

ORIGINAL

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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Appeal from Horry County
Honorable Larry B. Hyman, Circuit Court Judge

S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

LUZENSKI ALLEN COTTRELL,

APPELLANT

APPELLATE CASE NO 2015-000731

RECORD ON APPEAL

KEIR M. WEYBLE
Cornell Law School
Death Penalty Project
Myron Taylor Hall
Ithaca, NY 14853

SHERI LYNN JOHNSON
Cornell Law School
Death Penalty Project
Myron Taylor Hall
Ithaca, NY 14853

ROBERT M. DUDEK
Chief Appellate Defender
South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEYS FOR APPELLANT

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

ANTHONY MABRY
Assistant Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

JIMMY A. RICHARDSON
Solicitor, Fifteenth Judicial Circuit
P.O. Box 1276
Conway, SC 29526

ATTORNEYS FOR RESPONDENT

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THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS COURT:

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COURT’S EXHIBIT NO. 12 (CD)
STATE’S EXHIBIT NO. 10 (CD)

1 pressure or -- you know, it's one and there's pressure
2 applied, then it might take a little bit longer to lose
3 consciousness.

4 Q I have asked you, of course, about the manner of
5 death. What was your ultimate finding about the cause
6 of death?

7 A It was the gunshot wound to the face.

8 MR. RICHARDSON: The Court's indulgence just a
9 second, your Honor.

10 BY MR. RICHARDSON:

11 Q To a reasonable degree of medical certainty, were
12 you able to determine the manner of death?

13 A Well, I classified the manner of death as
14 homicide. And in our forensic pathology arena,
15 homicide means that he died from the hands of another.

16 Q Is it common when you're doing an autopsy,
17 Dr. Presnell, to do height and weight?

18 A Yes.

19 Q Do you have Joe's autopsy in front of you?

20 A Yes. I have him weighing 285 pounds and being
21 76 inches, which is six-four.

22 Q Six-foot-four, 280 pounds?

23 A Approximately.

24 MR. RICHARDSON: Okay. Dr. Presnell, if you would
25 answer any questions the defense might have for you.

1 CROSS-EXAMINATION

2 BY MR. MCGUIRE:

3 Q Doctor, first I'm just going to pick up where you
4 left off. The term "homicide," I don't want anybody to
5 be confused about that. That does not mean murder.

6 A Correct. That is not our decision.

7 Q For instance, voluntary manslaughter could be
8 homicide?

9 A Any -- yes. Any of the killings can be homicide.
10 And I'm not actually familiar with all the court -- the
11 legal terms of the different causes of death -- or
12 manners of death.

13 Q So self-defense could be homicide as well?

14 A Absolutely.

15 Q Okay. The injury that Officer McGarry sustained,
16 the gunshot wound, could have produced a concussive
17 injury and rendered him immediately incapacitated?

18 A It may have.

19 Q Okay. And the wound on the back of his head,
20 injury to the back of his head, was consistent with an
21 unbroken fall?

22 A It is. It could -- I mean, again, it's an injury
23 that I'm interpreting in the context of the autopsy
24 room. It certainly is in the location of an injury
25 that somebody with an unbroken fall would sustain.

1 Q Okay. So the injury that you saw is consistent
2 with an unbroken fall?

3 A Yes.

4 Q And an unbroken fall is consistent with a body
5 being incapacitated?

6 A It is.

7 MR. McGUIRE: Thank you.

8 MR. RICHARDSON: No further questions, your Honor.

9 THE COURT: Thank you. You may step down.

10 MR. RICHARDSON: Your Honor, may Dr. Presnell be
11 released from her subpoena?

12 MR. McGUIRE: No objection, Judge.

13 THE COURT: Without objection, Dr. Presnell, you
14 are released from your subpoena.

15 MR. HIXSON: The State would call Special Agent
16 Bello Paavel from the State Law Enforcement Division.

17 BELLO PAAVEL,

18 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

19 THE WITNESS: My name is Bello Paavel, spelled
20 B-e-l-l-o, P-a-a-v-e-l.

21 DIRECT EXAMINATION

22 BY MR. HIXSON:

23 Q Good morning, sir. How are you doing today?

24 A Fine, sir.

25 Q Could you please tell this jury what you do for a

1 living.

2 A I currently work for the South Carolina Law
3 Enforcement Division, which is commonly known as SLED.
4 I work in the forensic services laboratory in the
5 firearms department where I'm considered to be a senior
6 criminalist or senior analyst.

7 Q And, of course, SLED is a pretty big organization,
8 so tell us specifically in SLED what your specialty is,
9 where your area of expertise is, and what that entails.

10 A In the firearms department, I perform what's known
11 as firearm and toolmark identification analysis or
12 examinations. And what that generally entails is
13 examining fired bullets, fired cartridge cases, and
14 trying to determine whether they were fired by
15 particular firearms. I also examine firearms to
16 determine whether they're functioning properly. I do
17 serial number restorations. Also, general toolmark
18 work is done.

19 Now, in my current position, since I retired -- I
20 retired several years ago and I came back. Currently,
21 much of what I do is training a new employee. I also
22 work on accreditation and measurement uncertainty. At
23 the time that I examined evidence in this case, I was
24 primarily doing firearm and toolmark identification
25 analysis for examination.

1 Q Okay. So I think you answered that question,
2 which is: Back in December of 2002, did you have an
3 occasion to come in contact with evidence that were
4 generated in the shooting death of Officer Joe McGarry?

5 A Yes, sir, I was.

6 Q Okay. Well, let's take the expertise question and
7 let's address that. It sounds like that's a fairly
8 sophisticated area. It sounds like you need some
9 training or experience to do that. So could you please
10 tell the jury what type of training or experience you
11 may have had in order to fulfill this role.

12 A Yes, sir. When I first went to work at SLED in
13 1987, I was in the firearms department. Now, firearms
14 at that time was responsible for crime scene
15 processing, latent print examination and
16 identification, and firearm and toolmark
17 identification.

18 When I first started, I was primarily doing crime
19 scenes and latent print work and some firearm and
20 toolmark identification work.

21 In 1989, we built the new building. And when we
22 moved into that new building, I actually went to the
23 firearms department where I did primarily firearm and
24 toolmark identification.

25 Now, as a matter of gaining expertise after I was

1 first hired at SLED, I actually was doing training in
2 all areas of latent print, crime scene, and firearm and
3 toolmark identification. What I had to do, or what I
4 did, actually, was do extensive reading on firearms. I
5 also was given test bullets and test cartridge cases
6 that I had to look at under a comparison microscope,
7 which is the primary instrument that we use. I
8 assisted examiners in preparing cases and examining
9 firearms with them. I've had an opportunity to attend
10 some armorer schools. And ultimately, I was allowed to
11 work cases on my own. Also, prior to being in law
12 enforcement, I actually worked at a gun shop where my
13 main job was to buy, sell, and repair firearms. So I
14 had a fairly good background in how firearms worked
15 before I actually -- that actually became my law
16 enforcement-related career.

17 Now, once I was allowed to work cases on my own, I
18 ultimately testified in court as an expert in firearm
19 and toolmark identification. And since then, I have
20 testified approximately 315 times in South Carolina
21 General Sessions Court or Federal Court as an expert in
22 firearm or toolmark identification.

23 Q Okay. You mentioned the microscope that was the
24 tool of the trade, to so speak. Generally speaking,
25 when it comes to comparison, is that a chemical test?

1 Is it -- what kind of testing do you use? It sounds
2 like it's a visual test.

3 A It is. It's a physical and visual examination. I
4 use a comparison microscope. And what that simply is,
5 is a microscope that has a binocular type of eyepiece.
6 It's almost like looking into a pair of binoculars.
7 And it allows me to put one object on one side of the
8 microscope and another object on the other side of the
9 microscope, and by looking through the eyepiece -- and
10 it has an optical bridge that connects the eyepiece to
11 these two stages and objective lenses. I can look at
12 both of those objects at the same time side by side,
13 and I can move these objects back and forth, up and
14 down, rotate them, change the lighting on them. So I
15 had the ability to compare the surfaces and the surface
16 contours of these two objects to each other.

17 MR. HIXSON: At this point, we'd offer Special
18 Agent Paavel as an expert in the area of toolmark and
19 firearm identification.

20 THE COURT: Toolmark and firearm --

21 MR. HIXSON: Toolmark as well as firearm
22 identification.

23 MR. MCGUIRE: Stipulate, Judge.

24 THE COURT: All right. He is qualified as an
25 expert in toolmark and firearms identification.

1 MR. HIXSON: Thank you.

2 BY MR. HIXSON:

3 Q Well, let's get down to business, then.

4 So you said that you had received some evidence
5 that was generated from this case. Is that safe to
6 say?

7 A Yes, sir.

8 Q Let's start with: Do you recall what the nature
9 of that evidence was? And I'll -- just to refresh your
10 recollection, you probably don't need it, I'm sure
11 you -- did you generate a written report in this
12 matter?

13 A Yes, sir, I did.

14 (WHEREUPON, State's Exhibit 77 was marked for
15 identification.)

16 BY MR. HIXSON:

17 Q Let me show you what's been premarked as State's
18 Exhibit 77. I believe this is -- I'm showing the
19 witness what's been marked as State's 77.

20 It's marked as a firearms report, I believe, the
21 firearms department. Do you recognize that item?

22 A Yes, sir. This is a copy of the written report
23 that I generated in reference to the evidence I
24 examined in this case.

25 Q Okay. And does that correspond to your written

1 report that you're testifying you kind of have in a
2 summary form to aid your testimony to refer to your
3 report?

4 A Yes, sir.

5 MR. HIXSON: At this time I move State's 77 into
6 evidence.

7 MR. McGUIRE: No objection, Judge.

8 THE COURT: Without objection, it's admitted.

9 (WHEREUPON, State's Exhibit 77 was admitted
10 into evidence.)

11 BY MR. HIXSON:

12 Q All right. Did you receive a quantity of
13 .40-caliber shell casings in this matter for testing?

14 A Yes, sir, I did.

15 Q Let me show you what's been marked State's 57
16 through 70 in evidence. Here you go. I believe
17 they're still in order. See if you recognize the items
18 as items that you performed analysis on.

19 A Yes, sir, I recognize these items.

20 Q Okay. Can you give the Court, or give this jury,
21 I guess, your expert opinion relating to what you're
22 identifying and what firearms -- let me start over.

23 Did you take -- perform any analysis on two
24 .40-caliber Smith & Wesson service weapons? Did you do
25 any analysis on those?

1 A Yes, sir. There were two .40-caliber Smith &
2 Wesson brand pistols that were identified as being
3 service weapons that I examined in this case. And I
4 examined those, test-fired those, in addition to
5 documenting other information about it, and obtained
6 the test specimens or test cartridge cases and I
7 microscopically compared those test cartridge cases to
8 these fired .40 Smith & Wesson caliber cartridge cases
9 that were recovered from the scene.

10 Q I'm specifically referring to your SLED item 48,
11 which is marked in your report which is in evidence,
12 and I'm referring to your report as State's 77, as I
13 recall, and that would be stamped as Guthinger's
14 firearm, Guthinger's duty weapon?

15 A Yes.

16 Q And also item 47, which has been marked as
17 McGarry's duty weapon?

18 A That's correct. Those are the two .40-caliber
19 pistols that I examined in this case.

20 Q Okay. Now, as it relates to your comparison with
21 the shell casings, were you able to come to a
22 reasonable degree of scientific certainty about which
23 casings were fired from which weapon?

24 A Yes, sir.

25 Q And I'm referring to State's Exhibit 2, which is

1 in evidence, which is a summary of a crime scene chart
2 that Jeff Crooks had generated that also indicates some
3 of your conclusions on there already that correspond to
4 your report. And if that aids your testimony, I have
5 provided a laser pointer if that can help aid the
6 testimony for the jury.

7 A All right. Let me sort these out first.

8 Briefly, again, normally what I do when I receive
9 a firearm for examination, I'll take it, document it,
10 photograph it, write down all the particulars about it,
11 make, model, serial number, its magazine capacity and
12 so on, and then I will test-fire it. And the way I
13 test-fire it is we have a large vertical tank that's on
14 the second floor in our laboratory which goes down to
15 the first floor. It has about 500 gallons of water in
16 it. We shoot down into that tank. We have the ability
17 to recover the bullets and we recover the cartridge
18 casings.

19 In taking those fired cartridge cases, I use a
20 comparison microscope like we talked about before,
21 where I can put one on one side and one on the other
22 side and I can look at those, compare them, and look at
23 the markings that were left on that fired cartridge
24 case as a result of either the firing pin striking the
25 primer or the primer being -- and the head of the

1 cartridge case being marked by the slide in the breech
2 face area, or there could be markings left by the
3 chamber or the inside of the barrel, or I may get
4 markings from the extractor.

5 By examining those markings and comparing them to
6 the tests which I also compare to each other, it's
7 important to compare the tests to each other, I can
8 usually make a determination as to whether or not that
9 cartridge case was fired by that particular firearm.

10 Now, in this instance, there were 13 fired
11 cartridge cases that I determined that were fired by
12 SLED item 48, which was Guthinger's pistol.

13 Mr. Hixson, do you want me to give the actual
14 State exhibit numbers as to which ones these are?

15 Q Yeah. I tell you what, if you don't mind, why
16 don't you do that, and then I'll just point to them as
17 you read them off. Perhaps it will --

18 A All right.

19 Q -- help the process. Okay.

20 A Again, these were identified as being fired from
21 Mr. Guthinger's pistol, State's Exhibit 57.

22 Q It has your location corresponding on your report?
23 We have to do the --

24 A You want the actual --

25 Q The marker number.

- 1 A You want the marker number?
- 2 Q That would help.
- 3 A All right, sir. Let's do it another way, then.
- 4 This is going to be marker No. -- let's go back this
- 5 way. This is marker No. 10.
- 6 Q Right there?
- 7 A Yes.
- 8 Q That's a Guthinger casing?
- 9 A That's Guthinger.
- 10 State's 58, which is marker No. 12.
- 11 Q That's a Guthinger casing?
- 12 A Yes, sir.
- 13 State's 59 is marker No. 13.
- 14 Q That's a Guthinger casing?
- 15 A Yes.
- 16 State's 61 is marker No. 21.
- 17 Q That's a Guthinger casing?
- 18 A Yes.
- 19 State's 62 is marker No. 24.
- 20 Q That's a Guthinger casing?
- 21 A Yes.
- 22 State's 63 is marker No. 25.
- 23 Q That's a Guthinger casing?
- 24 A Yes.
- 25 State's 64 is marker No. 26.

1 Q Guthinger casing?

2 A Yes.

3 State's 65 is marker No. 27.

4 Q It's a Guthinger casing, sir?

5 A Yes.

6 State's 66 is marker No. 28.

7 Q That is a Guthinger casing, sir?

8 A (Witness nodding head.)

9 State's 67 is marker No. 30.

10 Q And when I say "Guthinger casing," that means your
11 comparison to his duty weapon --

12 A That's correct.

13 Q -- in your opinion, that duty weapon fired that
14 cartridge casing?

15 A That's right. In my opinion, these cartridge
16 cases I've been talking about, based on my analysis and
17 comparison, these cartridge casings were fired by the
18 pistol that was identified as Guthinger's pistol.

19 State's 68 is marker No. 32.

20 Q And that's a Guthinger casing?

21 A Yes, sir.

22 State's 69 is marker No. 33.

23 Q Also a Guthinger casing?

24 A Yes, sir.

25 State's 70 is marker No. 34.

1 Q And also a Guthinger casing?

2 A Correct.

3 And now, there was a final -- or the fourteenth
4 cartridge case, which is State's Exhibit No. 60. This
5 is marker No. 20. This particular cartridge case was
6 fired by my item No. 47, which was identified as
7 Officer McGarry's service weapon. And again, State's
8 Exhibit No. 60, photo marker No. 20.

9 Q Right there?

10 A Yes, sir.

11 Q Thank you.

12 Did you have an opportunity to perform some
13 analysis on a variety of .45 ACP caliber cartridge
14 casings that were recovered from this crime scene?

15 A Yes, sir.

16 MR. HIXSON: I'm handing the witness what's been
17 marked as State's 46 through 50.

18 BY MR. HIXSON:

19 Q See if you recognize these items. I believe these
20 casings are already in evidence. See if you recognize
21 those. And did you perform any analysis on those
22 casings?

23 A Bear with me a moment.

24 Yes, sir, I recognize these items. These are ten
25 .45 auto caliber cartridge cases that I examined.

1 Q And, Special Agent, in your analysis as it relates
2 to those casings, in your expert opinion, did they
3 appear to all come from the same firearm?

4 A Yes, sir, they did.

5 Q Okay. I'm showing you what has been marked as
6 State's 25. I'm also showing the witness what's been
7 marked as State's 26 in evidence as well as State's 27.
8 See if you recognize these items, sir.

9 MR. HIXSON: And I would just note for the Court,
10 pursuant to Supreme Court rule, the firearm is still
11 with the cable lock and incapable of being fired, as it
12 was yesterday.

13 THE COURT: Yes, sir.

14 BY MR. HIXSON:

15 Q Take a look at that, sir, and these items as well,
16 I believe, and see what you think.

17 A All right, sir.

18 Yes, sir. I recognize these items also. I have
19 examined these in reference to this case.

20 Q Okay. And let me show you one other item, which
21 has been marked State's Exhibit 39. It's in evidence.
22 Appears to be an empty .45-caliber magazine. See if
23 you recognize that.

24 A Yes, sir, I recognize this also. I examined this
25 before in reference to this case.

1 Q Thank you, sir.

2 Can you please describe the function testing that
3 you performed on -- I believe that's been already
4 identified as a Ruger P90, .45 ACP semiautomatic
5 handgun.

6 A Yes, sir. And it is. This is a Ruger brand.
7 It's called a P90, and it is a semiautomatic pistol,
8 and it is a .45 ACP or .45 auto caliber.

9 Now, as a matter of function testing, normally
10 what I do is take the firearm and physically examine it
11 first to see if there's something obviously wrong with
12 it, do I see any external damage or any sort of obvious
13 alterations or anything that would cause the firearm to
14 malfunction. I will cycle the firearm, meaning I will
15 move the slide back and forth, test the trigger pull,
16 make sure it's working properly, test the safety or
17 decocker on the firearm to see if it's working
18 properly.

19 In this particular instance, the pistol was in
20 working order when I received it. And it did work
21 during testing, and I was able to actually successfully
22 test-fire it without any kind of problem.

23 Q Now, as it relates to State's 29, which is a
24 magazine assembly, I believe, for that P90, is that
25 magazine assembly consistent with one that was used in

1 that firearm?

2 A Yes. This is a correct magazine assembly for this
3 type of pistol and it does actually fit and function
4 properly and did fit and function properly in this
5 particular Ruger pistol.

6 Q Okay. And then the same with the magazine
7 assembly. I think, when you received it, there were
8 loaded rounds that were in the magazine assembly. I
9 think it was probably unloaded when you got it, but do
10 you have any indication that that's the correct
11 magazine assembly and the firearm functions with both
12 of those mags?

13 A Yes, this firearm functions with both of these
14 magazines and the cartridges. The .45 auto caliber
15 cartridges that were with it are proper caliber for
16 that particular firearm.

17 Q Okay. Now, can you -- we're going to hear it
18 again, so maybe we'll talk about it now, a general
19 distinction between a single-action semiautomatic
20 handgun and a double-action-only semiautomatic handgun
21 and the distinctions between the two.

22 A Correct. This particular pistol has what's known
23 as -- has single-action and double-action capability in
24 the same pistol. And this can be a little bit
25 confusing, but single-action simply means that when you

1 pull the trigger, it usually only does one thing,
2 meaning it causes the gun to fire. It releases the
3 hammer and it fires. In a double-action type of
4 firearm, pulling the trigger actually cocks the hammer
5 or cocks the striker and then causes it to release,
6 causing it to fire.

7 This particular pistol you can do both of those
8 ways. You can either cock the hammer first and fire it
9 or, if the hammer is down and the safety has been
10 disengaged, you can simply pull the trigger in a long
11 trigger pull and it will fire.

12 Now, some pistols, like the service pistols, those
13 .40-caliber service pistols, those are a little bit
14 different. Those are what is known as
15 double-action-only. You can only simply pull that
16 trigger. You can't really cock that hammer. You have
17 to pull that trigger in a long fairly heavy trigger
18 pull, and then it resets and you do the same thing over
19 and over and over.

20 With this particular pistol, if you cock the
21 hammer on this pistol, the very first shot will be
22 very, very light, and then the successive shots are
23 also very light. If the hammer is not cocked on this
24 particular .45-caliber pistol for the first round, you
25 have a long heavy trigger pull, and then it resets, and

1 then you have a light trigger pull.

2 Q Let me show you what's been marked as State's 24.
3 That's in evidence, and -- it's in evidence. It's a
4 close-up of the P90 Ruger recovered in the rear deck of
5 the suspect vehicle.

6 What is the -- what is the firing status or the
7 condition of that handgun as you see it in its natural
8 state in that car?

9 A The hammer is back. It's all the way back. It's
10 cocked.

11 Q It's cocked?

12 A Yes, sir.

13 Q And as such, that would be single-action mode,
14 light trigger pull, ready to roll?

15 A Yes, sir. And, in fact, if this is the pistol
16 that we have here, which I'm assuming it is, the
17 trigger pull weight on that particular pistol when I
18 tested it, when it's cocked like this, would be
19 approximately four and three-quarter pounds when I
20 tested it.

21 Q Thank you.

22 And let me show you what's been marked as State's
23 Exhibit 42. That is already in evidence and was
24 identified in evidence as Officer McGarry's duty
25 weapon. Can you describe the hammer, the double-action

1 on the hammer assembly on that semiautomatic handgun?

2 A This particular hammer is in its forward or at
3 rest position. With these double-action-only pistols,
4 you really can't pull that hammer back into a cocked
5 position normally. So it's simply when you pull the
6 trigger, the hammer goes back and it releases. You
7 can't pull it back and keep it in a cocked position as
8 you can with this particular .45 Ruger. And in this
9 position, the hammer is obviously in its forward
10 position.

11 Q So from a firearms design or safety standpoint,
12 why would that be beneficial? Why would a department
13 want that to be that way when they issue weapons like
14 that?

15 A One advantage to having a double-action-only
16 pistol, one of the advantages is, you only have to
17 learn one way of pulling the trigger. It's the same
18 trigger pull each time. It's a long heavy pull each
19 time. Now, if you issued a .45 Ruger, like this P90,
20 the officers would have to learn two different trigger
21 pulls, okay, and that can be somewhat complicated
22 because when you're shooting, you have what's known as
23 a double-action/single-action transition. The first
24 shot is a long heavy pull, then your next shot is a
25 very light pull, and that takes some training to get

1 used to that; whereas, with the long double-action-only
2 pull, you only have to learn how to pull the trigger
3 one way. And for some of the older officers or other
4 officers who were used to the older double-action
5 revolvers, they will be used to that long double-action
6 pull if you transitioned or converted or started using
7 a pistol with the double-action-only trigger pull.

8 Q Okay. And also, one of the -- was that duty
9 weapon equipped with a manual thumb safety of any kind?

10 A No. The Smith & Wesson .40-caliber pistols do not
11 have an external manual safety. And the reason for
12 that is it uses that long heavy double-action pull or
13 relatively heavy double-action pull as a safety
14 feature, plus it has an internal firing pin block that
15 prevents the gun from firing unless the trigger has
16 been pulled all the way to the rear, and the slide has
17 to be forward in the proper position in order for that
18 to happen.

19 Q And so as it relates to the functionality of
20 specifically -- well, Officer Guthinger, but more
21 specifically Officer McGarry's handgun, were you able
22 to determine the weight of the trigger pull, how much
23 effort would be required to apply?

24 A Yes, sir. When I examined the firearm and
25 determined the trigger pull weight, it required at

1 least nine and a quarter -- or approximately nine and a
2 quarter pounds of weight in order for that trigger to
3 be pulled all the way to the rear and the firearm to
4 discharge.

5 Q Okay. So as it relates to the firing pin block,
6 what's the purpose of the firing pin block, then, for
7 instance if the weapon was dropped or struck the
8 ground?

9 A Yes. That's one of the main purposes of it is to
10 keep the firearm from discharging if you dropped it.
11 The trigger has to be pulled to the rear, and that
12 mechanical block in there is designed to prevent the
13 firearm from discharging or firing unless you have that
14 trigger pull all the way to the rear.

15 And in a slide also -- the slide, again, is the
16 top portion of the firearm that moves back and forth on
17 a pistol. That has to be in a particular location
18 also. So if you had a gun and somehow you had a
19 malfunction and the slide wasn't all the way forward,
20 you couldn't pull the trigger and cause the gun to fire
21 with the slide being out of battery or being in the
22 incorrect position.

23 Q Well, thank you for that background. Let's get
24 into your testing on the casings, then. How's that?

25 Could you please -- did you perform any casings

1 and find any conclusions to a reasonable degree of
2 scientific certainty as to what firearm fired these
3 .45-caliber rounds?

4 A Yes, sir. There were ten .45 auto caliber
5 cartridge cases that were recovered from the scene. I
6 did the same examinations as I did with the .40 Smith &
7 Wesson caliber cartridge cases. I test-fired the
8 pistol into a water tank. I recovered bullets and
9 cartridge cases. Using the comparison microscope, I
10 compared the cartridge tests, actually, to each other
11 first, and then I compared evidence cartridge cases to
12 the test and ultimately compared the evidence cartridge
13 cases to each other. That's normally what I do. And I
14 determined that these ten cartridge cases were fired by
15 State's Exhibit No. 25, which is the Ruger P90 pistol.

16 Q And as the summary that we used before, could you
17 give your expert opinion that you already did and where
18 they were recovered in this summary?

19 A Yes, sir. Going in order again, State's
20 Exhibit 46 is marker No. 1.

21 Q That's a Luzenski Cottrell casing?

22 A That's correct. That's related to the Ruger,
23 correct.

24 Q Just to clarify, and when I ask that, I mean that
25 your analysis indicated that that casing was fired from

- 1 the Ruger P90?
- 2 A That's correct. State's 47 is marker No. 3.
- 3 Q That's a Cottrell casing?
- 4 A Correct.
- 5 State's 48 is marker No. 4.
- 6 Q Is that a Cottrell casing?
- 7 A Yes, sir.
- 8 State's 49, marker No. 5.
- 9 Q A Cottrell casing, sir?
- 10 A Yes, sir.
- 11 State's 50 is marker No. 6.
- 12 Q A Cottrell casing, sir?
- 13 A Yes, sir.
- 14 State's 51 is marker No. 7.
- 15 Q Also a Cottrell casing?
- 16 A Yes, sir.
- 17 State's No. 52 is marker No. 8.
- 18 Q A Cottrell casing?
- 19 A Yes, sir.
- 20 State's 53 is marker No. 9.
- 21 Q Also a Cottrell casing, sir?
- 22 A Yes, sir.
- 23 State's 54 is marker No. 11.
- 24 Q A Cottrell casing, sir?
- 25 A Yes, sir.

1 And State's 55 is marker No. 19.

2 Q Also a Cottrell casing?

3 A Correct.

4 Q Did you have an opportunity to do any comparisons
5 on bullets, .45-caliber ACP bullets -- well, you
6 wouldn't know ACP on a bullet, but .45-caliber bullets
7 consistent with the .45 ACP?

8 A Yes, sir. I examined several bullets or bullet
9 fragments in reference to this case.

10 And, ladies and gentlemen, when I talk about a
11 bullet -- let's make sure we get something straight
12 here so we don't have any confusion, because sometimes
13 people use this term interchangeably. When I talk
14 about a bullet, I'm talking about the projectile.
15 That's the part that comes out the barrel and goes
16 toward a target. Sometimes people call a piece of
17 ammunition a bullet. When I talk about bullet, we're
18 talking about that projectile.

19 I call a piece of ammunition a cartridge or a
20 round of ammunition. And a cartridge case is that
21 container that holds the bullet and the gunpowder and
22 the primer. And the primer is that little explosive
23 cap that's in the head of the cartridge that the firing
24 pin usually strikes and causes the gunpowder to be
25 ignited.

1 Q Let me show you two bullets, State's 56 and
2 State's 71. Take a look at those and see if you
3 recognize those items. And they are both in evidence,
4 Special Agent.

5 A Yes, sir, I recognize these two items. These are
6 two fired bullets that I examined in reference to this
7 case.

8 Q Okay. And were you able to make a conclusion to a
9 reasonable degree of scientific certainty on the weapon
10 that fired those bullets?

11 A Yes, sir. Both of these bullets, State's 56 and
12 State's 71, were fired by the Ruger .45-caliber pistol,
13 which is State's Exhibit No. 25.

14 Q Now, as it relates to the marker numbers, your
15 SLED I.D. numbers on this summary that's admitted as
16 State's 2, did you get a location where those items
17 were recovered?

18 A Yes. For State's No. 56, that's the one that's
19 on -- it looks like -- the lower left part of the --
20 yes, that right there. That's the one that came out of
21 the wall at Calabash Seafood.

22 Q SLED 69, right?

23 A Yeah, my item 69.

24 Q The seafood restaurant down here?

25 A Correct. And then State's 71 indicates it is on

1 photo marker No. 17. And let me confirm that with my
2 documents. Yes.

3 Q That's a .45-caliber bullet?

4 A Both of these are .45-caliber bullets or
5 projectiles.

6 Q And that's a Cottrell bullet?

7 A Correct.

8 Q And State's 69 is a .45-caliber bullet. That's a
9 Cottrell bullet as well?

10 A That's correct.

11 Q Let me show you a couple of items marked State's
12 29 and 29A. These are in evidence also, sir.

13 MR. HIXSON: And pursuant to the Supreme Court
14 rule, it's still in a cable lock, your Honor. It's
15 incapable of being fired.

16 THE COURT: Thank you.

17 BY MR. HIXSON:

18 Q See if you recognize those items and did you
19 perform any testing on those items?

20 A Yes, sir, I recognize these items. They were
21 examined by me in relation to this case.

22 Q Now, as it relates to the weapon's
23 functionality -- well, what is that, first off?
24 State's 29, it's obviously a stainless steel revolver
25 of some type.

1 A Right. This is a Rossi brand of revolver. It's a
2 model 971. And this is a double-action revolver. I'll
3 take it out of here and keep it pointed down.

4 This is another type of firearm that you can
5 either cock the hammer and shoot it, or you can simply
6 pull the trigger and shoot it, and you'll have two
7 different types of trigger pulls. Now, this differs
8 from a semiautomatic pistol in the sense that it has a
9 cylinder that holds the cartridges. This is where the
10 cartridges go. You place them in the cylinder, you
11 close the cylinder, and the firearm will be ready to
12 shoot. A pistol normally uses some sort of magazine or
13 clip, as some people call it, that holds the
14 cartridges, and then that magazine is inserted into the
15 firearm. With the revolver, the cylinder is an
16 integral part of the firearm. And this particular one
17 is a .357 Magnum caliber.

18 Q Okay. Was that functioning properly at the time
19 that you looked at it?

20 A Actually, I believe -- let me refer to my notes, I
21 did have some difficulty with this firearm
22 occasionally. Let me confirm that.

23 Right. This particular revolver occasionally I
24 could not properly cock it. It required some
25 manipulation and kind of jiggling the parts around in

1 order to get it to cock at times. But it was capable
2 of firing, and I actually did test-fire it during the
3 examination process.

4 Q Fair enough. And the ammunition that you have
5 analyzed that were in there, that appeared to be
6 functioning ammunition, no problem with those, as far
7 as you could tell?

8 A Yes, sir. In the course of examining ammunition,
9 I mean, normally what I do is to look at it and
10 document its make, its caliber, and the particulars
11 about it and what's stamped on the head of the
12 cartridge case. If necessary, I will take a cartridge
13 apart to see what the type of projectile is in it. But
14 whether or not these absolutely function, I wouldn't
15 know unless I put it in the firearm and shoot it --

16 Q Fair enough.

17 A -- which I have no reason to believe that they
18 would not function.

19 Q Fair enough.

20 Now, during your analysis of any of the casings,
21 did any evidence that came from State's 29 appear
22 anywhere in this particular crime scene through your
23 analysis?

24 A I didn't find anything that was submitted to me
25 that I could link to that particular revolver.

1 Q Thank you.

2 Let's just talk -- let me just talk numbers here
3 for a second, then. If I may refer you back to the
4 magazine assembly, State's 26 and State's 29. Can you
5 just talk about specifications and capacities for a
6 moment as it relates to the Ruger .45 ACP?

7 A Yes, sir. The .45 magazines -- and let me refer
8 to my notes so I don't say anything incorrectly here.

9 Yes, sir, those magazines when I tested them, they
10 were capable of holding eight cartridges and did hold
11 eight cartridges properly.

12 Q Okay. And as far as the capacity of a fully
13 loaded Ruger P90, by that I mean with a fully loaded
14 magazine as well as one in the chamber, we're talking
15 17 rounds total, two magazines with one in the chamber?

16 A That's correct. You would have -- potentially, if
17 everything is loaded to full capacity, you would have
18 eight in one magazine, eight in another magazine, and
19 then you could actually have one more in the barrel.
20 So if you had the pistol and two loaded magazines and
21 the chamber loaded, you would have 17 cartridges or 17
22 rounds.

23 Q And how many -- I think you testified earlier, how
24 many .45 ACP cartridges did you say that you had
25 recovered and tested?

1 A Cartridges or cartridge cases?

2 Q Fired cartridge cases.

3 A There were ten fired cartridge cases, .45 auto.

4 Q As it relates to the live ammunition that was in
5 magazine assembly 26 that was in firearm 25, how many
6 live rounds of .45 ACP ammunition?

7 A There were seven.

8 Q Seven. So if counted, for a total of 17?

9 A That's correct.

10 Q Thank you.

11 Now, Special Agent, did you have an opportunity to
12 perform some forensic testing on State's 76? Of
13 course, you wouldn't have known it at that time. Well,
14 let me touch base with this first. We'll finish with
15 this.

16 I'm going to show you an item that's in evidence,
17 which is State's 31, and I'm referring your Honor to
18 some boxes of ammunition that were recovered in a gold
19 Honda. Take a look at those and tell me if you've
20 formed any opinion on those.

21 A Mr. Hixson, this bag is sealed. Do you want me to
22 open this?

23 Q No, sir. I believe that you just -- I was just
24 referring to your report. I think you answered the
25 question in your report.

1 A Yes, sir. This bag is still -- appears to be
2 sealed, just like it was when I sealed it. I see my
3 initials on it, and the tape is intact, and it looks
4 like the -- it looks like that seal is intact, so I'm
5 not going to open it.

6 These are boxes that contain various amounts of
7 ammunition that were submitted to me for examination in
8 reference to this case. In particular -- let me get my
9 numbers here. There was a Remington UMC brand
10 ammunition box, and it contained 31 unfired .45 auto
11 caliber cartridges. And those cartridges were
12 headstamped RP .45 auto, which is the proper headstamp
13 for the cartridges that should be in that box.

14 There was a Winchester USA ammunition box, a .357
15 Magnum caliber box. And inside there, there were 38
16 unfired .357 Magnum caliber cartridges. They were
17 stamped Winchester .357 Magnum, and that's what I would
18 expect to be in that box. Now, those two boxes were
19 50-round capacity boxes.

20 The next box is a smaller capacity box. This is a
21 Federal ammunition box, and it contained six unfired
22 .357 Magnum caliber cartridges that were headstamped
23 Federal .357 Magnum.

24 Q So all told, in summary, you have 75 possible
25 rounds of ammunition that are in that testing, I

1 believe, 38 in one, six in another, and --

2 A Right, there's 37, plus -- yeah, 75.

3 Q 75 total shots?

4 A Yes.

5 Q And the ammunition there would function -- the .45

6 ACP ammunition, that would properly function in the

7 Ruger P90?

8 A Oh, yes, sir, it would.

9 Q And the .357 Magnum ammunition would properly
10 function in the Rossi .357 Magnum?

11 A Yes, either of these would fit into the Rossi
12 revolver.

13 Q Thank you. One other thing.

14 THE COURT: Yes, ma'am?

15 JUROR: Can we use the restroom?

16 THE COURT: You need a break? Okay. Well, you
17 did the right thing. I've been waiting for someone to
18 see if they had paid attention to what I told you.
19 Certainly, we can take a break.

20 JUROR: Thank you.

21 THE COURT: Mr. Ropp, take this jury to their jury
22 room and let's give them a break.

23 (WHEREUPON, the jury exited the courtroom
24 at 10:16 a.m.)

25 THE COURT: All right. While the jury is out,

1 let's all take a break.

2 (WHEREUPON, recess taken from 10:16 a.m.

3 to 10:28 a.m.)

4 THE COURT: Mr. McGuire is here, Mr. Cottrell,

5 Ms. Norris, and Mr. Richardson, and Mr. Hixson.

6 Are you ready to bring the jury back? They are

7 ready? If they're ready, let's bring them in.

8 (WHEREUPON, the jury came into open court at

9 approximately 10:29 a.m.)

10 THE COURT: Again, let me stress upon you, if at

11 any time any juror needs to take a break, don't

12 hesitate to let me know. It's so hard to pay attention

13 when you're uncomfortable, so just let me know, just

14 like you did.

15 Okay. Mr. Hixson.

16 MR. HIXSON: Thank you, your Honor.

17 BY MR. HIXSON:

18 Q Special Agent Paavel, did you have an opportunity

19 to receive a fired projective from an autopsy of

20 Officer Joe McGarry?

21 A Yes, sir, I did.

22 MR. HIXSON: And I'm referring to State's

23 Exhibit 76, your Honor, that's in evidence.

24 BY MR. HIXSON:

25 Q I'd like to hand that up and see if you recognize

1 that item.

2 A Yes, sir, I recognize this item. This is the
3 fired bullet and fragment that I examined in reference
4 to this case.

5 Q Okay. And based on -- did you conduct analysis on
6 that item?

7 A Yes, sir. I did microscopic comparison of this
8 particular fired bullet and the fragment to test
9 bullets that I actually fired from the firearms that
10 were submitted in this case.

11 Q Okay. And so did you form a conclusion in that
12 matter?

13 A Yes, sir, I did.

14 Q And to a reasonable degree of scientific
15 certainty, can you tell this jury what handgun fired
16 that bullet from the body of Joe McGarry?

17 A Based on my examination and comparison, I
18 concluded that this particular bullet, which is State's
19 No. 76, and this is the bullet that was in the autopsy
20 container marked "Joseph McGarry" and some other
21 information, was fired by the Ruger P90 .45-caliber
22 pistol, which is State's Exhibit No. 25.

23 MR. HIXSON: Beg the Court's indulgence just for a
24 moment.

25 Thank you, Special Agent. Please answer any

1 questions Mr. McGuire may have of you.

2 THE COURT: Mr. McGuire? Ms. Norris?

3 CROSS-EXAMINATION

4 BY MR. MCGUIRE:

5 Q Is it Agent Paavel?

6 A Technically, right now I'm just Mr. Paavel. When
7 I came back to work as a retiree, I'm a retired
8 employee, but I have no rank. I'm a non-sworn
9 employee.

10 Q Probably better for you.

11 A Yes, sir.

12 Q I'm going to talk to you a little bit about the
13 service weapons, the .40-caliber Smith & Wessons.

14 A Yes, sir.

15 Q An officer can load the magazine to capacity,
16 insert it into the weapon, slide a round into the
17 chamber, eject the magazine, top off, and reinsert the
18 magazine?

19 A Yes, sir.

20 Q That's normal procedure?

21 A I think for most -- every place, just about, I've
22 work at in law enforcement, that was the normal
23 procedure in one way or the other. It may require
24 doing it from your holster or some way, but normally
25 you loaded the semiautomatic pistol to full capacity.

1 That's how I was taught.

2 Q Okay. And when a double-action semiautomatic
3 handgun is loaded in that manner, if you pull the
4 trigger all the way back, like you said, the full
5 trigger pull, the gun will fire?

6 A Yes, sir, unless there's some sort of malfunction.
7 In a properly working firearm, if you pull the trigger
8 all the way back, with these two service weapons, it
9 cocks the hammer, releases it, and the gun fires.

10 Q Okay. That's what I want to talk to you about
11 right now. You've testified and you characterized it
12 as the long heavy trigger pull?

13 A Yes, sir, compared to the single-action pull that
14 the Ruger has.

15 Q Right. And the reason we use these weapons as
16 service weapons in police departments, one reason is
17 that you have a lot of officers that were used to the
18 trigger pull of a revolver?

19 A That's correct. Many officers are accustomed to a
20 double-action revolver, which were a first shot, unless
21 you physically cock it. You simply pull, and it's a
22 long fairly heavy trigger pull.

23 Q Right. Because we have a lot of stuff going on,
24 and the trigger has to rotate the cylinder and move the
25 hammer back, correct?

1 A In a double-action revolver, that's correct. When
2 you pull the trigger when the hammer is down, it
3 actually cocks the hammer, moves it to the rear, it
4 rotates the cylinder, and then at a certain point the
5 hammer will go forward and hits the firing pin, hits
6 the primer, and discharges the cartridge. And then you
7 release that trigger and you do it again.

8 Q And the Smith & Wesson .40-caliber that you
9 examined, the service weapons here, they have a similar
10 trigger pull?

11 A That's correct.

12 Q Okay. And some people refer to the double-action
13 trigger pull as sort of the internal safety mechanism
14 of the gun?

15 A I don't know that I consider it an internal
16 feature. It is something that can be considered a
17 safety feature because it is a long trigger pull
18 compared to a very, very short trigger pull. Because
19 with single-action revolvers and single-action pistols,
20 in many cases, you have to move that trigger just a
21 fraction of an inch in order to fire it; whereas, in
22 this particular instance, I did not measure that, but
23 it's much more than what the single-action pull would
24 be.

25 Q Exactly. And the single-action pull you described

1 is the very light, short pull?

2 A That's correct.

3 Q Okay. And the reason we have a consistent long
4 pull -- long heavy pull with a service weapon is so
5 that every round you fire is the same consistency of
6 that long heavy trigger pull?

7 A Yes. I think that's one of the reasons that the
8 double-action-only pull was put into some pistols.
9 Besides the transition or changing from double-action
10 revolvers was the fact that you just have to train that
11 officer one way of pulling the trigger. I talked
12 briefly about that with the single-action/double-action
13 transition. You know, you take that Ruger pistol for
14 the first shot, you're going to have a long trigger
15 pull. Then when you let that trigger go and it's ready
16 to fire again, you have a very short, light pull. And
17 you have to learn that transition. You have to be very
18 careful with that transition.

19 Q Sure. And rather than have officers trained to
20 adjust to that inconsistency, it's better, more
21 advantageous, to have them just have that long heavy
22 trigger pull every time?

23 A I think some police administrators and some
24 instructors think so, yes, sir.

25 Q Fair enough.

1 Now, you test-fired Officer McGarry's weapon?

2 A Yes, sir.

3 Q You were able to recover a fired cartridge? Let
4 me rephrase that.

5 When you test-fired, you got your own known
6 cartridge that came from that gun in your presence?

7 A Yes, sir. I fired several times in particular
8 Officer McGarry's pistol. Let me see how many times I
9 actually fired it.

10 I actually fired it seven times total.

11 Q Okay. And you recovered the seven fired cartridge
12 shells?

13 A Cartridge cases, yes, sir.

14 Q Cartridge casings. And you made a visual
15 comparison with the cartridge -- fired cartridge case
16 that was marked as item No. 20 on the -- SLED item 23
17 but placard marker 20?

18 A That's correct.

19 Q And in your comparison, your analysis, there's
20 little or no doubt that it's Officer McGarry's service
21 weapon that fired that recovered fired cartridge
22 casing?

23 A Yes, sir. The degree of certainty that we can
24 have in firearm and toolmark identification, that
25 particular cartridge case was fired by officer

1 McGarry's pistol.

2 Q Okay. And the trigger pull necessary to pull
3 Officer McGarry -- that long heavy trigger pull that
4 you described was nine and a quarter pounds?

5 A Yes, sir. During testing of that particular
6 pistol, again, I have nine and a quarter pounds of
7 weight was required. And what I use or what we have
8 been using in the laboratory would be a -- what's known
9 as a dead weight. There's actually a set of weights in
10 various increments and sizes and it has a metal rod,
11 and I could hang that weight set onto the trigger and
12 literally I lift the gun and weight set so I'm trying
13 to see how much weight will that trigger lift, so to
14 speak. And it required nine and a quarter pounds,
15 approximately, for that to occur.

16 Q Or another way to put it is, nine and a quarter
17 pounds are hanging off that trigger before it goes off?

18 A That's correct. Nine to nine and a quarter. It
19 normally would take anywhere in that range. I have
20 roughly about a quarter-pound tolerance in that in most
21 cases.

22 MR. McGUIRE: That's all I have, sir. Thank you
23 very much.

24 THE COURT: Thank you.

25 MR. HIXSON: Nothing further, your Honor.

1 THE COURT: You may step down.

2 MR. HIXSON: Excuse Special Agent from his
3 subpoena?

4 THE COURT: You have any objection to excusing
5 this witness?

6 MR. McGUIRE: No, sir.

7 THE COURT: You are excused and released from your
8 subpoena. Thank you very much.

9 THE WITNESS: Thank you, sir.

10 MR. HIXSON: The State would call Special Agent
11 Rodney Thomason from the State Law Enforcement
12 Division.

13 RODNEY THOMASON,

14 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

15 DIRECT EXAMINATION

16 BY MR. HIXSON:

17 Q Good morning, sir. How are you?

18 A Good morning.

19 Q Please tell this jury what you do for a living
20 now.

21 A I work for Coastal Carolina University. I'm
22 employed out there as the deputy chief over public
23 safety.

24 Q Okay. And so let's go back to around 2002. Tell
25 us what you were doing for a living then.

1 A I was employed with the South Carolina State Law
2 Enforcement Division as a criminal agent assigned to
3 the Pee Dee region.

4 Q Okay. And as a criminal agent, just give us an
5 idea of what your professional responsibilities were
6 back then.

7 A SLED is -- some of you may not know, but SLED is
8 generally thought of as an assisting agency. We try to
9 supply additional manpower or expertise to smaller
10 departments. A lot of the bigger agencies wouldn't
11 need SLED as much, but there are smaller agencies and
12 police departments throughout the state that need our
13 assistance occasionally investigating criminal cases.

14 Q Okay. And how about even with bigger agencies
15 involving a shooting involving a law enforcement
16 officer, what would SLED's role be in that?

17 A On most all officer-involved shootings, SLED is
18 called in to investigate. And our objective would be
19 to see that the officer was justified in the actions
20 that he took. That wouldn't be the only thing we would
21 be looking at, but that is one of the criteria. And to
22 get somebody with sort of like an outside -- that's not
23 associated, not an insider, that doesn't work for the
24 agency.

25 Q Okay. And so were you acting in that function

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1 when you received a call for assistance from Myrtle
2 Beach Police Department on December 29th of 2002?

3 A I was.

4 Q And please tell the jury what you recall about
5 that evening into the next day.

6 A Okay. I was called -- contacted by my lieutenant,
7 who had received a request from Myrtle Beach Police
8 Department. What typically happens is they will call
9 SLED headquarters, the agency requesting, and then that
10 information would go through the chain of command and
11 filter down to the agent in the region. I was the
12 senior agent in the region and was assigned to this
13 case.

14 I responded around 12:30, 12:40 at night, along
15 with Special Agent Chris Graham. We went to the crime
16 scene.

17 The incident had already occurred. There was --
18 Myrtle Beach City Police had already started protecting
19 the crime scene, roped it off, done their due diligence
20 there. They had already contacted -- and I had
21 confirmed by checking that SLED crime scene was also
22 en route to come process the crime scene. Officer
23 McGarry had already been transported to the hospital.

24 Q Okay. At some point in time that evening on
25 December 29th, did you have an opportunity to come in

1 contact with Defendant Luzenski Cottrell?

2 A I did, later that evening.

3 Q Okay. Tell us about the circumstances surrounding
4 that contact.

5 A I went to the hospital. The Solicitor, Greg
6 Hembree, and Fran Humphries, the Assistant Solicitor,
7 were both on the scene. After discussing it, I met at
8 the hospital with both of them. I was there to
9 interview Allen and to get his side of the story. I
10 talked with the head nurse. I think her name was
11 Debbie Warren.

12 And, first of all, we wanted to try to ascertain
13 his condition. Was he able to speak? Was he alert and
14 coherent? Was he in a condition where he could have a
15 conversation? I talked with her, and she stated
16 that --

17 MR. McGUIRE: Objection. Hearsay.

18 THE WITNESS: Sir?

19 THE COURT: All right.

20 MR. McGUIRE: Objection. Hearsay.

21 MR. HIXSON: I'll clarify that.

22 BY MR. HIXSON:

23 Q Don't tell what Nurse Warren said, but you can
24 just tell what -- based on her responses and your
25 actions, based on that, what your understanding was and

1 move forward.

2 A I understand. After talking with the charge
3 nurse, I requested that she give me the information
4 that she -- I asked her to prepare a written statement,
5 which she did. And after obtaining that statement --
6 actually, I don't know that I actually got the physical
7 statement at that time. I talked to her, gained her
8 information, and after acting on that information, I
9 went in, along with one of the Horry County detectives,
10 and interviewed Mr. Cottrell.

11 Q Okay. After talking with the charge nurse and
12 your personal observations, did you believe that
13 Mr. Cottrell was of a proper state of mind and physical
14 condition to obtain a voluntary statement?

15 MR. McGUIRE: Objection. Speculation.

16 THE COURT: Ask him exactly what he observed, an
17 opinion based on that.

18 BY MR. HIXSON:

19 Q Please describe what you observed in
20 Mr. Cottrell's physical condition, his state of
21 alertness, et cetera.

22 A Okay. When I entered the -- I'm calling it a
23 room, but as I recall, and it's been quite some time, I
24 believe that it was an emergency room where they have
25 the curtains around. And so it was kind of like a

1 room, but not a room with hard walls. I went into the
2 room. He was there. He was semi-propped up in the
3 bed. I think he had a sheet covering but with his leg
4 exposed. I believe he had just gotten back from having
5 his leg x-rayed. He seemed very alert. He was
6 relaxed. He was coherent. I mean, he -- I asked him
7 questions, and he responded. And when he responded to
8 me, the answer made sense. In other words, what I
9 asked him is what he responded to, so I knew that he
10 understood what I was saying to him.

11 Q Okay. Did you have a discussion with the charge
12 nurse and get approval before conducting this
13 interview?

14 A I did.

15 Q Was Defendant Cottrell handcuffed in that room?

16 A I don't think he was handcuffed together. I think
17 he had a handcuff on one arm and one to a railing on
18 the bed. I believe he had an IV in his arm.

19 Q Did Defendant Cottrell seem to be suffering unduly
20 from the gunshot wound that he had sustained?

21 A He did not.

22 Q Was he talkative?

23 A He was.

24 Q Was he oriented to time and space?

25 A I think he was, yes, sir.

1 Q Was his -- I think you indicated this before in
2 your conversation with him. Were his answers and the
3 questions -- answers to those questions appropriate?
4 In other words, if I said, "What's your favorite
5 color?" that's an appropriate response to that
6 question?

7 A Right. And they were, and he responded
8 appropriately.

9 Q Okay. Did you advise this defendant of his
10 rights, his Miranda warnings?

11 A I did. I would have had this briefcase, or one
12 similar in nature, with me. And from the form that is
13 normally signed -- I didn't have him sign because of
14 his being in the hospital and handcuffed, and so I just
15 read him those rights verbally and explained his rights
16 to him.

17 Q And what did you say to Defendant Cottrell?

18 A Okay. I just advised him that, "You have the
19 right to remain silent. Anything you say will be used
20 against you as evidence in court. You are entitled to
21 talk to a lawyer now and have him present now or at any
22 time during questioning. If you cannot afford an
23 attorney, one will be appointed for you without cost.
24 If you decide to answer questions now without a lawyer
25 present, you will have -- you will still have the right

1 to stop answering at any time. You also have the right
2 to stop answering at any time until you talk to a
3 lawyer."

4 And I usually explain to them at that point that
5 what that means is even though you give up your rights,
6 say, "Yeah, I want to talk to you," then I start -- we
7 start having our conversation, our interview, at any
8 time during that interview you still are free to --
9 it's not like you give up your rights forever. You
10 only give it up for the period that you want to. You
11 can always say, "I don't want to talk to you anymore,"
12 and I have to respect that and quit talking to you.

13 Q Did he indicate to you -- was he paying attention
14 when you gave him those Miranda warnings?

15 A He did. He responded back to me and said that he
16 understood his rights, he knew he could have a lawyer,
17 and he knew he didn't have to talk to me.

18 Q Did he make that voluntary choice to talk to you
19 then?

20 A He did. I told him -- again, I reiterated that I
21 worked for SLED. I didn't work for Horry County. I
22 didn't work for the City of Myrtle Beach. I was there
23 as somewhat of a neutral person looking into an
24 officer-involved shooting. I explained to him he had
25 been shot by a police officer, and I was getting all

1 this information from the police about what had
2 happened, and I needed to know from him his side of the
3 story.

4 MR. McGUIRE: Judge, I think this would be a good
5 time for the record to renew our previous motion in
6 limine regarding the statement.

7 THE COURT: All right. Let's take the jury out.
8 (WHEREUPON, the jury exited the courtroom
9 at 10:51 a.m.)

10 THE COURT: Yes, sir.

11 MR. McGUIRE: Thank you, Judge. I'm going to let
12 Ms. Norris put this on the record for us.

13 THE COURT: All right. Ms. Norris, if you would.

14 MS. NORRIS: Your Honor, just again we had
15 objected, of course, on the basis -- not just to
16 voluntariness, but as it flows from what we submit was
17 an unlawful arrest. So we just want to make sure we're
18 preserved on that, as well as if we get to putting
19 those statements out there, we need an instruction
20 beforehand and afterwards telling the jury that at the
21 end they're going to have to decide whether that's
22 proper for consideration. In other words they're going
23 to have to make the determination of whether it's
24 proper in light of, one, unlawful arrest or
25 voluntariness. They're going to have to decide that

1 beyond a reasonable doubt.

2 THE COURT: And you want me to give that charge
3 now?

4 MS. NORRIS: I think they need to be told before
5 hearing any statement that you made a determination
6 from your perspective but that they have to make that
7 decision, so that when they hear that, they know that
8 there is another legal question in there for them to
9 decide.

10 THE COURT: All right. You do understand that I
11 have previously ruled on both of those issues. I
12 believe that the commission of intervening offenses
13 would remove any taint, if there was any taint there,
14 arising from any possibility of an illegal arrest or an
15 attempt to make an illegal arrest. That was the basis
16 for my ruling there.

17 Also, after a full *Jackson vs. Denno* hearing, I
18 made a determination that -- at least a preliminary
19 determination that it was a free and voluntary
20 statement. I made those rulings.

21 I do acknowledge that these are matters that would
22 have to be considered by the State, but on the issue of
23 a charge to the jury at this time, let me hear from the
24 State.

25 MR. HIXSON: A charge on that issue is incorrect.

1 That's actually argument. After a ruling, we had a
2 fleshed-out argument, I believe it was on Thursday,
3 relating to that where your Honor conclusively ruled
4 that he was convicted of resisting arrest, assault on
5 Officer Guthinger from resisting arrest. That's the
6 arrest that he is under, as well as the arrest for
7 murder. It has nothing to do with Joe McGarry's
8 situation. That's what your Honor ruled. And as such,
9 there is no issue of unlawful arrest and it's
10 conclusively estopped by the conviction of
11 Mr. Cottrell, that he's under that conviction now for
12 that resisting arrest. It's done. So there is no
13 basis for a charge. Actually, it would be an improper
14 charge to do that.

15 THE COURT: Well, I think that they're entitled to
16 a charge on voluntariness --

17 MR. HIXSON: Yes, sir.

18 THE COURT: -- at the end of the case.

19 MR. HIXSON: Let me clarify. I'm just referring
20 to the illegal arrest statement line of thinking. But,
21 obviously, the jury has to determine voluntariness as
22 part of a reasonable doubt charge at the end of the
23 trial as part of the jury charge. They have to
24 determine voluntariness.

25 THE COURT: And I will give that charge, but I

1 just will not give it at this juncture. Okay? I don't
2 think it's appropriate.

3 All right. Bring the jury in.

4 (WHEREUPON, the jury came into open court at
5 approximately 10:56 a.m.)

6 THE COURT: All right. We have our jurors and our
7 alternates back.

8 Mr. Hixson, if you would continue, please.

9 MR. HIXSON: Thank you, your Honor.

10 Thank you, Special Agent.

11 BY MR. HIXSON:

12 Q I believe we were at the point that you had
13 indicated that you had advised Defendant Cottrell of
14 his Miranda rights; is that right?

15 A Yes, sir.

16 Q And that you had -- it was your understanding --
17 would you describe your understanding about his
18 understanding of that and waiving those.

19 A Yes, sir. After that, I entered into an interview
20 with him, and I just asked him, "I just need to hear
21 your side of the story, you know, what happened." And
22 I told him that I have been hearing the other side, I
23 wanted to hear his side of the story. And he started
24 out -- and if I can just look at my report.

25 Q Well, let me ask you this: Did you generate a

1 written memoranda, a memoranda of interview on this
2 issue?

3 A I did at a later date, yes.

4 Q And would that refresh your recollection
5 specifically about what Defendant Cottrell said when he
6 was in the hospital that night?

7 A It would. Yes, it would.

8 He indicated that he knew the police officer. He
9 had gone to the Dunkin' Donuts with friends, and that
10 while he was in the Dunkin' Donuts, some officers had
11 arrived, and he felt like the officer was eyeing him.
12 And as he left, the officers were outside, and one of
13 the officers confronted him, asked him for an I.D. And
14 he said, "I knew that officer," because that officer
15 had stopped him before for some kind of traffic
16 violation.

17 And I'm reading from my notes. And I remember he
18 said something about a car, that he was driving in a
19 car and one of the officers, Officer McGarry, had
20 stopped him, and so he knew who the officer was. He
21 said the officer asked him for his I.D., and he showed
22 it to him. And then the officer said, "I'm going to
23 pat you down."

24 And Mr. Cottrell told him then "No" and turned and
25 started to walk off.

1 According to Mr. Cottrell, he said the next thing
2 he knew, his gun was out, and he said something like,
3 "I'll pat you down or I'll drop you."

4 So Mr. Cottrell states that he pulled his gun out
5 and shot him. I asked him what kind of gun he had. He
6 described it as a P90 .45-caliber pistol. He stated
7 that he shot him at least once or twice, that he had
8 the gun in his waistband, and that when he shot Officer
9 McGarry, that the other cop started shooting at him, so
10 he shot back.

11 He told me that he had shot until his clip was
12 empty, and he put in a new clip, and then he shot some
13 more. Cottrell stated that he did have another gun in
14 the car. I asked him if he had any other weapons. He
15 said yes, he had a Rossi .357-caliber pistol that was
16 in the car.

17 And then I just asked him, you know, "Why do you
18 think this happened? What happened?"

19 And he told me, he said he felt like the cop was
20 just hassling him and it just made him mad, the temper,
21 and he just -- and that was that.

22 And that was pretty much the conclusion of my
23 portion of the interview. I had gone into this
24 interview with a Horry County detective, Mr. Johnson,
25 Nathan Johnson. He was with me for that portion of the

1 interview. He had some questions he wanted to ask and
2 that was totally unrelated, so I left at that point.

3 Q At some point did you come back and ask any
4 follow-up questions to Defendant Cottrell?

5 A I did. This was, you know, a long process
6 throughout the night. Around 6:10 the next morning, I
7 had gotten a -- actually, that same detective had gone
8 and gotten a search warrant for hair and blood samples
9 from Mr. Cottrell. I went -- he had been transferred
10 up to a room in the same hospital, at Grand Strand. So
11 I, along with Chris Graham, went up to the hospital.
12 He was being guarded by a couple of, I think, Horry
13 County sheriff's deputies. Got ahold of a nurse, and
14 they started to draw the blood and get the hair samples
15 to be sent to SLED for analysis.

16 While I was in there, Officer Graham was actually
17 executing the warrant, so I had an opportunity to have
18 a conversation with Mr. Cottrell again. And I had a
19 question that I wanted to ask him that I hadn't asked
20 him the night before. I was curious to know whether or
21 not he knew who had shot him. So I asked him that
22 question, and he responded, he said --

23 Q What was your question?

24 A I asked him did he know who had shot him, and he
25 said, "Yes."

1 And I said, "Well, are you sure? How do you know
2 which one shot you?"

3 He said, "I know which one shot me. It was the
4 one I didn't get." So I took that to mean Officer
5 Guthinger.

6 Q Now, prior to that second statement that you
7 specifically testified, I believe it was, "Yes, it was
8 the one I didn't get," if he invoked his right to
9 counsel, did he indicate that he didn't want to speak?
10 Any voluntariness of his statement issues there ever
11 invoked?

12 A In a case like this, any time before you would
13 talk to a defendant, you would remind him of his
14 rights. I don't know that it's actually required
15 because he had already been Mirandized, but I did it
16 again just in an abundance of caution. So, yes, I did
17 remind him of his Miranda rights.

18 Q If you can, just the beginning of that -- your
19 memorandum, the beginning of the first paragraph, I
20 think, can you just address that beginning. You
21 started the memorandum -- if it refreshes your
22 recollection, I guess the full context of that
23 statement, the very -- the beginning of the second
24 paragraph, if that --

25 A You want me to just read that?

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1 Q Yes. I just wanted to make sure that
2 Mr. Cottrell's words are reiterated exactly like you
3 recall them.

4 A You know, I asked him, you know, what had
5 happened, and he told me that the cop was hassling him.
6 In his opinion, apparently the cop -- he felt like the
7 cop was hassling him. He said, "The cop had stopped me
8 a while back, something about a car door being open and
9 me running people off the road. So that is how I knew
10 who he was from when he stopped me. He asked for my
11 I.D., and when I showed it to him, he said he was going
12 to pat me down. I told him no."

13 MR. McGUIRE: Judge, I think that has been asked
14 and answered.

15 MR. HIXSON: That's fine.

16 THE COURT: All right.

17 MR. HIXSON: I just wanted to clarify that first
18 part.

19 Beg the Court's indulgence.

20 THE COURT: Yes.

21 BY MR. HIXSON:

22 Q Is the individual that gave that statement to you
23 in the courtroom today, Special Agent?

24 A He is.

25 Q And where is he?

1 A He's sitting over at the defense table wearing the
2 blue shirt.

3 MR. HIXSON: I have no further questions, Special
4 Agent. Thank you.

5 MR. McGUIRE: Judge, if I can approach, can I see
6 the report?

7 CROSS-EXAMINATION

8 BY MR. McGUIRE:

9 Q I read your report before, and I had difficulty
10 finding any description of the physical struggle that
11 they engaged in. Is that in here?

12 A In the memorandum?

13 Q Yes, sir.

14 A No, it's not.

15 Q Sir?

16 A I don't think it is, not in the memorandum of
17 interview. I think it mentions it in the actual
18 report, but no, I didn't go into that detail.

19 Q Well, in terms of what Mr. Cottrell told you, is
20 it your position that he just completely didn't talk
21 about being grabbed by the officer or flung up against
22 the car or anything like that?

23 A No. My interview with him was short. It was, I'm
24 sure, around 15 minutes at most, and he never said
25 anything -- I know from other statements, and I guess

1 he assumed I knew from other statements, that there was
2 a struggle, but I don't particularly recall that
3 portion of it.

4 Q Was it important to you to find out how that
5 struggle began, the events leading up to the shooting?

6 A Yes.

7 Q Why didn't you ask him about it?

8 A I'm sure that at the time I probably did. I just
9 didn't put it in that memorandum of interview. I don't
10 know that we talked about -- I did not talk about it
11 with him then.

12 Q So we can agree that your memorandum is
13 incomplete?

14 A I'm sure there's always something else that could
15 be added, yes.

16 Q Well, I mean, we're talking about a shooting. And
17 every eyewitness on the scene describes a physical
18 confrontation with Officer McGarry grabbing
19 Mr. Cottrell from the back, and there's absolutely no
20 reference to that in here. And I'm asking: Why is
21 that?

