

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
Daniel F. Pieper, Circuit Court Judge

Opinion No. 2010-UP-331 (S.C. Ct. App. filed 6/28/2010)
05-GS-10-8601 & 8602

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S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

DAVID M. ROCQUEMORE,

APPELLANT

APPENDIX

Volume 2

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VOLUME II OF II

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In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

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**** STATE'S EXHIBIT 50 HAS BEEN TRANSPORTED TO THE COURT OF APPEALS****

1 THE COURT: Yes. Did you say 44?

2 MS. KNEESE-SHEALY: I did.

3 THE COURT: I'm not showing that. I
4 don't show that as in evidence.

5 (Ms. Kneese-Shealy and Mr. Durant review
6 exhibits.)

7 MR. DURANT: State's exhibit 43 is in.

8 BY MS. KNEESE-SHEALY:

9 Q. I'm going to show what's been marked as
10 state's exhibit 43, and I'm going to ask...

11 MS. KNEESE-SHEALY: We can put it back
12 up, please.

13 BY MS. KNEESE-SHEALY:

14 Q. Now, you told us what was in the very rear of
15 your vehicle. What are these items here?

16 A. Those would be music -- music CD's.

17 Q. And what is on top of those music CD's?

18 A. It's a Taurus catalogue.

19 Q. What is a Taurus catalogue?

20 A. A Taurus is a Brand of a -- a gun.

21 Q. Okay. Thank you. Now, let me ask you about
22 Chris Thomas. Have you talked to Chris Thomas since
23 these events?

24 A. No, ma'am.

25 Q. But prior to that, you and Chris Thomas had

1 been good friends for quite a while; is that correct?

2 A. Yes, ma'am.

3 Q. And how did y'all -- did y'all meet through
4 work?

5 A. Yes. We met on a job called Extra-S
6 (phonetic), an ITM job.

7 Q. Now, when you were at the scene on the night
8 in question, going into the early morning hours when
9 you had gotten back from the store, and after
10 Mr. Gibbs and Mr. Gibbs and Mr. Eason and Mr. Denson
11 arrived, there were words exchanged between the two
12 groups of people; is that correct?

13 A. I wouldn't say there was -- there was -- there
14 was words exchanged, but upon their arrival when they
15 came back, they had a few choice words that they said
16 them things. That's right.

17 Q. Well, let me ask you about what Chris Thomas
18 said if I could. Isn't it true that after there was
19 a lot of mouthing-off going on that he said, "Things
20 are going to quiet down when I go to my trunk"? You
21 heard him say that; did you not?

22 A. No, ma'am.

23 Q. You did not hear Chris Thomas say that before
24 he went to his trunk?

25 A. No, ma'am.

1 Q. Why is it that you haven't talked to Chris
2 Thomas since these events? You mad at him?

3 A. No, I wouldn't say I'm mad at him, but
4 I was ---

5 Q. Did he get you in some trouble with your
6 family?

7 MR. SAVAGE: Allow the witness to answer
8 the question.

9 THE COURT: I'm sorry?

10 MR. SAVAGE: She asked a question, he's
11 answering, she interrupted him.

12 THE COURT: Did you not finish your
13 answer, sir?

14 THE WITNESS: Can you just repeat the
15 question, ma'am?

16 BY MS. KNEESE-SHEALY:

17 Q. Did Chris Thomas get you in some trouble with
18 your family?

19 A. In -- in the past.

20 Q. Regarding these events, Mr. Rocquemore?

21 A. No. It was just a decision that it was just
22 better judgment that everybody -- you know, just to
23 stay away from anybody or everybody that was
24 involved.

25 Q. So even though Chris Thomas had been your

1 friend for how many years? Since 1999?

2 A. Yes, ma'am.

3 Q. You chose to not talk to Chris Thomas anymore
4 after these events?

5 A. That's right.

6 Q. Now, when y'all were gone, you and Dexter,
7 y'all left to go get some more drink materials; is
8 that correct?

9 A. Yes, ma'am.

10 Q. When you got back, is it fair to say that
11 Chris was very upset that the girls had left?

12 A. Christopher Thomas wasn't upset. He wasn't
13 upset at all. He was just -- he was just telling
14 Dexter Brown what had taken place just happened.

15 Q. He wasn't upset about anything?

16 A. No, ma'am.

17 Q. Not at all?

18 A. Not at all.

19 Q. Weren't you upset that the girls were gone?

20 A. Not at all.

21 Q. So y'all had been at a party where there were
22 some attractive young ladies, and when you got back
23 the girls were gone and you weren't upset?

24 A. Yes, the girls were gone ---

25 Q. Is that your testimony?

1 A. --- but I wasn't upset. Yes, ma'am.

2 Q. And Chris Thomas wasn't upset?

3 A. No, ma'am.

4 Q. Well, let's talk about earlier in the evening.

5 When you went to the party in Summerville, you

6 introduced yourself to Mr. Gibbs and Mr. Gibbs and

7 Mr. Eason and Mr. Denson?

8 A. No, ma'am.

9 Q. You didn't introduce yourself to them?

10 A. No, ma'am.

11 Q. Okay. How did you meet them, Mr. Rocquemore?

12 A. It basically was, hey, this is -- I think he

13 referred to me as the shoe man. This is Chris --

14 this is Christopher Thomas -- this is Chris's boy, I

15 mean, you know.

16 Q. Who is saying this? I'm sorry?

17 A. I think it might have been Dexter.

18 Q. Dexter made the introductions?

19 A. Yes.

20 Q. Okay. And you got along with those guys while
21 you were at that party; isn't that true?

22 A. Yes, I did. There was no problems.

23 Q. Okay. And you left and in fact went over to
24 Troy Eason's house; is that correct?

25 A. Yes, for a short time.

1 Q. And you had no problem going over to Troy's
2 house?

3 A. No, there was no problem getting to Troy's
4 house.

5 Q. And you were interested in continuing to
6 socialize with these gentlemen; is that correct?

7 A. I was just -- not necessarily socializing with
8 the gentlemen, but, I mean, I didn't have a problem
9 at that time with being there, no.

10 Q. Okay. So let me make sure I understand what
11 you're saying. You weren't interested in socializing
12 anymore that evening, or you were?

13 A. I really wasn't talking that much to any -- to
14 the guys or even the young ladies, ma'am.

15 Q. So why were you there, Mr. Rocquemoire? You're
16 not interested in socializing. Why were you there?

17 A. To network, ma'am, to see if I could possibly
18 make a few sales.

19 Q. To network and make a few sales. Were there
20 some people in need of gold teeth at the party?

21 A. No, but two of the individuals they had on
22 basketball jerseys, and I also sold basketball
23 jerseys, ma'am, along with basketball sneakers.

24 Q. You told us about your gun.

25 A. Yes, ma'am.

1 Q. You keep your gun in your console?

2 A. Yes, ma'am.

3 Q. Is that correct?

4 A. Yes, ma'am.

5 MS. KNEESE-SHEALY: If I could see
6 state's exhibit number eight, please.

7 (Ms. Kneese-Shealy reviews exhibits.)

8 BY MS. KNEESE-SHEALY:

9 Q. Okay. Showing you what's been marked as
10 state's exhibit 42, is there a spare magazine in
11 there, Mr. Rocquemore?

12 A. Yes, ma'am, it is.

13 Q. So in your console in your car, you had a
14 loaded .45 semiautomatic weapon; is that true?

15 A. Yes, ma'am.

16 Q. And you had a loaded spare magazine?

17 A. Yes, ma'am.

18 Q. And you had a catalogue of guns in the back;
19 is that correct?

20 A. Yes, ma'am.

21 Q. Now, when you were describing for Mr. Savage
22 how you were fending off the people behind you, am I
23 correct in saying that you said you had one hand on
24 the steering wheel?

25 A. Yes, ma'am. I had my right hand gripping the

1 steering wheel to prevent from being drug from my
2 truck, yes.

3 Q. And where -- didn't you also say you had your
4 hand on the console?

5 A. No. The same hand, ma'am. I was just
6 grabbing and holding on to whatever I could.

7 Q. You're not saying you had the same hand on the
8 two things at the same time?

9 A. I'm not saying that, ma'am.

10 Q. Okay. So you're telling us that at some point
11 the hand's on the steering wheel and at some point
12 it's on the console?

13 A. Yes, during the struggle, ma'am, yes.

14 Q. And your door is open, and you're able to hold
15 it in with your right hand and do some kicking with
16 your legs from backwards?

17 A. No, ma'am. I wasn't holding it, nor was I
18 backwards.

19 Q. Well, Mr. Rocquemoire, are you telling this
20 jury that when you say the guys were at your truck
21 that you're having to hold on not to be drug out of
22 your car? Is that what you're telling the jury?

23 A. Can you repeat the question, ma'am?

24 Q. Are you telling this jury that when you went
25 to your car, you opened the door -- is that correct?

1 A. Yes, I did.

2 Q. And are you telling this jury that you were
3 trying to get in the car?

4 A. Yes. I made an attempt to get completely in
5 to my truck, yes.

6 Q. And where were your feet?

7 A. My right -- my right feet was planted on -- on
8 the floorboard. My -- my -- the right of my buttocks
9 was in the seat, and I was holding on to -- to the
10 right -- to the steering wheel and the console with
11 my right hand.

12 Q. And then how is it that you're kicking someone
13 in that position?

14 A. Leaning.

15 Q. Excuse me?

16 A. Leaning, ma'am.

17 Q. I'm sorry, I still didn't understand what you
18 said.

19 A. What I said was leaning.

20 Q. Can you spell the word that you're saying?

21 A. Leaning.

22 Q. Leaning?

23 A. Lean, leaning. I was just fending them off
24 the best I could, ma'am.

25 Q. With one foot on the floorboard, one hand on

1 the console?

2 A. Yes. I was halfway in the truck, yes, ma'am.

3 Q. Mr. Rocquemoire, isn't it true that nobody
4 approached behind you when you were going to that
5 car?

6 A. No, ma'am, that isn't true.

7 Q. Well, tell us, if you would then, are you
8 telling this jury that with one hand, while all this
9 other activity is going on, that you were able to
10 open the console and get the gun out?

11 A. Yes, ma'am.

12 Q. With one hand?

13 A. Yes, ma'am.

14 Q. And you were able to do that while there was
15 other things going on behind you?

16 A. You said behind me; what you do you mean?

17 Q. Well, were people pulling you out of the car
18 or not?

19 A. From the driver -- from the same side of the
20 door, yes, ma'am.

21 Q. So you want this jury to believe that you were
22 able to open the console and get a gun while trying
23 to fend off people trying to pull you out?

24 A. That was during the struggle, yes, ma'am.

25 Q. That's what your testimony is?

1 A. That's what happened, ma'am.

2 Q. Well, let's go back to when the Mr. Gibbs and
3 Mr. Denson and Mr. Eason actually drive up. You say,
4 you say, that they were coming down the street,
5 screeching out profanity, yelling out profanities?

6 A. That's right.

7 Q. And did you say that someone swung a punch at
8 you?

9 A. Yes, ma'am.

10 Q. Who swung a punch at you?

11 A. I'm not sure of the guy's name, but one of the
12 two individuals that approached me.

13 Q. Well, you've been sitting in here both last
14 week and this week when people testified; have you
15 not?

16 A. Yes, ma'am.

17 Q. And you can't tell this jury still who punched
18 you or took a punch at you?

19 A. During the time of the struggle, I wasn't
20 looking for faces or asking names. I did the best to
21 protect myself.

22 Q. You -- I'm sorry, tell -- say that for me
23 again. You did the best to what?

24 A. I did the -- I did the best to protect myself.
25 I wasn't really too concerned with faces or names. I

1 just did the best that I could to defend myself in
2 the situation I was -- that I was in.

3 Q. Well, when you saw Chris Thomas going to his
4 trunk of his vehicle, did you believe he was going to
5 get a weapon?

6 A. Ma'am, I never seen Chris Thomas go to the
7 trunk of his vehicle.

8 Q. Oh, you didn't see Chris Thomas go to the
9 trunk of his vehicle?

10 A. No, ma'am.

11 Q. What were you doing, Mr. Rocquemoire, when
12 Chris Thomas was going to his vehicle?

13 A. I was getting beat up at that time, ma'am.

14 Q. Beat up. This is when the beating started?

15 A. I didn't...

16 Q. Is that when the beating started? When Chris
17 Thomas went to his trunk?

18 A. I'm not sure. Like I said, I'm not sure when
19 Chris Thomas went to his truck. After one of the two
20 individuals swung a punch, I -- right then I took off
21 running to my vehicle. I don't know what Chris
22 Thomas did after that.

23 Q. Well, let me make sure I understand. Were you
24 getting beaten before you took off to your truck?

25 A. I was -- I was punched, and from there I took

1 off running, trying to get to my truck, trying to get
2 into my truck. I was hit and -- I was punched and
3 grabbed on, trying to be prevented from getting to my
4 truck.

5 Q. Mr. Rocquemore, did those guys have any reason
6 to be upset with you?

7 A. I never gave them a reason to be upset with
8 me. No.

9 Q. You will agree they had no reason to be upset
10 with you; is that correct?

11 A. Yes, ma'am.

12 Q. But you would have this jury believe that they
13 are following you to your truck and trying to pull
14 you out of your truck? Is that what you're saying?

15 A. Yes, ma'am.

16 Q. And despite their efforts, you're able to get
17 something out of the console and get out of the car
18 with that gun in your hand; is that correct?

19 A. That's not correct. I was dragged from my
20 truck.

21 Q. You were dragged?

22 A. Yes. Pulled out of my truck.

23 Q. Did your face get all scraped up?

24 A. When I say dragged, I was pulled, pulled and
25 beaten from my truck.

1 Q. Pulled and beaten?

2 A. Yes, ma'am.

3 Q. And Mr. Savage asked you whether or not they
4 could see the gun, and you testified yes, that they
5 could see the gun; is that correct?

6 A. Yes, ma'am.

7 Q. So you're telling this jury that those guys,
8 Mr. Eason, Mr. Densen, and Rodney Gibbs -- because
9 Ronald is back over there with Chris Thomas; is that
10 correct?

11 A. I'm not sure, ma'am. I'm...

12 Q. You don't know that either?

13 A. I'm focused on you, ma'am.

14 Q. Okay. You're focused on me now?

15 A. Yes.

16 Q. Do you (sic) need to slow down so you can
17 understand my question? Do I need to slow down?

18 A. You can keep on, ma'am.

19 Q. When -- you're going to tell this jury, then,
20 that Mr. Eason, Mr. Gibbs, and Mr. Denson, knowing
21 that you had a weapon, continued to pull you out of
22 your vehicle and beat you?

23 A. Like I said, I don't know who it is, who the
24 individuals were, pulling on me and beating on me,
25 but, yes, they continued to beat -- to beat on me

1 once I had my gun in my hand.

2 Q. So you don't know who beat you?

3 A. Not by names or at that time their face --
4 faces either.

5 Q. So you don't know who beat you, by names or
6 faces, but you shot Mr. Denson. Is that correct?

7 A. That was later confirmed when I was -- when I
8 was in police custody, yes, ma'am.

9 Q. So you're telling this jury that you shoot a
10 man not knowing whether he is one of them that beat
11 you?

12 A. Like I said, on my mind was defending myself.

13 Q. You keep responding that way. Can you tell me
14 factually what happened, please, Mr. Rocquemore? Let
15 me make sure I understand this. Are you telling this
16 jury that as you are still in your vehicle, with the
17 weapon, that you are pulled out of your vehicle and
18 being beaten. Is that correct?

19 A. That is correct.

20 MR. SAVAGE: Answered and responded
21 numerous times. It's argumentative.

22 THE COURT: I sustain that. That's been
23 asked and answered, Counsel.

24 BY MS. KNEESE-SHEALY:

25 Q. Once you're out of the vehicle, how is it,

1 then, that you are standing and able to take a swing
2 at Mr. Denson with your weapon?

3 A. You said how I was able to stand and -- as I
4 came out of my vehicle, ma'am, that's when I made the
5 attempt to swing.

6 Q. When you were coming out of your vehicle?

7 A. As they pulled me from my vehicle, that's when
8 I made the attempt to swing.

9 Q. But I thought you just told me they were
10 beating you at that point?

11 A. They were.

12 Q. They were beating you, yet you were able to
13 take a swing?

14 A. Yes, ma'am.

15 Q. When you got out of your vehicle,
16 Mr. Rocquemore, you slammed the door on it; did you
17 not?

18 A. No, ma'am.

19 Q. You didn't slam the door?

20 A. No, ma'am.

21 Q. You've seen the photographs with the door
22 closed in every shot; have you not?

23 A. Yes, they are. Those doors are closed, ma'am.

24 Q. Okay. Are you telling the jury, then, that
25 you didn't take the time to slam that door and come

1 out with that weapon in your hand and start acting
2 bad?

3 A. I never got a chance to slam my door or did I
4 come out with my gun and act bad, no, ma'am.

5 Q. Do you deny, then, that when you approached
6 your vehicle that you opened the door, that you were
7 standing, and that you were reaching in towards the
8 console to get the gun. You deny that?

9 A. That isn't true, ma'am.

10 Q. That's not true? And when you got out, you
11 deny that you then said, "Who's talking now?" or
12 something to that effect while holding the gun?

13 A. Ma'am, I think you said -- that's what Chris
14 Thomas said. I didn't say anything like that, ma'am.

15 Q. Then so what your position is, then, is that
16 when you get out of the vehicle, armed with a weapon,
17 these guys are still trying to hit you?

18 A. Yes. I was still being beat. These were the
19 same individuals that had thrown the drink on the
20 young lady, also, earlier that night.

21 Q. Are you trying to tell us that you had seen
22 them earlier in the evening?

23 A. Pardon me?

24 Q. You're trying to tell us they were guys that
25 you had seen earlier in the evening?

1 A. Yes, at the first initial party. Yes, ma'am.

2 Q. But to answer my question, at the point where
3 you have a weapon, you're telling the jury that these
4 guys kept trying to hit you?

5 A. They never stopped. They never stopped
6 hitting me, ma'am.

7 Q. Despite the fact that you had a weapon?

8 A. Despite the fact I had a weapon.

9 Q. Mr. Rocquemoire, didn't you point that gun at
10 Demar Denson?

11 A. No, ma'am.

12 Q. You dropped the weapon. There's no question
13 about that, right?

14 A. Yes, ma'am, I dropped it.

15 Q. And the person closest to the weapon, the
16 person who succeeds in getting the weapon, is not
17 Rodney Gibbs and is not Troy Eason and is not
18 Demar Denson, but is David Rocquemoire because you're
19 right there with the weapon; is that correct?

20 A. Ma'am, the weapon fell directly on the
21 pavement.

22 Q. My -- my question is, you were closest to the
23 gun; is that not correct?

24 A. I'm not sure who was around -- who was all
25 around the gun, but every -- the gun was circled with

1 individuals, yes, ma'am.

2 Q. You were the one able to get the gun?

3 A. I was the one succeeding in picking it up back
4 off the ground, yes, ma'am.

5 Q. And neither Mr. Eason nor Mr. Gibbs nor
6 Mr. Denson were close enough to you or close enough
7 to the gun to grab it. Is that correct?

8 A. No, ma'am, that's not rue.

9 Q. That's not true? Who got the gun,
10 Mr. Rocquemoire?

11 A. I grabbed the gun, ma'am.

12 Q. When you get that gun, do you not point that
13 gun at Demar Denson and go all the way down across
14 from Dexter's house near that ditch and shoot him?

15 A. No, ma'am.

16 Q. Well, you agree, do you not, that that's 55
17 feet that you covered?

18 A. I'm -- I'm not sure what you -- that -- what
19 you just said, ma'am, didn't happen.

20 Q. You agree that you end up in that ditch, do
21 you not, Mr. Rocquemoire?

22 A. I was running for my truck. I ran for my
23 truck across the street, and that's where I ended up
24 at, yes, ma'am.

25 Q. And you were running, pursuing Mr. Denson,

1 were you not, Mr. Rocquemore?

2 A. Ma'am, at that time I was running for my life.

3 Q. You were running for your life, and you're
4 armed with a weapon?

5 A. Yes, ma'am. I never -- I never made an
6 attempt to shoot anyone after I initially grabbed it
7 out of my console, ma'am. I never wanted to hurt
8 anybody.

9 Q. Well, you've got a catalogue, you know what a
10 gun is, you've got a license. They're deadly
11 weapons; are they not?

12 A. Yes, ma'am.

13 Q. And things changed once you armed yourself
14 with a deadly weapon; did they not, Mr. Rocquemore?

15 A. You said things changed. I was still being
16 beaten up or was still being pursued, so that didn't
17 change. Like I said before, ma'am, when I initially
18 grabbed the weapon the first time, I still didn't
19 fire my weapon because I never wanted to hurt
20 anybody. I was just trying to protect myself.

21 Q. Trying to protect yourself?

22 A. Yes, ma'am.

23 Q. Well, once you get the weapon, you never
24 return to you car; do you, Mr. Rocquemore?

25 A. I never got an opportunity to. The police --

1 I was -- I was in police custody.

2 Q. I'm talking about before the shots,
3 Mr. Rocquemore. You arm yourself with a weapon, and
4 you want this jury to believe that those guys weren't
5 like "oh, gosh, he's got a weapon now"? You want the
6 jury to believe they were still coming at you?

7 A. Yes, ma'am. They continued to beat me even
8 after I had my weapon inside of my hand.

9 Q. And at no point did you then walk away from
10 it, walk away from it with a loaded weapon, and get
11 back in that car and drive away? Never did you do
12 that, did you, Mr. Rocquemore?

13 A. Not at all, ma'am.

14 Q. And you've indicated to us that you fired that
15 weapon?

16 A. As I -- as I -- as I was tackled and beaten to
17 the ground as the gun went off.

18 Q. The gun went off, or you fired it,
19 Mr. Rocquemore?

20 A. The gun -- ma'am, the gun was in my hand, and
21 like said, as I fell to the ground the gun fired.

22 Q. The gun fired?

23 A. Yes.

24 Q. You shot Mr. Denson twice; did you not,
25 Mr. Rocquemore?

1 A. That's what I was told once I was in police
2 custody, yes, ma'am.

3 Q. So are you denying, then, that you shot him
4 twice?

5 A. No, ma'am, I'm not denying.

6 Q. So if the gun went off, did it just go off
7 twice, Mr. Rocquemore?

8 A. Ma'am, as I racing -- as I -- as I was beaten
9 to the ground, the last desperation, I mean, the gun
10 -- the gun fired, ma'am. I'm not denying I fired the
11 weapon, ma'am.

12 Q. And you're not denying that you fired it
13 twice?

14 A. I'm not sure. I just -- I'm not sure how many
15 times I fired it. One or two or the detail, I don't
16 know.

17 Q. And you want the jury to believe that they
18 were still coming at you during this whole time?

19 A. Even after I fired my weapon, I was still
20 being beat. The beating never stopped.

21 Q. Did Ronald Gibbs ever pull a gun on you that
22 evening?

23 A. I'm not sure who Ronald Gibbs is, ma'am.

24 Q. Did anybody pull a gun on you...

25 A. No, ma'am.

1 Q. --- that evening?

2 A. No, ma'am.

3 Q. And the men that you've seen come in here and
4 testify, did any of those guys pull a gun on you?

5 A. No, ma'am.

6 Q. You shot Demar Denson when he was unarmed.
7 Isn't that correct?

8 A. I don't know if he -- if he was armed or not,
9 ma'am.

10 Q. You never saw a weapon, did you,
11 Mr. Rocquemoire?

12 A. Ma'am, like I said, I was just being beaten.
13 I was trying to defend myself, protect myself, ma'am.

14 Q. When you -- when the police got out there at
15 about 4:05 and from that time until about 6:05, I
16 want to ask you about that time period, okay?

17 A. Yes, ma'am.

18 Q. You would agree, would you not, that a variety
19 of officers arrived at the scene?

20 A. I mean, there was -- yes, there was a lot of
21 commotion on the street. The law enforcement,
22 everyone, the medical personnel, yes.

23 Q. So the EMS was there? Is that correct?

24 A. Yes, ma'am. They arrived shortly.

25 Q. And by the way, they took a look at you at the

1 scene and didn't take you in; isn't that true?

2 A. I'm not sure if they took a look at me or not,
3 ma'am. I was placed in the back of a police car, and
4 that's where I stayed until I was taken to -- I don't
5 know if it's the police precinct or to Leeds. I
6 don't know where I was.

7 Q. Okay. But you don't remember, then, the EMS
8 at the scene taking a look at you?

9 A. No, ma'am.

10 Q. And there were several police officers, and
11 law enforcement kept arriving; is that correct?

12 A. Yes, ma'am.

13 Q. And at some point you have your hands bagged;
14 is that correct?

15 A. Yes, ma'am.

16 Q. And one of the officers put you in his
17 cruiser. Is that correct?

18 A. Well, after they picked me up off the ground,
19 yes, they put me in the back of a police car.

20 Q. Tell this jury, if you would, from 4:05 in the
21 morning until 6:05 in the morning, did you ever say
22 one thing to law enforcement about how you got
23 jumped?

24 A. They never -- I never was given -- given the
25 opportunity, ma'am.

1 Q. You were never given the opportunity?

2 A. No, ma'am. They placed me in a police car and
3 attended to the street.

4 Q. Well, when they placed you in the police car,
5 did you tell the officer then?

6 MR. SAVAGE: Asked and answered,
7 Your Honor.

8 THE COURT: I'll allow that. Go ahead.

9 BY MS. KNEESE-SHEALY:

10 Q. Do you want me to repeat that?

11 A. Yes, ma'am.

12 Q. When the police officer put you in the car, he
13 walked you from the ditch across from Dexter's and
14 put you in his police car; is that correct?

15 A. From -- from the film, there was two officers
16 that picked me up ---

17 Q. Okay, two officers.

18 A. --- and placed me inside.

19 Q. Did you tell those two officers that you
20 defended yourself?

21 A. They -- they placed me in the car and just
22 closed the door. They never -- they never asked me
23 anything, ma'am.

24 Q. You didn't scream it out, Mr. Rocquemore? "I
25 was defending myself"?

1 A. At that time, ma'am, I don't know what I was
2 thinking about, I mean.

3 Q. So the answer is no?

4 A. Well, I never -- I never told them. They
5 never asked me. No, ma'am. I -- I never told them.
6 No.

7 Q. You didn't think it was important to tell law
8 enforcement that you were defending your life because
9 you had been beaten so badly?

10 A. But to be perfectly honest, I figured -- I
11 mean, I'm not going to say I figured, but by the way
12 I was beaten, I mean, I don't know which they are,
13 why they couldn't, you know -- they didn't -- they
14 never -- they never came across as to be helping me,
15 as to really wanting to know what happened, they
16 never asked me why did I shoot somebody or why was I
17 carrying a firearm. They asked me none of those
18 questions, ma'am.

19 Q. But you didn't tell them, Mr. Rocquemoire, did
20 you?

21 A. No, ma'am.

22 Q. And you didn't tell them that anybody tried to
23 prevent you from leaving initially at that car, did
24 you?

25 A. No, ma'am. They never asked me.

1 Q. And in addition to those two officers, you
2 didn't tell the lieutenant that was bagging your
3 hands, did you?

4 A. I'm not sure who bagged my hands, ma'am.

5 Q. Did you tell anyone, Mr. Rocquemore? Did you
6 tell anyone your side of the story between 4:05 and
7 6:05 that morning?

8 A. No, ma'am. I was just trying to just gather
9 my bearings together. I was beaten. I was beaten up
10 bad, ma'am.

11 Q. When you were still in the ditch, those guys
12 were trying to get that gun from you; were they not?

13 A. I'm not sure. I mean, they just continued to
14 beat me, continued to punch and kick me.

15 Q. Is that the only response you can have to my
16 questions, Mr. Rocquemore?

17 MR. SAVAGE: Objection. Argumentative,
18 Your Honor.

19 THE COURT: I sustain that.

20 BY MS. KNEESE-SHEALY:

21 Q. My question is, were those guys trying to get
22 the gun away from you, Mr. Rocquemore, when you were
23 in the ditch?

24 MR. SAVAGE: Asked and answered, Your
25 Honor.

1 MS. KNEESE-SHEALY: I don't know that he
2 did.

3 THE COURT: Go ahead. Go ahead. You'll
4 direct your response to the Court.

5 Go ahead.

6 THE WITNESS: Ma'am, they were trying to
7 kill me.

8 BY MS. KNEESE-SHEALY:

9 Q. They were trying to kill you?

10 A. Yes, ma'am.

11 Q. Now, you told us earlier they were trying to
12 beat you and that they were beating you, but now you
13 tell us they were trying to kill you?

14 A. Yes, ma'am.

15 Q. Were they trying to kill you when you were in
16 the ditch, Mr. Rocquemoore?

17 A. The reason, ma'am, the reason why I say that
18 they were trying to kill me, because once they began
19 beating me up, they never stopped. Even once I could
20 grab my gun, even after I tried to strike the
21 individuals, they never stopped beating me.

22 Q. They never stopped beating you?

23 A. Yes, ma'am.

24 Q. Now, Mr. Rocquemoore, when you were taken to
25 jail after you were arrested that evening, you were

1 making some phone calls to some family members; were
2 you not?

3 A. After I came from the hospital, yes, I made
4 calls, yes, ma'am.

5 Q. And who was Deanna? Is she your sister?

6 A. Yes, ma'am.

7 Q. And do you recall telling Deanna that "they
8 tried to jump me, they tried to rob my stuff" when
9 she asked you on August 14th, 2005, during a phone
10 call from the jail what happened?

11 A. Can you repeat the question, ma'am?

12 Q. Do you recall telling Deanna on August 14th,
13 2005 -- that was your first phone call out; is that
14 correct? That's the first person you talked to?

15 A. I can't recall, ma'am.

16 Q. Okay. You don't deny that you talked to
17 Deanna from the jail?

18 A. No, ma'am, no.

19 Q. On August 14th, 2005, when you were at the
20 jail, did you call your sister and tell her "they
21 tried to jump me, tried to rob my stuff"?

22 A. I may have told her that, ma'am.

23 Q. And you haven't told us anything about robbing
24 your stuff. Did you make that up for Deanna?

25 A. No, ma'am.

1 Q. You didn't make that up for Deanna?

2 A. No, ma'am.

3 Q. So are you telling us now that they were
4 trying to rob your stuff?

5 A. To be perfectly honest, ma'am, that's the only
6 thing, that's the only thing that I could come up
7 with due to the fact that I had a truckload full of
8 merchandise. I was introduced to them as the shoe
9 man. They were -- I would say they were familiar
10 with -- with the things that I had in my truck. So
11 that -- that's all I could come up with, because I
12 hadn't -- I mean, they -- like I said, I never -- I
13 didn't give them a reason to come back to like start
14 a fight with me. So that's the only thing that I
15 could -- that was the only reason that I thought they
16 would come back and do something.

17 Q. So your testimony is that was the only thing
18 you could come up with?

19 A. That was the only thing, ma'am, in my mind, to
20 trigger individuals to beat up on somebody
21 relentlessly as they did.

22 Q. And that's what you told your sister as to
23 what happened?

24 A. Pardon me?

25 Q. That's what you told your sister is what

1 happened?

2 A. Yes, that -- that they tried rob me.

3 Q. You didn't tell her this was your theory. You
4 told her that's what happened. Is that correct?

5 A. I don't understand what you mean by that's my
6 theory as to what happened.

7 Q. Well, you told us that that was the only thing
8 you could come up with as to what happened, but you
9 didn't tell us ---

10 MR. SAVAGE: Your Honor, that's a
11 misleading question. What he is trying to explain
12 is...

13 THE COURT: She's asking you, sir,
14 whether or not that's what you believe happened, or
15 is that what you actually said happened.

16 That's what you're asking, Counsel?

17 THE WITNESS: Ma'am, at that time, yes,
18 that's what I believed was -- that's what I believed
19 happened as I was trying -- I was attempted to be
20 robbed, yes, ma'am.

21 BY MS. KNEESE-SHEALY:

22 Q. Are you telling the jury today that they tried
23 to rob you?

24 A. Ma'am, today? I don't -- I don't know what
25 they were trying to do.

1 Q. Did you tell your sister on August 14th,
2 2005 ---

3 MR. SAVAGE: Asked and answered multiple
4 times.

5 MS. KNEESE-SHEALY: Your Honor, I don't
6 think so.

7 THE COURT: Well, if you're asking a
8 specific person, I'll go ahead and allow it, but
9 you've asked the general question a few times. Go
10 ahead.

11 BY MS. KNEESE-SHEALY:

12 Q. On August 14th, did you tell your sister that
13 they had tried to rob you?

14 A. Yes, ma'am.

15 Q. And later on August 14th, 2005, while you were
16 at the jail and called your sister Deanna, do you
17 recall telling her that "a truckload of dudes pulled
18 up"?

19 A. Yes, ma'am.

20 Q. Do you recall telling her, "Man, they took my
21 watch and ring"?

22 A. Yes, ma'am.

23 Q. So are you telling this jury that your watch
24 and ring was taken?

25 A. Yes, ma'am, it was.

1 Q. Well, you didn't testify to that earlier, did
2 you, Mr. Rocquemore?

3 A. I didn't probably say that, ma'am.

4 Q. But you're saying that now?

5 A. I'm not saying it. You asked me the question,
6 and I answered it, ma'am. At that time, I mean, I
7 was beaten. Like I said, I was beaten up and, like,
8 you know, when I -- when the police picked me up, my
9 belongings, some of my belongings were missing, which
10 was my watch and my ring.

11 Like I said, I -- I never gave these guys a
12 reason to do anything to me, and that's the only
13 thing that I could come up with in my mind as to why
14 they would, you know, just come back and react and,
15 you know, and jump me and change like that.

16 Q. Mr. Rocquemore, when you were continuing to be
17 in jail for a time, you had further conversations
18 with Deanna, did you not, and your mother and other
19 family members?

20 A. Yes, ma'am.

21 Q. You've never mentioned again that they took
22 your watch and ring, did you?

23 A. No. Ma'am, I was instructed by my attorney at
24 the time, don't discuss the case anymore, so I just
25 stopped, because he...

1 Q. But prior to that, you had talked to your
2 family members numerous times; is that correct?

3 A. Yes, ma'am.

4 Q. And you've never mentioned again that your
5 watch and ring had been stolen?

6 A. Ma'am, I was instructed don't -- not to
7 disclose with anyone or not to talk about what
8 happened over the phone.

9 Q. But, Mr. Rocquemoire, I'm asking you prior to
10 your being instructed, there was a time period that
11 you didn't have an attorney and you were talking to
12 your family members freely; is that correct?

13 A. Yes, ma'am.

14 Q. And you never mentioned that watch and ring
15 being stolen, again, did you?

16 A. I'm not sure. I think I may have. I'm not
17 sure.

18 Q. And also on August 14, 2005, when talking to
19 Deanna while you were at the jail, do you recall
20 telling Deanna, "Yo, man, Deanna, this dude, man, he
21 took my sneakers and all that, man"?

22 A. Yes, it's possible that I did tell her that.
23 I figured that they made off with some of my stuff.
24 Like I said, that was the only reason I could come up
25 logically in my mind as to why I was attacked that

1 night.

2 Q. Well, is it fair to say that your sister was
3 confused as to why -- how this happened?

4 A. Ma'am?

5 Q. Why it happened?

6 A. I'm not sure if she was confused or not,
7 ma'am.

8 Q. Do you recall later telling Deanna on that
9 same date in question, "Yeah, you know what I'm
10 saying, like I'm saying before that even happened, I
11 wasn't trying to let them get close enough to me."
12 Do you recall telling Deanna that?

