

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

Ernest Toney,

Petitioner,

v.

State of South Carolina,

Respondent.

APPENDIX VOLUME II

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S.C. SUPREME COURT

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1 MR. FATA: It's just a possibility I may
2 use it; it just depends.

3 THE COURT: Okay. All right, anything
4 else?

5 MR. FATA: Not from the State.

6 THE COURT: All right, you can bring in
7 the jury.

8 (WHEREUPON, the jury was returned to the
9 courtroom at approximately 2:45 p.m., and
10 the following proceedings commenced in
11 open court.)

12 THE COURT: Okay. Ladies and gentlemen,
13 hope you had a good lunch. We're ready to proceed.
14 Make sure you continue to pay close attention to all
15 the presentation of evidence.

16 Mr. Fata, you can call your next witness.

17 MR. FATA: Thank you, Your Honor. The
18 State calls Doctor Janice Ross.

19 THE COURT: Doctor Ross.

20 WHEREUPON,

21 **JANICE E. ROSS,**
22 having been duly sworn by the Clerk, testified
23 as follows:

24 THE CLERK: State your full name for the
25 record.

S - J. ROSS - DIRECT

1 THE WITNESS: Janice Edwards Ross.

2 **DIRECT EXAMINATION**

3 BY MR. FATA:

4 Q Doctor Ross, what is your occupation?

5 A I'm a forensic pathologist in Newberry, South
6 Carolina.

7 Q And the name of your practice is?

8 A Newberry Pathology Associates.

9 Q Tell us what your educational backgrounding is.

10 A I got a — I have a bachelors degree in, from the
11 University of South Carolina and then I have my MD
12 from Upstate Medical Center in Syracuse, New York
13 where I did my training in pathology. And pathology
14 is the discipline in medicine that trains you how to
15 do an autopsy and how to diagnose tissue diseases
16 and use blood work to diagnose different diseases or
17 anemias. I am further trained in forensic pathology
18 in upstate New York and board certified in three
19 areas of pathology.

20 Q Three areas?

21 A Yes.

22 Q What three areas?

23 A Anatomical and clinical pathology have to do with
24 blood work and tissue work, some cancers. Forensic
25 pathology uses or pathology knowledge legal matters

S - J. ROSS - DIRECT

1 such as homicides, suicides, and accidents and rape
2 cases. We learn how to do a specific more detailed
3 autopsy or forensic autopsy, and identify, identify
4 different patterns of injury.

5 Q How long have you been a forensic pathologist?
6 How long have you been practicing forensic
7 pathology?

8 A Thirty-six years.

9 Q All at Newberry?

10 A Since May of 2000 in Newberry.

11 Q Okay. And all the years that you've been
12 practicing forensic pathology how many cases do you
13 believe you have done?

14 A Over six thousand.

15 Q Six thousand. Have you ever testified in court?

16 A Yeah.

17 Q Regarding findings in different cases?

18 A Yes.

19 Q And have you been qualified as an expert witness,
20 as an expert witness in the area of forensic
21 pathology in courts of this state and ---

22 A Yes.

23 MR. FATA: We would offer Doctor Ross as
24 an expert in the area of forensic pathology.

25 MR. CHANDLER: If it please the Court, no

S - J. ROSS - DIRECT

1 objection.

2 THE COURT: All right, ladies and
3 gentlemen, this witness is qualified as an expert in
4 forensic pathology. As I mentioned to you earlier,
5 an expert is entitled to give opinions and the
6 reasons for those opinions. You are not bound by
7 the opinion and give the testimony the weight you
8 believe it deserves.

9 Mr. Fata, you can continue.

10 MR. FATA: Thank you, Your Honor.

11 BY MR. FATA:

12 Q Doctor Ross, did you receive the body of Gregory
13 Rogers at your office or laboratory on or about
14 September 13th, 2010?

15 A Yes.

16 Q And for what purpose did you receive that body?

17 A For an autopsy.

18 Q Okay. And were you given any briefing on what
19 had happened, background or history?

20 A Just that deceased was found next to a roadway in
21 Lee County and was a victim of a shooting.

22 Q Okay. Now what was your procedure in this case?

23 A We received a body in a body bag. We opened the
24 body bag and take photographs of the body as they
25 come in. We take an inventory of the clothing and

S - J. ROSS - DIRECT

1 then take the clothing off, and we do an external
2 examination with photographs and in this case so was
3 evidence of gunshot wound we took x-rays to look for
4 any extraneous full lead pieces.

5 Q You examine external body, skin, that sort of
6 thing?

7 A Yes.

8 Q Did you notice any marks on the victim's hands
9 knuckles, the knuckles or the fingers on the outside
10 of his hands?

11 A No, I did not.

12 Q Did not, okay. After you examined the body
13 externally what did you do, an x-ray, what did you
14 do?

15 A Then we do an internal examination, look for each
16 organ to find out any evidence of injury or disease
17 in the different organs.

18 Q And how do you do that?

19 A Through a Y shaped incision in the body to look
20 at organs and chest cavity and the abdomen. Then we
21 open the head to look at the brain.

22 Q Now when you look at the chest area, organs in
23 there, did you find anything that would have led to
24 Mr. Gregory's death?

25 A Yes. In the hole through his ---

S - J. ROSS - DIRECT

1 Q No, I'm talking about the heart area, the lungs,
2 that ---

3 A I'm sorry. As far as natural disease the only
4 thing he had was a myocardial (ph) blockage
5 90 percent blockage of one of the coronary arteries.

6 Q Okay. So other than that, pretty much normal in
7 the chest area?

8 A Yes.

9 Q All right. Now did you examine Mr. Rogers' neck?

10 A Yes.

11 Q And what were your findings there?

12 A We found a gunshot wound that went through, went
13 into the anterior part of the left neck at -- the
14 bullet path continued ---

15 MR. FATA: May she come down, Your Honor?

16 THE COURT: Yes, sir, just keep your voice
17 up, okay, Doctor?

18 THE WITNESS: Yes, sir.

19 BY MR. FATA:

20 Q Doctor, I'm gonna show you what's been marked as
21 State's Exhibit Number 25. Can you describe a
22 bullet entrance? Can you see that depicted in this?

23 A Yes. This is the entrance wound of the bullet at
24 the base of the left neck.

25 Q Okay. Now that bullet traveled in which

S - J. ROSS - DIRECT

1 direction?

2 A It went backwards and downward and it came out of
3 the left upper neck.

4 Q Okay. I want to show you -- I show you State's
5 Exhibit Number 22, and what are we looking at there?

6 A Can I turn it around?

7 Q Yes, ma'am, turn it however -- have I got it
8 upside down?

9 A Well...

10 Q Yeah, I did.

11 A We always put it so that the number is such that
12 the head is above the number. This shows that there
13 are exit wounds here. The bullet fragment is two
14 exit wounds and this wound is just a cut on his
15 hand.

16 Q Okay. Is this a bullet fragment in that?

17 A No.

18 Q Is this one here, is that a bullet fragment?

19 A It doesn't appear to be.

20 Q How do you know that?

21 A A bullet path, if it's a graze wound will have
22 abraded edges around it where the bullet wipes
23 across the surface of the skin. That's not -- it
24 doesn't, that's not here on that wound.

25 Q So is that, do you mean rough edge? Is that what

S - J. ROSS - DIRECT

1 you mean around here, abrading?

2 A It would be more of a red, very superficial rough
3 mark of the skin.

4 Q These here above this number, here and here,
5 those are the exit wounds?

6 A Correct.

7 Q Is this a closer view of that?

8 A Yes.

9 Q Okay. So the bullet enters here that's shown on
10 State's 25. The bullet enters here?

11 A Yes.

12 Q Goes through and exit at the back?

13 A Correct.

14 Q All right. Now you also have -- I'm gonna show
15 you a page in your -- and this is an anatomical
16 drawing Exhibit 26. Now what is this, Doctor?

17 A This is a rough draft diagram which I do at the
18 time of the autopsy to just put in my measurements
19 and different findings on the outside of the body.

20 Q Okay. Now please tell the jury what is all, what
21 is all this.

22 A Okay. This just depicts the entrance wounds.

23 These are measurements of how apart is, the top of
24 the head midline. This shows that there's some
25 abrasion of the skin of the left forehead, the left

S - J. ROSS - DIRECT

1 cheek, and the bridge of the nose. And these are
2 the exit wounds on the left back. This is that
3 defect in the skin.

4 Q Now you've got the -- and you describe your
5 position and the bullets for the entrance and the
6 exit wounds, how do you do that in relation to the
7 center line? You call it the center line?

8 A Yes. We measure it from the top of the head and
9 then how far it is away from the center midline of
10 the body.

11 Q I'm gonna show you a facing figure, and then I'm
12 gonna direct your attention to the rear of the
13 figure. Now is there some relation between where a
14 bullet went in and where the bullet came out?

15 A Yeah, it --

16 Q Any indication about that?

17 A Well, it shows that the entrance wound
18 is ten-and-a-half inches below the top of the head
19 and the exit wound 11 to 11.5 inches below the top
20 of the head so that just indicates that it's going
21 downward.

22 Q Is that significant downward?

23 A No. No, an inch.

24 Q All right. Now -- oh, no, no, let's do this, I'm
25 sorry. I show you State's Exhibit Number 25 again.

S - J. ROSS - DIRECT

1 You indicated on the anatomical drawing something
2 about some abrasions on the face?

3 A Yes.

4 Q Do you see those depicted in 25?

5 A Yes.

6 Q Where are they?

7 A This is on the left cheek. You see some on the
8 bridge of the nose. This here on the left forehead,
9 it's actually that's a little laceration here also.

10 Q Okay. You have any opinion as to when those may
11 have occurred?

12 A Those are what we see when a sort of a round
13 surface hits a flat surface, and at the same time
14 the forehead and the nose could have hit at the same
15 time. So it's consistent with that side of the face
16 hitting that surface.

17 Q Hitting hard or hitting just laying on it, or
18 how?

19 A It's hard a force, it's a pretty good injury.

20 Q Pretty good?

21 A Yeah.

22 Q And when do you think it happened, when do you
23 think it occurred?

24 A There's not a lot of reaction to this. It's not
25 kind of yellow based, it's not red based, so it's

S - J. ROSS - DIRECT

1 right at the time of death.

2 Q At the time of death?

3 A Yes.

4 Q Okay, you may sit down. Thank you.

5 A (Complies.)

6 Q Now we talked about the issue of the exit wound.

7 Let's talk about between the entrance and exit

8 wound. What happened, what do you find regarding

9 the internal injuries to Mr. Rogers?

10 A The bullet lacerated the left carotid artery and

11 jugular vein as it went through, and it also

12 fractured part of the cervical spine.

13 Q What significance is there to the fracturing of

14 the cervical spine? What injury would have resulted

15 in that?

16 A That would have caused like a shock wave, and I

17 think it's a partial laceration of the spinal cord

18 itself, which means that there would be no activity

19 from the neck down. In other words, the legs

20 wouldn't receive message to stand up so the person

21 would collapse.

22 Q Just fall?

23 A Yes.

24 Q Almost instantaneously or at the time?

25 A Pretty much instantaneously.

S - J. ROSS - DIRECT

1 Q Okay. Now what is the significance of severing
2 the jugular vein and the carotid artery?

3 A It allows his blood to escape, bleed out.

4 Q And in an injury like this when does the blood
5 begin to escape?

6 A Immediately.

7 Q And how much would begin to escape?

8 A Well, that depends on a lot of things, but it
9 would be a pretty quick injury with the carotid
10 artery being lacerated so it would be lethal, within
11 a minute or two.

12 Q Would a significant amount of blood come out in a
13 minute?

14 A Yes.

15 Q Okay. I show you State's Exhibit number 6.

16 MR. FATA: Your Honor, may she come down
17 again?

18 THE COURT: Yes, sir.

19 BY MR. FATA:

20 Q Doctor, this is State's Exhibit Number 26 and
21 then the blood pool and the blood pool, and I'm
22 gonna show you State's Exhibit number 7. Additional
23 pooling, and then along with the shirt. How long in
24 your opinion would it have taken for that amount of
25 blood to accumulate from this here?

S - J. ROSS - DIRECT

1 A It's hard to say. It depends on how fast the
2 heart was beating, a lot of different things; but it
3 would be a couple of minutes.

4 Q Couple of minutes.

5 A Yeah.

6 Q Not hours?

7 A No.

8 Q Couple of minutes?

9 A Yeah.

10 Q Okay, you can have a seat.

11 A (Complies.)

12 Q Now as you continue to do the internal
13 examination and the x-rays, did you compare x-rays
14 and look at the x-rays when you're doing your
15 internal examination and x-rays submitted or
16 anything?

17 A It just showed that there were no bullet
18 fragments left in the body except, well, there were
19 little tiny particles along the bullet path, what we
20 call a snow storm, which means it's a pretty
21 powerful, high velocity bullet.

22 Q Okay. Typically when you have a high velocity
23 gunshot wound, what does that look like?

24 A We call it, we refer to it as a snow storm
25 because it -- the bullet is going so fast little

S - J. ROSS - DIRECT

1 particles come off around, as it goes through the
2 tissue, and shows a snow storm along the path.

3 Q Did you retrieve those items, those snow storm
4 items?

5 A We're talk-- no, we're talking about dust like
6 particles.

7 Q Okay. Did you retrieve any bullet fragments at
8 all?

9 A No.

10 Q You did not? But the snow storm indicated that
11 there were bullet fragments or bullet caused this
12 track?

13 A Yes.

14 Q And it's your opinion that it was a high powered
15 rifle, high powered bullet?

16 A Well, could be, yes.

17 Q Okay. Now hold on just one second. Doctor, I
18 want to refer you -- and you've got your report
19 there, open your report. This is State's Exhibit
20 Number 6. And go to the page evidence transfer
21 from -- that evidence transfer form, excuse me.

22 MR. CHANDLER: Can I see where you are,
23 Solicitor?

24 MR. FATA: Right here.

25 THE COURT: You got it, Mr. Chandler?

S - J. ROSS - DIRECT

1 MR. CHANDLER: No, sir.

2 MR. FATA: It was provided to them, Your
3 Honor.

4 THE COURT: I understand, let them find
5 it.

6 (Pause.)

7 BY MR. FATA:

8 Q You see that page, Doctor, evidence transfer
9 form?

10 A Yes.

11 Q If you'll look down ballistics.

12 A Yeah, I see I did -- I stand corrected. There
13 was, must have been a small fragment of metal that
14 we see from the gunshot wound.

15 Q And what does that say, Doctor?

16 A There was one plastic bag with a metal, with
17 metal from gunshot wound.

18 Q Okay. It was from the left shoulder and the
19 shirt; is that correct?

20 A There was a piece of metal in the left shoulder
21 strap of the shirt.

22 Q And that was collected by you; is that correct?

23 A Yes.

24 Q And given to the Deputy Sheriff Capps?

25 A David Capps, yes.

S - J. ROSS - DIRECT

1 Q Okay. Now any other significant findings — and
2 look through your report, Doctor, any other
3 significant findings other than this gunshot wound
4 in the carotid artery on the heart artery followup?

5 A Just those abrasions on the face.

6 Q Okay. Now Doctor, how are deaths classified in
7 the state?

8 A Well, we have cause of deaths, what the person
9 dies from, and we have a manner of death. There are
10 five sets of manners — a manner of death is how a
11 cause of death came about being. There are five
12 manners of death: It's natural death, accidental,
13 suicide, homicide, and can't determine then it's
14 undetermined.

15 Q Undetermined. In this case do you have an
16 opinion to a most reasonable medical certainty as to
17 the cause and death, probable cause of death in this
18 case?

19 A Yes.

20 Q And what was it?

21 A Exsanguination, that is, bleed out, due to the
22 laceration of blood vessels due to the gunshot wound
23 to the neck.

24 Q And you would classify this death as a?

25 A Homicide.

S - J. ROSS - DIRECT

1 Q All right. So Doctor, explain to the jury the,
2 how this process works. You're shot in the neck and
3 what happens?

4 A Depending on where the bullet went, blood goes
5 through, it cuts the -- lacerates the jugular vein,
6 carotid artery, starts bleeding. It also fractures
7 the cervical spine and you become paralyzed from the
8 neck down.

9 Q And when you say somebody exsanguinates, what do
10 you mean?

11 A Exsanguinates.

12 Q Exsanguinates?

13 A You bleed out.

14 Q You bleed out, just bleed to death?

15 A Correct.

16 Q Because your arteries, they're getting cut by
17 gunshot wound?

18 A Yes.

19 Q One other thing, Doctor, I think you indicated
20 that he would not, that Mr. Rogers would not have
21 any motor function after being struck in the, after
22 the cervical spine is being struck by a bullet?

23 A Correct.

24 Q What do you mean by motor function?

25 A Movement.

1 Q What?

2 A Arms and legs.

3 Q Arms and legs?

4 A Yes.

5 Q And is that consistent? Is the way the body's
6 positioned in this picture falling on its face and
7 hands out, is that consistent with losing, that
8 cervical spine injury?

9 A Yes.

10 Q Okay. All right, answer any questions that Mr.
11 Chandler might have.

12 THE COURT: Mr. Chandler.

13 MR. CHANDLER: Thank you very much, Your
14 Honor.

15 **CROSS-EXAMINATION**

16 BY MR. CHANDLER:

17 Q Good to see you again, Doctor. I think the last
18 time I see you was up in Newberry, maybe three or
19 four years?

20 A Yeah.

21 Q I appreciate you coming down. So what we know
22 about this case is this gentleman was shot once in
23 the neck, and we do not know the caliber of the
24 bullet because there are so many slivers of metal;
25 is that correct?

S - J. ROSS - CROSS

1 A Correct.

2 Q And high powered can be a pistol as well as a
3 rifle; can it not?

4 A Yes.

5 Q So a 45 could be a high velocity weapon, 45
6 caliber pistol?

7 A It could give you that extra.

8 Q But you know, there's some rifles that are high
9 powered as well?

10 A Yes.

11 Q This gentleman was exsanguinated, bled to death
12 as we see this picture. And you took a vitreous
13 blood sample of him at the autopsy; did you not?

14 A Yes.

15 Q And I believe your reports indicate that his
16 vitreous blood alcohol level was something like
17 .1326?

18 A Correct.

19 Q So it was higher than the .12 level, correct?

20 A .12 in the blood, yes.

21 Q And that's the reason for that is the vitreous
22 sample kind of lags behind the blood going up and
23 then it gets faster going down; is that right?

24 A It just lags behind the blood level for about an
25 hour.

S - J. ROSS - CROSS

1 Q Okay. So when this gentleman was here for four
2 hours apparently before he was moved and taken up to
3 you, is there an impact at all on that blood alcohol
4 level?

5 A No.

6 Q So we know now that you have a level of .13?

7 A Correct.

8 Q Thank you so much.

9 THE COURT: Mr. Fata.

10 MR. FATA: Nothing, Your Honor. May
11 Doctor Ross be excused?

12 THE COURT: Any objections?

13 MR. CHANDLER: Yes, sir, please, she's got
14 a long trip back.

15 THE COURT: You can be excused. Thank you
16 very much.

17 Mr. Fata.

18 MR. FATA: Yes, sir, Your Honor, we call
19 Lorie Rogers.

20 WHEREUPON,

21 **LORIE ROGERS,**

22 having been duly sworn by the Clerk, testified
23 as follows:

24 THE COURT: All right, Mr. Fata.

25 Ms. Rogers, would you please tell us your first

S - L. ROGERS - DIRECT

1 name, spell your name.

2 THE WITNESS: Lorie Rogers, L-O-R-I-E.

3 THE COURT: Go ahead, Mr. Fata.

4 **DIRECT EXAMINATION**

5 BY MR. FATA:

6 Q Ms. Rogers, where you live?

7 A Fifteen Street.

8 Q How long have you lived there?

9 A Thirty years.

10 Q Thirty years. Do you have children?

11 A Yes, sir, I do.

12 Q How many do you have?

13 A I have three.

14 Q Three? Two boys and a, I think a girl; isn't it?

15 A Yes, sir.

16 Q And what do you do for a living?

17 A I work at Department of Corrections.

18 Q And as a what?

19 A As a corrections officer.

20 Q And ---

21 A CO.

22 Q As a corrections officer what is your function
23 there at the prison? Are you in a dorm or?

24 A Dorm.

25 Q In a dorm?

S - L. ROGERS - DIRECT

- 1 A Yes, sir.
- 2 Q Okay, that's a pretty serious job?
- 3 A Yes, it is.
- 4 Q You were married to Gregory Rogers; is that
5 right?
- 6 A Yes, I was.
- 7 Q You were, excuse me, you were. And y'all were
8 married for how many years?
- 9 A 29 years.
- 10 Q 29 years. And those 29 years did y'all live at
11 Wrenn Drive or some other places?
- 12 A Most of them. We stay at my mother-in-law house
13 at the beginning of our marriage.
- 14 Q Okay.
- 15 A In the same area.
- 16 Q Okay. Now did you know Mr. Toney, the defendant?
- 17 A Yes, I do.
- 18 Q And you see him in the courtroom?
- 19 A Yes, sir.
- 20 Q Where is he sitting?
- 21 A (indicating). Sitting right there at the table.
- 22 Q At defense table sitting next to Mr. Kent; is
23 that correct?
- 24 A Kent, yes, sir.
- 25 Q And how do you know, how did you meet Mr. Toney?

S - L. ROGERS - DIRECT

- 1 A On the job.
- 2 Q On the job? Where is that?
- 3 A At Pilgrim Pride.
- 4 Q Pilgrim's Pride, is that formerly known as
- 5 Goldkist?
- 6 A Formerly known as Goldkist.
- 7 Q And what would you do? What was your job at
- 8 Goldkist?
- 9 A I was a production worker for 11 years now. I
- 10 made it to supervisor.
- 11 Q Supervisor? What did Mr. Toney do out there at
- 12 Pilgrim Pride?
- 13 A He was production manager.
- 14 Q Production work?
- 15 A Yes, sir.
- 16 Q He was never a supervisor or anything?
- 17 A No, sir.
- 18 Q Okay. Now you left Pilgrim Pride; is that
- 19 correct?
- 20 A Yes, sir.
- 21 Q And went to the prison?
- 22 A Yes, sir.
- 23 Q Did Mr. Toney still work there, do you know?
- 24 A Was he still working there?
- 25 Q At Pilgrim Pride?

S - L. ROGERS - DIRECT

1 A Yes, he was still working there.

2 Q Is he working there now that you know of?

3 A To my knowledge he was.

4 Q Okay. Now, you know Mr. Toney right now; don't
5 you?

6 A Yes, sir.

7 Q In fact, you had a relationship with Mr. Toney;
8 is that right?

9 A Yes, sir.

10 Q A longstanding relationship?

11 A Yes, sir.

12 Q Okay. And longstanding, about how long was it?
13 How many years you think it was?

14 A At least six or seven.

15 Q Six or seven years. And in fact ---

16 MR. KENT: Judge, I'm gonna object. He's
17 giving a lot of leading questions.

18 MR. FATA: I'll ---

19 THE COURT: Sustained.

20 BY MR. FATA:

21 Q What kind of relationship was that Ms. Toney?
22 What kind of relationship did you have with Mr.
23 Toney?

24 A It was a friendly relationship at first and it
25 became romantic.

S - L. ROGERS - DIRECT

1 Q Became roommate?

2 A No.

3 Q Oh, romantic, excuse me, I'm sorry. Became
4 romantic. And as a result of that romantic
5 relationship did anything occur?

6 A As?

7 Q As far as children?

8 A Yes, sir.

9 Q Tell me about that.

10 A About the child?

11 Q Yea.

12 A The daughter.

13 Q Your daughter.

14 A Yes, sir.

15 Q What about your daughter?

16 A That's (inaudible).

17 Q Who is the father of that child?

18 A Ernest Toney.

19 Q Ernest Toney, okay. Now did Ernest Toney love
20 you?

21 A He acted like he did.

22 Q Did he want you to leave home?

23 A No, he didn't never encourage me to leave home.

24 Q Never encouraged you to leave home?

25 A I was -- that was established. I would never

S - L. ROGERS - DIRECT

1 leave Toney.

2 Q Did Mr. Rogers ---

3 MR. KENT: Objection, still leading
4 questions.

5 THE COURT: Yes, sir. If it calls for yes
6 or no answer I don't think so, but if crosses the
7 line of suggesting an answer, then, yes. Mr. Fata,
8 you can ask the next question. If it's leading I'll
9 tell you to ask it another way.

10 BY MR. FATA:

11 Q Did Mr. Rogers know about this relationship?

12 A Yes.

13 Q What discussions did you and Mr. Rogers have
14 about this relationship?

15 A Well, what do you want?

16 Q Well, was he happy about it?

17 A No, sir, he wasn't happy.

18 Q Did he -- what did he tell you, if anything,
19 about the relationship, about the status between you
20 and Mr. Toney?

21 A Stay away from Toney.

22 Q Stay away from him. Did you do that?

23 A Sometime.

24 Q Was the relationship ongoing at the time of
25 Mr. Rogers' death?

S - L. ROGERS - DIRECT

1 A Yes.

2 Q It was ongoing. When was the last time you saw
3 Mr. Toney before Mr. Rogers' death?

4 A Before the death?

5 Q The day before? Was that the last time you saw
6 Mr. Toney?

7 A Before the death?

8 Q Have you seen him since the death?

9 A Yeah, I've seen him about once or twice.

10 Q Have you seen him a romantic way?

11 A No, sir.

12 Q Okay. Have you allow— what about Mr. Toney's
13 daughter, has he, has Mr. Toney seen his daughter?

14 A Once or twice. She was at our house.

15 Q So what is the status of the relationship between
16 you and Mr. Toney?

17 A Nothing now.

18 Q Is it over?

19 A Yes, sir. As far as I'm concerned, yes, sir.

20 Q What was Gregory Rogers' attitude about your
21 relationship with Mr. Toney?

22 A Well, what's it compared to?

23 Q What was his attitude? Was he happy about it,
24 sad about it, mad about it?

25 A He was mad about it.

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1 Q Mad about it, okay. Now on September 12th of
2 2010, did you see your husband that day, Mr. Rogers?

3 A Yes, sir.

4 Q When and where did you see him?

5 A At the house.

6 Q At the house. When was the first time you saw
7 him at the house?

8 A When we -- earlier that morning.

9 Q What happened later that day?

10 A Well, that day he was in the best I've seen him
11 in a while. He was very pleasant, very nice, very
12 nice. At about 1:00 he got a phone call from his
13 cousin James Rogers and asking him to take him to
14 the store, and he replied to me that he did want to
15 be home. His intention was to stay around the house
16 all day, but since that call he was gonna take him
17 to the store.

18 Q Did he take -- do you know that he took get back
19 take him to the store?

20 A Well, he was so pleasant I didn't want him to
21 leave so I tried to encourage him to stay. He
22 couldn't take it. He say whatever, he'll take him
23 'cause every time he call he got the chance to take
24 him everywhere so he ---

25 Q So did Mr. Toney leave, I mean, Mr. Rogers leave?

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- 1 A Yes, sir, he did.
- 2 Q And what did you do?
- 3 A I just ---
- 4 Q Did you leave?
- 5 A I stayed home and tried to cook dinner.
- 6 Q Okay. When did you see Mr. Rogers again?
- 7 A I say about 3 or 3:30.
- 8 Q All right. And where was that at?
- 9 A Back to the house.
- 10 Q Okay. And what was his state then? What was he
- 11 like then?
- 12 A Oh, he was upset. Something had happened out in
- 13 the street. He was upset.
- 14 Q You -- do you know what it was?
- 15 A No, sir.
- 16 Q Did you ever find out what it was?
- 17 A Well, later on.
- 18 Q And what'd he do when he came to the house?
- 19 What'd you see him do?
- 20 A Well, when he came in the house I was actually on
- 21 the phone with my cousin. It was a cousin of mine.
- 22 And he asked me who was I talking to and I could
- 23 tell he was upset by his tone of voice, and I told
- 24 him I was talking to Gloria. And I kept talking.
- 25 But then while I was talking he went back in one of

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- 1 the rooms and retrieved a gun and ---
- 2 Q Retrieved a gun?
- 3 A Yes.
- 4 Q What kind of gun did he retrieve?
- 5 A It was a long gun.
- 6 Q A long gun. I'm gonna show you State's Exhibit
- 7 Number 27. Do you recognize that?
- 8 A It looks like the gun.
- 9 Q What do recognize by the gun?
- 10 A The strap.
- 11 Q The strap? The camouflage strap?
- 12 A Yes, sir.
- 13 Q So that looks like the gun that came out of the
- 14 room?
- 15 A Yes, sir.
- 16 Q What did he do with this gun?
- 17 A Well, he went, babbling at first, and I told him
- 18 put it away 'cause I didn't want K [REDACTED] (ph), my
- 19 little girl, to see that, get frightened by that so
- 20 I told him to put the gun away.
- 21 Q And?
- 22 A Then I asked him what happened that, out there,
- 23 what happened while he was out, I said what happened
- 24 so upset. But he wouldn't tell me so I told him, he
- 25 don't have to tell me, I'll just call Pat since I

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1 knew he was the right person I'd just ---

2 Q Now did your husband leave at that time?

3 A No, he didn't. He didn't.

4 Q He didn't leave with the gun at that time?

5 A No, I called Pat and his wife picked up, and I
6 asked him what had happened. And she said Pat,
7 today she said nothing that she was aware of, and
8 she said, what's wrong. I said, he was, ran in the
9 house and appeared to be upset and got a gun and I
10 was trying to figure out what happened. And she
11 said she didn't know, nothing that she was aware of.

12 Q Okay, what happened next?

13 A Well, he left.

14 Q He being your husband?

15 A Yes, my husband left then.

16 Q And what about the gun?

17 A With the gun.

18 Q Took the gun with him? How long was he gone?

19 A Approximately seven minutes.

20 Q Seven minutes?

21 A About five to seven minutes. It wasn't long.

22 Q And he came back in? He did come back n?

23 A He came back in with the gun.

24 Q He came back ---

25 A He came back in the house with the gun.

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- 1 Q He came back in the house with this gun?
- 2 A With the gun, yes, sir.
- 3 Q With this gun. Then what happened?
- 4 A We then sat in the bedroom and one little
- 5 confused and throwing things and kind of pulled back
- 6 in the chair. And I looked back to ask him a
- 7 question, and I said to myself because he was so
- 8 upset I would leave him alone right now and I'm
- 9 gonna give him his space and do whatever. And I
- 10 asked him what happened in the street and then about
- 11 four he left again.
- 12 Q Okay. When he left that time where were you in
- 13 the house?
- 14 A In the kitchen.
- 15 Q And where did he come from in the house?
- 16 A In the bedroom right next to the kitchen.
- 17 Q So he, right next to the kitchen. So what was
- 18 his path?
- 19 A He had to walk right past me.
- 20 Q Had to walk past you?
- 21 A Yes.
- 22 Q Did you look at him?
- 23 A Yes, I did.
- 24 Q Did he have State's Exhibit 27 with him?
- 25 A No, sir.

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1 Q He did not? And as he walked past you where did
2 he go?

3 A He left. He went out.

4 Q He left. Did you see him again that day?

5 A Yes, sir. I was waiting for him to come back.
6 We was going to some friend's house, no, I didn't.

7 Q Did you get a telephone call from anyone that
8 day?

9 A Yes, sir, I did.

10 Q Who was that from?

11 A Ernest.

12 Q Ernest Toney? Mr. Toney right here?

13 A Yes, sir.

14 Q And what did Mr. Toney want?

15 A He just called and then he just told general
16 conversation, but I asked did you see my husband,
17 yeah.

18 Q And what'd he say?

19 A He said yes, I did.

20 Q And what did you tell him?

21 A Did anything happen? He said he was, he had
22 passed him. He didn't go into no great details, but
23 I did told him if you should see him —

24 Q See who?

25 A My husband, that day or any day, I mean, don't

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1 try to handle it himself.

2 Q What did you tell him to do?

3 A I told him to call 9-1-1 and let the law handle
4 it.

5 Q Why did you tell him to call 9-1-1?

6 A 'Cause I didn't want anybody fighting or anything
7 'cause that's what the law for; and if the law is
8 there ain't anybody gonna fight, they won't fight.

9 Q Did you know if Mr. Toney was in your
10 neighborhood?

11 A No, sir.

12 Q Is there any, other than coming to see you or the
13 daughter, was there any reason for Mr. Toney to be
14 in your neighborhood?

15 A Not my neighborhood.

16 Q Okay. And I'm gonna show you State's Exhibit
17 Number 29. This is John Wesley Road and this is you
18 circled on there, where you live. Circle on there.
19 I think it's...

20 THE COURT: What exhibit is that?

21 MR. FATA: 29.

22 BY MR. FATA:

23 Q That's where you live. And John Wesley Road is?

24 A Right here.

25 Q And what kind of road is it? Where did it go to?

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- 1 A It's a dead-end road.
- 2 Q Dead-end road. And of course, do you know what
3 road your husband was found on?
- 4 A Yes, sir. Yes, I did.
- 5 Q What road was that?
- 6 A John Wesley Road.
- 7 Q And of course, you can tell, somebody can tell a
8 distance between John Wesley Road and your road at
9 the house by looking at this map.
- 10 A Yes, sir.
- 11 Q Did you hear from your husband again that day or?
- 12 A No, I didn't. No, sir.
- 13 Q And what happened next? What happened next?
14 After your husband left, you got a call from
15 Mr. Toney, what happened next?
- 16 A What happened after that? I called -- after that
17 I called my friend Sonia Patterson 'cause he was
18 planning on going to their house and asked her had
19 she seen Piggy today ---
- 20 Q Piggy is what? Who's Piggy?
- 21 A My husband.
- 22 Q Okay.
- 23 A And she said she hadn't seen him, and she said
24 she just had told her husband, you know, Darryl's
25 not coming, Darryl's not coming over to the house.

1 When we get back they'll be there.

2 Q When did you find out that your husband had been
3 shot?

4 A About 6, 6, 6. Somewhere around the neighborhood
5 around 6.

6 MR. FATA: Beg the Court's indulgence just
7 a second.

8 BY MR. FATA:

9 Q So the last time, Ms. Toney, you saw -- the last
10 time you saw your husband alive is when he passed
11 you in the kitchen; is that correct?

12 A Yes, sir.

13 Q And he did not have his gun?

14 A No, sir.

15 Q Answer any questions either one of those
16 gentlemen have.

17 **CROSS-EXAMINATION**

18 BY MR. KENT:

19 Q Ms. Rogers, how are you doing?

20 A Fine.

21 Q Ms. Toney, we have not talked before trial; we
22 don't know each other. We haven't -- you haven't
23 talked to me about this trial or haven't contacted
24 me or anything about this case at all, have you?

25 A No, sir.

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1 Q Okay. Lorie, I just want to go into a little bit
2 of background. You mentioned during direct
3 examination from the solicitor that the morning of
4 the 12th your husband Gregory Rogers woke up
5 extremely happy, was extremely in a good mood. Was
6 this rare for him to be in a good mood? Why did
7 that ---

8 A No, not really. That's the best mood I seen him
9 in a while.

10 Q Was he always in a good mood? Y'all get along
11 very well?

12 A Yeah, we had bad days like any other couple.

13 Q What do you mean by that?

14 A Well, sometimes he had bad days and so would I.

15 Q Tell me about his bad day.

16 A If he a bad day he would sometime get his
17 (indiscernible).

18 Q Go ahead. I?

19 A I mean, get his ---

20 Q Nothing big deal, no big deal?

21 A I mean, our problem is more about Mr. Toney.

22 Q Tell me about those arguments.

23 A Sir?

24 Q Tell me about those arguments. You said a lot of
25 those arguments are ---

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1 A Well, some of them were about him, not all of
2 them.

3 Q And what were the arguments about Mr. Toney?

4 A About seeing him today or something like that.

5 Q What -- did he say it like this, did you see him
6 today and you'd say no and --

7 A No, I'm assuming that he would hear some hearsay
8 that I might have seen him, so he was trying to get
9 confirmation.

10 Q And how did he react?

11 A He would be upset.

12 Q What do you mean? You say he would be upset,
13 what, I'm trying to figure out --

14 A He would say stay away from him.

15 Q Did he say stay away from him or -- did he say
16 stay away from him, leave him alone, and walk out of
17 the room, what'd he say? You can't remember?

18 A Stay away from him. Maybe he would say stay away
19 from him or, I'm, I don't know.

20 Q Go ahead. You were about to say --

21 A Or either, I mean, stay away from him.

22 Q Tell me this, when was the last time you had a
23 disagreement about Mr. Toney? When is the last
24 argument you had about Mr. Toney and your
25 relationship?

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1 A Me and him one? It wasn't that day. That day
2 the didn't brung his name up.

3 Q Okay. When before that?

4 A I don't know.

5 Q You gave a statement, you gave a written
6 statement to law enforcement after all this stuff
7 happened?

8 A Yes, sir.

9 Q Okay. Did you review your statement before you
10 testified today? Did they give you a copy of it and
11 tell you to look through it and review it to make
12 sure you're prepared for your testimony? You
13 remember such amazing detail.

14 A No, he didn't give it, they didn't give it to me.
15 He didn't give me anything.

16 Q Have you reviewed it before you testified?

17 A He gave it to -- no, they gave it to me
18 afterwards.

19 Q After you ---

20 A Sometimes afterwards.

21 Q What do you mean they gave it to you afterwards?

22 A They gave it to me, something afterward. They
23 gave me a copy.

24 Q Had you looked at your testimony, have you looked
25 at that statement you gave before you testified

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1 today?

2 A Uh-huh.

3 Q When was the last time you read that, I'm just
4 asking? When was the last time you read that?

5 A I hadn't. I just remember having it that day.

6 Q So you had been having ongoing -- the minor
7 child, let's talk about the minor child. Her name
8 is K [REDACTED], isn't it?

9 A Yes.

10 Q The minor child you share with Mr. Toney?

11 A Yes, sir.

12 Q How old is she now?

13 A 6

14 Q She's six years old now?

15 A Yes.

16 Q And I think you were asked in testimony from the
17 solicitor you said you two had been having a
18 relationship for about six years. So it would have
19 been longer than that, wouldn't it, if the child is
20 six, right?

21 A Six or seven years.

22 Q Six or seven years? So how long actually do you
23 think the relationship between yourself and Mr.
24 Toney was going on?

25 A Seven years I guess.

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1 Q So y'all had a relationship, one day had sex, had
2 a baby and y'all started, had a baby, then had a
3 relationship for six years? Is that what happened?
4 First day y'all got together, had sex, you got
5 pregnant, you had a baby, the baby is now six —

6 A It was longer than that.

7 Q I need to know. How much longer?

8 A I don't know.

9 Q You don't know again, okay. So you had a
10 relationship at least six years, maybe a little bit
11 longer?

12 A At least six, or I say seven.

13 Q Six or seven. When did your husband find out
14 about that affair that you were having?

15 A I don't know.

16 Q So he finds out, you don't know when, you don't
17 remember?

18 A It was a while back.

19 Q It was a while. So he found out. So your
20 husband found out about an affair that you're having
21 with Mr. Toney, you were still seeing Mr. Toney, you
22 were still talking to Mr. Toney, you were still
23 contacting Mr. Toney, and he would tell you over and
24 over again, stop seeing this man, stop seeing this
25 man, stop seeing this man. You don't know what he

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1 would say, stop seeing him more, and he just kept
2 going through this over and over and he never got
3 angry, really angry---

4 A It wasn't over and over.

5 Q Well, how ---

6 A Like I say when people, he'd seen them or talk
7 that's when.

8 Q Well, you tell us, how often were you seeing
9 Mr. Toney?

10 A Well, we were working together so I would see him
11 every day at work.

12 Q How often were you seeing him romantically?

13 A Oh, um...

14 Q After your husband found out and ordered you to
15 stop seeing him romantically, let's ---

16 A We stopped for a while, then kind of slowed it
17 down.

18 Q Kind of slowed it down or you stopped, there's a
19 difference. Did you slow down or did you stop?

20 A Slow it down. But then I think we stopped 'cause
21 we.

22 Q Which time is that time?

23 A That was after he found out.

24 Q And when did he find out? Now you're starting to
25 realize when he found out. When did he find out?

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- 1 A I don't know when he found out but he found out.
- 2 Q Actually, did he find out before or after the
- 3 child being born?
- 4 A Before.
- 5 Q He found out ---
- 6 A Before the child. It was before the child.
- 7 Q Before the child was born he found out that you
- 8 were having an affair?
- 9 A I was pregnant. It's been a while back.
- 10 Q And what ---
- 11 A It is a while. I will say before, I'm not sure.
- 12 Q So before the child was born he found out that
- 13 you were having an affair with Mr. Toney, right?
- 14 A I would say, yes.
- 15 Q When did you tell him that it was Mr. Toney's
- 16 baby?
- 17 A When did I tell him?
- 18 Q Yeah, when did you tell him?
- 19 A He --- I never did told him, he suspected.
- 20 Q You never told him?
- 21 A No, sir, I never did tell him.
- 22 Q So how did he find out?
- 23 A People.
- 24 Q How did people know?
- 25 A I don't know. People assume.

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1 Q During your testimony on direct examination you
2 said he knew that that was Mr. Toney's baby?

3 A I didn't say he knew.

4 Q Oh, you hadn't said that he knew? Okay, I must
5 have made that up. So at no point in time did he
6 specifically know that this was Mr. Toney's baby,
7 just people in the community told him?

8 A Sir, he ---

9 Q Go ahead.

10 A Say that again now. Repeat your question.

11 Q You never told this man that the minor child
12 wasn't his kid. You never told him that K [REDACTED]
13 wasn't his daughter?

14 A He always said K [REDACTED] was his daughter no matter
15 what.

16 Q You never told him that K [REDACTED] wasn't his
17 daughter?

18 A He didn't get to hear that.

19 Q You never told him that K [REDACTED] wasn't his
20 daughter?

21 A I never told him. He told ---

22 Q You never told him?

23 A He always said no matter what people or they
24 said, K [REDACTED] was his daughter.

25 Q And he wasn't upset at all about the fact that,

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1 yet, you were carrying another man's child, wasn't
2 upset about it? Y'all never had a confrontation
3 about it, never had a disagreement about it, never
4 yelled at you about it.

5 A No.

6 Q Never got upset about it, never said, hey, why am
7 I seeing this other girl who's not even my child.
8 Never said anything about it?

9 A No, sir, because he told me that he was, 'cause
10 he the same way, so he understood how it is. And
11 nobody mistreating him. So it wasn't the child's
12 fault how she got here as why he got here so he
13 could relate.

14 Q Did Mr. Rogers have a temper?

15 A At times.

16 Q What do you mean at times? Did he have a bad
17 temper?

18 A At times, not all the time.

19 Q Did y'all ever get into a bad disagreement or bad
20 fight or bad argument about anything else? Did he
21 ever flash his temper with you? Did he ever
22 threaten you?

23 A What, anything other than this?

24 Q Yeah.

25 A Oh, well, yes, sir.

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1 Q So he had a temper?

2 A Yes, sir.

3 Q And he threatened you?

4 A Yeah.

5 Q He asked (inaudible).

6 A Yeah.

7 Q He scare you when you were pregnant when he was
8 threatening you?

9 A Well, yeah.

10 Q You ever call law enforcement on him?

11 A Yes, sir.

12 Q In fact, you called law enforcement on him
13 because you were scared of his temper?

14 A Called law enforcement on him?

15 Q Yeah.

16 A Yes, sir.

17 Q Did he ever threaten to kill you?

18 A Maybe.

19 Q Has he ever threatened to kill you?

20 A (There was no response.)

21 Q Go ahead, take your time. Answer the question,
22 has he ever threatened to kill you?

23 A Maybe.

24 Q Maybe? That's not something you remember if your
25 husband threatened to kill you at some point in

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1 time?

2 A A lot of bad memory I block out trying to, wanted
3 to erase it.

4 Q So you block out a lot of bad memories of your
5 husband threatening to kill you and his violent
6 temper?

7 A I say maybe he have ---

8 Q Ma'am?

9 A Maybe he have, I just can't say, maybe.

10 Q Maybe. Do you remember getting an order of
11 protection ---

12 MR. FATA: Objection, Your Honor.

13 Objection, Your Honor, may we approach.

14 THE COURT: Yes, sir.

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

17 THE COURT: All right. Ladies and
18 gentlemen, if you would please, step to your jury
19 room. We'll go ahead and use this as an afternoon
20 break. Do not discuss the case. If you need
21 anything let the foreman know and tap on the door,
22 okay.

23 (WHEREUPON, the jury was removed from the
24 courtroom.)

25 THE COURT: Okay. Mr. Kent, you may

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1 cross-examine the witness.