22 A Can I see that for just a moment?

23 Q Sure.

24 A I think that's actually the report, isn't it? And
25 this is the memorandum.

1 There's nothing in my memorandum that refers to a
2 struggle, no, sir.

3 Q Okay. And you actually spoke with Mr. Cottrell in
4 December of 2002?

5 A Yes. Whatever date is on there. If you're asking
6 me to recall from memory, I apologize, I can't.

7 Q The first five words are, "On Sunday, December 29,
8 2002."

9 A Then that would be correct.

10 Q Okay. And then you put your notes together three
11 months later -- well, a couple months later -- March of
12 2003?

13 A When I actually prepared this document for the
14 report, yes, sir.

15 Q Based on what you know, to characterize these
16 events, as the officer said, "I want to pat you down,"
17 "I said no, I was mad, I took my gun out and shot him,"
18 that would be an inaccurate statement. You'd agree
19 with that?

20 A I would agree that that's accurate and, obviously,
21 there's more to it than just that. That portion of it
22 is correct.

23 Q Okay. And the more -- I'm just trying to
24 establish was Mr. Cottrell out of it, confused, and
25 left a lot of stuff out, or did you just not ask the

1 questions regarding that physical struggle?

2 A I kept the interview -- and I felt like it was an
3 interview. It was not an interrogation in the fact
4 that it wasn't adversarial. He was cordial and willing
5 to speak with me, and I kept it on that basis. I was
6 trying to get the information about this officer and
7 the shooting, and I took what information he gave me.

8 Q Okay. And my question was: Did he leave it out,
9 the struggle, or did you leave it out? Somebody did,
10 right?

11 A I'm sure that it came up. Now, whether he told me
12 right then -- I knew that through all the other
13 statements. But when you talk about a struggle, from
14 all the statements or all the information I had, which
15 was very limited, I don't think that the whole incident
16 took but just mere seconds. When you say "a struggle,"
17 obviously, he said he was going to pat him down, and
18 Mr. Cottrell indicated he said no and was walking away.
19 The officer tried to stop him from walking away, and
20 that's when this occurred. So there wasn't a long
21 struggle, apparently.

22 Q But were you interested in that struggle is my
23 question?

24 A Was I interested in that struggle?

25 Q Sure.

1 A Yes, sir.

2 Q And did you ask questions about it?

3 A Obviously, I didn't include those in this report,
4 if I did ask it. It's been 12 years. I don't remember
5 if I asked it that night or not, honestly.

6 Q Okay. And when you spoke to Mr. Cottrell, he was
7 being prepared for surgery?

8 A The next day?

9 Q When you spoke to him, he was about to go to
10 surgery at 6 o'clock in the morning?

11 A I'm not aware of that.

12 Q Okay. You don't know that he was on morphine?

13 A I was told by the head nurse that she had been --
14 that he had been given something for pain, yes.

15 MR. McGUIRE: Okay. That's all I have for you.

16 REDIRECT EXAMINATION

17 BY MR. HIXSON:

18 Q Let's describe just briefly the difference between
19 a memorandum of interview and an investigative report,
20 okay?

21 Let me show you and see if you just recognize
22 this. I don't want you to testify to anything off of
23 it. Just generally speaking, from your process, what's
24 the difference between a memorandum of an interview and
25 a big investigative report?

1 A An investigative report is where I attempt to just
2 tie all the information together. My job is more -- I
3 wasn't -- in other words, I didn't do the forensic
4 examinations. All I did was accept those reports, put
5 them in a package that would make it more convenient
6 for the Solicitor to review.

7 Q Okay. Now, a memorandum of interview, I guess the
8 title is kind of explicit on what it is, but describe
9 what the purpose of this is, a memorandum of interview.

10 A In an incident where you're unable to take a
11 written statement from somebody because he's under
12 these kind of conditions or others, I would document
13 the fact that we talked and, you know, what the main
14 thrust of our conversation was, and that would be put
15 in a memorandum of interview, and I would refer to that
16 in the investigative report. And when I got to that
17 portion, I would prepare that memorandum of interview.

18 Q Okay. And I think you initially had testified
19 that your approach was you were there investigating an
20 officer-involved shooting?

21 A Exactly.

22 Q Not necessarily a murder, but, you know, we've got
23 a lot going on here. It's an officer-involved
24 shooting. Is that fair to say?

25 A That's a fair statement, yes.

1 Q And as such, I believe you said that your approach
2 was not an interrogation, but obviously to hear
3 Defendant Cottrell's side of the story. I believe you
4 testified to that.

5 A It was.

6 Q So from that position, what's the purpose of the
7 memorandum of interview? What are you trying to
8 capture in that memorandum during the interview
9 process?

10 A Just the main thrust, you know, the essence of
11 what he told me. It's not a word for word exactly what
12 he said, but the main thrust of the information that he
13 relayed to me.

14 Q So does that memorandum -- the purpose is to
15 accurately reflect what Defendant Cottrell told you?

16 A Yes, it is.

17 Q As word for word as you can?

18 A Exactly.

19 Q Did you make any judgments or analysis or did you
20 just try to generate word for word?

21 A No, I put exactly what I heard him tell me. I'm
22 not trying to say that what he told me is exactly what
23 happened. Some of the things he told me may or may not
24 have been true. I don't know. I was just writing down
25 what he was willing to tell me or recalling exactly

1 what he meant to tell me in that interview.

2 Q So this accurately reflects what Defendant
3 Cottrell wanted you to know at that time?

4 A Yes, sir.

5 MR. HIXSON: I have no further questions.

6 RECROSS-EXAMINATION

7 BY MR. MCGUIRE:

8 Q Agent -- well, not agent anymore. Mr. Thomason.
9 Sorry about that. Just briefly, the way you all
10 approach these interviews in a shooting like this, it
11 seems to me, the way it's been described to me in the
12 past, is that there are three burning questions: Who
13 shot, when did they shoot, and what happened leading up
14 to the shooting. Is that fair to say?

15 A That's fair to say, yes, sir.

16 Q And every competent interviewer on the scene to
17 talk to eyewitnesses would want to know the answers to
18 those questions?

19 A True.

20 Q Okay. And you would imagine that almost every
21 witness would be asked the question: Did you see
22 Officer McGarry shoot at all?

23 A competent interviewer would not leave that
24 question unsaid?

25 A I feel like you're calling me incompetent,

1 which --

2 Q No, no, no.

3 A I'm not going to argue with you there --

4 Q No, no, no, I'm not --

5 A -- but I did the best I could at the time, yes,
6 sir.

7 Q I'm not even talking about your report or your
8 statement. I'm not going to tie it to that. I'm just
9 talking about general procedure. And I'm not taking
10 you to task at all right now.

11 With regard to when you have an eyewitness and
12 multiple shots are exchanged, you want to know who
13 shot, when they shot, and the events leading up to
14 that, right?

15 A Right.

16 Q And when one of the people on the scene is an
17 officer who has a service weapon out, clearly, you're
18 going to ask all the witnesses, "Did he ever get a shot
19 off? Did you see him shoot?"

20 A See, I --

21 Q I'm not asking you did you do that. That's how
22 all officers would approach that?

23 A If they knew that information.

24 Q Right.

25 A At the time I didn't know he had his weapon out,

1 and I don't know to this day. I understand that he did
2 get a shot off, from what I've heard from reports of
3 forensics, but did I know that at the time? No, I
4 didn't know that at the time.

5 Q No, no, I'm not saying that -- I'm not saying that
6 any officer on the scene was armed with the information
7 that Officer McGarry did, in fact, fire his service
8 weapon. I'm not saying you all knew that. Okay?

9 A Right.

10 Q I'm just saying when you have a shooting, there
11 are multiple shooters, and there is a victim who's --
12 who carries a service weapon, it's a logical extension
13 of that to ask witnesses, "Did you see the officer
14 shoot or return fire?"

15 A Right.

16 Q Okay. That would be a normal question?

17 A Uh-huh.

18 Q And you'd want to know the sequence of events and
19 when they shot?

20 A Exactly.

21 Q If somebody knows that information?

22 A Yes, sir.

23 Q And that would be something that all officers
24 would want to ferret out, if possible?

25 A Yes, sir.

1 MR. MCGUIRE: That's all I have for you. Thank
2 you.

3 MR. HIXSON: No further questions of Special Agent
4 Thomason -- Deputy Chief Thomason, I guess.

5 THE COURT: You may step down.

6 THE WITNESS: Thank you.

7 THE COURT: Will you need him further?

8 MR. HIXSON: No. We would like to have him
9 excused from his subpoena.

10 MR. MCGUIRE: No objection, Judge.

11 THE COURT: All right. Without objection, you are
12 excused.

13 MR. HIXSON: Your Honor, we do have an evidentiary
14 matter that we'd like to take up outside the presence
15 of the jury.

16 THE COURT: All right. Take the jury back into
17 the jury room.

18 (WHEREUPON, the jury exited the courtroom
19 at 11:18 a.m.)

20 THE COURT: All right.

21 MR. HIXSON: Your Honor, we'd like to proffer the
22 testimony of a witness outside the presence of the
23 jury. It's very short, but it's specifically relating
24 to testimony of Ware Kimmell. I have case law to
25 support that. We'd just ask for analysis under -- we

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1 have a packet of case law if your Honor is interested
2 now or would you like to hear the testimony first?

3 THE COURT: All right. Well, let's hear it.

4 MR. HIXSON: The State would call Ware Kimmell,
5 please.

6 Can I hand it up, just for efficiency?

7 THE COURT: Yes.

8 You're calling who now?

9 MR. HIXSON: Ware Kimmell.

10 THE COURT: Okay.

11 EDWARD W. KIMMELL,

12 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

13 THE WITNESS: Edward W. Kimmell, E-d-w-a-r-d
14 K-i-m-m-e-l-l.

15 VOIR DIRE EXAMINATION

16 BY MR. RICHARDSON:

17 Q Mr. Kimmell, did you know Luzenski Cottrell back
18 in 2002?

19 A Yes, sir.

20 Q And tell the Court how you knew him.

21 A I met him through a mutual friend.

22 Q All right. And at some point, did you have an
23 occasion through your business to be offered some guns?

24 A I did.

25 Q And who offered you those guns?

1 A An officer from the J. Reuben Long.

2 Q All right. Was that in person or over the phone?

3 A It was in person.

4 Q And what kind of phones -- excuse me -- what kind
5 of guns were they?

6 A It was two Smith & Wesson .357.

7 Q Was anyone in the room with you when the officer
8 offered to sell you the guns?

9 A Yes, sir, my boss.

10 Q All right. And who was that?

11 A Al Holcomb.

12 Q All right. Were you interested in buying the two
13 .357 guns?

14 A No, sir.

15 Q Did you talk with anyone else about buying those
16 guns?

17 A I did. I called a friend of mine who had been
18 telling -- he wanted to buy a handgun, and I called him
19 to see if he wanted to buy it.

20 Q All right. And that was?

21 A The mutual friend, our mutual friend.

22 Q What's the mutual friend's name?

23 A Rick.

24 Q Rick?

25 A Hartman.

1 Q Rick Hartman. All right. And did Rick Hartman
2 want to buy those guns?

3 A He did not.

4 Q All right. Did you ever get another inquiry into
5 the -- into those two .357 handguns?

6 A I did.

7 Q All right. Tell me when and who called you about
8 those guns.

9 A It was approximately two days later after I had
10 spoken with Rick. Mr. Cottrell called me at my office,
11 asked me if I still had access to the two handguns.

12 Q And you had never discussed the handguns with
13 Mr. Cottrell before?

14 A No, sir.

15 Q And Mr. Cottrell called you about the two .357
16 handguns?

17 A Yes.

18 Q All right. Now, what did you -- did you end up --

19 THE COURT: Wait a minute. When was this? Now,
20 when was this taking place?

21 MR. RICHARDSON: Sir?

22 THE COURT: When was this taking place?

23 BY MR. RICHARDSON:

24 Q Can you give the Court the approximate time that
25 this took place?

1 A It was sometime late in the summer of 2002.

2 THE COURT: Okay. Before this incident?

3 MR. RICHARDSON: Yes, sir.

4 THE COURT: Okay. All right. Go ahead.

5 BY MR. RICHARDSON:

6 Q And we wouldn't proffer this for the jury, this
7 next little part, but tell the judge how you know
8 approximately when it was. Yeah, the first
9 conversation. This isn't in front of the jury.

10 A I had Mr. Cottrell in mind from June of 2002.

11 Q All right. Now, back to the proffer.

12 So sometime after June 2002 but before November --

13 A Yes, sir.

14 Q -- of 2002, Luzenski Cottrell called you inquiring
15 about the two handguns?

16 A Yes, sir.

17 Q And what was your response to that request?

18 A I asked him why he needed two .357s.

19 Q And what was his response to you?

20 A He told me that if the police ever came for him,
21 he was going to shoot it out with them.

22 Q Okay. Now, again, I don't know that we'll go
23 through this on the record, but please, how did
24 Luzenski Cottrell know Rick Hartman?

25 A He worked for him.

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1 Q He worked for him?

2 A Yes, sir.

3 Q And do you know what he did for Rick Hartman?

4 A I guess he drove for him.

5 Q Okay. And what kind of business did Hartman have?

6 A He had an escort service.

7 Q Okay. And did you ever know Luzenski Cottrell
8 before Rick Hartman?

9 A No, sir.

10 Q So you met Luzenski Cottrell through Rick Hartman?

11 A Yes, sir.

12 MR. RICHARDSON: That would be the State's proffer
13 of Mr. Ware Kimmell.

14 THE COURT: Are you attempting to offer this under
15 some 404 analysis?

16 MR. HIXSON: No, sir. It would be an express
17 statement of intent. It would be -- we're offering
18 under *State vs. Cox* and *State vs. Glenn* and Gilchrist
19 and Beck, under a specific express intent.

20 THE COURT: Okay.

21 MR. HIXSON: We're offering it for --

22 THE COURT: Mr. McGuire, do you need to examine
23 this witness? Do you want to examine the witness?

24 MR. MCGUIRE: I don't really need to.

25 THE COURT: They're making a proffer. Do you want

1 to ask him anything?

2 MR. McGUIRE: No, sir. I don't think I need to.

3 THE COURT: Pardon?

4 MR. McGUIRE: No, sir.

5 THE COURT: Okay. When do you propose to call
6 this -- I don't want to delay things. You have handed
7 up your cases. I'd like an opportunity to read them.
8 I don't want to break down. Have you got another
9 witness you can call?

10 MR. HIXSON: No, sir. This is -- the State is
11 going to rest. The question is whether it's
12 appropriate for Mr. Kimmell to do it in our
13 case-in-chief or if he would be available for reply or
14 rebuttal if this intent becomes even more probative to
15 call him after defense's case depending upon what --

16 THE COURT: So you don't intend to call him in
17 your case-in-chief?

18 MR. HIXSON: We're just trying to make sure we're
19 getting guidance from the Court. In other words, we
20 didn't want to put this in front of the jury and then
21 have an evidentiary problem under 401 or 403. So just
22 to protect the process up until this point prior to
23 resting, we just want a ruling. If your Honor finds it
24 more prejudicial than probative, then we certainly
25 wouldn't, but then we might be in a position to put it

1 in in rebuttal.

2 THE COURT: And you're telling me that the purpose
3 of the -- I remember the Gilchrist case. That was
4 Judge Moring's, wasn't it?

5 MR. HIXSON: I don't remember the judge,
6 specifically. I obviously just know the holding of it.

7 THE COURT: And the probative value is what?

8 MR. HIXSON: If, in fact, the defense counsel --
9 what was set out in opening statements, which I
10 understand opening statements is not, you know,
11 evidence, but in opening statements, there was an
12 indication that self-defense, that the mens rea of this
13 defendant, his mental state and his intent, was
14 fundamentally at issue with this case. In other words,
15 he only shot because Joe McGarry shot him on accident.
16 He had no intention of doing this. Then his mental
17 state is the most probative issue in this.

18 We all agree forensically across the board. We
19 all agree that Joe McGarry fired. But it's defendant's
20 mental state. And if, prior to being on bond for
21 possession with intent to distribute marijuana, he
22 asked for two .357 Magnum handguns and says, "If the
23 police ever come for me, I'm going to shoot it out with
24 them," we have 98 rounds of ammunition in the vehicle,
25 we have 17 shots by Mr. Cottrell in the parking lot,

1 that demonstrates that he did exactly what he said he
2 was going to do somewhere between July and December of
3 2002.

4 That would be our showing, and Gilchrist supports
5 that.

6 THE COURT: Well, until -- at least until the
7 defense would raise the issue of self-defense, would
8 put up something in support of that position, quite
9 frankly, I view the probative value under 403 to be
10 slight, if nonexistent. That's going to change or
11 probably will change depending on whether or not the
12 State even intends to do that.

13 Right now I see it as a real problem under 403,
14 not under Gilchrist but under 403. I think that it has
15 great prejudicial value, and at this juncture, right
16 now, slight probative value. I think it may be
17 something, may be something. I want to read these
18 cases again, and I'll do it over lunch. It may be
19 something that would all of a sudden become very
20 probative, and that probative value would outweigh the
21 prejudicial that -- if in case the issue is raised.
22 And I think that at that point it would be proper reply
23 testimony.

24 MR. HIXSON: Thank you, your Honor.

25 THE COURT: And that's just the way I see it under

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1 a 403 analysis at this juncture.

2 MR. HIXSON: Thank you, your Honor. Thank you.
3 That's the guidance we need.

4 THE COURT: Do you want to be heard on that,
5 Mr. McGuire?

6 MR. McGUIRE: No, sir.

7 THE COURT: Okay. Let's do that.

8 MR. HIXSON: The State does not intend to call him
9 at this time.

10 THE COURT: All right. And again, that's my
11 ruling at this juncture. I don't think it has much
12 probative value. I can anticipate it becoming more
13 probative, but we'll just have to wait and see. Okay?

14 And after looking at what the defense puts up, I
15 still may determine -- even if they put up
16 self-defense, I still may determine it to be more
17 prejudicial than probative. I just want to look at it
18 and see what we have. Okay?

19 MR. HIXSON: Thank you, your Honor.

20 THE COURT: Does the State intend to rest at this
21 point?

22 MR. HIXSON: Yes, sir.

23 THE COURT: Okay. So the State will rest. All
24 right.

25 Let's do it this way: I want to bring in the

1 jury. You can rest. I will send the jury to lunch.

2 Have we got it here?

3 THE CLERK: No, sir. It's supposed to be here at
4 a quarter till one.

5 (The Court confers with the clerk briefly
6 regarding lunch.)

7 THE COURT: Well, what we can do is we can go
8 ahead, you can rest, send the jury back into their jury
9 room. I'm sure that Mr. McGuire has matters to put on
10 the record. We can do that, and we may even have an
11 opportunity to get the defense started. I don't know.
12 We'll just have to see. Okay?

13 Yes, sir?

14 MR. McGUIRE: Actually, I should tell you, then,
15 in all candor that we've got our people coming at noon.
16 You know, I don't know -- I can't predict the State's
17 case, so I have to kind of rely on them telling me when
18 I should have people here. I've got them here coming
19 at noon.

20 THE COURT: Noon is good.

21 MR. McGUIRE: Okay.

22 THE COURT: Noon is wonderful. I would -- you
23 know, you're going to have to make your motions. We're
24 going to excuse the jury. We'll probably need to take
25 a little break ourselves before we get started, and

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1 then it's noon by then.

2 MR. McGUIRE: Yes, sir.

3 MR. RICHARDSON: May Mr. Kimmell --

4 THE COURT: Okay. You may step down. Sorry. You
5 are not released from your subpoena. You must remain
6 available.

7 (WHEREUPON, the jury came into open court at
8 approximately 11:33 a.m.)

9 THE COURT: All right. We have our jurors and our
10 alternates back.

11 Mr. Hixson? Mr. Richardson?

12 MR. RICHARDSON: Your Honor, the State would rest.

13 THE COURT: All right. Ladies and gentlemen,
14 whenever we reach a point in the proceedings where the
15 State or either -- either side rests their case, there
16 are certain matters that the Court has to take up.

17 Now, we have arranged for your lunch at 1 o'clock.
18 So these matters that I have to take up will take a few
19 minutes, so I'm going to let you go back in your jury
20 room. Just relax, get to know each other again. Don't
21 talk about the case. As soon as I can, I'll bring you
22 in, and I would hope that we can get a witness or two
23 taken care of before we your lunch.

24 Mr. Parmalee, if you would take the jurors back to
25 their jury room. Make sure they're comfortable and

1 have everything they need.

2 (WHEREUPON, the jury exited the courtroom
3 at 11:35 a.m.)

4 THE COURT: Mr. McGuire?

5 MR. McGUIRE: Thank you, your Honor.

6 We would move at this time for a directed verdict
7 based on there being insufficient direct evidence and
8 no substantial circumstantial evidence from which to
9 conclude the guilt of the accused, Mr. Cottrell,
10 specifically on the element of malice.

11 The only way the State could show some sort of
12 malice is to fill in a lot of blanks. There's a
13 struggle. He's told to freeze at gunpoint, according
14 to the evidence that's come in, and he was told to
15 freeze so he could -- or stop so he could be patted
16 down, and that was at gunpoint. The phrase was, "I'll
17 drop you if you don't."

18 That's an unlawful use of force that was
19 introduced before there's any evidence of a weapon. In
20 fact, when you look at Guthinger's testimony, they were
21 looking for a weapon and they didn't see one. And so
22 there's no evidence that Officer McGarry reacted to a
23 weapon, saw a weapon. And, therefore, all you have is
24 an introduction of lethal force, commands. When those
25 commands were not followed -- and he had a right to

1 walk away as a citizen -- then physical force was used
2 to try to get his hands behind his back or control his
3 movements. And it's only after that situation happens
4 and these men separate there's a shot.

5 And based on those events, there's no way to find
6 malice without filling in some blanks, and we don't
7 fill in blanks for the State.

8 MR. HIXSON: Your Honor, there's substantial
9 direct and circumstantial evidence. Identity is not an
10 issue. It all runs specifically to implied malice.
11 The weapon was fired 12 inches from Officer McGarry's
12 face. That physical act in and of itself is exotic and
13 malicious.

14 There is no evidence of self-defense presented at
15 this time. That is obviously going to be an issue for
16 the jury if the case proceeds as it is. Defendant's
17 statement itself indicates express malice in that he
18 was hassled, he maintained that mental state in his
19 statement alone, and fired the fatal shot into Officer
20 McGarry's face. There is no evidence at all that he
21 was free to leave. The only testimony was he was under
22 investigative detention, was not free to leave subject
23 to a pat-down and investigative stop. So there is no
24 unlawful use of force here. He's operating under Terry
25 and a reasonable detention. I think there's

1 substantial circumstantial evidence and direct
2 evidence. We believe we have carried our burden to
3 submit it to the jury.

4 THE COURT: Mr. McGuire, would you agree with me
5 that the standard requires me to look at the evidence
6 in the light most favorable to the nonmoving party,
7 that being the State?

8 MR. MCGUIRE: I agree that's a correct statement
9 of the law.

10 THE COURT: And, Mr. McGuire, if we look at the
11 evidence, are we not also -- am I not also required to
12 look at any reasonable inferences that might arise from
13 the evidence?

14 MR. MCGUIRE: I believe that's also correct.

15 THE COURT: And here we have a situation where all
16 of a sudden the officer goes into -- by all testimony
17 was almost cordial, certainly not adversarial,
18 conversation to high alert status. The officer is
19 attempting to pat down and to start saying, "Let me see
20 your hands. Let me see your hands."

21 It's undoubted -- undisputed that Mr. Cottrell did
22 have a firearm. There's evidence that it was being
23 unlawfully carried. There's certainly a substantial
24 amount of evidence to support the fact that this was a
25 lawful arrest. I believe that there is certainly

1 circumstantial evidence that would support the State's
2 position, and I would respectfully deny your motion for
3 a directed verdict.

4 MR. McGUIRE: Thank you, Judge.

5 THE COURT: Now, in that regard, your folks are
6 not going to be here until noon, and I understand that.
7 You hadn't planned for them. We'll just be at ease,
8 unless you have some other matters for me, until your
9 witnesses are here. Once they're here, if you would
10 please notify the Court.

11 MR. McGUIRE: Sure. What I'd like to do to help
12 the Court is just tell you a little bit about what we
13 have so you can plan scheduling a little bit. I think
14 that would be useful.

15 THE COURT: All right.

16 MR. McGUIRE: I mean, the bad news is, your Honor,
17 people aren't here until noon, but the good news is
18 we'll be done today. I think it's a possibility we can
19 get to the jury and give them the case this afternoon.

20 THE COURT: Are you prepared -- both of you are
21 prepared to do your arguments today?

22 MR. McGUIRE: I can.

23 MR. HIXSON: Yes, sir.

24 THE COURT: As an aid to the Court, let me just
25 ask you this: Do you feel comfortable at this time

1 suggesting to me any charges on the law that you would
2 anticipate? And there again, I don't want you to give
3 up any strategy or anything of that nature, but as I
4 told you, it's always been my practice to give the jury
5 my charge in writing. It's been my experience that it
6 really helps the jury. They don't come back and ask to
7 be recharged on the law. But if there's anything
8 unique, anything special you want to have as part of
9 the charge, of course, it takes a little bit of time to
10 get all that prepared. Drew has been working on it for
11 me already.

12 If there's any -- and if you want to just hand it
13 up by way of a note to the Court, you would have no
14 objection to that, that kind of communication with the
15 Court, would you, Mr. Richardson?

16 MR. RICHARDSON: No, sir, your Honor.

17 THE COURT: Just give us a little advanced notice.
18 And you could e-mail it. And the best thing would be
19 if you could e-mail a Word document to Drew, and that
20 would be Lhyman1c@sccourts.org. You can send it to
21 him. I promise you we will not share it with the
22 State. And the State has said that they have no
23 objection to that kind of ex parte communication with
24 the Court. So that would just be helpful if we could
25 be doing that.

1 MR. McGUIRE: Happy to serve, Judge. We can do
2 that. We can use this break to put those together and
3 get them to you.

4 THE COURT: If you would, just tell me anything
5 that you anticipate having done. Of course, we will
6 give all the standard things that you might expect in a
7 murder case, the presumption of innocence, burden of
8 proof, reasonable doubt, circumstantial and direct
9 evidence, we will describe the offense, we'll give an
10 initial charge on -- straight from the charge book on
11 duties of the judge and jury. We include that. We'll
12 start out with that. Those things you can depend on.
13 But anything else, just -- and the same for the State.

14 MR. RICHARDSON: Yes, sir.

15 THE COURT: If you've got anything, please. I'm
16 sure that there's going to be an issue on -- is it
17 Becker?

18 MR. McGUIRE: Belcher?

19 THE COURT: Belcher, I'm sorry. I have a block on
20 Belcher for some reason. I can never remember whether
21 it's Belcher, Becker, or Baker. But anyway, I'm sure
22 there is a Belcher issue.

23 MR. McGUIRE: Obviously, our position would be
24 that we would object to a charge that malice be
25 implied.

1 THE COURT: And let me just ask the State if
2 you're prepared to address that issue. My
3 understanding of Belcher, if there is any evidence
4 presented that would excuse or defend the use of the
5 weapon, such as self-defense, that the traditionally
6 used charge, the common charge on malice arising from
7 the use of a deadly weapon would not be appropriate.
8 That's my understanding of Belcher.

9 What's the State's position?

10 MR. HIXSON: My understanding of it, basically,
11 means is you can't have -- it can't be implied just
12 from that. But, obviously, the State is free to argue
13 the presence of that weapon is malice and --

14 THE COURT: And I agree.

15 MR. HIXSON: There's no automatic implications.

16 THE COURT: The issue is whether or not you're
17 entitled to a charge that it arises from that.

18 MR. HIXSON: No, I don't -- it's inappropriate to
19 have "arises from," but I think there is language in
20 Belcher that says it's okay, one of the factors you may
21 consider is the instrumentality of death. In other
22 words, it's not implied. There's no implication. It's
23 not automatic.

24 THE COURT: Well --

25 MR. HIXSON: It's just a fact you can consider.

1 THE COURT: I think there's language like that.

2 MR. HIXSON: I'll try to address that in the same
3 manner.

4 THE COURT: In -- yeah. I think it's in my charge
5 on malice. There's some language to that effect,
6 some -- somewhat innocuous.

7 MR. HIXSON: Two specific issues we have.
8 Obviously, we're requesting the charge on the nature of
9 a lawful detention of Terry-type situation under this
10 Khingratsaiphon case. I'll provide Drew with the
11 cites.

12 THE COURT: And there again, send up --

13 MR. HIXSON: And Linder as well.

14 THE COURT: -- anything you have, the Court will
15 certainly appreciate it.

16 Okay. Now we're going to take a little break?

17 MR. RICHARDSON: One second, your Honor.

18 MR. HIXSON: I beg the Court's indulgence just for
19 a moment.

20 Your Honor, just -- since the jury is out, it's a
21 good time to talk about this, to have the Court give
22 some guidance similar to our proffer. We have been
23 pretty forthright with each other, which is a nice,
24 civil situation. I appreciate that.

25 We just need some guidance. If Detective Nathan

1 Johnson is called for the defense, that opens up a
2 substantial -- potential for a substantial amount of
3 information. And as such, if defense calls it, then
4 I'll be able to cross-examine my lead detective, or
5 Mr. Richardson will, on all of the information
6 surrounding the Hartman murder. And just because -- if
7 counsel opens the door on that, we still have ethical
8 obligations to not drive a semi-truck through that door
9 and potentially cause a reversal issue. Just because
10 you're open, doesn't mean we can continue through it.

11 THE COURT: 403 still applies even if they open
12 the door.

13 MR. McGUIRE: I can focus this all on the exact
14 issue. There really are just two pieces of information
15 that we would object to. There's a statement from a
16 witness that was interviewed by Detective Johnson that
17 indicated that Mr. Cottrell was a scary guy, just kind
18 of a general kind of scary-character-type guy. We
19 would object to that coming in. And then there are
20 also --

21 THE COURT: That wouldn't be admissible under 404.

22 MR. McGUIRE: I don't think so either.

23 THE COURT: Okay.

24 MR. McGUIRE: And then also there is information
25 from --

1 THE COURT: Unless you --

2 MR. McGUIRE: I'm not going to say he's a
3 peaceful, nice guy.

4 THE COURT: Unless you put his character in --

5 MR. McGUIRE: Sure.

6 THE COURT: -- there could be an issue.

7 MR. McGUIRE: I am not going to ask him, "Didn't
8 everybody say he's a happy-go-lucky, laid-back guy?"

9 THE COURT: Okay. All right. Just be aware of
10 that.

11 MR. McGUIRE: Absolutely.

12 And there are several people that describe the
13 fact that Mr. Hartman, the victim in the murder case,
14 was supplied by -- marijuana and cocaine by
15 Mr. Cottrell. We would move to keep that out.

16 THE COURT: Those are the other bad acts that
17 would -- it's sort of a Lyle issue. Again, 404, but it
18 would have to show motive, intent, absence of mistake,
19 that sort of stuff, wouldn't it?

20 MR. HIXSON: Yeah. And this is the difficulty we
21 find ourselves in in this position is that if
22 Mr. McGuire proffers information similar to what he
23 said in his opening statement, in other words, that
24 Horry County had no information at all that Cottrell
25 was involved in the Hartman murder, the only way for

1 the State to counter that is to show that he did.

2 THE COURT: Well --

3 MR. HIXSON: And to do that, that's the drug --

4 THE COURT: And that is a quandary. And,
5 actually, I think in the Court's order when this was
6 reversed initially, I think that was a concern.

7 MR. McGUIRE: In my opening statement, your Honor,
8 and I described the nature of the information that was
9 available to Detective Johnson regarding the Hartman
10 murder, I said that Mr. Cottrell drove for the escort
11 service, that he knew Mr. Hartman, that they were
12 friends, and rode WaveRunners and had other dealings.
13 And the other dealings was a reference to other
14 interactions, and I just left off that they were drug
15 dealings.

16 MR. HIXSON: I agree. And we're just -- you know,
17 we want to make sure this thing is as clean as we can
18 possibly get, and that's why we want to talk about it
19 now.

20 The proof to show that that assertion is not true
21 is the fact that Mr. Cottrell was under indictment and
22 charged in the Hartman murder. So it's disingenuous.
23 We're kind of stuck because --

24 THE COURT: He was under indictment?

25 MR. HIXSON: He's been charged for -- he was

1 charged --

2 THE COURT: Subsequently.

3 MR. HIXSON: Subsequently, right. And so to say
4 you have no evidence and he didn't have anything to do
5 with this is not true. It's -- he did. This event
6 triggered the final tumbling of the warrants in the
7 Hartman case. The only reason that Hartman's charges
8 aren't pending now is because Mr. Cottrell has been
9 tried for the Love murder, for this murder now twice;
10 otherwise, it's still a solid case against him for
11 Hartman, and then I won't be able to get into that, and
12 I don't want to -- I want to make it as clean as I can.
13 If we start talking about, "He didn't know them, he
14 didn't know them," the entire case is the drug
15 connection between the two of them, and then I can't
16 get into that, and it leaves a false impression on the
17 jury because it is all there. I just can't do it or
18 I'm going to -- we're going to retry this thing again.

19 THE COURT: On the one hand, if that becomes
20 necessary, you can say -- you know, you can get into
21 all the bloody details of it, or you can simply say he
22 is charged and indicted for that, I mean, you know, if
23 it's necessary.

24 MR. McGUIRE: Well, your Honor --

25 THE COURT: If it becomes necessary, let's

1 minimize it as much as we can, you know, and what do we
2 need to do to do that?

3 MR. MCGUIRE: And just so the Court's clear, in
4 the opening, what we -- what I stated was that at that
5 moment in time, there was a very limited amount of
6 information that was available to Detective Johnson
7 and, therefore, the use of the word "suspect" to
8 describe Mr. Cottrell was inaccurate. So I am going to
9 call Detective Johnson --

10 THE COURT: And I don't know what they have. I
11 don't have a clue.

12 MR. HIXSON: Well, we proffered that testimony in
13 the initial. And the main thing is that Rick Hartman
14 was on the phone with Cottrell three times to buy a
15 slab that night, to go out and buy that night. And
16 Cottrell at that time, his role was a driver and a
17 part- -- and bodyguard, as a trusted confidante. And
18 they met out on the road, and that's where that firing
19 took place. But they were there to set up a drug deal,
20 and that's the thrust of the phone records at that
21 time. And the WaveRunner conversation all showed that,
22 and so I can't -- I'm going to have to let it set as it
23 is because I can't dare say "drug deals" or else we're
24 going to do it again.

25 THE COURT: Well, this is where I think it's

1 important, and that's the determination of the nature
2 of the arrest. You know, was there probable cause for
3 Officer McGarry to engage in the seizure or arrest,
4 detaining of Mr. Cottrell? And I think that the
5 Supreme Court struggled with that. And they gave us
6 some guidance, and I think it was by way of a footnote.
7 You know, that kind of information, whether it be
8 admissible under a res gestae-type theory or as a reply
9 when the arrest was challenged, I think the Court is
10 saying that information, to some extent, was
11 appropriate. I just don't know. But that's what the
12 Court seemed to be saying, as I read the order, that
13 there's a level at which that has to be explored. But
14 there again, we don't want to go too far with it. I
15 mean, we don't want to go further than what we need to
16 do to show that the arrest was lawful. And I think
17 there is a gateway there, and we don't want to pass
18 through it.

19 MR. McGUIRE: I mean, I can tell the Court that I
20 am going to call Detective Johnson, and I'm going to
21 get out the information that he had up to the point of
22 the McGarry shooting because that's what's relevant,
23 that level of information was what was transmitted to
24 Myrtle Beach. But I don't want to -- I'm going to
25 caution right now -- I'm going to caution Detective

1 Johnson that when I ask him -- and beyond having worked
2 there, beyond riding WaveRunners, they also had some
3 other dealings, and I'm going to tell him when I say
4 that, I am not talking about drug dealings and I don't
5 want any information about drug dealing to come in. I
6 just want him to say yes, they had other dealings, but
7 then I don't want to be in a position where then the
8 Court rules that the drug dealing is relevant, and then
9 it comes out from the State and it looks like I hid it.

10 THE COURT: Well, Mr. McGuire, does it really make
11 any difference whether Mr. Cottrell was actually a
12 suspect, whether there were warrants out on him,
13 whether there weren't warrants out on him? Does it
14 really make any difference?

15 I mean, isn't it a subjective test? Isn't it a
16 subjective test of what was in the officer's mind? It
17 makes no difference whether it was right or wrong.
18 It's what was in his mind at the time he attempted to
19 make the arrest, the seizure. That's what is relevant,
20 isn't it?

21 MR. McGUIRE: I would generally say yes, sir,
22 except that the word "suspect" was -- the word
23 "suspect" comes up from the Horry County Police
24 Department, which is a collateral source to the Myrtle
25 Beach Police Department, and I think the State would

1 likely argue that McGarry was acting in complete good
2 faith based on the information he had. And to be quite
3 honest with you, I agree with that statement. It's
4 just that there's no good faith exception when the
5 source comes from a collateral agency.

6 MR. HIXSON: I think I can crystallize this. I
7 can tell, Judge, if I can't bring up drug dealing and I
8 can't bring -- that's the essence of the crime. Nathan
9 Johnson didn't have anything -- if he can't say
10 Cottrell is known to carry a gun, he's selling cocaine,
11 he's selling marijuana, then I can tell you that Nathan
12 Johnson will say, "I didn't have any information if I
13 cannot say that," because that's the whole substance of
14 it. And as such, we would argue that is intentionally
15 misleading to the jury. I don't --

16 THE COURT: Well, if Mr. McGuire gets into that, I
17 think that that becomes highly probative. And you're
18 asking him what's his state of mind. Now, I think that
19 Mr. McGuire might request at that time that I instruct
20 the jury that that evidence is offered only as to what
21 the state of mind was of the officer, what was the
22 state of his investigation, not evidence of whether or
23 not the defendant -- not evidence of his character.

24 You know, we'll just have to look at it and see.
25 I mean, I don't know how this is going to be presented.

1 I don't know how we're going to do it. We'll just have
2 to see. Okay?

3 MR. HIXSON: Thank you, your Honor.

4 THE COURT: I just want to see how far he goes
5 with Officer Johnson.

6 MR. HIXSON: Thank you, your Honor.

7 THE COURT: All right. Let's take a break. Okay?
8 You know, we're worried about wasting any time, but
9 it's almost 12:00 now. We've got ten minutes, I think,
10 until then. Let's take a quick break, and then we'll
11 bring the jury back in and take care of a witness.

12 (WHEREUPON, recess taken from 11:56 a.m.
13 to 12:09 p.m.)

14 THE COURT: What I'm going to have Mr. Postal do,
15 I'm going to have him send it to both of you, or all
16 four of you, just as is. And, again, I haven't looked
17 at it. And I'll look at it at lunch and we'll
18 formulate something a little more specific so that
19 we'll be ready when we finish the defense. I'm sure
20 we'll meet again or talk to him about what we should
21 put in that charge. Okay?

22 MR. MCGUIRE: Yes, sir.

23 THE COURT: At this juncture, I don't know. I
24 don't know what will be presented by the defense, but
25 these are just some thoughts that we have.

1 Okay. Are we ready? I see Mr. Cottrell is here
2 and Ms. Norris and Mr. McGuire, Mr. Hixson and
3 Mr. Richardson.

4 Please bring in the jury.

5 (WHEREUPON, the jury came into open court at
6 approximately 12:11 p.m.)

7 THE COURT: All right. We have our jurors and our
8 alternates back in the courtroom.

9 Mr. McGuire or Ms. Norris.

10 MR. McGUIRE: Thank you very much, Judge. Defense
11 calls Danielle Bauer.

12 If you would come around and take the witness
13 stand, Ms. Bauer.

14 THE COURT: Come around, Ms. Bauer.

15 **DANIELLE LOUISE BAUER,**

16 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

17 THE WITNESS: Danielle Louise Bauer, B-a-u-e-r.

18 THE COURT: All right.

19 DIRECT EXAMINATION

20 BY MR. McGUIRE:

21 Q Good afternoon, Ms. Bauer.

22 Back in December of 2002, did you find yourself at
23 a Dunkin' Donuts where there was a shooting?

24 A Yes, sir.

25 Q And at the time you were a nursing student?

1 A Oh, at that time I was studying biology and
2 chemistry.

3 Q Okay. And did you go -- what do you do now?

4 A Now I am a nurse.

5 Q Okay. So you were in college, in school, and you
6 were going to be a nurse?

7 A Yes.

8 Q Okay. And you are a nurse today?

9 A Yes, sir.

10 Q And back in December 29 of 2002, you were at the
11 Dunkin' Donuts. What did you do earlier in the
12 evening? How did you get there?

13 A I had actually gone to a Dave Matthews Band cover
14 concert at the House of Blues.

15 Q Okay. And I think with a friend?

16 A Yes, sir.

17 Q Okay. And after the concert, you stopped off at
18 the Dunkin' Donuts?

19 A On the way home, yes, sir.

20 Q Okay. And you don't know or have any personal
21 relationship with anybody involved in this case, do
22 you?

23 A Besides my friend that I was in Dunkin' Donuts
24 with, no, sir.

25 Q Yeah, okay, that's my point. You never knew

1 Officer McGarry or Officer Guthinger or Mr. Cottrell,
2 Diane Lawson, Star Benson, Donny Morgan, Fred Halcomb,
3 none of these people?

4 A No, sir.

5 Q Okay. You were just a customer at the Dunkin'
6 Donuts?

7 A Yes, sir.

8 Q And at some point, did you see Mr. Cottrell?

9 A Yes, sir.

10 Q And what was he doing?

11 A He was -- he came in after my friend and I were
12 already there, and he was talking with the gentleman
13 behind the counter with two other people.

14 Q Okay. And was he kind of joking with them?

15 A Yes, sir. They never made a point to sit down.
16 They just stood up there and talked the entire time.

17 Q Okay. Right. Mr. Cottrell and the people with
18 him, they never got a table?

19 A No. They just stood up there and talked and joked
20 around the entire time they were there.

21 Q Okay. And when you say "joked around," I think
22 you stated before that it looked like Mr. Cottrell knew
23 the clerk and they were sort of engaging in -- sort of
24 bantering?

25 A Yes, sir, they were just laughing and talking.

1 Q Okay. Did you see Mr. Cottrell spill some coffee?

2 A Not until after the police officers came inside.

3 Q Okay. After the police officers came into the
4 Dunkin' Donuts, did you see Mr. Cottrell spill some
5 coffee?

6 A Yes, sir.

7 Q And that was on the floor of the Dunkin' Donuts?

8 A Yes, sir.

9 Q And what did he do about that?

10 A He told the police officers to look out for the
11 coffee and not to slip and fall, and he went to clean
12 it up.

13 Q Okay. So he got some napkins to clean it up?

14 A Yes, sir.

15 Q And he got down and wiped it up?

16 A Yes, sir.

17 Q And told the officer, "Watch your step, I spilled
18 some coffee"?

19 A Yes, sir.

20 Q Was he polite?

21 A Yes, sir.

22 Q Okay. Did you see Mr. Cottrell leave the donut
23 store?

24 A Yes, sir. Like exit the premises, yes.

25 Q And what happens when he starts to leave the

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Danielle Louise Bauer - Direct Examination by Mr. McGuire

1 store? What happens?

2 A On his way out the door before he reached the
3 exit, they asked for his identification.

4 Q And you heard that?

5 A Yes, sir.

6 Q And what was his reaction?

7 A He said he had to go out to his car. He said,
8 "Okay," and he went out to his car. Well, I assumed he
9 went out to his car. I apologize. I could not see his
10 car.

11 Q Okay. But he said he had to leave to get it?

12 A Yes, sir.

13 Q And he went -- and he came back and produced the
14 I.D.?

15 A At that time everyone was outside the door, sir,
16 but yes, he did hand them something.

17 Q Okay. And I think at this time you and your
18 friend are sort of getting ready to leave?

19 A Yes, sir.

20 MR. HIXSON: Your Honor, this is his witness. He
21 just can't lead her. He has to ask her questions.

22 THE COURT: Yes, just ask her what she was doing.
23 Okay?

24 BY MR. McGUIRE:

25 Q After you saw Mr. Cottrell produce his license,

1 what happened?

2 A He started pacing back and forth and they were
3 looking. I'm not really sure if he was talking into a
4 walkie-talkie or something, but the gentleman made a
5 move for his shoulder.

6 And then after he was pacing back and forth, one
7 of the gentleman went and hastened his -- like ran
8 after him. And after he ran after him, all of a sudden
9 I heard something. Jessica and I were getting up to
10 leave. I heard something, what I thought was
11 firecrackers. And then I looked outside as we were
12 about to exit and I saw a spark hit the ground, and I
13 realized it was gunshots being fired.

14 I grabbed Jessica, and we ran to the bathroom, and
15 we barricaded ourself in the bathroom. Jessica called
16 911.

17 I realized that the other people that were
18 there -- I don't know exactly how many other gentlemen,
19 but there were other gentlemen there. No one else had
20 made a move to leave. So I left the bathroom to tell
21 all the gentlemen that there were gunshots being fired
22 and that they needed to move away from the window, but
23 nobody -- even when I told them that there were
24 gunshots right there, nobody wanted to move. So I went
25 back to the bathroom.

1 Q Let me stop you there. Let's go back to when you
2 say you saw an officer go to run after Mr. Cottrell.
3 There were two officers on the scene. Do you know the
4 difference between the two?

5 If I told you one was bigger than the other one,
6 can you --

7 A I can do taller and shorter.

8 Q Okay. Taller and shorter. Let's go with that.
9 Was it the taller one that ran?

10 A The shorter gentleman was the one that was on his
11 walkie-talkie, I'm assuming, because I couldn't hear at
12 this point. And then the taller gentleman may have ran
13 after the -- ran after him.

14 Q Okay. And you didn't see what caused him to run
15 or make the running move?

16 A No, I did not.

17 Q Okay. And then the gunfire erupted?

18 A Yes, sir.

19 Q Okay.

20 A It was pretty quickly.

21 Q It all happened very quickly?

22 A It was very fast.

23 MR. McGUIRE: Okay. If I could have just one
24 second, Judge.

25 BY MR. McGUIRE:

1 Q When the officer -- the taller officer made the
2 running move, did it look like he was -- did you see
3 his hands do anything?

4 A He reached for his side, but I didn't see him pull
5 anything out.

6 Q Okay. You didn't see him pull a gun out, but you
7 saw him reach for his side?

8 A Yes, sir.

9 MR. MCGUIRE: Okay. That's all I have for you,
10 ma'am. Thank you so much.

11 THE COURT: Mr. Richardson?

12 MR. RICHARDSON: I don't have any questions, your
13 Honor.

14 THE COURT: You may step down.

15 MR. MCGUIRE: Be excused?

16 THE COURT: May she be excused, Mr. Richardson?

17 MR. RICHARDSON: Yes.

18 THE COURT: You are released from your subpoena.
19 Thank you.

20 THE WITNESS: Thank you.

21 MR. MCGUIRE: Defense calls Diane Lawson Serio.

22 Ms. Serio, if you would, come forward and take the
23 witness stand.

24 DIANE TERESA SERIO,

25 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

1 THE WITNESS: Diane Teresa Serio, S-e-r-i-o.

2 DIRECT EXAMINATION

3 BY MR. MCGUIRE:

4 Q Ms. Serio, good afternoon. I think your name is
5 Serio now, but it was Lawson back in 2002?

6 A Yes.

7 Q Okay. And was your boyfriend Fred Halcomb?

8 A Yeah.

9 Q And on December 29 in 2002, did you go to the
10 Dunkin' Donuts with Fred Halcomb?

11 A Yes.

12 Q And did other people also go to the Dunkin'
13 Donuts?

14 A Yes.

15 Q And who was that?

16 A Donny Morgan, Amber, a girl named Star, and Allen.

17 Q And who went -- and y'all rode in two separate
18 cars?

19 A Yes.

20 Q Who rode in your car?

21 A Fred Halcomb.

22 Q You and Fred Halcomb?

23 A Uh-huh.

24 Q And who was driving?

25 A Fred.

1 Q When the cars -- did the cars arrive at the same
2 time to the Dunkin' Donuts, or close in time?

3 A Yeah.

4 Q Okay. Did you go into the Dunkin' Donuts?

5 A Yes.

6 Q Who did you go in with?

7 A I -- I went in with Fred and Allen to use the
8 restroom.

9 Q Okay. And did they order?

10 A They ordered.

11 Q And what did they order?

12 A Coffee.

13 Q Okay. So the trip was to get coffees?

14 A Yes.

15 Q Okay. And a number of people -- did several
16 people get coffees?

17 A Yes.

18 Q At some point, did you see Allen spill some coffee
19 on the floor? You don't remember that?

20 A I don't remember that.

21 Q Okay. Did you see some police officers enter the
22 Dunkin' Donuts?

23 A Yes.

24 Q And what happened after that?

25 A We were about to leave. They followed us out, and

- 1 one of the officers asked -- well, they started to have
2 a conversation with Allen like he had known him before.
3 Q Okay.
4 A It was friendly. And then I took a seat in Fred
5 Halcomb's car. And at that time, the other officer
6 came around to ask for Fred's I.D. and my I.D.
7 Q Okay. Now, when you say "other officer," there
8 were how many officers on the scene?
9 A Two officers.
10 Q Okay. Was one noticeably taller and bigger than
11 the other guy?
12 A Yeah.
13 Q Okay. We can refer to them as the taller officer
14 and the shorter officer, if that helps.
15 A Okay.
16 Q Which officer came to your car to get your I.D.
17 and Fred's I.D.?
18 A The shorter one.
19 Q Okay. And what was the taller officer doing with
20 Allen?
21 A Talking with him.
22 Q Did Allen give him his I.D.?
23 A He did.
24 Q Did -- what was Allen's reaction to being asked
25 for his I.D.?

1 A He was cooperative. He didn't -- it was friendly.
2 It wasn't anything wrong with -- he didn't seem like
3 there was anything wrong at the time.

4 Q Okay. At some point, does Allen walk away from
5 the police officer?

6 A He does.

7 Q And what does the police officer do?

8 A He asked him to freeze.

9 Q And did he have his gun out?

10 A Not at that time. But Allen kept approaching the
11 car, and then he asked him to freeze again, and he
12 pulled his weapon.

13 Q Okay. Now, the second time the officer pulls his
14 weapon and tells Allen to freeze, does he freeze?

15 A Yes.

16 Q And does he have coffee in his hands?

17 A Not that I remember.

18 Q Okay. Does he stay frozen or does he --

19 A He does stay frozen. He wonders why -- it's
20 almost like he didn't understand what was going on,
21 like why he had asked him to do that.

22 Q He looked confused?

23 A Yeah, he was confused.

24 Q Okay. And then did he -- did he continue to
25 follow the officer's instruction to stay frozen, or did

1 he start walking again?

2 A He started to walk away, to drop off the coffee.

3 Q Okay. So you think he did have the coffee to
4 deliver it to the Morgan car?

5 A I think so.

6 Q Okay. And he walked -- if he walks away from
7 Officer McGarry, is he walking towards Donny Morgan's
8 car?

9 A Yes.

10 Q With coffees?

11 A Yes.

12 Q And then what happens next?

13 A The officer reholsters his weapon and he goes to
14 follow him to the back of the vehicle.

15 Q Does he kind of jump on his back?

16 MR. HIXSON: Your Honor --

17 THE COURT: Please don't lead the witness.

18 THE WITNESS: He was trying to restrain him.

19 It's -- from what it looked like. I mean, I don't know
20 what hap- -- why or what happened, but I know he was
21 trying to restrain him.

22 BY MR. McGUIRE:

23 Q Did you ever hear the command, "Put your hands
24 behind your back"?

25 A I don't remember hearing that.

1 Q Okay. Do you remember hearing a command about
2 putting your hands on your head?

3 A No.

4 Q Okay. And did you see -- when you say the officer
5 went to restrain Allen, can you describe what that
6 looked like?

7 A It was a struggle. It was -- he just -- I
8 remember he had one hand on his neck up here and was
9 trying to get his other hand behind his back. So it
10 was just a struggle. And Allen wasn't trying to do
11 what the officer wanted him to do.

12 Q What do you mean by that? He wasn't --

13 A He wasn't -- he was fighting with him, like
14 struggling with him, trying not to put his hands behind
15 his back.

16 Q Okay. So the officer made a command, "Put your
17 hands" -- well, the officer was trying to get his hand
18 behind his back, and Allen was resisting?

19 A Yeah.

20 MR. HIXSON: Once again, your Honor, she asked and
21 answered that question, said she didn't know that, and
22 that's a leading question.

23 THE COURT: Just ask her what she knows,
24 Mr. McGuire, and please do not lead the witness.

25 MR. McGUIRE: Yes, sir.

1 BY MR. MCGUIRE:

2 Q I know this is 12 years ago.

3 A I know.

4 Q And it's hard to remember. Do you remember
5 testifying back on September 8th, just a couple weeks
6 ago, a little while ago?

7 A Yeah.

8 MR. HIXSON: Your Honor, he can't impeach his own
9 witness when she's asked and answered that she didn't
10 know that. This is his witness. He can't impeach her.

11 THE COURT: That's correct, Mr. McGuire. That's
12 the rule.

13 MR. MCGUIRE: Judge, this is only on the issues
14 that she said she couldn't remember.

15 THE COURT: Okay. All right.

16 MR. MCGUIRE: So this is within the rule.

17 THE COURT: All right. Okay.

18 BY MR. MCGUIRE:

19 Q Just so we're clear, you were a little confused
20 about when Allen put up his hands did he have coffee.
21 Do you think he had the coffee now?

22 A I don't think he had coffee in his hands. I'm not
23 sure.

24 MR. MCGUIRE: Okay. That's okay. What I want to
25 do is show you your testimony just to see if it jogs

1 your memory, okay.

2 If I can approach, Judge.

3 THE COURT: All right.

4 THE WITNESS: Yeah, I see, but I don't -- I went
5 over the statements that I had made in 2005 in the
6 courtroom prior to coming here and just trying to
7 remember exactly what I had saw. And according to
8 that, he didn't have coffee in his hands, but I don't
9 remember now. Like, I'm trying to do the best I can
10 do.

11 BY MR. MCGUIRE:

12 Q I understand. Trust me, I understand. But we can
13 agree that September 8th, just a -- not too many days
14 ago, when I asked you that question, did he have coffee
15 in his hands --

16 MR. HIXSON: Your Honor, once again, this is asked
17 and answered, asked and answered. She doesn't remember
18 and she's using past testimony --

19 THE COURT: She says, Mr. McGuire, that at this
20 juncture she just cannot remember.

21 THE WITNESS: I can't remember.

22 MR. MCGUIRE: That's okay. But, Judge, I do
23 believe I'm allowed to ask her did she testify under
24 oath that she did say that.

25 THE COURT: I will let you ask that one question.

1 BY MR. McGUIRE:

2 Q Okay. You now recall testifying under oath
3 September 8th that you did say when Allen put his hands
4 up, he had coffee in his hands?

5 A Yeah.

6 Q Okay. After the officer physically engages Allen,
7 what happens next?

8 A He -- he struggles with the officer as he's trying
9 to put his hands behind his back. And all I remember
10 is him pulling a gun and shooting the officer in the
11 face.

12 Q Okay. Do you remember saying that you saw him
13 pull the gun from his waistband and you saw --

14 A From the front of his pants, yes.

15 Q Okay. And do you remember that -- do you remember
16 them separating a little bit for a second in the
17 struggle and that's when he pulled the gun?

18 A I don't remember.

19 Q Okay. You don't remember that?

20 A No.

21 Q Okay. Do you remember -- how many times did
22 Mr. Cottrell shoot?

23 A I don't remember that either.

24 Q Do you remember saying four times? Does that
25 sound familiar?

1 A Huh-uh.

2 MR. McGUIRE: Thank you, Ms. Lawson. I don't have
3 any more questions for you -- or Ms. Serio. I'm sorry.

4 MR. RICHARDSON: Your Honor, if it please the
5 Court.

6 THE COURT: Yes, sir.

7 CROSS-EXAMINATION

8 BY MR. RICHARDSON:

9 Q Hey, Diane, how are you?

10 A I'm okay.

11 Q Not the best.

12 Hey, I want to show you what's already in evidence
13 as State's Exhibit No. 2.

14 A Okay.

15 Q Do you recognize that?

16 A Yes.

17 Q All right.. Do you think that it would help your
18 testimony to work off of -- could you work off of this
19 diagram?

20 Do you recognize the car marked as Halcomb?

21 A Yes.

22 Q All right. And Morgan?

23 A Yes.

24 Q Do you think you could show the jury sort of where
25 everybody was at and where you were at by working off

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1 of this?

2 A Um --

3 Q How about try? Will you try if I give you a
4 pointer?

5 All right. Well, work with me. Okay?

6 A Okay.

7 Q If you can't do it, we just can't do it.

8 All right. Now, this car is marked as Halcomb
9 vehicle, correct?

10 A Yes.

11 MR. RICHARDSON: All right. Thank you, Bill.

12 BY MR. RICHARDSON:

13 Q Diane, will you step down and just keep your voice
14 up.

15 A (Witness complies.)

16 Q All right. Just hold this like that where you
17 want to point. Okay?

18 A Okay.

19 Q Point out to the jury where Halcomb's vehicle
20 would have been.

21 A Here.

22 Q All right. Now --

23 THE COURT: Ms. Serio?

24 THE WITNESS: Yes.

25 THE COURT: You're very soft-spoken. You have a

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1 soft voice, but this lady right here needs to record
2 what we're saying. So if you could, speak up a little
3 louder.

4 THE WITNESS: Okay.

5 THE COURT: Thank you.

6 BY MR. RICHARDSON:

7 Q All right. That's Fred's car, correct?

8 A Yes.

9 Q And that was parked right outside of Dunkin'
10 Donuts?

11 A Yes.

12 Q When you and Fred came out, show the jury where
13 you went.

14 A I went from the Dunkin' Donuts around and into the
15 passenger side of Fred's car.

16 Q Okay. And who got into the driver's side?

17 A Fred Halcomb.

18 Q All right. And when y'all did that, do you know
19 where Officer McGarry and Officer Guthinger were when
20 you went to the car?

21 A They were up in this area.

22 Q And who was there with them?

23 A Allen.

24 Q Okay. So they were still there when you got in
25 the car --

1 A Yes.

2 Q -- right?

3 And you had testified about hearing this
4 conversation about, "Can I see your I.D.?" that sort of
5 stuff?

6 A Yes.

7 Q I think you said that that was done in a friendly
8 manner?

9 A Yes.

10 Q No aggression, nothing like that?

11 A (Witness shaking head.)

12 Q Now, when Officer Guthinger -- show the jury where
13 he came up to the vehicle at, please.

14 A He came up right here.

15 Q All right. Were you watching Officer Guthinger as
16 he asked for you guys' I.D.?

17 A I was.

18 Q All right. And Fred's attention was to Officer
19 Guthinger too?

20 A Yes.

21 Q All right. What brought your attention from
22 Officer Guthinger back to where you saw what was going
23 on?

24 A Allen arguing with the officer about freezing.

25 Q Okay. And in the officer's voice or in Allen's

1 voice, did it still seem friendly at that point?

2 A No.

3 Q No? Okay. Things -- something had happened to
4 make the officer say, "Freeze" or "Show me your hands"
5 or something like that?

6 A Yes.

7 Q Okay. And where about was Mr. Cottrell when you
8 heard that --

9 A He was here.

10 Q -- raised voice?

11 He was here walking toward --

12 A The vehicle.

13 Q -- the vehicle?

14 A Uh-huh.

15 Q All right. Now, when you talk about a
16 confrontation between the two of them, can you tell me
17 how -- now, you were here. Was there anything blocking
18 your view back over to Donny's car?

19 A No.

20 THE COURT: I think we're -- you're blocking the
21 juror --

22 MR. RICHARDSON: Oh, I'm sorry.

23 THE COURT: -- Mr. Richardson. If you would, just
24 stand to the side.

25 MR. RICHARDSON: I will.

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1 BY MR. RICHARDSON:

2 Q Diane, was there anything blocking your view back
3 over here?

4 A No.

5 Q Okay. Now, when Officer McGarry approached Allen
6 Cottrell, did he approach him -- he approached him from
7 behind. He came up to the back of --

8 A Yeah, because Allen had turned around.

9 Q Okay.

10 A When he asked him to freeze, he had turned around.
11 He didn't -- at first, he had complied, but then he
12 turned away --

13 Q Yeah.

14 A -- and went to Donny's -- towards Donny's car.

15 Q And tell me how fast Allen was -- or tell the jury
16 how fast Allen was walking away from the officer.

17 A He started to back up at first and then turned, so
18 it was slowly.

19 Q All right. When he start -- did he speed up
20 coming towards --

21 A Yeah, the back of the car.

22 Q All right. So he turned away very gingerly, and
23 then he started moving more rapidly away?

24 A Yes.

25 Q Okay. Now, as he reached that car, had he gotten

1 to that car when Officer McGarry got to him yet?

2 A He had already got there, yes.

3 Q Okay. And Officer McGarry came up from --

4 A Behind.

5 Q -- Allen's back?

6 A Yes.

7 Q Okay. Could you tell what Officer McGarry was
8 reaching for, where he was struggling with Allen
9 Luzenski Cottrell?

10 A His hand -- his arms.

11 Q He was trying to control his arms?

12 A Yes.

13 Q Okay. Could you see how -- did you ever see --
14 you saw Officer McGarry reholster back up here?

15 A Yes.

16 Q Did you ever see him pull out his gun again?

17 A No.

18 Q No. Did you actually see Allen Luzenski Cottrell
19 shoot --

20 A Yes.

21 Q -- Officer McGarry?

22 Is there any doubt in your mind as to who shot
23 Officer McGarry?

24 A No.

25 Q Did you know at the time that McGarry had even

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1 shot a weapon?

2 A No.

3 Q All right. And I know this is difficult, but
4 could you -- be close enough to me as Allen was to
5 McGarry when he shot him.

6 A Well, he was like this, and then he turned and
7 he --

8 Q Just that close?

9 A -- shot him, yeah.

10 Q Okay. Now, go ahead sit down. Take a break. I'm
11 sorry.

12 (Witness crying.)

13 THE COURT: Are you okay?

14 THE WITNESS: Yes.

15 THE COURT: All right.

16 BY MR. RICHARDSON:

17 Q Diane, are you okay?

18 A (Witness nodding head.)

19 Q Do you recognize State's Exhibit No. 8?

20 A That's Fred's car.

21 Q Okay. And that's already in evidence, but that
22 was the car that Fred was driving that night?

23 A Yeah.

24 Q All right. And, Diane, once -- once Cottrell shot
25 Officer McGarry, what happened next? What did you guys

1 do?

2 A I -- there was a lot of firing, cross firing, and
3 I was in the front seat bent down screaming, glass was
4 flying everywhere, and then they drove off. Fred drove
5 off.

6 Q Okay. Did you see anything aggressive about
7 Officer McGarry's actions towards Luzenski Cottrell on
8 that night?

9 A No.

10 Q Diane, how long had you known Allen before
11 December 29th?

12 A Not -- I mean, I didn't really know him.

13 Q You just knew him through Fred?

14 A Yeah.

15 MR. HIXSON: Hold on just for a moment.

16 (Mr. Hixson and Mr. Richardson confer.)

17 MR. RICHARDSON: Court's indulgence just one
18 moment.

19 THE COURT: Certainly.

20 (Mr. McGuire and Mr. Richardson confer.)

21 BY MR. RICHARDSON:

22 Q Diane, isn't it true that you've testified before?
23 He talked about in September, right? Do you remember
24 going on record and talking with a court reporter
25 before?

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1 A About?

2 Q About the shooting. That's all I'm --

3 A In 2005?

4 Q Yes.

5 A In 2005?

6 Q Well, in, I think, September of this year, right?

7 A Talking to a reporter?

8 Q No, talking -- answering questions for Mr. McGuire
9 a month ago, about a month ago. You don't remember?

10 A For the defense?

11 Q Yeah.

12 A No, I didn't speak with them.

13 Q Okay.

14 THE COURT: Did you come to this courtroom and
15 testify about a month ago, or another courtroom? Do
16 you recall that?

