

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM BEAUFORT COUNTY
The Honorable Diane S. Goodstein, Trial Judge
The Honorable R. Scott Sprouse, Post-Conviction Relief Judge

S.C. SUPREME COURT

Appellate Case No: 2017-000970

JABARI LINNEN,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

APPENDIX

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1 THE COURT: --- he had pushed him up side the head. I
2 mean, that's it at this point. You are a long way at this
3 moment from Day.

4 MR. BROWN: Your Honor, Day did not deal, in my
5 opinion, with anything about what he knew; not on that
6 issue.

7 THE COURT: What Day dealt with is what was known by
8 the defendant, and the reason that the Court allowed those
9 other violent episodes in was to allow the corroboration of
10 what was known by the defendant. The defendant knew that
11 this person was paranoid, that they were violent, he held a
12 gun to his before, that he knew the way he reacted to drug
13 deals, he'd been doing drug deals with him. They had this
14 long history; he knew him. He knew he was a dangerous human
15 being, and the reason that the Court in Day allowed these
16 other episodes was to corroborate that Day wasn't making all
17 this up, that there were other people who had experienced
18 the exact same conduct. What I have done for you to this
19 point is that I have let you lay down a litany of violent
20 conduct on behalf of the alleged victim.

21 MR. BROWN: Yes, ma'am.

22 THE COURT: What you haven't done, at this point, is
23 your ability to tie it up at this point, and based on your
24 representation to the Court of where it's going, it isn't
25 going to be Day. Now, maybe you will come somewhere where

1 it will be Day, but at this point, all there is, is that Ms.
2 Blanding told your client, because he had a relationship
3 with her daughter, and she was mad one day that he pushed
4 her son up against the head. That's where we are right now.

5 MR. BROWN: Yes, ma'am.

6 THE COURT: We are very far away from Day, at this
7 point right now.

8 MR. BROWN: And then I'll --- yes, ma'am.

9 THE COURT: I'm not going to allow the testimony about
10 the reaction of the family with regards to the treatment and
11 the commitment of the alleged victim for that two days. It
12 doesn't comport with Day. It doesn't comport with 405(a) or
13 405(b). And I note your exception for the record.

14 MR. BROWN: Yes, ma'am.

15 THE COURT: Obviously, under great, on your behalf,
16 very creative, very adroit examination, yet Dr. McElveen has
17 made it pretty clear that he is unable to testify, based on
18 your hypothetical, and therefore, that testimony would not
19 be admissible.

20 MR. BROWN: How about his actual diagnosis? Not what
21 the family did or anything else, whether that's admissible.
22 Not what the family did to take him to the doctor, but
23 whether his diagnosis itself is admissible, as to the state
24 of mind of Mr. Nichols?

25 THE COURT: That he is a danger to others 30 days

1 before?

2 MR. BROWN: That he is an explosive person with a
3 homicidal tendency.

4 THE COURT: No.

5 MR. BROWN: I can't imagine anything that's not more
6 relevant than that in a self-defense case, that a person's
7 homicidal.

8 THE COURT: Did your client know that? Did he have any
9 information?

10 MR. BROWN: Well, you have to hear my client's
11 testimony.

12 THE COURT: Well, sir, not at this point; it's not
13 admissible.

14 MR. BROWN: Okay. And I guess, then, at that point, I
15 need to make sure that I have the ability to bring that
16 testimony back in, should I tie it in appropriately. But
17 Your Honor, I do need a ruling on the other part, about
18 psychosis causing inability to recall reality.

19 On the memory question, the question asked to Mr.
20 Nichols was whether or not he had memory problems, and he
21 said yes. And I said do you know what causes your memory
22 problem, and he said no, he didn't know what caused it.
23 Memory, and for what it's worth, this has nothing to do with
24 his character; this is his competency as a witness.

25 I'm not saying he's incompetent, but the question of

1 whether or not the weight of his recall is a question that
2 the jury has to judge, whether the person was able to recall
3 it. And it's not just because it was too far away and his
4 glasses were too thick, but it can also be because he has an
5 organic brain injury, or he's, in this case, suffers from a
6 symptom that can cause or exhibits through a break in
7 reality.

8 Now, he can't remember reality if he never perceived
9 it, and I think clearly this is an explanation which is set
10 up by his own testimony. If he said he can't remember or
11 it's been too long, or something, that would be a different
12 thing; but he left it open, and I asked him very open
13 questions, not leading questions, about what caused that
14 memory problem.

15 THE COURT: Let me ask you this question.

16 MR. BROWN: Yes, ma'am.

17 THE COURT: What issue, what fact, that is an issue in
18 this case, does the reason for his lack of memory make more
19 probable or less probable? He might just be lying.

20 MR. BROWN: That's correct.

21 THE COURT: Okay.

22 MR. BROWN: But otherwise, he gave a version of events
23 at the instant of the confrontation that differs from a
24 witness we've already heard, significantly. Like he was not
25 out of the car, that he was sitting down and not standing

1 up, and things like that. That is very indicative of him
2 not recalling reality. The State's own other witness
3 contradicts him on those very questions. And you're right,
4 the jury can decide, well ---

5 THE COURT: And you think that this doctor is going to
6 be able to tell you 30 days later why was he having -- why
7 was his ---

8 MR. BROWN: No, ma'am. I think that he can say that
9 he's been diagnosed with psychosis and that ---

10 THE COURT: The jury is welcome to speculate on whether
11 or not that was what he was suffering from 30 days later.

12 MR. BROWN: No, ma'am. That psychosis can cause an
13 inability to recall reality.

14 THE COURT: Thirty days later?

15 MR. BROWN: I think anytime you have it. He's not
16 cured of it. He has adjustment disorder.

17 THE COURT: Thank you.

18 MR. BROWN: And I'm assuming that that was sufficiently
19 proffered?

20 THE COURT: He doesn't have this. This doctor doesn't
21 have this.

22 MR. BROWN: Okay. Well, I mean I don't want to have to
23 reoffer that argument.

24 THE COURT: This doctor does not have an opinion within
25 a reasonable degree of medical certainty that being more

1 likely than not with regards to what, if any, psychosis or
2 medical condition, that the alleged victim was suffering 30
3 days out. He's concerned about him. I think he thinks he
4 needs counseling. He thinks he has adjustment disorder, and
5 when events happen in his life, maybe he reacts in ways that
6 are not healthy, but I don't think he has an opinion with
7 regards to his psychosis.

8 MR. BROWN: Yes, ma'am. And respectfully, my
9 recollection is I never actually -- I tried to ask him that
10 question, but ---

11 THE COURT: I think you did a good job asking him. I
12 think you got there.

13 MR. BROWN: So as a matter of factual finding for
14 appeal, I'm confused, because I only asked about whether he
15 had an opinion about his danger to others, not whether he
16 suffered a psychotic break that day or anything.

17 THE COURT: Yeah, you did. You asked him that.

18 MR. BROWN: Relevant to whether or not it could affect
19 his recalls.

20 THE COURT: You did ask him.

21 MR. BROWN: And I'll be honest, Your Honor, it's not
22 whether he couldn't recall that.

23 THE COURT: He doesn't have an opinion if he had
24 psychosis. If he doesn't have an opinion, how is he going
25 to have an opinion any better on why did the psychosis that

1 he had 30 days later than he doesn't have an opinion about?

2 MR. BROWN: I don't believe he ---

3 THE COURT: It's his memory.

4 MR. BROWN: I don't believe he said he didn't have
5 psychosis.

6 THE COURT: Thank you, I've ruled. Anything further?

7 MR. BROWN: Yes, ma'am. I guess to make sure that I
8 get it in, I'm going to have to try to introduce it during
9 the actual trial.

10 THE COURT: Do whatever you have to do.

11 MR. BROWN: And I'm assuming we'll go straight through
12 without clearing the jury out of the room?

13 THE COURT: I don't know what you ---

14 MR. BROWN: I guess what I'm saying is ---

15 THE COURT: I feel like you're trying to threaten me in
16 some way, Mr. Brown. Tell me what you're telling me.

17 MR. BROWN: No, ma'am. That I'm going to call him in
18 front of the jury and have an objection to the testimony.

19 THE COURT: From the doctor?

20 MR. BROWN: Well, an objection from the State. Because
21 in limine doesn't -- I mean, I'll be honest, the
22 preservation rules are ---

23 THE COURT: Isn't that -- I mean ---

24 MR. BROWN: Yes, ma'am, the same doctor.

25 THE COURT: This doctor. I went to an awful lot of

1 effort yesterday afternoon to make sure that this doctor was
2 our first person here, right?

3 MR. BROWN: Yes, ma'am. And I suggest, maybe, when
4 they come out, because we will then be live in the trial,
5 that I suggest I call Dr. McElveen for the purposes
6 previously discussed, and I guess that they will then
7 object, and then your Court would reaffirm the ruling, and
8 that way it is actually preserved.

9 THE COURT: I don't think that's required, but I
10 certainly don't want to keep you from being in the position
11 to be very confident that you have preserved the record in
12 the way that you think you must. I don't think that's
13 required. I think if I exclude his testimony ---

14 MR. BROWN: Yes, ma'am.

15 THE COURT: --- and then, outside the presence of the
16 jury, I think that's sufficient, and then we move on. Yes,
17 sir?

18 DEP. SOL. THORNTON: And Your Honor, I apologize, but I
19 would ask the Court to go with that position. The position
20 being that if it's excluded outside the testimony, it is
21 preserved; because then it looks like the State is
22 attempting to hide things when I get up and object and a
23 witness is taken off the stand.

24 So I would just ask, we've done it, he's proffered it,
25 Mr. Brown has been given two and half hours to proffer

1 testimony ---

2 MR. BROWN: That's a misrepresentation. I mean, it
3 wasn't two hours of my proffer.

4 THE COURT: I think you just interrupted him.

5 MR. BROWN: I'm sorry?

6 THE COURT: I think you just interrupted his argument.

7 MR. BROWN: I apologize.

8 DEP. SOL. THORNTON: If it was an exaggeration, I
9 apologize to the Court. He's been given ample opportunity
10 was my point to proffer testimony. The Court has ruled. If
11 Your Honor sees fit to exclude it, I'd ask that we'd just
12 move on and not recall him in front of the jury for me to
13 object and for him to move back only for an appellate
14 ground, which I think is already preserved by Your Honor
15 excluding it at this point. That would be the State's
16 argument. Thank you, Judge.

17 MR. BROWN: And in my learned practice doing post-
18 conviction cases, I don't think that that adequately
19 preserves it.

20 THE COURT: Do you have any authority to that effect?
21 I'm not excluding -- see, here's the thing. I'm not
22 excluding some of his testimony. I'm excluding all of this
23 testimony; everything you have proffered, everything you can
24 tell me he is going to testify to, I have excluded him.

25 MR. BROWN: Maybe it would be easier if the Court is

1 not allowing me to recall him, then I can't do anything
2 else.

3 THE COURT: There you go.

4 MR. BROWN: So I want to make sure that the Court is
5 saying I cannot.

6 THE COURT: And I want to ask you this question, is
7 there any other issue for which you would call this doctor,
8 because I don't want you to be sneaky. But is there any
9 other issue for which you would call this doctor that you
10 have not addressed with me?

11 MR. BROWN: No, ma'am. There is, and I would just
12 like, originally, just to go into his ability to recall or
13 perceive reality. Also, I'm not waiving the other grounds;
14 it did come up, but I will be honest, subject to tying it up
15 later, I would like him to be available.

16 THE COURT: Absolutely. Thank you for that, and I'll
17 address that. Let me say this, it is my intention, Mr.
18 Brown, as I exclude this witness at this point, it is my
19 understanding that you do not need to call him in front of
20 the jury in order to preserve your issue.

21 It is my intention on the basis of what's been
22 requested by the State, and I'm granting that request by the
23 State, that I believe for this record that you have done
24 everything within your power to preserve this issue, and if
25 this issue is not preserved, it is the fault of the Court;

1 it is not the fault of defense counsel. I know of nothing
2 else you can do. It is my fault.

3 MR. BROWN: Thank you, Your Honor.

4 THE COURT: I don't know of anything else that you can
5 do.

6 MR. BROWN: Thank you.

7 THE COURT: And I am granting the request of the State
8 not to call him, to have him take the stand and then leave,
9 and I want this record to reflect that I know of nothing
10 else that defense counsel can do to preserve this issue,
11 okay?

12 MR. BROWN: Thank you, Your Honor.

13 THE COURT: Absolutely. I want that one, if there is a
14 problem, because you are relying on my exclusion. All
15 right.

16 MR. BROWN: My understanding is that I cannot call him.

17 THE COURT: Exactly, based on everything you have
18 represented to me at this point. Now, we all agree that
19 that could change, because trials are what they are.

20 MR. BROWN: Yes, ma'am.

21 THE COURT: But at this point, and there is nothing
22 more you can do to preserve your issue in this record, and I
23 do understand that concern; I really do.

24 MR. BROWN: Yes, ma'am.

25 THE COURT: Now, Mr. Davis, Dr. McElveen, can I rest in

1 the belief that if we need Dr. McElveen, that we will have
2 his presence?

3 MR. DAVIS: You can, Your Honor.

4 THE COURT: Very well. I understand that not only was
5 he here at 9:00 this morning, but he was here at 8:00 this
6 morning.

7 MR. DAVIS: As directed, Your Honor. We were both here
8 at 8:00 this morning.

9 THE COURT: All right. Well, I'm going to first of
10 all, if we hadn't taken so much time on Dr. McElveen today,
11 I might have a comment or two, but I am very confident that
12 he understands now about subpoenas. He has a terrific two
13 lawyers. I know that the hospital lawyer had a little bit
14 of input; I know you have had a lot of input, Mr. Davis.
15 I've known you for a long time and I know you have explained
16 to him probably the difference between deposition subpoenas
17 and trial subpoenas.

18 MR. DAVIS: Yes, Your Honor.

19 THE COURT: And I am absolutely satisfied that I need
20 not worry.

21 MR. DAVIS: You do not.

22 THE COURT: And I want to thank you so much last
23 evening for being so available to me. I know I took you out
24 of a meeting. You were gracious enough to let me do that.
25 Thank you for that. I thank you for your follow up last

1 evening. I thank you so much for being here at 8:00 this
2 morning, and I thank Dr. McElveen for being here at 8:00
3 this morning. And I am satisfied that we don't have to
4 worry about whether or not if we need him again, I'll be
5 calling Buster, and Buster would be calling Dr. McElveen and
6 we will proceed anew.

7 MR. DAVIS: You are correct. Thank you, Your Honor.

8 THE COURT: Very well. And what that means is if you
9 would just take a moment and explain to Dr. McElveen that he
10 is not released from this subpoena, but we will give him
11 time to get here. Okay? Probably about an hour.

12 MR. DAVIS: Yes, ma'am, Your Honor.

13 THE COURT: Thank you. Thank you. Okay.

14 MR. BROWN: I do have another concern, Your Honor.

15 THE COURT: Okay. Before they leave?

16 MR. BROWN: No, ma'am. Not at all related to them.

17 THE COURT: Okay.

18 MR. BROWN: Just for purposes of appearances with my
19 client, I want to make sure there is no detriment to our
20 position based on the amount of time that any issue
21 presented to the Court has taken, because there was a
22 comment about the amount of time that I had to argue
23 something ---

24 THE COURT: Do you mean by the State?

25 MR. BROWN: That's correct. And obviously, that can

1 later pose a concern that maybe I was chilled from arguing
2 more out of a concern that I had taken too much court time.

3 THE COURT: I would address that, and I will address
4 your client, specifically.

5 MR. BROWN: Yes, ma'am.

6 THE COURT: You may have heard me tell the jury
7 yesterday about the witness not showing up? And that there
8 wasn't one more thing that these lawyers could do to get the
9 witness to show up, that I felt a little bit like I raised
10 these two lawyers, because I've known them since they was
11 knee-high to a grasshopper. So let me tell you something
12 about your lawyer. Your lawyer is, if you haven't figured
13 out that he is -- that he will fight to the last possible
14 believable detail and he is very creative, I feel a little
15 bit like I helped train him there, because he had a PCR with
16 me, his very first PCR, I sent him to school to be sure he
17 learned every trick or the trade; and the OID, which is the
18 Office of Indigent Defense, they still fuss at me about
19 that. But he's

20 MR. BROWN: Ten years; that case was 10 years. It was
21 10 years with Your Honor.

22 THE COURT: Isn't that amazing. Well, so that is the
23 reality, and you know, I guess I said last evening, that
24 while it always presses the Court, I think it's joyous and
25 you always, when you are in the courtroom with Mr. Brown,

1 just like Mr. Thornton said, "I'm looking for this to come
2 down the pipes, because I know it's coming down the pipes."
3 Because everybody knows that you've got to watch every
4 moment, because he is such an advocate. So I take no
5 offense at that at all. I appreciate Mr. Thornton for this
6 record, for putting that on the record, because I want the
7 record to reflect that Mr. Brown had every opportunity,
8 especially when I excluded a witness. So I'm delighted that
9 you put it on the record, because I certainly don't want
10 anybody worried about the Court's patience, because the
11 Court has got lots of that, especially with you lawyers.

12 DEP. SOL. THORNTON: Yes, ma'am. And that was my
13 point, Judge, it wasn't that Mr. Brown had gone on too long.
14 Mr. Brown and I both have been in trials and hearings that
15 have lasted much longer than this one. The point was that I
16 thought that he had successfully preserved every possible
17 issue he could have over the Court.

18 THE COURT: And I tend to agree with you there; how
19 about that? All right. Now, anything before we bring the
20 jury out?

21 MR. BROWN: Nothing, Your Honor.

22 DEP. SOL. THORNTON: No, ma'am.

23 THE COURT: Jury.

24 BAILIFF: Yes, Your Honor.

25 (WHEREUPON, THE JURY ENTERS THE COURTROOM, AND THE

1 FOLLOWING IS HELD ON THE RECORD.)

2 THE COURT: Ladies and gentlemen, I feel as though I
3 owe you some explanation. Part of your service, when I
4 qualify the jury is that there are going to be times when
5 you are going to be cool in your heels and that that is also
6 your jury service as I do the things that I must do. Most
7 of the time, I can basically figure out how long things are
8 going to take, but sometimes I cannot, and this morning was
9 one of those instances. I thank you for your patience.
10 That patience is also very much a part of your jury service.

11 At this time, ladies and gentlemen, we will continue
12 with the defense's case and we're turning to you, Mr. Brown,
13 if you'd call your next witness.

14 MR. BROWN: May it please the Court, Your Honor?

15 THE COURT: Yes, sir.

16 MR. BROWN: I'd call Jabari Lennin to the stand.

17 THE COURT: Very well.

18 (WHEREUPON, MR. JABARI LINNEN IS DULY SWORN.)

19 MR. BROWN: Before he takes the stand, may I ask that
20 he stand up and compare his height to me?

21 THE COURT: Sure.

22 (WHEREUPON, MR. LINNEN AND MR. BROWN STAND SIDE BY SIDE
23 FOR THE JURY TO VIEW, AND THEN MR. LINNEN TAKES THE WITNESS
24 STAND.)

25 MR. BROWN: Thank you.

1 THE COURT: All right. Mr. Lennin, state your full
2 name for our record and spell your last name.

3 MR. LINNEN: Jabari Lennin, L-E-N-N-I-N.

4 THE COURT: And Mr. Lennin, I want you to talk all the
5 way to Mr. Brown, okay?

6 MR. LINNEN: Yes, ma'am.

7 THE COURT: If you will look and talk to him, then you
8 will have enough volume, because everyone is interested in
9 what you have to say, okay?

10 MR. LINNEN: Yes, ma'am.

11 THE COURT: Thank you so much. Your witness, counsel.

12 MR. BROWN: And Jabari, if you would, like Your Honor
13 said, if you move the microphone, that's fine, too. You can
14 move the whole base so that you see.

15 THE COURT: Now, Mr. Linnen, you have a little cup of
16 water there. If you need more water, would you let us know?

17 MR. LINNEN: Yes, ma'am.

18 THE COURT: Okay. Your witness.

19 MR. BROWN: Thank you, Your Honor.

20 DIRECT EXAMINATION

21 BY MR. BROWN:

22 Q Jabari, would you tell us just a little bit about how
23 old you are and where you grew up?

24 A I'm 20 years old right now, and I grew up in Beaufort,
25 South Carolina, all my life; and my grandparents are in the

1 courtroom, Mr. Joseph Lennin and Rosa Lee Lennin; my
2 mother's in the courtroom, along with my stepfather, my
3 cousin and my brother. I never moved all my life, you know
4 what I mean? I made friends there and I got along.

5 Q Let me ask you, Where did you go to school?

6 A I went to school at Beaufort High.

7 Q And when did you graduate?

8 A 2010.

9 Q So it was a year before this happened?

10 A Yes, sir.

11 Q All right. And at the time, April 21st, were you
12 employed?

13 A Yes, sir.

14 Q Where did you work?

15 A Hardee's in Port Royal.

16 Q All right. And did you have a fiancée or somebody you
17 were involved with?

18 A Yes, sir. Desiree Blanding, she's also my baby moma to
19 my 10 month old son.

20 Q Ten months old. So your child was born, I want to make
21 sure I get this right, in July?

22 A No. He was born in November of last year.

23 Q November of last year. Okay. And so, Ms. Blanding was
24 actually pregnant on April 21st?

25 A On April 21st, she was two months pregnant.

1 Q Okay. All right. And have you ever helped Ms.
2 Blanding, as far as bettering herself?

3 A Well, besides bettering herself, I used to always tell
4 her that she can be anything she wants to be.

5 Q Tell us a little bit about what that meant.

6 A Like ---

7 THE COURT: You know what? If you back off just a
8 little bit from that microphone, I think we can hear you --
9 you've got good volume in your voice. You really do.

10 A But -- can you repeat the question one more time?

11 Q I sure can. What did you do to help her?

12 A She was in school at the time, but she never could find
13 a ride, and stuff like that, and she always had a problem
14 with walking to the bus stop, because of situations like
15 prior, but I would take her to school, I would pick her up,
16 I would take her to work and pick her up; I would take her
17 wherever she needed to go. When we first started talking,
18 we never had nothing; and I know people thought we wasn't
19 going to be nothing, but we made it.

20 Q And so y'all both were able to work and try to better
21 yourselves?

22 A Yeah. We both were able to get on our feet and start a
23 family.

24 Q All right. And let me ask you, did you have a vehicle
25 to help transport her?

- 1 A Yes, sir.
- 2 Q And what vehicle was that?
- 3 A A 1986 Crown Victoria.
- 4 Q And on April 21st, were you driving the vehicle when
- 5 you took her home?
- 6 A No, sir.
- 7 Q And is there a reason you weren't driving?
- 8 A Yes, sir. I lost my license to speeding tickets.
- 9 Q So you weren't able to drive, so you didn't drive?
- 10 A Yeah, I wasn't driving.
- 11 Q Okay. And now let me ask you about your knowledge or
- 12 relationship with Mr. Nichols. How long had you known him?
- 13 A I know Trey about -- well, ever since I was in high
- 14 school. I was in 9th grade and he was in 10th grade, so you
- 15 know, I knew him ever since then; but you know, I just heard
- 16 stuff about him; I never was really friends with him.
- 17 Q And let me ask you this, where did you hear that stuff
- 18 about him?
- 19 A Well, I heard stuff about him through classmates, and
- 20 stuff like that, and you know, females, they like to talk
- 21 and stuff, about boys.
- 22 Q And let me ask you, did you learn more information
- 23 about him after you started dating Ms. Blanding?
- 24 A Yeah. I learned a lot, because I didn't know what was
- 25 going on with her before I met her.

1 Q And I think it's already been talked about, but how
2 close to the Nichols' did Ms. Blanding live?

3 A She stay like right there. If you were to step out her
4 front door, there's another house there, but you can also
5 see the street lights and everything there. I mean, it's
6 not no jump shot, you know, it's right there.

7 Q Would you say that you ran in the same circles, at
8 least socially, in that community as Mr. Nichols?

9 A I mean, yeah, I was there, but I never really been
10 nowhere else but at Desiree's house, her grandmother's
11 house.

12 Q You weren't hanging out with Mr. Nichols?

13 A No.

14 Q But you were hanging out with Mr. Nichols' neighbors in
15 the community?

16 A Yeah, basically, only the Blanding's.

17 Q And Mr. Mitchell?

18 A Yeah, Mr. Paul, but he was staying there, too; he's a
19 Blanding, too.

20 Q And let me ask you, how many folks approximately stayed
21 there?

22 A You got the grandmother, the mother ---

23 Q And if you'd give some names.

24 A Ms. Loretta Blanding, Ms. Regina Blanding, the mother,
25 you had the older sisters, Leah and Nichole, Desi, Trivia,

1 and you also had the baby brother, Robert. I mean, that was
2 basically it, but Trivia, you know, she had a baby, so she
3 had the little boy there. My son wasn't born yet.

4 Q Did you have a fair amount of interaction with the
5 folks who lived in that community?

6 A Yeah. I also went to school with her sister, too, so
7 me and her sister was good friends, too.

8 Q Okay. Do you recall going to school with a lady named
9 Ariel Polite?

10 A Yes, sir.

11 Q Do you recall going to school with a lady named
12 Victoria Dantzler?

13 A Yes, sir.

14 Q All right. And how long did y'all go to school
15 together?

16 A Well, they was grades younger than me, you know, so I
17 only saw them like when they played basketball and stuff,
18 like that in the gym. I used to be the teacher's aide, or
19 whatever, to Coach Beasley, so they used to play a little
20 basketball and stuff like that, and we used to talk then.

21 Q And so let me ask you, you knew Mr. Nichols, you're
22 acquainted with him through school?

23 A Yes, sir.

24 Q And you're acquainted with him through your involvement
25 with the Blandings on the same street or community that Mr.

1 Nichols lived?

2 A Yes, sir.

3 Q And did you have an occasion to form an opinion about
4 his reputation for violence?

5 A Yes, sir.

6 Q And is that based on his acquaintances and your time in
7 the community with the Blandings and other people who knew
8 Mr. Nichols?

9 A Yes, sir.

10 Q What was that opinion?

11 A My opinion was automatically that he was a violent
12 person, and I know that I'm not from around here. I grew up
13 in Beaufort all my life, so you know, I didn't really want
14 no trouble over there, just because you know I'm not from
15 around here. You know, I'm not there; it's not my stomping
16 grounds.

17 Q And on that same vein, what was Mr. Nichols'
18 reputation?

19 A Well, I know he was a really violent person. I mean, I
20 heard throughout the ---

21 DEP. SOL. THORNTON: Objection, Your Honor. He's able
22 to testify to his opinion and that's it, not hearsay.

23 MR. BROWN: Certainly, I understand that, Your Honor.

24 A Well, my opinion ---

25 THE COURT: Hold on.

1 A Oh, I'm sorry.

2 MR. BROWN: I didn't elicit that part for reputation.

3 THE COURT: So the objection is if it goes beyond, he
4 was going into hearsay and beyond the opinion?

5 DEP. SOL. THORNTON: It is, Your Honor.

6 THE COURT: Okay.

7 Q And Jabari, you just can't talk about what other people
8 told you.

9 A All right. I apologize.

10 Q Are you nervous here today?

11 A Yes, sir, I am. My life is on the line.

12 Q Well, let me ask you this, have you ever personally
13 observed any specific instances of conduct of Mr. Nichols
14 within a short timeframe, a four or five month timeframe, of
15 April 21st?

16 A Yes, sir, I have.

17 Q And would you tell this jury about some of those
18 specific instances of Mr. Nichols' violence?

19 A Well, there was one time when I had to pick up my baby
20 mother, Desiree Blanding, from work, and there was nobody
21 that could drive in her family at the time, so I had to pick
22 her up. And so, I called off, and I went to go pick her up
23 and I drove her on the island, but I had to be back in 30
24 minutes, and this is a 30-minute ride by itself. So going
25 in, I saw him there at the tree, but I never said nothing,

1 and Desiree told me don't say nothing, just keep driving,
2 and so I kept driving. And when I was pulling back out, I
3 saw him at the tree, and when I came to a complete stop, he
4 ran up to my car and he kicked the door, not the driver
5 door, but the actual passenger door, because I tried to pull
6 up before he got to the car.

7 So when he kicked the door, I didn't think that he left
8 a dent in the door until I got back to my job and I noticed
9 I couldn't open my door how I usually opened it. So I saw a
10 big dent in there, and it cost me like \$100 to get the dent
11 out, you know what I'm saying? Because you know, out here
12 they tax for everything. So that was one incident that I
13 had.

14 Q What other incidents?

15 A Another incident was when I was picking up Desiree from
16 school and we just had finished eating; we went to the
17 Chinese restaurant. We always go to the Chinese restaurant.
18 And when I was coming to take her home, I was going on the
19 island and I saw him, and I noticed like just before I got
20 to the road, he started throwing bottles and stuff in the
21 street, you know, but I'm smart enough to walk away from the
22 bottles, you know, if I see it in the street, but I'm
23 saying, like, I don't know why he's doing it, because I
24 never really did nothing to him, ever in my life, you know?

25 Q Did you ever have discussions with the Blandings about

1 Mr. Nichols?

2 A Every night just about, because the situation got so
3 out of hand to where, you know, Desiree was scared to walk
4 down the road to get her niece from off the bus.

5 Q How old is her niece?

6 A Her niece is about seven or eight or nine years old
7 right now, but at the time she was just a little girl
8 starting school back then. You know, that was her job and
9 she never had a problem with it.

10 Q And let me ask you, the area where the elementary
11 children were dropped off, how close is that to the tree?

12 A It's actually at the tree because the tree is at the
13 intersection and the bus actually stops there at the
14 intersection.

15 Q How many times would you say Mr. Nichols was at the
16 tree when you drove by?

17 A Honestly, there wasn't a day that I never saw Mr. Trey
18 Nichols, because he was always there and I never knew why,
19 but you know, I know he didn't have a job or anything,
20 because I never used to see him in any work clothes or
21 anything; but it's just he was always there.

22 Q So he was at the tree when you'd go by?

23 A All the time.

24 Q He was at the tree when the bus dropped off?

25 A While Robert and ---

1 DEP. SOL. THORNTON: Objection, Your Honor. I've let
2 it go for a little while, but he's leading the witness
3 pretty much every question.

4 THE COURT: Yes.

5 Q When was he at the tree besides just when you went by
6 yourself?

7 A Can you repeat the question?

8 Q Yeah. What other times -- you testified you saw him by
9 the tree when you drove by. What other times did you see
10 him at the tree when it wasn't just you there?

11 A When it wasn't just me?

12 Q That's correct.

13 A What times did I see him at the tree?

14 Q When there were other people there?

15 A I still don't understand.

16 Q What times did you go see the bus drop the children
17 off?

18 A Oh, the time, around 3:30.

19 Q Okay. And was Mr. Nichols there?

20 A Yes, he was.

21 Q And I can't lead you -- and let me ask you this. Was
22 there any other times that Mr. Nichols did or said anything
23 to you or Desiree?

24 A Yes, there was.

25 DEP. SOL. THORNTON: Your Honor, I would object unless

1 he was present.

2 THE COURT: Sustained.

3 A I was present.

4 Q That's what I'm asking; And I apologize for not being
5 artful about it. What other times besides what you've told
6 us have you observed Mr. Nichols either engage you or
7 Desiree?

8 A Yes, sir. There was also another time where she had to
9 go pick up her brother, you know, because sometimes she'd
10 pick up her brother and then she'd walk down the road and go
11 get her niece, but this time her brother called the house
12 just before he left school and was like ---

13 DEP. SOL. THORNTON: Objection, Your Honor.

14 Q You can't say what he said, but tell me what you did
15 after that phone call was made.

16 A Well, after the phone call was made, we ended up doing
17 what he asked us to do, which was meet him down the road;
18 and when we met him down the road, we noticed that Trey was
19 sitting at the tree.

20 Q And what did Mr. Nichols do that you saw?

21 A Well, Desiree got out the car, because I drove my car
22 down there; we didn't walk down there. And I parked away
23 from him just because I didn't want him to start anything.
24 I was just there for one reason. So when she got out the
25 car, she walked to the road, and I was watching him just to

1 make sure he didn't do anything to her, but that never
2 stopped him, you know, and Trey, he just started calling
3 them names, you know what I'm saying? Teasing about the
4 police, and stuff like that, making smart remarks about the
5 police officers, and stuff like that, because she was
6 calling the police, because, you know.

7 Q Tell me -- if you don't mind, I want to slow down and
8 please tell me what exactly you observed; and I know it's
9 going to take a little bit of detail.

10 A I remember the remarks.

11 Q Not what she said, but what exactly you observed; the
12 events of that day.

13 A Well, I observed him walking towards her, like he was
14 going to hit her, and immediately I thought, you know,
15 that's my baby mother, and she was pregnant at the time, but
16 she wasn't two months pregnant. She was just like
17 conceived. So I was scared. I mean, I didn't know what to
18 do, and I don't have a cell phone, she was the only person
19 with a cell phone. So she immediately called the police,
20 but when she started calling the police, I noticed that he
21 was making little remarks or whatever.

22 Q What concern did Mr. Nichols have about what Ms.
23 Blanding was doing? What concern did he show?

24 A He didn't show any. I mean, that was him. He don't
25 care.

1 Q So what did Mr. Nichols do after that call was made?

2 A Nothing; he was just still at the tree.

3 Q And what did y'all do?

4 A We rode off. I took Desiree home, because I didn't
5 want her to stay down there anymore, and I told Ms. Regina,
6 who is her mother, that I didn't want her to even walk down
7 there either, but that didn't stop her, because she's a
8 mother of six.

9 Q Let me ask you this. What was your feelings concerning
10 Mr. Nichols' threat to your family, or Ms. Blanding's
11 family?

12 DEP. SOL. THORNTON: Your Honor, I'd object to that.

13 THE COURT: Sustained.

14 Q Did you develop any feelings?

15 A Yes, sir, I did. I developed a feeling that I knew he
16 was a very bad person; that I was scared, you know. I was
17 scared of him. I'm not even going to lie. I was scared
18 just because, you know, I knew about him.

19 Q What did you know about him?

20 A That he was a bad person. He was doing bad things.
21 Like every time I drive down the road, I always saw the
22 police officers at his house, and if they weren't at his
23 house, they were always patrolling, but they never patrolled
24 for no one else.

25 Q And let me ask you this, how many days would you drive

1 down that road?

2 A Every day; every morning, every afternoon, and every
3 night.

4 Q And again, I may draw an objection on this, but how
5 many times when you were driving there was Mr. Nichols at
6 that tree?

7 A Every day, sir.

8 Q Now, we talked about his reputation, but let me ask you
9 this, had you ever heard of any other specific instances?

10 A About Mr. Trey Nichols?

11 Q Yes, sir.

12 A When you say him, what was the word you used?

13 Q Other specific acts or conduct?

14 A Like before this?

15 Q Before the shooting.

16 A Yeah. About the sexual assault charges and the um ---

17 DEP. SOL. THORNTON: Objection, Your Honor.

18 MR. BROWN: I didn't ask that question.

19 DEP. SOL. THORNTON: I ask to approach?

20 THE COURT: Yes.

21 (WHEREUPON, A BENCH CONFERENCE IS HELD OFF THE RECORD
22 AND OUT OF THE HEARING OF THE JURY.)

23 THE COURT: Ladies and gentlemen, please step to your
24 jury room. We're going to take our morning break. Please
25 do not discuss this matter or allow anyone to discuss it

1 with you. Thank you.

2 (11:45 A.M., WHEREUPON, THE JURY EXITS THE COURTROOM,
3 AND THE FOLLOWING IS HELD ON THE RECORD.)

4 THE COURT: (TO THE WITNESS.) We're going to take a
5 break. I'll see y'all in about ten minutes. Do not discuss
6 your testimony with anyone, sir. If you need to use the
7 facilities, feel free to do that and then come right back to
8 the courtroom, okay?

9 MR. LINNEN: Okay.

10 MR. BROWN: And Your Honor, out of an abundance of
11 precaution, I would prefer that he stay on the stand.

12 THE COURT: Okay. Well, what if he's got to go to the
13 bathroom?

14 MR. BROWN: Except for that. I didn't mean it like
15 that, but I think it's easier than having to deal with any
16 other issues.

17 THE COURT: Okay.

18 (WITNESS LEAVES THE STAND AND THE FOLLOWING IS HELD ON
19 THE RECORD.)

20 THE COURT: All right. Mr. Brown, let me hear from
21 you.

22 MR. BROWN: Your Honor, my question was not at all
23 directed, or in any way encouraging, or trying to elicit any
24 prohibited testimony. Quite frankly, and I'm going to
25 assume, because the record speaks for itself, that the

1 question I asked was not limited to the four months, that
2 one question, but more than one time I had asked that it was
3 within the four months, and for what that's worth, it's a
4 follow-up question, because I had asked about any incident
5 in the first four months, and he gave some incidents; and
6 the one where the car was kicked and the one where Ms.
7 Blanding called 911, and I asked if there were other
8 incidents, because as an officer of the Court, Mr. Lennin
9 and I had talked about other incidents that would fit within
10 this timeframe.

11 And again, that's a follow-up question, and obviously,
12 if I have to go back and lay the context, the questions
13 become very long and, obviously, Mr. Lennin, on the other
14 hand, did not understand the characterization. Again, as an
15 officer of the Court, without going into too much of our
16 privileged information, we did prep him and we did discuss
17 Your Honor's rulings. He's never been on the stand before,
18 ever, in any matter.

19 And Your Honor, this is not the purpose of my question,
20 but at some point and time there was, or would be in the
21 future, a question about whether or not some things had been
22 known by him and they influenced his perception or belief,
23 because that's different in offering for the truth of the
24 matter asserted as what the effect was on the elicitor, and
25 I say that because Your Honor, certainly, I would not ask

1 that question.

2 As I told Mr. Thornton, there's no way that I would try
3 to get into that when I have all of this other information.
4 There's no advantage for me to be put in this position, Your
5 Honor. We would, however, assert that if a mistrial is
6 granted that that would be jeopardy. This was not an
7 intentional goading. It was not an intentional act at all
8 that would violate Your Honor's Order. No more so than Dr.
9 McElveen may have been naive about what a subpoena meant.
10 My client has never testified before.

11 THE COURT: Yes, sir?

12 DEP. SOL. THORNTON: My position would be this -- and I
13 need to clarify something, obviously, that I indicated when
14 Mr. Brown and I talked. When I said that I think he did it
15 intentionally, which is what I told you at the bench, and I
16 do believe he did it intentionally, but I'm not making
17 reference to Mr. Brown.

18 Mr. Brown, I think, asked a very poorly phrased
19 question, but his client has been in every single hearing
20 we've had; he has to be. Every time we put something on the
21 record, he's been in here. His client, Mr. Lennin, had to
22 have known, absent Mr. Brown's assertion about the prep that
23 they did, that that information was not to be allowed in
24 this Court.

25 We probably talked about it, and I've asked about it,

1 probably 50 times in the three days we've been here. His
2 client knew that, Judge, had to know, because he's the only
3 person other than the lawyers that has to be here every time
4 we have a ruling. He knew it and he specifically came out
5 with -- it wasn't slow, it wasn't belabored, it was
6 immediate.

7 Your Honor, there is no way -- I know the standard, I
8 had to look it up Judge, it's been so long since I looked at
9 one; it's Manifest Necessity. I've been doing this 15
10 years, Judge, when jury's hear things about sexual
11 misconduct, it's like flipping a switch. Forget about the
12 proprietariness of it to begin with where you have a charge
13 that was so bad it wasn't even indicted by the grand jury,
14 and other things were done, I mean, forget about all that.

15 The fact is you ruled that that was not to come in. It
16 is now in. I can't unring the bell. I don't believe
17 there's any limiting instruction. I certainly don't believe
18 that the defendant gets a double jeopardy protection when it
19 has nothing to do with the State. I mean, that generally
20 only occurs when there's been misconduct on the part of the
21 State and that's the reason for the mistrial. He can't, by
22 his own misconduct, force me into a mistrial request, and
23 then get the benefit of double jeopardy. I think that's
24 patently ridiculous.

25 THE COURT: What I think what he is talking about is

1 that if I improvidently grant a mistrial, which I am
2 considering, what he's telegraphing is, is that jeopardy has
3 attached.

4 DEP. SOL. THORNTON: Yes, ma'am, and that's true.

5 THE COURT: And of course, that is extraordinarily
6 disconcerting. Let me tell you what bothers me. What
7 bothers me, and I understand your point, but that was the
8 third or fourth time that Mr. Brown asked him the same
9 question, and he obviously didn't have anymore information
10 to give him; that's what I'm troubled by, to be honest with
11 you. I'm troubled by the assistance that counsel gave him
12 to get that. How about that? So I am very concerned with
13 where I am. Because he had asked that question, this
14 witness should have been able to answer it the first time he
15 asked it. I think Mr. Brown had asked it at least -- I
16 think he asked it at least three times. And it almost came
17 out at as I don't know what you talking about. I guess you
18 want me to tell you this. So that's what has got me upset,
19 okay? That's what's got me very, very concerned, because of
20 the repeated times that you, Mr. Brown, asked him the same
21 question. What else? What else? And more and more general
22 each time that you asked a question. So I am very concerned
23 with where I am.

24 MR. BROWN: May I be heard, Your Honor?

25 THE COURT: Yeah.

1 MR. BROWN: Excluding the ---

2 THE COURT: And if you instructed him not to go into
3 it, why did he go into it?

4 MR. BROWN: That would ask for speculation on my part,
5 Your Honor.

6 THE COURT: It seems to me that if I was explaining to
7 my client, "Don't go into this. This is going to cause you
8 major problems in your criminal case where you're on trial
9 for attempted murder," and they go into it, after the same
10 question having been asked repeatedly, it seems to me that
11 they wouldn't do it.

12 MR. BROWN: May it please the Court, Your Honor?

13 THE COURT: Yep.

14 MR. BROWN: Not discussing the excluded incidents,
15 including this one that has come up, not counting that Mr.
16 Lennin still had not discussed all of the matters, and
17 obviously, I had leading objections, so I have to ask it ---

18 THE COURT: Well, sure.

19 MR. BROWN: What else? And the record speaks for
20 itself. I don't recall limiting it to the four months in
21 that question, but since that question had been asked, in my
22 recollection, twice before with a four months limitation ---

23 THE COURT: Right. And this is the third time you
24 asked him.

25 MR. BROWN: But there wasn't all the incidents yet.

1 THE COURT: Well ---

2 MR. BROWN: All the admissible ones.

3 THE COURT: How do you think it ought to be repaired,
4 Mr. Brown?

5 MR. BROWN: Well, I would say that they first -- this
6 is my understanding, when there's objectionable information,
7 that first, if it was the defense, I would have to ask for a
8 curative instruction, and then Your Honor would have to give
9 it, and then I would have to say that's not enough, and then
10 ask for a mistrial. Otherwise, we don't get to that point
11 where you make that decision. That's my reading of the
12 rules regarding defense request for mistrial is that you
13 first have to have a limiting instruction and then you have
14 to assert that that's not enough, et cetera.

15 THE COURT: I don't think you get two bites at the
16 apple. I think it could be so violative of the Court's
17 earlier rulings that the Court can make a determination that
18 there is no limiting instruction that is strong enough to
19 unring the bell.

20 MR. BROWN: Yes, ma'am. And just for the record, my
21 client was not privy to any discussions that were not on the
22 record, and that's my -- because we did have discussions
23 that were on the record.

24 THE COURT: Sure he was. Discussions with you.

25 MR. BROWN: Oh, I understand that. I understand that.

1 Well, and if it's directed at me, Your Honor, I mean, all I
2 can say is I didn't do anything wrong.

3 (BRIEF PAUSE IN THE COURTROOM.)

4 THE COURT: Again, how do you think it ought to be
5 remedied, Mr. Brown?

6 MR. BROWN: Well, I think that the procedures that I
7 laid out are the only ---

8 THE COURT: How would you give a curative instruction?
9 How extreme do you think it ought to be?

10 MR. BROWN: Sure. Well, I think that what you
11 generally do is assume the jury will follow the law, and
12 then, with that assumption that they're told in front of the
13 jury that the testimony on the proceeding question and the
14 question that had been stricken from the record and that
15 they're to not consider it and I think that's the standard
16 instruction.

17 THE COURT: Well, how about the fact that your client
18 knew not to say it; he had been instructed not to discuss
19 it; he knew that it wasn't to be discussed, and he did it
20 anyway.

21 MR. BROWN: How do we deal with that in front of the
22 jury for purposes of this trial?

23 THE COURT: Right. How about you talk to the jury and
24 you tell the jury exactly what happened. That matter had
25 been into by the Court, that the Court had made a

1 preliminary ruling, that your client knew he wasn't supposed
2 to talk about it, and he chose, in the face of knowing not
3 to talk about it, and he talked about it.

4 MR. BROWN: I don't believe I can do that, Your Honor.
5 I think that would make me a witness against my client.

6 THE COURT: See what I'm saying? I think that affects
7 his ability for justice.

8 MR. BROWN: "His" being Mr. Lennin's?

9 THE COURT: Yeah. In other words, I think that the jury
10 -- I wonder if in order to give a complete curative
11 instruction, if it's not important to tell the jury that
12 your client had some role in doing something he shouldn't
13 have done, that he knew he shouldn't have done. Is the jury
14 entitled to know that?

15 MR. BROWN: Is that from me or you?

16 THE COURT: From me.

17 MR. BROWN: Well, I think that would be a comment on
18 the facts.

19 THE COURT: I think it's part of the curative
20 instruction, because it isn't supposed to be a fact in this
21 case.

22 MR. BROWN: Yes, ma'am. And for what it's worth, I
23 think there was earlier ---

24 THE COURT: See what I'm saying? That's what's going
25 through my mind about whether or not the appropriate thing

1 to do is to grant a mistrial, to be sure that this gentleman
2 gets a fair trial and that the improper vilification now of
3 the alleged victim doesn't get communicated to this jury in
4 what was in every way I know how, with a whole lot of energy
5 of the last three days to try to keep from happening.

6 MR. BROWN: May it please the Court?

7 THE COURT: Yes.

8 MR. BROWN: I think that it would contradict the
9 Court's earlier discussion with the jury where thereby they
10 were told not to draw any inference from either an objection
11 or your ruling on the objection ---

12 THE COURT: I guess that means I got to grant a
13 mistrial; is that what you're saying Mr. Brown?

14 MR. BROWN: Not at all. I believe that the jury could
15 follow your instruction, because they're sworn to follow
16 that, and if you ask them to strike it, they'll put it out
17 of their mind.

18 THE COURT: Mr. Brown, here's what you need to know.
19 There is no curative instruction that could begin to be
20 given in this case but to tell this jury that what your
21 client just said was completely improper and untrue.

22 MR. BROWN: That's not true. That's telling a
23 falsehood to the jury.

24 THE COURT: The only curative instruction would be to
25 tell this jury that this defendant has never been convicted

1 of criminal sexual conduct.

2 MR. BROWN: And I think that is truthful. Of course,
3 the defendant being Mr. Nichols as a defendant.

4 THE COURT: I didn't mean that. The defendant in that
5 case, I guess, but I would say the alleged victim in this
6 case has never been convicted of that, and to make some
7 comment that I do not know why your client would have made
8 that comment to this jury, but that they have to disregard
9 it because he has never been convicted of that. Do you
10 understand?

11 MR. BROWN: Yes, ma'am.

12 THE COURT: I'm not going to play games. In other
13 words, any curative instruction is going to do my very best
14 to erase the possibility that the alleged victim would be
15 considered to have committed those offenses, and it will be
16 done, if you will, with a view towards your client saying
17 something he should never have said.

18 MR. BROWN: But Your Honor, I believe that is then the
19 Court ---

20 THE COURT: That's your problem. He's not going to get
21 to say it, Mr. Brown, and have it be okay is what I want you
22 to understand.

23 MR. BROWN: I understand that. I'm not going to move
24 for a mistrial, but I would ask that the Court not telegraph
25 bias against my client.

1 THE COURT: I'm going to tell this jury that your
2 client should never have said that, do you understand?

3 MR. BROWN: Yes, ma'am. And I would ask that ---

4 THE COURT: I'm not going to let it be okay that he
5 failed to follow the direct orders of this Court in pretrial
6 matters; do you understand?

7 MR. BROWN: I don't think it's okay, and I'm not in any
8 way saying that ---

9 THE COURT: And I'm not letting this jury think he
10 should have given him a little bit of information they
11 really need to have.

12 MR. BROWN: And Your Honor, I'll be quite honest with
13 you, that is not at all the way that I read this, but the
14 record does speak for itself. There was no special wink or
15 nod between counsel and client.

16 (BRIEF PAUSE IN THE COURTROOM.)

17 THE COURT: Okay. Anything further from the State?

18 DEP. SOL. THORNTON: Your Honor, and with all due
19 respect to the Court, I just don't think this curative
20 instruction is going to cut it. I've ask for exactly -- I
21 believe this is the second mistrial I've asked for in 15
22 years. I don't do it lightly, you know that. You've known
23 me since I started in the late 90's, but I do think it's
24 Manifest Necessity when jurors hear that language and that
25 phrasing. I just don't know that there's any way to burn it

1 out of their head without you going, almost, like you were
2 talking to Mr. Brown, about too far the other way.

3 I just don't think that there's any way, at this point,
4 Judge, there will be justice in this case based on what he
5 said. I don't think there's a curative instruction. That's
6 the State's position.

7 THE COURT: I feel your pain and that's what's
8 troubling me.

9 DEP. SOL. THORNTON: Yes, ma'am. And I do want the
10 Court to understand, I did not undertake this lightly, we
11 went through great expense to get a witness flown in from
12 New York; not doing it lightly, I don't like retrying cases
13 either, but I don't have any other choice but to ask the
14 Court again to grant a mistrial. Thank you.

15 THE COURT: Thank you. And you're exactly -- you are
16 in my -- unfortunately, that is what I am struggling with,
17 exactly what you said. Yes, sir, Mr. Brown, you wanted to
18 say something else?

19 MR. BROWN: I did. I would ask that - obviously, when
20 you get to instruction, that it would be incumbent upon me
21 if I had an objection to voice it, and maybe it would be
22 easier if I knew the exact language of the curative
23 instruction, that would make it a little bit easier for me
24 instead of disjointing when the jury comes back in. Thank
25 you.

1 THE COURT: Okay. Let me have the jury, please.

2 (12:25 P.M., WHEREUPON, THE JURY ENTERS THE COURTROOM,
3 AND THE FOLLOWING IS HELD ON THE RECORD.)

4 THE COURT: Ladies and gentlemen, I need to talk to you
5 about what occurred before you left the courtroom, and in
6 order for you and for me to do that, here is that we must
7 do. I need you to listen very carefully to me and I need
8 you to be able to do what I am going to ask you to do.

9 This witness testified to something before we stopped.
10 This gentleman back here, Mr. Nichols, has never been
11 convicted of anything, and certainly has never been
12 convicted of what this man said, and I need you to hear
13 that. That should not have been testified to and I need you
14 to hear that, and I need you to absolutely be able to
15 dismiss and to disavow that from your minds; otherwise, we
16 are not doing what we must do here today. I need to be
17 assured that you are able to do that. I am instructing you
18 to do that.

19 Now, if, over the course of the remainder of this
20 trial, you have any concerns in your mind that you're
21 somehow unable to do that, I need you to send me a note. I
22 need to know that, because I'm telling you that in order for
23 justice to be done here today, that testimony must be
24 disregarded completely. If you find that that is cropping
25 up in your mind as some kind of concern or thought, I'm

1 going to ask you to let your presiding juror know or send me
2 a note directly yourself, because this alleged victim in
3 this case has not been convicted of any such matter. Thank
4 you for that. All right.

5 MR. BROWN: May it please the Court, Your Honor?

6 THE COURT: Yes.

7 DIRECT EXAMINATION CONTINUES

8 BY MR. BROWN:

9 Q Now, Mr. Lennin, we can look back at four months going
10 back to, I guess, to the end of January, mid-January to mid-
11 April, when the incident with Mr. Nichols occurred. What
12 other incidents of conduct of Mr. Nichols did you notice or
13 see?

14 THE COURT: I'm going to ask you not to lead him. You
15 suggest an answer; please don't lead. Okay?

16 Q What other conduct did you observe?

17 A Well, I think my codefendant testified about ---

18 DEP. SOL. THORNTON: Objection, Your Honor. If he's
19 just going to repeat testimony from his codefendant, the
20 jury was here and heard the testimony of the codefendant.

21 THE COURT: Is that a hearsay objection?

22 DEP. SOL. THORNTON: It is, Your Honor.

23 THE COURT: On the basis of hearsay, I sustain the
24 objection.

25 Q And obviously, don't talk about what anybody else said;

1 tell me what you observed?

2 A Well, I was there, also, so we were riding and we
3 noticed Trey was on the street, on Luther Warren, and for
4 some reason, he felt like he needed to pull his pants down
5 and show us his rear end while we were riding past.

6 Q Who was there with y'all?

7 A Just me and King David Williams.

8 Q And what, if any, other instances of conduct have you
9 observed regarding Mr. Nichols as you passed that tree
10 within those four months?

11 A Within those four months?

12 Q That's correct.

13 A Besides the stuff I already told you, I mean, it was
14 just repeated. As far as the bottles being thrown, you
15 know. It would never stop, just constant.

16 Q Was he engaging you ---

17 THE COURT: Do not lead.

18 Q What did you do to cause there to be some encounter
19 with Mr. Nichols, if anything?

20 A To prevent an encounter?

21 Q No, what did you do to cause that, if anything?

22 A Oh, I never did anything. I've never did anything. I
23 mean, like I'm saying, I've never spoke to him in
24 conversation, ever.

25 Q Now, let's talk about April 21st. When you were in the

1 car with King David, what were y'all doing?

2 A Well, I remember me and him, we took Desiree, my baby's
3 mother, to school that morning and we had to pick her up
4 around 12:00, so we went to pick her up and we got on
5 Seaside road and I noticed that he was walking, coming
6 towards the tree.

7 Q Who is "he"?

8 A Trey Nichols. And after, I noticed that -- I noticed
9 that when he was walking, he saw my car, and he put up his
10 middle finger before we made the turn. After we made the
11 turn, we ended up going to Desiree's house to take her home,
12 because she had just got out of school. We were pulling out
13 and Desiree told me, she was like ---

14 DEP. SOL. THORNTON: Objection, Your Honor. It's
15 hearsay.

16 THE COURT: Sustained. Hearsay.

17 Q And after you spoke with her, what happened?

18 A After I spoke with her, we rode back down the road and
19 he was at the tree, and then, that's when he threw a soda
20 can and we made a complete stop and came to the stop sign;
21 he threw a soda can. After he threw a soda can, I asked
22 him, "Man, why you messing with me?" And he started acting
23 all aggressive, saying, "Nigga, this is my hood, nigga.
24 What the fuck you doing around here?" Excuse my - I'm
25 sorry. I'm just saying, "This my hood, nigga. What the

1 fuck you doing around here. This ain't your turf." So you
2 know, he kept saying that.

