

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Roger L. Couch, Circuit Court Judge

VOL. I of II

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S.C. Supreme Court

KENNETH D. SMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000696

APPENDIX

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1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) IN THE COURT OF GENERAL SESSIONS

3 The State,)
4 -vs-) TRANSCRIPT OF RECORD
5 Kenneth Danfelix Smith,) 2008-GS-42-601;2009-GS-42-3470
6 Defendant.) September 8 - 10, 2009
7) Spartanburg, South Carolina
8
9

10 B E F O R E:

11 HONORABLE J. DERHAM COLE, JUDGE; and a jury
12
13

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24 Circuit Court Reporter
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1 (Proceedings September 8, 2009)

2 THE COURT: All right. This is the matter of the
3 State vs. Kenneth Danfelix Smith. Mr. Smith is charged
4 with the crimes of murder and the breach of peace of a high
5 and aggravated nature.

6 Derrick Bulsa and Danny Fulmer are here on behalf of
7 the state; Richard Whelchel is on behalf of the defendant.

8 Are there any matters that need to be addressed prior
9 to jury selection?

10 MR. BULSA: Your Honor, the defendant was directly
11 indicted for breach of peace of a high and aggravated
12 nature. He is being arraigned on that.

13 THE COURT: All right. You are Kenneth Smith.

14 THE DEFENDANT: Yes.

15 THE COURT: You're charged in Indictment 2009-3470
16 with the crime of breach of peace of a high and aggravated
17 nature, the state alleging by way of that indictment that
18 you did on or about March the 28th of 2008 disturb and
19 break the peace of the general public on Hayne Street in
20 Spartanburg, and that you committed that crime under
21 circumstances of aggravation, or it being high and
22 aggravated in that you did go armed with a pistol while at
23 a location on Hayne Street which placed other persons in
24 grave and serious danger of violent injury or death.

25 If you were found guilty of breach of peace of a high

1 and aggravated nature you could receive a sentence of up to
2 ten years in jail. Do you understand the nature of the
3 charge?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: And do you understand the potential
6 sentence that could be imposed if you were found-guilty?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Mr. Whelchel is your lawyer.

9 THE DEFENDANT: Yes.

10 THE COURT: Mr. Whelchel, does your client wish to
11 enter a plea of guilty or not guilty to the crime of breach
12 of peace of a high and aggravated nature?

13 MR. WHELCHER: Not guilty, Your Honor.

14 THE COURT: Okay. Any other matters we need to
15 address before a jury is selected?

16 MR. BULSA: Not from the state, Your Honor.

17 MR. WHELCHER: Dealing with the indictment, Your
18 Honor, that Your Honor has just talked to my client about,
19 there would be some problems with the indictment I will
20 read to the Court and ask this indictment be quashed.

21 THE COURT: All right.

22 MR. WHELCHER: Breach of peace of a high and
23 aggravated nature, Indictment 09-3470, if you read the
24 language in the indictment, Your Honor, it says the
25 defendant did in Spartanburg County.

1 And the defendant is not named in the indictment. I
2 don't know what was said to the grand jury. I have no idea
3 what they heard, but he is not named in the body of the
4 indictment. I think that's a defect on the indictment,
5 Your Honor.

6 THE COURT: All right. Anything else?

7 MR. WHELCHER: In addition, Your Honor, the statute
8 that is cited, 22-5-150, requires or the statute reads that
9 magistrates may cause to be arrested. And I'm reading item
10 22-5-150, Your Honor.

11 THE COURT: Okay.

12 MR. WHELCHER: The statute reads magistrates may cause
13 to be arrested (a) all affrayers, rioters, disturbers and
14 breakers of the peace, (b) all who go armed offensively, to
15 the terror of the people. That specific item, to the
16 terror of the people, is not in the indictment.

17 Also, Your Honor, it reads further that persons
18 arrested for such offenses, for any of such offenses, shall
19 be examined by the magistrate before whom they are brought
20 and may be tried before him.

21 I take the position that the "shall be examined by the
22 magistrate" is mandatory. And that has not happened. As
23 Your Honor knows, he was just, he was directly indicted and
24 just served with the indictment here in the courtroom.

25 Based on all the previous matters I would move to

1 quash that indictment, Your Honor.

2 THE COURT: All right. Mr. Bulsa.

3 MR. BULSA: Your Honor, the defendant is referenced on
4 the face of the indictment as Kenneth Smith. So clearly it
5 addresses him in the body of the indictment as to this
6 first part.

7 The second point is the rest of the language in
8 22-5-150 states when the -- when the offense is of a high
9 and aggravated nature they may be committed and bound over
10 for trial for the court of general sessions. It's not
11 required that a magistrate screen cases.

12 The state has the ability and the grand jury has the
13 authority to pass indictments for criminal matters in South
14 Carolina, and that is exactly what occurred in this case.

15 THE COURT: All right. Note the exceptions. Motion
16 to quash is denied.

17 Anything else?

18 MR. WHELCHEL: No, sir.

19 MR. BULSA: If I may have a moment to get the family
20 down here, Your Honor.

21 THE COURT: All right. We will take ten minutes, and
22 then we will come back.

23 MR. BULSA: Yes, sir. Thank you.

24 (Whereupon, a recess was taken.)

25 THE COURT: All right. Are we ready for the jury

Jury qualification

1 panel?

2 MR. BULSA: Yes, sir.

3 MR. WHELCHER: Yes, sir.

4 THE COURT: Bring them in.

5 (The following takes place in the presence of the jury
6 venire.)

7 THE COURT: Ladies and gentlemen, we are ready to
8 begin with jury selection in the first case that's going to
9 require some of your participation. And the title of that
10 case is the State vs. Kenneth Danfeli Smith.

11 Mr. Smith is charged in two separate indictments with
12 two separate and distinct offenses, although they are
13 alleged to have arisen out of one particular event or
14 course of events which the state alleges occurred back on
15 March the 28th of 2008.

16 By way of two separate indictments the state through
17 the solicitor is accusing the defendant, Mr. Smith, of
18 having committed the crimes of murder and breach of peace
19 of a high and aggravated nature.

20 With respect to the indictment alleging the crime of
21 murder, the state alleges that Mr. Smith did here in
22 Spartanburg County on or about March the 28th of 2008
23 wilfully and with malice aforethought kill one Jerry De La
24 Rosa by shooting the victim with a handgun and that the
25 victim died as a proximate result of that act.

Jury qualification

1 The second indictment charges the defendant with
2 having committed the crime of breach of peace of a high and
3 aggravated nature.

4 The state alleges by way of that separate indictment
5 that the defendant did on March the 28th of 2008 disturb
6 and break the peace of the general public on Hayne Street
7 in Spartanburg in a high and aggravated nature in that the
8 defendant did go armed offensively and fired a pistol or a
9 firearm while at a location at a time while vehicles were
10 traveling on Hayne Street which placed persons in the
11 vehicles in grave and serious danger of violent injury or
12 death.

13 As to all of those allegations and as to each of the
14 charges set forth in each of those separate indictments the
15 defendant has entered a plea of not guilty. And that plea
16 of not guilty places upon the state the burden of proving
17 the allegations that they have set forth in each of those
18 indictments, the burden of proving each of the essential
19 elements that make up the crimes that they have alleged
20 against the defendant; and therefore the burden is upon the
21 state to establish the defendant's guilt to the
22 satisfaction of 12 jurors beyond a reasonable doubt before
23 any verdict of guilty could be returned as to either
24 indictment.

25 So we're going to be selecting 13 of you. There will

Jury qualification

1 be 12 primary jurors and one additional juror to serve as
2 an alternate. And by way of your selection you're just
3 going to be called upon to listen to testimony and consider
4 other evidence that might be introduced during the trial.

5 At the trial's conclusion when you're asked to go back
6 and begin deliberations you'll examine all of that
7 evidence. From that evidence you will determine what you
8 believe to be the true facts as they relate to these
9 allegations made by the state.

10 Once you determine those facts, you will then apply
11 the law that I will have provided you, and you will
12 determine whether or not the defendant has been proven
13 guilty of any crime the state claims he committed.

14 Before you could find a defendant guilty of any crime
15 the state claims he committed you must be convinced of his
16 guilt beyond a reasonable doubt. Therefore we're now going
17 to select 13 of you to participate in the trial of the
18 case.

19 I'm going to ask you some questions. The purpose of
20 these questions is to determine whether or not there is a
21 reason why any one of you jurors should not be selected to
22 participate in the trial of this particular case. In other
23 words, is there some reason why any individual juror could
24 not be fair and impartial to both sides in the case if you
25 were called upon to serve as a juror.

Jury qualification

1 And so during the course of this process I'm going to
2 ask you some questions. You'll be providing me with
3 information. But in the end I need to simply know whether
4 or not any juror has a reason why you cannot be fair and
5 impartial. So during this process you let me know of that
6 fact should that be the case.

7 I'm going to introduce some people to you to find out
8 if you have any connection with them. And the reason I'm
9 introducing them is because I need for you to tell me if
10 you are related by blood or marriage, or whether you have
11 any close personal, social, business, professional or any
12 other type of relationship with any of these individuals,
13 as well as whether or not you just know them, you've met
14 them somewhere, you happen to know who they are.

15 So as these people are introduced or as these
16 potential witnesses' names are recited if you have any
17 connection or you know any person that is called out, I
18 will ask that you please stand so that we can determine
19 what that connection or relationship is.

20 Now, first of all as I told you, the person who is
21 accused of having committed each of these offenses is
22 Kenneth Danfelix Smith.

23 Mr. Smith, I'm going to ask you to please stand and
24 face the jury panel so they may see who you are.

25 (Whereupon, the defendant stood.)

Jury qualification

1 THE COURT: Okay. Thank you. Be seated.

2 Seated with Mr. Smith at the defense table is Dick
3 Whelchel, his lawyer. He'll be assisting him in the trial
4 of the case. You can stand if you want to.

5 (Whereupon, Mr. Whelchel stood.)

6 THE COURT: The person who is alleged to have been the
7 victim in the murder indictment is Jerry De La Rosa. And
8 some members of his family are present. So I'll ask them
9 to stand so that the jury may see who they are. And that
10 way you can determine whether or not you believe you knew
11 Jerry De La Rosa.

12 (Whereupon, the victim's family members stood.)

13 THE COURT: And presenting the case on behalf of the
14 state is Derrick Bulsa who is an assistant circuit
15 solicitor for the 7th Judicial Circuit.

16 Potential witnesses to be called during the trial of
17 the case may include the following persons: John Burgess
18 with the Spartanburg Public Safety Department; Suzann
19 Cromer with the South Carolina Law Enforcement Division;
20 Brandy Edwards with the Spartanburg Public Safety; Ed
21 Guthro, Spartanburg Public Safety; Shonta Monique Kelly;
22 Lou Mathis, Spartanburg Public Safety; Tonya McCravy; Sonya
23 McCullough, Spartanburg Public Safety; Christi Norkett,
24 Spartanburg Public Safety; Frank Osrechek, Spartanburg
25 Public Safety; Adrian Patton, Spartanburg Public Safety;

Jury qualification

1 Annie Peterson; David Reeves, Spartanburg Public Safety;
2 John Roberts, State Law Enforcement Division; Santos
3 Delaros Ruiz; John Sainvil; Adam Solesbee; Reginald
4 Spurgeon, Spartanburg Public Safety; Freddie Thompson,
5 Office of Spartanburg County Communications; C. E.
6 Tillotson, Spartanburg Public Safety; Courtney Westfall,
7 Spartanburg Public Safety; John David Wren, Pathologist,
8 Spartanburg Regional Medical Center; Donald Stepp,
9 Spartanburg County Public Defender's Office; Sabrina Smith;
10 and Eugene Brannon.

11 Now, does any juror know or have any connection with,
12 including have you met, any of the persons that I have just
13 identified for your benefit, those who are present in court
14 as well as those who were not present but who have been
15 identified as potential witnesses? If so, please stand.

16 All right. I have three. I'll start on the front row
17 and work my way back by row. If you will, give me your
18 name and your juror number, please, and then tell me how
19 the question relates to you.

20 JUROR NO. 1: Sharon Aguilar, Juror No. 1. I was
21 previously friends with a family member of the De Le Rosa.

22 THE COURT: Okay. And would that fact or that
23 connection have any bearing upon your decision in the case,
24 or would it in any way interfere with your ability to be
25 fair and impartial to both sides in this case?

1 JUROR NO. 1: I believe I could be fair.

2 THE COURT: All right. You may be seated.

3 That's Juror No. 1.

4 Yes, ma'am.

5 JUROR NO. 66: I'm Juror No. 66. And I work with
6 Spartanburg Regional Medical Center and know Dr. Wren. I'm
7 familiar with Dr. Wren.

8 THE COURT: Would that have any bearing upon your
9 decision in this case?

10 JUROR NO. 66: No.

11 THE COURT: Thank you. Be seated.

12 Yes, ma'am.

13 JUROR NO. 129: Yes. I'm Juror No. 129, and I'm
14 familiar with Sonya McCullough.

15 THE COURT: You said you were No. 129?

16 JUROR NO. 129: Yes.

17 THE COURT: And how do you know Ms. -- well, I'm
18 trying to find it now on my list -- Sonya McCullough. How
19 do you know Ms. McCullough?

20 JUROR NO. 129: We went to school together.

21 THE COURT: Would that have any bearing upon your
22 decision in the case?

23 JUROR NO. 129: No.

24 THE COURT: Thank you. Be seated.

25 Is any member of the jury panel in any way connected

Jury qualification

1 with or do you know anyone who is employed with the
2 7th Judicial Circuit Solicitor's Office or the Spartanburg
3 County or, excuse me, the 7th Judicial Circuit Public
4 Defender's Office, either the solicitor's office or the
5 public defender's office? If so, please stand.

6 All right. I'm going to work. I'll start on my
7 right. I'll work to my left row by row. If you'll give
8 me, again, name and juror number, please, and then tell me
9 how that question relates to you.

10 JUROR NO. 50: I'm Juror No. 50, Beth Holland.

11 THE COURT: Did you say 50?

12 JUROR NO. 50: Fifty. And I know Barry Barnette.

13 THE COURT: And how do you know Mr. Barnette?

14 JUROR NO. 50: Through friends. We play tennis.

15 THE COURT: Okay. Would that have any bearing upon
16 your decision in this case?

17 JUROR NO. 50: No, sir.

18 THE COURT: Thank you. You may be seated.

19 Yes, sir.

20 JUROR NO. 131: Juror 131. I went to school with
21 Derrick Bulsa.

22 THE COURT: And would that have any bearing upon your
23 decision in this case?

24 JUROR NO. 131: No, sir.

25 THE COURT: Thank you. Be seated.

Jury qualification

1 Yes, ma'am.

2 JUROR NO. 129: Juror 129. I did, I attended a
3 leadership class with Tiffany Freeman.

4 THE COURT: And would that have any bearing upon your
5 decision in this case?

6 JUROR NO. 131: No, sir.

7 THE COURT: Thank you. Be seated.

8 Yes, ma'am.

9 JUROR NO. 140: I know Derrick Bulsa.

10 THE COURT: And your name and number?

11 JUROR NO. 140: Peggy Watkins, 140.

12 THE COURT: 140. Would that have any bearing upon
13 your decision?

14 JUROR NO. 140: No, sir.

15 THE COURT: Thank you. Be seated.

16 Yes, sir.

17 JUROR NO. 19: Juror No. 19, Tony Dill. Familiar with
18 the public defender, Mr. --

19 THE COURT: Whelchel?

20 JUROR NO. 19: Yes, sir.

21 THE COURT: All right. Would that have any bearing
22 upon your decision?

23 JUROR NO. 19: No, sir.

24 THE COURT: How do you know Mr. Whelchel?

25 JUROR NO. 19: He represented my son at one point in

1 time a couple of years ago.

2 THE COURT: Okay. Thank you. You may be seated.

3 Is there any member of the jury panel or any member of
4 your immediate family -- I'm going to define an immediate
5 family member as a parent or spouse or a child or
6 sibling -- a parent, a spouse, a child or a sibling.

7 I need to know if any member of the jury panel or any
8 members of your immediate family as I just defined it have
9 ever been the victim of or have ever been accused of the
10 commission of any type of crime that might be classified or
11 characterized as a violent crime. And that would include
12 murder, manslaughter, armed robbery, burglary, criminal
13 sexual conduct, criminal domestic violence of a high and
14 aggravated nature, assault and battery with intent to kill,
15 assault and battery of a high and aggravated nature or any
16 other similar type of an offense.

17 I need to know if you or a family member as I
18 described it have ever been the victim of such an offense
19 or have ever been accused of having committed such an
20 offense. If so, please stand.

21 All right. I've got six jurors responding or standing
22 and responding.

23 Now, as you answer the question, I'm going to give you
24 an option. You can answer the question where you're
25 standing. That's fine. If there's something about it that

Jury qualification

1 you prefer not to respond to in front of the audience, you
2 can come down here and answer the question down here.

3 I'm not sure also. Criminal sexual conduct would also
4 be a violent crime, and that's included in that definition.

5 All right. Yes, sir. I'll start with you if you'll
6 give me your name and number, please, sir.

7 JUROR NO. 49: No. 49, Michael Hoit.

8 THE COURT: All right.

9 JUROR NO. 49: I've been a victim of a home burglary
10 back in 1990-ish.

11 THE COURT: Was anyone charged with that burglary?

12 JUROR NO. 49: No one was ever found.

13 THE COURT: Okay. And would that experience have any
14 bearing upon your decision in this case?

15 JUROR NO. 49: Should not, no.

16 THE COURT: All right. Thank you. Be seated.

17 Yes, sir.

18 JUROR NO. 103: 103, Mitchell Pruitt. I'm a victim.
19 I got stabbed seven times in '05.

20 THE COURT: And was someone charged with that crime?

21 JUROR NO. 103: It's still pending.

22 THE COURT: It's still pending. Would that experience
23 have any bearing upon your decision in this particular
24 case?

25 JUROR NO. 103: No, sir.

Jury qualification

1 THE COURT: All right. Thank you. Be seated.

2 Yes, ma'am.

3 JUROR NO. 56: I'm 56, Tina Hughes. I don't know if
4 this applies, but my daughter was convicted of a felony D.
5 U. I.

6 THE COURT: All right. And would that fact have any
7 bearing upon your decision in this case?

8 JUROR NO. 56: No.

9 THE COURT: Thank you. Be seated.
10 Yes, ma'am.

11 JUROR NO. 73: No. 73. Victim of burglary.

12 THE COURT: And was anyone charged with that crime?

13 JUROR NO. 73: Yes.

14 THE COURT: And has that case been resolved?

15 JUROR NO. 73: Yes.

16 THE COURT: And was that here in Spartanburg?

17 JUROR NO. 73: Yes, sir.

18 THE COURT: And would that fact or that experience
19 have any bearing upon your decision in this case?

20 JUROR NO. 73: I don't believe so.

21 THE COURT: All right. Thank you. You may be seated.
22 Yes, sir.

23 JUROR NO. 28: Juror 28, Robert Frohnauer. A
24 victim -- my wife and I -- of an armed robbery by two
25 individuals in Saint Louis, Missouri, in 1998.

Jury qualification

1 THE COURT: And would that experience have any bearing
2 upon your decision in this case?

3 JUROR NO. 28: No.

4 THE COURT: Thank you. Be seated.

5 Yes, ma'am.

6 JUROR NO. 31: Juror 31, Susan Glenn. My sister was
7 the victim of domestic violence.

8 THE COURT: And would that fact have any bearing upon
9 your decision in this case?

10 JUROR NO. 31: I don't believe it would.

11 THE COURT: All right. Thank you, ma'am. You may be
12 seated.

13 This is an incident which the state alleges occurred
14 on Hayne Street here in Spartanburg. Hayne Street is a
15 street that runs behind the fairgrounds if you're familiar
16 with that.

17 And on Hayne Street right near the fairgrounds where
18 you -- if you are going from Howard Street over to Hayne
19 Street, you pass the fairgrounds. You could go down
20 Franklin Street. I think there's some other streets there.
21 But I believe Franklin Street is the one that runs beside
22 the fairground. And you go through an underpass. And you
23 go around to your right. Well, that's Hayne Street. And
24 right there on the corner there -- I guess you could call
25 it a corner. It's on a curve. But nevertheless is a store

Jury qualification

1 called the Corner Stop. And these events, the state
2 claims, occurred at or near that particular location.

3 Is there any member of the jury panel that's heard,
4 seen or read anything or been exposed to any type of
5 information that might relate to this particular case? In
6 other words, do you have any information from any source
7 whatsoever about this case? If so, please stand.

8 All right. Yes, ma'am.

9 JUROR NO. 122: I'm Juror No. 122.

10 THE COURT: All right.

11 JUROR NO. 122: My name is Jewell Sullivan. And I
12 live on which is about --

13 THE COURT: You live on :?

14 JUROR NO. 122: , yes.

15 THE COURT: All right. And that's how close to this
16 location?

17 JUROR NO. 122: About two blocks from the store.

18 THE COURT: All right. And have you heard something
19 about this particular case?

20 JUROR NO. 122: Well --

21 THE COURT: Don't tell me that. Just yes or no.

22 JUROR NO. 122: Yes.

23 THE COURT: Have you heard something about the case?

24 JUROR NO. 122: Yes.

25 THE COURT: You have. And from what source did you

Jury qualification

1 receive some information?

2 JUROR NO. 122: News media.

3 THE COURT: And about when did you hear or see or read

4 that information?

5 JUROR NO. 122: At the time that the crime was

6 committed.

7 THE COURT: So you haven't heard, seen or read

8 anything about the case since March of 2008?

9 JUROR NO. 122: No, sir.

10 THE COURT: All right. And is there anything about

11 what you were exposed to about the case that would affect

12 your judgment if you were a juror?

13 JUROR NO. 122: No, sir. I don't think so.

14 THE COURT: You could still be fair and impartial to

15 both sides?

16 JUROR NO. 122: Yes, sir.

17 THE COURT: All right. Thank you. You may be seated.

18 Juror No. 122.

19 Anybody else?

20 (No response.)

21 THE COURT: Is any member of the jury panel now

22 employed as a law enforcement officer, or have you ever

23 been employed as a law enforcement officer, and further are

24 you related to any person that is now or has ever been

25 employed as a law enforcement officer?

Jury qualification

1 And a law enforcement officer basically is just a
2 police officer. But there are other law enforcement
3 officers that aren't necessarily called policemen or police
4 women but they're still law enforcement.

5 And that includes military as well as civilian law
6 enforcement; that includes state law enforcement division; --
7 that includes the corrections department; that includes a
8 county jail or detention facility. That would include a
9 probation or parole agent. That would include persons
10 employed in sheriffs' departments. That would include
11 persons employed in city, town or municipal law enforcement
12 agencies. So that about covers it.

13 I need to know if you or some member of your family is
14 now or has ever been employed as a law enforcement officer.
15 If so, please stand.

16 All right. I'm going to start to my right. I'll work
17 across and back. And then I'll go over to the other side.

18 I will start with you, ma'am, if you will please tell
19 me your name and number.

20 JUROR NO. 141: My number is 141, Wanda Watson.

21 THE COURT: All right. How does that question relate
22 to you?

23 JUROR NO. 141: Should I give the name?

24 THE COURT: Sure.

25 JUROR NO. 141: James Peake.

Jury qualification

1 THE COURT: Work for the city police department?

2 JUROR NO. 141: He works Spartanburg something. He
3 had a job change. He used to be city. Something else now.

4 THE COURT: All right. Yeah. What's your connection
5 to him?

6 JUROR NO. 141: We cousins, distant cousins.

7 THE COURT: All right. Would that have any bearing
8 upon your decision?

9 JUROR NO. 141: No.

10 THE COURT: Thank you. Be seated.

11 Yes, sir.

12 JUROR NO. 74: Juror No. 74. I am retired from the
13 Department of Juvenile Justice for 18 years.

14 THE COURT: And would it have any bearing upon your
15 decision?

16 JUROR NO. 74: I don't think so.

17 THE COURT: Thank you. Be seated.

18 Yes, sir.

19 JUROR NO. 59: Michael James, Juror 59. I have
20 relatives work for the county sheriff.

21 THE COURT: And who are they?

22 JUROR NO. 59: Mark Freeman.

23 THE COURT: Is that it? All right. Would that have
24 any bearing upon your decision?

25 JUROR NO. 59: No, sir.

Jury qualification

1 THE COURT: Thank you. Be seated.

2 Yes, sir.

3 JUROR NO. 103: Mitchell Pruett, 103. My sister is in
4 the military.

5 THE COURT: Thank you. Be seated.

6 Yes, ma'am.

7 JUROR NO. 73: Juror No. 73. My first cousin is a
8 state trooper. My aunt's the head of communications at
9 Spartanburg 9-1-1.

10 THE COURT: And what are their names?

11 JUROR NO. 73: Tina Davey and Michael Davey.

12 THE COURT: All right. Would either of those
13 connections have any bearing upon your decision?

14 JUROR NO. 73: No, sir.

15 THE COURT: Thank you. Be seated.

16 Yes, ma'am.

17 JUROR NO. 75: Juror No. 75, Amber McAbee. My uncle
18 is a Cherokee County police officer.

19 THE COURT: Would that have any bearing upon your
20 decision?

21 JUROR NO. 75: No, sir.

22 THE COURT: Thank you. Be seated.

23 Yes, ma'am.

24 JUROR NO. 140: Juror 140. My son was with public
25 safety years ago.

Jury qualification

1 THE COURT: And his name is what?

2 JUROR NO. 140: Wayne Bishop.

3 THE COURT: Thank you. Would that affect your
4 judgment in the case?

5 JUROR NO. 140: No, sir.

6 THE COURT: Thank you. Be seated.

7 Yes, ma'am.

8 JUROR NO. 20: Juror 20, Ann E. Downs. I have a
9 brother-in-law that is a correction officer, and my uncle
10 is a correctional officer, and I have another
11 brother-in-law that's a chief of police over in Iraq right
12 now.

13 THE COURT: And would any of those connections have
14 any bearing upon your decision?

15 JUROR NO. 20: No.

16 THE COURT: Thank you. Be seated.

17 Yes, ma'am.

18 JUROR NO. 17: My name is Ann Davis, Juror 17. My
19 husband is an ex-state trooper and my son was in the
20 military. My nephew was in the military. My
21 brother-in-law is in the military.

22 THE COURT: And would any of those facts have any
23 bearing upon your decision in this case?

24 JUROR NO. 17: No, sir.

25 THE COURT: Thank you. Be seated.

Jury qualification

1 All right. I have introduced to you or identified for
2 you the person who is alleged to have been the victim in
3 this case. I have introduced to you some members of his
4 family. I've introduced to you the defendant in the case.
5 I have introduced to you the lawyers in the case. And I've
6 told you a little bit about what the case is about just by
7 reading the allegations in each of the indictments.

8 So understanding all of that and having been exposed
9 to that information, is there anything about this case that
10 would prevent any juror from being able to be fair and
11 impartial if you were called upon to serve as a juror in
12 this case? Do you have any reason whatsoever why you think
13 you could not be fair and impartial? I would ask that you
14 please stand.

15 (No response.)

16 THE COURT: Any other questions requested by the
17 state?

18 MR. BULSA: Your Honor, may we approach?

19 THE COURT: Yes.

20 (Bench conference held off the record.)

21 THE COURT: All right. Any other questions requested
22 by the state or the defense?

23 MR. BULSA: No, sir.

24 MR. WHELCHER: No, Your Honor.

25 THE COURT: All right. Draw us a jury please, ma'am.

Jury qualification

1 As your names are called you'll be asked to come
2 forward. You'll see the desks where the lawyers are
3 seated. If you'll just take about two steps past those
4 desks just in the middle of the room there, look towards
5 your fellow jurors.

6 Each side has a chance to have you seated for service
7 in the case or have you excused from service in the case.

8 If either side asks that you be excused from serving
9 in the case, you can go back and have a seat in the back.
10 If both agree to have you seated for service in the case,
11 you'll be having a seat in the jury box to your right and
12 to my left.

13 So if you'll simply come forward when your name is
14 called you'll be instructed if you're to be seated or
15 excused from service in the case.

16 MR. BULSA: There is one other matter. May we
17 approach while she prints that?

18 (Bench conference held off the record.)

19 (Whereupon, a jury was impanelled.)

20 THE COURT: All right. Those who have been selected,
21 I'll ask you to please go with a bailiff to a jury room.
22 And I will bring you back in just a few minutes to excuse
23 you for lunch.

24 (The following takes place outside the presence of the
25 jury.)

1 THE COURT: Are there any matters that need to be
2 addressed regarding jury selection by the state?

3 MR. BULSA: No, Your Honor.

4 THE COURT: By the defendant?

5 MR. WHELCHER: I beg the Court's indulgence, Your
6 Honor.

7 (Pause.)

8 MR. WHELCHER: None from the defense, Your Honor.

9 (Whereupon, the remaining members of the jury venire
10 were excused.)

11 THE COURT: All right. Any matters we need to address
12 before we recess for lunch?

13 MR. BULSA: There was one item. May we approach on
14 this one?

15 (Bench conference held off the record.)

16 THE COURT: All right. Bring the jury in, please.

17 MR. BULSA: Your Honor, there is one other matter.

18 The defendant gave a statement. The state intends to
19 introduce that. I don't believe Mr. Whelcher is contesting
20 that, but it needs to be stated on the record.

21 MR. WHELCHER: No, sir.

22 THE COURT: No, sir, what?

23 MR. WHELCHER: We don't contest it.

24 THE COURT: Okay. All right. Bring the jury in.

25 (The following takes place in the presence of the

1 jury.)

2 THE COURT: All right. Ladies and gentlemen, we are
3 going to recess for lunch.

4 Let me caution you before you leave that at no time
5 during the trial of this case are you permitted to talk
6 about the case with any person whatsoever in any fashion
7 whatsoever.

8 You're only permitted to discuss the case when you're
9 actually involved in jury deliberations, and that of course
10 won't be until the end of the trial after all of the
11 evidence has been received and I have instructed you on the
12 law.

13 So during the trial up until jury deliberations -- up
14 until jury deliberations do not discuss the case with any
15 person whatsoever in any fashion whatsoever.

16 Also, you're never permitted to conduct your own
17 research or do your own investigation into any issue that
18 might arise during the trial.

19 So you can't go on the internet to try to find out any
20 information about this case or anything related to it. You
21 can't talk to anybody about it. You can't conduct any
22 research whatsoever of any type.

23 You have to base your decision in this case solely
24 upon the evidence that is received during the trial. And
25 you can't supplement that knowledge or that information by

1 conducting any outside research or investigation.

2 As you leave, you know, there are always people around
3 the courthouse. Some are spectators. Some may have an
4 interest in the case. Some may not. But you may hear
5 people talking about a case. And it's always important
6 that you avoid that. So please avoid any other persons
7 having a discussion about the case.

8 Again, whatever they're discussing, they might be
9 providing information. It may be about this case, or it
10 might be about some other case. Even if it's about this
11 case, the information might be incorrect, and it might have
12 some influence on you. And, again, that's inappropriate.

13 So in order to avoid that when you leave for lunch,
14 please leave the courthouse property directly. And when
15 you come back, please instead of standing on the steps or
16 loitering in the hall, please go directly to your jury
17 room, and please be there not later than 2:30 this
18 afternoon, 2:30 this afternoon, at which time we'll begin
19 with the trial of the case.

20 Have a good lunch. We'll see you at 2:30.

21 (The following takes place outside the presence of the
22 jury.)

23 THE COURT: All right. Court is in recess until 2:30.

24 (Whereupon, a recess was taken.)

25 (C. D. marked State's Exhibit No. 1; photographs marked

1 State's Exhibits 2 through 12.)

2 THE COURT: Any matters to address before the jury is
3 brought in?

4 MR. BULSA: No, sir.

5 MR. WHELCHEL: No, Your Honor.

6 THE COURT: Okay. Bring them in. Ask Mr. Still to
7 take the foreperson's seat.

8 (The following takes place in the presence of the
9 jury.)

10 THE COURT: Good afternoon, ladies and gentlemen.

11 We are ready to begin with the trial of the case for
12 which you have each been selected.

13 And, Mr. Still, I'm going to ask you to serve as the
14 foreperson of the jury. And as the foreperson you'll have
15 three specific duties that none of the other jurors will
16 have.

17 Number one, you'll be asked to serve as the
18 spokesperson for the jury. And so if during the trial
19 something arises that needs to be brought to my
20 attention -- you or a fellow juror has some difficulty or
21 problem or question -- if you'll the bailiff know of that
22 fact, he'll let me know, and I'll address any issue or
23 answer any question.

24 Secondly, you're going to be called upon to preside
25 over jury deliberations when the time comes. That of

1 course will not be until the end of the trial after all the
2 evidence has been received and I have instructed you on the
3 law. But when the time does come for jury deliberations
4 you will preside over that process in the jury room simply
5 to ensure that those deliberations are carried out in some
6 orderly fashion.

7 And, thirdly, you'll be asked to actually write the
8 verdicts or the decisions of the jury. You'll do that on
9 verdict forms that I'll provide you at the trial's
10 conclusion on which you will indicate the jury's unanimous
11 decision.

12 Now, the foreperson has those specific duties that I
13 have just indicated. That does not however mean that he is
14 any more important than any of you other jurors, because
15 the decision of a jury is the unanimous consensus opinion
16 of all 12 jurors. And so each of you will have an equal
17 say and an equal vote in what the ultimate decisions will
18 be in this case.

19 Someone simply has to be delegated those
20 responsibilities that I have just indicated, and I have
21 delegated those to Mr. Still in appointing him as the
22 foreperson.

23 But each of you jurors are equally important so far as
24 the ultimate decisions in the case are concerned because,
25 as I have stated, the decisions have to be unanimous. All

1 of you must be in agreement.

2 Now, Ms. Klinetop, you've been selected as an
3 alternate juror. And the function of an alternate is to
4 take the place of one of the original 12 if during the
5 trial of the case one of these original 12 cannot continue
6 to serve for some reason.

7 And so if one is called away because of an emergency
8 or an illness or some other reason and they cannot continue
9 to participate, then you would take that person's place.
10 In that event you would become the 12th juror. In that
11 event you would participate throughout the trial, including
12 in the jury deliberations.

13 If however when the time comes for jury deliberations
14 the original 12 are all able to participate in that
15 process, then your service would end and you would not
16 participate any further, because the decision of the jury
17 is that of 12. No more than 12 are permitted to engage in
18 that deliberation process.

19 It is important however that you pay just as careful
20 attention as we ask of all of the jurors in the case
21 because it does occur from time to time for one reason or
22 another one of these original 12 may be unable to continue.
23 In that event you become the 12th.

24 So we do appreciate your participation as an alternate
25 juror, just as we appreciate the participation of each of

Jury sworn

1 you jurors who have been selected for service in this
2 particular case.

3 You may swear the panel.

4 (Whereupon, the jury was duly sworn.)

5 THE COURT: Ladies and gentlemen, as you know, you
6 have been selected to decide the verdicts in the case of
7 the State vs. Kenneth Smith.

8 As you also know, Mr. Smith has been accused by the
9 prosecutor with having committed the crimes of murder and
10 of breach of peace of a high and aggravated nature.

11 The state alleges those offenses occurred back on
12 March the 28th of 2008. And the allegations setting forth
13 those charges are contained in those documents called
14 indictments that I referred to prior to your selection in
15 order to inform you as to what the case is about.

16 These charges and these indictments are not evidence
17 of anything and they're not proof of anything. They are
18 simply the formal charging paper. And of course they serve
19 to put a defendant on notice as to what crime the state
20 claims they have committed.

21 The indictments will be in the jury room when you go
22 back to deliberate, but, again, they're not evidence of
23 anything. They don't establish anything. They will be
24 there because they will serve as the verdict forms.

25 And so it's on the back of each of those indictments,

1 Mr. Foreman, that you're going to be indicating the jury's
2 unanimous decision as it relates to that particular charge.
3 But they serve no other purpose so far as you jurors are
4 concerned other than use as a verdict form.

5 And as to each of those charges the defendant has
6 entered a plea of not guilty. And as I told you, that plea
7 of not guilty therefore places upon the state the burden of
8 proving the allegations that they have set forth in each of
9 those indictments, the burden of proving each of the
10 essential elements of the crimes that are alleged in those
11 indictments; and therefore the burden is upon the state to
12 establish the defendant's guilt to the satisfaction of you
13 12 jurors beyond a reasonable doubt before any verdict of
14 guilty could be returned as to either of the indictments.

15 Every person who is accused of a crime under the law
16 is always presumed to be innocent. And that presumption of
17 innocence remains with any defendant, as it does with this
18 defendant, from the time that he is placed under arrest and
19 throughout the course of the criminal process and even
20 throughout the course of the actual trial in the case.

21 That presumption of innocence will be with Mr. Smith
22 even at the time that you go back into your jury room to
23 begin with your deliberations in this case. And that
24 presumption of innocence will be with him in that jury
25 room, and it'll be with him forever unless you 12 jurors

1 determine that he's no longer entitled to that presumption
2 of innocence.

3 That is after you've carefully examined all the
4 evidence in the case, and from that evidence you've decided
5 the facts, and upon deciding the facts you apply the law
6 that I will have provided you, if you 12 jurors unanimously
7 determine that his guilt as to a charge has been proven
8 beyond a reasonable doubt, then he would no longer be
9 entitled to that presumption of innocence. But it's only
10 if, unless and until you are satisfied of his guilt beyond
11 a reasonable doubt that the presumption of innocence would
12 no longer be applicable.

13 Now, the way the trial will proceed is that in a
14 moment the lawyers are going to address you in what are
15 called opening statements. There are two occasions in the
16 trial of a case where lawyers are permitted to address the
17 jury, and that is at the beginning of the trial before any
18 evidence has been introduced and then again at the
19 conclusion of the trial after all of the evidence has been
20 received.

21 Keep in mind, as I've just indicated, the evidence
22 comes in between the opening and the closing statements of
23 the lawyers. And therefore what the lawyers tell you in
24 their statements is not to be considered by you as any
25 evidence upon which you will base your decision. And

1 that's because the lawyers aren't witnesses to anything.
2 They're not going to be telling you anything they know
3 about this case of their own personal knowledge or
4 perception as a witness will be. And so what they tell you
5 is not to be considered by you as evidence in the case.
6 You should however listen to what they have to say because
7 the statements do serve a purpose.

8 And the opening statements will serve to provide you
9 with a basic understanding as to what the case is about
10 from the perspective of both the state and the defense so
11 that you will have some context in which to place the
12 evidence that we will be receiving shortly thereafter.

13 The closing statements occur after all of the evidence
14 has been received. And, again, while those statements are
15 not evidence, it does permit the lawyers an opportunity to
16 discuss with you the evidence that you have seen and heard
17 during the trial of this case. And through that discussion
18 each will have an opportunity to try to persuade you or to
19 convince you that that evidence does or does not support a
20 particular decision. And, as I've said, the evidence comes
21 in between those opening and closing statements.

22 The state, as you know, has the burden of proof. The
23 state has to establish a defendant's guilt beyond a
24 reasonable doubt before any verdict of guilty could be
25 returned. And so the state has an obligation to present

1 evidence, and therefore they will go forward first in their
2 presentation.

3 A defendant in a criminal trial is under no obligation
4 to testify or to produce evidence. The burden is not upon
5 a defendant to prove that he or she is not guilty or to
6 prove that he or she is innocent because in some cases that
7 might not be possible.

8 The burden is always upon the state because they made
9 the accusation to establish a defendant's guilt beyond a
10 reasonable doubt. However a defendant in a criminal case
11 is afforded an opportunity to testify and/or present
12 evidence if they wish to. They simply are not required to.

13 And where a defendant does not testify or does not
14 call any other witness or produce any evidence, that's not
15 a circumstance or a fact that the jury may consider in
16 arriving at your determination as to whether or not the
17 evidence in the case proves his guilt beyond a reasonable
18 doubt.

19 So if a defendant makes such a decision you cannot
20 hold that in the slightest degree against the defendant.
21 But a defendant is afforded an opportunity to present
22 evidence in the event that he or she wished to do so.

23 So after all the evidence has been received and after
24 you've heard the final summations of the lawyers, I will
25 then instruct you fully on the law as it relates to the

1 criminal law in general and as it relates to these
2 particular crimes specifically, after which you'll go back
3 and begin with your deliberations.

4 And through that process you will simply in the
5 exercise of good judgment and common sense conscientiously
6 applied to the testimony and evidence in the case decide
7 what you believe to be the true facts as they relate to
8 these allegations. And once you decide those facts you'll
9 then apply the law that I will have provided you, and you
10 will inform us as to whether or not the defendant's guilt
11 has been proven beyond a reasonable doubt.

12 If the defendant's guilt has been proven as to a
13 particular indictment beyond a reasonable doubt, then your
14 verdict would be guilty. And if it has not been proven
15 beyond a reasonable doubt, then your verdict would be not
16 guilty as to that particular charge.

17 Now, all we're going to ask for you to do is to pay
18 careful attention throughout the course of the trial. Give
19 every witness the same degree of attention as they testify.
20 That of course does not mean that you'll be giving every
21 witness' testimony the same degree of weight, because you
22 may find some witness' testimony not to be credible.

23 But it's important that you give every witness the
24 same degree of attention as they testify so that when you
25 go back to begin your deliberations you'll be in a proper

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1 position to be able to fairly assess and evaluate a
2 witness' credibility in light of not just that witness'
3 testimony but in light of all of the testimony and all of
4 the evidence received during the trial of the case.

5 And of course it's important that you keep an open
6 mind throughout the course of the trial. And that just
7 means that you are not to begin making up your minds or
8 formulating your opinions as to what you think the ultimate
9 decisions in this case ought to be until all of the
10 evidence has been received, until I have instructed you on
11 the law and until you've been asked to go back and to begin
12 with your deliberations in the case.

13 That is the process that is designed for you 12 jurors
14 to arrive at a fair and just decision in the case.

15 So I do want to thank you in advance for your
16 participation, as well as for your careful attention. I
17 would ask that you please give the lawyers your attention
18 now as they give you their opening statements.

19 Mr. Bulsa.

20 MR. BULSA: Thank you, Your Honor.

21 Good afternoon, ladies and gentlemen. On the
22 afternoon of March the 28th of 2008 a lady by the name of
23 Annie Peterson was driving in her vehicle down Franklin
24 Street.

25 Franklin Street goes beside the elementary school and

Opening statements

1 down beside the fairgrounds. It takes a sharp curve and
2 comes around under an underpass. The judge I think
3 described that to you as we were doing the jury
4 qualifications.

5 When she came through that underpass, to the right is
6 a little convenience store. She heard shots ring out. She
7 saw a black car in the parking lot. She saw a truck
8 pulling out into the roadway. She had to stop her vehicle
9 because of the way the truck was coming out. The shots
10 were being fired in her direction. As soon as the truck
11 got out of her way she took off to get out, get out of the
12 way.

13 Ms. Peterson had her 96-year-old mother in the
14 vehicle, and also an 8-year-old goddaughter in the vehicle
15 with her.

16 She was afraid for her life. She drove from the area.
17 She called the police. She stopped at a house and then
18 called the police, calling 9-1-1. You're going to hear
19 that 9-1-1 call.

20 She described to the 9-1-1 operator what she saw. She
21 saw the driver of that black vehicle shooting a gun in her
22 direction, in the direction of the truck, the truck that
23 was coming onto the roadway that she had to stop for.

24 The people in that truck, Santos Ruiz, his brother,
25 Jerry De La Rosa, and another friend of theirs named Adam

Opening statements

1 Solesbee, they had went to this convenience store to meet
2 up with the defendant and a gentleman by the name of John
3 Sainvil.

4 So you had two people in the black vehicle, which is a
5 Honda, and you had three people in the truck. Mr. Ruiz had
6 set up a meeting. He and the defendant set up the meeting.

7 They had -- they had a meeting the night before.
8 You're going to hear about a gun being sold. You're going
9 to hear about a gun not working. You're going to hear
10 about this meeting getting set up.

11 They decided to meet at this public place to exchange
12 money for that gun. Something went wrong during that
13 meeting. An altercation occurred, a dispute arose and
14 Mr. Ruiz and his brother and his friend got back in their
15 truck, and they were leaving the area.

16 Evidence will show that this man was not happy, pulled
17 a gun, shot multiple times in the description I just
18 described for you that Mr. Peterson described and related
19 to the police.

20 Mr. Ruiz's brother, Jerry, was driving that truck.
21 That truck got struck we know at least three times by
22 bullets. The fourth bullet went through the window,
23 through the driver's window, and struck Jerry as he was
24 driving that vehicle.

25 Santos had to slide his brother over and drive from

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1 the middle seat to the hospital. Jerry De La Rosa died at
2 the hospital that evening.

3 Ladies and gentlemen, this defendant put every person,
4 every person in society, that was in that area at risk and
5 at danger. That's the breach of the peace of a high and
6 aggravated nature. He had a weapon. He fired a weapon at
7 5:20 in the afternoon into a roadway where people were
8 driving.

9 He put Annie Peterson and her mother, her goddaughter
10 and anybody else in the area at risk. And one of those
11 bullets found its mark, and it killed a man. And I submit
12 to you, ladies and gentlemen, the evidence will show that
13 he's guilty of murder. Thank you.

14 THE COURT: Mr. Whelchel.

15 MR. WHELCHEL: May it please the Court, Your Honor.

16 THE COURT: Yes, sir.

17 MR. WHELCHEL: Or he did not. Let me say that again.
18 Or he did not.

19 You will hear testimony about sales, guns and other
20 contraband. You will hear testimony about a fight that
21 took place, testimony wherein the people in the truck
22 assaulted John Sainvil, assaulted John Sainvil.

23 There are medical records I'm assuming that will be
24 presented. Mr. Sainvil was kicked in the eye. He had a
25 hat on that got knocked off. He was kicked in the eye,

Opening statements

1 beaten, beaten, kicked in the ribs. Sainvil. All of that
2 happened to him.

3 Kenneth Smith when all that's going on, untouched,
4 untouched. Yet the government would have you believe after
5 all the investigation that's been done that this man got a
6 gun, shot at the truck.

7 And there is no question but that Jerry Santos was
8 killed. None whatsoever. The question that you have to
9 decide is this sufficient, do you believe the evidence they
10 present to you, when you hear the evidence presented is it
11 sufficient to prove to you, and you, and to all 12 of you
12 as individual jurors of Kenneth Smith's guilt beyond a
13 reasonable doubt.

14 Now, the defense does not contest that this is a bad
15 thing, that it's a tragic thing or that Jerry Santos was
16 killed. I didn't do it. That's it in a nutshell.

17 In order for you to convict or to return a guilty
18 verdict you must hear evidence so strong and so convincing
19 as to remove the cloak of innocence that the judge talked
20 about earlier and will talk about again in closing
21 argument, in his closing instructions to you.

22 You remember when the judge said that everybody who
23 sits where he sits is presumed to be innocent and that
24 presumption runs since he was arrested, throughout the
25 trial and unless and until they, meaning the government,

Opening statements

1 present to you evidence that you can believe that is
2 credible that passes your common-sense test. You heard the
3 judge said say something about that earlier.

4 What we ask of you as jurors is very simple. It's
5 been the same since I started practicing law as a
6 prosecutor myself 28 years ago. We want your collective
7 wisdom. Horse sense, common sense. I don't care what you
8 call it. But that's what we need from each and every one
9 of you, and that is collective.

10 You use it every day. It happens so often you don't
11 even realize you do it. But when you hear a wife or
12 husband, brother, sister, child, coworker, whoever, say
13 something and you go does that sound reasonable, does that
14 sound credible, does that sound believable, does it have
15 that ring of truth so much so that I can hear it and react
16 to it and say that man is guilty of what they charged him
17 with, that's the burden of proof that they have.

18 At the end of this entire matter you are asked to
19 return a verdict. Verdict is a combination of two Latin
20 words, vere and dicta. It means literally to speak the
21 truth.

22 Listen to what is presented and ask yourself while and
23 when these people -- does that sound like a truth, does
24 that sound reasonable, believable, credible. Because
25 that's what you have to do. At the conclusion of all the

Freddie Thompson
Direct examination by Mr. Bulsa

1 evidence that's presented you must make the decision.

2 On behalf of Kenneth Smith we would submit that that
3 decision would be not guilty. Thank you.

4 THE COURT: Mr. Bulsa.

5 MR. BULSA: The state calls Freddie Thompson.

6 FREDDIE THOMPSON, having been
7 first duly sworn, testified as follows:

8 DIRECT EXAMINATION BY MR. BULSA

9 Q Mr. Thompson, if you would, introduce yourself to the
10 ladies and gentlemen of the jury.

11 A My name is Freddie Thompson. I work for Spartanburg
12 County Communications 9-1-1 Department.

13 Q How long have you been with them?

14 A Thirty-six years.

15 Q What are your duties with them? What are your duties
16 with them?

17 A Varied responsibilities, one of which has been
18 custodian of records.

19 Q Is that why you're here in court today?

20 A Yes, it is.

21 Q Did you have an occasion to verify a recording for me?

22 A Yes, sir.

23 Q I show you what's marked State's Exhibit No. 1 without
24 objection. Does that appear to be a recorded incident that
25 occurred on March the 28th of 2008?

Freddie Thompson
Direct examination by Mr. Bulsa

1 A Yes, sir.

2 Q Just so the jury has an understanding, how are these
3 recorded? How are the calls made and recorded?

4 A Any and all calls coming into the dispatch center are
5 automatically recorded. The person taking the call does
6 not have a choice as to whether to record or not. It's
7 done automatically.

8 The recorder now is very similar to a computer hard
9 drive. It's stored there. Then we extract it through
10 another computer and put it onto a CD to bring in to cases
11 such as this.

12 Q So this originated with someone calling in to 9-1-1.

13 A That's correct.

14 MR. BULSA: Your Honor, at this time I would publish
15 this to the jury.

16 (Whereupon, the CD was played for the jury.)

17 A It jumped for some reason. Start over.

18 (Whereupon, the CD was played for the jury.)

19 Q Mr. Thompson, do your records show what time that call
20 was made?

21 A 1718.

22 Q What time is that?

23 A 5:18 p.m.

24 Q Okay. That would be in the afternoon hours of
25 March the 28th?

Freddie Thompson
Cross-examination by Mr. Whelchel

1 A That's correct.

2 Q And is this, does this, can it be played in a CD
3 player, or does it have to be played on a computer?

4 A It has to be played on a computer. It's like a data
5 type disc.

6 Q From your reviewing of this file was that the only
7 9-1-1 call that came in regarding this incident?

8 A Right. That's the only one I could find when I made
9 this recording.

10 Q Okay. Thank you. Answer any questions Mr. Whelchel
11 may have.

12 CROSS-EXAMINATION

13 BY MR. WHELCHER

14 Q Freddie, other than the -- excuse me. Mr. Thompson,
15 other than your people or your office and the people that
16 work with you collecting this data, you don't know anything
17 about this case, do you?

18 A No, sir, not at all.

19 Q Thank you, sir.

20 THE COURT: You may step down.

21 MR. BULSA: Your Honor, we ask Mr. Thompson be
22 excused.

23 THE COURT: He may be.

24 MR. WHELCHER: No objection, Your Honor.

25 (Whereupon, the witness was excused.)

Annie Peterson
Direct examination by Mr. Bulsa

1 MR. BULSA: Annie Peterson.

2 ANNIE PETERSON, having been
3 first duly sworn, testified as follows:

4 DIRECT EXAMINATION BY MR. BULSA

5 MR. BULSA: May I approach a minute, Your Honor?

6 (Bench conference held off the record in the presence
7 of the jury but out of the hearing of the jury.)

8 Q I brought this out to help you tell your story to the
9 jury. While we're waiting on it to warm up could you
10 identify yourself to the jury, ma'am?

11 A Annie Peterson.

12 Q Ms. Peterson, you were in here and you heard that
13 9-1-1 tape, didn't you?

14 A Yeah.

15 Q And that was you?

16 A Yes, that was me.

17 Q Okay. Where were you that day?

18 A I had dropped off a friend of mine on Howard Street
19 and I was heading back home. And I came through by the
20 fairground and stopped at a stop sign and made a right to
21 go under the underpass.

22 And as my hood cleared the underpass this truck was
23 heading towards me head-on, and I stopped and it stopped.
24 And then it went around to the -- my left, the side it was
25 supposed to have been on.

Annie Peterson
Direct examination by Mr. Bulsa

1 And I continued as I cleared this like a hill there, a
2 red clay hill. As I cleared it I saw the guy standing at
3 the back of the car shooting like this.

4 And I hit the gas because I was scared. And I went
5 straight across on Franklin and made a right on Whitlock
6 and stopped at a friend's house to see was my mom and my
7 goddaughter, was okay. And then I made the 9-1-1 call.

8 Q So you had some people in the car with you.

9 A Yeah.

10 Q Your mother is how old?

11 A She's 98.

12 Q Okay. And your goddaughter is how old?

13 A Now she's nine.

14 Q Back then she would have been what?

15 A Eight.

16 Q Eight. Now, do you live in that community?

17 A Yes. I live on

18 Q And how close is . . . to where this shooting
19 occurred?

20 A I'll say maybe a block and a half if that far.

21 Q Okay. And this shooting is in the city limits of
22 Spartanburg?

23 A Yes.

24 Q Now, you identified yourself on the 9-1-1 call by
25 neighborhood watch captain. What does that mean?

Annie Peterson
Direct examination by Mr. Bulsa

- 1 A Well, we have neighborhood watches for the community.
2 And I have a block in my street from one stop sign to the
3 next stop sign, and in the street behind me those two
4 streets from the stop sign to the stop sign from my block
5 to report anything unusual or to call the police or for the
6 neighbors to get in touch with me if anything happens.
7 They always call me.
- 8 Q Okay. So this was not unusual for you to call the
9 police after having seen something.
- 10 A No.
- 11 Q Okay. So would you consider yourself more observant
12 than most people because of your position?
- 13 A Well, I think so in some cases when I'm not scared.
- 14 Q Okay. In this case you were certainly scared.
- 15 A Yeah.
- 16 Q Were you scared for yourself?
- 17 A I'm also scared for my mom and my godchild, because
18 they was on that side.
- 19 Q They were on the side of the shooting?
- 20 A Yeah.
- 21 Q Okay. So you would have been closer to the middle of
22 the street.
- 23 A Yeah.
- 24 Q All right. Now, we heard you make the call. Where
25 were you when you made that call?

Annie Peterson
Direct examination by Mr. Bulsa

1 A I had made it to my friend's yard and stopped in her
2 yard on It's the first house on your
3 left.

4 Q Okay. And that's not very far from where this
5 occurred, was it?

6 A No, it's not.

7 Q Do you remember what kind of day it was?

8 A It was clear.

9 Q Okay. And was there anything blocking your view of
10 what you witnessed?

11 A No.

12 Q Do you remember if there were any other cars around
13 the area?

14 A No. I don't remember seeing any cars.

15 Q What about people out?

16 A I don't remember seeing people out.

17 Q Okay. Now, where was your attention focused, ma'am?

18 A Pardon?

19 Q Where was your attention focused?

20 A Getting out of the way.

21 Q Do you recall what you first saw or heard?

22 A Yes.

23 Q What was it?

24 A Well, I first saw, as I said, was the truck. And then
25 as I cleared that hill I saw somebody standing shooting.

Annie Peterson

Direct examination by Mr. Bulsa

1 And I heard them as the door of the car was either open, or
2 it opened it. But it went to the car and said let's get
3 out of here. And I hit the gas myself so I could get out
4 of there.

5 Q All right. Let me see if I can get this thing to show
6 us. I think it's going to work for us. We've got some
7 pictures here that were premarked without objection. I'm
8 going to go right into them.

9 THE COURT: Before you do that let's move the jury
10 down.

11 Would you move that rope so the jury can move down and
12 see a little bit better?

13 (Pause.)

14 Q They're out of number, but this is actually State's
15 No. 12. It's a street diagram. Do you recognize that?

16 A Yeah.

17 Q Okay. Now, would you look up there and see if you're
18 able to see it from where you are sitting?

19 A Yes.

20 Q I'm going to zoom it out a minute.

21 THE COURT: Do you have an extra copy for her so she
22 doesn't get a crick in her neck trying to look at that?

23 MR. BULSA: I have got a pointer right here.

24 Q Now --

25 THE COURT: Wait just a minute.

Annie Peterson
Direct examination by Mr. Bulsa

1 Ms. Peterson --

2 THE WITNESS: Yes.

3 THE COURT: -- I need for you to face towards Mr.
4 Bulsa because the court reporter is behind you.

5 THE WITNESS: Okay.

6 THE COURT: Or she was. But she can't hear you if
7 you've got your back to her.

8 THE WITNESS: Oh, okay.

9 THE COURT: So try to project your voice towards Mr.
10 Bulsa so she can see your profile.

11 THE WITNESS: Okay.

12 Q Now, when you called 9-1-1, you described this
13 underpass being near the fairgrounds.

14 A Yes.

15 Q The fairgrounds is right near Franklin Street?

16 A Yes.

17 Q Okay. And you make a sharp turn to the right.

18 A Yes.

19 Q And you make a turn to the left and you come under the
20 underpass, right?

21 A Right.

22 Q And the road kind of curves. And the convenience
23 store is right there in that curve, right?

24 A Right.

25 Q So the railroad track actually runs behind it.

Annie Peterson

Direct examination by Mr. Bulsa

- 1 A Yeah.
- 2 Q Behind the store.
- 3 A Yes, yes.
- 4 Q So that's the -- what street was your friend living on
- 5 when you stopped?
- 6 A Street.
- 7 Q Okay. Is that Street up here, runs down and
- 8 comes into Fairfax?
- 9 A Yes.
- 10 Q So you would have driven under the railroad trestle.
- 11 Would you have crossed Hayne Street --
- 12 A Yes.
- 13 Q -- to get on Fairfax?
- 14 A Yes.
- 15 Q Okay. Did you turn onto Fairfax?
- 16 A Well, sort of. It's you bear to your left as you are
- 17 going around the curve on Hayne Street.
- 18 Q Okay. So you were at the Fairfax Street area when you
- 19 actually stopped and made the call.
- 20 A I was at the Street.
- 21 Q Yes, ma'am.
- 22 A Yeah.
- 23 Q Okay. And we can actually hear someone in the
- 24 background on that tape. Was that your friend?
- 25 A Yes.

Annie Peterson
Direct examination by Mr. Bulsa

1 Q And you made a comment to her, it sounded like, there
2 goes the car now.

3 A Yeah.

4 Q Describe what you meant, what you were saying and
5 seeing to the jury when you made that comment.

6 A Well, I was in her yard. And as I was out, and I was
7 calling 9-1-1, the car went up. It went up Fairfax Street
8 to Williams Street and made a left. And that's when I was
9 saying, "There goes the car now."

10 Q Okay. Now, was the car still in the parking lot when
11 you went past it and drove towards Fairfax Street?

12 A Yes. The, the driver was getting in when, as, when
13 they stopped shooting. Then it went to the driver's side,
14 and he said let's get out of here. I could hear that
15 because my windows was down. But-and then I had already
16 hit the gas. I was moving.

17 Q Okay. So you're describing to the jury the person you
18 saw in the back of the car shooting as the same person
19 getting into the car on the driver's side.

20 A Yes.

21 Q And you would have went past him. So you would have
22 been past the store by the time he actually left, that car
23 left.

24 A Yes, yeah.

25 Q Okay. But the truck had actually made it past you and

Annie Peterson
Direct examination by Mr. Bulsa

1 went up under the underpass.

2 A Went under, yes.

3 Q And you don't know where it went.

4 A No.

5 Q Just so the jury has a different view, State's Exhibit
6 No. 2. Do you recognize that?

7 A Okay. Let's see. Well, it's upside down. Okay.
8 There's the tracks, yeah.

9 Q Okay. I'm going to show this up here. I think we had
10 it this way showing it to the jury before. I'm just going
11 to ask you to look at it up here. Does this look like an
12 aerial picture of what we've been talking about, this being
13 the store?

14 A Yes.

15 Q And here's the underpass. Okay. And the shooting
16 actually occurred to the side of the building?

17 A Yes.

18 Q Okay. A couple of other pictures to show you.

19 State's Exhibit No. 3. Does that appear to be a shot of
20 the parking lot?

21 A Yes, the side here.

22 Q Okay. State's Exhibit 4. That would be a shot from
23 the parking lot to the roadway?

24 A Yes.

25 Q Okay. And here's a picture, State's Exhibit No. 5.

Annie Peterson
Direct examination by Mr. Bulsa

1 Does that show both the parking lot and the underpass?

2 A Yes.

3 Q All right. State's Exhibit No. 3. Do you see here to
4 the right of this an embankment and a railroad track would
5 be up on the embankment?

6 A Yes.

7 Q Is this the parking area where the vehicle was?

8 A Yes.

9 Q And was it the car that you saw, was it pulled into or
10 backed into?

11 A Pulled into the side of the building.

12 Q So the front of the vehicle would have been facing the
13 building.

14 A Yes.

15 Q Did it appear that it was in actually one of these
16 parking spaces?

17 A I didn't even notice.

18 Q You didn't notice. You just know it was pulled in.

19 A Yeah.

20 Q And it was a black or green small car.

21 A Yeah. It was a dark color. It was a real dark one.

22 Q So the jury can have a view from the other angle,
23 here's State's Exhibit No. 4. This is from the, sort of
24 from the, building looking back towards where your car
25 would have been coming.

Annie Peterson
Direct examination by Mr. Bulsa

- 1 A Yeah, yeah.
- 2 Q State's Exhibit No. 5. You see the underpass and the
3 parking area.
- 4 A Yes.
- 5 Q Okay. And you driving on the correct side of the road
6 would have been on this inside lane.
- 7 A Yes.
- 8 Q And it was somewhere in here where you met the truck
9 coming out?
- 10 A Yes.
- 11 Q And there were no other vehicles in this area blocking
12 your view.
- 13 A No.
- 14 Q Had you seen either one of those vehicles before?
- 15 A If I did, I don't remember seeing them.
- 16 Q Did you recognize any of the people you saw?
- 17 A No.
- 18 Q Do you remember how many people were in the truck?
- 19 A No. I couldn't tell how many was in the truck. I
20 just focused on, because I thought he was going to run into
21 me head-on. And I'm just -- and I stopped and like this.
22 And then they stopped. And then he went to the side.
- 23 Q Could you tell what nationality they were?
- 24 A I couldn't tell what they were. I know they wasn't
25 Caucasian and I knowed they wasn't black. They had a --

Annie Peterson
Direct examination by Mr. Bulsa

1 the driver had olive colored skin. I could see him. But
2 to tell what he were, I didn't.

3 Q And you couldn't tell how many people were actually in
4 the truck.

5 A No.

6 Q When you saw the car could you tell how many people
7 were actually in the car?

8 A Well, I -- in the car I saw some hair on the side of
9 the, like the, for the headrest, and-but I didn't. And I
10 just saw some stuff sticking out back there. I didn't know
11 whether male, female or what.

12 Q Was it on the passenger's side?

13 A Yeah, because I was moving. I was trying to get out
14 of the way.

15 Q So you saw somebody that had a lot of hair or --

16 A Yeah.

17 Q Okay. I don't know how to describe it. But you just
18 noticed something about the hair.

19 A Yeah.

20 Q All right. The man that was shooting the gun though
21 was actually standing out behind the car.

22 A Yes.

23 Q And I think you made some gesture. What were you
24 doing?

25 A I was doing like this. I guess -- I don't know

Annie Peterson
Direct examination by Mr. Bulsa

1 anything about pistols, so I don't know if it was jumping
2 as they pulled the trigger, but it was doing like that.

3 Q Approximately how many times did you hear that gun go
4 off?

5 A About five.

6 Q Okay. Had you ever seen anything like that before?

7 A No.

8 Q How long would you say after this shooting that you
9 actually called 9-1-1? Was it pretty quick?

10 A Well, when I got to my friend's yard and stopped. And
11 then I checked my car and my mom and my goddaughter to see
12 was they okay, because then I like can go around the car.
13 You go around the car and see is any holes in it or
14 anything, because with my mom she has Alzheimer's-dementia.
15 And if she had got hit she wouldn't have known it. And
16 that's why I had to check and see was everybody okay.