17 THE WITNESS: On the 8th?

18 THE COURT: I think she's just confused.

19 BY MR. RICHARDSON:

20 Q I think it was the 8th.

21 A Yeah, I was here on the 8th.

22 Q Okay. Let me ask you, and all I'm worrying about
23 is just that small amount of time, okay, when you were
24 seated in the car with Fred, and then across the
25 parking lot you saw Luzenski Cottrell shoot Officer

1 McGarry. Okay?

2 A All right.

3 Q I think you had testified before that you actually
4 saw Officer McGarry fire. Do you remember that?

5 A As he was dropping, yes.

6 Q As he was falling?

7 A Yes.

8 Q All right. And how quick were those two shots?

9 A It was just like a reaction. I don't know how to
10 explain it. It was just fast.

11 Q Well, was it like "pow, pow," or was it "pow,
12 pow"?

13 A I mean, it was just two shots back to back.

14 Q Back-to-back shots?

15 A Yes.

16 Q All right. And you saw Officer McGarry fire his
17 weapon as he was falling back?

18 A Yes.

19 MR. RICHARDSON: All right. I have no further
20 questions, your Honor. Thank you.

21 REDIRECT EXAMINATION

22 BY MR. MCGUIRE:

23 Q Ms. Lawson -- Ms. Serio, you're not proud of this
24 little part of your life, are you, back in 2002?

25 A It's something that I don't think about anymore.

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1 Q Okay. You want to put that behind you?

2 A Yeah, it is behind me.

3 Q And not think about it ever again?

4 A Yes.

5 Q Okay. In 2002, December of 2002, did you speak to
6 a number of police officers and give a number of
7 statements?

8 A Yes.

9 Q Okay. And they asked you questions?

10 A Yeah. I mean, I don't remember those -- I don't
11 have any of those papers or anything.

12 Q I understand that, but I think you would agree
13 with me that the first time you ever said --

14 MR. HIXSON: I'm going to object. Once again,
15 this is his witness. If we can't lead when it's our
16 witness, and he can't lead when it's his witness.

17 MR. MCGUIRE: I don't think it's leading, Judge.

18 THE COURT: Let me hear you ask the question. I
19 don't know what you're going to ask.

20 MR. MCGUIRE: I think that's fair enough, Judge.

21 BY MR. MCGUIRE:

22 Q When was the first time you ever said in the last
23 12 years that Officer McGarry -- that you saw Officer
24 McGarry shoot?

25 A With Greg Hembree, the first solicitor on this

1 case --

2 Q Okay.

3 A -- before he went to trial.

4 Q And did he ask you to testify to that?

5 A They just -- they didn't ask me to testify to
6 anything. They just told me to answer the questions as
7 I was asked, and that's what I did.

8 Q Did they tell you that they didn't believe you?

9 MR. HIXSON: Objection, your Honor. That's --

10 THE COURT: That's not appropriate.

11 BY MR. McGUIRE:

12 Q Can you help --

13 A Why --

14 Q I'm going to withdraw the question. There's not a
15 question in front of you right now.

16 If these two fellows were looking for a document,
17 a statement, any statement at all that you made to a
18 law enforcement officer in 12 years --

19 A I should have those statements as well, though.

20 Q What I'm asking you is: Is there any statement,
21 any document in this case, that memorializes the fact
22 that you said you saw Officer McGarry shoot?

23 A I'm not sure because I don't have everything
24 that's been said.

25 MR. HIXSON: Well, I'm sure they'd find one if

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Diane Teresa Serio - Redirect Examination by Mr. McGuire

1 there was. Thank you.

2 MR. RICHARDSON: No further questions, your Honor.

3 THE COURT: Ms. Serio, you can step down. Thank
4 you very much.

5 Do we need this witness further?

6 MR. MCGUIRE: My understanding is she's under the
7 State's subpoena for the penalty phase.

8 MR. RICHARDSON: We'll just call her, your Honor.

9 THE COURT: Okay. They tell me we have lunch for
10 the jury, so this is a perfect time to break. If you
11 would, retire to your jury room and just let me know
12 when you have had plenty of time for your lunch. Okay?

13 (WHEREUPON, the jury exited the courtroom
14 at 12:48 p.m.)

15 THE COURT: All right. Let's take a break. That
16 will give me an opportunity over lunch to read the
17 materials that the State has passed up, the
18 authorities. Mr. Postal will be working on the charge.

19 Gentlemen, let's get lunch and try to be back as
20 quickly as we can. Okay? We'll have to depend on the
21 jury to let us know. Okay?

22 (WHEREUPON, recess taken from 12:48 p.m.
23 to 1:53 p.m.)

24 THE COURT: All right. We have Mr. Cottrell and
25 his attorneys in the courtroom, as well as the State's

1 attorneys. Mr. Ropp, if you would.

2 (WHEREUPON, the jury came into open court at
3 approximately 1:55 p.m.)

4 THE COURT: All right. We have all our jurors and
5 the alternates in.

6 Mr. McGuire.

7 MR. McGUIRE: Thank you, your Honor. Defense
8 calls Amber Counts.

9 AMBER ALICIA COUNTS,

10 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

11 THE WITNESS: Amber Alicia Counts, C-o-u-n-t-s.

12 DIRECT EXAMINATION

13 BY MR. McGUIRE:

14 Q Good afternoon, Ms. Counts.

15 Back in 2002, did you know Allen Cottrell?

16 A Yes, sir.

17 Q Fred Halcomb?

18 A Yes, sir.

19 Q Diane Lawson?

20 A Yes, sir.

21 Q Donny Morgan?

22 A Yes, sir.

23 Q And Star Benson?

24 A Yes, sir.

25 Q Did that group go out to the Dunkin' Donuts one

1 night back in December of 2002?

2 A Yes, sir.

3 Q And who went into the Dunkin' Donuts?

4 A Fred, Diane, and Allen.

5 Q Okay. And did you see Allen come out of the

6 Dunkin' Donuts?

7 A Yes, sir.

8 Q Did you see some police officers?

9 A I did.

10 Q What did you see happen with the police officers?

11 A I saw them go into Dunkin' Donuts a little while
12 after Fred, Diane, and Allen did. Fred, Diane, and
13 Allen come out; the two officers followed them out. It
14 appeared that one of the officers had asked Allen for
15 his I.D.

16 Q Okay. Did he give it to him?

17 A He did.

18 Q Okay. Was he compliant with the instructions?

19 A It appeared so.

20 Q Okay. Then what happens?

21 A It appeared that he was -- the officer was calling
22 information in on the radio.

23 Q Okay. You didn't hear that, but you saw them?

24 A It appeared. Yeah, that's what I saw.

25 Q Okay. Then what happened?

1 A About that point, Allen comes and -- to bring the
2 coffees to the car. I hear something about -- the
3 officer say something about hands. And the next thing
4 I know, the officer is coming at -- coming up and
5 reaching for his gun.

6 Q Okay. And did he -- did he tell Allen to do
7 anything that you remember?

8 A I only heard something about his hands, "Show me
9 your hands," because I saw Allen kind of moving his
10 hands to where he could see them.

11 Q Okay. And did Allen have coffee at the time?

12 A Yes.

13 Q And was he -- did he go to the car to deliver the
14 coffee?

15 A Yes.

16 Q Did the officer physically engage him when Allen
17 was facing the car, facing away from the officer, I
18 guess?

19 A Yes.

20 Q Okay. Did you ever see Allen do anything
21 aggressive towards the officer up until that fatal
22 moment when the shots were fired?

23 A No, sir.

24 Q Okay. Did you -- when the officer -- when the
25 officer comes and gets -- physically engages Allen,

1 what happens then? Describe that, if you would.

2 A The only thing, I didn't really see much. It had
3 moved from the driver's side back to the back of the
4 car.

5 Q Kind of the trunk area?

6 A Back towards the trunk area. I hear two thumps.
7 The next thing I know, I'm hearing gunshots.

8 Q Okay. Do you remember the sequence of the
9 gunshots or how many you heard or how far apart they
10 were, or anything?

11 A I heard three or four at the beginning. It wasn't
12 like a constant, like, "boom, boom, boom, boom, boom,"
13 but I heard three or four gunshots pretty close
14 together.

15 Q Okay. And then a shootout ensues?

16 A Yes, sir.

17 Q Does Allen get in the car and ask you to drive
18 eventually?

19 A Yes.

20 Q Do you do that?

21 A Yes.

22 Q Was he injured?

23 A Yes.

24 Q Okay. And did the police department stop your car
25 that you were driving?

1 A Yes.

2 Q And how did they do that?

3 A With the stop sticks.

4 Q Okay. The car stops eventually?

5 A Yes.

6 Q And are you and Allen taken out of the car?

7 A I get out of the car myself, put my hands up.

8 They tell me to get down. I'm drug across the road,
9 and then he's pulled out of the car.

10 Q Okay. Did you offer any resistance to arrest?

11 A No.

12 Q Did Allen?

13 A No.

14 Q Do you remember seeing a -- do you remember seeing
15 a video?

16 MR. McGUIRE: If I can have this marked for I.D.
17 I'll stop talking.

18 (WHEREUPON, Defendant's Exhibit 4 was marked for
19 identification.)

20 MR. McGUIRE: If I could approach, Judge.

21 THE COURT: Yes.

22 BY MR. McGUIRE:

23 Q If I could show you what's been marked Defense
24 Exhibit No. 4, does that look familiar?

25 A Yes, sir.

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1 Q Is it a DVD, a video?

2 A Yes, sir.

3 Q Have you seen it?

4 A I have.

5 Q Does it capture the stopping of the car and the
6 arrest of both you and Allen?

7 A Yes, sir.

8 Q Is it accurate?

9 A Yes, sir.

10 Q A fair and accurate representation of the events
11 of that night?

12 A Yes, sir.

13 Q Has it been changed or altered in any way?

14 A No, sir.

15 MR. McGUIRE: Judge, I want to move it into
16 evidence and play it for the jury, if I could.

17 THE COURT: Any objection?

18 MR. RICHARDSON: No objection.

19 THE COURT: Okay. Go ahead.

20 (WHEREUPON, Defendant's Exhibit 4 was admitted
21 into evidence.)

22 (Video plays from 2:02 p.m. to 2:14 p.m.)

23 MR. McGUIRE: Just to be certain, I move
24 Defendant's 4 in evidence. Any objection?

25 MR. HIXSON: The video you just played? I thought

1 it was in, that's why --

2 MR. McGUIRE: Yeah.

3 THE COURT: It's in now?

4 MR. McGUIRE: Yes, sir.

5 THE COURT: All right.

6 BY MR. McGUIRE:

7 Q Ms. Counts, when you saw Officer McGarry run over
8 to Allen and reach for his gun, was Allen walking away
9 with coffee?

10 A Yes.

11 MR. McGUIRE: Okay. That's all I have for you,
12 ma'am.

13 CROSS-EXAMINATION

14 BY MR. HIXSON:

15 Q Good afternoon, ma'am. How are you?

16 A Good. How are you?

17 Q So you knew Luzenski Cottrell, I guess, back in
18 2002?

19 A Yes, sir.

20 Q Just tell us what the nature of your relationship
21 was back then.

22 A We were --

23 Q I mean, boyfriend/girlfriend?

24 A Boyfriend/girlfriend.

25 Q Okay. And I guess you all -- did you have a child

1 in common with him back then at that time?

2 A No.

3 Q Okay. Let's just get right to the Dunkin' Donuts
4 part, then, okay. I think you had testified -- or you
5 had given statements initially, I guess. And let me
6 see if this may just aid your testimony.

7 MR. HIXSON: This thing has already been put into
8 evidence, your Honor. This is State's 2.

9 BY MR. HIXSON:

10 Q Can you see it from there, Amber? Can you see it
11 at all?

12 A I can see the top of it.

13 Q Let me get -- this just has been helpful in the
14 past for folks talking about what was going on. See if
15 it helps you.

16 So I think you indicated before that you had
17 arrived there in Donny Morgan's vehicle?

18 A Yes, sir.

19 Q And who all was in Donny Morgan's vehicle? Do you
20 remember?

21 A Myself, Allen, Donny, and Star.

22 Q Okay. And then you had talked about what was
23 going on outside, that you indicated that it was a
24 civil conversation, a civil conversation, and asked for
25 an I.D., I think. I'm trying to fast forward to where

1 your testimony picks up. Is that safe to say?

2 A Yes, sir.

3 Q And then I think you indicated before that at some
4 point in time, it got a little contentious, that Allen
5 continued to walk away from the officer as the officer
6 was saying, "Show me your hands," "I'm trying to pat
7 you down," those type of statements. Fair to say?

8 A Yes, sir.

9 Q Okay. And then I think you said you're seated
10 back here in this seat, in the driver's side rear?

11 A Yes, sir.

12 Q That's right. And then isn't it true that you
13 said when they reached this area and reached towards
14 here, that you couldn't see what was happening back
15 past this part of the car?

16 A Yes, sir.

17 Q And then you hear shots fired. You know that it
18 came from the rear of the vehicle. Isn't it true that
19 you said you don't know what happened back here, but
20 you do know that obviously the defendant comes around
21 this way and then Officer Guthinger starts returning
22 fire? Safe to say?

23 A I know that I heard gunfire. I couldn't really
24 see what was -- exactly what was going on.

25 Q Right. I'm not trying to trick you.

1 A Yeah.

2 Q I'm just trying to -- so let's pick up right here.
3 I think previously isn't it true that you had said that
4 you knew that Allen frequently carried a burgundy
5 bookbag with him?

6 A Yes, sir.

7 Q And I think -- let me see if I have a photograph
8 here to show you that burgundy bookbag.

9 MR. HIXSON: Beg the Court's indulgence just for a
10 second, your Honor. Getting to be too many of these.
11 Here we go.

12 I'm showing the witness what's been marked as
13 State's Exhibit 11.

14 BY MR. HIXSON:

15 Q See if you can recognize that photograph over all,
16 and specifically I'll draw your attention to that
17 burgundy bookbag on the roadway.

18 A Yes, sir.

19 Q And I guess that was the traffic stop that we just
20 saw a video of, right?

21 A Yes, sir.

22 Q Is that the burgundy bookbag we're talking about?

23 A Yes, it is.

24 Q State's Exhibit 11.

25 And isn't it true that you had given a statement

1 indicating that Allen carried spare magazines and
2 ammunition in that bookbag?

3 A No, sir.

4 Q Isn't it true that you had previously given a
5 statement indicating that you recognize this firearm?

6 MR. HIXSON: And I'm showing the witness what's
7 been marked as State's Exhibit 25, which is a Ruger P90
8 .45-caliber handgun.

9 BY MR. HIXSON:

10 Q Isn't it true that you testified that you
11 recognized that as being Luzenski Cottrell's?

12 A Yes, sir.

13 Q And that he frequently carried it in his
14 waistband?

15 A Yes, sir.

16 Q Did you specifically see Luzenski Cottrell with
17 that firearm in his waistband that night prior to
18 shooting Officer McGarry?

19 A No, sir.

20 Q At some point in time after this initial eruption
21 of gunfire, okay, and I'm phrasing it that way because
22 you said you couldn't see what was happening back here,
23 okay, isn't it true that you had indicated that
24 Luzenski Cottrell was down in this area of the vehicle
25 returning fire to Officer Guthinger?

- 1 A Yes, sir.
- 2 Q And at some point in time, isn't it true that he
- 3 told you that "I'm done, I'm hit, I'm done"?
- 4 A Yes, sir.
- 5 Q And at that time, didn't you say that Cottrell
- 6 reaches in and grabs his bookbag and gets a spare
- 7 magazine from his bookbag?
- 8 A Yes, sir.
- 9 Q Okay. And reloads his weapon. Did you see him
- 10 reload his weapon?
- 11 A I don't recall if I actually saw him reloading,
- 12 but he was in his backpack. I do recall that.
- 13 Q Fair enough. There's a lot going on, isn't there?
- 14 Were you, during that period of time, trying to
- 15 get below the window level to avoid being shot?
- 16 A Yes, sir.
- 17 Q Okay. So at the point in time that Defendant
- 18 Cottrell is in this area beside the Morgan car, you're
- 19 still in the rear seat of the vehicle, right?
- 20 A Yes, sir.
- 21 Q Okay. I'm sorry. Let me use that pointer.
- 22 That's why I got the thing. See if this helps
- 23 everybody.
- 24 Can you see this, Ms. Counts?
- 25 A Yes, sir.

1 Q Okay. So let's get back to where we were.

2 So at this point, you're in the rear seat of the
3 vehicle and Defendant Cottrell is in this area?

4 A Yes, sir.

5 Q Do you hear when he calls out? You testified -- I
6 mean, you gave a statement earlier indicating that you
7 heard Defendant Cottrell call out to Officer Guthinger,
8 "I'm done, I surrender." Isn't that true?

9 A Yes.

10 Q And did you see Officer Guthinger advance on the
11 defendant in this direction? Did you see it, or were
12 you still down during that point?

13 A I was still down. I didn't see that.

14 Q And after you hear that, that call out, isn't it
15 true that Defendant Cottrell fired additional rounds at
16 Officer Guthinger when he came this way, that you heard
17 those shots go off?

18 A Yes, sir.

19 Q After that happens, Defendant Cottrell asked you
20 to get in and drive; is that correct?

21 A Yes, sir.

22 Q And you get out of the passenger's seat, get in
23 the driver's seat, and Defendant Cottrell gets in the
24 rear seat --

25 A Yes, sir.

- 1 Q -- is that right?
- 2 And then you back out and leave the parking lot in
- 3 this direction, right?
- 4 A Yes, sir.
- 5 Q During that period of time, Defendant Cottrell
- 6 didn't force you to do that, did he?
- 7 A No, sir.
- 8 Q You did it out of -- at that time, we're talking
- 9 2002, the truth's the truth, you did it out of
- 10 affection for Defendant Cottrell to get him out of
- 11 there?
- 12 A Yes, sir.
- 13 Q And then, I believe -- you saw the video. You see
- 14 it pick up, you know, way -- we're off the map down
- 15 here, you know, on -- eventually up to 76th Avenue.
- 16 You're familiar with that. That's where you got
- 17 stopped with stop sticks, right?
- 18 A Yes, sir.
- 19 Q Could you estimate in watching that video, do you
- 20 think, how many police cars were chasing you?
- 21 A A lot.
- 22 Q It looked like at least five --
- 23 A Five or six.
- 24 Q -- I'm sure. We were watching the same thing
- 25 together, right?

1 A Yes.

2 Q And you mentioned stop sticks, right? You
3 mentioned those?

4 A Yes, sir.

5 Q What happened when you hit those stop sticks?

6 A I pulled over not too far. Heard a big pop and
7 then pulled over.

8 Q Were you starting to lose your ability to control
9 that vehicle?

10 A Yeah.

11 Q And so I guess your car is pretty disabled at that
12 point in time?

13 A Yes, sir.

14 Q Fair enough to say?

15 And I saw you get right out. You're on the video
16 getting right out. I think the jury saw that too.

17 A Yes, sir.

18 Q Put your hands over your head. You even went to
19 the ground and said, "Hey, I'm cool," right?

20 A Yeah.

21 Q Didn't see Defendant Cottrell get out of the
22 vehicle and do the same thing. He was in the backseat,
23 correct?

24 A Yes, sir.

25 MR. HIXSON: Beg the Court's indulgence for just a

1 second.

2 Amber, I have no further questions.

3 I have no further questions, your Honor.

4 THE COURT: Anything further, Mr. McGuire?

5 MR. MCGUIRE: Just very briefly.

6 REDIRECT EXAMINATION

7 BY MR. MCGUIRE:

8 Q On the point regarding Allen not getting out of
9 the car with you, you saw that he was injured?

10 A Yes, sir.

11 Q And where was he injured?

12 A In his leg.

13 Q And he was saying, "I'm done, I'm done"?

14 A Yes.

15 Q And what did you take that to mean?

16 A I took it to mean as, you know, it was fatal.

17 MR. MCGUIRE: That's all we have for you, ma'am.

18 Thank you.

19 MR. HIXSON: No further questions, your Honor.

20 THE COURT: You may step down. Thank you.

21 MR. MCGUIRE: Defense calls Officer Nicole Pyle
22 Shelton.

23 NICOLE PYLE SHELTON,

24 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

25 THE WITNESS: Nicole Pyle Shelton, S-h-e-l-t-o-n.

1 DIRECT EXAMINATION

2 BY MR. McGUIRE:

3 Q Officer Shelton, you were Officer Pyle back in
4 2002?

5 A Yes.

6 Q Okay. You've had a name change?

7 A I have.

8 Q Congratulations.

9 A Thank you.

10 Q You were on duty that night?

11 A I was.

12 Q We saw a traffic stop that you executed with
13 another officer right before you got the call of shots
14 fired.

15 A I did.

16 Q Okay. And you were -- you pulled a fellow over,
17 he gave you some paperwork, and then he kept looking
18 for other paperwork?19 A Yes, he was looking for paperwork that I had asked
20 for.

21 Q You responded immediately to the scene?

22 A I did.

23 Q It was still a dangerous situation when you got
24 there, it appeared to me.

25 A It was.

1 Q And you were on scene when efforts were made to
2 offer medical aid to Officer McGarry?

3 A Yes.

4 Q And then after that, you remained on the scene?

5 A I did.

6 Q And you were one of the first people to speak to
7 Officer Guthinger about what happened?

8 A I was.

9 Q And you were still mic'd up from your traffic
10 stop?

11 A Yes.

12 Q That was just sort of a coincidence that night.
13 You didn't mean to be mic'd up when you were doing all
14 this stuff?

15 A No.

16 Q Okay. And you and Mike -- you and Officer
17 Guthinger had a conversation?

18 A Yes.

19 Q And it was captured, again, on video and audio?

20 A Yes.

21 (WHEREUPON, Defendant's Exhibit 5 was marked for
22 identification.)

23 BY MR. MCGUIRE:

24 Q In fact, I'm going to show you what's been
25 marked -- I'm going to show you what's been marked

1 Defendant's Exhibit 5, if I could. Does that just look
2 familiar?

3 A Yes.

4 Q Okay. And is it an audio recording taken from the
5 video of your car?

6 A Yes.

7 Q And have you listened to it?

8 A Yes, I have.

9 Q And have you also compared it to a transcript that
10 was provided by the State?

11 A Yes.

12 Q Does it appear to be accurate?

13 A Yes.

14 Q A fair representation of the conversation you had
15 with Officer Guthinger?

16 A Yes.

17 MR. MCGUIRE: Okay. Judge, I want to move the
18 audio into evidence.

19 MR. HIXSON: No objection.

20 THE COURT: Without objection, it's admitted.

21 (WHEREUPON, Defendant's Exhibit 5 was admitted
22 into evidence.)

23 MR. MCGUIRE: And, Judge, we'll publish for the
24 jury at this time.

25 THE COURT: Very well.

1 How long is it, Mr. McGuire?

2 MR. McGUIRE: It's very short. This is the
3 transcript of it, if you want to see how long it is.

4 THE COURT: No, that's all right.

5 BY MR. McGUIRE:

6 Q Officer Shelton, while we're waiting for the
7 technology, I'm going to show you what's been marked
8 Defendant's Exhibit 2. Is that the transcript that was
9 taken from that audio?

10 A Yes, it is.

11 Q That also appears to be fair and accurate?

12 A Yes.

13 THE COURT: How about let's let the jury and me
14 step out for a minute while we get all that fixed,
15 okay?

16 MR. McGUIRE: Sure. Thank you, Judge.

17 (WHEREUPON, the jury exited the courtroom at
18 2:30 p.m. Recess taken until 2:36 p.m.)

19 THE COURT: All right, Mr. Ropp.

20 MR. McGUIRE: Judge, can we approach just quickly?

21 THE COURT: Yes.

22 (WHEREUPON, a bench conference was held off the
23 record in the absence of the jury.)

24 (WHEREUPON, the jury came into open court at
25 approximately 2:37 p.m.)

1 BY MR. MCGUIRE:

2 Q Officer Shelton, we're going to go ahead and
3 listen to that audio now. And if you would, just
4 follow along in the transcript that you've been
5 provided.

6 A Okay.

7 (Audio recording plays from 2:38 p.m. to
8 2:41 p.m.)

9 BY MR. MCGUIRE:

10 Q And, again, that's the audio from you being on the
11 scene talking to Mike Guthinger?

12 A Yes.

13 Q And it corresponds with the transcript there --

14 A Yes, it does.

15 Q -- that you have?

16 MR. MCGUIRE: And I think I just -- I think I've
17 already moved the audio in evidence, Judge, but just to
18 be sure, I want to move the transcript and the audio in
19 evidence.

20 THE COURT: What says the State?

21 MR. HIXSON: It's fine.

22 THE COURT: Without objection.

23 MR. MCGUIRE: If I could have just one second,
24 Judge.

25 Officer Shelton, that's all I have for you. Thank

1 you, ma'am.

2 THE WITNESS: Thank you.

3 MR. McGUIRE: Answer any questions they might
4 have.

5 CROSS-EXAMINATION

6 BY MR. RICHARDSON:

7 Q Officer Shelton, I just have a few questions for
8 you.

9 Did you say that you had reviewed the audio and
10 also this transcript?

11 A Yes.

12 Q All right. Does that fairly and accurately depict
13 what was said?

14 A Yes.

15 Q All right. And who gave you that statement?

16 A Mr. McGuire.

17 Q I mean, whose words? Is that Guthinger and you?

18 A Oh, yes, that's me.

19 Q Will you read what Guthinger said to you.

20 A The whole thing? That big, long paragraph?

21 Q Yes, ma'am.

22 A "I got a shit load off. Joe wants to get a
23 coffee. I hate this place up here, but we came up and
24 there's this WM, WF, and BM in a jersey getting a
25 coffee. He said -- he is acting like an idiot to begin

1 with, and Joe goes -- he goes 10-60, 10-61, 10-32
2 suspect. And I go -- I said -- I said -- I got --
3 let's go call so and so and have them meet us up here.
4 So we go out and get the phone. And he said, I'll do
5 it on the radio. And he walked outside and said, Hey,
6 buddy, how you doing? You know me. I stopped you
7 before and said, Be cool. And he said, Give me your
8 I.D. Oh, I got that shit taken care of, you know. And
9 Joe goes, Just let me see your I.D. because I don't
10 remember how to spell your name. And he is running it
11 right there. And then the guy threw something out and
12 I was with him. And everything was cool right there.
13 And Joe goes, Well, go get the driver in that car,
14 that's -- that's that white guy's I.D. I walked, I
15 say, Hey, buddy, can I have your I.D. here? And at
16 that time Joe, he starts -- the BM starts walking
17 around the front of the car. So Joe is following him.
18 And all of a sudden I hear Joe, Put -- put your hands
19 on your head. Put your hands on your head because --
20 to see if I like -- a gun print. And we didn't see
21 anything, and then Joe got him by -- put your hands --
22 let me see your hands. I heard a pop. I went -- I had
23 to run around the car. I got up. I drew my gun on
24 him, and he's running to get behind the silver car, and
25 then a third shot. I was -- boom, boom. I was just

1 rattling them off. I took cover behind the silver car
2 that's all -- that's all shot up. Joe was down."

3 Q Thank you, Nicole.

4 Nicole, earlier, and Mr. McGuire alluded to this,
5 but we saw a video of you making an ordinary traffic
6 stop.

7 A Yes.

8 Q Do you remember approximately where that was?

9 A It was at 11th Avenue and Kings Highway.

10 Q And Chad Mullinix came up and helped you with that
11 stop?

12 A Yes, he was my backup officer.

13 Q Before that stop was over or complete, we saw you
14 run off when Mike called out, "Shots fired, officer
15 down."

16 A Yes.

17 Q All right. And that became the most important
18 thing in your mind at that time?

19 A Yes.

20 Q You didn't know who was down but that an officer
21 had been shot?

22 A Yes.

23 Q And you immediately left Circle K and went to
24 Dunkin' Donuts?

25 A Yes.

1 Q And when you got to Dunkin' Donuts, where did you
2 park your car?

3 A It was just past the Dunkin' Donuts store. It was
4 about 31st Avenue.

5 Q Was gunshots still going on when you pulled up?

6 A No.

7 Q All right. Was the car with Amber Counts and
8 Luzenski Cottrell still there when you pulled up?

9 A Yes, it was.

10 Q All right. How long would you say that you were
11 there and that car is still in the parking lot?

12 A Maybe a minute.

13 Q All right. Did you approach while that car was
14 still in the parking lot?

15 A I start to, yes.

16 Q All right. Was there anybody -- did you see
17 Luzenski Cottrell or Amber Counts in that vehicle?

18 A Cottrell in the backseat.

19 Q You did see Cottrell in the backseat?

20 A Uh-huh.

21 Q Did you see the car back out?

22 A Yes, I did.

23 Q When the car backed out, could you see Joe?

24 A No.

25 Q Okay. When did you find out that Joe had been

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1 killed?

2 A My idea of it is when he closed his eyes in my lap
3 right there on scene.

4 Q So when you first came up to Joe, his eyes were
5 open?

6 A Yes.

7 Q Okay. But he wasn't able to communicate with you?

8 A No.

9 Q All right. And is that -- was Joe gone when you
10 talked with Mike?

11 A Yes.

12 Q So Joe had already been taken by EMS?

13 A Yes.

14 Q And you just asked Mike what had happened?

15 A Yes.

16 Q You've talked with Mike since?

17 A Yes, I have.

18 Q Have you ever heard anything differently than this
19 is what happened?

20 A No.

21 Q That Mike, repeatedly restating Joey's words were,
22 "Show me your hands" or "Put your hands on your head"
23 or something to do with hands over and over and over?

24 A Yes.

25 Q And something to do with Luzenski Cottrell's hands

1 is what caused Joe to raise his voice?

2 A Yes.

3 MR. McGUIRE: Objection. Speculation. She can't
4 speculate as to Officer McGarry.

5 THE COURT: The jury will disregard the response
6 to the last question.

7 BY MR. RICHARDSON:

8 Q Every time you've heard this story, it always
9 dealt with Joe asking to see Luzenski Cottrell's hands?

10 A Yes.

11 Q Now, whether it was "Show me your hands" or "Put
12 your hands on your head," has that ever changed?

13 A No.

14 Q Okay. But it always dealt with hands?

15 A Yes.

16 Q Now, what did you do -- you said you came up. The
17 car had left. You went up and started talking to Joe.
18 Was there anything else that you saw that could help
19 this jury determine the facts around this murder?

20 MR. McGUIRE: Objection. Vague.

21 THE COURT: Restate your question.

22 BY MR. RICHARDSON:

23 Q Did you do anything else during that time?

24 A I performed CPR on Joe.

25 Q Okay. Did you see anything else of Cottrell?

1 A His I.D. His identification card.

2 Q Okay. And where was that?

3 A It was on my side of Joe, which I was on the right
4 of him.

5 Q Okay. Did you see Joe's gun had been pulled?

6 A I do not remember seeing his gun.

7 Q All right. One second, Nicole.

8 Yeah, I think you alluded to this, but when you
9 were talking to Mike and that conversation was
10 captured, that isn't how Mike usually talks, is it?

11 A No, no. Mike's a very low-key, even-keeled
12 person, and he was pretty shaken up.

13 Q And that was certainly broken sentences. Mike
14 doesn't usually talk in broken sentences?

15 A No, he doesn't.

16 Q Would it be fair to say that Mike was still under
17 the stress of the situation?

18 A I believe so.

19 Q How many minutes after Joey had left in the
20 ambulance did you ask Mike what had occurred,
21 approximately?

22 A The whole thing seemed like it lasted forever, so
23 maybe about a couple minutes.

24 Q So this was just a few minutes after Joe had left
25 in the ambulance?

1 A Yes.

2 Q Was Mike helping you render aid at that point?

3 A Yes, he was.

4 Q Was anyone else helping you render aid to Joey?

5 A There was other people next to me. I think
6 Officer Arroyo was checking for a pulse while me and
7 Mike were working on Joe.

8 Q So it would have been you, Arroyo, and Mike?

9 A Mike and I were the -- yeah, Mike and I were
10 talking to Joe and working with Joe. And there was
11 another one, Officer Arroyo, I think, to my right.

12 Q But no doubt the three of you guys were there
13 until the ambulance came?

14 A Yes.

15 Q The ambulance came, loaded Joey up to take him to
16 the hospital?

17 A Yes, we helped load him.

18 Q You helped load him. And then within two, three,
19 four minutes you asked Mike, "What happened here?"

20 A Yes.

21 Q And that's the answer that Mike gave you?

22 A Yes.

23 MR. RICHARDSON: All right. No further questions.

24 Thank you.

25 MR. MCGUIRE: Nothing further, Judge. Thank you.

1 THE COURT: You may step down. Thank you very
2 much.

3 MR. RICHARDSON: May she be released from her
4 subpoena?

5 MR. MCGUIRE: Yes, of course.

6 THE COURT: I have no objection to that. You're
7 released from your subpoena.

8 MR. MCGUIRE: Your Honor, the defense calls
9 Mr. Lloyd Kendle.

10 THE COURT: All right. Have Mr. Kendle come
11 around.

12 MR. MCGUIRE: He's coming from the back, Judge.
13 He's in prison.

14 MR. RICHARDSON: Your Honor, before we get
15 started, can we get his Social and his date of birth
16 for running NCIC?

17 THE COURT: Certainly.

18 MR. RICHARDSON: Mr. Kendle.

19 (Mr. Richardson confers with Mr. Kendle.)

20 LLOYD KENDLE,

21 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

22 THE WITNESS: Lloyd Kendle. Last name
23 K-e-n-d-l-e.

24 DIRECT EXAMINATION

25 BY MR. MCGUIRE:

1 Q Good afternoon, Mr. Kendle.

2 A How you doing?

3 Q I'm good.

4 You used to live in Myrtle Beach; is that right?

5 A Yes, sir.

6 Q And did you have a little store in Myrtle Beach?

7 A Yes, sir.

8 Q Did Officer McGarry patrol your area where your
9 store was?

10 A Yes, sir.

11 Q Did you know him?

12 A I knew of him as a police.

13 Q Right. You weren't friends with him; you didn't
14 go out with him?

15 A No, sir.

16 Q You knew that he was an officer in your
17 neighborhood?

18 A Yes, sir.

19 Q Did there come a time where you saw him pull over
20 Mr. Cottrell?

21 A I seen him pull over that gentleman there, but I
22 didn't know his name or nothing like that.

23 Q Right. You don't know Mr. Cottrell?

24 A No, sir.

25 Q You're not friends?

- 1 A No, sir.
- 2 Q You're not related?
- 3 A No, sir.
- 4 Q But you saw Officer McGarry pull over
- 5 Mr. Cottrell?
- 6 A Yes, sir.
- 7 Q This man here?
- 8 A Yes, sir, in front of my store.
- 9 Q Okay. And tell me, what did you see? How did
- 10 Officer McGarry pull over the car?
- 11 A He had on -- not the blue lights, but the caution,
- 12 regular lights. They was blinking.
- 13 Q The --
- 14 A Regular headlights.
- 15 Q Okay. Not the sirens or the blue lights?
- 16 A No, sir, he didn't have them on.
- 17 Q The regular lights of the car?
- 18 A Yes, sir.
- 19 Q And did the car pull over?
- 20 A Sir?
- 21 Q Did Officer McGarry pull the car over?
- 22 A Yes, sir.
- 23 Q Was that in front of your store?
- 24 A Yes, sir.
- 25 Q Did you see Officer McGarry approach the car?

1 A Yes, sir.

2 Q Did he speak to the driver?

3 A Yes, sir.

4 Q Who was the driver?

5 A The gentleman sitting right there.

6 Q Okay. Was there a request for identification or
7 anything?

8 A He asked him for his driver's license, his I.D.
9 card.

10 Q Okay. And what happened after that?

11 A This gentleman here give him his driver's license
12 out of his pocket. And he reached over to get the
13 registration out the glove compartment, but he couldn't
14 find the registration, so the officer was standing
15 there talking to him.

16 Q Okay. And did you hear any words that were angry?
17 Did Mr. Cottrell protest?

18 A He just told him, he said, "I'm tired of you
19 pulling me." He said, "You done pull me two or three
20 times." And he said, "What you pulling me about, this
21 white woman?"

22 Q Was there a white passenger in the car?

23 A Yes, sir.

24 Q A female?

25 A A lady.

1 Q Okay. And did Officer McGarry still have the
2 driver's license?

3 A Yes, sir.

4 Q Did Mr. Cottrell pull off and leave?

5 A No. Him and Mr. -- him and the police stood there
6 and talked for two or three minutes, but the police was
7 the one doing the talking, Joe.

8 Q Officer McGarry talked at Mr. Cottrell for a
9 little while?

10 A Yes, sir.

11 Q Okay. And ultimately, does Mr. Cottrell pull off
12 and leave?

13 A After the officer told him he wasn't going to give
14 him the license back.

15 Q So Officer McGarry said, "I'm going to keep this
16 license"?

17 A "I'm going to keep this license." Then this
18 gentleman -- the gentleman then pulled off and went
19 around the curve.

20 Q And when he pulled off, was Officer McGarry still
21 holding his driver's license.

22 A Yes, sir.

23 MR. McGUIRE: That's all I have for you, sir.

24 Thank you.

25 THE WITNESS: Yes, sir.

1 CROSS-EXAMINATION

2 BY MR. HIXSON:

3 Q Afternoon, sir. How are you?

4 A How you doing, sir?

5 Q I see that you are in the custody of the South
6 Carolina Department of Corrections.

7 A Yes, sir.

8 Q Do you mind the telling Court -- I beg the Court's
9 indulgence, your Honor.

10 We're going to wait on your NCIC to make sure that
11 we know the information before we wade into that.

12 Where are you housed?

13 A Where I do what now?

14 Q Where are you housed? At what facility in South
15 Carolina Department of Corrections are you --

16 A I'm in Lieber Correctional Institution.

17 Q You're in Lieber?

18 A Yes, sir.

19 Q Okay. During your period of time in Lieber, have
20 you -- I can't say that either.

21 Let's just talk about the facts of that incident
22 specifically. Okay?

23 A Yes, sir.

24 Q Where were you located? In other words, were you
25 on a curb? You sitting on a front porch? In front of

1 your store?

2 A I'm on the Main Street of Canal Street. It ain't
3 but one way, about three blocks up the street from 501
4 to 10th Avenue. But it don't go to 10th Avenue; it
5 goes straight to a dead-end. My store is sitting right
6 on the corner.

7 Q Okay. And so this -- what time -- about how long
8 ago do you think this was, this incident?

9 A I'm going to say at least three to four years
10 because I've been in jail for three years just about.

11 Q Okay. So you think it was about three or
12 four years ago?

13 A Yes, sir.

14 Q Okay. So what is it, 2014? So you're talking
15 about 2011, you think, about that time?

16 A No, sir. It was like 20- -- I want to say 2010 or
17 2011. I'm not exact. Because I left in 2012.

18 Q Okay. So you think probably about -- this whole
19 incident probably happened sometime in 2010?

20 A Nine or '10. Somewhere in that area.

21 Q Okay. Fair enough.

22 And how did you come to know -- I mean, there's a
23 lot of folks probably coming and going on Canal Street.
24 How did you come to identify of all of the folks back
25 and forth from Myrtle Beach recognize Mr. Cottrell?

1 Did you know him prior to this?

2 A I don't know the man. I don't know him at all. I
3 met him when Joe had him on the street in front of my
4 store. That's what I met him. I mean, that's when I
5 seen him --

6 Q Okay.

7 A -- when Joe had him in front of my store.

8 Q Okay. I understand.

9 What kind of vehicle was Officer McGarry driving?
10 Was he in a marked unit?

11 A He was driving a blue -- a blue and white crown
12 Victoria.

13 Q Like a normal marked police --

14 A A police car, a patrol car.

15 Q A patrol car?

16 A Yes, sir.

17 Q Okay. Well, and you know that Myrtle Beach street
18 crimes units, they wear different kind of uniforms.
19 Some of them wear blue uniforms, like the officers in
20 the back, black, it depends upon -- do you recall what
21 kind of uniform Officer --

22 A Joe was wearing a blue -- I mean, a black -- at
23 that time it was blue. Joe was wearing a blue uniform
24 just like the two gentlemen back there in the back got
25 on.

1 Q Okay. And I believe you just testified this was
2 2010 that you --

3 A I'm saying it was 2010 or '9. I'm not exactly,
4 you know, up with that date.

5 Q Okay. Fair enough.

6 Were you aware of the fact that Officer McGarry
7 had been dead for eight years prior to this?

8 A Well, I don't know how long he's been dead, but I
9 know when I seen him. That's all I know. Because I
10 know him by being in my neighborhood.

11 MR. HIXSON: Okay. I have no further questions,
12 your Honor.

13 MR. McGUIRE: Nothing further.

14 THE COURT: You stay step down. Thank you, sir.

15 MR. McGUIRE: The defense calls Anita McGarry.

16 ANITA McGARRY,

17 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

18 THE WITNESS: Anita McGarry, M-c-G-a-r-r-y.

19 DIRECT EXAMINATION

20 BY MR. McGUIRE:

21 Q Afternoon, Mrs. McGarry.

22 A Afternoon.

23 Q You and I have spoken before, and I'm sorry we
24 have to meet like this, under these circumstances. I'm
25 just going to ask you a very, very short question.

1 When you were cleaning out Joe's apartment, did he
2 have a little home office area, like a business area?

3 A I wasn't cleaning it out.

4 Q I'm sorry. Did you go to your son's apartment and
5 did you find a driver's license or I.D.?

6 A I -- yes, I did. Yes, I did.

7 Q And did you -- I think you gave it to your
8 husband?

9 A It was amongst all Joe's belongings, just --
10 actually, it was a haunting because I looked over and I
11 saw Mr. Cottrell's driver's license, and I knew he had
12 just killed my son.

13 Q I understand. That must have been a very unusual
14 moment. But you gave -- you gave the I.D.,
15 Mr. Cottrell's I.D., to your husband?

16 A Yes.

17 Q And he turned it over to law enforcement?

18 A Yes.

19 MR. McGUIRE: That's all I have for you, ma'am.
20 Thank you.

21 CROSS-EXAMINATION

22 BY MR. HIXSON:

23 Q Hi, ma'am. How are you?

24 A Hi.

25 Q I've just got a couple real context questions.

1 Nothing much. Okay?

2 So, Anita, around the time -- we're going to go
3 quick through this and get -- around December 29th,
4 2002; were you living in Myrtle Beach, or where were
5 you living at the time when Joe was down there working
6 for Myrtle Beach?

7 A No, we lived in Warwick, Rhode Island.

8 Q Okay. And then you get the tragic news. And then
9 you have to take care of some personal issues, I guess,
10 don't you, then, when you hear about the loss of your
11 son?

12 A Personally, I -- it was just entering the house.
13 I didn't think I could go back.

14 Q Okay. And when you say --

15 A And it was a decision to just go back, and it
16 was -- it was -- it was very bad.

17 Q Okay.

18 A Very bad.

19 MR. McGUIRE: Your Honor, I've got a matter of law
20 to take up.

21 THE COURT: All right. Please send the jury out.
22 (WHEREUPON, the jury exited the courtroom
23 at 3:05 p.m.)

24 THE COURT: Counsel, shouldn't this be addressed
25 in the victim impact portion of the sentencing phase?

1 MR. HIXSON: Absolutely, your Honor. I don't want
2 to get into any of that at all. I don't want that.

3 Ms. McGarry returned police items, including
4 ticket books and things like, through her husband back
5 to the police department. That's what I'm trying to
6 get through, but I don't know how else to get to the
7 context without saying she was cleaning her son's stuff
8 up to give it back. That's why he had --

9 THE COURT: Is that even relevant, that he may
10 have turned back over the tickets? Are we going
11 anywhere with it?

12 MR. HIXSON: It's not my witness. I know that he
13 must want to put that in for some reason. I don't want
14 it. I don't want it --

15 THE COURT: I'll just -- just ask the question:
16 Did you also turn over ticket books and things of that
17 nature?

18 MR. HIXSON: That's it. That was it.

19 THE COURT: Bring them back.

20 (WHEREUPON, the jury came into open court at
21 approximately 3:07 p.m.)

22 THE COURT: All right. We have our jury back.
23 You may proceed.

24 MR. HIXSON: Thank you, your Honor.

25 BY MR. HIXSON:

1 Q I'll get straight to the point again.

2 After Joe's passing, did you find and recover
3 several duty police items at Joe's apartment that you
4 returned to Myrtle Beach Police Department?

5 A Yes, I did.

6 Q And among those effects, did you find Luzenski
7 Cottrell's driver's license?

8 A Yes.

9 Q And you returned that, gave that to Myrtle Beach
10 Police Department?

11 A Yes.

12 MR. HIXSON: I have no further questions.

13 MR. MCGUIRE: Nothing further, Judge.

14 THE COURT: All right. You may step down. Thank
15 you.

16 MR. MCGUIRE: Judge, if we could approach on
17 scheduling.

18 THE COURT: Certainly.

19 (WHEREUPON, a bench conference was held off the
20 record in the presence of the jury, but out of
21 the hearing of the jury.)

22 THE COURT: Take the jury out. We need to put
23 something on the record.

24 (WHEREUPON, the jury exited the courtroom
25 at 3:19 p.m.)

1 THE COURT: Okay.

2 MR. McGUIRE: Thank you, your Honor.

3 Our next witness will be Nathan Johnson, who is
4 the detective on the Richard Hartman murder
5 investigation. He's the one who asks for information
6 regarding Mr. Cottrell and requested that information
7 from the Myrtle Beach Police Department. And this is
8 where the "Suspect, shooting, county" information comes
9 from that was disbursed and eventually got to Joe
10 McGarry.

11 Part of our case is showing the discrepancy
12 between what Nathan Johnson actually knew, which was
13 very scant information regarding Mr. Cottrell, and it
14 didn't warrant the term "suspect." It was more of a
15 person of interest or a witness that we would want to
16 talk to.

17 The only thing that they had on Mr. Cottrell at
18 the time, at that moment in time, was that he had been
19 a former driver for the escort service, he knew and
20 dated some of the girls, got one of the girls pregnant
21 sometime in the past, was friends and acquaintance with
22 Mr. Hartman, they rode WaveRunners together, and that
23 he also supplied marijuana to Mr. Hartman, even though
24 one or two other people said he also supplied cocaine.

25 THE COURT: Let me ask you this: Don't we run

1 into some difficulty doing that?

2 Mr. Johnson -- in that case, you're talking about
3 not necessarily prior bad acts, not necessarily
4 character. What you're talking about -- it's not a
5 prior admission. It would be excluded along with
6 hearsay rule, 801. What you're talking about is
7 essentially hearsay, is it not, that Mr. Johnson --

8 MR. HIXSON: Your Honor, we believe it's properly
9 excludable, just a simply 401 relevance analysis. And
10 if you do find it's relevant, we think it's excludable
11 under 403. In other words, any effort -- because of
12 the limitations of relevance, as your Honor pointed out
13 prior in the discussion, what Nathan Johnson thought is
14 not material to what Joe McGarry thought. Everyone
15 agrees that the ten code, the reference of a shooting
16 suspect, and that is correct, is what was in the mind
17 of the officer at that particular time.

18 Now, the good faith exception, that's not what
19 we're talking about. He did rely in good faith and had
20 a good reason to because in order to show that he
21 was -- Luzenski Cottrell was indicted for that, that
22 has to come in under a prior bad act to show that we're
23 not intentionally misleading this jury. So we believe
24 probably a 401 relevance -- it's simply not relevant to
25 the presentation of facts. And one of the reasons we

1 exclude that evidence is undue litigation of the
2 issues, it's a waste of time, it's potentially
3 misleading to the jury. And what it will trigger is a
4 significant problem with maintaining a fair trial for
5 Mr. Cottrell. In other words, 403 is going to tip it
6 way over, it's not particularly relevant, and the
7 prejudicial effect to Mr. Cottrell really skyrockets
8 because it's simply not relevant to what Joe McGarry
9 thought.

10 THE COURT: Mr. McGuire, we've heard testimony
11 from Officer Prock, I believe, about what information
12 she received, what information she shared with Officer
13 McGarry. What difference does it make -- what
14 probative value would Mr. -- Officer Johnson's sources
15 or the information that he had really have in this
16 case? What difference does it make what information he
17 had or where he got it? The issue is whether or not he
18 passed that information on to Myrtle Beach and Myrtle
19 Beach shared it with Mr. -- or Officer McGarry. And
20 we're talking about his state of mind. Does it make
21 any difference how reasonable Officer Johnson's
22 assumptions may have been?

23 What if Officer Johnson had absolutely nothing, he
24 just plain made it up, just had no basis for it,
25 renegade policeman? I'm just making it up about Bill

1 McGuire. And he issues a BOLO or whatever or issues a
2 warrant, has a warrant issued, and an Horry County
3 officer arrests you on that warrant, are you suggesting
4 that that officer who made the arrest is not acting in
5 good faith?

6 MR. MCGUIRE: No, sir. What I'm saying is in that
7 situation, even acting in good faith, if I'm completely
8 innocent and it was just made up, I would have the
9 right to resist an unlawful arrest.

10 THE COURT: Are you saying that the officer then
11 is responsible for going behind his sources and
12 determining whether or not there was probable cause to
13 issue a warrant or anything of that nature?

14 What if it's a warrant from another state?

15 MR. MCGUIRE: What I'm saying is that -- that when
16 the information comes from a collateral police agency
17 and not the vertical chain of command, there is no good
18 faith exception.

19 THE COURT: Can you show me some authority for
20 that? I mean, can you pass up some case law?

21 MR. MCGUIRE: Yes, sir.

22 THE COURT: If you can, please do that. That may
23 make it something else, something different. You know,
24 maybe all of a sudden it becomes relevant. And I'm
25 sure that it will make a difference now whether Myrtle

1 Beach ever executes one of Horry County's warrants or
2 Horry County is willing to do Myrtle Beach or Myrtle
3 Beach willing to do North Myrtle Beach.

4 MR. HIXSON: And then --

5 THE COURT: I find it difficult to believe that
6 that is the case, but --

7 MR. HIXSON: The difficulty that we follow is --
8 and it relates to the probative value situation, that
9 even if that's the case --

10 THE COURT: It's whether or not he acted
11 reasonably --

12 MR. HIXSON: That's right.

13 THE COURT: -- in conducting a pat-down.

14 MR. HIXSON: It's not --

15 THE COURT: Subjectively, looking at it, were his
16 acts reasonable? Did he have articulable suspicions
17 that were justified?

18 MR. HIXSON: Okay. And along the lines of that,
19 we'd also parallel that to a third party guilt issue
20 where -- Luzenski Cottrell was indicted for this.
21 There is probable cause for an arrest for him for this.
22 To make representations that there isn't any or wasn't
23 any is not true. And in order for us to defend that,
24 we actually have to bring that up, which is -- we got
25 all kinds of prejudicial value to do it, to set the

1 record straight, to prevent that improper perception
2 being in the jury room, then we're stuck up against it,
3 we can't relay those facts properly. And I think I've
4 articulated that several times, your Honor.

5 MS. NORRIS: Your Honor, but Mr. McGuire has
6 passed this one over to me.

7 Just with respect to this indictment and stuff,
8 what matters is what -- where we were in time on
9 December 29th, 2002 shortly after midnight.

10 There is no question -- Mr. Johnson has already
11 testified in pretrial proceedings, will again today if
12 we call him -- that he did not have probable cause, and
13 he --

14 THE COURT: Probable cause for an arrest?

15 MS. NORRIS: To arrest Mr. Cottrell on the Hartman
16 offense.

17 And with respect to the law, I apologize to the
18 State. I only have one case -- or one copy to hand up
19 to the Court, but I'm going to cite the United
20 States --

21 THE COURT: Do you have evidence to support your
22 position that Mr. Cottrell was being arrested at the
23 time of this difficulty for the Hartman case?

24 MS. NORRIS: Your Honor, I think Officer Guthinger
25 already testified that they were going to run him and

1 until they cleared him of the warrant check and patting
2 him down, he wasn't free to leave, which means he was
3 arrested. Officer Guthinger already said that.

4 MR. HIXSON: That -- yeah, that's fundamentally
5 not the case. We have always maintained the position
6 throughout this is, you have a voluntary police
7 interaction, then you have the Terry, which once those
8 questions are answered, you're not free to leave, but
9 once -- you don't have enough to rise to the level of
10 probable cause.

11 There are three different functions: A voluntary
12 interaction; the Terry interaction, which says I have
13 reasonable and articulable suspicion that says this
14 person -- criminal activity may be afoot. They check
15 him for warrants and they see that -- and want to pat
16 him down. He is not under arrest. He was never under
17 arrest. Terry fundamentally stands for the concept
18 that a police officer doesn't have to wait if they
19 believe there is articulable suspicion to get enough to
20 arrest him. He is never under arrest. We have never
21 asserted that. It is short of that. If the warrants
22 had come back and said, "Hey, he's under arrest," he
23 would have relied on that and placed him under arrest.

24 If the defendant had allowed Officer McGarry to
25 touch his waistband and had felt on the exterior of his

1 clothing a handgun, he would have been placed under
2 arrest. Had Joe had the opportunity once he saw the
3 weapon pulled and put in his face, he was going to be
4 placed under arrest, ultimately, and was able to use
5 lethal force back against him when he sees that weapon.
6 He was never going to be placed under arrest until
7 those questions were answered, and they were --
8 Cottrell killed him before those questions could be
9 answered. He was in a Terry situation, your Honor.

10 THE COURT: I want to see the authority for the
11 proposition that Mr. McGuire set forth that an officer
12 cannot reasonably rely on a collateral police agency.
13 It has to be vertical, not horizontal.

14 MS. NORRIS: I've got that, your Honor. That's
15 what I was trying to get to.

16 THE COURT: Okay. Then let's go ahead. Let's get
17 to it.

18 MS. NORRIS: On that point, once -- unless the
19 officer thinks there's ongoing crime right there, this
20 is not a Terry stop. That might be what they want to
21 argue, but their witness said -- and, you know, on this
22 one, I will cite *State vs. Brannon*, Court of Appeals,
23 South Carolina Supreme Court -- or South Carolina Court
24 of Appeals: To constitute an arrest, however, the
25 quintessential seizure of the person under our Fourth

1 Amendment juris prudence, the mere grasping or
2 application of physical force with lawful authority,
3 whether or not it exceeded in subduing the arrestee,
4 was sufficient.

5 Once he's grabbed, he's arrested. But Officer
6 Guthinger said even before that, "When we took his
7 I.D., he was stopped, he was arrested."

8 The case your Honor asked about is *United States*
9 *vs. Massenburg*. And let me cite it here, and then I'll
10 hand it up. And, again, I apologize. I don't have a
11 copy for the rest of us. But this is a case out of the
12 Fourth Circuit, 2011, that talks about when you can
13 rely on other officers' information. You can only rely
14 on the other officers' information if there is a
15 warrant or --

16 THE COURT: To do what? To do what, though?

17 MS. NORRIS: To arrest.

18 THE COURT: Okay.

19 MS. NORRIS: If Officer McGarry had a warrant, he
20 could have arrested. If his supervisor, who had direct
21 knowledge, said --

22 THE COURT: I'm familiar with that concept.

23 MS. NORRIS: -- "Go out and arrest." But relying
24 on a different agency, when that agency itself does not
25 have probable cause is --

1 THE COURT: Is that what it says, or does it
2 simply say under those two circumstances, you can?
3 Does it exclude information from other agencies?

4 MS. NORRIS: It says directly: The law seems to
5 be clear -- and this is page 493. The citation is 654
6 F. 3d 480. This is page 493: The law seems to be
7 clear that so long as the officer who orders an arrest
8 or search has knowledge of facts establishing probable
9 cause, it is not necessary for the officers actually
10 making the arrest or conducting the search to be
11 personally aware of the facts.

12 And it goes on, essentially, to say: Again, the
13 collective knowledge doctrine simply directs us to
14 substitute the knowledge of the instructing officer or
15 officers for the knowledge of the acting officer. It
16 does not permit us to aggregate bits and pieces of
17 information from among myriad officers, nor does it
18 apply outside the context of communicated alerts or
19 instructions.

20 And if I may approach, I'll just hand it up.

21 THE COURT: Yes.

22 MR. HIXSON: I don't have a copy of that. I don't
23 know what that says. I know that just on the
24 recitation we've heard, the standard for an arrest is
25 probable cause. It's a substantially higher standard

1 than a Terry frisk articulable suspicion standard. And
2 it does make sense intuitively to have probable cause,
3 it's such a -- it's a higher standard that you need to
4 know all that stuff.

5 But Joe McGarry had articulable suspicion of
6 Cottrell in the parking lot even after the 10-61, 10-32
7 in the parking lot. We have baggy clothing. We have
8 him not responding to the situation. In other words,
9 handing the I.D., saying, "I'm not going to let you pat
10 me down," and trying to avoid that.

11 He continued to develop additional articulable
12 suspicion after the initial ten codes go on. He was
13 never -- by the nature of the videotape that you hear
14 him say when he says, "Let me run your NCIC and let me
15 see if you got warrants."

16 If he knew he had warrants, he would have arrested
17 him then, and that is not inconsistent with our
18 position because he is not and never was under arrest.
19 He was going to be once the weapon was discovered. But
20 until then, it was still operating under articulable
21 suspicion, which is a lower standard, which allows you
22 to rely on your supervisor telling you that as well as
23 Horry County police and NCIC. We rely on the dispatch
24 and the National Crime Information System.

25 MS. NORRIS: The articulable suspicion has to be

1 of a crime afoot, criminal activity afoot. That does
2 not mean something you heard a month ago that may or
3 may not be reliable. And as far as --

4 THE COURT: You know, I asked this question --
5 asked this question before because in one of your
6 briefs that you passed up, the standard was -- what
7 that meant was that a crime was being committed or the
8 defendant had committed a crime. You know, I asked you
9 if you could tell me what the difference was.

10 MS. NORRIS: The difference is, your Honor --

11 THE COURT: Some courts say crime afoot --

12 MS. NORRIS: -- appreciable --

13 THE COURT: Some say crime afoot, others say a
14 crime is being committed, or a defendant has committed
15 a crime. Which is it?

16 MS. NORRIS: Well, sir, I agree with you, the
17 wording changes. Some of it says criminal activity
18 afoot, some of it says ongoing criminal activity. But
19 if you look at the facts in all of those cases, it's
20 either the officer observes a crime being committed or
21 what he believes is a crime being committed or has
22 information that within the recent past in that area,
23 you know, for example, a call goes in from a store
24 saying there was a robbery, here's the person defined
25 or described. If the officer sees him a couple blocks

1 away, that's articulable suspicion of ongoing activity.

2 THE COURT: Well, it would appear to me,
3 Ms. Norris, that this started out as a consensual
4 contact between Mr. Cottrell and the officer.
5 Everybody says it was very pleasant. They're just
6 talking, okay. He asked him for his identification.
7 At some point he wants to frisk him. I think that is a
8 Terry frisk situation. It evolves into that.

9 Massengale clearly says that just because you
10 refuse it, that doesn't give you the right to arrest.
11 And I understand that. But the issue is whether or not
12 the officer had the right to frisk. And to do so, he
13 just needed to know whether or not -- or have
14 reasonable suspicion, articulable suspicion, there was
15 either criminal activity afoot, the person was
16 committing a crime, or the person had committed a
17 crime. I don't know which it is because the same
18 language is used -- or all three things are used by the
19 courts in discussing this same issue. What was
20 available to him?

21 First of all, he had been told. It was in his
22 mind. There's no question, I don't think, in anybody's
23 mind that he said, "10-61, 10-32." Ample evidence of
24 that. "Suspect, shooting, gun."

25 It leads us to the question of whether or not that

1 information that he had received, whether or not that
2 information that was at hand was sufficient to justify
3 a Terry stop.

4 I don't know what went wrong with this thing and
5 where it went further. It obviously got to the point
6 where there was an arrest or arrest was certainly
7 contemplated. I will agree with you on that point.

8 What we have here is, Mr. McGuire, you want to
9 talk about the issue of how much information
10 Mr. Johnson had. I don't think that is relevant. I
11 think what is relevant is how much information
12 Mr. McGarry -- or Officer McGarry had. I think that's
13 the question here. If we get into all these other
14 things, you start opening the door talking about it,
15 you start trying to limit the State to allow the State
16 to pass through that door, I've got real problems with
17 it.

18 First of all, I don't think any of it is relevant
19 and I don't think any of it is probative. I think it
20 is highly prejudicial. If we play it your way, it's
21 prejudicial to the State. If we play it the State's
22 way, it's going to be prejudicial to your client. I
23 don't see where it serves any purpose to go down that
24 road. It's only going to confuse the issue. The jury
25 has already heard what was in Officer McGarry's mind.

1 What Officer Johnson knew is not going to expand it.
2 What Officer Johnson knew is not going to change it.
3 What we heard is the only evidence that I know of what
4 was in his mind. And we're just not going to go down
5 that road.

6 MR. HIXSON: Your Honor, can I provide some
7 authority, not for that --

8 THE COURT: Yes.

9 MR. HIXSON: -- just for the prior conversation
10 Ms. Norris had?

11 And I'm specifically referring to the *State vs.*
12 *Khingratsaiphon* case, 352 South Carolina 62.

13 The facts in that case was actually
14 Charlotte-Mecklenburg had issued -- and I'll quote from
15 page 4 of the opinion: Charlotte-Mecklenburg Police
16 Department and Lyman testified that he was contacted by
17 an agent with the State Bureau of Investigations in
18 North Carolina and, among other information, was
19 informed that an agent had a possible connection to a
20 shooting at the Aiken pawnshop.

21 That was another state agency offering in South
22 Carolina, and that was the basis for a proper Terry
23 stop. That was information flowing from one agency to
24 another, similar to the circumstance we have here. I
25 just want to cite that for the record, your Honor.

1 THE COURT: All right. Okay. Well, that's my
2 ruling, okay.

3 All right. Let's take a break now, okay. Thank
4 you.

5 (WHEREUPON, recess taken from 3:31 p.m.
6 to 3:44 p.m.)

7 MR. McGUIRE: Judge, if we could approach just one
8 second.

9 THE COURT: Yes.

10 (WHEREUPON, a bench conference was held off the
11 record in the absence of the jury.)

12 THE COURT: All right. We have Mr. Cottrell back
13 in. I would like to clear some things up, make sure
14 the record is complete.

15 I have -- I want to make sure there is a clear
16 understanding in my ruling a moment ago concerning the
17 presentation of evidence as to what Mr. Johnson may
18 have had concerning the Hartman killing and his contact
19 with Myrtle Beach Police Department.

20 I think the issue is what information was received
21 by Myrtle Beach, what had been passed on to Officer
22 McGarry, what was in Officer McGarry's mind. We have
23 heard that, that testimony. The defense has certainly
24 had an opportunity to cross-examine Officer Prock, who
25 was responsible for passing that information on. They

1 have discussed that with her.

2 If you want to put up a witness who would
3 contradict that, who would offer testimony that that
4 didn't occur or that that information was not passed on
5 to the Myrtle Beach Police Department and consequently
6 not passed on to Officer McGarry, I certainly would
7 allow that.

8 However, to go into what information was available
9 in the Hartman case, we're essentially going to try the
10 Hartman case. We're going to talk about everything
11 that was available, everything that wasn't available.
12 And, quite frankly, I don't think that is relevant.
13 What is relevant is the information to pass onto
14 Officer McGarry and what was the basis of his concerns
15 about the defendant. I think that to do so would
16 simply just confuse the issues, could mislead the jury.
17 I don't think it's necessary that it be done. I am
18 extremely concerned that if that door is opened, in
19 fairness to the State, the State would have an
20 opportunity to address those issues. And we're going,
21 if that happens, to get into any number of issues that
22 could be highly prejudicial to Mr. Cottrell. I
23 certainly don't want to do that.

24 My ruling is that I will allow testimony from
25 Officer Johnson that would negate what Officer Prock

1 has said. If the defense has something that would
2 indicate that that was not true, I would certainly
3 allow that. But to get into the Hartman case, to
4 essentially try the Hartman case here today, I do not
5 believe that it passes muster under 403 and I do not
6 believe that it is relevant under 401 and 402. And
7 that's my ruling.

8 MR. HIXSON: Thank you, your Honor.

9 THE COURT: All right. Now, are we prepared to go
10 forward? Do we have everything ready to go? The next
11 witness is ready?

12 Okay. If the jury is ready, come in. Let's bring
13 the jury in.

14 MR. McGUIRE: Judge, before they come in --

15 THE COURT: Mr. Ropp, one moment.

16 MR. McGUIRE: -- just to preserve the issue and
17 offer up a proffer.

18 THE COURT: It's preserved.

19 MR. McGUIRE: We would just state on the record
20 that failing -- if we were to not be able to go into
21 that information, it would be a violation of
22 Mr. Cottrell's Sixth Amendment right to present a
23 defense. It would also be a violation of his due
24 process rights under the Fourteenth Amendment. And it
25 would be a violation of heightened liability with

1 regard to the Eighth Amendment.