3 So when he was saying that, he was moving aggressively.
4 He was coming towards the car, then, when he was speaking.
5 And then he picked up the soda can and after he picked up
6 the soda can, he threw it in the car, that was after the
7 soda can hit the car. What he failed to realize is, it
8 never hit my codefendant, it hit me, so you know, that would
9 make me really want to get out of the car and just like talk
10 to him. I just wanted to talk to him, like, why do you keep
11 on doing this to me? You know? What have I done to you
12 that was so hurtful to make you mess with me every day? I
13 have a life. I have a child, everything, on the way. I got
14 a job. I'm doing good. Why do you feel the need every time
15 when I ride by to mess with me, you know?

16 So therefore, we went on and I noticed that when I got
17 out of the car, he was still acting the same. Like he never
18 stopped. And when he was coming towards me, it was the
19 same, he was threatening me. He was like, "Yo, sup, nigga,
20 so you ready to die, nigga?" Immediately, I got scared.
21 And I keep a gun, because I'm not a person that goes around
22 starting trouble. The only reason I had the gun was to
23 prevent me from getting hurt or just being able to defend
24 myself.

25 So, therefore, I grabbed the gun before I got out of

1 the car; it was in the glove box. So I got the gun, and I
2 never showed it to him, ever, because I didn't want him to
3 know I had it. I just wanted to talk to him, but I felt
4 like if things would have gotten out of hand that I know he
5 would have ended up doing something to me and preventing me
6 from seeing my family again.

7 Q What do you mean "preventing you"?

8 A Like he could have killed me, you know. He could have
9 done anything. He's never at work. He's always starting
10 trouble with your family. You know, when you see a person
11 like that, I mean, what's your problem? But as I was
12 saying, he was coming towards me, when he was coming towards
13 me, I got scared, so I pulled the gun out; and I was so
14 scared I starting closing my eyes, because I didn't even
15 realize what I was doing at the time. I was so scared; I'm
16 not used to this. Then, I started -- I just started
17 shooting. I didn't really think I was hitting him until I
18 opened my eyes and I noticed that he wasn't in the area, so
19 I just ran back to my car and King was like ---

20 Q You can't say what anybody said, but what did King do?

21 A When I got back in the car, my codefendant drove off,
22 and when he drove off, we went on Folly Road and he turned
23 left on Folly Road. He said that he knew someone that
24 stayed on Folly Road, so he ended up taking the car and
25 parking it behind an abandoned house and he left the keys in

1 it.

2 Q What happened with that car, eventually?

3 A Well, sir, to be honest with you, I can't really tell
4 you what happened because I don't really know what happened
5 to it; I think someone stole it or whatever. I filed a
6 report on it being stolen, but I haven't really gotten any
7 hearsay from the police officers after that.

8 Q When did you file that report, roughly?

9 A After I got out of jail. You can't make 911 calls in
10 jail.

11 Q What happened to the gun?

12 A Well, I had to come home and we was coming back from
13 off of Folly Road -- well, I was coming back. I was with a
14 friend. I knew someone on Folly Road who was able to take
15 me to Beaufort. So he took me to Beaufort and I told him
16 what was happening, and I was crying my eyes out, because he
17 knew something was wrong. When we got to my house, he
18 wanted to talk to me, but I was so scared I couldn't even
19 talk. The only thing I was thinking about was, man, dang, I
20 just shot somebody, you know. I didn't know how to defend
21 myself, but I threw the gun in a river behind a neighbor's
22 yard of mine, like there's a river back there, like a
23 riverbank, and I took the gun, put it in a bag, and threw it
24 over there.

25 Q Now, where did that gun come from, Jabari?

1 A One day I was walking at the time and I found it behind
2 the bricks, you know, right there by the National Cemetery.
3 I was walking through the cemetery and I saw something
4 black, but I didn't really know what it was, you know? So I
5 just walked up by it because it was in my walkway where I
6 was walking at, and I saw it was a gun, and I was like, you
7 know, and I took it, just because I would rather me take it
8 then a little kid take it or something.

9 Q Were you old enough to have the gun when you got it?

10 A Yes, sir.

11 Q You live -- how close are you to where you found the
12 gun?

13 A I stay like four blocks right down the road from that
14 National cemetery, so it was nothing to walk.

15 Q Did you stay in the downtown Beaufort area?

16 A Yes, sir.

17 Q All right. Why did you think that you had to fire the
18 gun at Mr. Nichols?

19 A I felt if I didn't do what I did that there would have
20 been a possibility that he would have ended up doing it to
21 me. Like somebody always messing with you every day. What
22 is it gonna lead to?

23 Q What did he do that made you think that would happen
24 that day?

25 A When he was coming towards the car, that's when I

1 noticed that he was in attack mode and he was moving towards
2 me, so that's why I got out. That's how I know that he was
3 ready to do whatever he was going to do. So, you know, I
4 saw his hands, his hands were coming out of his baggy
5 shorts, or whatever he had on, and I didn't know. I was,
6 like, I saw it, and I was like, man, and I just started
7 closing my eyes and I just started shooting, but I didn't
8 think I hit him because I opened my eyes and he was gone.

9 Q Why didn't you drive that car away?

10 A At the time, I didn't have my license, so I couldn't
11 really drive at all. And my baby's mother, she needed to
12 get places; it was not about me anymore. It was about her
13 because she was pregnant at the time, too, so I just wanted
14 to make sure she was getting to where she needed to be safe,
15 without me going to jail for driving under suspension and
16 taking that risk.

17 Q Were you in a position to drive the car? Who was in
18 the driver's seat?

19 A Mr. King David Williams.

20 Q Where were you, either in or out of the car? Where
21 were you when this difficulty began?

22 A Can you repeat the question?

23 Q Where were you when this difficulty with Mr. Nichols
24 began?

25 A Well, when it began, I was in the car. Me and my

1 codefendant, we were just riding. We had just left my baby
2 moma's house.

3 Q And who was at fault in bringing on this difficulty?

4 DEP. SOL. THORNTON: Objection, Your Honor. That calls
5 for a legal conclusion.

6 THE COURT: Sustained.

7 Q What did you do, if anything, to break it up?

8 A Well, I didn't do anything. I didn't never intent -
9 well, you have to stop at a stop sign. That's how it
10 started, if that stop sign was never there, then all this
11 would have never happened, but at the same time, if he
12 wasn't there, all of this would have never happened.

13 Q Where were you standing when he approached you outside
14 of the car?

15 A When I was outside of the car, I was actually on the
16 driver's side of the car, which I was in the middle of the
17 street.

18 Q You were in a public street?

19 A Yes, sir.

20 Q What did you do to start that difficulty outside of the
21 car?

22 A I didn't start anything. Like I said, when I got out
23 of the car I only wanted to talk to him, because he is going
24 to always see me; this is my family now. If you don't like
25 me driving on Luther Warren, then, I mean, ain't nothing he

1 can do about it, but I guess that's why, I guess, he was
2 doing what he was doing.

3 Q And let me ask you, Jabari, before you answer the
4 questions of Mr. Thornton, when you thought about what might
5 happen to you, what events over the preceding four months
6 went through your mind?

7 DEP. SOL. THORNTON: Objection. Leading.

8 THE COURT: Sustained.

9 Q What events were you thinking about on April 21st,
10 within the preceding four months?

11 A Before everything went down -- I was thinking about
12 everything, I was thinking about the prior stuff, everything
13 he was doing, things that I seen him do to people with my
14 own eyes. I thought about all of that, but still that
15 doesn't give anybody the right to mess with you or anything.

16 MR. BROWN: If I may, Your Honor, get some tissues for
17 Mr. Lennin's tears.

18 THE COURT: Here you go. I got some.

19 MR. LENNIN: I don't need no tissues.

20 THE COURT: All right. You may proceed.

21 MR. BROWN: I'm sorry, do you need more time, Jabari?

22 MR. LENNIN: No, I'm good, sir.

23 Q All right. What else would you like to tell your jury
24 related to April 21st?

25 A (No response.)

1 Q Was this a decision you made lightly?

2 A No, I've never did nothing like this before in my life.

3 Q What emotions did you have at that stop sign?

4 A I was scared. Honestly, you know, I don't do stuff
5 like this. I'm a family man. That's all I was there for
6 was to be around my family, instead of being in the streets
7 getting pulled over, arrested for nonsense. I'm not the
8 type of guy to just sit on a corner every day. I'm the type
9 of guy to go get it. I want to go work. That's all I want
10 to do is live my life, but now I'm going through this and
11 I'm sitting in front of y'all and y'all determine whether I
12 should be free or not.

13 DEP. SOL. THORNTON: Objection, Your Honor, now we're
14 getting into irrelevance.

15 THE COURT: Sustained.

16 Q Thank you, Jabari, I don't have any other questions.
17 Please answer any questions Mr. Thornton might have.

18 THE COURT: Cross-examination.

19 DEP. SOL. THORNTON: Thank you, Judge.

20 CROSS-EXAMINATION

21 BY DEP. SOL. THORNTON:

22 Q Mr. Lennin, are you okay or do you need another minute
23 to compose yourself?

24 A No, I'm alright, sir.

25 Q Outstanding. Well, let me ask you this question to

1 start with, why'd you get out of the car?

2 A My codefendant, Mr. King David Williams, was driving
3 the car.

4 Q Okay. That's not what you said earlier, though, you
5 said -- didn't you tell this jury ---

6 MR. BROWN: Your Honor, that's not a question. He's
7 telling him what he said earlier.

8 THE COURT: This is cross-examination. Let him finish
9 his question and then object.

10 MR. BROWN: I sure will. Thank you, Your Honor.

11 Q Didn't you tell this jury, just a few minutes ago, that
12 you got out because you wanted to talk to him?

13 THE COURT: Do you still have an objection?

14 MR. BROWN: No, I don't have an objection to the
15 question part of it.

16 THE COURT: Okay.

17 A You asked me why did I get out of the car?
18 Essentially, that's what you're asking me, but you never
19 asked me the reason behind everything. You ain't never, you
20 know, you just started.

21 Q Mr. Lennin, why is the reason? Is it true what you
22 testified to earlier that you got out because you wanted to
23 talk to Mr. Nichols?

24 A Yes, sir.

25 Q Okay. So it wasn't because -- you don't have to look

1 at Mr. Brown, you can look at me.

2 A I'm looking at my family, so.

3 MR. BROWN: Your Honor, he can ask questions. I don't
4 believe he can direct. I believe that's for the Court, if
5 he would like to ask Your Honor that.

6 THE COURT: You may proceed.

7 DEP. SOL. THORNTON: Thank you, Your Honor.

8 Q Mr. Lennin, did you get out of the car because your
9 codefendant was driving it or did you get out of the car
10 because you wanted to talk to Mr. Nichols; which is it?

11 A I just answered your question.

12 DEP. SOL. THORNTON: Your Honor, I'd ask the witness be
13 directed to answer.

14 THE COURT: Respond to the question, please, sir.

15 A I wanted to talk to him.

16 Q Okay. Do you generally go to talk to people with a gun
17 on you?

18 A Only when I feel a threat and I feel a fear for my
19 life.

20 Q Well, let me ask you that. I'm glad you said that.

21 THE COURT: Hold on a second. Mr. Brown, I need to see
22 you please.

23 MR. BROWN: Yes, Your Honor.

24 DEP. SOL. THORNTON: I'm sorry, Your Honor, do you need
25 me?

1 THE COURT: I do.

2 DEP. SOL. THORNTON: Yes, ma'am.

3 (WHEREUPON, A BENCH CONFERENCE IS HELD OFF THE RECORD
4 AND OUT OF THE HEARING OF THE JURY.)

5 Q Mr. Lennin, earlier you testified that you found the
6 gun?

7 A Uh-huh (affirmative).

8 Q And forgive me, I may have misunderstood what you said,
9 was what you said was you didn't know what to do with it?

10 A No, sir. I said I didn't want a little kid to pick up
11 the gun and do something stupid with it.

12 Q All right. How old were you at the time?

13 A I was 18 years old.

14 Q How old are you in South Carolina before you are
15 lawfully allowed to carry a pistol?

16 A You have to be 21, I think.

17 Q So when Mr. Brown asked you earlier were you old enough
18 to have that gun, you weren't were you?

19 A Not to hold a pistol.

20 Q What kind of gun was it?

21 A It was a pistol.

22 Q Okay. So earlier, when you said that you were old
23 enough to have that gun, that's not true, is it?

24 A No, sir.

25 Q Now, I recall earlier, some -- and if this didn't come

1 out -- did you say you had family over there?

2 A Yes, sir.

3 Q Don't you have -- in addition to the gentleman who just
4 threw his hands up in the air, don't you have a relative
5 that used to be in law enforcement?

6 A Yes, sir. My great-grandfather.

7 Q And wasn't he a former police chief?

8 A Yes, sir.

9 Q Was it him that told you that any time you find a gun,
10 you ought to just pick it up and put it in your pocket, even
11 if it's illegal?

12 A No, sir.

13 Q Okay. So you knew better, didn't you?

14 A Yes, sir.

15 Q And your testimony also was after you shot Mr. Nichols
16 that the car has mysteriously vanished. The car has never
17 been found, has it? Has the car ever been found to your
18 knowledge?

19 A No, sir.

20 Q Okay. And you reported it stolen how long after you
21 shot Mr. Nichols?

22 A It might have been a couple of weeks when I got out of
23 jail, but you know, you can't do it while you're in jail.

24 Q Right. But when did it become missing?

25 A I don't know.

1 Q Did it become missing the day of this event? The day
2 you shot Trey Nichols?

3 A No, sir.

4 Q When did it start missing?

5 A I couldn't really tell you. It wasn't in my
6 possession, sir.

7 Q Why wasn't it in your possession?

8 A Because I wasn't the driver.

9 Q All right. So who was driving, King David Williams,
10 right?

11 A Yes, sir.

12 Q Now, when you went down Folly Road with King David
13 driving, what happened when you stopped? Is that where
14 y'all stopped and you got out or did he get out? How did
15 that happen?

16 A I don't understand your question?

17 Q Okay. I'll slow down for you. When did you leave the
18 car after you shot Trey Nichols?

19 A When did I leave the car?

20 Q Yes.

21 A I still don't understand. Like, what are you saying?

22 Q That's no problem. We can go at this until we get it
23 right. Are you currently sitting in your missing Crown
24 Victoria?

25 A No, sir.

1 Q All right. Were you, on April 21st, 2011, at some
2 point that day, sitting in your Crown Victoria?

3 A Yes, sir.

4 Q How, between then and now, did you get out of your
5 Crown Victoria? When did that happen?

6 A I still don't understand your question, sir.

7 Q Okay. Were you in your Crown Victoria before you shot
8 Trey Nichols?

9 A Yes, sir.

10 Q Did you get out of the Crown Victoria and shoot Trey
11 Nichols.

12 A I got out of the car to speak with Trey Nichols.

13 Q With a gun?

14 A Yes, sir.

15 Q Did you, then, shoot him?

16 A No, sir.

17 Q You didn't shoot him?

18 A Not at that period of time; not right then.

19 Q At some point after that, did you shoot Trey Nichols?

20 A After he was being aggressive and coming towards me.

21 Q I got it. The super aggressive move of having his
22 hands in his pants. Was he arguing with you with his hands
23 in his pants the whole time or was that just at the last
24 second?

25 A Come again?

1 Q I'm sorry. Am I speaking too quickly?

2 A No, you're just trying to be, you know.

3 Q Were his hands in his pockets? You see these are
4 pockets. Were his hands in his pockets ---

5 MR. BROWN: Your Honor, I have to object to the
6 badgering.

7 THE COURT: Thank you. Overruled. You may proceed.

8 MR. BROWN: Thank you, Your Honor.

9 Q Were his hands in his pockets ---

10 DEP. SOL. THORNTON: And just for the record, Your
11 Honor, I will indicate that I have put my hands in my own
12 pants pockets.

13 Q Were Mr. Nichols' hands in his pockets the entire time
14 he was arguing with you, or did he put his hands in his
15 pockets at the last second, or do you know when his hands
16 were in his pockets?

17 A When I got out of the car.

18 Q His hands were in his pockets when you got out of the
19 car?

20 A Can I speak?

21 Q I don't know.

22 THE COURT: Answer the question. I believe the
23 question was when he got out of the car, was Mr. Nichols'
24 hands in his pockets?

25 A His hands were never in his pockets. I said his hands

1 was in his pants.

2 Q All right. So then where in his pants were they?

3 A In the front.

4 Q Okay. So they weren't in his pockets; they were inside
5 his pants?

6 A Yes.

7 Q All right. So his hands were in there?

8 A Not both of his hands. Well, he had -- I can
9 demonstrate it for you.

10 DEP. SOL. THORNTON: By all means. Your Honor, I'd ask
11 he be able to stand down.

12 THE COURT: Sure. Can you keep your voice up, because
13 we've got to hear you.

14 A He had sweat pants on, you know, like this. His hands
15 was like this, basically.

16 Q Okay. Thank you, Mr. Lennin. Were his hands like that
17 the entire time?

18 A No, sir.

19 Q Okay. Now ---

20 A I'm not finished answering your questions. His hands
21 were like that when I got out of the car, but from the
22 beginning, his hands were out.

23 Q So when you got out of the car, his hands were like
24 that?

25 A When I got out of the car, his hands were like what I

1 just demonstrated, but when I was in the car, that's when he
2 was throwing the soda cans.

3 Q All right. So he threw a soda can at the car and it
4 hit the car, right?

5 A Yeah. And then he got up ---

6 Q Mr. Lennin you asked me earlier to let you finish;
7 please let me finish.

8 A All right. Go ahead.

9 Q When he picked it up and threw it at the car, he then
10 picked it up and threw it inside the car; is that right?

11 A Yeah.

12 Q What side of the car was he on?

13 A He was on the driver's side.

14 Q At what point did he come all the way around the car to
15 your side of the car?

16 A He didn't have to.

17 Q He didn't, did he?

18 A No, he didn't have to. The can had already hit me.

19 Q Mr. Lennin, that means he didn't, correct?

20 A That means he didn't have to.

21 Q So at any point, let me ask again, maybe you're
22 misunderstanding me. At any point, did Trey Nichols come
23 all the way around the car to your side?

24 A He didn't have to. I gave you an answer. You asked me
25 for an answer, and that's my answer, sir.

1 Q Mr. Lennin, where did you get the gun again? Where in
2 the car did you keep the gun?

3 A The glove compartment.

4 Q How long had you kept it in there?

5 A Not that long.

6 Q How long?

7 A I don't keep it in there like if I just ride around.

8 If I'm going home, on the island, then I'll keep it on me.

9 THE COURT: You need to move back a little bit from the
10 microphone. Your volume is good.

11 MR. LINNEN: I'm sorry, ma'am. My voice is deep.

12 THE COURT: You do have a deep voice, exactly.
13 Sometimes when you get a little bit close, even though the
14 volume is good.

15 MR. LINNEN: Testing, testing, testing. Can y'all hear
16 me? All right.

17 THE COURT: And I know I interrupted y'all, and you
18 don't know what the question is.

19 MR. LENNIN: I'm just saying, I don't want to do
20 nothing wrong. I just want y'all to hear me.

21 DEP. SOL. THORNTON: Mr. Lennin, this is not your show.
22 You need to respond when I ask you questions.

23 MR. LENNIN: Sir, I was talking to the jury.

24 MR. BROWN: Your Honor, I would object to the
25 badgering.

1 THE COURT: Hold on. If you've got concerns about
2 examination, direct them to me.

3 DEP. SOL. THORNTON: I apologize, Judge. I believe
4 that Mr. Lennin's repeated attempt to engage the jury is
5 improper.

6 THE COURT: Direct it to me if you think there is a
7 problem.

8 MR. BROWN: And I would ask that we not have speaking
9 objections in here within earshot of the jury.

10 THE COURT: Thank you.

11 BY MR. THORNTON:

12 Q All right. So your car, and back to the question I was
13 trying to get to earlier. You testified earlier that you
14 left with your codefendant, King David Williams, driving
15 your car. Y'all left together; is that correct?

16 A When's this?

17 Q After you shot Trey Nichols multiple times.

18 A After I was shooting at him?

19 Q After you shot him multiple times, where did you go, if
20 anywhere?

21 A After the shooting, yes, I did, I was riding with Mr.
22 King David Williams.

23 Q That's what I was after. So you were riding with King
24 David in your car?

25 A Yes, sir.

- 1 Q Y'all drove down the road?
- 2 A Yes, sir.
- 3 Q At some point, you ended up on Folly Road?
- 4 A Yes, sir.
- 5 Q Did you get out of the car on Folly Road?
- 6 A Not on Folly Road, but I was at a dirt road off it.
- 7 Q So in the Folly Road area, you left the car?
- 8 A King David left the car.
- 9 Q Okay. Did you get out of the car?
- 10 A Yes, sir.
- 11 Q All right. What did you do then?
- 12 A I walked to a friend of mine's house, which is right
- 13 down the road. Like this dirt road with a bunch of paths
- 14 through it. So I walked to my home-boy's house.
- 15 Q Now, at some point, something happened to the gun that
- 16 you used to shoot Trey Nichols; is that correct?
- 17 A Uh-huh (affirmative).
- 18 THE COURT: That's a "yes"?
- 19 A I'm sorry, yes.
- 20 Q What did you do with the gun?
- 21 A I didn't dispose of the gun until I got back to
- 22 Beaufort.
- 23 Q Okay. So your car is abandoned and ends up missing; is
- 24 that fair to say?
- 25 A Yes, sir.

1 Q All right. And it miraculously disappeared?

2 A I wouldn't say miraculously disappeared, but I believe
3 someone probably stole it.

4 Q Okay. Do you know where it is right now?

5 A No, sir.

6 Q So it's gone?

7 A Yes, sir.

8 Q The gun you used to shoot Trey Nichols is also gone; is
9 that right?

10 A Yes, sir.

11 Q And you disposed of the gun, is that correct?

12 A In a bag, yes, sir.

13 Q So you threw evidence of a crime away?

14 MR. BROWN: Your Honor, objection. That's a legal
15 conclusion that there was a crime.

16 DEP. SOL. THORNTON: I'll rephrase, Judge.

17 THE COURT: Thank you.

18 Q After you shot Trey Nichols, you disposed of the gun
19 you did it with, right?

20 A Yeah. I couldn't even bear to look at it.

21 Q You couldn't bear to look at it, so you bagged it up
22 and threw it in the river?

23 A Yes, sir.

24 Q Okay.

25 DEP. SOL. THORNTON: Your Honor, Court's indulgence for

1 one moment.

2 THE COURT: Okay.

3 Q How many time did you personally call the police about
4 Trey bothering you?

5 A I didn't have to.

6 Q Would it be fair to say that's none?

7 A No, sir.

8 Q All right. So when did you personally call?

9 A "You" being me?

10 Q I don't know who else you'd be, Mr. Lennin; I'm
11 assuming "you" would mean you.

12 MR. BROWN: Your Honor, I would object to that comment.
13 It was "I don't know who else you would be."

14 THE COURT: If you think he's not being responsive,
15 direct it to the Court.

16 DEP. SOL. THORNTON: Yes, Your Honor. I apologize.

17 Q Mr. Lennin, you being you, when have you ever called
18 law enforcement to complain about Trey Nichols bothering
19 you?

20 A Well, knowing from ---

21 Q Mr. Lennin ---

22 A Can I please answer the question, first?

23 DEP. SOL. THORNTON: Your Honor, I'd ask if he'd
24 respond to the question. It's a very simple question.

25 A I'm not going to say yes or no. I'm going to give you

1 an open answer, and if you can't accept my answer, then you
2 just have to move on.

3 THE COURT: Excuse me. Mr. Lennin, if you are asked a
4 yes or no question, you must answer, and then if you need to
5 explain your answer ---

6 MR. LENNIN: He won't let me do it, though.

7 THE COURT: I'm right here if you need to explain your
8 answer.

9 MR. LENNIN: I would like to explain my answer. I
10 really do.

11 THE COURT: Let's go through this once more, if you're
12 asked a yes or no question, you've got to answer it yes or
13 no, and if you need to explain your answer, then you can.

14 DEP. SOL. THORNTON: I'll try to re-ask it as
15 specifically a yes or no.

16 THE COURT: Okay.

17 Q Have you, Mr. Lennin, you being you, have you ever
18 called law enforcement about Trey Nichols bothering you?

19 A Can I explain myself after I answer your question? I'm
20 going to answer it.

21 THE COURT: Mr. Lennin, I've already told you that you
22 could.

23 A No, sir I haven't. I've never personally called them
24 myself, but the reason why is because I noticed the police
25 is always down there and doing stuff, filing reports, people

1 always filing reports. I know from my personal self, they
2 ain't never did nothing. The police officers never, they
3 couldn't do nothing with him. You know, well, I'm not going
4 to bring something back up in the trial, because you've
5 already said don't do that, but if somebody was in trouble
6 with a whole bunch of charges and never been in jail for
7 one, I wouldn't call y'all either.

8 Q So you just wanted to take the law into your own hands?

9 A No, it's not like that.

10 Q You wanted to get out of your car to talk to Mr.
11 Nichols and you did it with a loaded .45 caliber handgun on
12 you; is that right?

13 A Can you repeat the question?

14 Q You got out of the car to talk to Mr. Nichols?

15 A Yes, sir.

16 Q You got out of the car to talk to Mr. Nichols with a
17 loaded .45 caliber handgun?

18 A Yes, sir.

19 Q You then shot Mr. Nichols?

20 A After him coming towards me.

21 Q But you shot him?

22 A After him coming towards me, yes, sir.

23 Q All right. You then abandoned the vehicle that you
24 used to get away from the scene in; is that a yes?

25 A Yes, sir.

1 Q And you disposed of the gun that you did it with; is
2 that right?

3 A Yes, sir.

4 Q So you were more concerned with getting a DUS, a
5 driving under suspension, than you were with shooting Mr.
6 Nichols?

7 A It wasn't even like that, man. I already told you I
8 dispose of the gun because I couldn't barely look at it.
9 Y'all don't understand because you've never been in a
10 situation before.

11 Q No, sir. I've never shot an unarmed man before.

12 A No, you don't know ---

13 DEP. SOL. THORNTON: Your Honor, I've got nothing
14 further. Thank you.

15 THE COURT: All right.

16 MR. BROWN: I would ask that that last comment be
17 stricken.

18 THE COURT: Very well.

19 REDIRECT EXAMINATION

20 BY MR. BROWN:

21 Q What emotions did you feel when you were in the car?

22 DEP. SOL. THORNTON: Objection, Your Honor. I didn't
23 ask him anything about his emotions on cross. I don't think
24 it's proper redirect.

25 MR. BROWN: I did think you ask what the purpose was of

1 getting out of the car, which would ask why he did it; the
2 motivation.

3 THE COURT: I had trouble, to be honest with you, Mr.
4 Brown, I couldn't hear you.

5 MR. BROWN: Oh sure, I said what emotions did he have
6 when he was in that car.

7 THE COURT: Oh, what emotions. I thought you said what
8 motions did you have. Thank you. What emotions did you
9 have when you got out of the car? Redirect, I'll let him
10 answer it. I'll allow it.

11 MR. BROWN: Thank you.

12 Q What emotions did you have when you got out of that
13 car?

14 A Well, before I got out of the car, I was scared.

15 THE COURT: That's not responsive. Listen carefully to
16 his question and then answer his question.

17 A I was scared. Period. My emotions was always being
18 scared. Like I said, I'm not from around here and a lot of
19 stuff has been going on, a lot of shootings and everything.
20 Drugs, you know, everywhere, over there.

21 Q Thank you, Mr. Lennin.

22 THE COURT: All right. Recross?

23 DEP. SOL. THORNTON: None, Your Honor.

24 THE COURT: Very well. Mr. Lennin you can come on
25 down.

1 MR. BROWN: I'm ready for my next witness, Your Honor.

2 THE COURT: Very well. But we will do lunch.

3 MR. BROWN: Okay.

4 THE COURT: All right. Ladies and gentlemen, we are
5 going to take our lunch break. I'm going to ask you to
6 please be back in your jury room ready to continue with this
7 matter at 2:30. Remember, please do not discuss this matter
8 or allow anybody to discuss it with you and don't take your
9 notepads with you.

10 (TO JUROR, MR. WHITEFORD.) We need to talk a minute
11 about your meeting.

12 BAILIFF: It's at 3:00, Your Honor.

13 THE COURT: Oh, your meeting is at 3:00, so you've got
14 to leave at 2:00 to make your meeting?

15 JUROR: No, it's at 4:00, and I would have to leave at
16 3:00, 3:15 at the latest, Your Honor.

17 THE COURT: And you need to be there in person? I
18 can't just plug you in by phone?

19 JUROR: No, ma'am.

20 THE COURT: I'm with you. Very well. Hold on one
21 second.

22 Let me see you one second, counsel.

23 MR. BROWN: Yes, ma'am.

24 DEP. SOL. THORNTON: Yes, ma'am.

25 (OFF THE RECORD, BRIEFLY.)

1 THE COURT: All right. Mr. Whiteford, I will excuse
2 you from your service on this jury. I do not believe that
3 we will be concluded. I think that will not happen before
4 now, and when you need to leave at 3:00, given that we're
5 going to come back from lunch at 2:30, I do not believe that
6 we will be finished. Therefore, I'm going to excuse you
7 from your service on this jury and I want to thank you for
8 your service. If you will give me just a moment when we
9 conclude, I'd like to have a moment just to thank you and
10 give you a little bit of instruction, but I don't want to
11 stop the others from lunch. So if you would just stay with
12 me for just a moment, I'd like to have the opportunity to do
13 that, but I will be like Elizabeth Taylor was with Senator
14 Warren, I will not keep you long. And with that, we have an
15 alternate. You are no longer an alternate. You will now be
16 our juror and I am so grateful to you for serving as a
17 juror. Thank you. Everyone enjoy your lunch, we will see
18 you at 2:30.

19 (1:15 P.M., WHEREUPON, THE JURY EXITS AND THE TRIAL IN
20 THIS CASE IS IN RECESS FOR LUNCH. THEREAFTER, AT 2:30 P.M.,
21 THE FOLLOWING IS HELD ON THE RECORD.)

22 THE COURT: All right. Have you had a chance to view
23 whatever it is ---

24 MR. BROWN: I have, Your Honor. If I can kind of
25 paraphrase where I think we are, and Mr. Thornton can kind

1 of tell me whether he agrees or not. There's a video that
2 they've had a snippet out of, and I do plan on objecting to
3 the foundational part of it, and assuming that it's still
4 admitted, it has been redacted to take out some
5 inappropriateness that is not related at all to the issue
6 here. It's at a strip club, so nobody really wants to look
7 at.

8 THE COURT: Okay.

9 MR. BROWN: And then, there's a part where we discussed
10 possible opinion testimony regarding a hand gesture that
11 they've attributed to my client on the video.

12 THE COURT: Right.

13 MR. BROWN: And I told Mr. Thornton a suggestion I
14 would have, and again, not trying to try his case, but
15 instead of having qualification of an expert to give an
16 opinion about a gang sign, which is an issue that is out
17 there for a lot of Courts whether you can do that or what it
18 takes, but it's like anything else, it's expert testimony.
19 I would not object to Sean making that argument in closing,
20 because I believe it would be a reasonable inference from
21 what's on there, just by seeing the hand gesture and that he
22 may make that argument. I'm not going to object if he made
23 that argument in closing and I think that would give him the
24 same argument if I try to predict that he's going to make.
25 And I think that's kind of where we are.

1 DEP. SOL. THORNTON: It is, Judge. And to keep it
2 clean, Mr. Brown and I talked about it, and he and I kind of
3 came up with that resolution, and I'm completely fine with
4 that. I won't try to qualify him as an expert. Basically,
5 he will be there as the foundation of how the video was
6 discovered and the timeframe that it would have had to of
7 occurred in, and the fact that it was, in fact, just two
8 snippets pulled out, because they're the only things
9 relevant to this case. That way, the jury knows why it's
10 just two snippets and where it occurred, where the video was
11 found, et cetera, and we can do it as a proffer very
12 quickly, if that would be Mr. Brown's preference.

13 MR. BROWN: There would be a foundational issue that I
14 think I'm kind of obligated to make to see if they can
15 establish it is what it is.

16 THE COURT: I understand. If that's it, I think I can
17 do the foundation without seeing it.

18 MR. BROWN: Yes, ma'am. I think so, too. There is one
19 other thing. They date it, because, actually, in the video
20 part that's been edited, a person has a shirt that
21 references the date of death of a person who actually was
22 the deceased in a murder investigation. Instead of going
23 into any of that, I'm okay with the officer testifying
24 should the video come in that there's reference in there to
25 an event that did not occur until June.

1 DEP. SOL. THORNTON: Your Honor, it had to be after
2 June 21st, and the video was posted in September, all in
3 this year; so it had to be in that time.

4 THE COURT: Okay. I understand.

5 MR. BROWN: I think that's -- I mean, otherwise, the
6 shirt doesn't bother me too much, but then it goes in behind
7 that shirt and references a lot more, another entire
8 investigation, which I don't believe involves my client, but
9 I think it is worth saying that.

10 THE COURT: Right. I understand.

11 DEP. SOL. THORNTON: Mr. Brown has correctly referenced
12 everything, Judge. I think that's the easiest and cleanest
13 way, but if you want to do the foundation very quickly, we
14 can; if not, then I'll ---

15 THE COURT: We'll do it in front of the jury, I think.

16 MR. BROWN: And that's fine.

17 THE COURT: Great. Anything else before we bring the
18 jury out?

19 DEP. SOL. THORNTON: Nothing from the State, Judge.

20 MR. BROWN: Actually, I have another witness.

21 THE COURT: Okay. Yeah, but you're ready for your
22 witness?

23 MR. BROWN: Oh, yes, ma'am. I just meant ---

24 THE COURT: I just wanted to know if we were ready for
25 the jury; I know you haven't rested.

1 MR. BROWN: Yes, ma'am. Although, right now, I do only
2 have one witness, and I don't think it will take very long.

3 THE COURT: All right. Let's bring in the jury.

4 (WHEREUPON, THE JURY ENTERS THE COURTROOM, AND THE
5 FOLLOWING IS HELD ON THE RECORD.)

6 THE COURT: All right. Ladies and gentlemen, at this
7 time, we will continue with the defense. Mr. Brown, call
8 your next witness.

9 MR. BROWN: May it please the Court?

10 THE COURT: Yes.

11 MR. BROWN: I call Desiree Blanding.

12 (WHEREUPON, THE MS. DESIREE BLANDING IS SWORN.)

13 THE COURT: All right. Your witness, Mr. Brown.

14 MR. BROWN: May it please the Court, Your Honor?

15 THE COURT: Yes.

16 DIRECT EXAMINATION

17 BY MR. BROWN:

18 Q Ms. Blanding, would you tell the jury a little bit
19 about your age and where you live?

20 A I am 23 and I live on 40 Luther Warren Drive on St.
21 Helena Island.

22 Q How long have you lived there?

23 A I've been there since I was 12.

24 Q And who do you live there with?

25 A My grandmother, my mother, my brother, and my sister,

- 1 and my nephew.
- 2 Q Where'd you go to school?
- 3 A I went to Beaufort High.
- 4 Q And after Beaufort High, did you go to school?
- 5 A Yes, I did, at TCL.
- 6 Q And do you work anywhere?
- 7 A Yes, I work at Burger King in Port Royal.
- 8 Q Let me ask you this, what's your relationship to Jabari
- 9 Lennin?
- 10 A That's my boyfriend.
- 11 Q All right. Do y'all have a child together?
- 12 A Yes, I have a 10 month old.
- 13 Q All right. And how long have you known Trey Nichols?
- 14 A About nine years.
- 15 Q And how have you been able to know him -- through what
- 16 contact had you gotten to know him?
- 17 A We went to school together.
- 18 Q And obviously, you've lived on the same street or the
- 19 same neighborhood?
- 20 A Yes, he lives across from me.
- 21 Q Okay. And through the acquaintances over the nine
- 22 years that you lived there -- and let me ask you this, did
- 23 you also go to school together before high school?
- 24 A No.
- 25 Q What school did you go to then?

1 A I went to Lady's Island Middle.

2 Q Okay. Where did he go to middle school?

3 A I'm not sure if he was in school when I was in it, but
4 he probably was.

5 Q Is he younger than you?

6 A Yes.

7 Q But you went to high school together and you lived
8 together in that neighborhood?

9 A Yes.

10 Q Okay. And so you got acquainted with him through
11 school and through living in the same neighborhood?

12 A Yes.

13 Q All right. Let me ask you, through that acquaintance
14 and moving in the same community, moving in the same circles
15 within the community, have you been able to form an opinion
16 regarding his character for peaceableness or violence?

17 A He's very violent, being that I've had two incidents
18 with my brother and ---

19 DEP. SOL. THORNTON: Objection, Your Honor. This is
20 just his reputation and not incident.

21 THE COURT: Yes.

22 Q Let me just ask the questions and see if we can get
23 there, okay. Have you formed an opinion regarding his
24 reputation?

25 A To me, he's a person that picks and bullies on people.

1 DEP. SOL. THORNTON: Your Honor, objection. He asked
2 her if she had, and I'm not trying to nit-pick, but he asked
3 her if he had a reputation, not what the reputation was.

4 Q What is the reputation?

5 A Just being a bully.

6 Q Okay. Now, within the four months before April 21st,
7 2011, would you tell the jury if there are any specific acts
8 of conduct by Mr. Nichols?

9 A When Jabari used to pick me up to take me to school or
10 to work, we used to ride right into the intersection to go
11 home and Trey would sit at the tree, and it's like he would
12 watch the car coming in and he would throw the bottle at the
13 car.

14 Q And tell me again, was this once?

15 A It's been a couple of times.

16 Q Okay. What other incidents or matters of conduct by
17 Mr. Nichols have you seen during that timeframe?

18 A It was about a month ago, I had to get my brother and
19 my niece from the bus stop and Jabari took me ---

20 Q And let me ask you, you say a month ago, you say before
21 the shooting?

22 A Before the shooting.

23 Q Thank you.

24 A Before the shooting, I had to go pick up my brother and
25 my niece from the bus stop and Jabari drove up and we saw

1 Trey at the tree, so I told Jabari to park away from the
2 tree. So Jabari stayed in the car and I walked up, because
3 the bus was coming.

4 As I'm walking up, Trey called my name and I ignored
5 him. So he sees that I ignored him and didn't say anything.
6 He says to me, "Bitch, you ain't nothing," so I ignore him
7 again, and he gets up from the stump and says to me, "You
8 want me to slap Jabari, because you're being disrespectful."
9 So I kept going on and then that's when the bus was stopped
10 to drop the kids off and I go from the front to get away
11 from him and as I'm walking away, he's following me.

12 So at the time, I called the police, and he was like,
13 "You're calling the police?" As my brother and them come
14 off the bus, I walked back to the car and Jabari drove me
15 back home and then I told my mother what happened. We
16 walked back to the end of the road and waited for the
17 police. The police told me that not to say nothing to him
18 and just ignore him and she asked me what he had on.

19 Q Was there ever any contact after that between you and
20 law enforcement regarding that complaint?

21 A No, they did not contact me.

22 Q All right. Anything else that you saw or knew about
23 through your own personal witness regarding Mr. Nichols?

24 A Just that he would always sit there, and he had a
25 problem with my brother; and it was to the point where he

1 would just sit there, and it's like 6:00 in the morning when
2 my brother was trying to go to school, and he said -- he
3 said something to him and he mushed him in the back of his
4 head.

5 Q Would you tell the jury what the word "mush" means?

6 A It's like when you take your hand and push the person's
7 head from the back.

8 Q And this was Mr. Nichols that mushed your brother?

9 A Yes.

10 Q And is that Robert?

11 A Robert Blanding.

12 Q Okay. And let me ask you real quick, have you ever
13 heard a nickname for that tree?

14 A It's been said it's the crack tree, but I have heard of
15 people down there selling drugs.

16 Q Now, let me ask you this, on April 21st, do you
17 remember being with Jabari?

18 A Yes.

19 Q Tell me what you can about that day.

20 A Okay. Well, it was like a normal day. Jabari picked
21 me up and took me to school. Jabari picked me up around
22 1:00, and I actually stopped at Burger King, because I don't
23 work on my school days and my work schedule comes out on
24 Wednesdays, so I stopped at Burger King to get my schedule
25 and he took me home. As we were coming in, we bypassed him

1 to go into the intersection to get home, I saw Trey walking
2 towards the tree. Jabari then took me home and that was it.

3 Q All right. And let me ask you about one other matter
4 occurring within that four month time period. Was there
5 ever a time that you were able to observe anything else
6 about Mr. Nichols that he didn't say, but he did with his
7 backside?

8 A Yes. It was one day when I was home and my grandmother
9 sent King and Jabari to the store for her and when they came
10 back, they told me that ---

11 DEP. SOL. THORNTON: Objection, Your Honor, hearsay.

12 THE COURT: Yes.

13 Q But you weren't there to observe anything yourself?

14 A No.

15 Q Okay. When you were around Mr. Nichols how did you
16 feel?

17 DEP. SOL. THORNTON: Objection, Your Honor, as to
18 relevance.

19 MR. BROWN: Well, I'm going to tie it back in. I'll
20 start with the other question.

21 Q Did you ever discuss with Mr. Lennin how you felt about
22 Mr. Nichols and how he made you feel?

23 A Yes.

24 Q And how did Mr. Nichols make you feel?

25 A I was trying to ignore him, not trying to fall into

1 it too much because I know he likes to provoke people.

2 Q And when you say provoke, provoke into what?

3 A Like he'll say things to people, curse words to make
4 them mad or to make them get angry with him. He'll poke at
5 them.

6 Q Provoking a fight?

7 A Yes.

8 MR. BROWN: Your Honor, I don't have any other
9 questions at this time.

10 THE COURT: All right. Cross-examination?

11 CROSS-EXAMINATION

12 BY DEP. SOL. THORNTON:

13 Q Ms. Blanding, I think just one question. On April
14 21st, 2011, were you present at the scene when Jabari shot
15 Trey?

16 A No.

17 Q Okay.

18 DEP. SOL. THORNTON: I don't have any further
19 questions.

20 THE COURT: All right. Redirect?

21 MR. BROWN: Very briefly.

22 REDIRECT EXAMINATION

23 BY MR. BROWN:

24 Q When you came home from TCL that day, were you with
25 Jabari and King?

1 A Yes.

2 Q Did you see Mr. Nichols out there then?

3 A Yes.

4 Q Did he acknowledge y'all through any conduct?

5 A He usually sticks his finger up when we go by.

6 Q Thank you.

7 THE COURT: Any recross?

8 DEP. SOL. THORNTON: No, ma'am.

9 THE COURT: Very well. You are free to go. All right.
10 Call your next witness.

11 MR. BROWN: The defense rests, Your Honor.

12 THE COURT: Very well. I'm going to send the jury out.
13 Counsel, let me have you approach a minute.

14 (WHEREUPON, A BENCH CONFERENCE IS HELD OFF THE RECORD
15 AND OUT OF THE HEARING OF THE JURY.)

16 THE COURT: All right. Anything else?

17 MR. BROWN: Nothing else, Your Honor, except for the
18 matter we just discussed.

19 THE COURT: Very well. All right. And there is
20 rebuttal reply?

21 DEP. SOL. THORNTON: There is, Your Honor.

22 THE COURT: Ladies and gentlemen, you have now heard
23 the witnesses and received the evidence from the defense.

24 We will now hear reply rebuttal evidence from the State.

25 And with that, Mr. Thornton?

1 DEP. SOL. THORNTON: Thank you, Your Honor. At this
2 time in rebuttal of the State, I'd call Jeremiah Fraser to
3 the stand.

4 THE COURT: So our record is going to be clear, when
5 you're seated, I'm going to ask you to state your name just
6 so our record reflects who's here.

7 MR. FRASER: Sergeant Jeremiah Fraser, F-R-A-S-E-R.

8 THE COURT: Your witness.

9 REBUTTAL - DIRECT EXAMINATION

10 BY MR. THORNTON

11 Q Detective Fraser, who do you work for, sir?

12 A I work for the Beaufort County Sheriff's Office in
13 criminal investigations.

14 Q And are you the case officer of the case of the State
15 v. Jabari Lennin?

16 A I am.

17 Q As part of your investigation, have you reviewed or
18 seen any videotape with Mr. Lennin in it?

19 A I have.

20 Q I'm going to hand you, for identification only, what's
21 been marked as State's Exhibit Number Seven. Do you
22 recognize that CD?

23 A I do by my initials on it.

24 Q All right. And is that -- what is the depiction of
25 that CD?

Rebuttal Examination
Direct Examination of Sgt. Jeremiah Fraser by Dep. Sol. Thornton

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- 1 A Are you asking me ---
- 2 Q I'm sorry, that's a horribly phrased question, but what
3 does that CD show?
- 4 A Contained on this CD is two clips of video taken from
5 Club Ocean.
- 6 Q All right. Where is Club Ocean?
- 7 A Club Ocean is a strip club in Jasper County.
- 8 Q And do you know when this video would have been taken?
- 9 A I do. It's roughly between June 21st and September 4th
10 of this year.
- 11 Q All right. How do you know that?
- 12 A There is a date on the video on a shirt of a -- well,
13 there's a date on a shirt of an incident that I'm aware of
14 and also the video was posted September 4th, so the date on
15 the shirt is June 21st of this year and the video was posted
16 September 4th of this year; so it's in between that
17 timeframe.
- 18 Q All right. And did you, yourself, pull the clips that
19 are shown on that disc?
- 20 A I did.
- 21 Q Are they a fair and accurate representation of what is
22 shown on the video?
- 23 A Yes, they are.
- 24 Q And let me ask you this, where was the video again?
25 Where is it at?

Rebuttal Examination
Direct Examination of Sgt. Jeremiah Fraser by Dep. Sol. Thornton

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1 A The video was downloaded from Youtube, which is a
2 public site.

3 Q And when did you download that?

4 A I first viewed it a couple of weeks ago.

5 Q When did you actually pull it down?

6 A Today.

7 Q And are the clips that you pulled, is it a fair and
8 accurate depiction of what occurs on the video in the tape?

9 A Yes.

10 Q Those two clips that were pulled out, were they altered
11 or changed in any way?

12 A No, they were not.

13 Q What did the two clips show?

14 MR. BROWN: Your Honor, I would object to a
15 characterization of the clips, because I think he's going to
16 enter the video.

17 THE COURT: Because they will speak for themselves.
18 Sustained.

19 Q All right.

20 DEP. SOL. THORNTON: Your Honor, at this time I'd move
21 State's Exhibit Number Seven into evidence.

22 THE COURT: All right. And there's no objection?

23 MR. BROWN: No objection.

24 THE COURT: Very well.

25 (STATE'S EXHIBIT NUMBER SEVEN, DVD, IS RECEIVED INTO

Rebuttal Examination
Direct Examination of Sgt. Jeremiah Fraser by Dep. Sol. Thornton

592

1 EVIDENCE.)

2 DEP. SOL. THORNTON: Your Honor, I apologize. Court's
3 indulgence for just a moment while I get this set up.

4 THE COURT: All right.

5 DEP. SOL. THORNTON: And Your Honor, if I could get
6 Detective Fraser down for me.

7 THE COURT: All right.

8 Q Detective Fraser, without making any characterizations
9 as to the video, would you please point out the important
10 person on the videotape? Detective, if you'd please take it
11 over; you do much better with that stuff than I do anyway.

12 (COURT'S EXHIBIT NUMBER SEVEN, DVD, BEGINS PLAYING.)

13 A This right here is Jabari Lennin, the defendant, in
14 between that June timeframe and September of this year.
15 That was the first video. The second video, he's right
16 there; that's Jabari Lennin between June and September of
17 this year.

18 Q Thank you, Detective.

19 DEP. SOL. THORNTON: I have nothing further, Your
20 Honor.

21 THE COURT: Very well. Cross-examination?

22 CROSS-EXAMINATION

23 BY MR. BROWN

24 MR. BROWN: Not with the video. Thank you.

25 Q I've just got one question, and so the jury can see,

Rebuttal Examination
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20 Honor.

21 THE COURT: Very well. Cross-examination?

22 CROSS-EXAMINATION

23 BY MR. BROWN

24 MR. BROWN: Not with the video. Thank you.

25 Q I've just got one question, and so the jury can see,

Rebuttal Examination
Cross-Examination of Sgt. Jeremiah Fraser by Mr. Brown

1 Investigator Fraser -- there's been reference to a tree on
2 Luther Warren and Seaside Road. Have you ever heard that
3 tree referred to in a nickname?

4 A It's the one in this picture, correct?

5 Q That's correct.

6 A I've never heard the nickname it's been called.

7 Q And Investigator Fraser, do you recall there being a
8 preliminary hearing in this matter?

9 A I do.

10 Q Do you recall being asked about whether or not there
11 was a nickname for that tree?

12 A Now that you mention it, I think I do.

13 Q And would you recall what the nickname was?

14 A Yes, sir. If I said it was the crack tree, then that's
15 probably what I said, but there are several and I don't
16 recall if I've mentioned that one specifically, but I may
17 have.

18 Q Is there any other oak tree that's been discussed
19 regarding Mr. Lennin's case?

20 A No, sir.

21 Q That has been referred to as a crack tree?

22 A I think so.

23 Q Thank you. No other questions.

24 THE COURT: Okay. Redirect?

25 DEP. SOL. THORNTON: Nothing further, Judge. I ask

1 that he be allowed to step down.

2 THE COURT: Very well. You may step down. And do you
3 have any additional witnesses?

4 DEP. SOL. THORNTON: I do not, Your Honor.

5 THE COURT: All right. Ladies and gentlemen, you have
6 now heard the witnesses and received the evidence which you
7 will in this case. What remains for us are the arguments of
8 counsel and my charge, or instruction, on the law. That
9 also signifies to me that there are matters that I must take
10 up outside your presence; we're going to also use this as
11 our afternoon break. When you return, ladies and gentlemen,
12 I anticipate that we will go into the arguments of counsel
13 and then my charge, or instruction, on the law.

14 So leave your notebooks in your seat, step to your jury
15 room, do not discuss this matter or allow anyone to discuss
16 it with you, because you're not ready to deliberate, because
17 you haven't heard the arguments of counsel nor my charge on
18 the law. Enjoy your break.

19 (3:10 P.M., WHEREUPON, THE JURY EXITS THE COURTROOM,
20 AND THE FOLLOWING IS HELD ON THE RECORD.)

21 THE COURT: All right. Motions?

22 MR. BROWN: Yes, ma'am. And I'd like to make motions
23 that I made explicitly. I'd like to renew all my previous
24 evidentiary issues and motions. I'd also like to move for a
25 directed verdict, and the directed verdict basis I made at

1 the end of the State's case would be the one I renew that
2 there's no evidence of malice. We don't have an inference
3 of malice for use of a deadly weapon in this case, but under
4 these circumstances, in my opinion, under Belcher, and so
5 we're left with no other information, and the reason why I
6 say this is that we've heard from two State's witnesses and
7 Mr. Lennin; and the State's witnesses I refer to are Mr.
8 Williams and Mr. Nichols, and they all discussed, for lack
9 of a better word, some argument that triggered the heat of
10 passion, and that defeats malice, and that's a general way
11 of saying it, and so I would renew it both at the end of my
12 case and now at the end of their case, and we did discuss
13 that. I think it was put on the record at the end of that
14 case, and I also add the renewal of my motion to admit the
15 testimony from Dr. McElveen at both of those stages, as
16 well.

17 THE COURT: Thank you so much. I would respectfully
18 deny your motions for the same reasons that I gave earlier.
19 It is not for me to weigh the evidence, but to ascertain
20 whether or not there is evidence on each and every element
21 of each offense, and I find that there is evidence on each
22 and every element on which this jury could make a
23 determination of guilt, and would respectfully deny your
24 motion. The evidentiary rulings that I have made throughout
25 the trial, I would be consistent with and they would remain.

1 Now, if you all would be so kind as to join me in
2 chambers, please, because I'd like to have an informal
3 charge conference with you and then we'll talk about
4 argument and charge.

5 DEP. SOL. THORNTON: Yes, ma'am.

6 MR. BROWN: Yes, ma'am.

7 (WHEREUPON, THE TRIAL IN THIS CASE IS IN RECESS FOR A
8 BRIEF PERIOD. THEREAFTER, THE COURT RECONVENES AND THE
9 FOLLOWING IS PLACED ON THE RECORD.)

10 THE COURT: Here's what I'm going to do. I am going to
11 give the jury this choice, since it's taken me a little bit
12 longer. I'm going to give them this choice to begin afresh
13 and new in the morning. I do not want my jury not listening
14 to y'all with crispness or whether they want to proceed; I
15 want them crisp and able to pay attention. So I'm going to
16 give them a little bit of leeway of what they want to do. I
17 just want y'all to know that. I know that throws you just a
18 little bit, but if they're not going to be crisp and they're
19 not going to be able to listen to you guys, and what I know
20 will be wonderful closing arguments, and they are going to
21 be tired, I don't want that to happen. I think everybody is
22 entitled for them to be fresh to include them. So I'm going
23 to ask them that, and that will be their first issue of
24 deliberation, because we're going to be here tomorrow. So
25 that's what I'm going to do. Bring in the jury, please.

1 MR. BROWN: And Your Honor, I'd like to enter the
2 Request to Charges that I have.

3 THE COURT: But I need number one, because you really -
4 - I mean, I know you wanted them all, but one and eight and
5 five are really what I want to study, and I want to study
6 them. Okay? So give me a copy of One.

7 MR. BROWN: Yes, ma'am. I think you already had a copy
8 of One. What I wanted to do is if I can just enter the
9 whole set, because I do think you did cover all ---

10 THE COURT: Well, I want you to enter all of them. I
11 agree with you, but ---

12 MR. BROWN: This is my only whole set. I had three,
13 but we're down to one whole set.

14 THE COURT: Yeah, do a whole set. But there were some
15 that you really wanted me to study.

16 MR. BROWN: Yes, ma'am, and after the court reporter
17 marks them, I will make a copy and hand a set up to you.

18 (4:45 P.M., WHEREUPON, THE JURY ENTERS THE COURTROOM,
19 AND THE FOLLOWING IS HELD ON THE RECORD.)

20 THE COURT: All right. Ladies and gentlemen, y'all are
21 about to have your first issue for deliberation and here it
22 is. The schedule is you are first going to hear from Mr.
23 Brown in his closing argument, and then you're going to hear
24 from the State in their closing argument, and then you're
25 going to hear the charge. We are talking about two and half

1 hours to three hours of work before you receive the
2 deliberation.

3 Here's your first issue. Do you want to do that this
4 evening or do you want to begin fresh in the morning. If
5 you choose to return in the morning to begin, do you want to
6 start at 9:00 or 9:30? I'm going to let you step out and
7 make this decision and let me know.

8 (4:50 P.M., WHEREUPON, THE JURY EXITS THE COURTROOM.

9 THE COURT: Ladies and gentlemen, I think that the
10 consensus is this. We will begin in the morning about 9:30
11 and that will allow for freshness. Now, because you haven't
12 heard the arguments of counsel and you haven't heard my
13 charge on the law, the same admonitions that we've been over
14 every night, do not discuss this matter or allow anyone to
15 discuss it with you; don't read anything, don't listen to
16 anything, don't do any research, don't access any social
17 media with regards to this matter. Especially, tomorrow, I
18 need you to be as fresh and crisp as you all have been
19 throughout this trial for which I am so grateful. Have a
20 pleasant evening and I will see y'all at 9:30.