13 A. Yes, ma'am.

14 Q. And that's because they never got close enough
15 to you, did they, Mr. Rocquemoire?

16 A. Ma'am, at that time, like I said, I made an
17 attempt to run to my vehicle to get into my truck.

18 Q. Mr. Rocquemoire, they didn't get close enough
19 to you when you were at your vehicle, did they?

20 A. Yes, ma'am, they were -- I was beat up at my
21 vehicle, and once I was back outside my vehicle, I
22 was still being beaten up, beat on.

23 Q. But you told Deanna, "I wasn't trying to let
24 them get close enough to me." Is that correct?

25 A. Like I said, I may have told -- I may have

1 told her that, but like I said, in reference to me
2 leaving, me trying to run to my truck. I wasn't
3 trying to let anyone get close to me. All I wanted
4 to do was just leave, ma'am.

5 Q. Mr. Rocquemoire, is it fair to say that you
6 were trying to convince your family that they were --
7 they had stolen your stuff, your stuff out of your
8 vehicle?

9 A. No, ma'am, I wasn't trying to convince my
10 family that they had stolen any of the belong -- any
11 of my belongings out of my truck. Like I said, at
12 the time that was the only thing that I could
13 logically -- that I could think of as to why four
14 individuals would come back and start something with
15 me. We -- we had no problems previous that night.

16 Q. So that's why you tell Deanna that the watch
17 and ring were stolen?

18 MR. SAVAGE: Asked and answered a couple
19 of times, Your Honor.

20 THE COURT: No. I'll allow that. Go
21 ahead.

22 THE WITNESS: Ask your question again,
23 ma'am?

24 BY MS. KNEESE-SHEALY:

25 Q. Is that why you told Deanna that your watch

1 and ring had been stolen?

2 A. Well, I told her that because once -- like I
3 said, once I was -- once the police had me in
4 custody, my jewelry that I had on that night it was
5 not on my arm or my finger.

6 Q. Who's Mark, Mr. Rocquemore?

7 A. Say it again, ma'am?

8 Q. Who is Mark?

9 A. Mark, that's my brother.

10 Q. Okay. And did you and Deanna and Mark have a
11 conversation on August 14th where y'all did a
12 three-way call when you were at the jail? Do you
13 recall that?

14 A. Yes, we talked.

15 Q. And do you recall telling them, "I'm saying,
16 look, I ain't even tried to shoot him at first, I hit
17 him with it first, like you know what I'm saying,
18 because he was all snatching on me and that was my --
19 I turned around and hit him, and then when I hit him
20 it fell, and then and him his friends tried to rush
21 that joint, and I picked it up, man. Yeah, they was
22 rushing me, and they was all on top of me." Do you
23 recall telling them?

24 A. Yes, ma'am.

25 Q. You said it was like a dog pile and you were

1 on the bottom?

2 MR. SAVAGE: Your Honor, none of this is
3 inconsistent with any of his testimony. We object to
4 this line of questioning.

5 THE COURT: Approach. When you have an
6 objection, state the nature of the objection,
7 Counsel. Approach the bench.

8 (There was an off-the-record bench
9 conference in the presence of the jury but out of the
10 hearing of the jury.)

11 (Said bench conference being concluded,
12 the following proceedings were had:)

13 THE COURT: Ladies and gentlemen, I'll
14 send you to the jury room. Do not discuss it in any
15 way. Thank you very much.

16 (Whereupon, the jury goes to the jury
17 room at approximately at 5:11 p.m.)

18 THE COURT: Please be seated, sir.
19 What's your objection, please?

20 MR. SAVAGE: The objection is that the
21 solicitor is trying to place in evidence what's not
22 in evidence. She's reading from some -- from some
23 document that she purports to the jury to be a
24 conversation, a three-way -- I guess they were
25 recording the conversation -- or a two-way

1 conversation, but she's -- she's reading into the
2 record and before the jury from items that are not
3 evidence.

4 MS. KNEESE-SHEALY: Your Honor, it's
5 cross-examination. I'm questioning him as to whether
6 or not he had said anything. I am reading from my
7 notes for cross-examination. I am asking him about
8 the substance of the statement in case he denies it,
9 so that we then can use, under the rule, extrinsic
10 evidence. I think it's completely appropriate.

11 MR. SAVAGE: But it's not a statement.
12 It's her notes. If she wants to play the recording
13 of the telephone conversation, maybe then she could
14 say is this your voice, do you recognize this, is
15 this what you said? He either says, yes, it is or,
16 no, it isn't. Then it becomes ---

17 MS. KNEESE-SHEALY: He hasn't indicated
18 -- excuse me.

19 MR. SAVAGE: Then maybe it becomes an
20 inconsistent statement and she can go on, but what
21 she's doing is she's introducing evidence that's not
22 evidence.

23 THE COURT: Well ---

24 MS. KNEESE-SHEALY: Your Honor, I'm
25 asking him whether he said it. He's indicated that

1 he did.

2 THE COURT: If it's a prior inconsistent
3 statement, she needs to ask him -- inform him about
4 the nature of the statement, the time and place, etc.
5 We went through this analysis before.

6 MR. SAVAGE: Yes. But she ---

7 THE COURT: But she doesn't have to let
8 him hear it.

9 MR. SAVAGE: But she can't, in front of
10 the jury, have these documents that purport by visual
11 observation to be authenticated transcripts of some
12 telephone conversation.

13 THE COURT: If you're gesturing in such a
14 way, then perhaps that's true, but I didn't ---

15 MR. SAVAGE: The mere looking at it and
16 reading it sends a visual.

17 THE COURT: Well, it's her notes. She's
18 entitled to have notes. She's entitled to have notes
19 to ask questions from, Counsel.

20 MR. SAVAGE: How is he going to know
21 without having reference to his notes of the
22 conversation or some other document or medium to
23 review whether or not that is the conversation?

24 THE COURT: Well, that's the same with
25 any conversation. Either you recognize it or you

1 don't. And she asks him did he make that statement
2 or did he have -- does he recall that, and explain
3 the nature of the details of that conversation, when
4 it took place, and afford him the opportunity to
5 either admit or deny it.

6 If he admits it, then you move on. If he
7 denies it, then it's denied, and then go to the next
8 part of the analysis as to whether or not that
9 conversation should be admissible as extrinsic --
10 extrinsic evidence.

11 MR. SAVAGE: And I don't know that we've
12 gotten there because I don't hear him ever denying
13 anything. He's admitting it, and he's repeatedly
14 questioned about the same thing.

15 THE COURT: Well, I mean, at this point
16 he is admitting it, so we are not triggering the rest
17 of the analysis. You're saying that he needs the
18 opportunity to have his notes and all, but he's not
19 saying he doesn't recall ---

20 MR. SAVAGE: Well, then maybe ---

21 THE COURT: --- or he doesn't remember or
22 it's not the statement. We're not getting to the
23 second part of the analysis.

24 MR. SAVAGE: But we're not getting off
25 the first part, either.

1 THE COURT: Well...

2 MR. SAVAGE: It's repeated questions
3 about the same thing ---

4 THE COURT: That's a different objection.

5 MR. SAVAGE: --- over and over and over
6 again.

7 THE COURT: That's a different objection.
8 That's, you know, an objection that it's cumulative
9 or asked and answered. It's not an objection that he
10 has not been afforded his notes to recall his
11 conversation. Perhaps strategically that would be
12 what one would want, but that is not what the nature
13 of the objection is, Mr. Savage.

14 MR. SAVAGE: Thank you.

15 THE COURT: Let's take a short break.

16 Sir, You may step down during the break.
17 You may not discuss your testimony with anyone. Do
18 you understand?

19 THE WITNESS: (The witness leaves the
20 witness stand.)

21 (A break is taken at approximately
22 5:15 p.m.)

23 (The trial reconvenes at approximately
24 5:25 p.m., the defendant being present with counsel,
25 and the following proceedings were had:)

1 THE COURT: Are y'all ready?

2 MS. KNEESE-SHEALY: One moment,
3 Your Honor.

4 THE COURT: Okay.

5 (Ms. Kneese-Shealy and Mr. Durant
6 confer.)

7 THE COURT: Tell me when you're ready.

8 MS. KNEESE-SHEALY: Oh, I apologize. I'm
9 ready, Your Honor.

10 THE COURT: Still waiting on the bailiff.

11 (There was off-the-record discussion.)

12 THE COURT: They're coming in now.

13 (Whereupon, the jury returns to the
14 courtroom at approximately 5:27 p.m.)

15 THE BAILIFF: All seated, Your Honor.

16 THE COURT: Thank you. Please be seated.
17 Go ahead. Proceed with your questions.
18 Go ahead, Counsel.

19 DAVID M. ROCQUEMORE,
20 previously duly sworn, resumes the witness stand and
21 is examined and testifies further as follows:

22 CROSS-EXAMINATION (CONTINUED)

23 BY MS. KNEESE-SHEALY:

24 Q. Mr. Rocquemoire, you testified this afternoon
25 that those guys tried to kill you. That's your

1 testimony; is that correct?

2 (There was off-the-record discussion.)

3 THE COURT: Start all over again. Just
4 start over. Go ahead.

5 MS. KNEESE-SHEALY: Okay.

6 BY MS. KNEESE-SHEALY:

7 Q. You testified this afternoon that those guys
8 tried to kill you?

9 A. Yes, ma'am.

10 Q. Is that correct?

11 A. Yes, ma'am.

12 Q. When you were lying in that ditch, Ronald
13 Gibbs got that gun from you; did he not?

14 A. I'm not sure who got the gun from me.

15 Q. Someone got the gun from you?

16 A. Yes, ma'am.

17 Q. Is that correct?

18 A. Yes, ma'am.

19 Q. And no one tried to kill you; isn't that
20 correct?

21 A. I'm not sure if anybody tried to shoot me or
22 not. I'm not sure.

23 MS. KNEESE-SHEALY: I have no further
24 questions. Thank you, Your Honor.

25 THE COURT: Any follow up, Mr. Savage?

1 MR. SAVAGE: Yes. We'll be brief, I
2 hope, Your Honor.

3 REDIRECT EXAMINATION

4 BY MR. SAVAGE:

5 Q. Mr. Rocquemore, maybe I forgot to you ask you
6 some questions when I was asking you earlier, and the
7 prosecutor has made statements that were in the form
8 of a question about telephone recordings. Let's set
9 the stage for that if you would. The night of this
10 incident, did you lose consciousness?

11 A. Yes, sir.

12 Q. And is that documented in your medical
13 records?

14 A. I'm not sure if they are or not.

15 Q. Did you ever see the medical records from the
16 hospital?

17 MS. KNEESE-SHEALY: Objection,
18 Your Honor.

19 THE COURT: What's your objection?

20 MS. KNEESE-SHEALY: May we approach?

21 THE COURT: Yes. Approach. Approach,
22 Counsel.

23 (There was an off-the-record bench
24 conference in the presence of the jury but out of the
25 hearing of the jury.)

1 (Said bench conference being concluded,
2 the following proceedings were had:)

3 BY MR. SAVAGE:

4 Q. The -- let's step back another before we go
5 into that. When you left the incident location,
6 where did you go? You went to the police station?

7 A. Yes.

8 Q. How did you leave the police station?

9 A. I'm not...

10 Q. Who transported you?

11 A. I'm not sure how I ended up in the -- I just
12 -- I just was at the hospital.

13 Q. Do you remember riding in an ambulance?

14 A. No, sir.

15 Q. You don't remember anything?

16 A. No, sir.

17 Q. Had you lost consciousness?

18 A. Yes, sir.

19 Q. And were you examined at the hospital?

20 A. Yes, sir.

21 Q. Were you -- the jury doesn't know what a jail
22 is like except from the outside. Is there a hospital
23 in the jail?

24 A. Yes, it is.

25 Q. When you were taken from St. Francis, were you

1 placed in a hospital at the jail?

2 MS. KNEESE-SHEALY: Objection ---

3 THE WITNESS: It's a medical ward.

4 MS. KNEESE-SHEALY: --- to the form.

5 THE COURT: No, I'll allow it. Go ahead.

6 BY MR. SAVAGE:

7 Q. And are there doctors and nurses there?

8 A. Yes.

9 Q. And were you kept under their observation 24
10 hours a day?

11 A. Yes.

12 MS. KNEESE-SHEALY: Objection to the
13 form.

14 BY MR. SAVAGE:

15 Q. Sir?

16 THE COURT: I'll allow it. Go ahead.

17 BY MR. SAVAGE:

18 Q. In those records, didn't the -- while you were
19 in the hospital at St. Francis and while you were in
20 a hospital at the jail, did people take notes and
21 observe you, ask you questions?

22 A. Yes.

23 Q. Take your pulse? Temperature? Look at your
24 head? Look at the injuries?

25 A. Yes, sir.

1 Q. There's some reason to believe that the state
2 thinks that you were only injured about your head.
3 What other injuries did you have?

4 A. I had bruised hands.

5 Q. How about your trunk of your body and your
6 legs?

7 A. I -- yeah. I was swollen all over. My neck
8 was swollen, and my shoulders were swollen, my ribs
9 was bruised. I had bruising to my right shin and my
10 legs from getting kicked and punched.

11 Q. Now, when you were in the hospital, did you
12 have an opportunity to make telephone calls?

13 A. No, sir.

14 Q. Well, did you have an opportunity to use the
15 telephone to make calls out to people outside the
16 hospital from -- excuse me, not the hospital, the
17 prison hospital to the outside world?

18 A. Oh, we have -- yes, sir. Yes, sir.

19 Q. And that's what you were talking about when
20 the prosecutor was asking did you tell your momma
21 this, did you tell your sister that, and your brother
22 that, weren't you?

23 A. Yes, sir.

24 Q. Now, did they record those calls?

25 A. At the time I was unaware of it. They -- yes,

1 I guess. I'm not sure if they did or they didn't.

2 Q. But you're aware now that every phone call you
3 made when you were in jail they recorded it?

4 A. Yes, sir.

5 Q. And would it be fair to say that you made in
6 excess of a hundred telephone calls?

7 A. Yes, sir.

8 Q. That were recorded?

9 A. Yes.

10 Q. And you indicated to the jury earlier that
11 some lawyer came along and told you not to talk?

12 A. Yes.

13 Q. Did you have a different lawyer at that time
14 than you have today?

15 A. Yes, I did.

16 Q. And that lawyer told you not to talk on the
17 telephone?

18 MS. KNEESE-SHEALY: Objection to the
19 form ---

20 THE WITNESS: Yes.

21 MS. KNEESE-SHEALY: --- Your Honor.

22 THE COURT: Yeah. I sustain that. Go
23 ahead.

24 BY MR. SAVAGE:

25 Q. But when you talked...

1 MR. SAVAGE: Do you want to see this?

2 (Ms. Kneese-Shealy reviews document.)

3 MR. SAVAGE: Judge, we have a certified
4 copy of the transcript of the telephone conversations
5 we'd like to open at this time and show it to the
6 witness.

7 THE COURT: Have you seen this?

8 MS. KNEESE-SHEALY: I have not, and we
9 have a matter, Your Honor, and I'd like to approach.

10 THE COURT: Approach. Approach.

11 (There was an off-the-record bench
12 conference in the presence of the jury but out of the
13 hearing of the jury.)

14 (Said bench conference being concluded,
15 the following proceedings were had:)

16 BY MR. SAVAGE:

17 Q. Mr. Rocquemore, in the immediate phone calls
18 following your placement in the jail, did you tell
19 your family what happened that night?

20 A. I -- I attempted to.

21 Q. Did you tell them that these fellows had
22 jumped you?

23 A. Yes.

24 Q. Did you tell them these people -- that you
25 thought these people were trying to kill you?

1 A. Yes.

2 Q. Did you tell them that you thought at that
3 time the only motivation they had was to rob you?

4 A. Yes.

5 Q. And was there a basis for that? For instance,
6 did you still have the jewelry you went out with that
7 night?

8 A. No, sir. My wristwatch and ---

9 MR. SAVAGE: May we see state's 30,
10 please?

11 (Mr. Savage and Mr. Durant confer.)

12 BY MR. SAVAGE:

13 Q. What I want to do is show you a photograph
14 that's been introduced by the state, which has been
15 identified as exhibit number 30. It's a photograph.
16 I believe the testimony so far is that it's a piece
17 of jewelry. Would you tell the members of the
18 jewelry -- of the jury about that if you know
19 anything about it?

20 A. That's my ring.

21 Q. That's what, sir?

22 A. That is my diamond ring.

23 Q. And then -- and state's exhibit number 31?

24 A. That is my Seiko Kinetic watch.

25 Q. Now, did you take that off that night?

1 A. No, sir.

2 Q. Was it taken from you?

3 A. Yes, sir.

4 Q. And is that part of the foundation for your
5 belief that you were being robbed that night?

6 A. Yes, sir.

7 Q. The statements about what happened that night,
8 now, of course, that -- do you know where that ring
9 was or that watch was that was just up in those
10 photographs? I mean, before having seen the
11 photographs in court, did you know where they were
12 found, or do you remember them coming off your hand
13 or finger that night?

14 A. No, sir. I'm not sure. I'm -- I was not sure
15 where they were.

16 Q. All right. And the ring would be just like
17 anybody else's ring; it was on your finger?

18 A. Yes, sir.

19 Q. It wasn't in a pocket or in a ---

20 A. No. It was on ---

21 Q. --- container?

22 A. It was on my finger.

23 Q. Now, in those telephone calls to your family,
24 did you try to explain to them what happened to you
25 that night that caused you to be in jail?

1 A. Yes, I did try to explain to them.

2 Q. And did you explain to them in detail that --
3 the same things that you've testified to in court to
4 this jury today?

5 A. Yes, I have.

6 Q. Did you in any way in your testimony before
7 this jury attempt to mislead them or lie to them or
8 be deceitful to them?

9 A. No, sir.

10 Q. On the night of August 14th, did you take
11 every measure within your power to stop the assault
12 on you before firing the weapon?

13 A. Yes, I did.

14 Q. Did you try to get away?

15 A. Yes, sir, I did.

16 Q. Did you try to close the door?

17 A. Yes, sir, I did.

18 Q. Did you try to kick off and punch off those
19 who were attacking you?

20 A. Yes, sir, I did.

21 Q. Did you take the weapon and not fire it but
22 use it as a ---

23 MS. KNEESE-SHEALY: Your Honor, I'm going
24 to object to the form of these questions.

25 THE COURT: Yes. I sustain that.

1 BY MR. SAVAGE:

2 Q. Tell us what you did before you fired the
3 weapon to protect yourself.

4 A. I tried striking the individuals who was
5 beating me up.

6 MR. SAVAGE: Kindly answer any further
7 questions the prosecution may have.

8 MS. KNEESE-SHEALY: Just briefly,
9 Your Honor.

10 RE-CROSS-EXAMINATION

11 BY MS. KNEESE-SHEALY:

12 Q. Mr. Rocquemore.

13 A. Yes, ma'am.

14 Q. None of those guys that evening told you that
15 they were robbing you, did they? They never said
16 "we're robbing you, give us this," did they?

17 A. Ma'am, after -- after I tried to run to my
18 vehicle, I really don't -- I can't recall what they
19 were saying. All I know, all I can recall is, when
20 they initially brought up the profanity and things of
21 that nature, me being told that I shouldn't be in the
22 neighborhood.

23 Q. You don't recall anybody saying "give me your
24 ring," do you, Mr. Rocquemore?

25 A. Well, yes, I -- I do recall somebody saying

1 like "take -- take that F'ers ring, take his ring and
2 get -- take his jewelry," something to that effect.

3 Q. Did that just come to you just now,
4 Mr. Rocquemore?

5 A. (There was no response.)

6 Q. Did it?

7 A. I'm not going to say it just came to me, but
8 I'm not sure what -- I can't be exactly sure if they
9 -- if they took it from me while I was in my truck
10 or, you know, during the course of -- of the fight.

11 Q. Mr. Rocquemore, those items were found right
12 over there where they were struggling to get that gun
13 away from you; is that correct?

14 A. No, ma'am.

15 Q. No?

16 A. No, ma'am.

17 Q. The items were not found in the area where you
18 were when they were struggling to get that gun away?

19 A. The items seem to be a distance from where we
20 were at, from where the struggle took place at, not
21 directly where we were at.

22 Q. Mr. Rocquemore, those guys were trying to get
23 that gun away from you; is that correct?

24 A. I can't -- I can't recall.

25 MS. KNEESE-SHEALY: I have no further

1 questions. Thank you, Your Honor.

2 THE COURT: Anything else, Mr. Savage?

3 MR. SAVAGE: No, sir.

4 THE COURT: You may step down, sir.

5 (The witness is excused from the witness
6 stand.)

7 MR. SAVAGE: The state would rest.

8 THE COURT: Defense?

9 MR. SAVAGE: The defense rests.

10 (The defense rests.)

11 MR. SAVAGE: I forget where we were.

12 THE COURT: Anything else?

13 MR. DURANT: Us, as well, Your Honor.

14 THE COURT: All right.

15 All right, ladies and gentlemen. That
16 will be the completion of all of the witnesses and
17 the evidence in the case. At this point, but not
18 today, but tomorrow you will actually hear the
19 closing arguments of counsel. Then after those
20 closing arguments, I will instruct you on the law
21 that applies to this case, and at that point, I will
22 release you to begin your deliberations or, depending
23 what time it is, you may go to lunch first and then
24 deliberate. It just depends on how long it takes.

25 Again, I'll go ahead and let you go for

1 Generally, about the charge, what is your
2 thought first?

3 MR. DURANT: Well, I was interested in
4 what your thought was, Judge, as to what you were
5 going to charge. Obviously ---

6 THE COURT: Well, I want to hear
7 Mr. Savage out on potential charge, lesser included.

8 MR. SAVAGE: Judge, our specific charges
9 would be...

10 MR. DURANT: Your Honor, I don't know
11 that -- have we been provided with a copy of your
12 proposed charges?

13 (Mr. Durant and Mr. Savage confer.)

14 MR. SAVAGE: We did that at the pretrial
15 conference.

16 MR. DURANT: I think you gave the judge
17 one. I'm not sure if we got one.

18 MR. SAVAGE: We gave everybody ---

19 THE COURT: We asked at pretrial. We
20 asked at pretrial if everybody had a copy.

21 MR. SAVAGE: I believe we have another
22 copy, Your Honor.

23 (Mr. Savage and Mr. Durant confer.)

24 THE COURT: All right. Yes, sir.

25 MR. SAVAGE: Well, why you wanted us to

1 address the facts of specific charges, Judge, I think
2 -- murder is what he's charged with. I believe
3 voluntary manslaughter would be appropriate.

4 THE COURT: Hold on. Go ahead. I assume
5 the state can understand that one. Voluntary
6 manslaughter, does the state have any problem with
7 that? In light of the testimony?

8 MR. DURANT: You know, I mean, it's a
9 close enough question that...

10 THE COURT: All right. I'll charge those
11 two. What else?

12 MR. SAVAGE: Based on the defendant's
13 testimony, accidental.

14 THE COURT: All right. Go ahead.

15 MR. DURANT: I don't think it's
16 accidental. He said he intended to shoot the weapon,
17 Your Honor.

18 THE COURT: He kind of vacillated on
19 that. First, when he went out, and then he shot, or
20 I don't remember. But as soon as I heard the
21 testimony, I wrote down accidental. I'm probably
22 going to charge that, I don't know.

23 MR. SAVAGE: Self-defense.

24 MR. DURANT: Sure. I had -- that request
25 to charge, Your Honor, is just on the duty to

1 retreat. It's probably, I'm sure...

2 THE COURT: Well, that may turn out to be
3 the biggest argument.

4 MR. DURANT: Yeah.

5 THE COURT: So -- all right. Then
6 obviously this is the -- this is why I said I'd
7 prefer to have overnight to think about the charge,
8 because the whole debate today is going to be about
9 the duty to retreat.

10 MR. SAVAGE: Judge, we believe that there
11 is no duty to retreat. We believe that the parent
12 statute of self-defense, the extension of the Castle
13 Doctrine came to be with us, as well as the -- at
14 homes. In any event, it's also a place of business.
15 They have no duty to retreat in his business
16 regardless of whether that was the creation or not of
17 the incident, but the ---

18 THE COURT: Have you reviewed those,
19 Counsel?

20 MR. DURANT: I have not reviewed those,
21 Your Honor, but I also would like to point out that
22 the testimony was -- that there is also testimony in
23 the record that he got his weapon, left his "home" or
24 car, and -- and became the aggressor in the incident
25 by trying to pistol-whip Demar Denson.

1 And so even assuming that, that
2 interpretation of the law, he definitely -- he
3 definitely was not -- you know, he definitely had a
4 duty to retreat in that situation.

5 It would be our position that once he
6 armed himself with a weapon against people that were
7 unarmed that he had a duty to -- to conduct himself
8 in a manner that did not involve the killing of other
9 people.

10 Now, I understand what he has said, but
11 I also understand what our witnesses have said, and
12 certainly there is testimony in the record that he
13 had the -- he has the ability to -- to retreat from
14 this situation without killing anyone.

15 THE COURT: Well, what about ---

16 MR. DURANT: And maybe not necessarily
17 retreat, but it's been -- you know, it's been called
18 the duty to retreat, but the law basically says that
19 if he can avoid taking human life without -- without
20 endangering his own, he has the duty.

21 THE COURT: What about all the
22 presumptions of the statute?

23 MR. DURANT: Pardon me?

24 THE COURT: What about all the
25 presumptions in the statute about what you can assume

1 under certain circumstances?

2 MR. DURANT: I'm not sure I'm...

3 THE COURT: About is there -- like, for
4 example, the version where essentially he is being
5 attacked while he is in his vehicle, and the
6 presumption is, under the statute, that he would have
7 the right to fear imminent peril or death; once you
8 have that presumption, that it gives you the
9 corresponding right to use that degree of force.

10 See, the statute is kind of -- it's
11 loaded with all kinds of stuff. That's why I thought
12 perhaps we needed to look at this overnight.

13 MR. DURANT: Well...

14 THE COURT: Because, quite frankly, it
15 hasn't been charged very much in the state since it
16 came out.

17 MR. DURANT: Okay. Can I get the number
18 of that?

19 THE COURT: 16-11-410 through 450. Well,
20 actually, I'm not sure -- are you aware of anyone
21 that's charged this statute to date?

22 MR. SAVAGE: Yes. I understand ---

23 THE COURT: Actually, someone told me
24 they had it.

25 MR. SAVAGE: Yeah. It's been charged in

1 the Ninth Circuit, actually.

2 THE COURT: Here?

3 MR. SAVAGE: Yes. I'll find out who it
4 is. I have the e-mail. It may have been one of your
5 former clerks, but...

6 THE COURT: One of my former clerks
7 charged it?

8 MR. SAVAGE: No, no, no. Was involved.

9 THE COURT: I argued it before? Myself?

10 MR. SAVAGE: After we did it, we decided
11 to send out on this survey if it was done before, and
12 it had -- it has been charged.

13 THE COURT: Well, if it actually has,
14 it's been --- but I don't know if that was here. I
15 think it was upstate or something, but...

16 MR. SAVAGE: Somebody has charged it
17 somewhere at the trial level.

18 THE COURT: What about his argument ---

19 MR. SAVAGE: And it resulted in an
20 acquittal, so there's no appellate record.

21 THE COURT: Well, did they charge
22 presumptions?

23 MR. SAVAGE: I don't know, Judge.

24 THE COURT: My concern is -- we need to
25 think about some of these things. I mean, it says:

1 The person who unlawfully by force enters
2 or attempts to enter a person's dwelling, residence,
3 or occupied vehicle is presumed to be doing so with
4 the intent to commit an unlawful act involving force
5 or violent crime.

6 A person is presumed to have a reasonable
7 fear of imminent peril of death or great bodily
8 injury to himself or another when using deadly force
9 that is intended or likely to cause death or great
10 bodily injury to another person.

11 If the person -- and it gives a whole
12 range of scenarios. And you have a different type of
13 scenario. I just -- we'd want to know ---

14 MR. DURANT: Well, you know ---

15 THE COURT: --- is it applicable to the
16 situation and ---

17 MR. DURANT: Yeah.

18 THE COURT: --- how was it charged.

19 MR. DURANT: I understand what that says,
20 Judge, but -- you know, if you have what he says.
21 But you also have witnesses' testimony in this case,
22 the state's witnesses, that basically said that he
23 went to his vehicle without anybody following him,
24 without anybody -- without anybody fighting him or
25 anything, he just slipped off when Chris Thomas was

1 being held to the ground and got this -- and got a
2 weapon out of the truck and then went after the
3 person.

4 THE COURT: What about that, Mr. Savage?

5 MR. SAVAGE: Judge, I defer to your
6 recollection of the testimony. My recollection is
7 that there is ---

8 THE COURT: He testified he went to his
9 car and shot while going towards the ground or
10 something to that extent; did he not?

11 MR. SAVAGE: The big picture is I believe
12 there were only two visual witnesses. One is
13 Mr. Rodney Gibbs. He's the only witness for the
14 state who visually testified as to what happened.
15 The other witness is the defendant. And the third
16 audio witness is Christopher Thomas.

17 My understanding was that, from the
18 defense witness, the audio witness, is that he heard
19 a scuffle. He didn't go in any detail.

20 From Mr. Rocquemore's testimony, he ran
21 from the scene of the prior conduct to his car to get
22 to a position of safety. While trying to get in that
23 car, he was attacked. When he got out of the car,
24 the first thing he did was to take a swing with the
25 weapon. He didn't fire it. And in the process of

1 that, the weapon went on the ground. There was then
2 a scramble for that weapon. He picked it up, was
3 attacked, and fired the weapon.

4 But it was a continuous conduct. There's
5 no disengagement at all once the action started when
6 he was in his car until the final action.

7 THE COURT: All right.

8 MR. DURANT: But that's not what ---

9 MR. SAVAGE: That's the nature of ---

10 MR. DURANT: --- the other witnesses
11 said.

12 THE COURT: Well, I mean ---

13 MR. SAVAGE: That's the nature of the
14 request.

15 THE COURT: Right. But if there's
16 conflicting testimony, you deal with it, you know,
17 but in part it takes you -- in part, it takes you out
18 of the statute. You're in the statute and partly out
19 of it, depending on the version accepted.

20 MR. SAVAGE: But if you accept that he
21 was attacked in his vehicle, and there's a continuum,
22 there's no break in that action, so whatever he's
23 lawfully authorized to do. Now...

24 MR. DURANT: And I don't know what you
25 do, Judge, because, I mean, the stories are

1 diametrically opposed. And if you believe our
2 witnesses, he has a duty to retreat. If you believe
3 his witness, then -- then maybe he's entitled to a
4 discussion. I don't know what to do with that
5 situation.

6 MR. SAVAGE: But as a general principle
7 there's no ---

8 THE COURT: And usually when I say we
9 need overnight to think about it, that's very rare,
10 Mr. Durant.

11 MR. DURANT: I understand that,
12 Your Honor, but, you know, we -- we kind of need to
13 know what to argue about in the morning, as well.

14 MR. SAVAGE: But once the issue of
15 self-defense is raised, the law is very clear,
16 whether it's that statute or not. The law has been
17 in South Carolina, the case law, is that the Court if
18 requested must charge self-defense.

19 THE COURT: Well, there's no doubt, you
20 know -- you know, there would be self-defense
21 charged. Like I said, this whole -- before y'all
22 started talking, I assumed the whole argument was
23 going to turn on this duty to retreat. I knew it
24 ahead of time. I've been reading it for -- for a
25 while now. I just knew that this fight was coming.

1 And, quite frankly, as I've indicated, if
2 it's been charged maybe once -- I don't know the
3 nature of the circumstances in that case it was
4 charged in. I know that it was considered by another
5 judge upstate, and he did not charge it.

6 So I'm going to -- all right. And since
7 it's 16-11-410, the reason I said that, I want to
8 look at this language very carefully, especially
9 presumptions. Did you give proposed charges about
10 any presumptions?

11 MR. SAVAGE: Yes. And we've given all
12 the -- the only charge that I did not give you that's
13 changed from the testimony is accident, because I
14 wasn't anticipating that.

15 THE COURT: I'm going to let you bring
16 that in the morning, please, Mr. Savage.

17 MR. SAVAGE: Yes, sir.

18 THE COURT: Bring that in the morning,
19 please.

20 MS. WILLIAMS: I believe we have a copy,
21 Your Honor.

22 MR. SAVAGE: If I don't have it, then
23 I'll bring it to you.

24 THE COURT: Well, I don't know, Chad told
25 me we had it, what the request is.

1 MR. DURANT: Your Honor, I mean, I've got
2 -- I'm little bit -- we were provided with a copy of
3 his proposed charges at the charge -- at the
4 conference. We don't know where it is. I've never
5 seen it.

6 MR. SAVAGE: I will send them one by
7 e-mail immediately upon return to the office.

8 THE COURT: You don't know where your set
9 is?

10 MR. DURANT: I don't remember receiving
11 one.

12 THE COURT: Well, I remember ---

13 MR. DURANT: I remember getting a book
14 like that.

15 THE COURT: Yeah. Jenny asked if the
16 state had a copy of it.

17 MS. KNEESE-SHEALY: I remember there
18 being some discussion about it. I truly don't
19 remember getting it. I don't remember if they gave
20 it to us or if they said we have one and we'll get it
21 to you.

22 THE COURT: Jenny thought that you said
23 that you got one, but it didn't look like this. That
24 was her understanding.

25 MR. SAVAGE: Not that notebook, I don't

1 think.

2 THE COURT: That's her recollection of
3 your conversation.

4 MS. KNEESE-SHEALY: I'm glad you
5 remembered that. Let me look and see then.

6 THE COURT: We had a tabbed copy, and
7 y'all did not.

8 MR. SAVAGE: Correct.

9 THE COURT: But his charges do raise this
10 whole new statute. And that statute was just
11 effective June 9th of 2006.

12 MR. DURANT: And would it even apply, for
13 one thing?

14 THE COURT: Well, that's something I'll
15 be happy to hear you out on.

16 MR. DURANT: Well, I mean, if it's not --
17 you know, I have no reason to believe a statute like
18 that would be made retroactive, Your Honor, because
19 we'd have to go through every self-defense case ever
20 -- ever decided in the state.

21 THE COURT: Well, we would, though, for
22 cases that have already been tried, but a pending
23 case is different...

24 MR. SAVAGE: That would be our position.

25 THE COURT: --- as a substantive charge.

1 MR. SAVAGE: The case, I can't say off
2 the top of my head, it said that you charge the
3 current law.

4 (Mr. Savage and Ms. Williams confer.)

5 THE COURT: It says: The General
6 Assembly finds that no person or victim of a crime
7 should be required to surrender his personal safety
8 to a criminal, nor should a person or victim be
9 required the duty to retreat in the face of an
10 intrusion or attack.

11 MR. DURANT: I guess that depends on what
12 your view of who is the victim out there, Your Honor.

13 THE COURT: That's what I was saying;
14 that in part it could be in the statute and in part
15 it could not be, and...

16 Well, then it says: A person who is not
17 engaged in an unlawful activity who is attacked in
18 another place where he has a right to be, including
19 but not limited to his place of business, has no duty
20 to retreat and has the right to stand his ground and
21 meet force with force, including deadly force, if he
22 reasonably believes it is necessary to prevent death
23 or great bodily injury to himself or another person
24 or to prevent the commission of a crime, violent
25 crime.

1 MR. DURANT: I think that's always been
2 the law, Your Honor.

3 THE COURT: Yeah, I think that part's
4 always been the law. The problem is, the whole new
5 section seems to eviscerate the duty to retreat.

6 I think it's best that we look at this
7 overnight. Because without going through this
8 provision, you're not going to be able to argue
9 that. And I'm charging self-defense. The only
10 debate in the morning will be the duty to retreat
11 aspects. So if you're making preparations, you can
12 prepare accordingly under both versions, I guess.