17 Q You were afraid for your family?

18 A Yeah.

19 Q And then you called 9-1-1.

20 A Yeah.

21 Q And while you were calling you actually saw the same
22 car again.

23 A Yeah.

24 Q Could you tell how many people were in the car at that
25 time?

Annie Peterson
Direct examination by Mr. Bulsa

1 A Two.

2 Q Did you get a good enough look at the shooter to
3 identify him?

4 A No. I really didn't.

5 Q Now, the police actually came and found you
6 afterwards, right?

7 A Yes.

8 Q And they got a statement from you.

9 A Yes.

10 Q And you described in your statement what you testified
11 to and what you called, 9-1-1.

12 A Yes.

13 Q And are you certain that it was the driver that was
14 the one that fired the shots?

15 A Well, whoever it was firing the shots, they went to
16 the driver's side to get in.

17 Q Okay.

18 A I'm certain of that.

19 Q Was it -- how many doors did the car have?

20 A I don't know. I think it had four, but I really, I
21 don't know. I was trying to get out of the way.

22 Q They went into the driver's door?

23 A Yes.

24 Q Okay. Not in the back door. They went to the
25 driver's door.

Annie Peterson
Cross-examination by Mr. Whelchel

1 A Yeah, the driver's.

2 Q And you heard that person remark.

3 A I heard somebody remark, "Let's get out of here."

4 Q Okay. Do you think it was the same person?

5 A I don't know.

6 Q How was it that you could hear that?

7 A Well, I had my windows down. Even though it was
8 March, my mom is sort of like she's in the summertime, she
9 rolls the windows up. In the wintertime she rolls the
10 windows down.

11 So I have to kinda keep at her about the windows. And
12 she had her window down. And Notie (sic) had her window
13 down. But it was a nice day, but it wasn't, you know, that
14 warm.

15 Q Okay. Thank you, Ms. Peterson. Answer any questions
16 Mr. Whelchel may have.

17 CROSS-EXAMINATION

18 BY MR. WHELCHER

19 Q How old are you, Ms. Peterson?

20 A Sixty-five.

21 Q I had to ask that, didn't I?

22 A That's okay. I don't mind. I'm blessed to be here.

23 Q Beats the alternative, right?

24 A Yes.

25 Q Those reading glasses, ma'am?

Annie Peterson
Cross-examination by Mr. Whelchel

- 1 A They all glasses.
- 2 Q Okay. Do you have to have them to drive?
- 3 A Yes.
- 4 Q Okay. I assume you had them on that day.
- 5 A Yes. I can't see without them. I have to have them
- 6 on.
- 7 Q Okay. You had dropped someone off, as you said
- 8 earlier, on Howard Street.
- 9 A Yes.
- 10 Q Came down the street in front of the fairgrounds.
- 11 A Yes.
- 12 Q And when you do that you have to stop --
- 13 A Yes.
- 14 Q -- before you turn right to go under the tunnel,
- 15 right?
- 16 A Right.
- 17 Q Okay. When you went under the tunnel you met this
- 18 vehicle headed the other way or headed towards you,
- 19 correct?
- 20 A Yeah, heading towards me.
- 21 Q That's the tunnel we're talking about, ma'am?
- 22 A Yes.
- 23 Q Okay. You were still in the tunnel. Did you come to
- 24 a complete stop?
- 25 A Yes.

Annie Peterson
Cross-examination by Mr. Whelchel

- 1 Q And you were still inside the tunnel.
- 2 A Yeah. But from the -- I'll say from the front mirror
3 on back was inside the tunnel when I saw this truck come
4 out.
- 5 Q Your front mirror?
- 6 A Yeah, my front windshield.
- 7 Q Okay. Was inside. So would be in the dark there, is
8 where you are talking about, correct?
- 9 A Yes.
- 10 Q And even when you come out of the tunnel you still
11 can't see the store over here to your right because of that
12 bank --
- 13 A Right.
- 14 Q -- where the railroad track is. When the truck went
15 around you, you proceeded on through the tunnel or --
- 16 A No. I was coming out of the tunnel.
- 17 Q But you stopped in the tunnel. That's what I'm --
- 18 A Yes.
- 19 Q Okay. And once the truck cleared and got on its side
20 of the road, you proceeded on.
- 21 A Yes.
- 22 Q Okay. How many people were out there in that parking
23 lot?
- 24 A I only saw one person out there in the parking lot,
25 and that's the person that was behind the car. When I

Annie Peterson
Cross-examination by Mr. Whelchel

1 cleared that embankment, that hill, when I cleared it, I
2 only saw one person.

3 Q Is it possible there were other people out there?

4 A It's a possibility, but I was scared. I only saw one
5 person.

6 Q Did you see anybody else standing around in the
7 neighborhood?

8 A No.

9 Q Did you see anybody else standing on porches?

10 A No.

11 Q It is possible they were there, you just didn't
12 notice?

13 A Right.

14 Q You were scared.

15 A Yes, I were.

16 Q That's understandable. Do you know how fast you were
17 going, ma'am?

18 A When I got -- well, about where the water is on there
19 and I --

20 Q Where are you talking about, ma'am?

21 A The little, that real dark spot there.

22 Q Right there?

23 A Yes, a little farther back than that. When I got
24 there and I saw somebody with a gun in their hand, I hit
25 the gas. And how fast I was going, I really don't know,

Annie Peterson
Cross-examination by Mr. Whelchel

1 because I was scared. I was just trying to get out of the
2 way.

3 Q Okay. Do you think you were doing 30?

4 A Yeah.

5 Q Or faster?

6 A I think when I hit the gas I was going faster.

7 Q Okay. Forty?

8 A Probably about 40 or 45.

9 Q Okay. Do you know how far it is, ma'am, from right
10 here where the edge of the tunnel is to where the, where
11 you cleared the trees, where you could see the side of that
12 store? Do you know how far that is?

13 A No, I really don't.

14 Q Okay. Do you know how far it is from where you
15 cleared the trees to the intersection? Let me put this
16 side on so you can see what I am talking about.

17 A The -- okay.

18 Q Do you know how far it is from where you cleared the
19 trees on that other photograph to this intersection right
20 here on Hayne Street? That's Hayne Street, am I right,
21 ma'am, running right down here?

22 A Yes. It turns to Hayne right there at the store.

23 Q Okay. Do you know how far it is from that
24 intersection back to where you can see the side of the
25 store and the parking lot?

Annie Peterson
Cross-examination by Mr. Whelchel

1 A No. I really don't.

2 Q Okay. But once you crossed Hayne Street you went down
3 to Fairfax and turned right. When you turn right on
4 Fairfax, you can either go straight up Fairfax or kind of
5 bear around to the right and go up Whitlock, is that right?

6 A Yeah. When I went down Hayne, across Hayne Street,
7 this is, there's a street going down through there. And
8 right at the intersection of Fairfax and ---

9 Q Yes, ma'am --

10 A -- I made a right there onto --- Street.

11 Q Right here is ---, is that right?

12 A Yes.

13 Q Okay. And the house that you stopped at is up here on
14 the left?

15 A Yes.

16 Q First house on the left?

17 A Yes.

18 Q That's a duplex.

19 A Yes.

20 Q The people that you were going to, was their house on
21 the left or the right side?

22 A Their house was on, facing the house, it was on the
23 left side. It was heading -- the face -- the side of that
24 house was towards that intersection.

25 Q Okay. I understand that. Were the doors opened on

Annie Peterson
Cross-examination by Mr. Whelchel

1 this vehicle?

2 A I didn't notice. I just noticed after this shooting
3 and I hit the gas that they was getting into, whoever the
4 driver were was getting into, the driver's side of the car.

5 Q The driver's position or just the driver's side?

6 A The driver's position under the steering wheel.

7 Q Okay. And you heard someone say something, correct?

8 A Yes. "Let's get out of here."

9 Q But you don't know who that was.

10 A No, I don't.

11 Q And you don't know if anybody else was out there.

12 A No, I don't.

13 Q Okay. But it's possible someone else was out there.

14 A Yeah.

15 Q Okay. And, again, ma'am, you don't know how far it is
16 from where you cleared the bank. Excuse me. You don't
17 know how far it is from somewhere in here where you cleared
18 the bank and you can see actually see the side of the
19 store.

20 A Yeah.

21 Q You don't know how far it is from there to this
22 intersection here with Hayne Street, is that right?

23 A Right.

24 Q Okay. And actually when you get to that intersection,
25 the pumps and the store are behind you and over to your

Annie Peterson
Cross-examination by Mr. Bulsa

1 right shoulder, is that right?

2 A Right.

3 Q Okay. Would it surprise you to know, ma'am, that from
4 that intersection back to where the -- where you cleared
5 the bank and you can see, would it surprise you to know
6 that's 223 feet?

7 A No. I don't have any perception as to how, how far
8 that is.

9 Q I understand, ma'am. Would it surprise you to know
10 that at 40, at least, miles an hour you would cover that
11 223 feet in 3.8 seconds?

12 A No. I didn't know that.

13 Q All right, ma'am. Thank you, ma'am.

14 REDIRECT EXAMINATION

15 BY MR. BULSA

16 Q Ma'am, could you see the store from where your friend
17 lived?

18 A No, because there's houses blocking the store from
19 where she lived.

20 Q So your friend didn't see what happened, but she heard
21 what happened.

22 A Yeah. She said it's on, it was on the 9-1-1 thing
23 that she heard the shots.

24 Q The person you saw getting into the driver's side of
25 the car, was that the same person that you saw standing

Adrian Patton
Direct examination by Mr. Bulsa

1 behind the car shooting?

2 A Yes.

3 MR. WHELCHEL: Objection. It's improper redirect.

4 It's already been asked and answered on his direct.

5 THE COURT: Overruled.

6 Q And your answer was?

7 A Yes.

8 Q Thank you, ma'am. That's all I have.

9 THE COURT: You may step down.

10 MR. BULSA: We ask that Ms. Peterson be excused if she
11 would like to.

12 THE COURT: She may be.

13 (Whereupon, the witness was excused.)

14 MR. BULSA: The state calls Adrian Peterson, excuse
15 me, Adrian Patton.

16 ADRIAN PATTON, having been
17 first duly sworn, testified as follows:

18 DIRECT EXAMINATION BY MR. BULSA

19 Q Please introduce yourself to the jury.

20 A Yes. I'm Adrian Patton.

21 Q Who are you employed with?

22 A Spartanburg Public Safety.

23 Q What capacity?

24 A Investigator.

25 Q Make sure you speak up. This machine makes a noise

Adrian Patton
Direct examination by Mr. Bulsa

1 back here.

2 A I am an investigator.

3 Q And what do you investigate?

4 A All types of crimes.

5 Q Okay. How long have you been an investigator?

6 A Right now a year and a half.

7 Q All right. So you were a new investigator back when
8 this case happened.

9 A Yes, sir.

10 Q Did you have any assistance in the case?

11 A I did. I had assistance from Investigator Spurgeon.

12 Q And how long has he been an officer?

13 A Well, longer than I have. I can't say exactly how
14 many years.

15 Q Okay. Were you actually on duty the day this
16 happened?

17 A I was, yes, sir.

18 Q And how did you hear about the call?

19 A I heard the call over my, my radio in the vehicle.

20 Q And what did you hear the call as?

21 A I heard the call as a BOLO for a black or dark green
22 car shooting at a pickup truck. And the location was
23 supposed to have been close to a train trestle near South
24 Center Street.

25 Q Okay. And what is a BOLO?

Adrian Patton
Direct examination by Mr. Bulsa

1 A Be-on-the-look-out.

2 Q So you're in your vehicle. And sometime after
3 5:00 you hear this call come out to look for this vehicle.

4 A Yes.

5 Q And you said the -- you heard the call being near
6 South Center Street?

7 A Yes.

8 Q Now, you heard the 9-1-1 call, right?

9 A Right.

10 Q Okay. And you heard the description being near the
11 fairgrounds, right?

12 A Yes.

13 Q And is South Center near the fairgrounds?

14 A Yes. South Center is at the --

15 THE COURT: Excuse me. You're going to have to use
16 the microphone. You've got your back to the court
17 reporter.

18 THE WITNESS: Okay. I'm sorry. .

19 THE COURT: And you can't do that.

20 THE WITNESS: Sorry.

21 Q Point if you would.

22 A Okay. This is Hugh Street. South Center -- this is
23 South Center Street I'm pointing at right here where Hugh
24 Street runs into it.

25 Q All right. That's not marked on the map. So I'm

Adrian Patton

Direct examination by Mr. Bulsa

1 going to give it to you and ask you to write it on there
2 for me.

3 (Whereupon, the witness wrote on the map.)

4 Q Okay. So you were actually directed to South Center
5 and what?

6 A It was, it was dispatched as a train trestle near
7 South Center Street.

8 Q Okay. And we see a train track appears to be right
9 there.

10 A Yes, sir. This is a train, a train trestle or train
11 bridge, however you want to call it, that South Center goes
12 up under the railroad tracks there.

13 Q Okay. So you first actually went there?

14 A That was my first, that was the first place that I
15 responded to, was this area looking for a possible scene.

16 Q Okay. And did you find anything there?

17 A Not really. I did find a little bit of glass on the
18 roadway, but, nothing, nothing that stood out.

19 Q Okay. And did it relate to this case?

20 A No, sir.

21 Q Okay. Well, once you were there and looking around,
22 what happened?

23 A I was advised that two witnesses was at, was located
24 at the hospital and that they were being transported to
25 city hall in order for us to interview.

Adrian Patton
Direct examination by Mr. Bulsa

1 Q Okay. And then you went back to city hall?

2 A Yes, I went back to city hall.

3 Q And during those interviews did you learn where the
4 actual crime occurred?

5 A Yes, sir. During the interview I learned that the
6 actual crime occurred at the corner store on --

7 MR. WHELCHEL: Objection.

8 THE COURT: Sustained.

9 Q Okay. After you got that information did you go to
10 another location?

11 A Yes. I advised patrol and --

12 Q Where did you tell patrol to go?

13 A I told patrol to go to the corner store on Hayne
14 Street.

15 Q Would you point that out on the map, please?

16 A That would be this location right here.

17 Q And is that the train trestle closest to the
18 fairgrounds?

19 A That is correct.

20 Q Did you direct a forensic unit to go to that location?

21 A I did. I contacted Forensics Officer Ed Guthro.

22 Q All right. He went out there to see if he could find
23 anything pertaining to the case.

24 A Yes, sir.

25 Q Now, the two men that were taken to city hall to be

Adrian Patton
Direct examination by Mr. Bulsa

1 interviewed, tell us what occurred. Tell us what they
2 said, just what occurred.

3 A Yes. They were Adams -- identified as Adam Solesbee
4 and Santos Ruiz. I think that's the way you say that.

5 Q Okay. Were they -- they were located at the hospital?

6 A They were located at the hospital and was transported
7 to city hall. I spoke to Adam Solesbee as the other
8 officers were interviewing Santos.

9 Q Okay. All right. And these men were at the hospital
10 with the individual that was brought in that had been shot.

11 A Yes. They, they came into the hospital with the
12 victim in the same vehicle.

13 Q And that vehicle was what?

14 A It was a brown pickup truck. I do not have the --

15 Q I show you State's Exhibit No. 7. Is that the vehicle
16 they were in?

17 A Yes, that's the vehicle.

18 Q Okay. Looks like that picture was actually taken at
19 the hospital.

20 A Yes, sir.

21 Q Did Mr. Guthro process that vehicle?

22 A Yes, sir, he did.

23 Q During your investigation did you identify a black
24 Honda or a green Honda, either one?

25 A Yes, I did.

Adrian Patton
Direct examination by Mr. Bulsa

- 1 Q Okay. I show you State's Exhibit No. 6.
- 2 A Yes, sir. That's it.
- 3 Q That's the vehicle?
- 4 A Yes, sir.
- 5 Q And how did the police come to get possession of that
- 6 vehicle?
- 7 A During the interview a description was given. And
- 8 Investigator Spurgeon was able to contact John Sainvil.
- 9 When John Sainvil arrived at city hall the owner of this
- 10 vehicle, Shonta Kelly, drove him to the scene -- drove him
- 11 to city hall. And that's how we got with, got with the
- 12 vehicle.
- 13 Q Okay. And that was then processed by Mr. Guthro.
- 14 A Yes, sir.
- 15 Q After speaking with -- well, did you interview
- 16 Mr. Sainvil when he was brought in?
- 17 A Investigator Spurgeon interviewed Mr. Sainvil as I was
- 18 assisting with the search warrants on the two vehicles.
- 19 Q Okay. All right. And after Mr. Sainvil was
- 20 interviewed did you then begin to look for Mr. Smith?
- 21 A Yes, sir, I did.
- 22 Q And during the course of your interview, excuse me,
- 23 the course of your investigation did you pull a 9-1-1 call
- 24 and listen to it?
- 25 A Yes, sir. I requested the 9-1-1 call and the

Adrian Patton
Direct examination by Mr. Bulsa

1 computer-aided dispatch, she, which gave me the name of
2 Ms. Peterson, and I was able to find her.

3 Q And did this car appear to fit the description that
4 was provided to 9-1-1?

5 A Yes, sir.

6 Q Now, what attempts were made to locate Mr. Smith?

7 A There were several addresses that we went to that we
8 had from prior addresses. I could go through his addresses
9 if you would like.

10 Q Just tell us how many you went to.

11 A Went to four locations.

12 Q Okay. And did you find him in any of those locations?

13 A No, sir, we did not find him.

14 Q Do you recall what day of the week or, excuse me, what
15 day of the investigation that you interviewed Mr. Sainvil?
16 Was it the same day of the shooting?

17 A It was the same day of the shooting.

18 Q Approximately when was that?

19 A It was that evening after 8:00, after 8:00 p.m.

20 Q Sometime in the later evening hours?

21 A Yes, sir.

22 Q And did Mr. Sainvil assist in trying to locate
23 Mr. Smith?

24 A He did state that Mr. Smith --

25 MR. WHELCHEL: Objection.

Adrian Patton
Direct examination by Mr. Bulsa

- 1 THE COURT: Sustained.
- 2 Q Did he assist you in trying to locate Mr. Smith?
- 3 A Yes, sir, he did assist.
- 4 Q Okay. And when did you finally find Mr. Smith?
- 5 A On the 29th, the next day.
- 6 Q Now, okay. You got -- you've interviewed
- 7 Mr. Solesbee, Mr. Ruiz and Mr. Sainvil. And when you got
- 8 the 9-1-1 call you went to look for Ms. Peterson?
- 9 A Yes, sir.
- 10 Q And you interviewed Ms. Peterson. And you interviewed
- 11 her sometime after --
- 12 A It was sometime afterwards, yes, sir.
- 13 Q And I believe the charges were already made.
- 14 A Yes, sir.
- 15 Q All right. I'm going to recall you at a later time in
- 16 this trial to go into what Mr. Smith told you, but did he
- 17 give you a statement?
- 18 A Mr. Smith did give me a statement.
- 19 Q We're not going to go into what he told you now. But
- 20 after getting that statement did you have someone look in
- 21 the vehicle for some sort of stick?
- 22 A Yes, I did. I had Forensics Officer Westfall.
- 23 Q And let me show you. That has not been marked.
- 24 MR. BULSA: Could I get this marked for I. D., please?
- 25 (Stick marked State's Exhibit No. 13 for

Adrian Patton
Direct examination by Mr. Bulsa

1 Identification.)

2 Q State's Exhibit No. 13. Does that appear to be a
3 picture of the interior of that car?

4 A Yes, sir.

5 Q Does it show some sort of stick object on the
6 floorboard?

7 A Yes, sir, it does.

8 Q And was that object recovered?

9 A Yes, sir, it was recovered.

10 Q As I point to the jury, what object you are talking
11 about?

12 A You can see the end of it right here.

13 MR. BULSA: I've already shown this picture. I need
14 to get 13 moved into evidence, State's 13 into evidence.
15 That's without objection, Your Honor.

16 THE COURT: Put it in.

17 (Stick marked State's Exhibit No. 13; stick marked
18 State's Exhibit No. 14 for Identification.)

19 Q I want to show you State's Exhibits 14 for I. D. Do
20 you recognize that object?

21 A Yes, sir.

22 Q Is that the object taken from the vehicle?

23 A Yes, sir, it is.

24 MR. BULSA: Your Honor, I would move that into
25 evidence at this time.

Adrian Patton
Cross-examination by Mr. Whelchel

1 MR. WHELCHEL: No objection, Your Honor.

2 THE COURT: It is admitted.

3 (Broomstick marked State's Exhibit No. 14.)

4 Q Would you pull that out and show the jury what it is?

5 A Yes, sir.

6 Q It appears to be some sort of broomstick?

7 A Yes, sir. It's broken off to a sharp point.

8 Q Okay. Put it back in there. Thank you. Answer any
9 questions Mr. Whelchel may have.

10 MR. WHELCHEL: Beg the Court's indulgence.

11 (Pause.)

12 CROSS-EXAMINATION

13 BY MR. WHELCHEL

14 Q You're the chief investigator on this case?

15 A Yes, sir. I had assistance with Investigator
16 Spurgeon.

17 Q You're going to have to do better than that. I'm
18 wearing hearing aids.

19 A Well, I'll lean down to it. Yes, sir.

20 THE COURT: You can move that microphone if you need
21 to. And I've asked you not to turn your back to the court
22 reporter.

23 Q You are the lead investigator, the chief investigator,
24 or whatever you want to call it.

25 A Yes, sir.

Adrian Patton
Cross-examination by Mr. Whelchel

1 Q Okay. Now, you say that you or some of the other
2 officers were assisted by Mr. Sainvil in trying to find my
3 client, correct?

4 A Yes, sir.

5 Q And that would be after Mr. Sainvil came down and gave
6 a statement, correct?

7 A Yes, sir.

8 Q Have you got that with you -- Mr. Sainvil's statement?
9 You've got all the evidence right here, right? Do you need
10 to step down and get it?

11 MR. BULSA: It's in the box, Mr. Whelchel.

12 MR. WHELCHER: Okay. Go ahead and get it.

13 (Whereupon, the witness left the stand.)

14 MR. BULSA: May we approach?

15 (Bench conference held off the record in the presence
16 of the jury but out of the hearing of the jury.)

17 (Whereupon, the witness returned to the stand.)

18 Q Do you know, sir, what time it was that you started
19 looking for Mr. Smith?

20 A Yes, sir. It was after 1:00 a.m. on the 29th.

21 Q Okay. Did you see him when he turned himself in?

22 A Yes, sir, I did.

23 Q That was on the 29th.

24 A Yes, sir.

25 Q Okay. You mentioned in direct examination by Mr.

Adrian Patton
Cross-examination by Mr. Whelchel

- 1 Bulsa that you obtained search warrants, is that correct?
- 2 A Yes, that is correct.
- 3 Q How many search warrants did you get, sir?
- 4 A I've got a search warrant for the vehicle, for this
- 5 vehicle that's shown right now.
- 6 Q For the black Honda.
- 7 A Yes, sir. And assisted in another one.
- 8 Q All right. How many other search warrants did you
- 9 get?
- 10 A I don't have the exact count. I did get a consent to
- 11 search also for this one.
- 12 Q Okay. Did you get a search warrant for the phone
- 13 records of Kenneth Smith?
- 14 A Yes, sir, I did.
- 15 Q Okay. And did you bring the phone records with you?
- 16 A Yes, sir. They're in, in evidence. I don't have them
- 17 with me.
- 18 Q Could you step down and get them?
- 19 (Whereupon, the witness left the stand.)
- 20 (Pause.)
- 21 A No, sir. The phone records.
- 22 (Pause.)
- 23 MR. BULSA: You can't talk to him.
- 24 (Pause.)
- 25 MR. BULSA: You have not found them yet?

Adrian Patton
Cross-examination by Mr. Whelchel

1 Can we take a brief recess to compare his notes to the
2 folder? He has found a copy of his notes. He has got to
3 find the original envelopes.

4 THE COURT: Well, let me see y'all just a minute.

5 (Bench conference held off the record in the presence
6 of the jury but out of the hearing of the jury.)

7 THE COURT: All right. Mr. Patton, you can just come
8 and have a seat. Mr. Whelchel can use his copy.

9 (Whereupon, the witness returned to the stand.)

10 Q Mr. Patton, I'm going to show you these papers, and I
11 want you to look at them. I realize they're copies, but I
12 want you to look at them and see if you've seen them
13 before, or just look at them and see if you can tell us
14 what they are.

15 (Pause.)

16 A Yes, sir. I have seen them before.

17 Q Okay.

18 A There is your copy.

19 Q Thank you, sir.

20 Is that a copy of the search warrant that you've been
21 looking for, sir?

22 A Yes, sir.

23 Q Okay. And attached to the search warrant is
24 essentially the fruit of the search warrant, is that
25 correct, the phone records of Kenneth Smith?

Adrian Patton
Cross-examination by Mr. Whelchel

- 1 A Yes, sir.
- 2 Q Okay.
- 3 THE COURT: Please don't turn your back to the court
- 4 reporter.
- 5 Q And you applied for the search warrant on June the
- 6 23rd of 2008.
- 7 A Yes, sir.
- 8 Q Okay. You actually signed the arrest warrant also, is
- 9 that correct?
- 10 A Yes, sir.
- 11 Q Okay. And you got the arrest warrant on March the
- 12 29th, is that correct?
- 13 A Yes, sir.
- 14 Q Okay. Do you remember what time it was on March the
- 15 29th? Excuse me. Do you remember what time it was on
- 16 March the 29th?
- 17 A No, sir, I don't know what time it was, no, sir.
- 18 Q Okay. When Kenneth Smith came into the police
- 19 department after y'all got in contact with him did you
- 20 already have the arrest warrant?
- 21 A No, sir.
- 22 Q It wasn't in the papers that were on the desk when you
- 23 took your statement?
- 24 A No, sir. It was not.
- 25 Q Okay. All right. But you got the arrest warrant on

Adrian Patton
Cross-examination by Mr. Whelchel

1 the 23rd, excuse me, the 29th of May.

2 A Of March?

3 Q Excuse me. I'm sorry. The 29th of March. March and
4 May always get me confused. Of 2008.

5 A Yes, sir.

6 Q Okay. And you got this search warrant for his phone
7 records in June of 2008.

8 A Yes, sir.

9 Q Have you reviewed the records?

10 A Yes, sir.

11 Q Okay. How many phone calls are in these records
12 between my client and Santos Ruiz?

13 A I didn't see any.

14 Q Okay. Can you find the original search warrant at
15 some point, and records?

16 A Yes, sir, at some point.

17 Q Okay.

18 MR. WHELCHER: Your Honor, when he finds those I would
19 move to place those into evidence as Defense Exhibit No. 1.

20 THE COURT: Okay. Well, we'll address that when we
21 find them.

22 MR. WHELCHER: Yes, sir.

23 THE COURT: Mr. Bulsa.

24 MR. BULSA: Is he finished?

25 THE COURT: He sat down.

Adrian Patton
Redirect examination by Mr. Bulsa

1 MR. WHELCHER: Beg the Court's indulgence.

2 (Pause.)

3 MR. WHELCHER: Yes, sir.

4 REDIRECT EXAMINATION

5 BY MR. BULSA

6 Q Officer, are you nervous?

7 A Yes, sir, I am.

8 Q Okay. Is this your first homicide?

9 A Yes, sir.

10 Q Okay. You're nervous like everybody in this
11 courtroom, right?

12 A Yes, sir.

13 Q Okay. So you can take your copy of the phone records
14 and look at these envelopes and find out where they are,
15 right?

16 A Yes, sir.

17 Q Okay. Mr. Whelchel brought up these dates, March and
18 June. What significance is there in those dates?

19 A It's just the date that I requested the information I
20 got that still covers the area of the crime.

21 Q Okay. And what it shows is you were continuing to
22 investigate, is that correct?

23 A Yes, sir.

24 Q Okay. And he asked you about phone numbers contained
25 in the records that -- did that cause you to believe that

Adrian Patton
Recross-examination by Mr. Whelchel

1 you had the wrong person charged?

2 A No, sir.

3 Q Okay. So you were just as confident on March -- on
4 June the 8th when you got those records as you were on
5 March the 29th.

6 MR. WHELCHER: Objection, Your Honor. Leading.

7 THE COURT: Sustained.

8 Q Were you just as confident after you got those records
9 that you had the right person?

10 A Yes, sir.

11 Q In your investigation you actually spoke to the people
12 at the location where this crime occurred, is that right?

13 A Yes, sir.

14 Q You and Investigator Spurgeon.

15 A Yes, sir.

16 Q And those people are here to testify.

17 A Yes, sir.

18 Q Thank you. That's all I have at this time.

19 MR. BULSA: Your Honor, we're going to recall him at a
20 later time in the trial.

21 RECROSS-EXAMINATION

22 BY MR. WHELCHER

23 Q In your investigation how long did you spend looking
24 at the wrong scene?

25 A Sir?

Adrian Patton

Redirect examination by Mr. Bulsa

1 Q You went to South Center Street, the train trestle at
2 South Center Street, and you found some broken glass. How
3 long were you, and how many other officers were there?

4 A I would have to estimate that time.

5 Q That's fine.

6 A It was --

7 Q First, how many other officers were there?

8 A There were two other officers that I know of.

9 Q Uniformed officers?

10 A Yes, sir.

11 Q Okay. And how long were all of y'all there looking at
12 the wrong place?

13 A I was there 15 or 20 minutes. I'm just guessing.

14 Q Okay. You heard the call go out, correct?

15 A I did hear the call go out, yes, sir.

16 REDIRECT EXAMINATION

17 BY MR. BULSA

18 Q The call went out as what?

19 A The call went out as a be-on-the-lookout-for the black
20 car shooting at a truck at the train trestle near South
21 Center Street.

22 Q Okay. So the location that Ms. Peterson gave was then
23 relayed to law enforcement.

24 A When it was relayed to us it was -- I perceived it
25 differently. There's two train trestles in that area, and

Ed Guthro
Direct examination by Mr. Bulsa

1 I went to the one on South Center Street.

2 Q In fact, we saw both train trestles on the map.

3 A Yes, sir.

4 Q Okay.

5 MR. BULSA: That's all I have at this time.

6 THE COURT: You may step down.

7 MR. BULSA: The state calls Ed Guthro.

8 THE COURT: Let me see y'all just a minute before you
9 put him up -- Mr. Whelchel.

10 (Bench conference held off the record in the presence
11 of the jury but out of the hearing of the jury.)

12 ED GUTHRO, having been first
13 duly sworn, testified as follows:

14 DIRECT EXAMINATION BY MR. BULSA

15 Q I've got to turn this machine on, because you took
16 these pictures, right?

17 A Yes, sir.

18 Q Introduce yourself to the jury.

19 A Ed Guthro. I've worked with the Spartanburg Public
20 Safety Department a little over 21 years.

21 Q And what is your job with the public safety?

22 A Currently, I work as a forensic investigator.

23 Q And what does that mean?

24 A I investigate crime scenes, process crime scenes and
25 other elements of the crime.

Ed Guthro
Direct examination by Mr. Balsa

- 1 Q We hear of and see television shows like C. S. I. Do
- 2 you do that sort of stuff?
- 3 A Yes. But it's not nearly that successful or fast.
- 4 Q Okay. All right. So you're the guy that goes to the
- 5 location looking for the clues.
- 6 A Yes, sir.
- 7 Q Okay. And in this case you went to many places, is
- 8 that right?
- 9 A I went to two eventually for the crime scene.
- 10 Q You actually went to city hall to look at two
- 11 different vehicles.
- 12 A Yes. That was after the crime scene.
- 13 Q And you went to the hospital.
- 14 A That's correct.
- 15 Q I believe your first stop was actually at the
- 16 hospital, is that right?
- 17 A That's correct.
- 18 Q And why did go to the hospital?
- 19 A I was in route to South Center Street where I had been
- 20 called to see if I could find the crime scene. And I was
- 21 contacted by Captain Hardy asking me to come to the
- 22 hospital to take pictures of the victim's vehicle.
- 23 Q And was that the truck that we saw?
- 24 A Yes, it was.
- 25 Q All right. So you took some pictures of the truck.

Ed Guthro
Direct examination by Mr. Bulsa

1 Did you give instructions to have the truck towed to the
2 city impound lot?

3 A Yes. The captain and other officers were there. And
4 I still needed to try to locate a crime scene. And so they
5 called a wrecker. The wrecker was arriving as I was
6 leaving to go to South Center Street.

7 Q Okay. And why were you going to South Center Street?

8 A Because I had been told that they thought they might
9 have found a crime scene on South Center Street. And that
10 was where they thought the initial call was to.

11 Q Okay. Call came near the train track trestle.

12 A That's correct.

13 Q Okay. And there's a train trestle on South Center.

14 A Yes, there is.

15 Q And did you actually go to South Center?

16 A I did.

17 Q What did you do when you got there?

18 A When I got there I spoke to patrol officers Norkett
19 and Tillotson. They had located a little bit of glass on
20 the road that they thought have might -- that they thought
21 might have belonged to the victim's vehicle as the window
22 was busted out. It did not. It was broken-bottle glass.

23 Q So about how long did you stay at that location?

24 A I was only there maybe ten minutes at the most before
25 we got a call advising us that the scene was actually

Ed Guthro
Direct examination by Mr. Bulsa

1 supposed to be at the corner mart on Hayne Street.

2 Q That's another location near another train trestle.

3 A Yes, sir.

4 Q Okay. So you got that call and went to that location.
5 What did you do?

6 A When we got there we didn't know exactly where the
7 incident was to have taken place.

8 Myself and those other officers searched the entire
9 parking lot and the roadway and did not locate anything.

10 And after being there for some time we learned that
11 the location was supposed to be between the end of the
12 building and the roadway near the trestle, which we had
13 already searched, but we searched again, and did not locate
14 anything as far as shell casings, blood, that type of
15 stuff.

16 Q All right. Show you State's Exhibits 3 and 4 -- 3. I
17 believe you took this picture, right?

18 A That's correct.

19 Q Okay. And is this where you believed the crime scene
20 to be?

21 A Yes.

22 Q In fact, there's a Spartanburg police car right there.
23 And here's State's Exhibit No. 4. Is that a reserve
24 view?

25 A Exactly. That's taken standing at the end of the

Ed Guthro
Direct examination by Mr. Bulsa

1 building towards the roadway.

2 Q Is that your vehicle there? Says forensics.

3 A It is. When I parked it there I did not know that was
4 supposed to be exactly where the crime scene took place.
5 But, yes, it is.

6 Q Okay. And what did you do to search that area?

7 A We walked the area -- and just it's nothing but
8 asphalt -- and didn't locate anything, looking for, like I
9 said before, any blood or impact marks maybe by projectiles
10 that had been left on the asphalt, shell casings, evidence
11 of that type. Nothing was located.

12 Q So what does that suggest to you?

13 A It could suggest --

14 MR. WHELCHEL: Objection, Your Honor. Calls for
15 speculation.

16 THE COURT: Sustained.

17 Q How long have you been a forensic officer?

18 A Been in forensics for about four years and a regular
19 investigator eight years prior to that.

20 Q How long have you been in law enforcement all
21 together?

22 A Over 21.

23 Q How many crime scenes have you been to?

24 A Hundreds.

25 Q How many times have you looked for -- well, let's see.

Ed Guthro
Direct examination by Mr. Bulsa

1 What would you be -- would you be looking for shell
2 casings?

3 A Yes, I would.

4 Q And you didn't find any shell casings.

5 A That's correct.

6 Q What does that mean?

7 A Could mean several things, either they were --

8 THE COURT: Excuse me just a minute.

9 Let me see y'all just a minute.

10 (Bench conference held off the record in the presence
11 of the jury but out of the hearing of the jury.)

12 Q Let me ask it to you this way, Officer Guthro.

13 Did you -- do you always expect to find shell casings
14 when a shooting occurs?

15 A No, sir.

16 Q What kind of weapons are there?

17 A There are --

18 Q How are, how are shell casings left at the crime
19 scene?

20 A Shell casing are left when a semiautomatic or
21 automatic weapon is fired ejecting a spent shell casing.

22 Firearms that could be fired without doing that would
23 be the single-shot firearms or more commonly a revolver
24 which can fire multiple shots and not eject any rounds.

25 Q Do you think it could be possible that you just missed

Ed Guthro
Direct examination by Mr. Bulsa

1 them?

2 A Impossible is not a word but, I mean, a hard word.
3 But I don't think so in this case because it's nothing but
4 concrete. It's not like we're walking through grass or
5 bushes. It's just a smooth, level surface. And there was
6 nothing there.

7 Q Now, okay. You don't find anything at the scene.

8 A That's correct.

9 Q Did you take these pictures to show us the view?

10 A That's correct.

11 Q Then you go back to the impound lot and start
12 processing the truck?

13 A That's correct.

14 Q All right. And you saw pictures of a truck. Did you
15 notice any impact marks on the truck?

16 A There were three impacts to the driver's door. The
17 driver's-door window was broken, but all of the glass was
18 actually contained inside the door indicating that the
19 window was down when it was broken. And it was most likely
20 broken by one of the projectiles that entered the door.
21 Actually, one of them just entered the door. But none of
22 them went through that would have broken the glass.

23 Q Okay. Can you use that pointer up there and point to
24 the part of the truck where you located the impact marks?

25 A As best as I can tell from this angle, this is one of

Ed Guthro
Direct examination by Mr. Bulsa

1 them.

2 Q I've got a closer picture, but are they all pretty
3 much in that location?

4 A Yes, sir. One is there; one would be right there, I
5 believe, from this angle; and the other one was on the very
6 bottom right at the edge of the truck.

7 Q Let me show you these State's Exhibits 8 through 11.
8 Do you recognize those?

9 A Yes, sir. These are photographs that I took of the
10 truck and the impact marks.

11 Q Okay. Showing you first State's Exhibit No. 8. What
12 portion of the truck is that?

13 A It's the towards-the-front-of-the-driver's-door.

14 Q Okay. You pointed it out earlier, but just so the
15 jury can understand, point it out on the truck.

16 (Whereupon, the witness pointed.)

17 Q Okay. So this shows --

18 A That mark right there.

19 Q -- that clear mark. Do you see the other impacts?

20 A Yes, sir, I do. One is right there and the other is
21 right there.

22 Q Okay. And then State's No. 9 is a closeup picture of
23 the highered mark?

24 A Yes, sir. That's correct.

25 Q State's 10. Is that a closeup of the next lower mark?

Ed Guthro
Direct examination by Mr. Bulsa

- 1 A That's correct.
- 2 Q State's 11.
- 3 A That would be the lowest impact.
- 4 Q Okay. Did any of those rounds penetrate the door?
- 5 A No, sir, none of them penetrated completely through
- 6 the door. The upper one did enter, although not
- 7 completely. It was still stuck just inside that hole.
- 8 Q So this one --
- 9 A That's correct.
- 10 Q -- entered the outer shell of the door?
- 11 A Yes. None of them passed entirely through the door.
- 12 Q The actual window was broken?
- 13 A It was broken, and the glass was contained inside the
- 14 door.
- 15 Q All right. Did you later process the Honda?
- 16 A Yes, sir.
- 17 Q Did that involve taking this, these pictures, also?
- 18 A Yes, sir, it did.
- 19 Q Now, I want to show the interior here of State's 13.
- 20 What I'm interested in is showing that stick in the bottom.
- 21 A Yes, sir.
- 22 Q Was this -- do you know whose car this was?
- 23 A I had no idea whose car it was. I was simply given a
- 24 warrant to execute on this car.
- 25 Q And you collected the information and gave it to

Ed Guthro
Direct examination by Mr. Bulsa

1 Mr. Patton and Mr. Spurgeon?

2 A That's correct. I collect whatever evidence, place it
3 into evidence and then give them a copy of my report if
4 it's done at that time, and with the evidence sheets, or
5 both.

6 Q Okay. Did you have an occasion to go to the autopsy
7 of Mr. De La Rosa?

8 A Yes, sir, I did.

9 Q Do you remember when that took place?

10 A On 3/29/08 at about 12:00 noon.

11 Q Okay. And did you observe the wound that he had to
12 his body?

13 A I did. He had a bullet wound under his left arm which
14 did not penetrate his arm, like his arm might have been
15 raised or something like that.

16 Q Okay. And were you given the bullet that was taken
17 out of his body?

18 A I was.

19 Q And did you perform any tests on the body yourself?
20 Did you collect any samples?

21 A I collected a gunshot residue kit from the hands.

22 Q Explain to the jury what that is.

23 A A gunshot residue kit is a process, a kit that comes
24 from SLED that we use to collect gunshot residue, which is
25 tiny particles of medical -- metal powder, that type of

Ed Guthro
Direct examination by Mr. Bulsa

1 stuff. It consists of tiny sticky pads that we use to dab
2 on the hands, both hands, front and back, and fingers, that
3 those particles adhere to.

4 We also do a liquid swab, which is done with Q-tips
5 after the particle lifters. And then all of that is
6 submitted to SLED, and they do an analysis to determine
7 whether or not somebody has fired a weapon and whether
8 maybe somebody fired a weapon. It's not a one hundred
9 percent thing.

10 Q Why would you take -- why would you collect that off
11 of Mr. De La Rosa's hands?

12 A Well, sometime a victim, even if they weren't
13 shooting, can have G. S. R. on their hands such as somebody
14 just in close proximity to a gun going off, can have G. R.
15 R. on them. A victim might have G. S. R. on them if they
16 were to put their hands up or something to try to block if
17 somebody was pointing a gun at them. Or the victim may
18 have been firing a weapon themselves, so.

19 Q Is this sort of standard procedure?

20 A Yes.

21 Q Is there a time frame in which you need to be
22 concerned with in order to collect this evidence?

23 A For a living person it's generally four hours, because
24 it's a fairly fragile type of evidence. It's easily washed
25 off, rubbed off. It just falls off.

Ed Guthro
Direct examination by Mr. Bulsa

1 On a deceased person there is no time limit because
2 they are not moving. There's nothing to cause the evidence
3 to dissipate.

4 Plus, his hands were bagged prior. In other words,
5 they would put paper bags over their hands and tape them in
6 case there is any evidence there that it doesn't get lost.

7 Q So they did that to preserve them.

8 A Yes.

9 Q So but when you did that you didn't have any
10 information as to how the crime occurred, did you?

11 A No. And I'm not sure that I'm the one that bagged
12 them in this case. I can't recall actually being the one
13 that did the bagging in this case. I removed the bags.
14 I'm not sure who applied it.

15 Q If he went to the hospital trying to be treated would
16 they have done it there?

17 A One of the investigative officers probably would have.

18 Q All right. You collected that, as well as the other
19 evidence, to be sent to the state law enforcement division?

20 A That's correct.

21 Q That's for later processing to determine if there's
22 anything of value?

23 A Yes.

24 Q Thank you. Answer any questions Mr. Wheelchel may
25 have.

Ed Guthro
Cross-examination by Mr. Whelchel

1 CROSS-EXAMINATION

2 BY MR. WHELCHER

3 Q When you went -- did you go to South Center Street
4 first?

5 A I did.

6 Q Okay.

7 A Actually, I'm sorry. I was on my way there and got
8 called to the hospital. I took the pictures of the truck
9 and then went to South Center Street.

10 Q Okay. So you went to the hospital and took pictures
11 of the truck.

12 A Yes, sir.

13 Q Okay. Any other? Anything else at the hospital other
14 than the pictures of the truck?

15 A No, sir.

16 Q What time did you get to South Center Street?

17 A It was --

18 Q Roughly.

19 A -- probably a quarter till 6:00 or something like it.

20 Q Okay. And what time did you ultimately make it to
21 this store where this shooting took place?

22 A Probably close to 6:00 o'clock roughly.

23 Q Okay. How many people were milling around that
24 parking lot between the time of the shooting and the time
25 that you arrived?

Ed Guthro
Cross-examination by Mr. Whelchel

1 A I don't -- I wouldn't know because I wasn't there.
2 But after I arrived there were several.

3 Q Those are police officers.

4 A Yes.

5 Q They're all there looking for the shell casings Mr.
6 Bulsa has been asking you about.

7 A That's correct.

8 Q Okay. But prior to that nobody knows who was out
9 there picking up what.

10 A That'd be correct.

11 Q Okay.

12 MR. BULSA: Your Honor, I have nothing further of
13 Mr. Guthro.

14 THE COURT: You may step down.

15 MR. BULSA: We ask that he be excused.

16 THE COURT: He may be.

17 (Whereupon, the witness was excused.)

18 MR. BULSA: Your Honor, the next witness would be
19 lengthy. Do you want to continue?

20 THE COURT: No.

21 Ladies and gentlemen, we're going to recess for the
22 afternoon.

23 Remember my caution previously given you, and that is
24 during the overnight recess you can't talk about the case
25 with anybody. It's perfectly natural that you might have a

1 spouse or a child or a friend or somebody that wants to
2 find out what you're doing if they know you have jury duty
3 this week. But you just tell them you can't talk about it.

4 After you reach a decision in the case you can talk
5 about it as much or as little as you want to as many or as
6 few as you want. But until you've reached your decision
7 you're not permitted to discuss this case with anybody
8 whatsoever in any fashion whatsoever. And, as I told you,
9 that includes your fellow jurors. You can only talk to
10 them about it during jury deliberations.

11 Also, do not conduct any research. Don't do your own
12 investigation in any fashion as to any issue that might
13 arise during the trial.

14 Do have a good evening. And please report to your
15 jury room at 9:30 in the morning, 9:30 in the morning.

16 (The following takes place outside the presence of the
17 jury.)

18 THE COURT: We are not in recess. Tell him to have a
19 seat, please.

20 THE BAILIFF: I am sorry, Your Honor. I told him to
21 go.

22 THE COURT: Any matters we need to address before we
23 recess?

24 MR. BULSA: Your Honor, he found the phone records.
25 He was just overlooking them.

1 THE COURT: Okay. Let me see y'all just a minute.
2 (Bench conference held off the record.)
3 THE COURT: Court's in recess until 9:30.
4 END OF PROCEEDINGS SEPTEMBER 8, 2009
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Santos Delaros Ruiz
Direct examination by Mr. Balsa

1 (Proceedings September 9, 2009)

2 (The following takes place outside the presence of the
3 jury.)

4 THE COURT: Bring the jury in, please.

5 (The following takes place in the presence of the
6 jury.)

7 THE COURT: Good morning, ladies and gentlemen.

8 Now that we have everyone assembled we will continue
9 with the state's presentation of evidence.

10 Mr. Balsa.

11 MR. BULSA: Thank you, Your Honor. Santos Ruiz.

12 SANTOS RUIZ, having been first
13 duly sworn, testified as follows:

14 DIRECT EXAMINATION BY MR. BULSA

15 Q Make sure you speak up. Okay? Introduce yourself to
16 the jury.

17 A My name is Santos Delaros Ruiz.

18 THE COURT: You're going to have to speak much louder.
19 And if you'll use that microphone, it'll help a lot.

20 A My name is Santos Delaros Ruiz.

21 Q And are you Jerry's brother?

22 A Yes.

23 Q Where do you live?

24 A Right now?

25 Q Did you recently move?

Santos Delaros Ruiz
Direct examination by Mr. Bulsa

- 1 A Yes.
- 2 Q Where did you live back when this happened?
- 3 A
- 4 Q Is that towards North Spartanburg?
- 5 A Yes.
- 6 Q Near Sherman College?
- 7 A Yeah, in front of it.
- 8 Q Okay. And who did you live there with?
- 9 A With my mother.
- 10 Q Did Jerry live with you?
- 11 A He lived there.
- 12 Q And is he a younger brother?
- 13 A Yes.
- 14 Q How old was he?
- 15 A Eighteen.
- 16 Q I know this is hard for you, but we need you to tell
- 17 us what happened. Okay? The day of his death, where had
- 18 y'all been?
- 19 A He just got off from work.
- 20 Q Did you have a meeting set up somewhere?
- 21 A Yeah. They had been calling all day. My brother got
- 22 off from work and I told him about it. And I told him I
- 23 didn't want no problems in the house.
- 24 Q Who were you supposed to meet with -- Mr. Smith? And
- 25 who else?

Santos Delaros Ruiz
Direct examination by Mr. Bulsa

- 1 A And the other guy.
- 2 Q Talking about the directions. Okay. And where were
- 3 you supposed to meet them?
- 4 A Biggerstaff.
- 5 Q Biggerstaff's. Okay. And did you meet them at
- 6 Biggerstaff's?
- 7 A No.
- 8 Q Answer out loud here.
- 9 A No.
- 10 Q Okay. Why didn't you meet them at Biggerstaff's?
- 11 A I feel uncomfortable.
- 12 Q And why were you uncomfortable?
- 13 A Too many people.
- 14 Q So where did you go?
- 15 A There's a store close to Biggerstaff, like maybe a
- 16 couple of minutes.
- 17 Q Is that the store that we saw in the pictures?
- 18 A Yes.
- 19 Q What was the purpose of this meeting?
- 20 A About a gun.
- 21 Q Okay. What about the gun?
- 22 A I'm supposed to get it back.
- 23 Q You were supposed to get a gun back?
- 24 A Yes.
- 25 Q From whom?

Santos Delaros Ruiz
Direct examination by Mr. Bulsa

1 A From him and the other guy.

2 Q Those two guys?

3 A Yes.

4 Q How did they come to be in possession --

5 THE COURT: Excuse me just a second.

6 When you refer -- when you refer to somebody as him or
7 her --

8 THE WITNESS: I don't know his name.

9 THE COURT: You need to tell us who that is, because
10 we don't know.

11 THE WITNESS: I never knew the names.

12 THE COURT: Do you see that person in the courtroom?

13 THE WITNESS: Yes.

14 THE COURT: Can you identify that person for us?

15 THE WITNESS: Yeah. That's the guy who killed my
16 brother, that one over there.

17 THE COURT: That one over there. Now, you realize
18 there are several people over there. Which one are you
19 referring to?

20 THE WITNESS: Him with the black -- with the white
21 shirt.

22 THE COURT: The white shirt and the pen in his hand?

23 THE WITNESS: Yes, yes.

24 THE COURT: Seated next to Mr. Whelchel?

25 THE WITNESS: Yeah, right there in the middle.

Santos Delaros Ruiz
Direct examination by Mr. Bulsa

- 1 THE COURT: The lawyer?
- 2 THE WITNESS: Yes.
- 3 THE COURT: Okay. Thank you.
- 4 He's identified the defendant.
- 5 MR. BULSA: Yes, sir.
- 6 Q So you were to meet with the defendant and his friend,
- 7 the gentleman in the blue shirt.
- 8 A Yes.
- 9 Q Light blue shirt.
- 10 A Yes.
- 11 Q And you talked about meeting them to get a gun back.
- 12 A Yes.
- 13 Q Whose gun was it?
- 14 A My brother Ezekiel.
- 15 Q Excuse me?
- 16 A My brother.
- 17 Q Your brother.
- 18 A Ezekiel.
- 19 Q What was your brother's name?
- 20 A Ezekiel.
- 21 Q Ezekiel?
- 22 A Yes.
- 23 Q How many brothers do you have?
- 24 A Do you want me to say their names?
- 25 Q No. Just the number of people.

Santos Delaros Ruiz
Direct examination by Mr. Bulsa

- 1 A Only six right now.
- 2 Q Okay. Was Jerry number seven? You need to answer.
- 3 A Yes.
- 4 Q So how did these men come to get Ezekiel's gun?
- 5 A I sold it to them.
- 6 Q And when did you sell it to them?
- 7 A The day before that.
- 8 Q And where did this sale take place?
- 9 A My mom's house.
- 10 Q What kind of gun was it?
- 11 A My brother say it was a .45.
- 12 Q Why were you to get it back the day of this incident?
- 13 A After I sold it like maybe, maybe, maybe a few
- 14 minutes, they came back.
- 15 Q Why?
- 16 A I don't know.
- 17 Q What happened when they came back?
- 18 A Well, they, they, they tried to break the door in, and
- 19 I tried to hold it.
- 20 Q What was going on? Why were they? Were they saying
- 21 anything?
- 22 A They wanted the money back. I said give me, give me
- 23 the gun back. They won't give it back. So they're trying
- 24 to break in. And I'm trying to hold the door by myself.
- 25 And my brother Michael was there and his girlfriend was

Santos Delaros Ruiz
Direct examination by Mr. Bulsa

1 there.

2 Q Were you able to hold them out?

3 A Yes.

4 Q Okay. And then what happened?

5 A They still, they trying to like, they tried to open
6 the door, but I keep stopping it, not to come inside.

7 Q Okay. And did they leave?

8 A Yes.

9 Q Okay. How did this meeting get set up?

10 A The next day they been calling over and over about the
11 gun didn't work. They finally said to go to Biggerstaff.
12 And they said to go over there.

13 Q All right. And you went over to the other convenience
14 store. And then what happened when you got to the store?

15 A I was in place there for like a little bit. Then
16 after that I went to other store. They keep calling, and I
17 was calling back. I got there first. Then they came.

18 Q Who was with you?

19 A Adam and Jerry.

20 Q Whose car were you in?

21 A My mama's truck.

22 Q Is that the picture we saw yesterday?

23 A Yes.

24 Q Okay. Who was driving that truck?

25 A Jerry.

Santos Delaros Ruiz
Direct examination by Mr. Bulsa

- 1 Q So Jerry drove y'all over to the store. And you got
2 there first. And then what happened?
- 3 A I got out, went under Jerry, in case something
4 happened, for in the back the car was in the picture.
- 5 Q Okay. So you and Adam and Jerry get there first.
- 6 A Yes.
- 7 Q And where are you parked?
- 8 A If you park behind the store, on your left.
- 9 Q Okay. So were you parked in that picture we saw
10 yesterday --
- 11 A Yes.
- 12 Q -- beside of the store?
- 13 A Yes, in the left.
- 14 Q Okay.
- 15 A And then parked like in the middle.
- 16 Q Did they pull up beside you?
- 17 A Yes.
- 18 Q Okay. They pulled their car in.
- 19 A Yes.
- 20 Q And did you tell us that you told Jerry to pull the
21 car, the truck in behind them?
- 22 A Yes.
- 23 Q All right.
- 24 A And after that I got out. They came. And I said
25 where's the gun, this and that.

Santos Delaros Ruiz
Direct examination by Mr. Bulsa

- 1 Q Wait a minute. You got out and did what?
- 2 A And I told them where's the gun.
- 3 Q You went to the car?
- 4 A Yes, by myself. Jerry and Adam stayed in the truck.
- 5 Q All right.
- 6 A Told them to give me the gun. They didn't have it.
- 7 They were just playing games, I guess. I don't know.
- 8 Screaming and making threats. And it happened so fast.
- 9 Somehow the door got opened, and I see that guy, Mr. Smith,
- 10 had a room (sic) -- he moved kind of funny. And he put his
- 11 hand under the seat into the room (sic) stick.
- 12 Q Is that this stick here, State's Exhibit 14? Is that
- 13 the broom he had?
- 14 A Yeah, that's the one.
- 15 Q Okay. What did he do?
- 16 A He tried to stick me.
- 17 Q Tried to stick you?
- 18 A Yes.
- 19 Q And what did you do?
- 20 A I react fast, and I start fighting.
- 21 Q All right.
- 22 A I couldn't reach him, you know, but I try.
- 23 Q All right. What did you do then when you couldn't hit
- 24 him, when you couldn't reach him?
- 25 A Well, I was taking care of that guy at first. I

Santos Delaros Ruiz
Direct examination by Mr. Bulsa

1 couldn't reach the other guy. So I was trying to be, like
2 the other one. I was taking care of him first.

3 Q Okay. And you're pointing to the guy in the blue
4 shirt.

5 A Yes.

6 Q Now, do you remember where each one of them were
7 seated in the car?

8 A He was the driver.

9 Q He being? Identify him.

10 A Mr. Smith.

11 Q Mr. Smith was the driver.

12 A Yes.

13 Q And where was the other one?

14 A Beside you.

15 Q Passenger seat?

16 A Yes.

17 Q Okay. So which side of the car did you approach on?

18 A Where he was sitting at.

19 Q Passenger side?

20 A Yes.

21 Q Doors opened and Mr. Smith produces a stick.

22 A I'm fighting with this guy right here and trying to
23 hit that one at the same time.

24 Q Okay.

25 A And after that Adam got out and Jerry got out. Jerry

Santos Delaros Ruiz
Direct examination by Mr. Bulsa

1 is trying to control that guy, trying to take, trying to
2 take the stick out or something. And Adam was like beside
3 me hitting the other guy too.

4 Q Make sure the jury has this picture right. You're at
5 the car on the passenger side involved in a fight.

6 A Yes.

7 Q And Adam gets out and comes to your side.

8 A Uh-huh.

9 Q And Jerry gets out and goes to the driver's side.

10 A Trying to stay, trying to control that guy, you know.
11 When that happened so fast, I told him to come out of the
12 truck, because they were trying to like with the stick,
13 trying to stick me. That's when they got out.

14 Q Okay. Did you give them any money?

15 A No.

16 Q Give their money back?

17 A Uh-uh. Told them to give me the gun. They told me to
18 go to some, some house. But their agreement was to get the
19 gun from that store, from Biggerstaff. But he said to go
20 to -- I told him to go to the next store.

21 Q The meeting was to set up at Biggerstaff's.

22 A To get --

23 Q And switched to the other store. So this was a
24 prearranged meeting.

25 A Yes.

Santos Delaros Ruiz
Direct examination by Mr. Bulsa

1 Q Why didn't the exchange occur? Why didn't you give
2 them the money and they give you the gun?

3 A They told me they had, they had the gun. They told
4 me.

5 Q They told you they had it.

6 A Yes. They had it. That was the plan.

7 Q Okay. But they didn't actually bring it to --

8 A They didn't. I think they, because I -- huh?

9 Q Did that make you mad?

10 A At first I felt, I felt uncomfortable because they
11 tried to break in my mom's house. So I was kinda concerned
12 already.

13 And then the second day they supposed to bring the
14 gun, and they never bring it back. It happened so fast,
15 we, all the trouble and commotion happened right there.

16 Q And then what? What happened when Adam and Jerry got
17 out? What happened then?

18 A The fight lasted maybe not too long.

19 Q What caused the fight to stop?

20 A I told Jerry and Adam to go back to the, back to the
21 truck.

22 Q Did they go?

23 A Somehow that guy over there started running, went to
24 the gas station where the pumps are. I seen him running.
25 There was nobody there.

Santos Delaros Ruiz
Direct examination by Mr. Bulsa

1 Q You saw the passenger get out and run?

2 A Yeah. But I don't know which way, which way he got
3 out.

4 Q Do you know anything about his boots being taken?

5 A No, nothing about it. It happened so fast. And from
6 there too by the time I told 'm to get inside the truck,
7 somehow got inside the truck. I don't know. I don't
8 remember which side went. So we took off, like we drove
9 from here to there. And there were a car coming, and here.
10 And so Jerry had to stop. I turned around. I see that guy
11 got out, out the car.

12 Q Who is that guy?

13 A Smith.

14 Q Mr. Smith get out of the car?

15 A Yes. He went back and open, 'opened the trunk and took
16 a gun out. And I told Jerry he had a gun. He said, he
17 told me but I can't go nowhere.

18 Q And then what happened?

19 A He started shooting. After that my brother told me
20 after he got shot --

21 (Pause for witness crying.)

22 A He told me he couldn't go nowhere. Again, there was a
23 car in front of us. And soon as he passed, he drew like in
24 the bridge. He passed out right there.

25 So I, so I push him kind of over there and start

Santos Delaros Ruiz
Direct examination by Mr. Bulsa

1 driving. I took his truck to the, to the hospital. And I
2 told Adam to get out, call somebody.

3 They came in a wheelchair. And I got out. Couldn't
4 pick him up. He was too heavy. We have a hard time, me
5 and Adam, to pick him up. And more people came and helped
6 us put him in the wheelchair. And after that they told us
7 to go to the front. And I went there a few minutes. And
8 then I got arrested, me and Adam.

9 Q You mean you got taken. The police stopped you and
10 took you down to city hall and talked to you?

11 A Yeah.

12 Q Did they tow your truck?

13 A I don't know after that.

14 Q Okay.

15 A Because I was arrested.

16 Q Santos, this is State's Exhibit No. 7. This is the
17 truck.

18 A Yeah. That's my mama's truck.

19 Q Okay. We saw pictures yesterday of some damage. Look
20 at these pictures and tell me if that damage was done to
21 the truck before the shooting. These are State's 8, 9, 10
22 and 11.

23 A The truck didn't have that.

24 Q Okay.

25 A This --

Santos Delaros Ruiz
Direct examination by Mr. Bulsa

1 Q Look through all of them right now and then I'm going
2 to ask you questions about them.

3 (Pause.)

4 Q Do you see the marks that are shown in each of those
5 pictures?

6 A Yes.

7 Q Were those there before this shooting?

8 A No.

9 Q Was the window rolled down in the truck?

10 A Down, uh-huh.

11 Q Do you know where your brother got shot?

12 A When my brother would drive he told me. He went like
13 this. And so right here.

14 Q When did you learn he'd died?

15 A I think he died under the bridge, but he passed out.

16 Q Santos, back when -- at the store did you see anybody
17 else outside around the building?

18 A No. There was nobody in the gas station, sir. In the
19 gas station store there were nobody.

20 Q So it was just you and --

21 A Two cars only.

22 Q Your truck and their car.

23 A Yeah.

24 Q Answer any questions Mr. Whelchel has of you.

25

Santos Delaros Ruiz
Cross-examination by Mr. Whelchel

1 CROSS-EXAMINATION

2 BY MR. WHELCHER

3 Q Mr. Santos, Mr. Ruiz. Is that it? Your last name is
4 Ruiz?

5 A Yeah, Ruiz.

6 Q Ruiz?

7 A Ruiz.

8 Q Okay. Do you recall giving a statement to this
9 investigator --

10 A Yes.

11 Q -- later that day?

12 A Uh-huh.

13 Q Which investigator did you give that statement to?

14 A To him.

15 Q Investigator Spurgeon?

16 A Yes.

17 Q This fellow right here.

18 A Yes.

19 Q Okay. Do you have a copy of your statement? Did they
20 give you one?

21 A Yeah, I got one.

22 Q Do you have it with you?

23 A No.

24 Q Okay. Before we begin with your statement, sir, you
25 were convicted in 2002 of burglary second degree and

Santos Delaros Ruiz
Cross-examination by Mr. Whelchel

1 larceny, is that correct?

2 A Yes.

3 Q You were also convicted of accessory after the fact to
4 forgery.

5 A Yes.

6 Q And again to accessory after the fact to forgery.

7 A Yes.

8 Q Four counts, is that correct?

9 A Yes.

10 Q And again in 2003 you were convicted of burglary and
11 larceny, is that correct, sir?

12 A Yes.

13 Q And again in 2003 you were convicted of forgery, is
14 that correct?

15 A That's two thousand what?

16 Q 2003. Do you want to see this?

17 A In 2006 I only got sentenced for second degree of
18 burglary and four counts of accessory after the fact and
19 the thing you said, the second word.

20 Q Okay. This is a forgery indictment.

21 A I --

22 Q December the 10th of 2003.

23 A Yeah. I got sentenced for three years.

24 Q Okay. On forgery.

25 A All together, all together.

Santos Delaros Ruiz
Cross-examination by Mr. Whelchel

- 1 Q Do you want to see this?
- 2 A Because I went and done --
- 3 Q Is that your signature?
- 4 A Yeah.
- 5 Q Okay. Thank you, sir.
- 6 Now, back in March of last year you gave a statement,
- 7 as we were talking about earlier, to Investigator Spurgeon.
- 8 A Yes.
- 9 Q Take a look at that, sir.
- 10 (Pause.)
- 11 Q Is that your statement, sir?
- 12 A Yeah, yes.
- 13 Q You called Jay and asked him if he wanted to buy a
- 14 gun, is that right?
- 15 A Yes.
- 16 MR. WHELCHER: Stand up, sir, please.
- 17 (Whereupon, the person stood.)
- 18 Q This fellow right there.
- 19 A Yes.
- 20 Q That's the guy that you called in March --
- 21 A Yes.
- 22 Q -- and said you want to buy a gun.
- 23 A They want a gun. They.
- 24 Q I said did you call him.
- 25 A Yeah. But he give me a number.

Santos Delaros Ruiz
Cross-examination by Mr. Whelchel

- 1 Q Did you ask him if he knew anybody, or if we wanted to
2 buy a gun or knew anybody that wanted to buy a gun?
- 3 A They wanted a gun.
- 4 Q Excuse me?
- 5 A They want a gun.
- 6 Q That's not what I asked you. Did you call him, this
7 fellow here?
- 8 A I told him that I had a gun.
- 9 Q Did you call him on the phone?
- 10 A Yes, yes.
- 11 Q So you initiated the contact about the gun.
- 12 A Yes.
- 13 Q Okay. How did you know him?
- 14 A I met him.
- 15 Q Okay.
- 16 A I met him in a trailer.
- 17 Q Excuse me?
- 18 A I met him in the trailer.
- 19 Q Okay. You met him in the trailer earlier when you
20 bought drugs from him, is that correct?
- 21 A Both of them.
- 22 Q You bought drugs from him according to your statement.
- 23 A Him and the other guy. They always together.
- 24 Q That's not what it says here in your statement.
- 25 A But they were together all the time.