21 (5:00 P.M., WHEREUPON, THE JURY RECESSES FOR THE
22 EVENING AND COURT IS ADJOURNED FOR THE EVENING. THEREAFTER,
23 ON FRIDAY MORNING, AT 9:40 A.M., COURT RECONVENES IN THE
24 TRIAL OF THIS CASE AND THE FOLLOWING IS HELD ON THE RECORD.)

25 THE COURT: All right. Any issues before we proceed

1 this morning?

2 MR. BROWN: If you don't mind if I key it up, Your
3 Honor. I think that's there, Your Honor. And I did mark
4 defendant's request to charge number 18, and I think that's
5 Court Three, because yesterday there was a packet of one
6 through seventeen that I submitted, and that's part of
7 Court's Two, and Your Honor, obviously, those are things
8 that I've submitted.

9 THE COURT: Absolutely. We'll deal with that according
10 to what the Court charges at some later point in time.

11 THE COURT: There you go. Absolutely. Anything else
12 before we bring the jury out?

13 DEP. SOL. THORNTON: Nothing from the State, Your
14 Honor.

15 MR. BROWN: Nothing from the Defense, Your Honor.

16 THE COURT: Okay. Now, what I'm going to tell the jury
17 just so they'll know what to anticipate, Mr. Brown, I'm
18 going to tell them you are going to argue first, okay?

19 MR. BROWN: Yes, ma'am.

20 THE COURT: And then I'm going to tell them, Mr.
21 Thornton, that you're going to argue, okay?

22 DEP. SOL. THORNTON: Yes, ma'am.

23 THE COURT: Let's have the jury.

24 (9:45 A.M., WHEREUPON, THE JURY ENTERS THE
25 COURTROOM, AND THE FOLLOWING IS HELD ON THE RECORD.)

1 THE COURT: Good morning, ladies and gentlemen. I
2 wanted to tell you how we are going to be proceeding. You
3 are first going to hear closing arguments of Mr. Brown, and
4 of course he's making those on behalf of Jabari Lennin. You
5 are then going to hear the closing argument on behalf of
6 the State, and that's going to be by Mr. Thornton.

7 Once the closing arguments are finished, then they'll
8 be a very short break, which will be very self-evident when
9 that occurs. And then I will deliver the charge, or the
10 instruction, to you on the law and there'll be another very
11 short break which I will explain to you when we reach that
12 point, and then, ladies and gentlemen, you will receive this
13 case for your deliberation.

14 So, ladies and gentlemen, at this time, I ask that you
15 please draw close as we listen to closing arguments of our
16 attorneys. Mr. Brown?

17 MR. BROWN: May it please the Court, Your Honor?

18 THE COURT: Yes, sir.

19 CLOSING ARGUMENT

20 BY MR. BROWN:

21 (WHEREUPON, DEFENSE EXHIBIT NUMBER THIRTEEN, A PORTION
22 OF FIVE SECONDS, IS PLAYED FOR THE JURY, WHICH IS NOT
23 TRANSCRIBED.)

24 We've heard testimony about that incident through
25 police reports. We've actually been able to hear what

1 happened that day without any reasonable bias. Now, there's
2 little dispute about most of the facts in this case, but
3 there is one thing that we have to understand from the
4 beginning, that for a person to commit a crime, they have to
5 commit both a criminal act physically and that they do that
6 with criminal intent. Shooting someone can be criminal or
7 non-criminal, and if a person is justified then
8 justification is self defense, and that negates, it
9 eliminates, criminal intent. That's why justified shooting
10 is not criminal. That's what distinguishes self defense
11 from cold killing or even heat of passion killing.

12 Now, the judge is going to charge you what the law is.
13 You need to understand before we go through any of the
14 arguments and assessing all of this that the burden of proof
15 is on the government. They have to prove it was a criminal
16 act and criminal intent. Self defense is before you, they
17 have to disprove self defense beyond a reasonable doubt.
18 Now, there's a lot of negatives in this. What it means is
19 that if there's a reason to believe that Jabari was
20 justified, if you have a reason to believe it, not beyond a
21 reasonable doubt, just a reason to believe that Jabari was
22 justified, that's it. Because this is not a case of
23 competing stories. It's not whether Jabari Linnen's case is
24 better than the Trey Nichols' State's case. Again, they
25 have to prove there was no reason supporting self defense.

1 Now, it's a little bit unusual because this is a case
2 where we talk about character, and it's not just one
3 person's character. We have the character of the aggressor,
4 Mr. Nichols versus the character of Jabari Linnen, but we do
5 have character information here. And so I want to talk
6 about what we've heard regarding character.

7 We know, undisputed, that Mr. Nichol's character is
8 that of a bully. He's a violent person. He's a person who
9 cannot play within the rules whether it's the rules of law
10 or the rules of his own house. We know that he was willing
11 to lie to the police to try and manipulate the judicial
12 system; that's his character.

13 And we heard character evidence from Jabari Linnen, and
14 we heard Jabari testify how he worked and he made
15 arrangements for the mother of his child to get to school.
16 And the State introduced character evidence of Jabari Linnen
17 and showed that he went to a strip club.

18 Now, the important part of character is whether or not
19 it bears upon the case here the issue of self defense, and
20 succinctly, self defense is that the person using the force
21 was without fault in bringing on the difficulty. That
22 person who used the force actually believed he was in
23 imminent danger of great bodily danger or death. That he,
24 in fact, was in imminent danger of great bodily injury or
25 death, either one of those two, and that having a duty to

1 retreat, but only if retreat was reasonably possible or if
2 he believed he could reasonably retreat or if he reasonably
3 believed he couldn't retreat, he didn't have to.

4 Now, once the elements of self defense are established,
5 we know that Jabari can meet force with force. We know he
6 is able to take a number of things into account. When you
7 look at whether or not Mr. Nichols was the one at fault in
8 bringing on the difficulty, you are allowed to consider any
9 words, accompanied by hostile acts, because words alone,
10 accompanied by hostile acts may be enough to trigger self
11 defense, and that's the law. I didn't make that up.

12 In this case, we're not talking about some kind of
13 words that won't break your bones, we're talking about words
14 from a man who can break your bones. Accompanied by the
15 acts of aggression, throwing of an item into his face. And
16 then, when somebody tries to reason with him, he asks if
17 they are ready to die and there's an expletive that comes
18 after that. Undisputed testimony regarding that.

19 Now, Mr. Lennin is able to act on appearances. So if
20 it appears the Mr. Nichols is removing his hands from his
21 sagging, baggy pants in a threatening way, he is able to act
22 on the way it appears to him. Because remember the question
23 is whether he reasonably believes he was in danger of great
24 bodily injury. We also know Mr. Lennin does not have to
25 wait for Mr. Nichols to get the drop on him. That is the

1 law in South Carolina. He doesn't have to be fired upon
2 first before he fires back, otherwise, self defense wouldn't
3 be of much use.

4 Mr. Lennin, and you, the jury, are allowed to
5 consider prior difficulties between Mr. Nichols and Mr.
6 Lennin, any threats made by Mr. Nichols to Mr. Lennin, any
7 instances of violence, which bears on the question of who
8 was the aggressor. The amount of force that can be used is
9 enough to stop the danger and it doesn't have to be a nice
10 calculation. And for what it's worth, five shots did not
11 ultimately stop Mr. Nichol's mobility. Because if you will
12 recall, he didn't lay there where he was shot. Now, I will
13 point out at this point in time the idea that he was sitting
14 on a stump and got shot in the thighs defies the law of
15 physics. He had to be standing to be shot in the thighs.
16 He's the only one who said that.

17 Now, all of those factors are things that the judge is
18 going to tell you about and that you can consider, because
19 remember if you consider those factors, the question is
20 whether or not there is any reason to believe that Jabari
21 Linnen is justified. If there's any reason to believe it,
22 you must find him not guilty.

23 Now, we've talked about some of the character, being a
24 bully, being a manipulator of law enforcement, about lying
25 that he's violent, that his violence is equally distributed

1 among all, young and old, male and female, but we can talk
2 about specific instances that we heard here today. We know,
3 among other things, that Mr. Nichols took a habit of not
4 working and hanging out at the crack tree.

5 Now, coincidentally, the crack tree happens to be the
6 bus stop, too. So all day, every day, or a lot of days, Mr.
7 Nichols would stay at the crack tree while the kids went
8 back and forth to school, and the high school kids and the
9 elementary kids, and he didn't really care. And he didn't
10 care if Desiree Blanding went to go pick up her brother, and
11 he was willing to accost her, and then threaten Jabari
12 Linnen. What did he say, "What, do you need me to slap him
13 in the head for you disrespecting me?" That's a threat.
14 That's a prior threat from Trey Nichols to Jabari Linnen.

15 If you will recall, he actually did commit a battery
16 against Robert Blanding, and let's think about a little of
17 that dynamics. Robert Blanding is so much younger than Mr.
18 Nichols that they're not in high school together. Mr.
19 Nichols didn't graduate from high school until 2009; this
20 was in 2011. So we're dealing with a person who is younger,
21 arguably not in the age of majority, versus a person who is
22 older and who should know better. Robert Blanding did
23 nothing, and I couldn't conceive that a person of his size
24 would ever do anything to Trey Nichols. So he will pick on
25 younger guys who are a lot smaller. He will pick on Desiree

1 Blanding who is a lot smaller. He will do it in front of
2 the other children.

3 Now, we know how he reacted when somebody tried to deal
4 with him just through words. When Regina Blanding asked him
5 to stop, do you recall the response he gave? And that's
6 consistent with his other acts. Sadly, he did the same
7 thing to his own family.

8 I submit to you when you review these reports, that you
9 will note a pattern of escalation, where he is increasingly
10 becoming more aggressive from the first report in February
11 to the two police calls of April 21st. First, he's willing
12 to go to blows, and from what I can understand, the only one
13 throwing blows against his non-blood relative, his step-
14 grandfather, who is at least a man; but a man who is over 35
15 years older than he is, and taller. He lays him out.

16 Then a month later, he decides that he is going to do
17 the same thing to his 5'4", 62 year old grandmother, and
18 that is the call we just heard. It's ambiguous; and the
19 reason I played that was just for that reason. "Come quick,
20 or somebody's gonna get hurt." Now, we don't know who the
21 somebody is or the person who would do the hurting, but if
22 you think about it, either way -- either way you view it is
23 a fact that helps Jabari Linnen's case, because if you don't
24 come quickly, Trey Nichols is going to hurt us; we know how
25 bad he is. And if it's because the police are to come

1 quickly because Ms. Nichols is going to have to hurt Trey,
2 that's because she has to use force to repel him. And I
3 don't know what she meant by that, the recording speaks for
4 itself. There's no lying on that recording. You can hear
5 in her voice the urgency.

6 I'm not sure what it is that will get Trey Nichols to
7 obey the law, because we know thus far that his parents
8 can't intervene, his neighbors can't do anything, and
9 unfortunately even the police were not able to stop his
10 rampage in that neighborhood between February and April.

11 Now, when I was in school, an English professor taught
12 me that there were three ways to look to character, and one
13 is what the person does; one is what that person says, and
14 another one is what other people say about him. And so,
15 we've got a lot about what Mr. Nichols does. Interestingly,
16 Mr. Nichols was very candid on the stand with his testimony.
17 He characterized himself as a violent person, and he said he
18 had problems remembering things. And he said he was willing
19 to lie to the police so to better his own position in their
20 eyes. His words, not mine.

21 He testified that he used those profane words at the
22 car at that stop sign. That he approached that car that
23 day. That he brought on that difficulty and on questioning
24 by me, he said that there was nothing Jabari Linnen did to
25 provoke that. That is prong one of the self-defense claim.

1 And again, I don't have to establish it; they have to
2 disprove it beyond a reasonable doubt, but that is
3 uncontradicted. There were three people there: Mr.
4 Nichols, Mr. Williams and Jabari Linnen. And not one of
5 them said that Jabari was at fault for bringing that one,
6 not one of them.

7 Now, we know some reasons that Jabari would be actually
8 in imminent danger, because we've heard about some of these
9 other acts of aggression and what Trey Nichols is willing to
10 do. You also heard testimony from King David Williams about
11 what happened. We know he said that Trey approached the
12 car. We know that Trey approached Jabari when Jabari was
13 out of the car. We know that he never saw Jabari show any
14 gun or show use or threaten use of force before Trey
15 aggressively approached him. If anything that I say is
16 contradictory to your notes, resolve it your way; but the
17 testimony is here and you will have access to that.

18 Now, we also know what wasn't said. King David never
19 said, "I tried to drive off and Jabari told me not to." He
20 never said that Jabari asked him to pull over on the side
21 there so he could engage in some kind of confrontation with
22 Trey Nichols. And I asked why they stopped. Was it because
23 Jabari asked you to? Because you came to the stop sign.
24 Did Jabari ever ask you to stay? Did Jabari ever in any way
25 indicate that he wanted a confrontation that day? It was

1 not. It was Trey Nichols.

2 Now, Jabari has testified also, consistent with King,
3 that Trey Nichols aggressively approached him outside of
4 that car. That's consistent. The only thing inconsistent
5 was Mr. Nichols' statement that he was sitting on the stump
6 when he got shot. Again, I submit you can't get shot in the
7 thigh sitting on a stump.

8 Now, there are some factors that are important when you
9 look at self defense, and we've talked about that. I've
10 asked that you consider self defense, because it shows
11 whether or not Mr. Linnen had the reason to believe he was
12 in imminent danger, and whether, in fact, he was. Because
13 if either of those are true, it suffices. As long as that's
14 a belief that would be held by another reasonable person.

15 And I don't know how many more reasonable people I
16 could present besides Mr. Mitchell, the Blandings, and
17 testimony through 911 calls, and Mr. Nichols' own family
18 about fear that Trey Nichols created in that community. I
19 didn't call the Nichols as witnesses, because they are
20 witness to his danger and it's in the police report. He
21 won't obey the law. He just doesn't follow the law.

22 Now, I didn't come here to brazenly tell you that
23 Jabari Linnen would prefer to be judged by twelve instead of
24 being carried by six. This is about a decision that was
25 made with some type of premeditation. There's no

1 premeditation that Jabari did to draw Trey Nichols to that
2 car. There's no indication King David never saw a gun out,
3 he wasn't asked to stop or stay at the stop sign. And
4 consider the issue of retreat, whether that was reasonable.
5 How is it Jabari was supposed to run away from Trey? Trey
6 is a trained athlete and Jabari is not. Using Trey's own
7 words, that was his turf, and if King thought it prudent to
8 drive off, he would have already done so. Driver's license
9 or not, Jabari was not behind the wheel of that car. We do
10 know that Trey Nichols was threatening the use of a weapon;
11 he did with that beer bottle. And that's on the tape as
12 well, and police reports.

13 Now, this is the point where I come here and turn over
14 the task I have of protecting Jabari's liberty and freedom
15 to you. I mentioned that earlier to you in the trial that
16 that awesome power is going to come to you in this case.
17 Please, again, remember your duty is not to seek some
18 explanation from Jabari beyond a reasonable doubt, but it's
19 to determine, as the judge will tell you, whether there's a
20 reason to believe Jabari was justified. It's an awesome
21 responsibility, especially in this sad case that we have two
22 20-year olds with contrasting lives that has been portrayed
23 before you. Trey Nichols had a family and he had a future
24 and he squandered that. I ask that you resolve all the
25 questions that you are going to have in Jabari's favor and

1 allow him to continue on with his life.

2 THE COURT: Thank you, Mr. Brown.

3 MR. BROWN: Thank you, Judge.

4 THE COURT: Mr. Thornton?

5 DEP. SOL. THORNTON: Thank you, Your Honor, May it
6 please the Court?

7 THE COURT: Yes, sir.

8 CLOSING ARGUMENT

9 BY DEP. SOL. THORNTON:

10 When Jabari got up and testified, he didn't testify
11 that he told King David to drive off either, did he? Now,
12 why didn't he? Because he wanted to go harm him. Why else
13 would you get out of a car with a gun that you're not even
14 supposed to have?

15 Ladies and gentlemen, April the 21st of 2011, Jabari
16 Lennin shot an unarmed man multiple times with a .45 caliber
17 pistol; that's what this case is about. What's uncontested
18 in this case? What cannot be argued based on what the
19 evidence is before you? You know that Jabari Lennin shot
20 Trey Nichols. You know he did it with a .45 caliber pistol.
21 You know he fired at least nine times, at a minimum. You
22 know that Jabari wasn't supposed to have that gun. You know
23 that Jabari got the gun and got out of the car and walked
24 all the way around it before he started shooting.

25 You can look at the photograph Detective Fraser

1 testified to at where the shell casings were in the road and
2 they start, interestingly enough, about in the middle of the
3 road, right about where the driver's door is and continue on
4 into the grass. Does that sound like somebody who's
5 terrified? Who has their little eyes closed as they're
6 firing a weapon and they just don't know what they're doing?
7 Or does that sound like a cold-blooded killer trying to
8 follow his victim as he continues to fire, not once, not
9 twice, not five times, not six times, but a minimum of nine
10 times? How many is enough? And he's supposed to get extra
11 credit because Trey Nichols didn't fall dead right at his
12 feet? You should feel sorry for Jabari because Trey Nichols
13 was able to hop and run and collapse into his grandmother's
14 house?

15 What else do you know that uncontested? He fled the
16 scene. He left. Trey was gone. If you were an upstanding,
17 upright citizen and you had just protected yourself because
18 you were in reasonable fear, why did you flee? Why did you
19 abandon the getaway car and why did you take the gun that
20 you so righteously and justifiably used, bagged it up, and
21 threw it in the river? Do those sound like the actions of
22 an innocent man who was righteous and justified in what he
23 did or does that sound like a coward that got out of a car,
24 gun downed an unarmed man and tried to cover it up? That's
25 up to you to decide, ladies and gentlemen. Those things are

1 uncontested.

2 So the only issue really in this case boils down to
3 this. You know, you don't have to worry about the identity
4 of the shooter; you know that. You don't have to worry
5 about the identity of the victim; you got that. You don't
6 have to worry about the method of injury; we've got all
7 that. The only thing you have to decide is was it
8 reasonable and was it justified? Is he, Jabari Lennin,
9 should he get self defense? That's the issue in this case.

10 One of the things you can consider is reputation and
11 character of the victim in this case, Trey Nichols, and
12 there was a lot made about the character of Mr. Nichols.
13 Jabari Lennin attempted to murder him on April 21st and his
14 character was attempted to be murdered in this courtroom.
15 But it doesn't matter, because that's not what the case is
16 about, but even if you take everything that those witnesses
17 told you as true, as a fact, what do they show? The
18 escalation of violence, you know, just because you get up
19 and use big words and do it with a lot of emphasis, it
20 doesn't change what's written in the reports, and you'll
21 have those.

22 Shoving match with momma over toothpaste, shoving match
23 with grandma, hit step-granddad because, according to Mr.
24 Nichols, that he and the grandma were getting into it. And
25 that 911 call, don't you remember towards the end of that

1 she keeps saying, "You stay here. You stay here," she's
2 talking to Trey. How much fear can she be in if she's
3 telling him to stay? How much fear can she in if she is the
4 one who keeps telling him to come over to the house?

5 Is Trey Nichols somebody who treated his moma right?
6 Who treated grandmoma right all the time? Well, clearly
7 not. You don't get into a shoving match with your moma, but
8 what does that got to do with this case? Was Jabari Lennin
9 there? Was he in fear because Trey shoved his moma or maybe
10 shoved the moma over the toothpaste? No, he wasn't. He's
11 also apparently committed the awful offense of trespassing,
12 clearly that justifies shooting him eight or nine or ten
13 times.

14 What's the other awful things that he's done? He's
15 mushed someone in the back of the head. I'm glad that they
16 finally cleared that up and that means pushed. He is
17 clearly the scourge of the Department of Transportation for
18 breaking bottles in the road. How many times was it
19 testified to that he ever laid a finger on Jabari Lennin?
20 The answer is zero. None. All of that testimony.

21 And then we get into what is his reputation? What did
22 Ms. Blanding, not Desiree, but her mother, what did she say?
23 Mr. Brown said do you have an opinion as to his reputation
24 for violence? None. What did Mr. Mitchell say? I think
25 he's kind of a bully and he's kind of disrespectful. He

1 curses at people, he cursed at my wife. Inappropriate?
2 Yes. Deserving of attempted murder? No. And again, what
3 does that got to do with Jabari, was he there? No, he
4 wasn't.

5 So let's focus on what this case is about. This case
6 is about April 21st of 2011 and what happened right then.
7 When Jabari Lennin pulled that trigger over and over again
8 at an unarmed man. Jabari got on the stand, he showed you
9 the baggy pants -- remember, I asked him if they were in his
10 pockets, "No, they weren't in his pockets. They were right
11 here." What gun are you worried about if you're already
12 armed coming out? That, by the way doesn't exist, because
13 there was no gun; you'll remember every single witness that
14 got up here. No witness ever heard of a gun, saw a gun, saw
15 anything shiny, saw an object, saw a thing, including Jabari
16 Lennin, because it didn't exist. He cannot get around the
17 fact that he gun downed an unarmed man and then fled the
18 scene and disposed of evidence.

19 Now, character, reputation. It's also about
20 credibility. It's also about whose story and whose
21 testimony matches the other evidence. Credibility of Jabari
22 Lennin, sat up on that stand, took a lot of work on my part
23 to get him to answer questions, but when he finally did,
24 what did he keep telling you? What did he tell you when Mr.
25 Brown was talking to him? "I'm just a family man. I don't

1 do anything wrong. I go to work. That's all I do."

2 So is Jabari Lennin the scared, running, righteous, oh-
3 I'm-so-upset user of that firearm who just goes to work and
4 is a good family man or is he the guy who shoots an unarmed
5 man multiple times, hides evidence, runs away from the
6 scene, and right before his trial decides it's a good idea
7 to go to the strip club and throw out gang signs?

8 Now, I don't care what club he's in, but the fact that
9 he's throwing out gang signs seems a little bit inconsistent
10 with the family man who's so concerned and just kind of goes
11 to work and doesn't do anything else. That's the purpose of
12 those two clips that we put in. I don't care if he's
13 sitting out on the street corner; he's throwing out gang
14 signs. That's what's important. Typically, family men who
15 don't do anything wrong don't throw out gang signs.

16 You know, ladies and gentlemen, another thing that Mr.
17 Brown mentioned about self defense is you have to be without
18 any fault in bringing on the difficulty as a defendant. In
19 other words, Jabari Lennin cannot have any fault in this,
20 because if he does, then he doesn't get self defense, and it
21 is my job to disprove that.

22 Why did he get out of the car? I mean, I'm confused.
23 Jabari, like a lot of people, doesn't like to take
24 responsibility for his actions; did you notice that?

25 First, it's the fault of the stop sign, because the

1 stop sign was there. Remember what he said? "That stop
2 sign wouldn't have been there, this wouldn't have happened."
3 Then, it was "If Trey hadn't been cussing at me, this
4 wouldn't have happened." How about if you didn't have the
5 damn gun, it wouldn't have happened? How about if you
6 didn't get out of the car, it wouldn't have happened? How
7 about if you didn't get out of the car and come around the
8 car and pull the trigger, not once, but at least nine or ten
9 times, this wouldn't have happened, because that's what this
10 case is about. It has to be without fault in bringing on
11 the difficulty.

12 What was the testimony? They were coming together
13 because they were going to fight; they includes Jabari. And
14 if they are going to fight, and if he has some part of the
15 difficulty, he doesn't get self defense.

16 One of the other pieces of self defense is that he
17 couldn't have retreated; he couldn't have avoided it. Mr.
18 Brown's argument is, it wasn't possible, because he wasn't
19 driving the car. Not once did Jabari Lennin testify, not
20 once did King David Williams testify, "Jabari told me to
21 drive off, and I said no, because I wanted to see somebody
22 fight." He voluntarily got out the car and engaged in an
23 altercation and he was the only one that was armed.

24 Not once, in all of the assassination attempts of Mr.
25 Nichols' character, other than one time he picks up a bottle

1 and says if he comes back, meaning his step-granddad, he's
2 going to hit him in the head with a bottle, and his step-
3 granddad wasn't even there. Not once did anybody ever say
4 he has a reputation for carrying a gun or carrying a weapon,
5 so if Mr. Brown and Mr. Lennin want to take all the
6 advantage they can out of his bad reputation, where was the
7 evidence that he was known to carry a gun? There isn't any,
8 because he didn't. The only person carrying a gun that day
9 was Jabari Lennin.

10 Ladies and gentlemen, you have the duty to avoid this
11 kind of situation if you can, and Jabari Lennin chose not to
12 leave the situation. He chose to engage in the argument and
13 he chose to use that .45. The aggressive behavior that day
14 of Mr. Trey Nichols was a Coke can. He threw an empty Coke
15 can.

16 Y'all please excuse me, there's so many of these things
17 that it's hard to keep them in place. (SOLICITOR PICKS UP
18 COURT EXHIBIT AND SPREADS THEM ON THE JURY BANNISTER IN
19 FRONT OF JURY.) What Jabari threw back was at least nine
20 .45 caliber slugs; is that reasonable? Because if nine
21 slugs from a .45 is not a reasonable response for getting an
22 empty Coke can thrown at you in the car, then he's guilty of
23 the crime charged. He's guilty of attempted murder and he
24 is guilty of possession of a weapon during the commission of
25 a violent crime.

1 Ladies and gentlemen, this case, as I told you in my
2 opening, all the paperwork you'll see, it doesn't say Trey
3 Nichols versus Jabari Lennin; it says the State of South
4 Carolina versus Jabari Lennin. That's because Jabari didn't
5 break Trey's laws; he broke South Carolina's law. Because
6 you and I and everyone in this courtroom and the entire
7 State of South Carolina have two choices. You can live as a
8 society of rules or you can arm everybody, let everybody
9 shoot to settle their differences over Coke cans, and pray
10 to God no innocent bystanders get hit.

11 Now, I submit to you, ladies and gentlemen, based on
12 all of the evidence that you have, the identity of the
13 shooter, the identity of how he shot, clearly, the fact that
14 Trey Nichols was shot multiple times, including two to the
15 chest, and the ridiculous assertion of self defense.

16 I think that after all of that, ladies and gentlemen, I
17 ask that you go back to your jury room and deliberate once
18 the Judge has charged you on the law and return the only
19 reasonable verdict in this case, and that is guilty on both
20 counts, that Jabari Lennin on April 21st of 2011, committed
21 the crime of attempted murder and possession of a weapon
22 during the commission of a violent crime because we live in
23 a society of laws. Thank you.

24 THE COURT: Thank you so much. All right. Ladies and
25 gentlemen, the first break. Just stand up. I just need you

1 to be able to pay attention to me for a little bit while I
2 deliver the charge. Mr. Brown, I need to see you for just a
3 second, and it's going to take me about 40 minutes to
4 deliver the charge to you. I want everybody comfortable and
5 able to listen. Anybody need a short comfort break? Don't
6 be shy. Very well, if you don't need a comfort break,
7 stretch a little bit and then be seated. Counsel, I need to
8 see you for just a second.

9 (BRIEF PAUSE IN THE COURTROOM.)

10 THE COURT: all right. Ladies and gentleman, are we
11 all ready to go for about 40 minutes? Wonderful.

12 JURY CHARGE

13 Ladies and gentlemen, you all have rivetedly listened
14 to the evidence of testimony in this case. I am so grateful
15 to you for that. You have not allowed your thoughts to
16 wander. You have done that which I asked you to do when we
17 began this case. It is now my duty, my charge, to give you
18 the instruction on the law in this case.

19 Ladies and gentlemen, I'm going to be instructing you
20 on various parts of the law. It is my intention to give you
21 the body of law that you may need for your deliberations and
22 that you may need based upon your findings of fact.

23 The way that this is going to work is that you, based
24 on the evidence in this case -- what is the evidence in this
25 case? Well, here's what it is. It's three things. It is

1 the sworn testimony of the witnesses, it is the exhibit's
2 that were admitted into evidence that you will have in your
3 jury room, and it was stipulations of counsel, meaning that
4 the lawyers wanted you to accept what they told you; they
5 want you to accept that as fact. So that's the evidence in
6 this case.

7 You will then make the findings the facts, but then you
8 will take the law as I will give it to you and you're going
9 to apply it to those facts and that is how you will reach
10 your verdict. You don't have to worry about what you think
11 the law is or what it ought to be, but for our system to
12 work correctly, you must accept and you must apply the law
13 exactly as I give it to you, otherwise, our system will not
14 work.

15 I cannot tell you what the facts are, make kinds of
16 expression, I can't do anything with regards to the facts,
17 because you are the judges of the facts, but you can't
18 disagree with me regarding the law. That give you an
19 overview about what we're doing.

20 I'm going to make some preliminary parts of the charge
21 that are so critically important, so critically important,
22 and then, I am going to specifically define for you the
23 events of attempted murder; there's something called a
24 lesser included offense, which is called assault and battery
25 of a high and aggravated nature, and then I'm going to talk

1 about what's called self defense, and the State has to prove
2 beyond a reasonable doubt that that didn't occur. And then
3 I'm going to talk to you about the second indictment, which
4 is possession of a weapon during the commission of a violent
5 crime. Then, I'm going to go over the verdict form with
6 you. So there is your overview and we are going to get
7 right into it now.

8 Now, ladies and gentlemen, the State has charged the
9 defendant, Jabari Lennin, with attempted murder and
10 possession of a weapon during the commission of a violent
11 crime. They are two indictments. One is 2011-GS-07-946 and
12 2011-GS-07-947. I'll remind you that the fact that Mr.
13 Lennin was arrested, charged, and indicted in this case is
14 not evidence in this case, nor does it create any
15 presumption or inference of guilt. These documents are
16 strictly the notice documents. They're just notifying the
17 citizen that they have been charged with violating the
18 criminal laws of the State of South Carolina and the State
19 has done one for one and one for the other; they're just
20 pieces of paper. They're just notifying documents and they
21 are certainly not evidence of anything, but they are the
22 formal documents by which cases are brought into Court.
23 That's what they are.

24 Now, we have two indictments. One charges Mr. Lennin
25 with attempted murder, and the other indictment charges Mr.

1 Lennin with possession of a weapon during the commission of
2 a violent crime, and I want you to know that each of them
3 are separate and distinct in the State and you will decide
4 each of the charges separately on the evidence and the law
5 applicable uninfluenced in your decision as to the other
6 charge with one exception.

7 If you find that the defendant is guilty of attempted
8 murder and you find that he used a weapon, a gun, a weapon
9 during the commission of a violent crime, I would tell you,
10 and you'll hear that later on, that attempted murder and
11 assault and battery of a high and aggravated nature that
12 we're going to talk about, that those are violent crimes.
13 However, let me tell you this, if you find that the State
14 has failed to carry it's burden of proof regarding attempted
15 murder or assault and battery of a high and aggravated
16 nature, that they have failed to prove Mr. Lennin guilty
17 beyond a reasonable doubt, of either of those offenses, then
18 you cannot find Mr. Lennin guilty of possession of a weapon
19 during the commission of a violent crime. That is set out
20 on the verdict form and I will go over those with you.
21 Other than those connections, ladies and gentlemen, you have
22 to consider the indictments separately.

23 Now, I want you to know that as to each of these
24 indictments, to include the lesser included offense of
25 assault and battery of a high and aggravated nature that Mr.

1 Lennin has pled not guilty, not guilty; and that plea places
2 upon the State of South Carolina the burden to prove each
3 and every allegation of each of these indictments beyond a
4 reasonable doubt.

5 And I charge you, ladies and gentlemen, that a person
6 charged with committing a criminal offense or offense that's
7 in South Carolina is never, is never required to prove
8 himself or herself innocent. You're going to hear me talk
9 about a defense called self defense. Now, when I say self
10 defense, it's a defense, and it negates one of the elements
11 of attempted murder and assault and battery of a high and
12 aggravated nature, and so when there is self defense, a
13 person cannot be guilty of attempted murder or assault and
14 battery of a high and aggravated nature, but the burden
15 doesn't shift; that burden isn't on Mr. Lennin.

16 The way that our law works is that once the self
17 defense is raised, which Mr. Lennin has done, the State must
18 prove that self defense did not exist beyond a reasonable
19 doubt. The reason I want to be clear about that is that
20 under our law, a person charged with a crime is presumed
21 innocent, the State maintains the burden of proof; Mr.
22 Lennin doesn't have to prove anything.

23 Now, I charge you that it is an important rule of the
24 law that a defendant in a criminal trial, doesn't matter how
25 serious the charge may be, that that person will always be

1 presumed to be innocent of the crimes for which the
2 indictments were issued, unless guilt has been proven by
3 evidence satisfying you of that guilt beyond a reasonable
4 doubt.

5 This presumption of innocence does not end when you
6 begin your deliberations, but it accompanies the defendant
7 throughout this trial and into your deliberations until you
8 should reach a verdict, should you reach a verdict, of guilt
9 based on evidence satisfying you of that guilt beyond a
10 reasonable doubt.

11 The presumption of innocence is not a mere legal
12 theory. It's not just a legal phrase. It is a substantial
13 right to which every citizen, every defendant, is entitled,
14 unless you, the jury, are satisfied from the evidence of the
15 defendant, of Mr. Lennin, guilt beyond a reasonable doubt.

16 What, then, is a reasonable doubt? There's a short
17 definition, and then, of course, there's a longer one. The
18 short one is this, a reasonable doubt is the kind of doubt
19 that would cause a reasonable person to hesitate to act and
20 the State has the burden of proving the defendant guilty
21 beyond a reasonable doubt.

22 Now, I don't know the answer to this, but some of you
23 may have served as jurors in civil cases where you were told
24 that it was only necessary, that a fact is more likely than
25 not, and you may have been told that the burden of proof in

1 a civil case is called the greater weight or the
2 preponderance of the evidence, meaning you have to tip the
3 scale ever so slightly in the favor of one side or the
4 other.

5 Ladies and gentlemen, that is not the burden of proof
6 applicable in a criminal case. In criminal cases, the
7 State's proof must be more powerful than that. It must be
8 beyond a reasonable doubt. Proof beyond a reasonable doubt
9 is proof that would leave you thoroughly convinced of the
10 defendant's guilt. You know there are very few things in
11 this world that we know of absolute certainty and in
12 criminal cases, the law does not require proof that
13 overcomes every possible doubt. If, based on your
14 consideration of the evidence, you are firmly convinced that
15 the defendant is guilty of the crimes charged, you must find
16 him guilty.

17 If, on the other hand, you think there is a real
18 possibility that the defendant is not guilty, you must give
19 the defendant the benefit of the doubt and find him not
20 guilty.

21 Ladies and gentlemen, I remind you that during the
22 course of this trial, you and I have had certain duties to
23 perform. As the trial judge, it is my responsibility to
24 preside over the trial of this case and I also have the duty
25 to rule on the admissibility offered during this trial. You

1 had an opportunity to observe that.

2 You are to consider only the competent evidence before
3 you. Now, if there was any testimony ordered to be stricken
4 from the record, and there was, you must, you must disregard
5 that testimony. You are to consider only testimony that's
6 been presented from the witness stand and in the exhibit's
7 which have been made part of the record in this case that
8 you will have with you in your jury room and the
9 stipulations of counsel.

10 I have the additional duty to charge or instruct you
11 regarding the law applicable to this case. As the presiding
12 judge, I am the sole judge of the law of this case and it is
13 your duty as jurors to accept and apply the laws that I have
14 now stated to you.

15 If you already have any ideas to what the law is or
16 what it ought to be, and it doesn't agree with what I now
17 tell you the law is, you must, by your oath, abandon your
18 preconceived idea, because you are sworn to accept and apply
19 the law exactly as I state it to you.

20 In every case tried in this Court before a jury, the
21 jury becomes the sole and exclusive judge of the facts in
22 this case. As you know, the trial judge cannot intimate,
23 state, or comment on to a trial jury about facts in this
24 case. Since you are the sole judges of the facts in this
25 case, you must not infer from what I may have said or done

1 during the progress of this trial and ruling on
2 admissibility of evidence or otherwise, or anything that I
3 say to you now during the course of this instruction being
4 given to you that I have any opinion about facts of this
5 case. The law doesn't allow me to have an opinion regarding
6 facts in this case. I have no opinion regarding the facts.
7 That is a matter solely for you to determine.

8 As jurors, it is your duty to determine the effect, the
9 value, the weight, and the truth of the evidence which has
10 been presented during this trial.

11 Now, ladies and gentlemen, I want to talk about the two
12 broad categories of types of evidence. You know it by your
13 common sense, but I want to focus on it now. There are two
14 types of evidence which are generally presented during a
15 trial. One is called direct evidence and the other is
16 called circumstantial evidence.

17 Now, direct evidence is the testimony of a person who
18 claims to have actual knowledge of a fact, such as an eye
19 witness. It is evidence which immediately establishes the
20 main fact to be proved. Circumstantial evidence is proof of
21 a chain of facts and circumstances indicating the existence
22 of a fact. It is evidence which immediately established
23 collateral facts from which the main fact may or may not be
24 inferred.

25 Circumstantial evidence is based on inference and not

1 on personal knowledge or observation. What in the world
2 does all that mean? This is where I get to give an example.
3 I use often. Ladies and gentlemen, I want you to go with me
4 to February, late February. It's cold. And snow is
5 forecast. Everybody gets out of school early. Everybody
6 leaves work early, because snow is forecast. You're there
7 in your home and you're wondering what is the weather
8 outside.

9 You walk outside and look up and lo and behold, you get
10 hit in the face by little white flakes, frozen, that you
11 know is snow. You are an eyewitness to the fact that it is
12 snowing. It is snowing. That is an eyewitness account of
13 snow. That is called direct evidence. You immediately
14 establish the fact that is proved.

15 Let's talk about circumstantial evidence. Again, same
16 time in February. Remember in my earlier example, you were
17 curious and went outside to look? Well, you're not so
18 curious now; you're tired. So when you go to bed, you know
19 it's late February and you know that snow is forecast, and
20 you're tired. You look outside on the way going to bed, and
21 all you see is your beautiful looking brown bunch of grass.

22 You go to bed. And as you wake up in the morning, as
23 you go to your kitchen to get your cup of coffee, oh, my
24 goodness, you look out over your lawn; it is covered. It is
25 snow. All right. You did not see it snow, but here is what

1 you do know. It's late February. Snow was forecast. It
2 was cold. There was brown crunchy grass when you went to
3 bed, and now snow covers nearly everything as far as the eye
4 can see.

5 You know all of the collateral facts, so that you can
6 say, so that you can testify, it snowed last night. You
7 didn't see it snow, but you know it snowed last night,
8 because you know all of the collateral facts: February,
9 cold, forecast, brown crunchy grass when you went to bed,
10 you wake up and snow has covered everything. It's not
11 snowing now, but you know that it snowed overnight. That is
12 circumstantial evidence. It's proof of a chain of
13 collateral facts that points to the existence of a fact; it
14 snowed last night.

15 The law makes absolutely no distinction, no
16 distinction, between the weight or the value to be given to
17 either direct or circumstantial evidence, nor is a greater
18 degree of certainty required of circumstantial evidence than
19 of direct evidence. You should weigh all of the evidence in
20 the case, and after weighing all the evidence, if you are
21 not convinced of the guilt of the defendant beyond a
22 reasonable doubt, you must find the defendant not guilty.

23 On the other hand, after hearing all the evidence in
24 this case, if you are convinced of the guilt of the
25 defendant beyond a reasonable doubt, you must find him

1 guilty.

2 Now, we are going to talk about credibility of
3 witnesses. Ladies and gentlemen, it is necessary as you
4 determine the facts in this case, you are necessarily going
5 to have to determine what's called the credibility of the
6 witnesses who have testified in this case. Credibility
7 simply means, believability; who do you believe, what do you
8 believe.

9 Now, it becomes your duty as jurors to analyze and to
10 evaluate the evidence and to determine which evidence
11 convinces you of it's truth.

12 In determining the believability of witnesses who have
13 testified in this case, you may believe one witness over
14 several witnesses or several witnesses over one witness.
15 You can believe a part of a testimony of a witness and you
16 can reject the remaining part of the testimony of that same
17 witness.

18 You may believe the testimony of a witness in its
19 entirety or you may reject the testimony of a witness in its
20 entirety. You may consider whether any witness has
21 exhibited to you any interest or biased or prejudice or
22 other motive in this case. You may also consider the
23 appearance and the manner of a witness while on the witness
24 stand.

25 Now, ladies and gentlemen, expert witnesses. The rules

1 of evidence ordinarily do not permit witnesses to testify
2 regarding their opinions or conclusions. An exception to
3 this rule exists for witnesses we call expert witnesses. A
4 witness who by education and experience has become an expert
5 in some art, science, or profession and they may give an
6 opinion as to the subject that the witness claims to be an
7 expert in and they may also give the reasons for their
8 opinion.

9 You should consider any expert opinion given by a
10 witness, and like any other evidence, you give it the weight
11 that you think it deserves. If you decide that an expert
12 witnesses opinion is not based on sufficient education or
13 experience or if you decide that reasons given in support of
14 the opinion are not sound or that the opinion is outweighed
15 by other evidence, you may disregard the opinion in its
16 entirety.

17 A witnesses testimony is to be given no greater weight
18 than that of other witnesses simply because the witness is
19 an expert and you do not have to accept an expert's opinion
20 even though it is uncontroverted, meaning that nobody
21 contradicts it, but you still don't have to accept it.

22 Now, ladies and gentlemen, there has been evidence
23 presented that witnesses have made prior statements that are
24 not consistent with the witnesses present testimony. You
25 may use this evidence to decide whether to believe the

1 witness if you choose. You may also use the evidence of the
2 earlier contradictory statements to determine the truth of
3 those statements. It is up to you to decide whether to
4 believe the earlier statement or statements, or the
5 testimony given at trial. That is again, within your
6 purview.

7 If a witness is shown to have knowingly testified
8 untruthfully concerning any material matter, you may
9 consider this in determining whether to trust the witnesses
10 testimony as to other matters. You may reject all testimony
11 of that witness or give all or a part of the testimony the
12 weight that you think it deserves.

13 Now, ladies and gentlemen, we're going to talk about
14 intent. In order to establish criminal liability, criminal
15 intent is required. Criminal intent must be proven by the
16 State beyond a reasonable doubt. Criminal intent is always
17 a matter that must be determined by the jury from the
18 circumstances surrounding the situation.

19 There is no way to prove intent to a mathematical
20 certainty can't dissect the person's brain to determine what
21 somebody had in their mind at the time so the law says that
22 criminal intent may be inferred from the circumstances shown
23 to have existed and this is how you make a determination of
24 whether or not the element requiring intent was present.

25 It is not necessary to establish intent by direct and

1 positive evidence, but intent may be established by
2 inference in the same way as other facts by taking into
3 consideration the acts of the parties and all the facts and
4 circumstances of the case based on evidence introduced
5 during the trial of this case.

6 Criminal intent is a mental state; it's a conscious
7 wrongdoing. It is up to you to determine what the defendant
8 intended to do based on the circumstances shown to have
9 existed. Criminal intent can arise from an action or
10 failure to act. It may arise from indifference to duty or
11 to consequences our law considers to be the equivalent of
12 criminal intent. And I will now define the offenses for
13 you. Before I go into the definitions of those offense, I
14 do want to go over the indictments, because again, these are
15 the charging documents.

16 Ladies and gentlemen, Indictment 2011-GS-07-00946
17 states in part that in Beaufort County, on or about April
18 21st, 2011, the defendant, Jabari Lennin with intent to kill
19 and malice aforethought, did attempt to kill the victim,
20 Kenneth Trey Nichols, in that the defendant did shoot the
21 victim multiple times with a firearm in violation.

22 Now, Indictment 2011-GS-07-00947 states in part, that
23 in Beaufort County, on or about April 21st, 2011, the
24 defendant, Jabari Lennin, did possess a firearm, or
25 physically displayed what appeared to be a firearm during

1 the commission, or attempted commission, of a violent crime.
2 Ladies and gentlemen, those are the allegations that the
3 State must prove beyond a reasonable doubt and again, to
4 each of these indictments, Mr. Lennin has plead not guilty.

5 Now, I'm going to define the offenses for you. First,
6 I'm going to define for you attempted murder, the lesser
7 included offense of assault and battery of a high and
8 aggravated nature, and I'm going to talk to you about self
9 defense, which has been raised. It must again be proven by
10 the State beyond a reasonable doubt that self defense did
11 not exist.

12 And then, finally, I'm going to define for you the
13 events of possession of a weapon during the commission of a
14 violent crime, so that gives the overview.

15 An attempted murder. A person who with intent to kill
16 attempts to kill another person with malice aforethought,
17 either expressed or implied, commits the offense on
18 attempted murder.

19 An attempt is an effort to accomplish a crime which
20 does not succeed. An attempt includes a specific intent to
21 do a particular criminal act along with an act falling short
22 of the act intended. The State must show more than mere
23 preparation and intent, there must be some overt act
24 committed in the effort to commit the crime.

25 Intent means intending the result which actually

1 occurs, not accidentally or involuntarily. Intent may be
2 shown by acts and conduct of the defendant and other
3 circumstances for which you may naturally and reasonable
4 infer intent. The intent, ladies and gentlemen, in
5 attempted murder, is the intent to kill.

6 What do we mean when we say malice aforethought?
7 Malice is hatred, ill will, or hostility towards another
8 person. Malice is the intentional doing of a wrongful act
9 without just cause or excuse and with an intent to inflict
10 an injury under circumstances that the law will infer an
11 evil intent.

12 Malice aforethought does not require that malice exist
13 for any particular time before the act is committed, but
14 malice must exist in the mind of the defendant just before
15 and at the time the act is committed, therefore, there must
16 be a combination of the previous evil intent in the act.
17 Malice aforethought may be expressed or inferred, these
18 terms of expressed or inferred do not mean different kinds
19 of malice, but they really mean the manner in which malice
20 is shown to exist; that is either by direct evidence or
21 inference from the facts and circumstances which are proved
22 beyond a reasonable doubt.

23 Express malice is shown when a person speaks words
24 which express hatred or ill will for another or when the
25 person prepared beforehand to do the act which was later

1 accomplished. Now, malice may be inferred from conduct
2 showing a total disregard for human life. I'm finished
3 defining attempted murder.

4 Ladies and gentlemen, there is something called a
5 lesser included offense in that of attempted murder and that
6 is called assault and battery of a high and aggravated
7 nature. In assault and battery of a high and aggravated
8 nature, it is a lesser included offense of attempted murder.
9 If you find that the State has not proven that the defendant
10 is guilty of attempted murder, then you must determine
11 whether the State has proved that the defendant is guilty of
12 assault and battery of a high and aggravated nature. I'm
13 going to define that for you.

14 A person commits the offense of assault and battery of
15 a high and aggravated nature if the person unlawfully
16 injures another person and great bodily injury to another
17 person results or the act is accomplished by means likely to
18 produce death or great bodily injury. Great bodily injury
19 means bodily injury which causes a substantial risk of death
20 or which causes serious permanent disfigurement or retracted
21 loss or impairment of a function of a bodily member or
22 organ.

23 Now, what is assault? Assault occurs when a person
24 unlawfully attempts or offers to commit a violent injury
25 upon another person and has the present ability to complete

1 the attempted injury. An assault is the intentional
2 creation of a reasonable fear of immediate bodily harm.

3 A battery is the unlawful touching of another person by
4 a person who has committed the assault. An unlawful
5 touching can be caused by a part of the accused body or by
6 any object the accused puts in motion. A battery is the
7 completion of the assault by using or applying force to
8 another person by a rude, angry, or resentful manner without
9 legal justification for doing so.

10 Now, ladies and gentlemen, I want to now talk to you
11 about self defense. That has been raised in this case, the
12 State must prove beyond a reasonable doubt that self defense
13 did not occur. Now, there are several elements but I want
14 you to keep in mind is that self defense negates an element
15 both of attempted murder and assault and battery of a high
16 and aggravated nature, both have to be an unlawful act.
17 Self defense is a complete defense to both attempted murder
18 as well as assault and battery of a high and aggravated
19 nature. And again, there is no burden shifting here, ladies
20 and gentlemen, the burden is and it remains on the State to
21 prove beyond a reasonable doubt that self defense did not
22 occur.

23 Ladies and gentlemen, if self defense occurred then you
24 must find the defendant not guilty. It is a complete defense
25 as I just explained to you. And the State has the burden of

1 disproving self defense by proof beyond a reasonable doubt.
2 If you have a reasonable doubt of the defendant's guilt
3 after considering all the evidence, including the evidence
4 of self defense, then you must find the defendant not
5 guilty.

6 If on the other hand, you have no reasonable doubt of
7 the defendant's guilt after considering all the evidence
8 including the evidence of self defense, then you must find
9 the defendant guilty. The following elements define self
10 defense.

11 First, the defendant must be without fault in bringing
12 on the difficulty. If the defendant's conduct was the type
13 which was reasonably calculated and then for both an assault
14 the defendant would be at fault in bringing on the
15 difficulty and we'd not be entitled to a determination of
16 not guilty based on self defense.

17 In other words, the defendant's conduct must be without
18 fault in bringing on the difficulty. Self defense is not
19 available to a person who uses language which is so
20 contemptuous that a reasonable person would expect it to
21 bring on a physical encounter in which actually contributed
22 to the physical encounter. I tell you that words and words
23 alone do not give rise to self defense. Words accompanied
24 by hostile acts may, depending on the circumstances,
25 establish self defense. Now, I want to talk to you about

1 imminent danger.

2 The second element of self defense is that the
3 defendant was actually in imminent danger of death or
4 serious bodily injury or that the defendant actually
5 believed he was in imminent danger of death or serious
6 bodily injury. If the defendant was actually in imminent
7 danger, it must be shown that the circumstances would have
8 warranted a person of ordinary firmness and courage to
9 strike the blow to prevent death or serious bodily injury.

10 If the defendant believed he was in imminent danger of
11 death or serious bodily injury, it must be shown that a
12 reasonable prudent person of ordinary firmness and courage
13 would have had the same belief. If this belief is
14 reasonable, then the defendant need not wait until an actual
15 attack or wait until he or she is injured, or wait until
16 force is used by the aggressor before themselves using the
17 force in self defense.

18 Now, in deciding whether the defendant actually was or
19 believed that he was in imminent danger of death or serious
20 bodily injury, you should consider all the facts and
21 circumstances surrounding the crime, events, including the
22 physical condition and the characteristics of the defendant
23 and the alleged victim.

24 A defendant, this defendant, does not have to show that
25 he was actually in danger. It is enough if the defendant

1 believed he was in imminent danger and a reasonable prudent
2 person of ordinary purpose and courage would have had the
3 same belief, the defendant has the right to act on
4 appearances even though the defendant's belief's may have
5 been mistaken. It is for you to decide whether the
6 defendant's fear of immediate danger of death or serious
7 bodily injury was reasonable and would have been felt by an
8 ordinary person in the same situation.

9 Now, evidence of prior difficulties between the
10 defendant and the alleged victim may be considered in
11 deciding whether a threat existed, whether the defendant had
12 a reason to believe the threat existed and how serious that
13 threat was.

14 Also, the relative sizes and ages and weights of the
15 defendant and alleged victim may be considered in deciding
16 the apparent or actual need for force in self defense and
17 the amount of force needed.

18 The reputation of the alleged victim as a violent
19 person may be considered in deciding whether there was a
20 need for force, whether the defendant had reason to believe
21 there was a need for force and whether deadly force was
22 necessary.

23 Prior instances of violence by the alleged victim may
24 be considered in deciding whether the defendant actually
25 believed he was in imminent danger of death or serious

1 bodily injury or was actually in imminent danger. Threats
2 made by the alleged victim may be considered and determined
3 whether the defendant actually was or believed he was in
4 imminent danger.

5 And the final element of self defense is that the
6 defendant has no other possible way to avoid the danger of
7 death or serious bodily injury than to act as the defendant
8 did in this particular instance. By this, I mean the
9 defendant need not retreat in order to avoid the need for
10 deadly force if it is not possible or did not reasonably
11 appear possible to retreat without danger of being killed or
12 suffering serious bodily injury.

13 Now, a person cannot be required to make an exact
14 calculation as to the degree or amount of force which may be
15 needed to avoid death or serious bodily injury. Therefore,
16 in self defense, the defendant has the right to use the
17 force needed to avoid death or serious bodily injury. The
18 force used in self defense does not have to be limited to
19 the degree or the amount of force used by a victim.

20 The defendant has the right to use so much force as
21 appeared to be necessary for complete self protection, and
22 which a person of ordinary reason and prudence would have
23 believed to be needed to prevent death or serious bodily
24 injury.

25 If the defendant is justified in defending himself and

1 in firing the first shot, then the defendant is also
2 justified in continuing to shoot until it is apparent that
3 the danger of death or serious bodily injury has completely
4 ended.

5 Now, ladies and gentlemen, we've talked about attempted
6 murder, assault and battery of a high and aggravated nature,
7 self defense. The second indictment is possession of a
8 weapon during the commission of a violent crime.

9 The State must prove beyond a reasonable doubt that the
10 defendant was in possession of a firearm or visibly
11 displayed what appeared to be a firearm during the
12 commission of a violent crime. A firearm means that a
13 machine gun, automatic rifle, or any weapon which is
14 designed to or made to be readily converted to expel a
15 projectile.

16 In order to find the defendant guilty of possession of
17 a weapon during the commission of a violent crime, you must
18 first find the defendant guilty of either committing a
19 violent crime or attempting to commit a violent crime. I
20 charge you that the offense of attempted murder and assault
21 and battery of a high and aggravated nature are classified
22 under our law as violent crimes.

23 Now, ladies and gentlemen, we are going to go over the
24 verdict form. A couple of things I want you to keep in
25 mind. First of all, your verdict must be unanimous. It

1 must be the verdict of each and every one of you. Ladies
2 and gentlemen, here, it says in the first box, it says, we
3 the jury, unanimously find the following, number one, as to
4 Indictment 2011-GS-07-00946, the charge of attempted murder,
5 we, the jury, unanimously find the defendant, Jabari Lennin,
6 not guilty or guilty.

7 Now, ladies and gentlemen, irrespective of what your
8 verdict is, I want you to be sure that it's very clear that
9 you want to just check it, that's fine. If you want to
10 circle it and check it, that's fine. I just want it to be
11 clear which is the unanimous verdict of this jury with
12 regards to the charge listed in number one.

13 Now, if you find that the defendant is guilty of
14 attempted murder, then you proceed to question three. If
15 you find that the defendant is not guilty of attempted
16 murder, then you go on and you consider the offense of
17 assault and battery of a high and aggravated nature. Then,
18 you will indicate your verdict guilty with regards to
19 assault and battery of a high and aggravated nature.

20 Now, ladies and gentlemen, if you find the defendant
21 guilty of assault and battery of a high and aggravated
22 nature, then you go on to number three which is the second
23 offense, but if you find that the defendant is not guilty of
24 attempted murder, you find him not guilty of assault and
25 battery of a high and aggravated nature, then he cannot be

1 guilty of the possession of a deadly weapon during the
2 commission of a violent crime; so you would not then go to
3 number three. At that point, you would just proceed on and
4 sign your name.

