

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEE COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Appellate Case 2017-000063

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S.C. SUPREME COURT

Ernest Toney,

Petitioner,

v.

State of South Carolina,

Respondent.

APPENDIX VOLUME I

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STATE OF SOUTH CAROLINA)
COUNTY OF LEE) COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA)

STATE,)

TRANSCRIPT OF RECORD
11-GS-31-156

v.)

ERNEST TONEY,)

DEFENDANT.)

December 10, 2012
Bishopville, South Carolina

B E F O R E :

THE HONORABLE GEORGE C. JAMES, JR., JUDGE;
AND JURY

A P P E A R A N C E S:

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1 THE COURT: All right, ladies and
2 gentlemen.

3 MR. FATA: Your Honor, the State calls
4 indictment 11-GS-31-156, the State versus Ernest
5 Toney, indictment for murder. He is here today
6 seated at defense table represented by Mr. Kent and
7 Mr. Chandler, and the State is ready for trial.

8 THE COURT: Can I see the lawyers up here
9 one more time.

10 (WHEREUPON, counsel approached the
11 Bench for an off-the-record discussion.)

12 THE COURT: All right, ladies and
13 gentlemen, we're going to now strike a jury for the
14 trial of the case of State of South Carolina versus
15 Ernest Toney. I'm going to go over some questions,
16 ladies and gentlemen, that are designed to make sure
17 that we impanel a jury that is fair and impartial
18 and one which will base a verdict of this case on
19 the evidence and the law and not based on any
20 improper motivation on the part of me.

21 Jurors, please listen carefully. If I ask
22 you a question that applies, do not raise your hand;
23 you stand, 'cause that way I'll be able to see you
24 if somebody raises their hand. I can't see the hand
25 because there's so many folks out there. If I ask a

1 question that applies to you, you stand up. The
2 first thing I will need is, I'll ask you for your
3 name. That's all I want, is your name. If you know
4 your juror number you can give me your juror number.
5 What I do want you to do, is to stand up and start
6 talking. The questions that I ask you will be very
7 specific. I may ask you to come up here and give me
8 information just in the presence of the attorneys
9 and the court reporter. If we do that, please do
10 not share with any of your fellow jurors anything we
11 talked about. Also, if someone does come up here
12 and you're on the, out in the jury, don't ask that
13 person what we were talking about. Most of the time
14 it doesn't make any difference. It's just, I don't
15 know what you're going to say so I'll likely have
16 you come forward and give me the information
17 privately.

18 All right, now ladies and gentlemen, when
19 a person is arrested or charged or indicted for any
20 criminal offense, that is not evidence in a case.
21 The indictment process is simply the process that
22 literally walks in this case into the courtroom. It
23 has to get in the court somehow.

24 And in this state there's the indictment
25 process. The indictment contains allegations made

1 by the State against the defendant. The defendant
2 has entered a plea of not guilty to this charge and
3 that plea puts the burden on the State to prove
4 guilt beyond a reasonable doubt. The defendant in a
5 criminal case is presumed innocent and does not have
6 to prove or disprove anything. The fact that I
7 refer now to this indictment is not intended to be a
8 comment by me on the facts because primarily I don't
9 have a view of the facts; and if I did have one, I
10 would not be permitted to express them to you. I
11 simply need to read from the indictment to ask you,
12 ladies and gentlemen, the first question. And that
13 is going to be, is there anyone who knows anything
14 about this case in any way whatsoever from whatever
15 you may have read or heard or listened to? And
16 that's from any source that you can imagine.

17 (There was no response.)

18 THE COURT: And ladies and gentlemen, the
19 indictment says or alleges that Ernest Toney did in
20 this county on or about September 12, 2010, with
21 malice aforethought and willfully kill one Gregory
22 Rogers by means of shooting him with a rifle. Of
23 course, it goes on to say that Mr. Rogers did die as
24 a proximate result of that shooting. Now is there
25 anyone on this jury panel who knows anything about

1 this case other than what I just referenced from the
2 indictment? In other words, have you read anything
3 about it, listened to anything about it, heard even
4 casual conversation about anything involving this
5 case, or you have any knowledge at all other than
6 what I just referenced from the indictment, if so,
7 please stand?

8 If you'll, ladies and gentlemen, get in
9 line in the center aisle. Stand right there,
10 jurors, for the time being.

11 Also, Mr. Toney, if you could stand and
12 please face the jury panel.

13 This is Ernest Toney.

14 Mr. Toney, you can sit down.

15 Is there anyone on this jury panel — if I
16 use the term immediate family during the course of
17 any of these questions, that typically means your
18 father, your mother, your brother, your sister, or a
19 child or anyone else you consider to be a close
20 family member. You've seen Mr. Ernest Toney. Is
21 there anyone on this jury panel or to your knowledge
22 anyone in your immediate family who, first of all,
23 might be kin to Mr. Toney? That's either blood,
24 kin, or related to him by marriage, or is there
25 anyone on this jury panel or to your knowledge

1 anyone in your immediate family who has any type of
2 acquaintance, however slight and however long ago?
3 It could be as close as you go to church with him,
4 went to school with him, work with him or formerly
5 worked with him, or see him passing in the store,
6 any type of acquaintance, however close or however
7 slight with Mr. Toney, please stand. All right.

8 (WHEREUPON, potential juror approached the
9 Bench for an off-the-record discussion.)

10 THE POTENTIAL JUROR: My name is Colletta
11 Capell.

12 THE COURT: Okay. Capell?

13 THE POTENTIAL JUROR: Number 20.

14 (WHEREUPON, potential juror approached the
15 Bench for an off-the-record discussion.)

16 THE COURT: Okay, Mr. Moses.

17 THE POTENTIAL JUROR: Andrew Moses.

18 THE COURT: Your first name?

19 THE POTENTIAL JUROR: Andrew.

20 THE COURT: Yes, sir.

21 (WHEREUPON, potential juror approached the
22 Bench for an off-the-record discussion.)

23 THE POTENTIAL JUROR: Odell Fortune.

24 THE COURT: Foreman?

25 THE POTENTIAL JUROR: Fortune.

1 THE COURT: All right.

2 (WHEREUPON, potential juror approached the
3 Bench for an off-the-record discussion.)

4 THE POTENTIAL JUROR: Timothy Kirven.

5 THE COURT: Yes, sir.

6 (WHEREUPON, potential juror approached the
7 Bench for an off-the-record discussion.)

8 THE POTENTIAL JUROR: Mary Harry.

9 THE COURT: Ms. Harry, come on up.

10 (WHEREUPON, potential juror approached the
11 Bench for an off-the-record discussion.)

12 THE COURT: Okay.

13 THE POTENTIAL JUROR: Wendell Boyd.

14 THE COURT: Yes, sir.

15 (WHEREUPON, potential juror approached the
16 Bench for an off-the-record discussion.)

17 THE COURT: Okay. Ladies and gentlemen,
18 you heard referenced in the indictment the name
19 Gregory Rogers. Is there anyone, to the extent you
20 may not have already given me that information, is
21 there anyone on this jury or to your knowledge
22 anyone in your immediate family who was kin to or
23 otherwise related by blood or marriage to Mr.
24 Gregory Rogers, or did you or any family member that
25 you know of have any type of connection or

1 acquaintance or association with him?

2 (There was no response.)

3 THE COURT: No one stood. I'm gonna call
4 out now, ladies and gentlemen, the names of some
5 possible — they are also called prospective or
6 potential witnesses, and the question will be the
7 same. Is there anyone on this jury panel, to your
8 knowledge anyone in your family who might be kin to
9 them by blood or marriage or have any type, however
10 slight, however strong connection or acquaintance or
11 association with them, the witnesses present? If
12 the witness' name I call is present, if you would
13 please stand. Wilhelmenia Benjimin. Is she
14 present?

15 MR. FATA: Your Honor, only law
16 enforcement people are here.

17 THE COURT: Xavius Benjimin, Lee Otis
18 McDowell; John Jackson, former Lee County sheriff's
19 deputy; Sheriff Daniel Simon, Major J.D. Dellinger;
20 Investigator David Caps, Dana Wingate, also former
21 Lee County sheriff investigator. The following
22 people from SLED, State Law Enforcement Division,
23 Kim Dihn, Ila Simmons, Stephanie Stanley, Toni
24 Broom, Michelle Eicheinmiller, Betty Butler, a
25 Doctor Ross from Newberry, a pathologist. That's in

1 Newberry.

2 MR. FATA: That's Doctor Janice Ross, Your
3 Honor.

4 THE COURT: Janice Ross, medical doctor
5 from Newberry Pathology. Naomi Toney, James Rogers.
6 Naomi Toney is the — could you please stand again,
7 ma'am. Ms. Toney is right over here to my right.
8 Thank you, ma'am.

9 James Rogers, Lorie Rogers, face the jury
10 panel please so they can see you. Hattie Wilson,
11 over here to my right. Deputy Andrew Beasley.

12 Is that Lee County?

13 MR. FATA: Yes, sir, Your Honor.

14 THE COURT: Deputy Andrew Beasley,
15 Corporal Shante Demary, Investigator Patrick Hicklin
16 of the Lee County Sheriff's Office; Sergeant Robert
17 Burnish of the Sumter County Sheriff's Office;
18 Joseph Henry, an attorney in the back of the
19 courtroom. Is it Paul Larosa; is that correct?

20 MR. FATA: Yes, sir, Your Honor.

21 THE COURT: Paul Larosa of SLED. Captain
22 Herbert Mazingo, Lee County Sheriff's Office. All
23 right, again, ladies and gentlemen anyone on the
24 panel or to your knowledge anyone in your immediate
25 family either kin by blood or marriage to any of

1 these witnesses or have any type of connection or
2 acquaintance or association with them, if so, please
3 stand.

4 All right, the first thing I'd like,
5 ma'am, is your name.

6 THE POTENTIAL JUROR: Jennifer Gilbert.

7 THE COURT: Gilbert?

8 THE POTENTIAL JUROR: Yes, sir.

9 (WHEREUPON, potential juror approached the
10 Bench for an off-the-record discussion.)

11 THE COURT: All right, Ms. Gilbert is 48.
12 The first thing I'd like to know, ma'am, first of
13 all, is how you know them, the possible witnesses,
14 just give me the name.

15 THE POTENTIAL JUROR: Herbert Mozingo.

16 THE COURT: Do you know them or are you
17 related to them?

18 THE POTENTIAL JUROR: Related.

19 THE COURT: By what degree, do you know?

20 THE POTENTIAL JUROR: My father's side of
21 the family.

22 THE COURT: Some type of cousin?

23 THE POTENTIAL JUROR: Yes, sir.

24 THE COURT: You'll see him from time to
25 time?

1 THE POTENTIAL JUROR: Yes, sir.

2 THE COURT: And those are at family
3 gatherings?

4 THE POTENTIAL JUROR: Not quite, just here
5 and there.

6 THE COURT: Okay. If you were on the jury
7 in this case could you be fair and impartial to both
8 sides?

9 THE POTENTIAL JUROR: Yes.

10 THE COURT: And base your verdict on the
11 evidence and the law?

12 THE POTENTIAL JUROR: Yes.

13 THE COURT: Thank you, Ms. Gilbert.

14 All right, your name, sir?

15 THE POTENTIAL JUROR: Don R. McDaniel, Jr.

16 THE COURT: Mr. McDaniel is number 87.

17 All right, Mr. McDaniel, first of all just the name
18 of the witness or witnesses.

19 THE POTENTIAL JUROR: Well, several of the
20 law enforcement.

21 THE COURT: Their name?

22 THE POTENTIAL JUROR: Herbert Mozingo,
23 J.D. Dellinger, the sheriff.

24 THE COURT: Okay.

25 THE POTENTIAL JUROR: And Wilhelmenia

1 Benjimin.

2 THE COURT: And of course, you work down
3 the street at the Farm Bureau agency?

4 THE POTENTIAL JUROR: That's right.

5 THE COURT: Is it in that capacity that
6 you know them or socially or otherwise?

7 THE POTENTIAL JUROR: That capacity which
8 I know Ms. Benjimin.

9 THE COURT: Okay, I'll have you come back
10 up in just a few minutes. Thank you, Mr. McDaniel.

11 Your name please.

12 THE POTENTIAL JUROR: Michelle Jones.

13 THE COURT: Michelle Jones is number 69.
14 Ms. Jones, follow which witness or witnesses.

15 THE POTENTIAL JUROR: Herbert Mozingo and
16 Sheriff Simon.

17 THE COURT: Herbert Mozingo and Sheriff
18 Simon?

19 THE POTENTIAL JUROR: Yeah.

20 THE COURT: How long have you known them?

21 THE POTENTIAL JUROR: I knew of them
22 obviously started work so.

23 THE COURT: And you see them there?

24 THE POTENTIAL JUROR: Yes, sir.

25 THE COURT: If you were on a jury,

1 Ms. Jones, would you be fair and impartial to both
2 sides?

3 THE POTENTIAL JUROR: Yes, sir.

4 THE COURT: Could you base your verdict on
5 the evidence and the law and set aside the fact they
6 may come into that business from time to time?

7 THE POTENTIAL JUROR: Yes, sir.

8 THE COURT: Thank you, ma'am.
9 Your name, sir.

10 THE POTENTIAL JUROR: Ralph Pacifico.

11 THE COURT: Mr. Pacifico is number 105.
12 First of all, which witness or witnesses?

13 THE POTENTIAL JUROR: Herbert Mozingo.

14 THE COURT: How long have you known him?

15 THE POTENTIAL JUROR: Twenty years.

16 THE COURT: Okay. And that's -- is that a
17 situation where you see him very frequently?

18 THE POTENTIAL JUROR: No, just slight.

19 THE COURT: The fact that you have a
20 slight acquaintance with him over those 20 years,
21 does that have any impact upon your ability to be
22 fair and impartial?

23 THE POTENTIAL JUROR: No.

24 THE COURT: Could you base your verdict on
25 the evidence and the law in this case?

1 THE POTENTIAL JUROR: Yes.

2 THE COURT: Thank you, sir.

3 Yes, sir, your name.

4 THE POTENTIAL JUROR: Brandon Mozingo.

5 THE COURT: Okay. Mr. Mozingo is number
6 98. Are you related to Mr. Mozingo?

7 THE POTENTIAL JUROR: Yes, sir.

8 THE COURT: Any other witnesses do you
9 know what that degree of kinship is?

10 THE POTENTIAL JUROR: Yeah, he's my
11 father.

12 THE COURT: Oh, he's your father.

13 THE POTENTIAL JUROR: Yes.

14 THE COURT: Well, that certainly clarifies
15 it. You can have a seat. Thank you, sir.

16 All right, your name, sir.

17 THE POTENTIAL JUROR: Bob Blackwell.

18 THE COURT: Blackwell?

19 THE POTENTIAL JUROR: Yes, sir.

20 THE COURT: Mr. Blackwell is number 11.
21 First of all, which possible witness or witnesses?

22 THE POTENTIAL JUROR: Sheriff Simon,
23 Mr. Dellinger, Mr. Mozingo. I've known most of them
24 since young childhood life.

25 THE COURT: Okay. If you were a juror in

1 this case, Mr. Blackwell, could you set all that
2 aside, and base your verdict on the evidence and the
3 law in this case.

4 THE POTENTIAL JUROR: Yes, sir.

5 THE COURT: Could you be completely fair
6 and impartial to the State and to the Defendant?

7 THE POTENTIAL JUROR: Yes, sir.

8 THE COURT: Thank you, Mr. Blackwell.
9 Your name please.

10 THE POTENTIAL JUROR: Willie Ard.

11 THE COURT: Ms. Ard is number 3. Which
12 witness or witnesses?

13 THE POTENTIAL JUROR: Mr. Mozingo,
14 Mr. Simon, and Mr. Hickman.

15 THE COURT: How long have you known them?

16 THE POTENTIAL JUROR: A few years from
17 working at Bishopville Drugs.

18 THE COURT: Working at drug store you're
19 working as a pharmacist ---

20 THE POTENTIAL JUROR: Yes, sir.

21 THE COURT: Here?

22 THE POTENTIAL JUROR: Yes.

23 THE COURT: Your husband is an American
24 forest manager. If you were a juror in this case,
25 Ms. Ard, could you be completely fair and impartial

1 to the State and to the Defendant?

2 THE POTENTIAL JUROR: Yes.

3 THE COURT: And set aside the
4 acquaintances you mentioned and base your verdict on
5 the evidence and the law?

6 THE POTENTIAL JUROR: Yes.

7 THE COURT: And would you do that?

8 THE POTENTIAL JUROR: Yes.

9 THE COURT: Thank you.

10 Your name please, ma'am.

11 THE POTENTIAL JUROR: Melissa Kennedy.

12 THE COURT: Ms. Kennedy is number 72.

13 Ms. Kennedy, which witness or witnesses?

14 THE POTENTIAL JUROR: Joseph Henry.

15 THE COURT: How long have you known him?

16 THE POTENTIAL JUROR: Cousin on my
17 mother's side.

18 THE COURT: He's a cousin on your mother's
19 side?

20 THE POTENTIAL JUROR: Yes, sir.

21 THE COURT: Do you know whether it's
22 first, second, third, or something else?

23 THE POTENTIAL JUROR: No.

24 THE COURT: Do you see him frequently as
25 well?

1 THE POTENTIAL JUROR: No, sir.

2 THE COURT: If you were a juror in this
3 case could you be completely fair and impartial to
4 the State and to the Defendant?

5 THE POTENTIAL JUROR: Yes, sir.

6 THE COURT: If he did or did not serve in
7 this case could you set aside your being a cousin
8 and base your verdict completely on the evidence and
9 the law in this case?

10 THE POTENTIAL JUROR: Yes, sir.

11 THE COURT: Thank you, ma'am.

12 All right, the State of South Carolina is
13 represented by Mr. Paul Fata from the third circuit
14 Solicitor's Office. The defendant is represented by
15 Mr. Ray Chandler and Shawn Kent of the Clarendon
16 County bar. Is there anyone on this jury panel or
17 to your knowledge anyone of your immediate family
18 who's related by blood or marriage to any of these
19 attorneys? Of course Mr. Fata also practices with
20 the firm of Stuckey, Fata, and Segars. His law
21 partner is Mr. Jimmy Segars. Mr. Kent and Mr.
22 Chandler practice with the firm of Coffey, Chandler,
23 Kent, and McKenzie. It's in Manning. They have
24 Mr. Billy Coffey, Joe Coffey. Of course, Mr. Kent
25 Mr. Chandler, Steve McKenzie, Scott Robinson, and

1 Tara Lee Parr. Is that your Manning Office?

2 MR. CHANDLER: Yes, sir.

3 THE COURT: Is there anyone on the jury
4 panel or to your knowledge anyone in your immediate
5 family who might even have a casual acquaintance,
6 however slight, with any of these attorneys, or
7 you've been represented by any of these attorneys or
8 their offices within the last five years?

9 All right. Mr. Blackwell is number 11.
10 Yes, sir.

11 THE POTENTIAL JUROR: Yes, sir. My
12 father-in-law drinks coffee on occasion with Mr.
13 Fata at the Waffle House.

14 THE COURT: And whereabouts is that?

15 THE POTENTIAL JUROR: Bishopville, at the
16 Waffle House.

17 THE COURT: At the Waffle House?

18 THE POTENTIAL JUROR: Yes, sir.

19 THE COURT: Do you ever go there?

20 THE POTENTIAL JUROR: Sometimes.

21 THE COURT: Okay, and Mr. Fata may even be
22 there on occasion?

23 THE POTENTIAL JUROR: Yes, sir. I don't
24 speak to him; I just sit down.

25 THE COURT: Could you set aside that,

1 Mr. Blackwell, and be fair and impartial and base
2 your verdict on the evidence and the law?

3 THE POTENTIAL JUROR: Yes, sir.

4 THE COURT: All right, thank you, sir.
5 Yes, sir, your name.

6 THE POTENTIAL JUROR: Douglas Green.

7 THE COURT: All right. Mr. Green is
8 number 50. Yes, sir.

9 THE POTENTIAL JUROR: Just a good, casual
10 friend with Mr. Fata.

11 THE COURT: How long has that been the
12 case?

13 THE POTENTIAL JUROR: Four years.

14 THE COURT: Okay. If you were a juror in
15 this case, Mr. Green, could you set aside that
16 relationship and be completely fair and impartial to
17 both sides?

18 THE POTENTIAL JUROR: Yes, sir.

19 THE COURT: And base your verdict on the
20 evidence and the law?

21 THE POTENTIAL JUROR: Yes, sir.

22 THE COURT: Thank you, sir.

23 Mr. Boyd.

24 THE POTENTIAL JUROR: Yes.

25 THE COURT: Let me get your number again.

1 THE POTENTIAL JUROR: Number 12.

2 THE COURT: Number 12, yes, sir.

3 THE POTENTIAL JUROR: The firm of Segars,
4 Fate and Stuckey, I have —

5 THE COURT: Represented you before?

6 THE POTENTIAL JUROR: Yes.

7 THE COURT: How long ago?

8 THE POTENTIAL JUROR: Approximately four
9 to five years.

10 THE COURT: Is that matter concluded?

11 THE POTENTIAL JUROR: Yes, it is.

12 THE COURT: Why don't you and Mr. McDaniel
13 go ahead and get in line in the center aisle and
14 come on up.

15 Come on up, Mr. Boyd.

16 (WHEREUPON, potential juror approached the
17 Bench for an off-the-record discussion.)

18 THE COURT: Come on up please, sir.

19 (WHEREUPON, potential juror approached the
20 Bench for an off-the-record discussion.)

21 THE COURT: Is there anyone on the panel,
22 to the extent you may not have already answered this
23 question, is there anyone on the panel who had any
24 type of personal or business or professional
25 relationship with Gregory Rogers?

1 (There was no response.)

2 THE COURT: Anyone on this jury panel who
3 has any type of personal, business, or professional
4 relationship with any member of the Third Circuit
5 Solicitor's Office, and that perhaps might include
6 but certainly not limited to, any acquaintance with
7 anyone who works in that office or perhaps would
8 have been associated with that office in any type of
9 case as an alleged victim or even a witness or
10 anything of that nature?

11 (There was no response.)

12 THE COURT: No one stood. Is there anyone
13 on the panel who has ever been employed as a law
14 enforcement officer and that would be with the city
15 police department, county sheriff's office or State
16 Law Enforcement Agency, or even a federal law
17 enforcement agency?

18 (There was no response.)

19 THE COURT: Is there anyone on the panel
20 who is, a member of your immediate family, who is
21 now or has been employed with the law enforcement
22 agency?

23 All right, your name, sir.

24 THE POTENTIAL JUROR: Benjimin Clavon.

25 THE COURT: Mr. Clavon.

1 THE POTENTIAL JUROR: Tim Clavon.

2 THE COURT: Lee County Sheriff's Office?

3 THE POTENTIAL JUROR: Yes, he is.

4 THE COURT: That's your brother?

5 THE POTENTIAL JUROR: Yes.

6 THE COURT: All right. If that being the
7 case, Mr. Clavon, could you be fair and impartial in
8 this case?

9 THE POTENTIAL JUROR: Yeah.

10 THE COURT: And base your verdict on the
11 evidence and the law?

12 THE POTENTIAL JUROR: Yes.

13 THE COURT: Thank you, sir.

14 Your name please, ma'am.

15 THE POTENTIAL JUROR: Sonia Forcier.

16 THE COURT: Ms. Forcier, let me see if I
17 can find your number.

18 THE POTENTIAL JUROR: 43.

19 THE COURT: All right, yes, ma'am.

20 THE POTENTIAL JUROR: My brother is
21 retired from the Charlotte Police.

22 THE COURT: How long is he employed there?

23 THE POTENTIAL JUROR: 23 years.

24 THE COURT: Could you be fair and
25 impartial in this case and ---

1 THE POTENTIAL JUROR: Yes.

2 THE COURT: ---base your verdict on the
3 evidence and the law?

4 THE POTENTIAL JUROR: Yes.

5 THE COURT: And set aside the fact that
6 your brother was employed in that capacity?

7 THE POTENTIAL JUROR: Yes.

8 THE COURT: Thank you, ma'am.

9 To the extent you may have already stood
10 in response to the question about any witnesses
11 employed by the Lee County Sheriff's Office, is
12 there anyone on the panel who is a relative or close
13 friend of any member of Lee County Sheriff's
14 Department or the South Carolina Law Enforcement
15 Division?

16 Ms. Ard.

17 THE POTENTIAL JUROR: My brother-in-law
18 works for Lee County Sheriff's Department.

19 THE COURT: And how long has he been
20 working there?

21 THE POTENTIAL JUROR: Two, three years.

22 THE COURT: What's his name?

23 THE POTENTIAL JUROR: Chase Asman.

24 THE COURT: Last name?

25 THE POTENTIAL JUROR: Asman.

1 THE COURT: Would that impact on your
2 ability to be fair and impartial?

3 THE POTENTIAL JUROR: No.

4 THE COURT: Could you base your verdict on
5 the evidence and law in this case?

6 THE POTENTIAL JUROR: Yes.

7 THE COURT: Thank you, ma'am.
8 Your name please.

9 THE POTENTIAL JUROR: Rosa Belle.

10 THE COURT: Ms. Belle is number 10. Yes,
11 ma'am.

12 THE POTENTIAL JUROR: My brother is a
13 retired state trooper.

14 THE COURT: He's a retired state trooper?

15 THE POTENTIAL JUROR: Yes, sir.

16 THE COURT: What part of the state did he
17 work?

18 THE POTENTIAL JUROR: Columbia.

19 THE COURT: Okay. What's his last name?

20 THE POTENTIAL JUROR: Lucky.

21 THE COURT: Lucky?

22 THE POTENTIAL JUROR: Yes, sir.

23 THE COURT: He was employed there for how
24 long?

25 THE POTENTIAL JUROR: 25 years.

1 THE COURT: Okay. If that is the case,
2 ma'am, could you be completely fair and impartial

3 —

4 THE POTENTIAL JUROR: Yes, sir.

5 THE COURT: —and base your verdict on
6 the evidence and the law in this case?

7 THE POTENTIAL JUROR: Yes, sir.

8 THE COURT: Thank you, ma'am.

9 Is there anyone on the panel other than
10 me, doing this right here, is there anyone on this
11 panel, has anyone discussed with you the fact that
12 you might be a member of the jury in this case,
13 anyone discussed that with you in any way other than
14 me?

15 (There was no response.)

16 THE COURT: No one stood. Is there anyone
17 on this panel or anyone in your immediate family who
18 has ever been accused of, been the victim of a crime
19 of violence? And I'm gonna explain to you basically
20 what that means. That would be an armed robbery, or
21 a kidnapping, a sexual assault, or a murder, or a
22 burglary in the first degree, things of that nature.
23 It does not include somebody breaking into your car
24 or shoplifting at a store where you work or you've
25 ever been accused of those things. So is there

1 anyone on this panel or anyone in your immediate
2 family ever been accused of committing or ever been
3 the victim of a crime of violence, if so, please
4 stand.

5 All right, folks, could you form a line in
6 the center aisle.

7 Okay, come on up please, ma'am. Your
8 name?

9 THE POTENTIAL JUROR: Vernell Toney.

10 THE COURT: Toney?

11 (WHEREUPON, potential juror approached the
12 Bench for an off-the-record discussion.)

13 THE COURT: Okay.

14 THE POTENTIAL JUROR: Number 133.

15 THE COURT: Yes, ma'am.

16 (WHEREUPON, potential juror approached the
17 Bench for an off-the-record discussion.)

18 THE COURT: Okay.

19 THE POTENTIAL JUROR: Mary Thigpen.

20 THE COURT: Ma'am?

21 THE POTENTIAL JUROR: Mary Thigpen.

22 (WHEREUPON, potential juror approached the
23 Bench for an off-the-record discussion.)

24 THE POTENTIAL JUROR: Number 67.

25 THE COURT: Okay, yes, sir.

1 (WHEREUPON, potential juror approached the
2 Bench for an off-the-record discussion.)

3 THE COURT: Okay.

4 THE POTENTIAL JUROR: Patricia Holloman.

5 THE COURT: Holloman. Yes, ma'am.

6 (WHEREUPON, potential juror approached the
7 Bench for an off-the-record discussion.)

8 THE COURT: All right.

9 THE POTENTIAL JUROR: Mary Harry.

10 THE COURT: Yes, ma'am.

11 (WHEREUPON, potential juror approached the
12 Bench for an off-the-record discussion.)

13 THE COURT: Okay. Yes, ma'am, your name.

14 THE POTENTIAL JUROR: Mary White.

15 THE COURT: Mary White. Yes, ma'am.

16 (WHEREUPON, potential juror approached the
17 Bench for an off-the-record discussion.)

18 THE COURT: Yes, ma'am, your name.

19 THE POTENTIAL JUROR: Isaacs, 61.

20 (WHEREUPON, potential juror approached the
21 Bench for an off-the-record discussion.)

22 THE COURT: Is there anyone on the jury
23 who has what you would consider to be a great deal
24 of knowledge or expertise in dealing with firearms
25 whether it be handguns, rifle, things of that

1 nature? Anyone on this jury panel who considers
2 themselves or he is to be someone who have a great
3 deal of knowledge or expertise in dealing or
4 handling guns?

5 Your name, sir.

6 THE POTENTIAL JUROR: Chad Galloway.

7 THE COURT: Galloway?

8 THE POTENTIAL JUROR: Yes, sir.

9 THE COURT: Mr. Galloway is number 47.

10 Yes, sir, tell me about that.

11 THE POTENTIAL JUROR: I just have hunted
12 and fished all my life and been around firearms a
13 lot, have my own personal weapons license.

14 THE COURT: Okay. All right, if there's
15 evidence in this case dealing with testimony about a
16 particular type firearm, could you be fair and
17 impartial?

18 THE POTENTIAL JUROR: I think so.

19 THE COURT: And base your verdict on the
20 evidence and the law?

21 THE POTENTIAL JUROR: Yes, sir.

22 THE COURT: Thank you, sir.

23 All right. Is there anyone on this jury
24 panel who is a member of or contributor to any
25 organization that has as its primary focus the

1 promotion of law enforcement or the enforcement of
2 victims rights? And these would include but not be
3 limited to Citizens Against Violent Crime, South
4 Carolina Law Enforcement, Special Accelerating State
5 Troopers Association, Mother's Against Drunk
6 Driving, Students Against Drug Driving, any members
7 or contributors of any of those organizations?

8 (There was no response.)

9 THE COURT: Is there anyone on this jury
10 panel who knows of any bias or prejudice that you
11 might have for or against the State of South
12 Carolina, the defendant Ernest Toney, any of the
13 attorneys, or any of the witnesses?

14 (There was no response.)

15 THE COURT: One of the instructions that
16 you will receive from me during the case and at the
17 conclusion of this case is that your verdict must be
18 based on your common sense and view of the facts in
19 this case and the charge or the statement of law
20 that I give to you. Is there anyone on this jury
21 panel who feels that they could not follow the
22 instructions, that they must follow the law as I
23 give it to you in this case? Anyone who feels like
24 they will not be able to do that?

25 (There was no response.)

1 THE COURT: Is there anyone on the panel
2 who has formed or expressed any opinion about any
3 issue or matter involved in this case?

4 (There was no response.)

5 THE COURT: All right. Can I see the
6 lawyers up here one more time, and Ms. White.

7 (WHEREUPON, counsel approached the
8 Bench for an off-the-record discussion.)

9 THE COURT: The process we go through is,
10 in the old days your names were put into a piece of
11 paper, put into a drum — or the Lee County cigar
12 box and jumbled. The names were drawn out
13 individually. Now we have a system that's employed
14 all throughout the state. It's the computer up here
15 jumble the names electronically and 30 some odd
16 names will be put on a sheet of paper and that will
17 be given to me and the clerk will have them and the
18 lawyers will have it. And if your name is called
19 from that list, you'll come forward down the center
20 aisle, or side aisle towards these two microphones.
21 Don't be concerned; you won't have to talk. Stop at
22 the microphone, face the back of the courtroom, and
23 the process will go through that quick.

24 Mr. Fata, you see any need for more than
25 one alternate? Would you like two?

1 MR. FATA: Due to the seriousness of the
2 case, I do I think two may be important.

3 THE COURT: Two? What about you,
4 Mr. Kent?

5 MR. KENT: Two, Judge.

6 THE COURT: There will be five and twelve
7 on the jury. And each alternate will be one strike.
8 State two strikes, defendant per alternate. Okay.
9 We also, wherever we are whether it's Oconee County
10 or Lee County or anywhere else in the state we
11 always hold our breath whether this machine will
12 actually print the list.

13 (Pause.)

14 THE CLERK: Juror number 12.

15 MR. FATA: Please present the juror.

16 MR. KENT: Please excuse Mr. Boyd from the
17 trial.

18 THE CLERK: Have a seat back out in the
19 audience.

20 Juror number 47, Chad Galloway (white
21 male).

22 MR. FATA: Please present the juror.

23 MR. KENT: Please swear Mr. Galloway.

24 THE CLERK: Have a seat in the jury box on
25 the right.

1 Juror number 60, Natasha Howard (black
2 female).

3 MR. FATA: Please present the juror.

4 MR. KENT: Please swear Ms. Howard for the
5 trial of this case.

6 THE CLERK: Have a seat in the jury box on
7 the right.

8 Juror number 145, Margaret Williams.

9 Juror number 145, Margaret Williams (black female).

10 MR. FATA: Please excuse the juror for the
11 trial of this case today.

12 THE CLERK: Have a seat back in the
13 audience.

14 Juror number 48, Jennifer Gilbert.

15 MR. FATA: Please present the juror.

16 MR. KENT: Please excuse this juror for
17 the trial of this case.

18 THE CLERK: Have a seat back in the
19 audience.

20 Juror number 69, Michelle Jones.

21 MR. FATA: Please present the juror.

22 MR. KENT: Please excuse Ms. Jones in the
23 trial of this case.

24 THE CLERK: Juror number 32, Tabitha Watts
25 (white female).

1 MR. FATA: Please present the juror.

2 MR. KENT: Please swear Ms. Watts.

3 THE CLERK: Have a seat in the jury box on
4 your right.

5 Juror number 43, Sonia Forcier (white
6 female.)

7 MR. FATA: Madam Clerk, what number is
8 that?

9 THE CLERK: Number 43.

10 MR. FATA: Please present Ms. Forcier.

11 MR. KENT: Please present Ms. Forcier.

12 THE CLERK: Have a seat in the jury box.

13 Juror number 3, Kimberly Ard (white
14 female).

15 MR. FATA: Please present the juror.

16 MR. KENT: Please excuse Ms. Ard from
17 trial of this case.

18 THE CLERK: Have a seat back in the
19 audience.

20 Juror number 110, Lois Peterson (black
21 female).

22 MR. CHANDLER: Would you give me that
23 number again please, ma'am.

24 THE CLERK: Number 110.

25 MR. CHANDLER: Thank you.

1 MR. FATA: Please excuse the juror from
2 the trial of this case today.

3 THE CLERK: Have a seat back in the
4 audience.

5 Juror number 111, Jimmy Pettus (black
6 male).

7 MR. FATA: Please present the juror.

8 MR. KENT: Please swear Mr. Pettus.

9 THE CLERK: Have a seat in the jury box.
10 Juror number 54, Donna Hawkins (white
11 female).

12 MR. FATA: Please present the juror.

13 MR. KENT: Please swear Ms. Hopkins.

14 THE CLERK: Have a seat in the jury box.

15 JUROR HOPKINS: Can I go to the restroom
16 first? Please, I have to go every 30 minutes.

17 THE CLERK: Juror number 87, Don R.
18 McDaniel, Jr. (white male).

19 MR. FATA: Please present the juror.

20 MR. KENT: Please excuse Mr. McDaniel for
21 the trial of this case.

22 THE CLERK: Juror number 27, Jennifer Cook
23 (black female).

24 MR. FATA: Please present the juror.

25 MR. KENT: Please swear Ms. Cook.

1 THE CLERK: Have a seat in the jury box.
2 Juror number 121, Eileen Rock (white
3 female). Please present the juror.

4 MR. KENT: Please swear Ms. Rock.

5 THE CLERK: Have a seat in the jury box.
6 Juror number 92, Allen Mixon, Jr. (white
7 male).

8 MR. FATA: Please present the juror.

9 MR. KENT: Please swear Mr. Mixon.

10 THE CLERK: Have a seat in the jury box.
11 Juror number 133, Mary Thigpen (white
12 female).

13 MR. FATA: Please present the juror.

14 MR. KENT: Please excuse Ms. Thigpen from
15 the trial of this case.

16 THE CLERK: Juror number 126, Viola Shaw
17 (black female).

18 MR. FATA: Please present the juror.

19 MR. KENT: Please swear Ms. Shaw.

20 THE CLERK: Have a seat in the jury box on
21 your right.

22 Juror number 148, Veronica Wilson (black
23 female).

24 MR. FATA: Please present the juror.

25 MR. KENT: Please swear Ms. Wilson.

1 THE CLERK: Have a seat in the jury box.
2 Juror number 23, Benjimin Clayvon (black
3 male).

4 MR. FATA: Please present the juror.

5 MR. KENT: Please excuse Mr. Clayvon for
6 the trial of this case.

7 THE CLERK: Juror number 16, Rodriguez
8 Bradley (black male).

9 MR. FATA: Your Honor, may we approach.

10 THE COURT: Yes, sir.

11 (WHEREUPON, counsel approached the
12 Bench for an off-the-record discussion.)

13 THE COURT: All right, Mr. Bradley, you
14 can have a seat for the time being. Thank you, sir.
15 You didn't do anything wrong.

16 MR. FATA: Is that going to be a court
17 strike, Judge?

18 THE COURT: Yes.

19 THE CLERK: Juror number 77, Aubeiannie
20 Laws (black female).

21 THE COURT: Ms. Laws is number 77.

22 MR. FATA: Please excuse this juror for
23 the trial of this case.

24 THE CLERK: Juror number 147, Darron
25 Wilson (black male).

1 MR. FATA: Please excuse the juror from
2 the trial of this case.

3 THE CLERK: Have a seat back in the
4 audience.

5 Juror number 67, Woodrow Joe (black male).

6 MR. FATA: Plead excuse the juror for the
7 trial of many case.

8 THE CLERK: Have a seat back in the
9 audience.

10 Juror number 72, Melissa Kennedy (white
11 female).

12 MR. FATA: Please present the juror.

13 MR. KENT: Please excuse Ms. Kennedy from
14 the trial of this case.

15 THE CLERK: Juror number 83, John Martin
16 (white male).

17 MR. FATA: Please present the juror.

18 THE CLERK: Please excuse Mr. Martin from
19 the trial of this case.

20 Juror number 118, Jordan Rhodes (white
21 male).

22 MR. FATA: Please present the juror.

23 MR. KENT: Beg the Court's indulgence one
24 moment. Please swear Mr. Rhodes.

25 THE CLERK: Have a seat in the jury box.

1 THE COURT: All right, two alternates.

2 THE CLERK: Juror number 104, John Norris
3 (white male).

4 MR. FATA: Please present the juror.

5 MR. KENT: Please swear Mr. Norris.

6 THE CLERK: Have a seat in the jury box.
7 Juror number 138, Mary Washington (black
8 female).

9 MR. FATA: Please excuse the juror from
10 the trial of this case.

11 THE CLERK: Have a seat back out in the
12 audience.

13 Juror number 29, Heather Council (white
14 female).

15 MR. FATA: Please present the juror.

16 MR. KENT: Please swear Ms. Council.

17 THE COURT: Other than what's been brought
18 up at the side, at Bench conference, is there any
19 motions or other matters pertaining to jury
20 selection from the State?

21 MR. FATA: No, sir, Your Honor.

22 MR. KENT: Nothing on behalf of Defense,
23 sir.

24 THE COURT: Sir?

25 MR. KENT: No motions on behalf of the

1 Defense, Your Honor.

2 THE COURT: All right, let me see the
3 lawyers up here for just a minute.

4 (WHEREUPON, counsel approached the
5 Bench for an off-the-record discussion.)

6 THE COURT: All right, ladies and
7 gentlemen, those of you who have been selected as
8 jurors in the trial of this case, we're going to
9 start the trial Wednesday morning. I originally was
10 gonna start it earlier, but we're going to start
11 9:30, 9:30 Wednesday morning. Between now and then
12 and throughout the course of this trial you may not
13 discuss this case at all with anyone on earth. You
14 can't talk to anybody about it. That includes
15 amongst yourselves. More than likely this is the
16 only thing that the Court and we have in common, but
17 you may not discuss it amongst yourselves at all.
18 You cannot read anything about it. You cannot
19 listen to anything about it. You cannot watch
20 anything about it, and you cannot interject to do it
21 on your own to gather any information about it at
22 all from any source. That includes the internet.
23 Any type of resource you may have access to you
24 can't do any fact finding on your own. That's
25 because you'll be taking notes. You'll try this

1 case according to the evidence and the law. You'll
2 get all that right here in this courtroom. Also,
3 you may, this is a small thing, if you have to go
4 somewhere, don't discuss this in the grocery store
5 line or anywhere about this case, tell them you're
6 on a jury and stand away from them. Sometimes that
7 kind of thing happens don't talk about it at all and
8 don't undertake or do any fact finding on your own.
9 Please go to your jury room that the bailiff will
10 show you to, Wednesday morning promptly at 9:30 a.m.
11 we're going forward. Thank you very much. I'll see
12 you Wednesday.

13 (WHEREUPON, the jury was removed from the
14 courtroom at 5:30 p.m.)

15 THE COURT: All right, Mr. Fata,
16 Mr. Chandler, Mr. Kent, bond status, y'all know
17 anything about that?

18 MR. FATA: We haven't talked about it. I
19 don't have a problem —

20 THE COURT: All right, Mr. Fata, go ahead.

21 MR. FATA: I don't have a problem with him
22 remaining on bond as far as that goes, as long as he
23 knows that come Wednesday morning that this case
24 will go forward whether he's here or not.

25 THE COURT: What time tomorrow will you do

1 the motions?

2 MR. FATA: We're at the pleasure of the
3 Court. We can start at 9:30 if you'd like, 10:00.

4 MR. KENT: Whatever time, Your Honor.

5 THE COURT: Mr. Toney, please stand.
6 We're gonna begin motions on your case tomorrow
7 morning at 10:00. If you are not here two things
8 will happen. One, we'll go on without you and I'll
9 reserve the right to issue a bench warrant for you
10 to be picked up, okay?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Also, at any other point in
13 the trial if you're still out and I will order you
14 to jail. You must be back in the courtroom at the
15 appointed time or we'll go on without you and I'll
16 send somebody after you to pick you up. All right?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Now tomorrow we will start at
19 ten, but I would like for you to be here no later
20 than quarter till ten. If Mr. Kent wants you here
21 earlier you go by him; but you be sitting in this
22 courtroom at quarter to ten. And you're to have no
23 contact at all with anyone affiliated with
24 Mr. Rogers' family. You understand that?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: That's even aside along the
2 reigns for a comment. You can't say anything to
3 them, can't talk to them. All right, thank you.
4 We'll be back on the record tomorrow morning at
5 10:00.

6 MR. KENT: Did you want to just put that
7 one issue we discussed at side bar about, just to
8 cover ourselves?

9 THE COURT: Yes.

10 MR. KENT: For the purpose of the record,
11 Judge, as we were selecting the jury two things
12 became apparently obvious. Apparently Mr. Fata
13 drinks coffee with about everyone on the jury,
14 drinks coffee with just about everyone. I think at
15 that point in time I requested from the Court a
16 strike for cause based upon the fact that I thought
17 it was an honor burden in light of the fact that
18 these people knew him better than the casual
19 acquaintance. I do not believe during the call of
20 the jurors the jurors that we were talking about,
21 that being specifically Mr. Green, Mr. ---

22 THE COURT: Mr. McDaniel is one.

23 MR. KENT: Ms. McDaniel was called.

24 MR. FATA: I didn't drink coffee with him,
25 Your Honor.

1 THE COURT: Well, he said he'd known him
2 40 years but you didn't use but nine of your
3 strikes, I think you were okay on that. But he said
4 he could be fair and casual acquaintance or more
5 than a casual acquaintance is not grounds for
6 dismissing someone for cause unless obviously they
7 cannot be fair. I respectfully deny your motion.
8 We can do all that -- if you want to look over your
9 notes to make it more complete tomorrow morning you
10 can do that.

11 MR. KENT: Thank you so much.

12 THE COURT: We'll be back on the record at
13 10:00.

14 (WHEREUPON, the proceedings were concluded
15 and reconvened on December 11, 2012 at
16 9:30 a.m.)

17 (WHEREUPON, State Exhibits Nos. 1, 2, and
18 3 were marked for identification only.)

19 THE COURT: Everybody ready?

20 MR. FATA: Yes, sir, the State's ready,
21 Your Honor.

22 THE COURT: All right, Mr. Kent, you had a
23 Jackson Denno motion?

24 MR. KENT: Yes, it is. You want me to do
25 any of my housekeeping motions first or do you want

1 to do the Jackson v. Denno first?

2 THE COURT: Whatever you'd like to do.

3 MR. KENT: Okay, thank you, Judge. Back
4 on the record, of course, with State versus Ernest
5 Toney. As we mentioned yesterday we were doing our
6 pretrial motions, that one of the motions at the
7 conclusion of the jury selection you had mentioned
8 that I could go into more detail about some of the
9 questions I had about jury selection yesterday.

10 THE COURT: Yes, sir.

11 MR. KENT: I think you properly handled
12 that; I just want to cover that for the record. I
13 don't think there will be anything additional that I
14 would choose to add at this point in time. I think
15 you properly handled that, just our original
16 objection.

17 THE COURT: Okay, those are noted and
18 respectfully overruled.

19 MR. KENT: Number two, Judge, in murder
20 trial we would request a sequestration motion order,
21 not only of any witnesses that defense intends on
22 calling, witnesses specifically that the State would
23 intend on calling. We would ask at this point in
24 time that the State lets us know who their case
25 agent will be. The case law allows them to keep a

1 case agent.

2 THE COURT: Okay. All right, I'll allow
3 the victim.

4 MR. KENT: There wouldn't be a victim in
5 this case.

6 THE COURT: Well, somebody in the family
7 to stay. And I'll also allow the case agent to
8 stay. Who is that gonna be?

9 MR. FATA: The case agent is Major
10 Dellinger and the victim's wife Ms. Rogers is
11 closest relative.

12 THE COURT: All right, how, do you object
13 ---

14 MR. FATA: She is a witness, I mean, she's
15 a witness.

16 THE COURT: I understand that. Do you
17 object to motion to sequester witnesses otherwise?

18 MR. FATA: No, sir, I do not. I mean, it
19 goes both sides.

20 THE COURT: Obviously. Any response to
21 that, Mr. Kent?

22 MR. KENT: Judge, for the record I would
23 object to the victim's wife Lorie Rogers being
24 allowed in the courtroom because, whereas,
25 technically she's not a victim. She would also be a

1 fact witness. My understanding she would be a fact
2 witness. She's given a statement; they'd be
3 utilizing her testimony as facts and testimony. For
4 the record I would object to her staying in the
5 room.

6 THE COURT: All right, Mr. Fata, of course
7 I'll consider that; it's all within my discretion.
8 I'll consider that, but we have an unusual situation
9 that the victim is obviously deceased, but the
10 victim's family does have rights under current law
11 to attend every stage of the proceeding so,
12 Mr. Kent, I'll have to weigh that. Of course, when
13 you cross-examine her you can certainly question her
14 on the fact that, you know, she has been here the
15 whole time and if you detect her stories are or her
16 testimony is a bit too consistent with what's
17 already been proffered or offered by the State. So
18 I will allow Major Dellinger, and I'll think about
19 the victim's wife. I would likely allow her to
20 stay. I think that's gonna ---

21 MR. KENT: I understand.

22 THE COURT: That's going to be a given so
23 I'll likely allow her to stay too, but the others
24 will have to be absent during the proceedings. Will
25 that include this pretrial testimony that we take?

1 MR. KENT: I would have no objection to
2 pretrial, no, sir, Judge.

3 THE COURT: All right. Of course, any
4 expert witnesses ---

5 MR. KENT: I have no problem. The only
6 fact, let me offer too, their factual witnesses the
7 State would be offering to testify I have objection.