Santos Delaros Ruiz
Cross-examination by Mr. Whelchel

1 Q What does your statement say, sir?

2 A I cannot read too good but I -- both of them always
3 together.

4 Q Okay. Tell me if you can read right here, this. Do
5 you see where it starts "this"? Can you read that?

6 A Yeah. "This."

7 Q Okay. Read it loud.

8 A From here?

9 Q Yeah. Where it starts with "this".

10 A "This." And black man right there?

11 Q Yeah.

12 A That --

13 Q Do you want me to read it and you tell me if it's
14 right?

15 A "That I purchased crack cocaine from March, thinks I
16 tried to set."

17 Q Wait a minute. March when?

18 A It doesn't say.

19 Q Okay. But before you tried to sell that fellow a gun
20 you bought crack cocaine from him.

21 A Yeah, both of them.

22 Q Okay.

23 THE COURT: Excuse me just a minute, now.

24 Again, when you say both, you have to identify who
25 you're talking about.

Santos Delaros Ruiz
Cross-examination by Mr. Whelchel

1 THE WITNESS: Mr. Smith. And I never knew the names.

2 THE COURT: Can we find out?

3 Sir, would you tell us your name, please?

4 JOHN SAINVIL: My name is John.

5 THE WITNESS: John.

6 THE COURT: What's your -- sir?

7 JOHN SAINVIL: Sainvil.

8 THE COURT: John Sainvil. Okay. His name is John.

9 And his name is Mr. Smith and Mr. Sainvil. Okay.

10 THE WITNESS: John, right?

11 THE COURT: John Sainvil.

12 THE WITNESS: John, okay.

13 THE COURT: Kenneth Smith. John Sainvil in the blue
14 shirt and Kenneth Smith in the white shirt. Okay.

15 Q Okay. Your statement says, "This black male that I
16 purchased crack cocaine from in March of 2008 thinks I
17 tried to set him up after I was stopped and arrested in
18 Una." That's correct?

19 A Yes.

20 Q Okay. It doesn't say two black males, does it?

21 A I meant both of them.

22 Q It doesn't say two black males, does it?

23 A I meant both of them.

24 Q That's not what I asked you.

25 A I know.

Santos Delaros Ruiz
Cross-examination by Mr. Whelchel

- 1 Q Does it say two black males?
- 2 A No.
- 3 Q All right. And this is the fellow that you went to
4 Una in March and brought drugs from.
- 5 MR. WHELCHEL: Stand up, please.
- 6 Q Is that correct?
- 7 A I would buy crack from both of them.
- 8 Q I understand that's what you're saying now. This is
9 the fellow that you went in Una and bought drugs from in
10 March, correct?
- 11 A Yes.
- 12 Q Okay. Follow along, sir.
- 13 A From here?
- 14 Q Yeah. After it says "Una". You just follow, and I'll
15 read it if that's okay with you.
- 16 A Okay. Where you start reading at?
- 17 MR. BULSA: Your Honor, can I ask him to ask a
18 question instead of just reading this?
- 19 THE COURT: Yeah. I think the purpose of the
20 statement is to be used for any inconsistency,
21 Mr. Whelchel, and not just for him to read. So you just
22 ask him whatever questions you want to ask him. And then
23 we can deal with the statement if we need to.
- 24 MR. WHELCHEL: Yes, sir.
- 25 Q Right after it says Una here -- do you see that?

Santos Delaros Ruiz
Cross-examination by Mr. Whelchel

1 A Yes.

2 Q You said in your earlier statement, "He'd been driving
3 me. He'd been driving by my house and coming by," is that
4 correct?

5 A Yes.

6 Q Okay.

7 THE COURT: Let me see y'all just a minute, please.

8 (Bench conference held off the record in the presence
9 of the jury but out of the hearing of the jury.)

10 Q Mr. Ruiz, did you tell --

11 THE COURT: No, sir.

12 Q -- Mr. Spurgeon --

13 THE COURT: Mr. Whelchel, I thought I -- I don't know
14 how else I can explain it. Let me see y'all just a minute.

15 (Bench conference held off the record in the presence
16 of the jury but out of the hearing of the jury.)

17 Q Mr. Ruiz, did you see Jay John Sainvil driving by your
18 house?

19 A They came together.

20 Q Did you see John Sainvil driving by your house?

21 A When?

22 Q After you bought the drugs from him and after you got
23 arrested for that.

24 A Yes.

25 Q Okay. Did he call you on your phone?

Santos Delaros Ruiz
Cross-examination by Mr. Whelchel

- 1 A The trailer, from my mom's phone.
- 2 Q Okay.
- 3 A They were coming.
- 4 Q Did he call you on your brother's phone?
- 5 A The day my brother died, yes. I don't know whose
- 6 number it was, but they called.
- 7 Q Okay. So later there's a meeting at Biggerstaff's, is
- 8 that right?
- 9 A Yes.
- 10 Q Did Mr. Sainvil threaten you when he called you in
- 11 those phone calls?
- 12 A He just being mean. Both of them. I could hear him
- 13 in the background saying stuff. And after I left, they
- 14 saying they be calling my mom's house making threats.
- 15 Q Where does it say that, sir?
- 16 A After I got arrested in the hospital after they
- 17 released me.
- 18 Q Okay. That's not in your statement, what you're
- 19 telling me.
- 20 A No.
- 21 Q Okay. Let's move on to the meeting at Biggerstaff's.
- 22 John Sainvil, Jay, called you that day, correct?
- 23 A Yes. They told me they were coming.
- 24 Q And you called him back.
- 25 A Yes.

Santos Delaros Ruiz
Cross-examination by Mr. Whelchel

- 1 Q A series of phone calls going between you and him.
- 2 A Back and forth, back and forth, yes.
- 3 Q Okay. And you decide to meet at Biggerstaff.
- 4 A Yes.
- 5 Q You get to Biggerstaff, and you don't like
- 6 Biggerstaff.
- 7 A There were a lot of, a lot of people.
- 8 Q Cameras?
- 9 A I don't know. A lot of people.
- 10 Q Okay. So there are more conversations between you and
- 11 Jay. And the meeting place gets moved to this store, is
- 12 that correct?
- 13 A Yes.
- 14 Q You got there first, you and --
- 15 A My brother and Adam.
- 16 Q -- your brother and Adam -- Adam. Do you know Adam's
- 17 last name?
- 18 A Solesbee.
- 19 Q Solesbee. Okay. Stop me if I'm wrong. Is Jerry
- 20 driving?
- 21 A The whole time.
- 22 Q Okay. And you're riding up front with Jerry?
- 23 A I was in the middle in the front.
- 24 Q Okay. All three of you in the same seat up front.
- 25 A Yes.

Santos Delaros Ruiz
Cross-examination by Mr. Whelchel

- 1 Q Okay. How did Jerry know about this meeting?
- 2 A He just got home from work.
- 3 Q He just got off from work?
- 4 A Yeah.
- 5 Q Did you ask him to go with you?
- 6 A I told him I'm having problems that become --
- 7 Q Okay. Did you ask him to go with you?
- 8 A I told him he can go with me, and he said yes.
- 9 Q Okay. How old are you, sir?
- 10 A Right now 37 -- 36. I'll be 37 November the 11th.
- 11 Q And Jerry was?
- 12 A Eighteen.
- 13 Q When y'all arrived at the second store, not
- 14 Biggerstaff's, pulled in on the right side of the store
- 15 when you're facing the store, is that right?
- 16 A You know where the metal bridge is, right, the metal,
- 17 the bridge? Right there.
- 18 Q Uh-huh. Let's say this is the store front. Better
- 19 yet, look at this photograph here.
- 20 A We parked right here and they parked right here.
- 21 Q Okay. You parked where?
- 22 A Right here.
- 23 Q Okay.
- 24 A And they parked right here in the middle.
- 25 Q All right. When you parked this way was the truck

Santos Delaros Ruiz
Cross-examination by Mr. Whelchel

1 facing in towards the building?

2 A Facing, yes.

3 Q Or was it backed in?

4 A At first we go there, we park facing like this.

5 Q Facing the building.

6 A Yes.

7 Q Okay. So let's assume that this is the building. So
8 y'all are looking at the wall?

9 A Yes.

10 Q Waiting on people to arrive --

11 A Yes.

12 Q -- that have threatened you?

13 A Yes.

14 Q And did they arrive?

15 A A few minutes later.

16 Q Okay. And it's Jerry, you in the middle.

17 A Yes.

18 Q And Adam. Or are you on the end?

19 A No. Me in the middle.

20 Q Okay. Jerry, you and Adam. And when they pulled up
21 which side of the car were they on?

22 A In the side, the part in the middle.

23 Q This side here. Okay. And where was Jay John Sainvil
24 in that car?

25 A On the right side.

Santos Delaros Ruiz
Cross-examination by Mr. Wheelchel

- 1 Q Passenger side.
- 2 A Yes.
- 3 Q All right. Did you get out of your vehicle?
- 4 A Yes.
- 5 Q Okay. So when you got out Adam got out?
- 6 A No. Just by myself.
- 7 Q Did you crawl over him?
- 8 A Yes.
- 9 Q Okay. And you walked around.
- 10 A The car.
- 11 Q The car.
- 12 A Yes.
- 13 Q And you approached John, that fellow back there.
- 14 A Yes.
- 15 Q He's in the passenger side.
- 16 A Yes.
- 17 Q Okay. Had a conversation with him.
- 18 A Before that I told my brother all the threat they been
- 19 making. I told my brother to park behind him in case
- 20 something happened, all of this stuff they say on the
- 21 phone, threatening my family. I got out.
- 22 Q Now, so your brother moved the truck?
- 23 A Yes.
- 24 Q How did he move it?
- 25 A In reverse?

Santos Delaros Ruiz
Cross-examination by Mr. Whelchel

- 1 Q Yeah.
- 2 A The back of the truck went in reverse and parked
- 3 behind the other car.
- 4 Q Okay. So he backed out. Did he come in?
- 5 A Facing, facing.
- 6 Q Did he come in directly behind it that way?
- 7 A No. The other way.
- 8 Q So he pulled out and backed in behind it.
- 9 A Yes.
- 10 Q Okay. So once the cars are changed, their car is
- 11 headed this way pointed towards the wall.
- 12 A Yes.
- 13 Q And your truck --
- 14 A Behind it.
- 15 Q -- is headed this way --
- 16 A Yeah.
- 17 Q -- so that you can get away, correct?
- 18 A In case something happens.
- 19 Q Okay. You arrived with two others, correct?
- 20 A My brother and Adam.
- 21 Q Yeah. Well, there's three of you.
- 22 A Yes.
- 23 Q And two of these other fellows.
- 24 A Yeah.
- 25 Q Okay. And as soon as they get there, on your

Santos Delaros Ruiz
Cross-examination by Mr. Whelchel

1 instructions Jerry takes the truck y'all are in and blocks
2 them in, correct?

3 A Yes.

4 Q Okay. And while he's moving the truck are you talking
5 to Jay?

6 A I didn't talk to him too much.

7 Q Okay. At some point during that altercation there you
8 decided to hit John Jay.

9 A No.

10 Q No. You didn't? You never touched him?

11 A I did. But what working funny, that guy, Smith, took
12 a broomstick and tried to stick me. I react right away and
13 started fighting.

14 Q Okay. Let me get this straight.

15 According to you, Kenneth Smith has a broomstick and
16 tries to hit you with it from -- wait a minute -- from the
17 driver's side.

18 A Yes.

19 Q And you're on the passenger side.

20 A Yes.

21 Q And Jay is sitting between you.

22 A It's a very small car. He can reach me.

23 Q I understand that. But Jay is between the two of you.

24 A Yes.

25 Q Okay. And subsequent or after that at some point you

Santos Delaros Ruiz
Cross-examination by Mr. Whelchel

1 and Adam start beating up on John, correct?

2 A I was by myself.

3 Q Okay. Did you kick him in the eye?

4 A I kick him somewhere.

5 Q Did you kick him in the ribs?

6 A I don't know. I was just kicking where he's at.

7 Q You were fighting with this man.

8 A Yes.

9 Q Okay.

10 A The other guy tried to stick me with the stick.

11 Q Okay.

12 A Then my brother, Jerry, and Adam got out right away
13 when that happened, with that commotion, all the fighting.
14 They got out right away.

15 Q Did you --

16 A My brother tried to control the other guy, tried to
17 stick with the broom -- broomstick.

18 Q Jerry went and stood --

19 A In front of him.

20 Q -- beside the driver.

21 A Yes.

22 Q Okay. And you and Adam --

23 A No. I was by myself.

24 Q Where did Adam go? You just said he got out of the
25 truck.

Santos Delaros Ruiz
Cross-examination by Mr. Whelchel

- 1 A As soon as that happened they got out, both of them.
2 But I went by myself in front of, in front of the door.
3 Q Where did Adam go?
4 A Beside me, but he cannot hit the other guy. You know,
5 I don't think so.
6 Q Did they have a sunroof on this car?
7 A Yes.
8 Q Was it open?
9 A Yes.
10 Q Okay. Adam hit John through the sunroof?
11 A I -- he tried, but he couldn't reach him because he
12 was so leaned back all the way like sideways.
13 Q He was fighting back. He was defending himself, is
14 that right? John, that fellow right there.
15 A Yes.
16 Q Okay. Did you take his boots from him?
17 A No.
18 Q You know his boots were taken, is that right?
19 A No, uh-uh.
20 Q You don't know that.
21 A I find out after I got arrested, if I knew anything
22 about that. They told me. I knew about the boots and a
23 gold chain, and I knew nothing about it.
24 Q These fellows told you about the boots and the gold
25 chain.

Santos Delaros Ruiz
Cross-examination by Mr. Whelchel

1 A Yes, but I knew nothing about it it happened so fast.

2 Q Okay.

3 A When that happened I went straight to the hospital and
4 I got arrested.

5 Q Okay. Adam took the boots and the chain.

6 A I know nothing about it.

7 Q Okay. Well, let's do it this way.

8 Jerry's on this side of the car. Jay is on the other
9 side of the car, and the door is opened and he's getting
10 beat up, correct?

11 A Yes.

12 Q You didn't take his boots --

13 A I didn't take nothing.

14 Q -- or his gold chain.

15 A Nothing.

16 Q Okay. Who else is on that side of the car with you?

17 A Adam.

18 Q Okay. And you never saw Jerry take anything.

19 A No. He didn't took nothing.

20 Q No way he could, right?

21 A Uh-huh. The guy had a stick.

22 Q And you didn't take them.

23 A Uh-huh.

24 Q Okay. At any point did John say, hey, fellows, take
25 my boots and my necklace?

Santos Delaros Ruiz
Cross-examination by Mr. Whelchel

- 1 A No.
- 2 Q Okay.
- 3 A It happened so fast. He had --
- 4 Q And they found them. These officers told you --
- 5 A Yeah. They told me already.
- 6 Q Found them in your truck, right?
- 7 A Yeah.
- 8 Q Okay.
- 9 A They found only the boot. They didn't find the gold
- 10 chain they talking about.
- 11 Q All right.
- 12 A Nothing get lost. We got arrested. They took the
- 13 truck. As soon as we went to the hospital, we got arrested
- 14 right there. The officer came and pick us up.
- 15 Q Who did you call?
- 16 A My sister and niece.
- 17 Q Who else did you call?
- 18 A It was so hard for me -- niece.
- 19 Q Huh?
- 20 A Niece. That's my sister's niece I called. That's
- 21 after my brother got shot.
- 22 Q After your brother was shot --
- 23 A I call my sister niece.
- 24 Q Let me finish. And you left with your brother and
- 25 Adam. Did you call this man?

Santos Delaros Ruiz
Cross-examination by Mr. Whelchel

- 1 A No. I ain't called nobody.
- 2 Q You didn't call this man.
- 3 A Uh-uh.
- 4 Q You didn't call this --
- 5 A I ain't called nobody.
- 6 Q Ever.
- 7 A Uh-uh, never. As soon as my brother got shot, I
- 8 didn't call.
- 9 Q Do you remember --
- 10 A I was arrested. I didn't call nobody.
- 11 Q Do you remember your phone number?
- 12 A My mom's phone number, I think it was --- -- no.
- 13 Q When you went to see these investigators at the
- 14 Spartanburg City Police Department --
- 15 A When I got arrested?
- 16 Q The same day that you --
- 17 A Yes.
- 18 Q Yes, sir.
- 19 A As soon as my brother got shot, I got arrested like a
- 20 few minutes and --
- 21 Q Did they show you a lineup, a group of six pictures?
- 22 A They only show me the picture of -- they asked me how
- 23 they look like. I told them there's a guy taller than me,
- 24 and a short. There's another guy shorter than me. They
- 25 asked me the names. I don't know the names.

Santos Delaros Ruiz
Cross-examination by Mr. Whelchel

- 1 Q Did you see that?
- 2 A Yes.
- 3 Q Okay. And you identified this fellow in the middle.
- 4 A Yes.
- 5 Q That's John Sainvil.
- 6 A Yes.
- 7 Q Okay. Anybody ever ask you to identify anybody else?
- 8 A I tried to explain to them how they looked like.
- 9 Q Uh-huh. That's not what I asked you.
- 10 A They didn't show me.
- 11 Q Did anybody at this table ever ask you to identify
- 12 anybody else? Did they show you any other lineup like I
- 13 just showed you?
- 14 A They only showed me that one.
- 15 Q Okay. So not until today. You identify the only
- 16 black man sitting at the defense table, is that correct?
- 17 A The Mr. Smith, the one that killed my brother.
- 18 Q This fellow right here.
- 19 A Yeah.
- 20 Q Okay. Nobody asked you before today.
- 21 A No.
- 22 Q Okay.
- 23 A I met a few times. They were always together. I
- 24 cannot forget a face.
- 25 Q Did you tell the officers that they were already --

Santos Delaros Ruiz
Redirect examination by Mr. Bulsa

1 always together?

2 A They always together. I told them, I show them where
3 they hang out.

4 Q No. That's not what I asked you. Did you tell these
5 fellows --

6 A Yes.

7 Q -- these investigators, Investigator Spurgeon?

8 A They were together all the time.

9 Q Investigator Spurgeon took your statement, this fellow
10 right here.

11 A Uh.

12 Q Did you tell him they were always together?

13 A I told him I bought crack from both of them. They
14 always together.

15 Q You told him that.

16 A Yes.

17 Q Okay.

18 MR. WHELCHEL: That's all I have, Your Honor.

19 MR. BULSA: Briefly in reply.

20 REDIRECT EXAMINATION

21 BY MR. BULSA

22 Q Santos, did you have a drug problem?

23 A Yes.

24 Q How long?

25 A I was clean for 20 months, and then I got out of

Santos Delaros Ruiz
Redirect examination by Mr. Bulsa

1 prison. I was clean again. Then I start over again by the
2 end of 2006.

3 Q Do you remember about how old you were when you
4 started?

5 A Almost 27.

6 Q So you had a drug problem for almost ten years?

7 A Yes.

8 Q Off and on?

9 A Yes.

10 Q Is that what was going on when you got all of those
11 charges?

12 A Yes.

13 Q Now, you were telling Mr. Whelchel that you always saw
14 these men together. Where would you see them together?

15 A In Una and Asheville Highway, you know, where they
16 sell fireworks -- Poor Paul's.

17 Q Yes, sir.

18 A Their trailer is Evans Trailer Park.

19 Q You would see them at a trailer park together?

20 A No. In a house.

21 Q A house?

22 A There's a trailer park, is across street. And there's
23 a house right there, a little house right there.

24 Q Did you know them by any nicknames?

25 A I always call him Blag, Brad, Brick. But I never --

Santos Delaros Ruiz
Redirect examination by Mr. Bulsa

1 they never told me their names, and they never knew my name
2 either.

3 Q How did you have their phone number?

4 A They gave it to me.

5 Q Okay.

6 A The first time I met, it was in Una. And there's a
7 trailer. They call it -- it's old man. They call him
8 Pop's. It's an old white man.

9 Q You met them in a trailer?

10 A Yeah, by a lady named -- they call Shorty, a skinny
11 black lady.

12 Q Okay. And at some point during that meeting they gave
13 you a phone number?

14 A Yeah. They gave it to me as soon as I approaches to
15 them.

16 Q They gave you a phone number in case you wanted to buy
17 more drugs?

18 A Yes.

19 Q The time the police spoke with you -- Mr. Whelchel
20 showed you that six pictures, the lineup he called it --

21 A Yes.

22 Q -- was that the first time they spoke to you or a
23 little bit later that same day?

24 A When they showed me those pictures?

25 Q Yes, sir. Do you remember when exactly that was?

Santos Delaros Ruiz
Redirect examination by Mr. Bulsa

- 1 A That's the day my brother died.
- 2 Q Okay.
- 3 A Later on the officers showed me another paper like
4 that.
- 5 Q Okay.
- 6 A But I didn't sign nothing, because I signed that one.
- 7 Q I know. Your statement was started at 1830. That's
8 6:30 p.m.
- 9 A Yes.
- 10 Q And you looked at this picture lineup at 9:30 p.m.
- 11 A Yes.
- 12 Q Okay. And your statement ended at 1907 or 7:07 p.m.
- 13 A Yes.
- 14 Q So it was about two and a half hours later they came
15 back to you with these pictures.
- 16 A Yes.
- 17 Q Do you know if they had spoken to John between that?
- 18 A I don't remember.
- 19 Q Okay. So you didn't know. They were just
20 investigating and then came back and talked to you again.
- 21 A Yes.
- 22 Q You keep saying you got arrested. Did you get taken
23 to jail?
- 24 A Yes, to jail.
- 25 Q Okay. Now, you mean locked up?

Santos Delaros Ruiz
Redirect examination by Mr. Bulsa

1 A Yeah.

2 Q Or do you just mean down to city hall?

3 A No. That was like, that was before. That was in May,
4 in May. May the 5th I got arrested.

5 Q Okay. But you weren't arrested the night your brother
6 got killed, were you?

7 A Yeah, I was arrested. Well, they took me to jail.
8 That means arrested, right?

9 Q Did you actually get put behind bars?

10 A No, uh-uh. They put me in a room.

11 Q They put you in a room and they spoke to you.

12 A Yes.

13 Q And then they let you go.

14 A Yes.

15 Q Okay. In your mind you're thinking that's arrested.

16 A Yes.

17 Q Okay. Who started the violence when you went to that
18 car, which person?

19 A As soon as I got out they were already cussing me out.
20 Both of them started.

21 Q Okay. But one of them actually had some sort of
22 weapon.

23 A A stick, a broomstick.

24 Q A stick. And that was Mr. Smith.

25 A Mr. Smith.

John Roberts
Direct examination by Mr. Bulsa

1 Q And regardless of what happened at the car, the three
2 of you got back in your truck and were leaving the area.

3 A Yes.

4 Q And then shots were fired, is that right?

5 A Yes.

6 Q Who fired those shots?

7 A Mr. Smith.

8 Q Thank you.

9 THE COURT: You may step down.

10 (Bench conference held off the record in the presence
11 of the jury but out of the hearing of the jury.)

12 JOHN ROBERTS, having been
13 first duly sworn, testified as follows:

14 DIRECT EXAMINATION BY MR. BULSA

15 Q Mr. Roberts, you're taken a little out of order
16 because of the lunch hour. I wanted to go ahead and get
17 you in and let you get back on your way.

18 Introduce yourself to the jury..

19 A My name is John Roberts. I work for the South
20 Carolina Law Enforcement Division, also known as SLED, in
21 the trace evidence department.

22 Q Is that located in Columbia?

23 A Yes, sir, it is.

24 Q And you drove down, excuse me, up here for this trial.

25 A I did.

John Roberts
Direct examination by Mr. Bulsa

1 Q In this case in particular did you receive a couple of
2 items, gunshot residue kits, to examine?

3 A Yes, I did.

4 Q And who are those gunshot residue kits on?

5 A I received a gunshot residue kit from John Cliff
6 Sainvil and Jerry De La Rosa.

7 Q And where do you actually work within SLED?

8 A Work in the trace evidence department. Trace evidence
9 is the analysis of evidence that you generally can't see
10 with your naked eye.

11 We do gunshot residue; we do arson analysis; paint;
12 fibers; glass; explosives; and duct tape; and bank dye
13 packs, is what we do in trace evidence.

14 My main unit that I'm dealing with right now is
15 gunshot residue and bullet-hole analysis.

16 Gunshot residue analysis consists of the analysis of
17 residues that are coming from a weapon when it's fired.
18 When you fire a weapon, the primer goes off and the
19 chemicals that are contained inside that primer escape the
20 weapon and land on items in the immediate vicinity of that
21 weapon.

22 What we look for are the chemicals lead, barium and
23 antimony. Based on quantities that we find we make
24 determinations on those quantities.

25 Q So is it safe to say you're a scientist?

John Roberts
Direct examination by Mr. Bulsa

1 A Yes, sir.

2 Q And what kind of training have you had?

3 A I got a bachelor's of science degree in chemistry from
4 Texas A&M, Corpus Christi.

5 When I got my job at SLED almost five years ago I went
6 to work under my lieutenant who had been there for 20
7 years, 20 or more years now. And he trained me how to do
8 gunshot residue. I worked cases with him. I assisted him
9 in writing up the cases.

10 After about three or four months I was given a mock
11 court where I had my own case to work, my own case to
12 defend. And I was qualified to work my own gunshot residue
13 cases, which I did for about a year.

14 Then I switched to working arson cases, and now I've
15 switched back to working gunshot residue cases again.

16 Q We've already identified -- did you receive two
17 gunshot residue kits in this case?

18 A Yes, sir. That's correct.

19 Q And those are kits collected by law enforcement?

20 A In most cases, yes. In this case -- give me just a
21 second here. These were collected by Spartanburg D. P. S.
22 as far as I can tell.

23 Q Okay. Public safety?

24 A Yes, sir.

25 Q All right. And they were transported to you for your

John Roberts
Direct examination by Mr. Bulsa

1 analysis?

2 A Yes, sir. That's correct.

3 Q Now, you've explained a little bit about what gunshot
4 residue is.

5 What's the purpose of looking at this kit? What are
6 you trying to determine?

7 A Normally, when we get a gunshot residue kit, the
8 submitting agency is looking to see if someone has fired a
9 gun or has been near a gun when it's gone off or simply
10 handled the weapon. Those are the three things they're
11 looking for when they submit a gunshot residue kit.

12 Q Is there some sort of time parameter that you're
13 restricted to?

14 A Yes, sir. Our protocol states that the gunshot
15 residue kit must be collected within six hours of the
16 incident taking place.

17 We find that after six hours the materials that come
18 out of the weapon have disappeared. These materials are
19 easily absorbed into your skin. Just by sitting there
20 you're constantly losing materials.

21 They're also easily removed physically. If you rub
22 your hands under water you'll remove these materials. It's
23 a lot like if you bake biscuits and you dust your hands
24 with flour. Once you put your hands under water, that
25 flour goes away.

John Roberts
Direct examination by Mr. Bulsa

1 It's much the same with gunshot residue. So running
2 water, wiping them on the, you know, your pockets, touching
3 doorknobs and such removes this material.

4 Q But if you don't take any steps to wash your hands,
5 the time alone can cause the materials to dissipate and
6 leave your hands.

7 A Yes, sir. That's correct.

8 Q So we have a 6-hour window, is basically what we're
9 looking at.

10 A Yes, sir.

11 Q Okay. Do you have notation as to when these were
12 collected --

13 A I do.

14 Q -- at the time?

15 A Yes, sir, I do.

16 Q Can you tell us what times? Well, let me ask you this
17 first, because one of these individuals was deceased. Does
18 that affect the time length of it?

19 A On a deceased person there isn't a time window because
20 the body processes have stopped. Once they're dead, the
21 skin doesn't absorb any. Your heart's not beating, so
22 you're not absorbing the material. As long as it's not
23 physically removed the material stays where it is.

24 Q So that's the reason why the victim's hands are
25 bagged.

John Roberts
Direct examination by Mr. Bulsa

1 A Yes, sir. That's correct.

2 Q To be --

3 A Yes, sir.

4 Q And tell us the time when those were collected.

5 A On the first kit, the kit from John Cliff Sainvil, I
6 have the incident time as 1730, which is 5:30 in the
7 afternoon, and the collection time at 10:55 p.m. So five
8 hours and change, more or less.

9 Q Five and a half hours?

10 A Yes, sir, right at. Right at the edge of my 6-hour
11 window.

12 On the other kit, the kit from Jerry De La Rosa, he
13 was deceased, so the timeframe didn't matter. If you want
14 to know, I can tell you when it was collected. But the
15 timeframe was irrelevant.

16 Q Okay. What were your results when you examined these
17 kits?

18 A On the first kit, the kit from John Cliff Sainvil, on
19 all the areas that we test -- the right palm, the right
20 back of the hand, the left palm and the left back of the
21 hand -- I found that the quantities of metals on those
22 areas did not indicate the presence of gunshot residue,
23 which is basically negative.

24 On the second kit, the kit from Jerry De La Rosa, on
25 the right palm I found that the result's inconclusive. On

John Roberts
Direct examination by Mr. Bulsa

1 the right back I found no gunshot residue. And on the left
2 palm and the left back of the hand I found that the
3 quantities of metals detected or quantities of metals found
4 did not indicate the presence of gunshot residue.

5 Q So you actually have three different phrases that
6 you're using.

7 A Yes, sir. That's correct.

8 Q First, the quantities of metals found did not indicate
9 the presence of gunshot residue. Could you explain that a
10 little further?

11 A Yes, sir. What happens when a gunshot residue kit is
12 collected, there's two types of sampling media. There's a
13 particle lift, which is an aluminum round tab with some
14 sticky tape on it that's applied to the palms and backs of
15 the hand. This removes single particles of gunshot
16 residue.

17 After the particle lifts are applied swabs are
18 applied. They're just cotton swabs. They are treated with
19 some dilute nitric acid. And they're used to mop up any
20 metals that are left over from the particle lifts.

21 What we do at SLED is we run the swabs first. We get
22 in literally thousands of these gunshot residue kits every
23 year. So we run the swabs first. They tell us how much
24 metal is present on the hands.

25 Based on the concentrations of those metals we can go

John Roberts

Direct examination by Mr. Bulsa

1 to the microscope where we analyze the particle lifts. We
2 look for the actual gunshot residue particles. That's the
3 reason for the different results.

4 When I say the quantities of metals found do not
5 indicate the presence of gunshot residue, what we've done
6 is tested swabs. And the swabs have come back with below
7 the threshold that we use to call a positive for gunshot
8 residue.

9 Q Therefore there's no need to continue looking.

10 A That's correct. Once the swabs are negative, there's
11 no need to continue on with the test.

12 Q Okay. What do you mean by results are inconclusive?

13 A Results are inconclusive means -- and in this case
14 specifically -- that there was something on the swab.
15 There was enough lead present on the swab where I had to
16 take the particle lift and examine it with a microscope.

17 When I do when I look through the microscope, is I
18 look for particles consisting of the three elements that
19 are present in gunshot residue -- the lead, barium and the
20 antimony. And I look for round particles. Round particles
21 consisting of lead, barium and antimony are unique to
22 gunshot residue. You get don't get them from anything
23 other than a firearm.

24 I also look for round lead particles. Round lead
25 particles are also a component of gunshot residue. And in

John Roberts
Direct examination by Mr. Bulsa

1 this case what I found was one round lead particle. One
2 round lead particle is not enough for me to call positive.
3 It's just not enough.

4 So my result was inconclusive. I found something but
5 not enough to call a positive.

6 Q Okay. And the other phrase you have is no gunshot
7 residue was found.

8 A In this case on that particle lift, what happened was
9 I ran the swab and I had a high indication of lead. I had
10 a lot of lead on the swab. And I ran the particle lift.
11 When I ran the particle lift I didn't find any gunshot
12 residue.

13 No gunshot residue found means that there was no
14 gunshot residue on that particle lift. It's a negative
15 result.

16 Q Now, how might lead have gotten on his hands?

17 A Usually you can get round lead from handling a weapon,
18 being near it when it goes off or shooting a weapon.

19 Q Okay. I must have misunderstood. You said you found
20 lead on one of the swabs, sir.

21 A I found a quantity of lead that would indicate that I
22 needed to take it to the microscope.

23 Q But that does not mean he actually handled the weapon.

24 A No, sir. It doesn't.

25 Q Can you get it from some other source?

John Roberts
Cross-examination by Mr. Whelchel

1 A There's a couple of different just elemental lead you
2 can get from anything that has lead in it. However, the
3 round lead particles are components of gunshot residue.
4 There's only a couple of other places you can get them.
5 Christmas lights cheaply made, Chinese Christmas lights,
6 and lead smelting plants are about the only two other, only
7 other places that you can get round lead. Some fireworks
8 may have them in it as well.

9 Q Okay. Regarding Jerry De La Rosa, what conclusion can
10 you draw from your results?

11 A The first one was inconclusive. All he had was one
12 round lead particle. I really can't draw any conclusions
13 from that. The other three areas were negative.

14 Q And regarding Mr. Sainvil, what did you draw?

15 A His results were also negative.

16 Q Thank you. Answer any questions Mr. Whelchel may
17 have.

18 A Surely.

19 CROSS-EXAMINATION

20 BY MR. WHELCHER

21 Q Mr. Roberts --

22 A Yes, sir.

23 Q -- we talked last week on the phone.

24 A Yes, we did.

25 Q Round. Tell me if I'm saying this right. Ground lead

John Roberts
Cross-examination by Mr. Whelchel

1 particles.

2 A Round.

3 Q Round.

4 A Circular spherical.

5 Q Okay. Round lead particles were found in your
6 analysis of the G. S. R. that was taken from John Sainvil,
7 correct?

8 A No, sir.

9 Q Okay.

10 A De La Rosa. I found one round lead particle on one
11 area of his hand.

12 Q On De La Rosa.

13 A Yes, sir, on De La Rosa.

14 Q And this 6-hour window that we're talking about, I
15 want to make sure I understand this. As time goes on
16 through this 6-hour window it becomes less likely that
17 you're going to find this G. S. R. evidence simply because
18 as we move through the, our lives and we move our hands
19 about and stuff like that, the skin absorbs it.

20 A That's correct. Yes, sir.

21 Q Okay. And even if we don't do anything, the six
22 hours, in that, outside of that 6-hour time period, the
23 skin will absorb it.

24 A Yes, sir.

25 Q Okay. And as we march through that 6-hour period the

John Roberts
Cross-examination by Mr. Whelchel

1 skin will absorb more of it in five hours than it will in
2 one.

3 A The longer you go between the time of the incident and
4 the time of the collection, the less material there will be
5 available to find, yes, sir.

6 Q Okay. And your records that were given to you show
7 that the shooting was at 1730.

8 A That's what I have on the gunshot residue information
9 sheet, yes, sir.

10 Q Okay. You don't have any way of knowing that it
11 actually happened earlier, do you?

12 A The thing that I use to determine my 6-hour window --

13 Q Is what they tell you.

14 A -- is what they tell me, yes, sir.

15 Q I understand. But using 1730 and your 6-hour window,
16 then the six hours would be 2330.

17 A Yes, sir. That's correct.

18 Q Okay. 11:30 p.m.

19 A Yes, sir.

20 Q And the sample was taken at 1055.

21 A Yes, sir.

22 Q Okay. So we're within 35 minutes of the end of the
23 6-hour window.

24 A That's correct.

25 Q Using 1730.

John Roberts
Cross-examination by Mr. Whelchel

- 1 A Yes, sir.
- 2 Q And if we use the actual time of 1718 we're within 23
3 minutes.
- 4 A Yes, sir. You're very close.
- 5 Q Okay. And that's assuming that no actions have been
6 taken to remove the gunshot residue from the hands.
- 7 A Yes, sir. That's correct.
- 8 Q Now, you said washing your hands can remove gunshot
9 residue.
- 10 A Yes, sir.
- 11 Q Wiping. If you wash your hands with just water, just
12 sling them off like that, do you lose more gunshot residue
13 that way or if you dry your hands after you get them wet,
14 or do you know?
- 15 A I'm not, I'm not sure. However, if you had washed
16 your hands and then dried them, you're going to lose the
17 greater percentage.
- 18 Q Okay. And if you use chemicals such as rubbing
19 alcohol -- I think we talked about that last week.
- 20 A Yes, sir.
- 21 Q If you use chemicals, does that help the process of
22 removing the gunshot residue?
- 23 A It does.
- 24 Q Okay. Thank you, sir.
- 25 MR. BULSA: Nothing further, Your Honor.

Suzann Cromer
Direct examination by Mr. Bulsa

1 THE COURT: You may step down.

2 MR. BULSA: We ask he be excused.

3 THE COURT: You may be.

4 (Whereupon, the witness was excused.)

5 MR. BULSA: The state calls Suzann Cromer.

6 SUZANN CROMER, having been
7 first duly sworn, testified as follows:

8 MR. WHELCHEL: May we approach, Your Honor?

9 THE COURT: Yes.

10 (Bench conference held off the record in the presence
11 of the jury but out of the hearing of the jury.)

12 DIRECT EXAMINATION BY MR. BULSA

13 Q Ms. Cromer, please introduce yourself to the jury.

14 A My name is Suzann Cromer. I'm employed by the South
15 Carolina Law Enforcement Division as a firearm and toolmark
16 examiner.

17 Q How long have you been employed in that capacity?

18 A I have been with SLED, it'll be 11 years in December.
19 I've been in my current position about nine and a half
20 years.

21 Q Have you ever been declared an expert in firearm and
22 toolmark examination?

23 A Yes, sir, 28 times.

24 MR. BULSA: Any challenge to her qualifications?

25 MR. WHELCHEL: No, sir.

Suzann Cromer
Direct examination by Mr. Bulsa

1 MR. BULSA: Your Honor, we would offer her as an
2 expert.

3 THE COURT: In what?

4 MR. BULSA: Firearms -- and I just said it and lost
5 it -- toolmark examination.

6 THE COURT: No objection?

7 MR. WHELCHEL: No, sir.

8 THE COURT: She is so qualified.

9 Q Agent Cromer, is it part of your duties to examine
10 bullets and rounds sent to you from law enforcement
11 divisions?

12 A Yes, sir, it is.

13 Q In this case did you receive a couple of items from
14 the Spartanburg Public Safety Department?

15 A I received two items. Actually one of the items was
16 two pieces. So I received three different items.

17 Q Were they actually submitted as two items?

18 A Yes, sir.

19 MR. BULSA: I would like to have this marked for
20 identification.

21 (Bullet jacket and fragment marked State's Exhibit No.
22 15 for Identification.)

23 Q Agent Cromer, I'm going to show you what's been marked
24 State's Exhibit 15 for Identification. Examine the
25 contents of that envelope.

Suzann Cromer
Direct examination by Mr. Bulsa

1 A Yes, sir. This is what I received as my item three,
2 which are the two pieces still in an envelope sealed with
3 my initials and my seal date.

4 This was what I received as my item No. 4, and it's
5 still in an envelope sealed with my seal date and my
6 initials.

7 Q And did you actually receive those packets from those
8 other envelopes?

9 A Yes, sir. They also contain my lab number and my item
10 number and my initials on each envelope.

11 Q Okay. We'll just call it all State's 15. Let's do it
12 this way. Let's do it State's 15-A and B if that'll be
13 okay with you.

14 A Yes, sir. That's fine.

15 Q And which goes with which?

16 A "A" would be my item No. 3 and "B" would be my item
17 No. 4.

18 Q I'll give this back to you. Start with 15-A. First
19 of all, I guess I should put all of these into evidence.
20 Without objection?

21 MR. WHELCHEL: No.

22 (Bullet jacket marked State's Exhibit No. 15-A;
23 fragment marked State's Exhibit No. 15-B.)

24 Q Let's start with item 15-A. Where was that collected
25 from as indicated on the package?

Suzann Cromer
Direct examination by Mr. Bulsa

1 A It's indicated on the package that this was received
2 from autopsy of Jerry De La Rosa.

3 Q Okay. 15-B. That as well?

4 A It was collected from driver's door of a Dodge truck.

5 Q And what were you actually testing for?

6 A What I do when I receive ammunition components is
7 first I look at them. I clean them, especially if they're
8 from autopsy. And then I measure them. I weigh them. And
9 I determine their caliber and if they're suitable for
10 identification back to a specific firearm.

11 If I do not have a specific firearm, what I aim to do
12 is give the investigator a list of possible firearms that
13 could have fired this bullet.

14 In this case I started with item No. 3. I measured
15 it; I weighed it. As you can tell, I have two pieces. One
16 is a fired copper bullet jacket and one is a lead core
17 fragment.

18 My core fragment does not come in contact with the
19 inside of the gun barrel, so that will not have any
20 information for me to look at to determine it coming from a
21 specific firearm.

22 The jacket, after I've measured it and weighed it and
23 determined its caliber, what I do is called a general
24 rifling characteristics exam. General rifling
25 characteristics are made up of your caliber and your

Suzann Cromer
Direct examination by Mr. Bulsa

1 rifling.

2 Rifling is what's put in a gun barrel to put rotary
3 motion on the bullet. And it's made up of a series of
4 lands and grooves, raised and depressed areas. And why
5 it's there is very similar to a quarterback throwing a
6 football. They want to put it into a tight spiral so it
7 doesn't lob end over end going to its target.

8 Well, that's what the rifling in a gun barrel does.
9 It puts a spiral on the bullet so it'll go more accurately
10 to its target.

11 Like I said, it's made up of lands and grooves. You
12 can have four; you can have five; you can have six.
13 There's many different combinations.

14 And then also you have twists which determines which
15 way it's going to spin, left or right. I determined that
16 this jacket had six lands and grooves with a right twist.
17 Then I measure the widths of each land and groove. And I
18 put that information into a database. And it gives me a
19 list of possible firearms that could have fired this, this
20 bullet.

21 Q And in this case you did not receive a firearm to test
22 this against.

23 A That is correct.

24 Q If you had would you have matched this bullet to a
25 firearm?

Suzann Cromer
Direct examination by Mr. Bulsa

1 A I may or may not have been able to. This bullet has
2 damage and it has limited striations. That's what we use.
3 It's kind of like scratches when you look through a
4 microscope. And that's what we use for our identification
5 purposes. It may or may not have been suitable for
6 identification.

7 Q Any idea how the pieces got separated?

8 A This was probably a jacketed hollow point or soft
9 point bullet which is designed to mushroom and open up once
10 it hits its target. And it's not uncommon for it to come
11 to pieces.

12 Q Once it hit the body it separated.

13 A Yes, sir. Most likely.

14 Q And what was the caliber of that round?

15 A I determined this to be either .38 Special or .357
16 Magnum.

17 Q What types of firearms shoot those kind of calibers?

18 A It's typically a revolver caliber.

19 Q Is that a handgun?

20 A Yes, sir. Revolvers like what you see in your Western
21 movies where it has the round thing, what we call a
22 cylinder that rotates around one firing mechanism.

23 Q And in your examination you identified a series or
24 just a number of possible firearms that could have fired
25 that. Brands, I guess it is.

Suzann Cromer
Direct examination by Mr. Bulsa

- 1 A Yes, sir. I gave -- I'm sorry -- 18 makes of possible
2 or makes or manufacturers of possible firearms that could
3 have fired this firearm, this bullet. I'm sorry.
- 4 Q And those are revolvers?
- 5 A Most of them. There are some derringers. A derringer
6 is a gun that just has a barrel and a firing mechanism, so
7 just the firing pen and the barrel.
- 8 Q That would be a single shot?
- 9 A There are some double shot derringers. There are some
10 single shots, double shots, and I have seen a 4-barrel
11 derringer before.
- 12 Q Are those uncommon?
- 13 A I have never seen a 4-barrel derringer in the .38
14 Special. I have seen a 2-barrel derringer in .38 Special.
- 15 Q Okay. So more likely than not a revolver fired this
16 round.
- 17 A Yes, sir.
- 18 Q How many rounds does a revolver hold typically?
- 19 A It depends on your make and model. In .38 Special it
20 can run from five up to seven.
- 21 Q How about a .357?
- 22 A Six. Well, anywhere from five to seven.
- 23 Q Both of them?
- 24 A Yes, sir.
- 25 Q And if you're -- how is a revolver fired?

Suzann Cromer
Direct examination by Mr. Bulsa

1 A A revolver, you load the cylinder like I talked about
2 before. The cylinder has the chambers in it, either five,
3 up to seven chambers where you put a cartridge, which a
4 cartridge is an unfired piece of ammunition. And it has
5 the long case and then the bullet sticking out of the top.

6 You load the cartridges in the cylinder, and you close
7 the cylinder. And you have a hammer.

8 Some of them are hammerless nowadays with
9 concealed-carry. But usually you cock the hammer and pull
10 the trigger for a single action, or you can just pull the
11 trigger and it will cock the hammer and fire.

12 Once you fire that cylinder will rotate to put the
13 next unfired round up against the firing mechanism.

14 Q How long would it take to fire off a full cylinder of
15 bullets?

16 A It depends on how quickly you can pull your trigger
17 finger in. So that depends on the person.

18 Q Just repeatedly doing it?

19 A If it's a double action -- sorry. Double action
20 revolvers, they do have a stouter trigger-pull, a little
21 bit heavier trigger-pull, usually in the ten plus pounds.

22 So if you think about it it's -- I think a gallon of
23 water is ten pounds. So it would be like pulling a gallon
24 of water with your finger.

25 Q Of course that doesn't take into account your

Suzann Cromer
Direct examination by Mr. Bulsa

1 adrenaline or anything that's flowing at the time.

2 A That's correct.

3 Q Could it be discharged rather quickly?

4 A Yes, sir.

5 Q And the revolver, does it eject the rounds or the
6 casings?

7 A No, sir. Those fired casings stay in that cylinder
8 until it's opened up and pushed out.

9 Q So if somebody fired a revolver and left without
10 emptying it, there would be no shell casing at the scene.

11 A That's correct.

12 Q Now, let's go to the second fragment. What can you
13 tell us about it?

14 A Well, it's also consistent with being a bullet core
15 fragment. And it had no markings of identification on it.
16 And due to its damaged nature I could not even determine
17 reliability -- reliably the caliber of it.

18 Q So obviously you couldn't match it to the firearm.

19 A That's correct.

20 Q Could you have matched it to the other round that you
21 received?

22 A No, sir, I couldn't.

23 Q So you can't even say that they were fired by the same
24 weapon.

25 A No, sir, I can't. Again, the core is usually

Suzann Cromer
Cross-examination by Mr. Whelchel

1 wrapped -- has this jacketed material around it. And the
2 jacketed material is what comes in contact with the inside
3 of the gun barrel. So the core fragment never touches
4 anything that would leave the markings on it that we would
5 need for identification.

6 Q Was that core similar to the core that you received in
7 the previous item?

8 A Yes, sir. They were both lead cores.

9 Q Thank you, ma'am. Answer any questions Mr. Whelchel
10 may have.

11 CROSS-EXAMINATION

12 BY MR. WHELCHER

13 Q You cannot match either of these items to a specific
14 weapon because you had no weapon.

15 A Yes, sir. I had no weapon to match them to.

16 Q Okay. And you can't even tell us if item three and
17 item four came from the same weapon.

18 A That's correct.

19 Q Okay. And what you can tell us that's -- is that
20 whatever these things were fired from, there's at least 18
21 different kinds of guns, maybe more --

22 A That's --

23 Q -- or different makers.

24 A That's correct.

25 Q That make these guns.

Suzann Cromer
Cross-examination by Mr. Whelchel

1 A Yes, sir.

2 Q And it's either a revolver or a derringer.

3 A That is correct.

4 Q Nothing else.

5 A There could be. There was one 12-gauge converter, but
6 in my 11 years at SLED I've never seen one.

7 Q I understand. And that's all you can tell us.

8 A That's all I can tell you.

9 Q Thank you, ma'am.

10 MR. BULSA: Thank you.

11 THE COURT: You may step down.

12 MR. BULSA: We ask that she be excused.

13 THE COURT: You may be.

14 (Whereupon, the witness was excused.)

15 THE COURT: Ladies and gentlemen, we are going to
16 break for lunch.

17 So I'll remind you of the caution I've given you
18 previously. No discussions about the case. Don't permit
19 yourselves to be exposed to any type of media coverage.
20 Don't conduct any investigation or do any research into any
21 issue.

22 Do have a good lunch, and please report to your jury
23 room at 2:30 this afternoon, 2:30 this afternoon.

24 (The following takes place outside the presence of the
25 jury.)

1 THE COURT: Court is in recess until 2:30.

2 (Whereupon, a recess was taken.)

3 THE COURT: All right. Are we ready for the jury?

4 MR. WHELCHEL: No, sir.

5 THE COURT: What do we have?

6 MR. WHELCHEL: Your Honor, the last witness that was
7 called by the state, I made an objection prior to her
8 testimony. And I wanted to put that on the record at this
9 time.

10 THE COURT: Well, when she testified you said you
11 didn't object.

12 MR. WHELCHEL: I was told that I was going to be able
13 to put it on the record outside the presence of the jury.

14 THE COURT: You can when you object, but you said you
15 did not object.

16 MR. WHELCHEL: All right.

17 THE COURT: Would you like to object to that testimony
18 in the presence of the jury?

19 MR. WHELCHEL: No, sir; no, sir. It doesn't need to
20 be in the presence of the jury. I was going to make my
21 argument outside of the presence of the jury.

22 THE COURT: I understand that. But ordinarily when
23 you object to something, you say you object rather than
24 saying I have no objection and then objecting to it when
25 the jury is not here. You can't do that.

1 MR. WHELCHEL: Your Honor had already ruled, and I was
2 putting it on the record.

3 THE COURT: And I told you you could do that, but you
4 can't tell the jury you don't object and then you object.

5 MR. WHELCHEL: That's fine, Your Honor.

6 THE COURT: Now, put on the record whatever you'd like
7 to put on the record.

8 All I'm saying is when the state offers something and
9 they ask you if you have an objection, if you do, you must
10 say you do. You can't say you don't and then tell me later
11 you do.

12 MR. WHELCHEL: I apologize to the Court. And I
13 thought the Court understood that I had an objection to
14 this.

15 THE COURT: I thought you did until you told us you
16 didn't. Would you like to state any objection that you
17 have?

18 MR. WHELCHEL: Yes, sir.

19 Your Honor, the state called Suzann Cromer as a
20 forensic scientist. She testified concerning the bullet
21 fragments that were taken.

22 I received from the solicitor's office the results of
23 that analysis on September the 4th at about 4:35 in the
24 afternoon.

25 And I informed the Court that I believed that the

1 evidence was not relevant. I also informed the Court that
2 it did not, was not provided to the defense timely under
3 Rule 5, and that was the basis for my objection.

4 THE COURT: All right. Mr. Bulsa.

5 MR. BULSA: Your Honor, discovery is an ongoing
6 process.

7 The state did not receive these reports until sometime
8 this summer. I don't have the actual date. But the date
9 on the report is June the 16th of 2009.

10 We thought we had forwarded them to defense counsel
11 when we received it. It was an oversight. Once we learned
12 we did not, we sent it immediately to him, faxed it to him.

13 It's my understanding he had gone to the city police
14 department and had actually seen the evidence and then seen
15 at the law enforcement division.

16 And he lodged no objection. In fact, he lodged no
17 objection until he asked to approach the bench just when I
18 called her as a witness.

19 THE COURT: All right. I understand the basis for the
20 objection is, number one, it's not relevant, and, number
21 two, it's not timely provided.

22 MR. WHELCHER: Yes, sir.

23 THE COURT: Are there any others?

24 MR. WHELCHER: No, sir.

25 THE COURT: All right. Well, the evidence is clearly

1 relevant.

2 State's Exhibit 15-A was the bullet, as I understand
3 it, the lead fragment, that was removed from the body which
4 I assume the pathologist will testify was the cause of
5 death. Perhaps he won't connect it up, but we'll see when
6 he testifies. So clearly the witness' examination of that
7 evidence is relevant.

8 State's Exhibit 15-B was a bullet taken from a truck
9 door which Mr. De Le Rosa testified occurred when his
10 brother was shot. And that bullet was removed from the
11 door and sent to SLED. And it was examined. And the
12 witness testified as to her examination of that bullet
13 fragment. So that clearly is relevant in the case since
14 there are two bullets that the state contends were fired at
15 the victim.

16 So far as the state's failure to provide the report
17 timely, as I understand it that was clearly an oversight.
18 It was provided on what date?

19 MR. BULSA: September the 4th is when it was faxed to
20 him.

21 THE COURT: September the 4th. And there was -- was
22 there any discussion with you and Mr. Whelchel about his
23 objecting to the admission of that evidence or the
24 untimeliness of it --

25 MR. BULSA: No, sir.

Dr. John David Wren
Direct examination by Mr. Bulsa

1 THE COURT: -- until today?

2 MR. BULSA: Yes, sir.

3 THE COURT: All right. The fact that the state has
4 failed to provide, assuming they did, failed to provide
5 that report timely results in no prejudice so far as I can
6 tell right now to the defendant, and therefore the motion
7 to exclude it based upon its untimeliness is denied.

8 All right. Anything else?

9 MR. WHELCHEL: No, sir.

10 MR. BULSA: Your Honor, I don't know if this is a
11 proper time, but I want to hand up the requests for charge
12 so Your Honor can be reviewing it. I provided a copy to
13 defense counsel.

14 THE COURT: All right. Bring the jury in, please.

15 (The following takes place in the presence of the
16 jury.)

17 THE COURT: Good afternoon, ladies and gentlemen.

18 We are going to continue with the state's presentation
19 of evidence.

20 MR. BULSA: Thank you, Your Honor. The state calls
21 Dr. David Wren.

22 DR. JOHN DAVID WREN, having
23 been first duly sworn, testified as follows:

24 DIRECT EXAMINATION BY MR. BULSA

25 Q Good afternoon, Dr. Wren. Would you please identify

Dr. John David Wren
Direct examination by Mr. Bulsa

1 yourself to the jury?

2 A My name is John David Wren.

3 Q What's your profession, sir?

4 A I'm a medical doctor with a specialty in pathology.

5 Q Do you work through Spartanburg Regional?

6 A I work at Spartanburg Regional. I work for Carolina's
7 Pathology Group.

8 Q And have you been qualified as an expert in forensic
9 pathology in the past?

10 A Yes.

11 Q Approximately how many times?

12 A Probably about 150.

13 MR. BULSA: Any challenge to Dr. Wren's credentials?

14 MR. WHELCHER: Your Honor, he's been doing this since
15 I was a solicitor. No challenge to Dr. Wren.

16 THE COURT: All right. He is qualified as a forensic
17 pathologist.

18 Q Dr. Wren, did you have an occasion to perform an
19 autopsy on Jerry De La Rosa?

20 A Yes. I performed an autopsy on an individual
21 identified as Jerry De La Rosa in the Spartanburg Regional
22 Hospital Autopsy Room on March the 29th of 2008 beginning
23 at approximately 12:20 p.m.

24 Q And based on the medical history provided to you did
25 he die in the emergency room?

Dr. John David Wren
Direct examination by Mr. Bulsa

1 A Yes.

2 Q And what was the purpose of your autopsy?

3 A Well, the purpose of a forensic autopsy is to
4 investigate the circumstances surrounding death and to
5 establish a cause of death and indirectly a manner of
6 death.

7 Q Had there been any attempts to save Mr. De Le Rosa's
8 life?

9 A Yes. He had been -- his chest had been opened during
10 resuscitation to try to attempt to stop the bleeding that
11 was going on internally.

12 Q Did you examine him for any other wounds?

13 A Yes. I do a complete external examination.

14 Q If you would, give that finding.

15 A The only external findings were those that were
16 associated with the resuscitation attempts, including
17 thoracotomy incisions and splitting of the sternum, which
18 is the chest plate, with some needle puncture marks that
19 were from establishing I. V. lines.

20 And then he had a gunshot wound to the left posterior
21 axilla, which is the armpit on the left side near what is
22 called the posterior axillary line, which is if you take
23 and draw imaginary lines vertically from the front and the
24 back of the armpit, that's the anterior and posterior
25 axillary line region. It was slightly anterior to the

Dr. John David Wren
Direct examination by Mr. Bulsa

1 axillary line posteriorly.

2 Q Would you come and show us on your body where the
3 wound was?

4 A Along in this area.

5 Q Did you recover a round from that wound?

6 A Yes. I recovered a copper jacket, which was up
7 against the chest plate anteriorly in the mediastinum which
8 is the tissues between the lungs and in front of the heart
9 and the great vessels and the tissues, the esophagus and
10 trachea.

11 And I recovered a copper, I mean, a lead fragment
12 which had separated from the copper jacket over a little
13 bit more laterally in the chest.

14 Q And, Dr. Wren, what did you do when you recovered
15 those items?

16 A I labeled those, the jacket portion with a, the No. 8,
17 Arabic No. 8, which is the last number of the autopsy,
18 because of space limitations. And then I use a delta to
19 identify that I did it, which is the Greek letter delta.
20 It's basically an equilateral, I mean a, yeah, equilateral
21 triangle everybody's familiar with. But it's easier to
22 make than it is a "D" or some other initial. And I
23 forwarded those to Officer Edgar V. Guthro of the
24 Spartanburg City Police Department who attended the
25 autopsy.

Dr. John David Wren
Direct examination by Mr. Bulsa

1 Q I show you State's Exhibit 15-A. Would those be the
2 items that you recovered?

3 A Is this sealed? On the container that I placed, I
4 usually place the bullets in, I labeled it myself with the
5 forensic number F-A08-078. And I put right chest there. I
6 signed it and dated it 3/29/08.

7 It consists of a copper jacket with visible lands and
8 grooves and a matching lead fragment. The base of this
9 jacket -- I can't see it very well here, but it should be
10 labeled with the Arabic No. 8 and the Greek letter delta as
11 I can see the outline of some of it, yes. This is
12 consistent with what I removed.

13 Q Okay. Now, Dr. Wren, what was the cause of death in
14 Mr. De Le Rosa?

15 A Well, as the bullet passed through his, through his
16 body, it hit the left upper lobe of the lung. As it was
17 progressing on further -- the main artery out of the heart
18 that goes to the lungs is called the pulmonary artery. It
19 grazed and lacerated that artery. And he essentially died
20 from internal hemorrhage from the gunshot wound to the
21 chest. I assigned the death as exsanguination, secondary
22 to the lacerated pulmonary artery, secondary to a gunshot
23 wound to the chest.

24 Q What is exsanguination?

25 A Pardon me?

Dr. John David Wren
Cross-examination by Mr. Whelchel

1 Q What is exsanguination?

2 A Bled to death, bleeding.

3 Q Thank you, Doctor. Answer any questions Mr. Whelchel
4 may have.

5 CROSS-EXAMINATION

6 BY MR. WHELCHER

7 Q Dr. Wren, I'm looking in your report page four,
8 please.

9 A Okay.

10 Q Down at the very bottom your report indicates that
11 your autopsy revealed a single apparent distant medium
12 caliber gunshot wound.

13 A Yes.

14 Q Okay. How far is distant?

15 A Well, gunshot wounds are classified as contact. And
16 that's either tight contact or loose contact when the
17 barrel is up against the skin, whether it's either pushed
18 against it or just resting against it.

19 Then the next range is intermediate, which depends on
20 examination of the body. If you have a light colored
21 object where the bullet is fired through as the gases and
22 unburned or burning particles of powder and the soot exits
23 the barrel, it will either tattoo the skin or the object or
24 soot will be deposited, depending on the caliber and the
25 ammunition.

John Sainvil
Direct examination by Mr. Bulsa

1 Up -- with a handgun up until about ten inches one can
2 tell and compare the pattern left by that deposition with
3 firing a weapon of interest, one can tell about how far it
4 was. But once it reaches that place where nothing's left,
5 it's considered distant.

6 So basically distant can be any distance from eight to
7 ten inches in a handgun, up to ever how far the bullet will
8 travel. So it was greater than 12 inches and could be
9 hundreds of feet, I guess.

10 Q I understand. And you don't have anything in there
11 that shows you who fired that.

12 A Pardon?

13 Q You don't have anything in there that tells you who
14 fired the shot obviously.

15 A No.

16 Q Thank you, sir.

17 MR. BULSA: We have nothing further and ask that he be
18 excused.

19 THE COURT: He may.

20 (Whereupon, the witness was excused.)

21 MR. BULSA: The state calls John Sainvil.

22 JOHN SAINVIL, having been
23 first duly sworn, testified as follows:

24 DIRECT EXAMINATION BY MR. BULSA

25 Q Mr. Sainvil, introduce yourself to the jury, please.

John Sainvil
Direct examination by Mr. Bulsa

- 1 A My name is John Cliff Sainvil.
- 2 Q Make sure you speak up so we can hear you.
- 3 A Yes, sir.
- 4 Q How old are you, sir?
- 5 A Thirty.
- 6 Q Where do you live?
- 7 A , or actually .
- 8 Q Is that in Spartanburg?
- 9 A Yes, sir.
- 10 Q What do you call your hair style?
- 11 A I just -- ain't no hair style. Just like plat, I
- 12 guess.
- 13 Q Plat?
- 14 A Yes, sir.
- 15 Q Okay. Some people call it dreadlocks?
- 16 A No. That's not dreadlocks. That's plat, just like
- 17 two hair, you just put it together. That's a plat.
- 18 Q Do you normally wear a rag on top of it?
- 19 A Yeah. Sometimes I do. I been -- I mean, every time,
- 20 yes, sir.
- 21 Q I made you take it off for court?
- 22 A Yes, sir, you did.
- 23 Q And did some of the hair stick out from the do-rag?
- 24 A Yes, sir, from the back, yes, sir, from the back.
- 25 Q Okay. How do you know Mr. Smith?

John Sainvil
Direct examination by Mr. Bulsa

1 A I know Mr. Smith through Demetrius Reed -- Demetrius
2 Reed. I used to go with Demetrius' cousin back in 2002 to
3 2003, I used to go Demetrius' cousin and then I used to
4 work at that --

5 THE COURT: Excuse me just a minute.

6 You're going to have to repeat that because I can't
7 understand it and the court reporter can't understand it,
8 and perhaps some of the jurors cannot understand your last
9 response.

10 THE WITNESS: Yes, sir.

11 THE COURT: So tell us again how you know the
12 defendant.

13 A I meet, I meet, I meet Mr. Smith through Demetrius
14 Reed.

15 Q Demetrius Reed.

16 A Yes, sir.

17 Q That's the name you're saying.

18 A Yes, sir. That's how I meet him through. That's how
19 I know him, from Demetrius.

20 Q Okay. Now, what is your accent? What's your
21 nationality?

22 A I'm Haitian and French, took me. My parents, my
23 parents mixed. I'm Haitian, French, Cuban.

24 Q Haitian, French, Cuban?

25 A Yes, sir.

John Sainvil
Direct examination by Mr. Bulsa

- 1 Q I thought it was Jamaican.
- 2 A Na.
- 3 Q No?
- 4 A No, sir.
- 5 Q Were you born in the United States?
- 6 A Na.
- 7 Q No?
- 8 A No, sir.
- 9 Q Do you know when you moved to the United States?
- 10 A No, sir.
- 11 Q How long have you been here approximately?
- 12 A I mean, in South Carolina about like over like ten
- 13 years in South Carolina.
- 14 Q Because your accent is kind of hard to understand.
- 15 That's why we need for you to speak slowly and clearly.
- 16 Okay?
- 17 A Yes, sir.
- 18 Q How long would you say you have known Mr. Smith?
- 19 A Probably two or three months.
- 20 Q Two or three months prior to this happening?
- 21 A Yes, sir. Excuse me, sir?
- 22 Q Prior to this incident happening.
- 23 A Yeah, before the incident's happened, yes, sir.
- 24 Q Okay. And do you know somebody named Shorty?
- 25 A Yes, sir.

John Sainvil
Direct examination by Mr. Bulsa

1 Q And did you meet Mr. Ruiz --

2 A Yes, sir.

3 Q -- through Shorty?

4 A Yes, sir. I, I, I meet them through this guy named
5 Tommy Crowe and D. L. Crowe. And D. L. Crowe is a guy that
6 live at Una. He used to live in Una. Now he passed. He
7 had a trailer. Like every weekend he got friends coming
8 over. They be out there doing whatever they do like
9 smoking and drinking.

10 And I was staying with Tommy because I was helping
11 Tommy like do some work because Tommy got a whole lot of
12 land. He give me a trailer. I clean his yard for him.
13 And he actually paid me. And I was working in the
14 courtyard earning self, side, Mr. Tommy, because I was
15 trying to rent a trailer from him.

16 Q That's good right there.

17 A Yes, sir.

18 Q Now, how was it that you came to be with Mr. Smith at
19 this store where this shooting happened?

20 A You say along?

21 Q How was it that you came to be with him?

22 A Before the shooting, Santos, he had called. D. L. had
23 the cell phone number, the cell phone number that's
24 everybody every weekend they call him and tell them they
25 come over.

John Sainvil
Direct examination by Mr. Bulsa

1 And Santos had came down to D. L.'s house, I guess,
2 about some smoke or do whatever it is or whatever. I think
3 some crack, crack cocaine. And Santos tell that lady
4 Shorty that he had a gun for sale. Well, he said Shorty,
5 he had a gun for sale.

