oath you are to draw no conclusion
17 whatsoever from the fact that a defendant in this
18 case did not testify. The fact that a defendant or
19 the defendants did not testify should not even be
20 discussed in the jury room. The burden of proof, as
21 I have stated to you, is on the State. A defendant
22 is not required to prove his or her innocence. The
23 burden of proof remains on the State to prove guilt
24 beyond a reasonable doubt.

25 Now, Ladies and Gentlemen, I am required to

1 declare the law as I've done through these
2 instructions to help and guide you to just and lawful
3 verdict. Whether some of these instructions will
4 apply will depend on what you find to be the facts.
5 The fact that I have instructed on various subjects
6 in this case must not be taken as indicating an
7 opinion of this Court as to what you should find to
8 be the facts or as to which party should be entitled
9 to your verdict.

10 Your verdict must represent the considered
11 judgment of each juror. In order to return a
12 verdict, it's necessary that each juror agree. Your
13 verdict must be unanimous in other words. All 12 of
14 you must agree on the verdict. Your verdict cannot
15 be based on sympathy, passion, prejudice, emotion or
16 any other consideration that is not in evidence in
17 this case.

18 Remember at all times that you are not partisans
19 favoring one party over the other. You are judges,
20 judges of the facts. Your sole interest in this case
21 is to seek the truth from the evidence that's been
22 presented to you during the course of this trial.

23 All right, ladies and gentlemen. You may now
24 return to the jury room to continue your
25 deliberations.

1 **JUROR:** Thank you, Your Honor.

2 (Jury out at 11:10 a.m.)

3 **MR. MEADORS:** Judge.

4 **THE COURT:** Yes, sir.

5 **MR. MEADORS:** It's a small point. But when you
6 were talking about burglary in the first charge I
7 guess Friday, when you were defining what a deadly
8 weapon is as one of the elements to find a burglary
9 first, I think you mentioned a bat. Today you
10 didn't. Am I wrong?

11 **THE COURT:** No, you're not wrong. But I did say
12 any instrument that could be used as a deadly weapon.

13 **MR. MEADORS:** Yes, sir. That was the only thing
14 that I found different from last Thursday. I just --

15 **THE COURT:** I think I probably did. I think I
16 may have just -- it's not in the charge. I probably
17 said it.

18 **MR. MEADORS:** I knew it wasn't in the murder
19 charge, but I figured it would be in the burglary.

20 **THE COURT:** What do you want me to do?

21 **MR. WHITLARK:** I know we objected to it being
22 included on the record. So --

23 **MR. MEADORS:** That's fine.

24 **THE COURT:** Thank you very much. We'll stand at
25 ease until we hear from the jury.

1 (Whereupon, a break is taken)

2 (WHEREUPON, Court's Exhibit No. 7 is marked for
3 identification.)

4 **THE COURT:** All right, counsel. We've got a
5 question from the jury. A question from the jury.
6 Approach the bench.

7 (Whereupon, a bench conference is had)

8 (WHEREUPON, Court's Exhibit No. 8 is marked for
9 identification.)

10 **THE COURT:** All right, counsel. The jury
11 advises they have reached a verdict. Are you ready
12 to receive the verdict?

13 **MR. MEADORS:** Yes, sir. The State's ready.

14 **MR. WHITLARK:** McDonald is ready, Your Honor.

15 **MR. KENDRICK:** Yes, sir, Your Honor.

16 **MR. REUWER:** Yes, sir.

17 **THE COURT:** Bring the jury, please.

18 (Jury in at 3:32 p.m.)

19 **THE COURT:** Be seated. All right, ladies and
20 gentlemen and Madam Forelady, has the jury reached a
21 verdict?

22 **MADAM FORELADY:** Yes, we have, Your Honor.

23 **THE COURT:** Would you hand it to the bailiff,
24 please.

25 (Forelady complies)

1 **THE COURT:** Madam Forelady, let me just ask you
2 one question. Just a yes or a no answer I believe
3 will suffice at this time. On the indictment of
4 Robert Cannon, has the jury been able to reach a
5 unanimous verdict on the charge of murder?
6 Unanimous. Just yes or no.

7 **MADAM FORELADY:** No.

8 **THE COURT:** The answer is no?

9 **MADAM FORELADY:** No.

10 **THE COURT:** All right. I have your other five
11 verdicts. Do you believe that after further
12 consultation the jury would be able to reach a
13 verdict on that particular indictment?

14 **MADAM FORELADY:** No.

15 **THE COURT:** All right. If you'll retire to the
16 jury room for just a minute, please. Let me discuss
17 this with the attorneys, and we'll call you in just a
18 minute.

19 (Jury out at 3:37 p.m.)

20 **THE COURT:** All right, counsel. Approach the
21 bench, please.

22 (Whereupon, a bench conference is had)

23 **THE COURT:** All right. Bring the jury.

24 (Jury in at 3:43 p.m.)

25 **THE COURT:** Be seated, please. All right,

1 ladies and gentlemen. I will tell you that this
2 happens from time to time, that a jury is unable to
3 reach a decision, whether it's one charge or four
4 charges or ten charges. And I wanted to discuss
5 something with the lawyers before we proceed.

6 But I'll tell you that when any matter is in
7 dispute, it's not always easy for two people to
8 agree. Therefore, I understand when 12 persons must
9 agree, it becomes much more difficult. But it is
10 important that litigation, and this case is
11 litigation, be ended if it can be ended without a
12 single one of you doing violence to your individual
13 judgments or your conscience.

14 It's your duty as jurors to consult with one
15 another to deliberate with a view towards reaching an
16 agreement if you can do so without violence to your
17 individual judgment. Each of you must decide the
18 case for himself or herself, but do so only after an
19 impartial consideration of the evidence in the case
20 with your fellow jurors.

21 In the course of your deliberations do not
22 hesitate to re-examine your own views and change your
23 opinion if you are convinced that your opinion is
24 erroneous. No juror is expected to give up his or
25 her opinion based on reasoning satisfactory to

1 yourself merely for the purpose of reaching a
2 verdict. And I want you to understand that. Do not
3 surrender your honest convictions as to the weight or
4 effect of the evidence solely because the opinion of
5 your fellow jurors is contrary to your opinion or for
6 the mere purpose of returning a verdict.

7 You are not called upon often to try cases. As
8 one of 46 circuit judges whose work is to try cases
9 from day-to-day throughout the year, it's very
10 unusual, almost unheard of, for a jury to go out and
11 promptly return a verdict. I know you have not had
12 that -- I mean, that has not been the case here.
13 However, at some time we usually get a verdict. And
14 I know have you worked hard on these six indictments.
15 And what I am referring to now is the sole indictment
16 that you have not been able to reach a verdict on.

17 What this means is that while it is normal for
18 jurors to disagree at first, the fact we normally get
19 a verdict also means that after reasonable persons
20 lay aside all extraneous matters and determine to
21 decide the case on the basis of the law and the
22 evidence, then they do somehow come to an
23 understanding and write a verdict.

24 It's never been intended that the verdict of a
25 jury should be the verdict of one person; and, on the

1 other hand, the verdict of the jury is the collective
2 reasoning of all persons put together. The reason we
3 have a jury is so we might have the benefit of
4 collective thought and collective reasoning of the
5 jury.

6 It may help, if you not have already done so, to
7 tell the other jurors how you feel about the case and
8 why you do. And I'm sure you've been doing that.
9 And, on the other hand, it may help if other jurors
10 explain their position to you and exchange views with
11 you. And I ask that you listen to each other and
12 give to the others' thoughts such meanings as you
13 think they should have.

14 A mistrial in a case is a very unfortunate
15 thing. If you as a juror do not agree on a verdict,
16 it doesn't mean that anybody wins or that case is
17 over. It just means at some future time at another
18 term of court before me or some other judge that some
19 other jury will sit where you are in the trial of
20 this case; that is, the sole case that you've been
21 unable to reach a verdict on.

22 The same participants will come. The same
23 lawyers will probably come, and they will basically
24 ask the same questions and presumably will get the
25 same answers. We will go through the entire process

1 again with regard to this single indictment.

2 Now, I have no reason to believe that any other
3 12 jurors from Kershaw County will represent a more
4 cross section of the county, would be more
5 intelligent or might be more capable of solving this
6 controversy than you are. And one day this will have
7 to be decided.

8 I'm going to ask that you again retire to your
9 jury room and further deliberate in this case to see
10 if you can write a verdict with regard to this
11 indictment.

12 Let me close again by saying that while it's
13 important that litigation be ended, it should be
14 ended in the form of a verdict without any juror
15 doing violence to his or her own conscience. No
16 juror is expected to give up an opinion based on
17 reasoning satisfactory to himself or herself merely
18 for the purpose of being in agreement.

19 Now, with these added instructions I'm going to
20 ask you to retire to your jury room and further
21 deliberate solely on the indictment as to Mr. Cannon
22 that you have been unable to reach a verdict on.
23 Thank you very much, ladies and gentlemen. Madam
24 Forelady, if you'll take this with you.

25 (Jury out at 3:47 p.m.)

1 **THE COURT:** All right. We'll await the verdict
2 of the jury.

3 (Whereupon, a break is taken)

4 **THE COURT:** All right, counsel. The jury has
5 informed the bailiff that they have received the
6 verdict. They have reached a verdict. Are you ready
7 to receive the verdict? The State ready?

8 **MR. MEADORS:** Yes, sir.

9 **MR. WHITLARK:** McDonald is ready.

10 **MR. KENDRICK:** Yes, sir, Your Honor.

11 **MR. RILEY:** Yes, sir.

12 **THE COURT:** All right. Let me say this. Ladies
13 and gentlemen of the audience, when the verdict is
14 read, depending on the outcome, I want to say this.
15 I don't want any emotional outbreaks in the room.
16 These things, I understand from both sides of the
17 room that this is a very tense moment. I understand
18 that there are a lot of feelings, a lot of emotions.
19 But I can't conduct an orderly courtroom if people
20 are highly emotional and express that emotion in open
21 court.

22 All of you have sat patiently and listened to
23 this testimony for over a week now. And I respect
24 each and every one of you. You all have conducted
25 yourselves as gentlemen and ladies, and I would hope

1 that would continue. But sometimes when the cases
2 are resolved, one side or the other feels very strong
3 emotion, and I understand that. But I'm going to ask
4 you to keep your emotions as best you can under
5 control. So, thank you very much. Bring the jury,
6 please.

7 (Jury in at 4:55 p.m.)

8 **THE COURT:** All right. Madam Forelady, has the
9 jury reached a verdict on the final indictment that
10 was returned?

11 **MADAM FORELADY:** Yes, we have.

12 **THE COURT:** Would you hand it to the bailiff,
13 please.

14 (Forelady complies)

15 **THE COURT:** All right, Madam Clerk. If you'll
16 publish the verdicts, please, in that order.

17 **THE CLERK:** Thank you, Your Honor. Indictment
18 number 2007-GS-28-19, The State of South Carolina,
19 County of Kershaw, vs. Christopher R. Whitehead,
20 indictment for burglary first degree, the verdict:
21 Guilty. Signed by Colleen Beattie.

22 Indictment No. 2007-GS-28-22, The State vs.
23 Christopher Ryan Whitehead, indictment for murder,
24 verdict: Guilty.

25 **MR. WHITEHEAD:** You all know you sentenced me to

1 life without parole for nothing.

2 **THE CLERK:** Signed by Colleen Beattie,
3 Foreperson.

4 Indictment 2007-GS-28-16, The State vs. Derrick
5 McDonald, indictment for burglary first, verdict:
6 Guilty. Signed by Colleen Beattie, Foreperson.

7 Indictment 2007-GS-28-15, The State vs. Derrick
8 McDonald, indictment for murder, the verdict:
9 Guilty. Signed by Colleen Beattie.

10 Indictment number 2007-GS-28-17, The State vs.
11 Robert Cannon, indictment for burglary first degree,
12 verdict: Guilty.

13 Indictment 2007-GS-28-18, The State vs. Robert
14 Cannon, indictment for murder, the verdict: Guilty.
15 Signed by Colleen Beattie, Foreperson.

16 Madam Forelady and Ladies and Gentlemen of the
17 Jury, if these are your verdicts, please signify by
18 raising your right hand.

19 **THE COURT:** All right, Madam Clerk. Poll the
20 jury, please.

21 **THE CLERK:** Thank you, Your Honor. Rose M.
22 Seawright, was this your verdict?

23 **JUROR:** Yes, ma'am.

24 **THE CLERK:** Are these still your verdicts?

25 **JUROR:** Yes.

1 **THE CLERK:** Thank you. Paula H. Wells, were
2 these your verdicts?

3 **JUROR:** (Nods head affirmatively).

4 **THE CLERK:** Are they still your verdicts?

5 **JUROR:** Yes.

6 **THE CLERK:** Thank you. Leah R. LeCroy, were
7 these your verdicts?

8 **JUROR:** Yes, ma'am.

9 **THE CLERK:** Are they still your verdicts?

10 **JUROR:** Yes, ma'am.

11 **THE CLERK:** Thank you. Colleen A. Beattie, were
12 these your verdicts?

13 **JUROR:** Yes.

14 **THE CLERK:** Are they still your verdicts?

15 **JUROR:** Yes.

16 **THE CLERK:** Thank you. Michelle B. Watkins,
17 were these your verdicts?

18 **JUROR:** Yes.

19 **THE CLERK:** Are they still your verdicts?

20 **JUROR:** Yes.

21 **THE CLERK:** Thank you. Claude F. Jones, were
22 these your verdicts?

23 **JUROR:** Yes.

24 **THE CLERK:** Are they still your verdicts?

25 **JUROR:** Yes.

1 **THE CLERK:** Thank you. Sheila t. Brown. Sheila
2 T. Brown.

3 **THE COURT:** No. She was excused.

4 **THE CLERK:** Excuse me. I'm sorry. James A.
5 Givens, were these your verdicts?

6 **JUROR:** Yes, ma'am.

7 **THE CLERK:** Are they still your verdicts?

8 **JUROR:** Yes, ma'am.

9 **THE CLERK:** Thank you. Charles L. Pinkerton,
10 were these your verdicts?

11 **JUROR:** Yes, ma'am.

12 **THE CLERK:** Are they still your verdicts?

13 **JUROR:** Yes, ma'am.

14 **THE CLERK:** Thank you. Michael B. Ware, were
15 these your verdicts?

16 **JUROR:** Yes, ma'am.

17 **THE CLERK:** Are they still your verdicts?

18 **JUROR:** Yes, ma'am.

19 **THE CLERK:** Susan R. Cox, were these your
20 verdicts?

21 **JUROR:** Yes, ma'am.

22 **THE CLERK:** Are they still your verdicts?

23 **JUROR:** Yes, ma'am.

24 **THE CLERK:** Thank you. Lisa A. Laborne, were
25 these your verdicts?

1 **JUROR:** Yes.

2 **THE CLERK:** Are they still your verdicts?

3 **JUROR:** Yes.

4 **THE CLERK:** Thank you. Your Honor, the jury has
5 been polled.

6 **THE COURT:** Okay. Thank you. Any motions?

7 **MR. MEADORS:** Nothing from the State.

8 **MR. WHITLARK:** Your Honor, we'd ask for ten days
9 to file our motions.

10 **THE COURT:** All right. I'll do so. Other
11 defendants?

12 **MR. KENDRICK:** The same request, Your Honor.

13 **MR. RILEY:** The same, Judge.

14 **THE COURT:** All right. Thank you. Your motion
15 is granted.

16 All right, ladies and gentlemen of the jury, I
17 am certain this was a difficult task. When we
18 started over a week ago, it perhaps did not appear at
19 that time that things would be as difficult as they
20 probably were for you in the jury room. I don't know
21 that, but the length of time that you started, you
22 put in two or so hours on Friday and you've been here
23 almost all day today. So I know that you've had
24 serious discussions, difficult discussions. And I
25 know it's difficult to make these kind of decisions.

1 But as I said earlier, these decisions have to
2 be made. They don't have to be made in any
3 particular fashion. They just -- some resolution
4 needs to be made of these matters. So I want to
5 thank you for your diligence and your
6 conscientiousness in going through this process with
7 us. It's been difficult for everybody, and I
8 understand that.

9 New, the remaining portion of this trial will
10 consist of the sentencing of the defendants. Now, we
11 don't have the luxury, as some television shows do,
12 like Law and Order, things like that, of waiting
13 several weeks and waiting and accumulating a lot of
14 data and going through another sentencing procedure.
15 We do it immediately following a trial.

16 And that process will take place in about 15
17 minutes. There is a good bit of paperwork that has
18 to be prepared before that can take place. What I'm
19 getting around to is to tell you that you're welcome
20 to stay for that. You're also free to leave. If you
21 do choose to leave, I'm sure you'll read about it in
22 the paper if you wish to do so. Or you can stay.
23 And I would assume the best place for you to stay is
24 right there in the jury box.

25 Now, I'm going to dismiss you for just a minute

1 to go back to your jury room. And if you wish to
2 come back in at the appropriate time after we get the
3 paperwork done, you're welcome to do that. Or, as I
4 say, you're also free to leave.

5 If you choose to leave, I just want to thank
6 you. It's been -- we've come down the long road
7 together. And it's been difficult and I know
8 difficult for you. These things are never -- things
9 of this import are never simple matters. So if you
10 choose to leave, I want to thank you on behalf of the
11 citizens of Kershaw County. I want to thank you on
12 behalf of these attorneys and litigants and myself,
13 the clerk, everybody that has worked with you over
14 these past six or seven days.

15 The penalties for murder are serious, and I'm
16 sure you all knew that. And it becomes now my
17 responsibility to decide how much of a penalty each
18 of the defendants will receive. They've all -- at
19 this stage they've all been treated by the same by
20 you, and there will be what's called a sentencing
21 procedure, in which case the defendants and their
22 attorneys will be able to argue what we call
23 mitigation as to what their sentences ought to be or
24 ought not to be. And that is my responsibility. It
25 now becomes my responsibility. You've handed it to

1 me, and I will do that.

2 So you are now free to go. Good luck to all of
3 you. If you wish to stay, you're welcome to do so.
4 Do you need to talk to them?

5 **THE CLERK:** If I may just a moment, sir, back
6 there.

7 **THE COURT:** The clerk would like to speak with
8 you for just a minute. And I'll be glad to -- after
9 the sentencing procedure, if you wish to stay, I will
10 be glad to speak with each of you collectively or
11 individually if you have any questions about how this
12 trial transpired.

13 Let me just say also, if any of the -- if
14 anybody wants to talk to you after this case is over,
15 you certainly are welcome to talk to them. You're
16 also welcome not to talk to them. If you would feel
17 uncomfortable talking to either members of the press
18 or any of the attorneys or anything like that, you
19 just tell them you don't care to talk to them. It's
20 something personal to you and you'd rather not talk
21 to them. Or if you feel like you can talk to them,
22 they may ask you some questions.

23 If anybody bothers you about that or persists in
24 trying to question you about that, you let me know or
25 somehow let me know and I will take care of it. You

1 have nothing to apologize for about your decision.
2 It was a hard fought case and it was a difficult case
3 and you made a difficult decision.

4 So I want to say thank you and good luck to all
5 of you. You are now free to retire to the jury room.
6 Ms. McDonald wants to speak with you for just a
7 minute after which you may leave or you may come back
8 into the jury room in about 15 or 20 minutes when we
9 reconvene for the sentencing procedure part of this
10 trial. Thank you very much, ladies and gentlemen.

11 (Jury out at 5:05 p.m.)

12 **THE COURT:** All right, counsel. We'll stand at
13 ease until we have everything in order for
14 sentencing.

15 (Whereupon, a break is taken)

16 **THE COURT:** All right, Solicitor.

17 **MR. MEADORS:** If it please, Your Honor. On
18 behalf of the Sheriff's Department and Josh Zoch and
19 the whole Zoch family, we do want to thank the jury
20 for their verdict in this case and thank them for
21 listening.

22 Judge, we have several family members, just a
23 few family members who would briefly like to briefly
24 address the Court if now would be the time you'd like
25 to do that.

1 **THE COURT:** Well, I'll do it in any order you
2 prefer.

3 **MR. MEADORS:** What do you prefer? I didn't know
4 how Your Honor wanted to --

5 **THE COURT:** I don't have strong feelings one way
6 or the other. I want to hear something about each of
7 the defendants --

8 **MR. MEADORS:** Sure.

9 **THE COURT:** -- prior to sentencing. And I'll be
10 glad -- it might be the appropriate time to hear from
11 the family now.

12 **MR. MEADORS:** Okay. Thank you. Then I'll
13 follow up with some brief comments after that.

14 **THE COURT:** Yes, sir.

15 **MR. MEADORS:** Judge, initially is Birgit Zoch.

16 **COURT REPORTER:** I need you to spell your first
17 name for me, please.

18 **MS. BIRGIT ZOCH:** B-I-R-G-I-T. Your Honor, my
19 name is Birgit Zoch. And the first statement I'd
20 like to make is on behalf of Josh's aunt who was here
21 all week and is unable to come here, and she wanted
22 me to read this to you.

23 **MR. MEADORS:** And, Your Honor, the aunt was
24 Jamie Wall Zoch.

25 **MS. BIRGIT ZOCH:** Jeanine.

1 **MR. MEADORS:** Jeanine Zoch who was here.

2 **MS. BIRGIT ZOCH:** May I begin?

3 **THE COURT:** Yes, ma'am.

4 **MS. BIRGIT ZOCH:** "Unfortunately, I cannot be
5 here today to speak about the murder of my nephew. I
6 would like to state that we loved Josh and we remain
7 heartbroken to this day with the void that will never
8 be filled even after a verdict from this court.

9 "Much was said about the word 'hero' this past
10 week. And we wanted to talk about the word 'hero'.
11 A hero is a father that was serving our country in
12 the Army working up to the rank of Sergeant Major,
13 receiving the Purple Heart and retiring after 23
14 years and now teaching teen-agers in high school in
15 Florida. That is a hero, and that was Josh's father.

16 "A hero is also our father who also served his
17 country for 21 years in the Navy and worked 20 years
18 thereafter at Dupont and cared for and loved his
19 grandson. Our father is a hero. And his birthday
20 was May 10th. That's the day he turned 77. And he
21 would have liked to celebrate his 77th birthday with
22 his grandson, Josh.

23 "In closing, as a critical care nurse for 23
24 years, I have seen and cared for patients with
25 traumatic head injuries. It is not pleasant, and it

1 is so painful to me personally to know this is how my
2 nephew died, alone, hemorrhaging and at the hands of
3 these cold-hearted cowards who dare to call
4 themselves heros.

5 "They should hang their heads in shame and
6 remember everyone how they hurt my family, how Josh
7 will never have his 20th birthday, how his family
8 will never be the same, that they took a human life
9 and how they also hurt their own families.

10 "I ask you to keep them away from society
11 forever and a day. Thank you, Mr. Meadors and Ms.
12 McDuffie, Mr. Moak and Ms. Tolkey and all law
13 enforcement officers and court personnel, and to you,
14 Judge Cooper."

15 Now I would like to say a few words on my own
16 behalf. I am Josh's step mom and I loved him. Much
17 was said about him during this trial. Now I want to
18 tell you about my Josh. He was gentle and he was
19 kind. He was funny and he was charming. There
20 wasn't anything he wouldn't do for his loved ones or
21 his friends. He never hurt anyone but himself. And
22 he was smart and full of potential. And now he will
23 never be able to reach it. And we won't be able to
24 share it with him.

25 I looked forward to just seeing him married and

1 having children of his own one day. And we will
2 never be able to hold him again or his grandchildren,
3 our grandchildren. This family has been devastated
4 by this, and we will forever be terrorized by the
5 images in our mind of how he died. So, Your Honor,
6 please keep that in mind when you pass sentence.
7 Thank you.

8 **MR. MEADORS:** Your Honor, next is father, Thomas
9 Zoch.

10 **MR. THOMAS ZOCH:** Thomas Zoch. Your Honor, I'd
11 like to start by saying Joshua, he was my first born.
12 My chosen profession took me away from him
13 frequently. I lived a hard life as an infantryman,
14 and that was my choice. Joshua was a casualty of a
15 military brat. I was not always there to give him
16 direction.

17 But he was a good boy and he'd give you the
18 shirt off of his back. He could walk into a room and
19 he would leave that room making a hundred new
20 friends. I'll tell that you Joshua cared about his
21 entire family. He veered off and he went down the
22 wrong road, but he was not a bad person.

23 Over 23 years of my career in the military I've
24 seen a lot of ugly things. And I will tell you most
25 of my career I was a hard individual. And when my

1 dad called me and told me what had happened, it
2 brought me to my knees. I've had to give many
3 speeches. I've had to speak at many of my soldier's
4 memorial services. And I'll tell that you this
5 brought me to my knees. And since this incident 17
6 months ago I have not been able to recover.

7 Joshua has a younger brother who he looked up
8 to. And because of this incident -- Jonathan, he was
9 here for one day of the trial, and I was very proud
10 of him for standing here and listening to all the
11 horrific things that were said about his brother.
12 Yes, he had some drug problems. Yes, he had some run
13 in's with the law. I think at one time he came
14 before you in juvenile court and you gave him a
15 chance. And I appreciate that.

16 And I ask you today to not have any mercy or
17 sympathy for these three individuals who have sat
18 here and attempted to get through this as a --
19 without being guilty. They deserve the max
20 punishment; and I ask you, sir, from the bottom of my
21 heart, please give it to them. Thank you, sir.

22 **THE COURT:** Thank you, Mr. Zoch.

23 **MR. MEADORS:** Your Honor, part of the reason I
24 love this job is getting to work with victims and
25 along with law enforcement helping them through what

1 is usually the most traumatic times in their lives.
2 And this gentleman coming up here now, his wife, John
3 and Helen Zoch, grandmama and granddaddy, I've just
4 gotten to know them maybe too well. But anyway, I've
5 spent a great deal of time with them in preparing for
6 this. They're wonderful people. And Mr. Zoch would
7 like to address Your Honor.

8 **THE COURT:** Yes, sir.

9 **MR. JOHN ZOCH:** Your Honor, I'm John Zoch. I'm
10 the grandfather. I don't think my wife can say
11 anything, so I'll speak for both of us. Your Honor,
12 between my son and I, we have about 45 years of
13 military service. I am retired. I'm an ex military
14 man. I'm tough. I believe in tough love.

15 When I appeared in your court last time, I
16 begged you to send my grandson back to me so that we
17 could be and try to be the parents that he did not
18 have at that time. And you released him to us under
19 house arrest, the most difficult four months of my
20 life.

21 Josh was a good kid. There is nothing my wife
22 would not have done for that boy, nor I. But I had
23 to take the hard path a lot of times. I had to turn
24 him away to try to make him understand the path that
25 he was on was wrong. I carry so much guilt in

1 myself. I now have to seek medical help to try to
2 get myself out of ruts. I wake up at night. I have
3 to go to bed by myself because my wife can't sleep.
4 When I wake up at night, she's crying. 17 months
5 worth. We loved that boy. We loved that boy so
6 much.

7 After the crimes were committed, my wife and I
8 had the responsibility of cleaning his house up. I
9 think I mentioned before, I see today here in front
10 of the jury box that carpet where he bled out, the
11 blood on the walls and the ceiling. We felt a
12 responsibility to clean it up ourselves rather than
13 somebody else to come in there. But we couldn't stay
14 in that residence over two hours at a time to see all
15 that blood.

16 Your Honor, I've seen a lot of dead people. I
17 have helped contribute to the death in combat related
18 situations and without, I have never seen as heinous
19 crime that I've seen three people completely smash a
20 body. The only thing I've ever seen it compared
21 would be Auschwitz, the pictures I've seen of that.

22 Your Honor, my wife and I would like to ask that
23 whatever sentence, hopefully life without parole. I
24 sleep with two guns because I'm afraid myself that
25 this could be related to something else. But today I

1 have a sense of relief and I can put the guns back in
2 the safe. Thank you very much, Judge. And God bless
3 you all.

4 **MR. MEADORS:** Judge, before I get to my
5 concluding remarks, I also want to -- Jackie, Melissa
6 and John Davy have been here. I want to thank them
7 for being here and the support they have given their
8 family.

9 I always do this, and I want to do it again now.
10 Special thanks out to Sheriff McCaskill, Captain
11 Thomley, Danny Catoe, Phil Crawford, and all the
12 other law enforcement involved. It's not easy being
13 law enforcement out there, especially today. I want
14 to thank them publicly for the fine work they did on
15 this case, the successful, just thank them for their
16 investigation, Judge. I want to thank you all for
17 the job you did.

18 I also want to thank our staff, Emily, Karen,
19 Leslie, Moak, Ms. McDuffie, everybody involved in
20 helping get this prosecution together.

21 Judge, you know, he almost went to Morris
22 Village that day. Helen almost had him in Morris
23 Village. And he wanted to see his girlfriend one
24 more time. I wish he had gone to Morris Village but
25 he didn't. He did have a drug problem. He was

1 trying to fight it, trying to get help for it, had
2 people that loved him.

3 For whatever reason these three defendants chose
4 to beat him to death that day. And I want to say for
5 the record, in my 21 years of prosecution this is the
6 most -- I've talked with the sheriff and I think
7 they'll agree with me -- the most brutal slaying I've
8 been in involved in my 21 years, Judge, as he was
9 asleep on the couch.

10 Judge, I don't know the layout of hierarchy.
11 Mr. Moak is going to speak in a moment. We do think
12 it was Defendant Whitehead's idea to go over there.
13 We think these other two defendants went with him.
14 But then once they got there, it's the hand of one is
15 the hand all, they all participated. They all
16 participated, McDonald with the bat and then finally
17 Defendant Cannon admitting he did hit him and did
18 kick him after he grabbed his legs and went over
19 there.

20 But if we had to do a chart, if you will, I know
21 Your Honor likes to know, I think Whitehead would be
22 first, McDonald would be a close second, and then it
23 would be Cannon after that.

24 Judge, I went and met with Dr. Sexton for two
25 and a half hours. And I want to thank "Dog", "Dog"

1 Austin who everybody has talked about for what he
2 did. And Lear. We went up there and met with Dr.
3 Sexton who I've been doing cases with for years and
4 my boss has been doing cases for years. And I think
5 he's the finest forensic pathologist that I know of.

6 And we kind of laid the pictures out and went
7 over them and put them in order. And even Dr. Sexton
8 was commenting on the brutality of this. I know when
9 to shut up and let somebody talk. And I think he;
10 not that it needed it, but corroborated to a "t" what
11 happened that night with the blood spatter and where
12 the body went. It was the most powerful testimony
13 from a pathologist I've ever seen. And I think that
14 kind of summed it up. And Josh did kind of speak
15 through Dr. Sexton, and I think that kind of speaks
16 for itself. I think that's all I have. Mr. Moak.

17 **MR. MOAK:** Your Honor, as to defendant
18 Whitehead, I filed on February 12th of this year, I
19 believe served it that same day at the pre-trial
20 hearing in Columbia we had before Your Honor a notice
21 of the State's intention to seek a sentence of life
22 without parole on the two indictment numbers that he
23 was convicted of today.

24 The basis for that is his conviction under
25 indictment number 2005-GS-32-2617 for attempted armed

1 robbery in Lexington County. A certified copy of
2 that indictment and a sentencing sheet was attached
3 to what I filed. A copy of both of those were served
4 on Mr. Whitehead and Mr. Riley on February 12th, the
5 same day they were filed, which was ten days previous
6 to the original court date. I believe it's ten days
7 previous to the original court date of February 25th
8 and certainly at least ten days previous to today's
9 court date.

10 **THE COURT:** Let me see that. You didn't tell me
11 that.

12 **MR. MEADORS:** Your Honor, I thought Mr. Moak had
13 told you about it.

14 **THE COURT:** Nobody told me this.

15 **MR. MOAK:** I thought he knew about it. The
16 original is in the clerk's file, Your Honor. So the
17 State is asking for a sentence of life without
18 parole.

19 **MR. MEADORS:** Your Honor, that's been filed and
20 been in the clerk's file for a long time.

21 **THE COURT:** I didn't say it wasn't.

22 **MR. MEADORS:** I apologize. Your Honor, my
23 concluding remarks are, and I'll be through.

24 **THE COURT:** Well, let me look at this.

25 **MR. MEADORS:** Okay.

1 **MR. MOAK:** Your Honor, I mentioned this when we
2 were in your office the week before the trial on that
3 Wednesday when Mr. Meadors was not present.

4 **THE COURT:** This appears to be a sentencing
5 sheet from Lexington County for attempted armed
6 robbery for which he received time served or ninety
7 days plus probation for five years. Is that correct?

8 **MR. MOAK:** I believe that's the basis, that
9 sentence. Yes, your Honor.

10 **THE COURT:** All right.

11 **MR. MEADORS:** Your Honor, my final comments are,
12 I know the age of these gentlemen will be mentioned
13 to Your Honor in mitigation. My final comments would
14 be that Joshua Zoch was too young to die and just did
15 not deserve to die like this. And that's all we'd
16 have. Thank you.

17 **THE COURT:** Well, does anybody else have a
18 record?

19 **MR. MEADORS:** No, sir.

20 **THE COURT:** No records from any of the other
21 defendants?

22 **MR. MOAK:** Convictions, no, Your Honor.

23 **THE COURT:** No convictions of either of the
24 other two defendants.

25 **MR. MOAK:** No, Your Honor.

1 **MR. MEADORS:** No, sir. That's correct, sir.

2 **THE COURT:** All right. Mr. Reuwer or Mr. Riley.

3 **MR. RILEY:** Your Honor, as I read 17-25-45, I
4 don't think the Court has a great deal of discretion.
5 I do want to mention --

6 **THE COURT:** Bring your client around. Well,
7 that's all right. You can stay right there. Stay
8 right there. Go ahead.

9 **MR. RILEY:** I do want to mention just a few
10 things, a few key things. As you know, on Saturday,
11 May the 10th, was Mr. Whitehead's 20th birthday. He
12 and his parents are here with him and have been here
13 throughout the trial. They have two children.
14 Christopher has a sister who was here part of the
15 trial. She is not here today.

16 I want to tell you, Your Honor, that regardless
17 of the heinousness of this crime, it's been a
18 pleasure and a privilege representing this young man.
19 And I've tried to do the very best for him that I
20 possibly can.

21 I think that not only the parents may wish to
22 say a few words to the Court, but I think the
23 defendant would like to also. And I would ask the
24 Court to allow them to do that.

25 **THE COURT:** Yes, sir. I'll be glad to.

1 **MR. RILEY:** I'm sorry, sir?

2 **THE COURT:** You may proceed.

3 **MR. RILEY:** Okay.

4 **MR. WHITEHEAD:** There was a lot of pointing
5 fingers here. And, you know, the sentencing is over.
6 I've been found guilty, and there's nothing I can do
7 about that right now. I do like to say I wish your
8 souls peace for the victim's family. I don't wish no
9 bad on nobody. And I hope that you all pray for my
10 soul to have peace, too.

11 You know, since I've been here, I've given my
12 life to God and I have learned how to show mercy to
13 others when they do wrong to me and I've learned how
14 to turn the other cheek and I've learned how to put
15 my faith in God.

16 Today, on this day, I don't know why I was found
17 guilty. There is a reason. And, you know, I don't
18 know the path or what comes in the future. But like
19 I said, I pray that you all pray for my soul to have
20 a peace as I pray for you all's soul to have peace.
21 I don't wish bad on none of you all. Your son, I
22 knew, not very well. But was a good man. He didn't
23 deserve to die. Just pray for me.

24 **FATHER OF MR. WHITEHEAD:** Your Honor.

25 **THE COURT:** Yes, sir.

1 **FATHER OF MR. WHITEHEAD:** I'm Christopher's
2 father. And I do appreciate the diligent efforts of
3 this Court. I know that this was a very difficult
4 week and a half I suppose or a week and a day for all
5 of us. And everyone had a voice up until now. Of
6 course we really didn't have a voice. So I guess
7 this is just the moment that we can address the
8 Court.

9 You know, I love my son. And I know something
10 about serving my country also. I'm a third
11 generation veteran. I served honorably for 21 years.
12 My grandfather served in World War II. My father
13 served in the Army in the Vietnam era. My uncle
14 served in the Navy during the Vietnam era. And, you
15 know, it was my hope that perhaps one day my son
16 would want to follow in the same suit.

17 My deployments and the times I had to be away
18 from home, I have been there for my son and raised
19 him. And I know that's a very difficult thing. I've
20 been married to the same woman for almost 22 years
21 now. So I know a little something about dedication
22 to the family and burdens that every family faces.

23 I hate drugs. I absolutely hate them. And I
24 know the law enforcement officers and the prosecutor
25 and the people that are here deal with this probably

1 every day. I think it steals our youth and I think
2 it robs them of the lives that they could have. But
3 people use them, trade them or are involved around
4 that process.

5 My prayer is help for the Zoch family because I
6 know that they have lost something that cannot be
7 given back. And I wish to take back nothing from
8 that. I really have considered their loss and their
9 pain. The way the structure of the court is set up
10 somehow just feels, when you're on the defendant's
11 side you kind of feel ostracized and as if you're
12 outside of that. Perhaps the family would feel that
13 they were not considered by any of us, and that is
14 simply not true.

15 But I would ask for your mercy and your
16 leniency. I probably have no right to that. But my
17 son is 20 years old. And that doesn't excuse any
18 actions of what the Court has found, but I know that
19 without hope that there really would be no purpose
20 for living.

21 In the Bible one of the greatest apostles was
22 Paul. He was a murderer. Even God found mercy upon
23 him and made him one of the greatest apostles. I
24 certainly do not profess that that is my son. But
25 what I am saying is that given no opportunity, given

1 life without parole, given no opportunity to do
2 something positive with your life or look forward to
3 something, what hope does any man have?

4 My words are just simple words. I hope I'm not
5 perceived as trying to persuade the Court in any way
6 other than just ask for mercy on my son's life. Give
7 him the opportunity to make amends if that's the way
8 you would like to perceive it. I do love him and I
9 will always love him. And I know the Zoch family
10 loved Josh very much. All parents should love and
11 care, be concerned for the welfare of their children.
12 And I ask for your leniency even though I know that
13 it's been asked that there be no leniency. Thank
14 you, Your Honor.

15 **MOTHER OF MR. WHITEHEAD:** Hi, Your Honor. My
16 name is Radonna Whitehead. I'm Chris' mom. I'm
17 going to do my best to not ramble.

18 **THE COURT:** That's all right.

19 **MOTHER OF MR. WHITEHEAD:** Bear with me if I do.

20 **THE COURT:** Take your time, ma'am.

21 **MOTHER OF MR. WHITEHEAD:** Okay. Today is
22 probably one of the saddest, you know, moments that a
23 mother can have. I can feel for the family of the
24 deceased quite greatly. As our family before
25 Christopher became arrested for this charge, we in

1 turn went through a similar event. But we were on
2 the other side of the coin with our daughter who was
3 attacked by a young man.

4 So I can -- we can completely, 100 percent all
5 of us sympathize with what the family has gone
6 through. But just like in that case, we had to
7 sit -- we had to sit and listen to things. And we've
8 listened to a lot this week. I can -- I can take the
9 jury's -- what the jury found. That's the way the
10 system is set up, too. And with anybody we have to
11 go through those same things.

12 As his mom and listening to those things, I
13 don't agree with what was found. I believe as
14 Christopher stood here and said that he is innocent,
15 and I hope that one day these officers will find the
16 person that is truly guilty of this crime.

17 But regardless of that fact, right now we're
18 looking at my son's -- what you plan on sentencing my
19 son. Now, I know that the solicitor brought up a
20 charge that Christopher recently had. Okay. I hope
21 that you can look at that. And I don't understand
22 the legal matters and what you have to do as far as
23 that, but I also know that that is what you have in
24 front of you, is just a piece of paper. You weren't
25 there. You didn't know that once again Christopher

1 was with some friends, had no idea that another
2 person, another person is the one who had the weapon.
3 He is the one who held up other friends in the car.
4 But once again, the law says by the hand of one, the
5 other, however it's said.

6 And Christopher in being young and just wanting
7 to get things done had no idea of the consequences of
8 his going ahead to make a plea at the age of just
9 turning 17 without his parents present. So,
10 therefore, that charge in our eyes was something that
11 had he been given the right to counsel or been given
12 because of his age may not have been there. But
13 that's something that is there.

14 Christopher had done very well for a long time.
15 He got his G.E.D. It was probably the proudest
16 moment that we could have ever had. He has struggled
17 throughout all of his school with school and with
18 that, and we were excited and pleased that this
19 happened. He had had plans on going to school and
20 continuing. We had even talked on when he finishes
21 probation on him entering the military.

22 Now, I know that the family has already asked
23 that you not give him any consideration as far as
24 lessening his time. But from what I understood, one
25 of the one things that the criminal system says is

1 that you're supposed to try to -- try to find a way.
2 A young man at 20, to put him away for the rest of
3 his life is just to me the worst thing, I mean, that
4 you could do. You're asking citizens to pay for
5 someone to be in a facility for the rest of their
6 life when they have the family and they have the
7 intelligence to eventually be a productive citizen.

8 And Christopher has done -- he has found the
9 Lord. And whether or not that's something that comes
10 up in all trials or whatnot, I don't know. But I
11 know that through the pastor at the jail and through
12 soul searching that Christopher has decided that he
13 wants the chance to be of service to the Lord.

14 And I only hope and can beg of you to give him
15 that chance and to also -- he is my child and he's my
16 husband's child. Please don't take that away from
17 us. Thank you.

18 **THE COURT:** All right. Thank you, Mr. and Ms.
19 Whitehead. Anything further?

20 **MR. REUWER:** No, sir.

21 **THE COURT:** As to Mr. McDonald.

22 **MR. WHITLARK:** Yes, Your Honor. May it please
23 the Court. Your Honor, first of all, I will say this
24 about this whole situation here. This drug cancer
25 that covers our whole society has now harmed an

1 entire roomful of people in a terrible, terrible way.

2 And I know that my client, Mr. McDonald, he is
3 very sorry for the loss that the Zochs have suffered
4 here. And we would say that we just hope that God
5 would help them with the grief they're enduring right
6 now and that somehow over time that their hearts will
7 be healed from the pain of the loss they've suffered.

8 I will say on behalf of Mr. McDonald that
9 regardless of the sentence this Court gives, he is
10 determined, Your Honor, to have a productive and
11 positive outlook on life.

12 Mr. McDonald was in the ROTC in high school when
13 this occurred. He was in the band. And he was a
14 regular participant in the Harvest Hope Food Bank and
15 serving Thanksgiving dinners at the Oliver Gospel
16 Mission. The reason I mention this to you, Your
17 Honor, is because it's a true reflection of the
18 character of this young man. That's why it's so
19 shocking and surprising to even have him in this
20 circumstance.

21 He comes from a good family. I've gotten to
22 know his mother and his brother and his father. And
23 they are good people. They are all horrified by the
24 loss that has been suffered by the Zochs. And again,
25 Mr. McDonald wishes to speak to them if they'll hear

1 his words. But I would ask the Court to keep in mind
2 that this young man is 18 years old. And -- 19 years
3 old. I'm sorry. And when this occurred he was a
4 senior in high school, Your Honor, wanting to go into
5 the Air Force, wanting to be somebody who contributed
6 to society and was a productive participant in our
7 society.

8 Again, Your Honor, it's not an excuse to say
9 that drugs are the catalyst for this entire event.
10 But there's no escape from it, Your Honor. Drugs are
11 the cause of this thing. They're the cause of the
12 motivation to go places, caused them to be in the
13 situation they were all in.

14 And this entire Sonic, I'll call it the Sonic
15 ring of people, were all involved in drugs. And look
16 where it's got us, Your Honor. Standing before you
17 with a ruined, a deceased young man and the lives of
18 three or more ruined. And again, Your Honor, it's
19 not a crutch. But Mr. McDonald is a good young man
20 despite what the jury has found here.

21 And I'd ask the Court to consider showing some
22 sort of hope for him to be a participant in our
23 society some day. To throw his life away and to lock
24 him away forever is not what we actually believe in.
25 We believe in trying to correct people, make them do

1 the right thing. And he was well on his way, Your
2 Honor.