8 THE COURT: And that would include any
9 witnesses of your own, Mr. Kent?

10 MR. KENT: That's right, Judge.

11 THE COURT: And those are noted as Ernest
12 -- or course Mr. Toney can stay. Naomi Rogers,
13 Lorie Rogers, Hattie Wilson, Deputy Beasley and
14 Corporal Demary would have to be sequestered as
15 well.

16 MR. FATA: Of course, Lorie Rogers is the
17 person that's the victim's wife.

18 THE COURT: I'm sorry, Lorie Rogers
19 will -- she'll stay.

20 MR. KENT: And Judge, and I, just for
21 housekeeping, I've run into this before. At some
22 point in time, and I know we have witnesses on the
23 defense witness list, if I choose not to call a
24 witness of course they can stay in the courtroom;
25 they just would not be allowed to testify.

1 THE COURT: They would not be allowed to
2 testify.

3 MR. KENT: Correct.

4 MR. FATA: Unless the State wants to call
5 them in its case in chief. Of course all the
6 witnesses who are listed are fair game for either
7 side.

8 MR. KENT: Yes, sir.

9 THE COURT: All right.

10 MR. KENT: Judge, going next I'd like to
11 mention all witnesses being fair game, my
12 understanding is that the State has informed the
13 Court they plan on calling all witnesses, the
14 experts from SLED and things of that nature. What I
15 would ask is if they choose to release any of those
16 witnesses they let the Defense know because we may
17 want to call those witnesses. And of course, it's
18 easier for the State's, you know, so any expert that
19 they intend on calling that is listed on the witness
20 list under subpoena, that they do not release until
21 they let us know because we might want to call as a
22 witness.

23 THE COURT: Mr. Fata?

24 MR. FATA: Oh, I have no problem with
25 that, Judge.

1 THE COURT: Okay, just notify any SLED
2 witnesses that they're still under at least my
3 subpoena until I've released them.

4 MR. FATA: Yes, sir.

5 THE COURT: All right.

6 MR. KENT: Judge, we have been provided,
7 realistically we were provided and this is not my
8 Jackson, but we were provided witness statements.
9 At this point in time I would ask just for the
10 record as there any additional witness statements
11 that the State would have, specifically from Lorie
12 Rogers, other than what she's already given to the
13 State that they turned over in discovery, any
14 additional witness statements saying she changed her
15 testimony or anything of that nature.

16 THE COURT: Does any oral and written?

17 MR. KENT: Oral and written statements
18 during the course of the trial depending on ---

19 THE COURT: So she's given no oral
20 statements to you or?

21 MR. FATA: Oh, she, I interviewed her. Of
22 course that's my work product.

23 THE COURT: I understand that, but to the
24 extent they're inconsistent with what she said in
25 her written statement.

1 MR. FATA: No, sir.

2 THE COURT: That would be subject to
3 discovery.

4 MR. FATA: Right, they're not
5 inconsistent. The statement that was provided she
6 gave to law enforcement on September 13th, 2010, is
7 her statement.

8 THE COURT: Okay. And nothing she said to
9 you or law enforcement is inconsistent with that?

10 MR. FATA: That's correct.

11 THE COURT: All right.

12 MR. KENT: Judge, the next motion is
13 similar. This is not any affront to Mr. Fata or
14 lead counsel, the Solicitor's Office, I think it's
15 in all cases, at this point in time the Defense
16 would move that for the State basically say that all
17 discovery we're entitled to has been turned over at
18 this point in time, make this motion just in case
19 something comes up during the course of trial.
20 Basically put them on notice that I've requested it.

21 THE COURT: Anything else that you haven't
22 turned over?

23 MR. FATA: Your Honor, as far as I know we
24 have given everything to the Defense. Now they have
25 not looked at any of the physical evidence which is,

1 will be provided today. We're gonna bring it up to
2 the grand jury room and he can go through it all,
3 see what we can mark. As far as I know everything's
4 been given. I mean, I...

5 THE COURT: Anything from law enforcement
6 that you know of that has not yet been delivered to
7 you?

8 MR. FATA: You've given me the entire case
9 file; haven't you? Major Dellinger says he's given
10 me his entire case file. And I haven't gone over
11 and rummaged through his case file, but generally he
12 give me everything that's in there.

13 THE COURT: All right. Okay, Mr. Kent.

14 MR. FATA: He's here, he's right here.

15 MR. KENT: Judge, we would request prior
16 records of any witness that the State would intend
17 on calling. They may not have a prior record; they
18 can inform me of that. They may not have a prior
19 record at all. And missing in my discovery packet
20 is the prior record of the victim. We're entitled
21 to the victim.

22 MR. FATA: I did give that to him. I gave
23 him — in fact, when he subpoenaed the file of the
24 victim's DUI charge, the criminal record was in
25 there.

1 MR. KENT: Okay, I didn't see it in the
2 stack.

3 THE COURT: And what is the victim's
4 criminal record?

5 MR. FATA: I've got it back in the office;
6 I don't have it here with me. Would you like a copy
7 of it now, Judge?

8 THE COURT: No, I just -- are we headed
9 towards a 404 question about character of the
10 victim?

11 MR. KENT: Potentially. I'm not sure to
12 be perfectly honest. I don't know. It depends on
13 how the testimony pans out.

14 THE COURT: Okay.

15 MR. KENT: And that is one of the reasons
16 I miss something I would like to ---

17 MR. FATA: I'll provide that, but that was
18 provided in ---

19 MR. KENT: And I'm not accusing him of
20 anything, I just want to handle the motion.

21 MR. FATA: And of course we would like the
22 social security numbers. And we need the social
23 security number, date of birth of his witnesses so
24 that we can get the criminal records.

25 THE COURT: Mr. Kent?

1 MR. KENT: I have no problem. All
2 witnesses that will be arguably the statements...

3 (Attorneys confer.)

4 THE COURT: And just to be specific, the
5 witnesses listed were Naomi Toney, James Rogers,
6 Hattie Wilson, Deputy Beasley and Corporal Demary.
7 Of course I left out Lorie Rogers.

8 MR. KENT: We'll provide them, Judge, I
9 have no problem.

10 MR. FATA: Your Honor, as far as law
11 enforcement, SLED agents and that sort of thing, do
12 you agree that —

13 MR. KENT: I hope they don't have a prior
14 record.

15 MR. FATA: So we don't have to — just lay
16 witnesses?

17 THE COURT: I think he's talking about
18 lay, non-law enforcement witnesses.

19 MR. FATA: Okay. And that would include
20 Doctor Ross?

21 MR. KENT: I don't trust Doctor Ross, at
22 least not on the record. No, I'm just kidding, I'm
23 kidding.

24 THE COURT: You don't need her.

25 MR. KENT: No.

1 THE COURT: Don't need her record.

2 MR. FATA: Okay. Lay witnesses.

3 MR. KENT: And Judge, we can handle this
4 now and I know it's pretrial, but it might speed
5 things up. It won't take long. My understanding of
6 what was provided, the defendant Ernest Toney has no
7 criminal record that they would intend on using
8 against him if he chose to testify. He has no
9 record.

10 MR. FATA: As far as I know he doesn't. I
11 have not been provided one.

12 THE COURT: Okay.

13 MR. KENT: And going in conjunction with
14 that I would ask if the State is intending on using
15 any type of Lyle type evidence against the
16 defendant, if they have any prior bad act evidence
17 or anything they would intend on using at this time.

18 MR. FATA: We haven't taken his deposition
19 so I don't know if he has any. We don't, we're not
20 aware of any.

21 THE COURT: Okay.

22 MR. KENT: And last, Judge, this will be a
23 motion in limine which shouldn't, it won't take too
24 long. When we met with Solicitor Fata as well as
25 Investigator Dellinger, he made the comment -- the

1 victim in this case had some gunshot residue on the
2 left palm of his hand. The statement was made that
3 we believe — I think the State said we believe this
4 is a defensive wound. We would have a motion in
5 limine before they even try to offer that type of
6 evidence to the jury, they'd have to proffer that
7 type of testimony where an expert could actually say
8 that is actually a defensive wound before any type
9 of evidence of that nature being offered before a
10 jury.

11 THE COURT: He had gunshot residue on his
12 left palm?

13 MR. KENT: Yes, gunshot residue on the
14 left palm, on his left palm. Me, myself,
15 Mr. Chandler, with the State, the statement was made
16 they believe that was a defensive wound as if the
17 victim had put his hand up in a defensive posture
18 as, don't shoot me, stop from shooting.

19 MR. FATA: Your Honor, we have an expert
20 witness that will testify that that is one possible
21 way gunshot residue can get on the palms of
22 somebody's, of decedent's hand.

23 THE COURT: Of course, the residue can
24 also get in there just by the fact somebody may,
25 you're electing he may have grabbed the weapon or

1 fired a weapon or been near ---

2 MR. FATA: Not fired a weapon. If fired a
3 weapon is on the outside. On the palm it's either
4 handling a weapon that's been fired or it's a
5 defensive wound.

6 THE COURT: Or otherwise, it doesn't
7 necessarily have to be defensive. It can just be
8 like this. It doesn't have to be ---

9 MR. FATA: No, and that ---

10 THE COURT: In other words, is the expert
11 going to offer that as a possibility?

12 MR. FATA: As a possibility. It's one of
13 the possibilities. And of course, it's subject to
14 cross-examination and you know.

15 THE COURT: Mr. Kent.

16 MR. KENT: Judge, I would definitely -- I
17 guess we'll have to wait until he actually testifies
18 so we can have a hearing.

19 THE COURT: We may deal with it by proffer
20 then. We'll just be on the lookout for it, okay.

21 MR. KENT: One moment, Judge. At a later
22 point we'll look at the pictures. I think there's
23 some pictures of the deceased. We'll look at the
24 pictures. I don't think I -- I haven't seen them
25 yet. I mean, I've seen them ---

1 MR. FATA: I have photo static copies of
2 them. I produced them. He has had photo static
3 copies of them. And when he came, when Mr. Chandler
4 came ---

5 MR. KENT: Thank you.

6 THE COURT: He's not saying he hadn't
7 gotten them; he's just talking about them.

8 MR. KENT: I'm not ---

9 THE COURT: He's not saying he doesn't
10 have them. He wants to tell me something about
11 them.

12 MR. KENT: Thank you, Judge. What I was
13 saying after I was interrupted, after I was going
14 through the pictures and looking at the pictures,
15 there might be a motion, there are certain pictures
16 I want excluded; but I don't know what pictures he
17 would seek to introduce.

18 THE COURT: 403 issues?

19 MR. FATA: Yes, sir, Judge.

20 THE COURT: Mr. Fata, are you gonna seek
21 to introduce all of them?

22 MR. FATA: A good number of them and I'm
23 gonna show them as soon as we've had a chance, when
24 we finish here. All the evidence, physical
25 evidence, will be shown to him and we'll mark what

1 we can mark and that, we'll show him the photographs
2 also.

3 THE COURT: And those obviously are of him
4 deceased?

5 MR. FATA: The deceased's photographs of
6 the victim at the scene and autopsy.

7 THE COURT: All right. Make sure that you
8 read State versus Torres which says that at some
9 point there is some tipping point where they become
10 too prejudicial either by what's in them or by sheer
11 volume.

12 MR. FATA: I agree, and we volume wise, we
13 don't need to have every photograph that was ever
14 taken. And we do need certain photographs so that
15 we can show the scene, and Doctor Ross will need
16 some photographs that show the entry wound, the exit
17 wound, and her findings.

18 THE COURT: Yes, sir.

19 MR. FATA: But I don't, we don't plan to
20 show the body cut up open and all that sort of
21 thing.

22 THE COURT: Okay, we'll address that. If
23 there is an issue about any photographs we'll deal
24 with that.

25 MR. KENT: Judge, I think at this time

J. D. DELLINGER - PROFFER

1 we're ready for our Jackson v. Denno.

2 THE COURT: Okay. Mr. Fata, you can call
3 your first witness.

4 MR. FATA: Thank you, Your Honor. We call
5 Major Dellinger.

6 WHEREUPON,

7 **JAMES D. DELLINGER,**
8 having been duly sworn by the Clerk, testified
9 as follows:

10 THE CLERK: State your full name for the
11 record.

12 THE WITNESS: James D. Dellinger.

13 **PROFFER EXAMINATION**

14 BY MR. FATA:

15 Q Major Dellinger, you're a deputy sheriff of the
16 Lee County Sheriff's Office?

17 A Yes, sir.

18 Q How long have you been in that capacity?

19 A I've been in law enforcement since 1989. I
20 originally started at the police department in '95,
21 then I went over to the Sheriff's Department.

22 Q And you're a major?

23 A I am a major.

24 Q What does that mean as far as the hierarchy in
25 the Sheriff's Office?

J. D. DELLINGER - PROFFER

1 A I supervise some of the other officers,
2 investigators, deputies.

3 Q Okay. And are you the lead investigator in this
4 case?

5 A Yes, sir.

6 Q All right. Now tell me how you became involved
7 in this case?

8 A I was contacted by central dispatch indicated we
9 had a crime scene on John Wesley Road and a
10 sheriff's deputy sheriff responded to that call.

11 Q And that crime scene was on September 12th, 2010?

12 A Yes, sir.

13 Q In, on John Wesley Road?

14 A John Wesley Road in Lee County.

15 Q In Lee County. And you responded?

16 A I did.

17 Q When you got there what did you find?

18 A A great number of officers were there prior to my
19 arrival. A sheriff had made a decision to contact
20 the State Law Enforcement Division come in and work
21 the crime scene. Those individuals are there. The
22 coroner, assistant coroner was there. EMS was
23 there.

24 Q Okay. And just the crime scene consisted of
25 what?

J. D. DELLINGER - PROFFER

1 A It was a relatively simple crime scene in that it
2 was an outside crime scene. You had a vehicle
3 parked on the side of the road and you had a
4 victim's body directly in front of the vehicle.

5 Q Okay. And the victim was deceased or wounded or
6 or what?

7 A The victim was deceased.

8 Q Okay. And do you know, was it determined a
9 gunshot wound?

10 A Gunshot wound.

11 Q Did you begin an investigation on behalf of the
12 Sheriff's Office?

13 A We did.

14 Q And what did you do? How did you begin?

15 A Well, part of our investigation was speaking to
16 the victim's family, try and do what we call a
17 victimology to find out where the victim had been,
18 who he had contact with, what he'd been doing
19 leading up to his death.

20 Q Now how did Mr. Toney become a suspect in this
21 case?

22 A Our conversation with Ms. Lorie Rogers, that she
23 had had a relationship with Mr. Toney.

24 Q Okay. And what kind of relationship was it?

25 A It was a boyfriend/girlfriend.

J. D. DELLINGER - PROFFER

1 Q And was it long standing?

2 A It was quite some time.

3 Q Okay. Now as a result of your conversation with
4 Ms. Rogers what did you do?

5 A Myself and other investigators went to Sumter
6 County and made contact with the Sumter County
7 investigator and ---

8 Q All right. Was the other Investigator Patrick
9 Hickman?

10 A That was one of the investigators that was with
11 us.

12 Q To the?

13 A Sumter county.

14 Q To Sumter County?

15 A And then we went to Mr. Toney's residence.

16 Q All right. Did you -- where did you find Mr.
17 Toney?

18 A Mr. Toney was at his residence.

19 Q Okay. And when you knocked on the door and he
20 answered the door what happened?

21 A He came out. We spoke to him. We identified
22 ourselves and we asked him to accompany us back to
23 the Sumter County Sheriff's Office.

24 Q So Mr. Toney was in Sumter County?

25 A Yes, sir.

J. D. DELLINGER — PROFFER

1 Q And you asked him to go to Sumter County
2 Sheriff's Office with you?

3 A Yes, sir.

4 Q What happened at the Sumter County Sheriff's
5 Office?

6 A We went upstairs. We went into a room. Myself
7 and Lieutenant Hickman interviewed Mr. Toney.

8 Q All right. Hold on one second please. I'm gonna
9 show you what's been marked as State's Exhibit 1 for
10 identification, and do you recognize that?

11 A Yes, sir, I do.

12 Q And what is that?

13 A That is a Miranda rights form from the Lee County
14 Sheriff's Office.

15 Q Okay. What are the Miranda rights form? What
16 are the Miranda rights?

17 A These are the defendant's constitutional rights
18 of self-incrimination, right to have an attorney,
19 not speak to us.

20 Q Okay. Now the form begins — I think you got
21 Sum— you got Lee County Sheriff's Office and so
22 forth. And then in bold what it says Miranda
23 warnings, your rights?

24 A Yes, sir.

25 Q Is that read to the defendant?

J. D. DELLINGER - PROFFER

1 A Yes, sir.

2 Q Now I see number one. What's number one down
3 there?

4 A You have the right to remain silent.

5 Q And I see a check mark or some indication of a
6 mark after that.

7 A Yes, sir. That would be a mark I would put after
8 that I read it off, kind of like a checklist.

9 Q And was you check it when you read it?

10 A Yes, sir.

11 Q Did Mr. -- you read it to Mr. Toney?

12 A Yes, sir.

13 Q And did Mr. Toney appear to understand it or make
14 any comment about the right to remain silent?

15 A He appeared to understand it.

16 Q Did he say anything that you recall?

17 A No, sir.

18 Q All right. Number two, what was that?

19 A Anything you say can and will be used against you
20 in a court of law.

21 Q Now I see the same check mark?

22 A Yes, sir, I check off each one of them as I read
23 over them.

24 Q Now did you read that to Mr. Toney?

25 A I did.

J. D. DELLINGER - PROFFER

1 Q Did he appear to understand that?

2 A He did.

3 Q Did he give you any indication that he wasn't
4 listening or didn't — wasn't paying attention or
5 didn't understand what you were saying?

6 A No, he appeared to understand it.

7 Q Okay. Number 3, what was that one?

8 A You have the right to talk to a lawyer, have him
9 or her present while you are being questioned.

10 Q I see the same check mark. Did he appear to
11 understand that?

12 A He did.

13 Q All right. Number 4?

14 A If you cannot afford to hire a lawyer the court
15 will appoint one to represent you without cost if
16 you wish.

17 Q And I see the check mark there.

18 A Yes, sir.

19 Q Now did you read that to Mr. Toney?

20 A I did.

21 Q Did he appear to understand that?

22 A He did appear to understand it.

23 Q Number 5?

24 A If you decide to answer questions now without a
25 lawyer present you will still have a right to stop

J. D. DELLINGER - PROFFER

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

4 Q All right. Did -- I see the check mark there.

5 A Yes, sir.

6 Q And does that mean you read it to him?

7 A I did.

8 Q Did he appear to understand that?

9 A Yes, sir.

10 Q Did he say he wanted a lawyer?

11 A He did not.

12 Q Did he say he wanted to stop answering questions?

13 A He did not.

14 Q Now you read those five statements to him, and
15 Mr. Toney appeared to understand what you were
16 saying?

17 A Yes, sir.

18 Q Did he appear to be under the influence of any
19 alcohol?

20 A No, sir.

21 Q Did you smell any alcohol on him?

22 A No, sir.

23 Q Did he appear to be under the influence of any
24 drugs of any kind?

25 A No, sir.

J. D. DELLINGER - PROFFER

1 Q Now the room that he was in, what was the room
2 like?

3 A It was a small room that I would call it an
4 interview room. It had, you know, a table, four or
5 five chairs. The lighting was basic generic
6 government room.

7 Q Was Mr. Toney handcuffed down?

8 A No, sir.

9 Q Was he deprived of air, heat, or I guess this was
10 in September, any air conditioning? Was he deprived
11 of any of that? Was he put in a cold or hot room?

12 A No, it was a comfortable room, normal
13 temperature.

14 Q Did he request anything to drink and was denied?

15 A I think he had water to drink. I don't remember
16 if that was a bottle or in a cup, but he had water
17 to drink.

18 Q Was that provided by you all or did he have it
19 already?

20 A It was provided by us.

21 Q Okay. Did he, was he -- did he ask to go to the
22 bathroom and was he denied that opportunity?

23 A No, sir.

24 Q Did he appear to be comfortable?

25 A Yes, sir.

J. D. DELLINGER - PROFFER

1 Q Did he appear to be under any duress or stress?

2 A No sir.

3 Q Did you or Deputy Hickman, Patrick Hickman,
4 threaten him or put any sort of duress or make
5 comments that would have made him feel threatened?

6 A No, sir.

7 Q All right. Now you began the Miranda warnings at
8 9:33?

9 A Yes, sir.

10 Q All right. I see the next thing it says, I have
11 read -- what is the next thing right before
12 signature?

13 A "I have read the above listed Miranda warnings
14 and understand what my rights are."

15 Q And is that his signature? Is that Mr. Toney's
16 signature there?

17 A I put an X there by sign and asked Mr. Toney to
18 sign.

19 Q And did he sign it?

20 A He did.

21 Q And you saw him?

22 A I did.

23 Q Then the next heading is waiver of rights. What
24 is, tell me about that.

25 A Heading is a waiver of rights, states: "I'm

J. D. DELLINGER - PROFFER

1 willing to make a statement, answer questions. I do
2 not want a lawyer at this time. I understand and
3 know what I'm doing. No promises or threats have
4 been made to me. No pressure or coercion of any
5 kind has been used against me."

6 Q After you read that to Mr. Toney did he make any
7 sort of protest that he was not there voluntarily
8 and all that sort of thing?

9 A No, sir.

10 Q Did he say that he didn't like the threats or any
11 kind of threats were placed against him?

12 A No, sir.

13 Q Okay. Now is that his signature by the X?

14 A Again, I would put an X on there and ask
15 Mr. Toney to sign it. He signed it.

16 Q All right. And did he, in fact, he signed it?

17 A He did.

18 Q And the witnesses are.

19 A I would sign as a witness and then I gave it to
20 Lieutenant Hickman to sign.

21 Q Okay. Now do you -- was there any indication
22 made by Mr. Toney that the, that he did not
23 understand his Miranda rights?

24 A No.

25 Q Was there anything that prevented him, Mr. Toney,

J. D. DELLINGER - PROFFER

1 from acting on any of the Miranda rights?

2 A No.

3 Q Were there anything that was done to coerce Mr.
4 Toney into waiving his Miranda rights and get ---

5 A No.

6 Q Okay. Did Mr. Toney give you a statement?

7 A He did.

8 Q And now I'm gonna show you what's been marked as
9 State's Exhibit Number 2 for identification. Do you
10 recognize that?

11 A I do.

12 Q And what is it?

13 A It's the statement Mr. Toney gave myself and
14 Lieutenant Hickman.

15 Q Okay. Now who wrote that statement out?

16 A I wrote the statement.

17 Q Okay. Now why did you write it?

18 A That was at Mr. Toney's request.

19 Q Did he indicate to you why he wanted you to write
20 it?

21 A He indicated that he doesn't write that well; he
22 preferred for us to write it.

23 Q Now did --- you wrote the statement out now.
24 Where did the words come from?

25 A From Mr. Toney.

J. D. DELLINGER - PROFFER

1 Q Okay. So you wrote down exactly what he told
2 you?

3 A Exactly what he said. And if he would start
4 talking real quickly we'd ask him to slow down and
5 hold up. I definitely couldn't write as quickly as
6 he would talk.

7 Q Now did Mr. Toney read the statement?

8 A It was given back to him and allowed him to read
9 it, and I also read it back to him.

10 Q So you read it to him and he read it himself?

11 A That's correct.

12 Q Did he ask you to make any changes in the
13 statement?

14 A He did not.

15 Q Did he tell you that he was making his statement
16 because you had threatened him?

17 A No.

18 Q Or Lieutenant Hickman had threatened him?

19 A No, there wasn't any adversarial to it.

20 Q Okay. Was the statement given by Mr. Toney free
21 and voluntarily given?

22 A Yes, sir.

23 Q Was any duress by you, Lieutenant Hickman, or
24 anybody else in Sumter Sheriff's Office or the Lee
25 County Sheriff's Office made against Mr. Hickman

J. D. DELLINGER - PROFFER

1 [sic] to get him to sign his statement?

2 A No, sir.

3 Q All right. And after Mr. Toney read the
4 statement he did not request any changes to be made?

5 A He did not.

6 Q And I see his signature appears on both pages?

7 It's a two page statement.

8 A Yes, sir.

9 Q And it's witnessed by you and Lieutenant Hickman?

10 A That's correct.

11 Q All right. Now based on this statement
12 basically — Your Honor, I guess we need to get him
13 to read the statement for the record.

14 THE COURT: Yes, sir. You can read it
15 slowly if you will please.

16 THE WITNESS: Yes, sir. At the beginning
17 is the name, Ernest Toney. The address of [REDACTED]
18 [REDACTED] Sumter County. The date is 9/13/2010
19 at 10:03. "I left home yesterday around 2 p.m. I
20 stopped at the bridge on Highway 76 and 378, the
21 Youngs Market, and bought some gas. I bought
22 20-dollars worth. I went down Highway 76 to
23 Mayesville. I made a left on Highway 154. When I
24 got to Lower Lee School I called Lorie Rogers to
25 talk about the baby. I went up to park on a paved

J. D. DELLINGER - PROFFER

1 Road and took a piss. Piggie pulled up in front of
2 me and jumped out. He said mother fucker, what are
3 you doing here? I said, this is a public highway.
4 Mother fucker, stay here till I get back Piggie said
5 as he got in his truck. I called Lorie back. Lorie
6 said piggie had a gun. I told Lorie I'm not worried
7 about no gun. When I looked up Piggie was pulling
8 up. Piggie jumped out of his car with a long gun.
9 I was standing on the outside of my truck. I got my
10 8 millimeter rifle from behind the seat; I shot it
11 one time. Piggie fell to the ground. I jumped in
12 my truck and went to my mother's house. I stayed
13 for about 15 or 20 minutes. Then I went to BJ's
14 lounge and bought two beers. I left BJ's and went
15 to my sister's house, Hattie Wilson. I stayed at
16 her house about one hour. When I left I came back
17 down 154. I stopped at 154 and Highway 15. I
18 bought some chips and a coke."

19 Q Now you started the Miranda at 9:33?

20 A Yes, sir.

21 THE COURT: Is that a.m. or p.m.?

22 MR. FATA: P.m., excuse me.

23 BY MR. FATA:

24 Q 9:33 p.m.

25 A P.m.

J. D. DELLINGER -- PROFFER

1 Q And the statement was given at what time?

2 A 10:03 p.m.

3 Q And end, what time did the statement end?

4 A 10:25.

5 Q So ---

6 THE COURT: Was this all on

7 September 12th?

8 THE WITNESS: September 13, Your Honor.

9 BY MR. FATA:

10 Q So a little less than an hour conversation with
11 him?

12 A Yes, sir.

13 Q Okay. Again, he was not denied use of a
14 telephone, bathroom, food, or drink, was he?

15 A No, sir.

16 Q Was he promised anything in exchange for giving
17 the statement?

18 A No, sir.

19 Q Was he under arrest at the time?

20 A No, sir.

21 Q So he could have gotten up and left any time he
22 decided? He didn't have to talk to you?

23 A Yes, sir.

24 Q When you asked him to come leave his house and
25 come down to the Sheriff's Office did he come

J. D. DELLINGER - PROFFER

1 voluntarily?

2 A Yes, sir.

3 Q Was he handcuffed?

4 A No, sir.

5 Q All right, now based on that statement by
6 Mr. Toney I'm gonna show you State's Exhibit Number
7 3 and see if you recognize that.

8 A Yes, sir, that's a search warrant.

9 Q And a search warrant obtained from where?

10 A Sumter County Magistrate.

11 Q And a search warrant for what?

12 A Mr. Toney's residence.

13 Q And why did you what to -- and what was the basis
14 of that search warrant?

15 A The gist was that our conversation with Mr. Toney
16 he indicated that the weapon he used in the shooting
17 was at his residence.

18 Q So probable cause for the search warrant was to
19 find the weapon at Mr. Toney's house?

20 A Yes, sir.

21 Q Now the search warrant was dated when?

22 A September 13.

23 Q And when was it executed?

24 A It was signed at 11:25 p.m. We left there and
25 went directly to Mr. Toney's residence.

J. D. DELLINGER - PROFFER

1 Q Did Mr. Toney accompany you to his residence?

2 A He did.

3 Q And what happened at his residence? Did you
4 search?

5 A We began looking for the gun and Mr. Toney
6 assisted us, directed us to a closet and told us —

7 Q Did Mr. Toney have more than one gun?

8 A There were shotguns in the other closets. We had
9 discussions about the shotguns. As we would take
10 them out to inspect them we would open the breach to
11 make sure they were unloaded and safe. And Mr.
12 Toney was rather meticulous about making sure that
13 we closed that breach and put either a towel or
14 piece of cotton back in the barrel before we put
15 those weapons back in the closet.

16 Q So the — what was the conversation? How was Mr.
17 Toney assisting you hunting for the gun?

18 A He was right there with us, and he basically said
19 that those weren't the guns that we were looking
20 for. The gun we were looking for is in this room,
21 and he directed us to that room where that gun was.

22 Q Okay. And what did he say about the gun?

23 A That was the gun that he used. That was the gun
24 involved in the incident with Mr. Rogers.

25 Q And he pointed out the Mauser, 8 millimeter

J. D. DELLINGER - PROFFER

1 Mauser?

2 A Yes, sir.

3 Q And said that's the gun that I shot Mr. Toney
4 with?

5 A Yes, sir.

6 Q Now was that statement, was that statement made
7 as a continuation of the statement that was taken at
8 the police department or Sheriff's Office?

9 A It was definitely a continuation of that
10 conversation and while we were at his home.

11 Q I mean, it was done the same, shortly after he
12 had given — the search was done shortly after
13 Mr. Toney had given, had told you the he used was
14 subject —

15 A That's right. It was all continually being
16 given.

17 Q Now was Mr. Toney in custody at that time?

18 A Oh, yes.

19 Q Based on the statement he had given you earlier
20 in the day?

21 A Yes.

22 Q That he had killed Mr. Rogers with a particular
23 rifle, the 8 millimeter Mauser?

24 A Yes.

25 Q Was anybody questioning Mr. Toney about the gun

J. D. DELLINGER - PROFFER

1 at the time it was discovered?

2 A No, that was -- we were going through the house
3 and looking at all the weapons. That was just kind
4 of, you know, I guess he was trying to speed up the
5 process to say, you know, that's not the gun you're
6 looking for, the gun you're looking for is over
7 here.

8 Q So he, it was just a voluntary utterance, here's
9 the gun you want?

10 A Yes. And like I said, he was, he was rather
11 meticulous about those other guns. I mean, he was
12 -- he wasn't overly thrilled about us handling them,
13 of opening the breach. You know, he wanted to make
14 sure they were put back in the same way.

15 Q Well, how was -- do you recall how the Mauser was
16 stored?

17 A In a closet.

18 Q Was it, did it have cotton in it, all that kind
19 of stuff?

20 A I don't remember it having any cotton in it. I
21 don't remember that specifically.

22 Q Do you recall how many guns Mr. Toney had?

23 A I'm not positive. I know there was two shotguns
24 and maybe a small pistol and the Mauser. There may
25 have been more but those ones kind of stand out in

1 my memory.

2 Q And again, he just said this is the gun you're
3 looking for?

4 A Yes, sir.

5 Q You didn't ask him is this the gun we need? He
6 voluntarily just said that.

7 A Right. He said he was kind of trying to, I
8 guess, speed the process up by directing us.

9 Q Answer any questions that Mr. Kent may have.

10 THE COURT: Mr. Kent.

11 **CROSS-EXAMINATION**

12 BY MR. KENT:

13 Q Is it still Captain or Major?

14 A Major.

15 Q Major, how are you doing?

16 A Good morning.

17 Q I want to make sure, the murder that we're
18 talking about, that happened on September 12th,
19 right?

20 A Yes, sir.

21 Q Okay. Then, to make sure I get the timeline
22 right, the murder happens on September 12th. You
23 guys investigate the murder. You initially go see
24 Lorie Rogers. Do you see her the next day or the
25 same day?

J. D. DELLINGER - PROFFER

1 A I believe both.

2 Q Both?

3 A But there wasn't much of a lengthy discussion and
4 interview that first evening. It was more of there
5 offering our services and giving her the very brief
6 facts we had at that time.

7 Q And so then we go and see her again the next day.
8 I think like 5 or 6:00 you go back and see her again
9 on the 13th?

10 A Yeah, she actually comes to the Sheriff's Office
11 that day.

12 Q Sumter or Lee County?

13 A Lee County.

14 Q So she comes to Lee County Sheriff's Department
15 on September 13th. She gives you information, a
16 little advice, started giving you information about
17 Mr. Toney. Did she say that he did it, could have
18 done it, or she just said this could have be a
19 suspect. I'm confused on how he became a suspect.

20 A Not, definitely not that he did it, but that
21 there was an ongoing relationship between them and
22 that there was some kind of issues earlier on the
23 12th with her husband and Mr. Toney.

24 Q Tell me about that. She said there was ongoing.
25 What did she say about that?

J. D. DELLINGER - PROFFER

1 A That she had an affair with Mr. Toney.

2 Q No, that there was ongoing thing between Mr.

3 Toney. You're saying ongoing thing between Mr.

4 Toney and Mr. Rogers?

5 A That's correct.

6 Q Did she say about any difficulty between Mr.

7 Toney or Mr. Rogers?

8 A No, she was, said Mr. Rogers came home upset and

9 that when she was talking to Mr. Toney on the phone

10 he was also upset. But it was more of a

11 hypothetical to Mr. Toney, if you do run into my

12 husband call 9-1-1.

13 Q I guess the ultimate question I'm trying to get

14 into is, did she say Mr. Toney could be a suspect,

15 he could be the one who killed my husband?

16 A Absolutely not.

17 Q She didn't say anything like that?

18 A Absolutely not.

19 Q Did she give you any other people who could

20 possibly be a suspect or was Mr. Toney the only

21 person she mentioned?

22 A It wasn't we were asking her for a list of

23 suspects.

24 Q Yes, sir.

25 A We were asking more for, like I said, what we

J. D. DELLINGER - PROFFER

1 call the victimology, what he was doing the day
2 before, where he was at the day before, and we
3 talked to the day before what could happen. And
4 then she provided that information and then we drew
5 whatever conclusions we wanted to about that person
6 needs to be interviewed, that person needs to be
7 eliminated, and that's how we progressed.

8 Q Now tell me about so I think a couple of hours
9 later we go to Mr. Toney's residence in Sumter on
10 Dollard Street.

11 A That's correct.

12 Q Knock on the door. What are the first things --
13 what do we say to Mr. Toney when we get there?

14 A We identify ourselves, you know, we're law
15 enforcement, where we're from and what we're there
16 for.

17 Q I mean, what did you tell him you were there for?

18 A We told him we were investigating the death of
19 Mr. Rogers.

20 Q Did you tell him that he was a suspect?

21 A No, no.

22 Q Okay. You just said we're investigating the
23 death of Mr. Rogers and what? I mean...

24 A I didn't want to talk to him at his residence so
25 we asked him to come to the Sheriff's Office.

J. D. DELLINGER - PROFFER

1 Q Hey, we're investigating the death of Mr. Rogers,
2 we just want you to come to be safe, you were in the
3 neighborhood, you could have been in the
4 neighborhood, Ms. Rogers mentioned your name? I'm
5 trying to figure out.

6 A I wasn't discussing much of that there with him.
7 I would say, I would kind of cut that short and say,
8 you know, we'll discuss all that at the Sheriff's
9 Office.

10 Q Did you say you don't have to go if you don't
11 want to go?

12 A I didn't necessarily volunteer that, no.

13 Q Okay. He gets back to Sumter, the Sumter Police
14 Department. That's where y'all ended up taking him,
15 correct?

16 A That's right.

17 Q Now the Sumter Police Department, it's got
18 recording capability that you can record people
19 giving statements?

20 A I don't honestly know that, but I would assume
21 so.

22 Q But this statement wasn't recorded at all?

23 A It was not.

24 Q Is that strange not recording a statement?

25 A No, it's not strange for us especially being in

1 somebody else's basically house. You know, I don't
2 know what Sumter has, but I didn't necessarily ask.
3 I mean...

4 Q Did it take 30 minutes to give him his Miranda
5 warn, I know Mr. Fata was saying y'all started at
6 9:33. You actually started writing that statement
7 at 10:00. What did y'all do that 30 minutes?

8 A We went over a oral version of what happened.

9 Q Well, did you — what questions were you asking,
10 what were you saying?

11 A Were you there, you know anything about it.
12 That's basically how it started. Tell us basically
13 what he did that Sunday and we would kind of, you
14 know, go from there and write that down.

15 Q When did you tell him he was possibly a suspect
16 or did you ever tell him?

17 A When we told him that we knew that he was there
18 and that he was in the county and talking on the
19 phone with Ms. Rogers.

20 Q How did you know all that? I asked you that
21 earlier and you said Ms. Rogers didn't tell you
22 that.

23 A No, Ms. Rogers had told us that. Ms. Rogers had
24 told us that he, that her husband came home upset
25 and that she had talked to Mr. Toney on the

J. D. DELLINGER - PROFFER

1 telephone.

2 Q Did he say that Mr. Toney was in the area?

3 That's what I'm trying to get to. Did she tell you
4 Mr. Toney was in the area?

5 A I'd have to look back at her statement and make
6 sure about that. I'm not ---

7 Q Do you mind because I'm getting confused here
8 because the question you said ---

9 THE COURT: Go ahead and show him the
10 statement.

11 MR. KENT: Ms. Rogers' statement?

12 MR. FATA: Yeah.

13 BY MR. KENT:

14 Q And also, I'm not trying to refute. I'm just, I
15 just want to make sure we have a clear record of
16 what we were telling. We were telling certain
17 things to Mr. Toney before we started taking his
18 statement.

19 A And she said that I called Mr. Toney, asked him
20 did he run into Piggy, and he said within passing,
21 but seemed too upset.

22 Q So was that the statement you're asking
23 Mr. Toney, just for clarity purpose you had
24 mentioned. I'm trying to figure out what all you
25 said to Mr. Toney before you started writing things

J. D. DELLINGER - PROFFER

1 down.

2 A And I may not have been overly specific with Mr.
3 Toney 'cause I probably wouldn't have provided him
4 with a whole lot of information with what we had. I
5 may have been, as we say, fishing to see what he
6 would tell me, whether he would place himself there
7 in Lee county.

8 Q But the point being, you don't know realistically
9 what you said to him that first 30 minutes?

10 A Oh, no, it was a general conversation.

11 Q When he said that, according to you, when he said
12 that he didn't want to write his own statement, did
13 you question him, did you do a detailed question
14 about his understanding of the English language,
15 things of that nature?

16 A I didn't go into a whole lot of detail about that
17 because that's not overly uncommon, but I absolutely
18 felt like he understood our conversations. In
19 talking to him from having his own home, having a
20 job, if he didn't have a formal education I felt he
21 had life experience education to understand what we
22 were talking about. I never had any indication that
23 he didn't understand the English that I was using or
24 verbal conversation. I think the trouble was in him
25 reducing it to writing.

J. D. DELLINGER - PROFFER

1 Q And you told him he was free to leave? I think
2 that's what Mr. Fata was asking you questions about,
3 he wasn't under arrest or?

4 A I don't know that I voluntarily said to Mr. Toney
5 you can get up and leave, but he would have been if
6 he asked that or he said I'm leaving.

7 Q He wasn't under arrest, wasn't in custody?

8 A At that time, no, sir.

9 Q The statement that he gave you, so I'm assuming I
10 think your testimony was during the 30 minutes, I
11 guess you kind of go over it beforehand what he
12 wanted to say?

13 A Yes, sir.

14 Q You went over basically a little bit of his
15 testimony. He said, all right, let's get this down
16 in writing?

17 A Yes, sir.

18 Q Now is it your testimony that that statement
19 contains everything that he told you that day?

20 A I think that would be difficult to say that it
21 contained everything 'cause, like I said, I know
22 that he told me it was an 8 millimeter and I know
23 that he told me it was a rifle. I don't know if
24 that's necessarily in there.

25 Q Well, isn't that necessary? I mean, he told you

J. D. DELLINGER - PROFFER

1 some information and the statement, his statement
2 doesn't contain all of the evidence he gave you?

3 A I don't know if that would have been in the
4 conversation. There's 25 or 30 minutes before we
5 started writing, or when he started telling me,
6 okay, we're gonna start writing. If it wasn't
7 something he said when we were, when we were writing
8 it, I wouldn't have added it.

9 Q So do we have any evidence or do we have anything
10 in writing whatsoever with him signing it -- let me
11 say this another way. Can you tell this Court what
12 all was missing from his statement that he told you
13 that is not in this statement 'cause you're telling
14 us right now there's something missing.

15 A And I guess I'm getting you a little bit confused
16 about there's stuff missing from what he told me
17 when we said we're gonna start writing because I
18 wrote exactly what he told me and what he wanted
19 written down.

20 Q Okay.

21 A I didn't add anything to that, I didn't take
22 anything away from that. Were there oral
23 conversations prior to this and after that that we
24 had in conversation that aren't reduced to writing,
25 yes.

J. D. DELLINGER - PROFFER

1 Q Are any of those, have those been turned over in
2 supplemental reports or anything of that nature?

3 A The one about him and directing as to the gun ---

4 Q I'm not there yet, I'm sorry.

5 A That has been reduced to writing by Investigator
6 Capps, I think, given to Mr. Fata and yourself.

7 Q And we'll get into that. I'm still talking about
8 before we left and did the arrest warrant. Has
9 anything other than what's in that statement there?

10 THE COURT: You mean before the search
11 warrant.

12 BY MR. KENT:

13 Q Before the search warrant, thank you, Judge.
14 Before the search warrant, anything not included in
15 that statement has that been written down and turned
16 over?

17 A Not that I'm aware of.

18 Q Okay. Do you know what information is missing
19 from that statement that you have?

20 A Well, again, I don't think he specifically
21 describes the weapon in this statement.

22 Q Okay. And is your testimony today that he
23 specifically described the statement that the weapon
24 that he utilized at some point in time is not
25 written down anywhere?

J. D. DELLINGER - PROFFER

1 A That's correct.

2 Q Okay. So it's your testimony today also today
3 that he specifically told y'all -- I want to make
4 sure I don't put words in your mouth -- that he
5 specifically told you, is it your testimony, and I'm
6 reading from State's Exhibit Number 3 for
7 identification, that Ernest Toney admitted to Lee
8 County Sheriff's investigator that he shot the
9 victim with the weapon being sought and the weapon
10 is located at his residence at ■■■ Dollard Street in
11 the County of Sumter?

12 A And if I can look at that and see under
13 description of property sought that it specifically
14 describes that rifle. And it's said a military
15 style 8 millimeter bolt action rifle with a wooden
16 stock. That information would have come directly
17 from Mr. Toney.

18 Q But that's not written down here anywhere?

19 A It is not in his written statement.

20 Q And he hadn't signed anything, signed anything to
21 that effect? There's no signature, I mean -- let me
22 say this another way. We were writing down this
23 statement, officer. There's nothing that you would
24 have written down and then had Mr. Toney sign to
25 events that's something that he told you?

J. D. DELLINGER - PROFFER

1 A That's correct.

2 THE COURT: Where is major about the
3 military issue, military type? Is that in, is that
4 in the affidavit?

5 THE WITNESS: That's in the affidavit
6 portion, Your Honor, of the description of property
7 sought. But in his statement he does say I got my 8
8 millimeter rifle to see ---

9 BY MR. KENT:

10 Q That's fine. And that's fine. But what we're
11 saying is there are specifics missing from that
12 statement?

13 A Oh, yes, sir.

14 Q After he gives the statement what do we do with
15 the statement? Did we give him a copy of it?

16 A I don't -- I don't honestly remember whether we
17 made a copy there at Sumter County or not. I'm not
18 sure, Mr. Kent.

19 Q Let me make sure I got -- you've got the warrant
20 in front of you. About 11:01 you start giving a
21 search warrant to the magistrate's office in Sumter;
22 is that about right? Around 11:00, something of
23 that nature? That would be on the 13th?

24 A Yes, sir, I believe it's signed at 11:25 by Judge
25 Taylor.

J. D. DELLINGER - PROFFER

1 Q Okay. He still is not under arrest at this point
2 in time; is that correct?

3 A At the point he told me he shot him, at that
4 point he wouldn't have been free to leave. I
5 wouldn't had let him just get up and leave.

6 Q Did you re-mirandize him at that point in time?

7 A No, sir.

8 Q 'Cause at that point in time he was in custody?

9 A He would not have been free to leave.

10 Q Okay. As a matter of fact, we didn't get the
11 arrest warrant if I'm not mistaken until
12 September 14th, and I just think that's because of
13 time.

14 A That's time and the date.

15 Q Yeah. So September 14th early morning hours,
16 like 12 a.m. and 1 a.m., something of that nature.

17 A That's correct. We would have done what we call
18 a hold ticket, placed him in the detention center
19 and got the actual arrest warrant the following
20 business day.

21 Q And at this point in time he's clearly in
22 custody; there's no doubt about that. We have
23 warrant for him. As far as we're concerned he's
24 admitted to a murder, he's under custody?

25 A He wouldn't have been free to go at that time, no

J. D. DELLINGER - PROFFER

1 sir.

2 Q You didn't re-Mirandize him at this point in
3 time?

4 A I did not go over Miranda rights after I would
5 have made that mental decision to say he's no longer
6 free to go. But that also never came up, Mr. Kent,
7 where he asked to leave or I refused. It was one of
8 those subjects that I wouldn't necessarily
9 volunteered at this point.

10 Q So at what point was he told he was under arrest
11 for murder?

12 A When we left the Sumter Sheriff's Office and went
13 back to his house with the search warrant in hand.

14 Q So at the point that you leave Sumter County
15 Sheriff's Office he's no longer — in his mind, I'm
16 not talking about your mind — in his mind now he's
17 got to know you are now a suspect for murder?

18 A Absolutely.

19 Q You have one, confessed, and we have now told you
20 you're not free to go?

21 A Absolutely.

22 Q So then we take him, the suspect, under arrest
23 back to his residence?

24 A That's correct.

25 Q Now tell me about all the conversations that

J. D. DELLINGER - PROFFER

1 happened back at the residence?

2 A As we said, we were looking for the weapon that
3 he described. We were going through the closets in
4 the rooms. We came across the other shotguns. We
5 opened the breaches to make sure they were safe,
6 said he was meticulous about those. He was adamant
7 he wanted those breaches closed back, that towel or
8 piece of cotton back in the barrel, that he directed
9 us to the rifle, the 8-millimeter rifle.

10 Q And those, those statements that he gave you,
11 those have not been codified in writing or had been
12 signed? Let me go back. On that day that wasn't
13 put in your own handwriting and he didn't sign —

14 A No, sir.

15 Q —that's what he told you?

16 A Yes, sir.

17 Q And we didn't do — well, you did a supplemental
18 report, correct?

19 A Investigator Capps did a — reduced that
20 statement about directing us to the gun.

21 Q And that was done?

22 A It wasn't until after we met with you and
23 Mr. Chandler and the Solicitor's Office and the
24 Solicitor directed us to do that, to provide that to
25 you.

J. D. DELLINGER - PROFFER

1 Q So basically until, I think, last week, Major,
2 last —

3 A Yes, sir.

4 Q —last week is when we did a supplemental report
5 that Mr. Toney gave an additional statement?

6 A That's when he reduced that to writing, right.

7 Q When he reduced it?

8 A Right.

9 Q But there is no statement with his signature on
10 it that says that he told y'all that information on
11 the date of September 14th?

12 A No, sir.

13 Q Are there any other statements — just
14 housekeeping, Major. Are there any other statements
15 you're attempting to say that Mr. Toney gave? Make
16 sure I got them all, rather. The initial statement
17 that you were utilizing is the actual statement, the
18 written, the one that you wrote down and you signed?

19 A Yes, sir.

20 Q There would be a statement that's not written
21 down and signed by him that he gave a specific
22 description of the weapon utilized for the search
23 warrant?

24 A Yes, sir.

25 Q 8-millimeter weapon with a wooden stock to kill

J. D. DELLINGER -- PROFFER

1 this man and this weapon is at my residence?

2 A That's correct.

3 Q Okay. That's a specific statement that we don't
4 have written down anywhere, but that would be one
5 that we would say he gave to y'all?

6 A That's correct.

7 Q And in conjunction with that statement we're
8 saying that he also said that and that the weapon I
9 used is at my residence?

10 A That's correct.

11 Q So we'll call that the first statement 'cause
12 that happened before he started writing down the
13 written statement you have in front of you?