6 And Mr. Smith was there and I wasn't there. So when I
7 came back, I was gone with Tommy at the time. When I get
8 back, and then Santos told Shorty that I don't want him to
9 come to my house, I know he, like he talking about he know
10 me, he don't want him to come to his house, he want me to
11 show him where they stay but he don't want him to come to
12 the house because he don't know him.

13 So he asked me can I take him and I can show him the
14 way down there. I said okay, I take you. So Santos called
15 back and said that give me the direction how to get to the
16 house. So he was driving. So at the time that we get
17 down --

18 Q Let me stop you there.

19 A Yes, sir.

20 Q You tell me the night before this happened you and
21 Mr. Smith went to Santos' house.

22 A Yes, sir, because Santos was trying to sell him a gun.

23 Q And how were you getting there?

24 A You say how we getting to his house?

25 Q Whose car?

John Sainvil
Direct examination by Mr. Bulsa

- 1 A I was driving -- it was in my baby's mama's car.
- 2 Q Baby's mama's car.
- 3 A Yes, sir.
- 4 Q Is that the Honda?
- 5 A Yes, sir, the Honda.
- 6 Q And that's the Honda we saw?
- 7 A In the picture, yes, sir.
- 8 Q And do you drive that Honda?
- 9 A No, sir. He did.
- 10 Q Okay. Why don't you drive it if it is your --
- 11 A I don't have, I don't have a license, sir. I got, I
- 12 got out of work. Demetrius would take me to work, or
- 13 sometimes he would take me to work.
- 14 Q And they would use your baby's mama's car?
- 15 A Yeah. They use my baby's mama's car. And sometimes
- 16 we go out to the club together cause all of us's ain't got
- 17 together like on weekends. When I call I say we going to
- 18 Club Hush by tomorrow, we'll go to the Hush, go to Hush
- 19 together.
- 20 Q What is your baby's mama's name?
- 21 A Shonta Kelly.
- 22 Q Shonta Kelly.
- 23 A Yes, sir.
- 24 Q And that's her car. And she let's people take you to
- 25 work in it.

John Sainvil
Direct examination by Mr. Bulsa

1 A Yes, sir, because I ain't got no license. I don't
2 have any license.

3 Q Would she let you use it at other times?

4 A Yeah. We use it all the time, because like she said I
5 got a driver with a license that you can use it, because
6 she was pregnant at the time. I was the only one working.

7 Q Okay. So the night before this happened you and
8 Mr. Smith went over to Santos' house?

9 A Yes, sir.

10 Q All right. And what do you recall happening?

11 A Okay. We went to Santos' house. And I told Santos
12 had got outside, wanted to buy the gun. And Santos tell me
13 come in. So when I came in and he showed me everything
14 that he had, he had like big guns, blue pool (sic) vests
15 and some more guns. So he said that's what I'm trying to
16 sell, I'm trying to say it's fully fired. So I said okay.
17 So I said the guy outside. He said okay, tell him come in.
18 So he went in. When he went --

19 THE COURT: Excuse me just a minute.

20 We're having a hard time hearing you. You know, the
21 court reporter is behind you, so don't turn your back to
22 her.

23 THE WITNESS: No, sir. Not see.

24 THE COURT: Mr. Bulsa, you come out. If you want to
25 use that podium, if you'll come out here, and that way he

John Sainvil
Direct examination by Mr. Bulsa

1 can look toward you and won't turn his back to the court
2 reporter.

3 THE WITNESS: Yes, sir.

4 THE COURT: Use the microphone too, please.

5 THE WITNESS: Yes, sir.

6 A So we went in. When he went in he saw that gun that
7 Santos was trying, so, so I said he gets onto their money.
8 And we went back outside to the car. Before they, we, he
9 left the yard he tried the gun. And when he tried the gun
10 and he clicked it, and I think someone with a trigger, so
11 we --

12 Q Let me stop you there.

13 A Yes, sir.

14 Q And make sure the jury is following you.

15 A Yes, sir.

16 Q You went in. And then you called Mr. Smith then.

17 A Call him so he can see that gun.

18 Q And money was traded for the gun.

19 A Yes, sir.

20 Q Did y'all go outside?

21 A Yes, sir.

22 Q And Mr. Smith is trying to use the gun.

23 A Yes, sir, because he pay, he pay him for that gun.

24 And then we went outside and tried the gun. And when it
25 clicked that trigger, something was wrong with that

John Sainvil
Direct examination by Mr. Bulsa

1 trigger. So he got mad. He said he wanted his money back.
2 So that's when he went back. So I went back and knocked on
3 the door. And Santos, and he said he wanted his money back
4 because the gun don't work. So Santos didn't want to open
5 the door back. So that's when he get out of the car and
6 stop pushing. Santos stopped pushing the door back and --

7 THE COURT: All right. You have got to slow down.

8 THE WITNESS: Yes, sir.

9 THE COURT: Repeat your answer slowly.

10 THE WITNESS: Yes, sir.

11 A So Santos, well, he was trying to push door in. And
12 Santos trying to pushed the door back and don't want him
13 came in. So and then he told me that night. He was real
14 upset that night. He told me that he going to come back in
15 and shoot up place. I said, na, don't do that. So we
16 left. And he dropped me off. After he dropped me off --

17 Q He dropped you off where?

18 A Yes, sir. He dropped me off at home.

19 Q Did he keep the car?

20 A Yes, sir.

21 Q What was he to do with the car?

22 A Because he keep that car and he go. He was talking to
23 a lady stay U. S. C. S. college, U. S. college. He went
24 the dorm, he went down to her place.

25 Q So he didn't take it back to Ms. Kelly?

John Sainvil
Direct examination by Mr. Bulsa

1 A Excuse me, sir?

2 Q He didn't take the car to Ms. Kelly?

3 A No, because he said he was coming back, said he had to
4 go do something. And then he left. He went and spent the
5 night with that girl. And they came back, said, next, next
6 morning.

7 Q Okay. So he would go off in that car and keep it
8 overnight?

9 A Yeah, yes, sir; yes, sir.

10 Q So how did this meeting get set up for the next day?

11 A Okay. The next day before the incident happened the,
12 he got mad for the, for the fact that gun. And then Santos
13 called the cell phone, D. L. cell phone that we had. And
14 then Santos said I get paid tomorrow, if you tell him bring
15 the gun back to me and I'm going to give him his money
16 back. So Santos fire can't see in (inaudible) --

17 Q The court reporter is having a little difficulty.

18 THE COURT: Mr. Sainvil --

19 THE WITNESS: Yes, sir.

20 THE COURT: -- I realize that you don't ordinarily
21 speak slowly.

22 THE WITNESS: Yes, sir.

23 THE COURT: Just based on your nationality and your
24 language, but you have to speak slowly --

25 THE WITNESS: Yes, sir.

John Sainvil
Direct examination by Mr. Bulsa

1 THE COURT: -- so everyone can understand it.

2 THE WITNESS: Yes, sir.

3 THE COURT: Speak slowly like I'm speaking right now.

4 THE WITNESS: Yes, sir.

5 A So Santos --

6 Q Five o'clock.

7 A (Inaudible) for 5:00 o'clock, yes, sir. Santos called
8 said that he get, if he buy, guy, so he wanted us to meet
9 him, he wanted his gun back. So at the time he was at the
10 barber shop getting his hair trimmed up like, came, because
11 it was like Friday night. And we say was going out to the
12 club. And then Santos called around about like 5:00, 5:00,
13 about like 4:00 something going to 5:00 o'clock. And, and
14 Santos asked. We said where y'all at. I said he at barber
15 shop getting his hair trimmed up. So (inaudible) going to
16 meet us at Biggerstaff.

17 Q He was at the barber getting his hair --

18 A He was at the barber.

19 Q Right.

20 A Yes, sir.

21 Q And you told Santos to meet at Biggerstaff's.

22 A Yes, sir.

23 Q And did y'all go meet at Biggerstaff's?

24 A Yes, sir. So while, we tried Biggerstaff, so he was
25 at people in front of him. So we had to wait for whoever

John Sainvil
Direct examination by Mr. Bulsa

1 was in front of him get their hair cut first and then --

2 Q The barber shop took longer than he expected?

3 A Yes, sir, really.

4 Q Okay. Then did you then go to Biggerstaff's?

5 A Santos called back. If you look in phone, Santos
6 called back and said (inaudible) --

7 THE COURT REPORTER: I cannot understand him.

8 THE COURT: Let me do this. Let me ask the jury if
9 you'll please go to your jury room for just a moment. And
10 I'll bring you back shortly.

11 (The following takes place outside the presence of the
12 jury.)

13 THE COURT: Mr. Sainvil, we clearly have a language
14 barrier here. But you are going to have to slow your
15 speech down --

16 THE WITNESS: Yes, sir.

17 THE COURT: -- so that we can understand what you have
18 to say.

19 THE WITNESS: Yes, sir.

20 THE COURT: You see, the jury is trying to understand
21 your testimony.

22 THE WITNESS: Yes, sir.

23 THE COURT: And if you don't slow down, they can't
24 understand it.

25 THE WITNESS: Yes, sir.

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1 THE COURT: And if they can't understand it, then
2 there's no point in you even being on the witness stand.

3 THE WITNESS: Yes, sir.

4 THE COURT: Now, if you will try simply to answer the
5 question as simply as you can rather than, you know, adding
6 a lot of extra information --

7 THE WITNESS: Yes, sir.

8 THE COURT: If you'll just answer the question, in
9 other words, I think the last question was -- well, what
10 was the last question? You said if he went to Biggerstaff
11 Grocery, and he talked about telephone records and
12 everything else.

13 THE COURT REPORTER: "Then did you then go to
14 Biggerstaff's?"

15 THE COURT: What was it?

16 THE COURT REPORTER: "Then did you then go to
17 Biggerstaff's?"

18 THE COURT: Yeah. Then did you go to the Biggerstaff
19 Grocery. That was the question. And you started talking
20 about telephone records and everything. Well, that's not
21 in response to that question.

22 Did you go to the Biggerstaff Grocery? Yes or no.

23 THE WITNESS: Yes, sir.

24 THE COURT: I mean, that's pretty simple.

25 So if you'll just try to answer the question that's

John Sainvil
Direct examination by Mr. Bulsa

1 asked, I'm sure that the solicitor knows what information
2 you have.

3 THE WITNESS: Yes, sir.

4 THE COURT: And at some point he's going to ask you a
5 question to get whatever information he thinks this jury
6 needs.

7 So you don't have to volunteer it all in response to
8 one simple question --

9 THE WITNESS: Yes, sir; yes, sir.

10 THE COURT: -- like did you go to Biggerstaff Grocery.

11 THE WITNESS: Yes, sir.

12 THE COURT: Just answer that question yes or no,
13 whichever it is.

14 THE WITNESS: Yes, sir.

15 THE COURT: But you've got to slow down.

16 THE WITNESS: Yes, sir.

17 THE COURT: I realize that's not your normal speech
18 pattern, but you've got to be very slow and deliberate or
19 we're going to have to stop every five seconds to rehash
20 the question.

21 THE WITNESS: Yes, sir. I will.

22 THE COURT: Okay. Bring the jury pack, please.

23 (The following takes place in the presence of the
24 jury.)

25 THE COURT: All right. Mr. Bulsa, I think we were at

John Sainvil
Direct examination by Mr. Bulsa

1 the point where you asked him if he had gone to the
2 Biggerstaff grocery store.

3 MR. BULSA: Yes, sir.

4 BY MR. BULSA

5 Q Did you actually make it to the Biggerstaff store?

6 A No, sir.

7 Q Where did you wind up going?

8 A Li'L Cricket.

9 Q Is that the corner store that we saw in the video --

10 A Yes, sir.

11 Q -- and on the photograph?

12 A Yes, sir.

13 Q And where did -- who was driving the vehicle at that
14 time?

15 A He was, Mr. Smith was.

16 THE COURT: When you say he, you mean --

17 THE WITNESS: Mr., Mr. Smith was driving.

18 Q Just like he always drives it when you're with him.

19 A Yes, sir.

20 MR. WHELCHEL: Objection. Leading.

21 THE COURT: Sustained.

22 Q Does he always drive it when you're with him?

23 A Yes, sir.

24 Q Was anybody else with you in the car?

25 A No, sir.

John Sainvil
Direct examination by Mr. Bulsa

1 Q Do you remember if the truck was already there when
2 you arrived?

3 A Yes, sir. The truck was already there.

4 Q And where were you? So you were in the front
5 passenger seat?

6 A Yes, sir, I was in the front passenger seat.

7 Q How were you dressed, sir?

8 A At the time I had a long pair of pants on and a white,
9 white, white beat (sic) on.

10 Q Did you have a black shirt on too?

11 A No, sir.

12 Q What color? Did you have your do-rag on?

13 A Yes, sir. My do-rag was black, and my hair was
14 hanging from the back.

15 Q Okay. Now, this is going to be an open-ended
16 question. Tell us the answer slowly. Okay?

17 A Yes, sir.

18 Q What happened when y'all pulled into the parking space
19 there at the store?

20 A When we pulled in, when I, when we, we pulled in the
21 parking space the truck was already there on the corner.
22 And Santos walk over to the car. He was like three on in
23 the truck. And two get out of that car, and one still stay
24 in the car.

25 So Santos came to my side. His brother was in the

John Sainvil
Direct examination by Mr. Bulsa

1 side. So my, their, their window was up at the time. So
2 after he put the window -- the car was still running at the
3 time. So when we pull up I pull my window down so I can
4 talk to Santos because he say --

5 Q Let me stop you there.

6 A Yes, sir.

7 Q Had the truck moved in behind you?

8 A Yes, sir. That's after that. Santos was already out.
9 Santos and his brother was already out. Brother was on
10 their side and Santos was on my side. And Santos asked for
11 the gun when I pulled my window down. And he told Santos
12 that he didn't have gun. So Santos said something in
13 Spanish to his brother. So they turned the truck around
14 and block us in.

15 Q And then what happened?

16 A And then when he block us in he asked for the gun.
17 And then Mr. Smith just said we ain't got the gun, you're
18 going to have to fight us or run. So Santos wasn't really
19 mad, he was mad because the incident happened that night
20 like he was say, because I can see to his face. That's
21 what we all said. So when he asked for the gun again,
22 Mr. Smith said you're going to have to fight us. So he
23 asked me can he get back in our car, in their car that was
24 running. I said, na, you need to get back into your car.

25 Q Okay. And then what happened?

John Sainvil
Direct examination by Mr. Bulsa

1 A So when I said that Santos got upset because my window
2 was half way down. And his brother was on this side. And
3 his window was up.

4 MR. WHELCHEL: Your Honor, I'm sorry. But I missed
5 the first part of that. I don't understand it at all.

6 THE COURT: Repeat it, please.

7 Q I can't remember where you were. Let's see. The
8 window was down. And what was going on?

9 A My window was --

10 Q Window was up. And what happened?

11 A His window was up; his window was up; his window was
12 up; Mr. Smith's window was up. My window was down. I was
13 talking to Santos. And Santos brother was in Mr. Smith's
14 side.

15 So Mr. Smith, Mr. Smith latched his door. That's when
16 he saw them get out of their car. He latched his door. So
17 I was talking to Mr. Santos, I mean, Santos on the corner,
18 I mean, right there. My window was half way down.

19 So Santos asked him where is that gun at. Told Santos
20 that the gun, he ain't got that gun and going had it.
21 Santos going to fight on him to his. His girlfriend was
22 stay in Una, got to follow him to Una to go get that gun.

23 So I guess Santos think he was trying to play game
24 with him. So Santos got real upset. And Santos brother
25 say I want my gun back, I want my gun back, because that's

John Sainvil
Direct examination by Mr. Bulsa

1 my gun, I want my gun back.

2 Q Let me ask you this. How many men were with
3 Mr. Santos?

4 A Three. It was three of them.

5 Q Did you take all three -- did you understand the other
6 two to be his brothers?

7 A No, sir, because the other one was doing. The one on
8 Mr. Smith's side was doing with that black stuff in his
9 hand. He had like I guess arm was broke. All I know he
10 had had some black stuff in his hand.

11 Q Okay. And did you see that?

12 A Yes, sir, I saw because that's the one hit us from the
13 sunroof.

14 Q Okay. How did the fighting get started?

15 A Because his brother wanted that gun back. And when he
16 keep asking him for that gun he don't want to give him that
17 gun back.

18 So Santos said, said lapistol, lapistol, lapistol like
19 he was. I don't understand what lapistol mean, but I know
20 whatever, whatever stuff he was saying. So he was real
21 upset.

22 So his brother stopped swinging at us because their,
23 his car door was locked, because his car door was locked,
24 because it's locked his car door. And I seen that dude
25 came around. Mr. Santos' brother come around and he locked

John Sainvil

Direct examination by Mr. Bulsa

1 his car door. But my window was already half way down.

2 So when they started hitting us from the sunroof, so
3 I'm trying to move back. And that's where Santos hit me in
4 my eye. He throw a punch at me in my eye. So I opened my
5 car door fixing to go outside, fixing to fight him.

6 And that's when his brother was in the other truck
7 came out with a gun. I said he got that gun in the hand.
8 So I jumped back in the car. When I jumped back in the
9 car, so I ain't had no time, left my door. That's when
10 Santos started kicking, trying to kick it in. And I heard
11 the bullets so I'm trying to fight him back, push him out
12 feet, like trying to fight him back.

13 Q Wait a minute. Is the door open while this is going
14 on?

15 A Yes, sir, my door was opened.

16 Q Your door is opened and you're in your seat trying to
17 push him with your feet.

18 A Yes, sir, because I open, I opened my door trying to
19 fight him, and I say he punched me in my eye because my
20 window wasn't half way down.

21 Q Okay. And you saw this stick, didn't you?

22 A Yes, sir.

23 Q And are you familiar with it?

24 A Yes, sir.

25 Q Whose is it?

John Sainvil
Direct examination by Mr. Bulsa

- 1 A It is my baby-mama.
- 2 Q Ms. Kelly?
- 3 A Yes, sir.
- 4 Q What is she doing with this?
- 5 A Sometimes she chase me with it.
- 6 Q Sometimes she what?
- 7 A Chase me with it.
- 8 Q Hit you with it?
- 9 A Yeah.
- 10 Q Okay. Did she keep it in the car?
- 11 A Yeah, she keep it in the car.
- 12 Q Did you ever see Mr. Smith with that stick?
- 13 A Na, not, not, not that time the incidence happened.
- 14 Q You did not see it?
- 15 A No, sir.
- 16 Q Where is it usually kept in the car?
- 17 A It was in the back seat. She always put it in the
- 18 back seat, or sometimes it be under her driver's seat,
- 19 sometimes.
- 20 Q Now, you're being assaulted first through the sunroof.
- 21 A Yes, sir.
- 22 Q And you try to get out to fight. You're not able to,
- 23 and you're assaulted through the door.
- 24 A Yes, sir. Santos, Santos hit me in the eye. That's
- 25 when I opened my car door to go outside to fight him. And

John Sainvil

Direct examination by Mr. Bulsa

1 when I see the other guy came out the car with a gun, I see
2 the gun in his hand. So I jump back in the car. When I
3 jump back in the car I didn't have no time left my door, so
4 my door was still open. And Santos stopped kicking from
5 inside. So the other guy still punching us from, from the
6 sunroof because the sunroof was open.

7 Q Okay. Now, who, who had the gun?

8 A The driver.

9 Q The driver --

10 A Yes, sir.

11 Q -- of that truck?

12 A Yes, sir.

13 Q Okay. And what was he doing with it?

14 A He didn't do nothing with it because he was across the
15 street. It was like around 5:00 o'clock. Across the
16 street was people. It was people across the street. And
17 nobody was in the gas station. He was, he wasn't people
18 inside while he was buying stuff, inside, but everybody
19 else was across the street.

20 Q Okay. So but he, so he had it in his hand but didn't
21 do anything with it.

22 A He didn't do nothing with it because too many people
23 was outside cross the street.

24 Q What caused him to stop beating you up and leave?

25 A His brother, Santos' brother, came around to my side

John Sainvil
Direct examination by Mr. Bulsa

1 because ~~they can~~ get it. They can't hit him because the
2 only thing they can do hit from the center, or so Santos'
3 brother came around on my side. They trying to drag me out
4 the car. And Santos trying to reach at him while he was in
5 driver's side. So I'm pushing Santos back with my foot.
6 So they trying to take all or drag me out the car. That's
7 when my boots came off. When my boots came off, then they
8 ran. When they ran, so my car door was already open. So I
9 took off running because I knew that guy had a gun. So I
10 ran in front of the store.

11 Q Okay. So you kicked, your boots came off, they --

12 A Yeah, they, they pulled, they take my boots off, but
13 they was trying to drag me out, yes, sir.

14 Q Did they then go back to the truck?

15 A Yeah. They ran.

16 Q They ran?

17 A Yeah. The reason why I see they ran because Santos
18 was saying like lapistol. Like I think he fixing to get
19 that gun and come back. So I ran. My car door was already
20 open. So I just ran up from the gas station.

21 Q So that gave you a chance to get away?

22 A Yes, because they was running to, to their car,
23 because.

24 Q And where did you run to?

25 A I ran up from the gas station.

John Sainvil
Direct examination by Mr. Bulsa

1 Q In front of the gas station?

2 A Yes, sir.

3 Q How far did you run?

4 A I ran like they had, they had like some place outside

5 like loose paper. It was in, it was in the left side on

6 the corner. So I ran right there. I ducked down. I ran

7 out there because I figured they was like come back and try

8 to shoot at me, something.

9 Q I just created some more noise in this courtroom, so
10 you're going to have to make sure you speak up.

11 A Yes, sir.

12 Q I want to show this to you real quick. Did you have a
13 gun or pistol on you?

14 A No, sir.

15 Q Did Mr. Smith?

16 A I don't know if he, I mean, he didn't tell me that he
17 carried on him, and he didn't tell me that he had the gun
18 on him, but that day, yes, he had.

19 Q And how do you know that he had one?

20 A Because after the incidence when Santos Senior ran to
21 the car and I heard the gunshot, gunshot, boom, boom, boom,
22 boom, I heard the gunshot. When I heard the gunshot, so I
23 ducked down. When I looked back, and that's when I seen
24 them fussing at them. He was fussing at them.

25 Q What kind of gun did he have?

John Sainvil
Direct examination by Mr. Bulsa

1 A A .38.

2 Q What did he do with it?

3 A I don't know what he did with it.

4 Q Did you get back in the car with him to leave?

5 A Because he talking about, he say, come on, come on,
6 get in, get in, come on, let's go, let's go, let's go. So
7 I ran back in the car. I ran back in the car, getting in
8 car, and then we left.

9 Q You got back in on the passenger side?

10 A Yes, sir.

11 Q Does this show the side of the building y'all were
12 parked on?

13 A Yes, sir.

14 MR. BULSA: For the record, I'm referencing State's
15 Exhibit No. 3.

16 Q And is this the direction you ran to?

17 A Yes, sir, that was, that was, yes, sir.

18 Q And do you know how far away you got from the store?

19 A If you, if you look under corner, that side right
20 there where I, I don't know if there's a tree back there on
21 the left side, so I was hiding right there in the corner
22 just in case they was shooting so I won't get hit. So I
23 was like --

24 Q Did you get all the way around the building side?

25 A No, sir. I was right there in front, maybe about like

John Sainvil

Direct examination by Mr. Bulsa

1 two or more parking spaces where the cars park at.

2 Q Okay. All right. I'm going to turn this off. I
3 think we can do it without this. This is a little
4 distraction to me.

5 So he tells you to come on and get back in the car.
6 And you do.

7 A Yes, sir, we, I, yeah.

8 Q And where do you go?

9 A I went to Una to Ms. Tammy McCravy house.

10 Q And how did you get there?

11 A He dropped me off. Me dropped me off and --

12 Q Mr. Smith dropped you off?

13 A Yes, sir. He dropped me off, and then he went home to
14 his girlfriend's house.

15 Q Did you see him again?

16 A I saw him around about like maybe 15 or 20 minutes
17 later.

18 Q Okay. Was he still in the car?

19 A Yes, he was still, yes, sir.

20 Q This was one of those times where he dropped you off
21 but kept the car.

22 A Yes, sir.

23 Q Okay. Did you and he talk about what had just
24 happened?

25 A Yes, sir.

John Sainvil
Direct examination by Mr. Bulsa

1 Q And what did you talk about?

2 A He told me that he know he, he want know.

3 Q I'm sorry?

4 A He say that he know that he hit one of them when he
5 was shooting, that he hit one of them.

6 Q Okay. Did you talk about anything you might tell the
7 police if the police found you?

8 A Say that one more time, sir.

9 Q Did you and he discuss anything about what to tell the
10 police?

11 A Yes, sir.

12 Q What was that?

13 A Our story was I was supposed to tell the police that
14 the Mexican was trying to rob me.

15 Q And did the police later find you to talk to you?

16 A Yes, sir. Mr. Officer Spurgeon, I think him went to
17 Una, went to D. L.'s house and talked to this D. L. and
18 Tommy Crowe and did that.

19 Q You have to explain. They found you through D. L.

20 A They found me through (inaudible).

21 THE COURT: Let me ask you to back up just a little
22 bit from the microphone. Don't eat it. But it's got to be
23 close enough to pick up. But you're getting your mouth all
24 over it.

25 Q So they found you.

John Sainvil
Direct examination by Mr. Bulsa

- 1 A Yes, sir.
- 2 Q And how did you get to city hall?
- 3 A Mr. Spurgess had left a number for me to call him, and
- 4 I called him. When I called him, he said I want to talk to
- 5 you about, about incidence happened earlier. So he said I
- 6 need to talk to you. So I said okay, I can meet you at
- 7 Mini Mart around 7:00 o'clock. And then when I said with
- 8 the clerk that I wasn't at the gas station with Officer
- 9 Spurgess.
- 10 Q Okay. You then went to city hall?
- 11 A Yes, sir. I ride in the car, I ride with Officer
- 12 Spurgess in a car.
- 13 Q How did Ms. Kelly's car get to city hall?
- 14 A She was driving.
- 15 Q Did she take you -- she did not take you down?
- 16 A Yes, sir. That's who took me to the city hall. No.
- 17 She just follow us around. I'm sorry.
- 18 Q You were riding with the officer and she followed you.
- 19 A Yes, sir, because the officer say they needed that
- 20 car.
- 21 Q Okay. They needed the car.
- 22 A Yes, sir.
- 23 Q And did you then speak with Mr. Spurgeon --
- 24 A Yes, sir.
- 25 Q -- about what happened?

John Sainvil
Direct examination by Mr. Bulsa

- 1 A Yes, sir.
- 2 Q And what did you tell him?
- 3 A At first I told him that, I told him exactly how had
4 happened.
- 5 Q Did you first tell him what you and Mr. Smith had?
- 6 A Yes, sir, at first, at first I did, told him that I
7 just -- Officer Spurgess said tell me what happened. And I
8 said Mexican was trying to rob me.
- 9 Q So you first told them a story.
- 10 A Yes, my story, because I just told them they had take
11 my boots. I said they going to rob me to my boots. But I
12 didn't tell him like, exactly like.
- 13 Q You didn't tell him the whole full story?
- 14 A Yeah, the whole full story.
- 15 Q Did they at some point swab your hands?
- 16 A Yes, sir; yes, sir.
- 17 Q Had you washed your hands or done anything --
- 18 A No, sir.
- 19 Q -- since the shooting?
- 20 A No, sir, I hadn't had no time, no, sir.
- 21 Q Mr. Santos, did you shoot --
- 22 A No, sir.
- 23 Q -- at that truck?
- 24 A No, sir.
- 25 Q Who did?

John Sainvil

Cross-examination by Mr. Whelchel

1 A Mr. Smith did it.

2 Q Did you see anybody else?

3 A Ain't nobody else was around. It was just like two
4 cars in the parking lot.

5 Q Thank you. Answer any questions Mr. Whelchel has for
6 you.

7 CROSS-EXAMINATION

8 BY MR. WHELCHER

9 Q This is in a lady's house that you went to -- Tonya
10 McCravy?

11 A Yes, sir.

12 Q Okay. Did you tell Tonya McCravy that the gun was for
13 you?

14 A Na, sir.

15 Q Okay. You've been here through this entire trial,
16 have you not?

17 A Yes, sir.

18 Q Okay. And you've heard the SLED people testify that
19 this weapon could have been a .38 or .357, is that right?

20 A Yes, sir.

21 Q When you gave your statement did you tell?

22 A Yes, sir, I did. Sure did.

23 Q Okay. You told Investigator Spurgeon.

24 A Yes, sir, I did.

25 Q That it was a .357 or a .38.

John Sainvil
Cross-examination by Mr. Whelchel

- 1 A Yes, sir.
- 2 Q And that would be in your statement.
- 3 A It should be.
- 4 Q Well, you read it, right?
- 5 A Of course, well, of course, yes, sir, today, yes, sir.
- 6 Q You read the statement and signed it.
- 7 A I did that, I did, yes, sir.
- 8 Q Okay. Now, before we get to the statement, Santos
- 9 called you and asked if you wanted to buy a gun, is that
- 10 correct?
- 11 A No, sir. Santos not call me. I ain't talked to
- 12 Santos. I talked to Santos after I get back.
- 13 Q Excuse me?
- 14 A After I got back from the house Santos called.
- 15 Q Santos called the house --
- 16 A Yes, sir.
- 17 Q -- where you lived.
- 18 A No, sir.
- 19 Q Where you stay.
- 20 A No, sir.
- 21 Q He called the house at random. They just happened to
- 22 find you?
- 23 A No, sir. I was looking, I was looking for Tommy Crowe
- 24 -- D. L.
- 25 Q Who?

John Sainvil

Cross-examination by Mr. Whelchel

- 1 A I was looking for Tommy Crowe. Santos was down at D.
2 L. Crowe house. Tommy Crowe house and D. L. Crowe house is
3 two different houses.
- 4 Q Okay. So Santos called a number.
- 5 A Yeah, called that number, D. L. Crowe house number.
- 6 Q Okay. Santos called D. L. Crowe's number.
- 7 A Uh-huh.
- 8 Q Correct?
- 9 A Yes, sir.
- 10 Q Looking for you.
- 11 A No, sir. He was not looking for me. He had went
12 there to get some crack from D. L. And then when he was
13 out there he told them that he got a gun for sale and he
14 didn't know anybody wanted to buy a gun. And Mr. Smith was
15 there. I wasn't there.
- 16 Q Okay. At some point after Santos called whoever he
17 called, you end up going to his house, is that correct?
- 18 A We end up going to his house.
- 19 Q I'll get to that in a minute. You went to his house,
20 correct?
- 21 A After he called back again.
- 22 Q Okay. Did you go to Santos' house?
- 23 A Yes, we did, because I, he, he didn't want him to come
24 to his house because he said he want me to bring him since
25 he know.

John Sainvil
Cross-examination by Mr. Whelchel

- 1 Q He knows you.
- 2 A Yes, he know me.
- 3 Q He knows you because y'all have a relationship.
- 4 A We ain't got no, I mean, we hadn't no, had no
- 5 relationship.
- 6 Q He calls you to sell a gun.
- 7 A He never call me. He went --
- 8 Q Called D. L. Crowe to sell a gun to you.
- 9 A No, sir. He went down D. L. Crowe to get crack.
- 10 Q Okay, well.
- 11 A And he said had a gun --
- 12 Q Well, he bought the crack from you, is that right?
- 13 A No, sir, not that day. That day we didn't sell him no
- 14 crack that day.
- 15 Q Okay. The day that he got arrested -- you were here
- 16 when he testified earlier, correct?
- 17 A Yes, sir.
- 18 Q Okay. He bought crack, said he bought crack from you.
- 19 A No, sir. I wasn't in there that day. He was in
- 20 there. Mr. Smith was there at the house. I was gone.
- 21 Q Okay. So he didn't buy crack from you.
- 22 A No, sir, not me. I wasn't there that day --
- 23 Q Okay.
- 24 A -- until later on.
- 25 Q So y'all don't have any kind of relationship where he

John Sainvil

Cross-examination by Mr. Whelchel

- 1 buys crack from you and you buy guns from him.
- 2 A Sir, D. L. Crowe house --
- 3 Q I'm asking. Do you have that relationship?
- 4 A We don't, we don't have no relationships.
- 5 Q Okay. He called you at, on your cell phone.
- 6 A Sir, that was D. L. Crowe cell phone.
- 7 Q Did he call you on your cell phone?
- 8 A No, sir, cause Santos don't have my cell phone.
- 9 Q He never called you on your cell phone.
- 10 A Santos do not have my cell phone number.
- 11 Q Wait a minute, wait a minute. When y'all were talking
- 12 to each other setting up this meeting --
- 13 A Uh-huh.
- 14 Q -- how did he call you?
- 15 A He called D. L. Crowe cell phone. He never had my
- 16 cell phone. I had a cell was --- (sic). That was my
- 17 cell phone number.
- 18 Q Okay. Did he call you on a number that you gave to
- 19 the police?
- 20 A Yes, sir, because after the incidence I had that
- 21 phone.
- 22 Q And did you call him back on the number that showed up
- 23 on that cell phone?
- 24 A Yes, sir. I called him back when he, when we set up
- 25 that meeting.

John Sainvil
Cross-examination by Mr. Whelchel

1 Q Whatever the phone numbers were, you and he were
2 talking to each other, is that correct?

3 A We was talking to each other. We was.

4 Q You and Santos.

5 A Me and Santos and Mr. Smith.

6 Q Okay. I understand that's what you say now.

7 A Uh-huh.

8 THE COURT: Don't get quite so close to the
9 microphone.

10 THE WITNESS: Yes, sir.

11 Q Did you tell Investigator Spurgeon that Santos called
12 my phone and stated he had some guns for sell?

13 A Yes, sir. He called that phone that was down at "D"
14 house.

15 Q Did you tell Investigator Spurgeon, Santos told us how
16 to get to his house?

17 A Correct.

18 Q Okay. Did you tell Investigator Spurgeon that you
19 went in first?

20 MR. BULSA: Your Honor, I'm going to object to this
21 line of questioning.

22 A Yes, sir. I told him --

23 THE COURT: Wait just a minute.

24 THE WITNESS: Yes, sir.

25 MR. BULSA: Your Honor, he's using the statement

John Sainvil
Cross-examination by Mr. Whelchel

1 instead of asking questions, the same issue we had with the
2 other ones.

3 MR. WHELCHEL: I'm asking him what he told
4 Investigator Spurgeon.

5 THE COURT: Well, it's only proper if you're using it
6 to impeach him. We've been through that.

7 MR. WHELCHEL: All right.

8 Q Let's go to the day of the shooting. You and Santos
9 agreed to meet at Biggerstaff.

10 A We, we agreed to meet at Biggerstaff, we.

11 Q I understand.

12 A Yes, sir.

13 Q There was going to be a meeting at Biggerstaff.

14 A Yes, sir.

15 Q Somebody moves it.

16 A He was, not we.

17 Q Who?

18 A Mr. Santos --

19 Q Okay.

20 A -- called, called the phone back.

21 Q Okay. Santos called you back and moved the meeting
22 from Biggerstaff to the store where it actually took place.

23 A Yes, sir.

24 Q Okay. When the two of you arrived, that being you and
25 Mr. Smith, they were already there.

John Sainvil
Cross-examination by Mr. Whelchel

1 A Correct.

2 Q How many of them were there?

3 A Three in the truck.

4 Q Okay. When they pulled their truck in, when they
5 pulled into the side of the building or when you pulled in,
6 the truck was already there.

7 A Correct.

8 Q If this is the side of the building, this wall right
9 here, is there a truck facing towards the jury or facing
10 towards the wall of the --

11 A Okay. I don't know if you're familiar with under,
12 under the pass. Under the pass the truck was facing like
13 they were leave, going under the pass. And they get.
14 Santos and his brother get out of the car. When they get
15 out of their car first, and Santos walk to their car, so
16 that's when I pulled my window down. His brother was in
17 that side. And I assume Mr. Smith saw his brother walk to
18 the car and he locked the door.

19 Q Which way was --

20 A They was going, they was, they was facing like that go
21 in, go under the bridge, like gone.

22 Q Okay. So the back end of the truck --

23 A The back end of the truck was next to the building.

24 Q Let me finish. The back end of the truck was closest
25 to the building.

John Sainvil
Cross-examination by Mr. Whelchel

1 A It was not closest. It was like towards the street,
2 like they're ready to leave, like they're ready to leave,
3 like when you go under the pass, it was right there across
4 the street.

5 Q Okay. So you drive -- the two of you drive around
6 them and pull --

7 A No, sir. Ain't no way we can do that because the
8 truck wasn't on the corner. That's the corner. There's
9 the corner where, where they treat as the train track on
10 top. The truck was missing. There's where like they going
11 under the bridge.

12 Q Uh-huh.

13 A So we pull in from that way and park in the middle
14 parking space. That's their side.

15 Q Were you pointed with the nose of the car headed
16 towards the brick wall beside of the building?

17 A Correct, yeah. We was facing. The car was like this?

18 Q All right. At some point after that Santos in
19 Spanish, you said, told them to move the truck.

20 A That's after they came to, that's obtained after they
21 came to the car.

22 Q Slow down. I can't understand you.

23 A That's after they came to the window and asked him for
24 the gun.

25 Q Okay. When you say they came to the window, who do

John Sainvil
Cross-examination by Mr. Wheelchel

- 1 you mean?
- 2 A Mr. Santos and his brothers.
- 3 Q Okay. Where was the third guy when --
- 4 A Is sitting in truck.
- 5 Q Okay. So the third guy is still in the truck.
- 6 A Correct.
- 7 Q Santos and his brother come to your vehicle.
- 8 A Yes, sir.
- 9 Q Okay. I mean, that was your girlfriend's vehicle.
- 10 A Yes, sir.
- 11 Q Okay. And they come to your side.
- 12 A No. Santos was at my side. His brother was on other
- 13 side.
- 14 Q His brother was on Kenneth's side.
- 15 A In Kenneth's side, yes, sir.
- 16 Q Okay. And Kenneth's window was up and his door was
- 17 locked.
- 18 A Yes, sir.
- 19 Q Your window was not up and your door was not locked.
- 20 A No. My door was locked. My window was half way down.
- 21 I seen, I seen them walk to their car. Mr. Smith saw his
- 22 brother wasn't in the car. So he locked his door. And
- 23 Santos came on my side. Santos' brother was asking for the
- 24 gun, asked Mr. Smith for the gun.
- 25 Q I understand all of that. Your window was half way

John Sainvil
Cross-examination by Mr. Whelchel

- 1 down.
- 2 A Correct.
- 3 Q Your door was locked.
- 4 A Yes, sir.
- 5 Q Okay. After some discussion --
- 6 A Uh.
- 7 Q -- Santos kicks you or hits you, right?
- 8 A Santos -- he didn't hit me first. His brother start
- 9 hit us from the, from the sunroof.
- 10 Q Through the sunroof.
- 11 A Through the sunroof, yeah.
- 12 Q Okay. All right. After that Santos --
- 13 A Yeah. After that when I turned around, because his
- 14 brother was hit us through the sunroof. So I'm trying not
- 15 to dodge, duck, like that. So I didn't turn my face
- 16 towards the window. That's when Santos hit me in my eye.
- 17 So I --
- 18 Q Which eye?
- 19 A This eye.
- 20 Q Okay. Hit you in your right eye.
- 21 A Correct.
- 22 Q Okay. And when did you get kicked?
- 23 A I guess after I opened my car door fixing to go
- 24 outside and find Santos, because he hit me. When he hit
- 25 me, I got mad. So I opened my car door and fixing to go

John Sainvil
Cross-examination by Mr. Whelchel

1 outside and hit him. And that's when his brother came with
2 that gun. So his brother came to the gun. I jumped back
3 in my car.

4 Q Okay. Did you tell these officers that Kenneth had a
5 gun?

6 A If I told them he had?

7 Q Yeah.

8 A Yeah.

9 Q Did you tell them that he had a gun?

10 A Of course. He had a gun, yeah.

11 Q Okay. I want you to look at that, please, sir.

12 (Pause.)

13 Q Is that your statement?

14 A Correct.

15 Q Did you give any other statements?

16 A No. I mean, I give other, when they asked me
17 questions, every, gishmal (sic), yeah, I think and I did
18 and told, tell them.

19 Q That's the only one you gave, the only written
20 statement you gave.

21 A That's the, that's --

22 Q And when does this start, sir? Do you know what time
23 that is?

24 A No, sir.

25 Q Okay. What are those numbers?

John Sainvil
Cross-examination by Mr. Whelchel

- 1 A 2307.
- 2 Q All right.
- 3 A But all, all I can say, I told them, I said
- 4 7:00 o'clock.
- 5 Q Okay. Have you read that?
- 6 A Yeah, correct.
- 7 Q Okay. Can you find where it says in your statement
- 8 that you gave them that you told the officers that there
- 9 was a .38?
- 10 A No, because I, I ain't told them to that. I told them
- 11 where, where was when, when was asking me questions before
- 12 they take that statement. If you look it, now, I think
- 13 they got a C. D. If you look at the C. D. you're going to
- 14 see, and you can't hurt it when I told them that I think
- 15 they got a C. D. or D. V. D.
- 16 Q So it's not in there.
- 17 A No, but it's on D. V. D.
- 18 Q Did you go to Kenneth Smith's home after the shooting
- 19 took place?
- 20 A No, sir.
- 21 Q Okay. Did you ask for rubbing alcohol while at
- 22 Kenneth Smith's home?
- 23 A No, sir.
- 24 Q Did you go to the hospital after you gave that
- 25 statement?

John Sainvil
Redirect examination by Mr. Bulsa

1 A That, them officers send me to the hospital because my
2 eyes was start getting swollen, and they say do you want to
3 go to the hospital. And I said yes. So that's the reason
4 that I went to the hospital.

5 Q So I want you to correct me if I'm wrong. Santos and
6 his brother hit and kicked you so badly that after you gave
7 the statement and everything to the police you had to go to
8 the hospital, correct?

9 A Of course.

10 Q Okay. And after all of that happened you say Kenneth
11 Smith shot Jerry.

12 A Of course. I see with two, with my two eyes.

13 MR. WHELCHEL: That's all I have, Your Honor.

14 REDIRECT EXAMINATION

15 BY MR. BULSA

16 Q Mr. Santos, is Mr. Smith a friend of yours?

17 A Yes, sir.

18 Q What do you call him?

19 A To me, to me I think I was like probably like a black
20 brother, because if I went to the mall buy myself
21 something, and I would buy him something too.

22 Q Did he have a nickname that you called him?

23 A Tang.

24 Q Tang?

25 A Yes, sir.

John Sainvil
Redirect examination by Mr. Bulsa

1 Q And you told us when you first spoke to the police
2 that you just told them about the robbery.

3 A Yes, sir, because that's exactly what I had said,
4 because, excuse me, officer had said we will call you back,
5 I think like stone. I don't know how they had said first
6 some place unless they had been and --

7 Q Just answer the question.

8 A Yes, sir.

9 Q You just told them about --

10 A The Mexican, yes, my chain, yes, sir.

11 Q What led you to tell them more?

12 A When I tell my cell friend, and then I started talking
13 to Officer Spurgeon, say he, that's when he say he's a
14 murderer. And so I said a murderer. He say, yeah, they
15 had murdered him. So I got a family. So I just tell him
16 exactly, I mean, how everything went down.

17 Q Is that when you learned somebody actually died?

18 A Yes, sir.

19 Q Now, Mr. Whelchel asked you about this written
20 statement.

21 A Yes, sir.

22 Q Let me show you the last page. Did you -- you didn't
23 write this, did you?

24 A No, sir.

25 Q Somebody wrote it for you, and you read it and signed

1 it.

2 A Yes, sir.

3 Q You told the officer that, "I heard gunshots and then
4 the Mexican truck took off."

5 A Yes, sir, because that Mexican truck stopped and took
6 off. That's when the guy that got hit, how he.

7 Q "And Tang told me to come on and get back in the car."

8 A The car, correct.

9 Q "I saw Tang put something in his pocket."

10 A Correct.

11 Q "I didn't see the gun until I went to the dollar store
12 near the iron bridge."

13 A Yes, sir. That's what he told me about it, that he
14 had think he hit one of them.

15 Q Excuse me?

16 A That's whenever they said that he think he hit one of
17 them, that he shoot one of them.

18 Q Okay. Well, why does your written statement not
19 mention a gun until you got to the dollar store?

20 A Because, first, Mr. -- the first time I see him, the
21 Officer Sprugeon trying to get Willie, trying to get in
22 touch with him to see where he was. So we had like they
23 was in it now. Again, when they came back to that, to that
24 statement, I guess, they didn't mention, I mean, they had
25 forgot about asking me some more questions, I think.

1 Q Where were you when the shots were actually being
2 fired?

3 A I had ran.

4 Q So you were some distance away from the car.

5 A Yes, sir. It was about like, if you, like you show me
6 that police car, probably like three parking spaces.

7 Q Do you know if Mr. Smith ever left the area of the,
8 the car?

9 A I don't know because he was in driver's side. He was
10 in the back. He was like come around the trunk.

11 Q You were standing around near the trunk?

12 A Yes, sir. That's when he run and said come on, come
13 on, let's go, get in car.

14 Q Thank you.

15 THE COURT: You may step down.

16 MR. BULSA: The state calls Shonta Kelly.

17 THE COURT: We're going to have to take a short break
18 before we do that.

19 All right. We're going to take a short break. Let me
20 ask the jury to please go to your jury room. Do not yet
21 discuss the case in any fashion. I'll bring you back after
22 that short break.

23 (The following takes place outside the presence of the
24 jury.)

25 THE COURT: Court's in recess for 15 minutes.

1 (Whereupon, a recess was taken.)

2 THE COURT: All right. Bring the jury in.

3 (The following takes place in the presence of the
4 jury.)

5 THE COURT: Mr. Bulsa.

6 MR. BULSA: Call Shonta Kelly.

7 SHONTA MONIQUE KELLY, having
8 been first duly sworn, testified as follows:

9 DIRECT EXAMINATION BY MR. BULSA

10 Q Ms. Kelly, introduce yourself to the jury, please.

11 A My name is Shonta Monique Kelly.

12 Q How old are you, ma'am?

13 A Twenty-four.

14 Q How many children do you have?

15 A Two.

16 Q Are you pregnant again?

17 A (No response.)

18 Q Okay. And are you the girlfriend of Mr. Sainvil?

19 A Yes, sir.

20 Q The car that we have been talking about, the Honda,
21 showing you State's Exhibit No. 6, is that your vehicle?

22 A Yes, sir.

23 Q How long have you had it?

24 A I no longer have that vehicle.

25 Q You don't have it any more. How long had you owned it

Shonta Monique Kelly
Direct examination by Mr. Bulsa

1 at that time?

2 A I don't remember the exact date. I think it was
3 around in January or February, sometime, when it was
4 purchased.

5 Q So you didn't have it but a few months.

6 A Uh-huh.

7 Q Answer yes or no.

8 A Yes.

9 Q Now, did you allow Mr. Sainvil to drive that vehicle?

10 A No. I never allowed him to drive it alone because he
11 didn't have license. But if he had a licensed driver, then
12 I'd allow him to let the licensed driver drive it.

13 Q Okay. So you let him have permission to use it if he
14 had somebody that could drive it.

15 A Yeah.

16 Q Do you know Mr. Smith?

17 A Not personally but through Demetrius and John.

18 Q Okay. But you've met him before.

19 A Yeah.

20 Q You know him by face. If you saw him you'd know his
21 name.

22 A Yeah.

23 Q And is he somebody that drove Mr. Sainvil around in
24 that car?

25 A Yeah.

Shonta Monique Kelly
Direct examination by Mr. Bulsa

1 Q And did Mr. Smith at times keep that car even after he
2 had dropped Mr. Sainvil off?

3 A Yes.

4 Q Why did you let him do that?

5 A Well, I didn't -- at the time I wasn't, I didn't
6 really have any use for my car because I was so far along
7 in my pregnancy. So I really didn't need it. And most of
8 the time I didn't even drive. And I allowed him to take
9 John, him and Demetrius to take John, back and forth to
10 work or wherever they went.

11 Q And you didn't mind him keeping the car until they
12 went and picked him back up?

13 MR. WHELCHEL: Objection. Leading.

14 THE COURT: Don't lead her.

15 Q Did you mind him keeping the car?

16 A No.

17 MR. WHELCHEL: Same objection, Your Honor.

18 THE COURT: Overruled.

19 Q And would he then go pick John up after work?

20 A Yes.

21 Q Okay. All right. We've heard testimony about this
22 stick, State's Exhibit 14. Did you keep that in your car?

23 A Yes.

24 Q And where did you usually keep it?

25 A It was under the passenger seat or the driver's seat.

Adrian Patton
Direct examination by Mr. Bulsa

1 Q And why would you keep that kind of stick in your car?

2 A I lived in the -- some apartments. And I found it
3 beside the trash can one night. And I used it when I did
4 drive, and maybe it was at night. And I would use it, and
5 I'd keep it under my seat.

6 Q Were you afraid of something?

7 A I mean, it's always stuff going on. So you never
8 know. When me and my daughter was riding alone at night --

9 Q But you didn't keep it in the trunk.

10 A No, sir. I didn't have it in the trunk.

11 Q Thank you, ma'am. That's all I have. Answer any
12 questions Mr. Whelchel has.

13 MR. WHELCHER: No questions.

14 THE COURT: You may step down.

15 MR. BULSA: The state recalls Adrian Patton.

16 THE COURT: You've previously been placed under oath.
17 You are still under oath for the purpose of these
18 questions.

19 THE WITNESS: Yes, sir.

20 ADRIAN PATTON, having been
21 first duly sworn, testified as follows:

22 DIRECT EXAMINATION BY MR. BULSA

23 Q Officer Patton, you've already testified you were the
24 lead investigator in this case.

25 A Yes, sir.

Adrian Patton
Direct examination by Mr. Bulsa

1 Q And we've seen some items that have been sent to
2 Columbia to the state law enforcement division.

3 A Yes, sir.

4 Q They were enclosed in State's Exhibit No. 5, excuse
5 me, 15, the bullets, and actually bullets and fragments.

6 A Yes, sir.

7 Q You're the one that actually transported those down
8 for testing.

9 A Yes, sir, I did.

10 Q As well as the gunshot residue kits.

11 A Yes, sir.

12 Q We've heard testimony about this initial meeting
13 supposed to have been at Biggerstaff's.

14 A Yes, sir.

15 Q State's Exhibit No. 12, is that where the location for
16 Biggerstaff's would be on that map?

17 A Yes, sir, it would.

18 Q Do you mind writing Biggerstaff's in there?

19 (Whereupon, the witness wrote on State's Exhibit No.
20 12.)

21 Q Okay. And then also note on that map where the Corner
22 Stop Store was where this incident occurred.

23 (Whereupon, the witness wrote on State's Exhibit No.
24 12.)

25 Q Okay. So according to this map about how far is that

Adrian Patton
Direct examination by Mr. Bulsa

- 1 time-wise?
- 2 A A minute --
- 3 Q Okay.
- 4 A -- or so.
- 5 Q So Biggerstaff's is on the corner of Farley and Hugh
- 6 Street?
- 7 A Yes, sir.
- 8 Q And you just go down Hugh Street right as it runs into
- 9 Hayne. Hayne Street is where the Corner Stop is.
- 10 A Yes, sir.
- 11 Q Okay. Is Biggerstaff's more -- is there generally
- 12 more foot traffic at Biggerstaff's?
- 13 A Yes, sir. The, the parking lot is generally more
- 14 crowded.
- 15 Q Okay. Now, I think you already testified that you
- 16 actually assisted in an interview of Mr. Smith, is that
- 17 correct?
- 18 A Yes, sir.
- 19 Q Who were you with when you interviewed him?
- 20 A It was myself and Investigator Spurgeon.
- 21 Q And where did the interview take place?
- 22 A The interview took place at city hall.
- 23 Q Do you recall how he got to city hall -- Mr. Smith?
- 24 A No, sir, I, I do not recall how they got to city hall.
- 25 Q Okay. So was there just the three of you in the room,

Adrian Patton
Direct examination by Mr. Bulsa

1 interview room?

2 A Yes, sir.

3 Q And prior to asking him questions did you read him his
4 so-called statement of rights or Miranda warnings?

5 A Yes, sir, I did.

6 (Waiver of rights marked State's Exhibit No. 16 for
7 Identification.)

8 Q It's been marked State's Exhibit No. 16 for
9 Identification at this time. Do you recognize that
10 document?

11 A Yes, sir, I do.

12 Q Does that contain the statement of rights that you
13 read to him?

14 A Yes, sir.

15 Q Does it contain his signatures acknowledging that he
16 understands those rights?

17 A Yes, sir.

18 Q And did he give those rights up and agree to speak
19 with you?

20 A Yes, sir, he did.

21 Q In fact, he actually signed that waiver of those
22 rights in a separate spot.

23 A Yes, sir.

24 MR. BULSA: Your Honor, the state would offer State's
25 Exhibit 16 into evidence.

Adrian Patton
Direct examination by Mr. Bulsa

1 MR. WHELCHEL: No objection.

2 THE COURT: It's admitted.

3 (Waiver of rights marked State's Exhibit No. 16.)

4 Q I'll do it this way so we don't get the noise. But
5 there's five rights that you read to him. Read those so
6 the jury can understand what information he was provided.

7 A Yes, sir.

8 "Statement of rights. Before any questions are asked
9 of you, you must understand your rights. You have the
10 right to remain silent. Anything you say can and will be
11 used against you in a court of law. You have the right to
12 talk to a lawyer and to have a lawyer present with you
13 while you are being questioned. If you cannot afford to
14 hire a lawyer, a lawyer will be appointed free of any cost
15 to represent you before any questioning begins. You have
16 the right to stop answering questions at any time."

17 Q And there's a check beside each one of those numbers.

18 A Yes, there is.

19 Q There also appears to be initials K. S.

20 A Yes, sir. After reading the rights I gave Mr. Smith
21 the paper and asked him that he read it himself and as he
22 read it to initial beside each one.

23 Q Okay. Is there any question whether he understood
24 those rights?

25 A No, sir.

Adrian Patton
Direct examination by Mr. Bulsa

1 Q There's a notation on here that looks like at two
2 spaces that says G. E. D.

3 A Yes, sir. I asked Mr. Smith how far in school he had
4 completed, and he stated he had a graduate or G. E. D,
5 graduate equivalent.

6 Q Didn't get diploma but he later went back and got his
7 G. E. D.

8 A Yes, sir.

9 Q And then below the statement of rights there's a
10 separate block stating waiver of rights.

11 A Yes, sir.

12 Q Read that so the jury can understand what he was
13 waiving.

14 A Yes, sir.

15 "Fully understanding my rights as they have been
16 explained to me, I wish to waive," and in parenthesis,
17 "give up my rights and talk to officer," and I put
18 "Investigator Patton, slash, Investigator Spurgeon in
19 reference to a shooting. I have waived my rights freely
20 and voluntarily without being threatened or coerced and
21 without being promised any leniency or reward."

22 Q And then he signed that?

23 A Yes, sir.

24 Q Okay. And this interview began at 2006, which is
25 8:06 p.m.

Adrian Patton
Direct examination by Mr. Bulsa

- 1 A Yes, sir.
- 2 Q And ended at 2153 p.m., which is 9:53 p.m.
- 3 A Yes, sir.
- 4 Q So less than two hours. And during the course of the
5 interview did you prepare a written statement based on what
6 he told you?
- 7 A Yes, sir, I did.
- 8 Q Give us a summary of the process.
- 9 A After completing the, this form I asked Mr. Smith to
10 tell me what happened that day, at which time he began to
11 tell me the story. I asked him a few questions. And after
12 listening to him I got -- I put it on paper as he was
13 telling me the second time.
- 14 Q Investigator Spurgeon was also in the room. Who did
15 most of the questioning of Mr. Smith?
- 16 A Mostly Investigator Spurgeon was questioning him as he
17 was telling the stuff, the story.
- 18 Q Okay. But you're the one that actually wrote it down?
- 19 A Yes, sir, I did.
- 20 Q So you didn't give Mr. Smith the paper and say write
21 it down?
- 22 A No, sir, I didn't.
- 23 Q Why did you not do that, sir?
- 24 A I, I just wrote it as he told me the statement.
- 25 Q Is that common practice?

1 A Yes, sir. It's normally what we do. Just as they
2 tell me, I write it down exactly what they tell me.

3 Q So these are his words that are written down.

4 A Yes, sir.

5 (Voluntary statement marked State's Exhibit No. 17 for
6 Identification.)

7 Q I show you State's Exhibit 17 for Identification,
8 voluntary statement starting at page two of five. Is the
9 waiver of rights considered page one?

10 A It is.

11 Q Okay. Do you recognize that document?

12 A Yes, sir.

13 Q Does that contain a statement, that as you wrote it
14 down as he told it to you?

15 A Yes, sir.

16 Q And did he read that or did he sign those pages?

17 A He did. He signed each one of them.

18 Q What was the purpose for having him sign them?

19 A To make sure that he signed it stating that this is
20 the truth and that this is his story and I didn't add
21 anything to it.

22 Q This is what he told you happened.

23 A Yes, sir.

24 MR. BULSA: The state would offer State's Exhibit 17
25 for Identification into evidence.

1 MR. WHELCHER: No objection, Your Honor.

2 THE COURT: It's admitted.

3 (Voluntary statement marked State's Exhibit No. 17.)

4 Q Okay. Officer, at this time I would like for you to
5 publish that to the jury by reading it.

6 A Yes, sir.

7 The top says, "This is the statement of Kenneth
8 Danfelix Smith given to Investigator Patton and
9 Investigator Spurgeon on 3/29 of '08 at 8:06 p.m. at city
10 hall." In parenthesis 145 West Broad Street.

11 "On 3/27/08 at 9:00 p.m. and 9:40 p.m., between those
12 hours," says, "9:00 p.m. and 9:40 p.m. when me and Jay got
13 a call from migo, and he was trying to sell some guns. He
14 asked if we knew somebody or if we wanted to buy some guns.
15 I told him yeah, I'll buy one. He said he had a .22 rifle
16 with scope with barrels sawed off, a long .22 rifle and a
17 .45 pistol." And in parenthesis, S & W, standing for Smith
18 and Wesson. "It was gray and black. We went to his house
19 on [redacted]. You go under the bridge and make the
20 first left. It's the first trailer on the left. We got
21 there about 10:00 p.m. and migo came to the door and
22 motioned to come in. We got out and went in. When you go
23 through front door it's the first room. He reached under
24 the bed and got the two .22 rifles. While we's looking at
25 them he left out and went into the back room and came back

1 in with the .45 pistol and a bulletproof vest. I looked at
2 the .45. He told me he wanted one hundred," or excuse me,
3 "\$200. I gave him 150 cash and erased a debt that he owed
4 me for some crack. We left out. We got back to the car
5 and said hold on, let me check, check it first. I slid the
6 clip out and pulled it back to see if one was in the head.
7 It was empty. So I pulled the trigger. The trigger, the
8 trigger went, went in the," excuse me, "the trigger went
9 in, in, but the hammer stayed back. That's when I got back
10 out of the car and knocked on the door. After about five
11 minutes migo came to the door, and he said what's up, migo.
12 I told him the gun don't work, I want my money back. I
13 act, I acted like he didn't," or excuse me, "he acted like
14 he didn't want to give me money back and saying the gun did
15 work. That's when migo got some money from his mother and
16 gave it to me. It was about \$100. I told him until he
17 gets the rest of it I'm keeping the gun. Me and Jay got in
18 the car and pulled off and went to Oakview Apartments to
19 get me some weed. After I got the weed I decided to throw
20 the gun in a dumpster at Oakview Apartments. I had it
21 wrapped in a white plastic bag tied in a knot. I got out
22 of the car like I was throwing trash away. I got back in
23 my car and went to my girlfriend's house in Cowpens. I
24 stayed at her house until 4:00 p.m. Jay picked me up and
25 we went to Spartanburg to the barber shop by Camie

Adrian Patton
Direct examination by Mr. Bulsa

1 Claggett." In parenthesis it has international. "Migo
2 calls Jay, Jay's phone while we at the barber shop. He
3 said he had the money, and we told him we was at the barber
4 shop. He wanted us to meet him at Biggerstaff. I told him
5 that Biggerstaff's got cameras, to meet me at the Li'L
6 Cricket. We, we're at the stop sign at Hugh and Hayne
7 Street. I seen an old buddy, and he hollered, and I
8 hollered back at him. We pulled over by the underpass.
9 His truck was backed in, and we pulled up beside his truck
10 on the driver's side. Migo jumped out from the passenger
11 door and came around to the passenger side of the car and
12 throwed a \$100 in Jay's lap. He asked for the gun, and I
13 told him that I didn't have it, it was at my grandma's
14 house. He then got angry, so we told migo to follow us in
15 his car. So he still didn't want to follow us. So we gave
16 him the \$100 back. He asked for the gun two more times.
17 After that he started speaking Spanish. The other two
18 pulled in behind us and blocked us in. All three of them
19 got out, two on the passenger and one on the driver's.
20 They asked one more time about the gun, and then the slim
21 fellow started getting real angry saying it was his gun. I
22 told him that they got to follow us. That's when migo
23 started swinging and kicking while Jay was trying to get
24 out of the car. The one on the driver's side was throwing
25 punches through the sunroof hitting me on the head.

1 Somehow Jay freed himself out the car and screamed for
2 help. That's when the slim migo tried to kick me one more
3 time. The big migo and tall migo was in the truck. So I
4 went to the trunk to get a small brown broomstick to hit
5 the third one on the outside of the truck. That's when I
6 heard shots come from behind me. I ran towards the dirt
7 hill, and I heard somebody say, Bret, you all right. I
8 looked up and seen it was an old buddy that I knew, the
9 same one that I had just hollered at at the stop sign.
10 That's when I told Jay to come on, let's go. I took him to
11 his house to get some shoes, because in the process they
12 took his shoes and snatched his gold necklace off his neck.
13 I then went to my girlfriend. We took her kids to the big
14 aquarium in Georgia. End of statement on 3/29/08 at 2153
15 hours at city hall."

16 Q Okay. And he signed each of those pages.

17 A Yes, sir.

18 Q Who was he referring to as migo?

19 A Santos.

20 Q And who was he referring to as Jay?

21 A John Sainvil.

22 Q And who is the old buddy that he talked about seeing?

23 A We did ask him. He stated that his name was Dwayne
24 Foster.

25 Q Okay. And in the course of the interview what was

Adrian Patton
Direct examination by Mr. Bulsa

1 Mr. Foster's role in this case that he described to you --
2 Mr. Smith.

3 A Mr. Smith described that Dwayne Foster's role in this
4 case was he came up and shot the gun.

5 Q Okay. So that's what he was trying to say in that
6 statement, that Dwayne Foster somehow came to his aid and
7 fired, he was the one that fired the shots.

8 A Yes, sir.

9 Q You and Investigator Spurgeon tried to determine who
10 such a person was.

11 A Yes, we did.

12 Q How so?

13 A First, we allowed Mr. Smith to try to make a telephone
14 call to Mr. Foster.

15 Q So they actually had a phone -- phone number for him.

16 A Yes, sir. He said he had a phone number for
17 Mr. Foster.

18 Q And what happened when that phone was called?

19 A Mr. Smith called the phone number and had the phone on
20 speaker phone so that myself and Investigator Spurgeon.
21 could hear it. The gentleman answered the phone, and
22 Mr. Smith asked for Dwayne. The gentleman --

23 MR. WHELCHEL: Objection. Hearsay, Your Honor.

24 THE COURT: Sustained.

25 Q Did Dwayne answer the phone?

Adrian Patton
Direct examination by Mr. Bulsa

1 MR. WHELCHEL: That's hearsay, Your Honor.

2 MR. BULSA: May we approach, Your Honor?

3 THE COURT: Yes.

4 (Bench conference held off the record in the presence
5 of the jury but out of the hearing of the jury.)

6 MR. BULSA: Thank you, Your Honor.

7 Q When Mr. Smith dialed the phone number did he use his
8 phone?

9 A Yes, he used his phone.

10 Q Was he able to get Dwayne Foster on the phone?

11 A No, sir.

12 Q Did you then try to use a different phone?

13 A Yes, sir.

14 Q Whose phone?

15 A I believe it was Investigator Spurgeon's phone.

16 Q Okay. So you dialed the same number with two
17 different phones.

18 A Yes, sir.

19 Q The number that Mr. Smith provided to you.

20 A Yes, sir.

21 Q And during either of those attempts did you locate a
22 Mr. Foster?

23 A No, sir.

24 Q Thank you. Answer any questions Mr. Whelchel has.

25

Adrian Patton
Cross-examination by Mr. Wheelchel

1 CROSS-EXAMINATION

2 BY MR. WHEELCHEL

3 Q Other than those two phone calls did you make any
4 other attempts to locate Mr. Foster?

5 A Yes, sir.

6 Q Didn't work?

7 A No, sir.

8 Q Did it work? Okay. In the process of this
9 investigation you obtained the phone numbers for Santos,
10 his cell phone and his home phone, is that correct?

