

VOLUME THREE OF FOUR

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

J. C. Buddy Nicholson, Jr., Circuit Court Judge

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S.C. Supreme Court

DAVID ROCQUEMORE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001213

APPENDIX

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1 A. Well, I -- I would sell retail, sports --
2 sporting goods, sold sneakers, handbags for women,
3 and children -- children's clothes, accessories. I
4 did custom, customized -- customized gold teeth.
5 Just like kind of like a variety -- a variety store
6 out of the back of my truck.

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

8 BY MR. SAVAGE:

9 Q. State's exhibit number 45 is a photograph
10 that's now before the jury.

11 A. Yes, sir.

12 Q. And if you would, would you describe the type
13 of vehicle that is, the type of truck that is?

14 A. It's a GM, a GMC Yukon. Six doors, including
15 the two in the rear.

16 Q. Is that the truck that you were driving August
17 13th?

18 A. Yes, sir.

19 Q. And if you would -- do you have that little
20 clicker thing?

21 A. Yes, sir.

22 Q. May I take a look at it?

23 (There was off-the-record discussion
24 regarding the laser pointer.)

25 BY MR. SAVAGE:

1 Q. I would like point to different portions of
2 that photograph and ask you if you can describe what
3 this object is.

4 A. That was my table that I used.

5 Q. What do you mean a table that you used? What
6 did you use it for?

7 A. I used -- the table that I used to set my
8 stand up. To, you know, set my merchandise on so
9 when customers come by, they can look at it and -- or
10 pick and choose to see what they would like for
11 themselves or...

12 Q. And when you set this table up, where was the
13 locale that you used to set it up?

14 A. I used -- well, I used to set up my -- my
15 storefront at the side of a little gas station on
16 Orangeburg Road down the street from where I live at,
17 with permission.

18 Q. Now, is that in -- what county?

19 A. It's in Dorchester County.

20 Q. Who were the type of customers that you would
21 have that would come and view your merchandise and
22 purchase from you? What's the nature of the
23 business? Who would do business with you?

24 A. Well, all -- all walks of life. Men, women,
25 white, black, business people. I also had Dorchester

1 County sheriffs and a couple officers, for them to
2 purchase from me, and I had a few Summerville's
3 police department that made purchases from me.

4 Q. Did you have, like, regular customers?

5 A. Yes, sir.

6 Q. Now, in these red boxes, what was in these
7 boxes?

8 A. Sneakers, Nike shoes.

9 Q. And if you look up close at that photograph,
10 could you tell the type of sizes you carry?

11 A. I carried all sizes, a variety of sizes.

12 Q. And would it be displayed on those boxes, if
13 the jury looked at the picture later on?

14 A. Yes.

15 Q. And what were these things in the middle?

16 A. Those were my handbags, some of the handbags
17 that I would take with me.

18 Q. Are they in containers or bags?

19 A. Well, I just kept those bagged due to the size
20 of the different handbags.

21 Q. Okay. And what is this material over here?

22 A. Those are -- those are mostly Jordans.
23 They're just different Brands. Those are Jordans.
24 The ones in the orange boxes are just regular Nikes.

25 Q. And this document that we're trying to bring

1 closer to the attention of the -- of the jury at this
2 time, it appears to be a paper taped to the back of
3 your door.

4 A. Yes, sir.

5 Q. And what is this document?

6 A. That's my Dorchester County business license.

7 Q. And was that part of your business? I mean,
8 that particular business, the selling business, that
9 you had to obtain a license and you're documented
10 with the county and the...

11 A. Yes, sir.

12 Q. --- jurisdiction? And was that displayed
13 appropriately and prominently when you would sell
14 your wares?

15 A. Yes, sir.

16 Q. What was the reason you had a gun in your
17 truck on the night of August 13th-14th?

18 A. Well, mostly in my -- in my car, that's where
19 I would keep it at. Due to the nature that I dealt
20 with on a cash only and a high volume of cash and
21 merchandise, I'd always hide it in my vehicle.

22 Q. Did you ever use that weapon against anyone
23 from the time you had it?

24 A. No.

25 Q. At the time you had it, did you fill out all

1 of the appropriate forms that are requested by the
2 government to be able to do a background check on you
3 and make sure that you were an authorized party to
4 have that type of gun?

5 A. Yes, sir, I did.

6 Q. Were you carrying that gun legally and
7 lawfully at all times in which you had it?

8 A. Yes, sir, I was.

9 Q. What was the reason you retrieved, why you
10 took that gun from the vehicle four o'clock in the
11 morning August 14th?

12 A. To defend myself with it.

13 Q. When you retrieved that gun, when you took
14 that weapon out of the car, did you fire it
15 immediately?

16 A. No, I didn't.

17 Q. Did you try to use other ---

18 MS. KNEESE-SHEALY: Object to the form.

19 THE COURT: Rephrase that, Counsel.

20 BY MR. SAVAGE:

21 Q. How did -- how did you try to use that weapon
22 before you fired it?

23 A. I just used it like -- I was trying to use it
24 like you would use any other object in a swinging
25 motion to defend yourself.

1 Q. Before you used the gun, what other actions
2 did you take to defend yourself before you even got
3 the gun?

4 A. I -- I tried to run.

5 Q. And after you ran, was running away
6 successful?

7 A. No.

8 Q. Did you try to get in your car?

9 A. Yes, sir.

10 Q. Your truck?

11 A. Yes, sir.

12 Q. Were you prevented from getting in your truck?

13 A. Yes, sir.

14 Q. What did you do at that time when you were
15 trying to get into your truck? What did you do to
16 protect yourself?

17 A. I just -- I was just swinging and kicking. I
18 was just holding on.

19 Q. Was that successful?

20 A. No, sir.

21 Q. And then you retrieved your gun?

22 A. Yes, sir.

23 Q. And did you -- again, you've told us several
24 times, you didn't fire that gun when you get it?

25 A. No, sir.

1 Q. You tried to use that as you would a hammer or
2 a mallet or a wrench or ---

3 A. Yes, sir.

4 Q. --- a broomstick or any other object?

5 A. Just as a -- just another heavy -- a heavy
6 object.

7 Q. At the time you fired the gun, had all other
8 attempts to get these fellows off you failed?

9 A. None of them worked.

10 MR. SAVAGE: Kindly answer any questions
11 the prosecutor might have.

12 THE WITNESS: Yes, sir.

13 MS. KNEESE-SHEALY: May it please the
14 Court.

15 THE COURT: Yes.

16 CROSS-EXAMINATION

17 BY MS. KNEESE-SHEALY:

18 Q. Mr. Rocquemore, as I understand your
19 testimony, you got beat that night?

20 A. Yes, ma'am.

21 Q. And beat?

22 A. Yes, ma'am.

23 Q. And beat?

24 A. Yes, ma'am.

25 Q. And beat?

1 A. Yes, ma'am.

2 Q. Well, let's go over your injuries a little
3 bit. You saw the photographs that were presented in
4 the courtroom, didn't you?

5 A. Yes, ma'am.

6 Q. And you actually went to the hospital that
7 evening; did you not?

8 A. Yes, ma'am.

9 Q. You had a swollen lip, didn't you?

10 A. I had a busted lip, ma'am.

11 Q. A busted lip?

12 A. Yes, ma'am.

13 Q. Okay. You had a busted lip. You had an
14 abrasion on your forehead; did you not?

15 A. My head was -- it was messed up.

16 Q. Your head was messed up?

17 A. Yes. I don't ---

18 Q. Is that what you're saying?

19 A. Yes, ma'am. I don't know, even know what the
20 abrasion is.

21 Q. You don't know -- okay. You don't know what
22 an abrasion is. When you got to the hospital, you
23 went to the emergency room; is that correct?

24 A. No. I'm not sure where I was at or where they
25 took me to.

1 Q. You recall going to the hospital; do you not?

2 A. Yes, I went to the hospital.

3 Q. You recall the hospital then x-raying you; do
4 you not?

5 A. I'm not sure what they were doing, ma'am.

6 Q. You don't know what an x-ray is,
7 Mr. Rocquemore?

8 A. Yes, ma'am.

9 Q. You do know what an x-ray is?

10 A. Yes.

11 Q. Do you recall being x-rayed while you were
12 there?

13 A. I'm not sure, ma'am. They did numerous things
14 to me.

15 Q. Okay. They did numerous things to you. They
16 were checking you out; is that correct?

17 A. That's right.

18 Q. Because you had told the officer you had had a
19 headache; is that right?

20 A. I'm -- I don't recall telling the officer
21 that, ma'am.

22 Q. You don't recall telling him that? Did you --
23 while you were at the emergency room, did they put a
24 cast on anything?

25 A. No, ma'am.

1 Q. Did they give you any prescription painkiller?

2 A. No, ma'am.

3 Q. They told you to take some Tylenol and put ice
4 on your wounds; is that correct?

5 A. They never -- they didn't tell me anything.
6 They just told the officers that they could take me
7 back.

8 Q. They could take you back to the jail; is that
9 correct?

10 A. Yes, ma'am.

11 Q. And so the same morning that you went to the
12 hospital you were then released that same day; is
13 that correct?

14 A. Yes, ma'am.

15 Q. They didn't keep you overnight?

16 A. No, ma'am.

17 Q. They didn't put a cast on anything?

18 A. No, ma'am.

19 Q. And do you recall them giving you a Tylenol or
20 a Motrin while you were there?

21 A. I don't think they gave me anything.

22 Q. You don't think they gave you anything?

23 A. Not that I can recall, ma'am.

24 Q. Okay. So there you were at a hospital, being
25 seen by a doctor, and they didn't even give you a

1 Tylenol. Is that what your testimony is?

2 A. Like I said, I don't -- I'm really not sure.

3 Q. But you were beat?

4 A. Yes, ma'am.

5 Q. And beat?

6 A. And beat.

7 Q. And beat?

8 A. Yes, ma'am.

9 Q. And you were beaten by not one and not two but
10 three people? Is that your testimony?

11 A. I'm not sure how many people I was beaten by.

12 MS. KNEESE-SHEALY: If you could pull up
13 state's 19.

14 I beg the Court's indulgence just a
15 moment.

16 BY MS. KNEESE-SHEALY:

17 Q. Showing you what has previously been marked as
18 state's exhibit number 34.

19 MS. KNEESE-SHEALY: And could we lower
20 the lights a bit, please.

21 BY MS. KNEESE-SHEALY:

22 Q. This is a picture taken of you at the
23 hospital; is that correct?

24 A. Yes, ma'am.

25 Q. Okay. Could we see 35? And I see a dark area

1 on your forehead. That came from these beatings?

2 A. My -- my face didn't look like that before I
3 was beaten up.

4 Q. Oh, you're saying this isn't an accurate
5 photograph?

6 A. It's an accurate photograph, yes, ma'am.

7 Q. Okay. But you're saying that's not what it
8 looked like?

9 A. I didn't -- I didn't have a chance to look at
10 my injuries, ma'am.

11 Q. You agree, do you not, that you're sitting in
12 a hospital bed, Mr. Rocquemore?

13 A. Yes, I am.

14 Q. You agree, do you not, that you were released
15 from the hospital that day?

16 A. I was.

17 MS. KNEESE-SHEALY: Could we see the next
18 exhibit, please.

19 BY MS. KNEESE-SHEALY:

20 Q. And, again, this is you, Mr. Rocquemore, in
21 the hospital that day; is that correct?

22 A. Yes, ma'am.

23 Q. And this is the head that got beaten and
24 beaten and beaten?

25 A. Yes, ma'am.

1 Q. Next exhibit, please. And this is the hand
2 that tried to swing at people and get them out of
3 your way?

4 A. That would be my left hand, ma'am.

5 Q. That would be your left or would not?

6 A. It is.

7 Q. Is that your left hand?

8 A. Yes, ma'am.

9 Q. And is that the hand that you were using when
10 you were swinging in the car while holding on to
11 something else with your other hand?

12 A. Yes, ma'am.

13 Q. Okay. And so those swinging efforts caused
14 that hand. Is that correct?

15 A. Can you repeat the question, Ms. Prosecutor?

16 Q. Is that a picture of your hand while you're
17 sitting in the hospital bed on August 14th?

18 A. Yes, it is.

19 Q. Okay. Is that the hand you used to swing
20 supposedly at people that evening?

21 A. Yes.

22 MS. KNEESE-SHEALY: Can we see the next
23 exhibit.

24 BY MS. KNEESE-SHEALY:

25 Q. And, similarly, that's the palm of your hand?

1 A. Yes, ma'am.

2 MS. KNEESE-SHEALY: Thank you. You can
3 take that off. Take that off, please.

4 BY MS. KNEESE-SHEALY:

5 Q. So just to make sure I understand then, when
6 those medical personnel were checking you all out,
7 you left, having not gotten any painkiller including
8 an over-the-counter Tylenol or Motrin; is that
9 correct?

10 A. Like I said, I don't -- I can't recall getting
11 anything; but due upon my arrival to the Charleston
12 Detention Center, I was placed in a medical unit, and
13 that's where I received treatment.

14 Q. Okay. And is the treatment that you received,
15 that was for your injuries to your face and to your
16 hands?

17 A. Well, they -- what they had to do was just
18 monitoring me.

19 Q. They were what?

20 A. Monitoring me. Due to the swelling issue,
21 they -- monitored my head trauma.

22 Q. I'm sorry, I'm having a hard time hearing you.
23 They were minor? Is that what you said?

24 A. No, ma'am. I said they were monitoring.

25 Q. Oh. They were monitoring you?

1 A. Yes, ma'am.

2 Q. And that's because you had come in from the
3 hospital when you were booked in; is that correct?

4 A. It was really the swelling to my head, yes,
5 ma'am.

6 Q. Because of the swelling to your head?

7 A. Yes, ma'am. And all of the bruises and, you
8 know, just what they were able to see with their
9 eyes.

10 MS. KNEESE-SHEALY: Okay. Now, if I
11 could have state's exhibit 45 brought back up,
12 please.

13 BY MS. KNEESE-SHEALY:

14 Q. Tell me the name of your side business again.
15 Frontline Enterprise?

16 A. Yes, ma'am.

17 Q. And did I understand you correctly to say you
18 sell customized gold teeth out of the back of your
19 car or out -- off the table?

20 A. Well, that's one of the items that I would
21 show.

22 Q. Okay. And this reflects the back of your
23 vehicle where the sneakers are?

24 A. Yes, ma'am.

25 Q. And when you said that there were pocketbooks

1 in the black bag, are those knock-off pocketbooks?

2 A. No, ma'am.

3 Q. You sell -- what kind of pocketbooks do you
4 sell?

5 A. Different, a different variety of pocketbooks,
6 ma'am.

7 Q. Do you sell Louis Vuitton bags?

8 A. Yes, ma'am.

9 Q. You do sell Louis Vuitton bags?

10 A. Yes, ma'am.

11 Q. And tell me again where you set that table up.
12 Where is that?

13 A. Down the street from where I lived at,
14 at E S Arco (phonetic) gas station on Orangeburg
15 Road.

16 Q. And you're telling this jury those are real
17 Louis Vuitton bags?

18 A. Yes, ma'am.

19 Q. That you've got in a garbage bag in the back
20 of your car; is that correct?

21 A. Yes, ma'am.

22 Q. In looking in the back of your car, it's true,
23 isn't it, that there is nothing missing from back
24 there. Is that correct?

25 A. I wouldn't say that, ma'am.

1 Q. You wouldn't say there is nothing missing?

2 A. I'm really not -- I'm really not sure if there
3 were items -- items missing or not. From that
4 picture, I can't tell, also, ma'am.

5 Q. Well, what do you mean by the picture you
6 can't tell? You're not able to see it, or you
7 just...

8 A. Well ---

9 Q. --- don't remember?

10 A. Well, in my -- I had -- I had merchandise from
11 the rear of my vehicle all the way to the front
12 seats. Where the seats are laying down, I had -- my
13 back was completely full of merchandise.

14 Q. The back was full of merchandise?

15 A. The back of the truck.

16 MS. KNEESE-SHEALY: Okay. Could I see
17 state's exhibit 45, please. Is that 44? Forty-four.

18 I beg the Court's indulgence just one
19 moment.

20 THE COURT: All right. Well, wait a
21 minute.

22 MS. KNEESE-SHEALY: I've got -- could we
23 -- we should take that off for just a second, please.

24 May I approach the court reporter,
25 Your Honor?

1 THE COURT: Yes. Did you say 44?

2 MS. KNEESE-SHEALY: I did.

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

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

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

8 BY MS. KNEESE-SHEALY:

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

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

13 BY MS. KNEESE-SHEALY:

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

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

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

18 A. It's a Taurus catalogue.

19 Q. What is a Taurus catalogue?

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

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

24 A. No, ma'am.

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

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

2 A. Yes, ma'am.

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

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

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

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

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

22 A. No, ma'am.

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

25 A. No, ma'am.

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

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

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

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

9 THE COURT: I'm sorry?

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

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

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

16 BY MS. KNEESE-SHEALY:

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

19 A. In -- in the past.

20 Q. Regarding these events, Mr. Rocquemore?

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

25 Q. So even though Chris Thomas had been your

1 friend for how many years? Since 1999?

2 A. Yes, ma'am.

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

5 A. That's right.

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

9 A. Yes, ma'am.

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

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

15 Q. He wasn't upset about anything?

16 A. No, ma'am.

17 Q. Not at all?

18 A. Not at all.

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

20 A. Not at all.

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

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

25 Q. Is that your testimony?

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

2 Q. And Chris Thomas wasn't upset?

3 A. No, ma'am.

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

5 When you went to the party in Summerville, you

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

7 Mr. Eason and Mr. Denson?

8 A. No, ma'am.

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

10 A. No, ma'am.

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

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

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

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

15 mean, you know.

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

17 A. I think it might have been Dexter.

18 Q. Dexter made the introductions?

19 A. Yes.

20 Q. Okay. And you got along with those guys while

21 you were at that party; isn't that true?

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

23 Q. Okay. And you left and in fact went over to

24 Troy Eason's house; is that correct?

25 A. Yes, for a short time.

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

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

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

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

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

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

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

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

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

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

24 Q. You told us about your gun.

25 A. Yes, ma'am.

1 Q. You keep your gun in your console?

2 A. Yes, ma'am.

3 Q. Is that correct?

4 A. Yes, ma'am.

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

7 (Ms. Kneese-Shealy reviews exhibits.)

8 BY MS. KNEESE-SHEALY:

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

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

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

15 A. Yes, ma'am.

16 Q. And you had a loaded spare magazine?

17 A. Yes, ma'am.

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

20 A. Yes, ma'am.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 A. Yes, I did.

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

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

6 Q. And where were your feet?

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

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

14 A. Leaning.

15 Q. Excuse me?

16 A. Leaning, ma'am.

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

19 A. What I said was leaning.

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

21 A. Leaning.

22 Q. Leaning?

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

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

1 the console?

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

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

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

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

11 A. Yes, ma'am.

12 Q. With one hand?

13 A. Yes, ma'am.

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

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

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

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

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

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

25 Q. That's what your testimony is?

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

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

6 A. That's right.

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

9 A. Yes, ma'am.

10 Q. Who swung a punch at you?

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

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

16 A. Yes, ma'am.

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

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

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

24 A. I did the -- I did the best to protect myself.

25 I wasn't really too concerned with faces or names. I

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

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

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

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

10 A. No, ma'am.

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

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

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

15 A. I didn't...

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

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

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

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

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

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

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

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

11 A. Yes, ma'am.

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

15 A. Yes, ma'am.

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

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

21 Q. You were dragged?

22 A. Yes. Pulled out of my truck.

23 Q. Did your face get all scraped up?

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

1 Q. Pulled and beaten?

2 A. Yes, ma'am.

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

6 A. Yes, ma'am.

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

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

12 Q. You don't know that either?

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

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

15 A. Yes.

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

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

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

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

1 once I had my gun in my hand.

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

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

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

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

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

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

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

19 A. That is correct.

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

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

24 BY MS. KNEESE-SHEALY:

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

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

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

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

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

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

11 A. They were.

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

14 A. Yes, ma'am.

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

18 A. No, ma'am.

19 Q. You didn't slam the door?

20 A. No, ma'am.

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

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

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

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

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

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

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

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

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

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

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

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

23 A. Pardon me?

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

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

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

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

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

8 A. Despite the fact I had a weapon.

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

11 A. No, ma'am.

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

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

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

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

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

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

1 individuals, yes, ma'am.

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

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

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

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

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

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

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

15 A. No, ma'am.

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

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

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

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

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

1 were you not, Mr. Rocquemore?

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

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

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

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

12 A. Yes, ma'am.

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

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

21 Q. Trying to protect yourself?

22 A. Yes, ma'am.

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

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

1 I was -- I was in police custody.

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

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

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

13 A. Not at all, ma'am.

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

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

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

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

22 Q. The gun fired?

23 A. Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

25 A. No, ma'am.

1 Q. --- that evening?

2 A. No, ma'am.

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

5 A. No, ma'am.

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

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

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

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

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

17 A. Yes, ma'am.

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

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

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

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

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

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

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

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

9 A. No, ma'am.

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

12 A. Yes, ma'am.

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

15 A. Yes, ma'am.

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

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

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

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

1 Q. You were never given the opportunity?

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

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

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

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

9 BY MS. KNEESE-SHEALY:

10 Q. Do you want me to repeat that?

11 A. Yes, ma'am.

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

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

17 Q. Okay, two officers.

18 A. --- and placed me inside.

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

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

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

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

3 Q. So the answer is no?

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

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

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

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

21 A. No, ma'am.

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

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

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

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

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

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

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

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

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

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

19 THE COURT: I sustain that.

20 BY MS. KNEESE-SHEALY:

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

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

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

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

5 Go ahead.

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

8 BY MS. KNEESE-SHEALY:

9 Q. They were trying to kill you?

10 A. Yes, ma'am.

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

14 A. Yes, ma'am.

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

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

22 Q. They never stopped beating you?

23 A. Yes, ma'am.

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

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

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

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

6 A. Yes, ma'am.

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

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

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

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

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

18 A. No, ma'am, no.

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

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

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

25 A. No, ma'am.

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

2 A. No, ma'am.

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

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

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

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

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

24 A. Pardon me?

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

1 happened?

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

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

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

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

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

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

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

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

21 BY MS. KNEESE-SHEALY:

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

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

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

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

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

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

11 BY MS. KNEESE-SHEALY:

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

14 A. Yes, ma'am.

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

19 A. Yes, ma'am.

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

22 A. Yes, ma'am.

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

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

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

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

4 Q. But you're saying that now?

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

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

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

20 A. Yes, ma'am.

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

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

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

3 A. Yes, ma'am.

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

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

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

13 A. Yes, ma'am.

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

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

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

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

1 night.

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

4 A. Ma'am?

5 Q. Why it happened?

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

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

13 A. Yes, ma'am.

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

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

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

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

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

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

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

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

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

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

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

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

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

24 BY MS. KNEESE-SHEALY:

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

1 and ring had been stolen?

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

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

7 A. Say it again, ma'am?

8 Q. Who is Mark?

9 A. Mark, that's my brother.

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

14 A. Yes, we talked.

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

24 A. Yes, ma'am.

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

1 on the bottom?

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

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

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

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

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

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

18 THE COURT: Please be seated, sir.

19 What's your objection, please?

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

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

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

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

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

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

23 THE COURT: Well ---

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

1 he did.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 THE COURT: Well...

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

4 THE COURT: That's a different objection.

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

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

14 MR. SAVAGE: Thank you.

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

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

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

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

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

1 THE COURT: Are y'all ready?

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

4 THE COURT: Okay.

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

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

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

10 THE COURT: Still waiting on the bailiff.

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

12 THE COURT: They're coming in now.

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

15 THE BAILIFF: All seated, Your Honor.

16 THE COURT: Thank you. Please be seated.

17 Go ahead. Proceed with your questions.

18 Go ahead, Counsel.

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

22 CROSS-EXAMINATION (CONTINUED)

23 BY MS. KNEESE-SHEALY:

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

1 testimony; is that correct?

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

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

5 MS. KNEESE-SHEALY: Okay.

6 BY MS. KNEESE-SHEALY:

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

9 A. Yes, ma'am.

10 Q. Is that correct?

11 A. Yes, ma'am.

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

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

15 Q. Someone got the gun from you?

16 A. Yes, ma'am.

17 Q. Is that correct?

18 A. Yes, ma'am.

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

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

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

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

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

3 REDIRECT EXAMINATION

4 BY MR. SAVAGE:

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

11 A. Yes, sir.

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

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

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

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

19 THE COURT: What's your objection?

20 MS. KNEESE-SHEALY: May we approach?

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

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

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

3 BY MR. SAVAGE:

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

7 A. Yes.

8 Q. How did you leave the police station?

9 A. I'm not...

10 Q. Who transported you?

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

13 Q. Do you remember riding in an ambulance?

14 A. No, sir.

15 Q. You don't remember anything?

16 A. No, sir.

17 Q. Had you lost consciousness?

18 A. Yes, sir.

19 Q. And were you examined at the hospital?

20 A. Yes, sir.

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

24 A. Yes, it is.

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

1 placed in a hospital at the jail?

2 MS. KNEESE-SHEALY: Objection ---

3 THE WITNESS: It's a medical ward.

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

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

6 BY MR. SAVAGE:

7 Q. And are there doctors and nurses there?

8 A. Yes.

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

11 A. Yes.

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

14 BY MR. SAVAGE:

15 Q. Sir?

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

17 BY MR. SAVAGE:

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

22 A. Yes.

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

25 A. Yes, sir.

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

4 A. I had bruised hands.

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

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

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

13 A. No, sir.

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

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

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

23 A. Yes, sir.

24 Q. Now, did they record those calls?

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

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

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

4 A. Yes, sir.

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

7 A. Yes, sir.

8 Q. That were recorded?

9 A. Yes.

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

12 A. Yes.

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

15 A. Yes, I did.

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

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

20 THE WITNESS: Yes.

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

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

24 BY MR. SAVAGE:

25 Q. But when you talked...

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

2 (Ms. Kneese-Shealy reviews document.)

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

7 THE COURT: Have you seen this?

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

10 THE COURT: Approach. Approach.

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

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

16 BY MR. SAVAGE:

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

20 A. I -- I attempted to.

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

23 A. Yes.

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

1 A. Yes.

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

4 A. Yes.

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

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

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

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

12 BY MR. SAVAGE:

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

20 A. That's my ring.

21 Q. That's what, sir?

22 A. That is my diamond ring.

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

24 A. That is my Seiko Kinetic watch.

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

1 A. No, sir.

2 Q. Was it taken from you?

3 A. Yes, sir.

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

6 A. Yes, sir.

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

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

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

18 A. Yes, sir.

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

20 A. No. It was on ---

21 Q. --- container?

22 A. It was on my finger.

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

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

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

5 A. Yes, I have.

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

9 A. No, sir.

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

13 A. Yes, I did.

14 Q. Did you try to get away?

15 A. Yes, sir, I did.

16 Q. Did you try to close the door?

17 A. Yes, sir, I did.

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

20 A. Yes, sir, I did.

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

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

25 THE COURT: Yes. I sustain that.

1 BY MR. SAVAGE:

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

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

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

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

10 RE-CROSS-EXAMINATION

11 BY MS. KNEESE-SHEALY:

12 Q. Mr. Rocquemore.

13 A. Yes, ma'am.

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

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

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

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

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

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

5 A. (There was no response.)

6 Q. Did it?

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

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

14 A. No, ma'am.

15 Q. No?

16 A. No, ma'am.

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

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

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

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

25 MS. KNEESE-SHEALY: I have no further

1 questions. Thank you, Your Honor.

2 THE COURT: Anything else, Mr. Savage?

3 MR. SAVAGE: No, sir.

4 THE COURT: You may step down, sir.

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

7 MR. SAVAGE: The state would rest.

8 THE COURT: Defense?

9 MR. SAVAGE: The defense rests.

10 (The defense rests.)

11 MR. SAVAGE: I forget where we were.

12 THE COURT: Anything else?

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

14 THE COURT: All right.

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

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

1 the evening. Do not discuss the case in any way
2 whatsoever. Do not conduct any type of investigation
3 on your own. Do not expose yourself to any type of
4 media coverage. If you'll please report back
5 tomorrow -- hold on just a second.

6 Counsel approach.

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

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

12 THE COURT: Ladies and gentlemen, if
13 you'll please report back tomorrow at 10:00 a.m.,
14 we'll be ready to proceed. Thank you very much.
15 Have a good night.

16 (Whereupon, the jury leaves the courtroom
17 at approximately at 5:47 p.m.)

18 THE COURT: Please be seated. Motion?

19 MR. SAVAGE: Your Honor, we repeat the
20 same motion we made at the end of the state's case.

21 THE COURT: Any response by the state?

22 MR. DURANT: Your Honor, I think,
23 obviously, at this point it's a jury issue.

24 THE COURT: All right. I deny that
25 motion.

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

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

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

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

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

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

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

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

18 MR. SAVAGE: We gave everybody ---

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

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

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

24 THE COURT: All right. Yes, sir.

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

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

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

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

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

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

14 THE COURT: All right. Go ahead.

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

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

23 MR. SAVAGE: Self-defense.

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

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

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

4 MR. DURANT: Yeah.

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

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

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

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

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

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

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

15 THE COURT: Well, what about ---

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

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

23 MR. DURANT: Pardon me?

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

1 under certain circumstances?

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

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

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

13 MR. DURANT: Well...

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

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

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

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

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

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

1 the Ninth Circuit, actually.

2 THE COURT: Here?

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

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

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

9 THE COURT: I argued it before? Myself?

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

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

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

18 THE COURT: What about his argument ---

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

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

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

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

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

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

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

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

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

17 MR. DURANT: Yeah.

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

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

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

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

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

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

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

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

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

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

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

7 THE COURT: All right.

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

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

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

12 THE COURT: Well, I mean ---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 MR. SAVAGE: Yes, sir.

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

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

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

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

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

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

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

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

12 THE COURT: Well, I remember ---

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

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

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

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

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

1 think.

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

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

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

8 MR. SAVAGE: Correct.

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

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

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

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

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

24 MR. SAVAGE: That would be our position.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 MR. SAVAGE: No, sir.

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

1 among all this.

2 (The Court further reviews document.)

3 THE COURT: You have 6-B about
4 intoxication: You may judge the witness's level of
5 intoxication as a factor in gaging a witness's
6 credibility to accurately recall the witnessed events
7 in question.

8 I might normally mention intoxication in
9 the -- or the use of alcoholic substances in the
10 self-defense context. I don't usually specify about
11 witness recollection unless there is some testimony
12 that it was at some level to affect their ability to
13 perceive. I'm probably not inclined to charge that.

14 MR. DURANT: I would agree, Your Honor.
15 I've never seen that charge before.

16 MR. SAVAGE: The eyewitness, Rodney
17 Gibbs, there is mixed evidence about his level of
18 intoxication. I think the female who testified today
19 said that he was intoxicated, one or two of them,
20 that would alter his perception as to ---

21 THE COURT: That's part of it, but...

22 MR. SAVAGE: --- what led to the
23 difficulty that led to David leaving the scene and
24 going to his truck.

25 THE COURT: Do you have to have medical

1 testimony on that? Expert testimony?

2 MR. SAVAGE: For intoxication?

3 THE COURT: Not as to intoxication
4 itself, but observing someone's demeanor as to its
5 ability to affect their ability to recall.

6 MR. SAVAGE: I don't think you need an
7 expert witness. I think that's common knowledge.

8 THE COURT: Well, I'll think about that
9 overnight.

10 MR. DURANT: I think he can argue it,
11 Your Honor, but I don't think he's entitled to a jury
12 charge on that. I'm not aware of any cases that ever
13 stated that intoxication, you know, affects
14 credibility.

15 MR. SAVAGE: Well, anybody that went to
16 college knows there's some mornings you wake up and
17 don't know where you were the night before.

18 THE COURT: Well, I mean, it's a question
19 of whether it's related or not for sure. He's citing
20 Judge Erwin's Request to Charge, though, so we'll
21 talk about that. I'll look it.

22 MR. SAVAGE: Thank you, Your Honor.

23 THE COURT: What else? Anything? Did
24 y'all find your set?

25 MR. DURANT: Pardon me?

1 MS. KNEESE-SHEALY: We did.

2 MR. DURANT: The jury charges? Yes, sir,
3 we did find our set. Thank you.

4 THE COURT: I've generally found that if
5 Jenny makes a note of it, it's true.

6 MR. SAVAGE: We'll keep that in mind.

7 THE COURT: Did you find his charge on
8 the castle doctrine?

9 MR. DURANT: I found it, Your Honor. I
10 just haven't had a chance to read it yet.

11 THE COURT: Okay. Those are the ones I'd
12 just make sure you have them so you can look at it
13 tonight. It looks like three or four of them.

14 MR. DURANT: There's C-1, C-2, C-2a,
15 C-2b.

16 THE COURT: Right. There might be one
17 later, too, that references it.

18 This has nothing to do with this case,
19 but earlier looking at our list, regarding what other
20 judges have charged, has anyone charged the castle
21 stuff yet?

22 MR. SAVAGE: Judge, the C-5f.

23 THE COURT: C-5f.

24 MR. SAVAGE: Intoxication of victim.

25 THE COURT: But that relates to

1 self-defense. That's what I was saying. I usually
2 mention the use of alcohol and all when it comes to
3 self-defense. Let me look at it. Yes. That's part
4 of my self-defense discussion. I may say it more
5 generically, though, that you may consider the use of
6 alcohol by all those involved.

7 MR. SAVAGE: Well, is there any testimony
8 that the defendant had any alcohol?

9 THE COURT: Well, all the -- the ladies
10 were talking about people drinking in general. So I
11 think it would probably be appropriate to be more
12 generic in that regard.

13 Anything else? I mean, well, that's
14 probably where we should be as far as it's enough to
15 make -- let you prepare. Murder, voluntary
16 manslaughter, accident, self-defense. Involuntary, I
17 will be looking at tonight, as well as the castle
18 doctrine.

19 And if y'all could get here about 9:15,
20 we'll finish up all of that before the jury comes in
21 at 10:00. All right?

22 MR. DURANT: Thank you, sir.

23 MR. SAVAGE: Thank you.

24 MS. KNEESE-SHEALY: Your Honor, may
25 Mr. Savage and I approach the bench just a moment?

1 THE COURT: Yes.

2 (There was an off-the-record bench
3 conference.)

4 (Said bench conference is concluded.)

5 (Whereupon, at approximately 6:15 p.m.,
6 the trial is recessed to the following day,
7 Wednesday, July 18, 2007, at 9:15 a.m.)

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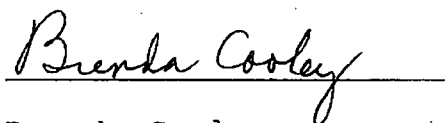
25

CERTIFICATE OF THE COURT REPORTER

I, the undersigned, Brenda Cooley, Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true and accurate transcript of record of the proceedings had and the evidence introduced in the hearing of the captioned trial, Volume IV of V, pages 774 through 1075, inclusive, relative to appeal, in the Court of General Sessions for Charleston County, Charleston, South Carolina, on the 17th day of July 2007.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

March 17, 2008



Brenda Cooley

Circuit Court Reporter

State of South Carolina) The Court of General Sessions
County of Charleston) The Ninth Judicial Circuit
State of South Carolina,)
) vs.) Case No. 05-GS-10-8601
) 05-GS-10-8602
David Michael Rocquemoore,)
) Defendant.)
_____)

VOLUME V of V

TRANSCRIPT OF RECORD

July 18 and 19, 2007

Charleston, South Carolina

B E F O R E:

The Hon. Daniel F. Pieper, Judge, and a Jury

A P P E A R A N C E S:

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Pages 1077-1386

Brenda Cooley
Circuit Court Reporter

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E X H I B I T S

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(No state's exhibits in Volume V of V.)

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* * *

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

5 THE COURT: All right.

6 MR. SAVAGE: Judge.

7 THE COURT: Yes, sir.

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

10 THE COURT: Before? Consideration for
11 what?

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

14 THE COURT: Go ahead.

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

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

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

1 MR. SAVAGE: Exactly.

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

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

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

9 MR. SAVAGE: Yes.

10 THE COURT: Okay. Go ahead.

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

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

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

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

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

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

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

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

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

1 to leave.

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

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

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

19 MR. SAVAGE: I know.

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

25 MR. SAVAGE: Do you know if that juror

1 was under oath when you questioned him?

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

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

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

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

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

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

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

25 I mean, the problem is we let the juror

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

3 MR. SAVAGE: My fault.

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

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

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

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

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

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

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

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

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

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

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

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

19 THE COURT REPORTER: Yes, Your Honor.

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

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

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

25 (The court reporter reads back the

1 following:

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

5 "No.

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

7 "No.

8 "Have you discussed this case in any way?

9 "No, sir.

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

11 (The reading is concluded.)

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

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

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

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

23 Go ahead.

24 (The court reporter reads back the
25 following:

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

3 "We've talked.

4 "You have talked? What about?

5 "Not on that. Just like...

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

8 "No. About his wedding and stuff.

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

12 (The reading is concluded.)

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

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

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

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

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

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

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

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

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

4 MR. SAVAGE: I told you that.

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

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

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

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

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

1 about the case in any way whatsoever.

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

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

8 MR. SAVAGE: Yes, sir.

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

11 MR. SAVAGE: Yes, sir.

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

14 MR. SAVAGE: Yes, I should have.

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

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

19 THE COURT: Send for Mr. Nelson.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 MR. DURANT: And ---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 prior to the enactment of that statute.

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

7 Mr. Savage, let me hear from you.

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

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

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

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

22 MR. SAVAGE: Well, it extends it.

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

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

3 THE COURT: All right.

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

6 THE COURT: What about that?

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

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

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

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

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

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

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

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

9 MR. SAVAGE: Correct.

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

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

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

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

1 standard language that was placed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 (Mr. Nelson enters the courtroom at

1 approximately 9:35 a.m.)

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

7 MR. SAVAGE: Yes, sir.

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

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

15 THE CLERK: Thank you.

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

20 MR. NELSON: Yes, Your Honor.

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

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

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

7 MR. NELSON: Yes, Your Honor.

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

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

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

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

25 That was pretty much it, Your Honor.

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

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

7 THE COURT: Did he mention the case?

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

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

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

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

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

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

22 MR. NELSON: Yes, sir.

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

25 MR. NELSON: Yes, sir.

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

3 MR. NELSON: I believe Saturday night.

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

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

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

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

15 THE COURT: All right. Counsel approach.

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

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

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

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

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

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

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

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

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

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

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

21 THE COURT: Okay.

22 MR. NELSON: And I know I told Mr. Durant
23 after that, but...

24 THE COURT: So you told Mr. -- your
25 colleagues over here that he was on the panel?

1 MR. NELSON: I believe so, Your Honor.

2 THE COURT: And that was when he got
3 selected or before qualifications?

4 MR. NELSON: I'm not sure about before
5 qualifications. I'm almost positive I told him after
6 he was selected.

7 THE COURT: Okay. Anything else?

8 MR. SAVAGE: Not from this witness,
9 Your Honor.

10 THE COURT: Anything else from the state?

11 MR. DURANT: No, sir.

12 THE COURT: All right. Thank you.

13 MR. NELSON: May I leave, Your Honor?

14 THE COURT: You may.

15 (Mr. Nelson is excused and leaves the
16 courtroom.)

17 THE COURT: Anything else?

18 MR. SAVAGE: Well, your Honor, that
19 creates a much more serious situation than we had
20 before, in the fact that that information was
21 communicated to trial counsel, that a juror was not
22 forthright in his discussions with the Court, which
23 they were aware of and that they had -- they were
24 aware of that he was related and had a close
25 relationship to a member of the jury. That shifts it

1 now from the juror and Mr. Nelson, and trial counsel
2 had a duty to report.

3 THE COURT: Well, as I indicated, I
4 wanted to ask all of y'all when -- when all that
5 transpired, but regardless, your remedy in the case,
6 you agreed ---

7 MR. SAVAGE: It's a violation of due
8 process.

9 THE COURT: How is that if the juror's
10 been excused and there is no disclosure? Assuming no
11 disclosure took place, and we'll find that out, but
12 -- we'll ask that question first to make sure.

13 But absent any type of disclosure to that
14 jury -- as you know, I've been very much involved in
15 jury discussions and disclosures this last couple of
16 years, so you're going to have to convince me.

17 MR. SAVAGE: And this -- this is not a
18 *Pittman* case. This is a case that involves not only
19 a jury but a trial officer of the Court where the
20 trial officer of the Court had knowledge of a
21 misconduct that was unreported, which they have an
22 obligation to do.

23 They have an obligation to report it to
24 the Court, and they have an equal obligation for due
25 process purposes to report it to defense counsel.

1 THE COURT: Well, I mean, but that still
2 begs the question of an appropriate sanction,
3 assuming everything else were appropriate for that,
4 and I certainly am not convinced that dismissal would
5 be an appropriate sanction, and then that begs
6 whether or not another sanction would be appropriate
7 under the circumstances, but I would be more
8 concerned about whether the jury was tainted in any
9 type of way. That's the normal analysis.

10 MR. SAVAGE: Well, the only ---

11 THE COURT: I can't see how this rises to
12 a due process violation at this stage without some
13 showing that his opportunity for a fair trial has
14 been affected by -- by that whole process.

15 I concur that if -- all else remaining
16 equal, that if any attorney here is being asked a
17 question that says do you know anybody in this office
18 or that, and there have been -- it's been my
19 experience that if a juror did not properly represent
20 to me, whether it's the state or the defense, usually
21 someone will walk forward and tell me that if they're
22 aware of that.

23 It doesn't mean they were aware of it at
24 that moment. That's just been my experience over the
25 last eleven years, that someone would tell me that.

1 You know, I don't know what point they became aware
2 of it.

3 What point did y'all become aware of it?

4 MR. DURANT: Your Honor, my only
5 recollection of any conversation with Mr. Nelson is I
6 passed him in the hall one day and he said that
7 his ---

8 THE COURT: That was after?

9 MR. DURANT: --- cousin was on the jury
10 panel.

11 THE COURT: That was after?

12 MR. DURANT: No. I believe that was
13 before.

14 THE COURT: Okay.

15 MR. DURANT: And ---

16 THE COURT: I mean, did you actually know
17 who it was?

18 MR. DURANT: No.

19 THE COURT: Okay.

20 MR. DURANT: I mean, like I say, I passed
21 him in hall, literally passed him in the hall, and he
22 made a comment that his cousin was on the jury.

23 THE COURT: Well, I assume if you had
24 known you would have disclosed that.

25 MR. DURANT: I would have disclosed it,

1 Your Honor.

2 THE COURT: I mean, Mr. Savage, I am --
3 it seems to me that this should turn on whether or
4 not the jury has been affected in any way.

5 I agree that I should have been made
6 aware of it as soon as possible and...

7 MR. SAVAGE: Here's an example how the
8 defendant is harmed, Your Honor. If the juror's been
9 disqualified, there are now 13 jurors. One of the
10 alternates has been picked randomly. If it had been
11 disclosed in a timely fashion, the jury composition
12 may not be the same as it is now.

13 THE COURT: If that were the case, then
14 we would have an absolute rule of law that that would
15 be the procedure to follow.

16 As you're well aware, based on your
17 substantial criminal experience, it is not unusual
18 from time to time to have a juror realize -- well, in
19 this very case, the juror -- one of the jurors
20 ultimately indicated that they did not recognize your
21 wife until after we started the case. And that's not
22 uncommon that such things take place.

23 Now, there's a difference between some
24 mistake or duty to disclose, etc., granted, but the
25 point of it being that it is not unusual for those

1 issues to come up.

2 Now, that being the case, it would be
3 very easy for appellate courts to just say as a
4 matter of a *per se* rule, because that argument would
5 always be there that you would have a different
6 composition of your jury, that it would be a
7 fundamental violation of the defendant's due process
8 rights that require a defined course of action, but
9 they have never accepted that as a legal proposition.

10 MR. SAVAGE: With all respect, Your
11 Honor, the situation which you have described is a
12 relationship of more than 21 years ago in a work
13 environment.

14 THE COURT: I recognize that it's
15 different, but there's a difference between making a
16 mistake and something that you know that should be
17 disclosed, but...

18 MR. SAVAGE: A difference between a
19 mistake, with a change in name and all the passage of
20 time and whatnot, and actual knowledge during the
21 trial which is not disclosed. There's a huge
22 difference between the two.

23 It's -- I think intentional is maybe a
24 strong word, but it may be an appropriate word.

25 The information, Mr. Nelson says, was

1 disclosed to one of the trial counsel for the state
2 during the course of the trial. And that was not
3 disclosed to the Court.

4 Now but for happenstance of it being
5 reported by somebody in Mount Pleasant over the
6 weekend to my office that they believed something
7 was inappropriate, it would have never been
8 questioned.

9 It's not that this matter was brought to
10 the attention of the Court as in the first case you
11 cited where the juror stood up and said, Judge, I've
12 made a mistake, I realize that I know Ms. Vonleigh
13 (phonetic) from days at SCNB.

14 THE COURT: I agree the scenarios are
15 different if that knowledge is on the other side, but
16 Mr. Durant said he didn't have that knowledge.

17 MR. SAVAGE: But Mr. Nelson has testified
18 under oath that he reported it to at least one of the
19 trial counsel and actually included more than one.

20 THE COURT: Well, did he tell you his
21 name, Mr. Alfaro?

22 MR. ALFARO: He didn't tell me his name,
23 Judge. He said that he had a cousin on the jury
24 panel. And that was before qualification. I didn't
25 go to qualification. I didn't -- I didn't know his

1 name.

2 THE COURT: At any time on the day we
3 drew this jury, did you know his cousin was on the
4 jury?

5 MR. ALFARO: No, sir.

6 THE COURT: Did you, Mr. Durant?

7 MR. DURANT: Yeah, I think he told me
8 that his cousin was on the jury panel, but I didn't
9 know who his cousin was.

10 THE COURT: Did he ever tell you the
11 name?

12 MR. DURANT: No, sir.

13 THE COURT: All right. When we drew the
14 jury, did you know the name at that point?

15 MR. DURANT: No, sir.

16 THE COURT: Okay.

17 MR. SAVAGE: But after the jury was
18 seated, Mr. Nelson says that he had a discussion with
19 counsel and told him that his cousin -- names don't
20 matter. The one name that matters is Mr. Juror. It
21 could have been any juror. The name doesn't matter.
22 They're on notice that "a juror" misled the Court
23 when he was seated on this jury.

24 THE COURT: All right. Let's get back.
25 What are you asking the Court to do, Mr. Savage?

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1 MR. SAVAGE: I think once it raises to
2 the level of not a mistake, and it's not something
3 that was discovered by happenstance, it's not
4 something that the juror brought to the attention of
5 the Court, it's not something that the prosecutor
6 brought to the attention of the Court, but it's
7 brought to the attention of the Court by defense
8 counsel because somebody happened to be observant in
9 the juror's neighborhood, I believe then that's a
10 different situation. That's a violation of due
11 process, the duty to disclose to the Court and
12 defense counsel.

13 The question is: What's the harm, and
14 what's the remedy? There's no question that due
15 process has been violated; but the language then I
16 think defense counsel has to make for the purposes of
17 this Court is the harm created by that violation, and
18 I'm not sure that we can tell that based on the
19 disclosures of the juror himself.

20 Perhaps at a minimum we have to
21 individually voir dire the remaining jurors, at a
22 minimum, and then the question is: If there has been
23 any taint, then I don't think that there's any
24 alternative to a mistrial.

25 THE COURT: Well, I don't need to

1 speculate about a taint until I hear from the jurors.

2 MR. SAVAGE: Yes, sir.

3 THE COURT: And almost an hour ago we
4 started with the assumption that I would talk to the
5 jurors. I'm not sure that absent that type of taint
6 disclosed by the jurors, though, you know -- I mean,
7 I still don't know what remedy you're asking for, and
8 I think the reason you want to ask for this is you
9 don't know what the jury is going to say either.

10 MR. SAVAGE: Correct.

11 THE COURT: And the question that you
12 would suggest would be?

13 MR. SAVAGE: The next step I think is an
14 individual voir dire of the jury.

15 THE COURT: The question which would be
16 to the juror?

17 MR. SAVAGE: Has the juror that's been
18 dismissed had any conversation about his relationship
19 with the Solicitor's Office or any information about
20 the case?

21 It's just not about the case, but it's
22 the relationship that would give credibility or
23 believability or enhance credibility or believability
24 to the state's position because of a voucher for, if
25 you will, by that juror of the good name of the trial

1 counsel.

2 THE COURT: Are all the jurors here?

3 (The bailiff leaves the courtroom.)

4 THE COURT: Mr. Clerk, call the jury in
5 one by one. As they come in, if you'll just note
6 their name and number, please, for the record. If
7 you would handle that, please. And then when they
8 come in the door, you can swear them in.

9 THE CLERK: Okay. So you want them to
10 come in. Where would you like them to ---

11 THE COURT: One by one, I want you to
12 tell me their name and number. Just right there is
13 fine.

14 THE CLERK: Just stand there?

15 THE COURT: Uh-huh. I don't want them to
16 feel like they're being interrogated, you know, on
17 the stand or something.

18 THE CLERK: And then you want me to swear
19 them?

20 THE COURT: Yeah.

21 (The bailiff returns to the courtroom.)

22 THE BAILIFF: We're missing some.

23 THE COURT: We're missing some still?

24 THE BAILIFF: Yes, sir.

25 THE COURT: Okay. Well, we can start

1 with the ones that are here.

2 THE BAILIFF: Okay.

3 THE COURT: They're not supposed to be
4 here till 10:00.

5 THE BAILIFF: Okay.

6 (Thomas Owens, Juror No. 200, enters the
7 courtroom at approximately 9:54 a.m.)

8 THE CLERK: Judge, this is Juror Thomas
9 Owens, Juror 200.

10 THE COURT: Sir, I just need to -- it's
11 nothing that concerns you per se. I just need to go
12 through a certain procedure I'm required to do.

13 MR. OWENS: Sure.

14 THE COURT: So if you wouldn't mind,
15 we're going to swear you in real quick and just ask
16 you a quick question.

17 THOMAS OWENS,
18 being first duly sworn by the clerk, is examined and
19 testifies as follows:

20 THE CLERK: Thank you.

21 THE COURT: All right, sir. As you know,
22 I had to dismiss one of the jurors.

23 MR. OWENS: Yes.

24 THE COURT: I just need to ask you: Did
25 that dismissed juror in any way discuss his

1 relationship -- to you or the other jurors, his
2 relationship with the Solicitor's Office, or did he
3 discuss the case in any way whatsoever?

4 MR. OWENS: No discussion with the case
5 whatsoever. If he discussed anything else with a
6 relationship, I don't remember hearing anything like
7 that.

8 THE COURT: Did you hear anything?

9 MR. OWENS: I didn't, no.

10 THE COURT: All right. And did you hear
11 him talk to other jurors about that?

12 MR. OWENS: No. Again, I didn't hear him
13 mention anything. We were kind of a quandary ---

14 THE COURT: I'm not saying you did.

15 MR. OWENS: No, I didn't. As a group of
16 jurors, I don't think anybody has any idea, and all
17 of a sudden he's gone. And so we've gone, hm, how
18 did he manage that? That's about the depth of the
19 conversation.