14 A Okay.

15 Q I'm just asking, I want to make sure a time
16 frame.

17 A Yes, sir.

18 Q So that would be the first statement. The second
19 statement is that one statement that you have in
20 front of you that you wrote in your own handwriting
21 and that he signed?

22 A Yes, sir.

23 Q And then the next statement that you want to
24 utilize against him would be the statement that
25 happened after he got back to his residence. When

J. D. DELLINGER - PROFFER

1 he got back to his residence is when he said you're
2 in the wrong room, the weapon that I used to kill
3 this guy is in this other one.

4 A Yes, sir.

5 Q Are there anything other than those three
6 statements?

7 A Well, and there was several conversations with —
8 I mean, there were an ongoing conversation with
9 Mr. Toney. We discussed some paper documents that
10 were on his table, but I don't know if Mr. Fata was
11 intending to —

12 Q Well, tell me about, what was those
13 conversations?

14 A We found a photograph of an ultrasound, some DNA
15 records, and a crayon picture on the table at
16 Mr. Toney's house.

17 Q Yes, sir.

18 A The DNA indicated that a child was about Lorie
19 Rogers.

20 Q Yes, sir.

21 A And the crayon picture he got from that young
22 girl K█████████ And we asked him for, if we could take
23 those, even though they were outside the description
24 of the property sought in the search warrant.

25 Q Yes, sir.

1 A And we asked him to sign a separate consent for
2 us to have those items, and he did.

3 Q And he signed them. You had him sign a separate
4 consent form to take these things?

5 A Absolutely, because those were outside the scope
6 of that search warrant. The search warrant didn't
7 list those as description of property sought.

8 Q Did you give him a copy of the search warrant or
9 consent form, or anything of that nature?

10 A I know a copy of the search warrant was left at
11 the residence. I don't know if it was specifically
12 given to him 'cause I didn't execute the search
13 warrant.

14 Q That's fine. Any other statements? And by
15 statement, any of a confession type statement or
16 anything that you utilized to decide —

17 A No, sir.

18 Q And is your testimony you don't remember if you
19 gave him a copy of this statement?

20 A I don't independently, Mr. Kent.

21 MR. KENT: Beg the Court's indulgence one
22 moment. Judge, that's all the questions I would
23 have.

24 THE COURT: All right. Redirect?

25 **REDIRECT EXAMINATION**

J. D. DELLINGER - PROFFER

1 BY MR. FATA:

2 Q Major Dellinger, the statement given by
3 Mr. Toney, State's Exhibit Number 2 for
4 identification, described the rifle; is that
5 correct?

6 A Yes, sir. It says, I got my 8 millimeter rifle
7 from behind the seat.

8 Q All right. And that's what he told you during
9 the interview?

10 A Yes, sir.

11 Q Okay. Now in the search warrant it says an 8
12 millimeter Mauser army style. Where did that
13 description come from?

14 A From him.

15 Q Okay. So when you were getting the search
16 warrant he just volunteered that information?

17 A That would have been in the, our oral
18 conversation prior to saying, we'll start writing
19 this down.

20 Q Okay, all right. Okay, that's all.

21 THE COURT: Anything else, Mr. Kent?

22 MR. KENT: Nothing.

23 THE COURT: Thank you, sir. You may step
24 down.

25 Next witness, Mr. Fata.

P. HICKMAN -- PROFFER

1 MR. FATA: Yes, sir, Your Honor, we call
2 Lieutenant Hickman.

3 WHEREUPON,

4 **PATRICK HICKMAN,**
5 having been duly sworn by the Clerk, testified
6 as follows:

7 THE CLERK: State your full name for the
8 record.

9 THE WITNESS: Patrick Hickman.

10 **DIRECT EXAMINATION**

11 BY MR. FATA:

12 Q Lieutenant Hickman, you're a deputy with the Lee
13 County Sheriff's Office?

14 A Yes, I am.

15 Q And how long have you been a deputy with the
16 Sheriff's Office?

17 A Lee County since 2006.

18 Q And as a lieutenant what's your job there?

19 A Investigate calls service, like crimes, different
20 type crime.

21 Q Were you -- did you assist Major Dellinger in the
22 investigation of the murder of Gregory Rogers?

23 A Yes, I did.

24 Q Okay. Did you accompany Major Dellinger to
25 Sumter to interview the defendant, Ernest Toney?

P. HICKMAN - PROFFER

1 A Yes, I did.

2 Q And you all went to his house?

3 A Yes.

4 Q Mr. Toney became a suspect after discussions with
5 Ms. Rogers?

6 A That's correct.

7 Q Regarding the ongoing affair between Ms. Rogers
8 and Mr. Toney?

9 A That's correct.

10 Q And you went to -- you and Major Dellinger went
11 to the home of Mr. Toney and what happened?

12 A We went to his house, asked him to come down to
13 law enforcement center in Sumter County. We talked
14 about the incident.

15 Q Did you tell him why you were there? Did you
16 tell him?

17 A No, I didn't.

18 Q Who was doing all the talking?

19 A Mostly Major Dellinger.

20 Q All right. Did Major Dellinger tell him why you
21 were, Major Dellinger tell Mr. Toney?

22 A Well, we told dealing with an investigation
23 shooting incident in Lee County.

24 Q And asked Mr. Toney to do what?

25 A To come down to the Sumter Sheriff's Office.

P. HICKMAN - PROFFER

1 Q Now did you begin an interview process? Did you
2 and Major Dellinger begin an interview process with
3 Mr. Toney?

4 A Yes, I did.

5 Q And who was the questioner? Who was the lead
6 investigator in this situation?

7 A Mostly Major Dellinger asking most of the
8 questions. I asked him a few questions during the
9 interview.

10 Q Who did the Miranda?

11 A Major Dellinger.

12 Q And were you in the room and witness Miranda?

13 A That's correct?

14 Q Tell me about the room that you were in.

15 A It was a small room with a table, a couple of
16 chairs. I don't think they had video upstairs.
17 They have it downstairs, but I don't think at that
18 time Sumter County had it upstairs.

19 Q There was no video?

20 A No.

21 Q Was the room well lit?

22 A It was well lit.

23 Q Was it appropriate temperature for the season?

24 A Yes.

25 Q Wasn't too hot, wasn't too cold?

P. HICKMAN - PROFFER

1 A No.

2 Q Was Mr. Toney deprived of anything?

3 A No.

4 Q Food, water?

5 A We didn't specifically ask him about the food,
6 but we always offer something to drink.

7 Q Did Mr. Toney get something to drink?

8 A He got some water.

9 Q Did Mr. Toney appear comfortable?

10 A Yes, in my opinion.

11 Q Did he appear under any sort of duress, stress,
12 or anything like that?

13 A No.

14 Q Did he appear to be under the influence of any
15 alcohol?

16 A No.

17 Q Any sort of drugs?

18 A No.

19 Q Okay. Now who went over the Miranda warnings,
20 and I'll show you State's Exhibit 1 for
21 identification. Who actually read those to Mr.
22 Toney and explained it to him?

23 A Major Dellinger.

24 Q All right. So did he, did Major Dellinger read
25 number one, you have the right to remain silent?

P. HICKMAN - PROFFER

1 A Yes, he did.

2 Q And did Mr. Toney ask to have that explained to
3 him?

4 A No, he did understand.

5 Q Did Major Dellinger read number two? Number two
6 is anything you say can be and will be used against
7 you in a court of law?

8 A That's correct.

9 Q And did Mr. Toney appear to understand that?

10 A Correct.

11 Q Did he ask any questions about that?

12 A No, he didn't.

13 Q Number three, you have the right to talk to a
14 lawyer, have him or her present with you while
15 you're being questioned. Did Major Dellinger read
16 that to Mr. Toney?

17 A Yes.

18 Q Mr. Toney ask him questions about it?

19 A No, he did not.

20 Q Did he appear to understand it?

21 A In my opinion.

22 Q Four, if you cannot afford to hire a lawyer the
23 Court will appoint one to represent you if you wish.
24 Did Major Dellinger read that to Mr. Toney?

25 A Yes, he did.

P. HICKMAN -- PROFFER

1 Q Did Mr. Toney ask him any questions about it?

2 A No, he did not.

3 Q Did he appear to understand it?

4 A He appeared to understand.

5 Q Number five, you still have the right to stop
6 answering at any time. You also have the right to
7 stop answering any time till you talk to a lawyer.

8 Did Major Dellinger read that to ---

9 A Yes, he did.

10 Q ---Mr. Toney? Did Mr. Toney appear to understand
11 it?

12 A That's correct.

13 Q Did Mr. Toney ask him questions about that?

14 A No, he did not.

15 Q Did he ask any questions about the, about the
16 Miranda warnings generally?

17 A The word coercion. He had a problem with the
18 word, the meaning of the word coercion. I think we
19 had to explain that to him. Not Miranda, but ---

20 Q The word coercion? Does that appear in Miranda
21 warnings?

22 A In the bottom sentence.

23 Q Oh, I ain't there yet.

24 A Okay.

25 Q I'm not there yet. Let's talk about the five

P. HICKMAN - PROFFER

1 warnings up there.

2 A Oh, he didn't have any questions about that.

3 Q Okay. And it says, I read above list of Miranda
4 warnings and I understand what my rights are. Is
5 that Mr. Toney's signature there?

6 A Yes, it is.

7 Q Did he appear to, did he appear to understand
8 those?

9 A Yes, to my opinion.

10 Q Did he voluntarily sign his name?

11 A That's correct.

12 Q Now the next heading is waiver of rights. The
13 statement says, "I am willing to make a statement,
14 ask questions. I do not want a lawyer at this time.
15 I understand and know what I am doing. No promise
16 of threats have been made to me, and no pressure or
17 coercion of any kind have been used against me."
18 Did Major Dellinger read that to Mr. Toney?

19 A Yes, he did.

20 Q Did Mr. Toney indicate that he was willing to
21 answer questions at that time?

22 A Yes, once we explained the coercion part to him.

23 Q What did he ask about coercion?

24 A He didn't know what the meaning was, he didn't
25 understand.

P. HICKMAN - PROFFER

1 Q Did Major Dellinger explain what coercion was?

2 A Yes.

3 Q That it's a threat or pressure put against
4 somebody to do something ---

5 A Yes.

6 Q ---that they don't want to do? Did Mr. Toney
7 understand that ---

8 A Yes, he fully told him in terms he understands.

9 Q Was there any coercion or pressure placed against
10 Mr. Toney ---

11 A No.

12 Q ---to give a statement?

13 A No.

14 Q Did he ask for a lawyer?

15 A No, he did not.

16 Q Did he know that a lawyer was available?

17 A Yes.

18 Q And did you make any promises to Mr. Toney?

19 A No.

20 Q Did Major Dellinger make any promises to him?

21 A No, he did not.

22 Q Now is this Mr. Toney's signature up there?

23 A Yes, it is.

24 Q And you -- and is that your signature witnessing?

25 A Yes.

P. HICKMAN - PROFFER

1 Q Is that Major Dellinger's signature?

2 A Yes.

3 Q All right. State's Exhibit Number 2 for
4 identification, that is Mr. Toney's statement?

5 A Yes, it is.

6 Q Okay. Now while writing that statement down did
7 you and Major Dellinger talk with Mr. Toney, ask him
8 any questions?

9 A Yes, we basically asked him his whereabouts that
10 day before. After interviewing Ms. Rogers she
11 stated that, you know, he was in the area. And the
12 fact that when he say he went out to his mother's
13 house I think she live right on 154 if I'm not
14 mistaken we questioned him about his whereabouts.

15 Q Basically where were you and what were you doing?

16 A Right.

17 Q And did he tell you?

18 A He told us.

19 Q Okay. What'd he tell you?

20 A He told us he went to his mother's house. At
21 first he went to his sister's house. If I remember
22 correctly he's -- when we first asked him that when
23 he told us he went to his mother and he went to his
24 sister's house. And we asked him whether, did he
25 talk with Ms. Rogers that day or the day before. He

P. HICKMAN - PROFFER

1 said ---

2 Q The day of the incident?

3 A The day of the incident.

4 Q September 12th.

5 A And he said he did. And we just -- we went from
6 there. We asked him whether, did he ever go by the
7 house. And if I'm not mistaken it seem like he said
8 that she wanted some money or she want something to
9 get for the little girl, and he was supposed to be
10 meeting her to take that out to her.

11 Q Okay. Did he then tell you he shot Mr. Rogers?

12 A He -- before he got to that point we asked him
13 what happened when he first saw Mr. Rogers. And it
14 seem like they didn't actually met on the Drive West
15 Road. They met on 154 at the side street there.
16 But anyway, Mr. Rogers asked Mr. Toney what was he
17 doing out here, and Mr. Toney told him this a free
18 country, he can travel where he want to travel.

19 Q That's all in his statement. That's all written
20 down?

21 A Yeah.

22 Q So how long, how long, how long did the
23 preliminary conversation take? Couple of hours?

24 A I'll say probably about 20, 20 minutes when we
25 asked him, actually started the initial statement.

P. HICKMAN - PROFFER

1 Q And when he started the initial statement who
2 wrote that down?

3 A Major Dellinger.

4 Q All right. And are those the exact words that
5 Mr. Toney told you?

6 A Yes, his exact words.

7 Q So Mr. Toney said, I left home yesterday around
8 2 p.m. That's the exact words that Mr. Toney said
9 and Major Dellinger would write it down?

10 A Right.

11 Q Okay. Was that statement given voluntarily?

12 A Yes, in my opinion it was.

13 Q He knew his rights. Mr. Toney knew his rights?

14 A Yes.

15 Q Mr. Toney knew he didn't have to talk?

16 A Yes.

17 Q He knew he could have a lawyer?

18 A Yes.

19 Q No coercion, duress, or anything like pressure
20 was put on him?

21 A No, there was none.

22 Q It was made freely and voluntarily?

23 A Yes.

24 Q Now it describes a gun in that statement. At
25 page two, if you'd look at that please, officer.

P. HICKMAN - PROFFER

1 Describe the what?

2 A Says I got my 8-millimeter rifle from behind the
3 seat.

4 Q Is that the way he described it?

5 A Yes, he did.

6 Q Okay. And the search warrant says you all were
7 looking for military style 8-millimeter bolt action
8 rifle with a wooden stock. Tell me why it's
9 described like that in the warrant and as an 8
10 millimeter ---

11 A We asked him for a detailed description of the
12 weapon we were looking for that he used.

13 Q When did you ask him for the detailed
14 description?

15 A Right after we did the written statement.

16 Q So he did the written statement, Mr. Toney signs
17 off on it?

18 A Right.

19 Q And then you say, well, what did the 8 millimeter
20 look like?

21 A We had a little bit more conversation about what
22 occurred that day, and in that conversation it came
23 about a detailed description of the weapon.

24 Q What else was said about what happened that day?

25 A I can't recall exactly how, what all was said, it

P. HICKMAN - PROFFER

1 was two years ago.

2 Q Was it just a continuation of his statement right
3 there?

4 A I mean, yes, it was a continuation of his
5 statement. We just kept going over and over see
6 what we could get of this, what he's saying.

7 Q Were you at the house when the search warrant was
8 executed?

9 A Yes, I was at the house. We all went in the
10 house when we directed them to a room the gun was
11 at. Me and Sergeant Burnish from -- not Burnish,
12 Lane from Sumter County, actually went out to the
13 truck and start searching the inside of the truck.

14 Q But did you, what did -- what did the defendant
15 Mr. Toney say about the rifle when he was in the
16 house? Did he say this is the rifle you want?
17 What'd he say?

18 A Well, he said the rifle that we're looking for is
19 in another room. Then that when I walked out the
20 back door.

21 Q So you weren't there ---

22 A When they asked him I wasn't there.

23 Q But you heard him say the rifle is in the other
24 room?

25 A Right.

P. HICKMAN - PROFFER

1 Q All right. Answer any questions that Mr. Kent
2 has.

3 THE COURT: Mr. Kent.

4 **CROSS-EXAMINATION**

5 BY MR. KENT:

6 Q Investigator?

7 A Yes.

8 Q Okay. Just 'cause we haven't had an opportunity
9 to meet, I'm sorry, I want to make sure I get your
10 title correct. I don't have very many questions for
11 you. During your testimony to the Solicitor you had
12 mentioned that -- make sure I got it right. He was
13 asking you, you said something like it seems like
14 Mr. Rogers and Mr. Toney had met somewhere earlier?

15 A Yeah, 'cause they wasn't on that side street. I
16 can't remember whether it was on 154, whether it's
17 the turnoff to go to Cooper Mill Road. But on one
18 of those roads they met and supposedly Rogers asked
19 him what he was doing out here and he told him it
20 was a free country, he could go wherever he wanted.

21 Q And that's not in the statement. Of course,
22 that's something you remember --

23 A Yeah, when we first started interviewing him.

24 Q And you -- do you know why we didn't put that in
25 writing and have him sign anything like that?

P. HICKMAN - PROFFER

1 A Well, we all interview him and then, you know,
2 whenever they say when we tell him we need to begin
3 so we can write it down and whatever the statement
4 we can put it in the statement.

5 Q Of course, I'm not gonna try to pretend I'm not
6 an investigator, I'm not an officer and I'm not a
7 major, but I've seen some statements — and correct
8 me if I'm wrong is after we get done with the
9 statement we ask specific questions and then we
10 write that down and write down their answers. Have
11 you seen something like that? I think that's a tool
12 that they teach at SLED?

13 A Yeah.

14 Q Why is that not — that if he gave a specific
15 answer to a specific question like, give me a
16 detailed description of a murder weapon, do you have
17 any?

18 A I don't know how to answer that.

19 Q And then like you said, you can't remember, it's
20 two years ago, that's a long time ago. And you
21 heard the Major say he couldn't remember giving him
22 a copy of the statement. Do you have any
23 recollection of giving him a copy of the statement?

24 A I think we did because I remember going to —
25 'cause I used to work for Sumter County —

P. HICKMAN - PROFFER

1 Q Let me make sure -- and I don't meant to
2 interrupt you. I need you to know. It's not "I
3 think" or "it's possible".

4 A I remember maybe I can, I remember 'cause I had
5 -- I can't remember. No, I been there before so I
6 make copies over there but I don't know if it was
7 this incident or not so I'd rather not say.

8 Q So you don't have independent recollection of
9 actually giving him a copy?

10 A Right, no, sir.

11 Q That's fine. And you also mentioned, you said
12 something about Mr. Toney was giving information
13 before y'all started writing down the statement,
14 wanting something for his little girl. Could you
15 explain that to me.

16 A After we interviewed Ms. Rogers she was telling
17 us about she had called Mr. Toney about needing some
18 money or bringing the little girl something, but I
19 can't remember to the fact exactly how it worded or
20 what it was.

21 Q Yes, sir.

22 A But that came up in, when we interviewed
23 Mr. Toney.

24 Q Thank you. That's all the questions I have.
25 Thank you so much, Lieutenant.

DAVID CAPPS- PROFFER

1 THE COURT: Redirect?

2 MR. FATA: None.

3 THE COURT: All right, you may step down.

4 MR. FATA: We call captain Capps --
5 Investigator Capps.

6 WHEREUPON,

7 **DAVID A. CAPPS,**

8 having been duly sworn by the Clerk, testified
9 as follows:

10 THE CLERK: State your full name for the
11 record.

12 THE WITNESS: David A. Capps.

13 **DIRECT EXAMINATION**

14 BY MR. FATA:

15 Q State's Exhibit Number 4 for identification, do
16 you recognize that?

17 A Yes, sir.

18 Q Tell me what that is.

19 A This is the statement I overheard at Mr. Toney's
20 residence that you requested we reduce to writing.

21 Q All right. You were at the residence when they
22 were searching for the weapon?

23 A Yes, sir.

24 Q You were at the residence when law enforcement
25 was searching for the weapon?

DAVID CAPPS- PROFFER

1 A Yes, sir.

2 Q And what, who was there? Major Dellinger, you,
3 some other officers?

4 A Yes, sir.

5 Q What was Major Dellinger doing?

6 A He was conducting the primary search.

7 Q Was he ---

8 A Conversation with defendant.

9 Q Was he looking at some weapons?

10 A Different ones, yes, sir.

11 Q And when looking at them to do what with them?
12 Would he pick them up?

13 A Yes, sir.

14 Q And did Mr. Toney make any statement regarding
15 the weapon?

16 A Yes, sir. As stated earlier, he was very
17 meticulous how he kept his weapons stored, we put
18 them back in the manner as we found them.

19 Q And then what did he -- then did he say anything
20 about any particular weapon?

21 A At some point in time we were going through the
22 bedrooms. Major Dellinger was handling a shotgun.
23 I don't remember what kind, just black. I believe
24 it was a 12 gauge of some sort. They were having a
25 conversation and Mr. Toney indicated that was not

DAVID CAPPS- PROFFER

1 what we were looking for and motioned for the Major
2 to follow him, and of course, we went in another
3 room. I waited in the doorway and heard Mr. Toney
4 make statement, this is the one you're looking for,
5 and showed us that older looking bolt action
6 military rifle.

7 Q And said Mr. Toney said that's the gun.

8 A The one that you're looking at is not the one you
9 want, I've got the one you want in this other room,
10 something to that effect -- I'm paraphrasing. It
11 was -- the statement was -- Mr. Toney, connected
12 directed us to a bedroom. He said the gun we're
13 looking for is not any of those. He pointed out an
14 older looking bolt action rifle.

15 THE COURT: Has that been marked?

16 MR. FATA: Yes, marked as for
17 identification number 4.

18 THE COURT: All right.

19 BY MR. FATA:

20 Q And that's what you were reading from?

21 A Yes, sir.

22 Q And that was, that rifle was taken into evidence?

23 A Yes, sir.

24 Q Answer any questions -- well, was anybody forcing
25 Mr. Toney to say anything or make any comment or

DAVID CAPPS- PROFFER

1 asking him is this the rifle, is this the rifle, is
2 this the gun, or anything like that?

3 A No, sir.

4 Q It's strictly a voluntary statement on his part?

5 A Yes, sir.

6 Q Answer any questions that Mr. Kent may have.

7 (WHEREUPON, State Exhibit No. 4
8 was marked for identification only.)

9 **CROSS-EXAMINATION**

10 BY MR. CHANDLER:

11 Q Investigator Capps, good to see you again, sir.

12 THE COURT: He's not a captain.

13 MR. FATA: I said Investigator Capps.

14 THE COURT: Oh, I thought you said
15 captain.

16 BY MR. KENT:

17 Q No, Investigator Capps. The statement that we're
18 talking about, I think it's State identification
19 number 4 directly in front of you, you would agree
20 with me, I know it's not dated, but this was just
21 written up last week?

22 A Yes.

23 Q And it was written up on behalf of myself and Mr.
24 Chandler, myself, Major Dellinger, as well as Paul
25 Fata?

DAVID CAPPS- PROFFER

1 A Yes.

2 Q You would agree with me that it's, before last
3 week it did not exist?

4 A Not this statement, no. The statement itself did
5 but the reduced to writing did not.

6 Q It did not. And we didn't have Mr. Toney sign
7 the statement, correct?

8 A No, sir.

9 Q And a few minutes ago when Mr., I mean when the
10 Solicitor was asking what the statement was, I think
11 you said something like, well, he said something
12 like -- you weren't specifically sure what he
13 actually said?

14 A Right, I didn't read from it first, yes, sir.

15 Q Well, is this statement word for word what he
16 said? You said you didn't read from it at first.

17 A This statement is not word for word. This is
18 what happened.

19 Q This is what happened.

20 A All I know is he got our attention and told us
21 that the ones we found, the guns, the weapons we
22 looked at so far at his home were not the weapon we
23 were looking for and he directed Major Dellinger to
24 another room. I followed behind and he showed us
25 this bolt action rifle. To be specific about it, he

DAVID CAPPS- PROFFER

1 actually made a comment too that's not in this
2 statement directed me to where the bullets were for
3 the rifle. They were in a separate location. We
4 recovered those as well. That's not a crime, but we
5 have those in evidence.

6 Q Is that written down anywhere other than ---

7 A It's probably on a search warrant or an inventory
8 warrant somewhere.

9 Q All right. Thank you, Investigator. That's all
10 the questions I have.

11 THE COURT: Mr. Fata.

12 MR. FATA: Nothing else, Your Honor.
13 That's all we have.

14 THE COURT: You may step down.

15 Any witnesses?

16 MR. KENT: May I have one for my client.

17 THE COURT: We'll take a five minute
18 recess and start promptly in five minutes.

19 (WHEREUPON, a recess was taken from the
20 proceedings.)

21 THE COURT: All right, Mr. Kent, you
22 offering any witnesses on this issue?

23 MR. KENT: I think I will, Judge, and let
24 me ask you this, and I've done this before and I
25 just want to make sure for the record before I offer

DAVID CAPPS- PROFFER

1 my client. At one point in time I have actually
2 offered my client on the stand just for the limited
3 purpose of one simple question, voluntariness of
4 this issue. I ask that so he doesn't open himself
5 up for cross-examination.

6 THE COURT: Well, he'll be subject to
7 cross-examination on anything brought out in your
8 direct.

9 MR. KENT: In my direct?

10 THE COURT: Otherwise, it goes to issue of
11 voluntariness, not as a fishing expedition.

12 MR. KENT: Agree, and that's why I offer
13 him for the limited purpose and I will protect him
14 if there's anything incriminating, ask incriminating
15 questions overrule on direct examination.

16 THE COURT: In other words, not to be
17 facetious, you don't want him to do kind of what you
18 were doing during their ---

19 MR. KENT: I had to get it out of the way,
20 Judge.

21 THE COURT: All right, I'll use my
22 discretion on that, but this purpose of this not to
23 determine whether or not he made any other
24 statement.

25 MR. KENT: That's correct.

ERNEST TONEY - PROFFER

1 THE COURT: It was to determine whether or
2 not the State want to offer freely and voluntarily.

3 MR. KENT: That is correct. I'll have very
4 limited questions I'll be asking.

5 THE COURT: So you want to call him?

6 MR. KENT: At this time I will call my
7 client Ernest Toney for the record for the limited
8 purpose.

9 WHEREUPON,

10 **ERNEST TONEY,**
11 having been duly sworn by the Clerk, testified
12 as follows:

13 THE CLERK: State your full name for the
14 record.

15 THE WITNESS: Ernest Toney.

16 **DIRECT EXAMINATION**

17 BY MR. KENT:

18 Q Mr. Toney, you heard all the testimony that the
19 officers gave while you were sitting there?

20 A Yes, sir.

21 Q I have one question I want to ask. The question
22 I asked and I think I asked two of the officers,
23 Major Dellinger and I think I asked Investigator
24 Hickman, did they give you a copy of your statement,
25 copy of your written statement, which for the record

ERNEST TONEY - PROFFER

1 is State's Identification Number 2? Were you given
2 a copy of that statement after it was signed by you?

3 A No, sir.

4 Q So no one gave you a copy of it that's your hand
5 to hand form?

6 A No, sir.

7 Q You weren't given a copy to take to the jail or
8 anything of that nature?

9 A No, sir.

10 Q That will be the extent of the questions I would
11 ask.

12 THE COURT: Mr. Fata.

13 **CROSS-EXAMINATION**

14 BY MR. FATA:

15 Q Mr. Toney, State's Exhibit Number 1, are these --
16 and I'll show it to you. Are those Miranda warnings
17 that Captain Dellinger gave to you?

18 A Yes.

19 Q Read to you? Did he answer?

20 THE COURT: Yes, sir, he did.

21 MR. FATA: Oh, okay, I'm sorry, I didn't
22 hear him. My hearing is about shot.

23 Q Now, State's Exhibit Number 2 for identification,
24 is that the statement that Major Dellinger wrote
25 down?

ERNEST TONEY - PROFFER

1 A No, sir.

2 Q That's not the statement? Is there another
3 statement?

4 A Yes, sir.

5 Q Well, where is it?

6 A I don't know. It was on a yellow piece of paper.

7 Q Yellow piece of paper?

8 A Yes, sir.

9 Q So that's not your statement?

10 A No, sir.

11 Q Is that your signature at the bottom?

12 A Yes, sir.

13 Q Is that your signature at the bottom of this one?

14 A Yes, sir.

15 Q And for the second page that's your signature on
16 both of those?

17 A Yes, sir.

18 Q So ----

19 THE COURT: Which exhibit are you talking
20 about?

21 MR. FATA: Number 2.

22 BY MR. FATA:

23 Q So that's your signature on there?

24 A Yes, sir.

25 Q But that's not what you told Major Dellinger?

ERNEST TONEY - PROFFER

1 A No, sir.

2 Q Okay. And how many conversations did you have
3 with Major Dellinger?

4 A Several.

5 Q Let me back up. Let me back up. So what you're
6 saying is that Major Dellinger wrote down a lie that
7 you signed?

8 A Sir?

9 Q Are you saying that Major Dellinger wrote down a
10 lie and you signed it?

11 A Yes, sir.

12 Q Okay. You can read and write?

13 A Yes, sir.

14 Q How far in school did you go?

15 A Twelve.

16 Q Graduated?

17 A Yes, sir.

18 Q You read that statement?

19 A No, sir.

20 Q You didn't read that statement?

21 A No, sir.

22 Q You just signed whatever Major Dellinger put in
23 front of you?

24 A Yes, sir.

25 Q Okay. You knew you were being accused of

ERNEST TONEY - PROFFER

1 murdering somebody?

2 A Sir?

3 Q You knew you were being accused of murdering
4 somebody so you just signed whatever they put in
5 front of you?

6 A Yes, sir.

7 Q Now as far as the Mauser, 8 millimeter Mauser,
8 were you at the house when the search warrant was
9 completed?

10 A Yes, sir.

11 Q And did you actually point out the Mauser gun to
12 them?

13 A Yeah, what kind of gun I had, yes, sir.

14 Q And did you say the 8 millimeter Mauser right
15 there in the corner or wherever it was?

16 A Yes, sir.

17 Q You had other guns too; didn't you?

18 A Yes, sir. He asked me what kind of gun I had.

19 Q Well, why did you show them a shotgun?

20 A I told them about all of them.

21 Q Told them about all of them?

22 A Yes, sir.

23 Q And you told them that you used the Mauser to
24 shoot Mr. Rogers with?

25 A No, sir.

ERNEST TONEY - PROFFER

1 Q So you're saying you didn't shoot Mr. Rogers?

2 A No, sir.

3 Q I mean, no, sir, you didn't shoot him? Is that
4 what you're saying?

5 MR. KENT: I'm gonna object, Your Honor.
6 This is way beyond the scope of direct and he's
7 asked direct ---

8 THE COURT: Just a second. Mr. Fata?

9 MR. FATA: Well, Your Honor, he -- he went
10 into all the statements that were allegedly made. I
11 was just trying to find out if he made other
12 statements.

13 THE COURT: Well, why don't you first of
14 all ask him what he told Major Dellinger because ---

15 MR. FATA: Okay.

16 THE COURT: You object to that?

17 MR. KENT: No, no, I don't object to that
18 analysis.

19 THE COURT: Ask him that first and then
20 I'll consider the rest.

21 BY MR. FATA:

22 Q All right. What did you tell Major Dellinger?

23 A He ask me what kind of gun I had and I told him I
24 have a shotgun, single barrel, five shot pump, and 8
25 millimeter rifle, an old military army rifle, and a

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1 pistol. He asked me what room they were in, and I
2 told him.

3 Q What'd you tell Major Dellinger about the
4 incident itself that happened on the 12th between
5 you and Mr. Rogers?

6 MR. KENT: Judge, I'm gonna have eto
7 object again. Again, this is beyond the scope of my
8 direct examination and ---

9 THE COURT: Overruled because -- the issue
10 of voluntariness is an issue obviously, that's why
11 we're having this hearing.

12 MR. KENT: I just ---

13 THE COURT: Let me finish. The witness
14 said on cross that Major Dellinger wrote a lie and
15 he signed it. Mr. Fata, I'm allowing him to say,
16 well then, what did you tell Major Dellinger.

17 MR. KENT: Now that I don't have a problem
18 with.

19 THE COURT: Okay, that's what he's asking.

20 So the question, Mr. Toney, is what did
21 you tell the Major about what, if anything, happened
22 between you and Mr. Rogers? You may answer that
23 question.

24 THE WITNESS: I was at the bridge and he
25 asked me what am I doing down here. And I told him

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1 it's a free country, I can go where I go, go
2 wherever I want to go. And then he tell me, he
3 said, to get back. And I jump in the truck and I
4 took off and I called Lorie. And after I told
5 Lorie, Lorie said, well, Piggy got a gun. I said I
6 ain't scared of no damn gun, I'm gone. So my
7 brother Joe and went to my mother's house to get the
8 trash. then I went to BJ's Lounge. I went to carry
9 the trash home, left her, and come back and stop by
10 BJ Lounge. Had went to my mother house and went to
11 my sister's house on 154. And that when I asked her
12 to call Lorie. And she called Lorie and Lorie said
13 she had just heard a gunshot.

14 Q Lorie said she had just heard a gunshot, is that
15 what you said?

16 A Yes, sir.

17 Q Okay. What else did you tell Major Dellinger?

18 A Then I immediately went and I jumped in the truck
19 and went back down ---

20 MR. KENT: I'm gonna object, Judge, this
21 is nothing more than a fishing expedition. For the
22 record I have to do this, Judge. This has gone way
23 beyond the scope of direct examination. If it's a
24 question whether or not voluntary or not he's not
25 even asking statement voluntary he's saying he

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1 didn't give statement. What he's trying to do —
2 that's my objection.

3 THE COURT: Well, for one thing I cannot
4 really understand what he's saying. Number two, the
5 question is, what else did you tell Major Dellinger.
6 For the purposes of this hearing I think it's
7 appropriate. Now whether it's gonna exceed the
8 light of day in the courtroom, Mr. Fata certainly
9 can't use it in front of the jury unless he himself,
10 unless Mr. Toney actually takes the stand in his own
11 defense.

12 So Mr. Fata, you, just ask what else did
13 you tell Major Dellinger.

14 BY MR. FATA:

15 Q You told Major Dellinger that Lorie heard a
16 gunshot.

17 A She did.

18 Q All right. After that that's where you stopped.
19 Now what else did you tell Major Dellinger about
20 this incident?

21 A Then that when I jump back in the truck, went
22 back down 54, and went down 15 and 54, stop there
23 and get a soda, a pack of chips, and then I jump in
24 my trunk and went back to Sumter.

25 Q Did you tell Major Dellinger what you were doing

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1 in that area that day?

2 A What I was doing?

3 Q You were doing ---

4 A I was coming from my cousin Graham (ph).

5 Q Do what now?

6 A I was coming from my cousin Graham.

7 Q Why were you near Lorie Rogers' house? Did you
8 tell Major Dellinger ---

9 A I stop to pee.

10 Q You went to pee at Lorie Rogers?

11 A Yes, sir.

12 Q You have relatives?

13 A Yes, sir, Graham (ph).

14 Q And so what else did you tell Major Dellinger
15 after that?

16 A After I leave Graham?

17 Q Uh-huh.

18 A And I went down 154 and I went down there, I
19 can't remember the name of the highway. He had rode
20 by the house to get a rifle. I looked in, I stop at
21 that bridge, and take a pill. That when Piggy drove
22 up and he had say, Mother Fucker, what you doing
23 down here. I said, this is a public damn highway, I
24 can go wherever I want to go.

25 THE COURT: Can you understand him,

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1 Melissa?

2 THE COURT REPORTER: I really missed that
3 part. I got the part about him going where he wants
4 to go, but I missed -- I just don't know ---

5 MR. FATA: Get closer to the microphone.

6 THE COURT REPORTER: No, I can hear him, I
7 just ---

8 THE COURT: It might make it worse. But
9 you know, he's your witness, you can ask him to do
10 that, but I'm frankly having trouble understanding
11 what he said.

12 BY MR. FATA:

13 Q I think you said that you told Major Dellinger
14 that you saw Piggy who is Mr. Rogers, right?

15 A Yeah. That when Piggy asked me what I'm doing
16 down here.

17 Q And what'd you tell him?

18 A I tell him it a public damn road, I can go
19 wherever I want.

20 Q And then what did you tell Major Dellinger after
21 that?

22 A Then I had jumped in the truck and I called Lorie
23 and Lorie tell me, said, Piggy got a gun. I tell
24 her ain't scared of no gun so I go to my brother's
25 house. So I go to my brother's house, Joe.

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1 Q And where is his house?

2 THE COURT: Okay, let's stick to the
3 statement, not where anything else is, okay.

4 MR. FATA: Okay.

5 BY MR. FATA:

6 Q What else did you tell Major Dellinger after
7 you -- you went to your brother and you told him you
8 went to your brother Joe's house, then what did you
9 tell him?

10 A I asked him to, then I went to my mother's house
11 to pick up the trash.

12 Q Pick up the trash. Then what did you tell Major
13 Dellinger?

14 A I went to BJ's Lounge. I went to BJ's Lounge to
15 get a beer.

16 THE COURT: Who?

17 MR. FATA: BJ's Lounge.

18 THE COURT: Okay.

19 BY MR. FATA:

20 Q And then what did you tell Major Dellinger?

21 A After that we went where we dump the trash in for
22 neighborhood.

23 Q Okay. Then what did you tell Major Dellinger?

24 A Went back to BJ's Lounge.

25 THE COURT: Went back to where?

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1 MR. FATA: Went back to BJ's Lounge.

2 THE COURT: Okay.

3 BY MR. FATA:

4 Q And then what'd you tell Major Dellinger?

5 A Went back to my mother house.

6 Q Okay. Then what'd you tell Major Dellinger?

7 A Went to Mayesville.

8 Q You went to where now?

9 A Back to Mayesville, my sister's house.

10 Q Mayesville? Okay.

11 A 154. And I asked her to call Lorie and talk to
12 her.

13 Q You told Major Dellinger you called Lorie from
14 there?

15 A I told my sister to call Lorie.

16 Q Your sister called Lorie. Okay, then what'd you
17 tell Major Dellinger?

18 A Again, I talked to Lorie. My sister talked to
19 her first. She said Lorie heard a gunshot.

20 Q Who said that? You told Major Dellinger who
21 heard a gunshot?

22 A Lorie Wilson, she heard a gunshot.

23 Q Had told that to who?

24 A My sister.

25 Q Okay. What did you ---

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1 A She told me the same thing, she had heard a
2 gunshot. Then I stay there for about 10, 15, 20
3 minutes and got in my truck and went back down 154
4 to 154 to 15 and stop and got a bag of chips and
5 went to Sumter.

6 Q All right. And of course -- okay.

7 MR. FATA: That's all I have, Judge.

8 THE COURT: Redirect?

9 MR. KENT: No, sir.

10 THE COURT: You can step down. Thank you,
11 sir.

12 Any other witnesses?

13 MR. KENT: That will be the extent of our
14 witnesses, Judge.

15 THE COURT: Any reply witnesses to that,
16 Mr. Fata?

17 MR. FATA: One second, Your Honor.

18 THE COURT: Remembering that the issue is
19 voluntariness.

20 MR. FATA: We're good, Judge, nothing.

21 THE COURT: All right, Mr. Kent, your
22 argument?

23 MR. KENT: Thank you, Judge, and I
24 appreciate the length of the Jackson versus Denno
25 hearing. We have a couple of concerns, Judge. As

1 you're aware Jackson versus Denno specifically talks
2 about the voluntariness of a statement allegedly
3 given by my client. The problem is, just even here
4 I'm hearing about statements that I've never heard
5 about before in front of this Court. And what I
6 tried to do, Judge, was codify and put it down to a
7 simple meaning so I can understand the different
8 statements that the officer talks about —

9 THE COURT: Let's talk about the written
10 statement first.

11 MR. KENT: And then we'll talk about —
12 okay, the written statements specifically that we're
13 talking about, Judge, I have two, specifically talk
14 about it. And list a little bit different, Judge.
15 And I know he specifically talked about the
16 voluntariness. But when I asked Major Dellinger
17 about everything that was included inside the
18 statement his exact comment everything is not in the
19 statement. That's concerning because we can't talk
20 about voluntariness of everything that's not in
21 there that they're trying to attribute to my client.
22 So we have trouble saying, okay, he voluntarily gave
23 a statement, we're picking and choosing what we're
24 putting inside of the statement.

25 Judge, as you're aware right now there is

1 a huge push from law enforcement agencies from the
2 State Law Enforcement Agency here in South Carolina
3 to all over the country that statements now should
4 be recorded because they say there is an indicia of
5 reliability.

6 THE COURT: Who says that?

7 MR. KENT: Our state law enforcement
8 division training individuals —

9 THE COURT: That's not in evidence though.

10 MR. KENT: That's not in evidence, no,
11 sir, Judge. But the problem that we have is you
12 look at the way that this statement is given, there
13 is no indicia of reliability based upon the
14 statement in light of the fact that it is not in my
15 client's own handwriting. What at best they have is
16 a statement written by the officer which does not
17 include everything inside the statement in and of
18 itself. But I will tell you, I will candidly tell
19 you as an officer of the Court, if there is anything
20 all the statements that law enforcement has offered
21 for us, the written statement that they've given us
22 based upon what they have testified, is the most
23 likely all the evidence that they have to get into
24 this witness statement here. My major concern after
25 hearing everything that they've testified, are the

1 other statements they're attempting to attribute to
2 my client that are not included inside of this
3 written document.

4 THE COURT: But those are discovery —
5 you're talking about from a discovery standpoint or
6 voluntariness standpoint?

7 MR. KENT: Voluntariness, admissibility,
8 yes, sir.

9 THE COURT: Okay. Well, let's stick with
10 Jackson versus Denno. Do you object to the written
11 statement?

12 MR. KENT: Judge, based upon the testimony
13 that I just heard, I do not think as an officer of
14 the Court that I can agree to the admissibility
15 based on the voluntariness of this witness
16 statement. I think on cross-examination part of it
17 I would have as as long as it's testified to.

18 THE COURT: Okay.

19 MR. KENT: But for the record, based upon
20 what I've heard testified I do not think I can make
21 a logical objection to State's Exhibit 2, State's
22 Exhibit Number 2.

23 THE COURT: Okay.

24 MR. KENT: Based upon Jackson versus
25 Denno.

1 THE COURT: Okay.

2 MR. KENT: Now I would have a separate
3 objection to the admissibility of this statement if
4 you would like to hear this now.

5 THE COURT: Yes, sir.

6 MR. KENT: Judge, the testimony that was
7 given forth by all of the officers were that they do
8 not remember giving a written copy of this statement
9 to my client. My client very specifically said that
10 he was not given a written copy of this statement.
11 If you look at code section 8-15-50, along with code
12 section 19-1-80 and 19-1-90, those code sections
13 specifically require the State of South Carolina to
14 take written — actually, any public official
15 whatsoever.

16 THE COURT: 8-15?

17 MR. KENT: 8-15-50. 8-15-50, 19-1-80 and
18 19-1-90. And I will read, for the record I will
19 read first 8-15-50.

20 THE COURT: All right.

21 MR. KENT: 8-15-50 entitled public
22 employee taking statement in investigation shall
23 give a copy to the person making a statement.
24 Public employees taking a statement in investigation
25 shall give a copy to a person making a statement.

1 Whenever a person employed by the State or any
2 county, city, or municipality thereof, any part of
3 any such governing body shall take a written
4 statement in any investigation of any kind, nature,
5 from any person, the person receiving or taking
6 written statement shall give the person making a
7 statement a copy thereof and shall obtain to the
8 person making a statement signed receipt for a copy
9 so delivered.

10 When we couple that, Judge, with section
11 19-1-80, no witness at any preliminary hearing or
12 any criminal judicial proceeding of any kind or
13 nature shall be examined or cross-examined by any
14 solicitor, lawyer, or prosecuting officer concerning
15 a written statement formerly made and given to any
16 person employed by this state or any county, city,
17 or municipality thereof, or any part of any such
18 governing body unless it first be shown at the time
19 of the making of the statement the witness was given
20 an exact copy of his statement and that before his
21 examination or cross-examination the witness was
22 given a copy of the statement and allowed reasonable
23 time in which to read it.

24 And then finally, 19-1-90 which juxtaposes
25 both of those statutes states, unless the provisions

1 of both Sections 8-15-50 and 19-1-80 have been
2 complied with, no statement such as is referred to
3 in those sections shall be admissible in evidence in
4 any case, nor shall any reference be made to it in
5 any trial in the case. My objection would be based
6 upon the testimony of the officers that do not
7 remember giving him a copy of the statement, and
8 they were given ample opportunity. My client, which
9 is why I put him on the stand saying, I was not
10 given a copy of the statement. They're in violation
11 of all three of those statutes. And even though
12 based upon Jackson versus Denno may be admissible,
13 based upon relevant South Carolina statutes they
14 didn't give him a copy of his statement. They were
15 all asked were they given him a copy and they said
16 they don't remember. That will be my position as to
17 that specific issue.

18 THE COURT: All right.

19 MR. KENT: Do you want me to keep going
20 or do you want me ---

21 THE COURT: Yes, keep going.

22 MR. KENT: Judge, as we look at --- and I,
23 I admittedly acknowledge that the statement that
24 they have given in State's Exhibit Number 2 should
25 come in. The problem is, there's all types of

1 additional statements now that they're trying to get
2 in, they're trying to attribute to Mr. Toney. First
3 specifically dealing with the Jackson versus Denno
4 hearing, when they were talking -- when Major
5 Dellinger was testifying he said initially when my
6 client gave his initial statement he was not under
7 arrest, he was not in custody, therefore Miranda had
8 not been triggered.

9 THE COURT: When?

10 MR. KENT: When he gave his initial
11 statement.

12 THE COURT: Well, they gave the Miranda so
13 that's kind of a moot point.

14 MR. KENT: Well, and this is a new one,
15 I'm sorry again, Judge. What I'm saying is after he
16 gave that statement and he was put under arrest and
17 later then asked other statements, and I think the
18 trigger for Miranda is words and/or action which are
19 reasonably likely to elicit an incriminating
20 response, they take him back to this house with this
21 search warrant looking for weapons possibly utilized
22 in the shooting according to them, it is our
23 position that he should have been re-mirandized at
24 that point in time, that he should have been
25 re-mirandized. According to them he wasn't under

1 custody, he wasn't in custody, he didn't ---

2 THE COURT: He was then.

3 MR. KENT: At a later point in time. The
4 testimony ---

5 THE COURT: At the house he was not free
6 to go.

7 MR. KENT: And at that point in time it's
8 my position that he should have been Mirandized at
9 that point in time when they took him back to the
10 residence. And at that point he was, he was being
11 interrogated so at that point in time they should
12 have mirandized.

13 THE COURT: All right. That's what I want
14 you to tell me about. Where's the evidence that he
15 was being interrogated? Or excuse me, however you
16 want to call it. What is the evidence -- that's
17 what I was listening for very carefully. What is
18 the evidence that he made the statement that's not
19 the gun you're looking for, it's in the other room?
20 Where is the evidence that he was being questioned
21 at that point?

22 MR. KENT: Well, there's two things,
23 Judge. It's one, well, clearly from the testimony
24 they're taking him around the house and showing
25 these guns. And number two, Judge, when we talk

1 about Miranda it's not just custody that triggers
2 Miranda, it's words and/or actions which are
3 reasonably likely to elicit an incriminating
4 response.

5 THE COURT: And you're saying looking for
6 guns —

7 MR. KENT: No, I'm saying —

8 THE COURT: Looking for guns is likely to
9 lead to incriminating response?

10 MR. KENT: If we take the testimony of the
11 major and use it in the totality of the
12 circumstances of if we take it as true what they're
13 saying was, this individual had just given a
14 confession and based upon this confession he told us
15 the murder weapon was at his residence and the
16 murder weapon was this specific type of gun and we
17 take him to his residence? Judge, that totally —
18 they're looking for incriminating information. That
19 triggers Miranda. When you take — it's words
20 and/or actions. It's not just words, it's words
21 and/or actions which are reasonably likely to elicit
22 an incriminating response. So if you take someone
23 back who, according to this testimony, we're taking
24 him back to the residence because we're looking for
25 the murder weapon and he just happens to give a

1 confession of a murder weapon. That's why they
2 wanted him to go back to the residence or they
3 wouldn't have taken him with him. They took this
4 person with them to the residence; he was with them.

5 THE COURT: I understand, you said that.
6 They took him with him so ---

7 MR. KENT: That's ---

8 THE COURT: That in and of itself is
9 calculated or reasonably calculated to lead to an
10 incriminating statement?

11 MR. KENT: Words ---

12 THE COURT: Wouldn't you say that most
13 people in that spot would just keep their mouth shut
14 and say in their mind, I sure hope they don't find
15 that, instead of saying you're looking for the wrong
16 one?