5 Now, ladies and gentlemen, if you remember, self
6 defense is a complete defense opposed to the charge of
7 attempted murder and assault and battery of a high and
8 aggravated nature; so that is the verdict form.

9 Ladies and gentlemen, in just a moment, I am going to
10 be sending you to your jury room with this instruction. Do
11 not discuss this matter or allow anyone to discuss it with
12 you. I'm going to be turning to these lawyers who will help
13 me know whether or not I have done two things. Have I given
14 you all of the law that you may need during your
15 deliberations? And have I stated it for you correctly?

16 Sometimes something just comes out wrong, and sometimes
17 I need to invite jury's to come back in to allow me to
18 correct my error in your minds, and I ask you in advance, if
19 I need to bring you back out for that reason, please allow
20 me to correct my error in your minds. Sometimes I need to
21 bring jury's back out because I have failed to give all of
22 the instructions that they may need for their deliberations.

23 In the event that I need to bring you back out for that
24 reason, I ask you please do not consider that instruction
25 with any emphasis, just know this is my chance to get this

1 right.

2 In the event that I do not need to bring you back out,
3 you will be brought the exhibit's and the verdict form and
4 the bailiff will tell you, ladies and gentlemen, it is not
5 time to begin your deliberations. Now, ladies and
6 gentlemen, as you deliberate you must keep in mind that all
7 12 of you must be present to deliberate. So if you all need
8 to take a comfort break and stop your deliberations, take
9 your comfort break, and reconvene your deliberations when
10 all 12 of you are together.

11 Now, ladies and gentlemen, I'm going to leave you with
12 this concluding thought. You know the word verdict comes
13 from a Latin phrase, *veredicto*, which means to speak the
14 truth; to speak the truth. Ladies and gentlemen, that is
15 now your task. Please step to your jury rooms. Do not
16 discuss this matter or allow anyone to discuss it with you.
17 Thank you.

18 (11:30 A.M., WHEREUPON, THE JURY EXITS THE COURTROOM,
19 AND THE FOLLOWING IS HELD ON THE RECORD.)

20 THE COURT: All right. Any additions or exceptions
21 from the State?

22 DEP. SOL. THORNTON: None, Your Honor.

23 THE COURT: From the defense?

24 MR. BROWN: Yes, ma'am. I don't have any corrections,
25 but I would request, and it was submitted yesterday, first

1 as Court's Exhibit Two, it was a set of requested charges,
2 and specifically, what I would ask is that the Court charge
3 on the right to stand your ground. And Your Honor, it's
4 encapsulated as three sentences that have been put in my
5 requested -- it's Court's Two, but it says defendant's
6 request for instruction number four, and I would ask that
7 the Court charge any or all of those three parts.

8 So in other words, if some of one or two were
9 appropriate, not three, then I would ask a jury charge on
10 that or the equivalent that Your Honor sees fit. And I
11 would also ask that the Court would charge what has been
12 submitted in that same packet as Defendant's Request 15
13 regarding entitlement to arm one's self if one is acting in
14 self defense; that you're entitled to arm one's self.

15 And then the last one would be Number 17, which would
16 was the nexus between drugs and guns, it creates a danger.
17 Your Honor, that's the only thing. No corrections, but I
18 would ask that those be added and would note that we
19 discussed this yesterday; it's not something new.

20 THE COURT: Thank you so much, and it is appropriate to
21 put those on the record right now; so thank you so much for
22 doing that. And thank you Mr. Brown for having filed this
23 as a Court's Exhibit, that way it's very clear for our
24 record of what those are. We addressed those yesterday and
25 let me just say that I do not believe that the Castle

1 doctrine, with regards to the vehicle, applies to these
2 facts. Given the dictates of the Castle doctrine, given the
3 facts of this matter that there was the Coke can that was
4 thrown, and then this gentleman chose to get out of his car
5 while on the public way, get out of the car, walk around the
6 car, and walk towards the alleged victim and begin shooting.
7 I don't believe that that is what is contemplated by the
8 Castle doctrine. We will know one day, because it is a
9 developing theory, so we will know.

10 I don't think it's applicable to the facts before us
11 with regards to the arming of one's self. I think that when
12 you look at the charge as a whole, that it is clear that a
13 person is entitled to use the force that is appropriate
14 under the circumstances up to and including a deadly force.

15 My concern about the charge, about your title to arm
16 yourself -- I think that really gets, in these facts, so
17 very close to a charge on the facts, but I do think it's
18 been communicated to the jury that if necessary, and you
19 need to, you can defend yourself under the circumstances, up
20 to and including deadly force, and in fact, there were a
21 couple of places where I had to say deadly force instead of
22 the fatal force, because in this circumstance it wasn't
23 fatal force, but it was deadly force. So really do think
24 that's encapsulated. And then the final one was?

25 MR. BROWN: Was the nexus between guns and drugs.

1 THE COURT: Nexus between guns and drugs, yes. I
2 actually think that one just marvelously underscores your
3 wonderful creativity that I, as a member of the bench,
4 admire and respect. I loved the crack tree, and you
5 absolutely were -- you doggedly were after that as evidence,
6 and I think that it was established that this tree is known
7 as the crack tree; without question. But I don't believe
8 that there was sufficient evidence presented in this trial
9 for me to charge that nexus, because I don't think anybody
10 is talking about this is some sort of drug shootout or
11 attempted robbery involving drugs. I think that the nexus
12 that was proven and I think there is evidence in this record
13 that this tree is known as the crack tree, but I don't think
14 that the evidence before me makes it appropriate for me to
15 charge that.

16 In fact, it would concern me in all candor. I have an
17 additional concern that that would cause this jury to infer
18 that your client somehow was involved in a drug transaction
19 and that's why he brought this gun to this drug tree and
20 somehow what's really going on is it's a drug deal gone
21 wrong; so in rejecting that, I really do it for two reasons.
22 One of them is because it would scare me to death that
23 somehow this jury would start speculating that that is what
24 is going on with your client and I ultimately would not want
25 that to happen.

1 MR. BROWN: Thank you, Your Honor. And the only other
2 last thing for record keeping is I did bring in today a
3 charge number 18 that been labeled as Court's Exhibit Number
4 Three is the way it's marked, and it was part of the four
5 elements of self defense, what I submitted for the elements
6 of self defense was only three, with the hope that I would
7 get the stand your ground/no duty to retreat, and I brought
8 that today as a supplement to mine. I do believe, Your
9 Honor, besides the three I've brought here have
10 substantially charged the jury to the other ---

11 THE COURT: I did. And I left out that term because
12 that's like a term from the wild west.

13 MR. BROWN: Yes, ma'am.

14 THE COURT: And I don't know that is really has
15 application but I think I did charge, certainly intended to
16 without the phrase, but I don't think it's current today.

17 MR. BROWN: Well, and I don't have any other objection
18 to anything else you charged. I do think you covered
19 everything else as to substance.

20 THE COURT: Thank you so much. Now, here's what I'm
21 going to ask you guys to do for me and I don't mind telling
22 you why. I want you guys to look at the verdict form one
23 more time, and please look at each and every piece of
24 evidence that is going to the jury, because I am the judge
25 that let the pair of pants go back to the jury that had the

1 confession in the back pocket that nobody knew about until
2 the trial was over. So help me by please looking at the
3 exhibits, which are going to be going to the jury, and then
4 we will be in recess when we hear from my jury.

5 DEP. SOL. THORNTON: Your Honor, the State is satisfied
6 that all the exhibit's have been accounted for and are boxed
7 up and ready to go to the jury, and the verdict form is also
8 correct.

9 MR. BROWN: And the defense agrees that everything's
10 proper to be submitted.

11 THE COURT: Wonderful. Okay.

12 (11:40 A.M., EXHIBITS AND VERDICT FORM ARE TAKEN TO THE
13 JURY.)

14 THE COURT: We will be in recess until we hear from the
15 jury.

16 DEP. SOL. THORNTON: Thank you, Your Honor.

17 MR. BROWN: Thank you, Your Honor.

18 (WHEREUPON, THE COURT IS IN RECESS IN THE TRIAL OF THIS
19 CASE. THEREAFTER, THE BAILIFF INFORMS THE COURT THAT THE
20 JURY HAS A QUESTION.)

21 THE COURT: All right. We have a note from the jurors
22 and it says, "Please give us the definition of attempted
23 murder versus aggra -- a-g, aggravated assault, high and
24 aggravated; thank you." We are going to mark this as a
25 Court's Exhibit in just a little bit. I'm going to charge

1 those two matters fully. I'm not going to define the
2 difference. I'm going to go back through and charge
3 attempted murder and assault and battery of a high and
4 aggravated nature, and they have not asked for the defense
5 of self defense, but because -- and obviously, I don't know
6 where they are in their deliberations. I am going to tell
7 them though, if they need to be recharged on the self
8 defense portion, to let me know and I would be happy to do
9 that as well. That's how I'm going to handle it. I know
10 that's not what you want me to do. What you want me to do
11 on behalf of the State is simply to say one has malice and
12 one doesn't.

13 DEP. SOL. THORNTON: And Your Honor, I just wanted to
14 note for the record. Or charge both of them, but to not
15 mention self defense and then nothing else, other than the
16 two that they asked for, because they didn't ask for that.
17 I think it over emphasizes it to the jury. That would be
18 the State's position. Thank you, Judge.

19 THE COURT: I understand. And you want me to charge
20 all of them with self defense?

21 MR. BROWN: Yes, ma'am. And if I may, just for
22 purposes of ---

23 THE COURT: Sure.

24 MR. BROWN: --- support, legally speaking, is it's not
25 an affirmative defense. So in other words, once it's

1 raised, then disproving self defense is actually an element
2 of any -- whether it was one charge, whether it was an
3 option for just attempted murder or just abhan, or both,
4 that they now have to prove beyond a reasonable doubt and
5 disprove the other ones. To me that's part and parcel of
6 one.

7 THE COURT: And that's exactly the reason that I'm
8 going to define just those two elements and tell them if
9 they need me to recharge on self defense to let me know and
10 I'll do that.

11 MR. BROWN: Yes, ma'am.

12 THE COURT: But I think it's important to clarify what
13 they've asked me to clarify.

14 MR. BROWN: Yes, ma'am.

15 THE COURT: And I wanted the record to reflect that I
16 know I came out before you got back and Mr. Lennin
17 understandably was -- not overly concerned, surely not
18 overly concerned. But I told him that you had stepped out
19 to get lunch, and his question to me was why didn't you
20 mention to him that this had happened, and I told him
21 because you didn't have a clue. I told him this happened to
22 you between bite one and bite two, and he smiled just as he
23 is smiling now.

24 MR. BROWN: And I hadn't even had a bite. Thank you,
25 Your Honor. .

1 THE COURT: I wanted you to know that I did have that
2 interchange with your client and the reason that I did that
3 was I wanted him to understand.

4 MR. BROWN: Thank you, Your Honor.

5 THE COURT: Bring the jury, please.

6 (COURT EXHIBIT NUMBER FOUR, JURY QUESTION, IS MARKED
7 AND RECEIVED INTO EVIDENCE.)

8 (2:00 P.M., WHEREUPON, THE JURY ENTERS THE COURTROOM,
9 AND THE FOLLOWING IS HELD ON THE RECORD.)

10 THE COURT: All right. Ladies and gentlemen, I have
11 your question, and this is what I intend to do. I intend to
12 recharge you on the offense of attempted murder and then the
13 lesser included offense of assault and battery of a high and
14 aggravated nature. I do not intend, at this point, to
15 charge you regarding self defense. As you know, we talked
16 about it negates the element of both attempted murder, as
17 well as assault and battery of a high and aggravated nature
18 of being an unlawful killing. If you need that charge, I'm
19 not going anywhere, and y'all let me know, and I will do
20 that also. My intention is to try and do what you have
21 asked and that is to go over the charge on attempted murder
22 and then assault and battery of a high and aggravated
23 nature.

24 Now, attempted murder. A person, who with intent to
25 kill, attempts to kill another person with malice

1 aforethought, either expressed or implied, commits the
2 offense of attempted murder. An attempt is an effort to
3 accomplish a crime which does not succeed. An attempt
4 includes a specific intent to do a particular criminal act,
5 along with an act falling short of the act intended. The
6 State must show more than mere preparation in intent; there
7 must be some overt act committed in the effort to commit the
8 crime.

9 Intent means intending the result which actually
10 occurs, meaning not accidentally and not involuntarily. In
11 other words, intending to do the act. Intent may be shown
12 by acts and conduct of the defendant and other circumstances
13 from which you may naturally and reasonable infer intent.

14 Malice is hatred, ill-will, or hostility towards
15 another person. It is the intentional doing of a wrongful
16 act without just cause or excuse and with an intent to
17 inflict an injury or under circumstances that the law will
18 infer an evil intent.

19 Malice aforethought does not require that malice exist
20 for any particular time before the act is committed, but
21 malice must exist in the mind of the defendant just before
22 and at the time of the act.

23 Therefore, there must be a combination of the previous
24 evil intent and the act. Malice aforethought may be
25 expressed or inferred. These terms express and infer do not

1 mean different kinds of malice, but merely the manner in
2 which malice may be shown to exist. That is either by
3 direct evidence or by inference from the fact and
4 circumstances which are proved beyond a reasonable doubt.
5 Expressed malice is shown when a person speaks words which
6 express hatred or ill-will for another or when the person
7 prepared beforehand to do the act which was later
8 accomplished. For example, acts of preparation going to
9 show that the deed was within the defendant's mind would be
10 express malice. Malice may be inferred from conduct showing
11 a total disregard for human life. I'm finished now with
12 attempted murder.

13 Now, assault and battery of a high and aggravated
14 nature. If you find that the State has not proven that the
15 defendant is guilty of attempted murder, you then must
16 determine whether the State has proven that the defendant is
17 guilty of assault and battery of a high and aggravated
18 nature. Because again, assault and battery of a high and
19 aggravated nature is a lesser included offense. I am going
20 to read to you the statute that governs assault and battery
21 of a high and aggravated nature -- assault and battery of a
22 high and aggravated nature.

23 A person commits the offense of assault and battery of
24 a high and aggravated nature if the person unlawfully
25 injures another person and great bodily injury to another

1 person results, or the act is accomplished by means likely
2 to produce death or great bodily injury. Great bodily
3 injury means bodily injury which causes a substantial risk
4 of death or which causes serious permanent disfigurement or
5 impairment of the function of a bodily member or organ.

6 Now, what is an assault? An assault occurs when a
7 person unlawfully attempts or offers to commit a violent
8 injury upon another person and had the present ability to
9 complete the attempted injury. An assault is the
10 intentional creation of a reasonable fear of immediate
11 bodily harm.

12 A battery is the unlawful touching of another person by
13 the person who has committed the assault. An unlawful
14 touching can be caused by a part of the accused's body or by
15 any object the accused puts in motion. A battery is the
16 completion of the assault by using or applying force to
17 another person, however slight, in a rude, angry, or
18 resentful manner without legal justification doing so.

19 Now, please return to your jury room, retire to your
20 jury room, and continue your deliberations.

21 (2:08 P.M., WHEREUPON, THE JURY EXITS THE COURTROOM,
22 AND THE FOLLOWING IS HELD ON THE RECORD.)

23 THE COURT: All right. Other than what was stated
24 earlier with regards to your request, is there any
25 objections or additional objections or exceptions?

1 DEP. SOL. THORNTON: Nothing additional, Your Honor.

2 THE COURT: All right.

3 MR. BROWN: I'm not going to make an objection. You
4 did say killing at one point, but I think it's obvious that
5 nobody died. For what it's worth.

6 THE COURT: Thank you. All right. We will continue in
7 recess until we hear from our jury.

8 (THE COURT IS IN RECESS IN THE TRIAL OF THIS CASE WHILE
9 AWAITING THE VERDICT IN THIS CASE. THEREAFTER, THE BAILIFF
10 INFORMS THE COURT THAT THE JURY HAS REACHED A VERDICT.)

11 THE COURT: The jury has reached its verdict. Anything
12 before we bring the jury out from the State?

13 DEP. SOL. THORNTON: Nothing from the State, Your
14 Honor.

15 THE COURT: From the defense?

16 MR. BROWN: Nothing that hasn't already been discussed,
17 Your Honor. Thank you.

18 THE COURT: Very well. All right. Let's have our
19 jury, please.

20 (2:35 P.M., WHEREUPON, THE JURY ENTERS THE COURTROOM,
21 AND THE FOLLOWING IS HELD ON THE RECORD.)

22 THE COURT: It is my understanding that the jury has
23 reached its verdict; yes or no?

24 JURY: Yes, ma'am.

25 THE COURT: And if you'll pass it to me, please. Very

1 well. I'll find that the verdict is in due form.

2 MADAME CLERK: The State of South Carolina v. Jabari
3 Lennin, 2011-GS-07-946, 2011-GS-07-947. We, the jury,
4 unanimously find the defendant not guilty of attempted
5 murder. As to Indictment 2011-GS-07-947, the charge of
6 assault and battery of a high and aggravated nature. We,
7 the jury, unanimously find the defendant, Jabari Lennin,
8 guilty. As to the charge of a possession of a deadly weapon
9 during the commission of a violent crime. We, the jury,
10 unanimously find the defendant, Jabari Lennin, guilty.
11 Madame forelady, is this your verdict?

12 FOREPERSON: Yes, it is.

13 MADAME CLERK: If all the jury would please raise your
14 right hands.

15 THE COURT: Let me observe for the record that all of
16 our jury has their right hands raised. Anything from the
17 State before we dismiss the jury?

18 DEP. SOL. THORNTON: No, Your Honor.

19 THE COURT: From the defense?

20 MR. BROWN: I would ask that they be polled.

21 THE COURT: Yes.

22 MADAME CLERK: When I call your name would you stand,
23 please. Robert Burns, was this your verdict?

24 MR. BURNS: Yes, it was.

25 MADAME CLERK: Is it still your verdict?

1 MR. BURNS: Yes, it is.

2 MADAME CLERK: Thank you. Harold Clifton, was this
3 your verdict?

4 MR. CLIFTON: Yes, it was.

5 MADAME CLERK: Is it still your verdict?

6 MR. CLIFTON: Yes, it is.

7 MADAME CLERK: Gregory Gresham, was this your verdict?

8 MR. GRESHAM: Yes, it was.

9 MADAME CLERK: Is it still your verdict?

10 MR. GRESHAM: Yes, it is.

11 MADAME CLERK: Thank you. Shaa Jackson, was this your
12 verdict?

13 MS. JACKSON: Yes, it was.

14 MADAME CLERK: Is it still your verdict?

15 MS. JACKSON: Yes, it is.

16 MADAME CLERK: Barbara Logan, was this your verdict?

17 MS. LOGAN: Yes.

18 MADAME CLERK: Is it still your verdict?

19 MS. LOGAN: Yes.

20 MADAME CLERK: Barbara Margopulis, was this your
21 verdict?

22 MS. MARGOPULIS: Yes.

23 MADAME CLERK: Is it still your verdict?

24 MS. MARGOPULIS: Yes.

25 MADAME CLERK: Charles Mathieu

1 MR. MATHIEU: Yes.
2 MADAME CLERK: Is it still your verdict?
3 MR. MATHIEU: Yes, it is.
4 MADAME CLERK: Deborah Morris, was this your verdict?
5 MS. MORRIS: Yes, it was.
6 MADAME CLERK: Is it still your verdict?
7 MS. MORRIS: Yes, it is.
8 MADAME CLERK: David Staigal, was this your verdict?
9 MR. STAIGAL: Yes, it was.
10 MADAME CLERK: Is it still your verdict?
11 MR. STAIGAL: Yes, it is.
12 MADAME CLERK: Thank you, sir. Jeremy Stansell, was
13 this your verdict?
14 MR. STANSELL: Yes.
15 MADAME CLERK: Is it still your verdict?
16 MR. STANSELL: Yes.
17 MADAME CLERK: Joseph White, was this your verdict?
18 MR. WHITE: Yes, ma'am.
19 MADAME CLERK: Is it still your verdict?
20 MR. WHITE: Yes, ma'am.
21 MADAME CLERK: And Richard Young, was this your
22 verdict?
23 MR. YOUNG: Yes, it was.
24 MADAME CLERK: And is it still your verdict?
25 MR. YOUNG: Yes, it is.

1 MADAME CLERK: Thank you.

2 THE COURT: Our jury has been polled. The verdict now
3 stands. Anything further from the defense at this time?

4 MR. BROWN: Nothing, Your Honor.

5 THE COURT: Very well. I want to thank you for your
6 service on this jury this week. You have given us an awful
7 lot of your dear and precious time, and for each and every
8 tick of the clock I want you to know on behalf of all of us,
9 how grateful we are for you and for your being here. We are
10 a citizen-based judicial system in this country and if you
11 weren't here, there would be no reason for any of us to be
12 here. I am so well aware of the treasure you have given,
13 which of course is your time, and I want to thank you for
14 it.

15 Now, when you go home this evening, you can talk; you
16 can e-mail; you can blog; you can discuss this matter, if
17 you wish. It has become my practice that when I have the
18 opportunity to work with jury's, what I tell jurors is that
19 should anyone contact you and want to talk about this case,
20 if you want to talk about it, that is perfectly fine; it's
21 okay. If you do not want to talk about it, just tell
22 whomever who wants to talk to you, "I don't want to talk
23 about it." And if they persist, then what you would want to
24 do is call your clerk of court's office and they will get in
25 touch with me and I will intercede on your behalf. I tell

1 jurors that. That actually had to happen, but I'm scared if
2 you don't say it, then sure as the world, it's going to
3 happen. So I always share that with jurors.

4 Ladies and gentlemen, with that new case management
5 system, your checks for your service this week - I used to
6 tell Dorchester County, which is where I'm from, I used to
7 tell jurors that the check was in the mail. At which point,
8 my clerk said you can't tell them that; that's not true. So
9 the check is not in the mail, but it will be to you shortly.
10 But you know, I always talk about the trip to Tahiti with
11 jurors, and we didn't get the opportunity to talk about it,
12 but the check is a very small, small representation of all
13 that you have given to us. You will realize that when you
14 receive it. What you have given to us, of course, is your
15 dear and precious time and for each and every click of the
16 clock, we are all very grateful to you for that.

17 Now, I do want to remind you that you have well-earned,
18 given the time that you have spend with us, your juror
19 exemption for Circuit Court for the years 2013 and 2014,
20 should you choose to exercise your exemption, you are now
21 not eligible to serve for the balance of 2012. I know you
22 are upset, but there is hope for you in magistrate's court
23 and in municipal court. But be mindful you are not eligible
24 to serve in a court of record for 2012, and you have an
25 exemption for 2013 and 2014.

1 I would end by telling you it's been an honor and a
2 privilege of mine to serve you in this capacity and should
3 our paths ever pass again, likewise, it would be an honor
4 and a privilege. Thank you so much. At this point, you are
5 free to go or you are free to stay. I will return you to
6 your citizen status. Thank you.

7 (2:45 P.M., WHEREUPON, THE JURY EXITS THE COURTROOM,
8 AND THE FOLLOWING IS HELD ON THE RECORD.)

9 DEP. SOL. THORNTON: Your Honor, Court's indulgence.
10 We are getting the sentencing sheets completed.

11 THE COURT: Sure. I knew exactly that was what you
12 were doing.

13 (WHEREUPON, A BENCH CONFERENCE IS HELD OFF THE RECORD
14 AND OUT OF THE HEARING OF THE JURY.)

15 THE COURT: All right. I'm listening to you and I'm
16 happy to hear from the victim or the victim's family.

17 DEP. SOL. THORNTON: Thank you, Your Honor. Your
18 Honor, I would ask that the Court recognize Sharine Nichols
19 and allow her to speak and then I'd like to speak on behalf
20 of the State.

21 THE COURT: Very well. I need the record, please,
22 also, of Mr. Lennin. Come on forward, ma'am.

23 Please state your name for us so that our record will
24 know who is speaking.

25 MS. NICHOLDS: Sharine Nichols.

1 THE COURT: How do you spell Sharine?

2 MS. NICHOLS: S-H-A-R-I-N-E, Nichols, N-I-C-H-O-L-S.

3 THE COURT: Thank you. Yes, ma'am. I'm listening to
4 you.

5 MS. NICHOLS: Thank you, Your Honor, for having me to
6 speak. Prior to my son getting shot, he was very mannerable,
7 responsible, and respectable. He never got suspended from
8 school for fighting or anything. He had a scholarship to
9 Newberry; he went there to play football. He got in a
10 little trouble there and he came home. He was angry at the
11 world. There was such a difference in his attitude, that's
12 what made me say, "Let me see what's wrong with my son,
13 because he's never been acting like this."

14 In the meanwhile, we went to Allendale, Allen College
15 in -- and he was offered a scholarship to go to Allen. So
16 while we were getting his records transferred from Newberry
17 to go to Allen, Trey did go to the tree a lot; it was not a
18 crack tree. Actually, I heard it was an unemployment tree.
19 So at the time that he was sitting at the tree is when he
20 got shot by Jabari. Gun downed and shot 10 times; my son
21 has twelve holes in his body.

22 So after that, after Trey got shot, the family went
23 through a great ordeal. My 14 year old and my three year
24 old saw my son laying in the doorstep of my mother's home
25 when he got shot. So they experienced that. That's in

1 their mind for the rest of their life. My three year old
2 still talks about it today, and he's four now.

3 After that happened, Trey finally came home. He had
4 this big cast bar sticking out in his leg for approximately
5 eight months. I had to take Trey to the bathroom. I had to
6 give Trey shots in his stomach every day, because he
7 couldn't walk; Trey was very paranoid.

8 My house is really huge and he used to put stuff up to
9 the windows, he put washer and dryers to the doors; he was
10 very paranoid. So after he was able to walk a little, I
11 took him to a doctor in Bluffton for SP -- I can't remember
12 ---

13 THE COURT: PTSD?

14 MS. NICHOLS: Yes, ma'am. So he went to the doctor for
15 almost a year, like maybe nine or ten months.

16 THE COURT: What a good moma you are.

17 MS. NICHOLS: I did everything I can for my son.

18 THE COURT: I got it.

19 MS. NICHOLS: Okay. So he was on medication for that
20 for like 10 months. They gave him the lowest dosage because
21 he was real young and they didn't want him to get too
22 addicted to it.

23 THE COURT: Did that medicine seem to help?

24 MS. NICHOLS: It helped a little bit. But every 4th of
25 July where I live at, people go hunting. Whenever Trey

1 hears shots -- I didn't even take my four year old out
2 because I stayed home with Trey, because I didn't know how
3 he would react to hearing the bullets.

4 When people go hunting he comes to me, "Mommy, what is
5 that? What is that?" He is paranoid to this day. They
6 said Trey was a bully; he was not. He has never got in any
7 trouble in school. Like I said, if he did, he would not
8 have gotten the scholarship, because they don't have unruly
9 bad kids. He played football, basketball, softball,
10 everything. He was getting a scholarship to Allen for
11 basketball, not even football, but for basketball.

12 Now, my son walks with a limp. I try to encourage him
13 that he still can play, but right now Trey is stuck. He
14 doesn't think he can ever play any sports again. He's kind
15 of lost because he's played that since he was six years old.
16 So because this man here felt threatened because Trey threw
17 a can into the car, he shot him 10 times with the biggest
18 gun possible, a .45.

19 He rolled on the island with this gun in attempt to
20 shoot Trey. If he did not, why did he get out of the car?
21 If he had a problem, why didn't he call the police? At
22 least to have it on record that Trey was bothering him; and
23 I feel as though you should give him the maximum. I'm sorry
24 about his little boy, but that's what he should receive.
25 That's it, Your Honor.

1 THE COURT: I got it. Let me ask you this question,
2 because there's lots of things that are traumatic that have
3 happened to your son. The buildup in high school of being a
4 great football player, is there anything in the high school
5 that's any bigger deal than being a great football player?
6 I think not.

7 MS. NICHOLS: Yes. And right now, like right now, he
8 is about to go to school. I finally got him to come out of
9 the house.

10 THE COURT: I think that's wonderful. I'm here with
11 you guys in heart and spirit and brain. It is my hope that
12 you do exactly what you continue to do and that you continue
13 to keep him connected with a good support system, because
14 it's very difficult as a mom to know what's going on in his
15 head and in his heart, and if there are lingering problems,
16 if there are lingering issues, then you want to have
17 somebody that he has a relationship with that he can go to.
18 So I am very thrilled that you did that.

19 MS. NICHOLS: Yes.

20 THE COURT: Good for you. Why am I not surprised that
21 you're a mother. Secondly, I'm thrilled that he's going
22 back to school, which is exactly where he needs to be. And
23 lastly, I urge you to help him find someone that he can
24 develop that relationship with, additional to you, that as
25 he hits bumps in the road and these things return to him.

1 Not only does he have this, he is so lucky to be alive;
2 we're so lucky we didn't lose him; but also the trauma of
3 this trial, the trauma of reliving this in this trial, and
4 then beyond that, the trauma of having been Mr. It, Football
5 Player, and then feel as though he lost that, too. He is
6 full of loss.

7 And with regards to your little ones, what they know
8 about little ones is when they suffer trauma and seeing
9 their big brother, who is really a big brother, hurt, they
10 will have to reprocess that at every stage of their
11 development. You have a 14 year old that's just going
12 through puberty; he's got to reprocess that. You've got a
13 little three year old that's going to have to reprocess that
14 at a number of different levels. Be mindful that if you
15 notice something in their behavior, I urge you to do exactly
16 what you did for Trey ---

17 MS. NICHOLS: I will.

18 THE COURT: --- and that is reconnect, because they
19 don't have the language until they reach that level of
20 maturity of emotional being until they reach that point in
21 their lives and they have to reprocess that.

22 I understand exactly where you are coming from. And as
23 I thought about him and as I thought about what this would
24 mean for him for the rest of his life, I'm just dancing a
25 dance that he is going back to school, and the wonderful

1 thing is that colleges, universities, schools, they are used
2 to dealing with young people, and his issues will not be
3 unique to them. You wish they were in this day and age,
4 okay? You wish in this day and age that the issues he's got
5 to deal with that nobody had ever heard of; but there are
6 schools that know how to do that. So I urge you to be his
7 support. I mean, I've seen him back there with you. You,
8 clearly, are his support. Thank you so much for speaking.

9 MS. NICHOLS: Thank you.

10 DEP. SOL. THORNTON: Your Honor, Mr. Lennin, the only
11 prior record the State is aware of are the tickets which
12 resulted in the loss of his license. It is very unfortunate
13 that he decided to embark on his first conviction with an
14 offense this serious.

15 Your Honor, it's the position of the State, the jury
16 gave him the benefit of the doubt by convicting him of a
17 lesser included offense. The State's position is that that
18 is all he is entitled to, Your Honor. The maximum sentence
19 under the law for this charge is 20 years in prison. The
20 State would ask for that 20 years, along with a five year
21 maximum on possession of a weapon during the commission of a
22 violent crime.

23 Your Honor, I'm doing that for two reasons. Other than
24 the fact the victim didn't die, this is about as close to an
25 execution as I think you can get. He fired 10 shots at an

1 unarmed man, and it was only by the grace of God and
2 fortuitousness that the victim did not, in fact, die in this
3 case.

4 Your Honor, had the victim died, this clearly would
5 have been something that I would have asked for a life
6 sentence on, and therefore, I'm asking for the maximum
7 sentence of 20 years, along with five years for possession
8 of a weapon during the commission of a violent crime. It is
9 truly a cowardly, cowardly act.

10 THE COURT: Thank you, Mr. Thornton. Thank you for
11 your words. Mr. Brown?

12 MR. BROWN: May it please the Court, Your Honor?

13 THE COURT: Yes.

14 MR. BROWN: Briefly, before I ask, a Rev. Powell wishes
15 to speak and I'd like to give him that opportunity, if I
16 may.

17 THE COURT: Sure.

18 MR. BROWN: Briefly before I get there, what I would
19 like to respond is that I ask that you not consider whether
20 or not the penalty, which is at the maximum range for what
21 he was convicted, as some kind of readjustment on the
22 correct sentence on an attempted murder charge. It wasn't
23 something he was given benefit of the doubt on. He was
24 acquitted on attempted murder. So what we're starting with
25 now for the charge of abhan is zero to twenty. So it's not

1 like somehow or another there was a jury's merciful
2 discount, because if that was the case, then they actually
3 didn't follow the law, because they're supposed to find it
4 without regard to mercy or sympathy to one side or the
5 other.

6 So I'm assuming that they followed the rules and he was
7 actually not guilty of that and that's why the jury came
8 back with that and not some type of compromise.

9 So therefore, I do ask that you consider what's the
10 traditional mitigation that goes along with this and the
11 first thing I think that's in part mitigating is that this
12 is not a malice crime. It may well be heat of passion.
13 We've heard a lot about those things that were out there,
14 and I think it's important because Mr. Lennin himself was a
15 young man as well, and I think that goes in hand in hand
16 with the issue about judgment. I know I've been before Your
17 Honor in a case with a 16 year old that was convicted of a
18 killing case, and Your Honor had it on PCR, and obviously,
19 the Court over the last few years since I had that case with
20 you, they've even come out and said that folks who are of a
21 certain age can't even serve a life sentence, because
22 they're not old enough to process that information. Now,
23 Mr. Lennin is old enough and I point that out because the
24 Court's are now aware that even when you hit your upper
25 teens, there are still judgmental issues out there and it's

1 not like flipping a light switch and all of a sudden you
2 turn 17 years old and you have the wisdom of a sage. It
3 takes time to develop that. So what we've got is a non-
4 malice verdict and a youthful defendant, which is one of the
5 most mitigating circumstances we can have. We know we grow
6 up with the idea that redemption is the best thing that we
7 can have and none of us are perfect and that there is
8 actually that opportunity.

9 And with that in mind, Your Honor, I would like to
10 point out that he also has no prior record, and he does have
11 substantial family ties and support here, as well, and Your
12 Honor, there's a five year mandatory penalty that comes with
13 one of the two convictions; I can't ask for anything
14 different on that. It is up to Your Honor whether that will
15 run consecutive or concurrently. Obviously, what's now
16 assault and battery of a high and aggravated nature is not
17 the same one we had for 200 years or so in South Carolina,
18 and it's substantially different. It's not that it went
19 from 10 to 20 years, but it also went to a real 20 years of
20 no parole, violent, a serious offense, and before that was a
21 non-violent, parolable offense. And so I would say it's
22 maybe three or four times instead of just twice as much on
23 what we've got.

24 Your Honor, I ask that you consider my client's youth
25 and the fact that he does have a young son and he still has

1 family here, and quite frankly, almost any sentence of a
2 significant length means that he's not going to be out free
3 to be with his grandparents or his adopted parents that
4 raised him, and I ask that you take that into account
5 because those things alone are types of suffering that
6 punishment's there for, but they are not acquainted to time.
7 Not being there when the people who raised you die --
8 there's no way that you could put that or calculate that
9 into an amount of time. There are events that can happen on
10 one second, as we know, and we even heard from Ms. Nichols
11 that can be greater than anything that can take place over a
12 long period of time. So I'd ask that Your Honor consider
13 the effect that might have, because quite frankly, Mr.
14 Lennin gets released and they've passed away, he may well
15 have no where to go. And I just point that out because that
16 is very significant when you look at what's going to happen.
17 Because, again, part of America is that we don't throw
18 people away; you have a second chance in this country and
19 that's one of the things that we started a long time ago.

20 Now, Your Honor, I'd ask that you hear from Rev.
21 Powell, and as well as Mr. Lennin's stepfather.

22 THE COURT: I'd be glad to. They just need to come on
23 up. I don't want our court reporter to have a hard time
24 hearing them. I know that's difficult, probably, but I
25 don't want our court reporter to miss and have to struggle

1 to hear, and I certainly want to hear them, too.

2 (Rev. Powell approaches the bench.)

3 Sir, all I need you to do is just state your full name
4 for the record.

5 REV. POWELL: Charlie Powell.

6 THE COURT: Pastor Charlie Powell, I'm listening to
7 you, sir.

8 REV. POWELL: Can I tell you a little bit about myself
9 before I talk about Jabari?

10 THE COURT: Okay.

11 REV. POWELL: My name is Charlie Powell and I'm 79
12 years old. I've never been arrested. I try to pass as a
13 legacy on to all young people, and not only Jabari. It hurt
14 me for both of them, because we're losing too many young
15 people, unnecessarily.

16 THE COURT: You're so right. You're so right.

17 REV. POWELL: I know Jabari from the time he was about
18 six years old. I baptized him and I taught him how to obey
19 the law of the land, and you must obey the law of the Lord.
20 I teach all young people the same thing and trying to keep
21 them from getting in trouble. We losing too many young
22 people getting in trouble for no reason, foolishness.

23 It hurt me to my heart to see Jabari in a situation
24 like this when he's been taught from six years old up until
25 where he is right now. I teach all young people, all old

1 people. It hurt me for him and it hurt me for that young man
2 over there, who I don't know, to be in a situation like
3 this. We got a lot of work to do with these young people of
4 today. I was motherless and fatherless before I was 20
5 years old. I didn't have no grandmoma. I didn't know no
6 grandfather; all I had was one grand aunt. I raised myself
7 from 19 years old to 79 years old, having never been
8 arrested. It's been over 35 years since I paid a speeding
9 ticket, because I obeyed the law of the land and I obeyed
10 the law of God. And this is what's going to have to be done
11 with this generation, because too many people are getting
12 locked up for no reason and for foolishness.

13 THE COURT: And we're losing them.

14 REV. POWELL: It don't make no sense. I'm 79 years old
15 and I raised myself and didn't have nobody. My dad had 10
16 sons, one girl, and raised four neighborhood boys along with
17 us, one man. He died at 70 years old and he taught me how
18 to be a man, and I am passing this legacy on to these young
19 generations how to be a man. I worked all my life and my
20 dad taught me how to own things. I don't know how they pay
21 rent; never rent in my whole entire life. I don't know how
22 to pay a rent, because my dad teach me to own land and
23 houses. And this young generation, we got a job to do. Not
24 only the law enforcement, mothers, fathers, cousins,
25 friends, everybody, this young generation has got to come to

1 some kind of conclusion that they got to stand up to be a
2 man. And I want to say to you, Your Honor, it hurt me to my
3 heart for both of these young men, not only Jabari, both of
4 these young men, to be in a situation like this.

5 I've been here for four days this week, sitting over
6 there and listening. It's very strange to me, because I've
7 never been in trouble in my life and it hurt me to see this.
8 I'm sorry to take up this Court's time, but I just have to
9 hold myself to keep from crying to see this situation like
10 this. And Jabari, I never experienced him to be violent.
11 Something had to drive him into this; had to. It really
12 hurt me to my heart and I want to say over there to the
13 young man who I do not know, I sat and I listened to things
14 that he said about him and it hurt me to my heart.

15 I teach Jabari and I teach all the young people in my
16 church to be respectable to the law. Sometime the law only
17 stop you to tell you that your taillight out, and you being
18 disrespectful. That -- that -- I never be disrespectful to
19 nobody, especially the law, because the law is the law of
20 the land. They got a job to do; just like I got a job to
21 do. I work for Jesus and they work for the land, for the
22 State. So my job is to try to save people. It's a daily
23 job. It's really a hard job, I mean, to see these two young
24 men in the situation like this, it really hurts me to my
25 heart. I mean, it hurt me to my heart to see this young

1 man, got a young son just born, and here he is going to
2 prison. And the young man over there, I'm very sorry for
3 him, too, because this could have been avoided. This should
4 be a lesson to all you young people that are sitting in this
5 courtroom today.

6 I'm tired of seeing this, and I know the law
7 enforcement, they're tired of seeing it. Something's got to
8 change. I want to tell you, Your Honor, I ask you to have
9 mercy on this young man. And that young man over there, I
10 will pray that God will continue to bless him and he will be
11 very respectable to his father and mother, because God said
12 don't be disrespectful to your mother and your father or
13 your days will be shortened. I just don't know what to say
14 to see Jabari in a situation like this, how he been taught
15 about God and how he been taught to obey the law of the
16 land. That's why I been here for four days. I don't know
17 how he got in a situation like this, and all I can ask this
18 Court is to have mercy on him, because this is a young man
19 that I've taught from six years old up until now. I got
20 three girls and three boys. My boys been in trouble, not
21 for doing nothing like this; for not paying a speeding and
22 not paying a ticket, and they get arrested. I sorry for
23 taking up all this time, but I just have to say what I said.
24 Amen.

25 THE COURT: Reverend Powell, here's what I will tell

1 you. I have had the same conversations, almost word for word
2 that you've just shared with all of us, and it hurts me to
3 my heart for both of these young men. And you said time and
4 again, something has to change. We are losing an entire
5 generation of young men and it is just a travesty. I don't
6 understand just what you were talking about, being
7 respected. "I'm going to kill you because you have
8 disrespected me." What does that mean? And what is with
9 the guns? You pick up your cell phone, your keys, and your
10 gun? We must stop. From your lips to God's ears to their
11 heart, I pray. Because Rev. Powell, we are losing --- he's
12 got a child. That child is going to grow up without his
13 dad. Where is the goodness in that? Over what? Over what?
14 And just as you say, there are lessons to be learned all
15 around, and it is absolutely heartbreaking. In my county
16 this week, Rev. Powell, a 19 year old man, sent to prison
17 for the rest of his life for killing another young person.
18 We have to stop it. It has to be stopped. So I am
19 heartened that you are amongst us, Rev. Powell, because you
20 know that you have the ability to turn your heart not to
21 evil, not to mischief, but to turn your heart to goodness,
22 and that is what we have to hope for our young people this
23 day, and tomorrow, and all the tomorrow to come. I thank
24 you. I think you are spot on, and it is my hope that you
25 continue to carry your message for many years to come.

1 Thank you.

2 REV. POWELL: Thank you.

3 MR. BROWN: And Your Honor, Mr. Rutledge is Mr.
4 Lennin's stepfather. He would like to speak.

5 THE COURT: Yes, sir. And again, all I need you to do,
6 sir, is just state your full name for our record.

7 MR. RUTLEDGE: My name is Darryl Rutledge.

8 THE COURT: Yes, sir.

9 MR. RUTLEDGE: Your Honor, I'm listening to the pastor
10 and I'm saying to myself inside that I met his mother eight
11 years ago, and I feel so responsible for this.

12 Being a mature, black male like I am, a college
13 graduate, obedient to my parents, but I feel so responsible
14 for this, and I want to take so much of the blame and pain
15 because his mother -- she had no choice but to turn him over
16 to her grandparents. She has a terminal illness, Your
17 Honor, and she's blind. She couldn't care for him as a
18 young child; she couldn't.

19 No male, no role model, nothing for him to look up to,
20 nobody; a granddad, Mr. Lennin, did the best he could do.
21 You have a young man growing up asking the question, "Where
22 is my dad? What happened here? What do you mean my mom is
23 going to die?" And to know that you spend a big portion of
24 your time in prison and to know that possibly your
25 grandparents could die.

1 I feel so responsible because I got into his life at a
2 time when he was a young teenager, very much influenced by
3 people in school. You know they say that if you do some
4 raising at home, school and television is going to be a lot
5 of a part of that raising. Videos, music, so many children
6 are caught up in this society where you got to be cool, you
7 got to be hip, you got to be down, and nobody wants to go to
8 school.

9 I got into his life at such a late time that I feel so
10 responsible. I feel like I could have done more. I could
11 have given him more. By the grace of God, me and his
12 mother, both being blind, we do everything we possibly can.
13 With her terminal illness, her taking 30 pills a day to stay
14 alive. She's there, she's beautiful, but what's going on
15 inside? But only by the grace of God that he's getting to
16 know his mother all over again. It doesn't excuse what he
17 has done, it doesn't, because that is senseless.

18 Who can understand what happened? Yes, I understand
19 when somebody -- you feel threatened, and you're afraid, and
20 you feel like somebody may be bullying you, but I feel like
21 there's some places that you could turn to, but sometimes
22 when people put you in a position where -- where you're
23 between your friends and what they say and what you're
24 reputation may be and what people think of you; young people
25 don't have the knowledge Your Honor or the education to make

1 better decisions other than what they hear from the street.

2 If there is some term of conviction that it includes a
3 mandatory order from Your Honor for education, a skill
4 trade. He was starting to learn, he had a job there at
5 Hardee's. But my thing is that not to have incarceration
6 without rehabilitation; it is senseless.

7 On behalf of my wife and our family, we just want to
8 say sorry to the victim, you know, because this is
9 senseless. We don't know what that young man went through
10 growing up, and this young man growing up without a stable
11 male figure or stable figures that gives us the right
12 guidance, because we can tell our children stuff all day,
13 but the street tells them things, too. T.V., Video, movies,
14 e-mail, MySpace, Facebook. Like I heard Your Honor say, wow
15 all these things that people get things from. What's the
16 other thing? Youtube. I'm just asking for mercy,
17 education, and some type of form of rehabilitation, so that
18 both of these young men will see a greater tomorrow. I
19 thank the Court for their time and for listening.

20 THE COURT: Thank you so much. Thank you for your
21 eloquence.

22 MR. BROWN: And I believe Mr. Lennin would like to
23 address the Court himself.

24 THE COURT: All right.

25 MR. LENNIN: Your Honor, as I speak, I just want one

1 request before I speak. I just want my son to be inside the
2 courtroom and be able to hold him before I speak to you and
3 to the courtroom. I wanted to know if you will allow that.

4 THE COURT: If I will allow him to do that? Mr.
5 Lennin, I'm going to tell you no, and I want you to know
6 why. Because he's a little baby, and that little baby, a
7 little ten month old baby doesn't belong in this room. You
8 don't belong in this room. And because you made the choices
9 that you made back on April 21st, 2011, you're in this room.
10 It is my hope, it is my prayer, that that little man, your
11 son, never ever comes in a room like this. So no, sir, Mr.
12 Lennin, he needs to remain outside of this room for all
13 time, unless, of course, he serves as a juror.

14 MR. LENNIN: Well, do you mind if, after the fact, I
15 get to see him? I need to say something.

16 THE COURT: Okay. I'm listening.

17 MR. LENNIN: The first thing I would like to address is
18 to the victim and his family and let y'all know I'm sorry
19 and I never wanted none of this to happen. But you know,
20 man, you provoked all of this ---

21 THE COURT: No, sir. I'm not going to allow that.

22 MR. LENNIN: I'm sorry, ma'am, I'm not like that. I
23 apologize. I didn't mean it like that. To my family, I
24 love each and every one of y'all and it hurts that I have to
25 get everybody like this together, you know what I'm saying,

1 to be in a courtroom. But you know I love y'all and y'all
2 have always been there for me. I don't got to call no names
3 because all of y'all are here.

4 To my grandmother, especially her and my grandfather,
5 my deepest apologies for everything. All the bad stuff I
6 did and for everything I said that I didn't mean. My son
7 ain't in the courtroom right now, and I know he can't
8 understand anything I'm saying, but whatever the case may be
9 when he gets old enough, I just want y'all to do one thing
10 for me, just let him know who his father was.

11 And Judge, I'm so sorry, and I understand what they're
12 going through, but please just don't keep me away from my
13 son. I understand I did something wrong. I've never been
14 in trouble before a day in my life. I don't do this. I had
15 a life; a real life that I was enjoying. But Your Honor, I
16 swear this is not the type of person I am; I swear, I'm not.
17 I've never been in trouble.

18 I just want you to show mercy on me, please. I
19 understand that you're a judge and you have to do your job,
20 but I also want you to know that you always deserve a second
21 chance. Please, Your Honor, just don't keep me away from my
22 family. I love my family to death. That's all I have.

23 THE COURT: Thank you, Mr. Lennin.

24 MR. BROWN: Your Honor, one thing I'd like to point
25 out, since we have talked about things and we've heard, you

1 know, if it was a murder case there'd be a life sentence and
2 Your Honor mentioned a life sentence and things of that
3 nature, and we had just heard in a greater context about if
4 there had been a killing here instead of a shooting that was
5 nonfatal. A few months ago, there were some statistics that
6 came out, pursuant to a four year request from the
7 Department of Corrections, and the average natural age of
8 death for a black male in the Department of Corrections is
9 48 years old, and that's average from maximum to minimum
10 security.

11 I ask that you take that into account. He's 20 years
12 old and there's a lot of time that you have within your
13 discretion to give him and, again, Your Honor, I ask that
14 you take that into account as far as what would be an
15 appropriate punishment. Thank you.

16 THE COURT: Thank you so much, Mr. Brown. Now,
17 security, listen up, as our families leave today, I want you
18 to let the victim's family leave first and give them some
19 time to leave the building and vacate the building, and then
20 let Mr. Lennin's family leave as well.

21 All right. With regards to 2011-GS-07-947, which is
22 the indictment of possession of a weapon during the
23 commission of a violent crime. Mr. Lennin I'm going to
24 commit you to the State Department of Corrections for a
25 period of five years. With regards to 2011-GS-07-946, which

1 is the indictment for assault and battery of a high and
2 aggravated nature, I'm going to commit you to the State
3 Department of Corrections for twenty years. These sentences
4 will run concurrent. You are to be given credit for any
5 time that you have served.

6 DEP. SOL. THORNTON: Thank you, Your Honor.

7 MR. BROWN: Thank you, Your Honor.

8 THE COURT: You're welcome.
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STATE OF SOUTH CAROLINA)
COUNTY OF COLLETON)

CERTIFICATE

I, REBECCA H. HILL, Official Court Reporter for the Judicial Department of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had in the trial of the captioned case, in the Court of General Sessions for Beaufort County, South Carolina, on the 17th - 21st day of September 2012.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

January 14, 2013

Rebecca H. Hill

Rebecca H. Hill,
Official Court Reporter

2016-07-0570

STATE OF SOUTH CAROLINA)

County of Beaufort)Jakari Mc Linnen #352550)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

APPLICATION FOR

POST-CONVICTION RELIEF

JEROME ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT
2016 MAR -4 PM 2:07**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 Beaufort County - Perry Corrections
2. Name and location of Court which imposed sentence Beaufort County
3. Name(s) of co-defendant(s) (if any) King David Williams
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) ABHAN #2011-GS-07-0946
 - (b) Possession of Firearm During violent Crime
" 2011-GS-07-0947

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) September 21st 2012
- (b) 20 years ran concurrent
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty jury trial
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Conviction yes & appealed
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. The Court of appeals
- ii. Supreme Court
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. August 14, 2014 Court of appeals
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. April 21²⁰¹⁵ denied from Court of appeals
- ii. November 7²⁰¹⁵ denied from Supreme Court
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) I answered yes to number (7)
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) ineffective assistance counsel
- (b) Judge abused her discretion's
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) My lawyer didn't properly represent me thro' my trial!
- (b) Judge abused by prejudicial material allowed from prosecutor, then leading the jury with lies!
- (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? Supreme Court ~~Supreme Court~~ Court of appeals
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? My 1st post conviction relief ever
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? yes to the Supreme Court
- (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. Direct appeal - "Denied"
- ii. Petition in the Supreme Court for certiorari - "Denied"
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. "The court of appeals" Columbia, SC.
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

N/A

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. This is my first P.C.B. N/A
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. N/A
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) N/A

(b) N/A

(c) N/A

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? never got on But yes

(b) your trial, if any? yes

(c) your sentencing? yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes Appeal

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Direct yes Private 3 appointed Appeal

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. Jim Brown Beaufort SC County at my ~~trial~~ trial
29902

ii. James A. Byars 1230 main street, suite 700
(29201) Post Office Drawer 2426 Columbia

iii. SC 29202 803-771-8900 - On my
Direct appeal!!

(b) the proceedings at which each such attorney represented you:

i. Jim Brown ~~trial~~ Trial

ii. James A. Byars "Appeal"
Robert M. Dudek "Appeal"

iii. _____

19. State clearly the relief you seek in filing this application:

To be able to Recieve a "Vacated" or a "Reversed"
"Reconcideration" on my Sentencing of 20 years
"Were I could get a lesser Charge of lesser time for this conviction"

20. Are you now under sentence from any other court that you have not challenged?

"NO"

STATE OF SOUTH CAROLINA)

County of Beaufort)

VERIFICATION

I, Jabari Linnen, 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.

Jabari Linnen

SWORN to and subscribed before me this 13th
 day of January, 2016.

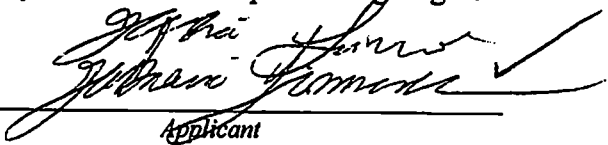
Nancy C. Murchant (L.S.)
 Notary Public

My Commission Expires: 1-23-2023

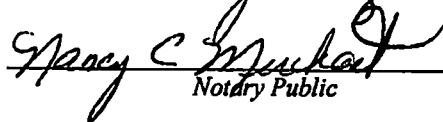
**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Jabari Limen, 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.


Applicant

SWORN or affirmed to and subscribed before me this
13th day of January, 2016.


Notary Public

My Commission Expires: 1-23-2023

2016-CP-07-0570

January 13th, 2016

Dear Clerk of Court,

The applicant believes he has additional claims for post-conviction relief, but does not yet have collateral counsel, more access to the discovery process, or the funds for expert services to investigate these claims. The applicant brings to the attention of the court that he desires to amend his P.C.R Application at some point during the process. I am filing my application for Post-Conviction Relief with your office, with attachments and exhibits. I am forwarding a true exact copy to the state attorney general's office addressed to the Clerk of Court. I am also sending two (2) copies to you and I respectfully request that your office return a clocked, stamped and docked copy to me. I thank you for your time and assistance regarding this matter.

Respectfully,

Jabari Linnen

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Jabari M. Linnen, #352550

Plaintiff,

vs.

State of South Carolina

Defendant.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

CASE NO.: 2016-CP-07-0570

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney:

James K. Falk, Esquire, Bar No. _____

Address:

38 Broad Street, Suite 350; Charleston, SC
29402

Phone: _____ Fax: _____

E-mail: _____ Other: _____

Defendant's Attorney:

J. Rutledge Johnson, Bar No. 78871

Address:

PO Box 11549 Columbia, SC 29211-1549

Phone: 803-734-3737 Fax 803-734-4113

E-mail: _____ Other: _____

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
- ☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
- ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: _____

Estimated Time Needed: _____ Court Reporter Needed: ☐ YES/☐ NO**SECTION II: Motion/Order Type**☒ Written motion attached☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff/☒ Defendant

July 7, 2016

Date submitted

SECTION III: Motion Fee☐ PAID - AMOUNT: \$ _____☒ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support☐ Domestic Abuse or Abuse and Neglect☐ Indigent Status ☐ State Agency v. Indigent Party☐ Sexually Violent Predator Act ☒ Post-Conviction Relief☐ Motion for Stay in Bankruptcy☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____**JUDGE'S SECTION**☐ Motion Fee to be paid upon filing of the attached
order.☐ Other:

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____☐ CONTESTED - AMOUNT DUE: \$ _____

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Jabari M. Linnen, #352550,

2016-CP-07-0570

Applicant,

v.

RETURN

State of South Carolina,

Respondent.

In response to the post-conviction relief application filed on March 4, 2016, Respondent would show this Court:

I.