3 Horrible mistake, horrible results and the
4 broken hearts of their family. It's hard to be
5 objective about it. But, Your Honor, Mr. McDonald
6 can be a good member of society. He has shown that
7 through his life. And I would ask the Court to
8 please consider giving him a chance sometime after he
9 has paid his debt to the Zochs and to society to join
10 again our American Society.

11 And now he wishes to speak, Your Honor, if you
12 would allow that. And his mother.

13 **MR. MCDONALD:** Your Honor, ladies and gentlemen
14 of the courtroom, especially the Zoch family, I would
15 like to say that this is the craziest thing I've ever
16 seen in my life in the 19 years that I've been
17 living. I've been through some hard things in my
18 life, but I've never seen or never experienced
19 anything like this before. I can honestly say that I
20 am innocent of this crime.

21 And I can honestly say that even though I am
22 found guilty by a jury of my peers on these two
23 charges, every day I spend in the Department of
24 Corrections I will find out who really did this. I
25 know I was framed. I can't prove that, but I will

1 prove that if I get a chance to come of this. I can
2 honestly say that my father works at the South
3 Carolina Department of Corrections. I've been there
4 before. I've seen the outcome of things, of bad
5 mistakes. This is not a subject of a bad mistake.
6 This is a subject of me, like I said before, being
7 framed. I maintain my innocence.

8 And, yes, I was in the ROTC. Yes, I did have 18
9 days 'til I graduated. Yes, I was going to be in the
10 Air Force to become what some people call a hero. I
11 have been to the Harvest Hope Food Bank. I have been
12 to Salvation Army, served dinner at Thanksgiving. I
13 didn't do these things just because I wanted to flash
14 them in front of you in front of the courtroom, Your
15 Honor. I did it out of the kindness of my heart.

16 I didn't have any charges back then. I've never
17 had any convictions of anything. Yeah, I may have
18 got into a couple of school disciplinary problems,
19 but that was in high school, Your Honor.

20 I just ask you, please, to just have some mercy
21 on my soul, Lord. Because if I'm not mistaken, if
22 the book of Romans in the Bible says that even though
23 evil is done to you, you should not do evil for evil
24 but do good for evil. And it's like putting burning
25 ashes on your enemy's head. And I'm not going to sit

1 here and downgrade these officers of Kershaw County,
2 investigators. I'm just going to say that they did
3 their job. Whether if it was the right way or the
4 wrong way, they did their job.

5 But like I said to the Zoch family, I'm sorry
6 for your loss, specifically the Zoch family, and I
7 will try to find out who really did this every day I
8 spend at the South Carolina Department of
9 Corrections. Thank you.

10 **MR. WHITLARK:** This is Ms. Josie McDonald, Your
11 Honor, the defendant's mother.

12 **MR. MCDONALD'S MOTHER:** Your Honor, first of
13 all, I would like to say my heart goes out to the
14 Zoch family. It's hard, very hard. I can't even
15 imagine what they're going through right now. I know
16 what it feels like to lose a family member. But each
17 death is different. We have had family members who
18 were murdered. And they're cold cases. And they
19 will be because of the timeframe as to when they
20 happened.

21 I have always taught my children to respect the
22 judicial system and law enforcement. Since third
23 grade when I was a home parent, my son has had a love
24 for law enforcement. Right now my youngest child who
25 is not here is afraid of them. And I don't want that

1 to be, not at all.

2 When Derrick was in third grade, as I stated, I
3 was a home parent, I organized a literacy program for
4 his classroom. One of the distinguished guests to
5 come and read a book to him was Mr. Giese because I
6 respected him. And I respect his department and I
7 know he goes by the books. I realize it's the job of
8 the solicitor to make sure that a case is done, to
9 make sure that it's won. But we need to know that we
10 need to make sure that the right person is arrested,
11 because if they're not, then that person is out there
12 to hurt someone else.

13 When you're dealing with someone's life, you
14 can't just rush through a process. Everything, every
15 evidence, maybe I've watched too much CSI, but
16 everything needs to be introduced to the jury. I
17 would not want to make a decision based upon
18 something being taken out and something being put in.

19 No disrespect. This family needs to know what
20 happened to their grandson. They need to know. My
21 best friend died. Her son is still a cold case in
22 Richland County. She went through a very hard time
23 because she never found out who the perpetrators
24 were. She never found out. Her husband is still
25 living. He never found out.

1 Derrick's dad, as he stated, is a correctional
2 officer. He is a former Marine. He served his
3 country. My father did. My mother did. There are
4 several people in our family who were in law
5 enforcement, the military who served their country.
6 Some of them even sat on the bench which I teach my
7 children is to be highly respected.

8 As Mr. Whitlark said, this thing with the drugs,
9 I've heard these children -- and I call them
10 children. I don't care if 18 makes you an adult, if
11 my mother were still living, she'd still be calling
12 me a child. These children sit up here and admit to
13 using drugs. That's what killed this young man, a
14 drug dealer, drugs. And like he said, it's ruining
15 our society. They sat up there and admitted to this
16 without even blinking an eye.

17 But yet still these people can walk out of a
18 courtroom with a slap on the wrist, and they're
19 murdering our children, whether it be with a pipe,
20 whether it be whoever they rob, they steal; they do
21 whatever in order to get it.

22 I'm not a perfect parent. None of us in here
23 are. If there was a book out there that we could
24 pick up and say this is the instructions, this is
25 going to make your child a judge, this is going to

1 make your child a state representative, a president,
2 we would buy every copy of it. But there's not. I
3 did the best that I could as a mother.

4 I believe in my son. I believe in his
5 innocence. And I know that he did not kill Mr. Zoch.
6 I know that in my heart. And, Your Honor, I ask that
7 the Court show mercy to my child. And I ask that
8 this case not be closed. These people who were
9 brought up, who they felt were suspects, they're not
10 going to stop.

11 **THE COURT:** Thank you, Ms. McDonald.

12 **MR. MCDONALD'S MOTHER:** Thank you.

13 **MR. WHITLARK:** Thank you, Your Honor.

14 **MR. JA'NARD MCDONALD:** Ja'nard Nivek McDonald.

15 **THE COURT:** Yes, sir.

16 **MR. JA'NARD MCDONALD:** I am the defendant's
17 brother. I myself, I really don't believe he is
18 guilty of this crime. I have many reasons for that,
19 many personal reasons, you know; because we have had
20 a lot of family members on my father's side of the
21 family that are now still on crack cocaine. We had a
22 friend that we lost because of this what they call a
23 crack game. And if anybody was trying to stop that,
24 my brother would not try to stand in their way. I
25 know that for a fact.

1 I myself had a bad past myself. And, luckily,
2 it had never gotten this far. And since I stopped
3 whatever I was doing, I've been trying to better
4 myself. I've been trying to better other people. My
5 brother will tell you I've spoken to him. I've
6 actually spoken to Rob, you know, while he's been
7 locked up and everything like that.

8 And, I mean, my brother was a geek before all of
9 this happened. You know, he was on orchestra. He
10 played Pokemon, had books a million, you know. He
11 read books all the time, things like that. So I
12 don't know how it got from reading books and stuff
13 like that to being accused of murder. None of it
14 makes sense to me. None of it really makes sense to
15 me.

16 But, you know, to Zoch, to the Zoch family, you
17 know, I want to say that what Joshua was doing as far
18 as working with Richland County, he was doing the
19 right thing, but I don't believe that Richland County
20 was protecting him the right way.

21 I knew your son. I knew your grandson in high
22 school. I didn't really agree with all the things
23 that he did, but that doesn't say that he should die.
24 And I am really sorry for what happened to him. I'm
25 really sorry for what you all go through. Because I

1 know what you're going through. I have lost a lot of
2 family and friends throughout my life also.

3 I'm not going to beg for any mercy for my
4 brother because in my eyes he was already found
5 guilty before he even walked in this courtroom.
6 That's all I have to say. Thank you, Your Honor.

7 **THE COURT:** All right. Thank you.

8 **MR. WHITLARK:** Thank you, Your Honor.

9 **THE COURT:** As to Mr. Cannon.

10 **MR. KENDRICK:** Thank you, Your Honor. Your
11 Honor, I've obviously stood in the courtroom a lot of
12 times and I've been in courtrooms with you before.
13 And I don't know that there is a more difficult time
14 in fashioning a sentence than there is today. And
15 this is one of those tragic situations where no
16 matter what happens we're still all left with a loss,
17 and that can't be changed.

18 I think that when we're looking at sentencing,
19 Your Honor, we look at the strict justice that is
20 demanded whenever we're in a situation like this but
21 we also look for mercy. And I think that's been an
22 overriding concern of the sentencing as long as it's
23 been in place.

24 My client at the time this occurred was 17 years
25 old. He had absolutely no criminal record or

1 involvement with the police. You know, he has come
2 into this court and pled not guilty. I've explained
3 to him, you know, at this juncture, Your Honor, that
4 it's not appropriate to address that. We respect
5 what the jury has done here and ask Your Honor for
6 mercy.

7 I think that the murder statute has a built in
8 element of strict justice, Your Honor, that doesn't
9 leave you with discretion on that part. Even a very
10 minimal sentence is extremely high. For a young man
11 of my client's age, if you give him the lowest
12 sentence you can give him, he will be far older than
13 most of us in this courtroom when he gets out.

14 Your Honor, I think that that's the sentence
15 that he deserves today, because there is no doubt
16 this was a bad situation for all involved. It's a
17 situation where we don't necessarily get anything
18 positive out of. But I ask Your Honor to look --
19 that there is a -- we always want some retribution
20 for a situation like this. And I don't doubt that.
21 And I don't -- I understand it.

22 But, Your Honor, the murder statute of South
23 Carolina has a built in element of retribution that
24 he will have to spend the time day for day and it
25 will be a very long time. So I would say that that

1 minimum sentence on the statute is appropriate
2 because it's far, far from a minimal sentence.

3 Your Honor, I believe my client would like to
4 address you as well as his father and also his mother
5 and his stepmother here. Before I go on, Your Honor,
6 I would like to tell you that last September when the
7 Court put me on this case, I have spent a long time
8 with Mr. Cannon. You know, my job brings me into
9 contact with all kinds of people. And he has always
10 been respectful to me. He's always been very
11 involved in what was going on, very intelligent about
12 it.

13 Again, it's a tragic situation, Your Honor, but
14 I am, in represent the hundreds and hundreds of
15 people that I represent in this court and a lot of
16 other courts, Mr. Cannon is not the normal person I
17 see. He does not have that cold blooded element that
18 I think, you know, you would expect. I think he is a
19 good kid who regardless of what happened has fallen
20 into a very bad situation. I'd ask you to take that
21 into account in sentencing.

22 **MR. CANNON:** At this point in time I just want
23 to pay my respects to the victim's family and ask
24 that they understand that I had nothing to do with
25 this and ask that they just pray for me so I can make

1 it through these years.

2 At this time I would like to say I knew Josh. I
3 met him through Sonic. And he was a good kid. He
4 never gave anybody a hard time. Me and Josh got into
5 one conflict due to Melissa Davy. And Ms. Pat can
6 testify that we handled that respectfully as young
7 men and we never looked back with that. That is all
8 I have to say, Your Honor.

9 **MR. MUNNERLYN:** Your Honor, Mario Munnerlyn.
10 I'm the stepfather of Robert Cannon. And first of
11 all, given that God is first in our lives, I want to
12 explain condolences to the family because I've been
13 on both sides of the fence. Just in Georgetown
14 County within the last four years I've had two first
15 cousins brutally murdered, one by her fiance. He
16 shot her in the back of the head as she laid over her
17 daughter. That happened two and a half years ago.
18 And I also had another cousin who was murdered and
19 his body was chopped up and found in potato salad in
20 Andrews, a section of Georgetown County, South
21 Carolina.

22 And also on October the 16th of 2007, my wife
23 and I, we lost triplets during delivery. So my heart
24 goes out to you all because we've lost children also.
25 So, I mean, I can't sit here and point fingers. Just

1 like I said, we all have to give an account to God at
2 the end of the day. I want God to put mercy on your
3 family; I want God to put mercy on our family. And I
4 just pray that we all can forgive each other, we all
5 can learn from this, we all can move on.

6 To Your Honor, I would like to ask that you give
7 leniency on my son. Because I myself, I mean, I
8 graduated from South Carolina State with a degree in
9 political science, prelaw with a minor in criminal
10 justice. So I do understand the law. And I
11 understand if you do the crime you do the time.

12 But I just ask that you find it in your heart,
13 you find it in the family's heart to please forgive
14 him, forgive all of us, because we've all sinned.
15 We've all fallen short.

16 And just like I said again, I want to say I
17 apologize to all of you. Everyone that has done
18 their jobs, you do what you have to do. I can't
19 knock that. I can't judge that. I don't have any
20 pail to put anyone in. So we can't just be judged
21 just because of one incident. And everyone deserves
22 a second chance.

23 The same way I know you wish Josh would come
24 back, I wish for your sake also. I wish my triplets
25 could come back. I had to see them be burnt. I have

1 their ashes on my mantel. Those are the only
2 children I had by birth. Granted, this is my
3 stepson, and I don't believe in the word "step"
4 because I believe if you accept the calf, you accept
5 the cattle.

6 But our heart goes out also because we've been
7 there also. And I just wanted to just say that. And
8 just to God be the Glory and God bless you all.

9 **MS. DAVIS:** My name is Veronica Davis. And I do
10 apologize, Your Honor. Robert is my middle child. I
11 sat back there when Mr. Whitehead and his wife was
12 talking, and I watched Investigator Catoe, and he
13 made faces. When Mr. McDonald spoke, he made faces.
14 But these are our children, too, Your Honor.

15 To the Zoch family, I know how it feels to lose
16 a child. I carried triplets for nine months, and the
17 day they were born they were taken. So I know how it
18 feels to lose a child.

19 Your Honor, I pray and ask that you have mercy
20 on my child. Robert has never been in trouble, don't
21 have a record, don't now how all this even came
22 about. I was even told I don't even need a lawyer.
23 But I would pray that you have mercy on him. When it
24 happened he was 17 and now he is 19 years old. Allow
25 him, oh, Jesus, to be a man and to get a wife and

1 have children and be able to teach them.

2 I wouldn't wish this on my worstest (sic) enemy.
3 And I know there are obviously people who don't like
4 me, but I wouldn't wish this on anybody. As Mr. Zoch
5 said that he have trouble sleeping, I have Lupus and
6 I have aneurysm. And I've been here all week long.
7 And when I leave here, Your Honor, my head hurts so
8 bad, it feels like somebody is hitting me in the head
9 with a hammer. Don't take my child. Again I say to
10 the Zoch family I am deeply sorry. Just have mercy
11 on him. That's all I have to say.

12 **MR. CANNON, SR.:** Good afternoon, Your Honor.

13 **THE COURT:** Good afternoon, sir.

14 **MR. CANNON, SR.:** To the victim's family --

15 **COURT REPORTER:** I'm sorry. I need his name.

16 **MR. CANNON, SR.:** -- the Zochs, my name is
17 Robert Cannon. This is my son.

18 **THE COURT:** This is Robert Cannon.

19 **MR. CANNON, SR.:** And at the time this happened,
20 he was only 17 years old. I heard about it about
21 three days afterwards. And when I faced my son and
22 talked to him, I looked him in the eyes like I always
23 do and talked to him. He said, "Daddy, I did not do
24 this."

25 All I am here to do is say, all I want to do is

1 show my condolences to the Zoch family. I understand
2 their pain. I can't tell them exactly what's going
3 on in their hearts, what's going on in their minds,
4 but I know they are hurting. I know they are, to
5 lose a son.

6 At this moment the only thing I can ask you,
7 Your Honor, is to have mercy on my son. He is a good
8 boy. He doesn't deserve life in jail. Neither of
9 these boys does for a mistake that they could have
10 made or could not make. I don't know this. None of
11 us in this courtroom know this in our hearts, know
12 this to be the truth.

13 Court started on Monday, on Tuesday last week.
14 On that -- on Monday. I'm sorry -- on that Tuesday I
15 was supposed to be at jury in Federal Court. And I
16 actually had to talk to the staff of George Hardwell
17 to let them know I could not be a juror in their
18 courtroom.

19 I've had a lot of pain, a lot of discomfort, and
20 there is no way that I could try to judge somebody
21 else's life considering my situation. All I just
22 want to ask the Court, to be merciful. This boy
23 deserves a break in life. I haven't been there for
24 him all the time, as you can see. But I'm asking
25 you, I'm pleading with you, please give my son a

1 chance.

2 **THE COURT:** Thank you, Mr. Cannon.

3 **MR. KENDRICK:** That is all we have to say, Your
4 Honor. Thank you.

5 (Pause)

6 **THE COURT:** All right. Mr. Whitehead, in light
7 of some of the comments that have been made here
8 today, just to assure myself, I have gone to the
9 statutes of the state of South Carolina with regard
10 to the life without parole statute and I have
11 double-checked it; that is Section 17-25-45 which
12 provides that a person must be sentenced to a term of
13 life without the possibility of parole if that person
14 has one or more prior convictions --

15 (Defendant Whitehead falls to the floor)

16 **MOTHER OF MR. WHITEHEAD:** Get him a doctor. My
17 goodness. If you don't mind.

18 **DEPUTY:** Sit down, ma'am. Sit down, ma'am.
19 Ma'am, please sit down.

20 **MOTHER OF MR. WHITEHEAD:** He has seizures.

21 **THE COURT:** Does he have medication?

22 **MOTHER OF MR. WHITEHEAD:** He hasn't had a
23 seizure in a long time, but he's had them. And as
24 much stress as he's under, please watch him for that.
25 He has seizures. And as much stress as he's under

1 right now --

2 **THE COURT:** Medication?

3 **MOTHER OF MR. WHITEHEAD:** Medication hasn't been
4 needed because he hasn't had one in a long time.

5 **UNKNOWN PERSON:** Get him into an elevated state,
6 about two and a half inches.

7 **MOTHER OF MR. WHITEHEAD:** Excuse me, Your Honor.
8 I've taken care of his seizures before. Is there any
9 way that I can look at him? I don't see a medical
10 person.

11 (Off the record)

12 (Pause)

13 **THE COURT:** Mr. Reuwer, you ready to continue?
14 Mr. Riley? Mr. Reuwer?

15 **MR. RILEY:** I believe so, Your Honor.

16 **THE COURT:** All right. Well, I wanted to
17 explain that the statutes, the laws passed by the
18 Legislature do not allow me any variation from the
19 sentences that are mandated by that statute. The
20 State has provided a certified copy of an attempted
21 armed robbery that the defendant, Whitehead, pled
22 guilty to in 2005. That statute is a qualifying
23 statute for the life without parole statute.

24 And as much as I would feel differently or might
25 feel differently in terms of sentencing Mr.

1 Whitehead, I have no choice. If I violate the law,
2 if the solicitor violates the law, then there are --
3 the system falls apart. My responsibility is to
4 follow the law as it's written by the Legislature.

5 Therefore, on indictment 2007-GS-28-00022,
6 Christopher Whitehead, indictment for murder, the
7 sentence of the Court is you be committed to the
8 State Department of Corrections for the remainder of
9 your life without parole.

10 On indictment number 2007-GS-28-00019, the
11 offense of burglary in the first degree, the sentence
12 of the Court you is be committed to the State
13 Department of Corrections for the remainder of your
14 life without parole. Both sentences are to run
15 concurrent.

16 As to Mr. McDonald and Mr. Cannon, I feel that
17 both of these defendants should be treated in a
18 similar fashion, both of whom have -- both
19 individuals have denied being a part of these most
20 serious crimes, but the jury has found both of them
21 guilty. And despite their protestations, I must look
22 at this as a guilty plea. I am not the fact finder
23 in this case. The jury was.

24 These are unfortunate circumstances. I mean,
25 they're not unfortunate. They're tragic with regard

1 to all four of the families that are involved in this
2 case. I probably would agree with someone who said
3 that drugs are one of the -- it's been true for a
4 long time -- but one of the most serious blights on
5 this society. None of us are safe from the ravages
6 of the drug culture.

7 However, be that as it may, each of you, Mr.
8 Cannon and Mr. McDonald, are responsible for your own
9 acts, and all acts are the result of choices and
10 those choices bring about consequences. But I do
11 feel in this case that just possibly one or both of
12 you may have something worth saving. And I hope you
13 do. And, frankly, I hope everybody in this room
14 does, for the sake of humanity.

15 Therefore, the sentences as to both are as
16 follows: On indictment number 2007-GS-28-00016,
17 Derrick McDonald, charged with burglary in the first
18 degree; and 2007-GS-28-00017, Robert Cannon, the
19 charge of burglary in the first degree, the sentence
20 of the Court is you be committed to the State
21 Department of Corrections for 35 years.

22 As to indictment number 2007-GS-28-00015,
23 Derrick McDonald, indictment for murder; and
24 2007-GS-28-00018, Robert Cannon, indictment for
25 murder, the sentence of the Court as to each is that

1 you be committed to the State Department of
2 Corrections for a period of 35 years. All sentences
3 are to run concurrent. Anything further?

4 **MR. KENDRICK:** No, Your Honor.

5 **MR. MEADORS:** Thank you.

6 **MR. WHITLARK:** No, Your Honor.

7 **THE COURT:** This court stands adjourned.

8 (Whereupon, the proceedings are concluded)

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CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

I, Jenny H. Williams, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Kershaw County, South Carolina, on the 6th, 7th, 8th, 9th, 13th days of May, 2008.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

October 20, 2008

Jenny H. Williams

Jenny H. Williams, Court Reporter

GENERAL SESSIONS DOCKET REPORT FOR KERSHAW COUNTY

REPORT RUN DATE - 01/02/2007

INDICTMENT NUMBER: 2007GS28 17

DEFENDANT NAME: CANNON, ROBERT

AKA:

ADDRESS: RD CITY: COLUMBIA STATE: SC ZIP 29229

SOCIAL SECURITY NUMBER: SEX: 1 MALE RACE: 2 BLACK

DATE OF BIRTH: DRIVERS LICENSE STATE / NO.: SC /

MARITAL STATUS:

WARRANT OR TICKET NUMBER: K142530 COUNTS: 01 OFFENSE CODE: 0079

NO WARRANT? 0 NAME OF OFFENSE: BURGLARY / BURG

DATE OF ARREST: 12/18/2006 DATE RECD BY CLERK: 01/02/2007

SUMMARY JUDGE:

DISP DATE: 00/00/0000 DISP TYPE: Trial

DISP TYPE EXPLANATION: Guilty

JUDGE CODE/NAME: 126 D. Thomas Cooper, Jr. COURT REPORTER: Jenny Williams

CONVICTION: CTS: 00 OFFENSE: 0000 ***** 0079 Burglary 1st

SENTENCE: SCDC 35 years concurrent

DEFENSE ATTORNEY:

PROSECUTING ATTORNEY: Danna McDuffie

1/28/07
8351

ARREST WARRANT
K- 142530

STATE OF SOUTH CAROLINA
☒ County/ ☐ Municipality of
KERSHAW COUNTY

STATE OF SOUTH CAROLINA
☒ County/ ☐ Municipality of
KERSHAW COUNTY

THE STATE
against
KEN

PERSONALLY appeared before me the affiant CATOE, DANNY INV
being duly sworn deposes and says that defendant CANNON, ROBERT
did within this county and state on 12/12/06 violate the criminal laws of the
State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of KERSHAW)
in the following particulars:

Address: 16-11-0311
Phone: 803 706-0621 SSN: 0079
Sex: M Race: A Height: 5' Weight: 150
DL State: SC DL #: 0079

DESCRIPTION OF OFFENSE: BURGLARY - 1ST DEGREE
I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:
THAT ON OR ABOUT DECEMBER 12, 2006 THE DEFENDANT ROBERT LEE CANNON DID ALONG
WITH CO-DEFENDANTS BREAK AND ENTER THE DWELLING HOUSE OF JOSHUA ZOCH, DURING
THE NIGHT TIME HOURS WHILE THE RESIDENCE WAS OCCUPIED, AND DID SO WITH THE
INTENT TO COMMIT A CRIME ONCE INSIDE. THIS INCIDENT TOOK PLACE AT
LANE IN ELGIN, KERSHAW COUNTY, SOUTH CAROLINA AFFIANT AND STATEMENTS TO
PROVE THE SAME.

Prosecuting Agency: CATOE, DANNY INV
Prosecuting Officer: CATOE, DANNY INV
Offense: BURGLARY - 1ST DEGREE
Code/Ordinance Sec. 16-11-0311 Offense Code: 0079

This warrant is CERTIFIED FOR SERVICE in the
☒ County/ ☐ Municipality of
is to be arrested and brought before me to be
dealt with according to law.

Signature of Affiant
[Signature]
Affiant's Address 609 LAFAYETTE AVE
Affiant's Telephone 803 425-1512 000-0000

Signature of Judge
[Signature] (L.S.)
Date: 12/18/06

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:
It appearing from the above affidavit that there are reasonable grounds to believe that
on 12/12/06 defendant CANNON, ROBERT
did violate the criminal laws of the State of South Carolina (or ordinance of
☒ County/ ☐ Municipality of KERSHAW) as set forth below:

RETURN
A copy of this arrest warrant was delivered to
defendant CANNON, ROBERT
on 12/18/06
[Signature]
Signature of Constable/Law Enforcement Officer

ARREST WARRANT
TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:
It appearing from the above affidavit that there are reasonable grounds to believe that
on 12/12/06 defendant CANNON, ROBERT
did violate the criminal laws of the State of South Carolina (or ordinance of
☒ County/ ☐ Municipality of KERSHAW) as set forth below:

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said
defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to
the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me
on DECEMBER 18, 2006)
[Signature])
Judge's Address P.O. DRAWER 1528
Judge's Telephone CAMDEN, SC 29020
Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit
R. E. HARTIS

RETURN WARRANT TO:
KERSHAW COUNTY SHERIFF'S OFFICE
100 WYOMING ST
CAMDEN, SC 29020

ORIGINAL

WITNESSES

Catoe, KCSD

ARREST WARRANT NUMBER

K142530

1743

ACTION OF GRAND JURY

VERDICT

Foreperson of Grand Jury
Date: FEB 06 2007

VERDICT

Guilty

Foreperson of Petit Jury
Date:

DOCKET NO. 2007-GS-28-0017

The State of South Carolina

County of Kershaw

COURT OF GENERAL SESSIONS

February TERM 2007

THE STATE
vs.

Robert Cannon

Indictment for

BURGLARY(AFTER 6/20/85)
1ST DEGREE

SC Code: 16-11-311
CDR Code: 079
Class FEL-EXM(V)

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

CLERK OF COURT
KERSHAW COUNTY, S.C.

07 FEB - 7 PM 3:47

RECORDED

1749

1750

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF KERSHAW

STATE

VS. Robert Cannon

INDICTMENT/CASE#:

2007-GS-28-00017

A/W#: K142530

Date of Offense: 12/12/06

S.C. Code §: 16-11-0311

CDR Code #: 0079

AKA:

Race: B

Sex: M

Age: 19

DOB:

SS#:

Address:

RD.

City, State, Zip

Columbia, SC 29229

DL#

SID#

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: Burglary 1st Degreein violation of § 16-11-311 of the S.C. Code of Laws, bearing CDR Code # 0079☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ Mandatory GPS (CSC
w/minor 1st or Lewd Act)☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant initial)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Joanna McDuffie

Solicitor

Defendant

[Signature]
Attorney for DefendantWHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus

costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina

Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine:

§14-1-206 (Assessments 107.5%) \$ _____

§14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00

§14-1-211(A)(2) (DUI Surcharge) \$100 \$ _____

§56-5-2995 (DUI Assessment) \$12 \$ _____

§35.13 (Public Def/Prob) \$500 \$ _____

§73.3, 1B TP (Law Enforce. Funding) \$25 \$ 25.00

§33.7, 1B TP (Drug Court Surcharge) \$100 \$ _____

§50-21-114(BUI Breath Test Fee) \$50 \$ _____

§56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____

3% to County (if paid in installments) \$ 3.25TOTAL \$ 128.25

PTUP

_____ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, §35.13 TP

Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code: 2111216Sentence Date: 5/13/08

Clerk of Court/ Deputy Clerk

Court Reporter: Jenny Williams

GENERAL SESSIONS DOCKET REPORT FOR KERSHAW COUNTY

REPORT RUN DATE - 01/02/2007

INDICTMENT NUMBER: 2007GS28 *18*

DEFENDANT NAME: CANNON, ROBERT

AKA:

ADDRESS:

RD

CITY: COLUMBIA

STATE: SC ZIP 29229

SOCIAL SECURITY NUMBER: *444 444 444*

SEX: 1 MALE

RACE: 2 BLACK

DRIVERS LICENSE STATE / NO.: SC /

MARITAL STATUS:

WARRANT OR TICKET NUMBER: K142528

COUNTS: 01 OFFENSE CODE: 0116

NO WARRANT? 0 NAME OF OFFENSE: MURDER / MURDER

DATE OF ARREST: 12/18/2006 DATE RECD BY CLERK: 01/02/2007

SUMMARY JUDGE:

5/13/08

DISP DATE: 00/00/0000 DISP TYPE: *Final*

DISP TYPE EXPLANATION:

Guilty

JUDGE CODE/NAME: *126 D. Thomas Connors, Jr.* COURT REPORTER: *Jeany Williams*

CONVICTION: CTS: 00 OFFENSE: 0000 *****

0116

Murder

SENTENCE: *SCDC 35 years, concurrent*

[Signature]

DEFENSE ATTORNEY:

PROSECUTING ATTORNEY:

Barbara McDuffie

ARREST WARRANT

K- 142528

STATE OF SOUTH CAROLINA

☒ County of KERSHAW Municipality of KERSHAW

FILE FOR RECORD

THE STATE

against

CANNON, ROBERT

Address:

CAMDEN, SC 29020

Phone:

780-4112

Sex:

M Race: W Height: 5'11" Weight: 175

DL State:

SC DL #: 9959595

Agency ORI#:

Prosecuting Agency:

CATTIE, DANNY INV

Prosecuting Officer:

Offense:

MURDER

Code/Ordinance Sec.:

15-03-0020

Offense Code:

0116

This warrant is CERTIFIED FOR SERVICE in the

☒ County/ ☐ Municipality of

The accused

is to be arrested and brought before me to be

dealt with according to law.

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to

defendant CANNON, ROBERT

on

12/18/06

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

KERSHAW COUNTY SHERIFF'S OFFICE

100 KNOX ST

CAMPDEN, SC 29020

P.O. DRAWER 1528

STATE OF SOUTH CAROLINA

☒ County of KERSHAW Municipality of KERSHAW

Personally appeared before me the

affiant

being duly sworn deposes and says that

defendant

did within this county and state on

State of South Carolina (or ordinance of ☐ County/ ☐ Municipality of KERSHAW)

in the following particulars: MURDER

DESCRIPTION OF OFFENSE:

15-03-0020

I further state that there is probable cause to believe that the defendant named above did commit

the crime set forth and that probable cause is based on the following facts:

THAT ON OR ABOUT DECEMBER 12, 2006 THE DEFENDANT ROBERT CANNON ALONG WITH

CO-DEFENDANTS DID WITH MALICE AFORETHOUGHT CAUSE THE DEATH OF JOSHUA ZOCH,

A HUMAN BEING, BY REPEATEDLY HITTING AND KICKING THE VICTIM CAUSING HIS

DEATH. THIS INCIDENT TOOK PLACE AT

IN ELGIN, KERSHAW COUNTY,

SOUTH CAROLINA AFFIANT AND STATEMENTS TO PROVE THE SAME.

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of KERSHAW

Affiant's Address

603 LAFAYETTE AVE

Affiant's Telephone

CAMDEN, SC 29020

803 425-1512

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

it appearing from the above affidavit that there are reasonable grounds to believe that

on 12/12/06 defendant CANNON, ROBERT

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of KERSHAW) as set forth below:

DESCRIPTION OF OFFENSE: MURDER

15-03-0020

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me

on DECEMBER 18, 2006

Judge's Address

P.O. DRAWER 1528

Judge's Telephone

CAMDEN, SC 29020

Signature of Issuing Judge

R. E. HARTIS

Judge Code: 562

Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

DOCKET NO. 2007-GS-28-*part* *0018* *MTA*

The State of South Carolina

County of Kershaw

COURT OF GENERAL SESSIONS

November TERM 2007

THE STATE
vs.

Robert Cannon

Indictment for

MURDER

SC Code: 16-3-10
CDR Code: 0116
Class FEL/EXM(V)

1753

WITNESSES

Catoe, KCSD

ARREST WARRANT NUMBER

K142528

ACTION OF GRAND JURY

WILL

Admell

Foreperson of Grand Jury
Date: FEB 6 2007

VERDICT

Guilty
James E. Brady
Foreperson of Petit Jury
Date:

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

U.S. DISTRICT COURT
SOUTH CAROLINA
JAN 20 2007

07 FEB - 7 PM 3:47

RECORDED

1754

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF KERSHAW

STATE VS. Robert Cannon

INDICTMENT/CASE#:

2007-GS-28-00018

A/W#: K142528

Date of Offense: 12/12/06

S.C. Code §: 16-03-0010, 0020

CDR Code #: 0116

AKA:

Race: B

Sex: M

Age: 19

DOB:

SS#:

Address:

City, State, Zip

Columbia, SC 29229

DL#

SID#

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: Murderin violation of § 16-3-10, 16-3-20 of the S.C. Code of Laws, bearing CDR Code # 0116☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ Mandatory GPS (CSC
w/minor 1st or Lewd Act)☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant initial)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Sandra McDeffie

Solicitor

Defendant

[Signature]

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 35 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus

costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina

Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine: \$ _____

\$14-1-206 (Assessments 107.5%) \$ _____

\$14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00

\$14-1-211(A)(2) (DUI Surcharge) \$100 \$ _____

\$56-5-2995 (DUI Assessment) \$12 \$ _____

\$35.13 (Public Def/Prob) \$500 \$ _____

\$73.3, 1B TP (Law Enforce. Funding) \$25 \$ 25.00

\$33.7, 1B TP (Drug Court Surcharge) \$100 \$ _____

\$50-21-114(BUI Breath Test Fee) \$50 \$ _____

\$56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____

3% to County (if paid in installments) \$ 3.75TOTAL \$ 128.75

PTUP

_____ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, §35.13 TP

Requires \$500 be paid to Clerk during probation

PRESIDING JUDGE

Judge Code: 211Sentence Date: 5/13/08Court Reporter: [Signature]

Clerk of Court/ Deputy Clerk

KERSHAW COUNTY SHERIFF'S OFFICE
CAMDEN, SOUTH CAROLINA

STATEMENT OF MIRANDA RIGHTS

- (106) 1. YOU HAVE THE RIGHT TO REMAIN SILENT.
- (107) 2. ANYTHING YOU SAY CAN AND WILL BE USED AGAINST YOU IN A COURT OF LAW.
- (108) 3. YOU HAVE THE RIGHT TO TALK TO A LAWYER AND HAVE HIM PRESENT WITH YOU WHILE YOU ARE BEING QUESTIONED.
- (109) 4. IF YOU CANNOT AFFORD TO HIRE A LAWYER, ONE WILL BE APPOINTED TO REPRESENT YOU BEFORE ANY QUESTIONING, IF YOU WISH.
- (110) 5. YOU CAN DECIDE AT ANY TIME TO EXERCISE THESE RIGHTS AND NOT ANSWER ANY QUESTIONS OR MAKE ANY STATEMENTS.

Danny Carter
OFFICER'S NAME AND TITLE

TRIPS

WAIVER OF RIGHTS

(111) THIS IS TO CERTIFY THAT I HAVE READ OR HAVE HAD READ TO ME THE ABOVE STATEMENT OF MY RIGHTS. I UNDERSTAND EACH OF THESE RIGHTS, AND HAVING THESE RIGHTS IN MIND I WAIVE THEM AND WILLINGLY MAKE A STATEMENT. NO PROMISES OR THREATS HAVE BEEN MADE TO ME AND NO PRESSURE OR COERCION OF ANY KIND HAS BEEN USED AGAINST ME.

[Signature]

WITNESSED BY:

Joseph Matthews
OFFICER'S NAME AND TITLE
Kershaw County Sheriff's Office
OFFICER'S DEPARTMENT

DATE: 12-15-2006
TIME: 18:45



ROBERT CANALAN
Name

Social Security Number

Address

12/15/01
Current Date

9:20 PM
Current Time

Columbia, S.C., 29229
City, State, Zip Code

Date of Birth

(803) 7884112 (803) 556-1597
Home Phone Work Phone

On Tuesday the 12th December 2006 AT 2:00pm Chris Whitehead got off of work AND picks me up. We go to the mall & I got a New Cell Phone & shoes. We then went to pick up (DJ) DERRICK McDonald and then we went to McDonalds in Blythwood and eat and from there we went to Sonic. I had on a ski mask and was joking around while Chris talked to a girl in the back and DJ was talking to Leroy. I don't know Leroy's last name. We then left Sonic and went to the Two notch Walmart and Chris and DJ got a ski mask. So we went riding and Chris said you know we need to do something with these mask, and I ask and DJ ask like what. and Chris said like beat ~~Chris~~ ^{JOSHLY} ass. because he's a snitch, and I told Chris I didn't think he was a snitch. He (Chris) then ask if me and DJ wanted to ride and we said whatever.

I have made the foregoing statement freely and voluntarily, without fear, threat, promise of reward or hope of reward of any kind. This is to certify that I have read or had read to me the foregoing statement consisting of 5 pages and a true copy has been given to me this date.

[Signature]
Signature of Individual Giving Statement

[Signature]
Witness

Page 1 of 5 Pages

[Signature]
Witness

Name

Social Security Number

Address

Current Date

Current Time

City, State, Zip Code

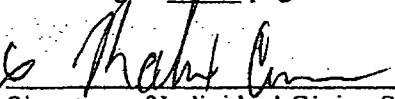
Date of Birth

Home Phone

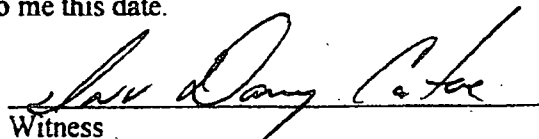
Work Phone

Because I had nothing else to do and no certain time to be home, THAT was about 11pm DJ was Real Quiet in the car while we were going to Josh's house. We pulled up to Josh's about 11:30pm, Chris knocked on the front door and Josh didn't answer. So Chris said that he was going to pull one of my moves and kick the door. So Chris went to the side door and he (Chris) busted it in. HE WENT IN FIRST and me + DJ followed him to watch the fight. Josh was asleep on the couch and Chris yelled hey Bitch, and when Josh looked up, Chris HIT him with a glass lamp. Right AFTER THAT Josh was in a claze and Chris drags him off the couch part of the way. THEN Chris started pressuring DJ to hit Josh with the bat that was in the house and DJ then hit Josh in the back of

I have made the foregoing statement freely and voluntarily, without fear, threat, promise of reward or hope of reward of any kind. This is to certify that I have read or had read to me the foregoing statement consisting of 5 pages and a true copy has been given to me this date.

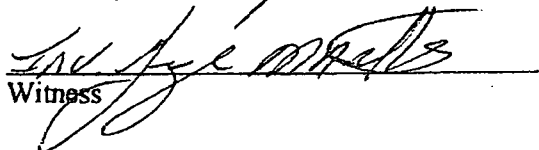


Signature of Individual Giving Statement



Witness

Page 2 of 5 Pages



Witness

Name

Social Security Number

Address

Current Date

Current Time

City, State, Zip Code

Date of Birth

Home Phone

Work Phone

HEAD. AFTER THAT JOSH was basically crawling trying to get up. and the whole time Chris was talking SHIT to him about being a Snitch. At that time Chris kicked Josh in the Ribs, And ask Josh where the weed was and Josh was just grunting. That when Chris Ask me to check the room and we started pulling draws and Chris Slipped the mattress and DJ was just standing there. Then Josh went unconscious and I got Josh a towel and put it to his head. Chris said fuck we don't have anything and pushed the Christmas tree over on Josh. Chris then got mad again and took the house phone. But before Chris left he got some frozen chicken from the freezer and put IT on Josh's head to try and stop the Bleeding. AFTER that we went BACK out the same way we came IN.

I have made the foregoing statement freely and voluntarily, without fear, threat, promise of reward or hope of reward of any kind. This is to certify that I have read or had read to me the foregoing statement consisting of 5 pages and a true copy has been given to me this date.

[Signature]
Signature of Individual Giving Statement

[Signature]
Witness

Page 3 of 5 Pages

[Signature]
Witness

Name

Social Security Number

Address

Current Date

Current Time

City, State, Zip Code

Date of Birth

Home Phone

Work Phone

we left and Chris dropped DJ OFF 1ST
and me second and I guess he went
home.

(Q) Did you Chris & DJ have on gloves? (A) yes.

Q WHAT KIND OF gloves?

(A) Purple Latex, and I had on 2 PAIR WHT AND
purple ones on top.

(Q) WHO'S CAR WAS you and Chris and DJ
IN that night?

(A) Chris's Blue Honda Accord.

(Q) WHERE WAS THE BAT FROM THAT WAS USED TO
HIT JOSH?

(A) IT WAS IN JOSH'S house, I just looked
over their and DJ picked it up.

I have made the foregoing statement freely and voluntarily, without fear, threat, promise of reward or
hope of reward of any kind. This is to certify that I have read or had read to me the foregoing statement
consisting of 5 pages and a true copy has been given to me this date.

[Signature]
Signature of Individual Giving Statement

[Signature]
Witness

Page 4 of 5 Pages

[Signature]
Witness

Name

Social Security Number

Address

Current Date

Current Time

City, State, Zip Code

Date of Birth

Home Phone

Work Phone

(Q) WHAT WERE YOU, CHRIS & DJ WEARING THAT NIGHT?

(A) BLACK PANTS and SHIRTS and SKI MASK.

(Q) WHAT COLOR WAS THE SKI MASK?

(A) MINE WAS BLACK and THEIRS WAS BLACK or DARK BLUE.

(Q) DID YALL CHANGE CLOTHES THAT NIGHT AFTER THE INCIDENT?

(A) YES, and CHRIS DONE SOMETHING WITH THEM.

I ASK INV DANNY CATOE TO WRITE THIS FOR ME and THIS IS IN MY OWN WORDS AS THEY ARE WRITTEN.

X *[Signature]*

12-15-06- 9:51 PM

I have made the foregoing statement freely and voluntarily, without fear, threat, promise of reward or hope of reward of any kind. This is to certify that I have read or had read to me the foregoing statement consisting of 5 pages and a true copy has been given to me this date.