11 A Yes, sir.

12 Q You also obtained the phone numbers for John Sainvil,
13 Jay, correct?

14 A Yes, sir.

15 Q Okay. And you obtained, as we've already gone
16 through, my client's phone records.

17 A Yes, sir.

18 Q Do you have phone records as a result of your
19 investigation from Mr. Sainvil's?

20 A I've got several. I don't know if I have
21 Mr. Sainvil's phone records.

22 Q But as a result of your investigation you got
23 Mr. Sainvil's phone records, correct?

24 A I got his phone number, yes, sir.

25 Q Okay. And did you direct that a -- his records be

Adrian Patton
Cross-examination by Mr. Whelchel

1 obtained? Do you remember?

2 A I believe I did. I'll have to look at the --

3 Q Go ahead. Do you want me to show you mine?

4 A Yes. I've got several phone records.

5 Q I understand. Did you establish during the course of
6 the investigation that the telephone number that

7 Mr. Sainvil was using was --- ?

8 A I'll have to look on his.

9 Q Go ahead.

10 A I don't have the copy of his statement with me right
11 now.

12 Q Okay.

13 (Whereupon, the witness left the stand.)

14 (Whereupon, the witness returned to the stand.)

15 A Yes, sir. I've got two phone numbers.

16 Q Okay. Two phone numbers?

17 A ---.

18 Q For Mr. Sainvil.

19 A Yes, sir.

20 Q And do you have those records, the ones I gave you?

21 A Yes, sir, we have them.

22 Q Could you look at those and see if that's the records
23 that you obtained or were obtained in the process of the
24 investigation?

25 A This is the phone records for --

Adrian Patton
Cross-examination by Mr. Whelchel

- 1 Q For Mr. Sainvil.
- 2 A Yes, sir.
- 3 Q Okay.
- 4 A 529-6574 is the phone we're talking about.
- 5 MR. BULSA: Your Honor, may we approach about this?
- 6 THE COURT: Yes.
- 7 (Bench conference held off the record in the presence
- 8 of the jury but out of the hearing of the jury.)
- 9 Q Did you review those records, sir?
- 10 A Yes, sir. I looked at them.
- 11 Q Okay. When Kenneth Smith arrived at the city police
- 12 department to give his statement, that was on a Saturday
- 13 night, is that correct?
- 14 A I don't remember what day of the, the week. I don't
- 15 know if it was on the --
- 16 Q It was the day after the shooting.
- 17 A Yes, sir, it was the day after the shooting.
- 18 Q Okay. And y'all called him on the phone number that
- 19 you were given. You called him at several different
- 20 places, did you not?
- 21 A I don't remember making a phone call to -- myself, no,
- 22 sir.
- 23 Q Okay. He came in voluntarily.
- 24 A Yes, sir, he did.
- 25 Q Okay. Where was John Sainvil when Kenneth Smith came

1 to the police department? Do you know?

2 A No, sir, I do not know where John Sainvil was at the
3 time.

4 Q Was John Sainvil at the police department when Kenneth
5 Smith came in to give his statement to you and the other
6 investigator?

7 A I, I can't recall if he was at the police department
8 or not --

9 Q Okay.

10 A -- whenever Mr. Smith got there.

11 Q Okay. At the conclusion of John Sainvil's statement
12 that was video-taped, who did you and Investigator Spurgeon
13 talk to next? Do you remember that?

14 A I wasn't in the interview for John Sainvil.

15 Q Okay. You don't remember being in that interview at
16 all? No, no, not John. Excuse me. Maybe I misspoke.
17 When you took the statement of Kenneth Smith, he's doing
18 the questioning and you're doing the writing.

19 A Yes, sir.

20 Q All right. Immediately after that statement who do
21 y'all talk to in the same room where he'd just given the
22 statement? Let me put it this way if you don't know. Was
23 John Cliff Sainvil there?

24 A I can't recall interviewing Mr. Sainvil that day
25 myself after Mr. Smith's.

Adrian Patton
Redirect examination by Mr. Bulsa
Recross-examination by Mr. Whelchel

1 Q All right. Thank you, sir.

2 REDIRECT EXAMINATION

3 BY MR. BULSA

4 Q So you said Mr. Smith came in voluntarily.

5 A Yes, sir. He met us and came upstairs to speak to us.

6 Q Okay. But you'd been looking for him for at least a
7 day.

8 A Yes, sir.

9 Q And in the statement, in fact, he noted that he had
10 left the statement at the door.

11 A Yes, sir.

12 Q Thank you.

13 THE COURT: You may step down. Have you got something
14 else?

15 RECROSS-EXAMINATION

16 BY MR. WHELCHER

17 Q That aquarium's in Atlanta, correct?

18 A Yes, sir, I believe that's where he, he told me he
19 took the kids.

20 Q Thank you.

21 THE COURT: Step down.

22 MR. BULSA: The state calls Reginald Spurgeon.
23
24
25

1 REGINALD SPRUGEON, having been
2 first duly sworn, testified as follows:

3 DIRECT EXAMINATION BY MR. BULSA

4 Q Okay. Officer, please introduce yourself to the jury.

5 A Good afternoon. I'm Reggie Spurgeon with the city of
6 Spartanburg. I'm an investigator there.

7 Q How long have you been with the city of Spartanburg?

8 A Approximately 13 years.

9 Q How long have you been an investigator?

10 A About three.

11 Q And were you assisting Investigator Patton on this
12 case?

13 A Yes, sir, I was.

14 Q Investigate violent crimes?

15 A I, I investigate violent crimes, property crimes. I'm
16 currently the gang investigator with the city.

17 Q So you investigate a number of --

18 A A number of things, yes, sir.

19 Q Was this Investigator Patton's first homicide?

20 A I believe it was, sir. The thing is with the
21 homicides, everybody's pretty much called in. And he was
22 assigned the lead because we were assigned -- we were there
23 that night.

24 Q So what is a lead investigator supposed to do?

25 A The lead investigator, basically what he does is he

Reginald Spurgeon
Direct examination by Mr. Bulsa

1 leads or manages the other investigators. Even though we
2 have a crew of experienced investigators, he basically
3 keeps up with the book. And we gather information for him.
4 And he basically gathers all that entailing and puts it
5 together for us.

6 Q So it's a group effort and somebody's got to lead.

7 A It's a group effort. No doubt.

8 Q Okay. And you assisted in -- let's see. You first
9 went to the hospital, is that right?

10 A I first responded to the hospital, yes, sir, because I
11 was called -- I was actually called on my cell phone to
12 respond to the hospital because there was a victim at the
13 hospital.

14 Q And what did you find when you got to the hospital?

15 A I spoke with Mr. Santos. I believe I spoke with Adam
16 Solesbee also. I spoke with the officer that had responded
17 initially, and Mr. Santos' girlfriend.

18 Q Did you ask some of them to come down to the police
19 station?

20 A I requested, and Mr. Santos and Adam responded to city
21 hall with me to see what actually transpired under the
22 bridge.

23 Q Now, we heard Santos kept using the phrases he was
24 arrested. Was he, in fact, arrested?

25 A There was actually no arrest. He was brought down

Reginald Spurgeon
Direct examination by Mr. Bulsa

1 because we thought he was a witness to a crime. I guess
2 due to his lack of knowledge as far as what is an arrest
3 and what is not an arrest, he assumed he was under arrest.

4 Q And when he was brought down who interviewed him?

5 A I interviewed him. I think myself and Investigator
6 Porter interviewed him initially.

7 Q And Investigator Patton interviewed Mr. Solesbee?

8 A Investigator Patton solely interviewed Mr. Solesbee
9 because we were video-taping the interview with Mr. Santos.
10 And Investigator Patton was in the actual C. I. D. room
11 interviewing Mr. Solesbee.

12 Q What is C. I. D.?

13 A Criminal investigation division. He was basically at
14 the desk there, and we were in another interview room.

15 Q Okay. And at what point did you begin looking for
16 John Santos?

17 A What Santos told me was the guy with the mark on his
18 face -- he didn't know his name. And I asked him where he,
19 where he had met him at and how they know each other. He
20 made reference to a trailer in Una.

21 So we traveled to a trailer in Una, and I met with
22 this young lady they call Shorty. I forgot to bring my
23 notes up here, but I know her real name. And then there
24 was another guy named D. L., which is Dallas Crowe, that
25 was also at the residence. They say they knew of Jay but

Reginald Spurgeon
Direct examination by Mr. Bulsa

1 they didn't know his real name. They sent me to a trailer
2 around the corner where Ms. McCravy was. And they stated
3 that she would know his real name because they basically
4 hung there together.

5 Q During your interview of Santos did he also tell you
6 of this second person? Did he tell you there were two
7 people in the car?

8 A He said there were two people in the car, but he
9 didn't know the other person. He just knew that both
10 people were together often.

11 Q So did Jay appear to be an easier person to identify
12 for you?

13 A That's correct. Jay was the target because he would
14 know who the actual suspect was.

15 Q Did Jay have the, the mark?

16 A That was the thing that actually stood out to us. He
17 said, you know, he had a big birth mark on his face. He
18 couldn't actually describe it, but he said he had a big
19 birth mark on his face.

20 Q So ultimately you identified Mr. Santos.

21 A Ultimately went to Ms. McCravy's trailer. She said I
22 don't know his real name right off but I think my daughter
23 does. Or somebody in her family knew his real name. So
24 within minutes she actually called me and came up with the
25 real name, John Sainvil.

1 I went to the computer to try to pull him up. But
2 based on the spelling of the name that I had I couldn't do
3 it. So therefore I called a friend that's a sergeant
4 that's over narcotics in, with the Spartanburg County
5 Sheriff's Office. And he say, yeah, I'm familiar with the
6 guy. So he gave me the correct spelling. At that point in
7 time I was able to formulate a photo lineup.

8 Q Okay. Just so the jury understands, you've
9 interviewed Mr. -- I'm going to call him Santos. That's
10 easier to say -- Santos shortly after the incident.

11 A That's correct.

12 Q And then you took a break from the interviewing with
13 him to try to find Mr. Sainvil.

14 A Actually, we traveled together in the car because my,
15 my, my windows on my car are extremely tinted, and you
16 can't see inside. So we traveled to the location we
17 actually knew that he hung out at.

18 Q Okay. After you got the name and you got the lineup,
19 that's when you showed it. Or what did you do with the
20 lineup? Let me ask you that.

21 A When I formally -- well, somebody else actually put
22 together the lineup for me after I got the correct
23 spelling. They gave me the lineup and then I presented it
24 to Mr. Santos.

25 Q Why did you do it that way?

Reginald Spurgeon
Direct examination by Mr. Bulsa

- 1 A Why did I do it which way?
- 2 Q Why did you show him the lineup?
- 3 A Because I actually wanted to know whether or not that
- 4 was the person that was involved in the crime with the
- 5 other subject.
- 6 Q Okay. And did he, in fact, pick out the person that
- 7 you thought was Mr. Santos?
- 8 A Based on the leads that we had, yes, sir.
- 9 Q And would that have been around 9:38, I think?
- 10 A I had him sign it and date it, and it was around
- 11 9:38 p.m.
- 12 Q Okay. That's still the same day of the incident.
- 13 A That's correct.
- 14 Q And how long did it take you to actually locate
- 15 Mr. Sainvil?
- 16 A Well, the investigation continued, because it was
- 17 later on into the evening. I'm not really sure on the
- 18 times, but it had passed 10:00, probably passed 11:00,
- 19 because I had received a call from another deputy stating
- 20 Mr. Sainvil wanted to report.
- 21 Q Don't go into what somebody told you.
- 22 A Okay. I re -- I located him later on that evening.
- 23 Q Okay. And how is it that he got to city hall?
- 24 A I went to pick him up at the Aunt M's on East Main
- 25 Street.

Reginald Spurgeon
Direct examination by Mr. Bulsa

- 1 Q Did he actually call you?
- 2 A He called me. He called me because he was told to
- 3 call me.
- 4 Q And you went and met with him. And how is it that you
- 5 got the car?
- 6 A How did, how did we retrieve the car?
- 7 Q Yes, sir.
- 8 A Well, actually his girlfriend was driving the car at
- 9 this point in time. I asked him to get in the car with me
- 10 and let's travel to city hall. And she therefore followed.
- 11 Q And did y'all seize the car at city hall?
- 12 A Yes, sir, we did.
- 13 Q Okay.
- 14 A We went and processed it for any, any evidence.
- 15 Q All right. Now, after -- did you interview
- 16 Mr. Sainvil?
- 17 A Mr. Sainvil, I did.
- 18 Q And after interviewing him did you then try to locate
- 19 Mr. Smith?
- 20 A We didn't know who Mr. Smith was because at the
- 21 point -- at that point in time he was giving me, giving me
- 22 just the nickname of Tang -- Tang. And then, then I said,
- 23 well, if you know, if he's Tang and y'all hang together all
- 24 the time, what's his real name. And then he recalled. He
- 25 said, well, his real name is, I believe it's, Kenneth

Reginald Spurgeon
Direct examination by Mr. Bulsa

1 Smith, he said because I recall his name because when we
2 were out in the trailer park a deputy, I recall a deputy,
3 running his name for checking him for warrants and that was
4 his name.

5 So when I went to the computer to check Kenny Smith
6 there were a number of Kenny Smiths. So I had to ask him
7 to come to the, the computer with me to look at the photos.

8 Q Okay. And he identified the correct Kenneth Smith?

9 A That will be correct.

10 Q And then what did you do to try to then find
11 Mr. Smith?

12 A After that point in time I asked Mr. Sainvil to try to
13 make some calls to see if he can come up and talk to us
14 after he was identified.

15 Q So he assisted you in trying to locate Mr. Smith.

16 A Yes, sir.

17 Q Now, how is it that y'all ultimately found him?

18 A Mr. Smith?

19 Q Yes.

20 A Actually Mr. Smith called my phone that Saturday. He
21 stated he was out of town, that he would show up from
22 wherever he was at. We didn't know he was in Georgia at
23 the time. But after he responded to city hall we found out
24 he was in Georgia. And so he came up there and gave us an
25 interview.

- 1 Q Had you been leaving messages for him at places?
- 2 A Actually we went looking for him. We were looking,
3 looking for him in several places that we thought he could
4 have been. But, you know, my thing is this. I thought
5 Mr. Sainvil would have the better lead because they, they
6 were close. They had, you know, they were in contact with
7 each other constantly. So I thought he would have a better
8 lead.
- 9 Q How did Mr. Smith get your phone number?
- 10 A Mr. Sainvil gave it to him.
- 11 Q And then Mr. Smith turned himself in and the interview
12 took place as Mr. Patton described.
- 13 A That will be correct.
- 14 Q During the interview did the name of Dwayne -- did the
15 name of Dwayne Foster come up?
- 16 A It did, it did. It came up. Mr. Smith stated that as
17 they were driving past the stop sign he observed an old
18 friend of his. And as time -- as the interview progressed,
19 we asked him what the friend's name was. He said his name
20 was Dwayne Foster. He made mention that after the incident
21 transpired when the fight had broke out I think Mr. Foster
22 came to their aid.
- 23 Q So did he tell you that Dwayne Foster -- he saw Dwayne
24 Foster shoot him?
- 25 A That's what he stated.

Reginald Spurgeon
Cross-examination by Mr. Whelchel

1 Q So did you become interested in who this person was?

2 A Sure, because if, if that was his alibi stating, we
3 was going to give him every opportunity to pretty much, you
4 know, to clear himself. So like Investigator Patton
5 stated, he called Mr. Foster or somebody on the phone. And
6 there was no Mr. Foster.

7 Q Thank you. That's all I have.

8 A Yes, sir.

9 CROSS-EXAMINATION

10 BY MR. WHELCHER

11 Q What time was it? Do you need to get your notes?

12 A I can.

13 (Whereupon, the witness left the stand.)

14 (Whereupon, the witness returned to the stand.)

15 Q What time was it when John Sainvil turned himself in
16 to you?

17 A I started interviewing him around 11:07.

18 Q When did you first start looking for him?

19 A Through the course of --

20 Q Approximately.

21 A Approximately, probably, and I'm guesstimating, maybe
22 around 9:30 or 10:00 as soon as I left Ms. McCravy's house,
23 and she had given us a name. And I contacted the sergeant
24 over narcotics with the Spartanburg County Sheriff's Office
25 who gave me the correct name. And then we went by that.

- 1 Q Were you here when he testified that he turned himself
2 in at 7:00 o'clock?
- 3 A I was here.
- 4 Q Yeah. Okay.
- 5 A Yes, sir.
- 6 Q Where was John Sainvil, Jay, when the interview was
7 being conducted with Kenny Smith the next day?
- 8 A I don't recall him being at city hall.
- 9 Q Okay. Is it possible he was?
- 10 A I don't recall. If, if it's possible that he was, he
11 wasn't with us.
- 12 Q Okay. He wasn't back there in the same rooms or off
13 in another room down the hall.
- 14 A No, sir; no, sir; no, sir.
- 15 Q Okay. Who did you talk to immediately after you
16 interviewed Kenneth Smith?
- 17 A I don't recall.
- 18 Q Did you talk to John Sainvil immediately after?
- 19 A To let him know that I had spoken with Kenneth Smith?
- 20 Q Person to person, face to face.
- 21 A I don't recall that, sir.
- 22 Q In the same room you interviewed Kenneth Smith in.
- 23 A I don't recall that.
- 24 Q Excuse me?
- 25 A I don't recall that.

Reginald Spurgeon
Cross-examination by Mr. Whelchel

1 Q Doesn't mean it didn't happen.

2 A It don't mean it didn't happen. I don't recall it.

3 Q Okay. All right.. May I borrow those? I just want to
4 see.

5 (Pause.)

6 Q When you talked to -- who was it that you talked to
7 that led you to John Sainvil -- the woman?

8 A Ms. McCravy, yes, sir.

9 Q Okay. She told you what John had told her.

10 A She told me what John had told her?

11 Q Yes, sir.

12 A That's correct.

13 Q Okay.

14 A She had made mention of it, yes, sir.

15 Q Is that in your notes?

16 A I think it is. I'm pretty sure it is.

17 Q I can't find mine. I'll have to use yours.

18 A Okay. I'm going to let you borrow them.

19 Q Thank you, sir.

20 A Okay. It says -- I don't even have my glasses with
21 me.

22 MR. BULSA: Objection. Can't testify to what she told
23 him.

24 THE COURT: Are you asking for hearsay information?

25 Q Did you talk to this lady?

Reginald Spurgeon
Redirect examination by Mr. Bulsa

1 A Did I talk to Ms. McCravy?

2 Q Yes.

3 A I did, sir.

4 Q Okay. And she told you what Jay told her.

5 A She stated she knew why I was there.

6 THE COURT: No. The question is --

7 THE WITNESS: Yes, sir.

8 THE COURT: -- did she tell you what Jay told her. Is
9 that a yes?

10 THE WITNESS: Yes, sir.

11 THE COURT: All right. That will be double hearsay.

12 MR. WHELCHEL: That wasn't my next question, Your
13 Honor. I wanted to ask.

14 Q But that is in your report, is that correct?

15 A My notes are right here, yes, sir.

16 Q Okay.

17 REDIRECT EXAMINATION

18 BY MR. BULSA

19 Q I'm a little confused as to that question.

20 You don't have a full recitation of what Jay told her
21 in your notes, do you?

22 A Oh, no, sir, no, sir. I just basically put in here
23 what she had stated.

24 Q You reference speaking to her and then her telling you
25 who Jay's name was.

Reginald Spurgeon
Redirect examination by Mr. Bulsa

- 1 A That's it.
- 2 Q Okay. In those same notes did you reference what you
3 did after interviewing Mr. Smith, whether you spoke again
4 with Mr. Sainvil?
- 5 A Yes, sir.
- 6 Q Okay. Mr. Whelchel has asked you if he was in the, at
7 city hall at the same time as the interview. Do you know
8 if he had to go find Mr. Sainvil again?
- 9 A Do I know we had to go find him?
- 10 Q After you spoke with Mr. Smith did you then have to go
11 look for Mr. Sainvil again? How is it that you came to
12 reinterview him?
- 13 A Did we reinterview him?
- 14 Q Just referencing your notes here. You said after
15 interviewing Mr. Smith you spoke with Mr. Sainvil.
- 16 A Okay, okay. Where's it at in my notes, because I
17 don't have my glasses. Okay.
- 18 Q Second page, the second line, paragraph.
- 19 A Okay, okay. Yes, sir.
- 20 Q Now, Mr. Whelchel was asking you whether Mr. Sainvil
21 was at the city hall. I believe that's why he was asking
22 you that, because of your reference.
- 23 A Because I selected him out of a photo lineup. That's
24 way down there. Okay. I see what you're saying. Do you
25 want me to read it?

Reginald Spurgeon
Redirect examination by Mr. Bulsa

1 Q No, sir. Do you recall if Mr. Sainvil was actually at
2 city hall or you had to go look for him?

3 A No. This is a different interview. This was a
4 different day.

5 Q So it was a different day.

6 A Probably. That wasn't -- no. That wasn't the same
7 day, because we wanted to get clarity on whether or not
8 there was a Dwayne Foster, period. We wanted to see if
9 there was anybody else observed while he was running. This
10 wasn't the same day.

11 Q All right. Okay. You interviewed Mr. Sainvil. He
12 helped you identify Mr. Smith. You find Mr. Smith after he
13 comes back from Georgia. You meet with Mr. Smith. He
14 tells you about this third person, Dwayne Foster. And that
15 causes you to go ask Mr. Sainvil if, in fact, there was a
16 third person.

17 A That's correct, that's correct. I'm sorry.

18 Q You just don't recall whether Mr. Sainvil happened to
19 be at city hall.

20 A Oh, he wasn't there.

21 Q Okay.

22 A No, he was not there at city hall on that particular
23 day. He came back on another day.

24 Q Okay. Now, even though Mr. Sainvil had the time wrong
25 as to when he turned himself in, he indeed did, in fact,

Reginald Spurgeon
Recross-examination by Mr. Whelchel

1 turn himself in?

2 A He came in, yes, sir, when I met him.

3 Q And he made the call and you went.

4 A And picked him up, yes, sir.

5 Q Okay. Thank you.

6 MR. BULSA: That's all I have.

7 RECROSS-EXAMINATION

8 BY MR. WHELCHER

9 Q After all the people -- after you've been to see all
10 the people looking for him, right?

11 A After -- that's when Mr. Smith came?

12 Q No, sir.

13 A What's the question?

14 Q Talking to Mr. Sainvil.

15 A The second time?

16 Q No, sir. Hang on.

17 A Oh, I see what you're saying.

18 Q Mr. Sainvil turned himself in at some point to speak
19 with you, correct?

20 A Yes, sir.

21 Q But that's after you had been looking for him and
22 going over to Una and all of that stuff, correct?

23 A That's correct.

24 THE COURT: You may step down.

25 THE WITNESS: Thank you, Your Honor.

1 MR. BULSA: May I confer with the court reporter?

2 (Pause.)

3 MR. BULSA: Your Honor, at this time the state would
4 rest.

5 THE COURT: All right. Ladies and gentlemen, that is
6 all of the testimony or evidence to be offered by the
7 state, at least in their case in chief.

8 Before we go any further I've got some matters I'll
9 need to address with the lawyers. And it's also time to
10 stop for the day. So we will resume with the trial in the
11 morning beginning at 9:30.

12 Keep in mind the caution previously given you. No
13 discussions about the case, no research, no investigation,
14 no media exposure, no exposure to any discussions carried
15 on by others.

16 So with that have a good evening, and please report
17 directly to your jury room at 9:30 in the morning. Don't
18 call the jury information line. Just show up at 9:30 in
19 the morning.

20 (The following takes place outside the presence of the
21 jury.)

22 THE COURT: Court is in recess until 9:30 in the
23 morning.

24 Let me see the lawyers before you go, please.

25 END OF PROCEEDINGS SEPTEMBER 9, 2009

1 (Proceedings September 10, 2009)

2 (The following takes place outside the presence of the
3 jury.)

4 THE COURT: Any matters to address before the jury is
5 brought in?

6 MR. BULSA: Not from the state.

7 THE COURT: All right. Bring them in.

8 MR. WHELCHER: Your Honor --

9 THE COURT: Sir?

10 MR. WHELCHER: -- excuse me.

11 Mr. Brant -- excuse me. Mr. Smith is going to
12 testify. I thought you might want to question him
13 concerning it.

14 THE COURT: Mr. Smith, do you understand you have a
15 right to remain silent in this trial?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Did your lawyer explain to you your right
18 to testify or not testify?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Do you understand it's your decision and
21 only you can make it?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: And have y'all discussed the advantages
24 and disadvantages of your taking the witness stand, as well
25 as not?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: And do you understand what those
3 advantages and disadvantages are?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Now, you understand nobody can compel you
6 to testify.

7 THE DEFENDANT: Yes, sir.

8 THE COURT: But if you do choose to take the witness
9 stand you'll have to answer all the questions asked, even
10 if they might tend to prove you guilty.

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Do you also understand that if you don't
13 take the witness stand and testify I'm going to instruct
14 the jury they can't hold that against you, they can't
15 consider it in any way as I already have?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Have you had plenty of time to reflect
18 upon your decision as to whether or not you will testify?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: And what is that decision?

21 THE DEFENDANT: I want to testify, sir.

22 THE COURT: And is that a decision that you reached of
23 your own free will and accord?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Has anybody pressured you into that

1 decision?

2 THE DEFENDANT: No, sir.

3 THE COURT: Has anybody forced you into that decision?

4 THE DEFENDANT: No, sir.

5 THE COURT: Did anyone suggest to you that that's the
6 decision that you ought to make in this case?

7 THE DEFENDANT: No, sir.

8 THE COURT: You made it on your own?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: And you're satisfied with it?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Okay. Anything else?

13 Bring the jury in.

14 (The following takes place in the presence of the
15 jury.)

16 THE COURT: Good morning, ladies and gentlemen.

17 As you know, when we recessed yesterday the state had
18 concluded with their presentation of evidence. So we're
19 now going to proceed with any to be offered by the defense.

20 Mr. Whelchel.

21 MR. WHELCHER: Thank you, Your Honor. The defense
22 would call Kenneth Smith.

23

24

25

Kenneth Smith
Direct examination by Mr. Whelchel

- 1 KENNETH SMITH, having been
2 first duly sworn, testified as follows:
3 DIRECT EXAMINATION BY MR. WHELCHER
4 Q How old are you, Mr. Smith?
5 A Twenty-seven.
6 Q Are you from Spartanburg?
7 A Yes, sir.
8 Q Okay. When did you first meet Jay Sainvil?
9 A I met John Sainvil back in December of '07.
10 Q Before this incident occurred in March of '08.
11 A Yes, sir.
12 Q So you'd known him for about three months.
13 A Yes, sir.
14 Q Okay. Do you have a driver's license, Kenneth?
15 A No, sir.
16 Q You drive a car, do you not?
17 A Yes, sir.
18 Q Okay. Have you ever owned a car?
19 A No, sir.
20 Q Have you ever paid for automobile insurance?
21 A No, sir.
22 Q No car registered in your name.
23 A No, sir.
24 Q But you are still driving one.
25 A Yes, sir.

Kenneth Smith
Direct examination by Mr. Whelchel

- 1 Q Okay. Now, on occasion you've driven this black Honda
2 that everybody's been talking about and we've seen pictures
3 of it, is that correct?
- 4 A Yes, sir.
- 5 Q Showing you State's Exhibit No. 6, is that the car
6 you're talking about?
- 7 A Yes, sir.
- 8 Q Okay. This car right here didn't belong to you.
- 9 A No, sir.
- 10 Q Belongs to Jay Sainvil's girlfriend.
- 11 A Yes, sir.
- 12 Q And Jay Sainvil never drove it.
- 13 A Not that day of the incident.
- 14 Q But he did drive it on other days, correct?
- 15 A Yes, sir.
- 16 Q Okay. As a matter of fact, the day of the incident he
17 came and picked you up, is that right?
- 18 A Yes, sir.
- 19 Q And you were in where?
- 20 A At Cowpens at Kamichi Mullins' house.
- 21 Q Okay. You didn't take that car with you to your
22 girlfriend's house in Cowpens?
- 23 A No, sir.
- 24 Q Okay. Oh, did you hide a gun in that car?
- 25 A No, sir.

Kenneth Smith
Direct examination by Mr. Whelchel

- 1 Q Did you hide a gun under the seat, in the trunk,
2 anywhere in that car?
- 3 A No, sir.
- 4 Q Okay. I'm handing you a bag containing an item marked
5 State's Exhibit No. 14. Will you look at that, please,
6 sir? Have you seen that before?
- 7 A Yes, sir.
- 8 Q Where?
- 9 A Inside the Honda.
- 10 Q Okay. Did you take that stick and try to hit this
11 fellow here -- Santos?
- 12 A No, sir.
- 13 Q Okay. Describe for the jury how it was that you came
14 to be -- you and Jay. When I'm talking about Jay, that's
15 John Sainvil. Is that what you call him -- Jay?
- 16 A Yes, sir.
- 17 Q Okay. While we are talking about names, Kenneth, do
18 you have another name?
- 19 A A nickname.
- 20 Q That is?
- 21 A Tang.
- 22 Q T-A-N-G?
- 23 A Yes, sir.
- 24 Q And who gave you the nickname Tang?
- 25 A My aunt gave me that name when I was younger.

Kenneth Smith
Direct examination by Mr. Whelchel

- 1 Q How young?
- 2 A About two or three years old.
- 3 Q Okay. Did she call you a sweet little thing?
- 4 A That was my grandmother.
- 5 Q And eventually got shouldered with Tang.
- 6 A Yes, sir.
- 7 Q Okay. And a lot of people know you as Tang, right?
- 8 A Yes, sir.
- 9 Q And they don't know your real name, just know you as
- 10 Tang.
- 11 A Yes, sir.
- 12 Q Okay. Now, going to March of last year, 18 months
- 13 ago, did you have an occasion to go with Jay out to the
- 14 home of Santos?
- 15 A I just drove Jay out to the home of Santos on March --
- 16 Q Okay. Did you know how to get there?
- 17 A No, sir.
- 18 Q Did you know where he lived?
- 19 A No, sir.
- 20 Q Okay. Well, who told you how to get there?
- 21 A John.
- 22 Q John Sainvil.
- 23 A Yes, sir.
- 24 Q Okay. And when you got there, what happened?
- 25 A When we got there on March 27th, that's on a Thursday

Kenneth Smith
Direct examination by Mr. Whelchel

1 night. John went in the house of Santos, and I came in
2 right behind John Sainvil. We went in this room, and
3 Santos was showing us these rifles. And he left out and
4 went and got a .45 caliber pistol and a bulletproof vest.

5 Q Okay.

6 A And he come back in the room and showed us the weapon
7 and the bulletproof vest. He said he wanted \$200 for the
8 weapon.

9 Q Okay. Well, let me stop you there. Did Santos call
10 you and ask you if you wanted to buy these weapons?

11 A No, sir.

12 Q He called Jay.

13 A Yes, sir.

14 Q Okay. So after you get out there and you're looking
15 at the weapons and vest and everything, what happens next?

16 A Santos negotiated a price for the pistol, and it was
17 \$200. And the price was -- Jay said he didn't want to pay
18 \$200. But Santos said he couldn't go no lower than \$150.

19 So we sat there and carried on a conversation a little
20 bit more. And we left back out. Me and John got in the
21 car, and John was like he was going to go ahead and get it.
22 I loaned John \$150 to go ahead and get it. He said he was
23 going to pay me back Friday, the next day.

24 Q Okay. I want you to speak up. I want to make sure
25 everybody can hear you.

Kenneth Smith
Direct examination by Mr. Whelchel

1 So did John go back in and get the weapon, or what
2 happens then?

3 A John went back in by himself and got the weapon and
4 brought it back to the car.

5 Q Okay. Then what?

6 A When he got back to the car he showed, he showed it to
7 me, that he got it. And I was like did you check it first
8 to see if it worked.

9 So John slipped the clip out, out of the pistol. And
10 I grabbed it to see if one was in the head, in the chamber.
11 And, and the hammer came back. And I pulled the trigger in
12 it to see if it worked. And the hammer didn't go back in.

13 So I told John the pistol didn't work. So John sat
14 there and contemplated for a minute about the pistol. So
15 when John -- he was sitting there getting angry about it.

16 So he got back out of the car. He was like he was
17 going to go ahead and get the money back. Went back to the
18 door. So he's leaning against the doorway, which it showed
19 on the door. Santos at the door. I guess he's sitting
20 there talking.

21 So I'm on the phone with Kamichi Mullins that night
22 calling her to let her know I'm coming up there to spend
23 the night with her and my daughter.

24 I see what's going on. I see they're arguing. So I
25 told Kamichi Mullins that I'll call you back. Steps out

Kenneth Smith
Direct examination by Mr. Whelchel

1 the car to go to the door to see what's going on.

2 John said he won't give the money back. So I was
3 like, well, don't worry about it. Santos saying that he
4 was going to call that next day and get the money back. So
5 I was like, well, until you get the money back we're just
6 going to keep the gun. And I walked off from them. Told
7 Jay to come on, let's go.

8 So we gets back in the car and pulls off. I drive
9 myself to Cowpens, Three Oaks Apartment, and gets out. And
10 John Sainvil gets in the driver's seat and drives off.

11 And that's when the next day I called John Sainvil
12 March 28th to let him know to pick me up around 4:00 or
13 5:00 o'clock because I was waiting for my little daughter
14 to get out of daycare to see her. That was, that was my
15 whole purpose of going to Cowpens that night.

16 Okay. John Sainvil pulls up around 3:00 or a little
17 something after 3:00, pulls in and backs in, jumps out of
18 the driver's seat and tells me to come on.

19 Q Well, let me ask you a question, sir. Stop right
20 there.

21 What's your girlfriend's name again?

22 A My girlfriend or the daughter?

23 Q The lady you were with that night.

24 A Oh, Kamichi Mullins.

25 Q Okay. Did y'all have plans for the weekend?

Kenneth Smith
Direct examination by Mr. Whelchel

- 1 A No. That was, that's my daughter's mother, Kamichi
2 Mullins.
- 3 Q Okay.
- 4 A The girlfriend I was with at the time.
- 5 Q Did you have plans with somebody for the weekend?
- 6 A Yes, sir.
- 7 Q Those were what?
- 8 A Plans to go to Georgia.
- 9 Q And where in Georgia?
- 10 A To the Georgia aquarium.
- 11 Q Okay. And did you do that?
- 12 A Yes, sir.
- 13 Q Okay. When did you go down to the Georgia aquarium?
- 14 A That Friday evening.
- 15 Q Okay. All right. Now, sometime Friday afternoon John
16 Sainvil shows up at your Cowpens apartment.
- 17 A Yes, sir.
- 18 Q All right. What happens then?
- 19 A When he shows up he tells me to come on, that Santos
20 called him about the gun. So we gets in the car. He
21 wanted me to drive. So I drives. I go to my grandma house
22 on . I go over there and put some
23 clothes in the washer because I needed some clean clothes.
24 From there I call --
- 25 Q For what? You needed clean clothes for what?

Kenneth Smith
Direct examination by Mr. Whelchel

- 1 A To go out of town with.
- 2 Q Oh, you mean on the trip to Atlanta?
- 3 A Yes, sir.
- 4 Q Okay.
- 5 A Okay. From there I called my barber at the
- 6 International Barber Shop. And he said he was, he was, he
- 7 didn't have nobody in the chair, to come on down there.
- 8 So we left from and drove over
- 9 there to the barber shop by Camie Claggett. When we pulls
- 10 up, he's standing out there waiting. So we goes straight
- 11 in. I get in the chair and get my hair cut.
- 12 The whole time I'm getting my hair cut John Sainvil's
- 13 on the phone talking. He'll hang up off the phone and
- 14 text. So and I gets out the chair. It's like 15 minutes
- 15 later.
- 16 Q Hold on just a minute. Let me ask you a question.
- 17 Your hair back then, is it the same way it is now?
- 18 A Yes, sir.
- 19 Q Have you always kept your hair short like that?
- 20 A Yes, sir.
- 21 Q Have you ever worn your hair in dreadlocks?
- 22 A No, sir.
- 23 Q Have you ever worn your hair like this?
- 24 A No, sir.
- 25 Q All right. After you finish with the haircut, what

Kenneth Smith
Direct examination by Mr. Whelchel

1 happens next?

2 A John tells me he got a meeting with Santos.

3 Q You're going to have to speak up. I'm having trouble
4 hearing you.

5 A John tells me he got a meeting at, with Santos
6 at Biggerstaff.

7 THE COURT: Excuse me just a minute.

8 When he asks you to speak up, that doesn't mean
9 necessarily get closer to the microphone. It just means
10 you speak up, because you distort the sound when you get
11 that close to the microphone. If you'll pull that -- do
12 you see that thing? Pull that up a little. No. This
13 part. And just speak loudly and it'll pick it up. If you
14 don't speak loudly, it won't.

15 THE WITNESS: Yes, sir.

16 THE COURT: But you can't get right on top of it. It
17 distorts it.

18 THE WITNESS: Yes, sir.

19 Q Go ahead.

20 A So when I finish getting my hair cut John said he got
21 a call from Santos to let him know to meet him at
22 Biggerstaff for this change for the pistol and the money.

23 So I drive John in the Honda to Biggerstaff. We never
24 made it to park at Biggerstaff parking lot. We comes in
25 front of Biggerstaff grocery store. It's on the corner of

Kenneth Smith
Direct examination by Mr. Whelchel

1 Farley. And I can't think of the other street.

2 We got there. Another phone call came in on John's
3 cell phone saying that where we at and to pull in at Li'L
4 Cricket. So John tells me to go to Li'L Cricket on the
5 corner of Hayne Street. And that's when I goes to Li'L
6 Cricket.

7 When we gets to the stop sign of Hayne Street to the,
8 to the right side of the corner market, the store, John
9 calls back and asks what vehicle they was in. And he said
10 I see and hangs up the phone.

11 So I turns on Hayne Street and goes into the parking
12 lot of the store.

13 Q All right. Stop there, sir.

14 I want you to take a look at those, please.

15 (Pause.)

16 Q Are those different photographs and different angles
17 of the store on Hayne Street?

18 A Yes, sir.

19 (Photographs marked Defendant's Exhibit Nos. 1 through
20 7 for Identification.)

21 MR. WHELCHER: Beg the Court's indulgence, Your Honor.

22 (Pause.)

23 Q Mr. Smith, I'm giving you what's been marked as
24 Defendant's Exhibit for Identification No. 6 at this point,
25 particularly calling your attention to the bottom

Kenneth Smith
Direct examination by Mr. Whelchel

1 photograph.

2 THE COURT: That has a zoom feature on it too should
3 you need it.

4 MR. WHELCHER: Excuse me?

5 THE COURT: That projector has a zoom feature on it
6 also should you need it.

7 Q Now, Mr. Smith, is that the store that you pulled
8 into? Is that the side view of that store?

9 A Yes, sir.

10 Q Excuse me?

11 A Yes, sir.

12 Q Okay. Speak up again like the judge told you.

13 When you arrived that afternoon Santos was already
14 there.

15 A Yes, sir.

16 Q Okay. You were driving. Where was Jay?

17 A On the passenger side of the car.

18 Q Okay. And where was Santos?

19 A On the passenger side of that truck.

20 Q Okay. You could see through his windows?

21 A Yes, sir. The windows was down.

22 Q Can you see through the windows in that black Honda?

23 A No, sir.

24 Q That Honda right there.

25 A No, sir.

Kenneth Smith
Direct examination by Mr. Whelchel

1 Q Okay. When you arrived the truck they were in was
2 already there.

3 A Yes, sir.

4 Q And what position was the truck in relative to the
5 side of the building?

6 A It was in the position like the truck that's parked
7 there now.

8 Q Backed in or headed in?

9 A Backed in.

10 Q Okay. And where did you pull in?

11 A I pulled in along on this side of the truck facing the
12 building.

13 Q Right here beside it?

14 A Yes, sir.

15 Q Okay. Then what happened?

16 A Sat there for about like a minute. Santos didn't know
17 what side of the vehicle to go to. He sat in the truck.
18 So John rolled his window down and waved him over to the
19 passenger side of the car.

20 Q How did he do that?

21 (Whereupon, the witness demonstrated.)

22 Q Okay.

23 A So that's when Santos got out of the truck to go to
24 the passenger side of the vehicle, or come to the passenger
25 side of our vehicle.

Kenneth Smith
Direct examination by Mr. Whelchel

1 He passed the money inside the window to John and
2 asked John for the pistol. John say he ain't got the
3 pistol. So he asked him where's the pistol that's supposed
4 to, you're supposed to give me the pistol back. He say he
5 ain't got the pistol. So John give him the money back.

6 So Santos stands up, well, leans back up and stands
7 straightforward and spoke in Spanish. The truck's crank up
8 and pulls in to block us in with his nose to the back end
9 of the car.

10 Q The nose of the truck to the back end of the Honda.

11 A Yes, sir.

12 Q Okay.

13 A That's when another little guy jumps out with
14 something black around his, his wrist and comes screaming
15 up give me my f'ing pistol. So Santos --

16 Q Whose side of the vehicle did he come to?

17 A Passenger side.

18 Q Okay. Was your window up?

19 A Yes, sir.

20 Q Was your window locked or was your door locked?

21 A Yes, sir.

22 Q Okay. There's a sunroof in this car?

23 A Yes, sir.

24 Q And it was opened.

25 A Yes, sir.

Kenneth Smith
Direct examination by Mr. Whelchel

1 Q Okay.

2 A So another, a little guy, comes up screaming give me
3 my f'ing pistol, you got my f'ing pistol, with racial slurs
4 in it.

5 So Santos throws the money back in, give me my pistol,
6 give me my pistol. So the driver gets out the truck, come
7 and stands to the driver side of my door.

8 Q Beside you.

9 A Yes, sir.

10 THE COURT: You can't turn your back to the court
11 reporter.

12 A And --

13 THE COURT: I say you cannot turn your back. He's not
14 asking you to reference that photograph right now. So just
15 talk to him.

16 A So the driver of the truck gets to the driver's side
17 of the car on the side I'm sitting on.

18 THE COURT: Excuse me just a minute.

19 Don't, don't lay down on the witness stand there.
20 Just -- there you go. Now she can see you and we can hear
21 you.

22 A And he's just standing there. So Santos throws the
23 money back in the Jeep, throws in his lap, screaming for
24 the pistol. He want the pistol.

25 So John turns around to see who this other little guy

Kenneth Smith
Direct examination by Mr. Whelchel

1 is that come from out the truck. When he turns around,
2 Santos kicks him in his eye. So John flies back into the
3 car.

4 Q Wait a minute. Is the door opened or closed at this
5 point?

6 A The door is opened.

7 Q How did the door get opened?

8 A Santos opened the door.

9 Q Okay. Santos opened the door.

10 A Yes, sir.

11 Q All right. Is that before or after this other fellow
12 came around to the passenger side where Santos and Jay
13 were?

14 A It's before the passenger got, before the other guy
15 come, to the passenger side.

16 Q Okay. Go ahead. What happened after that?

17 A So Jay flies back in the car back on my side. Hats
18 get knocked off. And he's trying to climb from the
19 passenger side to the driver's side on the back side of the
20 car.

21 Q Why does Jay fly back towards you?

22 A Because Santos kicked him in his face, in his eye, on
23 this side.

24 Q And Jay was wearing a hat?

25 A Yes, sir.

Kenneth Smith
Direct examination by Mr. Whelchel

- 1 Q Okay. Is his hair like it is today?
- 2 A He had a, a stocking cap on.
- 3 Q And a hat.
- 4 A It was like a cap to come down over his hair.
- 5 Q Was it braided or whatever you call this like that?
- 6 A It was in some kind of frizzy looking.
- 7 Q Okay. Go ahead.
- 8 A So John trying to run, well, trying to climb to the
- 9 driver's side in the back side of the car. Adam trying to
- 10 come in from the passenger side, which is the little guy.
- 11 Q You didn't know who that was until --
- 12 A After all of this done went.
- 13 Q Okay.
- 14 A So the little guy trying to come in through the
- 15 passenger-side door and, and assist with Santos on
- 16 assaulting Jay.
- 17 He came. The little guy can't assist because Santos
- 18 kicking Jay. So he opens the back-passenger door and
- 19 started punching Jay through there. When he can't get to
- 20 him through there he stands on the back-passenger door and
- 21 punching Jay through the sunroof.
- 22 Q Okay. Let me ask you something. While all of this
- 23 punching is going on Jerry try to hit you?
- 24 A No, sir. Jerry swung through the sunroof one time.
- 25 And that's when Jay was a little closer to the sunroof.

Kenneth Smith
Direct examination by Mr. Whelchel

- 1 Q Okay. So Jay is fighting off Santos and the other
2 fellow Adam.
- 3 A Yes, sir.
- 4 Q And Jerry's on your side.
- 5 A Yes, sir.
- 6 Q Okay. Did they take property from Jay?
- 7 A They took a necklace and a pair of boots from Jay.
- 8 (Pause.)
- 9 Q Would you look in that bag, sir? Just look in the
10 bag. Is that the kind of boots that Jay had on?
- 11 A Yes, sir.
- 12 Q Do you know what kind of boots those are?
- 13 A Timberland Boots.
- 14 Q Do you know what they cost?
- 15 A Well over a hundred dollars.
- 16 Q A pair.
- 17 A Not a pair. It's, it's a hundred something dollars
18 for the pair.
- 19 Q All right. Go ahead and pick it up. Let me back up.
20 At what point during this fight between Jay and Santos
21 and the other fellow happened, did Jay lose those boots?
- 22 A When Jay was trying to defend himself by kicking
23 Santos and them off him. Adam grabs the boot and the
24 necklace and goes back to the truck.
- 25 Q All right. Let me ask you something. Correct me if

Kenneth Smith
Direct examination by Mr. Whelchel

1 I'm wrong.

2 Let's assume that this is your vehicle facing the wall
3 and you're here in the driver's seat and Jay is right here
4 beside you. Correct?

5 A Yes, sir.

6 Q And at some point Jerry, the young guy, comes and
7 stands beside you. But before that Santos and Jay come to
8 the passenger side of the car and assault, excuse me,
9 Santos and Adam, that third fellow, come to this side of
10 the car and assault Jay, correct?

11 A Yes, sir.

12 Q Okay. Who hit who first?

13 A Santos hit Jay first.

14 Q Okay. Adam gets the boots and the necklace and runs
15 back to the truck.

16 A Yes, sir.

17 Q All right. What did Santos do?

18 A Santos still standing right there yelling for the
19 pistol or pistol, however he said. I know it's pistol in
20 it.

21 Q Okay. And then what happened?

22 A So Santos backs up a little. Jay gets enough room to
23 jump out of the car and run.

24 Q Which way did he run?

25 A In between the car and the truck.

Kenneth Smith
Direct examination by Mr. Whelchel

1 Q In between the back of the car and the front of the
2 truck?

3 A Yes, sir.

4 Q Now, can you show us on this, this lower photograph,
5 where he ran to?

6 A Up in the area right there.

7 Q Well.

8 THE COURT: Can you get that pointer please,
9 Mr. Taylor?

10 Q Yeah.

11 A Up in this area.

12 Q Okay. Is he in front of the automobile or beside
13 them, or where is he in relation to the truck and the car?

14 A He's in front of the trucks and the car.

15 Q Okay. So is he in front of the store?

16 A He's not directly. He's at angle in front of the
17 store.

18 Q Okay. Show me again where he was.

19 (Whereupon, the witness demonstrated.)

20 Q In that area.

21 A Yes, sir.

22 Q Okay. Show -- wait a minute. Let me keep that.

23 Can you show me the gas pumps? Is that the gas pumps
24 on the far left? And the front door of the store is where?
25 You can stand up a little if you need to.

Kenneth Smith
Direct examination by Mr. Whelchel

- 1 (Whereupon, the witness demonstrated.)
- 2 Q Right there at the side.
- 3 What was Jay wearing that day?
- 4 A Black t-shirt and dark jeans.
- 5 Q Okay. And the hat and the rag.
- 6 A It was a black hat.
- 7 Q Okay. But that got knocked off in the fight, is that
- 8 right?
- 9 A Yes, sir.
- 10 Q Okay. So when he's outside the car he's got that rag
- 11 thing on his head.
- 12 A Yes, sir.
- 13 Q Okay. Now, after he runs, what do they do?
- 14 A They gets in the truck and backs up. The driver
- 15 gassed the truck real hard and spin hard to the left and
- 16 goes in the traffic. He was going in the traffic.
- 17 When he backs up, I gets out the car. I'm at the back
- 18 driver rear wheel when he spins hard to the left and goes
- 19 in the traffic and comes around.
- 20 That's when shots was fired. Pulls up again, and he
- 21 stops because his traffic coming heads-on.
- 22 Q Stop. Use that pointer again and show us how the
- 23 truck backed up from where and turned where.
- 24 A We parked here. The truck backs up, spins hard.
- 25 Well, he comes around this way.

Kenneth Smith
Direct examination by Mr. Whelchel

1 Q And the tunnel was which way, sir?

2 A Over here.

3 Q Okay.

4 A So he turns. When he gets about right there,
5 traffic's coming. So that's when shots fired. So he pulls
6 back in.

7 Q Okay. Showing you Defendant's Exhibit for
8 Identification No. 1, sir. Is that the tunnel on the
9 right?

10 A Yes, sir.

11 Q Okay. And that's the store to the left.

12 A Yes, sir.

13 Q Okay. And these poles you see in both of those
14 pictures, they're across the street.

15 A Yes, sir.

16 Q And that's the street you see in the foreground or the
17 middle ground, I guess, of the picture, is that right?

18 A Yes, sir.

19 Q Okay. Now, once they start to leave are you already
20 out of the car or getting out of the car or what?

21 A Once they back the truck up I'm getting out the
22 vehicle.

23 Q Okay. What happens next?

24 A That's when the driver gassed it, gassed the truck
25 hard. And he spins the wheel going in this direction like

Kenneth Smith
Direct examination by Mr. Whelchel

1 he's heading out of the store parking lot this way but
2 decides to cut back. And when he gets around this way,
3 that's when shots fired.

4 Car's coming. So he pulls back in to keep from having
5 a head-on collision and stalls for a minute. And that's
6 when another vehicle comes out the tunnel and goes around.
7 The truck goes in the tunnel the wrong way, the wrong
8 direction, towards head on towards traffic.

9 Q Okay. Where were you when the shots were fired?

10 A Standing back there by the back driver rear tire.

11 Q The left rear tire of the Honda.

12 A Yes, sir.

13 Q On the driver's side.

14 A Yes, sir.

15 Q Had you opened the trunk?

16 A No, sir.

17 Q Did you go into the trunk?

18 A No, sir.

19 Q Okay. Where did the shots come from?

20 A From my right side behind me, sir.

21 Q Would you step down, please, sir?

22 (Whereupon, the witness left the stand.)

23 Q I want you to stand right here, sir. Face the jury.

24 Now, let's assume that you're standing beside the
25 automobile, the black Honda. Tell me the direction again

Kenneth Smith
Direct examination by Mr. Wheelchel

- 1 that the shots you heard came from. Back in that direction?
- 2 A Yes, sir.
- 3 Q From behind you and over your shoulder.
- 4 A Yes, sir.
- 5 Q Okay. You didn't fire those shots.
- 6 A No, sir.
- 7 Q Who was the only person that was in that area?
- 8 A John was the only person in the area, sir.
- 9 Q Wait a minute. John Sainvil?
- 10 A Yes, sir.
- 11 Q I want to make sure there's no doubt about this. This
- 12 fellow here --
- 13 A Yes, sir.
- 14 Q -- was back there.
- 15 A Yes, sir.
- 16 Q All right, sir.
- 17 (Whereupon, the witness returned to the stand.)
- 18 Q After the shots are fired and the truck drives off,
- 19 what happens?
- 20 A I tell John let's go.
- 21 Q Okay. Did you get back in the driver's seat?
- 22 A Yes, sir.
- 23 Q Okay. And where did you go?
- 24 A Straight across Hayne, well, Franklin Street.
- 25 Q Defendants Exhibit No. 3 for Identification,

Kenneth Smith
Direct examination by Mr. Whelchel

1 Mr. Smith. Look at the top photograph and see if you can
2 point out where you went after y'all left from that
3 photograph.

4 A Straight across that street.

5 Q You have got to use the pointer, Mr. Smith.

6 A There's a street right here goes straight across.

7 Q Let me borrow that.

8 Is this Hayne Street if you know that the store's in
9 front, that runs in front of the store?

10 A I know Hayne Street runs in front of the store goings
11 up but I don't --

12 Q Okay. And across from the store is Fairfax Street, is
13 that correct?

14 A Franklin.

15 Q I'm sorry. Franklin. And where did you go, you and
16 Jay?

17 A Gets to the stop sign to make a right on Fairfax.

18 Q Okay. So you went down Franklin Street and turned
19 right onto Fairfax.

20 A Yes, sir.

21 Q Okay. Then where did you go?

22 A Goes up to the stop sign at the top of Williams Street
23 and crosses over on Williams Street and stayed on Fairfax
24 and goes to the end of the stop sign at the end of Fairfax
25 and turns left on another little street.

Kenneth Smith
Direct examination by Mr. Whelchel

- 1 Q Do you know the name of it?
- 2 A No, sir.
- 3 Q Okay, okay. So where did that street end?
- 4 A It goes to a, it comes to another stop sign. And I
- 5 make a right at that stop sign. And it goes around a
- 6 curve. And you take it all the way up to another stop
- 7 sign, and you'll be on Front Street.
- 8 Q And on Front Street where did you go?
- 9 A I made a left on Front Street.
- 10 Q And?
- 11 A All the way to the stop sign on Powell Mill Road in
- 12 front of S. M. C.
- 13 Q Spartanburg Methodist College?
- 14 A Yes, sir.
- 15 Q Okay. And from Powell Mill Road at Spartanburg
- 16 Methodist College and Front Street where did you go?
- 17 A I made a right on Powell Mill Road all the way down to
- 18 the red light, the 29.
- 19 Q Okay. Went where?
- 20 A I made a right on 29 headed towards Westgate Mall.
- 21 From Westgate, by Westgate Mall we got on 26.
- 22 Q Okay. During the time that you were in the automobile
- 23 with Jay what was said about the shooting?
- 24 A I better not say nothing to nobody about it.
- 25 Q Who said that?

Kenneth Smith
Direct examination by Mr. Whelchel

- 1 A John say it.
- 2 Q Okay. While you were in the automobile with John
- 3 after this communication from him was there a phone call
- 4 received?
- 5 A Yes, sir.
- 6 Q Whose phone did it go to?
- 7 A Jay's phone.
- 8 Q And who called him?
- 9 A Santos.
- 10 Q So Jay and Santos were talking to each other minutes
- 11 after this shooting took place.
- 12 A Yes, sir.
- 13 Q More than one phone call?
- 14 A Yes, sir.
- 15 Q When you get out -- I think you headed out towards the
- 16 mall, is that correct?
- 17 A Yes, sir.
- 18 Q And then where did you go?
- 19 A On 26.
- 20 Q Okay. And where did you end up, sir?
- 21 A Ended up on the first 85 exit.
- 22 Q Okay. Then?
- 23 A Headed to Pine Street exit off first 85 exhibit.
- 24 Q All right. Where did you go, Mr. Smith?
- 25 A Bradford Grove Apartments in Hillcrest.

Kenneth Smith
Direct examination by Mr. Whelchel

1 THE COURT: Let me ask you not to turn your back to
2 the court reporter.

3 Q Where did you go again, sir?

4 A Bradford Grove Apartments in Hillcrest.

5 Q Okay. And why did you go there?

6 A To get Jay some shoes.

7 Q Okay. After you got Jay's shoes, where did you go?

8 A Went to Una.

9 Q Okay. Whose house did you go to?

10 A He tells me to go to Una so he can tell Shorty don't
11 let nobody nowhere he live at.

12 Q Okay. Did you go in with him while he was talking to
13 Shorty?

14 A No, sir.

15 Q Okay. So you're in the car and he's out of the car
16 talking to Shorty.

17 A Yes, sir.

18 Q Did he talk to anybody else that you know of?

19 A He said he was going to talk to Tonya also.

20 Q Who?

21 A A lady named Tonya.

22 Q Okay. You didn't go with him.

23 A No, sir.

24 Q All right. How long is he gone on these trips?

25 A About 20 or 30 minutes, sir.

Kenneth Smith
Direct examination by Mr. Whelchel

- 1 Q Okay. When he comes back where did he go, and who
2 directed where he goes?
- 3 A I told him I had to go to my grandma house, sir.
- 4 Q All right. Where does she live?
- 5 A On
- 6 Q Okay. So you went to your grandmother's house on
7
- 8 A Yes, sir.
- 9 Q Who was there at your grandmother's house when you got
10 there?
- 11 A My grandmother and my sister and my cousin and a
12 couple of family members.
- 13 Q Your sister Sabrina?
- 14 A Yes, sir.
- 15 Q Okay. How long did you stay at your grandmother's
16 house?
- 17 A I was planning on staying there, sir, until I got
18 ready to leave for the trip. But Jay got a phone call from
19 a female, and he was directing her to my grandmother's
20 house.
- 21 Q Okay. Did Jay go into your grandmother's house?
- 22 A No, sir.
- 23 Q Okay. Did he stay outside, did he get out of the car?
- 24 A He got out the car.
- 25 Q What did he do?

Kenneth Smith
Direct examination by Mr. Whelchel

1 A He got out the car standing on the side where my
2 cousin was standing at.

3 Q Okay. How long did y'all stay at your grandmother's
4 house?

5 A Estimate around ten or 15 minutes.

6 Q Did you take a shower there?

7 A After Jay left.

8 Q Okay. But before you didn't take a shower while Jay
9 was there with you.

10 A No, sir.

11 Q Okay. After or when you leave your grandmother's
12 house, where do you go next, sir?

13 A Me and Jay together, or after we split?

14 Q You and Jay together.

15 A Me and Jay together, we go to Family Dollar to direct
16 a girl that he was on the phone with back to my
17 grandmother's house.

18 Q Okay. You've got to speak up a little bit. Now, you
19 went to the Family Dollar.

20 A Yes, sir.

21 Q Is that at the end of Forest Street?

22 A Yes, sir.

23 Q It's on the corner. Is it on the corner of Forest and
24 West Main Street?

25 A Yes, sir.

Kenneth Smith
Direct examination by Mr. Whelchel

- 1 Q Okay. You live right up the street from that.
- 2 A Yes, sir.
- 3 Q On the other side of the iron bridge?
- 4 A Yes, sir.
- 5 Q Okay. When you get to Forest and West Main where the
- 6 Family Dollar is, what happened?
- 7 A We pulls in the Family Dollar store. The girl's
- 8 sitting in the car. Jay yells out the window to follow us.
- 9 We pulls right back off. She jumps behind us in her
- 10 vehicle. She follows back up the road to my grandmother's
- 11 house. Pulls in. We park. I gets out. And I'm talking
- 12 to my cousin. And my sister's standing out there. And Jay
- 13 is sitting there. He hung around another ten or 15
- 14 minutes. And him and the girl finally left because he got
- 15 the girl to follow him in the car.
- 16 Q So isn't that the last time you saw Jay that day?
- 17 A Yes, sir.
- 18 Q Okay. So Jay drove off in that Honda?
- 19 A Yes, sir.
- 20 Q Okay. When was the next time that you saw Jay?
- 21 A The next time I saw Jay was March 29th, the night I
- 22 turned myself in to have an interview with Detective
- 23 Spurgess and Detective Agent Patton.
- 24 Q Where did you see Jay?
- 25 A At the city hall.

Kenneth Smith
Direct examination by Mr. Whelchel

- 1 Q City police department?
- 2 A Yes, sir.
- 3 Q Okay. Before you gave your statement?
- 4 A Yes, sir.
- 5 Q Did you talk to him?
- 6 A No, sir.
- 7 Q Did you still have your phone with you?
- 8 A Yes, sir.
- 9 Q Did you give a statement?
- 10 A Yes, sir.
- 11 Q And you've heard that statement.
- 12 A Yes, sir.
- 13 Q Why didn't you tell Mr. Spurgeon and Mr. Patton,
- 14 whoever you were talking to, what you just told us?
- 15 A Because I was afraid and scared at the time.
- 16 Q Of what?
- 17 A Of Jay. Jay said don't tell nobody in a threatening
- 18 demeanor when we was in the car. And I just witnessed on
- 19 what he did. And he knew a lot about me and my family.
- 20 Q What do you mean, he knew a lot about you and your
- 21 family?
- 22 A He knew where I lived and my grandmother lived and my
- 23 child lived.
- 24 Q Over in Cowpens?
- 25 A Yes, sir.

Kenneth Smith
Direct examination by Mr. Whelchel

- 1 Q Excuse me?
- 2 A Yes, sir.
- 3 Q Okay. I'm sorry. So there never was any fellow
- 4 standing up on the hill.
- 5 A No, sir.
- 6 Q In your statement you make very little mention of Jay,
- 7 is that correct?
- 8 A Yes, sir.
- 9 Q What you told them when you talked to them.
- 10 A Yes, sir.
- 11 Q Why was that?
- 12 A Because I didn't want to bring him in, in the
- 13 equation, sir.
- 14 Q Well, you already knew he was in it to a degree.
- 15 A Yes, sir.
- 16 Q But you didn't know what he had told the police, did
- 17 you?
- 18 A No, sir.
- 19 Q You saw Jay before you gave your statement. He was at
- 20 the city police department.
- 21 A Yes, sir. He had just walked in.
- 22 Q Okay. When was the next time you saw Jay?
- 23 A I ain't see Jay no more after that.
- 24 Q Okay. You didn't see Jay later that night.
- 25 A No, sir.

Kenneth Smith
Cross-examination by Mr. Bulsa

1 Q Okay. Mr. Smith, did you shoot that gun that
2 afternoon at that store?

3 A No, sir.

4 Q Thank you, sir. Answer any questions Mr. Bulsa might
5 have.

6 THE COURT: Maybe we can turn the lights back on,
7 please.

8 CROSS-EXAMINATION

9 BY MR. BULSA

10 Q Mr. Smith, there was a lot of -- not a lot, but there
11 were some cars traveling on that street, right?

12 A Yes, sir.

13 Q Coming through the underpass and going there to the
14 store.

15 A Yes, sir.

16 Q So it wasn't just like an isolated area.

17 A No, sir.

18 Q Public at large, right?

19 A Repeat that question.

20 Q It was public out there at large, people on the store.

21 A Yes, sir.

22 Q People across the street.

23 A Yes, sir.

24 Q So you agree that it would be a dangerous situation if
25 somebody drew a gun out there.

Kenneth Smith
Cross-examination by Mr. Bulsa

- 1 A Yes, sir.
- 2 Q And, Mr. Smith, we heard about Mr. Santos' record.
- 3 Now, you have a conviction for possession of stolen vehicle
- 4 from 2001, don't you?
- 5 A Yes, sir.
- 6 Q And a carbreaking conviction in 2002.
- 7 A Yes, sir.
- 8 Q Criminal domestic violence third offense in 2005.
- 9 A Yes, sir.
- 10 Q And this statement you gave to the police you tell us
- 11 was as a result of fear of Mr. Sainvil.
- 12 A Yes, sir.
- 13 Q When the police were speaking to you, you knew they
- 14 were looking at you as the shooter, didn't you?
- 15 A No, sir.
- 16 Q You knew they were -- thought you were the shooter,
- 17 right?
- 18 A No, sir. They said they had some questions to ask me,
- 19 sir.
- 20 Q You met with them for two hours.
- 21 A Yes, sir.
- 22 Q Then why did it take them two hours for you to give
- 23 this statement if they weren't looking at you to be the
- 24 shooter?
- 25 A I have no idea, sir.