13 And then -- anything else? After
14 self-defense?

15 MR. SAVAGE: Could I have just a moment.

16 THE COURT: Murder and voluntary
17 manslaughter and accidental and self-defense.

18 MR. SAVAGE: Those are the only
19 fact-based charges.

20 THE COURT: You had put involuntary in
21 your package. That's being removed?

22 MR. SAVAGE: I don't think there's any
23 basis for it.

24 THE COURT: All right. Anything else?
25 In your charges?

1 MR. SAVAGE: Can I think involuntary
2 overnight, Judge? I'm thinking that the defendant's
3 testimony may have given some basis for that, but I
4 would just like to think about it.

5 THE COURT: The state want to comment on
6 that?

7 MR. DURANT: I just don't know that there
8 is any basis for involuntary manslaughter. I think
9 it's either it went off accidentally or he did it
10 intentionally.

11 THE COURT: Is there any evidence of
12 recklessness?

13 MR. SAVAGE: The way he handled the
14 weapon once -- you know, it's not like he picked it
15 up and shot at somebody. He picked it up and tried
16 to whack somebody, it dropped, he went -- I think
17 there was a scramble for the weapon.

18 I'm not saying that there is. I'm not
19 asking for that now. I'd like to think about it
20 overnight and review my notes.

21 THE COURT: All right. Anything else of
22 substance in your request?

23 MR. SAVAGE: No, sir.

24 THE COURT: I'm not talking about the
25 general charges. Oh, you had something that I saw

1 (On Wednesday, July 18, 2007, the
2 defendant being present with counsel, the trial
3 reconvenes at approximately 9:33 a.m., and the
4 following proceedings were had:)

5 THE COURT: All right.

6 MR. SAVAGE: Judge.

7 THE COURT: Yes, sir.

8 MR. SAVAGE: Could you give me some
9 consideration before we get into the charge?

10 THE COURT: Before? Consideration for
11 what?

12 MR. SAVAGE: Just to discuss something
13 that took place yesterday.

14 THE COURT: Go ahead.

15 MR. SAVAGE: I don't have an answer to
16 this, and I am not making a complaint. I'm not
17 asking for a mistrial. I'm not doing anything other
18 than talking about my thoughts last night.

19 The juror who was disqualified yesterday,
20 I was thinking further about this last night. And I
21 realize it's completely within the Court's discretion
22 how to handle that, and I am not suggesting that it
23 wasn't handled properly.

24 THE COURT: Well, I did it according to
25 what you asked me to do.

1 MR. SAVAGE: Exactly.

2 THE COURT: You asked me to excuse the
3 juror.

4 MR. SAVAGE: Yes, sir. The issue I was
5 thinking last night -- and I'm doing this in the form
6 of a discussion, not in the form of a motion.

7 THE COURT: Well, is this something you
8 want on the record?

9 MR. SAVAGE: Yes.

10 THE COURT: Okay. Go ahead.

11 MR. SAVAGE: Before I get into it, I
12 would say that the Court acted as it did, and I did
13 not raise an objection. In fact, the Court did what
14 I asked you.

15 THE COURT: Well, I specifically asked
16 you what you wanted me to do about it.

17 MR. SAVAGE: Yes, sir. And I don't have
18 any complaint. I'm not questioning it.

19 My question is -- my question to the
20 Court, not a request of the Court, because, frankly,
21 this is the first time I've run into this and I'm not
22 sure where I am. I am concerned that this juror did
23 not disclose, I am concerned that this juror had
24 multiple contacts with the Solicitor's Office, and
25 I'm concerned that -- that that juror may have

1 violated his oath in other ways, such as tainting
2 other members of the jury.

3 THE COURT: Well, that's one of the
4 reasons I asked you, Mr. Savage, what you wanted me
5 to do. I was considering polling the jury if
6 necessary.

7 MR. SAVAGE: Your Honor, at the time it
8 just didn't occur to me that it was necessary.

9 THE COURT: And, quite frankly, I was
10 already going to tell all of you, while the jury was
11 deliberating, I wanted to talk to y'all some more
12 about, you know, trying to understand exactly what
13 happened, because I personally would like to know why
14 I was not immediately told something that everyone in
15 the courtroom, at least counsel-wise, had an
16 obligation to me to report that matter to me.

17 Notwithstanding the faulty assumption
18 that I already knew, that was an assumption that
19 proved to be wrong, and everyone should have asked if
20 that assumption was true or not, but that's neither
21 here nor there, but it's still not too late to poll
22 the jury if you think that's something that you have
23 some reason to think -- or either bring Mr. Nelson in
24 here and question him. I didn't excuse him
25 yesterday. He left, and I thought y'all had told him

1 to leave.

2 MR. SAVAGE: I'm not in any way trying to
3 be accusatory to anyone, particularly not the Court
4 or not to anyone on the prosecution side either; but
5 the timing of it is that immediately before 1:30,
6 immediately before the jury reconvened yesterday, is
7 when I found out the extent of the involvement of
8 Mr. -- the assistant solicitor who was involved. And
9 he was very open and very frank with me, but he
10 literally did that as I walked into the courtroom.

11 And what I was thinking of last night,
12 it's not so much the assistant solicitor but this
13 juror who, one, did not disclose, who then had
14 multiple repeated contacts. How could you have
15 repeated contacts if they were rebuffed the first
16 time?

17 THE COURT: I'm happy to conduct any type
18 of inquiry you want. That's why I asked, Mr. Savage.

19 MR. SAVAGE: I know.

20 THE COURT: I even have some separate
21 questions because I was told that the juror was
22 immediately hung up on, and then the juror said they
23 talked about other things. So I'm happy to conduct
24 any type of questioning you want, because...

25 MR. SAVAGE: Do you know if that juror

1 was under oath when you questioned him?

2 THE COURT: Well, I just assumed that,
3 under their original oath. I didn't put him under
4 oath separately.

5 MR. SAVAGE: But his oath as a juror was
6 continued during that inquisition?

7 THE COURT: I would think so, but I guess
8 I can't say off the top of my head. But, you know,
9 this is why I sent the juror back to the hallway, to
10 ask y'all if there's anything else y'all want me to
11 do, just to get your guidance.

12 MR. SAVAGE: Judge, you gave me all the
13 time in the world. I just wasn't thinking.

14 THE COURT: Notwithstanding, what is it
15 that you want us to do today?

16 MR. SAVAGE: I'm looking for guidance.
17 I'm not asking ---

18 THE COURT: I think that we -- if you
19 have concerns in your mind that we need to hash out
20 on this record, then the assistant solicitor should
21 have been back in here. Because if you have any
22 concerns about what the juror told the assistant
23 solicitor, surely he will be forthright with this
24 Court about what transpired.

25 I mean, the problem is we let the juror

1 go yesterday. And that's why I kept him in the
2 hallway.

3 MR. SAVAGE: My fault.

4 THE COURT: So it seems like we -- we
5 have two options, it seems to me. And I'm certainly
6 happy to hear both of you on whatever options you
7 have, because I don't claim to be the master of every
8 option.

9 But number one, we could ask the
10 assistant solicitor exactly what transpired, and
11 number two is we can make some inquiry of the jury
12 panel as a whole if they had any conversation with
13 him.

14 It sounds to me like you're more
15 concerned that there may have been some potential
16 relay of information.

17 MR. SAVAGE: I have no basis to say this
18 other than my imagination.

19 THE COURT: Let me rephrase that. It
20 sounds to me that is what you would be concerned
21 about if it took place.

22 MR. SAVAGE: My concern would be, is: My
23 cousin or my friend is an assistant solicitor,
24 blah-blah-blah. That's sort of a braggadocio, that
25 he had more influence and more inside information.

1 Even if he didn't say specifically "the gun was fired
2 by him" or whatever, but the -- but the imparting of
3 inside information, if you will.

4 Now he's gone, so that's ended, but the
5 question is: Did he in any way discuss his
6 relationship or his attempts to contact the
7 solicitor; and what impression, even if it wasn't a
8 factual one, what impression that may have left.

9 THE COURT: Well, I specifically asked
10 him if he talked to the jury in any way whatsoever
11 about it or that he knew the assistant solicitor, and
12 he said no.

13 MR. SAVAGE: If he knew the assistant
14 solicitor?

15 THE COURT: I asked him yesterday. I
16 don't know if you heard that, but I asked him.

17 Madam Court Reporter, can you read back
18 that part of it.

19 THE COURT REPORTER: Yes, Your Honor.

20 MR. DURANT: Your Honor, if I just might
21 say ---

22 THE COURT: Well, hold on. Let her find
23 it first. She can't do both.

24 (There was off-the-record discussion.)

25 (The court reporter reads back the

1 following:

2 "And have you disclosed to the jurors in
3 any kind of way that you have some connection with
4 him?

5 "No.

6 "Has that come up in any kind of way?

7 "No.

8 "Have you discussed this case in any way?

9 "No, sir.

10 "If you will step outside. Thank you.")

11 (The reading is concluded.)

12 THE COURT: I was asking about Mr. Nelson
13 in that first question, so...

14 MR. SAVAGE: I'm a little dense this
15 morning, Judge. He was asked if he knew Mr. Nelson,
16 and he denied it?

17 THE COURT: Uh-huh -- no, no, no. He
18 said he knew Mr. Nelson, but he didn't disclose it.
19 And then I asked him did he tell the jury that they
20 -- that he knew Mr. Nelson.

21 Do you want her to read back the question
22 before that, a couple of questions of before that?

23 Go ahead.

24 (The court reporter reads back the
25 following:

1 "Now, have you been trying to make any
2 contact with Mr. Nelson since this trial has begun?

3 "We've talked.

4 "You have talked? What about?

5 "Not on that. Just like...

6 "Have you talked about this case in any
7 way?

8 "No. About his wedding and stuff.

9 "All right. And have you disclosed to
10 the jurors in any kind of way that you have some
11 connection with him?"

12 (The reading is concluded.)

13 MR. SAVAGE: At that time, Judge, what I
14 understand he said, he engaged in a conversation. My
15 understanding from Mr. Nelson was that he had no
16 conversation with him. So there's a problem with
17 that. Somebody is not...

18 THE COURT: That was the very thing I
19 said before we started, then, Mr. Savage, and I
20 wanted to -- y'all let Mr. Nelson go yesterday. No
21 one got my permission to let him go, so I thought
22 y'all were content. So with whatever information you
23 had, I summonsed him, not y'all.

24 MR. DURANT: Your Honor, I mean, I think
25 the key issue here that Mr. Savage is raising is, was

1 there any contact between that juror and the rest of
2 the jurymen and the rest of the jurors that could in
3 any way influence their decision in this case. And I
4 think the only way you can find that out is to bring
5 them out and ask them.

6 THE COURT: All right. I think our only
7 two options -- and, again, I'm happy to hear from you
8 -- is talk to Mr. Nelson and talk to the jurors and
9 -- unless there's something else that I'm missing,
10 Mr. Savage, you want me to do.

11 MR. SAVAGE: Well, I think -- and I
12 apologize, Judge. I didn't understand it to be that
13 way yesterday. My fault, and I'm not asking anything
14 but forgiveness.

15 If Mr. Nelson has violated the Court --
16 and I'm not sure he has, but he advised me that he
17 didn't have any conversation at all, that his -- that
18 when he was contacted he rebuffed him.

19 THE COURT: Well, let me stop at that
20 point. He didn't advise the Court. I never talked
21 to him. When y'all came in, y'all told me. One of
22 y'all told me, I don't remember which one, said that
23 based on your conversation in the hallway that he had
24 indicated that the juror had tried to contact him,
25 whether it be by telephone or text messaging, but I

1 thought I heard someone say he just hung up on the
2 juror. Now, which one of you told me that, I don't
3 recall.

4 MR. SAVAGE: I told you that.

5 THE COURT: Mr. Nelson didn't tell me
6 that.

7 MR. SAVAGE: What Mr. Nelson told me is
8 that he was contacted last week. I didn't think too
9 much of that. He then told me he was text-messaged
10 yesterday during the luncheon recess by that juror.
11 That alarmed me.

12 I asked him if he had a conversation with
13 him. He said, no, he rebuffed him the first time he
14 tried to contact him, which wasn't consistent. I
15 mean, why would he come back again?

16 But he doesn't have to talk about the
17 facts of the case in this context. He could have
18 talked to him about one of the prosecutors, his
19 relationship, is Bruce a good guy, is Mr. Alfaro a
20 good guy, Ms. Shealy, whatever it is, then to
21 emphasize the authenticity of their position to give
22 them more credibility or believability. If he did
23 that, I'm very concerned. And then I would ---

24 THE COURT: Well, let me stop you there,
25 because I thought I asked the juror did you talk

1 about the case in any way whatsoever.

2 MR. SAVAGE: But he may have interpreted
3 that in a different way than the Court asked. He may
4 have ---

5 THE COURT: Well, I mean, that's the part
6 where you should have come in and told me to follow
7 up ---

8 MR. SAVAGE: Yes, sir.

9 THE COURT: --- with some more questions,
10 Mr. Savage.

11 MR. SAVAGE: Yes, sir.

12 THE COURT: Because now the juror is not
13 here.

14 MR. SAVAGE: Yes, I should have.

15 THE COURT: So it seems to me, again, our
16 only option is to talk to Mr. Nelson.

17 MR. SAVAGE: Yes, sir. And I think
18 that's necessary.

19 THE COURT: Send for Mr. Nelson.

20 And I'll be happy to hear from you,
21 Mr. Durant as soon as -- do you want -- do you want
22 to go ahead and tell me what you wanted to say,
23 first?

24 MR. DURANT: I really don't have anything
25 else to add; but the concern here is what these

1 people know, not what went on between -- because that
2 juror's been discharged. What is key here is what
3 these people know or what that juror may have
4 disclosed to his fellow jury people. That is the
5 only thing that could affect this defendant's ability
6 for a fair and impartial trial in this case.

7 I think, you know, I may -- I may just be
8 a simple person, but it seems like to me this is --
9 has a simple solution: Bring them out here and ask
10 them.

11 THE COURT: Well, I agree with that part
12 of it. He's raising the -- the question about
13 whether or not anything was discussed at all with
14 Mr. Nelson that Mr. Nelson might have relayed to you.
15 Now, as an officer of the Court, I would assume you
16 would tell me ---

17 MR. DURANT: Mr. Nelson hasn't told or
18 relayed anything to me.

19 THE COURT: And I can accept that. But
20 now we're in a posture for the record, should he be
21 able to formally -- to set that straight once and for
22 all on this record either way. And it's always
23 better to have a clean record than just to leave
24 something in limbo. And if Mr. Nelson didn't discuss
25 it in any way whatsoever, it will take him all of 30

1 seconds to say that to me and be gone. And that's
2 the way to keep cases just totally clean from the
3 time.

4 Besides, it's not everyone -- you know,
5 it's very, very important, their day in court, and we
6 might as well just ask all the questions we need to
7 ask and be done with it.

8 MR. ALFARO: He's on his way, Your Honor.

9 THE COURT: I'll be happy to poll the
10 jury, too, Mr. Savage, but they're not going to be
11 here until 10:00, so...

12 MR. DURANT: Should we go ahead and
13 start?

14 THE COURT: Yeah. I mean, this whole
15 issue is taking away from our charging debate, but
16 that's a substantial question about that. So while
17 we're waiting, can we go ahead and talk about that?

18 MR. SAVAGE: We're prepared, Your Honor.

19 THE COURT: I wanted to know about the
20 retroactivity in this statute because I have some
21 questions in my mind about whether it should apply
22 retroactively.

23 MR. DURANT: May I be heard on that
24 issue, Your Honor?

25 THE COURT: Yes. Yes, sir. Let me just

1 go ahead and share with you some of the things you
2 can satisfy my mind about.

3 I need to know whether it's retroactive.
4 More specifically, I'd like to know how the savings
5 clause of the statute applies to this situation.

6 MR. DURANT: May I approach? That's what
7 I was going to give you, Your Honor. I had my crack
8 legal team...

9 THE COURT: Well, this crack legal team's
10 already read it, so...

11 MR. DURANT: --- pull the actual bill
12 itself.

13 THE COURT: I need to know the
14 interpretation of that clause, then especially the
15 amended or repealing language of "any law." That's
16 my main focus, my main inquiry.

17 MR. DURANT: And ---

18 THE COURT: Would that apply to common
19 law.

20 MR. DURANT: That -- in terms of the
21 castle doctrine, the castle doctrine basically
22 creates new law in terms of the presumptions and
23 things of that nature.

24 In my brief foray into the retroactive
25 application, I found that there is a presumption that

1 statutory enactments are to be given prospective
2 rather than retroactive effect. An exception to this
3 presumption arises when the enactment is remedial or
4 procedural in nature, such as a statute of
5 limitations. These are merely rules of construction,
6 however, and are subject to the paramount rule that
7 the intent of the legislature determines whether a
8 statute will have prospective or retroactive
9 application.

10 That is out of *Meares v.* -- excuse me --
11 *Jenkins v. Meares* at 302 S.C. 142, citing
12 *South Carolina National Bank v. South Carolina Tax*
13 *Commission*, 297 S.C. 279.

14 The original act passed by the
15 legislature has a specific savings clause in it,
16 concerning the legislature's legislative intent and
17 whether or not there is prospective or retroactive
18 application, and I don't think there's a whole lot of
19 room for interpretation there. In Section 4, Savings
20 Clause, it says:

21 "The repeal or amendment by this act of
22 any law, whether temporary or permanent or civil or
23 criminal, does not affect pending actions, rights,
24 duties, or liabilities founded thereon, or alter,
25 discharge, release or extinguish any penalty,

1 forfeiture, or liability incurred under the repealed
2 or amended law, unless the repealed or amended
3 provision shall so expressly provide. After the
4 effective date of this act, all laws repealed or
5 amended by this act must be taken and treated as
6 remaining in full force and effect for the purpose of
7 sustaining any pending or vested right, civil action,
8 special proceeding, criminal prosecution, or appeal
9 existing as of the effective date of this act, and
10 for the enforcement of rights, duties, penalties,
11 forfeitures, and liabilities as they stood under the
12 repealed or amended law."

13 THE COURT: Right. My question is when
14 it says repeal or amendment of any law. I mean, the
15 castle doctrine legislation is kind of a mixed pot of
16 stuff. It incorporates part of our common law and to
17 some extent abrogates part of our law.

18 You're correct, it does create some
19 presumptions, and it also creates an immunity from
20 prosecution. Normally, that type of protection from
21 something deemed a criminal offense would implicate
22 the retroactivity analysis, one of the two prongs of
23 analysis that potentially suggest retroactivity.

24 So then the question is, does the
25 specific savings clause language defeat that normal

1 operating exception. So when it says repeal or amend
2 any law, it all boils down to, in my mind, does that
3 include the common law.

4 MR. DURANT: And I guess in that regard,
5 Your Honor, I mean, the castle doctrine has always
6 been a part of the law; that, you know, a man's home
7 is his castle.

8 THE COURT: Well, I mean, but that just
9 -- it extends to automobiles.

10 MR. DURANT: But this act -- exactly.
11 This act extends it further than the common law.
12 Like, it applies it to the places of business when I
13 have a car because a car being a place of business
14 also, and it also extends it to occupied automobiles.

15 THE COURT: Let me hear -- let me hear
16 from the defense.

17 MR. DURANT: And so all of those
18 presumptions that it creates are within the law.

19 THE COURT: Well, when we start talking
20 about presumptions, we have to hash out procedural or
21 substantive questions and what we properly classify
22 them as being.

23 MR. DURANT: I don't really know that
24 those are procedural, Your Honor. That is a
25 substantive change in the law that did not exist

1 prior to the enactment of that statute.

2 THE COURT: I'm not saying I disagree
3 with you, but what I'm suggesting is that that might
4 take us down the -- the path about deciding whether
5 or not the immunity provision resolved it all, too,
6 again.

7 Mr. Savage, let me hear from you.

8 MR. SAVAGE: Judge, I think you start
9 with the basic case law that says that self-defense
10 matters are charged under current law, and the
11 current law at the time of this trial includes this
12 statute. There is a savings clause in that statute,
13 but ---

14 THE COURT: Why is it not within the
15 legislative purview to not effect the matter
16 retroactively?

17 MR. SAVAGE: Because that's the --- the
18 statute didn't exist before this. This is the
19 statute itself.

20 THE COURT: Well, does it amend common
21 law?

22 MR. SAVAGE: Well, it extends it.

23 THE COURT: Does that mean amended? See,
24 we're back to where I say is the critical inquiry.
25 It says any law. Does any law include common law?

1 MR. SAVAGE: It certainly doesn't say
2 common law.

3 THE COURT: All right.

4 MR. SAVAGE: And you'd have to interpret
5 it in the most narrow sense.

6 THE COURT: What about that?

7 MR. DURANT: I think "any law" includes
8 the common law and the statutory law, Your Honor.
9 Law is law.

10 THE COURT: Well, does the rule of lenity
11 require it to be construed in its most narrow sense?

12 MR. DURANT: If we're doing construction.
13 Like I said, Your Honor, the primary -- the primary
14 focus is on the legislative intent.

15 I think the savings clause in that
16 statute is a pretty clear statement of the
17 legislature's intent that this statute should be
18 applied prospectively to the extent that it changes
19 the law in this state, which it does substantially,
20 in the area of self-defense.

21 MR. SAVAGE: And this is our only
22 indication of legislative intent. If you open it up
23 as to what legislative intent is, I'm not sure if
24 South Carolina is appropriate. Then you get into the
25 discussion ---

1 THE COURT: Well, wait a minute. What do
2 you mean you're not sure if South Carolina is
3 appropriate?

4 MR. SAVAGE: Well, there's no manual
5 about the discussions during the course of the...

6 THE COURT: Well, this is not -- this is
7 not a statement of legislative intent. It's part of
8 the legislature.

9 MR. SAVAGE: Correct.

10 THE COURT: There's a difference between
11 interpreting the law and applying legislative intent
12 in a -- in a reckless manner. Let's just use that
13 language.

14 MR. SAVAGE: But when you look at the
15 law, you are required to take the most narrow
16 interpretation of the law as opposed to what was
17 discussed at the time of the passage of the
18 statute.

19 THE COURT: But seemingly there's an
20 ambiguity, that I might give you the benefit of that,
21 that rule, but does "any law" mean any law? One
22 might also have to ask the question, if it didn't
23 mean that, what would it mean, since that law was not
24 in effect at the time.

25 MR. SAVAGE: I think that that's just

1 standard language that was placed.

2 THE COURT: It's very rare the
3 legislature talks about retroactivity.

4 MR. SAVAGE: What we might want to do is
5 compare it to the change in the law on the sexual
6 conduct.

7 (Mr. Savage and Ms. Williams confer.)

8 MR. SAVAGE: There was a change in the
9 law in criminal sexual conduct at or about the same
10 time, the Romeo and Juliet laws.

11 THE COURT: If you have something in that
12 regard and you wish to share it with me, I'll be
13 happy to consider it.

14 Like I say, I've been struggling with
15 this since early this morning and -- when my law
16 clerk gave me the savings clause. But why not have
17 the savings clause in the code? I have no -- you
18 know, it should at least be in the notes. I don't
19 know why they do things like that.

20 MR. SAVAGE: And, Judge, you can also
21 distinguish the public policy aspect of opening up
22 the jailhouse doors on convictions as opposed to
23 cases that are ongoing and trials and during the
24 pendency.

25 THE COURT: Well, like I said, that it

1 comes down to an interpretation of those words.
2 Because the fact that all those other provisions are
3 there, truly are not -- will not be dispositive to
4 me, because when push comes to shove, the act
5 ultimately creates an immunity from criminal process
6 and, to me, that's immunity from a criminal sanction,
7 and that is the type of change that often is applied
8 retroactively.

9 So but for the savings clause, I might be
10 inclined to agree that it would be retroactive, to
11 the extent that that substantive change took place;
12 but the savings clause says any law, pending, and
13 it's not clear to me why that should not apply.

14 That's my gut -- that's my thought
15 process at this time based on what I've reviewed.

16 It's hard for me to say that "any" does
17 not have the meaning that is commonly afforded.

18 And with all due respect, I may be
19 incorrect, but that is probably -- that's where I'm
20 going to stand at this point. And, you know, unless
21 something else comes up in the research before we get
22 started, that's how I'll proceed.

23 MR. SAVAGE: What I'm trying to see now
24 is, I believe that the CSC...

25 (Mr. Nelson enters the courtroom at

1 approximately 9:35 a.m.)

2 THE COURT: Well, I'm going to let you
3 have that opportunity, but I'd like to go ahead and
4 take care of this other matter unless -- can she be
5 researching that while we take care of the other
6 matter?

7 MR. SAVAGE: Yes, sir.

8 THE COURT: Mr. Nelson, come forward,
9 please, and be sworn. You can stand right here at
10 the bench. It doesn't matter. That's fine right
11 there.

12 MICHAEL NELSON, ESQ.,
13 being first duly sworn by the clerk, is examined and
14 testifies as follows:

15 THE CLERK: Thank you.

16 THE COURT: Mr. Nelson, I'm going to go
17 ahead and ask the questions, because I would have
18 asked them yesterday. We had a little issue come up
19 which I understand you're aware of.

20 MR. NELSON: Yes, Your Honor.

21 THE COURT: About the juror and -- who
22 turned out to be related to you. Just to give you a
23 background, I was led to believe that you assumed
24 that he had disclosed that to the Court. And he had
25 not disclosed that to the Court, but the reason we

1 are calling you here today is not about that
2 component of it.

3 We're calling you about whether or not
4 you had any conversations with this juror, period, at
5 all, because we have heard different versions of
6 that.

7 MR. NELSON: Yes, Your Honor.

8 THE COURT: And I need to know, now that
9 you're under oath, did that juror make contact with
10 you, and did you talk with him in any way whatsoever,
11 and if so, what did you talk to him about?

12 MR. NELSON: I believe it was Friday or
13 Saturday night, I think Saturday I got a call from my
14 cousin. He had received an invitation to my
15 engagement party which is next weekend. We spoke
16 about that briefly. I told him I can't talk about
17 anything else.

18 And mostly that conversation pertained to
19 since he had the same party for a lot of the same
20 people two or three months ago and wanted to figure
21 out if it was the same thing.

22 Yesterday at lunch I got a call from him.
23 I didn't answer it. I text messaged him back, saying
24 I'm sorry, I can't talk to you.

25 That was pretty much it, Your Honor.

1 THE COURT: And so he never -- since your
2 -- during the conversation about the wedding, did he
3 ever mention the case at all?

4 MR. NELSON: I told him flat out in the
5 beginning, I said I can't talk to you about anything
6 about that.

7 THE COURT: Did he mention the case?

8 MR. NELSON: Saying he's on the jury and
9 blah-blah-blah, not anything on facts. Now, I had
10 talked to him ---

11 THE COURT: That was before the trial
12 started?

13 MR. NELSON: No. I believe that was
14 Saturday.

15 And he talked to me before the trial
16 started, basically trying to get off jury duty and
17 what he could do to get off jury duty.

18 And he called me, I believe, after he got
19 picked, saying "I'm on the jury."

20 THE COURT: All right. So you mean
21 Saturday night, the weekend that just passed?

22 MR. NELSON: Yes, sir.

23 THE COURT: The one that the trial was
24 starting?

25 MR. NELSON: Yes, sir.

1 THE COURT: The one starting? So he
2 contacted you on Saturday night?

3 MR. NELSON: I believe Saturday night.

4 THE COURT: And tell me exactly what he
5 said.

6 MR. NELSON: He said something to the
7 effect of "I got your invitation to the engagement
8 party." I go, "I can't talk about -- anything about
9 the case," blah-blah-blah.

10 THE COURT: Did he try to talk to you
11 about the case?

12 MR. NELSON: No, I don't believe so. I'm
13 not a hundred percent, but I don't believe so. We
14 talked about the engagement party basically.

15 THE COURT: All right. Counsel approach.

16 (There was an off-the-record bench
17 conference. Said bench conference being concluded,
18 the following proceedings were had:)

19 THE COURT: All right. Just to make sure
20 we're straight, when did he exactly tell you he was
21 on the jury?

22 MR. NELSON: I believe he -- he got
23 picked, and then y'all took a long break. He called
24 me then to see if we could go to lunch. I told him I
25 went home sick, and he told me "I was on the jury" --

1 he told me he was on the jury. I believe that was on
2 Monday because I went home sick last Monday.

3 THE COURT: So last Monday when the trial
4 started, he told you he was on the jury?

5 MR. NELSON: I believe he wanted to go to
6 lunch, I told him I went home sick, and he said "I'm
7 on the jury."

8 THE COURT: Okay. Anything else,
9 Counsel?

10 MR. SAVAGE: May I approach, Your Honor?

11 (There was an off-the-record bench
12 conference. Said bench conference being concluded,
13 the following proceedings were had:)

14 THE COURT: When did you disclose that to
15 your colleagues in the Solicitor's Office?

16 MR. NELSON: I know -- I'm not positive.
17 I told him -- I remember speaking, I believe, to
18 Mr. Alfaro, and I'm not sure if it was after he was
19 picked or before, saying that my cousin was on the
20 jury panel. I just don't remember, I'm sorry.

21 THE COURT: Okay.

22 MR. NELSON: And I know I told Mr. Durant
23 after that, but...

24 THE COURT: So you told Mr. -- your
25 colleagues over here that he was on the panel?

1 MR. NELSON: I believe so, Your Honor.

2 THE COURT: And that was when he got
3 selected or before qualifications?

4 MR. NELSON: I'm not sure about before
5 qualifications. I'm almost positive I told him after
6 he was selected.

7 THE COURT: Okay. Anything else?

8 MR. SAVAGE: Not from this witness,
9 Your Honor.

10 THE COURT: Anything else from the state?

11 MR. DURANT: No, sir.

12 THE COURT: All right. Thank you.

13 MR. NELSON: May I leave, Your Honor?

14 THE COURT: You may.

15 (Mr. Nelson is excused and leaves the
16 courtroom.)

17 THE COURT: Anything else?

18 MR. SAVAGE: Well, your Honor, that
19 creates a much more serious situation than we had
20 before, in the fact that that information was
21 communicated to trial counsel, that a juror was not
22 forthright in his discussions with the Court, which
23 they were aware of and that they had -- they were
24 aware of that he was related and had a close
25 relationship to a member of the jury. That shifts it

1 now from the juror and Mr. Nelson, and trial counsel
2 had a duty to report.

3 THE COURT: Well, as I indicated, I
4 wanted to ask all of y'all when -- when all that
5 transpired, but regardless, your remedy in the case,
6 you agreed ---

7 MR. SAVAGE: It's a violation of due
8 process.

9 THE COURT: How is that if the juror's
10 been excused and there is no disclosure? Assuming no
11 disclosure took place, and we'll find that out, but
12 -- we'll ask that question first to make sure.

13 But absent any type of disclosure to that
14 jury -- as you know, I've been very much involved in
15 jury discussions and disclosures this last couple of
16 years, so you're going to have to convince me.

17 MR. SAVAGE: And this -- this is not a
18 *Pittman* case. This is a case that involves not only
19 a jury but a trial officer of the Court where the
20 trial officer of the Court had knowledge of a
21 misconduct that was unreported, which they have an
22 obligation to do.

23 They have an obligation to report it to
24 the Court, and they have an equal obligation for due
25 process purposes to report it to defense counsel.

1 THE COURT: Well, I mean, but that still
2 begs the question of an appropriate sanction,
3 assuming everything else were appropriate for that,
4 and I certainly am not convinced that dismissal would
5 be an appropriate sanction, and then that begs
6 whether or not another sanction would be appropriate
7 under the circumstances, but I would be more
8 concerned about whether the jury was tainted in any
9 type of way. That's the normal analysis.

10 MR. SAVAGE: Well, the only ---

11 THE COURT: I can't see how this rises to
12 a due process violation at this stage without some
13 showing that his opportunity for a fair trial has
14 been affected by -- by that whole process.

15 I concur that if -- all else remaining
16 equal, that if any attorney here is being asked a
17 question that says do you know anybody in this office
18 or that, and there have been -- it's been my
19 experience that if a juror did not properly represent
20 to me, whether it's the state or the defense, usually
21 someone will walk forward and tell me that if they're
22 aware of that.

23 It doesn't mean they were aware of it at
24 that moment. That's just been my experience over the
25 last eleven years, that someone would tell me that.

1 You know, I don't know what point they became aware
2 of it.

3 What point did y'all become aware of it?

4 MR. DURANT: Your Honor, my only
5 recollection of any conversation with Mr. Nelson is I
6 passed him in the hall one day and he said that
7 his. ---

8 THE COURT: That was after?

9 MR. DURANT: --- cousin was on the jury
10 panel.

11 THE COURT: That was after?

12 MR. DURANT: No. I believe that was
13 before.

14 THE COURT: Okay.

15 MR. DURANT: And ---

16 THE COURT: I mean, did you actually know
17 who it was?

18 MR. DURANT: No.

19 THE COURT: Okay.

20 MR. DURANT: I mean, like I say, I passed
21 him in hall, literally passed him in the hall, and he
22 made a comment that his cousin was on the jury.

23 THE COURT: Well, I assume if you had
24 known you would have disclosed that.

25 MR. DURANT: I would have disclosed it,

1 Your Honor.

2 THE COURT: I mean, Mr. Savage, I am --
3 it seems to me that this should turn on whether or
4 not the jury has been affected in any way.

5 I agree that I should have been made
6 aware of it as soon as possible and...

7 MR. SAVAGE: Here's an example how the
8 defendant is harmed, Your Honor. If the juror's been
9 disqualified, there are now 13 jurors. One of the
10 alternates has been picked randomly. If it had been
11 disclosed in a timely fashion, the jury composition
12 may not be the same as it is now.

13 THE COURT: If that were the case, then
14 we would have an absolute rule of law that that would
15 be the procedure to follow.

16 As you're well aware, based on your
17 substantial criminal experience, it is not unusual
18 from time to time to have a juror realize -- well, in
19 this very case, the juror -- one of the jurors
20 ultimately indicated that they did not recognize your
21 wife until after we started the case. And that's not
22 uncommon that such things take place.

23 Now, there's a difference between some
24 mistake or duty to disclose, etc., granted, but the
25 point of it being that it is not unusual for those

1 issues to come up.

2 Now, that being the case, it would be
3 very easy for appellate courts to just say as a
4 matter of a *per se* rule, because that argument would
5 always be there that you would have a different
6 composition of your jury, that it would be a
7 fundamental violation of the defendant's due process
8 rights that require a defined course of action, but
9 they have never accepted that as a legal proposition.

10 MR. SAVAGE: With all respect, Your
11 Honor, the situation which you have described is a
12 relationship of more than 21 years ago in a work
13 environment.

14 THE COURT: I recognize that it's
15 different, but there's a difference between making a
16 mistake and something that you know that should be
17 disclosed, but...

18 MR. SAVAGE: A difference between a
19 mistake, with a change in name and all the passage of
20 time and whatnot, and actual knowledge during the
21 trial which is not disclosed. There's a huge
22 difference between the two.

23 It's -- I think intentional is maybe a
24 strong word, but it may be an appropriate word.

25 The information, Mr. Nelson says, was

1 disclosed to one of the trial counsel for the state
2 during the course of the trial. And that was not
3 disclosed to the Court.

4 Now but for happenstance of it being
5 reported by somebody in Mount Pleasant over the
6 weekend to my office that they believed something
7 was inappropriate, it would have never been
8 questioned.

9 It's not that this matter was brought to
10 the attention of the Court as in the first case you
11 cited where the juror stood up and said, Judge, I've
12 made a mistake, I realize that I know Ms. Vonleigh
13 (phonetic) from days at SCNB.