17 MR. KENT: Well, Judge, that's not what
18 Miranda characterizes. It doesn't say what they
19 should have done; that's the whole point of Miranda.
20 We don't look at people in different vacuums. You
21 don't look at someone who's as intelligent as a
22 judge, a lawyer, officer, you look at worst case
23 scenario. These are actions likely to elicit an
24 incriminating response. Why else would the officer
25 feel it's necessary to take a man who is under

1 arrest for murder to the residence to show him
2 what's in the house. There's no reason for them to
3 take him to his residence.

4 THE COURT: Well, if you accept as true
5 what you just said that he's already identified an 8
6 millimeter army style rifle, wouldn't they have
7 inevitably found it?

8 MR. KENT: Well, that would be of course a
9 separate argument that we don't think that should be
10 admissible.

11 THE COURT: Because of the other problem?

12 MR. KENT: Yes, sir, Judge.

13 THE COURT: What is, what do those
14 statutes say if he gave a -- can they testify about
15 what he told them and just not get the writing in?

16 MR. KENT: I think they could, Judge.
17 This is just my gut reaction, Judge; but I think
18 realistically, I mean, if I can read it again so --
19 under the provisions of 8-1-50 an 19-1-80 having no
20 statement such as as referred to any of those
21 sections shall be admissible in evidence in any case
22 nor shall be referenced to it in the trial of the
23 case.

24 THE COURT: So no reference at all?

25 MR. KENT: They can't make a reference to

1 the statements. I hate to shoot myself in the foot,
2 but I think realistically they probably can mention
3 the oral statements.

4 THE COURT: All right.

5 MR. KENT: Normally they can — Judge,
6 this statute does not speak to oral statements
7 whatsoever, it only speaks to written statements and
8 written statements.

9 THE COURT: Well, there are a lot of cases
10 cited under 8-15-50 and I obviously will have to
11 read those; and 19-1-90 is the one that I'm more
12 familiar with. All right, anything else at this
13 point, Mr. Kent?

14 MR. KENT: You want to hear the rest of
15 our arguments? And this is very similar to the rest
16 of the argument.

17 THE COURT: Yes.

18 MR. KENT: And I don't know, realistically
19 these will be Jackson motions of from what Jackson
20 discovery motion and some motions is up to tells
21 some of the sometimes several just attributed to my
22 client do you want to hear those now?

23 THE COURT: Yes, sir.

24 MR. CHANDLER: Judge, as during the
25 testimony unfortunately what we were heard a lot of

1 information that I didn't hear till just now today.
2 There's a lot of oral statements that they're
3 attributing to Mr. Toney, things that they are
4 saying he told them in passing, passing
5 conversations.

6 THE COURT: Such as?

7 MR. KENT: The description of the weapon,
8 the fact -- well, the big one is the description of
9 the weapon that out of nowhere that they say we
10 specifically asked him to describe the weapon was at
11 in point but when to writing at no point to my him
12 sign in information there were.

13 THE COURT: Well, it's in the statement
14 8-millimeter rifle behind my seat.

15 MR. KENT: Well, Judge, what's not in the
16 statement is they're saying specifically also said
17 that the murder weapon that I utilized is at my
18 residence sentence there's nowhere in whatsoever.

19 THE COURT: All right, let me, so the
20 description, specific description of the weapon
21 given orally and the whereabouts of the weapon,
22 isn't that in the search warrant affidavit? I
23 assume it to be.

24 MR. KENT: Well, you can put anything in a
25 search warrant and affidavit. That's not

1 necessarily a statement from him.

2 THE COURT: Well, what do they put in the
3 affidavit?

4 MR. KENT: You mean, what did they ---

5 THE COURT: Yeah, what's, I've not seen
6 it. What is in the search warrant and affidavit?

7 MR. KENT: You said you've seen it or have
8 not?

9 THE COURT: I have not seen it.

10 MR. KENT: I'm sorry. I'll hand State
11 Number 3.

12 THE COURT: I need to take a minute to
13 read this.

14 (Pause.)

15 THE COURT: The affidavit signed by
16 Sergeant Burnish says Lee County investigators
17 learned through the investigation that Ernest Toney
18 was having an affair with the wife of the deceased.
19 While interviewing Ernest Toney he admitted to Lee
20 County sheriff's investigator that he shot the
21 victim with the weapon being sought and the weapon
22 is located at his residence of [REDACTED]
23 Why didn't he, why didn't he put in there what kind
24 of weapon it was? Mr. Fata, you may not be able to
25 answer that but ---

1 MR. FATA: I don't know, Judge. You know,
2 these statements don't take place in a vacuum.

3 THE COURT: I understand, I understand
4 that, but I'll go back to Mr. Kent. Okay, go ahead,
5 Mr. Kent.

6 MR. KENT: And Judge, that's our concern
7 just to make it very candid.

8 THE COURT: How about the bullets?

9 MR. FATA: That's another statement.

10 THE COURT: Why didn't y'all tell him
11 about him statement their finding the bullets?

12 MR. FATA: You asking me, Judge?

13 THE COURT: Yes, sir.

14 MR. FATA: I don't know.

15 THE COURT: I mean, as a discovery matter,
16 as a discover matter, why didn't y'all tell him
17 that?

18 MR. FATA: Well, we did show him. We gave
19 him a copy of the, gave Mr. Kent a copy of the
20 consent when he turned over the DNA test and stuff.
21 The bullets are on it. Where is it? He's got a
22 copy of it.

23 THE COURT: No, I'm talking about
24 Investigator Capps testified. Well, that was
25 another thing that he also mentioned to us is where

1 he would find the bullets.

2 MR. FATA: As far as that's concerned, I
3 don't know why it's not in the statement. I
4 don't -- when he told me the other day about he
5 pointed out the gun, that's all he said. He didn't
6 say anything about he pointed out the bullets.

7 THE COURT: Well, the officers need to
8 understand that whatever the defendant tells him
9 they've got to memorialize or relate it to the
10 Solicitor's Office, period. That's why defense
11 lawyers always stand up and say, I just want to make
12 sure I've heard everything because I don't want
13 things to come dripping, dropping out at trial, and
14 during the Jackson versus Denno hearing we hear
15 about bullets. They can't be that way.

16 MR. FATA: Well, I understand, Judge, but
17 it's hard to, you know, these officers give you a
18 statement that say this is what he said, and you
19 talk to them and said this is what we were told and
20 then, you know, a week ago I hear about the, I hear
21 about ---

22 THE COURT: Listen, I'm not saying it's
23 your fault, but law enforcement as a whole needs to
24 understand how important this is at the trial level
25 and the appellate level. Just doesn't sound good.

1 MR. FATA: They need to make notes.

2 THE COURT: Right.

3 MR. FATA: They need to make notes about
4 all conversations and keep a log.

5 THE COURT: They do. And I know everybody
6 is busy, but that avoids the situation we're in now
7 where something else pops up about bullets. And he
8 said, well, yeah, the man also told me where to find
9 the bullets. They need to write the down, just do.
10 Because if it's important enough to say from this
11 chair it's important enough to write down.

12 MR. FATA: Yeah, I can, I agree one
13 hundred percent with you there.

14 THE COURT: Okay, Mr. Kent, you can go
15 ahead.

16 MR. KENT: Thank you, Judge. And when I
17 was questioning the major I think you rebate I
18 separated it into three statements. What I stated
19 was the second statement, the actual written
20 statement which I've already acknowledged.

21 THE COURT: First statement was a
22 run-through.

23 MR. KENT: Was a run-through.

24 THE COURT: After Miranda.

25 MR. KENT: After Miranda because a lot of

1 stuff before the run-through that's not in the
2 written statement.

3 THE COURT: Not a lot. He said Mr.
4 -- Major Dellinger said he told me what kind of gun
5 it was, and in the statement he only wrote 8
6 millimeter but it was actually 8 millimeter army
7 style rifle.

8 MR. KENT: Correct, I would object to that
9 information.

10 THE COURT: Well, Major Dellinger said
11 that's because when he was writing it down word for
12 word, that's what Mr. Toney said. He didn't insert
13 anything else that he'd already heard him say.
14 That's what I heard anyway.

15 MR. KENT: Okay.

16 THE COURT: And what else was left out of
17 the written statement?

18 MR. KENT: I'm trying to read my notes.

19 THE COURT: Okay.

20 MR. KENT: Judge, I think that was the
21 major thing. And then there was just, realistically
22 the testimony was just very splotchy because he just
23 doesn't remember and I can understand, this is from
24 two years ago. He doesn't remember information such
25 as what exactly he told Mr. Toney, did he tell him

1 he was a suspect or wasn't he a suspect, what
2 information had he gone through with Lorie Rogers.
3 It's just that type of information. It's impossible
4 to cross-examine because it's not written down what
5 these statements they're trying to attribute to my
6 client. So I guess my question is, what
7 specifically does the State want to attribute as
8 statements that were given by Mr. Toney so I don't
9 know -- I don't want to have a surprise in front of
10 the jury because ---

11 THE COURT: Well, a Jackson versus Denno
12 issue, the written statement to me is fine.

13 MR. KENT: I have no ---

14 THE COURT: At least for admissibility.

15 MR. FATA: Yes, sir.

16 THE COURT: The problem I perceive or
17 probably title 19 issue which I'll have to read
18 about, Mr. Fata did not have a chance to respond to
19 those. The verbal statement given before the
20 written statement which evidently was memorialized I
21 think you gentlemen said last week.

22 MR. KENT: No, that was the statement,
23 that was the statement you're talking about was the
24 statement at the house, the residence, that
25 memorialized ---

1 THE COURT: The run-through, what was the
2 testimony about that?

3 MR. KENT: The first run-through never
4 been memorialized. It's never been ---

5 THE COURT: The first you heard about it
6 was today?

7 MR. KENT: The first I heard about it was
8 run-through testimony.

9 THE COURT: So Mr. Fata will have to tell
10 me about that and whether or not he's going to go
11 into that.

12 MR. KENT: Yes, sir. And then of course,
13 the third statement that was mentioned about was --
14 and I think we've already addressed that, Judge, was
15 the statement that Mr. Toney specifically told them
16 where the firearm was inside of his residence.

17 THE COURT: In the house?

18 MR. KENT: In the house. The problem that
19 we have in the house this is after he's actually in
20 custody. There's no question about this. After the
21 search warrant, taking the search warrant into his
22 residence.

23 THE COURT: But the key interrogation/
24 questioning, not custody.

25 MR. KENT: Correct.

1 THE COURT: If it's custodial
2 interrogation perhaps he should have been
3 re-mirandized. I thought about that enough. The
4 question is whether or not that statement about
5 words or conduct was reasonably, a reasonable person
6 would have thought it would elicit some type of
7 response.

8 MR. KENT: And our second problem with
9 what one, Judge is, and you've seen State's Exhibit
10 Number 4 which is to be honest, I still don't even
11 know what statement is they were gonna — and they
12 don't know what the statement is they would be
13 intending on utilizing against Mr. Toney. I think
14 the testimony he said something like or something of
15 this nature, it was two years ago, I'm not exactly
16 sure what he actually said but I will —

17 THE COURT: Well, I think that the — I
18 don't think that their testimony has to be word for
19 word what your client said. I think it's clear from
20 Major Dellinger, Investigator Capps, and I don't
21 think Investigator Pitman was there.

22 MR. KENT: I don't know, he didn't
23 testify.

24 THE COURT: He went somewhere else,
25 something. But the gist of it is, it doesn't have

1 to be exact word for word; that can't be the
2 standard. But Investigator Capps and Major
3 Dellinger were very clear. They said that Mr. Toney
4 said something to the effect that it's not any of
5 those, what you're looking for is in the other
6 bedroom.

7 MR. KENT: And Judge, I guess our ---

8 THE COURT: That's what I assume they're
9 seeking to introduce and they can't make it anymore
10 specific, they can't make it anymore specific.

11 MR. KENT: Then I would additional
12 objection with that statement being turned over last
13 week on a two year old murder case. And the only
14 reason that was written down and codified is because
15 Mr. Chandler and I were here and Mr. Fata alerted
16 them and said you got to write this down.

17 THE COURT: Mr. Fata, when is the first
18 time that you let the defense know, not when you
19 knew, but when the Defense knew that Mr. Toney made
20 comment in the house, that's not the gun you're
21 looking for, it's the one, you'll find it in the
22 closet such and such?

23 MR. FATA: Your Honor, the day that
24 Mr. Chandler and Mr. Kent and myself, Major
25 Dellinger, and Investigator Capps were together

1 discussing the case.

2 THE COURT: When?

3 MR. FATA: Whenever that -- about a week
4 ago. Whenever they came. Last week?

5 MR. KENT: Last week.

6 THE COURT: Well, why -- that's an
7 incriminating statement.

8 MR. FATA: And that's when I found out
9 about it and I immediately told them to write it
10 down and he did and I forwarded it to them.

11 THE COURT: Well, rhetorical question or
12 not, why didn't they tell you before last week that
13 an incriminating statement like that was made.

14 MR. FATA: I don't know. I mean, that's,
15 that's them. And I wouldn't have known -- didn't
16 know he made -- I wouldn't have know he made it.

17 THE COURT: I'm not talking about what you
18 knew.

19 MR. FATA: Well, I'm, what I'm trying to
20 say is, if I had thought about it I would have asked
21 them about, well, how did you find the gun. I just
22 assumed that they told him about the Mauser at the
23 interview, initial interview at the police
24 department, and went in the house and there it was.

25 THE COURT: Was there any other

1 8 millimeter style, army style rifle in the
2 residence? Is there any evidence of that on the
3 interview?

4 MR. FATA: No evidence that I know of.

5 THE COURT: All right.

6 MR. FATA: In fact, on his testimony,
7 Mr. Toney's testimony was, he had a shotgun, a
8 handgun, and the Mauser. He doesn't describe any
9 other guns in the house.

10 THE COURT: Okay. All right, Mr. Kent,
11 any other points?

12 MR. KENT: No, sir, not on any of those
13 issues.

14 THE COURT: And the issue of prejudice
15 about not finding out about what your client
16 allegedly said about where to find the weapon,
17 what's the prejudice? Of course the Defense can
18 be — the sanction could be exclusion of the
19 evidence for not abiding by Rule 5, period. But
20 other than an application of Rule 5 wiped out, what
21 is the prejudice, do you have any prejudice?

22 MR. KENT: Judge, the only prejudice —
23 and realistically, and I told this to the
24 solicitor — this is a difficult case for recently
25 as last week we're still trying to come up with

1 theories one the case. We get that information and
2 it really hammers the defense because you have to
3 switch streams in the middle and say, okay, they're
4 trying to say they contested and to show where the
5 firearm is. It just throws your defense off to be
6 perfectly candid.

7 THE COURT: All right. Okay, Mr. Fata,
8 talk to me about title 9 and title 19.

9 MR. FATA: Your Honor, absolutely familiar
10 with Title 8. I just read Title 19, 19.1-80 and it
11 says that before an examination, before examination,
12 cross-examination, the witness was given a copy of
13 the statement and allowed to read it. The testimony
14 was he was allowed to read the statement and then he
15 signed it at the time it was done. He has not been
16 cross-examined or examined on that statement today
17 so, you know, I don't know if that section
18 technically ---

19 THE COURT: All right, how about 19-1-90?

20 MR. FATA: Basically that says if you
21 don't comply with 18-15-50 and 19-1-80 that the
22 statement doesn't come in. I'd have to read 8-15-80
23 which I don't -- 8-15-50. I just don't have it, not
24 familiar with it at all. But I would say that the
25 State has complied with 19-1-80 and because the

1 defendant has not been examined or cross-examined on
2 the statement. And of course, of course the Defense
3 has already had a copy of that statement. They had
4 a copy of the statement when we gave them Rule 5.

5 THE COURT: Okay.

6 MR. FATA: And provided to their lawyer,
7 and that's the same providing it to the defendant.

8 THE COURT: Okay. How about Mr. Kent's
9 argument that the defendant should have been
10 re-Mirandized at the house?

11 MR. FATA: Well, Your Honor, I don't know
12 that you're entitled to Miranda warnings every time
13 you're -- I think you're entitled to Miranda
14 warnings one time, and he was given those warnings
15 at the initial interview. Now, he -- right after
16 the initial interview the search warrant is gotten
17 and the search warrant is executed so you have a
18 continuation from the initial interview all the way
19 through the search warrant. So it's not like the
20 interview on, the initial interview, then you wait
21 two or three days, get it, carry him to the house
22 and then execute the search warrant. It's a
23 continuation of that one event.

24 THE COURT: Is there any evidence as to
25 why they took him there? I mean, was there any

1 evidence from the stand to why they took him?

2 MR. FATA: Probably, Your Honor, probably,
3 Your Honor, that instead of having to break in,
4 he — just use the key to get in. I guess they could
5 have taken, could have demanded his key there and
6 just gone by himself but I think it's of courtesy to
7 him they allowed him to accompany them so that they
8 don't ramble through whatever and they're just
9 looking for those guns.

10 THE COURT: Okay. All right, how about
11 the run-through statement, why wasn't that told to
12 the Defense?

13 MR. FATA: First of all, I wasn't aware

14 —

15 THE COURT: I know, and —

16 MR. FATA: I'm not —

17 THE COURT: We need to stay away from what
18 you were aware of.

19 MR. FATA: That's correct, I know.

20 THE COURT: Law enforcement issue.

21 MR. FATA: Right. Statements aren't given
22 in a vacuum, Judge, and you have to — when you get
23 to individual in you have to set the scene. You
24 have to tell them why they're there, you get
25 preliminary information, and then, you know, what

1 happened, were you there, so forth. He tells them
2 and then say, all right, let's write that down. My
3 point is that the written statement is probably
4 almost word for word for as to what he told in the
5 beginning.

6 THE COURT: Well, Major Dellinger said
7 it's pretty much the same but he didn't write down
8 anything other than what Mr. Toney said even if
9 something in what he wrote down was not in what
10 Mr. Toney said beforehand.

11 MR. FATA: Correct. And I think in
12 deference to Major Dellinger he was, he was going to
13 write down exactly what was dictated to him, make no
14 changes and when -- for example, he said 8
15 millimeter rifle, probably at prelim he said 8
16 millimeter -- I'm gonna say rifle -- when he was
17 dictating he said 8-millimeter rifle. So Major
18 Dellinger just wrote exactly what he said, not that
19 much difference between an 8 millimeter rifle and a
20 8-millimeter Mauser rifle, army style rifle.

21 THE COURT: I agree with you there.

22 MR. FATA: So ---

23 THE COURT: But I'm talking about at
24 least we took an oral statement before we took the
25 written statement.

1 MR. FATA: And we're not asking to have
2 any of that put in.

3 THE COURT: Okay. How about the statement
4 about, at the house about where to find the gun, not
5 turned over till last week. We may have already
6 gone over that.

7 MR. FATA: Well ---

8 THE COURT: Not the written version of it,
9 but the fact that Mr. Toney said what he said at the
10 house, why was that not given to you until last
11 week?

12 MR. FATA: These officers, Your Honor,
13 frankly, have a lot to do, may not think about.
14 They don't keep logs and they probably should keep
15 logs.

16 THE COURT: This is Mr. Toney's only
17 murder case.

18 MR. FATA: Mr. Toney's only murder case
19 and probably the most important thing in his life up
20 to this point, and I can understand that. But you
21 know, in deference to these officers, this is not
22 their only murder case. You know, we've got, we
23 have several rash murders in Lee County, rash of
24 break-ins, a lot of drugs. And we've got a
25 sheriff's department that's trying limited funds,

1 limited deputies. And these guys, these deputies,
2 have so many things, so many responsibilities, and
3 it probably just slipped his mind; and but, as soon
4 as we found out about it we turned it over.

5 THE COURT: All right.

6 MR. FATA: And I'll be honest with you, I
7 don't think the officer was — you know, it just
8 came to him when we were having that meeting. It
9 probably just came to him.

10 THE COURT: I'm not — certainly not
11 questioning his, you know, voracity. I'm just
12 saying it's an important enough thing.

13 MR. FATA: Oh, it should have been turned
14 over.

15 THE COURT: It's very incriminating.

16 MR. FATA: It should have been turned over
17 day one, but you know, we just...

18 THE COURT: Okay. Statement about the
19 bullets, that's today.

20 MR. FATA: That's today.

21 THE COURT: So I guess, is there one thing
22 I need to find out is there anything else?

23 MR. FATA: And I will find that out if you
24 give me, you know, during the break I'll find that
25 out.

1 THE COURT: How about, are you gonna seek
2 to use the statement about the bullets?

3 MR. FATA: No, sir, all I was going to do
4 is use the statement -- I'll tell you know, I won't
5 use the statement about the bullets, but I would
6 like to use the statement about the pointing out the
7 rifle.

8 THE COURT: All right. Okay, all right.
9 Mr. Fata, anything else that you'd like to note as
10 far as this argument?

11 MR. FATA: No, sir, I think that covers
12 it.

13 THE COURT: Mr. Kent, any response?

14 MR. KENT: Very, very briefly, Judge. I'm
15 not attacking the voracity of these officers. I
16 think the way Mr. Fata put it is exactly what
17 happened. I think Investigator Capps remembered
18 while we're still sitting here what exactly he said,
19 I still mean it. With that being said, Judge,
20 during the testimony something I found very
21 interesting, is they talked about finding the DNA
22 information as well as the picture. And at that
23 point in time they went to Mr. Toney and had him
24 sign a search warrant return to allow him to take so
25 we took time to write this stuff, but he gives this

1 very important statement saying here's the murder
2 weapon, and that's not written down. It's hard to
3 juxtapose those things that these officers are too
4 busy with the hard stuff to take the time to write
5 down something as innocuous as I love you daddy
6 letter and a DNA sample and have him write it down,
7 sign for it, and say it's okay to take it. But then
8 he confesses that this is the murder weapon, this is
9 where I used it, this is the murder weapon I used to
10 kill this person, and we don't write that down.
11 It's hard to juxtapose those two things.

12 MR. FATA: And ---

13 MR. KENT: And then, I'm sorry.

14 THE COURT: Go ahead.

15 MR. KENT: And then finally, just for the
16 record, Judge, at one point we asked the solicitor
17 was there any testimony into the record about why
18 they took Mr. Toney back to the residence and gave
19 in to, like from defense point, there's nothing in
20 the record when they were testifying as to why they
21 took Mr. Toney back to the residence. So there was
22 no evidence offered at that point just for the
23 record.

24 THE COURT: And you're saying just like
25 you said earlier, just as reasonable conclusion them

1 trying to see what else they can get out of him, you
2 already made that argument.

3 MR. KENT: But there's no evidence
4 specifically, they didn't offer why.

5 THE COURT: Yes, sir.

6 MR. FATA: And of course, Your Honor,
7 there's no reason not to take him. I mean, it's his
8 house. You know, they're executing the search
9 warrant. He has a right to be there to see what
10 they're doing. They're actually, actually they're
11 serving the search warrant on him so when he goes to
12 the house he has a right to be at the house to see
13 what they're doing. The other thing about —

14 THE COURT: He was in custody though.

15 MR. FATA: He was in custody. The other
16 thing about the writing down the baby picture and
17 the DNA stuff and writing down the 8 millimeter
18 Mauser bullets, the reason that was written down and
19 he was asking consent to it because it was outside
20 the scope of what they were looking for in the
21 search warrant. They were looking for the specific
22 Mauser rifle. And so, you know, anything else, they
23 weren't allowed to seize anything else so they had
24 to get permission to do that.

25 THE COURT: All right. I'll give you the

1 last word, Mr. Kent, that'll be it.

2 MR. KENT: Nothing further, Judge.

3 THE COURT: All right. Anything else
4 before I rule on these other things? Any other
5 motions you have, Mr. Kent? What I want to avoid is
6 tomorrow morning -- at 9:30 --

7 MR. KENT: I agree, yes, sir.

8 THE COURT: I'm gonna rule on this this
9 afternoon, but 9:30 tomorrow morning there will be
10 no more motion making.

11 MR. KENT: Let me in an abundance of
12 caution, Judge, and I'm not sure we may -- at this
13 point in time I'd like a motion in limine unless the
14 State can offer a rational reason. Some of the
15 evidence that I think the State is and they have
16 turned over to us and you've heard some of it
17 through the DNA evidence about the minor child
18 K█████ (ph). There's a minor child in the situation
19 named K█████ who is the daughter of defendant Ernest
20 Toney as well as the victim's wife Lorie Rogers so
21 they have a child in common and that child in common
22 occurred while she was married to Gregory Rogers.
23 I'm not sure if they're planning on saying this may
24 be motivation for the killing or the shooting or
25 something of that nature, but I would make a motion

1 in limine that that testimony is irrelevant at best.
2 And so at this point in time the defendant would
3 offer a motion in limine to exclude any testimony
4 unless there's a proper showing of motivation of the
5 shooting or something of that nature.

6 THE COURT: All right, Mr. Fata.

7 MR. FATA: Your Honor, this — and I don't
8 know how it's gonna to play out, but there was a
9 long standing relationship between Mr. Toney and the
10 victim's wife. In fact, they had a child together.

11 THE COURT: How old?

12 MR. FATA: Six years old now.

13 THE COURT: Now so four or so back then?

14 MR. FATA: Back then about four, yes, sir.
15 And I don't know how the evidence is going to come
16 out, but there was, there was some issues between
17 the parties regarding the child, and you know, what
18 ratio. It also has —

19 THE COURT: What parties?

20 MR. FATA: Mr. Toney and Ms. Rogers.

21 THE COURT: Not Mr. Rogers?

22 MR. FATA: And Mr. Rogers too.

23 THE COURT: Okay.

24 MR. FATA: And the fact that Mr. Toney is
25 in this neighborhood, he's from over in Sumter, over

1 in Sumter near, near that road that goes down to
2 Santee, what's he doing in this neighborhood.

3 THE COURT: Well, he had every right to be
4 there; didn't he?

5 MR. FATA: Oh, it's a free country. Like
6 he said, he can be anywhere he wants to be, but he's
7 on a dirt — he's on a dead-end street a tenth of a
8 mile from Ms. Rogers' house, a house that had
9 contained his paramour and daughter. And you know,
10 it may be something we don't use; but I just don't
11 know how, I just don't think, I think it's premature
12 motion in limine.

13 THE COURT: Well, I'll certainly be happy
14 to entertain any objections at the time, but the
15 jury can't try the case in snapshots.

16 MR. KENT: I understand.

17 THE COURT: If there's some —

18 MR. FATA: It's a motive, Your Honor.

19 THE COURT: Intends to prove something in
20 issue —

21 MR. KENT: I completely agree.

22 THE COURT: —it may come in, but if
23 you've got a 403 objection saying it's prejudicial
24 I'll entertain that at the appropriate time but I
25 don't see any reason at this point to exclude it as

1 being irrelevant because I just don't know. And I
2 don't — if it's relevant to prove why Mr. Toney may
3 have been in the area that may end up helping you;
4 otherwise, the record was silent on that. The jury
5 may have no other thing to conclude but that was he
6 was lying in wait for Mr. Rogers.

7 MR. KENT: I understand.

8 THE COURT: So maybe Mr. Fata has to
9 tackle that issue himself.

10 MR. FATA: Like I say, Your Honor, I just
11 don't know how it would be used, if it would be
12 used, and at this point in time it would be
13 premature in limine.

14 THE COURT: Well, let's — I agree, I
15 think it is premature.

16 MR. KENT: That's fine, Judge. It's a
17 murder trial, and I was just trying to cover every
18 basis I possibly could.

19 THE COURT: If Mr. Fata did not offer it
20 and wanting to plow the hand with the jury that
21 Mr. Toney was lying in wait, then you would say,
22 hey, wait a minute, they had child in common so he
23 had a reason to be around there. I mean, you would
24 want that to come in.

25 MR. KENT: Just covering every base I

1 possibly can, Judge. You're probably correct. And
2 this just popped in my head, Judge, just now, and
3 again, just to cover the record, and this is not
4 intentional but I think it just popped in my head.
5 I think there is going to be the allegation of
6 course of the adulterous conduct that they're
7 alleging my client committed adultery during all
8 this. I guess that would be Lyle evidence. That
9 would be a prior bad act and they would seek to
10 introduce against.

11 THE COURT: Well, it's not, it's not a
12 common scheme or plan in so far as a shooting is
13 concerned. But the jury does not need, the jury
14 should not base its decision he's guilty because he
15 is having an affair, I agree with you there. So
16 it's not Lyle evidence because it doesn't tend, it's
17 not common scheme or plan or intent or — it might
18 be motive, I don't know, but it's not a prior bad
19 act that shows any type of passion. It's gonna come
20 in. You object to the evidence about him having —
21 Mr. Fata said the child was four. I haven't heard
22 any evidence that he and she had any ongoing
23 relationship; it's not in the record yet. I don't
24 know what the State is going to seek to introduce.
25 For all I know it may have ended when the child was

1 conceived; I don't know. You know, I never heard
2 all of this obviously 'cause...

3 MR. KENT: I guess my comment then is, if
4 it's being offered for Lyle evidence, I understand
5 Lyle evidence must be proved by clear and convincing
6 evidence and rationale too so to prove the
7 adulterous conduct I don't think the officer can
8 just say that we learned he had been having an
9 affair. I think they have to have it proven before
10 the officers actually offer the testimony.

11 THE COURT: Would Lorie be able to say
12 that?

13 MR. KENT: I agree to that one hundred
14 percent. I'm just making sure the first officer
15 doesn't say, hey, ---

16 THE COURT: To the extent it's Lyle
17 evidence, yes, and whether or not that be done, I
18 don't know; but it may be offered for res gestae,
19 you know, to prove the whole scenario.

20 MR. KENT: Right, as far as the
21 investigation, you know, he can say I talked to
22 Lorie and we got, based on that conversation we
23 contacted Mr. Toney.

24 THE COURT: I can't make a ruling on that
25 pretrial without ---

1 MR. KENT: Can you make a ruling on what
2 his — if that's the way they're going to offer it,
3 then I don't see how that would be admissible.

4 THE COURT: What?

5 MR. KENT: I think the way they're
6 attempting to say they're going to offer it, is the
7 officers would testify, I talked to Lorie and she
8 told me they were engaging in an adulterous affair.

9 MR. FATA: No, I didn't say that. I
10 didn't say that.

11 THE COURT: That's what she said.

12 MR. KENT: I thought that's what he just
13 said on —

14 THE COURT: Well, I'm not gonna do this at
15 pretrial stage.

16 MR. KENT: Okay.

17 MR. FATA: Yes, it's premature.

18 THE COURT: If Mr. Fata offers an officer
19 that says Lorie told me, then you can object to
20 hearsay.

21 MR. KENT: Correct.

22 THE COURT: Even though she's gonna
23 testify, what she has to say it may still be
24 hearsay. He just may be call her first; I don't
25 know.

1 MR. KENT: That's fine, Judge, I just want
2 to make sure.

3 MR. FATA: And I, just as an aside, and
4 I'm by no means an expert on this and I've just had
5 a chance read through it. 19-1-80, I think all this
6 applies if you're going to cross-examine the maker
7 of the statement.

8 THE COURT: But not 18-1-90.

9 MR. FATA: Right, but technically 191-80
10 is complied with.

11 MR. KENT: But it's both statutes 8-15-50
12 and ---

13 THE COURT: I understand and we've been
14 over all that. But what I'm trying to find out now
15 is there gonna be anything else because we are not
16 gonna do anything else without this jury sitting in
17 the box beginning at 9:30 tomorrow unless I make a
18 ruling adverse to the State and they choose to
19 appeal it.

20 MR. KENT: The last issue, Judge, and I
21 think we discussed this a little bit in chambers and
22 I think this is gonna actually have to be determined
23 based upon the ruling we make upon the State. If
24 for some reason you chose to exclude the statement
25 that Mr. Toney told them this is the firearm I used

1 or something of that nature, then I would have a
2 motion to exclude the actual firearm as you can
3 imagine because as we talked to you about it, they
4 would be offering SLED evidence where no one from
5 SLED will be able to specifically say this was the
6 weapon utilized in the murder. The only information
7 they will have that this firearm would be from Mr.
8 Toney.

9 THE COURT: You would also have evidence
10 that he gave the statement, the written, if I let
11 that in, where he said I reached behind my seat and
12 got my 8 millimeter rifle.

13 MR. KENT: Correct.

14 THE COURT: And they get a search warrant
15 based on that and they would have inevitably found
16 it, it may still come in.

17 MR. KENT: I can't dispute that, Judge,
18 you're exactly right, I apologize.

19 THE COURT: Okay. Anything else because
20 this is the time?

21 MR. KENT: With the exception of Mr. Fata
22 and I go through the pictures and look through those
23 now but with the exception of those what will come
24 in evidence.

25 THE COURT: Just to make it clear, when we

1 get here when 9:30 comes tomorrow morning I'm not
2 going to shy okay. You just say you need a few more
3 minutes to mark these pictures. I'm gonna do that.
4 I'm not gonna rule on anything, I'm not gonna rule
5 on anything else. If you say, well, we do have an
6 issue about some of these photos, we'll take them as
7 they come because we're gonna start with the jury at
8 9:30, period.

9 MR. KENT: And Judge, and if you wanted we
10 can go, if we have objections —

11 THE COURT: You have any objections this
12 afternoon I'll hear them.

13 MR. FATA: That's what we're gonna do.
14 We're gonna mark everything that we can agree on.

15 THE COURT: Okay. The reason I keep
16 repeating myself is this — a lot of people don't
17 think we're serious. 9:30 the jury is gonna sit
18 down to be sworn, and there's not gonna be anything
19 else.

20 MR. KENT: Perfect.

21 THE COURT: Okay? All right. I'll be
22 here, of course, this afternoon doing other things.
23 We're gonna break for lunch now, but we'll — I'll
24 be here. All right, we'll be back on the record at
25 2:15.

1 (Whereupon, a lunch break was taken.)

2 THE COURT: We're back on the record with
3 State versus Toney and you've indicated your client
4 will not be here.

5 MR. KENT: My client is not here and I
6 waive his presence, Judge. He knows what we're
7 going to do and he understands that.

8 THE COURT: Anything new that anybody
9 wants to bring out?

10 MR. KENT: Nothing on any of the motions
11 but we have marked evidence we can tell the Court
12 what we've premarked and ---

13 THE COURT: And more importantly, probably
14 a list typed or handwritten for the court reporter
15 before tomorrow would be a big help so who wants to
16 tell me about what you have marked and what you've
17 agreed on and what you haven't agreed on?

18 MR. FATA: I guess we need to wait on your
19 ruling, Judge, because if your ruling, if you rule
20 the statement doesn't not come in we're not ---

21 THE COURT: Okay. I'll go back and go
22 over all that.

23 (WHEREUPON, a recess was taken from the
24 proceedings.)

25 THE COURT: Okay, I did a fair amount of

1 research over the lunch break about the issue
2 concerning 8-15-50, 19-1-80 and 19-1-90 and first I
3 want to state that by no means am I questioning the
4 work ethic of law enforcement because I've said many
5 times -- I said it right here in Lee County -- that
6 I don't doubt their professionalism and their desire
7 to make sure that everything is explored that has to
8 be. Obviously we don't, or they don't investigate
9 cases like in dealing with TV and have everything
10 wrapped up in 20 minutes and have everybody in the
11 sun in effect called and do everything they want
12 whenever they want it done; but it's troubling
13 sometimes when statements are important enough to be
14 brought up at pretrial or shortly before and a
15 defendant has never been given notice.

16 Having said all of that, under the Jackson
17 versus Denno framework I don't think that the
18 defendant is really challenging the written
19 statement. I think that's what Mr. Kent indicated
20 before when he actually started, he started the
21 argument on the other points. The cases referencing
22 the title 19 provisions and the title 8 provisions
23 include but certainly not limited to, State versus
24 Banister. I'm trying to find the cite on that.
25 Actually, it's Banister versus the State, PCR

1 decision. That is a Supreme Court decision, 333
2 South Carolina 298, 509 S.E.2d 807 from 1998. In
3 that case the defendant was given a copy of his
4 statement, written statement, the morning of the
5 trial; and he alleged in his PCR proceeding that the
6 foregoing statutory provisions had been violated and
7 the Supreme Court denied his request for
8 post-conviction relief saying that he was not
9 prejudiced by the failure of the State to turn the
10 statements over until the morning of trial because
11 there was no evidence he did not have time to review
12 the statement in preparation for trial. And in that
13 case the police or the law enforcement officer when
14 took the statement never gave him a copy.

15 State versus Jones, I'm getting that cite.
16 I'll find that cite in just a minute but, the Court
17 stated — it's a South Carolina case. The Court
18 stated that a copy of the statement must be given
19 within a reasonable time after its making,
20 considering the surrounding circumstances and at all
21 of events far enough in advance to permit the
22 witness to read it before being examined. When did
23 you get your discovery materials, Mr. Kent?

24 MR. KENT: It's quite some time, Judge.

25 THE COURT: Sometime back I assume?

1 MR. FATA: Your Honor, it was ---

2 MR. CHANDLER: I have it.

3 MR. FATA: It was ---

4 MR. KENT: It was some time ago, Judge.

5 It wasn't recently. Clearly Rule 5 again is our
6 discovery answer ---

7 THE COURT: We'll get to that, and I hate
8 that ---

9 MR. FATA: We did a supplement on 2012
10 November. November 2011 is the date on my ---

11 THE COURT: All right. So at least the
12 statement was given back then, Mr. Fata?

13 MR. FATA: Yes, sir, it indicates
14 statement of 1(a), statement of Ernest Toney with
15 Miranda.

16 THE COURT: Okay. All right, State versus
17 Butler is another case where a defendant was
18 questioned at the police station and the copy
19 machine was broken, and the Supreme Court said that
20 as long as the witness has had time to prepare for
21 trial after receiving a copy of the statement,
22 failure to provide at the time made is not
23 reversible. In that case the defendant received the
24 statement three weeks after he gave it and four
25 months before trial. The court stated that South

1 Carolina code sections shall not be applied in a
2 hyper technical manner, the defendant had ample time
3 to prepare and there was no prejudice. There's a
4 1959 case that talks about title 8; and it basically
5 says that whether or not a statement was given at
6 the time it was made is a jury question. I've never
7 seen that apply since. I think that the current
8 state of the law as our courts have interpreted the
9 title 8 and title 19 issues is that as long as a
10 defendant has had a copy of that statement
11 sufficiently in time to prepare, then this need not
12 be excluded for its admissible and all other
13 grounds. So that's my ruling on that one. The
14 written statement will come in.

15 The issue about whether -- the defendant
16 has raised about whether or not the defendant should
17 have been re-mirandized at the house, I respectfully
18 disagree. Even if he should have been, I don't see
19 any evidence that any words, conduct, or anything
20 else would have reasonably been calculated to lead
21 to an incriminating statement on the part of the
22 defendant. The evidence as I heard it from
23 Mr. Capps and Mr. Dellinger was that they were
24 searching weapons and that Mr. Toney appeared to be
25 very sensitive to how the other weapons were being

1 handled and wanted to make sure that they were
2 properly taken care of and put back where they were
3 found. And at that point without any questioning
4 and frankly any comment being made by law
5 enforcement, Mr. Toney allegedly stated -- and I say
6 allegedly because he says he may say he didn't say
7 it -- that's not the one you're looking for, you'll
8 find the one you're looking for in the closet in the
9 back, something to that effect. The -- and those
10 were, the oral statements about the specific
11 description of the weapon -- excuse me, the specific
12 whereabouts of the weapon. Now the specific
13 description of the weapon, I believe that was part
14 of what our call and maybe Mr. Kent called the
15 run-through statement during which Mr. Toney
16 according to law enforcement gave an account of what
17 had occurred; and then after that was done a
18 verbatim account was elicited and that's what became
19 the statement. Mr. Kent objects to any testimony
20 about the content of the run-through statement on
21 the basis that it's never been made known to him
22 until today. Like Mr. Fata said, these question and
23 answer sessions are certainly not in a vacuum. The
24 only thing that was different from what I heard
25 between the run-through statement and the actual

1 witness statement was the written statement says an
2 8-millimeter rifle and the run-through statement
3 referenced 8-millimeter army style rifle, and I
4 think maybe law enforcement, according to what I
5 heard, didn't know it was a Mauser until they
6 actually seized it at the house. I don't think that
7 there's any Rule 5 violations or any other
8 evidentiary shortcoming about the run-through
9 statement.

10 As far as the Rule 5 question about the
11 statements given by the defendant at the house about
12 where to find the gun being a problem because the
13 defendant was not told about that statement until
14 last week, I find that the defendant has not
15 demonstrated any prejudice. The fact that his
16 defense may be evolving even as we speak, I don't
17 think is sufficient legal prejudice. Of course
18 Mr. Kent, you can cross-examine the witnesses on
19 that fact. You know, first, if he ever told law
20 enforcement about this last week and so forth so on
21 I'll allow that.

22 Now that gets us to the statement about
23 the bullets. Now that first came up today, and I
24 know that's not gonna be the linchpin of the State's
25 case. And according to Investigator Capps, the

1 defendant not only directed them to the whereabouts
2 of the gun, but he also said you'll find the bullets
3 in such and such a location. Isn't that what he
4 said, Mr. Fata?

5 MR. FATA: Yes, sir, that's correct.

6 THE COURT: Is that your recollection,
7 Mr. Kent?

8 MR. KENT: Yes, sir, Judge.

9 THE COURT: I don't, I don't see any real
10 harm, I don't see, how is that, how are you
11 prejudiced if that comes in, Mr. Kent, just kind of
12 want another keeping of ---

13 MR. KENT: It's gonna go along with all
14 the other objections.

15 THE COURT: In other words, just kind of a
16 little more drip and drop?

17 MR. KENT: I think one part — it's our
18 position with respect to the Court, if one part is
19 objectionable, it's all objectionable just so we
20 understand the Court's ruling on that.

21 THE COURT: All right, I'll think about
22 the statement about the bullets, and I don't think
23 that's gonna be a earth shattering ruling for the
24 State if I exclude that but; the statement was not
25 made known to the Defense until today, I'm likely

1 gonna exclude that. All right, is there any,
2 anything else we need to cover before we get into
3 the evidence?

4 MR. FATA: Nothing as far as the State is
5 concerned, no, sir.

6 MR. KENT: Just for record presentation, I
7 mean, protection, do you want me to reobject?

8 THE COURT: I think you'll have to.

9 MR. KENT: Okay.

10 THE COURT: I would tell you you don't
11 have to, there's a case that says what I say doesn't
12 count.

13 MR. KENT: That's my judicial respectful
14 understanding —

15 THE COURT: And I'll tell the jury in my
16 opening remarks to them that they're going to hear
17 lawyers object, and they -- and I'll tell them it's
18 your, the lawyers, plural, responsibility to do
19 that, and they're not to take offense to that
20 because it's something that you're required to do.

21 MR. KENT: Yes, Your Honor.

22 THE COURT: Okay? All right, you want to
23 go through the exhibits?

24 MR. FATA: I think Mr. Kent only has an
25 objection to two photographs.

1 MR. KENT: Do you want me to handle those
2 along with everything else? I think we can pretty
3 much agree to.

4 THE COURT: Are they marked?

5 MR. KENT: No, he can go ahead and mark
6 these, the ones I will object to.

7 THE COURT: Just for the purposes of this
8 hearing I guess make them Court's Exhibit.

9 THE COURT REPORTER: Okay.

10 THE COURT: Or if -- so they've not been
11 premarked?

12 MR. FATA: They have not been premarked.

13 THE COURT: How would you propose to do
14 it, Mr. Fata? State's exhibits?

15 MR. FATA: They're two -- yes, sir. There
16 are two sets of photographs. One would be two
17 photo-- one is of the scene and stuff like that.
18 The others are autopsy photographs so they would
19 come in at different times so it wouldn't be --

20 THE COURT: Photos of the scene?

21 MR. FATA: One is of the scene and one is
22 of an autopsy photograph.

23 THE COURT: All right, I got you.

24 MR. FATA: So they would come in at
25 different times so they wouldn't be right behind

1 each other.

2 THE COURT: And they're taken by law
3 enforcement?

4 MR. FATA: One is by the coroner and the
5 other is by law enforcement.

6 THE COURT: Okay.

7 MR. FATA: No, not coroner but the doctor,
8 the pathologist.

9 THE COURT: So these will be State's I.D.
10 5 and 6.

11 MR. FATA: Yes, sir. But then I don't
12 want to get them confused because they won't follow
13 behind each other in the regular chain of evidence.

14 THE COURT: Well, that's why I was asking
15 how do you want to mark them?

16 MR. FATA: Just do it, can we do it as a
17 Court exhibit, then we can change it at the time,
18 I'm sorry.

19 THE COURT: Okay. And I understand what
20 you're saying.

21 (Court's Exhibit Number 1 and 2 were
22 marked and made a part of the record.)

23 THE COURT: I'm going to hand the court
24 reporter back those other exhibits that are up here.

25 MR. FATA: Your Honor, while ---

1 THE COURT: Okay, I've got Court's Exhibit
2 1 which appears to be an autopsy photo, Court's
3 Exhibit 2 which appears to be taken of the victim
4 partially in a bag. And I'm assuming this is
5 alongside the road?

6 MR. FATA: Yes, sir.

7 THE COURT: Clearly I can't see asphalt.

8 MR. FATA: They just turned him over and
9 placed him in the bag. The reason why I want to get
10 the picture of the victim face up is it shows the
11 skid marks on his forehead at the scene that -- and
12 then it shows the bullet travel or where he was
13 shot. That's the reason why I want those.

14 THE COURT: Any there other photos of him
15 at the scene that you do not object to?

16 MR. KENT: One moment, Judge.

17 THE COURT: Can I see those?

18 MR. FATA: Let me get them.

19 THE COURT: Because State versus Torres
20 talks about the cumulative effect which is what I
21 have to look at.

22 (Attorneys confer.)

23 THE COURT: And what is it about the --
24 you said abrasions on his forehead?

25 MR. FATA: Yes.

1 THE COURT: Face.

2 MR. FATA: Abrasions on his face. They're
3 at the forehead showing where he hit the ground,
4 fell flat on his face and without breaking his fall.

5 THE COURT: And what would that tend to
6 show?

7 MR. FATA: That he died instant, just fell
8 forward.

9 THE COURT: Okay.

10 MR. FATA: That it's evidence of -- well,
11 it's evidence that he didn't break his fall, he died
12 instantly.

13 THE COURT: And the 30-30 shells, what,
14 just curious, what does that show?

15 MR. FATA: They were in the victim's
16 building [ph].

17 THE COURT: And the autopsy photos the
18 defendant does not object to appear to be where the,
19 where Mr. Rogers is cleaned up?

20 MR. FATA: That's correct.

21 THE COURT: Okay. Okay, your argument,
22 Mr. Kent?

23 MR. KENT: Thank you, Judge. And I'll
24 defer to the Court so you can tell me which number
25 is which but I will start, not with the autopsy

1 picture, but the other picture that they tend on
2 using from the side of the road. I think that's
3 number two.

4 THE COURT: Court's Exhibit Number 2.

5 MR. KENT: Dealing first, Judge,
6 specifically with Court Exhibit No. 2 our objection
7 to that would be two-fold. The first is, it's not
8 an actual depiction of what happened on the side of
9 the road. As you can see, the defendant has been
10 placed inside of a body bag. Inside of the picture,
11 candidly, has been turned on his back so it's a
12 manipulated picture. That's not how he was found on
13 the side of the road. If you look at some of the
14 pictures that the State has already given you, those
15 are how he was actually found on the side of the
16 road. So if anything, it's a manipulated picture.
17 It's not how he was found on the side of the road.
18 So that wouldn't -- that's not actually showing the
19 jury what actually happened, not telling the jury
20 what happened. He has a picture of how the
21 defendant was actually found on the side of the
22 road.

23 THE COURT: Okay.

24 MR. KENT: And then coupled with the
25 argument that they want to show the scars and so

1 forth to the side of his face, if you look at the
2 autopsy pictures that they've given you, those
3 actually show the scars and so forth on the side of
4 his face. And then -- I'll wait for you to look at
5 those, Judge.