2 **P R O F F E R E X A M I N A T I O N**

3 BY MR. KENT:

4 Q Lorie, on cross-examination, during
5 cross-examination I asked you specifically do you
6 remember Gregory Rogers ever threatening you, and I
7 specifically asked you do you remember Gregory
8 Rogers ever threatening to kill you and you said,
9 maybe, you were not sure. I didn't let you answer,
10 I'm sorry. I'm sorry, go ahead.

11 A I said maybe, I wasn't sure.

12 Q I was going to ask you do you remember
13 specifically filing an order of protection against
14 Gregory Rogers stating to the family court that he
15 had threatened to kill you, and you asked for an
16 order of protection from him? Do you remember that?

17 A I think. It was a long time ago.

18 Q Yes, ma'am, but do you remember that?

19 A I remember that.

20 Q Do you remember specifically him threatening to
21 kill you and you telling the Court he threatened to
22 kill you and I need an order of protection from him?

23 A Yes, sir.

24 Q So you do remember that?

25 A Now, yes, sir.

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1 Q So there is a specification time in your history
2 where Gregory Rogers has threatened to kill you?

3 A Say that again.

4 Q There's a specific time, it's not a maybe now,
5 there's a specific time in your history which
6 Gregory Rogers ---

7 A Yes, sir, I remember.

8 MR. KENT: You want me to continue go,
9 Judge? That's where the proffer would go.

10 THE COURT: That would move -- that mean
11 you'd stop with this?

12 MR. KENT: I would stop ---

13 THE COURT: Stop with the order of
14 protection because ---

15 MR. KENT: I would introduce it at this
16 point because she's -- I'm sorry.

17 THE COURT: In other words, I assume she's
18 making a full proffer about the order of protection
19 as I think that's Mr. Fata's objection so if there's
20 any other questions about that event you can ask
21 her.

22 MR. KENT: Judge, at the point now that
23 she has now, her -- she's remembered the order of
24 protection, I don't think I can delve more into the
25 order of protection specifically and I would

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1 introduce she's now said ---

2 THE COURT: Mr. Fata, your objection?

3 MR. FATA: Your Honor, it's -- the order
4 of protection is dated in 2003. The rule
5 specifically says evidence of a pertinent trait of
6 the victim, rule 404(2), evidence of pertinent
7 trait. One incident is not a pertinent trait, I'm
8 afraid. I don't think one incident, two of them.

9 THE COURT: Okay, Mr. Kent.

10 MR. KENT: Judge, I asked her the question
11 and she answered to an un-objected to question.

12 THE COURT: I'll allow the question.

13 MR. FATA: Thank you, sir.

14 THE COURT: She testified -- and I'm
15 paraphrasing -- she testified he had a violent
16 temper at times, said she couldn't remember if he'd
17 ever threatened to kill her and now she indicates
18 she did. I think that all goes toward pertinent
19 trait acts.

20 MR. FATA: And Your Honor, there is an old
21 CDV on the record which is, which is well past the
22 ten years.

23 THE COURT: Well, ten years doesn't apply
24 in character evidence ---

25 MR. FATA: No.

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1 THE COURT: ---but it may apply as to
2 whether or not it's pertinent trait. When was that?

3 MR. FATA: I don't -- where is his record?
4 I don't have the record in front of me. I had it.

5 THE COURT: Does anybody know?

6 MR. FATA: It was ---

7 MR. KENT: Realistically I ---

8 MR. FATA: I should have had ready, Judge,
9 I knew you were going to get into this.

10 THE COURT: All right, let's do this, the
11 jury is taking a break. I will instruct the
12 witness, Ms. Rogers, you can step down but you may
13 not discuss your testimony, either what you've
14 already said, anything about this case, anything
15 that may come up, with anybody at all in this whole
16 wide world. You understand?

17 THE WITNESS: Yes, sir.

18 THE COURT: Okay, and you'll be subject to
19 any questioning about that. Thank you, ma'am. You
20 can step down. We'll take a few minutes.

21 (WHEREUPON, a recess was taken from the
22 proceedings.)

23 THE COURT: Just to be clear, I'll allow
24 Mr. Kent to ask the question about the order of
25 protection based on the fact that the witness did

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1 indicate that she didn't remember whether or not
2 he'd ever threatened to kill her specifically, but
3 yet he could have. Also, I think it's appropriate
4 to either refresh her memory or impeach her with
5 that. And in addition, it does tend based on t he
6 current state of her testimony, it does tend to —
7 if the jury accepts it that way — does tend to
8 establish a time character of 404(a) (2). Okay, Mr.
9 Fata, is the State ready for the jury?

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

11 THE COURT: Mr. Kent?

12 MR. KENT: Yes, sir, Judge.

13 THE COURT: If they're ready they can come
14 out.

15 (WHEREUPON, the jury was returned to the
16 courtroom at approximately TIME , and
17 the following proceedings commenced in
18 open court.)

19 THE COURT: Mr. Kent, you can continue
20 with your questioning.

21 MR. KENT: Thank you.

22 BY MR. KENT:

23 Q Ms. Rogers, the question I was asking you, I
24 asked you specifically if you remembered at any
25 point in time Mr. Rogers actually threatened to kill

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1 you, or something of that nature, and you said
2 maybe, I'm not sure. Do you remember back in 2003
3 that you actually requested an order of protection
4 from the court trying to protect you from Gregory
5 Rogers for threatening to kill you?

6 A Yeah, I remember.

7 Q Do you remember that?

8 A I think I didn't go before the court.

9 Q You didn't go before the court?

10 A I went up there and talk to the victim advocate
11 and, in fact, as I was leaving she — I told her not
12 to worry about it. But she said, she says, it's the
13 State's responsibility to — I've got to do it, with
14 that kind of complaint, it's their responsibility to
15 proceed with it whether I wanted to or not so they
16 went on with it and signed an order along with it.

17 Q Gloria, do you remember getting a copy of the
18 order of protection?

19 A Yeah, I remember. I didn't know what was on it
20 but I remember.

21 Q Have you seen that before?

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

23 THE COURT: Yes, sir. Hand me a copy
24 please.

25 MR. KENT: Yes, sir, Judge.

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

3 THE COURT: Ladies and gentlemen, please
4 step to your jury room. You may not discuss the
5 case.

6 (WHEREUPON, the jury was removed from the
7 courtroom.)

8 THE COURT: Mark it for I.D. please.

9 (WHEREUPON, Defense Exhibit No. 1 was
10 marked for identification only.)

11 MR. FATA: Your Honor, I don't think under
12 these circumstances that's proper.

13 THE COURT: It's for I.D.

14 MR. FATA: Court exhibit though.

15 THE COURT: No, defense I.D. That does
16 not mean it's gonna come in unless you offer it.
17 It's got to have a sticker on it so the world later
18 will know what we're talking about.

19 MR. FATA: Oh.

20 THE COURT: Okay, Mr. Kent, you can hand
21 the witness I.D. 1 for the defendant.

22 **P R O F F E R E X A M I N A T I O N**

23 BY MR. KENT:

24 Q Ms. Rogers, when we took a break I handed you a
25 copy of that document and asked had you ever seen a

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1 copy of that to refresh your memory as to everything
2 that happened on that day.

3 A Yes, sir, I did.

4 Q And when I was asking you a question earlier, you
5 mentioned that a victim's advocate mistook myself
6 and you never went in front of the court. You agree
7 this document says you actually went in front of the
8 court?

9 A Mr. Kent, I didn't never go to court. She said
10 it was her responsibility to follow through because
11 I had a underage child at the time.

12 Q You have read this document?

13 A I read it.

14 Q You read the first part of the document that says
15 that petition for order of protection was continued
16 from November 13th, 2003. The plaintiff was present
17 at the hearing appearing pro se. The defendant was
18 served and appeared pro se. Do you agree with that,
19 that's what that says?

20 A That's what it says, yes, sir.

21 Q And then it says evidence established, the order
22 of protection is granted. Defendant verbally
23 threatened plaintiff. There's a history of violence
24 between the parties since 1997. You agree that's
25 what that says?

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1 A Yes, sir.

2 Q And you were given a copy of this document?

3 A Yes, sir.

4 Q And the document said you actually went in front
5 of the court. That was signed by the Honorable
6 George McFadden, the judge who was in the courtroom
7 at the time. So there was a judge. You went in to
8 the room and you were there pro se, meaning nobody
9 was representing you. You agree with me on that?

10 A Yes, sir, I would. I remember now, but I didn't
11 want to go forward. I remember —

12 Q I'm not —

13 A Yes, sir, yeah.

14 Q Let me go back to my question. You did go in
15 front of the court?

16 A Yeah, I did, yes, sir.

17 Q You think you did or you did? You go in front of
18 a judge.

19 A I don't if I went in front of judge or.

20 Q You agree with me this document says that you
21 went in front of the judge?

22 A Yes, I do.

23 Q You requested an order of protection?

24 A Yes, sir.

25 Q You requested an order of protection from Gregory

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1 Rogers?

2 A Yes, sir.

3 Q You requested an order of protection against
4 Gregory Rogers because he had threatened to kill you
5 in the past?

6 A Yes, sir.

7 Q And that's what this order was. It was in front
8 of a judge. It wasn't a victim advocate or actually
9 somebody was telling you something. This was you in
10 the courtroom, correct?

11 A You say had threatened? Yeah, I see, yes, sir.

12 Q Thank you. That will be it for my proffer.

13 THE COURT: All right, Mr. Fata, do you
14 object to any of that?

15 MR. FATA: Yes, sir.

16 THE COURT: Well, the reasons different
17 from what I overruled your earlier objection.

18 MR. FATA: No, sir.

19 THE COURT: It sounds like the same thing.

20 MR. FATA: No, sir. He -- his line of
21 questioning was to elicit from her had she ever been
22 threatened to be, threatened with her life by
23 Gregory Rogers. That was his line of questioning.
24 She him and hawed. And then he brings this up to
25 refresh her memory. Now she now has said, yes,

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1 Gregory Rogers threatened me, threatened to kill me.
2 So now I don't think he needs to be able go into all
3 the, this order of protection. Her memory has been
4 she has answered his question.

5 THE COURT: She did out here, but not when
6 the jury is in the room.

7 MR. FATA: She did just a minute ago. He
8 asked her, has Gregory Rogers ever threatened to
9 kill you.

10 THE COURT: All right, here's what she
11 said, here's what she said. She said in front of
12 the jury: Well, I went up there, then I told them
13 not to worry about it and the victim advocate said
14 well, I've got to do it. That's not the way they do
15 it in family court first of all.

16 MR. FATA: Absolutely.

17 THE COURT: You're probably talking about
18 the CDV from 1997, I don't know. But she says
19 something different in the proffer, Mr. Fata, than
20 what she said in front of the jury.

21 MR. FATA: Regarding this thing. But
22 prior to him coming -- just when we came back in he
23 asked her had Gregory Rogers ever threatened her and
24 to kill her, and she said yes, and then Mr. Kent
25 goes into this, into this exhibit.

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1 THE COURT: Here's what I'm gonna allow.
2 I'm gonna allow you to question the witness by
3 saying did, you know, cross-examination, whatever
4 you choose to adopt -- in 2003, did you request and
5 obtain an order of protection in family court
6 because your husband had threatened, you know,
7 whatever testimony you choose, and she can answer
8 the question.

9 MR. FATA: And I thought she had, maybe
10 I'm mistaken, maybe I heard it wrong.

11 THE COURT: She has answered it in two or
12 three different ways.

13 MR. FATA: Well, I thought when we came
14 back in that when he asked her, did your husband
15 ever threaten to kill you, she said yes. And then
16 Mr. Kent began to go through the order of protection
17 which I ---

18 THE COURT: And I allowed him to do. And
19 then she equivocated again.

20 MR. FATA: Well, I look at the order of
21 protection as refreshment; and once her memory is
22 refreshed, she said yes, he did, then that ends the
23 issue.

24 THE COURT: All right. And Mr. Fata ---

25 MR. FATA: I may be wrong.

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1 THE COURT: Okay. I think your position
2 is preserved. You may ask her the question that I
3 mentioned. Are there any other questions that you
4 want to ask her that you have not asked her so far?

5 MR. KENT: Nothing.

6 THE COURT: Any additional questions that
7 you want to ask her other than what I've just
8 outlined?

9 MR. KENT: Order of protection, no, sir.

10 THE COURT: And if the witness equivocates
11 again, then we may have to do this again.

12 MR. FATA: So he can ask her, have you
13 ever sought an order of protection in family court
14 against —

15 THE COURT: Sought and obtained an order
16 of protection in family court because your husband
17 threatened to kill you. And he can establish when
18 that may have been.

19 MR. FATA: And she says yes, that's it, he
20 can't go any further?

21 MR. KENT: I've been trying to, Judge —

22 THE COURT: Okay.

23 MR. FATA: But I thought Your Honor, and
24 I'm not gonna beat a dead horse, you've already
25 ruled, but I thought she'd answered that question,

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1 I'm sorry.

2 THE COURT: No, sir, she hadn't.

3 You can bring the jury in.

4 (WHEREUPON, the jury was returned to the
5 courtroom, and the following proceedings
6 commenced in open court.)

7 THE COURT: Okay. Mr. Kent, you may
8 continue.

9 BY MR. KENT:

10 Q Ms. Rogers, before we left I specifically asked
11 you a question about the order of protection. You
12 agree with me now that it's true that October 2003
13 you personally sought an order of protection on
14 Gregory Rogers, is that true?

15 A Yes, sir.

16 Q You personally went in front of the family court
17 and requested an order of protection from Gregory
18 Rogers in that he threatened to kill you?

19 A Yes, sir.

20 Q This wasn't a — this was you, you personally did
21 that?

22 A Yes, sir.

23 Q Thank you. How about Mr. Rogers' drinking, did
24 he have a drinking problem?

25 A Yes, sir.

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1 Q When he drank is that when he got more violent,
2 is that when he was more angry?

3 A Yes, sir.

4 Q And that's pretty well known when he drank that's
5 when he was more violent?

6 A Yes, sir.

7 Q And everybody pretty much knew that?

8 A (No verbal response.)

9 Q Is that a yes?

10 A Yes, sir.

11 Q Okay. And most of the problem that y'all had
12 with each other was that when he was drinking,
13 that's when his temper was out?

14 A Yes, sir.

15 Q And when he wasn't drinking he wasn't like that?

16 A No.

17 Q Okay. The day that all of this happened had
18 Gregory Rogers been drinking that day?

19 A Not to my business.

20 Q You don't know if he had been drinking?

21 A That day, no, sir.

22 Q Well, let me ask you this, was he different when
23 he was drinking than when he wasn't? Were you able
24 to recognize him when he wasn't drinking?

25 A Yes, sir.

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1 Q Could you tell that he was drinking that day?

2 You made the comment in your statement that he had
3 this wild look in his eye.

4 A Yeah, he did.

5 Q Was that the wild look that he usually had when
6 he was drinking? 'Cause I think I understand you
7 said he had this wild look in his eye and you knew
8 to stay away from him?

9 A Yes, I was.

10 Q How did you know to stay away from him? What
11 would happen when he was drinking?

12 A When he was drinking he would sometime get kind
13 of rowdy.

14 Q He would get rowdy? What do you mean by rowdy?

15 A It was the drinking.

16 Q If he was drinking. Let's talk about when he was
17 drinking. When he was drinking he would get rowdy.
18 And that's what you mean, that's the personality
19 trait?

20 A Yes, sir.

21 Q And you knew that. You knew that when he was
22 drinking he was rowdy, stay away from him?

23 A Yes, sir.

24 Q What type of things would he do when he was
25 drinking, when he got rowdy? Would he fight people?

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1 A Well, if they bother him or he would just go to
2 sleep. If they bother him.

3 Q He ever fight cops or anything like that or?

4 A Yes, sir.

5 Q You knew about him fighting some cops when he was
6 drinking?

7 A Yes, sir.

8 Q Okay.

9 THE COURT: Wait. Mr. Fata?

10 MR. FATA: I object to that.

11 THE COURT: Sustained. Is that --
12 relevance?

13 MR. KENT: She's already asked and
14 answered. I can get into ---

15 THE COURT: Well, he objected.

16 MR. KENT: I'll leave it alone for now.

17 THE COURT: All right, shall I instruct
18 the jury to disregard that?

19 MR. KENT: Can we approach the Bench?

20 THE COURT: Yes, sir.

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

23 BY MR. KENT:

24 Q Ms. Rogers, in the statement that you made and we
25 talked about this a little bit, you made one of the

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1 comments that when you had talked to Ernest Toney
2 you told him if you see Greg call 9-1-1, don't deal
3 with him. Why did you, what is his history that you
4 knew that he would call 9-1-1 and don't deal with
5 Greg and talk to him, what did you mean by that?

6 A If he walked into him that day or any day, to
7 call 9-1-1.

8 Q Did you tell that to anybody else about Gregory
9 Rogers? Call 9-1-1 if you see my husband, if you
10 see Gregory call 9-1-1. Why did you tell Ernest
11 Toney on that day specifically, you see Greg you
12 better call 9-1-1, don't talk to him. Why would you
13 say that?

14 A Because they had bad blood.

15 Q 'Cause what?

16 A They had bad blood between the two.

17 Q They had bad blood?

18 A (Inaudible.)

19 Q And because Greg probably was acting in that way,
20 had that crazy wild look in his eyes that day?

21 A Maybe.

22 Q Maybe?

23 A I know the two of them don't get along so.

24 Q So they don't get along, he had this wild look in
25 his eye, he was upset about something.

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1 A Something.

2 Q And you had talked to Ernest and you said, look,
3 if you see Greg call 9-1-1, don't deal with him.

4 A Yes, sir.

5 Q Have you ever told — you and Ernest talked.
6 Y'all talked a lot, there's no secret about that.

7 Y'all talked on the phone and you talked about
8 ████████, you two were friends?

9 A Yes, sir.

10 Q Is that a yes?

11 A Yes.

12 Q And I'm assuming as your friend you would talk
13 about problems at home, you would talk about life,
14 y'all would talk about all types of things?

15 A Yes, sir.

16 Q You would talk about the child K██████, you would
17 talk about things that happened at work I'm sure,
18 you would talk about good times, you would talk
19 about bad times, right?

20 A Yes, sir.

21 Q And at some point in time he romanced you at some
22 play. I'm sure he talked about your husband, you
23 talked about the difficulties you had with your
24 husband and the problems you had with your husband?

25 A Yes, sir.

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1 Q And you would talk to him about problems that you
2 had with your husband?

3 A Yes, sir.

4 Q And you would talk to him about his temper I'm
5 sure. You would talk to Ernest about the temper
6 your husband had?

7 A Yes, sir.

8 Q And so he knew about it, he knew about his
9 temper?

10 A Yes, sir.

11 Q And he knew about his temper when he got drunk
12 and intoxicated; isn't that true?

13 A Yes, sir.

14 Q Even things that you would tell Ernest that
15 Ernest specifically knew about the temper of Gregory
16 Rogers when he got angry, when he got upset, you
17 would tell him about that?

18 A Maybe.

19 Q Maybe? I would -- go ahead.

20 A Maybe.

21 Q But you would talk to him?

22 A Yes, sir.

23 Q The guns, in the statement that you gave law
24 enforcement you specifically said Greg came into the
25 house, he grabbed a firearm, and he left the house

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1 for seven minutes or so. He had an angry look and
2 left with a firearm, with a long gun.

3 A He say?

4 Q You said initially he left with a long gun?

5 A Yes, sir.

6 Q And you said he came back, he sat down, correct?

7 A Yes, sir.

8 Q He sat down in the room and I think your
9 testimony was he was rocking back and forth. Wasn't
10 that your testimony?

11 A Yes, sir.

12 Q He was just rocking back and forth like this,
13 like I'm rocking right now?

14 A Yes, sir.

15 Q And he seemed angry?

16 A Yes, sir.

17 Q And you knew not to mess with him?

18 A No.

19 Q As he's rocking, don't mess with him. And you
20 went into the kitchen?

21 A Yeah, I went to use the phone.

22 Q You went to use the phone. And did you call
23 Ernest at that point?

24 A I called Fat, I mean, James Rogers.

25 Q You called James to figure out why was he so

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1 upset, what has gotten him so upset?

2 MR. FATA: All that has been asked and
3 answered.

4 MR. KENT: This is cross-examination,
5 Judge.

6 THE COURT: Wait a minute, if he objects
7 you don't say anything. And when you object and he
8 says something, you don't say anything. Okay, your
9 objection is based on what?

10 MR. FATA: All that has been gone into on
11 cross-examination and direct.

12 THE COURT: Overruled. Just one time
13 summary, you won't be permitted to summarize it
14 again of the question.

15 BY MR. KENT:

16 Q So you go through all of this stuff and I think
17 in your testimony -- you said he left a second time.
18 Do you remember in your statement you said you think
19 he left with a gun, you weren't sure? Or you think
20 he didn't leave with a gun? You weren't sure if he
21 left with a gun or not? Do you remember telling law
22 enforcement that?

23 A Yes.

24 Q Okay. You weren't sure if he left with a gun or
25 not? You weren't positive, were you, that Greg left

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1 the house with a gun?

2 A That's why I said I think, but I'm pretty sure he
3 did but.

4 Q Did you write that in the statement that, I'm
5 pretty sure he left with a gun; or did you say, I'm
6 not sure?

7 A I think on my statement I think.

8 Q Yes, ma'am. Your statement was actually written
9 as close to the incident as possible. This is two
10 years ago when you wrote that statement.

11 A No, sir.

12 Q When did you write your statement?

13 A The next day.

14 Q The next day right after this shooting happened?

15 A Yes.

16 Q Is when you told them, I think, I'm not sure if
17 he left with a gun you said. You'd agree with me
18 with that fact?

19 A Yes, sir.

20 Q And today, you're positive he left with a gun or
21 you're positive he didn't leave with a gun today,
22 two years later?

23 A Well, they found it in the house so.

24 Q Now let's talk about that.

25 A He had to have 'cause ---

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1 Q 'Cause you're guessing he had to have his gun?

2 A They found it in the house.

3 Q So that's why you're saying today he could have
4 left with the gun, you said they found it in the
5 house, not because of your independent recollection.
6 You don't remember if he left with a gun or not the
7 second time, do you?

8 A That day was, that morning was overwhelming.

9 Q You don't remember, do you?

10 A (No response.)

11 Q It's okay. Law enforcement came back to your
12 house and they searched your house with a search
13 warrant, didn't they? They came looking for this
14 long gun you were talking about. Do you remember
15 them coming back to your house with a search warrant
16 looking for this long gun?

17 A Yes, sir.

18 Q They didn't find it, did they?

19 A No, sir.

20 Q The Lee County Sheriff's Department came to your
21 house looking for this long gun. They looked under
22 the beds, they looked in the doors, they looked
23 everywhere throughout the house; didn't they?

24 A Yes, sir.

25 Q They looked under the bed, they looked in the

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1 car, they looked -- trained officers, these are
2 trained officers, they couldn't find this long gun.
3 And then later you gave it to them. Where did you
4 find it?

5 A I didn't never find it.

6 Q You never found it? Where did the gun come from?

7 A Well, they found it under the bed.

8 Q Who? They found it--

9 A Law enforcement. They found it under the bed at
10 the time they came in.

11 Q So the first time they come to the house, they
12 have a search warrant so they have a search warrant,
13 they're looking for this long gun you're talking
14 about. I just asked you, they looked under the bed,
15 they looked in the car, they looked under the doors,
16 and they don't find it anything, right?

17 A Right.

18 Q And then they come back and they look under the
19 bed, and like, oh, there's a gun, they must have
20 missed it the first time; is that what you're
21 saying?

22 A They found the gun under the bed?

23 Q So they just missed this gun the first time they
24 looked under the bed?

25 A Yes, sir.

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1 Q Hum. They found a pistol the first time they
2 went to the house, correct?

3 A Yes, sir.

4 Q And a pistol had an obliterated serial number
5 where somebody had tried to file the serial number
6 off the gun, they found that, right?

7 A I never seen the gun but that's what they told
8 me.

9 Q That's what they told you?

10 MR. KENT: Beg the Court's indulgence one
11 moment.

12 THE COURT: All right.

13 BY MR. KENT:

14 Q Lorie, that day do you ever remember telling
15 Ernest that Piggy possibly has a gun? Do you
16 remember that, when you called him?

17 A Not ---

18 Q Remember when Ernest called and talked to you, do
19 you remember telling him Piggy had a gun, be
20 careful?

21 A I seen ---

22 Q You told him?

23 A He met with him and he brought it back.

24 Q You told Ernest that?

25 A He left with a gun. I think.

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1 Q I want to make sure you understand what I'm
2 asking, my question. Did you specifically tell
3 Ernest that Piggy had a gun? Do you remember that?

4 A When I asked him and he said that he did, then I
5 think he had — he didn't went into all the details,
6 but they — I could tell he had a pistol with him,
7 and I said, well, that's why he came and got — I
8 guess that's why he came and got a gun. But I don't
9 — possibly I might have.

10 Q You might have told Ernest he left with a gun and
11 to be careful?

12 A And call 9-1-1.

13 Q And call 9-1-1.

14 A I assume that would be the same conversation.

15 MR. FATA: Judge, may we approach?

16 THE COURT: Yes, sir.

17 (WHEREUPON, counsel approached the
18 Bench for an off-the-record discussion.)

19 THE COURT: All right, ladies and
20 gentlemen of the jury, please step to your jury
21 room. Do not discuss the case.

22 (WHEREUPON, the jury was removed from the
23 courtroom.)

24 THE COURT: Okay, Mr. Kent.

25 **P R O F F E R E X A M I N A T I O N**

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1 BY MR. KENT:

2 Q Lorie, when we were doing your testimony I had
3 specifically asked you about Gregory Rogers drinking
4 and the fact that he had a violent temper when he
5 drank, do you remember that?

6 A Yes, sir.

7 Q And you remember when I asked you, did he get in
8 fights with individuals when he drank. You said --
9 your answer was yes?

10 A Yes, sir.

11 Q And we talked about him getting rowdy when he
12 drank, your answer was yes?

13 A Yes, sir.

14 Q And then I asked you about fighting law
15 enforcement officers, and the answer was, yeah, he
16 had done that also.

17 A (No verbal response.)

18 Q Is that a yes?

19 A Not fighting, yes, sir.

20 Q But you knew about that?

21 A Yes, sir.

22 Q Did you specifically know about, I guess four
23 months before this shooting, I think it was July of
24 that year, where he had gotten arrested for driving
25 under the influence?

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1 A Yes, sir.

2 Q You knew about that?

3 A Yes, sir.

4 Q And you were aware that he had actually been
5 tazed by law enforcement when he got arrested for
6 driving under the influence? He got tazed that
7 night.

8 A Yes, sir, he told me.

9 Q He told you all that. And he told you that he
10 had pulled a tazer out of his shirt chest and
11 started to try to fight the cops, and they had to
12 taze him a couple of times. You knew all those
13 facts.

14 A He tried to pull it out and they had to taze him.

15 Q They had to taze him, and he tried to fight.

16 A Yes, sir.

17 Q When he was intoxicated?

18 A I didn't know whether he was drinking or not. He
19 didn't say he was drinking, but he told me that
20 (indiscernible). They had to taze him.

21 Q Yes, ma'am. You told Ernest about that also.
22 You told Ernest about how he hit all these cops;
23 didn't you?

24 A I may did.

25 Q You may did? Did you told Ernest about all these

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1 cops when he got tazed, you told him that; didn't
2 you? Well, the date's not important. You remember
3 the incident?

4 A I remember the incident.

5 Q You remember telling Ernest?

6 A It's possible I could have.

7 Q I got to ask you again and I know the answer, do
8 you remember telling Ernest about this incident? I
9 know you said you probably, you may have, and I know
10 you're ---

11 A It was out. Everybody, a lot of people heard it.

12 Q I know everybody, but I'm asking you, do you
13 remember telling Ernest and I know you said you
14 probably did ---

15 THE COURT: Just ask her.

16 MR. KENT: I know, Judge.

17 BY MR. KENT:

18 Q Do you remember telling Ernest specifically about
19 that incident?

20 A Specifically I don't remember specifically.

21 Q What do you remember telling him about that?

22 A I remember talking to him, but not what I said
23 about that.

24 Q But you remember talking or you just don't
25 remember what you said. You remember talking about

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1 it, you don't remember what you said?

2 A Yes, sir.

3 Q You don't remember what you said, but you
4 remember talking to him about it?

5 A I don't even remember talking to him about it.

6 Q I'm just trying to make sure. You do not
7 remember ---

8 A I don't remember talking to him about it to be
9 honest. I'm not saying I didn't, but I don't
10 remember. 'Cause we talked a lot about different
11 things so I just, I'm not saying I didn't, but I
12 don't remember telling him about that.

13 Q And I hate to keep -- I just need to know did you
14 tell him? You're saying I don't remember ---

15 MR. FATA: It's been asked and answered.

16 THE COURT: Well ---

17 MR. KENT: No.

18 THE COURT: It's been asked several times.

19 It's been answered three different ways. Just ask
20 her one more time without qualifying a question, did
21 you or did you not, and then ask it.

22 BY MR. KENT:

23 Q Ms. Rogers.

24 A Yes, sir.

25 Q Did you or did you not tell Ernest Toney about

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1 the incident involving law enforcement officers that
2 we just specifically talked about in which he got
3 tazed involving the cops?

4 A I don't remember.

5 THE COURT: Okay, she doesn't remember,
6 okay. And you want to ask this question?

7 MR. KENT: Yes, sir I do.

8 THE COURT: And the relevance?

9 MR. KENT: It goes to pertinent character
10 trait. I show specific case law 404(a) type
11 evidence when he's intoxicated he fights.

12 THE COURT: If she doesn't remember, if
13 she told him that.

14 MR. KENT: If she told him ---

15 THE COURT: Is that in her statement
16 anywhere or ---

17 MR. KENT: That is not in her statement.

18 THE COURT: Is it in Mr. Toney's
19 statement?

20 MR. KENT: It's not in Mr. Toney's
21 statement.

22 THE COURT: Okay. So if she doesn't
23 remember how does it tend to prove anything?

24 MR. KENT: Well, what it also shows is she
25 specifically just said everybody in the community

1 knew about that incident.

2 THE COURT: Okay. So the fact that she
3 may have told Mr. Toney about it is it not what
4 you're getting at?

5 MR. KENT: Well, I am getting at that.
6 Also, she also says everybody in measurement knew
7 that happened also goes to show pertinent character
8 show pertinent characteristic to show the pertinent
9 character trait he's intoxicated he fights and she
10 said everybody in the community knew it.

11 THE COURT: Ms. fate.

12 MR. FATA: Well, Your Honor, she doesn't
13 remember I think the important is whether or not any
14 had fold earns Toney she says she doesn't remember.
15 And she's already testified that he gets intoxicated
16 and has problems. That's all.

17 THE COURT: What I will not let you ask is
18 if she told Mr. Toney that because she doesn't
19 remember.

20 MR. KENT: Yes, sir, Judge.

21 THE COURT: Now the fact about whether or
22 not it occurred is another thing. You got to lay a
23 foundation on how she knows it occurred, and she
24 says because her husband told her.

25 MR. KENT: Yes, sir, Judge.

1 THE COURT: And that was a DUI arrest and
2 some type of altercation with the police four months
3 before.

4 MR. KENT: That is correct.

5 THE COURT: Now Mr. Fata, I'm not gonna
6 let him ask whether or not she told Mr. Toney that,
7 but evidence of the event itself insofar as
8 pertinent character is concerned, if it doesn't come
9 in through this witness, could it not come in
10 through another witness?

11 MR. FATA: He can get it through -- he's
12 got two witnesses subpoenaed that it can come
13 through, that's correct.

14 THE COURT: And how, what's the source of
15 their knowledge?

16 MR. KENT: They're the arresting officers.

17 THE COURT: That's what it was?

18 MR. KENT: I have them subpoenaed, yes,
19 sir.

20 THE COURT: Could you not get it in
21 through them?

22 MR. KENT: She's already testified she
23 doesn't remember.

24 THE COURT: What I'll permit you to do is
25 get it in through them if you call them, and then

1 you can re-call her to see if she knew about it too.
2 So in other words, I know one reason you don't want
3 to call them.

4 MR. KENT: That's what I'm trying to
5 figure why would I be hamstrung from asking her if
6 she had specific knowledge of it. And I'm not being
7 disrespectful to the Court at all, Judge.

8 THE COURT: Because they're the ones that
9 it happened to. They're the best evidence.

10 MR. KENT: I understand.

11 THE COURT: The fact that she knew about
12 it does not — well, the fact that she knew about it
13 may let it, may — in other words, you want to get
14 it in through her as opposed to the very people it
15 happened to.

16 MR. KENT: Judge, if the witness was to
17 get up and testifies, she knows the best character,
18 her husband in here situation. If she is allowed to
19 testify, she already said my husband's character in
20 the community and I know the reputation in the
21 community. He's got in a fight. As a matter of
22 fact, four months ago he got into a fight with law
23 enforcement officer where they tazed him. I don't
24 understand why we're being stopped from asking those
25 questions.

1 THE COURT: How do you know what she says
2 is right?

3 MR. KENT: She's on the witness stand, she
4 put her hand on the Bible, she kind of swore to tell
5 the truth.

6 THE COURT: I'm sure you'll be arguing
7 later on the jury can't believe much of what she
8 says.

9 MR. FATA: Everything she's testifying to
10 is hearsay.

11 THE COURT: Well, how about the hearsay
12 part?

13 MR. KENT: It's not ---

14 THE COURT: Out of court statement by her
15 husband offered to prove the truth of the matter
16 asserted.

17 MR. CHANDLER: If I asked her, are you
18 aware your husband was arrested for driving under
19 the influence in 2003 ---

20 THE COURT: Two thousand what?

21 MR. KENT: I'm sorry, 2010 for a driving
22 under the influence charge and she called law
23 enforcement, yes, I am, and I would stop right
24 there.

25 THE COURT: You'd stop right there?

1 MR. KENT: I'll stop right there.

2 THE COURT: No tazing?

3 MR. KENT: I won't even get into, I won't
4 get into the tazing or anything of that nature, Your
5 Honor.

6 THE COURT: All right, Mr. Fata.

7 MR. FATA: If she knows of her own
8 knowledge. I don't know how she would know unless
9 somebody told her.

10 MR. KENT: I'm sure ---

11 THE COURT: Don't talk when I'm talking.

12 MR. KENT: I won't, Judge.

13 MR. FATA: She wasn't there.

14 THE COURT: Thank you. She testified that
15 her husband told her.

16 MR. FATA: That's hearsay.

17 THE COURT: What do you think about that?

18 MR. FATA: That's hearsay.

19 THE COURT: How about the hearsay argument
20 and then we're going to move on.

21 MR. KENT: Judge, I'm not asking her about
22 a specific statement. The question was, are you
23 aware. I'm asking how are you aware, what you told,
24 are you aware in 2010 your husband got into an
25 altercation with law enforcement officers in which,

1 for a driving under influence charge, in which he
2 fought the officer. Yes, I am. I stop right there.
3 Judge, I don't see how that's hearsay because we ask
4 several officers all the time when they're on the
5 stand all the time, are you aware of this, yes, I
6 am, how did it happen, he told me this, that part is
7 hearsay.

8 MR. FATA: But that's part of the business
9 record. I mean, they keep those records in their
10 investigations.

11 THE COURT: Business records have nothing
12 do with this.

13 MR. FATA: Well, I don't know how he asked
14 the officers then...

15 MR. KENT: That's all I'm gonna do, Judge.
16 I'm not gonna —

17 THE COURT: Wait just a second. Wait just
18 a second, Mr. Kent. All right, it is — anything
19 her husband told her in that regard is an
20 out-of-court statement. You agree with that?

21 MR. KENT: Yes, sir.

22 THE COURT: Offered to prove the truth of
23 the matter asserted. It's offered to prove that, in
24 fact, it did happen. You're offering to prove for
25 that reason?

1 MR. KENT: Yes, sir, I'm offering it
2 (indiscernible) for law enforcement yes, sir.

3 THE COURT: Well, you've gotten into
4 evidence through her that when he gets intoxicated
5 he gets —

6 MR. KENT: Violent and rowdy.

7 THE COURT: He gets rowdy, crazy look in
8 his eye, and he doesn't like it when people mess
9 with him while he's drinking. But if you want to
10 ask her whether or whether or not her husband told
11 her that he'd been arrested for DUI and got in an
12 altercation with law enforcement, how is that not
13 hearsay?

14 MR. KENT: I'm not asking her what he told
15 her. I said are you aware, how is she aware of it?

16 THE COURT: Well, how is she aware of it?

17 MR. KENT: Everybody in the community.
18 What she said earlier was everybody in the
19 community, knew about that incident. That was her
20 exact testimony. Everybody in the community knew
21 about that. You can read it back, everybody in the
22 community knew about that. It was something she was
23 aware of, his reputation in the community. Anybody
24 can testify to that.

25 MR. FATA: And that's beyond first-hand

1 hearsay.

2 MR. KENT: But that's not hearsay.

3 THE COURT: Okay, hold on just a second.
4 Okay, I'll allow you to get into specific instances
5 of conduct under 405(b) but not based on hearsay.
6 And I find -- my ruling is that this will call for
7 hearsay response from the party's witness. You can
8 proffer it and we can move on. Okay.

9 MR. KENT: I'm sorry, hearsay?

10 THE COURT: Same.

11 MR. FATA: For the record that
12 specifically what you're saying is I won't be
13 allowed to call officers to testify to that call
14 this witness --

15 THE COURT: Correct.

16 MR. KENT: And if I call another witness
17 ask them, for the record, I call another witness and
18 say, hey, are you aware of his reputation in the
19 community, yes; are you aware that he got in a fight
20 with law enforcement officer in which he was
21 intoxicated. And I can't ask that of any other
22 witness?

23 THE COURT: No, you -- if it calls for
24 hearsay, if their source of knowledge is hearsay you
25 are true.

1 MR. KENT: Judge, how do I ever get into
2 reputation in the community, how would we ever get
3 into if we're allowed to ---

4 THE COURT: Well, if you want to argue
5 about it then we can I make my ruling.

6 MR. KENT: I just need to cover on the
7 record; this is a murder trial.

8 THE COURT: I'm not going to engage to
9 academic debate about rules of evidence. I've made
10 my ruling.

11 MR. KENT: Okay.

12 THE COURT: All right, you can bring in
13 the jury.

14 (WHEREUPON, the jury was returned to the
15 courtroom, and the following proceedings
16 commenced in open court.)

17 THE COURT: Mr. Kent.

18 MR. KENT: Subject to our original
19 objection to the other objection we made, Your
20 Honor, present outside the jury, that would be all
21 the questions I have.

22 THE COURT: Mr. Fata, redirect.

23 MR. FATA: One second, Your Honor. I'm
24 not going to have any further questions, Your Honor.

25 THE COURT: Okay, you may step down. Any

1 other witnesses today, Mr. Fata?

2 MR. FATA: Your Honor, we could go into --

3 THE COURT: Y'all can approach if you'd
4 like.

5 MR. FATA: Your Honor, the next witness
6 will be Major Dellinger and I don't know how long
7 he's going to be.

8 THE COURT: All right, we'll, just come up
9 just a minute.

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

12 THE COURT: All right, ladies and
13 gentlemen, we're gonna break for the day. Please be
14 back in the jury room tomorrow morning at 9:30. You
15 may not discuss this case at all. Also, do not read
16 anything about it, listen to anything about it, or
17 watch anything about it at all. Any type of setting
18 where that is even remote possibility, remove
19 yourself from that situation. Don't undertake to do
20 any type of research. I need you back tomorrow
21 morning at 9:30. Enjoy your evening.

22 (WHEREUPON, the jury was removed from the
23 courtroom.)

24 THE COURT: Okay. Mr. Kent, you asked
25 earlier about how can you ever get in reputation

1 evidence.

2 MR. KENT: And Judge, I apologize.

3 THE COURT: When you get reputation
4 evidence under 405(a) — I looked it up while the
5 jury was coming. In all cases in which evidence of
6 character trait of character of a person is
7 admissible, proof may be made by testimony as to
8 reputation or by testimony in the form of an opinion
9 is what the rule says. A trait or character is not
10 a specific event on the side of the road. 404(b),
11 405(b) says in cases which character or trait of
12 character is essential element of the charge claim
13 or defense, which we have here, proof may be made by
14 specific instances of that conduct. It doesn't say
15 that proof may be made by specific instances of that
16 conduct regardless of the rules against hearsay. So
17 in other words, you can be get into reputation or
18 opinion evidence as you did through her.

19 MR. KENT: Yes, sir.

20 THE COURT: But she cannot testify to
21 specific instances of that conduct unless she was a
22 party to it. That's my ruling. Now there's a case,
23 I believe, called State versus Bennett. It might be
24 one of the few cases that talks about this in any
25 detail. It's probably ten, maybe ten years old,

1 maybe less. Maybe y'all can find that one. If I'm
2 wrong I'll correct myself in the morning. She can
3 get back up here and you can ask her about it.

4 MR. KENT: Respectfully, Judge, would I
5 have option -- you can say no, you can say no, this
6 is your final ruling. I have time to do my own
7 research this evening and if I find something in
8 opposite of that so it that will permit her to get
9 back on the stand without me calling her back on the
10 stand.

11 THE COURT: If I'm wrong I'll never be too
12 proud to admit it.

13 MR. KENT: Thank you, Judge. Nothing
14 further, Judge.

15 THE COURT: All right.

16 MR. FATA: Are we done, Judge?

17 THE COURT: I don't know.

18 MR. KENT: Nothing further, Judge.

19 THE COURT: All right, Mr. Toney, you be
20 back here at 9:15. If your lawyers want you here
21 earlier you go by what they say. Mr. Fata, you've
22 indicated that you would like to call Major
23 Dellinger next and then Lieutenant Hickman and then
24 you said you might would call Mr. Capps.

25 MR. FATA: It just depends on how their

1 testimony goes, but it's highly unlikely but that
2 may be a witness.

3 THE COURT: All right, Mr. Chandler and
4 Mr. Kent, if you would brief your client on the
5 Fifth Amendment conversation I'll have with them so
6 he can be prepared at least to consider all that.

7 MR. KENT: Yes, sir.

8 THE COURT: Okay, thank you.

9 (WHEREUPON, the proceedings were concluded
10 for the day to be reconvened on December
11 13, 2012.)

12 THE COURT: Are you ready?

13 MR. FATA: Yes, sir, I think I am.

14 THE COURT: Mr. Chandler, Mr. Kent, are
15 y'all ready?

16 MR. KENT: Yes, sir, Judge.

17 THE COURT: Okay, bring the jury in.

18 (WHEREUPON, the jury was returned to the
19 courtroom at approximately 9:32 a.m., and
20 the following proceedings commenced in
21 open court.)

22 THE COURT: Okay, Mr. Fata, if you're
23 ready you can call your next witness.

24 MR. FATA: Your Honor, the State calls
25 Major Dellinger.

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1 WHEREUPON,

2 **JAMES D. DELLINGER,**

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: James D. Dellinger.

8 **DIRECT EXAMINATION**

9 BY MR. FATA:

10 Q Major, your occupation is what?

11 A I'm an investigator with the Lee County Sheriff's
12 Office.

13 Q And how long have you been an investigator for
14 Lee County Sheriff's Office?

15 A I started with the Sheriff's Office in 1995.
16 Before that I was with the Bishopville Police
17 Department. I started there in 1989.

18 Q And you were a patrol officer for the City of
19 Bishopville?

20 A Initially, yes, sir.

21 Q Then worked your way, started from the bottom and
22 worked your way up?

23 A Yes, sir.

24 Q Tell us what kind of schools you've been to.

25 A First off I'm a certified police officer with the

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1 South Carolina Criminal Justice Academy. I've gone
2 to several advanced classes at the academy and other
3 agencies involving death investigation, homicide
4 investigation, child death investigation, crime
5 scene analysis, crime scene photography, blood
6 spatter analysis, fingerprints, several other
7 advanced classes.

8 Q And I think you said the last six years you've
9 been primarily an investigator?

10 A Yes, sir.

11 Q And how many cases do you think you've
12 investigated during that time?

13 A Cases in general or — hundreds.

14 Q Hundreds. Murder cases?

15 A Well, fortunately the county hasn't had as many
16 lately but several of those.

17 Q Several of those. Now do you investigate or have
18 a part of investigation or where you the
19 investigator in this case, the death of Gregory
20 Roberts?

21 A I took a part in this investigation. I was
22 assisted and assisted the, all the other
23 investigators.

24 Q Okay. Tell me how you became involved.

25 A I was contacted by central dispatch that told me

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1 that they had a death scene on John Wesley Road and
2 I responded to the scene. I got there somewhat
3 later than everyone else did because I was actually
4 on my way back from a baseball game that my son had
5 had.