[Signature]

Signature of Individual Giving Statement

[Signature]

Witness

Page 5 of 5 Pages

[Signature]

Witness



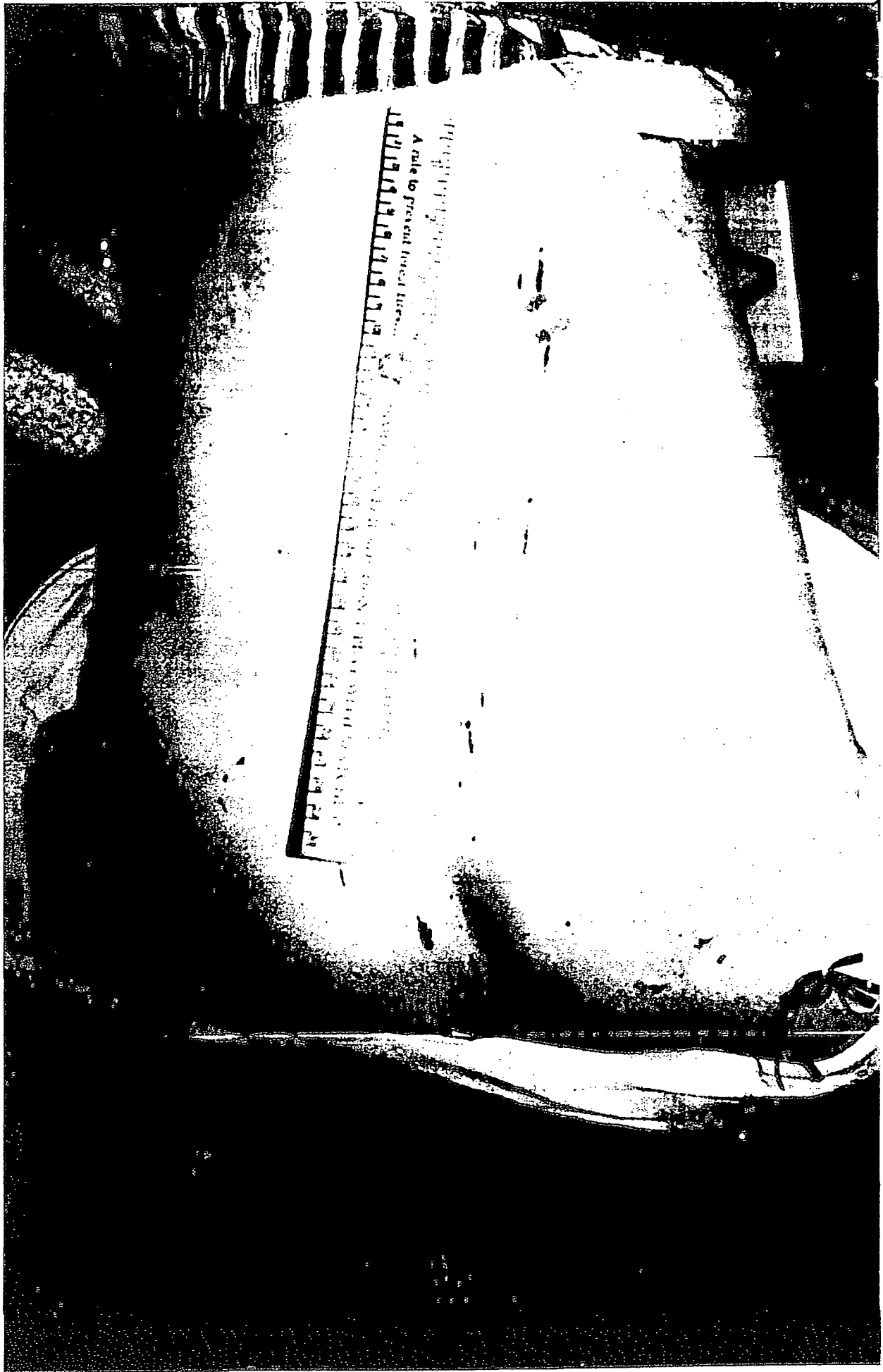
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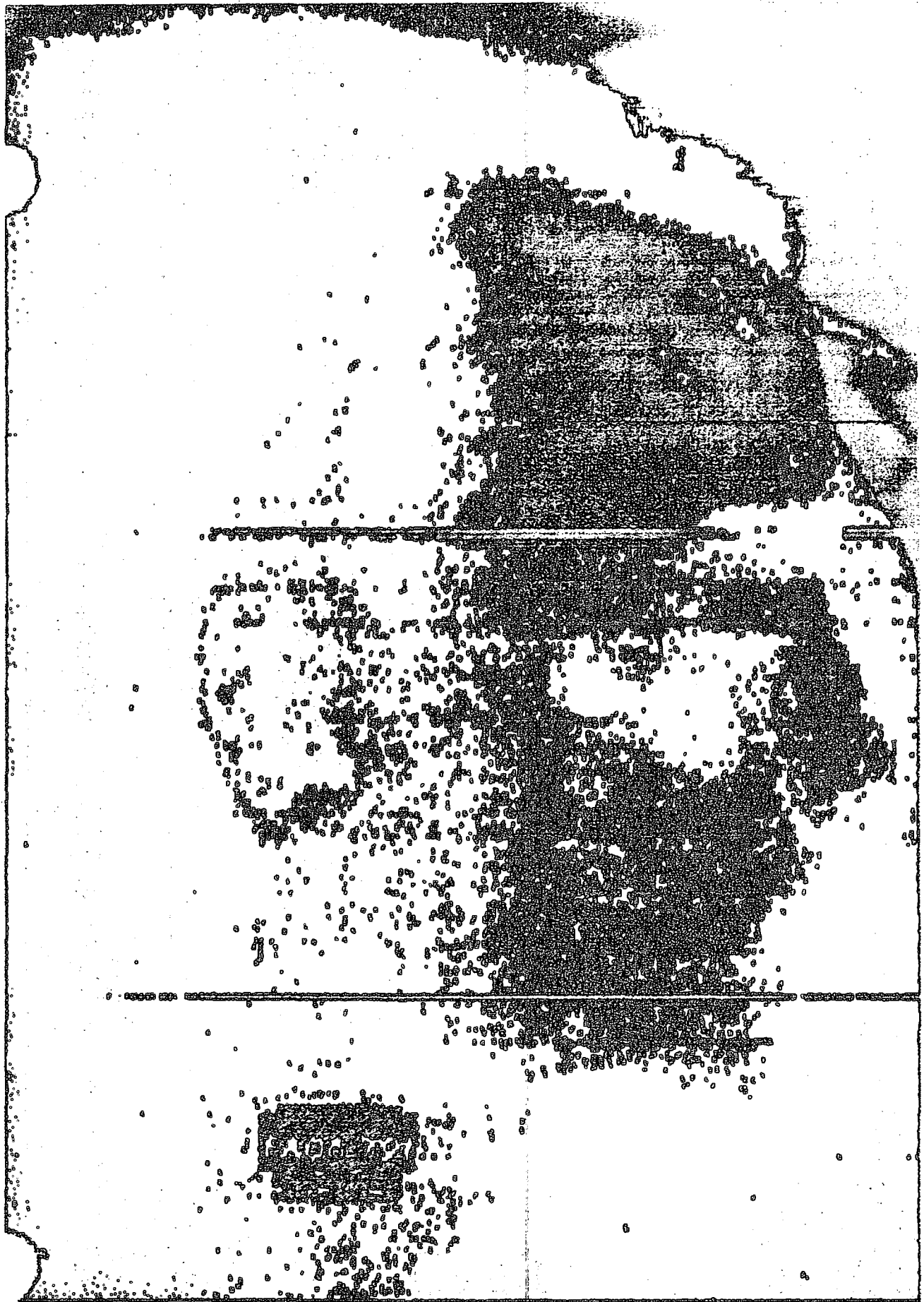
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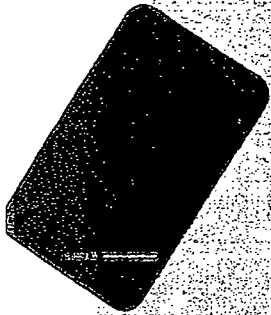
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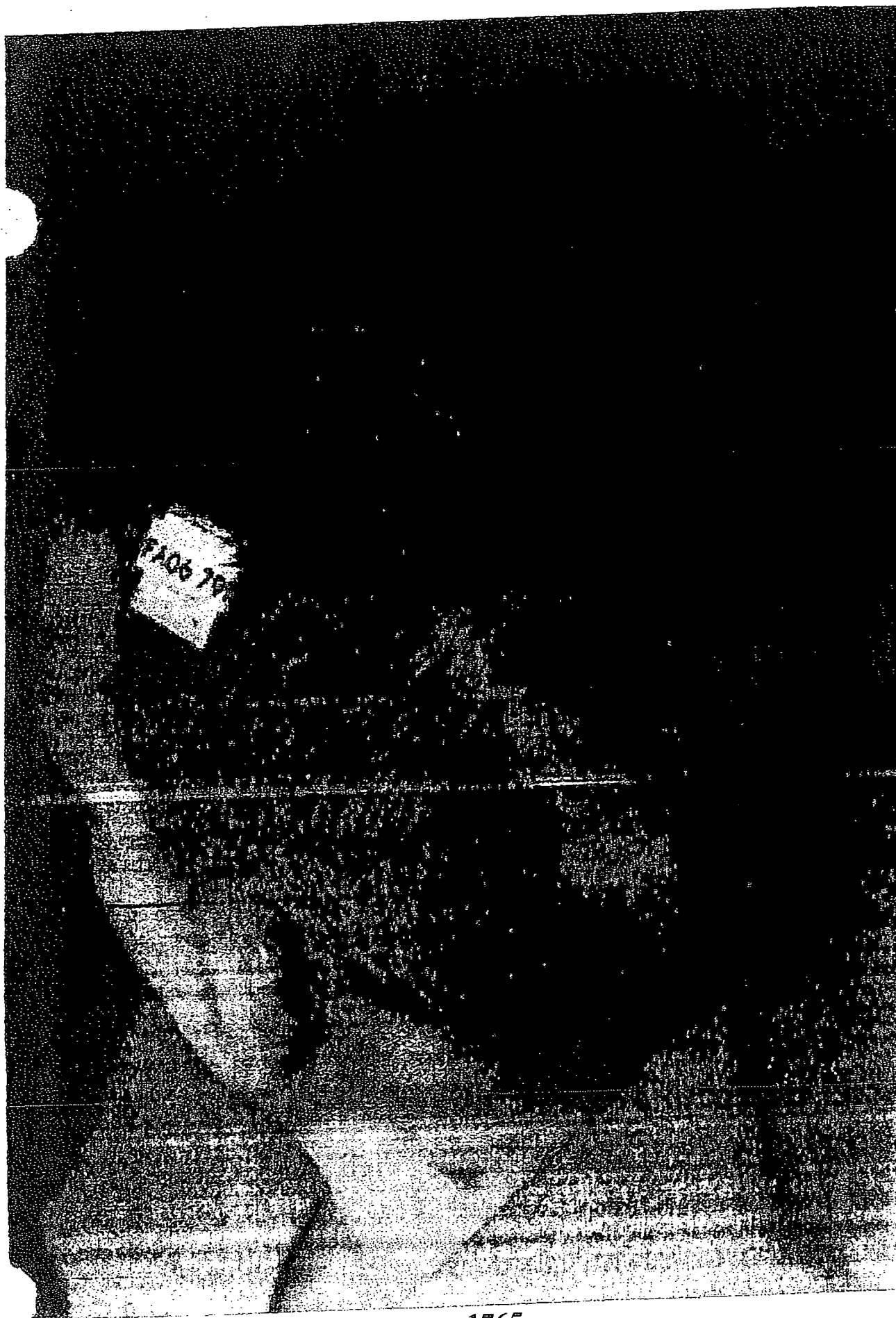
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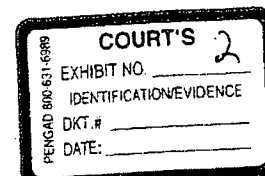
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OFFICE OF
KERSHAW COUNTY SHERIFF

STEPHEN D. MCCASKILL, SHERIFF

DAVID E. THOMLEY, POLYGRAPH EXAMINER
PHILIP R. CRAWFORD, POLYGRAPH EXAMINER

POLYGRAPH REPORT

This is an official report of the Kershaw County Sheriffs Office Polygraph Division and is to be used in connection with an official criminal investigation. This report is intended only for the use of the agency to which it was disseminated and may contain information that is either privileged or confidential. It's contents are not to be distributed outside of your agency.

Date of Examination December 14, 2006	Subject Examined Adrian Doran	Examination Results Deception Indicated	Polygraph Case No. P-06-055
Polygraph Examiner Philip R. Crawford	Victim Joshua Zoch	Location of Examination Kershaw County Court House	
Testing Issue: Whether or not the examinee caused the death of Joshua Zoch or knows who did.			
Examiner's Results R1) Did you plan with anyone to kill Joshua? Examinee Response: No R2) Do you know for sure who killed Joshua? Examinee Response: No R3) Did you kill Joshua? Examinee Response: No			
Testing Format R&I Technique			
Post Test Comments: None.			
This opinion should be considered a final report; however, all examinations undergo a Quality Control Review. Should this Quality Control Review change the results of this examination, your agency will be promptly notified by written report.			
Officer Signature Inv. Danny Catoe	Agency Kershaw County Sheriffs Office	Date Notified December 14, 2006	
Examiner's Signature <i>Philip R. Crawford</i>	Agency Kershaw County Sheriffs Office	Date of Report December 14, 2006	

OFFICE OF
KERSHAW COUNTY SHERIFF

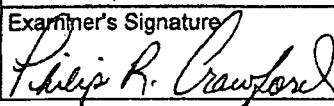
STEPHEN D. MCCASKILL, SHERIFF

DAVID E. THOMLEY, POLYGRAPH EXAMINER

PHILIP R. CRAWFORD, POLYGRAPH EXAMINER

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Date of Examination December 16, 2006	Subject Examined Robert Cannon	Examination Results Deception Indicated	Polygraph Case No. P-06-056
Polygraph Examiner Philip R. Crawford	Victim Joshua Zoch	Location of Examination Kershaw County Court House	
Testing Issue: Whether or not the examinee lied on his statement to the police regarding the death of the victim.			
Examiner's Results R5) Did you lie in any part of your statement to the police regarding the death of Joshua Zoch? Examinee Response: No R7) Regarding your statement about the death of Joshua Zoch, did you lie in any part of it to the police? Examinee Response: No			
Testing Format			
Bi-Zone Comparison Test			
Post Test Comments: Examinee was given the results of the polygraph. He confessed that all three suspects "hit the back door together, but I was still last." He also stated that the victim grabbed his leg during the incident and that he kicked him. Prior to the polygraph the examinee wrote a supplemental statement listing additional items that took from the residence.			
This opinion should be considered a final report; however, all examinations undergo a Quality Control Review. Should this Quality Control Review change the results of this examination, your agency will be promptly notified by written report.			
Officer Signature Inv. Danny Catoe	Agency Kershaw County Sheriffs Office	Date Notified December 16, 2006	
Examiner's Signature 	Agency Kershaw County Sheriffs Office	Date of Report December 16, 2006	

OFFICE OF
KERSHAW COUNTY SHERIFF

STEPHEN D. MCCASKILL, SHERIFF

DAVID E. THOMLEY, POLYGRAPH EXAMINER

PHILIP R. CRAWFORD, POLYGRAPH EXAMINER

POLYGRAPH REPORT

This is an official report of the Kershaw County Sheriffs Office Polygraph Division and is to be used in connection with an official criminal investigation. This report is intended only for the use of the agency to which it was disseminated and may contain information that is either privileged or confidential. Its contents are not to be distributed outside of your agency.

Date of Examination December 14, 2006	Subject Examined Melissa Davy	Examination Results Deception Indicated	Polygraph Case No. P-06-054
Polygraph Examiner Philip R. Crawford	Victim Joshua Zoch	Location of Examination Kershaw County Court House	
Testing Issue: Whether or not the examinee knows who caused the death of Joshua Zoch or is withholding any information regarding his death.			
Examiner's Results R5) Are you withholding any information regarding the death of Joshua? Examinee Response: No R7) Regarding Joshua's death, are you withholding any information from the police? Examinee Response: No R10) Do you know for sure who caused Joshua's death? Examinee Response: No			
Testing Format Zone Comparison Test			
Post Test Comments: The examinee states that she was present when Chris called Zack on Tuesday night and asked if Zack wanted to go with him to beat up Joshua. She also stated she had questioned Robert about a pair of shoes he had that looked like Joshua's that were stolen in a prior burglary.			
This opinion should be considered a final report; however, all examinations undergo a Quality Control Review. Should this Quality Control Review change the results of this examination, your agency will be promptly notified by written report.			
Officer Signature Inv. Danny Catoe	Agency Kershaw County Sheriffs Office	Date Notified December 14, 2006	
Examiner's Signature <i>Philip R. Crawford</i>	Agency Kershaw County Sheriffs Office	Date of Report December 14, 2006	

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM KERSHAW COUNTY
HONORABLE G THOMAS COOPER, PRESIDING

07-GS-28-19

THE STATE,

RESPONDENT,

V.

ROBERT L. CANNON, III

APPELLANT.

CERTIFICATE OF COUNSEL

Counsel hereby certifies that Appellant's Record on Appeal contains only that material designated by the parties and nothing else.



Melissa I. Kimbrough, Esquire
1830 Marion Street
Columbia, S.C. 29201
(803) 765-2796.
Attorney For Robert L. Cannon, III

This 11th day of December, 2009.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

State of South Carolina,

Respondent,

V

Robert L. Cannon, III

Appellant.

FINAL BRIEF OF APPELLANT

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Assistant General

JOHN W. MCINTOSH
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(803) 576-1800
ATTORNEYS FOR RESPONDENT

TABLE OF AUTHORITIES

United States Supreme Court Cases

<i>Brady v. Maryland</i> , 373 U.S. 83 (1963).....	10
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966).....	7
<i>Strickland v. Washington</i> , 466 U.S. 688 (1984).....	11
<i>United States v. Bagley</i> , 473 U.S. 667 (1985).....	10, 11
<i>Arizona v. Fulminante</i> , 499 U.S. 279 (1991).....	7, 8
<i>Kyles v. Whitley</i> , 514 U.S. 419 (1995).....	11, 12
<i>Strickler v. Greene</i> , 527 U.S. 263 (1999).....	10, 11

Federal Court Cases

<i>Spicer v. Roxbury Correctional Institution</i> , 194 F.3d 547 (4 th Cir. 1999).....	10

State Court Cases

<i>State v. Arrowood</i> , 375 S.C. 359 (2007).....	7
<i>State v. Council</i> , 335 S.C. 1 (1999).....	12
<i>State v. Middleton</i> , 288 S.C. 21 (1986).....	14
<i>State v. Patrick</i> , 289 S.C. 301 (1986).....	14
<i>State v. Peake</i> , 291 S.C. 138 (1987).....	8
<i>State v. Rochester</i> , 301 S.C. 196 (1990).....	7
<i>State v. Thorne</i> , 239 S.C. 164 (1961).....	14
<i>State v. Todd</i> , 290 S.C. 212 (1986).....	14
<i>State v. Trotter</i> , 322 S.C. 537 (1996).....	10, 13
<i>State v. Waitus</i> , 224 S.C. 12 (1954).....	14

ISSUES ON APPEAL

I. WHETHER THE LOWER COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS ALLEGED CONFESSION WHEN LAW ENFORCEMENT IMPROPERLY INDUCED APPELLANT TO CONFESS BASED ON THEIR PROMISES, BOTH IMPLIED AND EXPRESSED, TO HELP HIM, THEREBY USING COERCION, PRODUCING AN INADMISSIBLE "CONFESSION?"

II. WHETHER THE LOWER COURT ERRED IN DENYING DEFENSE COUNSEL'S MOTION TO HALT THE TRIAL DUE TO THE STATE'S UNTIMELY DISCLOSURE OF DISCOVERY?

III. WHETHER THE LOWER COURT ERRED IN ADMITTING GRUESOME CRIME SCENE AND AUTOPSY PHOTOGRAPHS THAT WERE IRRELEVANT GIVEN THE UNCONTESTED FACT THAT THE VICTIM'S CAUSE OF DEATH WAS HOMICIDE AND THE PHOTOGRAPHS WERE EXTREMELY PREJUDICIAL AND INFLAMMATORY?

STATEMENT OF THE CASE

On the morning of December 13, 2006, the badly beaten body of Joshua Zoch was discovered in his home by Melissa Davy, his on-again, off-again girlfriend. Mr. Zoch had died from multiple blunt force trauma to his head administered by a baseball bat. After a thorough investigation, no evidence of any forensic value was recovered from the scene, nor any found pursuant to further investigation.

Investigators interviewed employees at the Sonic fast-food restaurant located on Hard Scrabble Road. (PT Tr. At 22-23; ROA. at 22-23). Based on these interviews, law enforcement developed Appellant, Robert L. Cannon, III, along with his two co-defendants--Derrick McDonald and Christopher Whitehead--as suspects. (PT Tr. P. 89; ROA at 89). Investigator Danny Catoe (hereinafter "Catoe") began to search for Derrick McDonald, during which he ran into Christopher Whitehead, who said he did not know a "damn thing" about Zoch's murder. Whitehead was arrested on the spot for driving under suspension. (PT Tr. p. 27; ROA at 27).

Catoe later located Derrick McDonald. (PT Tr. p. 29; ROA at 29). McDonald alleged an alibi--Christopher Rust--for the night of the murder.

Issue 1.

When Catoe arrived at Appellant's home, Appellant's parents were also there. Once at the home, Catoe read Appellant his *Miranda* rights. (PT Tr. 34; ROA at 34). Catoe testified he "[s]ometimes I will say or make a statement, you know, you can be used -- you can also be used as a witness." (PT Tr. 96, lines 2-4; ROA at 96, lines 2-4). Further, Catoe admitted that he could not refute having told Appellant that "he could be used as a witness in this trial." (PT Tr. 96, lines 7-10; ROA at 96, lines 7-10).

At some point during his questioning of Appellant, Catoe called his superior, Captain Tomley (hereinafter "Tomley"), and had him meet with he and Appellant. (PT Tr. 105, lines 1-5; ROA at 105, lines 1-5). Catoe called Tomley because "I think Mr. Cannon kind of doubted my seniority, I guess you would say. So I told him that I was going to call my captain..." (PT Tr. 105, lines 9-11; ROA at 105, lines 9-11). Tomley spoke privately with Appellant, out of earshot from Catoe. (PT Tr. 105, lines 18-19; ROA at 105, lines 18-19). Shortly thereafter, Appellant told Catoe "that he knew more but wanted to make sure that he could get some help." (PT Tr. 111, line 18-112, line 1; ROA at 111, line 18--p. 112, line 1). Appellant then provided an incriminating statement, in which he admitted some involvement in Zoch's murder. (PT Tr. 106, lines 16-19; ROA at 106, lines 16-19). Appellant's statement was the only evidence tying him to Zoch's murder. (PT Tr. 107, lines 19-22; ROA at 1-7, lines 19-22).

Astonishingly, after Appellant gives a statement amounting to a "confession" to murder, law enforcement *did not arrest him*. Rather, Catoe left Appellant at home with his parents, because he "didn't think he posed any danger to anybody that night, and he was there with his parents." (PT Tr. 108, lines 8-9; ROA at 108, lines 8-9).

During *in camera* trial proceedings, Tomley testified he told Appellant that he would tell the judge that Appellant “cooperated with us.” (Tr. p. 21, lines 23-25; ROA at 209, lines 23-25). Investigator George Marthers (hereinafter “Marthers”) testified he was present during Appellant’s questioning and at the time his statement was made. (Tr. P. 38, lines 1-8; ROA at 226, lines 1-8). Marthers could “not recall” hearing Catoe tell Appellant he could be a witness rather than a defendant. (Tr. P. 57, lines 15-20; ROA at 245, lines 15-20).

Appellant and his family members also testified concerning Catoe’s interrogation. Veronica Munnerlyn, Appellant’s mother, testified overhearing Catoe telling Appellant that they needed him to testify against Whitehead. (Tr. P. 165, lines 11-16; ROA at 353, lines 11-16). She also heard Catoe tell Appellant “[y]ou’ll be helping yourself out.” (Tr. P. 165, lines 20-22; ROA at 353, lines 20-22). Mario Munnerlyn, Appellant’s step-father, testified he was present during the initial interrogation of Appellant, and Catoe told him Appellant “isn’t in any trouble.” (Tr. P. 182, lines 23-24; ROA at 370, lines 23-24). Appellant testified, in pertinent part, that he questioned Catoe’s ability to help him, and Tomley assured Appellant he wouldn’t be charged if he cooperated and would get to stay at home with his parents. (Tr. P. 195, lines 2-8; ROA at 383, lines 2-8).

Trial counsel for Appellant moved to suppress his statement on the basis that it was induced by Catoe’s offer to get “some help before he [Appellant] said anything.” (Tr. P. 227, lines 5-6; ROA at 415, lines 5-6). That Captain Tomley was called in corroborates Appellant’s position, as does Tomley’s own testimony, that Tomley told Appellant he would speak to the judge and prosecutor on Appellant’s behalf. (Tr. P. 235, lines 2-19; ROA at 423, lines 2-19). Finally, trial counsel noted that Appellant, despite

"confessing" to involvement in a homicide, was allowed to stay home with his parents, anecdotally supporting Appellant's testimony that he was told his cooperation would be rewarded.

The trial court denied Appellant's motion to suppress, finding that "whether the promise of a recommendation to law enforcement, to the Solicitor's Office or to the Court that there might be some leniency derived as a result of that cooperation in my mind is not so overbearing; as Peake and both (sic) Rochester point out, that the statement induced by a promise of leniency is involuntary only if *so connected* with the inducement as to be a consequence of the promise." (Tr. P. 256, lines 12-19; ROA at 444, lines 12-19). The trial court further ruled that the dictates of *Miranda v. Arizona* were fully complied with "and that the alleged statements given by the defendants were freely and voluntarily given, without duress, without coercion, without undue influence, without reward, without promise or hope of reward, without threat of injury, and without compulsion or inducement of any kind; and that such alleged statements were the voluntary product of the free and unconstrained will of the defendants." (Tr. P. 259, lines 4-11; ROA at 447, lines 4-11).

At trial, the state presented numerous lay witnesses--Allen Charles Brown, Cosmo Bacomo, Christopher Joseph Rust, Zachary Waltemath, Patricia Heathcoe, Cecile Trapp, Molly Lowaire, Melissa Davy--many of whom worked at the Sonic Restaurant on Hard Scrabble Road. None of these witnesses could establish Appellant's involvement in any crime, much less Zoch's murder, but did establish his association with Whitlark and Whitehead and the fact that he had been at Sonic on the day of, and prior to, the murder.

Law enforcement witnesses were also called. The only evidence adduced against

Appellant from among these witnesses was his coerced statement, admitted during the course of Catoe's testimony. (Tr. Pp. 738-748; ROA at 926-936). Trial counsel contemporaneously objected to Appellant's statement being admitted as evidence. (Tr. P. 731; ROA at 919).

Issue 2.

While having timely filed a discovery motion, defense counsel was never provided prior to trial with the underlying data upon which Appellant's "failed" polygraph report was based. Rather, trial counsel received the underlying data *during* trial. Defense counsel argued that his defense was hampered by the untimely disclosure of discovery, and that Crawford's testimony should be excluded. (Tr. P. 1007, line 10-p. 1008, line 12; ROA at 1195, line 10-p. 1196, line 12). Based on *Kyles v. Whitley*, trial counsel argued unsuccessfully to exclude Crawford's testimony. (Tr. P. 1010, line 19-p. 1011, line 2; ROA at 1198, line 19-p. 1199, line 2). Over counsel's objection, Lt. Phil Crawford of the Kershaw County Sheriff's Office testified concerning a follow-up interview with Appellant on December 16, 2006 (the day following Appellant's "confession" to Danny Catoe), the result of which was a second statement containing more detail about Zoch's murder. (Tr. P. 1026, line 3-p. 1027, line 12; ROA at 1214, line 3-p. 1215, line 12). All of this information was obtained after Appellant was advised he had "failed" his polygraph examination.

Issue 3.

During the expert testimony of forensic pathologist, Joel Sexton, the state sought to introduce numerous gruesome autopsy photographs. Defense counsel objected to the photographs on the basis that they were "gruesome," very prejudicial, and unnecessary, as

the issue of whether the wounds were self-inflicted had not been raised. (Tr. P. 1082, lines 4-22; ROA at 1270, lines 4-22). The trial court denied defense counsel's motion and allowed state's exhibit numbers 37, 39, 92, 113-116, 118, and 119 into evidence. (Tr. P. 1100-1102, 1104, 1106, and 1119; ROA at 1288-1290, 1292, 1294, and 1307).

ARGUMENT I

THE LOWER COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS ALLEGED CONFESSION WHEN LAW ENFORCEMENT IMPROPERLY INDUCED APPELLANT TO CONFESS BASED ON PROMISES, BOTH IMPLIED AND EXPRESSED, TO "HELP" HIM, THEREBY USING COERCION, PRODUCING AN INADMISSIBLE "CONFESSION."

On appeal, the trial court's ruling on the admissibility of statements made by the accused are reversible when they are "manifestly erroneous as to show an abuse of discretion." *State v. Arrowood*, 375 S.C. 359, 366 (2007). An abuse of discretion occurs when the trial court's ruling demonstrates an "error of law" of fact findings that are "without evidentiary support." *Id.* The trial court must find that the statement was voluntarily made by a preponderance of the evidence before this evidence may be admitted for the jury's consideration. *Id.*

Under the Fourteenth Amendment, a confession must be freely, voluntarily and knowingly made after advisement of the right to not speak with law enforcement in order to be admissible against the accused. *Miranda v. Arizona*, 384 U.S. 436, 498-499 (1966). Law enforcement may not induce the accused to "confess" based on promises of leniency, whether express or implied. *State v. Rochester*, 301 S.C. 196, 200 (1990).

In *Arizona v. Fulminante*, 499 U.S. 279 (1991), the United States Supreme Court reversed a murder conviction based on its having been obtained based on a coerced

confession. In *Fulminante*, the coerced confession was based on a government agent extracting a confession in exchange for physical protection of the accused. *Id.*, 499 U.S. at 286. The threat of physical harm to the accused was found credible by the court. *Id.*, 499 U.S. at 287. In the final analysis, the Court found that it was the promise of aid, in the form of protection from physical harm, by the Government Agent that induced *Fulminante* to confess, and thus the statement was constitutionally infirm and inadmissible. *Id.*, 499 U.S. at 288.

In *State v. Peake*, 291 S.C. 138 (1987), the South Carolina State Supreme Court reversed and remanded a murder conviction due to a promise of leniency to a defendant accused of murder. The investigating officer told the accused he would not face the death penalty if he gave a statement to law enforcement. *Id.*, 291 S.C. at 139. The Court noted that the investigating officer was in a position of "apparent authority" and his statements were "tantamount to a promise." *Id.*

The trial court's ruling denying Appellant's motion to suppress his statement to law enforcement was clearly erroneous, contrary to both state and federal legal precedent, and the constitutions of both the United States and South Carolina. Appellant told Catoe he "knew more but wanted to make sure he could get some help," and, during cross-examination, Catoe did not refute telling Appellant he could be a "witness" in the case. (PT Tr., pp. 96, 111-112; ROA at 96, lines 111-112). Catoe admitted he called his Captain, David Tomley, who had "more authority," and asked him to speak with Appellant. Captain Tomley admitted he told Appellant he would speak on his behalf to the judge and the solicitor if Appellant cooperated with law enforcement. (Tr. P. 913; ROA at 1101). Shortly after Tomley's discussion with him, Appellant confessed to

involvement in the Zoch homicide. Astoundingly, Appellant was not arrested after confessing to involvement in a brutal homicide.

There is overwhelming evidence in this case that law enforcement induced Appellant to confess. As an initial matter, the police were desperate because they had absolutely no case against any of the suspects without a statement. (PT tr. Pp. 225-226; ROA at 413-414). Appellant asked for some "help," and Catoe brought in a superior--Tomley--with the apparent authority to provide "help" to Appellant. While not admitting directly that he told Appellant he could be a witness, rather than an accused, in exchange for his help, Catoe would not deny having made this remark to Appellant prior to the statement being given. Tomley admitted point-blank that he would speak to the prosecution and the judge on Appellant's behalf, and shortly after this promise was made Appellant "confessed."

As in *Peake*, Appellant's statement to law enforcement was based on a promise, albeit an implied one, of assistance in exchange for his cooperation with law enforcement, and a person with "Apparent authority" to make such an assurance--Tomley--made assurances of assistance to Appellant. under these facts and circumstances, the trial court erred in admitting Appellant's statement, and Appellant's conviction should be reversed.

ISSUE 2

THE LOWER COURT ERRED IN DENYING DEFENSE COUNSEL'S MOTION TO HALT THE TRIAL DUE TO THE STATE'S UNTIMELY DISCLOSURE OF DISCOVERY.

The appropriate remedy for untimely disclosure of discovery under S.C. Rule 5, SCRCrimP, is “to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing the undisclosed evidence...”

The Fourteenth Amendment guarantee of due process is violated by “the suppression by the prosecution of evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady v. Maryland*, 373 U.S. 83, 87 (1963). “[I]mpeachment evidence . . . falls within the *Brady* rule” because impeachment evidence “if disclosed and used effectively, . . . may make the difference between conviction and acquittal.” *United States v. Bagley*, 473 U.S. 667, 676 (1985).

“There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.” *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). “Suppressed evidence is ‘information which had been known to the prosecution but unknown to the defense.’” *Spicer v. Roxbury Correctional Institution*, 194 F.3d 547, 557 (4th Cir. 1999) (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976)). Moreover, even if the individual prosecutor does not know of or possess all of the evidence, “the individual prosecutor has a duty to learn of any favorable evidence

known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). The prosecutor's duty to disclose is the same regardless of the general or specific nature of defense counsel's request, but the more specific the request "the more reasonable it is for the defense to assume" the requested evidence does not exist if it is not disclosed by the prosecution. *Bagley*, 473 U.S. at 682-83.

Evidence is material under *Brady* "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682, 685 (adopting the test enunciated in *Strickland v. Washington*, 466 U.S. 688 (1984), for resolving Sixth Amendment claims of ineffective assistance of counsel). "[T]he materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions." *Strickler*, 527 U.S. at 290. Finally, *Brady* requires a cumulative analysis of prejudice. *Kyles*, 514 U.S. at 436 (materiality must be "considered collectively, not item-by-item").¹

Prior to trial, defense counsel moved for disclosure of evidence under South Carolina Rule of Criminal Procedure Rule 5—and *Brady*. Prior to trial defense counsel

¹ Like *Brady*, the South Carolina Rules of Criminal Procedure "ha[ve] the same goal of ensuring the criminal defendant's right to a fair trial." *State v. Kennerly*, 331 S.C. 442, 454, 503 S.E.2d 214, 220 (Ct. App. 1998), *aff'd*, 337 S.C. 617, 524 S.E.2d 837 (1999). Thus, Rule 5 also applies to evidence within the actual possession of the prosecutor or within "the possession of other government agencies" and uses the same definition of materiality used in the *Brady* context. *Id.*

received some discovery, including that of a polygraph examination report; however, after the start of trial, counsel was provided with the underlying data upon which the examiner had relied in determining that Appellant, as well as two unindicted suspects, had failed their polygraph examinations.

Defense counsel argued that his defense was hampered by the untimely disclosure of discovery, and that Crawford's testimony should be excluded. (Tr. P. 1007, line 10-p. 1008, line 12; ROA at 1195, line 10-p. 1196, line 12). Based on *Kyles v. Whitley*, trial counsel argued unsuccessfully to exclude Crawford's testimony. (Tr. P. 1010, line 19-p. 1011, line 2; ROA at 1198, line 19-p. 1199, line 2). Over counsel's objection, Lt. Phil Crawford of the Kershaw County Sheriff's Office testified concerning a follow-up interview with Appellant on December 16, 2006 (the day following Appellant's "confession" to Danny Catoe), the result of which was a second statement containing more detail about Zoch's murder. (Tr. P. 1026, line 3-p. 1027, line 12; ROA at 1214, line 3-p. 1215, line 12). All of this information was obtained after Appellant was advised he had "failed" his polygraph examination.

The trial judge clearly erred in refusing to grant defense counsel's motion to either halt the trial, in order to allow for an appropriate expert examination of the underlying data, or exclusion of Crawford's testimony. As an initial matter, without additional time the disclosure of polygraph data was utterly useless to the defense, as this information requires as duly qualified expert to interpret the meaning of its content and determine the significance, if any, of that content. Given its scientific nature, polygraph evidence is inadmissible without an expert, found duly qualified, to introduce the results at trial.

(1999).

Given the need for an expert polygraph examination witness, the trial court should have granted defense counsel either a continuance or should have excluded Crawford's testimony, which contained damaging additional evidence contained in a statement given by Appellant after he was told he flunked his polygraph test. Defense counsel had no way to know whether the additional statement was procured through deceit concerning the polygraph examination, and therefore could not properly move to exclude Appellant's second statement. Moreover, the results related to the two other suspects--both of whom allegedly failed their exams--could have been used to call into question the Appellant's guilt, as well as the credibility of his confession to the murder in that if two other suspects were involved, then appellant's statement might amount to a false confession. Finally, given the coercive, if not downright dishonest, nature of law enforcement's procurement of Appellant's statement, defense counsel was obligated to ensure that the polygraph results were accurate. Obviously, as defense counsel argued, this is exactly what he wanted additional time to do--ensure that the polygraph report was an accurate conclusion based on an independent examination of the raw data.

The trial court erred in denying defense counsel's motion to halt the trial or exclude Crawford's testimony. *State v. Trotter, supra*. Even the judge himself conceded his ruling might be unduly prejudicial and was a "very appealable issue." (Tr. P. 1012-1013; ROA at 1200-1201). This Court should reverse Appellant's convictions.

ISSUE 3

THE LOWER COURT ERRED IN ADMITTING GRUESOME CRIME SCENE AND AUTOPSY PHOTOGRAPHS THAT WERE IRRELEVANT GIVEN THE UNCONTESTED FACT THAT THE VICTIM'S CAUSE OF DEATH WAS HOMICIDE AND THE PHOTOGRAPHS WERE EXTREMELY PREJUDICIAL AND INFLAMMATORY.

South Carolina law holds that photographs should be excluded if they are calculated to arouse the sympathies or prejudices of the jury or where they are irrelevant or unnecessary to substantiate facts. *State v. Todd*, 290 S.C. 212 (1986); *State v. Thorne*, 239 S.C. 164 (1961). *State v. Waitus*, 224 S.C. 12 (1954) held that four photographs of the victim should not have been admitted because:

[In regard to] (t)he admission of the hour pictures of the deceased taken in the boiler room of the parish house before the body was removed(.) [i]t is claimed by the state that these pictures were relevant as showing the marks, bruises and abrasions made as a result of the assault, condition of the clothes of deceased, and that her rings had been removed and placed on the index finger. There was *no dispute as to these facts*. Ass of them were fully established both by uncontradicted medical and lay testimony. These pictures were calculated to inflame and arouse the passions of the jury and their introduction was wholly unnecessary to establish the facts claimed. They should have been excluded. (emphasis added)

Likewise, in *State v. Patrick*, 289 S.C. 301 (1986), the Court ruled that a single color photograph was prejudicial because it "was not substantially necessary and it was highly prejudicial." And, in *State v. Middleton*, 288 S.C. 21, 22 (1986), the South Carolina Supreme Court held four color photographs from an autopsy should have been excluded due to the testimony of a forensic pathologist, which "negated any arguable evidentiary value of the photographs."

Forensic Pathologist Dr. Joel Sexton testified for the state at Appellant's trial. His

testimony consisted of explaining to the jury, in great detail, what injuries he found on the body of Mr. Zoch. (Tr. P. 1091-1096; ROA at 1279-1284). Sexton testified as to the bloody head injuries, lacerations, bruising, breaking of capillaries, skull fractures and internal brain injuries and hemorrhage. (Tr. P. 1091-1095; ROA at 1279-1283).

Despite the very clear picture painted during Dr. Sexton's testimony of the injuries resulting in Mr. Zoch's death, the trial Court admitted, over objection, numerous inflammatory and unnecessary photographs.

These photographs, taken during the autopsy, were completely unnecessary to the jury's understanding of Mr. Zoch's death. Furthermore, in regard to State's 118 and 119, the photographs do not depict the injuries accurately, as it appears that Mr. Zoch's head had been shaved around the injuries, making him appear as though he had been scalped.

The trial court's admission of the photographic evidence taken at autopsy in this case was very prejudicial to Appellant. Notably, Appellant was not on trial for capital murder, where autopsy photographs are frequently allowed in during the penalty phase. Here, the unnecessary evidence came in during the guilt-or-innocence phase. Thus, if the rulings of *Patrick* and *Middleton* are applied to this case, then the prejudice suffered by Appellant was even worse than that found reversible in those cases. Finally, Dr. Sexton's extensive and detailed testimony about Mr. Zoch's injuries and cause of death negated any evidentiary value to the photographic evidence.

Appellant's convictions should be reversed.

CONCLUSION

Based upon the foregoing, Appellant's convictions should be reversed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Melissa J. Kimbrough', written over a horizontal line.

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This 13th day of January, 2010.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

State of South Carolina,

Respondent,

V.

Robert L. Cannon, III

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR. The undersigned also certifies that the Final Brief is in compliance with the South Carolina Supreme Court's Order of August 13, 2007.



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STATE OF SOUTH CAROLINA
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APPEAL FROM KERSHAW COUNTY
Court of General Sessions
G. Thomas Cooper, Jr., Circuit Court Judge

The State,

Respondent,

vs.

Robert L. Cannon, III,

Appellant.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
APPELLANT'S STATEMENT OF ISSUE ON APPEAL	1
RESPONDENT'S STATEMENT OF THE CASE	2
RESPONDENT'S STATEMENT OF FACTS	3
ARGUMENT	8
I.	
The trial judge did not abuse his discretion in determining that appellant's statement was voluntary where even though appellant had hoped for leniency, the evidence did not support that any specific promise was made.	8
II.	
The trial judge did not abuse his discretion in denying appellant's request to exclude Lt. Crawford's testimony due to appellant's inability to cross-examine the officer on the polygraph testing in general, purportedly from late disclosure of supporting documents, where defense counsel admittedly had the test results well before trial, and there was no proffer supporting the polygraph testing in general was admissible.	17
III.	
Appellant's issue is procedurally barred from review where appellant neither objected nor joined his co-defendant's objections to the photographs. Even so, the record supports that the trial judge did not abuse his discretion in admitting State's 113, 114, 115, 116, 118, and 119 to corroborate the forensic pathologist's testimony, and to allow detailed consideration of the facts and circumstances identified and utilized by the pathologist in rendering his opinion on the wounds, weapon(s), and method and place of attack.	23
CONCLUSION	29

TABLE OF AUTHORITIES

Federal Cases:

<i>Brady v. Maryland</i> , 373 U.S. 83, 83 S.Ct. 1194 (1963)	20, 21
<i>Bruton v. United States</i> , 391 U.S. 123, 88 S.Ct. 1620 (1968)	5
<i>Beckwith v. United States</i> , 425 U.S. 341, 96 S.Ct. 1612 (1976)	15
<i>Jackson v. Denno</i> , 378 U.S. 368, 84 S.Ct. 1774 (1964)	8, 17
<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S.Ct. 1602 (1966)	8, 11
<i>United States v. Bagley</i> , 473 U.S. 667, 105 S.Ct. 3375(1985)	21
<i>United States v. Agurs</i> , 427 U.S. 97, 96 S.Ct. 2392 (1976)	21

State Cases:

<i>Davis v. Traylor</i> , 340 S.C. 150, 530 S.E.2d 385, 387 (Ct.App.2000)	27
<i>State v. Arrowood</i> , 375 S.C. 359, 366, 652 S.E.2d 438, 442 (Ct. App. 2007)	14, 15
<i>State v. Bennett</i> , 328 S.C. 251, 261-262, 493 S.E.2d 845, 850 (1997)	19
<i>State v. Brannon</i> , 347 S.C. 85, 89, 552 S.E.2d 773, 774 - 775 (Ct. App. 2001)	24
<i>State v. Caldwell</i> , 378 S.C. 268, 286, 662 S.E.2d 474, 483-484 (Ct. App. 2008)	20
<i>State v. Carriker</i> , 269 S.C. 553, 555, 238 S.E.2d 678, 678 (1977)	24
<i>State v. Council</i> , 335 S.C. 1, 515 S.E.2d 508 (1999)	21
<i>State v. Crosby</i> , 348 S.C. 387, 401, 559 S.E.2d 352, 360 (Ct.App. 2001), <i>reversed</i> on other grounds, 355 S.C. 47, 584 S.E.2d 110 (2003)	27
<i>State v. Dunbar</i> , 356 S.C. 138, 142, 587 S.E.2d 691, 693 - 694 (2003)	19, 24
<i>State v. Dye</i> , 384 S.C. 42, ___, 681 S.E.2d 23, 26 (Ct.App. 2009)	13
<i>State v. Fletcher</i> , 363 S.C. 221, 258-259, 609 S.E.2d 572, 591 (Ct.App. 2005)	24
<i>State v. Franklin</i> , 299 S.C. 133, 137, 382 S.E.2d 911, 913 (1989)	14, 16
<i>State v. Freiburger</i> , 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005)	19

<i>State v. Holder</i> , 382 S.C. 278, 283, 676 S.E.2d 690, 693 (2009)	5
<i>State v. Howard</i> , 296 S.C. 481, 492-93, 374 S.E.2d 284, 290 (1988)	14, 15
<i>State v. Jackson</i> , 364 S.C. 329, 334, 613 S.E.2d 374, 376 (2005)	26
<i>State v. Jarrell</i> , 350 S.C. 90, 564 S.E.2d 362 (Ct.App. 2002)	25, 27
<i>State v. Johnson</i> , 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000)	26
<i>State v. Kelsey</i> , 331 S.C. 50, 76, 502 S.E.2d 63, 76 (1998)	26
<i>State v. Kennerly</i> , 331 S.C. 442, 452, 503 S.E.2d 214, 219-220 (Ct.App. 1998) ...	20, 21
<i>State v. Landon</i> , 370 S.C. 103, 108, 634 S.E.2d 660, 663 (2006)	20, 21
<i>State v. Martucci</i> , 380 S.C. 232, 250, 669 S.E.2d 598, 607 (Ct. App. 2008) ...	24, 26, 27
<i>State v. McHoney</i> , 344 S.C. 85, 95-97, 544 S.E.2d 30, 35 - 36 (2001)	21
<i>State v. Middleton</i> , 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986)	26
<i>State v. Miller</i> , 375 S.C. 370, 387, 652 S.E.2d 444, 453 (Ct.App. 2007)	14
<i>State v. Nichols</i> , 325 S.C. 111, 123, 481 S.E.2d 118, 124 (1997)	24, 27
<i>State v. Parker</i> , 381 S.C. 68, 73, 671 S.E.2d 619, 621 (Ct.App. 2008)	13
<i>State v. Proctor</i> , 358 S.C. 424, 429, 595 S.E.2d 480, 482 (2004)	21
<i>State v. Quattlebaum</i> , 338 S.C. 441, 527 S.E.2d 105 (2000)	13
<i>State v. Rochester</i> , 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990)	13, 14, 16
<i>State v. Rosemond</i> , 335 S.C. 593, 596, 518 S.E.2d 588, 589-90 (1999)	24
<i>State v. Saltz</i> , 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001)	13, 14
<i>State v. Silver</i> , 314 S.C. 483, 486, 431 S.E.2d 250, 251 (1993)	16
<i>State v. Tucker</i> , 324 S.C. 155, 478 S.E.2d 260 (1996)	25
<i>State v. Vang</i> , 353 S.C. 78, 88, 577 S.E.2d 225, 230 (Ct. App. 2003)	26
<i>State v. Von Dohlen</i> , 322 S.C. 234, 244-245, 471 S.E.2d 689, 695 - 696 (1996) ...	15, 21

<i>State v. Ward</i> , 374 S.C. 606, 613, 649 S.E.2d 145, 149 (Ct. App. 2007)	24, 25

United States Constitution:

Fifth Amendment	20

Fourteenth Amendment	20

State Rules:

Rule 5, SCRCrimP	20

APPELLANT'S STATE OF ISSUES ON APPEAL**I.**

Whether the lower court erred in denying appellant's motion to suppress his alleged confession when law enforcement improperly induced Appellant to confess based on their promises, both implied and expressed, to help him, thereby using coercion, producing an inadmissible "confession?"