6 THE COURT: I've seen them.

7 MR. KENT: And third, Judge, the graphic
8 impact of the pictures, the blood all over his face
9 and so forth, there is case law out there that
10 worries about the prejudicial impact of putting the
11 blood and so forth all over the face to the
12 defendant. I would have argument that exactly how
13 he was found which you can see the grass and so
14 forth of how he was manipulated and positioned by
15 law enforcement and actually placed inside of a body
16 bag. For those reasons, I also find it just
17 cumulative for what they actually want to show the
18 jury. They don't want to show the jury how he was
19 found out at the scene 'cause that's not how he was
20 found. They say they want to show the abrasions and
21 so forth or show that, how he fell, and that's in
22 the autopsy pictures already don't have a problem
23 with.

24 I think the cumulative nature of the
25 pictures, the graphic nature of the pictures, the

1 fact that there's actually a body bag included
2 inside of the pictures that they want to introduce,
3 and the graphic nature of the pictures would be our
4 objection to that.

5 THE COURT: Mr. Fata, what does Court's
6 Exhibit No. 2 show as far as abrasions that the
7 autopsy photo that he does not object to show?

8 MR. FATA: It shows how they appeared at
9 the scene and ---

10 THE COURT: What would that tend to prove?

11 MR. FATA: It would tend to prove that
12 they occurred from the fall and not by being
13 mishandled, not by the body being mishandled or
14 dropped or anything like that. And the only way we
15 can show that at the scene is, law enforcement can
16 show that at the scene is to flip him over; and
17 unfortunately, that's the only way you do it. You
18 have to manipulate the body to show all the injury.
19 In fact, the entry wound was on the front so you
20 have to flip him over to show the entry wound.

21 THE COURT: Okay. But I don't think for a
22 minute that anybody with law enforcement or
23 otherwise mishandled the body; but what is it about
24 this photo, Court's Exhibit 2 -- and I mentioned
25 Court's Exhibit 1, I meant to say Court's Exhibit 2.

1 Court's Exhibit 2 could have been taken after the
2 body was mishandled. You indicated initially that
3 you wanted to show that it shows that he fell on his
4 face.

5 MR. FATA: Correct. And it shows that
6 that's the way he was found at the scene. Of course
7 he was found face down but that's, when you turn him
8 over that's another injury that was found at the
9 scene.

10 THE COURT: But what does this injury have
11 to do with anything?

12 MR. FATA: Well, it has to do with how he
13 fell and what he had in his hands when he fell and
14 did he break his fall, all that sort of thing, his
15 hands -- and then that, you know, he falls to the
16 ground and falls directly on his head. He wouldn't
17 have got that skid mark, scrape on his head if he
18 had broken his fall.

19 THE COURT: Could not the doctor testify
20 in her opinion that weapon was, excuse me, that
21 wound was caused -- if she looks at the pictures of
22 him laying face down on the side of the road that
23 Mr. Kent does not object to, could she not testify
24 that those abrasions shown in the un-objected to
25 autopsy photographs are consistent with falling on

1 one's face without breaking the fall?

2 MR. FATA: Oh, absolutely, she could. But
3 you know, I mean, it's obvious in that photograph.

4 THE COURT: Okay. Anything in response,
5 Mr. Kent, to — and these are the road side
6 photographs that I'm talking about, Court's Exhibit
7 2.

8 MR. KENT: Correct. No, sir, Judge. As
9 we had mentioned, I think the State keeps saying
10 they want to show how he was found. That's not how
11 he was found. You know, we've agreed to enough
12 pictures that actually show the side of the road,
13 how he was found, and have not objected to the
14 pictures of the autopsy that show the abrasions on
15 his face. I think if you look at that picture with
16 the body bag, with the graphic nature of the blood,
17 the fact that the person has been flipped over, the
18 prejudicial impact is greatly outweighing the
19 probative value. The probative value that the State
20 is trying to show is he has abrasions on his face;
21 they're still gonna to be able to show that. But to
22 show that now, they're trying to show the blood and
23 gore in a body bag and a manipulated body.

24 MR. FATA: Well, but as an injury that
25 occurred at the scene as this incident, just like

1 the bullet hole is an injury at the scene.

2 Unfortunately, that's the way we have to show it,
3 with the photograph.

4 THE COURT: But is there going to be
5 testimony that that facial abrasion is fatal, is it?

6 MR. FATA: That it was fatal?

7 THE COURT: Yes, sir.

8 MR. FATA: No, sir.

9 THE COURT: All right, let's move to
10 Court's Exhibit 1 and your argument on that. That's
11 the autopsy photograph, you object to?

12 MR. KENT: Judge, that's just graphic. I
13 mean, that's just graphic. That's about as
14 prejudicial as it humanly gets. I don't know the
15 relevance of putting it in. The pathologist will be
16 able to testify to the nature of the injury of the
17 wound, with the color, with the graphic impact. The
18 prejudicial impact is colossal. They're still going
19 to be able to testify as to what happened. That's
20 just graphic, Judge.

21 THE COURT: What's it gonna tend to show?

22 MR. FATA: It shows the bullet track,
23 Judge. One, it shows bullet track through the neck,
24 upper body there across the lung. And the other one
25 shows the -- and I'm not a hundred percent sure if

1 this is correct, but I believe it shows the, where
2 the bullet fragments came from.

3 THE COURT: Okay. What is the -- I can
4 make out what the larger -- well, I can't make out
5 what the bottom photo is on Court's Exhibit Number
6 1.

7 MR. FATA: I think that's --

8 THE COURT: Is that a specimen?

9 MR. FATA: That's a specimen where the
10 bullets, the fragments, bullet fragments were taken
11 from I believe.

12 THE COURT: All right. And this is
13 obviously a dissected --

14 MR. FATA: Correct.

15 THE COURT: --view of his left neck and
16 carotid area.

17 MR. FATA: Correct, it just shows the
18 bullet track.

19 THE COURT: And is the pathologist --

20 MR. FATA: Gonna testify, and she has a
21 dia-- to be perfectly honest with the Court, she has
22 a diagram, you know, the body, whatever they call
23 it, anatomical body. It shows where the bullets
24 went in and exited and all that sort of thing.

25 THE COURT: Well, sometimes in my

1 experience, Mr. Kent, a defendant wants to keep
2 these photographs out and then jump on a soap box
3 and say, what photographs have you seen to support
4 this, ladies and gentlemen of the jury, there's no
5 evidence that this bullet killed him.

6 MR. KENT: Judge, I can assure you as an
7 officer of the Court, our argument is not gonna be
8 that he's not dead.

9 THE COURT: No, I'm talking about malice
10 aforethought killing with a weapon and this shooting
11 caused his death.

12 MR. KENT: That is not gonna be any part
13 of our defense strategy whatsoever. And to be —
14 Judge, at one, I'm sorry, our point is that they're
15 just graphic and I think the prejudicial impact is
16 greatly outweighed by what probative value they're
17 trying to -- if those were the only pictures, the
18 only thing they could have to show the bullet track
19 it would be one thing; but if they're simply trying
20 to show the bullet track, you can show that through
21 numerous methods.

22 THE COURT: I may have to wait on ruling
23 on that to let the State make a proffer as to what
24 value, if any, that photograph has to the
25 pathologist. And please keep in mind the State

1 versus Torres. It just says cautions — the
2 prosecutors don't mess up a perfectly good case by
3 putting in photographs that don't do anything but
4 arouse passion or horror. So that, I'll have to see
5 what the pathologist says about that one.

6 I've got some reservations about Court's
7 Exhibit No. 2. Mr. Kent has the burden of
8 establishing any probative value that is
9 substantially outweighed by the danger of unfair
10 prejudice. The autopsy photographs that were not
11 objected to do show a facial abrasion, as a matter
12 of fact, two of them do. And the two photos in
13 Court's Exhibit 2 are graphic perhaps maybe more so
14 by the body bag, but I'll reserve my ruling on that
15 till tomorrow.

16 MR. FATA: May I look at that photograph
17 one more time. I think there's one additional thing
18 that I wanted to do and I...

19 THE COURT: All right, that's Court's
20 Exhibit 2.

21 MR. FATA: Yeah. The one additional --
22 and may I add something?

23 THE COURT: Yes, sir.

24 MR. FATA: In the statement with Mr. Toney
25 he says that Mr. Rogers had a gun and had, got out

1 of his truck with a rifle, and Mr. Toney says that
2 he shot first. And of course the way he fell,
3 abrasions to his face and so forth, that gun would
4 more than likely have been underneath him,
5 underneath Mr. Rogers. So I want to show all the
6 blood that's on his shirt 'cause that blood would
7 have, could have transferred to the rifle.

8 THE COURT: Well, they never found a
9 rifle.

10 MR. FATA: They found a rifle at
11 Mr. Rogers' home.

12 THE COURT: Oh.

13 MR. FATA: Which I have here.

14 THE COURT: I see. But not, just a rifle.

15 MR. FATA: Yes, sir, it was this one.

16 THE COURT: But Mr. Toney never identified
17 like a 30 Aut 6.

18 MR. FATA: He never identified 30 Aut 6 or
19 M16 or AK-47, he just said a rifle.

20 THE COURT: When he was found -- the
21 photos that show him face down ---

22 MR. FATA: Yes, sir.

23 THE COURT: ---were those taken before he
24 was moved?

25 MR. FATA: Yes, sir, those photos were

1 taken before he was moved.

2 THE COURT: And is there any rifle
3 protruding from either side?

4 MR. FATA: No rifle was found at the
5 scene.

6 THE COURT: Mr. Kent, how about that
7 probative value?

8 MR. KENT: That is completely subjective
9 testimony, Judge. I guess I'd like to see if they
10 intend on offering that. I mean, that's not
11 exposing the argument offering. But to say that
12 there's some expert who's gonna come in and say
13 that, I don't see how that's possible, that's
14 completely subjective. And the point is still the
15 problem is they're offering that for a limited
16 purpose. They're offering that to inflame the jury.
17 That's the only reason, that's the only rationale
18 why it's offered. This person is flipped over and
19 then put on a body bag, and that's not even saying
20 it's at the same place where he was flipped over at.
21 I mean that, that doesn't show anything of the crime
22 scene. That shows they flipped him over, which they
23 have a right to do; but then to say, well, this is
24 how the crime scene, they keep saying this is what
25 we want to show from the scene, but that's not the

1 crime scene at that point in time. Once it gets
2 manipulated it's no longer actually the crime scene.
3 That same picture could have been taken inside of
4 the autopsy room.

5 THE COURT: Okay. Anything else?

6 MR. KENT: Judge, I guess just the last
7 point, if they did just want a picture of him just
8 flipped over, he's on a body bag so it's not just
9 him flipped over, it's flipped over and placed on a
10 body bag. That is a manipulated picture.

11 MR. FATA: Your Honor, the only other
12 thing I would say is that you have to, sometimes
13 have to move things to investigate a crime scene and
14 just because you move something doesn't mean it's
15 not a crime scene.

16 THE COURT: I understand that. Okay, I'll
17 think about both of these photos and I'll rule on
18 that before we start tomorrow. You want these back,
19 Mr. Fata?

20 MR. FATA: Yes, sir.

21 THE COURT: And the Court exhibits I'll
22 leave with Melissa. Anything else?

23 MR. FATA: I don't have anything, Judge.

24 MR. KENT: We've agreed to pretty much on
25 all the rest of the evidence with the one caveat

1 that I've agreed to most of the SLED evidence, most
2 of the shirts, most of the bullets, things of that
3 nature. But the caveat is, I'm not objecting to
4 them coming into evidence so long as the individuals
5 from SLED — I've been told that they're going to
6 show up — so long as they show up. I just want to
7 make sure that caveat is placed on the record.

8 THE COURT: So foundation is laid?

9 MR. KENT: And I'm not —

10 MR. FATA: Does he mean as long — do I
11 have to — he doesn't mean chain of custody. He
12 means, I think, the crime scene investigator, the
13 firearm person, the serologist, and so forth. I
14 think that's what he means.

15 THE COURT: But if they don't come you do
16 object to them?

17 MR. KENT: Correct.

18 THE COURT: I think the State would
19 probably not offer them even on a stipulation,
20 they're gonna want to have their little —

21 MR. KENT: I understand.

22 THE COURT: —building blocks there.

23 MR. KENT: And that's just the one
24 agreement that we had; but for that, we're not
25 objecting.

1 THE COURT: It would be a big help to the
2 court reporter at least, she could pre-mark the
3 exhibits for I.D. I don't even think she'll care if
4 you use her stickers. You can probably go down to
5 the office supply store and buy some and just write
6 it, maybe she'll give you a sheet.

7 MR. FATA: So these will be marked for ID
8 and not ---

9 THE COURT: Do you mind if they mark them
10 for I.D.?

11 THE COURT REPORTER: No, it's up to them,
12 whatever they want.

13 THE COURT: You can mark them as State's
14 I.D.

15 MR. KENT: I'm not objecting to them
16 coming in.

17 MR. FATA: Unless I don't bring ---

18 THE COURT: No, I'm talking about the
19 photos he does not object to. It saves 30 seconds
20 per photo if you've already got a sticker on it.

21 MR. FATA: Oh, yeah.

22 THE COURT: See what I'm saying?

23 MR. FATA: And the photos, the guns, it's

24 ---

25 THE COURT: At least mark them for I.D.

1 If he agrees to them just mark them.

2 MR. FATA: Okay.

3 THE COURT: And we can do that today and
4 then Melissa can initial those for her records.

5 MR. FATA: You want the photographs marked
6 individually I assume?

7 THE COURT: I think that'd be the best
8 thing.

9 THE COURT REPORTER: Yeah.

10 THE COURT: Okay. All right, we'll start
11 at 9:30; and before that maybe by the end of the
12 day, Mr. Kent, if you're back in Manning I'll email
13 you with my ruling about the photos.

14 MR. KENT: Yes, sir.

15 THE COURT: Okay. And Mr. Kent, you don't
16 have to show him what your exhibits are, if you
17 intend to offer any; but it might be a big help if
18 you've already got those premarked in your own hands
19 before we start. That doesn't mean you've got to
20 use them. Thank y'all.

21 (WHEREUPON, the proceedings were concluded
22 and State Exhibits Nos. 5 through 29 were
23 marked and admitted into evidence.)

24 (Court resumed on December 12, 2012.)

25 THE COURT: We're back on the record with

1 State versus Ernest Toney. Mr. Fata, you got all
2 your exhibits premarked?

3 MR. FATA: We got -- we have a lot of it,
4 Judge, but everything we've agreed on. I was going
5 to just get through the, the last few things would
6 be the report from the experts. I was going to do
7 those as we went.

8 THE COURT: Okay.

9 MR. FATA: 'Cause he was concerned if
10 somebody didn't come. We have the vast majority of
11 them.

12 THE COURT: Okay. As far as those two
13 photographs, Court's Exhibits 1 and 2, I'm gonna
14 reserve my ruling on that until there's some at
15 least a proffer on whether or not this is, first of
16 all, any probative value. Second of all, whether or
17 not it's substantially outweighed by the danger of
18 unfair prejudice but the autopsy photographs, of
19 course, the one that is most troubling. The other
20 one of Mr. Rogers on his back in the body bag is
21 pretty troubling too. And if it tends to prove that
22 a weapon, if he had one it would have blood on it,
23 it may be probative of something. But again, I'll
24 have to do that balancing test after I hear exactly
25 what the probative value is.

1 MR. FATA: Your Honor, I've got that
2 there. Is that in anybody's way?

3 MR. KENT: What is it?

4 MR. FATA: That's to show the exhibits.

5 MR. KENT: Oh, okay, that's the Elmo.

6 THE COURT: Are you proposing to show
7 exhibits during the opening statement?

8 MR. FATA: I've got one I'm gonna show.

9 THE COURT: Which one is that?

10 MR. FATA: That's that big board.

11 THE COURT: Big what?

12 MR. FATA: This is the aerial photograph.

13 THE COURT: Any problem with him showing
14 that during the opening statement?

15 MR. KENT: No, sir, Judge.

16 THE COURT: Mr. Chandler?

17 MR. CHANDLER: None, no, sir.

18 THE COURT: All right. As far as the
19 statement made about the box of bullets made by the
20 defendant to Investigator Capps, I guess
21 Investigator Capps is going to testify, right, Mr.
22 Fata?

23 MR. FATA: He is, yes, sir.

24 THE COURT: Okay. Just don't mention
25 about anything about that in opening, but it does

1 bother me a bit that it wasn't disclosed until
2 hearing yesterday. I'll likely allow testimony that
3 they found the box of bullets while executing the
4 search warrant, but maybe not the statement.

5 MR. FATA: Well, I will ---

6 THE COURT: I'll have to think about that.

7 MR. FATA: I will caution him just to say
8 that during, or during the search he pointed out the
9 rifle and then we found the box of bullets.

10 THE COURT: All right. Anything else,
11 Mr. Kent, to follow up from yesterday?

12 MR. KENT: The only thing, Judge, is you
13 were going to let us know about our victim being in
14 the courtroom, the victim's wife.

15 THE COURT: I think the victim's wife,
16 allows her to be here?

17 MR. KENT: I think you just mentioned that
18 you would --

19 THE COURT: And I think I will assume to
20 lay some foundation for some things, the State's
21 gonna have to offer her pretty much first, if not
22 near the top.

23 MR. KENT: Yes, sir.

24 THE COURT: Once she testifies she can be
25 in here for the rest of the time anyway. Please

1 make sure that all the witnesses understand that
2 sequestering means that not only are they not
3 allowed to be in here, but no witness who has
4 testified can go outside during lunch or break and
5 brief them on what has been discussed and make sure
6 they understand that.

7 MR. FATA: We only have ---

8 THE COURT: Lawyers cannot either.

9 MR. FATA: Right. We only have three lay
10 witnesses so.

11 MR. KENT: Well, Judge, we have the
12 officers.

13 THE COURT: Well, the officers can't be in
14 here either.

15 MR. FATA: They're not, and they know
16 that. I'm just saying ---

17 THE COURT: I'm talking about nonexperts.

18 MR. FATA: Nonexperts, right.

19 THE COURT: Well, you got Mr. Capps who
20 here. You have Ms. Toney who will be here all the
21 time. You got Mr. Dellinger who is going to be in
22 here all the time.

23 MR. FATA: And we have five ---

24 THE COURT: Lieutenant Hickman. So they
25 can't go outside and say, okay, witness Joe Blow

1 said this, this, and this; can't do that, nor can
2 the lawyers.

3 Mr. Kent, your sequestered witnesses are
4 Naomi Toney — or the ones you've listed?

5 MR. KENT: Yes, Judge.

6 THE COURT: Naomi Toney, James Rogers,
7 Hattie Wilson, Deputy Beasley, Corporal Demary?

8 MR. KENT: The two deputies listed, I
9 think I talked to them. They're only gonna be
10 present. I told them I'd call them so I don't think
11 they're going to come in and out of the courtroom,
12 and I'm gonna talk to my lay witnesses. I may not
13 talk to them. If they're in the courtroom they may
14 not be able to testify, I understand that.

15 THE COURT: Mr. Fata, do you remember
16 yesterday Mr. Kent sequestered any witnesses you
17 have under subpoena not be released by the State?

18 MR. FATA: Oh, I have not released
19 anybody. And as they testify I'll ask the Court if
20 they may be excused and then make a decision at that
21 time.

22 MR. KENT: I have no objection.

23 THE COURT: And the final thing, what I
24 think typically do when I talk to the jury in the
25 beginning is I tell them the State is going to give

1 an opening statement through Mr. Fata and the
2 defendant if he chooses, even though he does not
3 have to, he can wait until the State rests so I
4 don't know if y'all had given any thought to that,
5 but that's what I typically do.

6 MR. KENT: Say that again.

7 THE COURT: What I typically do when I
8 talk to the jury at the beginning.

9 MR. KENT: Yes, sir, Judge.

10 THE COURT: I tell them here's how the
11 trial goes, opening statements, State's evidence,
12 defendant if he chooses, so forth and so on, closing
13 arguments. I also tell them that opening statement
14 need not be given by defendant at all and the
15 defendant can wait until the State rests to give
16 opening statement so I just wanted you to not be
17 caught off guard about that. I had a defense lawyer
18 tell me one time he thought that was an indication
19 to the jury that they were gonna wait until the
20 State rested but that's not how I say it.

21 MR. KENT: Yes, sir.

22 THE COURT: Is all the jury here yet? We
23 got — that clock is real slow. It's about five
24 minutes slow.

25 MR. KENT: Judge, ---

1 THE BAILIFF: We have one more.

2 MR. KENT: Procedurally, Judge, Mr.
3 Chandler and I will be trying this case together and
4 I ask you about preserving some of the objections
5 made throughout the course of trial. There are some
6 witnesses Mr. Chandler will take and, of course,
7 there are some witnesses t hat I will take. Would
8 you be offended if -- and not in an attempt to tag
9 team the State, there are some objections I made
10 yesterday that maybe Mr. Chandler doesn't remember
11 ---

12 THE COURT: Since you know about them
13 first hand.

14 MR. KENT: First hand ---

15 THE COURT: I don't have a problem with
16 that as long as ---

17 MR. KENT: I will not ---

18 THE COURT: Once you make the objection he
19 can't join in then. Then in other words, I think we
20 can all handle that ---

21 MR. KENT: Yes, sir.

22 THE COURT: ---in the normal course.

23 MR. KENT: Judges, I just wanted you just
24 for the record, didn't want a situation where
25 Mr. Chandler objected and ---

1 THE COURT: Lastly, the phone call I had
2 with you yesterday afternoon after I talked to Mr.
3 Fata, Ms. Watkins got a phone call from -- I'm not
4 gonna say her name, I'll just go by juror number.
5 Juror number 142 called Ms. Watkins yesterday and
6 wanted to know if she had to serve because this was
7 her first time on jury duty and she didn't think she
8 was qualified.

9 MR. KENT: Yes, sir.

10 THE COURT: My inclination is to not
11 dismiss her because that's not criteria by any
12 stretch.

13 MR. CHANDLER: Humility should not be
14 disqualifying attribute.

15 THE COURT: That's right. I'm not even
16 going to address her separately unless somebody
17 gives me a reason why I should. Mr. Fata?

18 MR. FATA: I agree, I don't have a problem
19 with that.

20 MR. KENT: I understand, Judge, I have no
21 problem with that.

22 THE COURT: And you'll also notice that
23 juror number 54, I did not know during the
24 qualifications because evidently she was, she's
25 pretty short. She is very pregnant. She, you know,

1 I asked the question about any medical conditions
2 that would keep you from being an efficient juror.
3 She didn't stand up. But once she got seated I
4 think she was the sixth juror seated and immediately
5 asked Ms. Smith, the bailiff, if she could stand up
6 and she didn't know how long she'd be able to sit.
7 So let's just be on the lookout for that, and I will
8 just handle that as it comes. Otherwise, I think
9 we're ready to go.

10 MR. FATA: Can we have five minutes,
11 Judge.

12 THE COURT: For what?

13 MR. FATA: I want to go to the bathroom.

14 THE COURT: That will take less than five
15 hopefully.

16 (Pause.)

17 THE COURT: Okay, State ready?

18 MR. FATA: Yes, sir.

19 THE COURT: Defense ready?

20 MR. KENT: Yes, sir.

21 THE COURT: Mr. Chandler, ready?

22 MR. CHANDLER: Yes, sir.

23 THE COURT: Okay, bring in the jury.

24 (WHEREUPON, the jury was returned to the
25 courtroom at 9:33 a.m. and the following

1 proceedings commenced in open court.)

2 THE COURT: Okay. I believe everybody is
3 present. Ladies and gentlemen, I'm gonna get
4 started with the trial of the case of the State of
5 South Carolina versus Ernest Toney. The first order
6 of business will be for you to take an oath so if
7 you will please stand.

8 THE CLERK: Please raise your right hand.

9 (WHEREUPON, the jury was sworn at 9:33 a.m.)

10 THE COURT: All right, can I see the
11 lawyers up here please.

12 (WHEREUPON, counsel approached the
13 Bench for an off-the-record discussion.)

14 THE COURT: All right, ladies and
15 gentlemen, we are now going to begin this trial.
16 You have taken an oath and what you're sworn to do
17 is try this case according to the evidence and law
18 so help you God. We're gonna talk to you just a few
19 minutes about what your responsibilities are and how
20 this trial will proceed. How many of you have
21 actually sat in a jury like this, in any kind of
22 case, criminal or civil, how many of you actually
23 done it? So some of you have done it. And the law
24 doesn't require anyone to have any degree of
25 expertise as a juror. All of you come into this

1 courtroom with different life experiences. And what
2 you're called upon in this case to do is simply
3 apply your common sense to the evidence that's going
4 to be introduced, and you take the law as I give it
5 to you at the end of this case, you put those things
6 together and you'll reach a verdict in this case
7 that speaks the truth. So again, you're not called
8 upon to have any degree of expertise at all, and
9 these parties have selected you to be the jurors in
10 this case. And you are the only people in the world
11 who can determine at the end of this case whether or
12 not the State has proven beyond a reasonable doubt
13 the elements of the crime charged so a few things
14 along those lines.

15 Evidence is going to come in in this case
16 in different ways. It will come to you by way of
17 witnesses who are sworn and then they sit in this
18 chair and they testify. And that is, the testimony
19 is simply an exchange where questions are asked and
20 the witness answers the question. Evidence will
21 also come in by way of exhibits. The exhibits are
22 typically things you can see and touch. It might be
23 in any given case a photograph. It might be a piece
24 of paper, a document. It might be a tire. It might
25 be a rock. It could be any one of a number of

1 things, but exhibits are typically things that you
2 can see and touch. Evidence can also come in by way
3 of a stipulation. That's when the parties may agree
4 between themselves that a certain fact is true. It
5 might be that such and such occurred on a Saturday
6 or January 12th of a certain year, fell on a
7 particular day of the week. If a stipulation is
8 entered into by the two sides that'll be made known
9 to you. You may hear the word "published". It will
10 be published or read or made known to you. So those
11 are the ways that evidence comes in.

12 You will notice that when the witnesses
13 testify they'll be testifying to you. They won't be
14 talking to me. The reason that's important to you
15 to know is because it is up to you and you alone to
16 determine whether or not you believe the witnesses.
17 In other words, the believability is credibility.
18 You will have to determine whether or not the
19 witness is credible. You can believe every word of
20 what a witness has to say if that's what you want to
21 do. You can disbelieve every word you think that is
22 appropriate, or when one witness is testifying you
23 can believe part of what a witness says and
24 disbelieve the rest. Typically when you watch
25 somebody talk every day you are in your mind

1 determining whether or not you believe it. And you
2 use your good common sense in making that
3 determination. You can, among other things, take
4 into account how that witness appears on the stand.
5 Was that witness hesitant or straight forward when
6 answering questions. You can also take into account
7 whether or not in your mind that witness has a
8 reason to give testimony that helps or hurts one
9 side over the other. We call that bias or
10 prejudice. You can also take into account in your
11 mind, well, what was that witness' ability to know
12 what he or she claims to know. Also, is that
13 witness's testimony strengthened or weakened by
14 other evidence that's in the record. And also,
15 whether or not that witness may have said something
16 different or the same on prior occasion. And again,
17 anything else that you think is appropriate you can
18 take into account. What you don't do is you don't
19 count up the number of witnesses you say A, and the
20 number of witnesses who say the opposite and say,
21 well more said this than said the other thing so I
22 got to believe more. In other words, you don't
23 count up the number of witnesses in determining what
24 to believe by counting up those witnesses. You can
25 believe one witness over several or several over

1 one; That'll be entirely up to you.

2 Now it's important for you to pay very
3 close attention during the entire trial, and I
4 realize that you'll be sitting in that box and you
5 may say, well, what choice do I have. Don't let
6 your mind wander. That will be especially pertinent
7 this afternoon while you have lunch because if
8 you're like me, sometimes your mind wants to rest in
9 the afternoon. You can't do that because you heard
10 the list of potential witnesses that was called out.
11 There are gonna be a fair number of witnesses who
12 testified. You're sworn to try the case according
13 the evidence and the law so you've got to pay
14 attention. The testimony of the first and the
15 fifth, tenth, and fifteenth witnesses is no more and
16 no less important than any of the witnesses who
17 testify. So pay close attention to it all. We'll
18 take breaks from time to time, typically an hour 15
19 minutes or so apart. And you're not — and if
20 anybody has any discomfort just raise your hand and
21 we'll take a break so don't worry about that.

22 Now the trial itself will be conducted in
23 stages. In a moment the lawyers are gonna stand up
24 and give opening statement. First of all, Mr. Fata
25 for the State and what he believes the evidence will

1 or will not establish in this case. After that the
2 defendant, if he chooses, he does not have to, can
3 give an opening statement through either
4 Mr. Chandler or Mr. Kent. The defendant does not
5 have to give an opening statement at all because he
6 had no burden of proving or disproving anything.
7 The defendant, if he wants to, can waive and give an
8 opening statement until the complete presentation of
9 the State's case; and then, even then, the defendant
10 doesn't have to give one. After these opening
11 statements the State will present, begin presenting
12 its case in chief. And the State will do that by
13 calling witnesses and offering evidence, other
14 evidence other than testimony. After the State's
15 case has been presented the defendant, if he
16 chooses, even though he does not have to, can
17 present witnesses and other evidence as well.

18 After all of the evidence is in, the
19 lawyers will give a closing argument to you and then
20 I'll give you a charge on the law. Now the
21 defendant in this case, of course, as you know, from
22 me having read the indictment on Monday is charged
23 with the offense of murder. As I mentioned to you
24 Monday, and I again charge you, that the fact that a
25 person has been arrested or charged or indicted is

1 not evidence of anything. The State has the sole
2 burden of proving the elements of the crime beyond a
3 reasonable doubt. The defendant has entered a plea
4 of not guilty to this charge; he is presumed
5 innocent. And that plea puts the burden on the
6 State to prove the elements of the crime beyond a
7 reasonable doubt. The defendant does not have to
8 prove or disprove anything. You're the judge of the
9 facts. You'll be the ones who are responsible for
10 delivering a verdict in this case. The same law
11 that makes you the judge of the facts makes me the
12 judge of the law. One illustration of that is, at
13 the end of this case I'll be giving you a charge on
14 the law; I'll be telling you what the law is. And
15 you have to accept the law exactly as I give it to
16 you even though you might disagree with it.

17 Another illustration of how I'm the judge
18 of the law is that during the course of this trial
19 you will no doubt -- it happens in every case -- you
20 will no doubt see one side or the other stand up and
21 make an objection. An objection is a legal point so
22 that's one of the areas where I come in. We have in
23 Sumter County rules of evidence. My copy is in this
24 brown book and the lawyers know the rules. We also
25 have procedural rules and my copy is in this, I

1 guess it's a purple book. The lawyers may make
2 objections on procedural points or evidentiary
3 points. The rulings that I make should not result
4 in a score card for you that I made certain rulings
5 that I ruled in favor of one party more than the
6 other. Don't keep score in that regard. The rules
7 of evidence, for example, take up a relatively small
8 part of this book. The rest of it is
9 interpretation. When lawyers on any given a
10 occasion may have a good faith difference of opinion
11 as to whether or not a question is proper or whether
12 or not an answer is admissible or whether or not an
13 exhibit is admissible. If a lawyer makes an
14 objection the lawyer may make the objection
15 repeatedly, and that is, because the rules that we
16 have may require that so don't take offense if a
17 lawyer objects that, well, that lawyer is trying to
18 hide something; well, he's not. He has an
19 obligation under the rules. By the same token, if
20 an objection is made and perhaps sustained, don't
21 think that the lawyer against whom I rule is trying
22 to slip something in that really ought not to come
23 into evidence. Don't believe that because, again,
24 there are good faith differences of opinion. I'll
25 make rulings based on what the law is, not on who I

1 think should win. So I might have to send you out
2 of the courtroom at any given time to make a ruling.
3 If you want to blame somebody for that, blame me.
4 Usually why I do that is because I really might not
5 know if they want to tell me and I'm not gonna put
6 them on the spot and make their arguments in front
7 of you so I may send you out. Sometimes I may send
8 you out and make a ruling, you come back in in just
9 a very few moments I may have to send you out again.
10 And that's not hiding anything from me, just simply
11 I need to make sure that all the parties have the
12 right to air their arguments fully. You can talk
13 comfort in the fact that even you may not be in the
14 courtroom when we discuss those things, we won't be
15 back in that jury room with you when you begin your
16 deliberations.

17 One final thing, you may not under any
18 circumstances discuss this case amongst yourselves
19 until I tell you that you can. For example, about
20 10:30 or so we'll probably take a break. When we do
21 take breaks you cannot talk about what you just
22 heard or saw, can't do it. That's because you base
23 your verdict in the case on all evidence and it will
24 be terribly inappropriate and against the rules and
25 not in accordance with the law for you to begin

1 making up your mind as the case goes on. Keep an
2 open mind. Do not begin making up your mind until
3 you have seen and heard everything. Likewise, as I
4 will tell you repeatedly, you cannot read anything
5 about this case at all. You cannot listen to
6 anything about it. You cannot undertake, do any
7 type of research on your own in any way at all
8 because, again, you're sworn to base your verdict on
9 the evidence and the law. You'll get all of that
10 right here in this courtroom, and it will be
11 terribly inappropriate for you to get that from any
12 other source.

13 All right, any objection to those remarks
14 from the State?

15 MR. FATA: None, Your Honor.

16 THE COURT: Any from the Defendant?

17 MR. CHANDLER: No, sir.

18 THE COURT: Okay, Mr. Fata.

19 MR. FATA: Thank you, Your Honor. Ladies
20 and gentlemen of the jury, good morning. My name is
21 Paul Fata and I'm an attorney here in Bishopville.
22 I practice with my partner James R. Segars, but I
23 also assist your Solicitor who you elected, Ernest
24 Finney, commonly called Chip Finney, whose office is
25 in Sumter. Mr. Finney can't try all the cases. He

1 can't be present at every court hearing so he has
2 people in their County to assist him and that's what
3 I'm doing today. I want to thank you for your
4 presence here.

5 I know in December, Christmas time, this
6 is not how you want to spend it. Wal-Mart, Hardees,
7 something of that type thing I think are probably
8 where you want to be, but anyway, I thank you for
9 your attendance and hopefully we will get this thing
10 presented to you in a timely manner.

11 Now the judge has eluded to the indictment
12 which is the charging paper in this case. I'm just
13 gonna read it to you. It says that Ernest Toney --
14 Mr. Toney, the defendant seated at the defense table
15 here -- herein Lee county on or where about
16 September, 12th 2010, violated code sections and its
17 16-3-10, Code of Laws of the State of South
18 Carolina, that he both feloniously and willfully
19 with malice aforethought either expressed or implied
20 kill one Gregory Rogers. That's Mr. -- that's the
21 decedent. His wife is seated over there behind me
22 or next to the victim's advocate behind Major
23 Dellinger, in the yellow blouse, by means of
24 shooting him with a high powered rifle and that
25 Mr. Gregory, I mean Mr. Rogers, died as a result.

1 Now what does that mean? That means on
2 September 12th, 2010, Mr. Toney used a Mauser 8
3 millimeter rifle, or the evidence is gonna show,
4 that he used a Mauser 8 millimeter rifle, and shot
5 Mr. Gregory, the bullet entering his neck severing
6 his carotid artery and jugular vein, tore off the
7 top of his left lung, jacked his spine. As a
8 result, and you're hear the pathologist, as a result
9 of that he died.

10 Now there are a couple of words in here in
11 this indictment that everybody hears all the time.
12 If you watch Court TV, Law and Order, CSI, and you
13 hear the words malice aforethought, and it's a legal
14 testimony. His Honor is gonna explain that to you.
15 But what does that mean? Basically a lot of people
16 believe it means malice means an evil and malice is
17 evil. It means evil. It means evil heart, or evil,
18 but that's not technically what it means in the law.
19 What it means in the law is that you, a person, does
20 a wrong act intentionally. In other words, they
21 intend to do what they've done. In this case the
22 evidence is going to show that Mr. Toney took the
23 rifle and intended to shoot Mr. Gregory; and he
24 formed that intent, aforethought, meaning prior. He
25 formed that intent to do that prior to the actual

1 act. Now how long does that prior thought, prior
2 thing have to occur? It could be days, it could be
3 weeks, it could be months, it could be years. If
4 you plan and wait till a correct opportunity. It
5 can also be seconds; it can be instantaneous. In
6 all of this, the malice, aforethought, can be
7 inferred from the act itself from the use of a
8 deadly weapon: In this case, the use of a rifle.

9 Now you're gonna hear from Ms. Rogers;
10 she's gonna testify. You're gonna hear from Major
11 Dellinger. Major Dellinger is the lead investigator
12 with the Sheriff's Office. You're gonna hear from
13 Kim Dihl with SLED; she is the crime scene
14 Investigator. You've heard of the guy on CSI. They
15 got out and they dig up the evidence, collect, and
16 so forth. You're gonna hear from her. She's gonna
17 tell you what she found. Major Dellinger is gonna
18 tell you about his investigation, in fact, the
19 conversations he had with the defendant Mr. Toney.
20 You're also gonna hear from experts, scientists, a
21 technical scientist, highly trained individuals from
22 SLED who are gonna talk about the rifle and they're
23 gonna talk about fingerprints, who are gonna talk
24 about blood analysis and things like that. Then
25 you're gonna hear from pathologists. Pathologists

1 are persons, -- her name is Doctor Ross. She's the
2 person who did the autopsy on Mr. Gregory; and she
3 will be here to tell you what she finds, what her
4 findings were, what she did, what her findings were.
5 And she will give you her expert opinion as to how
6 the crime is classified. I mean, how the deaths are
7 classified too. There are ways, you know, like
8 natural, suicide, homicide, and she will give you
9 her expert opinion as to how she has classified this
10 death.

11 I've got a newfound device here in this
12 courtroom right behind me, and I'm not an expert at
13 all this kind of stuff. I'm gonna try to attempt to
14 use it and I hope it will work. In fact, I'm gonna
15 turn it on down. If it doesn't, I think what we'll
16 do is just go back to the old fashioned means of
17 passing things around, but. I'm going to the old
18 fashioned method right now. I want to put this in
19 perspective for you. This is an attachment. This
20 is State's Exhibit Number 29. This may be referred
21 to throughout the trial, and this may be the only
22 time you see it except you'll have it in the jury
23 room.

24 This is, like I say a tax map, and it
25 shows John Wesley Road which is a dead-end road here

1 in Lee County. This is about right in here where
2 the body was found, where Mr. Gregory's body was
3 found. Here is Wrenn, Wrenn Road or Wrenn Street.
4 That's where Mr. Gregory and Ms. Gregory live.
5 Right there. So this is -- you can see for
6 yourself, between the two it's very short, very,
7 very close in proximity. It's important in this
8 case both, which I'm not going into now, it's a fact
9 we represented to you that I think will put
10 everything in perspective without going into it.
11 Thank you very much for your attention. As soon as
12 Mr. Chandler I believe is through, we will present
13 our first witness.

14 THE COURT: Thank you, Mr. Fata.
15 Mr. Chandler.

16 MR. CHANDLER: Mr. Fata, if it please the
17 Court.

18 THE COURT: Yes, sir.

19 MR. CHANDLER: Good morning. You guys
20 remember being out in that venire out there
21 hoping, and praying that you weren't gonna get
22 picked. I saw the look of elation on one guy's
23 face. I thought he was going to jump and spin out
24 the room when he got excused. One of the first
25 questions you want asked when you get into any type

1 of trama -- and I imagine that most of you this may
2 be the first time, you go, why did these people pick
3 me and let those others go? Because we wanted you.
4 Individually and collectively we wanted you. We
5 have trust and confidence in your collective
6 experience and common sense, and the fact that you
7 hold the oath that you took sacred and inviting. We
8 want you because you're citizens of this county. We
9 want you because individually you will listen to all
10 of this evidence. I saw you lean up when the judge
11 was giving you those instructions arguably looking
12 because you didn't want to miss a single word
13 because each of you individually knows how important
14 this day and the next day and the following day is
15 to Mr. Toney, a man who worked for Goldkist almost
16 20 years, attends AME church, he lives over in
17 Sumter community and he's on trial for taking the
18 life of another man.

19 Judge James talked to each of you about
20 the testimony that comes from this stand. Now while
21 the testimony is crystallized today for the first
22 time, we need to think back about the day that this
23 indictment which is in Septem-- this incident which
24 was in September of 2010 and it's now December 2012.
25 And that's important because it's been a long time

1 so the testimony that comes from this stand was
2 generated soon after this incident occurred. And
3 you will need them to depend on these officers who
4 investigated this case to tell you accurately today
5 what occurred over two years ago and tell it clearly
6 and convincingly beyond a reasonable doubt. My
7 client, as the judge told you, comes to court
8 clothed in a big cloak of innocence. One of our
9 supreme court judges almost 60 years ago described
10 that for juries to say beyond a reasonable doubt and
11 the presumption of innocence is like a large coat
12 buttoned up surrounding a defendant. It is not a
13 mystical or fanciful doubt, but it is a substantial
14 one. And in order for one to find a defendant
15 guilty to overcome that presumption, you do not take
16 the coat off, pull at a sleeve, but you remove it
17 and throw it in the courtroom so it is seen no
18 longer. And in that fifty years I believe that's
19 the best description of presumption of innocence
20 that surrounds this land.

21 Now the coat must be taken off by the
22 testimony of these people. The scientists, the
23 experts, the folks from SLED, have examined the
24 evidence, but they examined the evidence that was
25 gathered by these investigators. And these

1 investigators have a way of going on out their work
2 taking notes, doing things so that nothing that is
3 important should be left out.

4 Anybody here have kids? A kid gets caught
5 doing something they shouldn't, maybe a little
6 brother or sister, or friend does something that
7 concerns you, what do you want to hear? You want to
8 hear the truth; don't you? You want to be able to
9 punish them or forgive them or do whatever you want
10 to with that child or that friend or that brother or
11 sister so why do you normally ask them, just tell me
12 the whole truth, tell it all? Because if something
13 left out, I may make a mistake. You've taken an
14 oath and there's a different oath that's going to be
15 administered over there and you might not be able to
16 hear it over this thing, but that oath is gonna be
17 every witness and some of them have taken oaths
18 before on different pieces of paper — we're gonna
19 talk a little about that. They put this hand on the
20 Bible and they swear to tell the truth, the whole
21 truth, and nothing but the truth. They swear to God
22 to sit in that chair and tell you the whole truth,
23 not parts of truth, not truth that may look good,
24 not things that may be convenient or save time; but
25 someone here is on trial for murder, and the

1 question is going to be did they gather that
2 evidence.

3 What happened out on that road according
4 to the State, is there was one bullet shot, one, and
5 a man died. And this case is going to tell you how
6 and why. And you individually are gonna have to
7 take that truth and go back and say, Mr. Kent,
8 Mr. Chandler, Judge James, Mr. Fata, did you tell me
9 the whole truth because that's what you want from
10 me, you want a verdict, you want me to know
11 everything that happened, every evidence, every
12 piece of evidence, what everybody said, for you knew
13 it was going to be 18 months or two years. And
14 today is your day. We're gonna test that. And then
15 that test is going to be substantial and reasonable
16 doubt; and in the description of what happened,
17 there is going to be doubt contrary to what the
18 State told you in its opening statements. And on
19 that alone I believe that you individually and
20 unanimously will find Mr. Toney not guilty. Thank
21 you.

22 THE COURT: Thank you, Mr. Chandler.

23 All right, Mr. Fata.

24 MR. FATA: Thank you, Your Honor. The
25 State calls Wilhelmenia Benjimin.

S- W. BENJIMIN - DIRECT

1 WHEREUPON,

2 **WILHELMENIA BENJIMIN,**

3 having been duly sworn by the Clerk, testified
4 as follows:

5 THE CLERK: State your full name for the
6 record.

7 THE WITNESS: Wilhelmenia Benjamin.

8 **DIRECT EXAMINATION**

9 BY MR. FATA:

10 Q Ms. Benjamin, you live here in Lee County?

11 A Yes, I do.

12 Q And I believe you live on John Wesley Road; is
13 that correct?

14 A Yes.

15 Q And let me show you State's Exhibit Number 29.
16 See if this is an aerial map of the County, or that
17 section of the County. John Wesley Road is — or
18 whereabouts is John Wesley Road to where you live?
19 Point that out.

20 A I stay on the end of John Wesley Road, all the
21 way to the back.

22 Q All the way to the back? Is that back in here?
23 Is this your house or is this your house?

24 A I'm the last house.

25 Q The last house up here?

S- W. BENJIMIN - DIRECT

1 A Yes.

2 Q Now does the road end at your house or does it go
3 through somewhere?

4 A It ends at my house.

5 Q It ends at your house so John Wesley Road is a
6 dead-end road?

7 A Yes.

8 Q Okay. How many people live on John Wesley Road?

9 A Three, four miles.

10 Q You know your neighbors pretty well?

11 A Yes.

12 Q Most of them? Okay. Now on September the 12th,
13 2010, were you on John Wesley Road late in the
14 evening?

15 A Yes, on my way going home.

16 Q Going home. And where were you coming from?

17 A Beverly College in Columbia.

18 Q And what was your purpose over there?

19 A I went to take my daughter back to college.

20 Q Okay. And you were on your way home. Do you
21 recall what time it was that you were on?

22 A It was after 6 because I remember I had -- I went
23 to catch Ace open, and Ace close at 6 so it was
24 after 6 on my way home.

25 Q Would it have been around 6:00, 3 minutes to 6,

S- W. BENJIMIN -- DIRECT

1 anything like that?

2 A It was a little after 6.

3 Q Okay. Now as you were driving down John Wesley
4 Road was your attention called to anything?

5 A Yes, I remember seeing a car that was on my right
6 and why he was laying down on the ground; and it
7 looked kind of strange, you know, this time of day
8 and I thought maybe he was fixing on the car. So as
9 I got closer to him I called out, I say sir, and he
10 didn't say nothing. Then I blow the horn and he
11 didn't move, and that's when I called 9-1-1.

12 Q I want to put on the projector here State's
13 Exhibit number 8. May she come this way, Your
14 Honor.

15 THE COURT: Yes, sir.

16 Make sure you keep your voice up,
17 Ms. Benjamin, okay.

18 BY MR. FATA:

19 Q Just stand right there, Ms. Benjamin, so we won't
20 interfere with that. Ms. Benjamin, is that what you
21 observed on John Wesley Road?

22 A Yes, sir.

23 Q Okay. And is this another view of that? That
24 was State's Exhibit 8. This is State's Exhibit 9.
25 Is that another view of what you saw?

S- W. BENJIMIN - DIRECT

1 A Yes.

2 Q Okay. Now in response to seeing it -- have a
3 seat Ms. Benjamin. In response to seeing that on
4 the side of the road, Ms. Benjamin, what did you do?

5 A Oh, when I saw that's when I called 9-1-1. I
6 tell her there was a body on the side of the road;
7 I didn't know who it was. And so I told her I
8 needed to go to the house because I had my two
9 grands with me; and dispatch said I can leave. So I
10 went and take my two grands home, and I came back
11 and I went to my neighbor house and tell there was a
12 body on the side of the road and they weren't
13 responding.

14 Q Is your neighbor, Mr. McDowell?

15 A Yes, Otis McDowell.

16 Q Now did you blow the horn, get out of the car or
17 anything like that when you stopped there and saw
18 Mr. Toney?

19 A Yes, I did. I thought, you know, thought that
20 maybe if I said sir, he would have moved, you know,
21 but he didn't. His was non response.

22 Q He didn't move so you called 9-1-1?

23 A Right.

24 Q Took the grand children home?

25 A Right.

S - W. BENJIMIN - CROSS

1 Q And saw your neighbor Mr. McDowell?

2 A I went back to -- I went to Mr. McDowell house
3 and I knocked on the door and I went in. I told him
4 it was a body side of the road and I didn't know who
5 it was, you know, so Mr. Otis, we got up -- he came
6 out there. I drove my -- I still ain't get out my
7 car. I just drove my car and parked the car and I
8 stayed in the car and wait till the man stay.

9 Q Thank you, Ms. Benjamin, answer any questions
10 that either Mr. Kent or Mr. Chandler may have.

11 **CROSS-EXAMINATION**

12 BY MR. CHANDLER:

13 Q Good morning, ma'am, how are you?

14 A Good morning, fine.

15 Q You gave a statement, correct?

16 A Right.

17 Q You didn't take those pictures, did you?

18 A No, I didn't.

19 Q And so you don't know how long after you saw the
20 body those pictures were taken, do you?

21 A No.

22 Q Okay. But you saw this body in front of this red
23 vehicle; is that right?

24 A Right.

25 Q So the individual was outside of the car,

S - W. BENJIMIN - REDIRECT

1 correct?