6 Q And when you got to the scene was the body still
7 there?

8 A It was.

9 Q Was it covered or had it already ...

10 A All the other investigators and the crime scene
11 people were already there. So, the majority of that
12 was done and taken care of way in advance of my
13 arrival.

14 Q What was your role at that time?

15 A I was just there to be hands-on, what the
16 discussions were, what they found, what they didn't
17 find so I could assist in the rest of the case.

18 Q The next day did you begin anything, any sort of
19 investigation?

20 A Well, we started that evening with the difficult
21 task of going to the family home and telling them
22 about their loved one passing away. At that time we
23 wouldn't gather a whole lot of information. It
24 would be basically offering our services and our
25 condolences and we kind of left and followed up the

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1 next day.

2 Q Now, an investigation, particularly a murder
3 investigation, what's some of the things that you
4 want to do try and arrive at a suspect?

5 A Well, the term we use is victimology, and we try
6 and figure out what we can about the victim and back
7 track the victim's last twenty-four, forty-eight
8 hours to try and find out what they did, who they
9 came in contact with, and hopefully that will lead
10 us to the individual that caused their death.

11 Q Okay. So how do you do that, what do you do?

12 A Talking to the family and the ones that were
13 closest to them, that we know where the victim was,
14 where they were, what they did the day before, you
15 know, leading up to their death.

16 Q Now, talking to the family did you talk to Ms.
17 Roberts?

18 A I did.

19 Q After talking to her did you have a lead?

20 A After talking to her we knew that there was a
21 boyfriend and a paramour and that that was somebody
22 that we were going to have to talk to either include
23 or exclude.

24 Q So, and who was that paramour?

25 A The defendant, Ernest Toney.

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1 Q Tell me, is he here?

2 A Yes, sir, sitting at the defense table beside Mr.
3 Kent.

4 Q How did you proceed then? You wanted to either
5 include or exclude Mr. Toney, what did you do?

6 A Mr. Toney lives in Sumter County, which is
7 outside our jurisdiction so we went to the Sumter
8 authorities. We had a Sumter investigator accompany
9 us to Mr. Toney's residence.

10 Q How far, well, of course you know where the scene
11 is here on John Wesley Road and where Mr. Toney
12 lives, what was his address?

13 A Mr. Toney is at [REDACTED]

14 Q Do you know how far from John Wesley Road that
15 is?

16 A It's probably a good 20, 30 minute drive.
17 Dollard Drive is on the south side of Sumter on 15
18 South.

19 Q Like you're going to Summerton?

20 A You can be going toward the industrial area, it's
21 toward Sumter. It's in that area.

22 Q Like going to Pilgrims Pride, the Goldkist plant?

23 A Yeah, it's before you get to Pilgrim's Pride but
24 in that general area.

25 Q In that general area. So you say it's how far?

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1 A A good twenty, thirty minute drive from here.

2 Q so you -- who was with you when you went to see
3 him?

4 A Investigator Hickman was with me. Then we had
5 the investigator from the Sumter County Sheriff's
6 Office and then later some other investigators from
7 Lee County arrived.

8 Q So what did you do?

9 A We went to Mr. Toney's residence.

10 Q And I'm assuming you knocked on the door?

11 A We knocked on the door.

12 Q Then what happened?

13 A We told Mr. Toney who we were, that we wanted to
14 talk to him, and we asked him to come down to the
15 Sumter County Sheriff's Office.

16 Q Did you tell him what you wanted to talk to him
17 about?

18 A We told him what we were there for and what type
19 of crime it was. I wouldn't have answered many more
20 questions. I would have kind of left it pretty
21 generic because I've found in experiences that if I
22 answer one question like what do you want to talk
23 about, it just leads to another question and I
24 wouldn't have wanted to talk to him on the porch at
25 his house.

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1 Q So Mr. Toney, did he accompany you to the Sumter
2 County Sheriff's Office?

3 A He did, rode with me to the Sheriff's Office.

4 Q When you got to the Sheriff's Office did you and
5 Mr. Toney, what'd y'all do, where did you go?

6 A We went upstairs into an office or a room. Myself
7 and Mr. Toney and Mr. Hickman with the Lee County
8 Sheriff's Office.

9 Q Explain to me what that room looked like.

10 A It was a relatively small room, tile floor, a
11 table, chairs on both sides of the table, florescent
12 lighting.

13 Q Would the dimension seating be like 5x5, 10x10?

14 A It would be like a small office room, maybe like
15 a 8x6, something in that area. It wasn't huge.

16 Q What kind of lighting was in that room?

17 A Kind of like government florescent lighting.

18 Q A little bit brighter than this I bet?

19 A Yeah, it was brighter than this. It has the
20 square panels. It was kind of like a doctor's
21 office with tile floors and plain desk.

22 Q What about the air conditioning, what was it
23 like?

24 A It was normal temperature. It wasn't excessively
25 hot or excessively cold.

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1 Q Was he in handcuffs?

2 A Not at that time, no, sir.

3 Q Did Mr. Toney ask for any food or drink or
4 anything like that?

5 A We offered Mr. Toney something to drink and he
6 had some water. I don't remember if it was in a cup
7 or a bottle, but one of us stepped out the room and
8 got him something to drink.

9 Q Okay. Was he allowed a bathroom break or did he
10 ask to go to the bathroom?

11 A He never asked to go to the bathroom.

12 Q Now, how did you proceed from there? After you
13 got in the room — of course, you did say it was a
14 comfortable room, no stress in that room?

15 A That's correct.

16 Q How did you proceed, what's the next thing you
17 did?

18 A The first thing I had to do was advise him of his
19 Miranda Rights.

20 Mr. Fata: Can everyone see that?

21 BY MR. FATA:

22 Q That's State's Exhibit Number 1. What are the
23 Miranda Warnings?

24 A Those are the defendant's Fifth Amendment
25 Constitutional Rights not to incriminate themselves

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1 without an attorney or counsel present.

2 Q Okay. And a -- you make a conscious effort to go
3 over those with him and tell him what they are?

4 A Yes, sir.

5 Q And this is a form and up at the top it says Lee
6 County Law Enforcement Center but then in bold it
7 says Miranda Warning Rights?

8 A Yes, sir.

9 Q So is this the specific form that was used by the
10 Lee County Sheriff's Department?

11 A That is our Miranda Form.

12 Q Okay. You date it and the time up there is 9:33
13 p.m. What time is that?

14 A 9:30 in the evening.

15 Q That's when it starts?

16 A Yes, sir.

17 Q What's the first thing that you do?

18 A Read him his rights. Number one, you have the
19 right to remain silent.

20 Q And I see a little pencil mark or ink right
21 there, what's that?

22 A That's kind of my habit of either checking off
23 each one as I do it step by step to make sure I go
24 over each one of those with him.

25 Q So you read to him you have the right to remain

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1 silent?

2 A Yes, sir.

3 Q Did he indicate to you, Mr. Toney that is,
4 indicate to you that he understood that right?

5 A He didn't give me any indication that he didn't
6 understand.

7 Q Let me ask you this, something that I didn't go
8 over to start with. You had an opportunity to
9 observe Mr. Toney?

10 A Yes, sir.

11 Q Up close and personal really, when y'all were
12 sitting across the table, right?

13 A Yes, sir.

14 Q Did you notice anything that he might have, any
15 stress that he might have been under?

16 A No, sir. He didn't act stressed to me.

17 Q How about did he appear to be under the influence
18 of anything, alcohol or drugs?

19 A No, sir, he didn't.

20 Q Did he seem to be clear headed at the time you
21 talked to him?

22 A Yes, sir.

23 Q Let's go back to number 2. Tell me about number
24 2.

25 A Number 2 says, Anything you say can and will be

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1 used against you in a court of law.

2 Q And, again, I see that little mark by that
3 sentence.

4 A Yes, sir, I checked it off.

5 Q You read that to Mr. Toney?

6 A Yes, sir.

7 Q And did he appear to understand it?

8 A Yes, sir.

9 Q Did he ask you any questions about that or the
10 first one?

11 A No, sir.

12 Q How about number 3?

13 A You have the right to talk to a lawyer and have
14 him or her present with you while you are being
15 questioned.

16 Q Again, I see a little mark.

17 A Yes, sir.

18 Q What does that indicate?

19 A Just a little check mark or notch mark that I
20 read that one to him.

21 Q Now, did he ask you any questions about that,
22 number 3?

23 A No, sir.

24 Q Did he appear to understand that?

25 A He did.

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1 Q Did he understand he had a right to a lawyer at
2 the time of this questioning?

3 A I believe so.

4 Q Let's go to number 4.

5 A If you cannot afford to hire a lawyer the court
6 will appoint one to represent you without costs if
7 you wish.

8 Q Again I see a check. Did Mr. Toney know that the
9 public defender's office could have represented him?

10 A I believe he did.

11 Q Did he ask for a public defender?

12 A No, sir.

13 Q Did he ask permission or ask for time to go hire
14 somebody?

15 A No, sir.

16 Q Now, number 5 is?

17 A If you decide to answer questions now without a
18 lawyer present you will still have the right to stop
19 answering at any time. You also have the right to
20 stop answering at any time until you talk to a
21 lawyer.

22 Q Okay, I see the check again.

23 A Yes, sir.

24 Q You read that to him?

25 A Yes, sir, I did.

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1 Q Did he understand that he could stop at anytime?

2 A I believe he did.

3 Q Did he call a lawyer?

4 MR. KENT: Your Honor, I object. A lot of
5 this calls for speculation. He's asking ---

6 THE COURT: I think you can ask did he
7 appear.

8 BY MR. FATA:

9 Q Did he appear to understand that?

10 A I believe he did.

11 Q Did he ask you any questions about that?

12 A No, sir.

13 Q You read one through five to him and did Mr.
14 Toney ask any questions about any of the five?

15 A No, sir.

16 Q Okay. The next thing on that sheet is what?

17 A I have read the above listed Miranda Warnings and
18 I understand what my rights are.

19 Q Now it says sign and there's an x. Whose name is
20 that?

21 A Ernest Toney, the defendant's.

22 Q And did Mr. Toney sign that?

23 A Yes, sir, he did.

24 Q The next thing you see in bold it says Waiver of
25 Rights. Tell me about that.

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1 A The Waiver of Rights is the second portion of the
2 Miranda form where it states: "I'm willing to make
3 a statement and answer questions. I do not want a
4 lawyer at this time. I understand and know what I'm
5 doing. No promises or threats have been made to me
6 and no pressure or coercion of any kind has been
7 made against me."

8 Q I see a check there.

9 A Yes, sir. I would have checked it off after I
10 read it to him, or as I read it to him.

11 Q And I see where it says sign and an x. Whose
12 signature is that?

13 A The defendant, Ernest Toney.

14 Q And he -- and you saw him sign it?

15 A Yes, sir.

16 Q Did he appear to make a knowing waiver of his
17 rights?

18 A Yes, sir.

19 Q Now I see witnesses, who's that first witness?

20 A That's, the first signature is mine.

21 Q And there's another witness under there.

22 A That's the other investigator, Lieutenant Patrick
23 Hickman.

24 Q Okay. So the first procedure that you go through
25 when you interview a person is to do what?

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1 A Advise them of the Miranda Rights.

2 Q What happens if you don't think the interviewee
3 understands any of this?

4 A I can't really go forward.

5 Q Will you stop?

6 A Yes, sir.

7 Q And what would you have done if you thought Mr.
8 Toney did not understand his rights?

9 A I would have had to have stopped.

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

11 A He did.

12 Q I want to show you State's Exhibit Number 2.
13 Now, is that the statement that Mr. Toney gave you?

14 A Yes, sir.

15 MR. KENT: Judge, at this time, I would
16 renew the earlier objections that we made, Jackson
17 v. Denno.

18 THE COURT: Yes, sir. You can continue Mr.
19 Fata.

20 MR. FATA: Yes, sir.

21 BY MR. FATA:

22 Q Now, what is your procedure starting out in the
23 interview process? I know you've talked about
24 Miranda. After you past Miranda what is your
25 procedure?

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1 A Well, the Miranda is kind of cold and formal. So
2 if you just go in like T.V. and say, tell me what
3 happened, virtually nobody is gonna talk to you, so
4 you'll talk to them and try and establish some kind
5 of rapport, some type of conversation back and
6 forth.

7 Q What, if anything, do you tell the interviewee of
8 why he's there?

9 A He knew why we were there, what the purpose of
10 our interview was.

11 Q So then what do you, how do you start out?

12 A I would start by really generic questions, things
13 that I probably already know like what's your name,
14 where you live, where you work, how many kids do you
15 have, where'd you go to school, things like that.

16 Q Did he give you answers?

17 A Yes.

18 MR. KENT: Judge, I'm going to object to
19 this.

20 THE COURT: What ---

21 MR. KENT: I'm just renewing my earlier
22 objection to the statement. This is the pre-murder
23 statement information ---

24 THE COURT: All right, this -- that's
25 overruled. Okay, continue.

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1 BY MR. FATA:

2 Q And then do you get into the statement? How does
3 that statement get on the paper?

4 A Well, generally, I would prefer that they write
5 it themselves; but in this case, Mr. Toney said that
6 his handwriting wasn't that good and then asked one
7 of us to write it for him.

8 Q Did Mr. Toney appear to know what was going on in
9 the room?

10 A Oh, yes, sir. There was never any indication
11 that there was a misunderstanding problem or
12 communication problem.

13 Q Okay. So, who wrote the statement? Whose
14 handwriting is this?

15 A I wrote this statement.

16 Q And who asked you to write that statement?

17 A Mr. Toney.

18 Q Okay. And it -- so how did the words get there?
19 Tell me how that process went.

20 A We'd ask Mr. Toney to tell us what he wants to
21 write in his statement and he would start to tell
22 us. If -- I don't write very quick and I write kind
23 of sloppy also, so if he would start to talk too
24 fast I would ask him to slow down, I can't keep up
25 with him, and try and write down word for word what

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1 he said.

2 Q So tell me what, read to the jury what Mr. Toney
3 said. And I know there's some offensive language in
4 it, but unfortunately it's there.

5 A "I left home yesterday around 2:00 p.m. I
6 stopped at the bridge on Highway 76 and 378, the
7 Young's Market and bought some gas. I bought twenty
8 dollars worth. I went down Highway 76 to
9 Mayesville. I made a left on Highway 154. When I
10 got to Lower East School I called Lorie Rogers to
11 talk about a date. I went up to park on the paved
12 road and took a piss. Piggy pulled up in front of
13 me and jumped out. He said, Mother Fucker, what are
14 you doing here get out of her, and I said this is a
15 public highway, Mother Fucker, stay here until I get
16 back Piggy said as he got in his truck. I called
17 Lorie back. Lorie said" ---

18 Q Wait a minute, Officer. Go ahead.

19 A "I called Lorie back. Lorie said Piggy had a
20 gun. I told Lorie I'm not worried about no gun.
21 When I looked up Piggy was pulling up. Piggy jumped
22 out of his car with a long gun. I was standing on
23 the outside of my truck. I got my 8 millimeter
24 rifle from behind the seat. I shot it one time.
25 Piggy fell to the ground. I jumped in my truck and

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1 went to my mother's house. I stayed about 15 or 20
2 minutes. Then I went to BJ's Lounge and bought two
3 beers. I left BJ's and went to my sister's house,
4 Hattie Wilson. I stayed at her house about one
5 hour. When I left I came down 154. I stopped at
6 154 and Highway 15. I bought some chips and a
7 coke."

8 Q And that ended the statement?

9 A Yes, sir.

10 Q Now on the second page do you see a signature?

11 An x, do you see an x with a name by it?

12 A That's the defendant Ernest Toney's signature.

13 Q And the two witnesses, who are they?

14 A Myself and Lieutenant Hickman.

15 Q Let's go back to the first page. You also see
16 again, it says signature and there's an x.

17 A Yes, sir. That's the defendant's signature,
18 Ernest Toney.

19 Q And yours and ---

20 A Lieutenant.

21 Q Lieutenant Hickman. The start time of the
22 statement is 10:03 and it's finished at 10:25?

23 A Yes, sir.

24 Q There's some preprinted information right after
25 the lines where you the handwriting, what is that?

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1 On page, excuse me, at the bottom there.

2 A It says: I have read this statement consisting
3 of two pages each of which bare my signature. I do
4 affirm that the facts and statement contained herein
5 are true and correct and have received a copy of the
6 statement.

7 Q So, did Mr. Toney read that statement?

8 A Yes, sir.

9 Q And did you give him a copy?

10 A I don't even remember if I gave him a copy or
11 not.

12 Q What is your standard procedure?

13 A It's our normal procedure to ---

14 MR. KENT: Your Honor, at this point in time
15 I would renew my objection ---

16 THE COURT: yes, sir. Thank you.

17 BY MR. FATA:

18 Q What is your normal procedure?

19 A It's my normal procedure to give them one, but I
20 don't honestly know being in the Sumter's Sheriff's
21 office whether I did that or not.

22 Q Now, what was Mr. Toney's attitude during this
23 interview process?

24 A He was rather flat, indifferent I would say.

25 Q How about the language, defensive language?

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1 A He was matter of fact about that. He wasn't - he
2 didn't tippy top about that. That was just a
3 flowing conversation.

4 Q Like it was his normal language?

5 MR. KENT: Your Honor, I'm gonna object.

6 That's ---

7 MR. FATA: I'll withdraw it. I'll withdraw
8 it.

9 BY MR. FATA:

10 Q Now, on Page 2 of his statement, Mr. Toney
11 indicates the type of gun that he used. It was a 8
12 millimeter rifle?

13 A Yes, sir.

14 Q All right. He also indicates that there was,
15 that Mr. Toney had a gun?

16 A Mr. Rogers?

17 Q Excuse me. Mr. Rogers had a gun?

18 A Yes, sir.

19 Q Was a gun found at the scene?

20 A No, sir.

21 Q Was there any indication, in your investigation
22 was there any indication that a gun was there with
23 Mr. Rogers?

24 A No, sir.

25 Q Now based on this 8 millimeter information and

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1 Mr. Toney's statement, what did you and your, Mr.
2 Hickman or whoever else was with you, do?

3 A Well, two things would have taken place. One,
4 Mr. Toney was changed from not in custody to custody
5 and then we presented the information that he gave
6 us to a Magistrate in Sumter County and obtained a
7 search warrant for his residence.

8 Q Now, I've got State's Exhibit Number 3 on the
9 screen.

10 THE COURT: You said Number 3, Mr. Fata?

11 MR. FATA: Yes, sir.

12 BY MR. FATA:

13 Q What is that?

14 A This is part of the search warrant that we
15 obtained from the Magistrate in Sumter County.

16 Q And what did you tell the Magistrate you were
17 looking for, the description of property sought?

18 A Military style 8 millimeter bolt action rifle
19 with a wood stock.

20 Q Is that information that Mister —

21 MR. KENT: Objection, I'm sorry, our
22 pretrial objection and contemporaneous in being
23 introduced.

24 THE COURT: Overruled.

25 BY MR. FATA:

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1 Q This information was provided by who?

2 A Ernest Toney, the defendant.

3 Q Now what did you do after the search warrant was
4 secured?

5 A We executed the search warrant and went back to
6 Mr. Toney's residence.

7 Q By execution of the search warrant what do you
8 mean?

9 A We carried it out. We did what the search
10 warrant allows us to do. We went and searched his
11 residence.

12 Q Was Mr. Toney with you?

13 A Yes, sir, we did bring him with us.

14 Q Is that generally common practice?

15 A It's not uncommon, especially if there is nobody
16 else there at the residence since the only person
17 that lives there at the residence. He had the keys.
18 We didn't want to have to force entry and we wanted
19 him to be present while we were searching just in
20 case they said anything was damaged or missing or...

21 Q Did you search the house?

22 A We did.

23 Q And you were looking for this gun?

24 A We were.

25 Q And where did you start this search?

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1 A We started it in the bedroom of the closet.

2 Q And what did you find in that closet?

3 A First we found a shotgun. As always in
4 procedure, I don't know if a gun is loaded or not
5 loaded at someone else's house. When I pick it up I
6 open the breach to try and confirm that it's safe or
7 unloaded, and that's what I did with the shotgun. I
8 took it out of the closet and opened the breach to
9 see if there was no bullets in it.

10 Q And did Mr. Toney make any comment about that gun

11 ---

12 MR. KENT: Your Honor, at this point in time
13 I'm going to renew our earlier pretrial motion.

14 THE COURT: Yes, sir. Thank you.

15 BY MR. FATA:

16 Q Did Mr. Toney make any comment about that shotgun
17 or any other gun in the house?

18 A Well, Mr. Toney was kind of meticulous about us
19 handling the gun and how we put the gun back so he
20 wanted the breach closed back and a piece of cotton
21 or scrap piece of material put back in the barrel
22 before we put that gun back.

23 Q Why?

24 A I guess that's just one of his quirks ---

25 MR. KENT: Objection, Your Honor. He says

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1 why and the response was ---

2 The Court: Okay.

3 MR. KENT ---calls for speculation.

4 THE COURT: It calls for speculation. Okay.

5 Go ahead, Mr. Fata.

6 BY MR. FATA:

7 Q Well, anyway, he wanted that gun?

8 A He wanted that gun. He was specific about that.

9 He wanted that gun.

10 Q Did he make any other comments?

11 A As that process was ending he was saying that's

12 not the gun we were looking for and directed us to

13 the 8 millimeter rifle in another room.

14 Q In another room. I'm gonna show you State's

15 Exhibit Number 28 and see if you recognize that.

16 A (Witness reviews Exhibit number 28). Yes, sir.

17 This is the rifle we found in Mr. Toney's residence.

18 Q Is this the rifle he said he used on Mr. Gregory

19 Rogers?

20 A Yes, sir.

21 Q All right. I see you have what is known as a

22 return. What is that return? That's part of

23 Exhibit Number 3, the search warrant.

24 A Well, when we obtain a search warrant we have to

25 go to a judge and tell them specifically what we're

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1 looking for and why we're looking for it and what
2 crime it's connected to. Then when we are done
3 searching we have to go back to that judge and give
4 them a list or inventory of everything that we found
5 or we took as a result of the search warrant they
6 gave us and then swear again under oath that that's
7 the only items we took pursuant to that search
8 warrant.

9 Q And what is listed here on this return?

10 A FB random bolt action rifle, serial number
11 514202RZ in master bedroom.

12 Q Did you take some other stuff, or is that the
13 only thing you took?

14 A We took a few other items from the house that we
15 didn't know existed prior to getting the search
16 warrant and we came across as we were searching the
17 house.

18 Q I'm going to show you State's Exhibit Number 30
19 for identification. Do you recognize that?

20 A Yes, sir.

21 Q And what are they?

22 A Those are some 8 millimeter bullets that we found
23 in Mr. Toney's residence.

24 Q Were they near the rifle, where were they?

25 A In the closet.

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1 Q They were in the closet.

2 MR. FATA: All right. Your Honor, we
3 would move these in. They were initially marked for
4 identification.

5 THE COURT: They're in.

6 BY MR. FATA:

7 Q State's Exhibit 30 are the 8 millimeter bullets
8 that you found?

9 A Yes, sir.

10 Q Now, how come the 8 millimeter bullets don't
11 appear on the return?

12 A The 8 millimeter bullets and the other items we
13 took were not listed on the search warrant so they
14 were taken outside of the scope of the search
15 warrant.

16 Q Now was another document prepared regarding
17 bullets and some other items that you took. "

18 A Yes, sir.

19 Q I'm gonna show you State's Exhibit 31 for
20 identification and see if you recognize that.

21 A That is a consent to search form.

22 Q And what is listed as writing, what is listed on
23 there?

24 A You want all the items listed on there?

25 Q Well, the items taken, is that correct, other

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1 than -- don't list them, just other items taken.

2 A Other items taken.

3 MR. FATA: Your Honor, we would move this
4 into evidence.

5 THE COURT: 31 for I.D.?

6 MR. FATA: 31 for I.D.

7 MR. KENT: No objection.

8 THE COURT: 31 for I.D. is in.

9 (State's Exhibit Number 31 was admitted in
10 evidence.)

11 BY MR. FATA:

12 Q Why don't you come down here since this is the
13 only copy that we've got for the jury to be able to
14 see it.

15 A (Witness complies.)

16 Q This is State's Exhibit 31.

17 MR. FATA: Can everyone see? You might want
18 to stand on this side.

19 BY MR. FATA:

20 Q All right. Consent to search, now tell me the
21 purpose of that.

22 A We're getting his permission to search or take
23 these things since they are not listed, and they are
24 outside the scope of a search warrant. They are not
25 things that we told the Magistrate that we were

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1 looking for.

2 Q Okay. This consent to search was done on the
3 same day as the search warrant?

4 A Yes, sir.

5 Q And at what address?

6 A ■■■ Dollard.

7 Q And what did you take?

8 A We took a ultrasound picture from Lorie Rogers, a
9 crayon colored picture from ■■■■ Rogers, a DNA
10 test report, an 8 millimeter Mauser bullets and a
11 cell phone.

12 Q And those, the Mauser bullets, State's Exhibit
13 Number 30?

14 A Yes, sir.

15 Q Now, whose signature appears on there?

16 A Ernest Toney's and myself.

17 Q Now, is this standard procedure, Major Dellinger?

18 A Yes, sir.

19 Q So when you come across something that is not on
20 the search warrant you just can't take it, is that
21 correct?

22 A I wouldn't be able to take it without the
23 defendant's consent or stopping and contacting the
24 Magistrate again, filling out another search warrant
25 and getting another signature and executing that

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1 one.

2 Q Okay. After this — oh, let's back up. The
3 statement given by Mr. Toney was completed at 10:25?

4 A Yes, sir.

5 Q What happened next? We need to get the
6 chronology here. What happened next after this?

7 A We obtained a search warrant.

8 Q And was the search warranted obtained, when? And
9 let me give you State's Exhibit 3.

10 A The time noted on it is 11:25 p.m.

11 Q So, does he say — how long after the statement?

12 A Looks like approximately one hour.

13 Q When was that executed?

14 A Shortly after we got there.

15 Q So from the time of Mr. Toney's statement until
16 the execution of the search warrant and the
17 discovery of the rifle and the bullets, how long,
18 how much time had transpired?

19 A Maybe a hour-and-a-half, a hour and forty
20 minutes. It took some time to contact the
21 Magistrate and the Magistrate to come in. It was
22 all continuous event.

23 Q One continuous event?

24 A Yes, sir.

25 Q It wasn't like you took the statement and two

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1 days later you took the warrant?

2 A Oh, no, sir. We did one right after the other.

3 Q All right. Was Mr. Toney in custody at any time
4 during this span of time between those, during the
5 coming to the police station, interview and
6 execution of the search warrant?

7 A Yes. At the completion of his statement and at
8 the time that he told me that he shot Piggy he would
9 have been in custody.

10 Q In custody?

11 A Yes, sir.

12 Q So, was he in custody at the time the search
13 warrant was executed?

14 A Yes, sir.

15 Q After you executed the search warrant, what
16 happened next?

17 A After the search warrant was executed Mr. Toney
18 was placed in the Detention Center.

19 Q Placed in the Detention Center? What other
20 investigation did you try to accomplish?

21 A I was involved with the search warrant of Mr.
22 Rogers' home and the interview of Ms. Rogers, the
23 tracking down of the Wal-mart receipt.

24 Q Tell me, let's look at Wal-mart -- let's do this
25 first. You were involved with the search warrant of

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1 Ms. Rogers' home and when was that executed? The
2 day or a couple of days later?

3 A Without having that search warrant I am -- it was
4 shortly after the incident took place.

5 Q And the purpose of that search warrant was?

6 A Looking for a long gun or rifle.

7 Q Did you find a long gun or rifle at that time?

8 A During the search warrant, no, sir.

9 Q Later on did you find a long gun or rifle?

10 A Yes, sir.

11 Q Now, I'm gonna show you State's Exhibit 27, do
12 you recognize that?

13 A Yes, sir. This is the rifle we found in the home
14 when we returned a few days later.

15 Q What did you know about that rifle? Had a
16 description ever been given to you earlier or
17 anything like that?

18 A We were given a description of it being a long
19 rifle and it having a shoulder strap. It was kind
20 of described as a flowery.

21 Q So this rifle fits the description you had?

22 A Yes, sir.

23 Q Was it found at the scene?

24 A No, sir.

25 Q What was done with this rifle?

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1 A It was sent to the SLED laboratory for DNA
2 analysis to see if there was any blood on it.

3 Q But initially that wasn't found on the first, at
4 the search warrant when you looked there the first
5 time?

6 A No, sir.

7 Q What else did you do next?

8 A the tracking down of the Wal-Mart receipt.

9 Q That's right. Now, let me show you State's
10 Exhibit Number 33, the Wal-Mart receipt. Tell me
11 about the Wal-Mart receipt. Why is that Wal-Mart
12 receipt significant? Or is it significant and why?

13 A Well, it was located in the, Mr. Rogers' car. It
14 was adjacent to his body. It was in the front seat.
15 It was dated the day of the incident and shortly
16 before we were dispatched to the incident.

17 Q What's the time on there?

18 A The date is 9-12-2010 and the time is 1630:25
19 which would be 12:30 and a few seconds.

20 Q And Where is that Wal-Mart store?

21 A Sumter.

22 Q So how far is it from that Wal-Mart store to John
23 Wesley Road?

24 A Probably 30, 35 minutes.

25 Q So at 4:30 what do you gather from that sales

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1 receipt regarding Mr. Rogers?

2 A That somebody made a purchase at 4:30 at Wal-Mart
3 in Sumter so we followed up with that to see if
4 there was any video of that transaction to see who
5 that somebody was.

6 Q Who was it?

7 A Mr. Rogers.

8 Q So at 4:30 he was alive in Sumter?

9 A At the Wal-Mart in Sumter.

10 Q When did the call come in that there was a body
11 by the road, at the edge of the road?

12 A I believe that was 6:01, shortly after 6 p.m.

13 Q A minute after 6?

14 A I believe that's correct.

15 Q So does that sort of establish a time of the
16 incident?

17 A That gives a window, yes, sir.

18 Q Anything else, Officer? What else did you do?

19 A I believe that was the gist of my involvement.

20 Q Okay. Not the statement given by Mr. Toney,
21 state's Exhibit 2, was given with notice of his
22 Miranda?

23 A Yes, sir.

24 Q He knew -- did he know he didn't have to talk to
25 you?

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1 A Oh, yes, sir.

2 Q And he talked to you anyway?

3 A Yes, sir.

4 Q And he gave you State's Exhibit Number 2, the
5 statement?

6 A Yes, sir.

7 Q And in that statement he says what?

8 MR. KENT: Judge, I'm gonna have to object.
9 That's been asked and answered. This is already all
10 in the record..

11 THE COURT: All right. Overruled at this
12 point.

13 THE WITNESS: I'm confused about which
14 portion.

15 BY MR. FATA:

16 Q Excuse me, let's go to page two. "Is he worried
17 about Mr. Rogers having a gun?"

18 A "I'm not worried about no gun."

19 Q "Did he say that Mr. Rogers had a gun at the
20 scene?"

21 A "I looked up and he was pulling up. Piggy jumped
22 out of his car with a long gun."

23 Q Did he say he shot Mr. Rogers?

24 A "I was standing on the outside of my truck. I
25 got my 8 millimeter rifle behind the seat. I shot

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1 it one time; Piggy fell to the ground."

2 Q Was a rifle found with Mr. Rogers body?

3 A No, sir.

4 Q Was any weapon found on Mr. Rogers body?

5 A No, sir.

6 Q Was a weapon reported by Ms. Benjimin when she
7 called in?

8 A No, sir.

9 Q Was a weapon found when Investigator Capps
10 searched the area?

11 A No, sir.

12 Q Was a weapon found when Investigator Capps went
13 back with the metal detector?

14 A No, sir.

15 Q And this is all at the scene I'm talking about?

16 A Yes, sir.

17 Q So no weapon was ever found at the scene?

18 A No, sir.

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

20 THE COURT: Everybody on the jury okay?
21 Anybody need to take a break?

22 THE JUROR: Yes.

23 THE COURT: All right, we will take about
24 five minutes, Ladies and Gentlemen. You may not
25 discuss the case. You may bring back out your

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1 coffee, drinks. It will be a short break.

2 (WHEREUPON, the jury was removed from the
3 courtroom at 10:20 a.m.)

4 THE COURT: Major Dellinger, you may step
5 down; but as you know, you cannot discuss your
6 testimony with anyone.

7 (WHEREUPON, a recess was taken from the
8 proceedings.)

9 THE COURT: Major Dellinger, you can come
10 on back up and have a seat.

11 (Witness complies).

12 THE COURT: Mr. Fata, is the State ready?

13 MR. FATA: Yes, sir.

14 THE COURT: Mr. Kent?

15 MR. KENT: Yes, sir.

16 THE COURT: All right. The jury can come
17 in.

18 (WHEREUPON, the jury was returned to the
19 courtroom at approximately 10:34 a.m.,
20 and the following proceedings commenced
21 in open court.)

22 THE COURT: All right, Mr. Kent.

23 **CROSS-EXAMINATION**

24 BY MR. KENT:

25 Q Major, how are you?

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1 A Good morning, Mr. Kent.

2 Q The Solicitor started his direct examination
3 about he was asking you a little bit about your
4 background. I'm going to cross that a little bit
5 more if you don't mind. You've been in law
6 enforcement I think in excess of twenty something
7 years, a long time?

8 A Yes, sir.

9 Q In law enforcement one of the things that we deal
10 with is we go through a lot of training?

11 A Yes, sir.

12 Q And one of the reasons that we go through a lot
13 of training is to make sure that they properly
14 prepare you to be better law enforcement officers?

15 A Yes, sir.

16 Q And we go through training from the State Law
17 Enforcement Division, SLED is what it's called, is
18 that correct?

19 A Yes sir.

20 Q And as a matter of fact, when y'all start going
21 through SLED they make you go through a bunch of
22 classes, is that correct?

23 A I don't work for SLED.

24 Q But when you went, when you started, started as a
25 law enforcement officer in Columbia they made you go

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1 through a bunch of classes, is that correct?

2 A At the Academy?

3 Q At the Academy?

4 A Yes, sir.

5 Q When you were at the Academy they trained you,
6 they trained you to be a better police officer and
7 went to a bunch of different classes while you were
8 at the Academy?

9 A Yes, sir.

10 Q They went through classes on evidence?

11 A Yes, sir.

12 Q They went through classes on writing police
13 reports?

14 A Yes, sir.

15 Q They went through classes on taking statements?

16 A Yes, sir.

17 Q They went through classes on collecting evidence?

18 A Yes, sir.

19 Q They went to tell officers how important it is to
20 do these things to make them better officers; isn't
21 that correct?

22 A Yes, sir.

23 Q They told you about the importance of making sure
24 you take evidence, when you take statements and how
25 important these things are to the preservation of

1 cases?

2 A Yes, sir.

3 Q They went through laws with you and told you how
4 important laws were and how important laws were for
5 a just society and things of that nature?

6 A Yes, sir.

7 Q And then during the years in the twenty years you
8 were at the Academy, each year they went through
9 certain training?

10 A Yeah, we have certain updates, yeah.

11 Q Updates. And they update the law to you and they
12 update all types of things to keep you a better
13 officer every year, is that correct?

14 A Yes, it's an evolving process.

15 Q It's an evolving process. I think when the
16 solicitor was asking you questions you were talking
17 to him about all the various training throughout the
18 year that has helped you with your job. You went
19 thorough several classes and just a whole bunch of
20 stuff, correct?

21 A Yes, sir.

22 Q Well let's go over all this stuff that we've
23 learned at the Academy and we've learned through
24 SLED, we've learned throughout the year. Let's
25 start with police reports. Police reports are a

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1 vital and important part of any officer's job, is
2 that correct?

3 A A:Yes sir.

4 Q What is a police report?

5 A A report or documentation of the incident.

6 Q Of the incident. It's almost like a snapshot,
7 isn't it, of what happened as close to the incident
8 as humanly possible.

9 A Yeah. I mean, there is no way for it to be
10 completely and all inclusive, but yeah.

11 Q What they want to try and put as much information
12 inside the police reports as possible because
13 they're snapshots to as close to the incident as
14 possible?

15 A Yes, sir.

16 Q And when they take us to the Academy, when they
17 tell us the reason we want to put as much
18 information in these police reports as possible is
19 cases take a while to come to court?

20 A Yes, sir.

21 Q And our memories are fallible; sometimes we
22 forget stuff; isn't that true?

23 A That's true.

24 Q So what we try to do is we try to trust our
25 report over trusting our memories?

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1 A Yes, sir.

2 Q Because memories are fallible. And so, a police
3 report, usually what ends up happening, make sure I
4 understand a police report, after the incident or as
5 close to the incident as possible what officers do
6 is write down everything that they remember
7 happening. Then sometime you have a supervisor or
8 somebody else review it to make sure this is exactly
9 what happened and you can put it inside the case
10 file for all people to look at forever?

11 A Right. The case file would be compiling all the
12 documents involved.

13 Q All — and I think you reminded me, the language
14 you used was it's involved. Let's talk about
15 statements. Statements are kind of the same as
16 police reports. They're snapshots. They're as
17 close to the incident as possible what happened?

18 A Can you ask that question again?

19 Q Well, you tell me, what's a statement? What's
20 the purpose of taking statements from people?

21 A You want to get that person's rendition of what
22 you're asking about what happened.

23 Q Do you want it as close to the incident as
24 possible, or do you want it five or ten or twenty
25 years down the road?

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1 A You wouldn't want it five, ten, and twenty years
2 down the road; but sometimes the closer you get to
3 it, depending on the amount of sleep they had, their
4 trauma, the emotions, right away may not be ideal
5 either.

6 Q But you want those, sometimes you might not want
7 it that close, but you don't want it two or three
8 years down the road?

9 A That's correct.

10 Q What type of information do you want in a
11 statement?

12 A You want it to be clear and accurate, what they
13 recall happened.

14 Q Because again, you take these things as close to
15 the incident as possible because of our memories.
16 Peoples' memories are fallible; they're not perfect?

17 A That's true.

18 Q And what someone writes down they can't say,
19 "well, I didn't write that down", but they can say I
20 didn't remember it. So you point to somebody and
21 say, well, you wrote this down, this is what you
22 wrote down. I think that's what the solicitor kept
23 showing you, this is his signature, this what he
24 signed, this is what he told you. Correct?

25 A That's true.

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1 Q Talk about search warrants. You guys were
2 talking about search warrants and the purposes of
3 search warrants and what they taught you at the
4 State Law Enforcement Division. How do you get
5 search warrants again? Let me make sure I
6 understand that.

7 A We have to present probable cause to a
8 Magistrate.

9 Q And I think your testimony was you go to the
10 Magistrate, you get a search warrant, you say this
11 is the stuff we're searching. And you said from
12 your testimony to the Solicitor, that's all we're
13 allowed to take, we ain't allowed to take anything
14 else unless it's in the search warrant and we
15 specifically asked for it.

16 A Well, that's kind of so unless it's specifically,
17 you know, a contraband or something that's illegal
18 for them to possess anyway; but normally you stick
19 to the scope of the search warrant.

20 Q All right, now we're talking about scope.
21 Explain that to me now because I understood the
22 testimony that you gave from the State was that if
23 it ain't specifically what the Magistrate asked for,
24 I've got to get consent to get the rest of that
25 stuff.

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1 A That's true.

2 Q So you're saying if I went into somebody's house
3 tomorrow and I had a search warrant for some Raggedy
4 Ann dolls and they got a kilo of cocaine, do I have
5 to get permission and say, sir, will you sign this
6 so I can get this cocaine? Or what is that called?

7 A In that situation I wouldn't just leave the kilo
8 of cocaine there on the coffee table. I would have
9 to probably stop and get another search warrant
10 done, but I wouldn't just let you keep it just
11 because it's not on the search warrant because it's
12 illegal for you to possess cocaine.

13 Q The Solicitor went through pain-- let's talk
14 about this case now. The solicitor went through
15 painstaking detail to talk about the statement that
16 was presented to you by Mr. Toney.

17 A Yes, sir.

18 Q And during the detail statements he went through
19 the Miranda warnings. He said he went through a
20 bunch of details. I think it was State's Exhibit
21 Number 1. He went through all these details on this
22 form, painstaking details, explaining to him the
23 law, explaining to him the rationale, making sure
24 that he understood he didn't have to talk. Is that
25 correct?

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1 A That's correct.

2 Q And you went through painstaking detail to make
3 sure, look, you don't have to talk to me, if you
4 talk to me, I'm going to write down what you say.
5 Is that what happened?

6 A You don't have to talk to me but what you say can
7 and will be used against me in the court of law.

8 Q And we want this thing out. I mean, you knew
9 this was a murder trial?

10 A Yes, sir.

11 Q There's no doubt about it. This wasn't one of
12 those I wonder what this is, this is a regular
13 murder. You were interviewing a murder suspect,
14 correct?

15 A Yes, sir.

16 Q You were interviewing a man who you thought
17 possibly could be suspected of murder?

18 A Yes, sir.

19 Q And so we want to make sure -- you know, murder
20 cases don't come up two seconds down the road, we
21 agree with that?

22 A That's true.

23 Q Murder usually take a year to two years to come
24 up.

25 A That's true.

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1 Q So when they come up a year or two years down the
2 road we want to make sure, I'm talking to this
3 person right now and I have an exact representation
4 of what he says now and what he's going to say two
5 years down the road?

6 A Yes, sir.

7 Q So when we sat there -- was this statement
8 recorded?

9 A No, sir.

10 Q Do you have recording capability?

11 A We were in Sumter County and I honestly don't
12 know what their capabilities have, but I didn't have
13 a tape recorder with me that day.

14 Q Did you ask?

15 A I did not.

16 Q We talked about going through these continuing
17 education requirements that we do at the Academy.
18 That's one of the things our State wants them to
19 start doing is recording statements from
20 individuals, isn't it?

21 A They are rather insistent about in DUI arrests.
22 Beyond that I don't know.

23 Q Well, why do they want these things recorded?

24 A To document what was said.

25 Q To document what was said, to document testimony

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1 so we don't have to rely on somebody's memory.

2 MR. FATA: Just for clarification, he said
3 these things recorded. I don't know what things
4 he's talking about.

5 THE COURT: Clarify, please.

6 BY MR. KENT:

7 Q Statements. We want statements of individuals
8 recorded so we can not check peoples' memories where
9 we can actually see it and the juries can see it for
10 themselves, correct?

11 A Yes, sir.

12 Q And this is not recorded in this situation?

13 A It is not.

14 Q And so we don't exactly know what the demeanor of
15 Mr. Toney was; we just have to trust your
16 impression?

17 A I described to you what I thought his demeanor
18 was, was rather flat and indifferent.

19 Q Show in that statement that you wrote down for
20 him on the day close to the incident that his
21 demeanor was flat. Is that written down somewhere?

22 A This is your client's statement. This is what he
23 wanted to say.

24 Q Okay. I'm sorry, when we talk about the incident
25 report. Show me in the incident report where you

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1 wrote down that his demeanor was flat.

2 A It's not.

3 Q It's not?

4 A No.

5 Q But that was important information for you to
6 tell the jury that he was flat. And why is that not
7 written down if it's such an important part to tell
8 a jury?

9 A Mr. Fata asked me the question and I answered the
10 question.

11 Q But it's not written down?

12 A No sir.

13 Q Is there anything else missing from the statement
14 that Mr. Toney gave you that day? Or did you write
15 down everything that he told you in specificity?

16 A In the statement portion what we were — yes, I
17 wrote down exactly what he was telling me.

18 Q Did you understand every word that he said? Was
19 he easy to understand? Was he clear and crystal?
20 Did he speak with queens English with perfect
21 fiction and easy to write down every word that he
22 said?

23 A No, oh no. It wasn't perfect English or perfect
24 grammar. Like I said, if he was talking faster than
25 I could scribble or write, then I would ask him to

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1 slow down.

2 Q And punctuation. I see you even put the
3 punctuation, did he tell you where to put
4 punctuation?

5 A Oh, no sir.

6 Q This is all the stuff that you put in?

7 A Yes sir. But if he said Piggy said, then I put
8 that in quotation marks.

9 Q But none of this is recorded?

10 A No, sir.

11 Q Now this actually isn't his handwriting, it's
12 your handwriting?

13 A It's my handwriting. He asked us to write it.

14 Q And usually -- let's go back to that. When we
15 talk about statements, and I've seen numerous of
16 statements. Usually we'll write down at the
17 beginning of a statement Mr. Toney had asked me to
18 write this for him. We've written that in some
19 statements before, haven't we?