II.

Whether the lower court erred in denying defense counsel's motion to halt the trial due to the State's untimely disclosure of discovery?

III.

Whether the lower court erred in admitting gruesome crime scene and autopsy photographs that were irrelevant given the uncontested fact that the victim's cause of death was homicide and the photographs were extremely prejudicial and inflammatory?

(BOA, p. 1).

RESPONDENT'S STATEMENT OF THE CASE

A Kershaw County Grand Jury indicted appellant, Robert Cannon, in February 2007, for burglary first degree, and, subsequently, in November 2007, for the murder of Joshua Zoch. (R. pp. 1743 and 1747). Joshua Kendrick, Esq., represented Petitioner on the charges. A jury trial was held May 5-9, 2006, before the Honorable G. Thomas Cooper, Jr. Appellant was tried along with co-defendants Christopher Whitehead and Derrick McDonald. After a break in the proceedings, the jury continued deliberations on May 13, 2009, and returned a verdict of guilty as charged. (R. pp. 1689-1690). The judge sentenced appellant to concurrent terms of thirty-five (35) years imprisonment on each charge. (R. pp. 1738-1739). This appeal follows.

RESPONDENT'S STATEMENT OF FACTS

On Tuesday December 12, 2006, the victim, Joshua Zoch, was brutally murdered in his home. At approximately 11:30 p.m., neighbor Cosmo [Baccamo] testified that he was outside with his son's dog and heard "a lot of knocking noise, loud, like somebody kicking something or slamming doors" and, "about ten minutes later," he heard "excited" and loud male voices, a door slam, a car, with a loud muffler, take off. (R. p. 525, line 25 - p. 527, line 15).

Earlier, at approximately 10:00 p.m. that evening, Allen Brown, a manager at a local Sonic recognized appellant, along with Derrick McDonald, and Christopher Whitehead, all of whom had worked at some point for him, in the restaurant. Appellant was wearing a ski mask, and was told to take it off. Brown instructed appellant to leave, which he did. (R. p. 511, line 2 - p. 512, line 14). Christopher Rust, also an employee at Sonic, confirmed that appellant was wearing the ski mask, and also testified that all three left at the same time. (R. p. 549, lines 11 - 22). Rust recalled that Christopher Whitehead drove a car with "noticeable" muffler noise. (R. p. 559, line 20 - p. 560, line 5).

Zachary Waltemath, who was also an employee at Sonic testified that at approximately 7:00 or 8:00 that same night, Christopher Whitehead called him and asked him to call the victim "and see what he's doing because he wanted to go over there and fight him or something." (R. p. 573, line 17 - p. 574, line 3). Waltemath decline. Whitehead called back shortly after and asked if Waltemath had tried to call him. He responded he had not, and Whitehead indicated he wanted Waltemath to call him. (R. p. 574, lines 4-11). The next day, Wednesday December 13, 2006, Whitehead came to work at Sonic with a scratch under

one eye, a noticeable limp, and complaining his ankle hurt. (R. p. 631, line 19 - p. 633, line 23; p. 666, lines 16-24).

Victim's longtime, live-in girlfriend, Melissa Davy, was absent from the home at the time of the burglary and murder, the two having had a disagreement over victim's drug use. Victim had used crack cocaine and marijuana, and had drugs in the home. (R. p. 781, line 16 - p. 784, line 12). Victim hosted a party at their home on Friday, December 8, 2006 that lasted into the early morning hours of Saturday, December 9, 2006. At approximately 2:00 a.m. that Saturday, Davy left with friends Zachary Waltermath and his sister Molly, after a fight about victim's drug use, and his request that they leave the house. (R. p. 751, line 13 - p. 753, line 17; p. 783, line 23 - p. 784, line 3). Davy would later spend time with the victim on Monday, December 12, 2006. (R. p. 755, line 1 - p. 756, line 19). She last spoke to him when he called her at approximately 6:00 that night. (R. p. 757, lines 14-19). The next day, Tuesday, December 13, 2006, at approximately 5:30, p.m., after completing her work shift at Sonic, Davy went back to the victim's home with Zach and Molly. The lights were off and victim's car was backed into the garage, which was unusual for the victim and alerted Davy that things were not right. She called victim's grandmother, Helen Zoch, who had purchased the home for victim to rent, (R. p. 1459, lines 14-24), and stayed on the phone with the grandmother as she entered the home.

Helen Zoch testified that she had spent time with victim the day before and hoped to help him with his drug problem. She also testified that she had called at 7:30 that morning, but had not gotten an answer. At approximately 2:00 p.m., she went by the home, noticed the victim's car was backed in the garage, which was unusual, but she did not try to enter the

home. (R. p. 1460, line 6 - p. 1462, line 24; p. 1466, line 11 - p. 1468, line 11). She was aware that her grandson was working with the police, making drug buys for them. (R. p. 1472, lines 9-24). (See also R. p. 807, lines 19-25).

Investigating officers found the home a “complete mess” with the victim’s body in the middle of it. (R. p. 880, lines 13-17). The back door had been kicked in. (R. p. 863, lines 13-25). The investigation began to focus on Whitehead, McDonald and appellant. Whitehead informed the investigating officers he “didn’t know a damned thing about” victim’s murder. (R. p. 905, line 18 - p. 906, line 5). Both McDonald and appellant similarly denied any direct knowledge or involvement in their initial statements to police. (R. p. 909, lines 21-25; p. 920, lines 14-25). However, appellant gave a detailed confession to officers, (redacted for presentation at trial to avoid *Bruton*¹ issues), including not only the grisly facts of the vicious beating -- such as the attack on the victim while he slept, dragging him off his couch, using the victim’s bat, which he kept in the house for protection, on the victim’s head -- but also that the victim was selected because he was thought to be a “snitch” and for his drugs. Appellant’s details included that one person took frozen chicken from the kitchen and place it on the victim’s head wounds in an attempt to stop the bleeding, that someone hit the victim with a glass object, and the fact that the three used purple latex gloves during the attack and wore ski masks. (R. p. 936, line 25 - p. 940, line 15). Appellant later supplemented his statement voluntarily with a list of items he recalled taking from the home, including DVDs, a DVD player, presents, hair clippers, and phones. (R. p. 1210, line 16 - p. 1211, line 17).

¹ *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620 (1968). See also *State v. Holder*, 382 S.C. 278, 283, 676 S.E.2d 690, 693 (2009).

McDonald would also confess to the crime, also in detail, including that the three went to the local Wal-Mart and bought a ski mask and a box of purple gloves; that one called "Zach" to see if someone was home; all three kicked in a sturdy back door; one person "picked up a glass bowl with flower petals in it, picked it up over his head and hit Josh in the head with it while Josh was asleep on the couch"; another person dragged victim off the couch; that he repeatedly hit victim with his fists then hit him in the back of the head using the victim's bat; they were searching for drugs and money; and another kicked and stomped the victim, and, eventually, pulled a Christmas tree over on him. He claimed someone else left the house with "plastic bags of stuff" and gave him some "DVD's and stuff." (R. p. 961, line 15 - p. 963, line 21).

Whitehead, though he did not give a confession to officers, was twice overheard by another inmate at the detention center bragging about the killing, identifying the home where the murder occurred, and calling the victim's name. (R. p. 1409, lines 12-20; p. 1414, line 10 - p. 1415, line 7). A detention center officer confirmed the former inmate who testified was in the cell next to Whitehead at the time the initial conversation was overheard. (R. p. 1445, lines 15-20).

Forensic pathologist Joel Sexton, M.D., testified that at autopsy he identified "at least six" and possibly eight "injuries or blows were inflicted to the head that were each capable of causing death," with wounds inflicted on the top and back of head and behind the left ear, along with abrasions and cuts to the face, injuries on legs, abrasions on knees and on the abdomen. (R. p. 1279, line 15 - p. 1284, line 8; p. 1286, line 19 - p. 1287, line 16; p. 1288, line 21 - p. 1293, line 4). From the wounds and autopsy and from looking at scene photos, the pathologist was able to opine that two blows were inflicted on the couch, but that the

victim either came off, or was pulled off, the sofa and was hit on the floor with a “cylindrical and linear” object such as the bat (State’s 99), and that he was hit on the head with a glass potpourri bowl, remnants of same still being on the couch. (R. p. 1311, line 17 - p. 1313, line 14). He also confirmed that testing showed a prior use of cocaine and marijuana. (Tr. p. 1315, lines 11-17).

Investigators obtained a copy of a receipt from the local Wal-Mart confirming a purchase of a ski mask and purple gloves on December 12, 2006 at 10:43 (R. p. 1246, line 7 - p. 1249, line 5). Ms. Davy testified that victim’s grandparents had provided a bat to keep in their residence for protection. (R. p. 778, line 4 - p. 779, line 12). Ms. Zoch testified that she had recently replaced the back door to the home with another sturdier door prior to the burglary and murder. (R. p. 1470, line 17 - p. 1471, line 6). Photos from the scene also confirmed the use of the latex gloves, the bat, the placement of the frozen chicken near victim’s head, and the overturned Christmas tree. (R. p. 899, line 3 - p. 901, line 2; p. 1294, line 1-7). In sum, the physical evidence supported the detailed confessions of both appellant and McDonald.

ARGUMENT

I.

The trial judge did not abuse his discretion in determining that appellant's statement was voluntary where even though appellant had hoped for leniency, the evidence did not support that any specific promise was made.

Relevant Facts:

Appellant argued to the trial judge that his confession to Investigator Catoe was involuntary because appellant "was made some type of promise, some type of inducement to get this statement out of him." (R. p. 416, line 22 - p. 417, line 2).

Investigator Catoe testified at the *Jackson v. Denno*² hearing that he called appellant and appellant arranged a meeting at appellant's home with appellant's parents present. (R. p. 92, line 8 - p. 93, line 16). Though the interview was in the home, the investigator, accompanied by Investigator George Marthers, read appellant his *Miranda*³ rights and appellant acknowledged his rights by initialing same on the waiver form. (R. p. 35, line 7 - p. 39, line 15; p. 1749). The investigator testified that he neither threatened appellant, nor promised him anything. (R. p. 39, line 22 - p. 40, line 3). The officer wrote the statements as given by appellant, while appellant was at his kitchen table eating, but appellant filled in the basic information on the form such as social security number and date of birth. (R. p. 42, line 4 - p. 43, line 22). Appellant reviewed the statement, made corrections and initialed same, then signed each of the five pages. (R. p. 43, line 23 - p. 46, line 10; pp. 1750-54). The form reads, in part, "I have made the foregoing statement freely and voluntarily, without fear, threat, promise of reward or hope of reward of any kind." (R. p. 44, lines 1-4; State

² *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774 (1964).

³ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966).

Exhibit 2). Investigator Catoe testified that when he went to appellant's home, he was "still in the investigative process" and did not deny that he may have said that appellant could be used as a witness, (R. p. 95, line 9 - p. 96, line 10), but specifically testified that he would not have downplayed the amount of "trouble" appellant could be in "in a case with this severity." (R. p. 96, lines 13-19). Appellant, after giving a false story, told the officers that "he wanted to talk outside the presence of his parents and told us he was scared and that he wanted to be honest with us," but he did not want his parents to overhear him. (R. p. 99, lines 4-24; p. 103, lines 17-25). According to the investigator's notes, appellant stated he "knew more but wanted to make sure that he could get some help." (R. p. 111, line 24 - p. 112, line 1). Investigator Catoe testified that he believed appellant "doubted" his "seniority" so the officer called his superior, Capt. Thomley, who came to the home and spoke with appellant. (R. p. 105, lines 9-19). After speaking with Capt. Thomley, appellant returned and stated he was ready to talk. Capt. Thomley stated he believed appellant wanted to cooperate and wanted to tell the truth. (R. p. 106, lines 3-6). After the statement, Investigator Catoe asked appellant to go the Sheriff's Office the following day to take a polygraph test. Appellant agreed. Appellant was left at the home with his parents. (R. p. 108, lines 2-21). Appellant was not arrested until officers also had McDonald's detailed statement. (R. p. 109, lines 4-5).

Investigator Marthers testified that appellant appeared to understand his rights, and signed the forms appropriately. (R. p. 223, line 11 - p. 224, line 9). Investigator Marthers confirmed that appellant had wanted to say more, but not in front of his parents. (R. p. 225, lines 9-13). He recalled Capt. Thomley coming by, but did not hear the conversation. (R. p. 225, lines 16-20). He recalled that appellant had filled out the information on the

statement form, then let Investigator Catoe write the statement as appellant ate a bowl of cereal at the kitchen table. (R. p. 226, line 9 - p. 227, line 21). Appellant signed each page after reviewing the statement. (R. p. 227, line 22 - p. 229, line 1). Investigator Marthers testified that there were no "threats, promises or coercion made" in the process of taking the statement. (R. p. 228, lines 3-5).

Capt. Thomley testified that he recalled Investigator Catoe calling him to appellant's home. When he arrived, he first confirmed that appellant had been read his rights. He then spoke with appellant. (R. p. 207, lines 3-10). When asked if he offered any reward or promise for appellant's cooperation, he answered the deputy solicitor's question as follows:

A. No. We have a standard I guess line, if you will. Of course we don't promise anyone anything. He would have been told, and I told him, that we'd be glad to let you know as the prosecuting agency and the judge know that he cooperated with us and that his cooperation in any statement that he may have given is subject to a polygraph, what we call a statement verification polygraph examination.

Q So you told him you'd let this cooperation be known to His Honor?

A Yes, sir. And I will.

(R. p. 209, lines 13-25).

Further, Capt. Thomley recalled meeting appellant's parents. He recalled his mother was very upset, and he tried to calm her. He also attempted to calm appellant's stepfather, talking sports and colleges, but did not recall speaking about the case. (R. p. 210, line 21 - p. 211, line 3).

Appellant called his mother, Veronica Munnerlyn, who testified that Investigator Catoe told her when he first arrived that she did not need a lawyer, that he did not believe that appellant "did anything." (R. p. 352, lines 1-14). She recalled Investigator Catoe saying that "Whitehead did it" and he wanted appellant to testify against him, and he would be

helping himself if he would talk to them. (Rr. p. 353, lines 11-24). According to Ms. Munnerlyn, when appellant went outside to smoke, Investigator Marthers attempted to reassure her that she did not need a lawyer and they knew appellant "didn't do anything." (R. p. 356, lines 1-9). She recalled Capt. Thomley coming in the house shortly thereafter, and stating to appellant that he should "[j]ust sign whatever Catoe tells you to sign." (R. p. 356, line 20 - p. 357, line 4). She claimed the investigators had appellant sign a blank form. (R. p. 358, lines 5-13).

Appellant's stepfather, Mario Munnerlyn, testified that he understood the officers to say appellant was not in trouble, because if he was, they would have served a warrant. Instead, they expressed they just wanted to talk. (R. p. 370, line 19 - p. 371, line 1). Mr. Munnerlyn testified that the officers did not read appellant his rights. (R. p. 371, lines 4-7). Mr. Munnerlyn testified that when appellant returned from taking a smoke break outside, the investigators were going to take a statement, but still assured him "things are going to be all right." (R. p. 372, line 24 - p. 373, line 12). When asked on cross-examination whether he recalled seeing the statement, which appellant had signed off on five times, he replied he did not recall appellant signing the statement, but recalled him signing a blank form in addition to the *Miranda* form. (R. p. 375, lines 18-25).

Appellant testified that while outside, Investigator Catoe offered him help, and stated, "We can make it possible for you not be charged at all. All you have to do is just sign a piece of paper; we can make this all go away." (R. p. 382, lines 7-9). However, appellant testified that he did not believe him. (R. p. 382, lines 10-13). He testified that he replied to the investigator that, "With you being an investigator, I doubt you have the power to do that, and I need you to call someone who is going to be able to say something truly about that," after

which Investigator Catoe called his supervisor. He testified that Capt. Thomley “verified” that they could “make it possible” appellant would not “get in trouble” if he “sign[ed] this paper,” that he would not be charged, and that he would “be released back in the custody of [his] parents.” (R. p. 383, lines 2-8). Appellant testified he gave the statement “[b]ecause they promised me that I wouldn’t be charged with anything” and noted that he did, in fact, stay at home that night. (R. p. 383, lines 18-19). Appellant testified that he “signed five blank pieces of paper.” (R. p. 393, lines 10-17).

The trial judge found:

... I don’t find again by a preponderance of the evidence that there were promises of leniency. Now, there is certainly conflicting testimony on this issue, and it’s very - - it’s somewhat troubling. But I still don’t believe I can find by a preponderance of the evidence that there was a promise of leniency which extracted the confessions. I mean, State v. Arrowood points out that promises of help are not promises of leniency, or they are not so much as to overpower the mind of the defendant:

...

But the testimony of the officers say there was some indication that they would mention to the Court, mention to the Solicitor’s Office that there was cooperation. But I don’t - - I can’t find that that in and of itself was a determining factor in whether or not these young men would make a - - give a statement to the police....

(R. p. 443, line 3 - p. 444, line 2). He further concluded that appellant appeared well spoken, and to understand his rights, and that he had his stepfather with him, who also appeared to understand the appellant’s rights and the law. (R. p. 444, lines 3-11). Although they may have hoped for a different result, there was no specific improper promise that induced the statement, and the general promise there may be a benefit in cooperation is simply not

enough to show appellant's confession was a product of inducement and involuntary. (R. p. 444, lines 12-19).

Discussion:

On appeal, appellant argues that a unspecified promise of "help," even Capt. Thomley's admitted promise to tell the solicitor and judge about appellant's cooperation, rendered appellant's informed decision to confess invalid, as his confession was based on a promise to assist him. (BOA, p. 9). However, the record shows that the trial judge was well within his discretion in admitting the statement when, after reviewing conflicting testimony, and in accord with precedent, he found that the State showed by a preponderance of the evidence that the statement was voluntarily given, and not a product of inducement by an actual promise that appellant would not be charged, or any promise other than a general, and permissible, promise to advise the solicitor and court of his cooperation.

In reviewing the trial court's decision, an appellate court is bound by the lower court's factual findings unless clearly erroneous. *State v. Parker*, 381 S.C. 68, 73, 671 S.E.2d 619, 621 (Ct.App. 2008), citing *State v. Quattlebaum*, 338 S.C. 441, 527 S.E.2d 105 (2000). "[T]he circuit court's conclusions on issues of fact as to the voluntariness of a confession will not be disturbed unless so manifestly erroneous as to show an abuse of discretion." *State v. Dye*, 384 S.C. 42, ___, 681 S.E.2d 23, 26 (Ct.App. 2009), citing *State v. Rochester*, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990). See also *State v. Saltz*, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001). "When reviewing a trial judge's ruling concerning voluntariness, the appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any

evidence.” *State v. Arrowood*, 375 S.C. 359, 366, 652 S.E.2d 438, 442 (Ct. App. 2007), citing *Saltz*, 346 S.C. at 136, 551 S.E.2d at 252.

“The test of admissibility of a statement is voluntariness.” *State v. Franklin*, 299 S.C. 133, 137, 382 S.E.2d 911, 913 (1989). “The trial judge’s determination of the voluntariness of a statement must be made on the basis of the totality of the circumstances, including the background, experience and conduct of the accused.” *Id.*, 299 S.C. at 138, 382 S.E.2d at 914. For a statement to be admissible, the State must prove, by a preponderance of the evidence, that the statement is voluntary. *Saltz*, 346 S.C. at 136, 551 S.E.2d at 252. Conflicting evidence requires the trial judge to weigh the facts and determine whether the state has met its burden of proof in admissibility. *Arrowood*, 375 S.C. at 367, 652 S.E.2d at 442. *See also State v. Howard*, 296 S.C. 481, 492-93, 374 S.E.2d 284, 290 (1988).

Promises of Leniency

“A statement induced by a promise of leniency is involuntary only if so connected with the inducement as to be a consequence of the promise.” *State v. Rochester*, 301 S.C. at 200, 391 S.E.2d at 246-247. However, a defendant’s hopes for a favorable outcome does not show evidence of a promise of leniency or the like. 301 S.C. at 199-201, 391 S.E.2d at 246-247 (statement “it would be certainly, probably, in his best interest to tell the truth” not considered to be a promise of reward or benefit); *State v. Miller*, 375 S.C. 370, 387, 652 S.E.2d 444, 453 (Ct.App. 2007)(“statements were made in the ‘hope’ of leniency rather than as a consequence of a ‘promise.’”). For example, in *Miller*, the officer simply told the defendant “it was in his best interest to cooperate” but there was no direct or implied promise of leniency. *Id.* Additionally, the mere fact that officers are kind, friendly, or even sympathetic, does not indicate there was, in fact, a promise of leniency; rather, such evidence

may show merely good investigative techniques. See *State v. Von Dohlen*, 322 S.C. 234, 244-245, 471 S.E.2d 689, 695 - 696 (1996), citing *Beckwith v. United States*, 425 U.S. 341, 96 S.Ct. 1612 (1976). Lastly, a simple "discussion of possible benefit" does not support finding a promise of leniency. In *State v. Howard*, officers admitted discussion of consolidating charges, but denied any express promise. The Supreme Court of South Carolina affirmed the ruling finding the statement voluntary and allowing the statement to be presented as, noting the officer's testimony that there was no explicit promise as evidence to support the factual resolution by the trial judge. *Howard*, 296 S.C. at 492-93, 374 S.E.2d at 289-90.

Here, appellant claims that he was promised leniency, he was treated with trust and allowed to stay a home after the statement but prior to his polygraph, and a superior officer was called in at his request (BOA, pp. 8-9); however, the only specific promise shown was the promise to advise the solicitor and judge of appellant's cooperation, as admitted by Capt. Thomley. (See R. p. 209, lines 13-25). As the trial judge found, this case is resolved by *Arrowood*, and, specifically, the following quotation: "Under precedent emanating from South Carolina jurisprudence, the officers' offer to attest to Arrowood's cooperation did not constitute promises of leniency." *Arrowood*, 375 S.C. at 368, 652 S.E.2d at 443. Though here there was some conflicting testimony as to the extent of the aid (appellant testified that he understood he would not be charged at all, Officers Thomley, Catoe and Mathers testified there was no such promise), the statement, signed multiple times by appellant does not reflect a promise, but, to the contrary, indicated *no* promises were made. Further, as the trial judge noted, appellant appeared to understand his rights, and his testimony reflects an intelligent young man, who communicates well. (See R. p. 384, lines 5-13). The testimony that

appellant signed blank sheets is simply not credible on this record (which is apparently part and parcel of the trial judge's ruling), especially where the statement shows not just his signature on the bottom of each page, but also initials by his correction. (See States's Exhibit 2). Given the evidence supportive of discounting the testimony, there is no abuse of discretion regarding the facts. Moreover, in appellant's subsequent statement given just before the polygraph examination, appellant not only knew what was in his first statement, he *volunteered* to add a list of stolen items. (R. p. 395, line 2 - p. 396, line 13). That statement is not challenged on appeal. Again, there is no evidence of an abuse of discretion.

In sum, considering the "totality of the circumstances," *Franklin, supra*, the records fully and fairly supports the trial judge's decision. Appellant was in his own home with his parents, and not a coercive environment. *See State v. Silver*, 314 S.C. 483, 486, 431 S.E.2d 250, 251 (1993) ("custody is a factor to be considered in determining voluntariness, [though] a defendant need not show he was in custody when he is challenging the voluntariness of a statement"). He was advised of his rights, including the right not to speak with the officers. (R. p. 224, lines 2-11). There are no harsh techniques or tactics evident in any testimony regarding the taking of the statement, and no evidence appellant was tricked or forced into giving a confession. *See generally Rochester*, 301 S.C. at 201, 391 S.E.2d at 247 (reviewing totality of the circumstances, including whether coercive tactics, tricks, force or threats were used). And, contrary to appellant's position, there was no express or implied promise of leniency. The trial judge did not abuse his discretion in finding, by a preponderance of the evidence, that the statement was voluntary and admissible.

Appellant's argument to the contrary should be rejected.

II.

The trial judge did not abuse his discretion in denying appellant's request to exclude Lt. Crawford's testimony due to appellant's inability to cross-examine the officer on the polygraph testing in general, purportedly from late disclosure of supporting documents, where defense counsel admittedly had the test results well before trial, and there was no proffer supporting the polygraph testing in general was admissible.

Relevant Facts:

During the *Jackson v. Denno* hearing on Tuesday, May 6, 2008, appellant questioned Lt. Phillip Crawford of the Kershaw County Sheriff's Department about details concerning the polygraph process. At the conclusion of direct examination, counsel for appellant noted, "I guess after the end of this hearing there will be another issue based on all that stuff he's got in his hands." (R. p. 289, lines 7-10). After re-direct and re-cross, the deputy solicitor put on the record that appellant was provided a "copy of the polygraph report involving his client" and copies of the reports on tests performed on Melissa Davy and Adriene Dorn. Counsel for appellant agreed that he had received these copies prior to trial. (R. p. 291, lines 14-20). (See also R. p. 617, lines 10-18). No motion was made at that time for any additional materials. (R. p. 292, lines 3-8). The case began after pre-trial motions concluded.

The next day, on Wednesday, May 7, prior to resuming testimony, counsel for appellant noted as to "underlying records related to the polygraphs" that "[t]he State yesterday turned over those records as related to my client." (R. p. 615, lines 13-18). He complained, however, that he had not received such records as to Davy and Dorn. (R. p. 615, lines 19-20). Counsel requested the record be turned over, "before Mr. Crawford and maybe before Mr. Catoe" would be called to testify at trial. (R. p. 616, lines 17-25). The State offered to get copies of same to counsel before Investigator Catoe testified. Counsel for

appellant agreed to the offer, and thanked the Court and the deputy solicitor. (R. p. 619, line 25 - p. 620, line 2).

After Investigator Catoe, but before Lt. Crawford testified, counsel for appellant moved to exclude Lt. Crawford's testimony as "I feel like my cross examination of this witness is being hampered...." (R. p. 1184, lines 4-11). He argued, "I don't think he should be able to testify because I can't go into the polygraph." (R. p. 1186, lines 8-17). He contended that the polygraph results would be admitted as to his client but not to the other non-indicted individuals. (R. p. 1186, line 21 - p. 1188, line 24). He contended late disclosure hampered his ability to argue, and while he did not want a continuance, he believed he was "entitled" to one. (R. p. 1195, lines 10-23). The trial judge declined to exclude the testimony or stop the trial, finding that 1) the polygraph issue could have been addressed in the pre-trial hearing and counsel "knew what it was"; and 2) polygraph evidence is inadmissible. (R. p. 1199, line 11 - p. 1200, line 8). The State noted that the defense had the polygraph results "since last year." (R. p. 1201, lines 5-25). (See R. pp. 1766-68). Lt. Crawford testified thereafter. On cross-examination, counsel for appellant questioned Lt. Crawford about the fact he "told him at one point that [he] did not think [appellant] was being totally truthful. (R. p. 1220, lines 20-22). He also asked Lt. Crawford about "follow-up" questions, about interviews with Davy and Duran, and the fact that Lt. Crawford "didn't believe" Duran's denial of involvement. (R. p. 1219, line 9 - p. 1223, line 16). McDonald's counsel also questioned Lt. Crawford on "information" he had that "led [him] to believe [Duran] wasn't telling the truth when he said he didn't kill Mr. Zoch." (R. p. 1225, lines 3-13).

Discussion:

Appellant complains on appeal that trial judge “erred in refusing to grant defense counsel’s motion to either halt the trial, in order to allow for an appropriate expert examination of the underlying data, or exclusion of Crawford’s testimony.” (BOA, p. 12). He argues now that he needed time to retain an expert to examine the materials to determine if the polygraph results were accurate, which, in turn, would allow for an argument that the statement made after he was informed he had “flunked” the polygraph, was procured by deceit. (BOA, p. 13). He also argues that the other two test results on the non-indicted, non-parties, “could have been used to call into question the Appellant’s guilt, as well as the credibility of his confession to the murder in that if the two other suspects were involved, then appellant’s statement might amount to a false confession. (BOA, p. 13).

First, the argument on appeal regarding experts differs greatly from the argument below, and the issue is not preserved for appeal. It is well settled that “[i]ssues not raised and ruled upon in the trial court will not be considered on appeal.” *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 - 694 (2003). Moreover, a defendant cannot argue one ground to the trial judge and a different one on appeal. *State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005); *State v. Bennett*, 328 S.C. 251, 261-262, 493 S.E.2d 845, 850 (1997). At trial, defense counsel made no argument that the results needed interpretation, and that the State’s “late disclosure” of the underlying data (it is conceded the results were disclosed before trial) prevented him from retaining an expert. Respondent notes that this argument could clearly have been raised prior to trial, as with any other contest concerning the testing, a fact repeatedly referenced by the trial judge. (R. p. 1198, line 10-11; p. 1199, lines 13-16). Nothing in the purported “late disclosure” would have hampered the defense’s

request for time to retain an expert. Clearly, counsel accepted the judge's ruling that the polygraph evidence was not admissible, and was simply requesting that the testimony be excluded because the polygraph evidence was not admissible. (R. p. 1184, lines 4-11; p. 1186, lines 8-17; p. 1187, lines 16-22; p. 1188, lines 14-24). The issue, as it relates to notice and time to retain an expert, was *not* raised at trial, and such an issue is procedurally barred. *Id.*

Second, as to the late disclosure affecting counsel's ability to explore the results showing deception as to the non-indicted, non-parties, that issue should be deemed moot as the record clearly shows that counsel cross-examined the witness on that very issue, as did a co-defendant's counsel. (See R. p. 1219, line 9 - p. 1223, line 16; 1225, lines 3-13). Counsel was allowed to question the expert on his information on deception, just simply not on the testing itself - - arguably more favorable to the defense than contesting the validity of the test and its scientific reliability (or lack thereof). In sum, what was requested was received. At any rate, that information was clearly disclosed prior to trial, and was presented for the jury's consideration. There could be no prejudice, and Petitioner is not entitled to any relief. *See State v. Caldwell*, 378 S.C. 268, 286, 662 S.E.2d 474, 483-484 (Ct. App. 2008), *citing State v. Landon*, 370 S.C. 103, 108, 634 S.E.2d 660, 663 (2006) ("A Rule 5 violation is not reversible unless prejudice is shown").

Moreover, there was no finding that "material" evidence was withheld. In fact, the deputy solicitor offered to produce the underlying data for the two non-indicted, non-parties, and counsel for appellant agreed to accept the disclosure without any complaint of timing. (R. p. 619, line 25 - p. 620, line 2).

“The *Brady* disclosure rule is grounded in the defendant's fundamental right to a fair trial mandated by the Due Process Clause of the Fifth and Fourteenth Amendments.” *State v. Kennerly*, 331 S.C. 442, 452, 503 S.E.2d 214, 219-220 (Ct.App. 1998). The disclosure requirements covers evidence in possession of the State that is “material to guilt or punishment.” *Id.*, citing *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375(1985); *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392 (1976); *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). “ ‘[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A “reasonable probability” is a probability sufficient to undermine confidence in the outcome.’ ” *Id.*, quoting *Bagley*, 473 U.S. at 682, 105 S.Ct. 3375. Essentially, if there is a reasonable probability the result of the trial would have been different had the evidence been disclosed, the evidence is material. *Id.* See also *State v. Von Dohlen*, 322 S.C. 234, 471 S.E.2d 689 (1996).

Here, there could be no reasonable probability that the result would have been different as there was no showing, whatsoever, that polygraph evidence may now be deemed admissible. See generally *State v. McHoney*, 344 S.C. 85, 95-97, 544 S.E.2d 30, 35 - 36 (2001); *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999). Compare *State v. Proctor*, 358 S.C. 424, 429, 595 S.E.2d 480, 482 (2004)(where defendant based materiality argue for proficiency test records on showing “defense experts examining proficiency tests from other labs have found errors that demonstrated flaws in the test lab's methodology” and “evidence that no DNA lab has a ‘zero error rate’ on DNA proficiency exams”); *State v. Landon*, 370 S.C. at 108-109, 634 S.E.2d at 663 (“we hold that once a defendant makes a prima facie

showing of prejudice, the burden must shift to the State to prove the defendant was not prejudiced"). Appellant here cannot show materiality.

However, as noted above, the evidence was received, and was used at trial. There is no error. Appellant's argument to the contrary should be rejected.

III.

Appellant's issue is procedurally barred from review where appellant neither objected nor joined his co-defendant's objections to the photographs. Even so, the record supports that the trial judge did not abuse his discretion in admitting State's 113, 114, 115, 116, 118 and 119 to corroborate the forensic pathologist's testimony, and to allow detailed consideration of the facts and circumstances identified and utilized by the pathologist in rendering his opinion on the wounds, weapon(s), and method and place of attack.

Relevant Facts:

Prior to the forensic pathologist, Dr. Sexton, testifying, the trial judge reviewed the photographs to be offered through the witness. The trial judge cautioned that he would not consider admissibility "without Dr. Sexton saying they're necessary" as "[w]e've already got pictures of the scene and the body in evidence." (R. p. 1258, lines 17-20). The judge advised, "Now, if Dr. Sexton can tell us how these pictures relate to the cause of death, then they may be admissible." (R. p. 1259, lines 1-6). The doctor reviewed the pictures and opined the photos (State's 111-119) were used in determining the cause of death. (R. p. 1266, lines 3-9). In response to questions from co-defendant's counsel, Dr. Sexton testified that drawings were not as accurate as the photographs in showing the "nature of the wounds." He testified further that he uses photographs to explain what he found and why it means something to him, allowing the jury to assess the reasonableness of his conclusions. (R. p. 1268, lines 7-25). He also testified that his testimony is not simply whether the wounds were self-inflicted or inflicted by another, but encompasses the reasons for his conclusions on "the type of instrument that might have caused the injur[y], and in one case the position of the body at the time the injury occurred." (R. p. 1269, line 25 - p. 1270, line 3). As to the photos showing the victim on the scene, (State's 111 and 112), Dr. Sexton testified, "the value of the 111 is that it shows blood spatters which are directional, indicating the position of the

body at the time at least one of more blows was rendered to the back of the head” but that 112 “doesn’t have any additional information for me.” (R. p. 1272, lines 4-10). (See also R. p. 1261, lines 14-25). The trial judge excluded State’s 112. Counsel for appellant raised no objections to any of the photographs, nor did he join in any objection by a co-defendant.

Discussion:

As a first matter, this issue is not preserved for review as appellant neither objected nor joined in a co-defendant’s objection. It is well settled that “[i]ssues not raised and ruled upon in the trial court will not be considered on appeal.” *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 - 694 (2003). *See also State v. Nichols*, 325 S.C. 111, 123, 481 S.E.2d 118, 124 (1997) (“issues raised by appellant are not preserved for review since appellant failed to object during trial or join in his co-defendant’s objections”); *State v. Brannon*, 347 S.C. 85, 89, 552 S.E.2d 773, 774 - 775 (Ct. App. 2001), *citing State v. Carriker*, 269 S.C. 553, 555, 238 S.E.2d 678, 678 (1977) (“appellant may not bootstrap an issue for appeal by way of a co-defendant’s objection”). At any rate, the record shows the trial judge did not abuse his discretion in admitting the photographs that corroborated the witnesses’ testimony in specific measure important to prove the details of the crime.

Rulings on the admission of photographs are in the sound discretion of the trial judge and will not be reversed absent a showing of an abuse of discretion. *State v. Rosemond*, 335 S.C. 593, 596, 518 S.E.2d 588, 589-90 (1999). *See also State v. Ward*, 374 S.C. 606, 613, 649 S.E.2d 145, 149 (Ct. App. 2007). A trial judge’s decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances. *State v. Martucci*, 380 S.C. 232, 250, 669 S.E.2d 598, 607 (Ct. App. 2008).

“Admitting photographs which serve to corroborate testimony is not an abuse of discretion.” *State v. Fletcher*, 363 S.C. 221, 258-259, 609 S.E.2d 572, 591 (Ct.App. 2005), citing *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996); *State v. Jarrell*, 350 S.C. 90, 564 S.E.2d 362 (Ct.App. 2002). Here, the photographs were offered through the forensic pathologist as part and parcel of his testimony, showing the wounds, and interpreting the scene in conjunction with the wounds, in determining the manner and cause of death, and, his opinion on the instrument used and the location of the body. Therefore, the record does not show an abuse of discretion in admitting the photographs. See, for example, *State v. Ward*, 374 S.C. at 613, 649 S.E.2d at 149 (upholding admission of autopsy photo demonstrating graze wound on victim’s back for jury’s consideration in connection with defense position on angle of the shot).

Appellant argues, however, that the photographs were not necessary in light of “Dr. Sexton’s extensive and detailed testimony about” the victim’s wounds and the cause of death. (BOA, p. 15). He confines his argument only to those photographs “taken during autopsy.” (BOA, p. 15). In particular, he argues that State’s 118 and 119 do not reflect the injuries correctly as the victim’s head was shaved to show the wounds “making him appear as though he had been scalped.” (BOA, p. 15).

As to the autopsy photographs (113, 114, 115, 116, 117, 118, 119), appellant contests only 113, 114, 115, 116, 118 and 119, (BOA, p. 15, citing R. p. 1288-1290, and 1292). State’s 113 is an autopsy photo of the face reflecting the beating, and is fairly clear of blood. State’s 114 is an autopsy photo of the face, different angle, again showing bruising, and is also fairly clear of blood. State’s 115 and 116 show a clean leg, and reflects bruising. State’s 118 and 119 show a shaved head, again, fairly clear of blood, but reflecting the

significant head wounds. Respondent notes that appellant has not challenged the admission of State's 111, which is a photograph of the head wounds *without* the cleaning from autopsy, which, of course, shows the blood on and around the wounds. This must necessarily lessen any prejudicial impact the clean autopsy photos could possibly have.

As to the "scalped" argument, no such argument was made below, and there was no such testimony or even hint of testimony on scalping. Clearly, the doctor used photographs that reflected the wounds in the best manner for viewing. In fact, the doctor noted that the autopsy photos reflected the wounds after the wounds had been cleaned of blood - - an arguably better demonstration for appellant. (See R. p. 1262, line 12- p. 1266, line 2). (See also State's Exhibits 113, 114, 118 and 119). Moreover, the cleaned face, and the leg photos from autopsy show bruising not otherwise visible. (See, for example, State's 37, photo showing body as found).

As to the "inflammatory and unnecessary" argument, as referenced above, the trial judge was extraordinarily careful to admit only those photographs necessary to corroborate the pathologist's testimony. The trial judge specifically held inadmissible a photograph that the doctor candidly testified would not add any "additional information" to the testimony. (See R. p. 1272, lines 4-12).

Lastly, appellant essentially argues that the fact of the murder was not contested and the pictures, therefore, unnecessary. (BOA, p. 15). However, this assertion misses the mark on admissibility as the pathologist's testimony was not presented just to establish the fact of the murder, but was meticulously presented as to the wounds and possible weapons which supported the truthfulness of the confession by giving evidentiary support to the assertions made therein. *See State v. Kelsey*, 331 S.C. 50, 76, 502 S.E.2d 63, 76 (1998)(affirming

admission of photographs that corroborated condition of pipe bomb victim's body and fragments supported assertion bomb was detonated in victim's mouth); *State v. Vang*, 353 S.C. 78, 88, 577 S.E.2d 225, 230 (Ct. App. 2003)(photo reflecting shell casing by body admissible to corroborate pathologist's testimony regarding a "close contact wound"). To the extent that appellant relies upon *State v. Middleton*, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986) for the proposition that the testimony alone was sufficient, his reliance is misplaced.

In *Middleton*, the Court found that "the testimony of the forensic pathologist negated any arguable evidentiary value of the photographs." 288 S.C. at 24, 339 S.E.2d at 693. However, that was *after* determining that the photographs were not necessary to any fact in issue. *Id.* ("it is clear the information was not really at issue"). In fact, the court noted that "[t]he State candidly admit[ed] the photographs were not essential to the prosecution." *Id.* The photographs at issue were "color autopsy photographs of one of the victims. Three depicted the victim's scalp pulled away from her skull. One showed her surgically opened vaginal cavity exposing a large amount of seminal fluid." *Id.* Clearly, even if relevant, where not necessary for corroboration of a particular fact, the pictures would have been more prejudicial than probative. *Middleton* and its logic cannot be imposed here where the photographs, of the wounds on victim's head, clean and presented in a sterile setting, may not be seen to readily appeal to the emotions. (See State's Exhibits 118 and 119).

"The State has the right to prove every element of the crime charged and is not obligated to rely upon a defendant's stipulation." *Martucci*, 380 S.C. at 249, 669 S.E.2d at 607, citing *State v. Johnson*, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000). See also *State v. Jackson*, 364 S.C. 329, 334, 613 S.E.2d 374, 376 (2005). A trial judge is not required to exclude relevant evidence merely because it is unpleasant or offensive. *Martucci*, 380 S.C.

250, 669 S.E.2d at 607, *citing Davis v. Traylor*, 340 S.C. 150, 530 S.E.2d 385, 387 (Ct.App. 2000); *State v. Jarrell*, 350 S.C. 90, 106-107, 564 S.E.2d 362, 371 (Ct. App. 2002)(affirming trial judge's decision to admit graphic photographs where "the photos helped the jury understand the pathologist's testimony").