2 A Exactly.

3 Q And you indicated that you saw blood around
4 beside his head; is that right?

5 A I didn't see no blood inside his head. I called
6 when I called out some.

7 Q Let me see about your statement. Is that your
8 statement?

9 A Yes.

10 Q Does it say there was blood on the ground on the
11 side of his head?

12 A It say there was blood on the side of his head.

13 Q Thank you, ma'am.

14 A You're welcome.

15 MR. CHANDLER: I have nothing else, Judge.

16 THE COURT: Redirect.

17 **REDIRECT EXAMINATION**

18 BY MR. FATA:

19 Q Ms. Benjimin, that's the way the body appeared
20 when you saw it?

21 A Exactly.

22 Q I have no further questions.

23 THE COURT: All right, you may step down.
24 Thank you, ma'am.

25 THE WITNESS: You're welcome.

S - L. MCDOWELL - DIRECT

1 MR. FATA: May this witness be excused,
2 Your Honor, she's ---

3 THE COURT: Any objection?

4 MR. CHANDLER: No objection.

5 THE COURT: Thank you, Ms. Benjimin. You
6 may stay if you'd like or leave, whatever you want.

7 Mr. Fata.

8 MR. FATA: Your Honor, we call Lee Otis
9 McDowell.

10 THE CLERK: Place your left hand on the
11 Bible and raise your right hand.

12 WHEREUPON,

13 **L. OTIS MCDOWELL,**
14 having been duly sworn by the Clerk, testified
15 as follows:

16 THE CLERK: State your full name for the
17 record.

18 THE WITNESS: Lee Otis McDowell, Jr.

19 **DIRECT EXAMINATION**

20 BY MR. FATA:

21 Q Mr. McDowell, you live in Lee County?

22 A Yes, sir.

23 Q I believe you live on John Wesley Road?

24 A Yes, sir.

25 Q Let me show you -- I'll stand aside so the jury

S - L. MCDOWELL - DIRECT

1 will be able to see this aerial. This is State's
2 Exhibit Number 29. This is John Wesley Road.
3 Whereabout on John Wesley Road do you live? Can you
4 point that out?

5 A That house there.

6 Q This house right here?

7 A Yes, sir.

8 Q Now long have you lived there?

9 A Over 30 years.

10 Q Okay. And were you home all day on that day?

11 A Yes, sir.

12 Q Okay. Now on the 12th, excuse me. Were you home
13 all day on December 12th, 2010?

14 A Yes, sir.

15 Q All right. On that day late in the afternoon did
16 you have contact with Ms. Wilhelmenia Benjimin?

17 A Yes, sir. She came to the house that evening
18 probably about quarter to six, came and told me that
19 she saw someone laying on the road and want to see
20 if, wanted me to go down there and see what was
21 going on. She said that her son saw what appeared
22 to be blood so that's when I went down there to see
23 just who it was she was talking about.

24 Q Okay. May he come down, Your Honor?

25 THE COURT: Yes, sir. Keep your voice up.

S - L. MCDOWELL - DIRECT

1 THE WITNESS: Yes, sir.

2 BY MR. FATA:

3 Q Mr. McDowell, I want to show you what's been
4 marked State's Exhibit Number 9, a photograph. When
5 you got to the — you went down there; is that
6 correct?

7 A Yes, sir.

8 Q When you went down there what — is that what you
9 found, Mr. Rogers on the side of the road —

10 A Yes, sir.

11 Q —in that fashion?

12 A Exactly.

13 Q Exactly that way. When you got there did you get
14 out your vehicle?

15 A Yes, sir.

16 Q And what did you do?

17 A I walked, I approached the body. I walked up
18 close to it just to see whether or not he was
19 breathing. When I noticed he wasn't breathing I
20 took the back of my hand and ran it right along here
21 just to see how he felt.

22 Q Right along his side or the side of his arms?

23 A Right on top of his arm right above his watch
24 there.

25 Q Ran your hand right along there?

S - L. MCDOWELL - DIRECT

1 A Yes, sir.

2 Q Forearm?

3 A Yes, sir.

4 Q Okay.

5 A And when I felt and he appeared to be cold and
6 then I told her, I said, I don't think he's living
7 no more so that's when I called Sheriff Simon, you
8 know, let him know what it was I found and he told
9 me, proceeded to tell me to go ahead and call 9-1-1.

10 Q Okay. Did Sheriff Simon -- you may sit down.
11 Did Sheriff Simon come to the scene?

12 A Later on that evening.

13 Q Okay. And did you recognize him as
14 Mr. Gregory -- or Rogers?

15 A No, like I said, at first with his face being
16 turned away from me I did not know who he was until
17 the deputy pull his license out and he said that
18 gentleman stay on Wrenn Drive. I said, Wrenn Drive,
19 that's right down the road right there.

20 Q Okay, let me back up one second. I want to show
21 you State's Exhibit 29 again. All right, this is
22 John Wesley Road?

23 A Yes, sir.

24 Q Is that Wrenn Drive here?

25 A Yes, sir.

S - L. MCDOWELL - DIRECT

1 Q That little red line?

2 A Yes, sir.

3 Q How far is it from John Wesley Road to Wrenn
4 Drive, do you have any idea?

5 A I'd say about half a mile at the most.

6 Q You think it's half a mile from there to there?
7 Can you stand John Wesley Road ---

8 A I mean, you see ---

9 Q Can you see Wrenn Drive?

10 A Yeah, you can actually see Wrenn Road because it
11 go around the curve and you can actually see the
12 curve was, see, to the turning from that point right
13 there.

14 Q So it's very close?

15 A Yes, sir.

16 Q Now the picture up here on the screen, State's
17 Exhibit Number 9, is that the way the body of Mr.
18 Gregory Rogers was when you got there?

19 A Yes, sir.

20 Q Answer any questions either Mr. Chandler or
21 Mr. Kent may have.

22 THE COURT: Cross-examination.

23 MR. CHANDLER: If it please the Court,
24 Your Honor.

25 **CROSS-EXAMINATION**

S - L. MCDOWELL - CROSS

1 BY MR. CHANDLER:

2 Q Do you know Gloria Ann Wright?

3 A Sir?

4 Q Gloria Ann Wright?

5 A Gloria Ann Wright?

6 Q Yeah, you know someone by that name?

7 A No, sir.

8 Q Lives over there in that neighborhood?

9 A No, and I probably know by face, but not by ---
10 you say Gloria Ann? No, sir.

11 Q Maybe I got the name wrong? You acting like
12 maybe I'm close?

13 A It sound familiar. No, sir, I don't know that
14 name.

15 Q All right, thank you.

16 MR. FATA: Nothing else, Your Honor. May
17 the witness be excused?

18 THE COURT: Yes, sir. Any objection?

19 MR. CHANDLER: No objection, Judge.

20 THE COURT: You can stay if you'd like or
21 you can go.

22 MR. FATA: Thank you.

23 We call Sheriff Danny Simon.

24 WHEREUPON,

25 DANIEL SIMON,

S - D. SIMON - DIRECT

1 having been duly sworn by the Clerk, testified
2 as follows:

3 THE CLERK: State your full name for the
4 record.

5 THE WITNESS: Daniel Simon.

6 **DIRECT EXAMINATION**

7 BY MR. FATA:

8 Q You are the sheriff of Lee County?

9 A Yes, I am.

10 Q And that's an elected position?

11 A Yes, sir.

12 Q You were just elected this last election?

13 A Pre-election.

14 Q And how long have you been sheriff, sheriff
15 before that?

16 A Yes, sir, I won a special election July 13th of
17 2010.

18 Q Okay. Now you've been in law enforcement a long
19 time?

20 A Yes, sir.

21 Q How long?

22 A December 30th will be 25 years.

23 Q You started out with the city of Bishopville I
24 believe?

25 A The city of Bishopville, then I went on to the

S - D. SIMON - DIRECT

1 county Sheriff's Office, and I got major in 2001,
2 was Chief Deputy until the special election.

3 Q Now as a police officer -- well, you're the
4 sheriff; but as a police officer which the sheriff
5 is, you're a certified law enforcement officer?

6 A Yes, I am.

7 Q What kind of schools have you been to?

8 A I've been to instructor school, blood splatter,
9 narcotics, homicide investigation, radar supervisor,
10 newly sheriff elected school, member school of
11 (inaudible).

12 Q And of course you went to the basic school of the
13 Police Academy?

14 A Yes, I have.

15 Q And are a certified law enforcement officer?

16 A Yes, sir.

17 Q Now on September the 12th, 2010, were you in Lee
18 County?

19 A Yes, I was.

20 Q Were you the sheriff?

21 A Yes, sir.

22 Q Did you receive a call from Mr. McDowell, Lee
23 Otis McDowell?

24 A I did.

25 Q What was that call regarding?

S - D. SIMON - DIRECT

1 A He called me on my cell phone -- I was at my
2 residence -- just before 6:00 and said that a guy
3 was lying in the front of a vehicle on John Wesley
4 Road by his residence.

5 Q Go ahead. Did he indicate whether the person was
6 moving or still or anything like that?

7 A He indicated he had person appeared to be dead.

8 Q All right. What did you tell Mr. McDowell to do?

9 A I told him to just back away and I'll be on my
10 way. At that time I got dressed, notified central
11 dispatch, signed on radio I was in route to John
12 Wesley Road and they had already dispatched deputies
13 out to that location. I may have Deputy John
14 Jackson at that resident a little bit after 6:00
15 around 6:00. And as he told me it was a burgundy
16 vehicle, black man, burgundy vehicle lying on the
17 side of the road.

18 Q Now as the sheriff of Lee County you're chief law
19 enforcement officer?

20 A Yes, I am.

21 Q All right. So when you got there you began to
22 direct your deputies?

23 A Yes, sir.

24 Q What did you tell them to do?

25 A We secured the crime scene, and at that time EMS

S - D. SIMON - DIRECT

1 came. EMS came. They ran a strip on him.

2 Q Tell me what securing the crime scene means.

3 A Securing the crime scene is that we put up the do
4 not enter barricade so that nobody can enter into
5 that particular area where the body was located at
6 and keep from bringing in or taking away any
7 evidence that's there.

8 MR. FATA: Your Honor, may the Sheriff
9 come down?

10 THE COURT: Yes, sir.

11 BY MR. FATA:

12 Q Sheriff, I'm going to show you what's been marked
13 as State's Exhibit Number 9. And do you recognize
14 that photograph?

15 A Yes, sir.

16 Q And that is, what is that of?

17 A That's the way the crime scene looked the day
18 that I was there. It was daylight. When I arrived
19 there the vehicle was parked in the same location.
20 The body was lying in the front of the vehicle just
21 as it is in the picture.

22 Q Just as it is. Stand there just one second for
23 me please. You said that EMS came and ran a strip?

24 A Yes, sir.

25 Q Now what does that mean?

S - D. SIMON - DIRECT

1 A That was determined, where they're to detect a
2 heart beat or any heart rhythm.

3 Q Okay. I'm gonna show you State's Exhibit Number
4 6. Now tell me, when you got to the crime scene
5 were these little things, these little -- looks like
6 little dots, little things, were they on the body?

7 A No, they weren't

8 Q And what does that, what is that?

9 A Those are the strips that they put on -- I'm not
10 an EMS personnel, but those are the strips that they
11 put on there to detect rhythm of the heart and they
12 indicated that they did not detect any rhythm of the
13 heart.

14 Q There was no rhythm?

15 A No, sir.

16 Q He was -- meaning he was dead?

17 A He was dead.

18 Q Have a seat, thank you. Now as -- of course, you
19 say you saw the officers secure the scene?

20 A Yes, sir.

21 Q Did anybody, any strangers, any non-police
22 personnel get into the scene?

23 A No, sir. As they put the barrier up, police
24 barrier around the crime scene, no was allowed in
25 the area of the crime scene but essential personnel,

S - D. SIMON - DIRECT

1 law enforcement, EMS, and coroner. At that time I
2 then notified SLED, State Law Enforcement Division,
3 and advised them that I needed their crime scene
4 forensic unit to meet with us here.

5 Q Is -- do you always call the crime scene unit
6 from SLED to come over?

7 A It's common practice that we do because they
8 handle majority -- they handle all of our crime
9 scene for violent crimes.

10 Q And this is, was this a violent, would this be a
11 violent crime?

12 A Yes, sir, it's as violent as it's going to get.

13 Q And did SLED send somebody to investigate?

14 A Yes, sir.

15 Q Do you know who that was?

16 A Paul Larosa and Kim, I can't recall.

17 Q Dihn?

18 A Dihn.

19 Q All right. Who -- when the SLED crime scene
20 folks got to the scene who briefed them? Did you
21 brief them?

22 A Investigator on-call Capps also came to the scene
23 right after I did. Investigator Capps gave them a
24 brief synopsis of what took place. They get a
25 recent introduction from myself to them, but.

S - D. SIMON - CROSS

1 Investigator Capps pretty much gave them a synopsis
2 of what had taken place.

3 Q Thank you, Sheriff, just one second. Answer any
4 questions either Mr. Chandler or Mr. Kent may have.

5 **CROSS-EXAMINATION**

6 BY MR. CHANDLER:

7 Q Hey, Sheriff.

8 A Good morning.

9 Q How are you?

10 A I'm good.

11 Q I'd say congratulations on that election but some
12 days you don't think it is. You have any notes
13 about this?

14 A Just the incident report.

15 Q Okay. What time did you get there, sir?

16 A Just about right around 6:00, a little bit after
17 6 p.

18 Q Does your note indicate about what time you got
19 there?

20 A No, sir.

21 Q So you recall it was after 6:00.

22 A Yes, sir.

23 Q You don't know how long that body had been laying
24 there, do you?

25 A After I got there ---

S - D. SIMON - CROSS

1 Q From your observation, yes, sir.

2 A No, sir.

3 Q You don't know who might have been there around
4 that body before you secured the crime scene, do
5 you?

6 A No, sir, not immediately, no, sir.

7 Q But we do know that some EMS people worked on
8 him; is that right?

9 A This is while I was there, yes, sir.

10 Q So there were how many EMS people were around
11 him?

12 A I think it was gonna be like two.

13 Q Two people, okay. And can you tell me other than
14 putting those things on his body what else they did?

15 A I couldn't tell you, sir.

16 Q But if they did something else, move him around
17 or what have you, you would not know it; is that
18 right?

19 A No, sir.

20 Q Okay. And in addition, you don't know how long
21 he had been bleeding in that way; is that right?

22 A No, sir.

23 Q Thank you so much.

24 THE COURT: Redirect?

25 **REDIRECT EXAMINATION**

S - D. SIMON - RECROSS, REDIRECT

1 BY MR. FATA:

2 Q Do you recall what time the call came in to the
3 9-1-1 center?

4 A According to the incident report it was a little
5 bit after 8 — I mean, 18:06. 18:01 is a little bit
6 after 6 p.m.

7 Q So 18:01 is 6:01 p.m.?

8 A Yes, sir.

9 **RECROSS-EXAMINATION**

10 BY MR. CHANDLER:

11 Q What time did the SLED crime scene folks get
12 there?

13 A Can I look at my notes?

14 Q Oh, yes, sir.

15 A The report don't indicate, but I would say it was
16 around 8:00 before dark.

17 Q So the report does not tell us when the SLED
18 crime scene people arrived to process it?

19 A The incident report doesn't.

20 Q It's absent?

21 A Yes, sir.

22 Q But your recollection, Sheriff, is sometime
23 around or after 8:00?

24 A After 8:00, around 8:00, because by the time that
25 we make the phone calls and they get their crew

S - D. SIMON - RECROSS, REDIRECT

1 together, they're coming from Columbia and that.

2 Q In all due respect though, is that an assumption
3 or conclusion that you're making based on the time
4 they were taking to get there?

5 A That's my — normally when we don't call.

6 Q I'm talking about this incident. It's you're
7 basically comparing other incidents to determine
8 what time they got there. Would that be a fair
9 statement?

10 A Yes, sir.

11 Q Okay. So you just don't know when they got
12 there?

13 A No, sir.

14 Q Thank you.

15 THE COURT: Anything else, Mr. Fata?

16 MR. FATA: Just one thing.

17 **FURTHER DIRECT EXAMINATION**

18 BY MR. FATA:

19 Q During that time period waiting on the SLED crime
20 scene people, was the scene secured?

21 A Yes, sir.

22 Q By the Lee County Sheriff's Department?

23 A It was.

24 Q That's all.

25 THE COURT: You can step down.

S - D. CAPPS - DIRECT

1 MR. FATA: He's not under subpoena. I'm
2 assuming he can be excused.

3 THE COURT: Mr. Chandler?

4 MR. CHANDLER: Yes, sir.

5 THE COURT: Yes, sir.

6 Everybody on the jury okay?

7 (There was no response.)

8 THE COURT: Okay, Mr. Fata.

9 MR. FATA: Yes, sir, we call Investigator
10 Capps.

11 THE CLERK: Place your left hand on the
12 Bible.

13 MR. FATA: May we approach, Your Honor.

14 THE COURT: Yes, sir.

15 (WHEREUPON, counsel approached the
16 Bench for an off-the-record discussion.)

17 THE COURT: You can go ahead and swear him
18 in.

19 WHEREUPON,

20 **DAVID A. CAPPS,**
21 having been duly sworn by the Clerk, testified
22 as follows:

23 THE COURT: Okay, go ahead, Mr. Fata, the
24 witness has been sworn.

25 THE CLERK: State your full name for the

S - D. CAPPS - DIRECT

1 record.

2 THE WITNESS: David A. Capps.

3 **DIRECT EXAMINATION**

4 BY MR. FATA:

5 Q Investigator Capps, tell me what your, who you're
6 employed by.

7 A Lee County Sheriff's Office.

8 Q How long you been with the sheriff?

9 A About two-and-a-half years.

10 Q And what is your job at the Sheriff's Office?

11 A I'm the investigator.

12 Q And as an investigator what do you do, what are
13 your duties?

14 A Investigate crimes and occurrences in Lee County
15 and followup on criminal cases.

16 Q And were you working on September the 12th, 2010?

17 A Yes, sir.

18 Q And were you called to the scene of a, I guess a
19 murder or a body, dead body, on John Wesley Road
20 that day?

21 A Yes, sir, I was.

22 Q And about what time were you called and what time
23 did you get there?

24 A If I recall it was about 18, 25:18, about 7:30 in
25 the afternoon.

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1 Q Yeah, let's use the old fashioned clock 'cause I
2 can't ---

3 A All right.

4 Q ---instead of the 24 hour clock. And when you
5 got there what did you observe?

6 A A single motor vehicle on that roadway. A single
7 motor vehicle on that roadway. Sheriff, the
8 deputies, began cording off the area and the
9 deceased in front of that vehicle.

10 MR. FATA: Your Honor, may he come down.

11 THE COURT: Yes, sir.

12 BY MR. FATA:

13 Q I'm gonna show you on the screen here what's been
14 marked as State's Exhibit Number 9. Is that what
15 you saw when you got to the scene?

16 A Yes, sir, it is.

17 Q Okay. The body was exactly like that?

18 A Yes, sir.

19 Q In front of the vehicle ---

20 A Yes, sir.

21 Q ---in that fashion? Have a seat.

22 A (Complies.)

23 Q Now did someone brief you when you got to the
24 scene?

25 A I spoke with Sheriff Simon.

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1 Q And he briefed you on what was going on and what
2 he was ordering ---

3 A Yes, sir.

4 Q ---and that sort of thing?

5 A Yes, sir.

6 Q What did you do after that?

7 A As a result of that conversation I learned SLED
8 crime scene had been called, and I continued cording
9 off the area, did a, just a brief look around for
10 any potential evidence to mark and wait for the
11 crime scene technicians to get there from SLED.

12 Q What were you looking for?

13 A Anything and everything. Just, you know, any
14 other vehicle tracks, any clothing, any --- what we
15 typically look for, any spent cartridges from
16 gunshots or anything of that nature.

17 Q Did you find any?

18 A No, sir, I did not.

19 Q Okay. Did SLED crime scene arrive at the scene?

20 A Yes.

21 Q And do you recall who it was? I mean, do you
22 know what their names are?

23 A Let me see if I pronounce the name right. First
24 name is Kim, the last name is either Dine or Dihn,
25 I'm not quite ---

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1 Q Dihn, okay. And when she got there did you have
2 any interaction with her?

3 A Yes. I told her everything that I saw and showed
4 her where we had cordoned the area off, what I had
5 looked for so far, things that I had observed on my
6 first looking around the crime scene.

7 Q Okay. After she got there what was your function
8 at the crime scene? What was your function at the
9 crime scene?

10 A Basically I just stayed with her and followed her
11 around and showed her where I had observed what
12 would be considered the paper fingerprints which are
13 prints left dusted in the vehicle which could be
14 seen with the naked eye and versus the latent ones
15 which only showed up after it's dusted. I showed
16 her a bag in the front seat of the vehicle where you
17 could see through the window that had some sort of
18 ammunition in it and some clothing in the back of
19 the vehicle, and of course where the deceased's
20 body.

21 Q After Ms. Dihn arrived at, the SLED Agent Dihn
22 arrived at the crime scene, was she sort of in
23 charge or were you still in charge?

24 A Once SLED crime scene gets there that's their
25 show, they take care of it. I just assist them at

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1 that point.

2 Q Okay. Now I'm gonna show you State's Exhibit
3 Number 3. Tell me what that is.

4 A That is the search warrant for the address of [REDACTED]
5 [REDACTED] in Sumter.

6 Q Who lives there? Who lives there now or at the
7 time of the search warrant's execution?

8 A Mr. Toney.

9 Q And that's defendant Mr. Toney here?

10 A Yes.

11 Q And you, why were you going to the scene -- why
12 were you going to search Mr. Toney's house?

13 A He had had conversation with Investigator Hickman
14 and Major Dellinger, and as a result of their
15 conversation ---

16 MR. KENT: Judge, at this point in time
17 I'm gonna renew my earlier objection during pretrial
18 motions about statements ---

19 THE COURT: All right, overruled.

20 BY MR. FATA:

21 Q And I'm gonna show you State's Exhibit Number 2.
22 Do you recognize that?

23 A Yes, sir.

24 Q And what is that?

25 A This is a statement provided and signed by Mr.

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1 Toney.

2 Q Okay. And in that statement what does Mr. Toney
3 indicate?

4 A Statement based on ---

5 THE COURT: Wait.

6 MR. KENT: Judge, I'm gonna, again, renew
7 my earlier objection also to the statements of the
8 voluntariness of the Jackson versus Denno hearing
9 that Your Honor heard yesterday.

10 THE COURT: All right, the objection is
11 noted and overruled.

12 Go ahead, Mr. Fata.

13 BY MR. FATA:

14 Q Mr. Toney indicated what in his statement?

15 A That he had shot the deceased and that the weapon
16 we were seeking was at his mobile home which
17 resulted in tandem search.

18 Q Did he describe the weapon?

19 A Yes, sir, on page number two of this statement he
20 said, I got my 8 millimeter rifle from behind the
21 seat.

22 Q He described the weapon as an 8 millimeter rifle?

23 A Yes.

24 Q Okay. The search warrant executed on Mr. Toney's
25 home was, you just heard was what?

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1 A Under section B, description of property sought,
2 it says a military style 8 millimeter bolt action
3 rifle with a wooden stock.

4 Q Okay. Did you accompany other officers to
5 Mr. Toney's home? Tell me, did you accompany other
6 officers to search Mr. Toney's home at ■ Dollard?

7 A Yes.

8 Q In Sumter?

9 A Yes.

10 Q Now during that time — let me back up. Did you
11 find any guns?

12 A Yes, we did.

13 Q All right, what kind of guns did you find?

14 A We found a couple, a handgun, a couple of
15 shotguns, and the bolt action rifle.

16 Q Well now, let me ask you this, when you were
17 looking at shotguns and handguns did Mr. Toney say
18 anything about the handling of the gun?

19 MR. KENT: Judge, at this point in time
20 I'm gonna renew the objection made yesterday during
21 the pretrial conference.

22 THE COURT: Yes, overruled.

23 BY MR. FATA:

24 Q Did Mr. Toney say anything about how to handle
25 those guns?

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1 A During execution of the search warrant I was with
2 the accompany of Mr. Toney and Major Dellinger, and
3 we were looking at a particular shotgun. That
4 shotgun when we finished examining it, we were
5 putting it back and Mr. Toney asked us to please put
6 the material back in the barrel. He said he didn't
7 want bugs to get it in. That's how he kept them,
8 how meticulous to about how he kept his firearms.

9 And —

10 Q Now go ahead.

11 A He made the statement to the effect that was not
12 the weapon we were looking for anyway, said the one
13 we want is in this room. And we kind of turned
14 towards him and he walked towards another bedroom
15 and Major Dellinger went into the bedroom with him.

16 Q And did he point out a weapon in that room?

17 A He did.

18 Q And I'm gonna show you what's been marked as
19 State's Exhibit Number 28.

20 THE COURT: All right, ladies and
21 gentlemen, let me explain something to you about any
22 firearms that may be handled in the courtroom.
23 These are incapable of being fired and they're empty
24 and such and the witness will confirm that they're
25 not capable of being fired.

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1 Anybody who handles it, Mr. Fata and Mr.
2 Capps, make sure that it's pointed straight down or
3 straight up and not towards any person or anything
4 other than the ceiling of the court. Is the weapon
5 capable of being fired, Mr. Capps?

6 THE WITNESS: Not in that fashion, no,
7 sir.

8 THE COURT: It's number what, Mr. Fata?

9 MR. FATA: Excuse me, Judge, it's number
10 28, State's Number 28.

11 THE COURT: Let's just make sure it's
12 handled in that fashion.

13 BY MR. FATA:

14 Q I'm gonna show you State's Exhibit Number 28.
15 And you got it?

16 A Yes, sir.

17 Q Did Mr. Toney make any comment about that
18 particular gun?

19 A He indicated this was the weapon we were looking
20 for.

21 Q Okay. What kind of gun is that?

22 A This is an old military style 8 millimeter Mauser
23 bolt action rifle.

24 Q Okay.

25 A With a wooden stock.

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1 Q And again, Mr. Toney said, this is the gun you're
2 looking for?

3 A Yes.

4 Q Did you continue to search at the house?

5 A Yes, I did.

6 Q And I'm gonna show you what's been marked State's
7 30 for identification. Do you recognize those?

8 A Yes, sir.

9 Q And what are they?

10 A This is a, as it states here, 8 millimeter Mauser
11 bolt rifle that was obtained as a result of our
12 search.

13 Q Do they fit in that rifle, State's number ---

14 MR. CHANDLER: Objection.

15 THE COURT: Yes, sir.

16 MR. CHANDLER: That's leading and
17 conclusory.

18 THE COURT: Overruled.

19 BY MR. FATA:

20 Q Would they fit in the rifle, State's Exhibit 28?

21 A Yes, sir.

22 Q And they were found in Mr. Toney's house?

23 A That's correct.

24 MR. FATA: Your Honor, we move these in as
25 State's Exhibit 30.

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1 THE COURT: Mr. Chandler.

2 MR. CHANDLER: Subject to my
3 cross-examination, Your Honor.

4 THE COURT: All right. They're -- I'll if
5 you renew that at the end of cross-examination. Mr.
6 Fata, it's just marked for I.D. right now.

7 MR. FATA: Okay, all right.

8 (WHEREUPON, State Exhibit No. 30 was
9 marked for identification only.)

10 MR. FATA: Answer any questions that
11 Mr. Chandler may have or Mr. Kent.

12 MR. CHANDLER: Your Honor, if it pleases
13 the Court, I may be a while with that witness, and
14 we've been here an hour and fifteen minutes, could
15 we take a break?

16 THE COURT: All right. Ladies and
17 gentlemen, we're gonna recess at this point probably
18 ten or fifteen minutes. While you're in there you
19 may not discuss the case at all. Don't talk about
20 anything you see or heard. Don't talk about
21 anything remotely involved in this case. You can go
22 to your jury room. If you need anything that's not
23 in there please let the bailiffs know. Thank you.

24 (WHEREUPON, the jury was removed from the
25 courtroom at 11:13 a.m.)

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1 THE COURT: Mr. Capps, you can step down,
2 but you may not discuss your testimony with anyone,
3 okay. We'll take a few.

4 MR. KENT: Judge, if I can make sure I'm
5 covered on the record. I think just in an abundance
6 of caution, I think to contemporaneous objection to
7 every statement, I think that Investigator Capps
8 testified but just in case I misspoke for the record
9 I'd like to renew all contemporaneous objections to
10 any statements that he tried to get into that we
11 talked about in the Jackson versus Denno hearing.

12 THE COURT: Objection is noted. And I
13 think you did; but if you didn't, you just did, it's
14 overruled.

15 MR. KENT: Thank you, Your Honor.

16 (WHEREUPON, a recess was taken from the
17 proceedings.)

18 THE COURT: Mr. Fata, is the State ready?

19 MR. FATA: Yes, sir.

20 THE COURT: Mr. Chandler?

21 MR. CHANDLER: Yes, sir.

22 THE COURT: All right, you can bring me
23 the jury.

24 (WHEREUPON, the jury was returned to the
25 courtroom at approximately 11:21 a.m. and

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1 the following proceedings commenced in
2 open court.)

3 THE COURT: Mr. Chandler.

4 MR. CHANDLER: If it please the Court,
5 give me a second, Your Honor.

6 **CROSS-EXAMINATION**

7 BY MR. CHANDLER:

8 Q How long have you been a criminal investigator?

9 A Six-and-a-half years.

10 Q And before that six-and-a-half years, sir, what
11 did you do?

12 A I was patrol officer, canine handler, a SWAT team
13 member.

14 Q And how long have you been in law enforcement?

15 A Twenty-eight years.

16 Q So you've been in 28 years and six-and-a-half of
17 that you've been an investigator?

18 A Yes.

19 Q And how many murder cases have you handled during
20 that time?

21 A Three.

22 Q Three? This would be the third or is it ---

23 A This is the third.

24 Q This is the third.

25 A Yes, sir.

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1 Q When we go into a case where someone is shot out
2 in public, you guys have talked about gathering
3 evidence. That's a serious part of the —

4 A Yes, sir.

5 Q So you went about gathering the evidence as you
6 started into the crime scene; is that right?

7 A If there's any to gather, yes.

8 Q And so in an incident report you kind of
9 reflected some of the evidence that you gathered or
10 what you look for that you didn't find?

11 A Yes, sir.

12 Q And we know that one of the things that you
13 looked for was something inside the car to see what
14 had happened inside the car; is that right?

15 A Yes, sir.

16 Q And you found a very clean car?

17 A Yes, sir.

18 Q With no evidence of foul play in the car?

19 A Correct.

20 Q But you found a Wal-Mart bag in the car?

21 A Yes, sir.

22 Q And in that Wal-Mart bag was a box of .30 caliber
23 high powered rifle shells?

24 A There was rifle shells in there. I believe they
25 were 30-30 caliber.

S - D. CAPPS - CROSS

1 Q Yes, 30-30s?

2 A Sure.

3 Q Is that correct?

4 A Yeah.

5 Q So at some point earlier the individual who was
6 driving the car had handled 30-30 shells, right?

7 A Yes.

8 Q So now we had an individual who is shot with a
9 high powered rifle, right?

10 A Correct.

11 Q He is out of his vehicle and he has a box of
12 30-30 shells, correct?

13 A Yes, sir.

14 Q But they were unopened?

15 A Correct.

16 Q So you started looking for a gun?

17 A Yes, sir.

18 Q And you didn't find one at the scene?

19 A No, we didn't.

20 Q And you didn't find any evidence that this car
21 had stopped abruptly?

22 A Correct.

23 Q You found no evidence that there was another
24 vehicle stopped abruptly up close to it?

25 A That's correct.

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1 Q You looked for a gun from -- the cartridge
2 casings up and down the scene and you found none?

3 A Yes, sir, that's correct.

4 Q You would not normally have then go back and do
5 some metal detector and try to figure that out
6 later; didn't you do that?

7 A Yes, we did.

8 Q And the search of the scene with a metal detector
9 uncovered no cartridges at all?

10 A Correct.

11 Q And you got there about 6:35, is that right,
12 according to the incident report?

13 A 6:35.

14 Q Yes, sir. And somewhere during that time the
15 SLED folks were notified and they came on a couple
16 of hours later, right?

17 A Right.

18 Q Okay. Now I'm gonna ask you about your testimony
19 here, these rounds, and then I'm gonna go on.

20 Search warrants, what do you do to get a search
21 warrant in Sumter County where my client lived?

22 A The search warrant was retained with a Sumter
23 County deputy sheriff based on the statement of your
24 client and was obtained by Major Dellinger, yes,
25 sir.

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1 Q Okay. And the statement of my client indicated
2 that I think Mr. Fata showed you that he had an 8
3 millimeter; is that right?

4 A Yes, sir.

5 Q And looking at that statement that I'm trying to
6 find here, I see no place in it where it describes a
7 military type bolt action wooden stock gun in these
8 two pages. Why not?

9 A I wouldn't -- I wasn't in there when the
10 statement was taken. I don't know.

11 Q Well, tell me where the statement is that
12 describes this weapon that you say he pointed out in
13 his house if it's not in this statement.

14 A The weapon was described in the search warrant.
15 It should be listed on the return of the search
16 warrant.

17 Q It should be listed on the return; but before you
18 even get in the house, sir, you got to go tell a
19 magistrate that this is what you're looking for.

20 A Right.

21 Q And in that affidavit sworn under oath one of
22 your law enforcement folks said that we are looking
23 for a wooden stock military style bolt action
24 8-millimeter rifle, correct?

25 A Yes, sir.

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1 Q And there is nothing in this man's statement that
2 describes that. My question is where did you get
3 that description?

4 A That -- I wasn't privy to that.

5 Q Okay, well, isn't it true that you think it's
6 time investigator to investigate something as
7 serious as taking of a life that you would record
8 the statement of an individual that you might be
9 suspecting?

10 A If you have the capabilities, yes, sir.

11 Q So Lee County does not have a tape recorder to
12 use in a investigation of a homicide?

13 A I didn't have one at that time. I can't tell you
14 what the other officers had. I wasn't in the room.

15 Q Would it be fair to say that there is no recorded
16 statement of Mr. Toney anywhere in existence?

17 A None that I'm aware of.

18 Q Okay. Mr. Toney did not even write out his
19 statement. Are you aware of that?

20 A Yes, sir, I'm aware.

21 Q Some policeman did it; is that right?

22 A Yes, sir.

23 Q So we don't know now where the description of the
24 rifle came from?

25 A I believe it was a result of conversation between

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1 the other two investigator and your client, sir.

2 Q So you don't write down all of the conversations
3 in a murder investigation?

4 A We miss things sometimes; sometimes we don't. I
5 guess this is one that didn't get written down.

6 Q You miss things. Now tell me about the return on
7 the search warrant. What's the importance
8 constitutionally of the return? What are you
9 talking about there?

10 A That's the document attached to the search
11 warrant where we write down the items that are
12 removed from the home.

13 Q Yes, sir.

14 A Based on the content of that data and what we're
15 looking for, okay.

16 Q And so basically what you do in a return is
17 somebody goes under oath back to a magistrate and
18 says, judge, here oath, this is what we found at
19 that house.

20 A Yes, sir.

21 Q Isn't that right?

22 A Yes.

23 Q Yes, sir. Okay.

24 A Yes, sir.

25 Q Now I want you to read what this return given to

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1 me by the Lee County Sheriff's Department says you
2 found in Mr. Toney's house.

3 A An FB random bolt action rifle with the serial
4 number 51420Z in the master bedroom closet.

5 Q Okay, and the statement after that?

6 A Observed in the presence of Captain Dellinger,
7 Sheriff Simon, Lieutenant Hickman, Sergeant Capps,
8 and Lieutenant Wingate.

9 Q May I have it?

10 A Sure.

11 Q Yes, sir. After that statement there's an X.

12 A Yes, sir.

13 Q And what does that thing say after that?

14 A Last item.

15 Q Last item. Where are those cartridges on this
16 return, Officer?

17 A They're all on this return, sir.

18 Q So we have -- is there a return someone has not
19 given me in the two year course of the
20 investigation?

21 A There's another document that was a consent form
22 that those were listed on I believe.

23 Q Sir, you executed -- you just testified that you
24 executed a search warrant, and you led this jury to
25 believe that it was done with the assistance of my

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1 client and you waved in front of this jury this
2 weapon that you said that you'd gotten as a result
3 of the search, right?

4 A Yes, sir.

5 Q And then you waved this box of ammunition that
6 you said you got as a result of that search.

7 A Yes, sir.

8 Q It isn't on your return, is it?

9 A Not this one, no, sir.

10 Q Well, where did they come from?

11 A Out of your client's bedroom closet.

12 Q Why did you not then tell the magistrate, first
13 state of this investigation we found matching shells
14 in the suspect's house?

15 A They were — all the documents were given to the
16 magistrate. Sir, on this?

17 Q The return?

18 A The search warrant indicated the weapon. It
19 didn't list — as an abundance of caution we did a
20 consent form and added that to the consent form.
21 It's in the case file, sir.

22 Q Well, we haven't been given it.

23 A I don't know that, sir.

24 MR. FATA: Your Honor, we have a matter to
25 take up I believe.

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1 THE COURT: Come up here first.

2 (WHEREUPON, counsel approached the
3 Bench for an off-the-record discussion.)

4 THE COURT: Ladies and gentlemen if you
5 would please step to your jury room. You may not
6 discuss the case.

7 (WHEREUPON, the jury was removed from the
8 courtroom at 10:43 a.m. and the following
9 proceedings commenced.)

10 THE COURT: Mr. Fata.

11 MR. FATA: Your Honor, Mr. Chandler is
12 arguing that the 8 millimeter bullets are not on the
13 return on the search warrant. Obviously they're not
14 on the return to the search warrant because they
15 weren't searching for 8-millimeter bullets; they
16 were searching for the Mauser rifle. And that's
17 what goes on a return. There's a separate document
18 for the bullets and some other items which the
19 defendant signed giving his consent for the
20 sheriff's office to take those items and it's —

21 THE COURT: Has that document been marked
22 for identification?

23 MR. FATA: It has not, and we'll do it
24 now. It will be number 31, Your Honor.

25 (WHEREUPON, State Exhibit No. 31 was

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1 marked for identification only.)

2 MR. FATA: And this was provided to the

3 ---

4 MR. CHANDLER: It was.

5 MR. FATA: It wasn't?

6 MR. CHANDLER: It was.

7 THE COURT: Can I see it? State's 31 for
8 I.D.?

9 THE COURT REPORTER: Yes.

10 THE COURT: It references ultrasound
11 pictures from Lorie Rogers, crayon color picture,
12 DNA test report, 8 millimeter Mauser bullets. And
13 it says in parentheses 14. I assume that goes with
14 bullets set following entry for Samsung telephone.
15 And it has a signature on it and I do recognize
16 Major Dellinger's signature and I believe the next
17 signature is Pat Hickman. So what are we -- what's
18 the State's position on what we do -- I think
19 Mr. Chandler's challenge to the witness is why
20 hadn't anything been given to us in the last two
21 years.

22 MR. FATA: The line of questioning was,
23 why did the bullets not appear on the search
24 warrant, and I think that's perfectly valid. And
25 then the officer says, well, it was on a separate

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1 consent and Mr. Chandler challenged him that he
2 didn't have it and but he does have it. It was
3 provided to him a long time ago.

4 THE COURT: All right, Mr. Chandler.

5 MR. CHANDLER: That's correct. However,
6 this consent says it's a description of property to
7 be searched for. It doesn't confirm that the
8 property was seized.

9 THE COURT: Okay. Just to be clear, it
10 says I, Ernest Toney, do hereby consent to the
11 search of my premises at ■■■ Dollard. And that's a
12 Sumter address?

13 MR. CHANDLER: Yes, sir.

14 THE COURT: Search by officers of the Lee
15 County Sheriff's Department. These officers are
16 authorized by me to take from my premises -- and I'm
17 paraphrasing -- letters, papers, materials, and
18 other property which they desire and that can be
19 used in their investigation in criminal activity.
20 Description of property to be searched for, and then
21 goes through the pictures, DNA report, 8 millimeter
22 Mauser bullets, Samsung cell phone.

23 MR. FATA: Those items.

24 THE COURT: And then it says, I've been
25 advised I do not have to give my consent and I'm

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1 aware that any evidence obtained as a result of the
2 search can be used against me in a court of law.
3 Okay. So it says that they have permission to
4 sentence for and I realize yesterday for a fair
5 amount of time we went through it, however
6 Investigator Capps, Major Dellinger that they saw
7 the DNA report and some crayon pictures on a table
8 and they said, hey, can we take this and Mr. Toney
9 signed the consent form and then later on the same
10 issue came about bullets that was yesterday. So
11 there's a distinction between what this form says
12 about whether or not they seized it and it's the
13 State's position that, well, it makes sense that
14 they wrote it down with that particularity. Of
15 course, that's an acknowledgment that they also
16 seized it. Mr. Chandler.

17 MR. CHANDLER: Yes, sir, and I believe the
18 appropriate questioning for me should be there was a
19 separate consent form and you listed that among
20 other things, and his response would be yes.

21 THE COURT: Yes.

22 MR. CHANDLER: And that's the form that I
23 was given and his response would be yes.

24 THE COURT: That he searched for?

25 MR. CHANDLER: Yes, sir.

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1 THE COURT: And of course, it's also the
2 witness's testimony that that's what they seized.

3 MR. CHANDLER: Yes, sir, and that would be
4 his testimony, it would be valid enough if it was a
5 consent. If he said, yes, we had a consent and we
6 went in there and got these items.

7 THE COURT: Well, I understand what you're
8 saying; but the way it, the way the testimony went
9 pretrial was they saw the pictures and the
10 ultrasound photo, you know, of the baby, of a baby,
11 DNA reports, and the color picture. I'm not going
12 to say the child's name, the crayon colored
13 pictures, and the bullets and a cell phone the
14 testimony was, well, we saw these things and we
15 said, hey, we see these, would you consent to us
16 taking them. That was the evidence behind the
17 execution of this form.

18 MR. CHANDLER: And I cannot then move to
19 keep it out because it's subsequent, it's pursuant
20 to a valid consent.

21 THE COURT: Correct.

22 MR. CHANDLER: And so my question ---

23 THE COURT: Yes, sir. But what I did keep
24 out was any evidence that Mr. Toney told Mr. Capps
25 or anyone, I can tell you where you can find the

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1 bullets too. The reason I kept that out is because
2 that was not disclosed to the Defense until
3 yesterday. But I did not keep out the fact that
4 they got the bullets.

5 MR. CHANDLER: And that's why I was
6 definitely trying to avoid that. And now that I see
7 the consent I don't want to open the door. I'm
8 simply going to say, we were provided with a consent
9 to search that indicated they were Mauser bullets,
10 are those the bullets you got.

11 THE COURT: You would, okay. You
12 acknowledge to the witness in jury's presence I
13 stand corrected, we did have this consent?

14 MR. CHANDLER: Absolutely, it's only
15 appropriate.

16 THE COURT: Is that sufficient?

17 MR. FATA: That's sufficient, Your Honor.

18 THE COURT: All right. This is still for
19 ID at this time, the State's Number 31. I don't
20 know whether the State's gonna offer that into
21 evidence on redirect. We'll cross that bridge when
22 we come to it. Anything else, Mr. Fata?

23 MR. FATA: No, sir, Your Honor.

24 THE COURT: Mr. Chandler?

25 MR. CHANDLER: There are some.

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1 THE COURT: Mr. Fata, I mean, Mr. Chandler
2 you ready?

3 MR. CHANDLER: I'm ready.

4 THE COURT: Okay.

5 (WHEREUPON, the jury was returned to the
6 courtroom at approximately 11:00 a.m.,
7 and the following proceedings commenced
8 in open court.)

9 THE COURT: Mr. Pettus, I'm gonna appoint
10 you as foreman of this jury. I'll talk to you later
11 about what your responsibilities are. I don't mind
12 where you sit, nor do I mind where any of the other
13 jurors sit. At the conclusion of the case I'll talk
14 to you about what your responsibilities are; but in
15 the meantime, if anyone on the jury has any concerns
16 whether it be from parking to creature comforts in
17 the jury room, they're to let you know and you can
18 tap on the door, or otherwise, let the bailiffs
19 know.

20 Okay, Mr. Chandler, you can continue.

21 MR. CHANDLER: May it please the Court.

22 BY MR. CHANDLER:

23 Q I'm advised and corrected that the search warrant
24 was for the rifle?

25 A Yes, sir.

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1 Q There was not a separate return made for the
2 bullets?

3 A Correct.

4 Q There was a seizure of bullets by your agency,
5 correct?

6 A Yes, sir.

7 Q Those were those bullets there?

8 A Correct.

9 Q Not subject to a search warrant?

10 A Correct.

11 Q We straight now?

12 A Yes, sir.

13 Q Okay. Didn't mean to yell at you.

14 A You're fine.

15 Q Then the next question is, in your investigation
16 have you fired these bullets from this weapon?

17 A I have not.

18 Q Have they been?

19 A I believe SLED did test fire the weapon.

20 Q And this would be a — the weapon is in working
21 order?

22 A I believe so, yes.

23 Q But you don't know that?

24 A I have not fired it myself.

25 Q Okay. The second search warrant, were you

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1 involved in the search of the house on Wrenn?

2 A Yes.

3 Q Okay. I'm not gonna get into the return on that,
4 okay?

5 A Yes, sir.

6 Q You went to the house on Wrenn?

7 A Yes.

8 Q That is the alleged victim's house?

9 A Correct.

10 Q Correct? And you went to the house on Wrenn as a
11 result of the statement of my client; is that right?

12 A Yes.

13 Q To look for another gun?

14 A Yes, sir.

15 Q A high caliber gun?

16 A Yes, sir.

17 Q And when you executed the search warrant just
18 like you did before, you found no high caliber gun?

19 A Correct.

20 Q Not under the bed, not in the closet, anywhere?

21 A We found none.

22 Q But you did find a 9 millimeter handgun?

23 A Yes.

24 Q That had all of the markings and things filed
25 off?

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1 A That's correct.

2 Q And you found some 9-millimeter bullets?

3 A Yes, sir.

4 Q Okay. And you searched the house as thoroughly
5 as you searched Mr. Toney's?

6 A Yes.

7 Q Now about a day-and-a-half or two days later did
8 y'all return to the Wrenn address?

9 A Yes, sir.

10 Q Okay. Were you presented with a 30-30 rifle?

11 A It was presented to the Major at the Sheriff's
12 Office.

13 Q Were you present ---

14 A We did -- we did acquire that weapon, yes, sir.

15 Q Were you present then?

16 A Yes, sir.

17 Q Who presented the 30-30 caliber rifle to law
18 enforcement?

19 A I truly don't remember. There were several
20 family members around. I don't, I didn't -- I know
21 the officers went in without a rifle and someone in
22 the house gave it to them. When they came out I was
23 on the front porch.

24 Q Did you go in the house?

25 A No, sir.

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1 Q So I would ask Major Dellinger?

2 A Yes, sir.

3 Q But he went in the house and obtained a high
4 caliber, the 30 caliber rifle which you guys were
5 looking for two days before?

6 A I believe that's correct.

7 Q And you can tell us as a result of that search it
8 wasn't there?

9 A On the first time?

10 Q Yes, sir.

11 A Yes, sir, that's correct.

12 Q You know where it was?

13 A I don't remember.

14 Q Did you ask whoever presented it to you where it
15 had been?

16 A Yes, and I was advised that it was under a bed.

17 Q Well, the ---

18 A I don't ---

19 MR. FATA: Your Honor, I object to any
20 hearsay.

21 THE COURT: Okay, sustained.

22 MR. CHANDLER: Yes, sir.

23 THE COURT: Jury disregard that particular
24 statement.

25 MR. CHANDLER: I was expecting a different

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1 response, Your Honor, like yes, correct.

2 BY MR. CHANDLER:

3 Q So you searched, didn't find it, come back a
4 day-and-a-half two days later, and it's presented to
5 you by them?

6 A Yes.

7 Q And it's a 30-30 caliber that matches the
8 ammunition that was found in the car that was out on
9 the road that the alleged victim was laying in front
10 of?