20 A I never have because it's clear when I look at a
21 statement that that's my handwriting so I've never
22 done that. That's never been my practice.

23 Q You've never written down when a defendant has
24 specifically asked you to write something down for
25 him?

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1 A I have never done that. I never wrote that or
2 including that in a statement. That's never been my
3 practice.

4 Q And we're talking about the statement. What else
5 is in the statement? Does this statement include
6 everything this man told you that day? Because this
7 is our snapshot, this is what we have, this is what
8 he told you.

9 A No, sir. As we've talked about before, you know,
10 we sat down, we went over Miranda, we talked for a
11 while. So this is not inclusive of everything he
12 said from the time I arrived on his porch until the
13 time we put him in jail.

14 Q But you knew this was a murder case?

15 A Yes, sir.

16 Q You knew it was an important case?

17 A Yes, sir.

18 Q You knew you were interviewing the murder
19 suspect?

20 A Yes, sir.

21 Q You knew it would take a while to come to court?

22 A Yes, sir.

23 Q We've already talked about at the Academy you
24 have been trained to know that memories are fallible
25 so we want to have stuff written down as close to

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1 the incident as possible, is what your testimony is?

2 A Yes, sir.

3 Q But we don't have everything written down that
4 Mr. Toney possibly told you on the date of this
5 murder, we don't have it all written down?

6 A No, not every word he said from the time we met
7 until the time departed, no, sir.

8 Q Okay. Well do we have -- do we have a
9 supplemental incident report that includes some of
10 this information that you wrote down as close to the
11 incident as possible that says, I didn't put it down
12 inside the report, however, Mr. Toney told me this,
13 this, and this before I wrote down the statement.

14 A What happens, what Mr. Toney wrote in his
15 statement either.

16 Q Well, what you wrote for him.

17 A Yes, for Mr. Toney.

18 Q Do you have any of the information that he told
19 you beforehand? Is that written down in an incident
20 report, somewhere so that this jury can look at what
21 else he said, is that written down?

22 A No, sir.

23 Q Well, it's a murder trial. We haven't written
24 down information what Mr. Toney told you other than
25 this two sheet document? That's all we have?

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1 A That's what I have.

2 Q But you agree that there's other information out
3 there that he told you?

4 A I agree with you that everything he told me from
5 the time I met him on the porch until the time I
6 left him at the jail is not written down here on
7 this statement.

8 Q And we don't have a valid reason why that stuff
9 is not written down?

10 A I guess if you want to refer to it as an
11 oversight on my part or a mistake on my part, but it
12 wasn't done overtly and intentionally.

13 Q As a case agent, you're the case agent in this
14 case. That's what we keep calling you is the case
15 agent.

16 A That's terms that other people use, yes.

17 Q But you have charge of the full case file. You
18 have the file and you've looked at the entire file.
19 You know everything dealing with this case on State
20 versus Mr. Toney?

21 A I have the case file, yes.

22 Q You have the case file. So if I ask you
23 questions generically about the file you know where
24 everything is to deal with the witnessed in this
25 case?

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1 A I have the case file. I don't know that I can
2 recall everything that's in the case file off the
3 top of my head, if that's the direction that we're
4 going then.

5 Q I'll let you refer to your notes. If there is
6 something you don't know, I'll definitely let you
7 look at the file. But I want to make sure that I
8 understand the time frame properly. Mr. Toney was
9 developed as a suspect based upon information that
10 Ms. Rogers gave you, Lorie Rogers?

11 A That was the confirmation that there was a
12 relationship.

13 Q That there was a relationship. But Ms. Rogers
14 never told you, this guy shot my husband, I know for
15 a fact he shot my husband. She never gave you any
16 statements or anything of nature?

17 A Oh, no, sir.

18 Q Mr. Toney, you went to Mr. Toney's house, you
19 talked to him about some information?

20 A Yes, sir.

21 Q We don't have that written down here, we've
22 already gone through that, but you talked to Mr.
23 Toney?

24 A Yes, sir.

25 Q After talking to Mr. Toney he voluntarily come

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1 down to the Sumter Police Department?

2 A Yes, sir.

3 Q He come down to Sumter even though it's a Lee
4 County case just because he lived in Sumter?

5 A That's correct.

6 Q He sits down in the morning with y'all. He
7 wasn't angry with you. He wasn't yelling at y'all.
8 He wasn't fighting with y'all?

9 A No, sir.

10 Q You started going through his Miranda Warnings,
11 correct?

12 A Yes, sir.

13 Q When we go through Miranda Warnings, I think the
14 solicitor was going through certain things to make
15 sure he understood his Miranda Warnings?

16 A Yes, sir.

17 Q And we do things to make sure people understand
18 their Miranda rights. Some people understand them
19 more than other people understand them, correct?

20 A (No verbal response).

21 Q And some people have been in a trouble a bunch
22 and some people haven't been in trouble a bunch.
23 Some people have heard the Miranda, gave them to
24 them a thousand times, and some people have never
25 heard of them?

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1 A Yes, sir.

2 Q You went through his educational requirements to
3 see if he was educated, if he understood them?

4 A Yes, sir, I believe he understood those.

5 Q And so you went through his entire Miranda rights
6 and he voluntarily talked to you?

7 A Yes, sir.

8 Q He voluntarily, according to y'all, gave you a
9 statement.

10 A Yes, sir.

11 Q He voluntarily gave you a statement and said,
12 look, I was on the side of the road, I was using the
13 restroom. I forgot the language you said he used,
14 but he was using the restroom?

15 A That's correct.

16 Q And we're not saying that he didn't have a right
17 to use it, correct? He had a right to use the
18 bathroom. He was legally close but he had a right
19 to do it?

20 A Yes, sir.

21 Q So he gives you a statement voluntarily, not
22 angry with y'all, not fighting with you, saying,
23 man, I was on the side of the road using the
24 restroom. After that he tells you, he tells you
25 about an altercation with and Piggy, correct?

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1 A That's correct.

2 Q He said Piggy and I got into a altercation.

3 There were some curse words used against each other,
4 correct?

5 A That's correct.

6 Q He said, he cursed at me, I cursed back at him
7 and he said, MF'er, you wait right here, I'm going
8 to be right back, correct?

9 A That's correct.

10 Q He leaves. At some point they find each other
11 again according to his statement, correct?

12 A That's correct.

13 Q They find each other again according to his
14 statement, and according to -- whether you believe
15 it or not -- according to Mr. Toney, Gregory Rogers
16 hops out of his car with a long gun.

17 A That's correct.

18 Q Right? According to his statement.

19 A That's what the statement says.

20 Q He pulls out a gun on him. Now before we go any
21 further with this statement, did you take a
22 statement from Lorie Rogers?

23 A Yes.

24 Q Okay. Tell me when you took a statement from
25 Lorie Rogers?

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1 A Earlier that day.

2 Q You took a statement from Lorie Rogers earlier
3 before you ever took a statement from Mr. Toney?

4 A That's correct.

5 Q Anything through your investigation made you
6 think that Lorie Rogers had called Mr. Toney,
7 concocted a story or worked anything or he told her
8 what to say or anything like that?

9 A I don't know what communications they had.

10 Q But there's nothing in the police report, there's
11 nothing in the statement that says that she called
12 Mr. Toney or told him what to say or vice versa?

13 A No. And I have no idea what they communicated or
14 whether they did or they didn't.

15 Q And you've heard the testimony from Ms. Rogers
16 yesterday where she said that she called him and
17 warned him basically?

18 A I remember there was controversy over whether she
19 said that or didn't say that and whether that was in
20 her statement.

21 Q Well, she gave you a statement?

22 A Yes, sir.

23 Q And in her statement she told you that she said
24 to Mr. Toney, if you run into Mr. Rogers call 9-1-1.

25 A I remember call 9-1-1.

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1 Q And what else? What else —

2 A in her statement?

3 Q Yeah.

4 A I don't remember.

5 Q What else do you remember? If you don't remember
6 that's fine.

7 A She told me that if he run into him to call
8 9-1-1. I don't remember in her statement her
9 warning him that her husband had a gun.

10 Q She was on the stand yesterday. You heard her
11 say that during her testimony?

12 A And I remember that being a controversy over
13 that. I'm just saying it, I don't remember that
14 being in her written statement that she said to call
15 9-1-1.

16 Q We've already —

17 A He said she told, that Lorie told him that Piggy
18 had a gun, and he said I'm not worried about no gun.

19 Q We've already established these statements don't
20 include everything that these people are telling
21 you.

22 A That's true.

23 Q So her statement may or may not have included it,
24 correct? I mean these statements aren't included.
25 We're already seen it. This guy is accused of

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1 murder. Everything is not in his statement, and
2 it's possible that everything is not in Lorie
3 Rogers' statement either, is it? She testified
4 everything wasn't in her statement basically.

5 A Yes.

6 Q Okay. So Lorie Rogers' testimony was she called
7 him, she warned him and told him that this man had a
8 gun?

9 A That's your characterization of her testimony.

10 Q Okay, I guess I misheard her. So that's his
11 statement. He gives you the statement. He tells
12 you the man comes up, has a gun, gets out the car, I
13 shoot him because he has a gun, right?

14 A Yes, sir.

15 Q After that point in time, tell me again what
16 happened. Tell me what happened.

17 A After this statement?

18 Q After he gives the statement tell me what
19 happened.

20 A We present the evidence to the Magistrate and get
21 the search warrant.

22 Q Then what happens?

23 A We execute that search warrant at his residence.

24 Q What time about was that when you executed the
25 search warrant and went back to his residence?

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1 A It looks like it was executed shortly after
2 midnight, at 12:02.

3 Q 12:02?

4 A Yes, sir.

5 Q And that would be the early morning hours of ---

6 A Of the 14th.

7 Q Of the 14th. And that's when you served the
8 warrant on Mr. Toney in the earlier morning hours of
9 the 14th?

10 A The search warrant?

11 Q The search warrant and the arrest warrant.

12 A That's what the documents show, yes, sir.

13 Q That's what y'all's documents show. Was he ever
14 out of your sight at any point in time?

15 A From the time we took him?

16 Q From the time you took him back over to his own
17 residence on the morning of the 14th, was he ever
18 out of your sight? Did he ever get to stay home?

19 A No. Not necessarily always in my sight because I
20 might have left the room or something, but he was
21 with one of the other investigators from the time we
22 left his house initially until when we went back.

23 Q Did he have a reason to go back to his home later
24 that evening for any reason? Did you go back to
25 Dollard Street later that evening?

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1 A No.

2 Q None at all?

3 A No.

4 Q And you wouldn't had to serve -- he wouldn't have
5 been free at his house, hanging out by himself
6 waiting for y'all to come back to his house on the
7 evening of the 14th to have a search warrant or
8 arrest him on a search warrant, would he?

9 A No.

10 Q Also we talked about incident reports. I'm
11 handing you a copy of the incident report from this
12 case that we're talking about again. Are you
13 familiar with that incident report?

14 MR. FATA: What page?

15 MR. KENT: You want me to show this to you.

16 THE COURT: Let Mr. Fata be looking at the
17 same thing.

18 THE WITNESS: Yes, sir.

19 BY MR. KENT:

20 Q You're familiar with it?

21 A Yes, sir.

22 Q And you've reviewed it?

23 A Some of it, yes, sir.

24 Q The last, the very last sentence on the last
25 page, what does it indicate that y'all did?

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1 A I accompanied Captain Dellinger, Lieutenant
2 Hickman back to [REDACTED] where a warrant was
3 served on Mr. Toney, taken into custody without
4 incident.

5 Q It says later that evening, not hours; doesn't
6 it?

7 A Yes, sir.

8 Q So that's kind of an opposite of the testimony
9 you just gave. So is that incident incorrect or the
10 testimony earlier correct?

11 A And I'm not sure which officer wrote this,
12 whether they have their dates of the 14th and the
13 13th mixed up.

14 Q But you would agree with me that's an incident
15 report kept in the file?

16 A Yes, sir.

17 Q And you testified earlier that the point of these
18 incident reports will give us a close snapshot as
19 close as possible to the incident as possible
20 because our memories are fallible?

21 A Yes, sir.

22 Q So that incident report says something completely
23 different than what you're testifying to, correct?

24 A Yes, sir.

25 Q So what happened? Is the incident report wrong

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1 or is your testimony wrong?

2 A I believe the incident report has the wrong date
3 on it.

4 Q So there's another potential mistake kept inside
5 the agent's case file, a huge mistake?

6 A Yes, sir, but the ---

7 Q And that's not a small mistake, that's a big
8 mistake ---

9 THE COURT: Let's let him finish his answer,
10 Mr. Kent. Let him finish.

11 THE WITNESS: All the other documents and
12 correspondence talk about the 13th going into the
13 earlier morning hours on the 14th.

14 BY MR. KENT:

15 Q When we talk about - when I talk about these
16 incident reports they're just not written by one
17 person. They're actually -- somebody supervises,
18 actually goes over them and looks at them and make
19 sure they're correct so somebody else had to look at
20 the incident report, correct?

21 A And everyone is human, they make mistakes.

22 Q So two people are human and make mistakes in this
23 instance?

24 A Everybody makes mistake. And if you slice it
25 apart there are going to be mistakes.

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1 Q And so technically, if there's two people that
2 make mistakes, this is in the major case that we
3 talked about and you're the case agent. You're in
4 charge of the file and you looked in the file and
5 didn't notice this glaring mistake?

6 A I did not.

7 Q So three people made a mistake?

8 A I don't know who all has reviewed it and what
9 three you're talking about. I can account for
10 myself and I didn't catch that earlier.

11 Q Is this your case file here, Officer?

12 A Yes, sir.

13 Q Officer, if you can find any documents inside of
14 your case file which is the full case file of this
15 murder case that back up what you just testified to,
16 that that is the report right there that is
17 completely incorrect, it's not right, here's what we
18 did.

19 A Well, you have the Miranda form that's dated the
20 13th and it starts at 9:30 to 3:00 which is the
21 evening of the 13th. The search warrant that is
22 signed and sworn to in front of a magistrate is the
23 14th at 11:25 p.m. The same search warrant that is
24 again sworn to and saying we executed in front of a
25 Magistrate says it was executed September 14 at

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1 12:02 a.m. So those documents differ from this
2 paragraph.

3 Q Actually, all those documents, what they say is
4 stuff that was done. It doesn't say what we've done
5 with Mr. Toney in any of the documents that you
6 said. Is there anything in that that says Mr. Toney
7 was arrested right now, at this point in time in the
8 early morning hours?

9 A No, sir.

10 Q Nothing. So the only thing in the file says
11 something completely different. You would agree
12 with me on that? That document, the incident report
13 that's kept inside your case file?

14 A Yes, sir.

15 Q Let's talk about the weapon. I think there's been
16 a big -- we talked about this, the weapon. We're
17 gonna talk about both of the weapons; but for the
18 one we're gonna talk about first, let's talk about
19 the statement of Mr. Toney. After he left and he's
20 back at the residence at sometime, we don't know
21 what time it was, but he goes back to the residence
22 with you and according to y'all he stays. You're
23 looking for the wrong gun. The gun I used is that
24 gun over there in that closet, correct?

25 A Yes, sir.

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1 Q And this is a murder investigation?

2 A Yes, sir.

3 Q And this individual, according to y'all, has not
4 only confessed to a murder, but has told you
5 specifically where the murder weapon was. That's
6 huge information, correct?

7 A Yes, sir.

8 Q Where was that written down in that case file?

9 A It wasn't written down until we met with you and
10 the solicitor.

11 Q So when was that, a couple of years ago?

12 A No, that was last week, I believe, when the
13 Solicitor instructed Investigator Capps to write
14 that down and reduce that to writing and give it to
15 you.

16 Q So y'all are saying a man that has confessed to a
17 murder case, confessed to where a weapon is, told
18 you specifically the weapon that he utilized, and
19 was never written?

20 A Yes, sir.

21 Q We spent thirty minutes this morning going over
22 this statement and Miranda in painstaking details we
23 did to get all this information down, but we don't
24 take a little bit of time to write down information
25 and have an individual sign it that he specifically.

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1 told you where the murder weapon was?

2 A Yes, sir.

3 Q Why is that?

4 A The only thing I can characterize it is an
5 oversight or mistake. Like I told Mr. Fata, it
6 wasn't something that was done overtly,
7 intentionally, or conscientally [sic], I'm gonna
8 leave this out.

9 Q But in the same respect, when we're talking about
10 the search warrant, you indicated that you went to
11 the residence, you had a search warrant for a gun
12 and a gun only and you found a picture that said, I
13 love you, daddy. We made an individual sign a
14 consent form for that. Correct, State's Exhibit
15 Number 31?

16 A Yes, sir.

17 Q State's Exhibit Number 31, that's the consent
18 form that Mr. Fata was talking to you about,
19 correct?

20 A Yes, sir.

21 Q And State's Exhibit Number 31, he took the time
22 to write down the information that was detailed that
23 we found. What all did y'all say you found in
24 there?

25 A Ultrasound pictures from Lorie Rogers, crayon

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1 colored picture from [REDACTED] Rogers, DNA testing, 8
2 millimeter Mauser bullets, Samsung cell phone.

3 Q What date is on that?

4 A The 14th.

5 Q And whose sig-- who signed that?

6 A Myself and Investigator Hickman.

7 Q So something as innocuous, something that's
8 clearly not even related to the search warrant --
9 and we agree with that because that's why y'all got
10 the consent order because it's not something related
11 to the search warrant, right?

12 A (Nods head affirmatively).

13 Q Is that a yes?

14 A Yes.

15 Q Something that's that innocuous, that
16 unimportant, we took the time to get two witnesses,
17 a new form, write this information down and have him
18 sign it, correct?

19 A Well, I didn't think that they were unimportant.
20 I thought they were important enough to want to
21 seize them and ask that he sign the consent so I,
22 it's not that I thought those papers were
23 unimportant. I thought they were significant.

24 Q But a statement that this is the murder weapon,
25 this is what I used, that wasn't as important as

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1 that stuff?

2 A Oh no, I didn't characterize one over the other.

3 Q Well, we did, one is written down and one is.

4 A That's true.

5 Q So one is more important than the other, correct?

6 A That's your characterization. I don't think
7 that's true.

8 Q So do you write down everything that's important
9 in a murder trial?

10 A I, the answer to that is it should. It should
11 have been done.

12 Q That's another mistake, correct?

13 A It should have been done.

14 Q Let's talk about the next warrant. Let's talk
15 about the weapon that and that's what everybody has
16 been arguing about, where's the weapon, where's the
17 weapon. You officers asked to do a search warrant
18 on Lorie Rogers' house, correct?

19 A That's correct.

20 Q You went to Lorie Rogers' house and you heard
21 testimony that y'all went into her house looking for
22 this weapon that you had a description that it was
23 flowered or something like that, you had a
24 description it was flowered. Who did you get that
25 description from?

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1 A From Lorie.

2 Q From Lorie. She told you that he left the house
3 with a flowery gun?

4 A Which time are you talking about?

5 Q When you had a description that you came and
6 looked for the weapon.

7 A During her statement when she talked about he
8 left the house the first time, yes.

9 Q And she told you that the weapon had flowers on
10 it?

11 A Long gun, yes, sir.

12 Q Is that included in her statement?

13 A I'm pretty sure that the long gun is. I don't
14 know about flowery, the description of the shoulder
15 strap.

16 Q Isn't that kind of important because you
17 testified to the jury that the flowery part was
18 important. Is that written down in the statement?

19 A But again, that's her statement so I can't make
20 her, compel her to include what she includes in her
21 statement.

22 Q If it's that important is it in a supplemental
23 report somewhere inside your case file?

24 A I don't think so.

25 Q So nowhere written down at all was the fact that

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1 she mentioned that it was a flowery, it was flowery,
2 inside anywhere that you have?

3 A I don't know if it's written down in the
4 description of the search warrant we had for their
5 residence but ---

6 Q You ---

7 THE COURT: Let him finish.

8 THE WITNESS: I'm not sure about that.

9 BY MR. KENT:

10 Q Officer, you have that case file. Would you like
11 to look at the case file and see if you have ---

12 A I'm not sure I have a copy of that search warrant
13 in this case file. I don't see that search warrant
14 in here.

15 Q The search warrant for Lorie Rogers' house is not
16 in the case file?

17 A I don't have a copy of it. We've been going in
18 and out of this case file all week long so things
19 have been taken out and put into evidence, things
20 have been taken out for Mr. Fata.

21 MR. KENT: Beg the Court's indulgence for a
22 moment while I try to find a copy of it.

23 THE COURT: All right.

24 BY MR. KENT:

25 Q Sir, I'm handing you a copy. Is that the search

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1 warrant that we're talking about that you were
2 looking in your case file for?

3 A Yes, sir.

4 Q If you'll take your time and look through that
5 and tell me if it has the description of the flowery
6 weapon that you're talking about.

7 A No, sir, it only talks about a long gun.

8 Q It only talks about the long gun?

9 A Yes, sir.

10 Q I mean, when you asked, when you went to the
11 Magistrate and asked him for a type weapon, what did
12 you specifically tell the Magistrate you were
13 looking for?

14 A This warrant is much more generic and we were
15 searching for any, any guns.

16 Q What does it say?

17 A It says any and all firearms, any and all
18 firearms, ammunition, documents, records concerning
19 the firearms, and then talk about the cell phone.

20 Q And that was the search warrant that was executed
21 at the victim's residence, correct?

22 A That's right.

23 Q And you officers, y'all searched the residence?

24 A We did.

25 Q You searched the residence painstakingly. Y'all

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1 searched?

2 A We searched it thoroughly.

3 Q Did you find this long gun?

4 A We did not.

5 Q Did you find any guns?

6 A We did.

7 Q What'd you find?

8 A They found a black 9 millimeter with the serial
9 numbers, identification markings scraped off of it.

10 Q And that's a crime. You're not supposed to have
11 a filed off ---

12 A That's illegal possession.

13 Q It's illegal possession. So you find an illegal
14 weapon inside the residence, but you never found
15 this long gun?

16 A We did not.

17 Q Did you ever find a long gun?

18 A We did.

19 Q When was that?

20 A I believe it was two days later.

21 Q Did you get a phone call that said, hey, we found
22 the long gun, or did you all go search again?

23 A I got a cell, a phone call that indicated for us
24 to come back to the house, that they had located a
25 gun.

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1 Q That they had located a gun. And where'd they
2 locate the gun?

3 A I say they, it — the gun had been located.

4 Q The gun had been located. Where was it found?

5 A When we went back in the house it was underneath
6 the bed in the master bedroom.

7 Q And I think we had had discussions that's usually
8 where people keep their guns?

9 A Yes, sir.

10 Q So that's probably a place you would have
11 searched the first time when you —

12 A Oh, we searched that place the first time.

13 Q And then the gun just popped up two days later,
14 isn't that strange?

15 A It is.

16 Q When we talk about that gun, we're all making an
17 assumption that that's the gun, that's the gun that
18 everybody's talking about. But the only way we got
19 that gun was from Lorie Rogers and her family.

20 That's just the gun they gave you?

21 A That's correct.

22 Q And they said that this must be the gun?

23 A That's the only gun we found other than the
24 handgun connected to this, this house, the victim's
25 home in the victim's bedroom.

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1 Q We're saying that's the only gun we found but we
2 actually didn't find the gun the first time so the
3 gun is gone. And then the gun showed up two days
4 later?

5 A Yes, sir.

6 Q So is it not possible that other guns were taken?

7 A I have no way of knowing.

8 Q We're just trusting that they gave them to you?

9 This is a trust thing.

10 A I have no way of knowing.

11 Q Do you know who actually found the gun?

12 A I never could get that established.

13 Q Did they —

14 A Or where it was those two days.

15 Q So no one gave you that information. No one gave
16 you a straight answer of who found the gun, where
17 was the gun found?

18 A No, sir.

19 Q Who was asked about that gun?

20 A Ms. Lorie Rogers and her two sons.

21 Q None of them gave you a straight answer?

22 A Lorie Rogers said she didn't know. The older son
23 said he did not stay in the home. He hadn't been
24 living in the home for a couple of years. I believe
25 he was gone off to school or college, and the other

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1 son I never heard from. He never gave me a answer.

2 Q When Ms. Rogers gave you a statement she talked
3 to you initially at the beginning of the
4 statement -- and if you need to look through your
5 case file you can look through it. But initially,
6 she was talking about she thought that her husband
7 had been in an argument with James Rogers. Who is
8 James Rogers?

9 A I think that's just a family friend or
10 acquaintance of the victims.

11 Q And her statement was enough -- she had picked up
12 the phone and called James Rogers' wife and talked
13 to James Rogers' wife, was her statement?

14 A That's right.

15 Q Did we ever interview James Rogers?

16 A Yes.

17 Q Do we have a statement from James Rogers?

18 A I don't see any written statement from Mr.
19 Rogers.

20 Q So we talked to him, but again, we don't have a
21 written statement from somebody whose really close
22 to the scene and might know Mr. Rogers was upset?

23 A There's no written statement by him.

24 Q There's no statement. I think your testimony was
25 you talked to him but there is no statement?

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1 A That's correct.

2 Q And we don't remember what he said.

3 A I don't remember him saying any significant about
4 why he was upset or why he was arguing. If that
5 were the case I would have asked him to write it
6 down.

7 Q Well, we've already established that if someone
8 says this is a murder weapon that isn't written
9 down.

10 A Well, that's your characterization of the events.

11 Q Okay. Do we know if James Robinson was inside of
12 the vehicle when Mr. James Robinson left?

13 A When this incident happened?

14 Q Uh-huh.

15 A I have no indication that the victim was by
16 himself, was anything other than by himself. I've
17 never found another witness to say that there was
18 somebody else with him, that he left the house with
19 somebody else.

20 Q Did they ask anybody? Did he ask Mr. Rogers? We
21 all know ---

22 A Yes. I did ask Mr. Rogers that. And Mister ---

23 Q How do we know that's not ---

24 THE COURT: Wait, wait. Mr. Kent ---

25 THE WITNESS: Well, just because ---

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1 THE COURT: Stop, stop. The court reporter
2 has to take one person down at a time so, Mr. Kent,
3 you let him finish and the witness will let you
4 finish and we'll do it in that fashion, keep the
5 record clear.

6 Go ahead, Mr. Kent, if you'll restate the
7 question.

8 BY MR. KENT:

9 Q It's not written down anywhere? James Rogers'
10 statement what he told you, what he did or didn't
11 tell you, that's not written down?

12 A No, sir.

13 Q It's not been turned over, it's not in the
14 incident report anywhere, is it?

15 A No, sir.

16 Q It's not anywhere written down in your file
17 whatsoever what Mr. Roberts told you?

18 A No, sir.

19 Q So there's no way that we knew about it, the
20 defense, correct, from you?

21 A Not from me, but nothing would have prohibited
22 you from going and talking to Mr. James Rogers.

23 Q You had somebody come in here and talk about
24 fingerprints. Do you know if we sent James Rogers'
25 fingerprints off to be matched against the vehicle

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1 to see if he was ever inside of it?

2 A No.

3 Q You said we did all the investigation necessary
4 to determine if anyone else was inside the vehicle.
5 We don't test fingerprints.

6 A There were no other fingerprints taken from
7 inside of the vehicle. There was, from my
8 understanding, one latent fingerprint found from the
9 outside of the vehicle.

10 Q Is there anything else that you can testify
11 specifically from your memory that's not included in
12 the file that's something you think has gone on in
13 this case that is not in the file anywhere?

14 A No, sir.

15 Q But you will agree with me that there is a lot of
16 stuff missing from this case file?

17 A There's a lot of stuff missing not written down
18 in one specific place. I think that may be a
19 mischaracterization on your part that there is a lot
20 of stuff missing altogether.

21 Q Fair enough. Well, then let's go back through
22 it. Where is the statement that Mr. Toney gave
23 y'all, where is it written down that this is the
24 murder weapon that was used? Where is that?

25 A I've already answered that. It isn't written

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1 down.

2 Q It doesn't exist?

3 A That's correct.

4 Q Where is the statement of James Rogers?

5 A Mr. Rogers never gave us a written statement.

6 Q It doesn't exist. Did you find or talk to
7 anybody that said Ernest Toney was angry that day,
8 was in a bad mood that day, anything of that nature
9 that says that he was angry and he was looking for
10 Mr. Rogers?

11 A The only one that says he was angry was Lorie
12 Rogers.

13 Q Lorie Rogers said that Ernest Toney was angry?

14 A That's correct.

15 Q Is that written in her statement somewhere?

16 A I don't have her statement here. I'll have to
17 look at her statement.

18 Q You have a case file.

19 A Again, Mr. Kent, I've gone through this, put
20 stuff in, pulled stuff out.

21 Q I'll hand you my copy.

22 A Thank you, sir. No, sir, she just talks about
23 she called Mr. Toney and that they, that Mr. Toney
24 and Piggy saw each other in passing.

25 Q So there's nobody out there that says Mr. Toney

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1 was anger that day and upset, not even Ms. Rogers?

2 A And in this week we've talked to Ms. Rogers
3 several times in preparing so -- it's not written
4 down in her statement.

5 Q And so no one told you that Mr. Toney was angry
6 that day?

7 A No, I've answered that question. Ms. Rogers did
8 tell me and Mr. Fata that.

9 MR. KENT: Your Honor, objection. I have a
10 matter if we can we take up outside the presence of
11 the jury.

12 THE COURT: All right. Ladies and
13 Gentlemen, please step to the jury room. You may
14 not discuss the case.

15 (WHEREUPON, the jury was removed from the
16 courtroom at 11:22 a.m.)

17 THE COURT: All right. Will this require
18 any further questioning at this point?

19 MR. KENT: No, sir.

20 THE COURT: All right, go ahead.

21 MR. KENT: Judge, during pretrial motions on
22 Tuesday one of the questions I specifically asked
23 the State of South Carolina was concerning the
24 testimony of Lorie Rogers. One of the things that I
25 specifically requested and asked was, had Lorie

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1 Rogers given any additional or different statements
2 which are different than the statement that she had
3 given to law enforcement and the statement that I
4 currently had.

5 THE COURT: What I wrote down was point
6 number four, that was on the 11th. Any additional
7 statements given by the wife inconsistent with her
8 written statements. That's what I wrote down. Of
9 course, the record will bear out what you asked for.

10 MR. KENT: That's specifically what I asked
11 for. At that point in time the State said Ms.
12 Rogers has not given us anything any different then
13 what she has given specifically in her statement.
14 This officer just testified in front of the jury
15 that Ms. Rogers told myself and Mr. Fata that Lorie
16 Rogers told them that Mr. Toney was angry on the day
17 in question, which is not in the statement. I
18 specifically asked about the statement. He says
19 it's not in the statement here, but she specifically
20 told us that he angry and basically made that
21 suggestion to the jury. That's why I asked the
22 question. It is completely in opposite of what they
23 have presented to us.

24 THE COURT: All right, Mr. Fata?

25 MR. FATA: Your Honor, I frankly don't

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1 recall that.

2 THE COURT: Oh, I do.

3 MR. FATA: Not his motion. I frankly don't
4 recall her telling me that.

5 THE COURT: Well, that doesn't matter.

6 MR. FATA: I know, it's whatever he recalls.
7 And number one, it's not exculpatory but it would be
8 different from what her statement is. I don't
9 recall it. The officer may have had conversations
10 with her. I've had a lot of conversations with her
11 but don't recall that statement.

12 THE COURT: Hand me please -- first what I'd
13 like to do and make sure you do it from this day
14 forward. If a witness is handed anything, it has to
15 be marked. Even if you don't seek to introduce it
16 it has to be marked for identification. And I don't
17 know, and I don't think the record will ever bear
18 out, what you handed to him that hasn't been marked.
19 In other words, I'm gonna hand you this copy and get
20 him to read it. So point number one to make sure
21 the record is protected, has her statement been
22 marked for I.D.?

23 MR. KENT: It has not been marked for I.D.

24 THE COURT: Let's mark it for I.D. Staple
25 it together and mark it for I.D.

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1 (Defendant's Number 2 was marked for
2 identification.)

3 (Off-the-record discussion.)

4 THE COURT: Hand that to me please. I'm
5 looking at Defendant's Number 2 for identification
6 only. And then I'd like to have Mr. Toney's
7 statement.

8 MR. KENT: His statement is in evidence,
9 Judge.

10 MR. FATA: State's Number 2.

11 THE COURT: Has there been any testimony in
12 whose handwriting the wife's statement is in?

13 MR. KENT: I don't think there's been any
14 testimony.

15 THE COURT: Major, whose handwriting is that
16 statement in?

17 THE WITNESS: I believe that's in her
18 handwriting, Your Honor.

19 THE COURT: All right.

20 MR. KENT: That hasn't been questioned,
21 though, Judge.

22 THE COURT: I'm just trying to get it clear
23 for my own purposes. I'm looking at page 2 of 4.

24 "He never told me why he was so upset." That's Mr.
25 Rogers. "Sometime after that I received a call from

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1 Ernest Toney, and I asked him did he ran into Piggy
2 and he said within passing," or "I guess that would
3 be passing, "but he too seemed upset." I don't know
4 what that means. He too seemed upset. Too is
5 spelled t-o. And I'll read that again. "I asked
6 him did he run into Piggy and he said within passing
7 but he to seemed upset." Okay, and I'll continue
8 reading it myself.

9 (Pause.)

10 THE COURT: Okay, let me read Mr. Toney's.
11 I think your question was there anything that the
12 wife said that indicated that Ernest Toney was upset
13 or anything in the case file that indicated Mr.
14 Toney was upset.

15 MR. KENT: That is correct, Judge, and then
16 the officer ---

17 THE COURT: Which one? Anything in the
18 case file?

19 MR. KENT: I actually asked both questions,
20 Judge.

21 MR. FATA: He did.

22 THE COURT: All right. And I'm not gonna
23 get into a debate because I may have mine own
24 conclusions about whether or not Mr. Toney's
25 statement is an indication that he was telling them

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1 when he said, you know, we met in a public place, I
2 can be here if I want. It that's upset, I don't
3 know. He just said I'm not worried about no gun.
4 That's relevant as to whether or not he's upset.
5 But the -- well, what relief are you asking for, Mr.
6 Kent? If there has been, I guess, a Rule 5
7 violation, what are you asking for?

8 MR. KENT: Judge, to be candid I have to
9 put my objection on -- if you'll allow me I need to
10 talk to my client. You understand I have to ask him
11 what relief he actually wants, if he wants me to ask
12 for a mistrial ...

13 THE COURT: Would you like a break?

14 MR. KENT: If you wouldn't mind, we can
15 discuss that.

16 THE COURT: Before we do that, Mr. Fata, is
17 there anything that you want to say at this point?

18 MR. FATA: The only thing, Your Honor, I
19 don't recall her saying anything different than
20 what's in her statement. And in her statement --

21 THE COURT: That's not the question.

22 MR. FATA: In her statement -- well, what
23 is the question then?

24 THE COURT: The question is whether or not
25 she told y'all, first of all, law enforcement,

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1 anything different from what's in her written
2 statement. And he, Mr. Kent, boiled that down to
3 did he, did she indicate anything to you that Ernest
4 Toney was upset. And he, Major Dellinger said,
5 well, yeah, she told me and Mr. Fata during the
6 course of this week that Ernest Toney was upset.

7 MR. FATA: And that's not different from
8 what she says in her statement.

9 The Court: Where?

10 MR. FATA: He too seemed upset.

11 THE COURT: And I don't know what that
12 means.

13 But anyway, you talk to your client and
14 we'll debate all that when we get back out.

15 And Major, you can step down. Of course,
16 you know you may not discuss any part of your
17 testimony.

18 (WHEREUPON, a recess was taken from the
19 proceedings.)

20 THE COURT: We'll go back on the record
21 now. Mr. Kent, anything before the jury comes in?

22 MR. KENT: Judge, at this point in time
23 thank you for taking a break. We discussed with our
24 client based upon the testimony and information that
25 was provided on the testimony of this officer, at

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1 this point in time we make a mistrial motion.
2 Specifically, our mistrial motion would be based
3 upon the fact what the officer has testified is
4 inconsistent with my pretrial motion.

5 The Court: All right, Mr. Fata.

6 MR. FATA: Your Honor, if she did, in fact,
7 make that statement, it's not inconsistent -- let me
8 back up. His pretrial motion was to, for the State
9 to inform him of any changes in Ms. Rogers' written
10 statement. The officer testified that she said that
11 the defendant was upset. It's our position that the
12 statement, he too seems upset means that that's not
13 a change in her statement.

14 THE COURT: All right. Can I have both of
15 those documents back? The one for I.D. and the one
16 that's in evidence.

17 All right, I'm gonna deny your motion, Mr.
18 Kent. I think we've all been around long enough to
19 know that when the witness preparation is occurring
20 that it's a relatively fluent process.

21 (Pause.)

22 MR. KENT: Yes, sir.

23 THE COURT: I just want to make sure I've
24 got your attention.

25 MR. KENT: Yes, sir.

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1 THE COURT: It's a fluent process. And
2 when the witness says, you asked him, I think in
3 essence, is there anything in the case file that
4 indicates that Lorie Rogers told you that Mr. Toney
5 seemed or sounded upset and he said no; but she told
6 Mr. Fata and I, Mr. Fata and me this week that he
7 seemed upset. That's the sticking point. If you
8 dissect that testimony that is somewhat an
9 indication that she said something that is
10 inconsistent with what he remembers there being in
11 the case file. Arguably, page two and page three of
12 the statement does say -- and the statement itself
13 is not in evidence and this excerpt is not even
14 published to the jury -- sometime after that I
15 received, excuse me. "He, Mr. Rogers, never told me
16 why he was so upset. Sometime after that I received
17 a call from Ernest Toney, and I asked him did he ran
18 into Piggy and he said within passing but he to
19 seemed upset." I don't know what that means, but it
20 is arguably indication that Mr. Toney sounded upset
21 to her.

22 And then we go to Mr. Toney's statement,
23 for whatever it's worth. He did make some comments
24 to the police, if the jury believes that he made
25 those statements, that they exchanged curse words

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1 and some type of indignation on Mr. Toney's part
2 about being asked why he was there, and he said,
3 well, I'm here, it's a free country, I can go
4 anywhere I want. Whether that's upset or perturbed
5 or in a rage, I think it's not the latter but maybe
6 one or the other.

7 So, to the extent that the witness may
8 have testified inconsistently with what he recalled
9 that there being in the case file, all in all I
10 don't think there's a Rule 5 violation, certainly
11 not a Brady violation so I'm gonna deny your motion.

12 MR. KENT: Thank you.

13 THE COURT: And then, once the jury comes
14 in and you chose to pursue that, then objections can
15 come if they want or if you would like and then
16 we'll move forward from there, okay? Anything else?

17 MR. KENT: Nothing else, Judge.

18 THE COURT: Mr. Fata, anything else?

19 MR. KENT: No, sir, Your Honor.

20 THE COURT: All right, you can have this
21 I.D. exhibit back. Are you ready for the jury, Mr.
22 Kent?

23 MR. KENT: Yes, sir, Judge.

24 THE COURT: Mr. Fata?

25 MR. FATA: Yes, sir.

S - J. DELLINGER - CROSS

1 THE COURT: All right, let me ask one more
2 thing. It's about, it's getting close to twelve. If
3 the cross-examination of the witness and the
4 redirect ends will that be a good time break for
5 lunch?

6 MR. FATA: Yes, sir. I think so then I'll
7 have one more witness. It might not be quite as long
8 as this but it will be some involved.

9 THE COURT: All right, you can bring in the
10 jury.

11 (WHEREUPON, the jury was returned to the
12 courtroom at approximately 11:53 a.m.,
13 and the following proceedings commenced
14 in open court.)

15 THE COURT: All right. Go ahead, Mr. Kent.
16 Ladies and Gentlemen, thank you for your patience.

17 Mr. Kent, you can continue your
18 questioning.

19 BY MR. KENT:

20 Q Officer, a few minutes ago when we were talking
21 about the fingerprint cards and I talked about the
22 fact -- and you were in here when the expert has
23 testified about fingerprints, correct?

24 A Yes, sir.

25 Q And I'll give you a copy of State's Exhibit

S - J. DELLINGER - CROSS

1 Number 35. I'm sure you've looked at it. State's
2 Exhibit Number 35 showing the fingerprints that were
3 taken from the vehicle. You see that in front of
4 you?

5 A I see what you just handed me. I haven't had a
6 chance to look at it though.

7 Q And I had asked you and we had talked about the
8 fingerprints that were actually lifted off of the
9 vehicle. My understanding was one of the
10 fingerprints that was lifted off of the vehicle,
11 they were not able to identify who it was, unable to
12 identify Mr. Rogers or anyone?

13 A That's correct.

14 Q That's correct. So, there's one fingerprint that
15 you have no clue who it is?

16 A That's correct.

17 Q Okay. And I'm sorry, I might have misspoken when
18 I asked you about that earlier when we were talking
19 about James Rogers, but we don't know whose
20 fingerprint it is?

21 A That's correct.

22 Q But there's another fingerprint on that vehicle
23 and we have no clue who the fingerprint belongs to,
24 correct?

25 A That's correct.

S - J. DELLINGER - CROSS

1 Q And usually -- and you've been doing this long
2 enough. A lot of times what we'll do is we'll send
3 all the fingerprints and known cards we have on
4 somebody, we'll send them to SLED and say check all
5 these out and figure out who they belong to. That
6 is something we normally do, is that correct?

7 Meaning -- I'm sorry, I'll let you answer.

8 A I guess I don't really understand your question.

9 Q Meaning sometimes we'll send a suspect
10 fingerprint cards up there like we have a suspect,
11 say a burglary, a robbery, a home invasion, we'll
12 send the suspect's known fingerprint card and the
13 fingerprint card we have, and say will you character
14 lift it and see if this is this same person.

15 A That hasn't been my experience. My experience is
16 that we'll -- if we have a lift that's unknown and
17 it's something that couldn't be explained away by
18 the general public, we would run that fingerprint
19 through AFIS. And then if we didn't have a hit
20 through the Automated Fingerprint Identification
21 System we would wait back for any response from
22 SLED.

23 Q One thing we are clean on, though, is Mr. Toney
24 was in custody at some point in time?

25 A That's correct.

S - J. DELLINGER - CROSS

1 Q And we would have had his fingerprints?

2 A We would have had his fingerprints. We wouldn't
3 have had what we call major case prints from your
4 client.

5 Q Why wouldn't we have had major case prints? I
6 was confused on that.

7 A Why wouldn't we have?

8 Q Yes, sir.

9 A Typically any time someone is processed in the
10 jail they take regular fingerprints which is a
11 normal process of the jail business per se.

12 Q Right.

13 A To get major case prints usually calls for either
14 consent or an order saying to give these up because,
15 and then we go back to the person and say we need
16 the major case prints which she described would
17 include a palm and a heel and other parts other than
18 just the finger tips.

19 Q Or somebody had been incarcerated or in trouble
20 before will have case prints but ---

21 A We typically only have their fingerprints not
22 their major case prints. Those fingerprint cards
23 don't typically include what we call major case
24 prints, the palm of their hand and the heel of their
25 hand. It's usually just the ten card with the ten

S - J. DELLINGER - CROSS

1 digits.

2 Q But we're clear on that. You had Mr. Toney's
3 fingerprints and you don't know whose fingerprint
4 that is on the car. It's not Gregory Rogers?

5 A That's correct.

6 Q We don't know for a fact according to the
7 statement that Ernest Toney told you that Greg
8 Rogers pulled out a long gun.

9 A Yes, sir.

10 MR. FATA: Your Honor, the characterization
11 of that — never mind, never mind.

12 THE COURT: Go ahead, Mr. Kent.

13 BY MR. KENT:

14 Q We know for a fact that Greg Rogers was buying
15 ammunition for a long gun at Wal-Mart at
16 approximately 4:30 that day?

17 A Yes, sir.

18 Q We know for a fact that Greg Rogers and Ernest
19 Toney had had difficulties in the past?

20 A Yes, sir.

21 Q We know for a fact that on the day in question
22 that Greg Rogers, according to our case file, had a
23 blood alcohol of at least .1 to a .12?

24 A Yes, sir.

25 Q We know from the testimony of Lorie Rogers that

S - J. DELLINGER - CROSS

1 Greg Rogers became angry, combative, rowdy when he
2 was intoxicated?

3 A That was her testimony.

4 Q We know -- there's a lot of things we know about
5 this case. We know that we've gotten a statement
6 from Ernest Toney. He gave you a statement,
7 correct?

8 A Yes, sir.

9 Q He gave you a statement that said he was in a
10 spot that he legally had a right to be and he was
11 using the restroom on the side of the road?

12 A Yes, sir.

13 Q So all of these things in here that that we have
14 that we've done throughout the nature of the and
15 we've looked throughout the entire file, all these
16 things are things that you all utilized to figure
17 out what happened that day?