20 THE COURT: Okay. But they did not -- as
21 far as you know, he did not talk to y'all in any way
22 about either of those things?

23 MR. OWENS: No.

24 THE COURT: All right. Thank you. When
25 you go back to the jury room, if you will not discuss

1 what we're doing in here, please.

2 MR. OWENS: Okay, sir.

3 THE COURT: Thank you.

4 (Mr. Owens returns to the jury room.)

5 (Andrew Tash, Juror No. 259, enters the
6 courtroom.)

7 THE CLERK: Your Honor, this is juror
8 number 259, Andrew Tash.

9 THE COURT: All right. Sir,
10 procedurally, I need to do something. So don't worry
11 about it. It doesn't necessarily affect you or
12 anything anyone's done wrong. I'm just required to
13 swear you in and ask you a question. So if you don't
14 mind, we'll do that.

15 ANDREW TASH,
16 being first duly sworn by the clerk, is examined and
17 testifies as follows:

18 THE CLERK: Thank you.

19 THE COURT: All right. Sir, as you know,
20 I had to dismiss one of the jurors, and so I need to
21 ask you: Did the dismissed juror in any way discuss
22 his relationship to the Solicitor's Office or the
23 case in general in any way whatsoever?

24 MR. TASH: Not that I know of. He didn't
25 say anything to any of the jurors.

1 THE COURT: All right. Thank you, sir.
2 And if you would not discuss this when you go back
3 there. Thank you.

4 (Mr. Tash returns to the jury room.)

5 (John Gross, Juror No. 320, enters the
6 courtroom.)

7 THE CLERK: Sir, if you don't mind
8 standing right there, please.

9 Your Honor, this is juror number 320,
10 John Gross.

11 THE COURT: All right, Juror 320.

12 Sir, I need to ask you some questions.
13 Not that you or anyone did anything wrong. It's just
14 I have a certain procedure that we have to follow.
15 So I'm going to ask you to be sworn in, please.

16 JOHN GROSS,
17 being first duly sworn by the clerk, is examined and
18 testifies as follows:

19 THE CLERK: Thank you.

20 THE COURT: As you know, I've dismissed
21 one of the jurors, sir. I just need to ask: Did the
22 dismissed juror in any way discuss his relationship
23 to the Solicitor' Office or the case in general in
24 any way whatsoever?

25 MR. GROSS: Not that I know of, sir.

1 THE COURT: All right. Thank you. And
2 do not discuss this when you go back.

3 MR. GROSS: Okay.

4 (Mr. Gross returns to the jury room.)

5 (Donna McNeill, Juror No. 329, enters the
6 courtroom.)

7 THE CLERK: Your Honor, this is juror
8 number 329, Donna McNeill.

9 MS. MCNEILL: Good morning.

10 THE COURT: Good morning. Ma'am, I need
11 to ask you a question. It's not that anyone did
12 anything wrong. But I have to swear you in ---

13 MS. MCNEILL: Yes, sir.

14 THE COURT: --- and follow-up on
15 something. So if you don't mind, please be sworn.

16 DONNA MCNEILL,
17 being first duly sworn by the clerk, is examined and
18 testifies as follows:

19 THE COURT: Ma'am, as you know, I've
20 dismissed one of the jurors, and I need to know: Did
21 that dismissed juror in any way discuss his
22 relationship to the Solicitor's Office or the case in
23 general in any way whatsoever?

24 MS. MCNEILL: Not to my knowledge, no,
25 sir.

1 THE COURT: All right. Thank you, ma'am.
2 And if you would please not discuss this when you go
3 back. Thank you.

4 MS. MCNEILL: Yes, sir.

5 (Ms. McNeill returns to the jury room.)

6 (David McQueeney, Juror No. 330, enters
7 the courtroom.)

8 THE CLERK: Your Honor, this is juror
9 number 330, David McQueeney.

10 THE COURT: All right, sir. I need to
11 ask you a question. Not that anyone's done anything
12 wrong. It's just that I have to follow a certain
13 procedure. So if you wouldn't mind being sworn in,
14 please.

15 DAVID MCQUEENEY,
16 being first duly sworn by the clerk, is examined and
17 testifies as follows:

18 THE CLERK: Thank you.

19 THE COURT: As you know, I dismissed one
20 of the jurors, and I need to ask you: Did that
21 dismissed juror in any way discuss his relationship
22 to the Solicitor's Office or the case in any way
23 whatsoever?

24 MR. MCQUEENEY: He did not discuss the
25 case with me. I do know I went to school with him.

1 I do know that I think his cousin was a member of the
2 Solicitor's Office.

3 THE COURT: And so you knew that from
4 some prior experience?

5 MR. MCQUEENEY: Yes, sir.

6 THE COURT: Did that come up in any way
7 in the jury room?

8 MR. MCQUEENEY: No.

9 THE COURT: Did you know that it was that
10 juror?

11 MR. MCQUEENEY: I knew before we ran into
12 each other in the jury room, so...

13 THE COURT: Do you mean when you were on
14 the panel?

15 MR. MCQUEENEY: Right.

16 THE COURT: Downstairs in the panel room?

17 MR. MCQUEENEY: Yes, sir.

18 THE COURT: Okay.

19 Counsel approach.

20 (There was an off-the-record bench
21 conference. Said bench conference being concluded,
22 the following proceedings were had:)

23 THE COURT: Sir, let me ask you, were you
24 aware that the other juror did not -- did you hear my
25 question about did everyone -- did anyone have any

1 connection with the Solicitor's Office?

2 MR. MCQUEENEY: Yes, sir.

3 THE COURT: Were you aware that he did
4 not respond to that? Just out of curiosity.

5 MR. MCQUEENEY: I guess so. I didn't
6 really think about it at the time.

7 THE COURT: That's all I need to know.
8 Thank you.

9 MR. MCQUEENEY: Yes, sir.

10 THE COURT: Please do not discuss this
11 when you go back there.

12 MR. MCQUEENEY: Yes, sir.

13 THE COURT: Thank you.

14 (Mr. McQueeney returns to the jury room.)

15 (Cynthia Peeples, Juror No. 335, enters
16 the courtroom.)

17 THE CLERK: Your Honor, this is juror
18 number 335, Cynthia Peeples.

19 THE COURT: Ma'am, I need to ask you a
20 question.

21 MS. PEEPLES: Okay.

22 THE COURT: Not that anyone's done
23 anything wrong. I just have to follow up on certain
24 things sometimes just so we have it all written down.

25 MS. PEEPLES: Okay.

1 THE COURT: So I need to swear you in,
2 please.

3 CYNTHIA PEEPLES,
4 being first duly sworn by the clerk, is examined and
5 testifies as follows:

6 THE COURT: Ma'am, as you know, I
7 dismissed one of the jurors. I need to know: Did
8 that dismissed juror in any way discuss his
9 relationship to the Solicitor's Office or the case in
10 any way whatsoever with you or the other jurors?

11 MS. PEEPLES: No.

12 THE COURT: Okay. Thank you. Do not
13 discuss this when you go back.

14 MS. PEEPLES: Okay.

15 THE COURT: Thank you.

16 (Ms. Peeples returns to the jury room.)

17 (Hunter Bowie, Juror No. 20, enters the
18 courtroom.)

19 THE CLERK: Your Honor, this is juror
20 number 20, Hunter Bowie.

21 THE COURT: Sir ---

22 MR. BOWIE: Good morning.

23 THE COURT: Good morning. I need to ask
24 you a question. Not that anyone's done anything
25 wrong. It's just that I have to follow up on things

1 sometimes.

2 MR. BOWIE: Sure.

3 THE COURT: So I need to swear you in.

4 HUNTER BOWIE,

5 being first duly sworn by the clerk, is examined and
6 testifies as follows:

7 THE COURT: As you know, I dismissed one
8 of the jurors.

9 MR. BOWIE: Yes, sir.

10 THE COURT: I need to ask: Did that
11 dismissed juror in any way discuss his relationship
12 to the Solicitor's Office or the case in any way
13 whatsoever?

14 MR. BOWIE: No, sir. He -- he said that
15 he had a cousin that worked in the Solicitor's
16 Office, but other than that, he didn't say anything
17 about the case.

18 THE COURT: When did he say that he had a
19 cousin that worked for the Solicitor's Office?

20 MR. BOWIE: We were just in talking one
21 day, talking about procedures of the Court, and he --
22 he said, well, I have a cousin that works in the
23 Solicitor's Office and this is the way this happens,
24 this happens.

25 THE COURT: And was that downstairs, or

1 was that after I selected this jury?

2 MR. BOWIE: That was after the jury was
3 selected.

4 THE COURT: And y'all -- after the trial
5 had started?

6 MR. BOWIE: Yes, sir.

7 THE COURT: Okay.

8 Counsel approach.

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

12 THE COURT: And when you said that y'all
13 discussed procedures, what did you mean by that?

14 MR. BOWIE: I don't know that it's as
15 much procedures as just, you know, what does the
16 judge do while we're sitting there, what does the
17 prosecution do, or what kind of usually happens sort
18 of thing. And I think he was just saying, well, I
19 have a cousin that's a prosecutor, I'll ask him. You
20 know, sort of what -- I guess what papers you're
21 looking at, what the judge does, that sort of thing.

22 THE COURT: Okay. And so y'all did not
23 discuss the case?

24 MR. BOWIE: No, sir. No, sir. Just...

25 THE COURT: General stuff?

1 MR. BOWIE: Just -- right, general stuff.
2 Not -- nothing specific to the case.

3 THE COURT: All right. Now, did he
4 disclose to the other jurors that he had a cousin on
5 the jury or just to you?

6 MR. BOWIE: Oh. It was -- it was just
7 something he said. He said, I have a cousin that
8 works in the Solicitor's Office or prosecutor's
9 office or something.

10 THE COURT: Well, what I mean by that,
11 was he just telling you, kind of whispering right
12 beside you ---

13 MR. BOWIE: Oh.

14 THE COURT: --- or did he tell the whole
15 jury panel that?

16 MR. BOWIE: I heard him say that. I'm
17 not sure who he was directing it to, but I did hear
18 him say that.

19 THE COURT: Okay. Now, would that in any
20 way affect your ability to give everyone a fair and
21 impartial trial?

22 MR. BOWIE: No, sir.

23 THE COURT: All right. Now, if you'll go
24 back.

25 MR. BOWIE: Sure.

1 THE COURT: Please do not discuss this in
2 any way.

3 MR. BOWIE: Sure.

4 THE COURT: Thank you.

5 MR. BOWIE: Yes, sir.

6 (Mr. Bowie returns to the jury room.)

7 (Ruth Green, Juror No. 99, enters the
8 courtroom.)

9 THE CLERK: Your Honor, this is juror
10 number 99, Ruth Green.

11 THE COURT: Hello ma'am. Ma'am,
12 sometimes I have to just follow up on things. It
13 doesn't mean anyone did anything wrong. I just need
14 to make sure it's all in writing so if anyone wants
15 to have that information they can have it. So I need
16 to swear you in, please.

17 RUTH GREEN,
18 being first duly sworn by the clerk, is examined and
19 testifies as follows:

20 THE COURT: Ma'am, as you know, I have
21 dismissed one of the jurors, excused one of the
22 jurors. I need to know: Did that dismissed juror in
23 any way discuss with you or any other jurors, if
24 you're aware of it, that he had a relationship to the
25 Solicitor's Office, or did he discuss the case in any

1 way whatsoever?

2 MS. GREEN: He didn't discuss the case.

3 THE COURT: Okay.

4 MS. GREEN: I don't remember him saying
5 anything about the Solicitor's Office.

6 THE COURT: Okay. All right. Thank you,
7 ma'am. If when you go back, please do not discuss
8 this in any way when you go back there.

9 MS. GREEN: I won't.

10 THE COURT: Thank you.

11 (Ms. Green returns to the jury room.)

12 THE COURT: Mike, I need Mr. McQueeney
13 back.

14 THE CLERK: Okay.

15 (David McQueeney, Juror No. 330, returns
16 to the courtroom.)

17 THE COURT: Sir, one thing -- you'll just
18 remain under oath. One thing I neglected to ask you
19 is: Would that information that you received in any
20 way whatsoever affect your ability to give everyone
21 in this case a fair and impartial trial?

22 MR. MCQUEENEY: No, sir, not at all.

23 THE COURT: All right. Thank you, sir.
24 If you'll go back to the jury room. Please, again,
25 do not discuss anything.

1 (Mr. McQueeney returns to the jury room.)

2 THE COURT: So just for the record, the
3 two that indicated they had some conversation, I've
4 asked the follow-up question. I'm not saying that
5 it's dispositive. I just want to make sure I do have
6 that in the record.

7 Bring the next juror in, please.

8 (Ashley Parks Gallagher, Juror No. 202,
9 enters the courtroom.)

10 THE CLERK: Your Honor, this is juror
11 202, Ashley Parks Gallagher.

12 THE COURT: Good morning.

13 MS. PARKS GALLAGHER: Good morning.

14 THE COURT: I need to follow up on
15 something. Not that anyone's done anything wrong. I
16 have to make sure that we put everything down in the
17 record. So I need to ask you a question under oath
18 if you don't mind.

19 MS. PARKS GALLAGHER: Okay.

20 ASHLEY PARKS GALLAGHER,
21 being first duly sworn by the clerk, is examined and
22 testifies as follows:

23 THE COURT: Ma'am, as you know, I've
24 excused one of the jurors.

25 MS. PARKS GALLAGHER: Right.

1 THE COURT: I need to know: Did the
2 dismissed juror in any way discuss his relationship
3 to the Solicitor's Office or discuss the case in any
4 way?

5 MS. PARKS GALLAGHER: I believe the only
6 thing he said was that his cousin worked in the
7 building. That was pretty much all he said.

8 THE COURT: Did he say where in the
9 building?

10 MS. PARKS GALLAGHER: Uh-uh.

11 THE COURT: Okay.

12 MS. PARKS GALLAGHER: Other than that, he
13 really didn't talk at all.

14 THE COURT: Okay. Would that in any way
15 affect your ability to give everyone in the case a
16 fair and impartial trial?

17 MS. PARKS GALLAGHER: No, sir.

18 THE COURT: All right. Thank you.
19 Please do not discuss this when you go back there.

20 MS. PARKS GALLAGHER: All right, sir.

21 (Ms. Parks Gallagher returns to the jury
22 room.)

23 (William Shannon, Juror No. 236, enters
24 the courtroom.)

25 THE CLERK: Your Honor, this is 236,

1 William Shannon.

2 THE COURT: Sir, sometimes I need to
3 follow up on things. Not that anyone's done anything
4 wrong. I need to ask you a question under oath if
5 you don't mind.

6 WILLIAM SHANNON,
7 being first duly sworn by the clerk, is examined and
8 testifies as follows:

9 THE COURT: Sir, as you know, I've
10 excused one of the jurors.

11 MR. SHANNON: Yes, sir.

12 THE COURT: I need to -- can you come a
13 little closer? I'm having a hard time hearing you.
14 That's fine, wherever's comfortable.

15 I need to know: Did that dismissed juror
16 in any way discuss with you or any other jurors that
17 you know of, that -- some relationship with the
18 Solicitor's Office or discussed the case in any way
19 whatsoever?

20 MR. SHANNON: No, sir.

21 THE COURT: Okay. Thank you.

22 MR. SHANNON: All right.

23 (Mr. Shannon returns to the jury room.)

24 (Belinda Shumpert, Juror No. 240, enters
25 the courtroom.)

1 THE CLERK: Your Honor, this is juror
2 number 240, Belinda Shumpert.

3 THE COURT: Ma'am, I need to ask you a
4 question. Not that you or anyone's done anything
5 wrong. It's just that sometimes we have to follow up
6 on things. If you don't mind, I need to put you
7 under oath.

8 BELINDA SHUMPERT,
9 being first duly sworn by the clerk, is examined and
10 testifies as follows:

11 THE COURT: Ma'am, as you know, I excused
12 one of the jurors, and I need to know: Did that
13 juror in any way discuss his relationship to anyone
14 in the Solicitor's Office or discuss the case in any
15 way?

16 MS. SHUMPERT: No, sir.

17 THE COURT: Okay. Thank you.

18 (Ms. Shumpert returns to the jury room.)

19 (Carol Baloglu, Juror No. 301, enters the
20 courtroom.)

21 THE COURT: Good morning.

22 MS. BALOGLU: Good morning.

23 THE CLERK: Your Honor, this is 301,
24 Carol Baloglu.

25 THE COURT: Ma'am, I need to follow up on

1 something. Not that you or anyone's done anything
2 wrong. So I need to put you under oath and just ask
3 you a question if you don't mind. Go ahead.

4 CAROL BALOGLU,
5 being first duly sworn by the clerk, is examined and
6 testifies as follows:

7 THE COURT: As you know, I excused one of
8 the jurors.

9 MS. BALOGLU: Uh-huh.

10 THE COURT: So I need to ask: Did the
11 dismissed juror in any way discuss with you, or the
12 other jurors that you know of, any relationship to
13 the Solicitor's Office or connection or discuss the
14 case in any way?

15 MS. BALOGLU: No, sir.

16 THE COURT: Okay. Thank you.

17 MS. BALOGLU: Thank you.

18 THE COURT: Ma'am, please do not discuss
19 anything when you go back.

20 (Ms. Baloglu returns to the jury room.)

21 (Jarrett Lindon, Juror No. 161, enters
22 the courtroom.)

23 THE CLERK: Your Honor, this is juror
24 161, Jarrett Lindon.

25 THE COURT: All right. Sir, I need to

1 follow up on something. Not that you or anyone's
2 done anything wrong. It's just that we have to make
3 sure it's all put down and followed up. So I need to
4 swear you in and ask you a question if you don't
5 mind.

6 JARRETT LINDON,
7 being first duly sworn by the clerk, is examined and
8 testifies as follows:

9 THE COURT: Sir, as you know, I excused
10 one of the jurors. I need to ask: Did the excused
11 juror in any way discuss any relationship to or
12 connection to the Solicitor's Office or discuss the
13 case in any way whatsoever?

14 MR. LINDON: No, sir.

15 THE COURT: Okay. If you would go back
16 to the jury room. Please do not discuss this in any
17 way. Thank you.

18 (Mr. Lindon returns to the jury room.)

19 THE COURT: And, Mr. Clerk, when you go
20 back there, please remind them do not discuss this in
21 any way, just in case I didn't tell ---

22 THE CLERK: Yes, sir.

23 THE COURT: --- every single one of them.
24 I think I have, but...

25 THE CLERK: And that's -- all the jurors

1 are polled.

2 THE COURT: That's it? All right.

3 All right. I'll be happy to hear from
4 you, argument-wise, Defense, please.

5 MR. SAVAGE: Judge, what makes this
6 situation a little bit different, let me just be sure
7 that the characterization that the Court gave in
8 referring to one of the jurors...

9 THE COURT: I'm sorry?

10 MR. SAVAGE: So that I can distinguish
11 between the juror who acknowledged her association
12 with Ms. Vonleigh when she was Ms. Vonleigh, Cheryl
13 left SCN Bank in 1984. We got married in 1986.

14 THE COURT: I don't think you have to
15 spend any time on it. I recognized the distinction,
16 Mr. Savage. I said it on the record, that there is a
17 difference between something like that and a
18 situation where there may be a duty to disclose.

19 MR. SAVAGE: And we had been using that
20 as a similarity, bringing up the time that the juror
21 then disclosed to the Court "oh, I forgot to tell you
22 that my cousin is in the Solicitor's Office," but
23 here we have an important involvement.

24 Here we have the involvement of trial
25 counsel in the knowledge that a juror sitting on an

1 empanelled jury failed to disclose appropriately to
2 the Court. So it's not just a juror's dishonesty or
3 forgetfulness. It's something that the state who's
4 prosecuting the case, trial counsel, had knowledge
5 of.

6 Now, that fact was disclosed to other
7 jurors, one or more, two or more. The juror that
8 said that he was -- who was the most precise about it
9 said that he indicated that he wasn't talking
10 specifically to him. When the Court questioned him,
11 he said he heard that. He couldn't describe who else
12 may have heard that. The impression that he left, at
13 least with the defense counsel, was that he wasn't
14 being addressed directly. That was done after the
15 jury was empanelled.

16 The question then is the psychological
17 effects of that, of not maybe discussing the case but
18 bolstering the credibility of the state and the
19 prosecutors. And that could easily have been
20 prevented, whatever that harm is that we'll never
21 know. They said they can still be fair and impartial
22 and whatnot, but the question of the enhancement of
23 the believability and the credibility of the state's
24 prosecutors is in question, the extent of which we
25 don't know.

1 The only reason that this is a problem
2 before the Court this morning is because the state
3 failed to disclose that in a timely basis.
4 Therefore, the state should be sanctioned, and we
5 believe that the sanction is a mistrial.

6 The effect of a mistrial under these
7 circumstances would be the same as a dismissal.
8 We're not asking the Court to dismiss the charges.
9 We're asking for a mistrial.

10 THE COURT: Well, why would you say that
11 the -- that a mistrial under these circumstances
12 would be the same as a dismissal?

13 MR. SAVAGE: Because with a dismissal,
14 that's the end of the case.

15 THE COURT: I understand that, but ---

16 MR. SAVAGE: If it's a mistrial, it's
17 pending.

18 But the mistrial was caused by the state,
19 action or lack of action, and therefore the state
20 would have to suffer the consequences of a double
21 jeopardy argument. That's not here today.

22 We're not asking for a dismissal. We're
23 asking for a mistrial.

24 THE COURT: Mr. Alfaro, please stand.

25 (Mr. Alfaro complies.)

1 THE COURT: On the day that the jury was
2 selected, did you tell me you knew that the juror was
3 on there?

4 MR. ALFARO: On the selected panel? No,
5 Your Honor. I said I knew that he was in the jury --
6 the jury pool.

7 THE COURT: Okay. At what point did you
8 become aware that he had not answered my question?

9 MR. ALFARO: When it was brought up in
10 court and he was excused. I didn't know -- like I
11 said, I didn't go to jury qualification, so I don't
12 know who got up for what.

13 THE COURT: Okay.

14 MR. ALFARO: I didn't know his name until
15 -- I didn't know his name, that he was Nelson's ---
16 Michael Nelson's cousin, until it was brought up in
17 court.

18 THE COURT: So what you're saying is
19 Mr. Nelson told you he had a cousin, but he didn't
20 tell you the name?

21 MR. ALFARO: He said he had a cousin on
22 the jury -- in the jury pool. And I didn't know the
23 name.

24 THE COURT: Did Mr. Nelson at any point
25 tell you that his cousin was on this jury?

1 MR. ALFARO: Not that I remember him
2 telling me that.

3 THE COURT: Mr. Durant?

4 MR. DURANT: The same thing, Your Honor.
5 I remember passing Michael Nelson in the hall and him
6 mentioning that his cousin was on the jury panel. No
7 -- no -- and I'm talking about the jury pool. I
8 didn't know who his cousin was, and I found out that
9 his cousin was on the jury when Mr. Savage brought it
10 up in court.

11 THE COURT: Anything else, Mr. Savage,
12 case law-wise or anything?

13 MR. SAVAGE: Judge, we have, much like
14 the trial itself, a credibility issue here.

15 My recollection of Mr. Nelson, who has no
16 interest in the outcome of this case other than he
17 works in the office, says that he advised Mr. Alfaro
18 and he believes advised Mr. Durant following the
19 empaneling of the jury that his cousin was on the
20 jury, in the jury, petit jury. I believe that's what
21 he said.

22 THE COURT: Bring him back. Let's ask
23 him.

24 MR. SAVAGE: If I'm mistaken of that, I
25 stand corrected.

1 THE COURT: Bring Mr. Nelson back,
2 please.

3 MR. DURANT: It was my understanding that
4 he said he thought it might have been after, but it
5 could have been before.

6 MR. SAVAGE: Well, maybe the transcript
7 will tell.

8 THE COURT: Well, we'll just verify it
9 one way or another. It's too important a question.
10 If you're correct, it's not my role to rule on
11 whether or not there is some consequence down the
12 road.

13 (At approximately 10:25 a.m., there is a
14 pause in the proceedings. At approximately
15 10:30 a.m., the following proceedings were had:)

16 THE COURT: Any word on Mr. Nelson? I
17 guess he'd understand that I said for now, I mean.

18 MR. DURANT: All's I know is we're trying
19 to find him.

20 MR. ALFARO: Your Honor, I just called
21 over to our office. He wasn't physically in his
22 office, but I told the receptionist to please have
23 someone go find him and tell him to get here
24 immediately. And I tried his cell phone, as well,
25 but didn't get an answer but left a message.

1 (Mr. Nelson enters the courtroom at
2 approximately 10:31 a.m.)

3 THE COURT: Mr. Nelson, come forward,
4 please. You'll remain under oath.

5 MR. NELSON: Yes, Your Honor.

6 MICHAEL NELSON, ESQ.,
7 previously duly sworn, is examined and testifies
8 further as follows:

9 THE COURT: I just want to make sure we
10 clarify again the exact moment you disclosed that
11 your cousin was on the jury, the selected jury.

12 MR. NELSON: I don't know if I spoke to
13 them about it after he was -- I don't remember when.
14 I remember walking down the hall and, I believe,
15 Mr. Durant, saying my cousin's on the -- I don't
16 think I was talking about the jury or the jury panel
17 Monday morning. I don't remember. I don't remember.

18 THE COURT: What Monday are you talking
19 about? The Monday of this week ---

20 MR. NELSON: Last Monday.

21 THE COURT: --- or the Monday of last
22 week?

23 MR. NELSON: Last ---

24 THE COURT: The first, the first Monday?

25 MR. NELSON: I'm not positive about it.

1 I think the ---

2 THE COURT: Are you talking about the
3 qualification day?

4 MR. NELSON: Yes, Your Honor.

5 THE COURT: Okay.

6 MR. NELSON: I believe that's when I said
7 my cousin's on the jury. I think I said jury, but
8 not talking about the panel here, talking about the
9 qualifications.

10 THE COURT: Okay.

11 MR. NELSON: But I'm not a hundred
12 percent on that, Your Honor.

13 THE COURT: And you say you had a
14 conversation with Mr. Alfaro?

15 MR. NELSON: I know it was pretty much
16 the same thing, passing in the hallway.

17 THE COURT: You're not saying he was on
18 -- did you ever tell the name?

19 MR. NELSON: No. The most I said is
20 cousin.

21 THE COURT: Never a name to anyone?

22 MR. NELSON: No. Well, not to anybody
23 here. I mean, there's people in the office that know
24 my cousin separately.

25 THE COURT: Okay.

1 MR. NELSON: Well, not know him. Met him
2 through me.

3 THE COURT: And you've talked to them
4 about him being on the panel?

5 MR. NELSON: Not talk, but, like I said,
6 I think I said my cousin's on the jury.

7 THE COURT: Jury panel or jury?

8 MR. NELSON: I think after he was picked
9 for the panel on the jury. I don't -- I don't
10 remember. These conversations were passing by. They
11 weren't -- I don't remember when or exactly what was
12 said. They weren't -- in all honesty, they weren't
13 important conversations to me.

14 THE COURT: Okay. Anything further,
15 Mr. Savage, question-wise?

16 MR. SAVAGE: Yes, Your Honor. I'd like
17 you to ask the witness if he told me in the presence
18 of a third party that he spoke to Mr. Alfaro after
19 this jury was selected and told him that his cousin
20 was on the jury.

21 THE COURT: Did you tell Mr. Savage that?

22 MR. NELSON: Was that...

23 THE COURT: That it was after the jury
24 was selected?

25 MR. NELSON: Was that yesterday when we

1 spoke?

2 THE COURT: It would have been the only
3 time you talked to Mr. Savage.

4 MR. NELSON: I -- I don't think so. I'm
5 honestly not sure.

6 THE COURT: Okay. Well, but you're here
7 now telling me that you do not know for sure when you
8 told them?

9 MR. NELSON: Correct. I remember -- I
10 remember it was passing in the hallway. I don't
11 remember which day. And like I said, that's -- it
12 wasn't a stop-and-talk conversation. It was just two
13 people crossing in the hall.

14 THE COURT: Were you at jury
15 qualification?

16 MR. NELSON: No, Your Honor.

17 THE COURT: Okay.

18 MR. DURANT: May I ask a question,
19 Your Honor?

20 THE COURT: You need to tell me what the
21 question is, and I'll ---

22 MR. DURANT: Oh. I just want to ask him,
23 though, if he was under the impression that his
24 cousin had disclosed that information to the Court.

25 MR. NELSON: I believe my cousin talked

1 to me the Sunday before qualifications, asked me how
2 he can get off the jury. He goes, "I'm going to tell
3 the judge that I know you and you're my cousin."
4 That's what I assumed the whole time.

5 THE COURT: Okay.

6 MR. NELSON: Up until yesterday when I
7 spoke to Mr. Savage.

8 THE COURT: Okay. All right. If this
9 ever happens again, you tell the judge personally.

10 MR. NELSON: Yes, Your Honor.

11 THE COURT: Thank you.

12 MR. NELSON: May I be excused?

13 THE COURT: Uh-huh.

14 (Mr. Nelson is excused and leaves the
15 courtroom.)

16 THE COURT: All right. Mr. Savage,
17 arguments?

18 MR. SAVAGE: Your Honor, our position is
19 the same.

20 As a matter of practicality, it would be
21 of no benefit to say my cousin's on the jury panel.
22 The purpose of communicating that information is to
23 direct the solicitor's attention to who would be a
24 favorable juror. He wouldn't just say my cousin.
25 He'd provide more information of that.

1 So the more logical evaluation of his
2 statement is "my cousin's on the jury," because
3 there's no benefit of communicating that information
4 to the solicitor's staff before the panel is seated.
5 Out of the 300, God knows how many, people we had on
6 Monday, to say his generic relationship, "my cousin,"
7 is of no meaning.

8 THE COURT: Well, let's take that one
9 step. Let's suppose someone says they have a cousin
10 that works in the Solicitor's Office. Does that mean
11 they're automatically excused?

12 MR. SAVAGE: No, sir. It leads to the
13 next question, can you be fair and impartial, as you
14 did many of the jurors who revealed some at least
15 relationship, whatever.

16 I mean, there were many, many occasions
17 during the selection of this jury that Your Honor
18 asked would that affect your decision to be fair and
19 impartial to the state and the defense in this case.

20 That was not proposed to this potential
21 juror because the information was not provided to
22 the Court that it was appropriate to ask that
23 question.

24 THE COURT: Well, then that still brings
25 us back to the point, now that we've uncovered that

1 fact and the juror's been excused, why shouldn't I
2 determine this on whether or not this has indeed
3 prejudiced the defendant, because we have an
4 alternate?

5 MR. SAVAGE: We do, but we have also had
6 at least one, two, or more tainted jurors with
7 information that may not be direct about the case but
8 affects the credibility and the believability. The
9 key question ---

10 THE COURT: That's a different line of
11 argument. We're first trying to get to the threshold
12 about what -- this whole duty to disclose and whether
13 or not there is inappropriate harm that should be
14 rectified, but -- and, quite frankly, I'm not
15 convinced, I'm not prepared to say there was some
16 kind of intentional conduct on the part of the state.
17 I'm not sure the record rises to that level. And I
18 would be inclined to determine -- determine that part
19 of it on whether or not some harm resulted to the
20 defendant, some prejudice, etc., but that doesn't
21 address now what to do about the other jurors that
22 have been...

23 MR. DURANT: If I might just respond to
24 that argument, Your Honor. I'm told virtually every
25 time I try a case by somebody in the office that they

1 have a friend or a cousin or a father-in-law or
2 somebody on the jury. I don't really pay that
3 information any attention at that time, and I don't
4 ask who it is; because if it comes up, those people
5 have invariably disclosed that to the Court, and
6 they're not going to be on my jury anyway. So it
7 doesn't -- really makes no difference to me ---

8 THE COURT: All right.

9 MR. DURANT: --- who is on the jury
10 panel.

11 You know, what makes this case a little
12 bit different is that he apparently did not disclose
13 that, and apparently Mr. Nelson thought that he had.

14 And the issue here is: Is his client
15 prejudiced by that nondisclosure? And from what I've
16 heard in the courtroom this morning, he has not been.

17 THE COURT: All right. Go ahead,
18 Mr. Savage.

19 MR. SAVAGE: Other than the fact that the
20 jurors ---

21 THE COURT: Well, getting back -- back to
22 what my question was, I'm not convinced as a matter
23 of law that a challenge for cause would have been
24 sustained. Okay? It's generally not my policy if
25 someone has some connection that I -- unless it's an

1 immediate family member, I don't necessarily excuse
2 them for cause if they say they can give a fair and
3 impartial trial to anyone. So...

4 MR. SAVAGE: I realize what I'm saying
5 now is speculation, it may be categorized as wild
6 speculation, but we're told that this juror did not
7 want to serve. He had an opportunity to avail
8 himself of a reason to be excused. Was there some
9 reason why he didn't avail himself of that
10 opportunity to be excused?

11 I'm not accusing of anything, but just --
12 it's a very big question in my mind, that this fellow
13 wanted to get off the jury, he happened to be the
14 cousin of somebody, he knows somebody else that knows
15 somebody, somebody, but he's on the jury, whatever.
16 It doesn't ring true.

17 The other problem I have is the juror who
18 testified, whose name I don't recall, maybe McQueeney
19 or something like that, testified in that
20 conversation they described job descriptions. What's
21 the judge doing while we're out here, what are the
22 prosecutors doing, what are the defense -- you know,
23 there was an inquisition about what was going on and
24 apparently some discussion about that. Now, again,
25 it may not be about "they're looking at evidence

1 that's" ---

2 THE COURT: Well, wait. Wait. Let me
3 stop you, because I want the record to be absolutely
4 clear that there is a difference between ruling on
5 what you claim to be misconduct and ruling on what's
6 related to the prosecution and ruling on something
7 related to the jury.

8 That has nothing to do with the
9 prosecution if they started just inquiring about what
10 does the prosecutor do, what does the defense lawyer
11 do, what does the judge do.

12 And as a matter of fact, as far as I
13 understand it, we keep pamphlets that go into -- to
14 look at about those kind of things. But I don't know
15 for sure, but I probably should find out.

16 But if I'm going to rule, I want it to be
17 separated, because the analysis may be different.

18 And, quite frankly, if you think that
19 there's been some effect that attaches to the ruling,
20 that effect is substantially changed because of which
21 prong you're -- part you're going down. Do you
22 understand?

23 MR. SAVAGE: Yes, sir. What I'm
24 suggesting is...

25 THE COURT: Go ahead.

1 MR. SAVAGE: I believe, and I may stand
2 corrected by the Court and the court reporter, that
3 when Mr. Nelson -- I can tell you when I spoke to
4 Mr. Nelson yesterday at the noon hour, he told me
5 that the information was communicated to one of the
6 trial counsel, not two, not three, but one
7 specifically whom he named, that his cousin was on
8 the panel, the panel being the petit jury. That
9 matter was brought to the Court's attention at that
10 time.

11 I believe that he indicated this morning,
12 although I'd like to refresh my memory by reviewing
13 the record, that he testified today that he provided
14 that information to trial counsel after the jury was
15 seated.

16 It only makes sense that he would give a
17 generic description as opposed to a name for a seated
18 panel member. It would be of no value to say my
19 cousin is on the summonsed jury as opposed to the
20 seated jury.

21 THE COURT: I don't know what you mean by
22 that it only makes sense. His only testimony is he
23 passed him in the hallway and made that statement.

24 MR. SAVAGE: But there's no value in that
25 information.

1 He also told me yesterday that that
2 information was passed around the Solicitor's Office.
3 I think he said that today, on some sheet or
4 whatever, however they ask anybody if they know
5 anybody on the jury. I'm not saying he said that
6 today, but I understood him ---

7 THE COURT: I was about to say I didn't
8 hear that today.

9 MR. SAVAGE: He had talked to other
10 people that his cousin was on the jury about this
11 trial.

12 MR. DURANT: And that didn't happen to
13 me. I showed the jury list to Juan Middleton
14 (phonetic) in my office, and I showed it to Detective
15 Stanley in my office, and other than that, I didn't
16 discuss the jury list with anybody.

17 THE COURT: I mean, my problem,
18 Mr. Savage, you're asking me to speculate,
19 essentially, because you have prosecutors here saying
20 they didn't realize at the time he was selected and
21 you have Mr. Nelson saying I didn't -- essentially
22 saying I don't know when -- where we were at in the
23 process.

24 MR. SAVAGE: But that's the latest
25 version of that. But I believe his earlier version

1 was that he spoke, talked to Mr. Alfaro, trial
2 counsel, that his cousin was on the seated jury.
3 Now, I would like to ensure that that's what was
4 said.

5 THE COURT: Well, we can check that.
6 Madam Court Reporter will check. Mr. Alfaro said
7 that's not the case, too. I understand. Let's check
8 it.

9 MR. SAVAGE: That is a credibility issue,
10 and that's what I had been arguing earlier. It's
11 just a part of the main trial, it's a credibility
12 issue, who has an interest in the outcome. That's a
13 judgment that the Court has to make on credibility if
14 it's in conflict.

15 THE COURT: Well, I mean, I think a way
16 to resolve that would be, you know, if -- you know,
17 then I might have to say: Did these two or three do
18 anything wrong?

19 MR. SAVAGE: Well, that's another matter.

20 THE COURT: Well, I mean, but you're
21 saying that they are the ones that didn't disclose
22 and they had a duty to disclose.

23 MR. SAVAGE: Yes. Yes, they did.

24 THE COURT: And if they're telling me
25 that they were not aware of it at the time the jury

1 was selected, and Mr. Nelson is saying "I'm not sure
2 about the process," other than listening to what he
3 said earlier, as you requested, I'm not sure that
4 that credibility decision could not be properly made
5 that they didn't know.

6 You know, if I'm trying a case as the
7 fact finder and making credibility determinations,
8 and you have people saying "this is the way it was"
9 and you have someone saying "I'm not sure," I would
10 probably lend more of the credibility determination
11 to the people that were sure.

12 MR. SAVAGE: Or you might ask the first
13 time he testified and how they testified, and what's
14 he been doing between the time he testified and now.

15 THE COURT: I said subject to let's look
16 at what he said earlier. But then a determination
17 would have to be made about one of the witnesses not
18 telling the truth, and that's a whole different
19 approach.

20 And, but standing alone, when you have
21 uncertainty versus certainty, it would be hard, if
22 you were in Judging 101, to say not go with
23 certainty.

24 And if I were telling new judges, you
25 know, how to look at those kind of things, you know,

1 it's easier to say, well, certainty comes closer to
2 meeting a standard of proof than uncertainty does.

3 When all the smoke clears, regardless of
4 what I do here today, I do agree, though, that, you
5 know, the minute someone becomes aware of something
6 not to assume anything.

7 And, you know, the problem is there was
8 an assumption here that that juror disclosed it at
9 qualification.

10 And, you know, the qualification process
11 is such that sometimes everyone's at qualification;
12 sometimes all the attorneys are not. And then it's
13 further -- and problems are further associated with
14 the fact that counsel don't necessarily walk up there
15 when the jurors do approach.

16 But it just turns out that this juror did
17 not approach the bench.

18 MR. SAVAGE: You will recall that
19 Mr. Nelson reported through me that the juror did
20 disclose yesterday, and I reported that to the Court.

21 THE COURT: Well, I thought you told me
22 yesterday that that was his understanding, and then
23 he backtracked on that later. I thought that's what
24 you told me yesterday.

25 MR. SAVAGE: That's what he told me.

1 When he addressed the Court, he backtracked.

2 THE COURT: Okay.

3 MR. SAVAGE: But if ---

4 THE COURT: But, see, you know, he was
5 speaking with knowledge he really didn't have,
6 because he wasn't even at qualification. That's why
7 I asked him if he were at qualification.

8 And now he's satisfied me by saying when
9 he actually did talk to the juror he was under the
10 impression that the juror was going to tell me that
11 on Monday morning, and that's what his assumption was
12 based on.

13 And, in fact, the juror did not tell me.

14 MR. DURANT: And, basically, which goes
15 back to my original point, Your Honor. I mean, like
16 I said, every week I have this. And this is the
17 first time, to my knowledge, I've actually had a
18 juror that didn't disclose a relationship. I mean,
19 they always have in the past.

20 THE COURT: Madam Court Reporter, are you
21 looking for that? I mean -- well, hold on a second.

22 You know, Mr. Savage, you know, when I
23 reflect on it, if Mr. Nelson has clarified what --
24 now that he's the under the pressure of questioning
25 from the Court what exactly -- to really recall what

1 took place, and he's explained it, why shouldn't I
2 accept that explanation? I'm not trying to ---

3 MR. SAVAGE: Your Honor, I believe there
4 is some doubt about his recollection at the time he
5 made the initial statement. I'm not -- I don't want
6 to vouch for what he said at that time.

7 My recollection of what he said is that
8 he had a discussion with Mr. Alfaro after the petit
9 jury was seated. I think that is supported by the
10 fact that he reported that generically, not by name.

11 It would be of no value, as I've argued
12 before, to report that my cousin is on the -- I mean,
13 why would you even say that unless it was specified
14 who that party is? It is -- it's meaningless.

15 But once a jury is seated, then a generic
16 title to that juror is appropriate: Hey, we've got
17 somebody on the jury, my cousin.

18 THE COURT: I still don't -- because he's
19 now said he doesn't know, and they say they know, I
20 don't know how I can resolve that otherwise.

21 Now, it doesn't seem that the jury's been
22 tainted by it in any way. And I'm not absolutely
23 convinced that -- I'm just not convinced that there
24 was anything intentional on their part.

25 Had the case gone to a verdict and this

1 came up after the fact, now it's just more compelling
2 of an argument that he never disclosed it, but...

3 MR. SAVAGE: But then I would have the
4 burden of explaining to the Court why I didn't
5 disclose it immediately upon my knowledge. I can't
6 sit on that information and see how it goes, and if
7 it doesn't go my way then play that card.

8 THE COURT: I agree with that. But what
9 I'm saying is, if you discovered it after the trial
10 and we received a verdict and it appeared that a
11 juror -- a juror did not disclose something that the
12 juror should have disclosed and it was done
13 intentionally, then that is definitely a more
14 troubling situation than when you have someone --
15 that you do uncover it before you even get to the
16 verdict. You remove the taint, and the rest of the
17 jury says they have not been affected by it one way
18 or the other, you know.

19 Then you get back to the question, am I
20 sanctioning them for not doing something that they
21 should have done that hasn't harmed the defendant, or
22 am I sanctioning them for something they should have
23 done that has harmed the defendant. In my mind,
24 there is a substantial difference.

25 MR. SAVAGE: My position is that I have

1 no interest in a sanction.

2 THE COURT: What I mean, when I use the
3 word "sanction," that includes the full range of
4 dismissal or whatever. I'm just talking about a
5 remedy.

6 MR. SAVAGE: Your Honor, the remedy that
7 I am seeking is only as it applies to my client.

8 My client's due process rights have been
9 violated by the failure to disclose that there was a
10 seated juror who was not honest with the Court, who
11 had a relationship, a special relationship with a
12 member of the Solicitor's Office.

13 It's not only the failure to disclose,
14 but it's the failure to disclose not that my uncle
15 was a law enforcement officer or some other question
16 that was asked by the Court, but a very material,
17 important issue: Do you have any relationship or
18 connection to the Solicitor's Office? Because they
19 are the ones that are prosecuting the case.

20 That relationship is with a prosecutor in
21 the prosecutor's office. And during the course of
22 the jury's discussion, not about the case but about
23 the players in the courtroom, they discussed the role
24 of a prosecutor.

25 THE COURT: I'm listening.

1 MR. SAVAGE: And who knows what the
2 psychological impact of that is in terms of
3 bolstering the credibility, that all prosecutors are
4 good guys, they only do truthful things, or what's
5 going on when the courts are closed, are they doing
6 something else, are they trying to hide something.
7 Whatever those discussions were, it's only
8 speculation, but the issue is: Has that bolstered
9 the credibility?

10 And this is a credibility case, Judge.
11 This is not, oh, boy, this is obvious that he's
12 guilty or obvious he's not guilty. It's credibility,
13 credibility, credibility. It's been that way before
14 the case. It's been that way in opening arguments.
15 It's been that way in direct examination. It's been
16 that way in cross-examination.

17 And the slice of baloney is very thin in
18 this case: Who are you going to believe? There are
19 not very many eyewitnesss to this situation, and are
20 you going to believe the one who the prosecutor
21 offered?

22 He authenticates this witness, he called
23 this witness, are you going to believe him, or are
24 you going to believe the witnesses that have been
25 authenticated and presented by the defense?

1 THE COURT: I agree with that, but ---

2 MR. SAVAGE: This case is a ---

3 THE COURT: --- but we've nipped it in
4 the bud. Because post-verdict, those argument are
5 heightened. Those are -- those are elevated because
6 you can say that that indeed is problematic. But
7 we're not post-verdict here. It's heightened
8 post-verdict.

9 We're here. We are saying that he's
10 removed from the jury, and the rest of the panel says
11 they are not affected by it one way or another.

12 MR. SAVAGE: He's also said that he
13 didn't discuss it with the jurors. Then you get two
14 or three jurors out here that says he discussed it
15 with them.

16 THE COURT: And he's removed.

17 MR. SAVAGE: But they are not removed.

18 THE COURT: But they have said that he --
19 they were honest with the Court. They said that he
20 told them that he had -- one of them said a cousin,
21 and one of them just said someone in the building.

22 MR. SAVAGE: And then one described what
23 prosecutors do when we're in recess.

24 THE COURT: Well, they said they asked
25 about that. But that's a separate issue, whether

1 that is discussing the case or not, you know, talking
2 about things like that. That's not this issue.

3 I'm not prepared to grant the relief.

4 I'm not prepared to grant relief on those bases.

5 I'm not sure that the prosecution -- I'm
6 not convinced that the prosecution's conduct was
7 intentional or in bad faith in this situation, and
8 I'm prepared to go with the analysis of whether or
9 not this created any type of harm to the defendant or
10 prejudice.

11 And I do believe that the juror should
12 have disclosed that information, and I'm not
13 convinced that the juror misunderstood the question,
14 and I'm not convinced that I would have excused the
15 juror for cause at the time had he disclosed the
16 information. I would have just asked, you know,
17 whether or not it would have affected his ability to
18 give a fair and impartial trial. And, quite frankly,
19 I don't know the answer to that question.

20 MR. SAVAGE: If the information, clearly,
21 had been brought to the attention of the defendant at
22 that time, we could have exercised a preemptory. So
23 whether the Court dismissed it, that doesn't mean
24 that he would still sit on the jury.

25 THE COURT: But it's not clear that the

1 defendant would have used a preemptory.

2 MR. SAVAGE: Well, I am -- I'm not sure
3 I've ever seated anybody on a jury panel that's
4 related to someone in the Solicitor's Office, but I
5 guess that is -- that is true there may have been
6 other prevailing reasons to seat him.

7 THE COURT: That's exactly right. There
8 may have been other jurors that you were more
9 concerned about using your preemptory challenges for.

10 And so, based on this record, I can't say
11 that, you know, you would have supported any
12 challenge for cause or it would have changed your use
13 of a preemptory in this case. That record has not
14 been developed.

15 I deny your request in this regard.

16 Anything further?

17 MR. SAVAGE: That's all we have. Thank
18 you, Your Honor. Appreciate it.

19 THE COURT: I'll be happy to hear from
20 you if you've discovered any other research on the
21 self-defense issue on the applicability of the
22 statute, but if you need a short break, since we've
23 been here for two hours, I'll be happy to let you
24 have it.

25 MR. DURANT: I could definitely use a

1 break, Your Honor..

2 THE COURT: All right. Did you want to
3 say something else, Mr. Savage?

4 MR. SAVAGE: Judge, you may want to
5 consider this during the break. There is a case out
6 of Oconee County involving Judge Macaulay. Yesterday
7 I had indicated that that was the Romeo and Juliet
8 law which has the same savings clause.

9 And Judge Macaulay did, in fact, charge
10 the new Romeo and Juliet. Interestingly, against the
11 wishes of the defendant. I don't understand quite
12 how it was done, but it is Judge Macaulay who did --
13 who did give that charge.

14 THE COURT: Against the request of the
15 defendant, and the change in the law -- well, that
16 doesn't make a lot of sense.

17 MR. SAVAGE: It sure doesn't. I'm
18 just ---

19 THE COURT: Because, if anything, the
20 Romeo law inured to the benefit of the defendant, and
21 if it were applicable...

22 MR. SAVAGE: The lawyers involved are
23 Derek Enderlin and the Public Defender's Office, and
24 it was Judge Macaulay, and he did charge, as I
25 understand it, the current law.

1 THE COURT: Well, not knowing the facts,
2 my only -- I can't understand that, but I haven't got
3 the savings clause before me, either. Is it the
4 exact same savings clause?

5 MR. SAVAGE: I understand that it is,
6 Judge.

7 THE COURT: If you want to print that out
8 for me and show it to me, I'd be happy to look at it.
9 But I'm not sure I understand that approach.

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

11 (Mr. Savage tenders document to the
12 Court.)

13 THE COURT: Was this the final version of
14 the bill ---

15 MS. WILLIAMS: Judge, I believe ---

16 THE COURT: --- that was passed?

17 MS. WILLIAMS: I believe that is. That's
18 not in the code, obviously, the savings clause part
19 is not in the code under the castle doctrine, as
20 well. That's the final version that I found on line
21 when we were just researching it.

22 But, Judge, I believe the savings clause
23 is word for word the same as the one the castle
24 doctrine involved.

25 THE COURT: All right. We'll take a

1 short break.

2 (A break is taken at approximately
3 11:02 a.m.)

4 (The trial reconvenes at approximately
5 11:21, the defendant being present with counsel, and
6 the following proceedings were had:)

7 THE COURT: Anything else we need to take
8 up before we get started?

9 MR. DURANT: Judge, does your ruling
10 remain the same with regard to the castle doctrine,
11 Your Honor? I thought you had ruled that it was not
12 applicable or...

13 THE COURT: Hold on. Just one second.

14 (The Court and the law clerk confer.)

15 THE COURT: I really can't explain,
16 without knowing more, I don't know why, Mr. Savage,
17 but -- I don't know why the judge did that in that
18 case. That just doesn't...

19 MR. SAVAGE: I don't know either.

20 MS. WILLIAMS: Judge, I have a friend
21 that I know who actually talked with the judge who
22 was on the trial who said it was a very odd fact
23 pattern. This was in the hall earlier. I didn't
24 want to take up my time by going into it.

25 But it was odd, a weird case, but the

1 judge actually prepared the charge himself. It
2 wasn't requested by either side. He didn't know why.

3 Judge, we'd like to add, we have just --
4 just one additional argument based on the language of
5 the savings clause itself.