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Beaufort County Clerk of Court's orders of commitment. Applicant was indicted by the May 2011 term of the Beaufort County Grand Jury for one (1) count of Attempted Murder and one (1) count of Possession of a Weapon During the Commission of a Violent Crime (2011-GS-07-0946, -0947). Jim Brown, Esquire and Kate Brobston, Esquire represented him. On September 17, 2012, Applicant proceeded to a jury trial before The Honorable Stephanie McDonald. During September 18-21, 2012, Applicant proceeded to trial before The Honorable Diane S. Goodstein pursuant to which he was found guilty to a lesser offense of Assault and Battery of a High and Aggravated Nature and as indicted for the count of Possession of a Weapon During the Commission of a Violent Crime. The Honorable Diane S. Goodstein sentenced Applicant to confinement for twenty (20) years for the count of Assault and Battery of a High and Aggravated Nature and five (5) years for the count of

Possession of a Weapon During the Commission of a Violent Crime. The sentences run concurrently.

A notice of appeal was filed on Applicant's behalf and an appeal perfected pursuant to Anders v. California 378 U.S. 738, 87 S. Ct. 1396 (1967). The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Linnen, Op. No. 2015-UP-212 (filed on April 22, 2015). The Remittitur was issued on December 3, 2015.

II.

In his application for post conviction relief, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Trial Counsel"
 - a. "My lawyer didn't properly represent (sic) me threw (sic) my trial (sic)!"
2. "Judge abused (sic) her discretion's (sic)"
 - a. "Judge abused (sic) by prejudicial material allowed from prosecutor and leading the jury with lies!"

For the purpose of this Return, Respondent incorporates the Clerk of Court records, the South Carolina Department of Corrections' records, the record on appeal and Court of Appeals opinion. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

Respondent construes Applicant's allegation as alleging ineffective assistance of counsel. The Respondent asserts that Applicant's allegation of ineffective assistance of trial counsel is without merit. Respondent also asserts that Applicant's attorney rendered effective assistance well within the standard of reasonableness within professional norms for a criminal defense attorney.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney

performance is measured by its reasonableness under professional norms. Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland v. Washington). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland v. Washington. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Second, counsel's deficient performance must have prejudiced Applicant such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In other words, where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner must prove that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The Respondent submits that Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant's second allegation is an allegation of abuse of the judge's discretion. This allegation raises a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417,

215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Applicant could have raised this issue at trial or on appeal. His failure to do so has waived this allegation as a ground for relief. Therefore, the Court should summarily dismiss this allegation.

V.

Applicant also alleges prosecutorial misconduct in his second allegation. Prosecutorial misconduct is not an issue for post conviction relief. Rather, this allegation is a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is the Applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989).

VI.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

VII.

WHEREFORE, Respondent requests an evidentiary hearing solely for the purpose of determining whether Applicant's trial counsel was ineffective and whether the Applicant's appellate counsel was ineffective.

{Signature Block on Following Page}

Respectfully submitted,

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Attorney General

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By: 
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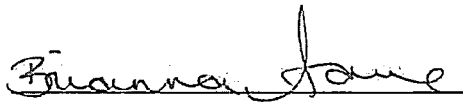
July 7, 2016

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT	)	
	)	
	)	2016-CP-07-0570
	)	
JABARI M. LINNEN, #352550	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

James K. Falk, Esquire
 PO Box 1058
 Charleston, SC 29402

DATED this 7th day of July, 2016.


 Brianna Arnone, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	P.C.R. APPLICATION FOR RELIEF
COUNTY OF BEAUFORT	)	Case No.: 2016-CP-07-0570
JABARI M. LINNEN,	)	
SCDC No.: 352550	)	
	)	
Applicant,	)	
	)	
-vs-	)	PRE-TRIAL BRIEF OF PETITIONER
	)	MOTION TO AMEND, IF NECESSARY
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	
_____	)	

TO: THE TRIAL COURT and RUSTON W. NEELY, Esquire, Assistant Attorney General:

The Applicant respectfully submits this Pre-Trial Brief to state his position and arguments and to clarify and focus his claims of ineffective assistance of trial counsel. Further, the Applicant will move, if necessary, to conform his Application for Post Conviction Relief to the evidence presented at trial.

I. BACKGROUND:

The Applicant was represented by James (Jim) Brown of the Beaufort bar. The Applicant was on trial for Attempted Murder (2011-GS-07-0946) and Possession of a Weapon During the Commission of a Violent Crime (2011-GS-07-0947). At trial, it is clear that the defense was steering toward a case self-defense. Applicant was ultimately convicted of ABHAN and sentenced to twenty (20) years, notwithstanding that he was twenty years old and had no criminal record.

The facts are relatively simple. The alleged victim, Trey Nichols, a much physically larger man harassed the Applicant on several occasions as the Applicant drove past a location known as

the “crack tree,” in order to get to his girlfriend’s residence. The alleged victim “hung out” at the tree. On the date of the incident alleged, Nichols threw a soda can at the car where the Applicant was a passenger. There were only three witnesses to the actual incident. The alleged victim, Kenneth Travon Nichols, King David Williams and the Applicant. The former co-defendant, Williams testified that Nichols, after throwing the soda can, approached the vehicle in an aggressive manner. Applicant testified that he got out of the vehicle, after the soda can was thrown in order to talk to Nichols. According to the Applicant, Nichols aggressively approached him and that Nichols has his hands in his pants. Fearful of not seeing Nichols’ hands, Applicant’s knowledge of Nichols past acts of violence and the aggressive advance upon him, the Applicant produced a pistol and fired several shots in the direction of Nichols. The Applicant testified that he and Williams left the location and Applicant did not know whether or not any of the shots struck Nichols. Applicant learned later that Nichols had been struck several times.

Since there were no other witnesses to the incident, and no physical evidence pertinent to the State’s case or the defense, the case hinged entirely on the testimony of the alleged victim, Williams and the Applicant. The attorney for the Applicant made extraordinary attempts to place specific prior incidents as to the alleged victim’s character or propensity for violence. The defense proffered a mental health professional to present evidence of a prior psychotic episode of Nichols and homicidal ideology. The testimony was disallowed. Therefore, the gravamen of the case was credibility, either the Applicant was credible or not, or Nichols was credible or not. If one believed the Applicant, he established a self-defense case. If one believed Nichols, the Applicant was guilty of the charge. Simple as that.

At almost every turn the trial judge stifled the defense’s proffer of specific evidence of

violence done by the alleged victim and the defense expert. The trial court limited the defense to allowing the jury to hear that the alleged victim threw a soda can at the Applicant, kicked the door to his vehicle, and made insults directed to the Applicant and his girlfriend, and two limited instances with the alleged victim's family members shortly before this incident. A litany of violent acts by the alleged victim were excluded by the trial judge as too remote to be probative.

Specifically disallowed by the trial court were other instances of violence toward the alleged victim's family members and two indicted (although discretionarily dismissed) counts of criminal sexual conduct in the first degree.¹ The Applicant was questioned about specific acts of violence committed by the alleged victim, Trey Nichols. After citing several acts of violence by Nichols, the Applicant on direct examination was asked, "was there anything else." To that question the Applicant said, "Yeah. About the sexual assault charges . . ." (Tr. p. 531, l.16-17). In response, the solicitor immediately objected and requested that the jury be retired in order to hear argument and a mistrial motion by the State. The jury was retired by the trial judge and legal arguments followed.

II. DEFENSE OBJECTION TO A MISTRIAL:

The State persisted in moving for a mistrial because of the Applicant's testimony, and inexplicably the defense vehemently resisted such motion, even after being specifically warned by the trial judge, that any curative instruction would necessarily be prejudicial to the Applicant.² The

¹

The two local fifteen year olds were not called or proffered by the defense as witnesses to the aggravated sexual assaults which Nichols was indicted for and allegedly committed against their persons.

²

It is anticipated, through conversations with the Applicant, that defense counsel never consulted or advised the Applicant the ramifications of a mistrial or a curative instruction.

trial court stated in no uncertain terms that it was inclined to grant the State's motion for a mistrial. The trial court and the solicitor discussed the correct manifest necessity standard and the court tended to agree with the State. The defense repeatedly requested a curative instruction, notwithstanding the court's admonitions and without consulting the Applicant. The State and the trial court resisted such a "curative" instruction because its could not overcome the perceived prejudice to the State, unless such an instruction were given, it would have to be so harsh as to prejudice the Applicant. The court, in no uncertain terms announced that any curative instruction would be prejudicial to the Applicant, the State concurred in with the court's view.

The defense was completely unperceptive to the easily recognizable winds of prejudice blowing against the mantle of the Applicant's case. The solicitor recognized the prejudice to the Applicant of any "curative" instruction. The trial court specifically and fully informed defense counsel that the court's curative instruction necessarily would be prejudicial to the Applicant. The trial court informed the defense attorney in clear terms that curative instruction would be prejudicial to the defense. Defense counsel, after hearing the proposed curative instruction noted the prejudice, if the proposed instruction was given to the jury and offered possible solutions to the court. The court questioned the defense attorney, "How would you give a curative instruction? *How extreme do you think it ought to be?*" (Tr. p. 539, 1.8-9). The court went on further:

THE COURT: "I'm not going to play games. In other words, any curative instruction is going to do my very best to erase the possibility that the alleged victim would be considered to have committed those offenses, and it will be done, if you will, with a view towards your client saying things he should never have said." (Tr. p. 542,

l. 12-17).

MR. BROWN: "I understand that. I'm not going to move for a mistrial, but I would ask the Court not to telegraph bias against my client." (Tr. p. 542, l. 23-25).

Trial counsel asked the court to inform him in advance of, "the exact language of the curative instruction." (Tr. p. 544, l. 22). The court did not respond to defense counsel's request, and proceeded with charging the jury while the Applicant was still on the stand. (Tr. p. 545 ,l.1-25, p. 546, l. 1-4).

Without objection, the trial court gave an extensive "curative" instruction to the jury which: 1) commented on the facts; 2) misstated facts; 3) obliterated the credibility of the Applicant; and 4) vouched for the character of the alleged victim witness. The charge to the jury, in part, is as follows:

"This *gentleman* back here, Mr. Nichols, has never been convicted of anything, and certainly has never been convicted of what this man [referring to the Applicant on the witness stand] said, I need you to hear that. That should have not been testified to and I need you to know that." (Tr. p. 545, l. 10-13)(Emphasis and annotation added).

The reference to the alleged victim as a "gentleman" went contrary to the defense assertion at trial that Nichols was a violent person to be feared. The trial court affirmatively charged that the alleged victim has no criminal record. That unlawful charge on the facts not only violated the South Carolina Constitution S.C. Const., Article V, Section 21 ("Judges shall not charge juries in respect

to matters of fact . . .”) but was also not a true statement about this “gentleman’s” criminal record.³

The court in essence vouched for the credibility and reputation of the alleged victim. To add more fuel to the fire against the Applicant, the court specifically charged the jury that the Applicant should not have, “testified to that.” The solicitor, in his closing argument, acknowledged what the entire case was about. Solicitor Thornton argued to the jury,

“Now, character, reputation. It’s also about credibility. It’s also about whose story and whose testimony matches the other evidence.” (Tr. p. 615, l. 19-21).

In giving the jury this, by the court’s own recognition, highly prejudicial instruction against the Applicant, he was now branded as a bad person not worthy of belief and sanctified the piety of the alleged victim. This charge amounted to a structural trial defect not capable of cure. To further and fatally exaggerate matters against the Applicant, the court charged,

“I’m telling you that in order for justice to be done here today, that testimony must be disregarded completely.” (Tr. p. 545, l. 22-24).

So, in other words, the court says, don’t believe the defendant sitting right here on the stand, now defense attorney proceed further with the Applicant’s testimony. The testimony of the Applicant proceed after the court’s jury instruction. Although the trial court’s “curative” instruction was highly prejudicial, defense counsel, after the curative instruction, still did not object to the court’s charge to the jury and the trial continued forward. At this point the Applicant was doomed and since

3

The alleged victim, Kenneth Travon Nichols has been convicted of: Malicious Injury to Animals (Case No. 15030EJ 06-10-2009) and Reckless Driving (24336EJ 12-18-2008). Further, Nichols was in fact indicted for two counts of Criminal Sexual Conduct 1st Degree (2009-GS-07-02244 and 02245), the cases were dismissed as, “prosecutorial discretion.”

defense counsel did not object to the jury charge, no appeal could be had on that matter.

The specific fear defense counsel recognized was that the court not “telegraph” to the jury any wrongdoing on the Applicant’s behalf or comment on credibility. That “telegraphing” is exactly what occurred and all while the Applicant was still testifying. To compound matters of un-objected to prejudice, the defense allowed the state to introduce in rebuttal two video clips of the Applicant in a “strip club,” throwing, “gang signs,” immediately after the Applicant testified. Defense counsel initially objected to the strip club videos and gang signs, but then inexplicably relented and consented to their admission without objection.

The video clips taken well after the incident, and just prior to trial were not relevant to anything testified to by the Applicant. Second the video clips were pure character assassination evidence. Defense counsel initially objected to testimony of bring in a “strip club,” and of “throwing gang signs,” without expert testimony to prove the gestures were in fact “gang signs.” Again, and just as unexplainable, defense counsel relented and consented to the solicitor telling the jury that the Applicant was, “throwing gang signs,” at the “strip club,” during his closing argument. The solicitor argued in closing,

“ . . .and right before his trial [he] decides it’s a good idea to go to the **strip club** and **throw out gang signs.**” . . .”that’s the purpose of those two clips that we put in . . .**he’s throwing gang signs.** That’s what’s important. Typically, family men who don’t do anything wrong don’t **throw gang signs.**” (Tr. p. 616, l. 6-15)(Emphasis added).

At no time did counsel for the Applicant object. There was absolutely no evidence in the record, or proffered by the State that the Applicant was affiliated with a gang or even knew what gang signs are or mean. This un-objected to adverse character evidence, combined with the grossly prejudicial

“curative” instruction, likewise un-objected to, all combined to deprive the Applicant a structurally fair trial under a due process standard.

III. CONCLUSION:

The Applicant raises two distinct issues before this Court. First, Applicant will present evidence that his trial counsel rendered ineffective assistance of counsel by: 1) failing to not oppose a mistrial under the circumstances;⁴ 2) failing to object to the “curative” instruction as given on grounds of impermissible comments on the facts, impermissible bolstering of the alleged victim, impermissible vouching for the alleged victim and attacking the credibility of the Applicant while he was on the stand; 3) failing to object to evidence of bad character during the State’s rebuttal with respect to the Applicant being at a “strip club,” and “throwing gang signs”; and, 4) failing to object to the State’s closing argument attacking the Applicant’s character during closing argument in reference to being at a “strip club,” and “throwing gang signs,” multiple times. Defense counsel’s performance deviated from the range of competence required in a criminal case. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989)(citing, Strickland v. Washington). Further, Applicant can and will show prejudice sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). The only adverse witness to the Applicant was the alleged victim,

4

Additionally, defense counsel had an “out” on the mistrial issue. The record will support that defense counsel interposed a legally proper objection to a mistrial, requested a curative instruction and was initially overruled. Counsel should have stopped right there, because all of the Applicant’s jeopardy rights were fully preserved. The Court telegraphed, in no uncertain terms, that it would grant a mistrial anyway. Defense counsel persisted at length, opposing both the State and the Court, who both recognized the prejudice to the Applicant, if a curative instruction were given. From interviews with the Applicant’s defense counsel, it is anticipated that counsel did not have a strategic reason for insisting that this trial go forward. Quite the opposite was true, the defense proffers were almost uniformly gutted at every stage of the trial prior to the State’s mistrial motion.

Kenneth Trayvon Nichols. By failing to object to a “curative” instruction which vouched for the alleged victim, “telegraphed” that the Applicant was not truthful while he was on the stand, and commented on the facts in a trial where the credibility of the alleged victim and Applicant was the crux of the case was fatal to the Applicant’s case.

Second, the Applicant would allege that due to trial counsel’s numerous prejudicial errors that caused a structural defect in the trial itself. There are certain constitutional rights which are so basic to a fair trial that their infraction can never be treated as harmless error (presumed prejudice). See, State v. Brewer, ___ S.C. ___, ___ S.E.2d. ___ (S.C. Op. No. 27487 Jan, 28th 2015)(Beatty, J., concurring, in part and dissenting, in part). Structural are not subject to a harmless-error analysis regardless of the evidence presented. State v. Rivera, 402 S.C. 225, 741 S.E.2d 694 (2013). The trial court made a charge on the facts in its “curative” instruction in violation of Article V, Section 21 of the South Carolina Constitution. Defense counsel called this problem out to the court’s attention during the colloquy about the “curative” instruction, yet relented and failed to object to the very concern he initially raised. Judicial bias, likewise, is a structural error. Arizona v. Fulminante, 499 U.S. 279 (1991).

The twin sins of vouching for the alleged victim and informing the jury that the Applicant was not truthful in his testimony, was a charge from the bench of which witness to believe, thus destroying the adversarial process, a clear violation of structural due process. Because defense counsel failed to object to the instruction, this grave, glaring and fatal error was unpreserved for appeal. Because of defense counsel’s failure to object, any argument on this subject was forever lost to the Applicant.

Finally, although the State did not move to make the Applicant’s petition more definite and

certain, the Applicant would move, if necessary to state these claims before the P.C.R. Court, or in the alternative, moves to conform his Application to conform with the evidence and arguments presented at trial.

Respectfully Submitted,

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February 6, 2017.

STATE OF SOUTH CAROLINA
FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT
COURT OF COMMON PLEAS
CASE NO. 2016-CP-07-00570

JABARI LINNEN,
Petitioner

Vs.

STATE OF SOUTH CAROLINA,
Respondent.

TRANSCRIPT OF POST-CONVICTION RELIEF HEARING
BEAUFORT, SOUTH CAROLINA
February 13, 2017
VOLUME 1 of 2

B E F O R E:

THE HONORABLE R. SCOTT SPROUSE, JUDGE

Wanda H. Rowe, CVR-M
Official Court Reporter

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I N D E X

WITNESS

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P R O C E E D I N G S

(Whereupon, the following proceedings started at 12:09.)

THE COURT: Yes, sir.

MR. NEELY: Thank you, Your Honor. This is the -- the State will call the case of Jabari N. Linnen versus the State of South Carolina. Case No. 2016-CP-07-0570. The Applicant is incarcerated on his May 2011 indictments by the Beaufort County grand jury for one count of attempted murder and one count of possession of a weapon during the commission of a violent crime. Jim Brown represented him at trial.

On September 17th, 2012, Applicant proceeded to a jury trial before the Honorable Stephanie McDonald and was found guilty and sentenced to a period of 20 years on the count of assault and battery of a high and aggravated nature, it's a lesser-included defense, and five years for the count of possession of a weapon during commission of a violent crime.

This appeal was filed and perfected pursuant to *Ander v. California*. The South Carolina Court of Appeals affirmed the conviction and sentenced and a writ was issued December 3, 2015.

THE COURT: Okay. Was this Judge McDonald or Judge Goodstein?

MR. NEELY: Your Honor, I can clear that up. Judge McDonald was, I guess, under an apprenticeship, was sitting with Judge Goodstein, and Judge McDonald had the limited role

1 of qualifying the jury and selecting the jury. Judge
2 Goodstein was actually the trial judge, and I believe Judge
3 McDonald was watching at trial.

4 THE COURT: Thank you. Thank you. All right.
5 Mr. Newman?

6 MR. NEWMAN: If it pleases the Court, Your Honor, if -- I
7 have submitted a pre-trial brief for the Court, focusing in
8 onto the issues that I want the Court to look at. To give the
9 Court just a thumbnail, we believe that counsel was
10 ineffective for not requesting an immunity hearing and not
11 informing Mr. Linnen what an immunity hearing was and what his
12 rights were to that. And specifically ineffective -- during
13 the trial, a key -- a key element was -- there were basically
14 two witnesses to this incident, with little physical evidence.
15 There was a Mr. Trey Nichols, who was the alleged victim in
16 the case, and Mr. Linnen.

17 And this involved a -- Mr. Linnen hung out at a certain
18 area and had been harassed on a number of occasions,
19 Mr. Linnen and his girlfriend, at the point the alleged victim
20 threw a soda can at the car of Mr. Linnen that Mr. Linnen was
21 a passenger in, they stopped. Mr. Linnen -- I'm sorry, were
22 you driving?

23 THE APPLICANT: No, I was a passenger. I was a
24 passenger.

25 MR. NEWMAN: That's right. I thought I said that you

1 were a passenger.

2 THE APPLICANT: The can hit me -- at least I think it hit
3 me.

4 MR. NEWMAN: And hit the can [sic]. The car stopped.
5 Mr. Linnen got out and was standing there. By Mr. Linnen's
6 testimony, Mr. Nichols had his hand tucked in his pants and
7 was approaching him aggressively. The driver of the car
8 testified similarly to that, and Mr. Linnen testified he felt
9 threatened, produced a pistol, and fired several shots. And
10 they left the area.

11 Mr. Nichols testified in the case and Mr. Linnen would
12 have needed to testify in the case to set up -- the entire
13 case was based on his self-defense. The entire case rested on
14 the credibility of Mr. Linnen versus the credibility of
15 Mr. Nichols. The other facts weren't really in dispute, just
16 on whether or not it was a self-defense.

17 And finding that, the jury necessarily would have had to
18 look at credibility of the alleged victim, Mr. Nichols, and
19 the alleged -- the credibility of Mr. Linnen. And in the
20 trial, Mr. Brown made a conceited effort -- concerted efforts
21 to introduce evidence of instances of violence from
22 Mr. Linnen, who was admittedly -- not Mr. Linnen, Mr. Nichols,
23 the alleged victim, who was admitted by a larger man than
24 Mr. Linnen.

25 The trial court denied specific instance of it, limited

1 the defense to basically three instances, I believe pushing
2 those -- on Mr. Nichols, pushing his grandmother, throwing a
3 soda can, and kicking in a car door or dinging a car door in
4 the case.

5 The defense tried to get in two indictments that had been
6 dismissed by the Solicitor for criminal sexual conduct,
7 alleging Mr. Nichols committed two counts of criminal sexual
8 conduct against the minor, sexual battery. That was not
9 allowed in.

10 Mr. Brown proffered an expert witness that had seen
11 Mr. Nichols approximately 30 days before this incident and in
12 a proffer hearing, said that Mr. Nichols was psychotic and had
13 homicidal ideations. However, he had been treated for those
14 and released, and the trial court denied the testimony of the
15 expert. So that was not let in.

16 During the course of Mr. Linnen testifying, defense
17 counsel, Mr. Brown, asked him about the specific incidents of
18 conduct, and he said he threw a soda can that had hit him.
19 And he asked him what else, and he said, Well, he disrespected
20 by fiancée on several occasions. Mr. Brown asked him what
21 else, and Mr. Linnen said, Do you mean the two counts of rape?

22 The State immediately stood up and said objection. The
23 jury was dismissed or retired to the jury room, and the
24 Court -- and I'm going to ask Mr. Brown this and through the
25 transcript -- the Court becomes very concerned that there's no

1 way to fix this problem; that she had ruled that was not
2 coming before the jury, and that she was going to grant the
3 State's motion for a mistrial. The trial judge did a good job
4 of, for jeopardy purposes, saying why it was -- they used the
5 correct standard of manifest necessity, and both -- oddly
6 enough, both the Solicitor and the Court, in the dialogue --
7 and I'm going to have Mr. Brown read some of that --
8 recognized the prejudice to Mr. Linnen and that they don't
9 believe that it could go forward.

10 Inexplicably, Mr. Brown resisted a mistrial and asked for
11 a curative instruction. And there's going to be a bit of
12 dialogue about the trial judge saying I don't think I can give
13 a curative instruction that is not going to be biased toward
14 the defendant. I don't think the defendant can get a fair
15 trial.

16 Inexplicably, the defense pressed and pressed and
17 pressed. The Court gave about a page and a half jury trial
18 while Mr. Linnen was seated on the stand, still testifying,
19 that basically said what this man told you is not true. Take
20 it out of your mind. He should have never said it. It's not
21 a fact in the case. Then comments on the facts and said --
22 points to Mr. Nichols, the alleged victim, and calls him --
23 and said, this gentleman over here has not been convicted of
24 this. In fact, he's not been convicted of anything. That's
25 not true. Mr. Nichols did have a criminal record; it just was

1 not admissible.

2 Mr. Brown asked if he could hear what the jury -- what
3 the curative instruction would be. The judge basically --
4 when Mr. Brown asked that -- because he was concerned about
5 telegraphing bias against Mr. Linnen in the charge. The judge
6 says -- immediately says, "Bring in the jury." And she gives
7 this charge that is not objected to and not objected to on the
8 Article 5, Section 22 violation of comments facts to the
9 jury -- the judge stating facts to the jury.

10 So what we have is what I think is a structural error in
11 the process that the Solicitor recognized, the Court
12 recognized, but, unfortunately, Mr. Brown didn't recognize.
13 And I'm going to have Mr. Linnen testify, and Mr. Brown, on
14 that. That's a road map of where I want to go, Your Honor,
15 just for the Court's --

16 THE COURT: Do you have a hard copy of your --

17 MR. NEWMAN: Yes, I do, Your Honor.

18 THE COURT: That did not make its way into the packet.

19 Okay. My clerk informed me you did e-mail it to her.

20 Could I have a hard copy? Do you have one?

21 MR. NEWMAN: Yes, sir, I do have a hard copy. And I have
22 given the State one. I even mailed one to the State when I
23 copied the State in on the e-mail to your law clerk. And the
24 State tells me they didn't get it. And I didn't get a
25 kick-back. But I did provide the State with a copy, and I

1 know it does -- it's a partial amendment to the application.

2 So you know if the State wants to be heard on that.

3 THE COURT: Do you have extra copies?

4 MR. NEWMAN: You can have my copy, Your Honor.

5 THE COURT: Let's go off for --

6 (A brief recess was taken.)

7 MR. NEWMAN: At this time, I would like to call
8 Mr. Linnen to the stand.

9 THE COURT: Okay. Just wait one second.

10 MR. NEWMAN: Oh, we can wait. Yes, sir, Your Honor.

11 THE COURT: Thank you. Ma'am.

12 MR. NEWMAN: Thank you.

13 THE COURT: All right, Mr. Newman.

14 MR. NEWMAN: If it pleases the Court, we'd call the
15 applicant, Mr. Jabari Linnen, to the stand.

16 THE COURT: Mr. Linnen, please come around to the witness
17 chair.

18 THE APPLICANT: Yes, sir.

19 JABARI LINNEN,
20 the witness, after having been duly sworn, was examined and
21 testified to as follows:

22 DIRECT EXAMINATION

23 BY MR. NEWMAN:

24 Q Mr. Linnen, when you were charged in this matter, how old
25 were you?

1 A I was 19 years old when I first caught my charge in 2011.

2 Q All right. And you were, I believe, 20 years old at the
3 time of the actual trial?

4 A Yes, sir.

5 Q All right. Did you have any criminal record?

6 A No, sir.

7 Q Did you have any experience in a criminal courtroom?

8 A No, sir.

9 Q Have you watched trials?

10 A No, sir.

11 Q Okay. Now, you retained Mr. Brown in this matter, you
12 and your family did; is that correct?

13 A Yes, sir.

14 Q All right. And y'all discussed how the case was going to
15 be; that it was a self-defense case; is that correct?

16 A Yeah, we discussed that when we first sat down, yeah.
17 Yes, sir.

18 Q Okay. And you told Mr. Brown the facts as you knew them
19 and basically the facts you testified to at trial; is that
20 correct?

21 A Yes, sir.

22 Q All right. And you told Mr. Brown about prior problems
23 that you and a number of people in the neighborhood had had
24 with Mr. Nichols, the alleged victim in this case?

25 A Correct.

1 Q All right, sir. Now, did Mr. Brown ever explain to you
2 that you had a right to an immunity hearing?

3 A No, sir. He never -- no, sir. He never, no.

4 Q Have you now heard those terms and understand that you
5 could have had a hearing on the immunity?

6 A Yes, sir.

7 Q And you would have had the burden of proof by the
8 preponderance to show the facts that you stood your ground?

9 A Yes, sir.

10 Q And that Mr. Nichols was advancing upon you in a hostile
11 manner; is that correct?

12 A Yes, sir. I know now.

13 Q Okay. So that was not discussed by Mr. Brown --

14 A Not at all. Not at all.

15 Q -- that you could have done that? That you could have
16 exercised that right?

17 A Yeah, he never -- no, he never did that at all.

18 Q Had he explained that, would you have exercised that
19 right?

20 A Yes, sir.

21 Q Now, during the trial, Mr. Brown unsuccessfully attempted
22 to get in a number of bad acts by Mr. Nichols; is that
23 correct?

24 A Correct.

25 Q All right. And the trial judge was -- did not allow that

1 in; is that correct?

2 A That's correct also.

3 Q Mr. Brown put up an expert to talk about the psychotic
4 episode from Mr. Nichols, and the judge didn't allow that
5 either?

6 A Yes, sir, he did, and she denied it also, yes. Yes, sir.

7 Q Okay. So what were left in the trial basically, other
8 than King David Williams is your testimony versus Trey
9 Nichols' testimony. Would that be a fair statement?

10 A Correct.

11 Q All right. And that the jury would have had to judge
12 your credibility and Mr. Nichols' credibility?

13 A Right.

14 Q All right. Now, do you recall at trial Mr. Brown asked
15 you about an incident that occurred about throwing the soda
16 can?

17 A I got -- would you say it again? I mean....

18 Q When you were testifying on direct testimony, in other
19 words, Mr. Brown put you on the stand --

20 A Right.

21 Q -- and he asked you, with respect to Mr. Nichols, he
22 asked you did he throw anything at you.

23 A He asked me did Mr. Nichols throw anything?

24 Q Yes.

25 A Yes, sir, he did.

1 Q All right. You were able to testify to that; correct?

2 A I believe so, yes, sir.

3 Q And Mr. Brown asked you what else?

4 A He was asking me did I know anything else about the
5 victim, as far as, like, obtaining the victimwise. Yeah, she
6 was asking me questions about that.

7 Q Okay. And did you state that the alleged victim,
8 Mr. Nichols, had a couple of rape charges?

9 A Yes, sir, I did.

10 Q All right. And at that point, the State moved for a
11 mistrial?

12 A Correct.

13 Q All right. And do you recall the argument being that you
14 were told by the Court that you weren't supposed to testify to
15 that? Or the defense was not supposed to bring it up?

16 A No, sir. I can't recall, but I'm pretty sure it might be
17 in records.

18 Q Okay. If we read the transcript, we can get it from
19 there, because that would be a clearer memory; correct?

20 A Correct.

21 Q All right. Now, did -- when the Solicitor objected to
22 the mistrial, the jury was sent out. Do you recall a number
23 of discussions between the Solicitor, Mr. Brown, and the
24 Court?

25 A Yes, sir.

1 Q All right. And is it your recollection that ultimately
2 the Court and the Solicitor both were inclined to grant a
3 mistrial?

4 A Yes, sir.

5 Q Okay. Did you understand at that time -- I know you have
6 probably learned a good bit -- at that time, did you
7 understand what a mistrial was and what its effects were?

8 A No, sir.

9 Q Okay. Did Mr. Brown ever inform you about what a
10 mistrial was, about what its effects were, and ask you what
11 you wanted to do?

12 A No, sir, he never did that.

13 Q Okay. And what is your understanding of a mistrial now,
14 after we have had a chance to talk?

15 A My understanding of a mistrial is a trial that will be
16 restarted or a trial could be overlooked and restarted --

17 Q Start over again?

18 A Basically start over. Yeah, basically restarted.

19 Q Okay. And a couple of days of trial that you went
20 through, quite frankly, the trial judge denied most of
21 Mr. Brown's requests; is that correct?

22 A Yes, sir.

23 Q Had you been fully informed that the State and the Court,
24 recognizing bias, wanted a mistrial, what would you have opted
25 for were you fully informed?

1 A Well, if I was informed of the mistrial and what the
2 capabilities of the mistrial were --

3 Q Yes, sir.

4 A -- then I would have asked for the mistrial, and I wish
5 that he would have done that then.

6 Q Okay. But you weren't consulted on that in court as part
7 of the trial?

8 A No, sir.

9 Q All right.

10 MR. NEWMAN: At this time, Your Honor, I'm reserving the
11 right to recall Mr. Linnen. That's the questions that I have
12 for him.

13 THE COURT: Mr. Neely?

14 MR. NEELY: Thank you, Your Honor.

15 CROSS-EXAMINATION

16 BY MR. NEELY:

17 Q Mr. Linnen, isn't it true that, as you have already
18 testified, that this case kind of boiled down to credibility?

19 A Kind of. Kind of. I mean, credibility is a strong word,
20 so I'm not really going to say that, but kind of, yeah. More
21 than likely, yeah. Yes, sir.

22 Q Okay. And the State alleged that you were a passenger in
23 a vehicle; right?

24 A I was in the passenger side of the vehicle, yes, sir.

25 Q Right. And the driver stopped at a stop sign?

1 A Yes, sir.

2 Q And that was when the victim threw the Coke can and you
3 got out?

4 A Inside. Yeah, he threw the Coke can inside the vehicle,
5 not outside. Well, he did it twice. I'm going to say, like,
6 because he did it twice. The first time he threw it, it
7 landed outside the car. It hit the outside of the car. Then
8 he walked up and grabbed the soda can again from off the
9 ground and threw it inside of the car, which is in the
10 transcript also.

11 Q And then you got out of the vehicle and --

12 A Then I got out of the vehicle.

13 Q Right. And then you pulled your firearm?

14 A No, no. In testimony on my victim's behalf, he stated in
15 his testimony on the stand that, when I got out of the car, my
16 hands were behind my back. My attorney, Jim Brown, he asked
17 my victim, Mr. Trey Nichols, is he sure of that. He said,
18 yes, my hands was behind my back when I got out of the car.
19 So he never saw a firearm. He never mentioned a firearm when
20 I first got out of the car. He said my hands were behind my
21 back.

22 And if you want to, you can go to the page.

23 Q But it's not -- it's not in dispute that you shot him;
24 right?

25 A No, sir. I'm not disputing that I did shoot -- I did

1 shoot him, sir.

2 Q All right. So you got out of the car and there was a
3 verbal argument between you and the victim; right?

4 A No, it was a rebelliance on my end, and it was a more
5 aggressive argument on his end. I'm just clearing that up. I
6 just want you to -- I just want to clear it up. Yeah, I want
7 to clear it, because I don't want you to mislead or misled the
8 State like we was arguing. We wasn't arguing. I was
9 rebelling to wondering why is he keep doing the thing that
10 he's doing every time that I got to the stop sign or I'm over
11 here living with my family.

12 Q And I'm not trying to put any words in your mouth. If
13 you ever feel like I'm trying to make you say something that's
14 not true --

15 A That's all right. You all right.

16 Q -- stop me and correct me.

17 COURT REPORTER: Don't interrupt him.

18 THE APPLICANT: Okay.

19 BY MR. NEELY:

20 Q But what I mean by argument is, you know, he was talking
21 to you, you were talking to him, y'all were disagreeing. Is
22 that a correct statement?

23 A I'm not going to answer that. I just answered the
24 question just now.

25 Q Okay. And so you're saying your attorney never discussed

1 with you -- after you -- after you allege that the victim had
2 two rape charges and the Solicitor asked for a mistrial, he
3 didn't discuss anything with you?

4 A Who? My lawyer?

5 Q Your attorney, Mr. Brown.

6 A Yeah, he never -- he never told me anything about the
7 mistrial. I mean, like, as far as what it was or what it
8 could have been in the future. Like, no, he never pulled
9 me -- because I was still on the stand when she told the jury
10 to leave. And then they started talking; the Solicitor, the
11 judge, and my attorney. And when they was agreeing or
12 deciding on what was going on, he never asked me at one point
13 in time period, do I want this mistrial.

14 Q Do you remember -- and it's called a pre-trial hearing
15 but it's that same, you know, the day of the trial. The
16 pre-trial hearing when the judge ruled that that matter was
17 not to be discussed.

18 A What are you asking me? Do I remember a pre-trial?

19 Q Yes.

20 A Do I -- I remember a -- a semi pre-trial, yes, sir.
21 Yeah, I do remember the trial, but as I told my lawyer, I
22 never really knew anything about the law at all. So them
23 saying, like, what they were saying during the pre-trial, it
24 really went over my head because I never understood anything
25 and he never really took the time out to explain to me, to

1 tell me that, Mr. Linnen, you cannot say this, you cannot say
2 that. He never took me to the side at all. Even though he's
3 been my lawyer for quite some time, I haven't been interacting
4 with him while I was in the County or on bond like that.

5 MR. NEELY: All right. That's all the questions I have,
6 Your Honor.

7 THE COURT: All right. Any redirect?

8 MR. NEWMAN: Not at this time, Your Honor.

9 THE COURT: All right. Thank you, Mr. Linnen. You can
10 step down.

11 THE APPLICANT: Thank you, sir.

12 MR. NEWMAN: I would ask to be able to recall Mr. Linnen,
13 if necessary.

14 THE COURT: So granted.

15 MR. NEWMAN: I would call James Brown.

16 JAMES BROWN,
17 the witness, after having been duly sworn, was examined and
18 testified to as follows:

19 DIRECT EXAMINATION

20 BY MR. NEWMAN:

21 Q Mr. Brown, first of all, these are always difficult
22 situations. You and I practice law together and have known
23 each other for many, many years, but I am going to have some
24 specific questions for you in regard to Mr. Linnen's case.

25 A No problem.

1 Q Okay. Then you heard Mr. Linnen's testimony and you were
2 in the courtroom?

3 A I did.

4 Q Okay. Mr. Linnen testified that you did not explain to
5 him what his immunity hearing was and the ramifications; is
6 that correct?

7 A That -- that's correct.

8 Q And at some point, you made a decision, as I can glean
9 from reading the record, that you were attempting to kind of
10 do a hybrid immunity issues along with your self-defense?

11 A In -- at the time -- and I still believe that it should
12 be, but the immunity hearing, I thought, would conflate into
13 the self-defense part and we would get a stand-your-ground
14 jury instruction. I have previously been able to get that
15 type of instruction in a jury trial.

16 And preceding this case, I had an immunity hearing that I
17 thought I should have won, and unfortunately, did not win it
18 under the preponderance of the evidence. And what we ended up
19 with was just previewing my case to the prosecutor's office
20 months before the trial for them to get a copy of the
21 transcript to just go through the immunity hearing. And so I
22 figured why give them a preview. We have got some pretty good
23 provocation on -- and I used that phrase -- provocation by the
24 victim in this case, by Mr. Nichols, and I figure I'd just
25 rather have the jury deal with the ability to stand his

1 ground, that part of it, the failure or lack of a duty to
2 retreat. And that's why I did it that way, but I never went
3 over it with Mr. Linnen.

4 Q Okay. So that he could make a knowing choice of saying I
5 want to follow your advice or I don't want to follow your
6 advice?

7 A Sure, absolutely. And, in fact, it looks like, in
8 hindsight, that that was a really bad decision by me because
9 the law now says that you don't get a jury instruction on the
10 duty to retreat issue in a stand-your-ground setting. That's
11 a bewildering decision because --

12 Q Bewildering because, in immunity, you don't have to
13 retreat, and common law self-defense, you have to --

14 A So when you're standing on the street at the time that
15 you have to use force, you have got to predict in the future
16 whether or not a judge is going to agree with you on immunity
17 and run -- and then you can stand your ground and use force or
18 run away. You have to somehow or another divine what a
19 circuit court judge is going to do should you actually get
20 arrested and the police not honor your immunity at the front
21 end.

22 I don't know how -- that law was not the law at the time,
23 but that is the way the judge treated it, which also makes me
24 wonder whether or not there was some discussion among the
25 judiciary about how to handle those instructions because she

1 was very confident I didn't get it, and subsequent to that,
2 there was a case that came out that says I don't get that
3 instruction at trial.

4 But I never went over it with Mr. Linnen. I thought it
5 was better played a different way, but clearly, I read that
6 statute absolutely wrong, since the courts have said that's
7 not the way it happens.

8 Q Okay. And I think you heard me previewing to the trial
9 judge. Would you agree in the assessment that this entire
10 case came down to the credibility of Mr. Linnen -- and he had
11 to testify to set up self-defense -- and credibility of the
12 alleged victim, Trey Nichols?

13 A Absolutely.

14 Q Because there was no -- other than Mr. Williams briefly
15 testifying the snippet that he saw, nobody else saw the
16 incident.

17 A That's exactly right.

18 COURT REPORTER: Nobody saw the what?

19 MR. NEWMAN: Incident.

20 THE APPLICANT: That's exactly right.

21 BY MR. NEWMAN:

22 Q Okay. So be fair to say that's what the jury was going
23 to weigh when they went to their jury room: His testimony
24 versus Trey Nichols' testimony?

25 A That's correct.

1 Q And you went to -- the transcript is rather lengthy. You
2 brought in a number of instances of violence of Mr. Nichols,
3 and you were ultimately shot down on most of those?

4 A Demoralizing is the way I can describe it. I mean, we
5 went in -- I don't think that -- I don't think there's a law
6 enforcement officer that knew Mr. Nichols that wouldn't have
7 shot and killed him if he'da done that to them, with a soda
8 can thrown at them and cussing at them and tell him that. I
9 think that would have been justified under all of that. I
10 mean, it was -- I have never seen a case where I walked in and
11 almost immediately have to preview my cross-examination in
12 limine --

13 Q You had to proffer every one of --

14 A My cross-examination in limine, I have never seen that
15 before trial even opened. It was bizarre.

16 Q Okay. And you even went so far as to ask a very veteran
17 and KG detective, Detective Frazier, if he knew Mr. Nichols'
18 reputation, and he said -- basically told you, Well, I don't
19 live in that community, although you got him to admit he
20 worked that community regularly?

21 A I think when I spoke with the cops or law enforcement in
22 general, they referred to the tree where Trey Nichols stood as
23 the crack tree. And they would say that in the hall, you
24 know, when you hear things like a public service shooting of
25 Mr. Nichols because of all of the problems they had with him

1 in that neighborhood, as they would tell me, standing at the
2 crack tree and harassing the entire neighborhood.

3 Q All right. And despite your best efforts, Judge
4 Goodstein limited you to a very narrow time frame and a very
5 narrow window of basically just one or two specific incidents
6 of rather benign propensity for violence?

7 A That's correct.

8 Q And you made an attempt to proffer the indictments or
9 proffer the fact that Mr. Nichols had been charged and
10 indicted by a Beaufort County grand jury for two counts of
11 criminal sexual conduct in the first degree?

12 A That's correct. And Mr. Linnen knew about those.

13 Q And that came across the flavor that you wanted the Court
14 to know that it's important what's in his mind, who he's
15 facing?

16 A Absolutely, because Mr. Linnen did not live in that
17 neighborhood, but his fiancée did and had actually had trouble
18 with Mr. Nichols, her entire family. And if I recall
19 correctly, they were dropping her off or picking her up. I
20 want to say they were dropping her off.

21 Q I believe it was to school?

22 A And the reason I point that out is Mr. Linnen is having
23 to leave the area with his pregnant fiancée sitting there with
24 Mr. Nichols terrorizing them. And so certainly what he did to
25 other women, I would assume, would have been on his mind --

1 Mr. Linnen's mind at the time of Mr. Nichols' accosting of
2 him.

3 Q Over your very able argument, the trial judge denied that
4 coming into evidence; is that correct?

5 A That's correct.

6 Q And I see in here you also had an expert from, I guess,
7 Beaufort Jasper Mental Health, that's one of the mental
8 health. Mr. Nichols had only -- either 30 or 28 days prior --
9 had been admitted for a psychotic episode; is that correct?

10 A That's correct. I believe, at some point in time, had
11 been beating up his grandparents and shoved one of them into a
12 glass table.

13 Q And that the opinion of the examiner at that time, he
14 had, as I read quote from the transcript, homicidal ideations?

15 A I believe that is exactly right. I had never seen
16 anything that helpful for a defense of justified use of force
17 in an evaluation. I had never seen anything like that. That
18 one point about whether he was a danger.

19 Q And once again, the trial judge disallowed in its
20 entirety that?

21 A That's correct.

22 Q All right. So would it be fair to say that what you're
23 trying to show as to the violent propensities of Mr. Nichols,
24 you were basically shut down in being able to get that to a
25 jury?

1 A I would say that what came out was probably less than 20
2 percent of what I think was supportive of our justified use of
3 force defense.

4 Q Okay. Now, you had asked Mr. Linnen several questions
5 about Trey Nichols of the allowable testimony?

6 A Sure.

7 Q Throwing the soda can?

8 A Sure.

9 Q I believe kicking the car door or denting a car door or
10 something like that.

11 The State objected to you leading Mr. Linnen; is that
12 correct?

13 A I can't recall that but....

14 Q Well, as it came out -- and we'll let the transcript
15 speak for itself --

16 A Sure.

17 Q -- you basically asked Jabari, "And is there anything
18 else? What else?"

19 A Sure, sure.

20 Q And he, in violation of the court order but it's
21 discussed, probably not a knowing violation, said, "You mean
22 the rape charges?"

23 A And it's very clear, at his age, he didn't -- and level
24 of sophistication in the court system -- that he didn't
25 realize that that -- even if he heard it off limits, I mean,

1 it was not intentional. And I say that because I think,
2 immediately, the judge said it was like all my fault that
3 Mr. Linnen answered my question that way.

4 Q And actually, in an odd twist, the Solicitor came to your
5 defense.

6 A And I -- I -- I don't recall that. It was not
7 intentional, and we didn't try to get anything we weren't
8 supposed to get in.

9 Q Right. Now, when Mr. Linnen said that inadvertently, the
10 State immediately objected; is that correct?

11 A That's correct.

12 Q And the judge retired the jury to hear argument on the
13 State's motion?

14 A I do vaguely remember that.

15 Q Okay. And the State was basically arguing that the State
16 believed it could not get a fair trial because of the judge
17 said, quote, "vilification of the victim." And the trial
18 judge was going to grant the mistrial; is that correct?

19 A If the record reflects that. And I think you and I have
20 talked about it, but that sounds correct.

21 Q Okay.

22 MR. NEWMAN: I beg the Court's indulgence. One minute.

23 BY MR. NEWMAN:

24 Q All right. If the record bore out basically -- and I can
25 make copies for the Court -- from pages 531 to about page 546,

1 the State --

2 MR. NEELY: 541?

3 MR. NEWMAN: To 5 -- I'm sorry.

4 BY MR. NEWMAN:

5 Q Start at 533, I apologize, in the record, to about 546
6 are the relevant portions. And I'd like to make as part of
7 the record, if I could copy that and give those pertinent
8 parts that's solely related to the mistrial issue in the
9 transcript.

10 You had asked, rather than a mistrial, you resisted that
11 fact and asked for a curative instruction; is that correct?

12 A I think that's correct.

13 Q Okay. And the Court informed you -- and this is on page
14 540. This is the Court speaking to you, "In order to give a
15 complete curative instruction, if it's not important to tell
16 the jury that your client had some role in this that he
17 shouldn't have had, that he shouldn't have done that," and she
18 was telegraphing to you, was she not -- because you respond to
19 it -- that whatever charge she could give, the problem would
20 be there would be bias and privilege to the defendant, who is
21 still sitting on the witness stand, by the way?

22 A I think that she -- she was trying to tell me, I want to
23 grant a mistrial; I don't want to tell the jury that they
24 don't need to listen to it because I'm going to make it sound
25 like he said something he wasn't supposed to.

1 Q Right. And the Court -- I'm reading from 541 -- is
2 basically saying, the only way to do this is grant a mistrial,
3 "To be sure that gentleman gets a fair trial and that the
4 improper vilification now of the alleged victim does not get
5 communicated to this jury in what was an every-way-I-know-how,
6 a whole lot of energy the last three days to try to keep that
7 from happening."

8 So the judge is telegraphing kind of a bias to you, is
9 she not, that she's trying to keep out vilification of who she
10 describes as a gentleman, Mr. Nichols?

11 A I can only say that I felt like any time we got close to
12 the issues about Mr. Nichols coming out, it's almost like a
13 foot was being held up against that door to keep it from
14 opening. I mean, that information, I guess, just was not
15 going to come in in any way at all.

16 Q Okay.

17 A But I know that may not answer your question. I don't
18 know exactly.

19 Q Well, what I'm trying to set up and ask you --

20 A Sure.

21 Q -- is there some strategic reason for resisting a
22 mistrial?

23 A You know, the only thing I can say is I didn't have one.
24 I can't come in here and tell you that there was a strategy
25 that he formulated as we were developing the case to keep it

1 from being a mistrial. So I don't know that there was one.
2 The only thing I can suggest is, I guess, the jury did hear
3 the information about the rape, but in light of the actual
4 instruction he gave that you discussed with me before this
5 hearing, that certainly wasn't a better avenue. It was not
6 better to have that instruction and go forward than a mistrial
7 would have been.

8 Q And the Court asked you, on 541, directing this to you,
9 is, "I guess that means I got to grant a mistrial. Is that
10 what you're saying, Mr. Brown?" And you respond, "Not at
11 all."

12 So is the Court not telegraphing to you that, whatever
13 charge she's going to give, you're not going to like?

14 A Certainly it is. Absolutely.

15 Q Okay. And the Court, on page 541 at line 18, says,
16 "Mr. Brown, here's what you need to know: There's no curative
17 instruction that could begin to be given in this case, but to
18 tell the jury that what you're implying said just was
19 completely improper and not true."

20 A And the worst part about that is that it is true. So,
21 actually, whether or not it's improper is distinct from
22 whether or not Mr. Linnen's statements were true. And I think
23 that kind of is a little flavor of what was going on, is that
24 if there's a search for the truth, it was certainly, I think,
25 obstructed by the Court in this case.

1 Q You believe that would be a comment on the facts?

2 A I do think that's a comment on -- and that's in
3 hindsight. That's when you went over that the other day, I
4 don't know why I didn't think of that as a comment on the
5 facts when she's talking about the character of the two people
6 or whether something is true or not.

7 Q Right. The Court tells you, "I'm not going to play
8 games. I'm going to do this, quote, with a view towards
9 saying your client said something he should have never had."

10 And you respond to that -- and the Court's response back
11 to you, "That's your problem."

12 So is the Court not clearly telegraphing to you that
13 you're not going to -- you need a mistrial?

14 MR. NEELY: I'm going to object. He keeps saying --
15 keeps going into what the Court's telegraphing him, and I
16 think it calls for speculation on the part of the witness on
17 what the Court's mindset is.

18 THE COURT: He can ask the witness how the witness
19 interpreted the Court's comments.

20 MR. NEWMAN: That would be a better question.

21 BY MR. NEWMAN:

22 Q Going through the things that I have read to you, how did
23 you interpret that?

24 A Honestly, at some point in time, we were going to lose
25 this case no matter what I did because that -- I mean, it

1 was -- I just felt like that judge at some point turned
2 against the case. She apologizes later to me saying, Oh, I
3 didn't realize it wasn't you, it was your client. And I think
4 that's telling because that suggests that she was blaming
5 me --

6 Q Right.

7 A -- at that point in time.

8 Q And let me ask you this: You heard Mr. Linnen testify
9 that you did not discuss with him what a mistrial meant --

10 A We did not.

11 Q -- and the ramifications.

12 A There's no -- I have no question I would not have gone
13 over that with him.

14 Q Okay. So he could not have made a knowing and informed
15 decision as to whether -- that you could have either joined or
16 not resisted the Court and the Solicitor wanting to grant --

17 A More than -- more than anything else, I don't think he
18 would have known was a mistrial was compared to not asking for
19 one.

20 Q Because unlike a lot of our clients that have as much
21 court time as we do, Mr. Linnen had never been a party?

22 A Absolutely not.

23 Q And he had just turned 20 years old.

24 A Which is also what made it a little extra damning when
25 the judge discounts his testimony.

1 Q Okay. And I'm going to read from page 542, line 23,
2 after the Court tells you about "that's your problem" about
3 the charge, you say, "I'm not going to move for a mistrial,
4 but I would ask that the Court not telegraph bias against my
5 client."

6 And isn't, in fact, when I read you the charge, that
7 that's exactly what the Court did?

8 A She picked which person was the good person. She gives a
9 character assessment between Mr. Nichols and Mr. Linnen, the
10 very thing that I could not get in --

11 Q Right.

12 A -- was the character information of Mr. Nichols.

13 Q In fact, she called Mr. Nichols several times a
14 gentleman?

15 A That's exactly -- the same gentleman who beat up his
16 grandmother into a glass table.

17 Q But you couldn't get that evidence in.

18 A I couldn't get that in.

19 Q All right. And on page 544, you do -- obviously, you
20 say, when you're going to give the instruction that "it would
21 be incumbent upon me if I had an objection to voice it, and
22 maybe it would be easier if I knew the exact language of the
23 curative instruction."

24 So you wanted -- you were thinking you wanted to hear
25 what it is?

1 A That -- yes.

2 Q All right. And you say that rather than disjointing the
3 jury, coming in and out. At line 1 from page 545, apparently
4 that didn't happen because the trial court says, "Let me have
5 the jury, please."

6 A And the only way -- when we went over that, and my memory
7 is that we weren't going to have a chance to pick apart each
8 part of this. I mean, I think that she -- she wasn't going to
9 let me to continue to object to any of that stuff.

10 Q All right. Would the reasonable alternative to being --
11 was to accede in the State and Courts wanting to grant?
12 Because they recognize -- even the State recognized the
13 prejudice to Mr. Linnen.

14 A I don't know whether they recognized on it but I
15 certainly think a mistrial would have been better off. And
16 I'm going to say this: I think it's very possible that my
17 assessment of that was colored by what I'm going to say is a
18 personal issues with the judge holding me at fault on some of
19 these things personally.

20 Q Okay.

21 A And it may be that I was not taking my client's
22 interest -- putting those before my fear of what the judge was
23 doing or telegraphing to me personally.

24 Q Okay.

25 A And so I should have done a better job standing up for my

1 client.

2 Q All right. And the judge, in her curative instruction
3 that starts on page 545, and I'll quote from 9 to 13
4 basically -- and this is the judge charging the jury, and
5 Mr. Linnen is sitting right there basically where you're
6 sitting, and says, "The witness testified to something before
7 we stopped." Witness referring to Jabari Linnen. "This
8 gentleman back here, Mr. Nichols, has never been convicted of
9 anything and certainly has never been convicted of what that
10 man said. I need you to hear that. That should not have been
11 testified to. I need you to hear that. I need you to
12 absolutely be able to dismiss and disavow that from your
13 minds; otherwise, we are not going to do what we must here
14 today."

15 Then she goes on, line 22, "I'm telling that, in order
16 for justice to be done today, that testimony must be
17 disregarded completely." And she's directing all this at the
18 defendant who is sitting on the witness stand. She identified
19 Mr. Nichols as a gentleman. And do you agree that that is a
20 comment on the facts when she said Mr. Nichols has about no
21 criminal record?

22 A I think it absolutely is a comment on the facts and a
23 false comment.

24 Q Because he does --

25 A It's actually --

1 Q -- have a criminal record?

2 A It actually presents false information to a jury, and she
3 knows it's false information, because we had gone through his
4 stuff. I don't think a pros- -- I think a prosecutor would
5 have a Napue problem of presenting false information if they
6 would have done that. And we got a judge telling somebody
7 something false, a jury false information.