18 A Yes, sir.

19 Q We also know for a fact that when you went to the
20 residence and you executed a search warrant the
21 first time at the Roberts' house there's no long gun
22 to be found?

23 A We did not find it the first time we searched.

24 Q We know for a fact two days later they actually
25 called somebody, -- I'm sorry, let me make sure I

S - J. DELLINGER - CROSS

1 say that -- somebody called the Lee County Sheriff's
2 Department and says, hey, we found the long gun?

3 A Yes, sir.

4 Q And the long gun just happened to be in a spot
5 where y'all clearly had already looked?

6 A That's correct. We had looked in that place.

7 Q And the only reason that we knew that it was the
8 long gun we're talking about is because that's the
9 one that the Rogers family gave to you?

10 A That's correct.

11 Q We didn't find any other weapon inside of the
12 residence?

13 A No, sir.

14 Q But we're not saying that it couldn't be there,
15 we just didn't find any?

16 A Other than the handgun, the long gun were found
17 in that residence.

18 Q What we did find inside of the residence was a
19 pistol with an obliterated serial number?

20 A Yes, sir.

21 Q Which is illegal, which is a crime, which is not
22 allowed to have?

23 A That's correct.

24 Q And that was found inside of the residence?

25 A That's correct.

S - J. DELLINGER - CROSS

1 Q Although we would agree there are some things
2 that are not written down in the case file that
3 should be or could have been written down, there are
4 things that are missing?

5 A Yes, sir.

6 Q There are statements that are specifically
7 missing that are not written down that we're
8 attributing to Mr. Ernest Toney which are not in the
9 case file, not written down anywhere?

10 A Yes, sir.

11 Q There are some stuff that we're saying that
12 certain people told us that we don't have written
13 down, some things that Lorie told us that are
14 different then what are written in her statement.
15 There are differences?

16 A I think the differences of things falls into
17 characterization. You know, that may be what one
18 person heard, one person saw. I'm not sure that I
19 can fully agree with you on that.

20 Q Well, you would agree with me that there's, at
21 the minimum, there's an incident report which is
22 completely in opposite of testimony that has been
23 offered in front of this jury. We don't know which
24 one is right. I'm sorry, we'll take what you're
25 saying as right. We're saying that there is an

S - J. DELLINGER - CROSS

1 incident report inside of the file that is
2 completely, according to your testimony, in correct?

3 A Yes, sir.

4 MR. FATA: Your Honor, may we approach?

5 THE COURT: Yes, sir.

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

8 THE COURT: Go ahead, Mr. Kent.

9 BY MR. KENT:

10 Q And you would agree with me that you do not have
11 a recording of Ernest Toney's statement that he gave
12 y'all?

13 A I do not.

14 Q You would agree with me that recording is a
15 prefer method of taping statements, specifically
16 murder cases, so that we know about how people are
17 acting, what their standard demeanor is ---

18 A That would ideal.

19 Q But we don't have it in this situation?

20 A That's correct.

21 Q So all we have in this situation to trust what
22 Mr. Toney said to y'all is your testimony?

23 A Can you ask me that question again?

24 Q What we have to trust what Mr. Toney specifically
25 said to you because it's not in his own handwriting

S - J. DELLINGER - REDIRECT

1 is your testimony today?

2 A Yes, sir.

3 MR. KENT: Thank you. That's all the
4 questions I have. Thank you so much.

5 THE COURT: Mr. Fata.

6 MR. FATA: Thank you, Your Honor.

7 **REDIRECT EXAMINATION**

8 Q Well, Major Dellinger, we know a lot about this
9 case; don't we? We know a lot of facts about this
10 case; don't we?

11 A Yes, sir.

12 Q How far was Mr. Toney from his home on that day,
13 September 12?

14 A A good thirty, thirty-five minutes drive.

15 Q What business did Mr. Toney have in Mr. Rogers'
16 neighborhood?

17 MR. KENT: Objection, Your Honor, calls for
18 speculation, beyond the scope.

19 THE COURT: Overruled.

20 BY MR. KENT:

21 Q What business did Mr. Toney have in Mr. Rogers
22 neighborhood?

23 A I don't know of any other than his relationship
24 with Lorie Rogers.

25 Q And who shot Mr. Toney?

S - J. DELLINGER - REDIRECT

1 A Ernest Toney.

2 Q I mean, who shot Mr. Rogers?

3 A Ernest Toney.

4 Q And how far, excuse me, what do we know about
5 John Wesley Road?

6 A It's definitely in Lee County.

7 Q but is it a dead-end road?

8 A It's a dead-end road off of 154.

9 Q Is there a business on there, a store?

10 A No, it's just four or five houses, maybe six.

11 Q I hand you, this is State's Exhibit. I had Ms.
12 Rogers circle her home. She circled this area right
13 here. Can you indicate on John Wesley Road where
14 the body was found? Approximately.

15 A I don't know what the scale that this here is,
16 but it was beyond this first residence but
17 definitely before you get to the other two
18 residences.

19 Q Now, can you estimate, you put an x about where
20 the J and the O are on John Wesley Road, I believe,
21 right here.

22 A Yes, sir.

23 Q How far is that from Lorie Rogers' home?

24 A A couple of tenths of a mile. Two-tenths of a
25 mile.

S - J. DELLINGER - REDIRECT

1 Q And you come out here to, it says the St. Charles
2 Road. Can you see the Rogers home?

3 A From the intersection of John Wesley and 154?

4 Q Uh-huh.

5 A Yes, sir, you can definitely see the driveway. I
6 guess it depends on the time of the year and the
7 trees whether you can see them all, but you can
8 definitely see Ms. Rogers driveway from there.

9 Q We know from the facts that Mr. Toney is claiming
10 self defense?

11 A That's correct.

12 Q We know from the facts that Mr. Toney said there
13 was a gun at the scene?

14 A That's correct.

15 Q We know from the facts that no gun was found at
16 the scene?

17 A That's true.

18 Q What else do we know about that gun at the scene?

19 A There wasn't a gun found at the scene.

20 Q What else do we know about how what efforts were
21 made to find a gun at the scene?

22 A Well, between all of the investigators at the
23 crime scene, individuals there, it was, you know, an
24 extensive search for the weapon or any ammunition at
25 the scene.

S - J. DELLINGER - REDIRECT

1 Q What do we know about Mr. Toney's attitude about
2 the gun? And I'm referring to State's Exhibit
3 Number 2. What do we know about Mr. Toney's attitude
4 regarding the gun?

5 A He said I'm not worried about no gun.

6 Q So we know a lot of things about this case; don't
7 we?

8 A Yes, sir.

9 Q Now, let's go back to the statement. Tell me
10 what your procedure is when you first bring a person
11 in to interview.

12 A To go over their Miranda.

13 Q Well, go over their Miranda. And then you, do
14 you sit there and say, okay, tell me, tell me all
15 about it. Is that what you ask?

16 A No. As I said, we would just try and establish
17 some rapport and ask questions probably that I knew
18 most of the answers to, very generic, very general
19 questions to try and get some conversation going
20 back and forth.

21 Q And do you tell the interviewee about why he's
22 there?

23 A Yes.

24 Q Do you ask the interviewee if he wants to give a
25 statement?

S - J. DELLINGER - REDIRECT

1 A Yes.

2 Q And is it that point where you, excuse me, back
3 up. If he agrees to give a statement, when do you
4 start writing down?

5 A It would depend if the question of whether we
6 would like for you to give us a written statement
7 and then we ask, you know, whether they want to do
8 it in their own handwriting or if they want one of
9 us to do it.

10 Q And in this situation did you ask Mr. Toney if he
11 wanted to give a written statement?

12 A Yes.

13 Q And did he give that written statement?

14 A He did.

15 Q Did he ask you to write it down?

16 A Yes, he did.

17 Q Did you write down exactly what he told you?

18 A Yes, sir.

19 Q Did you make anything up?

20 A No, sir.

21 Q The words, the vulgar words, the slang that he
22 used, did you make any of that up?

23 A No, sir.

24 Q Now Mr. Kent asked you about videotaping these
25 things. Was that available to you -- was that

S - J. DELLINGER - REDIRECT

1 available at this time? Did you know?

2 A I don't honestly don't know. Like I said, we
3 were in the Sumter County Sheriff's Office. I could
4 have only assumed that they do have it, but I
5 honestly don't know.

6 Q Is it a general practice of yours to videotape
7 interviews?

8 A It has not been a practice of mine.

9 Q Is it a policy of Lee County Sheriff's Office to
10 videotape it?

11 A No, sir, it's not.

12 Q So was this taking a written statement was this
13 contrary with your general practice with the
14 Sheriff's general practice?

15 A No, it was fairly normal.

16 Q It is standard procedure?

17 A Yes, sir.

18 Q Now, once Mr. Toney said what he said, he said I
19 shot him, I shot Mr. Rogers and killed him, was he a
20 free man at that point?

21 A No, sir.

22 Q What would have happened?

23 A He would have been arrested.

24 Q Does that mean under arrest?

25 A Yes, sir.

S - J. DELLINGER - REDIRECT

1 Q Would he have been handcuffed?

2 A Yes, sir.

3 Q Now, of course I think you've already testified
4 that you got the statement, the search warrant, and
5 went to the house right away, one right after
6 another, found the gun. Would Mr. Toney have been
7 under arrest right during that time you were at the
8 house, during the time you were getting the search
9 warrant?

10 A Yes.

11 Q He would have been in custody?

12 A Where are you talking about, at what place?

13 Q At the house at the time -- excuse me, let me
14 back up. Right after he said, I gave this
15 statement, would he have been placed in custody?

16 A Yes, sir.

17 Q And he would have remained in custody until when?

18 A Until we saw a Magistrate and was --

19 Q Bonded out?

20 A Bonded out.

21 Q Now...

22 Mr. Fata: Mark this if you would.

23 (WHEREUPON, State's Exhibit Number 40 was
24 marked for identification)

25 BY MR. FATA:

S - J. DELLINGER - REDIRECT

1 Q I give you State's 40 for identification, and
2 what is that?

3 A The arrest warrant for Ernest Toney.

4 Q What's the date that that arrest warrant was
5 served?

6 A September 14th.

7 Q The day that you searched Mr. Toney's house?

8 A Mr. Toney's house would have been the very early
9 morning hours —

10 Q Of that day?

11 A —of that same day.

12 Q I mean, the statement was taken on September
13 13th, is that right?

14 A Yes, sir.

15 Q The search warrant was when?

16 A The search warrant was signed by the Magistrate
17 at 11:25 p.m. on the 13th according to the
18 documents.

19 Q What's the date on the return?

20 A It was executed September 14th at 12:02.

21 Q Okay. So was Mr. Toney, did you have that — did
22 you have State's Exhibit 40 at the time all that was
23 done, that search warrant you think?

24 A I'm confused, did I have State's Exhibit ---

25 Q State's Exhibit 40 for identification, the arrest

S - J. DELLINGER - REDIRECT

1 warrant.

2 A No, sir, we did not have that.

3 Q When would you have gotten that?

4 A Sometime later on in the business day of the
5 14th, not at ---

6 Q Where was Mr. Toney at that time?

7 A After we left his residence?

8 Q After you left his residence.

9 A Incarcerated at the detention center.

10 Q And then did an officer take that over and serve
11 Mr. Toney?

12 A Yes, sir.

13 Q On the 14?

14 A Yes, sir.

15 Q So he was in custody and right after he giving
16 that statement and he was arrested on the 14th,
17 served with the warrant on the 14th?

18 A Yes, sir.

19 Q Okay. Is that normal procedure?

20 A Yes, sir.

21 Q 'Cause you don't -- are you allowed to carry
22 warrants around in the car? How, what's the
23 procedure for getting a warrant?

24 A We would have to have gone back to in front of a
25 magistrate in Lee County and tell them the facts or

S - J. DELLINGER - REDIRECT

1 probable cause for the arrest and the nature of the
2 warrant.

3 Q And then that's here in Lee County, then you have
4 to go to Sumter County to serve it?

5 A That's correct.

6 Q Now Mr. Kent was curious about other oral
7 statements, I guess, that are not written down. Is
8 there a difference in an oral statement and the oral
9 statement as defendant's exhibit -- State's Exhibit
10 No. 2, is there a difference in just conversation
11 and the official statement?

12 A Yes, I mean, in oral you're just, you know,
13 having conversation, just, of back and forth.

14 Q Would, when Mr. Toney I.D.'d the gun would you go
15 back and amend his voluntary statement?

16 A We wouldn't go back and amend his statement, no,
17 sir.

18 Q So the State's Exhibit 2 is the official
19 statement?

20 A Of Mr. Toney.

21 Q Okay. Fingerprint cards, AFIS, what is AFIS?

22 A Those are -- that's for the Automatic Fingerprint
23 Identification System, basically a huge computer
24 that has a bunch of fingerprints stored in it for
25 comparison of...

S - J. DELLINGER - RECROSS

1 Q Okay. And where do they get those fingerprints
2 from?

3 A Arrest of individuals and law enforcement.

4 Q Law enforcement — people arrested in Sumter-Lee
5 jail ---

6 A That's correct.

7 Q ---that are staying there for a while?

8 A That's correct.

9 Q And those fingerprints are sent into this
10 computer?

11 A That's correct.

12 Q Do you recall the, Ms. Dihn saying, talking about
13 prints, was that one print run through AFIS?

14 A That's correct, she did say that.

15 Q And there was no match?

16 A That's correct.

17 Q The defendant would have been fingerprinted at
18 the jail?

19 A Sumter-Lee Detention Center, yeah.

20 Q I don't have anything else. Thank you.

21 THE COURT: Anything else, Mr. Kent?

22 MR. KENT: Yes, sir.

23 **RECROSS - EXAMINATION**

24 BY MR. KENT:

25 Q Officer, you've been doing this for a long time?

S - J. DELLINGER - RECROSS

1 A Yes.

2 Q Twenty something years. And we've been making
3 this big deal about no gun. There's been many times
4 you don't find evidence at the crime scene, it
5 doesn't necessarily mean that a crime did not occur,
6 correct? You don't find everything you're looking
7 for.

8 A Your Honor, I'm not sure I understand that
9 question.

10 Q Do you find all of the evidence of a crime at
11 every single crime scene that you go to?

12 A No, sir.

13 Q It's almost impossible. I mean, you look for it
14 and you don't find it all the time?

15 A And I don't know what you're talking about what
16 we're looking for.

17 Q Well, Mr. Fata makes a big deal about the gun. I
18 mean, so we didn't find a gun and we didn't find
19 ammunition. This means we just didn't find it, it
20 doesn't necessarily mean it wasn't there. Can you
21 make that conclusory one hundred percent statement?

22 A We didn't find a gun or weapon at the scene.

23 Q At the scene. Mr. Fata has made a big thing
24 about there are certain things we know. Well,
25 there's a lot of assumptions we're making in this

S - J. DELLINGER - RECROSS

1 case too; aren't there? Let's go through them. We
2 are assuming the family gave you the proper gun,
3 correct?

4 A That's correct.

5 Q We are assuming that there was no gun at the
6 crime scene whatsoever; we're making assumptions.

7 A And I think that's your characterization of it.

8 Q We're assuming that Mr. Rogers was involved.

9 THE COURT: Wait, just a second, let Mr.

10 —

11 MR. FATA: Let him finish his answer.

12 THE COURT: Are you finished, Major?

13 THE WITNESS: Yes, sir.

14 BY MR. KENT:

15 Q We're assuming that Mr. Rogers was in the vehicle
16 by himself.

17 A I never had any other indication that he wasn't
18 by himself.

19 Q Right. We don't know if he was or wasn't so
20 we're making an assumption he was in the car by
21 himself.

22 A Correct.

23 Q It's an assumption. We have facts and we have
24 assumptions. Correct?

25 A And if you go by what your client said, he said

S - J. DELLINGER - FURTHER DIRECT

1 that the victim was in the car by himself.

2 Q You have facts and you have assumptions. Certain
3 facts that we definitely know is we know for a fact,
4 we know one person definitely had handled a firearm
5 out there regardless, right? He had gunshot residue
6 on his hands. That's a fact, isn't it?

7 A That he had gunshot residue on his hands?

8 Q On his left palm. You heard the testimony ---

9 A Yes.

10 Q And so we know that's a fact. That he had
11 gunshot residue on his hand, he had alcohol in his
12 system. That's another fact.

13 A Yes.

14 Q And he was angry that day, that's another fact?

15 A Yes.

16 Q Thank you.

17 THE COURT: All right, anything else?

18 This will conclude. Anything else?

19 **FURTHER DIRECT EXAMINATION**

20 BY MR. FATA:

21 Q And we know that the defendant, Mr. Toney,
22 confessed to killing, killing Mr. Rogers?

23 A Yes, sir.

24 Q That's all.

25 THE COURT: All right, step down. Thank

S - P. HICKMAN - DIRECT

1 you.

2 Next witness.

3 MR. FATA: John -- Patrick Hickman.

4 THE CLERK: Place your left hand on the
5 Bible, raise your right hand.

6 WHEREUPON,

7 **PATRICK HICKMAN,**

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: Patrick Hickman.

13 **DIRECT EXAMINATION**

14 BY MR. FATA:

15 Q I think you're Lieutenant Hickman; is that
16 correct?

17 A That's correct.

18 Q Tell me what your job is. You work with the
19 Sheriff's Office?

20 A We investigate crimes that are called, service
21 like burglaries, murders.

22 Q And you're an investigator?

23 A Yes, sir.

24 Q How long have you been an investigator at the
25 Sheriff's Office?

S - P. HICKMAN - DIRECT

1 A For 40 years now.

2 Q And prior to that what did you do?

3 A Investigator with the Sumter County Sheriff's
4 Office.

5 Q How many years have you been in law enforcement?

6 A Roughly about 18.

7 Q 18 years?

8 A Yes, sir.

9 Q Okay. And how many years -- just four years with
10 Lee County?

11 A I've been in Lee County six years.

12 Q Six years. Four years as an investigator?

13 A Yes, sir.

14 Q And on September the 12th, 2010 you worked?

15 A Yes, sir, I wasn't actually working.

16 Q Were you called to the crime scene?

17 A Yes, I was.

18 Q And where was that crime scene?

19 A Off of John Wesley Road off of 154.

20 Q Okay. And when you got to the crime scene what
21 was going on?

22 A Basically other officers was on the scene and I
23 basically tried to help secure the scene and keep
24 the crowd back.

25 Q Okay. So you were doing crowd control and that

S - P. HICKMAN - DIRECT

1 sort of thing. Were the SLED crime scene
2 investigators there then?

3 A I think they were out after I did.

4 Q Okay. So when they got there they -- she did
5 whatever she did?

6 A Yes, sir.

7 Q She's testified about that. Now did you assist
8 Major Dellinger in the investigation of this case?

9 A Yes, sir.

10 Q Part, not all of it, parts of it. Did you
11 accompany Major Dellinger when he interviewed
12 Ms. Rogers, Lorie Rogers?

13 A Yes, I did.

14 Q And as a result of interviewing Ms. Rogers did
15 you identify someone you wanted to talk to?

16 A Yes, we did.

17 Q And was that Mr. Toney?

18 A Yes, it was.

19 Q And did you and Major Dellinger go to Sumter to
20 interview him?

21 A Yes, we did.

22 Q Tell me about that. Tell me about the process of
23 going over there. What did you do?

24 A We contact Investigator Rogers with Sumter County
25 and he asked was Mr. Toney, go around to his home.

S - P. HICKMAN - DIRECT

1 We knocked on the door, tell him we was
2 investigating a crime for Lee County and would he
3 mind going up to he Sumter County Sheriff's Office
4 with us.

5 Q Okay.

6 A And he agreed to go out there for the interview.

7 Q Okay. Now tell me -- tell me about the interview
8 room there at the Sumter County.

9 A I want to say it's probably -- I'm not good with
10 measurements -- about a 6X8 table and like three or
11 four chairs.

12 Q Okay.

13 A Well lit.

14 Q Is that industrial light that's real bright?

15 A Yes, it's well lit, comfortable temperature.

16 Q Comfortable temperature. Was Mr. Toney allowed
17 to use the bathroom?

18 A Yes, if he wanted to he was allowed to. That's
19 correct.

20 Q Was he allowed anything to drink or something --

21 A Yeah, we also asked him, I think gave him some
22 water.

23 Q Now did you ask or did Major Dellinger -- tell me
24 what your role is. You ---

25 A Basically I was there to assist in the

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1 investigation. It was Major Dellinger's case so I
2 just was there to assist him in whatever he needed.

3 Q So you were an observer?

4 A Right.

5 Q Okay. Now did you, were you in the room when
6 Major Dellinger read the Miranda warnings to him?

7 A Yes, I was.

8 Q Now I want to direct -- it's not -- I've got the
9 form that's in evidence, State's Exhibit 1, and I've
10 got a copy there for you. You see it says Lee
11 County law enforcement and it says Miranda warnings,
12 your rights.

13 A Right.

14 Q Are those five things read to Mr. Toney?

15 A Yes, it was.

16 Q Number one, you have the right to remain silent.

17 I see a little check, what is, what's that?

18 A That's how Major Dellinger does his Miranda
19 warnings. Once he read it of he checks it off as he
20 read it.

21 Q Okay. Now let me ask you one other thing before
22 we can please. Did you observe Mr. Toney? Were you
23 able to observe him?

24 A Yes.

25 Q Did he appear to be under the influence of any

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1 alcohol?

2 A No, he did not.

3 Q Any drugs?

4 A No, he did not.

5 Q Did he appear to be under any kind of stress or
6 duress or anything like that?

7 A No, he did not.

8 Q Was any coercion applied against him?

9 A No.

10 Q Number two, anything you say can be used against
11 you in a court of law, and I see another little
12 check. Why is that checked there?

13 A He read it and appeared that he understand it.

14 Q Major Dellinger read it ---

15 A He checked it.

16 Q Number three, you have a right to talk to a
17 lawyer and have him or her present with you while
18 you are being questioned, and I see another check.

19 A Yes.

20 Q Did Major Dellinger read that to ---

21 A He read that.

22 Q ---Mr. Toney? Number four, if you can't afford
23 to hire a lawyer the court will appoint one to
24 represent you without cost if you wish. I see a
25 check.

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1 A He read that one also.

2 Q Read that to Mr. Toney?

3 A Right.

4 Q Number five, if you decide to answer questions
5 now without a lawyer present you will still have the
6 right to stop answering at any time. You also have
7 the right to stop answering at any time until you
8 talk to a lawyer. And I see a check.

9 A That's correct. He read that one also.

10 Q He read that to him. Now Mr. -- Major Dellinger
11 read one, two, three, all five of these.

12 A That's correct.

13 Q Did Mr. Toney appear to understand?

14 A In my opinion he did.

15 Q Did Mr. Toney ask any questions about it?

16 A No, he did not.

17 Q And then I see it says, I have read the above
18 listed Miranda warnings and I understand what my
19 rights are. Then I see a signature, an X. Whose
20 signature is that on there?

21 A Mr. Toney's signature.

22 Q And he signed that?

23 A That's correct.

24 Q Then I see where it says Waiver of Rights. "I'm
25 willing to make a statement and answer questions. I

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1 do not want a lawyer at this time. I understand and
2 know what I'm doing. No promises or threats have
3 been made to me. No pressure or coercion of any
4 kind has been used against me." I see another X
5 with a signature. Who is that? Whose signature is
6 that?

7 A Mr. Toney.

8 Q What does that mean, that waiver of rights?

9 A That he understands his rights and that we didn't
10 pressure him or use any force towards him to get him
11 to talk with us without a lawyer present.

12 Q And did anybody put any pressure on him?

13 A No.

14 Q Did anybody threaten -- did you threaten him?

15 A No.

16 Q Did Major Dellinger threaten him?

17 A No, he didn't.

18 Q Now I see witnesses, who is that, the first one?

19 A Major Dellinger.

20 Q And who is the second one?

21 A Patrick Hickman.

22 Q That's you?

23 A That's me.

24 Q Okay. So Mr. Toney was given his Miranda rights
25 and he appeared to understand what they were?

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1 A Right, and he did.

2 Q And he had ability to act on those; is that
3 correct?

4 A That's correct.

5 Q Did Mr. Toney then give a statement?

6 A Yes, he did.

7 Q Now —

8 MR. KENT: Judge, I'm just gonna renew
9 that pretrial objection.

10 THE COURT: Yes, sir.

11 MR. KENT: Thank you, sir.

12 BY MR. FATA:

13 Q Who was the questioner? Who was the person that
14 was in charge at the, this giving his statement?

15 A Major Dellinger.

16 Q Okay. Now did Major Dellinger and Mr. Toney talk
17 for a little while, a few minutes before they,
18 before this statement was written down?

19 A Yes, they did.

20 Q What were some of the things that Major Dellinger
21 was telling Mr. Toney?

22 A He was asking him his whereabouts, where he was
23 at on the day prior.

24 Q The 12th?

25 A The 12th. And Mr. Toney proceed to tell him that

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1 he was at his mother's house, went to be there for
2 setup.

3 Q Okay. And at some point in time did Major
4 Dellinger ask Mr. Toney if he wanted to give an
5 official statement?

6 A He asked whether he wanted, whatever they
7 discussed whether he was willing to put it in
8 writing.

9 Q In writing.

10 A Correct.

11 Q And what did Mr. Toney say?

12 A He don't write that well.

13 Q He said he doesn't write that well?

14 A That's right.

15 Q So what did — well, was he willing to give a
16 written statement?

17 A He was willing to give a statement but he was
18 concerned that he couldn't write that well.

19 Q Okay, so what did Mr. Toney request? Did he make
20 a request somebody, Major Dellinger write it?

21 A The Major tell him he would go ahead and write
22 the statement, just go ahead and give it to him over
23 again.

24 Q Now how was that statement accomplished, how was
25 that done?

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1 A Mr. Toney gave the statement orally.

2 Q So, and then what did Major Dellinger do?

3 A Major Dellinger wrote it down as he dictate it.

4 Q So Mr. Toney is dictating and Mr. Dellinger is
5 writing?

6 A That's correct.

7 Q Okay. Now after giving this statement did the
8 custody status of Mr. Toney change?

9 A After we put it in writing, yes, it did.

10 Q What'd it change to?

11 A Well, we determined that he's, he's a suspect --
12 well, he was a suspect all the time but --

13 Q Did you arrest him?

14 A He was then placed under arrest.

15 Q He was placed under arrest.

16 A Yes, sir.

17 Q Because what he did do in this statement? How
18 about just read the statement for us.

19 A "I left home yesterday about 2 p.m. I stopped at
20 the bridge on Highway 76 at 378, the Youngs Market,
21 and I bought some gas. I bought 12-dollars worth.
22 I went down 76 to Mayfield. I made a left on
23 Highway 154. When I got, when I got to Lower Lee
24 School I called Lorie Rogers and talked about the
25 baby. I went up to park on the paved road and then

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1 and took it a piss. Piggy pulled up in front of me
2 and jumped out. He said, mother fucker, what are
3 you doing down here. I said, this is a public
4 highway. Mother fucker, stay here until I get back,
5 Piggy said, as he got in his truck. I called
6 Lorie."

7 Q Let me turn the page.

8 A "Back. And Lorie said Piggy had a gun. I told
9 Laura I did not worry about no gun. When I looked
10 up Piggy was pulling up. Piggy jumped out of his
11 car with a long gun. I was standing outside of my
12 truck. I got in. I got my 8-millimeter rifle from
13 behind the seat; I shot it once. Piggy fell to the
14 ground. I jumped in my trunk and went to my
15 mother's house. I stayed about 15 or 20 minutes and
16 then I went to BJ lounge and bought two beers. I
17 left BJ lounge, BJ's, and went to my sister's house
18 Annie Wilson. I stayed at her house about one hour.
19 When I left I came back down 154. I stopped at the
20 154 at Highway 15 and I bought some chips and a
21 coke."

22 Q Now based on this statement Mr. Toney was
23 arrested?

24 A Yes.

25 Q All right. Let's look at the bottom of that

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1 first page and I see a -- it says: "I have read the
2 statement consisting of two pages, each page which
3 bears my signature. I do affirm that the facts,
4 that facts in statements contained herein are true
5 and correct and I have received a copy of the
6 statement." Then I see a signature. Whose
7 signature is that?

8 A Mr. Toney.

9 Q All right. Then I see a witness, who are the
10 witnesses?

11 A Dellinger and myself.

12 Q All right. On page 2 I see, again an X but whose
13 name is that by the X?

14 A Mr. Toney.

15 Q And he signed there?

16 A That's correct.

17 Q And I see two witnesses, who are they?

18 A Dellinger and myself.

19 Q And Mr. Toney read this statement?

20 A Yes, he did.

21 Q And then after reading it he signed it?

22 A Yes.

23 Q Okay. Based on this statement what did you and
24 Major Dellinger do? Besides putting Mr. Toney
25 under, placing him under arrest what did you do?

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1 A We had Sergeant to contact the on-call magistrate
2 to seek a search warrant.

3 Q Did you seek, and did you get that search
4 warrant?

5 A Yes, I did.

6 Q All right. And the search warrant was for what?

7 A For 8 millimeter rifle.

8 Q Okay. And that's State's Exhibit Number 3.

9 Searching for a military style 8 millimeter bolt
10 action rifle?

11 A With a wood stock.

12 Q Did you accompany Major Dellinger and other
13 officers to the scene?

14 A Yes.

15 Q To the house at ■ Dollard?

16 A Yes, I did.

17 Q Do you recall if Mr. Toney came along?

18 A Yes, he did.

19 Q Was he in custody?

20 A Yes.

21 Q Was he handcuffed? If you remember.

22 A I don't recall.

23 Q Okay. And was a, was a rifle secured or taken
24 from that home?

25 A Yes, it was.

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1 Q And I'm gonna show you State's Exhibit Number 28.

2 Do you recognize that?

3 A That's the particular weapon.

4 Q That was taken from Mr. Toney's home. Do you
5 recall Mr. Toney pointing this rifle out to anyone,
6 or were you in the house at that time?

7 A Well, I was -- it would have to be -- to initiate
8 the search warrant they start looking in certain
9 rooms and then Mr. Toney made a statement that it's
10 not, it's not ---

11 MR. KENT: I'm sorry, Judge, I just have
12 to renew my earlier objection.

13 THE COURT: All right, thank you.

14 THE WITNESS: The weapon that you're
15 looking for is not in that room. And at that time I
16 walked on the outside to look into it.

17 BY MR. FATA:

18 Q So you didn't actually see them retrieve that?

19 A No, I did not.

20 Q How about State's Exhibit Number 30, did you --
21 theses are 8-millimeter bullets, did you see these
22 retrieved?

23 A No, I did not.

24 Q So you were outside doing what?

25 A Looking at the vehicle since he said when he

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1 pushed the seat back in order to get the weapon I
2 was just examining the vehicle at that time.

3 Q What kind of vehicle was it?

4 A I know the pickup truck, but I can't remember
5 what model it was. I know it was older model pickup
6 truck.

7 Q What kind of back seat did it have.

8 A It just have a seat that push forward.

9 Q Okay, was it a big pickup, little —

10 A It's a full size model pickup.

11 Q Was there a gun rack in the pickup?

12 A No gun rack.

13 Q Do you know how the rifle was placed in the
14 pickup?

15 A No, he just said it got it from behind the seat.

16 Q He told you how he reached behind the seat and
17 got it?

18 A Yes.

19 Q Okay. Beg the Court's indulgence one moment.

20 THE COURT: All right.

21 BY MR. FATA:

22 Q Lieutenant, again, the person in charge of taking
23 this statement and everything, who was that?

24 A Major Dellinger.

25 MR. CHANDLER: Excuse me,

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1 Your Honor. Paul, again, I just can't hear you
2 when...

3 BY MR. FATA:

4 Q Who was in charge of taking this statement?

5 A Major Dellinger.

6 Q Major Dellinger. Being the senior officer?

7 A That's correct.

8 Q Now answer any questions that Mr. Chandler or Mr.
9 Kent may have.

10 THE COURT: All right, Mr. Chandler.

11 MR. CHANDLER: Yes, sir.

12 **CROSS-EXAMINATION**

13 BY MR. CHANDLER:

14 Q Hello, Lieutenant.

15 A How are you doing?

16 Q You got the statement right there in front of
17 you?

18 A Yes, sir.

19 Q See the line that's drawn down there in the
20 middle of it, the line kind of copy line, do you
21 have that?

22 A On the second page?

23 Q No, on the first page?

24 MR. FATA: His doesn't have that.

25 BY MR. CHANDLER:

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1 Q Let me go back and draw your attention to this,
2 okay. This gentleman is in the Sumter Law
3 Enforcement Center, right?

4 A Right.

5 Q And he's talking to you guys?

6 A Right.

7 Q And you guys ask him what happened?

8 A Correct.

9 Q Isn't that right?

10 A Yes.

11 Q He said, I shot this guy because the guy gets out
12 of the car and he's got a gun, right?

13 A Basically.

14 Q Right. He said, I called, I called my
15 girlfriend, the victim's wife, and she said he's got
16 a gun; isn't that right?

17 A Yes, that's why he said.

18 Q Now let's go through it because the statement is
19 — I want to make sure. You see that on the part
20 where my client says, he says that he was on the
21 road taking a piss. You see that?

22 A Yes.

23 Q All right. Then he says Piggy — and I take it
24 that that's Mr. Rogers, right? — jumped out and
25 said, mother fucker, what are you doing down here,

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1 right?

2 A Right.

3 Q And so we take it that Piggy was upset?

4 A Yes.

5 Q Pretty upset, right?

6 A I guess he was pretty upset, he was upset.

7 Q He said, mother fucker, what are you doing down
8 here? Okay. And I said, this was a public highway,
9 right?

10 A Right.

11 Q Now look at that. That's a period, right, after
12 that?

13 A Right.

14 Q He finished that statement. And then it says,
15 mother fucker, stay here and wait till I get back.
16 Now that's what Piggy said; isn't it?

17 A Yes. Yes.

18 Q So my client never said a curse word in this
19 statement?

20 A According to this statement.

21 Q Right?

22 A According to this statement, right.

23 Q But Piggy was yelling calling him a mother fucker
24 and telling him to wait right there, I'm coming
25 back. Is that right?

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1 A That's in the statement, yes.

2 Q So now we know that Piggy left mad, came back --
3 according to this statement -- got out of the
4 vehicle with a gun, right?

5 A By the statement, correct.

6 Q Loaded or unloaded he get out with a gun?

7 A Correct.

8 Q My client reaches behind the back of the truck
9 and shoots one time, right?

10 A Right.

11 Q And that's the incident that we're here today
12 about; is that right?

13 A That's correct.

14 Q Now just as query, question to you, this
15 gentleman, Major Dellinger, was taking down every
16 word that he said.

17 A Correct.

18 Q Asking him to slow up 'cause I cannot keep up
19 with you, right?

20 A That's correct.

21 Q And I guess what you were saying a little while
22 ago, Mr. Fata said, Mr. Toney was dictating and the
23 Major was writing it down?

24 A That's correct.

25 Q Correct?

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1 A Right.

2 Q Now what does Mr. Toney call his gun?

3 A 8-millimeter.

4 Q Okay. Is that the only description that's in
5 this statement?

6 A Yes, sir.

7 Q Okay. And that's what he told them sitting in
8 that lighted 6X8 comfortable room in Sumter, I shot
9 him with an 8-millimeter rifle; is that right?

10 A That's right.

11 Q That's all he said about it; wasn't it?

12 A Correct.

13 Q Well, how in the world did you guys go to the
14 magistrate and tell the magistrate that you were
15 looking for an army style bolt action wooden stock
16 rifle?

17 A Before we left and after we determined that he
18 was going to be placed under arrest I asked him the
19 question, we need a detailed description of the
20 weapon.

21 Q It ain't written down anywhere, is it?

22 A No, it's not.

23 Q So we didn't know that before we came in here,
24 did we?

25 A No, we didn't.

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1 Q And the fact Mr. Fata decided he would drop,
2 would cover up a little bit from these other guys
3 had not said something to us and made them write
4 another statement ---

5 MR. FATA: I'm going to object to that.

6 THE COURT: Wait a minute just a is a they
7 could?

8 MR. FATA: I don't understand what he said
9 I did. He said I'm ---

10 THE COURT: Mr. Chandler, that's -- you
11 can rephrase the question.

12 MR. CHANDLER: I certainly can.

13 THE COURT: That's ---

14 MR. CHANDLER: Before ---

15 THE COURT: Wait just a second. Objection
16 is sustained. Rephrase the question.

17 BY MR. CHANDLER:

18 Q Were you asked to write a supplemental statement
19 to give to us about the gun description?

20 A No, I did not.

21 Q Were you aware when we had a meeting last week
22 regarding what Mr. Toney had said about weapons that
23 we were given a supplemental statement?

24 A I did not.

25 Q So this statement that you made was the first

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1 time any of us had heard it; is that right?

2 A To my knowledge, yeah.

3 Q Okay, that's all I needed. Thank you so much.

4 THE COURT: Redirect.

5 MR. FATA: Thank you, Your Honor.

6 **REDIRECT EXAMINATION**

7 BY MR. FATA:

8 Q Let's go back to Mr. Toney's statement. Let's go
9 to "Piggy pulled up in front of me and jumped out.

10 He said, mother fucker, what are you doing down
11 here. I said, this is a public highway. Mother
12 fucker, so stay" -- so he is using the language,
13 he's, Mr. Toney using the language that appears to
14 be angry; doesn't it?

15 A Not on the statement.

16 Q I said this is a public highway, mother fucker,
17 is not what -- that's what Mr. Toney said.

18 MR. CHANDLER: Absolutely object, that's
19 leading.

20 THE COURT: Sustained.

21 BY MR. FATA:

22 Q What did Mr. Toney say about the public highway?

23 A He said I said, and the guy in parentheses says
24 this is a public highway, comma, and parentheses.

25 Q And then?

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1 A Mother fucker, stay till I get back.

2 Q Okay, I'm misreading the statement then. Okay,
3 let's go to the second page. He tells Mister — he
4 tells Lorie, Mr. Toney tells Lorie he's not worried
5 about no gun.

6 A That's correct.

7 Q Okay. Now do we know that Mr. Rogers left the
8 first time? According to this statement Mr. Rogers
9 left the first time.

10 A That's correct.

11 Q And Mr. Toney stayed?

12 A First statement, yes.

13 Q Mr. Toney just sat there?

14 A Right.

15 Q Mr. Toney sat on a, dead end of the road, John
16 Wesley Road?

17 A Yes.

18 Q Which is a short distance from where Mr. Rogers
19 lived?

20 MR. CHANDLER: Objection, he's leading,
21 Judge.

22 THE COURT: Sustained, just ask — you may
23 not lead.

24 BY MR. FATA:

25 Q Okay. How far was John Wesley Road to where

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1 Mr. Rogers lived?

2 A Between two and three-tenths of a mile.

3 MR. FATA: That's it.

4 THE COURT: Anything else?

5 **RECROSS-EXAMINATION**

6 BY MR. CHANDLER:

7 Q So if I took a gun from the scene I would only
8 have to go about two tenths of a mile to get back to
9 the Rogers house; is that right?

10 A That's correct.

11 MR. FATA: That's outside of my redirect.

12 THE COURT: Overruled. Anything else?

13 MR. FATA: One other thing.

14 **FURTHER DIRECT EXAMINATION**

15 BY MR. FATA:

16 Q Was a gun found at the scene?

17 A No, it was not.

18 Q Was the scene canvassed looking for a gun?

19 A Yes, it was.

20 Q And none was found?

21 A None was found.

22 THE COURT: That's it.

23 **FURTHER RECROSSE-EXAMINATION**

24 BY MR. CHANDLER:

25 Q That's because you guys didn't get there until

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THE COURT: That's it.

Step down. Thank you.

MR. FAITA: That's the State's case. The State rests.

THE COURT: All right. Ladies and gentlemen, we're gonna break for lunch now. Before I tell you what time to come back I'm going to ask the attorneys to come up please.

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

THE COURT: If you would go back to the jury room for a few minutes. Of course, do not discuss the case.

(WHEREUPON, the jury was removed from the courtroom at 12:51 p.m.)

THE COURT: All right, any motions from the Defense?

MR. KENT: Judge, at this point in time, one, we'd like to renew all motions made during the course of the trial, not to mention all motions that were made at the beginning of trial. All of our pretrial motions, I renew all those. And specifically, at this point in time we move for directed verdict just based upon the lack of

1 evidence presented by the State which I understand I
2 have to make a directed verdict motion based on
3 taking the evidence in a light most favorable to the
4 nonmoving party who is this case, of course, the
5 State of South Carolina. We would ask the Court
6 grant a verdict of not guilty based upon the
7 evidence, and I believe that's it.

8 THE COURT: Okay. Mr. Fata.

9 MR. FATA: Your Honor, I think there's
10 sufficient evidence in which the jury could find
11 that the defendant was guilty of this crime.

12 THE COURT: All right, Mr. Kent, I will
13 respectfully deny your motions including the
14 directed verdict motion. There's, of course, it's
15 evident I'm only concerned not with weight of
16 evidence but the existence, and I think there's
17 sufficient evidence to support the case going
18 forward. Would your client come forward please to
19 be sworn.

20 THE CLERK: Raise your right hand.

21 WHEREUPON,

22 **ERNEST TONEY,**

23 having been duly sworn by the Clerk, testified
24 as follows:

25 THE COURT: Your name, sir.

1 THE DEFENDANT: Ernest Toney.

2 THE COURT: Mr. Toney, at this time I'm
3 going to explain to you certain rights that you
4 have. If you don't understand anything that I say,
5 all you have to do is let me know also during the
6 course of this proceeding, this particular
7 proceeding, if you would like to stop and confer
8 with your attorney about anything would you please
9 let me know?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: All right. We've reached the
12 stage of trial now since you heard that the State
13 has rested. That means the State has presented all
14 the evidence that it's going to present in its case
15 in chief. You now have the right to claim certain
16 protections granted to you by the Fifth Amendment to
17 the constitution of the United States and that
18 amendment states in pertinent part that no person
19 shall be compelled in any criminal case to be a
20 witness against himself. What that means is that
21 you cannot be forced to testify. No one can make
22 you take the witness stand against your will. You
23 understand that?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: For example, you have seen

1 other witnesses come forward, be sworn, and take the
2 witness stand. In most instances and in this case,
3 in those instances the witness has to take the stand
4 even though he or she might not want to. Do you
5 understand that?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Since you're accused of a
8 crime or since you do have those rights under Fifth
9 Amendment, no one can make you do that. For
10 example, of course Mr. Fata cannot. Even your own
11 lawyers cannot make you take the witness stand
12 against your will. You understand that?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: The reason for that is that
15 the right which you have under the Fifth Amendment
16 are personal rights. Since they are rights personal
17 to you, you're the only one who can give them up.
18 Do you understand that?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: If you decide to testify
21 you'll be basically subject to the same rules that
22 govern the direct examination and the
23 cross-examination of any other witness who
24 testifies. You understand that?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: In other words, your lawyers
2 question you and then Mr. Fata would be permitted to
3 cross-examine you. You've seen that with the other
4 witnesses, right?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: That's basically the same
7 proceeding, that same procedure that would occur if
8 you testify.

9 Now Mr. Fata, does the defendant have any
10 type of criminal record that the State would seek to
11 introduce?

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

13 THE COURT: All right. If you decide to
14 testify, that decision on your part has to be made
15 freely and voluntarily and intelligently by you with
16 full knowledge of your rights and with full
17 knowledge of the consequences of your decision to
18 testify. Do you understand that?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: In other words, you can be
21 examined and cross-examined on any relevant
22 component of this case. Do you understand that?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: If you decide not to testify I
25 will tell the jury, I will instruct the jury and

1 emphasize to the jury the fact that you did not
2 testify cannot be considered by them at all.
3 Basically what I'd tell the jury in that instance is
4 that the fact that you did not testify is something
5 that they cannot even think about, they can't talk
6 about it, and that cannot enter into their decision
7 whatsoever on the issue of whether or not you're
8 guilty or not guilty. You understand that?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Also I'd tell the jury if you
11 do testify that does not mean you have assumed the
12 burden of proving anything with or disproving
13 anything. Do you understand that?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Now in the end it's left
16 entirely up to you whether or not you do or do not
17 testify. You may consult with your lawyers and
18 perhaps family members already about that; but in
19 the end after you thought about it and given it
20 consideration that you should, the decision in the
21 end is yours. Do you understand that?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Have you talked to your
24 lawyers about it?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Mr. Kent and Mr. Chandler, do
2 you below you need to consult with your client any
3 further about it, or do you — has he made his
4 decision?