11 A Yes.

12 MR. CHANDLER: Court's indulgence just a
13 moment.

14 BY MR. CHANDLER:

15 Q Are there any written statements regarding the
16 whereabouts of that weapon, the reason why it was
17 not located?

18 A I don't recall.

19 Q Would that be something that would be important
20 to you?

21 A It would be.

22 Q Especially if my client told you guys that the
23 victim had a long gun?

24 A Yes.

25 Q In that written statement, correct?

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1 A That would be important, yes, sir.

2 Q All right.

3 MR. CHANDLER: Nothing else, Your Honor.

4 THE COURT: Redirect.

5 THE COURT: 31 for I.D.?

6 MR. FATA: 31 for I.D.

7 **REDIRECT EXAMINATION**

8 BY MR. FATA:

9 Q Captain, I'm gonna show you 31, State's Exhibit
10 31 for identification. Can you identify that?

11 A Yes, sir.

12 Q Tell me what it is.

13 A That is a Lee County Sumter County law
14 enforcement consent to search form.

15 Q And when was that form completed?

16 A It'd be on 14th, October 14th, 2010.

17 Q And it was completed as a result of what?

18 A How it was listed on the report exactly
19 Mr. Toney's residence.

20 Q Okay. Your Honor, your name -- does your name
21 appear on that?

22 A I don't think so.

23 Q But were you there?

24 A Yes, sir.

25 Q When this was done?

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1 MR. FATA: Your Honor we would — I don't
2 know if this is the proper, we move this into
3 evidence.

4 THE COURT: 31, sir.

5 MR. FATA: I'll wait. I'll deal with it
6 when the other officer testifies.

7 MR. KENT: At this point in time.

8 THE COURT: Yes, sir, okay. That's still
9 for ID. Ladies and gentlemen, if it's ID it's not
10 in evidence, if it's offered, accepted for ID
11 references removed, that's why we call that just for
12 I.D.

13 BY MR. FATA:

14 Q Now the search warrant, which is State's Exhibit
15 number 3, says that -- well, the search warrant is
16 done for what, a specific piece of material?

17 A Yes, sir.

18 MR. CHANDLER: Objection.

19 THE COURT: Sustained.

20 BY MR. FATA:

21 Q What is the search warrant usually issued for?

22 A A variety of reasons, but the primary reason is
23 search warrant is issued to give law enforcement
24 permission to go locate, see certain items involved
25 or suspected to have been involved.

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1 Q All right. Is this a blanket privilege you can
2 go in there and take anything you want?

3 MR. CHANDLER: Objection.

4 THE WITNESS: No, sir.

5 MR. CHANDLER: Leading.

6 THE COURT: That's not leading. It's
7 overruled.

8 THE WITNESS: It is not.

9 MR. FATA: It is not.

10 THE WITNESS: It is specific.

11 BY MR. CHANDLER:

12 Q So when it says description of property sought on
13 the search warrant, what is that in that section B,
14 what is that designed for?

15 A To tell you what.

16 Q Who you tell, who you give that information to?

17 A Mr. Toney. And the return ---

18 Q In order to get the search warrant?

19 A To -- yeah, to the magistrate, yes, sir.

20 Q Now ---

21 A Sorry, I misunderstood.

22 Q So when you tell them you're looking for a 8
23 millimeter, military style 8 millimeter, bolt action
24 rifle with a wooden stock, are you -- what effect
25 does that have?

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1 A Means it's like the shotgun may be found.

2 Couldn't take those ---

3 Q You were limited to that item?

4 A Yes, sir.

5 Q So you were limited to that item?

6 A Yes.

7 Q Anything else that you find that's important, how
8 do you deal with that?

9 A We have to obtain another search warrant, have
10 someone give us consent to remove those items.

11 Q And was Mr. Toney with you when you did that
12 search?

13 A He was.

14 Q And when you found State's Exhibit Number 30, the
15 8 millimeter bullets, what was your procedure then?

16 A To find the consent form and to give Mr. Toney
17 consent us removing those.

18 Q So you use a separate form. Would you have
19 not -- would you have put it on the return to the
20 warrant?

21 A No, sir.

22 Q So the purpose of the return is to inform the
23 magistrate what?

24 A That that item they gave us permission to go find
25 we found.

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1 Q And nothing else?

2 A That's it.

3 Q All right. Now at the scene there was no weapon
4 found, was there?

5 A Correct.

6 Q No -- did you find a knife?

7 A No.

8 Q A handgun?

9 A No, sir.

10 Q A rifle?

11 A No, sir.

12 Q Anything?

13 A No, weapon.

14 Q No weapon?

15 A No weapon.

16 MR. FATA: Your Honor, just as an aside,
17 we've got these three items that came in this bag.
18 How do you wish to mark these? Individually? The
19 bag is probably, they were in this bag when they
20 were found in the car. How do you want ----

21 THE COURT: I would say mark them
22 separately.

23 MR. FATA: Okay. All three? Okay.

24 THE COURT: 32, 33, 34.

25 MR. FATA: Yes, sir.

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1 (WHEREUPON, State Exhibits Nos. 32, 33,
2 and 34 were marked for identification
3 only.)

4 BY MR. FATA:

5 Q I'm gonna show you what's been marked as State's
6 Exhibits 32, 33, and 34. Tell me, can you recognize
7 those.

8 A Yes, sir.

9 Q What are they?

10 A These are the contents of the bag that was on the
11 passenger seat front of the vehicle located beside
12 the decedent.

13 Q Okay.

14 MR. FATA: Beg the Court's indulgence just
15 a minute, Your Honor.

16 BY MR. FATA:

17 Q They were found in the decedent's vehicle, Mr.
18 Gregory, Mr. Rogers' vehicle?

19 A Yes.

20 MR. FATA: May he come down, Your Honor?

21 THE COURT: Yes, sir. Keep your voice up.

22 BY MR. FATA:

23 Q All right. I'm gonna show you -- now you have to
24 stand -- let me get the exhibit number. That's
25 exhibit number 11, State's Exhibit 11. Do you

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1 recognize -- can everybody see? Is that exhibits

2 ---

3 A Yes, sir.

4 Q 32, 33 and 34?

5 A Yes.

6 Q Found in the front seat of the vehicle?

7 A Yes.

8 Q Of Mr. Gregory's, Mr. Rogers' vehicle?

9 A Yes, sir.

10 Q This is State's Exhibit Number 12. What is this
11 right here?

12 A That's a closeup of a receipt. You can see the
13 date and time that it was purchased.

14 Q Date and time here?

15 A Yes, sir.

16 Q What is the date?

17 A 9/12/2010.

18 Q And what time?

19 A About 4:30.

20 Q That's 16:30 and that's about 4:30?

21 A Yes, sir.

22 Q And again, State's Exhibit number 13, is that the
23 same item in the car?

24 A Yes.

25 Q And that was in Mr. Rogers' car ---

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1 A Yes, sir.

2 Q —in the front seat. Have a seat.

3 A (Complies).

4 MR. FATA: Your Honor, we would move these
5 three items in as State's Exhibit 33 — excuse me,
6 32, 33 and 34.

7 MR. CHANDLER: No objection, Your Honor.

8 THE COURT: Okay, those are in without
9 objection.

10 (WHEREUPON, State Exhibits 32, 33, and 34
11 were admitted into evidence.)

12 BY MR. FATA:

13 Q Now these are 30 — State's Exhibit Number 32 is
14 30-30 bullets?

15 A Yes.

16 Q And are they the bullets that were purchased on
17 this, sales receipt State's Exhibit 33, can you
18 tell?

19 A Yes, sir, they are.

20 Q Okay. So at 4:30 in the afternoon where was Mr.
21 Gregory Rogers?

22 MR. CHANDLER: I object, it doesn't —
23 calls for a conclusion beyond his capacity.

24 THE COURT: All right, Mr. Fata.

25 MR. FATA: Well, Your Honor, it's

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1 circumstantial. The sales receipt is in the
2 vehicle.

3 THE COURT: If you can lay a foundation
4 that it was he that purchased it, I will allow the
5 question. If not, objection sustained.

6 BY MR. FATA:

7 Q We may not be able to do that. I can, I have my
8 Wal-Mart -- excuse me, where's my Wal-Mart bill?

9 THE COURT: Can I see the lawyers up here
10 just a minute please. Can I see the lawyers please.

11 (WHEREUPON, counsel approached the
12 Bench for an off-the-record discussion.)

13 THE COURT: All right, I'll allow the
14 question.

15 MR. CHANDLER: Thank you.

16 THE COURT: Go ahead.

17 BY MR. FATA:

18 Q At 4:30 in the afternoon Mr. Rogers was at
19 Wal-Mart according to that sales receipt and
20 purchased those, that ammunition?

21 A Yes.

22 Q Again, was a 30-30 rifle found at the scene?

23 A No, sir.

24 Q You searched the scene. You were one of the
25 first officers there; were you not?

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1 A Yes, sir.

2 Q And you searched the scene?

3 A Yes, sir.

4 Q You walked the area?

5 A Yes, sir.

6 Q And I think Mr. Chandler said you went back with
7 a metal detector?

8 A Yes, sir.

9 Q Did you find anything with the metal detector?

10 A No, sir.

11 Q Okay. And was that the Wal-Mart in Sumter?

12 A Yes, it is.

13 Q You have any idea how far it is from that
14 Wal-Mart in Sumter to Wrenn -- not Wrenn, but to
15 John Wesley Road?

16 A I would say it's about 15 to 20-miles.

17 Q 15 or 20-miles?

18 A I know how far it is to my house. Maybe I was
19 only about four miles out of town from my house,
20 it's 20-miles.

21 Q Okay. Driving distance, you have any idea about
22 driving distance?

23 A No, sir, I don't know which path --

24 Q I mean driving time, excuse me. Again, no weapon
25 was found at the scene?

1 A Correct.

2 Q Answer any questions that Mr. —

3 **RECROSS-EXAMINATION**

4 BY MR. CHANDLER:

5 Q I guess what we know from this is that the victim
6 was shot sometime between 4:30 and around 6:00; is
7 that right?

8 A Yes, sir.

9 Q Okay. And within an hour or a little more, the
10 time that he was shot he had driven over to Sumter
11 to buy 30-30 shells for a rife?

12 A Yes, sir.

13 Q A rifle that you later discovered that he owned?

14 A Correct.

15 Q A rifle that you later discovered was not found
16 in his home when you went to search for it?

17 A Correct.

18 Q A rifle that you later received from a family
19 member?

20 A Yes, sir.

21 Q Did you have a consent from for that?

22 A No, sir.

23 Q Did you seize it?

24 A It was given to the Sheriff's Office and we took
25 it.

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1 Q Thank you.

2 THE COURT: All right anything else,
3 Mr. Fata?

4 **FURTHER DIRECT EXAMINATION**

5 BY MR. FATA:

6 Q Again, it was in the found at the scene?

7 MR. CHANDLER: Asked and answered.

8 THE COURT: Sustained. You may step down
9 okay.

10 Next witness.

11 MR. FATA: Kim Dihn.

12 THE COURT: Come around the front,
13 Ms. Dihn.

14 WHEREUPON,

15 **KIM DIHN,**

16 having been duly sworn by the Clerk, testified
17 as follows:

18 THE CLERK: State your full name for the
19 record.

20 THE WITNESS: Kim Dihn, D-I-H-N.

21 **DIRECT EXAMINATION**

22 BY MR. FATA:

23 Q What is your occupation?

24 A I'm currently, my occupation is (indiscernible)
25 instructor at the Criminal Justice Academy.

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1 Q How long have you been doing that?

2 A For one year.

3 Q Prior to that what was your occupation?

4 A I was a special agent with the State of South
5 Carolina, commonly known as SLED, assigned to crime
6 scenes doing forensics.

7 Q Tell us what your educational background is.

8 A I graduated with a four year degree from the
9 University of South Carolina in criminology. After
10 that did a two year in-house training program with
11 SLED forensics where I was sent to the Academy as a
12 sworn officer. After I graduated I went to latent
13 school fingerprinting, tire wear, photography,
14 footwear, and blood and stain process.

15 Q And you acted as a crime scene investigator for
16 SLED how many years?

17 A For five years.

18 Q Five years. During that time how many crime
19 scenes do you think you've investigated?

20 A Over 350.

21 Q Okay. Murder scenes mostly or?

22 A Mostly.

23 Q Okay.

24 A Violent crimes.

25 Q And have you ever been qua-- have you ever

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1 testified before?

2 A Yes, sir.

3 Q Have you ever been qualified as an expert in the
4 area of crime scene investigation, latent prints,
5 what was the other? Blood ---

6 A Bloodstain, footwear, tire wear.

7 Q Have you ever been qualified as an expert in
8 those areas in courts of this state?

9 A Yes, sir.

10 MR. FATA: Your Honor, we'd offer Ms. Dihn
11 as an expert in the areas of crime scene
12 investigation, latent prints, blood, and ---

13 THE WITNESS: Footwear and tire wear.

14 MR. FATA: Footwear and tire wear.

15 MR. CHANDLER: We have no objection.

16 THE COURT: All right, ladies and
17 gentlemen, the witness is qualified as an expert in
18 the fields referenced by the Solicitor. Let me have
19 your attention and talk to you a minute about that.
20 Typically when witnesses testify they are not
21 permitted to give opinions; in other words, we call
22 them lay witnesses. Lay witnesses can testify to
23 things they saw or heard or smelled, things of that
24 nature. There is an exception in our rules of
25 evidence for witnesses who are qualified by

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1 education, training, or experience in a particular
2 field. These are called expert witnesses. They can
3 give opinions and they can give the reasons for
4 those opinions. You are not bound by the testimony
5 of an expert just because it comes from an expert.
6 In other words, you give the testimony of an expert
7 witness the weight you believe it deserves. I'll
8 instruct you a little more specifically at the
9 conclusion about this, but the witness is qualified
10 as an expert in crime scene investigation, latent
11 prints, footwear, and tire wear.

12 THE WITNESS: And blood stains.

13 THE COURT: And blood stains.

14 All right, go ahead, Mr. Fata.

15 BY MR. FATA:

16 Q Agent Dihn, were you called to the scene of a
17 crime here in Lee County on September 12th, 2010?

18 A Yes, sir.

19 Q And how did you receive that call?

20 A I received that call from our dispatch center. I
21 received a call at military time is 18:46 so
22 standard time would be 6:46 in the afternoon in the
23 evening basically telling me that I had such and
24 such on the crime scene. It's my job to assist that
25 county.

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1 Q Okay. When did you arrive in Lee County?

2 A I arrived at 10:28 that evening and I cleared
3 approximately two-and-a-half hours later.

4 Q Okay. Now when you arrived you'd just gone to a
5 naked scene with nobody around or anything? What
6 happened when you get there?

7 A When I arrive on scene there's typically deputies
8 or sheriffs there. When I arrived on the scene the
9 scene was secured. They walked out a perimeter
10 around the crime scene, and I -- when I arrive I get
11 a repeat on what happened. That lets me know what
12 I'm looking for. If they tell me there's a stabbing
13 I'm looking for a knife or other things. If they
14 tell me it's a shooting I'm gonna be looking for
15 guns and things of that nature so getting a brief, a
16 short synopsis of what happened so I can further do
17 my investigation.

18 Q Okay. Did you get that briefing?

19 A Yes, sir.

20 Q And based on the briefing what were you looking
21 for?

22 A I was advised that one deceased subject via
23 shotgun -- I mean, I'm sorry a shot wound, shotgun
24 wound and a ---

25 Q A gunshot wound?

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1 A I mean, I'm sorry, gunshot wound. A gunshot
2 wound, and that was one via bullet and that was it.

3 Q Did you begin your investigation?

4 A Yes, sir.

5 Q What did you do?

6 A The first thing I do is I photograph the area as
7 I arrive to document, policy was before I touch or
8 remove anything.

9 MR. FATA: Your Honor, may she come down?

10 THE COURT: Yes, ma'am, just keep your
11 voice up, okay.

12 THE WITNESS: Yes, sir.

13 BY MR. FATA:

14 Q I show you what's been marked as State's Exhibit
15 Number 9 and do you recognize that?

16 A Yes, sir, this is the — this is the scene where
17 I arrived at with the deceased victim on the side of
18 the road along with the burgundy SUV.

19 Q And while you're there I'm gonna ask you about
20 this, have you go up and down. This is State
21 Exhibit Number 6. Tell me what these little patches
22 are.

23 A These appear to be the patches that EMS put up
24 there to when they arrive to verify deceased.

25 Q Okay. Is that standard operating procedure?

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1 A Yes, sir.

2 Q Have a seat. Now you arrived, that's the scene
3 you found that's depicted in State's Exhibit Number
4 9, what did you do?

5 A From there I do a 360 of the entire area. I go
6 across the area to see what is important, what is
7 not important. The important things I mark with a
8 marker and photograph those closer to scale if need
9 be, and collect those or process those if need be.

10 Q Okay. What did you mark, if anything, what did
11 you photograph or scale, if anything?

12 A I, on the vehicle I marked one latent that I
13 processed the vehicle. I collected that. And from
14 the deceased I —

15 Q Now what's a latent? You said you collected a
16 latent.

17 A I'm sorry. A latent is, it is hidden or not easy
18 visible fingerprint that is left or an impression
19 that is left on a surface. Once I process it with
20 black powder I can see it. Once I see it I'll take
21 a piece of tape, I'll run it over it, pull it off,
22 and I'll put it on a piece of shiny postcard kind of
23 thing. And that is to us, a latent of a fingerprint
24 that probative of value of something that could be
25 important from the scene.

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1 Q And did you run that latent fingerprint against,
2 compare it against anything?

3 A Yes, sir. As well as collecting a latent I
4 collected a major case print from the deceased; and
5 what that does is, I take that and I run it across
6 the system to verify the deceased is who we think
7 they are. With those fingerprints that I collected
8 on scene I compare that latent from the vehicle to
9 the deceased.

10 Q And was it the decedent's?

11 A No, sir.

12 Q Did it compare to anybody else?

13 A No, sir. I submitted it to AFIS. AFIS is our
14 Automated Fingerprint Identification System. Once
15 it's submitted to AFIS it gets run across our South
16 Carolina data base that's collected from criminals
17 and also police officers from the oldest files. All
18 the fingerprints are stored on file.

19 Q Okay.

20 A And it came back with no hits.

21 Q That's people who have been arrested and so
22 forth?

23 A People, yes, sir.

24 Q Arrest criminals and police officers?

25 A Yes, sir.

S - K. DIHN - DIRECT

1 Q Came back to nobody?

2 A Yes, sir.

3 Q All right. Well, major case prints, now describe
4 to the jury what that is. They may not understand
5 what major case prints are.

6 A Major case prints are fingerprints that I collect
7 from the victim. I collect all ten fingers as well
8 as the palm area and the areas beneath, between the
9 fingerprint and the palm so the entire finger. I
10 also collect areas between the thumb and the finger
11 as if you were holding something round, that that
12 impression might be. And also the edge, what we
13 call the write edge, so when you write or you bear
14 down, or you have your hand, that edge as well.
15 Anything that has friction ridges which is what
16 enables us to grab the riffings.

17 Q And so you took major case prints of Mr. — or
18 the decedent, and, Mr. Rogers, and you ran those
19 against what?

20 A I pulled a card from AFIS which when we believe
21 to have a name, I will pull that name from AFIS and
22 he had a previous card on file. And I compared it
23 to what I collected on scene to what I pulled out
24 the system and it matched.

25 Q Okay. So you were able to identify it as being

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1 Mr. Rogers?

2 A Yes, sir.

3 Q What else?

4 A I also collected a GSR kit. GSR stands for
5 gunshot residue. They're sticky tabs that I touch
6 the skin with as well as swabs that I swab the
7 surface of the skin. It's collected in sections
8 such as the back hand or the left to palm on the
9 left, back hand right, palm of the right. You
10 collect it in sections to show if there are any
11 gunshot residue which are any particles that are
12 left from a gun that have been fired on the hand.

13 Q What do you do with those gunshot residue swabs?

14 A They're sealed, delivered to the trace department
15 for further analysis.

16 Q And somebody else checks those?

17 A Yes, sir.

18 Q All right. Now did you determine what this was
19 that killed Mr., or appeared to have killed
20 Mr. Rogers?

21 A It appeared to be a gunshot wound to the entrance
22 to the front of the neck, possible entrance in the
23 front of the neck and exits towards the base of the
24 neck on the left-hand side. It's not in neck and
25 shoulder area. It's like a piece may have

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1 fragmented off and made another small hole as well.

2 Q Now did you search the scene for a weapon?

3 A Yes, sir.

4 Q And did you find a weapon?

5 A No, sir, there was, there was no firearm.

6 Q Did you search Mr. Rogers' vehicle that was at
7 the scene?

8 A Yes, I did.

9 Q Did you find a weapon in there?

10 A There was no firearm in there.

11 Q Okay. But I believe you did find this bag which
12 is State's 34 with the sales receipt, State's 33,
13 and this box of bullets, State's Exhibit 32; is that
14 correct?

15 A Yes, sir. It's one box of 30-30 ammo, and it's a
16 full box along with a Wal-Mart bag and a receipt
17 from Wal-Mart.

18 Q Okay. So it's a full box, nothing's been taken
19 out of it?

20 A Correct.

21 Q But you found no 30-30 rifle at the scene?

22 A No, sir.

23 Q Or any other kind of handgun or weapon, did you?

24 A No, sir.

25 Q All right. Now as far as the body, when you got

S - K. DIHN - DIRECT

1 there -- you said -- this is State's Exhibit Number

2 9. You say that's the way you found the body?

3 A Yes, sir.

4 Q All right, let me show you State's 6. That's
5 just another view of the victim?

6 A Yes, sir.

7 Q All right. Now can you tell if that body had
8 been moved?

9 A It does not appear that body's been moved.

10 Q All right. How would you determine that?

11 A The way the blood pools and the body's been moved
12 there's typically called a swipe. Swipe is when a
13 bloody surface, bloody object touched another
14 surface and moves. It leaves a trail, or in our
15 current case a swipe motion, and we call that a
16 movement of blood but there appears to be no
17 movement of blood.

18 Q Okay. Now where would you be looking for
19 movement in this situation? You can come up and
20 point it out if you like.

21 A From here, typically around the edges will show
22 movement here. And also when we move the body, if
23 the body outline has been disturbed in any shape,
24 form, or fashion.

25 Q And here's another view, State's Exhibit -- let

f
S - K. DIHN - DIRECT

1 me see, is that 9 or 7? State's Exhibit 7. There's
2 another view. Where would you be looking there,
3 same thing or what?

4 A Yes, sir. With the entrance or the exit being
5 close to here we would expect that the bullet to be
6 near the wound. You can kind of tell there's
7 movement there, but that's probably from EMS. But
8 the fact that blood traveled that part of the shirt
9 lay there for a while, and the blood actually
10 saturated and moved its way up the shirt. And then
11 in probably 30, 40 minute hour could have passed,
12 I'm not sure of the time frame, but definitely way
13 later than when he fell that this shirt was moved
14 from that pattern right there. But that's what
15 happened with that.

16 Q Okay. You say this is an example of a ---

17 A Swipe.

18 Q ---swipe. You have any idea why that may have
19 been moved in that fashion?

20 A It possibly could be EMS pulling the shirt in any
21 shape, form, or fashion. But with blood being that
22 high up, that had to take a long time for blood to
23 saturate from here to this shirt and up the shirt to
24 leave blood that high.

25 Q Okay. So it could have been these tabs?

S - K. DIHN - DIRECT

1 A Yes, sir.

2 Q Have a seat.

3 A (Complies.)

4 Q Now after you processed the scene what did you do
5 with all the evidence?

6 A The evidence I collected I submit it to the lab
7 for further analysis.

8 Q Okay, and you ran fingerprint cards?

9 A Yes, sir.

10 Q And anything, any other evidence that you
11 actually personally process?

12 A Yes, sir.

13 Q Okay. Is that standard procedure to let others
14 process the items?

15 A Yes, sir, it's according to their expertise. I'm
16 not an expert in trace or gunshot residue of
17 firearms so I don't examine those areas.

18 Q Now your report, I want to show you this. Is
19 this a copy of your report?

20 A Yes, sir.

21 Q And it contains the fingerprint cards, the --
22 everything that you did at the scene. Fingerprint
23 cards, the list of things you collected and so
24 forth?

25 A This, my report actually contains what I actually

S - K. DIHN - DIRECT

1 examined so it contains the fingerprint card that I
2 pulled from the AFIS, the fingerprint card that I
3 pulled from him that night as well as the latent
4 that I pulled from the vehicle.

5 Q Okay. Let me ask you this, doesn't it also
6 contain your notes as to what you did, where the
7 body was, and so forth?

8 A That's part of my theory as well.

9 Q Okay. And where was the body when you got there
10 on John Wesley Road?

11 A The body was directly in front of the burgundy
12 vehicle approximately 200 feet from Saint Charles
13 Highway from -- he was so close from the vehicle,
14 from his feet to the vehicle, I approximated the
15 distance between front of the vehicle to his feet to
16 the closest intersection.

17 Q And that was 200 feet?

18 A Yes, sir.

19 MR. FATA: I'll mark this, and I
20 apologize, Judge. This will be whatever number it
21 is. 35.

22 (WHEREUPON, State Exhibit No. 35
23 was marked for identification only.)

24 THE COURT: State's 35 for I.D.?

25 MR. FATA: Yes, sir.

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1 MR. KENT: No objection, Your Honor.

2 THE COURT: Okay, 35. You offer that?

3 MR. FATA: Yes, sir.

4 THE COURT: 35 is in.

5 (WHEREUPON, State Exhibit No. 35 was
6 admitted into evidence.)

7 BY MR. FATA:

8 Q Just a couple of other things, Agent. Will you
9 come down please, ma'am.

10 A (Complies.)

11 Q All right. Tell me what this is a part of
12 number, State's 35, what are we looking at here?

13 A These are my notes of the scene as far as the
14 times I arrived, time I got the call, time I
15 cleared, any observations or further information
16 that I thought was important on scene, what I saw,
17 what I did see, as well as a sketch and the deceased
18 and the footwear.

19 Q This would be Saint Charles Road here?

20 A Yes, sir.

21 Q And this is John Wesley and the vehicle and the
22 stick figure is the decedent?

23 A Yes, sir.

24 Q These are the latent prints?

25 A Yes, sir, this is what I took off of the driver's

S - K. DIHN - DIRECT

1 side door.

2 Q Off of this door?

3 A Yes, sir.

4 Q Now these are the major case prints?

5 A Yes, sir.

6 Q Those came from the ---

7 A The deceased.

8 Q And of course your log sheet and then the crime
9 scene data sheet indicates when you arrived so forth
10 with what you found?

11 A Yes, sir.

12 Q And that sort of thing. All right, have a seat.

13 A (Complies.)

14 Q Answer any questions that Mr. Chandler -- wait a
15 minute.

16 MR. CHANDLER: Thank you.

17 BY MR. FATA:

18 Q There's one other question. If in fact -- are
19 you familiar with transfer of blood?

20 A Yes, sir.

21 Q Object to object? Would you come down here
22 please, ma'am.

23 A Complies).

24 Q If ---

25 THE COURT: What number?

S - K. DIHN - DIRECT

1 MR. FATA: On, excuse me, Number 6,
2 State's 6.

3 BY MR. FATA:

4 Q If, in fact, there had -- this amount of blood,
5 if there had been a weapon or anything under the
6 body is there a possibility of blood transfer?

7 A Absolutely.

8 MR. CHANDLER: Objection to possibility.

9 THE COURT: Mr. Fata.

10 BY MR. FATA:

11 Q Well, is it -- well --

12 THE COURT: Reasonable degree of
13 certainty.

14 MR. FATA: Right.

15 BY MR. FATA:

16 Q In a situation like this with this amount of
17 blood, with a reasonable degree of certainty could
18 there, is blood transfer possible?

19 A Yes, sir.

20 MR. CHANDLER: Objection.

21 THE COURT: Sustained.

22 BY MR. FATA:

23 Q Have a seat.

24 A (Complies.)

25 Q To a reasonable degree of certainty in this

S - K. DIHN - DIRECT

1 situation would you expect blood to transfer to
2 other objects?

3 A I'm not sure what you're asking me.

4 Q Could -- would this amount of blood at the scene,
5 could this amount of blood be transferred,
6 transmitted, or put on something else?

7 MR. CHANDLER: Objection.

8 THE COURT: Yes, sir.

9 MR. CHANDLER: Improper foundation,
10 nonconclusion, is not within the standard on expert.

11 THE COURT: All right. You can rephrase
12 the question. Reasonable degree of certainty ---

13 BY MR. FATA:

14 Q Based upon your expertise in the area of blood
15 analysis, is it more likely or is to a reasonable to
16 a reasonable degree of certainty, can blood be
17 transferred in this situation to other objects?

18 A Yes, sir.

19 Q And could that be weapon, could that be of
20 clothing ---

21 MR. CHANDLER: Objection.

22 BY MR. FATA:

23 Q What other things ---

24 MR. CHANDLER: Objection.

25 THE COURT: You can just ask her what.

1 objects.

2 MR. FATA: That's what I'm gonna do.

3 BY MR. FATA:

4 Q What other objects would you expect transfer to
5 be on?

6 A Anything in close proximity.

7 Q Anything in close proximity?

8 A With this type of injury, also anything behind
9 the object as well as spatter and any type of
10 projectile carry blood to anything from front or
11 behind it as well or from the entrance and exit.

12 Q Okay. Answer any questions that Mr. Chandler.

13 **CROSS-EXAMINATION**

14 BY MR. CHANDLER:

15 Q I'm Ray Chandler representing the defendant. I
16 want to talk you about your earlier testimony. When
17 you got to the scene this gentleman had bled out;
18 had he not?

19 A Yes, sir.

20 Q Okay. He had completely exsanguinated?

21 A I'm sorry?

22 Q He had exsanguinated? He bled out on the ground?

23 A He had blood on the ground.

24 Q And on his shirt?

25 A Yes, sir.

S - K. DIHN - CROSS

1 Q And on his shirt?

2 A Yes, sir.

3 Q Not on his hands?

4 A No, sir, I don't believe so.

5 Q Now that's what I'm getting at. And you got
6 there at how long afterwards?

7 A I was notified at 6:45. I arrived on scene at
8 10:28.

9 Q And so this is ---

10 A I'm sorry, 8:28.

11 Q So this is a picture when you got there?

12 A Yes, sir.

13 Q Not the picture immediately after he was shot?

14 A Correct.

15 Q And so we don't know how much blood was on the
16 ground immediately after he was shot, do we?

17 A I don't know how much blood there was, no, sir.

18 Q You can't testify as to how much blood was on the
19 ground?

20 A Not before I arrived there.

21 Q You could not testify as to what's spatter
22 without seeing the individual as soon as he was shot
23 or pictures, correct?

24 A I'm not sure exactly what is it you're talking a
25 bout.

S - K. DIHN - CROSS

1 Q You are asked to look at this picture with all
2 that blood and render an opinion could there be
3 transference two or three hours afterwards to get
4 completely pled bled out; is that correct?

5 A I'm not sure exactly...

6 Q Let me do it again. Mr. Fata looked at this
7 picture and brought you up there. He said you see
8 this picture with all that blood? And you said yes.
9 And he said with all that blood there could there
10 have been a transference, and you said there might
11 have been.

12 A Yes, sir.

13 Q Correct?

14 A Yes, sir.

15 Q With all that blood?

16 A Yes, sir.

17 Q But you don't know how much blood was out there
18 when he was immediately shot, do you?

19 A No, sir, I wasn't there.

20 Q And you cannot render an opinion on that, can
21 you?

22 A On the fact that he shot or the amount of blood?

23 Q No, ma'am, the amount of blood that was in
24 immediately after he was shot you can't render a
25 spatter opinion, can you?

S - K. DIHN - CROSS

1 A Not at to the shot, no, sir.

2 Q Thank you. That's what I was trying to get?

3 A Okay.

4 Q Now you said that AFIS is only criminals.

5 A It's those who have been charged. They're
6 criminal cards, not criminals, criminal cards.
7 Those have been charged, as well as police officers.

8 Q So if someone had been arrested you would have
9 access to those things?

10 A I should have access to those. It's also
11 dependent on those who collect the cards whether
12 they send them in. If they don't send them in, I
13 don't have access.

14 Q Yes, ma'am, I understand. And so would you help
15 me with this please. In your numerous
16 investigations in the hundreds, after an event
17 occurs do law enforcement agencies ever submit
18 fingerprint cards to you or potential witnesses or
19 suspects?

20 A Typically if we know that there is one and we do
21 not have a card, we will request one; otherwise,
22 they tell us the name. If we have a card they don't
23 send one in unless we specifically request it.

24 Q So if I have a suspect and that suspect got
25 arrested, he or she would be fingerprinted, right?

S - K. DIHN - CROSS

1 A Correct.

2 Q And then law enforcement might then send that
3 card to you to compare with the one, the latent that
4 you have on the door?

5 A I would think so but I can't speak for them.

6 Q But that happens, doesn't it? They say we've got
7 a suspect, we send you a card to see if it matches?

8 A That has happened.

9 Q That didn't happen in this case, did it?

10 A You're asking the wrong person; I don't know.

11 Q Well, you don't -- somebody else gets those?

12 A Yes, sir.

13 Q Okay. Then I am asking the wrong one, I'm sorry.
14 You just gather the evidence?

15 A Correct. If it's on file I gather it, but I
16 don't get it like unless it's sent directly to my I
17 don't get that.

18 Q So somebody else in your SLED agency would be
19 able to take your information and match it to AFIS
20 card of someone who's arrested?

21 A Correct.

22 Q Correct?

23 A If I didn't have an AFIS sheet that would be a
24 AFIS operator who does all that.

25 Q And that would either rule-in or rule-out that

S - K. DIHN - CROSS

1 claim against the suspect?

2 A It can. Sometimes depending on the nature of a
3 latent that it can be that person and not make a hit
4 because of the area it's left, it may not be
5 represented on a card. So therefore, if we have a
6 particular one we like for to have them submitted
7 directly to us so we can make a manual comparison
8 because the computer doesn't always make that
9 comparison for us.

10 Q I guess that's what I'm saying. It could be
11 submitted to you and you could have a scientific
12 conclusion?

13 A Yes, sir.

14 Q Yes, ma'am. And there's nothing in your file
15 that would indicate that had been done because
16 that's not your job?

17 A There's nothing in my file indicate there's a
18 card for the suspect or that there's a (inaudible).

19 Q Thank you so much. Let me ask you one more
20 question. Did you indicate that this individual was
21 right in front of the vehicle; is that right?

22 A He's -- deceased laying in front of the vehicle.

23 Q Did you take any fingerprints of the rifle here?

24 A No, sir. There was no gun collected on scene and
25 I did not compare with that rifle.

S - K. DIHN - REDIRECT

1 Q Somebody else at SLED would be taking those,
2 would be collecting those on evidence?

3 A It would have to be requested.

4 Q Now if there were other weapons seized a few days
5 later it could be followed up for fingerprints; is
6 that right?

7 A If it was requested and proper packaged.

8 Q Thank you very much.

9 A You're welcome.

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

11 THE COURT: Yes, sir.

12 **REDIRECT EXAMINATION**

13 BY MR. FATA:

14 Q Agent, how would you characterize this wound of
15 Mr. Rogers? Significant wound, minor would?

16 A It's definitely —

17 MR. CHANDLER: Objection, suggestive
18 leading.

19 BY MR. FATA:

20 Q You're just ask her how she characterized?

21 THE COURT: Just don't use an answer
22 yourself.

23 MR. CHANDLER: That's correct. Thank you,
24 Your Honor.

25 BY MR. FATA:

S - K. DIHN - REDIRECT

1 Q How would you describe this wound?

2 A I would say it's a major inflicted wound.

3 Q And what do you expect to find in major inflicted
4 wounds?

5 A Lots of damage that are, can be fatal or ---

6 Q How about blood, what do you expect to find about
7 blood?

8 A I would expect to see a lot of blood.

9 Q And when would you expect to see that blood, a
10 lot of blood?

11 A Depending on how they hit as particular artery or
12 vessel or a muscle, the way it contracts, they can
13 expel a lot of blood immediately.

14 Q Immediately?

15 A Yes, sir.

16 Q Depends on how you get hit?

17 A Yes, sir.

18 Q Does it depend on what they hit as far as veins
19 and arteries in the neck?

20 A Absolutely. A carotid is a very big artery and
21 if this is cut, then it takes seconds to bleed out
22 and lots of blood. And then you have your heart
23 that as it's ejecting, then blood still alive the
24 heart protracts and spills blood as the heart
25 protects.

1 Q So would there be a significant amount of blood
2 immediately if the carotid artery was ---

3 A Yes, sir.

4 Q Okay.

5 **RECROSS-EXAMINATION**

6 BY MR. CHANDLER:

7 Q So this gentleman bled out around his neck, is
8 that correct?

9 A It appears so, sir.

10 Q He bled out around his neck?

11 A Yes, sir.

12 Q And he bled out around his shoulder?

13 A Yes, sir.

14 Q And it absorbed into the upper part of his
15 T-shirt; is that right?

16 A The up -- you mean as in upper on top or upper?

17 Q The top right there?

18 A May I see that?

19 Q Excuse me, you were pointing out this area.

20 A Yes, sir.

21 Q Okay, that upper part there?

22 A Yes, sir.

23 Q There?

24 A Yes, sir.

25 MR. FATA: I didn't understand what he ---

S - K. DIHN - FURTHER DIRECT

1 THE COURT: You finished, Mr. Chandler?

2 MR. CHANDLER: Yes, sir.

3 THE COURT: All right, this will be it.

4 **FURTHER DIRECT EXAMINATION**

5 BY MR. FATA:

6 Q The gunshot wound entered where?

7 A The gunshot wound appeared to enter on the front
8 on the neck.

9 Q In the front of the neck. And what is this spot
10 in the back here?

11 A That appears to be an exit.

12 Q Okay. A gunshot wound come in, enters the neck,
13 where is the blood going to come from?

14 A The neck.

15 Q Front of the neck or the back of the neck?

16 A Both.

17 Q Both. Where's the most significant amount come
18 from?

19 A Depending if he's face up or face down. If he
20 was face up it would be draining out the backside as
21 well as both sides so it also depends on how he's
22 laying and how he's pulled. You ---

23 Q Lay face down ---

24 A ---then it would be ---

25 MR. CHANDLER: Excuse me, Judge, if he'd

S - K. DIHN - FURTHER DIRECT

1 let her finish.

2 THE COURT: Yes, sir, please let her
3 finish.

4 THE WITNESS: If you're laying face down
5 the blood would be pooling towards the gravity the
6 once you once your heart stops beating blood stops
7 flowing and will just go to any exit and hen if you
8 are laying face dock become of healed lane side more
9 flood will drain to the low part because of the
10 gravity, the bottom part.

11 Q Okay, good.

12 MR. FATA: That's all, Your Honor.

13 MR. CHANDLER: Nothing else.

14 THE COURT: Thank you, ma'am. You can
15 step down.

16 MR. CHANDLER: She's excused from this
17 side.

18 THE COURT: Any objection to her being
19 excused?

20 MR. FATA: None, Your Honor.

21 THE WITNESS: Thank you, Your Honor.

22 THE COURT: Okay, thank you. Everybody on
23 the jury okay? Anybody need to take a break?

24 (There was no response.)

25 THE COURT: Mr. Fata.

S - I. SIMMONS - DIRECT

1 MR. FATA: We would call Agent Ila
2 Simmons. Come around to be sworn.

3 WHEREUPON,

4 **Ila Simmons,**

5 having been duly sworn by the Clerk, testified
6 as follows:

7 THE CLERK: State your full name for the
8 record.

9 THE WITNESS: My name is Ila Simmons.

10 **DIRECT EXAMINATION**

11 BY MR. FATA:

12 Q Agent Simmons, what is your occupation?

13 A I am employed with the South Carolina Law
14 Enforcement Division also known as SLED in the
15 forensics laboratory trace evidence department.

16 Q Okay. And trace evidence, what is that?

17 A Gunshot residue, gunpowder residue in the form of
18 fiber, paint, and glass as well as analyzing post go
19 plastics and debris.

20 Q Now what is your background, educational
21 background?

22 A I have a bachelor's degree in chemistry. I
23 have -- after completing that I came to SLED, and
24 the first three years I worked with a court
25 qualified SLED certified trace evidence examiner who

S - I. SIMMONS - DIRECT

1 taught me how to collect and analyze trace evidence.
2 During that time I had to take written and practical
3 examinations completing with a hundred percent
4 proficiency. I'm a member of the Southern
5 Association of Forensic Science, The American
6 Academy of Forensic Science, and each year I have to
7 take tests and every year in trace evidence and pass
8 them with one hundred percent proficiency to remain
9 current in trace evidence analysis.

10 Q And tell me how long you've been doing, working
11 in trace.

12 A Thirteen years.

13 Q Thirteen years. Have you ever testified before?

14 A Yes, I have.

15 Q And have you been qualified as an expert in the
16 area of trace evidence collection and analysis in
17 the course of this state?

18 A Yes, sir, over two hundred times.

19 Q Two hundred times?

20 A Yes, sir.

21 MR. FATA: And Your Honor, we would submit
22 her, Ms. Simmons, Agent Simmons, as an expert in the
23 area of trace evidence.

24 MR. KENT: No objection, Judge.

25 THE COURT: Okay, ladies and gentlemen,

S - I. SIMMONS - DIRECT

1 she is qualified as an expert in the area of trace
2 evidence. The instruction I gave you during the
3 testimony of the last witness would also apply to
4 Agent Simmons' testimony.

5 Mr. Fata.

6 (WHEREUPON, State Exhibit No. 36
7 was marked for identification only.)

8 BY MR. FATA:

9 Q Agent, I'm gonna give you what's been marked as
10 State's Exhibit 36, do you recognize — for
11 identification — do you recognize that?

12 A Yes, sir.

13 Q And what is it?

14 A It is a black tank top style shirt that I
15 analyzed in this case.

16 Q And that was submitted to you as — how? How was
17 that submitted to you?

18 A It was submitted, it was in a large box and it
19 was submitted.

20 Q Regarding this case?

21 A Yes.

22 Q This case? The Rogers homicide?

23 A Yes.

24 MR. FATA: Your Honor, we would move this
25 as State's Number 36.

S - I. SIMMONS - DIRECT

1 MR. KENT: No objection.

2 THE COURT: Okay, that's in.

3 (WHEREUPON, State Exhibit No. 36 was
4 admitted into evidence.)

5 BY MR. FATA:

6 Q You received this and some other stuff; didn't
7 you?

8 A Yes, I did.

9 Q Other clothing?

10 A Yes, sir.

11 Q Did you analyze the other clothing along with
12 this shirt?

13 A Yes, sir, I analyzed the clothing. I looked to
14 see if there were any holes that may be consistent
15 with gunshots.

16 Q Uh-huh. The other clothing, did you see any
17 holes consistent with gunshots?

18 A No, sir.

19 Q Now on this shirt, State's Exhibit Number 36,
20 what were your findings?

21 A I found three holes in the shirt. There was a
22 hole in the center back area that appeared like it
23 may have been a exit hole from where a piece of a
24 projectile came back through the shirt. I found a
25 hole underneath the armpit as well in the strap

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1 area.

2 Q And did you check that shirt for any gunshot
3 residue?

4 A I checked it for gun powder, yes, sir.

5 Q Gunpowder. Did you find any?

6 A No, sir.

7 Q Now you also analyzed the GSR?

8 A Yes, sir.

9 Q Tell the jury what GSR is.

10 A Gunshot residue is also called GSR. It's a
11 mixture of microscopic chemicals that come out of a
12 gun when it's discharged. If you've seen, in movies
13 you'll see a big puff of smoke come out of a gun.
14 This contains the gunshot residue. Although you
15 can't see it, you just see the burning pattern. It
16 can get on anything in close proximity to that gun
17 when it's discharged including the hands of the
18 person holding the gun.

19 Q Okay. Where do you expect -- if somebody shoots
20 a gun where do you expect to find gunshot residue?

21 A On the palms and backs of both of their hands if
22 they're holding it with both hands. If they're
23 holding it with one hand, I would expect to find it
24 on the palm of the back of that one hand.

25 Q Just the one hand?

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1 A Yes, if they were shooting with that one hand.

2 Q Was a gunshot residue kit submitted to you in
3 this case?

4 A Yes, it was.

5 Q And who was that of?

6 A That was for Rogers, the last name ---

7 Q The victim? What were your findings on that?

8 A I found -- the samples were taken from the palm
9 of the right hand. A sample was also taken from the
10 back of the right hand, a sample from the palm of
11 the left hand, and a sample from the back of the
12 left hand.

13 Q Okay.

14 A I analyzed all four samples and found that the
15 metals on the left palm may be associated with
16 gunshot residue.

17 Q May be associated?

18 A Yes, sir, that is the only area that ---

19 Q Why you say may be?

20 A Because the threshold levels that we have set, it
21 was the lowest of the threshold level.

22 Q Okay. Is there any significance to that?

23 A It is more consistent with not having been
24 directly within the plume of smoke from the gun. If
25 someone were shot at and they were to move their

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1 hands up, if their hands were not directly in front
2 of the weapon.

3 Q So tell me some of the ways that you can get
4 gunshot residue on you besides firing a gun?

5 A You can handle it an object that has gunshot
6 residue on it and it can transfer on to your hands,
7 or if you were to stand---

8 Q And then that's -- let me stop you there. And in
9 that situation where would you expect to find the
10 residue?

11 A On the palms of the hands because you usually
12 only touch something with the palm of a hand. You
13 wouldn't rub the back of your hand like that.

14 Q Okay. How else would you get gunshot residue on
15 you?

16 A If you were very near a gun when it was
17 discharged, either if you were being fired upon or
18 you were standing by a gun when it was discharged.

19 Q How about on the palm, how would you get it on
20 the palm?

21 A Mainly by handling something or touching
22 something. That's most consistent.

23 Q How about if somebody is shooting a gun at you,
24 what would you expect and you held your hands up?

25 A Yes, that's also a possibility.

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1 Q All right. But if somebody shoots a gun, if I
2 pull out a gun and I shoot that gun, the residue is
3 gonna be only on my palms?

4 A It should be on the palm and back of the hand.

5 Q So you would expect to find it on the backs of
6 the hands?

7 A Yes, sir.

8 Q In this case did you find any gunshot residue on
9 the backs of Mr. Rogers' hands?

10 A No, sir, I did not.

11 Q Tell me how long GSR, gunshot residue, will last
12 on your hand.

13 A If it's a living person it will not last more
14 than six hours, and it begins to fall off
15 immediately. It has the consistency of salt so if
16 you get it on your hands and you wipe your hands on
17 your pants or you wash your hands when you shower,
18 it's gonna be gone. So more than six hours
19 (indiscernible).

20 Q Okay. And what about a deceased person?

21 A On someone who's deceased, now that you've no
22 longer making contact with objects and they're not
23 absorbing things through the skin and they're not
24 sweating, it can remain on the palm of somebody
25 deceased indefinitely.

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1 Q Indefinitely. So it doesn't wash off?

2 A No, not unless someone washed it off, an outside
3 source.

4 Q Beg the Court's indulgence. What about handling
5 bullets? What if I opened this box with the bullets
6 here and take some out, and you know, I take it out
7 and I handle it like this.

8 A If there's gunshot residue on the cartridge when
9 you handle it, you can get gunshot residue on your
10 hand.

11 Q But not if it hadn't been fired, been around shot
12 residue?

13 A No, sir, it isn't (indiscernible).

14 Q Okay. One second, Your Honor. Answer any
15 questions that Mr. Kent.

16 THE COURT: All right, Mr. Kent.

17 **CROSS-EXAMINATION**

18 BY MR. KENT:

19 Q Agent Simmons, how are you?

20 A I'm well, sir.

21 Q You said you've been doing this approximately 13
22 years?

23 A Yes, sir.

24 Q As a matter of fact, what you may not realize,
25 one of the first cases we had was when I was a

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1 prosecutor down in Charleston so I met you quite
2 some time ago so 13 years exactly. And of course,
3 I'm not gonna go through your expertise because
4 you're an expert but I want to ask a couple of
5 questions to make sure I understand some of the
6 things you were talking about. When the Solicitor
7 was asking questions he was talking about the
8 gunshot residue, and you gave a description some as
9 I think you described it as a puff of smoke that
10 kind of comes out and you fire a weapon and a puff
11 comes out.