2 And just by way of a factual proffer, we would
3 just incorporate by reference the September 8th
4 testimony of Nathan Johnson when Scott Hixson and I
5 both examined Detective Johnson. I think that would be
6 sufficient for a proffer.

7 THE COURT: And I will allow that as part of -- I
8 think that was transcribed, and I will allow you to
9 introduce that as a Court's exhibit.

10 MR. McGUIRE: Thank you, your Honor.

11 (WHEREUPON, Court's Exhibit Number 4 was marked
12 for identification.)

13 THE COURT: And you may make reference to that.
14 And I don't know if we have it right now, but we would
15 at least -- do you want to mark it right now? Do you
16 have it available? If not, we can do so at the next
17 break.

18 MR. McGUIRE: I'll do it at the next break. I've
19 got a copy of it. I just have to edit it out a little
20 bit.

21 THE COURT: And I certainly hope that I have not
22 violated any of his due process rights.

23 Now, let's bring in the jury.

24 (WHEREUPON, the jury came into open court at
25 approximately 3:52 p.m.)

1 THE COURT: All right. We have all our jurors
2 back. We have Mr. Cottrell and his attorneys, as well
3 as the State's counsel. Let's go forward.

4 MR. McGUIRE: Thank you, your Honor. The defense
5 calls Dr. David Goltra.

6 If you would, sir, come around to the witness
7 chair.

8 DAVID GOLTRA, M.D.,
9 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

10 THE WITNESS: David Goltra, G-o-l-t-r-a.

11 DIRECT EXAMINATION

12 BY MR. McGUIRE:

13 Q Good afternoon, sir.

14 If you could, tell the jury what's your
15 occupation.

16 A I'm a physician. Specifically, I'm a
17 neuroradiologist and a diagnostic radiologist.

18 Q Okay. And with regard to your education, could
19 you give us a snapshot from college to completion of
20 your medical training.

21 A Sure. I went to undergraduate at the University
22 of Cincinnati after completing four years in the United
23 States Navy. I went to medical school at the Ohio
24 State University. After that I did a residency in
25 emergency medicine at the University of Cincinnati.

1 Practiced emergency medicine for about eight years in
2 Cincinnati and in Charleston.

3 MR. HIXSON: I'm going to stipulate. I'm sure
4 he's an expert in the field, just want to know what
5 field he's being offered up in. Radiology?

6 MR. McGUIRE: Radiology and examination and
7 analysis of CT scans.

8 THE COURT: He is so admitted as an expert in
9 radiology, radiology examination and CT scans, and he's
10 entitled to give an opinion in those areas.

11 MR. McGUIRE: Thank you, Judge.

12 BY MR. McGUIRE:

13 Q Dr. Goltra, the State concedes you're an expert.
14 How did you get involved in this case?

15 A I believe that you contacted me and asked me if I
16 would be able to determine the trajectory of a bullet
17 based on imaging studies that could be obtained.

18 Q Okay. And did you and I work together to have
19 Mr. Cottrell undergo some scans?

20 A Yes, we did.

21 Q And could you describe what they were?

22 A Well, Mr. Cottrell was taken to a facility in
23 Columbia, South Carolina called Palmetto Imaging, which
24 is an outpatient imaging center. And there he
25 underwent a high-resolution CAT scan, computed

1 tomography of his leg. You and I were both there. I
2 was there to supervise the study, make sure that the
3 appropriate images were obtained, and also to examine
4 Mr. Cottrell.

5 Q Okay. So you were able to do a visual physical
6 examination of Mr. Cottrell, and also he received the
7 scanning process?

8 A Yes.

9 Q And do you have visual aids for the jury with
10 regard to the scans?

11 A Yes.

12 Q Could you show them to the jury and explain what
13 we're seeing.

14 A Sure.

15 Q And, Dr. Goltra, the screen is -- or the machine
16 is warming up, so to speak. And when we play the
17 slides, we need you to come around, if we don't mind.

18 A Sure.

19 THE COURT REPORTER: Did we mark that?

20 MR. MCGUIRE: We're going to move the -- Judge,
21 I'm going to move --

22 (Counsel confer.)

23 (WHEREUPON, Defendant's Exhibits 6-8 were marked
24 for identification.)

25 MR. MCGUIRE: Judge, if we could approach.

1 (WHEREUPON, a brief bench conference was held
2 off the record in the presence of the jury, but
3 out of the hearing of the jury.)

4 THE COURT: All right. Let's take the jury out.
5 We need a minute. This technical stuff just throws us
6 all for a loop. We're doing the best we can.

7 (WHEREUPON, the jury exited the courtroom
8 at 3:58 p.m.)

9 THE COURT: Ms. Avant, could you do something for
10 me? When Mr. Ropp goes in now, make sure he closes
11 that door promptly.

12 FEMALE SPEAKER: Yes, sir.

13 MR. HIXSON: Your Honor, I sent Investigator Brown
14 down to my office to get the disk.

15 THE COURT: That's fine. We're at ease.

16 (WHEREUPON, recess taken from 3:58 p.m. to
17 4:08 p.m.)

18 THE COURT: When that screen comes down, from
19 their perspective, they're having some difficulty
20 because of glare. Is there anything we can do about
21 that?

22 MR. MCGUIRE: My understanding is no.

23 THE CLERK: No, sir.

24 THE COURT: Okay. All right. Mr. McGuire, I hear
25 you've got another request to pitch.

1 MR. MCGUIRE: I do. Your Honor, part of this
2 testimony involves a physical examination and display
3 of Mr. Cottrell, who is sitting in the floor in front
4 of the jury box. It will involve showing his left leg,
5 which was shot. And, obviously, after that
6 examination, we'll go into some slides, some CT scans.
7 But I don't want him sitting there just looking at the
8 jury, so after we do the physical examination, if we
9 could just take a short break and bring them right back
10 in and get Mr. Cottrell back to the table without, you
11 know, the deputies moving with him.

12 THE COURT: All right. We can do that quicker
13 than we can argue about it.

14 MR. MCGUIRE: Thank you, Judge.

15 THE COURT: Mr. Ropp.

16 (WHEREUPON, the jury came into open court at
17 approximately 4:10 p.m.)

18 THE COURT: All right. We have our jurors back.

19 Ladies and gentlemen, we're going to do something
20 that probably will be even more inconvenience to you,
21 but please humor me. It's something I want to do. I'm
22 going to have some brief testimony and examination.
23 I'm going to send you back in your room for just a
24 moment and then bring you back out, okay, then we'll
25 continue. All right?

1 MR. McGUIRE: Thank you so much, Judge.

2 BY MR. McGUIRE:

3 Q Dr. Goltra, part of your examination of
4 Mr. Cottrell was a physical visual examination?

5 A Yes.

6 Q And that was of his left leg that was shot?

7 A Correct.

8 Q And if you could, show the jury what you saw by
9 coming down here and showing them Mr. Cottrell's leg.

10 A (Witness complies.)

11 (Several jurors stand.)

12 THE COURT: Feel free to stand.

13 THE WITNESS: So Mr. Cottrell showed me his leg
14 when we were at the imaging center in Columbia. And
15 the entrance wound is this sort of dime-size scar right
16 here. It's just a little bit below his kneecap and
17 slightly on the outside of his leg but in the front.

18 This is a surgical scar from the pin and
19 immobilization device that was subsequently put in when
20 he went to the hospital. The exit wound is back here
21 on his calf. You can see -- do you want to stand up?

22 This is the exit wound back here on his calf.
23 It's a little bit bigger than the entrance wound, which
24 you would expect from a typical bullet. This is
25 another scar from the fixation device that was put in.

1 BY MR. MCGUIRE:

2 Q And, Dr. Goltra, is that about all you need to do
3 with the jury with regard to the physical and visual
4 examination?

5 A I think so.

6 MR. MCGUIRE: Okay. Well, what we'll do is set up
7 the technology and we'll bring you guys right back.

8 MR. MCGUIRE: Thank you, Judge.

9 THE COURT: Take them out for just a moment,
10 Mr. Ropp.

11 How long do you think we'll need?

12 MR. MCGUIRE: Two minutes, Judge.

13 THE COURT: All right. Just two minutes.

14 (WHEREUPON, the jury exited the courtroom
15 at 4:13 p.m.)

16 (Defendant returned to the defense table.)

17 MR. MCGUIRE: Judge, thanks for the accomodation.

18 THE COURT: We can bring them in, can we not?

19 MR. MCGUIRE: Yes, sir.

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

22 THE COURT: All right. We're going to continue.

23 And I think have some visual aids. And I understand
24 that it's not very easy to see the screen, that there
25 may be some glare going on. And I'm checking, but this

1 is the very best we can do. So if you absolutely can't
2 see it -- yes, sir?

3 JUROR: I can't really hear you, sir.

4 THE COURT: I said if you absolutely cannot see
5 it, we'll make some arrangement to bring you around in
6 front or something, but I ask you to please try to
7 follow the testimony. Okay?

8 All right, Mr. McGuire.

9 MR. MCGUIRE: Thank you, Judge.

10 BY MR. MCGUIRE:

11 Q Now, Dr. Goltra, if you could, tell the jury
12 generally what kind of scanning we're talking about and
13 what you're able to do with it.

14 A Okay. So the scan that was obtained is called a
15 CAT scan or CT scan, and it was obtained on what's
16 called a multi-detector machine. So the original CT
17 scans that came out back in the '70s would take one
18 slice and then move, take another slice and then move,
19 and then they would take all those slices and
20 reconstruct that information into pictures.

21 The modern era CT scanners -- and this machine is
22 absolutely a state-of-the-art machine -- take as many
23 as 64 or even more slices per rotation of the gantry.
24 And a gantry rotation takes place in a third of a
25 second, so you can get upwards of about 190 slices

1 through somebody in one second. So it's very, very
2 accurate and very, very precise in terms of the type of
3 imaging that's obtained.

4 Q Okay. And if you would, share with the jury and
5 show them the slides we're talking about.

6 A So this first slide is called -- this is actually
7 the first image that a technologist will obtain when he
8 or she does a CT scan. This is called a scanogram.
9 And this is -- they do some slices through the leg, not
10 the entire 64 slice, you know, all the way through the
11 leg, but they do a representative number of slices so
12 that they can re-create an image. And this looks a lot
13 like a plain x-ray. This looks like a plain x-ray that
14 you would get if you just took a regular x-ray of the
15 front of his leg.

16 And what we see here is -- so this would be the
17 outside of his leg over here. And this little density
18 right about there is a marker that was placed on the
19 entrance wound by the CT scanner. There's also a
20 marker down here by the exit wound that you can't
21 really see on this, but I'll show it in subsequent
22 images.

23 So you can see there's some deformity of this
24 bone. This is the tibia, and it was apparently
25 fractured by the bullet. You can see fragments of the

1 bullet as they came from the front downward to the back
2 and out through the calf. You can see a trail of
3 fragments that were left behind by the bullet.

4 Now, this is a screw that was placed in there by
5 the surgeon. Some of these other fragments are
6 fragments of bullet that are actually embedded in the
7 bone. There are even some fragments down here that I
8 suspect were left up here, but in the surgical process,
9 they go in there and they rinse things out and stuff
10 gets moved around. The surgeon really can't see all
11 this stuff. All he can see is the tissue that's right
12 before him. He can't see everything that's in there.

13 Q So is it fair to say that these little specks here
14 are sort of like a shedding of debris from a bullet?

15 A That's correct. It's sort of like a comet tail,
16 little tiny fragments that are left behind as the
17 bullet moves through the tissue.

18 Q Okay. And is that represented by the little white
19 specks?

20 A So that's a little fragment, that's a fragment,
21 that's a fragment, that's a fragment. If you look,
22 these generally line up along the expected trajectory
23 of the bullet based on the examination.

24 Q Okay. And do you have further visual aids for the
25 jury?

1 A Yes.

2 Q What are we looking at?

3 A So this is that same scanogram, just for reference
4 over here. This is one of the slices that was
5 obtained. That's the entrance wound marker that was
6 placed on the skin, okay. So we're really below the
7 level where we started to see bullet fragments at this
8 point.

9 So this is -- this slice was obtained right there.
10 So you can see it's below the level of the marker. And
11 you can see the trail of fragments that are left behind
12 as the bullet moved through the leg. You can see
13 there's even a scar in this muscle. This would be the
14 medial gastrocnemius muscle belly. There is a scar
15 right through it where the bullet traversed the muscle.

16 And this little device right here is actually the
17 marker that was placed on the exit wound.

18 Q Okay.

19 A So you've got entrance wound up here a little bit
20 higher, bullet going through, obliquely through the
21 leg, from the front on the outside to the back on the
22 inside.

23 Q Okay. I know you took a lot of scans. Do you
24 have any more for the jury?

25 A I think that's it. Yeah, that's it.

1 Q Let me ask you just the final question, which is:
2 To a reasonable degree of medical certainty, is the
3 entrance wound regarding this gunshot, is it where you
4 demonstrated for the jury on the front part of
5 Mr. Cottrell's left leg?

6 A Yes.

7 Q To a reasonable degree of medical certainty, is
8 the exit wound in his calf area?

9 A Yes.

10 Q At the rear of his leg?

11 A Yes.

12 Q With a downward trajectory?

13 A Yes.

14 MR. McGUIRE: That's all I have for you, sir.

15 Thank you. If you would, return to the stand and
16 answer any questions Mr. Hixson might have for you.

17 And, Judge, for the record, I would move Defense
18 No. 8 -- 6, 7, 8 into evidence. I believe it's without
19 objection.

20 MR. HIXSON: Without objection.

21 THE COURT: Without objection, it's admitted, 6,
22 7, and 8.

23 (WHEREUPON, Defendant's Exhibits 6-8 were
24 admitted into evidence.)

25 CROSS-EXAMINATION

1 BY MR. HIXSON:

2 Q I've just got a couple of questions for you, Doc,
3 after this thing settles down.

4 I notice the pin in the leg on the femur, I
5 guess -- excuse me -- tibia, I believe it was.

6 A Tibia.

7 Q The nature of the wound that Mr. Cottrell
8 sustained, I believe the tibia in your lower left leg
9 would be a weight-bearing bone in your leg. Fair
10 enough?

11 A Correct.

12 Q And after suffering a wound like that, would it be
13 difficult, if not impossible, for Mr. Cottrell to put
14 any weight on that leg?

15 A Well, I wouldn't say impossible because people can
16 do extraordinary things in a, you know, high-adrenaline
17 state. So it would be difficult to walk with any sort
18 of comfort or even run with any sort of comfort with
19 that sort of fracture that presumably occurred at the
20 time of the gunshot wound.

21 Q In essence, I guess what I'm saying is, if a leg
22 suffered that kind of impairment, isn't it true that
23 you would manifest an inability to bear your weight on
24 that leg with a reasonable degree of medical certainty?

25 A It would be difficult, but if you told me that

1 someone took a few steps or ran a few steps or was able
2 to stand for a few minutes, I wouldn't be surprised by
3 that.

4 MR. HIXSON: Okay. No further questions, your
5 Honor.

6 MR. McGUIRE: May he be excused, Judge?

7 THE COURT: Any objection?

8 MR. HIXSON: No, sir.

9 THE COURT: You are released from your subpoena.
10 Thank you.

11 MR. McGUIRE: Your Honor, at this time the defense
12 rests.

13 THE COURT: Very well. Ladies and gentlemen, if
14 you would, return to your jury room and we'll find out
15 what we're going to do.

16 (WHEREUPON, the jury exited the courtroom
17 at 4:23 p.m.)

18 THE COURT: All right.

19 MR. McGUIRE: Two matters, Judge. One is we renew
20 our motion for a directed verdict based on the grounds
21 stated before.

22 The other is I'm certain the Court wants to
23 question Mr. Cottrell whether he wanted to testify in
24 the defense case. He's prepared to say that he's
25 talked to us about it and choses not to --

1 THE COURT: I certainly do.

2 Mr. Cottrell, your attorneys tell me that the
3 defense is prepared to rest. Mr. Cottrell, do you
4 understand that you have an absolute right to testify
5 in this matter?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Okay. Let's swear him, please.

8 (WHEREUPON, the defendant was sworn.)

9 THE COURT: All right. Mr. Cottrell, at this time
10 I'm going to explain to you certain of your rights.
11 And if you don't understand anything that I say, please
12 let me know. All right, sir?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: And if you want me to explain anything
15 in a more detailed fashion, let me know that as well.
16 Do you understand?

17 THE DEFENDANT: Yes, sir, I do.

18 THE COURT: Now, we've reached the stage in trial
19 where your attorneys have begun to present your
20 defense. And you have the right to claim the
21 protections given you by the Fifth Amendment of the
22 Constitution of the United States. And this amendment
23 says in part: No person shall be compelled in any
24 criminal case to be a witness against themselves.

25 This means that you cannot be required to testify

1 in this case. You have the right to testify on your
2 own behalf; however, no one can make you testify. And
3 this is a personal right, and no one can waive this
4 right except you.

5 If you decide to testify, understand you will be
6 subject to the same rules that governs other witnesses.
7 You may be examined and cross-examined on any relevant
8 issue in the case. In addition, if you have any
9 convictions involving dishonesty or false statement for
10 crimes punishable by imprisonment for more than one
11 year and this Court determines that the probative value
12 of admitting this evidence outweighs its prejudicial
13 effect to you, the Solicitor will be able to introduce
14 your record to attack your credibility for that purpose
15 alone.

16 If you decide to testify, this decision must be
17 made freely, voluntarily, and intelligently with the
18 knowledge of the protections given to you by the Fifth
19 Amendment and the consequences of your decision to
20 testify.

21 If you decide not to testify, please understand I
22 will instruct the jurors they cannot give the fact that
23 you did not testify any consideration whatsoever. And
24 there is to be absolutely no prejudice to you because
25 you did not testify. It is left entirely up to you

1 whether or not to testify.

2 Let me tell you that I'm going to give you a
3 moment. You can talk to your attorney, family,
4 friends, anyone else, but the final decision will be
5 left entirely up to you.

6 Do you understand what I've explained to you?

7 THE DEFENDANT: Yes, sir, I do.

8 THE COURT: Do you have any questions about what I
9 have explained to you?

10 THE DEFENDANT: No, sir, I don't.

11 THE COURT: Now, have you discussed with your
12 lawyer whether you should or should not testify?

13 THE DEFENDANT: I have.

14 THE COURT: Do you wish to talk with your lawyer
15 any further at this point or anyone else about this?

16 THE DEFENDANT: No, sir.

17 THE COURT: Do you wish to testify?

18 THE DEFENDANT: No, sir, I don't.

19 THE COURT: Are you making this decision freely,
20 voluntarily?

21 THE DEFENDANT: Yes, sir, I am.

22 THE COURT: Do you need to ask me anything else
23 about this?

24 THE DEFENDANT: No, sir.

25 THE COURT: Do you understand your rights clearly?

1 THE DEFENDANT: Yes, sir, I do.

2 THE COURT: All right, sir.

3 I find that he has intelligently, voluntarily, and
4 freely waived his right to testify in this matter.
5 Thank you.

6 MR. McGUIRE: Thank you, Judge.

7 THE COURT: Okay. As to your -- and I want to
8 make it clear to you, Mr. Cottrell, your attorney said
9 he has rested, but I will allow him to reopen. I mean,
10 it's not too late. He can come back and you can
11 testify. Do you understand that?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: All right. Your motion?

14 MR. McGUIRE: Renew directed verdict motion based
15 on the same grounds stated before after the State's
16 case.

17 THE COURT: All right. And I appreciate your
18 motions, Mr. McGuire, and I would respectfully deny
19 them. I think there is a wealth of testimony that
20 would support the jury's decision in this matter and I
21 am going to let it go to the jury.

22 MR. McGUIRE: I understand, Judge.

23 Judge, could Dr. Goltra come around and get his
24 computer and excuse him?

25 THE COURT: Sure. Sure.

1 Were you planning on keeping it, Mr. McGuire?

2 MR. MCGUIRE: Well, I need to improve my level of
3 technology.

4 THE COURT: You excused him or asked for him to be
5 excused.

6 MR. MCGUIRE: Yes, sir.

7 THE COURT: All right. Gentlemen, what I would
8 like to do is to speak to you concerning a charge on
9 the law. I am very concerned about the charges in this
10 matter. Mr. Postal and I have been working on it. I
11 think he e-mailed sort of a preliminary draft. I know
12 it's not complete. I know we've got other things we've
13 got to do with it. But have you looked at it and do
14 you have matters that you want the Court to consider
15 concerning that charge?

16 MR. MCGUIRE: Well, Judge, I have not had a chance
17 to look at it, neither has Ms. Norris.

18 THE COURT: Well, let's do this: Let's take some
19 time.

20 MR. MCGUIRE: Yes, sir.

21 THE COURT: Let's take some time to look at it --
22 over it. Let's take -- would a half hour be enough?

23 MR. MCGUIRE: Yes, sir. And, Judge, based on your
24 ruling with regard to us putting up Nathan Johnson,
25 that sort of substantially changed my closing argument,

1 and I would request if we could close and charge
2 tomorrow.

3 THE COURT: I am leaning towards that very much.
4 In fact, I never like to split my charge from the
5 arguments.

6 MR. McGUIRE: Yes, sir.

7 THE COURT: I've just made it a rule that I don't
8 do that.

9 It is 4:30 right now. What if I do this. The
10 jury has been working hard, and we have -- the clerk
11 tells me they planned to take them out tonight.

12 Is that correct?

13 THE CLERK: Yes, sir.

14 THE COURT: Okay. And let's do this. Let's let
15 them do that. Let's just excuse the jury for this
16 afternoon. It's 4:30. The jury would not get the
17 case, probably 5 o'clock at the earliest, and then
18 another half hour to finish the charge, 6:30, then
19 probably an hour and a half to two hours for the
20 charge. We're getting late in the evening, and I just
21 don't want to do that.

22 I'll tell you what I'll do. I'll let the jury go.
23 I'll let you think about your charges. Please look
24 over what Mr. Postal has sent you. I have not had a
25 chance to look over it. I have been turning around

1 making suggestions to him throughout the trial or
2 presenting certain issues.

3 I would like to get an early start in the morning.
4 Can we have the lawyers in here at 8:30 in the morning
5 and let's talk about the charge?

6 MR. McGUIRE: Yes, sir.

7 THE COURT: All right. Let's be here at 8:30 to
8 talk about the charge. I do not think we'll need the
9 jury here in the morning until 9:30.

10 MR. McGUIRE: Yes, sir.

11 THE COURT: Okay. All right. Let's bring them
12 in, Laura.

13 Drew tells me he's continuing to work. He's got a
14 new one he wants to send you. And if you would, get me
15 a hard copy of your requested charges and send it to
16 Drew by Word Perfect -- Word.

17 (WHEREUPON, the jury came into open court at
18 approximately 4:34 p.m.)

19 THE COURT: All right. Ladies and gentlemen, as
20 you heard a moment ago, the defense has rested on this
21 first phase. And again, I do not make any suggestion
22 when I refer to it as first phase; just that this is
23 the first phase. They have rested on this first phase
24 of the trial. If we go forward this evening, it would
25 take us about another hour or longer to discuss the

1 charge, a couple more hours for arguments, and then
2 we'd have the charge. Essentially, we're going to put
3 you very late to even begin deliberations tonight, and
4 we don't want to do that, primarily because tonight
5 they're going to take you to one of my favorite
6 restaurants. They're going to take you over to the
7 Bistro. It's a very nice restaurant here in town.

8 Isn't that right? Isn't that where you're going
9 to take them?

10 THE CLERK: I'm not sure, your Honor.

11 THE COURT: Well, they told me that they would. I
12 hope they are. It is a very nice place.

13 I'm going to bring the lawyers back in early in
14 the morning and I'm going to be here with them, and
15 we're going to have everything ready to go.

16 I ask the folks in charge of you not to -- or I'm
17 going to tell them not to bring you back until 9:30,
18 because when you get here, I want to be ready to go.
19 And I think if we have you here at 9:30 we should be
20 ready to go. So I'm going to let you go home -- or
21 back to your hotel. Have a nice, restful evening, I
22 hope, and a nice meal, and we'll have you back in here
23 at 9:30, okay.

24 Thank you very much. Please remember all my
25 rules.

1 (WHEREUPON, the jury exited the courtroom
2 at 4:36 p.m.)

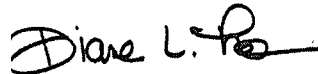
3 THE COURT: All right. Gentlemen, that's it until
4 in the morning. Please be here at 8:30.

5 (WHEREUPON, proceedings adjourned at 4:36 p.m.)
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1 Certificate of Reporter

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3 I, Diane L. Thommes, Official Court Reporter
4 for the Tenth Judicial Circuit of the State of South
5 Carolina, do hereby certify that the foregoing is a
6 true, accurate, and complete transcript of record of a
7 portion of the proceedings had and evidence introduced
8 in the trial of the captioned case, relative to appeal,
9 in the Circuit Court for Horry County, South Carolina,
10 on the 23rd day of September 2014.
11 This transcript may contain quoted material. Such
12 material is reproduced as read by the speaker.
13 I do further certify that I am neither of kin, counsel,
14 nor interest to any party hereto.

15 January 15, 2015

16 

17 _____
18 Diane L. Thommes, RPR, CRR
19 Circuit Court Reporter
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1 State of South Carolina
2 County of Horry In the Court of General Sessions

3
4 STATE OF SOUTH CAROLINA,)
5) 2003-GS-26-20
6 -vs-) September 24, 2014
7 LUZENSKI ALLEN COTTRELL,)
8 Defendant.) Volume VIII of X
9) Pages 2571 - 2731
10) Transcript of Record
11)
12)
13)

11 B E F O R E:

12 The Honorable Larry B. Hyman, Jr., Judge

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

15 Attorneys for the State:
16 Jimmy A. Richardson, II, Solicitor
17 Scott R. Hixson, Assistant Solicitor
Fifteenth Circuit Solicitor's Office

18 Attorneys for the Defendant:
19 Bill McGuire, Chief Attorney, Capital Trial Division
South Carolina Commission on Indigent Defense

20 Teresa L. Norris, Attorney at Law
Blume Norris & Franklin-Best, LLC

21 Diana Holt, Attorney at Law

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Diane L. Thommes, RPR, CRR
Circuit Court Reporter

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I N D E X

	<u>Page</u>
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E x h i b i t s

For the Court:

Marked	Description	I.D.	Admitted
5	Jury Charge	2609	
6	Defense requested jury charge	2717	
7	Jury Note	2719	
8	Jury Note	2721	

1 (WHEREUPON, court convened with all parties
2 present and the following proceedings were had
3 commencing at approximately 9:30 a.m.)

4 THE COURT: Gentlemen, our jury is here, but I
5 wanted to review with you the proposed charge. We did
6 something last night, Mr. Postal and I did, and we've
7 been sort of keeping you abreast of what we've been
8 thinking for the last couple of days.

9 Let's start with -- and I want to, if possible,
10 get everybody on board with this charge. And I think
11 it's fair that you have it before you argue, so let's
12 try to talk about that.

13 Mr. McGuire or Ms. Norris, I think you have it.
14 Okay.

15 Tell me, Ms. Norris -- you're standing -- what you
16 think.

17 MS. NORRIS: Yes, sir. I had initially edited the
18 document that Mr. Postal sent yesterday, which for the
19 most part, up until we get to talking about arrest, is
20 the same as your current charge. I had just made a few
21 wording requests. For example, on page 3, under
22 charge --

23 THE COURT: Let's go right through it, okay. On
24 page 3?

25 MS. NORRIS: Yes, sir.

1 THE COURT: All right. Tell me what you would
2 like.

3 MS. NORRIS: Rather than "indictments," it's just
4 one indictment.

5 THE COURT: And that's just a typo. It should
6 say, "The indictment charges the defendant." And,
7 again, we're not talking about multiple charges, just
8 the one charge, so we'll certainly do that. That was
9 just a typo. All right.

10 MS. NORRIS: On page 4, the middle of that second
11 paragraph where it says, "guilt has been proven by
12 evidence satisfying you," we would just request that
13 after that we add "all unanimously."

14 THE COURT: I don't have a problem with that,
15 quite frankly. It's just a matter of semantics. I
16 will do that.

17 MS. NORRIS: The last paragraph after the
18 language, "but it accompanies the defendant throughout
19 the trial," we request that you strike the word "until"
20 and put in instead "and does not end unless you
21 unanimously reach a verdict."

22 THE COURT: And it looks like the next sentence,
23 "satisfying all 12 of you of that guilt." I don't
24 really have a problem with any of that. I don't think
25 it makes any difference. But just as a matter of

1 clarity, I'll change that.

2 It looks like on page 5 you said, "remains with
3 the defendant unless" instead of "until." I have no
4 problem with that. And "satisfying all 12 of you," I
5 have no problem with it. It doesn't change it at all.

6 "Unless you -- unless all 12 of you," instead of
7 "you the jury"? Is that what you'd like, "all 12 of
8 you".

9 MS. NORRIS: Yes, sir.

10 THE COURT: I have no problem with that. It
11 really doesn't change anything.

12 Look on page 6, "unless you are firmly convinced
13 beyond a reasonable doubt," no problem with that.

14 "If, on the other hand, you think there is a real
15 possibility the defendant is not guilty, or simply that
16 the State has not proven guilt," I tell you what I'll
17 do. I would change that -- I don't think that there
18 should be an "or" there. I think they're the same. I
19 would change it and use, "a real possibility that the
20 State has not proven guilt beyond a reasonable doubt."
21 Okay? I mean, that's what not guilty means. Not
22 guilty in the law is really just a term of art we use
23 which means it has not been proved.

24 MS. NORRIS: Yes, sir.

25 THE COURT: I mean, I think to put both, it would

1 infer to the jury that they mean different things, and
2 they really don't. And I think you understand that as
3 well.

4 MS. NORRIS: Yes, sir.

5 THE COURT: But I would give you, "a real
6 possibility that the State has not proven guilt beyond
7 a reasonable doubt, you must give the defendant the
8 benefit of the doubt and find him not guilty." Okay?
9 Would that satisfy you?

10 MS. NORRIS: Yes, sir.

11 THE COURT: Okay. All right.

12 MS. NORRIS: The next suggestion was over on
13 page 9, I believe.

14 THE COURT: "After weighing all the evidence, if
15 you are not convinced unanimously" -- I really can't
16 read what you're putting there. "Unanimously" --

17 MS. NORRIS: "Meaning all 12 of you."

18 THE COURT: I have no problem with that. It's the
19 same thing.

20 "Or inform the Court that you have not reached a
21 unanimous verdict." I think that what we have is the
22 correct statement of the law, you must find him not
23 guilty. What's the purpose of "or inform the Court
24 that you have not reached a unanimous" --

25 MS. NORRIS: If they aren't unanimous, your Honor.

1 THE COURT: Let me hear from the State on that.
2 Everything else we've talked about is just a matter of
3 saying the same thing I said.

4 MR. HIXSON: That's right. Just I think that's
5 the third time we've put the "unanimous." I think it's
6 a sufficient and substantial instruction, and the way
7 your Honor has it is a correct statement of the law.

8 THE COURT: Well, no, the thing that I'm concerned
9 about is this, is what you -- have you looked at these?

10 MR. HIXSON: I have not seen the proposed change.

11 THE COURT. Okay. I'm sorry. The other thing
12 she's talking about is just where I say what the
13 finding is, I repeat that it must be unanimous, is
14 essentially what it says. But if you'd look at
15 page 9 --

16 MR. HIXSON: Yes, sir.

17 THE COURT: -- "After weighing all the evidence,
18 if you are not convinced unanimously, meaning all 12 of
19 you, of the guilt of the defendant beyond a reasonable
20 doubt, you must find the defendant not guilty."

21 And what she wants to add is, "or inform the Court
22 that you have not reached a unanimous verdict."

23 MR. HIXSON: I understand that. I don't believe
24 that's appropriate. Obviously, under an Allen charge,
25 you have to have a deadlock, and they have to express

1 that and not have the instruction invade the province
2 of the jury in that area.

3 THE COURT: I think that the way I have it,
4 Ms. Norris, is appropriate, and I would respectfully
5 decline that request. I don't want to confuse the
6 jury. They know what their burden is.

7 It looks like, then, you don't have anything until
8 page 13?

9 MS. NORRIS: Yes, sir.

10 THE COURT: "The burden of proof remains on the
11 State to prove guilt beyond a reasonable doubt to the
12 satisfaction of all 12 of you." I really don't have
13 any problem with that.

14 Murder. "The defendant is charged with murder.
15 The State must prove beyond a reasonable" -- we're on
16 page 14, Mr. Hixson. Look at the first sentence.

17 "The defendant is charged with murder. The State
18 must prove beyond a reasonable doubt that the defendant
19 unlawfully" -- I have "the defendant killed another
20 person with malice aforethought." I think that she
21 wants to put "unlawfully killed another person with
22 malice aforethought." I think that is the correct
23 statement of the law. I will put that in. I should
24 have put it in at the beginning.

25 What do you mean, your next comment there in that

1 sentence?

2 MS. NORRIS: In the initial document that I had
3 edited, which I had also handed up, rather than the
4 instruction you have starting with "malice is hatred,"
5 that paragraph, I'd simply ask that it be changed to
6 "unlawfully killed another person with malice
7 aforethought, either express or inferred. Malice is
8 something which springs from wickedness, from hatred,
9 from depravity, and from a heart devoid of social duty
10 and fatally bent on mischief." Simply changing it to
11 the language we have been using all along with the
12 jurors.

13 THE COURT: Let me flip back. I'm sure that I
14 have that somewhere.

15 MS. NORRIS: I handed it to Drew just before he
16 went out the door.

17 THE COURT: Okay. Mr. Hixson, if you will look at
18 page 14.

19 MR. HIXSON: Yes, sir.

20 THE COURT: What I said there is, "malice is
21 hatred, ill will, or hostility towards another person.
22 It is the intentional doing of a wrongful act without
23 just cause or excuse with the intent to inflict an
24 injury or under circumstances that the law will infer
25 an evil intent."

1 The requested language is at the end of that first
2 paragraph, state that -- change that first paragraph to
3 say this: "The defendant is charged with murder. The
4 State must prove beyond a reasonable doubt that the
5 defendant unlawfully killed another person with malice
6 aforethought." And I think that is a correct statement
7 of the law.

8 MR. HIXSON: Yes, sir.

9 THE COURT: Then either express or inferred. I do
10 not have that in mine, and that is, of course, a
11 correct statement of law. Malice can be, and the State
12 can show, that it's either express or inferred.

13 "Malice is something that springs from wickedness
14 or from hatred, from depravity, and a heart devoid of
15 social duty and fatally bent on mischief. A person
16 cannot be found to act with malice aforethought if the
17 acts were taken with just cause or legal defense or
18 provocation, such as self-defense or manslaughter."

19 Tell me about that second -- I have no problems
20 with the first sentence. I think it's just in keeping
21 with exactly what I'm saying and what we've talked
22 about in the trial, a wickedness, hatred, and
23 depravity, that sort of thing. I don't have a problem
24 with that. I do your second sentence, "A person cannot
25 be found to act with malice aforethought if their

1 actions were taken with just cause or legal defense or
2 provocation such as self-defense or manslaughter."

3 MR. HIXSON: Initially, your Honor, I support the
4 language that you have in your initial charge. I
5 believe that's right out of the bench book. It's well
6 accepted throughout the State of South Carolina on the
7 proper charging of the law. But I don't have any
8 problem at the end of the copy that we've been
9 provided, the first paragraph -- the second paragraph,
10 "malice is hatred," is fine, and perhaps we can put,
11 "it springs from ill will, depravity." If your Honor
12 wants to use that, tack that onto the end of the second
13 paragraph.

14 THE COURT: Well, the difference in that is, first
15 of all, we had express or implied -- or inferred
16 malice, and I'm sure you don't care about that.

17 MR. HIXSON: Yes, your Honor. You have that in
18 the charge in the fourth paragraph, the standard
19 charge. I thought that was properly addressed in the
20 fourth paragraph, that's why I didn't think it needed
21 to be put in there twice.

22 THE COURT: And so that is in there. The key here
23 is the difference in the description of malice. I say
24 malice is hatred, ill will, or hostility towards
25 another person, the intentional doing of an act without

1 just cause or excuse with an intent to inflict an
2 injury.

3 And isn't that exactly what I'm saying,
4 Ms. Norris, when I say that it is the intentional doing
5 of a wrongful act without just cause or excuse?

6 MR. HIXSON: That's correct. Well, I apologize.
7 I just -- the last point that we had was your charge
8 subsequently brings up self-defense, and bring those
9 already if you're going to charge that. So I believe
10 it's unnecessary and improper to put it in the malice
11 section of --

12 THE COURT: I don't want to comment directly on
13 the facts of this case by saying the legal defense is
14 self-defense or manslaughter. I think that my charge,
15 that being the charge actually directly from the bench
16 book, covers everything that you are asking. I think
17 that it is a reasonable and correct statement of the
18 law. I do go down and talk about inferred and express
19 malice and explain those. I think that the charge, as
20 proposed, is correct.

21 I will add the "unlawfully killed another person,"
22 but otherwise, I think my charge, again being the
23 charge directly from the bench book, properly describes
24 malice and covers everything that you have asked except
25 that I specifically instruct the jury concerning

1 self-defense or manslaughter. And I don't think that
2 that would be appropriate, to comment directly on
3 those.

4 I notice on page 15, "Malice may be inferred from
5 conduct showing a disregard of human life." And you
6 asked me, "You may not infer or determine that malice
7 is present simply because of use of a deadly weapon."

8 Now, I took out the Belcher charge that you
9 originally had. I don't think Belcher allows a charge
10 on the inference of malice arising from a deadly weapon
11 where self-defense, manslaughter, provocation is
12 raised. I think Belcher is a change in the existing
13 law, but it is the current law. Belcher came down
14 three years ago, two years ago, something like that.
15 But I believe the Supreme Court is very clear. I don't
16 think that a Belcher charge is there. I am -- I think
17 we're walking on thin ground when we tell the jury not
18 to infer it from use of a deadly weapon. I haven't
19 told them that. I mean, there's no instruction that
20 tells them that they should do that.

21 MR. HIXSON: Yeah, that's an incorrect statement
22 of the law. They absolutely may, and it's important
23 that they do infer it by the mechanism of injury or
24 death. It's just that the Court can't tell them that
25 you have an automatic inference from it. The Court

1 can't say that.

2 THE COURT: Well, I think the jury has the right
3 to look at the evidence, look at the circumstances of
4 the case. I think the jury has the right to make that
5 inference from the evidence if the jury chooses to do
6 so. I think the difference here and where Belcher was
7 going, is Belcher was not telling the jury that they
8 may infer that. It's almost like the old presumption
9 charge. You know, infer it from the presence of a
10 weapon. I don't think that we can tell the jury that
11 they cannot make that assumption or inference from the
12 totality of the circumstances involved in this case.
13 And I would, again, decline to give that particular
14 charge.

15 All right. Look on page 17. It looks like you
16 have asked to exclude the testimony -- I mean, the
17 charge concerning cooling.

18 I was somewhat concerned about that charge,
19 Mr. Hixson, because it may be confusing to the jury,
20 and there's certainly no evidence that there was any
21 period of time in which there could have been a cooling
22 off. I mean, it was almost instantaneous. Does that
23 charge have any place in this particular case?

24 MR. HIXSON: I have no problem with that, your
25 Honor, if under -- on page 16, the language relating to

1 "make an ordinary person unable to coolly reflect on
2 his actions," if that's in there, I believe that's
3 appropriate, then I think that probably covers the
4 bases of this cooling off period and process of
5 re-arming and coming back again.

6 THE COURT: That doesn't even apply to this case.

7 MR. HIXSON: That's correct, your Honor.

8 THE COURT: Provocation was instantaneous. I
9 mean, we're talking about seconds. I think the
10 whole -- the whole incident -- I've heard some
11 testimony that the whole thing was a minute and a half
12 at the most.

13 MR. HIXSON: Yes, sir.

14 THE COURT: So there was certainly no cooling off
15 time. So I would assume you're asking that that be
16 removed?

17 MS. NORRIS: Yes, sir.

18 THE COURT: Okay. And I would grant your motion
19 in that regard.

20 On page 19, you asked me to put: "The following
21 four elements are required to establish..." We've got
22 four. I don't mind saying four, if you would like
23 that.

24 MS. NORRIS: Yes, sir. And on the initial draft,
25 I had actually inserted a paragraph just listing those

1 four and then going into your detailed explanations of
2 them.

3 THE COURT: Well, if you look at it, I say:
4 "First, the defendant must be without fault," which is
5 exactly what you have, and then I spell out each one.
6 Secondly --

7 MR. HIXSON: Your Honor, I believe, in essence,
8 you just compartmentalized imminent danger into whether
9 or not you actually were or the person reasonably
10 believed that he was, and I think you just combined
11 them both into the --

12 THE COURT: The second element of self-defense was
13 actually in imminent danger.

14 I'm trying to find out where I did three. If
15 that's the final, there should be a fourth one. I want
16 to make sure that I covered them all.

17 Must be without fault. The second, imminent
18 danger. This is the third one.

19 What I will do is if you look on page 20, the
20 second -- under "imminent danger," the second
21 paragraph, I'll put the third element.

22 I'll put: "As a third element, if the defendant
23 was actually in imminent danger, it must be shown that
24 the circumstances would have warranted a person of
25 ordinary firmness and courage to strike the fatal

1 blow."

2 Do you want to put "or defend himself in order to
3 prevent death or serious bodily injury"?

4 MS. NORRIS: Yes, sir.

5 THE COURT: I don't really have any problem with
6 that. It expands it just a little, but -- well, I
7 don't think it does on this case. It's just a correct
8 statement of the law.

9 And then where we have on page 22, number 3, "no
10 other way to avoid danger," put the final or fourth --
11 right? -- final or fourth element of self-defense, "the
12 defendant had no other probable way to avoid the danger
13 of death or serious injury," okay, so that that way we
14 make it clear as to what precisely I'm talking about as
15 being the four elements.

16 And in that regard, I don't mind coming back on
17 page 19, Ms. Norris -- well, actually, it's exactly
18 what I'm saying. I think it may be confusing to the
19 jury -- to the jurors to -- I tell you what, I'm going
20 to put that in. It just does them, and then I explain
21 them in detail later. I don't think it makes any
22 difference at all. It just says it more than one time.
23 It's exactly what I say. It may help the jury
24 understand it. Okay?

25 MS. NORRIS: Yes, sir.

1 THE COURT: On page 23, you want me to strike out
2 the part that says "defending yourself or others."

3 State, you have no objection to that, striking out
4 "defending or others in firing the first shot"?

5 MR. HIXSON: The totality -- continuing until the
6 threat is also -- how would the paragraph read then if
7 that was gone?

8 THE COURT: It will read this way: "If the
9 defendant is justified in defending himself, then the
10 defendant is also justified in continuing to shoot
11 until it is apparent that" --

12 MR. HIXSON: I got you. So just -- I understand.
13 I apologize. Just the "or others" language.

14 THE COURT: "Or others" and "in firing the first
15 shot," and "then the defendant is also" --

16 MR. HIXSON: Gotcha. That's fine.

17 THE COURT: Okay. All right. So we'll take that
18 out. Okay? That's fine.

19 MS. NORRIS: Yes, sir. Going back to the imminent
20 danger, you addressed my request to add "or to defend
21 himself." You addressed that language.

22 In the following paragraph, I had also requested
23 that we strike out "surrounding the crime" there.

24 THE COURT: Let's say "surrounding the incident."

25 MS. NORRIS: That's fine, your Honor.

1 THE COURT: Incident? Okay. Just make that
2 "incident."

3 All right. Let's look at page 27: "When officers
4 are presented with serious danger in the course of
5 carrying out an investigative detention." This is
6 something that the State asked for. And "they may
7 brandish weapons or even constrain the suspect with
8 handcuffs in order to control the scene and protect
9 their safety."

10 Okay. And you want that out. You cite *Tennessee*
11 *vs. Grimes*?

12 MS. NORRIS: *Tennessee vs. Garner*.

13 THE COURT: *Garner*.

14 MS. NORRIS: And that language is actually in
15 our defense-requested jury instructions that I filed
16 and handed up yesterday. That is page 8. It requests
17 the instruction No. 17: The use of deadly force to
18 prevent the escape of an individual, whatever the
19 circumstances, is constitutionally unreasonable where
20 the individual poses no immediate threat to the officer
21 and no threat to others. The harm resulting from
22 failing to apprehend him does not justify the use of
23 deadly force to do so.

24 I think this just goes to the heart of the
25 question. By giving that instruction, we're telling

1 them Officer McGarry could have pulled out his weapon,
2 could have shot him, could have handcuffed him, and
3 that just destroys the entire question that our jury
4 has to address: Was this a lawful arrest? So we
5 object to that.

6 THE COURT: Let me hear from the State. Have you
7 seen her Grimes --

8 MR. HIXSON: I have not seen any. I have not been
9 provided that.

10 MS. NORRIS: I handed this to Jimmy yesterday.

11 MR. HIXSON: Okay.

12 MS. NORRIS: It's a document we filed and handed
13 up to you.

14 MR. HIXSON: The difficulty we have, your Honor,
15 Grimes -- I understand just generally what Ms. Norris
16 is referring to. Once again, the distinction continues
17 to get confused about the effort to place somebody
18 under arrest and the nature of the force that's
19 allowable under *Terry vs. Ohio* and its progeny,
20 *Michigan vs. Long*, all of those cases that say it is a
21 proper statement of the law to say that officers can
22 use whatever force they deem reasonable to protect
23 themselves for officer's safety as well as protect the
24 citizens, assuming they have --

25 THE COURT: Well --

1 MR. HIXSON: -- articulable suspicion.

2 THE COURT: -- if she gets Grimes, there's no
3 question I'm going to give you this charge that you
4 asked for, "When officers are presented with serious
5 danger in the course of carrying out an investigative
6 detention, they may brandish weapons or even constrain
7 the suspect with handcuffs in order to control the
8 scene and protect their safety."

9 All right. Now, the question comes -- or before
10 me is whether or not this Grimes proposed charge -- and
11 Drew is trying to find it for me.

12 MS. NORRIS: It's Garner, your Honor.

13 THE COURT: Or Garner. I'm sorry.

14 MS. NORRIS: *Tennessee vs. Garner*.

15 THE COURT: This Garner charge.

16 MS. NORRIS: I actually have an extra copy, your
17 Honor.

18 THE COURT: I am trying to locate that,
19 Ms. Norris.

20 MR. HIXSON: In just reading Garner, just this --
21 the proposed instruction, which is just a bifurcated
22 sentence, it is a correct statement of the law. It
23 says: "Where the individual poses no immediate threat
24 to the officer and no threat to others, then the use of
25 deadly force to prevent the escape of an individual is

1 unreasonable."

2 Yeah, you can't shoot somebody for running away
3 from a traffic ticket. So that's probably a correct
4 statement of the law. The harm resulting from that
5 failing to apprehend him does not justify the use of
6 deadly force.

7 The concern that we have is perhaps if it was
8 rewritten and the second paragraph -- the use of deadly
9 force to prevent the escape of an individual where the
10 individual poses no immediate threat to the officer is
11 not justified. That is a correct statement of the law.
12 You know, you can't shoot a shoplifter.

13 THE COURT: Right.

14 MR. HIXSON: And so in that regard, if that was
15 refined a little bit more, because the way it's
16 written, whatever the circumstance is it's misleading
17 to the jury because the issue is the reasonableness of
18 the threat, is the man armed and dangerous, does he
19 have a weapon, versus, you know, a misdemeanor
20 littering. You can't shoot the dude if he --

21 THE COURT: Tell us again, Ms. Norris, precisely
22 what you propose, the exact wording.

23 MS. NORRIS: I would propose taking out that
24 paragraph that your Honor has in there and using our
25 requested instruction on *Tennessee vs. Garner*.

1 The part about "When officers are presented with
2 serious danger in the course of carrying out an
3 investigative detention," that already raises two
4 problems. One, there's no evidence here that before a
5 gun coming out that Mr. Cottrell was doing anything
6 dangerous until he was grabbed, we submit, unlawfully.
7 The question of whether this was an investigative
8 detention, I think, yeah, goes to the heart of the
9 issue.

10 We submit that it was not a proper Terry stop. Of
11 course, Mr. Johnson's evidence was excluded, and I
12 won't go into that, but that's the essence of what the
13 jury has to decide. And with this instruction, we're
14 just blowing right on past that.

15 THE COURT: Well, what the jury does have before
16 it is that this officer, rightly or wrongly, had in his
17 mind certain evidence that this was a person involved
18 in a shooting, he was a suspect, and that he was armed.
19 And that fact is borne out by the undisputed evidence
20 that the defendant did, in fact, have a firearm.

21 Now, I think if we take the evidence and look at
22 it in the light most favorable to the State, what we're
23 going to be left with is a situation where this jury
24 can very easily infer from the evidence before it that
25 what happened was, all the testimony is that the

1 conversation seemed to be almost cordial, and then all
2 of a sudden it is escalated to a very high level at a
3 time when this officer determined to do a pat-down.

4 Now, the jury can certainly infer, it's a
5 reasonable inference from that testimony, that this
6 officer saw a gun. There's no -- nothing to suggest
7 any other reason for all of a sudden this heightened
8 level of inquiry by the officer. I think it's there.

9 MR. HIXSON: Your Honor, perhaps to gratify the
10 Court, if the language of *Tennessee vs. Garner* was
11 slightly different, in other words, if the charge read:
12 Where the individual poses no immediate threat to the
13 officer and no threat to others, the use of deadly
14 force to prevent the escape of an individual is
15 unreasonable or can be seen as unreasonable --

16 THE COURT: And there again, where -- I mean,
17 that's based on the premise that Officer McGarry shot
18 Mr. Cottrell, and there is certainly a wealth of
19 evidence that he did not. In fact, there's scant
20 evidence that he did. I don't know if there's any
21 evidence that Officer McGarry shot.

22 MS. NORRIS: Well, your Honor, just on the
23 question of whether -- the only inference we can draw
24 is that Officer McGarry saw a firearm. I submit it's
25 not. Diane Serio testified that he put his weapon

1 away.

2 THE COURT: Please don't think that I am saying
3 that's the only inference. The jury could infer from
4 the -- from what they have heard that Officer McGarry
5 pulled out a gun and shot Mr. Cottrell.

6 MS. NORRIS: Or they --

7 THE COURT: The jury is free to make that
8 inference or reach that conclusion based on the
9 evidence.

10 MS. NORRIS: Or they could say that he put his
11 weapon away when Mr. Cottrell started walking away, and
12 he grabbed him because he was mad. He wouldn't stop,
13 even being told to stop with a gun.

14 THE COURT: Those are all things that this jury
15 could determine to be the facts in this case. The jury
16 makes the determination of what the facts are based on
17 the evidence that the jury has heard.

18 Now, what concerns me here is the proposed charge.
19 I think that it's an appropriate charge on the law to
20 leave the charge in that I have, "When officers are
21 presented with serious danger" -- the jury would have
22 to make that determination -- "in the course of
23 carrying out an investigative detention" -- that's for
24 the jury to determine whether there was a serious
25 danger -- "they may brandish weapons or even constrain

1 the suspect with handcuffs in order to control the
2 scene and protect their safety." I think that's a
3 correct statement of the law.

4 What you propose is also, I believe, a correct
5 statement of law. If the jury determines that this
6 officer -- if the jury determines that Mr. McGarry was
7 the one who shot Mr. Cottrell and he shot -- Officer
8 McGarry shot him first because he thought he was just
9 trying to walk away or leave, that's certainly
10 something for the jury to determine. The jury can
11 reach that conclusion based on the evidence. And
12 that's the position that I believe that the defense has
13 taken. It's there. And I don't have any problem
14 charging that. But I don't think that it's a situation
15 where we charge one and not the other.

16 MR. HIXSON: We would just ask that that language
17 just be clarified because it appears internally
18 inconsistent. In other words, just the way that the
19 defense's proposed instruction is cumbersome. It's
20 difficult to --

21 THE COURT: I really don't have it.

22 MR. HIXSON: I apologize.

23 THE COURT: I would like to have it.

24 MR. HIXSON: May I hand this copy up?

25 THE COURT: Yes.

1 MR. HIXSON: Just the way it's -- there's ellipsis
2 in there, and the way that it's separated it seems
3 awkward.

4 THE COURT: Okay. All right. Ms. Norris.

5 MS. NORRIS: Yes, sir.

6 THE COURT: I have it now, and that would be
7 instruction 17, correct?

8 MS. NORRIS: Yes, sir.

9 THE COURT: Okay. Well, you asked that I charge:
10 "The use of deadly force to prevent the escape of an
11 individual, whatever the circumstances, is
12 constitutionally unreasonable where the individual
13 poses no immediate threat to the officer and no threat
14 to others. The harm resulting from failing to
15 apprehend him does not justify the use of deadly force
16 to do so."

17 MR. HIXSON: And, your Honor, we specifically have
18 "whatever the circumstances," because that's not a
19 correct statement of the law. We would just ask where
20 the -- just to invert those sentences, the second one
21 to the first one. In other words, where the officer --
22 where the suspect poses no threat to the officer, then
23 you can't use deadly force.

24 THE COURT: Doesn't that say what you want me to
25 say, Ms. Norris, if I were to charge: "Where the

1 individual poses no immediate threat to the officer and
2 no threat to others, the harm resulting from failing to
3 apprehend him does not justify the use of deadly force
4 to do so"?

5 MS. NORRIS: I think so, your Honor.

6 THE COURT: All right. Let me add that, then, to
7 the language that I already have, and I will just put:
8 "However, where the individual poses no immediate
9 threat to the officer and no threat to others, the harm
10 resulting from failing to apprehend him does not
11 justify the use of deadly force to do so."

12 MR. HIXSON: Fair enough, your Honor.

13 THE COURT: Drew, can you add that? I'm going to
14 leave this in.

15 All right. And then we -- on 28, "Probable cause
16 is a good faith basis to believe that the defendant
17 committed a crime." And you want to add: "In the
18 officer's presence."

19 MS. NORRIS: Yes, sir. I think this goes to the
20 whole Terry stop. It's not enough, we submit, to say
21 that a crime was committed somewhere in the past. I
22 think Terry requires a crime right then or reasonably
23 close.

24 THE COURT: And I don't know. I am absolutely
25 convinced that freshly committed offenses and in the

1 officer's presence are clearly covered. However -- you
2 know, and you and I have discussed this. We look at
3 the different language that the courts have used in
4 justifying this type of intrusion. We've used
5 everything -- or the courts have used everything from
6 "criminal activity was afoot" to "is committing a
7 crime" to "has committed a crime."

8 And, quite frankly, with the use of language
9 indicating that all three of those things may give rise
10 to justification for the officer's actions, I don't
11 know. What do you think, Ms. Norris? Show me
12 something that says that we should ignore the other
13 language used by the courts.

14 MS. NORRIS: Your Honor, just looking at the
15 facts, I think it has to be the officer sees it or it's
16 recent information; otherwise, we can just do away with
17 arrest warrants, period. We don't need them. If
18 knowledge that a crime was committed somewhere in the
19 past is enough five weeks later to go -- just because
20 you heard the word "suspect" to go arrest him, we don't
21 need arrest warrants ever.

22 THE COURT: And there again, it goes to what he's
23 being arrested for. But what is an officer, in your
24 view, to do if, rightfully or wrongfully -- he may have
25 had bad information, but if he has an honest concern in

1 his mind that a person may be the suspect, the use of
2 that word gives rise on all sorts of connotations. I
3 mean, does he have a warrant for his arrest? You know,
4 is he wanted? The officer doesn't know when he hears
5 "suspect," but if it's a serious offense, are you
6 telling me that the officer then should not and cannot
7 at least make an inquiry?

8 MS. NORRIS: I think certainly the officer could
9 go up and talk to Mr. Cottrell, run his name. But when
10 Mr. Cottrell started to walk away, he had absolutely
11 every right to do that. And had he not been grabbed,
12 had there not been a struggle, he would have gone.
13 This would have never happened.

14 The officer -- there were two officers there on
15 the scene. They could have kept him under observation.
16 They could have radioed out to the other officers
17 saying, "Keep your eyes on this vehicle until we find
18 out if there's a warrant."

19 THE COURT: All right. And what if Mr. Cottrell
20 is walking away and there had been time and that NCIC
21 comes back and says: We've got an active warrant for a
22 homicide on this individual?

23 MS. NORRIS: Then you can arrest him. You've got
24 an arrest warrant. No question about it. Had there
25 been an active warrant, there's no question about it.

1 He could have been arrested.

2 THE COURT: Okay. But in that case, we would not
3 have been talking about a crime in the officer's
4 presence. What if someone comes back on the radio and
5 says, "That's the guy who just did a shooting last
6 night. That's the guy we've been looking for. We
7 don't have an arrest warrant, but that's the guy we're
8 looking for"? What should the officer do?

9 MS. NORRIS: That one is closer, your Honor. On
10 that first example, the difference was a warrant. A
11 judicial officer made an independent determination.

12 On the second one, I think you're closer. Again,
13 that's within the area of a recent crime where you've
14 got a description of who you're looking for, the
15 general area, et cetera. That's a different situation.
16 But here we don't have that. We don't have anywhere
17 close.

18 THE COURT: What if this jury were to determine,
19 then, that he -- that Officer McGarry's actions are
20 circumstantial evidence that support a finding that he
21 did observe -- there's no question Mr. Cottrell was
22 engaged in a criminal act at the time he was carrying
23 that firearm? If the jury reaches that point, I guess
24 you're of the opinion, then, that that would be a crime
25 committed in the officer's presence, if the jury were

1 to reach that point?

2 MS. NORRIS: I'm sorry.. What crime? I'm sorry..

3 I was --

4 THE COURT: The unlawful carrying of a firearm.

5 MS. NORRIS: There's no basis other than obviously
6 when it comes out. But before that, Officer Guthinger
7 said nobody saw it, even the people with Mr. Cottrell.
8 Amber didn't see it. We don't know. And carrying a
9 weapon that -- you got to be caught for that in order
10 for it to be a crime.

11 THE COURT: But what evidence do we have here? We
12 have evidence that all of a sudden an officer goes on a
13 high level of alert. He goes from a cordial
14 conversation to wrestling with the defendant, trying to
15 control his right arm. The right arm is -- the
16 testimony indicates was in a position where the jury
17 could possibly infer that he was reaching for a weapon.
18 I don't know. But it was in that area. And then all
19 of a sudden a weapon is retrieved and the officer is
20 shot. I mean, we may be in a situation here where the
21 jury determines that there was a crime being committed.
22 I guess that goes back to in the officer's presence,
23 but --

24 MR. HIXSON: May I be heard on that, your Honor?

25 THE COURT: Yes.

1 MR. HIXSON: We have litigated this and litigated
2 this, and this is why we're having a jury trial,
3 obviously. That's a jury issue. But this issue was
4 conclusively resolved in 1967 in *Terry vs. Ohio*. I
5 don't know if it's an intentional effort to confuse the
6 issues on the part of counsel or not, but the issue is
7 clear, a voluntary interaction with law enforcement and
8 the defendant was free to leave. He can leave. If
9 there is articulable suspicion not rising to probable
10 cause, *Terry vs. Ohio*, the Supreme Court says that's
11 the law of the United States of America, that that
12 officer can detain the individual to gather
13 information, and that reasonable suspicion stays there
14 until either those suspicions are confirmed or
15 rejected. If they're confirmed, he's placed in a full
16 custodial arrest. If it's rejected, "I'm sorry, sir,
17 that I detained you. I apologize, and have a great
18 day."

19 Because law enforcement does not have to, under
20 Tillman, adopt alternative means to determine the
21 detection of crime to protect its citizens. They don't
22 have to come up and do a massive investigation on a
23 DUI. If the officer sees him hit the fog line and the
24 yellow line, they can pull that person over, detain
25 them, say, "Are you drinking, ma'am? I'm sorry you

1 dropped your cell phone. You're free to leave."

2 They were detained, they weren't free to leave,
3 but they were never under arrest.

4 The distinction in this charge that Ms. Norris
5 continues to refer to over and over again is trying to
6 conflagrate the issue between an arrest and a Terry.

7 This is an investigative detention. He can detain
8 the individual. If Luzenski Cottrell came back: No
9 local NCIC, 10-74, and he didn't have a gun on him,
10 Officer Joe McGarry would have said, "Sir, you have a
11 great day." That was the testimony from the witness
12 stand.

13 He never got to the second prong of the 10-32
14 analysis, never had a chance to pat him down. And
15 Terry, in 1967, conclusively allows him to do that, and
16 that's why we believe the charge on this is
17 appropriate; specifically, law enforcement may arrest a
18 person without a warrant when a crime is committed.

19 We would ask to change from "the" crime, that it's
20 "a" crime, if that's appropriate.

21 THE COURT: And I will do that.

22 MR. HIXSON: And we certainly agree that that is
23 the proper standard for probable cause for an arrest.
24 That's exactly right. But this case never rose to
25 probable cause until Officer McGarry saw that firearm.

1 Unfortunately, like I said before, it was 12 inches
2 from his face before -- or sometime prior to being
3 there, but he certainly saw it.

4 But it's a Terry analysis, your Honor. It's not a
5 probable cause analysis in this case. It got there,
6 but, unfortunately, the fatal acts were set in motion
7 prior to getting there. That's the State's position,
8 your Honor.

9 THE COURT: I am going, on page 28, to make the
10 change, "A law enforcement officer may arrest a person
11 without a warrant when a crime is committed in the
12 officer's presence." And then the other charges that
13 are requested on 28 requiring "in the officer's
14 presence," I am not going to charge those.

15 On page 29, "which would cause a reasonable person
16 to believe that the defendant was committing a crime or
17 had just committed a crime," what do you say about
18 that, Mr. Hixson?

19 MR. HIXSON: Yes, I believe the language from all
20 the case law indicates a crime has been committed, was
21 about to be committed, or was in the process of. I
22 think they have expanded that, but I think that's
23 appropriate. Had committed, was about to commit, or in
24 preparation of. Before, during, and after is all
25 appropriate.

1 THE COURT: All right, Ms. Norris. Let me hear
2 you on that part.

3 MS. NORRIS: I think we're back to the same
4 question, your Honor. And I'm not ignoring Terry, just
5 so it's clear. I'm not trying to confuse the law. I'm
6 arguing what I submit the law is.

7 On our requested instructions on page 4, in fact,
8 this is language that I pulled out of Terry itself:
9 The law does recognize, however, that there are some
10 circumstances where the police must take swift action
11 based upon the on-the-spot observations of the officer
12 on patrol.

13 If we say he believes he had committed some
14 crime -- again, we're talking five weeks ago. We just
15 object to that, your Honor. I think our position is
16 clear.

17 THE COURT: Okay. I'm going to leave it as I have
18 it. That's directly from the charge book, and I think
19 it's a proper charge.

20 All right. Let's move on. Jury verdict, this is
21 the last page: "There are four possible verdicts which
22 you may find on the indictment in this case: Guilty or
23 not guilty of the offense of murder and guilty or not
24 guilty of the offense of voluntary manslaughter.

25 "If you find the defendant not guilty of the

1 offense of murder, you will consider the offense of
2 voluntary manslaughter. And as to that charge, you may
3 find the defendant guilty or not guilty.

4 "There is no significance whatsoever in the order
5 in which I state these possible verdicts. It is simply
6 that I must -- that one must be stated first."

7 All right. There seems to be no objection to
8 that.

9 We get down, and it's, "Ladies and gentlemen, your
10 verdict must be a unanimous one."

11 "Mr. Foreperson, when" -- I will change that to
12 "if the jury agrees on a unanimous verdict" -- I will
13 give you that -- "you will write the verdict on" -- we
14 should have that "the verdict form."

15 I assume you have no problem with that,
16 Mr. Hixson?

17 MR. HIXSON: Not a bit, your Honor.

18 THE COURT: Okay. "And sign your name. If you
19 cannot reach a unanimous verdict after a reasonable
20 deliberation, you should send out a note informing" --
21 I'm just not going to do that. The jury will let us
22 know if they cannot reach a verdict. It's very clear
23 that they understand that they have to notify us if
24 they reach a unanimous verdict. If they cannot, I'm
25 sure they will tell us that.