5 MR. CHANDLER: Yes, sir.

6 THE COURT: He's made his decision?

7 MR. KENT: He has, Judge.

8 THE COURT: And what is that decision,
9 sir?

10 THE DEFENDANT: No, sir.

11 THE COURT: That you will not testify?

12 THE DEFENDANT: I will not.

13 THE COURT: Okay. Has anyone forced you
14 to make that decision?

15 THE DEFENDANT: No, sir.

16 THE COURT: Have you made that decision
17 freely and voluntarily with full knowledge of your
18 rights?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Have you explained everything
21 -- excuse me, have you understood everything we've
22 been over?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Now in a moment I'm gonna call
25 the jury back in on the assumption that when I -- by

1 the way, Mr. Kent, are you going to offer any other
2 witnesses?

3 MR. KENT: I will not offer other
4 witnesses, Judge.

5 THE COURT: So by bringing the jury in now
6 based on your client's responses ---

7 MR. KENT: I will not. Rest my case.

8 THE COURT: Now when that jury is coming
9 in the door, if you change your mind or if you think
10 hey, I need to talk to my lawyer a little bit more,
11 you tug Mr. Kent and Mr. Chandler's sleeve and say,
12 not so fast, I think want to testify. Of course you
13 understand that what you just told me is not the
14 end; but as soon as your lawyer says you do rest,
15 then it's over. You understand that?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Okay. Now you, again, you
18 understood everything I explained to you?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Do you have any questions at
21 all?

22 THE DEFENDANT: No, sir.

23 THE COURT: Okay. Now anything that you
24 think I need to cover, Mr. Kent?

25 MR. KENT: Nothings, Judge, you've covered

1 it all.

2 THE COURT: Anything else you need?

3 MR. CHANDLER: No, sir.

4 THE COURT: Mr. Fata?

5 MR. FATA: No, sir.

6 THE COURT: You can have a seat.

7 What we'll do, gentlemen, is use -- since
8 we do have to go over the jury charge, the specifics
9 of the jury charge, what would be the best realistic
10 time for me to tell the jury to come back so we can
11 go over charges. You may have a debate about some
12 charges, and for you gentlemen to have time to
13 prepare?

14 MR. FATA: Once they, once we finish that
15 argue and charge they're gonna be deliberating, you
16 let them come back today, tomorrow?

17 THE COURT: No, they're going to do it
18 today.

19 MR. FATA: Okay. I don't think there's
20 that much that I need to ask about.

21 THE COURT: Melissa, what's your watch
22 say?

23 THE COURT REPORTER: It says 12:59.

24 MR. FATA: So if they were to come in
25 immediately I will tell them to come back 2:15; is

1 that sufficient?

2 MR. CHANDLER: 2:15, 2:30.

3 THE COURT: And then we can spend some
4 time talking about the charge and then go to lunch
5 and then you can prepare as you need to prepare,
6 okay. Does that suit everybody?

7 MR. FATA: Yeah.

8 MR. CHANDLER: Yes, sir.

9 THE COURT: You can bring in the jury.

10 (WHEREUPON, the jury was returned to the
11 courtroom at approximately 1:00,
12 and the following proceedings commenced
13 in open court.)

14 THE COURT: All right, ladies and
15 gentlemen, thank you. The State has rested.
16 Mr. Ken, will defendant be offering any evidence?

17 MR. KENT: Thank you, Your Honor. Based
18 upon testimony or conversations with my client as
19 well as Mr. Chandler in the State's Case, we have
20 elected not to put a case on at this time.

21 THE COURT: So you do rest?

22 MR. KENT: Defense will rest.

23 THE COURT: All right, ladies and
24 gentlemen, what that means is that the evidence that
25 is going be introduced in this case has now been

1 introduced. All the evidence that will be
2 introduced is in. Nothing else will be introduced.
3 The next stage of the trial coincidentally will be
4 for me to discuss with the attorneys certain matters
5 as to what I will charge you on the law after the
6 arguments are concluded. It is lunch time so I'm
7 gonna allow you to go on to lunch and I'm gonna stay
8 behind with the attorneys and go over this during
9 the lunch break, if you would, please be back in
10 your jury room at 2:15. And let's be more specific,
11 in an hour and fifteen minutes, okay. Maybe we can
12 get somebody in a fix that clock so I'll know better
13 what time to tell you. Please be back in your jury
14 room let's 2:15 or an hour and fifteen minutes from
15 now.

16 During lunch you may not discuss the case
17 at all. You can't read anything about it, discuss
18 anything about it, research anything about it at
19 all. That time for you to discuss it is coming very
20 soon; it will be this afternoon. Because the next
21 stage of the trial will be the closing arguments,
22 then I'll charge you on the law, then you will be
23 released to deliberate. So don't do anything to
24 violate what I've asked you not to do. See you at
25 2:15 and thank you for your patience.

1 (WHEREUPON, the jury was removed from the
2 courtroom at 1:02 p.m. and the following
3 procedures commenced.)

4 THE COURT: All right, would either side
5 like to take a recess before we start or you want to
6 go right into the charge? Melissa, you okay?

7 THE COURT REPORTER: Yes, sir.

8 THE COURT: Does the State have anything
9 in writing that they would look to present to me to
10 review?

11 MR. FATA: No, sir.

12 THE COURT: Does the Defendant?

13 MR. KENT: Not in writing, no, sir.

14 MR. FATA: Do you plan to charge
15 voluntary?

16 THE COURT: Well, we're gonna get into
17 that. The first thing I want to know does anybody
18 have anything in writing?

19 MR. FATA: No, I said no.

20 THE COURT: Okay, and they don't. So
21 specific charges and I guess track and call into is,
22 well, other than your general charge I would like so
23 and so. General charge is not defined anywhere, but
24 the first question is about voluntary manslaughter.
25 Does the State request a charge on that?

1 MR. FATA: Yes, sir.

2 THE COURT: Does the Defendant?

3 MR. KENT: We have no objection to that
4 charge.

5 THE COURT: Lesser included of voluntary
6 manslaughter I'll look at the elements of that, and
7 I don't disagree that appropriate but I'll take a
8 closer look at it.

9 MR. FATA: Well, he said — the statement
10 says that the victim had a gun. You know, it could
11 have been a, could not have been malice there or
12 something, you know.

13 THE COURT: All right, okay, so —

14 MR. FATA: Or may not have been malice.

15 THE COURT: Anything else specifically the
16 State would request?

17 MR. FATA: No, sir.

18 THE COURT: Anything specific from the
19 Defense?

20 MR. KENT: Of course, the first one we
21 request is self-defense charge pursuant State versus
22 Fuller. We believe looking at the —

23 THE COURT: State versus —

24 MR. KENT: I think it's State versus
25 Fuller, Judge, it spells out the self-defense

1 charges of the elements of self-defense.

2 THE COURT: Okay.

3 MR. KENT: But specifically, I guess, our
4 rationale and we can argue that our rationale is
5 based upon Mr. Toney's testimony which technically
6 is in the record by his statement, the statement of
7 Lorie Rogers. I think there's some existence in the
8 record which would justify and satisfy the
9 self-defense charge coupled with the fact that even
10 (indiscernible) said to the jury they're arguing
11 self-defense. I think that a self-defense charge in
12 this case would be appropriate.

13 THE COURT: Anything else that you would
14 request specifically?

15 MR. KENT: Let me make sure, Judge, I
16 would definitely request an expert charge. I think
17 you're gonna already charge the testimony of an
18 expert the definitely goes charge the testimonying
19 on the right to act on appearances I think charge
20 says defendant had right to act on appearances.

21 THE COURT: That's part of self-defense.

22 MR. KENT: Part of the self-defense
23 charge. Make sure I got everything. I think
24 there's prior difficulties charge also Judge prior
25 different defendant as well as the victim I think

1 that testimony has been put inside record from marry
2 Rogers.

3 THE COURT: Let me stop you just a moment
4 to you object is self-defense charge.

5 MR. FATA: Your Honor, the — I have
6 hardly he said he the defendant got out of the truck
7 with a long gun. It doesn't say he pointed it at
8 him he cocked it anything like that said he got out
9 of the truck with a long gun didn't indicate that
10 the gun was used in any fashion he said that I got
11 my gun out and shot him. Just because you get out
12 of a truck, hunters do that every day, get out of a
13 truck with a gun.

14 THE COURT: Not after they've said, stay
15 right here, MF, I'll be right back; if the jury
16 believes the —

17 MR. FATA: He could.

18 THE COURT: —that statement.

19 MR. FATA: And second part of that is he
20 could have retreat and he didn't. He could have
21 gone.

22 THE COURT: Well, that's the primary
23 point.

24 MR. FATA: Crank up and left. So he just
25 sat there and waited, he could have cranked up and

1 left.

2 THE COURT: All right, that brings to bear
3 what I've always wondered about this new statute we
4 have. If someone is in a place where they have a
5 legal right to be and then it says including one's
6 own business, which I don't know why you got to
7 include something if it says if they're in a place
8 where they have a legal right to be, there is no
9 duty to retreat. I don't understand -- we all call
10 that the Castle Doctrine which typically is tied to
11 one's house, but that's what the statute says. Of
12 course, that's more of an immunity statute than it
13 is a self-defense statute but. How about the duty
14 to retreat? You've got a situation where evidently
15 Mr. Toney probably knew, circumstantially, where Mr.
16 Rogers lived. And he says in a threatening way, you
17 stay right here, I'll be right back and then he
18 leaves in that vehicle. Did not Mr. Toney have the
19 time and the means to truck on out of there?

20 MR. KENT: Judge, I don't think so. I
21 think realistically that's the problem with the
22 testimony. I think realistically we have in this
23 situation is one evidence in the record that would
24 justify self-defense charge we have the duty to
25 retreat. I've got to be honest, I got to read that

1 again, see actual duty to retreat specifically
2 required. But if we look at it in a light most
3 favorable to Mr. Toney, what ends up happening he
4 sees an individual, he says you wait right here, I'm
5 not even sure that he actually wait right there in
6 that situation. I don't think that statement said,
7 oh, I'll wait right here for him to come back. I
8 got on the phone, next thing I know he was back
9 getting out of his car with a gun. It doesn't even
10 say he actually has time to retreat.

11 THE COURT: You agree that the duty to
12 retreat at least is something that the jury has to
13 determine as part of whether or not you're —

14 MR. KENT: They can argue.

15 THE COURT: —disproving self-defense?

16 MR. KENT: Yes, sir. It takes away from
17 any self-defense charge. I think that's an argument
18 that Mr. Fata will be able to make to the jury.

19 THE COURT: All right, okay.

20 Mr. Fata.

21 MR. KENT: Let me —

22 THE COURT: I need to go back to him
23 because what I'll do, Mr. Kent, if I do charge
24 self-defense, everything that is within the realm of
25 self-defense that could factually apply to this case

1 I will charge such as act on appearances, prior
2 difficulty. Mutual combat is not an issue in this
3 case. In other words, I'll call those out before we
4 begin the argument. Before you begin the argument
5 I'll let you look at the ones that I crossed out and
6 the ones that I circled. That's if I, of course if
7 I charge it.

8 MR. KENT: Yes, sir.

9 THE COURT: All right. And you may have
10 seat, Mr. Fata.

11 Mr. Kent, is there anything else that you
12 specifically would like for me to give?

13 MR. KENT: Can you can give me a second to
14 talk to Mr. Chandler for a moment.

15 (Pause.)

16 MR. KENT: Judge, I don't believe we have
17 any.

18 THE COURT: Mr. Fata -- I'll come back to
19 you -- would you like to be heard further on
20 self-defense?

21 MR. FATA: No, sir, I think my position is
22 clear, that he had a duty to retreat. I think
23 that's an element of self-defense if he can retreat
24 without being, you know, put himself in additional
25 danger or whatever. And the Castle Doctrine I don't

1 think applies in this case simply because it hadn't
2 been raised as a defense.

3 THE COURT: Well, it's not a defense, it's
4 an immunity.

5 MR. FATA: It's an immunity and it hadn't
6 been raised.

7 THE COURT: Well, I think it's — the
8 statute is really not clear on when it has to be
9 raised. Since it's characterized as an immunity
10 under a recent case, it's typically brought up, if
11 at all, during the pretrial stage and it does belong
12 together with self-defense at least philosophically
13 but it's — what I'll do, if I charge self-defense
14 I'll charge the common law self-defense. Is that
15 what you're asking for?

16 MR. KENT: Yes, sir, Judge.

17 THE COURT: Okay. All right. If either
18 of you would like to peak at my charge, I do not
19 give a written copy to the jury. If either of you
20 would like to peak at it for reasonable doubt, for
21 the elements of the crime, for any specific part of
22 the charge, I'll let you look at it. And if you
23 want to take it somewhere and copy it, that's fine;
24 but don't put it on the projector. I've seen people
25 do that. I don't, I don't want you to do that.

1 Also, the verdict form, of course you will have a
2 copy of that but I'm not gonna allow you to put that
3 on the projector.

4 MR. KENT: Okay by me, Judge. Just to
5 cover myself on the, just for the record, I
6 understand we technically could have argued the
7 qualified immunity, and I think there's some things
8 out there that say ---

9 THE COURT: It's not qualified, it's
10 absolute.

11 MR. KENT: Absolute immunity that we could
12 argue, but it's also becomes a pretrial. It becomes
13 a mini trial within a trial so discretionary
14 strategy decision. There's no reason for us to want
15 to try the case twice, let then know our strategy.
16 That's what we wanted to ---

17 THE COURT: We'll be helped out in the
18 coming years about some development of that case
19 law, but we'll go forward with the self-defense
20 issue. More than likely, Mr. Fata, I'm gonna charge
21 it as -- if I were a fact finder, to me the most
22 debatable part of the self-defense would be why
23 didn't Mr. Toney just leave. But as a matter of
24 law, I don't think I cannot charge it. In other
25 words, that's a jury question. All right, thank

1 you. I'll see you back, let's just call it in about
2 an hour. Okay.

3 (Whereupon, a lunch break was taken.)

4 THE COURT: Ready to begin with the
5 arguments?

6 MR. FATA: Yes, sir.

7 THE COURT: Anything from the State?

8 MR. FATA: Can we approach, Your Honor,
9 just a moment.

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

12 THE COURT: Is the State prepared to go
13 forward?

14 MR. FATA: Yes, sir.

15 THE COURT: Mr. Kent?

16 MR. KENT: Yes, sir.

17 THE COURT: Mr. Chandler?

18 MR. CHANDLER: Yes, sir.

19 MR. FATA: Your Honor, what is the order
20 of argument?

21 THE COURT: You will go first, Defense
22 will go last, there will be no reply.

23 MR. FATA: I just want to make sure.

24 MR. CHANDLER: Mr. Fata says he's gonna
25 waive opening.

1 THE COURT: Let's make sure that if you
2 hold the weapon during the closing there will be no
3 reenactment. You can touch it but it has to be
4 pointed completely up in the air or down at the
5 floor. If you take an exhibit from the court
6 reporter during the argument, don't put it on your
7 table and forget to give it back to her. I've never
8 had to call time on an attorney in argument. I'll
9 leave it up to your good judgment how long you will
10 and should take.

11 MR. FATA: You let me know — if you don't
12 mind I'll set my I-phone time. Would that be okay
13 with you?

14 THE COURT: Oh, you can take two hours,
15 suits me fine, but I don't think the jury will like
16 it.

17 MR. FATA: Well, if I do forget, knock on
18 the counter, knock on your desk at 30 minutes?

19 THE COURT: Well, I don't want the jury to
20 think I'm cutting you off.

21 MR. KENT: I will, Judge.

22 THE COURT: Why don't you just tell the
23 jury that I'm going to do the best I can do to take
24 this amount of time, and we all know the preacher
25 rule, after 15 minutes you begin to lose everybody.

1 So I'm gonna leave -- I'm not gonna tap on the ---

2 MR. FATA: Okay.

3 THE COURT: I don't want the jury to think
4 that I'm calling time on the State and then I don't
5 call time on Mr. Kent. The verdict form will say as
6 to the charge of murder, we, the jury, find the
7 defendant not guilty or guilty. If you have found
8 that the defendant guilty of murder, stop and
9 deliberate no further. If you have found him not
10 guilty, proceed to question number 2, that being
11 voluntary manslaughter. The same two options not
12 guilty, guilty. And then a place for Mr. Pettus,
13 the foreman, to sign. I'll also tell the jury that
14 the weapons can get in the jury room; the ammunition
15 can be in the jury room, by none of it at the same
16 time. In other words, all bullets or all guns, but
17 not both. And I'll tell them not to fiddly with --
18 I don't know, I'll think of a fancier word than
19 fiddle. They can't fiddle with the weapons and
20 manipulate on any type of chamber on either weapon
21 and they're not to put anything in it. We don't
22 have any drugs in any BEST kit type thing I think
23 the investigator ---

24 MR. FATA: You might want to caution them
25 about number 36 which is the shirt.

1 THE COURT: Not to take it out.

2 MR. FATA: We don't have any gloves and it
3 is —

4 THE COURT: It's sealed.

5 MR. FATA: Well, yeah, it's got evidence
6 tape on it but it's a biohazard.

7 THE COURT: Okay. Anything, Mr, Kent?

8 MR. KENT: No, sir.

9 THE COURT: Mr. Fata, you ready?

10 MR. FATA: Yes, sir.

11 THE COURT: Okay, bring in the jury.

12 (WHEREUPON, the jury was returned to the
13 courtroom at approximately 2:19 p.m., and
14 the following proceedings commenced in
15 open court.)

16 THE COURT: All right, ladies and
17 gentlemen, let me have your attention for just a
18 minute as I mentioned to you before lunch, all of
19 the evidence that is going to be introduced in the
20 case has been introduced. We now move forward to t
21 he part of the trial during which the two sides are
22 permitted to give closing arguments. This is the
23 opportunity of the parties to argue to you the
24 conclusion that they believe the evidence or lack of
25 evidence will tell will be in this case. I will

1 remind you that the lawyers are not witnesses. In
2 other words, they cannot stand up and introduce
3 evidence out of their own mouth so, but they are
4 permitted to refer to evidence that is in the
5 record. They tell you that and read that into their
6 arguments.

7 If a lawyer says something during the
8 course of argument that does not correspond with
9 your collective memory of what the evidence actually
10 was, of course you go with your memory. They
11 wouldn't purposefully mischaracterize any evidence,
12 but just make sure you understand that instruction.
13 Also, they are permitted to refer to the points of
14 law that I will charge you. As I mentioned to you,
15 I did have a conference with the lawyers about the
16 points of law that will be charged. The charge is
17 the law that I'll give you. If a lawyer refers to a
18 point of law that does not correspond with the law
19 as I give it to you, you go with the law as I give
20 it to, not what the attorney may mistakenly say.
21 They won't purposefully mischaracterize it, but just
22 keep that in mind.

23 The order according to the rules will be
24 this, Mr. Fata for the State will present the first
25 argument. And then after that, either Mr. Kent or

1 Mr. Chandler will present argument for the
2 defendant. The -- I don't call time on lawyers,
3 don't set a time but I do permit if they want to
4 time themselves and to have a beeper or something go
5 off to let them know that they're at the end point
6 of their self I, allow them to do that. One or both
7 of the lawyers may do that. Please, please give
8 them your undivided attention. This is not the time
9 to take a little snooze. It's not the time to let
10 your attention wander because this is extremely
11 important, just as any other portion of the trial
12 would be. And they all expect and they certainly
13 are entitled to your absolute undivided attention.
14 All right, Mr. Fata.

15 MR. FATA: Thank you, Your Honor. Now
16 ladies and gentlemen, I'm setting my time for 30
17 minutes, this thing will go off. Hopefully I will
18 be through by then.

19 THE COURT: Mr. Fata, I'll interrupt you.
20 Any time during the argument, Mr. Kent or
21 Mr. Chandler, you need to see the TV or vice versa,
22 you feel free.

23 MR. CHANDLER: Thank you, sir.

24 MR. FATA: I'm gonna hold myself to 30
25 minutes because you have heard the facts. They were

1 represented through — they were cross-examined by
2 Mr. Kent and Mr. Chandler. You've heard the
3 evidence. You know what was presented to you. You
4 heard the witnesses testify and you see these
5 lawyers plus exhibits into evidence, and you will
6 have those back in the jury room.

7 Now the important thing to remember is why
8 you are here. A lot of people say, well, the judge
9 is a lawyer, the solicitor is a lawyer, defense
10 attorney is a lawyer, but I'm not, and we're talking
11 about legal issues and we're applying laws of fact,
12 what I am I going here, why should I sit here and
13 listen to this and what do I bring to the table
14 that's important. What you bring to the table is
15 your life's experiences. You bring what is known as
16 common sense. All of you have families, jobs,
17 belong to clubs variations organizations, and
18 churches, and so forth. And you use that common
19 sense and I think the judge mentioned that a little
20 bit; but it's important that you take that common
21 sense, those life's experiences that you have over
22 your life time and you look at the evidence, look at
23 the evidence and apply that common sense. You don't
24 get that anywhere else but by having citizens of the
25 county or the city or wherever, the State, sit here

1 and look at the evidence.

2 Now Mr. Toney is charged with the crime of
3 murder and I'm not gonna go a lot into this. His
4 Honor is gonna tell you what the legal definition is
5 and so forth. And basically it's killing, unlawful
6 killing of somebody with malice aforethought, you
7 know, a wrongful act, and that you plan it out. You
8 don't have to plan it out for days, months or years;
9 but it can be instantaneously, at the time the act
10 is done, you intend that the person you kill die.

11 Now His Honor is also gonna charge you a
12 lesser included offense for voluntary manslaughter,
13 and that is the unlawful killing of somebody without
14 malice. And I'm gonna let the judge take care of
15 that and explain that to you. He's got a very good
16 charge on that, but it's what is known as a lesser
17 included charge of murder. So His Honor will
18 explain that to you and you will have that back in
19 your deliberation.

20 Now let's talk about this case in
21 particular. On September the 12th, 2010, here in
22 Lee County the defendant Mr. Toney, who by the way
23 lives in Sumter County or in the city of Sumter out
24 towards Goldkist. From John Wesley Road it's sort
25 of like on the other side of the county; it's a long

1 way away. Officer, Major Dellinger says it's about
2 a 30 minute drive. And on the 10th -- on the 12th,
3 September 12th, 2010, Mr. Toney is parked on John
4 Wesley Road, a dead-end road in Lee County, a couple
5 of houses back there, but it goes nowhere. But it's
6 about a tenth of a mile to Lorie Rogers' and Gregory
7 Toney's house.

8 Now unfortunately, Ms. Rogers -- and I
9 hate to bring all this up but it's a fact of the
10 case. Ms. Rogers was in a relationship with Mr.
11 Toney and she was living with her husband. In fact,
12 the last child she had was the child of Ernest
13 Toney. That relationship was going, the sexual
14 relationship, that relationship was going on and I
15 think Ms. Toney -- Ms. Rogers testified that she had
16 been with Mr. Toney the day before, this afternoon
17 before. I really felt sorry for Ms. Toney's
18 testimony because I believe she had feeling, some
19 overriding guilt because whenever you have a
20 situation where you're balancing two men -- or it
21 could be the other way, bouncing two women -- but in
22 this case it's two men, one is your husband and the
23 other is your paramour. You have a child with that
24 person and you're living in the home with your
25 husband and then somebody, something like this

1 happens, you have to feel some amount of guilt. And
2 I really felt sorry for her and continue to feel
3 sorry for her. And she got on the stand, and she
4 cooperated the best she could. And she cooperated
5 with law enforcement in the beginning and
6 everything.

7 But what is Mr. Toney doing on John Wesley
8 Road? Why would he be there? He has no business
9 there. He had no store there. There's no relative
10 in the area then. Oh, well, I guess his daughter is
11 at the house down here where Mr., where Mr. Rogers
12 lives; but there's no reason for him to be there.
13 And unfortunately, Mr. Rogers and Mr. Toney get
14 together at some point and Mr. Toney shoots
15 Mr. Rogers and kills him. And we have this crime
16 scene. We have this crime scene. We have
17 Mr. Rogers laid out in front of the vehicle.

18 And law enforcement begins, is called to
19 the scene. Now we know Mr. Rogers is alive at 4:30
20 in Sumter and it's about a 30 minute ride back to
21 this spot so at 5:00 Mr. Rogers is alive. The call
22 comes in at 6 so between 5 and 6 on the, on that day
23 Mr. Rogers was killed. Law enforcement begins their
24 investigation. They come and secure the scene.
25 SLED crime scene comes and so forth. They begin

1 their investigation. And how do you get to the —
2 what do you do? How does an investigation start?
3 Well, the crime scene comes out — excuse me, they
4 first secure the crime scene which means that
5 they're not going to let other people in and out.
6 They're not going to let people trample all over
7 everything. Does everybody watch CSC? Protecting
8 the crime scene is one of the primary things that
9 they do. And that's what the sheriff, the sheriff's
10 deputies did and so forth, protecting that crime
11 scene. And when Kim Dihn came, the crime scene
12 investigator, she was able to go ahead and gather
13 whatever evidence was available at the time. It was
14 not a complicated crime scene. It was outside in a
15 confined, not confined area but, on a straight road.
16 Law enforcement, she gathered evidence. I asked
17 her, I said, could you tell the body had been moved.
18 She said the body had not been moved, and I said,
19 how do you know? She said, well, you can tell by
20 the, you can tell by the blood smears. And she
21 showed us an example of blood smear. She said if
22 you look, if you look on here and you see this right
23 here by the arm opening, you see a little smear.
24 She said that's an example of blood smear. And she
25 said, I looked around the edges of the blood path,

1 blood pool and so forth, that body had not been
2 moved. She said the smear here is caused by the
3 shirt being pulled down to put this pad on so you
4 can see if Mr. Toney's heart is beating. She said
5 the body hadn't been moved.

6 Now Major Dellinger, Lieutenant Hickman,
7 and other officers went to the scene, part of their
8 investigation, and what they were trying to do?
9 They were attempting to determine what, where Rogers
10 had been that day, who he had associated with that
11 day. And as a result of taking Ms. Rogers'
12 statement they were directed, or Mr. Toney became
13 somebody they wanted to talk with. He became a
14 person of interest. So like good law enforcement
15 they go over to Sumter and they interviewed
16 Mr. Toney. And I went through, I took a lot of
17 trouble to go through the Miranda. I went through
18 it with Major Dellinger. I went through it with
19 Lieutenant Hickman because, and I didn't do that
20 just because I like to do that or because I like to
21 see it on TV when -- I don't know, when somebody in
22 Law and Order arrests somebody. I do that because
23 this is important, that a defendant knows, that a
24 person who is interviewed knows that he doesn't have
25 to say a word, he can keep his mouth shut. He

1 doesn't have to say a word. He's got a right to an
2 attorney, but also he knows that if he says anything
3 that it will be used in a court of law. It can and
4 will be used in a court of law. Both Lieutenant
5 Hickman and Major Dellinger said, we went over it
6 with him, it's my practice to check it off here,
7 right here. He signed saying that he understood
8 them. He signed saying he waived them, and there
9 are your two witnesses. Now there was no pressure
10 put on him.

11 Now he gives a statement. He gives a
12 voluntary statement. The defense wants to make up a
13 lot of, wants to say that, well, they didn't write
14 down every word he said. I guess they should have
15 written down both, my name and Major Dellinger, and
16 then, and what Mr. Toney said, probably said hello.
17 Of course, write that down. That ain't the way
18 statements work. Statements aren't in a vacuum.
19 Police officers close the door you're gonna work the
20 case, what he's there for. When he goes down to the
21 station you can't just say, okay, tell me something.
22 You've got to explain what you're there for; you've
23 got to explain why he's there. You've got to tell
24 him what has happened, that there's an investigation
25 going on regarding, and I guess in this case, the

1 killing of Gregory Rogers. That's common sense
2 you're gonna have those preliminary discussions;
3 they're not written down. There was something
4 about, oh, well, he didn't videotape this. Well,
5 Major Dellinger said, well, we don't videotape
6 generally unless it's a DUI. And his practice --
7 and the sheriff, your elected sheriff who is not
8 here, but your elected sheriff's policy is not to
9 videotape. I mean, you can videotape. But after
10 preliminary, use your common sense, ladies and
11 gentlemen, after preliminary the defendant is asked,
12 do you want to make a statement. He don't have to
13 say a word one. So he says, no, I don't want to say
14 anything, I don't want to say anything. And once he
15 says that, or he says I want a lawyer, once he says
16 that it's bye, you don't -- that's it; that's the
17 end of it. But in this case Mr. Toney elected to
18 give a statement, and he says, I want Major
19 Dellinger to go ahead and write it down 'cause he
20 doesn't write well. And you'll have his statement
21 in the jury room. Basically what he says is that on
22 that date he, Mr. Toney says, he went to, through
23 Mayesville, turned on █████ Saint Charles Road and
24 went over here to, I'm assuming it's John Wesley
25 Road. That's where the body is found; that's where

1 Mr. Rogers body is found. He sees, he sees Gregory
2 Rogers.

3 Now do you think there's some tension
4 between those two? And why is Mr. Toney and
5 Mr. Rogers in this neighborhood in his face. Why is
6 he over thumbing his nose at Mr. Rogers? He's
7 already got Mr. Rogers' wife. Mr. Rogers is already
8 raising his daughter. Why is he adding insult to
9 injury? Why do that? Toney had no business in that
10 neighborhood. Two tenths of a mile, one tenth, two
11 tenths of a mile from where Mr. Rogers lives.
12 Mr. Toney says, oh, now I had a right to be there.
13 Well, I guess so. He had a right to be anywhere on
14 any street, a right to be on any street. Under
15 normal circumstances that's a valid, valid reason to
16 be anywhere. But why are you in Mr. Rogers'
17 neighborhood. Can't be there but no other reason
18 than control. That's the only reason to be there.
19 He says that basically, Mr. Rogers says, what are
20 you doing here. He says, I got a right to be
21 anywhere I want to be. Mother fucker, he says, wait
22 here. Mr. Rogers says, wait here, I'll be back.
23 Why did Mr. Toney wait? Me, Major Dellinger, the
24 judge, all these guys, Mr. Toney and his defense
25 team, would not be here today if Mr. Toney had done

1 one thing, crank up his vehicle and gone and left.
2 He's not had a duty to leave? If you are in the
3 other guy's neighborhood, in the other guy's
4 neighborhood, you in the other guy's territory, and
5 you don't crank your car up and leave, you wait, you
6 lay in wait. Mr. Toney says when Mr. Rogers came
7 back he gets out of his car. He gets out of his
8 car, but excuse me, he gets out of his car.
9 Mr. Rogers get out of his car and he has a long gun.
10 I don't -- he hadn't described how he's holding it,
11 but I'm assuming this is the way you hold a long
12 gun; it's the way I hold it. He has a long gun. In
13 his statement Mr. Toney said, well, I saw that, I
14 reached in the back of my pickup, pulls out, I
15 reached behind my back seat, I pulled my rifle out
16 and I shoot. Well, I got my gun out already and I
17 see the other guy pulling a gun out. Well, I don't
18 stand there? He says he pulled it out of the back
19 seat, reached over the seat, and by then it's lift
20 up over the back seat so you can see it in the
21 windshield. Am I gonna stand there if I'm Mr.
22 Rogers and let him pull it out, draw it down on me
23 and pull the trigger, am I going to do that?

24 Now we've all heard that scientific
25 evidence on the, evidence gathered on the scene

1 doesn't lie. We've heard that on CSI many a time,
2 that no matter what happens, the crime scene
3 evidence does not lie. Doctor Ross testified that
4 as soon as Mr. Rogers was shot in the neck, it
5 severed the carotid artery, the jugular vein, and
6 shattered the spine. At that time at that point he
7 lost all motor skills when paralyzed. When
8 paralyzed he fell flat forward and you can see that
9 here in this exhibit, State's 8. So he just fell,
10 bam, right there. Now where is this gun gonna land
11 if he falls forward in that fashion? It's gonna
12 land up under him.

13 Look at that blood pool, ladies and
14 gentlemen. Look at that blood pool right here,
15 right here all the way down in front of the shirt.
16 That gun is gonna be under here. It's important for
17 two reasons. Number one, the body was not moved.
18 Remember Doctor Ross told you the body bled out in
19 about two minutes. That body was not moved
20 according to Kim Dihn. If that body had been moved
21 to pull the gun out you'd have seen Kim -- Kim Dihn
22 had said you'd have seen skin marks or, yeah, I call
23 them skin marks, whatever that is, on this, along
24 here along the edge of the blood pool. Didn't see
25 any of those. Number two, there would have been

1 blood on this gun. Look at the quantity of blood on
2 that shirt, would have blood on the gun. Oh, well,
3 Mr. Kent said, well, you can get this gun and clean
4 it all off, couldn't he? Well, Ms. Butler, the SLED
5 technician swabbed the gun, said no, you can't get
6 blood, said that would be extreme hard to do because
7 we go down little nooks and crannies and we swab the
8 nooks and crannies and there was no blood on the
9 gun. And two, this is a -- and this is swab also,
10 this is spongy, soiled so it would absorb the blood.
11 Okay.

12 Next thing, if it's true it's self-defense
13 why didn't Mr. Toney stay there? I just shot a guy,
14 I just shot a guy that had a gun pointed at me, a
15 guy that I say wanted to kill me, insinuating he
16 wanted to kill me. Why didn't he stay there? What
17 is the reasonable thing to do? First of all, what
18 the reasonable thing to do would have been to crank
19 up and leave is what a reasonable person would do.
20 But after he shot Mr. Rogers why does he not stay
21 there, get on his cell phone, know he had one, and
22 call the police and say I almost got killed but i
23 shot him first, here's the gun he had, here's the
24 gun he had underneath him. There's the gun he had
25 sticking out from underneath. No, he didn't do

1 that. What does he do? He goes off to momma's
2 house, sister's house, goes buys him some beer. The
3 last thing I think he said he bought some potato
4 chips and a soda. Bought chips and a coke. That
5 ain't what a reasonable person would do. A
6 reasonable person would just stay there and say,
7 look, this guy tried to kill me and I got my gun and
8 there's the gun.

9 Now, you know, the defense attorney, very
10 good defense lawyers, some of the best defense
11 lawyers in the state. Major Dellinger testified
12 about the State and they went into the statement
13 about why he write this down, why he wrote that
14 down, all this kind of stuff. Sometimes they can't,
15 sometimes they try to find points; but if Major
16 Dellinger was making it up I think that's what
17 they're insinuating -- but Major Dellinger is making
18 it up, if he was making it up why would he put in
19 there about Mr. Rogers having a gun? Why would
20 he -- if he's gonna make it up why would he give the
21 defendant Mr. Toney positive (indiscernible) claim.
22 It don't make sense, does it? And Mr. Toney signed
23 his sign, he signed it, the statement, signed it in
24 two places. He read it and signed it. Ladies and
25 gentlemen, that is Mr. Toney's statement. Mr. Toney

1 killed Mr. Rogers. Mr. Rogers did not have a gun.
2 There's no evidence of a gun at the scene. Remember
3 what Ms. Benjamin, Mr. McDowell, and remember what
4 Ms. Betty and Mr. McDowell said. Ms. Betty said I
5 rode by, I rode by, I had just taken my child to
6 Benedict College, and I looked and there was a body
7 beside the road. And who was it? My son, my son
8 said it looks like blood, mamma, so she backs up.

9 Can I give this to the jury, Your Honor?

10 THE COURT: You object, Mr. Kent?

11 MR. CHANDLER: Not at all. What am I
12 going to say, Judge, I object.

13 THE COURT: That's why I didn't ask you.

14 MR. FATA: He probably would have. Why
15 would he have — oh, let's go back. Ms. Benjamin
16 said, well, I backed up, I backed up, and I looked,
17 he didn't appear to be moving and I blew the horn
18 and he wasn't moving. So she said, well, I'll take
19 my grandchildren home and while she's doing that she
20 can call 9-1-1. She saw Mr. McDowell. Mr. McDowell
21 goes down there and he says, I checked the body, I
22 got out and I checked the body. Now, felt his
23 wrists, his arms, everything like that, he wasn't
24 moving, and I called the sheriff. Both of them said
25 and they were there, first persons there, both of

1 them said, there was no long gun at the scene, no
2 long gun at the scene. And then we have David Capps
3 who is an investigator with the Sheriff's Office,
4 said that night when I got to the scene secured it
5 so began, began to canvass the scene, walked up and
6 down. We said what are you doing that for? Well,
7 looking for evidence. I'm looking for bullet
8 casings, footprints, all kinds of stuff like that.
9 Well, where? I was looking for a gun. Didn't find
10 any gun. Came back with a metal detector and got
11 some photos, got some things in evidence that's
12 photograph that haven't been talked about, but
13 they're still in evidence and you'll have them back
14 in the jury room. This is State's Exhibit Number
15 18. That's John Wesley Road. The body was found,
16 Mr. Rogers' body was found about in here. Now
17 you'll look at that road, it's open, there's a ditch
18 bank there, but it's open mostly. And he says, we
19 get the metal detector and everything and we went
20 over, no long gun was found, no gun period was
21 found. No black gun was found, not even a knife,
22 nothing. Nothing was found. So ladies and
23 gentlemen, there was no gun, no long gun with Mr.
24 Rogers.

25 This is a very unfortunate case. This, by

1 the way, is not in evidence. Any time you have this
2 situation you can call it a love triangle. You can
3 call it a, you can call it a eternal triangle. But
4 any time you have one -- in this case it's a woman
5 and it could be a man here -- and you have two men,
6 you have a legal relationship here ...

7 (Cell phone rings.)

8 MR. FATA: Hold on just a little bit
9 longer. And you have this legal relationship
10 between -- legal relationship I mean by marriage,
11 between Mr. and Ms. Rogers, and then you have this
12 elicited relationship between Ms. Rogers and
13 Mr. Toney. He's over on John Wesley Road on
14 September the 12th, 2010, to come between this
15 relationship, to break it, to break that
16 relationship because he wanted her for himself. Why
17 not? Why? It's the only explanation for the reason
18 he was over there, the only explanation to why he
19 did not leave after Mr. Rogers said, well wait right
20 here. Why did he wait? He waited, and while he was
21 he was probably getting the gun from the back of the
22 truck. He probably did pull it over the back of the
23 seat but he was already set up. He was already set
24 up. Mr. Rogers, he was upset. He had -- the
25 evidence says he had a little bit of alcohol in him.

1 He had that false courage, and I guess he was tired
2 of sharing his wife. And of course, you know, he
3 had done the raising of that daughter. I bet you he
4 went there to say get out of my neighborhood, leave
5 my wife alone. I bet you he went there, took his
6 hands, he went maybe, maybe gone to, maybe thought
7 he might have wanted to argue or whatever, not
8 knowing that Mr. Toney would lay in wait with — I
9 will get this gun, or this gun, already aimed, ready
10 to go when he gets out of the truck. He didn't get
11 far. Photographs, he's right there in front of the
12 truck. He, he's laid out and you'll have the
13 photograph.

14 Now if you find Mr. Toney not guilty —
15 Mr. Toney is a competent technician. He's a
16 ,competent technician. He's gotten rid of
17 Mr. Rogers, and now you have to prove he shot at Mr.
18 Rogers. Look at this evidence. Look at -- use your
19 common sense, ask yourself what was Mr. Toney doing
20 in that neighborhood where he had no business. Why
21 didn't Mr. Toney leave when he had the opportunity.
22 That's one of the things His Honor will tell you
23 about self-defense. You have to retreat. Or you
24 retreat, safe retreat is just a requirement. Why,
25 why, why didn't he stay after he shot him if Mr.

1 Rogers — I could stand here all night, of this
2 afternoon, and ask you why, ask you why, why, why
3 did Mr. Toney act in the way he did? It was a
4 calculated, calculated event of Mr. Toney's heart to
5 eliminate Mr. Rogers. Mr. Toney is guilty in this
6 case, guilty of murder. Thank you.

7 THE COURT: Mr. Fata.

8 Mr. Kent.

9 MR. KENT: May it please the Court.

10 THE COURT: Yes, sir.

11 MR. KENT: Mr. Fata.

12 How are y'all today? I am 38 years old.
13 I'm from Charleston, South Carolina. The first car
14 I would ever have was given to me by my mom and dad.
15 It was a 1976 Pontiac Grand Pris. If you know
16 anything about cars (indiscernible) 38 year old high
17 school driving a 1976 Pontiac Grand Pris. That car
18 smoked in the back. It made a lot of noise,
19 (indiscernible) shifting actually at the bottom of
20 the garage. You can put your feet directly through
21 the bottom of the car to warm (indiscernible) off of
22 the vehicle. The worst thing about the car was,
23 believe it or not, it was one of those old cars that
24 actually had an 8 track inside of it so I had to
25 listen to music with an 8 track and the only sound

1 that I actually got on the radio came from an MPR.
2 And I said, so I could either listen to an MPR or I
3 could listen to an 8 track, so you can imagine
4 growing up as an African American trying be cool for
5 a lady when you've got an 8 track and MPR when
6 you're out there driving your car. So when I would
7 listen to the MPR, the only thing I would ever hear
8 was Paul Harvey. He used to talk about the rest of
9 the story, now you know the rest of the story. And
10 I used to hear it all the time. I used to hear more
11 of Paul Harvey and was impressed by his stories.
12 And so when I hear this case and I think about this
13 case, what I catch myself is hearing Paul Harvey's
14 voice in my head. Now you know the rest of the
15 story, now you know the rest of the story. 'Cause
16 what he would do, once we get on the radio, it's all
17 right to tell a story, innocuous story that was very
18 innocent at the beginning. He would tell some story
19 that you have heard a million times before and one
20 time told the story about the man who'd gotten his
21 face beat in so awful when he was a child. He got
22 beat so bad that it couldn't be seen. And people
23 would see him down the road and say he was one of
24 the ugliest people they'd ever seen. He had trouble
25 getting girlfriends, had trouble getting dates. He

1 met up, became best friends with a plastic surgeon,
2 a doctor. The plastic surgeon fixed his face and
3 forgot (indiscernible) him and so he said, now you
4 know the rest of the story.

5 Ladies and gentlemen, that's what we have
6 here right now. We have a case where we need to
7 know the rest of the story. You've heard from the
8 State of South Carolina being aptly represented by
9 Paul Fata, and you've heard what they have put on.
10 They've put on the first version of a story. They
11 put on a very simple version of a story. The simple
12 version of a story is, guess what? Love triangle,
13 this man snaps, kills somebody, lay in wait. That's
14 it, ladies and gentlemen, find him guilty, let's sit
15 down. I guess this is the Paul Harvey time for the
16 program where we tell you the rest of the story.
17 And the great news about trials, when you hear the
18 rest of the story you get to hear the rest of the
19 story from the witness stand. This isn't stuff that
20 we make up. This isn't stuff we conjecture. This
21 isn't stuff that we just pull out of ourselves. You
22 got to hear the rest of the story from the
23 witnesses. And guess who you got to hear the rest
24 of the story from? The State's witnesses. So let's
25 talk about the State's witnesses and let's talk

1 about the rest of the story.

2 What did the State's witnesses they gave,
3 the first couple of witnesses, come forward and give
4 in evidence? The first two witnesses were very nice
5 people, came forward and said, guess what, we didn't
6 see anything, we came over, we looked along the side
7 of the road and there was a man dead on the side of
8 road. They didn't tell you how long he had been
9 there; they didn't know anything about it. They saw
10 a man who had been shot and killed. Actually, they
11 didn't know he was shot. They saw a man who was
12 dead on the side of the road.

13 And then let's talk about all this
14 scientific evidence that the State of South Carolina
15 brought you. Who all did they bring? They brought
16 you evidence to show you a couple of things. They
17 brought you a gunshot residue expert. Did the
18 gunshot residue expert come in and say we can tell
19 you firmly beyond a shadow of a doubt Ernest Toney
20 had a weapon, he fired a weapon, he did it, he was
21 angry? No. What did they testify to? They said,
22 well, one thing that we know is that Greg Rogers had
23 gunshot residue on his left palm. It probably means
24 he had handled a firearm within six hours. The rest
25 of the story.

1 The next thing they introduce you to is
2 somebody from SLED who comes to work and they talk
3 about blood alcohol limit. Remember the one lady
4 got up there, she started talking about blood
5 alcohol and all that fancy stuff. I think when the
6 words got big she started putting her voice down a
7 little bit. But she started talking about blood
8 alcohol, blood alcohol level, and what was inside
9 the people's system. Did she come up here and say,
10 let me tell you about Ernest Toney and how drunk and
11 how belligerent he was on that day, let me tell you
12 how angry he was? No. Their expert telling the
13 rest of the story said, well, let me tell you about
14 Greg Rogers. His blood alcohol level that day was a
15 .12. This man was right -- had recently fired a gun
16 on the day in question he was a .12, he was drunk.
17 The rest of the story.