6 The savings clause where it says the
7 repeal or an amendment of the existing law, obviously
8 if it's a repeal of an existing law, that statute is
9 an amendment, and we'd argue that it's created a
10 wholly a new right.

11 THE COURT: Well, it doesn't wholly
12 create a new right because it preserves all the
13 rights that are normally attached to being in your
14 residence.

15 MS. WILLIAMS: But then it said no duty
16 to retreat, Judge, and we would argue ---

17 THE COURT: It seems to me that would be
18 an amendment of the common law in that regard.

19 MS. WILLIAMS: And, Judge, when it does
20 say "to any law," I think that language would apply
21 the U.S. Supreme Court precedent, Judge.

22 We do have the *Schiller* (phonetic), we do
23 have *Griffith*, we have all these cases that say that
24 a new rule applies to all pending criminal cases.

25 And that's very -- that's well settled,

1 there is no question there, and that, you know, this
2 is a cut-and-paste savings clause in view of the
3 state's ---

4 THE COURT: But it is Supreme Court. I
5 mean, the U.S. Supreme Court has not interjected
6 itself into the state's determination of
7 retroactivity decisions except where it involves a
8 rule imposed by the U.S. Supreme Court.

9 MS. WILLIAMS: That is true, Your Honor.

10 THE COURT: We have plenty of case law
11 that says that we do not go that far in suggesting
12 the state's approach to retroactivity decisions, and
13 I think that would fully trespass on the state's
14 rights unless it involved a constitutional principle
15 imposed by the Supreme Court.

16 MS. WILLIAMS: But, Judge -- and I agree,
17 I think there is definitely a separation of power
18 issue there. This is longstanding common law. You
19 know, Judge Macaulay ---

20 THE COURT: And like I said when we first
21 started this discussion, the entire analysis, in my
22 opinion, whether it be correct or not, would be does
23 "any law" include, and I don't think you have to go
24 beyond the common law of South Carolina. And that's
25 the question. Either I'm correct; or if not, you

1 know, it's wrong.

2 MS. WILLIAMS: Judge, obviously, our
3 argument is that it does not...

4 THE COURT: I understand.

5 MS. WILLIAMS: --- include any -- any
6 common law in...

7 THE COURT: I understand your argument,
8 it's been noted for the record, but I'm not prepared
9 to say that. If it were entirely new, as you
10 propose, by the way, you're assuming it would have no
11 meaning or purpose.

12 MS. WILLIAMS: Well, Judge, I think the
13 purpose is to codify no duty to retreat. It's
14 something that...

15 THE COURT: Well, I'm talking about the
16 savings language would have no purpose.

17 MS. WILLIAMS: I'm sorry, Judge, I don't
18 quite follow you.

19 THE COURT: If this was an entirely new
20 approach and it wasn't amending anything, what is the
21 need for the savings clause?

22 MS. WILLIAMS: Well, and, Judge, that was
23 my point in the Romeo clause, as well. I mean, it's
24 the same cut-and-paste savings clause.

25 I would argue, you know, if you look for

1 the savings clause in the criminal statute, you would
2 find this one. I don't know if it's in -- if it is
3 -- if it's there or not, I can't tell you from --
4 from the legislature if it goes there in every single
5 case, but I can tell you this isn't unique to this
6 bill. It's -- you know, it's -- you know, the
7 purpose it serves, you could probably -- you'd could
8 put it on the end of the bill. They might do it in
9 every case, might not. But, Your Honor, again, there
10 is -- there's a first in every case.

11 THE COURT: Well, I understand. I really
12 don't want to revisit this argument.

13 MS. WILLIAMS: Okay.

14 THE COURT: I was just asking if there's
15 anything further. But I stand by my decision on
16 that.

17 MS. WILLIAMS: Thank you, Your Honor.

18 THE COURT: And I believe you've properly
19 postured everything for the record. I'm not trying
20 to cut you off, but like I say, it's going to all
21 boil down to that "any law" language, and either it's
22 correct or it's not.

23 Yes, sir.

24 MR. DURANT: The only other thing I
25 wasn't clear about after yesterday was whether you

1 were charging involuntary manslaughter.

2 THE COURT: Well, we haven't gotten to
3 that point yet. Perhaps -- he wants that in the
4 discussion. So -- Mr. Savage said he wanted to think
5 about that overnight.

6 Probably what we'll do is arguments
7 before lunch and -- well, it's already 11:30, so I
8 don't know about that. Maybe you need lunch to
9 re-clarify your thoughts after the change in
10 approach, anyway, so...

11 MR. DURANT: If it's up to me, Your
12 Honor, I'd just as soon get done with it.

13 THE COURT: Yes, sir. Involuntary?

14 MR. SAVAGE: Yes, Your Honor. We asked
15 for it yesterday. Our position has not changed.

16 THE COURT: I'm sorry?

17 MR. SAVAGE: Our position has not
18 changed.

19 THE COURT: What is that position?
20 Yesterday you said you wanted to think about it
21 overnight.

22 MR. SAVAGE: Oh, I'm sorry. Yes. We're
23 asking for the involuntary charge.

24 THE COURT: Does the state wish to be
25 heard on that?

1 MR. DURANT: Your Honor, I just leave it
2 to your discretion. I just want to know what your
3 charge is.

4 THE COURT: I'm going to charge it. Due
5 to the whole issue of -- because it's all somewhat
6 intertwined with his whole theory of accident,
7 self-defense, and involuntary, or just arguing the
8 involuntary aspect of it and whether he recklessly
9 did it or not. I'm inclined to charge it.

10 MS. WILLIAMS: Judge, one, one quick
11 thing on the charge. I believe you asked if we would
12 submit our accident charge. You wanted to see ours.
13 And so I made a copy for the prosecutor, as well.

14 Your Honor, may I approach?

15 Judge, also, Jury Charge H-2, that was
16 our inference from the fact that a witness was not
17 called by the state. That had some blanks in it when
18 we submitted it based on how the case proceeded. So
19 we've revised it for the closing.

20 Thank you, Judge.

21 MR. DURANT: Well, Your Honor, I also
22 wanted to ask if you were inclined to charge the
23 state's request to charge on the duty to retreat,
24 whether that's included in the charge.

25 THE COURT: That's in the general charge.

1 Now that new law, I'm not saying the new law applies.
2 I'll make sure it is.

3 What's your position on the inference
4 charge?

5 MR. DURANT: Are you asking me,
6 Your Honor?

7 THE COURT: Yes.

8 MR. DURANT: Which? Could you give me...

9 THE COURT: Which witness are you talking
10 about?

11 MS. WILLIAMS: Judge, in that, in that
12 particular charge regarding that, we referred to the
13 investigative detectives in the case.

14 MR. DURANT: Your Honor, I object to
15 that.

16 THE COURT: Well, it just says
17 investigating detectives and/or additional law
18 enforcement. That's pretty broad.

19 MS. WILLIAMS: Well, Judge, I mean, it
20 does get more specific as to investigative detectives
21 as to who might have interviewed or directed the
22 crime scene investigation.

23 We have testimony from both of those
24 crime scene detectives that they were under the
25 direction of someone else when they were collecting

1 and photographing and things like that.

2 Also, the witnesses who were interviewed
3 by the detectives, they were never -- never called to
4 testify about those...

5 THE COURT REPORTER: Could you please
6 speak up for me?

7 THE COURT: You need to speak up, please.

8 MS. WILLIAMS: I'm sorry.

9 So, Judge, I think that the law is pretty
10 settled that should the state fail to call someone
11 and the jury thinks that there are people who might
12 have testified who might have been able to clarify
13 some issues, that they could have been material
14 witnesses, if the jurors would have needed them, the
15 inference is in the defendant's favor that -- that
16 their testimony would have been harmful to the
17 state's case.

18 MR. DURANT: Your Honor, I object to that
19 charge.

20 Number one, there is no -- especially,
21 with regard to police witnesses. And what is a
22 detective who took a statement going to testify to in
23 this case when the witness that gave the statement
24 takes the stand and testifies?

25 The only time that really a detective's

1 testimony may come up is if the witness denied making
2 the statement and you have to prove the statement by
3 extrinsic evidence.

4 MS. WILLIAMS: Judge, the issue is not
5 just the detectives taking the statements. It's also
6 the detectives directing the crime scene itself.

7 You know, we did have some testimony that
8 -- that some people were photographed and some people
9 weren't. Some people's clothing was seized; some
10 wasn't. The crime scene detective did testify they
11 weren't the final line of decision on that, that it
12 was these detectives running the show.

13 So I think that that might have been
14 helpful to the jury to know, okay, well, why did you
15 do this and not this.

16 MR. DURANT: And if they want to argue
17 that to the jury, more power to them, but it's not
18 the subject of a jury charge, Your Honor.

19 THE COURT: Did other people testify as
20 to that information that you're claiming was not
21 indicated?

22 MS. WILLIAMS: Beyond...

23 THE COURT: That they would have
24 testified about?

25 MS. WILLIAMS: I'm sorry, Judge, what was

1 your question?

2 THE COURT: Was that information conveyed
3 by -- through other witnesses?

4 MS. WILLIAMS: Investigator Hodge and
5 Owen, Judge.

6 THE COURT: Pardon me?

7 MS. WILLIAMS: Investigators Hodge and
8 Owen did say that the crime scene unit detectives
9 were directing the scene at the crime scene.

10 THE COURT: Is there some information
11 that you say has not been disclosed?

12 MS. WILLIAMS: Judge, I don't know. It
13 depends on if -- what the jury -- the way this charge
14 reads is:

15 If you think this person could have
16 testified and helped clarify issues for you and that
17 the state could have called them but did not, then
18 the inference works in the defendant's favor that the
19 testimony would have been harmful to the state.

20 Judge, I mean, I have the case law on the
21 issue if that's -- if that's the issue.

22 THE COURT: I understand what the law is.
23 Usually, usually there's some -- first of all, if
24 that information was revealed through other
25 witnesses, it would not be warranted. And, secondly,

1 you know, I don't know anything about why a witness
2 was not called, or do you have any -- you don't have
3 any burden to do anything, but before you get that
4 type of inference, do you -- you have the opportunity
5 to call that witness if you so desire, right?

6 MS. WILLIAMS: Judge, I would assume we
7 would have had the opportunity. We did not have an
8 opportunity to do this before trial, I think the law
9 is...

10 THE COURT REPORTER: I can't hear her.

11 THE COURT: She can't hear you.

12 MS. WILLIAMS: I'm sorry. I'll speak up.

13 Judge, you know, I think the case law is
14 pretty clear that, you know, we don't have to show
15 there's a burden, that it's a burden -- you know, bad
16 faith on the part of the state of anything
17 intentional. All we have to show is that it was a
18 witness who was in the state's control and that the
19 state could have brought them if they had wanted to.

20 You know, we did have Investigator Hodge
21 and Owen on the stand, saying, you know, I knew that
22 the car was in the crime -- I didn't investigate it
23 because I wasn't told to by the detective, or I did
24 not seize this off the ground because I wasn't told
25 to by the detective.

1 That might be questions raised in the
2 jurors' mind. And to not to call the lead
3 investigator on the case, they might need -- need to
4 hear something from them for clarification.

5 Closing argument, Judge, I think the law
6 is pretty settled that we can make an inference that
7 this person could have come to trial, this person
8 could have testified, answered some questions that
9 were left hanging open by some of the state's
10 witnesses, this person was in the state's control,
11 meaning under the subpoena ability of the state.

12 THE COURT: Well, I mean, the question is
13 not whether or not you can argue why these guys have
14 not been presented to you and where is this
15 information; but whether I should charge a negative
16 inference, when I don't have a clue why they're not
17 here, is a different point.

18 MS. WILLIAMS: And, Judge, I don't think
19 it's our burden to prove why, why they're not here.
20 The case law doesn't actually say there has to be a
21 -- an excellent reason why.

22 THE COURT: Well, then how do I know --
23 how do I know that the information that was presented
24 by the other witnesses was not that that would have
25 been presented by this particular one? You got

1 generic witnesses in here, but I think that's
2 specified, but...

3 MR. DURANT: Your Honor, if you carry
4 that argument to its conclusion, I would be required
5 -- required to call every member of a police
6 department that had any connection with a case
7 whatsoever, whether or not the information they had
8 would be relevant to the jury's consideration or not,
9 especially in a situation where they are subject to
10 the defendant's subpoena power as they are mine.

11 They've had discovery in the case. They
12 know what these people did. If they felt that there
13 was something that these people did that we have not
14 -- failed to disclose to the jury that the jury needs
15 to know about, then they could have put them up there
16 themselves. They put up a case in this particular
17 case.

18 You know, the inference she's trying to
19 draw is, is the one you usually get from a fact
20 witness, not from a police officer witness.

21 MS. WILLIAMS: Judge, the case law
22 doesn't distinguish between the type of witness, and
23 the law says that if -- if the solicitor could have
24 called a witness to testify as to a fact at issue and
25 did not, you can infer that that testimony would have

1 been unfavorable. That's -- that's the law. The
2 burden ---

3 THE COURT: Would their testimony have
4 only corroborated the other witnesses' testimony?

5 MR. DURANT: Your Honor, I put up -- when
6 I prepare a case, I put up witnesses that I think
7 present relevant information to the jury about a
8 case.

9 In every case, I have myriad police
10 officers that were involved in the case in some way,
11 but if -- a detective, for example. If a detective,
12 for example, took a witness's statement, I will
13 generally put that detective under subpoena in case
14 the witness denies having made the statement, but I
15 don't call -- I don't bring that detective in and
16 call them as a witness because he does not present
17 any additional information to the jury that the
18 witness did, other than what the witness provided.

19 So, like I say, if you take her argument
20 to its logical conclusion, I would have to call
21 everybody with the Charleston County sheriff's
22 office, everybody on that crime scene log, whether
23 they had any additional information to present to
24 this jury or not, every detective that was out there,
25 every person associated with this case in any way.

1 And I don't think -- I don't think the law requires
2 me to do that.

3 MS. WILLIAMS: Judge, with all due
4 respect to Mr. Durant, you know, the question in the
5 law is whether or not if a witness could testify as
6 to something's that at issue, something there is a
7 question.

8 It doesn't apply to every single witness
9 who passed through the crime scene, touched the crime
10 scene, had anything to do with the case. So there is
11 -- there is a stop to the number of witnesses that
12 would have to be called under -- under this case law.

13 And if there's facts in issue and if a
14 witness could clarify something, then the jury
15 thinks, well, maybe I should have heard from him.

16 The jury may think, you know what, maybe
17 they didn't call -- didn't call him for a reason,
18 maybe I don't need to hear anything from this
19 witness, but...

20 THE COURT: Well, I think that you can
21 argue that, you know, why didn't we hear from this
22 person or why didn't we hear from this person, but
23 I'm not prepared to charge a negative inference.

24 I agree with you that the Hammond
25 decision says: While the charge requested by counsel

1 for the defendant has heretofore been deemed proper,
2 it's been considered a rule of limited use.

3 Upon a review of our own decisions, as
4 well as authorities from other jurisdictions, we
5 entertain grave doubt as to the propriety in a
6 criminal case of the rule of an adverse inference
7 from the failure to produce a material witness.

8 Certainly, a charge on this proposition
9 to the jury on behalf of either the state or defense
10 is not warranted except under the most unusual
11 circumstances.

12 Clearly, within the purview of a defense
13 against failure -- from *Davis vs. Sparks* (phonetic),
14 and which, you know, suggests perhaps some kind of
15 attempt to -- willfully attempting to withhold
16 competent testimony or something of that nature.

17 I know nothing about what these witnesses
18 said. I can only base on what is said. I don't know
19 whether it's, you know, punitive or prerogative, the
20 other testimony, and I can only base the decision on
21 what is in the record.

22 I deny that request, and you're free to
23 argue to the jury then what -- you know, they didn't
24 even present this witness or that witness.
25 Obviously, that happens all the time.

1 Anything else?

2 MS. WILLIAMS: Judge, just -- just to
3 make the record, I'll be very, very brief.

4 Judge, I have been through the *Hammond*
5 decision. We do -- we would submit that this is an
6 unusual case and that the testimony could have
7 contradicted or could have corroborated. We don't
8 know, Judge, because the issue is that they weren't
9 here. There were questions hanging in the air that
10 were not answered.

11 THE COURT: What you just said is the
12 most dispositive of the entire analysis, and what I
13 try to tell people over and over again -- listen to
14 my words very carefully: There is nothing in this
15 record for me to make that determination. Whenever
16 that comes out of my mouth, then certainly I've given
17 you guidance, and whether you accept it or not is not
18 my concern.

19 That request is denied.

20 MS. WILLIAMS: Thank you, Judge.

21 THE COURT: Anything further?

22 MR. SAVAGE: Always something further,
23 Judge.

24 Judge, yesterday, I inadvertently failed
25 at the end of the day to move for the introduction of

1 a public record. I'd like the Court's permission to
2 reopen the defendant's case to introduce that record.

3 THE COURT: What is that public record?

4 MR. SAVAGE: The record is the detailed
5 death certificate in this case.

6 THE COURT: What more does it show in
7 this case other than the fact that everyone
8 acknowledges he is deceased?

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

10 THE COURT: Show it to opposing counsel,
11 first, please.

12 MR. DURANT: I'd like to see it, as well.

13 MR. SAVAGE: While he's looking at that,
14 Judge, you may recall my examination of Dr. Harley.
15 I was asking him questions that probably didn't make
16 sense enough to the jury about the medical examiner
17 and the coroner and the roles that the various
18 parties play and the source of information that the
19 medical examiner uses to make their protocol, their
20 opinion as to the cause and manner of death; and that
21 the coroner's office, as I recall his testimony being
22 more expansive, they receive information from law
23 enforcement agencies as well as from the medical
24 examiner.

25 The death certificate is -- has the

1 manner of death, homicide. And here it says the
2 cause of death, a close gunshot wound to the
3 abdominal area which bisected the aorta.

4 THE COURT: Yes, sir.

5 MR. DURANT: And my objection,
6 Your Honor, is, quite frankly, it is cumulative.
7 It's nothing other than what the medical examiner --
8 may I hand you the exhibit?

9 THE COURT: Well, if it's cumulative, do
10 you have any objection to putting it in the record?

11 MR. DURANT: And it's also got -- it's
12 also got a lot of information other than that, as
13 well, Your Honor.

14 THE COURT: What other information?

15 MR. DURANT: For instance, the cause of
16 death, I presume that he's putting it in there
17 because it has cause of death as close gunshot, which
18 is right out of the coroner's testimony -- in the
19 medical examiner's testimony.

20 THE COURT: Well, I mean, if it is
21 cumulative, why not let it in? If there is something
22 you want to redact, y'all can talk about it.

23 I'd be more concerned if it completely --
24 if it suggested something entirely new that wasn't
25 explored. But if you're telling me it's just

1 cumulative to the testimony...

2 MR. DURANT: Well, you know...

3 THE COURT: --- or if there's a problem
4 one way or another.

5 MR. DURANT: Your Honor, we just need to
6 move this thing along, Judge. Let them put in what
7 they want to put in, and let's go.

8 THE COURT: All right. Mark it, Madam
9 Clerk.

10 MR. SAVAGE: Thank you.

11 THE COURT: In evidence without
12 objection. It's reopened to that extent.

13 (Defendant's Exhibit No. 27, copy of
14 death certificate of Herschel Demar Denson, is marked
15 for identification and received in evidence.)

16 THE COURT: Anything further? How long
17 will your arguments take? Just curious.

18 MR. SAVAGE: Judge, the last case I had
19 with you, I believe, was a similar case, similar
20 length of time. That was the Nowell (phonetic) case
21 in Berkeley County. The same issues are in this case
22 as were in that case. I don't actually recall.

23 THE COURT: I don't either.

24 MR. SAVAGE: Maybe 40 minutes.

25 THE COURT: How long for the state?

1 MR. SAVAGE: I'll try not to talk too
2 long.

3 THE COURT: Are you going to open?

4 MR. DURANT: I'm going to waive opening
5 on the law, Your Honor. I would think probably 30 to
6 40 minutes.

7 THE COURT: It's almost noon now. It
8 will probably take -- I don't mind trying to get the
9 arguments in and then sending them to lunch and
10 closing -- I mean, charging after lunch if that's
11 okay.

12 MR. DURANT: That would be fine,
13 Your Honor.

14 THE COURT: Ready to get going?

15 MR. SAVAGE: Yes, sir.

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

18 (Whereupon, the jury enters the courtroom
19 at approximately at 11:45 a.m.)

20 THE BAILIFF: All jurors are present,
21 Your Honor.

22 THE COURT: Thank you. Please be seated.

23 All right, ladies and gentlemen. I'm
24 sorry to keep you delayed. We had some matters we
25 had to attend to. We're ready to proceed with the

1 trial.

2 At this point you will hear the closing
3 statements of counsel. Again, remember this is the
4 opportunity for counsel to summarize the evidence
5 from their respective points of view, to put the
6 pieces of the puzzle together, so to speak. These
7 arguments by counsel are not to be considered as
8 evidence.

9 Then probably what will happen, due to
10 the timing of that, I'll send you to lunch, maybe a
11 little bit shorter lunch, and then I'll bring you
12 back and charge you on the law, and at that point I
13 will direct you to begin your deliberations.

14 So at this point we're ready to proceed.

15 Go ahead, Counsel. You waive opening?

16 MR. DURANT: I would waive opening on the
17 law, Your Honor.

18 THE COURT: All right. Counsel.

19 MR. SAVAGE: May it please the Court.

20 CLOSING ARGUMENT

21 BY MR. SAVAGE:

22 Mr. Foreman, ladies and gentlemen, first
23 of all, I'd like to thank you on behalf of the State
24 of South Carolina and Mr. Rocquemore. I don't say
25 that lightly. This is not a pleasantry for saying

1 good morning or good afternoon or thank you. Thank
2 you means thank you, because you and the other 150 or
3 so members of Charleston County's public were willing
4 to come forward last Monday, subject yourself to
5 questioning by the Court, subject yourself to further
6 questioning here, so that a jury could be empaneled,
7 a fair and impartial jury could be empaneled, to
8 determine the fate of somebody who's on trial.

9 That's the American system. Now, we talk
10 about it in grammar school, and you read about it in
11 the newspaper. They'll talk about lawyers, and talk
12 about this, and that the criminal justice system
13 doesn't work, how sometimes it does, sometime it
14 doesn't.

15 I like to believe it does work. And the
16 reason it works is because of you, men and women who
17 are willing not to shun their civic duty but are
18 willing to come forward and make tough decisions.

19 It's not like in other countries where
20 they have a judge. While we all appreciate and
21 acknowledge Judge Pieper being a member of the
22 judiciary, in this country we rely on our fellow
23 citizens who are interested in, who have a stake in
24 the outcome of the community. We want things to be
25 right in the community when we make these decisions.

1 Foreigners, they have judges. Here, you
2 have a stake in this community, and you're asked to
3 judge this case in a fair and impartial way. So
4 thank you for doing that.

5 Thank you then for the attention you have
6 paid to His Honor's initial instructions, to the
7 opening statement of the prosecutor, to our
8 statement, and then thank you for paying so close
9 attention to the testimony that was brought before
10 you, because your role, as Judge Pieper will explain
11 to you, is to make decisions based on facts, not
12 decisions of law and what the law is.

13 He's charged with murder, voluntary
14 manslaughter, involuntary, accident, self-defense,
15 all those other legal things. The judge makes those
16 decisions where appropriate in this case, what
17 charges are appropriate, and he will instruct you on
18 that law, but he makes those decisions.

19 Do you remember during the course of the
20 trial either the prosecutor or we would stand up and
21 say I object, and then the judge would say state the
22 reason for the objection. Those are his decisions,
23 but your decisions are to determine the facts in the
24 case.

25 And what are the facts? The facts are

1 words, the interpretation that you make of words from
2 the witness stand, not just what you hear but what
3 you see as those words are being delivered to you.

4 What does that mean? That means the
5 demeanor, the interest in the case, the reason for
6 somebody to be biased one way or the other.

7 You analyze that. You sit there and you
8 look at them right in the courtroom next to you, and
9 you say, well, I kind of believe this, or I don't
10 believe that, I believe a little bit of this, I don't
11 believe any of that.

12 What other facts are there? There are
13 facts that come to you through evidence. Mostly
14 undisputed. Remember I told you at the beginning
15 this is not a who dunnit? It's never been disputed
16 that Mr. Rocquemoire was there that night, that it was
17 Mr. Rocquemoire's car, that it was Mr. Rocquemoire's
18 gun, his gun that he had purchased some years before.
19 All those things are undisputed, but yet you
20 ultimately make that decision.

21 And then there are photographs. There
22 are photographs that were displayed to you by the
23 state. There are photographs that were displayed to
24 you by defense counsel. You can look at, if you
25 will, the demeanor of those displays.

1 What do I mean by that? Well, on the
2 witness stand when you see somebody, you can see
3 whether they're frowning or if they seem to be
4 agitated or aggravated or whether they seem to be
5 relating the story as if it happened.

6 The demeanor I'm talking about in
7 photographs would be: Why did they show me that
8 picture of the face when I can hardly see the face,
9 or why did they show me the picture of this side of
10 the head when I can hardly see what the photograph is
11 telling me?

12 And you can evaluate the type of
13 photographs, the type of information that was
14 presented to you, and you can evaluate whether that
15 gave you a complete picture or not, the picture being
16 a complete picture, or whether there was some
17 interest, whether some bias, or whether there was
18 some motive not to give you all the information.

19 So keep that in mind, if you will, about
20 photographs.

21 The judge will tell you, I expect, that
22 in cases, you determine the facts by not only what is
23 presented on the witness stand, is introduced as
24 evidence, is displayed on the screen, but what did
25 not, what did not come before you. And you have to

1 evaluate the demeanor, if you will, the motivation,
2 if you will, of things that were intentionally not
3 shown to you.

4 Think about it. Once you're back in the
5 jury room, think about the things that are in this
6 courtroom that are very close to me in this courtroom
7 that you have seen but are not in evidence, so
8 they're not pieces of evidence that can be evaluated
9 when you go back in the jury room.

10 Now why is that important? This is not a
11 who dunnit case. This is a how dunnit case. And
12 when you have a how dunnit case, what do you rely on?
13 You rely on the testimony of people who were present.
14 I would suggest to you in this case we have maybe
15 two, maybe two witnesses, maybe.

16 I say that because one witness says he
17 was an eyewitness because he was in a position to
18 talk and to see Rodney Gibbs. Remember Rodney Gibbs?
19 And then you have the witness that may or may not
20 have seen, by the name of Troy Eason. Then you had
21 another witness who couldn't see, but he could hear.
22 His name I forget all the time, but it's Timothy
23 somebody. He was the fellow who used to work with
24 Mr. Rocquemoire. And then, of course, you have
25 Mr. Rocquemoire.

1 Now, in evaluating their testimony, much
2 like you do with the photographs and the other
3 evidence that was introduced, or withheld from you,
4 you will evaluate their demeanor, their motivation,
5 their biases, their prejudices, their interest in the
6 outcome. That's all fair play for you, members of
7 the jury, to decide.

8 But they're eyewitnesses. They're people
9 who have an interest in the outcome of the
10 proceeding. How do you test their credibility?

11 You followed them when they testified.
12 Does it make sense? Is it consistent? Is it too
13 consistent? Are the words the same? Did they get
14 together? Did they collaborate to get their
15 testimony out? Did they appear honest and truthful?
16 Were they drinking that night; they weren't drinking
17 that night? Were they mad that night; were they not
18 mad that night? Were there any other things that
19 would interfere with it?

20 Well, we do know that there are other
21 witnesses. And who are those other witnesses?
22 Witnesses who were at the party.

23 Remember the witness that Rocquemore was
24 not at party number three when whatever happened in
25 terms of the dispute between the Gibbs brothers and

1 one or more of the ladies who were there, that he was
2 not present.

3 So how would it be then for you, members
4 of the jury, to determine the flow of activity that
5 night, what transpired that night that led up to this
6 terrible fatal shooting?

7 Did the state, did the prosecutor, have a
8 motive to be open and honest with you, to fill in the
9 gaps, to tell you what happened by the people who
10 have no interest in the outcome of the proceeding?

11 Not one of the women who was present
12 there that night who was involved or witnessed what
13 precipitated all this aggravation and agitation, not
14 one of them was called by the state.

15 And think about the information that was
16 provided by the two ladies who were there that night
17 and whether that information was important to you or
18 not, about who was drinking, the extent of their
19 drinking, their volatility, who started the
20 volatility, how it came about, how all that
21 transpired. Is that important to know?

22 And if it is important to know, which I
23 suggest to you it is important to know, in order to
24 get a full understanding of how people were thinking
25 and acting that night, think about that as to the

1 prosecutor. Why is it that he didn't tell us about
2 that? Do you only want us to know the narrow, little
3 pieces of evidence that fit to your theory of the
4 case, or do you want to know it all?

5 So you have witnesses who claim they were
6 there, the eyewitnesses. You have witnesses who were
7 present at party number one, two, and three that will
8 give you the flow of what happened that night, whose
9 testimony may or may not be consistent with others.
10 And I suggest to you it is inconsistent with the ones
11 who said they were eyewitnesss, the Gibbs and Eason.

12 And then who else do you have? A third
13 category of witnesses who are silent, who don't have
14 any affiliation with these people, who don't know
15 Mr. Rocquemoire, who don't know any of the parties
16 involved.

17 And who are they? You've got the two
18 fellows from SLED who came down here. The one fellow
19 who talked about the gun, how it fired and how it was
20 fired, what -- you know, what the condition of it
21 was, and then you had Lieutenant Joseph Powell.
22 Remember him?

23 Lieutenant Powell was the trace evidence
24 man. And what did he talk about? I propose to you
25 his testimony was important, because the medical

1 examiner who examined the body told in his report on
2 multiple occasions that it was a close wound, and the
3 prosecutor, a couple weeks ago, didn't like that, so
4 he went over and tried to get the medical examiner to
5 change his opinion.

6 And the basis for that opinion was the
7 shirt that the decedent was wearing on the night he
8 got shot, and you recall that.

9 Well, why didn't -- why didn't the
10 prosecutor tell the pathologist that the decedent had
11 gunpowder on his right hand?

12 And what did Mr. Powell say about the
13 position of where the weapon was at the time it was
14 fired; and the deceased, what was his position?

15 And while we went through a little
16 demonstration, I think -- I think what you recall
17 most of all is that his hand, the back of his right
18 hand, had to be between the weapon when it was fired
19 and his shirt.

20 It's also interesting that the doctor who
21 has no interest in the outcome of the case said that
22 the decedent was drinking to the extent that his
23 judgment was impaired.

24 I suggest to you, ladies and gentlemen of
25 the jury, that impairment of judgment is important in

1 this case, because you want to search for an
2 explanation of how did this quiet party turn into
3 this turbulent, violent, and lethal event.

4 And you have to question why the
5 prosecutor wouldn't want you to know or why he didn't
6 bring out to you that the decedent was intoxicated to
7 the extent that it affected his judgment and his
8 physical being that night.

9 All those type of things are third
10 parties, people who are independent who don't have a
11 stake in the outcome.

12 For instance, the physician who
13 testified, Dr. Harley, he told you about the two
14 wounds. He told you about the toxicology, the
15 alcohol ingestion. And, interestingly, when he
16 testified about the two wounds, he said that one was
17 on the left side and the other one was on the left
18 side but more center mass. Those facts can't be
19 changed.

20 He said that when the bullets entered the
21 deceased, they were on a downward trajectory. That
22 fact can't be changed.

23 The question is: What was the
24 relationship of the parties? And we know by that
25 third-party testimony, the physician, that it

1 couldn't have been somebody down firing up unless the
2 person who got hit was diving at the person who fired
3 the gun.

4 And I suggest when you go back and you
5 think about what could have happened that night, you
6 keep in mind that this scientist, Joe Powell,
7 Lieutenant Powell, absolutely affirmatively said that
8 there was gunpowder on the outside of the hand, there
9 was not any on his shirt, and the doctor says it was
10 a downward trajectory.

11 So the person who got hit had to be going
12 in the direction of the party who was firing the gun.
13 He couldn't be going in reverse. If he's going back
14 that way, the gunpowder would be on this side. If he
15 had his hands up, the gunpowder would be on this
16 side, the palms of the hand, and the trajectory would
17 have been quite the opposite.

18 These people have no interest in the
19 outcome. They have no reason to say that he had been
20 drinking that night. There's no motivation on their
21 part at all to mislead you and try to head you in a
22 different position.

23 You know, I don't get a chance -- and
24 you're probably glad that I only get one chance to
25 come up here and talk to you. The reason is because

1 the state has the burden of proof in this case beyond
2 a reasonable doubt. They have to prove that the
3 crime was committed beyond a reasonable doubt, and
4 they have to prove to you each element of
5 self-defense did not happen beyond a reasonable
6 doubt. So they have to not only show that the crime
7 happened, but then they have to prove to you beyond a
8 reasonable doubt that it was not self-defense.

9 What I don't want them to do -- and
10 you're going to have to answer for me -- is on this
11 issue of the gunpowder, which I suggest to you is so
12 important, on the outside of the hand, that for some
13 reason afterwards that he touched the gun or somebody
14 hit him with the gun or it was something with the gun
15 or whatever. There's no evidence in the record of
16 that.

17 There's no evidence in there to explain
18 the gunpowder on the outside of the palm in any other
19 manner other than when Lieutenant Powell showed you,
20 described to you, unchallenged, I might add, the
21 position of the body at the time the weapon was shot.

22 And you remember the demonstration. And
23 the prosecutors didn't stand up and challenge that in
24 any way. They did not question Lieutenant Powell in
25 any way following his cross-examination by defense

1 counsel. Nothing was challenged. And when you don't
2 challenge it, that means you accept it. So don't be
3 fooled by transfer of that gunpowder in any other way
4 other than what's been testified by Lieutenant
5 Powell.

6 I think it's important, it's obviously
7 important for the defense, to have these independent
8 witnesses. It's also important to have witnesses who
9 are trained to provide information to you about what
10 they observed and the details they took that day.

11 You will recall that Deputy Ford and
12 Deputy Prindle testified. They were the first
13 responders. They had the video, and they showed you
14 what was on the video.

15 You will recall that Inspector Hodge and
16 Inspector Owen would tell you about what they
17 examined at the crime scene early that morning.

18 You also recall that Inspector Hodge and
19 Inspector Hughes -- Owen, excuse me -- Owen also said
20 to you that they only did what they were told to do.
21 They only did what the detectives -- I believe their
22 characterization was they only did what they were
23 told to do by the detectives. God knows there were a
24 lot of detectives who were there.

25 How many detectives have testified in

1 court? None. Why weren't those detectives available
2 to explain to you the level of intoxication of people
3 that were interviewed that morning? Why weren't they
4 there to explain to you the attitude of the people
5 who were there that morning?

6 Why didn't they explain to you their
7 attempt to interview Rodney Gibbs that morning and
8 his failure and refusal to continue the
9 interrogation?

10 Why weren't they there to explain why
11 Troy Eason wasn't photographed that night, why his
12 clothes weren't photographed, why his hands weren't
13 photographed, why his face wasn't photographed like
14 the other two were? Are we really going to believe
15 that he was busy giving a statement when you have
16 seen the statement that he gave and how long that
17 would have taken?

18 Why weren't the detectives available to
19 explain when the photographs were taken only the Army
20 man Gibbs' hands were shown and photographed? And
21 you remember how bruised they were. The right hand
22 was bleeding, his right hand.

23 But when his brother was photographed,
24 what did he do with his hands? Go look at that video
25 again where he intentionally hid his hands -- I

1 submit to you he intentionally hid his hands -- and
2 did not show them, never displayed them out, never
3 showed how they were banged up, because it would be
4 tough to explain why they were so banged up.

5 And, again, why weren't the detectives
6 here? Why weren't they called to explain to you why
7 there were no photographs taken of the third friend,
8 none at all?

9 All that is important, again, I relate to
10 you, because they were not involved in the case. So
11 what you are left with are the people who were
12 involved in the case.

13 One other thing...

14 May I approach, Your Honor?

15 THE COURT: Yes.

16 MR. SAVAGE: State's exhibit number 52.
17 As she's showing that picture, I'll continue.

18 Now, the state's 52 is a photograph of
19 the street out in front of Mr. Brown's house. At
20 some point in time, obviously the skid marks that
21 were present were pretty important. They were not
22 only photographed, but there is a display of cones,
23 as you'll see, showing the trajectory of those skid
24 marks. They obviously were recent, or the police
25 would not have involved themselves and gone into such

1 detail on it.

2 And why did they do that? Because they
3 wanted to associate the skid marks with the activity
4 that happened the night before if it was related, and
5 certainly they went to great efforts to do that.
6 They measured them, they photographed them, they
7 diagramed them, they laid out pylons to see where
8 they were.

9 Why didn't you follow through, Inspector
10 Hodge? Because somebody told me they weren't
11 relevant.

12 I think he said some sergeant said, some
13 -- Sergeant Willoughby said that, you know, the
14 neighbor's kid did it. Well, whatever he said, I
15 don't know, but the sergeant wasn't here. The
16 sergeant didn't explain that, the neighbor whose kid
17 supposedly put it there.

18 Who recorded it? I submit to you, I
19 submit to you, there is no such person. Because if
20 there was somebody that would have said the tire
21 marks were unrelated to this case, you know that the
22 state would have produced the neighbor that said they
23 put them there.

24 You also know that Michele Powe, the
25 young lady who testified, the first one, also said

1 that that night it wasn't Mr. Roger's Neighborhood
2 where they turned their lights off as a courtesy to
3 everybody in the neighborhood. She said that when
4 they left that house, they screeched off.

5 Now, she can't testify to whether or not
6 those skid marks are related to Mr. Gibbs' automobile
7 or not. She's not competent to testify to that.

8 All she can testify to is what she did
9 testify to; and that is, those people when they left
10 that night, the three of them, Eason and the two
11 Gibbs, they were mad, they were agitated, they were
12 angry. And the proof of that is they slammed down on
13 the floor, they roared their engine, and they took
14 off.

15 I submit to you, if they were parked on
16 the wet grass and they went from the wet grass onto
17 the pavement, that the pylon in yellow just happens
18 to follow the same trajectory of what Michele
19 described.

20 Now, again, does she have any interest in
21 the outcome? Was she involved in the case? Was she
22 an impartial witness? Does she have anything to
23 gain? Would her credibility be an issue because they
24 say she dated somebody and that dating ended a year
25 ago? That's something for you to decide, for you to

1 evaluate.

2 But what could have been presented to you
3 by the state that has the obligation to present all
4 the facts of a case is Sergeant Willoughby or the
5 neighbor or somebody else that wouldn't leave to
6 speculation the source of those marks.

7 Why is that important? It's very
8 important to show what the attitude was of the people
9 who left the party.

10 Now, let's get to that party. A lot of
11 uncontested facts.

12 It's uncontested that David Rocquemoire
13 has never been in trouble in his life. It's
14 uncontested that David Rocquemoire was hard working,
15 working two jobs at the time.

16 It's uncontested that he was quiet and
17 calm that night. Everybody agrees to that.

18 It's uncontested that he wasn't drinking
19 any alcohol that night. The only explanation of his
20 drinking was a Sprite, but your recollection, not
21 mine. And he was not engaged with any of the women.
22 He was not acting out towards anyone.

23 But we do know that Demar was acting out
24 that night, and not necessarily in a bad way but in a
25 way when how people act when they've had a few

1 drinks. They do things that on reflection they may
2 have wished the next day they didn't do.

3 And what type of things did he do?
4 Sexually aggressive actions with young women,
5 language that was used with young women, those type
6 of things.

7 If you were to believe the Gibbs brothers
8 and Mr. Eason, you would think you were at a church
9 choir party, that nothing was going on.

10 Michele says they were drinking. They
11 were getting pretty jumped up.

12 Dexter Brown says that he had been
13 drinking pretty consistently. The expression I
14 heard, and I apologize if this wasn't in the
15 courtroom, was he was tore up from the floor up.
16 That's pretty drunk. Mr. Brown.

17 Now, what that does in terms of alcohol,
18 it is -- it affects how you act.

19 Thank you. I'm sorry. (Counsel refers
20 to lights being turned up.)

21 MR. SAVAGE: How you act is affected by
22 alcohol. The judgment, as the doctor said, the
23 judgment is -- is affected by it. But it also
24 affects your memory and your interpretation of the
25 events that took place that night. Alcohol does

1 that.

2 Let's talk about those events.

3 Everybody from the party went to number
4 one. It's interesting that a time line couldn't be
5 established. Why do I say the time line? Why was
6 that important? What were those questions about?
7 What time did you get there, what time did you leave,
8 how long did it take, how long was the second party,
9 blah-blah-blah-blah.

10 Time line is important for you to
11 determine how long party number three lasted and what
12 people were doing at party number three. That's
13 important, because everybody generally says, well,
14 they were drinking at number one, it was more
15 family-oriented than it was drinking, dancing, party
16 oriented. And party number two was a bust because
17 there was no booze and there was no music. It only
18 lasted for a short time. So in terms of hearty
19 partying late at night, party number three is where
20 the action was.

21 The question that I thought would be
22 helpful for you is: How long did that last? How
23 long were people drinking? What were they doing?

24 It's uncontested that they were drinking
25 that night, that Eason was drinking, it's uncontested

1 that Gibbs was drinking, it's uncontested that the
2 deceased was drinking, Demar. It's uncontested that
3 Dexter Brown was drinking. It's uncontested that
4 Chris Thomas was drinking. It's uncontested that
5 David Rocquemore was not drinking.

6 Sometime during that night, something
7 happened. I'm not sure we know what happened, but
8 there are some things that we know happened.

9 We know that immediately upon getting to
10 party number three, Troy Eason left. That's
11 uncontested. The only question is, did he leave
12 immediately, ten minutes later, or shortly later?
13 But we know for the most part of that party, the
14 majority of the party, the hours of that party, Troy
15 Eason was not present. Fact. Uncontested.

16 We know that during that party, Dexter
17 Brown was driven to a store to get more alcoholic
18 beverages, of whatever type, by David Rocquemore.
19 Uncontested. Fact.

20 We know that when David Rocquemore drove
21 off in his car and took Dexter Brown, Dexter had been
22 drinking heavily and David had not been drinking.
23 Fact. Uncontested.

24 While they were gone, there were some
25 contested facts. It has nothing to do with David

1 Rocquemore.

2 If you would believe the boys' version,
3 the girls were acting up. If you would believe the
4 boys' version, Mr. Gibbs and Mr. Gibbs and Mr. Eason,
5 the women initiated the misconduct. You would
6 believe that they were cussing and swearing and
7 carrying on, and that Mr. Gibbs was forced, I guess,
8 to have to throw a drink on the lady's face to shut
9 her up. That's what he would have you believe.

10 The ladies testified quite differently.
11 They testified that one of the ladies went outside
12 because she felt ill, and she was sitting on her car,
13 and she was trying to gather her senses or feel
14 better, whatever she was doing, that the two women
15 were by themselves. And then Rodney Gibbs pursued
16 her while she was not feeling well, and pursued her
17 and pursued her and pursued her, to the extent that
18 another person had to step in between and say, please
19 leave her alone, please go on.

20 David Rocquemore wasn't there for that.
21 He wasn't involved with that at all.

22 But however it became volatile enough is
23 that Ronald Gibbs had to come over and pull his
24 brother away and say enough is enough.

25 So there must have been something there

1 that triggered enough nervousness of the parties that
2 everybody decided to leave.

3 Michele says that not Army man Ronald but
4 his brother drove the car, and that's when they sped
5 off.

6 Now, who was in that car? The two Gibbs
7 brothers and Eason -- excuse me -- two, two of the
8 Gibbs brothers and Demar. Eason was not present; he
9 had been gone for hours. These were buddies for life
10 they said, from a young time.

11 The question that I would have that has
12 not been answered that I would ask you to reflect on
13 is: Why is a married man with three kids and all
14 these other responsibilities they told you about at
15 3:30, quarter to 4:00 in the morning going to
16 Mr. Eason's house? If the party was over -- think
17 through this, now, please, help me -- why would they
18 go to Eason's house? Why didn't they go home?

19 I suggest to you the only reason they
20 went to Eason's house is to get two more fists,
21 another battle. Now, whether that was deliberate on
22 the way when they decided to do that, how did that
23 come about, what caused that, why did they want more
24 muscle there, but it just doesn't make sense that at
25 that time of the morning you would go and wake up,

1 whatever he was doing, watching TV or what, and get
2 somebody else who gets out of bed who didn't want to
3 be at the party in the first place who had left the
4 party hours before. Why in God's name at that time
5 of the morning would you get back up and go back to
6 the party? It just doesn't make sense.

7 You know, they try to say that a phone
8 call was made. Remember that? Along with the
9 missing detectives and the other people that they
10 didn't tell you, y'all know it's common sense today
11 when you have a phone call on a cell phone, what do
12 you get at the end of the month. You get a bill. If
13 you want to get the bill, what do you get? You get
14 the phone records.

15 So if somebody wanted to make a statement
16 I made a phone call, how much trouble would it be to
17 say let me see your phone records? Let me look at
18 who you were talking to. How long did you talk to
19 them? How long was that conversation in relationship
20 to what happened at the house?

21 And do you know what they'd tell you?
22 They'd tell you that Dexter Brown called who? Who
23 did he call? Eason. Eason hadn't been at the party
24 for hours. Why would he call Eason?

25 And the proof is there someplace. It's

1 just not here. They didn't give it to you.

2 And if he really did make that phone
3 call, where is the telephone record? Because I have
4 a problem, and I think you'll share that problem, why
5 some people would call Eason. There was no problem
6 with Eason. He wasn't there.

7 And if they say that he called Eason
8 because he knew that Gibbs and Demar went to his
9 house, how did he know it? Nobody announced where
10 they were going. Whether you take their version that
11 they lived in Mr. Roger's Neighborhood and backed out
12 quietly and off down the road or whether you take
13 Michele's independent witness testimony that they
14 sped off and they screeched off, no one knew where
15 they were going except them.

16 So how could this call have gone to a
17 place where they didn't know anybody was? It just
18 doesn't make sense.

19 It doesn't make sense that the drunk
20 Dexter Brown who admits he was grossly intoxicated,
21 tore up, would call and want to have some peace
22 convention at four o'clock in the morning.

23 You don't put four grown men in a car at
24 four o'clock in the morning and go back to a party
25 that's no longer in existence. You only go back for

1 one purpose: trouble.

2 Now, whether that trouble was they were
3 going to come back and have it out with the ladies, I
4 don't know; or whether when they got there the ladies
5 weren't there, and they're so agitated they started
6 this initial cussing and swearing which led to
7 fisticuffs, who knows.

8 Now, they would tell you that the phone
9 call was made because Mr. Brown was not upset about
10 anything except his house being left unattended. But
11 we know that's not true. Why do we know that's not
12 true? Because we know that one male, at least, was
13 there, the fellow who worked with David Rocquemore,
14 and we know at least five women were there. The
15 house was not unattended.

16 So when Brown tells you he called Eason
17 because he was mad about the house being unattended,
18 it doubly doesn't make sense. Number one, because
19 Eason wasn't there. He didn't leave the house
20 unattended. He had left hours beforehand. And
21 number two, there are five ladies and other men still
22 at the house, not unattended.

23 So when they tell you something like
24 that, I think you question their credibility and
25 their believability and why they would want to

1 deceive you, what's to be gained by that.

2 What's to be gained by that from their
3 point is they have to give a reason for these four
4 guys to come back to the party. That's why they told
5 you that. They wanted to give the Gibbs brothers,
6 Demar, and Eason an excuse of why they returned,
7 other than that they came back to rumble.

8 But it doesn't make sense. Filter
9 through that. No phone record, they call Eason who
10 wasn't there, they complain to Eason about the house
11 being unattended when they knew the house was
12 attended, and they want to have a peace conference at
13 four o'clock in the morning. Doesn't ring true,
14 doesn't make sense.

15 Let's talk about Demar. Let's talk about
16 his relationship.

17 It is never anything but a sad case when
18 somebody loses their life. And I say to you we all
19 recognize this was a foolish, absolutely wasteful
20 event that happened that night. Whatever caused the
21 problem, we can't get away of the permanent fact
22 that someone is dead, needlessly, because of
23 foolishness.

24 The question is whether you attribute
25 that foolishness to David Rocquemoire and that he was

1 criminally responsible for the murder of Demar.

2 And in evaluating this evidence, you look
3 again to the people who have testified, his friends
4 for life.

5 What did they tell you? They told you
6 they went to three parties, but what else did they
7 tell you? They told you why they were home, they
8 told you about, you know, how got they home, they all
9 got together, and they went out this night.

10 And what did they do first, early in the
11 evening? They went to the mall. Why would they tell
12 you that? Why would they tell you they went to the
13 mall with Demar and bought party clothes and that
14 they shared the expense and the cost for Demar and
15 they bought him new clothes to wear to the party that
16 night? Was that true?

17 Or did Lieutenant Powell who could
18 examine trace evidence, who's familiar with fabric,
19 who's familiar with clothing, he told you absolutely
20 unequivocally -- and he has no motive in the case,
21 other than truth -- that that shirt was anything but
22 Brand new. In fact, I asked him if it could have
23 been bought at the mall that night, and what did he
24 say? Absolutely no.

25 What does that do? That spills over to

1 the believability and the credibility.

2 What are they trying to do? They're
3 trying to show sympathy. They're trying to show that
4 this poor fellow who they loved and they grew up
5 with, they went out that night and bought him
6 clothes, Brand new clothes to wear to the party. The
7 only motivation for telling you that is to create a
8 sense of sympathy for this poor guy.

9 Well, we have sympathy for him. But we
10 want honesty, as well. That shirt was not a Brand
11 new shirt.

12 Lieutenant Powell also said -- and
13 Lieutenant DeFreese talked about the weapon and
14 firing of the weapon and whatnot. Let me start with
15 Lieutenant Dan DeFreese. He's the -- he's the gun
16 guy.

17 He testified that the gun -- that he
18 traced the gun and said the gun was lawfully
19 purchased, when it was purchased, and that it was
20 operating, and he test-fired it on a number of
21 occasions. And he made comparisons to uncontested
22 fact, uncontested fact being that that gun caused the
23 death of Demar Denson.

24 Lieutenant Powell then testified -- and
25 all of what Lieutenant DeFreese testified to was

1 accurate and uncontested. It's fact, a fact that
2 that's the gun that was used, the gun was fired, that
3 it was operating properly.

4 When I sit down, don't let the state
5 infer that that gun was jammed. Remember a lot of
6 conversation about it being -- the gun being jammed?
7 There was a picture of the gun being jammed.

8 No one has testified, no one, it's
9 uncontested, no one has said that that gun was jammed
10 when it was in the possession of David Rocquemore.

11 No one said the gun was jammed and he
12 couldn't fire it and we jumped on him. No one has
13 testified to that.

14 No one has testified about the source of
15 what could have caused the gun to be jammed. Whether
16 it was the fight that went on later on, whether it
17 was done during the handling by -- by Mr. Gibbs,
18 nobody has testified to that.