1 All right. Now, other than the objections that
2 you have posed -- it looks like there is another one.

3 MS. NORRIS: Yes, your Honor. On that original
4 draft, I added in some language. Essentially, we're
5 asking for what we generally know as an Allen charge,
6 but simply the portion telling them that they should
7 listen and respect the opinions of their fellow jurors
8 but that they cannot give up an honestly held opinion
9 and change your mind if it would do violence to your
10 conscious. We're just asking --

11 THE COURT: I think that was clear to the jurors
12 during the voir dire, and I will certainly charge that.
13 If they cannot reach a unanimous verdict, I will give
14 that to them in an Allen charge, and I think that's
15 when it's appropriate.

16 MR. HIXSON: Just to clarify, that's if an Allen
17 charge is necessary?

18 THE COURT: Certainly if an Allen charge is
19 necessary. We will charge them if it becomes
20 necessary.

21 MR. HIXSON: Yeah, not during the initial charge.

22 THE COURT: Ms. Norris, your recommendations of
23 charge and objections are on the record right now.
24 Okay. If I charge precisely as I have told you now, do
25 you feel that you would need to -- well, I tell you

1 what. Let's just give you another opportunity at the
2 end of the charge. Okay?

3 MS. NORRIS: Yes, sir. All I want to say, I did
4 request -- I did file those requested charges. Some of
5 them we've talked about. We don't need to go over that
6 again.

7 THE COURT: Okay.

8 MS. NORRIS: Just am I correct in assuming that if
9 you're not giving it, my request has been denied?

10 THE COURT: Right.

11 MS. NORRIS: All right.

12 THE COURT: And I will tell you that your argument
13 as to everything we've addressed here is on the record.

14 MS. NORRIS: Yes.

15 THE COURT: At the end of the charge, if you want
16 to add to that, that's fine, but you do not have to
17 repeat it.

18 MS. NORRIS: Yes, sir. Thank you, sir.

19 (WHEREUPON, Court's Exhibit Number 5 was marked
20 for identification.)

21 THE COURT: Does the State have any other
22 requests?

23 MR. HIXSON: No, sir.

24 THE COURT: Okay. Drew is going to be making
25 those changes for me. Let's take a real quick break,

1 we'll bring the jury in, and we'll argue.

2 But before we do that, Mr. Cottrell --

3 THE DEFENDANT: Yes, sir.

4 THE COURT: -- you remain under oath. You have
5 already been placed under oath. You were yesterday
6 when I inquired about your right to testify, and you
7 declined to testify.

8 THE DEFENDANT: Yes, sir.

9 THE COURT: I want to inform you that in that this
10 is a death penalty case, we depart from the normal
11 procedures that we follow in a trial of any other
12 offense. In trial, other trials, your attorneys would
13 have the right to make a closing argument. Since they
14 have put up evidence, they would have to go first, and
15 the State would have the right to go last. But since
16 this is a death penalty case, one of the changes in
17 procedure that is statutory is, first of all, that your
18 attorneys, regardless of the fact that they put up
19 evidence, have the right to make the last argument.
20 And they will, of course, exercise that right, so I do
21 not need to discuss waiver of last argument with you.
22 However, the statute also provides that you have the
23 right to make a closing argument or statement to the
24 jury.

25 Have you considered that, sir?

1 THE DEFENDANT: Yes, sir, I have.

2 THE COURT: Do you understand that you have that
3 right?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Do you understand that that is a
6 personal right that your attorneys cannot waive for
7 you? It is -- no one can take it from you. It is a
8 right that you have, and any waiver of that right must
9 be made freely, voluntarily, knowingly, and
10 intelligently. Intelligently means you understand it.

11 Do you understand you have that right?

12 THE DEFENDANT: Yes, sir. When I first came --

13 THE COURT: Do you --

14 THE DEFENDANT: Excuse me.

15 THE COURT: I'm sorry. I didn't mean to
16 interrupt.

17 THE DEFENDANT: When I first came in this morning,
18 I made them aware of that.

19 THE COURT: Okay. Do you need to ask me any
20 questions?

21 You clearly understand you have that right?

22 THE DEFENDANT: Yes, sir, I do.

23 THE COURT: Okay. Now, have you had an
24 opportunity to discuss that with your attorneys?

25 THE DEFENDANT: Yes, sir, I have.

1 THE COURT: And do you need any more time to
2 discuss your right to make a closing argument with your
3 attorneys?

4 THE DEFENDANT: No, sir.

5 THE COURT: Do you wish to discuss it with anyone?

6 THE DEFENDANT: No, sir.

7 THE COURT: Okay. Have you made a decision as to
8 whether or not you will exercise your right to make a
9 final argument?

10 THE DEFENDANT: I have, and I will not make one.

11 THE COURT: You will not make one?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Is that decision your decision?

14 THE DEFENDANT: Yes, sir, it is.

15 THE COURT: Is it made freely and voluntarily?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: All right. I find that the defendant
18 has made a free, voluntary and knowing waiver of his
19 right to make a closing at this guilt phase.

20 I will tell you, Mr. Cottrell, this does not
21 affect any rights you might have if we get to the
22 sentencing part of this trial, and I will again at that
23 point ask you if you wish to exercise that right. Do
24 you understand?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: All right. Thank you, Mr. Cottrell.

2 THE DEFENDANT: Thank you.

3 THE COURT: Anything further from the State?

4 MR. HIXSON: No, your Honor, just a brief time to
5 straighten things out.

6 THE COURT: All right. Let's just take a second.

7 (WHEREUPON, recess taken from 10:30 a.m.
8 to 10:46 a.m.)

9 THE COURT: All right. We have Mr. Cottrell and
10 Ms. Norris and Mr. McGuire here, and we also have
11 Mr. Richardson and Mr. Hixson.

12 And I am informed that the deputy has instructed
13 everyone that they will be required to remain once we
14 start. So if you need to leave, now is the time to do
15 that; otherwise, I would expect you to be here. I
16 don't want anyone distracting the jury by coming and
17 going.

18 Mr. Ropp -- or Mr. Parmalee, is our jury ready to
19 come in?

20 THE BAILIFF: Yes, sir.

21 THE COURT: Bring them in.

22 (WHEREUPON, the jury came into open court at
23 approximately 10:49 a.m.)

24 THE COURT: Let's see. We have all of our jurors
25 and we have our alternates back in the courtroom.

1 I had them bring you over at 9:30 this morning. I
2 apologize for making you sit back there. However, I do
3 things a little differently. In usual circumstances,
4 the attorneys would make closing arguments and I would
5 then discuss how I was going to charge the law with
6 them, and that would be a delay. It's been my
7 experience, and it's my opinion, that it aids the
8 attorneys if they understand the charge that I will
9 give on the law before I do so. And so I met with the
10 attorneys this morning to make sure that they had a
11 good understanding of how I intended to charge you as a
12 jury.

13 So by taking some time this morning, early, we
14 have avoided delays later. So I hope you will
15 understand that and forgive us for keeping you back
16 there in the dark, so to speak.

17 I hope you had a good evening and you're rested.

18 As you heard yesterday, the evidence in this part
19 of the trial has been completed, and the attorneys are
20 now going to give their closing remarks. I hope that
21 you will direct your attention to these remarks. They
22 are an important part of the trial.

23 Again, what the attorneys say in closing arguments
24 is not evidence. It is appropriate that they comment
25 on the evidence that's been presented to you. That's

1 their job, to give you their views on that evidence.

2 And it's also their job or their right to comment on
3 the law that they anticipate will be charged to you.

4 Again, I am the source of the law. You will apply
5 the law exactly as I give it at the end of this trial.

6 If the attorneys say anything that is different from
7 what I charge you on the law, you must disregard that.

8 I promise you none of these attorneys would do that
9 intentionally. And as I said a moment ago, their
10 interpretation of the evidence is their interpretation.
11 They cannot add to the evidence or take away from the
12 evidence that has been presented. The weight that you
13 give the evidence is entirely up to you, the jury, in
14 determining what the facts are in this case.

15 I hope you will listen carefully. Everything they
16 say is important.

17 Mr. Hixson.

18 MR. HIXSON: Thank you, your Honor. May it please
19 the Court.

20 Duty. Duty. What in the world does that word
21 mean? We haven't really given it much thought. I know
22 we know what Webster's dictionary says. I mean, it
23 says it's an obligatory task that arises from one's
24 position in life, like your job or your role over an
25 individual. It's something you've got to do based on

1 where you are in life.

2 We all have it. We all have duties that we have
3 to do. Maybe it's a formal duty, kind of like you're
4 serving your government, like if you're in the
5 military, if you're in the Navy, or you're a civil
6 servant, you know, you're a post carrier. You have a
7 duty to other people. And some folks' duties aren't as
8 formal. Maybe you're a parent and you've got to take
9 care of your kids. And we've got to pay the mortgage.
10 We have a duty to pay the bank what the bank is owed.
11 And you know what, sometimes we just want to walk away
12 from that duty and not do it. We just don't want to do
13 it. But that's not what a duty is. A duty is an
14 obligation.

15 MR. McGUIRE: Judge, I've actually got a matter of
16 law I need to take up.

17 THE COURT: All right. Let's take the jury out.
18 (WHEREUPON, the jury exited the courtroom
19 at 10:54 a.m.)

20 THE COURT: Yes, sir.

21 MR. McGUIRE: Your Honor, there was a reference to
22 duty, and it was likened to being a postal worker. And
23 the only black person on the 12 that are seated as the
24 jury is a black postal worker. I believe that was an
25 argument and an appeal made directly to him, and I

1 would like Mr. Green brought out here and given
2 instructions from the Court that that's not be done and
3 that he should not take it as such.

4 THE COURT: Mr. McGuire, I don't even know what
5 the Solicitor is talking about yet.

6 MR. MCGUIRE: It's an argument with duty. It's an
7 obligation to do something. It's an argument to get
8 that man to do something by the argument of you might
9 not want to do it, you might not like to do it, but
10 it's your duty, it's your obligation, like being a
11 postal worker. The only black person on the jury is a
12 black man, postal worker.

13 THE COURT: I don't know if he's talking about the
14 jury's duty. I don't know if he's talking about the
15 officer's duty. I have no idea what he's talking about
16 at this point in time.

17 MR. MCGUIRE: Well, I know what he's talking
18 about. He's talking about a postal worker. And there
19 is a black man on the jury who is a postal worker.

20 THE COURT: And what do you want me to do?

21 MR. MCGUIRE: I want you to bring Mr. Green in
22 here and say that "There was a reference to duty and
23 obligation based on your station in life; for instance,
24 a postal worker. I want you to understand, Mr. Green,
25 that there is no argument directed at you personally.

1 I understand you're a postal worker. I want you to
2 make sure you understand that."

3 THE COURT: Why can't I just tell the jury
4 generally?

5 MR. McGUIRE: Because it's directed at Mr. Green.

6 THE COURT: I don't know if it is or not. If I
7 tell the -- I don't want to single Mr. Green out.

8 MR. McGUIRE: He's already been singled out.

9 THE COURT: I don't know if he has or not.
10 Let me hear from the State.

11 MR. HIXSON: I have no opposition to make sure
12 that this defendant gets a fair trial. And if I'm
13 trying to use thematic elements to develop what a role
14 is in it, if your Honor feels it's curative, then cure
15 it, but there's no --

16 THE COURT: I can do it as to the jury. I will
17 tell the jury that -- and I don't know if -- "any
18 reference to duty is not directed at you personally and
19 should not be."

20 MR. HIXSON: And, additionally, I referenced
21 parents, and I was getting ready to reference a bank.

22 THE COURT: I would assume there are lots of
23 parents on there.

24 MR. McGUIRE: Yes, but only one black postal
25 worker.

1 MR. HIXSON: We don't oppose an instruction. I
2 want to make sure the trial is clean.

3 THE COURT: Tell me again. You want -- and I'm
4 going to do it as the entire jury.

5 MR. McGUIRE: Yes, sir.

6 THE COURT: And you want me to instruct the jury
7 that no reference to duty is intended to refer to any
8 individual juror, is that -- or to suggest that any
9 individual juror has any unique duty.

10 Just tell me, Mr. McGuire.

11 MR. McGUIRE: Well, I don't want the curative
12 instruction to be so watered down and nonspecific that
13 he doesn't get it. I mean, I think we should speak to
14 Mr. Green directly.

15 THE COURT: Well, if he picks up on that, I mean,
16 I think he can pick up on if I tell the jurors that
17 reference to duty is not intended to refer to any
18 particular juror or any juror's specific duty in life.

19 MR. HIXSON: We don't oppose that, your Honor, if
20 that helps.

21 MR. McGUIRE: I think it would be better to --
22 instead of focusing on the word "duty," we focus on the
23 examples. "If anybody thought a reference to a
24 particular occupation or station in life was a personal
25 appeal to you, I tell you now that is not the case and

1 to disregard it."

2 THE COURT: "Occupation or station in life" --

3 MR. McGUIRE: Yes, sir.

4 THE COURT: Okay.

5 MR. McGUIRE: Thank you, Judge.

6 THE COURT: -- "is a particular reference to you,
7 please disregard it."

8 MR. McGUIRE: Yes, sir.

9 THE COURT: All right. Bring them in.

10 (WHEREUPON, the jury came into open court at
11 approximately 10:59 a.m.)

12 THE COURT: All right. We have everyone back in
13 the courtroom again.

14 And let me just say this: Any reference to a
15 particular occupation or a person's station in life is
16 not directed to any individual on this jury and you
17 should disregard it. Okay? Any reference to an
18 occupation or a person's station in life. Okay?

19 Thank you.

20 MR. McGUIRE: Thank you, Judge.

21 THE COURT: All right. Go ahead. You may
22 continue.

23 MR. HIXSON: Thank you, your Honor.

24 We all have our duties, everything that we have to
25 do on a daily basis. Some are pretty obvious to us and

1 some aren't so obvious, but you absolutely know it when
2 you see it. You absolutely know when it's time for you
3 to do your duty, whatever it might be.

4 You know, it's interesting, this kind of judicial
5 process. It seems like you have a pretty common sense
6 idea of what's going on. Solicitor Richardson in his
7 opening statement thought of the Challenger explosion
8 and mentioned the Kennedy assassination. And, of
9 course, we all see that jarring event in our life.
10 Holy cow. But, you know, when the judicial process
11 gets ahold of a Challenger explosion, it turns it into
12 an intentional rapid disassembly of a vehicle instead
13 of a "boom," right?

14 Like the Kennedy assassination, we all know what
15 happened, but by the time the legal process gets ahold
16 of it, it turns into someone losing their job over
17 workplace violence. It's an assassination. It is what
18 it is. It doesn't have to be conflagrated and
19 confused. We know what it is. We can see it.

20 And that's what we have here. We know what
21 happened, and the judicial process is trying to create
22 some confusion, trying to create it to appear to be
23 what we know. It's an execution of Officer Joe McGarry
24 on December 29th of 2002 by Luzenski Allen Cottrell.
25 That's what this is. And so that's where I'm going to

1 start talking to you. Stop the chatter, stop the
2 disassembly to get the big picture.

3 Speaking of big picture, one of the analogies that
4 I may come back to from time to time is a simple one.
5 It's a grain of sand. Do you ever go down to the beach
6 and walk out on the sand? And, man, this is nice and
7 serene. It's beautiful, soft. But if you ever reach
8 down and pick up a single grain of sand and you hold it
9 right up next to your eye, you lose that perspective.
10 And if you put it under a microscope or a magnifying
11 glass, that's a shredded, sharp shard of ancient coral
12 or shell. It's sharp. It's ugly. But when you drop
13 that sand back in its proper perspective, it's the way
14 it's supposed to be. It's smooth and nice. And we see
15 it. It's obvious. No question. The judicial process
16 doesn't destroy that. It clarifies it when we drop
17 that sand back where it's supposed to be.

18 So one by one I'm going to drop that sand back on
19 the ground for you where it's nice and soft for you
20 walk on. And at the end of that, I'm going to ask you
21 to walk in your jury room and do your duty. So let's
22 start. Okay?

23 Let's start with the basic concept of law that
24 you're going to hear over and over again, and that is
25 the concept of what a Terry frisk -- I'm going to give

1 you a little blueprint, a road map, so that when we're
2 talking about the facts, you can see how it fits into
3 the conversation. If we agree to the terms, we
4 generally can agree with the process at the end. Fair
5 enough?

6 My artistic skills aren't very good. Thought of
7 it last night, so I just thought I'd put pen to paper
8 and talk about it, okay.

9 Pretty simple concept of law. I'm going to use
10 personal experience from that. A voluntary interaction
11 with law enforcement. Very simple. An officer walks
12 in the Circle K and says, "Hey, man, how you doing?"
13 He might even ask you for a driver's license. "Can I
14 see your I.D.?"

15 And you can say, "No, not today, sir. You have a
16 good day." Walk away.

17 Have no reason, there is no suspicion of any kind,
18 absolutely no basis for that officer to detain you. He
19 cannot. He's violating your constitutional rights if
20 he does, okay, because he doesn't have any suspicion of
21 a crime. It's just a human being; he's interacting.
22 No problem with that.

23 And good police officers do it all the time.
24 That's even a concept of community policing that we
25 have, right? The City of Myrtle Beach engages in

1 community policing.

2 In the classic, you know, crime drama of the beat
3 cop walking around, you know, walking around talking to
4 the store owner. "How are you doing today, sir?"

5 "How are you doing?"

6 That's the voluntary interaction that some
7 communities consider the foundation of good policing,
8 right? Know your folks, know the cops. So if a
9 problem that comes up, there's that good relationship
10 that people can come for help. They don't feel
11 intimidated, right? We want that. That's a good
12 thing.

13 The next step, which is what we have in this case,
14 okay, it's an investigative detention. It's called a
15 Terry stop. And we can think of things from Andy
16 Griffith all the way through all of the high-tech
17 movies and probably personal experience, that you may
18 have been involved in a Terry stop and didn't even
19 realize it. And we'll talk about that here in a
20 second, okay.

21 The key to that is that you have to have
22 reasonable suspicion that a crime may be afoot, but
23 you've got to support that by specific articulable
24 facts. In other words, it can't be a hunch. A cop
25 can't be sitting around going, "I don't like the way

1 that guy looks."

2 It's unconstitutional. He can't do that. He has
3 to point to objective, specific, articulable facts on
4 why that guy versus everybody else. Okay? And if
5 those facts exist, then he can briefly detain you.
6 You're not free to leave, right? You can't leave. He
7 can hold you, depending upon the threat, keep you there
8 until one of two things happens, okay, either that
9 suspicion is eliminated, okay, "I'm sorry, I was
10 wrong," or the suspicion is confirmed, "You are
11 committing a crime and now I'm going to place you under
12 arrest," okay.

13 Let's give a real-life example of what that might
14 be. Let's take an old Andy Griffith show, all right.
15 A lady is coming out of -- walking down the street, old
16 grandma, she's got a purse on, and a cop -- a police
17 officer doesn't see any of this, right, doesn't see it.
18 And all you hear is, "Stop, thief. Stop. Stop that
19 man."

20 And the cop turns around and looks, looks, and he
21 sees a man running that way, and he's got a purse in
22 his hand, right? The cop did not see any crime occur,
23 doesn't know if a crime occurred, has no idea. But
24 what he does know is that he heard a female voice say,
25 "Stop, thief," and females often carry purses. Men

1 often don't carry purses. He sees him running, right?

2 Is that officer's duty to ignore that situation,
3 step away and say, "Oh, I'm not doing that"?

4 No. He has articulable suspicion supported by
5 articulable facts that a crime may be afoot. It is his
6 duty to go after that man and use physical force if
7 necessary.

8 How many times do you see in a movie a tackle and
9 take him to the ground, right?

10 Now we're at the nexus of the problem. What's
11 that nexus? If the guy just carries a purse and he
12 happened to be jogging and that suspicion has been
13 exhausted, "I am so sorry, sir. I'm sorry. I'm sorry
14 I reacted on this. You are free to go, and I'm sorry."
15 Or if he picks up the purse and it's this lady's purse,
16 says, "Ma'am, is this your purse?" Guess what's
17 happening to that guy? He's going to the next stage,
18 and that's a full custodial arrest. "Please put your
19 hands behind your back. I'm going to take you into
20 custody." Okay. It's pretty straightforward stuff.
21 We see it all the time. It's intuitive. We know that.

22 Let's take another example, and that might be
23 you're driving down the road, maybe it's 10:30 at night
24 on a Friday night. You're coming around the Broadway
25 at the Beach area and you're driving and you hit the

1 yellow line, "ooh," and then you hit the white line on
2 the other side. And there happens to be a police
3 officer behind you, and he sees that behavior, right?
4 He has reasonable articulable suspicion supported by
5 specific facts to activate the blue lights and pull you
6 over, right? You are not under arrest, but he can
7 detain you reasonably to see what's going on in there,
8 right?

9 Walks up, "May I see your driver's license and
10 registration? Let me see your I.D.," to make sure
11 you've got proof of insurance and a driver's license,
12 right? An interview, field interview, okay.

13 And then -- by the way, when he's doing that, he's
14 also probably leaning in the car and smelling in there,
15 see if he smells any alcohol. He may also be looking
16 in there to see if there's any beer bottles in there or
17 something like that.

18 Your driver's license and your registration are
19 good, no beer bottles in the car. He may even ask,
20 "Ma'am, have you had anything to drink tonight?"

21 You say, "No, sir."

22 "Well, I saw you weaving back there. What's going
23 on?"

24 "I dropped my cell phone. The thing went off. I
25 dropped the cell phone. I reached around to get it and

1 ooph."

2 What he just did and what, theoretically, you just
3 experienced is a lawful investigative detention. What
4 he did was stop you. You are not free to leave, okay.
5 He has supported it by reasonable facts. You hit one
6 side and hit the other, coming in at 10:30 at night in
7 an area where folks are known to get intoxicated and
8 drink and drive. And he based that for the reason to
9 briefly detain you. You couldn't leave until one of
10 two things happens, right? That is, that you resolved
11 the reasonable doubt in your favor. You weren't drunk.
12 You did, you know, swerve, but sort of, you know. No
13 beer bottles, no liquor. This thing isn't going any
14 further. Your driver's license is good, this is good.

15 "Sorry, ma'am. You're free to go. Please, you
16 know, watch that cell phone. Don't text and drive."

17 Or, "Man, it smells like alcohol in there. You've
18 got beer bottles in there. Step out of the car. Ooh,"
19 you know.

20 Then the suspicions have been confirmed, the
21 suspicions that something is going on here. And then
22 we'll get to field sobriety, whatever may happen. You
23 may end up being in full custodial arrest. You may go
24 to jail that night for driving under the influence.

25 Pretty straightforward stuff. See it all the

1 time. It's 101 law enforcement interaction. It
2 happens every day.

3 Let's add a little element to it to clarify this.
4 In investigative detention, there's also an armed and
5 dangerous element, okay. In other words, let's change
6 the purse-snatching analogy just a second. Let's
7 change that to a teller runs out of a bank and yells,
8 "Hey, stop that guy. We've just been robbed. The
9 man's got a gun."

10 And the officer looks around, doesn't see it, he
11 didn't see it. He has to rely on what somebody else
12 told him, right? Didn't see it. So he looks, and
13 there's a guy running. And he's got a bag in his hand,
14 he's running. Does that officer step away from his
15 duty and say, "Oh, not me today, not today. You know,
16 I got football to watch. It's Saturday. I'm not going
17 to get into this thing," or does he acknowledge what
18 information he got, and that is, the element in this
19 one is a gun, right? So he has a reason to believe
20 this person could be armed and dangerous.

21 The nature of armed robberies or bank robberies,
22 inherently in that, have weapons involved. It's a
23 danger to the community and to the officer itself,
24 okay. So that level of force that he can use gets
25 stepped up a little bit. And so instead of just

1 running after a purse snatcher, which is probably kind
2 of benign and, you know, a small crime, we have a
3 felony bank robbery, in his mind. He can draw his
4 weapon and take the man to the ground to resolve this
5 issue. "Let me see your hands. Let me see what's
6 going on here."

7 And if this guy happened to be out for a jog with
8 a bag on him and he wasn't involved in the bank
9 robbery, and the teller comes out and says, "No, sir,
10 that wasn't the guy. He ran the other way. This guy
11 I've never seen before in my life," "I'm sorry, sir.
12 You're free to leave. I'm sorry. I apologize for
13 that. You're free to go. Can I help you?"

14 But if he has a bag in his hand with the cash,
15 with a dye pack in it, that was very reasonable, as a
16 matter of fact, it's purely -- entirely constitutional
17 for the officer to use force, to brandish his weapon,
18 if necessary, to protect himself and the community
19 if -- this is reasonable suspicion, infer that the
20 individual is armed and dangerous.

21 Does that make sense? That's fundamental to the
22 analysis. Okay?

23 Once this guy -- doesn't have a dye pack and he
24 was out for a jog, he is free to go. He never makes it
25 over to the red zone. He is free to go. "I'm sorry."

1 But the officer has a duty. He would be negligent in
2 his duties if he allowed an armed robber to run away.
3 "Ooh, I'll see you later."

4 He's protecting the citizens. That's why he's got
5 a badge and a bulletproof vest and a gun, because he's
6 confronting people that are armed and dangerous. And
7 he has to do that for the community. Okay?

8 So given that framework, let's talk about the
9 facts of the case, because we're going to refer back to
10 this now. Okay?

11 December 29th of 2002, y'all remember the story.
12 It's already been like a long time, but it's only been
13 two days. Well, jury selection is a different story.

14 Mike Guthinger and Officer Joe McGarry hadn't seen
15 each other, Chad Mullinix comes up, and he says, "Hey,
16 man, I've got some great news. I want to talk to you
17 about things. This is cool. I want to go to Dunkin'
18 Donuts."

19 And Guthinger says, "No, man, no. Come on."

20 He says, "Come on. We'll go get a cup of coffee.
21 We'll go down to the beach access and we'll talk about
22 stuff."

23 It's December 29th of 2002. Myrtle Beach is a
24 ghost town. Well, it's getting better, the off-season
25 and stuff, not a lot of folks around, but there are ten

1 head at least in the Dunkin' Donuts, right?

2 So they pull up, Guthinger -- Officer Guthinger
3 says he doesn't think it's going to last very long, so
4 he doesn't back his car in. Joe McGarry does. They
5 get out. Everything is good. No problem.

6 They have no intention of going to the Dunkin'
7 Donuts to investigate anything. That's Joe McGarry's
8 state of mind. He's not thinking about trying to find
9 somebody to pat down. He's not thinking about trying
10 to find somebody to arrest. He's trying to think at
11 the time, at midnight, to spend with his friend.
12 That's Joe McGarry's state of mind.

13 And he follows through all the way up until the
14 point that we conclusively prove the existence of
15 reasonable suspicion. The definition of it: Open the
16 door, attention is drawn to Defendant Cottrell. Looks
17 at him.

18 How do we know that he was concerned for officer
19 safety? Because he didn't go, "Hey, Mike, boom, that's
20 10-61, 10-32 over there. What are we going to do about
21 him?"

22 He didn't. What did he do? He goes (whispering).

23 He used hushed tones because he didn't want
24 Defendant Cottrell to know what he knew. That's why he
25 used hushed tones. And that's exactly why Guthinger

1 said, "Well, let's try to get him outside and talk to
2 him about this."

3 Implicit in that statement is an effort to protect
4 the citizens in the Dunkin' Donuts in case this thing
5 goes bad, bad, bad.

6 So they wait for him to get outside. That is
7 proof beyond a reasonable doubt of specific articulable
8 facts supporting an investigative detention, right?
9 And there's more, but that's enough right now, okay?

10 We hear testimony from Officer Guthinger that a
11 10-61 and 10-32 is a suspect in a shooting. Implicit
12 in a shooting is involving a firearm. And 10-32 in
13 common parlance is "man with a gun."

14 So we have two prongs there. We've got a crime of
15 shooting, and we also have presently armed and
16 dangerous man with a gun. That's exactly the same as,
17 "Stop, thief." That's the same as hitting the yellow
18 line, "Whew."

19 Now it's the officer's time to make a decision,
20 right? Do they step away? Do they let a shooting
21 suspect go without any investigative effort? Isn't
22 that dereliction of a duty, of an oath that they took
23 to protect the citizens of Myrtle Beach?

24 They see him. They know him. Cottrell confirms
25 that he knows him. "Hey, I know that guy. Do you

1 remember me?"

2 "Yes, I do."

3 This is the same guy. They see a white male
4 coming out of there with him. The information they get
5 from Horry County is a white male is involved too.

6 "Can you I.D. who this white male is known as Red?"

7 There was a golden colored Honda or Acura, I guess
8 it was, involved. That's in the parking lot.

9 What do they do? Joe McGarry does his duty. He
10 was there to talk about other things. He wanted to get
11 a coffee and leave. And he interrupted his life at
12 that moment to do his duty, to find out what's up with
13 a 10-61 and 10-32 man standing right in front of him.
14 That's what he did.

15 Mike Guthinger didn't know anything about what
16 that was at the time. He said, "Hey, this is Joe. I
17 didn't know him. This is his show. So I supported the
18 officer. I stood beside in preparation -- you know,
19 I'm not sure what's going on here, but I'm here in case
20 you need me." He puts his foot up here, tried to look
21 cool.

22 And then we see the manifestation of Officer
23 McGarry going step-by-step through that Terry analysis.

24 "Hey, man, you remember me?"

25 "Yeah I, do. I do."

1 "Hey, did you take care of some of those problems
2 you had in the past, speeding tickets, whatever they
3 were?"

4 We now know that was a ruse to get on the radio to
5 find out about whether there are shooting warrants for
6 him or not. But he said, "Hey, let's try to take care
7 of this stuff, okay? Let me see what's going on. And
8 by the way, your name is tough, I can't remember your
9 spelling. I can't remember that. Can you give me your
10 I.D. so I can check your spelling?"

11 And there's no question that that statement at
12 that point in time, that it was cordial. Now, it was
13 so cordial that perhaps Defendant Cottrell thought we
14 are still in this voluntary stop stage, right?

15 We know testimony -- we know for sure that the
16 officer -- it was never in a voluntary stage. Once
17 they identified him as a shooting suspect and
18 identified him as a man with a gun, he was never going
19 to be free to leave until they either extinguish,
20 right, NCIC came back negative, or he didn't have a gun
21 on him, then he's going to be free to leave, or they
22 confirm that the NCIC -- that he does have warrants or
23 that he had a weapon on him, one of those two. If he
24 has a weapon on him, he's going to go to jail, or if
25 there's warrants he's going to go to jail. If he's

1 free to leave because the NCIC is negative and he
2 doesn't have a weapon after pat-down, "Well, thanks,
3 enjoy your coffee. Hope you have a good Christmas."

4 That's what was going to happen. We never got
5 there. And why didn't we get there? Because of an
6 earpiece. Because Defendant Cottrell -- decisions
7 started flowing when Joe McGarry accessed information.
8 Cottrell doesn't know what's in that information. He
9 has to make a decision. He doesn't know what that NCIC
10 is going to come back, doesn't know what Joe McGarry
11 knows. Doesn't know.

12 So everything is cordial. "Let me see your I.D.
13 Man, how are things?"

14 "Everything is good."

15 "Well, let me run this NCIC."

16 When he runs an NCIC, that's when, "Hey, man,
17 you're harassing me. Why are you harassing me?"

18 Didn't have any problem handing the I.D. to him
19 until that I.D. was going to access a national
20 database, and then, "Hey, you're harassing me, man.
21 You're harassing me."

22 Okay. How do we know this is what happened?
23 Well, Defendant Cottrell told you that he was trying to
24 get -- be patted down pursuant to an investigative
25 detention. He said, "He wanted to pat me down, and I

1 told him no." That's defendant's own words. He said,
2 "He was trying to effect a Terry stop by patting me
3 down, and I said no."

4 Now, we know that he can't say no. This is a
5 proper detention. It's not voluntary. He is not free
6 to leave until either it's been resolved in the
7 defendant's favor without any problem, or it's been
8 confirmed that you have a weapon, and then you're going
9 to get arrested. Very straightforward. It's out of
10 the man's -- the defendant's mouth himself, okay.

11 So at that point in time, we clearly see Officer
12 McGarry running his NCIC and having a conversation.
13 Now, let's talk about a couple other things that
14 Officer McGarry and Guthinger saw, okay.

15 They see a five-foot-nine man, about 180 pounds,
16 according to I.D., I think, back -- of course, that's
17 an old I.D., wearing a triple X shirt. A triple X
18 shirt, okay, that's big. That's baggy.

19 Remember, Officer McGarry was a street crimes man.
20 He's a street crimes unit. He does face-to-face
21 confrontations all the time, and that means he involves
22 and deals with folks in difficult situations.

23 It's entirely concealable. He knows baggy
24 clothing can be an indicia for concealable weapons.
25 It's also an indication of preparation to carry a

1 weapon when you carry baggy clothing to hide something
2 that we know that, unfortunately, Officer Joe McGarry
3 did not know and, unfortunately, it may have cost him
4 his life, that Luzenski Cottrell had a .45-caliber
5 handgun in his waistband in the Dunkin' Donuts, all
6 during that conversation, all the way until the end.
7 He had it on him the whole time.

8 You also heard testimony specifically about the
9 duty if you lawfully carry a handgun in South Carolina,
10 you have to disclose that if you have an interaction
11 with a police officer. In other words, if you have a
12 concealed weapons permit and you get pulled over by a
13 police officer, when he says, "Do you have a driver's
14 license and registration?" you have an affirmative duty
15 to say, "Just so you know, I'm a concealed weapons
16 permit holder. Don't -- you know, don't get weirded
17 out if you see a gun on me because everything is good,
18 sir."

19 And then he goes, "Okay, let me see. Let me see.
20 Where is it? Okay. Don't reach over there. Just give
21 me your driver's license," you know.

22 So if Cottrell was in that situation, the first
23 thing he asks, "Let me see your I.D.," "Hey, I'm good.
24 By the way, I've got a pistol here. Don't get sketched
25 out."

1 Didn't do that. Did not. Cannot. So he's
2 unlawfully carrying a handgun at that point in time,
3 and he had it in Dunkin' Donuts. Had it all through
4 that period of time.

5 Joe McGarry didn't know that, but he had an
6 articulable suspicion that he might be a 10-32, baggy
7 clothing, 12 o'clock at night, and so he asked, "Let me
8 pat you down. Let me see your I.D. Let me pat you
9 down."

10 He is one step away from resolving the issue. He
11 never got to it because Defendant Cottrell specifically
12 says, "No, man, you ain't patting me down." Why? As
13 soon as he touches it, he's going to jail.

14 Let's talk about something that's a little
15 difficult, a concept a little difficult to embrace.

16 Officer McGarry absolutely saw a weapon on
17 Luzenski Cottrell on December 29th of 2002. No
18 question. Absolutely no question. He saw it 12 inches
19 from his face when that gun went off.

20 Luzenski Cottrell was going to go to jail that day
21 under arrest. Now, the question we have to figure out
22 is how far earlier in that process did he first see it,
23 because we know he saw it, and we know he grabbed for
24 his weapon to try to defend himself. It was a gunfight
25 at the end, the very end when he realizes he's going

1 to -- "Ooh, man, here it comes. He's coming at me.
2 I'm coming at him. Here it comes."

3 Absolutely conclusive that Luzenski Cottrell fired
4 the first shot in Joe McGarry's face. There is no
5 question about that. Eyewitness testimony indicates
6 that. We also have testimony from Diane Lawson that
7 Officer McGarry fired his weapon in continuation after
8 he was hit, and going down, in the face. Two
9 eyewitnesses, both conclusive: Luzenski Cottrell fired
10 the round directly in Joe McGarry's face, okay.

11 So we know Joe saw it. And we'll just go
12 backwards in time to see when we believe beyond a
13 reasonable doubt he did see it, because we know he did,
14 right? And we know he had it on him, right?

15 So what was going on at the point in time when
16 everything starts escalating? All right. What
17 happened that caused this escalation? It was civil.
18 It was a civil conversation until he keys up the radio
19 and you heard the transmission. And then his clock
20 starts running, right? Cottrell's decision tree starts
21 running. "What am I going to do? What am I going to
22 do? What am I going to do?"

23 Okay. Well, let's clear up this coffee issue.
24 This is kind of something floating around out there
25 that's a little interesting distraction. It's kind of

1 like the Challenger rapidly disintegrating into -- and
2 just, you know, "boom."

3 Coffee cups are right here in the picture. You
4 can see the coffee cups here. Right there and right
5 there. Cottrell had to hand the I.D. to Officer
6 McGarry. He didn't hand Officer McGarry his I.D. with
7 coffee cups in his hand like this. He walks over to
8 the hood of Donny Morgan's car, sets them down, goes
9 back to the officer, gives the I.D. to him. That's a
10 reasonable inference from the facts.

11 How do we know the coffee cups are there? When
12 Diane Lawson got in the car and backed away, swung the
13 hood around, they fell off the car. You can see the
14 coffee in the picture. Take a look at it when you get
15 a chance. That's a red herring.

16 The point being is, Defendant Cottrell had his
17 hands free when he gave his I.D. to Officer McGarry.
18 And then, according to Diane Lawson's testimony, starts
19 backing away. As soon as he keys up the radio, starts
20 backing away, backing away. And then he starts turning
21 when he says, "I'm going to pat you down, man. I'm
22 going to pat you down."

23 Remember, we're dealing with a field training --
24 excuse me -- a crime scene guy. You guys aren't
25 trained law enforcement. All right. But just imagine

1 this situation in a parking lot, right? You're talking
2 to a fellow. You're not harassing this guy, and he's
3 starting to say, "You're harassing me."

4 Hey, man, you heard the guy's tone on the radio.
5 He wasn't saying harassing language a bit. He was calm
6 and professional through that period of time. Yes, and
7 we keyed it up, and we can tell you this: 37 seconds
8 go by while he's waiting on a response from dispatch
9 that the warrants came back negative. In that period
10 of time, according to testimony, Defendant Cottrell
11 turned around and went like this. Now, when does Joe
12 see that? Does he see it when he's backing away? Does
13 he see it because this thing is loose and baggy and
14 it's a front-button shirt that can gap and he can see
15 the pistol? It's not a pullover. I don't know if it
16 was snapped that night or not, but it's a front-button
17 shirt, just like my jacket.

18 So if I'm standing like this and I go, "Hey, man,
19 hey," and I turn like this, can he see it at that
20 moment when he backs away and turns? Only Joe McGarry
21 would know about. But is that a reasonable inference
22 from the facts?

23 What else do we know? Well, we know that being a
24 field training officer -- excuse me -- being a crime
25 scene guy -- I mean, a street crimes guy, do you have

1 any indication or any doubt what I'm doing if I'm
2 standing with you like this and I do this? Do you have
3 any doubt what he's doing when everything is fine, he's
4 yelling "no" and he turns his back to you and he goes
5 like this? There's no doubt.

6 How do you know the sound of your spouse's voice?
7 How do you know it? You can't describe it. But when
8 you hear it, "boom." You know she's home. Can't
9 describe how you know it. But based on training and
10 experience, if you're at 2 o'clock in the morning and a
11 guy that's a shooting suspect, a 10-32, and you see
12 this, what are you going to do with that arm? What are
13 you going to do with it? Are you going to see when he
14 turns and what he has for you, or are you going to try
15 to control that hand? You're going to go, "Hey, man,
16 show me your hands. Show me your hands."

17 And where does he go? He goes to the threat.
18 Where's threat? The right hand. Where is the right
19 hand? In the waistband.

20 Amber Counts says he carries a gun in the
21 waistband. Luzenski Cottrell told you in his own words
22 he carries a waistband (sic). And, unfortunately, Mike
23 Guthinger saw him pull a weapon from the waistband and
24 put it 12 inches from his partner's -- his best
25 friend's face.

1 There is no doubt that Officer Joe McGarry is
2 very familiar in dealing with folks in Terry
3 situations, a 10-32, what that means.

4 Did you see a gun? Could you see a gun? Is there
5 any question that you know what he's doing?

6 When you hear your spouse's voice you know it.
7 You can't say why, but you know it.

8 He knew it. And he knew, "I gotta do something
9 now. I gotta do something now." So he goes after him,
10 goes across to take -- "Hey, show me your hands. Hey,
11 show me your hands."

12 Let's put something else to rest now. Officer
13 Guthinger didn't see Officer McGarry pull a pistol. He
14 didn't see that. I don't know if he did or not. So
15 let's just take the facts in the best-case scenario for
16 Defendant Cottrell. Let's just say he did, okay.

17 So as he's starting to cross here to the vehicle
18 that was described as a golden colored vehicle, this is
19 part of his reasonable suspicion, that this thing is
20 involved too. He sees the defendant heading that way,
21 right? We now know that there was another handgun and
22 90-some rounds of ammunition in that car. Officer
23 McGarry didn't know that at the time. But he knows
24 he's heading that way, right? And he's saying, "Show
25 me your hands. Show me your hands. Show me your

1 hands."

2 And let's say he does say, "This guy is armed.
3 He's not complying with my commands."

4 Another thing that's interesting. He gave the man
5 his driver's license -- or his I.D., but yet the
6 defendant is walking away from his I.D. He didn't wait
7 there to get it back, going, "Hey, I'm good, man. I
8 took care of those tickets. You have nothing to worry
9 about from me." And he doesn't wait there for his I.D.
10 He leaves his property with the officer to get away
11 from him. That's suspicious. Why did he do that? Why
12 do you turn your back away from him? Why do you make
13 furtive gestures? That helps continue to develop the
14 articulable suspicion on why something is going on.
15 It's not static. It continues to develop on contact,
16 when he says I'm harassing you.

17 "I'm not. Why are you saying that? Why did you
18 just walk away from an I.D. when you just told me
19 everything was okay?"

20 "I took care of those tickets. Everything is
21 okay."

22 Why is he making furtive gestures?

23 So he says, "Show me your hands. Show me your
24 hands."

25 And let's just assume he does pull a weapon.

1 "Show me your hands." Joe being a lefty.

2 We have testimony from Diane Lawson that he
3 reholsters his weapon and lays hands on Defendant
4 Cottrell. What is that? That's the definition of
5 reasonableness, of saying, "Hey, I need to control your
6 hand. I need to use nonlethal force to figure out what
7 I'm going to do with your hand. And if I'm
8 misrepresenting the situation, you're free to go, man.
9 But you look like you've got a gun on me, I kind of
10 thought you had a gun, and let me find out. So give me
11 your hand."

12 And how do we know that he reholstered his weapon?
13 Because that's when Officer Guthinger can see what's
14 going on. When he looks up and he sees left hand on
15 the shoulder right here. No handgun. And Joe McGarry
16 is left-handed. No handgun. And the right hand is
17 grabbing his wrist, trying to control his wrist. He's
18 afraid of that wrist. Guthinger couldn't see what was
19 there, but he's afraid of that wrist. Joe McGarry knew
20 what was there and was terrified. If that thing comes
21 out, somebody is going to go down. He was right. It
22 was him, unfortunately -- for anybody to go down,
23 unfortunately.

24 Then he's attempting to use nonlethal force,
25 notice, lays hands on the man, struggling with him.

1 They finally get separation and turn. Weapon comes
2 out. Joe McGarry sees it. Joe McGarry is entitled to
3 use lethal force to shoot Luzenski Cottrell dead right
4 there and tried to, because the gun went off. We have
5 a shell casing from Joe McGarry's gun. Our state
6 expert says that casing came from Joe McGarry's gun.
7 That round went off somewhere. But there's substantial
8 direct and circumstantial evidence on what happened
9 there, and that is, "pow, pow." Flash, bang, boom.

10 Diane Lawson says a round goes off as he's going
11 down.

12 Dr. Presnell said, "I can't tell you what happens
13 with a concussive injury. He may or may not have been
14 able to fire that weapon at that time. Unfortunately,
15 in a tragic situation like that, there's not a lot of
16 case studies on what happens when a human being is hit
17 in the face with a .45-caliber bullet. We know the
18 round went off and we know what happened after Cottrell
19 shot him in the face. But had Cottrell not shot at
20 all, when you pull a weapon on a police officer, you
21 are getting ready to get shot. And that is okay for a
22 police officer to do. You pull a gun on a cop, that's
23 not a difficult thing to figure out.

24 So Joe McGarry acted absolutely appropriately.
25 It's okay that he fired his weapon when he sees a gun

1 coming up like that to use lethal force. It was also
2 entirely appropriate to pull the gun on him if he
3 believes that he is armed and dangerous. He can use
4 force to resolve it, to protect everybody in Dunkin'
5 Donuts, to protect his partner, protect himself. It's
6 entirely appropriate.

7 Now, this is a sliding scale of reasonableness,
8 okay. You can't take a SWAT team and kick in a front
9 door and say, "Hey, I think you may have written a bad
10 check." You can't do that. That's not reasonable.
11 But you can if you think the guy is armed and dangerous
12 and a suspect in a shooting. You don't have to take
13 the least available means necessary. You don't have
14 to, because the police officer is there to try to
15 figure out what's going on, to save everybody else, to
16 protect everybody else. He's the one that signs up to
17 be the first one in the front door. So he did do that,
18 and that's what he's supposed to do. That's why he's
19 acting lawfully in the process. Okay?

20 Let's go through the rest of this and see what
21 little gems we can get out as this thing develops.

22 We talked a lot about this moment right here, the
23 fatal shooting, and that's the most important part, but
24 how can we use the other things around it to help
25 interpret what exactly happened? What exactly

1 happened, okay?

2 At this point in time, Officer Guthinger is trying
3 to close. Officer Guthinger continues to articulate
4 reasonable suspicion when he said, "Well, I see him
5 struggling, and I see Joe trying to control that hand,
6 being aggressive, using nonlethal means."

7 He didn't act unreasonably and shoot Cottrell and
8 ask questions later. "I didn't see a gun, but I
9 couldn't take a chance."

10 No. As a matter of fact, his reasonableness
11 probably caused him to be about a second and a half too
12 slow. He was not able to get a shot off before
13 Cottrell was able to shoot him in the face with "bang,
14 bang" timing we're referring to.

15 As he's going in, Guthinger says he's not free to
16 leave. Now, if you recall, what was Officer Guthinger
17 doing? Okay. He was acting at the direction of
18 Officer McGarry, doing exactly what Amy Prock asked him
19 to do through Horry County, and that is, I.D. the white
20 male involved in this thing, I.D. him. Right there is
21 Halcomb's I.D.

22 How do we know what was in Joe McGarry's mind as
23 far as articulable suspicion is concerned? Because he
24 acted on what they asked him to do: I.D. the guy in
25 the black Acura. And that's what Guthinger was doing

1 right here when he hears a civil conversation and then
2 hears the escalation, "Show me your hands. Show me
3 your hands," across the parking lot. Okay.

4 And once again, we're talking the whole thing,
5 wire to wire, is a minute 30. This is 30 seconds, a
6 mortal struggle that results in Luzenski Cottrell
7 firing ten handgun rounds.

8 When Officer Guthinger gets there and gets up to
9 him, he's reaching for the left hand to control the
10 left hand, because he thinks Joe has the right hand.
11 And so he says, "I'm not sure what's going on, but
12 that's like a 'stop, thief,' and we're going to go to
13 the ground and sort this thing out," right?

14 "I didn't see a gun, but I'm going to take him to
15 the ground, and then we'll go okay. I'm going to
16 maintain the status quo of this situation. And if
17 we're wrong and Officer -- I mean, Luzenski Cottrell,
18 we tackled him for no reason, then I'm going to
19 apologize to Mr. Cottrell, but I'm not going to get
20 shot because I was too late in reacting."

21 And that's what they were trying to do at the
22 time, and they were too late in reacting. But they're
23 allowed to react. Don't stand and wait.

24 So when the round goes off, you heard testimony
25 from Officer Guthinger that he immediately starts to

1 clear leather and his firearm is coming up. All he
2 knows is that he just witnessed a murder and he, "boom,
3 boom, boom, boom," coming up. And Luzenski Cottrell's
4 giving it right back, right there, right at him,
5 empties a magazine at him across the trunk of this
6 Honda, nine rounds. Well, eight rounds, because one is
7 in Officer McGarry's face, and the rest are (makes
8 sound), right through here.

9 You heard Guthinger talk about what happened. He
10 immediately tries to get cover because he's entirely
11 exposed. Officer Guthinger said, as it relates to this
12 round that was fired right in here, after witnessing
13 the boom and flash -- one thing you've got to remember,
14 it's dark. It's midnight. It's not bright. Sometimes
15 it's easy to forget that you've got a limited light
16 situation in the parking lot. And Cottrell is turning
17 and going this way, trying to get around the corner,
18 and he said, "I don't know if I shot him or not. I was
19 (makes sound) right at him."

20 But we don't have to question that. We can just
21 ask Luzenski Cottrell. And he says, "Do you know who
22 shot you?"

23 "Yeah, the one I didn't get. The one I didn't
24 get. That's who shot me."

25 So it's a little like the Challenger disaster,

1 kind of a thing like that. You get the court process
2 and coming in here. And during the course of the
3 Challenger disaster, it's not an explosion anymore.
4 It's a rapid disassembly of a vehicle. That's not what
5 it is. If the doctor's telling the truth, that's what
6 the x-ray shows, but it's meaningless. We know that
7 Guthinger shot him after he shot McGarry. We know
8 that. Guthinger retreats, gets back here, additional
9 rounds are being fired. Officer Guthinger at this
10 location reloads.

11 Now, one of the ways that we can determine the
12 credibility of witnesses, the believability of
13 witnesses, take the pressure off and try to figure out
14 who to believe or not. Is there physical evidence or
15 anything that corroborates this? Does it corroborate
16 what happens? That's what this charge is, is absolute
17 corroboration of the testimony of Officer Guthinger,
18 specifically -- well, you've seen the picture. His
19 magazines were recovered right here, the three rounds
20 in the magazine. Right where he said the mag change
21 was, right?

22 How do we know Luzenski Cottrell fired a -- well,
23 No. 18. Luzenski Cottrell's empty eight-round
24 .45-caliber magazine right there.

25 We also know that's what he did because Amber

1 Counts, the defense's witness, said, "He asked me to
2 grab the bookbag where he keeps his spare mags and
3 reloaded, ready to go." That's what happened, okay.

4 Interestingly enough -- let's just talk about
5 malice and this and just absolute proof of this
6 situation for a second.

7 This is Luzenski Cottrell's gun, okay. When we're
8 talking about malice aforethought, one of the things
9 we're talking about is the preparation for the crime or
10 intense indifference to human life. (This actual)
11 preparation, going about and doing what you're doing
12 and actually preparing for it, is evidence of malice,
13 that you intended the act as it happened, what you're
14 accused for.

15 So this is his handgun. This is the magazine that
16 was in the handgun. It was fully loaded, and I'll show
17 you how we know that beyond a shadow of a doubt.
18 Ultimately, seven rounds in the magazine, okay.

19 I want you to go back there and feel this. I want
20 you to feel it. Feel how heavy it is. Feel how
21 cumbersome this thing is. Feel how intentional it is,
22 that this thing is in a man's waistband in the Dunkin'
23 Donuts. This is malice. This is intending to do what
24 he did. It's heavy. It's malice. And he has a spare.
25 He has a spare. So this isn't enough. It's not

1 enough. We've got to get ten more.

2 So if recall, Bello Paavel said eight shots plus
3 one, right? Eight, and one in the chamber. One, two,
4 three, four, five, six, seven, eight, plus one, right?

5 McGarry, Guthinger, Guthinger, Guthinger,
6 Guthinger, Guthinger, Guthinger. How many does this
7 hold? Nine. One, two, three, four, five, six, seven,
8 eight, nine. Shot dry. He needs to reload. We know
9 it was empty because it was recovered from the crime
10 scene empty, completely empty.

11 So he puts another mag in, a fully loaded
12 eight-shot mag, and says, "I surrender. I surrender."

13 Here comes the trick. Here comes the trick. "I
14 surrender. I give up. I give up."

15 And so what does Officer Guthinger do in response
16 to that when he's trying to do his duty? He is trying
17 to detain a person that he watched murder a police
18 officer. He didn't say, "Oh, I'm going to walk away
19 from that situation, I've got too much to do. I'm
20 going to do my duty." And you know what he did? He
21 made one decision that made him the luckiest man in the
22 world on December 29th of 2002. He was in an area of
23 cover right here. Luzenski Cottrell is laying right
24 here. His feet are here, and his gun and his head are
25 pointed in this direction on the front approach to that

1 vehicle. And Officer Guthinger bit. He turns the
2 corner and comes this way and gets right here. You've
3 got to remember, the Halcomb vehicle is gone by now.
4 He gets right there and, for whatever reason, he
5 changes his approach, and he says, "I'm getting up on
6 the sidewalk and I'm going to go this way."

7 And when he gets right here, what does he see?
8 "Show me your hands. Show me your hands." He's got
9 the fire around the corner. And he says it's like the
10 wicked witch, legs were out there, he's all prone out,
11 and "boom." He pulls up, and what's he do? "Boom."

12 We know he didn't intend to surrender because he
13 fires the last round at Guthinger. How do we know
14 that's what happened? Because we have seven rounds in
15 the magazine, plus one, that's eight. That's 17 shots
16 recovered, just exactly like Bello Paavel. He shot the
17 first one dry, mag change, said "I surrender," and then
18 popped another off at Officer Guthinger to kill him
19 too.

20 Beyond a reasonable doubt. That's malice. That's
21 preparation. That's reckless indifference to human
22 life. It's murder. Murder.

23 What else do we have going on? In the world of
24 the legal process, suddenly a high-speed chase across
25 the city of Myrtle Beach with five police officers at

1 least chasing him, with stop sticks deployed, with guns
2 pulled, and the legal process that turns into a
3 surrender. That's an effort to get away, to avoid
4 responsibility for your crime. And but for Horry
5 County police throwing out stop sticks and blowing out
6 the tire, who knows what was going on happen. We don't
7 have to guess because we know. But only in a courtroom
8 does a 90-mile-an-hour chase turn into a surrender. Of
9 course, only in a courtroom does a malicious, brutal
10 murder turn into an unsubstantiated claim of
11 self-defense.

12 Let's talk about reckless indifference to human
13 life, which is one of the elements that you consider
14 concerning malice. Just take a look when you have a
15 chance when you're deliberating at the bullet holes in
16 these cars and the glass blown out at the people when
17 they're -- of people in the Dunkin' Donuts trying to
18 come out, not knowing what's going on, that Defendant
19 Cottrell is firing rounds down range, unconcerned about
20 who it hits, who it doesn't hit, just concerned about
21 getting the one that he hadn't got yet. Danielle -- or
22 this silver unrelated vehicle where Guthinger was
23 hiding behind, windows blown out, bullet holes in it.
24 Unrelated vehicle, two bullet holes, .45-caliber
25 bullets in the side of that vehicle. That's

1 represented on this chart in this location, two of
2 them. And perhaps a bigger concern, we've got a bullet
3 in a Calabash Seafood restaurant all the way down here,
4 all the way across busy Highway 17, striking this area
5 right here, two lanes of traffic. Whoever was driving
6 December 29th of 2002 could have been struck by
7 Luzenski Cottrell's bullet. Thank God they weren't.
8 That's what this picture means.

9 I have a couple more comments on the bloodletting.
10 Here the doctor testified through the course of the
11 x-rays that it was a substantial injury to Cottrell's
12 leg. It's a weight-bearing leg. He answered that that
13 would significantly impair his ability to be mobile.
14 We also know that Officer Guthinger said, "He had no
15 problem running when he was running away from me. When
16 I was firing at him, he was going. And then I noticed
17 afterwards that he was hopping around."

18 Well, you can clearly see in the bloodletting
19 photographs he bled substantially. There was clearly
20 no bloodletting between Officer McGarry's body and
21 where the location that he was hit by Officer
22 Guthinger. There's no blood trail there. It's not
23 what happened. The Challenger wasn't disassembled. It
24 blew up.

25 Let's just talk about a little bit of law. I

1 don't want to dominate all your time.

2 That's conclusively the bullet that killed Officer
3 Joe McGarry fired from Luzenski Cottrell's gun. No
4 question.

5 We want to talk specifically about elements of
6 malice that can be used to prove murder. One of the
7 things the judge will instruct you on is acts in
8 preparation of a crime. Did he know that he was going
9 to kill Officer McGarry that night? No, but he knew he
10 wasn't going without a fight. This is armed and
11 dangerous.

12 His articulable suspicion was confirmed. He
13 didn't have a chance to put him under arrest. Now, I
14 submit to you he was under arrest for 20 seconds when
15 the scuffle started and he went for his waistband and
16 saw that gun. "I'm going to place you under arrest
17 now."

18 I completely think it's comfortable for you to
19 assume that at some point in time prior to the end of
20 Joe McGarry's life when he got here that he was. A
21 lawful proper arrest. He had illegally carried a
22 .45-caliber handgun in his waistband that moved here.
23 It's up to you to decide whether you believe the facts
24 show that it moved from here to here, but this is still
25 lawful, 100 percent lawful. That's what we expect our

1 people to do. We expect him to detain and find out,
2 then say, "I'm sorry, you can go if you don't."

3 But he had a gun on him. Joe saw the gun on him.
4 No question. Saw it before he got shot. Just where is
5 this line? You figure it out. But either one is
6 entirely lawful. There is no evidence of an unlawful
7 arrest. None. He did everything he was supposed to
8 do. No evidence. None.

9 Let's talk about some of the law that you're going
10 to hear concerning jury charges, okay. Let's just talk
11 about murder.

12 Murder is the unlawful killing of a person, of
13 another, with malice aforethought, either expressed or
14 implied. In other words, if I say, "Man, I'm going to
15 kill you," and I do it, that's express malice, right?
16 I don't have to figure out what I was thinking. I said
17 it. Sometimes people do that. Generally speaking, it
18 happens all the time, you've to figure out what was in
19 the heart at the time you fired a fatal shot. And this
20 malice can be formed in an instant. It's just that you
21 intend to do what you did, and you did it. So when you
22 say, "I'm going to pull the trigger" and you do, boom,
23 malice is there. It doesn't have to be a big, long
24 plot. It doesn't have to be a big, long preparation.
25 I did what I intended to do even if it's fast.

1 And I submit to you that Luzenski Cottrell made up
2 his mind on what he was going to do. He was going to
3 get away or kill when that mic got keyed up. And since
4 Joe was not going to let him go until he released his
5 suspicion, confirmed or denied it, the die was cast
6 right there. He knew fight or flight. "If they're
7 going to let me go because they don't know what's in
8 there, then I'm good. But if not, we're going to shoot
9 it out." That's implied malice.

10 And you can use a different -- various different
11 versions of implied malice to get to your guilty
12 verdict. And that's sort of what this case is all
13 about. That's the entire case, right? Is there any
14 doubt in your mind that Joe McGarry is a human being?
15 No. Any doubt in your mind that he is no longer with
16 us, that he passed on? No question he died. A bullet
17 wound to the face is the proximate cause of his injury.

18 So the only issue is malice, what his criminal
19 intent is. Well, you can take a look at the
20 instrumentality that's used and think, was this an
21 accident, like did you electrocute yourself or, you
22 know, did you get mercury poisoning or something? The
23 instrumentality, the mechanism that causes the death,
24 can be used to think, "Hmm, I wonder if that's
25 malicious?"

1 In this case, a .45-caliber handgun was used. We
2 talked about that before, and that's why I want you to
3 feel it. That is malice, the use of that, the way he
4 used it, the way he had it in his waistband in
5 preparation for it. This wasn't a homeowner's dispute
6 or this wasn't somebody kicking in somebody's front
7 door and some confusion. No. This was a deliberate
8 act to put the pistol in somebody -- and let's talk
9 about this.

10 Is there any doubt of your intention to do the act
11 that you did when the weapon is this far away, from
12 this far away, 12 inches? No question that the
13 intention was to kill Joe McGarry. No question.

14 So the only question becomes, was there any
15 self-defense claim or anything like that that would
16 have a tendency to think that he acted in fear of
17 reasonable bodily harm or death?

18 And what the judge will charge you is there's four
19 factors that you have to take into account relating to
20 self-defense, okay. One really is -- well, let's go to
21 the last one first. Well, let's take the first one.

22 The very first one is, were you at fault at all in
23 bringing on the difficulty? In other words, if you
24 come to a situation with unclean hands, then you can't
25 claim, "Oh, you know, I'm sorry. I'm sorry."

1 But part of bringing on the difficulty is, were
2 you unlawfully carrying a weapon? Did you do anything
3 improperly to put yourself in a position to be patted
4 down?

5 In other words, a police officer acting properly
6 in patting somebody down, acting lawfully under
7 reasonable suspicion, that officer is not bringing on
8 the difficulty by doing his job, right?

9 And let's get a little more detailed also. As
10 this progresses, Luzenski Cottrell is compliant, says,
11 "You can have my I.D. That's fine."

12 But then when the officer tells him "No," all he
13 has to do is stop and stand there. That's all he has
14 to do.

15 He says, "I understand."

16 For instance, if you were in a traffic stop -- or
17 let's not say you, the jury -- anybody was in a traffic
18 stop and the officer said, "Hey, you hit the line."
19 And the officer said, "Hey, let me see your I.D."

20 "No."

21 "Well, sir/ma'am, I'm detaining you on reasonable
22 suspicion of driving under the influence. Ma'am, I
23 need to see your I.D."

24 "No, I don't have to."

25 "You do have to. You have to because I believe a

1 crime may be occurring. If you comply and you got
2 that, no problem."

3 You're bringing on the difficulty because you
4 don't have a legal basis to not comply at that time.
5 You don't. You say, "Yes, sir."

6 Now, if it's the first encounter, the voluntary
7 interaction, you do. But if this guy just pulls you
8 over for no reason, you don't have to comply. But as
9 long as he can articulate, "I saw you hit the line, saw
10 you hit the line, the radar gun went off, you were
11 speeding about 20 over," you have to comply.

12 All Luzenski Cottrell -- let me go through the --
13 the next step is: Are you in fear of imminent danger
14 of bodily harm? In other words, was the perceived
15 threat real?

16 Now, we have to make a real leap of faith to
17 assume that an officer that's kindly talking to you
18 somehow is going to shoot and kill you so you're so
19 afraid that you've got to shoot back. There's no basis
20 for that. But if you want to try to play along with
21 that, then you have to believe that in the pleasant
22 conversation that the police officer had, Cottrell was
23 so concerned for his bodily safety that he had no other
24 alternative than to fire in self-defense. And if you
25 believe that Officer McGarry pulled his weapon; then

1 you have to also know that he reholstered his weapon.
2 So at the time of the fight, his gun was not even out.
3 It wasn't even out. How do we know that? Hand up
4 here. Hand right here. That's how we know that.

5 We also know that Luzen- -- "He asked for my I.D.,
6 and when I showed it to him, he said he was going to
7 pat me down. I told him no, and I walked off."

8 You can't walk off, right?

9 "The next thing I knew, he had his gun out and
10 said something like, 'I'll pat you down and drop you.'"

11 This is what he said happened. I don't know if it
12 happened, but let's just assume it did happen. That's
13 fine. He's still acting properly. I don't know if he
14 said, "I'll drop you." It's inarticulate words. But
15 nonetheless, we know that Diane Lawson said he put his
16 gun back in his holster. He did not use lethal force.
17 He put his gun back in his holster and had both hands
18 on the guy. In other words, Joe McGarry is struggling
19 with what the level of force is that's reasonable.
20 He's trying to figure it out in 30 seconds. He's
21 putting it back in (makes sound). "Okay. I'm going to
22 lay hands on you. I'll take you to the ground and
23 figure this out."

24 "He said something like, 'I'll pat you down or
25 drop you.' I pulled my gun and shot him. It was a P90

1 .45. It was in my waistband. I fired -- I shot at him
2 at least once or twice."

3 Cottrell doesn't even know how many times he fired
4 because the shots were so together, "pow, pow." What
5 Cottrell heard was Joe's shot as he was going back.
6 That tells you that Joe didn't shoot him because he
7 didn't even know that it was McGarry's shot. He
8 thought it was his.

9 "The other cop started firing at me so I shot at
10 him. I shot until the clip was empty and I put in a
11 new clip."

12 Only in a judicial process does the act of killing
13 another police turns into, "Hey, I was struggling in
14 self-defense and so I didn't know what else to do so I
15 thought I would kill another cop and then I -- I was
16 just defending myself."