18 The next witness, remember the witness on
19 the stand that said, you know, we're gonna tell you
20 exactly where Greg Rogers was that day. He was at
21 Wal-Mart doing what? Buying ammunition. .12, had
22 recently had fired a gun, and was buying ammunition
23 to fit his firearm about 4:30 that day. The rest of
24 the story. This wasn't the evidence that we
25 brought. This was the State's grandiose evidence to

1 prove their case to you, that the victim in this
2 situation, guess what, had been drinking, had
3 recently held a weapon and was going where? To
4 Wal-Mart to get firearms -- to get bullets. So we
5 go to the rest of the story.

6 Then we hear from Lorie Rogers who
7 testified to the rest of the story. Lorie, tell me
8 about Greg. He's violent. When he's drinking guess
9 what, he gets rowdy. He fights with people when he
10 drinks. And he doesn't like guess who, ladies and
11 gentlemen? Ernest Toney. The rest of the story.
12 And she tried to dance around it a little bit, well,
13 you know, he maybe once in a while, maybe told me he
14 was going to kill me. I don't really remember if
15 he's ever said that. And she's trying to protect
16 her husband, this violent man who drank, who held a
17 firearm. This is the rest of the story.

18 It's not as innocent as this love triangle
19 that Mr. Fata wants to paint, just a simple love
20 triangle, poor Mr. Toney. It's a little more
21 intense than we're trying to tell you. There is the
22 rest of the story that we're trying to hear.
23 There's more that we're trying to get through. You
24 heard Rogers and then I think Mr. Fata who was under
25 the impression that they were trying to call these

1 cop (indiscernible.) They're not calling anybody
2 (indiscernible). But what I am saying is, just like
3 they said, we made mistakes. As a matter of fact,
4 one of the folks that you heard from, Investigator
5 David Capps was, sometimes we find things, sometimes
6 we don't. This is a murder trial. This is a man on
7 trial for his life who is sitting up here with the
8 State of South Carolina, not Paul Fata, not the
9 investigator. The State of South Carolina with all
10 the money, all the resources the State of South
11 Carolina has charged a man with murder. They went
12 to his residence. They got in his face and said,
13 you are charged with murder. Well, did you take a
14 statement? Ah, well, some of the stuff we left out.
15 This is murder. This is the most serious thing you
16 can be charged with in the State of South Carolina
17 and we don't take down everything? We don't have a
18 little recorder? I love the whole, oh, we don't
19 have video equipment, but we can get a recorder.
20 This man is charged with murder two years ago. I
21 talked to the investigator about memories, how
22 fallible they are, how you can't remember
23 everything. You know why this was important to me?
24 It wasn't important because I'm not saying it didn't
25 happen that way, but there's the details of chain of

1 events. Details are important. Details are
2 important as it possibly gets. When we hear
3 recordings, when we submit we get to see something,
4 we can see if they were upset, we can see how they
5 were acting. You can hear the exact words that they
6 were using. You don't have to take somebody's
7 memory, somebody's memory, somebody who sits up
8 there and says, I don't really remember this, I
9 don't really remember that, oh, but I remember this,
10 I remember that. So there's something in your file,
11 an incident report that is completely in opposite of
12 what you just testified to. Nah, I guess they must
13 have been wrong. They know this is a murder case.
14 This is Mr. Toney's life.

15 He went there. He talked to them; he
16 talked to them voluntarily. He gave them his side
17 of the story. He gave them their statement. The
18 reason that it's so important to have every word
19 that he said, everything he said because of the way
20 you can say things because if we look at the rest of
21 the story, there is a second story. What does the
22 statement tell you? Look, I was on the side of the
23 road. Mr. Fata had a problem with the fact that he
24 was over there. Why how dare he go over there. I
25 don't know, guess what, I wasn't there neither,

1 neither was Mr. Fata, neither was any of these
2 officers. I wasn't there. I don't know why he was
3 there. You know, maybe he's right. Maybe he was
4 going over to see Lorie Rogers, maybe they were
5 having an affair. Maybe he was waiting for Greg
6 Rogers to leave so he could drive over to the house
7 to see his girlfriend; I don't know. But there were
8 nothing illegal they're making, that he has a right
9 to be there. So he's there. Greg Rogers sees him.
10 He gets immediately angry. He's been drinking. We
11 know he's been drinking, and we know how he gets
12 when he's drinking. And we know they had prior
13 difficulties. And we know they don't like each
14 other. Think about it. He's saying, oh, Ernest
15 Toney is so angry, so angry, because Greg Rogers is
16 taking care of his child, because Ernest Toney has
17 been sleeping with Greg Rogers' wife. Greg
18 Rogers -- Ernest Toney is so -- who most likely
19 would be angry in that situation? The person we
20 know is angry is Greg. The person that we know has
21 been drinking is Greg. The person we know has a
22 history of violence is Greg. This angry individual
23 is tired of it, he's frustrated, I'm tired of this
24 guy. He's exactly right. Threatened me. You can't
25 make that up. How dare you, you're gonna sleep with

1 my wife, I'm taking care of your child, [REDACTED] is at
2 my house all the time. She sends me little notes, I
3 love you daddy. I'm angry, I'm frustrated, I've had
4 it. I'm going to Wal-Mart and guess what, I'm
5 getting some weapons. I'm done with this, you wait
6 right here. What does he do? He picks up the
7 phone. And when he picks up the phone, guess what
8 Lorie Rogers says to him. Not, hey, Greg is looking
9 a little upset. She says call 9-1-1. Make that
10 clear, she says call 9-1-1. Remember I directly
11 asked her on the stand, did you tell him Greg had a
12 gun? Yes. Call 9-1-1, Greg has a gun. She's told
13 him about the difficulty. She's told him how he
14 acts and he had prior difficulty between each other.
15 What does she think is going to happen?

16 She testifies he went home, he got a gun,
17 he left. And then he came back. He came back and
18 he got the gun? That started getting messy. One
19 time she said he did, then she said he didn't, and
20 then she said she wasn't sure.

21 And one of those interesting things in
22 this whole trial, the rest of the story, is where
23 they found this gun. These officers -- and they are
24 good officers -- they went to the house. They went
25 with a search warrant and they searched the house.

1 They searched under the bed. They searched the
2 closet. They searched everywhere to look for this
3 gun. And guess what, they found nothing. They
4 found no where. They didn't find this gun. They
5 didn't find any type of rifle. They found one an
6 illegal one but they didn't find this gun. And then
7 all of a sudden two days later they call, oh, I
8 found the gun, it's under the bed. They go back and
9 they search and that's under the bed. God, we must
10 have missed it the first time we were there. But no
11 one talks about that part of the rest of the story.
12 That makes zero sense.

13 They talk about a fingerprint that's found
14 on the side of the vehicle. There's another
15 fingerprint, was someone else there? Well did
16 y'all talk to anybody, fingerprint anybody? Nah.
17 Is that written statement from Ms. James Rogers, the
18 person who clearly was with him and saw him angry,
19 how did you feel when you talked to him. This is a
20 murder trial. This is a man who (indiscernible).
21 all the money, all the power, all the resources of
22 the State of South Carolina. We have got without a
23 doubt one of the fanciest things I've seen in my
24 life. Apparently when I put my hand on it you can
25 see my hand pop up, but we can't find a recorder to

1 record a statement. All the money, all the power,
2 all the resources of the State of South Carolina,
3 and this is what they have to offer. I don't know
4 what happened that day. I don't know, I wasn't
5 there, I can argue left and right, Mr. Fata can
6 argue left and right without a doubt. But I read
7 his statement. I read Greg Rogers' statement. I
8 looked at all the search warrants and talked to all
9 the officers. And if you just put it together, if
10 you just think outside, trying to think outside the
11 box, you just put it together and look at it and
12 say, let me do this right. They have this love
13 triangle. This man doesn't like this person on his
14 property, just had to get a restraining order. All
15 this crazy stuff is going on. He's in the
16 neighborhood. They say he doesn't have a right to
17 be there. Greg Rogers pulls up and sees him. Greg
18 Rogers gets immediately at him. There's no question
19 it didn't happen. Greg Rogers says wait right here.
20 Greg Rogers leaves. His home is instantaneously. I
21 told you how close the residence is. It's
22 instantaneous. It's not like he sat there for 30
23 minutes or an hour waiting; it's instantaneous.
24 He's on the phone. What Lorie, he left the house
25 with a gun? Doesn't make a big deal about the fact

1 that he said, I'm not scared of no gun. There's
2 something about trying to be fooled, remember the
3 guy in Florida (indiscernible) he tried to get
4 fooled. Oh, I'm not scared of his gun until a gun
5 shows up and it's being pointed at you. That's when
6 the news comes in. So all of a sudden this man
7 comes back up — and this is interesting. You look
8 at all the pictures, all the evidence, he wasn't
9 shot inside the vehicle, inside the vehicle. He
10 wasn't shot near car, right in front of the car.
11 They talk about blood splatter would have been all
12 over the car. This man clearly got out of the
13 vehicle and went to the front of the car. Just use
14 your common sense. Something else happened more
15 than they're saying. All the money, all the time,
16 all the resources of the State of South Carolina and
17 this is what they have to offer you.

18 When you came up you were all sitting over
19 here for the jury. When you came in you walked
20 through this room. You walked through this little
21 lock and the door stayed open. And the reason the
22 door stayed opened is the way I like to tell people
23 is because when you came in, everything that you
24 brought with you from back there came with you. All
25 of your ideas, all of your life experiences, all of

1 your common sense came with you and you showed up
2 with common sense still with you. It doesn't leave
3 you just because you get into that room. It doesn't
4 leave you 'cause you sit right there in those
5 chairs. It can't go anywhere. Our Supreme Court
6 has basically said, you know what, when you have to
7 find a person guilty you have to picture them
8 cloaked in a robe of righteousness, robe of
9 innocence. And for us to find him guilty the State
10 of South Carolina they said they've got to see them
11 buck naked. Not a sock on, not a hat on, they have
12 to be naked. You have to undress them completely
13 from what the State of South Carolina has presented
14 to you. There can't be anything left.

15 Mr. Fata made a large point about that if
16 he was making up this statement, talking about Mr.
17 Dellinger -- if he was making up this statement
18 where he had put X, Y and Z in. He then said he
19 made up, he said, I think there's something missing
20 here.

21 My mom, little did we know, little did we
22 know she's lascivious about cleaning. We had gone
23 on a holiday vacation. We went to a vacation. We
24 had, my brother and I had unfortunately had left the
25 windows open in one of the bathrooms. You know,

1 down in Charleston, northern Charleston, of course,
2 with the weather it wouldn't be too long we might
3 get mold spore and things of that nature stuck in
4 your house and start growing. So mom had a sewing
5 room. We got back from vacation. She got back and
6 she sent my brother and I into the bathroom and she
7 said, I want y'all to clean this bathroom and put
8 this (indiscernible), we can't have all this mold we
9 got growing in here. So mom gave us a concoction of
10 bleach and ammonia and mixed it together and asked
11 us to clean the room with the door shut. When you
12 try to put bleach and ammonia together and try to
13 shut the door, it can make you a little bit nutty.
14 So my brother and I are cleaning, we're getting all
15 woozy and trying to do our best job and trying to
16 clean till finally we couldn't take it anymore, went
17 running out of the room. We run out of the room,
18 leave the door open and spray that place down. We
19 didn't clean it until it was (indiscernible) 'cause
20 you know, you just can't savor that moment. Even
21 though we had all the good intentions of cleaning it
22 as good as possible, there was something
23 (indiscernible). And what was weird about that and
24 what we'll hear about that is, when we cleaned up
25 there was bleach, there was ammonia, there's some

1 mold spore left in the wood. A couple of weeks
2 later the spores started growing and they started
3 festering. The next thing you know there were mold
4 spores everywhere. Well, that's what's going on in
5 this case. You have a couple of little mistakes.
6 There's a couple of small mistakes. There's mold
7 spores in this case in everyone. They say if you
8 don't do it right that first time you're gonna have
9 to do it again. If you don't do it right the first
10 time you're never gonna be able to go at it again.
11 They made mistakes. They admitted they made
12 mistakes and that's a problem.

13 The last thing I'm gonna tell you and one
14 of the things he's gonna tell you, he's gonna tell
15 you about self-defense. He's gonna tell you that an
16 individual has a right to act on appearances. An
17 individual has to act on appearances, how things
18 look, how one acts, a history recount. He's also
19 gonna talk to you about reasonable doubt. I
20 graduated from law school. I was on a mission in
21 law school, and when I got out of law school I was
22 one of the first people to tell you I did not
23 understand reasonable doubt. I was one of them that
24 didn't understand what an objection meant, believe
25 it or not. I didn't understand what objection

1 meant, what means sustained and overruled. As some
2 people say my rules are very simple. Either
3 objection they say sustained or overruled, or I'll
4 just keep talking till stayed in ambiguous to show
5 you. But as far as reasonable doubt, reasonable
6 doubt is the type of doubt that would cause a
7 reasonable person to hesitate to act. Had no clue
8 it actually meant that you could hear it but you
9 don't know what it actually means. The day that I
10 finally completely understood reasonable doubt, I
11 was at home at my home in Summerton. Mom and dad
12 were home. My brother was there. And I remember it
13 was a nice day, rainy day in April, sometime around
14 there, car all covered with pollen, pollen all in
15 the air, the living room. We had Percy Sledge going
16 in the background all the day. My brother had
17 mouthed off to my mother or something. And they
18 were in the back room. My brother had mouthed off.
19 It's very serious. My dad told him, you go right
20 upstairs to your room and when you get to your room
21 don't slam your door. And the reason he told him
22 that is my brother had a notorious habit, he went
23 upstairs and he had a notorious habit. He'd slam
24 the door right then. Every time he went in the
25 room. Dad hated it. He had that specific look, you

1 go upstairs and don't you slam that damn door. He
2 said don't you slam it. Roger gets upset, goes
3 marching upstairs and like clockwork you would not
4 believe it, about ten seconds after the door
5 slammed. Dad is angry. Dad is about mad as he can
6 get. So he starts marching up those stairs, hands
7 behind him. My mom said, don't kill him, whatever
8 you do don't kill him. So he goes marching up those
9 stairs and of course, I go marching up the steps
10 right behind him. I wanted to watch my brother get
11 his little behind cut. So I go right up the stairs
12 behind him and dad goes up there and he opens the
13 door. When he opens the door you see my little
14 brother sitting there in the middle of the floor.
15 He's just sitting there looking at my dad. And he's
16 got these tears in his eyes, these crocodile tears;
17 and I say, oh, I can't wait. And he's like, my dad
18 looks at him and says, I told you not to slam that
19 door. My dad raises his hand to get ready to go
20 whoop him and my brother says, I didn't do it, it
21 was the wind that blew the door shut. I'm thinking,
22 that wind didn't shut the damn door. After dad puts
23 his hand up to go whoop him, he puts his hand up and
24 some wind from the old wind hit his hand. And I
25 could see that halt, I could see that hesitation, I

1 could see that look in my dad's face. I didn't know
2 he did it, I think he did it, but I'm not sure.

3 There's other factors out there, there's
4 other things out there that made me pause. Ladies
5 and gentlemen, that pause, that brief rest, that
6 wait, that's reasonable doubt. When you go back to
7 that jury room if you ask yourself, I'm not sure, I
8 think it could be something else, I don't think the
9 State of South Carolina proved their case, I do not
10 think they proved it beyond a reasonable doubt, I'm
11 not one thousand percent convinced what happened, I
12 don't think they proved it, then guess what, that's
13 your doubt. If you're going to have doubts five
14 years down, ten years down, twenty years down you're
15 not going to be able to talk about this case the
16 same with a friend. You say, I was sitting on a
17 murder case, this crazy guy to me he was looking
18 like Dwayne Wayne and he was yelling with his hands
19 all in the air. And he sat there, he had his hands
20 up and he started talking about doubt. And you
21 might sit there with your family and say, hum, if
22 you have doubts, have them now. Don't have them in
23 five years, don't have them in ten years, it's too
24 late. If you have doubts find him innocent. Thank
25 you so much.

1 THE COURT: All right, ladies and
2 gentlemen, we've been in the courtroom for about an
3 hour. We will have a very brief recess. I'll give
4 you the charge on the law. That's gonna take about
5 30 minutes, my best calculation. You go to your
6 jury room, but you may not discuss the case.

7 (WHEREUPON, the jury was removed from the
8 courtroom at 3:20 p.m.)

9 THE COURT: We'll take a very brief
10 recess, probably five minutes, no more.

11 (WHEREUPON, a recess was taken from the
12 proceedings.)

13 THE COURT: Okay, if the jury is ready.
14 (WHEREUPON, the jury was returned to the
15 courtroom at approximately 3:32 p.m., and
16 the following proceedings commenced in
17 open court.)

18 THE COURT: I believe we do have
19 everybody. Ladies and gentlemen, this will be the
20 last round of my instructions in the case. Pay very
21 close attention. I will now give you a charge on
22 the law. I do need your undivided attention. I'm
23 going to be explaining to you certain things during
24 the course of this charge. And as I mentioned to
25 you at the very beginning of the trial, we state --

1 I'm gonna give you legal principles that you are to
2 combine with your common sense view of the evidence
3 in this case, and you take those things and reach a
4 verdict in the case that speaks the truth. You are
5 required under your oath to accept the law as I give
6 it to you. Some of you, of course, may have come
7 into the case with a preconceived notion of what you
8 think the law is or what you think it ought to be.
9 But for this case, in fact any case, you must accept
10 under your oath the law exactly as I give it to you,
11 even if you disagree with it. I'll be calling to
12 you during the course of the charge about several
13 different legal principals. You may have heard
14 these before. You may have heard reference to them
15 during the course of the trial. I can guarantee you
16 that I will repeat myself as I go through this
17 charge. And the reason for that is not that I've
18 lost my place or forgotten what to say; it's simply
19 that the principles that I do discuss do intertwine
20 or have something do with other legal principles
21 that I'll discuss. For example, I'll be talking to
22 you about witness credibility, direct and
23 circumstantial evidence. I'll be talking to you
24 about the presumption of innocence. I'll tell you
25 what proof beyond a reasonable doubt means. I'll be

1 discussing with you things such as criminal intent,
2 the elements of murder. I'll discuss with you the
3 lesser included offense of voluntary manslaughter
4 and other, perhaps, legal principles that I'll be
5 mentioning and they do intertwine with one another
6 so please be patient with me.

7 This is not an instance where you should
8 sit back and try to memorize what I'm saying. Just
9 accept the law in your minds eye when you deliberate
10 and you take the law as I give it to you and apply
11 it to your common view of the facts, and you're to
12 reach a verdict in that fashion. Obviously you know
13 by now that during the course of this trial you and
14 I have had certain duties to perform. Under our
15 system of laws you are the sole judges of the facts.
16 Under that same system of law it's my responsibility
17 to preside over the trial. I deal with the legal
18 points; you deal with the factual points. You're to
19 consider — and I mentioned evidence a few minutes
20 ago, your common sense duty evidence. You're to
21 consider, you are to consider only the competent
22 evidence that has been introduced. If during the
23 course of the trial I have instructed you to
24 disregard something that you may have heard, under
25 your oath you're to do that. You're to disregard

1 what I instructed you to disregard. I do have
2 additional duty to charge you this law, as I
3 mentioned, and you're to accept it exactly as I give
4 it to you.

5 Now as the judges of the facts you're not
6 to be concerned with any rulings that I have made
7 about the admissibility of the evidence because the
8 only thing you're to be concerned about is if it
9 comes in, if the evidence comes in, you can consider
10 it. During the course of this trial you obviously
11 heard objections, you may have heard some of my
12 rulings. Don't keep score; I certainly don't.
13 Because I make my rulings solely on what the law is.
14 And don't, on top of that don't take from anything
15 that I have said or done that I favor one particular
16 result over the other 'cause I truly do not. That
17 is because that is your responsibility alone. For
18 example, you may have seen me taking notes during
19 the trial. The reason I do that is because I have
20 to. I write down, the court reporter writes down
21 what time, and if an exhibit was introduced or what
22 time person began direct or cross or redirect. I
23 write those times down not because I think it's
24 situation, but in case you want to hear that again.
25 We both have to know, be able to look back and say,

1 okay, here's where it was, we can find it. So I'm
2 not writing it down because I think it is an
3 ultimate point or anything like that so I want to
4 make sure you understood that.

5 Going forward to the indictment in this
6 case, the indictment does charge the defendant
7 Ernest Toney with the offense of murder. I will
8 remind you that the fact that a person is arrested
9 or charged or indicted for any criminal offense is
10 not evidence of guilt or non guilt. The defendant's
11 plea of not guilty does put the burden on the State
12 to prove the elements of the crime charged beyond a
13 reasonable doubt. So again, the fact that he has
14 been indicted is not evidence. Now ladies and
15 gentlemen, I've mentioned to you the evidence comes
16 in typically during a trial by way of testimony from
17 the witness chair, by way of exhibits — those are
18 the things you can see or touch or both and
19 sometimes by stipulation. Those are ways evidence
20 comes in. Evidence generally is presented in two
21 different, by two different types, and these are
22 called direct evidence and circumstantial evidence.
23 Direct evidence is evidence that immediately
24 establishes the main fact to be proved. So direct
25 evidence can be the testimony of a person who claims

1 to have actual knowledge of a fact, such as an
2 eyewitness. That's an example of direct evidence.
3 I saw the dog cross the road. I saw smoke. I
4 smelled lemons. I heard such and such. I heard a
5 free fall. If you believe that thing, you can
6 accept those things; those are direct evidence.

7 Now circumstantial evidence is proof of a
8 chain of facts and circumstances that indicate the
9 existence of a fact. So circumstantial evidence is
10 evidence that immediately establishes collateral
11 facts from which the main fact may be inferred.
12 It's based on inference. It is not based on direct
13 knowledge or observation. Now ladies and gentlemen,
14 the law makes absolutely no distinction between the
15 weight or value that you are to give to direct or
16 circumstantial evidence; nor is a greater degree of
17 certainty required of circumstantial evidence than
18 of direct evidence. In other words, direct and
19 circumstantial, you weigh all the evidence. After
20 weighing all of the evidence if you are not
21 convinced of the guilt of the defendant beyond a
22 reasonable doubt, you must find him not guilty. If
23 after weighing all the evidence you are convinced of
24 the defendant's guilt beyond a reasonable doubt, you
25 must find him guilty.

1 Now I've been over with you at the
2 beginning of trial, especially the fact you must
3 determine the believability or credibility of the
4 witnesses who testified. You can believe every
5 word, you can disbelieve every word, or you can
6 believe parts and reject the rest. It's your duty
7 to analyze and evaluate evidence so it's your duty
8 to analyze and evaluate the witness credibility.
9 You can believe one witness over several, several
10 over one, and you can take into account anything
11 that you think is appropriate in determining whether
12 or not you believe a witness.

13 Demeanor, how did the witness appear on
14 the stand, hesitant or straight forward? Did the
15 witness have a reason to give testimony that helps
16 or hurt one side or the other? In other words, was
17 the witness biased or prejudiced for one side or the
18 other. What was the witness' ability to know the
19 fact that he or she claims to know? Was that
20 witness' testimony strengthened or weakened by other
21 evidence in the record. Did the witness say
22 something different or the same on prior occasion?
23 Again, anything else that you think is appropriate
24 in determining whether or not to believe someone you
25 can use that tool as well.

1 Now as I mentioned a few times during the
2 trial, the rules of evidence that ordinarily don't
3 permit a witness to testify as to opinions or
4 conclusions. Those rules of evidence that we have
5 -- my copy is up here somewhere -- there's an
6 exception for people who are qualified as experts by
7 reason of education, training, or experience in a
8 particular field. Those kinds of witnesses can give
9 opinions and they can give the reasons for those
10 opinions. That does not mean that you are bound by
11 that expert's opinion even though it might be
12 contradicted. If in your mind you believe the
13 witness' qualifications or education or training is
14 not sufficient, you can disregard the opinion
15 entirely. Also, if the reasons given for the
16 opinion are not sufficient or sound in your judgment
17 you can disregard the opinion entirely. In short,
18 you give the expert's testimony the weight you
19 believe it deserves based on your common sense view.

20 Now ladies and gentlemen, as I go I'll get
21 more and more specific. The defendant in this case
22 has entered a plea of not guilty to this indictment.
23 And as I mentioned, that plea puts the burden on the
24 State to prove him guilty beyond a reasonable doubt.
25 A person who is charged with a criminal offense in

1 this state is never required to prove himself not
2 guilty, never required to prove himself innocent.
3 It's a very important rule of law that the defendant
4 in a criminal trial, no matter what the charge,
5 close your eyes and pick one, no matter what the
6 charge, the defendant is always presumed innocent of
7 that crime unless guilt has been proven by evidence
8 satisfying a jury of guilt beyond a reasonable
9 doubt. Now the presumption of innocence does not
10 end when you stand up in just a few minutes and go
11 out of the jury box into that jury room; but
12 presumption remains with the defendant throughout
13 the trial and throughout your deliberations unless
14 and until you reach a verdict of guilt based on
15 evidence satisfying you of guilt beyond a reasonable
16 doubt. Now ladies and gentlemen, the presumption of
17 innocence is not a casual phrase that we toss
18 around. It's not simple or mere legal theory. The
19 presumption of innocence is a substantial right to
20 which every defendant is entitled unless you, the
21 jury, is satisfied from evidence of that defendant's
22 guilt has been proven beyond a reasonable doubt.

23 Probably so far I have used the words
24 reasonable doubt 20 times. I will talk to you about
25 that now. You've asked yourself, what is a

1 reasonable doubt. A reasonable doubt in the law is
2 the kind of doubt that would cause an honest,
3 sincere, and reasonable person to hesitate to take
4 action. The State has the burden of proving the
5 defendant guilty beyond a reasonable doubt. Some of
6 you who raised your hands at the beginnings of trial
7 may have served as jurors in civil cases. Typically
8 in civil case you imagine scales of justice that are
9 perfectly even. A party in a civil case has the
10 burden of tipping those scales ever so slightly. We
11 call that by the greater weight of evidence, in
12 other words, tipped ever so slightly. Now in
13 criminal cases the State's proof must be more
14 powerful than that; it must be proof beyond a
15 reasonable doubt. Proof beyond a reasonable doubt
16 is proof that leaves you firmly convinced of the
17 defendant's guilt. Now obviously there are very few
18 things in this world that we do know with absolute
19 certainty, and the law does not require in criminal
20 cases for the State to present proof that overcomes
21 every possible doubt. It does require the State to
22 present proof that overcomes reasonable doubt. If
23 based on your consideration of the evidence you are
24 firmly convinced that the defendant is guilty of the
25 crime charged, you must find him guilty. If on the

1 other hand you think there's a real possibility that
2 the defendant is not guilty, you must give him the
3 benefit of the doubt and find him not guilty.

4 Now ladies and gentlemen, a statement
5 alleged to have been made by the defendant has been
6 admitted into evidence in the case. While the court
7 has determined that the statement is admissible, I
8 victim you that you make the ultimate decision on
9 whether or not the defendant made the statement. If
10 a defendant did make the statement you must
11 determine whether the statement was made by the
12 defendant voluntary and of his own know will. And
13 that means that the statement was not caused by
14 pressure, force, fear, threat, coercion, or
15 intimidation, or by hope or promise of leniency or a
16 reward of any kind. In determining whether the
17 statement was voluntary you should consider the
18 characteristics of the defendant and the detailed
19 questioning. Some of the factors you may consider
20 are the age of the defendant, education or lack
21 thereof, mental ability, IQ or intelligence,
22 background and environment, the place and length of
23 the detention, the nature of the questioning, and
24 the advice or lack thereof to the defendant of his
25 constitutional rights including the right to remain

1 silent, that any statement can used against him in
2 court, the right to have a attorney, and that if he
3 cannot afford an attorney one would be appointed to
4 represent him without cost, and that he can stop
5 making a statement at any time. You must carefully
6 consider all of the surrounding circumstances before
7 you give any weight to an alleged statement.

8 Now the State has the burden proving
9 beyond a reasonable doubt that the alleged statement
10 was voluntary. If you determine it was you may give
11 it the weight you believe is appropriate. And you
12 must decide what weight, if any, should be given to
13 the alleged statement. If you determine it was not
14 freely and voluntary statement of the defendant, you
15 should not consider the statement at all.

16 Now, ladies and gentlemen, I instruct you
17 and I emphasize to you that the fact that the
18 defendant did not testify in this trial is not a
19 fact to be considered by you in any way in your
20 deliberation and in your consideration of the
21 question of guilt or nonguilt of the defendant. It
22 must not be considered by you in any manner
23 whatsoever. So let me be specific. The fact that
24 the defendant did not testify is something that you
25 may not even think about, talk about, and it cannot

1 enter into your decisions in any manner whatsoever
2 during the course of your deliberations. So I
3 repeat under your oath you're to draw no conclusion
4 whatsoever from the fact that the defendant did not
5 testify. The burden of proof, as I've stated to
6 you, is always on the State and the defendant is not
7 required to prove his innocence and the burden of
8 proof remains with the State and, of course, that
9 burden is to prove the elements of the crime charged
10 beyond a reasonable doubt.

11 Now ladies and gentlemen, the defendant in
12 the indictment is charged with murder. The State
13 must prove beyond a reasonable doubt that the
14 defendant killed another person with malice
15 aforethought. Malice is hatred, ill will, or
16 hostility towards another person. Malice is the
17 intentional doing of a wrongful act without just
18 cause or excuse and with an intent to inflict an
19 injury or under circumstances that the law will
20 infer an evil intent. Malice aforethought does not
21 require that malice exists for any particular time
22 before the act is committed, but malice must exist
23 in the mind of the defendant just before and at the
24 time of the act, and therefore, there must be a
25 combination of the previous evil intent and the act

1 itself.

2 Now malice aforethought may be expressed
3 or inferred. Those two terms express or inferred do
4 not mean different kinds of malice, but simply the
5 manner in which the malice may be proven to exist.
6 And that's either by direct evidence or by
7 circumstantial evidence. Expressed malice is shown
8 when a person speaks words in which expressed hatred
9 or ill will for another, or when the person prepared
10 beforehand to do the act that was later
11 accomplished. Now ladies and gentlemen, malice may
12 be inferred from conduct showing a total disregard
13 for human life.

14 On the verdict form you'll have kind of a
15 two step process, Mr. Foreman. The first entry on
16 the verdict form says: As to the charge of murder,
17 we, the jury, unanimously find the defendant -- and
18 then there will be two choices that I'll get to in a
19 just a moment. If you find that the State has
20 failed to prove beyond a reasonable doubt that the
21 defendant committed murder, that's reflected on this
22 verdict form, what your next step would be you must
23 consider whether the State has proved beyond a
24 reasonable doubt that the defendant committed what
25 is called the lesser included offense of voluntary

1 manslaughter. To prove voluntary manslaughter the
2 State must prove beyond a reasonable doubt that the
3 defendant took the life of another person in the
4 sudden heat of passion based on sufficient legal
5 provocation. Both heat of passion and sufficient
6 legal provocation must be present at the time of the
7 killing to constitute voluntary manslaughter.

8 Sudden heat of passion may for a time
9 affect a person's self control and temporarily
10 disturb a person's reason. Sudden heat of passion
11 must be the type that would make an ordinary person
12 unable to coolly reflect on his actions and would
13 produce an uncontrollable impulse to do violence.
14 Sufficient legal provocation must be the type that
15 would make a person of ordinary reason and caution
16 to become enraged and lose control temporarily. The
17 provocation needed for voluntary manslaughter must
18 come from some act of or be related to the victim.
19 Words alone, however vulgar or insulting, are not
20 enough to be legal provocation. Where death is
21 caused by the use of a deadly weapon, the words must
22 be accompanied by some overt threatening act which
23 could have produced the heat of passion.

24 The exercise of a legal right, no matter
25 how offensive it is to another, is never sufficient

1 legal provocation for voluntary manslaughter. And
2 ladies and gentlemen, if the heat of passion had
3 cooled or if there was enough time between the
4 provocation, if any, and the killing would passion
5 of a reasonable person to cool, the killing would
6 not be voluntary manslaughter. In determining
7 whether a reasonable person would have had enough
8 time to cool off, you should consider all the
9 circumstances surrounding the killing. You may
10 consider the nature of the provocation, if any, the
11 defendant's mental and physical state, and the
12 circumstances and relationships between the parties.

13 Now ladies and gentlemen, in order to
14 establish guilt in a criminal case the State must
15 always prove an element called criminal intent. And
16 criminal intent must be proven beyond a reasonable
17 doubt. It's always — a criminal intent is always a
18 matter that must be determined by a jury from the
19 circumstances surrounding the situation. It can't
20 be proven by mathematical formula and there's
21 certainly no way for medical science to dissect a
22 person's brain to look at it and decide what, if
23 anything, that person intended to do at any given
24 time. So the law says that criminal intent may be
25 inferred from circumstances, and it's not necessary

1 to establish criminal intent by direct evidence but
2 it may be established by circumstantial evidence by
3 taking into consideration the actions of the parties
4 and all of the facts and circumstances of the case.
5 Criminal intent is a mental state, a conscious wrong
6 doing. It's up to you to determine what, if
7 anything, the defendant intended to do based on the
8 issues shown to have existed.

9 Now I will now discuss the issue of
10 self-defense. Self-defense is a complete defense.
11 The State has the burden of disproving self-defense
12 by proving beyond a reasonable doubt. In other
13 words, a defendant doesn't have to prove
14 self-defense. The State must disprove it beyond a
15 reasonable doubt. After reviewing all the evidence,
16 if you have a reasonable doubt of the defendant's
17 guilt and after you've considered all the evidence
18 including evidence of self-defense, then you must
19 find the defendant not guilty. On the other hand,
20 if you have no reasonable doubt of the defendant's
21 guilt after considering all the evidence, including
22 any evidence of self-defense, then you must find the
23 defendant guilty.

24 Now the following elements are required
25 for self-defense to apply as a defense. Number one,

1 first, the defendant must have been without fault in
2 bringing on the difficulty. If the defendant's
3 conduct was the type which was reasonably calculated
4 to and did provoke a deadly assault, the defendant
5 would be at fault in bringing on the difficulty and
6 would not be entitled to an acquittal based on
7 self-defense.

8 The second element of self-defense is that
9 the defendant was actually in imminent danger of
10 death or serious bodily injury or that the defendant
11 actually believed he was in imminent danger of death
12 or serious bodily injury. If the defendant was
13 actually in imminent danger it must be that the
14 circumstances would have warranted a person of
15 ordinary firmness and courage to strike the fatal
16 blow to prevent death or serious boldly injury to
17 himself. If the defendant believed he was in
18 imminent danger of death or serious bodily injury,
19 it must be that a reasonably prudent person of
20 ordinary firmness and courage would have same
21 belief. Now in deciding whether the defendant
22 actually was or believed he was in imminent danger
23 of death or serious bodily injury, you should
24 consider all of the facts and circumstances
25 surrounding the incident including physical

1 conditions and characteristics of the defendant and
2 the victim.

3 Now the defendant did not actually have to
4 have been in danger. It is enough that the
5 defendant believed he was in imminent danger and
6 that a reasonable prudent person would have had the
7 same belief. The defendant has the right to act on
8 appearances even though the defendant's beliefs may
9 have been mistaken. It's for you to determine
10 whether the defendant's fear of immediate danger or
11 death or serious bodily injury was reasonable and
12 would have been felt by an ordinary person in the
13 same situation. I further charge you that words
14 accompanied by hostile acts may depending on the
15 circumstances, establish self-defense. Further,
16 evidence of prior difficulty between the defendant
17 and the victim may be considered in determining
18 whether a threat existed, whether the defendant had
19 a reason to believe a threat existed, and how
20 serious that threat was.

21 I further charge you that the
22 representation of the victim as a violent person may
23 be considered in determining whether there was a
24 need for force and whether the defendant had a
25 reason to believe there was a need for force and

1 whether deadly force was reasonably necessary. I
2 charge you that threats made by a victim may be
3 considered in determining whether the defendant
4 actually was or reasonably believed he was in
5 imminent danger. The intoxication of the victim may
6 be considered in determining whether the defendant's
7 fear of death or bodily harm was reasonable.

8 Now the final element of self-defense is
9 that the defendant had no other probable way to
10 avoid the danger of death or serious bodily injury
11 than to act as the defendant did in the particular
12 instance. A defendant has no duty to retreat or
13 withdraw if by doing so the danger of being killed
14 or suffering serious bodily injury would increase.
15 I further charge you that a person cannot be
16 required to make an exact calculation as to the
17 degree or amount of force which may be needed to
18 avoid death or serious bodily harm. Therefore, in
19 self-defense a defendant has the right to use the
20 force needed to avoid death or serious bodily harm.
21 The force used in self-defense does not have to be
22 limited to the degree or amount of force used by the
23 victim, and the defendant has the right to use so
24 much force as appeared to be necessary for complete
25 self-protection in which a person of ordinary reason

1 would have believed to be needed to prevent death or
2 serious bodily harm.

3 Now ladies and gentlemen, going back to
4 the verdict form I will repeat, number one — Mr.
5 Foreman, you'll have this in the jury room with
6 you — as to the charge of murder, we, the jury
7 unanimously find the defendant Ernest Toney, there
8 are two choices: not guilty, guilty. Your verdict
9 must be unanimous. That means all twelve of you
10 have to agree. This is not a majority vote or even
11 eleven to one vote. It must be all twelve agree.
12 If you have determined that the State has not proven
13 guilt beyond a reasonable doubt as to that charge,
14 you can put a check or X in the blank beside not
15 guilty. If you have determined, if you determine
16 the State has proven the elements of murder beyond a
17 reasonable doubt you check or X the space beside the
18 word guilty. Now the verdict form goes on to say:
19 If you have found the defendant not guilty of murder
20 proceed to question two, and that is the one that
21 deals with the lesser included offense of voluntary
22 manslaughter. The verdict form also says, if you
23 have found the defendant guilty of murder stop
24 deliberating. In that instance you would sign the
25 verdict form on the second page, date it, tap on the

1 door, and let the bailiff know you've reached a
2 verdict. Again, if you find him not guilty of
3 murder, you go to the lesser offense of voluntary
4 manslaughter and then inquiries are the same.
5 Either the State has not proven him guilty beyond a
6 reasonable doubt or it has, and you complete the
7 verdict form accordingly.

8 Now you'll have in the jury room, of
9 course, this verdict form and all the exhibits. A
10 couple of comments about the exhibits. There are
11 two weapons. They'll be in the jury room. There
12 are two boxes of I believe what has been identified
13 as ammunition. The ammunition and the weapons will
14 not be in there at the same time. So if you need
15 the ammunition the weapons come out. If you want
16 the weapons, vice versa. In other words, the
17 weapons and the ammunition will not be in there at
18 the same time. You are not permitted to manipulate
19 anything on the weapons. In other words, if the
20 breech is open, it is to stay open; you're not to
21 manipulate it at all. You're not to do anything to
22 change the character of or the integrity of the
23 weapon as it exists when it goes into that jury
24 room. There's also, I believe, one exhibit that is
25 a sealed bag. It's I believe it's sitting right up

1 there on the rail. It's sealed with yellow tape.
2 You may not undo that tape and take out what is in
3 the bag. If you desire to do that, you got to get
4 my permission to do that and we'll deal with that
5 accordingly.

6 Now also, if you have any questions during
7 the course of your deliberations, Mr. Foreman, there
8 will be a note pad in the jury room for you. You
9 write the question down, tap on the door and let the
10 bailiff know that you have a question. Then you'll
11 deliver the question to me. The law dictates,
12 number one, if I can respond and also how I can
13 respond. You'll not be getting anymore evidence.
14 In other words, no more additional information will
15 be presented to you that has not been introduced
16 during the course of the trial, but certainly feel
17 free to request me any questions that you would like
18 to ask. If anything about my jury charge is unclear
19 I'll certainly be happy to recharge it. You will
20 not have a written copy of this charge in the jury
21 room. So in short, you'll have this in your jury
22 room: The evidence, your common sense, and this
23 verdict form. And you're to take the law as I've
24 given to you, put it together with your common sense
25 view of the evidence, and you reach a verdict that

1 speaks the truth.

2 Now the State of South Carolina expects
3 and is entitled to a fair and impartial trial at
4 your hands. The defendant, Ernest Toney, expects
5 and is entitled to a fair and impartial trial at
6 your hands. The only way that you can give them
7 what you have sworn to do is to give the issues in
8 this case the consideration that they deserve and
9 you're to make sure that your verdict in the case
10 does speak the truth. Now nobody is going to be in
11 that jury room. There are not gonna be any video
12 cameras, recording devices, or anything else. It'll
13 just be you. If you do have any questions you
14 simply let us know. If you do have a verdict you
15 let us now.

16 Next order of business, ladies and
17 gentlemen will be for you to go to your jury room.
18 You can't begin discussing the case quite yet. It
19 says under the rules the lawyers are permitted to
20 let me know if they believe I have charged anything
21 incorrectly or if I've left something out so don't
22 begin quite yet. Your signal to deliberate will be
23 when the bailiff comes to the door with the verdict
24 form and with the exhibits and tells you that you
25 can begin. If anybody needs to use the phone, first

1 you've got to get my permission to step out and use,
2 it; but if somebody does leave the jury room, Mr.
3 Foreman, please make sure you stop your
4 deliberations until that person comes back. Also,
5 if anybody happens to step into the restroom that's
6 certainly fine, but make sure you stop your
7 deliberations until that person comes back into the
8 immediate deliberation area.

9 All right, you can go to your jury room
10 except let me just call right there, Mr. Norris and
11 Ms. Council, if you can remain behind out in the
12 hall, okay?

13 (WHEREUPON, the jury was removed from the
14 Courtroom at 4:06 p.m.)

15 THE COURT: First of all, any objections
16 or additions from the State?

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

18 THE COURT: Any from the Defendant?

19 MR. KENT: None from defendant.

20 THE COURT: Okay, second, what is the
21 State's position and Defendant's position on the
22 alternate jurors? My interpretation of the statute
23 is that once a jury is released to deliberate the
24 alternates must be released.

25 MR. FATA: I don't have a problem with

1 that.

2 THE COURT: Some people say they need to
3 sit in a separate room. I don't ever do it that
4 way. I let somebody put their position on the
5 record, okay. I'll release them in just a minute.
6 While I'm doing that, if you would please make sure
7 that all the exhibits are in order and I'll have the
8 alternates step out.

9 (Attorneys review exhibits and the alternates are
10 excused.)

11 THE COURT: Okay. Mr. Fata, all the
12 exhibits in order?

13 MR. FATA: Yes, sir.

14 THE COURT: Mr. Kent?

15 MR. KENT: Yes, sir, on behalf of Mr.
16 Toney, I reviewed all the exhibits, and I believe
17 they're proper going back into evidence with the
18 jury.

19 THE COURT: I'll just note they start at
20 4:08.

21 THE COURT REPORTER: I got 4:12, Judge, on
22 my computer.

23 THE COURT: Okay.

24 (WHEREUPON, court was in recess and the jury began
25 their deliberations at 4:12 p.m.)

1 THE COURT: All right, Mr. Fata, I
2 understand — evidently based on the green light the
3 jury has a verdict. If so, is the State ready?

4 MR. FATA: Yes, sir.

5 THE COURT: Mr. Kent, is Defense ready?

6 MR. KENT: Yes, sir, Judge.

7 THE COURT: Let me note one thing for the
8 record for the benefit of everybody here. I realize
9 that whatever the verdict or verdicts might be, one
10 side or the other might be pleased, the other side
11 might be terribly disappointed. I'm not gonna
12 permit any type of visible or audible reaction. In
13 other words, whatever the verdict is, receive it
14 just as you're sitting here. There's not to be any
15 action that would cause any disturbance. All right,
16 we can bring out the jury.

17 (WHEREUPON, the jury was returned to the
18 courtroom at approximately TIME , and
19 the following proceedings commenced in
20 open court.)

21 THE COURT: All right, Mr. Foreman, have
22 you reached a verdict?

23 THE FOREMAN: Yes, sir.

24 THE COURT: Is the verdict unanimous?

25 THE FOREMAN: Yes, sir.

1 THE COURT: All right, you can hand the
2 form to the bailiff. Thank you.

3 (Verdict from tendered to the Court.)

4 THE COURT: All right. Mr. Toney, please
5 stand.

6 You may publish the verdict.

7 THE CLERK: State of South Carolina versus
8 Ernest Toney, case number 2011-GS-31-156, as to the
9 charge of murder: We, the jury, unanimously find
10 the defendant Ernest Toney guilty.

11 THE COURT: All right, ladies and
12 gentlemen, if this was your verdict and is still
13 your verdict please signify that by raising your
14 right hand.