Kenneth Smith
Cross-examination by Mr. Bulsa

- 1 Q And Mr. Whelchel said you didn't mention Jay much in
2 this statement at all. Do you remember that question?
- 3 A Yes, sir.
- 4 Q And your answer was no, you didn't.
- 5 A Yes, sir.
- 6 Q Well, you start off right away, "Me and Jay."
- 7 A Yes, sir, I did.
- 8 Q Is there some reason you won't look at me? That was
9 my question to you. Is there some reason you wouldn't look
10 at me --
- 11 A No, sir.
- 12 Q -- when you answer my questions?
- 13 A No, sir.
- 14 Q In fact, you put you and Jay together getting a call
15 from amigo. Isn't that right?
- 16 A Yes, sir.
- 17 Q And the person you are calling amigo is Santos?
- 18 A Yes, sir.
- 19 Q You knew him, didn't you?
- 20 A I didn't know him at the time, sir.
- 21 Q What do you mean, you didn't know him at the time?
22 You're telling me you had never seen him before?
- 23 A I seen him around, but I never had business dealings
24 with Santos, sir.
- 25 Q You never had dealings with Santos. Well, in your

Kenneth Smith
Cross-examination by Mr. Bulsa

- 1 statement here it was you, the one that were buying the
2 gun. "I gave him \$150 cash and erased the debt that he
3 owed me for some crack."
- 4 A Santos --
- 5 Q That's what you told the police, wasn't it?
- 6 A Yes, sir.
- 7 Q That means you had dealings with him, correct?
- 8 A Yes, sir.
- 9 Q So you had dealings with him. And you're also the one
10 that was buying the gun that night, wasn't it, weren't you?
- 11 A No, sir, I wasn't.
- 12 Q "Me and Jay got a call from amigo. He was trying to
13 sell some guns. I told him, yeah, I'll buy one." That's
14 your words to the police, isn't it?
- 15 A That's the words that night out of fear, sir.
- 16 Q Excuse me?
- 17 A That's the words out of fear, sir.
- 18 Q What's fear got to do with you telling the police you
19 were buying a gun from this gentleman?
- 20 A Because I didn't want, didn't want to mention the
21 other person's name, sir.
- 22 Q You had already mentioned the other person's name --
23 me and Jay.
- 24 A Jay was already at city hall that night, sir.
- 25 Q Then why did you put Jay in it at all, sir?

Kenneth Smith
Cross-examination by Mr. Bulsa

1 A Jay was already there talking to them.

2 Q And you know he had told the police that you had shot,
3 right?

4 A No, sir.

5 Q You didn't. Okay. You found that out later. And
6 that's why you're lying today and changing your testimony,
7 isn't it?

8 A No, sir. I was sworn to tell the truth, the whole
9 truth and nothing but the truth, sir.

10 Q Wasn't that what you did when you -- "I've read this
11 statement consisting of five pages. I swear or affirm the
12 facts contained therein are true and correct." Isn't that
13 what you did back then?

14 A No, sir. I didn't put my hand on the Bible to tell
15 the truth, sir.

16 Q All throughout this statement you're the one that
17 bought the gun, you're the one that erased the debt, you're
18 the one that even threw the gun away, right?

19 A I never threw the gun away, sir.

20 Q Didn't you tell the police you did?

21 A Out of fear, sir.

22 Q Out of fear from what?

23 A John Sainvil, sir.

24 Q Did you get out? Why did you get out of the car?

25 A Got out of the car to check on John Sainvil.

Kenneth Smith
Cross-examination by Mr. Bulsa

- 1 Q What? The truck was leaving, wasn't it?
- 2 A John Sainvil had ran towards the front of the store.
- 3 Q Exactly. Towards the front of the store, not the
- 4 street like you just showed this jury, right?
- 5 A He wasn't directly in front of the store, sir.
- 6 Q They ran in the front of the store like he testified.
- 7 He was yelling, and you put in here you did include him.
- 8 Again, "That he jumped out yelling and screaming for help,"
- 9 correct?
- 10 A He didn't get out of the car screaming for help. He
- 11 got out of the car running, sir.
- 12 Q "Jay freed himself from the car and screamed for
- 13 help." Aren't those your words, sir?
- 14 A Yes, sir.
- 15 Q You told the police you went to the trunk to get this
- 16 brown stick. Isn't that true?
- 17 A Yes, sir.
- 18 Q Is that what you did?
- 19 A No, sir. I never made it to the trunk, sir.
- 20 Q Then why in the world did you put in your statement
- 21 about this brown stick in the trunk? Huh?
- 22 A Because I know the stick be there inside the car.
- 23 Q I'm sorry. You knew this stick would be where?
- 24 A Either in the trunk or inside the car, sir.
- 25 Q There's no reason to include that in this statement,

Kenneth Smith
Cross-examination by Mr. Bulsa

1 was there?

2 A No, sir.

3 Q You had to give the police a reason why you were at
4 that trunk, didn't you?

5 A No, sir. I never made it to the trunk, sir.

6 Q So you brought the brown stick in trying to use that
7 as the excuse as to why you were out of the car, right?

8 A No, sir.

9 Q Because you were out of the car when the shooting
10 occurred, correct?

11 A We both was out of the car when the shooting occurred,
12 sir.

13 Q You were out of the car standing at the back of the
14 car when the shooting occurred, correct?

15 A Standing at the, at the back well of the passenger,
16 driver's side, sir.

17 Q You're not looking at me again.

18 So you're asking this jury to basically just throw this
19 statement away, is that right?

20 A No, sir.

21 Q You're not? Well, you're telling us it's all a lie,
22 aren't you?

23 A The statement, sir.

24 Q Excuse me?

25 A The statement is a, is a lie out of fear, sir.

Kenneth Smith
Cross-examination by Mr. Bulsa

- 1 Q It was you the one doing the yelling, "Come on. Let's
2 go."
- 3 A Yes, sir.
- 4 Q But the truck had already left.
- 5 A Yes, sir.
- 6 Q Y'all weren't in any danger any more, were you?
- 7 A No, sir.
- 8 Q And you left town.
- 9 A I left town because we had a vacation planned earlier
10 that week, that Monday, way before this incident happened,
11 sir.
- 12 Q Okay. So you left town on vacation. You didn't leave
13 town out of fear of Jay.
- 14 A I left town because we planned Monday night, me and my
15 girlfriend and her kids, to go out of town Friday through
16 Sunday to Georgia to the aquarium, sir.
- 17 Q Wasn't Jay the one that was trying to find you to get
18 you to turn yourself in?
- 19 A Jay never contacted me, sir.
- 20 Q Didn't Jay help the police try to find you, sir?
- 21 A That's what he stated.
- 22 Q Yet you want this jury to believe that Jay threatened
23 you in the car not to say anything.
- 24 A That's what he said to me, sir.
- 25 Q Now, one of Mr. Whelchel's first questions to you was

Kenneth Smith
Cross-examination by Mr. Bulsa

1 about whether John Sainvil drove that car. And your
2 comment was that he didn't drive it the day of the
3 incident. Do you remember that?

4 A He drove it to pick me up from my girl, from baby's
5 mother's house in Cowpens, sir.

6 Q Yeah. You made the comment first that he didn't drive
7 it at all. And then you started saying, well, he drove it
8 to pick me up and then he drove it later that evening, is
9 that right?

10 A He didn't drive the car no more after he picked me up
11 and when he left me.

12 Q So all during that time you had the car. You were the
13 one in the driver's seat.

14 A Yes, sir.

15 Q You were the one that would have left the back of the
16 car and gotten into the driver's seat.

17 A The back side of the car, sir, not the actual back of
18 the car, backed up by the rear wheel of the driver's side.

19 Q And you got into the driver's seat.

20 A Yes, sir.

21 Q And Mr. Sainvil would have been in the passenger seat.

22 A Yes, sir.

23 Q Now, would you keep that car some? Did you drive him
24 to work sometimes?

25 A No, sir.

Kenneth Smith
Cross-examination by Mr. Bulsa

- 1 Q You never drove him to work?
- 2 A I didn't know John Sainvil had a job, sir.
- 3 Q You were what, 25 years old when this happened?
- 4 A Yes, sir.
- 5 Q Who is Dwayne Foster?
- 6 A I don't know, sir.
- 7 Q Who did you call the night the police interviewed you?
- 8 A Just a number out of my phone, sir.
- 9 Q Why did you put the name of Dwayne Foster into this?
- 10 A Because I didn't want to tell him that Jay was the
- 11 shooter, sir.
- 12 Q That doesn't make sense. Why bring somebody else into
- 13 it then?
- 14 A There wasn't nobody else. That was just a name I
- 15 plucked out of the air, sir.
- 16 Q That's what I'm trying to understand. Why would you
- 17 do that?
- 18 A To keep from telling them on someone else, sir.
- 19 Q So that wasn't out of fear from John.
- 20 A Yes, sir, it was.
- 21 Q You took somebody else's name. Are you telling me
- 22 that's why you did it?
- 23 A Yes, sir.
- 24 Q Jay got the brunt of the assault, right?
- 25 A Yes, sir.

Kenneth Smith
Cross-examination by Mr. Bulsa

1 Q Why didn't y'all just give the gun back?

2 A Ask Jay that question, sir. I never had the pistol.

3 Q Well, in your statement you're the one that bought it
4 and you're the one that threw it away.

5 A My money never exchanged my hands to Santos' hands for
6 a gun, sir.

7 Q That's what you said in your statement that you told
8 the police you signed by your own hand, right?

9 A That statement is not true, sir.

10 Q But he got the brunt of the assault, right?

11 A Yes, sir.

12 Q Okay. But you also got assaulted, didn't you? Didn't
13 you get hit?

14 A At the time while he's trying to hit Jay through the
15 sunroof, sir.

16 Q Okay. You got hit. Who hit you?

17 A Jerry was swinging at Jay through the sunroof. He
18 just scraped my head.

19 Q How many times?

20 A One.

21 Q One time?

22 A Yes, sir.

23 Q Let's see. "The one on the driver's side was throwing
24 punches through the sunroof hitting me on the head."

25 A He hit me on the head one time.

Kenneth Smith
Cross-examination by Mr. Bulsa

- 1 Q So that part of the statement's true.
- 2 A Yes, sir.
- 3 Q But then the next part is not. "Somehow Jay freed
- 4 himself and screamed for help."
- 5 A Jay was screaming for help inside the car.
- 6 Q And that's exactly what he did when he ran out, right?
- 7 A He didn't scream for help when he jumped out the car.
- 8 He jumped out and ran, sir.
- 9 Q And, in fact, you were still in there. And you said
- 10 that that's when the slim amigo tried to kick me one more
- 11 time. So they were still trying to get you because you
- 12 were still there, right?
- 13 A Yes, sir.
- 14 Q Right?
- 15 A He had done backed up and walking toward the truck,
- 16 sir.
- 17 Q And that's when you said, "I went to the truck to get
- 18 a small brown broomstick to hit the third one outside the
- 19 truck."
- 20 A I never went in the trunk, sir.
- 21 Q I'm just reading what you said, sir, that you said was
- 22 the truth to the police. So you had a reason to want to
- 23 get back at them too, didn't you?
- 24 A No, sir.
- 25 Q Because you bought a gun that didn't work and didn't

Kenneth Smith
Cross-examination by Mr. Bulsa

1 get your money back.

2 A I never purchased a gun. I loaned the money to
3 someone for the gun.

4 Q In fact, that night when you didn't get -- the gun
5 didn't work, you went to try to get your money back then,
6 didn't you?

7 A No, sir. I didn't go to the door.

8 Q Let's see. You tested the gun to see if it worked,
9 didn't you?

10 A Yes, sir.

11 Q So that part of the statement's true. "I slid the
12 clip out and pulled it back to see if there was one in the
13 head. It was empty. So I pulled the trigger. The trigger
14 went in, but the hammer stayed back." Right?

15 A Yes, sir.

16 Q Why were you doing that if you didn't purchase the
17 gun?

18 A I told Jay to check to see if the gun was working. I
19 grabbed it and checked it and see if it worked and gave it
20 back to Jay and told John that the gun didn't work.

21 John got mad and took it back to the front door of the
22 trailer, knocked on the door. Santos come to the door.
23 John leaning against the door with his shoulder on the
24 trailer. They sitting there talking. I'm on the phone.
25 I'm sitting there seeing them arguing back and forth. I

Kenneth Smith
Cross-examination by Mr. Bulsa

- 1 tell whoever's one --
- 2 Q Would you answer my question, because we already got
- 3 to all of that.
- 4 A Repeat the question, sir.
- 5 Q You, you tested the gun, right?
- 6 A Yes, sir.
- 7 Q Are you familiar with guns?
- 8 A I'm familiar with how they work, sir, but I ain't
- 9 familiar with them like that.
- 10 Q Sure seemed like you were. You're familiar enough
- 11 with them to tell how to do it, describe it, know that the
- 12 hammer stayed back, isn't that right?
- 13 A I watch T. V., sir.
- 14 Q You do?
- 15 A Yeah.
- 16 Q What's that got to do with this?
- 17 A It tells you all about how guns work, C. S. I. and
- 18 all.
- 19 Q Oh, that's how you knew you had to be out of town so
- 20 you couldn't get your hands tested for G. S. R., right?
- 21 A No, sir.
- 22 Q You conveniently made yourself absent from the area,
- 23 right?
- 24 A No, sir.
- 25 Q And then that's when I -- meaning you -- got out of

Kenneth Smith
Cross-examination by Mr. Bulsa

1 the, got back out of the car and knocked on the door.

2 You're the one that went and confronted them about the gun,
3 true?

4 A No, sir.

5 Q What are you doing? You're putting yourself in where
6 Jay did. You're saying you did everything Jay did in this
7 statement?

8 A Yes, sir.

9 Q When they asked for the gun at the meeting that y'all
10 had arranged -- right? Y'all had this meeting arranged,
11 didn't you? Didn't you?

12 A He called Jay-phone and they sat up a meeting, sir.

13 Q And they wanted to meet at Biggerstaff's, right?

14 A Yes, sir.

15 Q "And I told him that Biggerstaff's got cameras, to
16 meet me at the Li'L Cricket," right?

17 A I never talked to Santos that day, sir.

18 Q That's what you told the police. "We at the stop sign
19 at Hugh and Hayne Street. Seen an old buddy." That's when
20 you get into Dwayne Foster. And you were part of setting
21 up the meeting, right?

22 A No, sir, I wasn't.

23 Q "And then they approached and asked for the gun."

24 And, in fact, they brought the money, right?

25 A Yes, sir.

Kenneth Smith
Cross-examination by Mr. Bulsa

- 1 Q But you didn't bring the gun.
- 2 A I never had the gun, sir.
- 3 Q "He asked for the gun. I told him I didn't have it,
- 4 it was at my grandma's house.
- 5 A The gun was never in my possession.
- 6 Q You gave a one-two-three-and-a-half-page written
- 7 statement in detail about the night before, the meeting,
- 8 the assault, the shooting and then afterwards, after the
- 9 shooting. Let's see. Last thing you tell the police is
- 10 dropping Jay off, right? Is that right? Before you told
- 11 them you went out of town. "I look him to his house to get
- 12 some shoes. Then went with my girlfriend. We took the
- 13 kids to the big aquarium in Georgia," right?
- 14 A Yes, sir.
- 15 Q And here in court you go into this long explanation
- 16 about where you drove and how you got there, right?
- 17 A Yes, sir.
- 18 Q In fact, you told this jury you didn't even know how
- 19 to get to Santos' house, right?
- 20 A I didn't. Jay directed me to Santos' house.
- 21 Q Well, you certainly knew enough to give the police
- 22 directions. "We went to his house on
- 23 You go under the bridge and make the first left. It's the
- 24 first trailer on the left." Right?
- 25 A Yes, sir.

Kenneth Smith
Cross-examination by Mr. Bulsa

1 Q You knew exactly how to get there because you did
2 everything. You're the one that shot as John Sainvil ran
3 away.

4 MR. WHELCHEL: Is there a question somewhere in our
5 future here, Your Honor? I would object.

6 THE COURT: Sustained.

7 Q You're the one that shot at that truck, aren't you?

8 A No, sir.

9 Q You're the one that shot as John Sainvil was running
10 away, aren't you?

11 A No, sir.

12 Q You're the one that shot as you were standing at the
13 rear of that car, aren't you?

14 A No, sir.

15 Q In the traffic coming from the underpass.

16 A No, sir.

17 Q And then got back into the driver's car.

18 A No, sir. I got in the driver's side, but I was never
19 the shooter, sir.

20 Q And then left town.

21 A I had a planned trip Monday.

22 Q And you killed Jerry De La Rosa.

23 A I never shot no one, sir.

24 Q And you put everybody else in that neighborhood in
25 danger.

Kenneth Smith
Redirect examination by Mr. Whelchel

1 A I put no one in danger.

2 Q Right?

3 A I put no one in danger, sir.

4 REDIRECT EXAMINATION

5 BY MR. WHELCHER

6 Q The trip to Atlanta to the aquarium, Jay knew you were
7 going.

8 A No, sir.

9 Q He didn't know you were going.

10 A No, sir.

11 Q Nobody knew you were going.

12 A Nobody but me and my girlfriend, sir.

13 Q Okay. Thank you, sir.

14 THE COURT: You can step down.

15 All right. We're going to take a short break before
16 we go further.

17 I'll ask the jury to please go to your jury room. Do
18 not yet discuss the case. I'll bring you back shortly.

19 (The following takes place outside the presence of the
20 jury.)

21 THE COURT: Court is in recess for 15 minutes.

22 (Whereupon, a recess was taken.)

23 THE COURT: Who is the next witness?

24 MR. WHELCHER: Mr. Stepp.

25 THE COURT: All right. Bring the jury in.

Donald Stepp
Direct examination by Mr. Whelchel

1 (The following takes place in the presence of the
2 jury.)

3 THE COURT: We will continue with the defense's
4 presentation, Mr. Whelchel.

5 MR. WHELCHER: Thank you, Your Honor. The defense
6 calls Donald Stepp.

7 DONALD STEPP, having been
8 first duly sworn, testified as follows:

9 DIRECT EXAMINATION BY MR. WHELCHER

10 Q You are Donald Stepp.

11 A Correct.

12 Q Where do you work, Mr. Stepp?

13 A I am an investigator with the Spartanburg County
14 Public Defender's Office.

15 Q How long have you worked there, sir?

16 A Thirteen months.

17 Q Okay. Prior to that where did you work?

18 A I was an investigator with the Spartanburg -- with the
19 7th Circuit Solicitor's Office for four years.

20 Q And you were a probation agent prior to that?

21 A For 15 years, yes, sir.

22 Q Total time as an investigation and probation agent?

23 A A little over 20 years.

24 Q All right, sir. Those items in front of you, would
25 you look as those, please?

Donald Stepp
Direct examination by Mr. Whelchel

1 A Yes, sir.

2 Q Do you recognize them, sir?

3 A Yes, sir.

4 Q Those are photographs that you took?

5 A Yes, sir, on March the 9th, excuse me, September the
6 3rd of this year.

7 Q All right, sir. Are those photographs a fair and
8 accurate representation of the store as it existed when you
9 took the photographs?

10 A It is.

11 Q As a matter of fact, that's your truck in the
12 photograph, is it not?

13 A It is.

14 Q All right, sir.

15 MR. WHELCHER: I would ask that these be entered into
16 evidence, Your Honor, at the time. I believe without
17 objection.

18 MR. BULSA: No objection.

19 THE COURT: They're admitted. What numbers are they?

20 THE COURT REPORTER: They're one through seven.

21 (Photographs marked Defendant's Exhibits Nos. 1 through
22 7.)

23 Q Answer any questions Mr. Bulsa may have, Mr. Stepp.
24
25

Donald Stepp
Cross-examination by Mr. Bulsa

1 CROSS-EXAMINATION

2 BY MR. BULSA

3 Q Mr. Stepp, where did you take these pictures?

4 A At the scene of the crime.

5 Q What made you choose the locations of where you
6 snapped the pictures?

7 A We just use various -- we use various distances,
8 various angles just to make sure we cover the entire scene.

9 Q Okay. What is the purpose of the two houses that are
10 snapped in Defendant's Exhibit 5, the lower picture?

11 A Those are the only two residences that are directly
12 across the street from the store.

13 Q And do they have any significance in this case that
14 you know of?

15 A They will in a later moment.

16 Q And what is that?

17 A We have a, Mr. Whelchel has a, witness that was at the
18 residence across the street at one of those houses.

19 Q I could barely hear you standing next to you.

20 A Mr. Whelchel. We have a witness that we'll present
21 that was on the porch of one of those houses across the
22 street when the incident occurred.

23 Q Okay. And so you took a picture to show the location
24 of the houses?

25 A Yes, sir.

Donald Stepp
Cross-examination by Mr. Bulsa

- 1 Q Where would you have been standing when you took those
2 pictures?
- 3 A Where the -- beside where my truck was parked at the
4 corner, front corner, of the store.
- 5 Q And where was the witness supposed to be at those
6 houses?
- 7 A On the front porch of the house on the right. I
8 believe it's the gray house. Yes, sir. On the gray-house
9 porch.
- 10 Q This is going to be important, sir. So I will use
11 this. Oh, you have a witness that was supposed to be on
12 that porch?
- 13 A Yes, sir.
- 14 Q Did you take a picture standing on that porch back
15 towards the store?
- 16 A Yes, sir.
- 17 Q Which picture is this?
- 18 A The one right above it.
- 19 Q The one right above it. You were actually standing on
20 the porch.
- 21 A Yes, sir.
- 22 Q Excuse me. Those are the two houses?
- 23 A That's correct.
- 24 Q And you said you were standing where?
- 25 A That picture was made from where the -- the corner of

Donald Stepp
Cross-examination by Mr. Bulsa

- 1 the store where the truck was parked.
- 2 Q So you're standing beside your truck.
- 3 A Correct, looking across the street towards those
- 4 houses.
- 5 Q This is Defense Exhibit No. 4. Your truck would have
- 6 been right there.
- 7 A Yes, sir.
- 8 Q And you were actually backed into the first parking
- 9 space.
- 10 A Correct.
- 11 Q See right there?
- 12 A Yes, sir.
- 13 Q Okay. Now, this house, doesn't it sit down below the
- 14 grade of the road?
- 15 A Slightly, yes, sir.
- 16 Q Did you do any measurements to determine how far it
- 17 went down?
- 18 A No, sir.
- 19 Q And the second photograph in Defendant's Exhibit No. 5
- 20 is a view from that porch?
- 21 A That's correct.
- 22 Q Do you know how far away that is?
- 23 A No, sir. To my knowledge no measurements were made
- 24 from the porch to the vehicle.
- 25 THE COURT: Can you repeat that?

Donald Stepp
Cross-examination by Mr. Bulsa

1 A To my knowledge no measurements were made from the
2 distance between the porch and the vehicle.

3 Q Did you take any measurements that day?

4 A No, sir. We went back later and measured the
5 distances from the intersection to the underpass, and from
6 the underpass to where you could see around the corner to
7 the parking lot.

8 Q So you took measurements. I'll use one of these
9 pictures, Defendant's Exhibit No. 1. From the underpass --
10 from the underpass forward are two, two, two dimensions.

11 A Right. We -- measurements were made from the edge of
12 the underpass forward to where you could see around to
13 where the incident occurred. And measurements were --
14 right. And we measured from the underpass over to where
15 the intersection in front of the gray house was.

16 Q Okay. So you've got the underpass, is there, and then
17 there's an embankment. So you've got one measurement from
18 the underpass to the embankment.

19 A Correct.

20 Q Okay. And what was the purpose of taking that
21 picture?

22 A To see how far you'd have to pull out from underneath
23 to come through before you could see where the vehicles
24 were parked.

25 Q Okay. And that's the direction Ms. Peterson would

Donald Stepp
Cross-examination by Mr. Bulsa

1 have been coming from.

2 A Right.

3 Q So you took measurements to help decide what she could
4 see.

5 A Correct.

6 Q And you took a second measurement from there to the
7 intersection.

8 A Yes, sir.

9 Q I don't actually have a picture. But let's use this
10 one here. From this area to this intersection?

11 A From the underpass to about the corner right there.

12 Q Okay. And what was the purpose of that dimension?

13 A That was just as a reference photo from Mr. Whelchel's
14 request.

15 Q So you get directions, get the distances from one
16 direction, but you didn't get it from this view facing that
17 way.

18 A Correct.

19 Q This street that comes into Hayne Street, do you
20 remember what that's called?

21 A I believe that's Hugh Street.

22 Q Hugh Street. Okay. Hugh Street, Hayne Street. And
23 then Franklin is actually coming up and goes across, right?

24 A Yes, sir. It's not in the picture, but it goes off to
25 the left off Hayne Street.

Donald Stepp
Cross-examination by Mr. Bulsa

1 Q Is there any significance to you parking a truck
2 there?

3 A We tried to park the vehicle where the decedent's
4 vehicle was parked at the time the incident occurred to get
5 an idea of where the vehicles were parked at.

6 Q Okay. So you parked that where the truck would have
7 been.

8 A Correct.

9 Q Okay. At the time of the shooting the truck would not
10 have been there, right?

11 A Well, at the time, that would be correct.

12 Q It would have been somewhere towards the roadway.

13 A True.

14 Q Why didn't you park it where the car would have been?

15 A We wanted to see where the victim's vehicle was parked
16 at. We knew where the car would have been, but we wanted
17 to see where the victim's truck was parked to start with.

18 Q Okay. But you wanted to show this view I guess this
19 witness is going to have, right?

20 A Yes, sir.

21 Q Then why didn't you get the view of what he would have
22 had of the car?

23 A We were told the car was parked on the other side of
24 the truck. So it would not have been visible. My truck is
25 similar in size to the truck we've already seen in the

Eugene Brannon
Direct examination by Mr. Whelchel

1 pictures. So any vehicles parked on the other side of it,
2 you wouldn't have been able to see it for the truck
3 setting in the line of sight.

4 Q Right. But if the truck were moved and it was in a
5 position where it would have been when the shots were
6 fired, you could have shown the jury that he would have had
7 a view of the car.

8 A Possibly.

9 Q And then you could have measured the distance just as
10 you measured the distance for Mr. Franklin, excuse me, Ms.
11 Peterson. Okay. I think this is all I have got. Thank
12 you, Mr. Stepp.

13 MR. WHELCHER: The defense could call Eugene Brannon.

14 EUGENE BRANNON, having been
15 first duly sworn, testified as follows:

16 DIRECT EXAMINATION BY MR. WHELCHER

17 Q You are Eugene Brannon?

18 A Yes, sir; yes, sir.

19 Q Okay. Pull that microphone up, Mr. Brannon, and speak
20 loudly.

21 A Yes.

22 Q Louder than that.

23 A Yes.

24 Q That's better.

25 Where do you live, Mr. Brannon?

Eugene Brannon
Direct examination by Mr. Whelchel

1 A Stay on No, no. I stay on

2

3 Q All right. In March of last year, 2008, where did you
4 live then, sir?

5 A , ...

6 Q That's right up the road from
7 this store that we've all been talking about, is that
8 correct?

9 A Yes, sir.

10 Q Okay. Do you have relatives that live in the
11 neighborhood?

12 A Right in front of the store.

13 Q You have relatives that live in front of the store.

14 A Yes, sir.

15 Q Were you -- excuse me. Were you visiting the
16 relatives the day this shooting took place?

17 A Yes, sir.

18 Q Okay. Your relatives' house, is it directly across
19 the street from the store?

20 A Right in front of the store.

21 Q Excuse me?

22 A Right across in front of the store.

23 THE COURT: Please don't lean into that microphone.

24 It distorts the sound. Just speak up like I'm speaking up
25 so people can hear.

Eugene Brannon
Direct examination by Mr. Whelchel

- 1 Q Where is the house that you were visiting?
- 2 A In front of the store.
- 3 Q And that's it. That's what we want.
- 4 Mr. Brannon, I'm showing you Defendant's Exhibit No. 5.
- 5 The top photo, is that the store?
- 6 A Yes, sir.
- 7 Q Is that the house --
- 8 A Yes, sir.
- 9 Q -- of your relatives?
- 10 A Yes, sir.
- 11 Q You were standing on the porch of that house?
- 12 A Yes, sir.
- 13 Q Okay. Is there anything that when you were standing
- 14 up that would block your view from seeing the parking lot
- 15 of the store --
- 16 A No, sir.
- 17 Q -- except for the occasional car going by?
- 18 A No, sir.
- 19 Q Okay. Did you see a shooting that day --
- 20 A Yes, sir.
- 21 Q -- in March of last year?
- 22 A Yes, sir.
- 23 Q After the shooting did you go across the street to the
- 24 store and tell the officers that ended up at the store that
- 25 you had seen it?

Eugene Brannon
Direct examination by Mr. Whelchel

- 1 A Yes, sir.
- 2 Q Okay. Tell this jury what you saw, sir.
- 3 A Well, I saw a, I saw a black car with tinted windows
- 4 pull up at the store.
- 5 Q Okay.
- 6 A And the, and the, and the passenger got out on the
- 7 passenger side.
- 8 Q Uh-huh. Go ahead. What happened next?
- 9 A Then about a few minutes later I hear some shooting.
- 10 Q Okay. What happened then?
- 11 A And the guy, I couldn't see his face. He had a black
- 12 shirt on, but I couldn't see his face. He had his back
- 13 turned, because he had dreadlocks in his head.
- 14 Q Had on a black shirt.
- 15 A Yes, sir.
- 16 Q The fellow that was shooting.
- 17 A Yes, sir.
- 18 Q Can you see this gentleman?
- 19 UNIDENTIFIED PERSON: I will stand up.
- 20 Q Did his hair look like this?
- 21 A It looked like he had dreads.
- 22 Q Okay. Did it look like that, like Mr. Smith's?
- 23 A No, sir.
- 24 Q Okay. After the shooting, what happened?
- 25 A After the shooting, for a few minutes later the

Eugene Brannon
Cross-examination by Mr. Bulsa

1 passenger got back in the passenger side, and then they
2 left and went toward Franklin Street.

3 Q Which would be right to the left or the left side on
4 the house?

5 A Yeah, where we standing on the porch at, straight
6 across.

7 Q Okay. And you told that to the officers at the store
8 that day?

9 A Yes, sir.

10 Q Okay. Had you had anything to drink that day?

11 A I had quite a few beers.

12 Q Okay. Were you drunk?

13 A No, sir.

14 Q You saw what you saw.

15 A Yes, sir.

16 Q Did you know Kenneth Smith?

17 A No, sir.

18 Q And you first talked to me about this about a month
19 ago, is that right?

20 A Yes, sir.

21 Q Okay. Answer any questions Mr. Bulsa might have.

22 CROSS-EXAMINATION

23 BY MR. BULSA

24 Q Mr. Brannon --

25 A Yes, sir.

Eugene Brannon
Cross-examination by Mr. Bulsa

- 1 Q -- you approached the police after the shooting.
- 2 A Yes, sir.
- 3 Q Correct? And isn't it true that you told them that
- 4 you saw a black vehicle pull up? Right?
- 5 A Yes, sir.
- 6 Q That you saw a black female sitting in the passenger
- 7 side of the vehicle.
- 8 A No, sir. I didn't say that.
- 9 Q You saw a dark-skin man no older than 25 get out of
- 10 the vehicle and begin to shoot towards Hayne Street.
- 11 A No. I didn't say that either.
- 12 Q And you didn't know what he was shooting at, shot
- 13 about four times, and get back into the vehicle.
- 14 A Yes, sir.
- 15 Q Okay. You told that to Officer Brandy Edwards,
- 16 correct?
- 17 A Yes, sir.
- 18 Q Do you know Ms. Edwards? Are you familiar with
- 19 Officer Edwards?
- 20 A No, sir.
- 21 Q How did you remember her name?
- 22 A I don't know her. I just went up there and talked to
- 23 her.
- 24 Q Okay. And she told you who she was?
- 25 A Not that I can remember.

Eugene Brannon
Cross-examination by Mr. Bulsa

1 Q All right. You not only spoke to Officer Brandy
2 Edwards. You spoke to Sonya McCullough. Do you remember
3 talking to her too?

4 A Yes, sir.

5 Q Okay. And you told her that you saw a young black
6 male driving a Honda Accord with a black girl in the
7 passenger seat, correct?

8 A No. I didn't say that.

9 Q And you said the black male got out of the car and
10 started shooting about four times.

11 A Yes. I said that.

12 Q Yeah. Black male. But there was a black girl in the
13 passenger seat, is what you told.

14 A No. I didn't say that.

15 Q Okay. And then you said that they got back in the car
16 and left going to Fairfax. You said -- you described the
17 black male as being 20 or 21 with short hair.

18 A No. I didn't say that either.

19 Q And you were sitting on the porch with two other black
20 males when you saw all of this. Is that what you told the
21 police?

22 A Yes, sir.

23 Q And the porch you were sitting on was the porch of
24 which of these, these houses?

25 A That one right there on the end.

Eugene Brannon
Cross-examination by Mr. Bulsa

- 1 Q Kind of on the end, the one on the right?
- 2 THE COURT: Mr. Seay, can you give him that pointer?
- 3 THE BAILIFF: Yes, sir.
- 4 A The one this way.
- 5 Q The one where my red dot is.
- 6 A Yes, sir.
- 7 Q And this is the porch.
- 8 A Yes, sir.
- 9 Q And I believe there are some seats on that porch,
- 10 right?
- 11 A Yes, sir.
- 12 Q And you were actually sitting down when you saw all of
- 13 this?
- 14 A Yes, sir.
- 15 Q And this house sits below the roadway, doesn't it?
- 16 A Yes, sir.
- 17 Q We just learned that this view was taken from somebody
- 18 standing on the porch. But you would not have had that
- 19 view, would you, because you were sitting?
- 20 A As long as I'm sitting down I'm can see across the
- 21 street.
- 22 Q I know. But you're sitting there lower than you would
- 23 be if you were standing.
- 24 A Yeah.
- 25 Q And the house is sitting lower than --

Eugene Brannon
Cross-examination by Mr. Bulsa

- 1 A Yes, sir.
- 2 Q Okay. Did you see the truck?
- 3 A No, sir.
- 4 Q You didn't see the truck at all?
- 5 A No, sir.
- 6 Q But yet you're telling us you saw the car pull in.
- 7 A Yes, sir.
- 8 Q Where did you see the car parked?
- 9 A Right there where the truck at.
- 10 Q About where the truck is?
- 11 A Yes, sir.
- 12 Q And you didn't see the truck at all.
- 13 A No, sir.
- 14 Q So you didn't see a fight at the car.
- 15 A No, sir.
- 16 Q And you didn't see somebody jump out and run?
- 17 A No, sir.
- 18 Q Did you ever see the truck?
- 19 A No, sir.
- 20 Q From this view. Well, let's see. When you're sitting
- 21 down can you see the underpass?
- 22 A Yes, sir.
- 23 Q Okay. So you didn't see a truck out here?
- 24 A No, sir.
- 25 Q Well, this person that was shooting which -- you said

Eugene Brannon
Cross-examination by Mr. Bulsa

1 they were shooting back at Hayne Street.

2 A They started shooting. I don't know. I don't know
3 they shooting in the air or shooting up the underpass.

4 Q Are you calling this road here that goes under the
5 underpass part of Hayne Street?

6 A Yes, sir.

7 Q Okay. It's actually Franklin, but Hayne kind of
8 curves into it, is that right?

9 A Yes, sir.

10 Q So you're calling it Hayne Street.

11 A Yes, sir.

12 Q And you saw the person firing back in that direction.
13 Look up there. Back in this direction?

14 A No. Let's see. When they was shooting, shooting in
15 the air, normally shooting toward the underpass.

16 Q Okay. And how much had you been drinking that day,
17 sir?

18 A I had two beers.

19 Q Two beers?

20 A Yes, sir.

21 Q I appreciate you going and talking to the police. But
22 did you call anybody when it happened?

23 A No, sir; no, sir.

24 Q How long did it take the police to get there?

25 A Maybe about five or ten minutes.

Eugene Brannon
Cross-examination by Mr. Bulsa

1 Q Five or ten minutes when they got to this location
2 after the shooting?

3 A Yes, sir. I seen them when they pulled up.

4 Q I know. But that's a pretty quick time after the
5 shooting.

6 A Yeah.

7 Q Okay. All right. Now, do you remember talking to
8 this officer?

9 A Yes.

10 Q Mr. Patton.

11 A Yes.

12 Q He got the information from the other officers who
13 wrote it in their report and came to speak to you about it.
14 Do you remember that?

15 A Yes.

16 Q When Mr. Whelchel met with you did he show you your
17 statement? Just read over that to yourself if you would.

18 (Pause.)

19 Q Do you remember that statement?

20 A Yes, sir.

21 Q I believe the officer met with you at the Northwest
22 Center, is that right?

23 A Yes, sir.

24 Q This was about a week after this incident. He wanted
25 to see about what you told the other two ladies, is that

Eugene Brannon
Cross-examination by Mr. Bulsa

1 right?

2 A Yes, sir.

3 Q And this is when you said, "I saw the passenger get
4 out and start shooting," right?

5 A Yes, sir.

6 Q And you said you saw -- you told him you saw the car,
7 black car, pull up. You saw the passenger get out and
8 start shooting. But then you told him that you didn't
9 remember how he looked.

10 A I didn't know how he looked.

11 Q Okay.

12 A I can't see how he looked when his back turned.

13 Q No description of his clothing or no description of
14 his hair. You didn't know how he looked.

15 A Uh-uh.

16 Q You just know you saw somebody get out of the car and
17 start shooting.

18 A Yes, sir.

19 Q Is that right?

20 A Yes, sir.

21 Q Yet you didn't see the truck or anything.

22 A No.

23 Q Well, had you been drinking the day you met with this
24 officer?

25 A No, sir.

Eugene Brannon
Redirect examination by Mr. Wheelchel

1 Q Okay. All right. Thank you. That's all I have.

2 THE COURT: He said that's all he had.

3 MR. WHEELCHEL: Oh, I'm sorry.

4 REDIRECT EXAMINATION

5 BY MR. WHEELCHEL

6 Q These two officers that talked to you that day, did
7 anybody ask you specifically about the hair of the
8 individual that you saw shooting?

9 A Yes, sir.

10 Q Okay.

11 A I told them.

12 Q Okay. And you told them.

13 A Yes, sir.

14 Q When you talked to this officer, he wrote that
15 statement, right?

16 A Yes, sir.

17 Q Did he ask you specifically what the hair looked like
18 on the shooter?

19 A No that I can remember that.

20 Q Okay. You gave him -- Officer Patton -- the statement
21 a month after this happened.

22 A Yes, sir.

23 Q That's when he came to you.

24 A Yes, sir.

25 Q But you went across the street and told whoever was

Eugene Brannon
Recross-examination by Mr. Bulsa.
Redirect examination by Mr. Whelchel

1 there what you had seen.

2 A Yes, sir.

3 Q Okay. Thank you, sir.

4 RE CROSS-EXAMINATION

5 BY MR. BULSA

6 Q Mr. Brannon, that officer you told at the scene, that
7 you described a black male to her as being 20 or 21 with
8 short hair.

9 A That's not correct.

10 Q And this statement on April the 4th was just, what,
11 seven days afterwards? That you don't remember how he
12 looked.

13 A That's not correct either.

14 Q Well, that's what you signed. "I don't remember how
15 he looked. I just know he was shooting."

16 A Where's that at?

17 Q "I don't remember how he looked. I just know he was
18 shooting."

19 A That ain't my writing. That's not right.

20 Q Well, is that your signature down there?

21 A Yeah, that's my signature.

22 Q Okay. Thank you. Nothing further.

23 REDIRECT EXAMINATION

24 BY MR. WHELCHER

25 Q How well do you read?

Eugene Brannon
Recross-examination by Mr. Bulsa
Redirect examination by Mr. Whelchel

1 A Excuse me?

2 Q How well do you read?

3 A I can't read that good.

4 THE COURT: Stand when you ask questions.

5 MR. WHELCHER: Excuse me, Your Honor.

6 Q How well do you read?

7 A Can't read that good.

8 MR. WHELCHER: That's all I have, Your Honor.

9 THE COURT: Step down.

10 Have you got something else?

11 MR. BULSA: I do. I just want to know.

12 THE COURT: Just a minute. They've got one other
13 question.

14 RECROSS-EXAMINATION

15 BY MR. BULSA

16 Q You did tell the officer you had 11 years of school.

17 A Yes, sir.

18 Q Okay. That's all.

19 THE COURT: Step down.

20 MR. WHELCHER: The defense rests, Your Honor.

21 THE COURT: Any reply?

22 MR. BULSA: Yes, sir. State calls Officer Brandy
23 Edwards.

24

25

Brandy Edwards
Direct examination by Mr. Bulsa

1 BRANDY EDWARDS, having been
2 first duly sworn, testified as follows:

3 DIRECT EXAMINATION BY MR. BULSA

4 Q Officer Edwards, please introduce yourself to the
5 jury.

6 A I'm Officer Brandy Edwards. I work with the
7 Spartanburg City Police Department.

8 Q In what capacity?

9 A I'm now a narcotics, vice and organized crime
10 investigator. At the time of the incident I was working on
11 patrol.

12 Q How long have you been an officer?

13 A Four years.

14 Q All of it with Spartanburg city?

15 A Yes, sir.

16 Q So back at this time you had been an officer, what,
17 two and a half years?

18 A Yes, sir.

19 Q All of it on patrol?

20 A Yes, sir.

21 Q Did you respond to a shooting incident on March the
22 28th of 2008?

23 A Yes, sir.

24 Q Do you remember where you first responded to?

25 A Saxon Avenue.

Brandy Edwards
Direct examination by Mr. Bulsa

1 Q Why did you go to Saxon?

2 A The dispatch had stated that a shooting had occurred
3 around a train trestle in that area. Another officer had
4 arrived in that area originally. And we were there trying
5 to determine where the crime scene was and speaking with
6 neighbors.

7 Q Was it Saxon or South Center?

8 A It may have been South Center. Can I refer to my
9 report?

10 Q Yes, if you brought your notes with you.

11 A You are correct. It was South Center Street. I
12 apologize.

13 Q The report you have, when did you prepare that report?

14 A The day of the incident.

15 Q And about how long after your part of the matter did
16 you sit down and write that?

17 A As soon as I completed speaking with Mr. Brannon, I
18 shortly after that, I got in my patrol car and typed up my
19 supplemental and submitted it.

20 Q Okay. But you first went to South Center. Do you
21 remember how long you were at South Center?

22 A No, sir, I don't.

23 Q Did you -- what did you do to attempt to determine if
24 that was the location?

25 A We spoke with the individuals at the houses there

Brandy Edwards
Direct examination by Mr. Bulsa

1 located -- 654, 652, 650, 648 and 646 were the house
2 numbers. We went to those locations and tried to speak
3 with the people inside the homes to determine if they had
4 seen or heard any shots fired or seen anything.

5 Q Sounds like -- did you talk with many of those people?

6 A I talked to a couple of them. A couple of them were
7 empty. One of them was abandoned.

8 Q Did you get out and search the roadway --

9 A We did, yes, sir.

10 Q -- for any knowledge?

11 A We did.

12 Q So can you estimate about how long you might been
13 there?

14 A I honestly don't know, sir. It was long enough.

15 Q Okay. You didn't find anything.

16 A I'm sorry?

17 Q Did you find anything?

18 A No, sir.

19 Q Were you directed to go to another location?

20 A Yes, sir. When we had actually went down to the curve
21 right before the train trestle there on South Center
22 Street, and we, we saw what we thought might have been some
23 tire tracks on the side of the roadway.

24 We roped that off thinking maybe that might be part of
25 the crime scene. And we were dispatched over to the, the

Brandy Edwards
Direct examination by Mr. Bulsa

1 store over on Franklin Street saying that that was the --
2 where the incident had occurred. It was the wrong train
3 trestle.

4 Q Okay. The houses that you went to, would they have
5 had -- on South Center -- would they have had a view of the
6 train trestle?

7 A Which one?

8 Q The numerous houses on South Center, the first scene
9 of the crime scene.

10 A Yes, they would have had a view of that because they
11 sit on a hill. And as the hill comes down, it curves. And
12 there's the train trestle here.

13 Q Is that what you call a neighborhood canvass?

14 A Yes, sir.

15 Q Did you question any of the residents to see if they
16 saw or heard anything?

17 A Yes, sir.

18 Q So then you were directed to go to the Corner Stop Gas
19 Station on Hayne Street.

20 A Yes, sir.

21 Q And what did you do when you got there?

22 A We got there and tried to determine where the crime
23 scene was.

24 There was no -- it seemed like business as usual.

25 There was nothing sticking out of the ordinary to determine

Brandy Edwards
Direct examination by Mr. Bulsa

1 that there was a crime scene at the time.

2 There were no vehicles that showed any indication of
3 being involved in a shooting. There were no people there
4 that were injured. It seemed like business as normal. But
5 we were still trying to determine what exactly had happened
6 since we had gotten a call.

7 Q Did anybody approach you?

8 A Mr. Brannon approached me after I spoke with the store
9 clerk.

10 Q And that was the gentleman that just testified.

11 A Yes, sir.

12 Q Do you know where he had come from?

13 A No, sir. My back was turned towards the embankment
14 trying to, to look through there to see if we could find
15 any shell casings of any kind.

16 Q Okay. And what did he tell you when he approached
17 you?

18 A He, he approached me and told me that he had seen a
19 dark-color car, dark Honda, pull up into the parking lot, a
20 black male get out, shoot four times, get back in and then
21 leave the scene.

22 Q Did he tell you anything about the passenger in the
23 vehicle?

24 A He told me the passenger was a black female.

25 Q Did he tell you which side of the car the person got

Brandy Edwards
Direct examination by Mr. Bulsa

1 out to shoot from?

2 A I assumed it was the driver.

3 Q Why?

4 A Because there was already somebody in the passenger
5 seat.

6 Q He described two people, one being a female and one
7 being a male.

8 A Yes, sir.

9 Q Did you collect his information?

10 A I did, sir.

11 Q Did you make notes about what he told you?

12 A I did, sir.

13 Q Did you later reduce those notes to this report?

14 A I did, sir, yes.

15 Q And include as part of the case file for the
16 investigators?

17 A Yes, sir.

18 Q Do you remember anything about Mr. Brannon's condition
19 at the time you were speaking to him?

20 A He, he had been drinking, sir. He smelled. He
21 smelled of alcohol, and he admitted that he had been
22 drinking that day.

23 Q How many beers did he tell you he had?

24 A He told me he had one.

25 Q Just one?

1 A Yes, sir.

2 Q Okay. Thank you. Answer any questions Mr. Whelchel
3 has.

4 CROSS-EXAMINATION

5 BY MR. WHELCHER

6 Q This report that you have with you, may I see it?

7 A Yes, sir.

8 (Pause.)

9 Q Okay. Thank you, ma'am.

10 A You are welcome, sir.

11 THE COURT: You may step down.

12 THE WITNESS: Thank you.

13 MR. WHELCHER: Oh, I was going to ask a question, Your
14 Honor. I'm sorry.

15 THE COURT: I thought you were going to sit down.

16 MR. WHELCHER: No, sir.

17 THE COURT: Well, then why aren't you asking it?

18 MR. WHELCHER: I'm about to.

19 BY MR. WHELCHER

20 Q Ma'am, this report says that at 1730 hours -- and I
21 want to make sure mine and yours say the same thing -- at
22 1730 hours you assisted Officer Tillotson, is that right?

23 A Yes, sir.

24 Q Okay. When attempting to locate the crime scene. And
25 that was on South Center.

Brandy Edwards
Cross-examination by Mr. Whelchel

- 1 A Yes, sir.
- 2 Q Okay. And that was the wrong place.
- 3 A Yes, sir.
- 4 Q Okay. So a mistake was made by someone in sending you
5 and the other officers there.
- 6 A Right.
- 7 Q Okay. But while you're there you go to 654 and 50 and
8 48 and 40 and all of these other houses that you talked
9 about.
- 10 A Yes, sir.
- 11 Q Okay. And that took some time. And you also found
12 some glass, I think, and roped that off. Is that at that
13 location?
- 14 A That was Officer Tillotson, and Norkett had -- they
15 determined it could possibly be a crime scene because it
16 was off the roadway.
- 17 Q They thought it might.
- 18 A Yes, sir.
- 19 Q Were you still there when Detective Guthro showed up?
- 20 A I wasn't on -- not at that location. I was over at
21 the store.
- 22 Q Okay.
- 23 A And he showed up shortly after that.
- 24 Q So at some point after that, after 1730, you went from
25 that location to the other, to the real location.

Brandy Edwards
Cross-examination by Mr. Whelchel

- 1 A Correct.
- 2 Q Okay. Have any idea what time that was?
- 3 A No, sir.
- 4 Q Okay. But there's no question in your mind that you
5 were at 1730 at the wrong trestle.
- 6 A No, sir, no question in my mind.
- 7 Q Okay. The report dated -- what does yours say?
- 8 A Are you talking about my first line here?
- 9 Q No. Where it says report date and time.
- 10 A I don't have that on mine.
- 11 Q Okay. Yours doesn't show 3/28/08 at 5:22 p.m.
- 12 A No, sir.
- 13 Q Okay. Do you know where is?
- 14 A I do now, sir.
- 15 Q Okay. And according to your report he was at his
16 residence at on the porch.
- 17 A That's what he told me, sir.
- 18 Q Okay. You can't see this location from
19, can you?
- 20 A Which location is that, sir?
- 21 Q The second one where you went where there was actually
22 shooting. Can you see the store from :?
- 23 A According to him, you can't. I didn't go to his house
24 and view the store that day if that's what you mean.
- 25 Q Okay. He wasn't at his house. He was at a relative's

Sonya McCullough
Direct examination by Mr. Bulsa

1 house. Do you remember him telling you that?

2 A No, sir, I don't.

3 Q Do you remember him telling you he was at the house
4 across the street?

5 A Yes, sir, I do.

6 Q Okay. But he lives at , correct?

7 That's what he told you.

8 A That's what he told me.

9 Q Okay. But the narrative reads that he was at his
10 house at and saw this, is that right?
11 Look and see.

12 A Yes. It reads that he was at his residence at

13

14 Q Okay. That would be a mistake on your part.

15 A It would be, yes, sir.

16 Q Thank you, ma'am.

17 MR. BULSA: Nothing further. The state calls Sonya
18 McCullough.

19 SONYA McCULLOUGH, having been
20 first duly sworn, testified as follows:

21 DIRECT EXAMINATION BY MR. BULSA

22 Q Officer, please introduce yourself to the jury.

23 A I am Sonya McCullough.

24 Q And who are you employed with?

25 A Spartanburg Public Safety.

Sonya McCullough
Direct examination by Mr. Bulsa

- 1 Q In what capacity?
- 2 A Investigator.
- 3 Q How long have you been an investigator?
- 4 A About three years.
- 5 Q How long have you been with public safety?
- 6 A Thirteen.
- 7 Q Have you been in law enforcement any longer than that?
- 8 A Fifteen, 16, excuse me. Sixteen total.
- 9 Q Okay. Did you have an occasion to go to the corner
- 10 convenience store on Hayne Street?
- 11 A Yes, sir, I did.
- 12 Q Had you gone to the earlier location on South Center
- 13 Street?
- 14 A No, sir. I didn't.
- 15 Q Were you directed to go to this convenience store?
- 16 A Yes, sir, I was.
- 17 Q When you got there, what did you do?
- 18 A Once I got to the convenience store Officer Norkett,
- 19 Officer Brandy Edwards and Investigator Guthro were already
- 20 there. I spoke with Officer Edwards and Officer Norkett at
- 21 which time Officer Edwards had given me some information of
- 22 a witness.
- 23 Q Were you assisting in the investigation of the
- 24 shooting that had occurred sometime that evening?
- 25 A Yes, sir, I was.

Sonya McCullough
Direct examination by Mr. Bulsa

1 Q Okay. So you were assisting investigators Patton and
2 Sprugeon.

3 A Yes, sir. I was.

4 Q Were they at city hall on something else?

5 A When I got to city hall I met with the supervisor and
6 was instructed to go to that location.

7 Q Okay. So you don't know what their role was at that
8 time, do you?

9 A No, sir.

10 Q So basically were you the investigator on the scene?

11 A Basically, I was told there to go and assist, and
12 assist the patrol officers in speaking with witnesses.
13 Excuse me.

14 Q And Investigator Guthro was the forensics
15 investigator.

16 A Yes, sir, he was.

17 Q Okay. So your job was to try to find some witnesses.

18 A Yes, sir.

19 Q Did you learn about Mr. Brannon?

20 A I did from Officer Edwards.

21 Q And what did you do when you learned about
22 Mr. Brannon?

23 A In speaking with Officer Edwards, she stated she had
24 spoken with a man across the street, at the house across
25 the street from the store. Apparently he had seen

Sonya McCullough
Direct examination by Mr. Bulsa

1 something and had given her some information. And she had
2 taken his information in a statement.

3 Myself and Officer Norkett proceeded across the street
4 and spoke with Mr. Brannon. And there were two other males
5 on the porch.

6 Q Did the other males know anything?

7 A They said that they didn't.

8 Q Mr. Brannon said he knew something.

9 A Yes, sir, he did.

10 Q Okay. In fact, he told you that he had given Officer
11 Brandy his information.

12 A Yes, sir, he, he did.

13 Q Okay. What did he tell you he saw?

14 A Basically, he said that he was sitting on the porch
15 and he saw a black Honda pull up with tinted windows. He
16 stated that he saw a black male, and a female on the
17 passenger side.

18 He stated that he saw the black male get out of the
19 car. He stated he saw the guy shoot about four times in
20 the air. He stated that -- I think I asked him a
21 description of the guy, and he said between 20 and 21 with
22 short hair.

23 Q Was that black male the driver of the vehicle? Did he
24 describe him as the driver?

25 A May I refer back to my notes?

Sonya McCullough
Direct examination by Mr. Bulsa

- 1 Q Yes, ma'am.
- 2 A Yes, sir. Stated they saw the young black male
3 driving a black Honda Accord.
- 4 Q And he'd already told you that he thought the person
5 in the passenger seat was a black girl.
- 6 A Yes, sir.
- 7 Q And then gave you a description giving his approximate
8 age and his hair style.
- 9 A Yes, sir.
- 10 Q That being short hair. And did he give you anything
11 else?
- 12 A No, sir. He said he didn't see anything else. And
13 then he made a comment that he had told the children or the
14 kids to go back into the house.
- 15 Q Okay. You're referring to your report. When did you
16 prepare this report?
- 17 A At 12:08 a.m. on the 29th.
- 18 Q Okay. There's a running sequence of times.
- 19 A Yes, sir.
- 20 Q How did you keep those times?
- 21 A I have a little note pad that I use when I go out on
22 scenes or when I'm doing my investigations. And when I get
23 my time -- my time comes from the time that I'm called out
24 from the supervisor or sent on a call. It starts then.
25 And I get my time from my, my Nextel phone. It keeps

Sonya McCullough
Cross-examination by Mr. Whelchel

1 better time than my watch. And whatever I do, I try to
2 keep a running time of it, when I arrive at city hall.

3 Once I get my call from the supervisor, when I arrive
4 to wherever she sends me to, and whatever, anything else
5 that I do, I try to keep a running time of it.

6 Q So you note the time in the pad.

7 A Yes, sir.

8 Q Do you make other notes in your pad as you are
9 speaking to people?

10 A Yes, sir.

11 Q And then you take that and put into a report format?

12 A Yes, sir.

13 Q Are you confident this information is accurate as to
14 what Mr. Brannon told you?

15 A Yes, sir.

16 Q Thank you. That's all I have.

17 CROSS-EXAMINATION

18 BY MR. WHELCHER

19 Q Did you ask him about clothing?

20 A I don't recall if I did. I asked him for a
21 description.

22 Q Okay. So you took what you say he told you and put it
23 in those notes and then transcribed it six hours later.

24 A Yes, sir.

25 Q Okay.

Sonya McCullough
Redirect examination by Mr. Bulsa

1 REDIRECT EXAMINATION

2 BY MR. BULSA

3 Q But you ask asked him for a description, and that's
4 all he gave you, was the clothing and his hair style.

5 A Yes, sir.

6 Q And did you then -- would this report have been made a
7 part of the file for the other investigators?

8 A Yes, sir.

9 Q Thank you.

10 THE COURT: You may step down.

11 MR. BULSA: Your Honor, that's the state's reply.

12 THE COURT: All right. Ladies and gentlemen, that is
13 all of the testimony or other evidence to be offered in
14 this trial of the case. What remains to be done are the
15 lawyers' final summations, after which I'll instruct you on
16 the law, and then you'll begin with your deliberations.

17 It's now noon, so we're going to recess for lunch. We
18 will resume with the final summations, the instruction and
19 your deliberations beginning at 1:30, at 1:30 this
20 afternoon.

21 Continue to follow the instruction previously given.
22 Do not discuss the case with anyone. Don't conduct any
23 research or do your own investigation or allow yourselves
24 to be exposed to any type of media coverage that might
25 relate to the case.

1 Do have a good lunch, and please report to your jury
2 room at 1:30 this afternoon, 1:30 this afternoon.

3 (The following takes place outside the presence of the
4 jury.)

5 THE COURT: Any motions or other matters to address?

6 MR. BULSA: Not from the state, Your Honor.

7 MR. WHELCHER: No, sir.

8 THE COURT: Any requests for instructions other than
9 that which has already been provided?

10 MR. BULSA: Is Your Honor going to charge any lesser
11 included offenses?

12 THE COURT: Well, I'm asking if y'all have any
13 requests. Do you have any other than this one?

14 MR. BULSA: I guess I was anticipating the defense
15 asking for voluntary manslaughter.

16 THE COURT: Well, we'll wait and see what they do.

17 MR. BULSA: Yes, sir. And none, none other.

18 THE COURT: Mr. Whelcher.

19 MR. WHELCHER: I wouldn't -- I would have no objection
20 to Your Honor charging voluntary whatsoever.

21 THE COURT: Well, are you requesting an instruction on
22 voluntary manslaughter?

23 MR. WHELCHER: Yes, sir.

24 THE COURT: All right. Anything else?

25 MR. WHELCHER: No, sir.

1 THE COURT: Mr. Bulsa.

2 MR. BULSA: Your Honor, the state doesn't object to
3 voluntary based on the altercation that occurred inside the
4 vehicle.

5 MR. WHELCHER: May we approach, Your Honor?

6 THE COURT: Yes.

7 MR. BULSA: The jury might find that is sufficient
8 provocation.

9 (Bench conference held off the record.)

10 THE COURT: Court is in recess until 1:30.

11 (Whereupon, a recess was taken.)

12 THE COURT: All right. Are we ready for the jury?

13 MR. BULSA: Yes, sir.

14 THE COURT: All right. Bring the jury.

15 (The following takes place in the presence of the
16 jury.)

17 THE COURT: Good afternoon, ladies and gentlemen.

18 As you know, the evidence has been received. So we're
19 going to hear from the lawyers in their final summations,
20 after which I'll instruct you on the law. And then you can
21 begin with your deliberations.

22 So please give the lawyers your attention now as they
23 give you their final summations.

24 Mr. Whelcher.

25 MR. WHELCHER: Thank you, Your Honor.

1 Mr. Foreman, ladies and gentlemen of the jury, we've
2 obviously reached the conclusion of the testimony phase of
3 this case. And this is what is commonly referred to as
4 closing statements or closing arguments. It may be a
5 misnomer because no one has an argument with you people in
6 this situation.

7 However you sat here. You've watched and you've
8 listened. And there's no question but that this, what
9 happened, all arose because of an argument either about a
10 gun, drugs for a gun, gun to repay a prior debt for drugs.
11 I'm not sure anybody really knows.

12 But let me ask you this question. Who started this
13 whole process? It all started weeks before when according
14 to Santos Ruiz he bought drugs from Jay. And then he got
15 arrested. And then Jay was threatening him and he was
16 scared he was going to turn him in. Do you remember that?

17 Then we fast forward a couple of weeks. And the
18 fellow who says Jay is threatening me calls Jay and says I
19 got some guns for sale, do you know anybody that wants to
20 buy them.

21 We talked early on in this trial about using your
22 common sense to determine credibility. And credibility
23 means simply believability, do you believe it.

24 We know there's a relationship between Santos and Jay.
25 They're selling guns and drugs back and forth. We know

Closing arguments

1 that. Jay, excuse me, Santos says he harassed,
2 intimidated, afraid of Jay, because he can tell the police
3 where he got the drugs.

4 Nobody seems to say anything about that. Yet when my
5 client tells you and the prosecutor and everybody here
6 today that he is scared of Jay, we scoffed at it, or some
7 persons scoffed at that.

8 The question you have to determine is simply this. Is
9 it reasonable to believe that one person can be scared of
10 Jay but not the other? Is it reasonable to believe that
11 the person who has a business relationship with Jay --
12 vis-a-vis guns and drugs -- can be scared of the fellow who
13 has known him for about three months who was also
14 threatened by him, cannot be afraid for his family and
15 himself? It cuts both ways.

16 And let's talk about some of the testimony. And the
17 first thing we need to understand is this. Dr. Wren is a
18 pathologist, and he can tell you how somebody died or why
19 he died. He can't tell you who.

20 Those guys from SLED, they can tell you all about
21 bullet fragments and all of that kind of stuff. They can't
22 tell you who.

23 All of the people from the government, investigators,
24 officers, they can't tell you who.

25 The only people who might possibly be able to tell you

1 who were there at the store that day. Ms. Peterson is
2 driving by. She's doing her dead level best to see what
3 she can see.

4 I asked her about her glasses. I asked her did you
5 know at that speed you got about 3.8 seconds to see
6 everything that you saw. And I also asked her is it
7 possible other persons are out there. Yeah, it's possible.

8 She was definite until you asked her more specific
9 questions, and then her answer became a little more vague.
10 And that's not intentional. She's trying to tell you what
11 she knows.

12 Eugene Brannon sitting across the street minding his
13 own business. He, unlike Ms. Peterson, is not driving a
14 car with her elderly mother and, I think, a godchild in the
15 car at 40-plus miles an hour and sees bullets flying and
16 trying to make sure to get out of there to keep everybody
17 okay. Eugene Brannon ain't in the line of fire.

18 Let's face it. Eugene is not a well-educated fellow.
19 I couldn't confuse him with the SLED agents. He just came
20 and told what he saw. But professionals couldn't even get
21 his address correct. They got him. That's why I asked the
22 lady. They got him living at , which is
23 where he lived, and seeing what he saw from

24 , which ain't possible.

25 They make mistakes. We all make mistakes. You've

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1 heard it time and again that they went to the wrong train
2 trestle. Even though it was plain as day in her call-in, I
3 just went by the fairgrounds, came under the trestle behind
4 the fairgrounds and there's a shoe. Maybe living in
5 Spartanburg all of your life like me you know where these
6 things are.

7 My dad used to work at the fairgrounds every year when
8 it came. He took up the money and had about six city
9 policemen follow him around to make sure the money he took
10 up he kept. It is impressive when you are a little kid.

11 But the bottom line is simply this. Do you believe
12 this happened the way they tell you it happened? Is it
13 believable? Is it credible?

14 The question is not is it a tragic thing that Jerry
15 Santos or Jerry Ruiz, excuse me, got shot. No question
16 about that. Eighteen years old. And he gets invited to
17 this soiree, shall we say, by his brother. Do you believe
18 what Santos believes and tells you?

19 The judge will charge you later, and he will tell you
20 how or if you can decide that the prior record I talked to
21 him about early on, the burglaries, the accessory to
22 felonies, the forgery, how that may, if you decide, so
23 influence his credibility.

24 That's a decision you make individually and as a
25 collective body. It's a legitimate question to ask. And

1 you've got to balance it.

2 Yes, my client has not been perfect. You balance the
3 two. You heard them both because that's what the jury
4 does. So three people, two of which say he did it.

5 Now, let's remind you that one of them, Santos, never
6 identified my client prior to this courtroom yesterday or
7 the day before. Never. Eighteen months later. And you
8 may remember me asking him does it have anything to do with
9 him being the only black man sitting at this table.

10 But when we started this trial Kenneth Smith stood up
11 and said I'm Kenneth Smith, here I am, I'm not guilty, they
12 got to prove it. So there he is. So you've got Santos and
13 then you've got Jay.

14 Now, let me ask you this question. If Kenneth Smith
15 is not the shooter, who is? Who has a reason to be angry
16 with Santos not only for this gun thing but the prior drug
17 offense?

18 He told you he bought drugs from Jay and got arrested
19 immediately. Doesn't take a rocket scientist to figure out
20 what happened there.

21 He's afraid of him, and yet he calls him up to sell
22 him guns. And when he shows up to sell him the gun or fix
23 the gun sale that went bad, there's three of him. Gun
24 sale's crowded. And two of the guys who are buying and may
25 have bought. You'll notice.

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1 So when everybody gets together at the store that day
2 Jay's on the passenger side. You've all heard it,
3 different versions of the same thing. And they're not
4 going to all match because we all see things from a
5 different perspective. They're not supposed to match.

6 But one thing is perfectly clear. Jay got beat up.
7 He got kicked in the eye, punched in the ribs, beat in the
8 head.

9 I forget which officer it was on the stand, but I
10 asked him and after it was all over you sent him to the
11 hospital. Jay goes to the hospital, not Kenneth Smith.
12 Kenneth Smith goes to the aquarium.

13 Do you believe that Jay just turned the other cheek
14 after he got his rear end kicked? Do you believe that Jay
15 just ran to the front of the store and said help, help, or
16 what?