Appellant's argument is nothing more than an assertion that the details do not matter, but here, in this case, every detail from wound to scene, matter not just in explanation of the murder itself, but in presenting the specific facts of the murder which in turn supported the truth of the detailed confessions. Moreover, the photographs were not gratuitously bloody or needlessly repetitive. *See generally State v. Nichols*, 325 S.C. 111, 121-122, 481 S.E.2d 118, 124 (1997)("The photographs are not unduly gruesome nor prejudicial considering the insignificant amount of blood and the material purpose for their introduction"); *State v. Crosby*, 348 S.C. 387, 401, 559 S.E.2d 352, 360 (Ct.App. 2001), *reversed on other grounds* *State v. Crosby*, 355 S.C. 47, 584 S.E.2d 110 (2003)(no abuse of discretion in admitting photograph of body where photograph corroborated position and injuries, and "[a]lthough the photograph showed some blood, ... the photograph was [not] offensive or calculated to arouse sympathy or prejudice."). Respondent notes again the trial judge's finding that State's Exhibit 112 would not be admitted when the pathologist candidly testified it would add nothing further to his presentation. (R. p. 1272, lines 4-12). Further, though appellant argues the photographs were "gruesome," he fails to argue how that alone affects admissibility. It was a "gruesome" crime but that does not affect admissibility where the photographs are relevant and necessary to a full presentation of the evidence. There is no error.

However, appellant failed to present or argue this issue, or even join in co-defendant's argument. The issue is clearly procedurally barred.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment, conviction, and sentence of the lower court should be affirmed.

Respectfully submitted,

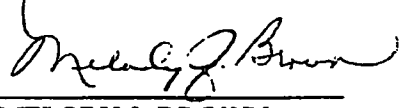
HENRY D. MCMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

MELODY J. BROWN
Assistant Attorney General

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BY: 

MELODY J. BROWN

Office of the Attorney General
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ATTORNEYS FOR RESPONDENT

December 30, 2009.
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of General Sessions
G. Thomas Cooper, Jr., Circuit Court Judge

The State,

Respondent,

vs.

Robert L. Cannon, III,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR. The undersigned also certifies that the Final Brief is in compliance with the South Carolina Supreme Court's Order of August 13, 2007.

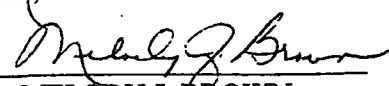
HENRY D. MCMASTER
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JOHN W. McINTOSH
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APPEAL FROM KERSHAW COUNTY
Court of General Sessions
G. Thomas Cooper, Jr., Circuit Court Judge

The State,

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vs.

Robert L. Cannon, III,

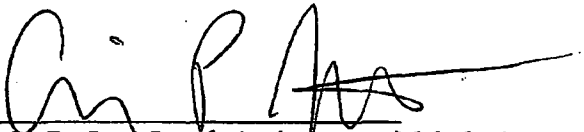
Appellant.

PROOF OF SERVICE

I, Erin P. Jett, certify that I have served the Final Brief of Respondent on Appellant by depositing three (3) copies of same in the United States mail, postage prepaid, addressed to his attorney of record:

Melissa J. Kimbrough, Esq.
1830 Marion Street
Columbia, SC 29201

This 4th day of January, 2010.


Erin P. Jett, Legal Assistant to Melody J.
Brown, Assistant Attorney General

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

2011-UP-267 - State v. Cannon

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Robert Cannon Appellant.

Appeal From Kershaw County
G. Thomas Cooper, Jr., Circuit Court Judge

Unpublished Opinion No. 2011-UP-267
Heard May 3, 2011 – Filed June 8, 2011

AFFIRMED

Melissa J. Armstrong, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John McIntosh, Assistant Deputy Attorney General Donald Zelenka, Assistant Attorney General Melody Brown, Solicitor Daniel Johnson, of Columbia, for Respondent.

PER CURIAM: Robert Cannon appeals his convictions for armed robbery and murder arguing that the trial court erred in: (1) denying his motion to suppress a statement he made to law enforcement regarding his involvement with the homicide, (2) denying his motion to delay the trial or exclude witness testimony due to the disclosure of discovery after the start of trial, and (3) admitting photographs of the crime scene and of the victim taken during the autopsy. During oral argument, Cannon conceded that he failed to preserve the third issue for appellate review. As to the remaining issues, we affirm pursuant to Rule 220(b)(1), SCACR, and the following authority:

As to whether the trial court erred in denying Cannon's motion to suppress his statement to law enforcement: State v. Simmons, 384 S.C. 145, 164, 682 S.E.2d 19, 29 (Ct. App. 2009) (holding a solicitor's comment that if a defendant cooperated, "it would be considered at sentencing" was not a promise of leniency); State v. Arrowood, 375 S.C. 359, 368, 652 S.E.2d 438, 443 (Ct. App. 2007) (holding an offer by police officers to speak on a defendant's behalf to inform the court that the defendant cooperated during an investigation was not a promise of leniency); Simmons, 384 S.C. at 165-66, 682 S.E.2d at 30 (holding that the trial court did not abuse its discretion in giving greater weight to the police's testimony as to the voluntariness of the defendant's statement when the defendant's testimony was in direct conflict).

As to whether the trial court erred in denying his motion to delay the trial: State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (holding that issues not raised and ruled upon at trial will not be considered on appeal). As to whether the trial court erred in denying Cannon's motion to exclude witness testimony: State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.").

AFFIRMED.

FEW, C.J., PIEPER, and LOCKEMY, JJ., concur.



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 1529
COLUMBIA, SOUTH CAROLINA 29211

1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201

TELEPHONE: (803) 734-1890

FAX: (803) 734-1839

WWW.SCCOURTS.ORG

June 24, 2011

REMITTITUR

The Honorable Joyce McDonald
515 Walnut St
PO Box 1557
Camden, SC 29020-8557

Re: The State v. Cannon, Robert
2007-GS-28-00017 2007-GS-28-00018

Dear Ms. McDonald:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

The exhibits being returned are: State's ex. 37, 39, 92, 113-116, 118 and 119 (all photographs). Please sign attached copy of this letter and return to acknowledge receipt of these items.

Sincerely,

Renee S. Johnson
Administrative Specialist

UAG/rj

cc: Melissa Jane Reed Kimbrough, Esquire
Assistant Deputy Attorney General Donald Zelekna
Assistant Attorney General Melody Brown

Receipt Acknowledgement:

Name: _____ Date: _____

FORM 5

STATE OF SOUTH CAROLINA)

County of HERSHAW)

IN THE COURT OF COMMON PLEAS

ROBERT LEE CANNON # 323397)

2012-CP-28-145

Full name and prison number (if any) of Applicant)

v.)

APPLICATION FOR

State of South Carolina)

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lee Correctional Institution, 990 W. Sackety Highway, Bishopville, South Carolina 29010
2. Name and location of Court which imposed sentence Hershaw County Court of General Sessions, Camden, South Carolina
3. Name(s) of co-defendant(s) (if any) Derrick McDonald, Christopher Whitehead
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2007-95-28-00017, Burglary First Degree
 - (b) 2007-95-28-00018, Murder

ATTEST True, Correct & Certified
Copy of Original on File in this
Court

Jayme McDonald
Clerk of Court Kershaw County

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) May 13, 2008, thirty-five (35) years
- (b) May 13, 2008, thirty-five (35) years
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ☒
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes, I did.
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. affirmed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. June 8, 2011
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Unpublished Opinion No. 2011-UP-267
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Actual Innocence
- (b) Ineffective Assistance of Counsel
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Not enough of Substantial Evidence to Convict
- (b) Failure to Properly Investigate Case
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. N/A
- ii. /
- iii. /
- iv. /

(d) the date of each such disposition:

- i. N/A
- ii. /
- iii. /
- iv. /

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

- i. N/A
- ii. /
- iii. /
- iv. /

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No, they have not.

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

(a) which grounds have been presented:

- i. N/A
- ii. /
- iii. /

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

- i. N/A
- ii. /
- iii. /

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

(a) First Opportunity to make 5th Claim
 (b) First Collateral Attack
 (c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? N/A
 (b) your trial, if any? Yes, I were.
 (c) your sentencing? Yes, I were.
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes, I were.
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
N/A

18. If you answered "yes" to one or more parts of (17), list:

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

i. Joshua Kachick,
 ii. Melissa J. Armstrong, Attorney at Law, 1830
Marion Street, Columbia, South Carolina 29201
 iii. _____

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

i. Trial and Sentencing
 ii. South Carolina Court of Appeals
 iii. _____

19. State clearly the relief you seek in filing this application:

Based on the grounds raised, Conviction and Sentence VACATED, REVERSE and REMAND for a New Trial.

20. Are you now under sentence from any other court that you have not challenged?

No, I am not.

STATE OF SOUTH CAROLINA)

County of HERSHAW)

VERIFICATION

I, ROBERT LEE CANNON, #322347, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

SWORN to and subscribed before me this 8 day of Feb 2012.

Debra Suris (L.S.)
Notary Public

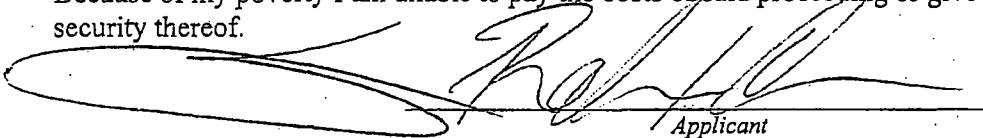
My Commission Expires: 11-4-2015

FILED
CLERK OF COURT
HERSHAW COUNTY, S.C.
2012 FEB -9 AM 11:52
J. W. T. H. S. C. INC.

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, ROBERT LEE CANNON, #328347, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.


Applicant

SWORN or affirmed to and subscribed before me this
8 day of Feb, 2012.


Notary Public

My Commission Expires: 11-4-2015

FILED
CLERK OF COURT
BERKHAM COUNTY, S.C.
2012 FEB -9 AM 11:52
1109 PM 02/09/12

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

**CANNON Robert L -
00328347,**

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

2012CP28145

**RETURN AND MOTION TO DISMISS
IN PART**

The Respondent, making its Return to the application for post conviction relief (PCR) filed February 9, 2012, would respectfully show this Court:¹

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. The Applicant was indicted at the February 2007 term of the Kershaw Grand Jury for Burglary/(After 6/20/85) 1st Degree, and Murder - (2007-GS-28-0017;0018).² He was represented by Joshua Kendrick, Esquire, on the charge(s). Applicant proceeded to jury trial before The Honorable G. Thomas Cooper, Jr.. On May 13, 2008, the Applicant was found guilty and sentenced to thirty-five (35) years imprisonment on each charge, to run concurrently.

¹

<http://publicindex.sccourts.org/kershaw/publicindex/PICaseDetails.aspx?County=28+&Casenum=2012CP28145&CourtType=G&CaseType=Civil&CourtAgency=28002>

² <https://sword.doc.state.sc.us/scdc-public/inmateDetails.do?id=+00328347>

Direct Appeal

The Applicant appealed his conviction and/or sentence. The appeal was unsuccessful and the Remittitur was dated June 27, 2011.

The application for post conviction relief (PCR) was filed February 9, 2012.

II.

Attached herewith and incorporated herein are the records of the Richland County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, and the trial transcript, and the Applicant's applicable direct appeal files.³ The Respondent reserves the right to amend this Return upon receipt of any relevant materials or submit an amended Return to reflect any amended allegations and/or to provide a more detailed procedural history.

III.

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following:

³ The Respondent will utilize the Record on Appeal if the direct appeal was an Anders appeal.

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

(a) Actual Innocence

(b) Ineffective Assistance of Counsel

(c) _____

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

(a) Not enough of Substantial Evidence to Convict

(b) Failure to Properly Investigate Case

(c) _____

IV.

First, addressing Applicant's allegation of "Actual Innocence" based on there not being "enough of substantial evidence to convict", Respondent moves this Court to summarily dismiss this claim as it is not a grounds for relief through post-conviction relief. S.C. Code Ann. § 17-27-20(a) states PCR is an appropriate course of action for:

(a) Any person who has been convicted of, or sentenced for, a crime and who claims:

(1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;

(2) That the court was without jurisdiction to impose sentence;

(3) That the sentence exceeds the maximum authorized by law;

(4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

(5) That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or

(6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute, without paying a filing fee, a proceeding under this chapter to secure relief. **Provided, however, that this section**

shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.

(emphasis added). It is clear under the statute that post-conviction relief is not the proper avenue to attack the sufficiency of evidence. Accordingly, Respondent moves to dismiss Applicant's first allegation as improper under the Uniform Post-Conviction Relief Act.

V.

Regarding Applicant's contention that counsel failed to properly investigate the case, the Respondent contends trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Id. Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant

decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. **The Respondent requests an evidentiary hearing to fully resolve solely this issue.** See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

VI.

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

therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VII.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held. The Respondent will coordinate with the Applicant's attorney who is, according to the Respondent's file, Tara D. Shurling, Esquire regarding when the hearing should be set.⁴

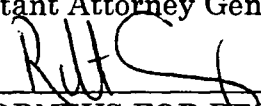
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney
General

ROBERT D. CORNEY
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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

March 2, 2012

⁴ The current PCR Roster for the 5th Circuit is available at <http://www.scag.gov/criminal-litigation/postconvictionrelief>

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

CANNON Robert L -
00328347,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

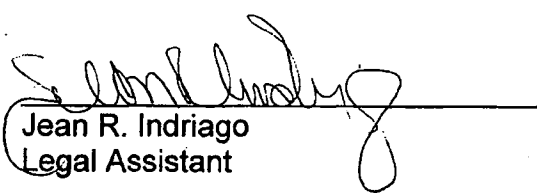
2012CP28145

CERTIFICATE OF SERVICE

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the a letter in the above-captioned matter on the following person(s) by routing the same to the United States mail, postage prepaid:

Tara D. Shurling, 3614 Landmark Drive - Suite D , Columbia, SC 29204

DATED March 12th, 2012.


Jean R. Indriago
Legal Assistant

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF KERSHAW)

ROBERT L. CANNON, #328347,) 2012-CP-28-00145
 Applicant,)
) AMENDED APPLICATION FOR
) POST-CONVICTION RELIEF
 THE STATE OF SOUTH CAROLINA,)
 Respondent.)

FILED FOR RECORD
 2014 MAR 12 AM 11:32
 JOYCE HODGKINS
 CLERK OF COURT
 KERSHAW COUNTY, S.C.

The Post-Conviction Relief Application previously filed on February 9, 2012 under docket number 2012-CP-28-00145 is hereby amended to include the following additional allegations:

1. Trial counsel was ineffective for neglecting to investigate and subpoena alibi witnesses where Counsel was provided with the names and contact information for these witnesses who could have verified the Applicant's presence at a party in Columbia, at a home next door to his mother's residence from 11:00 pm to 12:00 am. These witnesses Steven Coffee, Gerod Chandler, and Orlando Givens were made known to Trial Counsel and were at the time of the Applicant's trial, available to testify for the defense.
2. Trial Counsel was ineffective for failing to introduce testimony from the Applicant's mother, Veronica Davis, whose testimony could have confirmed that the Applicant was in and out of her home in Columbia during the time period he was next door at a neighbor's party.
3. Trial Counsel was ineffective for failing to call as alibi witnesses, two neighbors of his mothers, named Shannon and Melvin, who could have confirmed his presence at a party at their home the evening of this crime in Camden, South Carolina.
4. Trial Counsel was ineffective for neglecting to call the Applicant's then girlfriend, Ember Blow, as a witness for the defense where she was made known to trial counsel as a witness who could have testified that the Applicant arrived at her home in Columbia shortly after midnight and spent the night with her.

ATTEST True, Correct & Certified
 Copy of Original on File in this
 Court.

Joyce Hodgkins
 Clerk of Court Kershaw County

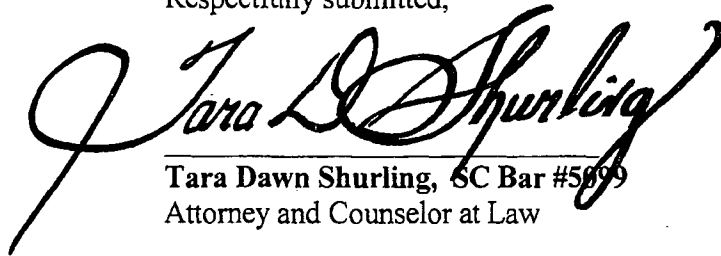
5. Trial Counsel was ineffective for failing to call Sheila and Chad Rodden as witnesses for the defense where this couple lived very near the crime scene and they could have rebutted testimony offered by the victim's girlfriend Melissa A. Davy concerning the circumstances under which she found the victim's body and the timing with which she reported it to the police.
6. Trial Counsel was ineffective in representing the Applicant at trial inasmuch as he failed to present two witnesses, Dixon Barker and Joe Wilson, whose testimony would have supported the Applicant's defense of third party guilt when these witnesses were available and willing to testify to admissions made by an individual named Adrian Duran concerning his intent to harm the victim in retaliation for his robbery by the victim.
7. Trial Counsel erred in failing to present documentation of robbery charges against the victim for robbing an individual named Adrian Duran where these charges, and Adrian Duran's subsequent alleged threats against the victim, were the basis for the Applicant's plan to utilize a defense of third party guilt.
8. Trial Counsel was ineffective in that he informed the Court at the outset of the Applicant's trial of his intent to present third party guilt as a defense and then failed to present any evidence in support of that theory at trial.
9. Trial Counsel failed to provide the Applicant reasonable professional assistance of counsel prior to and during his jury trial where Trial Counsel failed to give the State proper notice of his alibi defense, as required by Rule 5(e) SCRCrimP, despite having been advised of the Applicant's alibi when Trial Counsel was first appointed to represent the Applicant in September 2007 and thereby deprived the Applicant of the opportunity to present that defense at trial.
10. Trial Counsel was ineffective for neglecting to prepare a defense for presentation at the Applicant's trial.
11. Trial Counsel failed to provide the Applicant reasonable professional assistance of counsel where he neglected to argue that statements made by Adrian Duran to two witnesses concerning his intent to harm the victim were admissible as admissions against penal interests pursuant to Rule 804 (b) (3), SCRE.
12. Trial Counsel failed to adequately explain the law of accomplice liability to the Applicant prior to the Applicant being required to make a decision on a plea offer from the State to plead to the lesser-included offense of voluntary manslaughter.
13. Trial Counsel was ineffective for failing to advise the Applicant concerning pleas pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), and for failing to ascertain whether the State would have consented to the Applicant entering *Alford* pleas under the terms and conditions of the plea offer extended by the State.

14. Trial Counsel was ineffective for neglecting to seek a mistrial when the jury announced it was deadlocked and advised the Court that further deliberations were not likely result in a unanimous verdict.
15. Trial Counsel was ineffective for failing to make a motion for a severance where the Applicant's trial with co-defendant McDonald deprived him of the opportunity to cross-examine McDonald concerning his statements to law enforcement.
16. Trial Counsel was ineffective for failing to move to sever the Applicant's trial from his co-defendants where their joint trial deprived the Applicant of the opportunity to present testimony from Whitehead which would have verified that the Applicant left the Sonic with a friend; not one of his co-defendants.
17. Trial Counsel was ineffective for failing to object to the use of polygraph evidence relating to any of the three defendants on trial in the *Jackson v. Deno* hearing held in this case where polygraph evidence is inadmissible in South Carolina and its consideration by the Court in deciding the admissibility of the statements attributed to the Applicant improperly bolstered the credibility of the State's witness by improperly attacking the Applicant's credibility.
18. Trial Counsel failed to provide the Applicant reasonable professional assistance of Counsel when he informed the jury of a list of evidence they would hear during the Applicant's trial and then failed to introduce any of the evidence he promised the jury they would hear, thus setting the Applicant up for the jury to draw negative inferences from this omission and from his election not to present a defense in general.
19. Trial Counsel failed to raise adequate arguments for the suppression of the co-defendant statement of McDonald where, despite redaction, the statement of McDonald could easily be interpreted as implicating the Applicant, where McDonald was not available for cross-examination, and where the statement implicated the Applicant and Whitehead by confirming the State's theory that two others, in addition to McDonald, were responsible for this crime.
20. Trial Counsel failed to provide the Applicant reasonable professional assistance of counsel in that he neglected to preserve the Applicant's objection to gruesome crime scene photographs and inflammatory photographs of the victim's body where any arguable probative value of this evidence was outweighed by the tendency of this evidence to prejudice the Applicant's ability to receive a fair trial by inflaming the jury by appealing to their passions and where other trial testimony established any facts arguably demonstrated by the photographs in question.

21. Trial Counsel was ineffective for requesting, as an alternative to the suppression of the testimony of Lt. Crawford, a recess to permit him the opportunity to consult with a polygraph expert prior to Lt. Crawford's testimony where evidence relevant to the testing was not timely produced during the discovery process.
22. Trial Counsel was ineffective for neglecting to request a continuance based upon the State's failure to produce evidence relevant to the Applicant's polygraph examination where Counsel discovered the State had this evidence in dispute during the pretrial motions hearing.
23. Trial Counsel erred in failing to pursue a Rule to Show Cause when the State failed to respond to his subpoena for the raw data and test strips from the multiple polygraphs administered in this case.

The Applicant has no further amendments at this time. For the reasons set forth herein, as well as those set forth in his original application, the Applicant asserts that his right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, was violated in the trial court. Copies of these amendments have been served on opposing counsel, Megan Harrigan, Assistant Attorney General, and Trial Counsel for the Applicant, Joshua Kendrick, Esquire.

Respectfully submitted,



Tara Dawn Shurling, SC Bar #5899
Attorney and Counselor at Law

3614 Landmark Dr., Ste. A
Columbia, SC 29204
803-738-8622
803-738-1600 (Fax)

ATTORNEY FOR APPLICANT.

This 11th day of March, 2014..

STATE OF SOUTH CAROLINA)
)
 COUNTY OF KERSHAW)

IN THE COURT OF COMMON PLEAS

ROBERT L. CANNON, #328347,)
 Applicant,)

2012-CP-28-00145

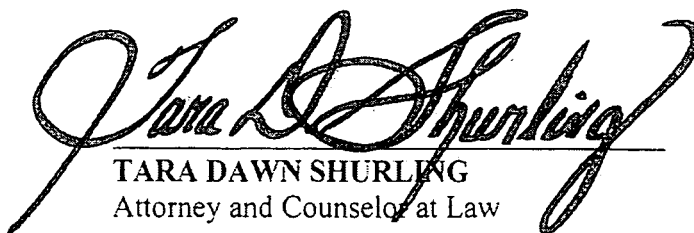
CERTIFICATE OF SERVICE

THE STATE OF SOUTH CAROLINA,)
 Respondent.)

FILED FOR RECORD
 2014 MAR 12 AM 11:32
 JYCE McDONALD
 CLERK OF COURT
 KERSHAW COUNTY, SC

The undersigned attorney hereby certifies that one copy of the Applicant's Amended Post-Conviction Relief Application in the above-entitled cause has been served upon, trial counsel, Joshua Kendrick, Esquire by email on this the 11th day of March, 2014.

Joshua Kendrick, Esquire
 P. O. Box 886
 Columbia, SC 29202
josh@kendrickleonard.com

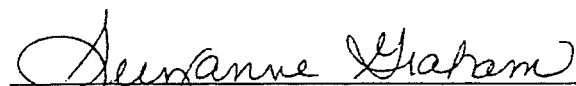

 TARA DAWN SHURLING
 Attorney and Counselor at Law

3614 Landmark Drive, Suite A
 Columbia, S.C. 29204
 (803) 738-8622
 (803) 738-1600 Fax

ATTORNEY FOR THE APPLICANT.

SWORN TO BEFORE ME this 11th day of

March, 2014.

 (L.S.)
 Notary Public for South Carolina
 My Commission Expires: 2/28/24

STATE OF SOUTH CAROLINA)
)
 COUNTY OF KERSHAW)

IN THE COURT OF COMMON PLEAS

ROBERT L. CANNON, #328347,)
 Applicant,)

2012-CP-28-00145

CERTIFICATE OF SERVICE

THE STATE OF SOUTH CAROLINA,)
 Respondent.)

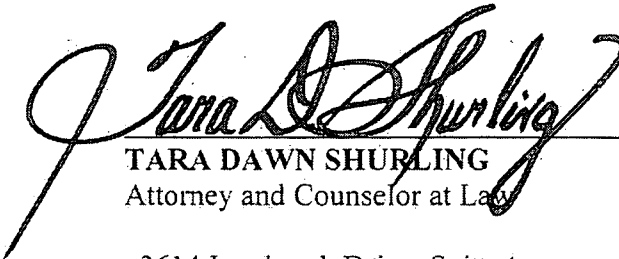
JUDGE McDONALD
 CLERK OF COURT
 KERSHAW COUNTY, S.C.

2014 MAR 12 AM 11:32

FILED FOR RECORD

The undersigned attorney hereby certifies that one copy of the Applicant's Amended Post-Conviction Relief Application in the above-entitled cause has been served upon, Megan Harrigan, Assistant Attorney General by email on this the 11th day of March, 2014.

Megan E. Harrigan
 Assistant Attorney General
 Office of the Attorney General
 P. O. Box 11549
 Columbia, SC 29211
mharrigan@scag.gov

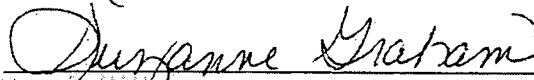

 TARA DAWN SHURLING
 Attorney and Counselor at Law

3614 Landmark Drive, Suite A
 Columbia, S.C. 29204
 (803) 738-8622
 (803) 738-1600 Fax

ATTORNEY FOR THE APPLICANT.

SWORN TO BEFORE ME this 11th day of

March, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: 2/28/24

1 State of South Carolina Court of Common Pleas
2 County of Kershaw Fifth Judicial Circuit

3
4 Robert Lee Cannon,) Transcript of Record
5 Petitioner/Applicant,) 2012-CP-28-00145
6 vs.)
7 The State of South Carolina,)
8 Respondent.)

9
10 March 17, 2014
11 Columbia, South Carolina

12 B E F O R E:

13 The Honorable Alison Renee Lee, Judge
14

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

16 Tara D. Shurling, Appellate Defender
Attorney for the Petitioner/Applicant

17 Megan E. Harrigan, Assistant Attorney General
18 Attorney for the State of South Carolina

19
20 Maryann S. Nevers
21 Circuit Court Reporter
22
23
24
25

I N D E X

WITNESS

PAGE

Robert Lee Cannon

Direct Examination by Ms. Shurling	6
Cross-Examination by Ms. Harrigan	48
Continued Cross-Examination by Ms. Harrigan	67
Redirect Examination by Ms. Shurling	70

Sheila Ann Rodden

Direct Examination by Ms. Shurling	72
Cross-Examination by Ms. Harrigan	78
Redirect Examination by Ms. Shurling	80
Recross Examination by Ms. Harrigan	83

Veronica Ann Davis

Direct Examination by Ms. Shurling	84
Cross-Examination by Ms. Harrigan	92
Redirect Examination by Ms. Shurling	96
Recross Examination by Mr. Harrigan	98
Further Redirect Examination by Ms. Shurling	101
Further Recross Examination by Ms. Harrigan	102

Joshua Kendrick

Direct Examination by Ms. Shurling	103
Continued Direct Examination by Ms. Shurling	145
Cross-Examination by Ms. Harrigan	146
Redirect Examination by Ms. Shurling	162
Recross Examination by Ms. Harrigan	170

Ember Blow

Direct Examination by Ms. Shurling	172
Cross-Examination by Ms. Harrigan	178
Redirect Examination by Ms. Shurling	181

Certificate of Reporter

198

1	<u>E X H I B I T S</u>			
2	<u>NUMBER</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
3	Petitioner's 1	Statement of Derrick McDonald	40	40
4	Petitioner's 2	Statement of Derrick McDonald	40	40
5	Petitioner's 3	Notes	82	82
6	Petitioner's 4	Bond Information	117	117
7	Petitioner's 5	Subpoena for Adrian Doran	143	143
8	Petitioner's 6	Subpoena for Chad Rodden	144	144
9				
10				
11				
12				
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1 (The following proceedings were held March 17, 2014,
2 in Richland County.)

3 MS. HARRIGAN: And, Your Honor, the next matter will
4 be Robert Cannon.

5 MS. SHURLING: Your Honor, may we approach quickly?

6 THE COURT: Yes, ma'am.

7 (Proceedings held at the bench; not reported.)

8 MS. HARRIGAN: May it please the Court?

9 THE COURT: Yes, ma'am.

10 MS. HARRIGAN: The next matter is Robert Cannon
11 versus the State of South Carolina. It's Docket Number
12 2012-CP-28-0145. Mr. Cannon was indicted during the
13 February 2007 term of the Kershaw County Grand Jury for
14 murder and burglary in the first degree. He was
15 represented by Joshua Kendrick.

16 On May 5th through 13th, 2008, Mr. Cannon, alongside
17 two co-defendants, proceeded to a jury trial before the
18 Honorable G. Thomas Cooper, Junior, where he was convicted
19 as indicated on both counts. Judge Cooper sentenced
20 Mr. Cannon to 35 years imprisonment for each offense with
21 the sentences to be served concurrently.

22 A notice of appeal was filed and the appeal was
23 perfected on Applicant's behalf. Following briefing and
24 argument, the South Carolina Court of Appeals affirmed
25 Mr. Cannon's convictions and sentences. The remittitur was

1 sent on June 24, 2011.

2 On February 9, 2012, Mr. Cannon filed an Application
3 for Post-Conviction Relief alleging that he was being held
4 unlawfully based on allegations of actual innocence and
5 ineffective assistance of counsel for failure to properly
6 investigate the case.

7 The State sent its return on March 2, 2012, requesting
8 an evidentiary hearing be held. On March 12, 2014,
9 Applicant through his counsel, Tara Shurling, filed an
10 amended application alleging twenty-three additional
11 grounds for relief, and at this time I'll turn it over to
12 Ms. Shurling.

13 THE COURT: Ms. Shurling.

14 MS. SHURLING: Thank you, Your Honor.

15 Your Honor, my client has alleged in his original
16 pro se application that his fundamental rights for
17 effective assistance of counsel as guaranteed by the
18 Sixth and Fourteenth Amendments, as well as Article 1,
19 Section 14 of our own state Constitution, was denied prior
20 to and during his jury trial.

21 In addition to the allegations raised in his pro se
22 application, we will also be proceeding on the numerous
23 allegations contained in the amended application, which I
24 am advised has been added to Your Honor's packet.

25 At this time, I would call the Applicant, Robert

1 Cannon, to the stand.

2 THE COURT: Yes, sir. You can bring up whatever you
3 need to bring up with you. Before you sit down, if you'd
4 raise your right hand and place your left hand on the
5 Bible.

6 ROBERT LEE CANNON,
7 having been duly sworn, testified as follows:

8 THE COURT: Thank you. If you'll have a seat.
9 State your full name for the record, please.

10 THE WITNESS: Robert Lee Cannon.

11 THE COURT: Thank you.

12 Yes, Ms. Shurling.

13 DIRECT EXAMINATION

14 BY MS. SHURLING:

15 Q. Mr. Cannon, in my observation, for a big guy you're
16 kind of soft-spoken and the nice lady sitting beside you
17 has to write down every word you say to make a record of
18 this proceeding, so I'd ask that you make an effort to
19 speak up just a little bit --

20 A. Okay.

21 Q. -- and remember that it's in everybody's best interest
22 that Her Honor can hear you and that we have a good record,
23 okay?

24 A. All right.

25 Q. All right. How old are you, Mr. Cannon?

- 1 A. 25.
- 2 Q. And how long have you been incarcerated?
- 3 A. Close to eight years now.
- 4 Q. Okay. How far did you go in school?
- 5 A. Eleventh grade.
- 6 Q. Eleventh grade?
- 7 A. Yes, ma'am.
- 8 Q. And did you ever complete a GED?
- 9 A. Yes, ma'am.
- 10 Q. Okay. Do you have any college classes that you've
- 11 taken subsequent to --
- 12 A. No, ma'am.
- 13 Q. -- getting your GED?
- 14 A. No, ma'am.
- 15 Q. Okay. One -- one thing we need to agree on is that
- 16 you'll let me completely finish my question before you try
- 17 to answer it. I understand that you may think you know
- 18 what I'm gonna ask, but, again, the nice court reporter
- 19 can't write down things that two people are saying at one
- 20 time and you might be wrong about what my question was
- 21 gonna be, so let me get it completely out, okay?
- 22 A. Yes, ma'am.
- 23 Q. Okay. You've heard the Attorney General go over what
- 24 your charges were back when you went to trial. Can you
- 25 share with us how much time you received for those charges?

1 A. 35 years.

2 Q. 35 years?

3 A. Yes, ma'am.

4 Q. And have you and I gone over the potential sentences
5 for murder and first degree burglary?

6 A. Yes, ma'am.

7 Q. What's the potential sentencing range on a murder
8 conviction?

9 A. 30 to life.

10 Q. And what's the difference between a life sentence that
11 you might get for murder versus a life sentence that you
12 would get for a different crime?

13 A. Possibility of parole.

14 Q. Well, what is the mandatory service requirement on a
15 murder sentence?

16 A. 30.

17 Q. Not the mandatory minimum, the service requirement.
18 In other words, if you get a 30-year sentence, how much of
19 that 30 years must you serve before you're eligible for
20 release?

21 A. Day for day.

22 Q. Day for day. That's the answer I was looking for.
23 Now what was the sentencing exposure you faced on first
24 degree burglary?

25 A. 85 percent, if I'm not mistaken.

1 Q. Okay. And the 85 percent would be the service
2 requirement. What would be the sentencing range? What was
3 the minimum sentence and the maximum sentence?

4 A. I think that's 30 to life also.

5 Q. Okay. Do you remember discussing that statute with
6 me and me pointing out that there was a 15-year minimum
7 sentence for burglary first?

8 A. Yes, ma'am, I remember now.

9 Q. Does that refresh your recollection?

10 A. Yes, ma'am.

11 Q. Okay. And, again, the difference between a life
12 sentence for first degree burglary and a life sentence for
13 murder is what?

14 A. 85 percent.

15 Q. Versus?

16 A. Mandatory day for day.

17 Q. Okay. So we're clear on those. Now you got a 35-year
18 sentence, right?

19 A. Yes, ma'am.

20 Q. I don't want to beat a dead horse on this, but it's
21 real important that Her Honor and everyone else know that
22 you and I've discussed the fact that if you win your
23 post-conviction relief, to use an appropriate analogy for
24 the day, what's the pot of gold at the end of the rainbow?
25 What do you win?

1 A. A re-trial.

2 Q. A re-trial. And you understand that at that re-trial
3 if you were convicted of murder and first degree burglary,
4 you would, once again, be facing the full sentencing range
5 that we have just discussed in your earlier testimony?

6 A. Yes, ma'am.

7 Q. And that the judge re-sentencing you would not be
8 limited in any way by the sentence that you received in
9 your original trial?

10 A. Yes, ma'am.

11 Q. So as it is, you have a 35-year sentence and if you
12 win a new trial and go back and were convicted, you fully
13 understand that there is at least the possibility that
14 if you were convicted again you could receive up to a
15 mandatory -- you could receive up to a life sentence with
16 no possibility of getting out before you died?

17 A. Yes, ma'am.

18 Q. And notwithstanding that risk, it's your desire to go
19 forward here today?

20 A. Yes, ma'am.

21 Q. Okay. Who was your lawyer back in the court of
22 General Sessions?

23 A. Joshua Kendrick.

24 Q. And was Mr. Kendrick court-appointed or was he
25 retained?

- 1 A. Court-appointed.
- 2 Q. Did you have an opportunity to meet with Mr. Kendrick
3 before your case went to court?
- 4 A. Yes, ma'am.
- 5 Q. And did you meet with him on a number of occasions?
- 6 A. Yes, ma'am.
- 7 Q. Mr. Kendrick spent a good bit of time with you, didn't
8 he --
- 9 A. Yes, ma'am.
- 10 Q. -- to be fair?
- 11 A. Uh-huh.
- 12 Q. Did he bring the discovery materials down there and go
13 over them with you?
- 14 A. Yes, ma'am.
- 15 Q. And when I say down there, you were at Alvin S. Glenn
16 Detention Center, correct?
- 17 A. No, I was at Kershaw County Detention Center.
- 18 Q. Oh, I'm sorry. I'm getting my counties mixed up. You
19 were in Kershaw, but he came to Camden to the detention
20 center and reviewed discovery materials with you?
- 21 A. Yes, ma'am.
- 22 Q. Did you get a copy of your discovery materials or just
23 go over them with Mr. Kendrick when he came to visit you?
- 24 A. I received a copy.
- 25 Q. You got a copy?

1 A. Yes, ma'am.

2 Q. So you had an opportunity to review them not only with
3 your lawyer but at your leisure at the detention center as
4 well?

5 A. Yes, ma'am.

6 Q. Okay. Well, as you were examining the charges against
7 you, did you have discussions with your lawyer about a
8 possible plea agreement?

9 A. He spoke briefly with me one time about a plea
10 agreement, which was before trial, and he notified me that
11 I could plead for eight to twelve, if I'm not mistaken.

12 Q. Okay. We've got to back up for a moment. You were
13 facing charges of murder and first degree burglary,
14 correct?

15 A. Yes, ma'am.

16 Q. When you say he said you could plead to eight to
17 twelve, did he tell you what crimes you would have to enter
18 a plea to in order to take advantage of that deal?

19 A. Manslaughter.

20 Q. Manslaughter. And were you also going to be required
21 to enter a plea to the first degree burglary or was that
22 going to be dropped?

23 A. It was gonna be dropped.

24 Q. Dropped?

25 A. Yes, ma'am.

1 Q. Okay. And it was your understanding that the range of
2 eight to twelve was a recommendation or a negotiation with
3 the State if you accepted their deal?

4 A. I think it was a negotiation.

5 Q. So there would be an agreement by you for no less than
6 eight and they would agree that you would get no more than
7 twelve?

8 A. Yes, ma'am.

9 Q. That was your understanding of the deal?

10 A. Yes, ma'am.

11 Q. Why didn't you take that?

12 A. For one, I was innocent.

13 Q. Okay.

14 A. And, secondly, you know, I wasn't aware at the time of
15 the hand of one, hand of all.

16 Q. Okay. Let's go into that for -- in just a second, but
17 -- so you affirmatively declined that plea offer?

18 A. Yes, ma'am.

19 Q. Did you have discussions with your trial attorney
20 about what is commonly called the law of the hand of one
21 being the hand of all?

22 A. No, ma'am.

23 Q. Prior to your jury trial, did your attorney ever
24 explain to you the full scope of what accomplice liability
25 law is in South Carolina?

1 A. No, ma'am.

2 Q. Have you had such discussions with me in preparation
3 of your PCR case?

4 A. Yes, ma'am.

5 Q. If you had understood prior to your jury trial or
6 rather more significantly prior to making a decision on
7 your guilty plea --

8 A. Uh-huh.

9 Q. -- what the requirements of the -- the components of
10 the law of accomplice liability were, would you have taken
11 the State's plea offer?

12 A. Despite my innocence and knowing the chances of me
13 winning trial, going -- having a joint trial and being next
14 to my -- to Mr. McDonald and Mr. Whitehead, yes, I would
15 have took the plea.

16 Q. Okay. And, again, that's something that you feel you
17 were not given the opportunity to fully understand before
18 you had to take or reject that plea offer?

19 A. Yes, ma'am.

20 Q. Okay. Moving on, you -- I'm gonna skip around just a
21 little bit. You've got a copy of the amended application
22 up there with you, don't you?

23 A. Yes, ma'am.

24 Q. Okay. Well, we're gonna skip around a little bit,
25 but you just mentioned the fact that you were on trial with

1 your co-defendants. Who were your co-defendants?

2 A. Derrick McDonald and Christopher Whitehead.

3 Q. Okay. Did your attorney ever discuss with you the
4 possibility of asking that your trial be severed from that
5 of your co-defendants?

6 A. No, ma'am. Never.

7 Q. Have you had an opportunity to learn a little bit
8 about the concept of severance since you've been
9 incarcerated?

10 A. A little bit.

11 Q. Okay. Knowing what you now know about the idea of
12 having your charges severed from your co-defendants, would
13 you have wanted Mr. Kendrick to ask that your trial be
14 severed from that of your co-defendants?

15 A. Absolutely.

16 Q. Why?

17 A. Because I couldn't -- that would mean I'm -- I'm
18 guilty by association. I mean, Mr. McDonald was on
19 probation for possession of drugs. Mr. Whitehead was on
20 probation for armed robbery, if I'm not mistaken, and I
21 had never had any type of run-in with the law period.

22 Q. Okay. Was there any other reason why you would have
23 wanted your trial to be separated from theirs?

24 A. To protect my confrontational rights.

25 Q. Okay. Was there any reason why you would have wanted

1 either Mr. McDonald or Mr. Whitehead to be available as
2 witnesses for the defense?

3 A. To testify that I didn't leave with them that night at
4 -- when we left Sonic and also to testify that we had never
5 committed a crime together.

6 Q. Okay. And do you understand that if you had gone to
7 trial on your own and called them as witnesses, they would
8 have had the right to invoke the Fifth Amendment and refuse
9 to testify?

10 A. Yes, ma'am.

11 Q. But you would have wanted to try?

12 A. Yes, ma'am.

13 Q. Okay. Let's move on a little bit. You said from the
14 beginning you didn't want to take the plea bargain because
15 you were innocent?

16 A. Yes, ma'am.

17 Q. Did your lawyer ever discuss with you the concept of
18 an Alford plea?

19 A. No, ma'am. I gained the understanding after being
20 sentenced.

21 Q. And have you and I discussed the holding in the Alford
22 decision and what exactly an Alford plea means?

23 A. Yes, ma'am.

24 Q. Understanding that -- well, let me back up. I've also
25 explained to you that the State would have to agree for you

1 to enter an Alford plea --

2 A. Yes, ma'am.

3 Q. -- and accepting the plea bargain, correct?

4 A. Correct.

5 Q. Okay. Knowing what you now know about the Alford
6 case, would you have wanted Mr. Josh Kendrick to explore
7 the option with the prosecution of allowing you to take the
8 deal but enter your plea pursuant to Alford?

9 A. If I -- if he had addressed the issue of the hand of
10 one, hand of all, certainly.

11 Q. Okay. So the two-prong problem with the plea is
12 that you didn't want to admit your guilt and you didn't
13 understand the hand of one was the hand of all?

14 A. Yes, ma'am.

15 Q. Okay. So if both of those factors had been addressed,
16 you would have taken the deal?

17 A. Yes, ma'am.

18 Q. If it had come down to it and the State had refused to
19 let you enter your plea pursuant to Alford, but you had a
20 full understanding of the law of accomplice liability,
21 would you have taken the deal?

22 A. Yes, ma'am.

23 Q. Okay. Now prior to trial, did you tell your lawyer
24 you were innocent?

25 A. Yes, ma'am.

1 Q. Did you tell your lawyer you had an alibi defense?

2 A. Yes, ma'am.

3 Q. What did you tell your lawyer about where you had been
4 during the time period when this crime was committed?

5 A. I told Mr. Kendrick between the time frame of 11 to
6 12:00 I was in Columbia next door to my mother's house at
7 my other neighbors' house who were having a party.

8 Q. Do you recall what those neighbors' names were?

9 A. Shannon and Melvin. I can't remember their last
10 names.

11 Q. Okay. And this was at a house right next door to your
12 momma's?

13 A. Yes, ma'am.

14 Q. How far away were the two houses?

15 A. From here to that desk.

16 Q. Okay. To your knowledge, did your defense attorney
17 interview Shannon and Melvin, the next door neighbors, and
18 question them about your presence at a party that evening?

19 A. He told me that he had spoken with Shannon and Melvin.

20 Q. Did he say he was going to bring them to court as
21 witnesses?

22 A. Yes, ma'am.

23 Q. Did he say they were under subpoena?

24 A. Yes, ma'am.

25 Q. Were they called as witnesses at your trial?

- 1 A. No, ma'am.
- 2 Q. Was anybody called as a witness in --
- 3 A. No one.
- 4 Q. -- on behalf of the defense at trial?
- 5 A. No one.
- 6 Q. Okay. How about your mom? Now I've got Veronica
- 7 Munnerlyn one place and Veronica Davis in another. I
- 8 apologize for the confusion. What is her current name?
- 9 A. Her current name is Davis.
- 10 Q. Davis?
- 11 A. Yes, ma'am.
- 12 Q. At the time of your trial, she was known as Veronica
- 13 Munnerlyn?
- 14 A. Yes, ma'am.
- 15 Q. Okay.
- 16 A. She was still married then.
- 17 Q. Pardon?
- 18 A. She was married then.
- 19 Q. She was married then. And your stepfather was whom?
- 20 A. Mario Munnerlyn.
- 21 Q. Okay. Now in the course of the time period when you
- 22 were next door at Shannon and Melvin's party, did you see
- 23 your mother? Was she at the party?
- 24 A. No, ma'am, she was next door at home --
- 25 Q. Okay.