14 THE COURT: I agree the scenarios are
15 different if that knowledge is on the other side, but
16 Mr. Durant said he didn't have that knowledge.

17 MR. SAVAGE: But Mr. Nelson has testified
18 under oath that he reported it to at least one of the
19 trial counsel and actually included more than one.

20 THE COURT: Well, did he tell you his
21 name, Mr. Alfaro?

22 MR. ALFARO: He didn't tell me his name,
23 Judge. He said that he had a cousin on the jury
24 panel. And that was before qualification. I didn't
25 go to qualification. I didn't -- I didn't know his

1 name.

2 THE COURT: At any time on the day we
3 drew this jury, did you know his cousin was on the
4 jury?

5 MR. ALFARO: No, sir.

6 THE COURT: Did you, Mr. Durant?

7 MR. DURANT: Yeah, I think he told me
8 that his cousin was on the jury panel, but I didn't
9 know who his cousin was.

10 THE COURT: Did he ever tell you the
11 name?

12 MR. DURANT: No, sir.

13 THE COURT: All right. When we drew the
14 jury, did you know the name at that point?

15 MR. DURANT: No, sir.

16 THE COURT: Okay.

17 MR. SAVAGE: But after the jury was
18 seated, Mr. Nelson says that he had a discussion with
19 counsel and told him that his cousin -- names don't
20 matter. The one name that matters is Mr. Juror. It
21 could have been any juror. The name doesn't matter.
22 They're on notice that "a juror" misled the Court
23 when he was seated on this jury.

24 THE COURT: All right. Let's get back.
25 What are you asking the Court to do, Mr. Savage?

1 MR. SAVAGE: I think once it raises to
2 the level of not a mistake, and it's not something
3 that was discovered by happenstance, it's not
4 something that the juror brought to the attention of
5 the Court, it's not something that the prosecutor
6 brought to the attention of the Court, but it's
7 brought to the attention of the Court by defense
8 counsel because somebody happened to be observant in
9 the juror's neighborhood, I believe then that's a
10 different situation. That's a violation of due
11 process, the duty to disclose to the Court and
12 defense counsel.

13 The question is: What's the harm, and
14 what's the remedy? There's no question that due
15 process has been violated; but the language then I
16 think defense counsel has to make for the purposes of
17 this Court is the harm created by that violation, and
18 I'm not sure that we can tell that based on the
19 disclosures of the juror himself.

20 Perhaps at a minimum we have to
21 individually voir dire the remaining jurors, at a
22 minimum, and then the question is: If there has been
23 any taint, then I don't think that there's any
24 alternative to a mistrial.

25 THE COURT: Well, I don't need to

1 speculate about a taint until I hear from the jurors.

2 MR. SAVAGE: Yes, sir.

3 THE COURT: And almost an hour ago we
4 started with the assumption that I would talk to the
5 jurors. I'm not sure that absent that type of taint
6 disclosed by the jurors, though, you know -- I mean,
7 I still don't know what remedy you're asking for, and
8 I think the reason you want to ask for this is you
9 don't know what the jury is going to say either.

10 MR. SAVAGE: Correct.

11 THE COURT: And the question that you
12 would suggest would be?

13 MR. SAVAGE: The next step I think is an
14 individual voir dire of the jury.

15 THE COURT: The question which would be
16 to the juror?

17 MR. SAVAGE: Has the juror that's been
18 dismissed had any conversation about his relationship
19 with the Solicitor's Office or any information about
20 the case?

21 It's just not about the case, but it's
22 the relationship that would give credibility or
23 believability or enhance credibility or believability
24 to the state's position because of a voucher for, if
25 you will, by that juror of the good name of the trial

1 counsel.

2 THE COURT: Are all the jurors here?

3 (The bailiff leaves the courtroom.)

4 THE COURT: Mr. Clerk, call the jury in
5 one by one. As they come in, if you'll just note
6 their name and number, please, for the record. If
7 you would handle that, please. And then when they
8 come in the door, you can swear them in.

9 THE CLERK: Okay. So you want them to
10 come in. Where would you like them to ---

11 THE COURT: One by one, I want you to
12 tell me their name and number. Just right there is
13 fine.

14 THE CLERK: Just stand there?

15 THE COURT: Uh-huh. I don't want them to
16 feel like they're being interrogated, you know, on
17 the stand or something.

18 THE CLERK: And then you want me to swear
19 them?

20 THE COURT: Yeah.

21 (The bailiff returns to the courtroom.)

22 THE BAILIFF: We're missing some.

23 THE COURT: We're missing some still?

24 THE BAILIFF: Yes, sir.

25 THE COURT: Okay. Well, we can start

1 with the ones that are here.

2 THE BAILIFF: Okay.

3 THE COURT: They're not supposed to be
4 here till 10:00.

5 THE BAILIFF: Okay.

6 (Thomas Owens, Juror No. 200, enters the
7 courtroom at approximately 9:54 a.m.)

8 THE CLERK: Judge, this is Juror Thomas
9 Owens, Juror 200.

10 THE COURT: Sir, I just need to -- it's
11 nothing that concerns you per se. I just need to go
12 through a certain procedure I'm required to do.

13 MR. OWENS: Sure.

14 THE COURT: So if you wouldn't mind,
15 we're going to swear you in real quick and just ask
16 you a quick question.

17 THOMAS OWENS,
18 being first duly sworn by the clerk, is examined and
19 testifies as follows:

20 THE CLERK: Thank you.

21 THE COURT: All right, sir. As you know,
22 I had to dismiss one of the jurors.

23 MR. OWENS: Yes.

24 THE COURT: I just need to ask you: Did
25 that dismissed juror in any way discuss his

1 relationship -- to you or the other jurors, his
2 relationship with the Solicitor's Office, or did he
3 discuss the case in any way whatsoever?

4 MR. OWENS: No discussion with the case
5 whatsoever. If he discussed anything else with a
6 relationship, I don't remember hearing anything like
7 that.

8 THE COURT: Did you hear anything?

9 MR. OWENS: I didn't, no.

10 THE COURT: All right. And did you hear
11 him talk to other jurors about that?

12 MR. OWENS: No. Again, I didn't hear him
13 mention anything. We were kind of a quandary ---

14 THE COURT: I'm not saying you did.

15 MR. OWENS: No, I didn't. As a group of
16 jurors, I don't think anybody has any idea, and all
17 of a sudden he's gone. And so we've gone, hm, how
18 did he manage that? That's about the depth of the
19 conversation.

20 THE COURT: Okay. But they did not -- as
21 far as you know, he did not talk to y'all in any way
22 about either of those things?

23 MR. OWENS: No.

24 THE COURT: All right. Thank you. When
25 you go back to the jury room, if you will not discuss

1 what we're doing in here, please.

2 MR. OWENS: Okay, sir.

3 THE COURT: Thank you.

4 (Mr. Owens returns to the jury room.)

5 (Andrew Tash, Juror No. 259, enters the
6 courtroom.)

7 THE CLERK: Your Honor, this is juror
8 number 259, Andrew Tash.

9 THE COURT: All right. Sir,
10 procedurally, I need to do something. So don't worry
11 about it. It doesn't necessarily affect you or
12 anything anyone's done wrong. I'm just required to
13 swear you in and ask you a question. So if you don't
14 mind, we'll do that.

15 ANDREW TASH,
16 being first duly sworn by the clerk, is examined and
17 testifies as follows:

18 THE CLERK: Thank you.

19 THE COURT: All right. Sir, as you know,
20 I had to dismiss one of the jurors, and so I need to
21 ask you: Did the dismissed juror in any way discuss
22 his relationship to the Solicitor's Office or the
23 case in general in any way whatsoever?

24 MR. TASH: Not that I know of. He didn't
25 say anything to any of the jurors.

1 THE COURT: All right. Thank you, sir.
2 And if you would not discuss this when you go back
3 there. Thank you.

4 (Mr. Tash returns to the jury room.)

5 (John Gross, Juror No. 320, enters the
6 courtroom.)

7 THE CLERK: Sir, if you don't mind
8 standing right there, please.

9 Your Honor, this is juror number 320,
10 John Gross.

11 THE COURT: All right, Juror 320.

12 Sir, I need to ask you some questions.
13 Not that you or anyone did anything wrong. It's just
14 I have a certain procedure that we have to follow.
15 So I'm going to ask you to be sworn in, please.

16 JOHN GROSS,
17 being first duly sworn by the clerk, is examined and
18 testifies as follows:

19 THE CLERK: Thank you.

20 THE COURT: As you know, I've dismissed
21 one of the jurors, sir. I just need to ask: Did the
22 dismissed juror in any way discuss his relationship
23 to the Solicitor' Office or the case in general in
24 any way whatsoever?

25 MR. GROSS: Not that I know of, sir.

1 THE COURT: All right. Thank you. And
2 do not discuss this when you go back.

3 MR. GROSS: Okay.

4 (Mr. Gross returns to the jury room.)

5 (Donna McNeill, Juror No. 329, enters the
6 courtroom.)

7 THE CLERK: Your Honor, this is juror
8 number 329, Donna McNeill.

9 MS. MCNEILL: Good morning.

10 THE COURT: Good morning. Ma'am, I need
11 to ask you a question. It's not that anyone did
12 anything wrong. But I have to swear you in ---

13 MS. MCNEILL: Yes, sir.

14 THE COURT: --- and follow-up on
15 something. So if you don't mind, please be sworn.

16 DONNA MCNEILL,
17 being first duly sworn by the clerk, is examined and
18 testifies as follows:

19 THE COURT: Ma'am, as you know, I've
20 dismissed one of the jurors, and I need to know: Did
21 that dismissed juror in any way discuss his
22 relationship to the Solicitor's Office or the case in
23 general in any way whatsoever?

24 MS. MCNEILL: Not to my knowledge, no,
25 sir.

1 THE COURT: All right. Thank you, ma'am.
2 And if you would please not discuss this when you go
3 back. Thank you.

4 MS. MCNEILL: Yes, sir.

5 (Ms. McNeill returns to the jury room.)

6 (David McQueeney, Juror No. 330, enters
7 the courtroom.)

8 THE CLERK: Your Honor, this is juror
9 number 330, David McQueeney.

10 THE COURT: All right, sir. I need to
11 ask you a question. Not that anyone's done anything
12 wrong. It's just that I have to follow a certain
13 procedure. So if you wouldn't mind being sworn in,
14 please.

15 DAVID MCQUEENEY,
16 being first duly sworn by the clerk, is examined and
17 testifies as follows:

18 THE CLERK: Thank you.

19 THE COURT: As you know, I dismissed one
20 of the jurors, and I need to ask you: Did that
21 dismissed juror in any way discuss his relationship
22 to the Solicitor's Office or the case in any way
23 whatsoever?

24 MR. MCQUEENEY: He did not discuss the
25 case with me. I do know I went to school with him.

1 I do know that I think his cousin was a member of the
2 Solicitor's Office.

3 THE COURT: And so you knew that from
4 some prior experience?

5 MR. MCQUEENEY: Yes, sir.

6 THE COURT: Did that come up in any way
7 in the jury room?

8 MR. MCQUEENEY: No.

9 THE COURT: Did you know that it was that
10 juror?

11 MR. MCQUEENEY: I knew before we ran into
12 each other in the jury room, so...

13 THE COURT: Do you mean when you were on
14 the panel?

15 MR. MCQUEENEY: Right.

16 THE COURT: Downstairs in the panel room?

17 MR. MCQUEENEY: Yes, sir.

18 THE COURT: Okay.

19 Counsel approach.

20 (There was an off-the-record bench
21 conference. Said bench conference being concluded,
22 the following proceedings were had:)

23 THE COURT: Sir, let me ask you, were you
24 aware that the other juror did not -- did you hear my
25 question about did everyone -- did anyone have any

1 connection with the Solicitor's Office?

2 MR. MCQUEENEY: Yes, sir.

3 THE COURT: Were you aware that he did
4 not respond to that? Just out of curiosity.

5 MR. MCQUEENEY: I guess so. I didn't
6 really think about it at the time.

7 THE COURT: That's all I need to know.
8 Thank you.

9 MR. MCQUEENEY: Yes, sir.

10 THE COURT: Please do not discuss this
11 when you go back there.

12 MR. MCQUEENEY: Yes, sir.

13 THE COURT: Thank you.

14 (Mr. McQueeney returns to the jury room.)

15 (Cynthia Peeples, Juror No. 335, enters
16 the courtroom.)

17 THE CLERK: Your Honor, this is juror
18 number 335, Cynthia Peeples.

19 THE COURT: Ma'am, I need to ask you a
20 question.

21 MS. PEEPLES: Okay.

22 THE COURT: Not that anyone's done
23 anything wrong. I just have to follow up on certain
24 things sometimes just so we have it all written down.

25 MS. PEEPLES: Okay.

1 THE COURT: So I need to swear you in,
2 please.

3 CYNTHIA PEEPLES,
4 being first duly sworn by the clerk, is examined and
5 testifies as follows:

6 THE COURT: Ma'am, as you know, I
7 dismissed one of the jurors. I need to know: Did
8 that dismissed juror in any way discuss his
9 relationship to the Solicitor's Office or the case in
10 any way whatsoever with you or the other jurors?

11 MS. PEEPLES: No.

12 THE COURT: Okay. Thank you. Do not
13 discuss this when you go back.

14 MS. PEEPLES: Okay.

15 THE COURT: Thank you.

16 (Ms. Peeples returns to the jury room.)

17 (Hunter Bowie, Juror No. 20, enters the
18 courtroom.)

19 THE CLERK: Your Honor, this is juror
20 number 20, Hunter Bowie.

21 THE COURT: Sir ---

22 MR. BOWIE: Good morning.

23 THE COURT: Good morning. I need to ask
24 you a question. Not that anyone's done anything
25 wrong. It's just that I have to follow up on things

1 sometimes.

2 MR. BOWIE: Sure.

3 THE COURT: So I need to swear you in.

4 HUNTER BOWIE,

5 being first duly sworn by the clerk, is examined and
6 testifies as follows:

7 THE COURT: As you know, I dismissed one
8 of the jurors.

9 MR. BOWIE: Yes, sir.

10 THE COURT: I need to ask: Did that
11 dismissed juror in any way discuss his relationship
12 to the Solicitor's Office or the case in any way
13 whatsoever?

14 MR. BOWIE: No, sir. He -- he said that
15 he had a cousin that worked in the Solicitor's
16 Office, but other than that, he didn't say anything
17 about the case.

18 THE COURT: When did he say that he had a
19 cousin that worked for the Solicitor's Office?

20 MR. BOWIE: We were just in talking one
21 day, talking about procedures of the Court, and he --
22 he said, well, I have a cousin that works in the
23 Solicitor's Office and this is the way this happens,
24 this happens.

25 THE COURT: And was that downstairs, or

1 was that after I selected this jury?

2 MR. BOWIE: That was after the jury was
3 selected.

4 THE COURT: And y'all -- after the trial
5 had started?

6 MR. BOWIE: Yes, sir.

7 THE COURT: Okay.

8 Counsel approach.

9 (There was an off-the-record bench
10 conference. Said bench conference being concluded,
11 the following proceedings were had:)

12 THE COURT: And when you said that y'all
13 discussed procedures, what did you mean by that?

14 MR. BOWIE: I don't know that it's as
15 much procedures as just, you know, what does the
16 judge do while we're sitting there, what does the
17 prosecution do, or what kind of usually happens sort
18 of thing. And I think he was just saying, well, I
19 have a cousin that's a prosecutor, I'll ask him. You
20 know, sort of what -- I guess what papers you're
21 looking at, what the judge does, that sort of thing.

22 THE COURT: Okay. And so y'all did not
23 discuss the case?

24 MR. BOWIE: No, sir. No, sir. Just...

25 THE COURT: General stuff?

1 MR. BOWIE: Just -- right, general stuff.
2 Not -- nothing specific to the case.

3 THE COURT: All right. Now, did he
4 disclose to the other jurors that he had a cousin on
5 the jury or just to you?

6 MR. BOWIE: Oh. It was -- it was just
7 something he said. He said, I have a cousin that
8 works in the Solicitor's Office or prosecutor's
9 office or something.

10 THE COURT: Well, what I mean by that,
11 was he just telling you, kind of whispering right
12 beside you ---

13 MR. BOWIE: Oh.

14 THE COURT: --- or did he tell the whole
15 jury panel that?

16 MR. BOWIE: I heard him say that. I'm
17 not sure who he was directing it to, but I did hear
18 him say that.

19 THE COURT: Okay. Now, would that in any
20 way affect your ability to give everyone a fair and
21 impartial trial?

22 MR. BOWIE: No, sir.

23 THE COURT: All right. Now, if you'll go
24 back.

25 MR. BOWIE: Sure.

1 THE COURT: Please do not discuss this in
2 any way.

3 MR. BOWIE: Sure.

4 THE COURT: Thank you.

5 MR. BOWIE: Yes, sir.

6 (Mr. Bowie returns to the jury room.)

7 (Ruth Green, Juror No. 99, enters the
8 courtroom.)

9 THE CLERK: Your Honor, this is juror
10 number 99, Ruth Green.

11 THE COURT: Hello ma'am. Ma'am,
12 sometimes I have to just follow up on things. It
13 doesn't mean anyone did anything wrong. I just need
14 to make sure it's all in writing so if anyone wants
15 to have that information they can have it. So I need
16 to swear you in, please.

17 RUTH GREEN,
18 being first duly sworn by the clerk, is examined and
19 testifies as follows:

20 THE COURT: Ma'am, as you know, I have
21 dismissed one of the jurors, excused one of the
22 jurors. I need to know: Did that dismissed juror in
23 any way discuss with you or any other jurors, if
24 you're aware of it, that he had a relationship to the
25 Solicitor's Office, or did he discuss the case in any

1 way whatsoever?

2 MS. GREEN: He didn't discuss the case.

3 THE COURT: Okay.

4 MS. GREEN: I don't remember him saying
5 anything about the Solicitor's Office.

6 THE COURT: Okay. All right. Thank you,
7 ma'am. If when you go back, please do not discuss
8 this in any way when you go back there.

9 MS. GREEN: I won't.

10 THE COURT: Thank you.

11 (Ms. Green returns to the jury room.)

12 THE COURT: Mike, I need Mr. McQueeney
13 back.

14 THE CLERK: Okay.

15 (David McQueeney, Juror No. 330, returns
16 to the courtroom.)

17 THE COURT: Sir, one thing -- you'll just
18 remain under oath. One thing I neglected to ask you
19 is: Would that information that you received in any
20 way whatsoever affect your ability to give everyone
21 in this case a fair and impartial trial?

22 MR. MCQUEENEY: No, sir, not at all.

23 THE COURT: All right. Thank you, sir.
24 If you'll go back to the jury room. Please, again,
25 do not discuss anything.

1 (Mr. McQueeney returns to the jury room.)

2 THE COURT: So just for the record, the
3 two that indicated they had some conversation, I've
4 asked the follow-up question. I'm not saying that
5 it's dispositive. I just want to make sure I do have
6 that in the record.

7 Bring the next juror in, please.

8 (Ashley Parks Gallagher, Juror No. 202,
9 enters the courtroom.)

10 THE CLERK: Your Honor, this is juror
11 202; Ashley Parks Gallagher.

12 THE COURT: Good morning.

13 MS. PARKS GALLAGHER: Good morning.

14 THE COURT: I need to follow up on
15 something. Not that anyone's done anything wrong. I
16 have to make sure that we put everything down in the
17 record. So I need to ask you a question under oath
18 if you don't mind.

19 MS. PARKS GALLAGHER: Okay.

20 ASHLEY PARKS GALLAGHER,
21 being first duly sworn by the clerk, is examined and
22 testifies as follows:

23 THE COURT: Ma'am, as you know, I've
24 excused one of the jurors.

25 MS. PARKS GALLAGHER: Right.

1 THE COURT: I need to know: Did the
2 dismissed juror in any way discuss his relationship
3 to the Solicitor's Office or discuss the case in any
4 way?

5 MS. PARKS GALLAGHER: I believe the only
6 thing he said was that his cousin worked in the
7 building. That was pretty much all he said.

8 THE COURT: Did he say where in the
9 building?

10 MS. PARKS GALLAGHER: Uh-uh.

11 THE COURT: Okay.

12 MS. PARKS GALLAGHER: Other than that, he
13 really didn't talk at all.

14 THE COURT: Okay. Would that in any way
15 affect your ability to give everyone in the case a
16 fair and impartial trial?

17 MS. PARKS GALLAGHER: No, sir.

18 THE COURT: All right. Thank you.
19 Please do not discuss this when you go back there.

20 MS. PARKS GALLAGHER: All right, sir.

21 (Ms. Parks Gallagher returns to the jury
22 room.)

23 (William Shannon, Juror No. 236, enters
24 the courtroom.)

25 THE CLERK: Your Honor, this is 236,

1 William Shannon.

2 THE COURT: Sir, sometimes I need to
3 follow up on things. Not that anyone's done anything
4 wrong. I need to ask you a question under oath if
5 you don't mind.

6 WILLIAM SHANNON,
7 being first duly sworn by the clerk, is examined and
8 testifies as follows:

9 THE COURT: Sir, as you know, I've
10 excused one of the jurors.

11 MR. SHANNON: Yes, sir.

12 THE COURT: I need to -- can you come a
13 little closer? I'm having a hard time hearing you.
14 That's fine, wherever's comfortable.

15 I need to know: Did that dismissed juror
16 in any way discuss with you or any other jurors that
17 you know of, that -- some relationship with the
18 Solicitor's Office or discussed the case in any way
19 whatsoever?

20 MR. SHANNON: No, sir.

21 THE COURT: Okay. Thank you.

22 MR. SHANNON: All right.

23 (Mr. Shannon returns to the jury room.)

24 (Belinda Shumpert, Juror No. 240, enters
25 the courtroom.)

1 THE CLERK: Your Honor, this is juror
2 number 240, Belinda Shumpert.

3 THE COURT: Ma'am, I need to ask you a
4 question. Not that you or anyone's done anything
5 wrong. It's just that sometimes we have to follow up
6 on things. If you don't mind, I need to put you
7 under oath.

8 BELINDA SHUMPERT,
9 being first duly sworn by the clerk, is examined and
10 testifies as follows:

11 THE COURT: Ma'am, as you know, I excused
12 one of the jurors, and I need to know: Did that
13 juror in any way discuss his relationship to anyone
14 in the Solicitor's Office or discuss the case in any
15 way?

16 MS. SHUMPERT: No, sir.

17 THE COURT: Okay. Thank you.

18 (Ms. Shumpert returns to the jury room.)

19 (Carol Baloglu, Juror No. 301, enters the
20 courtroom.)

21 THE COURT: Good morning.

22 MS. BALOGLU: Good morning.

23 THE CLERK: Your Honor, this is 301,
24 Carol Baloglu.

25 THE COURT: Ma'am, I need to follow up on

1 something. Not that you or anyone's done anything
2 wrong. So I need to put you under oath and just ask
3 you a question if you don't mind. Go ahead.

4 CAROL BALOGLU,
5 being first duly sworn by the clerk, is examined and
6 testifies as follows:

7 THE COURT: As you know, I excused one of
8 the jurors.

9 MS. BALOGLU: Uh-huh.

10 THE COURT: So I need to ask: Did the
11 dismissed juror in any way discuss with you, or the
12 other jurors that you know of, any relationship to
13 the Solicitor's Office or connection or discuss the
14 case in any way?

15 MS. BALOGLU: No, sir.

16 THE COURT: Okay. Thank you.

17 MS. BALOGLU: Thank you.

18 THE COURT: Ma'am, please do not discuss
19 anything when you go back.

20 (Ms. Baloglu returns to the jury room.)

21 (Jarrett Lindon, Juror No. 161, enters
22 the courtroom.)

23 THE CLERK: Your Honor, this is juror
24 161, Jarrett Lindon.

25 THE COURT: All right. Sir, I need to

1 follow up on something. Not that you or anyone's
2 done anything wrong. It's just that we have to make
3 sure it's all put down and followed up. So I need to
4 swear you in and ask you a question if you don't
5 mind.

6 JARRETT LINDON,

7 being first duly sworn by the clerk, is examined and
8 testifies as follows:

9 THE COURT: Sir, as you know, I excused
10 one of the jurors. I need to ask: Did the excused
11 juror in any way discuss any relationship to or
12 connection to the Solicitor's Office or discuss the
13 case in any way whatsoever?

14 MR. LINDON: No, sir.

15 THE COURT: Okay. If you would go back
16 to the jury room. Please do not discuss this in any
17 way. Thank you.

18 (Mr. Lindon returns to the jury room.)

19 THE COURT: And, Mr. Clerk, when you go
20 back there, please remind them do not discuss this in
21 any way, just in case I didn't tell ---

22 THE CLERK: Yes, sir.

23 THE COURT: --- every single one of them.
24 I think I have, but...

25 THE CLERK: And that's -- all the jurors

1 are polled.

2 THE COURT: That's it? All right.

3 All right. I'll be happy to hear from
4 you, argument-wise, Defense, please.

5 MR. SAVAGE: Judge, what makes this
6 situation a little bit different, let me just be sure
7 that the characterization that the Court gave in
8 referring to one of the jurors...

9 THE COURT: I'm sorry?

10 MR. SAVAGE: So that I can distinguish
11 between the juror who acknowledged her association
12 with Ms. Vonleigh when she was Ms. Vonleigh, Cheryl
13 left SCN Bank in 1984. We got married in 1986.

14 THE COURT: I don't think you have to
15 spend any time on it. I recognized the distinction,
16 Mr. Savage. I said it on the record, that there is a
17 difference between something like that and a
18 situation where there may be a duty to disclose.

19 MR. SAVAGE: And we had been using that
20 as a similarity, bringing up the time that the juror
21 then disclosed to the Court "oh, I forgot to tell you
22 that my cousin is in the Solicitor's Office," but
23 here we have an important involvement.

24 Here we have the involvement of trial
25 counsel in the knowledge that a juror sitting on an

1 empanelled jury failed to disclose appropriately to
2 the Court. So it's not just a juror's dishonesty or
3 forgetfulness. It's something that the state who's
4 prosecuting the case, trial counsel, had knowledge
5 of.

6 Now, that fact was disclosed to other
7 jurors, one or more, two or more. The juror that
8 said that he was -- who was the most precise about it
9 said that he indicated that he wasn't talking
10 specifically to him. When the Court questioned him,
11 he said he heard that. He couldn't describe who else
12 may have heard that. The impression that he left, at
13 least with the defense counsel, was that he wasn't
14 being addressed directly. That was done after the
15 jury was empanelled.

16 The question then is the psychological
17 effects of that, of not maybe discussing the case but
18 bolstering the credibility of the state and the
19 prosecutors. And that could easily have been
20 prevented, whatever that harm is that we'll never
21 know. They said they can still be fair and impartial
22 and whatnot, but the question of the enhancement of
23 the believability and the credibility of the state's
24 prosecutors is in question, the extent of which we
25 don't know.

1 The only reason that this is a problem
2 before the Court this morning is because the state
3 failed to disclose that in a timely basis.
4 Therefore, the state should be sanctioned, and we
5 believe that the sanction is a mistrial.

6 The effect of a mistrial under these
7 circumstances would be the same as a dismissal.
8 We're not asking the Court to dismiss the charges.
9 We're asking for a mistrial.

10 THE COURT: Well, why would you say that
11 the -- that a mistrial under these circumstances
12 would be the same as a dismissal?

13 MR. SAVAGE: Because with a dismissal,
14 that's the end of the case.

15 THE COURT: I understand that, but ---

16 MR. SAVAGE: If it's a mistrial, it's
17 pending.

18 But the mistrial was caused by the state,
19 action or lack of action, and therefore the state
20 would have to suffer the consequences of a double
21 jeopardy argument. That's not here today.

22 We're not asking for a dismissal. We're
23 asking for a mistrial.

24 THE COURT: Mr. Alfaro, please stand.

25 (Mr. Alfaro complies.)

1 THE COURT: On the day that the jury was
2 selected, did you tell me you knew that the juror was
3 on there?

4 MR. ALFARO: On the selected panel? No,
5 Your Honor. I said I knew that he was in the jury --
6 the jury pool.

7 THE COURT: Okay. At what point did you
8 become aware that he had not answered my question?

9 MR. ALFARO: When it was brought up in
10 court and he was excused. I didn't know -- like I
11 said, I didn't go to jury qualification, so I don't
12 know who got up for what.

13 THE COURT: Okay.

14 MR. ALFARO: I didn't know his name until
15 -- I didn't know his name, that he was Nelson's ---
16 Michael Nelson's cousin, until it was brought up in
17 court.

18 THE COURT: So what you're saying is
19 Mr. Nelson told you he had a cousin, but he didn't
20 tell you the name?

21 MR. ALFARO: He said he had a cousin on
22 the jury -- in the jury pool. And I didn't know the
23 name.

24 THE COURT: Did Mr. Nelson at any point
25 tell you that his cousin was on this jury?

1 MR. ALFARO: Not that I remember him
2 telling me that.

3 THE COURT: Mr. Durant?

4 MR. DURANT: The same thing, Your Honor.
5 I remember passing Michael Nelson in the hall and him
6 mentioning that his cousin was on the jury panel. No
7 -- no -- and I'm talking about the jury pool. I
8 didn't know who his cousin was, and I found out that
9 his cousin was on the jury when Mr. Savage brought it
10 up in court.

11 THE COURT: Anything else, Mr. Savage,
12 case law-wise or anything?

13 MR. SAVAGE: Judge, we have, much like
14 the trial itself, a credibility issue here.

15 My recollection of Mr. Nelson, who has no
16 interest in the outcome of this case other than he
17 works in the office, says that he advised Mr. Alfaro
18 and he believes advised Mr. Durant following the
19 empaneling of the jury that his cousin was on the
20 jury, in the jury, petit jury. I believe that's what
21 he said.

22 THE COURT: Bring him back. Let's ask
23 him.

24 MR. SAVAGE: If I'm mistaken of that, I
25 stand corrected.

1 THE COURT: Bring Mr. Nelson back,
2 please.

3 MR. DURANT: It was my understanding that
4 he said he thought it might have been after, but it
5 could have been before.

6 MR. SAVAGE: Well, maybe the transcript
7 will tell.

8 THE COURT: Well, we'll just verify it
9 one way or another. It's too important a question.
10 If you're correct, it's not my role to rule on
11 whether or not there is some consequence down the
12 road.

13 (At approximately 10:25 a.m., there is a
14 pause in the proceedings. At approximately
15 10:30 a.m., the following proceedings were had:)

16 THE COURT: Any word on Mr. Nelson? I
17 guess he'd understand that I said for now, I mean.

18 MR. DURANT: All's I know is we're trying
19 to find him.

20 MR. ALFARO: Your Honor, I just called
21 over to our office. He wasn't physically in his
22 office, but I told the receptionist to please have
23 someone go find him and tell him to get here
24 immediately. And I tried his cell phone, as well,
25 but didn't get an answer but left a message.

1 (Mr. Nelson enters the courtroom at
2 approximately 10:31 a.m.)

3 THE COURT: Mr. Nelson, come forward,
4 please. You'll remain under oath.

5 MR. NELSON: Yes, Your Honor.

6 MICHAEL NELSON, ESQ.,
7 previously duly sworn, is examined and testifies
8 further as follows:

9 THE COURT: I just want to make sure we
10 clarify again the exact moment you disclosed that
11 your cousin was on the jury, the selected jury.

12 MR. NELSON: I don't know if I spoke to
13 them about it after he was -- I don't remember when.
14 I remember walking down the hall and, I believe,
15 Mr. Durant, saying my cousin's on the -- I don't
16 think I was talking about the jury or the jury panel
17 Monday morning. I don't remember. I don't remember.

18 THE COURT: What Monday are you talking
19 about? The Monday of this week ---

20 MR. NELSON: Last Monday.

21 THE COURT: --- or the Monday of last
22 week?

23 MR. NELSON: Last ---

24 THE COURT: The first, the first Monday?

25 MR. NELSON: I'm not positive about it.

1 I think the ---

2 THE COURT: Are you talking about the
3 qualification day?

4 MR. NELSON: Yes, Your Honor.

5 THE COURT: Okay.

6 MR. NELSON: I believe that's when I said
7 my cousin's on the jury. I think I said jury, but
8 not talking about the panel here, talking about the
9 qualifications.

10 THE COURT: Okay.

11 MR. NELSON: But I'm not a hundred
12 percent on that, Your Honor.

13 THE COURT: And you say you had a
14 conversation with Mr. Alfaro?

15 MR. NELSON: I know it was pretty much
16 the same thing, passing in the hallway.

17 THE COURT: You're not saying he was on
18 -- did you ever tell the name?

19 MR. NELSON: No. The most I said is
20 cousin.

21 THE COURT: Never a name to anyone?

22 MR. NELSON: No. Well, not to anybody
23 here. I mean, there's people in the office that know
24 my cousin separately.

25 THE COURT: Okay.

1 MR. NELSON: Well, not know him. Met him
2 through me.

3 THE COURT: And you've talked to them
4 about him being on the panel?

5 MR. NELSON: Not talk, but, like I said,
6 I think I said my cousin's on the jury.

7 THE COURT: Jury panel or jury?

8 MR. NELSON: I think after he was picked
9 for the panel on the jury. I don't -- I don't
10 remember. These conversations were passing by. They
11 weren't -- I don't remember when or exactly what was
12 said. They weren't -- in all honesty, they weren't
13 important conversations to me.

14 THE COURT: Okay. Anything further,
15 Mr. Savage, question-wise?

16 MR. SAVAGE: Yes, Your Honor. I'd like
17 you to ask the witness if he told me in the presence
18 of a third party that he spoke to Mr. Alfaro after
19 this jury was selected and told him that his cousin
20 was on the jury.

21 THE COURT: Did you tell Mr. Savage that?

22 MR. NELSON: Was that...

23 THE COURT: That it was after the jury
24 was selected?

25 MR. NELSON: Was that yesterday when we

1 spoke?

2 THE COURT: It would have been the only
3 time you talked to Mr. Savage.

4 MR. NELSON: I -- I don't think so. I'm
5 honestly not sure.

6 THE COURT: Okay. Well, but you're here
7 now telling me that you do not know for sure when you
8 told them?

9 MR. NELSON: Correct. I remember -- I
10 remember it was passing in the hallway. I don't
11 remember which day. And like I said, that's -- it
12 wasn't a stop-and-talk conversation. It was just two
13 people crossing in the hall.

14 THE COURT: Were you at jury
15 qualification?

16 MR. NELSON: No, Your Honor.

17 THE COURT: Okay.

18 MR. DURANT: May I ask a question,
19 Your Honor?

20 THE COURT: You need to tell me what the
21 question is, and I'll ---

22 MR. DURANT: Oh. I just want to ask him,
23 though, if he was under the impression that his
24 cousin had disclosed that information to the Court.

25 MR. NELSON: I believe my cousin talked

1 to me the Sunday before qualifications, asked me how
2 he can get off the jury. He goes, "I'm going to tell
3 the judge that I know you and you're my cousin."
4 That's what I assumed the whole time.

5 THE COURT: Okay.

6 MR. NELSON: Up until yesterday when I
7 spoke to Mr. Savage.

8 THE COURT: Okay. All right. If this
9 ever happens again, you tell the judge personally.

10 MR. NELSON: Yes, Your Honor.

11 THE COURT: Thank you.

12 MR. NELSON: May I be excused?

13 THE COURT: Uh-huh.

14 (Mr. Nelson is excused and leaves the
15 courtroom.)

16 THE COURT: All right. Mr. Savage,
17 arguments?

18 MR. SAVAGE: Your Honor, our position is
19 the same.

20 As a matter of practicality, it would be
21 of no benefit to say my cousin's on the jury panel.
22 The purpose of communicating that information is to
23 direct the solicitor's attention to who would be a
24 favorable juror. He wouldn't just say my cousin.
25 He'd provide more information of that.