19 So don't infer what's not in evidence
20 that could have been in evidence, that the gun was
21 jammed and that's why the firing then stopped,
22 because that's a very -- a significant and very
23 important fact.

24 Lieutenant DeFreese was through, and then
25 Lieutenant Powell testified. And he not only

1 testified about what he did, he testified about what
2 he could have done.

3 And what he could have done was blood
4 splatter, fingernail scrapings, exchange of fiber.
5 He could have investigated Mr. Rocquemore's car to
6 look for fibers. Remember the fibers from the floor
7 mat or from the seat or whatever.

8 There were a lot of things. We don't
9 know what the results of those examinations would be,
10 but we know those examinations weren't done.

11 We know that he didn't -- that he didn't
12 get any -- any of this clothing and all these other
13 items over here that the state has had in their
14 possession, clothing that was worn by the two Gibbs
15 brothers, clothing that -- Mr. Eason says 5X, that
16 was his, he identified, yes, that clothing and shirt
17 he wore that night.

18 They didn't examine any of those clothes.
19 Now, would that be important? Why is the absence of
20 that information important? Because what they
21 focused on was the shooter and Demar.

22 Just as important, when somebody who
23 feels their life is being threatened by others are
24 the other people that are around him and how close
25 they were and what they're doing at the time.

1 And I submit to you that if Mr. Powell
2 had been given that clothing, he would then be able
3 to testify there's gunpowder residue or gunshot
4 residue on the clothing of any of the others.

5 Now, somebody at some point in time
6 thought that was important. Why? Because they took
7 the clothing into evidence that night. They just
8 didn't do anything with it. And it's because, I
9 submit to you, it's a risky business, and if you
10 submit it all and it doesn't come back like you say
11 it is, that's going to be a problem when you get to
12 court.

13 Joe Powell, Lieutenant Powell, he doesn't
14 have any interest in the case. He is just examining
15 evidence that's provided to him.

16 Controversy. Controversy, what happened,
17 what happened when David Rocquemore returned with
18 Dexter Brown. The next three to five minutes, ten
19 minutes, whatever it was, that's what's in
20 controversy.

21 You can interpret what happened in those
22 three to five minutes through the prism of what we've
23 talked about already, things that were explained to
24 you and things that weren't explained to you, all the
25 things that we've talked about up to now.

1 If there was a phone call, does it make
2 sense it was a phone call to Eason? How did he know
3 Gibbs and Demar were at his house?

4 The intoxication at the party, the third
5 party witnesses, the information from Lieutenant
6 Powell and Dan DeFreese, all that stuff sets up for
7 you the prism of how you view the testimony of what's
8 really essential, and that is the next three to five
9 minutes.

10 Uncontested. Uncontested, David
11 Rocquemore returns from the store in the same mood
12 that he left: quiet, composed, friendly but not
13 overly friendly, sober.

14 Uncontested, Dexter Brown returns from
15 the store trashed, intoxicated. Uncontested that
16 he's aggravated because the girls are leaving.
17 Uncontested, that despite his protestation that
18 Rocquemore is not involved in nor is Chris Thomas
19 involved in, the girls departed because they felt
20 there was trouble.

21 Contested. Gibbs, Demar, Eason return.
22 Everything from that point on is something that
23 you're going to have to sort out and determine,
24 again, and just as I said, from the prism of what led
25 up to that, the information that was provided to you,

1 who testified to what, what's believable, what's
2 credible, because there's a spillover of credibility
3 of these people who testified about the next three to
4 five minutes.

5 It's uncontested that David Rocquemore
6 was not armed. No one says that he threatened
7 anybody. No one says that he was armed. No one says
8 that he was going to his car to retrieve a weapon.
9 No one says that.

10 Depending on who you believe, Chris
11 Thomas says something. And if you were to believe
12 the state's case, he announces, once fisticuffs start
13 flying, he announces, hey, I'm going to my trunk and
14 I'm going to get something to end this noise.

15 Thomas testifies that in his mind, as he
16 told the police that morning, he was going to his
17 trunk to get a weapon, to get anything that he could
18 put his hands around, not a gun because he didn't
19 have a gun.

20 But in his mind, not in his mouth, he's
21 going to his car. It doesn't make sense for him to
22 announce I'm going to my car to get a weapon. It
23 just doesn't make sense at all. Think about that.
24 Why would he say that?

25 But on his way to the -- but later on

1 that morning, which is in the statement that's been
2 available to all these fellows now for two and a half
3 years, he said that in his mind he wanted to go and
4 get something out of his car.

5 He says that he didn't even open his
6 trunk; that before he got to his car, he was thrown
7 against the car when he was tackled and put down on
8 the ground and the trunk popped.

9 And you see in the picture, the trunk
10 wasn't open, it was popped, so much.

11 Now, if that is not true, if what he says
12 is not true about being banged against the hood --
13 the trunk of the car, if that's not true, then where
14 are the crime scene people and the detectives and the
15 other people who took custody of that car and
16 examined that car and looked through it, if it was
17 true that the trunk popped open by hitting against
18 it?

19 And you saw it in the picture. They
20 didn't show you the picture that showed that damage
21 to the car on the left-hand side. We had to get
22 another picture to show you because the picture that
23 was shown to you, the jurors, did not include that.

24 But when he testified, certainly the
25 state could have come back and said we examined that

1 lock, this is not true, they had to use a key to get
2 it open. It wasn't there.

3 So who are you to believe? Chris Thomas
4 or the Gibbs or Eason? There's nothing to support
5 their position.

6 And there's plenty of opportunity out
7 there for the cops to go back and examine that car,
8 examine that car that day. Yet they didn't come back
9 and testify, oh, the lock really wasn't broken, it
10 couldn't have popped open, we had to use the key to
11 open it. That's -- that's simple stuff to do, and it
12 wasn't done for you.

13 Thomas says he was knocked down. Thomas
14 said that a maneuver was used on him and he was down
15 on the ground. He couldn't see what happened, but he
16 heard what happened, and what he heard happening was
17 a scuffle over by David Rocquemoire's truck.

18 Totally consistent but not overblown,
19 saying things he saw that he couldn't have seen, but
20 he could hear them, and he could sense by his hearing
21 that there was a fight, a disturbance, a scuffle
22 going on near the truck.

23 Now, what other independent evidence is
24 there of a struggle at the truck? Clothing.

25 David Rocquemoire was not naked. He had

1 clothes on. And who has those clothes? The state
2 has those clothes. They took them from him that
3 night and testified to that.

4 Did they show you the tears on his left
5 side? Did they show you where his torn -- clothes
6 were torn on his left side? When you get in your
7 car, your left side is exposed. They didn't you show
8 that.

9 What they did show you were photographs.
10 And these photographs were shown to you for what
11 purpose? I don't know. You have to determine why
12 the state showed you these photographs, but let's
13 show you what was selectively shown to you.

14 Rocquemoore says when he was in his
15 vehicle, he was being attacked.

16 The state's witnesses agreed somewhat,
17 now, depending on how you listened to them or how
18 they expressed themselves or what they were feeling
19 at the moment, that they -- either they did follow
20 him, they didn't follow him, or the word I think they
21 used is they "shadowed" him.

22 What does to shadow mean? It means that
23 they didn't say where they were. They'd like to sort
24 of hedge their bets and say they followed him over
25 there, because they've got to explain those

1 sunglasses.

2 Remember the sunglasses in the grass back
3 by the truck? Somebody's got to explain that. So
4 they couldn't say that the fight started back where
5 it wound up.

6 They showed you in their photograph, and
7 it's not up before you now, but you remember the
8 sunglasses. Go back and look where those sunglasses
9 were. That was important to the state, important
10 enough to show you where they were found, but what
11 that does is it shifts the whole deal down to the --
12 to Rocquemore.

13 The jewelry that they found on the
14 windshield of Chris Thomas's car, why did they
15 photograph it? They won't tell you today whose
16 jewelry it was, but we know it's not Chris Thomas's,
17 because he said it wasn't his, and we know it's not
18 David Rocquemore's because we found David
19 Rocquemore's.

20 It just happens to be between the edge of
21 the driveway and David Rocquemore's truck. So what
22 does that tell you? Somebody's going down, and they
23 pulled their jewelry off on the side as they're
24 heading to go get David Rocquemore.

25 Now, let's talk about the pictures of

1 David Rocquemore. Remember Rocquemore says he was
2 beaten in his truck. He was beaten before he went to
3 his truck.

4 You saw on the ground where he was
5 beaten. He was kicked, and he was hit. This is
6 after the cops arrived he's still being beaten and
7 still being pounded, but his face is down.

8 This is the -- this is the state's
9 exhibit that was shown to you. Up on the top of this
10 blue line, that's state's exhibit 34. That's the --
11 that's the photograph that was shown to you.

12 And you've got to say, well, why did they
13 show me this photograph? Why is it important to show
14 me this photograph? They didn't put the clothing in
15 evidence. They didn't have the detectives testify.
16 They didn't have the girls testify. Why did the
17 state show me this photograph?

18 I propose to you they show you that
19 photograph because it shows nothing. The same
20 photographer who took that photograph took other
21 photographs, but they didn't show you the other
22 photographs.

23 Because of the color of his skin and
24 because of the lighting in the hospital, in that
25 photograph it looks like he is what? Uninjured.

1 And that's the impression they wanted you to have.

2 There's no other explanation for that,
3 ladies and gentlemen. Why would they do that?

4 Because the other photographs that the same
5 photographer took at the same time show you what? A
6 busted lip.

7 What else did they show you?

8 They have another picture of a busted
9 lip. Now, tell me, why was that photograph not shown
10 to you? Does that send you the same message as the
11 first photograph?

12 And you can ask, and I would encourage
13 you to ask, why did they show us state's 34 and not
14 this photograph?

15 What other pictures do we have? This is
16 state's 35, and this is the defense exhibit, a
17 photograph taken by the same photographer at the same
18 time. You answer that question for yourselves in the
19 jury room. Why are you showing some photographs that
20 don't indicate any injury and then the same
21 photographer took those photographs for the purpose
22 of showing his injuries?

23 Now, let's stop there and look at this.
24 Imagine yourself in the driver's seat of an
25 automobile. What side of the head would be exposed

1 to the door?

2 That is a picture of the left side of the
3 head. This is the picture that the state introduced
4 to show injuries to the left side of the head. Do
5 you see any?

6 Let's look at another photograph taken by
7 the same photographer at the same time, that is, the
8 state's photographer.

9 Why? Why? If you were sitting in the
10 driver's seat of your automobile, what hand would be
11 exposed on the door side? The left hand. That's the
12 photograph that the state shows you. The photograph
13 below that is the same photographer, same time, same
14 location, which shows the laceration to the middle
15 digit.

16 Thank you. Thank you, Mike.

17 Rocquemore goes to his car. He says he
18 was getting in his car to leave. That was the
19 purpose for getting in his car.

20 His testimony is he tried to get in his
21 car, and while he got in his car, he received a
22 beating that was continuous. His clothes were torn.
23 His head was bashed. But there are no pictures of it
24 or his rib cage, his legs, his feet.

25 Now, what they will say is all of those

1 injuries took place later on. Those injuries took
2 place later on after he fired the weapon. He says
3 those injuries started at his car door.

4 SLED could verify the transfer of blood
5 and how it was splattered and where it was and
6 whatnot. The car wasn't even examined for that. The
7 car wasn't examined for transfer of fibers. The car
8 wasn't examined for fingerprints to see who was at
9 the door.

10 And you know that they know what the deal
11 was, because what did they do? After they said, oh,
12 he didn't talk to anybody for two hours, after he had
13 the heck beat out of him, Ms. Shealy makes a big deal
14 you didn't talk to anybody. They were listening to
15 his phone calls, for God's sake. A hundred or more
16 phone calls, they listened to them.

17 They knew exactly what happened. They
18 had the car in their custody. When they listened to
19 his phone calls from the jail and he said exactly
20 what happened, as he's testified in this courtroom
21 two years later, they knew.

22 And they had that car. And they could
23 have examined it for blood. They could have examined
24 it for trace. They could have examined it for
25 fingerprints. It's done every day.

1 Yeah, they might not have examined the
2 gun for fingerprints because they said it wasn't a
3 suitable surface. Are you telling me they can't
4 examine the glass on an automobile? They can't
5 examine the exterior paint job of an automobile for
6 fingerprints? Hogwash. They didn't do it, because
7 they had their story and they were sticking to it.

8 David Rocquemore has testified under
9 oath. David Rocquemore who's never been in trouble
10 in his life testified under oath. David Rocquemore
11 who has never done anything harmful to anyone in his
12 life testified under oath that when he was being
13 pummeled and dragged out of his car he reached into
14 his glove box to grab anything, and he grabbed that
15 weapon.

16 I wish he had pepper spray. I wish he
17 had a baton. I wish he had an umbrella. I wish he
18 had a baseball bat. I wish he had brass knuckles. I
19 wish he had anything in that car other than the gun,
20 but that's all he had.

21 What's most telling in this, the next
22 couple of minutes what's most telling in this, is
23 that nobody got killed at the door of the car.

24 Everybody, it's uncontested, everybody,
25 including the Gibbs brothers and Eason, said that the

1 fight started at the car, that he got out of the car,
2 backed him around, and slammed at him. That's their
3 -- that's their testimony.

4 He didn't fire the gun. He didn't use
5 the gun for lethal force. He used it to protect
6 himself just like you would any other instrument. He
7 could have gotten out and bam-bam-bam-bam. He didn't
8 do that. Everyone agrees to that.

9 Everyone agrees that he tried to use that
10 weapon to fend off the attacker, to smack him. And
11 in the process of doing that, the gun dropped on the
12 pavement, and then chaos was let loose. There was a
13 scramble for the gun. He picked the gun up.

14 But whether it was alcohol or whether it
15 was hatred or whether it was emotion of the moment or
16 whether it was adrenaline or whether it was whatever,
17 the gun didn't back anyone off.

18 They continued to attack him, and they
19 came after him. Depending on what you recollect and
20 what was said and what happened that night, people
21 were banging around and the gun was fired.

22 It's not somebody who went to their car,
23 it's not somebody who carried a gun. You know, if
24 this was a situation where you had some thug who
25 carries a gun under the seat illegally that went and

1 retrieved the gun from under the seat, that wasn't a
2 licensed weapon, that wasn't bought by permit, that
3 there wasn't a background check, that hadn't been in
4 his possession for years, maybe then you'd say,
5 uh-uh-uh, this doesn't quite fit.

6 But here you have a lawfully-owned
7 possessed weapon that was properly stored in a
8 vehicle that remained in the vehicle until he was
9 attacked. Then when it was retrieved, it wasn't used
10 with lethal force. It was used to bang somebody back
11 to get somebody off of him. And then the gun was
12 dropped, everybody agrees it was dropped, and there
13 was a scramble for the gun, and everybody was coming
14 after him at that time.

15 But he had that gun in his car, and it's
16 uncontested, uncontested, that the weapon was
17 lawfully there, he was in lawful possession of that
18 weapon, that he was authorized by law to have it
19 there, and that he ran his business, his part-time
20 business out of that truck, and that's why he had it
21 there.

22 He didn't put it in the car that night
23 because he expected trouble at the party. He didn't
24 take the gun out of the truck earlier that night
25 because he was looking for trouble. He took that gun

1 out of the truck only when it was his only choice.

2 When he left there, when David Rocquemore
3 left there, while no detectives have testified --
4 remember they said they put him in the car, they put
5 him in the possession of the detectives -- he was
6 carried by ambulance to St. Francis Hospital. That's
7 uncontested. The ambulance was called not by David
8 Rocquemore but by the police department. That's
9 uncontested.

10 True, he was released from the hospital
11 from St. Francis. And the solicitor would have you
12 say, well, there was nothing wrong with him, they
13 didn't even give him an aspirin.

14 You've seen his pictures. They have his
15 medical records. They didn't show them to you, but
16 they have his medical records.

17 And if he wasn't severely injured, then
18 why was he transferred to another hospital that
19 happens to be in the Charleston County Detention
20 Center with doctors and nurses 24 hours a day?
21 Because of the beating that he took that night.

22 When somebody asks you whether they gave
23 you aspirin and when they know that you were taken to
24 another hospital, I would suggest that is done to
25 mislead you, to make you think, like those

1 photographs would make you think, that there was
2 nothing wrong with him.

3 When he gets to the hospital, he made
4 phone calls to his family. They have them. They've
5 listened to them. They didn't play them for you.
6 They questioned about what he said. They attacked
7 him on what he said and whether it varied with what
8 his statements -- statements were under oath to the
9 Court, but they didn't play them for you, and you've
10 got to ask why.

11 Mr. Rocquemoire's life is literally in
12 your hands. The facts that you will decide will
13 decide the remainder of his life. The judge in this
14 case is really you. Collectively, there are twelve
15 of you. With all due respect to Judge Pieper, you
16 are the judges. You are the people who have to
17 determine what's in controversy, the facts.

18 The law -- Judge Pieper might not like
19 this -- but it's easy. He looks at all the cases
20 that happened before here, and he looks at the
21 statute, and he's going to tell you what the law is,
22 but that's a pretty easy job, because it's written in
23 books. Your job is the tough one.

24 What Judge Pieper is going to tell you is
25 the state has the burden of proof. That's why they

1 got to go first.

2 The defendant had no obligation to even
3 present testimony. In this case, it was mandatory
4 because the state left so many gaps in the
5 information that they provided to you. It was
6 mandatory to show photographs, to question Lieutenant
7 Powell, to question Dr. Harley.

8 You know, as I think about Dr. Harley --
9 I know it's late, everybody's hungry, I am too. I'm
10 trying to only give you important things.

11 Remember asking Dr. Harley about what his
12 role was and what his training was, what his
13 experience was, and where he worked, and all that
14 sort of thing. And he told you how it works in the
15 hospital, you know, that they used to have a medical
16 examiner and the medical examiner used to go out in
17 the field, and Dr. Harley does his work right there
18 at MUSC.

19 He talked about the coroner. He talked
20 about what the coroner's role was and how the coroner
21 had its own investigators and they go out. They
22 determine the manner of death, which means whether it
23 was natural causes, whether it was a suicide, or
24 whether it was a homicide, but they also determine
25 the method.

1 And what has been introduced into
2 evidence, you may not have seen it yet, is the
3 official certificate of death in this case. And the
4 official record of death: Hemorrhage secondary to
5 close -- and I emphasize the word "close" -- range
6 gunshot wound to the abdominal area.

7 Close. I don't know what close means,
8 but I know that people were near each other at the
9 time the gun was discharged. How close, we don't
10 know. Why don't we know how close? Because the
11 state didn't determine it was in your interest to get
12 the evidence of the clothes of the Gibbs brothers and
13 Mr. Eason. You can infer by that, you can infer that
14 the fact they didn't do it is because the findings by
15 Lieutenant Powell would be contrary to their theory
16 of the case.

17 Judge Pieper will instruct you on the
18 law. I would ask you to pay close attention to the
19 law. I'm not going to discuss the law in depth with
20 you, that's his role, but he's going to talk about
21 what it means to murder somebody. He's going to talk
22 about how you have to have aforethought with malice,
23 hatred, depraved heart, darkened soul, and you want
24 to kill somebody, it's intentional. He's going to
25 talk to you about it.

1 He's going to talk to you about
2 involuntary manslaughter.

3 He's going to say in the law of the State
4 of South Carolina, someone who's inflamed, typically
5 found in a domestic setting, in the home when you
6 catch somebody in bed with someone you love, you get
7 all upset about it and you shoot one or the other.
8 That's the classic voluntary manslaughter. It's a
9 lesser. It doesn't have that same malice and hatred
10 and intent. It's an inflammation of the moment. The
11 heart changes because of something that spurs it on
12 at the moment to make you do things that you would
13 otherwise not do.

14 And he may talk to you -- he may talk to
15 you about involuntary manslaughter. Involuntary
16 manslaughter is the reckless use of an
17 instrumentality if you find that Mr. Rocquemore was
18 reckless in the way he handled the weapon. It's a
19 reckless act, a criminally negligent act, not just a
20 stupid act, but it had to be more than that. It had
21 to be criminally negligent, and I'm sure the Court
22 will instruct you on that.

23 And those are the options.

24 He might instruct you, he may say to you,
25 that this could have been accidental. In other

1 words, that it started out he was armed and he was
2 fighting, but then the gun dropped, and that in
3 retrieving the gun, the gun was fired accidentally.
4 It wasn't a controlled situation like when one would
5 reach into the glove box and control the weapon and
6 have knowledge of the weapon, where it is and how
7 it's being held and who it's pointed at.

8 Whether it's accidental in scooping up
9 the weapon, you could interpret the facts that way,
10 but that's up to you whether he picked up the gun and
11 handled it in a reckless manner or whether it was
12 accidentally discharged.

13 Did he discharge the weapon, or did
14 somebody else jump him on it at the time he
15 discharged the weapon? In other words, was he hit by
16 somebody else at the time the weapon was discharged
17 and it accidentally went off?

18 I suggest to you in the courtroom a
19 little proof of that. Of course, there could have
20 been much greater proof of that had the clothes of
21 the others been examined.

22 But because that proof isn't there, you
23 hold that against them. You don't assume they
24 weren't there. You assume they were there. Because
25 they, the state, it's not a person, but the state

1 failed to have those clothing examined. They're held
2 accountable for that. They're responsible for that.
3 Those clothing were in their custody and control.
4 They've had them for two years.

5 And you can assume that they weren't
6 given to you because what they'd indicate is that
7 other people were in very close proximity, almost
8 contact, with that weapon when it discharged.

9 Now, I believe the judge is going to tell
10 you that Mr. Rocquemoire is entitled to defend
11 himself. I believe that Judge Pieper is going to
12 advise you that if he felt threatened and he felt
13 imminent harm that he is entitled under the law, just
14 like you are, ladies and gentlemen, when somebody
15 attacks you, to protect yourself.

16 If you have no means to leave via, if he
17 couldn't crank up his car, close the door, and get
18 out of there, he is absolutely lawfully entitled to
19 protect himself with whatever force is necessary to
20 protect from that threat.

21 And if somebody is yelling at you and
22 telling you they're going to kill you and had all the
23 other language that was used, and punching you and
24 kicking you, you have a right -- he had a right to
25 run over them if he wanted to. He could crank up his

1 car and run over them, knock them over with his
2 truck.

3 He grabbed his weapon. He didn't shoot
4 them. He swatted at them, which is not lethal force.
5 He made a decision not to shoot at them at that
6 point. He used the lesser nonlethal force to get
7 them off, but they didn't back off. They didn't back
8 away.

9 Remember they all know, wait a minute,
10 he's got a gun, stop. No one said stop. No one said
11 back up. No one says he's got a gun, or this has
12 gotten out of hand, this is crazy.

13 They continued that pursuit. They were
14 fueled by animosity, hatred, alcohol, or stupidity,
15 but they didn't back off.

16 The judge will tell you that what was
17 going on in his mind, that's David Rocquemoire's mind,
18 not anybody else's mind, in terms of the threat that
19 was made to him, he could act on that threat. He
20 could act on that fear. He could defend himself:

21 And whether it was accidental, you can
22 find it was accidental that the gun discharged
23 because people were jumping on him, pushing him,
24 shoving him, or whether you find that he used that
25 gun appropriately to defend himself from an apparent

1 threat, from a real threat, not some make-believe
2 threat, not somebody shouting names at you or calling
3 you bad names, but saying that they were coming at
4 him, two or three people coming at him, you can
5 defend yourself.

6 And I submit to you, ladies and
7 gentlemen, when you filter through all the
8 evidence -- and I'm asking you to please do that.
9 Much as you paid close attention throughout the
10 course and the courtesies that you've extended to the
11 Court and the prosecutors and myself and
12 Mr. Rocquemoire, please continue in that spirit of
13 civic duty, to look at what has been offered and to
14 look at what has not been offered and to try to
15 reason why you were shown certain things and why you
16 were not shown other things.

17 And do you feel comfortable that you have
18 the full picture? Did the defense witnesses, and
19 which there was no obligation to call, assist you in
20 determining what happened that night?

21 Is the lack of a phone record important
22 to you? Could it confirm that a phone call was made
23 or that a phone call was not made?

24 Is it consistent, does it make sense that
25 he would call the guy, that Dexter Brown would call

1 the guy who was not even there?

2 One other thing about Dexter Brown before
3 I forget. Rodney Gibbs, the guy who said he threw
4 the drink in the young lady's face, he admits that.
5 He said he didn't get involved in the fight, that
6 Dexter Brown was holding him back. He wasn't
7 involved, because Dexter Brown grabbed his arm.

8 Well, the fact is that Dexter Brown's
9 testimony is and many of the other people that Dexter
10 Brown, as soon as the fight took off, he ran in the
11 house.

12 It's those kind of things that I'd ask
13 you to sift through and look for and see whether it
14 rings true, does it have an air of truth to it, or
15 did Mr. Rocquemore act within the law that night?

16 And I submit to you, Mr. Foreman and
17 ladies and gentlemen of the jury, when you go back
18 and debate and sift through and question all the
19 evidence that's been presented and the evidence that
20 has not been presented, that you will find that while
21 it is terrible and unfortunate and awful that a
22 person lost their life, that at the moment it
23 happened Mr. Rocquemore was not given other options
24 and that the firing of the weapon was in
25 self-defense, if you find that he did it, or that it

1 was accidental because of the jumping on a man who
2 had a loaded weapon in his hand by two or three other
3 people.

4 And when you do that, I'm confident that
5 you'll feel good when you leave here today and I see
6 you six months from now or a year from now on the
7 street and we recognize each other, or you see others
8 involved in this case, you'll feel good about
9 yourself for having made the right decision that
10 Mr. Rocquemoire is not guilty of any criminal act.

11 I thank you for your attention.

12 MR. DURANT: May we approach just a
13 moment, Judge?

14 THE COURT: Does anyone need a break, a
15 quick break before the state presents -- you do?

16 And just to let you know, ladies and
17 gentlemen, I went ahead and ordered pizza for
18 everyone, and I hope that's okay. That's not okay
19 with you? Okay.

20 I'll go ahead and send you to the jury
21 room. Do not discuss the case in any way. Thank you
22 very much.

23 (Whereupon, the jury goes to the jury
24 room at approximately 1:12 p.m.)

25 THE COURT: All right. Let's a take a

1 quick break.

2 (A break is taken at approximately
3 1:12 p.m.)

4 (The trial reconvenes at approximately
5 1:22 p.m., the defendant being present with counsel,
6 and the following proceedings were had:)

7 THE COURT: All right. Is the jury
8 ready? Please be seated.

9 THE BAILIFF: They're ready, Judge.

10 THE COURT: Bring the jury in.

11 If all these people are going to come
12 back in, you might want to wait a minute. I don't
13 want them to disturb your argument.

14 (Whereupon, the jury returns to the
15 courtroom at approximately 1:23 p.m.)

16 THE BAILIFF: All are present, Your
17 Honor.

18 THE COURT: Thank you. Please be seated.

19 All right, ladies and gentlemen. We're
20 ready to proceed.

21 MR. DURANT: May it please the Court.

22 THE COURT: Yes, sir.

23 CLOSING ARGUMENT

24 BY MR. DURANT:

25 Good afternoon, ladies and gentlemen.

1 You've heard the evidence in this case, and now the
2 torch, so to speak, passes to you, and you'll go back
3 in that jury room to deliberate after the judge has
4 instructed you on the law and arrive at a verdict in
5 this case.

6 And this is an important case, and it has
7 been a relatively lengthy case, but I would submit
8 that despite that, it should be a case that you
9 should have no difficulty in arriving at a decision.

10 And it all boils down to what Mr. Savage
11 told you: This is not a who dunnit. It's a what
12 is it. That's what you're here for. That's your role
13 in this case to determine what is it.

14 And despite Mr. Savage's complaints about
15 the police work in this case, we know we've got the
16 right man, because he told us that his client shot
17 Demar Denson, that David Rocquemore said that he
18 killed Demar Denson.

19 His entire case and his entire closing
20 argument has been to divert your attention away from
21 the critical issue that you have to resolve in this
22 case; and that issue is, that question is, the
23 question that you as a jury must decide is: What was
24 going on in the mind of David Rocquemore when he shot
25 and killed Demar Denson in the early morning hours of

1 August 14th, 2005?

2 That is the issue you have to resolve,
3 but that is not an issue that can be decided by the
4 beatification of some scientific test or experiment.
5 That question can only be answered by you,
6 collectively, as a jury, basing it upon your common
7 sense and your understanding of human nature.

8 We know in this case that David
9 Rocquemoire shot Demar Denson. We know that he shot
10 him two times. We know that he shot him at a
11 distance of at least three to four feet according to
12 the testimony of SLED Agent Powell.

13 We know that he used a .45 caliber
14 Highpoint semiautomatic weapon. We know that he shot
15 Demar Denson in front of [REDACTED] Street across
16 the street from Dexter Brown's house.

17 We know that Mr. Denson died as a direct
18 result of those gunshot wounds. It severed his
19 abdominal aorta, he bled to death internally, he was
20 was incapacitated in a matter of seconds.

21 We know that Mr. Rocquemoire was tackled,
22 disarmed, beaten, and held until the police arrived.

23 And we know that no one else out there
24 that night, with the possible exception of Chris
25 Thomas, had a gun.

1 And I say the possible exception of Chris
2 Thomas, and I know his car was searched and all of
3 that, but of all the people involved in this thing,
4 he was the only one that had an opportunity to get
5 rid of something from his trunk before the police got
6 there.

7 Now, there's no question he killed Demar
8 Denson. You have to decide what was on his mind when
9 he pulled the trigger. If it was malice
10 aforethought, as the judge will instruct you on, it
11 is murder. If he killed him in a sudden heat of
12 passion, upon sufficient legal provocation, it is
13 voluntary manslaughter. If he shot him
14 unintentionally through criminal negligence, it would
15 be involuntary manslaughter.

16 If, as the defendant claims, he killed
17 Mr. Denson as the only probable means of saving his
18 own life or if he shot him as an accident, then you
19 need to go back there and send him on his way, let
20 him go.

21 That is your role in this case, and your
22 whole role revolves around what was going on in his
23 mind at that time.

24 And I want to start with his claim of
25 self-defense. I would submit that his claim of

1 self-defense fails at virtually every level.

2 First of all, I believe the judge will
3 charge you that the first element of self-defense is
4 that Mr. Rocquemore not be at fault in bringing about
5 the difficulty which resulted in the death.

6 I would submit that it was David
7 Rocquemore and his friend Chris Thomas that started
8 this whole thing.

9 Contrary to what Mr. Savage would have
10 you believe, Ronald Gibbs and Troy Eason and Rodney
11 Gibbs are not a bunch of drunken thugs. They're all
12 in their late 30's, early 40's. They all have good
13 jobs. None of them have criminal records. These are
14 solid people with solid careers. They're not a bunch
15 of drunken frat boys feeling forthright out on a
16 Saturday night and being out there trying to roll
17 somebody.

18 I'm not saying that Mr. Rocquemore is a
19 bad person, but these people are not bad people
20 either. But the fact of the matter is that Demar
21 Denson and Rodney Gibbs and Ronald Gibbs and Troy
22 Eason had obviously no beef with this man or his
23 friend Chris Thomas. At no time, you did not hear a
24 single lick of testimony in this entire case that
25 indicated there was any bad blood between them and

1 the defendant.

2 Why would, as Mr. Savage would claim,
3 would they go back over there to confront
4 Mr. Rocquemore or Mr. Thomas who they hadn't even had
5 an unpleasant word with? Why, as Mr. Savage would
6 claim, do they have to go get Troy Eason to get
7 another pair of hands to beat up a bunch of women?

8 With all due respect, I think if that was
9 on their mind, they could have taken care of the
10 women themselves if that's what they were interested
11 in doing.

12 Fact of the matter is, Dexter called
13 them, and Dexter was angry because the girls weren't
14 there, and they went over to smooth things over.

15 But at no point, at no point did they
16 have any beef with this man, unless he said something
17 when they arrived that started it, like "What do you
18 N's think you are, a bunch of gangsters?" And that
19 started the whole cascade going.

20 And those words came from his mouth, and
21 those words were even confirmed by his witness
22 Mr. Thomas. He was arguing with them about driving
23 up with their lights off. And then on top of that --
24 so that's what started the argument.

25 And then Chris Thomas rachets it up by

1 saying he's going to get a weapon and quiet things
2 down. So he threatens to bring a deadly weapon to
3 what amounted to an argument at that point.

4 And then David Rocquemoire rachets it up
5 another level, and he actually brings a deadly weapon
6 to what at that point had amounted to an argument.

7 And then when armed himself, he went
8 after Demar Denson and tried to pistol-whip him.

9 Secondly, self-defense, he has to have a
10 reasonable apprehension or fear of death or great
11 bodily injury.

12 Well, ladies and gentlemen, whatever fear
13 he may have had on his mind that night ended when he
14 pulled this out of his car.

15 In spite of what he told you on the
16 witness stand, nobody, nobody, nobody attacks a man,
17 a big man like him, holding a loaded one of these.
18 And from that one fact you can infer everything he
19 told on the witness stand is not true. Fact of the
20 matter is, once he armed himself with that weapon, he
21 feared no man. He feared no man.

22 Thirdly, and most importantly on the
23 issue of self-defense, I believe the judge will
24 instruct you on what is called in the law of
25 self-defense as the duty of retreating. And I would

1 submit to you, ladies and gentlemen, that there was
2 no reason that David Rocquemoire had to kill Demar
3 Denson that night. The law does not favor taking of
4 human life. And if one can reasonably avoid it by
5 retreating, he must do so.

6 No matter what happened before, once
7 Mr. Rocquemoire armed himself with that .45 caliber
8 weapon, he had an obligation to avoid killing
9 Mr. Denson if he could have done so without
10 endangering himself.

11 And if David was able to get to his car
12 and get that weapon, he could have gotten in his car
13 and left. If these guys were around, he could have
14 shoot those guys off and left, but that's not the
15 path he chose that night.

16 Instead of doing that, he got the gun,
17 this gun, and started doing what the kids call
18 nowadays a front: "Now what you going to do? Now
19 what you going to do?"

20 Like I said, whatever fear he may have
21 had that night dissipated when he picked up that
22 weapon, and all of a sudden he becomes the aggressor
23 in this case.

24 "Now what you going to do? Now what you
25 going to do?" And he goes after Demar Denson, and he

1 tries to hit him across the head with that .45.

2 You can feel that .45 when you get back
3 there. That's a heavy piece of metal right here, and
4 it shoots a big heavy bullet.

5 And let me tell you this about another
6 thing that he said on that stand that you know is not
7 true. If he had been ganged at his car like he would
8 have you believe, there would have been somebody shot
9 that night. They would have been shot right there at
10 the driver's side of his vehicle and not 55 feet down
11 the street across from Dexter Brown's house.

12 And how did he get from Point A to Point
13 B? "Now what you going to do?" And going after
14 Demar Denson and trying to hit him in the head with
15 that pistol. It's the only version of what went on
16 there that night that makes any sense.

17 The fact of the matter is that
18 Mr. Rocquemoire, Chris Thomas, and Dexter Brown were
19 all upset because the girls had gone.

20 The fact of the matter is, none of those
21 guys who came in that Explorer had any reason to be
22 mad at Dexter Brown or David Rocquemoire or Chris
23 Thomas unless, as they say, he accused them of being
24 a bunch of gangsters, which cascaded this whole
25 thing.

1 An argument breaks out. At that point
2 it's just an argument. Chris Thomas rachets it up by
3 claiming to go get a weapon. He goes to his trunk
4 and opens his trunk.

5 And if you want to believe that the trunk
6 just flew open when he got tackled, then you're free
7 to do that, but I know this: When police got there,
8 that trunk was open.

9 So Ronald, the one that's trained, the
10 trained soldier, he's not going to let Chris Thomas
11 bring a weapon to this argument, and he tackles him
12 and holds him down. He doesn't beat him up. He
13 tackles him, holds him down, frisks him to make sure
14 he doesn't have a weapon, makes him take his shirt
15 off.

16 And Chris Thomas can deny that's his
17 shirt all he wants to, but the fact of the matter is,
18 ladies and gentlemen, everybody else out there had a
19 shirt on. We saw that on the video.

20 He can also deny that that jewelry on the
21 car was his. Who else could it belong to? Could he
22 have taken that off in preparation for this rumble he
23 was about to get in?

24 In any event, while Ronald and his friend
25 Chris Thomas are tied up on the ground between the

1 cars, David Rocquemore, Mr. Rocquemore, slips off to
2 his truck and grabs that .45 while everybody else is
3 engaged with what's going on between the other two
4 guys.

5 And at that point, he becomes the big dog
6 out there. He's the alpha male. He's the one with
7 the .45. He's going to teach those guys a lesson.
8 "Now what you going to do?"

9 He pursues Demar Denson. Demar is
10 backing up with his hands up, just like anybody in
11 the world would do in the same situation. When he
12 tries to hit him with that gun, Demar goes back. He
13 picks up the weapon, bam, Demar comes around, bam
14 (demonstrating). The only account of what went on
15 out there that night that makes sense.

16 On the other side of the coin, you have
17 David Rocquemore's story. And I would submit to you
18 that his story and the story of Chris Thomas on a
19 number of levels not only does not have the ring of
20 truth, but it's outright preposterous.

21 I've already gone through, and I won't
22 beat a dead horse, the whole premise about why these
23 fellows, Demar Denson and his friends, would attack
24 David Rocquemore. They had no reason to do so.

25 Nobody attacks David Rocquemore at his

1 truck for a variety of reasons. Number one, there
2 were no dents, no scratches, no blood, no nothing on
3 his truck that would corroborate this big fight that
4 he claimed went on at the door of his truck.

5 Number two, if it had happened as he told
6 you, if he's sitting there holding on to the wheel
7 with one hand, fighting the guys off and kicking them
8 with the other hand, if he had ever let go of that
9 wheel and started going to the center console to get
10 that gun, he would have been dragged right out of
11 that truck and the crap beat out of him.

12 If he had gotten his hands on that gun
13 and he had been savagely attacked at his truck like
14 he says was happening, he would have killed somebody
15 right at that truck.

16 But the big reason that it didn't happen
17 is because his truck door was closed. Something that
18 simple. It could be very simple.

19 You know, when you go back in here,
20 you're going to review his testimony in your mind.

21 He said he was dragged from the truck.
22 Did he say, "Excuse me, would you let me go, and take
23 a break, a recess from beating the crap out of me
24 while I go close my truck door?" Do you think
25 anybody, these people that were set upon him, would

1 have done that?

2 I know this. Look at that deputy's
3 video. That truck door is closed when they get
4 there.

5 This whole story about him being beat on
6 for three to five minutes, however long it was, when
7 he was the only one out there that had brought a .45
8 to a fist fight just does not ring true.

9 Would you do that, ladies and gentlemen?
10 Do you know of anybody that would do that? Do you
11 know of anybody that would go up against a loaded .45
12 and do anything other than "hey, man, calm down"?

13 If David Rocquemoire had been beaten as
14 long and as severely as he claimed, he would have
15 been a bloody pulp. He was not.

16 You have the pictures. You have my
17 pictures; you have his pictures. Basically, he had a
18 busted lip, a couple of abrasions on his forehead, a
19 nick on his hand, and scrape behind the ear. And
20 this after being, by virtue of the state's witnesses,
21 admittedly, chewing him up for several minutes while
22 the police were getting there.

23 Ladies and gentlemen, you can draw your
24 own conclusion from those photographs, but you have
25 to admit he doesn't look that bad for someone that

1 was beaten as badly as he says he was beaten on that
2 stand.

3 And you have to admit that every one of
4 those injuries that he -- that you see pictures of
5 could have occurred when they were trying to disarm
6 him and he refused to give up that weapon, including
7 the nick on the left hand when he's sitting there
8 trying to hold the gun under him and they're trying
9 to snatch it out of his hands.

10 He was beaten, ladies and gentlemen, but
11 he was beaten after the fact, not before the fact.

12 And the final reason we know that what he
13 told you wasn't true is because he never said that to
14 Deputy Ford when he came up to him when Deputy Ford
15 put him in the cuffs.

16 And you put yourself in his situation.
17 What is the first thing that's going to be out of
18 your mouth when the police arrive? "What are you
19 locking me up for? It was those guys that were
20 trying to kill me."

21 He didn't say that, because it wasn't
22 true.

23 No, it's not a case of self-defense,
24 ladies and gentlemen, which brings us to the next two
25 of his defenses: involuntary manslaughter and

1 accident, both of which require an unintentional act.
2 In other words, oops, I killed him.

3 One requires criminal negligence. That's
4 involuntary manslaughter. If you find that, it's a
5 violation of the law.

6 The other one, accident, is basically
7 without criminal negligence. This defense, if you
8 find that, then you cut him loose. That simple.

9 But the fact of the matter is, it's not
10 accident and it's not involuntary manslaughter,
11 because he intended to shoot Demar Denson.

12 You can accidentally shoot someone once.
13 You do not accidentally shoot someone twice. And,
14 quite frankly, if the gun hadn't been jammed, got
15 jammed in this case, he would have shot him a third
16 time and maybe a fourth time.

17 Mr. Savage can claim all he wants that
18 there's no testimony that the gun was jammed. But
19 Ronald Gibbs took it from his hands, got the gun away
20 from him, tried to clear it and it was jammed, and
21 put it on the truck.

22 He wants his cake and eats it too. He
23 wants to tell you that I was acting in self-defense.
24 But if you'll accept it, it was by accident.

25 If he was acting in self-defense, he was

1 acting in self-defense and he shot him intentionally
2 to save himself. If it was oops, it was oops.

3 But if you recall, his testimony about
4 "oops" was: I was falling to the ground, and the gun
5 went off, apparently two times, and maybe as many as
6 almost three, downward trajectory.

7 Downward trajectory, that's a documented
8 other fact, ladies and gentleman. If he's going down
9 on the ground when that gun goes off accidentally,
10 there's no way in the world you'd have downward
11 trajectories from the shots.

12 This is not a case of self-defense, it's
13 not a case of accident, it's not a case of
14 involuntary manslaughter, which leaves you with
15 either murder or voluntary manslaughter. If you find
16 him guilty of any one of those, then you have to find
17 him guilty of the weapons charge.

18 I don't know how long I've been going,
19 but I want to just address a few points based on his
20 defense, his closing, and during the case in chief,
21 and then I'll sit down.

22 During the case, the defense implied that
23 Ronald Gibbs and Rodney Gibbs and old Troy Eason left
24 the scene or left in their vehicle.

25 I think that y'all have seen from the

1 video that the vehicle that left the scene had
2 nothing to do with the incidents and could not have
3 been occupied by either the Gibbs brothers or Demar
4 Denson who were all within view of the camera or came
5 in view of the camera fairly soon after that car --
6 that car left.

7 That is a red herring. That is to divert
8 your attention away from what was going on in his
9 mind when he killed Demar Denson.

10 Was Dexter Brown out there during the
11 shooting? He may have been. You'd never get him to
12 admit that. But he had his home boys on one side and
13 his supervisor at work on the other. He was stuck
14 between a rock and a hard place.

15 He may have seen this whole shooting. If
16 you believe the girl that testified for them, he was
17 out there when the shots went off. But you'd never
18 get him to admit it.

19 Shoddy police work, made a big deal of
20 that. I mean, basically, a day in cross-examining
21 those crime scene tapes is a day that you will never
22 have back in your life. To what purpose? Because
23 it's completely irrelevant to the issue you have to
24 decide in this case.

25 MR. SAVAGE: Improper argument,

1 Your Honor.

2 THE COURT: Approach.

3 (There was an off-the-record bench
4 conference in the presence of the jury but out of the
5 hearing of the jury.)

6 (Said bench conference being concluded,
7 the following proceedings were had:)

8 THE COURT: Disregard that, ladies and
9 gentlemen.

10 Move on, Solicitor.

11 MR. DURANT: But I tell you what: The
12 forensic evidence you do have does not support his
13 claim.

14 The shell casing and the victim were some
15 55 feet from his car. Documented fact.

16 There was no gunpowder residue on Demar
17 Denson's shirt, which would indicate that he wasn't
18 in any kind of close struggle with the deceased in
19 this case.

20 Not searching the victim's car? Another
21 red herring. First of all, there is no testimony in
22 this case that any -- that the victim or any of his
23 friends had weapons. Secondly, had Mr. Rocquemoire
24 told Deputy Ford about this self-defense thing, then
25 their vehicle would have been impounded and searched;

1 but the police, Deputy Ford, only knew of the one gun
2 and the one guy that shot it.

3 His claims that we're trying to hide
4 things from you, you can believe that if you want to,
5 but you've heard testimony from the folks that were
6 out there that evening, the people that know.

7 The detectives who had gone out and taken
8 statements from people weren't there. They don't
9 know any more than you know. The people who were --
10 who were out there during the shooting were the ones
11 that you heard from.

12 We didn't try to hide the drink thrown in
13 the face thing. The only other new information
14 brought out by these girls was apparently one girl
15 was offended by the dirty dancing while another girl
16 said that they thought it was funny, and that's the
17 only thing they said about Demar.

18 The thing about his shirt being tested,
19 the medical examiner himself testified that he
20 suggested that the shirt be tested because he wasn't
21 sure of his initial evaluation of the shirt having
22 soot on it. Is there anything nefarious in that?

23 Did we hide the toxicology results from
24 you? Did not Dr. Harley, at my questioning, tell you
25 the victim was a .114?

1 Was Rodney hiding his hands from the
2 camera, or was he upset because his friend had just
3 gotten killed?

4 Skid marks, another red herring. Look at
5 the photos. There are more than one set of skid
6 marks out there, and they all originate from across
7 the street and down the road. What does that have to
8 do with what he was thinking when he killed Demar
9 Denson?

10 The time line, irrelevant. We know it
11 occurred at four o'clock in the morning or
12 thereabouts. It's right there on Deputy Ford's
13 vehicle.

14 None of these people, none of the state's
15 witnesses, none of the defense witnesses, knew about
16 time. This is not -- I mean, just to -- does the
17 defense want people to log times down on everything
18 they do during the night? They don't know; they're
19 at a party. Or does it have to do with what he was
20 thinking when he kills Demar Denson?

21 I've already touched on this. Went to
22 get Troy to have an extra pair of hands to come up
23 and beat up those girls? Because they didn't have a
24 beef with Chris Thomas when they left.
25 Mr. Rocquemoire and Dexter weren't even there.

1 They went -- this phone call didn't take
2 place? So they decide that they would need an extra
3 pair of hands to beat up Dileatha Washington and
4 Michele Powe and Diana Jenkins? They went back
5 because Dexter called them and wanted them to come
6 back.

7 Were they upset because the girls were
8 gone when they got back in? You're darn right.
9 Dexter was, I guarantee you Chris Thomas was, and I
10 guarantee you David Rocquemoire was, because they all
11 thought they were getting lucky that night.

12 It doesn't make sense that Chris Thomas
13 would make a statement about getting a weapon out of
14 his car? Doing the same thing as Rocquemoire when he
15 went and got the weapon out of his truck. That's all
16 it was.

17 Was the trunk on Thomas's car broke? I
18 doubt it. Mr. Savage called him as a witness. Does
19 he still have that car?

20 The shirt, I've already touched on that.
21 Whose shirt was it if it wasn't Chris Thomas's?
22 David Rocquemoire had a shirt on. We know both Gibbs
23 did. Troy Eason did. And as much as he wants to get
24 up there and deny it, he's the only person that shirt
25 could belong to. It's right there where Ronald Gibbs

1 tackled him.

2 Same for the jewelry. Can't you just see
3 it in your head, ladies and gentlemen? I'm going to
4 get something out of my trunk and it's going to get
5 quiet out here. Taking off his watch, his chain, and
6 going towards the trunk. He can deny it all he
7 wants.

8 The defendant's car was examined. It was
9 examined pursuant to a search warrant. No blood, no
10 dents, no evidence of any kind of fight going on at
11 that truck.

12 The death certificate, a close gunshot
13 wound. Well, ladies and gentlemen, we know Agent
14 Powell's testimony, that the man he killed was at
15 least three to four feet when he went down.

16 And like I said, I'm not trying to tell
17 you that David Rocquemoire is a bad man or a bad
18 person. Likewise, I would disagree with the defense
19 that Ronald Gibbs and Rodney Gibbs and Troy Eason and
20 Demar Denson are bad people. They're good people,
21 too. And the sad thing about this case is that they
22 are good people.

23 But this man had every opportunity to
24 avoid killing Demar Denson, and he chose another
25 path. Instead of getting his gun and getting the

1 heck out of there, he chose another path. He let his
2 testosterone override his brain, and he got that gun,
3 and he started fronting with it, and he went after
4 Demar Denson instead of getting the heck out of
5 there. He made that choice.

6 And as much as the defense would have you
7 believe that Ronald Gibbs, Rodney Gibbs, and Troy
8 Eason are just a bunch of thugs, I want you to think
9 about this: They had every opportunity in the world
10 and the motive to have killed David Rocquemoire that
11 night, and they chose not to.

12 David Rocquemoire had every opportunity to
13 and motive to kill Demar Denson, and he chose to do
14 so. He chose to take a man's life. It was not a
15 wise choice, but it was a choice that he made. It
16 was not the only way out of that difficulty for him,
17 but it was the choice he made.

18 It is now time for you, as the jury in
19 this case, to require him to pay for the choice he
20 made and find him guilty.

21 THE COURT: All right, ladies and
22 gentlemen. I'm going to send you to the jury room.
23 Your lunch should be ready. Do not discuss this case
24 in any way whatsoever. Once -- we'll try to take a
25 short lunch, maybe 45 minutes perhaps. Just let me

1 know and knock on the door when you have finished
2 eating lunch. Thank you very much. Again, do not
3 discuss the case in any way.

4 (Whereupon, the jury goes to the jury
5 room at approximately at 2:08 p.m.)

6 THE COURT: All right. Thank you. We
7 will try to take 45 minutes for lunch. Thank you.

8 MR. DURANT: What time would you like us
9 back, Judge?

10 THE COURT: Forty-five minutes. A little
11 bit before 3:00.

12 (A lunch break is taken at approximately
13 2:10 p.m.)

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AFTERNOON SESSION

(The trial reconvenes at approximately 2:56 p.m., the defendant being present with counsel, and the following proceedings were had:)

THE BAILIFF: Your Honor, they're ready.

THE COURT: Are y'all ready?

MR. DURANT: Yes, sir, Your Honor.

MR. SAVAGE: The defense is ready, Your Honor.

(The Court and the law clerk confer.)

THE COURT: Do y'all want to look at the verdict form, please.

(Mr. Durant and Mr. Savage comply.)

THE COURT: Any objection?

MR. SAVAGE: Not by the defense, Your Honor.

MR. DURANT: No, sir.

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

(Whereupon, the jury returns to the courtroom at approximately 3:00 p.m.)

THE BAILIFF: All jurors are present, Your Honor.

THE COURT: Thank you. Please be seated.

All right, ladies and gentlemen. At this

1 point I need to instruct you about the law that's
2 applicable to the case.

3 Can everybody hear me okay? If at any
4 point you can't hear me, please raise your hands,
5 because I will not know otherwise.