1 A. -- but I was constantly in and out of the house.

2 Q. Why were you constantly in and out of your momma's
3 house?

4 A. Using the restroom, grabbing cups of ice basically.

5 Q. Were there a lot of people at the party?

6 A. I'd say between about twenty -- fifteen, twenty
7 people.

8 Q. Okay. Then you'd go next door to your mom's to go to
9 the restroom?

10 A. Yes, ma'am.

11 Q. Okay. And you spoke to your mom during those visits
12 to her house?

13 A. Yes, ma'am.

14 Q. Did you advise your lawyer of that prior to your jury
15 trial?

16 A. Yes, ma'am. He was aware of that.

17 Q. If you know, answer me; if you don't, don't, I'll
18 address it with her, but does your mom have a prior
19 criminal record to your knowledge?

20 A. Not to my knowledge.

21 Q. Moms have secret pasts sometimes. We'll see. We'll
22 talk to her about that. But to your knowledge, your mom
23 had no prior criminal record?

24 A. No, ma'am.

25 Q. Okay. Was anybody else living with your mother other

1 than your stepfather and -- you were staying there at the
2 time, weren't you?

3 A. Yes, ma'am.

4 Q. Okay. Anybody else living in the residence at the
5 time?

6 A. I had a younger sister who was staying there also.

7 Q. Okay. And -- but you didn't see her that evening, did
8 you?

9 A. No, ma'am.

10 Q. Okay. All right. Moving along. So we've got Shannon
11 and Melvin whose party it was?

12 A. Yes, ma'am.

13 Q. And your mom?

14 A. Yes, ma'am.

15 Q. Did you also give your lawyer the names of some
16 friends that were people that were at the party and would
17 have recalled seeing you there?

18 A. Yes, ma'am.

19 Q. Can you remember the names of the three witnesses
20 specifically that you wanted to be witnesses?

21 A. Orlando Givens, Gerard Chandler and Steven Coffey.

22 Q. Okay. And at the time, were those people still living
23 in Camden -- I mean, pardon me, in Columbia?

24 A. Yes, ma'am.

25 Q. And you knew where they lived, where they -- who they

1 stayed with, you had all their contact information at --

2 A. I had their phone numbers. I didn't have their
3 address, but I spoke with Mr. Kendrick and informed him
4 that he can get it from my sister because they still went
5 to school -- she went to school with them, so she was aware
6 of their whereabouts also.

7 Q. Okay. I know it seems like I'm going on and on
8 forever with these questions, and forgive me --

9 A. That's okay.

10 Q. -- but you've got to let me finish my questions before
11 you start talking.

12 A. All right. I apologize.

13 Q. We don't want the court reporter to mutiny on us,
14 okay?

15 All right. So at the time, you were able to give
16 Mr. Josh Kendrick at least phone numbers for each of these
17 individuals?

18 A. Yes, ma'am.

19 Q. And was it your understanding that he had interviewed
20 them prior to trial?

21 A. Yes, ma'am.

22 Q. And did he have an investigator working on your case
23 or was he doing it all himself?

24 A. He had an investigator. One -- one came and actually
25 met with me about Shannon and Melvin --

1 Q. Yes.

2 A. -- and was asking where do they stay and I told him
3 exactly -- I told him Melvin stayed exactly next door and
4 Shannon stayed in the neighborhood around the corner and he
5 got that information and he went back out and supposedly
6 investigated.

7 Q. Okay. With regard to Steven Coffey, Gerard Chandler
8 and Orlando Givens, and you may have just answered this and
9 I didn't keep up, I'm sorry, was it your understanding they
10 were under subpoena?

11 A. No, I don't think he ever told me that they were
12 under subpoena. He just told me that he spoke with them.
13 He spoke to my alibi witnesses in general. He didn't
14 necessarily specify the names. He just said he spoke with
15 my witnesses.

16 Q. Okay. Did your lawyer ever discuss with you the fact
17 that if you're gonna pursue an alibi defense, you have to
18 notify the State in advance that you're putting forth an
19 alibi --

20 A. No, ma'am.

21 Q. -- defense?

22 A. No, ma'am.

23 Q. To your knowledge, did your defense attorney notify
24 the prosecution that you were going to raise a defense of
25 alibi before this trial?

1 A. No, ma'am, he did not.

2 Q. You had an additional witness that was an alibi
3 witness for a little bit later time period that evening,
4 correct?

5 A. Yes, ma'am.

6 Q. And who would that have been?

7 A. That was my at the time girlfriend, Ember Blow.

8 Q. Ember Blow?

9 A. Yes, ma'am.

10 Q. And what did Ms. Blow have to do with this case?

11 A. After 12, a little after 12:00, probably around 12:10,
12 I left and went to her house.

13 Q. And how long did you stay at her house?

14 A. I stayed the rest of the night.

15 Q. The rest of the evening?

16 A. The rest of the night.

17 Q. Okay. Did you leave her house at all?

18 A. No, ma'am.

19 Q. Okay. And y'all were boyfriend/girlfriend at that
20 time?

21 A. Yes, ma'am.

22 Q. Okay. Are you -- do you still consider yourself
23 boyfriend/girlfriend?

24 A. No.

25 Q. Okay. Has she remained a friend?

- 1 A. Yes, ma'am.
- 2 Q. Do you talk to her on a regular basis now?
- 3 A. I wouldn't say a regular basis. I check in every once
4 in a while.
- 5 Q. Okay. You, in fact, know that she's dating someone
6 else now, right?
- 7 A. Yes, ma'am.
- 8 Q. In a fairly serious relationship?
- 9 A. Yes, ma'am.
- 10 Q. Okay. Have you promised her anything or made any kind
11 of threats or anything that would motivate her to come to
12 court and testify for you?
- 13 A. No, ma'am.
- 14 Q. Okay. Has anyone in your family that you're aware of?
- 15 A. No, ma'am.
- 16 Q. Okay. When you got to trial, what explanation, if
17 any, did your defense attorney give you for not presenting
18 your mom, Steve Coffey, Gerard Chandler, Orlando Givens and
19 Ember Blow as alibi witnesses?
- 20 A. He never gave a reason. I could --
- 21 Q. Well, did you ask him hey, why aren't we presenting a
22 defense?
- 23 A. I asked him that and he stated that if we present a
24 defense, then that would mean that he wouldn't have the
25 last say-so in the closing arguments and he didn't want to

1 do that.

2 Q. Did you agree to that?

3 A. I was young. I didn't have no experience. I didn't
4 know it wasn't my decision.

5 Q. Okay. So it wasn't your decision?

6 A. No, it wasn't my decision.

7 Q. Okay. You don't have a child with Ember Blow, do you?

8 A. No, ma'am.

9 Q. And you're not paying her any kind of support --

10 A. No, ma'am.

11 Q. -- of any sort?

12 A. No, ma'am.

13 Q. Okay. Now you mentioned Sheila -- is it Roden or
14 Rodden?

15 A. I think it's pronounced Rodden.

16 Q. -- Rodden earlier. Had you given your defense
17 attorney the names of Sheila and Chad Rodden as potential
18 defense witnesses as well?

19 A. Yes, ma'am. They were in the discovery. They had
20 made statements to the investigator or the detective.

21 Q. Okay. And why did you feel their testimony would be
22 essential to your defense --

23 A. Because --

24 Q. -- or helpful even to your defense?

25 A. Because the State was making claims that, you know,

1 there was no evidence in the case, no physical evidence in
2 the case, and they were trying to say well, that's just
3 because they're good criminals, but Sheila and Chad Rodden
4 was next door to the incident when it transpired and they
5 could testify that the victim's girlfriend, along with
6 three other individuals, was at the house with the deceased
7 for over an hour and thirty minutes before anyone contacted
8 the police, in which case one of them got in the car and
9 fled the scene before the officers arrived.

10 Q. So it would -- you anticipate their testimony, if
11 it had been consistent with their statement to law
12 enforcement --

13 A. Yes, ma'am.

14 Q. -- would have been that the victim's girlfriend
15 arrived approximately an hour and a half before she called
16 the police?

17 A. Yes, ma'am.

18 Q. And that she had three male friends with her?

19 A. One female and two males.

20 Q. One female and two males and one of the males was seen
21 by the Roddens to leave?

22 A. Yes, ma'am.

23 Q. And do you recall when the male that left left
24 according to their statement?

25 A. They didn't say a specific time. They just said

1 shortly before the first officer arrived on the scene.

2 Q. Okay. Do you recall the testimony of the victim's
3 girlfriend at trial?

4 A. Vaguely.

5 Q. And based on your recollection, would it be fair to
6 say that she testified that she called law enforcement
7 almost immediately after arriving at the scene?

8 A. Yes, ma'am.

9 Q. And she did not mention having all of these people
10 with her at the house for any period of time before the law
11 arrived, did she?

12 A. No, ma'am.

13 Q. Okay. Would you have wanted your lawyer to be
14 prepared to impeach her testimony with that of either
15 Sheila or Chad Rodden?

16 A. Yes, ma'am.

17 Q. And I had thought that Sheila and Chad were -- were a
18 couple, but, in fact, Sheila is Chad's mother; is that
19 correct?

20 A. Yes, ma'am.

21 Q. Okay. And had you given Mr. Kendrick location
22 information, contact information, for the Roddens?

23 A. It was in the -- the discovery.

24 Q. He already had it, right?

25 A. Yes, ma'am.

1 Q. It was in the discovery, correct?

2 A. Yes, ma'am.

3 Q. Okay. You have noted in your discussions with me that
4 your attorney said he was going to present a defense of
5 third-party guilt at your trial; is that correct?

6 A. Yes, ma'am.

7 Q. In connection with that defense, did you tell him
8 about two witnesses named Dixon Barker and Joe Wilson?

9 A. Yes, ma'am.

10 Q. And who were those individuals?

11 A. They were allegedly -- supposedly three friends of
12 Mr. Adrian Doran who had -- was around when Mr. Adrian
13 Doran made the statement that he was gonna do bodily harm
14 to Josh.

15 Q. Josh being the victim?

16 A. Yes, ma'am.

17 Q. And why would Adrian Doran have wanted to do bodily
18 harm to the victim?

19 A. Well, I want to say it was a month prior to the -- the
20 deceased having -- the deceased being killed he broke into
21 Mr. Doran's house and robbed him for \$4,000.

22 Q. How did you become aware about the statements of
23 Adrian Doran that had supposedly been made to or in the
24 presence of Dixon Barker and Joe Wilson? How did you find
25 out about that?

- 1 A. All this was in my discovery.
- 2 Q. Pardon?
- 3 A. All of this was in my discovery.
- 4 Q. So that was in your discovery as well --
- 5 A. Yes, ma'am.
- 6 Q. -- that those individuals gave statements saying that
- 7 they had heard Adrian Doran threaten bodily harm to the
- 8 victim in connection with a burglary?
- 9 A. Yes, ma'am.
- 10 Q. Or robbery rather?
- 11 A. Yes, ma'am.
- 12 Q. Okay. Had you discussed with Mr. Kendrick the
- 13 possible use of Dixon Barker and Joe Wilson as witnesses
- 14 to support your third-party guilt defense?
- 15 A. Yes, ma'am.
- 16 Q. And what did he say?
- 17 A. He was -- he was gonna use them.
- 18 Q. Pardon?
- 19 A. He said that he would put them on the stand and let
- 20 them testify.
- 21 Q. Okay. And when you got to trial, were Dixon Barker
- 22 and Joe Wilson there?
- 23 A. No, ma'am.
- 24 Q. They were not?
- 25 A. No, ma'am.

1 Q. And did you ask Mr. Kendrick why they weren't there?

2 A. He stated he had them. I -- the State -- he stated he
3 had them, but they didn't need to be present at the time
4 because the State was still presenting their case.

5 Q. Okay. So did he tell you they were under subpoena?

6 A. Yes, ma'am.

7 Q. Okay. Looking through the discovery, did it also
8 contain documents that -- that verified the fact that the
9 victim had criminal charges for robbing Adrian Doran?

10 A. Yes, ma'am.

11 Q. And those documents were, likewise, in the discovery
12 package?

13 A. Yes, ma'am.

14 Q. Now I don't have a page cite for this, and if you do,
15 I want you to help point us all out toward it, but you
16 have indicated that at some point early on in the trial
17 Mr. Kendrick made the court aware that he intended to
18 pursue a defense of third-party guilt?

19 A. Yes, ma'am.

20 Q. Do you have a page cite for that?

21 A. I seem to have left it on the desk.

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

23 THE COURT: Yes.

24 MS. SHURLING: Your Honor, may I hand him his bag?

25 THE COURT: Yes, sir -- yes, ma'am.

1 THE WITNESS: I'm sorry for the inconvenience.

2 A. In my transcript, that would be Page 495.

3 Q. Now when you say Page 495, are you using the numbers
4 at the bottom of the page or the numbers at the top right
5 of the pages? We have record on appeal pages and we have
6 the original transcript pages. Do you know which ones you
7 were using?

8 A. The numbers at the top right.

9 Q. Okay. And that was Page 495?

10 A. 495 through 512.

11 Q. 495 through what? Pardon me.

12 A. Page 512.

13 Q. Okay. And in this portion of the record, both your
14 attorney and Mr. Whitlark, who was representing one of your
15 co-defendants, were talking about the presentation of the
16 defense of third-party guilt, correct?

17 A. Yes, ma'am.

18 Q. Despite having announced the intent to pursue that
19 defense, did I understand you to say that your lawyer
20 didn't present any evidence at your trial?

21 A. No, ma'am. And -- right.

22 Q. So he presented no evidence in support of a claim of
23 third-party guilt?

24 A. Judge Cooper stated that he had no problem with him
25 presenting third-party guilt, but Mr. Kendrick failed to

1 secure Mr. Adrian Doran as a witness -- excuse me --
2 failed to secure Mr. Adrian Doran as a witness and without
3 Mr. Adrian Doran's testimony the other three witnesses
4 would be hearsay.

5 Q. Well, did your attorney ever discuss with you the
6 possibility of calling the other witnesses, that would be
7 Dixon Barker and Joe Wilson, and asserting that their
8 testimony would be an exception to the hearsay rule as an
9 admission by Mr. Adrian Doran against penal interest?

10 A. No, ma'am, we never discussed it.

11 Q. Did you ever hear that expression?

12 A. No, ma'am.

13 Q. All right. Did he explain to you that if he had
14 called Adrian Doran as a witness that Mr. Doran would have
15 had the right to invoke his Fifth Amendment privilege to
16 remain silent?

17 A. No, ma'am.

18 Q. Did you ever have discussions about the fact that if
19 Mr. Doran had been called as a witness and invoked his
20 Fifth Amendment privilege that at that point it would have
21 rendered him unavailable as a witness and enabled you to
22 argue an admission against penal interest as a means to
23 getting in the testimony of these other two witnesses?

24 A. No, ma'am.

25 Q. You don't remember any discussion about that at all?

1 A. No, we had no discussion about that.

2 Q. Okay. Well, moving along.

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

4 Q. Do you remember the portion of your trial that's
5 called a Jackson versus Denno hearing?

6 A. Yes, ma'am.

7 Q. I'll rephrase that. Do you remember the in-camera
8 hearing dealing with the question of whether or not your
9 statement and that of your co-defendants were admissible?

10 A. Yes, ma'am.

11 Q. And during that Jackson v. Denno hearing, do you
12 remember the State introducing testimony concerning
13 polygraph tests that were given to various people?

14 A. Yes, ma'am.

15 Q. Did you ever discuss with your attorney or did he ever
16 mention to you the possibility of moving to exclude, in
17 conjunction with counsel for your co-defendants, any
18 reference to polygraph evidence even in the in-camera
19 proceeding?

20 A. No, ma'am.

21 Q. Did he discuss with you the fact that polygraph
22 evidence is not admissible in South Carolina?

23 A. No, ma'am.

24 Q. There was no mention, was there, of polygraph evidence
25 in the presence of the jury at your trial?

- 1 A. Yes, ma'am.
- 2 Q. There was?
- 3 A. Yes, ma'am.
- 4 Q. Okay. Tell me at what juncture polygraph evidence was
- 5 admitted during your trial. I'm talking about in front of
- 6 your jury.
- 7 A. Lieutenant Phillip -- Phillip Crawford, his testimony.
- 8 Q. Okay.
- 9 A. I think he testified that I -- I took the polygraph
- 10 and it came back deception.
- 11 Q. Okay. And you think he did that in the presence of
- 12 the jury?
- 13 A. Yes, ma'am.
- 14 Q. Okay. Did your lawyer object to that?
- 15 A. I don't think so.
- 16 Q. Okay. Do you remember in your discussions with me
- 17 expressing concern about the fact that your lawyer had
- 18 basically promised the jury they were gonna hear a defense
- 19 of third-party guilt?
- 20 A. Yes, ma'am.
- 21 Q. Or words to that effect?
- 22 A. Words to that effect.
- 23 Q. Okay. Can you point out to us in the transcript where
- 24 you feel Mr. Kendrick did that, where he led the jury to
- 25 believe they were gonna hear a defense?

1 MS. SHURLING: The Court's indulgence, please.

2 THE WITNESS: Excuse me. Once again, I apologize for
3 the inconvenience.

4 MS. SHURLING: Your Honor, if I might be forgiven
5 slightly here.

6 Q. Was it during the opening argument?

7 A. Yes, ma'am.

8 Q. Okay. If you would look at -- the opening, I believe,
9 is found at 496, Line 7, through 500, Line 18.

10 A. Okay.

11 Q. If that helps you narrow it down.

12 A. Yes, ma'am. Mr. Kendrick didn't verbally say these
13 things, but, however, on -- if you look, as you say, 497,
14 Line 10 through Line 12, Mr. Kendrick states: I think they
15 might have told you just about everything that I have to
16 say.

17 Q. Okay. We've got to back up for a second. Are you
18 looking at numbers at the top right again --

19 A. No.

20 Q. -- or at the bottom now?

21 A. At the bottom, 496.

22 Q. Okay. 497?

23 A. 496.

24 Q. 96?

25 A. Yes, ma'am.

1 Q. And this time you're looking at numbers from the
2 record on appeal?

3 A. Yes, ma'am.

4 Q. And what specific lines are you talking about?

5 A. Line Number 9 through 12.

6 Q. Okay.

7 A. And Mr. Kendrick stated: I feel a little bad because
8 I think after these two lawyers I think they might have
9 told you just about everything that I have to say.

10 Q. Okay. And, in fact, the lawyers for your
11 co-defendants had already alluded to third-party guilt?

12 A. Yes, ma'am.

13 Q. Okay. So you feel that by making those statements
14 at the beginning of his opening argument, Mr. Kendrick
15 essentially adopted the promises that were made by
16 co-counsel?

17 A. Yes, ma'am.

18 Q. And, again, the jury never heard any evidence in --

19 A. No, ma'am.

20 Q. -- in terms of the presentation of a defense by your
21 lawyer of third-party guilt, did they?

22 A. No, ma'am.

23 Q. Why do you think it was wrong for your lawyer to give
24 the jury reason to expect that and then not do it?

25 A. Because it's a lie. When you -- when you tell the

1 jury you're gonna present something to them and, you know,
2 they're expecting to hear this, they're expecting to hear
3 my side of the story to things to help prove my innocence
4 and you don't present it, it's like you're adding to my
5 guilt.

6 Q. So you believe that by creating an expectation that
7 you would present evidence that when they didn't do it
8 they diminished the credibility of your presumption of
9 innocence?

10 A. Yes, ma'am.

11 Q. Okay. Do you remember at trial the State's lawyers
12 and your lawyers and the lawyers for Mr. Whitehead and
13 Mr. McDonald going through a process called redacting
14 statements?

15 A. Yes, ma'am.

16 Q. Okay. And once the statements were redacted,
17 Mr. McDonald's statement was actually introduced in
18 evidence at your trial, correct?

19 A. Yes, ma'am.

20 Q. There were two of them, right?

21 A. Yes, ma'am.

22 Q. Okay. And it's your feeling that under the recent
23 Henson decision that even with redaction those statements
24 still pointed to you and, therefore, should have been
25 excluded from evidence --

1 A. Yes, ma'am.

2 Q. -- is that correct?

3 A. That's correct.

4 Q. Okay. So it's your believe that trial counsel was
5 ineffective for failing to raise arguments to the effect
6 that the statements could not be sufficiently redacted to
7 remove, what we lawyers call, the risk of a Bruton problem?

8 A. Yes, ma'am.

9 Q. Did you discuss that issue with your attorney when you
10 were preparing for trial?

11 A. No, ma'am. As I said before, I knew nothing of the
12 law at this point in time.

13 Q. Okay. Once you got to trial you became aware that
14 statements had to be, what we call, redacted for references
15 to either you or the other co-defendant, correct?

16 A. Yes, ma'am.

17 MS. SHURLING: Your Honor, Derrick McDonald's
18 statements in redacted form were introduced as State's
19 Exhibit Number 4 -- pardon me. His statement was
20 introduced as State's Exhibit Number 4 for ID and then
21 eventually as State's Exhibit Number 104 at trial, and for
22 the convenience of the Court, I would move to introduce a
23 copy of 104, the redacted version.

24 MS. HARRIGAN: I'd prefer you to introduce both.

25 (Discussion between Ms. Shurling and Ms. Harrigan.)

1 MS. SHURLING: Thank you. Your Honor, the Respondent
2 has asked, and I would be inclined to agree, that it would
3 be appropriate to introduce both. So at this time I would
4 move to introduce State's Exhibit Number 4 for ID, which is
5 an un-redacted version of Derrick McDonald's statement, and
6 then State's Exhibit 104, which is the redacted version.

7 A moment's indulgence.

8 MS. HARRIGAN: No objection from the State, Your
9 Honor.

10 THE COURT: And those will be Petitioner's 1 and 2?

11 MS. SHURLING: Yes, ma'am.

12 THE COURT: They're admitted.

13 (Petitioner/Applicant's Exhibit Numbers 1 and 2,
14 statements of Derrick McDonald, were marked and admitted
15 into evidence.)

16 MS. SHURLING: For the convenience of the Court, Your
17 Honor, extra copies of the same exhibits.

18 BY MS. SHURLING:

19 Q. Okay. Looking at the redacted version, which has now
20 been marked State's Exhibit -- pardon me -- Applicant's
21 Exhibit -- one moment, 2 --

22 A. Which is the redacted --

23 Q. -- which is 104, looking at that can you tell us why
24 you feel that even after it was redacted this statement
25 still pointed sufficiently to you to make it a problem

1 under the Bruton case and in -- why under the original line
2 of thought with the Bruton case the statement should have
3 been excluded even with redaction?

4 A. Well, there were three of us standing trial at the
5 same time. McDonald's statement clearly implicated three
6 people. It used references such as "we."

7 Q. Okay.

8 A. And clearly states "another person" and "another
9 person" came to my house and that's really -- I mean, all
10 of us are being prosecuted, the Solicitor is seeking to
11 convict all of us of the same crime, so the jury would
12 automatically infer that "another person" and "another
13 person" was me and Whitehead.

14 Q. And during your trial there were three people on
15 trial?

16 A. Yes, ma'am.

17 Q. Two along with you?

18 A. Yes, ma'am.

19 Q. So if Mr. McDonald was referring to two others --

20 A. Yes, ma'am.

21 Q. -- you believe that it would have been apparent
22 to the jury that the two others referenced in this
23 statement, even redacted, would have pointed to you and
24 your co-defendant and, therefore, that the whole thing
25 should have been excluded from evidence?

1 A. Yes, ma'am.

2 Q. And did your lawyer to your recollection ever ask for
3 these statements to be excluded on the ground that they
4 could not be sufficiently redacted to avoid problems
5 with Bruton error and the confrontation clause of the
6 Constitution?

7 A. I want to say he made the objection to Crawford, but
8 it was like in the middle of the trial or something, but
9 the judge shot it down.

10 Q. During the Jackson v. Denno hearing that was held in
11 this matter and subsequent discussions of the redaction of
12 Mr. McDonald's statement, is it your recollection that your
13 lawyer ever made a specific motion to exclude the redacted
14 statement?

15 A. No, not at that time.

16 Q. Okay. That was my question. There were a number
17 of, what I will call, gruesome crime scene photographs
18 introduced during your case; were there not?

19 A. Yes, ma'am.

20 Q. And there was some discussion about those, in what we
21 lawyers like to call in limine, but when they were actually
22 introduced into evidence, your lawyer did not object to
23 their introduction into evidence; is that correct?

24 A. That's correct.

25 Q. And the failure of counsel to preserve that objection

1 was subsequently noted by the Court of Appeals in its
2 decision in your direct appeal, correct?

3 A. Yes, ma'am.

4 Q. Okay. Obviously you would have wanted your lawyer to
5 preserve that issue for you for appeal?

6 A. Yes, ma'am.

7 Q. Okay. During the pre-trial portion of your trial, do
8 you remember it coming to your defense attorney's attention
9 that Lieutenant Crawford had certain raw data relating to
10 your polygraph examination in his possession in the
11 courtroom?

12 A. Yes, ma'am.

13 Q. And your lawyer, in fact, made a motion to exclude
14 Lieutenant Crawford's testimony based on the failure of
15 the State to honor his request for that material prior to
16 trial?

17 A. Yes, ma'am.

18 Q. Once it became clear that the data that your lawyer
19 had requested pre-trial was, in fact, available and in
20 the courtroom, did your lawyer ever ask for a recess of
21 sufficient length to give him the opportunity to consult
22 with a polygraph expert?

23 A. No, ma'am.

24 Q. Since the revelation of the existence of this data
25 came before the actual presentation of witnesses began at

1 trial, did you have any discussion with your lawyer about
2 the possibility of asking for a continuance to enable your
3 case to go forward at a later date after he had had an
4 adequate opportunity to review that evidence?

5 A. No, ma'am.

6 Q. And, lastly, once your attorney had made a request for
7 this information and the State didn't turn it over, did you
8 ever have any discussions with him pre-trial about filing a
9 rule to show cause demanding that the State answer to the
10 Court for why they had not responded to the subpoena for
11 this information?

12 A. No, ma'am.

13 Q. Were you aware that he had the authority as your
14 attorney to make such a request to file such a motion?

15 A. No, ma'am.

16 Q. If you had known that such a motion was available as
17 a tool, if you will, to get the State to comply with the
18 request, would you have wanted him to file a rule to show
19 cause?

20 A. Yes, ma'am.

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

22 Q. At the very end of your trial, at one point the jury
23 came back and announced that they were deadlocked, correct?

24 A. Yes, ma'am.

25 Q. Can you point us to the page where that occurred?

1 A. At the top right-hand corner, it would be Page 1495.

2 MS. SHURLING: Which would be 1683 in the page numbers

3 from the record on appeal, Your Honor, if you're looking at

4 those.

5 Q. At that juncture -- and I believe that discussion

6 actually begins on 1862 of the record on appeal, or 1494,

7 what did the jury advise the court?

8 A. The jury advised the court that they could not reach a

9 unanimous decision.

10 Q. And looking at 1495, Lines 10 through 14, did the

11 court ask the forelady whether any further deliberation on

12 the question would enable them to reach a verdict on the

13 indictment?

14 A. Yes, ma'am, he did.

15 Q. And what was the forelady's answer?

16 A. Her response was no.

17 Q. Okay. And they were hung up on a verdict just on you,

18 right?

19 A. Yes, ma'am.

20 Q. It was only you, not your co-defendants?

21 A. Yes, ma'am.

22 Q. Okay. At that point, what was the court's response to

23 the jury's position?

24 A. He asked them to return to the -- the jury room for

25 just a minute.

1 Q. Okay. And the record reflects that there was a bench
2 conference held if you look at 1495, Line 22. What that
3 normally means is the lawyers went up to the bench and
4 talked to the judge off the record. Is that what happened?

5 A. Yes, ma'am.

6 Q. Okay. Did your lawyer have any discussions with you
7 at that point about whether you wanted to ask that the
8 case be mistried, whether you wanted to object to the jury
9 being given further instructions, or what us lawyers like
10 to call the dynamite charge, asking them to reach a
11 verdict? Did you have any discussions with Mr. Kendrick
12 about that?

13 A. No, ma'am. He just came back and just informed me
14 that the judge was gonna give the Allen charge.

15 Q. Okay. And did you -- or did your lawyer at any point
16 object to the jury being given that charge and the jury
17 being pressured to reach a verdict in your case?

18 A. No, ma'am.

19 Q. What would you have wanted your lawyer to do in
20 response to the State's {sic} note indicating that they
21 were hung up on your verdict?

22 A. Request for a mistrial.

23 Q. Okay. Mr. Cannon, I have gone through -- let me check
24 your original application.

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

1 Q. I have taken your sort of copious allegations in your
2 pro se pleadings and some other materials that you've sent
3 to me and tried to clean them up and make them into these
4 amended allegations, but this is your case, okay? I
5 believe that I have sufficiently set forth in each of these
6 allegations the questions that you wanted Her Honor to
7 address on collateral review, but is there anything -- and
8 this is your one PCR. Is there anything specifically that
9 you feel I have neglected to raise in the questions that
10 I've asked you here today that you would like to bring to
11 Judge Lee's attention?

12 A. No, ma'am, there is not.

13 Q. Are you sure?

14 A. Yes, ma'am.

15 Q. Okay. And, once again, you know you're looking at a
16 possible life without parole sentence if she were to grant
17 you a new trial and you still want to go for it?

18 A. Yes, ma'am.

19 MS. SHURLING: Okay. I'm gonna ask that you listen
20 very carefully to each of the questions that are put to you
21 by counsel for the Respondent --

22 THE WITNESS: Uh-huh.

23 MS. SHURLING: -- and answer them truthfully, please.

24 MS. HARRIGAN: May it please the Court?

25 THE COURT: Yes, ma'am.

1 CROSS-EXAMINATION

2 BY MS. HARRIGAN:

3 Q. Mr. Cannon, you testified before that you met with
4 Mr. Kendrick numerous times before going to trial, correct?

5 A. Yes, ma'am.

6 Q. Do you recall an approximate number of times? Was it
7 more than ten times?

8 A. No, not more than ten.

9 Q. Can you give the Court a rough estimate?

10 A. I'd say around about six or seven.

11 Q. And you did review discovery with him and he gave you
12 a copy of that discovery?

13 A. Yes, ma'am.

14 Q. And your testimony was that you did discuss possible
15 defenses with your attorney. You discussed an alibi
16 defense, correct?

17 A. Yes, ma'am.

18 Q. And I believe your testimony was you gave the names
19 of numerous witnesses to your attorney, correct?

20 A. Yes, ma'am.

21 Q. Is it those witnesses that are laid out in your
22 amended application, Allegation 1, 2, 3 and 4?

23 A. Yes, ma'am.

24 Q. And your testimony was that to the best of your
25 knowledge your attorney had subpoenaed those witnesses

1 and you thought they were gonna be present at trial,
2 correct?

3 A. Yes, ma'am.

4 Q. I believe you testified that Shannon and Melvin, who
5 are listed in Amended Allegation Number 3, you didn't have
6 a last name or contact information for them, correct?

7 A. No, I told him that they stayed next door to my
8 mother's house. Well, Melvin did. I didn't know their
9 last name, but I know they stayed next door.

10 Q. And you testified that Mr. Kendrick did use a private
11 investigator in your case?

12 A. Yes, ma'am.

13 Q. And that you talked with the private investigator
14 about, I believe, Shannon and Melvin, correct?

15 A. Yes, ma'am.

16 Q. Did you discuss any of the other witnesses with the
17 private investigator?

18 A. No, that's all he came and questioned me about.

19 Q. And how many times did you meet with this
20 investigator?

21 A. Just once.

22 Q. And the only thing you talked about with the
23 investigator was Shannon and Melvin?

24 A. Yes, ma'am.

25 Q. How long was that meeting with the investigator?

1 A. No more than thirty minutes.

2 Q. And in thirty minutes you only discussed Shannon and
3 Melvin?

4 A. Yes, ma'am.

5 Q. So the other witnesses you just told Mr. Kendrick
6 about, correct?

7 A. Yes, ma'am. I figured he had already relayed the
8 message to the private investigator.

9 Q. Do you know if he was able to track down these
10 witnesses?

11 A. That's what I was informed.

12 Q. And he told you he'd subpoenaed all of them for
13 trial?

14 A. He informed in general. He didn't state a specific
15 name.

16 Q. You gave two statements to law enforcement in this
17 case, correct?

18 A. No.

19 Q. You didn't give any statements to law enforcement?

20 A. No.

21 Q. Do you recall statements being introduced at trial
22 against you?

23 A. Yes.

24 Q. Do you recall being polygraphed by the State?

25 A. Yes.

1 Q. Do you recall giving a statement after you were
2 polygraphed?

3 A. Yes.

4 Q. So you did give at least one statement, correct, after
5 you were polygraphed?

6 A. I wrote something on statement paper, but it wasn't
7 anything concerning this crime, but --

8 Q. It wasn't? You didn't admit in that second statement
9 kicking the victim?

10 A. In the second statement?

11 Q. Given after the polygraph --

12 A. No, I did not.

13 Q. -- did you admit to kicking the victim?

14 A. No.

15 Q. Did you provide law enforcement with a list of items
16 taken from the victim's home?

17 A. That was a different incident.

18 Q. It wasn't in relation to this incident?

19 A. No, it was not.

20 MS. HARRIGAN: A moment's indulgence, Your Honor.

21 May I approach, Your Honor?

22 THE COURT: Yes, ma'am.

23 BY MS. HARRIGAN:

24 Q. Mr. Cannon, I'm showing you what's been -- what's
25 marked as State's Exhibit Number 5 for ID, State's Exhibit

1 Number 6 for ID, and State's Exhibit Number 7 for ID,
2 which, Ms. Shurling, I believe you have a copy of them?

3 MS. SHURLING: Yes. Let me make sure that's the same
4 thing I have.

5 Q. Do you recall ever having seen these materials before
6 in your discovery?

7 A. Yes, ma'am.

8 Q. Okay. And this is the -- these are the statements
9 and forms you signed before and after your polygraph,
10 correct?

11 A. Correct.

12 Q. Okay. And your testimony here today is State's
13 Exhibit Number 7 that was marked for ID during trial, the
14 list of items taken from a home, this isn't in regards to
15 this murder?

16 A. No.

17 Q. What is it in regards to?

18 A. Okay. After the -- the polygraph, he informed me of
19 -- that I had failed and he asked was there anything that,
20 you know, I had not informed, you know, the investigator
21 of or something that I feel, you know, would make me --
22 allow me to fail the test and I informed him that I failed
23 to inform the investigator of an incident between me and
24 Josh and in that incident Josh had accused me of breaking
25 into his house and stealing some things.

1 Q. And that list is the things you stole from Josh's
2 house --

3 A. No.

4 Q. -- or that Josh had accused you of taking?

5 A. Accused me of taking.

6 Q. But the incident you were polygraphed about, that
7 was just in regards to the home invasion and murder that
8 occurred on December 12th, correct?

9 A. Correct.

10 Q. But at the end, you volunteered that they were items
11 Josh had accused you of taking from his home?

12 A. Yes, ma'am.

13 Q. And today you deny ever making that first statement
14 to law enforcement?

15 A. In reference to --

16 Q. In reference to the murder.

17 A. Oh, I never made a statement to the murder.

18 Q. Okay. Do you recall law enforcement coming by and
19 interviewing you at your house in reference to this murder?

20 A. Yes.

21 Q. And, in fact, you had a Jackson v. Denno hearing in
22 regards to the suppression of the statement, correct?

23 A. That's correct.

24 Q. I believe you talked about that with Ms. Shurling
25 during your direct examination, correct?

1 A. Uh-huh.

2 Q. Okay. And during this Jackson v. Denno hearing your
3 mother and stepfather testified, correct?

4 A. Correct.

5 Q. And your testimony then was that you did make a
6 statement; however, it was not a voluntary statement,
7 correct?

8 A. No.

9 Q. So then you denied ever making a statement as well?

10 A. No. What I did was I admitted to signing a blank
11 statement form. I never admitted to a confession to a
12 murder or given a statement about any knowledge of a
13 murder.

14 (Discussion between Ms. Harrigan and Ms. Shurling.)

15 MS. HARRIGAN: Your Honor, may I approach the witness?

16 THE COURT: Yes, ma'am.

17 BY MS. HARRIGAN:

18 Q. Mr. Cannon, I'm handing you what was marked at your
19 trial as State's Exhibit 2 for ID only.

20 A. Uh-huh.

21 Q. Do you recognize the statement?

22 A. Yes, I recognize it.

23 Q. And your signature is on this statement. Can you --
24 can you review the pages and -- and see how many times your
25 signature's on that statement?

1 A. I see five.

2 Q. So your testimony here today is you signed five blank
3 pieces of paper that were handed to you by law enforcement,
4 but you never gave a statement?

5 A. That's correct.

6 Q. Why did you sign five blank pieces of paper when you
7 were being investigated for a murder?

8 A. Well, when Mr. -- you know, the investigator sat down,
9 he asked me a lot of questions and I answered his questions
10 and he was jotting down notes. He had a couple of pieces
11 of paper and he just stated that he was gonna transfer what
12 he had in his notes over to the statement form.

13 Q. So when you signed these five pieces of paper, they
14 were all blank?

15 A. Yes.

16 Q. Even though you signed saying that you were the
17 individual giving the statement --

18 A. Yes. He just --

19 Q. -- five different times?

20 A. -- and -- and I signed -- he stated that my consent
21 -- that it consented him -- for him to place the -- to
22 transfer the words over to the blank statement.

23 Q. Regarding your allegation involving plea offers in
24 this case, your testimony was that you discussed plea
25 offers with Mr. Kendrick only one time, correct?

1 A. Correct.

2 Q. And I believe your testimony was that Mr. Kendrick
3 informed you that the State was offering voluntary
4 manslaughter for eight to twelve years, correct?

5 A. That's correct.

6 Q. And to drop the burglary in the first degree charge,
7 correct?

8 A. Correct.

9 Q. And your testimony was that you didn't take this plea
10 offer for two reasons. One was because you were innocent
11 and two was because Mr. Kendrick failed to explain the hand
12 of one, hand of all to you, correct?

13 A. Correct.

14 Q. But the defense you're setting forth today at this
15 PCR is alibi, correct?

16 A. Correct.

17 Q. So if you had an alibi, why were you concerned
18 about hand of one, hand of all if you weren't with your
19 co-defendants when this crime was committed?

20 A. Because I was having a joint trial and I would be
21 sitting next to them.

22 Q. But you've set forth in Allegations 1 through 5
23 various witnesses who would account for your whereabouts
24 during the time the crime was committed, correct?

25 A. Correct.

1 Q. And do you recall approximately what time the State
2 was alleging the crime was committed?

3 A. Between the time frame of 11 to 11:30.

4 Q. Do you recall the testimony of witness Cosmo Bacomo?

5 A. Yes, ma'am.

6 Q. Okay. Do you recall who he was?

7 A. I don't know, but I -- I remember him testifying at
8 my trial.

9 Q. Do you recall him being a neighbor of the victim who
10 was outside walking his dog?

11 A. That's what he said.

12 Q. And to the best of your recollection, you recall the
13 crime being between 11 and 12, correct?

14 A. Between 11 and 11:30.

15 Q. 11 and 11:30. And, again, today you're saying you
16 have an alibi to account for that time, you weren't with
17 your co-defendants, correct?

18 A. Correct.

19 Q. But you didn't want to accept the State's plea offer
20 because of hand of one, hand of all? That's your testimony
21 today, correct?

22 A. Could you, please, simplify that, please?

23 Q. Your testimony here today is the reason you didn't
24 accept the State's plea offer is because Mr. Kendrick
25 failed to inform you of the legal theory of hand of one,

1 hand of all, correct?

2 A. And also because of my innocence.

3 Q. But your testimony is that you had an alibi to
4 protect you for the time that you weren't even with your
5 co-defendants, correct?

6 A. Correct.

7 Q. Were your co-defendants at this party with you?

8 A. No.

9 Q. So you were away from your co-defendants during the
10 time in question, correct?

11 A. Correct.

12 THE WITNESS: Excuse me, Your Honor. Could I get a
13 sip of water?

14 MS. HARRIGAN: Would you like me to get him some
15 water?

16 THE COURT: Yes, please.

17 MS. HARRIGAN: Here you go.

18 THE WITNESS: Thank you.

19 BY MS. HARRIGAN:

20 Q. And your testimony was that Mr. Kendrick didn't also
21 explain overall accomplice liability to you, correct?

22 A. No, he did not.

23 Q. Moving back towards your alibi defense that
24 Mr. Kendrick failed to set forth for you as -- as you've
25 alleged in your amended application, there were several

1 witnesses who testified at your trial from Sonic where you
2 had previously worked, correct?

3 A. Correct.

4 Q. And would you -- would you say it's fair to say that
5 a lot of witnesses evolved around the Sonic restaurant on
6 Hardscrabble Road?

7 A. Correct.

8 Q. And there were several witnesses who testified that
9 they saw you at the shop -- the Sonic shortly after 10 PM
10 on the night of the murder, correct?

11 A. Correct.

12 Q. Do you recall an Allen Brown testifying to that?

13 A. Yes.

14 Q. Do you recall a Chris Ross (ph.) testifying to that?

15 A. Yes, ma'am.

16 Q. And do you recall a Cecile Trout (ph.) testifying to
17 that?

18 A. Yes, ma'am.

19 Q. Do you recall them all testifying that you were with
20 both co-defendants around 10:00 at Sonic?

21 A. Yes, ma'am.

22 Q. And that's approximately an hour from when the State
23 alleged the murder took place, correct?

24 A. Correct.

25 Q. So what time did you get to this party next to your

1 mother's house then if you're alleging alibi?

2 A. A little early. Around about like 10:50, 11:00.

3 Around that time.

4 Q. Did you go straight to the party or did you go to your
5 mother's first?

6 A. I went to my mother's first.

7 Q. What time did you get over to the party next door that
8 these -- Shannon and Melvin saw you?

9 A. No more than five minutes after I got home.

10 Q. And you've also alleged that then you were at your
11 former girlfriend Ms. Ember Blow's house around midnight,
12 correct?

13 A. Correct.

14 Q. So your testimony is you were just at this party for
15 around an hour, correct?

16 A. Correct.

17 Q. And I believe you testified that you were running back
18 and forth between your mother's house and the -- do you
19 know the last name of Shannon and Melvin?

20 A. No, I do not.

21 Q. They live together?

22 A. No. Melvin stayed next door; Shannon stayed around
23 the corner.

24 Q. So your testimony is that in this approximate hour
25 you numerous times left the party to go to your mother's

1 house to either use the restroom or get ice or various
2 other reasons, correct?

3 A. Uh-huh.

4 Q. Okay. Approximately how many times did you go to your
5 mom's house?

6 A. About five or six times.

7 Q. So five or six times within one hour that you were at
8 a party you went over to your mother's house and came back?

9 A. Uh-huh.

10 Q. And then what time did you leave the party to go to
11 Ms. Blow's home?

12 A. Shortly after 12.

13 Q. Where does Ms. Blow live?

14 A. In the same neighborhood.

15 Q. And the party was directly next door to your mother's,
16 correct?

17 A. That's correct.

18 Q. How far does your mother live from the Sonic on
19 Hardscrabble Road?

20 A. About ten -- no more than ten minutes away.

21 Q. And had you ever been to the victim Josh's house?

22 A. Yes.

23 Q. How far does the victim live from Sonic?

24 A. About twenty-five, thirty minutes. He stays in
25 Camden.

1 Q. It's in Kershaw County, correct?

2 A. Correct.

3 Q. But right over the line in Elgin, correct?

4 A. Well, we always drove through Camden when we went to
5 his house, so I figured it was Camden.

6 Q. You drove through Camden when you went to Mr. Zoch's
7 house?

8 A. Yes.

9 Q. How many times did you go to his house?

10 A. About three or four times. It wasn't a continuous
11 thing.

12 Q. Do you recall approximately how many miles Sonic was
13 from the victim's house? Does ten sound about correct to
14 you?