1 So the more logical evaluation of his
2 statement is "my cousin's on the jury," because
3 there's no benefit of communicating that information
4 to the solicitor's staff before the panel is seated.
5 Out of the 300, God knows how many, people we had on
6 Monday, to say his generic relationship, "my cousin,"
7 is of no meaning.

8 THE COURT: Well, let's take that one
9 step. Let's suppose someone says they have a cousin
10 that works in the Solicitor's Office. Does that mean
11 they're automatically excused?

12 MR. SAVAGE: No, sir. It leads to the
13 next question, can you be fair and impartial, as you
14 did many of the jurors who revealed some at least
15 relationship, whatever.

16 I mean, there were many, many occasions
17 during the selection of this jury that Your Honor
18 asked would that affect your decision to be fair and
19 impartial to the state and the defense in this case.

20 That was not proposed to this potential
21 juror because the information was not provided to
22 the Court that it was appropriate to ask that
23 question.

24 THE COURT: Well, then that still brings
25 us back to the point, now that we've uncovered that

1 fact and the juror's been excused, why shouldn't I
2 determine this on whether or not this has indeed
3 prejudiced the defendant, because we have an
4 alternate?

5 MR. SAVAGE: We do, but we have also had
6 at least one, two, or more tainted jurors with
7 information that may not be direct about the case but
8 affects the credibility and the believability. The
9 key question ---

10 THE COURT: That's a different line of
11 argument. We're first trying to get to the threshold
12 about what -- this whole duty to disclose and whether
13 or not there is inappropriate harm that should be
14 rectified, but -- and, quite frankly, I'm not
15 convinced, I'm not prepared to say there was some
16 kind of intentional conduct on the part of the state.
17 I'm not sure the record rises to that level. And I
18 would be inclined to determine -- determine that part
19 of it on whether or not some harm resulted to the
20 defendant, some prejudice, etc., but that doesn't
21 address now what to do about the other jurors that
22 have been...

23 MR. DURANT: If I might just respond to
24 that argument, Your Honor. I'm told virtually every
25 time I try a case by somebody in the office that they

1 have a friend or a cousin or a father-in-law or
2 somebody on the jury. I don't really pay that
3 information any attention at that time, and I don't
4 ask who it is; because if it comes up, those people
5 have invariably disclosed that to the Court, and
6 they're not going to be on my jury anyway. So it
7 doesn't -- really makes no difference to me ---

8 THE COURT: All right.

9 MR. DURANT: --- who is on the jury
10 panel.

11 You know, what makes this case a little
12 bit different is that he apparently did not disclose
13 that, and apparently Mr. Nelson thought that he had.

14 And the issue here is: Is his client
15 prejudiced by that nondisclosure? And from what I've
16 heard in the courtroom this morning, he has not been.

17 THE COURT: All right. Go ahead,
18 Mr. Savage.

19 MR. SAVAGE: Other than the fact that the
20 jurors ---

21 THE COURT: Well, getting back -- back to
22 what my question was, I'm not convinced as a matter
23 of law that a challenge for cause would have been
24 sustained. Okay? It's generally not my policy if
25 someone has some connection that I -- unless it's an

1 immediate family member, I don't necessarily excuse
2 them for cause if they say they can give a fair and
3 impartial trial to anyone. So...

4 MR. SAVAGE: I realize what I'm saying
5 now is speculation, it may be categorized as wild
6 speculation, but we're told that this juror did not
7 want to serve. He had an opportunity to avail
8 himself of a reason to be excused. Was there some
9 reason why he didn't avail himself of that
10 opportunity to be excused?

11 I'm not accusing of anything, but just --
12 it's a very big question in my mind, that this fellow
13 wanted to get off the jury, he happened to be the
14 cousin of somebody, he knows somebody else that knows
15 somebody, somebody, but he's on the jury, whatever.
16 It doesn't ring true.

17 The other problem I have is the juror who
18 testified, whose name I don't recall, maybe McQueeney
19 or something like that, testified in that
20 conversation they described job descriptions. What's
21 the judge doing while we're out here, what are the
22 prosecutors doing, what are the defense -- you know,
23 there was an inquisition about what was going on and
24 apparently some discussion about that. Now, again,
25 it may not be about "they're looking at evidence

1 that's" ---

2 THE COURT: Well, wait. Wait. Let me
3 stop you, because I want the record to be absolutely
4 clear that there is a difference between ruling on
5 what you claim to be misconduct and ruling on what's
6 related to the prosecution and ruling on something
7 related to the jury.

8 That has nothing to do with the
9 prosecution if they started just inquiring about what
10 does the prosecutor do, what does the defense lawyer
11 do, what does the judge do.

12 And as a matter of fact, as far as I
13 understand it, we keep pamphlets that go into -- to
14 look at about those kind of things. But I don't know
15 for sure, but I probably should find out.

16 But if I'm going to rule, I want it to be
17 separated, because the analysis may be different.

18 And, quite frankly, if you think that
19 there's been some effect that attaches to the ruling,
20 that effect is substantially changed because of which
21 prong you're -- part you're going down. Do you
22 understand?

23 MR. SAVAGE: Yes, sir. What I'm
24 suggesting is...

25 THE COURT: Go ahead.

1 MR. SAVAGE: I believe, and I may stand
2 corrected by the Court and the court reporter, that
3 when Mr. Nelson -- I can tell you when I spoke to
4 Mr. Nelson yesterday at the noon hour, he told me
5 that the information was communicated to one of the
6 trial counsel, not two, not three, but one
7 specifically whom he named, that his cousin was on
8 the panel, the panel being the petit jury. That
9 matter was brought to the Court's attention at that
10 time.

11 I believe that he indicated this morning,
12 although I'd like to refresh my memory by reviewing
13 the record, that he testified today that he provided
14 that information to trial counsel after the jury was
15 seated.

16 It only makes sense that he would give a
17 generic description as opposed to a name for a seated
18 panel member. It would be of no value to say my
19 cousin is on the summonsed jury as opposed to the
20 seated jury.

21 THE COURT: I don't know what you mean by
22 that it only makes sense. His only testimony is he
23 passed him in the hallway and made that statement.

24 MR. SAVAGE: But there's no value in that
25 information.

1 He also told me yesterday that that
2 information was passed around the Solicitor's Office.
3 I think he said that today, on some sheet or
4 whatever, however they ask anybody if they know
5 anybody on the jury. I'm not saying he said that
6 today, but I understood him ---

7 THE COURT: I was about to say I didn't
8 hear that today.

9 MR. SAVAGE: He had talked to other
10 people that his cousin was on the jury about this
11 trial.

12 MR. DURANT: And that didn't happen to
13 me. I showed the jury list to Juan Middleton
14 (phonetic) in my office, and I showed it to Detective
15 Stanley in my office, and other than that, I didn't
16 discuss the jury list with anybody.

17 THE COURT: I mean, my problem,
18 Mr. Savage, you're asking me to speculate,
19 essentially, because you have prosecutors here saying
20 they didn't realize at the time he was selected and
21 you have Mr. Nelson saying I didn't -- essentially
22 saying I don't know when -- where we were at in the
23 process.

24 MR. SAVAGE: But that's the latest
25 version of that. But I believe his earlier version

1 was that he spoke, talked to Mr. Alfaro, trial
2 counsel, that his cousin was on the seated jury.
3 Now, I would like to ensure that that's what was
4 said.

5 THE COURT: Well, we can check that.
6 Madam Court Reporter will check. Mr. Alfaro said
7 that's not the case, too. I understand. Let's check
8 it.

9 MR. SAVAGE: That is a credibility issue,
10 and that's what I had been arguing earlier. It's
11 just a part of the main trial, it's a credibility
12 issue, who has an interest in the outcome. That's a
13 judgment that the Court has to make on credibility if
14 it's in conflict.

15 THE COURT: Well, I mean, I think a way
16 to resolve that would be, you know, if -- you know,
17 then I might have to say: Did these two or three do
18 anything wrong?

19 MR. SAVAGE: Well, that's another matter.

20 THE COURT: Well, I mean, but you're
21 saying that they are the ones that didn't disclose
22 and they had a duty to disclose.

23 MR. SAVAGE: Yes. Yes, they did.

24 THE COURT: And if they're telling me
25 that they were not aware of it at the time the jury

1 was selected, and Mr. Nelson is saying "I'm not sure
2 about the process," other than listening to what he
3 said earlier, as you requested, I'm not sure that
4 that credibility decision could not be properly made
5 that they didn't know.

6 You know, if I'm trying a case as the
7 fact finder and making credibility determinations,
8 and you have people saying "this is the way it was"
9 and you have someone saying "I'm not sure," I would
10 probably lend more of the credibility determination
11 to the people that were sure.

12 MR. SAVAGE: Or you might ask the first
13 time he testified and how they testified, and what's
14 he been doing between the time he testified and now.

15 THE COURT: I said subject to let's look
16 at what he said earlier. But then a determination
17 would have to be made about one of the witnesses not
18 telling the truth, and that's a whole different
19 approach.

20 And, but standing alone, when you have
21 uncertainty versus certainty, it would be hard, if
22 you were in Judging 101, to say not go with
23 certainty.

24 And if I were telling new judges, you
25 know, how to look at those kind of things, you know,

1 it's easier to say, well, certainty comes closer to
2 meeting a standard of proof than uncertainty does.

3 When all the smoke clears, regardless of
4 what I do here today, I do agree, though, that, you
5 know, the minute someone becomes aware of something
6 not to assume anything.

7 And, you know, the problem is there was
8 an assumption here that that juror disclosed it at
9 qualification.

10 And, you know, the qualification process
11 is such that sometimes everyone's at qualification;
12 sometimes all the attorneys are not. And then it's
13 further -- and problems are further associated with
14 the fact that counsel don't necessarily walk up there
15 when the jurors do approach.

16 But it just turns out that this juror did
17 not approach the bench.

18 MR. SAVAGE: You will recall that
19 Mr. Nelson reported through me that the juror did
20 disclose yesterday, and I reported that to the Court.

21 THE COURT: Well, I thought you told me
22 yesterday that that was his understanding, and then
23 he backtracked on that later. I thought that's what
24 you told me yesterday.

25 MR. SAVAGE: That's what he told me.

1 When he addressed the Court, he backtracked.

2 THE COURT: Okay.

3 MR. SAVAGE: But if ---

4 THE COURT: But, see, you know, he was
5 speaking with knowledge he really didn't have,
6 because he wasn't even at qualification. That's why
7 I asked him if he were at qualification.

8 And now he's satisfied me by saying when
9 he actually did talk to the juror he was under the
10 impression that the juror was going to tell me that
11 on Monday morning, and that's what his assumption was
12 based on.

13 And, in fact, the juror did not tell me.

14 MR. DURANT: And, basically, which goes
15 back to my original point, Your Honor. I mean, like
16 I said, every week I have this. And this is the
17 first time, to my knowledge, I've actually had a
18 juror that didn't disclose a relationship. I mean,
19 they always have in the past.

20 THE COURT: Madam Court Reporter, are you
21 looking for that? I mean -- well, hold on a second.

22 You know, Mr. Savage, you know, when I
23 reflect on it, if Mr. Nelson has clarified what --
24 now that he's the under the pressure of questioning
25 from the Court what exactly -- to really recall what

1 took place, and he's explained it, why shouldn't I
2 accept that explanation? I'm not trying to ---

3 MR. SAVAGE: Your Honor, I believe there
4 is some doubt about his recollection at the time he
5 made the initial statement. I'm not -- I don't want
6 to vouch for what he said at that time.

7 My recollection of what he said is that
8 he had a discussion with Mr. Alfaro after the petit
9 jury was seated. I think that is supported by the
10 fact that he reported that generically, not by name.

11 It would be of no value, as I've argued
12 before, to report that my cousin is on the -- I mean,
13 why would you even say that unless it was specified
14 who that party is? It is -- it's meaningless.

15 But once a jury is seated, then a generic
16 title to that juror is appropriate: Hey, we've got
17 somebody on the jury, my cousin.

18 THE COURT: I still don't -- because he's
19 now said he doesn't know, and they say they know, I
20 don't know how I can resolve that otherwise.

21 Now, it doesn't seem that the jury's been
22 tainted by it in any way. And I'm not absolutely
23 convinced that -- I'm just not convinced that there
24 was anything intentional on their part.

25 Had the case gone to a verdict and this

1 came up after the fact, now it's just more compelling
2 of an argument that he never disclosed it, but...

3 MR. SAVAGE: But then I would have the
4 burden of explaining to the Court why I didn't
5 disclose it immediately upon my knowledge. I can't
6 sit on that information and see how it goes, and if
7 it doesn't go my way then play that card.

8 THE COURT: I agree with that. But what
9 I'm saying is, if you discovered it after the trial
10 and we received a verdict and it appeared that a
11 juror -- a juror did not disclose something that the
12 juror should have disclosed and it was done
13 intentionally, then that is definitely a more
14 troubling situation than when you have someone --
15 that you do uncover it before you even get to the
16 verdict. You remove the taint, and the rest of the
17 jury says they have not been affected by it one way
18 or the other, you know.

19 Then you get back to the question, am I
20 sanctioning them for not doing something that they
21 should have done that hasn't harmed the defendant, or
22 am I sanctioning them for something they should have
23 done that has harmed the defendant. In my mind,
24 there is a substantial difference.

25 MR. SAVAGE: My position is that I have

1 no interest in a sanction.

2 THE COURT: What I mean, when I use the
3 word "sanction," that includes the full range of
4 dismissal or whatever. I'm just talking about a
5 remedy.

6 MR. SAVAGE: Your Honor, the remedy that
7 I am seeking is only as it applies to my client.

8 My client's due process rights have been
9 violated by the failure to disclose that there was a
10 seated juror who was not honest with the Court, who
11 had a relationship, a special relationship with a
12 member of the Solicitor's Office.

13 It's not only the failure to disclose,
14 but it's the failure to disclose not that my uncle
15 was a law enforcement officer or some other question
16 that was asked by the Court, but a very material,
17 important issue: Do you have any relationship or
18 connection to the Solicitor's Office? Because they
19 are the ones that are prosecuting the case.

20 That relationship is with a prosecutor in
21 the prosecutor's office. And during the course of
22 the jury's discussion, not about the case but about
23 the players in the courtroom, they discussed the role
24 of a prosecutor.

25 THE COURT: I'm listening.

1 MR. SAVAGE: And who knows what the
2 psychological impact of that is in terms of
3 bolstering the credibility, that all prosecutors are
4 good guys, they only do truthful things, or what's
5 going on when the courts are closed, are they doing
6 something else, are they trying to hide something.
7 Whatever those discussions were, it's only
8 speculation, but the issue is: Has that bolstered
9 the credibility?

10 And this is a credibility case, Judge.
11 This is not, oh, boy, this is obvious that he's
12 guilty or obvious he's not guilty. It's credibility,
13 credibility, credibility. It's been that way before
14 the case. It's been that way in opening arguments.
15 It's been that way in direct examination. It's been
16 that way in cross-examination.

17 And the slice of baloney is very thin in
18 this case: Who are you going to believe? There are
19 not very many eyewitnesss to this situation, and are
20 you going to believe the one who the prosecutor
21 offered?

22 He authenticates this witness, he called
23 this witness, are you going to believe him, or are
24 you going to believe the witnesses that have been
25 authenticated and presented by the defense?

1 THE COURT: I agree with that, but ---

2 MR. SAVAGE: This case is a ---

3 THE COURT: --- but we've nipped it in
4 the bud. Because post-verdict, those argument are
5 heightened. Those are -- those are elevated because
6 you can say that that indeed is problematic. But
7 we're not post-verdict here. It's heightened
8 post-verdict.

9 We're here. We are saying that he's
10 removed from the jury, and the rest of the panel says
11 they are not affected by it one way or another.

12 MR. SAVAGE: He's also said that he
13 didn't discuss it with the jurors. Then you get two
14 or three jurors out here that says he discussed it
15 with them.

16 THE COURT: And he's removed.

17 MR. SAVAGE: But they are not removed.

18 THE COURT: But they have said that he --
19 they were honest with the Court. They said that he
20 told them that he had -- one of them said a cousin,
21 and one of them just said someone in the building.

22 MR. SAVAGE: And then one described what
23 prosecutors do when we're in recess.

24 THE COURT: Well, they said they asked
25 about that. But that's a separate issue, whether

1 that is discussing the case or not, you know, talking
2 about things like that. That's not this issue.

3 I'm not prepared to grant the relief.

4 I'm not prepared to grant relief on those bases.

5 I'm not sure that the prosecution -- I'm
6 not convinced that the prosecution's conduct was
7 intentional or in bad faith in this situation, and
8 I'm prepared to go with the analysis of whether or
9 not this created any type of harm to the defendant or
10 prejudice.

11 And I do believe that the juror should
12 have disclosed that information, and I'm not
13 convinced that the juror misunderstood the question,
14 and I'm not convinced that I would have excused the
15 juror for cause at the time had he disclosed the
16 information. I would have just asked, you know,
17 whether or not it would have affected his ability to
18 give a fair and impartial trial. And, quite frankly,
19 I don't know the answer to that question.

20 MR. SAVAGE: If the information, clearly,
21 had been brought to the attention of the defendant at
22 that time, we could have exercised a preemptory. So
23 whether the Court dismissed it, that doesn't mean
24 that he would still sit on the jury.

25 THE COURT: But it's not clear that the

1 defendant would have used a preemptory.

2 MR. SAVAGE: Well, I am -- I'm not sure
3 I've ever seated anybody on a jury panel that's
4 related to someone in the Solicitor's Office, but I
5 guess that is -- that is true there may have been
6 other prevailing reasons to seat him.

7 THE COURT: That's exactly right. There
8 may have been other jurors that you were more
9 concerned about using your preemptory challenges for.

10 And so, based on this record, I can't say
11 that, you know, you would have supported any
12 challenge for cause or it would have changed your use
13 of a preemptory in this case. That record has not
14 been developed.

15 I deny your request in this regard.

16 Anything further?

17 MR. SAVAGE: That's all we have. Thank
18 you, Your Honor. Appreciate it.

19 THE COURT: I'll be happy to hear from
20 you if you've discovered any other research on the
21 self-defense issue on the applicability of the
22 statute, but if you need a short break, since we've
23 been here for two hours, I'll be happy to let you
24 have it.

25 MR. DURANT: I could definitely use a

1 break, Your Honor.

2 THE COURT: All right. Did you want to
3 say something else, Mr. Savage?

4 MR. SAVAGE: Judge, you may want to
5 consider this during the break. There is a case out
6 of Oconee County involving Judge Macaulay. Yesterday
7 I had indicated that that was the Romeo and Juliet
8 law which has the same savings clause.

9 And Judge Macaulay did, in fact, charge
10 the new Romeo and Juliet. Interestingly, against the
11 wishes of the defendant. I don't understand quite
12 how it was done, but it is Judge Macaulay who did --
13 who did give that charge.

14 THE COURT: Against the request of the
15 defendant, and the change in the law -- well, that
16 doesn't make a lot of sense.

17 MR. SAVAGE: It sure doesn't. I'm
18 just ---

19 THE COURT: Because, if anything, the
20 Romeo law inured to the benefit of the defendant, and
21 if it were applicable...

22 MR. SAVAGE: The lawyers involved are
23 Derek Enderlin and the Public Defender's Office, and
24 it was Judge Macaulay, and he did charge, as I
25 understand it, the current law.

1 THE COURT: Well, not knowing the facts,
2 my only -- I can't understand that, but I haven't got
3 the savings clause before me, either. Is it the
4 exact same savings clause?

5 MR. SAVAGE: I understand that it is,
6 Judge.

7 THE COURT: If you want to print that out
8 for me and show it to me, I'd be happy to look at it.
9 But I'm not sure I understand that approach.

10 MR. SAVAGE: May I approach, Your Honor.
11 (Mr. Savage tenders document to the
12 Court.)

13 THE COURT: Was this the final version of
14 the bill ---

15 MS. WILLIAMS: Judge, I believe ---

16 THE COURT: --- that was passed?

17 MS. WILLIAMS: I believe that is. That's
18 not in the code, obviously, the savings clause part
19 is not in the code under the castle doctrine, as
20 well. That's the final version that I found on line
21 when we were just researching it.

22 But, Judge, I believe the savings clause
23 is word for word the same as the one the castle
24 doctrine involved.

25 THE COURT: All right. We'll take a

1 short break.

2 (A break is taken at approximately
3 11:02 a.m.)

4 (The trial reconvenes at approximately
5 11:21, the defendant being present with counsel, and
6 the following proceedings were had:)

7 THE COURT: Anything else we need to take
8 up before we get started?

9 MR. DURANT: Judge, does your ruling
10 remain the same with regard to the castle doctrine,
11 Your Honor? I thought you had ruled that it was not
12 applicable or...

13 THE COURT: Hold on. Just one second.

14 (The Court and the law clerk confer.)

15 THE COURT: I really can't explain,
16 without knowing more, I don't know why, Mr. Savage,
17 but -- I don't know why the judge did that in that
18 case. That just doesn't...

19 MR. SAVAGE: I don't know either.

20 MS. WILLIAMS: Judge, I have a friend
21 that I know who actually talked with the judge who
22 was on the trial who said it was a very odd fact
23 pattern. This was in the hall earlier. I didn't
24 want to take up my time by going into it.

25 But it was odd, a weird case, but the

1 judge actually prepared the charge himself. It
2 wasn't requested by either side. He didn't know why.

3 Judge, we'd like to add, we have just --
4 just one additional argument based on the language of
5 the savings clause itself.

6 The savings clause where it says the
7 repeal or an amendment of the existing law, obviously
8 if it's a repeal of an existing law, that statute is
9 an amendment, and we'd argue that it's created a
10 wholly a new right.

11 THE COURT: Well, it doesn't wholly
12 create a new right because it preserves all the
13 rights that are normally attached to being in your
14 residence.

15 MS. WILLIAMS: But then it said no duty
16 to retreat, Judge, and we would argue ---

17 THE COURT: It seems to me that would be
18 an amendment of the common law in that regard.

19 MS. WILLIAMS: And, Judge, when it does
20 say "to any law," I think that language would apply
21 the U.S. Supreme Court precedent, Judge.

22 We do have the *Schiller* (phonetic), we do
23 have *Griffith*, we have all these cases that say that
24 a new rule applies to all pending criminal cases.

25 And that's very -- that's well settled,

1 there is no question there, and that, you know, this
2 is a cut-and-paste savings clause in view of the
3 state's ---

4 THE COURT: But it is Supreme Court. I
5 mean, the U.S. Supreme Court has not interjected
6 itself into the state's determination of
7 retroactivity decisions except where it involves a
8 rule imposed by the U.S. Supreme Court.

9 MS. WILLIAMS: That is true, Your Honor.

10 THE COURT: We have plenty of case law
11 that says that we do not go that far in suggesting
12 the state's approach to retroactivity decisions, and
13 I think that would fully trespass on the state's
14 rights unless it involved a constitutional principle
15 imposed by the Supreme Court.

16 MS. WILLIAMS: But, Judge -- and I agree,
17 I think there is definitely a separation of power
18 issue there. This is longstanding common law. You
19 know, Judge Macaulay ---

20 THE COURT: And like I said when we first
21 started this discussion, the entire analysis, in my
22 opinion, whether it be correct or not, would be does
23 "any law" include, and I don't think you have to go
24 beyond the common law of South Carolina. And that's
25 the question. Either I'm correct; or if not, you

1 know, it's wrong.

2 MS. WILLIAMS: Judge, obviously, our
3 argument is that it does not...

4 THE COURT: I understand.

5 MS. WILLIAMS: --- include any -- any
6 common law in...

7 THE COURT: I understand your argument,
8 it's been noted for the record, but I'm not prepared
9 to say that. If it were entirely new, as you
10 propose, by the way, you're assuming it would have no
11 meaning or purpose.

12 MS. WILLIAMS: Well, Judge, I think the
13 purpose is to codify no duty to retreat. It's
14 something that...

15 THE COURT: Well, I'm talking about the
16 savings language would have no purpose.

17 MS. WILLIAMS: I'm sorry, Judge, I don't
18 quite follow you.

19 THE COURT: If this was an entirely new
20 approach and it wasn't amending anything, what is the
21 need for the savings clause?

22 MS. WILLIAMS: Well, and, Judge, that was
23 my point in the Romeo clause, as well. I mean, it's
24 the same cut-and-paste savings clause.

25 I would argue, you know, if you look for

1 the savings clause in the criminal statute, you would
2 find this one. I don't know if it's in -- if it is
3 -- if it's there or not, I can't tell you from --
4 from the legislature if it goes there in every single
5 case, but I can tell you this isn't unique to this
6 bill. It's -- you know, it's -- you know, the
7 purpose it serves, you could probably -- you'd could
8 put it on the end of the bill. They might do it in
9 every case, might not. But, Your Honor, again, there
10 is -- there's a first in every case.

11 THE COURT: Well, I understand. I really
12 don't want to revisit this argument.

13 MS. WILLIAMS: Okay.

14 THE COURT: I was just asking if there's
15 anything further. But I stand by my decision on
16 that.

17 MS. WILLIAMS: Thank you, Your Honor.

18 THE COURT: And I believe you've properly
19 postured everything for the record. I'm not trying
20 to cut you off, but like I say, it's going to all
21 boil down to that "any law" language, and either it's
22 correct or it's not.

23 Yes, sir.

24 MR. DURANT: The only other thing I
25 wasn't clear about after yesterday was whether you

1 were charging involuntary manslaughter.

2 THE COURT: Well, we haven't gotten to
3 that point yet. Perhaps -- he wants that in the
4 discussion. So -- Mr. Savage said he wanted to think
5 about that overnight.

6 Probably what we'll do is arguments
7 before lunch and -- well, it's already 11:30, so I
8 don't know about that. Maybe you need lunch to
9 re-clarify your thoughts after the change in
10 approach, anyway, so...

11 MR. DURANT: If it's up to me, Your
12 Honor, I'd just as soon get done with it.

13 THE COURT: Yes, sir. Involuntary?

14 MR. SAVAGE: Yes, Your Honor. We asked
15 for it yesterday. Our position has not changed.

16 THE COURT: I'm sorry?

17 MR. SAVAGE: Our position has not
18 changed.

19 THE COURT: What is that position?
20 Yesterday you said you wanted to think about it
21 overnight.

22 MR. SAVAGE: Oh, I'm sorry. Yes. We're
23 asking for the involuntary charge.

24 THE COURT: Does the state wish to be
25 heard on that?

1 MR. DURANT: Your Honor, I just leave it
2 to your discretion. I just want to know what your
3 charge is.

4 THE COURT: I'm going to charge it. Due
5 to the whole issue of -- because it's all somewhat
6 intertwined with his whole theory of accident,
7 self-defense, and involuntary, or just arguing the
8 involuntary aspect of it and whether he recklessly
9 did it or not. I'm inclined to charge it.

10 MS. WILLIAMS: Judge, one, one quick
11 thing on the charge. I believe you asked if we would
12 submit our accident charge. You wanted to see ours.
13 And so I made a copy for the prosecutor, as well.

14 Your Honor, may I approach?

15 Judge, also, Jury Charge H-2, that was
16 our inference from the fact that a witness was not
17 called by the state. That had some blanks in it when
18 we submitted it based on how the case proceeded. So
19 we've revised it for the closing.

20 Thank you, Judge.

21 MR. DURANT: Well, Your Honor, I also
22 wanted to ask if you were inclined to charge the
23 state's request to charge on the duty to retreat,
24 whether that's included in the charge.

25 THE COURT: That's in the general charge.

1 Now that new law, I'm not saying the new law applies.
2 I'll make sure it is.

3 What's your position on the inference
4 charge?

5 MR. DURANT: Are you asking me,
6 Your Honor?

7 THE COURT: Yes.

8 MR. DURANT: Which? Could you give me...

9 THE COURT: Which witness are you talking
10 about?

11 MS. WILLIAMS: Judge, in that, in that
12 particular charge regarding that, we referred to the
13 investigative detectives in the case.

14 MR. DURANT: Your Honor, I object to
15 that.

16 THE COURT: Well, it just says
17 investigating detectives and/or additional law
18 enforcement. That's pretty broad.

19 MS. WILLIAMS: Well, Judge, I mean, it
20 does get more specific as to investigative detectives
21 as to who might have interviewed or directed the
22 crime scene investigation.

23 We have testimony from both of those
24 crime scene detectives that they were under the
25 direction of someone else when they were collecting

1 self-defense fails at virtually every level.

2 First of all, I believe the judge will
3 charge you that the first element of self-defense is
4 that Mr. Rocquemore not be at fault in bringing about
5 the difficulty which resulted in the death.

6 I would submit that it was David
7 Rocquemore and his friend Chris Thomas that started
8 this whole thing.

9 Contrary to what Mr. Savage would have
10 you believe, Ronald Gibbs and Troy Eason and Rodney
11 Gibbs are not a bunch of drunken thugs. They're all
12 in their late 30's, early 40's. They all have good
13 jobs. None of them have criminal records. These are
14 solid people with solid careers. They're not a bunch
15 of drunken frat boys feeling forthright out on a
16 Saturday night and being out there trying to roll
17 somebody.

18 I'm not saying that Mr. Rocquemore is a
19 bad person, but these people are not bad people
20 either. But the fact of the matter is that Demar
21 Denson and Rodney Gibbs and Ronald Gibbs and Troy
22 Eason had obviously no beef with this man or his
23 friend Chris Thomas. At no time, you did not hear a
24 single lick of testimony in this entire case that
25 indicated there was any bad blood between them and

1 the defendant.

2 Why would, as Mr. Savage would claim,
3 would they go back over there to confront
4 Mr. Rocquemoire or Mr. Thomas who they hadn't even had
5 an unpleasant word with? Why, as Mr. Savage would
6 claim, do they have to go get Troy Eason to get
7 another pair of hands to beat up a bunch of women?

8 With all due respect, I think if that was
9 on their mind, they could have taken care of the
10 women themselves if that's what they were interested
11 in doing.

12 Fact of the matter is, Dexter called
13 them, and Dexter was angry because the girls weren't
14 there, and they went over to smooth things over.

15 But at no point, at no point did they
16 have any beef with this man, unless he said something
17 when they arrived that started it, like "What do you
18 N's think you are, a bunch of gangsters?" And that
19 started the whole cascade going.

20 And those words came from his mouth, and
21 those words were even confirmed by his witness
22 Mr. Thomas. He was arguing with them about driving
23 up with their lights off. And then on top of that --
24 so that's what started the argument.

25 And then Chris Thomas rachets it up by

1 saying he's going to get a weapon and quiet things
2 down. So he threatens to bring a deadly weapon to
3 what amounted to an argument at that point.

4 And then David Rocquemoire ratchets it up
5 another level, and he actually brings a deadly weapon
6 to what at that point had amounted to an argument.

7 And then when armed himself, he went
8 after Demar Denson and tried to pistol-whip him.

9 Secondly, self-defense, he has to have a
10 reasonable apprehension or fear of death or great
11 bodily injury.

12 Well, ladies and gentlemen, whatever fear
13 he may have had on his mind that night ended when he
14 pulled this out of his car.

15 In spite of what he told you on the
16 witness stand, nobody, nobody, nobody attacks a man,
17 a big man like him, holding a loaded one of these.
18 And from that one fact you can infer everything he
19 told on the witness stand is not true. Fact of the
20 matter is, once he armed himself with that weapon, he
21 feared no man. He feared no man.

22 Thirdly, and most importantly on the
23 issue of self-defense, I believe the judge will
24 instruct you on what is called in the law of
25 self-defense as the duty of retreating. And I would

1 submit to you, ladies and gentlemen, that there was
2 no reason that David Rocquemoire had to kill Demar
3 Denson that night. The law does not favor taking of
4 human life. And if one can reasonably avoid it by
5 retreating, he must do so.

6 No matter what happened before, once
7 Mr. Rocquemoire armed himself with that .45 caliber
8 weapon, he had an obligation to avoid killing
9 Mr. Denson if he could have done so without
10 endangering himself.

11 And if David was able to get to his car
12 and get that weapon, he could have gotten in his car
13 and left. If these guys were around, he could have
14 shoot those guys off and left, but that's not the
15 path he chose that night.

16 Instead of doing that, he got the gun,
17 this gun, and started doing what the kids call
18 nowadays a front: "Now what you going to do? Now
19 what you going to do?"

20 Like I said, whatever fear he may have
21 had that night dissipated when he picked up that
22 weapon, and all of a sudden he becomes the aggressor
23 in this case.

24 "Now what you going to do? Now what you
25 going to do?" And he goes after Demar Denson, and he

1 AFTERNOON SESSION

2 (The trial reconvenes at approximately
3 2:56 p.m., the defendant being present with counsel,
4 and the following proceedings were had:)

5 THE BAILIFF: Your Honor, they're ready.

6 THE COURT: Are y'all ready?

7 MR. DURANT: Yes, sir, Your Honor.

8 MR. SAVAGE: The defense is ready,
9 Your Honor.

10 (The Court and the law clerk confer.)

11 THE COURT: Do y'all want to look at the
12 verdict form, please.

13 (Mr. Durant and Mr. Savage comply.)

14 THE COURT: Any objection?

15 MR. SAVAGE: Not by the defense,
16 Your Honor.

17 MR. DURANT: No, sir.

18 THE COURT: All right. Bring the jury
19 in, please.

20 (Whereupon, the jury returns to the
21 courtroom at approximately 3:00 p.m.)

22 THE BAILIFF: All jurors are present,
23 Your Honor.

24 THE COURT: Thank you. Please be seated.

25 All right, ladies and gentlemen. At this

1 point I need to instruct you about the law that's
2 applicable to the case.

3 Can everybody hear me okay? If at any
4 point you can't hear me, please raise your hands,
5 because I will not know otherwise.

6 Now, as you've heard, the State of South
7 Carolina has charged the defendant with the offenses
8 of murder and possession of a firearm during the
9 commission of a violent crime.

10 You will have those indictments with you
11 in the jury room during deliberations, but you should
12 distinctly understand that an indictment just
13 contains allegations on the part of the state and is
14 in no way to be considered as evidence.

15 Now, the evidence in the case is the
16 testimony from the witness stand, any exhibits which
17 have been introduced into evidence during the course
18 of the trial.

19 Please pay close attention, because at
20 times I may get a request from the jury to give you a
21 written copy of any legal instructions, which I do
22 not provide to you.

23 Now, to the indictment -- the
24 indictments, the defendant has pled not guilty which
25 places the burden of proving the defendant -- of

1 proving the defendant guilty upon the state.

2 A person charged with committing a
3 criminal offense is never required to prove
4 innocence. A defendant does not have to produce any
5 evidence or witnesses. The burden is always upon the
6 state to prove a defendant guilty beyond a reasonable
7 doubt.

8 I charge you that it is a vital,
9 important rule of law that a defendant in a criminal
10 trial must always be presumed innocent until the
11 defendant's guilt has been proven beyond a reasonable
12 doubt.

13 This presumption of innocence remains
14 with the defendant at all times throughout the trial
15 and is only removed when and if the state has proven
16 guilt beyond a reasonable doubt, for it is your
17 solemn duty, ladies and gentlemen, if not convinced
18 of guilt beyond a reasonable doubt to find the
19 defendant not guilty.

20 What is a reasonable doubt in the law? A
21 reasonable doubt is a doubt that would cause a
22 reasonable person to hesitate to act.

23 All reasonable doubts must be resolved in
24 favor of a defendant. Suspicion, however strong,
25 does not suffice to sustain a conviction. As

1 indicated, the burden of proof is always upon the
2 state.