17 When asked why he felt this had happened, "The cop
18 was just hassling me. It just made me mad and that was
19 that."

20 That is express malice.

21 If a state trooper is mistreating you in a traffic
22 stop, not improperly but was a little short with you,
23 you can't shoot him. You can't shoot him. You can
24 never shoot him.

25 We have express malice. We have implied malice.

1 We have preparation. We have reckless indifference to
2 human life. Reckless indifference is manifested by the
3 attempt to kill Mike Guthinger with a magazine reload
4 after he tried to trick him to come out. That's what
5 we know was in Cottrell's mind at the time he killed
6 Joe McGarry.

7 The last little bit of self-defense just to -- I'm
8 sorry. I'm kind of confusing the logical flow on
9 self-defense.

10 Cottrell was at fault in bringing on the
11 difficulty. He caused the difficulty because all you
12 have to do as a citizen is to say, "I'm sorry." If he
13 was breaking the law and you don't want to go to jail,
14 all he has to do is say, "You got me. Arrest me and
15 take me to jail."

16 It's not self-defense to resist a crime that
17 you're committing. That's not self-defense. It never
18 will be. You have a burden to get away from the
19 threat. In other words, the only means for you to
20 avoid the use of lethal force -- you have no other
21 means to avoid it. He didn't. All he had to do was,
22 "Okay. Pat me down, man. You got me. There it is.
23 You got the pistol. Okay. I was illegally carrying a
24 weapon. Arrest me. Take me to jail." Not kill a
25 police officer.

1 That's how you avoid the difficulty. That's what
2 our law requires that you do. It's not a stretch of
3 logic to say I could have avoided this difficulty by
4 complying and saying, "You know what, you've got me. I
5 was carrying a gun. I'm going to jail."

6 Instead, Defendant Cottrell said, "No, I'm going
7 to kill you instead of going to jail." And that's what
8 the argument is. That's what he did.

9 We've talked a lot about Terry, I did at the front
10 of the conversation, because I wanted you to have the
11 framework we could weave back and forth in through this
12 so you understand what the State's position is across
13 the board.

14 The judge will specifically charge you that a
15 police officer, based on the threat to him and the
16 community at large, can brandish his weapon or can even
17 handcuff a suspect to maintain the status quo of the
18 situation until they can figure out what's going on.
19 They don't have to get shot at and killed before they
20 decide how much they should do to protect you and
21 protect me and anybody else. So they can pull a weapon
22 out and say, "Okay. Let's calm this down."

23 In the bank robbery example, the officer doesn't
24 have to run up there and say, "Hey, man, I got a gun on
25 you." No, he doesn't. No. Take him to the ground,

1 handcuff him. "Let me see what's going on. Let me
2 see -- oh, I'm sorry. You do. I'm sorry, sir. I
3 didn't realize that was your purse. I'm sorry, but --
4 I'm sorry." That's okay. That's proper.

5 He will charge you that malice may be inferred
6 from conduct showing a total disregard for human life.
7 He will talk about acts in preparation to do the act
8 that was later accomplished. You can use that to say
9 there is malice. This is malice. Tuck in that gun.
10 The heft of that weapon is malicious. That
11 preparation, going to a Dunkin' Donuts for coffee is
12 malicious.

13 Now, involuntary manslaughter, the last little
14 piece of the puzzle, if you find, and I submit that you
15 will, because this isn't a disassembly of a space
16 vehicle, this is an explosion, and you will find that
17 Officer McGarry had him under investigative detection,
18 he was going to pat him down, Cottrell said he was
19 going to pat him down, and he was legally allowed to do
20 that, but if an officer is obeying the law and doing
21 what he's legally allowed to do, such as a trooper in a
22 traffic stop or the cop running down and saying, "Man,
23 you know, did you purse snatch that lady's purse?" then
24 any act can never ever be sufficient legal provocation
25 to reduce a charge from murder to manslaughter, okay.

1 It can't. It's blocked. It never will be.

2 So if you find, and as you will, that he is in a
3 Terry stop, because that's what he's doing, then the
4 act of doing that, you can't say, "Man, that just
5 hassled me, it upset me so much, he aggravated me to
6 the point that I had to kill him," it will never, never
7 happen. It can't happen.

8 You have to believe that none of this applies,
9 that Joe McGarry had a full custodial arrest on the
10 guy, that he arrested him, had none of this, none of
11 this existed, "I'm taking you to jail." And if that's
12 the case, then you have to say, "He effectuated that
13 arrest unlawfully, abusive. He abused me. He had me
14 down. He was effectuating an unlawful arrest or he was
15 effecting a lawful arrest unlawfully." In other words,
16 "He was whooping me. I didn't do anything. They said
17 I shoplifted and they got me on the ground beating me."
18 That would be effecting a lawful arrest unlawfully.
19 You're letting a man have it when -- "Hey, it was a bad
20 check. Why are you guys beating me? Why are you doing
21 this to me?" That would be effecting a lawful arrest
22 unlawfully.

23 Now -- and there's absolutely no evidence of that.
24 There's no evidence of any physical assault on
25 Defendant Cottrell at all. None. The only injury that

1 he sustained was when Mike Guthinger shot him as he was
2 trying to run away. And Mike Guthinger was trying to
3 arrest him for the murder of Joe McGarry. So you will
4 not be able to find that in any way Joe McGarry was
5 effecting an unlawful arrest. He was trying to Terry
6 frisk him until the gun came out, and then he was going
7 to try to arrest him but never got to it, never got
8 around to it. He lost his life before that happened.

9 Let's just briefly touch this. It's not really
10 worth much of a conversation really, but we may as
11 well.

12 The defense put up quite a few witnesses, I guess.
13 Just to summarily dispose of those, I guess, is the
14 best way to describe it.

15 Danielle Bauer said she didn't see the guy with
16 the gun, didn't see Officer McGarry with a gun.

17 Diane Lawson said that she saw the officer
18 reholster his weapon and she saw Officer McGarry fire
19 his weapon as he was falling down after he was shot in
20 the face by Luzenski Cottrell. She said she saw him
21 shoot him in the face.

22 Amber Counts said that she saw or thought that Joe
23 McGarry had pulled his weapon, but then they went
24 behind the car and couldn't see after that. Well,
25 that's entirely consistent with what we know. If he

1 pulled his weapon and doesn't see it -- and Diane
2 Lawson sees the tail end of that, reholster the weapon.
3 And then Mike Guthinger sees the tail end of that,
4 which is hands up here and a hand right here.

5 So they're entirely consistent with what happened.
6 I mean, it's like the old analogy of one person -- they
7 blindfold folks and they grab the tail of an
8 elephant -- the leg of the elephant and the trunk of
9 the elephant, and everybody gives their opinion on what
10 happened. But when you look at the whole animal, it's
11 an elephant. It just feels different in different
12 parts.

13 So we know that Diane said he pulls it and he
14 reholsters it. Amber said he had it out "but I
15 couldn't see him after that," so she missed the
16 reholster. And then you have Guthinger see the tail
17 end of that when he's coming around the car, and the
18 hand's already -- the gun's already back. Hands here,
19 trying to use a more reasonable means to control that.
20 And perhaps he shouldn't have reholstered his weapon,
21 but he did.

22 We also had -- I talked about the x-ray situation.
23 We don't dispute the x-ray. That's where Guthinger
24 shot him. The doctor can't say who shot him. He said,
25 "The wound is here and here."

1 If there is some effort to disprove Guthinger's
2 statement because of the direction that the wound
3 traveled, wow. Once again, we're back into that eight
4 rounds in a gunfight this far apart when you just
5 witnessed that saying, "Well, you said it was here, but
6 it was really here. Aha, I got you now." Well, that's
7 disassembling a space vehicle there.

8 We also had -- well, we had an inmate that said he
9 saw Joe after he was dead, so I don't really need to
10 talk about that.

11 One clarification the Solicitor indicated to me.
12 In order for you to believe that self-defense applies,
13 you have to find all four of them, every single one of
14 them, to find that Officer -- Defendant Cottrell was
15 acting in self-defense. So you can't pick and choose.
16 It's not a buffet. You get all or nothing. If you
17 really think he wasn't at fault carrying an illegal
18 weapon into Dunkin' Donuts and not complying with basic
19 officer commands of "Hey, stay here," and when you
20 turn, "Show me your hands," as he does this, furtive
21 motions, as he starts moving away with a triple X baggy
22 shirt that had a .45-caliber handgun underneath it,
23 that's bringing on the difficulty.

24 He had no reason to be in imminent fear of a
25 police officer that did nothing to him and didn't

1 understand the tone of his voice on why he would be
2 concerned at all until he says, "You're harassing me.
3 What are you doing?"

4 He goes, "Hey, man, I believe you've got weapons.
5 Oh, come here. Hold on. Let me see what you got."
6 And he never was able to complete the pat-down.

7 We know that's what Cottrell's thinking because he
8 said that's what he was doing, "Trying to pat me down
9 and I wouldn't let him, because if he does, I'm going
10 to jail."

11 And finally, the last part of that is, really, did
12 you have other means to avoid the conflict, other means
13 to avoid the danger, and that is, yes. You can comply
14 with the lawful request of a police officer and not
15 kill him. That's how you avoid that danger. You say,
16 "Yes, sir, you got me on speeding. I'll take my ticket
17 and I'll go argue in court." You don't say, "No, sir,
18 I wasn't, bam." You just comply. And that's why
19 self-defense -- well, it isn't there period, but that's
20 why legally it's not there, neither is voluntary
21 manslaughter because voluntary manslaughter requires a
22 sudden rage of passion. A classic voluntary
23 manslaughter is -- and what voluntary manslaughter does
24 is it reduces your mental culpability from murder to
25 manslaughter, based on sufficient legal provocation.

1 And kind of like the law school example of that would
2 be, you walk in, "Honey, I'm home from work." And you
3 walk upstairs and your wife and some other guy is up
4 there and you witnessed it and you're so (makes sound)
5 and you grab it and you shoot somebody for it.

6 Now, it's -- you can't do that, but there is a
7 lesser mental state, that sudden rage of passion, that
8 sudden reason to be upset reduces your -- it's not as
9 bad in the eyes of the law as it comes to punishment
10 because of that.

11 There is no provocation here. There is no
12 provocation that causes a man to rise so angry right
13 there that he has to grab a handgun and do something
14 about it. As a matter of fact, Defendant Cottrell was
15 coolly, coolly thinking about what he's going to do
16 before he does it. He coolly walks away from the
17 officer. His decision tree is going. "When that radio
18 calls back, I don't know what's going to be on there.
19 I have to think about what I'm going to do. I have to
20 think about what I'm going to do."

21 And he did think about what he was going to do,
22 and that's murder Officer Joe McGarry. And he had to
23 get it done before that radio call came back and
24 whatever that might be.

25 Well, the Solicitor told you earlier in the

1 process that 81 seconds -- there's 81 seconds that this
2 whole issue developed over. And he said he's going to
3 talk to you about when you need to start counting that
4 down. When are you going to start counting it down.
5 Well, we're getting close. I'm about ready to sit back
6 down. And you're going to hear from Bill McGuire.
7 He's going to talk to you about the defendant's case.
8 And when you go retire back to the jury room, that
9 countdown begins until the time that -- like it or not,
10 it's your duty now. Now is the time when you're going
11 to have to not be able to walk away from it. You're
12 not going to be able to walk away from it. You're
13 going to have to start thinking about this stuff for
14 real. Think about what the word "duty" means and how
15 it affects you when you find the facts of this case and
16 what happened.

17 The Solicitor's office duty is to be a minister of
18 justice and bring the truth to you.

19 Mr. McGuire's duty is to zealously represent --
20 and Ms. Norris -- is to represent the interests of
21 Mr. Cottrell.

22 The judge's duty is to make sure that it's a fair
23 and impartial forum in here where the facts are fairly
24 and accurately aired out.

25 And it's your duty to go determine the facts of

1 what happened, apply them to the law as the judge gives
2 you, come up with a stew, and then come out and tell us
3 what that stew is. That's what your job and your duty
4 is.

5 And you will be armed with several tools to go
6 through that process, okay. You're going to get to
7 take all these exhibits back in here, and you get to
8 take this back. The handguns are safe. You'll be able
9 to handled those. And I want you to feel them. I want
10 you to think about what that's like to get a cup of
11 coffee with this weapon right here in preparation.
12 Feel it. Feel the malice in it. You're going to be
13 able to take the photographs, Cottrell's statement and
14 read it. Read the consistency of Mike Guthinger's
15 statement given minutes after he was giving CPR to his
16 partner, where he couldn't get a good airway in because
17 of the blood on his face. And think about would you be
18 a little bit strained concerning how articulate that
19 you were in that statement under that circumstance in
20 the parking lot of Dunkin' Donuts on December 29th of
21 2002.

22 You'll take all that back with you. And you'll
23 also take the jury charge back with you. And you can
24 look at it, and you can read the things that I spoke
25 about, about what malice means, about malice may be

1 inferred from conduct, a lawful arrest, the fact that
2 Officer McGarry, in acting lawfully, it will never rise
3 to a voluntary manslaughter, will not. If a cop can
4 act lawfully and you can shoot him and it's voluntary
5 manslaughter, that's a disassembled space vehicle, I
6 guess. But you will take all of that information. The
7 clerk will bring it back to you. You'll go in your
8 jury room and you'll close the door.

9 But you'll take something else back in the jury
10 room with you. Hey, someone else will be there with
11 you. And at first you won't know she's there. You
12 probably won't even see her at first. Well, some of
13 you will. Some of you will see her. She'll be sitting
14 quietly in a corner of the room. Some of you may
15 already see her right now. And her name is justice.
16 And she speaks the language of truth, and she speaks
17 the language of reason. And she's already talking to
18 some of you, I know. But in the end, every single one
19 of you will hear it, hear her voice. It will be quiet
20 at first. "Guilty. Guilty." And then finally every
21 single one of you will hear, "Guilty."

22 Convict and find Luzenski Cottrell guilty of the
23 murder of Officer Joe McGarry. Guilty.

24 Thank you.

25 THE COURT: That took about an hour and a half,

1 and I would expect that the defense will also have a
2 lengthy final argument.

3 Do any of you need to take a -- I see heads
4 nodding all over the place and hands going up.

5 Okay. Let's do that. Let's take just a quick
6 break because I want you to be able to pay attention to
7 Mr. McGuire or Ms. Norris.

8 (WHEREUPON, the jury exited the courtroom
9 at 12:15 p.m.)

10 (WHEREUPON, recess taken from 12:15 p.m. to
11 12:27 p.m.)

12 THE COURT: I see we have Mr. Cottrell and his
13 attorneys back, as well as the Solicitor and
14 Mr. Hixson.

15 Okay. Are you ready?

16 MR. MCGUIRE: I just want to tell the Court we're
17 having a little technological problem with getting the
18 realtime feed. You might see an IT person over here
19 trying to fix it while I'm doing my closing. That's
20 fine with me. I just wanted to let the Court know.

21 THE COURT: Is there any need for a realtime feed
22 now? We're sort of done.

23 MR. MCGUIRE: I mean, I'm fine if he waits until
24 after the closing.

25 THE COURT: Okay.

1 MR. McGUIRE: I won't be quite as long as
2 Mr. Hixson.

3 THE COURT: All right. Bring the jury in.
4 (WHEREUPON, the jury came into open court at
5 approximately 12:27 p.m.)

6 THE COURT: Okay. We have got all our jurors and
7 alternates back.

8 Mr. McGuire, will you argue?

9 MR. McGUIRE: Thank you. Yes, sir.

10 Good afternoon. I started this case by telling
11 you all that it's a tragedy. It's a tragedy. This
12 case is a tragedy. There's absolutely no doubt about
13 it. But it's not murder, and I'm going to tell you why
14 now.

15 You may refer to this part of the case as closing
16 argument or lawyer's argument. You're not going to get
17 really much or any argument from me. I'm going to just
18 ask you to come with me, partner with me, and let's
19 examine the facts, and the facts will do my arguing for
20 me, and they'll do it effectively.

21 Yeah, I like Mr. Hixson, but you get an argument
22 from him. You're going to get an examination of the
23 facts from me.

24 I want you to just acknowledge something with me,
25 and that is, the tragedy of an officer being shot and

1 killed is a very incredibly emotional -- emotionally
2 powerful thing. Let's all acknowledge that. Let's all
3 acknowledge that the world would be better if Joseph
4 McGarry was here and that all our hearts are going out
5 to him. And we just acknowledge the tragedy of that.
6 Let's also acknowledge the fact that the very emotional
7 and powerful fact that happens here can color how we
8 see things that led up to it. Let's just acknowledge
9 that and make sure it doesn't happen. Okay?

10 And I'm going to ask you to come with me and look
11 at the facts that happened at the Dunkin' Donuts. But
12 instead of it ending with the gunshot and Joseph
13 McGarry being killed, it ends with Mr. Cottrell saying,
14 "Please don't shoot me again." And let's see how we
15 see the facts in that situation. Okay?

16 So we'll get to the end, and instead of
17 Mr. Cottrell pulling his weapon and firing -- which I
18 agree that happened, I don't disagree with that --
19 instead of that happening, he went, "Don't shoot me
20 again. I give up." And let's see how we see the facts
21 now leading up to that moment. Okay?

22 He's in the Dunkin' Donuts, and he's joking around
23 with the clerk, "Hey, when I say sweet, I mean like 20
24 sugars."

25 Danielle Bauer says it looks like he knew the guy

1 and there was laughter and banter and joking. Spills
2 the coffee. Danielle Bauer sees him go down and he
3 gets the napkins to wipe it up. And he makes contact
4 with the police officers. And he says, "Officer, I
5 spilled some coffee here. Watch your step." He says
6 something first, and it's polite and helpful. And he
7 has to walk past the officers to get out the door, and
8 he's going out with his coffees. He's going out with
9 his coffees, and he's stopped.

10 "Hey, pal, can I have your I.D.? You remember me.
11 I wrote you some tickets. I want to run you. Can I
12 get your I.D., pal?"

13 "Sure. Here's my I.D."

14 And I think there's some evidence that he may have
15 gone over to Fred's car and given a coffee or -- but
16 he's kind of free to move around there. It looks like
17 they're letting him.

18 And then, "Guthinger, go get the white male's
19 I.D."

20 And Mike goes over to the other car. And
21 remember, this is the -- they got bad information.
22 They wanted -- they thought Horry County wanted to
23 arrest Mr. Cottrell for a shooting, for a shooting. So
24 Guthinger should -- Mike Guthinger should be on high
25 alert going to that car, keeping his eyes on the

1 interior of the car, getting that license, watching
2 those hands. He can't watch Officer McGarry. He can't
3 see what happens.

4 And that's where Diane Lawson picks it up. "Well,
5 I saw -- I saw Allen with his coffees. And I saw the
6 officer, 'Hey, pal, put your hands up. Put your hands
7 up.'"

8 And she ultimately said -- she was confused, but
9 she ultimately said his hands go up. Not at first. At
10 first, he's like -- he kind of keeps walking.

11 It's like, "Hey, pal," and the gun comes out.
12 "Put your hands on your head."

13 Remember, Diane Lawson says she sees Officer
14 McGarry draw his weapon and say, "Put your hands on
15 your head," because verbal commands didn't do the job.
16 Okay.

17 And then he goes up with his hands, and he
18 complies for a second. But then he's like, "Man,
19 you're harassing me." And he's going with the coffees,
20 going away from Officer McGarry, going to the Donny
21 Morgan vehicle.

22 They started their interaction over here. And
23 when he starts to walk to the Donny Morgan vehicle,
24 he's going this way. His back is to Officer McGarry.
25 He just -- remember, there are no warrants on him. He

1 came back negative. He's a citizen free to walk away.
2 He's just walking away with his coffees. He's going --
3 he's leaving. He's probably leaving. He's probably
4 getting in the car and leaving, which he has a right to
5 do. As a citizen, we have a right just to walk away
6 from the police if they don't have reason to keep us.

7 Now remember, that warrant search, that NCIC
8 search, came back negative. There are no warrants on
9 him. No warrants on him.

10 So he's walking away with his coffee. Officer
11 McGarry takes advantage of that moment when
12 Mr. Cottrell is turned away. It's sort of like getting
13 the advantage on somebody. If you want to engage them
14 physically, do it when they're not looking. That's
15 what he did. He reholsters. And let's just pause and
16 think about that for a second. He reholsters. What
17 does that mean to you? Sure didn't see a gun. Any
18 police officer going to put their gun back in their
19 holster if they see a gun? Absolutely not.

20 So he reholsters because Mr. Cottrell is a man
21 walking with coffee.

22 Now remember, Diane said, "He wanted him to put
23 his hands behind his back. He wanted him to put his
24 hands behind his back."

25 And he uses that moment when Cottrell is not

1 looking, when Allen is not looking, he runs over there
2 and physically engages him. He's trying to get that
3 hand behind his back, but Allen doesn't want to do it.
4 He thinks he's being hassled, okay. And in that
5 struggle that takes just that split second when they
6 start to slide down the car and then they get to the
7 trunk area, I want you to see where -- where would
8 Mr. Cottrell -- where would Allen be able to look?
9 He's able to look over here. As he's being mashed up
10 against the car with McGarry's stomach to his back and
11 they're kind of sliding down the car. And all he can
12 see is this over here. And then they sort of stumble
13 and they start to slide and spin off the back of the
14 car.

15 And Mike Guthinger is starting to come over now.
16 He's starting to run over. He's starting to run over
17 to the Morgan vehicle. And then in that spinning and
18 in that sliding when Guthinger says it looks like they
19 were going to lose their balance, "bang." McGarry's
20 gun goes off, and they separate.

21 What would cause the separation? McGarry is
22 six-foot-four, 285 pounds. Almost 100 pounds bigger
23 and heavier than Allen. Allen didn't get the better of
24 him, didn't use his strength to break away, didn't do
25 anything to get away. The gunshot startled McGarry.

1 That's how a little five-foot-ten guy separates from a
2 six-foot-four, 285-pound guy. McGarry was never going
3 to lose physical control over him until that moment.
4 And he's like a deer in the headlights, startled.
5 That's why they separate.

6 And when Allen looks around, he sees that
7 Guthinger, the other officer -- because remember, he
8 can't see anything. He's looking this way. He's
9 mashed up against the car. When he starts to spin off
10 the car and he's able to see, what does he see? He
11 sees the officer coming to offer assistance. And in
12 his mind, the assistance that the officer was giving
13 was shooting him. He thinks Guthinger came around to
14 assist McGarry and he was shot by Guthinger. Now we
15 know that's not true. Probably still thinks it.

16 They separate and Officer McGarry is a deer in the
17 headlights and he's startled, and that's the time that
18 is necessary for the shot. But let's say it doesn't
19 happen. We get to that point and Allen is shot in the
20 leg and he just puts his hands up and says, "Don't
21 shoot me."

22 Now let's see how we see those events. A man who
23 had no warrants on him. Horry County didn't want to
24 arrest him. He was told at gunpoint to put his hands
25 over his head, to freeze. "I want to search you, pal.

1 Put your hands on your head."

2 When the gun didn't do it, when the commands
3 didn't do it, he was physically -- basically, like
4 tackled by a 285, six-foot-four police officer and
5 smashed up against a car, and then he was shot. They
6 didn't have a right to stop him, detain him, point a
7 gun at him, tell him to put his hands on his head,
8 search him, and for God's sakes, they didn't have a
9 right to shoot him.

10 Let's think about the headline if it would have
11 ended with, "Please, God, don't shoot me again."

12 "Police want to run man's I.D., shoot him instead.
13 Police want to run a check -- check a man at Dunkin'
14 Donuts for NCIC warrants. Man not wanted, shot
15 anyway."

16 We can agree that emotional event of Officer
17 McGarry's death can color all the events leading up to
18 it. But if you see it like that and it ended right
19 there, my God, it's different. My God, it's different.

20 And that is the moment that I've led you up to, at
21 that moment a man being shot down so they could run his
22 I.D., does he have a right to fire in panic and in
23 self-defense, and the answer is yes.

24 Let's look at the facts that support that. That
25 is what happened. That is what happened, and the facts

1 support it. I don't have to argue it. Let's start
2 with the gunshot wound to Mr. Cottrell's leg.

3 Guthinger clearly testified, "He was running away
4 from me. He back was to me, and I shot him in the back
5 calf area." Back calf area.

6 You saw the gunshot wound. It's in the front of
7 the leg, just a little over to the side, but in the
8 front. And if McGarry's gun came around in that
9 struggle, "bam," that's exactly where it would go.
10 Left-handed shooter, "bam." It makes perfect sense.
11 That fact, that gunshot wound where it is, is a
12 scientific fact. Argument is trying to make you forget
13 about it, don't consider it, reject it. But I'm asking
14 you, just accept the hard, hard, hard cold fact that
15 that gunshot wound is in the front. Trajectory down.
16 Thinks it's in the back. And that is 180 degrees from
17 what Mike Guthinger testified to. And I'm not saying
18 he's lying. In the heat of battle, in the heat of that
19 moment, I believe he thinks he's telling the truth. I
20 believe he believes that. Just like Allen thinks that
21 Guthinger shot him. They both believe it. The science
22 says it's wrong. And I think we're all going to rely
23 on science and not argument.

24 So now we have a problem. Science says Guthinger
25 did not shoot Allen Cottrell. There's only one other

1 person that fired on that scene that night. That's
2 Officer McGarry. So now we know Officer McGarry shot
3 Allen Cottrell. And the question is: When did that
4 shot go off? I think the evidence is clear that it's
5 during the struggle and the spin on the car his gun
6 accidentally went off. Let's look at the facts, and
7 the facts will argue that for you.

8 The pathologist, Dr. Presnell, indicated that a
9 bullet has a concussive effect and it can render
10 somebody incapacitated immediately. We have all seen
11 football player videos where the football player hits
12 another helmet and they just go limp like that. And
13 the injury that Officer McGarry sustained was like a
14 hundred times harder and more impactful. The moment
15 that bullet hit him, he was immediately incapacitated.
16 That's what the doctor's testimony would support. And
17 he has an injury on the back of his head. Like she
18 said, that's consistent with an unbroken fall. An
19 unbroken fall is consistent with immediate
20 incapacitation. Well, that's a problem for the
21 government. That fact is a problem for the government,
22 because now we know Officer McGarry shot before
23 Cottrell. That is a problem for the government.
24 Science supports it, medical science. That's a fact.
25 But their case has a fatal problem. McGarry shot first

1 now, so they need something to rescue that flaw.

2 Diane Lawson testified that she's been interviewed
3 by numerous law enforcement officers, testified
4 numerous times. This happened in 2002. Today we're
5 here 12 years later. She's given numerous statements.
6 There are numerous transcripts of her testimony. And
7 she basically wants you all to believe that she had
8 this information in her head that she saw Officer
9 McGarry shoot when he was falling, and she kept that to
10 herself for a dozen years. I'm shocked they trotted
11 that little nugget out for you.

12 You know, when I was questioning one of the SLED
13 officers -- and I think I was a little hard with him,
14 and I didn't mean to be. If you think I'm hard on
15 somebody and if I offended somebody, you all hold that
16 against me and not Mr. Cottrell. But I think I was a
17 little hard on Thomason. I just said, "Look, fellows,
18 if you are competent, you want to know three things:
19 Who shot, when did they shoot, and what led up to it?

20 And do you think -- does anybody think that Diane
21 Lawson ran the gauntlet of being interviewed by
22 multiple SLED agents, police officers, testified
23 multiple times under oath, and she ran that gauntlet
24 without dropping this little nugget of, "Oh, by the
25 way, I saw Officer McGarry shoot."

1 That insults your intelligence. Nobody is going
2 to swallow that one. But when you're desperate and you
3 have a fatal flaw in your case and you need argument to
4 get someone to disregard the facts, we'll try that out.
5 I know nobody on this jury is going to believe that
6 little nugget trotted out by Diane Lawson. No way.

7 So, let's look at it. Officer McGarry shot first.
8 That's a fatal problem for the State's case. How else
9 do we know that that's correct, that's a fact? Well,
10 let's talk about trigger pull on the Smith & Wesson and
11 Mr. Paavel's testimony. It's a double-action
12 semiautomatic, a long, heavy trigger pull. Long, heavy
13 trigger pull. That's the kind of gun that Officer
14 McGarry had. Not a rapid, light tap. Huh-uh. Nine
15 and a quarter pounds was in his report. Imagine a gun
16 pointing up with nine and a half pounds hanging from
17 the trigger. You got to get that much before it goes
18 off. That is a long and heavy trigger pull. Officer
19 McGarry could not have, did not shoot after he was
20 shot. It's impossible. That is a fact.

21 And Diane Lawson saying that "I know I've kept
22 this to myself for 12 years, but believe me, I saw it,"
23 that is absurd. No one here is going to swallow that.
24 I have far too much confidence in that and you.

25 And the State now has a real problem because we

1 know McGarry shot first, and I think by accident, by
2 accident. When he was still alive, when he was in the
3 heat of the struggle, when he could put that nine and a
4 half pounds on the trigger -- nine and a quarter pounds
5 on the trigger and make that long trigger pull, that's
6 when he would do that, that's when he would do that,
7 and that's what happened. When they separate, that's
8 what happened.

9 So now the State has to say, "Well, that's okay.
10 That's okay. We're going to come up with a reason to
11 make that okay. We're going to pretend that Officer
12 McGarry saw something. We're just going to add that.
13 We're just going to fill that blank in."

14 There's no evidence Officer McGarry ever saw a gun
15 until the fatal moment. None. They want to say, well,
16 he must have been controlling with Allen because he saw
17 a gun. Yeah? Where's the evidence of that?

18 Diane says it was, "Put your hands behind your
19 back," after he said, "Hey, pal, put your hands
20 together, I want to search you." That didn't work.
21 "Put your hands behind your back."

22 There is zero evidence that Officer McGarry ever,
23 ever, ever saw a gun on Allen Cottrell until the fatal
24 moment. So then it's, well, let's add something else,
25 since there's no evidence of that. That's a big blank

1 to fill in too. That's asking a lot of you folks. I
2 know you're not going to do that. Let's add something
3 else. Let's add, instead of a man walking away with
4 coffee, let's make it a man walking away grabbing for a
5 gun. Anybody hear that? You can play back every piece
6 of testimony in this trial if you want to. You can
7 hear every witness again on tape. Nobody, nobody, not
8 one of you heard anything about furtive movements,
9 secretive movements, going for a gun movement. That
10 was just added in argument. It's not based on
11 testimony, and it's not based on fact, and they know
12 it. And they put it in there because they have fatal
13 flaws in their case. They're coming to you and saying,
14 "We don't have evidence of this, so you'll hear it in
15 argument, and please fill in the blank for us. Please
16 assume that's what happened."

17 Conjecture, speculation, and imagination has no
18 place in this case. And I have faith and confidence
19 that you will reject that type of argument. And that's
20 what it is.

21 The facts that we have looked at scream my
22 argument and they scream the truth. Allen was walking
23 away with coffee, and he was leaving. He was leaving,
24 just like he left one time before, and that was
25 witnessed by Lloyd Kendle. I'm not vouching for Lloyd

1 Kendle's mental stability or memory or anything else.
2 He might be a little mad. But how do you explain
3 Allen's license being found in Joseph McGarry's home by
4 his mother after his death? That is a bizarre, unusual
5 fact of this case. Sometimes truth is stranger than
6 fiction. And imagine her shock and surprise at seeing
7 that. And the only way it got there is because an
8 officer took it from him and didn't give it back and
9 that Allen left the officer standing there with it.
10 And that was going to happen again on December 29th,
11 2002.

12 Allen thought he was being hassled. Lloyd said,
13 "I could hear him saying, 'Yeah, man, you're hassling
14 me. You pull me over when I'm with a white girl.'"

15 Allen doesn't get aggravated or anything else. He
16 gives his license. Everything is cool until it's,
17 "Hey, pal, come here. I want to search you." And
18 that's when it goes bad, because he's a citizen at that
19 moment in time, free to walk away, and it goes to
20 full-out lethal force, deadly force, unlawful arrest,
21 him getting shot, and in panic and self-defense pulling
22 a gun and firing.

23 Let's look at the facts. I don't even have to
24 argue. Murder is off the table. Off the table. You
25 have two options now: Not guilty based on self-defense

1 or voluntary manslaughter. Based on the facts that are
2 screaming out to you what the truth is, those are your
3 two options.

4 Thank you.

5 THE COURT: Ladies and gentlemen, I will now
6 charge you on the law that you will apply in this case.

7 I have a procedure that I follow in every case.
8 It is a little different from most judges, or all
9 judges, I don't know, and that is, I appreciate the
10 fact that sometimes charges on the law can be very
11 technical. And it's really not fair for us to think
12 that you can listen to a charge on the law that may be
13 30 minutes long, or longer, with very technical aspects
14 and, as laypersons, go in and remember it all. It's
15 not fair for us to think that. It would be like us
16 trying to go to work with you and understand everything
17 that you did, things that you were familiar with.

18 So what I do is I always, in every jury trial,
19 prepare a written transcript of my charge, and I will
20 charge you from that transcript. Our Supreme Court has
21 told me that I can do that. I just have to read it
22 exactly as I give it to you.

23 Before I do that, let me tell you that my charge
24 on the law is a complete document. You should not, as
25 a juror, focus in on any one part of the charge. Look

1 at the -- that part of the charge that you find
2 interesting or pertinent in the context of the whole
3 charge. The whole charge should be considered by you.

4 Let me remind you that during this trial, you and
5 I have certain duties to perform. As the trial judge,
6 it is my responsibility to preside over the trial of
7 this case. And I also have the duty to rule on the
8 admissibility of evidence offered during the trial.
9 You are to consider only the competent evidence before
10 you. If there was any testimony ordered stricken from
11 the record in this case during this trial, you must
12 disregard that testimony. You are to consider only the
13 testimony which has been presented from this witness
14 stand, any exhibits which may have been made a part of
15 the record in this case, and any stipulations of
16 counsel.

17 I have the additional duty to charge you the law
18 applicable to the case. As the presiding judge, I am
19 the sole judge of the law of this case, and it is your
20 duty as jurors to accept and apply the law as I now
21 state it to you. If you have already any idea as to
22 what the law is or what the law ought to be and it does
23 not agree with what I now tell you the law is, you must
24 abandon this idea because you are sworn to accept the
25 law and apply the law exactly as I state it to you.

1 In every case tried in this court before the jury,
2 the jury becomes the sole and exclusive judge of the
3 facts in a case. A trial judge cannot intimate, state,
4 comment on, or make any statement to a trial jury about
5 the facts in a case.

6 Since you, the jury, are the sole judges of the
7 facts in this case, you are not to infer from what I
8 have said during the progress of this trial in ruling
9 on the admissibility of evidence or otherwise, or
10 anything that I say now during the course of this
11 instruction to you, that I have any opinion about the
12 facts in the case. The law does not allow me to have
13 an opinion about the facts. This is a matter solely
14 for you, the jury, to determine. As jurors, it is your
15 duty to determine the effect, value, weight, and truth
16 of the evidence presented during this trial.

17 The indictment charges the defendant with murder.
18 I remind you that the fact that the defendant was
19 arrested, charged, and indicted in this case is not
20 evidence in the case and it cannot be considered by you
21 as evidence of guilt in the case, nor does it create
22 any presumption or inference of guilt. This document
23 is simply the formal written instrument which contains
24 the charges made against the defendant. It is the
25 formal document by which the case is brought into

1 court.

2 The defendant has pled not guilty to the
3 indictment. And that plea puts the burden on the State
4 to prove the defendant guilty. A person charged with
5 committing a criminal offense in South Carolina is
6 never required to prove himself innocent. I charge you
7 that it is an important rule of the law that the
8 defendant in a criminal trial, no matter what the
9 seriousness of the charge may be, will always be
10 presumed to be innocent of the crime for which the
11 indictment was issued unless guilt has been proved by
12 evidence satisfying you all unanimously of that guilt
13 beyond a reasonable doubt.

14 This presumption of innocence does not end when
15 you begin your deliberation, but it accompanies the
16 defendant throughout the trial and does not end unless
17 you unanimously reach a verdict of guilt based on
18 evidence satisfying all 12 of you of that guilt beyond
19 a reasonable doubt.

20 The presumption of innocence is like a robe of
21 righteousness placed about the shoulders of the
22 defendant, which remains with the defendant unless it
23 has been stripped from the defendant by evidence
24 satisfying all 12 of you of the defendant's guilt
25 beyond a reasonable doubt.

1 The presumption of innocence is not mere legal
2 theory. It's not just a legal phrase. It is a
3 substantial right to which every defendant is entitled
4 unless you, all 12 of you in the jury, are satisfied
5 from the evidence of the defendant's guilt beyond a
6 reasonable doubt.

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

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

1 doubt, you must give the defendant the benefit of the
2 doubt and find him not guilty.

3 What is a reasonable doubt in the law? A
4 reasonable doubt is the kind of doubt that would cause
5 a reasonable person to hesitate to act.

6 Now, there are two types of evidence which are
7 generally presented during a trial: Direct evidence
8 and circumstantial evidence. Direct evidence is the
9 testimony of a person who claims to have actual
10 knowledge of a fact, such as an eyewitness. It is
11 evidence which immediately establishes the main fact at
12 issue. Circumstantial evidence is proof of a chain of
13 facts and circumstances indicating the existence of a
14 fact. It is evidence which immediately establishes
15 collateral facts from which the main fact can be
16 inferred. Circumstantial evidence is based on
17 inference and not on personal knowledge or observation.

18 The law makes absolutely no distinction between
19 the weight or value to be given to either direct or
20 circumstantial evidence, nor is a greater degree of
21 certainty required of circumstantial evidence than of
22 direct evidence. You should weigh all the evidence in
23 the case. After weighing all the evidence, if you are
24 not convinced unanimously, meaning all 12 of you, of
25 the guilt of the defendant beyond a reasonable doubt,

1 you must find the defendant not guilty.

2 Necessarily, you must determine the credibility of
3 witnesses who have testified in this case. Credibility
4 simply means believability. It becomes your duty as
5 jurors to analyze and to evaluate the evidence and
6 determine which evidence convinces you of its truth.

7 In determining the believability of witnesses who
8 have testified in this case, you may believe one
9 witness over several or several witnesses over one
10 witness. You may believe a part of the testimony of a
11 witness and reject the remaining part of the testimony
12 of that same witness. You may believe the testimony of
13 a witness in its entirety or reject the testimony of a
14 witness in its entirety. You may consider whether any
15 witness has exhibited to you any interest, bias,
16 prejudice, or other motive in this case. You also may
17 consider the appearance and manner of a witness while
18 on the witness stand.

19 Now, the rules of evidence ordinarily do not
20 permit witnesses to testify to opinions or conclusions.
21 An exception to this rule exists for witnesses we call
22 expert witnesses. A witness who, by education and
23 experience, has become an expert in some art, science,
24 profession, or calling may state an opinion as to
25 relevant and material matter in which the witness

1 claims to be an expert and may also state the reasons
2 for that opinion.

3 You should consider any expert opinion received in
4 evidence in this case and, like any other evidence,
5 give it the weight you think it deserves. If you
6 decide that the opinion of an expert witness is not
7 based on sufficient education and experience, or if you
8 conclude that the reasons given in support of the
9 opinion are not sound or that the opinion is outweighed
10 by other evidence, you may disregard the opinion
11 entirely. An expert witness's testimony is to be given
12 no greater weight than that of other witnesses simply
13 because the expert is -- the witness is an expert.

14 Further, you are not required to accept an
15 expert's opinion even though it is not contradicted.

16 I instruct you and emphasize that the fact that
17 the defendant did not testify is not a fact to be
18 considered by you in any way in your deliberation and
19 in your consideration on the question of the guilt or
20 the innocence of the defendant. It must not be
21 considered by you in any manner whatsoever. A
22 defendant has the constitutional right to remain
23 silent, and the assertion of this right must not be
24 considered by you in your deliberations. I repeat,
25 under your oath, you are to draw no conclusion

1 whatsoever from the fact that the defendant in this
2 case did not testify. The fact that this defendant did
3 not testify should not even be discussed in the jury
4 room.

5 The burden of proof, as I have stated to you, is
6 on the State. The defendant is not required to prove
7 his innocence. The burden of proof remains on the
8 State to prove guilt beyond a reasonable doubt to the
9 satisfaction of all 12 of you.

10 Now, the defendant is charged with murder. The
11 State must prove beyond a reasonable doubt that the
12 defendant unlawfully killed another person with malice
13 aforethought. Malice is something which springs from
14 wickedness, from hatred, from depravity, from a heart
15 devoid of social duty and fatally bent on mischief.
16 Malice aforethought does not require that malice exist
17 for any particular time before the act is committed,
18 but malice must extend in the mind -- must exist in the
19 mind of the defendant just before and at the time the
20 act is committed. Therefore, there must be a
21 combination of the previous ill intent -- evil intent
22 and the act.

23 Again, malice aforethought may be express or
24 inferred. These terms, express and inferred, don't
25 mean different kinds of malice, but merely the manner

1 in which malice may be shown to exist, that is, either
2 by direct evidence or by inference from the facts and
3 circumstances which are proved.

4 Express malice is shown when a person speaks words
5 which express hatred or ill will for another or when
6 the person prepared beforehand to do the act which was
7 later accomplished, for example, lying in wait for a
8 person or any other acts of preparation going to show
9 that the deed was within the defendant's mind would be
10 express malice. Malice may be inferred from conduct
11 showing a total disregard for human life.

12 If you find that the State has failed to prove
13 beyond a reasonable doubt that the defendant committed
14 murder, you may consider whether the State has proved
15 beyond a reasonable doubt that the defendant committed
16 voluntary manslaughter. Included within the offense of
17 murder is the lesser offense of voluntary manslaughter.

18 To prove voluntary manslaughter, the State must
19 prove beyond a reasonable doubt that the defendant took
20 the life of another person in the sudden heat of
21 passion based on sufficient legal provocation. Both
22 heat of passion and sufficient legal provocation must
23 be present at the time of the killing to constitute
24 voluntary manslaughter.

25 Sudden heat of passion may, for a time, affect a

1 person's self-control and temporarily disturb a
2 person's reason. The sudden heat of passion must be
3 the type that would make an ordinary person unable to
4 coolly reflect on his actions and would produce an
5 uncontrollable impulse to do violence.

6 Sufficient provocation must be the type that would
7 make a person of ordinary reason and caution become
8 enraged and to lose control temporarily. The
9 provocation needed for voluntary manslaughter must come
10 from some act of or related to the victim. Words
11 alone, however vulgar or insulting, are not enough to
12 be legal provocation. Where death is caused by the use
13 of a deadly weapon, the words must be accompanied by
14 some overt threatening act which could have produced
15 the heat of passion. The exercise of the legal right,
16 no matter how offensive it is to another, is never
17 sufficient legal provocation for voluntary
18 manslaughter.

19 The defendant has raised the defense of
20 self-defense. Self-defense is a complete defense, and
21 if it is established, you must find the defendant not
22 guilty.

23 The State has the burden of disproving
24 self-defense by proof beyond a reasonable doubt. If
25 you have a reasonable doubt of the defendant's guilt

1 after considering all the evidence, including the
2 evidence of self-defense, then you must find the
3 defendant not guilty. On the other hand, if you have
4 no reasonable doubt of the defendant's guilt after
5 considering all the evidence, including the evidence of
6 self-defense, then you must find the defendant guilty.

7 The following four elements are required to
8 establish self-defense:

9 First, the defendant must be without fault in
10 bringing on the difficulty.

11 Second, the defendant must have actually believed
12 he was in imminent danger of losing his life or
13 sustaining bodily injury or he actually was in such
14 imminent danger.

15 Third, if his defense is based upon his belief of
16 imminent danger, a reasonably person -- a reasonably
17 prudent man of ordinary fitness and courage would have
18 entertained the same belief. If the defendant actually
19 was in imminent danger, the circumstances were such as
20 would warrant a man of ordinary prudence, firmness, and
21 courage to strike the fatal blow in order to save
22 himself from serious bodily harm or losing his own
23 life.

24 Fourth, the defendant had no other probable means
25 of avoiding the danger of losing his own life or

1 sustaining serious bodily injury than to act as he did
2 in this particular instance.

3 I will now explain these four elements further.

4 Without fault. First, the defendant must be
5 without fault in bringing on the difficulty. If the
6 defendant's conduct was the type which was reasonably
7 calculated to and did provoke a deadly assault, the
8 defendant would be at fault in bringing on the
9 difficulty and would not be entitled to an acquittal
10 based on self-defense.

11 Imminent danger. The second element of
12 self-defense is that the defendant was actually in
13 imminent danger of death or serious bodily injury or
14 that the defendant actually believed he was in imminent
15 danger of death or serious bodily injury.

16 The defendant's perception of imminent danger. If
17 the defendant was actually in imminent danger, it must
18 be shown that the circumstances would have warranted a
19 person of ordinary firmness and courage to strike the
20 fatal blow or defend himself in order to prevent death
21 or serious bodily injury. If the defendant believed he
22 was in imminent danger of death or serious bodily
23 injury, it must be shown that a reasonably prudent
24 person of ordinary firmness and courage would have had
25 the same belief.

1 In deciding whether the defendant actually was or
2 believed he was in imminent danger of death or serious
3 bodily injury, you should consider all the facts and
4 circumstances surrounding the incident, including the
5 physical conditions and characteristics of the
6 defendant and the victim.

7 The defendant does not have to show that he was
8 actually in danger. It is enough if the defendant
9 believed he was in imminent danger and a reasonably
10 prudent person of ordinary firmness and courage would
11 have had the same belief.

12 The defendant has the right to act on appearances,
13 even though the defendant's belief may have been
14 mistaken. It is for you to decide whether the
15 defendant's fear of immediate danger or death or
16 serious bodily injury was reasonable and would have
17 been felt by an ordinary person in the same situation.

18 Words accompanied by hostile acts may, depending
19 on the circumstances, establish self-defense. Evidence
20 of prior difficulties between the defendant and the
21 victim may be considered in deciding whether a threat
22 existed, whether the defendant had a reason to believe
23 a threat existed, and how serious that threat was. The
24 relevant size, ages, and weights of the defendant and
25 the victim may be considered in deciding the apparent

1 or actual need for force in self-defense and the amount
2 of force needed. Threats made by the victim may be
3 considered in determining whether the victim actually
4 was or believed he was -- whether the defendant
5 actually was or believed he was in imminent danger.

6 The fourth and final element of self-defense is
7 that the defendant had no other probable way to avoid
8 danger or death or serious bodily injury than to act as
9 the defendant did in this particular instance.

10 The defendant had no duty to retreat if by doing
11 so the danger of being killed or suffering a serious
12 bodily injury would increase.

13 A person cannot be required to make an exact
14 calculation as to the degree or amount of force which
15 may be needed to avoid death or serious bodily harm.
16 Therefore, in self-defense, the defendant has the right
17 to use the force needed to avoid death or serious
18 bodily harm. The force used in self-defense does not
19 have to be limited to the degree or amount of force
20 used by the victim. The defendant has the right to use
21 so much force as appeared to be necessary for complete
22 self-protection and which a person of ordinary reason
23 and firmness would have believed to be needed to
24 prevent death or serious bodily harm. - If the defendant
25 is justified in defending himself, then the defendant

1 is also justified in continuing to shoot until it is
2 apparent that the danger of death or serious bodily
3 injury has been -- has completely ended.

4 A lawful arrest or a detention in a lawful manner
5 by an officer will not constitute an adequate
6 provocation for heat of passion, reducing the grade of
7 homicide to manslaughter, nor will lawful acts of
8 officers while in discharge of their duties constitute
9 actual provocation. The killing may only -- may be
10 only manslaughter where a legal arrest is attempted in
11 an unlawful manner, as when passion of the accused is
12 aroused by employment of unnecessary violence.

13 A police officer may stop and briefly detain and
14 question a person for investigative purposes without
15 treading on his Fourth Amendment rights when the
16 officer has a reasonable suspicion supported by
17 articulable facts, short of probable cause for arrest,
18 that the person is involved in criminal activity.
19 Reasonable suspicion for purposes of a Terry stop
20 require a particularized and objective basis that would
21 lead one to suspect another of criminal activity.

22 Subsequent to a valid Terry stop, a police officer
23 may search the individual for weapons where the officer
24 has reason to believe the person is armed and
25 dangerous. In assessing whether a subject is armed and

1 dangerous subsequent to a valid Terry stop, the officer
2 need not be absolutely certain that the individual is
3 armed. The issue is whether a reasonably prudent man
4 in the circumstances would be warranted in the belief
5 that his safety or that of others was in danger.

6 The reasonableness of the investigative stop may
7 be determined by examining whether the police were
8 aware of specific and articulable facts giving rise to
9 reasonable suspicion and whether the degree of
10 intrusion was reasonably related to the known facts.
11 In other words, the issue is whether police conduct,
12 given their suspicions and surrounding circumstances,
13 was reasonable.

14 Citizens can be subject to a full custodial arrest
15 only if the arresting officer has probable cause to
16 detain them. Probable cause to arrest exists when a
17 reasonably cautious and prudent person would be
18 justified in believing the person to be arrested had
19 committed, was committing, or was about to commit a
20 crime. A finding of reasonable suspicion supporting a
21 Terry stop must be based on the totality of the
22 circumstances presented to the officer at the time of
23 the detention. The totality of the circumstances
24 encompasses both the experience of the law enforcement
25 agent and the behavior and characteristics of the

1 suspect.

2 When officers are presented with serious danger in
3 the course of carrying out an investigative detention,
4 they may brandish weapons or even constrain the subject
5 with handcuffs in order to control the scene and
6 protect their safety. However, where the individual
7 poses no immediate threat to the officer and no threat
8 to others, the harm resulting from failing to apprehend
9 him does not justify the use of deadly force to do so.

10 When a person is the subject of a lawful arrest,
11 there is a duty to peaceably allow the arrest.
12 However, a person has a right to resist an unlawful or
13 illegal arrest and may use such force as is reasonably
14 necessary to prevent the unlawful arrest.

15 In order to determine whether the defendant was
16 entitled to resist arrest, you must first determine
17 whether the arrest in this case was lawful. A law
18 enforcement officer may arrest a person without a
19 warrant when a crime is committed in the officer's
20 presence. A law enforcement officer may also arrest
21 for a misdemeanor without a warrant when the facts or
22 circumstances observed by the officer provide probable
23 cause to believe that a misdemeanor had been freshly
24 committed. Probable cause is a good faith belief --
25 excuse me. Probable cause is a good faith basis to

1 believe that defendant committed a crime. This means
2 that at the moment the arrest was made, the officer had
3 reasonably trustworthy information which would cause a
4 reasonable person to believe that the defendant
5 committed a crime.

6 If you determine that the defendant had the right
7 to resist the arrest in this case, you must then decide
8 whether the force used by the defendant was reasonable
9 and necessary to prevent the unlawful arrest,
10 detention, or interference with the defendant's person.
11 Only that force which is reasonably necessary under the
12 circumstances to resist the unlawful arrest may be
13 used.

14 Before you may consider any of the defendant's
15 statements made while being questioned by the police,
16 the State must -- the State must prove beyond a
17 reasonable doubt that the statement was made freely and
18 voluntarily. The test for determining whether a
19 defendant's statement was given freely, knowingly, and
20 voluntarily is focused upon whether the defendant's
21 will was overborne by the totality of the circumstances
22 surrounding the statements. Appropriate factors that
23 may be considered include background, experience,
24 conduct of the accused, age, maturity, physical
25 condition, mental health, length of custody or

1 detention, threats of violence, direct or indirect
2 promises, however slight, lack of education or low
3 intelligence, repeated and prolonged nature of the
4 questioning, exertion of improper influence, and the
5 use of physical punishment, such as deprivation of food
6 or sleep. This list of factors is not an exhaustive
7 list. Moreover, no single factor is dispositive;
8 rather, you must consider all the surrounding
9 circumstances. Even if the defendant's statements were
10 voluntary, if the statements derive immediately from an
11 unlawful arrest, the statements must not be considered
12 as proof against the defendant.

13 If you find that the arrest was unlawful, you must
14 then determine whether the evidence of the defendant's
15 statements were a result of that illegal arrest or
16 instead a result of independent means sufficiently
17 separated from the illegal arrest so far that they are
18 considered by you to be derived from independent legal
19 grounds. In other words, even if the statements in
20 this case were voluntary, you still must determine that
21 the statements were an act of free will, independent of
22 the unlawful arrest.

23 Whether -- the question whether a confession is
24 the product of a free will must be answered on the
25 facts of each case. No single fact is dispositive.

1 Warnings made by the police to the defendant concerning
2 his rights are an important factor to be sure in
3 determining whether the statement is obtained by
4 exploitation of an illegal arrest, but they are not the
5 only factors to be considered. The closeness in time
6 of the arrest and the statement, the presence of
7 intervening circumstances, and in particular the
8 purpose and flagrancy of the official conduct are all
9 relevant.

10 Finally, there are four possible verdicts which
11 you may find on the indictment in this case: Guilty or
12 not guilty of the offense of murder and guilty or not
13 guilty of the offense of voluntary manslaughter.

14 If you find the defendant not guilty of the
15 offense of murder, you will consider the offense of
16 voluntary manslaughter. And as to that charge, you may
17 find the defendant guilty or not guilty.

18 And let me tell you, there is no significance
19 whatsoever in the order in which I state the possible
20 verdicts. Simply, one must be stated first.

21 Ladies and gentlemen, your verdict must be a
22 unanimous one.

23 Madam Forelady, if the jury agrees on a unanimous
24 verdict, you will write the verdict on the back -- or
25 on the verdict form and sign your name as foreperson.

1 And I have for you here a verdict form, a very simple
2 form. It simply begins with the charge of murder, and
3 it asks you to circle your verdict.

4 Should you find and if you find the defendant not
5 guilty of the offense of murder, you will move then
6 down to the offense of voluntary manslaughter and
7 follow the instructions there, again, simply circling
8 the verdict which you unanimously find, and then you
9 will sign it.

10 When you have done so, knock on the jury room door
11 and the bailiff will receive the verdict, and at that
12 time we will receive you back into the courtroom.

13 Let me say this. I'm going to send you to your
14 jury room right now. Do not begin your deliberations.
15 I want to make sure that I have fully instructed you.
16 I may bring you back and give you another instruction.
17 If I do not, if I do not need to send you further
18 instructions, what I will do is I will send in a
19 bailiff, or one of these fine officers who have been
20 looking after us, with a copy of my charge to you,
21 which you may use during your deliberation.

22 Again, I caution you, look at it as a whole
23 document. Consider the whole document.

24 I will send in the verdict form and I will also
25 send in all of the exhibits that have been presented.

1 If I do that, that is, I present the exhibits to you,
2 the charge and the verdict form, that is a signal,
3 without bringing you back in, to begin your
4 deliberations. Okay?

5 All right. Mr. Ropp, if you would take this jury
6 to their jury room.

7 Is there lunch for them yet?

8 Yes, I think you've got some lunch in there
9 already. I hope you had a good dinner last night. I
10 wanted to go with you.

11 JUROR: Good recommendation.

12 THE COURT: Good.

13 JUROR: Thank you.

14 (WHEREUPON, the jury exited the courtroom
15 at 1:27 p.m.)

16 THE COURT: Do you want to look at the verdict
17 form, Mr. McGuire or Ms. Norris? The State?

18 It simply says: As to the charge of murder, we
19 the jury unanimously find the defendant, Luzenski Allen
20 Cottrell, circle one. And then I say: If you have
21 found the defendant guilty of murder, stop. If you
22 have found the defendant not guilty, you will consider
23 the charge of voluntary manslaughter.

24 As to the charge of manslaughter, we find the
25 jury -- we, the jury, unanimously find the defendant,

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1 Luzenski Allen Cottrell, circle one, guilty, not guilty
2 and sign it.

3 I don't think it can be any simpler than that.

4 All right. Now, I have noted all previous
5 objections to the charge. Are there others that you
6 want to add to it?

7 MS. NORRIS: No, sir. We don't need to argue them
8 anymore. I do want to just mark as a Court exhibit so
9 that the record is clear, and the first page is just
10 where we were denied at the end of our malice
11 instruction that it can't be malice without just --
12 when there's just cause or legal defense. Also, our
13 request that they be instructed that you can't infer
14 malice from use of a deadly weapon, essentially the
15 Allen charge language, noting specifically our
16 objection again to what the Court did charge, when
17 officers are presented with serious danger, that
18 paragraph.

19 And finally, on the right to resist unlawful
20 arrest, just the language that I had written in about
21 the Terry stop that are in there.

22 (WHEREUPON, Court's Exhibit Number 6 was marked
23 for identification.)

24 THE COURT: And I would think that -- I think that
25 the charge is a correct statement of the law.

1 Do you want to be heard on any of that,
2 Mr. Richardson?

3 MR. RICHARDSON: No, sir, your Honor.

4 THE COURT: All right. Let's -- gentlemen and
5 lady, let's get here and make sure we've got all the
6 exhibits together, make sure everything is right, and
7 we'll just send that in to the jury. Okay?

8 MR. HIXSON: Yes, your Honor.

9 MS. NORRIS: Your Honor, the only other thing, I
10 did not mark as a court exhibit the defendant's
11 requested jury instructions because that is in the
12 clerk of court's file. It's file stamped.

13 THE COURT: All right. Okay.

14 MS. NORRIS: Thank you, sir.

15 MR. HIXSON: Thank you, your Honor.

16 THE COURT: All right. The jury has asked already
17 if they can have some pads and writing material. Can
18 we accommodate them, Madam Clerk?

19 THE CLERK: Yes, sir.

20 THE COURT: Can you get something for them?

21 THE CLERK: Yes, sir.

22 THE COURT: I don't think there's anything back in
23 the jury room.

24 (Brief pause in proceedings.)

25 THE COURT: I want the alternates sequestered from

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1 the other jury before we send in these exhibits.

2 Somebody get that -- just put them in their own place,
3 somewhere where they'll be comfortable.

4 (WHEREUPON, recess taken from 2:12 p.m.
5 to 3:32 p.m.)

6 (WHEREUPON, Court's Exhibit Number 7 was marked
7 for identification.)

8 THE COURT: Is everyone here?

9 Yes, I see Mr. Cottrell, his attorneys, as well as
10 the State.

11 Two questions. "Can we listen to Officer McG's
12 call-in, preferably on laptop?"

13 All right. Do we have it available on a laptop?

14 MR. HIXSON: That's how it was played.

15 THE COURT: It was introduced. Is there anything
16 else on that tape?

17 MR. HIXSON: No, there is not anything on that.
18 That's just video and audio of that stop.

19 THE COURT: I think they're talking about where he
20 called in --

21 MR. HIXSON: That's right.

22 THE COURT: -- the officer down, whatever.

23 MS. NORRIS: The version of that we used in the
24 courtroom was where -- what we were looking at was
25 Officer Pyle Shelton on her traffic stop. We were

1 listening to her.

2 MR. HIXSON: Right. What is on that disk in
3 evidence is just edited, that version.

4 THE COURT: So it's clean?

5 MS. NORRIS: Yes, sir. And it is on a CD. I
6 assume they can put it in a laptop and play it.

7 THE COURT: So if we could get them a laptop. I'm
8 just a little bit concerned about giving them a laptop.

9 MS. NORRIS: Yes, sir, I am too. If we can just
10 have them look at it here in the courtroom, just let
11 them pass it one by one if they want to.

12 THE COURT: Let's see what they want. If they
13 want to review it, I could instruct them not to do
14 anything but listen just to that on the laptop. I
15 mean, they may want to discuss it.

16 MR. HIXSON: I was going to say if a deputy was
17 running the computer back there so they could control
18 it.

19 THE COURT: I don't think it would be appropriate
20 for anyone to hear their comments. I think they're
21 perfectly capable of doing that. And if we instruct
22 them not to -- the only service available would be the
23 sheriff's department service, and I doubt they would
24 even know how to get on it. That's the only Wi-Fi
25 here.

1 MS. NORRIS: There's public Wi-Fi in the
2 courtroom, your Honor. It's not hard to figure out.
3 Mr. McGuire could even figure that one out.

4 THE COURT: Well, I haven't.

5 I could instruct them not to attempt to go
6 anywhere else on it, and then take the laptop back
7 whenever they have had an opportunity to look at it. I
8 don't want to limit their ability to make comments
9 concerning each other playing it back and forth, if
10 that's what they want to do, but I would give them an
11 instruction.

12 Do you have any objection to that particular --

13 MS. NORRIS: No, sir.

14 (WHEREUPON, Court's Exhibit Number 8 was marked
15 for identification.)

16 THE COURT: Okay. All right. "We need SLED
17 agent's memorandum of interview of Cottrell in
18 hospital."

19 That is not in evidence, is it?

20 MS. NORRIS: That would be Mr. Thompson's (sic).

21 MR. HIXSON: No, the writing is not, just his
22 testimony.

23 THE COURT: Well, then what I will do is I will
24 instruct them that they can hear his testimony again
25 concerning that, but I would also advise them that that

1 is not in evidence and they may only consider things
2 that are presently in evidence, but they are welcome to
3 re-hear his testimony.

4 Okay. We're on the same page. Okay.

5 Mr. Parmalee, if you would bring the jury in.

6 (Brief pause in proceedings.)

7 THE COURT: What's the officer who testified --

8 MR. RICHARDSON: Guthinger.

9 THE COURT: Guthinger? I think they're talking
10 about Officer McGarry.

11 MR. RICHARDSON: (And, your Honor, what that is, is
12 at the beginning of Nicole Pyle's interview --

13 THE COURT: It's all on the same thing?

14 MS. NORRIS: Yes, sir. When we were watching
15 Officer Pyle, it was her radio that we were hearing the
16 call about the --

17 THE COURT: I'll ask them. I'll try to make sure.
18 (WHEREUPON, the jury came into open court at
19 approximately 3:38 p.m.)

20 THE COURT: All right. We have all of our jurors
21 back in. I see they brought the alternates back in as
22 well.

23 They have been sequestered, have they not, the
24 alternates?

25 THE BAILIFF: Yes, sir.

1 THE COURT: Okay. You asked if you could listen
2 to Officer McGarry's call-in. As I recall, that was on
3 a CD of Officer Pyle standing by a car; she just
4 happened to pick it up. We can make that available to
5 you. I think you actually have it back there. We'll
6 get you a laptop, but please listen carefully to my
7 instructions.

8 Do not use the laptop for any other purpose than
9 to listen to that and that alone. Don't go anywhere.
10 Don't go on the Internet. I don't know if you could
11 here, but please don't even try. And once you're done,
12 please let the bailiff know and let's surrender the
13 laptop back to him. And if you need it again, we'll
14 make it available to you later on to listen to it
15 again, just let us know.

16 Also, you have indicated that you need the SLED
17 agent's memorandum of interview of Cottrell in the
18 hospital.

19 Let me say this: That document, for whatever
20 reason, has not been placed in evidence. Having not
21 been placed into evidence, I could not provide it to
22 you now. However, if you need to hear the agent's
23 testimony again or anything else concerning that, let
24 us know and we'll be happy to bring that back up and
25 get you in here and let you hear that. All right?

1 Now, is there someone who -- I'm glad I'm not the
2 one in charge of doing that, but I'm sure that there's
3 some of you who could play that back if we just gave
4 you a laptop; is that correct? I see some heads
5 nodding, some computer literate folks.

6 All right. Let's let them go back in -- well, let
7 me just maybe resolve the second issue concerning the
8 agent's report.

9 What can I do for you in that regard? Do you want
10 to hear his testimony or do you want to just wait a
11 minute and decide whether you need it? Whatever you
12 would like to do, or do you know?

13 JUROR: We would like to hear it.

14 THE COURT: You would like to hear his testimony.

15 In what order would you like to hear the -- the
16 call-in first and review that and then hear the SLED
17 agent's testimony?

18 JUROR: Yeah, that would be fine.

19 THE COURT: Okay. Well, let's get them a laptop,
20 Mr. Ropp, so that they can review that. And as soon as
21 they're done with it, let me know, and we'll bring them
22 back in.

23 In the meantime, we'll have the court reporter
24 bring up that testimony, and we'll have it available
25 for you. Okay?