8 Q Okay. So the key part of the trial, the credibility of
9 Mr. Linnen versus the criminality and credibility of
10 Mr. Nichols, would you not agree that charge basically
11 obliterated that?

12 A It absolutely did.

13 Q All right. And was there a reason the Court, after it
14 gives the charge, said you may continue -- and you continue.
15 Is there a reason why you did not move to dismiss the jury and
16 object to that charge as given?

17 A Probably just fatigued from getting beat down by the
18 Court.

19 Q Would you agree that you should have objected to that
20 charge?

21 A Absolutely.

22 Q And reserve it for error?

23 A Absolutely.

24 Q And would you agree that charge violated Section 5, part
25 22 of the Constitution where judges cannot charge on the

1 facts?

2 A Absolutely.

3 Q All right. And you did not object to that, and of course
4 that couldn't have been --

5 A And I didn't even think of that until we were talking
6 about this beforehand.

7 Q Okay.

8 A The objection beyond about making some kind of -- about
9 the charge not being adequate in some way, or biased. The
10 comment on the facts part, I had never thought about until
11 prep -- until you went over that instruction with me, calling
12 me about this then.

13 Q And let me ask you: Had you objected to that charge,
14 would you have been, on your own, either accede or say "I need
15 a mistrial now"?

16 A I would have probably asked for a mistrial after that
17 instruction. In hindsight, I should have.

18 Q Because -- would you say that there was definitely
19 overwhelming prejudice to Mr. Linnen at that point?

20 A I would say that the judge was correct that the jury
21 instruction put my client in a worse position than without the
22 jury instruction.

23 Q And in going along with the lines of credibility, the
24 State had two -- I guess there were two video clips from
25 YouTube that they were wanting to introduce that directly went

1 to Mr. Linnen's character?

2 A Yes.

3 Q Okay. And when the clips come up, you have a problem
4 with the detective being able to say he's throwing gang signs.
5 And then you agree that, if the Solicitor wouldn't mention it,
6 he could certainly argue it, and the Solicitor, in fact,
7 argued gang signs a number of times, and you did not object to
8 that?

9 A And let me tell you a couple of things about this, on
10 that part of it, is when I left that trial during the next
11 weeks, I think it's pretty clear that that video introduction
12 could have been challenged a little bit more. Interestingly
13 enough, it probably contains some inadmissible information
14 that under the Brewer case, should have been kept out or
15 redacted from the video.

16 Q Because they were actually at a funeral for somebody --
17 or a party for somebody that had been murdered and had
18 T-shirts?

19 A I will say this: In my defense, I never knew that that
20 evidence was out there. I will say we did not want to get
21 into anything that would -- my client could get up there and
22 say all the good things he had done, that usually come in and
23 not as usually character evidence like, I have a job, I go to
24 school, and I have got a woman that I care for. And those are
25 the kind of normal things, tell us about yourself, I worked

1 here.

2 Q Right, but those aren't specific incidents of character,
3 truthfulness or --

4 A Absolutely.

5 Q -- peacefulness or lack of peacefulness?

6 A Absolutely. There was a statement that Mr. Linnen
7 made -- and it was just a lack of artfulness where I do
8 believe he says he just wants to be a family man. And I
9 actually do believe that that opens the door somewhat to some
10 of that information I did not know about on that, because I
11 think -- I think the damning part is that he wasn't -- I took
12 it to be the worst part is that he was actually on house
13 arrest and instead of being on house arrest, was at the club.

14 I also think -- and again, this is one of those things in
15 trial -- I do also think, though, that there could have been a
16 better job of handling that information. I don't think -- I
17 think too much came in, and I should have kept more out.

18 Q Okay. Long and short of it, when the evidence was
19 introduced -- and this is on page 5 -- 591 as to the two
20 clips, the State says -- Solicitor Thornton says, "Your Honor,
21 at this time, I move State's Exhibit No. 7, the clips, into
22 evidence."

23 A Right.

24 Q The Court asks if there's an objection. And your answer
25 on line 23 was, "No objection"?

1 **A** And, again, that's -- and the only thing I can tell you
2 is, at that point in time -- and this is not a strategy
3 reason -- at this point in time, I was not aware of the clips'
4 existence before I was shown those. After the questioning or
5 after the statement, my client did arguably open the door to
6 some of that. I had never seen those clips before, and that's
7 after all of the other whippings that I took in that case.

8 **Q** Okay. Well, one thing you were able to do was Detective
9 Frazier -- because he didn't have a foundation -- wasn't able
10 to say that he was throwing gang signs, and the Court agreed
11 with you on that.

12 **A** All I can tell you is I know the gang stuff has come up a
13 fair amount as being information that's character information,
14 probably not going to come in.

15 **Q** Okay.

16 **A** And that kind of comes back to what I was trying to get
17 at. My client opening the door by saying that he just wants
18 to be a good family man, I don't know that that opened the
19 door to more than just the fact that he violated house arrest.
20 And I say that because the video has a lot more character in
21 it, and I could just suggest being at a strip club might be
22 character evidence.

23 **Q** Oh, I forgot about that. It wasn't just a club. The
24 State made an effort to tell the jury it was at a strip club?

25 **A** That's correct. And I probably should have gotten all of

1 that kept out because whether or not he wants to be a good
2 family man has nothing do with whether he goes to a strip
3 club, just like the members of some law firm may go to after
4 somebody's birthday party as kind of a gag.

5 Q Or the Solicitor's conference in Myrtle Beach?

6 A Or maybe a former judge that was stopped leaving one in
7 Columbia 25 years --

8 MR. NEELY: Object to relevance right now.

9 THE COURT: Yeah, let's move on.

10 THE WITNESS: But the fact being that the admissible part
11 of that, I think, was is lot less than what came in.

12 BY MR. NEWMAN:

13 Q Well, the Solicitor argues on page 615 in -- and I think
14 he hits it, and you tell me if he doesn't -- Solicitor tells
15 the jury, "Now, character reputation. It's also about
16 credibility. It's about whose story and whose testimony
17 matches." Would that be a fair statement that the Solicitor
18 made that that's what the case was about?

19 A That almost sounds objectionable. There's almost a
20 little burden shift there.

21 Q There is.

22 And on page 616, the Solicitor argues -- and I'll quote
23 from line 6 on down -- "And right before his trial, he" --
24 Mr. Linnen -- "decides it's a good idea to go to the strip
25 club and throw out gang signs. Now, I don't care what club

1 he's in. In fact, he's throwing out gang signs. Seems a
2 little bit inconsistent with family man."

3 It goes on further, "The purpose of those two clips we
4 put in, I don't care if he's sitting on a street corner. He's
5 throwing out gang signs. That's important. Typically family
6 men who don't do anything wrong don't throw out gang signs."

7 Now, there was no testimony about gang signs. Is there
8 any reason you did not object to the Solicitor multiple times
9 in assassinating the character of Mr. Linnen by basically
10 inferring he's in a gang when there's no evidence of that?

11 A None at all.

12 Q Okay.

13 A I can only tell you this: We didn't know about the
14 video. I say "we," I had an associate lawyer at the time. We
15 didn't know about that video or the incident about the video
16 itself. So the only thing I can tell you is that it caught
17 us -- it blind-sided us when that video was produced.

18 Q And was it produced immediately prior to the State's
19 putting on the case in reply?

20 A That's correct. After he opened -- after Mr. Linnen
21 opened the door to that issue through that statement is when
22 they -- essentially at the break said, Look at this video we
23 have got.

24 Q Okay. Assuming Mr. Linnen opened the door.

25 A And I agree with you on that. I do personally feel like

1 the door was opened a little bit. When there's a blanket
2 generalization about being a family man that I would wish that
3 statement had not come in at all, but I don't believe it
4 come -- all of that video comes in like that either.

5 Q Well, what about not objecting to one, two, three, four
6 comments on throwing gang signs?

7 A No -- absolutely no justification for not objecting to
8 that.

9 Q Okay.

10 A Except, again, I didn't -- had no idea that was going to
11 come up until we were -- at that point in time.

12 Q And would you agree that's the State attempting to
13 assassinate and to link Mr. Linnen to a gang, when, in fact,
14 there was absolutely no evidence that the Solicitor had a
15 basis for it?

16 A Absolutely agree with that. And it just compounds all
17 the other stuff where I can't get any of Mr. Nichols' true
18 character in. I mean, it's just one feeding off the other on
19 the balance of the scales there.

20 Q Right. So we go from a guy that has no record all of a
21 sudden to being a gang guy, and the guy who has an actual
22 criminal record having a judge tell the jury that he doesn't?

23 A That's correct. I even believe that there's other
24 information about Mr. Nichols -- I understood he was kicked
25 out of college for stealing from a locker room, but I never

1 got any of that information. For what it's worth, I don't
2 know if it's come up, but I think Mr. Nichols was a college
3 football player and like six-foot-eight or something like
4 that.

5 Q He was a big fellow.

6 A Very big. D1-size football player.

7 Q Of course the Court called him a gentleman.

8 A That's....

9 Q All right. And just to be clear, the things that I
10 brought up, the mistrial, the gang signs, you had no tactical
11 reason for failing to object to any of those and for the
12 judge's -- I hate to call it a curative instruction -- her
13 instruction on the facts with that Mr. Jabari wasn't telling
14 the truth?

15 A Absolutely none. And all I can say that is -- and the
16 file's in the trunk of my car in the parking lot. But I
17 remember my associate and I specifically went -- every time we
18 had a break and took notes of all the bizarre things that had
19 been said off record, it was just -- my client was not going
20 to walk out of that courtroom. It was pretty apparent. And
21 why I didn't do more to stop that, I don't know. And why I
22 didn't take the opportunity for a mistrial, I have no idea
23 why.

24 Q And objecting to the charge and --

25 A Oh, yeah. And I only say the mistrial because --

1 COURT REPORTER: I'm sorry. We're talking over.

2 And you started to say, "And objecting to the charge...."

3 BY MR. NEWMAN:

4 Q And objecting to the charge and possibly making your own
5 motion or joining the State's motion for mistrial?

6 A There's no reason for me not to have done those things.

7 Q And at that point, after that jury charge, was Mr. Linnen
8 pretty much doomed, in your opinion?

9 A He was. I mean, it -- in the charge conference, I mean,
10 it was just downhill. I think at one point the judge, in
11 chambers, saying -- I don't remember, a Tammy Wynette song or
12 something, "Stand by Your Ground". And we wrote that down
13 because then she had belittled our client's defense during the
14 jury charge conference in the back. And I specifically know I
15 took notes on that and put it in my file. I never had a judge
16 sing a song, making fun of his defense back in the judge's
17 chambers. That was just bizarre.

18 I mean, that was just kind of part and parcel the way the
19 case was. You know, we were just -- our case was not
20 something that she thought was legitimate.

21 Q From start to the --

22 A -- very end. Absolutely.

23 Q Thank you, Mr. Brown.

24 MR. NEWMAN: That's all the questions I have, Your Honor.

25 Thank you.

1 THE COURT: All right. Cross-examination?

2 CROSS-EXAMINATION

3 BY MR. NEELY:

4 Q Mr. Brown, you have made a lot of comment about how you
5 weren't able to get anything in that you wanted to get in.

6 A Well, I can tell you I didn't get the good stuff in about
7 him being homicidal or I think threatening or raping two
8 girls, teenage girls with a knife.

9 Q And those were all charges. They were not convictions?

10 A They were actually actions of Mr. Nichols regardless of
11 what the Court system did.

12 Q But they were charges, not convictions; is that not
13 correct?

14 A I'm trying to think if he actually was charged with
15 anything on the homicidal ideation. I mean, I understand what
16 you're asking --

17 Q So you're saying he should have been charged with an
18 idea, a homicidal ideation, which is just an idea that he was
19 homicidal?

20 A No, I'm saying that the expert opinion that he was
21 homicidal was pertinent to or relevant to the question of
22 whether or not Mr. Linnen was actually in danger of serious
23 bodily injury or death, under prong 3 of the self-defense
24 test.

25 Q So you're not -- but you aren't counting the fact that

1 you were able to get in, what, three or four prior acts of
2 violence against his family, because you argued those
3 extensively in your opening and closing argument, didn't you?

4 A There's no question. I think I argued more than I was
5 able to prove, which I think is actually another side of
6 deficiency on my part that I promised more than I actually
7 couldn't get in.

8 Q There was testimony on all four of those incidents.

9 A Not on the one with the two women and the knife. And by
10 the way, my understanding is those two girls that were
11 victimized on that rape with the knife actually went to school
12 with Mr. Linnen and his fiancée.

13 Q I don't understand what that has to do with this case.
14 The judge ruled in a pre-trial order that that was not to come
15 in, didn't she?

16 A She did.

17 Q And so that was not part of your opening argument, was
18 it?

19 A No, I don't believe I got into that.

20 Q Or in your closing argument, was it?

21 A I'm sure it was not.

22 Q Because the judge ordered that it was not to come in.

23 A The record speaks for itself.

24 Q And -- but what was able to come in, what you were able
25 to get through witnesses, was what the incidents of violence

1 that went to the victim's character, which you were able to
2 use against him in your opening and closing argument and bring
3 out through testimony; correct?

4 A We did bring in some incidents of his character, yes.

5 Q And when the Solicitor had to defend that on his closing
6 argument, the fact that his client had assaulted his
7 grandmother and grandfather and his mother -- and his mother
8 the day of the incident; correct?

9 A That's correct.

10 Q And that was certainly a concern for their case?

11 A I think it was a concern for their case.

12 Q And then we have -- the Solicitor -- when he's asking for
13 a mistrial, for, you know, whenever your client alleged the
14 two -- I believe it was the sexual assault is what he said,
15 charges --

16 A Sure.

17 Q When -- we have about 15 pages where they go back and
18 forth on the mistrial, and the Solicitor, right before the
19 charge is given to the jury says, Your Honor, I don't think
20 this is enough. He thinks that the bell had been rung. He's
21 still asking for a mistrial because he thinks that it has not
22 done enough to cure the fact that your client was able to get
23 out, against the order of the judge, that he had two pending
24 sexual assault charges; isn't that correct?

25 A The question part I missed, but I understand --

1 Q The question --

2 A I understand all the comments. I understand factually
3 what you're setting up the question. And what's the question
4 part?

5 Q The question was, Didn't the Solicitor think it wasn't
6 enough?

7 A Well, I can answer it this way: At the end -- after the
8 case was over, I was told that the prosecutor was extremely
9 upset that Mr. Linnen was not convicted of the greater charge.
10 He thought this was a loss.

11 Q Was not convicted of the greater charge?

12 A That's correct. He was convicted of the lesser-included
13 offense on this.

14 Q Correct.

15 A And he -- the prosecutor was very upset, I was told the
16 next day, that he did not get the attempted murder conviction,
17 even though my client, in my view, should have walked on
18 justified use of force. Instead, he gets 20 years of prison.

19 So if you're asking me why the prosecutor would be upset,
20 I assume because he didn't believe he was going to be able to
21 ring the bell for the full 30 years. I think that's why he
22 was upset.

23 Q And he wasn't able to? They didn't convict him on that?

24 A That's correct.

25 Q So, in the prosecutor's view, this jury charge that's

1 been made so much of, actually hurt him in his case?

2 A I don't believe that that jury -- the instruction -- the
3 curative instruction, I don't think, hurt the State, if that's
4 what you're asking.

5 Q In his opinion, it did, because the testimony said so.

6 A I think he thinks that the fact the sexual assault came
7 out hurt him.

8 Q Correct.

9 A And to the extent that he believes that that information
10 hurt the State's case more than the instruction hurt my case,
11 but I think that the truth is, he got both. I mean, he may
12 not realize it, but, in hindsight -- because the
13 instruction -- we never had a preview on it. I'll be honest:
14 I have never heard that instruction before in my life. It
15 makes me think the judge made it up. I mean, I have never
16 seen a judge refer to one person as to the truth or a
17 gentleman and another person is somebody doing stuff wrong. I
18 mean, I have just never seen -- I have seen them tell them to
19 disregard it, but she went way beyond it and said it was wrong
20 for him to have gotten into that and all.

21 I mean, I'd love to have instructions when a police
22 officer varies a little bit from a ruling and somebody tells
23 them they're wrong and they shouldn't have done that and all
24 of this extra.

25 Q This wasn't varying a little bit from a ruling. This was

1 specifically ruled on that this issue was not to be talked
2 about; right?

3 A That's correct. And I don't believe I ever asked a
4 question inviting that answer because --

5 Q I'm not saying --

6 A Yeah, because -- and I think that's why Mr. Newman
7 brought it up. I got in trouble for leading, so I go to
8 open-ended, and my open-ended question is, "Is there anything
9 else?" And of course I think, in Mr. Linnen's mind, as a
10 layperson, he did have more information he wanted to tell the
11 jury.

12 Q And this is something I'm going to have to address in my
13 case.

14 A Sure.

15 Q Well, page 543 of the transcript, it's a little bit
16 curious to me that they even get the curative instruction
17 beforehand because, on page 543, on line 18 to 20, the
18 Solicitor says, "Your Honor, with all due respect to the
19 Court, I just don't think this curative instruction is going
20 to cut it."

21 A We never saw it.

22 Q It sounds like, from that, that it had been seen, or at
23 least explained.

24 A Mm-hmm. I mean -- and you didn't ask but I'll volunteer.
25 I think I did a good job of preparing the case for Mr. Linnen.

1 I think I came in with enough information to win it, whether
2 it was me or another lawyer. I think, from the time that the
3 trial started, it went downhill and got worse.

4 MR. NEELY: Beg the Court's indulgence.

5 (Pause in the proceedings.)

6 BY MR. NEELY:

7 Q And there's been some mention of whether it was trial
8 strategy or whether it was error to go into the Castle
9 Doctrine hearing or to ask for a Castle Doctrine hearing.

10 On page 648, Judge Goodstein indicated that she didn't
11 believe that this was Castle Doctrine appropriate, didn't she?

12 A I don't recall that.

13 Q You don't recall that?

14 A But I'll be honest: I mean, it was -- the part about not
15 asking for it, there's no question it was a strategy decision
16 by me. Honestly, though, I did not realize at the time that
17 it was a strategy based upon my misapprehension or misreading
18 of the law. And the way I say that is, after having gone
19 through this with other cases, I realize that it was going to
20 be very hard for a judge to stand up and grant immunity in a
21 case where it's not a home invader.

22 And, in fact, my previous case, it was a guy banging on
23 the door that wouldn't go away that was shot in the front
24 yard, and it was denied because there was no home invasion, of
25 the guy was trying to come inside.

1 And this case was out in public. So I figured why
2 preview the case when I can essentially get the jury to hear
3 the same stand-your-ground law, and I figured they would be
4 less -- I guess they would be more intellectually honest about
5 the factual situation that my client was in under a
6 stand-your-ground setting. But now we know that is not
7 correct, that the jury was never going to get to hear it.

8 So essentially, I thought that "stand your ground" would
9 be an issue in the trial. That's why I was willing to forego
10 the immunity hearing. But Judge Goodstein would not let
11 "stand your ground" be an issue in trial by refusing to charge
12 that language and it appears that that is correct. And so I
13 was wrong, believing that I could get the "stand your ground"
14 language before a jury.

15 Q But you're wrong in hindsight. That had not been
16 established at the time of your trial.

17 A Well, what's funny is that I think that that case -- that
18 the appellant opinion was not out yet, and it appears that
19 that ruling by that trial may have been out at that time. So
20 I am out there doing it wrong. Maybe there was another lawyer
21 out there doing it wrong also.

22 Q But certainly another trial court doesn't hold over what
23 that trial court -- Judge Goodstein was doing.

24 A But I don't know that there was even a dissent, so I
25 guess there were five justices that read it the right way and

1 I'm just a little old lawyer that read it the wrong way.

2 Q Well, you're talking about an appellant opinion that came
3 down after this trial; correct?

4 A But a unanimous one, so....

5 Q It was unanimously found after this trial; correct?

6 A Oh, I'm not going to -- there's no question that the
7 ruling was not available for either me or the judge, but
8 considering Mr. Thornton thought it was correct, and he was
9 the prosecutor; Judge Goodstein thought it was correct, and
10 five justices and some other trial judge, they all were right,
11 and I must be the one that's just wrong on it. I mean, I
12 don't know how else to say it. It must have been that wrong.

13 Q Regardless of whether there's a trial strategy or not, I
14 mean, Judge Goodstein said she didn't think it was applicable
15 to this case. So even if you had asked for it and got a
16 Castle Doctrine hearing, it seems rather evident that she
17 would have denied it.

18 A I absolutely agree that she did not like Mr. Linnen. She
19 did not agree with the facts that we were arguing, and I think
20 that that -- her opinion was so obvious that she was not
21 unbiased. And I don't know whether it was against me or I
22 don't know whether it was against my client.

23 Q I'm not asking for the bias. I'm sorry.

24 A Well, what I -- if you're asking me about that statement
25 she made, I think that that is just proof of her bias in this

1 case.

2 Q I'm asking whether you think she would deny your Castle
3 Doctrine motion.

4 A I don't know that she would have heard it. She was
5 visiting judge. Because back then, we were hearing them
6 months in advance. I mean....

7 Q That's fair.

8 A I mean, the one that I had lost right before this was
9 eventually heard, I think 14 months before your office
10 actually got the case and dropped it, ironically.

11 The judge denied me immunity but Creighton Waters (ph)
12 just dismissed it without one hearing because it was so bad.

13 Q And this is actually even before the Castle Doctrine
14 immunity was kind of trimmed down so that it could be part of
15 the trial almost?

16 A That's correct. I mean, this is back when we were doing
17 them months and years. And I'm going to tell you, that was a
18 strategy decision. After we did that one where we put up
19 hours of information so I could win immunity, and you know,
20 the State's over there just taking notes and ordering the
21 transcript to prepare for trial, I absolutely decided it was
22 not worth previewing my case to them. But in hindsight, you
23 have to do it that way. I should have read the statute
24 differently.

25 Q Just again, it is a hindsight for you to say "I should

1 have read the statute differently." You had read the statute
2 and you're interpreting to the best of your ability and the
3 justice agreed with you?

4 A What we're left with is my client being squarely within
5 the purview of the stand-your-ground law and never getting
6 that opportunity because of some scheduling that puts his case
7 after somebody's decided it's a jury trial, right, but before
8 some decision comes out about it. However you want to look at
9 it, it was a wrong decision on my part.

10 Q Why do you think you would have been granted immunity?

11 A I think he was entitled to the hearing. I don't know
12 what a judge would have done. Frankly, why should he have
13 been granted immunity? He was in a place that he had a right
14 to be. He had no ability to leave, and that seemed to be lost
15 upon everybody else in court, I guess, because he wasn't
16 driving the car, and the driver stopped the car for
17 Mr. Nichols. I don't think he did it to hurt Mr. Linnen, but
18 he had no ability to go anywhere. It's his car sitting right
19 there, and he's trapped in on the passenger side.

20 And I believe Mr. Nichols' statement was, "Are you ready
21 to die" is what he told Mr. Linnen, who, by the way, is
22 clearly eight or nine inches smaller than Mr. Nichols who is
23 a -- I want to say, within that same 12 months, had been a
24 college football player. I mean, we're not talking about
25 decrepit man. We're talking about a mean, big guy. I don't

1 know what else he would have done.

2 And he -- his gun was in the glove box. That's a lawful
3 place to have it. He took the gun out of the glove box after
4 being accosted. I mean, I think it fits every single bit of
5 it.

6 Q So despite the fact the Castle Doctrine requires you to
7 be in your home or in your car while the accosting is taking
8 place, as you already mentioned yourself, you lost a Castle
9 Doctrine hearing when the man was on the front door and in the
10 yard --

11 A Maybe I'm still misreading it. I don't believe it
12 requires you to be in your car. In a place that you have a
13 right to be. But he was -- he did happen to be in his car.

14 Q And then he got out of his car and advanced towards the
15 victim, according to the State's case?

16 A I would suggest to you my reading is he got out of the
17 car to use the deadly force against the attacker.

18 Q And the attacker being an unarmed man that's hurling
19 insults and Coke cans?

20 A I would suggest that man could kill somebody with his
21 bare hands. There's no question about it. He is a bad, mean
22 guy. And when police officers joke with me in the hallway,
23 that was a public service shooting, that's exactly what it
24 means.

25 I mean, it's a small community. I mean, when you hear

1 the police laugh about Mr. Nichols being shot, that's not the
2 same as it gets pitched towards the jury.

3 Q And the Solicitor had to address that. He had to address
4 not only the -- the instances that you were able to get in,
5 but also about reputation of the victim?

6 A I think if Mr. Nichols would have been shot by somebody
7 besides Mr. Linnen, maybe somebody who held down a white
8 collar job, I don't think he would have ever been charged.

9 MR. NEELY: I think the witness is not --

10 THE COURT: Stick to the --

11 MR. NEELY: -- my questions.

12 THE COURT: Stick to the questions.

13 THE WITNESS: Yes, sir.

14 MR. NEELY: That's all I have for this witness, Your
15 Honor.

16 THE COURT: Any redirect?

17 MR. NEWMAN: Just briefly, Your Honor.

18 REDIRECT EXAMINATION

19 BY MR. NEWMAN:

20 Q I just seem to get lost on different roads on this thing.
21 The fact is, Mr. Linnen not being experienced, was not advised
22 as to his right to an immunity hearing and made a -- couldn't
23 make an informed waiver of whether he wanted to go with your
24 strategy or persist in the hearing?

25 A I never advised him on that.

1 Q Okay. As to the issue of a mistrial, Mr. Linnen was not
2 consulted about what a mistrial was, what his rights were, and
3 whether he wanted you to accept the mistrial or try and get --

4 A I don't -- and I don't have any evidence that I did go
5 over there with him.

6 Q Okay. The -- in your opinion and the years of practicing
7 criminal law, was that jury charge prejudicial to Mr. Linnen?

8 A Absolutely.

9 Q All right. Did it state facts -- judge charging the jury
10 on facts?

11 A It did, and I believe it even had conclusions about the
12 character of the people.

13 Q Okay. And you did not object to the charge?

14 A I did not.

15 Q No strategic reason for that?

16 A No. In fact, I -- especially bad -- failure to object in
17 light of the fact that I asked to hear it before it was given,
18 and then never objected afterwards.

19 Q She immediately cut you off and said "send for the jury"?

20 A (Witness nodding.)

21 Q Okay. And there was no reason not to object to the
22 Solicitor's repeated use of attacking your client's character
23 by saying he was throwing gang signs at a strip club?

24 A I think, at that point, I had just been overwhelmed. I
25 mean, I didn't know that video was out there. I certainly

1 didn't respond to it correctly.

2 Q Okay. And you made no Rule 5 objection of just getting
3 hit with new evidence?

4 A No, I did not.

5 Q Is that an objection that could have been made?

6 A Honestly, no, because I think Rule 5, although I don't
7 like it this way, I think it's kind of limited to what they
8 introduce in their case in chief. So I don't think I would
9 have been entitled to it. It was very clear that they knew
10 about it because almost instantly, they're giving me that
11 video. I mean, that's -- like, as soon as he finishes,
12 they're going to introduce that video.

13 Q But the sole purpose of the video was to show that -- to
14 attack your client's character as to throwing gang signs and
15 being in a strip club and being somewhere he shouldn't have
16 been because he's --

17 A Ostensibly it was just to counteract that statement he
18 made about being a family man, I believe. And I can't
19 remember the exact quote, but that's what I believe opened the
20 door. It appears that the character information that came in
21 is way beyond what I'm going say is fair comment.

22 Q And there was no evidentiary foundations --

23 A For the gang signs.

24 Q -- that this gentleman was in a gang, knew what a gang
25 sign was?

1 **A** No.

2 **Q** Nor the detective was unable to testify to what a gang
3 sign was?

4 **A** And I don't know why I would have said something like he
5 could stay out but then get argued later. I don't know why I
6 would have said that.

7 **Q** Whether that was said or not, the fact is that -- go to
8 page -- well, page -- here it is. Comes from page 616. He
9 constantly talks about being at the strip club and throwing
10 gang signs. And that would have gone directly against your
11 client's character and credibility?

12 **A** Abs -- way outside the scope of what was before the Court
13 on the shooting between him and Mr. Nichols.

14 **Q** And in the trial itself, there was no testimony about him
15 being in a gang or gang signs?

16 **A** If I'd known, that would be information about it.

17 **Q** Thank you.

18 **A** Had no indication.

19 Thank you.

20 **THE COURT:** Anything further from this witness?

21 **MR. NEELY:** Not from the State, Your Honor.

22 **THE COURT:** All right.

23 **MR. NEWMAN:** No, sir, Your Honor.

24 (The witness exited the courtroom.)

25 **THE COURT:** Any further witnesses?

1 MR. NEWMAN: No, sir, Your Honor. That would be -- with
2 allowing the record to be held open, the specific pages of
3 transcript that I can copy those and ask to make those a part
4 of the record in this case if I can get them to your -- to the
5 State and to your chambers.

6 MR. NEELY: I believe they're already part of the record
7 in this case, Your Honor.

8 MR. NEWMAN: If the transcript itself is part of this
9 record, then that's fine.

10 THE COURT: The Attorney General has submitted the
11 transcript as part of --

12 MR. NEWMAN: Okay. Then you'd have it, Your Honor.

13 THE COURT: Okay.

14 MR. NEWMAN: And just a brief summation, Your Honor, if
15 the Court wishes to hear from --

16 THE COURT: I'll allow both attorneys to give me -- I'm
17 going to -- and gentlemen, I'm going to take this under
18 advisement. I want to read the transcript.

19 MR. NEELY: Your Honor, I realize this is just a close of
20 the defense case or the -- sorry, the applicant's case;
21 however, I did not receive the amendment until this morning,
22 and I do not disbelieve Mr. Newman when he says he e-mailed it
23 to me. I have looked in my e-mail and was unable to find it.
24 I was copied on the e-mail that your clerk received, which
25 would be the amendment.

1 I didn't know about it until this morning. I would ask
2 for some time. I believe I would like to call Mr. Thornton,
3 who is the prosecutor in this case, to maybe fully flesh out
4 some of the allegations that have been made that I did not
5 know were going to be made in this case, if Your Honor would
6 grant me some time, maybe I can try to get here this afternoon
7 after lunch.

8 THE COURT: Well, if -- I'm going to be here all week for
9 PCR hearings. So if you want to -- let's see. Mr. Newman,
10 you up here anywhere this week?

11 MR. NEWMAN: I am not, Your Honor. I can -- when we take
12 a break, I can step out and call my office. I know I'm in
13 town this week, so I mean, I could probably make myself -- as
14 long as we could schedule a time. I could make myself
15 available.

16 THE COURT: All right. This is what I'll do. I'll hold
17 the record open for the rest of the week and the two of you
18 sit down and if you need to supplement the record, just make
19 sure that you specifically note what you're wanting to put in
20 the record, and Mr. Newman has notice of that, and then I'll
21 hold the record open and allow you to do that. Just
22 coordinate the schedule.

23 You're going to be in town this week?

24 MR. NEWMAN: I think we can work around the courts and
25 the Attorney General's schedule to put it in some way.

1 THE COURT: And your client's here from the Department of
2 Corrections.

3 THE APPLICANT: Columbia.

4 MR. NEWMAN: He's in Columbia, yes, sir. I guess they
5 would keep him here. No?

6 THE COURT: When do y'all plan on taking him back?

7 DEPUTY: We can keep him here.

8 THE COURT: Can you keep him here until tomorrow?

9 DEPUTY: Yes, I can do that.

10 THE COURT: Y'all talk this afternoon, and if you need to
11 get him up here this afternoon, like I said, I'll be here.

12 MR. NEELY: Thank you, Your Honor.

13 MR. NEWMAN: Yes, sir.

14 THE COURT: Okay.

15 (At 1:19 p.m., the above hearing was adjourned sine die,
16 with the record held open.)

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1 CERTIFICATE OF TRANSCRIBER
2

3 I, Bobbi J. Fisher, RPR, do hereby certify that the
4 foregoing transcript is a true and accurate record of the
5 proceedings; that said proceedings were transcribed to the
6 best of my ability from the audio recording as provided; and
7 that I have no interest, financial or otherwise, in this
8 proceeding.
9

10
11 Bobbi J. Fisher

12 Bobbi J. Fisher, RPR, Transcriber

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STATE OF SOUTH CAROLINA
FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT
COURT OF COMMON PLEAS
CASE NO. 2016-CP-07-00570

JABARI LINNEN,

Petitioner

Vs.

STATE OF SOUTH CAROLINA,

Respondent.

TRANSCRIPT OF POST-CONVICTION RELIEF HEARING

BEAUFORT, SOUTH CAROLINA

February 15, 2017

VOLUME 2 of 2

B E F O R E:

THE HONORABLE R. SCOTT SPROUSE, JUDGE

Wanda H. Rowe, CVR-M
Official Court Reporter

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I N D E X

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P R O C E E D I N G S

(Whereupon, the following proceedings started 1:12 p.m.)

THE COURT: The record was left open to allow the State to present a witness.

Mr. Neely, do you have your witness here?

MR. NEELY: Yes, sir, Your Honor.

THE COURT: All right. I'll -- if you'll come around to the witness stand.

MR. NEELY: The State would call Sean Thornton.

THE COURT: Mr. Thornton.

SEAN THORNTON,

the witness, after having been duly sworn, was examined and testified to as follows:

DIRECT EXAMINATION

BY MR. NEELY:

Q Mr. Thornton, if you would, would you give us your current place of employment and some of your background for your work.

A Yes, sir. My name is Sean Thornton. I'm currently the Deputy Solicitor for the 14th Judicial Circuit. I supervise all five counties for the Solicitor Isaac McDuffie Stone, III. I started practicing law in 1998. I was a public defender in Colleton County. I stayed there for I think about four years and then went into -- I was a part-time County attorney, which I still am a part-time County attorney for Colleton County,

1 and in private practice for about a year.

2 In 2003, I joined the Solicitor's Office as an assistant
3 solicitor under Randolph Murdaugh, III, in Colleton County and
4 then again still as part-time County attorney for Colleton
5 County.

6 And when Duffie Stone was elected or appointed solicitor
7 by the Governor in -- in January of 2006, he asked me to be
8 deputy over his four -- what we call the Western Division of
9 the rural counties, which is Allendale, Hampton, Jasper, and
10 Colleton. I became the deputy solicitor there in 2005.

11 And then in 2011, his other deputy solicitor, who is
12 Angela McCall-Tanner here in Beaufort County, she went into
13 private practice, and he asked me to take over Beaufort as
14 well and transferred me from the Colleton office to the office
15 here in -- well, it's in Beaufort County; it's not in
16 Bluffton.

17 Q Okay. And were you the solicitor that was over the
18 Jabari Linnen case?

19 A Yes, sir.

20 Q And have you had an opportunity to review that
21 transcript?

22 A Yes, sir. And I did bring my tablet, for lack of a
23 better word, with me so I can refer to it, if need be. I did
24 review it, but, obviously, it's a fairly long transcript, as
25 most of them are.

1 MR. NEELY: Judge, may I hand him his --

2 THE COURT: Yes, sir.

3 BY MR. NEELY:

4 Q And if I could call your attention to page 532. And on
5 that page, Mr. Linnen is on the stand and makes reference to
6 sexual assault charge -- page 531, line 16 -- and make a
7 motion for a mistrial. Do you recall that?

8 A Yes, sir, I do. And I recall that, in general terms,
9 when you contacted me about needing me to -- possibly needing
10 me to testify and then I went back through the transcript to
11 kind of refresh myself a little bit more on the specifics, but
12 I do remember that, yes, sir.

13 Q And do you recall the judge, throughout the trial, making
14 a ruling that that case must not be mentioned?

15 A Yes, sir. That had been done. There had been extensive
16 discussions. Jim Brown is the attorney on the other side. He
17 and I have worked together. This is a relatively -- although
18 a large area circuit, there's not that many lawyers that do
19 criminal work. Obviously, I'm very familiar with Mr. Newman
20 at counsel table, Jim Brown. We have known each other for
21 several years.

22 And this had been discussed. I had discussed it with
23 Jim, I think prior to the trial, but I know it had been
24 discussed in pretrial, and I believe the judge had made a
25 ruling specifically on these issues.

1 And what upset me about it more than anything, which, as
2 I look back, I -- I think that clearly came across probably
3 more than I would have wanted it to, but what upset me more
4 than anything was I felt like Mr. Linnen did that on purpose,
5 that he had been in the courtroom --

6 MR. NEWMAN: Your Honor, I'm going to object to that
7 testimony as to what Mr. Linnen was thinking in his mind while
8 he was on the witness stand, while he was not consulting with
9 his attorney. And whatever the solicitor's opinions might be,
10 I think, are objectionable and inadmissible. He can't
11 possibly know what Mr. Linnen, who had never been in a
12 criminal courtroom in his life, knew or did not know about
13 rules of the court.

14 MR. NEELY: Your Honor, from the State's perspective,
15 that is a large portion of what the judge had to consider, was
16 whether it was intentional.

17 THE COURT: I'm going to overrule the objection.

18 MR. NEWMAN: Thank you, Your Honor.

19 BY MR. NEWMAN:

20 Q And why did you believe that to be an intentional act?

21 A Well -- and so the Court knows, the reason I brought that
22 up is that's why -- one of the reasons I asked for a mistrial,
23 because I did feel like it was intentional conduct, and that's
24 what brought me to that. And I think I said in the record
25 that I have done that. I think at that time I had done it

1 other one time. I don't know that I've done it again since
2 then.

3 So me moving for a mistrial is a very rare thing. I take
4 it -- I don't take it lightly. I think, in that case, we had
5 to fly in a witness. So those things are never certainly
6 taken lightly by me, and that's what drove me to -- one of the
7 reasons it drove me to do that was because I did feel like
8 Mr. Linnen had ample opportunity to understand that that was
9 not to be gone into and then he went ahead and did it anyway.

10 One thing I did want to clear up, I did make a reference
11 -- I saw in the transcript that I think he did it
12 intentionally, and I hope I cleared this up on the record. I
13 looked in the transcript for it. When I said that, I meant
14 "he" being Mr. Linnen, not his attorney. I don't think -- I
15 don't think Mr. Brown intended to bring that out. He does not
16 have that reputation, and I've never dealt with him where he
17 would have done something like that on purpose.

18 So just to make it clear for the record here, I thought
19 that Mr. Linnen had done it knowing that that -- the sexual
20 assault allegations were not to be gone into.

21 Q And when you say he had ample opportunity to understand
22 that it would not be gone into --

23 A He was present in the court when the judge was ruling on
24 these matters as to what could and could not be gone into. In
25 the transcript, it was early -- much earlier on in trial we

1 had talked about it during pretrial. Obviously, as the
2 defendant, Mr. Linnen is in the courtroom when that is being
3 -- when that is being discussed.

4 So any rulings that the judge makes on the record, he's
5 going to be in the room for and was in the room during that
6 entire trial.

7 Q And was the judge vague in her ruling that it was not to
8 be gone into?

9 A I don't believe she was vague at all, no. I don't have
10 the specific language in front of me, but I think everybody in
11 the room certainly understood that.

12 Q When the judge tries to give a curative instruction and
13 you still ask for a mistrial, what is your opinion as to the
14 curative instruction and how that affected the prejudice in
15 your case?

16 MR. NEWMAN: Your Honor, I would object to that. I think
17 that's a ruling for the Court. The solicitor is, obviously,
18 going to have an opinion for the State. He's the one that put
19 this man in prison. And I don't think his opinion as to the
20 prejudice prong matters. I think it's what -- that's a ruling
21 for the Court.

22 THE COURT: Sustained.

23 BY MR. NEELY:

24 Q When the judge gave a curative instruction, did you still
25 ask for a mistrial?

1 **A** Not after she gave the curative instruction, I do not
2 believe so. I think I gave it -- once she ruled that she was
3 going to give a curative instruction, I do think I asked to be
4 heard again and reiterated my desire that we -- that she
5 should consider a mistrial. But she overruled it. I know she
6 struggled with it, as I did, in asking for it. She said that
7 as much on the record.

8 I do not -- I'm going by memory now. I did not see that
9 in the transcript. I do not believe I asked for a mistrial
10 after she gave the curative instruction at the time she gave
11 it. Once she brought the jury back in and gave the curative
12 instruction, I do not think I asked for a mistrial again.

13 **Q** Do you recall whether the judge told you what she was
14 going to say in the curative instruction before she gave it?

15 **A** She said that in general terms. She gave several cues as
16 to what she was likely to do in a curative instruction, and I
17 did look at that in the transcript. I think Mr. Brown made
18 several objections or -- asking about clarifications as to
19 what the language would be, not wanting it to be seen by the
20 jury that -- as negative towards his client.

21 I mean, there was a lot of dialogue. There was, frankly,
22 more dialogue, it looked like, between Mr. Brown and the judge
23 than myself, other than when I reiterated my desire for a
24 mistrial.

25 Once she started talking about the types of things she

1 was going to say in the curative instruction, she had a pretty
2 extensive conversation on the record with Mr. Brown about his
3 desire that -- that it not be phrased in such a way to be --
4 negatively impact his client.

5 Q Kind of switching gears now, do you recall there being
6 talk at an immunity hearing the Castle Doctrine hearing?

7 A I do not. If you've got something specific in the record
8 -- I know that we -- I don't recall any specific conversation
9 I had with Mr. Brown outside the presence of the Court. I do
10 believe that I may have had conversations internal with my
11 office. I know I talked to somebody; I just can't swear that
12 it was with Mr. Brown.

13 I mean, obviously, I don't think it applies, but I don't
14 remember specifically. I do think I talked about it with him,
15 but I can't guarantee it. But it was not on the record, that
16 I recall, anything at trial. But I do recall some
17 conversations ahead of time, and I think I talked about it
18 with Mr. Brown, but I cannot swear that I did.

19 Q But Mr. Brown did ask for a stand-your-ground instruction
20 to be made?

21 A He did.

22 Q And you opposed that, and the judge sustained your
23 opposition?

24 A That is my recollection, yes, sir.

25 Q And, again, switching gears, do you recall a Facebook or

1 YouTube video that you entered into evidence in reply to
2 defendant's testimony?

3 A Yes, sir.

4 Q What was that -- contained in that?

5 A Basically, as I recall, the defendant, on direct, got up
6 and made in general -- and I know that, obviously, the record
7 speaks for itself; it's in the transcript. But made some
8 reference to the fact that he was a family man, this is not
9 what he's about, he doesn't hang out on corners. He works and
10 goes home to the family, something like that.

11 And I had a -- either a Facebook post or a YouTube --
12 forgive me; I'm not sure exactly where it came from. I think
13 it was a Facebook. It was off the internet, that the
14 detective had found with him -- the defendant in the case,
15 Mr. Linnen, at a strip club throwing up what at the time I
16 understood to be gang signs and what law enforcement also
17 indicated to me, when I asked them, were gang signs.

18 Once he -- and for the record, I had not shown that to
19 Mr. Brown ahead of time. I don't think I was required to
20 under the rules of evidence, because, obviously, I can't use
21 it in my case in chief. I don't know whether his client is
22 going to testify or not, and it certainly wasn't exculpatory,
23 in my opinion.

24 However, as soon as Mr. Linnen said that, once we took a
25 break -- I think it was a lunch break -- Mr. -- I brought

1 Mr. Brown over, we talked about it. I'm pretty sure I showed
2 it to him on my computer at counsel table. I know we
3 discussed it extensively because my recollection is he sent --
4 he asked Mr. Linnen or somebody -- I think it was
5 Mr. Linnen -- to go and let his either girlfriend or wife --
6 forgive me; I don't remember which one -- know that it was
7 coming because I don't think she knew it was coming. And
8 obviously, on the record, you can see that we had some
9 extensive discussions about it as far as what I would play,
10 that I wouldn't play the entire thing. I think he talked
11 about something about a shirt with a symbol on it he had an
12 issue with, and there was something else he mentioned about
13 asking me not to have -- not to try to qualify the officer as
14 an expert in gangs so as not to introduce that in direct
15 testimony, but -- in other words, in negotiation, that he
16 would not object to me using the gang sign reference in
17 closing arguments, but that to not try to put that in in
18 direct, from an expert witness.

19 So we had extensive discussions about it prior to it
20 being played, and we also put it on the record with the judge.
21 That's all. And I think he objected for foundational purposes
22 and negotiated with me on what -- what he would not object to
23 from a perspective of putting this piece in and would not
24 object to me using the reference in closing so long as I
25 didn't try to put in a gang expert to say that they were gang

1 signs from a gang expert.

2 Q So a portion of the video that was played for the jury
3 was, I guess, edited to some extent?

4 A Yeah, we didn't play the -- I don't believe we played the
5 whole thing. I don't remember specifically what we cut out,
6 but we played a -- I think the word I used was "snippet." I
7 think it was a longer video. And we played a portion of it
8 that showed Mr. Linnen at the club.

9 Q And that was just in response to --

10 A Yes, sir, to him making the statement he was just a
11 family man and all he did was go to work. And, again, I'm
12 paraphrasing; I know the record speaks for itself. But
13 something to that effect, yes, sir.

14 MR. NEELY: That's all the questions I have, Your Honor.

15 THE COURT: All right. Mr. Newman, any cross?

16 CROSS-EXAMINATION

17 BY MR. NEWMAN:

18 Q As to the statement as to he's a family man, you had no
19 evidence you could introduce before this jury of any arrest or
20 criminal record that Mr. Linnen had because he had none; is
21 that correct?

22 A I believe that's correct, yes, sir.

23 Q All right. And as to the discussions, as I read them,
24 Jeremiah Frazier would not have been qualified to say what
25 gang signs were and what gang they were specifically related

1 to?

2 A Jeremiah would not have. I believe, at the time, there
3 may have been someone either in Colleton County or in Beaufort
4 County that I would have tried to get here to do that, but no,
5 sir, I do not believe Jeremiah -- and I don't think he is now.
6 I don't know that he is a gang expert.

7 Q He's not.

8 All right. And you had no witness in voir dire that was
9 listed that would talk about gang signs?

10 A No, sir. I would have had to ask the Court to allow them
11 to testify. And, again, I don't remember specifically who
12 that would have been. I think there was somebody over in
13 Colleton that had been to some training that we may very well
14 have been able to do that, but I did not have anybody listed
15 on voir dire, no, sir.

16 Q All right. And the State had no knowledge whatsoever
17 that Mr. Linnen was associated with a gang, was a member of a
18 gang?

19 A Other -- other than what was on the video, no, sir.

20 Q Okay.

21 A And when I say "associated," I mean, he's in the presence
22 of -- he appeared to be partying with people who were
23 identified as likely gang members and throwing up gang signs.
24 But other than the video, no, sir, I had no other evidence.

25 Q Well, you know that but the jury did not know that.

1 Wouldn't you agree there's not one lick of evidence that this
2 defendant was a member of or associated with any gang?

3 A Other than what's on the video, yes, sir, I think that is
4 correct.

5 Q Okay. And as to the video, there's no testimony in the
6 record about gang signs, about any association that Mr. Linnen
7 may have had with a gang, and there's specifically no
8 testimony that any of the other persons in the video were
9 members of any gang that ever went before the jury; is that
10 not correct?

11 A That is correct, yes, sir.

12 Q All right. And you, in your closing -- let me ask you
13 this, before I get to that, if this is your recollection, that
14 what this case boiled down to, other than a co-defendant named
15 King David Williams --

16 A Yes, sir.

17 Q -- who really didn't see a whole lot of anything, we kind
18 of call him a zero witness. He helped Jabari a little bit and
19 he backed up your version as he said Jabari was firing a
20 weapon.

21 A Yes, sir, I think that's fair. I don't know that he gave
22 a lot to either side. You know, if I had to tell -- if I had
23 to pick one, I'd say he helped Jabari more than me, but I
24 don't know that he was a tremendous witness for either side.

25 Q Right. He was a subpoenaed street witness who didn't

1 want to be there and he was going to be as minimal as he could
2 with everybody?

3 A Yes, sir.

4 Q Wanting to get out of there?

5 A Yes, sir, as you and I are very familiar with.

6 Q Yes. And his testimony was very short?

7 A It was short, I believe, yes, sir.

8 Q All right. And so in this trial -- the question is not
9 whether or not Jabari fired at and struck Mr. Nichols. The
10 question was, basically through -- and forensics really didn't
11 help you -- the basic question before this jury was the
12 credibility of Mr. Linnen that would have had to testify to
13 set up a self-defense; correct?

14 A I think his credibility was at issue, certainly.

15 Q Right. And he was the only one that could set up,
16 basically, his self-defense?

17 A Yes, sir.

18 Q He had self-defense charged.

19 A Yes, sir.

20 Q Based on his testimony.

21 A I think he would certainly be the one in the best
22 position, since Mr. King David did not assist a whole lot in
23 that regard.

24 Q Right. So my point is, if Jabari had not testified,
25 Mr. Brown would not have been able to get a self-defense

1 charge; wouldn't that be correct?

2 A It would have been unlikely. It's hard for me to
3 remember every scrap of statement and everything else. As you
4 know, Mr. Newman, there are ways to sometimes do that. I
5 cannot sit here and tell you I am aware of any other way he
6 would have done that.

7 Q Because, basically, you had your alleged victim, Trevon
8 Nichols, Trey Nichols, that said he just came at me and he
9 broke out a gun and he started blasting shots at me?

10 A Right. And you also had some statements and -- physical
11 evidence about him walking -- him being your client,
12 Mr. Linnen, walking around someone to get to Mr. Nichols to
13 approach him when he supposedly already had the gun out were
14 was getting a gun or might be armed with a gun and things like
15 that.

16 Q Correct. And that's my point.

17 Without Mr. Linnen explaining what he did -- and that's
18 all credibility for the jury -- explaining what he did and how
19 it went down, there is no self-defense?

20 A There would very likely not have been a self-defense
21 charge had he not taken the stand in this case. I think
22 that's fair to say.

23 Q Okay. So would you agree with me -- and this is on page
24 615 in the transcript -- toward the start of your closing
25 argument, you say that now character reputation, it's also

1 about credibility. It's about whose story, whose testimony
2 matching the evidence.

3 So the State had recognized what this was was a pitting
4 between Mr. Nichols' version of this event and Mr. Linnen's
5 version of this event; would that not be true?

6 A Other than the use of the word "pitting," as you know,
7 which is a no-no in court, but yes. I think that -- I think
8 that certainly a large portion of this case came down to that.
9 Absolutely. I think everybody recognized that.

10 Q For the jury to believe Trevon Nichols, then Mr. Linnen
11 would be guilty of either ABWIK or ABHAN?

12 A Certainly would be possible. As you know, Mr. Newman,
13 juries do strange things for strange reasons, but yes, sir.

14 Q I understand.

15 If they believe Mr. Linnen's version of events, they
16 would have found him not guilty based on the judge's
17 self-defense charge?

18 A That is entirely possible.

19 Q Okay. And on page 616, you make well use of the word
20 "gang signs" and I'm quoting from 616. He's saying right
21 before a trial decides, it's a good idea to go to the strip
22 club and throw out gang signs.

23 Did Mr. Brown do anything to limit you or Jeremiah
24 Frazier from testifying that the Coastal Club was a strip
25 club? Was there any reason the jury needed to hear that

1 rather than it was just a nightclub?

2 A I don't recall any specific discussions or limitations
3 about strip club. I think the limitations were in reference
4 to not putting in gang signs or gang activity in direct
5 testimony via an expert witness and limited me to using it in
6 closing. But no, sir, not as to strip club versus nightclub.

7 Q And you say "throw out gang signs." And you do say, "I
8 don't care what club he's in, but the fact is, he's throwing
9 out gang signs"?

10 A Yes, sir, I did say that.

11 Q "I don't care if he's sitting on a street corner, he's
12 throwing out gang signs"?

13 A Yes, sir.

14 Q Typical family man that don't do any wrong, won't throw
15 out -- don't throw out gang signs.

16 A Yes, sir.

17 Q Mr. Brown objected to none of that?

18 A That is true.

19 Q All right. And would you agree that that impacts upon
20 Mr. Linnen's character? I mean, you basically associated him
21 with being in a gang, at a gang party, without any evidence
22 being heard in front of the jury?

23 A Do I think that the fact that he claimed to be a family
24 man but was out at a nightclub, throwing up gang signs with
25 known gang members impacts his -- impacts him? Yes?

1 Q Yes. And that's why you did it. That strip club --

2 A Absolutely.

3 Q -- throwing out gang signs?

4 A Yes, sir.

5 Q And you do agree the jury had absolutely no evidence
6 before then about gang signs, what they are, or any
7 affiliation that this defendant was a gang banger, gang
8 member?

9 A Yes, sir, that is true.

10 Q And Mr. Brown made no objections to any of that?

11 A At that time, no. Again, all those discussions occurred
12 prior to the introduction of the video, which is referenced in
13 the transcript, which I know you have.

14 Q And Mr. Brown didn't object to the video?

15 A He objected, I think, on foundational grounds --

16 Q Other than that --

17 A -- talking about it --

18 Q -- put Mr. Frazier up to lay the foundation?

19 A Yes, sir. And other than the limiting that we did as far
20 as it would be a piece of it and not the whole thing and what
21 I have already answered, which I know I won't go into again.

22 Q Okay. But Mr. Frazier did not give any testimony about
23 gang signs, about any other patrons of the clubs, whether or
24 not they were gang members or affiliated with gang members?

25 A No, sir.

1 Q None of that came before the Court?

2 A We did not. As I understood, that was the agreement we
3 reached, and I tried to live up to that agreement.

4 Q Okay. And when you made the argument on page 616,
5 Mr. Brown didn't object. And it's all of our understandings
6 that, if you have an objection, it must be contemporaneously
7 made to be preserved; correct?

8 A Yes, sir, that is my understanding.

9 Q Okay. Same rule for the State as it is the defendant?

10 A That is my understanding, yes, sir.

11 Q Okay. Now -- and you were at the trial. Obviously, I
12 wasn't but....

13 A Yes, sir.

14 Q Knowing you, the minute Mr. Linnen had mentioned
15 something about "you mean the sexual assault charges," it
16 says, "SOLICITOR THORNTON: Objection, Your Honor." I'm sure
17 you came up out of your chair immediately?

18 A Very quickly, yes, sir.

19 Q Okay. And the judge did the correct thing. I think you
20 and Mr. Brown both wanted the jury recessed, which Judge
21 Goodstein did that?

22 A Yes, sir. Obviously, as you know, Mr. Newman, we're not
23 going to make those kinds of objections in front of the jury,
24 so the judge did excuse the jury, I believe, at that point or
25 very -- I think she did it for the break, like recessed them

1 for a little while.

2 Q That's correct.

3 And you laid out your record, you laid out the correct
4 standard that you don't believe there was any curative
5 instruction that would have gone far enough to unring the bell
6 you said or disavowed the jury from hearing that Mr. Nichols
7 at least had been arrested on sexual assault charges?

8 A Yes, sir. I did not -- at the time, I asked for the
9 mistrial because I thought it was of manifest necessity, which
10 I believe was the standard and is the standard --

11 Q Still the correct standard?

12 A And that's -- I based it on the fact that the defendant
13 in the case had indicated, as you said, you know, credibility
14 was important, as it is in every trial; that the alleged
15 victim in the case was basically a rapist, because that's what
16 your client indicated when he said that. So yes, sir.