3 Now, ladies and gentlemen, as you may
4 have heard me mention, you are the finders of the
5 facts in this case. I do not sit up here and pass
6 upon the facts or tell you or express to you any
7 opinion that I might have as to the facts or anything
8 that I may think about this case, and you should form
9 no opinion in that regard from anything that I have
10 said or done.

11 If you have construed any acts or
12 gestures or statements on my part as any indication
13 of what you think I feel about this case, then
14 certainly you must disregard any such acts, gestures,
15 or statements on my part.

16 You are the judges and the sole judges of
17 the credibility or believability of the witnesses who
18 have testified in this case.

19 In passing upon their credibility, you
20 may take into consideration many things, such as:
21 the demeanor or manner of testifying, was the witness
22 forthright or hesitant, whether the witness had
23 reason to be biased or prejudiced, or whether a
24 witness's testimony was contradicted on the one hand
25 or whether it was supported and corroborated or

1 consistent on the other, and whether a witness made
2 any previous statements which are inconsistent with
3 the witness's present testimony.

4 You may consider such statements in your
5 determination of the truth of any statements or
6 testimony, as well as your consideration as to the
7 credibility of a witness.

8 If a witness is shown to have knowingly
9 testified falsely concerning a material matter, you
10 may also consider this factor in determining the
11 credibility of such witness's other testimony.

12 It is entirely within the province of the
13 jury to determine the credibility, if any, to be
14 given to any earlier statements and that to be given
15 to any present testimony.

16 And what was the witness's opportunity
17 for observation and knowledge of the matters about
18 which the witness has testified. You may consider
19 all of the facts and circumstances, including any
20 circumstances that may have affected a witness's
21 ability to observe or to recall a fact or event that
22 may have taken place.

23 You may believe all, a small portion of a
24 witness's testimony and disregard the larger or vice
25 versa. You may believe one witness against many or

1 many against one. You may believe all, some, or none
2 of a witness's testimony. Again, it is entirely up
3 to you.

4 Now, evidence of some other crime may
5 also be considered by you on the limited issue of
6 credibility or impeachment of a witness if that crime
7 had been introduced into evidence in regard to a
8 particular witness.

9 Now, the rules of evidence ordinarily do
10 not permit witnesses to testify as to opinions or
11 conclusions. An exception to this rule exists as to
12 those whom we call expert witnesses.

13 Witnesses who by education and experience
14 have become expert in some art, science, profession,
15 or calling may state their opinions as to a relevant
16 and material matter in which they profess to be an
17 expert, may also state their reasons for their
18 opinions.

19 You must consider expert testimony in the
20 same manner as you do any other testimony and give it
21 such weight as you may believe it to be entitled when
22 considered with all of the other evidence in the
23 case. Such testimony is given for the purpose of
24 enlightening you and not for the purpose of
25 controlling your judgment.

1 There are two types of evidence which are
2 generally presented during a trial: direct evidence
3 and circumstantial evidence. Direct evidence is the
4 testimony of a person who asserts or claims to have
5 actual knowledge of a fact, such as an eyewitness.
6 Circumstantial evidence is the proof of a chain of
7 facts and circumstances indicating the existence or
8 nonexistence of a fact.

9 The law makes absolutely no distinction
10 between the weight or value to be given to either
11 direct or circumstantial evidence, nor is a greater
12 degree of certainty required of circumstantial
13 evidence than of direct evidence.

14 You should weigh all of the evidence in
15 the case. After weighing all of the evidence, if you
16 are not convinced of the guilt of the defendant
17 beyond a reasonable doubt, you must find the
18 defendant not guilty.

19 Now, by the same constitution that makes
20 you the finders of the facts, I am made the sole and
21 only instructor in the law. You must accept as
22 correct the law which I charge, apply to the law the
23 facts as you find them to be and reach your verdict.

24 Put aside any conceptions you may have
25 had as to the law before coming here today and accept

1 the law as I instruct it to be.

2 For purposes of your duty as jurors here
3 today, you should not be concerned about what the law
4 ought to be but rather what I charge you the law is
5 at the present time in this state.

6 Now, again, I'm going to go over the
7 charges and the indictments with you at this point.

8 In one indictment, the defendant is
9 charged with the offense of murder.

10 Murder is the unlawful killing of any
11 person with malice aforethought either express or
12 inferred. Hence, in order to convict of murder, the
13 state must not only prove the killing of a victim was
14 caused by the defendant, but it was done with the
15 requisite criminal intent; that is, with malice
16 aforethought.

17 Criminal intent is a necessary element of
18 this offense and must be proved by the state beyond a
19 reasonable doubt. It is a state of mind which
20 operates jointly with an act in the commission of a
21 crime.

22 Criminal intent is a mental state, a
23 conscious wrongdoing. It is up to you, the jury, to
24 determine what a defendant intended to do based on
25 the circumstances shown to have existed.

1 There is no way that medical science can
2 dissect a person's brain and determine what a person
3 had in mind, so the law says that criminal intent may
4 be inferred from the circumstances shown to have
5 existed. Of course, you have the right to reject any
6 such inferences.

7 I will talk to you a little bit about
8 malice aforethought. I tell you that while the law
9 does not require that malice shall exist for any
10 particular length of time before the commission of
11 the act in question, it must be aforethought which
12 means the malice must have been conceived in the mind
13 of the defendant and must have accompanied the act of
14 killing.

15 Malice is defined in the law of homicide
16 as a term of art; that is, a technical term importing
17 wickedness and excluding just cause or legal excuse.
18 It is the wrongful intent to injure another and
19 indicates a wicked or depraved spirit intent on doing
20 wrong.

21 The words "express" or "expressed" or
22 "inferred" do not mean different kinds of malice but
23 merely the manner or way in which the only kind of
24 malice known to the law may be shown to exist; that
25 is, either by direct evidence or inference.

1 Malice aforethought presupposes a
2 competent mind capable of thinking, entertaining, and
3 retaining an evil disposition to encompass the death
4 of another human being.

5 Now, malice may be expressed as where,
6 for example, there are previous threats of vengeance
7 or lying in wait or other acts of preparation which
8 show that the deed was within a defendant's mind.

9 Now, malice may be inferred as where,
10 though not directly expressed, it is indirectly but
11 necessarily inferred from the facts and circumstances
12 which are proved.

13 Malice may be implied or inferred from
14 the willful, deliberate, and intentional doing of an
15 unlawful act without just cause or legal excuse.

16 If a person using a deadly weapon
17 deliberately and intentionally without just cause or
18 legal excuse takes the life of another, malice may be
19 inferred.

20 If facts are proven beyond a reasonable
21 doubt sufficient to raise an inference of malice to
22 your satisfaction, this inference would simply be an
23 evidentiary fact to be taken into consideration by
24 you, the jury, along with all the other evidence in
25 the case, and you may give it such weight as you

1 determine it should have.

2 In any event, an inference in no way
3 lessens the burden of the state to prove malice
4 beyond a reasonable doubt.

5 In other words, any evidence of malice
6 from the use of a deadly weapon is simply an
7 evidentiary fact to be considered by you along with
8 all the other evidence in the case and given such
9 weight as you determine it should have, including
10 your right to reject any such inference.

11 Now, if you should find that the state
12 has failed to prove beyond a reasonable doubt that
13 the defendant committed murder, you may consider
14 whether the state has proved beyond a reasonable
15 doubt that the defendant committed voluntary
16 manslaughter, because included within the offense of
17 murder is the lesser included offense of voluntary
18 manslaughter.

19 To be convicted of this offense, the
20 state must prove beyond a reasonable doubt that the
21 defendant took the life of another in the sudden heat
22 of passion based on sufficient legal provocation.

23 Both heat of passion and sufficient legal
24 provocation must be present at the time of the
25 killing to constitute voluntary manslaughter.

1 Sudden heat of passion may for a time
2 affect a person's self-control and temporarily
3 disturb a person's reason. The sudden heat of
4 passion must be the type that would make an ordinary
5 person unable to coolly reflect on his actions and
6 would produce an uncontrollable impulse to do
7 violence.

8 Sufficient legal provocation must be the
9 type that would make a person of ordinary reason and
10 caution become enraged and to lose control
11 temporarily.

12 The provocation needed for voluntarily
13 manslaughter must come from some act of or related to
14 the victim.

15 Words alone, however vulgar or insulting,
16 are not enough to be legal provocation. The words
17 must be accompanied by some overt threatening act
18 which could have produced the heat of passion.

19 The exercise of a legal right, no matter
20 how offensive it is to another, is never sufficient
21 legal provocation for voluntary manslaughter.

22 If the heat of passion had cooled or if
23 there is enough time between the provocation, if any,
24 and the killing for the passion of a reasonable
25 person to cool, the killing would not be voluntary

1 manslaughter.

2 In deciding whether a reasonable person
3 would have had enough time to cool off, you should
4 consider all of the circumstances surround --
5 surrounding the killing.

6 You may consider the nature of any
7 provocation or any -- the defendant's and party's or
8 other party's mental and physical states, the use of
9 any alcohol, circumstances and relationships between
10 the parties, the particular situation at the time of
11 the incident, education, and others.

12 In other words, you may consider all the
13 facts and circumstances and the time in which an
14 ordinary reasonable person in like circumstances
15 would have cooled.

16 Now, going further with the discussion
17 about lesser included offenses, if you find the state
18 has failed to prove beyond a reasonable doubt that
19 the defendant committed voluntary manslaughter, you
20 may decide whether the state has proved beyond a
21 reasonable doubt the defendant committed involuntary
22 manslaughter, which is also a lesser included
23 offense.

24 To prove involuntary manslaughter, the
25 state must prove beyond a reasonable doubt that the

1 defendant unintentionally killed the victim without
2 malice but while engaged in an unlawful activity not
3 naturally tending to cause death or great bodily
4 harm, or that the defendant unintentionally killed
5 the victim without malice while engaged in a lawful
6 activity with reckless disregard for the safety of
7 others.

8 Now, unintentional means the defendant
9 did not intend for anyone to be killed or seriously
10 injured. Reckless disregard for the safety of others
11 is more than mere negligence or carelessness. Mere
12 negligence or carelessness is the failure to use the
13 care that a person of ordinary reason would use under
14 the same circumstances.

15 Recklessness is a conscious failure to
16 use ordinary care. It implies the doing of a
17 negligent act knowingly. Reckless disregard for the
18 safety of others means that you are not interested in
19 the consequences of your acts or the rights and
20 safety of others.

21 Again, mere negligence is not enough.
22 The state must prove beyond a reasonable doubt that
23 the defendant was reckless and that the death was not
24 the result of an accident or mere negligent.

25 If a person who knows or should know that

1 ordinary care requires certain precautions to be
2 taken for the safety of others when using a dangerous
3 instrumentality, such as, for example, a gun or a car
4 or some other type of dangerous instrumentality, if
5 that person fails to use those precautions without
6 concern, then the person's actions may be considered
7 to be reckless. Again, it is for you, the jury, to
8 make this determination.

9 Now, one cannot be convicted of any crime
10 which is defined in terms of a result, such as murder
11 or voluntary or involuntary manslaughter, unless
12 one's act is the proximate cause of the result, which
13 in murder or either voluntary or involuntary
14 manslaughter is the death of the victim.

15 Proximate cause is that cause which is a
16 natural and continuing sequence unbroken by an
17 efficient intervening cause which produces the death
18 and without which the result would not have occurred.

19 Now, in the other indictment, the state
20 charges or -- the defendant with the offense of
21 possession of a firearm during the commission of a
22 violent crime.

23 The law of South Carolina makes it
24 illegal to possess a firearm or physically display
25 what appears to be a firearm during the commission of

1 a violent crime.

2 South Carolina law provides that a
3 violent crime includes, among other things, the
4 offenses of murder or voluntary manslaughter.

5 For you to find the defendant guilty of
6 this separate statutory offense of possessing a
7 firearm during a violent crime, you must first decide
8 whether a defendant is guilty of a violent crime,
9 whether in this case, as it is alleged, whether the
10 defendant is guilty of murder or voluntary
11 manslaughter.

12 If you find the defendant guilty of one
13 of those two violent crimes, then you must determine
14 whether the state has proven beyond a reasonable
15 doubt that the defendant was in possession of a
16 firearm or visibly displayed what appeared to be a
17 firearm during the commission of said violent crime.

18 The South Carolina law defines a firearm
19 as any machine gun, automatic rifle, revolver,
20 pistol, or any weapon which will or is designed to or
21 may be readily converted to dispel a projectile.

22 Now, whenever I talk to you about a
23 criminal offense, whether it be the one alleged in
24 the indictment or whether it be one in the
25 indictments or whether it be one of a lesser included

1 offense -- offenses, the state in order to obtain a
2 conviction for a particular offense must prove all of
3 the elements of that offense beyond a reasonable
4 doubt.

5 If the state has failed to prove any one
6 or more elements of an offense beyond a reasonable
7 doubt, you must find the defendant not guilty of that
8 offense.

9 Now, I want to talk to you a little bit
10 about some other concepts at this time, ladies and
11 gentlemen. First I want to talk to you a little bit
12 about self-defense.

13 Self-defense is a complete defense. If
14 you find a defendant acted in self-defense, you must
15 find the defendant not guilty.

16 Now, the state has the burden of
17 disproving self-defense by proof beyond a reasonable
18 doubt.

19 There are certain elements required by
20 law for self-defense to be applicable:

21 First, the defendant must be without
22 fault in bringing on the difficulty.

23 Second, the defendant must have actually
24 believed he was in a present imminent danger of
25 losing his life or sustaining serious bodily injury

1 or he actually was in such present imminent danger.

2 Third, if based upon his belief of
3 present imminent danger, a reasonably prudent man of
4 ordinary firmness and courage would have entertained
5 the same belief. If the defendant actually was in
6 present imminent danger, the circumstances were such
7 as would warrant a man of ordinary prudence,
8 firmness, and courage to strike the fatal blow in
9 order to save himself from sustaining serious bodily
10 harm or losing his own life.

11 And fourth, the defendant had no other
12 probable means of avoiding the danger of losing his
13 own life or sustaining serious bodily injury than to
14 act as he did in this particular instance.

15 If you find the defendant was entitled to
16 use deadly force in self-defense, the defendant need
17 not retreat in order to avoid the need for deadly
18 force if it is not possible or did not reasonably
19 appear possible to retreat without danger of being
20 killed or suffering serious bodily injury.

21 If it is possible to do so, then -- if it
22 is possible to retreat in that fashion, then a person
23 must do so, but I charge you that an individual
24 claiming self-defense has no duty to retreat if by
25 doing so he would increase his danger of being killed

1 or suffering serious bodily injury.

2 The law of self-defense encompasses
3 preventive action taken to protect one's life if such
4 action is taken in anticipation of danger and in
5 response to immediate threat.

6 One may act on appearances even if one
7 may be mistaken. The law does not hold someone to a
8 refined assessment of the danger, provided, of
9 course, he acted as a person of ordinary coolness and
10 courage would have acted or should have acted in
11 meeting the appearance of danger.

12 He does not have to wait till -- until an
13 assailant gets the drop on him, for he has the right
14 to act under the law of self-preservation and prevent
15 an assailant from getting the drop on him.

16 In determining a defendant's right to act
17 in self-defense, you must consider all the facts and
18 circumstances of the case.

19 In assessing the reasonableness of a
20 defendant's conduct, you can -- you may consider,
21 amongst other things, any differences in age, weight,
22 or size between the defendant and the victim, any
23 history or current circumstances of bad feelings or
24 dealings between the two individuals, the consumption
25 of any alcohol, as well as the reputation of those

1 involved.

2 In addition, you may consider the number
3 of aggressors or assailants that may be involved, as
4 well as any words accompanied by hostile acts, in
5 consideration of all of the circumstances on this
6 issue. Again, all of the facts and circumstances of
7 the case may be considered by you in regard to this
8 issue.

9 Finally, the person who is unlawfully
10 assaulted or against whom such an unlawful attempt is
11 directed is not bound to yield -- this is generally
12 kind of summing up the defense -- and may resist
13 force with force but is not authorized to go beyond
14 the line of force as is reasonably necessary under
15 those circumstances.

16 Again, for self-defense to be applicable,
17 all the elements must exist. If any one or more of
18 these elements have been disproven by the state,
19 self-defense would not be applicable. As I've
20 previously indicated, the burden is upon the state to
21 disprove self-defense by proof beyond a reasonable
22 doubt.

23 I also would like to talk to you
24 momentarily about the concept of accident.

25 When the death of a human being is the

1 result of an accident in the true meaning of that
2 term, no criminal responsibility attaches to the act
3 of the perpetrator.

4 If you find that the killing was
5 unintentional, that it was done while the perpetrator
6 was engaged in a lawful enterprise and that it was
7 not the result of criminal negligence, the homicide
8 will be excused as an accident.

9 There is no burden of proof upon the
10 defendant to show that the death was an accident.
11 The burden of proof is upon the state to prove beyond
12 a reasonable doubt that the death involved was not
13 the result of an accidental or negligent killing.

14 The burden rests upon the state to prove
15 beyond a reasonable doubt that the death of the
16 victim was the result of a criminal offense, in other
17 words, murder, voluntary manslaughter, or involuntary
18 manslaughter, and to also disprove accident.

19 A homicide will be excusable on the
20 ground of accident when, one, kills unintentionally;
21 two, defendant was acting lawfully; and three, due
22 care was exercised in the handling of any weapon.

23 Moreover, a homicide is also excused when
24 caused by the discharge of a gun where the accused is
25 lawfully acting in self-defense and the victim meets

1 death by accident through the unintentional discharge
2 of a gun or the like.

3 Finally, ladies and gentlemen, as in all
4 cases, the state has the burden of proving identity
5 beyond a reasonable doubt.

6 It is for you, the jury, to determine
7 whether the state has proven the identification of a
8 defendant beyond a reasonable doubt, considering the
9 credibility of all the witnesses, the circumstances
10 of observation, and such direct and circumstantial
11 evidence as you deem appropriate.

12 If the state has failed to prove the
13 identity of a defendant beyond a reasonable doubt,
14 you must find the defendant not guilty.

15 Now, you have been selected as fair and
16 impartial jurors sworn to impartially try and
17 determine the facts of this case; and when you comply
18 with your oath to do so, then no one will have a
19 right to criticize your verdict, and you will have
20 fully discharged your duty as jurors.

21 As to each indictment, consider all the
22 evidence and testimony that's been presented to you
23 and make your determination. If you have a
24 reasonable doubt as to whether the defendant is
25 guilty or not guilty, then find the defendant not

1 guilty. If, however, the state has proven guilt
2 beyond a reasonable doubt, then find the defendant
3 guilty.

4 At this time I'll go over the verdict
5 choices with you and the verdict form.

6 Just to remind you, that as to the
7 indictment number 2005-GS-10-8602, that is the first
8 one, it is the indictment for murder: We the jury
9 unanimously find the defendant -- and you have four
10 choices. I'm going to tell you what the choices are.
11 Obviously, there's no significance to the order that
12 I read them out to you. One is not guilty, two is
13 guilty of murder, three is guilty of the lesser
14 included offense of voluntary manslaughter, and four
15 is guilty of the lesser included offense of
16 involuntary manslaughter.

17 Now, as to the indictment number
18 2005-GS-10-8601: We, the jury, unanimously find the
19 defendant -- it's either not guilty or guilty. And
20 that's on the possession of a firearm during the
21 commission of a violent crime.

22 Now, whatever your verdict is, ladies and
23 gentlemen, it must be unanimous as to each
24 indictment; that is, each and every one of you must
25 agree on that decision. It is not a majority

1 verdict. You all must agree. That means if I called
2 you back in here, I could call -- have the clerk call
3 out your names one by one, and you would each confirm
4 that that was indeed your verdict and it was still
5 your verdict.

6 Now, ladies and gentlemen, at this time
7 one thing I need to do is, our remaining alternate,
8 sir, I want to thank you for participating in this
9 case throughout the last two weeks. Now that we're
10 ready to begin, I can excuse you as your alternate --
11 as being alternate. Do you have anything in the jury
12 room?

13 THE ALTERNATE JUROR: Yes, sir.

14 THE COURT: Would the bailiff please
15 take him back there, and get your stuff. Thank you
16 again for your service. If you want to stay and
17 watch in the courtroom, you're welcome to do so, but
18 you're excused to leave. I appreciate your
19 assistance.

20 (Whereupon, the alternate juror is
21 excused and leaves the courtroom.)

22 THE COURT: Let me know when he's got his
23 stuff out of there, please.

24 THE BAILIFF: Yes, sir.

25 THE COURT: While we're waiting, ladies

1 and gentlemen, just to go over a couple remaining
2 thoughts with you, before -- do not begin any
3 deliberations yet. What I do is I'll send you out
4 and then give the attorneys another opportunity to
5 discuss with me some things. Sometimes they want me
6 to add something or explain something further, and I
7 may agree to do that.

8 Also, we'll take that time to go ahead
9 and get the exhibits together and put them all in one
10 stack, make sure we have everything that's supposed
11 to go back there to you.

12 If I need you out, I'll bring you back
13 out, and we'll accomplish whatever we need do.

14 If I don't need you, at that time the
15 clerk or the bailiff will come with the exhibits and
16 the verdict form and direct you to begin your
17 deliberations. So please do not begin any
18 deliberations yet.

19 One final thing, ladies and gentlemen,
20 sometimes when the jurors are going through the
21 exhibits, the jury will send me a note, can we see a
22 certain photo or a picture or a document that someone
23 referenced. Please keep in mind, ladies and
24 gentlemen -- and I can only tell you this way -- that
25 if you're entitled to look at the physical exhibit,

1 it will be with you in the jury room. So please keep
2 that in mind, ladies and gentlemen, because I always
3 have jurors that want to start requesting other
4 documents all of a sudden. So if you're entitled to
5 look at it, it will be in there in the jury room with
6 you.

7 Again, has the alternate -- has the
8 alternate left?

9 THE BAILIFF: Yes, sir. He's outside.
10 He's outside. He got everything out. Do you want to
11 see him?

12 THE COURT: No. I just want to make sure
13 he's out of the jury room before I send them back.

14 THE BAILIFF: He's out, by all means.

15 THE COURT: All right. Do not begin yet,
16 ladies and gentlemen. I'll see you when -- I'll let
17 you know momentarily.

18 (Whereupon, the jury goes to the jury
19 room at approximately 3:33 p.m.)

20 THE COURT: Please be seated. Anything
21 further from the state?

22 MR. DURANT: No, sir.

23 THE COURT: Defense?

24 MR. SAVAGE: Judge, during the course of
25 the trial, the jurors have taken notes.

1 THE COURT: Yes, sir.

2 MR. SAVAGE: I would ask that the Court
3 instruct them on the use of the notes, the proper use
4 and improper use of the notes in regard to some
5 testimony.

6 THE COURT: I'll be happy to do that. I
7 usually do, so I don't know why I skipped over it.

8 MR. SAVAGE: Judge, on our request to
9 charge A-8.

10 THE COURT: 8-A?

11 MR. SAVAGE: Yes, sir. The third
12 paragraph in 8-A: After careful and impartial
13 consideration of all the evidence in the case or lack
14 thereof.

15 "Lack thereof" is important from our
16 defense viewpoint, and I'd ask the Court to give
17 another instruction that includes that language,
18 that it's either derived from the facts of the case
19 or the lack of evidence in the case.

20 THE COURT: Well, I think I specifically
21 told them the state has to prove beyond a reasonable
22 doubt all the elements of the offense. You can enter
23 that objection, though.

24 MR. SAVAGE: Thank you, Your Honor.

25 THE COURT: Anything else?

1 MR. SAVAGE: That's all we have.

2 THE COURT: If y'all would please
3 approach the court reporter and -- well, I guess
4 perhaps I could ask the state on that.

5 Do you have any position one way or
6 another on his request?

7 MR. DURANT: Pardon me?

8 THE COURT: On that last request? I've
9 got to bring them back out anyway for the...

10 MR. DURANT: Yes, Your Honor. I think
11 your charge handled it. I have no objection to the
12 charge on the notes.

13 THE COURT: On the what?

14 MR. DURANT: I said I have no objection
15 to the charge on the notes. I believe on his request
16 for the other charge, I think that your charge
17 handled it.

18 THE COURT: I think I'll let it stand on
19 that charge with that. I've never had a problem with
20 that. I may charge it, though, just to protect you.

21 If y'all would please approach the court
22 reporter to make sure all the exhibits are in one
23 stack and nothing is being sent back that has not
24 been admitted, so I can put that on the record.

25 (State and defense counsel review

1 (On Thursday, July 19, 2007, the
2 defendant being present with counsel, the trial
3 reconvenes at approximately 9:15 a.m., and the
4 following proceedings were had:)

5 MR. DURANT: There's apparently a change
6 of plans since yesterday, Your Honor.

7 (There was off-the-record discussion by
8 the Court and Mr. Durant.)

9 THE COURT: Actually, there were several
10 things I wanted to put on the record yesterday when
11 we were talking about this statute, and then when we
12 shifted to the juror thing, I kind of lost my train
13 of thought, but I actually have a case that we wanted
14 to share with you, and I forgot to give it to you,
15 and I'll let you have it. It's not really necessary.
16 It's out of Florida. It's called *Smiley vs. State of*
17 *Florida*. It only came out a month ago, dealing with
18 their -- are you familiar with it?

19 MR. SAVAGE: Yes, sir.

20 THE COURT: So you don't need a copy of
21 it?

22 MR. SAVAGE: No, sir.

23 THE COURT: Do you want a copy?

24 MR. DURANT: No, sir, Your Honor. If you
25 give me the cite, I can...

1 THE COURT: 2007 Westlaw 1628111. It
2 just came out, so it doesn't have a cite yet.

3 But Jenny had given me that the other
4 day, and I forgot to put that on the record.

5 Not exactly on fully all squares, because
6 they actually have a constitutional provision about
7 retroactivity, but their constitutional provision is
8 somewhat analogous to the savings clause that was
9 attached to this legislation.

10 But the case was kind of more persuasive
11 to me on the fact that when I had indicated I thought
12 that this was a substantive change in the law, and so
13 I think it's good for that, also, for the record,
14 but -- obviously, I think the way that it might be
15 tracked is that there is generally a presumption that
16 statutory enactments are to be considered prospective
17 rather than retroactive.

18 The analysis might change depending on
19 whether you're talking about a substantive change in
20 the law versus a remedial or procedural change in the
21 law.

22 Also, the analysis could be a little bit
23 different if you're talking about a constitutional or
24 a decisional change announced by the U.S. Supreme
25 Court or either the South Carolina Supreme Court.

1 That's not present in this case. We're talking about
2 a statutory change.

3 And, overall, the statutory change here,
4 I don't think I can reach any conclusion other than
5 the fact that it is substantive.

6 I personally think there are many changes
7 in the statute, but one of which, similar to the
8 Florida case, is that it definitely alters the
9 circumstances in which it is -- in which it is
10 considered even to be a criminal act to use a deadly
11 force without first needing to retreat, that's one
12 substantive change. And it also will significantly
13 affect the substantive law and affirmative defenses
14 available to defendants.

15 So while not on all fours, it does --
16 should lend itself somewhat to the analysis, in part,
17 and I stand by my decision that once you look at the
18 savings clause and the general thought that statutory
19 change, as opposed to remedial or procedural changes
20 or constitutional issues, would generally be
21 prospective, and then the savings clause seems to
22 bolster that, that conclusion.

23 Also, I need to put on the record, there
24 is the evidence about the gun and -- or there is the
25 gun and bullets. I need to bring the jury in to say

1 reached a unanimous decision as to each indictment.
2 Is that correct?

3 THE FOREPERSON: We have.

4 THE COURT: Please hand it up to the
5 Court. Thank you.

6 (The foreperson complies.)

7 THE COURT: Mr. Clerk, please publish the
8 verdict.

9 THE CLERK: Yes, Your Honor.

10 The verdict form in the matter of The
11 State vs. David Michael Rocquemore, as to the
12 indictment number 2005-GS-10-8602, we the jury
13 unanimously find the defendant guilty of the lesser
14 included offense of voluntary manslaughter.

15 Ladies and gentlemen of the jury, if this
16 was your verdict, please raise your right hand.

17 (Whereupon, each member of the jury
18 raises their right hand.)

19 THE CLERK: Thank you.

20 Your Honor, all twelve jurors responded
21 to my question by raising their right hand.

22 As to the indictment number
23 2005-GS-10-8601, we, the jury, unanimously find the
24 defendant guilty of possession of a firearm during
25 the commission of a violent crime.

1 motion. Anything else?

2 (Mr. Savage and the defendant confer.)

3 MS. WILLIAMS: Judge, we would renew our
4 motion for mistrial at this -- at this time on bases
5 previously provided to the Court.

6 THE COURT: And that being the ground
7 raised when the Court excused the juror at issue?

8 MS. WILLIAMS: Judge, there was that
9 motion.

10 There was also a motion earlier in the
11 case based on the screen that was flashed up, that
12 one slide that was paused on. I believe that motion
13 was outstanding. The prosecutorial misconduct
14 portion of that motion I think has been resolved.

15 The final motion was the excusal of the
16 juror, Judge. I do think we have some ongoing issues
17 with that motion that would serve as a factual basis
18 for granting it.

19 THE COURT REPORTER: The factual basis
20 for what, please?

21 MS. WILLIAMS: For granting that motion.

22 THE COURT: Does the state wish to
23 respond?

24 MR. DURANT: Your Honor, obviously, with
25 regard to the title page thing on the video, I think

1 that was well within your discretion and...

2 THE COURT REPORTER: Please speak up,
3 Mr. Durant.

4 MR. DURANT: I'm sorry.

5 And well within your discretion and --
6 and cured during the course of the trial.

7 THE COURT: Yeah. I deny that motion.

8 MR. DURANT: And with regard to the --
9 with regard to the juror incident, Your Honor, we had
10 an extensive hearing in front of the Court. All of
11 the jurors were brought forward and individually
12 polled. All the jurors indicated that -- all the
13 jurors indicated that there had been no discussion of
14 the facts in this case with the juror and that they
15 testified under oath that they could give the state
16 and the defense a fair and impartial trial.

17 THE COURT: All right. I deny that
18 motion. Anything further?

19 MR. SAVAGE: Judge, would we be allowed
20 to expand the record on that? There's new
21 information that's coming in regularly.

22 The primary concern of that was not the
23 dismissal of the juror. The primary concern is the
24 contact of the juror with a member of the solicitor's
25 staff and then imparting information to the other

1 juror.

2 One juror testified, I believe was that
3 he testified that an inquiry was made what was going
4 on while they were in the jury room. Now, that could
5 be interpreted in a myriad of ways.

6 What I am particularly concerned with, if
7 a juror communicated to the member of the staff about
8 what was going on in this trial, which is the only
9 sensible conclusion of asking that question what was
10 the state doing, what was the defense doing, what was
11 the Court doing while we're in recess. That type of
12 question is not a generic question. There would no
13 reason to -- to pose that question unless it applied
14 to the case he was involved in.

15 THE COURT: Well, there was nothing ever
16 indicated that the contacted assistant indicated he
17 responded to that and -- and no juror indicated that
18 anything was discussed.

19 MR. SAVAGE: Well, one juror said that
20 there was a discussion, but he wasn't the recipient
21 or involved in that discussion, was that there was a
22 discussion about the roles of the prosecutor and the
23 defense in the jury room.

24 THE COURT: Well, I understood that
25 juror to be saying that's the only thing the jurors

1 back there talked about at all, not that it was
2 prompted by any telephone calls between the juror
3 and the assistant. There is nothing to suggest that
4 that assistant commented on that in any way
5 whatsoever.

6 MR. SAVAGE: But it appears that the
7 juror and the assistant were not forthright with the
8 Court in the Court's examination of the number of
9 contacts.

10 THE COURT: Well, the ---

11 MR. SAVAGE: There has now been
12 established twenty contacts between the juror and the
13 member of the solicitor's staff.

14 THE COURT: I agree with you that you had
15 provided information to the Court that suggested that
16 juror at least attempted to contact someone that was
17 not involved in this case that worked for the
18 Solicitor's Office. What I don't have is any kind of
19 information from that solicitor that he told this
20 juror anything.

21 And I also have the jurors we talked to.
22 None of them said that anything was communicated to
23 them. The only thing we really asked the jurors, I
24 guess, was have y'all discussed this in any way, and
25 they said no.

1 MR. SAVAGE: The dismissed juror, as well
2 as the staff member, understated their communications
3 to the Court. Both the assistant solicitor and the
4 dismissed juror apparently did not follow the Court's
5 instructions. If that fact is correct, then that
6 would question the credibility of both the assistant
7 solicitor and the dismissed juror.

8 THE COURT: Well, the dismissed juror was
9 dismissed. I'm not sure, you know, as long as he
10 didn't communicate anything to the rest of the panel,
11 that that would change the Court's decision to move
12 forward.

13 Now, whether the dismissed juror
14 misrepresented something to the Court about their
15 communication or whether the dismissed juror violated
16 the Court's instruction after the dismissed juror was
17 dismissed, by attempting to contact his cousin, I'm
18 not -- still there's been -- I don't know what else
19 has been presented to make the link that they were --
20 that they obtained any type of information from him.

21 MR. SAVAGE: You'd have to go back to the
22 one juror who said the question arose. Now, I
23 thought it was in the course of the communication
24 with the dismissed juror that he asked about what the
25 role of the various parties were in the courtroom

1 while they were in recess.

2 THE COURT: We can have the court
3 reporter read that back, but I recall that the person
4 was not -- it was one of the jurors who just said the
5 only thing we talked about, we were just chatting
6 about what the role of the judge, the prosecutor, and
7 the defense lawyer, what the roles are.

8 And, quite frankly, I don't find that
9 very unusual in the jury room, you know, as far as
10 jurors thinking about that. It's not really talking
11 about the case. It's just talking about everybody's
12 role.

13 And I didn't get out of that anything
14 that the cousin in the Solicitor's Office transmitted
15 information back to the jury about those roles in any
16 way whatsoever.

17 I'll be happy to have her look it up.

18 MR. SAVAGE: Your Honor, the Court's
19 ruling, I'm not arguing with the sCourt on that.

20 THE COURT: I understand. I just -- I
21 don't think I'm recalling incorrectly, but like I
22 say, if you think I am, I'll be happy to check it
23 out.

24 MR. SAVAGE: If we develop more
25 information, we would bring it to the attention of

1 the Court.

2 THE COURT: I hear all motions whenever
3 they're presented to me, Mr. Savage. I don't
4 foreclose that at all.

5 MR. SAVAGE: Thank you.

6 THE COURT: I'm just not prepared, you
7 know, based on what was presented by these jurors
8 about what was communicated to them -- actually, the
9 record does not indicate that anything was
10 communicated to them other than the dismissed juror
11 saying he was related to someone that -- one said, I
12 believe, he worked -- his cousin is someone in the
13 Solicitor's Office. One knew that because he knew
14 that juror. And then one indicated that he was
15 related to someone that worked in the building, I
16 believe.

17 (The Court reviews document.)

18 THE COURT: Was that your recollection?

19 MR. DURANT: Pardon me, Your Honor?

20 THE COURT: Was that your recollection?

21 MR. DURANT: My recollection, Your Honor,
22 was that the good juror was questioned fully. You
23 asked Mr. Savage if he had any additional questions
24 he wanted to ask the juror, he did not, everybody was
25 satisfied with the answer that we got, and he was

1 sent back. There was no juror who basically said
2 that there was any discussion with the dismissed
3 juror concerning the facts of this case at all.

4 THE COURT: Juror 200 said no discussion
5 about the case whatsoever. Anything about the
6 relationship, that juror didn't know about it.

7 Nothing came from -- Juror 259 said no.
8 Juror 320 said no. 329 said no.

9 330 said he actually had gone to school
10 with that juror. So he knew he had a cousin in the
11 Solicitor's Office ahead of time.