6 Now, as you've heard, the State of South
7 Carolina has charged the defendant with the offenses
8 of murder and possession of a firearm during the
9 commission of a violent crime.

10 You will have those indictments with you
11 in the jury room during deliberations, but you should
12 distinctly understand that an indictment just
13 contains allegations on the part of the state and is
14 in no way to be considered as evidence.

15 Now, the evidence in the case is the
16 testimony from the witness stand, any exhibits which
17 have been introduced into evidence during the course
18 of the trial.

19 Please pay close attention, because at
20 times I may get a request from the jury to give you a
21 written copy of any legal instructions, which I do
22 not provide to you.

23 Now, to the indictment -- the
24 indictments, the defendant has pled not guilty which
25 places the burden of proving the defendant -- of

1 proving the defendant guilty upon the state.

2 A person charged with committing a
3 criminal offense is never required to prove
4 innocence. A defendant does not have to produce any
5 evidence or witnesses. The burden is always upon the
6 state to prove a defendant guilty beyond a reasonable
7 doubt.

8 I charge you that it is a vital,
9 important rule of law that a defendant in a criminal
10 trial must always be presumed innocent until the
11 defendant's guilt has been proven beyond a reasonable
12 doubt.

13 This presumption of innocence remains
14 with the defendant at all times throughout the trial
15 and is only removed when and if the state has proven
16 guilt beyond a reasonable doubt, for it is your
17 solemn duty, ladies and gentlemen, if not convinced
18 of guilt beyond a reasonable doubt to find the
19 defendant not guilty.

20 What is a reasonable doubt in the law? A
21 reasonable doubt is a doubt that would cause a
22 reasonable person to hesitate to act.

23 All reasonable doubts must be resolved in
24 favor of a defendant. Suspicion, however strong,
25 does not suffice to sustain a conviction. As

1 indicated, the burden of proof is always upon the
2 state.

3 Now, ladies and gentlemen, as you may
4 have heard me mention, you are the finders of the
5 facts in this case. I do not sit up here and pass
6 upon the facts or tell you or express to you any
7 opinion that I might have as to the facts or anything
8 that I may think about this case, and you should form
9 no opinion in that regard from anything that I have
10 said or done.

11 If you have construed any acts or
12 gestures or statements on my part as any indication
13 of what you think I feel about this case, then
14 certainly you must disregard any such acts, gestures,
15 or statements on my part.

16 You are the judges and the sole judges of
17 the credibility or believability of the witnesses who
18 have testified in this case.

19 In passing upon their credibility, you
20 may take into consideration many things, such as:
21 the demeanor or manner of testifying, was the witness
22 forthright or hesitant, whether the witness had
23 reason to be biased or prejudiced, or whether a
24 witness's testimony was contradicted on the one hand
25 or whether it was supported and corroborated or

1 consistent on the other, and whether a witness made
2 any previous statements which are inconsistent with
3 the witness's present testimony.

4 You may consider such statements in your
5 determination of the truth of any statements or
6 testimony, as well as your consideration as to the
7 credibility of a witness.

8 If a witness is shown to have knowingly
9 testified falsely concerning a material matter, you
10 may also consider this factor in determining the
11 credibility of such witness's other testimony.

12 It is entirely within the province of the
13 jury to determine the credibility, if any, to be
14 given to any earlier statements and that to be given
15 to any present testimony.

16 And what was the witness's opportunity
17 for observation and knowledge of the matters about
18 which the witness has testified. You may consider
19 all of the facts and circumstances, including any
20 circumstances that may have affected a witness's
21 ability to observe or to recall a fact or event that
22 may have taken place.

23 You may believe all, a small portion of a
24 witness's testimony and disregard the larger or vice
25 versa. You may believe one witness against many or

1 many against one. You may believe all, some, or none
2 of a witness's testimony. Again, it is entirely up
3 to you.

4 Now, evidence of some other crime may
5 also be considered by you on the limited issue of
6 credibility or impeachment of a witness if that crime
7 had been introduced into evidence in regard to a
8 particular witness.

9 Now, the rules of evidence ordinarily do
10 not permit witnesses to testify as to opinions or
11 conclusions. An exception to this rule exists as to
12 those whom we call expert witnesses.

13 Witnesses who by education and experience
14 have become expert in some art, science, profession,
15 or calling may state their opinions as to a relevant
16 and material matter in which they profess to be an
17 expert, may also state their reasons for their
18 opinions.

19 You must consider expert testimony in the
20 same manner as you do any other testimony and give it
21 such weight as you may believe it to be entitled when
22 considered with all of the other evidence in the
23 case. Such testimony is given for the purpose of
24 enlightening you and not for the purpose of
25 controlling your judgment.

1 There are two types of evidence which are
2 generally presented during a trial: direct evidence
3 and circumstantial evidence. Direct evidence is the
4 testimony of a person who asserts or claims to have
5 actual knowledge of a fact, such as an eyewitness.
6 Circumstantial evidence is the proof of a chain of
7 facts and circumstances indicating the existence or
8 nonexistence of a fact.

9 The law makes absolutely no distinction
10 between the weight or value to be given to either
11 direct or circumstantial evidence, nor is a greater
12 degree of certainty required of circumstantial
13 evidence than of direct evidence.

14 You should weigh all of the evidence in
15 the case. After weighing all of the evidence, if you
16 are not convinced of the guilt of the defendant
17 beyond a reasonable doubt, you must find the
18 defendant not guilty.

19 Now, by the same constitution that makes
20 you the finders of the facts, I am made the sole and
21 only instructor in the law. You must accept as
22 correct the law which I charge, apply to the law the
23 facts as you find them to be and reach your verdict.

24 Put aside any conceptions you may have
25 had as to the law before coming here today and accept

1 the law as I instruct it to be.

2 For purposes of your duty as jurors here
3 today, you should not be concerned about what the law
4 ought to be but rather what I charge you the law is
5 at the present time in this state.

6 Now, again, I'm going to go over the
7 charges and the indictments with you at this point.

8 In one indictment, the defendant is
9 charged with the offense of murder.

10 Murder is the unlawful killing of any
11 person with malice aforethought either express or
12 inferred. Hence, in order to convict of murder, the
13 state must not only prove the killing of a victim was
14 caused by the defendant, but it was done with the
15 requisite criminal intent; that is, with malice
16 aforethought.

17 Criminal intent is a necessary element of
18 this offense and must be proved by the state beyond a
19 reasonable doubt. It is a state of mind which
20 operates jointly with an act in the commission of a
21 crime.

22 Criminal intent is a mental state, a
23 conscious wrongdoing. It is up to you, the jury, to
24 determine what a defendant intended to do based on
25 the circumstances shown to have existed.

1 There is no way that medical science can
2 dissect a person's brain and determine what a person
3 had in mind, so the law says that criminal intent may
4 be inferred from the circumstances shown to have
5 existed. Of course, you have the right to reject any
6 such inferences.

7 I will talk to you a little bit about
8 malice aforethought. I tell you that while the law
9 does not require that malice shall exist for any
10 particular length of time before the commission of
11 the act in question, it must be aforethought which
12 means the malice must have been conceived in the mind
13 of the defendant and must have accompanied the act of
14 killing.

15 Malice is defined in the law of homicide
16 as a term of art; that is, a technical term importing
17 wickedness and excluding just cause or legal excuse.
18 It is the wrongful intent to injure another and
19 indicates a wicked or depraved spirit intent on doing
20 wrong.

21 The words "express" or "expressed" or
22 "inferred" do not mean different kinds of malice but
23 merely the manner or way in which the only kind of
24 malice known to the law may be shown to exist; that
25 is, either by direct evidence or inference.

1 Malice aforethought presupposes a
2 competent mind capable of thinking, entertaining, and
3 retaining an evil disposition to encompass the death
4 of another human being.

5 Now, malice may be expressed as where,
6 for example, there are previous threats of vengeance
7 or lying in wait or other acts of preparation which
8 show that the deed was within a defendant's mind.

9 Now, malice may be inferred as where,
10 though not directly expressed, it is indirectly but
11 necessarily inferred from the facts and circumstances
12 which are proved.

13 Malice may be implied or inferred from
14 the willful, deliberate, and intentional doing of an
15 unlawful act without just cause or legal excuse.

16 If a person using a deadly weapon
17 deliberately and intentionally without just cause or
18 legal excuse takes the life of another, malice may be
19 inferred.

20 If facts are proven beyond a reasonable
21 doubt sufficient to raise an inference of malice to
22 your satisfaction, this inference would simply be an
23 evidentiary fact to be taken into consideration by
24 you, the jury, along with all the other evidence in
25 the case, and you may give it such weight as you

1 determine it should have.

2 In any event, an inference in no way
3 lessens the burden of the state to prove malice
4 beyond a reasonable doubt.

5 In other words, any evidence of malice
6 from the use of a deadly weapon is simply an
7 evidentiary fact to be considered by you along with
8 all the other evidence in the case and given such
9 weight as you determine it should have, including
10 your right to reject any such inference.

11 Now, if you should find that the state
12 has failed to prove beyond a reasonable doubt that
13 the defendant committed murder, you may consider
14 whether the state has proved beyond a reasonable
15 doubt that the defendant committed voluntary
16 manslaughter, because included within the offense of
17 murder is the lesser included offense of voluntary
18 manslaughter.

19 To be convicted of this offense, the
20 state must prove beyond a reasonable doubt that the
21 defendant took the life of another in the sudden heat
22 of passion based on sufficient legal provocation.

23 Both heat of passion and sufficient legal
24 provocation must be present at the time of the
25 killing to constitute voluntary manslaughter.

1 Sudden heat of passion may for a time
2 affect a person's self-control and temporarily
3 disturb a person's reason. The sudden heat of
4 passion must be the type that would make an ordinary
5 person unable to coolly reflect on his actions and
6 would produce an uncontrollable impulse to do
7 violence.

8 Sufficient legal provocation must be the
9 type that would make a person of ordinary reason and
10 caution become enraged and to lose control
11 temporarily.

12 The provocation needed for voluntarily
13 manslaughter must come from some act of or related to
14 the victim.

15 Words alone, however vulgar or insulting,
16 are not enough to be legal provocation. The words
17 must be accompanied by some overt threatening act
18 which could have produced the heat of passion.

19 The exercise of a legal right, no matter
20 how offensive it is to another, is never sufficient
21 legal provocation for voluntary manslaughter.

22 If the heat of passion had cooled or if
23 there is enough time between the provocation, if any,
24 and the killing for the passion of a reasonable
25 person to cool, the killing would not be voluntary

1 manslaughter.

2 In deciding whether a reasonable person
3 would have had enough time to cool off, you should
4 consider all of the circumstances surround --
5 surrounding the killing.

6 You may consider the nature of any
7 provocation or any -- the defendant's and party's or
8 other party's mental and physical states, the use of
9 any alcohol, circumstances and relationships between
10 the parties, the particular situation at the time of
11 the incident, education, and others.

12 In other words, you may consider all the
13 facts and circumstances and the time in which an
14 ordinary reasonable person in like circumstances
15 would have cooled.

16 Now, going further with the discussion
17 about lesser included offenses, if you find the state
18 has failed to prove beyond a reasonable doubt that
19 the defendant committed voluntary manslaughter, you
20 may decide whether the state has proved beyond a
21 reasonable doubt the defendant committed involuntary
22 manslaughter, which is also a lesser included
23 offense.

24 To prove involuntary manslaughter, the
25 state must prove beyond a reasonable doubt that the

1 defendant unintentionally killed the victim without
2 malice but while engaged in an unlawful activity not
3 naturally tending to cause death or great bodily
4 harm, or that the defendant unintentionally killed
5 the victim without malice while engaged in a lawful
6 activity with reckless disregard for the safety of
7 others.

8 Now, unintentional means the defendant
9 did not intend for anyone to be killed or seriously
10 injured. Reckless disregard for the safety of others
11 is more than mere negligence or carelessness. Mere
12 negligence or carelessness is the failure to use the
13 care that a person of ordinary reason would use under
14 the same circumstances.

15 Recklessness is a conscious failure to
16 use ordinary care. It implies the doing of a
17 negligent act knowingly. Reckless disregard for the
18 safety of others means that you are not interested in
19 the consequences of your acts or the rights and
20 safety of others.

21 Again, mere negligence is not enough.
22 The state must prove beyond a reasonable doubt that
23 the defendant was reckless and that the death was not
24 the result of an accident or mere negligent.

25 If a person who knows or should know that

1 ordinary care requires certain precautions to be
2 taken for the safety of others when using a dangerous
3 instrumentality, such as, for example, a gun or a car
4 or some other type of dangerous instrumentality, if
5 that person fails to use those precautions without
6 concern, then the person's actions may be considered
7 to be reckless. Again, it is for you, the jury, to
8 make this determination.

9 Now, one cannot be convicted of any crime
10 which is defined in terms of a result, such as murder
11 or voluntary or involuntary manslaughter, unless
12 one's act is the proximate cause of the result, which
13 in murder or either voluntary or involuntary
14 manslaughter is the death of the victim.

15 Proximate cause is that cause which is a
16 natural and continuing sequence unbroken by an
17 efficient intervening cause which produces the death
18 and without which the result would not have occurred.

19 Now, in the other indictment, the state
20 charges or -- the defendant with the offense of
21 possession of a firearm during the commission of a
22 violent crime.

23 The law of South Carolina makes it
24 illegal to possess a firearm or physically display
25 what appears to be a firearm during the commission of

1 a violent crime.

2 South Carolina law provides that a
3 violent crime includes, among other things, the
4 offenses of murder or voluntary manslaughter.

5 For you to find the defendant guilty of
6 this separate statutory offense of possessing a
7 firearm during a violent crime, you must first decide
8 whether a defendant is guilty of a violent crime,
9 whether in this case, as it is alleged, whether the
10 defendant is guilty of murder or voluntary
11 manslaughter.

12 If you find the defendant guilty of one
13 of those two violent crimes, then you must determine
14 whether the state has proven beyond a reasonable
15 doubt that the defendant was in possession of a
16 firearm or visibly displayed what appeared to be a
17 firearm during the commission of said violent crime.

18 The South Carolina law defines a firearm
19 as any machine gun, automatic rifle, revolver,
20 pistol, or any weapon which will or is designed to or
21 may be readily converted to dispel a projectile.

22 Now, whenever I talk to you about a
23 criminal offense, whether it be the one alleged in
24 the indictment or whether it be one in the
25 indictments or whether it be one of a lesser included

1 offense -- offenses, the state in order to obtain a
2 conviction for a particular offense must prove all of
3 the elements of that offense beyond a reasonable
4 doubt.

5 If the state has failed to prove any one
6 or more elements of an offense beyond a reasonable
7 doubt, you must find the defendant not guilty of that
8 offense.

9 Now, I want to talk to you a little bit
10 about some other concepts at this time, ladies and
11 gentlemen. First I want to talk to you a little bit
12 about self-defense.

13 Self-defense is a complete defense. If
14 you find a defendant acted in self-defense, you must
15 find the defendant not guilty.

16 Now, the state has the burden of
17 disproving self-defense by proof beyond a reasonable
18 doubt.

19 There are certain elements required by
20 law for self-defense to be applicable:

21 First, the defendant must be without
22 fault in bringing on the difficulty.

23 Second, the defendant must have actually
24 believed he was in a present imminent danger of
25 losing his life or sustaining serious bodily injury

1 or he actually was in such present imminent danger.

2 Third, if based upon his belief of
3 present imminent danger, a reasonably prudent man of
4 ordinary firmness and courage would have entertained
5 the same belief. If the defendant actually was in
6 present imminent danger, the circumstances were such
7 as would warrant a man of ordinary prudence,
8 firmness, and courage to strike the fatal blow in
9 order to save himself from sustaining serious bodily
10 harm or losing his own life.

11 And fourth, the defendant had no other
12 probable means of avoiding the danger of losing his
13 own life or sustaining serious bodily injury than to
14 act as he did in this particular instance.

15 If you find the defendant was entitled to
16 use deadly force in self-defense, the defendant need
17 not retreat in order to avoid the need for deadly
18 force if it is not possible or did not reasonably
19 appear possible to retreat without danger of being
20 killed or suffering serious bodily injury.

21 If it is possible to do so, then -- if it
22 is possible to retreat in that fashion, then a person
23 must do so, but I charge you that an individual
24 claiming self-defense has no duty to retreat if by
25 doing so he would increase his danger of being killed

1 or suffering serious bodily injury.

2 The law of self-defense encompasses
3 preventive action taken to protect one's life if such
4 action is taken in anticipation of danger and in
5 response to immediate threat.

6 One may act on appearances even if one
7 may be mistaken. The law does not hold someone to a
8 refined assessment of the danger, provided, of
9 course, he acted as a person of ordinary coolness and
10 courage would have acted or should have acted in
11 meeting the appearance of danger.

12 He does not have to wait till -- until an
13 assailant gets the drop on him, for he has the right
14 to act under the law of self-preservation and prevent
15 an assailant from getting the drop on him.

16 In determining a defendant's right to act
17 in self-defense, you must consider all the facts and
18 circumstances of the case.

19 In assessing the reasonableness of a
20 defendant's conduct, you can -- you may consider,
21 amongst other things, any differences in age, weight,
22 or size between the defendant and the victim, any
23 history or current circumstances of bad feelings or
24 dealings between the two individuals, the consumption
25 of any alcohol, as well as the reputation of those

1 involved.

2 In addition, you may consider the number
3 of aggressors or assailants that may be involved, as
4 well as any words accompanied by hostile acts, in
5 consideration of all of the circumstances on this
6 issue. Again, all of the facts and circumstances of
7 the case may be considered by you in regard to this
8 issue.

9 Finally, the person who is unlawfully
10 assaulted or against whom such an unlawful attempt is
11 directed is not bound to yield -- this is generally
12 kind of summing up the defense -- and may resist
13 force with force but is not authorized to go beyond
14 the line of force as is reasonably necessary under
15 those circumstances.

16 Again, for self-defense to be applicable,
17 all the elements must exist. If any one or more of
18 these elements have been disproven by the state,
19 self-defense would not be applicable. As I've
20 previously indicated, the burden is upon the state to
21 disprove self-defense by proof beyond a reasonable
22 doubt.

23 I also would like to talk to you
24 momentarily about the concept of accident.

25 When the death of a human being is the

1 result of an accident in the true meaning of that
2 term, no criminal responsibility attaches to the act
3 of the perpetrator.

4 If you find that the killing was
5 unintentional, that it was done while the perpetrator
6 was engaged in a lawful enterprise and that it was
7 not the result of criminal negligence, the homicide
8 will be excused as an accident.

9 There is no burden of proof upon the
10 defendant to show that the death was an accident.
11 The burden of proof is upon the state to prove beyond
12 a reasonable doubt that the death involved was not
13 the result of an accidental or negligent killing.

14 The burden rests upon the state to prove
15 beyond a reasonable doubt that the death of the
16 victim was the result of a criminal offense, in other
17 words, murder, voluntary manslaughter, or involuntary
18 manslaughter, and to also disprove accident.

19 A homicide will be excusable on the
20 ground of accident when, one, kills unintentionally;
21 two, defendant was acting lawfully; and three, due
22 care was exercised in the handling of any weapon.

23 Moreover, a homicide is also excused when
24 caused by the discharge of a gun where the accused is
25 lawfully acting in self-defense and the victim meets

1 death by accident through the unintentional discharge
2 of a gun or the like.

3 Finally, ladies and gentlemen, as in all
4 cases, the state has the burden of proving identity
5 beyond a reasonable doubt.

6 It is for you, the jury, to determine
7 whether the state has proven the identification of a
8 defendant beyond a reasonable doubt, considering the
9 credibility of all the witnesses, the circumstances
10 of observation, and such direct and circumstantial
11 evidence as you deem appropriate.

12 If the state has failed to prove the
13 identity of a defendant beyond a reasonable doubt,
14 you must find the defendant not guilty.

15 Now, you have been selected as fair and
16 impartial jurors sworn to impartially try and
17 determine the facts of this case; and when you comply
18 with your oath to do so, then no one will have a
19 right to criticize your verdict, and you will have
20 fully discharged your duty as jurors.

21 As to each indictment, consider all the
22 evidence and testimony that's been presented to you
23 and make your determination. If you have a
24 reasonable doubt as to whether the defendant is
25 guilty or not guilty, then find the defendant not

1 guilty. If, however, the state has proven guilt
2 beyond a reasonable doubt, then find the defendant
3 guilty.

4 At this time I'll go over the verdict
5 choices with you and the verdict form.

6 Just to remind you, that as to the
7 indictment number 2005-GS-10-8602, that is the first
8 one, it is the indictment for murder: We the jury
9 unanimously find the defendant -- and you have four
10 choices. I'm going to tell you what the choices are.
11 Obviously, there's no significance to the order that
12 I read them out to you. One is not guilty, two is
13 guilty of murder, three is guilty of the lesser
14 included offense of voluntary manslaughter, and four
15 is guilty of the lesser included offense of
16 involuntary manslaughter.

17 Now, as to the indictment number
18 2005-GS-10-8601: We, the jury, unanimously find the
19 defendant -- it's either not guilty or guilty. And
20 that's on the possession of a firearm during the
21 commission of a violent crime.

22 Now, whatever your verdict is, ladies and
23 gentlemen, it must be unanimous as to each
24 indictment; that is, each and every one of you must
25 agree on that decision. It is not a majority

1 verdict. You all must agree. That means if I called
2 you back in here, I could call -- have the clerk call
3 out your names one by one, and you would each confirm
4 that that was indeed your verdict and it was still
5 your verdict.

6 Now, ladies and gentlemen, at this time
7 one thing I need to do is, our remaining alternate,
8 sir, I want to thank you for participating in this
9 case throughout the last two weeks. Now that we're
10 ready to begin, I can excuse you as your alternate --
11 as being alternate. Do you have anything in the jury
12 room?

13 THE ALTERNATE JUROR: Yes, sir.

14 THE COURT: Would the bailiff please
15 take him back there, and get your stuff. Thank you
16 again for your service. If you want to stay and
17 watch in the courtroom, you're welcome to do so, but
18 you're excused to leave. I appreciate your
19 assistance.

20 (Whereupon, the alternate juror is
21 excused and leaves the courtroom.)

22 THE COURT: Let me know when he's got his
23 stuff out of there, please.

24 THE BAILIFF: Yes, sir.

25 THE COURT: While we're waiting, ladies

1 and gentlemen, just to go over a couple remaining
2 thoughts with you, before -- do not begin any
3 deliberations yet. What I do is I'll send you out
4 and then give the attorneys another opportunity to
5 discuss with me some things. Sometimes they want me
6 to add something or explain something further, and I
7 may agree to do that.

8 Also, we'll take that time to go ahead
9 and get the exhibits together and put them all in one
10 stack, make sure we have everything that's supposed
11 to go back there to you.

12 If I need you out, I'll bring you back
13 out, and we'll accomplish whatever we need do.

14 If I don't need you, at that time the
15 clerk or the bailiff will come with the exhibits and
16 the verdict form and direct you to begin your
17 deliberations. So please do not begin any
18 deliberations yet.

19 One final thing, ladies and gentlemen,
20 sometimes when the jurors are going through the
21 exhibits, the jury will send me a note, can we see a
22 certain photo or a picture or a document that someone
23 referenced. Please keep in mind, ladies and
24 gentlemen -- and I can only tell you this way -- that
25 if you're entitled to look at the physical exhibit,

1 it will be with you in the jury room. So please keep
2 that in mind, ladies and gentlemen, because I always
3 have jurors that want to start requesting other
4 documents all of a sudden. So if you're entitled to
5 look at it, it will be in there in the jury room with
6 you.

7 Again, has the alternate -- has the
8 alternate left?

9 THE BAILIFF: Yes, sir. He's outside.
10 He's outside. He got everything out. Do you want to
11 see him?

12 THE COURT: No. I just want to make sure
13 he's out of the jury room before I send them back.

14 THE BAILIFF: He's out, by all means.

15 THE COURT: All right. Do not begin yet,
16 ladies and gentlemen. I'll see you when -- I'll let
17 you know momentarily.

18 (Whereupon, the jury goes to the jury
19 room at approximately 3:33 p.m.)

20 THE COURT: Please be seated. Anything
21 further from the state?

22 MR. DURANT: No, sir.

23 THE COURT: Defense?

24 MR. SAVAGE: Judge, during the course of
25 the trial, the jurors have taken notes.

1 THE COURT: Yes, sir.

2 MR. SAVAGE: I would ask that the Court
3 instruct them on the use of the notes, the proper use
4 and improper use of the notes in regard to some
5 testimony.

6 THE COURT: I'll be happy to do that. I
7 usually do, so I don't know why I skipped over it.

8 MR. SAVAGE: Judge, on our request to
9 charge A-8.

10 THE COURT: 8-A?

11 MR. SAVAGE: Yes, sir. The third
12 paragraph in 8-A: After careful and impartial
13 consideration of all the evidence in the case or lack
14 thereof.

15 "Lack thereof" is important from our
16 defense viewpoint, and I'd ask the Court to give
17 another instruction that includes that language,
18 that it's either derived from the facts of the case
19 or the lack of evidence in the case.

20 THE COURT: Well, I think I specifically
21 told them the state has to prove beyond a reasonable
22 doubt all the elements of the offense. You can enter
23 that objection, though.

24 MR. SAVAGE: Thank you, Your Honor.

25 THE COURT: Anything else?

1 MR. SAVAGE: That's all we have.

2 THE COURT: If y'all would please
3 approach the court reporter and -- well, I guess
4 perhaps I could ask the state on that.

5 Do you have any position one way or
6 another on his request?

7 MR. DURANT: Pardon me?

8 THE COURT: On that last request? I've
9 got to bring them back out anyway for the...

10 MR. DURANT: Yes, Your Honor. I think
11 your charge handled it. I have no objection to the
12 charge on the notes.

13 THE COURT: On the what?

14 MR. DURANT: I said I have no objection
15 to the charge on the notes. I believe on his request
16 for the other charge, I think that your charge
17 handled it.

18 THE COURT: I think I'll let it stand on
19 that charge with that. I've never had a problem with
20 that. I may charge it, though, just to protect you.

21 If y'all would please approach the court
22 reporter to make sure all the exhibits are in one
23 stack and nothing is being sent back that has not
24 been admitted, so I can put that on the record.

25 (State and defense counsel review

1 exhibits.)

2 THE COURT: I think I might add what he
3 requested.

4 Back on.

5 I am going to charge what he requested,
6 along with the notes. I'm going to say a little bit
7 more than that, though.

8 (State and defense counsel further review
9 exhibits.)

10 MR. SAVAGE: The question that I have on
11 behalf of the defendant is state's exhibit number 50,
12 how will that be displayed to the jurors?

13 THE COURT: I can tell them if they want
14 something they can request it.

15 MS. KNEESE-SHEALY: Would they be brought
16 back into the courtroom to see that, Your Honor?

17 MR. SAVAGE: Well, we shouldn't be
18 present when they're deliberating and evaluating the
19 evidence.

20 THE COURT: Well, if I have to bring them
21 back in to show it to them, they wouldn't deliberate
22 at that point. Unless you have some other option,
23 tell them to stop deliberating so we can show it to
24 them and send them back.

25 MS. KNEESE-SHEALY: And we have to be

1 careful because I think that's the in-car video. I
2 think it still has that placard they objected to.

3 THE COURT: I mean, I don't know anything
4 else to do.

5 MR. SAVAGE: What I was going to do is go
6 through the exhibits and then address the attachments
7 to the exhibits. We didn't object to the evidence.
8 We did ---

9 THE COURT: All right. Y'all need to do
10 that together. I really don't think that y'all
11 really take it seriously.

12 (State and defense counsel further review
13 exhibits.)

14 (There was off-the-record discussion
15 while reviewing exhibits.)

16 MR. SAVAGE: Judge, we have gone through
17 all the items of evidence. We believe that all the
18 evidence is present, both introduced by the state and
19 the defense.

20 We would object to any superfluous
21 tagging and packaging that's not necessary that
22 either duplicates information or any more testimony.

23 For example, the bags, I have no
24 objection to, because they contain the evidence. The
25 labeling on the bag is unnecessary. For instance,

1 the cartridges, they were identified by Dan DeFreese
2 based on his initials on the cartridges.

3 THE COURT: Well, why didn't we take this
4 up as we went along if there is....

5 MR. SAVAGE: I believe I did, Your Honor,
6 and I said that I did not object to the evidence, but
7 I objected to the packaging.

8 THE COURT: But then you'll have to take
9 everything out or repack and do whatever. We
10 can't do that in two minutes while the jury's
11 waiting.

12 MR. DURANT: Your Honor, I just don't see
13 that there is any prejudice to the defendant.

14 THE COURT: I'm going to have to look at
15 each one of them.

16 MR. DURANT: I think he's talking about
17 the white tags on there.

18 THE COURT: But why is that -- why is
19 that an issue one way or another?

20 MR. SAVAGE: I don't think it's necessary
21 to send the bullets back that say they're from the
22 victim. That's a tag that was put on there. It has
23 nothing to do with the evidence itself.

24 THE COURT: I mean, why is the word
25 "victim" prejudicial? I mean, they've been

1 referenced. The person who it references is the
2 victim. There's no dispute the person was the
3 victim.

4 MR. SAVAGE: Well, I wouldn't categorize
5 him. I've never referred to him as the victim. I
6 referred to him as the deceased, the injured party,
7 Mr. Denson.

8 THE COURT: Well, I don't think that
9 "victim" has to have a negative connotation. Are all
10 those the same situation?

11 MR. SAVAGE: No, sir.

12 THE COURT: All right. What's the next
13 one?

14 MR. SAVAGE: Just the tags. There's
15 tags ---

16 THE COURT: No, but I'm saying is that
17 the same objection for all of them?

18 MR. SAVAGE: No. The one that you have
19 in front of you uses the term "victim." That's a
20 separate objection from the evidence that has tags on
21 it that provides identification information that was
22 not necessary for the jury to have.

23 THE COURT: All right. What is ---

24 MR. SAVAGE: Evidence labels.

25 THE COURT: And what are those like? Let

1 me -- someone will have to hand them to me one at a
2 time, and let's discuss them.

3 MR. SAVAGE: The one I've handed to the
4 Court is the video. And the only other type would be
5 what's been stapled to the evidence bag, it seems to
6 be just an extra label. I don't know that it's
7 necessary to go back with the bag, number one.

8 THE COURT: All right. On the CD, in-car
9 video and crime scene video, why does that -- I'll be
10 happy to tell them not to accord any weight to any
11 kind of labels. As I've told them plenty of times,
12 that these are allegations on the part of the state,
13 and they are going to decide what actually
14 transpired. How about that?

15 MR. SAVAGE: That will be satisfactory,
16 Your Honor.

17 THE COURT: All right. If someone could
18 put these back in the stack.

19 Other than that, everyone's reviewed all
20 the exhibits and nothing's going back that was not
21 admitted; is that correct? State?

22 MR. DURANT: Yes, sir, Your Honor.

23 THE COURT: Defense?

24 MR. SAVAGE: Yes, Your Honor.

25 MR. DURANT: Your Honor, would you

1 consider asking the jury whether or not they would
2 care to deliberate tonight?

3 THE COURT: No. I'm going to go ahead
4 and just let them come back tomorrow. They probably
5 will be a while with this case.

6 All right. So, to bring the jury back
7 out, we will discuss the note-taking, we'll discuss
8 the tagged exhibits, and we'll go ahead and add your
9 final request to charge about the evidence or lack of
10 evidence. Anything further?

11 MR. SAVAGE: That's all we have, Your
12 Honor.

13 THE COURT: State? Anything further?

14 MR. DURANT: No, sir, Your Honor.

15 THE COURT: Bring the jury in, please.
16 They do not need their note pads -- well, they can
17 bring their note pads, that's fine.

18 THE BAILIFF: They can bring them?

19 THE COURT: Uh-huh. I was just going to
20 say you'll have to take them right back, but we'll go
21 ahead and do it.

22 While they're coming, I was going to say:
23 Finally, as you review the exhibits you may see some
24 tags. Those labels are used merely for the purpose
25 of marking exhibits.

1 (Whereupon, the jury returns to the
2 courtroom at approximately at 3:57 p.m.)

3 THE COURT: Come forward.

4 (There was an off-the-record bench
5 conference in the presence of the jury but out of the
6 hearing of the jury.)

7 (Said bench conference being concluded,
8 the following proceedings were had:)

9 THE BAILIFF: All present, Your Honor.

10 THE COURT: Thank you. Please be seated.

11 All right, ladies and gentlemen. As is
12 often the case, there's a few things that I have to
13 follow up with or things that I may normally say that
14 I've just neglected to do that, and so I have a
15 couple more thoughts to -- or a couple more matters
16 to talk to you about.

17 And, obviously, because I go back and say
18 something, you should not single those out. You
19 should just consider everything in regard to my
20 charge as a whole in your consideration of the case.

21 One thing I neglected to talk to you
22 about was taking notes. You have been provided note
23 pads. I don't know which ones of you have been
24 taking notes and which ones have not been taking
25 notes. If you have taken notes, you should remember

1 that your notes are only intended to aid or help your
2 memory. They should not take precedence over your
3 own independent recollection of the evidence.
4 Moreover, those jurors who have not taken notes
5 should rely on their own memory of the evidence and
6 should not be influenced by the fact that another
7 juror has taken notes, since the notes are only
8 intended for the note-taker's personal use in
9 refreshing his or her memory of the evidence.

10 I also wanted to tell you -- I indicated
11 to you that we were going to gather up the exhibits
12 and send them back to you. As you go through the
13 exhibits, you may see some tags on those exhibits.
14 Those tags are there just solely for the purpose of
15 marking the exhibits. The labels should be given no
16 weight. As I told you, the state has made the
17 allegations in the case, and it's for you, the jury,
18 to decide the facts of this case and the disposition
19 of this case.

20 And, finally, ladies and gentlemen, as I
21 was talking to you about the different indictments
22 and your verdict options, I did indicate there is no
23 significance to the order in which I discussed with
24 you the various verdicts. It's just that I had to go
25 over those choices with you. But I did neglect to

1 say that each indictment does charge a separate and
2 distinct offense, and you should decide each
3 indictment on the evidence or the lack of evidence as
4 well as the law applicable to it.

5 And, again, you'll be asked to write a
6 separate verdict for each indictment. And as I
7 remind you, your verdict as to each indictment must
8 be unanimous.

9 Now, ladies and gentlemen, that brings us
10 to the point we have concluded everything that we
11 need to do. My concern now is that it is somewhat
12 late in the day, and I'm inclined to -- although I
13 probably suggested otherwise earlier, just trying to
14 guess about the time we were going to finish, I was
15 inclined to -- I'm inclined to bring you back in the
16 morning. And my reason for that is, once I let you
17 start your deliberations I usually have to -- I keep
18 you together until you reach a verdict.

19 Is that a problem for anyone if I bring
20 you back in the morning?

21 I know one of you had a problem. I'm not
22 sure if it was someone who was excused, but I
23 remember one of you had a problem for Friday, and I'm
24 keeping that in mind.

25 But if that's not a problem, if you could

1 please report back at 9:30 tomorrow morning.

2 Again, and this is very important, ladies
3 and gentlemen: Do not discuss this case in any way
4 whatsoever with anyone. Whether it's your family or
5 anyone who asks you about it, don't discuss it. You
6 just do not know how many problems that causes if
7 anyone attempts to discuss the case in any way.

8 Don't conduct any type of independent
9 investigation on your own, and don't expose yourself
10 to any type of media coverage.

11 Just as important, if it appears to any
12 of you that anyone violates my instructions, it's
13 incumbent upon each and every one of you to report
14 that matter to me -- to me.

15 I can't tell you that as -- enough, and I
16 don't mean to keep emphasizing it, but, you know,
17 I've had situations where that's happened and it's
18 just a -- it just throws everything out of context,
19 and it's just inappropriate and violative of your
20 oath.

21 All we can ask is that you wait until the
22 appropriate time to begin your deliberation and give
23 everyone complete and careful thought and
24 consideration of all the issues presented and not
25 influenced by any external or outside conversations

1 or otherwise, ladies and gentlemen. Please let that
2 bear heavily on you during the overnight break.

3 And I will see you back -- if you'll give
4 your note pads to the bailiff, we will secure them
5 overnight.

6 And we'll see you back tomorrow at 9:30
7 to -- we won't have anything else to do other than to
8 make sure you're all here. The clerk will call the
9 roll, normal procedure, the exhibits will be brought
10 back to you, and you'll be directed to begin your
11 deliberations at that time.

12 Thank y'all very much and have a good
13 night.

14 (Whereupon, the jury leaves the courtroom
15 at approximately 4:02 p.m.)

16 THE COURT: All right. Does that take
17 care of everything, State?

18 MR. DURANT: Yes, sir.

19 THE COURT: Defense?

20 MR. SAVAGE: No requests or additions or
21 exceptions, sir.

22 THE COURT: All right. Thank you. I'll
23 see y'all tomorrow. They'll secure the courtroom if
24 you want to leave anything.

25 MR. DURANT: Judge, I just want to make

1 sure, just to be clear, I'm not going to be here
2 tomorrow.

3 THE COURT: That's fine.

4 (Whereupon, at approximately 4:03 p.m.,
5 the trial is recessed to the following day, Thursday,
6 July 19, 2007, at 9:15 a.m.)
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1 (On Thursday, July 19, 2007, the
2 defendant being present with counsel, the trial
3 reconvenes at approximately 9:15 a.m., and the
4 following proceedings were had:)

5 MR. DURANT: There's apparently a change
6 of plans since yesterday, Your Honor.

7 (There was off-the-record discussion by
8 the Court and Mr. Durant.)

9 THE COURT: Actually, there were several
10 things I wanted to put on the record yesterday when
11 we were talking about this statute, and then when we
12 shifted to the juror thing, I kind of lost my train
13 of thought, but I actually have a case that we wanted
14 to share with you, and I forgot to give it to you,
15 and I'll let you have it. It's not really necessary.
16 It's out of Florida. It's called *Smiley vs. State of*
17 *Florida*. It only came out a month ago, dealing with
18 their -- are you familiar with it?

19 MR. SAVAGE: Yes, sir.

20 THE COURT: So you don't need a copy of
21 it?

22 MR. SAVAGE: No, sir.

23 THE COURT: Do you want a copy?

24 MR. DURANT: No, sir, Your Honor. If you
25 give me the cite, I can...

1 THE COURT: 2007 Westlaw 1628111. It
2 just came out, so it doesn't have a cite yet.

3 But Jenny had given me that the other
4 day, and I forgot to put that on the record.

5 Not exactly on fully all squares, because
6 they actually have a constitutional provision about
7 retroactivity, but their constitutional provision is
8 somewhat analogous to the savings clause that was
9 attached to this legislation.

10 But the case was kind of more persuasive
11 to me on the fact that when I had indicated I thought
12 that this was a substantive change in the law, and so
13 I think it's good for that, also, for the record,
14 but -- obviously, I think the way that it might be
15 tracked is that there is generally a presumption that
16 statutory enactments are to be considered prospective
17 rather than retroactive.

18 The analysis might change depending on
19 whether you're talking about a substantive change in
20 the law versus a remedial or procedural change in the
21 law.

22 Also, the analysis could be a little bit
23 different if you're talking about a constitutional or
24 a decisional change announced by the U.S. Supreme
25 Court or either the South Carolina Supreme Court.

1 That's not present in this case. We're talking about
2 a statutory change.

3 And, overall, the statutory change here,
4 I don't think I can reach any conclusion other than
5 the fact that it is substantive.

6 I personally think there are many changes
7 in the statute, but one of which, similar to the
8 Florida case, is that it definitely alters the
9 circumstances in which it is -- in which it is
10 considered even to be a criminal act to use a deadly
11 force without first needing to retreat, that's one
12 substantive change. And it also will significantly
13 affect the substantive law and affirmative defenses
14 available to defendants.

15 So while not on all fours, it does --
16 should lend itself somewhat to the analysis, in part,
17 and I stand by my decision that once you look at the
18 savings clause and the general thought that statutory
19 change, as opposed to remedial or procedural changes
20 or constitutional issues, would generally be
21 prospective, and then the savings clause seems to
22 bolster that, that conclusion.

23 Also, I need to put on the record, there
24 is the evidence about the gun and -- or there is the
25 gun and bullets. I need to bring the jury in to say

1 we can have them request them one at a time. Just
2 security procedures. Do y'all have any problem with
3 that?

4 MR. DURANT: I don't have any problem
5 with that, Your Honor, although I think the gun is
6 secured with that nylon thing. So it's not operable
7 as it is right now. They'd actually have to take
8 that thing off to be able to shoot it.

9 THE COURT: Well, as was just
10 demonstrated a few minutes ago when the court
11 reporter picked it up, that thing came completely
12 off. So...

13 MR. DURANT: Well, then I take it back.

14 THE COURT: I don't know how secure it
15 is. Are those things very secure?

16 THE DEPUTY: There is another one here,
17 Judge. We can fix it up.

18 THE COURT: Why did the other one just
19 pop off like that?

20 THE DEPUTY: I think probably the
21 Solicitor's Office put it on.

22 THE COURT: Oh. Someone just got thrown
23 under the bus.

24 Well, what do y'all prefer we do?

25 MR. DURANT: It doesn't matter, Your

1 Honor.

2 THE COURT: Are y'all going to send the
3 bullets back, too?

4 MR. DURANT: It doesn't matter. I'll
5 leave it up to you. I mean, they can certainly ask
6 for the ammunition if they want to see it.

7 THE COURT: All right. Any problem with
8 that?

9 MR. SAVAGE: No. I agree with the
10 Court's decision.

11 THE COURT: All right. Pull out the
12 ammunition, and I'll bring the jury in and tell them
13 that if they want to see that they can request it
14 separately and swap out the gun.

15 Are all the jurors here?

16 THE BAILIFF: Everyone is here.

17 THE COURT: Bring the jury in, please.

18 (Whereupon, the jury enters the courtroom
19 at approximately 9:30 a.m.)

20 THE BAILIFF: All jurors are present,
21 Your Honor.

22 THE COURT: Thank you. Please be seated.

23 All right, ladies and gentlemen. Now
24 that you're all -- you've all reassembled, we're
25 ready to allow you to begin your deliberations.

1 The one thing I -- the reason why I
2 brought -- normally, I'd just let you start, but I
3 neglected to tell you, as you heard throughout the
4 trial when we were referencing exhibits, some of
5 those exhibits have ammunition in them. And so just
6 as a matter of security procedures, we'll hold those
7 out because you'll have the gun back there with you,
8 and then if you knock on the door, we'll swap them
9 back, and you'll have the ammunition and give us the
10 gun. That's just for your protection, too, that they
11 have these procedures.

12 So we will send -- send everything back
13 with you. And when you've looked at the one thing,
14 you can knock on the door and send it out, and we'll
15 send the others back in. Okay?

16 Thank you very much. Once we send the
17 exhibits in and the verdict forms to you, you can
18 begin your deliberations.

19 (Whereupon, the jury goes to the jury
20 room at approximately 9:30 a.m.)

21 THE COURT: All right. And for the
22 record, we pulled out the two exhibits.

23 MR. DURANT: Do you have four, Madam
24 Court Reporter?

25 THE COURT: I think there's actually

1 four.

2 THE COURT REPORTER: 55, 56, 57, and 58.

3 MR. DURANT: May I approach, Your Honor?

4 THE COURT: Yes.

5 MR. DURANT: Just to look at the
6 exhibits.

7 MR. DURANT: 57, Your Honor, is just a
8 shell casing. It's an expired ---

9 THE COURT: Okay. That's all right.
10 We'll just -- we'll pull out 55, 56, and 58, and then
11 swap them out with the jury.

12 I didn't realize they had this security
13 procedure, by the way, so...

14 MR. DURANT: Well...

15 THE COURT: 55, 56, and 58.

16 MR. DURANT: I have it as being fifty --
17 those -- exactly, Your Honor, 55, 56, 58.

18 THE COURT: All right. Is that okay,
19 from Mr. Savage?

20 MR. SAVAGE: No objections, Your Honor.

21 THE COURT: All right. Well, then when
22 they send us the gun back, we'll send them the
23 ammunition.

24 All right. We'll just be at ease.

25 Mr. Clerk, you can tell them to begin

1 their deliberations. Do you have the verdict form
2 and the indictments?

3 THE CLERK: Over there.

4 THE COURT: All right. Thank y'all.

5 MR. DURANT: Thank you.

6 (Whereupon, the jury begins deliberation
7 at approximately 9:35 a.m.)

8 (The trial reconvenes at approximately
9 10:50 a.m., the defendant being present with counsel,
10 and the following proceedings were had:)

11 THE COURT: The jury had a note. They
12 asked for a clarification of the difference between
13 voluntary and involuntary manslaughter.

14 I thought I'd just read the definitional
15 part of those crimes, and then tell them if they want
16 more discussion to -- to let me know.

17 MR. SAVAGE: I think that's appropriate
18 from the defense perspective, Your Honor.

19 MR. DURANT: No problem, Your Honor.

20 THE COURT: Bring the jury in, please.

21 (Whereupon, the jury returns to the
22 courtroom at approximately at 10:55 a.m.)

23 THE COURT: Counsel approach.

24 (There was an off-the-record bench
25 conference in the presence of the jury but out of the

1 hearing of the jury.)

2 (Said bench conference being concluded,
3 the following proceedings were had:)

4 THE COURT: All right. All right, ladies
5 and gentlemen. I received your note, wanting to have
6 the difference between voluntary and involuntary
7 manslaughter. What I'm going to read to you is just
8 the definitional part of those offenses.

9 And then, you know, obviously, I talked
10 to you in greater detail about those when I gave you
11 my charges in full. If you need more, when you go
12 back to the jury room if you'll just send out another
13 note, whatever, I'll give you more, because I'm not
14 sure just how much you want, and usually when a jury
15 asks for a question we give them exactly what they
16 ask for.

17 So if any point you need further
18 instruction or more, do exactly what you did by
19 sending out a note, but for now I'm just going to
20 give you the definitional differences between the
21 two.

22 Now, voluntary manslaughter is the
23 unlawful killing of another person without malice in
24 the sudden heat of passion upon sufficient legal
25 provocation.

1 Involuntary manslaughter is the
2 unintentional killing of another person without
3 malice, and it has two subsets, while either engaged
4 in an unlawful activity not naturally tending to
5 cause death or great bodily harm -- that's one type
6 of involuntary manslaughter -- and the other is: Or
7 that the defendant unintentionally killed the victim
8 without malice while engaged in a lawful activity
9 with reckless disregard for the safety of others.

10 All right. Those are the two
11 definitional. Those are the definitions per se of
12 those offenses. If you should need more, send me
13 another note. Thank you very much. You may resume
14 your deliberation.

15 (Whereupon, the jury goes to the jury
16 room at approximately 10:58 a.m.)

17 THE COURT: Anything else from counsel on
18 that?

19 MR. DURANT: No, sir, Your Honor.

20 MR. SAVAGE: No exceptions for the
21 defendant.

22 THE COURT: All right. We'll be at ease
23 again. I'd like for you to stay close by just in
24 case they request more.

25 MR. DURANT: Yes, sir, Your Honor.

1 (Court's Exhibit No. 2, note from the
2 jury, is marked for identification.)

3 (Whereupon, the jury resumes
4 deliberations at approximately 10:58 a.m.)

5 (The trial reconvenes at approximately
6 11:50 a.m., the defendant being present with counsel,
7 and the following proceedings were had:)

8 THE COURT: Three jurors would like a
9 smoke break -- hold on.

10 (Mr. Savage enters the courtroom.)

11 THE COURT: Mr. Savage, three jurors
12 would like a smoke break. Do you have any objection?

13 MR. SAVAGE: My recommendation is that
14 they don't do it for their health, but if they want
15 to do it...

16 THE COURT: All right. Tell the jury to
17 stop deliberating, and they cannot resume until the
18 three jurors get back.

19 (At approximately 11:50 a.m., the trial
20 is in recess awaiting the verdict.)

21 (At approximately 12:30 p.m., the trial
22 reconvenes, the defendant being present with counsel,
23 and the following proceedings were had:)

24 THE COURT: They just wanted us to order
25 them lunch, so...

1 (The trial is in recess at approximately
2 12:23 p.m.)

3 (The trial reconvenes at approximately
4 5:50 p.m., the defendant being present with counsel,
5 and the following proceedings were had:)

6 THE COURT: All right. First of all,
7 they said they're not any closer to reaching a
8 decision. Then -- so it's kind of a mixed note: We
9 can't make a decision, but can we get transcripts.
10 Which they can't, I'll deal with that. Then we are
11 unclear on unlawful and lawful possession of a
12 firearm.

13 Do y'all have any thought -- and then
14 they ask me to re-read what I read them, re-read the
15 stuff on involuntary and voluntary, slowly, they
16 said, and ask what is reckless negligence. So I'll
17 have to read that part, which I didn't last time.

18 But about this we are unclear on the
19 difference between unlawful and lawful possession of
20 a firearm, I'm not sure if they're talking about the
21 possession during a violent crime or with regard to
22 the involuntary, of lawful conduct. Do y'all have
23 any thoughts you want to share on that? Suggestions?

24 MR. DURANT: I really don't know,
25 Your Honor. I mean...

1 THE COURT: I don't ---

2 MR. DURANT: --- I would think, you know,
3 I guess my -- probably referring to the involuntary
4 thing, but...

5 THE COURT: For involuntary -- well, on
6 just manslaughter. Do you have a thought?

7 MR. SAVAGE: It's just that it's
8 hard to...

9 THE COURT: I don't know if they're -- I
10 don't know. At first I just thought they were
11 talking about possession of a firearm during a
12 violent crime, and then it dawned on me maybe they're
13 not.

14 MR. SAVAGE: And it could very well be
15 whether he had lawful possession in his automobile,
16 whether it was proper. There has been testimony
17 about possession.

18 THE COURT: Well, they said between
19 unlawful and lawful possession of a firearm, the
20 firearm.

21 MR. SAVAGE: And it could be lawful
22 possession in the vehicle, properly compartmentalized
23 until the trouble started, if you take the
24 defendant's version.

25 (There was an interruption by cell phone

1 ringing.)

2 MR. SAVAGE: Not me, judge.

3 THE COURT: We've been through that
4 before.

5 Yes, sir.

6 MR. SAVAGE: So the point being, I don't
7 know what the time frame they're talking about. If
8 they're talking about the time frame of who brought
9 the gun to the scene, delivery to the scene was
10 lawful. Then there is a question whether that became
11 unlawful after that. But I don't know what the
12 question is -- what was the other thing? They wanted
13 reckless and one other thing you said.

14 THE COURT: They wanted me to re-read
15 what I read on voluntary and involuntary, but they
16 put in parentheses "slowly."

17 Oh. First they just said we're not
18 closer to reaching a decision.

19 Oh, the transcript of witnesses. I was
20 just going to tell them we don't have a transcript,
21 but if they want something replayed, they're
22 certainly welcome, let us know. That's all I can do
23 on that.