1 JUROR: The instructions that you went over before
2 we went back, did you send those back with us?

3 THE COURT: Yes.

4 JUROR: We -- I think someone said we didn't have
5 them.

6 FOREPERSON: The one that you read to us at the
7 end.

8 THE COURT: Yes. I mean, I gave it to the court
9 reporter to mark. All right. Just a second.

10 THE COURT REPORTER: I have it.

11 THE COURT: All right. Let's send it back. It's
12 marked. I intended for it to go back. Thank you.

13 All right. Mr. Ropp, take them back.

14 (WHEREUPON, the jury exited the courtroom
15 at 3:43 p.m.)

16 THE COURT: Make sure that the alternates are
17 segregated again. Take them out of the pool. And in
18 the future, if they have a question, I don't think it's
19 necessary for the alternates to come in.

20 Anyone have any objection to just keeping the
21 alternates totally separated?

22 MR. McGUIRE: No, sir.

23 THE COURT: Okay. All right.

24 (WHEREUPON, recess taken from 3:43 p.m.
25 to 4:19 p.m.)

1 THE COURT: I want to caution everyone, no
2 outbreaks will be tolerated in the presence of this
3 jury. This jury's decision will be respected by
4 everyone. I will not tolerate that. If you want to
5 spend the evening in jail, try me on this issue.

6 We have Mr. Cottrell now. We have Mr. McGuire and
7 Ms. Norris, as well as Mr. Richardson and Mr. Hixson.

8 I think we can bring the jury in.

9 (WHEREUPON, the jury came into open court at
10 approximately 4:20 p.m.)

11 THE COURT: All right. We have all of our jurors.
12 Madam Forelady, has the jury reached a verdict?

13 FOREPERSON: Yes, your Honor.

14 THE COURT: And is it a unanimous verdict?

15 FOREPERSON: Yes, your Honor.

16 THE COURT: All right. I would have you hand your
17 verdict form to the clerk, please.

18 FOREPERSON: (Complies.)

19 THE COURT: Thank you, ma'am.

20 Very well, you may publish this verdict.

21 THE CLERK: Indictment number 2003-GS-26-20, State
22 of South Carolina, County of Horry vs. Luzenski Allen
23 Cottrell. As to the charge of murder, we the jury
24 unanimously find the defendant, Luzenski Allen
25 Cottrell, guilty. Signed by Foreperson Kimmarie Forte,

1 dated September 24th, 2014.

2 Ladies and gentlemen of the jury, if this is your
3 verdict, so signify by raising your right hand.

4 (Jurors raise their hands.)

5 THE CLERK: Thank you.

6 THE COURT: All right. Will you request a --

7 MR. McGUIRE: No, sir.

8 THE COURT: No, sir?

9 MR. McGUIRE: No, sir.

10 THE COURT: All right. Very well. I will have
11 this jury returned to its jury room.

12 Mr. Ropp, please keep my alternates. They can
13 return to the hotel.

14 Ladies and gentlemen, as I told you earlier, in
15 the event you reached this verdict, that there would be
16 a second phase of the trial. The law requires a
17 24-hour waiting period. That is customarily observed.
18 So I will let you know as soon as possible whether we
19 will be needing you tomorrow or not. I'll get that
20 information to you as quickly as possible.

21 Mr. Ropp, take them back to the jury room, please,
22 and make arrangements for their transport.

23 (WHEREUPON, the jury exited the courtroom
24 at 4:23 p.m.)

25 THE COURT: All right. Mr. Ropp, we do not

1 release the alternates. They are not released. Okay?

2 THE BAILIFF: Okay.

3 THE COURT: Very well. Okay. Mr. McGuire, what
4 is your client's desire concerning the 24-hour waiting
5 period?

6 MR. MCGUIRE: We're going to request it.

7 THE COURT: Very well. You have that right.

8 All right, gentlemen, that means at the very
9 earliest it is -- the verdict was returned at 4:20.
10 That would mean we could not start any earlier than
11 4:30 tomorrow. Is that what you desire to do?

12 MR. MCGUIRE: Yes, sir.

13 THE COURT: You want to start at 4:30 tomorrow?

14 MR. MCGUIRE: I'm sorry. I agree that's the
15 earliest we could start. I don't think it would be
16 wise to start that late.

17 THE COURT: What does the State have to say about
18 that?

19 MR. HIXSON: That's fine. I don't know how
20 productive we would be with witness -- to bring
21 witnesses from a distance, get started and excuse them
22 if the Court was only going to go an hour or so. It
23 might be more appropriate to come straight out of the
24 gate and run hard than start and stop.

25 THE COURT: Well, we would bring them in for an

1 hour or so or I would work them way into the evening
2 and then they're going to be just plain tired and worn
3 out for the next morning. So, you know, it can be
4 counterproductive to do that.

5 I will bring them back in at 9 o'clock on Friday
6 morning. Does anyone have any objection to the
7 officers in charge informing the forelady that's what
8 the plan is so this jury will have an idea of what
9 we're going to do?

10 Any objection to that, Mr. McGuire?

11 MR. McGUIRE: No objection, Judge.

12 THE COURT: Okay. All right.

13 MR. HIXSON: Your Honor, I do have a brief
14 housekeeping matter.

15 THE COURT: Certainly. Okay.

16 MR. HIXSON: Just at this time the State would
17 move to incorporate all the evidence that we admitted
18 in the guilt phase and have that incorporated in the
19 penalty phase as well. I will make that motion again
20 at the beginning of the presentation of the penalty
21 phase evidence --

22 THE COURT: Well, I think we're jumping the gun a
23 little bit. I'm sure Mr. McGuire has some motions, or
24 do you?

25 MR. McGUIRE: We'll reserve all motions until the

1 end of penalty. While normally we would make some
2 motions now, we'll reserve them until the end.

3 THE COURT: All right. Very well.

4 All right. Then, Mr. Hixson, I don't see any
5 problem with that, but it's up --

6 MR. McGUIRE: It's automatic by statute, Judge.

7 THE COURT: I believe so. I just didn't know
8 whether you had any -- I would be surprised,
9 Mr. McGuire, if you had an objection to that.

10 MR. HIXSON: I'm just -- I'm crossing the I's and
11 dotting the T's, Judge. And I'll do it again.

12 THE COURT: All right. And they're incorporated.

13 All right. Anything further, gentlemen?

14 MR. McGUIRE: Not at this time, Judge.

15 THE COURT: All right. Then I look forward to
16 seeing you on Friday. I plan to work through the
17 weekend, just so you will know. Okay?

18 MR. HIXSON: 9 o'clock, your Honor?

19 THE COURT: Yes, be here by 9 o'clock. I would
20 like to have the jury out because the jury is familiar
21 with what we're doing. They will be ready to go.
22 Okay?

23 MR. HIXSON: Thank you, your Honor.

24 (WHEREUPON, proceedings adjourned at 4:26 p.m.)

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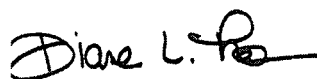
Certificate of Reporter

I, Diane L. Thommes, Official Court Reporter
for the Tenth Judicial Circuit of the State of South
Carolina, do hereby certify that the foregoing is a
true, accurate, and complete transcript of record of a
portion of the proceedings had and evidence introduced
in the trial of the captioned case, relative to appeal,
in the Circuit Court for Horry County, South Carolina,
on the 24th day of September 2014.

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I do further certify that I am neither of kin, counsel,
nor interest to any party hereto.

January 15, 2015



Diane L. Thommes, RPR, CRR
Circuit Court Reporter

1 State of South Carolina
2 County of Horry In the Court of General Sessions

3
4 STATE OF SOUTH CAROLINA,)
5) 2003-GS-26-20
6 -vs-) September 26, 2014
7 LUZENSKI ALLEN COTTRELL,)
8 Defendant.) Volume IX of X
9 -----) Pages 2732 - 2982
10) Transcript of Record

11 B E F O R E:

12 The Honorable Larry B. Hyman, Jr., Judge

13
14 A P P E A R A N C E S:

15 Attorneys for the State:
16 Jimmy A. Richardson, II, Solicitor
17 Scott R. Hixson, Assistant Solicitor
Fifteenth Circuit Solicitor's Office

18 Attorneys for the Defendant:
19 Bill McGuire, Chief Attorney, Capital Trial Division
South Carolina Commission on Indigent Defense

20 Teresa L. Norris, Attorney at Law
Blume Norris & Franklin-Best, LLC

21 Diana Holt, Attorney at Law
22

23

24

25

Diane L. Thommes, RPR, CRR
Circuit Court Reporter

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Exhibits

	Marked	Description	I.D.	Admitted
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6	78	Certified copy of conviction 2002-GS-26-2243 (Horry County) (redacted)	2753	2755
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8	80	Photo - Hartman truck in wooded area	2759	2760
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1	95	Photo - road leading to	2916	
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17		Love autopsy		
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19		conviction - Love (Marion		
20		County) - redacted		
21	103	Rope made in jail by	2945	2945
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23	104	Plastic bag with soap and	2944	2944
24		string used for "fishing"		
25	105	Twisted piece of metal	2944	2944
		found in Cottrell's cel		
	106	Officer's oath, etc. Taken	2951	2952
		by Officer McGarry		
	107	Photo - Officer McGarry	2953	2963
		signing oath with other		
		officers		
	108	Photo - Officer McGarry -	2971	2972
		First Annual Easter Egg		
		Hunt		
	109	Photo - Officer McGarry	2971	2972
		with children after Easter		
		Egg Hunt		

1 For the Defendant:

2	Marked	Description	I.D.	Admitted
3	9	Letter dated 12/8/04 to	2876	
4		Candice Adams Lively from		
		Solicitor's office		
5	10	Booking photo of Diane	2878	2879
		Lawson Photo #1028955		

6
7 For the Court:

8	9	Unredacted State's	2981	
		Exhibit 102		
9	10	Unredacted State's	2756	
		Exhibit 78		
10	11	Unredacted State's	2756	
		Exhibit 79		

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1 (WHEREUPON, court convened with all parties
2 present and the following proceedings were had
3 commencing at approximately 9:13 a.m.)

4 THE COURT: Okay. Are we all ready?

5 MR. HIXSON: The State is ready to proceed, your
6 Honor.

7 MS. NORRIS: Yes, your Honor.

8 THE COURT: All right. I see we have Mr. Cottrell
9 and his attorneys, as well as the State's attorneys,
10 and we're ready to go.

11 Mr. Ropp, if you would, bring in the jury.

12 (WHEREUPON, the jury came into open court at
13 approximately 9:16 a.m.)

14 THE COURT: I see that we have all of our jurors
15 and our alternates back in the courtroom. I hope that
16 you were able to rest up yesterday and are refreshed
17 and ready to go this morning. Good to see you all
18 back.

19 Ladies and gentlemen of the jury, the defendant,
20 Luzenski Allen Cottrell, was convicted on September
21 the 24th of 2014 of the offense of murder. It
22 therefore becomes necessary for us to hold an
23 additional proceeding which will determine the
24 punishment for this to -- and will impose on the
25 defendant.

1 Section 16-3-20 of the South Carolina Code of
2 Laws, as amended, provides in part as follows: A
3 person who is convicted of or pleads guilty to murder
4 must be punished by death or by imprisonment for life.

5 That section, as further amended, also provides in
6 part: Upon conviction of a defendant of murder, the
7 Court shall conduct a separate sentencing proceeding to
8 determine whether defendant should be sentenced to
9 death or life imprisonment.

10 So our purpose in conducting the proceeding in
11 which we are now engaged is to determine whether the
12 defendant, Luzenski Allen Cottrell, should be sentenced
13 by the Court to death or to life imprisonment.

14 With respect to your particular role in this
15 proceeding, you will be asked to recommend to the Court
16 whether it should sentence the defendant, Luzenski
17 Allen Cottrell, to death or life imprisonment.

18 During this sentencing proceeding, the State and
19 the defendant will have an opportunity to introduce
20 additional evidence in aggravation, extenuation, or
21 mitigation. And both sides will have an opportunity to
22 present arguments for and against the death penalty.
23 Should you recommend a sentence of life imprisonment or
24 should you recommend the sentence of death, that is the
25 only issue involved here.

1 After the last argument has been made to you
2 concerning punishment that should be imposed upon the
3 defendant, I will give you certain instructions. You
4 will then retire and determine whether a death sentence
5 or a life sentence is to be recommended.

6 Are we ready to proceed, gentlemen?

7 MR. RICHARDSON: The State is ready, your Honor.

8 THE COURT: All right.

9 MR. HIXSON: Thank you, your Honor. May it please
10 the Court.

11 Good morning and welcome back. We're getting
12 ready to go into a rare area. Not a lot of juries get
13 to go into this, and that's called the penalty phase of
14 a capital trial. I don't know if you're happy to be
15 back, but one way or another it's time to do stage two
16 of our duty.

17 Now, we talked about themes of duty and justice in
18 the first part, and then you guys came back with a
19 verdict of guilty. And now we're in a unique spot
20 almost to pull back the curtain, this curtain, to see
21 exactly what things that you may or may not have known
22 the first time to determine the specific facts and
23 circumstances of who Luzenski Cottrell is and the
24 circumstances surrounding his crime.

25 You have decided beyond a reasonable doubt he's

1 guilty of the offense of murder. And now that will be
2 our starting-off point, and we'll go from there, okay.

3 Let's talk about what my duty is and what the
4 prosecutor's duty is. Sometimes people have the
5 concept that his duty is to get a conviction, to
6 convict the man. Well, that may be a by-product of the
7 prosecution's duty, but what our fundamental duty is,
8 is to safeguard and protect the due process rights of
9 the citizens of Horry, Horry County in particular,
10 that's where we are, and the State of South Carolina,
11 and, of course, the citizens of the United States.

12 And you're going to hear me talking about
13 safeguards a lot, safeguards. And what is a safeguard?
14 It's a step or a process that makes sure that this
15 process is fair and just, and then you can rely on the
16 end result. Procedural safeguards.

17 And that curtain that I'm talking about that you
18 can pull back now and see more, that is the definition
19 of a procedural safeguard. You went through a
20 significant procedural safeguard. Five days of jury
21 selection.

22 MS. NORRIS: Your Honor, I apologize, but I object
23 to this. This is not an opening statement.

24 THE COURT: I'm going to allow it.

25 MR. HIXSON: I will whittle it down and get to the

1 point.

2 THE COURT: All right.

3 MR. HIXSON: Throughout the process, it's
4 important to make sure that Defendant Cottrell has a
5 fair and impartial jury that's been seated, and that's
6 you. That's part of the procedural safeguards. The
7 rules of evidence and our Constitution of South
8 Carolina are procedural safeguards to be confident and
9 be able to rely on the results of the process, okay.

10 And so now we can pull the curtain back and step
11 through that door, and there's still substantial
12 procedural safeguards, and that applies to Citizen
13 Cottrell, who became Defendant Cottrell, and now he's
14 Convict Cottrell. But he still has procedural
15 safeguards. And the rules of evidence apply, but now
16 we get to know more. It's not a free-for-all, but we
17 get to know more, okay.

18 So in this phase of the trial, what we're going to
19 talk specifically about is statutory aggravating
20 circumstances. In other words, we already have the
21 murder. We talked about that a lot. That's in your
22 pocket. That's done. Now, what about this murder
23 makes it particularly heinous? We heard those
24 comments. And the State alleges three.

25 All right. The first one is pretty easy and

1 almost -- nothing is automatic. You have to decide it
2 beyond a reasonable doubt. But the first statutory
3 aggravating circumstance we rely on is the murder of a
4 police officer in the performance of his duties. All
5 right.

6 Is there any question in your mind -- and this is
7 just opening statement, think about it -- that Joe
8 McGarry was a uniformed police officer for the City of
9 Myrtle Beach and was performing his duties, on duty,
10 December 29th of 2002?

11 You have to make a separate finding in the jury
12 room of that, but the evidence is conclusive that
13 that's the case. It's conclusive. We have seen
14 photographs of his uniform and his badge and everything
15 else. That's the only one that we have to prove to
16 make Defendant Cottrell eligible for the death penalty,
17 but there's more.

18 The second one is, and I'll read it exactly from
19 the statute: The offender by his act of murder
20 knowingly created a great risk of death to more than
21 one person in a public place by means of a weapon or
22 device which normally would be hazardous to the lives
23 of more than one person.

24 Okay. And that is why in the penalty-guilt
25 phase -- and take a look at this when you get an

1 opportunity. We're talking about the bullet strikes
2 crossing a public highway and striking a restaurant
3 over here. Anybody -- that's a public area. That's
4 one of the aggravating circumstances.

5 At the end of the trial, you will have an
6 opportunity to look at the photographs of unrelated
7 vehicles with bullet strikes and windows blown out of
8 them and 14 shots, because all of the evidence in the
9 guilt phase is incorporated into the penalty phase.
10 Right now it includes all of it. You don't have to do
11 it all over again. It's all the same. So you will
12 have an opportunity to look through that. That's one
13 of the ones that we allege.

14 And then the third one that we allege is the
15 defendant has a prior conviction for a murder. In
16 other words, he's already convicted of murder as he
17 stands right there today. And that's the jumping off
18 point. He was convicted, and the evidence will show
19 that he was convicted in Marion County of the murder of
20 Jonathan Love. And that's the perfect jumping off
21 point for the rest of the facts and circumstances
22 surrounding Mr. Cottrell.

23 At the end of the trial, we will argue to you that
24 we have proved beyond a reasonable doubt all three of
25 those. Joe McGarry was a police officer, anybody else

1 could have got shot and killed during the course of
2 this incident, and he already has a conviction for
3 murder prior to the one that you just brought back.
4 That makes two. Okay.

5 So let's talk about the utterance -- a preview of
6 the evidence that you will hear now going forward. And
7 you get to hear some of the context we talked about
8 before. You heard about Richard Hartman. Well,
9 Richard Hartman was shot and killed in Horry County in
10 his pickup truck around the area on
11 November 23rd of 2002.

12 Detective Nathan Johnson from Horry County was
13 investigating that crime. And you will hear from the
14 folks that were on scene investigating that that the
15 person that shot and killed Mr. Hartman was sitting in
16 the passenger seat of his truck. And he was shot
17 multiple times in the head, with the fatal shot right
18 in the back of his head. And during the course of that
19 investigation, they generated Luzenski Cottrell as a
20 suspect. You will hear that that's the case that Horry
21 County was asking for help on when they talked to
22 Mr. McGarry, and asked him, "Do you know anything about
23 this guy?"

24 They generated a suspect name, Luzenski Cottrell,
25 and some white male with him named Red. What we know

1 now, is the death of Officer McGarry triggered an
2 avalanche of information that ultimately resulted in
3 Mr. Cottrell being arrested for two more murders. You
4 will hear that.

5 The testimony will be, and you heard it, that
6 Officer McGarry didn't know the extent of it, but after
7 Defendant Cottrell was arrested on the side of the
8 Bypass that night, Diane Lawson, other individuals
9 involved, came forward, Amber Counts. Defendant
10 Cottrell is in custody, and they started talking, and
11 that developed and that developed, and suddenly charges
12 came forth on other murders because of that contact
13 that night.

14 The tip of the iceberg didn't sink the Titanic.
15 It's what's below the water that sunk the Titanic.

16 So you'll hear testimony on the Hartman murder.
17 You'll hear about that. You'll hear about folks that
18 were there during that period of time. And you'll hear
19 eyewitness testimony from Ms. Lawson about Defendant
20 Cottrell climbing out of the window of Hartman's
21 vehicle covered with blood and the efforts to clean
22 that vehicle up, to hide Donnie Morgan's vehicle, the
23 gold vehicle we have photographs on, the gold vehicle
24 that he was arrested in.

25 You'll also hear stories about Defendant Cottrell,

1 along with Fred Halcomb, ripping off drug dealers. In
2 other words, falsifying marijuana transactions to take
3 drugs from them and the money and then engaging in
4 gunfights with them if they tried to fight back.

5 You'll hear about an effort from Defendant
6 Cottrell and others when Brett Small, one of the
7 individuals that was ripped off, said, "Man, this --
8 you just ripped us off. This has got to stop," to try
9 to burn down his house, to utilize Jonathan Love to
10 perform an arson on that house, to burn his house down.

11 Well, it didn't take. It wasn't completed. And
12 as a result, Luzenski Cottrell took Jonathan Love into
13 the woods in Marion County under the concept of digging
14 a grave, perhaps for somebody else, but Jonathan Love
15 was shot here in the middle of the back and placed in
16 the grave he dug. And that's the man that did it.

17 You'll also hear testimony that may explain a lot.
18 We introduced this in the guilt phase, but it didn't
19 fire a single round in the gunfight. But this is the
20 gun that killed Jonathan Love. There's a murder weapon
21 in that Honda. This is the murder weapon of Jonathan
22 Love. And you'll hear testimony from Special Agent
23 Paavel it matched the bullet from Jonathan Love's
24 chest, from the Rossi .357 Magnum that was in Donnie
25 Morgan's vehicle in Dunkin' Donuts' parking lot that

1 night.

2 That's what I mean about pulling the curtain back
3 and getting an idea of what we're talking about, what
4 was really going on that night.

5 You'll hear some boilerplate stuff too, as a
6 matter of fact, our first witness we'll put up, and
7 that's Melanie Huggins, the Clerk of Court for Horry
8 County, to show Defendant Cottrell's prior convictions
9 for distribution of marijuana and distribution of
10 cocaine prior to the run-up to these circumstances to
11 provide you with context of what was going on in the
12 lead-up to Officer McGarry's death in Dunkin' Donuts'
13 parking lot.

14 And then finally, you'll hear two important
15 things, and that is, Defendant Cottrell has been
16 incarcerated since that point in time, since the stop
17 on the side of the road. And you'll hear testimony
18 from guards and detention center officers about an
19 assault on another inmate, attempt to assault another
20 guard, concerns over future dangers and concerns about
21 contraband, including a braided twisted wire and what
22 appears to be rope that was created by Defendant
23 Cottrell while incarcerated, and it will lead up to
24 this period of time. You can take from that what you
25 will about concerns over Defendant Cottrell as he is

1 incarcerated.

2 And then finally, you will hear testimony from --
3 again, you'll see Officer Guthinger. And you will also
4 find out what -- why they're going to Dunkin' Donuts
5 that night.

6 I told you in the penalty-guilt phase that they
7 weren't going there to investigate a crime. They were
8 going there because Joe McGarry had some good news. He
9 had just popped the question to his fiancée then five
10 days earlier, Holly Newman. And you'll get to hear
11 from Holly Newman.

12 And Joe McGarry asked his friend Mike Guthinger to
13 go to Dunkin' Donuts that night and told him, "Hey,
14 man, I just popped the question to Holly, and I want
15 you to be in my wedding. And let's go to a beach
16 access and let's talk about I want to have a
17 military -- you know, a police officer wedding. I want
18 to have uniforms and stuff like that."

19 That's what he was doing at Dunkin' Donuts that
20 night. That's the life that he interrupted when he saw
21 10-61 and 10-32. And that's what you'll hear about
22 during the course of the penalty phase.

23 And then finally, you will get a chance to talk to
24 Joe and Anita McGarry, who lost a son on December 29th
25 of 2002, and you'll get to hear what impact that's had

1 on them all these 12 years.

2 I thank you so much for your attention and your
3 patience. It's an emotionally taxing process, and it
4 should be. It should be, because what we're going to
5 ask of you at the end of this is the questions that
6 were asked of you up here, and that is, if we prove it,
7 if we have procedural safeguards in place that you're
8 confident in your decision. And it's bad enough -- I
9 can take a paper and pen out and I can put my name and
10 I can say Luzenski Cottrell should be sentenced to
11 death for all of those actions, but specifically the
12 death of Joe McGarry on December 29th of 2002. And I
13 can promise you at the end that's the question that
14 we'll ask of you. Okay? It's going to come at the end
15 of this presentation.

16 Thank you for your time, and please listen to what
17 the defense counsel has to say.

18 THE COURT: Ms. Norris.

19 MS. NORRIS: Ladies and gentlemen, by your
20 verdict, you have already sentenced that man, Luzenski
21 Allen Cottrell, to life imprisonment without parole.

22 Of course, here we are in sentencing. That's the
23 only question that remains. Is life without parole the
24 appropriate punishment or is the death penalty?

25 Your conviction of murder, we accept that. We

1 don't argue with it. And please don't hold it against
2 Mr. Cottrell that Mr. McGuire did his job and presented
3 a defense, but we're past that question now.

4 You will, in fact, hear all of those things in the
5 State's case, and there is not a lot of argument about
6 that. You already heard in the trial that Mr. Cottrell
7 was involved in driving for a prostitution service, an
8 escort for the girls, if you will, run by Mr. Hartman.
9 Beyond that, he was involved in drug dealing. He was
10 involved in these other things. But he was involved in
11 those other things, with the exception of the
12 prostitution service and the killing of Officer
13 McGarry, Fred Halcomb was with him in every single one
14 of those events. And you're going to hear testimony
15 later on about even how Mr. Cottrell changed after high
16 school when he started hanging out with Fred Halcomb.
17 You will hear from the State's witnesses that Fred
18 Halcomb essentially told Allen, "This is what you do,"
19 and it was done.

20 But again, there is no question that he is a
21 murderer. He is a murderer of Joseph McGarry. You
22 found that. But there is more to it than that.

23 With respect to the statutory aggravating factors,
24 let me help you out. You will find that he was a
25 police officer in the line of duty, you will find that

1 it was dangerous activity to others, and you will find
2 a prior murder conviction. There's just no way around
3 that. You can just go ahead and fill out that form.
4 That's not the question that you have to worry about.

5 With respect to the other stuff, all the bad acts,
6 you're going to hear that so you can assess Allen
7 Cottrell's character. But you're not sentencing him
8 for all of those things. You're sentencing him solely
9 on the murder of Joseph McGarry.

10 You will hear some mitigation about this
11 gentleman. And a number of you said when you were up
12 here on the witness stand being asked that you didn't
13 think background was all that important. We're going
14 to present a little bit of that but not very much.
15 What you will hear, though, you've already heard -- and
16 by that point, you will have already heard about all of
17 his crimes. But you will hear that in his first year
18 of confinement, he did get in some minor trouble at the
19 jail. Since then, for almost 11 years, not a single
20 disciplinary report. He has been a perfect inmate. In
21 other words, prison works for him. It works. He
22 doesn't harm inmates. He doesn't harm officers. He
23 obeys the rules.

24 He's 36 years old, hasn't seen his daughter since
25 she was nine months old except from behind bars.

1 Life without parole or the death penalty. And at
2 the end of this, the judge will, of course, remind you
3 again that you can give a life without parole sentence
4 based on mitigation. You can do it for any reason, or
5 no reason, as a matter of mercy. I'll just ask you to
6 wait to make that decision until you've heard all the
7 evidence.

8 And you will hear what we call victim impact.
9 You've already seen some of that. You've already seen
10 the tears in Officer Guthinger's eyes. You've seen
11 Nicole Pyle Shelton. You've seen the McGarrys here.
12 You're going to hear from them. Let me tell you now,
13 again, there's no argument there. Officer McGarry was
14 a wonderful man. He did great service to this
15 community. You're allowed to consider that, to know
16 who he was, but that doesn't go into the equation of,
17 is the punishment death.

18 Thank you and get ready, because they're going to
19 roll.

20 MR. HIXSON: Thanks, Ms. Norris.

21 May I proceed, your Honor?

22 THE COURT: Yes, sir.

23 MR. HIXSON: State would call Melanie Huggins from
24 the Clerk of Court's office -- Heather Lewis, I
25 apologize. Heather Lewis from the Horry County Clerk

1 of Court's office.

2 HEATHER LEWIS,

3 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

4 THE WITNESS: Heather Lewis, L-e-w-i-s.

5 DIRECT EXAMINATION

6 BY MR. HIXSON:

7 Q Good morning, ma'am.

8 A Good morning.

9 Q Please tell this Court what you do for a living.

10 A I am employed by the Horry County Clerk of Court's
11 office. I am an administrative assistant. I handle
12 criminal court proceedings, assist the public, and work
13 in the criminal division.

14 Q And occasionally testify in court, I guess, too?

15 A Yes, sir.

16 Q Okay. And part of that, you maintain the records,
17 the accurate records, of the court proceedings here in
18 Horry County?

19 A Yes, sir.

20 (WHEREUPON, State's Exhibits 78 and 79 were marked
21 for identification.)

22 BY MR. HIXSON:

23 Q Okay. Let me show you a couple items, what's been
24 marked State's Exhibit 78 and 79, and see if you
25 recognize those items.

1 A Yes, sir.

2 Q And is there a caption of the case on there? And
3 please don't read the sentence. We're just talking
4 about what the convictions were for. Okay?

5 A Okay.

6 Q Just please read that --

7 THE COURT: Which exhibit is she speaking of?

8 BY MR. HIXSON:

9 Q I apologize. I'll start with 78, State's 78.
10 Okay?

11 A Okay.

12 Q And what is it you're looking at specifically? Is
13 that a sentencing sheet?

14 A It is. This is a sentencing sheet with the name.

15 Q Is there also an indictment affixed to that packet
16 as well?

17 A Yes, sir.

18 Q And are those certified copies of those documents?

19 A They are.

20 Q Okay. And who are those documents in reference
21 to?

22 A Luzenski Allen Cottrell.

23 Q Okay. Does that have a conviction date on there
24 or a sentencing date?

25 A It does. On this particular one, he was sentenced

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1 August 16th of 2002.

2 Q And of what offense was he convicted of?

3 A Distribution of cocaine.

4 Q Okay. And also I'd like to show you State's
5 Exhibit 79. What is that?

6 A This is a sentencing sheet also.

7 Q What is the date of conviction of that?

8 A The date of conviction on that is August 16th of
9 2002.

10 Q What is the offense for?

11 A Distribution of marijuana.

12 Q Okay. That's Defendant Cottrell, August 16th,
13 '02, distribution of cocaine and distribution of
14 marijuana; is that correct?

15 A Yes, sir.

16 MR. HIXSON: At this time, your Honor, the State
17 would move State's 79 and 80 (sic) into evidence.

18 THE COURT: Have they been redacted?

19 MR. HIXSON: That's our intention. I'm not going
20 to publish them. And we'll make copies if that's
21 appropriate.

22 MS. NORRIS: Yes, sir.

23 THE COURT: All right. Admitted without
24 objection.

25 (WHEREUPON, State's Exhibits 78 and 79 were

1 admitted into evidence.)

2 (WHEREUPON, Court's Exhibits 10 and 11 were marked
3 for identification.)

4 MR. HIXSON: Thank you, your Honor. And we'll
5 publish these at a later date, then.

6 Thank you, Ms. Lewis. Answer any questions the
7 defense may have.

8 MS. NORRIS: No questions. Thank you, ma'am.

9 THE COURT: You may step down. Thank you, ma'am.

10 MR. HIXSON: Your Honor, may I have -- I'll
11 address this at the break.

12 MR. RICHARDSON: The State would call Buddy
13 Blackmon.

14 **BUDDY BLACKMON,**

15 **BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:**

16 **THE WITNESS: Buddy Blackmon, B-l-a-c-k-m-o-n.**

17 **DIRECT EXAMINATION**

18 **BY MR. RICHARDSON:**

19 Q Mr. Blackmon, please tell the jury what you do for
20 a living now.

21 A I'm retired. I was a maintenance engineer, and
22 I'm self-employed right now, and I work for the Horry
23 County Sheriff's Office in a reserve capability.

24 Q At Horry County Sheriff's Office as what?

25 A As a reserve deputy.

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1 Q Yes, sir. Yes, sir. And were you a reserve
2 deputy back in 2002?

3 A Yes, sir. Been in reserves since '96.

4 Q I want to take your attention back to
5 November 23rd of 2002. Do you remember that date?

6 A Yes, sir.

7 Q And what were you doing on that day?

8 A I was going to hunt. Going hunting that
9 afternoon.

10 Q You were going hunting?

11 A Yes, sir.

12 Q All right. Where were you going hunting?

13 A In Carolina Forest.

14 Q And, of course, back in the day, the Carolina
15 Forest was different than it is now?

16 A There's a few homes there now.

17 Q Okay. Did you have a hunting club or a place to
18 hunt back there?

19 A Yes. Myself and two other friends, we had a
20 hunting club in the back part of the Carolina Forest.

21 Q Tell the jury how you would have gotten to that
22 place. What road would you have taken?

23 A You have to take at that time.

24 Q So you'd go by Apartments on the right
25 and keep on going down?

1 A Yes, sir, all the way down to the back now where
2 the schools are, Ocean Bay schools.

3 Q Schools are back there now?

4 A Yes, sir.

5 Q Used to it was just woods?

6 A Yes, sir.

7 Q All right. And on the road, was that a dirt road
8 or a paved road?

9 A It was paved up to a point, and then it turned
10 into dirt.

11 Q All right. Mr. Blackmon, did anything catch your
12 eye as you -- first of all, what time were you going
13 hunting on the 23rd?

14 A It was midafternoon. Sometime after 1 o'clock.

15 Q Okay. Did anything catch your eye on the way into
16 the hunting club?

17 A Yes, sir. As I was driving down, I happened to
18 look to the right and I saw a truck in the woods, up in
19 the woods over the -- over the ditch and in the woods.

20 Q All right. And what did you do?

21 A I had already passed it after I caught -- after my
22 vision caught it, and I backed up. And it looked real
23 muddy in the back, like it had been sitting there for a
24 while and the tires were just turning. So I parked and
25 got out and went to the back of the truck and walked

1 across the ditch and went to the driver's side. Got
2 within three or four feet and saw somebody in there
3 kind of laying over the console. And I shouted out a
4 couple times to him. No response. He didn't respond
5 to me.

6 So I backed out of there and went back to the
7 road. And at that time I had a cell phone, I had a
8 phone in my truck, and called the 911.

9 Q All right. So you called 911 from, did you say, a
10 cell phone or from a pay phone?

11 A It was from my truck phone at the time, like a bag
12 phone.

13 Q Did you wait there with the truck until EMS
14 arrived?

15 A Yes, sir.

16 Q All right. Did you ever know who's truck that
17 was?

18 A No, sir.

19 Q All right. And you never walked up and looked
20 inside of the truck?

21 A No, sir. I didn't get any closer than three or
22 four feet.

23 (WHEREUPON, State's Exhibits 80-82 were marked
24 for identification.)

25 BY MR. RICHARDSON:

1 Q Mr. Blackmon, I'm going to pass to you what's been
2 marked as State's Exhibits 80, 81, and 82. And tell
3 this jury if you recognize those photographs.

4 A Yes, sir. This is the truck that I saw in the
5 woods. Yes, sir, this is the same --

6 Q Same truck. All right.

7 MR. RICHARDSON: Your Honor, the State would
8 move -- oh, excuse me.

9 BY MR. RICHARDSON:

10 Q Does this substantially look like the same as it
11 did back when you saw it in 2002?

12 A Yes. That's basically the way that it was. And
13 the road was up here a little more.

14 Q Back up this way?

15 A Yeah.

16 MR. RICHARDSON: All right. The State would move
17 State's Exhibit 80, 81, and 82 into evidence.

18 MS. NORRIS: No objection.

19 THE COURT: Without objection, they're admitted.

20 (WHEREUPON, State's Exhibits 80-82 were admitted
21 into evidence.)

22 BY MR. RICHARDSON:

23 Q All right. Now, I'm going to talk with the jury
24 about this one first, okay. Will you tell the jury how
25 you approached that vehicle.

1 A As you're looking at it, I went down in the ditch
2 towards the left-hand driver's side of the truck and
3 then proceeded to go on around. I had to cross the
4 ditch to get to the back of the truck. And I proceeded
5 to walk up towards the driver's door. And it was kind
6 of muddy in there too, so I just went as far as I could
7 go to the window and hollered at him, screamed a couple
8 times, "Hey, you. Hey." And he never responded, so I
9 figured it was something else other than -- I did see
10 him kind of slumped over the console.

11 Q But you didn't see blood or --

12 A No.

13 Q -- anything like that?

14 A Didn't see any sign of any blood or anything.

15 Q And, Buddy, you had talked about the wheels. Can
16 you describe there how the wheels looked?

17 A Yeah. It actually looked like it would run until
18 it ran out of gas, I would assume, but the mud was all
19 splattered, just the whole -- as you see the different
20 colors are shaded there. Looks like it's just -- all
21 that was just like really muddy, running muddy, wet.

22 Q Yeah, and that's sitting on the chassis, isn't it?

23 A Yes, sir.

24 Q Is there anything different about 81 or 82 than as
25 it appeared that day, or do you see anything on that --

1 A The only thing would be that door was not open.

2 Q The door wasn't open. You don't remember any of
3 the doors being open --

4 A No, sir.

5 Q -- when you arrived?

6 All right. And, Buddy, did you look at the
7 passenger's side? Was that passenger door able to be
8 opened, or did you look at that?

9 A The front door looked like it was really jammed up
10 against the trees and stuff.

11 Q So the passenger front door was jammed up against
12 that tree?

13 A Yes, sir.

14 Q Buddy, do you remember anything else about this
15 case?

16 A No, sir. Once I went down -- I didn't pay that
17 much attention once I went over the ditch and saw him
18 laying there. I kind of backed away and got out of
19 there.

20 Q And you waited until EMS came up?

21 A Yes, sir.

22 Q Did you see them take him out of the vehicle?

23 A No, sir. I proceeded on after he released me and
24 told me I could go. I just -- I went ahead and went
25 hunting.

1 MR. RICHARDSON: Thank you. No further questions.
2 If you would answer any questions the defense might
3 have.

4 MS. NORRIS: No questions. Thank you, sir.

5 THE COURT: You may step down, sir.

6 MR. RICHARDSON: Your Honor, the State would call
7 John Black.

8 THE COURT: How about this --

9 JUROR: Can we take a break for a minute?

10 THE COURT: I'm sorry?

11 JUROR: Can we please take a break?

12 THE COURT: You need a break? Okay. Very well.
13 Let's take a break.

14 (WHEREUPON, the jury exited the courtroom
15 at 9:49 a.m.)

16 THE COURT: Mr. Richardson, do you want to keep
17 that witness?

18 MR. RICHARDSON: No, sir. Can he be excused?

19 MS. NORRIS: Yes, sir, he can be excused.

20 THE COURT: All right. Mr. Blackmon, you are
21 excused.

22 THE WITNESS: Thank you, sir.

23 THE COURT: All right. We'll be at ease while we
24 give the jury a moment.

25 (WHEREUPON, recess taken from 9:49 a.m. to

1 10:01 a.m.)

2 THE COURT: I think our jury is ready now. I see
3 we have Mr. Cottrell and his counsel, as well as
4 State's counsel.

5 Mr. Ropp, if you would please bring them in.

6 (WHEREUPON, the jury came into open court at
7 approximately 10:02 a.m.)

8 THE COURT: All right. All our jurors are here
9 and our alternates.

10 Mr. Richardson, call your witness.

11 MR. RICHARDSON: Thank you, your Honor.

12 John Black. The State would call John Black.

13 JOHN BLACK,

14 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

15 THE COURT: Please be seated.

16 THE WITNESS: John Black, B-l-a-c-k.

17 DIRECT EXAMINATION

18 BY MR. RICHARDSON:

19 Q Mr. Black, please tell the jury where you're
20 presently employed.

21 A I own my own forensic consulting and training
22 company, and I'm based out of Olanta, South Carolina.

23 Q That's around Florence?

24 A Between Florence and Turbeville, basically.

25 Q Okay. And if you would, please tell the jury

1 where you were employed back in 2002.

2 A I was a senior agent with the South Carolina Law
3 Enforcement Division, also known as SLED, and I was
4 stationed in the forensic laboratory in Columbia.

5 Q Okay. And what was your job there in the forensic
6 laboratory?

7 A Assigned to the latent print and crime scene unit.
8 I was responsible for conducting fingerprint
9 examinations, footwear and tire track examinations,
10 bloodstain pattern examinations, and crime scene
11 investigations upon request from other jurisdictions,
12 such as police departments or sheriff's offices.

13 Q All right. And tell the jury, please, about some
14 of your training to become a special agent in crime
15 scene.

16 MS. NORRIS: Your Honor, we'll stipulate to his
17 qualification.

18 THE COURT: In what field, Mr. Richardson?

19 MR. RICHARDSON: Crime scene analysis, your Honor.

20 THE COURT: Crime scene analysis?

21 MR. RICHARDSON: And blood spatter.

22 MS. NORRIS: So stipulated.

23 THE COURT: All right. He is admitted as an
24 expert in the field of crime scene analysis.

25 MR. RICHARDSON: And, your Honor, we would ask for

1 bloodstain, spatter pattern.

2 MS. NORRIS: No objection.

3 THE COURT: All right. He is qualified as a -- or
4 admitted as an expert in blood splatter analysis.

5 MR. RICHARDSON:

6 Q Yes, sir. And please -- I won't go into all that,
7 but tell the jury how many times you have been
8 qualified as an expert in South Carolina courts in the
9 past.

10 A With respect to crime scene investigation and
11 bloodstain pattern analysis combined, around 50 times.

12 Q And did you have an occasion -- were you called to
13 Horry County to help out with the Hartman case, Rick
14 Hartman case?

15 A Yes, sir.

16 Q Did you know -- did they tell you that it was Rick
17 Hartman or give you any sort of information about the
18 decedent?

19 A Just information that we gathered when we got to
20 the Horry County Police Department, just general
21 background information. We typically would try to get
22 any victim information that we could. So we received a
23 name and a date of birth, but other than that, that's
24 about it.

25 Q You didn't know anything about him before that.

1 time?

2 A No, sir.

3 Q And I think you've already testified, but when you
4 processed Mr. Hartman's vehicle, it was not there in
5 the woods. They had moved it to Horry County.

6 A That's correct.

7 (WHEREUPON, State's Exhibits 83-87 were marked
8 for identification.)

9 BY MR. RICHARDSON:

10 Q All right. I want to pass to you what's been
11 marked as State's Exhibit 83, 84, 85, State's
12 Exhibit 86 and 87, have you look at these photographs
13 and tell the jury first the number, and tell the jury
14 what that's a photograph of, if you recognize it.

15 THE COURT: Ms. Norris, have you seen them?

16 MS. NORRIS: No, sir.

17 MR. RICHARDSON: I'm sorry, Teresa.

18 (Ms. Norris reviewing exhibits.)

19 MS. NORRIS: No objection.

20 MR. RICHARDSON: All right. Please, your Honor,
21 the State would move State's Exhibits 83, 84, 85, 86,
22 and 87 into evidence.

23 MS. NORRIS: No objection.

24 THE COURT: Without objection, they are admitted.

25 (WHEREUPON, State's Exhibits 83-87 were admitted

1 into evidence.)

2 BY MR. RICHARDSON:

3 Q Okay. Tell the jury what you see there in State's
4 Exhibit 83.

5 A State's 83 is -- first of all, I do recognize the
6 photograph. I see the SLED case number stamped onto
7 the photograph. This is an enlargement of that
8 photograph. This was taken under my direction and in
9 my presence in connection with this case. And this is
10 a general photograph of a black in color Ram 1500
11 vehicle as we found it when we responded to the Horry
12 County Police Department.

13 Q And that's sort of an overview photograph, Agent
14 Black?

15 A Yes, sir.

16 Q Please have a look at State's Exhibit 84 and tell
17 the jury anything that you might see in State's
18 Exhibit 84.

19 A In State's 84, again, I do recognize it with the
20 SLED case number as before. Again, this photograph was
21 taken in my presence. It's a photograph of the
22 interior of the truck cab taken from the front driver's
23 door. And inside you can see various items as well as
24 a fair amount of broken glass and some bloodstain
25 patterns as well.

1 Q All right. These two photographs were taken
2 where, Agent Black?

3 A At the Horry County Police Department.

4 Q Agent Black, I pass to you what's been marked
5 State's Exhibit 85 and see if you recognize that.

6 A I do. Again, I do recognize the SLED case number
7 in this enlargement, in State's 85. This depicts the
8 interior driver front door panel. And this photograph
9 is taken -- it's more of a mid-range to close-up
10 photograph as opposed to the previous photographs which
11 were more general in nature. This actually is designed
12 to depict evidence in more detail. And this depicts a
13 potential bullet defect at the top of the door panel,
14 also possible bullet defect in the side view mirror and
15 some bloodstain pattern information that is on the door
16 panel above the controls above the armrest.

17 Q State's 86, please.

18 A I recognize State's 86 as well. As previously
19 discussed, the SLED case number is present. This
20 photograph was taken from outside the vehicle on the
21 driver's side. It depicts me holding a metal probe or
22 a rod, so to speak, and it depicts an approximate path
23 of a bullet that goes through the steering wheel and
24 also hits the driver door panel. And it just is
25 designed to kind of show the approximate path of that

1 shot.

2 Q Thank you.

3 Finally, State's Exhibit 87, please tell the jury
4 if you recognize that and what that's a photograph of.

5 A I recognize this as well. I see the SLED case
6 number. State's 87 is a depiction of what was in State
7 86, but it's taken from outside the vehicle from the
8 front of the vehicle. So you're looking into,
9 basically, the windshield, and you're seeing the same
10 metal probe as it progresses from the passenger side to
11 the driver's side around the steering wheel.

12 Q Now, Agent Black --

13 MR. RICHARDSON: I would ask if Agent Black could
14 step down. I want to have him to discuss --

15 THE COURT: Very well.

16 MR. RICHARDSON: -- if he has any findings on
17 this.

18 BY MR. RICHARDSON:

19 Q Would you step down.

20 A (Witness complies.)

21 Q All right. I'm going to hold this, and that is a
22 pointer. Just hit that. And which -- with regard to
23 any findings, which photograph do you want to talk with
24 them about first?

25 A State's 85.

1 Q All right. I'll hold it for you. And is this the
2 photograph depicting the blood spatter?

3 A Yes. In State's 85, I mentioned a moment ago that
4 there was a bloodstain pattern above the armrest on the
5 door panel. And I'm referring to this area here with
6 the laser pointer. This is an area of very, very small
7 bloodstains. And this is very consistent with an
8 impact pattern. An impact pattern actually is a
9 pattern that implies some degree of force behind it,
10 typically as a result of either a gunshot or an
11 explosion or some type of high-speed machinery.

12 But this is very consistent and what we see in
13 shooting cases where bloodletting has occurred. And in
14 order to get this type of pattern, you typically get
15 that with an exit wound because most of the blood is
16 actually following the bullet when it leaves a
17 blood-rich source, obviously, like a body. So that's
18 what we're trying to depict right here in this
19 photograph.

20 Q You can tell from this photograph that it appears
21 to be an explosion of sorts consistent with a gunshot
22 wound, and that is on the driver's side door?

23 A Yes, sir.

24 Q What are we seeing here with these -- this looks a
25 little different to me, the blood that's dripping down.

1 A You're right. It does look different. These two
2 stains over here, actually, are more passive-type
3 stains where there's really no force behind them. It's
4 really more a -- some heavier volume drops that
5 actually are projected onto the panel, and because of
6 their volume, they simply just run down or they flow
7 down, according to gravity.

8 Again, there's nothing indicative of a gunshot
9 with those. Those would be after the fact of a
10 bloodletting event, such as a gunshot.

11 Q Can you tell from that pattern -- well, let's look
12 at State's 76, and please --

13 A 86.

14 Q 86. Excuse me. Tell the jury what you're looking
15 at here.

16 A As I mentioned a moment ago, this photograph was
17 taken from outside the vehicle on the driver's side.
18 Of course, you're looking into the cab. The steering
19 wheel right here had two bullet defects in it or two
20 defects in it consistent with a bullet. One was toward
21 the passenger side. The other, on the driver's side,
22 you actually had material from inside the steering that
23 was kind of exploded out, which helped us indicate the
24 direction of travel.

25 And I mentioned earlier about a bullet defect.

1 And if I may, may I refer back to State's 85?

2 Q Yes, sir, please.

3 A In State's 85, I mentioned that there was also a
4 bullet defect. And there was a bullet defect right
5 here at the very top of the driver's door panel. And
6 this metal probe that I mentioned earlier, basically
7 goes through the two holes in the steering wheel and
8 also intersects the bullet defect at the top of the
9 door panel. So we have three points which you connect
10 together. You need a minimum of two to establish any
11 type of general path or trajectory. We had three.

12 So this rod just basically extends along, you
13 know, back from where the bullet came. So it came
14 somewhere approximately along that path. Again, most
15 likely coming from the passenger side of the vehicle.

16 Q And that -- does the two together help you? The
17 spatter and the rod, does that confirm that it does, in
18 fact, look like it came from the passenger side?

19 A Yes, sir.

20 Q And finally, I had a question regarding this. Can
21 you -- is this meant to show distance, this probe?

22 A This probe is not meant to show distance. We did
23 not determine distance. It's just, again, to show the
24 approximate path of that shot that again struck the
25 steering wheel, impacted the driver's door panel. In

1 no way did we attempt to determine distance. It's just
2 to show, again, that approx- -- somewhere along that
3 path, from some indeterminate range, we believe that's
4 where the shot -- that particular shot originated.

5 Q And then it would appear that the shot originated
6 from the passenger seat, struck the top part of the
7 steering wheel through the outer portion of the
8 steering wheel and into the door side panel?

9 A Correct.

10 MR. RICHARDSON: Thank you. I think that that is
11 all the questions I have for you, if you will take a
12 seat. Please answer any questions Ms. Norris might
13 have.

14 THE WITNESS: Yes, sir.

15 CROSS-EXAMINATION

16 BY MS. NORRIS:

17 Q Sir, did you also process the vehicle for
18 fingerprints?

19 A We did. We did process it for fingerprints.

20 Q And did you find any fingerprints?

21 A There were no fingerprints of value for
22 identification purposes inside the vehicle.

23 MS. NORRIS: All right. Thank you, sir.

24 MR. RICHARDSON: No further questions.

25 THE COURT: Thank you. You may step down,

1 Mr. Black.

2 THE WITNESS: Thank you.

3 MR. RICHARDSON: Might Agent Black be excused from
4 his subpoena?

5 MS. NORRIS: No objection.

6 THE COURT: He is to be excused. Thank you.

7 THE WITNESS: Thank you, your Honor.

8 MR. HIXSON: At this time the State would call
9 Detective Nathan Johnson from the Horry County Police
10 Department.

11 NATHAN JOHNSON,

12 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

13 THE WITNESS: Nathan Johnson, J-o-h-n-s-o-n.

14 DIRECT EXAMINATION

15 BY MR. HIXSON:

16 Q Good morning, sir. How are you?

17 A I'm doing well.

18 Q Please tell this jury what you currently do for a
19 living.

20 A I currently own a heating and air conditioning
21 company in Surfside Beach, South Carolina.

22 Q Okay. And so what were you doing back in December
23 of 2000 -- well, November of 2002?

24 A At that point in time, I was employed by the Horry
25 County Police Department. I worked as an investigator

1 in the violent crimes section.

2 Q Okay. And were you working on November 23rd of
3 2002?

4 A Yes, I was.

5 Q And at some point in time, did you get called out
6 in reference to a homicide investigation in the death
7 of Richard Hartman?

8 A Yes.

9 Q Please tell us what happened that day for you.

10 A I was notified by our dispatch to respond to the
11 section of Horry County. There was
12 apparently a deceased individual found in a vehicle at
13 that location. I responded out there. Some of our
14 crime scene technicians and other investigators were
15 already on scene.

16 Q Let me show you what's already in evidence and
17 make sure we're talking about the same thing, State's
18 81 and State's 82.

19 MR. HIXSON: Already in evidence, your Honor.

20 BY MR. HIXSON:

21 Q Do you recognize those?

22 A That looks like the vehicle that was in the woods
23 at that point in time, yeah.

24 Q Okay. And did you make it out to the scene that
25 day?

1 A I did -- I did go to that scene, yes, sir.

2 Q And was Mr. Hartman, the decedent, still in the
3 vehicle at the time that you got there?

4 A To my recollection, yes.

5 Q Okay. Well, tell us what you -- what in the world
6 do you do when you go about having a decedent or a
7 victim, a murder victim, in a truck? How you go about
8 trying to figure out what happened?

9 A Well, obviously, we had our crime scene people
10 there. They were handling that. I was tasked with
11 basically sort of getting an idea of who Mr. Hartman
12 was, where he lived, and any individuals that might
13 know him.

14 So we started off, obviously, by identifying
15 Mr. Hartman with his -- I think his driver's license.
16 We also located a registration in the vehicle that gave
17 us an address. And at that point in time when we did
18 go to the address, we located an individual named Amber
19 Counts, spoke with her, and she gave us a little bit of
20 information on her relationship with Mr. Hartman, how
21 she knew him. And we also located some other
22 individuals during that same point in time that gave us
23 an idea of who he was.

24 Q Okay. Now, procedurally, since we're here in this
25 phase of the trial, and just to get right to the point,

1 when you went to Mr. Hartman's apartment, did you find
2 out that that was the location of an escort service?

3 A Yes. And that was also confirmed by our
4 narcotics -- or one of our narcotics personnel later on
5 down the road that, yes, he owned an escort service.

6 Q And do you understand, I guess, basically what --
7 when you went to the apartment, was that the office of
8 the escort service, for lack of a better term? What's
9 your knowledge of the basic -- the real basic
10 information?

11 A It was run -- what we were told by some of the
12 individuals is the escort service was run out of the
13 apartment. Now, I can't remember if that first
14 apartment was the apartment or not, but it was
15 Mr. Hartman's apartment was where that escort service
16 was run from.

17 Q Did Mr. Hartman -- during the course of your
18 investigation, did you determine that Mr. Hartman also
19 had another apartment where some of the girls stayed?

20 A Yes.

21 Q Now, during those initial stages, just generally,
22 not about Hartman, but just generally speaking, what
23 are you trying to -- what are you initially trying to
24 do?

25 A Obviously, to find out the cause of death and

1 who's responsible for it.

2 Q You're generally trying to get the universe of
3 information, for lack of a better term?

4 A Correct. Time frames, who was here, possible
5 suspects, who could have been involved, and also ruling
6 out people that wouldn't be involved.

7 Q Okay. So initially, and we're still talking about
8 November 23rd, did you come to generate a name of an
9 individual, and that name being Luzenski Allen
10 Cottrell?

11 A I don't know if it was that exact day, but yes,
12 his name was given to us by some of the girls that we
13 had spoken to at the apartment.

14 Q And the girls that you spoke to, Ms. Counts
15 specifically --

16 A Yes.

17 Q -- did she indicate a relationship -- that she had
18 a relationship with Mr. Cottrell?

19 A Not at that point.

20 Q Okay. Subsequently, did you find out that
21 Ms. Counts and Mr. Cottrell were -- had a personal
22 relationship?

23 A We learned later down the road that they were
24 dating, seeing each other.

25 Q Okay. And were you able to determine early on the

1 nature of the relationship between Mr. Cottrell and
2 Mr. Hartman?

3 A Yes. They were referred to as Al and Red by the
4 girls.

5 Q Excuse me. I'm sorry. At this time Mr. Hartman,
6 not Halcomb.

7 A Oh, I'm sorry. I thought you said Halcomb.

8 Q In other words, I'll just get straight to the
9 point. Did Defendant Cottrell work for Rick Hartman?

10 A We were told that he was a driver and answered the
11 phones sometimes, yes.

12 Q Okay. And just go from there. And that day did
13 you have an opportunity to enter a Ware Kimmell in
14 reference to this investigation?

15 A Yes. Mr. Kimmell, I believe, contacted us and let
16 us know that he was also a friend of Mr. Hartman and
17 that he had -- knew about a black truck that had been
18 located. And he met with us and indicated that he had
19 known Rick for several years, they golfed together.
20 And he also gave us a little bit of information on some
21 of the people who hung around with Mr. Hartman for our
22 information.

23 Mr. Kimmell did also indicate that -- or gave us
24 Luzenski Cottrell's name as somebody who knew
25 Mr. Hartman.

1 Q Okay. About this period of time, through the
2 evening hours of November 23rd up until the next day,
3 which is November 24th, did you have several
4 conversations with Mr. Kimmell that helped you define
5 the nature of the relationship between Mr. Cottrell and
6 Mr. Hartman?

7 A Yeah, we -- Mr. Kimmell indicated that he knew of
8 Mr. Cottrell supplying Mr. Hartman with drugs.

9 Q Okay. And let's go into the following day then, I
10 guess. Did you have any more conversations with any
11 other witnesses involved in that apartment, Michelle
12 Hill or others, that gave you an idea of the time frame
13 around when Mr. Hartman left in his black truck?

14 A Yes. There was a lady named Michelle Hill that
15 was at the apartment who also worked with Rick. And
16 she apparently was there the night that Mr. Hartman
17 left in the early morning hours. And she had indicated
18 that she knew of Al and Red, Mr. Cottrell and Red. She
19 also said that she was there when Mr. Hartman was in
20 phone conversations with an individual that she didn't
21 know who it was, obviously, but arranging a time or a
22 place to go meet that night.

23 Q And the purpose of the meeting -- was she aware of
24 the purpose of the meeting, what your understanding was
25 at the time why they were meeting?

1 A Well, my understanding from what she said was that
2 they were meeting to purchase drugs at that point.

3 Q Okay. And based on that, did you get for your
4 investigation a time frame when Mr. Hartman left his
5 apartment for the last time?

6 A Vaguely, from Ms. Hill, it was around 3:00 or 4:00
7 in the morning when he left his apartment.

8 Q Okay. Did you also get any information from
9 Ms. Counts concerning any difficulties perhaps that
10 were brewing between Mr. Cottrell and Mr. Hartman?

11 A Ms. Counts or Ms. Hill?

12 Q I believe either one, I think. Whatever your
13 recollection was. I apologize.

14 A There was some -- one of the girls had indicated
15 that there was some stress, I guess, between
16 Mr. Hartman and Mr. Cottrell over Mr. Cottrell being
17 with one of the girls and the possibility of her being
18 pregnant.

19 Q Okay. And as a result -- let's just move past
20 that. Let's just move past that.

21 Now we're moving into, I guess, November 24th. So
22 we're less than 24 hours, about, when you were out by
23 that truck and you had generated Mr. Cottrell's -- his
24 information at that time, correct?

25 A Yes, we knew who Mr. Cottrell was at that point.

1 Q Okay. And then, ultimately, did you have an
2 occasion to learn about Mr. Hartman's scope of friends
3 and him riding WaveRunners with some individuals?

4 A Yes. And I think this was given to us by Michelle
5 Hill also. Mr. Kimmell and Ms. Hill supplied sort of
6 the same information as far as Mr. Cottrell and Rick
7 would go ride WaveRunners together. And there were
8 only a few people that did that.

9 Q In fact, I think, isn't it true, that -- well, did
10 you generate information about -- that only four
11 individuals, two males and two females, had ridden
12 WaveRunners with Mr. Hartman; is that right?

13 A Yeah, that was -- Michelle Hill had indicated that
14 Ware, who was also known as Edward Kimmell, Al, Amber,
15 and Tammy.

16 Q And then I don't know -- I can't recall if he
17 specifically said it, but was Michelle Hill aware of
18 the gender of the person that was on the telephone
19 arranging a drug transaction with Mr. Hartman?

20 A Ms. Hill indicated that she seemed to believe it
21 was a male.

22 Q Okay. Okay. During the course of November 24th
23 and into 25th, did you get any other information that
24 disproved what you had developed as a suspect or
25 developed as an individual so far? In other words,

1 what did you do during that period of time?

2 A I'm sorry. Could you --

3 Q I know, that was a very cumbersome question. I'm
4 sorry.

5 Let's go into November 25th. Okay?

6 A Okay.

7 Q What did you do on November 25th to try to
8 determine who killed Richard Hartman?

9 A We reached out to some other people. We basically
10 interviewed a fellow named Ryan Beall. He was also a
11 friend of Rick's. He gave us some information about
12 the people he knew that Rick was with, being Ware,
13 Mr. Kimmell, and some of the girls. Amber Counts was
14 one of them. Also identified Al, or Mr. Cottrell, as
15 being a driver who answered phones and was involved
16 with drugs.

17 Q Okay. And then ultimately, did you get
18 information about what specifically -- I think it was
19 from Ms. Hill -- the conversation that the decedent had
20 with Defendant Cottrell -- with the -- with the
21 individual on the other line on the telephone about it
22 being cold that night and what they weren't able to do
23 that day?

24 A Yes. I can't remember exactly when it was that
25 she told us, but Ms. Hill did indicate that she

1 remembered overhearing a conversation in which I think
2 Mr. Hartman said, I guess, we couldn't take the
3 WaveRunners out today or something to that effect.

4 Q And then left to go to wherever he was going for
5 this transaction --

6 A Correct.

7 Q -- safe to say?

8 And based on this, at about -- I'm referring to
9 your investigative report. About 10:45; at some point
10 in time did you reach out to any other agencies for
11 assistance in determining more information on the
12 suspects or persons of interest that you had generated?

13 A Yes. I contacted Myrtle Beach Police Department,
14 I think Frank Daniels was who I spoke to, and asked him
15 if he had -- any of his folks had any information on
16 Mr. Cottrell and/or a white male that he traveled with
17 known as Red.

18 Q Did you provide the total case information at that
19 time? Did you provide basic information to them? What
20 was the nature of the give and take of information for
21 you?

22 A Basic information of -- basically, that there was
23 a shooting in . And some of the people
24 involved that we'd spoken with had indicated that Al
25 worked for the defendant -- or Mr. Cottrell worked for

1 the victim. I'm sorry. Just basic information about
2 the shooting and that we were interested in getting
3 sort of a timeline, any people that Mr. Cottrell was
4 with or knew, and if they had any information and they
5 could help us out.

6 Q Okay. Did they get back with you at some point in
7 time with that information?

8 A At some point in time, we received a fax, I think,
9 from Ms. Stanley on that.

10 Q Okay. And did she describe in that fax, do you
11 recall, whether or not she indicated that she had
12 reached out to any other officers to have them talk
13 about what they knew about Luzenski Cottrell?

14 A If I could refer to --

15 Q Please refer to -- would that refresh your
16 recollection from 12 years ago? By all means.

17 A Yeah, she indicated that she did have some
18 information and that there was an officer that had
19 stopped Mr. Cottrell. And she forwarded us a report, a
20 supplementary report, written by that officer.

21 Q Okay. Is that the report that's cosigned on the
22 right-hand side by Investigator -- by Ms. Stanley --
23 well, Stanley Prock? She was Stanley in 2002.

24 A I believe that's what it says. I can't read the
25 signature.

1 MR. HIXSON: If I may approach just briefly. Let
2 me see if we're talking about the same thing.

3 BY MR. HIXSON:

4 Q And I'll note the left-hand side of that document
5 you're referring to. Is the officer's signature on the
6 bottom of that document?

7 A There's a -- yes.

8 Q What's the signature on the bottom of that report?

9 A It says J. McGarry.

10 Q And what was that reported date?

11 A This report was dated 11/23/02.

12 Q So 11/23/02, McGarry writes a report indicating
13 his prior interaction with Cottrell. That's what that
14 appears to be to you?

15 A Yes.

16 Q And the Myrtle Beach police did respond back to
17 you with that information, so you knew they had had
18 that conversation, is that safe to say?

19 A Yes, they faxed this information to us.

20 Q Okay. Now, based on that going forward, what
21 other developments had you had after November 25th of
22 2002 as it relates to Defendant Cottrell's involvement
23 in the Hartman murder?

24 A Other developments?

25 Q Yeah, what other evidence or whatever developed.

1 What were you doing the period of time to try to make a
2 case against Defendant Cottrell for Hartman?

3 A We had very spare concrete evidence. We had a lot
4 of people indicating that Al could be involved. We
5 didn't have anything concrete at that point in time,
6 but we were subpoenaing phone records, trying to do
7 some background with all the people that had known
8 Mr. Hartman and get statements from them. But at that
9 point in time, the information as to putting
10 Mr. Cottrell at the level of an arrest was very spare.

11 Q Okay. So is it safe to say that you had generated
12 him as a suspect, but you did not have enough to arrest
13 him on probable cause at that time? Is that safe to
14 say?

15 A Yes.

16 Q At some point in time, did you develop enough
17 probable cause to arrest the Defendant Cottrell for the
18 murder of Richard Hartman?

19 A Yes. That's when we had some eyewitnesses to the
20 crime come forward.

21 Q Okay. And when did that happen?

22 A That was after Mr. McGarry was killed.

23 Q Okay. So let's fast-forward to December 29th of
24 2002. So you have an interaction with Myrtle Beach
25 police November 25th of 2002, Officer McGarry is shot

1 34 days later, and then information starts flowing to
2 you. Is that safe to say?