17 Q And charged with -- and then you immediately objected?

18 A I did.

19 Q And there was no further discussion of that.

20 All right. And it was --

21 A I'm sorry, Mr. Newman. Not in front of the jury.

22 Q Not in front of the jury.

23 A No, sir, we didn't.

24 Q And if I glean from the record, it was the State's
25 position that you were worried about the credibility being

1 impeached of Trevon, the alleged victim in the case, because
2 you recognized that, in order to secure a conviction, that
3 they would have to find Trevon credible in his version of
4 events that happened?

5 A In a way, yes, sir. As you know, Mr. Newman, you and I
6 have both done these trials a long time. It would -- in my
7 opinion and still would be my opinion today, if you were to
8 ask me without any benefit of hindsight that having someone
9 who is an alleged victim in a shooting case who is identified
10 as a rape -- rapist or a sexual assault perpetrator, it would
11 be difficult to get a jury, even with the judge's curative
12 instruction, to get the jury to unring that bell. Once they
13 have heard that, it's hard for them to unhear it sometimes.

14 Q I understand. And you and I, on both sides of the fence,
15 have tried cases where a jury has basically no sympathy for
16 the victim and they might just let the defendant go --

17 A Yes, sir.

18 Q -- no matter the circumstances.

19 A No matter the legality of it, they may very well do that.

20 Q All right. Now, the Court -- and I agree with your
21 settlement. The Court -- after you make a well-thought-out
22 reason for the mistrial, you set out the manifest necessity
23 standards, you state out the fact that you had to corral or
24 run down and pay for a witness to come down from New York, and
25 I believe your recollection was that was either the first or

1 second time in 15, 16 years of practice you had ever asked on
2 the -- or from the State's behalf for a mistrial?

3 A Yes, sir. And I will tell you, I mean, I thought about
4 this after the lawyer for the Attorney General's Office called
5 me. I think -- I know it's less than five times and I have
6 been doing it now almost 20 years. So I don't know that I
7 have done it more than two or three, but certainly less than
8 five times. I don't do it lightly.

9 Q All right. And then other -- quite opposite from the
10 defendant, you have to be really careful about asking for a
11 mistrial because if a Court finds there was not manifest
12 necessity, it's a jeopardy issue?

13 A It is. Jeopardy would have attached at that point.
14 Although, as I stated in the record -- and I think it's still
15 the correct statement of law -- you cannot get a jeopardy
16 attachment in your misconduct or your issue is what causes the
17 mistrial under a manifest necessity standard. And my position
18 was that Mr. Linnen -- and again, not to rehash it all, but it
19 was my position that he had intentionally mentioned that
20 knowing he shouldn't have. So that was -- I think I
21 referenced that actually in the transcript to the judge. I
22 don't believe that you get a jeopardy attachment when you have
23 caused, by your conduct, what requires a mistrial.

24 Q I understand that, but my issue is the State will be
25 particularly careful --

1 A Yes, sir.

2 Q -- in doing it.

3 A defendant, in other words, we ask for mistrials all the
4 time. It's a freebie if we get one --

5 A Yes, sir.

6 Q -- no consequences, other than we get to start again.

7 A Right.

8 Q And we get to get transcripts of what the witnesses said,
9 we know what the State is going to attack us with, those type
10 of things.

11 A Yes, sir, I agree.

12 Q All right. And Mr. Linnen at this time -- do you recall
13 whether or not -- he testified he was out on bond. Do you
14 disagree with that?

15 A No, sir. I think that's accurate, because as I indicated
16 earlier, that -- when the video came out -- and obviously,
17 your client would know this better than me -- but I am very
18 confident that he asked his client to go out and talk to his
19 significant other so that she would know. Now, this part is
20 an assumption on my part, I'm assuming so she would not get
21 upset or say something or act out in the courtroom by being
22 surprised.

23 So that makes sense because, had he been in custody, he
24 wouldn't have been able to walk out of the courtroom and do
25 that. So I do believe he was on bond at the time, yes, sir.

1 Q So the only ramifications to Mr. Linnen, if Mr. Brown had
2 not resisted the mistrial at least at this point -- we're
3 going to talk about another point in time -- the only
4 ramifications would have been everybody packs up, goes home,
5 and you reschedule the case?

6 A Yes, sir, and you have a different jury and....

7 Q Different judge, different jury, who knows.

8 A Yes, sir.

9 Q Okay. And do you recall -- and I'll give you excerpts if
10 you need it -- Judge Goodstein was very much telling Mr. Brown
11 that she did not believe that Mr. Linnen could get a fair and
12 unbiased trial were she to give a curative instruction, yet,
13 Mr. Brown assisted. And Judge Goodstein kept saying, I'm
14 going to have to say some things that you're not going to
15 like.

16 A Yes, sir. Let me answer that this way.

17 Q Sure.

18 A I believe what she was saying was I don't know how to
19 give a curative instruction and not basically penalize your
20 client. And the way she was saying that was because she
21 was -- she started out, for lack of a better word -- and I
22 know this is not going to translate well on the record -- but
23 she started out at about 100, she was not happy. And by the
24 time she actually gave the instruction, she had come way down.
25 Because I read the curative instruction again to make sure,

1 and in my opinion, it was very benign compared to some of the
2 statements she was making when she started out, if you look at
3 the record, about her -- the trouble she was having trying to
4 come up with a curative instruction that would still be fair
5 to Mr. Linnen.

6 And then once she actually gave the curative instruction,
7 if you read it, it seems to be pretty benign. And again, I
8 realize, we may disagree about that, but....

9 Q Well, I'd object to your testimony on that. I think the
10 record speaks for itself.

11 A Yes, sir. When she, though, was -- when she was saying
12 that, she did say that, and it was my understanding that was
13 in the context of her trying to come up within her mind
14 exactly how she would do it without penalizing Mr. Linnen.

15 Q And that was the true problem, and you even seem to
16 recognize that uncharacteristically for the State, that you
17 had a problem with how that jury charge would have to come out
18 because it would necessarily impact on Mr. Linnen's
19 credibility?

20 A Well, my trouble was this: I also could not, in my head,
21 come up with something that would satisfy me to the extent of
22 unringing a bell, which I didn't think could be unrung anyway
23 without going too far. And that was -- obviously, the judge
24 disagreed, and she came up with a charge. And, again, as you
25 indicated, the record speaks for itself and that will be up to

1 His Honor to decide. But I certainly think she was having
2 trouble trying to come up with something that would be fair.

3 Q And the judge, in struggling with that, says in order to
4 give a complete curative instruction, is it not important to
5 tell this jury that your client, speaking of Mr. Brown -- I'm
6 on page 540, Solicitor, at line 10.

7 A Thank you.

8 Q Is it not important to tell the jury your client had some
9 role in doing something that he shouldn't have done, that he
10 knew that he shouldn't have done this?

11 A Yes, sir.

12 Q The Court says, I think that has to be part of the
13 curative instruction.

14 A Yes, sir, that is true. And I believe Mr. Brown --
15 that's when I was referencing earlier that Mr. Brown was
16 having a discourse with the judge about what to do with the
17 limiting instructions and about his concerns.

18 Q Correct. And the flavor of it is, is that this judge is
19 trying to telegraph to Mr. Brown that I really don't know how
20 to do this without biassing this trial.

21 MR. NEELY: Your Honor, I'll object. It's calling for
22 speculation in the judge's mindset.

23 THE COURT: Move on. I think he's already answered that.

24 MR. NEWMAN: Thank you.

25 THE COURT: I think the record speaks for itself.

1 BY MR. NEWMAN:

2 Q And the Court says, on page 540, "See what I'm saying?
3 This is what's going through my mind, whether or not it's --
4 the appropriate thing to do is grant the mistrial, to be sure
5 that this gentleman gets a fair trial and that the improper
6 vilification" -- I'm on 541 now, Solicitor --

7 A Yes, sir.

8 Q -- "now, the alleged victim doesn't get communicated to
9 this jury in what was in every way I know, a whole lot of
10 energy the last three days to keep from happening."

11 Now, I want to go over the last three days. There
12 were -- Mr. Brown had numerous instances of conduct that he
13 wanted to proffer to the Court on the part of Trevon Nichols;
14 correct?

15 A I believe that's correct. We had a lot of discussion
16 about that in the front end about reputation, that type of
17 thing, and that's when the sexual assault items came up early
18 on in pre-trial.

19 Q Right. And they were instances -- basically, the judge
20 limited it to a short period of time, a couple of specific
21 incidences involving Trevon?

22 A Correct.

23 Q Okay. Mr. Brown, however, proffered numerous
24 instances -- accounts of violence that the judge, after the
25 proffer and your objection, sustained your objection and kept

1 out?

2 A I believe that is correct, yes.

3 Q Some assaults with other family members, things like
4 that?

5 A Yeah, either because they weren't related to the --
6 generally, as you know, Mr. Newman, I mean, generally
7 speaking, they're going to limit it in time and limit it to
8 either something that occurs between the victim and the
9 defendant or something that the defendant knew about and would
10 have put something in his mind and things like that.

11 But I do believe you're correct. There were several
12 things he proffered -- I don't know how many -- that the judge
13 sustained my objection to.

14 Q All right. And Mr. Brown even proffered an expert
15 witness to say that Trevon Nichols had had a psychotic episode
16 and homicidal ideations. And on your objection, the judge
17 kept that testimony out from the jury?

18 A I do believe you are correct. I don't remember the
19 specifics. I do remember there's an expert witness that was
20 going to testify to something of that, and I did object.

21 Q I think it was from Coastal Empire --

22 A Yes, sir.

23 Q -- or from somewhere that had seen Mr. Nichols?

24 A Yes, sir.

25 Q And described the psychotic episode and homicidal

1 ideations?

2 A And it might have even been the same -- same psychiatrist
3 that does some of this criminal sexual -- the CSCs with minors
4 evaluations. I just don't remember specifically. But he was
5 out of Coastal, which, I think, is out of Summerville.

6 Q Okay. And bottom line is the episode that occurred 28
7 days before the shooting incident, the judge ruled that, on
8 your objection, that Mr. Brown could not put that before the
9 jury, and that was not put before the jury?

10 A I believe that you are correct, yes, sir.

11 Q Okay. And that's what I'm wrapping back into, the judge
12 saying that we spent three days to make sure there's not a
13 vilification of the victim.

14 A Yes, sir.

15 Q Okay. And the Court tells Mr. Brown -- Solicitor, I'm on
16 page 542 -- "I'm not going to play games. In other words, any
17 curative instruction is going to do my very best to erase the
18 possibility that the alleged victim would be considered to
19 have committed these offenses and it will be done, if you
20 will, with a view towards saying your client should have never
21 said this."

22 Mr. Brown attempts to interject, "Your Honor," and he's
23 cut off, and the Court just says, "That's your problem."

24 A Yes, sir.

25 And, again, Mr. Newman, I would just point out -- and,

1 again, I apologize; I keep referencing a record that His Honor
2 has probably already read, but that is the discussion she's
3 having -- it's obviously something she, as the judge, is
4 considering how to do it, how to phrase it. She's having
5 discourse with Mr. Brown and, you know, in the end, though --
6 and I'm at 545, line 9 -- what she says is, "This witness
7 testified to something before we stopped. This gentleman back
8 here, Mr. Nichols," who, of course, was the victim in the
9 case, "has never been convicted of anything and certainly has
10 never been convicted of what this man said, and I need you to
11 hear that. This should not have been testified to and I need
12 you to hear that. I need you to absolutely be able to dismiss
13 and disavow that from your minds." And then she goes on to
14 say that.

15 So, again, I think she -- just from my benefit of being
16 in the trial, she started at 100 and came way down by the time
17 she actually crafted the language that she gave to the jury.

18 Q All right. And I'm going to get to that.

19 A Yes, sir.

20 Q But this extensive conversation between Mr. Brown and the
21 Court, you do, as a good trial lawyer is taught to do, when
22 the judge is arguing your position, you let them argue your
23 position for you; is that not correct?

24 A If I'm not winning, I try not to talk, yes, sir.

25 Q Absolutely.

1 A But, of course, at that point, I wasn't winning because I
2 had asked for a mistrial, and she did not seem that she was
3 going to do it. And although I did want to put my position on
4 the record, I also know enough to not continually argue a
5 judge's ruling with the judge. Once she ruled against me,
6 I -- once I felt like it was on the record, I stopped.

7 Q Okay. Well, I mean -- and I can bear this out in a
8 brief, but the record, three times, the judge keeps asking
9 Mr. Brown, "Well, what you're saying is we need to have a
10 mistrial," and he's arguing with the judge as to why he
11 doesn't want it.

12 A Right. I think he's trying to get with him what his
13 position is and why, just as she did with me.

14 Q All right. And her final view on that, when she said she
15 was going to do it, "I'm not going to play games" and "That's
16 your problem"?

17 A Yes, sir. I do believe she said that on the record.

18 Q All right. And Mr. Brown, on page 542 at line 23,
19 actually tells the judge, "I'm not moving for a mistrial, but
20 I would ask the Court not telegraph bias against my client."

21 A Yes, sir.

22 Q All right. She warns Mr. Brown, "I don't know how to do
23 this -- any way to do this other than burning it out of their
24 heads without almost, like, talking to you, Mr. Brown, going
25 too far the other way."

1 **A** Yes, sir.

2 **Q** All right. And Mr. Brown asks, on page 544 --

3 **MR. NEELY:** Your Honor, I believe he's just reading out
4 of the record now. I don't think he needs to read out of the
5 record. The record speaks for itself.

6 **THE COURT:** I'll allow the question.

7 Go ahead.

8 **BY MR. NEWMAN:**

9 **Q** And I do want to follow-up with some questions for the
10 Solicitor.

11 Mr. Brown asks, "If I knew the language of the curative
12 instruction instead of disjoining and bringing the jury back
13 out." Immediately on page 544, the judge just responds to
14 him, "Let me have the jury."

15 So Mr. Brown was not able to hear a preview of the jury
16 charge?

17 **A** I don't think either one of us did. You mean the
18 curative instruction? Yes, sir.

19 **Q** Yes, I meant the curative instruction.

20 **A** Yes, sir.

21 **Q** All right. Now, you read from line 9 on page 545.

22 **A** Yes, sir.

23 **Q** It says this witness testified to something before we
24 stopped. And she says, "This gentleman here, Mr. Nichols."
25 Why did she describe Mr. Nichols as a gentleman?

1 **A** It would be hard for me to say other than, as you know,
2 Judge Goodstein generally speaks like that. That's not --
3 that would not be unusual for her to refer to any person as a
4 gentleman or a lady. That's -- you know, Judge Goodstein, I
5 know you've practiced in front of her for a number of years,
6 as have I, Mr. Newman. So other than that's just normally the
7 way she speaks, I don't -- I don't know why she would have
8 said that as opposed to anything else.

9 **Q** Okay. She calls him a gentleman, and the gist of the
10 defense for three days was the defense was trying to show that
11 Mr. Nichols was anything but; isn't that correct?

12 **A** Yes, sir, including the reference to him being a rapist
13 by your client.

14 **Q** Yes, sir.

15 And she says, and has certainly never -- has never been
16 convicted of anything and certainly never been convicted of
17 what this man -- this would be Jabari Linnen sitting on the
18 witness stand in front of a jury --

19 **A** Yes, sir.

20 **Q** -- this man said.

21 **A** Yes, sir.

22 **Q** Now, is that not a charge on the facts? Because, in
23 fact, Mr. Nichols had a number of convictions; they just
24 weren't admissible in court.

25 **A** I don't --

1 Q She's telling the jury, is she not, that this man -- this
2 gentleman has never been convicted of anything -- and that
3 wasn't true.

4 A He wasn't convicted of anything that could have been
5 used. As to whether it's a charge on the facts, I mean, in my
6 opinion, I do not believe it is, no, sir.

7 Q Well, I'm not asking you for your opinion. Is that what
8 she told the jury, that he's never been convicted of anything?

9 A Yes, sir, she did tell -- that is on the record, yes,
10 sir.

11 Q Okay. And with respect to Jabari Linnen says, This
12 should not have been testified to.

13 A Yes, sir, that's correct.

14 Q And you read on, but you stopped. You said, "And I need
15 you to hear that. I need you to absolutely be able to dismiss
16 and disavow that from your mind." This is the quote you left
17 off, "Otherwise, we're not going to do what we must do here
18 today."

19 A Yes, sir.

20 Q Then she goes on to say, "I'm telling you that, in order
21 for justice to be done here today, that testimony must be
22 disregarded completely."

23 A Yes, sir, I believe that is it.

24 Q That said while this man is sitting kind of where you're
25 sitting in one of the courtrooms?

1 A Yes, sir, I believe that --

2 Q And looking at a jury and a jury looking at him.

3 A I believe it was Courtroom 1.

4 Q Okay. And after she gives her charge -- she says,
5 "Because the alleged victim in this case has not been
6 convicted of any such matter. Thank you for that. All
7 right."

8 Then Mr. Brown does not object in any way to this
9 instruction.

10 A That is correct.

11 Q In fact, the Court just says Mr. Brown -- and he says,
12 "Okay. Now, Mr. Linnen," and goes into finishing his
13 examination.

14 A Yes, sir.

15 Q All right. And would it not be fair to say that your
16 cross-exam -- skillful cross-examination of Mr. Linnen went
17 directly to things that involved his credibility as to what he
18 testified to?

19 A Yes, sir, I think that's fair.

20 Q Okay.

21 A As to what his testimony was versus what I -- what the
22 facts as I believe them to be and what the physical evidence I
23 believe showed.

24 Q And in your cross-examination, set up your argument for
25 him throwing gang signs, being in a strip club, it set up your

1 argument for the credibility of the defendant versus the
2 credibility of the gentleman, Mr. Nichols?

3 A I think -- I don't know that that's fair to say,
4 Mr. Newman, from this perspective. I could not have put in
5 the video had he not gotten on the stand and claimed he was a
6 family man. And, again, I don't want to miss -- it's in the
7 record. But I couldn't have used that video or made any
8 reference to that just based on my cross-examination. That
9 was something he had to do himself on direct.

10 Q Well, actually, as to that issue, since Mr. Brown
11 objected to it, your claim was opening up the door, and
12 Mr. Brown didn't object to it. We'll never know what the
13 Court would have ruled on that because he didn't object to it.

14 A He didn't object other than as to foundation and the
15 negotiation we made about whether to put the testimony up or
16 not, yes, sir, you're correct.

17 Q Right. And that's my point.

18 You believe that he -- Jabari, for the defense, opened up
19 the door by saying "family man." Mr. Brown never objected to
20 your position, so we'll never know how Judge Goodstein would
21 have ruled whether on that benign statement of "he's a family
22 man" would have, in fact, opened up the door.

23 A I would disagree with that, from my knowledge of Judge
24 Goodstein and how that was playing out. But, no, sir, I can't
25 point to anything on the record as to whether that was -- that

1 that was ruled on by the judge.

2 Q Okay. Irrespective of your knowledge of Judge Goodstein,
3 one will never really know, and two, the main thing is, that's
4 never preserved for appeal because it wasn't objected to.

5 A It was not preserved for appeal, you are correct.

6 Q Okay. The last thing I want to go over with you,
7 Solicitor, in this matter, was it apparent from when you
8 prepped this case and your knowledge of it, that the --
9 basically the -- this wasn't a who-done-it case; correct?

10 A No, sir.

11 Q It's just what the circumstances were on that particular
12 day during the time of the shooting?

13 A I think that's fair.

14 Q Okay. So you, in your trial prep -- and if you didn't
15 tell me -- because I'm assuming you were preparing that the
16 defense was going to put up a case of self-defense?

17 A I -- I prepared -- I almost feel silly telling you this,
18 Mr. Newman; you know me well enough to know -- I kind of
19 prepare for any possible defense that may or may not be there.
20 I will tell you, in this case, I thought that certainly would
21 have been a possible defense if you were going to mount one as
22 opposed to just trying to poke holes and raise a reasonable
23 degree defense.

24 But as far as defenses go, I thought it -- self-defense
25 was the most likely, so obviously, I considered that when I

1 was prepping the case.

2 Q Okay. And then you found out, when Mr. Brown actually
3 gave his opening statement, said what the case was about?

4 A Yes, sir.

5 Q And the whole case was geared to Jabari versus Trey
6 Nichols?

7 A It certainly starts to shift that way at that point, yes,
8 sir.

9 Q Okay. Now, since this was ABWIK -- ultimately an ABHAN,
10 but since this was an assault case involving -- there was no
11 disagreement that Jabari Linnen had a right to be on Luther
12 Warren Drive, is there?

13 A I'm sorry, I didn't understand your question.

14 Q The shooting occurred on Luther Warren Drive; did it not?

15 A I believe that is correct, yes, sir.

16 Q Okay. And you would have had no evidence to show a jury
17 that Mr. Jabari Linnen was in any way prohibited or
18 trespassing or being on Luther Warren Drive?

19 A No, sir, I don't believe so.

20 Q Okay. Now, did Mr. Brown ever serve your office with
21 notice that he wanted immunity or Castle Doctrine hearing?

22 A I believe we were never served with any notice as such.
23 Again, I think I testified to this earlier: I don't remember
24 specific conversations with Mr. Brown on it or not. I think
25 we had some discussion on it, but I can't swear to it. I do

1 not think he ever filed a formal notice, no, sir.

2 Q Okay. Did he have any negotiations with you that the
3 trial would come out a certain way if he elected to forego a
4 Castle Doctrine hearing or a Duncan hearing, I guess they call
5 them now?

6 A I don't -- not that I recall. I don't -- you know,
7 there's some of this stuff, Mr. Newman, as you know, kind of
8 fades with time. I don't believe there was any such
9 negotiation. I can't be positive, but I don't believe so, no,
10 sir.

11 Q Okay. Had Mr. Brown filed a petition for an immunity
12 hearing under our law and under these facts, a judge would
13 have at least had to hear it; isn't that correct?

14 A If you had filed a motion, we would have -- we would have
15 set it to be heard, yes, sir.

16 Q Right. And you would have prepared to respond to that
17 motion?

18 A Yes, sir.

19 Q All right. And the bottom line is, a criminal defendant,
20 under these circumstances, has a right to file that motion;
21 correct?

22 A Yes, sir. You can -- you have a -- as a criminal
23 defendant, as you know, Mr. Newman, you can file just about
24 any motion you want to. And it would be scheduled to be heard
25 regardless of the merits.

1 Q And you and I actually had an immunity hearing that
2 lasted about three days; did we not?

3 A Yes, sir, we did.

4 Q All right. Now, when you had made the motion for a
5 mistrial and the judge was talking about it, Mr. Linnen was on
6 the stand the entire time; is that correct?

7 A He was.

8 Q Did Mr. Brown, in your observation in the courtroom, ever
9 ask to consult with Mr. Linnen before responding to your
10 motion?

11 A I do not believe he approached his client to ask him
12 that.

13 Q Okay. And the record, I think, bears this out, but you
14 remember Mr. Brown asking the judge if we could have a moment
15 to explain to his client what the State was asking for and its
16 ramifications, positive and negative?

17 A I don't have any independent recollection. Obviously, if
18 that's in the record, then that's correct.

19 Q Or absent from?

20 A Or absent therefrom, yes, sir. I don't have any -- I
21 don't have any -- any independent recollection of that. But I
22 do not remember him doing that, no, sir.

23 MR. NEWMAN: Judge, I believe I'm about done. If I can
24 consult with my client.

25 BY MR. NEWMAN:

1 Q And to go back, with the immunity hearing, under the
2 statutes in the immunity hearing pretty much tracks common law
3 defense except for one element, and that's the duty to
4 retreat; is that correct?

5 A Yes, sir.

6 Q I.e., stand your ground if you're in a place you're
7 entitled to be?

8 A It's -- well, I don't know that it's that simple. I have
9 actually had discussions -- I don't know that you and I have
10 ever talked about this. I believe that what it requires is
11 that you cannot be -- you have to lawfully be somewhere. And
12 my position has been, as you, I think remember -- I think we
13 have had this discussion maybe on the record, I'm not sure, in
14 our last immunity case. You know, if someone has a weapon and
15 they're not entitled to carry it on their person, I don't
16 believe you're acting lawfully and lawfully in a place you
17 have to be. But obviously, that's something that a judge
18 would normally -- that would be an argument to the judge.

19 Q Okay.

20 A But stand your ground, in general, relieves you of the
21 duty to retreat, yes, sir.

22 Q Okay. And there's nothing in 16-11-440 that mentions
23 that specific --

24 A It just says lawfully, where you're lawfully supposed to
25 be.

1 Q Supposed to be.

2 A Yes, sir. And I think it's open to interpretation. I
3 have seen some case law that goes both ways.

4 Q Whether it is or not, there was no immunity hearing in
5 this --

6 A No, sir, there was not.

7 Q And you would agree that the defense -- although the
8 defense would have to show by a preponderance of the
9 evidence -- that's one element that the defense would not have
10 to show.

11 A You do not have to show a duty to retreat if the judge
12 found it was a stand-your-ground case.

13 Q However, in a criminal trial, one of the four elements is
14 a duty to retreat if reasonably --

15 A Safe to do so.

16 Q -- if it can be done within reasonable safety.

17 A Yes, sir.

18 Q Okay. And you do not know of any reason why Mr. Brown
19 did not file for an immunity hearing in this matter?

20 A No, sir. That would be a strategic decision up to him,
21 as it is in any case.

22 Q Okay.

23 MR. NEWMAN: That's all the questions I have for Deputy
24 Solicitor Thornton.

25 Thank you, Your Honor.

1 Thank you, Solicitor.

2 THE WITNESS: Yes, sir.

3 MR. NEELY: Very briefly, Your Honor.

4 REDIRECT EXAMINATION

5 BY MR. NEELY:

6 Q Was there ever any assertion that the defendant in this
7 case had a concealed weapon permit?

8 A No, sir, not that I recall.

9 Q And the vilification of the victim that the judge was
10 talking about would have been in relation to the sexual
11 assault charges she had ruled couldn't come in?

12 A That was my understanding. I think what the judge was
13 referring to was the fact that we had taken great pains in
14 going through all of this and had made rulings on it, and I
15 think that's what she was referring to, which includes the
16 statement that he made about the sexual assault charges, yes,
17 sir.

18 Q Because the judge certainly let in a number of incidents
19 that the victim had a reputation of violence or had committed
20 specific acts of violence, which you address in your closing
21 argument, I think pages 613 through 615?

22 A Yes, sir. I think that -- my recollection, again, after
23 reviewing the transcript and what occurred at the trial was
24 that she excluded some and let some in.

25 Q All right. And the -- what you called gang signs in your

1 closing argument, was your characterization of the YouTube
2 clip that you were able to show the jury in response to his
3 assertion of that he's a family man?

4 A Yes.

5 Q And just one final question. There was a lot of
6 testimony taken on Monday that Judge Goodstein was set against
7 Mr. Brown. Was that your opinion?

8 A I think Judge Goodstein got irritated with Mr. Brown when
9 his client made that reference. I don't think that stuck with
10 her or she was poised against him. I don't know any lawyer
11 who hasn't been in a trial where, you know, perhaps they have
12 done something and the judge gets a little irritated with
13 them.

14 Do I think she was poised against him or being unfair?
15 No, I do not. She ruled against him sometimes, she ruled for
16 me sometimes. That's how it goes in court. That's not
17 unusual.

18 MR. NEELY: Thank you. That's all the questions I have.

19 THE COURT: Anything further from this witness?

20 MR. NEWMAN: Just one last question, since the Solicitor
21 brought it up.

22 RECROSS-EXAMINATION

23 BY MR. NEWMAN:

24 Q You realize under State versus Burris -- and I quote you
25 on -- a person can be acting lawfully even if he is in

1 unlawful possession of a weapon, if he is entitled to arm
2 himself in self-defense?

3 A He is, but then you have the elements of self-defense
4 also.

5 Q Okay. And that was an issue in the trial?

6 A Yes, sir.

7 Q Which related solely to the credibility of Mr. Linnen?

8 A Not solely but it was certainly a big part of it.

9 Q Okay. Thank you.

10 A Yes, sir.

11 THE COURT: Thank you, sir.

12 THE WITNESS: Thank you, Judge.

13 THE COURT: You can step down.

14 THE WITNESS: Yes, sir. Your Honor, may I be excused?

15 THE COURT: Any objection to this witness being excused?

16 MR. NEWMAN: As much as I'd like to inconvenience the
17 Deputy Solicitor over the years, I have no objection.

18 MR. NEELY: None from the State, Your Honor.

19 THE COURT: Thank you, sir.

20 THE WITNESS: Thank you very much, Your Honor.

21 THE COURT: All right. Anything further from the State?

22 MR. NEELY: Not from the State, Your Honor.

23 THE COURT: All right. I'll be happy to hear summations.

24 MR. NEWMAN: If it pleases the Court, it's been so long
25 since you have done testimony in one, I guess I go first and

1 have a brief reply?

2 THE COURT: Well, I'll let you go -- just like an
3 ordinary case, I'll let you go first since you have the burden
4 of proof and close. And I'll let you reply to anything he
5 brings up.

6 CLOSING REMARKS BY THE DEFENDANT

7 MR. NEWMAN: Thank you very much, Your Honor.

8 We would rely a good bit on the record in this case that
9 we have cited to you. It's my understanding the Court
10 actually has the transcript as part of the record in the case.

11 We would also rely and ask the Court to review the
12 arguments of law in fact that we have put in our pre-trial
13 brief to the Court as to the issues we wanted the Court to
14 look at.

15 There's -- as you know the standard well under
16 Strickland, there's -- the attorney has fallen below a
17 reasonable standard of care in a criminal defense and there is
18 impacting prejudice to the defendant that he would meet his
19 burden by a preponderance of the evidence as to an ineffective
20 assistance of counsel in this case.

21 I think Mr. Brown was quite frank with you when he
22 testified on Monday with very specific issues, and one --
23 there's absolutely no reason that Mr. Brown gave, tactical or
24 otherwise, as to why he did not apply for an immunity hearing
25 in this case. And as the Court knows, an immunity hearing for

1 a defendant has absolutely no risk in it. If it's granted,
2 great; if it's not granted, it's going to be in the same boat.
3 They get to cross-examine the State's witnesses, get to hear
4 the case, and prep the case. Those are all important things
5 an immunity hearing can do. Even if you don't think you have
6 a chance on winning it, you can still put the State through
7 that based on these circumstances.

8 I also think that counsel would have a duty --
9 Mr. Linnen, as you heard, was 19, 20 years old at the time and
10 had no criminal record, not sat in a courthouse, didn't know
11 the ramifications of that. Mr. Brown admitted that he never
12 discussed his decision, tactical or otherwise, with Mr. Linnen
13 to do an immunity hearing.

14 Mr. Brown kind of said tactically we did that because I
15 wanted to raise that during the trial, and of course the
16 immunity issue that didn't work. But that Mr. Linnen, I
17 think, as a critical stage of a moving forward in the case
18 that Mr. Linnen would need to be fully informed and advised on
19 and ultimately make the decision. You know, the certain
20 rights, that the defendant testifies or not testifies, that
21 it's the defendant's decision. And you probably heard trials
22 and been involved as a trial lawyer where you have advised
23 your client not to testify, and if they want to testify
24 anyway, that's a decision they make, even based on advice of
25 counsel. But here, we don't have advice of counsel.

1 I think the twin things that really merge is, when the
2 State moves for a mistrial, I believe Mr. Brown said it up
3 right, he had no tactical reason for resisting the State on
4 it, other than he put his own motives ahead of his clients,
5 that he wanted the case to go forward, that there was not a
6 tactical reason for that.

7 You have a trial judge that spans 11, 12 pages of a
8 transcript warning Mr. Brown of the dangers of the curative
9 instruction that she is going to give, and it's going to be
10 bad. The Solicitor -- and God love him; he's the one that put
11 this man in jail and I understand his position and why he
12 testifies -- said he thought it was a rather benign jury
13 charge. I would put to the Court, if he thought it was rather
14 benign -- because he kept saying it's got to be a strong jury
15 charge -- that he would have objected and asked the judge to
16 make some additions to the instruction that she ultimately
17 gave. He was satisfied with the instruction and did not
18 object to the instruction on behalf of the State.

19 The problem -- real problems with this instruction is
20 when you call a victim in a case -- when the Court calls that
21 from the power of the bench this gentleman, you have
22 eviscerated everything the defense has tried to do, you
23 basically judicially vouched for a witness and basically the
24 only witness -- contrary witness in the case.

25 And then you tell the jury, We believe this is a

1 violation of Article 5, Section 22 of the South Carolina
2 Constitution that is -- that is just a killer. When she says
3 this man has never been convicted of anything, certainly not
4 that, she is making an -- referring to Judge Goodstein -- and
5 respectfully; I mean, trials are hard things to do for all of
6 us, so I want the Court to know I'm not disrespecting Judge
7 Goodstein in this. But these are the words that came out.
8 She has put in -- she violated Article 5, Section 22 of the
9 Constitution, which is instructional. I believe that
10 Mr. Brown, at that point, should have objected to the curative
11 instruction as being an unlawful comment on the facts, it
12 vouches for the alleged victim in the case, puts facts that --
13 even facts that aren't true because, as the Solicitor
14 admitted, Mr. Nichols had a criminal record, just not an
15 admissible, for court purposes, criminal record.

16 And then you have got Jabari Linnen, who this jury charge
17 is going right through them to the jury while he's sitting in
18 the middle of his testimony on the jury stand, and the judge
19 is saying, Don't listen to what he says. Well, he just told
20 you, it's not true. And she goes on to say, "You have got to
21 put that out of your mind to do what we must do here today."
22 And what Mr. Brown was afraid of and did not object to, she's
23 telegraphing to the jury what we must do here today is convict
24 Jabari Linnen because you shouldn't believe him; Mr. Nichols
25 is a gentleman. And I'm telling you that, for justice to be

1 done here today, that testimony, going right through in
2 Linnen, must be completely disregarded. And the fact is, the
3 alleged victim has not been convicted in any manner; once
4 again, misstating the facts and stating facts to the jury.

5 Mr. Brown has a chance to object to that charge, and as
6 we all know what the standard is, if he does -- and that was
7 not raised on appeal because it could not be raised on appeal,
8 because there was no contemporaneous objection. There's not
9 even a late objection to it. There's simply no objection to
10 it.

11 Mr. Brown testified to you that he had no reason -- that
12 he thought the charge was horrible and that he should have
13 objected, and then he had no reason -- no tactical reason
14 to -- I think he just said he blew it and got caught up in his
15 own interest and persisted on with the trial; that I think the
16 Solicitor himself recognized and the Court recognized at that
17 point, whether it's Mr. Linnen's fault or not, he's never been
18 in court, the only proper remedy would have been to abort this
19 trial and start it over again.

20 And the State was willing to abort it, the Court was
21 willing to abort it, Mr. Brown was not -- for no tactical
22 reason, was not willing to abort it. And, again, as testified
23 to, a mistrial in the trial of the case is a critical
24 structural juncture of a case. Mr. Linnen is entitled to have
25 the consultation of Mr. Brown, "What's that mean?" Because

1 Mr. Linnen testified -- and of course you have to judge his
2 credibility as well -- he didn't know what a mistrial was,
3 what it meant, what happens. And I think that the client,
4 Mr. Linnen, should have been consulted and say, Here's your
5 two options. Here's what happens. If this is a mistrial,
6 everybody goes home. We start from square one. We put the
7 case together and try it at some time in the future. What I'm
8 afraid of is maybe prejudice. Or he could have explained to
9 him, you know, I really want to go forward in this case.
10 Here's the reasons why. I think we ought to go forward. But
11 Jabari was not able to make any of those decisions, and quite
12 frankly, Mr. Brown admitted, had he explained to Jabari his
13 reasons for going forward, he wouldn't have been able to tell
14 him any positive reasons because he testified, you know, we're
15 trying to vilify this guy, it's not working. The judge and I
16 aren't getting along and the case is not going well. Or your
17 option, Jabari, if you want to exercise it, is, you know, I'll
18 keep slugging. Let's keep on going and get in this case.

19 Jabari did not have a chance to make that. And quite
20 frankly, Mr. Brown's testimony would be that, had he explained
21 it to him, like the light bulb, oh, I would have told him, we
22 have got to be out of here. This is going terrible. You have
23 got this horrible jury or going to get a bad jury instruction.
24 And ultimately, he had a second chance to move for his own
25 mistrial or ask to join in the State's motion after this jury

1 charge, and he doesn't get a chance to do that.

2 Mr. Brown does not object to these two videos, as they've
3 described, snippets of Mr. Linnen being in a nightclub, which
4 is described as a strip club. Mr. Brown should have objected
5 to that. Because we do have overconservative jurors in here
6 that may, just on that, that affects them that he's in a --
7 not just in a nightclub, he's in a strip club, you know, and
8 going directly to his character.

9 But why Mr. Brown would negotiate out that obviously he
10 knew that the State would not be able to get in front of the
11 jury anything about gang signs. Solicitor, as he said,
12 there's no absolutely no evidence through police or anything
13 that Mr. Linnen is connected with, associated with, a member
14 of, or a contributor of any kind of gang. But now the jury is
15 looking at a gang banger and the Solicitor says that --
16 repeatedly in his closing argument -- and not just gang signs,
17 throwing gang signs. And there was no evidence before the
18 jury on that, and I think the State recognized, because their
19 only witness that testified -- Detector Frazier is not a gang
20 expert, does not know what certain gang signs are. I guess
21 much beyond a layman, we could probably Google up what the
22 Crips or Bloods might throw as a gang sign, but whether it's
23 a gang sign or not, that is so highly prejudicial, and
24 Mr. Brown says he has no reason for not objecting to that. He
25 just said, Well, I thought he opened the door because he said

1 family man. Well, you at least try. You object. Maybe he
2 would have got that video limited down to the mere fact that
3 just he was at a nightclub party, you know, rather than now
4 he's at a strip club throwing gang signs. I mean, that's a
5 horrible assassination of character and Mr. Brown, once again,
6 says he has no reason why he didn't object to that other than
7 his personal interest, he wanted this trial to move forward.

8 I think, from a structural element, that there is a
9 structural defect in this trial, and that occurred at the
10 point of the mistrial. And structural defects, as Justice
11 Beatty recently ruled, are not subject to a harmless error
12 negligence, are not subject to a prejudice analysis.

13 But I think if you look at the actions -- admitted
14 actions of Mr. Brown, that he fell below a professional norm
15 in this trial, put some personal interests ahead of his
16 client, didn't fully advise his client, and there's clear
17 prejudice, because his client was called by the trial judge,
18 allowed on the witness stand, and the victim a gentleman. At
19 that point, Mr. Linnen is doomed in the trial of his case.

20 And if the Court wishes us to prepare or submit an order
21 or if it wants any further written argument, we'd be happy to
22 do that, Your Honor. Thank you for hearing us.

23 THE COURT: Thank you, Mr. Newman.

24 Mr. Neely?

25 CLOSING ON BEHALF OF THE STATE

1 MR. NEELY: Just briefly, Your Honor. My argument will
2 be succinctly stated, as Mr. Newman's. First, Mr. Brown
3 absolutely gave a reason why he didn't want to have an
4 immunity hearing. He testified on the stand that he had had
5 an immunity hearing a few months prior where he gave his full
6 defense in the case, and the State got to see every single
7 thing he wanted to argue. He didn't want to do that again.
8 And that's certainly a trial strategy decision, not to let the
9 State know exactly what you're going to argue at trial. And
10 that was directly testified to.

11 And the State moved for a mistrial because what was --
12 what the defendant testified to, the sexual assault charges,
13 was so prejudicial against the State's case that he knew the
14 bell couldn't be unrung. That's absolutely why his counsel at
15 trial wanted that not to be a mistrial but instead, for that
16 to be a curative instruction because it was certainly going to
17 be in the jury's mind. And the jury actually found him guilty
18 of the lesser-included charge.

19 So, to some extent, it certainly seemed to have work, the
20 character assassination that was done by Mr. Brown in this
21 case.

22 I think that the fact that this -- the "gentleman" thing
23 is certainly blown way out of proportion. I think I have
24 called defendants "gentlemen" in my opening and closing
25 arguments as I was prosecuting. I don't think it matters

1 whatsoever. I think it's just -- the same way I say "sir" or
2 "mister" when I call a docket hearing. I'm used to referring
3 to somebody by a generic nomenclature. And I don't believe
4 the judge telegraphed any such thing. She was just trying to
5 erase the immense amount of prejudice that Mr. Brown's client
6 caused by himself to the State's case without granting him a
7 mistrial based on his own behavior. I think that's what it
8 boiled down to.

9 THE COURT: Thank you.

10 FURTHER CLOSING REMARK BY THE DEFENDANT

11 MR. NEWMAN: Just briefly reply. I'd just follow-up by
12 saying it's clear that Mr. Linnen may have sat through the
13 trial and he's not a lawyer. You know, sat through a couple
14 of days before there was a ruling on that. Mr. Brown kept
15 asking him questions, "And is there anything else?"

16 "Yeah, he threw a soda can."

17 "Is there anything else?"

18 "He disrespected my girlfriend."

19 "Is there anything else?"

20 He's under pressure, sitting on the witness stand. "What
21 about the assault charge -- sexual assault charge?" And all
22 of that is not too strong. I mean, no competent lawyer, in my
23 opinion, would have gone forward with this trial with the
24 State asking for a mistrial. No competent lawyer would not
25 have objected to that jury charge. It's an absolute killer.

1 It's burden shifting. She says, You've got to disavow that
2 from your minds or we can't do what we must do here today. We
3 know what we must do today, and that's convict this guy
4 because he shot somebody. That's not the question.

5 Quote, "THE COURT: I'm telling you that, in order for
6 justice to be done here today, this testimony must be
7 completely disregarded." Combine that with the charge on the
8 facts and the gang signs, this guy is doomed. And I think not
9 only from prejudice analysis he's doomed, but if you go for a
10 structural analysis, which you don't even have to see that, at
11 that juncture, that mistrial became a structural trial defect
12 for trial counsel failed to take advantage of and failed to
13 advise his client and do the right thing on. And that's our
14 position.

15 Thank you, Your Honor.

16 THE COURT: Thank you, Mr. Newman.

17 Well, gentlemen, you-all have certainly given me a lot of
18 material to consider, and I want to take some time and read
19 all the materials that have been submitted, so I'm going to
20 take this matter under advisement and I'll have my law clerk
21 e-mail you a decision.

22 MR. NEELY: Thank you, Your Honor.

23 THE COURT: I want to thank both attorneys for their hard
24 work in this case.

25 (At 2:22 p.m., the hearing concluded.)

1 CERTIFICATE OF TRANSCRIBER
2

3 I, Bobbi J. Fisher, do hereby certify that the
4 foregoing transcript is a true and accurate record of the
5 proceedings; that said proceedings were transcribed to the
6 best of my ability from the audio recording as provided; and
7 that I have no interest, financial or otherwise, in this
8 proceeding.
9

10
11 Bobbi Fisher

12 Bobbi J. Fisher, Transcriber
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STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

FORM 4

JUDGMENT IN A CIVIL CASE

IN THE COURT OF COMMON PLEAS

CASE NO. 2016-CP-07-00570

Jabari M. Linnen, SCDC # 352550
PLAINTIFF(S)State of South Carolina
DEFENDANT(S)

Submitted by: Court

Attorney for : ☐ Plaintiff ☒ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCF; ☐ Rule 41(a), SCRCF (Vol. Nonsuit); ☐ Rule 43(k), SCRCF (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCF; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge

2752
Judge Code3-10-17
Date

For Clerk of Court Office Use Only

This judgment was entered on the 20 day of 3, 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 20 day of 3, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

pro se
Fath
Nowman

ATTORNEY(S) FOR THE PLAINTIFF(S)

Keely

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
P.C.R. APPLICATION FOR RELIEF
Case No.: 2016-CP-07-0570

JABARI M. LINNEN,)
SCDC No.: 352550)

Applicant,)

-vs-)

STATE OF SOUTH CAROLINA,)

Respondent.)

ORDER GRANTING P.C.R. RELIEF

2017 MAR 17 PM 12:41
JEROME A. HARRIS, JR.
CLERK OF COURT
BEAUFORT COUNTY, S.C.

After a full evidentiary hearing, a thorough review of the materials submitted and the testimony, This Court grants Mr. Linnen's Application for Post Conviction Relief.

I. FACTUAL BACKGROUND:

The basic facts in the trial of this case were not seriously disputed. The evidence presented showed that the Applicant and the alleged victim had prior altercations. There was no dispute that either the Applicant confronted or was confronted by the alleged victim. As a result of the confrontation, the Applicant shot the alleged victim. The primary issue in the Applicant's case was self-defense. The witnesses as to the issue of self-defense or not self-defense were the Applicant and the alleged victim. If the jury believed the Applicant, the jury could find self-defense or at least reasonable doubt that the State failed to disprove self-defense. On the other hand, if the jury believed the alleged victim, the jury would have had evidence of substance to convict the Applicant of assault. The credibility of each was central to a jury's determination

on this issue.

Extensive pretrial proffers of evidence of prior altercations between the alleged victim, the Applicant and past "bad" acts of the victim on others were conducted *in camera* by the Trial Court. The Court ruled on the matters which resulted in admitting some of the matters defense counsel proffered and specifically excluded other matters, particularly the victim's arrest on two charges of sexual assault. During the Applicant's testimony, he blurted out something about, "the two sexual assault charges," referring to the alleged victim. In response, the State immediately objected.

Once the jury was sequestered, the State moved for a mistrial. The State recognizing that the victim's credibility was a key factor in its case took the unusual step of moving for a mistrial as the State believed that the Applicant violated the Court's prior order prohibiting such testimony and that the credibility of the alleged victim was likely irreparable. The Trial Court stated its strong inclination to grant the State's motion. The Applicant's counsel strongly resisted a mistrial and moved for a curative instruction and that the trial proceed. The Trial Court clearly telegraphed the problem with a curative instruction under these circumstances. The problem was that in order to attempt to undo the prejudice to the State and the victim, the Court would have to "go too far," in its instruction which would necessarily prejudice the Applicant.

The curative instruction which was given to the jury was devastating to the Applicant in

several respects. The Trial Court, in its instruction, referred to the victim as a “gentleman.”¹ The instruction specifically commented/instructed on the facts and incorrect facts about the alleged victim’s prior criminal record. The instruction had the effect of bolstering the victim’s credibility and was damaging to the Applicant’s credibility. The instruction was given while the Applicant was on the witness stand. Applicant’s counsel made no objection at all to the instruction and continued examining the Applicant in front of the jury. Applicant’s counsel gave no strategic reasons for not objecting to the jury instruction. Counsel testified that he did not consult with the Applicant about the ramifications of accepting a mistrial or going forward. Counsel admitted that he had “personal reasons” for going forward, which in retrospect clouded his judgment.

II. DISCUSSION OF THE APPLICANT’S GROUNDS FOR A NEW TRIAL:

The Applicant raised three grounds for Post Conviction Relief.² The issues are discussed herein below:

1. FAILURE TO PETITION FOR AN IMMUNITY HEARING:

Applicant claimed that his trial counsel was ineffective for failing to request an Immunity Hearing under the Protection of Persons and Property Act provided for in Section 16-11-410 *et seq.* of the South Carolina Code of Laws, as

¹ As will be discussed *infra* this Court believes that the Trial Judge generally refers to any male as, “gentleman.” Applicant’s counsel did not object to this term.

² The Applicant submitted a Pre-trial Brief outlining his issues.

amended. Trial counsel admittedly did not request such a hearing pursuant to *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (S.C. 2011). The Applicant's argument on this ground fails for several reasons. The Applicant made no showing that he likely would have prevailed at a *Duncan* hearing. While it is possible a court may have granted immunity, the outcome of any such hearing cannot be classified as likely or probable. Trial counsel gave credible testimony that he had strategic reasons to forego an immunity hearing. Trial counsel testified that he had been through a lengthy immunity hearing in another case which was denied. Counsel further testified that he did not want to give the State a preview of his case during such a hearing.

I find that trial counsel gave valid strategic reasons for not opting to have an immunity hearing, that the strategic reasons given did not fall below the average competency range for defense counsel and the Applicant failed to show any prejudice as a result of trial counsel's performance. I find, therefore, that the Applicant failed to meet his burden of proof on this ground.

2. FAILURE TO OBJECT TO THE STATE'S REFERENCE TO "GANG SIGNS:"

Next, the Applicant claimed that his trial counsel was deficient by not objecting to the Solicitor's reference to the Applicant making "gang signs" in a video which was not entered by the State as reply evidence at trial. The trial court allowed the State to offer this evidence, in reply, to impeach the Applicant's

testimony about being “a family man.” Trial counsel negotiated with the State to keep the video out of evidence and limit the State’s proffer of evidence to two still photographs taken from the video, in exchange for the Defense not objecting to the reference of “gang signs.” Although there was no evidence that the Applicant had been in gang, trial counsel further negotiated as part of the deal that the Applicant would not object to the Solicitor’s reference of “gang signs” in exchange for the State not calling an expert in gang signs/activity to explain the hand gestures made by the Applicant in the two photographs.

I find that trial counsel gave valid strategic reasons for limiting the evidence proffered against the Applicant. I find that the strategic reasons given did not fall below the average competency range for defense counsel and the Applicant failed to show any prejudice as a result of trial counsel’s performance. I find, therefore, that the Applicant failed to meet his burden of proof on this ground.

3. FAILURE TO CONCEDE TO A MISTRIAL MOTION / FAILURE TO OBJECT TO CURATIVE INSTRUCTIONS:

The Trial Court conducted an extensive pre-trial hearing on evidence the Applicant sought to use to impeach the alleged victim. The alleged victim had pending criminal sexual charges that were ruled inadmissible as evidence in the case. When the Applicant took the stand later in the case, he blurted out

testimony about the alleged victim's "sexual assault charges" in violation of the Court's pre-trial rulings on the matter. The State immediately moved for a mistrial. The Applicant's counsel did not consent to a mistrial.

The Trial Court made every reasonable effort to fully inform and warn the Applicant's counsel that any curative instruction that was required would not be favorable to the Applicant. Nonetheless, trial counsel persisted in his objection to the grant of a mistrial and demand for a curative instruction.

The Trial Court, in order to prevent "vilification" of the alleged victim, gave a curative instruction that referenced the alleged victim as "this gentleman." While this Court believes that the reference to "this gentleman," is merely the way in which the judge refers to parties in her courtroom and not any attempt to bolster the alleged victim, use of the term "gentleman" in referring to the alleged victim while said victim's character was being impeached by the Applicant invited an objection from the Applicant's trial counsel. No such objection was made. Applicant's counsel gave no reason, strategic or otherwise, in failing to object to this reference.

Further, the Trial Judge gave the jury erroneous factual information, charging that the alleged victim had not been "convicted of anything," in contradiction to the facts. Undoubtedly, the Trial Judge was attempting to correct the problem with the Applicant's testimony regarding the pending criminal sexual conduct charges, but the charge came out as a blanket denial of any record on the

part of the alleged victim - - - an inaccurate statement of fact. The curative instruction involved the Trial Court commenting on the facts in contravention of Article V, Section 21 of the South Carolina Constitution ("Judges shall not charge juries in respects to matters of fact, but shall declare the law."). No objection was made to the trial court's comment on the facts. Applicant's counsel gave no reason, strategic or otherwise, in failing to object to this constitutional error and the curative instruction as a whole.

Applicant's trial counsel failed to give any reasons as to why he did not object to the curative instruction as given, and failed to articulate any strategic reasons for resisting a mistrial motion by the State at this point. From the testimony of the Applicant's trial counsel, it appears that he was irritated with the trial court and this jaded his judgment. Applicant's trial counsel testified that, in hindsight, he did have personal reasons for not acquiescing in the State's mistrial motion³ and for not objecting to the prejudicial curative instruction.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Under the facts of this case, I find trial counsel's representation was deficient under prevailing professional norms. I further find that the deficient performance prejudiced the

³ The Trial Court repeatedly announced its intention of granting the motion, stating that such motion was proper and that any curative instruction necessarily would be prejudicial to the Applicant.

Applicant's case. *See, Strickland v. Washington*, 466 U.S. 668 (1984). The Court does not take this matter lightly, especially considering that the Applicant's testimony was in violation of the Trial Judge's previous rulings and that testimony caused the State to move for a mistrial in the first place.

In a credibility case such as this one, where the two principal actors in the dispute had different versions of how the incident unfolded, with the jury having to decide which version was correct, the curative instruction given by the Court was devastating to the Applicant's case. The Trial Judge was put in the nearly impossible position of protecting the rulings of the Court and the rights of the victim, while at the same time protecting the Applicant's rights.

There simply was no way to give a curative instruction in these circumstances without prejudicing the Applicant severely. The Trial Court specifically warned defense counsel of this dilemma. Defense counsel failed to render reasonably effective assistance under prevailing professional norms for not recognizing the very damaging situation that was unfolding with the curative instruction. Further defense counsel was deficient for not objecting to the Trial Court's curative instruction as an unconstitutional charge on the facts and the overall prejudice of bolstering the victim's credibility and undermining the Applicant's credibility.

I find that the Applicant has established that counsel's performance, for the reasons outlined above, fell below a professional norm and that the Applicant has shown by a preponderance of the evidence that his counsel's unprofessional errors caused him prejudice. To show prejudice, a P.C.R. applicant must establish that the deficient performance prejudiced the applicant to the extent that "there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. “A reasonable probability is less than a preponderance of the evidence but still sufficient to undermine confidence in the outcome.” *Weik v. State*, 409 S.C. 214, 233, 761 S.E.2d 757, 767, (SC 2011). I find that the Applicant has met his burden in proving prejudice in this case.

IV. CONCLUSION & ORDER:

WHEREFORE IT IS THE ORDER of this Court that the Applicant, JABARI M. LINNEN, be granted a NEW TRIAL.

SO ORDERED.


 R. Scott Sprouse,
 Judge, Tenth Judicial Circuit
 (Presiding Judge, 14th Circuit P.C.R. Term)

Waltham, South Carolina

March 9, 2017.

STATE OF SOUTH CAROLINA)
 COUNTY OF BEAUFORT)

IN THE COURT OF GENERAL SESSIONS
 FOURTEENTH JUDICIAL CIRCUIT

Indictment No.: 2011- GS-07 - 00946
 2011- GS-07- 00947

The State of South Carolina,

v.

Jabari Linnen,

Defendant.

VERDICT

We, the Jury, unanimously find the following:

- (1) As to Indictment Number 2011- GS-07 - 00946, the charge of **Attempted Murder**, we, the jury, unanimously find the Defendant, Jabari Linnen:

☒ Not Guilty.

☐ Guilty.

If you find the Defendant is Guilty of Attempted Murder, proceed to question 3. If you find that the Defendant is Not Guilty of Attempted Murder, you must then consider whether he has committed the lesser included offense of Assault and Battery of a High and Aggravated Nature.

- (2) As to Indictment Number 2011- GS- 07 - 00947, the charge of **Assault and Battery of a High and Aggravated Nature**, we, the jury, unanimously find the Defendant, Jabari Linnen:

☐ Not Guilty.

☒ Guilty.