12 Juror 335 said nothing was said.

13 Juror 20 said that he heard that he had a
14 cousin that worked for the Solicitor's Office. I'm
15 trying to verify. Juror 20 might have been the one
16 that mentioned the discussion about everybody's role.
17 Actually, when we're done with this, we'll check that
18 just to be safe. And he also said we did not discuss
19 the case in any way.

20 MR. SAVAGE: Your Honor, based on that,
21 at that time the discussion with the Court and
22 defense counsel was not necessarily the facts of the
23 case, but this case came down to credibility and
24 believability, and that may have had an undue
25 influence on the credibility and believability of the

1 case as presented by the solicitor's staff.

2 THE COURT: Well, all I can say is I
3 asked all the jurors if that would in any way affect
4 them, and they indicated no, that it would not affect
5 their decision, that they had heard that he had that
6 relationship to someone in the Solicitor's Office.

7 And Juror 99 said nothing was said.

8 Juror 202 said that the cousin worked in
9 the building. That's the one I was trying to think
10 of. That it would not affect them.

11 Juror 236 said nothing was said. Juror
12 240 said nothing was said. Juror 301 said nothing
13 was said.

14 161 said nothing was said. Juror 161
15 said nothing -- and 161 is the one I ultimately
16 excused for something else.

17 All right. Check Juror 20's response,
18 please. Madam Court Reporter, read back what he said
19 about this discussion about the role of the judge and
20 defense, etc.

21 (The court reporter reads back the
22 following:

23 "I need to ask you: Did that dismissed
24 juror in any way discuss his relationship to the
25 Solicitor's Office or the case in any way whatsoever?

1 "MR. BOWIE: No, sir. He said that he
2 had a cousin that worked in the Solicitor's Office,
3 but other than that, he didn't say anything about the
4 case.

5 "THE COURT: When did he say that he had
6 a cousin that worked for the Solicitor's Office?

7 "MR. BOWIE: We were just in talking one
8 day, talking about procedures of the Court, and he --
9 he said, well, I have a cousin that works in the
10 Solicitor's Office and this is the way this happens,
11 this happens.

12 "THE COURT: And was that downstairs, or
13 was that after I selected this jury?

14 "MR. BOWIE: That was after the jury was
15 selected.

16 "THE COURT: After the trial had started?

17 "MR. BOWIE: Yes, sir.

18 "THE COURT: Okay.

19 "Counsel approach.

20 "There was an off-the-record bench
21 conference.

22 "THE COURT: And when you said that y'all
23 discussed procedures, what did you mean by that?

24 "MR. BOWIE: I don't know that it's as
25 much procedures as just, you know, what does the

1 judge do while we're sitting there, what does the
2 prosecution do, or what kind of usually happens sort
3 of thing. And I think he was just saying, well, I
4 have a cousin that's a prosecutor, I'll ask him. You
5 know, sort of what -- I guess what papers you're
6 looking at, what the judge does, that sort of thing.

7 "THE COURT: So y'all did not discuss the
8 case?

9 "MR. BOWIE: No, sir. No, sir. Just
10 what we...

11 "THE COURT: General stuff?

12 "MR. BOWIE: Just -- right, general
13 stuff. Nothing specific to the case.

14 "THE COURT: Did he disclose to the other
15 jurors that he had a cousin on the jury or just to
16 you?

17 "MR. BOWIE: It was just something he
18 said. He said, I have a cousin that works in the
19 Solicitor's Office or prosecutor's office or
20 something.

21 "THE COURT: Well, what I mean by that,
22 was he just telling you, kind of whispering right
23 beside you -- or did he tell the whole jury panel
24 that?

25 "MR. BOWIE: I heard him say that. I'm

1 not sure who he was directing it to, but I did hear
2 him say that.

3 "THE COURT: Okay. Now, would that in
4 any way affect your ability to give everyone a fair
5 and impartial trial?

6 "MR. BOWIE: No, sir.

7 "THE COURT: Now, if you'll go back.
8 Please do not discuss this in any way.

9 "MR. BOWIE: Sure.

10 "Mr. Bowie leaves the courtroom."

11 (The reading is concluded.)

12 THE COURT: Anything? Any response to
13 that?

14 MR. SAVAGE: Nothing further, Your Honor.

15 THE COURT: State?

16 MR. DURANT: No, sir, Your Honor.

17 THE COURT: I'm still satisfied,
18 Mr. Savage, that this jury was not improperly tainted
19 in any type of way; that while I do agree that the
20 contact that was at least attempted, I really don't
21 have a basis of knowing if anything further was said,
22 in this record; and all of the jurors indicated that
23 notwithstanding having found out -- the few that did
24 find out that the dismissed juror had some connection
25 to the Solicitor's Office, I don't think that serves

1 as a basis to set aside the jury's decision.

2 Quite frankly, I'm not so sure as a
3 matter of law, anyway, that if I had dismissed the
4 juror originally and announced to the whole jury I
5 had dismissed him because he had some connection to
6 someone involved in the case that that would change
7 the analysis either.

8 So I deny that motion. Anything further?

9 MR. SAVAGE: Judge, the defense would ask
10 that the Court accept as a Court exhibit a fax from
11 SunCom Communications that indicates the phone calls
12 that were made by the dismissed juror between July
13 6th and July 18th.

14 THE COURT: You can file that as a
15 Court's exhibit. I don't have a problem with that.

16 MR. SAVAGE: Thank you.

17 THE COURT: All right. Having said --
18 having addressed the post-trial motions, I'll hear
19 the state out. You can be seated. I'll hear the
20 state out on sentencing.

21 Do you have that copy you wish to submit
22 to the court reporter?

23 (Court's Exhibit No. 4, copy of Suncom
24 telephone log, is marked for identification.)

25 THE COURT: Yes, sir.

1 but one of the -- one of the employers that he had,
2 whose name is Mr. Eason, he worked with ---

3 THE DEFENDANT: Yes, sir.

4 MR. SAVAGE: Of course, he stayed away
5 from and there wasn't any contact. But we thought it
6 was his best interest, because of his presence there,
7 to seek other occupation.

8 Judge, he has no prior record with the
9 criminal justice system. He has no contact with the
10 police department. He had no problems in school, no
11 problems with his family, never thought of him as
12 being a bully or anything but a good young man.

13 I'd ask that the sentence that the Court
14 imposes is consistent with rehabilitation. Of
15 course, he has to be punished for what he did, what
16 the jury found that he did. There's no contest of
17 what the jury found. And I'd ask that you give him a
18 chance so that when he gets out he can continue what
19 had been a productive life, particularly prior to
20 August 13th of 2005.

21 THE COURT: Anything else?

22 MR. SAVAGE: That's all I have,
23 Your Honor.

24 THE COURT: Anything else from anyone
25 before I sentence? Any follow up from the family

1 family is going to be there for the defendant and
2 give him the support that he will need to -- to learn
3 from this experience and to lead the type of life
4 that needs to be led.

5 But, also, punishment must be dealt, and
6 it must be appropriate in the circumstance, but it is
7 not inappropriate for me to consider what all of you
8 have had to say here today.

9 And if I'm wrong, then I'm wrong, but I
10 don't sense that coming from the family. None of you
11 really addressed the subject of sentencing. It
12 seemed to me you were more concerned that the
13 defendant do some time and actually learn from this
14 experience. If I'm wrong about that, I would love to
15 hear from you; but I think all of you know that
16 regardless of the sentence I impose, it's not going
17 to bring your son back.

18 And I truly am inspired by all of your
19 words. It's -- it really is inspirational, and it's
20 -- you feel God's presence in this room by your
21 words.

22 Therefore, it is the judgment of this
23 Court that I sentence you, sir, to the Department of
24 Corrections for a period of ten years. Good luck to
25 you.

1 MR. SAVAGE: Thank you.

2 MS. WILLIAMS: Thank you, Your Honor.

3 THE COURT: Being nothing further, the
4 court shall be adjourned.

5 MR. SAVAGE: Thank you, Your Honor.

6 MR. DURANT: Thank you, Your Honor.

7 (The defendant is escorted from the
8 courtroom at approximately 8:35 p.m.)

9 THE COURT: Before -- bring the defendant
10 out, please.

11 (The defendant returns to the courtroom
12 at approximately 8:35 p.m. The defendant being
13 present with counsel, the following proceedings were
14 had:)

15 THE COURT: I neglected to say on the
16 possession of a weapon charge, the sentence would be
17 the five years required by statute, concurrent.

18 Good luck to you.

19 MR. SAVAGE: Judge, in terms of his
20 pretrial time, is that automatic, or is that
21 something that you have to...

22 THE COURT: The sentence sheet is always
23 marked credit. They calculate it at the Department
24 of Corrections.

25 MR. SAVAGE: Thank you.

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Transaction Search: Call Detail Record

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252	8434782849	18438030443	Jul-06-2007 19:47:28	Jul-06-2007 19:48:28	0:01:00
253	8434782849	8432247128	Jul-06-2007 18:33:13	Jul-06-2007 18:33:42	0:00:29
254	8434782849	8434782849	Jul-06-2007 18:32:11	Jul-06-2007 18:32:39	0:00:28
255	8434782849	8432247128	Jul-06-2007 18:52:20	Jul-06-2007 18:53:07	0:00:47
256	8434782849	8434782849	Jul-06-2007 18:20:26	Jul-06-2007 18:21:11	0:00:45
257	8434782849	18435097652	Jul-06-2007 16:23:16	Jul-06-2007 16:23:21	0:00:06

JUL-19-2007 14:29

SUNCOM WIRELESS

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P.08

258	8434782849	8434782849	JUL-06-2007 18:22:08	JUL-06-2007 18:22:41	0:00:33
259	8434782849	8433465327	JUL-06-2007 13:56:47	JUL-06-2007 13:56:57	0:00:10
260	8434782849	10435067852	JUL-06-2007 13:42:28	JUL-06-2007 13:44:16	0:01:48
261	8433431813		JUL-06-2007 12:57:29	JUL-06-2007 12:58:42	0:01:13
262	8434782849	18433431000	JUL-06-2007 12:48:12	JUL-06-2007 12:47:13	0:01:01
263	8434782849	18433431008	JUL-06-2007 12:45:50	JUL-06-2007 12:45:54	0:00:04
264	8434754299		JUL-06-2007 12:45:00	JUL-06-2007 12:45:38	0:00:38
265	8434782849	8432084364	JUL-06-2007 12:42:45	JUL-06-2007 12:44:21	0:01:36
266	8434782849	8433465327	JUL-06-2007 12:40:31	JUL-06-2007 12:41:06	0:00:34
267	8434754299		JUL-06-2007 12:08:14	JUL-06-2007 12:08:23	0:00:09
268	8433431813		JUL-06-2007 12:03:04	JUL-06-2007 12:04:07	0:01:03
269	8433431008		JUL-06-2007 11:32:07	JUL-06-2007 11:34:50	0:02:43
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273	8434782849	18435588879	JUL-06-2007 11:08:45	JUL-06-2007 11:08:52	0:00:07
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TOTAL P.08

STATE OF SOUTH CAROLINA	)	IN GENERAL SESSIONS COURT FOR
	)	THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	INDICTMENT NUMBERS: 2005-GS-10-8601
	)	2005-GS-10-8602
STATE OF SOUTH CAROLINA,	)	
	)	
Plaintiff,	)	
	)	
-versus-	)	MOTION FOR RELEASE OF RECORDS
	)	
DAVID M. ROCQUEMORE,	)	
	)	
Defendant.	)	

COMES NOW the Defendant, DAVID M. ROCQUEMORE, by and through his undersigned counsel, and moves this Honorable Court to Order granting the Defendant's request for the release of cellular telephone records in this matter. Specifically, the Defendant requests that this Court Order the immediate release of the text messages sent and received by cellular telephone number (843) 810-4438 for the dates July 6 through July 19, 2007, as such information is necessary to supplement the record in the above-captioned matter.

On August 14, 2005, the Defendant was arrested and charged with Murder and Possession of a Firearm During Commission of a Violent Crime in Charleston County. On July 19, 2007, the Defendant was found guilty of the offenses of Voluntary Manslaughter and Possession of a Firearm During Commission of a Violent Crime by a Jury in the Court of General Sessions of Charleston County.

On July 17, 2007, the defense requested a mistrial based on the failure of Juror Number 309 to disclose his close familial relationship with an Assistant Solicitor with the Ninth Judicial Circuit

Solicitor's Office. Specifically, the defense urged a mistrial based on the fact that the Assistant Solicitors assigned to the above matter were informed of the juror's relationship to a member of their office and failed to disclose it to the Court. Additionally, the defense urged a mistrial on the basis that the entire panel was tainted by Juror Number 309, and the Defendant's due process rights were thus violated. Following argument, Juror Number 309 was dismissed by this Honorable Court. This Court denied the Defendant's Motion for Mistrial.

On July 18, 2007, the defense again urged its Motion for Mistrial. This Court questioned the petit jury panel individually regarding their exposure to Juror Number 309's relationship to the prosecutor's office. Assistant Solicitor Michael Nelson, cousin of Juror Number 309, was also questioned by the Court regarding his contact and communications with Juror Number 309 since July 9, 2007, when the petit jury was selected.

On July 19, 2007, the defense obtained the cellular telephone records of Juror Number 309 for the dates July 6 through July 18, 2007. The records revealed twenty (20) contacts or attempts to contact Mr. Nelson via text message since the selection of the jury in this matter. As a result, the defense requested that it be allowed to supplement the record in this matter once the actual text of any text messages could be obtained via subpoena requesting Mr. Nelson's cellular telephone records. The defense was informed by the cellular carrier, Verizon Wireless, that these records are not available without a Court Order to this effect.

Thereafter, the Defendant was found guilty of Voluntary Manslaughter and Possession of a Firearm during the Commission of a Violent Offense. The defense renewed its Motion for Mistrial, which this Court denied. At that time, this Court stated that the defense would be permitted to supplement the record with any new and relevant information in support of its Motion for

Mistrial.

WHEREFORE, the Defendant, David M. Rocquemoire, respectfully requests that this Honorable Court Order the immediate release of the text messages sent and received by cellular telephone number (843) 810-4438 for the dates July 6 through July 19, 2007, as such information is necessary to supplement the record in the above-captioned matter.

Respectfully submitted,

SAVAGE & SAVAGE, P.A.
15 Prioleau Street
Post Office Box 1002
Charleston, SC 29402
Telephone (843) 720-7470

BY: _____
LAUREN E. WILLIAMS
SC Bar Number: 75158
ATTORNEY FOR DEFENDANT

Charleston, South Carolina

July 23, 2007

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

STATE OF SOUTH CAROLINA

VS.

DAVID ROCQUEMORE

Defendant.

IN THE COURT OF GENERAL SESSIONS
NINTH JUDICIAL CIRCUIT

Case Nos: 2005-GS-10-8601
2005-GS-10-8602

FILED
2007 AUG 20 PM 4:37
JULIE J. ARNSPACH
CLERK OF COURT

ORDER

This matter is before the court on defendant's Motion for Release of Records filed July 23, 2007. The defendant requests the release of cellular telephone records for the cellular phone of an assistant solicitor who did not participate in the trial of this case. During the course of the trial, the defense informed the court that a juror seated in the case, Juror # 309, was the cousin of the assistant solicitor. After questioning the juror on the record, the court excused the juror from the trial in this case and seated one of the alternate jurors. Before the trial proceeded, the defense moved for a mistrial, which was denied.

The next day, defense counsel again raised the issue before the court and requested that the court poll the jurors to find out if any of them knew that the excused juror was related to someone in the Solicitor's office.¹ Counsel was given the opportunity to propose questions to each juror and indicated that he had no further questions than those asked. Counsel was also given the opportunity to examine the assistant solicitor, and

¹ The primary basis of counsel's concern is that the juror may have sent substantive text or voice messages to the Solicitor's office that could have provided direction to that office on how to adjust their case or presentation. All of those persons questioned denied any such conversations. The court is convinced that any concerns of defense counsel are merely speculative in nature

again indicated that he had no additional questions. After defense counsel had introduced into the record the juror's phone records, the court directed the assistant solicitor to be available for questioning the following day; however, no further questioning was requested by counsel for the defendant.

A telephone hearing was held on July 24, 2007 (after the verdict), with Mr. Savage and Mr. Durant participating. Having reviewed the matter, the court denied the motion during the call notwithstanding the State's lack of objection.²

For the record, the defense was allowed to put into evidence a list of the juror's cell phone records. Moreover, the defense was given a full opportunity to have the court ask the juror questions at the time the juror was excused and was given the full opportunity to question the assistant solicitor who was contacted by the juror. All of the other jurors were also polled. In addition, the solicitors participating in the trial were questioned as to whether they received any information. Subsequently, upon receipt of the jury verdict, the court asked if there were any further matters before the jury was discharged in the event further polling became necessary and no action was requested.

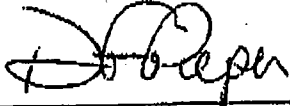
While the court did not actually request the subpoena of the excused juror's records, the court nonetheless allowed their introduction into the record in an abundance of caution. Notwithstanding, the court stands by its original decision that upon polling each juror, no improper tainting of the jury occurred. No substantive conversation about the case occurred. In response to those jurors that heard that one juror had a cousin in the Solicitor's office, those jurors indicated that in no way would it affect their ability to be fair and impartial. The court is satisfied that the defendant was ably represented by counsel

² Had any of the jurors expressed any hesitation or concerns, this court may have had some more substantive basis to pursue the matter further. However, it appears that there would be just as many concerns about whether other records should also be subpoenaed if the speculative nature of the request did not lead to any useful information as to the assistant solicitor at issue. Again, all of the solicitors, as officers of the court, responded in the negative about any improper substantive communications.

and received a fair and impartial trial. The court is further satisfied that counsel has fully pursued the matter and has revisited the matter twice with the court. However, the court concludes, having fully examined the actual trial jurors about the matter, as well as the attorneys potentially involved, that there is no likelihood continued proceedings on this matter would demonstrate any impact upon a fair and impartial jury verdict.

The court further notes that there is no pending motion for a new trial.³ Therefore, for all the reasons expressed during the conference call, and herein, the request to subpoena additional records after the original hearing on this matter and to allow further argument on this issue is denied.⁴

IT IS SO ORDERED.


Daniel F. Pieper, Resident Judge
Ninth Judicial Circuit
FILED
2007 AUG 20 PM 4:37
JULIE J. ARTHUR
CLERK OF COURT

Charleston, South Carolina
August 20, 2007

Attorneys for the State:
Attorneys for Defendant:
Court Reporter:

Bruce Durant, Deputy Solicitor
Andy Savage, Esquire
Brenda Cooley

06-GS-10-8801-JEA

³ After the verdict, a JNOV motion was made which this court construed as a renewed motion for acquittal.

⁴ The court originally denied this matter during the conference call. Defense counsel's office subsequently contacted this office by email on August 15, 2007, inquiring about the status of the matter. The court construed this inquiry as one seeking a final written order of this court's oral ruling.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Daniel F. Pieper, Circuit Court Judge

DAVID M. ROCQUEMORE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

IN RE: CELLCO PARTNERSHIP, D/B/A VERIZON WIRELESS

MOTION TO RELEASE
TEXT MESSAGE CONTENT

Counsel for David Rocquemore requests an order from the Court directing Cellco Partnership, d/b/a Verizon Wireless, to release the text message content for cell phone number 843-810-4438 for July 6 to July 19, 2007, and to provide counsel with a copy of the same for use in Mr. Rocquemore's direct appeal of his voluntary manslaughter conviction, presently pending in this

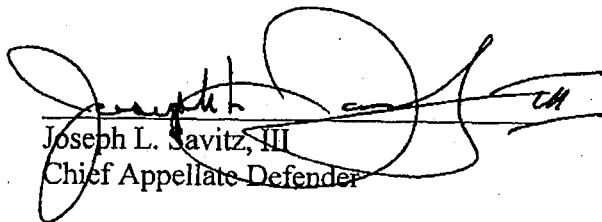
Court. A copy of Judge Pieper's order concerning this matter, dated August 20, 2007, provides the background for this motion. The information requested is not under seal.

Verizon Wireless is preserving this information at the request of Mr. Rocquemore's trial counsel, Andrew J. Savage. The undersigned has also contacted Verizon Wireless and been informed that they will release the text message content for this cell phone number on the dates in question upon receipt of a court order directing them to do so.

The fact that a juror at Mr. Rocquemore's trial sent text messages to an Assistant Solicitor employed by the Solicitor's Office prosecuting this case is already an issue in Mr. Rocquemore's appeal. Counsel must review the content of those communications in order to determine the gravity of this issue. (It is also necessary to ensure that this information is not purged prior to post-conviction relief, should that prove necessary.) He makes this request in good faith.

Accordingly, counsel for David Rocquemore requests an order from the Court directing Cellco Partnership, d/b/a Verizon Wireless, to release the text message content for the above referenced cell phone number for the applicable dates and to provide counsel with a copy of the same for use in Mr. Rocquemore's direct appeal.

Respectfully submitted,



Joseph L. Savitz, III
Chief Appellate Defender

Attorney for Appellant

This 7th day of March, 2008



The South Carolina Court of Appeals

KENNETH A. RICHSTAD
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

April 11, 2008

Chief Appellate Defender Joseph L. Savitz, III
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Rocquemore, David M.

Dear Counsel:

The following Order has been endorsed on your "Motion To Release Text Message Content" in the above entitled case on appeal.

"Denied.

s/ Jasper M. Cureton, A.J.

April 10, 2008."

By copy of this letter we advise all interested parties of this Court's decision.

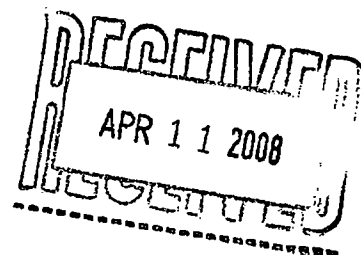
Very truly yours,

Dianne H. Ponder

Docketing Supervisor

[Signature]
/dhp

cc: Assistant Deputy Attorney General Salley W. Elliott



DBD-2005-08-04177

WITNESSES

EITH HAIR AND/OR

ATT CASEY

TANLEY, CCSO

CA# 2005-019560-B

ARREST WARRANT NUMBER
H-976851

AUGUST 15, 2005

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

DEC / 5 2005

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2005-GS-10-8602

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

DECEMBER TERM 2005

THE STATE

vs.

DAVID MICHAEL ROCQUEMORE

Indictment for

MURDER

BY

SOLIE A. ARMSTRONG
CLERK OF COURT

2005 DEC -8 PM 1:09

FILED

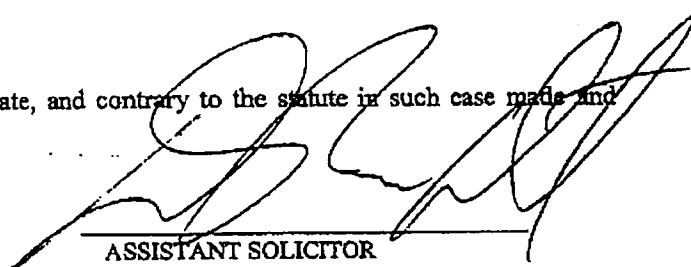
STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

INDICTMENT FOR
MURDER

At a Court of General Sessions, convened on December 5, 2005 the Grand Jurors of Charleston County present upon their oath:

That David Michael Rocquemore did in Charleston County on or about August 14, 2005 at 9752 Berrywood Drive feloniously and with malice aforethought, express or implied, kill one Hershall Demar Denson by shooting him with a pistol and that Hershall Demar Denson did die in Charleston County as a proximate result thereof on or about August 14, 2005 in violation of Section 16-3-10 of the South Carolina Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



ASSISTANT SOLICITOR

RULE 5

DBD-2005-08-04177

WITNESSES

KEITH HAIR AND/OR

MATT CASEY

STANLEY, CCSO

DCA# 2005-019560-B

ARREST WARRANT NUMBER

H-976852

AUGUST 15, 2005

ACTION OF GRAND JURY

Foreperson of Grand Jury

DEC. 15 2005

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2005-GS-10-8601

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

DECEMBER TERM 2005

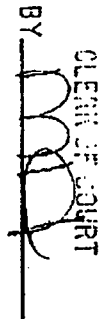
THE STATE

vs.

DAVID MICHAEL ROCQUEMORE

Indictment for

POSSESSION OF FIREARM DURING
COMMISSION OF VIOLENT CRIME

FILED
2005 DEC - 8 PM 1:09
J. L. STRONG
CLERK OF COURT
BY 

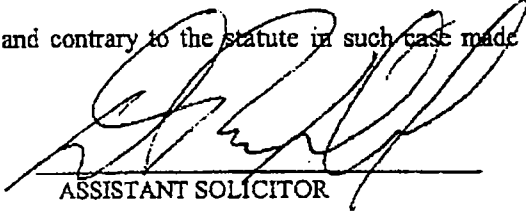
STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

INDICTMENT FOR
POSSESSION OF FIREARM DURING
COMMISSION OF VIOLENT CRIME

At a Court of General Sessions, convened on December 5, 2005 the Grand Jurors of Charleston County present upon their oath:

That David Michael Rocquemoire did in Charleston County on or about August 14, 2005 at 9752 Berrywood Drive, possess a firearm or visibly display what appeared to be a firearm, during the commission of the violent crime of murder, in violation of Section 16-23-490 of the South Carolina Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

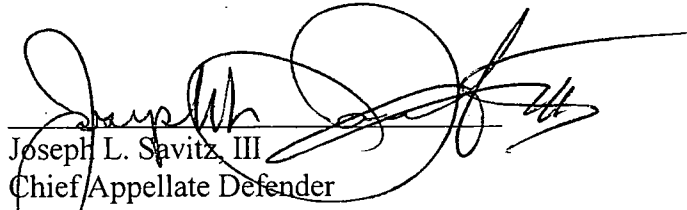

ASSISTANT SOLICITOR

RULE 5

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

May 13th, 2009



Joseph L. Savitz, III
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

Daniel F. Pieper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID M. ROCQUEMORE,

APPELLANT

FINAL BRIEF OF APPELLANT

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PO Box 1002
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ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. The trial judge committed reversible error by refusing to grant a mistrial once it was revealed that the State had neglected to disclose that a sitting juror was a close cousin of an Assistant Solicitor in their office and that the two had been communicating with each other throughout the trial.

2. The trial judge committed reversible error by refusing to afford retroactive effect to *S.C. Code Section 16-11-410 et seq.*, the Protection of Persons and Property Act, to the extent that it eliminates a duty to retreat in situations where a person is unlawfully and violently attacked in their vehicle, since appellant testified that he armed himself in self-defense as he was dragged from his truck while attempting to escape from a homicidal lynch-mob, which included the victim among its number.

STATEMENT OF FACTS

On July 9 through 19, 2007, David Michael Rocquemoire stood trial in Charleston County, before Judge Daniel F. Pieper and a jury, on two indictments charging him with murder (2005-GS-10-8602) and possession of a firearm during the commission of a violent crime (2005-GS-10-8601). Rocquemoire acknowledged that he shot and killed the victim, Hershall Demar Denson, but insisted that he had done so while defending himself from a homicidal lynch-mob, which included Denson among its number. “[A]s I was tackled and beaten to the ground,” Rocquemoire explained, “the gun went off.” ROA p. 521, line 14 – p. 522, line 11. (Denson was shot twice: once in the upper left abdomen – the fatal injury – and once close to the left armpit. ROA p. 307, lines 1-12.)

During the early morning hours of August 14, 2005, Rocquemoire went to an afterhours party with a friend, but he did not know many of the people there. ROA p. 393, line 21 – p. 394, line 7. A State’s witness remembered him as a polite and “[q]uiet guy” who “[b]arely said two words all night.” ROA p. 77, lines 1-8. In fact, Rocquemoire appeared to be “the only sober one in the crowd.” ROA p. 77, lines 9-13.

The tone of the gathering abruptly turned ugly when another man became sexually aggressive toward a disinterested female and threw a drink in her friend’s face when she sought to intervene. ROA p. 108, line 19 – p. 109, line 14; ROA p. 243, lines 10-22; ROA p. 325, line 17 – p. 331, line 8. This lout and his friends hastily departed before the friends of the woman he had assaulted could retaliate. ROA p. 359, line 4 – p. 361, line 8. But they returned after the party had broken up and confronted Rocquemoire and his friend, who were also preparing to leave, in the street. ROA p. 110, line 20 – p. 111, line 10; ROA p. 116,

lines 8-15; ROA p. 178, lines 13-22; ROA p. 245, line 17 – p. 246, line 9; ROA p. 397, line 7 – p. 399, line 6; ROA p. 468, line 11 – p. 471, line 1.

These men, upon whom the State's case depended, testified that the killing of Denson was "senseless" and unprovoked. ROA p. 233, line 16 – p. 234, line 2. "Nobody laid a hand on [Rocquemore]" before he opened fire, one of them testified. ROA p. 188, lines 8-11. Two witnesses even went so far as to assert that Denson's hands were raised in surrender and that he was backing away when Rocquemore fired the first shot. ROA p. 185, line 6 – p. 187, line 2; ROA p. 283, line 22 – p. 284, line 3.

But the physical evidence does not support this account of the incident. Denson had traces of gunshot residue on the back of his right hand but not his shirt. ROA p. 301, line 20 – p. 302, line 25. These findings indicate that he was in the process of throwing a punch at Rocquemore when he was shot. ROA p. 306, lines 8-14.

The men who later testified for the State were still beating Rocquemore when police arrived on the scene. ROA p. 15, lines 1-7. One officer testified:

[I]t was a pretty agitated scene. They were pretty agitated. It took several orders to tell them to get off. One of the individuals kicked him in the groin. I think one more might have punched him.

ROA p. 21, lines 2-15. A lynch-mob atmosphere still prevailed. Officers feared for their own safety and called for backup. ROA p. 40, lines 11-18; ROA p. 42, lines 22-24.

As previously indicated, Rocquemore specifically testified that he shot Denson in self-defense after he and his friend were brutally attacked without provocation. ROA p. 469, line 6 – p. 472, line 9; ROA p. 479, lines 2-15. He believed he had no other choice.

ROA p. 490, lines 7-9. Rocquemore's friend, who was also attacked, corroborated his account of the incident. ROA p. 398, line 8 – p. 409, line 7.

In addition to murder, the judge instructed the jury on voluntary and involuntary manslaughter, self-defense and accident. The jury found Rocquemore guilty of voluntary manslaughter, and the judge sentenced him to imprisonment for ten years and a concurrent sentence of five years for possession of a firearm during the commission of a violent crime. This case was Rocquemore's first contact with the criminal justice system. ROA p. 720, lines 8-10. As defense counsel pointed out, he had never been thought of as "anything but a good young man." ROA p. 720, lines 10-12.

ARGUMENT

1.

The trial judge committed reversible error by refusing to grant a mistrial once it was revealed that the State had neglected to disclose that a sitting juror was a close cousin of an Assistant Solicitor in their office and that the two had been communicating with each other throughout the trial.

None of the potential jurors responded when the judge asked:

Are any of you related by blood, connected by marriage, or have any social, business, or professional dealings with [the prosecutors on Rocquemore's case], or any dealings or connections with the Solicitor's office?

ROA p. 1, lines 16-22. After the State had rested its case, the defense learned that a sitting juror was in fact the cousin of an Assistant Solicitor in that very office. ROA p. 376, line 6 – p. 380, line 18. At no time did the State disclose this information to the judge or the defense. When this juror was seated, the defense had used only four of the ten peremptory strikes allotted. ROA p. 2, line 3 – p. 6, line 16.

Further investigation by the defense revealed that the juror had been in contact with his cousin the Assistant Solicitor by text message and telephone *during the trial*. ROA p. 380, line 22 – p. 383, line 14. Defense counsel then moved to have the juror dismissed and replaced with an alternate. ROA p. 383, lines 15-18. The State did not object. ROA p. 384, lines 11 and 12. The judge granted the motion. ROA p. 389, lines 3-6.

Defense counsel next asked the judge to determine whether this juror's presence on the jury had "tainted any other jury members." ROA p. 384, line 22 – p. 385, line 4. Under questioning by the judge, the juror admitted that he had a cousin who worked in the

Solicitor's office, but claimed he did not disclose that information during jury qualification because he did not feel it would have any effect on his ability to be fair, *not* that he did not understand the question. ROA p. 386, line 7 – p. 387, line 8. He and his cousin had “talked ... [a]bout his wedding and stuff” since the start of trial. ROA p. 387, lines 9-18. The juror denied having discussed the matter with his fellow jurors. ROA p. 387, line 19 – p. 388, line 3.

But the incident continued to trouble defense counsel. ROA p. 573, line 8 – p. 575, line 2. The Assistant Solicitor in question testified that his cousin had called to tell him that he was on Rocquemore's jury and that he had responded to a second phone call made during the trial with a text message stating, “I'm sorry, I can't talk to you.” ROA p. 596, line 16 – p. 598, line 19. He communicated this information to one or two of the three attorneys prosecuting Rocquemore. ROA p. 600, line 14 – p. 601, line 6. The Deputy Solicitor acknowledged that the Assistant Solicitor told him as they passed in the hall that “his cousin was on the jury.” ROA p. 604, lines 3-22. He did not realize it was something he needed to follow up or disclose. ROA p. 604, line 23 – p. 605, line 1. “I think he told me that his cousin was on the jury panel,” he explained, “but I didn't know who his cousin was.” ROA p. 608, lines 2-15. Another member of the prosecution team revealed that he also knew his colleague had “a cousin on the jury panel.” ROA p. 607, lines 20-24. “[T]hat was before qualification,” he added, and “I didn't go to qualification. ... I didn't know his name.” ROA p. 607, line 24 – p. 608, line 5.

Defense counsel got right to the point:

[N]ames don't matter. ... It could have been any juror. The name doesn't matter. They're on notice that “a juror” misled the court when he was seated on this jury.

ROA. p. 608, lines 17-23. He suggested (and the judge agreed) that the remaining jurors should be questioned individually. ROA p. 610, line 3 – p. 611, line 1.

Most of the jurors were unaware that their fellow juror had a cousin in the Solicitor's Office. One had gone to school with him and knew of the relationship independently. ROA p. 617, line 24 – p. 618, line 5. Another, on the other hand, had overheard the juror announce that his cousin was a prosecutor and that he was going to ask him what was going on in the courtroom while they waited in the jury room. ROA p. 621, line 10 – p. 623, line 18. Another juror partially corroborated this account. ROA p. 627, lines 1-13.

At this point, defense counsel moved for a mistrial:

The only reason that this is a problem before the court this morning is because the State failed to disclose [the relationship between the juror and the Assistant Solicitor] in a timely basis. Therefore, the State should be sanctioned, and we believe that the sanction is a mistrial.

ROA p. 634, lines 1-5. The Assistant Solicitor suddenly became less certain about when he had told the prosecution team "my cousin's on the jury." ROA p. 638, line 9 – p. 641, line 16. He had assumed this information would have come to light during jury qualification. ROA p. 641, line 25 – p. 642, line 4.

The judge observed, "I'm not prepared to say there was some kind of intentional conduct on the part of the State." ROA p. 644, lines 11-17. He subsequently added, "I do believe that the juror should have disclosed that information, and I'm not convinced that the juror misunderstood the question." ROA p. 659, lines 11-16.

The defense renewed its mistrial motion:

My client's due process rights have been violated by the failure to disclose that there was a seated juror who was not

honest with the court, who had a relationship – a special relationship – with a member of the Solicitor’s office.

ROA p. 656, lines 8-12. He added, “If the information ... had been brought to the attention of the defendant at that time, we could have exercised a peremptory.” ROA p. 659, lines 20-24. The judge denied the mistrial motion. ROA p. 660, lines 7-15.