15 A. No.

16 Q. Okay. How far would you estimate it to be?

17 A. I don't know that. I would say -- definitely say more
18 than ten, but I don't know.

19 Q. And the victim used to work at Sonic, correct?

20 A. That was before I ever worked there, so I didn't --
21 but I found out later on that he did.

22 Q. Do you know if the victim was living at his current
23 residence when he was working at Sonic? Do you have any
24 knowledge of that?

25 A. To my knowledge, he was.

1 MS. HARRIGAN: A moment's indulgence, Your Honor.

2 Q. Do you have a copy of the transcript there with you,
3 Mr. Cannon?

4 A. I have a majority of a copy of the transcript. I
5 don't have the whole transcript.

6 Q. Do you have the portion of the transcript that
7 includes -- and I'm going off the numbers on the bottom,
8 not the record on appeal numbers, starting at Page 695?

9 A. Yes.

10 Q. If you could turn to Page 695. In your Amended
11 Application for Post-Conviction Relief, you're arguing that
12 your attorney failed to argue that the statements made by
13 Adrian Doran to two witnesses threatening the victim were
14 admissible as statements against interest, correct?

15 A. Come again.

16 Q. Are you familiar with Allegation Number 11 you're
17 making in your Amended Application for Post-Conviction
18 Relief?

19 A. Yes.

20 Q. That Mr. Kendrick should have argued that the two
21 statements -- the statements that Mr. Doran made against
22 the victim as threats should have come in as statements
23 against interest, correct?

24 A. Correct.

25 Q. Okay. If you could briefly read pages 695 and 696 to

1 yourself.

2 MS. SHURLING: I apologize. Did you say you're using
3 the numbers at the bottom?

4 MS. HARRIGAN: Yes, at the bottom. 695 and 696.

5 MS. SHURLING: Thank you.

6 A. Okay.

7 Q. During this portion of the transcript, does your
8 attorney, Mr. Kendrick, bring that up to the court? Does
9 it appear from your review of those pages?

10 A. Bring up the fact that --

11 Q. Brings up the fact that these statements to these two
12 witnesses should be introduced as exceptions to the hearsay
13 rule as a statement against interest of Mr. Doran?

14 A. Yes.

15 Q. And Judge Cooper says you actually need the physical
16 witnesses, correct?

17 A. Correct.

18 Q. So your attorney did bring that up to the court?

19 A. Yeah.

20 MS. HARRIGAN: A moment's indulgence, Your Honor.

21 Q. And your testimony today is that you would have
22 accepted an Alford plea if Mr. Kendrick had been able to
23 negotiate one on your behalf, correct?

24 A. Correct.

25 Q. Do you know whether or not the State ever offered an

1 Alford plea to you?

2 A. To my knowledge, they didn't.

3 Q. It wasn't in the one plea offer that Mr. Kendrick
4 presented to you, correct?

5 A. Correct.

6 Q. And I believe you testified before on direct that at
7 the time of the crime you were living at your mother's home
8 with your stepfather and you sister, correct?

9 A. Correct.

10 Q. But they didn't see you at the home during the time
11 this incident allegedly took place? They couldn't have
12 been alibi witnesses for you, correct?

13 A. What do you mean?

14 Q. You testified that only your mom saw you when you were
15 at home --

16 A. Uh-huh.

17 Q. -- but your father -- your stepfather and your sister
18 lived with you, correct?

19 A. My stepfather was at work, he worked third shift at
20 the time, and my sister was upstairs sleeping.

21 Q. So only your mom saw you?

22 A. Yes, ma'am.

23 Q. In regards to your allegation involving third-party
24 guilt, do you know whether or not your attorney tried to
25 track down Mr. Adrian Doran?

1 A. I mean, he says he did. Well, he said he did in the
2 trial -- at trial.

3 Q. You recall him telling Judge Cooper that he had tried
4 to track him down, correct?

5 A. Correct. But if he wanted to find him, he could have.

6 Q. Do you recall Mr. McDonald's attorney, Mark Whitlark,
7 telling the court that he tried to track down Adrian Doran,
8 but to the best of his knowledge he was actually living in
9 Texas at the time?

10 A. Yes.

11 Q. You recall the tran -- you read that in the
12 transcript?

13 A. He doesn't know where he was at. But being that
14 the investigators found Mr. Adrian Doran for a -- a
15 polygraph test, I'm pretty sure he could have, you know,
16 asked the -- the detectives or Kershaw County or someone to
17 find him.

18 Q. And you -- your testimony is you did ask Mr. Kendrick
19 to track down Mr. Doran for you?

20 A. Uh-huh. He said he was gonna do it.

21 Q. Did he ever come to you and say I'm unable to find
22 him?

23 A. No.

24 Q. Did he ever come to you and say I found him, he's
25 gonna be at your trial?

1 A. He never said he wasn't.

2 Q. So you just had that one conversation with him and
3 you never followed up to see if Mr. Doran would be at your
4 trial?

5 A. I mean, I automatically assumed he would be.

6 THE COURT: Is there any -- let's take a brief break
7 at this time and we can come back and continue on.

8 MS. HARRIGAN: Thank you, Your Honor.

9 THE COURT: Mr. Cannon, during this break, you should
10 not discuss your testimony with anyone --

11 THE WITNESS: Yes, ma'am.

12 THE COURT: -- including your attorney, as you've not
13 concluded your testimony, so it would inappropriate to --
14 to discuss it at this time.

15 THE WITNESS: Okay.

16 THE COURT: Let's take a brief break and then we'll
17 come back.

18 MS. HARRIGAN: Thank you, Your Honor.

19 (Recess taken.)

20 BAILIFF: Court come to order. All rise.

21 THE COURT: Be seated, please.

22 Yes, ma'am. You may resume.

23 MS. HARRIGAN: Thank you, Your Honor.

24 CONTINUED CROSS-EXAMINATION

25 BY MS. HARRIGAN:

1 Q. Mr. Cannon, you have a copy of your amended
2 allegations in front of you, correct?

3 A. Yeah.

4 Q. I'm gonna ask you about Allegation Number 18, and this
5 is regarding Mr. Kendrick's opening statement made on your
6 behalf, correct?

7 A. Correct.

8 Q. And you have a copy of the transcript in front of you,
9 correct? If you could turn to Page 496 going by the record
10 on appeal number at the bottom.

11 A. Okay.

12 Q. And I believe your testimony on direct, but please --
13 please correct me if I'm wrong, was that the portions of
14 the opening statement that you take issue with are Lines 9
15 through 12, correct?

16 A. Correct.

17 Q. The "I feel a little bad because these two lawyers
18 they might have told you everything that he has to say",
19 and I believe your testimony was that's objectionable
20 because your two co-defendants' attorneys have laid out
21 evidence, then that's imputed on him, he then was gonna set
22 forth his evidence, correct?

23 A. Correct.

24 Q. If you could turn a few pages to Page 500. Do you see
25 at the bottom of Page 500 Mr. Riley get up to give his

- 1 opening statement?
- 2 A. Correct.
- 3 Q. Do you recall who Mr. Riley represented?
- 4 A. Mr. McDonald.
- 5 Q. Mr. McDonald or Mr. Whitehead; do you recall?
- 6 A. Correction. Mr. Whitehead.
- 7 Q. So your attorney's opening statement actually came in
- 8 the middle; after Mr. McDonald's opening statement, but
- 9 before Mr. Whitehead's opening statement, correct?
- 10 A. Correct.
- 11 Q. Regarding Allegation Number 19, the redacted statement
- 12 given by your co-defendant Mr. McDonald, your allegation
- 13 here today is that your attorney was ineffective for moving
- 14 to suppress his redacted statement, correct?
- 15 A. Correct.
- 16 Q. And you said you found it to be prejudicial that
- 17 it said "another person" because there were three
- 18 co-defendants, correct?
- 19 A. Correct.
- 20 Q. Okay. And you testified before you do recall the
- 21 testimony of Cosmo Bacomo who was the neighbor of the
- 22 victim, correct?
- 23 A. Correct.
- 24 Q. Do you recall him saying that he saw two or three men
- 25 leaving the home?

1 A. Correct.

2 Q. So the jury knew this wasn't one person?

3 A. No, he didn't say -- he didn't say he saw two or three
4 men. He said he heard voices --

5 Q. And I believe --

6 A. -- or what sounded like two or three people.

7 Q. Regarding your Allegations 21, 22 and 23 regarding the
8 raw data of the polygraphs, are you aware if Mr. Kendrick
9 consulted with a polygraph expert?

10 A. I'm not aware.

11 MS. HARRINGTON: No further questions, Your Honor.

12 THE COURT: Any redirect?

13 REDIRECT EXAMINATION

14 BY MS. SHURLING:

15 Q. With regard to your allegations concerning Adrian
16 Doran and the concept of third-party guilt, Mr. Cannon,
17 did your lawyer call any witnesses to establish that they
18 had tried to locate Mr. Doran and could not find him?

19 A. No, ma'am.

20 Q. Did your lawyer call an investigator or any other
21 witnesses to make a record concerning the fact that an
22 attempt had been made to subpoena?

23 A. He didn't say no words to that all during trial.

24 Q. Pardon me?

25 A. He didn't say no words to that all during my trial.

1 Q. So with regard to the testimony of the two individuals
2 whose testimony would have reported that Mr. Doran had
3 threatened the victim, your lawyer did not lay a foundation
4 for establishing that Mr. Adrian Doran was unavailable,
5 did he?

6 A. No, ma'am.

7 Q. And the admissibility of the statements of the other
8 witnesses as admissions against penal interest would
9 require under 804 that Mr. Adrian Doran be unavailable as
10 a witness, correct?

11 A. Correct.

12 MS. SHURLING: Thank you. No further questions.

13 MS. HARRIGAN: No more questions from the State, Your
14 Honor.

15 THE COURT: You may step down. Thank you.

16 (Witness excused.)

17 MS. SHURLING: Your Honor, I apologize because I
18 know we just took a break, but my next witness will be
19 Ms. Sheila Rodden and she had requested permission to
20 speak with me briefly before we go forward. If I might
21 just have two or three minutes.

22 THE COURT: Yes, ma'am. I'll allow you to do that.

23 MS. SHURLING: Thank you.

24 Your Honor, with the Court's leave, I'll just step
25 right outside with her.

1 (Pause in the proceedings.)

2 MS. SHURLING: Thank you, Your Honor. At this time I
3 would call Sheila Rodden as a witness.

4 SHEILA ANN RODDEN,

5 having been duly sworn, testified as follows:

6 THE COURT: Thank you, ma'am. If you'd have a seat
7 and state your full name and spell your last name, please.

8 THE WITNESS: R-O-D-D-E-N.

9 THE COURT: And your full name?

10 THE WITNESS: Sheila Ann Rodden.

11 THE COURT: Yes, ma'am.

12 DIRECT EXAMINATION

13 BY MS. SHURLING:

14 Q. Ms. Rodden, you and I have not had a chance to speak
15 for long, but from what little I have talked to you, you're
16 soft-spoken.

17 A. Yes.

18 Q. So I'm gonna tell you the same thing I told my client
19 and ask that you speak up, if you will, please.

20 A. Yes.

21 Q. Okay. It's been a long time ago, but do you recall
22 back in December of 2006 being interviewed by a Lieutenant
23 Tisdale concerning a murder in your neighborhood?

24 A. Yes.

25 Q. And the victim's name was what?

- 1 A. Josh Koch {sic}.
- 2 Q. And how far did he live from your home?
- 3 A. Probably a couple of hundred feet.
- 4 Q. Okay. Were you immediately next door or --
- 5 A. Yes.
- 6 Q. -- across the street?
- 7 A. Next door.
- 8 Q. Right next door?
- 9 A. Next door.
- 10 Q. At that time, were you employed?
- 11 A. Yes.
- 12 Q. Do you recall what you told Lieutenant Tisdale at the
- 13 time of your interview?
- 14 A. Not exactly. It's been a while and nobody ever
- 15 followed up with me after the first time.
- 16 Q. Okay. Well, let's approach it from another direction
- 17 then.
- 18 A. Okay.
- 19 Q. Where were you working at the time?
- 20 A. Lowe's.
- 21 Q. And do you know about what time you would have gotten
- 22 home that day?
- 23 A. Actually it was about -- probably 4:30, 5:00 maybe,
- 24 something like that.
- 25 Q. Okay. And did you observe anything over at the

- 1 victim's home --
- 2 A. Yes.
- 3 Q. -- at the time you arrived home?
- 4 A. Yes, I did. There were about four people standing
- 5 outside on the front deck of the house.
- 6 Q. Did you recognize one of those people?
- 7 A. One of them.
- 8 Q. And who would you say you recognized from that group?
- 9 A. His girlfriend that had been living over there with
- 10 him for probably about six months.
- 11 Q. Okay. And the other two -- pardon me. The other
- 12 three people, what were their genders?
- 13 A. One girl and two boys.
- 14 Q. Okay. And can you remember anything in terms of
- 15 description of the two males?
- 16 A. Only one of them because he was very tall.
- 17 Q. Okay.
- 18 A. He was standing right next to his girlfriend on the
- 19 front deck area and I noticed how much taller he was than
- 20 her.
- 21 Q. Yes, ma'am.
- 22 A. The girl -- the other girl was shorter than his
- 23 girlfriend, but the other boy I don't even really --
- 24 Q. Okay.
- 25 A. He just kind of was standing there.

1 Q. Did you subsequently notice anyone of that group
2 leave?

3 A. Yes.

4 Q. Time-wise can you give us an estimate how much long --
5 longer it was after you first arrived home?

6 A. Probably thirty minutes maybe.

7 Q. Thirty minutes?

8 A. Yeah. The tall boy left.

9 Q. Okay. And sometime not terribly long after that, did
10 you become aware of law enforcement activity next door?

11 A. Yes, it was probably around 6:30, 7:00, something like
12 that. Probably closer to 7.

13 Q. Closer to 7?

14 A. Yeah, and that's when I knew something was wrong
15 because we never have cops down the neighborhood.

16 Q. Yes, ma'am. Were you ever interviewed by Mr. Cannon's
17 lawyer, Josh Kendrick?

18 A. No.

19 Q. Did you ever give an actual written statement to
20 Lieutenant Tisdale or did he just take notes while he was
21 talking to you?

22 A. He just took notes.

23 Q. And do you recall whether or not he also interviewed
24 your son?

25 A. Yes, he did.

1 Q. For the record, at this time in December of 2006, was
2 your son living at home?

3 A. No, he was visiting. He was in the military.

4 Q. He was in the military?

5 A. Yes.

6 Q. But was he home on the date of this event?

7 A. Yes.

8 Q. And was he also interviewed by Lieutenant Tisdale?

9 A. Yes, he was.

10 Q. Okay. Where's your son today?

11 A. Texas.

12 Q. Texas?

13 A. Uh-huh.

14 Q. Okay. Is he in the military still?

15 A. No, he is on disability from the military.

16 Q. My condolences. I'm sorry. All right. Were you
17 subpoenaed by either the State or the defense to appear as
18 a witness at Mr. Cannon's trial?

19 A. No, I was not.

20 Q. Were you aware when this trial was going on?

21 A. No, not until I started reading about it in the
22 newspaper.

23 Q. Okay. And until this proceeding today, did you even
24 know what race Mr. Cannon was?

25 A. No, I did not.

- 1 Q. Okay.
- 2 A. I'm sorry.
- 3 Q. So are you -- and, I'm sorry, these questions may
- 4 sound silly to you, but I need to make a record. Are you
- 5 personal friends with either Mr. Cannon or anyone in his
- 6 family?
- 7 A. I never met him.
- 8 Q. Friends with any of his close friends or
- 9 acquaintances?
- 10 A. No.
- 11 Q. Has anyone, including me, offered you any reward,
- 12 monetary or otherwise, for appearing as a witness here
- 13 today?
- 14 A. No.
- 15 Q. I believe I had my process server give you a mileage
- 16 check for attending court today, correct?
- 17 A. Yes.
- 18 Q. And I also told you you'd get a \$25 witness fee for
- 19 appearing in accordance with state law, right?
- 20 A. Yes.
- 21 Q. Other than that, I haven't given you anything --
- 22 A. No.
- 23 Q. -- in exchange for your testimony?
- 24 A. No.
- 25 MS. SHURLING: Thank you. I have no further

1 questions.

2 THE COURT: Any cross?

3 MS. HARRIGAN: Yes, briefly, Your Honor.

4 CROSS-EXAMINATION

5 BY MS. HARRIGAN:

6 Q. Ms. Rodden -- Rodden is how you pronounce your name,
7 correct?

8 A. Yes.

9 Q. Ms. Rodden, you were originally interviewed by
10 Lieutenant Tisdale back in 2006, correct?

11 A. Correct.

12 Q. Do you recall what date you were interviewed?

13 A. Not really. It probably was only about a week at the
14 most after.

15 Q. Does the 14th sound about correct to you?

16 A. Yeah. I know it wasn't long after it happened.

17 Q. And your testimony here today is that you saw four
18 people standing on the front porch, correct?

19 A. Yes.

20 Q. Do you recall telling Officer -- or Lieutenant Tisdale
21 back in 2006 that you actually only saw three people on the
22 porch; one girl and two guys?

23 A. No.

24 Q. So your testimony --

25 A. Well, there was -- besides the girlfriend.

1 Q. Besides the girlfriend?

2 A. Besides the girlfriend --

3 Q. Okay.

4 A. -- there was another girl and two guys.

5 Q. So to the best of your recollection you don't recall
6 telling Lieutenant Tisdale that there were only three
7 people, one girl and two guys?

8 A. Right, right, right.

9 Q. And I believe you testified that you told Lieutenant
10 Tisdale that shortly after you got home one of the men
11 left?

12 A. Right.

13 Q. Okay.

14 MS. HARRIGAN: May I approach, Your Honor?

15 THE COURT: Yes, ma'am.

16 BY MS. HARRIGAN:

17 Q. I'm gonna hand you a document. Does that appear to be
18 notes from when Lieutenant Tisdale met with you?

19 A. Yes.

20 Q. Do you see --

21 MS. SHURLING: Objection, Your Honor. I don't think
22 she can authenticate Lieutenant Tisdale's notes. I mean,
23 she can -- she can confirm what the subject matter is,
24 but --

25 THE COURT: Rephrase the question.

1 BY MS. HARRIGAN:

2 Q. Do you see your name on here?

3 A. Yes.

4 Q. Is that your correct cell phone number?

5 A. Yes, it is.

6 Q. And to the best of your recollection you did talk to
7 Lieutenant Tisdale on the 14th?

8 A. Yes.

9 Q. And, again, your testimony today is that you told
10 Officer Tisdale that there were four people present on the
11 porch?

12 A. I don't know if I said four or three with her.

13 Q. Three with her.

14 MS. HARRIGAN: No further questions, Your Honor.

15 REDIRECT EXAMINATION

16 BY MS. SHURLING:

17 Q. Ms. Rodden, just so we're clear, are you comfortable
18 that you made it clear to Lieutenant Tisdale that there
19 were three people at the scene when you got home from work
20 in addition to the girlfriend that you know?

21 A. I don't know if it was clear to him.

22 Q. Well, I'm not asking whether it was clear to him --

23 A. Right.

24 Q. -- but what I'm saying is you told him that other --
25 in addition to the girlfriend there were three other people

1 there?

2 A. Right. Yes.

3 Q. Okay. And you didn't recognize any of those three
4 people as people you knew by name or knew from previous
5 observation at the residence?

6 A. Right.

7 Q. Back in a time more contemporaneous with this whole
8 incident, if you had been asked to come and testify to the
9 exact same subject matter that we've covered here today as
10 a witness for the defense, would you have been willing to
11 come?

12 A. Yes.

13 Q. And, again, you were not interviewed by defense
14 counsel, nor were you ever subpoenaed to come to court?

15 A. No.

16 MS. SHURLING: A moment's indulgence.

17 (Discussion between Ms. Shurling and Ms. Harrigan.)

18 BY MS. SHURLING:

19 Q. You were asked earlier by the State to take a look at
20 notes that are marked in the top right-hand corner --

21 A. Correct.

22 Q. -- as being those of Lieutenant Tisdale from 12-14-06,
23 correct?

24 A. Yes.

25 Q. And if you would look at the portion of those notes

1 that refer to you, it indicates that you reported -- that
2 at 5:15 you observed one girl and two guys next door at the
3 scene, correct?

4 A. Yes.

5 Q. And you've clarified that that one girl and two guys
6 was in addition to the girlfriend?

7 A. Right. Correct.

8 Q. With that clarification, is what is otherwise
9 preserved in Lieutenant Tisdale's notes accurate? Only
10 with regard to the portion addressing you. I'm not asking
11 about the other interviews.

12 A. It seems correct.

13 Q. And with regard to what time you actually got home,
14 would your recollection have been somewhat clearer back in
15 December of 2006 than it is today?

16 A. Yes.

17 MS. SHURLING: Your Honor, I would move to introduce
18 this as Applicant's 3, I believe.

19 THE COURT: Any objection?

20 MS. HARRIGAN: No objection.

21 THE COURT: It's admitted.

22 (Petitioner/Applicant's Exhibit Number 3, notes, was
23 marked and admitted into evidence.)

24 MS. SHURLING: No further questions, Your Honor.

25 MS. HARRIGAN: Very briefly, Your Honor.

1 RECROSS EXAMINATION

2 BY MS. HARRIGAN:

3 Q. Do you have a copy of that statement that was just
4 shown to you?

5 A. No, I don't.

6 MS. HARRIGAN: May I approach, Your Honor?

7 THE COURT: Yes, ma'am.

8 BY MS. HARRIGAN:

9 Q. Ms. Rodden, would you look at the statement and see --
10 it doesn't say on there one girl and two guys in addition
11 to the girlfriend, does it?

12 A. No.

13 Q. It just says one girl and two guys, correct?

14 A. Right.

15 MS. HARRIGAN: No further questions, Your Honor.

16 THE COURT: You may step down. Thank you.

17 (Witness excused.)

18 THE COURT: You may call your next witness.

19 MS. SHURLING: Yes, Your Honor. At this time I would
20 call Ms. Davis, the Applicant's mother.

21 VERONICA ANN DAVIS,

22 having been duly sworn, testified as follows:

23 THE COURT: Thank you. Have a seat and state your
24 full name, please.

25 THE WITNESS: Veronica Ann Davis.

1 THE COURT: Yes, ma'am.

2 DIRECT EXAMINATION

3 BY MS. SHURLING:

4 Q. Ms. Davis, you were referred to in this record at one
5 juncture as Veronica Munnerlyn. Was Munnerlyn your married
6 name at the time of your son's trial?

7 A. Yes, ma'am.

8 Q. And your ex-husband's name I believe was Mario
9 Munnerlyn?

10 A. Correct.

11 Q. Are you now divorced from Mr. Munnerlyn?

12 A. Yes, ma'am.

13 Q. And you now use your maiden name again, Davis?

14 A. I do.

15 Q. All right. Do you specifically recall the day after
16 the victim in this case was discovered dead and -- and the
17 murder was being discussed in the community?

18 A. Yes, ma'am.

19 Q. And did you at the time have a specific recollection
20 of where your son had been the previous evening?

21 A. Running in and out of my house.

22 Q. Ma'am?

23 A. Running in and out of the door.

24 Q. Okay. Now where's your home?

25 A. Right next -- it was -- at the time it was

1

2 Q. And where is that located?

3 A. Northeast Columbia.

4 Q. Northeast Columbia?

5 A. Right. Heritage Woods subdivision.

6 Q. Thank you. Are you familiar with Camden?

7 A. No, ma'am.

8 Q. Do you ever go to Camden?

9 A. I don't go to Camden, but I've passed the exit when
10 I'm going from Columbia to Florence and I see the sign that
11 say Camden, but I don't go to Camden.

12 Q. Okay. But you're not familiar with the layout of the
13 city of Camden or with Kershaw County in general?

14 A. Oh, no, ma'am.

15 Q. Okay. How about these next door neighbors we've
16 talked about? Did you know them?

17 A. Of them.

18 Q. You knew of them?

19 A. Yes, ma'am.

20 Q. You've heard me describe them as Shannon and Melvin.
21 That was their first names. Do you happen to know what
22 their last name was?

23 A. No, ma'am.

24 Q. Okay. But that evening you said your son was in and
25 out?

- 1 A. Correct.
- 2 Q. When he wasn't at your house, where was he?
- 3 A. Next door because I asked him. I said why you keep
4 going in and out of the house and he said well, I'm next
5 door at Melvin's house. So finally I told him look, it's
6 not a revolving door, stay in or stay out.
- 7 Q. Okay. Was there a party next door?
- 8 A. A loud party next door.
- 9 Q. A loud party?
- 10 A. Yes, ma'am.
- 11 Q. Were there a good many people over there?
- 12 A. From the noises I could hear, there was a lot -- a lot
13 of people over there.
- 14 Q. Were there a lot of cars next door?
- 15 A. There were.
- 16 Q. Okay. And when your son came back and forth to your
17 residence, did he say why he was coming in and out?
- 18 A. Well, one time I said -- I saw him while he was coming
19 in because I was downstairs laying on the chair. So the
20 downstairs bathroom was right there, so I saw him going to
21 the bathroom several times and I said why do you keep
22 running back to the bathroom, you know, use the bathroom
23 outside, don't be coming back in the house.
- 24 Q. Okay. And you specifically remember that that was the
25 evening before the discovery of this young man's body and

1 the whole issue of this murder coming up?

2 A. Yes, ma'am.

3 Q. How long after that was your son arrested?

4 A. It wasn't the next day. Probably -- I want to say
5 like two days later I think it was. It wasn't that -- it
6 wasn't that same day, nor the next day.

7 Q. Did you see your son in the days intervening the night
8 when the party was going on and when he was arrested?

9 A. Early that day or when do you mean?

10 Q. Well, the night of the party he was in and out of your
11 house.

12 A. Right.

13 Q. He didn't spend the night at your house that night
14 though, did he?

15 A. No, ma'am, because the last time I say stay in or stay
16 out he said we'll, I'm staying out. And he know my thing
17 is if you don't beat the sunlight, you can't come in. So
18 he said well, I'm staying out. I said you mean out-out and
19 he said yéah, I'm going to -- I'm staying at Ember's, so I
20 said okay, lock up behind you.

21 Q. Okay. When would you say that you did see him next?

22 A. The following day I saw him because I worked earlier,
23 so I came home -- like he called me. He said how long
24 before you come home? I said well, I was about to go to
25 the grocery store; why, what's up? And he said that some

1 detectives want to talk to you, but they can't talk to you
2 -- talk to me without you being here. Because at the time
3 he was only seventeen. And I said talk to me about what?
4 And that's when he said they're trying to say I killed
5 somebody. I said what? I said I'm on the way home, so
6 that's when.

7 Q. Okay. Were you interviewed by -- well, let -- let me
8 back up. Josh Kendrick was court-appointed to represent
9 your son, correct?

10 A. Uh-huh.

11 Q. Did you have meetings with Mr. Kendrick when he was
12 preparing your son's case for trial?

13 A. He came by the house once.

14 Q. Once?

15 A. Uh-huh.

16 Q. How long did he spend with you when he came by?

17 A. Maybe twenty minutes.

18 Q. Did you discuss at that time the fact that your son
19 had been at a party next door the evening when this killing
20 was alleged to have taken place?

21 A. He didn't even ask me about Robert's whereabouts. Our
22 conversation was that he let me know that he was Robert's
23 appointed attorney and that an investigator was gonna come
24 by and talk to me and I said okay. I said I'm so -- you
25 know, what's going on, what am I looking at because I don't

1 understand, and he just basically said that, you know, he
2 was implemented into a murder with two other guys. He said
3 I'm -- I'm gonna talk to him about doing a plea, whatever
4 he said, but I -- I don't know, I keep -- and that was the
5 first and last time I saw him until he went court.

6 Q. Okay. Well, did you ever in any way convey to
7 Mr. Kendrick the fact that your son had been in Columbia
8 and, in fact, in and out of your home the evening when
9 this killing took place?

10 A. No, ma'am. He never asked me about his whereabouts
11 and I was so -- I'm gonna be honest with you. I was so out
12 of it and just -- I didn't ask him anything. No more -- no
13 more than, you know, what is going on.

14 Q. Okay. What about the police? Did they interview you?

15 A. One guy did. He asked me about Robert's whereabouts
16 and I stated -- I told him that he was in and out of the
17 house that night and he asked me where and I said he was
18 next door at a party because it was so loud and, like I
19 said, I told Robert to stop coming in and out of the door
20 and he said okay. Then I said -- I said before we go any
21 further, do I need to call my lawyer? And he said no,
22 ma'am. He said he just wanted to ask me some questions.
23 We've got the two people that did it and if we thought he
24 did it, we would be arresting him as well.

25 Q. And the evening after your son was questioned by law

1 enforcement, he was allowed to stay at your home, correct?

2 A. Of course.

3 Q. And my hearing is not the best, so if I'm being
4 redundant --

5 A. You're fine.

6 Q. -- I apologize, but did you state for the record in
7 your testimony earlier -- did you say what time period you
8 thought your son was at the party next door based on when
9 he was coming and going from your house? If I've asked you
10 that already, I apologize.

11 A. No, no, you did not. The exact time -- I can't
12 pinpoint the exact time, but I know it was -- it was before
13 12 because I was waiting on my husband to call me on his
14 lunch break, which was at 11:45. So I know he was running
15 in -- in and out during that time frame.

16 Q. Between 11:45 and 12?

17 A. Between 11 and 11:45.

18 Q. Okay. So between -- and -- and just so we're clear,
19 how are you pinpointing the 11 to 11:45 window of time? If
20 you can give us your reference so you know -- we know how
21 you have narrowed it down to that.

22 A. Sure. Because I -- I was thirsty, so I had to go
23 downstairs to get something to drink and I said I'll cut
24 the TV on to look at the television until Mario calls and
25 then I was gonna go back upstairs because I didn't have an

1 upstairs phone, so I had to stay downstairs.

2 Q. Okay. So you were downstairs because you were waiting
3 for a phone call from your husband?

4 A. Uh-huh.

5 Q. When did your husband get home?

6 A. The next day at -- what was it, two, three in the
7 morning.

8 Q. Okay. So your husband would not have been available
9 as a witness to your son's whereabouts the night before?

10 A. Correct.

11 Q. Were you subpoenaed by your son's attorney or by the
12 State as a witness in this proceeding?

13 A. I was subpoenaed by Mr. Kendrick, but only because I
14 told him I needed to be subpoenaed so that my job wouldn't
15 fire me, so that's when he said okay, I'll do a subpoena
16 for you.

17 Q. And were you allowed to stay in the courtroom during
18 your son's trial or were you -- since you were under
19 subpoena, did you have to stay sequestered?

20 A. I was inside.

21 Q. Okay. And did Mr. Kendrick at any time discuss with
22 you the possibility of using you as an alibi witness to
23 establish your son's whereabouts in Columbia as opposed to
24 Kershaw County on -- during the time period when this
25 homicide occurred?

1 A. No, ma'am.

2 Q. And I guess it sounds like an obvious question, but
3 would you have been willing to testify on your son's behalf
4 if you had been asked to do so?

5 A. Yes, ma'am.

6 Q. This is the oldest line of questioning in -- in
7 criminal defense practice, but you love your son, don't
8 you?

9 A. I do.

10 Q. Would you lie for him under oath?

11 A. No, ma'am, because I love my freedom.

12 Q. You don't care to join him in SCDC?

13 A. No, ma'am.

14 MS. SHURLING: Thank you. No further questions.

15 THE COURT: Any cross?

16 MS. HARRIGAN: Briefly, Your Honor.

17 CROSS-EXAMINATION

18 BY MS. HARRIGAN:

19 Q. Good morning, Ms. Davis.

20 A. Good morning.

21 Q. You testified on direct that you're not familiar with
22 Camden, correct?

23 A. Correct.

24 Q. What about Elgin?

25 A. No, ma'am.

1 Q. Do you know approximately how far Elgin is from your
2 home?

3 A. Again, the only time I see those signs is when I'm
4 travelling from Columbia to Florence, so, I -- no, I'm not
5 real familiar.

6 Q. Do you travel between Columbia and Florence
7 frequently?

8 A. Every Sunday.

9 Q. And based on your weekly travels in passing these
10 exits, is Elgin closer to your home or further away than
11 Camden?

12 A. Camden is further away from my home.

13 Q. Elgin's further away from your home than Camden?

14 A. No, no, no. Camden is further away from my home.

15 Q. So Elgin's closer, correct?

16 A. From the sign that I can remember of the exit, they're
17 not too far from each other.

18 Q. But Elgin's closer to your home than Camden to the
19 best of your recollection from your weekly travels?

20 A. I wouldn't say closer. They're about the same.

21 Q. Are they the same exit?

22 A. If I'm not mistaken, one is one exit up and one is
23 the next exit up.

24 Q. Which is the closer exit?

25 A. I want to say -- it depends from where I'm coming.

1 Q. If you're coming from your home to Florence, which is
2 closer to your home, Elgin or Camden?

3 A. I think -- I want to say it's Camden first because
4 Camden is 90 something I want to say.

5 Q. So your testimony is Camden's closer to your home
6 than Elgin is?

7 A. I would say yes.

8 Q. And your testimony on direct was that Mr. Kendrick
9 only came by your house one time to meet with you,
10 correct?

11 A. Correct.

12 Q. And it was only for twenty minutes?

13 A. About fifteen or twenty minutes.

14 Q. So fifteen or twenty?

15 A. Uh-huh.

16 Q. What did you discuss during this meeting?

17 A. He came by to inform me that he had an investigator
18 that was going to get -- supposedly to get other witnesses
19 and talk to them and he gave me the name of the person who
20 was supposed to be coming by and that he was gonna call me
21 before he came.

22 Q. Did the investigator ever come by?

23 A. He did.

24 Q. Did you tell the investigator that you could account
25 for your son's whereabouts?

1 A. I did.

2 Q. But your testimony is that you never told Mr. Kendrick
3 you could account for your son's whereabouts?

4 A. Because Mr. Kendrick never asked me, the investigator
5 did.

6 Q. But -- so you never told him, correct?

7 A. No.

8 Q. And you testified that you only talked to him this one
9 time, correct?

10 A. Right.

11 Q. But then you testified later that you were subpoenaed
12 by Mr. Kendrick because you told Mr. Kendrick you needed to
13 be subpoenaed for work, correct?

14 A. Correct. That was via phone.

15 Q. That was via telephone. So you did talk to him more
16 than once? You talked to him on the telephone another
17 time?

18 A. Yeah, because I called him, but not because he called
19 me.

20 Q. Okay. Well, how many times did you talk to him
21 overall regardless of who called who?

22 A. Total, two.

23 Q. Two. So the only times you talked to him was this
24 fifteen to twenty-minute conversation and then right
25 before trial when you told Mr. Kendrick you needed to be

1 subpoenaed exclusively for work purposes?

2 A. Correct.

3 Q. All right. And you were subpoenaed?

4 A. Of course.

5 Q. And you were present at trial, correct?

6 A. Correct.

7 Q. And you actually did testify during your son's Jackson
8 vs. Denno hearing, correct?

9 A. I did.

10 Q. During this second conversation where you talked to
11 Mr. Kendrick about being subpoenaed, did you tell him then
12 that you could be an alibi witness for your son?

13 A. No.

14 MS. HARRIGAN: No further questions.

15 REDIRECT EXAMINATION

16 BY MS. SHURLING:

17 Q. Ms. Davis, you testified during the Jackson v. Denno
18 hearing at your son's trial. After that, did you have any
19 discussion with Mr. Kendrick about whether he was going to
20 call you as a witness for any other portion of your son's
21 case?

22 A. Well, I asked him did I have to come back and testify
23 again and he was like no, you don't have to say anything
24 else.

25 Q. Did you stay for the remainder of your son's trial?

1 A. I did.

2 Q. So you were there the entire time?

3 A. I was.

4 Q. Okay. In the what we've called the second
5 conversation with Mr. Kendrick, did you discuss anything
6 with him other than the fact you needed a subpoena for
7 work?

8 A. No, ma'am. Well, I did ask him is there anything
9 else that I need to do and he was like no, just make sure
10 you're there.

11 Q. Okay. And with regard to your having not told
12 Mr. Kendrick about your son's being at your home, being in
13 and out during this time period, you said you never shared
14 that with Mr. Kendrick, but when you were interviewed by
15 Mr. Kendrick he told you to expect an investigator to be
16 getting in touch with you to talk with you?

17 A. Correct.

18 Q. And if I understand your testimony correctly, an
19 investigator working for Mr. Kendrick did, in fact, contact
20 you later?

21 A. Correct.

22 Q. And you told him all about your son's whereabouts on
23 the night of the killing?

24 A. Correct.

25 Q. And, again, he was working for Mr. Kendrick?

1 A. Correct.

2 Q. So what did you believe in terms of what you told this
3 investigator?

4 A. Anything I told him would be conveyed to
5 Mr. Kendrick.

6 MS. SHURLING: Thank you. No further questions.

7 MS. HARRIGAN: Very briefly, Your Honor.

8 RECROSS EXAMINATION

9 BY MS. HARRIGAN:

10 Q. You just testified that after the Jackson v. Denno
11 hearing you asked Mr. Kendrick if you were needed anymore
12 and he told you no, correct?

13 A. Correct.

14 Q. Did you at that time tell Mr. Kendrick that you were
15 an alibi witness for your son?

16 A. No.

17 Q. Why not?

18 A. Again, my -- my understanding is he came to my
19 office -- my house and stated his investigator was coming.
20 His inves -- he said my investigator's coming so, you
21 know, just talk to him. So I thought my contact was his
22 investigator and then his investigator was relaying to
23 him.

24 Q. And the Jackson v. Denno hearing was held during the
25 same week as your son's trial, correct?

- 1 A. It was.
- 2 Q. It was pre-trial right before the trial, right?
- 3 A. Uh-huh.
- 4 Q. And your son was on trial for murder, correct?
- 5 A. Correct.
- 6 Q. Okay. And Mr. Kendrick told you you weren't gonna be
- 7 needed as a witness anymore, correct?
- 8 A. Correct.
- 9 Q. And you knew you had an alibi for your son?
- 10 A. I did.
- 11 Q. And your only explanation for why you didn't tell
- 12 Mr. Kendrick and insist that you be called is just well,
- 13 you already told the investigator?
- 14 A. Well, no. Actually after I got through testifying, I
- 15 was waiting for everybody else to be called and he didn't
- 16 call anybody else but my husband, so in the meantime in
- 17 being there we had a little break, I went to Mr. Kendrick
- 18 and I said okay, I can say where Robert was at and he was
- 19 like well, we're not through yet, we're not through yet,
- 20 and so I said okay.
- 21 Q. So now you're testifying -- you had testified before
- 22 you never told Mr. Kendrick you could be an alibi witness.
- 23 Now you're testifying you actually did tell him you could
- 24 be an alibi witness?
- 25 A. I come back -- after me getting a little break, I

1 went to him because he was gonna -- he was talking to the
2 other two lawyers and I said can I see you for a minute,
3 and he said sure, and it was literally a minute. I said
4 okay, where's his other witness because I can -- I can
5 also say where he was at and he say well, I'm not through
6 yet.

7 Q. So your testimony now, even though before you
8 testified you never told him about the alibi, now you're
9 testifying that during the conclusion -- at the conclusion
10 of the Jackson v. Denno you did tell him you could be an
11 alibi?

12 A. Later on that day while I was at court, yes, ma'am,
13 but not at the beginning when he came to my house that one
14 time, no.

15 Q. Did you -- were you present for your son's entire
16 trial?

17 A. I was.

18 Q. And the Jackson v. Denno was pre-trial, correct,
19 before the jury was sworn?

20 A. Correct.

21 Q. Did you approach Mr. Kendrick again and insist that
22 you be called as an alibi witness?

23 A. No, ma'am.

24 Q. So just that one brief one minute in the middle of the
25 hearing you told him?

1 A. Yes, ma'am.

2 Q. And you never followed up?

3 A. No, ma'am.

4 MS. HARRIGAN: No further questions, Your Honor.

5 MS. SHURLING: Your Honor, could I have one brief
6 redirect?

7 THE COURT: Yes, ma'am.

8 FURTHER REDIRECT EXAMINATION

9 BY MS. SHURLING:

10 Q. At that point, did you have any reason to question
11 whether Mr. Kendrick was going to use you if -- if and
12 when needed to provide testimony concerning your son's
13 whereabouts?

14 A. Honestly, I thought he had my son's best interest at
15 heart, and he's a lawyer, I'm not, so for me to say okay,
16 well, Mr. Kendrick, this is what you need to do, I put my
17 son's life in his hands. I didn't -- this is my first
18 time. I haven't ever been in trouble, so to ask him --
19 what things to ask him, I didn't know what to ask him, but
20 I -- he told me, you know, that I got this, so I thought he
21 had this.

22 Q. Yes, ma'am.

23 MS. SHURLING: No further questions.

24 MS. HARRIGAN: Very briefly, Your Honor, just in
25 response to those last questions.

1 FURTHER RECROSS EXAMINATION

2 BY MS. HARRIGAN:

3 Q. You testified before though that Mr. Kendrick
4 affirmatively let you know you weren't gonna be a witness,
5 correct, after the Jackson v. Denno?

6 A. Well, right. He said -- he told us all to leave
7 before that time.

8 Q. Okay. And you didn't follow that up then with I can
9 be an alibi witness on my son's behalf, please call me?

10 A. Again, like I said, during that little break is when
11 I approached him at that time and let him know -- I mean,
12 where's the rest of the witnesses, I can testify, but he
13 basically said I got this, I'm not through yet.

14 Q. And then you didn't approach him the whole remainder
15 of the week of the trial about being a witness?

16 A. No. No, ma'am.

17 MS. HARRIGAN: No further questions, Your Honor.

18 THE COURT: You may step down. Thank you.

19 (Witness excused.)

20 THE COURT: You may call your next witness.

21 MS. SHURLING: Your Honor, at this time I would call
22 Joshua Kendrick to the stand, please.

23 JOSHUA KENDRICK,

24 having been duly sworn, testified as follows:

25 THE COURT: Thank you. Have a seat and state your

1 full name, please.

2 THE WITNESS: Josh Kendrick, K-E-N-D-R-I-C-K.

3 DIRECT EXAMINATION

4 BY MS. SHURLING:

5 Q. Mr. Kendrick, how long have you been practicing law?

6 A. Roughly twelve years or so.

7 Q. Back in 2007, you would have been practicing about
8 eight years, seven years, something like that?

9 A. About four or five actually.

10 Q. Oh, okay. All right. Math never was my strong suit.
11 My apologies. Were you appointed or retained in this
12 matter?

13 A. Appointed.

14 Q. Okay. And at the time you represented Mr. Cannon, had
15 you tried any previous murder cases?

16 A. I don't think so.

17 Q. Had you tried many cases in the court of General
18 Sessions at that point in your career?

19 A. Yes. More than most people.

20 Q. More than most people? Can you give us an approximate
21 number?

22 A. I don't know. Five to ten maybe.

23 Q. Okay.

24 A. But I'm not positive.

25 Q. Close enough. Mr. Kendrick, at least initially what

1 was your focus in preparing this case for trial?

2 A. I don't know that I had a specific focus in the
3 beginning. I mean, obviously the first thing I saw when I
4 got the case was the confession, which -- so I guess maybe
5 my focus was on the confession and how that would affect
6 the rest of our -- our representation.

7 Q. Okay. So -- and you went straight to what I was
8 digging for. At least initially your priority was to try
9 to keep that confession out?

10 A. Yes.

11 Q. Okay. You were going to trial with two co-defendants?

12 A. Yes.

13 Q. And they were represented by Mark Whitlark and who?

14 A. Neil Riley, I think, is the name of the public
15 defender from Kershaw.

16 Q. And did the three of y'all work together to the extent
17 you could without compromising your role as advocates in
18 preparing this case for trial?

19 A. We did. I worked more with Mr. Whitlark than
20 Mr. Riley, but the three of us were on the same page, I
21 guess.

22 Q. Okay. And obviously at some point prior to trial you
23 subpoenaed documentation concerning a polygraph examination
24 that had supposedly been --

25 MS. HARRIGAN: Your Honor, I would object to the

1 leading. This is direct examination and Ms. Shurling is
2 testifying.