24 But I need to know about this firearm
25 issue, unless it's -- because we didn't really talk

1 about as unlawful and lawful possession of a firearm
2 in the instructions.

3 MR. SAVAGE: No, you didn't charge the...

4 THE COURT: I don't even know if that's
5 something we ever talked about, was it?

6 MR. SAVAGE: No, we didn't discuss -- we
7 had considered it, but I don't think we proposed it.

8 THE COURT: I don't remember any request
9 to charge on that, because I went through all the
10 charges.

11 MR. SAVAGE: We did not submit it.

12 THE COURT: That's the part -- I mean,
13 his possession of a gun, is the lawfulness of that at
14 issue?

15 MR. DURANT: Not as far as we're
16 concerned, at least not while it was stored in the
17 car, I mean, you know.

18 THE COURT: So shall I say that the
19 lawfulness or the possession of the gun is not an
20 issue in this case?

21 MR. DURANT: Well, I think -- I don't
22 know. I don't know.

23 THE COURT: When would it have become
24 unlawful?

25 MR. DURANT: You know, what I'm thinking

1 -- what I'm thinking, Your Honor, is maybe, you know,
2 when you're giving the definition of involuntary
3 manslaughter and you have the two-prong definition in
4 your ---

5 THE COURT: That's what I said first.

6 MR. DURANT: --- in the midst of a
7 lawful, unlawful act. Well, you know, I guess
8 basically that would be for them to determine whether
9 it was an unlawful act for him to arm himself in that
10 situation.

11 I mean, I don't think there's any
12 question that the gun was lawfully owned and the gun
13 was lawfully stored. The question is, was him
14 wielding the weapon lawful.

15 THE COURT: But that relates to
16 self-defense.

17 MR. DURANT: Right.

18 THE COURT: That doesn't relate to the
19 actual possession of the gun.

20 MR. DURANT: Right.

21 THE COURT: That whether he lawfully --
22 whether he rightfully responded in self-defense with
23 that gun is one of the issues they are considering.

24 I don't have a problem with saying,
25 unless y'all do, that it is not an issue in this case

1 as to whether or not the actual possession of the gun
2 was lawful. However, one of the issues you have been
3 asked to consider, amongst the others, is whether or
4 not he acted lawfully in self-defense.

5 I mean, the state never put forward an
6 argument that the gun possession was unlawful. That
7 was never presented to the jury. So...

8 MR. DURANT: Well, I mean, to tell you
9 the truth, Judge, I just think we need some
10 clarification.

11 MR. SAVAGE: But he was never charged
12 with the statutory crime of unlawful possession of a
13 weapon.

14 MR. DURANT: No. I mean, he's got -- but
15 the problem is, and that's what I'm worried about,
16 there is a charge for unlawful possession of a weapon
17 during the commission of a crime of violence, but
18 that's a different -- that's a different issue
19 altogether.

20 THE COURT: Well, I mean, if they're
21 talking about that, I'll just re-read that charge.

22 MR. DURANT: Yeah, and ---

23 THE COURT: That's the most -- the
24 easiest issue.

25 MR. DURANT: And, I mean, you know,

1 another thing, like I said, I don't think it's ever
2 been the state's position that his possession of the
3 weapon was unlawful while it was stored in his truck.

4 THE COURT: The state does not contend
5 that -- what if I told them the state does not
6 contend that the possession of the gun in the truck
7 was unlawful.

8 MR. DURANT: I have no problem with ---

9 THE COURT: And you may consider this
10 along with all the other evidence in your
11 consideration of the issues.

12 MR. DURANT: And I don't have a problem
13 with that concerning something -- you know, coupled
14 with something to the effect that it is up to you,
15 the jury, jury to determine whether him obtaining
16 possession of the weapon from the truck was lawful or
17 not under the circumstances.

18 THE COURT: Whether the use of the gun
19 under the circumstances was proper is one of the
20 issues that has been presented to you.

21 MR. DURANT: Right.

22 THE COURT: What about that, Mr. Savage?

23 MR. SAVAGE: I like the first part.

24 THE COURT: Well, I mean, it is what is
25 at issue.

1 MR. SAVAGE: But the question then that
2 we need to think through is if that's an unfair
3 comment on the facts.

4 THE COURT: Well, if they stipulate that
5 the possession of the gun in the truck wasn't
6 unlawful, that's okay.

7 MR. SAVAGE: I think we ought to leave it
8 at that.

9 MR. DURANT: But I don't think that's
10 what they're getting at, Your Honor. I think that
11 what they're getting at is, is -- especially if
12 they're hung up between voluntary and involuntary, is
13 whether his arming himself with the gun was lawful or
14 unlawful. And I think that's the issue they have to
15 decide.

16 THE COURT: What if we say the state
17 stipulates that the possession of the gun in the
18 truck was lawful; whether the use of the gun was
19 proper in one of the -- is one of the issues you are
20 considering in the context of the instructions given
21 to you.

22 (Counsel confer.)

23 THE COURT: Well, I now see a possible
24 problem. So wait a minute. The first part's okay,
25 but I can't -- as to the "role" the gun played is a

1 matter for your consideration. Because whether he
2 used it or fumbled it or accidentally discharged it, I
3 can't necessarily use the word "use."

4 MR. DURANT: Well, you know, the thing
5 is, Judge, and the concern I have is if he -- if he
6 was not arming himself lawfully in self-defense, then
7 the possession of the gun is not lawful. I would
8 stipulate that his story -- it's his story the weapon
9 in the center console of the truck, which I'm
10 assuming that it was stored in, is lawful. Whether
11 him taking that gun out of the truck and arming
12 himself, it would only be lawful if he did it in ---

13 THE COURT: I can't comment on that,
14 though, because you still have an accident
15 instruction.

16 The state stipulates that the possession
17 of the gun in the truck was lawful; you've never
18 disputed that.

19 MR. DURANT: But we ---

20 THE COURT: The role of the gun is one of
21 the factual issues presented to you that you should
22 consider along with all of my instructions.

23 MR. DURANT: But I guess the point we're
24 trying to make, Your Honor, is there are two
25 different types of possession. There's constructive

1 possession of being in the car, and there's the
2 actual possession of him possessing it on his body
3 and...

4 THE COURT: But that was never presented
5 to them. That's never been presented to them as an
6 issue.

7 MR. DURANT: I know it's not an issue,
8 but I think it's an issue in the sense of whether --
9 and I think, quite frankly, Your Honor, what they're
10 getting at is, you know, the involuntary, the
11 involuntary manslaughter charge.

12 THE COURT: That's why I don't see the
13 problem of saying it's their role, and the gun is one
14 of the factors in here that you should consider along
15 with all of my instructions.

16 MR. DURANT: How about if we
17 stipulate ---

18 THE COURT: That way I would not be
19 commenting on the facts.

20 MR. DURANT: How about if we just
21 stipulate that the defendant's ownership of the gun
22 is lawful?

23 THE COURT: And just nothing else? I
24 don't have a problem with that, either, Mr. Savage.

25 MR. SAVAGE: No, sir.

1 THE COURT: The state stipulates that the
2 defendant's -- that the defendant's ownership of the
3 gun was lawful.

4 MR. SAVAGE: Yes, sir.

5 THE COURT: Is that fine?

6 MR. SAVAGE: Yes, sir.

7 THE COURT: I'm going to first ask them
8 if they just wanted that kind of -- I think that's
9 what they want. I don't think it has to do with the
10 other offense.

11 MR. DURANT: And, like I said, I would
12 request that the ownership of the gun is not at
13 issue, that the use of the gun is the issue that they
14 have to decide.

15 THE COURT: Well, that was what we were
16 just saying in my other charge, and you didn't want
17 that.

18 MR. DURANT: Well, I understand, but you
19 -- they are asking "possession." I don't -- I don't
20 contest the legality of his ownership of the weapon.

21 THE COURT: Well, but wait, let's go back
22 to what we're being asked here, because I don't want
23 to answer anything more than I'm being asked.

24 They want to know about distinguishing
25 between unlawful and lawful possession of a firearm.

1 If we say: The state stipulates that
2 ownership of the gun was lawful, and you may consider
3 this in your consideration of all of my instructions
4 as a whole.

5 MR. DURANT: You know, like I said, my
6 position, obviously, is that ownership of the gun was
7 lawful. The use of the gun is the whole case.

8 THE COURT: I agree.

9 MR. DURANT: You know, the use of -- the
10 use the gun is they have to make -- make that
11 determination themselves.

12 THE COURT: Well, I tried at first to
13 suggest using the word "role" so I didn't comment on
14 the word "use," but ---

15 MR. DURANT: Well, that ---

16 THE COURT: That instruction was totally
17 fine in my opinion.

18 MR. DURANT: Okay, well...

19 THE COURT: And you didn't like it.

20 MR. DURANT: No, no, no. I didn't -- I
21 mean...

22 THE COURT: Say the state stipulates that
23 possession of the gun ---

24 MR. DURANT: I think "use" -- I think use
25 "use" contemplates a different -- something

1 different.

2 THE COURT: Well, I read them, being very
3 careful not to comment on whether just someone
4 actively used something or whether it was
5 accidentally discharged, because accident was
6 charged, and I'm not asking for trouble down the
7 line.

8 The state stipulates that the ownership
9 of the gun was lawful...

10 MR. DURANT: And I would just request:
11 Whether the use of the gun was lawful is an issue
12 that you, the jury, must decide, taking into
13 consideration all the facts and circumstances of the
14 case.

15 MR. SAVAGE: There is no need to
16 emphasize that. The possession of the weapon, we
17 agree, is lawful. That is...

18 MR. DURANT: I don't agree with that,
19 though. I agree that the ownership was lawful. I
20 don't agree -- I don't agree that his possession,
21 taking that weapon out of the truck, and using it was
22 lawful.

23 THE COURT: How about if I say: The
24 state stipulates that the ownership of the gun was
25 lawful; what role the gun played is a matter for your

1 consideration.

2 MR. SAVAGE: In accordance with my
3 instructions.

4 THE COURT: In accordance with my
5 instructions as a whole.

6 MR. SAVAGE: I don't have any exception
7 to that.

8 THE COURT: I'm not going to use the word
9 "use." They didn't ask me about the word "use."
10 What about that?

11 MR. DURANT: Well, like I said,
12 Your Honor, I would prefer "use," but you're the
13 judge.

14 THE COURT: Well, the next time when I
15 read the word "use" the first time, accept it,
16 because I did say "use" and you disagreed with the
17 word "use." All right.

18 MR. SAVAGE: May it please the Court.
19 Did the first note say ---

20 THE COURT: "We are not closer to
21 reaching any decision." See, I don't -- it's kind of
22 a combination everything kind of note, but at the end
23 of it all is ---

24 MR. SAVAGE: It's one note?

25 THE COURT: Yeah. I'm going to say: In

1 response to your note that you are not any closer to
2 reaching a verdict, if you're still unable to do so
3 after my responses to your questions, please report
4 that back to me.

5 Okay. Make sure I've covered everything.

6 Bring the jurors, please.

7 (Whereupon, the jury returns to the
8 courtroom at approximately at 6:15 p.m.)

9 THE BAILIFF: Your Honor, the jurors are
10 present.

11 THE COURT: Thank you. Please be seated.

12 All right, ladies and gentlemen. I
13 received your note. Hopefully, I'll -- there's a
14 couple of things, several things in your note, so
15 I'll try to make sure I cover everything.

16 Obviously, if at some point when you go
17 back you think there is something more you want,
18 you're always free to send it back out to me; or
19 sometimes, you know, when I read a note, I think I
20 know what you're wanting, and it may not exactly be
21 what you want. So you're always free to ask me or
22 clarify further when you go back. So I want you to
23 understand that.

24 First and foremost, we don't have written
25 transcripts of testimony. You have the opportunity

1 to take notes if you so desire. Also, if you want
2 some testimony played back to you or read back to you
3 by the court reporter, you have that if you make that
4 determination as to a witness or witnesses, but that
5 is your option. You would need to report that to me
6 if you decide you need that information.

7 Also, let's see. I'm trying to check
8 these off.

9 You wanted me to re-read slowly the
10 voluntary and involuntary, from what I understand, so
11 -- and then you added a little bit further about
12 negligence. Let's see. Okay.

13 Voluntary manslaughter. And raise your
14 hand if I'm reading too fast or if you want me to
15 slow down.

16 For voluntary manslaughter, it's the --
17 the killing of another person without malice in the
18 sudden heat of passion and upon sufficient legal
19 provocation. That's voluntary manslaughter.

20 Involuntary manslaughter has two
21 different ways to get to involuntary manslaughter.

22 Involuntary manslaughter is the
23 unintentional killing of a person without malice
24 while engaged in an unlawful activity not naturally
25 tending to cause death or great bodily harm or --

1 that's part of it. You need me to slow down?
2 Okay -- that the defendant unintentionally killed the
3 person without malice while engaged in a lawful
4 activity with reckless disregard for the safety of
5 others.

6 And you asked in your note for
7 specifically what is reckless negligence.

8 Reckless disregard for the safety of
9 others is more than mere negligence or carelessness.
10 Mere negligence or carelessness is the failure to use
11 the care that a person of ordinary reason would use
12 under the same circumstances.

13 Recklessness is a conscious failure to
14 use ordinary care. It implies the doing of a
15 negligent act knowingly.

16 Reckless disregard for the safety of
17 others means that you are not interested in the
18 consequences of your acts or the rights and safety of
19 others. Mere negligence is not enough.

20 You also asked, you say: We aren't clear
21 on the difference between unlawful and lawful
22 possession of a firearm.

23 The state stipulates that the ownership
24 of the gun was lawful. What role the gun played --
25 I mean, what role the gun played is a matter for your

1 consideration in accordance with all of my
2 instructions as a whole, the entirety of my
3 instructions, ladies and gentlemen.

4 Now, if you should need something more on
5 that, please let me know.

6 Now, in response to your note that you
7 are -- I believe I've covered everything you've asked
8 me.

9 In response to your note that you are no
10 closer to reaching a verdict, if you are still unable
11 to do so after my responses to your questions, you
12 may report that back to me.

13 With this, I'm going to release you to
14 begin your deliberations, resume your deliberations.
15 Thank you. And, again, if you need anything further,
16 if you need testimony or whatever, please let us
17 know.

18 (Whereupon, the jury goes to the jury
19 room at approximately 6:20 p.m.)

20 THE COURT: Please be seated.

21 Y'all are welcome to look at this before
22 I mark it, if you want. Interestingly, they
23 scratched out something, but...

24 MR. SAVAGE: No exceptions or additional
25 request.

1 THE COURT: All right. Thank you.

2 (Court's Exhibit No. 3, note from the
3 jury, is marked for identification.)

4 (The trial is in recess at approximately
5 6:20 p.m.)

6 (The trial reconvenes at approximately
7 7:12 p.m., the defendant being present with counsel,
8 and the following proceedings were had:)

9 THE COURT: Tell them to stop their
10 deliberation and they can resume when the smokers
11 come back.

12 (The trial is in recess at approximately
13 7:12 p.m.)

14 (The trial reconvenes at approximately
15 7:30 p.m., the defendant being present with counsel,
16 and the following proceedings were had:)

17 THE COURT: Please be seated. All right.
18 It's my understanding they have a decision. So
19 please bring the jury in.

20 (Whereupon, the jury returns to the
21 courtroom at approximately 7:32 p.m.)

22 THE BAILIFF: Your Honor, all jurors are
23 seated.

24 THE COURT: Please be seated.

25 Mr. Foreman, I understand the jury has

1 reached a unanimous decision as to each indictment.

2 Is that correct?

3 THE FOREPERSON: We have.

4 THE COURT: Please hand it up to the
5 Court. Thank you.

6 (The foreperson complies.)

7 THE COURT: Mr. Clerk, please publish the
8 verdict.

9 THE CLERK: Yes, Your Honor.

10 The verdict form in the matter of The
11 State vs. David Michael Rocquemoire, as to the
12 indictment number 2005-GS-10-8602, we the jury
13 unanimously find the defendant guilty of the lesser
14 included offense of voluntary manslaughter.

15 Ladies and gentlemen of the jury, if this
16 was your verdict, please raise your right hand.

17 (Whereupon, each member of the jury
18 raises their right hand.)

19 THE CLERK: Thank you.

20 Your Honor, all twelve jurors responded
21 to my question by raising their right hand.

22 As to the indictment number
23 2005-GS-10-8601, we, the jury, unanimously find the
24 defendant guilty of possession of a firearm during
25 the commission of a violent crime.

1 Ladies and gentlemen of the jury, if this
2 was your verdict, please raise your right hand.

3 (Whereupon, each member of the jury
4 raises their right hand.)

5 THE CLERK: Thank you.

6 Your Honor, all twelve jurors responded
7 to my question by raising their right hand.

8 And the verdict form is signed by Andrew
9 Tash, foreperson of the jury, on 7/19/07.

10 THE COURT: Any request to poll?

11 MR. SAVAGE: We request to poll,
12 Your Honor.

13 THE COURT: Please poll the jury,
14 Mr. Clerk.

15 THE CLERK: Ladies and gentlemen of the
16 jury, I'm going to ask you two questions. When I
17 call your name, if you'll please stand, I'll then ask
18 you two questions. Please respond verbally back to
19 me.

20 Juror number 259, Andrew Tash, were those
21 your verdicts?

22 MR. TASH: Yes.

23 THE CLERK: Are they still your verdicts?

24 MR. TASH: Yes.

25 THE CLERK: Thank you.

1 Juror number 20, Hunter Bowie, were those
2 your verdicts?

3 MR. BOWIE: Yes, sir.

4 THE CLERK: Are they still your verdicts?

5 MR. BOWIE: Yes, sir.

6 THE CLERK: Thank you.

7 Juror 99, Ruth Green, were those your
8 verdicts?

9 MS. GREEN: Yes, sir.

10 THE CLERK: Are they still your verdicts?

11 MS. GREEN: Yes.

12 THE CLERK: Thank you.

13 Juror number 200, Thomas Owens, were
14 those your verdicts?

15 MR. OWENS: Yes.

16 THE CLERK: Are they still your verdicts?

17 MR. OWENS: Yes.

18 THE CLERK: Thank you.

19 Juror 202, Ashley Parks Gallagher, were
20 those your verdicts?

21 MS. PARKS GALLAGHER: Yes.

22 THE CLERK: Are they still your verdicts?

23 MS. PARKS GALLAGHER: Yes.

24 THE CLERK: Thank you.

25 Juror number 236, William Shannon, were

1 those your verdicts?

2 MR. SHANNON: Yes, sir.

3 THE CLERK: Are they still your verdicts?

4 MR. SHANNON: Yes, sir.

5 THE CLERK: Thank you.

6 Juror 240, Belinda Shumpert, were those
7 your verdicts?

8 MS. SHUMPERT: Yes, sir.

9 THE CLERK: Are they still your verdicts?

10 MS. SHUMPERT: Yes, sir.

11 THE CLERK: Thank you.

12 Juror number 301, Carol Baloglu, were
13 those your verdicts?

14 MS. BALOGLU: Yes.

15 THE COURT: Are they still your verdicts?

16 MS. BALOGLU: Yes.

17 THE CLERK: Thank you.

18 Juror number 320, John Gross, were those
19 your verdicts?

20 MR. GROSS: Yes, sir.

21 THE CLERK: Are they still your verdicts?

22 MR. GROSS: Yes, sir.

23 THE CLERK: Thank you.

24 Juror 329, Donna McNeill, were those your
25 verdicts?

1 MS. MCNEILL: Yes, sir.

2 THE CLERK: Are they still your verdicts?

3 MS. MCNEILL: Yes, sir.

4 THE CLERK: Thank you.

5 Juror 330, David McQueeney, were those
6 your verdicts?

7 MR. MCQUEENEY: Yes.

8 THE CLERK: Are they still your verdicts?

9 MR. MCQUEENEY: Yes.

10 THE CLERK: Thank you.

11 Juror 335, Cynthia Peeples, were those
12 your verdicts?

13 MS. PEEPLES: Yes.

14 THE CLERK: Are they still your verdicts?

15 MS. PEEPLES: Yes.

16 THE CLERK: Thank you.

17 Was there any juror whose name I did not
18 call?

19 (There was no response.)

20 THE CLERK: Your Honor, the jury's been
21 polled and the verdict stands.

22 THE COURT: Any matters regarding this
23 jury before I excuse them?

24 MR. SAVAGE: Not by the defense,
25 Your Honor.

1 MR. DURANT: No, sir, Your Honor.

2 THE COURT: All right. Ladies and
3 gentlemen, I want to thank you for your participation
4 in the case. Obviously, it was a long case; and
5 certainly on behalf of the state, as well as the
6 county, I appreciate your willingness to contribute
7 to the administration of justice.

8 Each side did a great job in presenting
9 their respective positions, and I am satisfied that
10 you've given each side your complete and thoughtful
11 consideration of all the issues that were presented
12 to you.

13 At this point, I will excuse you. If you
14 will go with the bailiff, he'll show the way out.

15 The clerk will meet you in the hallway as
16 far as he has some stuff to give to you.

17 If any of you should like to be escorted
18 to your cars, if you'll let the clerk know, they'll
19 arrange for a deputy to escort you as a group if you
20 so desire.

21 Thank you. Have a good weekend.

22 (Whereupon, the jury is excused at
23 approximately 7:37 p.m.)

24 THE COURT: Please be seated. Post-trial
25 motions?

1 MS. WILLIAMS: Judge, we move for a
2 judgment notwithstanding the verdict on the grounds
3 that no reasonable jury could have found
4 Mr. Rocquemore guilty of voluntary manslaughter.

5 THE COURT: Any response from the state?

6 MR. DURANT: No, sir, Your Honor. I
7 believe the verdict was well within the range of the
8 testimony presented to the jury.

9 THE COURT: And specifically your ground
10 was -- you requested a voluntary manslaughter charge,
11 but you don't think there's any basis for the jury to
12 find voluntary manslaughter?

13 MS. WILLIAMS: Judge, I think the
14 evidence was sufficient to prove other findings than
15 voluntary manslaughter.

16 THE COURT: All right. I deny that.

17 MS. WILLIAMS: It was charged ---

18 THE COURT REPORTER: Please speak up.

19 MS. WILLIAMS: --- but, you know, we ---

20 THE COURT REPORTER: She needs to speak
21 up, please.

22 MS. WILLIAMS: I'm sorry.

23 We believe the evidence was sufficient to
24 prove our other charges.

25 THE COURT: All right. I deny that

1 motion. Anything else?

2 (Mr. Savage and the defendant confer.)

3 MS. WILLIAMS: Judge, we would renew our
4 motion for mistrial at this -- at this time on bases
5 previously provided to the Court.

6 THE COURT: And that being the ground
7 raised when the Court excused the juror at issue?

8 MS. WILLIAMS: Judge, there was that
9 motion.

10 There was also a motion earlier in the
11 case based on the screen that was flashed up, that
12 one slide that was paused on. I believe that motion
13 was outstanding. The prosecutorial misconduct
14 portion of that motion I think has been resolved.

15 The final motion was the excusal of the
16 juror, Judge. I do think we have some ongoing issues
17 with that motion that would serve as a factual basis
18 for granting it.

19 THE COURT REPORTER: The factual basis
20 for what, please?

21 MS. WILLIAMS: For granting that motion.

22 THE COURT: Does the state wish to
23 respond?

24 MR. DURANT: Your Honor, obviously, with
25 regard to the title page thing on the video, I think

1 that was well within your discretion and...

2 THE COURT REPORTER: Please speak up,
3 Mr. Durant.

4 MR. DURANT: I'm sorry.

5 And well within your discretion and --
6 and cured during the course of the trial.

7 THE COURT: Yeah. I deny that motion.

8 MR. DURANT: And with regard to the --
9 with regard to the juror incident, Your Honor, we had
10 an extensive hearing in front of the Court. All of
11 the jurors were brought forward and individually
12 polled. All the jurors indicated that -- all the
13 jurors indicated that there had been no discussion of
14 the facts in this case with the juror and that they
15 testified under oath that they could give the state
16 and the defense a fair and impartial trial.

17 THE COURT: All right. I deny that
18 motion. Anything further?

19 MR. SAVAGE: Judge, would we be allowed
20 to expand the record on that? There's new
21 information that's coming in regularly.

22 The primary concern of that was not the
23 dismissal of the juror. The primary concern is the
24 contact of the juror with a member of the solicitor's
25 staff and then imparting information to the other

1 juror.

2 One juror testified, I believe was that
3 he testified that an inquiry was made what was going
4 on while they were in the jury room. Now, that could
5 be interpreted in a myriad of ways.

6 What I am particularly concerned with, if
7 a juror communicated to the member of the staff about
8 what was going on in this trial, which is the only
9 sensible conclusion of asking that question what was
10 the state doing, what was the defense doing, what was
11 the Court doing while we're in recess. That type of
12 question is not a generic question. There would no
13 reason to -- to pose that question unless it applied
14 to the case he was involved in.

15 THE COURT: Well, there was nothing ever
16 indicated that the contacted assistant indicated he
17 responded to that and -- and no juror indicated that
18 anything was discussed.

19 MR. SAVAGE: Well, one juror said that
20 there was a discussion, but he wasn't the recipient
21 or involved in that discussion, was that there was a
22 discussion about the roles of the prosecutor and the
23 defense in the jury room.

24 THE COURT: Well, I understood that
25 juror to be saying that's the only thing the jurors

1 back there talked about at all, not that it was
2 prompted by any telephone calls between the juror
3 and the assistant. There is nothing to suggest that
4 that assistant commented on that in any way
5 whatsoever.

6 MR. SAVAGE: But it appears that the
7 juror and the assistant were not forthright with the
8 Court in the Court's examination of the number of
9 contacts.

10 THE COURT: Well, the ---

11 MR. SAVAGE: There has now been
12 established twenty contacts between the juror and the
13 member of the solicitor's staff.

14 THE COURT: I agree with you that you had
15 provided information to the Court that suggested that
16 juror at least attempted to contact someone that was
17 not involved in this case that worked for the
18 Solicitor's Office. What I don't have is any kind of
19 information from that solicitor that he told this
20 juror anything.

21 And I also have the jurors we talked to.
22 None of them said that anything was communicated to
23 them. The only thing we really asked the jurors, I
24 guess, was have y'all discussed this in any way, and
25 they said no.

1 MR. SAVAGE: The dismissed juror, as well
2 as the staff member, understated their communications
3 to the Court. Both the assistant solicitor and the
4 dismissed juror apparently did not follow the Court's
5 instructions. If that fact is correct, then that
6 would question the credibility of both the assistant
7 solicitor and the dismissed juror.

8 THE COURT: Well, the dismissed juror was
9 dismissed. I'm not sure, you know, as long as he
10 didn't communicate anything to the rest of the panel,
11 that that would change the Court's decision to move
12 forward.

13 Now, whether the dismissed juror
14 misrepresented something to the Court about their
15 communication or whether the dismissed juror violated
16 the Court's instruction after the dismissed juror was
17 dismissed, by attempting to contact his cousin, I'm
18 not -- still there's been -- I don't know what else
19 has been presented to make the link that they were --
20 that they obtained any type of information from him.

21 MR. SAVAGE: You'd have to go back to the
22 one juror who said the question arose. Now, I
23 thought it was in the course of the communication
24 with the dismissed juror that he asked about what the
25 role of the various parties were in the courtroom

1 while they were in recess.

2 THE COURT: We can have the court
3 reporter read that back, but I recall that the person
4 was not -- it was one of the jurors who just said the
5 only thing we talked about, we were just chatting
6 about what the role of the judge, the prosecutor, and
7 the defense lawyer, what the roles are.

8 And, quite frankly, I don't find that
9 very unusual in the jury room, you know, as far as
10 jurors thinking about that. It's not really talking
11 about the case. It's just talking about everybody's
12 role.

13 And I didn't get out of that anything
14 that the cousin in the Solicitor's Office transmitted
15 information back to the jury about those roles in any
16 way whatsoever.

17 I'll be happy to have her look it up.

18 MR. SAVAGE: Your Honor, the Court's
19 ruling, I'm not arguing with the sCourt on that.

20 THE COURT: I understand. I just -- I
21 don't think I'm recalling incorrectly, but like I
22 say, if you think I am, I'll be happy to check it
23 out.

24 MR. SAVAGE: If we develop more
25 information, we would bring it to the attention of

1 the Court.

2 THE COURT: I hear all motions whenever
3 they're presented to me, Mr. Savage. I don't
4 foreclose that at all.

5 MR. SAVAGE: Thank you.

6 THE COURT: I'm just not prepared, you
7 know, based on what was presented by these jurors
8 about what was communicated to them -- actually, the
9 record does not indicate that anything was
10 communicated to them other than the dismissed juror
11 saying he was related to someone that -- one said, I
12 believe, he worked -- his cousin is someone in the
13 Solicitor's Office. One knew that because he knew
14 that juror. And then one indicated that he was
15 related to someone that worked in the building, I
16 believe.

17 (The Court reviews document.)

18 THE COURT: Was that your recollection?

19 MR. DURANT: Pardon me, Your Honor?

20 THE COURT: Was that your recollection?

21 MR. DURANT: My recollection, Your Honor,
22 was that the good juror was questioned fully. You
23 asked Mr. Savage if he had any additional questions
24 he wanted to ask the juror, he did not, everybody was
25 satisfied with the answer that we got, and he was

1 sent back. There was no juror who basically said
2 that there was any discussion with the dismissed
3 juror concerning the facts of this case at all.

4 THE COURT: Juror 200 said no discussion
5 about the case whatsoever. Anything about the
6 relationship, that juror didn't know about it.

7 Nothing came from -- Juror 259 said no.
8 Juror 320 said no. 329 said no.

9 330 said he actually had gone to school
10 with that juror. So he knew he had a cousin in the
11 Solicitor's Office ahead of time.

12 Juror 335 said nothing was said.

13 Juror 20 said that he heard that he had a
14 cousin that worked for the Solicitor's Office. I'm
15 trying to verify. Juror 20 might have been the one
16 that mentioned the discussion about everybody's role.
17 Actually, when we're done with this, we'll check that
18 just to be safe. And he also said we did not discuss
19 the case in any way.

20 MR. SAVAGE: Your Honor, based on that,
21 at that time the discussion with the Court and
22 defense counsel was not necessarily the facts of the
23 case, but this case came down to credibility and
24 believability, and that may have had an undue
25 influence on the credibility and believability of the

1 case as presented by the solicitor's staff.

2 THE COURT: Well, all I can say is I
3 asked all the jurors if that would in any way affect
4 them, and they indicated no, that it would not affect
5 their decision, that they had heard that he had that
6 relationship to someone in the Solicitor's Office.

7 And Juror 99 said nothing was said.

8 Juror 202 said that the cousin worked in
9 the building. That's the one I was trying to think
10 of. That it would not affect them.

11 Juror 236 said nothing was said. Juror
12 240 said nothing was said. Juror 301 said nothing
13 was said.

14 161 said nothing was said. Juror 161
15 said nothing -- and 161 is the one I ultimately
16 excused for something else.

17 All right. Check Juror 20's response,
18 please. Madam Court Reporter, read back what he said
19 about this discussion about the role of the judge and
20 defense, etc.

21 (The court reporter reads back the
22 following:

23 "I need to ask you: Did that dismissed
24 juror in any way discuss his relationship to the
25 Solicitor's Office or the case in any way whatsoever?

1 "MR. BOWIE: No, sir. He said that he
2 had a cousin that worked in the Solicitor's Office,
3 but other than that, he didn't say anything about the
4 case.

5 "THE COURT: When did he say that he had
6 a cousin that worked for the Solicitor's Office?

7 "MR. BOWIE: We were just in talking one
8 day, talking about procedures of the Court, and he --
9 he said, well, I have a cousin that works in the
10 Solicitor's Office and this is the way this happens,
11 this happens.

12 "THE COURT: And was that downstairs, or
13 was that after I selected this jury?

14 "MR. BOWIE: That was after the jury was
15 selected.

16 "THE COURT: After the trial had started?

17 "MR. BOWIE: Yes, sir.

18 "THE COURT: Okay.

19 "Counsel approach.

20 "There was an off-the-record bench
21 conference.

22 "THE COURT: And when you said that y'all
23 discussed procedures, what did you mean by that?

24 "MR. BOWIE: I don't know that it's as
25 much procedures as just, you know, what does the

1 judge do while we're sitting there, what does the
2 prosecution do, or what kind of usually happens sort
3 of thing. And I think he was just saying, well, I
4 have a cousin that's a prosecutor, I'll ask him. You
5 know, sort of what -- I guess what papers you're
6 looking at, what the judge does, that sort of thing.

7 "THE COURT: So y'all did not discuss the
8 case?

9 "MR. BOWIE: No, sir. No, sir. Just
10 what we...

11 "THE COURT: General stuff?

12 "MR. BOWIE: Just -- right, general
13 stuff. Nothing specific to the case.

14 "THE COURT: Did he disclose to the other
15 jurors that he had a cousin on the jury or just to
16 you?

17 "MR. BOWIE: It was just something he
18 said. He said, I have a cousin that works in the
19 Solicitor's Office or prosecutor's office or
20 something.

21 "THE COURT: Well, what I mean by that,
22 was he just telling you, kind of whispering right
23 beside you -- or did he tell the whole jury panel
24 that?

25 "MR. BOWIE: I heard him say that. I'm

1 not sure who he was directing it to, but I did hear
2 him say that.

3 "THE COURT: Okay. Now, would that in
4 any way affect your ability to give everyone a fair
5 and impartial trial?

6 "MR. BOWIE: No, sir.

7 "THE COURT: Now, if you'll go back.
8 Please do not discuss this in any way.

9 "MR. BOWIE: Sure.

10 "Mr. Bowie leaves the courtroom."

11 (The reading is concluded.)

12 THE COURT: Anything? Any response to
13 that?

14 MR. SAVAGE: Nothing further, Your Honor.

15 THE COURT: State?

16 MR. DURANT: No, sir, Your Honor.

17 THE COURT: I'm still satisfied,
18 Mr. Savage, that this jury was not improperly tainted
19 in any type of way; that while I do agree that the
20 contact that was at least attempted, I really don't
21 have a basis of knowing if anything further was said,
22 in this record; and all of the jurors indicated that
23 notwithstanding having found out -- the few that did
24 find out that the dismissed juror had some connection
25 to the Solicitor's Office, I don't think that serves

1 as a basis to set aside the jury's decision.

2 Quite frankly, I'm not so sure as a
3 matter of law, anyway, that if I had dismissed the
4 juror originally and announced to the whole jury I
5 had dismissed him because he had some connection to
6 someone involved in the case that that would change
7 the analysis either.

8 So I deny that motion. Anything further?

9 MR. SAVAGE: Judge, the defense would ask
10 that the Court accept as a Court exhibit a fax from
11 SunCom Communications that indicates the phone calls
12 that were made by the dismissed juror between July
13 6th and July 18th.

14 THE COURT: You can file that as a
15 Court's exhibit. I don't have a problem with that.

16 MR. SAVAGE: Thank you.

17 THE COURT: All right. Having said --
18 having addressed the post-trial motions, I'll hear
19 the state out. You can be seated. I'll hear the
20 state out on sentencing.

21 Do you have that copy you wish to submit
22 to the court reporter?

23 (Court's Exhibit No. 4, copy of Suncom
24 telephone log, is marked for identification.)

25 THE COURT: Yes, sir.

1 MR. DURANT: Your Honor, obviously, you
2 are well aware of the facts in this case. I don't
3 believe I need to go over those any further. I think
4 you're also aware that the defendant in this case has
5 no prior record.

6 There are a number of members of the
7 victim's family who would like the opportunity to
8 address you before sentencing. Those would be the
9 victim's mother, Ms. Carla Denson; the victim's
10 friend, Rodney Gibbs; the victim's father, Herschel
11 Denson; and the victim's stepmother, Eileen Denson.

12 THE COURT: Come forward, please. They
13 can come up to the lectern, please.

14 Come forward, please, so we can all hear
15 you. Yes, ma'am. If you'll just state your name,
16 please, for the court reporter.

17 MS. CARLA DENSON: My name is Eleanor
18 Carla Denson. I'm Demar Denson's mother, and I am
19 here because of the event that's happened.

20 I appreciate what the Court has done to
21 make this justice. I appreciate everybody that has
22 worked so hard at it.

23 I want to extend my love to my family who
24 have been here this week and all my friends, but I
25 also would like to extend my love to the family who

1 also are having trouble, because we're all in it
2 together. It's just not about us. It's about the
3 whole community.

4 I'm not here to justify something that
5 was done wrong, but I am here to say that I know that
6 God has everything in his hands and that we all have
7 to work together because it's important that we take
8 care of our community. Our children is our future,
9 and we must teach them to love one another.

10 So that's what I wanted to say. Thank
11 you.

12 THE COURT: Thank you ma'am.

13 MS. CARLA DENSON: This is my picture of
14 Demar Denson. He was on his way to do a lot of great
15 things, he's done a lot of great things, but I know
16 in my heart that he's still going to be doing a lot
17 of great things. Thank you.

18 THE COURT: Thank you, ma'am.

19 Yes, sir. If you'd state your name for
20 the court reporter, please.

21 MR. RONALD GIBBS, JR.: Ronald Gibbs, Jr.

22 I'd just like to say I lost my best
23 friend, my best man at my wedding. Outstanding guy.

24 Even though justice was served, this is
25 bittersweet. But Ms. Denson, Mr. Denson, you lost

1 your son, and we can't bring him back. And the
2 Rocquemore's are losing a son.

3 So I don't want you to think this is a
4 victorious thing. It's something that hurts me. I
5 have to see trouble in the Iraqi war, that's where I
6 see trouble, and that's my job, but I seek a lot of
7 balance in my life during this war. And come back
8 home and see this, it's not good.

9 So I just want the families of
10 Rocquemore's and Denson's just talking with each
11 other and have no ill will toward each other.
12 Because that's the biggest thing, Your Honor.

13 THE COURT: Thank you, sir.

14 MR. RONALD GIBBS, JR.: Yes, sir.

15 THE COURT: I appreciate it.

16 Anyone else from the family?

17 MR. HERSCHEL DENSON: Thank you. My name
18 is Herschel Denson.

19 THE COURT: Yes, sir.

20 MR. HERSCHEL DENSON: Demar Denson was my
21 only -- only son. I love him from the bottom of my
22 heart. And I know that David's family love him. And
23 the tragedy should have never have happened.

24 I forgive David. The first day after I
25 leave the emergency room I asked the Lord, forgive

1 him. Because my son is dead. He's not going to cast
2 a shadow on this earth again, and I know that. And
3 the Lord made me strong to carry on.

4 I'm not going to rejoice because David
5 going to jail. David have a mother, he have a
6 father, a sister who love him, and I'm pretty sure
7 the rest of his family do, too. But the law of our
8 land, we have to pay for the injustice that we do to
9 others.

10 I believe the first day when the
11 detective come to my house and tell me about what
12 happened and tell me what the Rocquemore family said,
13 I don't understand this because this was a good young
14 man. He don't have no kind of record or anything.

15 And I said, "I have a good son. He did
16 nothing wrong. He worked hard and everything."

17 But God has a way of doing things. We're
18 not going to be angry with the Rocquemore family, and
19 I hope they don't be angry with us.

20 And, David, whatever you do, son, I wish
21 and pray that I can -- if you was to call me and say
22 "Mr. Denson, I'm too sorry for what happened," that
23 would -- I would just roll over and just cry.

24 You know, I'd like to just admit if I
25 meet you in the street and you said "Mr. Denson, I'm

1 a Rocquemore, and what happened here to you, sir, I'm
2 sorry." I know that people don't do that, but at
3 home I prayed every night that you would say
4 something, pick up the phone and call and say
5 "Mr. Denson, I'm sorry. I'm -- I'm sorry."

6 You have a good lawyer here. You got a
7 good lawyer. He did all he could for you.

8 But the Lord -- the Lord is -- the Lord
9 is in this, David. So wherever you go, don't --
10 don't be like most of the people in the penitentiary
11 when you go there. God don't send you for that.

12 This is something that's very important
13 in your life. You is a young man, and if you be
14 good, you'll be out in time. I mean -- I mean, this
15 could have happened to anybody in this room, and it
16 happened to you. Because you're a good young man, so
17 far as the record and anybody know.

18 But, David, I'm not here to chastise you.
19 I want you to do good, because you killed a good man,
20 my son. I loved him, I raised him, and -- you put a
21 bullet in my heart, but the good Lord take it out.
22 Do you understand, David?

23 THE DEFENDANT: Yes, sir.

24 MR. HERSCHEL DENSON: And I want you to
25 do good for your family. Understand?

1 THE DEFENDANT: Yes, sir.

2 MR. HERSCHEL DENSON: We've got too many
3 young blacks still who's out there, they don't amount
4 to nothing, don't want nothing, they ain't doing
5 nothing, but something happen to a young man who
6 wants something in life or a black young man who
7 wants something in his life and a tragedy like this
8 happen to him, I can't understand. But guess what?
9 God, God's got something to do with it, David. God's
10 got something to do with it.

11 Now, be a man, do what you got to do, and
12 make your family proud of you wherever you go.
13 Wherever you go and you have to spend the time, spend
14 it wisely. Make them proud of you in jail. Make
15 something -- as you go there, help someone in there.
16 Help the young man -- and, you know, I really believe
17 that you is a good young man, I do, David, and I
18 believe that. But if you had known my son, Demar,
19 y'all would have been the best of friends. When you
20 came to us at first, that's what he wanted to do, and
21 he have done that. When he was much younger, he
22 graduated. He did that. And -- but I can go on and
23 on, but, David, this is for you, for your sister,
24 your mom, and your daddy. You know?

25 THE DEFENDANT: Yes, sir.

1 MR. HERSCHEL DENSON: And I know it's
2 hard, David. I know it's hard, and it's hard on your
3 family and your -- and your mom. But, you know, I
4 know she loves you. Your father, your father is just
5 worried about you.

6 And when you get in trouble and you have
7 people that don't know one another and not talking to
8 one another, please, you know, let me prove to y'all,
9 that this man and this family lose their -- lose
10 their son. That's my only son, my heart. And my
11 bloodline stopped with Demar. And that was my heart.
12 It stopped there. But God put it in my heart to
13 forgive you, David, and don't you forget that, hear?

14 THE DEFENDANT: Yes, sir.

15 MR. HERSCHEL DENSON: Whatever you do and
16 wherever you go, write me sometime and let me know
17 how you're doing. Promise?

18 THE DEFENDANT: Yes, sir.

19 MR. HERSCHEL DENSON: You promise, David?

20 THE DEFENDANT: Yes, sir.

21 MR. HERSCHEL DENSON: Okay. That's all
22 I'm asking from you, because we're going to leave
23 here today with no animosity at all.

24 And Mr. Savage did a wonderful job for
25 your case. I know, you know, he did the -- he did

1 the best he could, David. But, you know, this had a
2 lot of -- you know, God is in it. He's sending you
3 to a place where you can probably do some good. And
4 you are going to do some good, and I know that.

5 And, David, I'm not going to chastise you
6 or anything. You know, you make your family proud.

7 THE DEFENDANT: Yes, sir.

8 MR. HERSCHEL DENSON: Thank you.

9 THE DEFENDANT: Mr. Denson. Mr. Denson.
10 I extend my hand, sir. I extend my hand.

11 (Mr. Herschel Denson and the defendant
12 hug each other.)

13 THE COURT: All right. Sir, I understand
14 what you're saying. Thank you. Is there anything
15 else you wish to say? Anything else, sir?

16 MR. HERSCHEL DENSON: That's it, sir.

17 THE COURT: Thank you.

18 Anyone else from the family? I'd like to
19 hear also how the family feels about sentencing.

20 MS. EILEEN DENSON: Good evening, Judge.
21 My name is Eileen S. Denson. I'm the husband (sic)
22 of Herschel Denson and the stepmother of Demar
23 Denson.

24 Demar was a young man when I married his
25 father. However, he was respectful enough to be a

1 son to me, also, and I grew to love him over the
2 years.

3 But on this morning of August 14th, 2005,
4 the path of two families crossed in an unfortunate
5 way. We realize that bad things happen to good
6 people, but we also understand that the law of the
7 land has the right to instruct us as to how we are to
8 take care of things that are done unjustly.

9 And so today, on behalf of the Denson
10 family, I want to extend our sympathy to the
11 Rocquemore family that came into our life on August
12 14th.

13 That morning when we were going downtown
14 to the Medical University to identify the body of
15 Demar, I told my husband that two families are now
16 hurting. They didn't do anything. It was Demar and
17 David.

18 Demar is deceased now. We have his
19 memories to cherish, and we will cherish them always.

20 David's life is still here, and we're
21 going to pray for him that his life will be one that
22 will be worthy to stand before the real judge, the
23 one that will judge all of us in the end.

24 I pray that this time that he has from
25 now until whenever the Court says is up, that he will

1 be able to find peace with himself, because we hold
2 no animosity toward David nor his family. We were
3 not there, so we did not become judges. We came here
4 today to find justice, and I feel within my heart
5 justice has been served.

6 So I would like to say to the Rocquemore
7 family that we did not come to judge you or sit in
8 judgment. However, we know and understand that the
9 rules of the law of the land has to be honored.

10 So we honor what the Court has done
11 today, and we thank the Court for what has been done.
12 We appreciate all efforts that have been taken toward
13 getting this case resolved. It's been almost two
14 years now since we have been hurting and talking
15 about this, and maybe from this day forward we can go
16 on, knowing that the things have been taken care of,
17 and we can work with our families and move on from
18 this point.

19 And we have to be able to realize that
20 nothing happens by happenstance. We serve a God that
21 knows everything. Therefore, we put David in God's
22 hands since August 14th when he came into our lives,
23 and we still have him there.

24 So I can only say that He who keeps
25 Israel neither slumbers nor sleeps. God knows what's

1 going on, and He continues to watch over us. And so
2 I say, Thou who keep us in perfect peace will keep us
3 forever if we stay in His way. He will keep us in
4 perfect peace because our minds will be stayed on
5 Him. Why? Because we trust in Him. And we came
6 here today, trusting the God who is the truth of all
7 things, and He is the one who was the judge here
8 today. Thank you.

9 THE COURT: Thank you. Anyone else from
10 the family?

11 Did the family express any thoughts about
12 sentencing to the state?

13 MR. DURANT: Your Honor, they -- they
14 would just like to leave it to you.

15 THE COURT: Okay. I'll be happy to hear
16 from the defense and anyone that wishes to speak from
17 the defendant's family.

18 Just one at a time, please. One at a
19 time, please.

20 MR. SAVAGE: Judge, before the family
21 member speaks, I wanted to address some issues that
22 were raised by the Denson family.

23 I want them to know I don't have the
24 faith that y'all have. I don't have the faith that
25 the Rocquemore family has. I don't have that faith.

1 I wish I did.

2 But I want to tell you that the
3 Rocquemore family -- which I did not represent until
4 you called -- and when David and I have met, every
5 occasion, every occasion they have come to my office,
6 they have asked me and my wife to join in prayer with
7 them, and not just for David Rocquemore but for your
8 family and your son. That's something that didn't
9 come from me. It came from them.

10 And I can tell you that David Rocquemore
11 on many occasions spoke of this incident and your
12 family. But he was not able to communicate with you,
13 not from his choice but through our instructions that
14 he received over the course of time that he was not
15 to talk to you. He was prohibited from contacting
16 you. And I can assure you if it was his choice, he
17 would have done so.

18 His daddy.

19 THE COURT: State your name, please.

20 MR. FRED ROCQUEMORE: Well, my name is
21 Fred Rocquemore, David's dad.

22 First of all, I just want to say to -- to
23 the family, nobody wanted this, because it's
24 something, you know, we're always going to live with,
25 whatever -- whatever the outcome was.

1 And, sir, I didn't want to talk to you,
2 you're losing a son, something my son will have to
3 live with for the rest of his life. I didn't want to
4 talk to you.

5 Your Honor, I just want to ask that the
6 Court have mercy on my son. My children have never
7 been in any trouble. We always tried to do and teach
8 them the right things.

9 And all I ask is just to throw myself on
10 and my son on the mercy of the Court. The family and
11 -- my family and the Denson family are tied for life
12 through this unfortunate incident.

13 That's all I have to say.

14 THE COURT: Thank you, sir.

15 Come forward, please.

16 MS. LAVONNE ROCQUEMORE: Good evening.
17 My name is Lavonne Rocquemore. I'm David's mom.

18 THE COURT: Yes, ma'am.

19 MS. LAVONNE ROCQUEMORE: I'm coming to
20 let you all know that David is a good son. He's my
21 middle son of -- of seven. We raised them to be the
22 men and women that God would have them to be, to make
23 wise choices, to do the right thing. And I know
24 sometimes in life things happen, and we do what we
25 feel like we need to do in a situation that we find

1 ourselves in, and sometimes there are consequences as
2 a result of that.

3 And I just want the Denson family to know
4 that our heart has gone out to you all from day one
5 when we found out what happened, you know, and I felt
6 the same way that y'all felt. You know, we were
7 hurting, and we knew that you guys were hurting. And
8 I've been praying for you all ever since the
9 situation happened, as well, you know, that God would
10 strengthen you and give you all peace as He gives us
11 peace and give us strength to go through, because it
12 has been a trying time over these last two years.

13 I want to ask you all to, you know, just
14 be mindful tonight, you know, and, Judge, I would
15 like to ask you to show mercy, and the family, mercy
16 on my son, you know, and allow him to have the least
17 amount of sentencing that is possible, because I feel
18 in my heart that what he did was in self-defense,
19 because he was not one that was out seeking for
20 trouble. He was -- he was not the type of child that
21 was out there to start trouble. But he did, you
22 know, feel that it was important for him to look out
23 for himself and he felt like his life -- well, that
24 his life was in danger.

25 So just have mercy, and, you know, that's

1 my plea to the judge and to the family on tonight.
2 And my, you know, prayer is that God will continue to
3 bless, you know, everybody that's been involved in
4 this.

5 And I hold no grudge in my heart, either,
6 against anybody, because we were not there. You
7 know, just like it was said, we weren't there. We
8 did not see what went on, and it's not our
9 responsibility to judge, either, because like you
10 said, God is the final judge and He will have the
11 final say so, and I'm just accepting the will of God.

12 THE COURT: Anyone else in the family
13 that wish to address the Court? This is your one
14 opportunity.

15 Come forward, please. State your name,
16 please.

17 THE PASTOR: My name is Sean Larevo
18 (phonetic). I'm the pastor of the Rocquemore family.

19 I just want to say to the Court and the
20 Denson family, we definitely pray for you all.

21 One of the things that Mr. Savage said,
22 he doesn't have the faith that we have. And in the
23 midst of this unbearable situation, God has allowed
24 our faith in this courtroom. We have a
25 responsibility to our Father and let His faith shine

1 even in the midst of hard times.

2 In my dealings with David Rocquemore, he
3 is a man of character, he is a man of strong faith.
4 What he is dealing with and has been dealing with for
5 the last two years is making him stronger.

6 How do you get stronger at a time like
7 this? The way the Father works is, His strength
8 shines in our weaknesses. You all, we thank you, for
9 I saw His strength in your weeping.