17 You saw his testimony; you listened to his testimony.
18 I believe you questioned his testimony. Simple things such
19 as this.

20 And Mr. Bulsa asked him were you born in America.
21 Well, I've lived in South Carolina for, and I don't know
22 what he said after that. I lost it.

23 Wouldn't answer a simple, direct question about where
24 he was born. He was evasive, to say the least, and Santos
25 was much the same way.

1 You ask him a question, none of which required a
2 simple answer, a yes or a no, or I did this. And even the
3 judge had to tell him answer the question that they ask
4 you. I think he had to tell both of them that. They
5 wanted you to hear what they wanted you to hear. They
6 wanted you to believe what they say. But you decide.

7 Now, I am reasonably sure that you're going to hear
8 something about my client's statement. And my client
9 forthrightly told you from the time he got on the stand and
10 when he got to his statement in the process that he didn't
11 tell the truth. And he told you why. And, like I said
12 before, why is it that Jay, excuse me, Santos can be
13 scared, frightened, intimidated, whatever of Jay but
14 Kenneth Smith cannot?

15 Santos told you he knew where he lived. And he knew
16 where Kenneth Smith lived too. He knew where his
17 grandmother lived. He had a girlfriend and child by her.

18 Ask yourself this question. After all of that beating
19 that took place does it make sense that the guy who ain't
20 had a glove laid on him -- you heard he barely got brushed
21 on -- a guy who didn't get a glove laid on him for all
22 intents and purposes gets out and gets a gun and starts
23 shooting at these guys that ain't hit him and are leaving?

24 It is important for Santos that you believe Kenneth
25 Smith tried to hit him, stab at him, whatever, with this

Closing arguments

1 stick from the driver's side. And yet Jay who was right
2 there said he never had the stick. And if there are any
3 forensic evidence, if there were any fingerprints, my
4 client had this stick, you would have it. But you don't.
5 Sticks, those sticks, it really doesn't matter.

6 But as I told you before, this whole thing boils down
7 to not only, not just do you believe Santos and Jay, but
8 after all of that you've heard from the government and from
9 every witness that's testified, after all that you've heard
10 are you convinced beyond a reasonable doubt that Kenneth
11 Smith committed murder and breach of the peace of a high
12 and aggravated nature?

13 After all that's been presented to you do you believe
14 that? Is it credible? Is it believable? Because it's
15 real simple. If not, your solemn oath from Tuesday is a
16 verdict of not guilty.

17 And, again, the burden of proof lies here. They are
18 the ones who have to prove to you with evidence so strong
19 and so convincing. And the judge will charge you about
20 this. Listen to his charge.

21 Evidence must so strong and so convincing as to remove
22 the presumption of innocence, to remove the cloak of
23 innocence that Kenneth Smith has. Not just Kenneth Smith
24 but anybody and everybody who is ever tried in this state
25 and country has that presumption, the only one that exists

1 in our law, the presumption of innocence given to Kenneth
2 Smith and anybody else who's hauled into a courtroom and
3 said you're going to trial.

4 You heard Mr. Santos telling you that he was arrested.
5 And I think it was detective or investigator. I can't
6 remember which one they used. It doesn't matter. Spurgeon
7 said, well, he wasn't arrested. He was probably, you know,
8 just confused with his inexperience with the criminal
9 system. Santos Ruiz. Inexperience with the criminal
10 system.

11 The evidence presented in this case must be sufficient
12 to remove Kenneth Smith's cloak, his presumption of
13 innocence.

14 It must be so strong and so convincing that you as
15 individual jurors and as a collective body, all 12 of you,
16 must agree that that cloak has been removed by evidence so
17 strong and so convincing, must be proven with evidence so
18 strong and so convincing that you would act, take the same
19 action in returning a guilty verdict if this were your
20 brother or your son.

21 MR. BULSA: Objection, Your Honor.

22 THE COURT: Sustained.

23 MR. WHELCHER: You decide whether or not the state has
24 met its burden. Again, not is this a tragic thing, but can
25 you believe what the witnesses for the state tell you? Do

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1 they have an ulterior motive? Are they out to protect
2 themselves?

3 We contend that the proper verdict in this case, a
4 unanimous verdict as the judge will tell you, is a verdict
5 that speaks the truth, a verdict of not guilty. Thank you.

6 THE COURT: Mr. Bulsa.

7 MR. BULSA: Thank you, Your Honor.

8 (Whereupon, the C. D. was played for the jury.)

9 MR. BULSA: Ladies and gentlemen, I put Ms. Peterson
10 up right after we played that tape because she had the
11 clearest view of what occurred. She was unfortunately
12 placed in the line of fire, along with her mother and her
13 goddaughter.

14 She testified to you, ladies and gentlemen, that the
15 man she saw shooting was the man who got in the driver's
16 side of that car. She saw it so clearly that she even
17 described to you how the gun was drawn. She was convinced
18 and positive that it was the driver, the man that got in
19 the driver's side of that car.

20 That was the case that the state is out to prove, that
21 the driver of that Honda was the shooter that killed Jerry
22 De La Rosa. And the evidence is clear, the evidence is
23 consistent that the man driving that car is sitting right
24 here. He had the gun. He is the shooter. He put
25 everybody in danger. He killed Jerry De La Rosa.

1 Mr. Whelchel went into great detail about who did it.
2 He wants you to think of this as an identity case of who
3 done it. And you have to decide that. You have to decide
4 if Ms. Peterson is believable. Is she credible? Yes, you
5 have to decide the credibility of every witness.

6 Ms. Peterson called 9-1-1 immediately after she went
7 and parked her car and checked on her mother and daughter,
8 within a few minutes.

9 She met with the officer and gave a statement to the
10 officer consistent with what she told the 9-1-1 operator.
11 She came in and testified consistent with what she said on
12 the 9-1-1 call when she told the officers. She is the most
13 believable witness other than the law enforcement that
14 came.

15 We saw the vantage point that she had to counter with
16 the vantage point that Mr. Brannon had. Mr. Brannon had no
17 doubt he actually saw something, but he describes it as
18 seeing a black car pull up, someone jump out and shoot.

19 We know it didn't happen that way. We know there was
20 a truck. We know there was an altercation. We know the
21 truck backed up and was heading out when the shots were
22 fired.

23 But you can take Mr. Brannon's first description of
24 what he saw to those two officers, Officer Brandy Edwards
25 and Officer or Investigator Sonya McCullough.

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1 And his actual view of the shooting is consistent with
2 Ms. Peterson. He said he saw the driver of that vehicle,
3 that black vehicle, shoot and jump in the car and leave.
4 But when he gave a statement to Mr. Patton he switched.
5 And he was confused.

6 He then said it was the passenger instead of the
7 driver. But he couldn't give a description of what that
8 man looked like. And then when he comes to court he's not
9 consistent again. He adds to his description stating that
10 he had dreads and was wearing black.

11 And yet what was his description to Sonya McCullough?
12 He said five minutes, the police showed up in five minutes.
13 We know that wasn't accurate because they went to a
14 different location.

15 And when he spoke to Ms. McCullough he said a black
16 male between 20 and 21, a young black male, with short
17 hair. He, this guy, fits that description.

18 The evidence is clear, ladies and gentlemen, that the
19 driver shot. Not the passenger. The driver.

20 You go back and review the evidence. You'll have all
21 the photographs; you'll have the map; you'll have the
22 stick; and you'll have the defendant's statement. Take
23 your time. Review it all. Read the statement. And you
24 will decide if man was the shooter.

25 And the state does not condone what act -- what took

Closing arguments

1 place out there that night. We don't condone this illegal
2 selling of the guns, the dealing in drugs. But
3 unfortunately Santos was caught up with the drug problem,
4 involved in it. Mr. Sainvil was caught up in that
5 lifestyle. And was so was Mr. Smith. But it doesn't give
6 anyone the right to shoot and kill someone.

7 Ladies and gentlemen, it doesn't really matter what
8 exactly occurred inside that car. I agree with
9 Mr. Whelchel. He stood up here and said the stories don't
10 match. And you wouldn't expect them to match because
11 everybody has their own perspective in what's going on.

12 What matters is what happened after that and who
13 decided to pull the gun and shoot at a car entering a
14 roadway with other cars going through. And that person was
15 right there. That's what matters.

16 Mr. Sainvil did bear the brunt of the assault. He got
17 out and fled. He was running away. What was this man
18 doing? He's staying in the car. He pulled his gun and he
19 retaliated.

20 You decide the credibility of each of the witnesses.
21 We know everybody has got something, some bias in this
22 case, as far as the parties that were at the scene of the
23 car and the fight.

24 You judge their demeanor on the stand, how they
25 answered questions, whether they would look someone in the

Closing arguments

1 eye when questioning. Did they appear believable?
2 Unfortunately, there was some accented shoes (sic) because
3 of the nationalities. Hopefully you could hear enough.
4 Don't hold their nationality against them.

5 Who had the best vantage point? Who had the most
6 clear view? Who was the most clear headed the night, the
7 day it happened? Who was the most consistent in their
8 versions they told the police and testified?

9 And, yes, who has a criminal history that you can use
10 to impeach or you can use to say, well, do I really want to
11 believe that person? Santos has that. So does this
12 gentleman. Use the same factors to evaluate everybody's
13 testimony. I don't think I heard any criminal history
14 about Mr. Sainvil though.

15 The defense, he didn't really talk about it in his
16 closing, but during the questioning of the officers
17 regarding the gunshot residue kits we brought in the SLED
18 expert or the SLED officer to testify about what gunshot
19 residue is and how it's collected and it's placed on your
20 hands and why you try to collect it.

21 Mr. Wheelchel went into great detail about how close in
22 time and roughly within six hours. And I guess that
23 means -- maybe that's why Mr. Sainvil if he was the
24 shooter, the test was negative. So we've got to explain
25 why it was negative. Oh, he washed his hands in a close to

1 6-hour time frame.

2 Just as John Sainvil fled the altercation at the car
3 when this gentleman stayed to retaliate, at least John
4 Sainvil stayed in town. This guy, where did he go? He
5 fled out of state. The police didn't have an opportunity
6 to swab his hands. In fact, he knows all about C. S. I.
7 He testified about it.

8 Mr. Whelchel is right. I'm going to talk about this
9 statement. I submit to you, ladies and gentlemen, this
10 statement is much more accurate of what occurred that
11 evening than this man's testimony in court today.

12 You'll have a chance to read it again. The officer
13 read it to you. I pointed out portions of it in his, in my
14 cross-examination of him.

15 Very few things in this statement were consistent with
16 his testimony. The one thing that was consistent was he's
17 the man that yelled come on let's go. And you heard the
18 9-1-1 call. Ms. Peterson heard that, say come on, let's
19 go. He did agree with the portion of his statement that he
20 left town and went to Georgia.

21 I questioned him on whether he was assaulted also. He
22 wants -- he's got to say that, no, I wasn't really hit, I
23 wasn't mad, I didn't have a reason to shoot at them. Yet
24 he describes in here as being hit through the sunroof. And
25 then he comes to court and he describes it as, oh, a

Closing arguments

1 glancing blow just one time.

2 So that really wasn't consistent with this either.

3 And the rest of it, I followed along as he was testifying.

4 And there virtually isn't anything else that matches it,

5 because it paints him in a poor light, but it doesn't say I

6 did the shooting.

7 He brings up this third follow, this buddy of his.

8 This does not read like he's afraid of John Sainvil. This

9 reads like, yeah, I was there and this stuff happened but

10 this buddy of mine I saw did the shooting.

11 It's clear that he and Jay have had dealings with

12 Santos in the past and the night before. They run

13 together. He drives him around in the car, takes the car

14 off with him.

15 Ladies and gentlemen, Mr. Whelchel touched on the fact

16 that the state has the burden of proof, and that is true.

17 The judge will describe that to you.

18 The judge is also going to describe the charges of

19 murder and breach of peace of a high and aggravated nature.

20 He's going to describe a third charge to you,

21 voluntary manslaughter, which is the lesser included

22 offense of murder.

23 And I submit to you, ladies and gentlemen, that that

24 is the real question you're going to face in your

25 deliberations, whether this should be murder or voluntary

1 manslaughter.

2 I submit to you the evidence is clear and consistent
3 that he's the shooter. I submit to you that the evidence
4 is clear and consistent that people on Hayne Street,
5 Franklin Street, around that convenience store, were put in
6 danger and that breach of peace of a high and aggravated
7 nature exists.

8 The judge will charge you on voluntary manslaughter.
9 Now, murder is the unlawful killing of another human being
10 with malice aforethought.

11 In some instances in homicides malice can be removed
12 if there's sufficient provocation by the parties involved
13 and there's a heat of passion that's created by the
14 actions.

15 The judge is going to describe the law of voluntary
16 manslaughter as the unlawful killing of another person
17 without malice. Okay. If it's malice, it's murder. If
18 you find there's no malice, and that malice is basically
19 removed because of the actions of the parties and that heat
20 of passion that's been generated, basically was he provoked
21 and was he acting under the heat of passion of that
22 provocation when he pulled that gun and fired the shot.

23 I want to point out a few things to you, ladies and
24 gentlemen, about what I will argue shows that he was acting
25 more out of malice than heat of passion.

Closing arguments

1 There's probably some question as to why do we bring
2 in a SLED expert on firearms if we don't even have a gun.
3 Well, we had a bullet from the body of Jerry De La Rosa,
4 and we had a round from the car.

5 We had three marks to the truck door and then the
6 bullet in the body. So we know that at least four shots
7 struck something. Four shots were fired at least.
8 Ms. Peterson thought she heard five.

9 The round from the body was what? A .38 or .357. How
10 was that fired, from a revolver or derringer? A derringer
11 shoots, most unusual, four rounds. I submit to you you can
12 remember derringer from the equation. I submit to you the
13 type of weapon fired was a revolver because of the slug and
14 the absence of shell casings.

15 Revolvers hold from five to seven rounds.
16 Ms. Peterson thought she heard five. We know at least four
17 struck. Bang, bang, bang, bang, bang. It suggests that
18 the person shooting unloaded the firearm. It's malice.

19 There's a reason for every witness we called.
20 Dr. Wren testified about the cause of death. It might
21 sound silly. You know a man was shot. That's an element
22 we've got to prove, that he died from a bullet wound. We
23 don't just call people to call them.

24 You decide, ladies and gentlemen. I submit to you
25 that the evidence presented by the state is consistent with

1 the 9-1-1 call from Ms. Peterson, Mr. Santos, or
2 Mr. Sainvil, from the officers who described the
3 investigation.

4 Even the reply witnesses we called all point to this
5 man as being the driver of that vehicle and the shooter of
6 the gun that led to the death.

7 And, yeah, Mr. Brannon, his witness, his first
8 statement says I mentioned to you, to law enforcement, were
9 consistent with the state's case. And the defendant's own
10 statement if you take out the lie about the buddy is
11 consistent because he puts himself at the back of that car.

12 "That's when slim amigo tried to kick me one more
13 time. The big amigo and tall amigo was in the truck. So I
14 went to the trunk to get a small brown broomstick to hit
15 the third one with on the outside of the truck."

16 Mr. Whelchel brought it out and waved it around. This
17 man certainly knew it was in the car because he talked
18 about how are they going to get it. I submit to you that
19 was his excuse to put himself outside the car when he
20 talked to law enforcement.

21 I called Ms. Kelly, the owner of the car, earlier to
22 ask her where in the world did you keep this stick in your
23 car.

24 And I asked her a question, did you keep it in the
25 trunk, and she gave me a puzzled look like, no, it was in

Jury charge

1 the car under one of the seats. I asked her that question
2 because I knew this statement had him saying he was going
3 to the trunk to get it. He didn't go to the trunk to get
4 it. He had it. But he puts himself at the location
5 Ms. Peterson said she saw the shooter.

6 Ladies and gentlemen, justice should be the concern of
7 every good citizen. I ask you to do your duty and see that
8 justice is served. I ask you to find the defendant guilty
9 of both charges. Thank you.

10 THE COURT: Mr. Foreman and ladies and gentlemen of
11 the jury, you of course have heard and seen all the
12 evidence in the case and now have heard the final
13 summations of the lawyers; and therefore it now becomes my
14 duty to instruct you on the law that's applicable in the
15 case. And then you'll be asked to go back and begin with
16 your deliberations. Through that process you'll examine
17 the evidence, decide the facts, apply the law and arrive at
18 a fair and just decision in the case.

19 It is your exclusive duty to determine what the facts
20 are. You do that through your own common-sense examination
21 and evaluation of all of the testimony and the other
22 evidence received during the trial of this case.

23 You 12 jurors alone will decide what weight, value and
24 effect to give to any particular testimony or other
25 evidence in the case.

Jury charge

1 Your sole objective is to simply reach the truth in
2 the matter. And by doing that you will have fulfilled your
3 obligations as jurors, and that is to simply give both the
4 state and the defendant a fair and impartial trial.

5 Now, in this case, as you know, the state has accused
6 the defendant with having committed two separate and
7 distinct offenses, although they are alleged to have arisen
8 out of one particular event or course of events which the
9 state alleges occurred back on March the 28th of 2008.

10 And by way of two indictments, which I explained to
11 you earlier, the state is accusing the defendant with
12 having committed the crimes of murder and with breach of
13 peace of a high and aggravated nature.

14 The indictment alleging the crime of murder sets forth
15 that the defendant did here in Spartanburg County on or
16 about March the 28th of 2008 wilfully and with malice
17 aforethought kill one Jerry De La Rosa by shooting the
18 victim with a handgun and that the victim died as a
19 proximate result of that conduct.

20 The second indictment charges the defendant with
21 having committed the crime of breach of peace of a high and
22 aggravated nature. That indictment sets forth that the
23 defendant did on or about March the 28th of 2008 disturb
24 and break the peace of the general public in a high and
25 aggravated nature in that he went armed offensively and did

Jury charge

1 fire a pistol or firearm while at a location while vehicles
2 were traveling on Hayne Street which placed persons in
3 grave or serious danger of violent injury or death.

4 Now, as to those allegations and as to each of those
5 charges the defendant has entered a plea of not guilty.
6 And, as I've told you, that plea of not guilty has
7 therefore placed upon the state the burden of proving the
8 allegations that are set forth in each of those
9 indictments, the burden of proving each of the essential
10 elements that constitute the crimes that have been alleged
11 in each of those indictments; and therefore the burden is
12 upon the state to establish the defendant's guilt to the
13 satisfaction of you 12 jurors beyond a reasonable doubt
14 before any verdict of guilty could be returned as to either
15 of the indictments.

16 The burden is never upon a defendant or a person
17 accused of a crime to prove that they are not guilty or to
18 prove that they are innocent, because in some cases that
19 might not be possible.

20 You are further instructed that it is a vital,
21 important and cardinal rule of law that every defendant in
22 a criminal trial, no matter how serious the offense might
23 be for which that person stands charged, that person shall
24 always be presumed innocent of the charge.

25 That presumption of innocence remains with any

Jury charge

1 defendant, as it does with this defendant, from the time
2 that he is placed under arrest and throughout the course of
3 the criminal process and even throughout the course of the
4 actual trial in the case.

5 As I've told you, that presumption of innocence will
6 be with the defendant as you go back to begin with your
7 deliberations in this case. And that presumption of
8 innocence will be with him in that jury room, and it'll be
9 him forever unless you 12 jurors determine that he's no
10 longer entitled to that presumption of innocence.

11 That is after you've carefully considered all of the
12 evidence in the case, and from the evidence you've
13 determined what you believe to be the true facts, and upon
14 determining those facts you apply the law that I will have
15 provided you, if you 12 jurors unanimously determine that
16 his guilt as to a particular charge has been proven beyond
17 a reasonable doubt, then the defendant would no longer be
18 entitled to that presumption of innocence as it relates to
19 that particular charge. But it's only if, unless and until
20 that you are satisfied of his guilt beyond a reasonable
21 doubt that the presumption of innocence would no longer be
22 applicable.

23 Now, while the state does have the burden of proving
24 the defendant's guilt to your satisfaction beyond a
25 reasonable doubt, that doesn't mean that they have to prove

Jury charge

1 his guilt beyond all doubt or beyond any possible doubt.
2 But it does require the state to prove his guilt to your
3 satisfaction beyond a reasonable doubt.

4 The term reasonable doubt should be given its plain
5 and ordinary meaning. A reasonable doubt is the kind of
6 doubt that would cause a reasonable person to hesitate to
7 act upon the information provided.

8 A defendant in a criminal trial is entitled to any
9 reasonable doubt that arises from the evidence or lack of
10 evidence in a case. And if upon any factual issue
11 essential to a finding of a verdict of guilty you have some
12 reasonable doubt as to how that issue should be resolved,
13 it would be your duty to resolve that reasonable doubt in
14 favor of the defendant.

15 Therefore if upon your consideration of the whole case
16 you have a reasonable doubt as to the defendant's guilt as
17 it relates to a particular charge, it would be your duty to
18 resolve that doubt in his favor and to return a verdict of
19 not guilty.

20 And, at the same time, after you've considered all the
21 evidence and decided the facts and applied the law, if you
22 have no reasonable doubt as to his guilt, then it would be
23 your corresponding duty to convict the defendant or to find
24 him guilty of any crime that has been established to your
25 satisfaction beyond a reasonable doubt.

Jury charge

1 Now, in applying the principal of reasonable doubt
2 where you are permitted to consider lesser included
3 offenses, those included in a greater offense alleged, if
4 you have a reasonable doubt as to whether or not the
5 defendant has been proven guilty of the greater or only
6 proven guilty of the lesser, again, you have to resolve
7 that doubt in his favor. And you may only find him guilty
8 of the lesser offense. But of course you could not find
9 him guilty of a lesser offense unless the elements of that
10 offense have been established to your satisfaction beyond a
11 reasonable doubt.

12 Now, the same law that provides that you are the
13 judges of the facts also provides that I am the judge of
14 the law. That simply means that nobody is going to tell
15 you how to arrive at your determination of fact in this
16 case.

17 You do that, as I have stated, through the exercise of
18 good judgment and common sense conscientiously applied to
19 the testimony and evidence received during the trial of the
20 case.

21 You must however under your oath as a juror accept the
22 law as I provide it to you as being the law that you are to
23 apply in this particular case. In other words, you are
24 never to concern yourself with what you thought the law was
25 before you came to serve as a juror this week or what you

Jury charge

1 think the law ought to be.

2 Under your oath as a juror you must accept the law as
3 I provide it to you as being the law that you are to apply
4 in this particular case. Then you simply take that law and
5 you apply it to the facts as you 12 jurors determine those
6 facts to be based upon your common sense examination and
7 evaluation of the evidence in the case.

8 Now, as I have told you, you are the sole judges of
9 the facts in this case. And you are therefore necessarily
10 the sole judges of the credibility or the believability of
11 each witness that has testified during the trial of this
12 case.

13 You 12 jurors alone will decide what weight, value and
14 effect to give to any particular witness' testimony, or
15 even portions of testimony. And so there are several
16 factors which you should consider in arriving at your
17 evaluation as to a witness' credibility. And I'm going to
18 list those factors for you.

19 You may consider the demeanor of the witness as the
20 witness testified. In other words, what was that witness'
21 manner and appearance when they testified? Were they
22 straightforward in responding to questions, or were they
23 hesitant or evasive in responding to questions that were
24 asked of that particular witness?

25 Simply put, did the witness appear to you to be

Jury charge

1 telling the truth and to have knowledge of the facts to
2 which that witness has testified?

3 You may also consider whether or not the testimony of
4 a witness is consistent, or is it inconsistent with that
5 witness' own testimony or with other statements made by
6 that witness, whether in court or outside of court.

7 You may consider whether or not the testimony of a
8 witness is consistent, or is it inconsistent with other
9 testimony or other evidence received during the trial of
10 the case.

11 You should also consider how the witness came to know
12 the facts to which a witness has testified. In other
13 words, what was that particular witness' opportunity and
14 ability to perceive the existence of those facts to which
15 that witness has testified by having previously used his or
16 her senses, and then what is that witness' ability to be
17 able to come into court and to accurately recollect to you
18 as to what they have previously seen or heard, or felt for
19 that matter.

20 You may also consider any bias or prejudice or
21 interest that you find a witness may have. In other words,
22 do you find some reason that a particular witness would
23 come into court and would testify one way or another to
24 help or to hurt one side or the other.

25 You may consider any interest that a witness has in

Jury charge

1 the outcome of the case if you determine that a witness
2 does have such an interest and you further find that that
3 interest would bear upon that particular witness'
4 credibility.

5 You may also consider whether or not the testimony of
6 a witnesses is strengthened, or is it weakened by other
7 testimony or other evidence received during the trial.

8 Now, during the trial of this case you have heard
9 testimony relating to certain witnesses, including the
10 defendant, having prior convictions for criminal offenses.

11 Ordinarily evidence of prior convictions is not
12 admissible in the trial of the case, and that's because
13 those convictions aren't relevant to anything in most
14 circumstances.

15 However, where a witness, including the defendant,
16 takes the witness stand and testifies during the trial of a
17 case, where that person has been convicted of certain types
18 of crimes, evidence of those convictions may be admitted
19 during the witness' testimony. But that evidence is
20 allowed and permitted, but it is restricted to a very
21 limited purpose.

22 You may consider such evidence if you find it credible
23 and probative solely on the issue of the credibility or the
24 believability of the witness. But you may not consider it
25 for any other purpose.

1 It is not being offered as proof of the defendant's
2 commission of the crimes for which he stands charged and
3 for which he now stands trial. It is solely being admitted
4 for the purpose of you considering it in your determination
5 as to his credibility or believability.

6 So while you may use it on the issue of credibility if
7 you find it probative, it may not be considered for any
8 other purpose.

9 Now, because you are the judges of the facts and
10 because you are the judges of the credibility of each
11 witness, you are permitted to believe as much or as little
12 of what a witness has testified to as you deem is
13 appropriate.

14 And so you may believe everything that a witness
15 testified to. You may choose to believe none of it. You
16 may believe one portion of a witness' testimony and reject
17 some other portion of that same witness' testimony. You
18 may believe one witness as opposed to several, or several
19 as opposed to one.

20 Whatever your good judgment and common sense tells you
21 is the most believable and credible testimony is the
22 testimony you should accept, and you should reject any
23 testimony or other evidence that you find not to be
24 credible or believable. Again, your sole objective is to
25 simply reach the truth in the matter. And by doing that

Jury charge

1 you will have fulfilled your obligations as jurors.

2 Now, while there are various forms of evidence such as
3 testimony, photographs, documents, charts and other types
4 of physical exhibits, there are really only two types of
5 evidence. Either or both of those types of evidence may
6 used to prove any fact in issue. But the two types of
7 evidence are direct evidence and circumstantial evidence.

8 Now, direct evidence is the testimony of a person who
9 testifies from actual knowledge of a fact. It is testimony
10 by a person who has perceived the existence of some fact by
11 means of his or her senses, and then that person comes into
12 court and they testify as to what they have previously
13 seen, heard, felt, that is what they previously perceived.

14 Circumstantial evidence, on the other hand, is the
15 proof of some other fact or set of facts which taken either
16 singly or collectively may prove the existence of a fact in
17 question as a necessary consequence, that is through an
18 inference.

19 And an inference is simply a deduction of fact that
20 may logically and reasonably be drawn from the proof of
21 some other fact or set of facts. In other words, it's not
22 a fact proven by the direct testimony of a person based
23 upon personal perception, but it is a conclusion that might
24 reasonably be drawn from the proof of other facts.

25 In other words, you may infer that a particular event

Jury charge

1 occurred or that a particular fact exists based upon the
2 proof of sufficient factual circumstances which would
3 reasonably warrant your arriving at such a conclusion.

4 Now, the law makes absolutely no distinction between
5 the weight or value to be given to direct evidence as
6 opposed to circumstantial evidence, nor is a greater degree
7 of certainty required of circumstantial evidence as opposed
8 to direct evidence.

9 Whatever the type of evidence used to prove any fact,
10 you should consider all of the evidence presented during
11 the trial of this case. And after considering all of that
12 evidence and carefully weighing it in your minds if you are
13 not convinced of the guilt of the defendant beyond a
14 reasonable doubt, then it would be your duty to resolve
15 that doubt in his favor and return a verdict of not guilty.

16 Now, as you are aware, the defendant is charged with
17 two separate and distinct offenses. You will be called
18 upon to render two separate and distinct verdicts. Those
19 verdicts may be the same, they may be different. That will
20 depend upon your determination of fact and then your
21 application of the law as I will have provided it to you.

22 One of the indictments charges the defendant with the
23 crime of murder. Murder is a statutory offense. The
24 legislature has defined what that offense consists of. And
25 that offense is set forth in a South Carolina Code section.

Jury charge

1 That section is 16-3-10. And that section provides that
2 murder is defined as the killing of any person with malice
3 aforethought, either expressed or implied.

4 In order for you to find the defendant guilty of the
5 crime of murder it would be necessary that the evidence in
6 this case has established to your satisfaction beyond a
7 reasonable doubt that the defendant did commit some act or
8 acts which proximately caused the death of the decedent and
9 that that killing was done with malice aforethought.

10 Malice aforethought is an essential element of the
11 crime of murder. Malice as an essential element of the
12 crime of murder is a term connoting an ill will and having
13 an intent to do harm.

14 Intent means the state of a person's mind which
15 directs his actions towards a specific object or goal. And
16 intent would include those consequences which represent the
17 very purpose for which an act is done, as well as those
18 consequences which are known to be substantially certain to
19 result whether actually intended or not.

20 Malice is a technical term importing wickedness and
21 excluding just cause or legal excuse. It is something
22 which springs from depravity, from a heart devoid of social
23 duty and fatally bent on mischief. It is a state of mind
24 indicating an extreme disregard for or an extreme
25 indifference to human life.

Jury charge

1 Malice may be likewise defined as a state of mind
2 which indicates a formed purpose and design to do a
3 wrongful act under circumstances that exclude any legal
4 right to do it.

5 The words expressed or implied malice do not mean
6 different kinds of malice but merely the manner in which
7 malice may be shown to have existed. That is to say either
8 by direct evidence or by circumstantial evidence from which
9 malice might be inferred.

10 Malice may be expressed as where there is an expressed
11 threat to kill or a lying in wait or where the
12 circumstances show directly that an intent to kill was
13 entertained by the killer.

14 Malice may be inferred, though no expressed intent to
15 kill is proven, by direct evidence in the case where the
16 facts and circumstances which have been proven by the
17 evidence in this case satisfy you beyond a reasonable doubt
18 that malice was present in the mind of the killer at the
19 time that any killing took place.

20 The existence of malice may be inferred from the
21 circumstances shown to have existed at the time of the
22 event, as often the state of a person's mind can only be
23 proven by circumstantial evidence. And therefore you are
24 permitted to infer the existence of malice from proof of an
25 unlawful and an intentional killing of another person

Jury charge

1 without justification or legal excuse.

2 You are permitted to infer malice from proof of a
3 wrongful intent to injure another person through the
4 infliction of serious bodily harm indicative of a wicked or
5 depraved spirit.

6 You are also permitted to infer malice from proof of
7 the intentional use of a deadly weapon. You are also
8 permitted to infer malice from proof of the intentional
9 commission of an act or acts which are inherently dangerous
10 to human life.

11 You are also permitted to infer malice from proof of
12 the commission of a reckless act or acts which are done and
13 are inherently dangerous to human life and which are done
14 so recklessly as to manifest a depravity of mind signifying
15 an extreme disregard for or an extreme indifference to
16 human life.

17 Now, the term malice as an essential element of the
18 crime of murder does not necessarily require proof of an
19 actual or a specific intent to take human life. But rather
20 it means a state of mind accompanying conduct signifying a
21 general malignant recklessness and an extreme disregard for
22 or extreme indifference to human life.

23 Now, even if the facts proven in the case are
24 sufficient to give rise to an inference of malice, such an
25 inference would simply be an evidentiary fact to be taken

1 into consideration by all of you jurors, along with all of
2 the other evidence received during the trial of the case.
3 And you may give such inferences such weight, if any, that
4 you determine they should receive, if any.

5 Simply stated, you are permitted to infer the
6 existence of malice from proof of any one or more of the
7 circumstances that I have just described, as well as from
8 any other evidence received during the trial of the case.
9 But you are in no way required to do so.

10 The state is required to prove malice, just as it must
11 prove any other essential element of the crime of murder.
12 And it is for you 12 jurors to determine whether or not the
13 evidence in this case establishes malice beyond a
14 reasonable doubt, considering all of the evidence in the
15 case and any reasonable inference that you find can be
16 drawn from that evidence.

17 It is also essential that there exist not only malice
18 but that it be malice aforethought. The law does not
19 require that malice exist for any appreciable length of
20 time before the commission of an act proximately causing a
21 fatal result. Indeed, it might be conceived at the very
22 moment that the fatal act is committed.

23 It is sufficient in the law so long as the state
24 proves beyond a reasonable doubt both the existence of
25 malice and the commission of an act or acts by the

Jury charge

1 defendant which proximately causes the fatal result.

2 And while the state must prove beyond a reasonable
3 doubt in order to prove the crime of murder that a killing
4 did occur and that that killing was accompanied by malice
5 aforethought either expressed or implied, it is not
6 necessary that the state prove any motive for the killing.
7 Motive is not an essential element of the crime of murder
8 which must be proven, although there may be evidence
9 relating to that fact introduced during the trial of the
10 case.

11 An indictment for murder may also include the lesser
12 included offense of voluntary manslaughter, even though
13 that lesser offense is not actually set out in the
14 indictment itself.

15 In other words, a defendant who is charged with the
16 crime of murder may be convicted or found guilty of the
17 lesser included offense of voluntary manslaughter if the
18 jury determines that the evidence warrants such a finding.

19 Manslaughter is defined as the unlawful killing of a
20 human being without the element of malice either expressed
21 or implied being present. While the element of malice must
22 be proven in order for the defendant to be found guilty of
23 the crime of murder, the element of malice need not be
24 proven in order for the defendant to be found guilty of the
25 crime of voluntary manslaughter.

1 Voluntary manslaughter is defined in the law as the
2 unlawful taking of the life of another human being that is
3 committed in a sudden heat of passion which is provoked by
4 a sufficient legal provocation.

5 The law recognizes that sudden heat of passion arising
6 out of exasperation, rage, anger, sudden resentment, fear
7 or terror may for the time being affect the self control of
8 an individual temporarily disturbing the ability to
9 properly reason and therefore will reduce the crime from
10 that of murder to that of voluntary manslaughter provided
11 there was a sufficient legal provocation.

12 The law does not reduce from murder to manslaughter
13 every homicide that is committed in the heat of passion.
14 It must be a heat of passion justly excited by a sufficient
15 legal provocation.

16 If a sufficient legal provocation does not exist, then
17 the killing, even where committed in the heat of passion,
18 is the crime of murder and not voluntary manslaughter.

19 The sudden heat of passion aroused by a sufficient
20 legal provocation which may reduce a homicide from that of
21 murder to that of voluntary manslaughter need not dethrone
22 reason entirely or shut out knowledge or volition. But it
23 must be such heat of passion provoked by such facts or
24 circumstances as would naturally disturb the sway of reason
25 of an ordinary reasonable and prudent person rendering the

Jury charge

1 mind incapable of cool reflection and producing what
2 according to human experience may be described as an
3 uncontrollable impulse to do violence.

4 In determining whether an act resulting in the death
5 of another was impelled by heat of passion or rather was
6 impelled by malice, you should take into consideration all
7 of the surrounding circumstances and conditions
8 accompanying the event, including any previous relations or
9 difficulties that might have existed between the parties.

10 And therefore, again, voluntary manslaughter is an
11 unlawful homicide committed in the absence of malice but in
12 sudden heat of passion arising or provoked by a sufficient
13 legal provocation.

14 The second indictment charges the defendant with
15 breach of peace of a high and aggravated nature. And
16 that's also a statutory offense. The statute setting forth
17 that particular crime is contained in Section 22-5-150 of
18 the code of laws.

19 That section of law provides that any person engaging
20 in any unlawful and unjustifiable affray, riot or other
21 disturbance, or any person who goes armed offensively to
22 the terror of the people, or any person who engages in
23 menacing or threatening species or otherwise engages in any
24 dangerous and disorderly conduct in a public place is
25 guilty of breach of peace..

1 In this case the defendant is charged with breach of
2 peace of a high and aggravated nature. So I'm going to
3 define the term breach of peace. I'll also define the
4 term, what is meant by high and aggravated nature.

5 Breach of peace is a generic term embracing a great
6 variety of conduct tending to destroy or to menace public
7 order and tranquillity.

8 A breach of the peace may be generally defined as such
9 a violation of the public order as amounts to a disturbance
10 of the public tranquillity by act or conduct, either
11 directly having this effect or by inciting or tending to
12 incite such a disturbance of the public tranquillity by
13 violence, the word peace and breach of peace as is used to
14 describe the tranquillity enjoyed by members of a community
15 where good order reigns.

16 A breach of peace of a high and aggravated nature is a
17 violation of the public order as amounts to a disturbance
18 of the public tranquillity which is accompanied by some
19 circumstance of aggravation.

20 The terms high and aggravated nature, high meaning
21 greater in relative degree, aggravated meaning more serious
22 or worse. And an example of an aggravating circumstance
23 would be the intentional or reckless use or threat of use
24 of a dangerous instrumentality in a public place or a
25 reckless, intentional, willful or wanton discharge of a

Jury charge

1 firearm in a public place.

2 You are further instructed that a criminal intent is
3 also a necessary element of any crime that must be proven
4 to your satisfaction beyond a reasonable doubt before any
5 crime could be proven.

6 The term intent refers to the state of a person's mind
7 that directs his actions towards a specific object or goal.
8 And intent would necessarily include those consequences
9 that represent the very purpose for which an act is done,
10 as well as those consequences that are known to be
11 substantially certain to result from an act, even though
12 not actually or specifically intended.

13 Criminal intent is the state of a person's mind that
14 operates jointly with the commission of an act in the
15 commission of a criminal offense. Criminal intent is a
16 mental state of conscious wrongdoing in contrast to an act
17 that is done inadvertently or mistakenly or accidentally
18 and without any criminal intent.

19 Where a person is engaged in the commission of a
20 criminal act accompanied by criminal intent he is legally
21 responsible for all of the consequences that necessarily
22 flow from the commission of that act or acts that are a
23 natural and probable consequence of the act or acts, even
24 though the factual result was not actually intended as part
25 of the original design so long as it is proven that the

1 result was reasonably known to be substantially certain to
2 occur.

3 Criminal intent may be established by proof of
4 intentional criminal conduct. Criminal intent may be
5 established by proof of criminal negligence.

6 Criminal negligence is defined as having a reckless
7 disregard for the safety of others, reckless conduct being
8 described as the commission of an act or acts which are
9 done knowingly and intentionally without regard as to their
10 consequences.

11 It is not necessary in order to establish the element
12 of criminal intent that such intent be proven by direct
13 evidence. Intent may be proven and established by
14 circumstantial evidence the same as any other fact or
15 element of a crime may be proven.

16 In your determination as to whether or not any
17 criminal intent has been proven you are permitted to infer
18 the existence of criminal intent from the declarations and
19 conduct of the defendant, as well as from any other
20 circumstances proven by the evidence in the case from which
21 you might reasonably and logically infer such intent so
22 long as you are satisfied of its existence beyond a
23 reasonable doubt.

24 Now, Mr. Foreman and ladies and gentlemen of the jury,
25 I am not in any way concerned with what your decisions are,

Jury charge

1 but, as I told you, the verdicts of the jury have to be
2 unanimous. All 12 must be in agreement.

3 Mr. Foreman, as you know, you're going to preside over
4 jury deliberations in the jury room simply to ensure that
5 they are carried out in some orderly fashion. But all
6 jurors are expected to participate in deliberations
7 because, as you know, the verdict has to be unanimous. And
8 it's intended to be a unanimous and consensus opinion of
9 the panel.

10 Mr. Foreman, as I also have told you, you will have
11 these indictments in the jury room along with any evidence
12 that has been introduced.

13 Again, the indictments are not evidence. They don't
14 prove anything. They are simply there to serve as the
15 verdict forms.

16 So on the back of each of the respective indictments
17 you'll see the word verdict. And it's beneath that word
18 that you'll indicate the jury's unanimous decision as to
19 that particular charge. And there's also a place for you
20 to sign your name as the foreperson. Only the foreperson
21 needs to sign the verdict form. There is also a place for
22 the date.

23 Now, with regard to the two indictments, referencing
24 the indictment charging the crime of murder, there are
25 three potential verdict forms. Those three potential

Jury charge

1 verdict forms are guilty, just that one word, which would
2 mean guilty of the crime of murder, which is set forth in
3 the indictment.

4 The second potential verdict form is guilty of
5 voluntary manslaughter. That's the lesser included offense
6 of murder. It is not actually alleged or set forth in the
7 indictment. But the jury may find that to be an
8 appropriate decision in the case based upon the evidence
9 and the law.

10 If that's your decision, then, again, that verdict
11 form would be guilty of voluntary manslaughter. You would
12 have to write that out.

13 And the third potential verdict form is not guilty.

14 With respect to the indictment charging breach of
15 peace of a high and aggravated nature, there are two
16 possible verdict forms. Those two possible verdict forms
17 are guilty and not guilty. So whichever that decision is,
18 indicate it in the space provided and sign your name as the
19 foreperson.

20 During your deliberations there may be a time where
21 you have some question about the evidence or the testimony.
22 You may wonder if there's something else that you could
23 have that you think would assist you in resolving the case.

24 No additional evidence can be received now that you're
25 getting ready to go back and begin with your deliberations.

Jury charge

1 So don't ask me if you can have something else. If you
2 don't have it, you can't get it now because you're going
3 back to deliberate. So even if it did exist, I would not
4 be permitted to allow you to have it. So don't -- I can't
5 answer any questions about the evidence and can't allow you
6 to have any additional.

7 If you have a question about testimony and you believe
8 that that question can be resolved by having testimony
9 replayed in whole or in part, we can bring you back into
10 the courtroom to have that testimony replayed.

11 I don't have transcripts of witnesses' testimony. But
12 if you have need of rehearing a particular witness'
13 testimony, if you'll let the bailiff know of that fact,
14 he'll let me know, and we can play that witness' testimony
15 here in the courtroom in its entirety or in just some
16 portion if that's all you need, is a portion.

17 If at any time you have a question about the law that
18 you are to apply, I can answer those questions. I am
19 permitted to give you an additional explanation or make a
20 clarification as to the law that you are to apply. And so
21 should you have such a question, if you'll let the bailiff
22 know, he'll let me know, and I'll be happy to provide that
23 additional explanation or clarification.

24 I don't know if we have any smokers on the jury. But
25 if you do smoke and you need to, you have to go outside for

1 that purpose. Let the bailiff know. He'll take you
2 outside. You can smoke.

3 However, you are instructed that deliberations can
4 only be engaged in while all 12 jurors are present in the
5 jury room. So if a juror is absent for any authorized
6 purpose, then the deliberations have to stop. And they may
7 only resume when all 12 are present so that all may
8 participate.

9 I think that covers everything. If it doesn't, I'll
10 know in just a few minutes. So right now I'll ask the 12
11 primary jurors if you'll please retire to your jury room.

12 But do not yet begin deliberations. I need to address
13 some matters with the lawyers. If I don't need to bring
14 you back I'll send word by way of the bailiff that you can
15 begin deliberations. And in that event he'll bring to the
16 jury room all of the exhibits which have been introduced.

17 And to you, Mr. Foreman, he'll also bring the
18 indictments which will serve as the verdict forms.

19 So I'll ask the 12 primary jurors to retire but await
20 my instruction as to when to begin.

21 (Whereupon, the jury retired to deliberate at
22 3:00 p.m.)

23 (Whereupon, the alternate juror was excused.)

24 THE COURT: Are there any exceptions taken to the
25 instruction or requests for additions to the instruction by

Jury charge

1 the state?

2 MR. BULSA: There are none, Your Honor.

3 THE COURT: By the defendant?

4 MR. WHELCHER: None, Your Honor.

5 THE COURT: Let me ask y'all to verify the exhibits,
6 please.

7 (Pause.)

8 THE COURT: All the exhibits have been verified and
9 accounted for?

10 MR. WHELCHER: They have, Your Honor.

11 MR. BULSA: Yes, sir.

12 THE COURT: All right. Send them back with the
13 verdict form and tell the jury to begin deliberations and
14 notify us when they have concluded.

15 We will be at ease while the jury is deliberating.

16 (Whereupon, a recess was taken.)

17 THE COURT: All right. Bring the jury in.

18 (Whereupon, the jury returned to the courtroom at
19 4:25 p.m.)

20 THE COURT: Mr. Foreman, I understand you and your
21 fellow jurors wish for me to redefine the term malice for
22 you.

23 THE FOREMAN: Yes, sir, Your Honor.

24 THE COURT: All right. Malice is a term connoting an
25 ill will and having the intent to do harm, intent meaning

Jury charge

1 the state of a person's mind which directs his actions
2 towards a specific object or goal.

3 And intent would include those consequences which
4 represent the very purpose for which an act is done, as
5 well as those consequences which are known to be
6 substantially certain to result whether actually intended
7 or not.

8 Malice is a technical term importing wickedness and
9 excluding just cause or legal excuse. It is something
10 which springs from depravity, from a heart devoid of social
11 duty and fatally bent on mischief. It is a state of mind
12 indicating an extreme disregard for or an extreme
13 indifference to human life.

14 Malice may be likewise defined as a state of mind
15 which indicates a formed purpose and design to do a
16 wrongful act under circumstances that exclude any legal
17 right to do it.

18 Malice may be expressed or it may be inferred.
19 Expressed or implied malice do not mean different kinds of
20 malice but merely the manner in which malice may be shown
21 to have existed, that is by proof by direct evidence or
22 proof by circumstantial evidence, or a combination of the
23 two.

24 Malice may be expressed malice as where it is shown
25 that there is an expressed threat to kill or a lying in

Jury charge

1 wait or where the circumstances show directly that an
2 intent to kill was entertained by the killer.

3 Malice may be inferred, though no expressed intent to
4 kill is proven by direct evidence, where the facts and the
5 circumstances which have been proven by the evidence in the
6 case satisfy you beyond a reasonable doubt that malice was
7 present in the mind of the killer at the time any killing
8 took place.

9 And malice may be inferred from proof of an unlawful
10 and an intentional killing of another person without
11 justification or legal excuse. Malice may be inferred from
12 proof of a wrongful intent to injure another person through
13 the infliction of serious bodily harm indicative of a
14 wicked or a depraved spirit.

15 Malice may be inferred from proof of the intentional
16 use of a deadly weapon. Malice may be inferred from proof
17 of the intentional commission of an act or acts which is or
18 are inherently dangerous to human life.

19 Malice may be inferred from proof of the commission of
20 a reckless act or acts which is inherently dangerous to
21 human life and which is done so recklessly as to manifest a
22 depravity of mind signifying an extreme disregard for or an
23 extreme indifference to human life.

24 Malice as an essential element of the crime of murder
25 does not necessarily require proof of an actual or specific

1 intent to take human life, but rather it means a state of
2 mind accompanying conduct signifying a general malignant
3 recklessness and an extreme disregard for or an extreme
4 indifference to human life. That's it.

5 Now, as you go back and continue with your
6 deliberations if at any time -- understand even though I
7 have already reinstructed you on the definition of malice,
8 I will do it as many times as the jury determines is
9 necessary.

10 I realize that this is your first exposure to legal
11 terms, and of course it's obviously important that you
12 understand those so that you can apply them. So any time
13 you need an instruction or an additional explanation or
14 clarification, feel free to ask me to do so.

15 Okay. All right. Please retire and continue with
16 your deliberations.

17 (Whereupon, the jury retired to deliberate at
18 4:32 p.m.)

19 THE COURT: Are there any exceptions taken to that
20 additional instruction?

21 MR. BULSA: None by the state, Your Honor.

22 MR. WHELCHER: None, Your Honor.

23 THE COURT: All right. We'll continue to be at ease
24 while the jury is deliberating.

25 (Question from the jury marked Court's Exhibit No. 1.)

Verdict

1 (Whereupon, a recess was taken.)

2 THE COURT: All right. I am told the jury has reached
3 a verdict. Are we ready to receive it?

4 MR. BULSA: Yes, sir, Your Honor. The state is.

5 THE COURT: All right. Bring them in.

6 (Whereupon, the jury returned to the courtroom at
7 4:45 p.m. to report its verdict.)

8 THE COURT: Mr. Foreman, have you and your fellow
9 jurors reached a unanimous decision as to each of the
10 separate indictments?

11 THE FOREMAN: Yes, Your Honor.

12 THE COURT: And have you reflected those decisions on
13 the back of the indictment as requested?

14 THE FOREMAN: Yes, sir, Your Honor.

15 THE COURT: Did you sign your name as the foreperson
16 and properly date it?

17 THE FOREMAN: Yes, sir.

18 THE COURT: All right. If you will, please hand those
19 up by way of the bailiff.

20 You may publish the verdicts.

21 THE CLERK: Indictment No. 2008-GS-42-6013, the State
22 of South Carolina vs. Kenneth D. Smith, indicted for
23 murder, verdict, guilty. Signed by the foreperson.
24 September the 10th of 2009.

25 Indictment 2009-GS-42-3470, the State of South

1 Carolina vs. Kenneth Smith, indictment for breach of peace
2 of a high and aggravated nature, the verdict, guilty.
3 Signed by the foreperson September 9th of 2009 --
4 September the 10th of 2009.

5 Ladies and gentlemen of the jury, is this your verdict
6 and still your verdict? If so, please raise your right
7 hand.

8 (Whereupon, all jurors responded in the affirmative.)

9 THE CLERK: So say you all.

10 THE COURT: Does the defendant wish to have the jury
11 polled?

12 MR. WHELCHEL: Please, Your Honor.

13 THE COURT: All right poll the jury, please.

14 THE CLERK: At this time I will pose a question, the
15 question being is this your vehicle and still your verdict.

16 Once I have posed the question, please answer after
17 your name and juror number has been called. Answer the
18 question and be seated.

19 Juror No. 74, Bobby Mays, is this your verdict and
20 still your verdict?

21 THE JUROR: Yes.

22 THE CLERK: No. 106, Beatrice Rookard, is this your
23 verdict and still your verdict?

24 THE JUROR: Yes.

25 THE CLERK: Juror No. 2, Patricia Armstrong, is this

Verdict

1 your verdict and still your verdict?

2 THE JUROR: Yes.

3 THE CLERK: Juror No. 61, Mary Jeter, is this your
4 verdict and still your verdict?

5 THE JUROR: Yes.

6 THE CLERK: Juror No. 65, Rosalyn Kinnunen, is this
7 your verdict and still your verdict?

8 THE JUROR: Yes.

9 THE CLERK: Juror No. 40, Lucretia Hanks, is this your
10 verdict and still your verdict?

11 THE JUROR: Yes.

12 THE CLERK: Juror No. 83, Amy Moore.

13 THE JUROR: Yes.

14 THE CLERK: Juror No. 45, Nicole Hicks, is this your
15 verdict and still your verdict?

16 THE JUROR: Yes.

17 THE CLERK: Juror No. 138, Pamela Wall, is this your
18 verdict and still your verdict?

19 THE JUROR: Yes.

20 THE CLERK: Juror No. 27, Sonya Franks, is this your
21 verdict and still your verdict?

22 THE JUROR: Yes.

23 THE CLERK: Juror No. 123, Ronnie Sullivan, is this
24 your verdict and still your verdict?

25 THE JUROR: Yes.

1 THE CLERK: Juror No. 120, Reddick Still, is this your
2 verdict and still your verdict?

3 THE JUROR: Yes.

4 THE CLERK: Your Honor, the jury has been polled.

5 THE COURT: All right. Any other matters we need to
6 address with the jury present?

7 MR. BULSA: No, Your Honor.

8 MR. WHELCHER: None, Your Honor.

9 (Whereupon, the trial jury was excused.)

10 THE COURT: All right. Any other matters to address
11 prior to the imposition of sentence?

12 MR. BULSA: None by the state.

13 THE COURT: All right. Mr. Whelchel, he can stand
14 right there.

15 MR. WHELCHER: Do you want us to stay here?

16 Your Honor, Mr. Smith, as you already know, is 27. He
17 was raised in Spartanburg. He has a five-year-old child.
18 We would ask because of his youth that you impose the
19 minimum sentence on the murder charge.

20 THE COURT: Anything else?

21 MR. WHELCHER: Your Honor, at this time I would make a
22 motion for a verdict -- a judgment notwithstanding the
23 verdict based on all of the objections and everything that
24 I made during the course of the trial, or in the
25 alternative a new trial on behalf of Mr. Smith.

Sentence

1 THE COURT: All right. Those motions are denied.

2 Mr. Smith, do you have anything you would like to tell
3 me?

4 THE DEFENDANT: No, sir.

5 MR. BULSA: Excuse me, Your Honor. I believe some of
6 the victim's family wishes to speak.

7 THE COURT: Okay. Do they want to come up here or are
8 they going to stand there? Just stand over near the
9 bailiff.

10 All right. And your name please, ma'am.

11 VICTIM'S FAMILY MEMBER: My name is Laura. We miss
12 our brother. It is not the same without him. All we are
13 asking is for justice. We're having a hard time already.
14 Every time we get together it's just not the same. My
15 brother should not have died. So the only thing we ask is
16 for justice.

17 THE COURT: All right. Ma'am, I wish you the very
18 best.

19 Anything else?

20 (No response.)

21 THE COURT: All right. On Indictment 2008-GS-42-6013,
22 an indictment for murder, wherein the defendant has been
23 found guilty of that offense, the Sentence of the Court is
24 you, Kenneth Smith, be confined to the South Carolina
25 Department of Corrections for the period of your natural

1 life.

2 Indictment 2009-3470, an indictment for breach of
3 peace of a high and aggravated nature, wherein you have
4 been found guilty by a jury of that offense, the Sentence
5 of the Court is you be confined to the South Carolina
6 Department of Corrections for a period of ten years.

7 Mr. Smith, you have a right to appeal the verdicts of
8 the jury and the Sentence of the Court. You must file any
9 notice of your intention to appeal those decisions within
10 ten days of today's date.

11 END OF REQUESTED TRANSCRIPT OF RECORD

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FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Kenneth D. Smith, #297395

Full name and prison number (if any) of Applicant.

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

2013-CP-42-0534

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay fees and costs of the proceedings. When the application is completed the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Perry Correctional Institution
2. Name and location of Court which imposed sentence Spartanburg General Session
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2008-GS-42-601
 - (b) 2009-GS-42-3470
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) September 10, 2009, Life and Ten (10) yrs.
 - (b) _____

Revised 3/2003

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty Not Guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes _____
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. S.C. Court of Appeals _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Denied _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. On or about March 2012 _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

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 M. ROSE BLANCHET

- (a) See Attached
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See Attached
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? X
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A
- (d) any other petitions, motions or applications in this or any other Court? N/A
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. Direct Appeal
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. S.C. Court of Appeals
- ii. _____
- iii. _____
- iv. _____
- (c) the disposition thereof:
- i. Denied
- ii. _____
- iii. _____

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HONORABLE CLERK

- iv. _____
- (d) the date of each such disposition:
- i. N/A _____
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. N/A _____
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
- No

15. If you answered "yes" to (14) identify:

- (a) which grounds have been presented:

- i. N/A _____
- ii. N/A _____
- iii. _____

- (b) the proceedings in which each ground was raised:

- i. _____
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) N/A _____
- (b) N/A _____
- (c) N/A _____

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? _____
- (b) your trial, if any? X _____
- (c) your sentencing? X _____
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? X _____
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? N/A _____

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Richard Whelchel

ii. Robert Dudek

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Trial; Direct Appeal

ii. _____

iii. _____

19. State clearly the relief you seek in filing this application:

New Trial

20. Are you now under sentence from any other court that you have not challenged?

No

2013 JAN 30 PM 3:26
MS. SHED BLAUMLEY

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURGKenneth D. Smith, #297395

Plaintiff.

vs.

State of South Carolina

Defendant.

IN THE COURT OF COMMON PLEAS

SUMMONS

FILE NO. _____-CP-_____

TO THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (90) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

Pelzer,

South Carolina

Kenneth D. Smith

Plaintiff/Attorney for Plaintiff

Dated: January 17, 2013

Address:

KENNETH D. SMITH - 297395
Perry Correctional Inst.PELZER, S.C. 29169

M. HOPE H. MOORE

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CLERK OF COURT
SOUTH CAROLINA
SPARTANBURG COUNTY

Date: January 17, 2013

Hon. Hope Blackley
 Clerk of Court, Spartanburg County
 Post Office Box 3483
 Spartanburg, S.C. 29304-3483

Re: Kenneth D. Smith #297395 v. State

Dear Hon. Blackley:

Enclosed please find the original Post-Conviction Relief (PCR) application and Memorandum of Law in Support of Application for Post-Conviction Relief for filing with your office. I have also enclosed a self-addressed envelope for your return to me clocked-stamped copies of these documents for my records.

Sincerely,

/s/ Kenneth D. Smith
 Kenneth D. Smith
 SCDC No. 297395
 Perry Correctional Inst.
 Pelzer, S.C. 29559

cc: Applicant's file

HOPE BLACKLEY
 2013 JAN 30 PM 3:27

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Kenneth D. Smith.

Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS

Case No.: _____

MEMORANDUM OF LAW IN SUPPORT OF
APPLICATION FOR POST-CONVICTION
RELIEF

COME NOW, the Applicant above-named, presents the Memorandum of Law in Support of Application for post-conviction relief (PCR) and would show the following unto the Honorable Court.

STATEMENT OF THE CASE

The Applicant was indicted by the Spartanburg County Grand Jury for murder and breach of the peace of a high and aggravated nature. On September 8, 2009, he went to trial before the Honorable J. Derhan Cole, and jury. He was represented by Richard Whelchelm and the State was represented by Derrick Bulsa and Danny Fulmer, Assistant Solicitors for the Seventh Judicial Circuit.

At the conclusion of the trial on September 10, 2009, the jury found him guilty of both offenses, and Judge Cole sentenced him to life imprisonment for murder and ten (10) years imprisonment for breach of the peace of a high and aggravated nature. A timely appeal was filed on applicant's behalf.

On appeal the applicant was represented by Robert M. Dudek, Acting Chief Appellate Defender, of the South Carolina Commission on Indigent Defense. On March 14, 2012, the S.C. Court of Appeals DISMISSED this appeal in Opinion No. 2012-UP-178.

ARGUMENT

The applicant was denied the right to effective assistance of trial counsel by counsel's failure to object to the judge's improper comments on the facts and failure to move for a mistrial and/or new trial.

To prove ineffective assistance of counsel, an applicant must show that counsel's performance fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability that the results at trial would have been different; a reasonable probability is one sufficient enough to undermine confidence in the trial. Riddle v. State, 418 S.E.2d 308 (S.C. 1992).

In applicnat's case, it was the State's contantion that while he and his friend, John Sainvil, was involved in a fight with the victim, Jerry De La Rosa, and two of his brothers about a defective gun, the applicnat shot and killed the victim. The victim's brother, Santos Reiz, initially sold the defective gun to applicant's friend Sainvil ~~who~~ wanted his money back.

During the State's direct examination of the victim's brother, Santos Reiz, the following direct examination by the Court took place:

Solicitor: How did they come to be in possession...?

Court: Excuse me just a second. When you refer--
when you refer to somebody as him or her

Reiz: I don't know his name.

Court: You need to tell us who that is, because we don't know.

Reiz: I never knew the name.

Court: Do you see that person in the courtroom?

Reiz: Yes.

Court: Can you identify that person for us?

Reiz: Yeah. That's the guy who killed my brother.

Court: That one over there. Now you realize there are several people over there at the defense table. Which one are you refering?

Reiz: Him with the black--with the white shirt.

Court: The white shirt and pen in his hand?

Reiz: Yes, Yes.

Court: Seated next to Mr. Whelchel (Applicant's counsel),

Reiz: Yeah, right there in the middle.

Court: The lawyer?

Reiz: Yes.

Court: Okay. Thank you. He identified the defendant.

Solicitor: Yes, Sir.

It should be judicially noted here that, prior to the Judge's direct examination of Santo Ruiz, this witness had never made any previous out-of-court identification of the applicnat. Tr.p. 147, L. 15-21.

Moreover, during cross-examination of Reiz, the Court again intervened in the examination of the witness, as follows:

Court: Excuse me just a minute, now. Again when you say both, you have to identify who you're talking about.

Reiz: Mr. Smith. And I never knew the names.

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M. J. P. BLACKLEY

Court: Can we find out? Sir will you tell us your name, please?

Sainvil: Sainvil.

Court: John Sainvil. Okay, His name is John and his name is Mr. Smith and Mr. Sainvil. Okay.

Ruiz : John right?

Court: John Sainvil.

Ruiz: John, okay.

Court: Kenneth Smith. John Sainvil in the blue shirt and Kenneth Smith in the white shirt, okay.

Tr. p. 131, L. 23—p. 132, L. 14.

The applicnat submits that it can be forcefully argued that, in this particular instance, the judge did not only improperly engage in direct and cross-examination of a material witness, but he did also solicited factual testimony that assisted the State in identifying the applicnat as the person who killed the victim. Tr.p. 115, L. 14-16. Under the provisions of the South Carolina Constitution, a judge shall not charge the jury in respect to matters of fact, but shall declare the law. S.C. Const., art. V, §21.

The real object of this Clause of the Constitution is to leave the decision of all questions of fact to the jury, exclusively, uninfluenced by any expression or opinion by the judge. State v. Coggins, 42 S.E.2d 240 (1947). A trial judge must refrain from all comments which tends to indicate his opinion as to weight or sufficiency of the evidence, credibility of witnesses, the guilt of the accused as to controverted facts. State v. Smith, 342 S.E.2d 400 (S.C. 1986).

The applicnat contends that he was deprived of a fundamental right to a fair trial by the judge's prejudicial direct and cross examinations of Santos Ruiz, a State material witness, on issuable facts that usurped the province of the jury and that was of such magnitude as to effect the outcome of the trial based primarily on the court's solicitation of Ruiz's identification of the applicant as the person who killed his brother. Tr. p. 115, L. 14-16. A trial judge may not, expressly or by implication, intimate any opinion as to the facts and effect of testimony in a case. State v. Dawkins, 232 S.E.2d 228 (S.C. 1977). The U.S. Supreme Court has held that, although most constitutional errors have been held amenable to harmless error analysis, some errors will always invalidate a conviction such as a trial "by an unfair and bias judge". See Arizona v. Fulminante, 111 S.Ct. 1246, 1265 (1991), citing Chapman v. California, 386 U.S. 18, 23 n.8.

The applicant was denied the right to effective assistance of trial counsel by counsel's failure to object to the judge's instruction on the facts of his murder offense that reduced the State's burden of proof.

To establish claim of ineffective assistance of counsel, an applicant for post-conviction relief must prove that counsel's performance was deficient and that deficient performance prejudiced his case. Satterwhite v. State, 491 S.E.2d 709 (S.C. 1997).

The applicant submits that after the close of the evidence and arguments by the counsels, the judge charged the jury on the inference of malice, in relevant part, as follows:

Court: Malice may be inferred, though no expressed intent to kill is proven, by direct evidence in the case "where the facts and circumstances which have been proven by the evidence in this case" satisfy you beyond a reasonable doubt that malice was present in the mind of the killer at the time that any killing took place. Tr.p. 400, L. 5-19.

The applicant submits that this portion of the judge's charge that "where the facts and circumstances which have been proven by the (State's) evidence in this case" amounted to a charge on the facts in violation of State Constitutional Law. S.C. Const., art. V, §21. A trial judge may not become a participant in the verdict of the jury by indicating an opinion at any stage of the trial on issuable facts.

Johns v. Elbert, 34 S.E.2d 796 (1945). A comment which could have been considered by a reasonable jury that the judge felt that the State had met its burden of proving defendant's guilt of charged offense, coupled with the judge's denial of defendant's request for clarifying instruction, constitutes reversible error. See, e.g., State v. Smith, 342 S.E.2d 600 (S.C. 1986).

If an instruction relieves the state of the necessity of proving every element of the crime beyond a reasonable doubt, it is constitutionally deficient, may not be treated as harmless error, and will always invalidate the conviction. Sullivan v. Louisiana, 113 S.Ct. 2079, 2081 (1993). In reliance on Sullivan, the applicant submits that his counsel's failure to object to the judge's factual jury charge, and failure to request a clarifying instruction from the judge, was ineffective assistance of counsel that was per se prejudicial to entitle him to reversal of his conviction insofar as the judge's factual jury charge relieved the State of its burden of proving the "malice element" to convict him of murder. The Due Process Clause requires the State to prove beyond a reasonable doubt every element of crime for which a defendant is charged. In re Winship, 90 S.Ct. 1068, 1073 (1970).