3 MS. SHURLING: I'll do it the long way, Your Honor.

4 THE COURT: Okay. Rephrase.

5 BY MS. SHURLING:

6 Q. In your investigation of this case, did you become
7 aware of any testing that had been done on your client?

8 A. I did.

9 Q. And how did you become aware of that?

10 A. I don't remember. Probably from the discovery.
11 Probably from the discovery file. It mentioned a
12 polygraph.

13 Q. And once you found out about that test, did you take
14 steps to try to obtain further documentation concerning
15 that polygraph examination?

16 A. I subpoenaed it directly from the sheriff's
17 department.

18 Q. Pardon?

19 A. I subpoenaed it directly from the -- I had served
20 a subpoena on the sheriff's department for that
21 documentation.

22 Q. Okay. And were the materials that you specifically
23 requested in the subpoena ever turned over to you?

24 A. During the Jackson v. Denno hearing.

25 Q. Okay. Prior to this trial, were the materials that

1 you requested by subpoena ever turned over to you?

2 A. No.

3 Q. Were you told they were unavailable?

4 A. I don't think I was told anything about them.

5 Q. Okay. Did you discuss with your client the
6 possibility of filing a rule to show cause to ask the
7 State's agency to explain why they had not turned over this
8 material?

9 A. No.

10 Q. How about asking for a continuance to give you an
11 opportunity to get the material and review it with an
12 expert before trial?

13 A. I did review it with an expert. It was just during
14 the trial.

15 Q. Pardon?

16 A. I did review it with an expert. It was just during
17 the trial.

18 Q. Okay.

19 A. So I was able to do that without asking for a
20 continuance.

21 Q. Okay. And that answers another question. We had
22 alleged in the amended application that you should have
23 asked for a sufficiently lengthy recess or, in the
24 alternative, a continuance in order to enable you to
25 consult with an expert. Is it your testimony now that

1 you did, in fact, have an opportunity to consult with an
2 expert?

3 A. Yes.

4 Q. And once you did so, did you discuss the possibility
5 of using that expert as a witness in this case or not?

6 A. No.

7 Q. It was not your opinion that that expert's testimony
8 would be helpful to the defense?

9 A. It was not his opinion that his testimony would be
10 helpful.

11 Q. Okay. Did you ever discuss with the attorneys who
12 were representing the two co-defendants the possibility of
13 filing a joint motion in limine to prohibit the State from
14 introducing testimony concerning polygraph examination in
15 the setting of the Jackson v. Denno proceeding?

16 A. No.

17 Q. Why not?

18 A. I never thought of moving to exclude evidence -- in a
19 pre-trial hearing to exclude evidence. Just --

20 Q. Well, let me back up for a minute. What is your
21 understanding generally of the law concerning the
22 admissibility of polygraph evidence in South Carolina?

23 A. Polygraphs are inadmissible.

24 Q. Inadmissible?

25 A. Correct.

1 Q. For any purpose; isn't that correct?

2 A. That is correct.

3 Q. And in the Jackson versus Denno hearing held in
4 this particular case, how important was your client's
5 credibility?

6 A. It was very important.

7 Q. Now if you had made an individual motion to exclude
8 polygraph evidence, at that point you would have sort of
9 let the cat out of the bag, wouldn't you?

10 A. Correct.

11 Q. And I guess you've indirectly already answered this,
12 but you could have asked co-counsel with whom you said you
13 were working on issues that worked to your joint advantage
14 to join with you in a motion to exclude any reference to
15 polygraph examinations, couldn't you?

16 A. Sure.

17 Q. And would it in your professional opinion have been
18 helpful for the trial judge not to have known that your
19 client had failed the polygraph?

20 A. I don't know.

21 Q. Well, I believe you just agreed that the credibility
22 of your client was an important issue in the Jackson v.
23 Denno hearing, correct?

24 A. Sure.

25 Q. The judge hearing that your client had failed a

1 polygraph certainly didn't help, did it?

2 A. I assume Judge Cooper didn't --

3 Q. Pardon?

4 A. I assume that Judge Cooper did what he was supposed to
5 do, but I -- I don't know. Maybe it would have helped.

6 Q. Okay. And, again, that -- that issue was not
7 discussed with you -- by you either with your client or
8 with co-counsel?

9 A. No, I never brought anything about that up.

10 Q. Okay. Did you at some juncture have the opportunity
11 to review the discovery in this case with your client?

12 A. Yes.

13 Q. And, in addition, you provided him a copy?

14 A. I didn't remember that, but he said I did, so.

15 Q. Okay. Did you discuss with him possible defenses that
16 might be raised in this case?

17 A. Yes.

18 Q. Once the court ruled that the statement attributed to
19 your client was coming in, what was your theory of defense?

20 A. And I'm answering this not from necessarily what I've
21 heard today, more from what I remember and -- and the
22 records I've read. I remember our theory of defense being
23 that someone else had done this and that the police had
24 more or less rushed to judgment against these three guys
25 because of Whitehead. You know, at one point I think we

1 alleged, well, what Mr. Cannon said, it was just a blank
2 statement, but that they had come up with the details in
3 the statement.

4 Q. Well, with regard to the concept of third-party guilt,
5 did you discuss that with your client as a possible defense
6 to this murder charge?

7 A. I think we did because I have notes in my file related
8 to Mr. -- I think his name is Doran, Adrian. I mean, I
9 know we tried to find him because I know that he had some
10 kind of dispute with the victim.

11 Q. Now my wording on my actual allegation may not be the
12 best, but Respondent has pointed out a discussion on the
13 record wherein you and Attorney Whitlark made the court
14 aware that you had made some effort to locate Adrian Doran,
15 correct?

16 A. Correct.

17 Q. And, in fact, at one point you informed the court that
18 you had subpoenaed him or attempted to subpoena him rather.

19 A. We had issued a subpoena for him. We could not find
20 him.

21 Q. And that you had an investigator who had been trying
22 to locate him so that the service could be accomplished?

23 A. Yes. It was my understanding he had gone several
24 places to try to find him.

25 Q. Okay. Why didn't you proffer either the process

1 server or the investigator that had attempted to locate
2 Mr. Doran? Why didn't you proffer testimony from them to
3 establish that Adrian Doran was, in fact, unavailable as a
4 witness?

5 A. I don't -- I don't specifically remember making that
6 decision. I understand where you're going with the
7 allegation of -- of the other witnesses, but we had -- had
8 pretty fully consented to the jury through crossing the
9 State's witnesses that that guy was a suspect. So I don't
10 think I ever considered calling those people, but I don't
11 -- I really don't remember. But the other two witnesses
12 that you mentioned --

13 Q. Okay. There were two witnesses, were there not --

14 A. Yes.

15 Q. -- who had actually specifically indicated that
16 Adrian Doran had made statements in their presence that he
17 intended to harm the victim?

18 A. I don't clearly remember that, but I agree that the
19 record and your allegations say that. I think that's
20 right.

21 Q. Okay. And had you interviewed and subpoenaed
22 Mr. Barker and Mr. Joe Wilson?

23 A. I don't remember. I thought -- I did not interview
24 them personally. I thought we had talked to our
25 investigator about either interviewing them or subpoenaing

1 them, but I don't remember how friendly of a witness they
2 were to us.

3 Q. Okay. What was your reason for not calling those
4 witnesses, if any, again?

5 A. I don't think we needed them. I mean, I read the
6 transcript this weekend cover to cover and it seems like
7 we brought up the issue of Adrian. I mean, to the extent
8 that we even had the police admit that he lied to them
9 about not being involved and they thought he was involved.
10 So I don't -- I don't think it would have added anything.

11 Q. But nobody testified that they had heard Adrian Doran
12 make express threats of violence against the victim, did
13 they?

14 A. I don't think so.

15 Q. And these witnesses would have addressed such
16 allegations?

17 A. I assume. I don't know what they would have said.

18 Q. Do you have any notes in your file that indicate your
19 investigator interviewed Dixon Barker or Joe Wilson?

20 A. I looked through that. It's a long file. I didn't
21 see it.

22 Q. Okay. What about alibi?

23 A. I looked again through -- through my file and through
24 the transcript. I don't clearly remember why or when I
25 specifically decided alibi wasn't gonna work, but I think

1 the problem with the alibi was that it did not cover
2 necessarily the time that this happened.

3 Q. You've heard the testimony a moment ago from the
4 Applicant's mother. Do you today have any independent
5 recollection of your interview with her back
6 contemporaneously at the time of this trial?

7 A. I remember going to her house. I don't remember what
8 we talked about.

9 Q. And did you, in fact, have your investigator interview
10 her?

11 A. I -- I believe he did, but I don't -- but I wasn't --
12 I asked him to interview her and the neighbors and I
13 remember having a conversation with him about that. I
14 don't have any kind of report from him and I don't have
15 any kind of notes. At some point after that, I decided not
16 to pursue an alibi defense.

17 Q. What about Ms. Blow, Ember Blow?

18 A. I honestly don't remember ever talking to her. From
19 what I've heard today, that -- I wouldn't have been
20 interested in using her as an alibi witness.

21 Q. Pardon?

22 A. I wouldn't have been interested in using her as an
23 alibi witness.

24 Q. And why would that be?

25 A. And I may be wrong about this, but it was my

1 understanding that -- that when this happened he -- he
2 could have still gone -- gotten home by the time. It
3 wasn't very far from his house where all this happened.

4 There was an issue about Camden. I mean, this was in
5 Lugoff or Elgin or somewhere, which is fairly close to
6 Northeast Columbia, and I didn't think the alibi was gonna
7 help us.

8 Q. Are you familiar with Pontiac, South Carolina?

9 A. I am.

10 Q. And Pontiac is actually a community that is just above
11 Blythewood, correct?

12 A. I think so.

13 Q. Would you agree with me that Elgin and Camden are very
14 close together?

15 A. I would -- I mean, sure.

16 Q. Okay. I'll let the geography speak for itself.
17 Wouldn't it have been helpful to have established that
18 sometime as recently as -- as close as thirty minutes of
19 when this crime allegedly occurred that your client was at
20 the home of his girlfriend acting normal, nothing wrong?

21 A. I don't know.

22 Q. You didn't consider that?

23 A. I mean, I think you're asking me to -- to get into my
24 opinion on -- you know, looking back, I mean, I don't know.
25 Probably not.

1 Q. Okay. What about the -- the victim's girlfriend in
2 this case testified that she came home -- pardon me -- came
3 to the victim's home and I believed called the victim's
4 mother and had her hold on the phone while she -- pardon me
5 -- grandmother. She called the grandmother and had the
6 grandmother stay on the phone while she went in, discovered
7 the victim and subsequently immediately called 9-1-1,
8 right?

9 A. Yes.

10 Q. Okay. Do you remember reviewing in the discovery the
11 notes of Lieutenant Tisdale that indicated that a -- the
12 next door neighbor had reported seeing the girlfriend home
13 some hour to an hour and a half before the 9-1-1 call?

14 A. I -- yes, because I remember cross-examining somebody
15 during trial. And I don't know if I remember it or if I
16 read it this weekend, but I know I cross-examined somebody
17 about the problem with her timeline.

18 Q. Okay. Well, what reason would you have had for not
19 calling Sheila Rodden to impeach the girlfriend's testimony
20 concerning how long she was there before law enforcement
21 was called?

22 A. I think the police officers conceded what Ms. Rodden
23 had said, so I -- I wouldn't have called her in addition to
24 that.

25 Q. You've heard her testimony today. Would it not have

1 been helpful to have had someone with no familial or even
2 close friendship-type relationship to the accused have
3 raised doubt concerning the veracity of the girlfriend's
4 testimony?

5 A. That could have been helpful.

6 Q. And, again, did you have any particular reason for not
7 utilizing that opportunity?

8 A. Not other than what I just said.

9 Q. Okay. Let's move on. When you reviewed the discovery
10 materials, did they contain documentation that would have
11 established the fact that charges had been brought against
12 the victim in connection with the robbery of Mr. Doran?

13 A. I don't remember where we got that from, but I
14 remember that it became a big issue at trial because we
15 asked a lot of people about it.

16 Q. Okay.

17 MS. SHURLING: A moment, please, Your Honor.

18 Q. Can I get you to take a look at those and see if they
19 look familiar?

20 A. Yes, they do.

21 Q. And what is the subject matter of those documents?

22 A. This is a burglary and a -- I would call it an armed
23 robbery. I don't remember. I guess he was charged with
24 burglary first, but the victim in this case was charged
25 with breaking into the house of Adrian Doran.

1 Q. And, again, Mr. Doran being the individual that was
2 alleged to have made statements to third-party witnesses
3 about his intent to harm the victim?

4 A. Yes.

5 Q. Did you consider introducing any of this documentation
6 to establish for the jury the exact nature of the charges
7 that Mr. Doran was facing?

8 A. I mean, we -- we asked a lot of witnesses about those
9 charges and they admitted to them. I don't know how I
10 would have gotten that in, but no.

11 MS. SHURLING: I move to introduce these, Your Honor,
12 as Applicant's 4.

13 MS. HARRIGAN: No objection.

14 THE COURT: There's no objection. They'll be
15 admitted.

16 (Petitioner/Applicant's Exhibit Number 4, bond
17 information, was marked and admitted into evidence.)

18 BY MS. SHURLING:

19 Q. To just backtrack for a second, once the statement
20 that was attributed to your client came into evidence, what
21 -- short of being able to suppress that statement, what was
22 your backup plan? What was your defense for Mr. Cannon?

23 A. Well, I mean, it's the defense that I think's apparent
24 from the transcript. You know, a term -- a specific term
25 for a defense, that's not -- I mean, I don't use that. I

1 don't say we're gonna have defense one, two and three and
2 if one didn't work -- we had generally argued the entire
3 time that the cops had done a bad job of investigating the
4 case. That they had found our client -- or, well, they
5 found my client and the other two and decided they did it
6 and then they kind of made everything fall into place from
7 there. So we pursued that line and tried to show the jury
8 that that was how it went. And then we tried to show that
9 there were other people that also had a motive, that there
10 was evidence, maybe had done something. So, you know, I
11 don't specifically call that third-party guilt, but that's
12 what it was.

13 Q. Okay. So is it true that there was no direct evidence
14 placing your client at the scene other than the statement?

15 A. I mean, the statement was the main evidence against
16 him, but there was -- if you take that statement away, this
17 case probably wouldn't have gotten very far at all.

18 Q. Okay. And the bulk of the -- the testimony concerning
19 your client having taken and failed a polygraph, that --
20 that was all discussed in-camera, not in the presence of
21 the jury?

22 A. No one ever said the word polygraph and Judge Cooper
23 made it very clear that if someone said that or any
24 derivative term, they were going to jail.

25 Q. Okay. And toward the end of the case the jury came

1 back and announced that they could not reach a verdict with
2 regard to Robert Cannon, didn't they?

3 A. Yes.

4 Q. How do statements work at trial?

5 A. What do you mean by how do statements work?

6 Q. Well -- I was gonna say that was a ridiculous
7 question. I'm sorry. A judge first entertains a motion to
8 suppress a statement in what we call a Jackson v. Denno
9 hearing. After a judge makes the initial determination,
10 does anyone else have to make a determination as to the
11 question of whether a statement was voluntarily and
12 intelligently given?

13 A. The jury.

14 Q. The jury?

15 A. Correct.

16 Q. And in this case, the jury having heard everything
17 about the statement except the polygraph information that
18 the judge heard, was deadlocked on the question of his
19 guilt or innocence, correct?

20 A. They were, but, I mean -- and I'll answer to what
21 extent you want me to. I -- I know the count on the
22 deadlock, and I don't know how, but they were only
23 deadlocked on one of his charges, so I don't know why.

24 Q. Meaning which one?

25 A. I think it was the murder.

1 Q. The big one?

2 A. Right. Well, you know --

3 Q. Okay. Now once the jury announced that they couldn't
4 reach a verdict on Robert Cannon, the judge took it a step
5 further, didn't he, and asked them whether they thought any
6 further deliberations could aid them in reaching a verdict
7 on him?

8 A. I don't remember that, but I agree with that now.

9 Q. If the record illustrates that the forelady said no,
10 that it would not help, can you tell us what, if any,
11 reason you would have had for not making a motion that the
12 case simply be mistried at that point?

13 A. I don't remember.

14 Q. What, if any, reason you would have had for not
15 objecting to a so-called dynamite charge where the forelady
16 had already informed the court that further deliberations
17 would not be helpful?

18 A. I assume you meant an Allen charge and I -- I don't
19 know why I wouldn't have objected to that. I remember all
20 of this happening. I don't remember if this was Friday
21 night or the following Tuesday when the verdict came back,
22 but I remember -- I remember knowing that it was only my
23 client that was hung. I remember somehow knowing the count
24 because it was written down in my notes. I knew it was ten
25 to two for guilty. I don't know how I know that. I think

1 it -- I think maybe they wrote it on the note and they
2 weren't supposed to and I read it upside down, but I -- in
3 my notes it's very clear that they were hung on the one
4 charge, so I don't know why I didn't make an objection to
5 -- or ask for a mistrial at that point.

6 Q. Now the court certainly didn't make any inquiry on the
7 record as to what the count was, did it?

8 A. Again, I saw that in my notes and what I seem to
9 remember is that -- that they had improperly written it on
10 the note that they sent Judge Cooper and they covered it
11 up, but I saw it somehow.

12 Q. Okay. Would you ordinarily object to the jury being
13 asked to continue on with deliberations when they've make
14 it clear that they don't think it's gonna happen?

15 A. You know, in the cases I've tried, I think I've done
16 it both ways, so I don't have an answer to that.

17 Q. Okay.

18 A. I don't have an ordinary practice with that. It would
19 very much depend on the circumstances going on at that
20 exact moment.

21 Q. Did you discuss the principle of accomplice liability
22 or the hand of one being the hand of all with your client
23 prior to trial?

24 A. I don't remember it. I've heard his testimony that
25 he didn't know anything about it, so. I don't remember

1 if I talked to him about it. I don't know how big of a
2 focus it was for me because I didn't believe this is that
3 -- the classic hand of one case where you've got a guy
4 who's kind of along for the ride. I remember thinking
5 that the State didn't do a very good job concentrating on
6 it at the end of trial, which is why, in my opinion, the
7 case hung because there was an issue with whether he had
8 been involved in the murder even though he was there.

9 Q. So you have no recollection of discussing the
10 principle of accomplice liability with your client prior
11 to trial?

12 A. Yeah, no. And I'd be lying if I said I did. I
13 imagine I did because I wanted him to plead guilty to the
14 charges.

15 Q. But you have no recollection of it?

16 A. No, I do not.

17 Q. Do you have any notes in your file that -- that
18 commemorate the fact that you warned him about the hand
19 of one being the hand of all and the law of accomplice
20 liability?

21 A. I do not.

22 Q. What's your recollection with regard to plea offers in
23 this case?

24 A. The one that he testified to, that did not happen.

25 Q. Pardon?

1 A. The one that he testified to did not happen. That was
2 not offered to us.

3 Q. Well, what is your recollection concerning any plea
4 offers that were extended?

5 A. I would have -- and I don't specifically -- there was
6 never a plea offer extended. Well, what I think was -- I
7 don't remember if it was extended to me or I went to talk
8 about it, but I asked John Meadors, the Solicitor, if there
9 was the ability to cut a deal. He said if there's gonna be
10 one, it's gonna be for your guy. And I think maybe him or
11 McDonald they would have worked with, but I don't think we
12 ever got to a number. I -- I'm absolutely sure that we
13 never got to a number because that would have stuck in my
14 head. The plea would have been to manslaughter and the
15 practice here is the Solicitor's Office never gives you any
16 kind of number until after you've done whatever they've
17 asked you to do.

18 Q. Well, was there an offer to plead to manslaughter as
19 opposed to murder?

20 A. If -- if he were willing to cooperate against the
21 co-defendants, then I could have -- I believe I could have
22 gotten that offer, but it was not formally made. But it
23 was absolutely preconditioned on him testifying for the
24 State.

25 Q. Well, did you discuss that with your client?

1 A. He was not willing to do that, no, ma'am. But, yes,
2 we absolutely discussed that.

3 Q. At the point you were having those discussions with
4 your client, if I understand you correctly, it was
5 hypothetical?

6 A. It was hypothetical.

7 Q. What if they were willing to?

8 A. Yes.

9 Q. Okay. Have you ever in your experience as a trial
10 attorney had a client end up taking something once a
11 concrete offer was made when they initially said they
12 wouldn't?

13 A. People change their mind all the time.

14 Q. Okay. So did you ever approach the prosecution about
15 getting a concrete offer in writing in order to better
16 your chances of convincing your client of the wisdom of
17 pleading?

18 A. I -- I probably did, but I don't remember that.

19 Q. Okay. In any event, your file does not reflect any
20 written offer from the Solicitor's Office with regard to
21 your client, does it?

22 A. No, there was never a written offer.

23 Q. Okay. And, again, you dispute there having ever been
24 an offer in -- with the range that was testified to earlier
25 by the Applicant?

1 A. If there had been a range of eight of twelve, I would
2 remember it because what I imagine is that may have been a
3 conversation we had about what he would have been willing
4 to take, but that absolutely wasn't offered to me. I would
5 have remembered that. That would have been a great deal on
6 a case like this from that solicitor.

7 Q. And you said your client absolutely wouldn't cooperate
8 and testify?

9 A. Correct.

10 Q. And what was his reason for not doing so?

11 A. I don't remember.

12 Q. Pardon?

13 A. I don't remember.

14 Q. Well, didn't he consistently tell you he was innocent?

15 A. He did.

16 Q. And that he did not, in fact, participate in the
17 victim's murder?

18 A. He did.

19 Q. Did you ever discuss the concept of a plea pursuant to
20 North Carolina versus Alford with your client?

21 A. No.

22 Q. Did you ever explore with the prosecution the question
23 of whether they might would permit him to enter a plea
24 pursuant to Alford if that would make the difference in
25 pleading versus going to trial?

1 A. Not that I remember. I think, again, the problem was
2 they wanted him to testify, so that would hurt my chances
3 to get a deal like that.

4 Q. Why didn't you make a motion to sever the trial of
5 Mr. Cannon from that of his co-defendants?

6 A. I don't know. I don't -- I don't have an independent
7 reason that I can come up with right now to tell you why I
8 didn't make a motion to sever.

9 Q. Weren't there aspects of McDonald's statement to law
10 enforcement that would have been beneficial to your client?

11 A. I believe there were.

12 Q. And if your client had been tried separately from
13 co-defendant McDonald, would he not have had the
14 opportunity to at least try to have McDonald as a defense
15 witness?

16 A. You can always try. Absolutely. And I -- I --
17 to modify what I said earlier, I don't remember what
18 McDonald's statement said, so I don't know if it would
19 have been beneficial or not. I should probably clarify
20 that.

21 Q. Assuming -- the statement's in evidence, but assuming
22 that it would have provided some evidence that your client
23 was not with McDonald and the other co-defendant when they
24 left the Sonic, that would have been beneficial to your
25 client; would it not?

1 A. And I don't remember what the statement said. If it
2 says he wasn't there when -- when the guy was murdered, it
3 would have been beneficial, but nothing else would have
4 been very helpful.

5 Q. Do you feel like in the -- the beginning of this trial
6 that your remarks in opening led the jury to anticipate
7 that they were gonna hear some kind of defense from you?

8 A. Absolutely not.

9 Q. Well, in -- in Mr. Whitlark's opening statement to the
10 jury, did he not lead them to believe that they were going
11 to be hearing evidence that somebody else did it?

12 A. I don't know what Mr. Whitlark said, but I'm sure
13 that's what he said because that was part of our focus.

14 Q. Okay. And at least a portion of your opening
15 indicated that he hadn't left much for you to say, right?

16 A. I mean, I was the third lawyer. This jury was -- had
17 been sitting there while we ran through this pre-trial
18 stuff. I wasn't adopting their opening statements. I was
19 telling the jury that I was sorry that they had to listen
20 to by now a fourth attorney give an opening statement.

21 What I meant was I wasn't gonna go back over all the -- the
22 stuff we love to tell juries about; thanks for being here,
23 bla, bla, bla, you know, but I wasn't adopting anything.

24 Q. It was your intent to tell them you were gonna get on
25 with it so to speak?

1 A. My intent was to build some relationship with them
2 because I was gonna need their help over the next several
3 days.

4 Q. Okay. What about the redaction of the statements that
5 were introduced at trial? Did you ever consider arguing
6 that despite redaction there remained a Bruton problem
7 where under basic confrontation principles the statement
8 still appeared to reference the -- the statements of the
9 co-defendants still appeared to reference the defendants
10 on trial that day due to the number and gender?

11 A. I thought I did make that argument because I brought
12 in two sets of statements where I typed my client and
13 Mr. McDonald's statements verbatim. I then redacted them
14 the way I think the statements should be redacted to avoid
15 a Bruton problem. I think Judge Cooper -- I don't think he
16 laughed at me, but the solicitor certainly did. He said
17 that's not how it's gonna work, so then we started the
18 white-out and magic marker stuff. I remember having a
19 problem with that, but to what extent I argued it I guess
20 I didn't go over that part of the transcript.

21 Q. Okay. There were some pretty gruesome crime scene
22 photographs introduced in this case, weren't there?

23 A. Well, I saw that in your application. When I read
24 the transcript this weekend, I saw a number of places where
25 we objected to all of those pictures, but then you said

1 something about I didn't object to some. So I -- I don't
2 remember which ones were introduced and which ones weren't.
3 That was a topic of discussion throughout the trial.

4 Q. Have you read the appellate decision in this case?

5 A. I probably read it when it came out, but I don't -- I
6 don't remember it being very long.

7 Q. Are you aware that the Court of Appeals found that you
8 had not preserved contemporaneously with the introduction
9 of these photographs an objection on behalf of Mr. Cannon?

10 A. I heard you say that this morning, but I read my
11 words in the transcript Friday night where I clearly was
12 objecting, so either I'm reading it wrong or someone else
13 read it wrong.

14 Q. Okay.

15 A. Or -- or we're talking about different pictures. I
16 don't know.

17 Q. All right.

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

19 Q. With regard to the defense that you were endeavoring
20 to present on behalf of Mr. Cannon, you said you -- you
21 felt like your -- even though you didn't put up witnesses
22 that your cross-examination of witnesses and that of your
23 -- the counsel for the co-defendants had raised the issue
24 of whether or not someone else had a motive to kill the
25 victim?

1 A. That's what I remember and then when I read the
2 transcript, I remember -- I mean, I remember us -- we
3 asked that question a lot to the point that we got one of
4 the police to testify that he thought Doran was lying.

5 Q. And if you were raising the question of whether
6 someone else had a motive for wanting to harm the victim,
7 would it not have also been helpful to introduce evidence
8 that that person not only had a motive for wanting to harm
9 the victim, but had expressed the intent to harm the
10 victim?

11 A. I guess. And I heard what Mr. Cannon said about how I
12 told him that I wanted the last argument, and that's highly
13 likely. I wouldn't do that now. I don't care about the
14 last argument, but at that time against that solicitor,
15 that may have been a concern so that if I didn't think they
16 were gonna add to what had put up, I probably wouldn't have
17 called them up, but I -- you know, just I don't clearly
18 remember when or why I made that decision.

19 Q. Okay. And we've established that you were not trying
20 to strictly speak and use labels, third-party guilt, with
21 regard to the issue concerning Mr. Doran, but -- but with
22 regard to the idea of trying to generate reasonable doubt
23 by establishing that someone else had a strong motive for
24 wanting to harm the victim, that would not in any way be
25 inconsistent with a companion defense of alibi, would it?

1 A. No.

2 Q. Would offering evidence in support of a defense of
3 alibi not give -- strengthen the potential defense with
4 regard to third-party guilt as opposed to distracting from
5 it?

6 A. If we had had an alibi, yes, but I just didn't think
7 that that alibi they were testifying to was clearly
8 covering the time well enough.

9 Q. Do you have any sort of investigative report in your
10 file that you recall seeing that set forth exactly the time
11 period your client's mother said her son was in and out of
12 her home on the evening in question?

13 A. I don't think I have a report, but I think maybe -- I
14 don't know.

15 Q. Would it be fair to say that the time period that the
16 mother said he was in and out of the home was consistent
17 with the time period when the homicide was alleged to have
18 occurred?

19 MS. HARRIGAN: Your Honor, I'd object. I believe he
20 just testified that he has no independent recollection of
21 the time period and she's asking this witness now to
22 speculate on testimony he heard from earlier today.

23 THE COURT: Rephrase the question.

24 BY MS. SHURLING:

25 Q. Do you recall whether or not your investigator's

1 report to you either in writing or even verbal confirmed
2 that his mother was saying that he was in and out of her
3 home during the time period when this crime occurred?

4 A. I don't remember. I just know how much preparation we
5 put into this case. I didn't forget to put up an alibi
6 witness though. If -- if there was an alibi, I would have
7 presented it.

8 Q. Had you put the State on notice of your intent to
9 pursue an alibi defense?

10 A. No.

11 Q. Are you aware of the rules of court that require you
12 to do so?

13 A. I'm very aware of all -- all the rules.

14 Q. Okay. So is it your position that you had made the
15 decision not to pursue an alibi defense before you went to
16 trial?

17 A. Yes. I knew when the case was going to trial.

18 Q. Pardon?

19 A. I knew when the case was going to trial, so I knew
20 when the ten days would have been up.

21 Q. And so prior to trial you had already made the
22 decision not to put forth the defense of alibi?

23 A. Yes.

24 Q. Had you told your client that?

25 A. I'm sure he would say I did not, so. I don't clearly

1 remember having that conversation.

2 Q. Okay.

3 A. I can't imagine -- we spent a lot of time together.
4 He was actually in Richland County right before the trial,
5 not in Kershaw County.

6 Q. Pardon?

7 A. He was actually in the Richland County Detention
8 Center prior to trial, not Kershaw.

9 Q. Thank you. That's what I thought. I was confused.

10 A. He was in Kershaw for a while, then he got moved for
11 something and then I asked him if he would just stay up
12 here and the solicitor left him there, so it was easier to
13 see him.

14 Q. So he was not wrong about the fact that he had been at
15 the Kershaw County Detention Center, he just was at both
16 places at some point?

17 A. You were both right. He was in Richland and in
18 Kershaw.

19 Q. What about the persons -- the two people, Shannon and
20 Melvin, who lived next door to the mother that had the
21 party on the night that the victim was killed, do you
22 recall discussions with your client about that party and
23 his attending that party?

24 A. I remember talking to him about that, yes, but I
25 don't --

1 Q. Did you ask your investigator to interview those
2 people?

3 A. I did.

4 Q. And what was the result of those interviews?

5 A. I don't remember. I remember the -- the time she's
6 talking about where I went to the house. I thought I'd
7 called, but I def -- I know I went out there and -- but
8 either calling or going out there, the purpose was don't
9 worry when this guy shows up, he's my investigator, not the
10 police investigator. We -- we went into this alibi, so,
11 again, if the alibi had covered the time of the crime, I
12 had all the witnesses, they were all right there, there
13 wouldn't have been any reason for me not to call them. So
14 I -- I just don't have the memory. I'm not gonna lie and
15 say I do remember what I don't. I just assumed that there
16 was a reason why that alibi did not cover the time period,
17 but I -- I don't know.

18 Q. Okay. Do you have anything in your file that
19 documents the specific tasks which your investigator was
20 given to investigate?

21 A. I saw a piece of paper in my file when I was going
22 over it this weekend where I think I wrote down the tasks
23 I was going to give him. I don't have anything that I
24 conveyed to him.

25 Q. And did that piece of paper include the task of

1 interviewing the next door neighbors who supposedly had
2 the party the night of this killing?

3 A. I think it did, but I don't know. I know I told him
4 to do that.

5 Q. And you have -- do you have any notes in your file
6 that indicate what the investigator reported back to you on
7 concerning Shannon and Melvin, the next door neighbors?

8 A. I didn't see it.

9 Q. What about Steven Coffey, Gerard Chandler and Orlando
10 Givens, three individuals that the Applicant says he gave
11 you as names of persons that were at that party that could
12 verify his attendance during the operative time period? Do
13 you have any recollection of having interviewed those
14 witnesses?

15 A. I don't think I did.

16 Q. Do you have any recollection or notes in your file
17 documenting that you assigned that task to your
18 investigator?

19 A. I don't know. I don't remember.

20 Q. Can you lay your hands on the handwritten notes that
21 you referred to a moment ago concerning what you had the
22 investigator -- or what you gave him to do, what his jobs
23 were?

24 A. It's a 700-page file. Absolutely, but it's gonna take
25 as long I -- I'm on electronic format now.

1 Q. Okay.

2 A. You have a copy of it.

3 Q. I have a copy?

4 A. Absolutely. The Attorney General may have a copy.

5 Q. We'll go back to that in just a second.

6 A. I don't mind looking for it.

7 Q. Again, Ember Blow, you said you were pretty clear on
8 the fact that you wouldn't have used her for what reason?

9 A. I don't know that he -- she -- the time was too late
10 to call her as an alibi witness. She -- her -- she
11 established where he was after midnight --

12 Q. Okay.

13 A. -- and that wasn't -- the timeline that I was fighting
14 with the State is what I would have wanted an alibi for,
15 not just whatever time he would have wanted.

16 Q. Okay. Toward that end, did you take a look at the
17 exact mileage between the location where the homicide
18 occurred and Ms. Blow's residence and determine how long it
19 would have taken him to travel there?

20 A. I think I did because when I heard you earlier, I
21 think you guys are incorrect about how far away it was, but
22 if I am wrong, then I will certainly not argue with you on
23 that.

24 Q. Okay. Well, are you aware of anything in your file
25 that documents that you investigated that aspect of her

1 potential testimony?

2 A. Like I said, you -- you have my file today. I didn't
3 go back and look at every page of it to get ready for this.

4 Q. Sure.

5 A. If it's in there, it's in there. If it's not, it's
6 not. I know how far -- I knew how far it was because the
7 -- because the distance between that area and Richland
8 County came up in several aspects, so that's how I knew. I
9 thought maybe it wasn't that, but --

10 Q. And just so the record's clear, I didn't take your
11 only copy of your file?

12 A. No, I have my file.

13 Q. Okay.

14 A. I was telling you I didn't go through it page by page
15 to get ready to testify. You guys can argue about what's
16 in there or not.

17 Q. Absolutely. I just didn't want the record to create
18 the impression that I had taken your file.

19 A. I printed a copy of my file for you.

20 Q. Got you. In having discussions with the Applicant
21 about the possibility of entering a plea in this case, did
22 you discuss with him the likelihood that he -- the State
23 would be able to make a case under the theory of accomplice
24 liability?

25 A. I don't remember that because I don't know that -- I

1 mean, you're saying accomplice liability. I mean, the
2 State's theory was that he was there and he was involved.
3 That three people were involved in the murder, directly
4 involved, so I would have probably gotten more into
5 accomplice liability if he had a more kind of indirect
6 involvement but still would have been found guilty under
7 the accomplice theory. But -- so -- so to answer your
8 question, I don't know. Probably not because I don't know
9 that it was -- I mean, he said he wasn't there, number one,
10 so it really didn't make it -- we didn't have any kind of
11 legal defense, but, you know, the other issue was that the
12 -- the State's theory was that he was there and he was
13 directly involved.

14 Q. Okay.

15 A. So I doubt I talked to him a whole lot about the hands
16 of one.

17 Q. But with regard to the question of actually causing
18 the death of the victim, you have no independent
19 recollection of ever discussing with him the fact that he
20 could be jointly and -- held jointly responsible for the
21 blows inflicted by his co-defendants?

22 A. I actually do remember having that conversation with
23 him now that he -- you bring it up because we talked about
24 the fact that he did not have to strike the killing blow.
25 I -- I seem to have a -- a memory of that, but I don't

1 know. I mean, I have that conversation with more or less
2 everybody that's involved in a murder that has more than
3 one person. That your hitting them and being the cause of
4 death according to some medical person is not -- that's not
5 what matters.

6 Q. Okay.

7 A. So I don't know. I mean, we probably talked about
8 that to the incident, but --

9 Q. Now going back to your earlier testimony, you don't
10 have a specific recollection of discussing with your client
11 in detail the strength of the State's case with reference
12 to the theory of accomplice liability?

13 A. Well, again, now -- now that you say that I do
14 remember -- I do remember that -- I feel like we had the
15 conversation about the -- I call it the killing blow
16 conversation. You don't have to be the one that hit the
17 blow. But, you know, if he was there and was beating on
18 the guy -- I mean, I clearly told him that if he was there,
19 he was liable for the murder. I think mostly likely if
20 they proved -- if he admitted he was there but didn't have
21 anything to do with the murder, I think he still would have
22 been found guilty, but I don't remember that being a -- one
23 of his positions.

24 Q. Understanding that he took the position that he wasn't
25 there at all, in discussing the potential for entering into

1 a plea agreement with the State did you discuss that option
2 with him from the vantage point of the strength of the
3 State's case and the likelihood of him being convicted?

4 A. No, I thought they had a very good case against him
5 and I was -- I remember being somewhat at a loss for why --
6 why he was so insistent on going to trial. Yes, I told him
7 they had a good case against him and a lot of it came from
8 his statement, you know. I did -- I mean, I thought we put
9 a pretty strong case on to get it kicked out, but if the
10 statement doesn't come out, then no matter what I came up
11 with the jury was gonna hear that he admitted to it.

12 Q. And, again, this jury was at least initially hung on
13 the question of your client's guilt?

14 A. They were.

15 Q. So notwithstanding that statement, there were at least
16 according to your notes a couple of holdouts that were not
17 comfortable finding him guilty at first?

18 A. Yeah, they didn't -- they actually didn't understand
19 the hands of one.

20 Q. Pardon?

21 A. They didn't understand the hands of one, if I remember
22 correctly.

23 Q. Well, I believe I had asked you, and if I didn't I'll
24 repeat the question, you didn't interview any of the jurors
25 after the trial, did you?

1 A. Well, I talked to a couple when I was putting my stuff
2 in my car outside the courthouse, but I don't know where I
3 got this information from, if I -- if I understood it from
4 a note they sent to the judge, but I could be totally
5 wrong.

6 Q. No, I'm not talking about the head count. And, I'm
7 sorry, I did exactly what I asked everybody else not to do.
8 I talk for everyone, so.

9 A. Well, I mean, I understand --

10 Q. I'm not talking about the head count. I'm talking
11 about -- you're expressing the opinion that they didn't
12 understand accomplice liability. How do you know that?

13 A. Good -- good point.

14 Q. Okay.

15 A. I do not have independent facts to back that up.

16 Q. Did you subpoena the Applicant's mother as a witness
17 for trial?

18 A. I think what she said is correct. I did not subpoena
19 her, but she needed a subpoena for her job.

20 Q. Well, how about for the stepfather?

21 A. I don't remember if I gave him a subpoena or not. If
22 he didn't need one, then I don't --

23 MS. SHURLING: May I approach, Your Honor.

24 Q. Do you recognize this from your file?

25 A. That's a subpoena for the stepfather. It's not signed

1 though.

2 Q. And this is a subpoena for whom?

3 A. For the mother.

4 Q. Okay. So you have no recollection as to why you had
5 prepared a subpoena for the father?

6 A. I don't know if he needed one for work or not. He was
7 gonna testify at the Denno hearing.

8 Q. All right.

9 A. He did testify.

10 Q. And I'd ask you to identify these documents for the
11 Court, please.

12 A. This is the cover letter and the -- the subpoena I did
13 for Mr. Doran.

14 Q. For Adrian --

15 A. Adrian Doran.

16 Q. All right. And that would be the gentleman that you
17 were trying to suggest had a motive for killing the victim,
18 someone other than your client that had a motive for
19 killing the victim?

20 A. Yes.

21 Q. And, again, once you approached the subject of this
22 witness's absence from the trial, you did not introduce
23 testimony from any witness to document the steps you had
24 taken to locate Mr. Doran as a witness?

25 A. I did not.

1 Q. Did you introduce as an exhibit for the defense your
2 subpoena to prove that you had at least prepared and
3 attempted to serve a subpoena for this individual?

4 A. No.

5 MS. SHURLING: Your Honor, I would move to introduce
6 the subpoena and the transmittal letter that accompanied it
7 dated May 1, 2008, as an Applicant's Exhibit.

8 MS. HARRIGAN: No objection.

9 THE COURT: It will be admitted.

10 (Petitioner/Applicant's Exhibit Number 5, Adrian Doran
11 subpoena, was marked and admitted into evidence.)

12 BY MS. SHURLING:

13 Q. Do you recall the earlier testimony of Ms. Sheila
14 Rodden?

15 A. I do.

16 Q. And had you considered using Ms. Rodden and her son
17 as witnesses to impeach the veracity of the girlfriend's
18 testimony at this trial?

19 A. I don't think so.

20 Q. Then I ask you to identify these documents, please.

21 THE COURT: Ms. Shurling, I think your client's trying
22 to signal you, I believe.

23 MS. SHURLING: I'm sorry.

24 A. These are -- this is a cover letter and a subpoena for
25 Chad Rodden from me, so I guess I did consider using him.

1 Q. Thank you. And does this indicate that the subpoena
2 was actually served?

3 A. No, and I don't know what copy of the subpoena that
4 is. I don't know if -- I don't know if I gave you the --
5 an unexecuted copy that was in my file and didn't have an
6 original, so I don't know if it was served or not.

7 MS. SHURLING: I move to introduce this as
8 Applicant's 6, Your Honor, the transmittal letter and
9 the subpoena.

10 MS. HARRIGAN: No objection.

11 THE COURT: It will be admitted.

12 (Petitioner/Applicant's Exhibit Number 6, Chad Rodden
13 subpoena, was marked and admitted into evidence.)

14 MS. SHURLING: Your Honor, my client advises me that
15 he needs a personal break.

16 THE COURT: Well, and actually this is about a good
17 time to take a lunch break.

18 MS. SHURLING: Thank you, Your Honor.

19 THE COURT: Let's take a lunch break. Mr. Kendrick,
20 I'm gonna remind you during the lunch break not to discuss
21 your testimony with anyone since you've not concluded it
22 and so it would be inappropriate to discuss it.

23 Let's take a lunch break. We'll come back at 2:00
24 and continue on.

25 MS. HARRIGAN: Thank you, Your Honor.

1 (Whereupon, a luncheon recess was taken.)

2 BAILIFF: Court come to order. All rise.

3 THE COURT: Good afternoon. Be seated, please.

4 MR. KENDRICK: Judge, can I --

5 THE COURT: Yes, sir. If you'd, please, retake the

6 witness stand.

7 (Whereupon, Joshua Kendrick retakes the witness

8 stand.)

9 MS. SHURLING: Is everyone all set?

10 THE COURT: I'm all set. We're ready.

11 CONTINUED DIRECT EXAMINATION

12 BY MS. SHURLING:

13 Q. Okay. I won't be but a moment. Mr. Kendrick, can you

14 recall approximately what time of death the pathologist was

15 able to determine?

16 A. No.

17 Q. Would it be consistent with your recollection that

18 Dr. Sexton put the time of death at some time in the early

19 AM hours?

20 A. That's possible.

21 Q. Okay. Let's go back to the autopsy pictures that came

22 in during Dr. Sexton's testimony for a moment.

23 A. Yes.

24 Q. When we addressed that point previously in your

25 testimony, you thought that you had objected to the

1 introduction of those photographs.

2 A. Yes.

3 Q. Have you had a chance to take a look at that again?

4 A. Yes, I -- it looked like Mr. Whitlark objected and I
5 didn't join in the objection.

6 Q. Thank you. So you now realize that you did not
7 preserve that issue for appeal?

8 A. That would be fair.

9 Q. Thank you.

10 MS. SHURLING: One moment's indulgence. Nothing
11 further.

12 THE COURT: Any cross?

13 MS. HARRIGAN: Yes, Your Honor. One moment.
14 May it please the Court?

15 THE COURT: Yes, ma'am.

16 CROSS-EXAMINATION

17 BY MS. HARRIGAN:

18 Q. Mr. Kendrick, you testified that you discussed
19 Mr. Cannon's version of the facts and he told you he was
20 innocent, correct?

21 A. Yes.

22 Q. Did he deny going to the victim's home that night?

23 A. Yes.

24 Q. Have you had an opportunity to review his statement
25 before coming into court today?