10 Moses killed a man, and I wonder how many
11 people took the time to find out the truth of why
12 Moses killed a man. God is the judge. The same
13 Moses delivered many, many, and many men. Watch God.
14 He is not through with you.

15 THE COURT: Anyone else?

16 MR. SAVAGE: Thank you, Your Honor. I
17 know that David wants to address the Court.

18 THE COURT: I'd like to hear from
19 Mr. Denson.

20 Is there someone else? Did I see a hand?
21 Okay.

22 MR. SAVAGE: The Denson family, as well
23 as the Court, I'll just tell you a little bit to fill
24 in some blanks.

25 David, as you know, was born in March of

1 1979. He graduated from high school and attended
2 Trident Tech. He received mechanical engineering
3 training, but he also received his EMT license.

4 His mom didn't tell you this, but she is
5 a nurse at St. Francis Hospital. His dad works as a
6 truck driver.

7 He has three brothers, three sisters.
8 They work in communications, they work in police
9 work, and they work in management at a hospital.
10 They work as a machine operator. They work with
11 autistic children. And one, the youngest, is a
12 student.

13 His aunt is here -- if you would stand
14 up, please -- who is a former law enforcement officer
15 and who has been very helpful in trying to proceed
16 through these proceedings.

17 I say it in the most sincere and
18 strongest language that I can to this Court that the
19 Rocquemore family has been inspirational in the way
20 they stay together and the way they're supportive and
21 in their religious beliefs.

22 David's a quiet fellow. He doesn't say
23 much. When he comes to our office, he speaks very
24 quietly and carefully.

25 I'd like for you to hear from him, and

1 I'd like the Denson family to have an opportunity to
2 hear from him directly.

3 THE DEFENDANT: Judge.

4 THE COURT: Yes, sir.

5 THE DEFENDANT: First of all, I would
6 just like to apologize. I ask your forgiveness,
7 Mr. and Mrs. Denson.

8 And not only that, I would also like to
9 apologize to his friends who was out there that night
10 who had to witness their friend...

11 THE COURT: Actually, sir, could I stop
12 you? Use the microphone, please, so they can all
13 hear you.

14 That's fine right there.

15 THE DEFENDANT: As I was saying, I would
16 like to apologize to his friends that were out there
17 that had to see firsthand for their self their friend
18 in a predicament that I never witnessed a friend
19 being in.

20 I can't tell you how it's been bothering
21 me for the last two years. But, Mr. Denson, when I
22 put my arms around you, it was like a big weight just
23 came off of me. And you don't even know what -- I
24 can't explain it.

25 So with that being said, like I said, I

1 beg y'all's forgiveness. I'm not asking for
2 sympathy. I just want forgiveness. And just know
3 I'm not a malicious person, I'm not a hateful person,
4 I'm not spiteful.

5 And believe it or not, we even -- we
6 worked in the same place. The whole time while this
7 was going on, I seen you, but there -- there was no
8 need for me to make myself known because, like the
9 family said, God was working on me. Like I said, I'm
10 not spiteful. I'm not revengeful. I'm not any of
11 that. But what has taken place is a change in my
12 life, and God is in control.

13 Like Mr. Denson said, the law of the land
14 is not the law of man, but it's the law of God, and
15 whatever God has for me is okay.

16 Like I said before, I just ask for your
17 guys' forgiveness.

18 To my family, I love you, and I thank
19 y'all for supporting me.

20 THE COURT: Thank you, sir.

21 Is there something else? I'm sorry, I
22 didn't mean to cut you off.

23 MR. SAVAGE: Judge, I just wanted to
24 point out that he has been gainfully employed, I
25 think you got that from the testimony at the trial,

1 but one of the -- one of the employers that he had,
2 whose name is Mr. Eason, he worked with ---

3 THE DEFENDANT: Yes, sir.

4 MR. SAVAGE: Of course, he stayed away
5 from and there wasn't any contact. But we thought it
6 was his best interest, because of his presence there,
7 to seek other occupation.

8 Judge, he has no prior record with the
9 criminal justice system. He has no contact with the
10 police department. He had no problems in school, no
11 problems with his family, never thought of him as
12 being a bully or anything but a good young man.

13 I'd ask that the sentence that the Court
14 imposes is consistent with rehabilitation. Of
15 course, he has to be punished for what he did, what
16 the jury found that he did. There's no contest of
17 what the jury found. And I'd ask that you give him a
18 chance so that when he gets out he can continue what
19 had been a productive life, particularly prior to
20 August 13th of 2005.

21 THE COURT: Anything else?

22 MR. SAVAGE: That's all I have,
23 Your Honor.

24 THE COURT: Anything else from anyone
25 before I sentence? Any follow up from the family

1 after you've heard what they had to say?

2 MR. DURANT: I don't believe so, Your
3 Honor.

4 THE COURT: Let me say, first, to the
5 victim's family, I certainly can feel your intense
6 loss and -- and your grief. Please understand it
7 would be so easy if I could just sit up here and just
8 bring your son back, but obviously I can't.

9 However, I have to say a few things about
10 what I sense in this room here today, and a lot of
11 these people may tell you that this is not the kind
12 of thing that I usually talk about in court.

13 I am touched by how the victim's family
14 has reached out in forgiveness. It's not something
15 that I see all the time, and -- and it's certainly
16 true that absent forgiveness we burden our souls for
17 the remainder of our lives and the remainder of our
18 human existence. And one may never -- one may never
19 forget, and let us all never forget, that the only
20 true path to healing is forgiveness.

21 And like I say, I don't talk about that
22 kind of stuff normally, but it's not normal that I
23 get that out of the entire room in the courtroom.

24 I sense the spirituality of all of you
25 who are in here. And as Mr. Savage said, it's not

1 just inspirational from one side. It's inspirational
2 from all of you who are sitting here, in here, in
3 this room with me here today.

4 Having said that, my role as a judge
5 requires me to take into consideration various
6 things, such as punishment, deterrence, as well as
7 rehabilitation.

8 Just as Mr. Denson indicated, he urged
9 the defendant to use whatever happens as an
10 opportunity to -- to better himself and to reach out
11 to others. I found that to be very touching. I was
12 touched by what the mother also said, and definitely
13 was touched by how Mr. Denson who reached out and
14 hugged the defendant.

15 I'm here to tell you these are not things
16 that we see here everyday. I've been doing this for
17 a long time. I've been -- I've been trying cases for
18 eleven years, and I've tried a lot of the murder
19 cases that have been in Charleston County, Berkeley
20 County, and all over the state, and it's not
21 something that I see.

22 My job as a judge is a difficult one, and
23 I'm sure all of you have come to understand that,
24 based on your conversations with all that you've
25 talked to and all that you have seen here today. You

1 all understand the frailties of our existence, and
2 the feelings that all of you have expressed in here
3 today has made this even more difficult for me. And
4 not a soul in this room will tell you otherwise,
5 because I would normally sentence and move on; but
6 when I feel something, then I feel an obligation to
7 also say what I feel.

8 I must also consider the fact that the
9 jury rejected the offense of murder. It is important
10 for all of you to understand that. Regardless of how
11 we feel, we have a jury make these determinations,
12 and this is what the jury decided, that it was
13 voluntary manslaughter and not murder, and they have
14 returned a lesser verdict on that. That doesn't
15 diminish what has happened to the family. It doesn't
16 matter what the label is to you. All we know is that
17 your son has been taken away from you. But I have to
18 take that into consideration in what I do.

19 And I have to say that but for what you
20 as a family have done here today, my sentence would
21 probably be different. And I can assure you of that.
22 But I don't sense that you have this objective to
23 just lock this man up for the rest of his natural
24 life. I don't sense that at all.

25 And I also sense that the defendant's

1 family is going to be there for the defendant and
2 give him the support that he will need to -- to learn
3 from this experience and to lead the type of life
4 that needs to be led.

5 But, also, punishment must be dealt, and
6 it must be appropriate in the circumstance, but it is
7 not inappropriate for me to consider what all of you
8 have had to say here today.

9 And if I'm wrong, then I'm wrong, but I
10 don't sense that coming from the family. None of you
11 really addressed the subject of sentencing. It
12 seemed to me you were more concerned that the
13 defendant do some time and actually learn from this
14 experience. If I'm wrong about that, I would love to
15 hear from you; but I think all of you know that
16 regardless of the sentence I impose, it's not going
17 to bring your son back.

18 And I truly am inspired by all of your
19 words. It's -- it really is inspirational, and it's
20 -- you feel God's presence in this room by your
21 words.

22 Therefore, it is the judgment of this
23 Court that I sentence you, sir, to the Department of
24 Corrections for a period of ten years. Good luck to
25 you.

1 MR. SAVAGE: Thank you.

2 MS. WILLIAMS: Thank you, Your Honor.

3 THE COURT: Being nothing further, the
4 court shall be adjourned.

5 MR. SAVAGE: Thank you, Your Honor.

6 MR. DURANT: Thank you, Your Honor.

7 (The defendant is escorted from the
8 courtroom at approximately 8:35 p.m.)

9 THE COURT: Before -- bring the defendant
10 out, please.

11 (The defendant returns to the courtroom
12 at approximately 8:35 p.m. The defendant being
13 present with counsel, the following proceedings were
14 had:)

15 THE COURT: I neglected to say on the
16 possession of a weapon charge, the sentence would be
17 the five years required by statute, concurrent.

18 Good luck to you.

19 MR. SAVAGE: Judge, in terms of his
20 pretrial time, is that automatic, or is that
21 something that you have to...

22 THE COURT: The sentence sheet is always
23 marked credit. They calculate it at the Department
24 of Corrections.

25 MR. SAVAGE: Thank you.

1 THE COURT: Credit for time served on the
2 sentence.

3 (Whereupon, the trial is concluded at
4 approximately 8:35 p.m.)
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CERTIFICATE OF THE COURT REPORTER

I, the undersigned, Brenda Cooley, Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true and accurate transcript of record of the proceedings had and the evidence introduced in the hearing of the captioned trial, Volume V of V, pages 1077 through 1385, inclusive, relative to appeal, in the Court of General Sessions for Charleston County, Charleston, South Carolina, on the 18th and 19th days of July 2007.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

March 18, 2008

Brenda Cooley

Brenda Cooley

Circuit Court Reporter

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

Daniel F. Pieper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID M. ROCQUEMORE,

APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. The trial judge committed reversible error by refusing to grant a mistrial once it was revealed that the State had neglected to disclose that a sitting juror was a close cousin of an Assistant Solicitor in their office and that the two had been communicating with each other throughout the trial.

2. The trial judge committed reversible error by refusing to afford retroactive effect to *S.C. Code Section 16-11-410 et seq.*, the Protection of Persons and Property Act, to the extent that it eliminates a duty to retreat in situations where a person is unlawfully and violently attacked in their vehicle, since appellant testified that he armed himself in self-defense as he was dragged from his truck while attempting to escape from a homicidal lynch-mob, which included the victim among its number.

STATEMENT OF FACTS

On July 9 through 19, 2007, David Michael Rocquemore stood trial in Charleston County, before Judge Daniel F. Pieper and a jury, on two indictments charging him with murder (2005-GS-10-8602) and possession of a firearm during the commission of a violent crime (2005-GS-10-8601). Rocquemore acknowledged that he shot and killed the victim, Hershall Demar Denson, but insisted that he had done so while defending himself from a homicidal lynch-mob, which included Denson among its number. “[A]s I was tackled and beaten to the ground,” Rocquemore explained, “the gun went off.” ROA p. 521, line 14 – p. 522, line 11. (Denson was shot twice: once in the upper left abdomen – the fatal injury – and once close to the left armpit. ROA p. 307, lines 1-12.)

During the early morning hours of August 14, 2005, Rocquemore went to an afterhours party with a friend, but he did not know many of the people there. ROA p. 393, line 21 – p. 394, line 7. A State’s witness remembered him as a polite and “[q]uiet guy” who “[b]arely said two words all night.” ROA p. 77, lines 1-8. In fact, Rocquemore appeared to be “the only sober one in the crowd.” ROA p. 77, lines 9-13.

The tone of the gathering abruptly turned ugly when another man became sexually aggressive toward a disinterested female and threw a drink in her friend’s face when she sought to intervene. ROA p. 108, line 19 – p. 109, line 14; ROA p. 243, lines 10-22; ROA p. 325, line 17 – p. 331, line 8. This lout and his friends hastily departed before the friends of the woman he had assaulted could retaliate. ROA p. 359, line 4 – p. 361, line 8. But they returned after the party had broken up and confronted Rocquemore and his friend, who were also preparing to leave, in the street. ROA p. 110, line 20 – p. 111, line 10; ROA p. 116,

lines 8-15; ROA p. 178, lines 13-22; ROA p. 245, line 17 – p. 246, line 9; ROA p. 397, line 7 – p. 399, line 6; ROA p. 468, line 11 – p. 471, line 1.

These men, upon whom the State's case depended, testified that the killing of Denson was "senseless" and unprovoked. ROA p. 233, line 16 – p. 234, line 2. "Nobody laid a hand on [Rocquemoire]" before he opened fire, one of them testified. ROA p. 188, lines 8-11. Two witnesses even went so far as to assert that Denson's hands were raised in surrender and that he was backing away when Rocquemoire fired the first shot. ROA p. 185, line 6 – p. 187, line 2; ROA p. 283, line 22 – p. 284, line 3.

But the physical evidence does not support this account of the incident. Denson had traces of gunshot residue on the back of his right hand but not his shirt. ROA p. 301, line 20 – p. 302, line 25. These findings indicate that he was in the process of throwing a punch at Rocquemoire when he was shot. ROA p. 306, lines 8-14.

The men who later testified for the State were still beating Rocquemoire when police arrived on the scene. ROA p. 15, lines 1-7. One officer testified:

[I]t was a pretty agitated scene. They were pretty agitated. It took several orders to tell them to get off. One of the individuals kicked him in the groin. I think one more might have punched him.

ROA p. 21, lines 2-15. A lynch-mob atmosphere still prevailed. Officers feared for their own safety and called for backup. ROA p. 40, lines 11-18; ROA p. 42, lines 22-24.

As previously indicated, Rocquemoire specifically testified that he shot Denson in self-defense after he and his friend were brutally attacked without provocation. ROA p. 469, line 6 – p. 472, line 9; ROA p. 479, lines 2-15. He believed he had no other choice.

ROA p. 490, lines 7-9. Rocquemoire's friend, who was also attacked, corroborated his account of the incident. ROA p. 398, line 8 – p. 409, line 7.

In addition to murder, the judge instructed the jury on voluntary and involuntary manslaughter, self-defense and accident. The jury found Rocquemoire guilty of voluntary manslaughter, and the judge sentenced him to imprisonment for ten years and a concurrent sentence of five years for possession of a firearm during the commission of a violent crime. This case was Rocquemoire's first contact with the criminal justice system. ROA p. 720, lines 8-10. As defense counsel pointed out, he had never been thought of as "anything but a good young man." ROA p. 720, lines 10-12.

ARGUMENT

1.

The trial judge committed reversible error by refusing to grant a mistrial once it was revealed that the State had neglected to disclose that a sitting juror was a close cousin of an Assistant Solicitor in their office and that the two had been communicating with each other throughout the trial.

None of the potential jurors responded when the judge asked:

Are any of you related by blood, connected by marriage, or have any social, business, or professional dealings with [the prosecutors on Rocquemore's case], or any dealings or connections with the Solicitor's office?

ROA p. 1, lines 16-22. After the State had rested its case, the defense learned that a sitting juror was in fact the cousin of an Assistant Solicitor in that very office. ROA p. 376, line 6 – p. 380, line 18. At no time did the State disclose this information to the judge or the defense. When this juror was seated, the defense had used only four of the ten peremptory strikes allotted. ROA p. 2, line 3 – p. 6, line 16.

Further investigation by the defense revealed that the juror had been in contact with his cousin the Assistant Solicitor by text message and telephone *during the trial*. ROA p. 380, line 22 – p. 383, line 14. Defense counsel then moved to have the juror dismissed and replaced with an alternate. ROA p. 383, lines 15-18. The State did not object. ROA p. 384, lines 11 and 12. The judge granted the motion. ROA p. 389, lines 3-6.

Defense counsel next asked the judge to determine whether this juror's presence on the jury had "tainted any other jury members." ROA p. 384, line 22 – p. 385, line 4. Under questioning by the judge, the juror admitted that he had a cousin who worked in the

Solicitor's office, but claimed he did not disclose that information during jury qualification because he did not feel it would have any effect on his ability to be fair, *not* that he did not understand the question. ROA p. 386, line 7 – p. 387, line 8. He and his cousin had “talked ... [a]bout his wedding and stuff” since the start of trial. ROA p. 387, lines 9-18. The juror denied having discussed the matter with his fellow jurors. ROA p. 387, line 19 – p. 388, line 3.

But the incident continued to trouble defense counsel. ROA p. 573, line 8 – p. 575, line 2. The Assistant Solicitor in question testified that his cousin had called to tell him that he was on Rocquemore's jury and that he had responded to a second phone call made during the trial with a text message stating, “I'm sorry, I can't talk to you.” ROA p. 596, line 16 – p. 598, line 19. He communicated this information to one or two of the three attorneys prosecuting Rocquemore. ROA p. 600, line 14 – p. 601, line 6. The Deputy Solicitor acknowledged that the Assistant Solicitor told him as they passed in the hall that “his cousin was on the jury.” ROA p. 604, lines 3-22. He did not realize it was something he needed to follow up or disclose. ROA p. 604, line 23 – p. 605, line 1. “I think he told me that his cousin was on the jury panel,” he explained, “but I didn't know who his cousin was.” ROA p. 608, lines 2-15. Another member of the prosecution team revealed that he also knew his colleague had “a cousin on the jury panel.” ROA p. 607, lines 20-24. “[T]hat was before qualification,” he added, and “I didn't go to qualification. ... I didn't know his name.” ROA p. 607, line 24 – p. 608, line 5.

Defense counsel got right to the point:

[N]ames don't matter. ... It could have been any juror. The name doesn't matter. They're on notice that “a juror” misled the court when he was seated on this jury.

ROA. p. 608, lines 17-23. He suggested (and the judge agreed) that the remaining jurors should be questioned individually. ROA p. 610, line 3 – p. 611, line 1.

Most of the jurors were unaware that their fellow juror had a cousin in the Solicitor's Office. One had gone to school with him and knew of the relationship independently. ROA p. 617, line 24 – p. 618, line 5. Another, on the other hand, had overheard the juror announce that his cousin was a prosecutor and that he was going to ask him what was going on in the courtroom while they waited in the jury room. ROA p. 621, line 10 – p. 623, line 18. Another juror partially corroborated this account. ROA p. 627, lines 1-13.

At this point, defense counsel moved for a mistrial:

The only reason that this is a problem before the court this morning is because the State failed to disclose [the relationship between the juror and the Assistant Solicitor] in a timely basis. Therefore, the State should be sanctioned, and we believe that the sanction is a mistrial.

ROA p. 634, lines 1-5. The Assistant Solicitor suddenly became less certain about when he had told the prosecution team “my cousin’s on the jury.” ROA p. 638, line 9 – p. 641, line 16. He had assumed this information would have come to light during jury qualification. ROA p. 641, line 25 – p. 642, line 4.

The judge observed, “I’m not prepared to say there was some kind of intentional conduct on the part of the State.” ROA p. 644, lines 11-17. He subsequently added, “I do believe that the juror should have disclosed that information, and I’m not convinced that the juror misunderstood the question.” ROA p. 659, lines 11-16.

The defense renewed its mistrial motion:

My client’s due process rights have been violated by the failure to disclose that there was a seated juror who was not

honest with the court, who had a relationship – a special relationship – with a member of the Solicitor’s office.

ROA p. 656, lines 8-12. He added, “If the information ... had been brought to the attention of the defendant at that time, we could have exercised a peremptory.” ROA p. 659, lines 20-24. The judge denied the mistrial motion. ROA p. 660, lines 7-15.

After Rocquemore had been found guilty of voluntary manslaughter, defense counsel renewed the mistrial motion based on “new information” the defense had uncovered. ROA p. 708, lines 19-21. Specifically:

[I]t appears that the juror and the Assistant [Solicitor] were not forthright with the court in the court’s examination of the number of contacts. ... There has now been established twenty contacts between the juror and the member of the Solicitor’s staff.

ROA p. 710, lines 6-13. In support of this motion, counsel introduced telephone records documenting the contacts, but not their substance. ROA p. 719, lines 9-24; ROA pp. 723-728. Defense counsel subsequently filed a written motion requesting an order “for the release of the substance of the text-messages sent and received” by the Assistant Solicitor during Rocquemore’s trial. ROA pp. 735-736. Following a conference call, the judge denied the motion by written order. ROA pp. 737. (The Court of Appeals denied a similar motion filed by the undersigned during the pendency of this appeal.) The judge denied the mistrial motion. ROA p. 718, line 17 – p. 719, line 8.

S.C. Code Section 14-7-1020 states in relevant part, “The court shall, on motion of either party in the suit, examine on oath any person who is called as a juror to know whether he is related to either party.” In accordance with this directive, the trial judge asked the prospective jurors in Rocquemore’s case to reveal any relationship “by blood” with the

Solicitor's Office. By their own admission, two of the three prosecutors knew at that point that one of the potential jurors was the cousin of an Assistant Solicitor in their office. Yet they did not reveal this information to either the judge or defense counsel when no one responded to the judge's inquiry. They apparently believed they were under no obligation to reveal the deception of a juror unless they had actual knowledge of his identity.

"It is fundamental that a defendant is entitled to a trial by an impartial jury." *State v. Gulledge*, 277 S.C. 368, 287 S.E.2d 488, 489 (1982), citing the *Sixth Amendment to the United States Constitution* and *Article 1, Section 14, of the South Carolina Constitution*.

Every fair-minded person will readily recognize the importance of having the jury to whom a case is submitted for trial composed of persons who, as far as practicable, are free from any bias or prejudice, either for or against one or the other of the parties, whether the same arises from interest, by reason of relationship or otherwise, or from having previously formed or expressed an opinion as to the merits of the controversy.

State v. Robertson, 53 S.C. 147, 31 S.E. 868, 869 (1899). *Gulledge* acknowledges that "a relationship with counsel" is a primary source of juror bias. 287 S.E.2d at 490. Nevertheless, "[t]here is no absolute rule of disqualification based on a juror's relationship to an attorney in the case." *Thompson v. O'Rourke*, 288 S.C. 13, 339 S.E.2d 505, 506 (1986).

"Prosecutors are ministers of justice and not merely advocates." *State v. Quattlebaum*, 338 S.C. 441, 527 S.E.2d 105, 109 (2000), citing *Rule 3.8, Rules of Professional Conduct*. By neglecting to reveal the blood relationship between an Assistant Solicitor in their office and a juror on Rocquemore's case, the State failed to exercise even a modicum of due diligence. See, for example, *Wilson v. Childs*, 315 S.C. 431, 434 S.E.2d

286 (Ct. App. 1993). Their unconscionable silence prevented the defense from intelligently exercising its peremptory strikes. Compare *Wall v. Keels*, 331 S.C. 310, 501 S.E.2d 754 (Ct. App. 1998). This relationship may have supported the challenge for cause but would definitely have been a material factor in the defense's use of its peremptory strikes. *State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2001). If this information had been brought to his attention in a timely manner, defense counsel stated, "we could have exercised a peremptory." ROA p. 659, lines 20-24. Compare *State v. Savage*, 306 S.C. 5, 409 S.E.2d 809 (Ct. App. 1991), certiorari denied January 22, 1992.

In short, the trial judge committed reversible error by refusing to grant a mistrial based on the State's failure to disclose the relationship between its office and one of Rocquemore's jurors. For this reason, the Court should reverse David Rocquemore's convictions and remand for a new trial.

2.

The trial judge committed reversible error by refusing to afford retroactive effect to S.C. Code Section 16-11-410 et seq., the Protection of Persons and Property Act, to the extent that it eliminates a duty to retreat in situations where a person is unlawfully and violently attacked in their vehicle, since appellant testified that he armed himself in self-defense as he was dragged from his truck while attempting to escape from a homicidal lynch-mob, which included the victim among its number.

Even the State agreed that the central factual issue at trial was whether the shooting was homicide or self-defense. ROA p. 558, line 23 – p. 559, line 4. The only dispute between the parties on this point was whether Rocquemore had a duty to retreat before employing deadly force in his own defense. ROA p. 559, line 5 – p. 560, line 20. Both they and the judge recognized that the retroactivity of *S.C. Code Section 16-11-410 et seq.* would be outcome-determinative of the issue. ROA p. 560, line 21 – p. 571, line 12. Those statutes became effective June 9, 2006, approximately ten months after the incident.

As an initial matter, Rocquemore's possession of the firearm was perfectly legal. ROA p. 290, line 19 – p. 291, line 3. It was lawfully secured in his truck until moments before the shooting. *Compare State v. Slater*, 373 S.C. 66, 644 S.E.2d 50 (2007).

Rocquemore testified that he and his friend were standing in the street when they heard "a vehicle coming down the street, loud profanities and noises coming from the vehicle." ROA p. 469, line 16 – p. 470, line 1. Returning were the gang of men who had left the party earlier, after one of them threw his drink in the face of a female. Rocquemore continued:

The vehicle stops directly in front of us. Upon the vehicle stopping, the doors come open, two individuals come directly towards me in my direction. At that time, the two individuals that came to me began to curse and scream ... saying things like I didn't belong over here and "You better understand where you're at" and things like that.

ROA p. 470, line 22 – p. 471, line 8. According to Rocquemore, the confrontation escalated unilaterally:

[O]ne of the individuals ... put his finger in my face and poked my chest as he was continually cursing and telling me I didn't belong there. At that time, I knocked his hand away from me. Shortly after that ... he swung a punch. I took off running to my vehicle, to my truck.

ROA p. 471, line 17 – p. 472, line 1. He was running to his truck "[f]or protection, for cover ... to get away from those guys." ROA p. 472, lines 2-4.

Their attack was relentless. Rocquemore testified, "I was being hit from behind and pulled and just beat. ... I was being beat up." ROA p. 472, lines 5-9. The men were trying to prevent him from getting into his truck, Rocquemore explained, but:

I was able to get myself half into my truck and just hold on to ... the steering wheel and the console. At the same time I was being hit and pulled, I continued to just swing and kick.

ROA p. 472, lines 16-25. As he was dragged from the truck, Rocquemore continued, "I reached in my console and grabbed my firearm." ROA p. 476, lines 10-15. His intention was "to use it to strike" his attackers. ROA p. 476, line 23 – p. 477, line 4. "I didn't want to shoot anybody," he stated. ROA p. 477 lines 20-22. He just wanted them to leave him alone. ROA p. 477, line 23 – p. 478, line 1.

But they would not. ROA p. 478, lines 2-5. They threatened to kill him. ROA p. 479, lines 5-15. He then swung at them with the gun and then:

[I]t came out of my hand. ... I tried to pick it up. And as I went for it, everybody else ... just went for it. And at that time, once I grabbed it, I tried to just run. I just tried to run.

ROA p. 478, lines 4-12. But he could not get away:

The individuals still continued to beat me, and as I was being beaten and pulled on ... from every angle ... as they began to fall on top of me, I fell to the ground with just my weapon.

ROA p. 479, line 23 – p. 480, line 6. “[A]s I was tackled and beaten to the ground,” Rocquemore continued, “the gun went off.” ROA p. 521, line 14 – p. 522, line 11. Whether the shooting was intentional or accidental, Rocquemore felt that he had no other choice. ROA p. 490, lines 7-9. He believed that his life was in imminent danger. ROA p. 528, lines 9-21.

Witnesses for both the State and the defense corroborated various portions of Rocquemore’s account of the incident. Police officers who arrived at the scene shortly after the shooting saw Rocquemore being beaten and feared for their own safety. Rocquemore’s friend testified that they were both attacked without provocation. One State’s witness verified that Rocquemore had attempted to hit Denson with the weapon and had dropped it before shots were fired. ROA p. 232, lines 7-16. Another testified that Rocquemore had “stumbled” as he was shooting. ROA p. 256, lines 8-15. Finally, the physical evidence indicated that Denson was swinging at Rocquemore when he was shot. ROA p. 306, lines 8-14.

The judge ultimately ruled that *S.C. Code Section 16-11-410 et seq.* was not intended to be retroactive. ROA p. 594, line 25 – p. 595, line 22. He relied primarily on a purported “savings clause” attached to the end of *2006 ACT No. 379*, an omnibus criminal bill which included the Protection of Persons and Property Act:

Either repeal or amendment by this act of any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repeal or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force in effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

He subsequently amended his ruling to include *Smiley v. State of Florida*, 966 So. 2d 330 (Fla. 2007). ROA p. 703, line 9 – p. 705, line 22.

In accordance with this ruling, the State argued in closing that Rocquemore could not have acted in self-defense because he did not retreat:

No matter what happened before Mr. Rocquemore armed himself with that .45 caliber weapon, he had an obligation to avoid killing Mr. Denson if he could have done so without endangering himself. And if David was able to get to his car and get that weapon, he could have gotten in his car and left. If these guys were around, he could have [shooed] those guys off and left, but that's not the path he chose that night.

ROA p. 673, line 22 – p. 674, line 15. And the judge instructed the jury that a person must retreat before employing deadly force in self-defense “if it is possible.” ROA p. 692, line 11 – p. 693, line 1.

S.C. Code Section 16-11-420(A) states that it was the intent of the General Assembly “to codify the Common Law Castle Doctrine, which recognizes that a person’s home is his castle and to extend the doctrine to include an occupied vehicle and the person’s place of business.” *Subsection (E)* provides that “no person or victim of crime should be required to

surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack.”

At the risk of oversimplifying the issue, the extension of the “castle doctrine” to occupied vehicles means that there is no duty to retreat before acting in self-defense. (Finer distinctions between self-defense and defense of habitation are addressed by the Supreme Court in *State v. Rye*, 375 S.C. 119, 651 S.E.2d 321 (2007). These distinctions are not relevant here.) Defense counsel argued – correctly, if the statutes are retroactive – that the duty to retreat should not be charged, as Rocquemore testified that he acted in self-defense as he was dragged from his truck by an apparently homicidal mob, which included the victim among its number. The State argued that retreat had to be charged, not on the facts, but because (its argument went) the legislature did not intend for the statute to be applied retroactively. The judge agreed with the State and ruled accordingly.

The underlying guidelines are clear:

In the construction of statutes, there is a presumption that statutory enactments are to be considered prospective rather than retroactive in their operation unless there is a specific provision in the enactment or clear legislative intent to the contrary. [Citation omitted.] However, statutes that are remedial or procedural in nature are generally held to operate retrospectively. [Citations omitted.]

South Carolina Department of Revenue v. Rosemary Coin Machines, Inc., 339 S.C. 25, 528 S.E.2d 416, 418 (2000); see, also, *Wiesart v. Stewart*, 379 S.C. 300, 665 S.E.2d 187 (2008).

Self-defense remains a common law defense. See, for example, *State v. Franklin*, 80 S.C. 332, 60 S.E. 953 (1908). *Section 16-11-410 et seq.* merely extended existing aspects of self-defense “to include an occupied vehicle and the person’s place of business.” Accordingly, these statutes do not repeal or amend any prior legislative enactments, so the

purported “savings clause” relied upon by the judge and the State is not dispositive of the retroactivity question. Nor does *Smiley v. State of Florida* control, since Rocquemore did not seek to have newly-created statutory presumptions charged to the jury, merely the common law of self-defense as it existed at the time of his trial. (Moreover: “The Florida Constitution imposes a restriction on retroactive application of criminal legislation.” 966 So. 2d at 336. South Carolina’s Constitution does not contain an equivalent provision.)

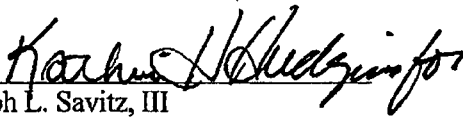
The question thus becomes one of legislative intent. *State v. Gaines*, Supreme Court Opinion No. 26549, decided October 6, 2008; *South Carolina Department of Revenue v. Rosemary Coin Machines, Inc.* In this instance, the General Assembly has made its intent unmistakable. *Section 16-11-420*, with its invocation of pre-existing fundamental rights, contemplates that the statutory scheme thus enacted is both remedial and retroactive. Compare *S.C. Code Section 17-23-170* (“Admissibility of evidence concerning battered spouse syndrome”).

For this reason, the Court should reverse David Rocquemore’s convictions and remand for a new trial.

CONCLUSION

Based on the foregoing arguments, the Court should reverse David Rocquemore's convictions for voluntary manslaughter and possession of a firearm during the commission of a violent crime and remand for a new trial.

Respectfully submitted,



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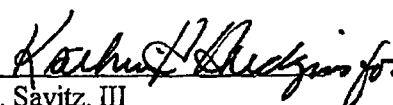
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This 4th day of June, 2009

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Daniel F. Pieper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID M. ROCQUEMORE,

APPELLANT

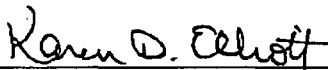
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Deborah Shupe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 4th day of June, 2009.


Joseph L. Savitz, III
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of June, 2009.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: March 19, 2017.

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Daniel F. Pieper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID M. ROCQUEMORE,

APPELLANT

FINAL BRIEF OF RESPONDENT

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<u>State v. White</u> , 371 S.C. 439, 639 S.E.2d 160 (Ct. App. 2006)	10
<u>State v. Woods</u> , 345 S.C. 583, 550 S.E.2d 282 (2001)	13, 14

Other Authorities:

S.C. Code §16-11-410 (Supp. 2008)	16

STATEMENT OF ISSUES ON APPEAL**I.**

The circuit court properly denied Rocquemore's motion for a mistrial because the juror in question was dismissed from the jury, and there was no evidence the remaining jurors were tainted by the dismissed juror's relationship to a prosecutor who not involved in the case.

II.

The Legislature did not intend retroactive application of the Protection of Persons and Property Act, and the circuit court properly declined to charge the jury regarding the Act's provisions since the incident at issue occurred approximately ten months prior to the Act's effective date.

STATEMENT OF THE CASE

Appellant was convicted by a jury on July 19, 2007, of one count of voluntary manslaughter and one count of possession of a firearm during a crime of violence. The Honorable Daniel F. Pieper, Circuit Court Judge, sentenced him to ten years and five years incarceration, respectively, with the sentences to run concurrent. This appeal followed.

STATEMENT OF FACTS

At approximately 4:05 a.m. on August 14, 2005, Charleston County deputies responded to a "shots fired" call. When they arrived, two men were restraining Appellant David Michael Rocquemoire ("Rocquemoire"), and another man, identified as Herschel Denson ("Denson"), was laying on the ground with a bullet wound. Denson was alive, but unconscious and unresponsive. The responding deputies got the two men off Rocquemoire and took control of him. As a result of information conveyed to the Sheriff's Department, they also recovered the gun used to shoot Denson, which was registered to Rocquemoire. (Trial Transcript [TT], pp. 130-133, 147-159, 483-486; Record on Appeal [R.], pp. 9-12, 19-31, 288-291).

Denson died from injuries sustained in the shooting. (TT, pp. 785-788; R., pp. 311-314). On December 5, 2005, the Charleston County Grand Jury indicted Rocquemoire on one count of murder and one count of possession of a firearm during a crime of violence. The case was called for a jury trial on July 9, 2007, before the Honorable Daniel F. Peiper, Circuit Court Judge.

Four eyewitnesses, Dexter Brown, Ronald Gibbs, Troy Eason and Rodney Gibbs, testified Rocquemoire and his friend, Chris Thomas, started an altercation with them and Denson. Thomas made a statement about getting something out of his trunk, and the witnesses thought he meant a gun. Ronald Gibbs followed Thomas to his car and tackled him when he reached into the trunk.

While Ronald Gibbs and Thomas were struggling, Rocquemoire went to his car and got a gun. He swung the gun at Denson, dropped it on the ground, picked it up and shot Denson twice. Troy Eason and Rodney Gibbs wrestled with Rocquemoire in an effort to get

the gun away from him, but it was underneath him on the ground, and Rocquemore did not release it until Ronald Gibbs came over and used a pressure point hold on him. (TT, pp. 201-225, 283-316, 352-381, 425-449; R., pp. 43-67, 97-130, 164-193, 237-261).

During the defense's case, defense counsel informed the court he learned that a juror was related to an assistant solicitor, Michael Nelson ("Nelson"), and had communicated with Nelson during the trial. When the court asked what relief counsel was requesting, he replied: "I think [the juror] should be dismissed." The court indicated it would dismiss the juror, and the State agreed. The court also agreed to ask the juror if he told other jurors about his relationship with Nelson. (TT, pp. 870-879; R., pp. 376-385).

The court then called the juror, Austin Davey ("Davey"), into the courtroom, and confirmed his cousin worked at the Solicitor's Office. Davey admitted he did not inform the court of that relationship during jury *voir dire*, stating: "[w]ell, somebody stood up and you asked if that was going to have any affect, you know. And it wouldn't, wouldn't affect me." He also stated he had talked with Nelson since the trial started, but they did not talk about the case in any way, and he did not disclose his relationship to Nelson to the other jurors. (TT, pp. 880-882; R., pp. 386-388).

Before dismissing Davey, the court again asked defense counsel what he wanted the court to do, and specifically if he had any further questions he wanted to ask Davey. Counsel stated he did not have any further questions. After the court dismissed Davey and instructed him not to discuss the case with anyone or contact Nelson until the case was over, defense counsel stated: "[t]he defendant is ready to proceed." (TT, pp. 882-884; R., pp. 388-390). Rocquemore did not move for a mistrial, or ask the court to individually poll the remaining jurors about communications with Davey.

Rocquemore then called Thomas, who testified that just prior to the shooting, he and Rocquemore were standing outside talking to Dexter Brown when an SUV "came flying down the streets with no lights on, a gentleman hanging out the window, yelling all kind of stuff, sorts of things." After the car pulled up in front of Dexter Brown's house, the men inside got out "in an aggressive manner, traveling towards [Thomas], Dexter Brown, and David Rocquemore." After a verbal altercation, one of the men started to put his hands in Rocquemore's face and Rocquemore slapped his hand down. Thomas turned "to go to [his] trunk to try to get something to hit [one of the men] with, and [the man] tackled [Thomas]." While the man was holding him on the ground, Thomas heard scuffling and two shots, but he could not see what happened. (TT, pp. 889-921; R., pp. 392-424).

Rocquemore testified he, Thomas and Dexter Brown were standing in front of Dexter Brown's house talking when a SUV came down the street, with loud profanities and noises coming from inside. When the SUV stopped, two men got out and came in Rocquemore's direction, cursing and screaming at him. One man put his finger in Rocquemore's face and poked his chest, saying Rocquemore did not "belong there." Rocquemore knocked the man's hand away and the man swung at him.

Rocquemore stated he "took off running to his [truck]," but "was being hit from behind and pulled and just beat." He tried to get in his truck, but he "was being hit and pulled," and he held on to the steering wheel and console to keep from getting pulled out.

While all this hitting and pulling was happening, however, Rocquemore was able to open the console and get his gun. He testified the men then drug him from the truck, and he swung the gun at one of them. He dropped the gun, picked it back up and tried to run, but "was still being beaten and pulled and kicked." The men fell on top of him, and he just

remembered a loud noise. (TT, pp. 965-1034, 1040-1052; R., pp. 468-537, 543-555).

The defense rested after Rocquemore's testimony, and after a brief charge conference, court adjourned for the day. When court reconvened the next morning, Rocquemore's counsel asked for further "discussion" of the dismissed juror, specifically stating he was "not asking for a mistrial." After discussing the issue, the circuit court questioned Nelson and the assistant solicitors about the situation involving Davey. In addition, with the State's agreement, the court individually questioned the remaining jurors to ascertain if they knew about the relationship between Nelson and Davey, and if so, did that knowledge impact their ability to give the parties a fair and impartial trial. (TT, pp. 1077-1090, 1100-1114; R., pp. 573-586, 596-610).

Ten jurors stated they were not aware of any relationship between the dismissed juror and someone in the Solicitor's Office. One juror indicated he knew about the relationship only because he went to school with Davey, but it would not affect his ability to render a fair and impartial verdict. One juror stated Davey said he had a cousin in the Solicitor's Office, but they never discussed the case and the knowledge would not affect his ability to render a fair and impartial verdict. The remaining juror stated Davey only said he had a relative who worked in the building, but did not say where the relative worked, and the knowledge would not affect her ability to render a fair verdict. (TT, pp. 1116-1135; R., pp. 612-631).

Rocquemore then moved for a mistrial, arguing the State failed to disclose the relationship and should be sanctioned. After further questioning Nelson and the assistant solicitors, and based on the remaining jurors' responses, the circuit court denied the motion, finding there was insufficient evidence of intentional conduct by the State, Davey had been removed from the jury, and the remaining jurors were not tainted. (TT, pp. 1136-1164; R.,

pp. 632-660).

The jury convicted Rocquemoire of the lesser included offense of voluntary manslaughter on the murder indictment, and the possession of a firearm during a crime of violence charge. (TT, p. 1340; R., pp. 706). After the verdict, Rocquemoire moved for a mistrial on the dismissed juror issue, arguing Nelson and Davey communicated more often during the trial than they related to the court. The court denied the motion, again finding the jury was not tainted. (TT, pp. 1347-1359; R., pp. 707-719).

The court sentenced Rocquemoire to ten years incarceration on the voluntary manslaughter conviction and five years, concurrent, on the possession of a firearm conviction. (TT, pp. 1383-1384; R., pp. 721-722). This appeal followed.

ARGUMENT

I. The circuit court properly denied Rocquemore's motion for a mistrial because the juror in question was dismissed from the jury, and there was no evidence the remaining jurors were tainted by the dismissed juror's relationship to a prosecutor who not involved in the case.

Rocquemore contends the circuit court erred in refusing to grant his motion for a mistrial after Davey failed to disclose he was related to Nelson, and then communicated with Nelson during the trial. Specifically, he asserts a mistrial was warranted because the State improperly failed to disclose the relationship between Davey and Nelson. His contentions ignore the evidence regarding what the solicitors trying the case knew about Davey and when they knew it, the posture of the case at the time the information was revealed, and more significantly, the circuit court's actions which essentially eliminated any potential prejudice to Rocquemore.¹

A. Preservation

As a threshold matter, this issue may not be preserved for appellate review. When Rocquemore raised the issue, the circuit court specifically asked counsel what relief he was requesting, and counsel responded: "I think [the juror] should be dismissed." (TT, pp. 870-878; R., pp. 376-384). After questioning Davey, the circuit court granted Rocquemore's request and seated an alternate juror. Rocquemore's counsel then stated: "The defendant is ready to proceed." (TT, pp. 878-884, 888; R., pp. 384-390, 391).

Thereafter, Rocquemore presented a witness, testified on his own behalf and rested his case. (TT, pp. 888-1053; R., pp. 391-556). When court reconvened the next day, however,

¹Rocquemore's account of the events at trial is misleading, and the State craves reference to the record as to the actual events.

Rocquemore's counsel stated he was not moving for a mistrial, but just wanted to discuss his "thoughts last night" about the dismissed juror. Counsel did not offer new evidence regarding the juror, and stated he was not questioning the way the court handled the issue or the integrity of the Solicitor's Office. (TT, pp.1077-1082; R., pp. 573-578).

When the juror issue was initially before the court, Rocquemore clearly had ample opportunity to request individual polling of the remaining jurors, or move for a mistrial based on Davey's admitted failure to disclose his relationship with Nelson. Rocquemore received all the relief he requested - dismissal of the juror - then affirmatively informed the court he was ready to proceed with presentation of his case, presented two witnesses and rested his case. His failure to seek additional relief when the issue was before the court waived the issue for appellate review. *Cf. Epting v. Brumble*, 264 S.C. 114, 212 S.E.2d 711, 712 (1975) (since trial court granted only relief sought, appellant cannot complain that he should have been granted more); *State v. McCord*, 349 S.C. 477, 562 S.E.2d 698, 694 (Ct. App. 2002) (no issue for appellate review if objecting party accepts judge's ruling on admission of evidence and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial).

B. Abuse of Discretion

Even if the belated motion for a mistrial preserved an issue for appellate review, however, the circuit court's ruling should be affirmed. Whether to grant or deny a mistrial motion is a matter within the trial court's sound discretion, and the court's decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. *E.g., State v. Council*, 335 S.C. 1, 515 S.E.2d 508, 514 (1999); *State v. Harris*, ____ S.C. ____, ____ S.E.2d ____ (Ct. App. 2009) (2009 WL 580309); *State v. Thompson*, 352 S.C. 552, 575

S.E.2d 77 (Ct. App. 2003). A mistrial is an extreme measure, and the court's power to declare a mistrial should be used with the greatest caution, and only when the defendant can show both error and resulting prejudice. Harris, ____ S.E.2d at ____; *see also* State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999); State v. White, 371 S.C. 439, 639 S.E.2d 160, 162-63 (Ct. App. 2006).

When Rocquemoire raised the juror issue the second time, even though counsel presented no new evidence of misconduct, the circuit court summoned Nelson to the courtroom, who testified under oath Davey called him after the jury was picked and they discussed Nelson's engagement party. Nelson stated Davey mentioned he had been selected for the jury, Nelson told Davey he could not talk about it, and they never discussed the case. Davey also called him during lunch the previous day, but Nelson did not answer the call, and subsequently told Davey by text message he could not talk to him. (TT, pp. 1100-1104; R., pp. 596-600).

Nelson testified he told two of his colleagues his cousin was on the jury panel, but did not remember whether the conversations occurred before or after the jury was selected. One assistant solicitor (Alfaro) stated Nelson told him his cousin was on the jury panel before jury qualifications, but he did not know the cousin's name or that he was on the jury in this case. The other assistant solicitor (Durant) stated he thought Nelson told him his cousin was on the jury panel, but he did not know the cousin's name when the jury was selected. (TT, pp. 1104-1112; R., pp. 600-608).

Rocquemoire's counsel then argued there was a due process violation. The following colloquy occurred between counsel and the circuit court:

MR. SAVAGE: Perhaps at a minimum we have to individually voir dire the remaining jurors, at a minimum, and then the question is: If there has been

any taint, then I don't think that there's any alternative to a mistrial.

THE COURT: Well, I don't need to speculate about a taint until I hear from the jurors.

MR. SAVAGE: Yes, sir.

THE COURT: And almost an hour ago we started with the assumption that I would talk to the jurors. I'm not sure that absent that type of taint disclosed by the jurors, though, you know - - I mean, I still don't know what remedy you're asking for, and I think the reason you want to ask for this is you don't know what the jury is going to say either.

MR. SAVAGE: Correct.

THE COURT: And the question that you would suggest would be?

MR. SAVAGE: The next step I think is an individual voir dire of the jury.

THE COURT: The question which would be to the juror?

MR. SAVAGE: Has the juror that's been dismissed had any conversation about his relationship with the Solicitor's Office or any information about the case?

It's just not about the case, but it's the relationship that would give credibility or believability to enhance credibility or believability to the state's position because of a voucher for, if you will, by that juror of the good name of the trial counsel.

(TT, pp. 1113-1115; R., pp. 609-611) (emphasis added).

The court then called each juror out individually and asked them whether the dismissed juror discussed his relationship with someone in the Solicitor's Office. Eleven jurors (including the remaining alternate) stated the juror did not say anything about a relationship with someone in the Solicitor's Office, or discuss the case in any way. One juror (McQueeney) indicated he knew the juror had a cousin with the Solicitor's Office only because he went to school with the juror, and it would not affect his ability to give a fair and impartial verdict. (TT, pp. 1116-1135; R., pp. 612-631).

One juror (Bowie) stated that during a general discussion about courtroom procedures, the dismissed juror said his cousin worked in the Solicitor's Office, but he did not discuss anything relating to the case. Bowie told the court nothing the dismissed juror said affected his ability to give everyone a fair and impartial trial. (TT, pp. 1125-1127; R., pp. 621-623).

Another juror (Gallagher) stated the dismissed juror said his cousin worked in the building, but did not say where the cousin worked. Gallagher told the court the information did not affect her ability to give everyone in the case a fair and impartial trial. (TT, pp. 1130-1131; R., pp. 626-627).

After the jurors were questioned, Rocquemore's counsel argued the State knew an impaneled juror failed to disclose information to the court, and Davey's telling other jurors about his relationship with Nelson bolstered the State's credibility. He then asked the State be sanctioned by way of a mistrial that would trigger double jeopardy. (TT, pp. 1136-1138; R., pp. 632-634).

The court again questioned the two assistant solicitors about what they knew regarding Nelson's cousin and when they knew it. Both stated Nelson told them his cousin was in the jury pool, but they did not know he was seated on the jury until defense counsel raised the issue during trial. (TT, pp. 1138-1140; R., pp. 634-636).

Nelson was summoned to the courtroom again, and testified Davey called him the Sunday before jury qualifications to ask how he could get off jury duty, and said he was going to tell the judge Nelson was his cousin. Based on their conversation, Nelson assumed Davey disclosed the relationship during jury qualification, and only learned it was not disclosed when Rocquemore's counsel informed him during the trial. Nelson stated he

passed one of the assistant solicitors trying the case in the hall the day of jury qualifications and mentioned his cousin was on the jury, but could not recall whether he said jury or jury panel. He never told either of the assistant solicitors his cousin's name. (TT, pp. 1142-1146; R., pp. 638-642).

Based on testimony from Nelson and the assistant solicitors, the circuit court determined the State did not intentionally fail to disclose Davey's relationship with Nelson. Rather, Nelson assumed Davey disclosed the relationship during *voir dire*, and the two assistant solicitors did not know Nelson's cousin was on the jury.² The court further noted the relationship would not have sustained a challenge for cause, and Rocquemore did not show he would have used a preemptory strike.³ The court then found the remaining jurors were not tainted, and denied the motion for a mistrial. (TT, pp. 1147-1164; R., pp. 643-660).

This case is clearly distinguishable from State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2001) (trial court erred in denying post-verdict new trial motion when juror intentionally concealed information on *voir dire* regarding her prior work as a victims' advocate), and State v. Gullede, 277 S.C. 368, 287 S.E.2d 488 (1982) (trial court erred in

²Rocquemore asserts the two assistant solicitors "knew" one of the potential jurors was Nelson's cousin and failed to disclose that fact to the court or defense counsel. As noted above, both assistant solicitors testified Nelson told them his cousin was in the jury pool. (TT, pp. 1139-1140; R., pp. 635-636). Nelson testified he was not sure when his conversations with the assistant solicitors took place or exactly what was said, but he never told them his cousin's name. (TT, pp. 1101-1105, 1142-1146; R., pp. 597-601, 638-642). Since it is undisputed neither assistant solicitor knew the cousin's name, they could not know the cousin was in the jury panel called for this case, much less that he was seated as a juror.