If you find the Defendant is Guilty of Assault and Battery of a High and Aggravated Nature, proceed to question 3. If you find that the Defendant is Not Guilty of Assault and Battery of a High and Aggravated Nature, stop deliberations.

Please continue to page 2.

(3) As to the charge of **POSSESSION OF A DEADLY WEAPON DURING THE COMMISSION OF A VIOLENT CRIME**, we, the jury, unanimously find the Defendant, Jabari Linnen:

_____ Not Guilty.

✓ _____ Guilty.

I certify that this is the unanimous decision of the jury.

Barbara Logan
FOREPERSON

September 21, 2012
Beaufort, South Carolina

When you have completed, please notify the bailiff.

853

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

Beaufort

VS.

Jabari Linnen

AKA:

Race: B Sex: M Age: 20

DOB: [REDACTED] SS# [REDACTED]

Address:

City, State, Zip:

DL#: [REDACTED] SID#: [REDACTED]

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Assault and Battery of a High and Aggravated naturein violation of § 16-13-600 (b) of the S.C. Code of Laws, bearing CDR Code # 3411☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 20 months days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment

of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: 9-21-2012☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>100.00</u>
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ca	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ <u>5.00</u>
3% to County (if paid in installments)	\$	\$ <u>3.90</u>
TOTAL	\$	\$ <u>133.90</u>

Clerk of Court/ Deputy Clerk

Court Reporter: Rebecca Hill

SCCA/217 (03/2011)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2011GS0700946A/W#: J349295Date of Offense: 4/21/2011S.C. Code § : 16-03-0029CDR Code #: 3410

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS☐ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 20 months days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment

of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: 9-21-2012☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>100.00</u>
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ca	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ <u>5.00</u>
3% to County (if paid in installments)	\$	\$ <u>3.90</u>
TOTAL	\$	\$ <u>133.90</u>

☐ Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.

Presiding Judge

Judge Code: 2112Sentence Date: 9-21-2012

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

INDICTMENT
2011GS0700946

At a Court of General Sessions, convened on May 19, 2011, the Grand Jurors of Beaufort County present upon their oath:

Murder / Attempted Murder

That in Beaufort County, on or about April 21, 2011, the Defendant, Jabari Linnen, with intent to kill and malice aforethought, did attempt to kill the victim, Kenneth Trey Nichols; in that the Defendant did shoot the victim multiple times with a firearm; in violation of Section 16-03-0029 of the Code of Laws of South Carolina (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



Solicitor

WITNESSES

J. Fraser (BCSO)

ARREST WARRANT NUMBER

J349295

ACTION OF GRAND JURY

True Bill

[Signature]
Foreperson of Grand Jury

Date: MAY 19 2011

VERDICT

15
5 Foreperson of Petit Jury

88 Date:

INDICT

DOCKET NO. 2011GS0700946

The State of South Carolina

County of Beaufort

COURT OF GENERAL SESSIONS

May Term 2011

THE STATE

vs.

Jabari Linnen

Indictment for

Murder / Attempted Murder

SC Code: 16-03-0029

CDR Code:3410

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I
Hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. and G.S.

856

STATE OF SOUTH CAROLINA

COUNTY OF Beaufort
 STATE VS.
Jabari Linnen

AKA:

Race: B Sex: M Age: 20DOB: [REDACTED] SS# [REDACTED]

Address:

City, State, Zip:

DL#: SID#: *CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: POSS. WEAPON DURING COMMISSION OF A VIOLENT CRIMEin violation of § 16-23-490 of the S.C. Code of Laws, bearing CDR Code # 6549
☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45
The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 5 days/months/years or ☐ under the Youthful Offender Act not to exceed yearsand/or to pay a fine of \$; provided that upon the service of days/months/years and/or paymentof \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: 9-21-2012☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ OrderedTotal: \$ plus 20% fee: \$ Payment Terms: ☐ Set by SCDPPPS Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %) \$ § 14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00§ 14-1-211(A)(2) (DUI Surcharge) \$100 \$ § 56-5-2995 (DUI Assessment) \$12 \$ § 56-1-286 (DUI Breath Test) \$25 \$ Proviso 47.9 (Public Def/Prob) \$500 \$ § 14-1-212 (Law Enforce. Funding) \$25 \$ 25.00§ 14-1-213 (Drug Court Surcharge) \$150 \$ § 50-21-114(BUI Breath Test Fee) \$50 \$ § 56-5-2942(J) (Vehicle Assessment) \$40/ea \$ Proviso 90.5 (SCCA Surcharge) \$5 \$ 5.003% to County (if paid in installments) \$ 3.90TOTAL \$ 133.90Clerk of Court/ Deputy Clerk La Sandy J. JonesCourt Reporter: Rebecca Hill

SCCA/217 (03/2011)

IN THE COURT OF GENERAL SESSIONS 5INDICTMENT/CASE#: 2011GS0700947A/W#: M056789Date of Offense: 4/21/2011S.C. Code § 16-23-0490CDR Code #: 0549

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADSin violation of § 16-23-490 of the S.C. Code of Laws, bearing CDR Code # 6549
☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45
The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 5 days/months/years or ☐ under the Youthful Offender Act not to exceed yearsand/or to pay a fine of \$; provided that upon the service of days/months/years and/or paymentof \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: 9-21-2012☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ OrderedTotal: \$ plus 20% fee: \$ Payment Terms: ☐ Set by SCDPPPS Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %) \$ § 14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00§ 14-1-211(A)(2) (DUI Surcharge) \$100 \$ § 56-5-2995 (DUI Assessment) \$12 \$ § 56-1-286 (DUI Breath Test) \$25 \$ Proviso 47.9 (Public Def/Prob) \$500 \$ § 14-1-212 (Law Enforce. Funding) \$25 \$ 25.00§ 14-1-213 (Drug Court Surcharge) \$150 \$ § 50-21-114(BUI Breath Test Fee) \$50 \$ § 56-5-2942(J) (Vehicle Assessment) \$40/ea \$ Proviso 90.5 (SCCA Surcharge) \$5 \$ 5.003% to County (if paid in installments) \$ 3.90TOTAL \$ 133.90PTUP days/hours Public Service EmploymentObtain GED ☐Attend Voc. Rehab. or Job Corp. May serve W/E beginning Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ beginning \$ paid to Public Defender FundOther:
☐ Appointed PD or appointed other counsel,
 § 47.12 requires \$500 be paid to Clerk
 during probation.
Presiding Judge Pamela S. JonesJudge Code: 212Sentence Date: 9-21-2012

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

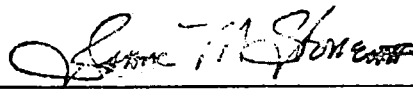
INDICTMENT
2011GS0700947

At a Court of General Sessions, convened on May 19, 2011, the Grand Jurors of Beaufort County present upon their oath:

Weapons / Possession of weapon during violent crime

That in Beaufort County, South Carolina, on or about April 21, 2011, the Defendant, Jabari Linnen, did possess a firearm or visibly display what appeared to be a firearm during the commission, or attempted commission, of attempted murder, a violent crime. This is in violation of 16-23-490 of the South Carolina Code of Laws, (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



Solicitor

WITNESSES

J. Fraser (BCSO)

ARREST WARRANT NUMBER

M056789

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury
Date:

MAY 19 2011

VERDICT

Foreperson of Petit Jury
Date:
INDICT

DOCKET NO. 2011GS0700947

The State of South Carolina

County of Beaufort

COURT OF GENERAL SESSIONS

May Term 2011

THE STATE

vs.

Jabari Linnen

Indictment for

Weapons / Possession of weapon during
violent crime

SC Code: 16-23-0490
CDR Code:0549

After being fully advised as to my legal
rights, I hereby waive presentment to the
Grand Jury.

Defendant

I
Hereby appear in my own proper person
and plead guilty to the within indictment or
to

Defendant

Witness:

C.C.C. PLS. and G.S.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
AUG 14 2014

APPEAL FROM BEAUFORT COUNTY
Court of General Sessions

SC Court of Appeals

The Honorable Diane S. Goodstein, Circuit Court Judge

Appellate Case No. 2012-213026

The State.....Respondent,
v.
Jabari Linnen Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUE ON APPEAL

Whether the trial court erred in denying Defendant's Request to Charge Number 4 on the "Protection of Persons and Property Act," S.C. Code § 16-11-410 *et seq.*, providing that a person has no duty to retreat from a vehicle and has the right to use force, including deadly force, when he reasonably believes such force is necessary to prevent the commission of a violent crime, when Appellant presented evidence that he exited his vehicle and fired shots at the alleged victim in the area immediately outside his vehicle, in response to threats of imminent violence and based upon his reasonable belief that the alleged victim was reaching for a weapon immediately prior to the shooting, such that he had no duty to retreat?

STATEMENT OF THE CASE

Appellant was indicted by the Beaufort County grand jury on one count of attempted murder and one count of possession of a firearm during the commission of a violent crime. (R. pp. 1-4.) On September 18, 2012, Appellant proceeded to a jury trial before the Honorable Diane S. Goodstein. (R. p. 7.) Jim Brown represented Appellant and Sean P. Thornton represented the State. (*Id.*)

At the conclusion of the trial on September 21, 2012, the jury found Appellant not guilty of attempted murder, guilty of the lesser-included offense of assault and battery of a high and aggravated nature, and guilty of possession of a firearm during the commission of a violent crime. (R. p. 369, ln. 22—p. 370, ln. 10.) Judge Goodstein sentenced Appellant to twenty years imprisonment for the aggravated assault and battery of a high and aggravated nature charge and five years concurrent for the weapon charge. (R. p. 374, ln. 21—p. 375, ln. 4.)

This appeal follows.

RELEVANT FACTS**A. The Alleged Crime**

On April 21, 2011, Appellant was riding down Luther Warren Drive on St. Helena Island in the passenger seat of his own vehicle. (R. p. 168, ln. 23—p. 170, ln. 2.) Appellant's friend, King David Williams, was driving because Appellant's license was under suspension. (*Id.*; R. p. 242, lns. 4-10.) Appellant's pregnant girlfriend, Desiree Blanding, was in the backseat of the car. (R. p. 240, lns. 23-25.) Appellant and Williams were driving Blanding home from school when they approached a stop sign on the corner of Luther Warren and Seaside Road. (R. p. 269, lns. 2-6.) They observed the alleged victim, Kenneth Treyvon Nichols, near a large oak tree at the corner. (R. p. 170, lns. 9-19; R. p. 269, lns. 2-13.)

Appellant presented testimony that Appellant and Nichols had been "beefing" since high school. (R. p. 206, lns. 5-17; R. p. 207, lns. 2-6.) Nichols, who was unemployed, often sat at the oak tree, and Nichols routinely made threatening comments to Appellant as Appellant drove by the tree. (R. p. 186, lns. 18-22; R. p. 248, lns. 15-23.) On previous occasions, Nichols threw glass bottles into the street as Appellant's car was approaching the intersection and ran up to Appellant's car and kicked the door as Appellant drove past. (R. p. 191, lns. 2-9; R. p. 246, ln. 19—p. 247, ln. 24.) Appellant presented testimony that Nichols had a reputation in the community for fighting and violence. (R. p. 195, lns. 12-18; R. p. 245, lns. 3-19.) In addition to his reputation, Appellant presented evidence that Nichols had been arrested for several incidents of violence in the months and years prior to the shooting, including battery of his grandfather and assault of his grandmother and mother. (R. p. 135, ln. 3—p. 136, ln. 11.) Appellant was aware of Nichols' reputation for violence

and Nichols' frequent interactions with police. (R. p. 244, ln. 21—p. 245, ln. 16; 530, lns. 19-24.)

As Appellant and Williams drove by Nichols on April 21, 2011, Nichols directed threatening words towards Appellant. (R. p. 189, ln. 6—p. 190, ln. 13; R. p. 161, lns. 3-5.) Williams testified that he believed Nichols wanted to fight Appellant. (R. p. 189, ln. 6—p. 190, ln. 13.) Williams further testified that Nichols is physically much bigger than Appellant. (R. p. 193, lns. 10-14.) Appellant testified that he was afraid of Nichols. (R. p. 251, lns. 9-18.)

After dropping Blanding off, Appellant and Williams approached the corner where Nichols was sitting a second time, from the opposite direction. (R. p. 269, lns. 17-21.) As Appellant's car came to a stop at the stop sign, Appellant and Williams testified that Nichols aggressively approached Appellant's vehicle, and began cursing at Appellant and calling him names. (R. p. 125, lns. 3-6; R. p. 131, lns. 11-22; R. p. 270, lns. 3-4.) More specifically, Appellant testified that Nichols repeatedly stated, "[t]his is my hood, nigga. What the fuck you doing around here? This ain't your turf." (R. p. 269, ln. 18—p. 270, ln. 2.) When he reached Appellant's car, Nichols threw a soda can into Appellant's car, striking Appellant. (R. p. 125, lns. 7-11; R. p. 171, ln. 10—p. 172, ln. 9; R. p. 159, ln. 14—p. 160, ln. 15; R. p. 270, lns. 3-10.) Williams testified that Nichols then told Appellant, "get out of the car, pussy." (R. p. 206, 18-23.)

Appellant exited his vehicle and began to circle the car, intending to speak to Nichols and to confront him regarding throwing the soda can in his car and to ask him why he continued to harass him and his girlfriend's family when they drove or walked by that corner. (R. p. 172, ln. 2—p. 173, ln. 20; R. p. 270, lns. 8-15; R. p. 275, ln. 22—S.R. p. 21,

ln. 2.) Appellant remained very close to the vehicle. (R. p. 173, lns. 1-15.) In response, Nichols quickly approached Appellant where they met immediately outside the vehicle on the driver's side and continued to argue. (R. p. 187, ln. 19—p. 189, ln. 5; R. p. 211, lns. 7-13.) Nichols was hostile and motioning with his arms. *Id.*; (R. p. 127, lns. 7-13.) Nichols was wearing baggy sweat pants with his hands near his waist. (R. p. 195, ln. 19—p. 196, ln. 5.)

As he approached Appellant at the car, Nichols made the statement, “[y]o, sup nigga, so you ready to die, nigga?” (R. p. 270, lns. 16-24.) Appellant saw Nichols reach inside the waist of his pants, presumably for a weapon. (R. p. 283, ln. 3—p. 285, ln. 2.) In fear for his life, Appellant removed a handgun from his waist behind his back and began to shoot Nichols. (R. p. 270, ln. 20—p. 271, ln. 18; R. p. 273, lns. 17-22; R. p. 294, lns. 12-20.) Nichols was shot several times in the thigh, arm, and torso. (R. p. 130, lns. 19-20.) Appellant turned himself in the following day.

A Beaufort County grand jury indicted Appellant on one count of attempted murder and one count of possession of a firearm during the commission of a violent crime. (R. pp. 1, 3.)

B. Appellant's Requested Jury Instruction

The case proceeded to jury trial on September 18-21, 2012. Following closing arguments by counsel, the Court instructed the jury panel on the law of the case, including common law self-defense. Although requested by Appellant's trial counsel as Defendant's Request to Charge Number 4, the Court refused to instruct the jury of the effect of the “Protection of Persons and Property Act,” S.C. Code § 16-11-410 *et seq.*, on

Appellant's duty to retreat following an attack in an occupied vehicle.¹ See Court's Exhibit 2.

Appellant's counsel timely objected to the Court's refusal to instruct the jury on Request to Charge Number 4. (R. p. 364, ln. 24—p. 365, ln. 10.) The Court overruled the objection and the application of the Castle Doctrine to the facts of the case, stating:

... [L]et me just say that I do not believe that the Castle Doctrine, with regards to the vehicle, applies to these facts. Given the dictates of the Castle Doctrine, give the facts of this matter that there was the Coke can that was thrown, and then this gentleman chose to get out of his car while on the public way, get out of the car, walk around the car, and walk towards the alleged victim and begin shooting. I don't believe that this is what is contemplated by the Castle Doctrine. We will know one day, because it is a developing theory, so we will know.

(R. p. 365, ln. 25—p. 366, ln. 9.)

C. Appellant's Conviction

Following jury instructions, the jury deliberated for nearly three hours before reaching a verdict of not guilty of attempted murder, guilty of the lesser-included offense of assault and battery of a high and aggravated nature, and guilty of possession of a firearm during the commission of a violent crime. (R. p. 369, ln. 22—p. 370, ln. 10.) The court sentenced Appellant to twenty years imprisonment for the assault and battery of a high and aggravated nature charge and five years for the possession of a firearm during the commission of a violent crime charge, to run concurrently. (R. p. 374, ln. 21—p. 375, ln. 4.)

¹ Appellant's Request to Charge 4, titled "Right to Stand Your Ground," reads: "The Castle Doctrine, which recognizes that a person's home is his castle has been extended to include an occupied vehicle. Residents and visitors of South Carolina have the right to remain unmolested and safe within their vehicles. A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a crime."

ARGUMENT

The judge erred by refusing to instruct Appellant's Request to Charge Number 4 on the "Protection of Persons and Property Act," S.C. Code § 16-11-410 *et seq.* ("the Statute"), because the request was a correct statement of law and was supported by facts in evidence. The Statute was intended to extend the common-law Castle Doctrine to occupied vehicles and thus provide citizens with the ability to protect themselves with deadly force and avoid the need for retreat when attacked in their vehicles. Appellant presented evidence that he was attacked by the alleged victim while inside his vehicle, exited the vehicle to confront him without violence, and began to shoot only after the alleged victim threatened Appellant's life and appeared to be reaching for a weapon in the area immediately outside Appellant's vehicle. Under these circumstances, Appellant was entitled to a jury instruction consistent with the Statute, as Appellant was attacked inside his vehicle and confronted the threat in a protectable area outside his vehicle. Thus, Appellant was entitled to the presumption of reasonable fear of imminent danger absolving him of the duty to retreat.

A. The Trial Court Commits Error by Failing to Give a Requested Charge on a Correct Statement of Law that is Raised by the Evidence.

The trial court is required to charge the correct law applicable to the case. *State v. Rayfield*, 369 S.C. 106, 119, 631 S.E.2d 244, 251 (2006); *State v. Mattison*, 388 S.C. 469, 478-79, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002). When a party requests the trial court charge a correct and applicable principle of law, the court must charge it. *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). When reviewing a challenge to the court's refusal to use the specific language in a request to charge, the appellate court

must consider the charge as a whole in evaluating whether the trial court charged the correct law applicable to the case. *Id.* at 549, 713 S.E.2d at 603.

The law to be charged to the jury is determined by the evidence presented at trial. *State v. Gaines*, 380 S.C. 23, 31, 667 S.E.2d 728, 732 (2008). The trial court has a duty to give a requested instruction that is supported by the evidence and correctly states the law applicable to the issues. *State v. Peer*, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996). If there is any evidence to support a jury charge, the trial judge should give a requested charge on the matter. *State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999).

The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand constitutes an error of law. *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 167 (2007); *see also State v. Peay*, 321 S.C. 405, 410, 468 S.E.2d 669, 672 (Ct. App. 1996) (holding that the refusal by the Court to charge the requested charge was an abuse of discretion in that it was error to omit applicable statutory law for the circumstances raised by evidence). On review of a jury charge, an appellate court considers the charge as a whole in view of the evidence and issues presented at trial. *Welch v. Epstein*, 342 S.C. 311, 536 S.E.2d 408, 425 (Ct. App. 2000).

B. Appellant Was Entitled to a Jury Charge on the Protection of Persons and Property Act as it Applied to His Duty to Retreat Before Using Force.

Appellant's counsel properly requested a jury charge on the Protection of Persons and Property Act because Appellant presented evidence that he was attacked inside his vehicle and used force in self-defense in an protectable area immediately outside the vehicle.

Under the common law of self-defense, a defendant is required to retreat if he has “no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in [the] particular instance.” *State v. Wiggins*, 330 S.C. 538, 545, 500 S.E.2d 489, 493 (1998). Unless the incident occurs in the accused's home or business or in the curtilage thereof, the accused generally has a duty to retreat. *Id.* at 548 n. 15, 500 S.E.2d at 494 n. 15.

By enacting the Protection of Persons and Property Act, the General Assembly intended “to codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business.” S.C. Code § 16-11-420(A). More specifically, the Statute provides that “no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack.” S.C. Code § 16-11-420(E). Therefore, the Statute expressly modifies the common law of self-defense by absolving a defendant from the duty to retreat before using force when attacked in an occupied vehicle.

Appellant's Request to Charge 4 correctly stated the law under the Statute as it applied to the duty to retreat from an occupied vehicle, and Appellant was entitled to that charge. Appellant was threatened and attacked by Nichols while in the passenger seat of his own, occupied vehicle. Appellant presented evidence that Nichols approached Appellant's vehicle and forcefully entered the vehicle by throwing a soda can inside, striking the Appellant. Appellant was not at fault at bringing about this confrontation; the attack occurred while Appellant's vehicle was stopped at a stop sign at a place he had a legal right to be. Appellant presented testimony that he peaceably exited his vehicle in

order to repel the attack by Nichols, and the shooting occurred immediately outside Appellant's vehicle only after Nichols threatened Appellant's life, aggressively approached Appellant, and appeared to be reaching inside his pants for a weapon.

Although the trial court properly instructed the jury on the law of self-defense,² the court refused Appellant's requested charge on the additional protections afforded those attacked in occupied vehicles provided by the Statute, on the grounds that Appellant exited the vehicle before the shooting at issue occurred. (R. p. 365, ln. 25—p. 366, ln. 9.) However, both the common law Castle Doctrine and the language of the Statute itself suggest that Appellant was within the intended scope of the law when he exited his vehicle to confront Nichols' threat. Appellant submits that occupied vehicles have a protectable curtilage within which there is no duty to retreat once the allege victim has forcibly entered the defendant's property, just as for dwellings and places of business.

In *Wiggins*, the Court noted, with respect to the common law of self-defense when protecting one's place of business, that, "consistent with this 'curtilage rule,' the absence of a duty to retreat on one's place of business applies to the business parking lot." *Wiggins*, 330 S.C. at 548 n. 15, 500 S.E.2d at 494 n. 15. (citing *Brooks*, 252 S.C. 504, 167 S.E.2d 307 (holding that if business proprietor was exercising good faith attempt to eject and was assaulted, he would have no duty to retreat, thus holding that self-defense applied to a shooting occurring in a parking lot outside the defendant's tavern)). In that

² The trial court instructed the jury on the common law duty to retreat prior to engaging self-defense: "And the final element of self-defense is that the defendant had no other possible way to avoid the danger of death or serious bodily injury than to act as the defendant did in this particular instance. By this, I mean the defendant need not retreat in order to avoid the need for deadly force if it is not possible or did not reasonably appear possible to retreat without danger of being killed or suffering serious bodily injury." (R. p. 360, lns. 5-12.)

case, the defendant presented evidence that he shot and killed the alleged victim in the parking lot outside his motel in self-defense after the alleged victim refused to leave and threatened the defendant with a gun. The Court agreed with Wiggins that he had no duty to retreat under these circumstances, as the protectable curtilage of the motel extended to its parking lot. *Id.*

Similarly, in this case, Appellant presented testimony that he was attempting in good faith to repel Nichols from further attacking him inside his own vehicle, and he did so by exiting the vehicle, circling to the side where Nichols was standing, and attempting to speak with Nichols. Appellant only fired shots at Nichols when Nichols aggressively approached Appellant and his vehicle, threatened Appellant's life, and appeared to be reaching for a weapon. Appellant had no more apparent ability to retreat from the area immediately outside his vehicle than he would have had inside his vehicle, and thus, like in *Wiggins*, Appellant should not have a duty to retreat before using force to meeting the alleged victim's threat.

Appellant concedes that this situation arguably differs from *Wiggins* in that the confrontation occurred not in a business parking lot, but in the public roadway immediately outside Appellant's vehicle.³ However, Appellant respectfully submits that the absence of the defendant's duty to retreat in *Wiggins* when attacked attempting in

³ Appellant notes that the Court has not expressly ruled on the issue of whether a public area can constitute the curtilage of a protected area, but leaves open the instant question of whether a Castle Doctrine instruction is appropriate under such circumstances. See *State v. Dickey*, 394 S.C. 491, 716 S.E.2d 97 (2011) ("We do not think it necessary to determine whether curtilage can extend to a public sidewalk, because we find the State failed to disprove beyond a reasonable doubt that Petitioner had no other probable means of avoiding the danger.").

good faith to repel the alleged victim from the parking lot immediately outside his place of business is analogous to this case, in which Appellant exited his vehicle in a good faith attempt to repel Nichols from further attack. While Appellant still must satisfy the additional elements of self-defense, the common law duty to retreat is equally inapplicable to the area immediately outside Appellant's vehicle as it is to the area immediately outside the defendant's place of business in *Wiggins*, such that an instruction on the Castle Doctrine is warranted. In both scenarios, the defendant's right to defend his property would be diminished if the obligation to retreat turned on whether he was physically inside his vehicle or place of business, when the threat to his property could be equally serious both inside and immediately outside the protected area.

Indeed, the trial court's ruling on Appellant's requested instruction suggests an interpretation of the Statute which would provide that the Statute never applies when a defendant exits his vehicle in order to repel an attack. Under such an interpretation, a defendant is only entitled to an instruction when the defendant uses self-defense to prevent attack when physically inside his vehicle. However, the plain language of the Statute suggests that Appellant need not have been physically inside his vehicle at the time of his act of self-defense in order to be absolved of the duty to retreat, so long as he was responding to a forceful intrusion into the vehicle.

The Statute imposes a presumption in which the defendant need not retreat under the following circumstances: (1) when the alleged victim was "in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle; (2) the defendant "removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle"; or (3)

the defendant “knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.” S.C. Code § 16-11-440(A). This language suggests that the duty to retreat is absolved both when the alleged victim is actively attempting to enter an occupied vehicle, as well as when the entry has already occurred. This is consistent with the Statute’s express purpose to codify the common law Castle Doctrine’s protection of persons who use force to expel attackers from being required to retreat in circumstances when, as in *Wiggins*, the alleged victim entered the protected area but was in an area in its immediate vicinity at the time of the attack.

Both the Statute’s express language, as well as its express purpose to codify the common law Castle Doctrine, suggest that the evidence presented by Appellant brings him within the scope of the Statute so as to warrant the requested charge. Because Appellant took steps in self-defense after being attacked inside his own vehicle, he falls within the language providing a presumption of fear absolving the duty to retreat, regardless of whether he exited the vehicle to address that threat.

Finally, because penal statutes are construed against the State and in favor of the defendant, *see Hair v. State*, 305 S.C. 77, 406 S.E.2d 332 (1991), any doubt concerning the application of the Statute to Appellant should have been resolved in favor of giving the requested charge. As such, the trial court’s refusal to charge the jury on Appellant’s Request to Charge 4 was in error.

C. The Trial Court’s Error in Refusing Appellant’s Request to Charge Was Material, Prejudicial, and Not Harmless.

The State may argue that if the trial court’s refusal to charge the jury on the Statute was in error, it was harmless error. “An error is not reversible unless it is material

and prejudicial to the substantial rights of the appellant.” *Visual Graphics Leasing Corp., Inc. v. Lucia*, 311 S.C. 383, 389, 429 S.E.2d 839, 841 (Ct. App. 1993). Error is harmless where it did not contribute to the verdict obtained. *State v. Pagan*, 369 S.C. 212, 212, 631 S.E.2d 262, 267 (2006) (citation omitted). No definite rule of law governs finding an error harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. *State v. Gillian*, 360 S.C. 433, 454-55, 602 S.E.2d 62, 73 (Ct. App. 2004) (citing *State v. Reeves*, 301 S.C. 191, 391 S.E.2d 241 (1990)); *State v. Mitchell*, 286 S.C. 572, 336 S.E.2d 150 (1985); *State v. Curry*, 380 S.C. 674, 636 S.E.2d 649 (Ct. App. 2006).

In this case, the trial court’s refusal to give the requested instruction on the Protection of Persons and Property Act was material and prejudicial because the State’s primary argument against self-defense was that the Appellant exited his vehicle before the shooting occurred and did not retreat. Indeed, the State’s closing statement began:

When Jabari got up and testified, he didn’t testify that he told King David to drive off either, did he? Now, why didn’t he? Because he wanted to go harm him. Why else would you get out of a car with a gun that you’re not even supposed to have?

(R. p. 329, lns. 10-14.) Throughout the closing argument, the State made similar statements in arguing that Appellant is not entitled to self-defense because he exited the vehicle before shooting Nichols. (R. pp. 329-337.) The State essentially argued that Appellant’s exit of the vehicle was fatal to his self-defense claim and particularly to his duty to retreat, and the jury’s verdict suggests that the jury accepted the same.

However, had the jury been instructed on the Protection of Persons and Property Act, it could have considered whether Nichols’ attack of Appellant while Appellant was

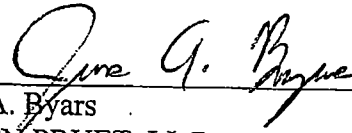
in the vehicle, coupled with his death threat and apparent reach for a weapon when Appellant exited the vehicle, absolved Appellant of his duty to retreat and supported his claim of self-defense. Pursuant to the court's instruction on common law self-defense, the jury had to determine the reasonableness of Appellant's fear of imminent danger before he was entitled to the use of force, but the Castle Doctrine, as codified by the Statute, provides Appellant with a presumption of reasonableness because the attack occurred in his vehicle.

The trial court's refusal to give Appellant's requested instruction surely affected the jury's analysis of Appellant's duty to retreat and denied Appellant the right to have the jury hear the potential effect of the Statute on Appellant's claim of self-defense. As there was no material factual dispute that Appellant shot Nichols in response to his threatening statements and attack while in his vehicle, the duty to retreat element of self-defense alone was likely determinative of this case. Therefore, the trial court's error in refusing the instruction is not harmless, and Appellant should be granted a new trial with the benefit of Appellant's requested instruction.

CONCLUSION

For the reasons stated herein and in any oral argument on this matter, Appellant Jabari Linnen respectfully requests a new trial.

This 14th day of August, 2014.



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of General Sessions

The Honorable Diane S. Goodstein, Circuit Court Judge

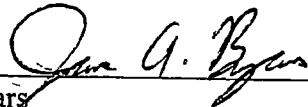
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Appellant complies with
Rule 211(b), SCACR.

This 14th day of August, 2014.


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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of General Sessions

The Honorable Diane S. Goodstein, Circuit Court Judge

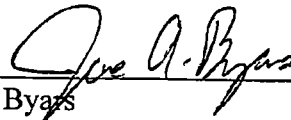
Appellate Case No. 2012-213026

The State.....Respondent,
v.
Jabari Linnen Appellant.

PROOF OF SERVICE

I hereby certify that I have served the foregoing Final Brief of Appellant on the Respondent by hand-delivering a copy of the same, addressed to J. Benjamin Aplin, Assistant Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Columbia, South Carolina 29201.

This 14th day of August, 2014.



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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Diane S. Goodstein, Circuit Court Judge

Appellate Case No. 2012-213026

The State, ...Respondent

v.

Jabari Linnen, ...Appellant.

FINAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

1. Whether the trial court properly denied Appellant's request to give the jury a charge under the Protection of Persons and Property Act where Appellant never sought a pretrial determination from the trial court regarding immunity under the Act and where the evidence presented at trial could not, as a matter of law, establish immunity under any specific terms of the Act?

STATEMENT OF THE CASE

Jabari Linnen (Appellant) was indicted at the May 19, 2011 term of the grand jury for Beaufort County for attempted murder (2011-GS-07-946) and possession of a weapon during the commission of a violent crime (PWDCVC) (2011-GS-07-947). He was represented by Jim Brown, Esquire, of the Beaufort County Bar. The State was represented by Deputy Solicitor Sean P. Thornton of the Fourteenth Judicial Circuit Solicitor's Office. (R.p.7). On September 17, 2012, jury qualification and selection were held before the Honorable Stephanie McDonald and on September 18-21, 2012, Appellant proceeded to trial by jury before the Honorable Diane S. Goodstein. The jury found Appellant guilty of assault and battery of a high and aggravated nature (ABHAN) as a lesser included offense of attempted murder and guilty of PWDCVC. He was sentenced to twenty (20) years' imprisonment for ABHAN and five (5) years' concurrent imprisonment for PWDCVC. (R.p.1-6; R.p.374, line 16-p.375, line 5). Appellant timely filed a notice of intent to appeal his conviction and sentence and subsequently submitted a Brief in support of his appeal. This Brief of Respondent (the State) follows.

STATEMENT OF FACTS

On April 21, 2011, King David Williams was driving Appellant's car down Luther Warren Drive on St. Helena Island in Beaufort County, with Appellant in the passenger seat. When they stopped at the corner of Seaside Road and Luther Warren, they encountered the victim, Trey Nichols, standing next to an oak tree and cursing at Appellant. Nichols threw an empty Coke can at the car. Appellant then retrieved a pistol from the glove compartment, exited the passenger's side of the car, walked around to the driver's side and fired multiple shots at the victim. Nichols was struck at least six times in the arms, legs and chest, and suffered at least three life-threatening wounds; however, he survived the attack. (R.p.50, line 11-SROA.p.2-3, line 13; p.52, line 12-p.53, line 14; p.54, line 4-p.57, line 15; p.60, line 23-p.61, line 3; R.p.121, line 6-SROA.p.7; p.133, line 21; p.167, line 17-p.182, line 9; p.208, line 21-p.210, line 6; p.238, line 18-SROA.p.20; SROA.p.21; p.294, line 25).¹

Prior to the jury being sworn, Appellant sought a pretrial ruling on the admissibility of evidence of specific instances of violence on the part of Nichols. Appellant wanted to introduce this evidence in support of his theory of justifiable homicide by showing he had a reasonable apprehension of fear from Nichols at the time of the shooting. The trial court ruled it would allow testimony about three specific prior instances of violence committed by Nichols within three months of the shooting but would exclude evidence of two other prior instances which were significantly older in time. The court also ruled Appellant would be allowed to elicit opinion or reputation

¹ Although the accounts given by Nichols, Williams, and Appellant differ in some details about what happened immediately prior to the shooting, it is undisputed that Appellant was outside his vehicle when he pulled a pistol from behind his back and shot Nichols multiple times. Thus, Nichols had not unlawfully and forcibly entered Appellant's vehicle, was not in the process of unlawfully and forcefully entering Appellant's vehicle, and was not removing or attempting to remove another person against his will from Appellant's vehicle.

evidence about Nichols if Appellant laid the proper foundation. (R.p.14, line 20-p.28, line 17). Appellant did not make a pretrial motion for immunity from prosecution under the “Protection of Persons and Property Act” (the Act), S.C. Code Ann. §§ 16-11-410 to -450 (2007).²

After the jury was sworn, the trial judge made preliminary remarks to the jury and the parties made opening statements briefly outlining the forthcoming evidence and their respective theories of the case. (SROA.p.1, line 20-R.p.49, line 24). Appellant’s counsel stated in part:

April 21st, 2011. Mr. Nichols attacked Jabari Linnen using hostile words and harsh facts at the corner of Luther Warren Drive and Seaside Road. Jabari was without fault in bringing on that difficulty. Jabari stood his ground, because he reasonably believed that force was necessary to prevent great bodily injury or death.

Now, you’ll find out that Mr. Nichols has a reputation for violence. Mr. Nichols has earned this reputation. What are you going to find out about Mr. Nichols? We know that he has physically attacked his mother, grandmother, and grandfather within two-and-a-half months of April 21st, including one incident with his mother the very morning that this happened.

Now, why is Mr. Nichols’ reputation for violence or instances of violence important? Because a person in South Carolina has the right to expect to remain free from molestation and attack. We know that a person in South Carolina has a right to stand their ground. As a person in this State that has not engaged in any unlawful activity and who is in a place where he has a right to be, has the right to stand his ground and has no duty to retreat as long as he reasonably believes that the force used is necessary to prevent harm, death, great bodily injury, or death to himself or others or to prevent the commission of a violent crime.

So it is important to understand that while Jabari Linnen tried to raise a family, Mr. Nichols was raising hell on Seaside Road.

(R.p.47, line 25-p.49, line 2) (emphasis added). In cross-examining the State’s second witness, Brandon Beaton, Appellant’s counsel asked Beaton if he had any information to

² “Immunity under the Act is therefore a bar to prosecution and, upon motion of either party, must be decided prior to trial.” State v. Duncan, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011) (emphasis added).

present to the jury indicating Appellant was not justified in standing his ground that day; however, the State's objection to the question was sustained. (R.p.51, lines 18-25).

Later, while cross-examining Investigator Jeremiah Fraser of the Beaufort County Sheriff's Office, Appellant asked if there had been any investigation into whether the shooting was lawful or unlawful. Fraser explained the police simply investigate the facts and present those facts to the solicitor's office in regard to whether a shooting might have been lawful. He acknowledged he was familiar with the term "justified shooting." (R.p.58, line 8-p.59, line 8; p.62, line 7-p.63, line 5; p.64, lines 18-25). Appellant was then allowed to cross-examine Investigator Fraser about the three previously admitted specific instances of violence committed by Nichols prior to the shooting. (R.p.65, line 13-SROA.p.4; SROA.p.5; p.93, line 7). On re-direct, Fraser noted that none of the three incidents had anything to do with Appellant. (R.p.94, line 10-SROAp.6, line 1). On re-cross, Appellant attempted to elicit reputation or opinion testimony about Nichols as a result of Fraser's knowledge of police investigations of prior incidents, but Fraser said he had not formed any opinion about Nichols' reputation for violence. Appellant's counsel then advised the trial court he had a matter of law. The judge excused the jury to allow the proffer of testimony and arguments regarding whether Appellant would be allowed to impeach Fraser's claim with extrinsic evidence not previously admitted. This evidence consisted of a DVD recording of the police interview of King David Williams, arrest warrants of Trey Nichols, and a Sheriff's Department summary of Trey Nichols. Appellant appeared to want to introduce this evidence to support his contention that Fraser actually does or should have an opinion about Nichols being a violent person. Appellant argued in part that he believed the questions were admissible to prove his

defense of “justification” and argued self-defense was merely a subset of justification. He claimed “justification” would include self-defense, “the right to stand your ground, statutorily,” and the defense of others. Ultimately, the trial court allowed Appellant to ask whether the incident reports from the previously admitted specific acts of violence led Fraser to form an opinion about Nichols but prohibited any attempts to ask Fraser about the other three pieces of extrinsic evidence. (SROA.p.6, line 6-p.121, line 2).

During his subsequent cross-examination of Williams, Appellant tried to show Nichols was a violent person who had an ongoing “beef” with Appellant. He also tried to establish that Appellant was in a place he had a right to be when he fired on Nichols in self-defense. (R.p.182, line 14-SROA.p.8; p.207, line 18). After the State rested, Appellant moved for a directed verdict on the attempted murder charge, arguing there was no evidence in the record of malice aforethought. He also noted the defense theory that his shooting of Nichols was justified, but he did not seek to invoke immunity under the terms of the Act. (R.p.213, lines 1-21).³

Appellant then presented evidence in his own defense. He further developed his theme that Nichols was a violent person by calling witnesses Regina Blanding, Paul Mitchell, Robert Blanding, and Desiree Blanding on his behalf. (R.p.214, line 11-p.233, line 22; p.234, line 3-SROA.p.9-16; p.235, line 25; p.236, line 1-SROA.p.17-19; p.237, line 21; R.p.300, line 12-p.308, line 10). Appellant also testified in his own defense,

³ In *State v. Curry*, our supreme court treated a challenge to the denial of immunity under the Act as preserved for review even though Curry improperly moved for immunity at the directed verdict stage rather than prior to trial, because the required pretrial procedure had not been established by the court at the time of Curry’s trial. 406 S.C. 364, 370 n.3, 752 S.E.2d 263, 266 n.3 (2013) (citing *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011)). Here, Appellant’s trial was held in September of 2012, more than a year after the published opinion in *Duncan*. Thus, any attempt by Appellant to invoke immunity under the Act at the directed verdict stage or any other time after the trial commenced would have been untimely.

claiming he was scared of Nichols and got out of the car only because he wanted to talk to Nichols about his behavior. (R.p.238, line 18-SROA.p.20; p.294, line 25).

After the defense rested, the State called Investigator Fraser in rebuttal. (R.p.308, line 11-p.312, line 19). Prior to closing arguments, the trial court held an informal charge conference in chambers, after which Appellant submitted a set of seventeen requests to charge as Court's Exhibit Two. (R.p.289, line 1-p.317, line 17). Appellant's fourth request to charge states:

The Castle Doctrine, which recognizes that a person's home is his castle, has been extended to include an occupied vehicle. Residents and visitors of South Carolina have the right to remain unmolested and safe within their vehicles. A person who is engaged in an unlawful activity and who is attacked in another place where he has a right to be has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a crime.

(Court's Exhibit Two). In his closing argument, Appellant focused on the theory that he was justified in shooting Nichols in self-defense. He argued he was without fault in bringing on the difficulty, that he believed he was in imminent danger of great bodily danger or death, that he was in fact in imminent danger of great bodily injury or death, and that even though he had a duty to retreat, he did not reasonably believe retreat was possible. Appellant also focused on Nichols' violent nature and his allegedly aggressive approach towards Appellant once Appellant was outside the car. (R.p.318, line 19-p.329, line 1).

Next, the State made its closing argument and the trial court charged the jury on the law, including a detailed charge on the law of self-defense. The trial court did not charge the common law Castle Doctrine or any provisions from the Act. (R.p.329, line 8-

p.364, line 19). Following the jury charge, the trial judge asked if there were any additions or exceptions from either the State or Appellant. Appellant referenced Court's Exhibit Two and specifically asked that the trial judge charge the jury on "the right to stand your ground." He noted there were three particular sentences listed as the defendant's request for instructions number four, all or any part of which he wanted the trial court to charge. (R.p.364, line 20-p.365, line 10). The trial court ruled as follows:

Thank you so much, it is appropriate to put those on the record right now; so thank you so much for doing that. And thank you Mr. Brown for having filed this as a Court's Exhibit, that way it's very clear for our record of what those are. We addressed those yesterday and let me just say that I do not believe that the Castle doctrine, with regards to the vehicle, applies to those facts. Given the dictates of the Castle doctrine, given the facts of this matter that there was the Coke can that was thrown, and then this gentleman chose to get out of his car while on the public way, get out of the car, walk around the car, and walk towards the alleged victim and begin shooting. I don't believe that that is what is contemplated by the Castle doctrine. We will know one day, because it is a developing theory, so we will know.

(R.p.365, line 20-p.366, line 9). The jury ultimately found Appellant guilty of assault and battery of a high and aggravated nature (ABHAN) as a lesser included offense of attempted murder and guilty of possession of a weapon during the commission of a violent crime. He was sentenced to twenty (20) years' imprisonment for ABHAN and five (5) years' concurrent imprisonment for the weapon charge. (R.p.1-6; R.p.374, line 16-p.375, line 5).

ARGUMENT

The trial court properly denied Appellant's request to give the jury a charge under the Protection of Persons and Property Act where Appellant never sought a pretrial determination from the trial court regarding immunity under the Act and where the evidence presented at trial could not, as a matter of law, establish immunity under any specific terms of the Act.

Appellant argues the trial judge erred by refusing to charge the jury on the "Protection of Persons and Property Act" (the Act), S.C. Code §§ 16-11-410 to -450, because his request to charge was a correct statement of law and was supported by facts in evidence. He maintains the Act was intended to extend the common law Castle Doctrine to occupied vehicles and thus provide citizens with the ability to protect themselves with deadly force and avoid the need for retreat when attacked in their vehicles. Appellant argues that since he was attacked inside his vehicle and confronted the threat "in a protectable area outside his vehicle" he was entitled to the presumption of reasonable fear of imminent danger absolving him of the duty to retreat and therefore was entitled to the requested jury charge. The State disagrees and submits Appellant was not entitled to a jury charge under the Act where he never sought immunity pursuant to the Act and where, as a matter of law, the evidence presented at trial could not establish immunity under any specific terms of the Act. Accordingly, the trial judge committed no error in refusing Appellant's request to instruct the jury on the Act, and Appellant's convictions should be affirmed.

Standard of Review

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id. The conduct of a

criminal trial is left largely to the sound discretion of the presiding judge and the appellate court will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way. State v. Commander, 396 S.C. 254, 262, 721 S.E.2d 413, 417 (2011) (quoting State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982)).

Law / Analysis

The trial judge committed no error in refusing to charge the jury on provisions of the Act where Appellant did not claim immunity under the Act and did not seek a pretrial determination from the trial court regarding immunity. In Curry, the trial court charged the jury with subsection 16-11-440(C) of the Act. State v. Curry, 406 S.C. 364, 372-73, 752 S.E.2d 263, 267 (2013). On appeal, Curry argued the trial court erred by charging the jury both on the provisions of the Act and on self-defense. Id. Our supreme court held that because the trial court denied Curry immunity under the Act, the Act “should have not been charged.” Id. at 373, 752 S.E.2d at 267 (emphasis added). In a partial concurrence, Justice Pleicones explained:

I agree with the majority that [the Act] creates a statutory immunity but leaves intact the common law defenses of habitation, of others, and of self-defense. While a criminal defendant is entitled to have the issue of statutory immunity decided prior to trial by a judge, once the case goes to trial a defendant’s right to a jury charge on these defenses is determined under common law principles.

Id. at 375, 752 S.E.2d at 268 (Pleicones, J., concurring in part and dissenting in part).

Here, Appellant was likewise “entitled to have the issue of statutory immunity decided prior to the trial by a judge,” but he never sought that determination. The State submits this constituted a waiver of the right to seek immunity under the Act and is equivalent to denial of immunity by the trial court for purposes of reviewing the propriety of a jury

charge. Thus, the Act “should not have been charged” to the jury in Appellant’s case, and the trial court properly denied Appellant’s request.

To the extent this Court concludes Curry is not controlling and that Appellant’s failure to seek a pretrial ruling on immunity under the Act does not amount to a denial of immunity, the trial court nevertheless properly denied Appellant’s request to charge because, as a matter of law, the evidence presented at trial simply could not have established immunity under the Act. “The evidence presented at trial determines the law to be charged, and a trial court commits reversible error in failing to give a requested charge on an issue raised by the evidence.” State v. Gibson, 390 S.C. 347, 355-56, 701 S.E.2d 766, 770 (Ct. App. 2010). “When reviewing a jury charge for alleged error, the charge must be considered as a whole in light of the evidence and issues presented at trial.” State v. Huckabee, 388 S.C. 232, 244, 694 S.E.2d 781, 787 (Ct. App. 2010). “Failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues.” State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010) (citation omitted). Absent an abuse of discretion, the appellate court will not reverse a trial court’s decision regarding a jury charge. Id. at 479, 697 S.E.2d at 584.

Presumably relying on subsection 16-11-440(A), Appellant argues he presented evidence that he was attacked inside his vehicle and used force in self-defense in a “protectable area” immediately outside the vehicle. (Brief of App.p.8). He acknowledges the statute effectively “modifies the common law of self-defense by absolving a defendant from the duty to retreat before using force when attacked in an occupied vehicle,” but seeks protection under the statute for actions taken after he left

the vehicle. (Brief of App.p.9) (emphasis added). Appellant argues Nichols “forcefully entered” the vehicle by throwing the Coke can in the window and that Appellant “peaceably exited his vehicle in order to repel the attack by Nichols.” He goes on to argue that like a place of business, an occupied vehicle has a “protectable curtilage” where there is no duty to retreat. (Brief of App.p.9-p.10). The State submits the plain terms of the Act do not support Appellant’s expansive interpretation.

In the context of a vehicle, subsection 16-11-440(A) narrowly limits using force against a person who either: (1) unlawfully and forcibly entered an occupied vehicle, (2) is unlawfully and forcibly entering an occupied vehicle, or (3) is attempting to remove a person against his will from the occupied vehicle. S.C. Code Ann. § 16-11-440(A)(1) (2007). A plain reading of the statute establishes that by using the words “entered” and “entering,” the Legislature intended for an unlawful and forcible entry to be a requirement of subsection 16-11-440(A), unless a person is being forcibly removed against his will from his occupied vehicle. Even though Appellant testified he was scared of Nichols and got out of the car only because he wanted to talk to Nichols, these facts do not concern whether Nichols had unlawfully and forcibly entered or was in the process of unlawfully and forcibly entering Appellant’s occupied vehicle. Absent evidence Nichols himself unlawfully and forcibly entered Appellant’s vehicle or Nichols was attempting to remove Appellant from his vehicle, Appellant’s argument that he acted within the scope of the law is without merit for purposes of determining immunity under subsection 16-11-440(A). Therefore, subsection 16-11-440(A) is inapplicable, and the trial court properly declined Appellant’s request to instruct the jury on the provisions of the Act.

There is no basis to reverse Appellant's convictions based on the trial judge's jury instructions because the trial court did not fail to give a requested charge on an issue raised by the evidence. Gibson, 390 S.C. at 355-56, 701 S.E.2d at 770. Indeed, because the instructions given afforded the proper test for determining the issues, there was no abuse of discretion. Mattison, 388 S.C. at 479, 697 S.E.2d at 583-84.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

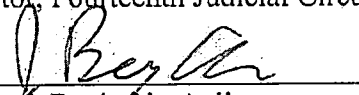
Respectfully submitted,

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Columbia, South Carolina
August 4, 2014

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Diane S. Goodstein, Circuit Court Judge

Appellate Case No. 2012-213026

The State,..... Respondent

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Jabari Linnen,..... Appellant.

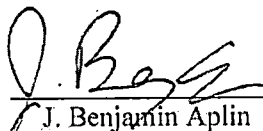
CERTIFICATE OF COUNSEL

The undersigned hereby certify that the Final Brief of Respondent complies with Rule
211(b), SCACR.

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Columbia, South Carolina
August 4, 2014

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Diane S. Goodstein, Circuit Court Judge

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The State,..... Respondent

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Jabari Linnen,..... Appellant.

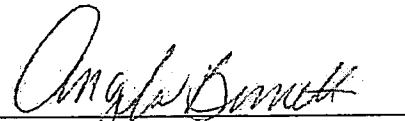
PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent*, dated August 1, 2014, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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Division of Appellate Defense
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I further certified that all parties required by Rule to be served have been served. This 4th day of August, 2014.



Angela Bennett
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The South Carolina Court of Appeals

The State, Respondent,

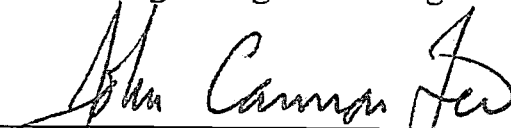
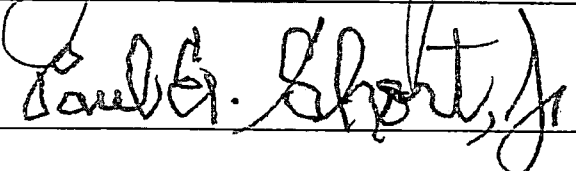
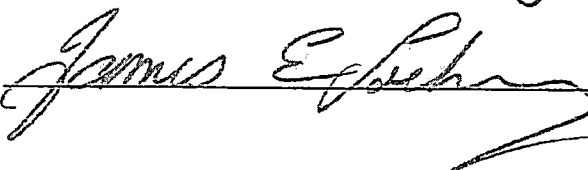
v.

Jabari Linnen, Appellant.

Appellate Case No. 2012-213026

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 J.

Columbia, South Carolina

cc:

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Alan McCrory Wilson, Esquire
James Andrew Byars, Esquire
John Benjamin Aplin, Esquire
Isaac McDuffie Stone, III, Esquire

FILED

June 18, 2015

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Referred to apem/pm
Answered

The Supreme Court of South Carolina

The State, Respondent,

v.

Jabari Linnen, Petitioner.

Appellate Case No. 2015-001533

Lower Court Case No. 2011-GS-07-00946, 2011-GS-07-00947

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restitution*

ATTORNEY GENERALS
OFFICE *JBA*

ORDER

This matter is before the Court on a petition for a writ of certiorari to review the Court of Appeals' decision in *State v. Linnen*, Op. No. 2015-UP-212 (S.C. Ct. App. filed Apr. 22, 2015). The petition is denied.


C.J.
FOR THE COURT

Columbia, South Carolina

November 4, 2015

cc:

The Honorable Jenny Abbott Kitchings
Robert Michael Dudek, Esquire
James Andrew Byars, Esquire
Alan McCrory Wilson, Esquire
John Benjamin Aplin, Esquire
Isaac McDuffie Stone, III, Esquire
The Honorable Jerri Ann Roseneau

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Jabari Linnen, Appellant.

Appellate Case No. 2012-213026

Appeal From Beaufort County
Diane Schafer Goodstein, Circuit Court Judge

Unpublished Opinion No. 2015-UP-212
Heard March 2, 2015 – Filed April 22, 2015

AFFIRMED

James Andrew Byars, Nexsen Pruet, LLC, and Chief
Appellate Defender Robert Michael Dudek, both of
Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General John Benjamin Aplin, both of
Columbia, and Solicitor Isaac McDuffie Stone, III, of
Bluffton, for Respondent.

PER CURIAM: Jabari Linnen appeals his convictions of assault and battery of a high and aggravated nature and the possession of a firearm during the commission of a violent crime, arguing the trial court erred in denying his request for a jury charge on the Protection of Persons and Property Act (the Act). *See* S.C. Code Ann. §§ 16-11-410 to -450 (Supp. 2014). We affirm pursuant to Rule 220(b), SCACR, and the following authorities: S.C. Code Ann. § 16-11-450(A) (Supp. 2014) ("A person who uses deadly force as permitted by the provisions of [the Act] or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution . . . for the use of deadly force . . ."); *State v. Duncan*, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011) (stating the Legislature's use of the words "immune from criminal prosecution" evidences an intent "to create a true immunity, and not simply an affirmative defense"); *id.* ("Immunity under the Act is therefore a bar to prosecution and, upon motion of either party, must be decided prior to trial."); *State v. Marin*, 404 S.C. 615, 625, 745 S.E.2d 148, 153-54 (Ct. App. 2013), *cert. granted*, S.C. Sup. Ct. Order dated Oct. 23, 2014 (finding a trial court should not charge the jury on the Act because subsection 16-11-450(A) of the Act "does not contain any substantive provisions of law[; r]ather, it is a procedural subsection under which the circuit court may grant immunity from prosecution before a trial begins"); *see also State v. Curry*, 406 S.C. 364, 373, 752 S.E.2d 263, 267 (2013) (finding subsection 16-11-440(C) of the Act should not have been charged to the jury because "the trial court had denied Appellant immunity"); *id.* at 375, 752 S.E.2d at 268 (Pleicones, J., concurring in part and dissenting in part) (explaining "[w]hile a criminal defendant is entitled to have the issue of statutory immunity decided prior to trial by a judge, once the case goes to trial[,] a defendant's right to a jury charge on these defenses is determined under common law principles").

AFFIRMED.

FEW, C.J., and SHORT and LOCKEMY, JJ., concur.

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The South Carolina Court of Appeals

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December 02, 2015

The Honorable Jerri Ann Roseneau
PO Box 1128
Beaufort SC 29901-1128

REMITTITUR

Re: The State v. Jabari Linnen
Lower Court Case No. 2011GS0700946, 2011GS0700947
Appellate Case No. 2012-213026

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Robert Michael Dudek, Esquire
Alan McCrory Wilson, Esquire
James Andrew Byars, Esquire