After Rocquemoire had been found guilty of voluntary manslaughter, defense counsel renewed the mistrial motion based on “new information” the defense had uncovered. ROA p. 708, lines 19-21. Specifically:

[I]t appears that the juror and the Assistant [Solicitor] were not forthright with the court in the court’s examination of the number of contacts. ... There has now been established twenty contacts between the juror and the member of the Solicitor’s staff.

ROA p. 710, lines 6-13. In support of this motion, counsel introduced telephone records documenting the contacts, but not their substance. ROA p. 719, lines 9-24; ROA pp. 723-728. Defense counsel subsequently filed a written motion requesting an order “for the release of the substance of the text-messages sent and received” by the Assistant Solicitor during Rocquemoire’s trial. ROA pp. 735-736. Following a conference call, the judge denied the motion by written order. ROA pp. 737. (The Court of Appeals denied a similar motion filed by the undersigned during the pendency of this appeal.) The judge denied the mistrial motion. ROA p. 718, line 17 – p. 719, line 8.

S.C. Code Section 14-7-1020 states in relevant part, “The court shall, on motion of either party in the suit, examine on oath any person who is called as a juror to know whether he is related to either party.” In accordance with this directive, the trial judge asked the prospective jurors in Rocquemoire’s case to reveal any relationship “by blood” with the

Solicitor's Office. By their own admission, two of the three prosecutors knew at that point that one of the potential jurors was the cousin of an Assistant Solicitor in their office. Yet they did not reveal this information to either the judge or defense counsel when no one responded to the judge's inquiry. They apparently believed they were under no obligation to reveal the deception of a juror unless they had actual knowledge of his identity.

"It is fundamental that a defendant is entitled to a trial by an impartial jury." *State v. Gullede*, 277 S.C. 368, 287 S.E.2d 488, 489 (1982), citing the *Sixth Amendment to the United States Constitution* and *Article 1, Section 14, of the South Carolina Constitution*.

Every fair-minded person will readily recognize the importance of having the jury to whom a case is submitted for trial composed of persons who, as far as practicable, are free from any bias or prejudice, either for or against one or the other of the parties, whether the same arises from interest, by reason of relationship or otherwise, or from having previously formed or expressed an opinion as to the merits of the controversy.

State v. Robertson, 53 S.C. 147, 31 S.E. 868, 869 (1899). *Gullede* acknowledges that "a relationship with counsel" is a primary source of juror bias. 287 S.E.2d at 490. Nevertheless, "[t]here is no absolute rule of disqualification based on a juror's relationship to an attorney in the case." *Thompson v. O'Rourke*, 288 S.C. 13, 339 S.E.2d 505, 506 (1986).

"Prosecutors are ministers of justice and not merely advocates." *State v. Quattlebaum*, 338 S.C. 441, 527 S.E.2d 105, 109 (2000), citing *Rule 3.8, Rules of Professional Conduct*. By neglecting to reveal the blood relationship between an Assistant Solicitor in their office and a juror on Rocquemore's case, the State failed to exercise even a modicum of due diligence. See, for example, *Wilson v. Childs*, 315 S.C. 431, 434 S.E.2d

286 (Ct. App. 1993). Their unconscionable silence prevented the defense from intelligently exercising its peremptory strikes. Compare *Wall v. Keels*, 331 S.C. 310, 501 S.E.2d 754 (Ct. App. 1998). This relationship may have supported the challenge for cause but would definitely have been a material factor in the defense's use of its peremptory strikes. *State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2001). If this information had been brought to his attention in a timely manner, defense counsel stated, "we could have exercised a peremptory." ROA p. 659, lines 20-24. Compare *State v. Savage*, 306 S.C. 5, 409 S.E.2d 809 (Ct. App. 1991), certiorari denied January 22, 1992.

In short, the trial judge committed reversible error by refusing to grant a mistrial based on the State's failure to disclose the relationship between its office and one of Rocquemore's jurors. For this reason, the Court should reverse David Rocquemore's convictions and remand for a new trial.

The trial judge committed reversible error by refusing to afford retroactive effect to S.C. Code Section 16-11-410 et seq., the Protection of Persons and Property Act, to the extent that it eliminates a duty to retreat in situations where a person is unlawfully and violently attacked in their vehicle, since appellant testified that he armed himself in self-defense as he was dragged from his truck while attempting to escape from a homicidal lynch-mob, which included the victim among its number.

Even the State agreed that the central factual issue at trial was whether the shooting was homicide or self-defense. ROA p. 558, line 23 – p. 559, line 4. The only dispute between the parties on this point was whether Rocquemore had a duty to retreat before employing deadly force in his own defense. ROA p. 559, line 5 – p. 560, line 20. Both they and the judge recognized that the retroactivity of *S.C. Code Section 16-11-410 et seq.* would be outcome-determinative of the issue. ROA p. 560, line 21 – p. 571, line 12. Those statutes became effective June 9, 2006, approximately ten months after the incident.

As an initial matter, Rocquemore's possession of the firearm was perfectly legal. ROA p. 290, line 19 – p. 291, line 3. It was lawfully secured in his truck until moments before the shooting. *Compare State v. Slater*, 373 S.C. 66, 644 S.E.2d 50 (2007).

Rocquemore testified that he and his friend were standing in the street when they heard "a vehicle coming down the street, loud profanities and noises coming from the vehicle." ROA p. 469, line 16 – p. 470, line 1. Returning were the gang of men who had left the party earlier, after one of them threw his drink in the face of a female. Rocquemore continued:

The vehicle stops directly in front of us. Upon the vehicle stopping, the doors come open, two individuals come directly towards me in my direction. At that time, the two individuals that came to me began to curse and scream ... saying things like I didn't belong over here and "You better understand where you're at" and things like that.

ROA p. 470, line 22 – p. 471, line 8. According to Rocquemoire, the confrontation escalated unilaterally:

[O]ne of the individuals ... put his finger in my face and poked my chest as he was continually cursing and telling me I didn't belong there. At that time, I knocked his hand away from me. Shortly after that ... he swung a punch. I took off running to my vehicle, to my truck.

ROA p. 471, line 17 – p. 472, line 1. He was running to his truck "[f]or protection, for cover ... to get away from those guys." ROA p. 472, lines 2-4.

Their attack was relentless. Rocquemoire testified, "I was being hit from behind and pulled and just beat. ... I was being beat up." ROA p. 472, lines 5-9. The men were trying to prevent him from getting into his truck, Rocquemoire explained, but:

I was able to get myself half into my truck and just hold on to ... the steering wheel and the console. At the same time I was being hit and pulled, I continued to just swing and kick.

ROA p. 472, lines 16-25. As he was dragged from the truck, Rocquemoire continued, "I reached in my console and grabbed my firearm." ROA p. 476, lines 10-15. His intention was "to use it to strike" his attackers. ROA p. 476, line 23 – p. 477, line 4. "I didn't want to shoot anybody," he stated. ROA p. 477 lines 20-22. He just wanted them to leave him alone. ROA p. 477, line 23 – p. 478, line 1.

But they would not. ROA p. 478, lines 2-5. They threatened to kill him. ROA p. 479, lines 5-15. He then swung at them with the gun and then:

[I]t came out of my hand. ... I tried to pick it up. And as I went for it, everybody else ... just went for it. And at that time, once I grabbed it, I tried to just run. I just tried to run.

ROA p. 478, lines 4-12. But he could not get away:

The individuals still continued to beat me, and as I was being beaten and pulled on ... from every angle ... as they began to fall on top of me, I fell to the ground with just my weapon.

ROA p. 479, line 23 – p. 480, line 6. “[A]s I was tackled and beaten to the ground,” Rocquemoire continued, “the gun went off.” ROA p. 521, line 14 – p. 522, line 11. Whether the shooting was intentional or accidental, Rocquemoire felt that he had no other choice. ROA p. 490, lines 7-9. He believed that his life was in imminent danger. ROA p. 528, lines 9-21.

Witnesses for both the State and the defense corroborated various portions of Rocquemoire’s account of the incident. Police officers who arrived at the scene shortly after the shooting saw Rocquemoire being beaten and feared for their own safety. Rocquemoire’s friend testified that they were both attacked without provocation. One State’s witness verified that Rocquemoire had attempted to hit Denson with the weapon and had dropped it before shots were fired. ROA p. 232, lines 7-16. Another testified that Rocquemoire had “stumbled” as he was shooting. ROA p. 256, lines 8-15. Finally, the physical evidence indicated that Denson was swinging at Rocquemoire when he was shot. ROA p. 306, lines 8-14.

The judge ultimately ruled that *S.C. Code Section 16-11-410 et seq.* was not intended to be retroactive. ROA p. 594, line 25 – p. 595, line 22. He relied primarily on a purported “savings clause” attached to the end of *2006 ACT No. 379*, an omnibus criminal bill which included the Protection of Persons and Property Act:

Either repeal or amendment by this act of any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repeal or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force in effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

He subsequently amended his ruling to include *Smiley v. State of Florida*, 966 So. 2d 330 (Fla. 2007). ROA p. 703, line 9 – p. 705, line 22.

In accordance with this ruling, the State argued in closing that Rocquemore could not have acted in self-defense because he did not retreat:

No matter what happened before Mr. Rocquemore armed himself with that .45 caliber weapon, he had an obligation to avoid killing Mr. Denson if he could have done so without endangering himself. And if David was able to get to his car and get that weapon, he could have gotten in his car and left. If these guys were around, he could have [shooed] those guys off and left, but that's not the path he chose that night.

ROA p. 673, line 22 – p. 674, line 15. And the judge instructed the jury that a person must retreat before employing deadly force in self-defense “if it is possible.” ROA p. 692, line 11 – p. 693, line 1.

S.C. Code Section 16-11-420(A) states that it was the intent of the General Assembly “to codify the Common Law Castle Doctrine, which recognizes that a person’s home is his castle and to extend the doctrine to include an occupied vehicle and the person’s place of business.” *Subsection (E)* provides that “no person or victim of crime should be required to

surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack.”

At the risk of oversimplifying the issue, the extension of the “castle doctrine” to occupied vehicles means that there is no duty to retreat before acting in self-defense. (Finer distinctions between self-defense and defense of habitation are addressed by the Supreme Court in *State v. Rye*, 375 S.C. 119, 651 S.E.2d 321 (2007). These distinctions are not relevant here.) Defense counsel argued – correctly, if the statutes are retroactive – that the duty to retreat should not be charged, as Rocquemore testified that he acted in self-defense as he was dragged from his truck by an apparently homicidal mob, which included the victim among its number. The State argued that retreat had to be charged, not on the facts, but because (its argument went) the legislature did not intend for the statute to be applied retroactively. The judge agreed with the State and ruled accordingly.

The underlying guidelines are clear:

In the construction of statutes, there is a presumption that statutory enactments are to be considered prospective rather than retroactive in their operation unless there is a specific provision in the enactment or clear legislative intent to the contrary. [Citation omitted.] However, statutes that are remedial or procedural in nature are generally held to operate retrospectively. [Citations omitted.]

South Carolina Department of Revenue v. Rosemary Coin Machines, Inc., 339 S.C. 25, 528 S.E.2d 416, 418 (2000); see, also, *Wiesart v. Stewart*, 379 S.C. 300, 665 S.E.2d 187 (2008).

Self-defense remains a common law defense. See, for example, *State v. Franklin*, 80 S.C. 332, 60 S.E. 953 (1908). *Section 16-11-410 et seq.* merely extended existing aspects of self-defense “to include an occupied vehicle and the person’s place of business.” Accordingly, these statutes do not repeal or amend any prior legislative enactments, so the

purported “savings clause” relied upon by the judge and the State is not dispositive of the retroactivity question. Nor does *Smiley v. State of Florida* control, since Rocquemore did not seek to have newly-created statutory presumptions charged to the jury, merely the common law of self-defense as it existed at the time of his trial. (Moreover: “The Florida Constitution imposes a restriction on retroactive application of criminal legislation.” 966 So. 2d at 336. South Carolina’s Constitution does not contain an equivalent provision.)

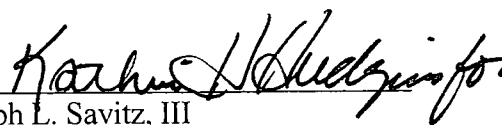
The question thus becomes one of legislative intent. *State v. Gaines*, Supreme Court Opinion No. 26549, decided October 6, 2008; *South Carolina Department of Revenue v. Rosemary Coin Machines, Inc.* In this instance, the General Assembly has made its intent unmistakable. *Section 16-11-420*, with its invocation of pre-existing fundamental rights, contemplates that the statutory scheme thus enacted is both remedial and retroactive. Compare *S.C. Code Section 17-23-170* (“Admissibility of evidence concerning battered spouse syndrome”).

For this reason, the Court should reverse David Rocquemore’s convictions and remand for a new trial.

CONCLUSION

Based on the foregoing arguments, the Court should reverse David Rocquemore's convictions for voluntary manslaughter and possession of a firearm during the commission of a violent crime and remand for a new trial.

Respectfully submitted,



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ATTORNEYS FOR APPELLANT

This 4th day of June, 2009

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

June 4, 2009



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Daniel F. Pieper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID M. ROCQUEMORE,

APPELLANT

CERTIFICATE OF SERVICE

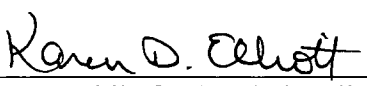
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Deborah Shupe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 4th day of June, 2009.



Joseph L. Savitz, III
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of June, 2009.



Notary Public for South Carolina (L.S.)

My Commission Expires: March 19, 2017.

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STATEMENT OF ISSUES ON APPEAL

I.

The circuit court properly denied Rocquemore's motion for a mistrial because the juror in question was dismissed from the jury, and there was no evidence the remaining jurors were tainted by the dismissed juror's relationship to a prosecutor who not involved in the case.

II.

The Legislature did not intend retroactive application of the Protection of Persons and Property Act, and the circuit court properly declined to charge the jury regarding the Act's provisions since the incident at issue occurred approximately ten months prior to the Act's effective date.

STATEMENT OF THE CASE

Appellant was convicted by a jury on July 19, 2007, of one count of voluntary manslaughter and one count of possession of a firearm during a crime of violence. The Honorable Daniel F. Pieper, Circuit Court Judge, sentenced him to ten years and five years incarceration, respectively, with the sentences to run concurrent. This appeal followed.

STATEMENT OF FACTS

At approximately 4:05 a.m. on August 14, 2005, Charleston County deputies responded to a "shots fired" call. When they arrived, two men were restraining Appellant David Michael Rocquemore ("Rocquemore"), and another man, identified as Herschel Denson ("Denson"), was laying on the ground with a bullet wound. Denson was alive, but unconscious and unresponsive. The responding deputies got the two men off Rocquemore and took control of him. As a result of information conveyed to the Sheriff's Department, they also recovered the gun used to shoot Denson, which was registered to Rocquemore. (Trial Transcript [TT], pp. 130-133, 147-159, 483-486; Record on Appeal [R.], pp. 9-12, 19-31, 288-291).

Denson died from injuries sustained in the shooting. (TT, pp. 785-788; R., pp. 311-314). On December 5, 2005, the Charleston County Grand Jury indicted Rocquemore on one count of murder and one count of possession of a firearm during a crime of violence. The case was called for a jury trial on July 9, 2007, before the Honorable Daniel F. Peiper, Circuit Court Judge.

Four eyewitnesses, Dexter Brown, Ronald Gibbs, Troy Eason and Rodney Gibbs, testified Rocquemore and his friend, Chris Thomas, started an altercation with them and Denson. Thomas made a statement about getting something out of his trunk, and the witnesses thought he meant a gun. Ronald Gibbs followed Thomas to his car and tackled him when he reached into the trunk.

While Ronald Gibbs and Thomas were struggling, Rocquemore went to his car and got a gun. He swung the gun at Denson, dropped it on the ground, picked it up and shot Denson twice. Troy Eason and Rodney Gibbs wrestled with Rocquemore in an effort to get

the gun away from him, but it was underneath him on the ground, and Rocquemore did not release it until Ronald Gibbs came over and used a pressure point hold on him. (TT, pp. 201-225, 283-316, 352-381, 425-449; R., pp. 43-67, 97-130, 164-193, 237-261).

During the defense's case, defense counsel informed the court he learned that a juror was related to an assistant solicitor, Michael Nelson ("Nelson"), and had communicated with Nelson during the trial. When the court asked what relief counsel was requesting, he replied: "I think [the juror] should be dismissed." The court indicated it would dismiss the juror, and the State agreed. The court also agreed to ask the juror if he told other jurors about his relationship with Nelson. (TT, pp. 870-879; R., pp. 376-385).

The court then called the juror, Austin Davey ("Davey"), into the courtroom, and confirmed his cousin worked at the Solicitor's Office. Davey admitted he did not inform the court of that relationship during jury *voir dire*, stating: "[w]ell, somebody stood up and you asked if that was going to have any affect, you know. And it wouldn't, wouldn't affect me." He also stated he had talked with Nelson since the trial started, but they did not talk about the case in any way, and he did not disclose his relationship to Nelson to the other jurors. (TT, pp. 880-882; R., pp. 386-388).

Before dismissing Davey, the court again asked defense counsel what he wanted the court to do, and specifically if he had any further questions he wanted to ask Davey. Counsel stated he did not have any further questions. After the court dismissed Davey and instructed him not to discuss the case with anyone or contact Nelson until the case was over, defense counsel stated: "[t]he defendant is ready to proceed." (TT, pp. 882-884; R., pp. 388-390). Rocquemore did not move for a mistrial, or ask the court to individually poll the remaining jurors about communications with Davey.

Rocquemore then called Thomas, who testified that just prior to the shooting, he and Rocquemore were standing outside talking to Dexter Brown when an SUV "came flying down the streets with no lights on, a gentleman hanging out the window, yelling all kind of stuff, sorts of things." After the car pulled up in front of Dexter Brown's house, the men inside got out "in an aggressive manner, traveling towards [Thomas], Dexter Brown, and David Rocquemore." After a verbal altercation, one of the men started to put his hands in Rocquemore's face and Rocquemore slapped his hand down. Thomas turned "to go to [his] trunk to try to get something to hit [one of the men] with, and [the man] tackled [Thomas]." While the man was holding him on the ground, Thomas heard scuffling and two shots, but he could not see what happened. (TT, pp. 889-921; R., pp. 392-424).

Rocquemore testified he, Thomas and Dexter Brown were standing in front of Dexter Brown's house talking when a SUV came down the street, with loud profanities and noises coming from inside. When the SUV stopped, two men got out and came in Rocquemore's direction, cursing and screaming at him. One man put his finger in Rocquemore's face and poked his chest, saying Rocquemore did not "belong there." Rocquemore knocked the man's hand away and the man swung at him.

Rocquemore stated he "took off running to his [truck]," but "was being hit from behind and pulled and just beat." He tried to get in his truck, but he "was being hit and pulled," and he held on to the steering wheel and console to keep from getting pulled out.

While all this hitting and pulling was happening, however, Rocquemore was able to open the console and get his gun. He testified the men then drug him from the truck, and he swung the gun at one of them. He dropped the gun, picked it back up and tried to run, but "was still being beaten and pulled and kicked." The men fell on top of him, and he just

remembered a loud noise. (TT, pp. 965-1034, 1040-1052; R., pp. 468-537, 543-555).

The defense rested after Rocquemoire's testimony, and after a brief charge conference, court adjourned for the day. When court reconvened the next morning, Rocquemoire's counsel asked for further "discussion" of the dismissed juror, specifically stating he was "not asking for a mistrial." After discussing the issue, the circuit court questioned Nelson and the assistant solicitors about the situation involving Davey. In addition, with the State's agreement, the court individually questioned the remaining jurors to ascertain if they knew about the relationship between Nelson and Davey, and if so, did that knowledge impact their ability to give the parties a fair and impartial trial. (TT, pp. 1077-1090, 1100-1114; R., pp. 573-586, 596-610).

Ten jurors stated they were not aware of any relationship between the dismissed juror and someone in the Solicitor's Office. One juror indicated he knew about the relationship only because he went to school with Davey, but it would not affect his ability to render a fair and impartial verdict. One juror stated Davey said he had a cousin in the Solicitor's Office, but they never discussed the case and the knowledge would not affect his ability to render a fair and impartial verdict. The remaining juror stated Davey only said he had a relative who worked in the building, but did not say where the relative worked, and the knowledge would not affect her ability to render a fair verdict. (TT, pp. 1116-1135; R., pp. 612-631).

Rocquemoire then moved for a mistrial, arguing the State failed to disclose the relationship and should be sanctioned. After further questioning Nelson and the assistant solicitors, and based on the remaining jurors' responses, the circuit court denied the motion, finding there was insufficient evidence of intentional conduct by the State. Davey had been removed from the jury, and the remaining jurors were not tainted. (TT, pp. 1136-1164; R.,

pp. 632-660).

The jury convicted Rocquemore of the lesser included offense of voluntary manslaughter on the murder indictment, and the possession of a firearm during a crime of violence charge. (TT, p. 1340; R., pp. 706). After the verdict, Rocquemore moved for a mistrial on the dismissed juror issue, arguing Nelson and Davey communicated more often during the trial than they related to the court. The court denied the motion, again finding the jury was not tainted. (TT, pp. 1347-1359; R., pp. 707-719).

The court sentenced Rocquemore to ten years incarceration on the voluntary manslaughter conviction and five years, concurrent, on the possession of a firearm conviction. (TT, pp. 1383-1384; R., pp. 721-722). This appeal followed.

ARGUMENT

I. The circuit court properly denied Rocquemore's motion for a mistrial because the juror in question was dismissed from the jury, and there was no evidence the remaining jurors were tainted by the dismissed juror's relationship to a prosecutor who not involved in the case.

Rocquemore contends the circuit court erred in refusing to grant his motion for a mistrial after Davey failed to disclose he was related to Nelson, and then communicated with Nelson during the trial. Specifically, he asserts a mistrial was warranted because the State improperly failed to disclose the relationship between Davey and Nelson. His contentions ignore the evidence regarding what the solicitors trying the case knew about Davey and when they knew it, the posture of the case at the time the information was revealed, and more significantly, the circuit court's actions which essentially eliminated any potential prejudice to Rocquemore.¹

A. Preservation

As a threshold matter, this issue may not be preserved for appellate review. When Rocquemore raised the issue, the circuit court specifically asked counsel what relief he was requesting, and counsel responded: "I think [the juror] should be dismissed." (TT, pp. 870-878; R., pp. 376-384). After questioning Davey, the circuit court granted Rocquemore's request and seated an alternate juror. Rocquemore's counsel then stated: "The defendant is ready to proceed." (TT, pp. 878-884, 888; R., pp. 384-390, 391).

Thereafter, Rocquemore presented a witness, testified on his own behalf and rested his case. (TT, pp. 888-1053; R., pp. 391-556). When court reconvened the next day, however,

¹Rocquemore's account of the events at trial is misleading, and the State craves reference to the record as to the actual events.

Rocquemore's counsel stated he was not moving for a mistrial, but just wanted to discuss his "thoughts last night" about the dismissed juror. Counsel did not offer new evidence regarding the juror, and stated he was not questioning the way the court handled the issue or the integrity of the Solicitor's Office. (TT, pp.1077-1082; R., pp. 573-578).

When the juror issue was initially before the court, Rocquemore clearly had ample opportunity to request individual polling of the remaining jurors, or move for a mistrial based on Davey's admitted failure to disclose his relationship with Nelson. Rocquemore received all the relief he requested - dismissal of the juror - then affirmatively informed the court he was ready to proceed with presentation of his case, presented two witnesses and rested his case. His failure to seek additional relief when the issue was before the court waived the issue for appellate review. *Cf. Epting v. Brumble*, 264 S.C. 114, 212 S.E.2d 711, 712 (1975) (since trial court granted only relief sought, appellant cannot complain that he should have been granted more); *State v. McCord*, 349 S.C. 477, 562 S.E.2d 698, 694 (Ct. App. 2002) (no issue for appellate review if objecting party accepts judge's ruling on admission of evidence and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial).

B. Abuse of Discretion

Even if the belated motion for a mistrial preserved an issue for appellate review, however, the circuit court's ruling should be affirmed. Whether to grant or deny a mistrial motion is a matter within the trial court's sound discretion, and the court's decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. *E.g.*, *State v. Council*, 335 S.C. 1, 515 S.E.2d 508, 514 (1999); *State v. Harris*, ____ S.C. ____, ____ S.E.2d ____ (Ct. App. 2009) (2009 WL 580309); *State v. Thompson*, 352 S.C. 552, 575

S.E.2d 77 (Ct. App. 2003). A mistrial is an extreme measure, and the court's power to declare a mistrial should be used with the greatest caution, and only when the defendant can show both error and resulting prejudice. Harris, ____ S.E.2d at ____; *see also* State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999); State v. White, 371 S.C. 439, 639 S.E.2d 160, 162-63 (Ct. App. 2006).

When Rocquemore raised the juror issue the second time, even though counsel presented no new evidence of misconduct, the circuit court summoned Nelson to the courtroom, who testified under oath Davey called him after the jury was picked and they discussed Nelson's engagement party. Nelson stated Davey mentioned he had been selected for the jury, Nelson told Davey he could not talk about it, and they never discussed the case. Davey also called him during lunch the previous day, but Nelson did not answer the call, and subsequently told Davey by text message he could not talk to him. (TT, pp. 1100-1104; R., pp. 596-600).

Nelson testified he told two of his colleagues his cousin was on the jury panel, but did not remember whether the conversations occurred before or after the jury was selected. One assistant solicitor (Alfaro) stated Nelson told him his cousin was on the jury panel before jury qualifications, but he did not know the cousin's name or that he was on the jury in this case. The other assistant solicitor (Durant) stated he thought Nelson told him his cousin was on the jury panel, but he did not know the cousin's name when the jury was selected. (TT, pp. 1104-1112; R., pp. 600-608).

Rocquemore's counsel then argued there was a due process violation. The following colloquy occurred between counsel and the circuit court:

MR. SAVAGE: Perhaps at a minimum we have to individually voir dire the remaining jurors, at a minimum, and then the question is: If there has been

any taint, then I don't think that there's any alternative to a mistrial.

THE COURT: Well, I don't need to speculate about a taint until I hear from the jurors:

MR. SAVAGE: Yes, sir.

THE COURT: And almost an hour ago we started with the assumption that I would talk to the jurors. I'm not sure that absent that type of taint disclosed by the jurors, though, you know - - I mean, I still don't know what remedy you're asking for, and I think the reason you want to ask for this is you don't know what the jury is going to say either.

MR. SAVAGE: Correct.

THE COURT: And the question that you would suggest would be?

MR. SAVAGE: The next step I think is an individual voir dire of the jury.

THE COURT: The question which would be to the juror?

MR. SAVAGE: Has the juror that's been dismissed had any conversation about his relationship with the Solicitor's Office or any information about the case?

It's just not about the case, but it's the relationship that would give credibility or believability to enhance credibility or believability to the state's position because of a voucher for, if you will, by that juror of the good name of the trial counsel.

(TT, pp. 1113-1115; R., pp. 609-611) (emphasis added).

The court then called each juror out individually and asked them whether the dismissed juror discussed his relationship with someone in the Solicitor's Office. Eleven jurors (including the remaining alternate) stated the juror did not say anything about a relationship with someone in the Solicitor's Office, or discuss the case in any way. One juror (McQueeney) indicated he knew the juror had a cousin with the Solicitor's Office only because he went to school with the juror, and it would not affect his ability to give a fair and impartial verdict. (TT, pp. 1116-1135; R., pp. 612-631).

One juror (Bowie) stated that during a general discussion about courtroom procedures, the dismissed juror said his cousin worked in the Solicitor's Office, but he did not discuss anything relating to the case. Bowie told the court nothing the dismissed juror said affected his ability to give everyone a fair and impartial trial. (TT, pp. 1125-1127; R., pp. 621-623).

Another juror (Gallagher) stated the dismissed juror said his cousin worked in the building, but did not say where the cousin worked. Gallagher told the court the information did not affect her ability to give everyone in the case a fair and impartial trial. (TT, pp. 1130-1131; R., pp. 626-627).

After the jurors were questioned, Rocquemore's counsel argued the State knew an impaneled juror failed to disclose information to the court, and Davey's telling other jurors about his relationship with Nelson bolstered the State's credibility. He then asked the State be sanctioned by way of a mistrial that would trigger double jeopardy. (TT, pp. 1136-1138; R., pp. 632-634).

The court again questioned the two assistant solicitors about what they knew regarding Nelson's cousin and when they knew it. Both stated Nelson told them his cousin was in the jury pool, but they did not know he was seated on the jury until defense counsel raised the issue during trial. (TT, pp. 1138-1140; R., pp. 634-636).

Nelson was summoned to the courtroom again, and testified Davey called him the Sunday before jury qualifications to ask how he could get off jury duty, and said he was going to tell the judge Nelson was his cousin. Based on their conversation, Nelson assumed Davey disclosed the relationship during jury qualification, and only learned it was not disclosed when Rocquemore's counsel informed him during the trial. Nelson stated he

passed one of the assistant solicitors trying the case in the hall the day of jury qualifications and mentioned his cousin was on the jury, but could not recall whether he said jury or jury panel. He never told either of the assistant solicitors his cousin's name. (TT, pp. 1142-1146; R., pp. 638-642).

Based on testimony from Nelson and the assistant solicitors, the circuit court determined the State did not intentionally fail to disclose Davey's relationship with Nelson. Rather, Nelson assumed Davey disclosed the relationship during *voir dire*, and the two assistant solicitors did not know Nelson's cousin was on the jury.² The court further noted the relationship would not have sustained a challenge for cause, and Rocquemore did not show he would have used a preemptory strike.³ The court then found the remaining jurors were not tainted, and denied the motion for a mistrial. (TT, pp. 1147-1164; R., pp. 643-660).

This case is clearly distinguishable from State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2001) (trial court erred in denying post-verdict new trial motion when juror intentionally concealed information on *voir dire* regarding her prior work as a victims' advocate), and State v. Gullledge, 277 S.C. 368, 287 S.E.2d 488 (1982) (trial court erred in

²Rocquemore asserts the two assistant solicitors "knew" one of the potential jurors was Nelson's cousin and failed to disclose that fact to the court or defense counsel. As noted above, both assistant solicitors testified Nelson told them his cousin was in the jury pool. (TT, pp. 1139-1140; R., pp. 635-636). Nelson testified he was not sure when his conversations with the assistant solicitors took place or exactly what was said, but he never told them his cousin's name. (TT, pp. 1101-1105, 1142-1146; R., pp. 597-601, 638-642). Since it is undisputed neither assistant solicitor knew the cousin's name, they could not know the cousin was in the jury panel called for this case, much less that he was seated as a juror.

³Rocquemore acknowledges he merely told the circuit court he "could" have exercised a preemptory strike if he was aware of the relationship between Nelson and Davey. In fact, when the circuit court noted it was "not clear that the defendant would have used a preemptory," counsel conceded "there may have been other prevailing reasons to seat [Davey]." (TT, pp. 1163-1164; R., pp. 659-660).

denying mistrial upon discovery of juror's failure to disclose relationship with deputy who viewed the crime scene and had custody of the defendant in the courtroom during trial; juror remained on jury and participated in deliberations). Davey was removed from the jury well before jury deliberations and the verdict, and the circuit court took appropriate steps to determine the remaining jurors were not tainted by anything he may have said while serving on the jury. Thus, the analysis in Woods and Gulledge does not apply in this case. See State v. Savage, 306 S.C. 5, 409 S.E.2d 809 (Ct. App. 1991) (mistrial properly denied in the absence of prejudice to the defendant from a juror's failure to disclose a relationship with a witness).⁴

The record amply supports the circuit court's determination the jury that ultimately heard all the evidence, deliberated the case and rendered a verdict, was capable of giving the parties a fair and impartial trial.⁵ See State v. Bell, 374 S.C. 136, 646 S.E.2d 888, 894 (Ct. App. 2007) (Determination of whether a juror is biased by the receipt of outside information concerning the case being tried, and the decision whether to dismiss a juror and replace him

⁴Rocquemore's contention the number of contacts between Davey and Nelson changes the analysis is likewise unavailing. As the circuit court recognized in denying Rocquemore's Motion for Release of Records, the remaining jurors were not influenced or tainted in any way regardless of the level of communication between Davey and Nelson while Davey was on the jury. (Order filed August 20, 2007; R., pp. 732-734). Therefore, whether Davey and Nelson shared two or twenty conversations/text messages is irrelevant to the issue before this Court. See State v. Jarrell 350 S.C. 90, 104, 564 S.E.2d 362, 370 (Ct. App. 2002) (recognizing an overriding rule of civil procedure that "whatever doesn't make any difference, doesn't matter")(citing McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 [Ct. App.1987]).

⁵Rocquemore's assertion Davey's relationship with Nelson somehow bolstered the credibility and believability of the State's case is belied by the fact the jury convicted Rocquemore of the lesser included offense of voluntary manslaughter rather than the murder charge as indicted. In order to reach that verdict, the jury apparently gave some credence to Rocquemore's evidence regarding the incident.

with an alternate, are matters within the trial court's discretion, and the court's decisions will not be reversed on appeal absent an abuse of discretion.). Thus, there was no abuse of discretion and Rocquemoire's convictions should be affirmed.

II. The Legislature did not intend retroactive application of the Protection of Persons and Property Act, and the circuit court properly declined to charge the jury on the Act's provisions since the incident at issue occurred approximately ten months prior to the Act's effective date.

Rocquemore contends the circuit court erred in denying his request for a jury charge retroactively invoking provisions of the Protection of Persons and Property Act (S.C. Code §16-11-410 [Supp. 2008]) (effective June 2006) (the "Act"), specifically as the Act relates to a person's duty to retreat when attacked in their vehicle. This Court conclusively resolved the issue regarding retroactive application of the Act contrary to Rocquemore's position in State v. Dickey, 380 S.C. 384, 669 S.E.2d 917 (Ct. App. 2008), and State v. Bolin, ____ S.C. ____, ____ S.E.2d ____ (Ct. App. 2009) (2009 WL 367595).

In Dickey, the Court held the Act created substantive rights for citizens by codifying the common law Castle Doctrine, and therefore, it was only retroactive if the legislature clearly expressed such an intent. Based on the Act's effective date and savings clause, the Court found "the Legislature clearly manifested its intent that the Act be applied prospectively," and it did not apply to the defendant's case since his prosecution was pending prior to the Act's effective date. 669 S.E.2d at 928.

The Court followed Dickey in Bolin, and affirmed the trial court's refusal to charge the jury on the Act's legal presumptions. The Act did not apply because the incident at issue occurred four months before the Act's effective date. Bolin, ____ S.E.2d at ____.

In this case, the shooting occurred on August 14, 2005, and Rocquemore was indicted on December 5, 2005, ten months and six months, respectively, before the Act's effective date of June 9, 2006. Under Dickey and Bolin, the Act did not apply, and the circuit court properly refused to charge the jury regarding its provisions.

CONCLUSION

Based on the foregoing, Respondent respectfully submits that Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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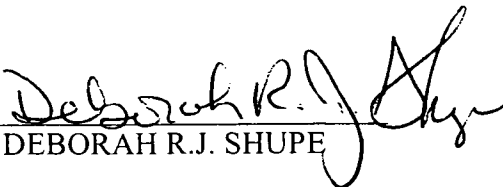
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June 1, 2009

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IN THE COURT OF APPEALS

Appeal From Charleston County
The Honorable Daniel F. Pieper, Circuit Court Judge

THE STATE,

Respondent,

vs.

DAVID MICHAEL ROCQUEMORE,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.

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