3 A Yes.

4 Q Okay. And what kind of information did you get?

5 A We received some information from Donnie Morgan
6 that he was present.

7 MR. McGUIRE: Objection. Hearsay.

8 BY MR. HIXSON:

9 Q Fair enough. Just don't say what the witnesses
10 said, just the source of the information and the
11 circumstances surrounding it. But you don't have to --
12 don't tell what they said. Okay?

13 A Okay. Well, the information we received was that
14 there were individuals -- or that Mr. Cottrell was the
15 shooter of Richard Hartman. There were individuals in
16 the car with him, that were in a car with him, that
17 observed the shooting.

18 Q And that's Diane Lawson?

19 A That's a name, yes.

20 Q Did you interview Ms. Lawson?

21 A We did do that, yes.

22 Q Okay. And so let's take you back to December 29th
23 of 2002, the Grand Strand Hospital. Did you respond to
24 there and were you in a room with Defendant Cottrell?

25 A Yes, I did.

1 Q And do you recall who else was present in the room
2 with you there?

3 A Rodney Thomason from SLED, and I believe one of
4 the nurses also.

5 Q Okay. And at that time did you hear Officer -- or
6 Special Agent Thomason read Defendant Cottrell his
7 Miranda warnings?

8 A Yes.

9 Q And did it appear to you that Defendant Cottrell
10 understood and voluntarily waived those Miranda
11 warnings? He gave a statement concerning the events of
12 McGarry's shooting?

13 A Yes.

14 Q Okay. And you wrote a summation of that, I guess,
15 in your report, is that safe to say?

16 A Yes, sir.

17 Q I'm trying to find that. Can you recall what
18 Defendant Cottrell said to -- that you heard Defendant
19 Cottrell say to Special Agent Thomason about the events
20 of that night?

21 A Cottrell indicated that he was in the Dunkin'
22 Donuts getting some coffee and saw the officer,
23 indicated that he went outside with his coffee. The
24 officer approached and asked to see his I.D. Cottrell
25 then indicated that he had known the officer and told

1 the officer that he didn't feel like the officer was --
2 or felt like the officer was harassing him. He also
3 indicated that he had a .45 semiauto in his waistband
4 and stated the officer told him he was going to pat him
5 down, and he told the officer no. And then Cottrell
6 indicated that he then went to walk away and the
7 officer grabbed him. Cottrell stated he pulled a gun
8 from his waistband and fired what he thought was two
9 shots at the officer and then, again, shooting back and
10 forth with the other officer.

11 Q Please just continue a little bit.

12 A Oh, okay. Cottrell also indicated that he had
13 emptied one magazine and reloaded prior to getting into
14 the car with Amber Counts, and that's when they left
15 the scene. Cottrell was also asked by Agent Thomason
16 about the gun that he used, and Cottrell described it
17 as a P90 .45-caliber auto, also indicated that he had a
18 .357 Rossi revolver in the car. And Cottrell made the
19 comment that he had just shot a cop and that the
20 officer just wanted to harass him.

21 Q And just the last sentence, through the last
22 sentence would be good.

23 A And Cottrell stated that he had a temper and just
24 lost it. Agent Thomason's last --

25 Q That's sufficient.

1 A Okay.

2 Q And that's documented and memorialized in your
3 investigative report. I guess that's what you
4 recall --

5 A Yes.

6 Q -- Defendant Cottrell saying.

7 After that statement, did you have an opportunity
8 to have a discussion with Defendant Cottrell concerning
9 the Hartman matter?

10 A Yes, sir. It was about 1:30 that afternoon.
11 Myself and another investigator, Allen Large, met with
12 Mr. Cottrell at the hospital and spoke with him about
13 Richard Hartman.

14 Q And during the course of the interview, did he
15 indicate -- say anything inculpatory or indicate any
16 involvement in the Hartman matter?

17 A No, sir. He indicated that he knew Rick,
18 obviously. Did indicate, the only thing, that they
19 rode Jet Skis together on occasion.

20 Q Confirmed that statement with you?

21 A Correct.

22 Q But didn't say anything, "I did it," or
23 anything --

24 A No.

25 Q -- just said, "I don't know what you're talking

1 about," basically?

2 A No.

3 Q Fair enough?

4 A (Witness nods head.)

5 Q Okay. At some point in time, did you obtain
6 warrants for Mr. Cottrell in the murder of Richard
7 Hartman?

8 A Yes, we did.

9 Q And do you recall the date, I guess? I'm just
10 trying to get when you did that.

11 A That would have been December the 30th.

12 Q So one day after the McGarry killing, you served
13 warrants on -- murder warrants on the defendant for
14 Hartman's killing, correct? That's correct?

15 A Correct.

16 Q Well, let's fast-forward now and get away from
17 Richard Hartman and let's talk about Marion County.

18 At some point in time, months later I believe it
19 was, were you contacted or did you have an occasion to
20 go to rural Marion County for a murder investigation?

21 A Yes. Diane Lawson had indicated to us that there
22 was another --

23 MR. McGUIRE: Objection. Hearsay.

24 THE WITNESS: Sorry.

25 BY MR. HIXSON:

1 Q Fair enough. Just -- at some point in time, did
2 you interview a witness that gave you information
3 concerning the murder of Jonathan Love?

4 A Yes.

5 Q And what -- who -- what individual gave you that
6 information?

7 A Diane Lawson.

8 Q Okay. And did Diane Lawson give substantial
9 assistance in aiding you to locate Jonathan Love's
10 body?

11 A Yes.

12 Q Was that in the nature of directions to the
13 location?

14 A Directions to the location, yes.

15 Q Were you also able to piece together the events
16 leading up to and what happened that night through the
17 aid of Diane Lawson?

18 A Through --

19 Q Did Diane Lawson tell you what happened?

20 A Yes, yes.

21 Q Fair enough. So let's go out -- did you, in fact,
22 go out to a rural area in Marion County in the spring
23 of 2013 (sic) it would have been by then; is that
24 right?

25 A Yes.

1 Q And tell us what happened. Tell us what happened
2 there.

3 A That was a location that we had been given some
4 information by the owner of the property that I believe
5 his name was Doug Newman that was an acquaintance with
6 Mr. Cottrell and Fred Halcomb. That is where we --
7 Ms. Lawson had indicated that Jonathan Love would be
8 located. And I think that's when Marion County was
9 called and exhumed the body.

10 Q Okay. Were you out there when they were looking
11 for the grave site initially? At what point in time
12 did you end up out there on the scene?

13 A I was out there that morning. But as far as the
14 actual exhumation of the body, I wasn't there for that.

15 Q Okay. So you left once authorities found a
16 probable location to start digging; is that safe to
17 say?

18 A Yes.

19 MR. HIXSON: Okay. Beg the Court's indulgence,
20 your Honor.

21 BY MR. HIXSON:

22 Q I apologize. The Solicitor corrected me. I may
23 have misspoken. I may have said 2013. I meant 2003.
24 It would have been the spring -- let me rephrase the
25 question.

1 Do you recall what year it was that you went out
2 to Marion County to follow up on the information you
3 got about the location of Jonathan Love's burial site?

4 A 2003.

5 Q Yeah, I apologize if I misspoke on 2013. That's
6 not correct.

7 Based on the information that you had received
8 about what happened during the course of the Hartman
9 murder, in other words, you mentioned about cleaning
10 up, that you had received information that Donnie
11 Morgan's car was cleaned up, that there was
12 bloodletting in the car from that, did you get any
13 information about efforts to clean blood out of the
14 vehicle? Do you remember what I'm talking about in
15 your report?

16 A If I could just --

17 MR. McGUIRE: Your Honor, I object.

18 MR. HIXSON: Pardon?

19 MR. McGUIRE: I object. Hearsay.

20 MR. HIXSON: I just asked him to -- I'm not using
21 a statement of anybody.

22 THE COURT: Rephrase your question or state your
23 question again.

24 BY MR. HIXSON:

25 Q Did you receive any information about efforts to

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1 clean up Donnie Morgan's vehicle after the crime?

2 THE COURT: I'll allow him to answer the question
3 affirmatively or negatively.

4 THE WITNESS: Did I receive information about --
5 BY MR. HIXSON:

6 Q Yes.

7 A Yes.

8 Q And based on that information, did you receive
9 any -- did you do a search of the vehicle, or are you
10 aware of a search of the vehicle relating to the rear
11 seat belts of Donnie Morgan's vehicle?

12 A I believe that -- yes.

13 Q And what information did you receive about the
14 rear seat belts?

15 A I believe that it was -- the rear seat belt was
16 actually removed or cut out.

17 Q Okay. Were you there for the search of Donnie
18 Morgan's vehicle to see that yourself, or was that
19 through a report from SLED, or how did you come to know
20 that?

21 A I believe that was a report from SLED. I
22 apologize. I'm trying to...

23 (WHEREUPON, State's Exhibit 88 was marked
24 for identification.)

25 BY MR. HIXSON:

1 Q Well, let me show you this. See if you can
2 authenticate this. It's marked as State's Exhibit 88.
3 See if you recognize what that is.

4 A That looks like a photograph of -- of -- I believe
5 that would be the vehicle, Donnie Morgan's car, in our
6 police impound.

7 Q Yeah, the vehicle was taken -- was the vehicle
8 taken to Horry County impound for a search or for crime
9 scene processing?

10 A Yes, it was. Yes.

11 Q And does this photograph indicate the rear seat
12 belt area of Mr. Morgan's vehicle?

13 A It looks like it does, yes.

14 MR. HIXSON: Okay. At this time we move State's
15 88 into evidence.

16 MR. MCGUIRE: No objection.

17 THE COURT: Without objection.

18 (WHEREUPON, State's Exhibit 88 was admitted
19 into evidence.)

20 BY MR. HIXSON:

21 Q And help clarify for the jury what the jury is
22 looking at. Does it appear that the rear seat belt is
23 cut out of that vehicle? Is that your understanding of
24 that photograph?

25 A Yes, that's what it appears like to me.

1 MR. HIXSON: Beg the Court's indulgence.

2 BY MR. HIXSON:

3 Q Well, let me just close the loop on the Jonathan
4 Love crime scene.

5 Are you aware of whether or not the State Law
6 Enforcement Division was called out to investigate that
7 crime scene?

8 A Yes.

9 Q Okay. And were they on the scene at the time that
10 you left that scene?

11 A We're talking about the scene in Marion County?

12 Q Marion County, the Jonathan Love scene.

13 A I don't recall right offhand, but I'm pretty sure
14 they were. I know Marion County officers were there.

15 MR. HIXSON: Okay. Thank you, sir. Please answer
16 any questions defense counsel may have.

17 THE WITNESS: All right. Thank you.

18 CROSS-EXAMINATION

19 BY MR. MCGUIRE:

20 Q Good morning, Mr. Johnson.

21 A Good morning, sir.

22 Q It used to be detective, but now it's Mr. Johnson?

23 A Correct.

24 Q You and I have talked about this before, and
25 you've testified previously about the investigation

1 into the Hartman murder.

2 A Right.

3 Q And what I need to do is to determine the amount
4 of information you had at a certain point in time, and
5 that point in time is December 29, 2002. Okay?

6 Your investigation starts off with the discovery
7 of the pickup truck and Mr. Hartman?

8 A Correct.

9 Q You were able to get two pieces of information to
10 start your investigation. One was a cell phone from
11 Mr. Hartman?

12 A Yes.

13 Q And the other was you were able to get the voter
14 registration card of Kyra Long?

15 A Yes, that was one of the names that initially --
16 yes.

17 Q Okay. And you do two things. You retrieve the
18 numbers that you can in the phone of people that have
19 called that phone, numbers that the phone called out
20 to, correct?

21 A Well, to the best of my ability, yes.

22 Q Right. I'm not saying you called in a forensic
23 technician or anything like that. You were able just
24 to manipulate the phone to get the numbers?

25 A Yes.

1 Q And then -- and, of course, you run those numbers
2 to see if any of them are a landline, because a
3 landline would be associated with a name and address?

4 A Correct.

5 Q And you used the address that was on the voter
6 registration card of Kyra Long to go to -- I believe
7 it's what, , ?

8 A .

9 Q . I'm sorry. And you go to that apartment,
10 and you don't -- I don't think you realize it at the
11 time, but that's -- well, that's where Amber Counts
12 was?

13 A That's where we met Amber Counts, yes.

14 Q Okay. And next door to that was Mr. Hartman's --
15 another condo, and that's where the escort service was
16 run out of?

17 A Correct.

18 Q Do you remember the name of the escort service?
19 Was it Hole In One?

20 A I don't recall that.

21 Q You don't remember that?

22 A No.

23 Q Okay. You talk to Amber Counts because she's at
24 the address on Kyra Long's voter registration card, and
25 now you start to develop more names. Fair to say?

1 A That would be fair, yes.

2 Q Okay. And I'm going to take you just through some
3 of the people you developed as persons of interest in
4 your investigation. Of course, you had Kyra Long and
5 Amber Counts right off the bat.

6 A Yes.

7 Q You got Jan Namey. That name came up. On page
8 two of your report, you indicate that one of the phone
9 numbers you got from the phone comes back to Jan Namey?

10 A Yes.

11 Q Okay. Edward Kimmell, also known as Ware,
12 actually, he presented himself to you. He called you?

13 A He contacted us, yes, sir.

14 Q And then Mr. Ware gives you more names. He says,
15 "Well, there's a fellow -- there's a fellow named
16 Jimmy; a fellow named Ryan; there is a guy named Mike,
17 he's called Canadian Mike; there's Tammy; there's Allen
18 Cottrell."

19 And these all come from Mr. Ware, correct?

20 A That is correct.

21 Q And I think you went back and talked to Amber
22 Counts again, and she gives you the name Stacey and
23 Crystal on page three of your report?

24 A Yes.

25 Q And during that interview -- and all of these

- 1 people are either escorts or friends of Mr. Hartman in
2 some sort of capacity, either business or a friendship?
- 3 A That's our understanding, yes, sir.
- 4 Q They all have some connection to Mr. Hartman?
- 5 A Correct.
- 6 Q And that's why you're getting these names?
- 7 A Correct.
- 8 Q And while you're interviewing Amber Counts the
9 second time, Jan Namey, Mike Namey, Mike Walker, and
10 Stacey actually walked in?
- 11 A Yes.
- 12 Q And you were able to find out that Stacey was
13 actually Jeanne White, a white female, 19, from, I
14 think, the Florence area?
- 15 A Yes.
- 16 Q And when you talked to Jan, Mike Namey, Mike
17 Walker, and Stacey, who is really Jeanne White, they
18 say, "Well, you need to talk to Michelle Hill"?
- 19 A Yes.
- 20 Q And you do talk to Michelle Hill?
- 21 A We did.
- 22 Q And she gives you even more names, Scotty and
23 Jeff?
- 24 A That's correct.
- 25 Q Okay. And some of these names you don't have last

1 names for. You just know the first name and then sort
2 of their relationship to Mr. Hartman?

3 A Yes, it was --

4 Q And, again, they're all either people that he has
5 business dealings with or he knows them through
6 friendship?

7 A Correct.

8 Q You talk to Michelle Hill, and she gives up a
9 couple more names for you. There is Treasure, who is a
10 prostitute; Cheyenne, a prostitute. I think you were
11 able to find out that Treasure was actually Amanda
12 Tabor?

13 A That sounds familiar, yes.

14 Q I think you will find it on page five of your
15 report. And then there's also Cheyenne, who I think
16 was also an alias, and she had a real name as well.

17 A Yes.

18 Q And Michelle Hill also tells you that, well, Rick
19 also has some ex-girlfriends. And I think it was Kyra,
20 Chrysta, and Donna?

21 A That was what Michelle indicated, yes.

22 Q Okay. And you talked to another prostitute, who
23 went by Savannah, and she gives you the name Ryan
24 Beall?

25 A Ryan Beall was -- yes, that was a name we were

1 given.

2 Q Okay. And he was a driver for Mr. Hartman?

3 A That's what he indicated, yes.

4 Q And Ryan Beall was able to say that, "Yeah, I know
5 Al." And he was actually able to give you an address
6 for Allen Cottrell. It's on page six of your report.

7 A I think he drew us a map of -- and the residence
8 was in the Cimerron Plantation.

9 Q Right. He drew you a map. He was able to say
10 this is the exact house, and he knew that because he
11 actually drove Mr. Cottrell there and dropped him off?

12 A Correct.

13 Q And so he was able to actually tell you exactly
14 which house he meant?

15 A Yes.

16 Q And you sent -- you actually went out there and
17 photographed it. And the address was ?

18 A That sounds familiar, yes.

19 Q Okay. And another name was developed. It was
20 Joey, a fellow that Rick played golf with. I think you
21 note that on page eight of your report.

22 A Yes, sir.

23 Q Okay. And again, a lot of times you don't know
24 the last name of people. You just know, well, Jeff
25 this guy, Scotty this guy, Joey this guy --

1 A Right.

2 Q -- and you know sort of the status of the
3 relationship.

4 And you had another conversation with somebody,
5 and that was Scotty Worrell. Do you remember that?
6 You mention that on page 12 of your report.

7 A Yes, sir.

8 Q And when you talked to Scotty, I think ultimately
9 you learned that Scotty actually was a partner of Rick
10 Hartman's with the escort service, but Scotty got out
11 of the business because he was actually robbed there
12 one time. Do you remember that?

13 A Yes. It's indicated in the report.

14 Q And that was -- that's part of the information you
15 got from Scotty Worrell?

16 A Correct.

17 Q And I think he still was half owner with one of
18 the condos that Rick was using for the escort service?

19 A That doesn't -- I don't --

20 Q That doesn't ring a bell?

21 A I don't recall.

22 Q Okay. That's okay. But he gives you two more
23 names, two more people that know Rick Hartman. One
24 guy's name is Brooks, and he's a former driver for Rick
25 Hartman. And then there is another guy that he knows

1 as "Mikey the mouth." Does that sound familiar?

2 A Yes.

3 Q And you note that on page 12 of your report,
4 correct?

5 A Yes.

6 Q And to talk to all these people, you actually went
7 out to some of their addresses. For instance, you went
8 to , and you talked to -- that was the
9 Kyra Long address, and you talked to Amber Counts
10 there, along with other people?

11 A Right.

12 Q And you went there on multiple occasions?

13 A I'm sure we did.

14 Q Okay. You went to looking for
15 Jan Namey?

16 A Yes.

17 Q You had another address for Kyra Long, and you
18 went there. That's , Garden City?

19 A That's correct.

20 Q You had another address for Kyra Long,
21 e. You didn't actually go there
22 yourself, but you dispatched a patrol car to see if she
23 was there?

24 A That sounds -- yes.

25 Q Okay. You went to in Garden

1 City, and you interviewed Tammy there?

2 A That -- yes.

3 Q Okay. Now, in your investigation -- and again,
4 I'm just talking about the time period before
5 December 29, 2002.

6 A Right.

7 Q In your investigation, you actually came up with
8 two addresses for Mr. Cottrell, that
9 you got from Ryan Beall?

10 A Right.

11 Q And you actually went there and photographed the
12 house?

13 A Yes.

14 Q And you also developed the address of
15 . Do you remember that?

16 A That -- that does ring a bell, yes, as far as the
17 addresses go.

18 Q On page nine of your report, you describe the
19 address. You also note the
20 address on page nine of your report. And you also make
21 reference on page six that Ryan Beall also gave you the
22 address for Mr. Cottrell. Does that sound all about
23 right?

24 A Yes.

25 Q Now, despite having two addresses associated with

1 Mr. Cottrell, did you ever knock on the door or ring
2 the doorbell to try to talk to him?

3 A No, sir.

4 Q Okay. And there was a time where you were serving
5 subpoenas at Horry Telephone Cooperative. Do you
6 remember that?

7 A Yes, sir.

8 Q And you were with Detective Large?

9 A Allen Large, yes.

10 Q Allen Large. And when you're leaving Horry
11 Telephone Cooperative with Detective Large, Detective
12 Large recognizes Amber Counts in the parking lot?

13 A That's correct.

14 Q He says something like, "Hey, look, there's Amber
15 Counts over there," right?

16 A Something to that effect, yes.

17 Q And you recognize Amber Counts too, correct?

18 A Yes, because we had spoken to her.

19 Q Because you spoke to her several times. And you
20 had, at this point, photographs of Mr. Cottrell?

21 A That's correct.

22 Q And you also knew him to hang out with a white
23 male character --

24 A Yes.

25 Q -- who had a nickname Red?

1 A That was what we had been told, yes.

2 Q You also had some information about the car that
3 Red would have driven?

4 A Yes.

5 Q Okay. And the car that you saw matched that
6 description?

7 A I don't know -- yeah. I mean, it was light in
8 color, from what I understand.

9 Q Acura?

10 A Yeah.

11 Q And despite having all of this information that
12 we've talked to up to this point -- and correct me if
13 I'm wrong -- but the summary of the information that
14 you had with regard to Mr. Cottrell is that he was a
15 former driver for Rick Hartman, supplied drugs to
16 Mr. Hartman, one of the girls from the escort service
17 he dated or was his girlfriend for a while, and they
18 road Jet Skis together. Is that pretty much what you
19 had?

20 A That's pretty much the summary of the information
21 we had. I mean, some of the other information we had
22 was that some of the girls said that he was scary.

23 Q Yeah, but I'm talking about directly connecting
24 Mr. Cottrell to the events of Mr. Hartman's murder. At
25 that point you had the association through the escort

1 service as a former driver, dated a girl from the
2 escort service, rode Jet Skis, and supplied Mr. Hartman
3 with marijuana?

4 A Right. We had no direct evidence at that point in
5 time that he was involved in the murder.

6 Q Exactly. And at that point in time when you saw
7 Mr. Cottrell in the parking lot was late November?

8 A Yeah. I believe so, yes.

9 Q Okay. And in late November when you saw
10 Mr. Cottrell in the parking lot, he wasn't so high on
11 your radar that you stopped him or detained him?

12 A We did not stop him at that point in time, no,
13 sir.

14 Q You didn't even approach him and talk to him?

15 A No, sir.

16 Q Okay. And I told this jury a couple days ago that
17 on December 29, 2002, the information that you had at
18 that time did not rise to the level of probable cause
19 and there were no warrants on Mr. Cottrell. And that
20 was true. That is true?

21 A Yes. There were no warrants on Mr. Cottrell at
22 that point in time.

23 Q And there was no probable cause for a warrant?

24 A No.

25 Q Okay. We can agree on that?

1 A Well, if there was --

2 Q Ultimately.

3 A -- the warrant would have been --

4 Q But remember, I've prefaced almost all my
5 questions with, "Going back to this point in time,
6 December 29, 2002." At that time -- at that time I
7 told this jury there was no probable cause to arrest
8 Mr. Cottrell. And that's true?

9 A That is true.

10 Q Okay. I'm going to talk to you just -- just
11 briefly about the search of Donnie Morgan's vehicle.
12 I'm not going to ask you any hard questions.

13 The vehicle was seized after the shooting?

14 A After the shooting of Joe McGarry?

15 Q Yes, sir.

16 A Yes.

17 Q Donnie Morgan's vehicle was seized?

18 A Yes.

19 Q And it was seized for the purpose of being
20 searched?

21 A I would assume so.

22 Q Okay. And David Black of SLED did a trace
23 evidence search on the vehicle?

24 A To my knowledge, yes.

25 Q Okay. He would be looking for any evidence of

1 criminal activity?

2 A Correct.

3 Q And that would certainly include any weapons,
4 firearm, ammunition?

5 A Yes.

6 MR. McGUIRE: Okay. Mr. Johnson, that's all I
7 have for you. Thank you, sir.

8 THE COURT: Redirect?

9 MR. HIXSON: Yes, your Honor, just relating to the
10 phone records.

11 REDIRECT EXAMINATION

12 BY MR. HIXSON:

13 Q Detective, you indicated after you got some
14 information back from Myrtle Beach that you undertook
15 an effort to try to find phone records relating to this
16 unfortunate incident with Mr. Hartman. Were you
17 able -- did you subpoena phone records relating to
18 Mr. Cottrell or Mr. Hartman? Do you recall?

19 A I know we did -- we got subpoenas for phone
20 records. I do not have copies of those, and I can't
21 remember exactly who we subpoenaed.

22 (WHEREUPON, State's Exhibit 89 was marked
23 for identification.)

24 BY MR. HIXSON:

25 Q Well, let me hand up what's been marked as State's

1 Exhibit 89 and see if you recognize this and what this
2 is.

3 A That's an account information printout from the
4 phone company.

5 Q And relating to what account holder information?

6 A The customer's name is Luzenski Cottrell.

7 Q Okay. And were you able to determine Rick
8 Hartman's telephone number through the course of your
9 investigation, the number that he would have been using
10 at that time?

11 A I'm pretty sure we were, yes.

12 Q Okay. Do you -- is that in your information, or
13 did you ever get this account information prior to Joe
14 McGarry's death?

15 A Not that I recall, no, sir.

16 MR. HIXSON: I have no further questions, your
17 Honor. Thank you.

18 MR. McGUIRE: Nothing further, Judge.

19 THE COURT: You may step down. Thank you.

20 MR. McGUIRE: Judge, we may need to keep Detective
21 Johnson under subpoena.

22 THE COURT: Very well.

23 MR. McGUIRE: Or Mr. Johnson, rather.

24 MR. RICHARDSON: The State would call Ware
25 Kimmell.

State v. Luzenski A. Cottrell 2003-GS-26-20 September 26, 2014
Edward Kimmell - Direct Examination by Mr. Richardson

1 EDWARD KIMMELL,

2 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

3 THE WITNESS: Edward Kimmell, E-d-w-a-r-d,
4 K-i-m-m-e-l-l.

5 DIRECT EXAMINATION

6 BY MR. RICHARDSON:

7 Q And I know you as Ware?

8 A Yes, sir.

9 Q Would you rather be referred to as Ware or Edward?

10 A Ware will be fine.

11 Q Ware is okay?

12 A Yes, sir.

13 Q All right. Please tell the jury where you are
14 currently employed.

15 A I own a bail bond company.

16 Q A what?

17 A A bail bond company.

18 Q Bail bond company. And were you -- did you own
19 that company back in 2002?

20 A No, sir, I did not. I was -- I have a partner
21 now. I was by myself at that time.

22 Q Back in 2002?

23 A I had a different company, yes, sir, but I was
24 still a bondsman.

25 Q And did you happen to know Rick Hartman?

1 A I did.

2 Q Tell the jury how you came to meet Rick.

3 A Got a call from a buddy of mine who ran -- worked
4 at a golf course at and had a fellow out
5 there that needed a couple of people to play golf with.
6 And we started playing golf and just -- we were golfing
7 buddies.

8 Q And you played golf a good bit back in 2002?

9 A Back then I did. We played probably three times a
10 week.

11 Q All right. And you ended up being partners with
12 Rick on a lot of those occasions?

13 A Yes, sir.

14 Q Did you come to know Rick pretty well?

15 A I did.

16 Q Call him a friend?

17 A I would.

18 Q And I think they already have heard that Rick
19 owned an escort service.

20 A He did.

21 Q All right. How long into your relationship did
22 you find all of that out, that he ran an escort
23 service?

24 A It was probably within the first month.

25 Q All right. And through the escort service and

- 1 through Rick, did you know Allen -- Luzenski Allen
2 Cottrell?
- 3 A I did.
- 4 Q All right. Now, were you and Cottrell friends?
- 5 A More of acquaintances, I would say.
- 6 Q All right. Known through Rick?
- 7 A Yes, sir.
- 8 Q Did you know about this -- I think Mr. McGuire had
9 asked about it -- a robbery. Did you know about Rick
10 being robbed, the escort service being robbed?
- 11 A I did.
- 12 Q Now, Cottrell had nothing to do with the robbery?
- 13 A No, sir.
- 14 Q All right. How did the employment of Cottrell
15 come in with regards to that robbery?
- 16 A From what I understood, he was protection, Rick's
17 bodyguard, for lack of a better term.
- 18 Q All right. And he was hired by Rick after the
19 robbery?
- 20 A Yes, sir.
- 21 Q All right.
- 22 A As far as I remember.
- 23 Q And any -- because of your relationship with Rick,
24 you met Al?
- 25 A Right.

1 Q Did you come to understand of Al being arrested
2 for -- did you, being a bondsman, did you ever hear
3 about Allen being arrested by Officer McGarry over a
4 PWID marijuana charge?

5 A I can't say that I knew it was Officer McGarry and
6 Rick.

7 Q Fair enough.

8 A I did know he was arrested.

9 Q Allen was arrested at some point for a PWID
10 marijuana charge?

11 A Yes, sir.

12 Q Do you remember the month and year?

13 A It was June of 2002, I believe.

14 Q June of 2002. And then Officer McGarry -- okay.
15 Officer McGarry was killed December 29, 2002?

16 A Yes, sir.

17 Q All right. Now, were you Allen's bondsman?

18 A I was.

19 Q For that June arrest?

20 A Yes, sir.

21 Q All right. I want to -- I know you gave a
22 statement at some point to Rodney Thomason --

23 A Yes, sir.

24 Q -- with SLED. Do you remember when you gave that
25 statement to Rodney?

1 A 2005.

2 Q 2005. Okay.

3 Specifically, on that statement, you talked with
4 Rodney about an officer, I think, at the detention
5 center?

6 A Yes, sir.

7 Q All right. Tell the jury about that officer
8 coming to visit you.

9 A I was -- at that time I was employed with Al
10 Holcomb. And we had a --

11 Q And he's a bondsman too?

12 A He is. One of the officers from the jail came in
13 our office and had a couple of Smith & Wessons, .357
14 Magnums he wanted to sell, with the holsters and all.
15 He needed some money. Neither Al nor myself wanted
16 them. Neither one of us are wheel gun -- you know, we
17 don't -- a revolver. We don't use revolvers. So we
18 both declined.

19 Rick had been robbed, so I called him and asked
20 him if he was interested in buying a .357. He also
21 declined.

22 Q Okay. And at some point did you hear from
23 Mr. Cottrell?

24 A About two days later.

25 Q Two days after you talked with Rick --

1 A Yeah.

2 Q -- about those guns --

3 A Right.

4 Q -- you heard from Luzenski Cottrell?

5 A Yes, sir.

6 Q How did you refer to Luzenski Cottrell?

7 A Al.

8 Q Al. So you heard from Al two days after Hartman
9 had declined. Did you call Al, or did Al call you?

10 A He called me at my office.

11 Q Okay. And tell the jury what was asked.

12 A He asked me if I still had access to the weapons.
13 And I told him -- I asked him why did he need two
14 .357's.

15 Q Okay. And at that time you were Al's bondsman?

16 A Right, on a PWID.

17 Q On a PWID. What was his response to you?

18 A He told me that he wanted the guns in case the
19 police came for him, he was going to shoot it out with
20 them.

21 And I simply said, "Well, man, the police are not
22 going to come after you for a PWID."

23 Q PWID marijuana?

24 A Right.

25 Q All right. Oh, yeah. Tell the jury what PWID

1 means.

2 A PWID is possession with intent to distribute.

3 Q Possession with intent to distribute marijuana?

4 A Marijuana, right.

5 Q And you were his bondsman on that charge. So when
6 he called, you asked him, "Why do you need those guns?"

7 A Right.

8 Q All right. And certainly not for PWID marijuana?

9 A Exactly.

10 Q All right. Now, let me -- that was sometime after
11 June. Do you remember the exact date?

12 A I do not. I just know it was after June and
13 before November.

14 Q Okay. Let's go to November, November 23rd --

15 A Yes, sir.

16 Q -- 2002. How did you come to find out that Rick
17 had been killed?

18 A I got a call from Rick's phone, I believe, and it
19 was a Detective Troy Large calling.

20 Q Allen Large?

21 A Yes.

22 Q Troy Allen Large. Okay. And he was going through
23 Rick's phone and called you because you were --

24 A Right.

25 Q Do you know if your number was listed in --

1 A I don't know. I don't know if it had been from a
2 previous call or what. He just -- I just remember he
3 called and he told me who he was and kind of gave me
4 the -- that they had found Rick and asked me if I could
5 come talk to him.

6 Q And did you go in and talk with Allen --

7 A I did.

8 Q -- Large?

9 A I met Allen and Nathan at Surfside PD.

10 Q Nathan Johnson?

11 A Yes, sir.

12 Q A detective with Horry County?

13 A Yes, sir.

14 Q What was the first thing that you thought when you
15 heard that he had been killed?

16 A I asked him where Al was.

17 Q Asked him where Al was. Was that because you
18 believed Al had killed him?

19 MS. NORRIS: Objection. Speculation.

20 THE COURT: It's leading too.

21 BY MR. RICHARDSON:

22 Q Do you -- why would you ask such a question?

23 A He was like his bodyguard.

24 Q So not that he was going to be the shooter, but
25 that he was his bodyguard?

1 A Exactly, right.

2 Q All right. So you went over and talked with
3 Nathan and Troy Allen Large. Were you able to give
4 them any information about some of the girls or where
5 to look and who to talk to?

6 A I was.

7 Q At some point did you go over, independent of the
8 police, and talk with the ladies at the escort service?

9 A I did.

10 Q As a matter of fact, who run the books for the
11 escort service?

12 A It was a girl named Tammy. I don't know her last
13 name.

14 Q All right. Who finally gave you the lead that you
15 later reported to the police?

16 A Tammy.

17 Q Tammy?

18 A Yes, sir.

19 Q And tell the jury how that came about.

20 A I -- it was the next --

21 MS. NORRIS: I'm going to object to anything Tammy
22 said.

23 BY MR. RICHARDSON:

24 Q Yeah, don't tell me what Tammy said, just tell me
25 what you found out and what you were able to give to

1 the police.

2 A I found out that Rick had received a phone call
3 early in the morning and that it was Al that had called
4 him.

5 MS. NORRIS: Objection.

6 THE COURT: Let's take the jury out a minute.

7 (WHEREUPON, the jury exited the courtroom
8 at 11:13 a.m.)

9 THE COURT: All right. Ms. Norris, state your
10 objection on the record, please.

11 MS. NORRIS: I object to hearsay, is the biggest
12 thing. First of all, Tammy didn't say it was Al. Even
13 if Tammy said to him, "It was Al," Tammy needs to get
14 on the witness stand and testify about it. This is all
15 hearsay.

16 THE COURT: I understand.

17 MR. RICHARDSON: Your Honor, I can move on from
18 that.

19 THE COURT: Okay. Well, let's be careful about
20 what the witness may have gotten from these girls at
21 the escort service. That's clearly hearsay.

22 MR. RICHARDSON: Yeah, I'm not going to ask any
23 more about that.

24 THE COURT: Okay. All right. Ask the jury if
25 they need a few minutes.

1 MS. NORRIS: Your Honor, we would ask to move to
2 strike that last testimony and instruct the jury to
3 disregard.

4 MR. RICHARDSON: No objection, your Honor.

5 THE COURT: All right. And that would have been
6 the question -- what would have been the question,
7 Ms. Norris, and what would have been the response?

8 MS. NORRIS: All that stuff about what he learned
9 from Tammy about the --

10 MR. RICHARDSON: The fact that Al had called.

11 THE COURT: Well, I think all we've heard is that
12 he learned something from Tammy, and we haven't gotten
13 any details about it.

14 MS. NORRIS: He said that Tammy told him that
15 Allen called. That's when I got back up and objected
16 and we sent the jury out.

17 THE COURT: That Allen called or Mr. Hartman
18 called Allen?

19 MS. NORRIS: There was a phone call to Al in
20 there.

21 THE COURT: Okay.

22 MS. NORRIS: All of that stuff about what Tammy
23 said.

24 THE COURT: Okay. All right. Tammy who now?
25 What's her name?

1 MR. RICHARDSON: She was a bookkeeper. I don't
2 know her last name.

3 THE COURT: What if I just tell them, "Please
4 disregard anything that Tammy, the bookkeeper, may have
5 said, that's hearsay, not properly before the court"?

6 MS. NORRIS: Yes, sir.

7 THE COURT: Does that satisfy you? That's what
8 we'll do.

9 Are they taking -- are some of them going to the
10 restroom?

11 THE BAILIFF: Yes, sir.

12 THE COURT: Okay. Well, let's take a break then,
13 if they are.

14 (WHEREUPON, recess taken from 11:15 a.m.
15 to 11:21 a.m.)

16 THE COURT: All right. We have the defendant and
17 his attorneys in the courtroom, as well as the State.
18 Is the jury ready?

19 THE BAILIFF: Yes, they're ready, your Honor.

20 THE COURT: As soon as they are ready.

21 (WHEREUPON, the jury came into open court at
22 approximately 11:24 a.m.)

23 THE COURT: All right. We have all our jurors and
24 our alternates back in the courtroom.

25 Ladies and gentlemen of the jury, you may have

1 heard some reference a few moments ago to comments the
2 person by the name of, I believe, Tammy, the
3 bookkeeper, may have made. She is not here. Anything
4 she would say would be hearsay. It's not properly
5 before you. I need to ask that you disregard that.
6 All right.

7 MR. RICHARDSON: Thank you, your Honor.

8 BY MR. RICHARDSON:

9 Q Ware, let's talk about your relationship with
10 Rick. I know y'all were pretty good friends. And
11 they've already heard that Rick smoked marijuana from
12 time to time and that Rick also used cocaine.

13 My question is: Did you ever smoke marijuana with
14 Rick?

15 A Yeah.

16 Q Sorry?

17 A I did.

18 Q Did you ever do any cocaine with Rick?

19 A No, sir.

20 Q All right. But you knew him to do cocaine and
21 marijuana?

22 A I did. He wouldn't do cocaine in front of me, but
23 I knew that he did.

24 Q Okay. And with that relationship, do you remember
25 Rick's phone number?

1 A I do.

2 Q All right. Tell the jury what his phone number
3 was, please.

4 A

5 Q How do you remember that?

6 A It's fairly similar to my mother's phone number.
7 And just when he got it, I thought it was curious that
8 they were so closely related.

9 Q Like a digit off?

10 A Yes, sir.

11 Q All right. Do you know who -- were you ever there
12 when Rick -- when someone would deliver marijuana to
13 Rick?

14 A No, sir.

15 Q All right. So you don't know who his drug dealer
16 was?

17 A No, sir.

18 MR. RICHARDSON: I have no further questions, your
19 Honor.

20 Please answer any questions the defense might have
21 for you.

22 CROSS-EXAMINATION

23 BY MS. NORRIS:

24 Q Mr. Kimmell, Mr. Hartman's escort service, that
25 actually involved prostitutes and hookers, did it not?

- 1 A I guess.
- 2 Q And was the name of it Hole In One?
- 3 A That -- that could be it.
- 4 Q Now, when Mr. Hartman was killed, you talked to
- 5 police officers on that day, November 23rd, 2002?
- 6 A That morning, yes, ma'am, I guess.
- 7 Q And you talked to them on November 24th, 2002?
- 8 A It's possible.
- 9 Q Several times. Talked to them November 25th,
- 10 2002; November 27, 2002. December 3rd, 2002, you
- 11 actually made a taped statement, right?
- 12 A Possibly. There was a lot going on.
- 13 Q And then May 5th of 2003, you provided some more
- 14 information?
- 15 A I guess, yes, ma'am.
- 16 Q And as part of that information, isn't it true
- 17 that you told the police that Mr. Cottrell was no
- 18 longer working for Mr. Hartman at the time he was
- 19 killed?
- 20 A I don't know because -- I mean, I may have. I had
- 21 distanced myself from Rick at this time because of some
- 22 of the stuff that was going.
- 23 Q Okay. And you had provided the police with
- 24 information about a man that Mr. Cottrell hung out
- 25 with, right, Red?

1 A Well, he actually was the one who paid me to bond
2 Al out in June. I only met him once.

3 Q Okay. But it was actually Red who you
4 subsequently came to know was Fred Halcomb that bonded
5 him out?

6 A Yes.

7 Q Okay. And after talking to the police all those
8 times, it wasn't until April 2nd of 2005, when Officer
9 McGarry had been dead for two and a half years, it
10 wasn't until then that you provide information about a
11 discussion about guns and a shootout with police?

12 A I guess, ma'am. You've got the information there.
13 I don't know. That was when I was asked to write it
14 down.

15 Q Well, Mr. Ware, you are a bondsman. If you had
16 provided information about that, Mr. Johnson would have
17 written it down.

18 A I'm saying I was not asked to write it down until
19 2005.

20 Q Okay. But my question is, you never provided that
21 information prior to --

22 A That may or may not. I don't know when I provided
23 that information.

24 Q Okay. Well, certainly if the State had any
25 evidence that you had said it before then, they'd offer

1 it?

2 A Sure.

3 MS. NORRIS: No further questions, your Honor.

4 REDIRECT EXAMINATION

5 BY MR. RICHARDSON:

6 Q Ware, you only saw Red once?

7 A Yes, sir.

8 Q You only talked with him once?

9 A Just the one time when he bonded Al out.

10 Q All right. And you saw Al a good many times?

11 A Yes.

12 Q Al wasn't always with Red?

13 A No.

14 MR. RICHARDSON: Okay. No further questions. Ask
15 that he be excused from his subpoena.

16 MS. NORRIS: No objection.

17 THE COURT: All right. You are excused. You are
18 released from your subpoena.

19 MR. HIXSON: The State would call Susan Johnson.

20 SUSAN JOHNSON,

21 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

22 THE WITNESS: Susan Johnson, J-o-h-n-s-o-n.

23 DIRECT EXAMINATION

24 BY MR. HIXSON:

25 Q Good morning, ma'am. How are you?

1 A. Good.

2 Q Please tell these folks what you do for a living.

3 A I work for T-Mobile as a senior specialist.

4 Q Okay. And what's a senior specialist?

5 A We respond to subpoenas from various law
6 enforcement agencies across the United States, as well
7 as testify in court as the custodian of those records.

8 Q Okay. And what records are we generally talking
9 about, then?

10 A Cellular telephone records, subscriber
11 information, and call detail records.

12 Q Okay. And were you in that capacity -- or maybe
13 not the exact capacity, but you were in the nature of
14 this business back in 2002, around that time period?

15 A Yes. I've been with T-Mobile for 17 years.

16 Q Okay. And if I can harken back, let me show
17 you -- so when you say that you're a custodian, you
18 testify to business records, what are the nature of
19 subscriber information records that your company would
20 have access to concerning calls made or who's using
21 your service, who's paying for your service, things
22 like that?

23 A The subscriber information would tell us who the
24 account holder is. It would have the name, address,
25 Social Security number, as well as the phone number

1 associated with the account.

2 Q Okay. Would it also indicate incoming and
3 outgoing calls?

4 A Yes, that would be the call detail records.

5 Q Okay. Let me show you what's been marked as
6 State's Exhibit 89 and see if you recognize this.

7 A Yes, I do.

8 Q And what is it that you're looking at?

9 A These are actual subscriber information as well as
10 call detail records from SunCom.

11 Q Okay. And is there a field on those -- and by the
12 way, are the records that you are looking at, were they
13 kept in the ordinary course of business back around the
14 time the records were requested, which was somewhere
15 after 2002?

16 A Yes.

17 Q And in the field of that document, is there an
18 indication of subscriber information? In other words,
19 whose documents are we looking at?

20 A The account customer name is Cottrell, Luzenski.

21 Q Okay. And so at that time -- we're looking at
22 documents that he was the subscriber of your service
23 back on November 23rd of 2002, safe to say?

24 A Correct.

25 Q Okay. And now, does it also have a detailed call

1 record attached with that subscriber information that
2 shows calls to and from and the times and durations of
3 those telephone calls?

4 A Yes.

5 Q Okay. And can I draw your attention, just to
6 speed things along for our process, around November
7 23rd of 2002, do you see a call or any calls, by any
8 chance, ingoing or outgoing to the phone number

9 ?

10 A Yes, I do.

11 Q Okay. And about how many -- could you tell me
12 what time those calls occurred and how many there are?

13 A There are four calls: 2:27, 2:22, 2:11, and then
14 again at 1:26.

15 Q Okay. So there are four calls. And we're talking
16 a.m. there?

17 A Correct.

18 Q The early morning hours of November 23rd of 2002;
19 is that right?

20 A Correct.

21 Q Does it indicate whether the Cottrell account
22 holder is calling the 333 number, or is the 333 number
23 calling the Cottrell account holder number?

24 A They would be outgoing calls.

25 Q So that would be the 333 number, which the

1 evidence indicated is Rick Hartman's number, going to
2 Luzenski Cottrell's phone number, is that --

3 A The Cottrell Luzenski's phone is dialing out to
4 the number.

5 Q Okay.

6 A They're blocking the number with star-67.

7 Q I got you. I appreciate that.

8 So the account holder, which is Defendant
9 Cottrell, is calling the Rick Hartman number?

10 MS. NORRIS: Objection.

11 THE COURT: Just ask her which is which. I'm
12 totally confused.

13 MR. HIXSON: Yeah, I am too.

14 BY MR. HIXSON:

15 Q So Cottrell is dialing the 333 number?

16 MS. NORRIS: Objection. We don't know who's
17 dialing.

18 THE COURT: Just ask her what the records show.
19 Don't lead her.

20 MR. HIXSON: I understand.

21 BY MR. HIXSON:

22 Q What do the records show relating to the account
23 holder -- the account holder's calls?

24 A Cottrell Luzenski is making an outbound call by
25 blocking the phone number when he or she is calling

1 333-1869.

2 Q Okay. And how many of those phone calls and are
3 they all outgoing?

4 A Yes, they're all outgoing, they're all blocked,
5 and there's four of them.

6 Q Okay. And what do you mean by "blocked"?

7 A That they don't want their caller I.D. to be known
8 on the other end, so they're dialing star 67.

9 Q Okay. And those are all roughly 1:00 a.m. to 2:00
10 a.m. in the morning?

11 A Correct.

12 MR. HIXSON: Okay. Beg the Court's indulgence
13 just for a moment.

14 Ma'am, I have no further questions for you.
15 Please answer any questions defense counsel may have.

16 Oh, by the way, I would like at this time to move
17 State's 89 into evidence.

18 MS. NORRIS: No objection.

19 THE COURT: Without objection, it's admitted.
20 (WHEREUPON, State's Exhibit 89 was admitted
21 into evidence.)

22 MS. NORRIS: No questions, ma'am. Thank you.

23 THE COURT: You may step down.

24 Do you have further need of this particular
25 witness?

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1 MR. HIXSON: No, sir. We'd ask that she be
2 excused.

3 THE COURT: You are excused and released from your
4 subpoena, Ms. Johnson.

5 THE WITNESS: Thank you.

6 THE COURT: Thank you.

7 MR. RICHARDSON: The State would call Diane Lawson
8 Serio.

9 DIANE TERESA SERIO,
10 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

11 THE WITNESS: Diane Teresa Serio, S-e-r-i-o.

12 DIRECT EXAMINATION

13 BY MR. RICHARDSON:

14 Q Diane, thank you for being with us again. I think
15 you met this jury a few days ago --

16 A Yeah.

17 Q -- as a defense witness.

18 A Yes.

19 Q We thank you for being here on the State's side.

20 Tell the jury how and when you got to Horry
21 County.

22 A When I moved here?

23 Q Where are you from?

24 A I'm from Mount Airy, North Carolina.

25 Q Mount Airy. And when did you get to Horry County?

1 When did you move here?

2 A When I was 12.

3 Q 12. All right. Did you have an occasion to meet
4 Fred Halcomb, is that it?

5 A Yes.

6 Q All right. How did you meet Fred Halcomb?

7 A Through who is my husband now, through him, Aaron
8 Serio.

9 Q Okay. And how old were you when you met Fred?

10 A I was 18.

11 Q 18. At 18, you were in a pretty bad place, right?

12 A Yes.

13 Q Tell the jury the first time you met Fred, what
14 was your job? Were you given a job by Fred?

15 A Yes. I was a driver for him to run drugs from
16 state to state through Texas, New York, North Carolina.
17 I was a lead car driver, then there would be someone in
18 the middle, and then there would be someone with the
19 drugs following us.

20 Q Okay. Was the person with the drugs in the middle
21 car or the last car?

22 A The last.

23 Q Okay. And your job was to call back in case you
24 saw a police officer?

25 A Yes.

- 1 Q Was most of that on the interstates?
- 2 A Yes.
- 3 Q All right. And through Fred did you meet Luzenski
- 4 Cottrell?
- 5 A Yes.
- 6 Q And what did you call Luzenski Cottrell?
- 7 A Black.
- 8 Q Black? All right.
- 9 At some point you started dating Fred?
- 10 A Yes.
- 11 Q Okay. Let's start, I guess, with Rick Hartman.
- 12 Okay?
- 13 A Okay.
- 14 Q Had you ever met Rick before?
- 15 A No.
- 16 Q Tell us about the night that -- where you were
- 17 staying and how you came to go to Rick Hartman's -- or
- 18 meet Rick Hartman.
- 19 A I was staying at the off of
- 20 501 when Allen had come to the apartment -- or condos
- 21 that I was staying in to pick me up to do a drug deal
- 22 with him. I got in the passenger side of Fred's car.
- 23 Q Who was in the backseat?
- 24 A Donnie and Allen.
- 25 Q All right. And Fred was driving?

1 A Fred was driving.

2 Q And do you remember the date that this took place?

3 A I don't remember the date.

4 Q Was it November of --

5 A It was in November.

6 Q -- 2002?

7 A Yes.

8 Q All right. So in the vehicle that you left the
9 in, Fred was driving. You were in the

10 passenger's seat?

11 A Yes.

12 Q All right. Who was seated behind you?

13 A Allen.

14 Q Okay. And who was seated behind Fred?

15 A Donnie.

16 Q Okay. Where did you guys go?

17 A We went to Apartments. There were some
18 apartments across from -- to the right of
19 and we dropped Allen off at mailboxes there to meet up
20 with Richard.

21 Q So Allen got out of the backseat of Fred's car,
22 and you and Donnie and Fred stayed in the car?

23 A Yes.

24 Q And Allen waited at the mailboxes?

25 A Yes.

1 Q All right. What did you do upon leaving Allen at
2 the mailboxes?

3 A We drove off and went down -- further down the
4 road. There were -- it was a dirt road at the time,
5 and we parked and waited for them to come and meet up
6 with us.

7 Q All right. How did you park?

8 A There was a cul-de-sac, like, and we parked -- it
9 was like we were backed into the cul-de-sac. And then
10 when Richard finally came in with Allen, they backed in
11 beside of us.

12 Q Okay. So for the jury, you guys -- the trunk
13 would have been nearer the woods and the headlights
14 would have been shining out on the road?

15 A Right.

16 Q All right. And then Rick Hartman and Allen drove
17 up and parked to your right or to your left?

18 A To the left of us.

19 Q Okay. All right. Tell the jury what took place
20 when they backed in beside you to your left.

21 A Allen got out of the truck, come over to Fred's
22 driver's side door and exchanged some cash for a
23 plastic bag filled with a sweatshirt, that was supposed
24 to be the drugs, and got --

25 Q Okay. Hold on. Hold on just a second.

1 A Sorry.

2 Q I'm with you. So when he backs in, Allen jumps
3 out the passenger side and carries an amount of money
4 to Fred?

5 A Right.

6 Q And then you say that there was a bag with a
7 sweatshirt in it?

8 A Yes.

9 Q Whose sweatshirt was it?

10 A Donnie's.

11 Q And that sweatshirt was folded up into the bag to
12 appear as to be drugs?

13 A Yes.

14 Q And what happened next?

15 A He gets back into Richard's truck, and all of a
16 sudden Richard peels off. He almost hit Fred's car.
17 And so Fred pulls out behind them. And as we were
18 behind them, he shot him twice.

19 Q How did you know that a gunshot --

20 A I seen the lights of -- I was in the front seat,
21 so I had seen it through the back window of the
22 vehicle.

23 Q And the truck, the interior of the truck, lit up
24 twice?

25 A Yes.

1 Q Okay. What happened with the truck?

2 A It took off and it ran into some trees. The back
3 wheels were spinning really hard. The passenger's door
4 was lodged against another tree, so he couldn't get out
5 on that side. So Allen ended up having to crawl over
6 Richard to get out on the driver's side.

7 And Fred didn't know whether it was Allen or
8 Richard that was coming out of the car, so he had his
9 gun drawn, ready to see who it was. And when he
10 realized it was Allen, he pulled it back, and Allen
11 came around the front of the car and got in the
12 backseat behind me.

13 Q And what do you remember from when Allen got back
14 into the vehicle?

15 Just take your time, Diane.

16 A Just the smell, the smell of it, the blood, the
17 everything. It just...

18 Q All right. And it's a different smell, it's it?

19 A It's awful, and I'll never forget it.

20 Q Is that the first time you have ever seen anybody
21 shot?

22 A Yes.

23 Q That was on November 23rd?

24 A Yes.

25 Q Hey, did you know that that was going to occur?

1 A No.

2 Q In your mind, did you think that it was going to
3 be a drug rip, or did you think that there was actually
4 going to be a selling of drugs?

5 A It was just going to be exchange of drugs.

6 Q All right. For money?

7 A Yes.

8 Q And you didn't know Rick?

9 A No.

10 Q Do you know if you had ever met him before that
11 day?

12 A No, I had never met him before.

13 Q Okay. And the vehicle crashes, Allen comes out
14 the driver's side, and he's covered in blood?

15 A Yes.

16 Q All right. Do you remember if he said anything
17 when he got in the car?

18 A He was -- it was just sarcasm. There was blood
19 everywhere, just like it -- another day.

20 Q He got blood all over him?

21 A Yeah, that's the problem.

22 Q All right. Fred's still driving.

23 A Yes.

24 Q You're freaking in the passenger side seat?

25 A I'm motionless. I'm not --

- 1 Q Okay.
- 2 A I'm not crying. I didn't do anything.
- 3 Q And where did you go?
- 4 A We went to a car wash off of 10th Avenue in Myrtle
- 5 Beach. And Fred and I had went into Wal-Mart to get
- 6 some gloves and Clorox to clean up.
- 7 Q So you took Fred -- was it Fred's vehicle?
- 8 A It was Donnie's car, I think.
- 9 Q Donnie's car?
- 10 A Yes.
- 11 Q What color was Donnie's car?
- 12 A Black or tan. I can't remember.
- 13 Q But you took Donnie's car from that, washed the
- 14 exterior, and then you and Fred went inside a Wal-Mart
- 15 to buy bleach and gloves?
- 16 A Yes.
- 17 Q All right. Where did you go from the Wal-Mart?
- 18 A We went to one of Fred's homes in Socastee to
- 19 clean out the car.
- 20 Q Okay. How long did it take to clean that car?
- 21 A Hours. It was sunup by the time we were done.
- 22 Q All right. And you used bleach and gloves on the
- 23 interior of the car?
- 24 A Donnie and Allen, yes.
- 25 Q Okay. Did you see anything -- where is that

1 photograph?

2 Diane, when they were cleaning that vehicle, was
3 there anything that they just -- any blood that they
4 just couldn't get out?

5 A I can't remember.

6 Q Do you remember anything about the seat belts in
7 the backseat?

8 A They had to cut them out.

9 Q Okay. And what was the purpose of cutting the
10 seat belts out?

11 A Because the blood wouldn't come off of it.

12 Q All right. I don't even know, but do you
13 recognize State's 88? Can you tell what that is?

14 A I can't tell what that is.

15 Q Okay. But you remember them cutting out the seat
16 belts?

17 A I do.

18 Q All right. What -- was anybody bloody except the
19 backseat of the car and Allen? Anybody else have blood
20 on them?

21 A I can't remember that. I just know that they
22 burned everything in the fireplace.

23 Q Okay. And when you say "everything," that's the
24 seat belt stuff and all of Allen's clothes?

25 A Uh-huh.

1 Q And that took place somewhere in Socastee?

2 A Yes.

3 Q All right. Did there come a time that -- Diane,
4 that you didn't live at the anymore?

5 A Yes.

6 Q And where did you move to?

7 A A house on the beach in North Myrtle Beach.

8 Q ?

9 A

10 Q All right. Who stayed there with you?

11 A Donnie, Allen, and Amber.

12 Q Okay.

13 A Fred most of the time.

14 Q Okay. Tell me about another drug deal, the Brett
15 Small incident. Do you remember that?

16 A Yes.

17 Q Do you know about what time that would have been?
18 Was that before or after Hartman was murdered?

19 A After.

20 Q Do you remember about how long after?

21 A It may have been a week.

22 Q About a week after. So somewhere around the end
23 of November maybe?

24 A Yeah.

25 Q And you go to -- end of November, first of

1 December, something in that time frame?

2 A Yes.

3 Q Tell the jury about going down to Brett Small's
4 house.

5 A We went there to do another drug deal. They -- I
6 was in the passenger's seat of Fred's car. Allen and
7 Amber were in the car, Donnie's car. They backed in,
8 and I pulled -- or Fred pulled in in front of him.
9 Allen and Fred got out of the car, went inside, and
10 then all of a sudden they're running out saying, "Start
11 the vehicle. Start the vehicle back up."

12 So as Fred's getting in my car, I back up, and
13 Allen and Amber pull out in front of me. And --

14 Q Is anybody coming outside of the house?

15 A Yes. There was quite a few people coming out
16 saying that, "They robbed us. They robbed us."

17 And we started -- we got into a chase off of 17
18 Bypass.

19 Q All right. Hold on just a second.

20 Tell the jury about where that -- Brett Small's
21 house was.

22 A Over by the airport. There's a diner over there
23 before you get to the Coastal Grand Mall.

24 Q Yeah.

25 A Right there.

1 Q All right. So it was back -- that set of houses
2 was to the right of the airport if you're going --

3 A On that side road, yeah.

4 Q So you all come out of there, and which is the
5 first car to leave?

6 A Allen and Amber.

7 Q Allen and Amber. And you follow Allen and Amber
8 to what road?

9 A 17 Bypass.

10 Q All right.

11 A We head north.

12 Q All right. And did the people that were angry
13 about the drug rip, did they --

14 A They chased us.

15 Q They chased behind. Tell the jury what happened
16 during that chase.

17 A We were -- I ended up passing Allen and Amber.
18 And during that, Allen was up out of the sunroof
19 shooting back at Brett Small, or whoever was driving
20 that vehicle. And it ended up causing the vehicle to
21 break down, like start smoking, so -- and we were going
22 probably about 110 miles per hour down 17.

23 Q Okay. So you passed Allen on 17 --

24 A Uh-huh.

25 Q -- going really, really fast?

1 A Yeah.

2 Q Probably over 100 miles an hour?

3 A Yeah.

4 Q And how do you know that Allen fired a handgun
5 through the sunroof back at the vehicle?

6 A Because I saw him.

7 Q All right. You were in front. You still were
8 able to --

9 A It's as I was passing him.

10 Q You saw him out of the sunroof firing back at the
11 vehicle behind him?

12 A Yes.

13 Q All right. So y'all got away?

14 A Yes.

15 Q Did -- where did you go from there that day?

16 A We went back to the house in

17 Q All right. Who all was at the house?

18 A Allen, me, Fred, and Amber.

19 Q Okay. How long did it take Brett Small to start
20 calling about his drugs and his money?

21 A It was that night, I think, and the next day.

22 Q All right. Did there ever come a time where -- I
23 don't want to know what Fred said -- well, first of
24 all, who was he calling?

25 A Fred.

1 Q He was calling Fred. Did there ever come a time
2 that you could visibly tell, without anything that he
3 said, that he got angry about Brett continuing to call?

4 A Yes.

5 Q Okay. And were you privy to any conversations
6 involving Allen Cottrell over the Brett Small incident?
7 Were you ever in a room where Allen and Fred were
8 talking about the Brett Small incident?

9 A To set it on fire?

10 Q Yes, that's what I'm talking about.

11 A Yes.

12 Q All right. So there came a plan to set what on
13 fire?

14 A Brett's house.

15 Q Okay. And it was a house that Brett lived in?

16 A Yes.

17 Q And the house that you were at that was robbed?

18 A Yes.

19 Q What was taken from the house?

20 A Some drugs, money. I don't know what else. I
21 can't remember.

22 Q What kind of drugs? Do you remember?

23 A Marijuana.

24 Q Marijuana. And what was the feeling when y'all
25 got back to the North Myrtle Beach house about the drug

1 rip?

2 A They were okay -- they were excited about what
3 they had done.

4 Q So they got some amount of money and some amount
5 of marijuana?

6 A Yeah.

7 Q And then Brett got mad, and there was a plan to
8 burn down Brett's house?

9 A Yes.

10 Q Was the plan to burn the house to be in the
11 daytime or at night?

12 A At night.

13 Q At night. And was there any plan for where Brett
14 would be during the time?

15 A I'm not sure with that. He was supposed to be
16 sleeping.

17 Q All right. So it was a plan to kill Brett in the
18 house?

19 A While they were sleeping.

20 Q All right. And did that plan ever come into
21 fruition?

22 A They did try.

23 Q Okay. And who is "they"?

24 A Allen, John Loveday, and somebody else.

25 Q Allen, Jonathan Love --

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1 A And Donnie.

2 Q -- someone else? Donnie?

3 A Yes.

4 Q All right. Had you ever met Jonathan Love before?

5 A No.

6 Q How did Jonathan get into this thing?

7 A Allen knew him.

8 Q So Allen had known Jonathan from before?

9 A Yes.

10 Q Did Fred know Jonathan before -- from before?

11 A I'm not sure of that.

12 Q The way you met Jonathan was through Allen?

13 A Yes.

14 Q Okay. So Allen says, "I've got someone that can
15 help."

16 MS. NORRIS: Objection. There's no evidence of
17 that.

18 THE COURT: I believe he said Allen, didn't he?

19 MR. RICHARDSON: Allen.

20 MS. NORRIS: Well, number one, there is a lot of
21 leading, but --

22 THE COURT: Well, let's take the jury out.

23 MR. RICHARDSON: We don't -- your Honor, I can --

24 THE COURT: All right. Good.

25 MR. RICHARDSON: Yes, sir.

1 BY MR. RICHARDSON:

2 Q All right. Do you go over to see the house burn?

3 A Yes.

4 Q And who were you with?

5 A Fred.

6 Q Fred. And where do you and Fred park?

7 A We park at the diner. You could see it from
8 there, that the house was on fire, but the ambulance
9 and the fire trucks were already there to put it out.

10 Q Okay. So did the house burn or not?

11 A No.

12 Q Did Brett die or not?

13 A No.

14 Q Okay. And I don't want to know what he said, but
15 could you tell from Fred, who was your boyfriend at the
16 time, if he was happy or sad or what emotion?

17 A He was upset.

18 Q He was upset?

19 A Very much.

20 Q All right. Now, after that, did there come a time
21 that Fred and Allen in your presence discussed what had
22 been the problem?

23 A That he didn't do it right.

24 Q That he didn't do it right?

25 A Yes.

1 Q And who was the blame put on?

2 A Jonathan.

3 Q Jonathan. Now, who put -- do you know who put --
4 from Allen's words, not Fred's, from Allen's words, who
5 put the gasoline around the house?

6 A They all did.

7 Q They all did?

8 A Yes.

9 Q And you're saying Donnie, Allen, and Jonathan?

10 A Yes.

11 Q Now, who took the blame for the house not burning?

12 A Jonathan.

13 Q Jonathan. All right. And let's fast-forward to
14 Marion County. Okay?

15 A Okay.

16 Q Now, was this just a passing fancy with Jonathan,
17 or how mad was Allen regarding Jonathan?

18 A It -- he was supposed to get rid of Jonathan
19 before the Marion incident happened on 90 but came back
20 and said that he couldn't do it because there was too
21 many people on the road.

22 Q All right. So Allen and Jonathan leave, and both
23 of them come back or -- you tell me. Who came back?

24 A I remember Allen coming back without Jonathan --

25 Q All right.

1 A -- and telling Fred.

2 Q And Allen said what?

3 A That he couldn't do it.

4 Q He couldn't do it?

5 A Because there was too many people in the road.

6 Q Okay. Now, tell me about how you left North
7 Myrtle Beach -- or that night to go to
8 Marion.

9 A Donnie -- I mean, not Donnie's car. Allen and
10 Jonathan had already left before us. They met up at
11 the North Myrtle Beach house. We -- Fred and I had
12 left later on that night. He had said that he wanted
13 to show me some property where he goes shooting. So I
14 went with him, and when we got to the location,
15 Donnie's car was already there.

16 Q Who had left -- did you say that Jonathan and
17 Allen had left earlier?

18 A Yes.

19 Q And what were they driving?

20 A Donnie's car.

21 Q Donnie's car?

22 A Yes.

23 Q All right. And that's the car without the seat
24 belt?

25 A Yes.