³Rocquemore acknowledges he merely told the circuit court he "could" have exercised a preemptory strike if he was aware of the relationship between Nelson and Davey. In fact, when the circuit court noted it was "not clear that the defendant would have used a preemptory," counsel conceded "there may have been other prevailing reasons to seat [Davey]." (TT, pp. 1163-1164; R., pp. 659-660).

denying mistrial upon discovery of juror's failure to disclose relationship with deputy who viewed the crime scene and had custody of the defendant in the courtroom during trial; juror remained on jury and participated in deliberations). Davey was removed from the jury well before jury deliberations and the verdict, and the circuit court took appropriate steps to determine the remaining jurors were not tainted by anything he may have said while serving on the jury. Thus, the analysis in Woods and Gulledge does not apply in this case. See State v. Savage, 306 S.C. 5, 409 S.E.2d 809 (Ct. App. 1991) (mistrial properly denied in the absence of prejudice to the defendant from a juror's failure to disclose a relationship with a witness).⁴

The record amply supports the circuit court's determination the jury that ultimately heard all the evidence, deliberated the case and rendered a verdict, was capable of giving the parties a fair and impartial trial.⁵ See State v. Bell, 374 S.C. 136, 646 S.E.2d 888, 894 (Ct. App. 2007) (Determination of whether a juror is biased by the receipt of outside information concerning the case being tried, and the decision whether to dismiss a juror and replace him

⁴Rocquemore's contention the number of contacts between Davey and Nelson changes the analysis is likewise unavailing. As the circuit court recognized in denying Rocquemore's Motion for Release of Records, the remaining jurors were not influenced or tainted in any way regardless of the level of communication between Davey and Nelson while Davey was on the jury. (Order filed August 20, 2007; R., pp. 732-734). Therefore, whether Davey and Nelson shared two or twenty conversations/text messages is irrelevant to the issue before this Court. See State v. Jarrell 350 S.C. 90, 104, 564 S.E.2d 362, 370 (Ct. App. 2002) (recognizing an overriding rule of civil procedure that "whatever doesn't make any difference, doesn't matter")(citing McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 [Ct. App.1987]).

⁵Rocquemore's assertion Davey's relationship with Nelson somehow bolstered the credibility and believability of the State's case is belied by the fact the jury convicted Rocquemore of the lesser included offense of voluntary manslaughter rather than the murder charge as indicted. In order to reach that verdict, the jury apparently gave some credence to Rocquemore's evidence regarding the incident.

with an alternate, are matters within the trial court's discretion, and the court's decisions will not be reversed on appeal absent an abuse of discretion.). Thus, there was no abuse of discretion and Rocquemore's convictions should be affirmed.

II. The Legislature did not intend retroactive application of the Protection of Persons and Property Act, and the circuit court properly declined to charge the jury on the Act's provisions since the incident at issue occurred approximately ten months prior to the Act's effective date.

Rocquemore contends the circuit court erred in denying his request for a jury charge retroactively invoking provisions of the Protection of Persons and Property Act (S.C. Code §16-11-410 [Supp. 2008]) (effective June 2006) (the "Act"), specifically as the Act relates to a person's duty to retreat when attacked in their vehicle. This Court conclusively resolved the issue regarding retroactive application of the Act contrary to Rocquemore's position in State v. Dickey, 380 S.C. 384, 669 S.E.2d 917 (Ct. App. 2008), and State v. Bolin, ____ S.C. ____, ____ S.E.2d ____ (Ct. App. 2009) (2009 WL 367595).

In Dickey, the Court held the Act created substantive rights for citizens by codifying the common law Castle Doctrine, and therefore, it was only retroactive if the legislature clearly expressed such an intent. Based on the Act's effective date and savings clause, the Court found "the Legislature clearly manifested its intent that the Act be applied prospectively," and it did not apply to the defendant's case since his prosecution was pending prior to the Act's effective date. 669 S.E.2d at 928.

The Court followed Dickey in Bolin, and affirmed the trial court's refusal to charge the jury on the Act's legal presumptions. The Act did not apply because the incident at issue occurred four months before the Act's effective date. Bolin, ____ S.E.2d at ____.

In this case, the shooting occurred on August 14, 2005, and Rocquemore was indicted on December 5, 2005, ten months and six months, respectively, before the Act's effective date of June 9, 2006. Under Dickey and Bolin, the Act did not apply, and the circuit court properly refused to charge the jury regarding its provisions.

CONCLUSION

Based on the foregoing, Respondent respectfully submits that Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

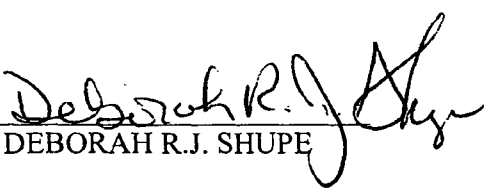
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ATTORNEYS FOR RESPONDENT

June 1, 2009

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Charleston County
The Honorable Daniel F. Pieper, Circuit Court Judge

THE STATE,

Respondent,

vs.

DAVID MICHAEL ROCQUEMORE,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

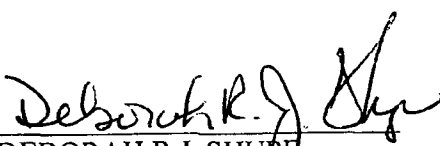
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STATE OF SOUTH CAROLINA
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Appeal From Charleston County
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THE STATE,

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PROOF OF SERVICE

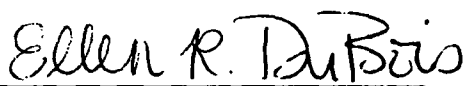
I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.

This 1st day of June, 2009.


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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State,

Respondent,

v.

David M. Rocquemoire,

Appellant.

Appeal From Charleston County
Daniel F. Pieper, Circuit Court Judge

Unpublished Opinion No. 2010-UP-331
Heard April 14, 2010 – Filed June 28, 2010

AFFIRMED

Andrew John Savage III, of Charleston, and Senior Appellate Defender Joseph L. Savitz III, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Deborah R.J. Shupe, all

of Columbia, and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

PER CURIAM: David Rocquemoire appeals his convictions and sentences for voluntary manslaughter and possession of a firearm during the commission of a violent crime. He argues the trial court erred in: (1) refusing to grant a mistrial when the State neglected to disclose that a sitting juror was a close cousin of an Assistant Solicitor and that the two had communicated during the trial; and (2) refusing to afford retroactive effect to the Protection of Persons and Property Act (the Act), sections 16-11-410 to 950 of the South Carolina Code (2003 & Supp. 2009), to the extent that it eliminates a duty to retreat in situation where a person is unlawfully and violently attacked in their vehicle. We affirm pursuant to Rule 220 (b)(1), SCACR and the following authorities:

1. The trial court did not err in refusing to grant Rocquemoire a mistrial based on the State's failure to disclose. Assuming, without deciding, that the trial committed error, we find Rocquemoire failed to demonstrate any prejudice. See State v. Culbreath, 377 S.C. 326, 331, 659 S.E.2d 268, 271 (Ct. App. 2008) ("Whether to grant or deny a mistrial motion is a matter within the trial court's sound discretion, and the court's decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law."); Smith v. State, 375 S.C. 507, 518, 654 S.E.2d 523, 529 (2007) (finding the trial court must ask whether potential jurors have any bias or prejudice against a party to ensure a fair and impartial jury); Culbreath, 377 S.C. at 331, 659 S.E.2d at 271 ("In order to receive a mistrial, a defendant must show error and resulting prejudice."); Felder v. Charleston County Sch. Dist., 327 S.C. 21, 26, 489 S.E.2d 191, 193 (1997) ("Substantial prejudice is required to establish a violation of due process.").

2. The trial court did not err in refusing to afford retroactive effect to the Act. See Graham v. Dorchester County Sch. Dist., 339 S.C. 121, 124, 528 S.E.2d 80, 82 (Ct. App. 2000) (finding as a general rule, statutes are presumed to be prospective rather than retrospective in nature unless retroactivity is expressly stated); State v. Bolin, 381 S.C. 557, 562, 673

S.E.2d 885, 887 (Ct. App. 2009) ("[T]he legislature clearly and unambiguously specified the Act be applied prospectively, the Act cannot be applied retroactively. . . . "); State v. Dickey, 380 S.C. 384, 405, 669 S.E.2d 917, 928 (Ct. App. 2008) (holding the Act applies prospectively and stating the "savings clause" of the Act specifically provides that the Act would not affect pending actions).

AFFIRMED.

SHORT, WILLIAMS, and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

DAVID M. ROCQUEMORE,

APPELLANT

Appeal from Charleston County

Daniel F. Pieper, Circuit Court Judge

Opinion No. 2010-UP-331

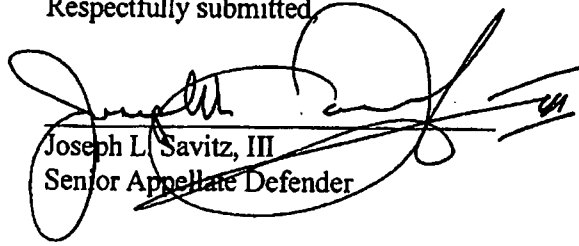
PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for David Rocquemore petitions the Court to rehear the first issue raised on appeal, which concerns the trial judge's refusal to grant a mistrial when the State neglected to disclose that a sitting juror was a close cousin of an Assistant Solicitor and that the two had communicated during the trial. The Court affirmed because it found "Rocquemore failed to demonstrate any prejudice."

The Court's unpublished opinion does not address the culpability of the Solicitor's Office, nor does it acknowledge the judge's refusal – and its own – to allow trial and appellate counsel access to the content of the text-messages sent and received by the Assistant Solicitor and his cousin during Rocquemore's trial. Both of these omissions bear directly on the question of prejudice.

For this reason, the Court should grant rehearing and reverse David Rocquemore's convictions for voluntary manslaughter and possession of a firearm during the commission of a violent crime.

Respectfully submitted,



Joseph L. Savitz, III
Senior Appellate Defender

This 7th day of July, 2010.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Daniel F. Pieper, Circuit Court Judge

THE STATE,

RESPONDENT,

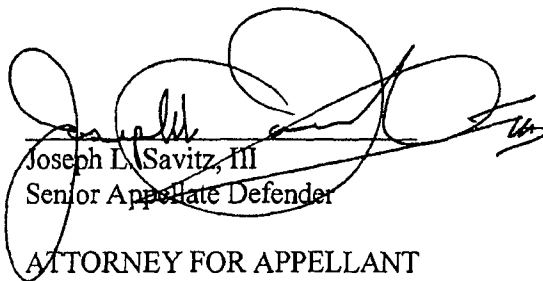
V.

DAVID M. ROCQUEMORE,

APPELLANT

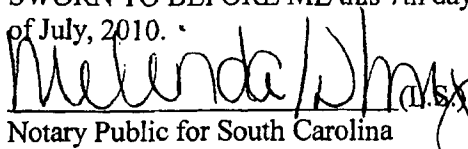
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Deborah R.J. Shupe, Esquire, Assistant Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 7th day of July, 2010.



Joseph L. Savitz, III
Senior Appellate Defender
ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 7th day
of July, 2010.


Notary Public for South Carolina

My Commission Expires: October 30, 2018.

The South Carolina Court of Appeals

The State,

Respondent,

v.

David M. Rocquemore,

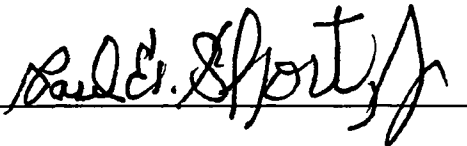
Appellant.

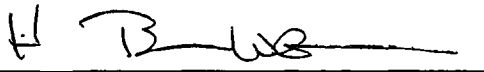
The Honorable Daniel F. Pieper
Charleston County
Trial Court Case No. 2005-GS-10-08601
2005-GS-10-08602

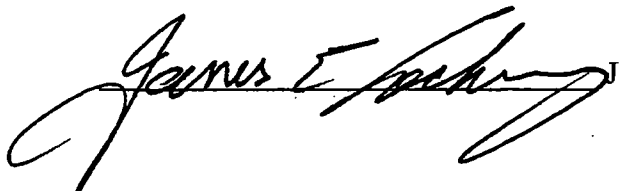
ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing.

It is, therefore, ordered that the Petition for Rehearing be denied.

 J.

 J.

 J.

Columbia, South Carolina
August 27, 2010

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Daniel F. Pieper, Circuit Court Judge

Opinion No. 2010-UP-331 (S.C. Ct. App. filed 6/28/2010)

05-GS-10-8601 & 8602

THE STATE,

RESPONDENT,

V.

DAVID M. ROCQUEMORE,

APPELLANT

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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ATTORNEY FOR PETITIONER

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 8/27/2010.

QUESTION PRESENTED

The trial judge committed reversible error by refusing to grant a mistrial once it was revealed that the State had neglected to disclose that a sitting juror was a close cousin of an Assistant Solicitor in their office and that the two had been communicating with each other throughout the trial.

STATEMENT OF THE CASE

On July 9 through 19, 2007, David Michael Rocquemore stood trial in Charleston County, before Judge Daniel F. Pieper and a jury, on indictments charging him with murder (2005-GS-10-8602) and possession of a firearm during the commission of a violent crime (2005-GS-10-8601). Rocquemore acknowledged that he had shot and killed the victim, Hershall Demar Denson, but insisted that he did so while defending himself from a homicidal lynch-mob, which included Denson among its number. “[A]s I was tackled and beaten to the ground,” Rocquemore explained, “the gun went off.” ROA p. 521, line 14 – p. 522, line 11. (Denson was shot twice: once in the upper left abdomen – the fatal injury – and once close to the left armpit. ROA p. 307, lines 1-12.)

During the early morning hours of August 14, 2005, Rocquemore went to an afterhours party with a friend, but he did not know many of the people there. ROA p. 393, line 21 – p. 394, line 7. A State’s witness remembered him as a polite and “[q]uiet guy” who “[b]arely said two words all night.” ROA p. 77, lines 1-8. In fact, Rocquemore appeared to be “the only sober one in the crowd.” ROA p. 77, lines 9-13.

The tone of the gathering abruptly turned ugly when another man became sexually aggressive toward a disinterested female and threw a drink in her friend’s face when she sought to intervene. ROA p. 108, line 19 – p. 109, line 14; ROA p. 243, lines 10-22; ROA p. 325, line 17 – p. 331, line 8. This lout and his friends hastily departed before the friends of the woman he had assaulted could find him and retaliate. ROA p. 359, line 4 – p. 361, line 8. But they returned after the party had broken up and confronted Rocquemore and his friend, who were also preparing to leave, in the street. ROA p. 110, line 20 – p. 111, line 10; ROA p. 116, lines 8-15; ROA p. 178, lines 13-22; ROA p. 245, line 17 – p. 246, line 9; ROA p. 397, line 7 – p. 399, line 6; ROA p. 468, line 11 – p. 471, line 1.

These men, upon whom the State's case depended, testified that the killing of Denson was "senseless" and unprovoked. ROA p. 233, line 16 – p. 234, line 2. "Nobody laid a hand on [Rocquemore]" before he opened fire, one of them testified. ROA p. 188, lines 8-11. Two witnesses even went so far as to assert that Denson's hands were raised in surrender and that he was backing away when Rocquemore fired the first shot. ROA p. 185, line 6 – p. 187, line 2; ROA p. 283, line 22 – p. 284, line 3.

But the physical evidence does not support this account of the incident. Denson had traces of gunshot residue on the back of his right hand but not his shirt. ROA p. 301, line 20 – p. 302, line 25. These findings indicate that he was in the process of throwing a punch at Rocquemore when he was shot. ROA p. 306, lines 8-14.

The men who later testified for the State were still beating Rocquemore when police arrived on the scene. ROA p. 15, lines 1-7. One officer testified:

[I]t was a pretty agitated scene. They were pretty agitated. It took several orders to tell them to get off. One of the individuals kicked him in the groin. I think one more might have punched him.

ROA p. 21, lines 2-15. A lynch-mob atmosphere still prevailed. Officers feared for their own safety and called for backup. ROA p. 40, lines 11-18; ROA p. 42, lines 22-24.

As previously indicated, Rocquemore specifically testified that he shot Denson in self-defense after he and his friend were brutally attacked without provocation. ROA p. 469, line 6 – p. 472, line 9; ROA p. 479, lines 2-15. He believed he had no other choice. ROA p. 490, lines 7-9. Rocquemore's friend, who was also attacked, corroborated his account of the incident. ROA p. 398, line 8 – p. 409, line 7.

In addition to murder, the judge instructed the jury on voluntary and involuntary manslaughter, self-defense and accident. The jury found Rocquemore guilty of voluntary

manslaughter, and the judge sentenced him to imprisonment for ten years and a concurrent sentence of five years for possession of a firearm during the commission of a violent crime. This case was Rocquemore's first contact with the criminal justice system. ROA p. 720, lines 8-10. As defense counsel pointed out, he had never been thought of as "anything but a good young man." ROA p. 720, lines 10-12.

On direct appeal to the South Carolina Court of Appeals, one of the two issues Rocquemore raised was:

The trial judge committed reversible error by refusing to grant a mistrial once it was revealed that the State had neglected to disclose that a sitting juror was a close cousin of an Assistant Solicitor in their office and that the two had been communicating with each other throughout the trial.

The Court of Appeals affirmed in an unpublished opinion holding, as to this issue, "[A]ssuming, without deciding, that the trial [judge] committed error, we find Rocquemore failed to demonstrate any prejudice." *State v. David M. Rocquemore*, Unpublished Opinion No. 2010-UP-331, filed June 28, 2010. It denied rehearing by order dated August 27, 2010.

David M. Rocquemore now petitions the Supreme Court for writ of certiorari to review the Court of Appeals' disposition of this issue.

ARGUMENT

The trial judge committed reversible error by refusing to grant a mistrial once it was revealed that the State had neglected to disclose that a sitting juror was a close cousin of an Assistant Solicitor in their office and that the two had been communicating with each other throughout the trial.

None of the potential jurors responded when the judge asked:

Are any of you related by blood, connected by marriage, or have any social, business, or professional dealings with [the prosecutors on Rocquemore's case], or any dealings or connections with the Solicitor's office?

ROA p. 1, lines 16-22. After the State had rested its case, the defense learned that a sitting juror was in fact the cousin of an Assistant Solicitor in that very office. ROA p. 376, line 6 – p. 380, line 18. At no time did the State disclose this information to the judge or the defense. When this juror was seated, the defense had used only four of the ten peremptory strikes allotted. ROA p. 2, line 3 – p. 6, line 16.

Further investigation by the defense revealed that the juror had been in contact with his cousin the Assistant Solicitor by text message and telephone *during the trial*. ROA p. 380, line 22 – p. 383, line 14. Defense counsel then moved to have the juror dismissed and replaced with an alternate. ROA p. 383, lines 15-18. The State did not object. ROA p. 384, lines 11 and 12. The judge granted the motion. ROA p. 389, lines 3-6.

Defense counsel next asked the judge to determine whether this juror's presence on the jury had "tainted any other jury members." ROA p. 384, line 22 – p. 385, line 4. Under questioning by the judge, the juror admitted that he had a cousin who worked in the Solicitor's office, but claimed he did not disclose that information during jury qualification because he did not feel it would have

any effect on his ability to be fair, *not* that he did not understand the question. ROA p. 386, line 7 – p. 387, line 8. He and his cousin had “talked ... [a]bout his wedding and stuff” since the start of trial. ROA p. 387, lines 9-18. The juror denied having discussed the matter with his fellow jurors. ROA p. 387, line 19 – p. 388, line 3.

But the incident continued to trouble defense counsel. ROA p. 573, line 8 – p. 575, line 2. The Assistant Solicitor in question testified that his cousin had called to tell him that he was on Rocquemore’s jury and that he had responded to a second phone call made during the trial with a text message stating, “I’m sorry, I can’t talk to you.” ROA p. 596, line 16 – p. 598, line 19. He communicated this information to one or two of the three attorneys prosecuting Rocquemore. ROA p. 600, line 14 – p. 601, line 6. The Deputy Solicitor acknowledged that the Assistant Solicitor told him as they passed in the hall that “his cousin was on the jury.” ROA p. 604, lines 3-22. He did not realize it was something he needed to follow up or disclose. ROA p. 604, line 23 – p. 605, line 1. “I think he told me that his cousin was on the jury panel,” he explained, “but I didn’t know who his cousin was.” ROA p. 608, lines 2-15. Another member of the prosecution team revealed that he also knew his colleague had “a cousin on the jury panel.” ROA p. 607, lines 20-24. “[T]hat was before qualification,” he added, and “I didn’t go to qualification. ... I didn’t know his name.” ROA p. 607, line 24 – p. 608, line 5.

Defense counsel got right to the point:

[N]ames don’t matter. ... It could have been any juror. The name doesn’t matter. They’re on notice that “a juror” misled the court when he was seated on this jury.

ROA. p. 608, lines 17-23. He suggested (and the judge agreed) that the remaining jurors should be questioned individually. ROA p. 610, line 3 – p. 611, line 1.

Most of the jurors were unaware that their fellow juror had a cousin in the Solicitor's Office. One had gone to school with him and knew of the relationship independently. ROA p. 617, line 24 – p. 618, line 5. Another, on the other hand, had overheard the juror announce that his cousin was a prosecutor and that he was going to ask him what was going on in the courtroom while they waited in the jury room. ROA p. 621, line 10 – p. 623, line 18. Another juror partially corroborated this account. ROA p. 627, lines 1-13.

At this point, defense counsel moved for a mistrial:

The only reason that this is a problem before the court this morning is because the State failed to disclose [the relationship between the juror and the Assistant Solicitor] in a timely basis. Therefore, the State should be sanctioned, and we believe that the sanction is a mistrial.

ROA p. 634, lines 1-5. The Assistant Solicitor suddenly became less certain about when he had told the prosecution team “my cousin’s on the jury.” ROA p. 638, line 9 – p. 641, line 16. He had assumed this information would have come to light during jury qualification. ROA p. 641, line 25 – p. 642, line 4.

The judge observed, “I’m not prepared to say there was some kind of intentional conduct on the part of the State.” ROA p. 644, lines 11-17. He subsequently added, “I do believe that the juror should have disclosed that information, and I’m not convinced that the juror misunderstood the question.” ROA p. 659, lines 11-16.

The defense renewed its mistrial motion:

My client’s due process rights have been violated by the failure to disclose that there was a seated juror who was not honest with the court, who had a relationship – a special relationship – with a member of the Solicitor’s office.

ROA p. 656, lines 8-12. He added, "If the information ... had been brought to the attention of the defendant at that time, we could have exercised a peremptory." ROA p. 659, lines 20-24. The judge denied the mistrial motion. ROA p. 660, lines 7-15.

After Rocquemore had been found guilty of voluntary manslaughter, defense counsel renewed the mistrial motion based on "new information" the defense had uncovered. ROA p. 708, lines 19-21. Specifically:

[I]t appears that the juror and the Assistant [Solicitor] were not forthright with the court in the court's examination of the number of contacts. ... There has now been established twenty contacts between the juror and the member of the Solicitor's staff.

ROA p. 710, lines 6-13. In support of this motion, counsel introduced telephone records documenting the contacts, but not their substance. ROA p. 719, lines 9-24; ROA pp. 723-728. Defense counsel subsequently filed a written motion requesting an order "for the release of the substance of the text-messages sent and received" by the Assistant Solicitor during Rocquemore's trial. ROA pp. 735-736. Following a conference call, the judge denied the motion by written order. ROA pp. 737. (The Court of Appeals denied a similar motion filed by the undersigned during the pendency of this appeal.) The judge denied the mistrial motion. ROA p. 718, line 17 – p. 719, line 8.

S.C. Code Section 14-7-1020 states in relevant part, "The court shall, on motion of either party in the suit, examine on oath any person who is called as a juror to know whether he is related to either party." In accordance with this directive, the trial judge asked the prospective jurors in Rocquemore's case to reveal any relationship "by blood" with the Solicitor's Office. By their own admission, two of the three prosecutors knew at that point that one of the potential jurors was the cousin of an Assistant Solicitor in their office. Yet they did not reveal this information to either the

judge or defense counsel when no one responded to the judge's inquiry. They apparently believed they were under no obligation to reveal the deception of a juror unless they had actual knowledge of his identity.

"It is fundamental that a defendant is entitled to a trial by an impartial jury." *State v. Gulledge*, 277 S.C. 368, 287 S.E.2d 488, 489 (1982), citing the *Sixth Amendment to the United States Constitution* and *Article 1, Section 14, of the South Carolina Constitution*.

Every fair-minded person will readily recognize the importance of having the jury to whom a case is submitted for trial composed of persons who, as far as practicable, are free from any bias or prejudice, either for or against one or the other of the parties, whether the same arises from interest, by reason of relationship or otherwise, or from having previously formed or expressed an opinion as to the merits of the controversy.

State v. Robertson, 53 S.C. 147, 31 S.E. 868, 869 (1899). *Gulledge* acknowledges that "a relationship with counsel" is a primary source of juror bias. 287 S.E.2d at 490. Nevertheless, "[t]here is no absolute rule of disqualification based on a juror's relationship to an attorney in the case." *Thompson v. O'Rourke*, 288 S.C. 13, 339 S.E.2d 505, 506 (1986).

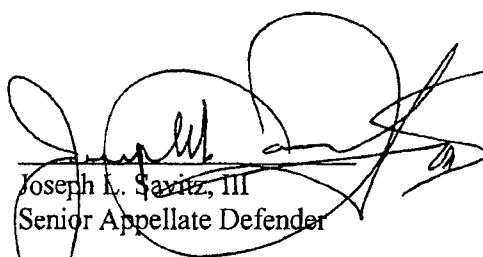
"Prosecutors are ministers of justice and not merely advocates." *State v. Quattlebaum*, 338 S.C. 441, 527 S.E.2d 105, 109 (2000), citing *Rule 3.8, Rules of Professional Conduct*. By neglecting to reveal the blood relationship between an Assistant Solicitor in their office and a juror on Rocquemore's case, the State failed to exercise even a modicum of due diligence. See, for example, *Wilson v. Childs*, 315 S.C. 431, 434 S.E.2d 286 (Ct. App. 1993). Their unconscionable silence prevented the defense from intelligently exercising its peremptory strikes. Compare *Wall v. Keels*, 331 S.C. 310, 501 S.E.2d 754 (Ct. App. 1998). This relationship may have supported the challenge for cause but would definitely have been a material factor in the defense's use of its peremptory strikes. *State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2001). If this information had

been brought to his attention in a timely manner, defense counsel stated, “we could have exercised a peremptory.” ROA p. 659, lines 20-24. Compare *State v. Savage*, 306 S.C. 5, 409 S.E.2d 809 (Ct. App. 1991), certiorari denied January 22, 1992.

The Court of Appeals affirmed on direct appeal because it found “Rocquemore failed to demonstrate any prejudice.” The Court’s unpublished opinion does not address the culpability of the Solicitor’s Office, nor does it acknowledge the trial judge’s refusal – and its own – to allow trial and appellate counsel access to the content of the text-messages sent and received by the Assistant Solicitor and his cousin during Rocquemore’s trial. It is somewhat disingenuous to deny defense counsel access to the means of establishing actual prejudice (if this is even necessary) and then bootstrapping that restriction into a finding of no prejudice.

Based on the foregoing argument, the Supreme Court should grant certiorari and ultimately reverse David M. Rocquemore’s convictions for voluntary manslaughter and possession of a firearm during the commission of a violent crime.

Respectfully submitted,



Joseph L. Savitz, III
Senior Appellate Defender
ATTORNEY FOR PETITIONER

This 23rd day of September, 2010

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
Daniel F. Pieper, Circuit Court Judge

Opinion No. 2010-UP-331 (S.C. Ct. App. filed 6/28/2010)
05-GS-10-8601 & 8602

THE STATE,

RESPONDENT,

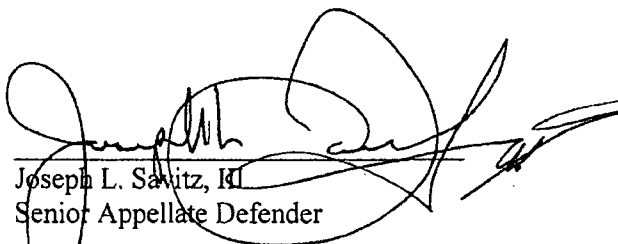
V.

DAVID M. ROCQUEMORE,

APPELLANT

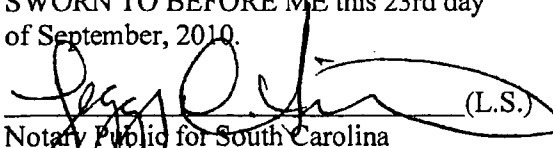
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Deborah R.J. Shupe, Esquire, David M. Rocquemore and the S.C. Court of Appeals this 23rd day of September, 2010.



Joseph L. Savitz, III
Senior Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 23rd day
of September, 2010.



(L.S.)
Notary Public for South Carolina

My Commission Expires: December 4, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From Charleston County
The Honorable Daniel F. Pieper, Circuit Court Judge

THE STATE,

Respondent,

vs.

DAVID MICHAEL ROCQUEMORE,

Petitioner.

**RETURN TO PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS**

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STATEMENT OF ISSUE PRESENTED

The Court of Appeals properly affirmed the denial of Rocquemore's motion for a mistrial, because the circuit court dismissed the juror in question, and took appropriate steps to ensure the remaining jurors were not tainted by the dismissed juror's relationship to a prosecutor who not involved in the case.

STATEMENT OF THE CASE

At approximately 4:05 a.m. on August 14, 2005, Charleston County deputies responded to a "shots fired" call. When they arrived, two men were restraining Appellant David Michael Rocquemoire ("Rocquemoire"), and another man, identified as Herschel Denson ("Denson"), was laying on the ground with a bullet wound. Denson was alive, but unconscious and unresponsive. The responding deputies got the two men off Rocquemoire and took control of him. As a result of information conveyed to the Sheriff's Department, they also recovered the gun used to shoot Denson, which was registered to Rocquemoire. (Record on Appeal [R.], pp. 9-12, 19- 31, 288-291).

Denson died from injuries sustained in the shooting. (R., pp. 311-314). On December 5, 2005, the Charleston County Grand Jury indicted Rocquemoire on one count of murder and one count of possession of a firearm during a crime of violence. The case was called for a jury trial on July 9, 2007, before the Honorable Daniel F. Peiper, Circuit Court Judge.

Four eyewitnesses, Dexter Brown, Ronald Gibbs, Troy Eason and Rodney Gibbs, testified Rocquemoire and his friend, Chris Thomas, started an altercation with them and Denson. Thomas made a statement about getting something out of his trunk, and the witnesses thought he meant a gun. Ronald Gibbs followed Thomas to his car and tackled him when he reached into the trunk.

While Ronald Gibbs and Thomas were struggling, Rocquemoire went to his car and got a gun. He swung the gun at Denson, dropped it on the ground, picked it up and shot Denson twice. Troy Eason and Rodney Gibbs wrestled with Rocquemoire in an effort to get

the gun away from him, but it was underneath him on the ground, and Rocquemore did not release it until Ronald Gibbs came over and used a pressure point hold on him. (R., pp. 43-67, 97-130, 164-193, 237-261).

During the defense's case, defense counsel informed the court he learned that a juror was related to an assistant solicitor, Michael Nelson ("Nelson"), and had communicated with Nelson during the trial. When the court asked what relief counsel was requesting, he replied: "I think [the juror] should be dismissed." The court indicated it would dismiss the juror, and the State agreed. The court also agreed to ask the juror if he told other jurors about his relationship with Nelson. (R., pp. 376-385).

The court then called the juror, Austin Davey ("Davey"), into the courtroom, and confirmed his cousin worked at the Solicitor's Office. Davey admitted he did not inform the court of that relationship during jury *voir dire*, stating: "[w]ell, somebody stood up and you asked if that was going to have any affect, you know. And it wouldn't, wouldn't affect me." He also stated he had talked with Nelson since the trial started, but they did not talk about the case in any way, and he did not disclose his relationship to Nelson to the other jurors. (R., pp. 386-388).

Before dismissing Davey, the court again asked defense counsel what he wanted the court to do, and specifically if he had any further questions he wanted to ask Davey. Counsel stated he did not have any further questions. After the court dismissed Davey and instructed him not to discuss the case with anyone or contact Nelson until the case was over, defense counsel stated: "[t]he defendant is ready to proceed." (R., pp. 388-390). Rocquemore did not move for a mistrial, or ask the court to individually poll the remaining jurors about

communications with Davey.

Rocquemore then called Thomas, who testified that just prior to the shooting, he and Rocquemore were standing outside talking to Dexter Brown when an SUV “came flying down the streets with no lights on, a gentleman hanging out the window, yelling all kind of stuff, sorts of things.” After the car pulled up in front of Dexter Brown’s house, the men inside got out “in an aggressive manner, traveling towards [Thomas], Dexter Brown, and David Rocquemore.” After a verbal altercation, one of the men started to put his hands in Rocquemore’s face and Rocquemore slapped his hand down. Thomas turned “to go to [his] trunk to try to get something to hit [one of the men] with, and [the man] tackled [Thomas].” While the man was holding him on the ground, Thomas heard scuffling and two shots, but he could not see what happened. (R., pp. 392-424).

Rocquemore testified he, Thomas and Dexter Brown were standing in front of Dexter Brown’s house talking when a SUV came down the street, with loud profanities and noises coming from inside. When the SUV stopped, two men got out and came in Rocquemore’s direction, cursing and screaming at him. One man put his finger in Rocquemore’s face and poked his chest, saying Rocquemore did not “belong there.” Rocquemore knocked the man’s hand away and the man swung at him.

Rocquemore stated he “took off running to his [truck],” but “was being hit from behind and pulled and just beat.” He tried to get in his truck, but he “was being hit and pulled,” and he held on to the steering wheel and console to keep from getting pulled out.

While all this hitting and pulling was happening, however, Rocquemore was able to open the console and get his gun. He testified the men then drug him from the truck, and he

swung the gun at one of them. He dropped the gun, picked it back up and tried to run, but “was still being beaten and pulled and kicked.” The men fell on top of him, and he just remembered a loud noise. (R., pp. 468-537, 543-555).

The defense rested after Rocquemore’s testimony, and after a brief charge conference, court adjourned for the day. When court reconvened the next morning, Rocquemore’s counsel asked for further “discussion” of the dismissed juror, specifically stating he was “not asking for a mistrial.” After discussing the issue, the circuit court questioned Nelson and the assistant solicitors about the situation involving Davey. In addition, with the State’s agreement, the court individually questioned the remaining jurors to ascertain if they knew about the relationship between Nelson and Davey, and if so, did that knowledge impact their ability to give the parties a fair and impartial trial. (R., pp. 573-586, 596-610).

Ten jurors stated they were not aware of any relationship between the dismissed juror and someone in the Solicitor’s Office. One juror indicated he knew about the relationship only because he went to school with Davey, but it would not affect his ability to render a fair and impartial verdict. One juror stated Davey said he had a cousin in the Solicitor’s Office, but they never discussed the case and the knowledge would not affect his ability to render a fair and impartial verdict. The remaining juror stated Davey only said he had a relative who worked in the building, but did not say where the relative worked, and the knowledge would not affect her ability to render a fair verdict. (R., pp. 612-631).

Rocquemore then moved for a mistrial, arguing the State failed to disclose the relationship and should be sanctioned. After further questioning Nelson and the assistant solicitors, and based on the remaining jurors’ responses, the circuit court denied the motion,

finding there was insufficient evidence of intentional conduct by the State, Davey had been removed from the jury, and the remaining jurors were not tainted. (R., pp. 632-660).

The jury convicted Rocquemore of the lesser included offense of voluntary manslaughter on the murder indictment, and the possession of a firearm during a crime of violence charge. (R., pp. 706). After the verdict, Rocquemore moved for a mistrial on the dismissed juror issue, arguing Nelson and Davey communicated more often during the trial than they related to the court. The court denied the motion, again finding the jury was not tainted. (R., pp. 707-719).

The court sentenced Rocquemore to ten years incarceration on the voluntary manslaughter conviction and five years, concurrent, on the possession of a firearm conviction. (R., pp. 721-722). This appeal followed.

By unpublished opinion filed June 28, 2010, the Court of Appeals affirmed Rocquemore's conviction. Even assuming (without deciding) error in denying Rocquemore's mistrial motion based on the State's failure to disclose the juror relationship, the Court found Rocquemore did not demonstrate any prejudice. (Appendix, pp. 1-3).

The Court denied Rocquemore's Petition for Rehearing by Order dated August 27, 2010. (Appendix, p. 7). On September 23, 2010, Rocquemore filed a Petition for Writ of Certiorari to the Court of Appeals, asking this Court to review the Court of Appeals decision.

ARGUMENT

The Court of Appeals properly affirmed the denial of Rocquemore's motion for a mistrial, because the circuit court dismissed the juror in question, and took appropriate steps to ensure the remaining jurors were not tainted by the dismissed juror's relationship to a prosecutor who not involved in the case.

Rocquemore contends the Court of Appeals erred in affirming based on a lack of prejudice without addressing "the culpability of the Solicitor's Office," or allowing counsel access to the content of text messages between the dismissed juror and the assistant solicitor. As he did in the circuit court and the Court of Appeals, Rocquemore ignores the evidence regarding what the solicitors trying the case knew about Davey and when they knew it, the posture of the case at the time the information was revealed, and more significantly, the circuit court's actions which essentially eliminated any potential prejudice to Rocquemore. Further, given the undisputed absence of any taint as to the remaining jurors, text messages between the dismissed juror and the assistant solicitor were irrelevant, regardless of their content.

A. Preservation

As a threshold matter, this issue was not preserved for appellate review. When Rocquemore raised the issue, the circuit court specifically asked counsel what relief he was requesting, and counsel responded: "I think [the juror] should be dismissed." (R., pp. 376-384). After questioning Davey, the circuit court granted Rocquemore's request and seated an alternate juror. Rocquemore's counsel then stated: "The defendant is ready to proceed." (R., pp. 384-390, 391).

Thereafter, Rocquemore presented a witness, testified on his own behalf and rested

his case. (R., pp. 391-556). When court reconvened the next day, however, Rocquemore's counsel stated he was not moving for a mistrial, but just wanted to discuss his "thoughts last night" about the dismissed juror. Counsel did not offer new evidence regarding the juror, and stated he was not questioning the way the court handled the issue or the integrity of the Solicitor's Office. (TT, pp.1077-1082; R., pp. 573-578).

When the juror issue was initially before the court, Rocquemore clearly had ample opportunity to request individual polling of the remaining jurors, or move for a mistrial based on Davey's admitted failure to disclose his relationship with Nelson. Rocquemore received all the relief he requested - dismissal of the juror - then affirmatively informed the court he was ready to proceed with presentation of his case, presented two witnesses and rested his case. His failure to seek additional relief when the issue was before the court waived the issue for appellate review. *Cf. Epting v. Brumble*, 264 S.C. 114, 212 S.E.2d 711, 712 (1975) (since trial court granted only relief sought, appellant cannot complain that he should have been granted more); *State v. McCord*, 349 S.C. 477, 562 S.E.2d 698, 694 (Ct. App. 2002) (no issue for appellate review if objecting party accepts judge's ruling on admission of evidence and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial).

B. Abuse of Discretion

Even if the belated motion for a mistrial preserved an issue for appellate review, however, the Court of Appeals properly affirmed the circuit court's ruling. Whether to grant or deny a mistrial motion is a matter within the trial court's sound discretion, and the court's decision will not be disturbed on appeal absent an abuse of discretion amounting to an error

of law. *E.g.*, State v. Council, 335 S.C. 1, 515 S.E.2d 508, 514 (1999); State v. Harris, 382 S.C. 107, 674 S.E.2d 532 (Ct. App. 2009); State v. Thompson, 352 S.C. 552, 575 S.E.2d 77 (Ct. App. 2003). A mistrial is an extreme measure, and the court's power to declare a mistrial should be used with the greatest caution, and only when the defendant can show both error and resulting prejudice. Harris, 674 S.E.2d at 537; *see also* State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999); State v. White, 371 S.C. 439, 639 S.E.2d 160, 162-63 (Ct. App. 2006).

When Rocquemoire raised the juror issue the second time, even though counsel presented no new evidence of misconduct, the circuit court summoned Nelson to the courtroom, who testified under oath Davey called him after the jury was picked and they discussed Nelson's engagement party. Nelson stated Davey mentioned he had been selected for the jury, Nelson told Davey he could not talk about it, and they never discussed the case. Davey also called him during lunch the previous day, but Nelson did not answer the call, and subsequently told Davey by text message he could not talk to him. (R., pp. 596-600).

Nelson testified he told two of his colleagues his cousin was on the jury panel, but did not remember whether the conversations occurred before or after the jury was selected. One assistant solicitor (Alfaro) stated Nelson told him his cousin was on the jury panel before jury qualifications, but he did not know the cousin's name or that he was on the jury in this case. The other assistant solicitor (Durant) stated he thought Nelson told him his cousin was on the jury panel, but he did not know the cousin's name when the jury was selected. (R., pp. 600-608).

Rocquemoire's counsel then argued there was a due process violation. The following

colloquy occurred between counsel and the circuit court:

MR. SAVAGE: Perhaps at a minimum we have to individually voir dire the remaining jurors, at a minimum, and then the question is: **If there has been any taint**, then I don't think that there's any alternative to a mistrial.

THE COURT: Well, I don't need to speculate about a taint until I hear from the jurors.

MR. SAVAGE: Yes, sir.

THE COURT: And almost an hour ago we started with the assumption that I would talk to the jurors. I'm not sure that absent that type of taint disclosed by the jurors, though, you know - - I mean, I still don't know what remedy you're asking for, and I think the reason you want to ask for this is you don't know what the jury is going to say either.

MR. SAVAGE: Correct.

THE COURT: And the question that you would suggest would be?

MR. SAVAGE: The next step I think is an individual voir dire of the jury.

THE COURT: The question which would be to the juror?

MR. SAVAGE: Has the juror that's been dismissed had any conversation about his relationship with the Solicitor's Office or any information about the case?

It's just not about the case, but it's the relationship that would give credibility or believability to enhance credibility or believability to the state's position because of a voucher for, if you will, by that juror of the good name of the trial counsel.

(R., pp. 609-611) (emphasis added).

The court then called each juror out individually and asked them whether the dismissed juror discussed his relationship with someone in the Solicitor's Office. Eleven jurors (including the remaining alternate) stated the juror did not say anything about a relationship with someone in the Solicitor's Office, or discuss the case in any way. One juror

(McQueeney) indicated he knew the juror had a cousin with the Solicitor's Office only because he went to school with the juror, and it would not affect his ability to give a fair and impartial verdict. (R., pp. 612-631).

One juror (Bowie) stated that during a general discussion about courtroom procedures, the dismissed juror said his cousin worked in the Solicitor's Office, but he did not discuss anything relating to the case. Bowie told the court nothing the dismissed juror said affected his ability to give everyone a fair and impartial trial. (R., pp. 621-623).

Another juror (Gallagher) stated the dismissed juror said his cousin worked in the building, but did not say where the cousin worked. Gallagher told the court the information did not affect her ability to give everyone in the case a fair and impartial trial. (R., pp. 626-627).

After the jurors were questioned, Rocquemore's counsel argued the State knew an impaneled juror failed to disclose information to the court, and Davey's telling other jurors about his relationship with Nelson bolstered the State's credibility. He then asked the State be sanctioned by way of a mistrial that would trigger double jeopardy. (R., pp. 632-634).

The court again questioned the two assistant solicitors about what they knew regarding Nelson's cousin and when they knew it. Both stated Nelson told them his cousin was in the jury pool, but they did not know he was seated on the jury until defense counsel raised the issue during trial. (R., pp. 634-636).

Nelson was summoned to the courtroom again, and testified Davey called him the Sunday before jury qualifications to ask how he could get off jury duty, and said he was going to tell the judge Nelson was his cousin. Based on their conversation, Nelson assumed

Davey disclosed the relationship during jury qualification, and only learned it was not disclosed when Rocquemore's counsel informed him during the trial. Nelson stated he passed one of the assistant solicitors trying the case in the hall the day of jury qualifications and mentioned his cousin was on the jury, but could not recall whether he said jury or jury panel. He never told either of the assistant solicitors his cousin's name. (R., pp. 638-642).

Based on testimony from Nelson and the assistant solicitors, the circuit court determined the State did not intentionally fail to disclose Davey's relationship with Nelson. Rather, Nelson assumed Davey disclosed the relationship during *voir dire*, and the two assistant solicitors did not know Nelson's cousin was on the jury.¹ The court further noted the relationship would not have sustained a challenge for cause, and Rocquemore did not show he would have used a preemptory strike.² The court then found the remaining jurors were not tainted, and denied the motion for a mistrial. (R., pp. 643-660).

This case is clearly distinguishable from State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2001) (trial court erred in denying post-verdict new trial motion when juror intentionally concealed information on *voir dire* regarding her prior work as a victims'

¹Rocquemore asserts the two assistant solicitors "knew" one of the potential jurors was Nelson's cousin and failed to disclose that fact to the court or defense counsel. As noted above, both assistant solicitors testified Nelson told them his cousin was in the jury pool. (R., pp. 635-636). Nelson testified he was not sure when his conversations with the assistant solicitors took place or exactly what was said, but he never told them his cousin's name. (R., pp. 597-601, 638-642). Since it is undisputed neither assistant solicitor knew the cousin's name, they could not know the cousin was in the jury panel called for this case, much less that he was seated as a juror.

²Rocquemore merely told the circuit court he "could" have exercised a preemptory strike if he was aware of the relationship between Nelson and Davey. When the circuit court noted it was "not clear that the defendant would have used a preemptory," counsel conceded "there may have been other prevailing reasons to seat [Davey]." (R., pp. 659-660).

advocate), and State v. Gullledge, 277 S.C. 368, 287 S.E.2d 488 (1982) (trial court erred in denying mistrial upon discovery of juror's failure to disclose relationship with deputy who viewed the crime scene and had custody of the defendant in the courtroom during trial; juror remained on jury and participated in deliberations). Davey was removed from the jury well before jury deliberations and the verdict, and the circuit court took appropriate steps to determine the remaining jurors were not tainted by anything he may have said while serving on the jury. Thus, the analysis in Woods and Gullledge does not apply in this case. See State v. Savage, 306 S.C. 5, 409 S.E.2d 809 (Ct. App. 1991) (mistrial properly denied in the absence of prejudice to the defendant from a juror's failure to disclose a relationship with a witness).

The analysis remains the same regardless of the number and substance of contacts between Davey and Nelson. As the circuit court recognized in denying Rocquemore's Motion for Release of Records, the remaining jurors were not influenced or tainted in any way regardless of the level of communication between Davey and Nelson while Davey was on the jury. (R., pp. 732-734). Therefore, whether Davey and Nelson exchanged two or twenty conversations/text messages is irrelevant to the issue in this appeal. See State v. Jarrell 350 S.C. 90, 104, 564 S.E.2d 362, 370 (Ct. App. 2002) (recognizing an overriding rule of civil procedure that "whatever doesn't make any difference, doesn't matter")(citing McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 [Ct. App.1987]).

The record amply supports the circuit court's determination the jury that ultimately heard all the evidence, deliberated the case and rendered a verdict, was capable of giving the

parties a fair and impartial trial.³ See State v. Bell, 374 S.C. 136, 646 S.E.2d 888, 894 (Ct. App. 2007) (Determination of whether a juror is biased by the receipt of outside information concerning the case being tried, and the decision whether to dismiss a juror and replace him with an alternate, are matters within the trial court's discretion, and the court's decisions will not be reversed on appeal absent an abuse of discretion.). Thus, there was no abuse of discretion and the Petition for a Writ of Certiorari to the Court of Appeals opinion should be denied.

³Rocquemore's assertion Davey's relationship with Nelson somehow bolstered the credibility and believability of the State's case is belied by the fact the jury convicted Rocquemore of the lesser included offense of voluntary manslaughter rather than the murder charge as indicted. In order to reach that verdict, the jury apparently gave some credence to Rocquemore's evidence regarding the incident.

CONCLUSION

Based on the foregoing, Respondent respectfully submits the Petition for Writ of Certiorari to the Court of Appeals should be denied.

Respectfully submitted,

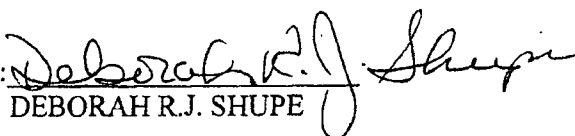
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ATTORNEYS FOR RESPONDENT

November 24, 2010

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County
The Honorable Daniel F. Pieper, Circuit Court Judge

THE STATE,

Respondent,

vs.

DAVID MICHAEL ROCQUEMORE,

Petitioner.

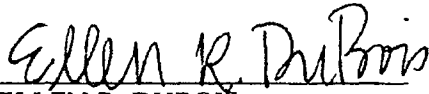
PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the Return to Petition for Writ of Certiorari to the Court of Appeals on Petitioner by depositing two copies in the United States mail, postage prepaid, addressed to:

Joseph L. Savitz, III
Senior Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served.

This 24th day of November, 2010.


ELLEN R. DUBOIS
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The Supreme Court of South Carolina

The State,

Respondent,

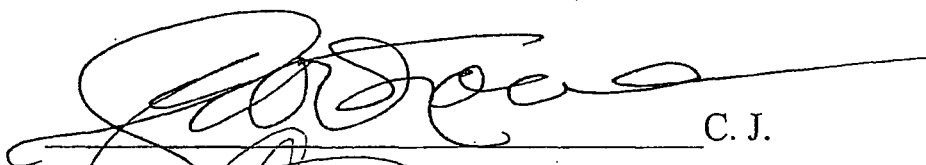
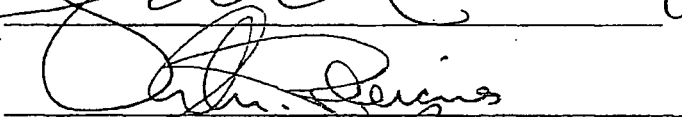
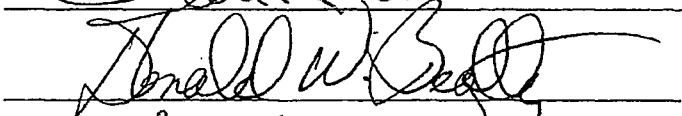
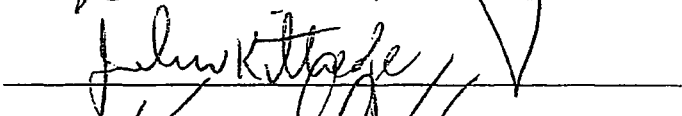
v.

David M. Rocquemore,

Petitioner.

ORDER

We grant the petition for a writ of certiorari to review the Court of Appeals' decision in State v. Rocquemore, Op. No. 2010-UP-331 (S.C. Ct. App. filed June 28, 2010). The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR.

 C. J.
 J.
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 J.

Columbia, South Carolina

December 1, 2011

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**SC OFFICE OF
APPELLATE DEFENSE**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Daniel F. Pieper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID M. ROCQUEMORE,

APPELLANT

BRIEF OF PETITIONER

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