12 A Yes, sir.

13 Q And those particles that come out of that
14 projectile is ejected from the weapon, those are
15 the — that's the gunshot residue?

16 A Yes, sir.

17 Q And the gunshot residue doesn't travel forever.
18 If I shot a gun in here everybody in the room is not
19 gonna pick up gunshot residue?

20 A That's correct.

21 Q It only goes a short distance?

22 A Yes, sir. Probably with most handguns about 5
23 feet. Maybe with a rifle up to 10 feet.

24 Q Up to 10 feet so probably from where I am to you?

25 A Yes.

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1 Q Gunshot residue? And these are particles in the
2 air that are gonna travel with the projectile; is
3 that correct?

4 A Yes, sir, and they're gonna disburse outward and
5 they're light so they'll start ---

6 Q So they're light and they disburse outwards so
7 the further you are away from the shot, the less
8 likely someone is to get gunshot residue on them; is
9 that correct?

10 A That's correct.

11 Q So if I was to shoot you from here with, say, a
12 pistol, and that's what we talked about first, a
13 pistol, it's not likely you're gonna get a lot of
14 gunshot residue on you, is it?

15 A That's correct.

16 Q Now what is that again? Explain that for the
17 jury.

18 A Because the gunshot residue is light and as it
19 hits the resistance of the air in the atmosphere,
20 it's gonna start falling off, start falling to the
21 ground.

22 Q And with a rifle you would get some gunshot
23 residue on you potentially. Is that something we
24 know for a fact?

25 A It's a possibility depending upon the type of

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1 rifle and the ammunition used.

2 Q When we talk about gunshot residue and the things
3 we test, we test gunshot residue I think you
4 mentioned the palm and back of the hand. You can
5 get it on clothing?

6 A Yes, you can.

7 Q And it's actually easier to get gunshot residue
8 on our clothing, isn't it?

9 A It can be, yes, sir.

10 Q And we talked about if someone is alive or dead
11 how long will it last. How long would gunshot
12 residue last on clothing?

13 A It will remain indefinitely.

14 Q It will last even longer?

15 A Yes, sir.

16 Q And a lot of time if somebody is, let's say we're
17 talking about close wound and I shoot somebody and
18 the gunshot residue gets on, say, their palm,
19 there's a likelihood it's gonna get on their
20 clothing also?

21 A Yes, sir.

22 Q Why is that likely that if you get some on your
23 palm after someone shoots at you you're likely to
24 get some gunshot residue on your clothing also, why
25 is that?

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1 A Generally it's because gunshot residue, if it
2 makes it as far as your hands it can also get on
3 clothing.

4 Q It's gonna get on your clothing. You were given
5 State's Exhibit Number 36. You tested that for
6 gunshot residue?

7 A I tested it for gunshot residue and the presence
8 of gun powder.

9 Q And the presence of gun powder?

10 A Yes, sir.

11 Q Did you find anything on that shirt as well?

12 A No, sir, nothing.

13 Q So you didn't find gunshot residue, you didn't
14 find gun powder, you didn't find particles, you
15 didn't find anything on that shirt at all?

16 A No, sir.

17 Q And as we mentioned when I was asking you, that's
18 the type of stuff that's gonna last forever?

19 A It could remain on a shirt indefinitely unless
20 there was a small amount. The only thing that can
21 remove it on clothing would be if the clothing were
22 washed or a large amount of blood was on the
23 clothing that enacted with the gun shots.

24 Q Talk to me about, you mentioned again, and I'm
25 not an expert when it comes to this, I heard you

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1 testifying on direct examination you mentioned
2 you're more likely to get gunshot residue on
3 someone's palm when they're handling or firing a
4 firearm?

5 A Yes, sir.

6 Q Explain that to the jury if you will.

7 A Because if I were to pick up a gun and handle it,
8 only my palms where the gun touch it, it's not gonna
9 be rubbed against the back of my hand. But if I
10 were to fire a gun, the plume of smoke is gonna, you
11 know, is gonna encapsulate my whole hand.

12 Q Again, on the left palm would be more likely,
13 that's the most likely where ---

14 A It actually, if I'm firing the gun it's gonna get
15 more on the back of the hand and a smaller amount
16 will be on the palm of the hand.

17 Q And what about a rifle?

18 A With a rifle your hands are slightly harder back
19 but you can still get gunshot residue on your hands
20 when you shoot a gun.

21 Q You still can? And I know it was suggested by
22 the State dealing with actual ammunition and you're
23 not gonna get gunshot residue on ammunition if it
24 hasn't been fired?

25 A Right. If it hasn't been, if it hasn't had

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1 gunshot residue on it from some source, but just if
2 it will not be pouring out of the cartridge.

3 Q So if the jury went back there and touching this
4 stuff, they're not gonna get gunshot residue all
5 over their hands and worry about having to do
6 gunshot residue tests?

7 A No, sir, not if it hasn't been fired or been
8 around something that's fired.

9 Q So when you go to Wal-Mart and you buy some
10 weapon, some ammunition you're not likely to get
11 gunshot residue on your hand

12 A No, sir.

13 Q Just going back to one of the hypotheticals you
14 may answer this, one of the hypotheticals from the
15 State that talked about, talked about defensive
16 wounds. If someone throws up a defensive wound to
17 keep from being shot, it is still your testimony
18 that the likelihood isn't they get gunshot residue
19 on their palm, they'll get it on their shirt?

20 A Yes, sir, that is a possibility.

21 Q When you get gunshot residue again on your shirt,
22 skin and face and things of that nature, can you get
23 gun—

24 A We would not test anywhere that was close to a
25 gunshot wound so like the front of the shirt may not

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1 have been tested for presence of gunshot residue
2 simply because there was one in the front of it.

3 Q But that, examiner, is just complete speculation,
4 isn't it, as whether, I mean, defensive wound things
5 of this nature. Is that anything you can offer as
6 expert testimony that's how someone definitely got
7 gunshot residue on the palm —

8 A I can't say definitively.

9 Q There's not definitively you can say about that
10 at all?

11 A Not definitively, no, sir.

12 Q And in this case you specifically were giving
13 your tests as gunshot residue in this case
14 specifically. Do you have a copy of your report in
15 front of you?

16 A Yes, sir.

17 Q Your report indicates that you found gunshot
18 residue on -- let me make sure I'm not saying this
19 incorrectly -- I think it's item 20.3, the left palm
20 of Gregory Rogers.

21 A Yes.

22 Q I think the indication of the quantity of metals
23 found may be associated with gunshot residue?

24 A Correct.

25 Q Now they say that -- I'm not the solicitor or

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1 prosecutor or Mr. Fata — I've seen a number of
2 those reports, all say may be associated with
3 gunshot residue. I've never seen one that says the
4 defendant has gunshot residue. I've never seen one
5 that said it definitely was gunshot residue?

6 A No, sir. What we have to say is may be
7 associated with gunshot residue because what we
8 found certain threshold levels of certain chemicals;
9 and they're, they may be associated with gunshot
10 residue. However, they can also possible be
11 associated with elements from different things.

12 Q Even if somebody came to you and said, we know
13 for a fact that this person one hundred percent
14 fired a firearm or had a firearm in their hand, you
15 know it's gunshot residue, your report is going to
16 say, may be associated with?

17 A Yes, sir, if it came from a victim. If it came
18 from someone who had not sustained a gunshot wound,
19 we would have taken it to a second portion of the
20 test where we could say gunshot residue was found.
21 But since it was from a decedent we don't go that
22 far.

23 MR. KENT: Beg the Court's indulgence for
24 one moment.

25 THE COURT: All right.

S - I. SIMMONS - REDIRECT

1 MR. KENT: Thank you. That's all the
2 questions I have, Agent, and I appreciate it.

3 THE COURT: Redirect.

4 **REDIRECT EXAMINATION**

5 BY MR. FATA:

6 Q Agent Simmons, you said other elements can affect
7 or can be a what, positive test? Is that what you
8 said?

9 A Yes.

10 Q What other elements?

11 A Lead, barium, and antimony are three elements
12 that we look for in gunshot residue and they can
13 come from other sources.

14 Q Such as?

15 A Such as lead, fishing weights. You can get
16 barium from makeup and you can get antimony from
17 leather goods.

18 Q What about lead bullets?

19 A Yes, if you're handling them.

20 Q If you're handling a lead bullet?

21 A Uh-huh.

22 Q Okay. So that would be a, I guess, false
23 positive?

24 A It would still be consistent with the elements.
25 That's why we say may be associated with.

S - I. SIMMONS - REDIRECT

1 Q Now, and it all depends, I think you can tell Mr.
2 Kent that it all depends how close you are to the
3 actual shot?

4 A Yes, sir, and the way that the body is positioned
5 if you're talking about gunshot residue on the
6 hands. If the hands were in a position and I was
7 shot and my hands were down like this, there
8 wouldn't be gunshot residue on them.

9 Q Okay. But if your hands were up like —

10 A Then you skip it, yes, sir.

11 Q All right. And as you were the other side of the
12 room maybe 30 feet away or — but you can't tell how
13 close, can you?

14 A No, sir.

15 Q 'Cause you don't, you don't test fire the
16 ammunition and all that kind of —

17 A That's correct.

18 Q You said something about the GSR on clothes lasts
19 forever?

20 A Yes, sir, it can.

21 Q Can it come off?

22 A Oh, absolutely, if it was washed or it got wet
23 with blood or wet with any sort of contact with a
24 wet item that would —

25 Q So the — and blood is wet?

S - I. SIMMONS - REDIRECT

1 A Yes, sir.

2 Q Okay. So this shirt, State's Exhibit Number 36,
3 tell me about the status of it regarding blood.

4 A Yes, it had a large amount of blood on it.

5 Q A large amount of blood?

6 A Yes, sir.

7 Q Enough to wash off any GSR?

8 A That's a possibility.

9 Q Okay. So there are a lot of factors then to
10 consider whether or not you get GSR on you, gunshot
11 residue?

12 A Yes, sir.

13 Q A lot of factors, a lot of intervening facts that
14 can either wash it away or even keep it there?

15 A Yes, sir.

16 Q And whether or not you got it on you, how close
17 you are, and that sort of thing?

18 A That's correct.

19 MR. FATA: That's all I have, Your Honor.

20 MR. KENT: No further questions for this
21 witness, Judge.

22 THE COURT: Thank you, ma'am. You may
23 step down.

24 MR. FATA: May she be excused, Your Honor?

25 MR. KENT: No objection.

1 THE COURT: Yes, she can be.

2 Everybody okay on the jury? Okay, we'll
3 take just a few minutes. Ladies and gentlemen, you
4 cannot discuss the case and either we'll break for
5 lunch in a few minutes or we'll have you back out
6 for a short time. Please, again, do not discuss the
7 case.

8 (WHEREUPON, the jury was removed from the
9 courtroom and the following proceedings
10 commenced in open court.)

11 THE COURT: All right, Mr. Fata, how many
12 witnesses did you want to call before lunch?

13 MR. FATA: I'd like to get all these SLED
14 agents out the way, and the one that I'll call next
15 has got to be in Colleton County in one hour so I've
16 got to get her in.

17 THE COURT: All right, how many more SLED
18 witnesses?

19 MR. FATA: One, two, three, four. But
20 they're short, I mean, they shouldn't be long.

21 THE COURT: You want to do those all
22 before lunch?

23 MR. FATA: I'd like to, Judge. It depends
24 —

25 THE COURT: All right. Any problem with

1 that Mr. Kent, Mr. Chandler?

2 MR. KENT: No problem.

3 MR. CHANDLER: No, sir.

4 THE COURT: Okay, then after -- just tell
5 me who they are.

6 MR. FATA: Ms. Eichenmiller.

7 THE COURT: Eichenmiller, Broom.

8 MR. FATA: And ---

9 THE COURT: Stanley and Butler.

10 MR. FATA: Stanley and Butler.

11 THE COURT: Okay. What does Eichenmiller
12 know, what's her subject area?

13 MR. FATA: Eichenmiller is gunshot
14 firearms, Broom is blood analysis, Stephanie Stanley
15 and Betty Butler. Betty Butler is a tech who
16 collected the swabs on the 30-30 rifle, and
17 Ms. Stanley is the person who supervised her. Now
18 we can do away with Ms. Stanley if they don't have a
19 problem with that.

20 THE COURT: I'll just -- we'll deal with
21 that as it comes, but in any event, we'll get back
22 together in just a few minutes so don't go far.
23 Okay? Thank you.

24 (WHEREUPON, a recess was taken from the
25 proceedings.)

1 THE COURT: Okay, bring in the jury.

2 MR. FATA: Oh, one thing, Judge, State's
3 Exhibit Number 30 which were those bullets found at
4 the house, at the defendant's house, are still for
5 I.D. and we had meant to move those in and they
6 objected because of the consent. We got the consent
7 in. I was just curious if their objection is still
8 there.

9 THE COURT: You still object?

10 MR. CHANDLER: I thought we objected to
11 the consent.

12 MR. FATA: The consent order is not in.

13 THE COURT: Okay. You ready for the jury?

14 MR. FATA: Yes, sir. So that's in now, 30
15 is in?

16 THE COURT: 30 is in.

17 (WHEREUPON, State Exhibit No. 30 was
18 admitted into evidence.)

19 (WHEREUPON, the jury was returned to the
20 courtroom at and the following
21 proceedings commenced in open court.)

22 MR. FATA: Your Honor, the State calls
23 Michele Eichenmiller.

24 THE CLERK: Place your left hand on the
25 Bible and raise your right hand.

S - M. EICHENMILLER - DIRECT

1 WHEREUPON,

2 **MICHELLE EICHENMILLER,**

3 having been duly sworn by the Clerk, testified
4 as follows:

5 THE CLERK: State your full name for the
6 record.

7 THE WITNESS: My name is Michele
8 Eichenmiller.

9 **DIRECT EXAMINATION**

10 BY MR. FATA:

11 Q Ms. Eichenmiller, you're an agent with SLED?

12 A Yes.

13 Q Tell me what your job there at SLED is.

14 A I work at the South Carolina forensics lab. I'm
15 a firearms examiner.

16 Q As a firearms examiner what do you do?

17 A Whenever there's a crime committed and there's a
18 gun involved we -- firearms identification is a
19 branch of forensic science that deals with fires
20 come out a gun, the gun that's involved, anything
21 like a cartridge case or a bullet, any other related
22 exams.

23 Q Now what is your educational background in that
24 area?

25 A I have a bachelor's degree in biology and I have

S - M. EICHENMILLER - DIRECT

1 a master's in forensic science.

2 Q And what training specifically have you had in
3 the area of firearms?

4 A In order to be a firearms examiner you have to go
5 through in-house training so I completed the SLED
6 in-house training program, which is a three to five
7 year program where I studied and clerked with my
8 examiner. And I'd read on my own then I did their
9 office learning how to do case work. I also do a
10 lot of microscopic comparisons on my own and then
11 when I'm done I have a comprehensive exam that I
12 have to take. I do a mock court and then they let
13 me do loose case work on my own.

14 Q How long have you been loose doing case work?

15 A Since 2010.

16 Q Okay. Have you — how many cases have you done
17 since 2010 you think?

18 A Hundreds.

19 Q Hundreds? And have you ever been called to
20 testify?

21 A Yes.

22 Q Have you ever been certified as an expert in the
23 courts of this state as a expert in the area of
24 firearms analysis?

25 A I have.

S - M. EICHENMILLER - DIRECT

1 Q And in firearms analysis includes the gun and
2 bullets and that sort of thing?

3 A Correct.

4 MR. FATA: Your Honor, we would submit
5 Agent Eichenmiller as an expert.

6 THE COURT: Firearms examination. Of
7 course, you may give the weight of the testimony of
8 this witness -- you may give the testimony of this
9 witness the weight you believe it deserves and the
10 other instructions I gave you concerning the other
11 expert witnesses will be the same for this witness.

12 All right, Mr. Fata.

13 MR. FATA: Thank you, Your Honor.

14 BY MR. FATA:

15 Q Agent Eichenmiller, I want to show you State's
16 Exhibit Number 28. Hold in the air or down to the
17 floor. Do you recognize State's Exhibit Number 28?

18 A Whenever I receive a piece of evidence I write on
19 it my initials, the case number and the an item
20 number. This is the same one that I examined.

21 Q And you see your case number and item number are
22 on there and your initials? Okay, so you examined
23 it. And what is this? Tell me what this is?

24 A It's a radon model WE 29 rifle, 8 millimeter
25 rifle Mauser.

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1 Q Did you do any tests, perform any tests on this
2 rifle?

3 A Whenever evidence, especially a firearm, comes to
4 the lab I do all kinds of testing to make sure that
5 it's safe, the safeties work, I document serial
6 numbers, anything that might be wrong with it. We
7 deal with several work sheets on it. And in this
8 case I examined this rifle. I also test fired it and
9 it was in working order.

10 Q So this was a working gun?

11 A Yes, sir.

12 Q You can shoot it and put a in it, bullet would
13 come out, and shoot it, a target?

14 A Yes.

15 Q All right. Is this a high powered rifle or 22,
16 22's, 30-30s, all that, 8 millimeter Mauser, how
17 does that fit in that?

18 A It's a little bit less than a 38 caliber, which
19 is like a 38 special or a 9 millimeter. It's kind
20 of a smaller gun but it is a rifle so it's got some
21 power behind it.

22 Q If somebody is shot with this would there be
23 significant damage?

24 A Yes, sir.

25 Q All right, I'm gonna show you State's Exhibit

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1 Number 30. You recognize that?

2 A Same thing, my initials, the item number, the
3 case number on here. These are the cartridges I
4 examined.

5 Q Okay. You examined those cartridges and those
6 are the — what size cartridges are those?

7 A They're 8 millimeter Mauser.

8 Q Okay. Do they fit in this State's Exhibit Number
9 28?

10 A Yes, they're correct for these, for that rifle.

11 Q Did you test fire those samples bullets from
12 there in this gun?

13 A We didn't need to. At SLED we have an ammunition
14 collection. As long as I have the correct
15 ammunition at SLED I would use that.

16 Q So, but those bullets fit in that gun?

17 A Yes, they do.

18 Q I'm gonna show you what's marked as State's
19 Exhibit 37 for identification and ask you if you
20 recognize that.

21 A Yes, I do.

22 Q And what is that?

23 A It's my item 9 and my number.

24 Q Item what, please, ma'am?

25 A Oh, it's my item 9. It's a lab number.

S - M. EICHENMILLER - DIRECT

1 Q Your lab number 9. And what is lab number 9, lab
2 item number 9, what is that?

3 A State's Exhibit 37 is a piece of metal, that
4 metal is a metal from the shoulder.

5 Q You know what it is, what kind of metal?

6 A It's a piece of lead.

7 Q Piece of lead from what?

8 A From an autopsy.

9 Q Okay. What kind of lead was it before it'd
10 broken up in ---

11 A I couldn't tell you. I could not tell.

12 Q Okay. But it's metal from, metal from where?

13 A It's says on the envelope it was metal from the
14 shoulder.

15 MR. FATA: Your Honor, we would move these
16 in as State's 37.

17 THE COURT: Mr. Kent.

18 MR. KENT: No objection.

19 THE COURT: All right, 37.

20 (WHEREUPON, State Exhibit No. 37 was
21 admitted into evidence.)

22 BY MR. FATA:

23 Q 37 is -- now why was this metal from the shoulder
24 sent to you?

25 A It was submitted with other items of evidence

S - M. EICHENMILLER - CROSS

1 that came from the autopsy and sent to the forensic
2 lab.

3 Q Okay. When on your report you say two lead
4 fragments from autopsy. What does that mean?

5 A Yes, sir.

6 Q What does that mean?

7 A In general if I got a bullet I can describe it as
8 a caliber. If I had a cartridge case I could call
9 it a caliber. In this case I couldn't tell you
10 really much of anything about these other than they
11 were two pieces of lead.

12 Q Okay. And could you identify and take those and
13 identify them with any other item like a bullet or a
14 knife blade, or anything like that?

15 A No, they have no marks on it that I could use to
16 identify with the firearm.

17 Q Okay, so they were unidentified?

18 A Correct, they were unsuitable for identification.

19 Q All you know is they came from the body?

20 A Correct.

21 Q Answer any questions that Mr. Kent may have.

22 **CROSS-EXAMINATION**

23 BY MR. KENT:

24 Q Ms. Eichenmiller, how are you doing? To make
25 sure I understand the testimony that you're giving,

S - M. EICHENMILLER - CROSS

1 your testimony is you were sent a gun to see if it
2 works?

3 A Yes, sir.

4 Q That's the extent of what your testimony is, that
5 gun works?

6 A I was sent the gun and the items from the autopsy
7 to attempt to identify if these came from that
8 firearm.

9 Q Which can be?

10 A Correct.

11 Q So that gun works?

12 A Correct.

13 Q Were you sent any other guns ---

14 A No.

15 Q ---or is that the only gun in this case you had
16 to look at, the only rifle?

17 A That's the only gun I looked at.

18 Q And so are there tests that can be sent to SLED
19 to see if a firearm has recently fired, they
20 request, hey, can you check and see if this gun has
21 been recently fired?

22 A No, there's nothing we can do ---

23 Q There's nothing you can do with that. The extent
24 of our testimony today is that gun works and that's
25 all I can testify?

1 A Correct.

2 Q Thank you, Michelle.

3 **REDIRECT EXAMINATION**

4 BY MR. FATA:

5 Q Okay, that gun works and those bullets work in
6 that gun?

7 A Correct, they're the right caliber for that
8 rifle.

9 **RECROSS-EXAMINATION**

10 BY MR. KENT:

11 Q The right kind — we're not saying those bullets
12 were used specifically with that gun or anything of
13 that nature. We're saying if you went to Wal-Mart
14 looking for some bullets that could fit with that
15 type gun, those are the type that can fit in that
16 gun?

17 A Correct. They can be used in that rifle or any
18 other 8 millimeter Mauser rifle.

19 MR. KENT: Okay.

20 MR. FATA: May this witness be excused,
21 Your Honor?

22 THE COURT: Any objection?

23 MR. KENT: No objection at all.

24 THE COURT: Thank you, Ms. Eichenmiller.
25 You can stay if you'd like or you can leave.

S - T. BROOM - DIRECT

1 MR. FATA: Your Honor, the State calls
2 Toni M. Broom.

3 WHEREUPON,

4 **TONI M. BROOM,**
5 having been duly sworn by the Clerk, testified
6 as follows:

7 THE CLERK: State your full name for the
8 record.

9 THE WITNESS: Toni Broom.

10 **DIRECT EXAMINATION**

11 BY MR. FATA:

12 Q Agent Broom, who are you employed by?

13 A South Carolina Law Enforcement Division, also
14 known as SLED.

15 Q Okay. And what is your position there?

16 A I'm a forensic toxicologist.

17 Q And what does a forensic toxicologist do?

18 A A forensic toxicologist is one that basically
19 handles biopsies of blood, urine, biological samples
20 basically for absence or actual concentration of
21 drugs and alcohol in determining results, supports
22 of law in criminal investigation in court.

23 Q What is your background, educational background
24 and training?

25 A I have a bachelor of science degree in chemistry

S - T. BROOM - DIRECT

1 from Francis Marion University. I have endless
2 training at SLED which consists of alcohol and drug
3 training.

4 Q And how long have you worked in toxicology at
5 SLED?

6 A Since August 2000.

7 Q And how many cases do you believe you've analyzed
8 since then?

9 A Over a hundred.

10 Q And have you testified regarding your work at
11 SLED in toxicology?

12 A I have.

13 Q Have you ever been qualified as an expert in the
14 area of toxicology in courts of this state?

15 A That's correct, I have.

16 Q You have.

17 MR. FATA: Your Honor, we would submit
18 Ms. Broom as an expert in the area of toxicology.

19 MR. KENT: No objection.

20 THE COURT: All right. Ladies and
21 gentlemen, the witness is qualified as an expert in
22 the field of toxicology. As with the other
23 witnesses, you may give her testimony the weight you
24 believe it deserves.

25 Mr. Fata, you can continue.

S - T. BROOM - DIRECT

1 MR. FATA: Thank you, Your Honor.

2 BY MR. FATA:

3 Q Agent Broom, did you receive samples of blood and
4 so forth from an autopsy performed on the decedent
5 Gregory Rogers?

6 A I did.

7 Q And did you analyze those for various substances
8 and what substances and what did you find?

9 A On a sample labeled Gregory Rogers FA10611 a
10 blood alcohol analysis was performed ---

11 MR. KENT: Judge, can everybody here? I
12 didn't hear.

13 THE WITNESS: I'm sorry.

14 MR. FATA: Come on up, Ms. Broom.

15 THE COURT: This room echos a bit so just
16 get closer to the microphone. You can go ahead and
17 begin.

18 BY MR. FATA:

19 Q Go ahead, I'm sorry.

20 A Blood alcohol analysis was performed on sample
21 labeled Gregory Rogers FA10611 along with drug
22 screen analysis.

23 Q And what were your findings?

24 A For the ethanol the result is 0.120, the same
25 weight of volume ethanol was found in this sample.

S - T. BROOM - DIRECT

1 Q Was methanol, acetone, isopropanol found?

2 A No.

3 Q Were amphetamines, benzodiazepine,
4 methamphetamines, oxycodone and cannabinoids found?

5 A No.

6 Q Now those things I just read, what are they?

7 A They're basically classes of drugs that's
8 commonly found either by direct recreation,
9 sometimes also described. And —

10 Q Okay. Cannabinoids are specifically what?

11 A Basically we're looking for the active point in
12 marijuana and that's the class that we're looking
13 for.

14 Q And benzodiazepine, what, why would you look for
15 that chemical? What result, what would cause that?

16 A Well, basically when we do a drug analysis we're
17 trying to get the most out of a screen that we can.
18 We're trying to see if the drugs that are commonly
19 described or abused and certain things come up like
20 a lot of people could be possible prescribed a drug
21 called Xanax which falls in the class. When we say
22 we are going to be drug screen, a drug screen that's
23 what we're looking for drugs that can be commonly
24 prescribed or abused.

25 Q So the amphetamines benzodiazepine

S - T. BROOM - DIRECT

1 methamphetamine, oxycodone, cannabinoids, are all
2 drugs?

3 A Via those drug classes, that's correct.

4 Q Found none of that?

5 A That's correct.

6 Q Cocaine, metabolite, and opiates, did you find
7 any of that?

8 A No.

9 Q Now what -- cocaine metabolite, is that -- what
10 is that the result of?

11 A Basically it's when you take a drug to evaluate
12 ingesting a drug it's gonna break down in your body
13 in the forms of a byproduct considered a metabolite.
14 If someone ingests cocaine they could have the
15 metabolite present and that's what we're looking for
16 when you spray it to give us indication if you need
17 to go any further to find actual parent drug.

18 Q So you found no cocaine in his system?

19 A No cocaine metabolite. The screen was negative.

20 Q Opiates would be stuff like what?

21 A People think of opiates like morphine that are
22 commonly prescribed in hospitals when people come to
23 use them.

24 Q Did you find any of that?

25 A No. The screen was negative for that.

S - T. BROOM - DIRECT

1 Q Negative for that. So the only thing Mr. Rogers
2 tested positive for was alcohol?

3 A That is correct.

4 Q Okay, .12?

5 A That's correct.

6 Q All right. Answer any questions that Mr. Kent
7 may have.

8 (Attorneys confer.)

9 MR. FATA: We'll put it in as a State.

10 MR. KENT: Sorry, so I'll have something
11 to identify to the jury.

12 THE COURT: What number is that?

13 MR. KENT: 38.

14 (WHEREUPON, State Exhibit No. 38 was
15 marked for identification only.)

16 THE COURT REPORTER: 38, Judge, yes, sir.

17 THE COURT: Is that offered, Mr. Fata?

18 MR. FATA: Well, yeah, we can put it in if
19 you want to.

20 MR. KENT: No objection, Judge, I just
21 wanted something that I ---

22 THE COURT: Okay, 38 is in.

23 (WHEREUPON, State Exhibit No. 38 was
24 admitted into evidence.)

25 **CROSS-EXAMINATION**

S - T. BROOM - CROSS

1 BY MR. KENT:

2 Q Are you an agent, I want to make sure I give you
3 the proper title, chemist?

4 A Agent of toxicology.

5 Q Agent Broom, and I'm not going to go through this
6 much and I know you've already seen that but I'm
7 showing you State's Exhibit Number 38. Mr. Fata
8 went through a litany of everything that you tested
9 for with Gregory Rogers. He went through a litany
10 of that. That means all these other drugs that were
11 given descriptions, of all the things you tested
12 for, quite simply, he had high blood alcohol; is
13 that correct?

14 A As in? He had a blood alcohol level of 0.120.

15 Q What's the legal limit in South Carolina?

16 A The ---

17 MR. FATA: Legal limit for what, Your
18 Honor, I don't know.

19 THE COURT: You can ---

20 BY MR. KENT:

21 Q Well, tell me what you mean by .12. You said
22 that blood alcohol level was .12. Explain that to
23 the jury if you don't mind.

24 A In reference to an inferred limit. Inferred
25 limit in South Carolina refers to your alcohol limit

S - T. BROOM - CROSS

1 for basically what the State is saying that at this
2 point this is inferred to be impaired. If you're
3 gonna compare basically a limit to it, the alcohol
4 that was found in the victim is higher than the
5 inferred limit of 0.08 for the State of South
6 Carolina, which is referring to with driving.

7 Q So at the time Gregory Rogers, and I think you
8 said the inferred limit of South Carolina is .08,
9 Gregory Rogers at the time of his death with
10 alcohol — the blood alcohol in his system was .012
11 so it's higher than the legal limit, inferred limit
12 in South Carolina?

13 A It's 0.012 so that is higher than the inferred —
14 the inferred limit refers to sobriety that 0.0.

15 Q Explain, and just so we understand for the jury
16 and I understand you guys did a bunch of separate
17 tests. I think it's — tell me all that you do to
18 get all of the information, blood test, there's the
19 level test, explain that to the jury if you don't
20 mind.

21 A Okay. Basically the alcohol test is ran on the
22 blood sample, the occipital sample. The urine was
23 not analyzed and neither was — the urine was not
24 analyzed nor the bowel gas. The occipital fluid was
25 not did not have a drug screen so we did not do a

S - T. BROOM - CROSS

1 drug screen analysis on occipital fluid so the drug
2 screen was performed on the blood that was
3 submitted.

4 Q What is occipital fluid?

5 A Occipital fluid is basically the fluid in your
6 eye, a retinal.

7 Q Say that again, I'm sorry.

8 A In vitreous fluid or occipital fluid, the fluid
9 around your eye.

10 Q And how do we get that, how do you test that?

11 A At the autopsy they will draw the samples, and
12 basically we're testing it in the same manner in
13 which when we test the blood alcohol.

14 Q I notice in your report -- if I could see that
15 just one moment. Looking at State's Exhibit 38, I
16 know you have a copy in front of you. When we look
17 at item number 3, sample type occipital fluid
18 labeled Gregory Rogers, it says ethanol insufficient
19 sample for quantitation, but it still shows it's
20 positive. What does that mean? Did it not give you
21 enough ocular fluid? I mean, what did that mean?

22 A Basically that is what it means. It was not
23 enough sample for me to get a quantitative value or
24 a numerical value, but it was positive so that's why
25 it was reported like that.

S - T. BROOM - CROSS

1 Q And the blood types, I mean, you guys know better
2 than me, I know you see all over people take breath
3 tests and they take urine tests. How, what is the
4 difference between blood test, urine test, and to
5 determine the amount of alcohol in someone's system?
6 What's the difference in those?

7 A When we're looking at blood samples, basically,
8 basically what's going through your veins right now
9 is fluid so when someone takes your blood sample,
10 that's taking a snapshot of what's going on in your
11 body at that time, as opposed to someone who is
12 taking your urine sample. Your urine is what's been
13 waste and your body does not need that anymore so
14 what's there is that history of what you have taken
15 or have been exposed to.

16 Q So you're saying that the blood sample you took
17 was a snapshot of the blood alcohol in Gregory
18 Rogers' system on the day that he was shot?

19 A That is correct.

20 Q And is that more accurate than, say, a breath
21 test or any urine test, the blood test?

22 A The blood test and the breath test correlates.
23 The urine test is, again, a history of what the
24 person was exposed to or ingested.

25 Q Thank you so much. That's all the questions I

S - B. BUTLER - DIRECT

1 have.

2 MR. FATA: Nothing. May this witness be
3 excused?

4 MR. KENT: No objection, Judge.

5 THE COURT: All right, thank you.

6 Ms. Broom, you can leave if you would like or you
7 can stay.

8 All right, Mr. Fata, you have another SLED
9 witness?

10 MR. FATA: I do, Ms. Butler, Betty Butler.

11 THE COURT: Okay.

12 MR. FATA: Then I have two more short ones
13 I think, Judge.

14 THE COURT: Yes, sir.

15 (WHEREUPON, State Exhibit No. 39 was
16 marked for identification only.)

17 MR. FATA: Ms. Butler, come up to be
18 sworn.

19 THE CLERK: Place your left hand on the
20 Bible, raise your right hand.

21 WHEREUPON,

22 **BETTY BUTLER,**

23 having been duly sworn by the Clerk, testified
24 as follows:

25 THE CLERK: State your full name for the

S - B. BUTLER - DIRECT

1 record.

2 THE WITNESS: Betty Butler.

3 **DIRECT EXAMINATION**

4 BY MR. FATA:

5 Q Ms. Butler, what is your occupation?

6 A I'm a forensic technician in evidence control,
7 evidence processing.

8 Q In evidence processing, all right. And what,
9 specifically what do you do as an evidence
10 processor?

11 A As a evidence forensic technician in the evidence
12 processing department we do presumptive tests for
13 blood, semen, for hairs, fibers, skin cells, or
14 anything that we put a value to a particular case.

15 Q Now you have training in this area?

16 A Yes, I have.

17 Q Okay, what kind of training have you had?

18 A Before you're able to go online we're trained to,
19 by a forensic technician and a chemist analyst that
20 is qualified as experts. We're trained on numerous
21 items. Before we was able to go online we have to
22 take a competency test and every year we have to
23 take a proficiency test.

24 Q Were you trained by SLED and any other outside
25 training you had?

S - B. BUTLER - DIRECT

1 A We normally do an evidence processing we don't
2 have outside training, but we do have to have
3 different training outside training.

4 Q Okay. Are you an agent?

5 A I'm a forensic technician.

6 Q Technician.

7 MR. FATA: Your Honor, we would submit
8 Ms. Butler as an expert in the area of evidence
9 collection as a forensic technician.

10 THE COURT: Any questions?

11 MR. KENT: No questions. No objection,
12 Judge.

13 THE COURT: All right, ladies and
14 gentlemen, the witness is so qualified and you are
15 to give this witness' testimony the weight you
16 believe it deserves as with the other witnesses.

17 Mr. Fata.

18 MR. FATA: Thank you, Your Honor.

19 BY MR. FATA:

20 Q Ms. Butler, I'm gonna show you what's been marked
21 as State's Exhibit Number 90 and tell you, hold it
22 straight up for right now, and tell me, do you
23 recognize that?

24 A Yes, I do.

25 Q How do you recognize it?

S - B. BUTLER - DIRECT

1 A The reason I recognize every piece of item that
2 comes in, we have to have an item number. We put
3 the item number on. We put our initials, and we
4 also put the lab number on it.

5 Q Okay. So that item 27, 27, item 27 came in to
6 you for what purpose?

7 A For possible blood.

8 Q Blood. Now how did you process this piece of
9 evidence?

10 A When this evidence came in it came into a sealed
11 evidence bag. I made sure that it was -- had all
12 the seals in tact. I did a visual on this
13 particular evidence first.

14 Q What's a visual?

15 A Visual we're looking to test for blood. I did a
16 visual looking for any blood stains on it. If I
17 didn't see any stains I looked -- I swab each
18 section for possible blood. We do a chemical test.
19 If it's a possible blood we, it turns pink. We --

20 Q Tell me, okay.

21 A Each area that you test.

22 Q And hold it straight up.

23 A Each area you test swabbing is different areas.
24 We do a marking saying that it's negative in this
25 area. Every area you take you put maybe if there's

S - B. BUTLER.- DIRECT

1 nothing came up. When you do test it doesn't turn
2 pink, that's means nothing is there.

3 Q So you're swabbing. You're swabbing, say, for
4 example, this area on the stock of the gun right
5 here where I'm pointing to this area how we got, you
6 got something in there, an equal sign or a circle,
7 and PH, what is that? What does that say?

8 A This negative sign is meaning it's, with a
9 circle, this means negative and this PH means
10 phenolphthalein. It's negative for phenolphthalein.
11 Every section that we see is a chemical test that we
12 do.

13 Q And phenylthalline is the, is the chemical used to
14 do what?

15 A To test, the presumptive test for blood.

16 Q If there's blood there, what happens to the swab?

17 A If there's blood there the swab will turn pink.

18 Q You also tested the strap?

19 A Yes, I did.

20 Q And several places all over the gun, and the jury
21 can see where you marked the little equal sign of
22 VHN; is that correct?

23 A That's correct.

24 Q All right. Did you in any of those swabs, did
25 any of those swabs test positive for blood?

S - B. BUTLER - DIRECT

1 A There's nothing that came up positive for blood
2 and I tested the whole entire rifle.

3 Q Okay. Now is this your test -- I'm gonna show
4 you State's Exhibit Number 39 and hand you the
5 second page. Is that your report?

6 A Yes, this is my worksheet.

7 Q And it describes what you did; is that right?

8 A It says item 18, which is State's Exhibit 27.

9 Q Yes, ma'am.

10 A A rifle, black and wood in color, the shoulder
11 strap, brand Winchester; and it has the serial
12 number, numerous areas negative for the chemical
13 test.

14 Q So now, let me ask you this, the swab and you put
15 the phenolphthalein on the swab. Swab, put the
16 phenolphthalein on it -- let me back up. You
17 swabbed, take a swab. You swab the spot on the
18 rifle; is that correct?

19 A That's correct.

20 Q You spray the phenolphthalein on the swab?

21 A Drop it on there, that's correct.

22 Q And the reaction color is what?

23 A Pink.

24 Q Pink. Can you have false positives?

25 A No, no false positives. We can have false

S - B. BUTLER - DIRECT

1 positive, but we won't have false negatives.

2 Q That's what I'm getting at. In other words, you
3 can have a false positive. In other words, it will
4 show blood and there's no blood there?

5 A Yes, sometimes it does that. It depends on
6 what's on, what's there.

7 Q If, in fact, you get a positive what happens?

8 A When we get a positive we dry the swab out, patch
9 it up, and send it to further testing.

10 Q Further testing. Now can you get a false
11 negative?

12 A No, we cannot get a false negative.

13 Q Okay. So a negative is a negative?

14 A A negative is a negative.

15 Q So if you don't find any blood you're a hundred
16 percent sure there's no blood on that rifle?

17 A I'm a hundred percent sure that it was negative.

18 Q That's what I said, negative, all right.

19 MR. KENT: One hundred percent.

20 (Attorneys confer.)

21 MR. FATA: We move item number 39 into
22 evidence, Your Honor.

23 THE COURT: Mr. Kent?

24 MR. KENT: I have no objection, Judge.

25 THE COURT: Answer any questions that

S - B. BUTLER - CROSS

1 Mr. Kent may have.

2 (WHEREUPON, State Exhibit No. 39
3 was admitted into evidence.)

4 **CROSS-EXAMINATION**

5 BY MR. KENT:

6 Q Ms. Broom, how are you doing?

7 A I'm fine, thank you.

8 Q Again, I want to give you your proper title. Are
9 you an agent or?

10 A I'm a forensic technician.

11 Q So I have to say forensic technician Butler? I
12 don't think I can say that properly without so I'm
13 just gonna say Ms. Butler.

14 A That's fine with me.

15 Q Ms. Butler, just asking a question, I know y'all
16 use that fancy word and I watch all those shows like
17 CSI and with SLED y'all call that stuff luminal. Is
18 that basically the same stuff you're talking about
19 you spray on blood?

20 A No, that's not what we use.

21 Q Okay.

22 A There, that test is called, it's phenylphtalene.
23 That's a test that we use for that particular item.

24 Q All you know is what they send you, correct? You
25 don't know where that weapon came from, you don't

S - B. BUTLER - CROSS

1 know whether that was the murder weapon, they just
2 send you a weapon and say test it and you test it?

3 A That's correct.

4 Q You don't have somebody there trying to protect
5 in this case or somebody there trying to look at for
6 their mother or ---

7 A That's correct.

8 Q So you have no clue what this weapon is, it's
9 just sent to you?

10 A You don't know where the weapon was found?

11 A No, I do not.

12 Q You don't know if it's the murder weapon or not?

13 A No, I do not.

14 Q You don't know who handled the weapon or didn't
15 handle the weapon?

16 A Only who handled it at SLED.

17 Q At SLED. Only who handled it at SLED. Y'all
18 were talking about all that fancy stuff and you were
19 trying to point the gun at the judge so I'm not
20 gonna do that. But what we do -- and I want to make
21 sure just for the record we're clear. Had this gun
22 was dumped in a bucket of blood and somebody cleans
23 it like crazy, there's no way to hide that blood,
24 like if somebody ---

25 A If someone cleans it there's a possibility you

S - B. BUTLER - REDIRECT

1 won't find anything.

2 Q Is there any way to clean blood off somehow --
3 and I keep calling it luminal but you have that
4 fancy phrase, phenonemine, nemine, nemine, whatever.

5 A If someone cleans it it's a possibility you won't
6 find anything.

7 Q So somebody can clean a gun there's a possibility
8 you won't find anything off of it?

9 A It's a possibility, yes.

10 Q Hum. So all that testing basically assume that
11 nobody has cleaned the gun or cleaned the gun and
12 cleaned anything off, correct?

13 A That's correct.

14 Q Thank you. I appreciate it.

15 THE COURT: Redirect.

16 MR. FATA: Yes, sir.

17 **REDIRECT EXAMINATION**

18 BY MR. FATA:

19 Q Ms. Butler, as far as who handled the gun, where
20 it came from and all that, that's not your job, is
21 it?

22 A No, it's not.

23 Q You're presented it and they say test this for
24 blood?

25 A That's correct.

S - B. BUTLER - RECROSS

1 Q And as far as cleaning it off, if there's a
2 significant amount of blood like Mr. Kent said,
3 dumped it down in a bucket of blood and pulled it
4 out, is it difficult to clean all that blood off?

5 A Sometimes it really is difficult because
6 sometimes it goes down in the cracks of the
7 particular item, and we do go inside and use a swab
8 and go inside and sometimes it turns up positive.
9 But in this case I tried that and that didn't work.

10 Q So you -- somebody cleaning up, is it your
11 testimony that if somebody cleaning up the gun would
12 have to clean out every nook and cranny in this gun?
13 Is that your testimony? Or you're gonna look for it
14 every nook and cranny?

15 A I'm gonna look for it, yes, I look.

16 Q Found nothing in nooks and crannies, did you?

17 A No, I did not.

18 Q Thank you.

19 THE COURT: Anything else, Mr. Kent?

20 MR. KENT: Briefly.

21 **RECROSS-EXAMINATION**

22 BY MR. KENT:

23 Q Let's examine it and make it more simple. If
24 someone didn't dunk it in there, let's say there's
25 some splatter spots and things of that nature,

S - B. BUTLER - FURTHER DIRECT

1 those can be cleaned off pretty easily, right?

2 A Splatter spots, sometimes they can.

3 Q They can. Thank you so much. That's all I have.

4 MR. FATA: Let me ---

5 THE COURT: This will be the last time.

6 MR. FATA: Last time.

7 THE COURT: The last time.

8 **FURTHER DIRECT EXAMINATION**

9 BY MR. FATA:

10 Q Is that strap thing on here, Ms. Butler, is that
11 strap thing on there maybe?

12 A Yes.

13 Q Is it easy to get blood off that?

14 A No, it's not. In my opinion, no, it's not.

15 Q How would -- is that spongy, can you feel it?

16 A Yes, sir.

17 Q And would it absorb blood?

18 A It should.

19 MR. KENT: Objection, Judge, calls for
20 speculation.

21 THE COURT: Well, it's leading.

22 BY MR. FATA:

23 Q So would that strap be hard to clean?

24 MR. KENT: Leading, same objection, Judge.

25 THE COURT: Leading.

S - B. BUTLER - FURTHER DIRECT

1 BY MR. FATA:

2 Q How — could this strap be cleaned?

3 A In my opinion if that, if it was cleaned you
4 wouldn't see, you would sometimes it's a lot of
5 blood on it you still see stains of blood or you
6 wouldn't see dirt on it. It will be really clean.

7 Q Okay. Thank you.

8 THE COURT: All right, you can step down.
9 Thank you, ma'am.

10 Any objection to the witness being
11 excused?

12 MR. FATA: None, Your Honor.

13 MR. KENT: Not at all, Judge.

14 THE COURT: All right, ma'am. You can
15 leave if you'd like. Thank you, Ms. Butler.

16 MR. FATA: This will be the last witness
17 we have from our experts.

18 THE COURT: All right. And the name?

19 MR. FATA: We're done.

20 THE COURT: Oh, I thought you said there
21 was one other witness.

22 MR. FATA: There's was one other witness
23 we'd taken care of so we don't have any.

24 THE COURT: Ladies and gentlemen, we are
25 gonna break for lunch now. It's about 1:30 on my

1 clock. We'll get back together, we're gonna take a
2 shorter than normal lunch. Be back in your jury
3 room please at 2:45, and we'll get moving promptly
4 at that time. I'm going by the clock I've got on my
5 hand. Just be back in your jury room. The clock on
6 that back wall, it's 20 till. In other words, an
7 hour and 15 minutes from now. That's when we're
8 gonna get back together. All right, you may not
9 discuss the case at all. Please don't discuss it
10 with yourselves or anyone else. Obviously you're
11 not permitted to do any type of research or read
12 anything or listen to anything about it. And we'll
13 just get back together in an hour and fifteen
14 minutes and begin again. Thank you.

15 (WHEREUPON, the jury was removed from the
16 courtroom at 1:27 p.m.)

17 THE COURT: All right, lawyers, be back in
18 an hour along with Mr. Toney. Be back in one hour,
19 okay.

20 (Whereupon, a lunch break was taken.)

21 THE COURT: Okay. Mr. Fata, is the State
22 ready to go forward?

23 MR. FATA: Yes, sir, we're ready to go.

24 THE COURT: Mr. Chandler, Mr. Kent?

25 MR. KENT: We're ready, Judge.

1 MR. CHANDLER: Yes, sir.

2 THE COURT: Anything before we begin? I
3 know that we have an issue with Doctor Ross and the
4 photo. Will you be offering that photo?

5 MR. FATA: I'm not going to offer that
6 photo, Judge. And what it is, it is the bullet
7 track.

8 THE COURT: Yes, sir.

9 MR. FATA: And that lump is part of the
10 lung tissue.

11 THE COURT: I see.

12 MR. FATA: So we're not going to offer
13 that. Now we do need to talk about the other
14 photograph.

15 THE COURT: Are you going to offer it
16 through her?

17 MR. FATA: No, not through her -- well,
18 yes, I may. I may.

19 THE COURT: Well -- and the photo, I don't
20 know the Court exhibit number. I think it might be
21 number 2.

22 MR. FATA: No, not that one.

23 THE COURT: Number 1. Your proffer of
24 that would have been for, just to show that the
25 blood of extent would cause anything that he may

1 have been holding to his chest or that was
2 underneath him would be stained with blood?

3 MR. FATA: Yes, sir, and that the injury
4 to his head more than likely occurred at the time he
5 fell because of the debris around the wound. If
6 you'll notice the straw, grass, and that sort of
7 thing that's in the wound.

8 THE COURT: Okay. Well, once we get to
9 the point where you'll be offering that we'll just
10 send the jury out because if the witness says the
11 right thing and I make the determination that the
12 probative value is not substantially outweighed by
13 the danger of unfair prejudice will come in but
14 before you put it up on the projector or actually
15 ---

16 MR. FATA: In fact ---

17 THE COURT: ---offer it.

18 MR. FATA: Let me see that again please.
19 The only one -- in fact we wouldn't want that side
20 anyway, just this side showing the, showing the ---

21 THE COURT: The one on my right. In other
22 words, as you're looking at it the one on the right.
23 When you get to the point where you want to hand
24 that to the witness, just let me know and we'll take
25 that up outside the presence of the jury.