The applicant was denied the right to effective assistance of trial counsel by counsel's failure to object to the judge's instruction on the facts of his "breach of the peace of high and aggravated nature" charge that lessened the State's burden of proof.

In order to prove ineffective assistance of counsel, a PCR applicant must show that his counsel's performance was deficient and that deficient performance prejudiced his right to a fair trial. Cobbs v. State, 409 S.E.2d 400 (S.C. 1991).

The applicant submits that in his case he was charged with the offense of "breach of the peace of a high and aggravated nature" pursuant to S.C. Code, § 22-5-150, which states, in relevant part, the following:

The magistrate may cause to be arrested (a) all affayers, disturbers and breakers of the peace, (b) all who go armed, offensively, to the terror of the people, (c) such as utter menacing or threatening speeches and (d) otherwise dangerous and disorderly person. Person arrested for any such offenses shall be examined by the magistrate before whom they are brought and may be tried before him. "If found guilty" they may be required to find sureties of peace and be punished within the limits prescribed in §22-3-560 or, when the offense is of a "high and aggravated nature", they may be committed or bound over for trial before the court of general sessions.¹

In defining a "breach of the peace of high and aggravated nature", the S.C. Supreme Court has held an "assault with a pistol is one of a high and aggravated nature. See State v. Wharton, 211 S.E.2d 237 (S.C. 1975).

By Comparison, in applicant's case, the judge charged the jury on his "breach of the peace of a high and aggravated nature" offense as follows:

Court: The second indictment charge the defendant with "breach of the peace of a high and aggravated nature. And that's also a statutory offense. The statute setting forth that particular crime is contained in section 22-5-150 of the code of laws.

This section of the law provides that any person engaging in any unlawful and unjustifiable affray, riot or other disturbance, or any person who goes armed offensively to the terror of the people, or any person who engages in menacing or threatening species or otherwise engages in any dangerous and disorderly conduct in a public "is guilty of breach of the peace (of a high and aggravated nature)".

Tr. p. 405, line 14-25.

The applicant submits that, unlike the judge's instruction

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to the jury that anyone who engages in any dangerous and disorderly conduct in a public place "is guilty of of breach of the peace(of an high and aggravated nature)"; the statute speaks ~~speaks~~ in terms of permissive language that "if found guilty" rather than "is guilty of". Thus, the applicant contends that the judge's instruction in this particular instance had the effect of conveying to jury the judge's opinion on the facts. A trial judge must be careful to avoid expressing, or intermingling any opinion as to the facts, and if he does so, whether intentionally or unintentionally, a new trial must be granted. State v. Thorne, 115 S.E.2d 954 (S.C. 1960).

The applicant contends that his counsel's failure to object to the trial judge's factual jury charge and failure to request a curative instruction was ineffective assistance of counsel that prejudiced his right to a fair trial.

The applicant was denied the right to effective assistance of trial counsel by counsel's failure to object to the judge's mandatory presumption, burden-shifting and confusing jury instruction on malice element of his murder offense.

Trial counsel is constitutionally ineffective is (1) counsel's performance was deficient or fell below an objective standard of reasonableness, and (2) this deficient performance prejudiced the case so that the defendant was deprived of a fair trial. Riley v. South Carolina, 82 F.Supp.2d 474 (D.S.C. 2000).

Accordingly, at the conclusion of the presentation of the evidence and arguments by counsels, the judge instructed the jury on the element of malice of the applicant's murder offense, in relevant part, as follows:

Court: You are permitted to infer malice from proof of an intentional use of a deadly weapon. You are also permitted to infer malice from the intentional commission of an act or acts which are inherently dangerous to human life. Tr.p. 401, L. 4-10.

Simply stated, you are permitted to infer the existence of malice from proof of "any one" or more of the circumstances that I have just described, as well as from other evidence received during the trial of the case. But you are in no way required to do so. Tr.p. 402, L. 5-9.

The applicant contends that the above portion of the judge's jury instruction regarding the inference of malice was constitutionally infirm because it allowed the jury to base its conviction in part on an inference or presumption of malice rather than on evidence introduced by the state with respect to this critical element (malice) of his murder offense.

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The applicant's contention is grounded in a line of Supreme Court cases dating back to In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970); which held that "due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged". The Supreme Court has applied the holding in Winship to potentially coercive jury instruction in a number of cases, most notably Sandstrom v. Montana, 442 U.S. 501, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979); Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); and Yates v. Evatt, -U.S.-1111 S.Ct. 1985, 1990, 114 L.Ed.2d 432 (1991).

As the Court noted in Sandstrom, "the threshold inquiry in ascertaining the constitutional analysis applicable to an erroneous presumption malice charge requires careful attention to words actually spoken to jury. 442 U.S. at 514, 99 S.Ct. at 2454. In applicant's case, the jury was instructed that "it was permitted to infer malice from applicant's intentional use of a deadly weapon, and from the intentional commission of an act or acts which are inherently dangerous to human life". The permission charges were qualified by the court with instructions that "the jury could infer malice from either one of the inferences instruction by the court". Tr.p. 402, L. 5-7.

The applicant accordingly contends that the judge's "qualifying jury instruction regarding malice permitted the jury to infer malice and base its verdict, independent of other evidence or lack thereof, upon an inference or presumption of malice rather than upon evidence introduced by the state with respect to the criminal element of intent for his murder conviction. See Yates v. Evatt, -U.S.-1111 S.Ct. 1984 (1991) (holding unconstitutional a presumption and burden-shifting jury charge that "malice is implied or presumed from the wilful, deliberate, and intentional doing of an unlawful act" and "from the use of a deadly weapon".); see also State v. Elmore, 306 S.E.2d 781 (1983) (giving mandatory presumption of malice charge, rather than charge creating permissive inference inference, is reversible error in murder prosecution.

While the court did include the correct jury instruction in conjunction with the incorrect jury instruction on the state's burden of proof on the malice element, it failed to withdraw the incorrect malice instruction. In addressing such conflicting jury instructions, our Supreme Court has held that when an incorrect charge is given, the court must withdraw it, and that "merely superimposing a correct statement of law over an erroneous jury charge only foster confusion and prejudice". State v. Robinson, 412 S.E.2d 411 (S.C. 1991). Likewise, the U.S. Supreme Court has held that when one portion of a jury charge contains an erroneous presumption, the jury charge does not comport with due process. Franklin, 471 U.S. at 322-24,

105 S.Ct. at 1975.

Furthermore, while an erroneous malice instruction is subject to a harmless error analysis, such an analysis is inapplicable to the applicant's murder case where there was evidence of, and jury charge on, a manslaughter offense. Our Supreme Court has held that in prosecution for murder, a defendant is deprived of effective assistance of trial counsel where defense counsel fails to object to a mandatory presumption of malice charge to jury; although such charge is subject to harmless error analysis, such an analysis is inappropriate where there is evidence from which the jury could find the defendant guilty of a lesser-included offense of voluntary manslaughter since a charge creating a mandatory presumption precludes manslaughter. See Carter v. State, 392 S.E.2d 1001 (S.C. 1990).

Finally, as there was evidence in the case from which the jury could have found applicant guilty of manslaughter, and as the judge charged the jury on this offense, the applicant contends that his counsel's ^{failure} to object to the judge mandatory presumption jury charge on the malice element of his murder offense was ineffective assistance of counsel that deprived him of the right to a fair trial. Riley, Supra.

CONCLUSION

WHEREFORE, for the foregoing reason, the applicant pray the Honorable Court grant him post-conviction relief to reverse his convictions for a new trial.

Respectfully Submitted,

1/s/ Kenneth O. Smith
KENNETH O. SMITH #297305
Perry Correctional Institution
430 Oaklawn Road-
Pelzer, S.C. 29569

2013 JAN 30 PM 3:27
M. HOPE BLANCHARD
CLERK

This 17 day of January, 2013

STATE OF SOUTH CAROLINA)

VERIFICATION

County of SPARTANBURG)

Kenneth Smith

I, , being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Kenneth Smith

SWORN to and subscribed before me this 17th
day of January, 2013.

Steven T. Milantley (L.S.)
Notary Public

My Commission Expires: January 7, 2016

FILED
JAN 30 2013
CLERK OF COURT
SOUTH CAROLINA
M. HOPE BLACKLEY
2013 JAN 30 PM 3:27

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

Kenneth Smith

I, , hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Kenneth Smith

Applicant

SWORN or affirmed to and subscribed before me this

17th day of January, 2013.

Heust M. Lacey

Notary Public

My Commission Expires:

January 7, 2016

FILED
 2013 JAN 30 PM 3:27
 M. HOPE CLARLEY
 CLERK OF COURT
 DISTRICT COURT
 DISTRICT OF COLUMBIA

<u>1</u>	COPIES MAILED
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DATE	<u>2-7-13</u>
DOC TYPE	

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
	)	2013-CP-42-0534
Kenneth D. Smith, #297395,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

Respondent, making its Return to the application for post-conviction relief (PCR) filed January 30, 2013, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the October 2008 term of the Spartanburg County Grand Jury for murder (2008-GS-42-6013) and the July 2009 term for breach of the peace of a high and aggravated nature (2009-GS-42-3470). The Applicant was represented by Richard Whelchel, Esquire. On September 10, 2009, the Applicant proceeded to trial and was convicted by a jury. The Honorable J. Derham Cole sentenced Applicant to life for murder and ten years for breach of the peace of a high and aggravated nature.

A timely notice of appeal and Anders brief were filed on Applicant's behalf. The South Carolina Court of Appeals dismissed Applicant's appeal. State v. Smith, Op. No. 2012-UP-178 (filed March 14, 2012). The Remittitur was returned on March 30, 2012.

Attached herewith and incorporated herein are the records of the Spartanburg County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records, and the trial transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

- a. Ineffective assistance of counsel, in that;
 - i. Counsel failed to object to the trial court's improper comments on the facts and failed to move for a mistrial or new trial on that basis;
 - ii. Counsel failed to object to the judge's instruction on the facts of the murder offense that reduced the State's burden of proof;
 - iii. Counsel failed to object to the judge's instruction on the facts of the breach of peace charge that lessened the State's burden of proof;
 - iv. Counsel failed to object to the judge's mandatory presumption, burden-shifting and confusing jury instruction on the malice element of murder.

III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668,

(1984); Butler, 334 S.E.2d 813. Respondent notes that it appears the Applicant appeared and pled guilty voluntarily without the assistance of counsel.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Each and every allegation contained within the application not hereinbefore expressly admitted, qualified or explained is hereby denied.

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

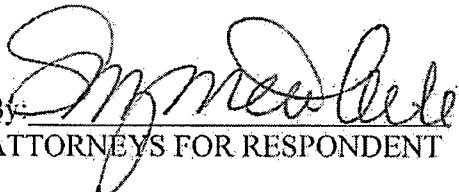
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

SUZANNE H. WHITE
Assistant Deputy Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

March 27, 2014.

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

KENNETH D. SMITH, #297395

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

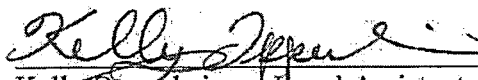
2013-CP-42-0534

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Christopher D. Brough, Esquire
The Brough Law Firm
175 Magnolia Street, Suite 202
Spartanburg, South Carolina 29306

DATED this 27th day of March, 2014.


 Kelly Oppenheimer, Legal Assistant
 For Respondent

1 STATE OF SOUTH CAROLINA)

2 COUNTY OF SPARTANBURG)

COURT OF COMMON PLEAS NONJURY

3
4 KENNETH D. SMITH,)

5 APPLICANT,)

6 VS.)

7 STATE OF SOUTH CAROLINA,)

8 RESPONDENT.)

TRANSCRIPT

OF

RECORD

2013-CP-42-0534

9
10 September 18th, 2014
11 Spartanburg, South Carolina
12

13 B E F O R E:

14 THE HONORABLE ROGER L. COUCH, Judge.

15
16 A P P E A R A N C E S:

17 CHRISTOPHER D. BROUGH
18 ESQ.
Attorney for the Applicant

19 SUZANNE H. WHITE
20 ASSISTANT ATTORNEY GENERAL
Attorney for the Respondent

21
22
23 PAMELA E. GREEN
24 Circuit Court Reporter
25 Seventh Judicial Circuit

I N D E X O F W I T N E S S E S

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E X H I B I T S

<u>NOS.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
	<u>Applicant's Exhibits</u>		
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P R O C E E D I N G S

THE COURT: All right. State may call the next case.

MS. WHITE: Thank you, Your Honor.

This is the case of Kenneth Smith versus the State.
It's Case Number 2013-CP-42-0534. Mr. Smith is represented
today by Mr. Chris Brough.

He was indicted in '08 of -- October for murder, and
then the July, 2010, excuse me, 2009 the term for breach of
the peace of a high and aggravated nature. Proceeded to
trial where he was represented by Mr. Richard Welchel, and
was convicted on September 10th, 2009. He was sentenced
to life for murder and ten years for the breach of peace.

There was a -- an appeal and a Anders brief were filed.
He's alleged ineffective assistance of counsel, various
claims, that counsel failed to move for a mistrial based on
improper comments on the facts, failed to object to the jury
instructions, and failed to object to the -- well, jury
instruction on malice, breach of peace, and burden shifting
instructions on murder.

So I will turn it over to Mr. Brough at this time.

THE COURT: Mr. Brough.

MR. BROUGH: Thank you, Your Honor.

May it please the Court.

Your Honor, Mr. Smith would also like to amend his

Kenneth Smith - Direct examination
by Mr. Brough

1 application to include allegations of ineffective assistance
2 for failing to present evidence of self-defense. I've
3 discussed this with Ms. White. It's my understanding that
4 they're not going to oppose that amendment.

5 THE COURT: Is that correct?

6 MS. WHITE: That's correct, Your Honor.

7 THE COURT: All right. We'll allow him to amend, amend
8 his application to include that allegation.

9 MR. BROUGH: At this time the Applicant would call Ken
10 Smith to the stand.

11 THE COURT: Sir, come forward to my left and be sworn.

12 (Applicant complies.)

13 THE COURT: Sir, if you'd put your left-hand on the
14 Bible and raise your right.

15 KENNETH SMITH, being first duly
16 sworn, testified as follows:

17 THE COURT: Have a seat, please.

18 Sir, once you're seated, state your name please.

19 THE WITNESS: Kenneth Smith.

20 THE COURT: Thank you.

21 Mr. Brough, your witness.

22 MR. BROUGH: Thank you, Your Honor.

23 May it please the Court?

24 THE COURT: Yes, sir.

25 DIRECT EXAMINATION

Kenneth Smith - Direct examination
by Mr. Brough

1 BY MR. BROUGH:

2 Q Mr. Smith, we're here today on your post-conviction
3 relief.

4 You've alleged that your trial counsel was ineffective,
5 that being Mr. Whelchel, is that correct?

6 A Yes, sir.

7 Q Okay. If you could, sir, just by way of a little bit
8 of background, if you could, two charges against you. One
9 for murder and one for breach of the peace of a high and
10 aggravated nature.

11 Is that correct?

12 A Yes, sir.

13 Q Okay. One of the allegations that you've made is, is
14 that you've alleged that Mr. Whelchel was ineffective for
15 failing to put up evidence of self-defense in your case.

16 Tell me why you believe that to be true, sir.

17 A The facts of the case was, when we pulled up, we was
18 going into---

19 Q Now, when you say we, please use names.

20 A Me and John Sanville at the time.

21 Q Okay.

22 A And we got blocked in into an altercation where we
23 couldn't leave, and---

24 Q And how were you blocked in?

25 A By another vehicle.

Kenneth Smith - Direct examination
by Mr. Brough

1 Q Okay. Where were you when you were blocked in?

2 A Inside of a car.

3 Q Okay. Where was that car?

4 A Parked in the store parking lot --

5 Q Okay.

6 A -- facing a wall.

7 Q And why were you parked in a store parking lot?

8 A I was instructed, from, from John Sanville, to, to go
9 there for a meeting they had set up with the victim and the
10 brother, whatever.

11 Q Okay. And what are their names?

12 A Santos Ruiz. That's the only one I knew at the time.

13 Q Okay. So, so you were there for a meeting and what was
14 the meeting concerning?

15 A To get -- to give a gun back and get some money back.

16 Q Okay. And, and if you could, sir, tell me what
17 happened at that meeting.

18 A Well, the Santos Ruiz got out and approached the
19 passenger side of the vehicle, which was -- you can see John
20 Sanville---

21 Q Well---

22 A ---and asked---

23 Q What was Mr. -- what was -- back up a little bit.

24 Mr. Ruiz, how did he get to the parking lot of the
25 store you were at?

Kenneth Smith - Direct examination
by Mr. Brough

- 1 A He was driven by Jerry Delarosa---
- 2 Q Okay.
- 3 A ---and Adam Solesbee.
- 4 Q Okay. So Santos came with Jerry Delarosa and Adam
- 5 Solesbee, correct?
- 6 A Yes, sir.
- 7 Q And what type of vehicle were they in?
- 8 A A Dodge truck.
- 9 Q Okay. And tell me how they approached you at that
- 10 time.
- 11 A Well, first, Santos got out and approached the
- 12 passenger side, which Sanville -- him and Sanville had some
- 13 discussions or words, an exchange. Adam got out of the
- 14 truck and approached the passenger side where Sanville was,
- 15 and that's when they had the physical altercation. Jerry
- 16 then pulled the truck---
- 17 Q Back it up.
- 18 when you say physical altercation, please don't skip
- 19 over facts. Please tell me what exactly occurred.
- 20 A Okay. The physical altercation was when, when Santos
- 21 Ruiz and Adam Solesbee jumped on, on Sanville in the car.
- 22 Q And, and Sanville was with you?
- 23 A Yes, sir.
- 24 Q And what happened after that?
- 25 A That's when Jerry pulled a truck behind the car,

Kenneth Smith - Direct examination
by Mr. Brough

1 blocked the car in and got out, and came to my side of the
2 car.

3 Q Okay.

4 A And that's when he started swinging through the sunroof
5 and trying to break the glass on the driver window.

6 Q And what did you do?

7 A I just locked, locked the door.

8 Q Okay. what happened after that?

9 A That's when they got back in the truck and whatnot, and
10 that's when John, John and I got out the car and shots was
11 fired after that.

12 Q Who fired the shots?

13 A It wasn't me.

14 Q Okay. who fired the shots?

15 A It had to be John Sanville.

16 Q Okay. At, at trial -- at your trial -- and you did go
17 to trial on this case, correct?

18 A Yes, sir.

19 Q Okay. So you, you contested the allegations against
20 you?

21 A Yes, sir.

22 Q You didn't plead or anything like that?

23 A No, sir.

24 Q Was their testimony presented by the occupants of the
25 vehicle that you were, in fact, the one who fired?

Kenneth Smith - Direct examination
by Mr. Brough

1 A It was a statement written, yes, sir.

2 Q Okay. Now, did you testify to what you just told the
3 court during your trial?

4 A Yes, sir.

5 Q Okay. And were there any other witnesses that were
6 called by you?

7 A One was Eugene Brannon that was sitting across the
8 street the time the incident happened.

9 Q Okay. And anyone other than Mr. Brannon that was
10 called?

11 A No, sir.

12 Q Now, there was -- you said there was a witness, an Adam
13 Solesbee, was in the other vehicle?

14 A Yes, sir.

15 Q Okay. Was he called as a witness in your case?

16 A No, sir.

17 Q So he was not called as a witness by the State?

18 A He was a -- from my understanding, he was a State
19 witness, but never was called.

20 Q Did you discuss with Mr. Whelchel calling him as a
21 witness in your case?

22 A No, sir, from my understanding there was -- they said
23 there was a problem with him testifying and that was left at
24 that.

25 Q Did you believe he should of been called as a witness?

Kenneth Smith - Direct examination
by Mr. Brough

1 A Yes, sir.

2 Q And, and why is that?

3 A For the simple fact that he, he was in the car with the
4 victim and his, his statement that he gave to the officer
5 then put the weapon into my hands.

6 MR. BROUGH: Have this marked as Applicant's 1 please.

7 (WHEREUPON, a statement was marked as Applicant's
8 Exhibit No. 1 for identification purposes only at this
9 time.)

10 Q Mr. Smith, I'm gonna hand you what's been marked for
11 identification purposes as Applicant's Exhibit No. 1.

12 Can you identify that document for me, sir?

13 A It's a witness interview form from Adam Lee Solesbee.

14 Q Okay. And is that the, the statement that you just
15 previously referred to, sir?

16 A Yes, sir.

17 Q Okay. And it's your position that nowhere in that
18 statement does Mr. Solesbee put the gun in your hand?

19 A It's -- no, sir, he never mentioned my name as putting
20 the gun in my hand, sir.

21 Q Now -- so your, your position is, is that you never
22 fired the gun in this case?

23 Is that it, sir?

24 A Yes, sir.

25 Q Okay. But there was testimony from witnesses from the

Kenneth Smith - Direct examination
by Mr. Brough

1 other vehicle indicating that you had, correct?

2 A There was one from Santos Ruiz.

3 Q Okay. And there was also testimony from you that the
4 other individuals started the fight, correct?

5 A Yes.

6 Q Okay. Did, did your attorney ever ask for a
7 self-defense instruction?

8 A No, sir.

9 THE COURT: What instruction?

10 What did you say?

11 MR. BROUGH: For a self-defense instruction.

12 THE COURT: Self-defense. Okay.

13 MR. BROUGH: And, and it would be our position, Your
14 Honor, that, despite the fact he never said he shot, that
15 the jury could view the evidence in interpreting from the
16 different witnesses that it could of been a self-defense
17 situation. They could of believed, from Mr. Ruiz, that he
18 shot. They could of believed, from him, that they didn't
19 start the altercation.

20 I understand that's --.

21 THE COURT: It's inconsistent.

22 MR. BROUGH: Well, but they can believe a part or
23 all---

24 THE COURT: They testified---

25 MR. BROUGH: ---of what a witness says or none or all

Kenneth Smith - Direct examination
by Mr. Brough

1 of what a witness says. I know that's one of the standard
2 instructions that the Court issues.

3 THE COURT: Okay. But there's more to self-defense
4 than who had the gun.

5 MR. BROUGH: Yes, sir, I understand.

6 THE COURT: Go ahead.

7 Q Mr. Smith, is there -- tell me -- you made some other
8 indications that you felt your -- Mr. Welchel was deficient
9 for some other reasons as well, is that correct?

10 A Yes, sir.

11 Q Okay. Tell me about those.

12 A The, the failure to object on improper comments stated
13 in facts.

14 Q Okay. And, and are you referring to specific testimony
15 in the case where the Court questioned witnesses?

16 A Yes, sir.

17 MR. BROUGH: Okay. If I could direct the Court's
18 attention to Page 114 of the transcript.

19 THE COURT: Yes, sir, I'm there.

20 Q Okay. Sir, if you could read for me from Line 19 to
21 Page 116 Line 4 if you would for me, sir, from the
22 transcript?

23 A Nineteen to 14?

24 Q Yes, sir.

25 A What was the purpose---

Kenneth Smith - Direct examination
by Mr. Brough

1 Q And this is from the direct examination of Santos Ruiz
2 who was the occupant in the other vehicle.

3 A What was the purpose of this meeting?

4 And the answer was about a gun.

5 Okay. What about a gun?

6 I'm suppose to get it back.

7 You suppose to get a gun back?

8 Yes.

9 From whom?

10 From him and the other guy.

11 Those two guys?

12 Yes.

13 How did they come in to be in possession?

14 And the Court, excuse me just a second. When you
15 refer, when you refer to somebody as him or her---

16 The Witness: I don't know his name.

17 The Court: You need to tell us who that is because we
18 don't know.

19 I never knew the names.

20 Do you see that person in the courtroom?

21 Yes.

22 Can you identify that person for us?

23 Yes, that's the guy who killed my brother, the one over
24 there.

25 The one over there.

Kenneth Smith - Direct examination.
by Mr. Brough

1 Now, you realize there's several people over there.

2 Which one are you referring to?

3 Him with the black with the white shirt.

4 The white shirt and the pen in his hand?

5 Yes.

6 Sitting next to the -- Mr. Wheelchel?

7 Yeah, right there in the middle.

8 Q Okay. And those questions that -- and the person
9 sitting next to Mr. Wheelchel that was identified, that was
10 you, correct?

11 A Yes, sir.

12 Q Okay. And the person asking those questions, that was
13 the judge?

14 A Yes, sir.

15 Q At any point in time during that did your attorney, Mr.
16 Wheelchel, object that the Court was questioning the witness
17 for identification purposes as to who the individual was at
18 that meeting?

19 A No, sir.

20 Q Okay. Do you feel they should have?

21 A Yes, sir.

22 MR. BROUGH: I'm gonna direct the Court's attention to
23 Page 131 of the transcript. This was on the
24 cross-examination again of Mr. Ruiz.

25 And, sir, if you could read for me from Lines 23 to

Kenneth Smith - Direct examination
by Mr. Brough

1 Page 133, Line 4.

2 A Him and the other guy.

3 Oh, this -- okay.

4 Court: Excuse me just a minute now. Again, when you
5 say both, you have to identify whom you're talking about.

6 The Witness: Mr. Smith, and I never knew the name.

7 The Court: Can we find out?

8 Sir, will you tell us your name please?

9 My name is John---

10 And, The Court, what's yours, sir?

11 John Sanville.

12 Okay. His name is John Sanville and his name is
13 Mr. Smith.

14 Mr. Sanville.

15 Okay.

16 The Witness: John, right?

17 The Court: John Sanville.

18 John -- okay. The Court: Kenneth Smith, John Sanville
19 in the blue shirt, and Kenneth Smith in the white shirt.

20 Okay. Their statement said this black male that I
21 purchased crack cocaine from in March of 2008 thinks I tried
22 to set him up after I was stopped and arrested in Una.

23 That's correct, yes.

24 Okay. And it doesn't say two black males, does it?

25 I meant both of them.

Kenneth Smith - Direct examination
by Mr. Brough

1 It doesn't say two black males, does it?

2 I meant both of them.

3 That's not what I asked, asked you, and the answer was
4 I know.

5 Does it say two black males?

6 No.

7 All right. And this is the fellow that you went to Una
8 in March and bought drugs from?

9 Mr. Whelchel: Stand up please.

10 Is that correct?

11 I would, I would buy crack from both of them.

12 Q Okay. Now, the Court was asking these questions,
13 correct?

14 A Yes, sir.

15 Q Okay. It wasn't your attorney or the prosecutor asking
16 these questions?

17 A No, sir.

18 Q So would it be your position that, at this point in
19 time, your lawyer still failed to object?

20 A Yes, sir.

21 Q And did you feel as if the Court was taking an active
22 part in your prosecution at that point?

23 A Yes, sir.

24 Q And, as to those comments, did you feel they were
25 improper comments on the facts, sir?

Kenneth Smith - Direct examination
by Mr. Brough

1 A Yes, sir.

2 Q All right. If, if you could, tell me -- go through any
3 other contentions that you may have as to how your attorney,
4 Mr. Wheelchel, was ineffective, sir.

5 A One, on, on the failure to object to the Judge's facts
6 on the murder offense that were reduced the State's burden
7 of proof and that's on Transcript Page 400.

8 Q Sir?

9 A On the jury charge, the words expressed or implied
10 malice do not means different kinds of malice, but merely
11 the manner in which malice may be shown to have existed.
12 That is to say either by direct evidence or by
13 circumstantial evidence from which malice might be inferred.

14 Malice can be expressed in where there is an expressed
15 threat to kill, kill, or a lying in wait or where there's
16 circumstances show directly that an intent to kill was
17 entertained by a killer. Malice may be inferred though no
18 express intent to kill is proven by direct evidence in this
19 case where the facts and circumstances which have been
20 proven by the evidence in this case satisfy you, beyond a
21 reasonable doubt, that malice was present in the mind of the
22 killer at the time that any killing took place.

23 Q Okay. And, and you felt that instruction should of
24 been objected to?

25 A Yes, sir.

Kenneth Smith - Direct examination
by Mr. Brough

1 Q Okay. And, and why do you feel that, sir?

2 A At, at the time they gave him permission to infer
3 malice -- the Court was permitted to infer malice with the
4 intentional use of a deadly weapon.

5 Q Okay.

6 A And, and -- well, the facts and the circumstances was
7 proven beyond a reasonable doubt and the evidence, but it
8 would leave -- he, he helped relieve the State of the burden
9 of proof.

10 Q Okay. Okay. And, and, Mr. Smith, I need you to think
11 through this.

12 Is there -- I want you to go through and make sure that
13 you cover everything that you're saying Mr. Wheelchel didn't
14 do.

15 Is there anything else that you feel as if was not done
16 properly on your case understanding this is probably your
17 last chance to bring it up?

18 So take your time in answering this question.

19 Is there anything else that you feel like Mr. Wheelchel
20 should of done differently for you that would of resulted
21 potentially in your acquittal, sir?

22 A Yes, he should of checked into the charge on the, on
23 the -- should of objected to the instruction on the facts of
24 the breach of the peace and aggravated nature charge also.

25 Q Okay. And why do you feel he should of objected to

Kenneth Smith - Direct examination
by Mr. Brough

1 that?

2 A As when he gave -- when he gave the, the instruction --
3 when he instructed the jury on the statute of the breach of
4 peace, it, it spoke in a permissive language as instead of
5 if found guilty. He said is guilty of.

6 Q Okay.

7 THE COURT: I'm not sure I'm following where he is.

8 Q If you could tell me what page on the transcript you're
9 referring to, sir?

10 A Page 405.

11 THE COURT: So he's still in the Judge's charge?

12 MR. BROUGH: Yes, Your Honor. It looks like he's on
13 Page 405 --

14 THE COURT: Okay.

15 MR. BROUGH: -- where it goes through the second
16 charges in the middle of page -- line -- starting at Line
17 14.

18 THE COURT: Where it starts with the second indictment?

19 MR. BROUGH: Yeah, the second indictment charges
20 failing breach and peace and we'll --.

21 THE COURT: What's the objection?

22 MR. BROUGH: Well---

23 THE WITNESS: Failure to object to the Judge's
24 instructions on the fact of the breach of peace and
25 aggravated nature.

Kenneth Smith - Direct examination
by Mr. Brough

1 Q Okay. And what -- what's wrong with the instruction is
2 what the, the Court's asking you?

3 A One, the statute is -- may I read the statute?

4 Q Well, just go ahead and tell me what's wrong with this
5 language first.

6 A Okay. When I say 405, it's 14.

7 The second indictment charged the defendant with the
8 breach of peace of a high and aggravated nature, and that's
9 also a statutory offense. The statute setting forth that
10 particular crime is contained in section 22-5-150 of the
11 Code of Laws.

12 The section of law provides that any person engaging in
13 any unlawful and unjustifiable fray, fight, or other
14 disturbance or any person who goes on officially to the --
15 terror the people or any person who engages in the menacing
16 or threaten the species or otherwise engages in any
17 dangerous or disorderly conduct in a public place is guilty
18 of breach of peace.

19 Q So you feel like he shouldn't of said is guilty?

20 A Yes, sir.

21 Q Okay. All right. Is there anything other than that
22 that you feel that Mr. Welchel didn't do properly for you?

23 A Yes, sir, I want to go back to the Transcript Page
24 401---

25 Q Yes, sir.

Kenneth Smith - Direct examination
by Mr. Brough

1 A ---and it's the failure to object to the judge's
2 mandatory presumption, burden shifting, and confusion of the
3 jury instruction on the malice element.

4 Q Now, is that, again, referring to the fact that malice
5 may be inferred?

6 Is that---

7 A Yes, sir.

8 Q ---what you're getting at?

9 A Yes, sir.

10 Q Because of the use of a deadly weapon?

11 Is that what you're talking about?

12 A 401, Line 6 through 10.

13 You are also permitted to infer malice from proof of
14 intentional use of a deadly weapon. You're also permitted
15 to infer malice in the proof of intentional commission of an
16 act or acts which were inherently dangerous to human life.

17 Q Okay. So you feel that was burden shifting?

18 A Yes, sir.

19 Q Okay. Outside of the Judge's instructions and the
20 Court commenting on the facts, is there anything, factually,
21 that you feel like should have been done that was not done?

22 A The facts -- should of called -- is that Adam Solesbee
23 for one.

24 Q Okay. And, and what, what do you think that his
25 testimony could do to help your defense?

Kenneth Smith - Direct examination
by Mr. Brough

1 A Had he testified with the testimony or with -- he
2 didn't put the gun in my hand and it could of helped my
3 defense in a whole lot.

4 Q Okay. All right. And you do understand that he is
5 here today and we will---

6 A Yes, sir.

7 Q ---call him momentarily?

8 A Yes, sir.

9 Q Okay. Is there anything, other than that, that you
10 feel like should of done been?

11 A No, sir.

12 Q Okay. Have I done everything you've asked of me?

13 A For right now.

14 Q Okay. Fair enough.

15 All right. No further questions. Please answer any of
16 Ms. White's questions.

17 MS. WHITE: Thank you.

18 CROSS-EXAMINATION

19 BY MS. WHITE:

20 Q Mr. Smith, I just have a couple.

21 In regards to saying that the act was committed
22 potentially in self-defense.

23 You denied, at trial, that you shot the gun though, is
24 that right?

25 A Yes, sir.

Kenneth Smith - Cross-examination
by Ms. White

1 Q And you---

2 A I mean yes, ma'am. Yes, ma'am.

3 Q That's all right.

4 You never stated that you've shot a gun at anyone, is
5 that right?

6 A Yes, ma'am.

7 Q Okay. So knowing that, how do you think your attorney
8 was gonna argue self-defense when you didn't acknowledge
9 ever using a weapon?

10 A I don't, don't know.

11 Q Okay. And, in fact, you originally gave a statement to
12 the police that was entered in as, as evidence, is that
13 correct?

14 A Yes, ma'am.

15 Q And, in that, you do give a statement that you went to
16 the trunk of the car and got a stick, like a broomstick, and
17 then someone shot from behind you and you did not identify
18 Mr. Sanville. You said it was a third party.

19 Is that right?

20 A Yes, ma'am.

21 Q Okay. But then, at trial, you denied that you got the
22 stick and you implicated Mr. Sanville as the shooter, is
23 that right?

24 A Yes, ma'am.

25 Q All right. In regards to the comment on the facts, the

Kenneth Smith - Cross-examination
by Ms. White

1 attorney -- your attorney cross-examined Mr. Ruiz about his
2 identification of you and the fact that the only person he
3 had previously identified in the lineup had been
4 Mr. Sanville, is that right?

5 A Yes, ma'am.

6 Q So he had never previously identified you or named you
7 as a suspect until that day, is that right?

8 A Yes, ma'am.

9 Q And your attorney pointed that out to the jury?

10 A He pointed it out, which he should have objected also.

11 Q Okay. But Mr. Ruiz, Mr. Ruiz, Santos Ruiz, even though
12 his statement had put you with the gun, he didn't identify
13 or name you, right?

14 A No, ma'am.

15 Q Okay. Now, there was an independent witness, a Ms.
16 Annie Peterson, to the shooting, isn't that right?

17 A Yes, ma'am.

18 Q She is the one that called 9-1-1 to your knowledge --
19 to your---

20 A Yes, ma'am.

21 Q ---recollection?

22 Okay. And she, in fact, testified at the trial that
23 she had seen the whole -- the shooting incident, is that
24 right?

25 A Yes, ma'am.

Kenneth Smith - Cross-examination
by Ms. White

1 Q And she testified to seeing the black Honda that you
2 and Mr. Sanville were in and the truck that the victim and
3 his brother and Mr. Solesbee were in?

4 A Yes, ma'am.

5 Q And, in fact, she testified that she saw the person who
6 was shooting get in the driver's side of the black Honda, is
7 that right?

8 A Yes, ma'am.

9 Q Okay. And you were testifying earlier today that you
10 had been the one driving the car earlier?

11 A Yes, ma'am.

12 Q Okay. Now, Mr. Solesbee never identified you as the
13 person you said with the gun?

14 He never named you, is that right?

15 A Yes, ma'am.

16 Q But he did describe two people in the vehicle and
17 described the shooting, is that right?

18 A Yes, ma'am.

19 Q Okay. Had you ever met Mr. Solesbee before?

20 A No. No, ma'am.

21 Q So, he didn't know your name?

22 A No, ma'am.

23 Q Okay. You argued that counsel should of objected to
24 the breach of peace charge.

25 Counsel initially made a motion to even quash that

Kenneth Smith - Cross-examination
by Ms. White

1 indictment, is that right?

2 A Yes, ma'am.

3 Q Do you recall that?

4 And that was because of, he alleged, some defects in
5 the indictment with the language?

6 A I think so. I'm not for sure.

7 Q Okay. And that was argued prior to trial and denied,
8 is that right?

9 A Yes, ma'am.

10 MS. WHITE: Okay. Your Honor, I think that's all I
11 have at this time, Your Honor.

12 THE COURT: All right. Mr. Brough, anything further
13 from the witness?

14 MR. BROUGH: Just briefly, Your Honor.

15 REDIRECT EXAMINATION

16 BY MR. BROUGH:

17 Q Mr. Smith, the independent witness Ms. White asked
18 about, that Annie Peterson, did you ever have any
19 discussions about how she might play into the trial of your
20 case with Mr. Welchel?

21 A As far as --?

22 Q As far as -- she was the victim of the breach of peace.

23 A Breach of peace.

24 Q Correct?

25 A Yes, sir.

Kenneth Smith - Redirect examination
by Mr. Brough

1 Q Okay. Did you ever have conversations cause my
2 understanding is you weren't originally charged with breach
3 of peace, is that right?

4 A Yes, sir.

5 Q Okay.

6 A I wasn't.

7 Q Okay. So you were just originally charged with the
8 murder case?

9 A Yes, sir.

10 Q And the breach of peace was a direct indictment?

11 A July -- I think June or July 2009, yes, sir.

12 Q Okay. Did you ever have any conversations with your
13 attorney as to why the State may of indicted you for a
14 breach of peace of a high and aggravated nature?

15 A No, sir.

16 Q Okay.

17 A It just said that's -- don't worry about that one. The
18 murder charge is what we need to worry about.

19 Q Okay. When you went to trial, and after having gone to
20 trial, and based on the presentation by Mr. Bulsa from the
21 solicitor's Office, do you know now why you were indicted on
22 that charge?

23 A Yes, sir.

24 Q And why, in your opinion, is that?

25 A It's to help build up the case for the murder charge --

Kenneth Smith - Redirect examination
by Mr. Brough

1 Q Okay.

2 A -- to get -- I mean, I guess, to get the jury to
3 dislike me from the, from the start.

4 Q Okay. Because Ms. Peterson was the Neighborhood Watch
5 captain?

6 A Yes, sir.

7 Q And she testified that shots were fired in the general
8 direction as she was driving through with her kids in the
9 car?

10 A Yes, sir.

11 Q Okay. Whereas the victim on the murder case was over
12 a, I guess, a weapons deal that had gone wrong?

13 A Yes, sir.

14 Q Okay. All right. Thank you, sir.

15 No further questions.

16 MS. WHITE: One more brief follow-up.

17 THE COURT: Yes, ma'am.

18 RE CROSS EXAMINATION

19 BY MS. WHITE:

20 Q In regards to Ms. Peterson and what she saw, there was
21 never any testimony that the victim and his passengers had a
22 weapon or were shooting, is there?

23 A Not that I know of.

24 Q Okay. All right. Thank you.

25 That's all that I have.

Adam Solesbee - Examination
by The Court

1 THE COURT: You may step down, sir.

2 MR. BROUGH: Your Honor, the Applicant would call Adam
3 Solesbee to the stand. He's in the Department of
4 Corrections. He's in the jail room, Your Honor.

5 THE COURT: All right, sir. Bring him in.

6 MS. WHITE: Your Honor, may we approach briefly?

7 THE COURT: Yes.

8 (WHEREUPON, a bench conference was held at this time.)

9 THE COURT: Sir, if you'll come to the witness stand
10 and place your left-hand on the Bible, raise your right.

11 ADAM SOLESBEE, being first duly
12 sworn, testified as follows:

13 THE COURT: Thank you. Have a seat.

14 (Witness complies.)

15 THE COURT: State your name please.

16 THE WITNESS: Adam Solesbee.

17 THE COURT: Mr. Solesbee, I was -- there are some
18 things that I would like to go over with you at this time.

19 My first question of you is are you represented
20 currently by an attorney?

21 THE WITNESS: No.

22 THE COURT: You have been subpoenaed and ordered to be
23 brought here for testimony. I want to -- you to be aware
24 that you have the right, at all times, to remain silent.
25 Anything that you say in this hearing could and will be used

Adam Solesbee - Examination
by The Court

1 against you in a Court of law.

2 You have a right to an attorney, and if you wish to
3 have an attorney an attorney could be appointed for you.
4 You have the right, at anytime, to refuse to answer
5 questions and you have the right to terminate your answers
6 to any questions at anytime.

7 Do you understand that you do have the right to remain
8 silent?

9 THE WITNESS: Yes, sir.

10 THE COURT: In this particular situation you're being
11 called as a witness to certain facts that may have occurred
12 in the case involving Mr. Kenneth Smith.

13 Do you wish to answer questions in regard to that
14 incident?

15 THE WITNESS: No, sir.

16 THE COURT: Are you invoking your right to the Fifth
17 Amendment in this case?

18 THE WITNESS: I don't understand what that means.

19 THE COURT: That means you're invoking your right,
20 under the Fifth Amendment, to remain silent as to any
21 matters that might deal with this incident.

22 Is that---

23 THE WITNESS: Yeah, I just want to remain silent.

24 THE COURT: So you do not wish to answer any questions
25 at all?

Adam Solesbee - Examination
by The Court

1 THE WITNESS: Hu huh. (Negative).

2 THE COURT: The State wish to ask any questions of him
3 concerning his implication of his rights?

4 MS. WHITE: Nothing, Your Honor.

5 THE COURT: Applicant wish to ask any questions of this
6 witness concerning his implication of his rights?

7 MR. BROUGH: Your Honor, I understand that he's
8 invoking his rights, and I don't have any questions
9 necessarily about that, but I would like to ask him though,
10 if the Court deems it appropriate, whether or not what's
11 been marked as Applicant's 1 was, in fact, a statement that
12 he gave to law enforcement at the time, and if that was a
13 sworn statement, but my position is---

14 THE COURT: Well, he's indicated that he wishes to
15 answer no questions concerning this matter---

16 MR. BROUGH: Yes, sir.

17 THE COURT: ---and he has the right to remain silent if
18 he chooses to do that.

19 My, my question of you was, again, do you wish to
20 discuss anything with him or ask him about the fact that he
21 has invoked his right to remain silent?

22 I'm not gonna allow any further questioning beyond that
23 when he has invoked his right---

24 MR. BROUGH: Yes, sir.

25 THE COURT: ---to remain silent.

1 MR. BROUGH: I have no questions as to that.

2 THE COURT: All right, sir. You may step down. Thank
3 you very much.

4 MR. BROUGH: Your Honor, may I have one moment to
5 discuss with --?

6 THE COURT: Yes, sir.

7 (Pause.)

8 MR. BROUGH: Your Honor, may we approach briefly?

9 THE COURT: You may.

10 (WHEREUPON, a bench conference was held at this time.)

11 MR. BROUGH: Your Honor, at this point the Applicant
12 would like to move into evidence Applicant's Exhibit No 1,
13 which is been previously identified, which is the sworn
14 statement of Adam Solesbee. It's my understanding that the
15 Attorney General's Office would stipulate that that is his
16 sworn statement and is not going to insist that we call the
17 officer to which that statement was given.

18 THE COURT: Is the stipulation further that that was
19 the statement that was in the discovery given to Mr.
20 Whelchel prior to trial?

21 MR. BROUGH: Yes.

22 MS. WHITE: Yes, Your Honor.

23 THE COURT: Okay. I'll accept that stipulation.
24 Is the State so stipulating?

25 MS. WHITE: Yes, Your Honor.

1 THE COURT: All right. Thank you.

2 Then I'll accept the stipulation and that document will
3 be placed into evidence as Applicant's No. 1.

4 (WHEREUPON, Applicant's Exhibit No. 1 was received into
5 evidence at this time.)

6 MR. BROUGH: Thank you, Your Honor.

7 Your Honor, that would be our showing at this point.

8 THE COURT: All right. State wish to call any
9 witnesses?

10 MS. WHITE: Thank you, Your Honor.

11 We'd call Mr. Richard Whelchel.

12 THE COURT: Mr. Whelchel, you have testified previously
13 before this Court today. So I'll inform you that you remain
14 under oath at this time.

15 Do you acknowledge and accept that fact?

16 THE WITNESS: Yes, sir.

17 THE COURT: All right. Have a seat please.

18 RICHARD WHELCHER, having been previously
19 sworn, testified as follows:

20 THE COURT: You may proceed.

21 MS. WHITE: Thank you, Your Honor.

22 DIRECT EXAMINATION

23 BY MS. WHITE:

24 Q Mr. Whelchel, do you recall representing Mr. Smith in
25 this matter?

1 A Yes, ma'am.

2 Q And in regard to conversations with him about possible
3 defenses, do you remember having any discussions with him
4 about what the defense was gonna be or strategy for this
5 one?

6 A Well, he had initially told me about the fellow that
7 was a friend or acquaintance of his that was standing up on
8 the hill and that may have been the guy that actually did
9 the shooting.

10 Q And when you're saying that, that is the third -- was
11 it your understanding that was the third party he referenced
12 in his statement to police?

13 A Yes, ma'am.

14 Q So when he initially spoke with you, he didn't say that
15 this was self-defense, I was in fear for my life, and I had
16 to shoot back to protect myself?

17 A No, ma'am.

18 Q Okay. Did he ever acknowledge that he was the one
19 shooting?

20 A No, ma'am.

21 Q When did -- obviously, at trial, he testified that it
22 was John Sanville that, that could of been the only person
23 shooting.

24 Were you aware that he was gonna testify to that prior?

25 A Yes.

1 Q I mean had, had you been able to discuss that change?

2 A Yes, ma'am.

3 Q And was that -- in regards to discovery, did you think
4 that theory or that defense was supported some by the
5 discovery or evidence in the case?

6 A Somewhat.

7 Q Can you tell me, what was the evidence that supported
8 your client being the shooter in this situation as compared
9 to anyone else?

10 A I think one of the, one of the victims or one of the
11 people in the other car identified him and identified the
12 clothing of the person and that was the clothing that he was
13 wearing.

14 Q Would that have been maybe Mr. Ruiz that testified?

15 A I believe so, yes, ma'am.

16 Q And that was the victim's brother?

17 A Yes, ma'am.

18 Q Okay. And, in fact, that was the testimony where he
19 began, in a discussion with the Court, was making a lot of
20 reference to he and him, and the Court mentioned you need to
21 identify who you're speaking of.

22 Do you recall that --

23 A Yes, ma'am.

24 Q -- interaction?

25 And do you recall when he identified the defendant and

1 said that, that's the man that killed my brother?

2 A Yes, ma'am.

3 Q Was there any discussion with the defendant or thought
4 about making an objection to the Court's questions or
5 discussion at that time?

6 A No.

7 Q If you had thought that was something that should of
8 been objected to, would you of made an objection?

9 A Yes, ma'am.

10 Q Had he previously identified Mr. Smith in any lineup or
11 photo lineup?

12 A No, ma'am, I don't believe so.

13 Q Okay. And, in fact, you cross-examined him on the fact
14 that the only person he had ever identified was actually Mr.
15 Sanville, is that right?

16 A Yes, ma'am.

17 Q In regards to strategy, it changed obviously from the
18 statement to the, the testimony that it was Mr. Sanville,
19 but what discussions did you have in regards to presenting
20 that defense or presenting that to the jury, how you were
21 gonna do that?

22 A Well, I told him that he would be cross-examined on
23 his, his testimony at trial, and cross-examined based on the
24 fact that his testimony didn't jive with what his statement
25 said from him previously.

1 Q So the client or the Applicant had told you he wanted
2 to testify or did you talk with him about the fact that that
3 would be the only way to present that story or---

4 A Yes.

5 Q Okay. In regards to the actual jury charges, do you
6 recall anything that concerned you about the malice
7 instruction or the instruction having to do with breach of
8 peace?

9 A No, ma'am, had I thought there was a problem with the
10 charge I would of objected to it.

11 Q And you would normally only make a objection if there
12 was a lawful, a lawful reason or an issue of legal reason to
13 do that?

14 A Yes, ma'am.

15 Q Okay. Did you ever discuss with him requesting a
16 self-defense jury charge maybe during the trial if you
17 didn't discuss it prior?

18 A I may have. I just do not remember and what I would of
19 told him that it was inconsistent with him claiming that he
20 never had a gun at all and then claiming that he fired in
21 self-defense.

22 Q Okay. What about Mr. Adam Solesbee?

23 The statement that he made to the police is in the
24 record.

25 Do you recall getting witness statements in discovery?

1 A Yes, ma'am.

2 Q And do you recall Mr. Solesbee's statement at all?

3 A Somewhat.

4 MS. WHITE: May I approach, Your Honor?

5 THE COURT: You may.

6 Q If you wouldn't mind kind of just skimming through that
7 for me, and I believe it might be the third or fourth page
8 that discusses it, is that right?

9 A Number two.

10 Q Number two?

11 A Yes, ma'am.

12 Q If you'll look at number two?

13 A (Witness complies.)

14 You want me to look at Page 3?

15 Q Does it -- is the incident described in Page 2?

16 I'm sorry. Two to three.

17 A Okay.

18 Q If you will, just kind of scan that.

19 It basically -- the first question is does that look
20 like the statement you would of received in discovery?

21 A Yes, ma'am.

22 Q Okay.

23 THE COURT: Are we talking about Solesbee's statement
24 now?

25 MS. WHITE: Yes, Your Honor.

1 THE COURT: Okay.

2 MS. WHITE: I'm sorry.

3 THE COURT: That's all right.

4 MS. WHITE: Applicant's No. 1.

5 THE COURT: Right.

6 A All right.

7 Q And, to your knowledge from looking at that, does he
8 identify the Applicant in anyway?

9 A No, ma'am, I don't believe so.

10 Q And you would of been aware of that information at the
11 time you received discovery?

12 A Yes.

13 Q Do you recall if you reviewed that with the Applicant?

14 A Yes, he, he saw all of the discovery in the case.

15 Q And in regards to calling Mr. Solesbee as a witness,
16 the Applicant testified he believed he was listed as a
17 State's witness, but was not called.

18 Was there a thought process or a strategy to why
19 Mr. Solesbee was not called?

20 A By the defense?

21 Q By you.

22 Yes, Your Honor. I mean -- excuse me. Yes, Mr.
23 Welchel.

24 A That's a first.

25 THE COURT: That's okay.

1 A I didn't deem him to be trustworthy and/or believable.

2 Q Had you called him, do you think he would of been a
3 risky witness for y'all to call?

4 A At -- I don't recall if we talked about this or not
5 cause it's been so long ago, but if he had told me that he
6 wanted me to call him as a witness I would of told him that
7 you don't know what he's gonna say. We've got this to
8 cross-examine with, but he can still make an in-court
9 identification at this point---

10 Q And this---

11 A ---and that---

12 Q I'm sorry.

13 A And that the fact that he hadn't done that before
14 doesn't keep him from doing it now. Now, I don't recall if
15 he even asked me to call this fellow as a witness, but that,
16 that would of been my position I believe.

17 Q And Mr. Solesbee was in the vehicle, the truck, where
18 the victim was shot and, in fact, the shooting, the shooting
19 was at the truck that Mr. Solesbee was in, is that right?

20 A Yes, ma'am, he, he was friends with the victim and the
21 witnesses that are prosecuting for the State.

22 Q And, in fact, he's one of the ones that helped drive
23 the victim to the hospital that evening following the
24 shooting for treatment?

25 A Yes, ma'am.

1 Q Okay. So he was not necessarily a favorable witness
2 for the defense?

3 A (Witness nods negatively.)

4 MS. WHITE: Your Honor, I think that's all I have at
5 this time.

6 THE COURT: Mr. Brough.

7 MR. BROUGH: Thank you, Your Honor.

8 CROSS-EXAMINATION

9 BY MR. BROUGH

10 Q Mr. Whelchel, as to the -- Adam Solesbee, is it fair to
11 say that the statement that he gave was significantly
12 different than the version of events given by the other two
13 people in the vehicle he was in?

14 A You talking about his statement versus their testimony?

15 Q Yes, sir.

16 A I think it may of been. I don't recall. I mean --.

17 Q Okay. Well, you were present in Court when Mr. Smith
18 was testifying about the fact that the other car blocked his
19 vehicle in that---

20 A Oh, yeah.

21 Q ---the vehicle he was in?

22 Okay. On Applicant's 1, on that statement, if you
23 could for me, sir, starting on Page 2, if you would for me,
24 read the portion of Applicant's 2 (sic) beginning with they
25 were on the road.

Richard Welchel - Cross-examination
by Mr. Brough

1 A That Biggerstaff?

2 Q Yeah.

3 A Okay. How far do you want me -- or do you just want to
4 stop me?

5 Q Just go through the following page and end with the I
6 didn't see a gun statement on the -- right there if you
7 would. See right here.

8 A Okay. They were on the road that Biggerstaff is on.
9 They pulled in front of us and then in the parking space on
10 the left of us. Santos got out and walked over to the
11 passenger side of the Honda. I don't know what words were
12 exchanged, but he looked over the car and told Jerry, in
13 Spanish, to pull behind us, pull behind them so they could
14 not leave. Santos and the passenger were still talking, and
15 I jumped out and yelled I want my fucking pistol back. He
16 said I know. I have to go back and get it.

17 Santos, I think that's Junior, opened the door and
18 kicked the passenger. I stepped up on the inside of the
19 door and hit him through the sunroof. He was laying across
20 to the driver's lap trying to push away. His feet was
21 hanging out and I decided to grab his boots. We all got
22 back in the truck.

23 Jerry Gaston had and turned to the left hard and spun
24 around. We were getting ready to leave and traffic was
25 coming. We stopped and I heard about four shots. Glass

Richard whelchel - Cross-examination
by Mr. Brough

1 came in, hit me in the face. The driver door window was
2 broken out. I looked out the window and saw the passenger
3 walking back to the car from the gas pump area and the
4 driver standing just outside the car. I didn't see a gun.

5 Q So actually Mr. Solesbee's in the other vehicle and his
6 version of events sort of supports what Mr. Smith was
7 saying, is that right?

8 A You got to say that again.

9 Q Okay. Mr. Solesbee was in the other vehicle, in the
10 victim's vehicle, correct?

11 A Yeah.

12 Q Okay. And his version of events actually supports---

13 A Oh, oh, okay. I'm sorry.

14 Q ---what Mr. -- Mr. Solesbee's version of events
15 actually support what Mr. Smith was indicating about being
16 blocked in, et cetera, correct?

17 A Oh, yeah, about the cars being blocked in.

18 Q And---

19 A Yeah.

20 Q And, in fact, I believe, at trial -- and there was a
21 bench conference about Mr. Solesbee potentially testifying.
22 That's obviously not preserved on the transcript.

23 what was said at that conference?

24 Do you remember?

25 A No, sir.

Richard Whelchel - Cross-examination
by Mr. Brough

1 Q Okay. Would you agree with me though that Mr.
2 Solesbee's statement actually helps support Mr. Smith's
3 defense in this case?

4 A Yeah, this statement might.

5 Q Yes, sir. I understand that. Yes, sir.

6 All right. Thank you. No further questions.

7 A All right.

8 MS. WHITE: Nothing further, Your Honor.

9 THE COURT: All right. You may step down.

10 MS. WHITE: Your Honor, the State has no other
11 witnesses.

12 THE COURT: All right. Mr. Brough, I'll hear from you.

13 MR. BROUGH: Your Honor, we would simply argue that the
14 Applicant has shown that the result in the case could of
15 potentially been different given the ineffective assistance
16 of trial counsel and we would ask for a ruling to the same.

17 THE COURT: State.

18 MS. WHITE: Thank you, Your Honor.

19 We would -- the State would obviously argue that he's
20 failed to meet his burden of proof, that there's no showing
21 that counsel was deficient in any manner.

22 Applicant failed to demonstrate that had Mr. Solesbee
23 been called, even based on his statement, or had a
24 self-defense jury charge been requested, which, because of
25 the evidence, most likely would of been denied anyway, that

1 the outcome of this trial would of changed, and so we would
2 ask that the application be denied.

3 THE COURT: All right. I'll take it under advisement
4 and advise you of my decision.

5 Thank you.

6 MS. WHITE: Thank you, Your Honor.

7

8 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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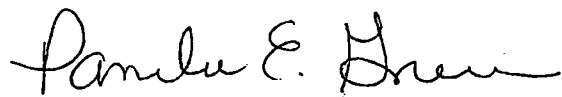
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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas Nonjury for Spartanburg County, South Carolina, on the 18th day of September, 2014.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

April 17th, 2015

A handwritten signature in cursive script, reading "Pamela E. Green", is written over a horizontal line.

PAMELA E. GREEN, Court Reporter

PUBLIC SAFETY DEPARTMENT

CITY OF SPARTANBURG
P.O. BOX 1746 - 145 W. BROAD ST.
SPARTANBURG, S.C. 29304

CASE NUMBER

03-0918-08

WITNESS INTERVIEW FORM

Name: Adam Lee Salesbee Address: _____

Telephone Number: _____ Social Security Number: _____

Date of Birth: _____ Today's Date: 3/28/08 Time: 1814

This is the statement of Adam Salesbee who
resides at _____ The statement
was taken at City Hall 145 W. Broad St. Spartanburg SC
29306. It was taken on 3-28-08 at 1814 hours.

I was at my house and Jerry DelaRosa called me around
4:30pm. I don't know his cell phone number but his house
number is 285-4235. My little brother, Thomas Salesbee,
answered the phone and I heard him say I don't want to
go but Adam probably will. He hung the phone and told me
that "Some Nigger stole Jerry's brother's 45." and that Jerry was
gonna be there in a minute to pick me up. Jerry's brother
is Ezekiel Dela Rosa (Zeke). I put on my shoes and
waited. Jerry got there about 4:45pm. He said "Whats going
down Anus!" He told me what happened. He said "Some niggers

Time Interview Began: 1814 p.m. Time (Statement/Interview) was completed: 1944 p.m.I have read this statement consisting of 4 page(s), and I swear or affirm that the facts contained therein are true and correct.

I further state that I have received a copy of this statement.

SWORN TO AND SUBSCRIBE TO BEFORE ME

THIS _____ DAY OF _____, 20____

NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: _____

Signed: Adam SalesbeeWitness: Adrian T. Patton

Witness: _____

VOLUNTARY STATEMENT

PAGE 2 OF 4

NAME Adam Salesbee

CASE NUMBER

03-0818-08

got into his house and stole the .45. We just trying to get it back. Santos was already with Jerry. Jerry must have picked him up after work. I think he works at Foam Installation Company. We then got in the truck and we went to Bigger Staff. When we got there at about 5:00 pm Santos called the guys and told them that we were there. Then after about 10 min we left because Biggerstaff has a lot of cameras. We went to the Lil Cricket at the train trussel. We backed into a parking spot on the right side of the store. The guys called Santos back and asked what we were driving. Santos told them a truck and then said I see you and hung up. I saw them at the stop sign in a Black Honda Accord with a sunroof. They were on the road that Bigger Staff is on. They pulled in front of us and then in a parking space on the left of us. Santos got out and walked over to the passenger side of the Honda. I don't know what words were exchanged but he looked over the car and told Jerry in Spanish to pull behind them so they could not leave. Santos and the passenger were still talking and I jumped out and yelled "I want my fucking pistol back!" He said "I know we have to go back and get it." Santos (Jr) opened the door and kicked the passenger. I stepped up on the inside of the door and hit him through the Sunroof.

WITNESS: Adrian T. Potts

WITNESS: _____

Signature of person giving voluntary statement

VOLUNTARY STATEMENT

PAGE 2 OF 4

CASE NUMBER

03-0918-08

NAME:

Adam Solesbee

He was laying across to the drivers lap trying to push away. His feet was hanging out and I decided to grab his boots. We all got back in the truck. Jerry gassed it and turned to the left hard and spun around. We were getting ready to leave and traffic was coming. We stopped and I heard about 4 shots. Glass came in and hit me in the face. The driver door window was broken out. I looked out the window and saw the passenger walking back to the car from the gas pump area and the driver standing ~~right~~ just outside the car. I didn't see a gun. Jerry drove through the trussel on the wrong side and took a right. We went up the hill and right at the curve we stopped. Santos and I started screaming Jerry's name because he fell out after he said "I'm hit" in Spanish. I looked at his hands and I seen blood all over them. His lips were white. Santos drove from the middle seat. We took a left then a right and went over Ashville Hwy. We then got to the hospital but it wasn't the right place. I yelled for help and the person told me we had to take him to the E.R. They came out with a wheel chair and said we had to get him in the wheel chair. Me and Santos did and then they moved him to the E.R. That's when the police got there. The driver was about six foot, bald or shaved head, wearing a white T-shirt.

WITNESS:

William D. Fetter

WITNESS:

Adam Solesbee

Signature of person giving voluntary statement

VOLUNTARY STATEMENT

PAGE 4 OF 4

NAME: Adam SolesbeeCASE NUMBER
03-0918-08

The passenger had a birth mark around his right eye and had a cap on with thick pieces of hair sticking out of it. The hair was nappy. He was wearing blue jeans and a large T-Shirt. Both were black males and seemed to be about 21 to 25 years old.

Santos told me that these guys lived behind a car dealership on Ashville Hwy. where across the highway is a car wash.

End of statement at 1944 hours on 3-28-08
at 145 W. Broad St. Spring, SC. 29306.

WITNESS: Adrian T. Potts

WITNESS: _____

Signature of person giving voluntary statement

LS000 : 00057 (06/11/08)

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2013-CP-42-0534

Kenneth D. Smith, #297395,

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

This matter comes before the Court by way of an Application for Post-Conviction Relief filed January 30, 2013. The Respondent made its Return on or about March 27, 2014. An evidentiary hearing into the matter was convened on September 18, 2014, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Christopher D. Brough, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Richard Whelchel, Esquire, also testified. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, the Appellate Court records, and the trial transcript.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the October 2008 term of the Spartanburg County Grand Jury for murder (2008-GS-42-6013) and the July 2009 term for breach of the peace of a high and aggravated nature (2009-GS-42-

3470). The Applicant was represented by Richard Whelchel, Esquire. On September 10, 2009, the Applicant proceeded to trial and was convicted by a jury. The Honorable J. Derham Cole sentenced Applicant to life for murder and ten years for breach of the peace of a high and aggravated nature.

A timely notice of appeal and Anders brief were filed on Applicant's behalf. The South Carolina Court of Appeals dismissed Applicant's appeal. State v. Smith, Op. No. 2012-UP-178 (filed March 14, 2012). The Remittitur was returned on March 30, 2012.

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel, in that;
 - i. Counsel failed to object to the trial court's improper comments on the facts and failed to move for a mistrial or new trial on that basis;
 - ii. Counsel failed to object to the judge's instruction on the facts of the murder offense that reduced the State's burden of proof;
 - iii. Counsel failed to object to the judge's instruction on the facts of the breach of peace charge that lessened the State's burden of proof;
 - iv. Counsel failed to object to the judge's mandatory presumption, burden-shifting and confusing jury instruction on the malice element of murder.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their

credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. This Court found the testimony of Counsel to be more credible than the testimony of Applicant as to all allegations raised in the application and at the hearing.

In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume the counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

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SPARTANBURG COUNTY
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Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

Applicant testified that he was at the scene of the shooting, but claimed he did not fire the shots. Applicant alleged that the shooter "must have been" John Sainvil, his co-defendant. In addition to his own testimony, Applicant testified that the defense called Eugene Brannon as a witness. Applicant testified that Adam Solesbee was listed as a possible State witness, but was never called at trial. However, Applicant claimed that Solesbee did not place the gun in Applicant's hand in his statement to police and Counsel should have called Solesbee to assist in the defense. Applicant also testified that the victim started the fight and Counsel should have requested a self-defense jury instruction. However, Applicant acknowledged that he asserted a defense the entire time that he had not shot the gun, not that he shot in self-defense.

Applicant testified that Counsel failed to object when Ruiz identified Applicant as "the guy who killed my brother," when asked by the trial court to clarify which "him" the witness was describing. (ROA p. 115, lines 15-16). Applicant acknowledged that Counsel extensively examined Ruiz about inconsistencies with his statement and testimony and pointed out that Ruiz had never previously identified the Applicant as the shooter.

Applicant testified that Counsel failed to object to the jury instructions when the trial court improperly instructed the jury that they could infer malice because the use of a deadly weapon. (ROA p. 401, lines 6-7). Applicant stated that the charge violated the holding in State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009). Applicant also testified that the instructions regarding the charge of breach of peace were improper because it should not say "is guilty," but this Court is unclear as to which specific part of the charge he alleges is improper.

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