15 (All jurors raising their hand.)

16 THE COURT: The record will show that all
17 twelve jurors of the jury have raised their hand.
18 All right, you can have a seat.

19 Mr. Kent, anything before the jury is
20 released?

21 MR. KENT: We request polling, Judge.

22 THE COURT: All right, Ms. King or Ms.
23 Watkins.

24 THE CLERK: Juror number 47, Chad
25 Galloway, is this your verdict and still your

1 verdict?

2 JUROR GALLOWAY: Yes, ma'am.

3 THE CLERK: Juror number 60, Natasha
4 Howard, is that your verdict and still your verdict?

5 JUROR BRADLEY: Yes, ma'am.

6 THE COURT: Juror number 142, Tabitha
7 Watts, is this your verdict and still your verdict?

8 JUROR WATTS: Yes, ma'am.

9 THE CLERK: Juror number 43, Sonia
10 Forcier, is this your verdict and still your
11 verdict?

12 JUROR FORCIER: Yes, it is.

13 THE CLERK: Juror number 111, Jimmy
14 Pettus, is this your verdict and still your verdict?

15 JUROR PETTUS: Yes, ma'am.

16 THE COURT: Juror number 54, Donna
17 Hawkins, is this your verdict and still your
18 verdict?

19 JUROR HAWKINS: Yes, ma'am.

20 THE CLERK: Juror number 27, Jennifer
21 Cook, is this your verdict and still your verdict?

22 JENNIFER COOK: Yes, ma'am.

23 THE CLERK: Juror number 121, Eileen Rock,
24 is this your verdict and still your verdict?

25 JUROR ROCK: Yes, ma'am.

1 THE CLERK: Juror number 92, Allen Mixon,
2 is this your verdict and still your verdict?

3 JUROR MIXON: Yes, ma'am.

4 THE CLERK: Juror number 126, Viola Shaw,
5 is this your verdict and still your verdict?

6 JUROR SHAW: Yes, ma'am.

7 THE CLERK: Juror number 148, Veronica
8 Wilson, is this your verdict and still your verdict?

9 JUROR WILSON: Yes, ma'am.

10 THE CLERK: Juror number 118, Jordan
11 Rhodes, is this your verdict and still your verdict?

12 JUROR RHODES: Yes, ma'am.

13 THE COURT: All right, the record will
14 show that the polling has confirmed the jury's
15 verdict. Mr. Kent, anything else before the jury is
16 released?

17 MR. KENT: Nothing further, Judge.

18 THE COURT: All right, ladies and
19 gentlemen, that does complete your service of this
20 case. I want to talk to you about a couple of
21 things before you do leave. Of course, your service
22 in this case is over and it's over for the week.
23 And I do want to thank you for the attention you
24 paid throughout the trial, and I do appreciate the
25 fact that you took your obligation very seriously.

1 You are now free to go. If you would be
2 so kind as to not discuss the case with anyone else
3 other than amongst yourselves while on the
4 courthouse grounds. That will allow you to get to
5 your cars without any interference from anyone else.

6 I'm gonna request everyone else in the
7 courtroom to remain behind until the jury does
8 depart. However, this is a public setting and if
9 you would like to remain behind and watch any other
10 proceedings in this case, certainly you're permitted
11 to do that. You can just go over there to the back
12 and have a seat in the back of the courtroom -- if
13 you want to, you don't have to -- but you are now
14 free to go. Thank you.

15 (WHEREUPON, the jury was removed from the
16 courtroom.)

17 MR. FATA: Judge, I have to get the
18 sentencing sheet ---

19 THE COURT: Well, I was gonna talk to you
20 about that.

21 Mr. Kent, do you have any position as to
22 whether sentencing take place this evening or
23 tomorrow?

24 MR. KENT: I prefer to do it in the
25 morning, Judge.

1 THE COURT: Sir?

2 MR. KENT: I prefer to do it in the
3 morning, Judge, to be honest.

4 THE COURT: Well, let's -- we can talk
5 about that, but I will -- before we go any further
6 from that, would you like ten days to make any
7 post-trial motions?

8 MR. KENT: I would, Judge. That's the
9 other thing I was gonna ask.

10 THE COURT: What I will not do is
11 calculate the time for you.

12 MR. KENT: Yes, sir.

13 THE COURT: Because I don't want to assume
14 anything improper. We know what the date is and the
15 ten days is set by rule. I will allow you ten days
16 to do that.

17 Mr. Fata, do you have any objection to
18 sentencing being in the morning?

19 MR. FATA: No, sir, that's fine. What
20 time you want to do it?

21 THE COURT: Wait just a second please.

22 (Pause.)

23 THE COURT: Now I don't know if the two
24 families know one another, but Mr. Davis Mazingo, if
25 you could perhaps make sure that order is

1 maintained. I'm not saying anything is going to
2 happen between the family members when they do
3 leave, but I've been surprised before. I just want
4 to make sure that order is absolutely and utterly
5 maintained. There won't be any type of celebration
6 or outward showing of disappointment on the
7 courthouse grounds, or certainly everybody should be
8 on their p's and q's away from the courthouse
9 ground. Mr. Toney is in custody.

10 MR. KENT: That is correct, Judge.

11 THE COURT: And we'll proceed with
12 sentencing tomorrow morning at 10:30. One final
13 thing, I do certainly appreciate the professionalism
14 exhibited by the lawyers in the case and the
15 witnesses, including of course law enforcement.
16 It's always a pleasure to preside over a trial
17 regardless of the result. I know one side has got
18 to be disappointed and certainly do appreciate the
19 way the lawyers did follow the rules and, you know,
20 the fact that they knew the rules. I appreciate
21 that and thank you for your efforts. All right,
22 we'll begin tomorrow morning at 10:30. I'll see you
23 tomorrow.

24 (WHEREUPON, the proceedings were concluded
25 and reconvened on December 14, 2012.)

1 THE COURT: All right, we're back on the
2 record with State versus Ernest Toney. Of course,
3 the jury yesterday afternoon found Mr. Toney guilty
4 of the indicted charge.

5 MR. FATA: Here's the indictment, Your
6 Honor.

7 THE COURT: Mr. Fata.

8 MR. FATA: 2011-GS-31-156.

9 THE COURT: All right, Mr. Fata, I'll hear
10 from you first.

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

12 THE COURT: And anyone from the victim's
13 family.

14 MR. FATA: Okay. Your Honor, this case
15 was one that took us a while to prepared, get ready.
16 There was a lot of loose -- convolutions and so
17 forth regarding the test-- you heard the testimony
18 about the relationship of the parties and
19 everything, which made it very difficult. In the
20 end, we were successful. I offered Mr. Toney a plea
21 bargain of voluntary manslaughter with a cap of 15
22 to 20 years, and of course, he doesn't have to take
23 it. I hope he did consider it. But this was a
24 serious case, the evidence will bear that out. The
25 easiest thing that could have happened, the best

1 thing that could have happened was they — when Mr.
2 Toney and Mr. Rogers confronted each other on John
3 Wesley Road and Mr. Rogers said, wait here, I'll be
4 right back. If he'd have just cranked up his
5 vehicle and drove off, that would have saved all
6 this trouble, he wouldn't be facing this long prison
7 sentence. But I'm not gonna re-hash the evidence.

8 We just cannot have this sort of conduct
9 in Lee County. The citizens of the county need to
10 know that the Court will take care of this and
11 protect them. People need to know that they can't
12 go around settling their differences in the street
13 in old fashioned gun fights.

14 And this is Major Dellinger who was, did a
15 very fine job in investigating and bringing the
16 facts in this case.

17 INVESTIGATOR DELLINGER: And Your Honor, I
18 had plenty of help with that. All the investigators
19 in the Sheriff's Office assist with that. I think
20 Your Honor's heard the facts and has a good grasp of
21 this situation in this case, but I do believe that
22 the oldest son of Mr. Rogers would like to address
23 the Court on behalf of his family.

24 MR. FATA: Creshawn -- excuse me.

25 INVESTIGATOR DELLINGER: His mother and

1 wife and younger son are also in the courtroom.
2 They just elect not to speak before you and allow
3 the —

4 THE COURT: All right, Mr. Fata, does —
5 do all those folks understand they do have the right
6 to speak if they want to?

7 MR. FATA: Yes, sir, we had a -- we,
8 yesterday after the verdict I discussed with the,
9 yeah. I discussed with the family they have a right
10 to speak to the Court, and they have elected the
11 oldest son, Creshawn Rogers —

12 MR. ROGERS: Rashad Rogers.

13 MR. FATA: Rashad, excuse me, to speak on
14 their behalf.

15 THE COURT: All right, Mr. Rogers, I'll be
16 glad to hear from you and just make sure that you do
17 direct all your statements to me and not to Mr.
18 Toney, okay?

19 MR. ROGERS: Yes, sir.

20 THE COURT: Yes, sir.

21 MR. ROGERS: Your Honor, first I want to
22 thank Solicitor Fata, Major Dellinger, Sheriff
23 Simon, and all of Lee County's finest, I guess, in
24 their efforts to bring this to a close. A lot has
25 been said about my father's character in this

1 particular trial, and I kind of feel like I have to
2 kind of defend that because it doesn't tell the
3 whole story about who he was as a man and how he
4 lived his life. He enjoyed his life, loved his
5 family.

6 And truth be told, he wasn't the one on
7 trial here. In fact, my father's resting in peace
8 at New Zion AME, and he's been there for the last
9 two years and Mr. Toney put him there. And this
10 family has struggled ever since then to kind of
11 figure out how to move forward and how to cope.
12 It's really been held for me to figure out what our
13 next move is, and but at least this helps us to
14 bring some closure to this chapter and help us move
15 forward.

16 At this point what we want to see is just,
17 you know, the appropriate penalty for him for taking
18 my father's life 'cause you know, we can't get him
19 back and there's nothing we can do about that and we
20 just have to accept that and just move forward. We
21 want to see justice served in the appropriate manner
22 at this point.

23 THE COURT: Thank you, sir.

24 MR. FATA: Your Honor, just one more
25 thing. I know the minimum sentence is 30 years. I

1 don't know if that is enough, but that's within your
2 discretion.

3 THE COURT: All right, anything else from
4 the State?

5 MR. FATA: Nothing else, Your Honor.

6 THE COURT: All right, Mr. Kent.

7 MR. KENT: Thank you, Judge, may it please
8 the Court, you've heard a lot of the facts. Before
9 I begin with my presentation I'd like to talk with
10 some family members to address you. By way of
11 procedure, Mr. Toney would like to address the Court
12 generally; however, based upon the conviction I
13 generally encourage my clients not to say a word to
14 the Court. That's no disrespect to the Court.

15 THE COURT: Right, I understand.

16 MR. KENT: Just for the record that I have
17 asked not to say a word, actually not to sign the
18 sentencing sheet. That's not disrespectful to the
19 Court. Before I get to my presentation if you'd
20 hear from Harry Toney as well as Blondell Toney
21 would like to address the Court.

22 THE COURT: Mr. Toney, yes, sir.

23 MR. HARRY TONEY: Good morning, Your
24 Honor.

25 THE COURT: Good morning.

1 MR. HARRY TONEY: My name is Harry Toney.
2 Ernest is my brother. And Your Honor, he comes from
3 a good Christian family. Ernie is a hard working
4 person. He have worked hard. He got a good work at
5 TEN. And I know — I don't really know what
6 happened, but he's a real honest person but I know
7 if he had to do it all over again it wouldn't be
8 happen. I know people don't get a second chance at
9 their life and I'm asking you to just have mercy on
10 him.

11 THE COURT: All right, thank you, sir.

12 MR. KENT: His sister, I mean his niece, I
13 apologize, Judge. Blondell Toney.

14 THE COURT: Your first name?

15 MS. TONEY: Blondell.

16 THE COURT: Yes, ma'am.

17 MS. TONEY: Hi, I'm his niece. My uncle,
18 he's honest. He never have been (inaudible). He
19 was close to his nieces and nephews. I never heard
20 him spoke in any way (inaudible). He has a big
21 heart. His nickname for me was Pam Gray (ph), which
22 is a black strong African American actor. But today
23 I don't feel like that and I apologize to this Court
24 for me not being strong enough to him by coming
25 forth to tell you what kind of person he is. He's

1 always been there for my nieces, my nephews, my kids
2 and their kids. He's always came to my grandma's
3 house on Sunday or after church we meet there. We
4 talk, we play. That's all I know, I mean, it's like
5 he's a big, small giant. He just have a big heart
6 and I know if he could took this back he would. But
7 like my Uncle Harry said, you can't bring back
8 somebody life. And I know through the courts there
9 are circumstances behind this, but I also ask the
10 Court to have mercy on him.

11 THE COURT: Thank you.

12 MS. TONEY: Thank you.

13 MR. KENT: Judge, the rest of his family
14 is in the back of the courtroom. As you know,
15 they've been here throughout the course of the
16 trial. They were on the witness list; but as I
17 mentioned to you when we came up, I talked to the
18 family, I talked to them about testifying. But
19 because of their relation and nature with them, they
20 chose to be in the courtroom rather than testify
21 during the trial, but they have been here the entire
22 time. They have strong support structure.

23 Judge, before I get to most of the
24 background I want to address something that the
25 solicitor said, and it's something that the

1 solicitor put on the record. A plea offer was
2 extended from the Solicitor's Office, a plea offer
3 of voluntary manslaughter, 15 to 25 to 20 year cap.
4 That offer was extended to the client. He was told
5 about the offer, he was asked about the offer. He
6 summarily rejected the offer along with myself and
7 Harry Toney. Myself and Mr. Chandler continuously
8 we went through the facts — and I'm not bringing
9 this up to say, oh, gosh, he didn't listen to his
10 attorney. I bring this up because he has maintained
11 his innocence steadfastly and steadily. He was told
12 that he had a very generous plea offer. I told him
13 it'd be in his best interest to take the plea offer.
14 He and his brother maintain their innocence, and
15 they said it was in their best interest not to take
16 the plea.

17 I'm not gonna get specifically into
18 negotiations and things that myself and Mr. Toney
19 had; but I will tell you adamantly, Judge, I know
20 that some appellate court will be reading this some
21 day but I put on a self-defense case and that was a
22 strategy decision that was explained to my client,
23 explained to his family and he understood the
24 strategy decision. I told him that based upon the
25 evidence and based upon the facts in the record that

1 this was a self-defense case. He was very adamant
2 the entire time that he did not do anything. He did
3 not change that; he did not waiver that.

4 THE COURT: He did not do anything?

5 MR. KENT: He was very adamant and — I
6 just bring this up. He understood what case that we
7 had to try. If you look back at the record it
8 wasn't anything that he said, that he told us. We
9 tried a self-defense case based upon the evidence
10 that was put forth by the State. I'm just putting
11 that on the record that I told him that.

12 THE COURT: Well, going back to the
13 Jackson versus Denno hearing, of course, we know
14 what the testimony was and —

15 MR. KENT: Yes, sir. And I just want to
16 make that clear for the record. That was a strategy
17 decision that we consciously made that we thought
18 was necessarily the best chance for him. That's
19 what we do as defense attorneys. But Judge, when we
20 met with Ernest this day and I've talked to him
21 since day one. He's maintained his innocence like
22 no client that I've ever had. He has been
23 remorseful about what has happened. He has been sad
24 about what has happened to Mr. Rogers. He didn't
25 have anything to do with what happened to Mr.

1 Rogers. He was very upset about it, sad about it,
2 very concerned about it. But he was very clear that
3 he had nothing to do with it. We've done tests,
4 we've interviewed individuals and talked to
5 individuals to try to back up the story of what he
6 was telling us, Judge.

7 All that being said, he still finds
8 himself in the dubious distinction of having a
9 conviction now for murder. Judge, and I've
10 explained to the family, I've explained to the
11 family that the sentence that you set down today is
12 not going to be a light sentence. There's no human
13 way possible it's going to be a light sentence.
14 This is a 55 year old man and any sentence that this
15 Court lays down realistically is gonna take him down
16 to a life that he has inside the Department of
17 Corrections and that is a sad function after that.

18 Judge, as you have heard throughout the
19 trial, he has zero record. This is not a man who
20 has been in trouble with the criminal justice
21 system. This is not a man who has had a history of
22 violence, had a history of any of these things going
23 on. This is such an aberration that he finds
24 himself, first time in trouble with the Department
25 of Corrections charged with murder. I think that's

1 one of the major reasons why, respectfully why the
2 Solicitor's Office offered him a 20 year sentence.

3 Judge, he's worked his entire life. He's
4 worked at Pilgrim Pride. I think you heard that
5 throughout the trial. For 18 years otherwise,
6 making \$9.52. Every person who I have talked to
7 about this man, every person who have been around
8 this man, Harry Toney, to his family, to his mother,
9 has had nothing but good things to say. He has
10 three children. You heard of one, [REDACTED], age six
11 now, she was age four when all this happened. He
12 has a daughter Brittany, as well as a daughter,
13 Jessica. Judge, these are difficult times,
14 difficult time with my client is convicted of
15 something and they maintain steadfast their
16 innocence. You have been a trial lawyer and I've
17 seen you in a courtroom, and you understand the
18 difficulties that finds, you find yourself on the
19 other side of trial. All I would ask, Judge,
20 whatever sentence in your mercy that you lay down
21 appropriate for this sentence. Murder has a range
22 and I understand murder has a range, and there's no
23 such thing as an easy murder. There's no such thing
24 as a good murder. Murder is murder. What I would
25 ask, Judge, that you sentence him to 30 years

1 because if we were to take the facts as presented to
2 the State — whether the jury believed those facts
3 or not, the facts in this case suggest a
4 self-defense murder, they still do. I'm not saying
5 it is a justifiable murder. The jury definitely
6 didn't see it as a justifiable murder. What it does
7 without makes circumstances of aggravation, the
8 factors that surround this murder base, it could
9 justify a 30 year sentence. Based upon his age,
10 Judge, a 30 year sentence is still a life sentence.
11 When sentencing individuals I know that's the
12 hardest thing you judges have. We sentence them for
13 a couple of reasons. And one of the things that I
14 let my clients go is the Department of Corrections
15 is that there is some hope for them. They know that
16 when they to go to the Department of Corrections
17 he's gonna be there for her. What I ask, that while
18 they're in the Department of Corrections there's
19 some hope on his part, know that it is possible that
20 some day that I will be released from the Department
21 of Corrections.

22 Again, as I -- and I'll finish with this,
23 Judge. Again, I apologize. As with any trial when
24 I have a conviction I encourage my clients not to
25 talk, they do have appellate rights. He understands

1 his appellate rights. He understands that he will
2 be found -- I encourage him to not talk. That is
3 not to disrespect the Court, that is not to
4 disrespect the family, that is not to disrespect his
5 son. I have encouraged him not to speak at this
6 point in time, and I'm sure there's a lot that he
7 wants to say based upon his appellate rights.

8 Finally, Judge, you've graciously given us
9 ten days to file post-trial motions. Respectfully,
10 I'll file those in writing on Monday and submit them
11 to yourself and submit them to Mr. Paul ---

12 THE COURT: And make sure you file them,
13 serve them, and send me ---

14 MR. KENT: I will. I will file it and
15 certainly send a copy to Paul. He understands he
16 won't need to be here when I file this motion.

17 THE COURT: Right.

18 MR. KENT: Respectfully, that's all we
19 have left. Thank you so much.

20 THE COURT: All right, Mr. Fata.

21 MR. FATA: That's all the State has, Your
22 Honor.

23 THE COURT: All right. In my mind it's
24 debatable, academically debatable that self-defense
25 was available as a defense. The most compelling

1 argument against it either as a matter of law of
2 from the jury's eyes as a matter of fact is that he
3 did have an opportunity, a golden opportunity to
4 retreat. I realize the issues raised in the Jackson
5 versus Denno hearing were inapposite to what the
6 evidence was presented at trial; but the only thing
7 that really made any sense was that Mr. Toney was
8 there on the side of the road. Obviously, we know
9 that. And that he was there when Mr. Rogers was
10 shot and that Mr. Toney is the one who fired the
11 weapon. Any other approach would have been,
12 frankly, ludicrous based on the overall scenario
13 presented to the jury and outside the presence of
14 the jury for that matter. If he'd just left, if
15 he'd just left. The business about well, he didn't
16 have a right to be there, he didn't have any
17 business there, well, anybody can be there.
18 Certainly it's a public place. They didn't have to
19 be there. He didn't have to be there a tenth of a
20 mile, or two tenths of a mile, and he certainly
21 didn't have to be there when this happened. He did
22 not have to be there; he could have been gone. He
23 knew that the evidence is correct, that Mr. Rogers
24 was angry, belligerent, he consumed a lot of
25 alcohol. He knew that so he should have left. And

1 all in all, what we have here is a man died and he
2 didn't have to die.

3 The fact that Mr. Toney has no record is
4 certainly pertinent in some cases, but to me it's
5 not pertinent in this case. It's probably not
6 pertinent in any murder case. I don't know why he
7 did what he did, but I don't doubt for a minute that
8 he did it. It was a jury issue as to whether or not
9 it was justified or whether or not there was a
10 defense. And I go back to what Mr. Fata said if
11 he'd just left. I don't think anybody in the world
12 would disagree with that.

13 I've said this before and I'll say it
14 again, this is the hardest part of this job, is
15 sentencing anybody, no matter what. Not because we
16 don't want to see a man go to prison, but it's the
17 end result of a situation that didn't have to
18 happen, just didn't have to happen. He's facing 30
19 years to life in prison. According to the
20 information I have he was born October 3, 1956, so
21 he's 56 years old. Whatever the sentence is, he's
22 going to be at advanced age when he is released from
23 prison, if at all. I'm not going to impose a life
24 sentence. I'm going to impose a period of time in
25 the State Department of Corrections that I think is

1 appropriate. As the young man stated, or at least
2 alluded to, nothing is going to bring his father
3 back. The young child has now lost the father she
4 had in the home; and the biological father, he will
5 be gone. What I mentioned a minute ago is I've said
6 this before and I'll say it again, I guess I say it
7 because I think it's right, I don't know what
8 sentence is correct. None of us can really know
9 that. Only thing I can do is impose a sentence
10 that's appropriate in my judgment.

11 Mr. Toney, I don't take any pleasure in
12 sentencing anybody to even a day in jail, but I have
13 to do what I think my duty requires. I'm gonna
14 commit you to the State Department of Corrections
15 for a determinate term of forty years. You'll get
16 credit for any time you have served.

17 And I sincerely wish the family of Mr.
18 Rogers the best of luck.

19 And I'm not insincere in saying this, I
20 wish you nothing but the best. I don't take any
21 pleasure in imposing this sentence.

22 All right, Mr. Fata, Mr. Kent, these
23 proceedings are concluded. I'll certainly take no
24 offense to any content of any post-trial motions.

25 * * * END OF REQUESTED TRANSCRIPT OF RECORD * * *

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C E R T I F I C A T E O F R E P O R T E R

STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE)

I, FRANCES B. RAY, Registered Professional Reporter (RPR), court reporter for the State of South Carolina, Third Judicial Circuit, do hereby certify that the foregoing proceeding was transcribed for Melissa Singletary through computer-aided transcription from audio recording; that the foregoing transcript contains a true record of the proceedings to the best of my ability.

I further certify that I am neither counsel for, nor related to nor employed by any of the parties connected to the action, nor am I financially interested in the action.

Witness my hand at Florence, South Carolina, this 28th day of January, 2016.

S/Frances B. Ray

FRANCES B. RAY, RPR

FORM 5

STATE OF SOUTH CAROLINA)
)
County of LEE)
)
ERNEST TONEY # 353588)
Full name and prison number (if any) of Applicant)

IN THE COURT OF COMMON PLEAS

15 - CR - 31 - 121

v.

State of South Carolina



APPLICATION FOR
POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention LIEBER CORRECTIONAL INSTITUTION

2. Name and location of Court which imposed sentence GENERAL SESSIONS- LEE COUNTY COURTHOUSE

3. Name(s) of co-defendant(s) (if any) _____

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2011-GS-31-0156 - MURDER
 - (b) _____

(c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

(a) DEC. 14. 2012 - 40 YEARS

(b) _____

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

No

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. _____

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. _____

ii. _____

iii. _____

(c) the date of each such result:

i. _____

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. _____

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) SEE ATTACHMENT: Marked as (9)(a).

(b) _____

Attachment 9(a).

The applicant in this matter has been awaiting a decision from his direct appeal, instead nearly 27 months later he receives a PCR application from his trial counsel. See Exhibit (1).

Counsel completely failed not only to file a timely appeal but also neglected to notify his client of his inactions.

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) See attachment.

(b) _____

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) See attachment.

(b) _____

(c) _____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? _____

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____

(d) any other petitions, motions or applications in this or any other Court? _____

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. _____

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. _____
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) _____
- (b) _____
- (c) _____

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? _____
- (b) your trial, if any? yes
- (c) your sentencing? _____
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
 - i. Shawn C. Kent
Ray Chandler
 - ii. _____
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. trial
 - ii. _____
 - iii. _____

19. State clearly the relief you seek in filing this application:

Reversal of conviction
Set aside judgment
Complete acquittal

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)
County of _____)

VERIFICATION

I, Ernest Jones, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Ernest Jones

SWORN to and subscribed before me this 4th day of May, 2015.

Lucrean Bryant (L.S.)
Notary Public

My Commission Expires: May 4, 2020

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Ernest Jones, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Ernest Jones
Applicant

SWORN or affirmed to and subscribed before me this
4th day of May, 2015.

Ludreon Bryant
Notary Public

My Commission Expires: May 26, 2020

10.(a) Applicant was denied the right to effective assistance of counsel - guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution - during the guilt-or-innocence phase of his jury trial.

11.(a) Supporting facts: Trial counsel's performance during the guilt-or-innocence phase was both unreasonable and prejudicial. See *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's acts or admissions included, but are not limited to, the following:

① Counsel failed to investigate, develop, and present all available, relevant and admissible evidence.

② Counsel failed to present expert witnesses i.e. handwriting expert to expose a fraudulent signature on a fraudulent statement.

①

③ Counsel failed to adequately investigate the facts and circumstances surrounding the death of the victim. Counsel's failure to conduct such an investigation deprived the jury of critical information relevant to an accurate assessment of applicant's guilt-or-innocence.

10.(b) Applicant was denied the right to effective assistance-guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution-during the sentencing phase of his jury trial.

11.(b) Supporting facts: Trial Counsel's performance during the sentencing phase was both unreasonable and prejudicial. See *Strickland v. Washington*, 466 U.S. 668 (1984) Counsel's acts or omissions included, but are not limited to, the following:

① Counsel failed to investigate, develop, and present all available, relevant and admissible mitigating evidence. As a result of

②

counsel's failure to uncover and present this evidence applicants sentence is unreliable.

② Counsel failed to object on all possible grounds to inflammatory and irrelevant evidence presented by the prosecution. As a result of counsels failure to make all appropriate objections, applicants sentence is unreliable.

③ The applicant in this case waiting for his direct appeal results receives a PCR application from trial counsel (27) months after conviction. See Exhibit (1).

④ Counsel recommends fills out and files the PCR as soon as possible, which is already 15 months late.

⑤ Counsel instructs applicant to list all grounds in which he would be entitled to post-conviction relief, which counsel did not timely file appeal, left applicant without a transcript to fully review all his grounds for relief.

③.

⑥ Counsel's gross incompetence is per-se enough to raise an issue of fact that reasonably questions his performance at all levels of representation.

Applicant respectfully requests this court to grant leave to amend P.C.R application according to additional information which is revealed through further discovery.

I, ERNEST TONEY, state pursuant to 28 U.S.C 1746 under penalty of perjury that the foregoing is true and correct.

x Ernest Toney
DATE: 5/4/15

K

KENT LAW FIRM

Exhibit (1)

March 13, 2015

Ernest Toney #00353588
Lieber Correctional Institution
PO Box 205
Ridgeville, SC 29472

RE: State of South Carolina v. Ernest Toney

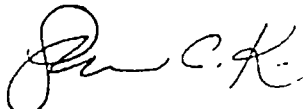
Dear Ernest,

I hope this letter finds you doing well. As we will be discussing over our scheduled telephone conference for March 17 2015, I have also enclosed an application for post-conviction relief (PCR). I would recommend that you fill out and file this application for post-conviction relief as soon as possible.

List all grounds for which you believe you are entitled to post-conviction relief (PCR).

Please note that I cannot file this application on your behalf and I can not represent you with regard to your post-conviction relief action. I suggest that you apply to have a lawyer appointed to you, or otherwise arrange for a lawyer to represent you in this matter. If you have any questions at all, please do not hesitate to contact me.

Sincerely,



Shaun C. Kent

SCK/jnl
Enclosures

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEE)	FOR THE THIRD JUDICIAL CIRCUIT
)	
Ernest Toney, #353588,)	Case No. 2015-CP-31-121
)	
Applicant,)	
)	
v.)	RETURN AND MOTION TO DISMISS
)	ALL CLAIMS BUT <u>WHITE v. STATE</u>
)	
State of South Carolina,)	
)	
Respondent.)	
_____)	

Respondent, making its Return to the Application for Post-Conviction Relief filed May 8, 2015, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lee County Clerk of Court. In September 2011, the Lee County Grand Jury indicted Applicant for Murder (2011-GS-31-0156). Shaun Courtney Kent, Esquire, represented Applicant. On December 14, 2012, Applicant proceeded to trial before the Honorable George C. James, Jr., and a jury. The jury found Applicant guilty as indicted. Judge James sentenced Applicant to forty (40) years imprisonment without negotiations or recommendation. Applicant did not appeal his conviction or sentence.

II.

In his Application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. "Applicant was denied the right to effective assistance of counsel"

- a. "Counsel failed to investigate, develop (sic), and present all available, relevant and admissible evidence"
- b. "Counsel failed to present expert witnesses i.e. handwriting-expert to expose a fraudulent signature on a fraudulent statement"
- c. "Counsel failed to object on all possible grounds to inflammatory and irrelevant evidence presented by the prosecution. As a result of counsels failure to make all appropriate objections, applicants sentence is unreliable."
- d. "Counsel instructs applicant to list all grounds in which he would be entitled to post-conviction relief, which counsel did not timely file appeal, left applicant without a transcript to fully review all his grounds for relief"

Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at an evidentiary hearing, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRPC.

Attached herewith and incorporated herein are the records of the Lee County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, and the transcript will be sent upon receipt. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

The Respondent submits that all allegations except the allegation regarding a direct appeal should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160. S.C. Code Ann. §17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within

one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was pled guilty to the offense(s) he challenges in this Application on April 10, 2012. The Applicant was therefore required to file his application on or before April 10, 2013. This Application was filed on July 30, 2014, which was well beyond the time that the statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (1985) authorizes the Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” Therefore, the Respondent requests that this Court summarily dismiss the application for post conviction relief for failure to file within the time mandated by the Post Conviction Procedure Act.

IV.

Applicant claims that he was denied effective assistance of counsel because his trial attorney failed to file a timely notice of appeal. The one-year statute of limitations does not apply to a claim that an applicant was denied his direct appeal. Wilson v. State, 348 S.C. 215, 559 S.E.2d 581 (2002).

Respondent submits that trial counsel for the Applicant was diligent in his representation of Applicant and that he performed within the wide range of reasonable professional assistance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). In Strickland, the United States

Supreme Court held that a convicted defendant's claim that counsel's assistance was so defective as to require a reversal of a conviction requires that the defendant show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. Respondent submits that trial counsel's performance was not deficient nor was the Applicant prejudiced in any way by such performance. The decision of the South Carolina Supreme Court, in White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974), holds that even though the post-conviction relief court finds that the Applicant had never voluntarily and intelligently abandoned his appeal, the court has no jurisdiction to grant a belated appeal. However, where an accused establishes in a post-conviction relief hearing that he was unconstitutionally deprived of his statutory right to a direct appeal, the South Carolina Supreme Court, upon an appeal of the post-conviction relief decision, will review the trial record and pass upon all issues properly raised and argued as if the direct appeal has been perfected.

Counsel has a constitutionally-imposed duty to consult with a defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029 (2000). The Respondent submits that the Applicant cannot satisfy the requirements set forth in the Roe test. However, the allegation of counsel's failure to advise the Applicant regarding the possibility of an appeal probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983); Delaney v. State, 269 S.C. 555, 238 S.E.2d 679 (1977).

V.

Respondent denies each and every allegation not hereinbefore expressly admitted, qualified, or explained.

VI.

WHEREFORE, having made its return, Respondent requests an evidentiary hearing be held.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

DANIEL GOURLEY
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

July 9, 2015.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEE)
)
)
)
)
 ERNEST TONEY, #353588,)
)
) Applicant,)
)
) vs)
)
) STATE OF SOUTH CAROLINA,)
)
) Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS

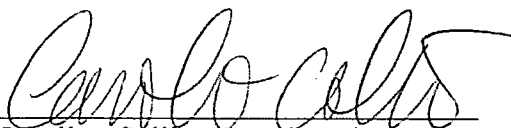
2015-CP-31-121

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return and Motion to Dismiss all Claims but White v. State** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Christopher Shannon Leonard, Esquire
Kendrick & Leonard, P.C.
Post Office Box 886
Columbia, South Carolina 29202

DATED this 9th day of July, 2015.



 Caroline Collins, Legal Assistant
 For Respondent

State of South Carolina)
County of Lee)

In the Court of Common Pleas
Third Judicial Circuit
2015-CP-31-0121

Ernest Toney,)
Applicant,)
vs.)
State of South Carolina,)
Respondent.)
_____)

Transcript of Record

July 26, 2016
Sumter, South Carolina

B E F O R E:

The Honorable Jocelyn Newman, Judge

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

Lance S. Boozer, Esquire
Attorney for the Applicant

Julie A. Coleman, Esquire, Assistant Attorney General
Attorney for the Respondent

Elizabeth B. Harris, CVR-M-CM
Circuit Court Reporter

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I N D E X

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No Exhibits Introduced.

1 THE COURT: I'm ready. Let's begin.

2 MS. COLEMAN: This is *Ernest Toney vs. The State of*
3 *South Carolina*, case number 2015-CP-31-121. Applicant is
4 presently confined in the South Carolina Department of
5 Corrections pursuant to orders of commitment of the Lee
6 County clerk of court. In September 2011, the Lee County
7 grand jury indicted applicant for murder, 2011-GS-31-0156.
8 Shaun Courtney King, Esquire, represented applicant. On
9 December 14, 2012, applicant proceeded to a trial before
10 the Honorable George C. James, Jr., and a jury. The jury
11 found applicant guilty as indicted. Judge James sentenced
12 applicant to forty years imprisonment without negotiations
13 or recommendations. Applicant did not appeal his
14 conviction or sentence.

15 Subsequently, Mr. Toney filed an application for
16 post-conviction relief on May 8, 2015, alleging that he was
17 being held in custody unlawfully for the following reasons:
18 applicant was denied the right to effective assistance of
19 counsel; counsel failed to investigate, develop, and
20 present all available relevant and admissible evidence;
21 counsel failed to present expert witnesses like a
22 handwriting expert to expose the fraudulent signature on a
23 fraudulent statement; counsel failed to object on all
24 possible grounds to inflammatory and irrelevant evidence
25 presented by the prosecution. As a result of counsel's

1 failure to make all appropriate objections, applicant's
2 sentence is unreliable, and counsel instructs applicant to
3 list all grounds in which he would be entitled to
4 post-conviction relief, which counsel did not timely file
5 appeal. Left applicant without a transcript to fully
6 review all of his grounds for relief.

7 The state filed its return and motion to dismiss all
8 claims but *White* on July 9, 2015, and applicant is present
9 in the courtroom today and represented by Mr. Lance Boozer.

10 THE COURT: All right, Mr. Boozer.

11 MR. BOOZER: Thank you, Your Honor. If it pleases the
12 court?

13 THE COURT: Yes, sir.

14 MR. BOOZER: Judge, I believe in discussions with the
15 attorney general's office, state is not opposing Mr.
16 Toney's request for a belated direct appeal. This was an
17 issue where -- there is a letter that's actually in his
18 application that Mr. Toney has marked as Exhibit 1 that's
19 from his prior counsel, Mr. Shaun Kent. I believe there
20 was just an oversight in the filing of the appeal. Mr.
21 Kent encouraged Mr. Toney to pursue the appropriate remedy
22 to get the belated appeal, which, of course, is this PCR
23 application. So, I believe the state is consenting to Mr.
24 Toney being granted the belated *White* appeal.

25 THE COURT: Is that correct?

1 MS. COLEMAN: That's correct. The state consents to
2 the *White* but moves to dismiss all other claims as
3 untimely, past the statute of limitations.

4 COURT REPORTER: Repeat that, please, that last
5 sentence.

6 MS. COLEMAN: Yes. The state moves to dismiss all
7 other claims besides the *White* review as being untimely and
8 past the statute of limitations.

9 MR. BOOZER: And, Your Honor, just to put the court on
10 notice, as I have Ms. Coleman for the state, I've made the
11 argument against precedent with the argument actually that
12 I'm about to make with regard to Mr. Toney's application.

13 This is kind of the rare situation where you have
14 someone who -- apparently he's been waiting around thinking
15 that he has a direct appeal after his conviction, and he
16 doesn't file his PCR application until he learns that
17 there's been no direct appeal. So, he doesn't have the
18 opportunity to pursue his PCR allegations during that time.

19 I do understand that the statute requires that an
20 application be filed within one year of the trial
21 conviction or, you know, after there's a belated -- or,
22 excuse me, after there's an appeal and remittitur sent
23 down, you then have a year to file after that. But I
24 believe the state's position and what may be case law is
25 that you're kind of out of luck if you -- if your lawyer

1 doesn't file the appeal and you don't file the PCR within
2 that one year.

3 So, I would like to put on the record that we do
4 oppose the motion to dismiss based on the statute of
5 limitations because he did -- he thought that he had a
6 direct appeal pending. He didn't know his lawyer had not
7 filed a direct appeal, so he didn't go ahead and pursue his
8 PCR claims that he had. So, that would be our response to
9 the motion to dismiss for statute of limitations.

10 THE COURT: Ms. Coleman.

11 MS. COLEMAN: I would just argue that the statute of
12 limitations is clear in its setting boundaries for filing,
13 and case law supports it.

14 THE COURT: All right. I don't know any way around
15 that. I know you had to take a shot, but I don't have to
16 grant ---

17 MR. BOOZER: That was my shot.

18 THE COURT: Yes, sir. I understand. So, but the
19 state does consent to ---

20 MS. COLEMAN: Yes, and at this time, if they have no
21 witnesses to present, the state would like to call Mr., Mr.
22 Kent to see his testimony on the appeal.

23 THE COURT: Absolutely.

24 MS. COLEMAN: State would call Shaun Kent to the
25 stand.

S. KENT - DIRECT EXAMINATION BY MS. COLEMAN

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SHAUN C. KENT, BEING DULY SWORN,

TESTIFIES AS FOLLOWS:

THE COURT: Good morning, Mr. Kent.

WITNESS: Hey, Judge. How are you?

THE COURT: Good. How are you?

WITNESS: Good.

BAILIFF: Please state your full name. Spell your last name for the record.

WITNESS: Shaun Kent, K-e-n-t.

DIRECT EXAMINATION BY MS. COLEMAN:

Q. Good morning, Mr. Kent. How are you?

A. Good morning. How are you?

Q. Good. Thank you for being here today. Will you tell us a little bit about your involvement in the case of Mr. Ernest Toney? Did you represent him in this matter?

A. Yes. Ernest Toney came -- I formerly was at a law firm, Coffey, Chandler, and Kent. Mr. Toney came in originally and hired my law partner at the time, Ray Chandler. So, Ray Chandler was hired on the case originally.

He had met with Mr. Toney's brother, Harry Toney. I got involved in the case and basically and took over the case and did most of the trial work on the case. But the case was originally handled by Ray Chandler, so we took over the case. We represented him. Myself and Mr.

1 Chandler tried the case together. However, my name was
2 mentioned as counsel of record during the trial since I did
3 the majority of the trial work.

4 He was convicted on December 14, 2012. After the
5 conviction, I actually ended up leaving the law firm. When
6 I say leaving the law firm, it was really within days, and
7 so the file stayed at the old law firm. I was also in the
8 process of running for a senate campaign. So, we'd left
9 the file at Mr. Chandler's office, and I think there was
10 some confusion, unfortunately for Mr. Toney, that Mr.
11 Chandler's firm had the case. However, I was counsel of
12 record, so the appeal never got filed.

13 Q. Okay. Did Mr. Toney ask you to file an appeal after
14 the conviction?

15 A. Candidly, I don't, I really don't remember. I know we
16 had talked about it several times after that. Mr. Toney
17 and I had met several times, and he definitely wanted to
18 appeal and wanted an appeal to be filed. I can't tell you
19 specifically when he asked.

20 Q. And you did not file a notice of appeal, correct?

21 A. No. There -- that was not filed by myself.

22 Q. Okay.

23 MS. COLEMAN: No further questions. Thank you.

24 MR. BOOZER: No questions, Your Honor.

25 THE COURT: All right, thank you, Mr. Kent.

1 WITNESS: Thank you.

2 (THE WITNESS EXITS THE STAND.)

3 MS. COLEMAN: Yes. So, Your Honor, at this time the
4 state consents to relief under *White vs. State*.

5 RULING OF THE COURT:

6 THE COURT: All right, then I will grant that, and I'd
7 also have to grant the state's motion to dismiss all other
8 PCR allegations.

9 MS. COLEMAN: Thank you, Your Honor.

10 THE COURT: Thank you.

11 MR. BOOZER: Thank you, Your Honor.

12 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR LEE COUNTY, SOUTH CAROLINA, ON THE 26TH DAY OF JULY, 2016.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

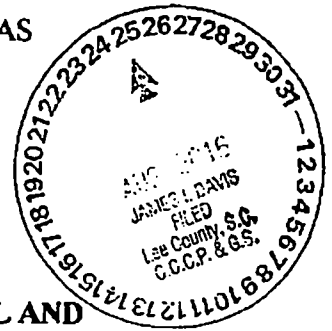
/S/ELIZABETH B. HARRIS, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

MARCH 15TH, 2017

STATE OF SOUTH CAROLINA)
COUNTY OF LEE) IN THE COURT OF COMMON PLEAS
2016 AUG) THIRD JUDICIAL CIRCUIT

RECORDED
2016 AUG 11 AM 9:01
JAMES L. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C. 2015-CP-31-121



Ernest Toney, #353588,

)
) Applicant,

)
) v.

)
) State of South Carolina,

)
) Respondent.
)

**CONSENT ORDER OF DISMISSAL AND
GRANT OF APPEAL PURSUANT TO
WHITE V. STATE¹**

This matter comes before the Court by way of an Application for post-conviction relief filed May 8, 2015. Respondent made its Return and Motion to Dismiss All Claims But White v. State on July 9, 2015. An evidentiary hearing was held on July 26, 2016 at the Sumter County Courthouse. Applicant was present and represented by Lance Boozer, Esquire. Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office represented Respondent.

I.

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lee County Clerk of Court. In September 2011, the Lee County Grand Jury indicted Applicant for Murder (2011-GS-31-0156). Shaun Courtney Kent, Esquire, represented Applicant. On December 14, 2012, Applicant proceeded to trial before the Honorable George C. James, Jr., and a jury. The jury found Applicant guilty as indicted. Judge James sentenced Applicant to forty (40) years imprisonment without negotiations or recommendation. Applicant did not appeal his conviction or sentence.

¹ White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974).

Applicant filed this application for post-conviction relief on May 8, 2015, alleging he was being held unconstitutionally based on the following allegations:

1. "Applicant was denied the right to effective assistance of counsel"
 - a. "Counsel failed to investigate, develop (sic), and present all available, relevant and admissible evidence"
 - b. "Counsel failed to present expert witnesses i.e. handwriting-expert to expose a fraudulent signature on a fraudulent statement"
 - c. "Counsel failed to object on all possible grounds to inflammatory and irrelevant evidence presented by the prosecution. As a result of counsels failure to make all appropriate objections, applicants sentence is unreliable."
 - d. "Counsel instructs applicant to list all grounds in which he would be entitled to post-conviction relief, which counsel did not timely file appeal, left applicant without a transcript to fully review all his grounds for relief"

II.

At the outset of the hearing, Respondent renewed its Motion to Dismiss All Claims But White v. State as being untimely for being filed past the one year statute of limitations. This Court granted that motion and proceeded solely on the claim of relief under White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). Respondent indicated to this Court that it consented to the granting of this relief.

This Court agrees that Applicant did not waive his right to a direct appeal. In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal if requested or comply with the procedure required by Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Where the post-conviction relief judge determines that the applicant did not freely and voluntarily waive his appellate rights, the